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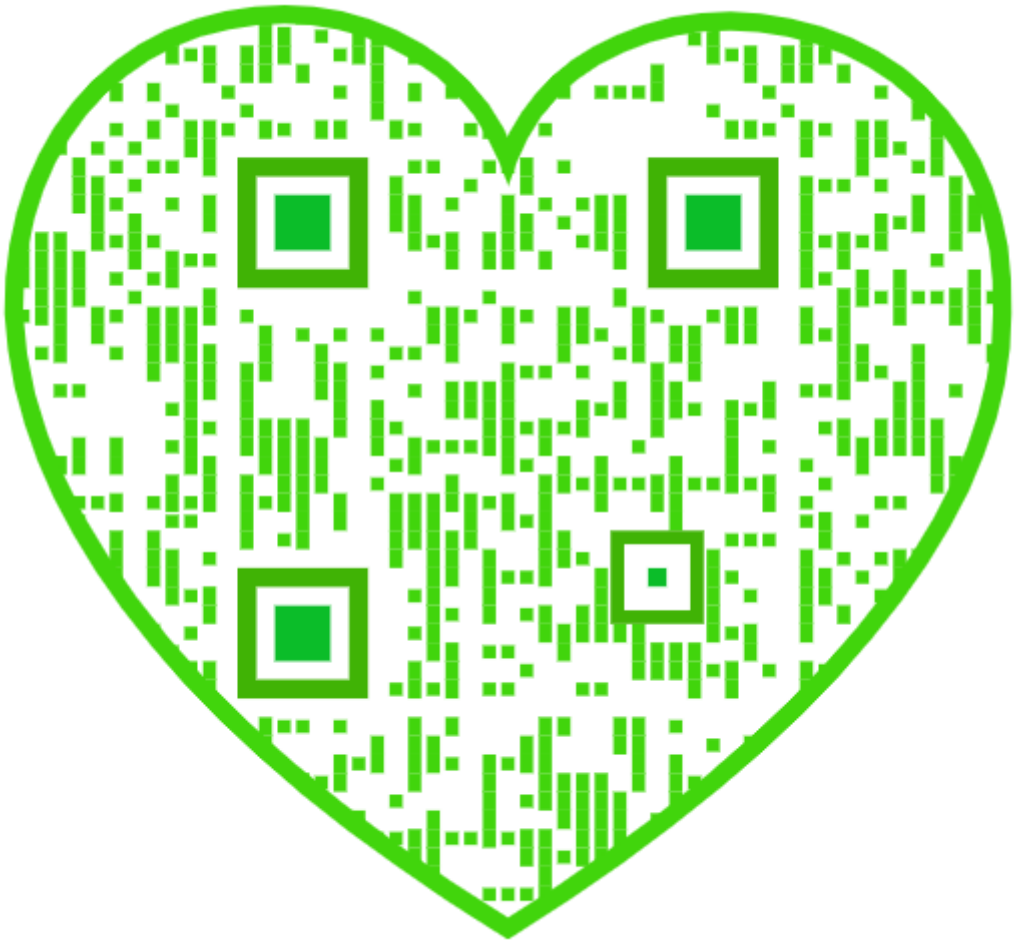

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CURRENT LAW

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HARMLESS AND PREJUDICIAL ERROR.

§ 1. The General Doctrine (1).
§ 2. Triviality Constituting Harmlessness (9).
§ 3. Errors Cured or Made Harmless by Other Matters (26).

§ 1. *The general doctrine.—Generally speaking, a judgment will not be reversed or a verdict set aside or other proceeding overthrown because of error of which it can be said that no harm resulted to the complaining party,*[1, 2] even though

1, 2. See 5 C. L. 1620. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007; King v. Davis, 137 F. 198; Flack v. Moore, 117 Ill. App. 551; Roy v. E. St. Louis & S. R. Co., 119 Ill. App. 313; Ruprecht v. Galt, 119 Ill. App. 478; Merry v. Colvin, 122 Ill. App. 459; Palmer v. Cowie, 7 Ohio C. C. (N. S.) 46; Board of Com'rs of Morgan County v. Crone, 36 Ind. App. 283, 75 N. E. 826; Equitable Trust Co. v. Torphy [Ind. App.] 76 N. E. 639; Pittsburgh, etc., R. Co. v. Simons [Ind. App.] 76 N. E. 883; Glos v. Ault, 221 Ill. 562, 77 N. E. 939; Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276; Link v. Campbell [Neb.] 104 N. W. 939; Teetzel v. Davidson Bros. Marble Co. [Neb.] 104 N. W. 1068; Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69; Chambers v. Chambers [Neb.] 106 N. W. 993; Milton v. Biesanz Stone Co. [Minn.] 109 N. W. 999; Ennis Brown Co. v. Hurst, 1 Cal. App. 752, 82 P. 1056; Linderman v. Nolan, 16 Okl. 352, 83 P. 796; Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47; Lowe v. Ozmun [Cal. App.] 86 P. 729; Creech v. Aberdeen [Wash.] 87 P. 44; James v. Ayer, 124 Ga. 862, 53 S. E. 103; Garmany v. Lawton, 124 Ga. 876, 53 S. E. 669; McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674; Kessler v. Pearson [Ga.] 55 S. E. 963; Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680; Ryan v. Young [Ala.] 41 So. 954; Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197; Miller v. Nuckolls [Ark.] 91 S. W. 759; German Ins. Co. v. Goodfriend [Ky.] 97 S. W. 1098. No prejudice without injury. Conde v. Dreisam Gold Min. & Mill. Co. [Cal. App.] 86 P. 825. No reversal where there is no error affecting substantial rights. Frepons v. Grostein [Idaho] 87 P. 1004. When substantial justice has been done. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654; Herrin v. Bowsher, 122 Ill. App. 565; Henrietta Coal Co. v. Martin, 122 Ill. App. 354. When result is correct and no advantage will accrue to litigant from reversal. Corbin v. Hill [Ind. App.] 79 N. E. 377. Rulings upon evidence. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189; My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540; Van Burg v. Van Engen [Neb.] 107 N. W. 1006. Admission of evidence. Colorado Springs Elec. Co. v. Soper [Colo.] 88 P. 165; St. Louis, etc., R. Co. v. Block [Ark.] 95 S. W. 155; Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639; Loverin & Browne Co. v. Bumgarner [W. Va.] 52 S. E. 1000. Admission of evidence which, if effective at all, could not injure complaining party and might help him. Hadley v. Passaic County Chosen Freeholders [N. J. Law] 62 A. 1132. Admission of evidence of care given children by husband when intoxicated in action by wife for selling liquor to husband. Mathre v. Story City Drug Co. [Iowa] 106 N. W 368. Introduction of policeman's record on trial before police commissioner harmless, since commissioner had right to refer to such record and to use the information thus acquired in reaching a determination. People v. Lewis, 111 App. Div. 375, 97 N. Y. S. 1057. Question in form calling for an answer seemingly stating an opinion as to the land held harmless where witness was fully examine on the facts and the court properly instructed the jury on the point. Sibley v. Morse [Mich.] 13 Det. Leg. N. 878, 109 N. W. 858. Admission of nonprofessional, expert testimony. Kolleen v. Atchison, etc., R. Co., 72 Kan. 426, 83 P. 990. Plaintiff not injured by evidence that defendant was man of wealth. Security Trust Co. v. Robb [C. C. A.] 142 F. 78. Judgment not reversible merely because some or all of witnesses stated damages to land instead of value where the damages depended wholly upon difference in value before and after the injury. Schmoe v. Cotton [Ind.] 79 N. E. 184. It is not reversible error to admit an amended ordinance regulating the speed of street cars, although it would have been more formal to introduce the original ordinance. Knoxville Traction Co. v. Brown, 115 Tenn. 323, 89 S. W. 319. Evidence to explain an unfavorable inference which might have arisen from defendant's conduct as shown by the undisputed evidence held harmless to plaintiff. Tuttle v. Moody [Tex. Civ. App.] 15 Tex. Ct. Rep. 763, 94 S. W. 134. Exclusion of

he has properly saved his objection and excepted to the ruling[3] and has regularly preserved it in the "record."[4]

evidence. Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560. On objection to report of administrator, exclusion of question as to property other than that in issue was harmless where the estate was left open without prejudice to the right of the heirs to a further examination of the administrator. In re Smith's Estate [Iowa] 109 N. W. 196. Instructions and evidence. Railton v. Chicago Title & Trust Co., 224 Ill. 485, 79 N. E. 600. Instructions. Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923. Failure to charge the rule under Civ. Code 1895, § 3712, that rescission of a contract will be allowed only when the parties can be placed in statu quo, was harmless to defendant where no case for rescission was made out. Williams v. Walden, 124 Ga. 913, 53 S. E. 564. Where court correctly adjudged that land in controversy belonged to one of the parties, there was no prejudicial error in cancelling certain deeds held by the other party and constituting a cloud on the title. Williams v. Hays [Ky.] 93 S. W. 1063. Refusal to require defendant to give additional certiorari bond where original bond was in substantial conformity with the requirements of the code. Giddens & Co. v. Rutledge [Ala.] 40 So. 759. Making opinion of circuit judge part of record of case. Stover v. Stover [W. Va.] 54 S. E. 350. Failure to pay jury fees by successful party as provided in Gen. St. 1901, § 3056, is not such an irregularity as affects substantial rights of parties and reviewable on appeal, especially when the attention of the trial court was not challenged as to that point on motion for new trial. City of Ottawa v. Green, 72 Kan. 214, 83 P. 616. Failure of appellate court to make formal order of transfer of papers back to trial court harmless on second trial where such papers were actually present in the trial court on such second trial and were used thereon. In re Burnett [Kan.] 85 P. 575.

So provided by statute: Rev. Codes 1899, § 5300. Vidger Co. v. Great Northern R. Co. [N. D.] 107 N. W. 1083. Code Civ. Proc. § 2545, relating to review of decisions of surrogate. In re Brower's Will, 112 App. Div. 370, 98 N. Y. S. 438. No reversal unless substantial rights are affected. Code Civ. Proc. § 475. Sherwood v. Wallin, 1 Cal. App. 532, 82 P. 566; Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256; McKee v. Cunningham [Cal. App.] 84 P. 260. Mills' Ann. Code § 78. Jackson v. McFall [Colo.] 85 P. 638. Civ. Code Prac. 134. Bell v. Hatfield, 28 Ky. L. R. 515, 89 S. W. 544; Ross-Paris Co. v. Brown, 28 Ky. L. R. 813, 90 S. W. 568. Code § 3601. Himmelman v. Des Moines Ins. Co. [Iowa] 110 N. W. 155; Jordan v. Markham [Iowa] 107 N. W. 613; Olson v. Brison, 129 Iowa 604, 106 N. W. 14. Clark's Code § 276. Wright v. Teutonia Ins. Co., 138 N. C. 488, 51 S. E. 65. Rev. St. 1898, § 2829. Mash v. Bloom, 126 Wis. 385, 105 N. W. 831; Coe v. Rockman, 126 Wis. 515, 106 N. W. 290; Alft v. Clintonville, 126 Wis. 334, 105 N. W. 561; Owen v. Portage Tel. Co., 126 Wis. 412, 105 N. W. 824. No reversal except for error materially affecting merits. Rev. St. 1899, § 865. Mockowik v. Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275; Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876; Gibson v. Swofford [Mo. App.] 97 S. W. 1007; Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527; Daggs v. Smith, 193 Mo. 494, 91 S. W. 1043. No reversal except for error affecting substantial rights. Rev. St. 1899, §§ 659, 865. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. Under Code § 3601, an action against an insurance company for conversion cannot be changed on appeal to an action on a policy. Himmelman v. Des Moines Ins. Co. [Iowa] 110 N. W. 155. Under Burns' Ann. St. 1901, §§ 401, 670, errors as to instructions not reversible when there has been fair trial and a correct result reached. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670; Princeton Coal & Min. Co. v. Gilmore [Ind. App.] 76 N. E. 787. Under Burns' Ann. St. 1901, § 344, error in overruling demurrer for misjoinder of causes of action is not ground for reversal. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Under Burns' Ann. St. Ind. 1901, § 394, variance between complaint and evidence deemed immaterial unless defendant actually misled to his prejudice. Indianapolis Traction & T. Co. v. Lawson [C. C. A.] 143 F. 834. Under statute failure to submit special issue, where such submission is not requested, is not reversible error where the finding of the court on such issue is correct. Warren v. Osborne [Tex. Civ. App.] 97 S. W. 851. The supreme court of South Carolina cannot reverse on appeal from a judgment of a circuit court overruling or sustaining exceptions and defects which do not affect the merits. Code Civ. Proc. 1902, § 368. Jenkins v. Southern R. Co., 73 S. C. 292, 53 S. E. 481.

Right decision on wrong ground. Smith v. Manlove [Ariz.] 85 P. 1066; Brown v. Yarraham Gold Min. Co. [Cal. App.] 86 P. 744; Barbee v. Morris, 221 Ill. 382, 77 N. E. 589; Pennsylvania Co. v. Rossett, 116 Ill. App. 342; Princeton Coal & Min Co. v. Gilmore [Ind. App.] 76 N. E. 787; Kipp v. Clinger [Minn.] 106 N. W. 108; Rosenbaum Bros. Co. v. Ryan Bros. Cattle Co. [Mont.] 84 P. 1120; Brown v. Daly [Mont.] 84 P. 883; Ruzcoski v. Wibrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142. The general rule is that if an order of the court can be sustained on any grounds, irrespective of those specified by the court, it will be done. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298; Milella v. Simpson, 47 Misc. 690, 94 N. Y. S. 464. The appellate court is not bound by any reason for his finding or judgment expressed by the trial judge in a written opinion. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. A decree in equity will be sustained where correct, though the lower court decided it upon the wrong reason. Harris Banking Co. v. Miller, 190 Mo. App. 640, 89 S. W. 629. Exclusion of evidence. Wightman v. Catlin, 98 N. Y. S. 1071; Bunner v. Ison, 8 Ohio C. C. (N. S.) 260. Admission of evidence and instruction as to damages on wrong theory

harmless where same result would be reached by application of correct theory. Abbott v. Milwaukee Light, Heat & Traction Co., 126 Wis. 634, 106 N. W. 523. Sustaining demurrer. Gaynor v. Bauer [Ala.] 39 So. 749; Lewisohn v. Stoddard, 78 Conn. 575, 63 A. 621; Newton v. Hamden [Conn.] 64 A. 229; Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401. Sustaining demurrer harmless where reply to defendant's special plea was bad. Jolly v. Miller [Ky.] 98 S. W. 326. Amendment of answer. Peterman v. Pope [S. C.] 54 S. E. 569. Dismissal. Aspley v. Hawkins [Tex.] 14 Tex. Ct. Rep. 213, 89 S. W. 972. Nonsuit. Carter v. Western Union Tel. Co., 73 S. C. 430, 53 S. E. 539. Nonsuit on ground of insufficient evidence held improper but not reversible where plaintiff's claim was barred by limitations. Cherry v. Lake Drummond Canal & Water Co., 140 N. C. 422, 53 S. E. 138. Instruction for defendant on ground that petition was insufficient was harmless where the evidence was insufficient. Siewerssen v. Harris County [Tex. Civ. App.] 91 S. W. 333. Setting aside verdict. Anderson v. Wood, 99 N. Y. S. 474. Direction of verdict. Latting v. Owasso Mfg. Co. [C. C. A.] 148 F. 369; Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522. See post § 2, Triviality Constituting Harmlessness. Granting new trial. Bresee v. Los Angeles Traction Co. [Cal.] 85 P. 152; Thompson v. California Const. Co., 148 Cal. 35, 82 P. 367; Houghton v. Market St. R. Co., 1 Cal. App. 576, 82 P. 972; Martin v. Markarian & Co., 1 Cal. App. 687, 82 P. 1072; Weisser v. Southern Pac. R. Co., 148 Cal. 426, 83 P. 439; Scott v. Stone, 72 Kan. 545, 84 P. 117; Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298; Beasley v. Berry [Mont.] 84 P. 791; Case v. Kramer [Mont.] 85 P. 878; Fournier v. Coudert [Mont.] 87 P. 455; Metropolitan Lead & Zinc Min. Co. v. Webster, 193 Mo. 351, 92 S. W. 79; Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737. Refusal of new trial. Rountree v. Atlantic Coast Line R. Co., 73 S. C. 268, 53 S. E. 424. Error as to time at which value should be computed harmless where it appeared that there had been no change of value. Whitworth v. Pool [Ky.] 96 S. W. 880. Only exception to rule that appellate court in reviewing order for new trial is not confined to reasons assigned by trial judge is where the question is as to sufficiency of the evidence and the evidence is conflicting. Weisser v. Southern Pac. R. Co., 148 Cal. 426, 83 P. 439. Nor does this principle apply where plaintiff is allowed to introduce secondary evidence without laying foundation therefor and judgment is rendered for the defendant on other grounds. In such case the judgment will not be affirmed regardless of other errors, but will be reversed and the plaintiff thus be given a chance to lay the foundation for his evidence. Boynton v. Ashabraner [Ark.] 88 S. W. 1011.

Result reached was the only one sustainable. In re Dolbeer's Estate [Cal.] 86 P. 695; Campbell v. McCrellis [N. J. Law] 62 A. 1129; King v. Davis, 137 F. 198; Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 96. Admission of evidence. Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306; Stackpole v. Boston El. R. Co. [Mass.] 79 N. E. 740; In re Nelson's Estate [Neb.] 106 N. W. 326. Verdict only one sustainable. Illinois Cent. R. Co. v. Brown [Miss.] 39 So. 531. When another trial would result in like result. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654. When verdict is one which the court might have properly directed, errors committed by the court are harmless. Stallings v. Gilbreath [Ala.] 41 So. 423. If on the undisputed facts the case is plainly for the defendants, errors committed by the court on the trial are harmless to plaintiff. Jeffrey v. Lemon, 58 W. Va. 662, 52 S. E. 769. Where judgment is necessarily against the party upon a decisive issue, error in connection with other issues is harmless. Kosower v. Sandler, 49 Misc. 443, 98 N. Y. S. 65. Where defendant was entitled to affirmative charge, plaintiff was not injured by errors of trial court. Leatherbury v. Spotswood, Turner & Co. [Ala.] 39 So. 588. Submitting issue to jury which should have been decided as a matter of law harmless where verdict is right. Mockowik v. Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Nelson v. Chicago & N. W. R. Co. [Wis.] 109 N. W. 933. Rulings on special pleadings and evidence are immaterial where the verdict is one which the court might have directed. Bailey v. Gary, Kennedy & Co. [Ala.] 41 So. 672. Where amount of recovery would not be changed by striking out item of damages allowed in recoupment. Streeter v. Sanitary Dist. [C. C. A.] 143 F. 476. Erroneous finding where judgment correct. Metcalf v. Central Vermont R. Co., 78 Conn. 614, 63 A. 633. Where result reached was only one sustainable, errors in admission of evidence and in instructions were harmless. San Jacinto Oil Co. v. Culberson [Tex. Civ. App.] 96 S. W. 110. Where judgment necessarily went against a party on his pleadings he was not injured by admission of testimony. Simmons v. Sharpe [Ala.] 42 So. 441. Where answer fails to state defense and admits plaintiff's cause of action, defendant not harmed by errors in regard to evidence and instructions. Miller v. Loverne & Browne Co. [Neb.] 105 N. W. 84. Errors in admission of evidence and in instructions harmless where verdict was sustained by the evidence. St. Louis, etc., R. Co. v. Sharrock [Ind. T.] 98 S. W. 158. Errors in instructions and in admission and rejection of evidence on trial of traverse of affidavit in attachment harmless where jury could not have legally rendered a different verdict. Peace River Phosphate Min. Co. v. Singleton [Fla.] 41 So. 594. Erroneous evidence held harmless in will case. Jacobs v. Button [Conn.] 65 A. 150. Admission of incompetent evidence. Heagany v. National Union [Mich.] 12 Det. Leg. N. 943, 106 N. W. 700. When plaintiff failed to prove his complaint he could not complain of error in sustaining demurrer thereto. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. Denial of right to jury trial not reversible error where defendant against whom the judgment was rendered had no defense whatever. Bedford v. Stone [Tex. Civ. App.] 95 S. W. 1086. Where defendant had no defense whatever, judgment against him would not be reversed because it was rendered by a special judge while the regular judge was holding court. Id. Evidence held sufficient to sustain the judgment, but not such as to require the affirmance of the judgment regardless of errors of law. John Silvey &

The party must affirmatively show error apparent on the "record."[5] It must

Co. v. Tift, 123 Ga. 804, 51 S. E. 748. Exclusion of evidence offered by defendant held not reversible error where evidence for plaintiff demanded verdict for full amount of note sued on, and offered evidence would not have authorized any other verdict. Riggins v. Boyd Mfg. Co., 123 Ga. 232, 51 S. E. 434. Rejection of lease offered in support of counterclaim for damages harmless where no damages proved. Pollock v. Talcott, 30 Pa. Super. Ct. 622. Where no case for damages was made out, evidence as to amount of damages was immaterial and its exclusion harmless. Merrill v. Milliken [Me.] 63 A. 299. Erroneous instruction harmless where verdict is right. Baker v. Oughton [Iowa] 106 N. W. 272; Regan v. McCarthy, 119 Ill. App. 578; Quatt v. Ross [Neb.] 106 N. W. 1044; Ramold v. Clayton [Neb.] 108 N. W. 980; Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997; Carr v. Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874; Mockowik v. Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256; Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. Errors in instructions will not be considered where verdict is only one sustainable under the evidence. Morrow v. Laverty [Neb.] 109 N. W. 150. Error in instruction when no other verdict could be expected. Regan v. McCarthy, 119 Ill. App. 578. Instruction that defendant was charged with absolute duty harmless where evidence was such as to require a finding of negligence. Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. S. 425. Verdict for defendant will not be set aside for erroneous instruction where plaintiff had no cause of action. Lomax v. Southwest Missouri Elec. R. Co. [Mo. App.] 95 S. W. 945. Where evidence conclusively shows that plaintiff cannot recover, verdict for defendant will not be disturbed on account of erroneous instructions. Smith v. Atchison, etc., R. Co. [Mo. App.] 97 S. W. 1007. Where upon the findings in a trial by the court plaintiff was entitled to the judgment rendered, error in a declaration of law in that it ignored a certain defense was harmless to defendant, it appearing from the other declarations of law that the said defense was duly considered by the court. Wheless v. Serrano [Mo. App.] 98 S. W. 108. Where a peremptory instruction for plaintiff would have been justified, defendant was not harmed by instructions. First Nat. Bank v. Leeper [Mo. App.] 97 S. W. 636. Refusing instructions requested by defendant harmless where court might have properly given an affirmative instruction for plaintiff. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405. Erroneous instruction harmless where appellant could not have prevailed under any phase of the proof. Hover v. Chicago, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 57, 89 S. W. 1084. Error in imputing negligence of servant to master harmless where evidence showed negligence of another party who did represent the master. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. Submission of case on erroneous theory harmless where verdict is correct. Dealy v. Coble, 112 App. Div. 296, 98 N. Y. S. 452. Presumption of prejudice from improper remarks of counsel does not prevail where the verdict is sustained by the evidence. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000.

Held prejudicial: Disregarding inadmissible evidence which might have been rendered admissible by amendment of the party's pleadings is error prejudicial to such party where the result is a judgment against him. Ewald v. Poates, 107 App. Div. 242, 94 N. Y. S. 1106.

3. See Saving Questions for Review, 6 C. L. 1385.

4. See Appeal and Review, 7 C. L. 138.

5. Smith v. Manlove [Ariz.] 85 P. 1066; Goddykoontz v. Omes [Colo.] 85 P. 839; Worth v. Emerson [Cal. App.] 85 P. 664; Gatlin v. Street [Tex. Civ. App.] 90 S. W. 318. See supreme court rule 22, cl. 5 [55 N. E. vi.]. Springer v. Bricker, 165 Ind. 532, 76 N. E. 114. Error never presumed. Hoyt v. Hart [Cal] 87 P. 569; Van Burg v. Van Engen [Neb.] 107 N. W. 1006. Error must be manifest in the record, and this cannot be unless the point is saved below. State v. Marshall County Election Com'rs [Ind.] 78 N. E. 1016. Court will not go beyond appellant's brief to search for errors, but will search the whole record for matter upon which the judgment may be sustained. Id. Misconduct of counsel. Renshaw v. Dignan, 128 Iowa, 722, 105 N. W. 209. Remarks of court must be shown to have been made in presence of jury. Coulter v. Barker's Estate [Minn.] 107 N. W. 823. Refusal of instruction as to weight of evidence the materiality of which was not shown. Van Burg v. Van Engen [Neb.] 107 N. W. 1006. Error cannot be predicated upon allowance of amendment where contents of amendment are not stated in record. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. Complaining party must show error in exclusion of evidence. Merrill v. Milliken [Me.] 63 A. 299. Record must show excluded evidence. In re Angle's Estate, 148 Cal. 102, 82 P. 668; Magnolia Metal Co. v. Gale, 191 Mass. 487, 78 N. E. 128; Fleener v. Johnson [Ind. App.] 77 N. E. 366; Stevens v. Citizens' Gas & Elec. Co. [Iowa] 109 N. W. 1090. Record must show testimony sought to be elicited by excluded question. International Harvester Co. v. McKeever [S. D.] 109 N. W. 642. Evidence complained of must be in record. De Coster v. Herzog Co., 97 N. Y. S. 295; Sullivan v. Fugazzi [Mass.] 79 N. E. 775. Admission of testimony cannot be held reversible error where previous testimony of witness does not appear. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. Admission of testimony as to extract from conversation with defendant not reversible error where neither subject-matter of conversations nor what was said therein was in record. Green v. Dodge [Vt.] 64 A. 499. It will be presumed that testimony on re-examination was rendered admissible by the cross-examination where the contrary does not appear. Grout v. Moulton [Vt.] 64 A. 453. Error cannot be predicated upon admission of impeaching evidence where the record does not show the materiality of the testimony of the impeached witness. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep.

harm him rather than a co-party,[6] and must be one which he has not invited[7] and which he can assail without inconsistency to his contentions made on the trial.[8]

724, 95 S. W. 563. Error in excluding testimony is not ground for reversal in absence of statement of the facts, unless the bill of exceptions shows prejudice. Gatlin v. Street [Tex. Civ. App.] 90 S. W. 318. Materiality of excluded evidence must appear of record. Tempie v. Phelps [Mass.] 79 N. E. 482. Record must be "quoted" in order to show error in excluding evidence. Creachen v. Bromley Bros. Carpet Co., 214 Pa. 15, 63 A. 195. Error cannot be predicated upon the insufficiency of the surety on an indemnity bond given in a suit to cancel a deed where the record does not contain the facts. Romine v. Howard [Tex. Civ. App.] 15 Tex. Ct. Rep. 347, 93 S. W. 690. Objections to jurors on account of relationship to parties will not be considered where the degree or character of the relationship does not appear. Jones v. Lossiter [Ky.] 93 S. W. 657. Where expression of opinion alleged to have been made by juror was not shown to have made by a juror, and it did not appear that remarks in the jury's presence were understood by any of jury or what the remarks were. Lyman v. Brown, 73 N. H. 411, 62 A. 550. Failure of a court to take action because of failure to show injury from certain conduct of the jury will not be ground for reversal, even though such conduct might in fact have been injurious. Fields v. Dewitt, 71 Kan. 676, 81 P. 467.

6. Commonwealth v. Louisville Trust Co., 28 Ky. L. R. 547, 89 S. W. 599; People v. Rea [Cal. App.] 83 P. 165; Worth v. Emerson [Cal. App.] 85 P. 664; Nealon v. McGargill [Neb.] 108 N. W. 170; Dwight v. Lawrence, 111 App. Div. 616, 98 N. Y. S. 76; Muller v. Whelen, 99 N. Y. S. 618. Instructions. People's State Bank v. Ruxer [Ind. App.] 78 N. E. 337. Admission of evidence. Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183. Judgment against codefendants who were not liable. Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 P. 1003. Judgment against one of two joint defendants harmless to other defendant. McKee v. Cunningham [Cal. App.] 84 P. 260. Errors as to parties not appealing. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. Directing verdict for codefendant and refusal to allow appellant to file cross petition against such codefendant not reviewable where the codefendant is not a party to the appeal. Chesapeake & O. R. Co. v. Wiley, 28 Ky. L. R. 770, 90 S. W. 557. Appellant from a motion cannot object on appeal that his codefendants who have not sought to appear or be heard on appeal were not served with notice. Simonson v. Lauck, 105 App. Div. 82, 93 N. Y. S. 965. Where appellee did not appeal from a judgment denying him a lien, the sufficiency of his pleadings and the evidence to entitle him to such a lien cannot be raised by appellant. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866. In a suit against a county and its treasurer to recover fees, plaintiff being found not entitled to such fees, cannot complain of a judgment against the county in favor of the treasurer. Benefield v. Marion County [Tex. Civ. App.] 15 Tex. Ct. Rep. 777, 95 S. W. 713. Party held not entitled to office could not complain that opposing candidate was not adjudged to be entitled. Tinkle v. Wallace [Ind.] 79 N. E. 365; Gilbert v. Washington Endowment Ass'n, 21 App. D. C. 344. Where one party on an appeal from an auditor's report in several consolidated causes withdraws his exceptions, a party to another of these causes cannot be heard to object to such withdrawal. Defendant cannot complain that petition of intervener was stricken from files. Andrews v. Ragel, 119 Ill. App. 51. Party not injured by award of cost out of fund in which he was not interested or by disposition of bill of interpleader relating to such fund. Brueggemann v. Brueggemann, 119 Ill. App. 112. Defendant in action for death cannot complain of distribution of amount of recovery among relatives of deceased. United Breweries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547. Failure to serve properly by publication certain defendants who defaulted is not available to another defendant appealing. O'Laughlin v. Covell, 222 Ill. 162, 78 N. E. 59. Defendant in accounting not interested in disposition of fund for which he has been adjudged liable. Miller v. Russell, 224 Ill. 68, 79 N. E. 434. A plaintiff appealing because a new trial was awarded cannot urge error in refusing to submit to the jury certain questions of damages. Thrush v. Graybill, 128 Iowa, 406, 104 N. W. 472. A joint appellant may urge errors not common to both appellants, but cannot assume a position antagonistic to his coappellant. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 854. See Appeal and Review, 7 C. L. 128.

In action for tort defendant is not injured by finding in favor of codefendant where there is no right of contribution between defendants. Forsythe v. Los Angeles R. Co. [Cal.] 87 P. 24. Joint tort feasor cannot complain of errors affecting codefendant alone or of failure to render verdict against such codefendant. Illinois Cent. R. Co. v. Murphy's Adm'r [Ky.] 97 S. W. 729. Where statute makes joint tort feasors liable to contribution, a judgment against two such tort feasors will be reversed for error as to one. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801.

7. Lake Shore & M. S. R. Co. v. Teeters [Ind.] 77 N. E. 599. Party cannot complain of admission of evidence to which he has opened the door. American Foundry & Furnace Co. v. Settergren [Wis.] 110 N. W. 238. When counsel stated he would not object to certain evidence. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360. Evidence as to facts as to which party has already introduced evidence. Jaegel v. Johnson, 148 Cal. 595, 84 P. 175. Evidence similar to that introduced by party himself. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572; Mathre v. Devendorf [Iowa] 106 N. W. 356; Vette v. Sacher, 114 Mo. App. 353, 89 S. W. 350; Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. Evidence introduced by appellant subject to any proper objection which she might thereafter urge was harmless as to her where its rejection would have left her

The majority of courts presume prejudice from error, once it is shown to exist,[9] and require the party defending against errors to show that no harm resulted.[10]

without any evidence at all. Wells v. Baker [Colo.] 88 P. 152. Testimony elicited by party himself. King v. Southern R. Co. [Ala.] 41 So. 639. Where defendant elicited certain statements as to certain papers by interrogating plaintiff in regard to the papers, he could not complain that the jury were misled by plaintiff's statements. Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109. Evidence brought out by party's cross-examination. New Orleans Furniture Mfg. Co. v. Hill Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 731, 94 S. W. 148; Pacific Exp. Co. v. Needham [Tex. Civ. App.] 15 Tex. Ct. Rep. 288, 94 S. W. 1070. Where court was led by conduct of counsel to allow jury to separate without admonition. Fields v. Dewitt, 71 Kan. 676, 81 P. 467.

Instructions. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347; Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325; City of Pana v. Broadman, 117 Ill. App. 139. Instruction similar to one given at party's own request. Patterson v. Frazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146; Louisiana & Tex. Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140; Habig v. Parker [Neb.] 107 N. W. 127; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; Chicago City R. Co. v. Pural, 224 Ill. 324, 79 N. E. 686. Instructions given at party's own request. Hales' Adm'rs v. Gilbert, 28 Ky. L. R. 1314, 91 S. W. 721; Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489. Submitting wrong issue at party's own request. St. Louis, etc., R. Co. v. Fisher [Ark.] 97 S. W. 279. Plaintiff cannot complain of defendant's instruction following the charge in the petition. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504. Party at whose instance the greater number of the instructions were given could not complain on account of the number given. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. Party cannot complain of an instruction submitting the case upon a theory in which he has acquiesced on the trial. Bragg v. Metropolitan St. R. Co., 192 Mo. 331, 91 S. W. 527. Party cannot complain that a correct instruction conflicts with an erroneous one given at his own request. Hammer v. Crawford [Mo. App.] 93 S. W. 348. Party cannot complain of a modification of an erroneous instruction given at his request so as to limit the scope of the instruction and thus limit the error. Woodbury v. Winestine [Conn.] 64 A. 221.

8. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351; Ellis v. National City Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437; Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012; Camplin v. Jackson [Colo.] 83 P. 1017. As to materiality of evidence in condemnation proceedings. Yellowstone Park R. Co. v. Bridger Coal Co. [Mont.] 87 P. 963. Where matter was stricken from answer on appellee's motion, he could not thereafter contend that proof of such matter was properly stricken because the matter should have been pleaded. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324. Party cannot complain of finding in which he has acquiesced. Daggs v. Smith, 193 Mo. 494, 91 S. W. 1043. Party cannot complain of submission of case without argument where he acquiesced in such submission. Tenzer v. Gilmore, 114 Mo. App. 210, 89 S. W. 341. Plaintiff could not complain of submission of whole case to jury notwithstanding defendant's admissions eliminating certain matters from the issues, plaintiff, however, having treated such matters as in issue. Harding v. Kohl [Iowa] 108 N. W. 233. Where a pleading has been treated by both parties as filed, error cannot be predicated upon failure to enter it upon the appearance docket in proper time. Foley v. Cedar Rapids [Iowa] 110 N. W. 158. Where the parties treat the issues as made up they cannot thereafter object on account of failure to make up issue before hearing. Bader v. Schult & Co., 118 Mo. App. 22, 94 S. W. 834; Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522. A party cannot complain of admission of testimony which is incompetent only when taken together with other testimony to which he did not object. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. A decree entered upon final hearing on plaintiff's motion to perpetuate an injunction will not be reversed at plaintiff's instance because of the pendency of a rule against defendant for violating the injunction. Pence v. Carney, 58 W. Va. 296, 52 S. E. 702. Party who has objected to admission of testimony on ground that fact sought to be proved was admitted by pleadings cannot subsequently assert that such fact was not proved. Mitau v. Roddan [Cal.] 84 P. 145.

9. See 5 C. L. 1623. In re Dean's Estate [Cal. App.] 87 P. 13; Lake Erie & W. R. Co. v. McFall, 165 Ind. 574, 76 N. E. 400; Englander v. Fleck, 101 N. Y. S. 125; Dunn v. Currie [N. C.] 53 S. E. 533; Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 16 Tex. Ct. Rep. 847, 96 S. W. 1037; Grout v. Moulton [Vt.] 64 A. 453. Where ruling indicates radically wrong theory of case, prejudice will be presumed. Booneville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

Rulings on evidence: Admission of incompetent evidence presumed prejudicial. Fountain v. Wabash R. Co., 114 Mo. App. 683, 90 S. W. 395; St. Louis, etc., R. Co. v. Courtney [Ark.] 92 S. W. 251; Lane Bros. & Co. v. Bott, 104 Va. 615, 52 S. E. 258. Where evidence is improperly admitted the prima facie presumption is that it was considered by the jury in reaching a verdict. Johnson v. Atlantic Coast Line R. Co. [N. C.] 53 S. E. 362. Admission of illegal evidence raises presumption of injury and requires reversal unless the remaining evidence is without conflict and is sufficient to support the judgment. Florence Wagon Works v. Trinidad Asphalt Mfg. Co. [Ala.] 40 So. 49. Improper exclusion of evidence presumed prejudicial. Inman Bros. v. Dudley & D. Lumber Co. [C. C. A.] 146 F. 449. Prejudice presumed from exclusion of evidence as to damages in action sounding in tort, and court cannot look into evidence to determine whether there has been prejudice. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514.

Rulings as to pleadings: Prejudice pre-

Errors which favor the party objecting are of course not ground for reversal,[11] nor are such as may be corrected without resort to a new trial.[11a]

sumed from striking out a defense where it does not appear from the record that the judgment would have been the same had the defense been considered. Houston & T. C. R. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 888, 97 S. W. 106. Error in sustaining demurrer to one count of complaint presumed prejudicial though other counts remained sufficient to sustain a judgment. Henderson v. Berry Co. [Ala.] 39 So. 662.

Instructions: Erroneous instruction presumed prejudicial. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682; Southern R. Co. v. Forgey [Va.] 54 S. E. 477; Smith v. Perham [Mont.] 83 P. 492; Ferrell v. Ellis, 129 Iowa, 614, 105 N. W. 993. Inconsistent instructions. American Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563. Submission of issue as to which there is no evidence is presumptively prejudicial. Fothergill v. Fothergill, 129 Iowa, 93, 105 N. W. 377. Refusal of instruction. Prescott & N. W. R. Co. v. Weldy [Ark.] 97 S. W. 452.

In matters of procedure error presumed harmless until contrary shown. Farmer v. Norton, 129 Iowa, 88, 105 N. W. 371.

Limitations of doctrine that prejudice is presumed from error will be found under the doctrine of Triviality Constituting Harmlessness, § 2.

10. Englander v. Fleck, 101 N. Y. S. 125; Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. It is only when it is clear that no prejudice resulted or could have resulted that the judgment may be affirmed. Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522. See post § 2, Directed Verdict. Presumption of error must be excluded beyond reasonable doubt. Inman Bros. v. Dudley & D. Lumber Co. [C. C. A.] 146 F. 449; Armour & Co. v. Russell [C. C. A.] 144 F. 614. Exclusion of material evidence is reversible error unless it appears beyond a reasonable doubt that such exclusion was harmless. Central Trust Co. v. Culver [Colo.] 83 P. 1064. Where it is impossible to ascertain whether the jury were influenced by the incompetent evidence, its admission calls for reversal. St. Louis, etc., R. Co. v. Courtney [Ark.] 92 S. W. 251; Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619. Where a demurrer to an insufficient paragraph of a complaint is overruled, plaintiff must show that verdict in his favor rested exclusively on good paragraphs. Lake Erie & W. R. Co. v. McFall, 165 Ind. 574, 76 N. E. 400; Lake Shore & M. S. R. Co. v. Barnes [Ind.] 76 N. E. 629. Presumption of prejudice in failing to limit degree of skill required of physician to that ordinarily possessed by physicians practicing in similar localities not rebutted where no physician from same or similar locality testified. Ferrell v. Ellis, 129 Iowa, 614, 105 N. W. 993.

11. See 5 C. L. 1623. Louisville & N. R. Co. v. Helm, 28 Ky. L. R. 603, 89 S. W. 709; Yellowstone Park R. Co. v. Bridger Coal Co. [Mont.] 87 P. 963. Objection that complaint does not state cause of action is not available to respondent on plaintiff's appeal from an order denying a new trial. County Bank of San Luis Obispo v. Jack, 148 Cal. 437, 83 P. 705. Defendant cannot complain of overruling of demurrer to his plea. Odom v. Moore [Ala.] 41 So. 162. Plaintiff cannot complain of granting of defendant's motion to strike one of his own pleas. Grimmer v. Nolen [Ala.] 40 So. 97. Allowing too many peremptory challenges. Freiberg v. South Side El. R. Co., 221 Ill. 508, 77 N. E. 920. Where result of applying wrong rule as to interest on disbursements of guardian was more favorable to him than if correct rule had been applied. Abrams v. U. S. Fidelity & Guaranty Co., 127 Wis. 579, 106 N. W. 1091. Defendant cannot complain of overruling motion for new trial by one of several plaintiffs. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

Evidence: Admission of evidence favorable to complaining party. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197; St. Louis, etc., R. Co. v. Block [Ark.] 95 S. W. 155; Shannon v. Tacoma, 41 Wash. 220, 83 P. 186. Admission of evidence of custom of partnerships in signing notes. Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755. Defendant in action for injuries not harmed by evidence that plaintiff had visited different places for her health where it appeared that her health was improved by such visits. Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109. Where defendant denied liability on note sued on, error in admitting testimony of his discharge in bankruptcy and that he had filed the note as one of his liabilities was harmless, since it merely tended to establish the validity of the note. Lovell & Co. v. Sneed [Ark.] 95 S. W. 157. Presumption, in absence of evidence, being that a bridge will be of such character as to do most injury to remaining property of landowner, erroneous admission of plan of bridge was harmless to freeholders. Hadley v. Passaic County Chosen Freeholders [N. J. Law] 62 A. 1132. Striking only part of answer, all of which was admissible, harmless to moving party. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Refusal to exclude evidence. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89. Error in placing burden of proof upon other party. Louisiana & Tex. Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140. Ruling as to burden of proof in quo warranto. Dunton v. People [Colo.] 87 P. 540. Error in placing burden of disproving revocation of will upon propounder harmless to contestant. In re Shelton's Will [N. C.] 55 S. E. 705.

Submission of issues: Defendant not harmed by submitting issue involving defense not available. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 96 S. W. 469. Party cannot complain of form of submission of issue found in his own favor. Davis v. Keen [N. C.] 55 S. E. 359. Refusal to submit issue which might have been found against appellant. Carr v. Prudential Ins.

Co., 101 N. Y. S. 158. Defendant not harmed by submission to jury of question resolvable against him as a matter of law. Shields v. Norton [C. C. A.] 143 F. 802; Emblen v. Bicksler [Colo.] 83 P. 636. Submitting question of contributory negligence to jury held favorable to appellant. Louisville & N. R. Co. v. Deason [Ky.] 96 S. W. 1115. Defendant in action for breach of warranty cannot complain that by the submission of issues the case was made to depend on proof of only a part of the warranty. San Antonio Mach. & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. Defendant railroad company not injured by instruction submitting the case upon the theory of care required by common law instead of the theory under speed ordinances. Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109.

Instructions. De Laval Separator Co. v. Sharpless, 129 Iowa, 114, 105 N. W. 384; Pierce v. Doolittle [Iowa] 106 N. W. 751; Carr v. Prudential Ins. Co., 101 N. Y. S. 158; Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470; Webster v. Sherman [Mont.] 84 P. 878; Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170; Norfolk & W. R. Co. v. Birchfield [Va.] 54 S. E. 879; Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637; Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628; Texas Midland R. R. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 401, 90 S. W. 185; Schmitt v. St. Louis Transit Co., 115 Mo. App. 445, 90 S. W. 421; International, etc., R. Co. v. Smith [Tex. Civ. App.] 90 S. W. 709; Matfield v. Kimbrough [Tex. Civ. App.] 13 Tex. Ct. Rep. 927, 90 S. W. 712; Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 S. W. 375; Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877; Southern Cotton Oil Co. v. Spotts [Ark.] 92 S. W. 249; St. Louis, etc., R. Co. v. Dooley [Ark.] 92 S. W. 789; El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166; City of Paducah v. Johnson [Ky.] 93 S. W. 1035; Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083; Dean v. Kansas City, etc., R. Co. [Mo.] 97 S. W. 910. Where contradictory charge is in favor of appellant. Mott v. Western Union Tel. Co. [N. C.] 55 S. E. 363; Donovan-McCormick v. Sparr [Mont.] 85 P. 1029. Error in manner of giving instructions which complaining party was not entitled to. O'Dea v. Michigan Cent. R. Co. [Mich.] 12 Det. Leg. N. 718, 105 N. W. 746. Instruction placing greater burden on plaintiff than that imposed by law was harmless to defendant. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440; Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770; Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539; Sherwood v. Home Sav. Bank [Iowa] 109 N. W. 9. Defendant not injured by error in placing burden of negativing contributory negligence upon plaintiff. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Instruction that if plaintiff contributed in any material degree to the injury he could recover nothing was harmless to defendant. Bowman v. Humphrey [Iowa] 109 N. W. 714. Charging defendant with duty of exercising less care than required by law. St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671. Stating that the court was not at liberty to say whether there was any evidence of willfulness was harmless to defendant where there was such evidence. Talbert v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 138. Use of word "directly" in charging that plaintiff could not recover if his actions contributed "directly" to his injury was harmless to defendant. Ruffin v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 86. Annexing to verbal stipulations relative to a written contract qualifications not required by law was harmless to party asserting the invalidity of such stipulations. Smith Premier Typewriter Co. v. Rowan Hardware Co. [N. C.] 55 S. E. 417. Instruction that the doctrine of res ipsa loquitur has no application to the case must be deemed correct on defendant's appeal. Dolan v. New York Sanitary Utilization Co., 104 App. Div. 14, 93 N. Y. S. 217. Instruction as to amount of brokerage due broker held favorable to broker. Yore v. Meshew [Mich.] 13 Det. Leg. N. 672, 109 N. W. 35.

Verdicts and findings: Awarding plaintiff less than he was entitled to was harmless to defendant. Brunson v. Blair [Tex. Civ. App.] 16 Tex. Ct. Rep. 926, 97 S. W. 337; Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011; Louisville & N. R. Co. v. Thomas [Miss.] 40 So. 257. Defendant cast by judgment cannot object that the verdict was too small even if it was also illogical. Morgan v. McCaslin, 114 Ill. App. 427. Defendant not harmed by verdict for less than evidence demanded. Pullman Co. v. Schaffner [Ga.] 55 S. E. 933. Defendant cannot complain that a verdict for plaintiff for a portion of the property sued for valued such portion at a sum equal to the value of all of the property as stated in the complaint. Phoenix Furniture Co. v. Jaudon [S. C.] 55 S. E. 308. Granting only compensatory damages in action for willful wrong was harmless to defendant. Wilson Lumber Co. v. Alderman & Sons Co. [S. C.] 55 S. E. 447. Findings in favor of defendant harmless as to him. Bader v. Ferguson, 118 Mo. App. 34, 94 S. W. 836. Finding giving party more land than claimed by him. Harris County Irr. Co. v. Hornberger [Tex. Civ. App.] 15 Tex. Ct. Rep. 771, 94 S. W. 145.

Judgment: Judgment in party's favor. Commissioners of Union Drainage Dist. No. 3 v. Virgil & Cortland Com'rs, 220 Ill. 176, 77 N. E. 71. Judgment more favorable than appellant entitled to. Lawrence Bros. v. Heylman, 111 App. Div. 848, 98 N. Y. S. 121. Defendant cannot complain that judgment is for less than verdict. Kessel v. Mayer, 118 Ill. App. 267. Defendant cannot complain that plaintiff was awarded less than he was entitled to. Deaton v. Lawson, 40 Wash. 486, 82 P. 879; Arnold v. McBride [Ark.] 93 S. W. 989; Burns v. Burns, 109 App. Div. 98, 95 N. Y. S. 797. That damages without injunction awarded harmless to defendant. Sadler v. New York [N. Y.] 78 N. E. 272. Party enjoined from using trade name in certain territory cannot complain that the injunction was not without geographical limitation. Cohen v. Nagle, 190 Mass. 4, 76 N. E. 276. Defendant cannot complain of dismissal of mandamus proceedings against him without judgment. McCormick v. State, 165 Ind. 639, 76 N. E. 293. Defendant in action on replevin bond cannot complain that judgment was for amount for which property was held where such amount was less than value of

§ 2. *Triviality constituting harmlessness.—An error is harmless if too trivial in its nature or consequences to have substantially influenced the result.*[12] The weight or strength of the evidence may affect the importance of error.[13]

property. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558. Seller, on being denied right to sue on purchase-money draft, cannot complain of failure to require return of a cash deposit made by the buyer. Biescar v. Pratt [Cal. App.] 87 P. 1101. Plaintiff in replevin not injured by failure to enter judgment against his sureties on the delivery bond nor by fact that judgment failed to order plaintiff to return the property or pay its assessed valuation, nor by failure to adjudge him to pay damages for taking and detention. Absher v. Franklin [Mo. App.] 97 S. W. 1002. Defendant in suit to enforce assessment for street improvements cannot complain that no personal judgment was rendered against him or that only part of the property was ordered to be sold, it not appearing whether the lien covered the whole property or that the part ordered sold would not pay the debt. Lindsey v. Brawner [Ky.] 97 S. W. 1.

11a. Roy v. E. St. Louis Suburban R. Co., 119 Ill. App. 313. Error in form of judgment. Id. See Appeal and Review, 7 C. L. 138. See, also, post § 3, Errors Cured or Made Harmless by Other Matters.

12. See 5 C. L. 1625. Irresponsive answers not of sufficient importance to warrant reversal. In re Dunahugh's Will [Iowa] 107 N. W. 925. Error in admitting certain evidence of bias of witness held too trivial to justify reversal. Levy v. Wolf [Cal. App.] 84 P. 313. Error involving trifling sum of money. Chany v. Hotchkiss [Conn.] 63 A. 947. A judgment will not be reversed because of error where the amount involved in the error is trivial compared to the costs of a new trial. Gates v. Davis, 28 Ky. L. R. 490, 89 S. W. 490. Erroneous instruction resulting in recovery of only $10 too much in action involving $350. Weick v. Dougherty, 28 Ky. L. R. 930, 90 S. W. 966. Failure of decree in an injunction suit to give plaintiff judgment for $1 damages awarded by jury held too trifling to require even a modification of the decree. Hoyt v. Hart [Cal.] 87 P. 569. Doubt as to whether judgment was for 18 cents too much. Neal v. Gray, 124 Ga. 510, 52 S. E. 622. Damages excessive to the amount of only $2.81. Spunner v. Roney, 122 Ill. App. 19. Doctrine of de minimis, etc., applied when error involved only $12 while case involved $500,000. McDougal v. Fuller, 148 Cal. 521, 83 P. 701. No reversal on account of instruction resulting in only nominal damages. Diamon v. Taylor [Minn.] 109 N. W. 1133. As general rule no reversal for failure to allow nominal damages. Clark v. American Exp. Co. [Iowa] 106 N. W. 642. Failure to award nominal damages harmless unless some right other than the right to damages is involved. Swift & Co. v. Newport News [Va.] 52 S. E. 821; Green v. Macy, 36 Ind. App. 560, 76 N. E. 264.

Held prejudicial: Rule that failure to give nominal damages is not reversible error not applicable in action for trespass where defendant's acts were such that if continued they might give rise to a claim of title by adverse possession. Wing v. Seske [Iowa] 109 N. W. 717. Recovery of nominal damagee may be prejudicial error where such recovery amounts to an adjudication of valuable rights. Harvey v. Mason City, etc., R. Co., 129 Iowa, 465, 105 N. W. 958.

13. Erroneous instruction harmless where evidence conclusive and verdict in accord therewith. Williams v. Supreme Ct. of Honor, 221 Ill. 152, 77 N. E. 542. Where only conflict was as to inferences to be drawn from testimony, instruction as to credibility of witnesses harmless. Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591. Where court might properly have taken question from jury and found as they found, erroneous instructions harmless. Berlin v. Belle Isle Scenic R. Co., 141 Mich. 646, 12 Det. Leg. N. 573, 105 N. W. 130. Where party's right of action is defeated by undisputed evidence, he is not harmed by erroneous instructions. Morris v. Jacks [Tex. Civ. App.] 16 Tex. Ct. Rep. 764, 96 S. W. 637; Walker v. Rein [N. D.] 106 N. W. 405. Erroneous instruction with reference to counterclaim not sustained by evidence harmless to defendant. Cuatt v. Ross [Neb.] 106 N. W. 1044. Incomplete instruction as to burden of proof on plaintiff harmless where defendant introduced no evidence. Barrie v. St. Louis Transit Co. [Mo. App.] 96 S. W. 233. Erroneous instruction as to burden of proof as to assumption of risk harmless when evidence conclusively disproved any such assumption. Pittsburg, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522. Instruction assuming facts conclusively proved, harmless. McManus v. Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176. Where evidence conclusively negatived certain acts of negligence, an instruction in regard to such negligence became immaterial. Smith's Adm'r v. Louisville & N. R. Co., 28 Ky. L. R. 439, 89 S. W. 694. Where evidence showed negligence beyond controversy, instruction imposing too onerous duty of care harmless. City of Gibson v. Murray, 120 Ill. App. 296; Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. S. 425. Erroneous instruction as to what constituted notice of adverse possession harmless where undisputed evidence showed notice. Yarborough v. Mayes [Tex. Civ. App.] 14 Tex. Ct. Rep. 785, 91 S. W. 624. Where the evidence conclusively showed a want of ordinary care, an instruction charging defendant with duty of exercising too high degree of care was harmless. Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841. Where it was apparent that plaintiff was injured by negligence for which defendant was liable, defendant was not injured by erroneous instruction as to proximate cause. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446. Where it was shown without conflict that wife had no independent means of support, instruction casting burden on husband to show that she had such means was harmless. Baker v. Oughton [Iowa] 106 N. W. 272. Improper argument outside of record ground for reversal when evidence was conflicting. Texas,

Cases applying these principles to errors or irregularities in process or appearance,[14] parties,[15] pleadings and formation of issues,[16] provisional and interlocu-

etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Admission of improper testimony prejudicial when evidence is conflicting. Lee v. Salt Lake City [Utah] 83 P. 562. When the evidence is conflicting, admission of incompetent evidence is of more consequence than when the evidence supporting the verdict is uncontradicted. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Incompetent evidence prejudicial where evidence was conflicting. St. Louis S. W. R. Co. v. Plumlee [Ark.] 95 S. W. 442. Opinion evidence held prejudicial where the evidence was conflicting. Lee v. Salt Lake City [Utah] 83 P. 562. When evidence as to ownership of property was conflicting it was reversible error to allow witness to testify to his personal impression or understanding as to such ownership. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48. Instruction as to negligence of which there was no evidence was not harmless where evidence as to other acts of negligence was not conclusive. Stevens & Citizens' Gas & Elec. Co. [Iowa] 109 N. W. 1090. Erroneous instruction reversible error where evidence conflicting. Chicago, etc., R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916.

14. Failure to issue warrant for arrest in contempt proceedings and bringing in the parties by notice or citation was not reversible error. State v. Thompson [Iowa] 106 N. W. 515. Improper service by publication upon persons, merely nominal parties to the proceeding, will not be ground for reversal. O'Laughlin v. Covell, 222 Ill. 162, 78 N. E. 59.

15. Error in reviving suit upon death of unnecessary party. Tainter v. Abrams [Neb.] 107 N. W. 225. Allowing disinterested party to participate in proceedings for appointment of administrator. In re McClellan's Estate [S. D.] 107 N. W. 681. Refusal to make a person a party who does not show that he has any defense. See Rev. St. 1898, § 2829. Mash v. Bloom, 126 Wis. 385, 105 N. W. 831. Misjoinder of parties plaintiff in an action for tort is harmless where the costs are not increased thereby. Galveston, etc., R. Co. v. Heard [Tex. Civ. App.] 14 Tex. Ct. Rep. 617, 91 S. W. 371.

16. Rulings on pleadings are unimportant where a general charge for defendant is properly given. Williams v. Central of Georgia R. Co. [Ala.] 40 So. 143. Indefiniteness and uncertainty in complaint. Creighton v. People [Colo.] 83 P. 1057. Appellant not prejudiced by technical error in denominating an attorney's petition for fees as a cross petition. Proctor Coal Co. v. Tye [Ky.] 96 S. W. 512. The fact that the petition claimed an item which did not figure in the adjudication against defendant or in the demand asserted against him did not injure him. Ragley v. Godley [Tex. Civ. App.] 14 Tex. Ct. Rep. 153, 90 S. W. 66. In absence of stipulation to contrary, technical errors in pleading waived by reporting case. Hurd v. Chase, 100 Me. 561, 62 A. 660. Failure to plead tender of return of property purchased where it appeared that such a tender would have been unavailing. Olson v. Brison, 129 Iowa, 604, 106 N. W. 14. Failure to dispose of issue made by replication where latter has been rendered immaterial by an amended replication. Ray v. Keith, 218 Ill. 182, 75 N. E. 921. Reference before answer filed and hearing by referee without such answer harmless where plaintiff had notice of contents of answer and time to meet the same. Bader v. Schuet & Co., 118 Mo. App. 22, 94 S. W. 834. Submission of issue already found by the court held harmless. Turner v. Wabash R. Co., 114 Mo. App. 539, 90 S. W. 391. Irregularity in making up issues harmless where the case was tried on its merits and there was no dispute about the facts. Meehan v. Peck, 28 Ky. L. R. 446, 89 S. W. 491.

Variance: Immaterial variance. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Disregarding variance curable by amendment, harmless. Indianapolis Traction & Terminal Co. v. Lawson [C. C. A.] 143 F. 834. Variance curable by amendment harmless. See Ball. Ann. Codes & St. § 4950. Irby v. Phillips, 40 Wash. 618, 82 P. 931; Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012; Coe v. Rockman, 126 Wis. 515, 106 N. W. 290. Complaint considered as amended to conform to proof. Lang v. Crescent Coal Co. [Wash.] 87 P. 261; Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514. In action for injury to crops a variance as to the description of a part of the land is harmless where the identity of the crops is fully made out. Williamson v. Missouri, etc., R. Co., 115 Mo. App. 72, 90 S. W. 401. Allowing evidence of consideration in action to reform contract where complaint failed to allege consideration. First Nat. Bank v. Bacon, 98 N. Y. S. 717. Variance between affidavit and accusation in contempt proceedings harmless where defendant had ample notice of and time to prepare his defense against the charge in the accusation. State v. McCarley [Kan.] 87 P. 743.

Sustaining demurrer; Demurrer to insufficient pleading. City of Huntington v. Amiss [Ind.] 79 N. E. 199. Demurrer to unnecessary allegations. Miller v. Taggart, 36 Ind. App. 595, 76 N. E. 321. Informal demurrer to bad answer. Board of Com'rs of Morgan County v. Crone, 36 Ind. App. 283, 75 N. E. 826. Demurrer to plea or answer stating facts provable under general denial on file at time of ruling. Swing v. Hill [Ind.] 75 N. E. 658; Shetterly v. Axt [Ind. App.] 76 N. E. 901; City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514; City of Covington v. Ferguson [Ind.] 78 N. E. 241; American Exp. Co. v. Southern Ind. Exp. Co. [Ind.] 78 N. E. 1021; American Exp. Co. v. State [Ind.] 78 N. E. 1029; American Exp. Co. v. State [Ind.] 79 N. E. 352; Western R. Co. v. Mitchell [Ala.] 41 So. 427; Little v. Marx [Ala.] 39 So. 517; Chandler Bros. v. Higgins [Ala.] 39 So. 576; Western R. Co. v. Stone [Ala.] 39 So. 723. But not when general denial is not filed until after the demurrer has been sustained to the special pleading. Swing v. Hill [Ind.] 75 N. E. 658. Demurrer to plea setting up matter contained in another plea. Forbes v. Davidson [Ala.] 41 So. 312; Springfield v.

tory proceedings,[17] continuances, adjournments, dismissal before trial, and the like,[18]

Hurley [Ala.] 41 So. 942. Demurrer to paragraph of answer harmless where facts set up therein are provable under another paragraph. People's State Bank v. Ruzer [Ind. App.] 78 N. E. 337. Demurrer to special replication setting up matter available under general reply. State v. Porter [Ala.] 40 So. 144; Gates v. O'Gara [Ala.] 39 So. 729. Demurrer to cross complaint where substantially same facts were provable under the answer. Coyne v. Baker [Cal. App.] 84 P. 269. Treating a demurrer as a motion to make more specific and sustaining it was harmless error where party refused to amend, though defects in the pleading were not strictly grounds for demurrer. Cook v. Jones [Ark.] 96 S. W. 620. Sustaining demurrer harmless where party is given benefit of his pleading. See post § 3, Errors Cured or Made Harmless by Other Matters.

Held prejudicial: Error in sustaining general demurrer ground for reversal though special demurrers were properly sustained and the pleading was not amended. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex.] 17 Tex. Ct. Rep. 4, 97 S. W. 686. Error in sustaining demurrer to complaint which stated cause of action not harmless because same questions presented by exceptions to conclusions of law. Warner v. Jennings [Ind. App.] 76 N. E. 1013.

Overruling demurrer: Overruling of demurrer to plea to a certain count of the complaint harmless where plaintiff fails to sustain such count. Hooks v. Huntsville R., Light & Power Co. [Ala.] 41 So. 273. Overruling special demurrer to portion of petition harmless where the issue raised by such portion was not submitted to jury. Jackson v. Poteet [Tex. Civ. App.] 14 Tex. Ct. Rep. 45, 89 S. W. 980. Error in overruling special demurrer to portion of petition for indefiniteness harmless where the case made was provable under portions that were sufficiently definite. Dallas Consol. Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 14 Tex. Ct. Rep. 388, 90 S. W. 933. Overruling demurrer to count abandoned by plaintiff and eliminated from the case by instructions. Blankenship v. Decker [Mont.] 85 P. 1035. When demurrer is sustained on certain grounds and the pleading is not amended, overruling other grounds is harmless. Henry v. Southern R. Co. [Ala.] 40 So. 87. Overruling demurrer for misjoinder of causes. See Burns' Ann. St. 1901, § 344. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Overruling demurrer to paragraph of reply where matter set up therein provable under general denial. Indiana Union Traction Co. v. McKinney [Ind. App.] 78 N. E. 203. Overruling demurrer to one paragraph of complaint harmless where it plainly appears that judgment rests entirely on another paragraph. Chicago, etc., R. Co. v. Williams [Ind.] 79 N. E. 442; Bedford Quarries Co. v. Turner [Ind. App.] 77 N. E. 58. Error in overruling demurrer to complaint to enforce laborer's lien on mining claims for failure to allege that claim was for more than $1,000 and was recorded, harmless to owner of claim. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47.

Held prejudicial: Overruling demurrer to one paragraph of complaint not harmless where it does not appear that judgment rests upon other paragraphs. City of Decatur v. McKean [Ind.] 78 N. E. 982.

Rulings on exceptions: Sustaining exception to part of answer asserting a defense which had been waived by defendant. Shearer v. Gaar, Scott & Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 146, 90 S. W. 684. Overruling exception to portion of plaintiff's petition which was not sustained by evidence. Houston & T. C. R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. Overruling exception by one defendant to answer of other defendant seeking judgment over against former harmless where no such judgment was rendered. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 600, 93 S. W. 1107. Overruling special exception to part of petition harmless where court did not submit the issue tendered by such part. International & G. N. R. Co. v. Trump [Tex. Civ. App.] 94 S. W. 903.

Ruling on motion to strike. Bosler v. Coble [Wyo.] 84 P. 895. Overruling motion to strike is harmless since the objection may again be raised by objection to the evidence and by requests for instructions excluding such evidence. Brownell v. Salem Flouring Mills Co. [Or.] 87 P. 770. Sustaining motion to strike plea where same matter is available under general issue. Little v. Marx [Ala.] 39 So. 517. Where subject-matter of stricken plea in abatement was incorporated in answer and was thus fully litigated. Simmons v. Kelsey [Neb.] 107 N. W. 122. Striking demise alleged in declaration in ejectment harmless where plaintiff did not by his proof connect himself with such demise. Wilson v. Hammond [Ala.] 40 So. 343. Striking amendment harmless where same issues were raised by another amendment. Murphy v. Hiltibridle [Iowa] 109 N. W. 471.

Amendment: Filing of unnecessary amendment. Miller v. Tjexhus [S. D.] 104 N. W. 519. Allowing amendment bringing in facts admitted. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. Where prejudice is not apparent from allowance of amendment. Florence Oil & Refining Co. v. Oil Well Supply Co. [Colo.] 87 P. 1077. Failure to make formal ruling on motion for leave to amend harmless where court clearly indicated that the motion would be denied. Hewel v. Hogin [Cal. App.] 84 P. 1002. Filing amendment in vacation harmless, especially where it was not necessary. Bramblett v. Deposit Bank, 28 Ky. L. R. 1228, 92 S. W. 283. Refusing to allow amendment which was merely a repetition of matter contained in the original complaint. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Amendment to conform pleadings to proof harmless where the evidence was admissible under the original pleadings. Carmichael v. Hancock Mut. Life Ins. Co., 48 Misc. 386, 95 N. Y. S. 587. Unauthorized amendment of claim for damages against city as regards date of accident. Kleyle v. Oswego, 109 App. Div. 330, 95 N. Y. S. 879. Unauthorized amendment of clerical error in misstating venue of affidavit harmless. Kleyle v. Oswego, 109 App. Div. 330, 95 N. Y. S. 879. Substantive right not affected by

the trial and course and conduct of the same,[19] formation and selection of the jury,[20] and rulings on demurrers to evidence and motions for directed verdicts and nonsuits,[21] are cited below.

correction of clerical error in petition. See Rev. St. 1898, § 2829. Alft v. Clintonville, 126 Wis. 334, 105 N. W. 561.

Ruling on motion for more specific allegation: Ruling on motion to make one paragraph of complaint more specific harmless where it is apparent that verdict is grounded on another paragraph. City of Indianapolis v. Keeley [Ind.] 79 N. E. 499. Refusal to require specific allegation of contents of trunk harmless where defendant was already informed and the trunk was in its possession. Texas & P. R. Co. v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58.

Election: Requiring an election harmless where the plaintiff had at the time completed his proofs and had introduced no evidence to sustain the cause against which the enforced election was made. Wilson v. Tye [Ky.] 92 S. W. 295. Error in failing to compel plaintiff to elect between actual and statutory damages harmless where only one kind of damages was allowed. Galbraith v. Carmode [Wash.] 86 P. 624. Where case submitted on single theory and each party permitted to introduce all his evidence, refusal to require election between counts was harmless. Tuffree v. Binford [Iowa] 107 N. W. 425.

17. Master's report. Matthews v. Whitethorn, 220 Ill. 36, 77 N. E. 89. Overruling demurrer to paragraph of reply to exceptions to receiver's report harmless, the issues presented thereby being determinable upon the report and exceptions thereto. Polk v. Johnson [Ind. App.] 77 N. E. 1139. Where a second ground for change of venue was comprehensive enough to include the third, and all the evidence available to prove the third was admitted to prove the second, sustaining exception to third ground was harmless. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010. Granting of injunction ineffective because of failure to give bond. Bosler v. Coble [Wyo.] 84 P. 895.

18. Continuances. Bratt v. Sparks [Ark.] 96 S. W. 1057. Denial of continuance asked for on account of absence of witnesses harmless where their testimony on a former trial was admitted and covered all the facts which were sought to be proved by the absent witnesses. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137. No reversal for refusal of continuance on account of absence of witness where adverse party admitted the evidence which witness would have given. Florence Oil & Refining Co. v. Oil Well Supply Co. [Colo.] 87 P. 1077. Refusal of continuance not reversible error where discretion not abused. Dorais v. Doll [Mont.] 83 P. 884. Dismissal without notice as to time of trial as required by Code Civ. Proc. § 594. In re Dean's Estate [Cal.] 87 P. 13. Plaintiff moving for dismissal not prejudiced by failure of court to include in a judgment for defendant all the property involved in the suit, such failure being in effect a dismissal pro tanto. Subera v. Jones [S. D.] 108 N. W. 26.

19. Order of trial. Linderman v. Nolan 16 Okl. 352, 83 P. 796. Submission of issues Starkweather v. Emerson Mfg. Co. [Iowa] 109 N. W. 719. Allowing security for costs to be given after return day. Charles Bakrow & Co. v. Totten [Mich.] 109 N. W. 31. Ruling as to burden of proof. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562. Departure from form of court rule not reversible error where substance of rule observed. In re Logan's Assigned Estate, 213 Pa. 218, 62 A. 843. The giving of special interrogatories by the court on its own motion is not reversible error where no prejudice results therefrom. Chicago City R. Co. v. Jordan, 116 Ill. App. 650. Ruling that plaintiff might show certain damages harmless where no such damages are shown. Gulf & C. R. Co. v. Hartley [Miss.] 41 So. 382.

20. Errors in formation of jury harmless where no question of fact arose on trial. Associated Presbyterian Congregation of Hebron v. Hanna, 98 N. Y. S. 1082. Overruling challenge. Williams v. Supreme Ct. of Honor, 120 Ill. App. 263. Overruling challenge not reversible error where it appears that party had fair trial. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074. Overruling peremptory challenges where challenges allowed by court were not exhausted and it did not appear that any objectionable juror was allowed on the jury. International, etc., R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113. Refusal to allow a party his statutory number of challenges not ground for reversal unless it appears from record that appellant was probably injured by such ruling, and no such injury appears where it does not appear that any objectionable juror was chosen or that the party would have used the additional challenges if they had been allowed to him. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442. Allowing additional peremptory challenge not reversible error in absence of showing of injury. Creech v. Aberdeen [Wash.] 87 P. 44. Sustaining objection to juror. Ives v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 74. Allowing challenge harmless where other party did not exhaust his peremptory challenges. Hodgin v. Southern R. Co. [N. C.] 55 S. E. 413. Ruling as to competency of juror was harmless where direction of verdict was properly made. Walton v. Lindsay Lumber Co. [Ala.] 39 So. 670.

Held prejudicial: Error in overruling challenge for cause presumed prejudicial regardless of whether the party has exhausted his peremptory challenges. Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. Disallowing challenge for cause held prejudicial where peremptory challenges were exhausted. St. Louis, etc., R. Co. v. Hooser [Tex. Civ. App.] 17 Tex. Ct. Rep. 27, 97 S. W. 708. Prejudice presumed from error in overruling challenge to juror for cause. Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. Denial of positive statutory right to have juror excluded was prejudicial. San Antonio, etc., R. Co. v. Lester [Tex.] 13 Tex. Ct. Rep. 813, 89 S. W. 752. Injury presumed from error in failing to sustain a challenge for cause where an objec-

The admission[22] or exclusion[23] of evidence which cannot have been efficient to

tionable juror is thus forced to be accepted. St. Louis, etc., R. Co. v. Hooser [Tex. Civ. App.] 17 Tex. Ct. Rep. 27, 97 S. W. 708.

21. Demurrer to evidence: The general rule is that the improper admission of evidence, which may have been prejudicial, constitutes reversible error, and this is true even though it be doubtful whether in fact such evidence was or was not prejudicial, but the general rule is subject to the exception that if in such case there is a demurrer to the evidence and an alternative verdict, and after disregarding upon such demurrer such illegal evidence and treating the balance of the evidence as is proper under the rules applicable to demurrers to evidence, there is plainly enough evidence to sustain a judgment for the demurrant, the admission of the illegal evidence will not reverse. Lane Bros. & Co. v. Bott, 104 Va. 615, 52 S. E. 258.

Direction of verdict: Verdict properly directed but on wrong grounds. Latting v. Owasso Mfg. Co. [C. C. A.] 148 F. 369. When a verdict is directed on specific, but untenable, grounds, it may not be affirmed on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the verdict was rendered. Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522. But, when the defeated party has introduced at the trial all the legal evidence he offered and has rested his case, he has thereby estopped himself from denying that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor, and if the bill of exceptions contains all the evidence, and it is clear beyond doubt that it would not sustain a verdict in his favor, an instruction by the court to return a verdict against him upon some other, but untenable, ground is error without prejudice and no ground for reversal. Id.

Note: "When a verdict is directed on limited, but untenable grounds, it may not stand on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated if they had been called to the attention of the defeated party at the time the motion was made. Peck v. Heurich, 167 U. S. 624, 42 Law. Ed. 302; Currier v. Dartmouth College [C. C. A.] 117 F. 44. But where parties have produced all their evidence, and the court has received it, and they have rested their case at the trial, they have thereby admitted, and in that way estopped themselves from denying, that they can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in their favor, because the question of the sufficiency of the evidence always arises in every case before its submission to a jury, and it is the province and duty of the court to determine it. Cole v. German Savings & Loan Soc. [C. C. A.] 124 F. 113, 122, 63 L. R. A. 416; Brady v. Chicago & G. W. R. Co. [C. C. A.] 114 F. 100, 105, 57 L. R. A. 712; Railway Co. v. Belliwith [C. C. A.] 83 F. 437, 441; Commissioners v. Clark, 94 U. S. 278, 284, 24 Law. Ed. 59; North Pennsylvania R. Co. v. Commercial Nat. Bank, 123 U. S. 727, 733, 31 Law. Ed. 287; Railway Co. v. Converse, 139 U. S. 469, 35 Law. Ed. 213. In W. B. Grimes Dry Goods Co. v. Malcolm, 164 U. S. 483, 491, 41 Law. Ed. 524; Id. [C. C. A.] 58 F. 670, 671, the trial court directed a juror to consent to a verdict because he had once agreed to it, although he protested that it was not his verdict before the court had received it. But the supreme court and this court held that the error was not prejudicial, and affirmed the judgment, because the record clearly showed that the evidence warranted a peremptory instruction and would not have sustained any other verdict, although that question had not been presented to the trial court by motion or suggestion, and it had submitted the case to the jury. When a defeated party has been permitted to present, and has introduced, all the legal evidence which he offered, has rested his case, and the court has instructed the jury to return a verdict against him upon a specified, but untenable ground, its action is error without prejudice, and will not warrant a reversal of the judgment, where it is clear beyond doubt from a bill of exceptions, which contains all the evidence, that it would not sustain any other verdict. Smiley v. Barker [C. C. A.] 83 F. 684, 687; Moffat v. Smith [C. C. A.] 101 F. 771; Baker v. Kaiser [C. C. A.] 126 F. 317, 319."—See Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522.

Nonsuit: Granting motion for nonsuit after announcing, before argument of the motion, that it would be denied, held not reversible error. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053. Refusal to grant nonsuit harmless where defendant's evidence supplies requisite proof. Levy v. Wolf [Cal. App.] 84 P. 313.

22. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984; Smith v. Dubost, 148 Cal. 622, 84 P. 38; Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665; Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572; Malott v. Central Trust Co. [Ind.] 79 N. E. 369; In re Wiltsey's Will [Iowa] 109 N. W. 776; Vette v. Sacher, 114 Mo. App. 363, 89 S. W. 360; Lyman v. Brown, 73 N. H. 411, 62 A. 650; Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276; In re Shelton's Will [N. C.] 55 S. E. 705. Hearsay. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255 Texas, etc., R. Co. v. Harrington [Tex. Civ App.] 98 S. W. 653; Sullivan & Co. v. Owens [Tex. Civ. App.] 90 S. W. 690; Jackson v Mercantile Mut. Fire Ins. Co. [Wash.] 88 P 127. Evidence having no probative force Barnett v. Pepper, 114 Mo. App. 216, 89 S. W. 345. Evidence too insignificant in its effect to require reversal. Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876. Evidence having no tendency to establish contested issue: Barnes v. Squier [Mass.] 78 N. E. 731. Evidence the exclusion of which would not have changed result. In re Angle's Estate, 148 Cal. 102, 82 P. 668; Loyerin & Browne Co v. Bumgarner [W. Va.] 52 S. E. 1000; Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820; Simmons v. Sharpe [Ala.] 42 So. 441. Evidence not considered in deciding case. Veatch v. Gray [Tex. Civ. App.] 14 Tex. Ct. Rep. 316, 91 S. W. 324. Findings showed that erroneous evidence was not con-

the result is harmless.[24] For example, evidence which tended to prove a fact not

sidered. Cox v. Odell, 1 Cal. App. 682, 82 P. 1086. Admission of evidence on part of defendant harmless where verdict shows that jury did not believe plaintiff had sustained his burden of proof. Rappaport v. New York City R. Co., 99 N. Y. S. 539. Expert testimony so complicated and unsatisfactory as to be of comparatively small force. In re McClellan's Estate [S. D.] 107 N. W. 681. Expert testimony of such a character that the jury could not make a finding based thereon until it had found other facts which alone authorized recovery. Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805. Incompetent evidence which did not add any additional support to the finding supported by uncontradicted evidence. Campbell v. McClellis [N. J. Law] 62 A. 1129. Rules regulating speed of cars, where such rules did not impose higher degree of care than that imposed by law. Blumenthal v. Union Elec. Co., 129 Iowa, 322, 105 N. W. 588. Reproduction of sounds made by railroad trains in proximity to defendant's hotel not reversible error, if error at all, in proceedings by railroad company for right to use street for its road. Boyne City, etc., R. Co. v. Anderson [Mich.] 13 Det. Leg. N. 739, 109 N. W. 429. Where running of limitations was dependent on defendant's ability to pay, evidence of inability at such a time as would not bar the action was harmless. Porter v. Magnetic Separator Co., 100 N. Y. S. 888. Admission of evidence affecting only amount of recovery harmless where there is no complaint that verdict is excessive. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511. Declaration of witness that his evidence on former trial was, to the best of his recollection, true, was harmless where the transcript was in evidence and he had already testified that independently of the transcript he had no recollection of his former testimony. Phillips v. Hazen [Iowa] 109 N. W. 1096. Evidence of a custom where the parties themselves had construed the contract in conformity with such custom. Mitau v. Roddan [Cal.] 84 P. 145. Testimony as to construction of contract where such construction conformed to the court's own construction. Strother v. McMullen Lumber Co. [Mo.] 98 S. W. 34.

Immaterial and irrelevant evidence. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619; Wood v. Holah [Conn.] 64 A. 220; Wilmot v. McPadden [N. J. Err. & App.] 65 A. 157; Security Trust Co. v. Robb [C. C. A.] 142 F. 78; Renshaw v. Dignan, 128 Iowa, 722, 105 N. W. 209; Tozer v. Ocean Acc. & Guarantee Corp. [Minn.] 109 N. W. 410; Escondido Lumber, Hay & Grain Co. v. Baldwin [Cal. App.] 84 P. 284; Martin v. Corscadden [Mont.] 86 P. 33; Conde v. Dreisam Gold Min. & Mill. Co. [Cal. App.] 86 P. 825; Davis v. Oregon Short Line R. Co. [Utah] 88 P. 2; Crawford v. Masters, 140 N. C. 205, 52 S. E. 663; Roberts v. Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985; Bussey v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 163; Armour & Co. v. Ross [S. C.] 55 S. E. 316; Jones v. Western Union Tel. Co. [S. C.] 55 S. E. 318; Ard v. Crittenden [Ala.] 39 So. 675; Gates v. O'Gara [Ala.] 39 So. 729; Stoker v. Hodge Fence & Lumber Co., 116 La. 926, 41 So. 211; Saunders v. Tuscumbia Roofing & Plumbing Co. [Ala.] 41 So. 982; Adair v. Stovall [Ala.] 42 So. 596; Smithers v. Lowrance [Tex. Civ. App.] 15 Tex. Ct. Rep. 88, 91 S. W. 606; Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. Irrelevant evidence. McGowan v Bowman [Vt.] 64 A. 1121. Evidence on totally immaterial issue. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820. Evidence not purporting to affect the only contested issue. Brown v. White, 219 Ill. 632, 76 N. E. 833. Evidence tending to show that engineer was drunk harmless where other evidence showed that accident was caused by his negligence. St. Louis, etc., R. Co. v. Boyles [Ark.] 95 S. W. 783. Testimony by plaintiff in trespass to try title as to consideration given by her for the land. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. Immaterial evidence not inconsistent with the contentions of the complaining party. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. Statement that contents of paper which defendant tried to get defendant to identify were not true, harmless to defendant where papers were not introduced Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109. Evidence on issue withdrawn by failure of court to submit it. St. Louis etc., R. Co. v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 376, 90 S. W. 926. Evidence incompetent under Code Civ. Proc. § 829, relating to evidence of transactions with decedents. In re King, 100 N. Y. S. 1089. That petitioner owned all property in vicinity of that sought to be condemned. Pullman Co. v. Chicago, 224 Ill. 248, 79 N. E. 572. Evidence of fact not sought to be proved. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Evidence excusing negligence where no evidence of negligence. Murphy v. Metropolitan Nat. Bank, 191 Mass. 159, 77 N. E. 693. Admission of contract stipulating against liability for negligence harmless to plaintiff where there was no evidence of negligence. Marable v. Southern R. Co. [N. C.] 55 S. E. 355. Evidence in rebuttal as to payment where there was no evidence in chief on such matter. Mullenary v. Burton [Cal. App.] 84 P. 159.

Admission of ordinance in action for negligence where no violation of ordinance was shown. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. Statement of counsel as to fact conceded and which had no probative force in regard to the contested issue. Lyman v. Brown, 73 N. H. 411, 62 A. 650. Evidence that conversation was had with defendant without showing what was said. Green v. Dodge [Vt.] 64 A. 499. Evidence as to number of children plaintiff in action for injuries had. Chicago, etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602. Evidence as to amount of capital stock of defendant corporation could not have affected issue as to compensation due plaintiff as an employe. McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 P. 614. Admission, in action by administrator for death, of evidence showing that deceased spent a portion of his earnings on a certain person who was not a distributee. Central of Georgia R. Co. v. Alexander [Ala.] 40 So. 424. Error in

necessary to the party's case,[25] or one conclusively disproved by other evidence,[26] or

admitting evidence or in the legal effect given to evidence admitted concerning acts held adequate to interrupt the course of the fifteen-year prescription, harmless where the appellate court decided that a longer period of prescription controlled concerning which the evidence admitted was wholly irrelevant, though defendant might have interposed other defenses if he had not relied on the certainty of reversal on account of the erroneous admission of the evidence. Royal Ins. Co. v. Miller, 199 U. S. 353, 50 Law. Ed. 226. In action for malicious prosecution evidence of a division of the jury on its first vote was harmless to plaintiff where plaintiff was finally acquitted. Gaither v. Carpenter [N. C.] 55 S. E. 625.

Held prejudicial: Immaterial evidence tending to prejudice jury against defendant is not harmless as to him. Chicago City R. Co. v. Heydenburg, 118 Ill. App. 387.

23. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007; Horner v. Buckingham [Md.] 64 A. 41; Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Roberge v. Bonner [N. Y.] 77 N. E. 1023; McDonough v. Boston El. R. Co., 191 Mass. 509, 78 N. E. 141; Pringle v. Burroughs [N. Y.] 78 N. E. 150; Owen v. Portage Tel. Co., 126 Wis. 412, 105 N. W. 924; Meyer v. Arends, 126 Wis. 603, 106 N. W. 675; Smith v. Glenn, 40 Wash. 262, 82 P. 605; Shepard v. Mace, 148 Cal. 270, 82 P. 1046; People v. Davidson [Cal. App.] 83 P. 159; Smith v. Dubost, 148 Cal. 622, 84 P. 38; Jackson v. Mercantile Mut. Fire Ins. Co. [Wash.] 88 P. 127; Riggins v. Boyd Mfg. Co., 123 Ga. 232, 51 S. E. 434; Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89; Hudson v. Vaughn [Ala.] 40 So. 757; Winans v. McCabe [Tex. Civ. App.] 92 S. W. 817; Luhn v. Luhn [Tex. Civ. App.] 15 Tex. Ct. Rep. 732, 93 S. W. 525; Taylor v. Industrial Mut. Deposit Co.'s Receiver [Ky.] 96 S. W. 462. Cumulative evidence which would have added no weight. St. Louis, etc., R. Co. v. Neal [Ark.] 98 S. W. 958; Evidence rendered inefficient by other evidence showing defendant's liability without regard to the evidence objected to. Brown v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. Where the rejection of certain ballots would not have changed result of election, error in counting them was harmless. Pledge v. Griffith [Mont.] 83 P. 392. Rejection of evidence that defendant was not in possession of part of property sued for in unlawful entry and detainer, where party in possession was not a party to the action. Camden v. West Branch Lumber Co. [W. Va.] 53 S. E. 409. Exclusion of evidence of the drawing of a deed under which party claimed was harmless where it was not claimed or proved that the deed was delivered. Fox v. Spears [Ark.] 93 S. W. 560. Where excluded question would obviously have elicited same answer already given. Daug v. North German Lloyd S. S. Co. [N. J. Err. & App.] 65 A. 199. Exclusion of evidence to impeach witness on immaterial matters. Bialy v. Krause [Mich.] 12 Det. Leg. N. 702, 105 N. W. 149. Photograph which would have thrown no light on the issues. Ness v. Escanaba [Mich.] 12 Det. Leg. N. 753, 105 N. W. 879. Exclusion of admission contrary to fact claimed to be admitted thereby and made long after the commencement of the suit. In re Tisdale, 110 App. Div. 857, 97 N. Y. S. 494. Exclusion of evidence of actual damages in action for liquidated damages. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. Exclusion of deed under which plaintiff claimed was harmless where no title was shown in the party under whom plaintiff claimed. Moore v. Kempner [Tex. Civ. App.] 14 Tex. Ct. Rep. 330, 91 S. W. 336. Evidence the value of which is dependent upon an affirmative finding upon a certain issue where a negative finding is made. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. Exclusion of evidence of decrease in value of cattle, harmless where it was not proposed to show that such evidence would reduce the value testified to by other party's witness. Harris v. Quincy, etc., R. Co., 115 Mo. App. 527, 91 S. W. 1010. Smallness of verdict indicated that excluded evidence of mitigating circumstances was harmless. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267.

24. Where answer states no defense. Miller v. Loverne & Browne Co. [Neb.] 105 N. W. 84. Where liability is admitted and there is no controversy as to amount of recovery, errors as to admissibility of evidence harmless. Indianapolis & M. Rapid Transit Co. v. Reeder [Ind. App.] 76 N. E. 816.

Held prejudicial: In cases sounding in tort the amount of the damages must be left to the jury upon all the evidence, and the court cannot, as it may sometimes do in cases on contract, look into the evidence to determine whether the complaining party has suffered from the exclusion of his evidence. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514.

25. **Evidence admitted.** Ennis Brown Co. v. Hurst, 1 Cal. App. 752, 82 P. 1056; Bivings v. Gosnell [N. C.] 53 S. E. 861; Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Evidence of facts presumed under rule of law. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012; Ivey v. Bessemer City Cotton Mills [N. C.] 55 S. E. 613. Where evidence in libel suit added nothing to presumption jury were entitled to make from nature of the libel. New York Evening Journal Pub. Co. v. Simon [C. C. A.] 147 F. 224. Evidence tending to show voluntary assumption of duty imposed by law. Southern R. Co. v. Morris, 143 Ala. 628, 42 So. 17. Evidence of liability through another where facts were admitted showing primary liability. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111. Evidence of a custom among other railroads which was shown to have been followed at one time by defendant itself. Lee v. Missouri Pac. R. Co., 195 Mo. 490, 92 S. W. 614. Witness' conclusion as to effect of conversations fully given in testimony. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. Where petitioner was entitled upon the transcript alone to be released from imprisonment under execution, admission of extraneous evidence showing lack of malice in cause of action against him was harmless to the plaintiff in the principal action. Petition of Wm. H. Mansfield, 120 Ill. App. 511. Where it appeared that defendant tele-

evidence erroneously admitted, tending to prove a fact admitted or sufficiently proved by other competent evidence.[27] Likewise the rejection of evidence of facts

graph company's operator knew of the importance of the message which was delayed, admitting an interpretation of the cipher in which the message was couched was harmless. Western Union Tel. Co. v. McGown [Tex. Civ. App.] 16 Tex. Ct. Rep. 117, 93 S. W. 710. Where positive negligence is proved, evidence of appliances which would have prevented the accident but which were not used by the defendant was harmless. Spencer Medicine Co. v. Hall [Ark.] 93 S. W. 985.

Evidence rejected. Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Morris v. Jacks [Tex. Civ. App.] 16 Tex. Ct. Rep. 764, 96 S. W. 637. Evidence to show liability fixed by statute. See Laws 1897, p. 734, c. 612, § 114. Far Rockaway Bank v. Norton [N. Y.] 79 N. E. 709. Evidence of defendant's negligence where plaintiff was guilty of contributory negligence. Stackpole v. Boston El. R. Co. [Mass.] 79 N. E. 740. Exclusion of evidence that part of work did not entitle complainant to mechanic's lien harmless where general payments had been made sufficient to pay for such work. Barbee v. Morris, 221 Ill. 382, 77 N. E. 589.

26. Hall v. New York, etc., R. Co. [R. I.] 65 A. 278.

27. Florence Wagon Works v. Kalamazoo Spring & Axle Co., 144 Ala. 598, 42 So. 77; Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603, 42 So. 73; Gates v. O'Gara [Ala.] 39 So. 729; Roach v. State [Ala.] 39 So. 685; Bratt v. Sparks [Ark.] 96 S. W. 1057; Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413; Waters-Pierce Oil Co. v. Burrows [Ark.] 96 S. W. 336; Dondero v. O'Hara [Cal. App.] 86 P. 985; Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313; Moynahan v. Perkins [Colo.] 85 P. 1132; Sheridan v. Patterson [Colo.] 82 P. 539; Upchurch v. Mizell [Fla.] 40 So. 29; Chicago City R. Co. v. Pural, 224 Ill. 324, 79 N. E. 686; Prather v. Chicago Southern R. Co., 221 Ill. 190, 77 N. E. 430; Simpson v. Danielson, 118 Ill. App. 615; Comer v. McDonnell, 117 Ill. App. 450; Haish v. Dreyfus, 111 Ill. App. 44; Swygart v. Willard [Ind.] 76 N. E. 755; Phillips v. Hazen [Iowa] 109 N. W. 1096; McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618; McKee v. Mouser [Iowa] 108 N. W. 228; Louisville & N. R. Co. v. Brown, 28 Ky. L. R. 772, 90 S. W. 567; McDonald v. City Elec. R. Co. [Mich.] 13 Det. Leg. N. 252, 108 N. W. 85; Kern v. Gerzema [Minn.] 106 N. W. 962; Cochran v. Cochran, 96 Minn. 523, 105 N. W. 183; Bonds v. Lipton Co., 85 Miss. 209, 37 So. 805; Hammer v. Crawford [Mo. App.] 93 S. W. 348; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Day v. Emery-Bird-Thayer Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903; Fike v. Ott [Neb.] 107 N. W. 774; City of Portland v. Cook [Or.] 87 P. 772; Hall v. New York, etc., R. Co. [R. I.] 65 A. 278; Young v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 225; Pacific Exp. Co. v. Needham [Tex. Civ. App.] 15 Tex. Ct. Rep. 889, 94 S. W. 1070; Keller v. Faickney [Tex. Civ. App.] 15 Tex. Ct. Rep. 541, 94 S. W. 103; Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715; Texas & P. R. Co. v. Warner [Tex. Civ. App.] 15 Tex. Ct. Rep. 530, 93 S. W. 489; Howard v. Fabj [Tex. Civ. App.] 14 Tex. Ct. Rep. 666, 93 S. W. 225; McKay v. Elder [Tex. Civ. App.] 92 S. W. 268; St. Louis S. W. R. Co. v. Bryson [Tex. Civ. App.] 14 Tex. Ct. Rep. 656, 91 S. W. 829; Southern Pac. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820; Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317; Missouri, etc., R. Co. v. Stanfield Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 301, 90 S. W. 517; Texas & P. R. Co. v. Felker [Tex. Civ. App.] 14 Tex. Ct. Rep. 308, 90 S W. 530; Smith v. Dow [Wash.] 86 P. 555; Shannon v. Tacoma, 41 Wash. 220, 83 P. 186; Boyle v. Robinson [Wis.] 109 N. W. 623; Crichfield v. Julia [C. C. A.] 147 F. 65. Evidence of facts agreed upon. Fleener v. Johnson [Ind. App.] 77 N. E. 366. Facts admitted. Mansfield v. Johnson [Fla.] 40 So. 196. Facts admitted in pleadings. Aultman, Miller & Co. v. Jones [N. D.] 106 N. W. 688. Evidence of facts judicially noticed. Wabash R. Co. v. Campbell, 219 Ill. 312, 76 N. E. 346. Statement of counsel as to fact admitted. Lyman v. Brown, 73 N. H. 411, 62 A. 650. Facts not controverted. Malott v. Woods, 119 Ill. App. 90; Camp v. League [Tex. Civ. App.] 92 S. W. 1062; Rice-Stix Dry Goods Co. v. Sally [Mo.] 96 S. W. 1030. Facts already proved by other party. Jaegel v. Johnson, 148 Cal. 695, 84 P. 175. Admission of evidence offered by one party harmless to other party where latter's own witness testified to same facts. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206. Admitting cumulative evidence in violation of Civ. Code Prac. § 606, subsec. 3, providing that no person shall testify for himself in chief after introducing other testimony for himself in chief. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308. Expert testimony as to facts otherwise proved. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Improper expert testimony harmless where same fact was testified to by witness as of his personal knowledge. Bach v. Brooklyn, etc., R. Co., 109 App. Div. 654, 96 N. Y. S. 321. Secondary evidence as to matters proved by other evidence. Nixon v. Goodwin [Cal. App.] 85 P. 169; Hoffman Heading & Stave Co. v. St. Louis, etc., R. Co. [Mo. App.] 94 S. W. 597; Stephens v. Faus [S. D.] 106 N. W. 56; Summerford v. Davenport [Ga.] 54 S. E. 1025. Admission of copies of bills of lading, the originals being in evidence and admitted as correct. Campbell v. McCrellis [N. J. Law] 62 A. 1129. When there is no conflict between undisputed evidence and exhibits erroneously admitted. Vidger Co. v. Great Northern R. Co. [N. D.] 107 N. W. 1083. Admission of affidavit to an account otherwise proved to be correct. Barlow v. Frederick Stearns & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 43, 98 S. W. 455. Admitting medical books to prove contagious nature of certain disease of cattle sold where the contagious nature of such disease was otherwise proved. Harper, Brooks & Co. v. Weikel, 28 Ky. L. R. 650, 89 S. W. 1125. Admission of conclusion of witness as to facts fully established by other evidence. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789; Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.]

otherwise established,[28] unless prejudice plainly appears.[29] Error in evidence is

39 So. 898. Conclusion of witness as to legal effect of signature to proposition of sale as bearing on date of sale where date otherwise proved. Tuffree v. Binford [Iowa] 107 N. W. 425. Declarations of decedent as to facts not within his personal knowledge. Putnam v. Harris [Mass.] 78 N. E. 747. Hearsay to prove admitted fact. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527. Hearsay to prove fact not controverted. St. Louis, etc., R. Co. v. Stites [Ark.] 95 S. W. 1004. Hearsay as to facts proved. Beddow v. Bagley [Ala.] 39 So. 773. Admission of list of articles contained in trunk where witness testified to same effect. Graham & Morton Transp. Co. v. Young, 117 Ill. App. 257. Admitting declarations of engineer as part of res gestae harmless where there was other evidence sufficient to show negligence. Southern Ind. R. Co. v. Osborn [Ind. App.] 78 N. E. 248. Incompetent evidence of value placing same no higher than competent evidence also received. Pullman Palace Car Co. v. Woods [Neb.] 107 N. W. 858. Admission on issue of forgery of checks subsequently written for purpose of comparison harmless where forgery was abundantly established by other evidence. Greenwald v. Ford [S. D.] 109 N. W. 516. Where there was other uncontradicted evidence warranting direction of verdict for party offering the evidence objected to. Chittenden v. King Shoe Co. [Colo.] 88 P. 183. Testimony as to conditions several days after accident harmless where it did not materially vary the testimony as to conditions immediately after the accident. Davis v. Oregon Short Line R. Co. [Utah] 88 P. 2. Erroneous admission of deeds harmless where certified copies were admitted without objection. Bivings v. Gosnell [N. C.] 53 S. E. 861. Where plaintiff and defendant claim through a common source, error in admitting evidence of the title of the common grantor is harmless. Mansfield v. Johnson [Fla.] 40 So. 196. Allowing buyer to testify that broker phoned him that seller would be at his office at a certain time harmless where it was undisputed that broker accompanied seller to such office at such time. Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86. Where specific authority of agent was proved, admission of evidence of general authority was harmless. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Admission of telegram containing no statement not testified to by witnesses. Smith v. Jefferson Bank [Mo. App.] 97 S. W. 247. General statements as to corners of survey harmless where undisputed testimony showed the corners to be where stated. Warner v. Sapp [Tex. Civ. App.] 16 Tex. Ct. Rep. 892, 97 S. W. 125. Experiments with litmus paper to show contamination of water of stream harmless where such contamination was otherwise fully proved. Crabtree Coal Min. Co. v. Hamby's Adm'r, 28 Ky. L. R. 687, 90 S. W. 226. Admission in action of ejectment of probate of will the execution of which had already been proved by uncontradicted witnesses. Young v. Norris Peters Co., 27 App. D. C. 140.

Held prejudicial: Where there is not enough competent evidence to sustain the judgment, admission of incompetent evidence is reversible error. Hindley v. Manhattan R. Co. [N. Y.] 78 N. E. 276.

28. Armour Packing Co. v. Vietch-Young Produce Co. [Ala.] 39 So. 680; Stewart v. Whittemore [Cal. App.] 84 P. 841; Carlton v. King [Fla.] 40 So. 191; Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139; Stevens v. Citizens' Gas & Elec. Co. [Iowa] 109 N. W. 1090; Wheeler v. Anglim [Mass.] 79 N. E. 810; Anternoitz v. New York, etc., R. Co. [Mass.] 79 N. E. 789; Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69; Wightman v. Catlin, 98 N. Y. S. 1071; Becker & Co. v. First Nat. Bank [N. D.] 107 N. W. 968; Buchanan v. Randall [S. D.] 109 N. W. 513; St. Louis, etc., R. Co. v. Ames [Tex. Civ. App.] 16 Tex. Ct. Rep. 298, 94 S. W. 1112; Camp v. League [Tex. Civ. App.] 92 S. W. 1062; Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000; Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864; Gatlin v. Street [Tex. Civ. App.] 90 S. W. 318; Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43; Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. Evidence of bias of witness. Norfolk & W. R. Co. v. Birchfield [Va.] 54 S. E. 879. Where substantially same evidence had already been admitted. Smith v. Cashie & C. R. & Lumber Co. [N. C.] 54 S. E. 788. Exclusion of record of judgments against alleged fraudulent seller where amount and existence of judgments against seller had been agreed upon. Hart v. Brierley, 189 Mass. 598, 76 N. E. 286. Rejection of evidence tending to show basis of testimony received. Guinn v. Iowa & St. L. R. Co. [Iowa] 109 N. W. 209. Testimony of witness at former trial as to facts fully established by other witnesses on second trial. Laubaugh v. Pennsylvania R. Co., 28 Pa. Super. Ct. 247. Sustaining objection to question already sufficiently answered. Packham v. Ludwig [Md.] 63 A. 1048; Southern Kan. R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074. Exclusion of part of witness' answer harmless where the facts stated therein were fully stated in the part admitted. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Exclusion of unsworn declarations by party in own interest harmless where party testifies to same facts. Samaha v. Mason, 27 App. D. C. 470. Rejection of expert testimony as to value of services otherwise proved. Sanford v. Hoge, 118 Ill. App. 609. Exclusion of opinion of testamentary capacity where the facts constituting the basis for such opinion had already been received. In re Brower's Will, 112 App. Div. 370, 98 N. Y. S. 438. Rejection of photographs harmless where the testimony was sufficiently explicit to enable the jury to understand what the photographs were intended to show. Kansas City So. R. Co. v. Morris [Ark.] 98 S. W. 363.

29. Where it does not appear that result would not have been changed by admitting the testimony, its erroneous exclusion is reversible error. St. Louis, etc., R. Co. v. Boyer [Tex. Civ. App.] 97 S. W. 1070. Exclusion of evidence as to damages in condemnation

innocuous in a trial of facts by the court where it may be supposed that the decision was founded solely on proper proofs.[30] Likewise where the case is tried de novo on appeal.[31] An improper mode of questioning or an erroneous ruling on a proper question may be harmless because of the answer given[32] or the lack of an answer.[33] Application of these doctrines to direct,[34] redirect,[35] and cross-examina-

proceedings held prejudicial though there was other evidence on the subject. Lewis v. Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44.

30. Where the judgment or decree is sustained by proper evidence, it will be presumed that the improper evidence was not considered. California Development Co. v. Yuma Valley Union Land & Water Co. [Ariz.] 84 P. 88; Strayhorn v. McCall [Ark.] 95 S. W. 455; Pratt v. Davis, 224 Ill. 300, 79 N. E. 562; Telford v. Howell, 220 Ill. 52, 77 N. E. 82. Admission of incompetent evidence where judgment sustained by competent evidence. Ray v. Hunter, 122 Ill. App. 466; Lloyd v. Simons [Minn.] 105 N. W. 902; Rule v. Rule [Miss.] 39 So. 782; Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160; Rose v. New York & H. R. Co., 108 App. Div. 206, 95 N. Y. S. 711; State v. Harris [N. D.] 105 N. W. 621; City of Portland v. Cook [Or.] 87 P. 772; In re McClellan's Estate [S. D.] 107 N. W. 681; Sprague v. Lovett [S. D.] 106 N. W. 134; Kirby v. Citizens' Tel. Co. [S. D.] 105 N. W. 95; Godfrey v. Faust [S. D.] 105 N. W. 460; Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572; Gage v. Hunter [Tex. Civ. App.] 94 S. W. 1104; Stublefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406; Dreeben v. First Nat. Bank [Tex. Civ. App.] 15 Tex. Ct. Rep. 917, 93 S. W. 510; Erickson v. Modern Woodmen of America [Wash.] 86 P. 584; Ekstrand v. Barth, 41 Wash. 321, 83 P. 305. Allowing witness to testify as to his conclusions. Illinois Steel Co. v. Preble Mach. Works Co., 219 Ill. 403, 76 N. E. 574. Findings showed that incompetent evidence was not considered. Lowe v. Ozmun [Cal. App.] 86 P 729. Whether an equity decree will be reversed for admission of incompetent evidence will depend upon the peculiar circumstances of each case. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134. Admission of transcript of justice's record on an appeal tried by the court. Keylon v. Missouri, etc., R. Co., 114 Mo. App. 66, 89 S. W. 337. Rulings on evidence which do not affect the judgment not ground for reversal. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899; Olmstead v. Rawson, 110 App. Div. 809, 97 N. Y. S. 239. Admission of irrelevant evidence in suit in equity harmless where it did not affect the findings. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. Where incompetent evidence was eliminated by the court in arriving at its conclusion. Llewellyn v. Cauffiel [Pa.] 64 A. 388. In quo warranto proceedings. Foltz v. People, 118 Ill. App. 557. Admission of a judgment in evidence harmless where a judgment reviewing it was also in evidence and contained everything of importance covered by the first judgment. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4. Where jury waived and cause tried under Rev. Codes 1899, § 5630, as amended by Laws 1903, p. 277, c. 201, admission of incompetent testimony not reversible error. More v. Burger [N. D.] 107 N. W. 200.

Held prejudicial: Incompetent evidence will be presumed prejudicial where the judgment is against the weight of the competent evidence. Trammell & Lane v. Guffey Petroleum Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 492, 94 S. W. 104; Bruce v. Bruce [Tex. Civ. App.] 89 S. W. 435. Reversal will follow where it affirmatively appears that the incompetent evidence was considered by the court. Texas & P. R. Co. v. Brashears [Tex. Civ. App.] 15 Tex. Ct. Rep. 139, 91 S. W. 594.

31. Traynor v. White [Wash.] 87 P. 823; Teater v. King, 41 Wash. 134, 83 P. 8. All improper testimony in equity case disregarded by appellate court. Winsor v. Hanson, 40 Wash. 423, 82 P. 710; McCormick v. Parsons, 195 Mo. 91, 92 S. W. 1162.

32. Nixon v. Goodwin [Cal. App.] 85 P. 169. Answer so indefinite and unsatisfactory that it could not have been prejudicial. Logan v. Field, 192 Mo. 54, 90 S. W. 127. Question and answer held not prejudicial as appealing to religious prejudice against witness. Sibley v. Morse [Mich.] 13 Det. Leg. N. 878, 109 N. W. 858. Answer showing lack of knowledge of matter sought to be proved. Stewart v. Whittemore [Cal. App.] 84 P. 841; Theodore Land Co. v. Lyon [Ala.] 41 So. 682. Answer that witness did not know and could not answer. Marcy v. Parker, 78 Vt. 73, 62 A. 19. Negative answer to improper question seeking affirmative answer. Kerr v. Grand Forks [N. D.] 107 N. W. 197; Lindsley v. McGrath [Mont.] 87 P. 961; Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400; Waters-Pierce Oil Co. v. Burrows [Ark.] 96 S. W. 336; Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Question improper in form to elicit opinion rendered harmless by immaterial answer. Wilmot v. McPadden [Conn.] 65 A. 157. Improper form of question calling for expert testimony rendered harmless by answer. McGuire v. J. Neils Lumber Co. [Minn.] 107 N. W. 130. Improper cross-examination rendered harmless. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44. Improper cross-examination harmless where it elicited no damaging evidence. Sakolski v. Schenkel, 98 N. Y. S. 190. Where improper question on cross-examination elicited nothing but witness' inability to remember. Grout v. Moulton [Vt.] 64 A. 453. Error in sustaining objection to question harmless where question is fully answered, notwithstanding the objection. Tutwiler Coal, Coke & Iron Co. v. Farrington [Ala.] 39 So. 898.

33. Where objection to question sustained. Austin v. Smith [Iowa] 109 N. W. 289. Where objection overruled but question not answered. Id. Lack of answer and substitution of proper question. Hasper v. Wietcamp [Ind.] 79 N. E. 191; Colorado Farm & Live Stock

tion,[36] and to the order of taking proof,[37] the burden of proof,[38] the reception of affidavits and depositions,[39] opinion,[40] and expert testimony,[41] admission of secondary evidence,[42] and rulings on motions to strike evidence,[43] are cited below. A

Co. v. York [Colo.] 88 P. 181; Gates v. Morton Hardware Co. [Ala.] 40 So. 509; Forbes v. Davidson [Ala.] 41 So. 312.

34. Refusal to allow answer to question already answered. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984; Packham v. Ludwig [Md.] 63 A. 1048; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074. Examination of expert. Chicago City R. Co. v. Pural, 224 Ill. 324, 79 N. E. 686. Ruling relating to qualifications of expert. Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256. Persistence in seeking to elicit testimony already excluded but relating to immaterial facts which were nearly all established by other evidence. McDonald v. City Elec. R. Co. [Mich.] 13 Det. Leg. N. 252, 108 N. W. 85. Where witness' former answer showed that he had no knowledge of the matter sought to be elicited by the excluded question. Stokes' Adm'x v. Southern R. Co., 104 Va. 817, 52 S. E. 855. Permitting leading questions. Chicago, etc., R. Co. v. Calvert [Tex. Civ. App.] 14 Tex. Ct. Rep. 642, 91 S. W. 825. Allowing leading question to be answered harmless where witness has already testified, without leading or objection, to the fact elicited by the leading question. McCaffery v. St. Louis, etc., R. Co., 192 Mo. 144, 90 S. W. 816.

35. McGuire v. Neils Lumber Co. [Minn.] 107 N. W. 130.

36. Prather v. Chicago So. R. Co., 221 Ill. 190, 77 N. E. 430; Swygart v. Willard [Ind.] 76 N. E. 755; Regester v. Regester [Md.] 64 A. 286. Exclusion of answer to question already answered. Borden v. Lynch [Mont.] 87 P. 609; Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. Sustaining objection to question already answered. Alabama Great So. R. Co. v. Sanders [Ala.] 40 So. 402; Schmoe v. Cotton [Ind.] 79 N. E. 184. Refusal to allow continuation of cross-examination as to certain facts as to which enough had already been brought out. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709; Chicago, B. & D. R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916. Exclusion of question without prejudice to renewal thereof where witness was recalled and question was not renewed. Pascieszny v. Boydell Bros. White Lead & Color Co. [Mich.] 13 Det. Leg. N. 726, 109 N. W. 417. Bringing out matters not properly the subject of cross-examination was harmless where such matters could have been brought out by a direct examination. Niemeyer v. Washington Water Power Co. [Wash.] 88 P. 103. Striking out of question a mere assertion of fact which counsel had no right to assume as true though an improper way of reaching the defect was harmless. Syson Timber Co. v. Dickens [Ala.] 40 So. 753. Exclusion of question designed to test witness' memory. Chicago City R. Co. v. Pural, 224 Ill. 324, 79 N. E. 686. Exclusion of question as to plaintiff's knowledge of discrepancy between his testimony on former and second trial harmless where witness fully examined in this regard and testimony on former trial was in evidence. Creachen v. Bromley Bros. Carpet Co., 214 Pa. 15, 63 A. 195.

37. Wheeler v. Reynolds Land Co., 193 Mo. 279, 91 S. W. 1050; Aultman, Miller & Co. v. Jones [N. D.] 106 N. W. 688; St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 97 S. W. 1087. Admitting evidence in surrebuttal. Newell v. Taylor [S. C.] 54 S. E. 212. Admitting evidence out of its logical order. Pittsburgh, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522. Allowing new evidence to be introduced after commencement of argument. Watson v. Barnes, 125 Ga. 733, 54 S. E. 723.

38. Error in placing burden of proof as to matters not put in issue. Waxahachie Cotton Oil Co. v. Peters [Tex. Civ. App.] 16 Tex. Ct. Rep. 98, 94 S. W. 431.

39. Affidavit. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485. Informality in manner of eliciting witness' answers held harmless. Gulf etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44. Admitting deposition the envelope of which was opened in appellant's absence and without notice to him. Jackson v. Mercantile Mut. Fire Ins. Co. [Wash.] 88 P. 127. Admission of deposition over objection that it had been taken before but not introduced held harmless in absence of showing of abuse of court's discretion in the premises to prejudice of appellant. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198. Refusal to consider interrogatory in deposition as taken for confessed held harmless in absence of any showing of injury or abuse of court's discretion in the premises. Id. Consideration of counter affidavits on motion for probate appeal after time allowed by law harmless where laches was practically undisputed and appeal was denied. In re O'Hara's Will, 127 Wis. 258, 106 N. W. 848.

40. Opinion or conclusion of witness where facts on which opinion is based are given. Sun Ins. Office v. Western Woolen-Mill Co., 72 Kan. 41, 82 P. 513; Jersey Island Dredging Co. v. Whitney [Cal.] 86 P. 691; City of Iola v. Farmer, 72 Kan. 620, 84 P. 386. Correct conclusion of witness from facts stated harmless. Davis v. Oregon Short Line R. Co. [Utah] 88 P. 2. Admission of opinion of witness which on the facts predicated in the question the jury were as competent to give as the witness was harmless. Alabama Great So. R. Co. v. Sanders [Ala.] 40 So. 402.

41. Allowing expert witness in action for injury to child while playing on defendant's street car to testify to various kinds of mechanical devices used on defendant's cars in general. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813.

42. In re McClellan's Estate [S. D.] 107 N. W. 681; Sennett v. Melville [Neb.] 107 N. W. 991. Failure to lay foundation for admission of copy of letter harmless where addressee denied having received the letter. Leidigh & Havens Lumber Co. v. Clark [Ark.] 94 S. W. 686.

43. Southern R. Co. v. Cothran [Ala.] 42 So. 100. Refusal to strike evidence of facts fully established by other evidence. Chicago & J. Elec. R. Co. v. Patton, 219 Ill. 211,

few illustrative cases wherein errors respecting evidence have been held prejudicial are collected.[44]

Improper argument,[45] or conduct of counsel[46] or party,[47] or interference with

76 N. E. 381. Refusal to strike answer as not responsive where same testimony could have been brought out by another question. Bird v. Utica Gold Min. Co. [Cal. App.] 84 P. 256. Refusal to exclude immaterial voluntary statement of witness. Driver v. King [Ala.] 40 So. 315. Not reversible error to overrule motion to exclude, directed against evidence some of which is admissible. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Where no objection is made to the reception of evidence, subsequent refusal to exclude will not be ground for reversal unless the prejudice from the ruling can be judicially seen and felt. Id. Refusal to strike out conclusions bearing on mental capacity, habits, etc., where full opportunity given to bring out details on cross-examination. Swygart v. Willard [Ind.] 76 N. E. 755. Refusal to strike general matters brought out in preliminary examination of expert. Id. Evidence improperly adduced on cross-examination. Prather v. Chicago So. R. So., 221 Ill. 190, 77 N. E. 430. Denial of motion by party to strike answers to his own questions where it did not appear that such answers constituted a material ground upon which verdict was based. De Coster v. Herzog Co., 97 N. Y. S. 295. Striking evidence of facts proved. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583. Striking out evidence of immaterial or undisputed facts. Mossteller v. Holborn [S. D.] 108 N. W. 13. Where rebuttal evidence which was stricken was not materially different from evidence in chief. Boulder & White Rock Ditch Co. v. Leggett Consol. Ditch & Reservoir Co. [Colo.] 86 P. 101. Delay in striking evidence harmless in trial by court. Smith v. Smith [Mich.] 13 Det. Leg. N. 237, 107 N. W. 894.

Held prejudicial: Striking evidence as to issue afterwards submitted to jury. Denver & R. G. R. Co. v. Burchard [Colo.] 86 P. 749. Granting motion to strike all evidence on ground of insufficiency was prejudicial where some of the evidence was relevant and admissible. Metz v. Willitts [Wyo.] 85 P. 380.

44. Admission of evidence involving collateral issues. Stout v. Columbia, 118 Mo. App. 439, 94 S. W. 307. Corroborative hearsay evidence. Tracey v. Reid, 111 App. Div. 396, 97 N. Y. S. 1074. Exclusion of cumulative evidence held prejudicial where it related to the main issue the decision of which turned on the weight of the evidence. Grath v. Mound City Roofing Tile Co. [Mo. App.] 98 S. W. 812. Refusal of offer of competent evidence is reversible error though the evidence offered might have been insufficient. Hoban v. Boyer [Colo.] 85 P. 837. Admission of incompetent evidence which was commented on and allowed to go to the jury without restriction. Capital Construction Co. v. Holtzman, 27 App. D. C. 125. Admission of incompetent evidence is reversible error where the appellate court has no way to determine its effect. Fountain v. Wabash R. Co., 114 Mo. App. 683, 90 S. W. 395. Testimony of unqualified witness as to speed of automobile. Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71. In controversy between two parties claiming under same seller, exclusion of evidence that one of the parties admitted that the sale to him was a sham was reversible error. Chandler Bros. v. Higgins [Ala.] 39 So. 576. Where the complaint was insufficient but leave to amend was given on condition that the evidence was sufficient, and the evidence was rendered insufficient by the improper exclusion of evidence and plaintiff was driven to a nonsuit, the exclusion of the evidence was reversible error. Bonner v. Stotesbury, 139 N. C. 3, 51 S. E. 781. Where the evidence consists principally of the testimony of the parties, it is substantial error to exclude any testimony having a legitimate bearing upon the weight to be given to the testimony of the parties respectively relating to their claims. Broadwell v. Conover [N. Y.] 79 N. E. 402. Declarations of defendant's mother in suit for slander based on charge that plaintiff mistreated his mother. Earley v. Winn [Wis.] 109 N. W. 633. In action for slander based on charge that defendant committed certain act, evidence of other similar acts was prejudicial. Id. Where verdict shows that it is founded on incompetent evidence. Roth v. Spero, 48 Misc. 506, 96 N. Y. S. 211. General verdict for defendant did not show that admission of evidence upon an unavailable defense was harmless where other defenses were interposed. Ergenbright v. Henderson, 72 Kan. 29, 82 P. 524. Where judge commended incompetent evidence to jury and jury based verdict thereon. Roth v. Spero, 48 Misc. 506, 96 N. Y. S. 211.

45. Grayson-McLeod Lumber Co. v. Carter [Ark.] 98 S. W. 699; Miller v. Nuckolls [Ark.] 91 S. W. 759; Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813; McDonald v. City Elec. R. Co. [Mich.] 13 Det. Leg. N. 252, 108 N. W. 85; Malott v. Central Trust Co. [Ind.] 79 N. E. 369; Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352; Horr v. Howard Co., 126 Wis 160, 105 N. W. 668. Irrelevant and nonprejudicial remarks. Beckman v. Hampton [N. H.] 65 A. 254. As to damages in condemnation proceedings. City of Detroit v. Little Co. [Mich.] 13 Det. Leg. N. 803, 109 N. W. 671. Improper remarks on motion for nonsuit. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053. An unauthorized assumption that defendant had suppressed evidence. Montanye v. Northern Electrical Mfg. Co., 127 Wis. 22, 105 N. W. 1043. Improper reference to conduct of adverse party. Bradford v. National Benefit Ass'n, 26 App. D. C. 268. Abuse of defendant's conductor whose conduct gave rise to the action held harmless. Texas & P. R. Co. v. Zink [Tex. Civ. App.] 15 Tex. Ct. Rep. 299, 92 S. W. 812. Characterization of defendant upon assumption that evidence proved his misconduct, there being evidence, however, tending to prove such misconduct. Bushey v. Northrup, 78 Vt. 430, 62 A. 1015. Going outside record where objection promptly sustained. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583;

the right to open and close,[48] may be disregarded if without material effect on the result. The same is true of remarks by the court.[49]

Error in instructing the jury or refusing to do so is ground for reversal when the jury has been misled or it was efficient to the result declared in the verdict,[50]

Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902. Argument outside record held improper but harmless. Hammock v. Tacoma [Wash.] 87 P. 924. Harmlessness indicated by amount of verdict. San Antonio & A. P. R. Co. v. McMillan [Tex. Civ. App.] 17 Tex. Ct. Rep. 596, 98 S. W. 421; Texas & P. R. Co. v. Zink [Tex. Civ. App.] 15 Tex. Ct. Rep. 299, 92 S. W. 812. Statement of result of former trial held harmless under the peculiar circumstances of the case and in view of the verdict of the jury. Culbertson v. Alexander [Okl.] 87 P. 863. Argument of plaintiff's counsel was improper in that it referred to the effect upon plaintiff's children of an adverse decision, but this was not ground for reversal. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441. Statement of counsel to jury that "he wished he was at liberty to inform them of certain admissions made by representatives of the defendant" harmless where the admissions were not stated and it appeared that the reason why counsel could not state them was because the court had ruled them out as incompetent. Campbell Turnpike Road Co. v. Maxfield, 28 Ky. L. R. 1198, 91 S. W. 1135. Statement that in nine cases out of ten a robbery of a guest at a hotel is committed by a servant or agent of the house held harmless in view of evidence that the robbery in question was so committed. Kerlin v. Swart [Mich.] 12 Det. Leg. N. 924, 106 N. W. 710. Statements justified by the evidence are not ground for reversal though made as of the attorney's personal knowledge. Hammock v. Tacoma [Wash.] 87 P. 924. Reading of decisions in presence of jury held harmless in view of admonitions of court and counsel that jury was not to consider such decisions. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715.

Held prejudicial. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. Referring to client's character as of attorney's own knowledge. Texas & N. O. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653.

46. Hannestad v. Chicago, etc., R. Co. [Iowa] 109 N. W. 718. Stating object of certain evidence in response to inquiry of court as to object thereof. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658.

Held prejudicial: Where defendant's counsel was commenting upon plaintiff's failure to introduce certain evidence in his possession, an offer of plaintiff's counsel thereupon to introduce the evidence was ground for reversal, though such conduct was rebuked. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275.

47. Remarks in presence of jury held not prejudicial. Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755.

48. Presumed harmless in absence of showing to contrary. Farmer v. Norton, 129 Iowa, 88, 105 N. W. 371. Irregularity in order of argument. Whiting Foundry Equipment Co. v. Hirsch, 121 Ill. App. 373.

49. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709; Hannestad v. Chicago, etc., R. Co. [Iowa] 109 N. W. 718; Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639. Remarks held not to impute bad faith to counsel. McFern v. Gardner [Mo. App.] 97 S. W. 972. Remark held not prejudicial as assuming improper conduct of defendant's conductor. Hirte v. Eastern Wis. R. & Light Co., 127 Wis. 230, 106 N. W. 1068. Remarks reflecting on counsel but not affecting merits. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139. Remarks not shown to have been made in presence of jury. Coulter v. Barker's Estate [Minn.] 107 N. W. 823. Harmless where peremptory instruction is properly given. Wilson v. Johnson [Fla.] 41 So. 395. Harmless to plaintiff where he failed to prove his complaint. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647.

50. East St. Louis Connecting R. Co. v. Meeker, 119 Ill. App. 27; Muncie, etc., R. Co. v. Ladd [Ind. App.] 76 N. E. 790; Bryce v. Chicago, etc., R. Co., 129 Iowa, 342, 105 N. W. 497; Smith v. Nixon [Mich.] 13 Det. Leg. N. 569, 108 N. W. 971; Wiese v. Gerndorf [Neb.] 106 N. W. 1025; Stantial v. Union R. Co., 101 N. Y. S. 662; Miller v. Atlanta & C. Air Line R. Co. [N. C.] 55 S. E. 439; Brixey v. New York, 145 F. 1016. Instruction as to damages. Corn Exch. Bank v. Peabody, 111 App. Div. 553, 98 N. Y. S. 78. Instruction as to negligence and contributory negligence. Damsky v. New York City R. Co., 101 N. Y. S. 579. Conflicting instructions as to defendant's liability for negligence. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Reference to amount claimed in declaration. Illinois C. R. Co. v. Becker, 119 Ill. App. 221. Charge upon weight of evidence. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312. Instruction based upon assumption that fact was proved merely because testimony in regard thereto was uncontradicted. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619. Commenting upon matters of fact in presence of jury. See Const. art. 4, § 16. Patten v. Auburn, 41 Wash. 644, 84 P. 594. Misleading as to burden of proof. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280. Instruction that jury might consider plaintiff's failure to call physician who attended him held prejudicial, though not pertinent. Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921. Misleading charge on issues substantially variant from those raised by the pleadings. Pensacola Elec. Terminal R. Co. v. Haussman [Fla.] 40 So. 196. Misleading by reason of abstractness and because contrary to evidence. Little Rock R. & Elec. Co. v. Goerner [Ark.] 95 S. W. 1007. Instruction not sustained by evidence. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944; Stevens v. Citizens' Gas & Elec. Co. [Iowa] 109 N. W.

and not otherwise.[51] The verdict and findings may indicate whether an erroneous

1090; Lewis, Hubbard & Co. v. Montgomery Supply Co. [W. Va.] 52 S. E. 1017; American Surety Co. v. Ashmore [Kan.] 86 P. 453. Submission of issues as to damages not within the evidence. International, etc., R. Co. v. Gonzales [Tex. Civ. App.] 14 Tex. Ct. Rep. 823, 91 S. W. 597. Instruction submitting issues not covered by the evidence held misleading. Smith v. Jefferson Bank [Mo. App.] 97 S. W. 247. Instruction submitting issue the evidence of which had been excluded, and defendant being thus deprived of introducing evidence on such issue. Denver, etc., R. Co. v. Burchard [Colo.] 86 P. 749. Charge authorizing finding not supported by evidence was reversible error though the findings were based on immaterial averments of complaint. Pullman Co. v. Krauss [Ala.] 40 So. 398. Instruction going outside of issues and evidence. Landers v. Quincy, etc., R. Co., 114 Mo. App. 655, 90 S. W. 117. Modification contrary to evidence. Little Rock R. & Elec. Co. v. Goerner [Ark.] 95 S. W. 1007.

Right to complain: Where defendants sued jointly were not jointly liable one of the defendants had the right to complain of an instruction erroneously detracting from the effect of its evidence, regardless of whether such instruction was given at the instance of the respondent or of a codefendant or on the court's own motion. Connelly v. Illinois Cent. R. Co. [Mo. App.] 97 S. W. 616.

51. In re Dolbeer's Estate [Cal.] 86 P. 695; Clements v. Mutersbaugh, 27 App. D. C. 165; Seaboard Air Line R. v. Bradley, 125 Ga. 193, 54 S. E. 69; Railton v. Chicago Title & Trust Co., 224 Ill. 485, 79 N. E. 600; Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923; Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591; Harvey v. Chicago & A. R. Co., 221 Ill. 242, 77 N. E. 569; Prather v. Chicago Southern R. Co., 221 Ill. 190, 77 N. E. 430; Schultz v. Reed, 122 Ill. App. 420; Harris v. Gaunt, 122 Ill. App. 290; City of Gibson v. Murray, 120 Ill. App. 296; Regan v. McCarthy, 119 Ill. App. 578; City of Pana v. Broadman, 117 Ill. App. 139; Chicago City R. Co. v. Nelson, 116 Ill. App. 609; Falender v. Blackwell [Ind. App.] 79 N. E. 393; Wabash River Traction Co. v. Baker [Ind.] 78 N. E. 196; Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770; Springer v. Bricker, 165 Ind. 532, 76 N. E. 114; Blumenthal v. Union Elec. Co., 129 Iowa, 322, 105 N. W. 588; Tozer v. Ocean Acc. & Guaranty Corp. [Minn.] 109 N. W. 410; Dalby v. Lauritzen [Minn.] 107 N. W. 826; Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048; Yazoo & M. V. R. Co. v. Williams [Miss.] 39 So. 489; Missouri Real Estate Syndicate v. Sims [Mo. App.] 98 S. W. 783; Sanders v. Quincy, etc., R. Co. 114 Mo. App. 655, 90 S. W. 117; Donovan-McCormick v. Sparr [Mont.] 85 P. 1029; Gammel Book Co. v. Paine [Neb.] 106 N. W. 777; Miller v. Loverne & Browne Co. [Neb.] 105 N. W. 84; Campbell v. Everhart, 139 N. C. 503, 52 S. E. 201; Kerley v. Germscheid [S. D.] 106 N. W. 136; Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198; Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84; Matfield v. Kimbrough [Tex. Civ. App.] 13 Tex. Ct. Rep. 927, 90 S. W. 712; Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206; Barrett v. Banner Shingle Co. [Wash.] 87 P. 919; Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514; Horr v. Howard Co., 126 Wis. 160, 105 N. W. 668. In order to constitute reversible error it must appear that appellant's rights have been prejudiced. Cresent Hosiery Co. v. Mobile Cotton Mills, 140 N. C. 452, 53 S. E. 140. Instruction substantially correct. Ross-Paris Co. v. Brown, 28 Ky. L. R. 813, 90 S. W. 568. An instruction given substantially as requested with slight amendments by the court may not be complained of. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Erroneous rule of damages harmless where effect of the application of such rule gives same damages as would the statement and application of correct rule. Abbott v. Milwaukee Light, Heat & Traction Co., 126 Wis. 634, 106 N. W. 523. Use of phrase "fair preponderance of evidence" criticized but held not prejudicial. Link v. Campbell [Neb.] 104 N. W. 939. Erroneous, superfluous instruction. Webster v. Sherman [Mont.] 84 P. 878. Unnecessarily enjoining jury to do what they were bound under their oath to do was harmless. Scott v. Commonwealth [Ky.] 93 S. W. 668. Instruction not strictly applicable but not unfavorable to complaining party. Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923. Irrelevancy in charge not reversible error unless appellant can show prejudice. Jackson v. Southern R. Carolina Division, 73 S. C. 557, 54 S. E. 231. Instruction on irrelevant matters. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. Instruction on theory not sustained by evidence. Gloyd v. Stansberry, 15 Okl. 259, 81 P. 428. Instruction correct but not sustained by evidence. Ruffin v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 86. Submitting as element of damage the effect of "noise, dust, smoke and cinders" held harmless though there was no evidence of the emission of cinders by defendant's trains. Cane Belt R. Co. v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 927, 97 S. W. 1066. Instruction inapplicable but harmless. Southern R. Co. v. Reynolds [Ga.] 55 S. E. 1039. Instruction on immaterial issue. Ford v. Southern R. Co. [S. C.] 55 S. E. 448; Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. If instruction sets forth the rule of law, it is immaterial what language is used so long as it is intelligible to the jury. Alfriend v. Fox, 124 Ga. 563, 52 S. E. 925. Clerical errors harmless where meaning is clearly apparent. Day v. Emery-Bird-Thayer Dry Goods Co., 114 Mo. App. 479, 89 S. W. 903. Verbal inaccuracies not affecting substantial meaning of instruction. City of Louisville v. Caron, 28 Ky. L. R. 844, 90 S. W. 604. Designating plaintiffs as "defense" in instruction where error palpably exposed by context. Chany v. Hotchkiss [Conn.] 63 A. 947. Erroneous instruction on nonessential feature of defense. Eubanks v. Alspaugh, 139 N. C. 520, 52 S. E. 207. Erroneous instruction on uncontested issue. Chicago Union Traction Co. v. Yarus, 221 Ill. 641, 77 N. E. 1129. Assumption of undisputed facts as proved. Bradford v. Nation-

instruction was effective.[52] If, as in equitable issues, the verdict is merely advisory,

al Ben. Ass'n, 26 App. D. C. 268; Helland v. Colton State Bank [S. D.] 106 N. W. 60. Instruction assuming that a special assessment was lawful not harmful where jury was not required to pass upon the lawfulness of such assessment. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794. Where car was standing still immediately before accident, instruction as to rate of speed harmless. Indianapolis St. R. Co. v. Hackney [Ind. App.] 77 N. E. 1048. Assumption that seller had overcharged buyer harmless to seller where it appeared that he had given buyer credit for alleged overcharge. Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S. W. 1020. Erroneous instruction that there was no evidence of a contract harmless where there was conclusive evidence that the contract had been abrogated by the parties. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206. Instruction as to denunciation of witnesses harmless where appellant's counsel did not denounce any witness and where instruction did not assume such denunciation and applied to both parties. Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183. Instructions as to capacity held harmless where question was not controverted and was not an issue in the case. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Instruction authorizing recovery notwithstanding immaterial variance between pleadings and proof. McManus v. Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176. Assuming that defendant had assumed the liability of another where facts were admitted showing primary liability for same act. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111. Instruction as to effect of payments on statute of limitations harmless where debt was not barred. Hammer v. Crawford [Mo. App.] 93 S. W. 348. Instruction as to authority of holder of note to fill up blank indorsement of guarantor harmless where ratification of guaranty was proved. Lloyd & Co. v. Matthews, 223 Ill. 477, 79 N. E. 172. Instruction not reversible error as allowing recovery of damages not proximately resulting from injury where there was no evidence of such damages. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108. Party who offers no evidence to rebut a presumption raised by the evidence not harmed by instruction stating such presumption in effect to the jury. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048. Instruction that plaintiff in action for slander was presumed from pleadings to be innocent of acts charged as constituting the alleged slander was harmless where there was no evidence that he was guilty of such acts. Schultz v. Guldensteln [Mich.] 13 Det. Leg. N. 348, 108 N. W. 96. Appellant not harmed by instruction as to validity of contract where his own testimony showed that it had been ratified and the invalidity thus cured. School Dist. No. 47 v. Goodwin [Ark.] 98 S. W. 696. Failure to give defendant asserting adverse possession the benefit of tacking his possession to that of his predecessors under whom he claimed was harmless where there was no evidence that such predecessors ever had any possession. Hughes v. Owens [Ky.] 92 S. W. 595. Failure to limit risks assumed by plaintiff to those actually known where the facts were such as to charge him with knowledge of all the risks. Mullen v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000. Where employment of skillful physician was proved. Instruction that damages would not be affected by failure to employ such a physician was harmless. Renfro v. Fresno City R. Co. [Cal. App.] 84 P. 357. Instruction precluding recovery upon certain theory harmless where there was no evidence to sustain such theory. Forge v. Houston & T. C. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 386, 90 S. W. 1118. Charge requiring proof of facts which were in fact fully proved was harmless to plaintiff. Smith's Adm'r v. Illinois Cent. R. Co., 28 Ky. L. R. 723, 90 S. W. 254. Placing too great a burden of care upon defendant harmless where he was guilty of negligence as a matter of law. Hansen v. Seattle Lumber Co., 41 Wash. 349, 83 P. 102. Instruction that a "high" degree of care was required of defendant railroad company. Whittacker v. Brooklyn, etc., R. Co., 110 App. Div. 767, 97 N. Y. S. 414. Defendant not harmed by instruction as to effect of negligence in regard to safety and comfort of passengers where the action was for unlawful injury to passenger by defendant's servants for which defendant was absolutely liable. Gulf, etc., R. Co. v. Luther [Tex. Civ. App.] 14 Tex. Ct. Rep. 195, 90 S. W. 44. Where plaintiff asserted that the accident would have been averted by the slightest degree of care on part of defendant's servants and defendant asserted that the highest degree of care would not have averted the accident, errors in instructing as to the degree of care required were harmless. Hovarka v. St. Louis Transit Co., 191 Mo. 441, 90 S. W. 1142. Where defendant pleaded assumption of risk to every ground of recovery alleged by defendant, a charge comprehending other risks was harmless to plaintiff, since he could in no event recover upon a ground not alleged. Bryan v. International, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693. Where a sleeping car company was liable to the carrier for failure to keep a car in repair, it could not complain that an instruction in an action by a passenger against both companies for injuries caused by the car being out of repair, placed too great a burden of care upon it, where the liability of the carrier was established. Pullman Co. v. Norton [Tex. Civ. App.] 14 Tex. Ct. Rep. 869, 91 S. W. 841. Instruction ignoring issue. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. Submitting issue of tender where tender affected only interest and no issue of interest in case. Berlin v. Belle Isle Scenic R. Co., 141 Mich. 646, 12 Det. Leg. N. 573, 105 N. W. 130. Instruction outside of pleading and evidence. Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919. Instruction too broad in that it authorized recovery upon proof of facts not alleged harmless where no such facts were proved and the evidence sustained the allegations made. Miller v. Nuckolls [Ark.] 91 S. W. 759. Incorporation of pleadings in instruction held not reversi-

such error is presumptively harmless.[53] Defects and irregularities in the verdict,

ble error, pleadings consisting of merely a short petition and a general denial. Kamm & Co. v. Sloan & Co. [Kan.] 83 P. 1103. Instruction erroneously referring to matter as stated in complaint harmless where such matter was established by the evidence. Kabat v. Moore [Or.] 85 P. 506. Instruction erroneously stating certain facts as appearing from the pleadings harmless where the facts were proved. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784. Not always reversible error to refer to amount claimed in declaration. Illinois C. R. Co. v. Becker, 119 Ill. App. 221. Argumentative and abstract instruction not necessarily reversible error. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590. Argumentative instruction as to plaintiff's appearance as result of injury by defendant harmless where jury saw plaintiff and heard his testimony. Cole v. Seattle, etc., R. Co., 42 Wash. 462, 85 P. 3. Indefiniteness in defining duties of defendant's conductor to passengers harmless where defendant's liability turned solely upon issue as to whether plaintiff was a passenger. Little Rock R. & Elec. Co. v. Goerner [Ark.] 95 S. W. 1007. Inaccuracy in definition of insolvency in that it was not sufficiently broad harmless where it applied to case on trial. Rex Buggy Co. v. Ross [Ark.] 97 S. W. 291. Erroneous definition of contributory negligence harmless to defendant in absence of evidence of such negligence. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184. Abstract instruction held harmless. Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919; Cincinnati Traction Co. v. Baron, 3 Ohio N. P. (N. S.) 633. Abstractness in charge as to damages harmless where plaintiff's evidence was offered according to rule stated and verdict was evidently based on such evidence. Dexter Sulphite Pulp & Paper Co. v. McDonald [Md.] 63 A. 958. Abstractness in stating duty of defendant without stating consequences of failure to perform such duty harmless to defendant. Nephler v. Woodward [Mo.] 98 S. W. 488. Instruction erroneous in the abstract but correct in effect owing to the peculiar facts of the case. McMurray v. Dixon [Va.] 54 S. E. 481. Instruction as to weight of evidence and credibility of witnesses. McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 P. 614. Instruction as to credibility of witnesses held harmless though erroneous in that it stated the names of the witnesses and was too specific in its application. Mahoney v. Dixon [Mont.] 87 P. 452. Instruction as to credibility of witnesses in general without reference to witnesses on either side. Chicago Union Traction Co. v. O'Brien, 117 Ill. App. 183. Giving undue prominence to parts of evidence. Southern R. Co. v. Bradford [Ala.] 40 So. 100. Instruction excluding defense not sustained by any evidence was harmless. Serrano v. Miller & T. Commission Co., 117 Mo. App. 185, 93 S. W. 810. Where court used word "important" to qualify word "fact" in instructions for both parties. Baker County v. Huntington [Or.] 87 P. 1036. Correction of erroneous charge held harmless. Corbet Buggy Co. v. Dukes, 140 N. C. 393, 52 S. E. 931. Giving instruction after all others had been given and jury was about to retire. Harvey v. Chicago & A. R. Co., 221 Ill. 242, 77 N. E. 569. Instruction leaving to the jury the meaning of the characters "Rel. Val. Ltd. 5 C. W. T.," on a bill of lading, harmless to defendant. Norfolk & W. R. Co. v. Harman, 104 Va. 501, 52 S. E. 368. Refusal of instruction. Keroes v. Weaver, 27 App. D. C. 384; Turner v. Osgood Art Colortype Co., 223 Ill. 629, 79 N. E. 306. Refusal of instruction upon matter not in issue. Smith v. Hockenberry [Mich.] 13 Det. Leg. N. 684, 109 N. W. 23. Refusal of instructions harmless where affirmative instruction for plaintiff is given. Bennett & Co. v. Brooke [Ala.] 41 So. 149. Failure to instruct as to damages as to which there was no evidence harmless to defendant. Cody v. Market St. R. Co., 148 Cal. 90, 82 P. 666. Refusal of instruction as to exemplary damages harmless where plaintiff not entitled to recover any damages at all. Johnson v. Johnson [Mich.] 13 Det. Leg. N. 655, 108 N. W. 1011. No injury from failure to instruct that material allegations of complaint were denied when jury must have so understood. Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514. Not reversible to refuse to charge converse of propositions given for plaintiff. Cohankus Mfg. Co. v. Rogers' Guardian [Ky.] 96 S. W. 437. Refusal to instruct that certain matters of defense not relied on by defendant and not submitted to jury could not be inferred from certain facts was harmless to plaintiff. Smith v. Hockenberry [Mich.] 13 Det. Leg. N. 684, 109 N. W. 23. Failure to submit question of agency to jury. Copeland v. Boston Dairy Co., 189 Mass. 342, 75 N. E. 704. Failure to submit undisputed issue. Bradford v. National Benefit Ass'n, 26 App. D. C. 268. Striking from instruction theoretical proposition of law. Bishop v. Atchison, etc., R. Co. [Kan.] 84 P. 718.

52. St. Louis & S. F. R. Co. v. Sharrook [Ind. T.] 98 S. W. 158. Erroneous instruction as entered harmless where no interest allowed. Regester v. Regester [Md.] 64 A. 286. Special finding showing that general verdict was not founded on certain theories advanced by the court. Milton v. Biesanz Stone Co. [Minn.] 109 N. W. 999. Where jury did not find conditional fact on which instruction was based. Woodbury v. Winestine [Conn.] 64 A. 221. Error in instructing jury that some of them must make concessions was harmless where they reported their inability to agree and did not reach a verdict until further instructions had been given. O'Neal v. Richardson [Ark.] 92 S. W. 1117. Error in authorizing recovery upon conditions not alleged harmless where no such conditions are found. Galveston, etc., R. Co. v. Udalle [Tex Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. Where verdict showed that connecting carrier was not held liable for any injury to the property prior to its actual delivery to such carrier, an erroneous instruction as to what constituted delivery to connecting carrier was harmless. Texas & P. R. Co. v. Horne [Tex. Civ. App.] 16 Tex. Ct. Rep. 124, 95 S. W. 97. Elaborate statement of allegations of petition which was highly inflammatory in its charges shown to be harmless by size of verdict.

findings, and conclusions of law are not ground for reversal where no harm results,[54] and the same is true as to the judgment and record.[55] Thus, a wrong de-

Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Absence of prejudice from instruction authorizing damages not shown by evidence indicated by size of verdict. Dallas Consol. Elec. St. R. Co. v. Ely [Tex. Civ. App.] 14 Tex. Ct. Rep. 605, 91 S. W. 887. Reference to amount claimed in pleadings shown to have been harmless by size of verdict Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222; Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640; Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. Instruction as to measure of damages shown to have been harmless. Bell v. Hatfield, 28 Ky. L. R. 515, 89 S. W. 544. Instruction upon measure of damages harmless where damages allowed were properly allowable without regard to such instruction. Western Coal & Min. Co. v. Honaker [Ark.] 96 S. W. 361; St. Louis, etc., R. Co. v. Fisher [Ark.] 97 S. W. 279; City of Pana v. Broadman, 117 Ill. App. 139; Chicago City R. Co. v. Nelson, 116 Ill. App. 609; Gulf, etc., R. Co. v. Moseley [Ind. T.] 98 S. W. 129. Error in refusing instruction harmless where the rule contended for in instruction was applied in the findings and judgment. Contaldi v. Errichetti [Conn.] 64 A. 211. Finding for plaintiff indicated that he was not harmed by refusal to charge that certain acts constituting a defense could not be inferred from certain facts in case. Smith v. Hockenberry [Mich.] 13 Det. Leg. N. 684, 109 N. W. 23.

Held prejudicial: Prejudice shown. Corn Exch. Bank v. Peabody, 111 App. Div. 553, 98 N. Y. S. 78. Prejudice shown by verdict for an amount which could have been found only by following the erroneous instruction. Starkweather v. Emerson Mfg. Co. [Iowa] 109 N. W. 719. Erroneous instruction as to measure of damages shown to be prejudicial by verdict which was excessive under the evidence. Missouri, etc., R. Co. v. Williams, [Tex. Civ. App.] 16 Tex. Ct. Rep. 847, 96 S. W. 1087.

53. Bouton v. Pippin, 192 Mo. 469, 91 S. W. 149; In re Peterson [Neb.] 107 N. W. 993; Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648; Lellman v. Mills [Wyo.] 87 P. 985. When court does not adopt verdict of jury. Lewis v. Snyder, 72 Kan. 671, 83 P. 621.

54. Failure of verdict to show substitution of one administrator for another as plaintiff held harmless. Gibson v. Swofford [Mo. App.] 97 S. W. 1007. Failure of jury to follow instruction excepted to by appellant was not prejudicial to him. St. Louis, etc., R. Co. v. Dooley [Ark.] 92 S. W. 789. Disregard of instruction too favorable to appellant not reversible error where verdict sustained by evidence. Campbell v. Western Union Tel. Co. [S. C.] 54 S. E. 571. Disregard of erroneous charge is harmless where the verdict is sustainable on grounds not affected by such charge. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189. Correction of clerical error in findings when it did not appesr that findings were not waived and the judgment therefore needed no findings to support it. Ladd v. Myers [Cal. App.] 87 P. 1110. Immaterial findings. King v. Davis, 137 F. 198; Ward v. Eastwood [Cal. App.] 86 P. 742; In re Tuohy's Estate [Mont.] 83 P. 486. Errors in regard to unnecessary findings. People v. Davidson [Cal. App.] 83 P. 181. Finding that defendant's bell was out of order and did not sound as its train approached crossing harmless where defendant failed to negative an averment in the complaint to same effect. Metcalf v. Central Vt. R. Co., 78 Conn. 614, 63 A. 633. Submission of interrogatories for special findings without notice. Fisk v. Chicago Water Chute Co., 119 Ill. App. 536. Erroneous answers to special interrogatories where the different answers supposable would not necessarily conflict with general verdict. Inland Steel Co. v. Smith [Ind. App.] 75 N. E. 852. Defendant in accounting not injured by finding upon which no judgment is rendered against him. Miller v. Russell, 224 Ill. 68, 79 N. E. 434. Plaintiff in whose favor judgment was rendered for the amount of an alleged tender cannot complain that the jury rendered a general verdict for defendant. New Orleans Furniture Mfg. Co. v. Hill Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 731, 94 S. W. 148. Finding of damages to crops and land separately was harmless to defendant. San Antonio & A. P. R. Co. v. Dickson [Tex. Civ. App.] 15 Tex. Ct. Rep. 51, 93 S. W. 481. Plaintiff not harmed by allowance of statutory instead of actual damages where there was no evidence that latter exceeded former. Galbraith v. Carmode [Wash.] 86 P. 624. Variance between findings and complaint harmless where correct result is reached. Longmont Farmers' Milling & Elevator Co. v. Aldridge [Colo.] 85 P. 687. Failure to make findings harmless where case is tried de novo on appeal. Williams v. Husky, 192 Mo. 533, 90 S. W. 425. Appellant not injured by failure to find when any finding that could have been made would have been adverse to him. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820.

Held prejudicial: A verdict could not be sustained where it is impossible to discover upon what theory it was rendered without reaching the conclusion that it was contrary to the instructions. Connelly v. Illinois Cent. R. Co. [Mo. App.] 97 S. W. 616. Refusal to find that easements interfered with by defendant's railroad had only a nominal value aside from consequential damages. Schmitz v. Brooklyn Union El. R. Co., 111 App. Div. 308, 97 N. Y. S. 791. Disregard of erroneous instruction may be reversible error. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189. But see ante § 1, first subdivision, note' Result Reached Only One Sustainable.

55. Formal errors harmless. May v. Vaughn, 28 Ky. L. R. 1088, 91 S. W. 273. Irregularities not affecting substantial rights. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. Irregularity in judgment for costs. Kaufer v. Stumpf [Wis.] 109 N. W. 561. Clerical error in entering judgment in favor of all defendants on an injunction bond, whereas only one of the defendants was interested in such damages was harmless to injunction plaintiff. Sutliff v. Montgomery, 115 Mo. App. 592, 92 S. W. 515. Form

cision when no substantial right exists,[56] or when substantially equivalent to a right decision,[57] is harmless.

§ 3. *Errors cured or made harmless by other matters.—Error is also harmless if some subsequent condition has rectified it or has averted its prejudicial effect.*[58] This may be done by allowing the injured party opportunity to obviate

of judgment correctible by entry in proper form in appellate court. Roy v. East St. Louis & Suburban R. Co., 119 Ill. App. 313. Erroneous naming of a party as defendant who was not such was merely clerical error which could be treated as surplusage or corrected at any time on motion. Sioux Falls Elec. Light & Power Co. v. Sioux Falls [S. D.] 108 N. W. 488. Where special finding in special verdict would not have sustained judgment for plaintiff, entering judgment for defendant non obstante without setting aside special verdict was harmless. Woodard v. German American Ins. Co. [Wis.] 106 N. W. 681. Judgment in action under Rev. St. 1898, § 3186, failed to determine expressly that plaintiff had an interest in or title to the land or that defendant's tax deeds constituted a cloud, but such matters were expressly set out in findings. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290. Entering judgment in favor of attorney for attorney's fees instead of taxing them as costs, harmless. Chambers v. Chambers [Neb.] 106 N. W. 993. Rendering judgment against one only of two joint defendants in an action on contract. McKee v. Cunningham [Cal. App.] 84 P. 260. Failure of judgment to follow verdict in merely formal matter. Jackson v. McFall [Colo.] 85 P. 638. Form of judgment for plaintiff where plea of tender was sustained. Birmingham Paint & Roofing Co. v. Crampton [Ala.] 39 So. 1020. Error in decreeing that devised lands should be sold if necessary to pay costs of administration and debts of estate, harmless where evidence showed that the assets primarily liable were sufficient to pay such costs and debts. West v. Bailey, 196 Mo. 517, 94 S. W. 273. Rendering personal judgment for amount due under mortgage in suit to set aside foreclosure where plaintiff admitted liability for such amount and alleged tender thereof. Daggs v. Smith, 193 Mo. 494, 91 S. W. 1043. Amendment of judgment at subsequent term so as to make it expressly direct what was otherwise clearly implied. Johnston v. Fraser [Tex. Civ. App.] 15 Tex. Ct. Rep. 80, 92 S. W. 49. Correct order not invalidated by erroneous but unnecessary and separable order. Pavlicek v. Roessler, 121 Ill. App. 219. Unnecessary order amending original order denying injunction. Adair v. Atlanta, 124 Ga. 288, 52 S. E. 739.

56. No prejudicial error in setting aside absolutely void decree. Camplin v. Jackson [Colo.] 83 P. 1017.

57. Greer-Wilkinson Lumber Co. v. Steen [Ind App.] 77 N. E. 673. See ante § 1, note Right Decision on Wrong Ground.

58. See 5 C. L. 1637. Court will search whole record for curative matter. State v. Marshall County Election Com'rs [Ind.] 78 N. E. 1016. All errors waived by refiling case by agreement in district court after the papers have been certified to such court. Greeley v. Greeley, 16 Okl. 325, 83 P. 711. Where plaintiff after having been allowed to establish the fact sought to be proved by the excluded evidence failed to prove his case in other respects. Hawes v. Bank of Elberton, 124 Ga. 567, 52 S. E. 922. Improper testimony as to value held harmless where court properly limited amount recoverable and the verdict was less than half the value testified to. St. Louis, etc., R. Co. v. Green [Tex. Civ. App.] 17 Tex. Ct. Rep. 1, 97 S. W. 531. Irregularity of auditor in refusing a demand for an issue instead of reporting demand and evidence to court cured where court reviewed whole matter and confirmed result arrived at by auditor. In re Logan's Assigned Estate, 213 Pa. 218, 62 A. 843. Admitting in evidence note without revenue stamp cured by subsequent affixing of stamp, since note could have been withdrawn and the stamp affixed and then reintroduced. Beem v. Farrell [Iowa] 108 N. W. 1044. Refusal to vacate reference rendered harmless by resignation of referee and appointment of a new one. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540. Failure of administrator to give bond cured by giving of bond after objection raised to the authority of the administrator to act as such in a legal proceeding. In re Wiltsey's Will [Iowa] 109 N. W. 776. Failure to rule on objection to evidence cured by ruling on motion to strike such evidence. Doe v. Allen, 1 Cal. App. 560, 82 P. 568. Want of notice of order correcting judgment entry cured by subsequent hearing of application to restore the judgment to its original form, though the application was refused. Christisen v. Bartlett [Kan.] 84 P. 530. Informality in decree in condemnation proceedings for a way for an irrigating ditch in not providing that money should be paid before beginning of work on ditch was cured by actual payment of money into court. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. Error in instruction cured by striking out erroneous portion. Scott v. Com. [Ky.] 93 S. W. 668. Withdrawal of pleading after demurrer erroneously sustained. Starkey v. Starkey [Ind.] 76 N. E. 876. Error in overruling exception to portion of petition harmless where such portion was ignored by the court as surplusage and no damages were asked upon the theory suggested thereby. Texas, etc., R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Sustaining demurrer to pleading harmless where party is allowed the benefit of the matter set up therein. Herren v. Tuscaloosa Waterworks Co. [Ala.] 40 So. 55; Alabama Consol. Coal & Iron Co. v. Turner [Ala.] 39 So. 603; Roach v. State [Ala.] 39 So. 685; First Nat. Bank v. Chandler [Ala.] 39 So. 822; Lookout Mountain Iron Co. v. Lea [Ala.] 39 So. 1017; Wellden v. Witt [Ala.] 40 So. 126; Georgetown Water, Gas, Elec. & Power Co. v. Smith [Ky.] 97 S. W. 1119; Gilliland v. Martin [Ala.] 42 So. 7; Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603, 42 So. 73. Striking plea or answer harmless

the effect of the error,[59] by trial de novo on intermediate appeal,[60] by withdrawal or abandonment of issues,[61] by pleadings and rulings thereon,[62] by the admission of evidence,[63] by striking out or excluding evidence,[64] by reinstating it,[65] by with-

where party is allowed benefit of defense set up therein. Moore v. Lanier [Fla.] 42 So. 462; Bennett & Co. v. Brooke [Ala.] 41 So. 149; In re Pike Street, 42 Wash. 551, 85 P. 45. Improper argument rendered harmless by withdrawal of same by counsel upon objection. San Antonio & A. P. R. Co. v. McMillan [Tex. Civ. App.] 17 Tex. Ct. Rep. 596, 98 S. W. 421. Remarks of counsel rendered harmless by withdrawal by counsel and by instruction of court. Covington & C. Bridge Co. v. Smith, 28 Ky. L. R. 529, 89 S. W. 674. Sustaining objection to remark of counsel and directing jury not to consider it cures error. Chicago Union Traction Co. v. Yarus, 221 Ill. 641, 77 N. E. 1129. Going outside of record cured by sustaining objection and reproving counsel. Springfield Boiler & Mfg. Co. v. Parks, 222 Ill. 355, 78 N. E. 809. Argument rendered harmless by sustaining of objection and withdrawal. International, etc., R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660; McKenzie v. Boutwell [Vt.] 65 A. 99. Error in requiring proof of certain facts cured where the facts are fully proved. Smith's Adm'r v. Illinois Cent. R. Co., 28 Ky. L. R. 723, 90 S. W. 254.

Not cured: Where evidence of an essential fact is admitted upon a promise to connect it, failure to furnish the connecting evidence before the taking of a nonsuit rendered necessary by the erroneous exclusion of other evidence does not cure the error in such exclusion. Malone v. La Croix [Ala.] 41 So. 724. Error in refusing to compel plaintiff to elect between a common law cause of action for negligence and a cause of action under a speed ordinance was not cured by striking out the allegations as to violation of the ordinance where other allegations of ordinance negligence were allowed to remain in the petition and evidence of such negligence was introduced. Claucy v. St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509. Where defendant's counsel was commenting on failure of plaintiff to introduce certain evidence, and the latter's counsel thereupon offered to introduce it, a mild rebuke from the court was not sufficient to prevent reversal. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Quere whether any rebuke could have obviated error. Id.

59. Admission of testimony possibly based on opinion cured by failure of other party to take advantage of chance to show by cross-examination whether the testimony was opinion or not. Stamets v. Mitchenor, 165 Ind. 672, 75 N. E. 579. Exclusion of evidence cured by subsequent opportunity to introduce it, though it be not introduced in fact. Merrill v. Milliken [Me.] 63 A. 299.

Not cured: Fact that effect of improper testimony could have been obviated by cross-examination does not cure the error. Couson v. Wilson [Cal. App.] 83 P. 262. Sustaining of general demurrer is not rendered harmless by failure to amend after the sustaining of special exceptions or demurrers, since such amendment would, under the ruling on the general demurrer, be unavailing. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex.] 17 Tex. Ct. Rep. 4, 97 S. W. 686.

60. Error in adjustment of property and debts of territory detached from one school district and attached to another immaterial on appeal to supreme court where case was tried de novo on appeal to circuit court. Independent School Dist. No. 2, Turner County v. District No. 37, Clay County [S. D.] 106 N. W. 302.

61. Exclusion of evidence on certain issue cured by withdrawal of issue. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Evidence as to certain damages rendered harmless by subsequent abandonment of all claims to such damages. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. Erroneous evidence as to certain issue harmless where such issue is eliminated by sustaining demurrer to pleading raising it and by an instruction. Little Rock R. & Elec. Co. v. Dobbins [Ark.] 95 S. W. 788. Error in overruling exception to petition on account of certain claims cured by dismissal of such claims and withdrawing same from consideration of jury. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 16 Tex. Ct. Rep. 16, 94 S. W. 381.

62. Overruling demurrer to petition on ground of lack of certain allegations cured by answer admitting the matters not alleged in the petition. Davis v. Big Horn Lumber Co. [Wyo.] 85 P. 980. Indefiniteness and uncertainty in complaint cured by pleading over or trial on merits. Creighton v. People [Colo.] 83 P. 1057. Failure of complaint to state plaintiff's readiness to perform contract cured where such issue was raised by the answer and the reply. Catlin v. Jones [Or.] 85 P. 515. Error in overruling motions to strike, make more definite, and elect, cured by party subsequently pleading to merits and going to trial. Dakam v. G. W. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. No injury from sustaining demurrer to plea where demurrer overruled as to amended plea setting up same defense. Haines' Ex'rs v. Haines [Md.] 64 A. 1044. Sustaining demurrer to original complaint harmless where demurrer to amended complaint overruled. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. Filing amended complaint after sustaining of demurrer to original complaint renders ruling on demurrer harmless. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

Not cured: Error in sustaining demurrer to special reply not cured by subsequent filing of general denial under which the special matter was provable, since the general denial not being on file at the time of the ruling such ruling had the effect of restricting the proof. Swing v. Hill [Ind.] 75 N. E. 658.

63. Cure of rulings on pleadings: Denial of amendment cured by receipt of proof as though issue tendered by the amendment had been raised. Seifen v. Racine [Wis.] 109 N. W. 72. Admitting evidence to prove

drawal of objections,[86] by proceeding with trial of issues of fact after overruling of

affirmative matter contained in an answer cured error in sustaining demurrer to such affirmative matter. Whitworth v. Pool [Ky.] 96 S. W. 880. Error in sustaining demurrer to answer harmless where evidence was admitted to prove the facts set up therein and the finding was against the defendant. Id.

Cure of exclusion of evidence: Exclusion of question seeking affirmative answer cured by subsequent testimony showing that the answer would have been in the negative. Nelson v. Hunter, 140 N. C. 598, 53 S. E. 439. Exclusion of testimony as to purpose for which injured property was used harmless when witness afterwards testified that his opinion as to value of property was not affected by purpose for which property was used. Baltimore Belt R. Co. v. Sattler, 102 Md. 595, 62 A. 1125. Excluded evidence afterwards admitted. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307; Gadsden Grocery & Feed Co. v. McMahen [Ala.] 40 So. 87; Smith v. Dubost, 148 Cal. 622, 84 P. 38; Bashore v. Mooney [Cal. App.] 87 P. 553; Chicago, etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602; Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605; Austin v. Smith [Iowa] 109 N. W. 289; Mier v. Phillips Fuel Co. [Iowa] 107 N. W. 621; Dalby v. Lauritzen [Minn.] 107 N. W. 826; Alabama & V. R. Co. v. Harz [Miss.] 42 So. 201; Locke v. Independence, 192 Mo. 570, 91 S. W. 61; Butte Elec. R. Co. v. Mathews [Mont.] 87 P. 460; In re Berry's Estate [N. J. Eq.] 64 A. 136; Anternoitz v. New York, etc., R. Co. [Mass.] 79 N. E. 789; Jennings v. Oregon Land Co. [Or.] 86 P. 367; Strickland v. Phillips [S. C.] 55 S. E. 453; Peeples v. Slayden-Kirksey Woolen Mills [Tex. Civ. App.] 14 Tex. Ct. Rep. 144, 90 S. W. 61; Grieb v. Koeffler, 127 Wis. 314, 106 N. W. 113; Lellman v. Mills [Wyo.] 87 P. 985. Substantially same testimony subsequently received. Buchanan v. Randall [S. D.] 109 N. W. 513; Sanguinetti v. Pelligrini [Cal. App.] 83 P. 293; Providence Mach. Co. v. Browning, 72 S. C. 424, 52 S. E. 117. Substantially same matter received in response to subsequent question to same witness. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368; Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921; Upchurch v. Mizell [Fla.] 40 So. 29; Kessler v. Pearson [Ga.] 55 S. E. 963; Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Same witness subsequently allowed to testify fully upon same matter. Holcomb-Lobb Co. v. Kaufman [Ky.] 96 S. W. 813; Galveston, etc., R. Co. v. Smith [Tex.] 98 S. W. 240. Where witness subsequently testified fully as to matters excluded on his cross-examination. Baltimore & O. R. Co. v. Deck, 102 Md. 669, 62 A. 958. Evidence excluded on cross-examination subsequently admitted on direct examination of same witness by the cross-examiner. Dewey v. Komar [S. D.] 110 N. W. 90. Proof on subject of inquiry subsequently admitted. Carroll v. Griffith [Tenn.] 97 S. W. 66. Fact sought to be proved by excluded evidence afterwards proved. Hilliker v. Allen, 128 Iowa, 607, 105 N. W. 120. Error in refusing to allow witness in will contest who had testified as to testator's soundness of mind to be cross-examined as to his previous opportunities of forming an opinion on the subject harmless where witness was afterwards fully examined on the subject. In re Nichols v. Wentz, 78 Conn. 429, 62 A. 610. Exclusion of nonexpert opinion as to handwriting rendered harmless by subsequent admission of witness' opinion after he had qualified as an expert. Yarborough v. Banking Loan & Trust Co. [N. C.] 55 S. E. 296.

Not cured: A party cannot insist that error in refusing to permit a certain fact to be proved was cured by subsequent evidence of such fact, since to allow such an effect to the subsequent evidence would imply the right of the jury to disregard the ruling of the court. Gulf, etc., R. Co. v. Mathews [Tex.] 15 Tex. Ct. Rep. 957, 93 S. W. 1068. Exclusion of evidence not cured by its subsequent admission for another purpose. Stoner v. Royar [Mo.] 98 S. W. 601. Exclusion of statement that a person was drunk not cured by admission of evidence of the talk and acts of such person. Kuhlman v. Wieben, 129 Iowa, 188, 105 N. W. 445. Exclusion of evidence negativing contributory evidence not cured by evidence of a warning which it did not appear affirmatively that plaintiff heard. Smith v. Milwaukee Elec. R. & Light Co., 127 Wis. 253, 106 N. W. 829. The erroneous exclusion of a deed in the presence of the jury on the ground that it is immaterial is not cured by a subsequent introduction by the opposing party. Whitman v. McComas [Idaho] 83 P. 604. Rejection of record of judgment not cured by testimony that execution had been issued on the judgment and levied on defendant's property, plaintiff being entitled to have the whole record admitted. Allison's Ex'r v. Wood, 104 Va. 765, 52 S. E. 559. Exclusion of evidence of adverse possession by defendant not cured by proof of better title by plaintiff under deeds from same source but covering only portion of the property in controversy. Janney v. Robbins [N. C.] 53 S. E. 863. Evidence of bias of witness. Salzman v. Mandel, 98 N. Y. S. 825. Evidence of damages in condemnation proceedings. Lewis v. Englewood El. R. Co., 223 Ill. 223, 79 N. E. 44. Subsequent question held not to cover subject-matter of question excluded. Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921.

Admitted evidence cured by later evidence: Same or similar evidence subsequently admitted without objection. Whitridge v. Baltimore [Md.] 63 A. 808; Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273; Lewis v. Susmilch [Iowa] 106 N. W. 624; Bussey v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 163; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; International Harvester Co v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Subsequent explanation of testimony by same witness. Hilliker v. Allen, 128 Iowa, 607, 105 N. W. 120. Admitted evidence rendered immaterial by later evidence. Security Trust Co. v. Robb [C. C. A.] 142 F. 78. Subsequent evidence connecting the evidence objected to which was irrelevant at the time of its admission. Louisville & N. R. Co. v. Tritton [Ala.] 39 So. 585. Admission of evidence for plaintiff rendered harmless

demurrer to evidence,[67] by instructions,[68] by verdict or findings,[69] by judgment,[70] by remittitur of damages,[71] or by statute.[72]

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where defendant's own witness testified to same facts. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206; Mathre v. Devendorf [Iowa] 106 N. W. 366. Admission of secondary evidence is harmless where best evidence is subsequently introduced. McCreary v. Jackson Lumber Co. [Ala.] 41 So. 822; Dorough v. Harrington [Ala.] 42 So. 557; Union Foundry & Mach. Co. v. Lankford [Ala.] 39 So. 765; Pass Packing Co. v. Torsch [Miss.] 40 So. 228. Testimony as to contents of deposition rendered harmless by subsequent introduction of the deposition. Elliott v. Howison [Ala.] 40 So. 1018. Error in admitting secondary evidence cured by subsequent competent evidence proving the fact in issue. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197. Admitting altered note without explanation of alteration cured by evidence in rebuttal showing that note was in same condition when endorsed by defendant. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619. Improper admission of bills of lading upon issue as to amount of sand shipped defendant cured by subsequent testimony that bills had been exhibited to defendant and that he had admitted that they were correct. Campbell v. McCrellis [N. J. Law] 62 A. 1129. Allowing witness to be questioned as to contradictory statements made to a certain party was harmless where such party on being called as a witness testified that witness had made no such statements to him. Birmingham R. & Elec. Co. v. Mason [Ala.] 39 So. 590. Admission of affidavit without proof of affiant's authority to make it for defendant cured by subsequent proof of authorization or ratification by defendant. Shannon v. Sims [Ala.] 40 So. 574.

Not cured: Evidence as to elements of damage not properly allowable not rendered harmless by mere fact that after eliciting such evidence plaintiff continued the examination on proper lines. Jones v. Cooley Lake Club [Mo. App.] 98 S. W. 82. Admission of evidence of offer of compromise not cured. Franklin v. Hoadley, 101 N. Y. S. 374. Error in admission of evidence not cured by subsequent admission without objection of evidence not coextensive with that admitted over objection. Southern R. Co. v. Simmons [Va.] 55 S. E. 459. Admission of heareay not cured by subsequent admission of original evidence on same point. Bryce v. Chicago, etc., R. Co., 129 Iowa, 342, 105 N. W. 497. Subsequent evidence held insufficient to cure error in admitting secondary evidence without proper foundation. Missouri, etc., R. Co. v. Morrison [Tex. Civ. App.] 15 Tex. Ct. Rep. 829, 94 S. W. 173.

64. Driver v. King [Ala.] 40 So. 315; McBride v. Des Moines R. Co. [Iowa] 109 N. W. 618; Blumenthal v. Union Elec. Co., 129 Iowa, 322, 105 N. W. 588; Fowles v. Rupert [Mich.] 12 Det. Leg. N. 946, 106 N. W. 873; Stout v. Columbia, 118 Mo. App. 439, 94 S. W. 307; Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951; Parrott v. Atlantic, etc., R. Co., 140 N. C. 548, 53 S. E. 432; Houston, etc., R. Co. v. Anderson [Tex. Civ. App.] 17 Tex. Ct. Rep. 122, 98 S. W. 440; Houston & T. C. R. Co. v. Craig [Tex. Civ. App.] 92 S. W. 1033; Houston, etc., R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55. Error in admission of testimony is generally cured by subsequently striking it out. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723. Excluding evidence by written instruction after retirement of jury. Long v. Kendall [Okl.] 87 P. 670. The withdrawal of the evidence should be explicit. Southern R. Co. v. Simmons [Va.] 55 S. E. 459. Where incompetent evidence is withdrawn from jury, the verdict will not be set aside for the error in admitting it in the first instance. Scharff v. Southern Ill. Const. Co., 115 Mo. App. 157, 92 S. W. 125. Evidence not going to fundamental right of action but merely incidental. Baker v. Oughton [Iowa] 106 N. W. 272. Admission of declarations of defendant's mine examiner as to knowledge of danger which resulted in accident, cured. Athens Min. Co. v. Carnduff, 221 Ill. 354, 77 N. E. 571. Improper evidence of value of property in condemnation proceedings. Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. Admission of evidence in personal injury case that plaintiff had a family cured by instruction excluding such evidence from the consideration of the jury. Southern R. Co. v. Steele, 23 Ky. L. R. 764, 90 S. W. 548.

Not cured. Viles v. Barre & M. Traction & Power Co. [Vt.] 65 A. 104. Error in admitting testimony that plaintiff when killed by defendant's train had a pass with certain conditions thereon was not cured by sustaining objection to copy of pass. Tingley v. Long Island R. Co., 109 App. Div. 793, 96 N. Y. S. 865. Erroneous admission of testimony as to damages by persons not qualified to give opinion not cured by striking out. Davis v. Pennsylvania R. Co. [Pa.] 64 A. 774.

65. Ordering copies of deeds and receipts reported by master as having been taken from record, to be attached to report, cured error in making such statement in first report. Matthews v. Whitehorn, 220 Ill. 36, 77 N. E. 89.

66. See 3 C. L. 1589, n. 54.

Not cured: Exclusion of proper question not cured by withdrawal of objection where court persists in the erroneous ruling. Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256.

67. Introducing evidence after reservation of ruling in motion for nonsuit. Franklin v. Burris [Colo.] 84 P. 809. When after denial of his motion for a nonsuit defendant introduced evidence supplying the defects in plaintiff's proofs. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804.

68. Improper argument and remarks of counsel. Robinson v. Duvall, 27 App. D. C. 535. Improper argument rendered harmless

by rebuke in presence of jury. Kentucky & I. Bridge & R. Co. v. Nuttall [Ky.] 96 S. W. 1131; Louisville, etc., R. Co. v. Sander's Adm'r [Ky.] 92 S. W. 937; Malott v. Central Trust Co. [Ind.] 79 N. E. 369; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033; Overton v. White, 117 Mo. App. 576, 93 S. W. 363; Leesville Mfg. Co. v. Morgan Wood & Iron Works [S. C.] 55 S. E. 768; San Antonio & A. P. R. Co. v. McMillan [Tex. Civ. App.] 17 Tex. Ct. Rep. 596, 98 S. W. 421; Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666; Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352; International & G. N. R. Co. v. Brisenio [Tex. Civ. App.] 14 Tex. Ct. Rep. 961, 92 S. W. 998; Thomson v. Issaquah Shingle Co. [Wash.] 86 P. 588; Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. Improper argument as to damages recoverable. City of Detroit v. Little Co. [Mich.] 13 Det. Leg. N. 803, 109 N. W. 671. Argument outside of issues rendered harmless by instruction confining jury to issues Monte Ne R. Co. v. Phillips [Ark.] 96 S. W. 1060. Argument upon matters rendered immaterial by instruction. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877. Merely sustaining objection to the argument is sufficient to obviate error in absence of request for special instruction. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010. Remarks of counsel. Miller v. Nuckolls [Ark.] 91 S. W. 759; McKenzie v. Boutwell [Vt.] 65 A. 99.

Improper cross-examination. Bennett v. Susser, 191 Mass. 329, 77 N. E. 884. Improper statements of counsel on cross-examination rendered harmless by instruction to disregard the irrelevant matter. Carpenter v. Hammer [Ark.] 87 S. W. 646.

Rulings on pleadings: Overruling exception to portion of petition setting up certain ground of recovery rendered harmless by submission of case solely upon another issue. International, etc., R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423. Defendant not injured by ruling on demurrer to complaint where an affirmative charge is given for him. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. Plaintiff not injured by overruling of demurrer to plea of set-off setting up matter available only in recoupment where the court restricted the plea to its legitimate scope as one in recoupment and there was no judgment over against plaintiff. Adams Mach. Co. v. Thomas [Miss.] 39 So. 810. Objections to amendment of reply and rulings on motions against amended reply cured by charge. Fike v. Ott [Neb.] 107 N. W. 774.

Not cured: Allowing amendment on appeal triable de novo raising amount in controversy beyond jurisdiction of trial court was not cured by appellate court's failure to include in its charge the items embraced in the amendment. Missouri, etc., R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 318, 98 S. W. 415.

Curing erroneous evidence. Frepons v. Grostein [Idaho] 87 P. 1004; Renshaw v. Dignan, 123 Iowa, 722, 105 N. W. 209; Fowles v. Rupert [Mich.] 12 Det. Leg. N. 946, 106 N. W. 873; McGunnegle v. Pittsburg & L. E. R. Co., 213 Pa. 383, 62 A. 988; Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400. Instruction considered in reaching conclusion that immaterial evidence was harmless. Security Trust Co. v. Robb [C. C. A.] 142 F. 78. Evidence rendered immaterial by instruction defining the real issue. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 15 Tex. Ct. Rep. 889, 94 S. W. 1070. Error in answer to hypothetical question cured by instruction. Smith v. Manhattan R. Co., 112 App. Div. 202, 98 N. Y. S. 1. Evidence as to damages not properly recoverable rendered harmless by instruction properly limiting the damages recoverable. Standley v. Atchison, etc., R. Co. [Mo. App.] 97 S. W. 244; Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351; Camden Interstate R. Co. v. Stein [Ky.] 97 S. W. 394; Tingle v. Kelly [Ky.] 92 S. W. 303. Instruction confining jury to proper issue to exclusion of the immaterial issue as to which evidence was improperly admitted. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Evidence of demand for proofs upon driver harmless where court instructed that there could be no recovery unless there was demand upon mine manager. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902. Testimony of facts not proper to be considered as probative of main fact in issue rendered harmless by exclusion from consideration of jury. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. Evidence as to personal acquaintance between servants harmless where court instructed that fellow-servant rule was not dependent upon such acquaintance. Chicago & E. I. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936. Evidence of another accident rendered harmless by instruction not to consider unless conditions were identical. Indianapolis Water Co. v. Harold [Ind. App.] 79 N. E. 542. Testimony as to changed conditions after the accident held harmless in view of explanatory and restrictive instructions. Barrett v. Bannen Shingle Co. [Wash.] 87 P. 919.

Not cured. Capital Construction Co. v. Holtzman, 27 App. D. C. 125. Error in admission of evidence cannot be cured by instruction to disregard it. Grout v. Moulton [Vt.] 64 A. 453. Testimony not admissible for any purpose not rendered harmless by instruction merely limiting its effect to a certain purpose. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222. Admission of improper evidence bearing on damages not cured by instruction giving correct measure of damages but not explicitly withdrawing the evidence. Southern R. Co. v. Simmons [Va.] 55 S. E. 459; Jones v. Cooley Lake Club [Mo. App.] 98 S. W. 82. In suit for malicious prosecution of plaintiff for embezzlement admission of evidence that plaintiff had right to retain certain items of funds charged to have been embezzled was not cured by an instruction that certain of such items were not chargeable against defendant by plaintiff. Singer Mfg. Co. v. Bryant [Va.] 54 S. E. 320.

Rejection of evidence: Rejection of evidence of common law of sister state cured by instruction embodying such law as part of case. Pullman Palace Car Co. v. Woods [Neb.] 107 N. W. 858.

Curing other parts of charge. St. Louis S. W. R. Co. v. Plumlee [Ark.] 95 S. W. 442; American Cent. Ins. Co. v. Antram [Miss.] 41

So. 257; McKee v. Crucible Steel Co., 213 Pa. 333, 62 A. 921; La Fitte v. Southern R. Co., 73 S. C. 467, 53 S. E. 755; Stewart v. Southern Bell Tel. & T. Co., 124 Ga. 224, 52 S. E. 331. Instruction expressly correcting previous instruction as to evidence. Coles v. Interurban St. R. Co., 49 Misc. 246, 97 N. Y. S. 289. Instruction must be construed as a whole. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Mullenary v. Burton [Cal. App.] 84 P. 159; Southern R. Co. v. Reynolds [Ga.] 55 S. E. 1039; Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923; Chicago & E. I. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936; Fitzgerald v. Benner, 219 Ill. 486, 76 N. E. 709; Harris v. Gaunt, 122 Ill. App. 290; Springer v. Bricker, 165 Ind. 532, 76 N. E. 114; Blumenthal v. Union Elec. Co., 129 Iowa, 322, 105 N. W. 588; Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505; Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401; City of Lexington v. Fleharty [Neb.] 104 N. W. 1056; Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640; Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074; Niemyer v. Washington Water Power Co. [Wash.] 88 P. 103; Glettler v. Sheboygan Light, Power & R. Co. [Wis.] 109 N. W. 973. Entire series of instructions considered together showed no reversible error. City of Gibson v. Murray, 120 Ill. App. 296. Charge as to measure of damages for death not rendered erroneous by mere remark that deceased might have contributed more to a deaf mute child than he ordinarily would to other children. Delahunt v. United Tel. & T. Co. [Pa.] 64 A. 515. All instructions given must be considered. Schultz v. Reed, 122 Ill. App. 420. Where all instructions not in record erroneous instructions presumed corrected. People's State Bank v. Ruxer [Ind. App.] 78 N. E. 337. Error in instruction for one party cured by instruction for other party. Galveston, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 505, 98 S. W. 898; Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E, 139; Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269. Omissions in instructions for plaintiff cured by those given for defendant. Austin v. St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450. Mere omissions cured. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Withdrawal of charge as to eliminated counts. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280. Excluding certain portion of instruction by written instruction after retirement of jury. Long v. Kendall [Okl.] 87 P. 670. Charge inapplicable to issues cured by charge that the erroneous charge has no application to the case. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203. Where other portions of the instruction precluded a recovery under the erroneous portion. International & G. N. R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423. Giving undue prominence to certain facts and omitting others cured by subsequently calling jury's attention to such omitted facts. Western Underwriter's Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447. Charge that certain fact was condonation by master of misconduct by servant rendered harmless by instruction that condonation was a question for the jury. Murray v. O'Donohue, 109 App. Div. 696, 96 N. Y. S. 335. References to amount claimed in declaration cured by proper limitation of the effect of such claim. McDermott v. Severe, 202 U. S. 600, 50 Law. Ed. 1162. Technical inaccuracy cured by other parts of charge. Tozer v. Ocean Accident & Guaranty Corp. [Minn.] 109 N. W. 410. Inaccuracy in instruction as to contributory negligence cured. Harvey v. Chicago & A. R. Co., 221 Ill. 242, 77 N. E. 569. Instruction as to contributory negligence of child rendered harmless. United Breweries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547. Inaccuracy as to measure of damages cured. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583. When true measure of damages was clearly stated to jury, reading to jury erroneous instructions by another court for purpose of pointing out that such instructions were erroneous held harmless. Brown v. Forest Water Co., 213 Pa. 440, 62 A. 1078. Using word "defendant" instead of "plaintiff" in an instruction cured by other instructions. National Enameling & Stamping Co. v. McCorkle, 219 Ill. 557, 76 N. E. 843. Incomplete instruction on burden of proof cured by other instructions. Barrie v. St. Louis Transit Co. [Mo. App.] 96 S. W. 233. Instruction that evidence must be "conclusive" cured by other instruction charging jury to find according to preponderance of evidence. Roberge v. Bonner [N. Y.] 77 N. E. 1023. Incompleteness cured. Southern R. Co. v. Cullen, 122 Ill. App. 293. Incomplete definition of proximate cause cured by subsequent instruction. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. Use of word "sole" as synonymous with proximate rendered harmless by proper instruction as to proximate cause. Gila Valley, etc., R. Co. v. Lyon, 27 S. Ct. 145. Failure to define an express warranty cured by instruction substantially giving such definition. Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919. Failure to define negligence cured by instruction defining the degree of care with which defendant was chargeable. Rattan v. Central Elec. R. Co. [Mo. App.] 96 S. W. 735. Jury not misled by charge that plaintiff should recover if defendant was negligent where subsequent charge made the case depend on contributory negligence. Walsh v. Yonkers R. Co., 100 N. Y. S. 278. Erroneous instruction as to negligence cured by subsequent instruction fully defining the extent of defendant's liability. Louisville & N. R. Co. v. Rhoads, 28 Ky. L. R. 692, 90 S. W. 219. Failure to limit liability to negligence the danger of which defendant might have reasonably foreseen cured by subsequent instruction. Nephler v. Woodward [Mo.] 98 S. W. 488. Failure to submit issue cured. Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737; Waples-Painter Co. v. Bank of Commerce [Ind. T.] 97 S. W. 1025.

Not cured: Village of Lockport v. Licht, 221 Ill. 35, 77 N. E. 581. Erroneous instruction not cured by subsequent correct instruction in conflict therewith. St. Louis, etc., R. Co. v. Thompson-Hailey Co. [Ark.] 94 S. W. 707; Louisville & N. R. Co. v. Muscat [Ala.] 41 So. 302; Miller v. Nuckolls [Ark.] 91 S. W. 759; Bayles v. Daugherty [Ark.] 91 S. W. 304; McKinnon v. Western Coal & Min. Co. [Mo. App.] 96 S. W. 485; Wilson v. Atlantic Coast Line [N. C.] 55 S. E. 257. When it cannot

be determined which instruction jury followed. Smith v. Perham [Mont.] 83 P. 492. Wrong rule in charge not cured by fact that right rule also given. Armour & Co. v. Russell [C. C. A.] 144 F. 614. Erroneous statement of facts which would justify verdict not curable. Baltimore, etc., R. Co. v. Schell, 122 Ill. App. 346. Erroneous statement of law not cured by other instructions. Southern R. Co. v. Cullen, 122 Ill. App. 293. Error in charge not cured by remarks made in refusing another charge and relating solely to the latter charge. Murphy v. Metropolitan St. R. Co., 110 App. Div. 717, 97 N. Y. S. 483. Erroneous instruction as to degree of care owed by defendant to employees not cured by correct instruction in regard thereto. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Instruction that certain act constituted negligence not cured by instruction submitting question of negligence to jury. American Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563. Failure to charge that if plaintiff failed to show negligence by defendant verdict should be for latter not cured by charge that contributory negligence would bar recovery. Denver, etc., R. Co. v. Burchard [Colo.] 86 P. 749. Erroneous instruction purporting to state facts which would justify a verdict not curable by other instructions in series, since it cannot be determined whether jury based verdict entirely on erroneous instruction. Osner v. Zadek, 120 Ill. App. 444. Erroneous specific instructions held not cured by general instruction. Damsky v. New York City R. Co., 101 N. Y. S. 579. Instruction as to interest of witnesses as affecting credibility not cured by general instruction that credibility is for the jury, the jury being also instructed that they must take the law from the court. Muncie, etc., R. Co. v. Ladd [Ind. App.] 76 N. E. 790. Error in instructing that permitting use of hand car with defective brake was negligence not cured by submission of interrogatory as to whether it was negligence to permit use of the car under the circumstances. Choctaw, etc., R. Co. v. Stroble [Ark.] 96 S. W. 116.

Curing refusal to charge: Refusal of instruction harmless where subject-matter is substantially covered by subsequent instructions. Gilliland & Son v. Martin [Ala.] 42 So. 7; Cody v. Market St. R. Co., 148 Cal. 90, 82 P. 666; Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010; Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313; Robinson v. Duvall, 27 App. D. C. 535; Kerves v. Weaver, 27 App. D. C. 384; Southern R. Co. v. Reynolds [Ga.] 55 S. E. 1039; City of Evanston v. Richards, 224 Ill. 444, 79 N. E. 673; Dillman v. McDane, 222 Ill. 276, 78 N. E. 591; Court of Honor v. Dinger, 221 Ill. 176, 77 N. E. 557; Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845; Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927; Elbert v. Mitchell [Iowa] 109 N. W. 181; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308; Magnolia Metal Co. v. Gale, 191 Mass. 487, 78 N. E. 128; Smith v. Nixon [Mich.] 13 Det. Leg. N. 569, 108 N. W. 971; Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505; Wellmeyer v. St. Louis Transit Co. [Mo.] 95 S. W. 925; Koenig v. Union Depot R. Co., 194 Mo. 564, 92 S. W. 497; Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Barrie v. St. Louis Transit Co. [Mo. App.] 96 S. W. 233; Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666; Wilson & Co. v. Levi Cotton Mills, 140 N. C. 52, 52 S. E. 250; Creachen v. Bromley Bros. Carpet Co., 214 Pa. 15, 63 A. 195; Banks v. Southern Express Co., 73 S. C. 211, 53 S. E. 166; St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671; Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84; Hickey v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 88, 95 S. W. 763; International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660; Missouri, etc., R. Co. v. Barnes [Tex. Civ. App.] 15 Tex. Ct. Rep. 524, 95 S. W. 714; Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191; San Antonio & A. P. R. Co. v. Dickson [Tex. Civ. App.] 15 Tex. Ct. Rep. 51, 93 S. W. 481; Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184; International, etc., R. Co. v. Brisenio [Tex. Civ. App.] 14 Tex. Ct. Rep. 961, 92 S. W. 998; Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511; Niemeyer v. Washington Water Power Co. [Wash.] 88 P. 103; Hirte v. Eastern Wis. R. & Light Co., 127 Wis. 230, 106 N. W. 1068. See Instructions, 6 C. L. 43. Refusal of instructions covered by other harmless, though rejected instructions were refused in presence of jury. Baltimore & O. R. Co. v. State [Md.] 64 A. 304. Refusal to charge as to certain alleged acts of negligence harmless to defendant where case was submitted solely upon another issue. International, etc., R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423. Refusal of special instruction withdrawing an issue harmless where the issue was not submitted and the plaintiff's right to recover was restricted to grounds presented by other issues. St. Louis & S. F. R. Co. v. Ames [Tex. Civ. App.] 16 Tex. Ct. Rep. 298, 94 S. W. 1112. Refusal of instruction and then giving it in modified form harmless where the instruction as given was substantially same as asked. Morrison v. Fairmont & C. Traction Co. [W. Va.] 56 S. E. 669. Refusal of specific instruction as to contributory negligence cured by general charge where the only kind of contributory negligence in issue was the kind referred to in the specific instruction. Chicago, etc., R. Co. v. Lost Springs Lodge, No. 494, I. O. O. F. [Kan.] 85 P. 803.

Not cured: American Hardwood Lumber Co. v. Dent [Mo. App.] 98 S. W. 814. Failure to charge as to interest of witness in case not cured by general charge that jury were judges of credibility of witnesses and weight of testimony. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. Refusal to charge not rendered harmless by reading excerpts from judicial opinion, which, without its context, tended to mislead rather than to instruct. Schmidt v. Interborough Rapid Transit Co., 49 Misc. 255, 97 N. Y. S. 390.

69. No reversible error when verdict does substantial justice. Henrietta Coal Co. v. Martin 122 Ill. App. 354. See ante § 1, first subdivision, note Result Reached Only One Sustainable. Where damages found were not excessive improper argument as to damages was harmless. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877. Correct verdict cures error in overruling challenge to juror. Wil-

liams v. Supreme Ct. of Honor, 120 Ill. App. 263. Striking out a negative and substituting an affirmative answer to an interrogatory as to actual fraud in suit to set aside a deed was harmless where the answers to other issues showed fraud in law. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666. Failure to submit evidence rendered harmless by verdict involving finding of other facts rendering such evidence immaterial. Allison v. Wall, 121 Ga. 822, 49 S. E. 831. Failure to make findings cured by finding upon decisive issue. Ward v. Eastwood [Cal. App.] 86 P. 742. Dismissal as to one defendant harmless when on trial as to other defendant a finding was made that there was no cause of action against either. Kolbe v. Boyle [Minn.] 108 N. W. 847. Failure to require jury to make specific answer to interrogatory as to choice of ways rendered harmless by finding of lack of knowledge of danger. City of Indianapolis v. Keeley [Ind.] 79 N. E. 499. Ignoring instructions on certain issue cured by finding against complaining party on such issue where such finding sustained by evidence. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108. Errors in relation to issues of contributory negligence and fellow-servants harmless where jury finds against defendant on issue of unsafe place to work and defective appliances. Hairston v. U. S. Leather Co. [N. C.] 55 S. E. 847. Where upon defendant's exception to commissioners to assess damages the case was submitted to a jury who found in defendant's favor for a certain sum, defendant could not complain of the manner in which the commissioners were appointed. Southern Ill. & M. Bridge Co. v. Stone, 194 Mo. 175, 92 S. W. 475.

Cure of rulings on pleadings: Where there is a special finding of facts, overruling demurrer is immaterial. Elsman v. Whalen [Ind. App.] 79 N. E. 514. Error in overruling demurrer to complaint for uncertainty in alleging a certain charge cured by finding for demurrant on such charge. Wilkerson v. Wilkerson [Cal. App.] 84 P. 784. Where verdict is for defendant he is not injured by erroneous instructions. Elbert v. Mitchell [Iowa] 109 N. W. 181. Finding of kind of negligence charged in complaint cures error in instruction broadening the issues as to negligence. Chicago, etc., R. Co. v. Lost Springs Lodge No. 494, I. O. O. F. [Kan.] 85 P. 803. Amendment to answer as to assumption of risk and fellow-servants harmless to plaintiff where finding against him is based solely on his contributory negligence. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053. Erroneous ruling as to paragraph of complaint rendered harmless by answer to special interrogatory eliminating such paragraph from the case. Chicago, etc., R. Co. v. Williams [Ind.] 79 N. E. 442. Defective statement of good cause of action cured by verdict. Anderson Art Co. v. Greenburg, 118 Ill. App. 220. Verdict based entirely on one count renders harmless rulings as to other counts. Boyett v. Standard Chemical & Oil Co. [Ala.] 41 So. 756. Refusal to make a plea in reconvention an issue harmless where the ground of such plea was negatived by the verdict. Guffy Petroleum Co. v. Hamill [Tex. Civ. App.] 94 S. W. 458. Appellant cannot complain of overruling of exception to cross action in which the finding is for him. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368. A correct finding of title under ten year limitation renders harmless the overruling of exceptions to pleas setting up shorter periods of limitation. Id.

Not cured: Special finding of facts does not render sustaining demurrer immaterial. Elsman v. Whalen [Ind. App.] 79 N. E. 514.

Curing exclusion of evidence. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540. By finding in excepting party's favor. Hodgin v. Southern R. Co. [N. C.] 55 S. E. 413; Locke v. Independence, 192 Mo. 570, 91 S. W. 61; Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820; Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347. Finding for plaintiff, though for less than amount claimed, cures error in exclusion of evidence going merely to question of liability for any amount at all. Pinch v. Hotaling [Mich.] 12 Det. Leg. N. 841, 106 N. W. 69. Evidence in action of claim and delivery as to price for which property sold at sheriff's sale harmless to defendant where verdict fixed value of property according to defendant's own testimony. Webster v. Sherman [Mont.] 84 P. 878. Proper description of case on one decisive issue renders harmless exclusion of evidence on another issue. Reed v. Bank of Ukiah, 148 Cal. 96, 82 P. 845. Exclusion of evidence of negligence harmless where plaintiff found guilty of contributory negligence. Owen v. Portage Tel. Co., 126 Wis. 412, 105 N. W. 924. Where in action of unlawful entry and detainer the jury found that the entry was not by force or under any contract with plaintiff or those under whom he claimed, the exclusion of a memorandum of service of a notice to quit was harmless. Fowler v. Prichard [Ala.] 41 So. 667. Plaintiff in action to recover subscription not injured by exclusion of evidence as to its relation to party who secured the subscription where jury found that defendant was not bound by the subscription. American Life Ins. Co. v. Meicher [Iowa] 109 N. W. 805. Exclusion of evidence of measure of damages harmless where jury finds that there are no damages at all. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674. Wallace v. North Alabama Traction Co. [Ala.] 40 So. 89. Exclusion of evidence affecting damages only harmless where finding is for defendant upon the main issue. Albin v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 270, 95 S. W. 589. Exclusion of evidence that plaintiff claimed only a certain amount harmless where verdict did not exceed such amount. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep 109, 97 S. W. 523. Exclusion of evidence as to market value of land in controversy harmless where jury finds that there are no damages at all. Andrew v. Carithers, 124 Ga. 515, 52 S. E. 653. Verdict negativing entire charge of slander renders harmless the exclusion of evidence as to special damages. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008. Finding against validity of lien renders harmless exclusion of evidence as to amount. Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43.

Not cured: Verdict, though small, did not cure admission of evidence of damages not allowable. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909.

Admitted evidence cured. Fowles v. Rupert [Mich.] 12 Det. Leg. N. 946, 106 N. W. 873. By finding in excepting party's favor. Hodgin v. Southern R. Co. [N. C.] 55 S. E. 413; Gadsden Distilling Co. v. Kennedy Stava & Cooperage Co. [Ala.] 39 So. 622; Gould v. Cates Chair Co. [Ala.] 41 So. 676. Where findings show that evidence was not considered. Young v. Milan, 73 N. H. 552, 64 A. 16. Finding contrary to erroneous evidence renders latter harmless. Weitzel v. Fowler [Mich.] 13 Det. Leg. N. 90, 107 N. W. 451. Estimate of damages not adopted by master or by court harmless. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463. Harmlessness of evidence as to amount of damages shown by amount of verdict. McKenzie v. Boutwell [Vt.] 65 A. 99; Pullman Palace Car Co. v. Woods [Neb.] 107 N. W. 858; Western Coal & Min. Co. v. Honaker [Ark.] 96 S. W. 361; Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. Where damages in condemnation proceedings were assessed as required by statute and were within the limits of the competent testimony. Yellowstone R. Co. v. Bridger Coal Co. [Mont.] 87 P. 963. Admission of contract limiting liability for negligence harmless where no negligence is found. Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751. Evidence as to one act of negligence rendered harmless by finding of another act sufficient to render defendant liable. Knott v. Cape Fear & N. R. Co. [N. C.] 55 S. E. 150. Error in admission of testimony as to reasonable value of work cured by judgment based entirely on an express contract. City of Houston v. Potter [Tex. Civ. App.] 14 Tex. Ct. Rep. 691, 91 S. W. 389. Admission of evidence of an express contract not covered by the pleadings rendered harmless by finding of liability for the amount covered by such contract upon grounds covered by the pleadings. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142. Where case was submitted upon right of conductor to eject plaintiff and the finding on such issue was for defendant, error in admitting testimony as to manner of ejection was harmless. Albin v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 270, 95 S. W. 589. When jury found it necessary for petitioning railroad to occupy street, evidence that road might be built on another route was harmless. Boyne City, etc., R. Co. v. Anderson [Mich.] 13 Det. Leg. N. 739, 109 N. W. 429.

Curing errors in charge: When substantial justice done between the parties. Harris v. Gaunt, 122 Ill. App. 290. Erroneous instruction harmless where verdict in accordance with evidence. Williams v. Supreme Ct. of Honor, 221 Ill. 152, 77 N. E. 542. Erroneous instruction cured by answers to interrogatories. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. Instruction as to issue rendered immaterial by finding. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927. Where verdict is in manifest disregard of instruction. Merry v. Calvin, 122 Ill. App. 459. The fact that the jury disregarded an erroneous instruction, provided they found a verdict which was justified by the evidence, furnishes no ground for a new trial. Gallgan v. Woonsocket St. R. Co., 27 R. I. 363, 62 A. 376. Leaving question of law to jury harmless where they decide it correctly. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726; Grout v. Moulton [Vt.] 64 A. 453; Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84. Error in submitting interpretation of written instrument to jury contrary to B. & C. Comp. § 136, harmless where finding of jury thereon is correct. Baker County v. Huntington [Or.] 87 P. 1036. Submission of mixed question of law and fact harmless where verdict was correct regardless of whether it was based upon the issue of law or the issue of fact. Clem v. Quincy, etc., R. Co. [Mo. App.] 96 S. W. 226. Submission of question which should have been decided as matter of law in defendant's favor cured by finding for defendant upon such issue. Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979. Error in submitting issue proposed by appellant cured by finding in his favor. Davis v. Keen [N. C.] 55 S. E. 359. Erroneous instruction on particular issue cured by finding in favor of appellant on such issue. Logan v. Field, 192 Mo. 54, 90 S. W. 127. Instruction ignoring issue harmless where issue found in appellant's favor. Rink v. Lowry [Ind. App.] 77 N. E. 967. Inconsistency in instruction relative to affirmative answer to interrogatory cured by negative answer. Horr v. Howard P. Co., 126 Wis. 160, 105 N. W. 668. Errors of omission harmless where it appears the jury considered omitted matters. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. Errors in charge as to contributory negligence cured by correct verdict against complaining party on such issue. Pittsburgh etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299. Erroneous instruction on one issue rendered harmless by finding on another and decisive issue. Ft. Smith Light & Traction Co. v. Carr [Ark.] 93 S. W. 990; Moerman v. Clark-Rutka-Weaver Co. [Mich.] 13 Det. Leg. N. 648, 108 N. W. 988; Abilene Cotton Oil Co. v. Anderson [Tex. Civ. App.] 15 Tex. Ct. Rep. 91, 91 S. W. 607; McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229. Erroneous instruction as to damages harmless where verdict not excessive. Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220. Errors in instruction as to measure of damages rendered harmless by finding of no cause of action. Corwin v. Young [Ky.] 92 S. W. 930; Tucker v. Southern R. Co. [S. C.] 55 S. E. 154. Uncertainty and vagueness as to measure of damages harmless to plaintiff where verdict gave him all he could legally recover under the evidence. Knoepker v. Redel, 116 Mo. App. 62, 92 S. W. 171. Instruction authorizing interest harmless where no interest was allowed. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 561, 94 S. W. 345; Fitzgerald v. Benner, 120 Ill. App. 447. Failure to limit the amount recoverable upon a counterclaim rendered harmless by a finding for an amount less than was recoverable upon such counterclaim. Knoxville Woolen Mills v. Wallace, 28 Ky. L. R. 885, 90 S. W. 563. Erroneous instruction relating to fellow-servant doctrine harmless where such issue was eliminated by special finding. New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485. Error in instruction as to form of verdict cured by verdict in correct form. Waples-Painter Co. v. Bank of Commerce [Ind. T.] 97 S. W. 1025.

Instruction authorizing recovery on fraudulent mortgage cured by finding that mortgage was not fraudulent. Curtiss v. Curtiss [Mich.] 13 Det. Leg. N. 126, 107 N. W. 323. Error in authorizing a verdict against the defendants either separately or collectively cured by finding against all the defendants. Costet v. Jsantet, 108 App. Div. 201, 96 N. Y. S. 638. Erroneous instruction as to certain defense cured by finding of estoppel to assert the defense. Fishblate v. Fidelity & Casualty Co., 140 N. C. 589, 53 S. E. 364.

Not cured: Where evidence not preserved in record, erroneous instruction not cured by verdict. Turner v. Righter, 120 Ill. App. 131. Erroneous instruction not cured where it does not appear that verdict was not caused thereby. Weierhauser v. Cole [Iowa] 109 N. W. 301; Stevens v. Citizens' Gas & Elec. Co. [Iowa] 109 N. W. 1090. Erroneous instruction authorizing a recovery where none could be legally had, not cured by verdict for less than amount sued for. Meyer v. Home Ins. Co., 127 Wis. 293, 106 N. W. 1087. Charge that plaintiff could not recover unless defendant was guilty of gross negligence not cured by finding in favor of plaintiff for small amount. Pendley v. Illinois Cent. R. Co., 28 Ky. L. R. 1324, 92 S. W. 1.

Curing refusal to charge: By finding in party's favor. Gates v. O'Gara [Ala.] 39 So. 729; Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Refusal to charge as to damages harmless where jury finds no cause of action. Earley v. Winn [Wis.] 109 N. W. 633. Refusal to charge as to exemplary damages harmless where jury finds plaintiff entitled to no damages at all. Johnson v. Johnson [Mich.] 13 Det. Leg. N. 655, 108 N. W. 1011. Refusal of instructions as to contributory negligence, assumption of risk and fellow-servants rendered harmless by finding for defendant on issue of negligence where such finding was sustained by evidence. Denny v. Kleeb, 40 Wash. 634, 82 P. 920. Refusal of instruction as to contributory negligence cured by finding of contributory negligence. Edwards v. Carolina & N. W. R. Co., 140 N. C. 49, 52 S. E. 234. Failure to instruct as to contributory negligence where jury found that defendant by exercising due care could have avoided the accident notwithstanding plaintiff's negligence. Glettler v. Sheboygan, Light, Power & R. Co. [Wis.] 109 N. W. 973.

70. No reversible error where judgment does substantial justice. Henrietta Coal Co. v. Martin, 122 Ill. App. 354; Herrin v. Bowsher, 122 Ill. App. 565. Correct decree cures errors in rulings of chancellor. Barbee v. Morris, 221 Ill. 382, 77 N. E. 589. Errors as to instructions cured by correct result. See Burns' Ann. St. 1901, §§ 401, 670. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670. Where the judgment rests upon one issue, error in regard to other issues is harmless. Kosower v. Sandler, 49 Misc. 443, 98 N. Y. S. 65; In re Wharton's Will [Iowa] 109 N. W. 492. Finding not supported by evidence is harmless where decision rests upon another finding which is not attacked in the specifications of error. Fitzhugh v. Mason [Cal. App.] 83 P. 282. When party is granted all relief he is entitled to. Taylor v. Hunter [Neb.] 107 N. W. 571; Equitable Trust Co. v. Torphy [Ind. App.] 76 N. E. 639. Error in overruling demurrer to answer cured by judgment for plaintiff. Equitable Trust Co. v. Torphy [Ind. App.] 76 N. E. 639. Where no judgment was rendered awarding the appellee affirmative relief on his cross complaint, any ruling as to such complaint could not afford the appellant any grounds of objection. Baum v. Palmer, 165 Ind. 613, 76 N. E. 108. Where no allowance was made on a claim objected to, error in admitting testimony as to the claim was harmless Flynn v. Seale [Cal. App.] 84 P. 263. Lack of interest in subject-matter on part of a plaintiff harmless to defendant when judgment rendered against such plaintiff. Cross v. Hendry [Ind. App.] 79 N. E. 631. Sustaining demurrer of garnishee harmless where judgment rendered for defendant in principal action. Tippecanoe Loan & Trust Co. v. Carr [Ind. App.] 78 N. E. 1043. Evidence as to certain damages harmless where no such damages allowed. Over v. Dehne [Ind. App.] 75 N. E. 664. Where judgment in action by assignee is sufficient to bind assignor failure to prove the assignment is harmless. Jordan v. Markham [Iowa] 107 N. W. 613. Where the decree in proceedings under U. S. Comp. St. 1901, p. 1430, to determine adverse claim to mining claim, showed that a deed executed by the claimant pending his application for a patent was considered only as having its proper legal effect in constituting claimant a trustee for his grantee, the admission of the deed in evidence was erroneous but harmless. Slothower v. Hunter [Wyo.] 88 P. 36.

71. Allowance of a specific unauthorized item of damages may be cured by remittitur. Macon, etc., R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197. Erroneous excess in judgment cured by remitting excess. Craig v. Dowie [Cal. App.] 87 P. 260; Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789. Error in allowing damages for a certain item cured by remittitur of the greatest sum which the jury could have found upon such item. Chicago, etc., R. Co. v. Seale [Tex. Civ. App.] 14 Tex. Ct. Rep. 48, 89 S. W. 997. Error in allowing too much costs cured by remittitur of excess. American Fruit Product Co. v. Ward, 99 N. Y. S. 717. Error of court in computing interest on note sued on instead of allowing jury to do so as required by Rev. St. 1899, §§ 721, 726, cured by remittitur of the interest. Locher v. Kuechenmiester [Mo. App.] 98 S. W. 92. Where all the jurors were agreed as to allowing a certain sum, error in reaching a larger sum by drawing straws was cured by remittitur of the excess above the sum originally agreed upon. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 16 Tex. Ct. Rep. 860, 98 S. W. 226. Verdict in excess of amount claimed in complaint cured by striking the excess. Mossteller v. Holborn [S. D.] 108 N. W. 13. Failure of judgment to make allowance for coinsurance cured by remittitur of proportionate amount. Western Underwriters Ass'n v. Haukins, 221 Ill. 304, 77 N. E. 447. Error in admission of evidence as to damages cured by remittitur. Brown v. Blaine, 41 Wash. 287, 83 P. 310. Remittitur of punitive damages cures error in instruction in regard thereto. Roundtree v. Charleston & W. C. R. Co., 72 S. C. 474, 52 S. E. 231. Overruling of demurrer to counterclaim cured by dismissal of main action and remittitur of damages found on the counterclaim. Smith v. Alvord [Utah] 88 P. 16. Error in submitting

HEALTH.

§ 1. Validity and Construction of Health Regulations (36).
§ 2. Health Boards and Officers (38).
§ 3. Care and Control of Sanitation and Disease (38). Enforcement of Health Regulations (39). Liability for Expenses (39). Negligence (40).

§ 1. *Validity and construction of health regulations.*[73]—The preservation of public health is a police power and cannot be surrendered,[74] though the exercise of it may be delegated to municipal bodies,[75] but, in so far as it involves legislation, not to the executive department.[76] In the promotion of public health reasonable regulations,[77] such as excluding unvaccinated children from the public schools,[78] prohibiting the sale of impure milk,[79] requiring burial permits,[80] and prescribing conditions for the issuing of the same,[81] are valid. Boards of health may adopt rules and regulations within the scope of their statutory authority[82] which have the

issue as to damages not covered by evidence may be cured by remittitur where the damages allowed under such issue are separable. Colorado Canal Co. v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 944, 94 S. W. 365.

Not cured: Error as to damages cannot be cured by remittitur where the erroneous damages cannot be separated. Atchison, etc., R. Co. v. Dawson [Tex. Civ. App.] 14 Tex. Ct. Rep. 139, 90 S. W. 65. Offer to release portion of damages erroneously allowed on condition that judgment be affirmed does not cure error where defendant refuses to accept offer. Farrar v. Wheeler [C. C. A.] 145 F. 482. Where the effect of erroneous evidence cannot be entirely eliminated by a remittitur of the amount directly based on such evidence, the error cannot be cured by remittitur of such amount. Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877. Where the court instructed the jury to find the value of plaintiff's property at place of delivery uninjured and to subtract the value in its damaged condition, and to deduct the advance charges and freight rates, but the jury assessed the damages at a certain sum plus the freight rates, the error could not be cured by a remittitur of the freight rates. Connelly v. Illinois Cent. R. Co. [Mo. App.] 97 S. W. 616.

72. Judgment will not be reversed for misjoinder of parties where a statute authorizing such joinder has gone into effect since the trial. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 600, 93 S. W. 1107. Admission of certified copies of legislative journals rendered harmless by Laws 1906, c. 240, passed pending the appeal, and rendering such copies harmless. In re Stickney's Estate [N. Y.] 77 N. E. 993.

73. See 5 C. L. 1641.

74. City of Portland v. Cook [Or.] 87 P. 772. Hence an ordinance granting the right to construct a slaughter house at a particular place is only a license and not a contract within the protection of the Federal constitution (Id.), and if it imperils the public health may be enjoined though it is a legitimate business (Id.).

75. City of Portland v. Cook [Or.] 87 P. 772. A statute denouncing certain contents of cesspools does not inhibit to municipalities the adoption of cesspools as a part of its sanitation system. Logan v. Childs [Fla.] 41 So. 197.

76. Laws 1901, p. 662, c. 479, § 4, subd. "b," authorizing the commissioner of agriculture, with the consent of the board, to establish and maintain cattle districts and quarantine lines, does not delegate legislative power to the Board of Agriculture, a branch of the executive department. State v. Southern R. Co. [N. C.] 54 S. E. 294.

77. An order prohibiting brick companies from digging clay except upon their own lands, the purpose being to avoid the stagnation of water in the excavations, is not a reasonable exercise of the power to regulate offensive businesses conferred by Rev. Laws, c. 75, § 91 (Inhabitants of Belmont v. New England Brick Co., 190 Mass. 442, 77 N. E. 504), nor is a rule requiring such companies to give a bond to refill the excavations, since it may deprive one of the use of his land (Id.).

78. Act of June 18, 1895 (P. L. 203), upheld as a valid exercise of the police power (Stull v. Reber [Pa.] 64 A. 419), and not objectionable as special legislation, though it applies only to municipalities and not to the country districts (Id.), nor as trespassing upon the reserved rights of the individual in that vaccination is the infliction of a disease upon the patient (Id.), nor does it contravene Const. art. 10, § 1, requiring the maintenance of schools wherein all children above six years of age may be educated (Id.).

79. People v. Department of Health, 51 Misc. 190, 100 N. Y. S. 788. A resolution of a board of health providing that milk above fifty degrees Fahrenheit shall be confiscated and destroyed is not unconstitutional. Kaiser v. Walsh, 4 Ohio N. P. (N. S.) 507. If, in fact, the milk is not injurious to the health, the members of the board refusing a permit are liable to the same extent as anyone else interfering with a lawful business. People v. Department of Health, 51 Misc. 190, 100 N. Y. S. 788.

80. Under Ky. St. 1903, § 3058, authorizing city councils to establish quarantine laws and regulations to prevent the spread of contagious diseases, and to secure the general health, a city may pass an ordinance requiring a burial permit as a condition of interment. Meyers v. Duddenhauser [Ky.] 93 S. W. 43.

81. Conditions must be reasonable. Meyers v. Duddenhauser [Ky.] 93 S. W. 43. A regulation requiring the attending physi-

effect and force of a statute,[83] but they cannot re-delegate any of their powers.[84] Incidental damage to property arising out of health laws is not a taking of property without due process of law.[85] The motive of a city council in passing a health regulation is not open to judicial investigation in passing upon the validity of the same.[86] The application and construction of particular statutes are treated in the notes.[87] A use of property detrimental to public health may be enjoined,[88] or, in some states, suppressed by a special procedure.[89]

cian's certificate as to the cause of death held reasonable. Id.

82. An order of a board of health prohibiting a brick company from digging clay except on its own land, having for its purpose the doing away with stagnant pools which result, is not authorized by §§ 65, 67, of Rev. Laws, c. 75, since those sections leave the manner of abatement to the landowner responsible for the condition. Inhabitants of Belmont v. New England Brick Co., 190 Mass. 442, 77 N. E. 504. Order requiring a bond to refill held void, there being no statute authorizing the imposition of such a condition. Id.

83. Under Code § 2565, conferring on the board of health power to make rules and regulations for the preservation of public health, a rule so made has the force and effect of a statute. Pierce v. Doolittle [Iowa] 106 N. W. 751. In Massachusetts a board of health of a town may declare that certain employments by the manner in which they are conducted are injurious to the health of the community and should be entirely prohibited or regulated, or that they constitute a nuisance, and such regulations until revoked, modified, or declared void have the force of law. Inhabitants of Belmont v. New England Brick Co., 190 Mass. 442, 77 N. E. 504.

84. Rev. Laws, c. 75, § 113, if it authorizes the board of health to make a regulation requiring parties cutting ice from the water supply pond to obtain a permit, does not authorize them to delegate the granting of the permit to the water board. Commonwealth v. Staples, 191 Mass. 384, 77 N. E. 712.

85. An ordinance abating water closets and privies in blocks having cesspools. Logan v. Childs [Fla.] 41 So. 197.

86. In a prosecution for violating a garbage ordinance alleged to be void, evidence that the ordinance was enacted with a fraudulent intent of creating a monopoly is inadmissible. People v. Gardner [Mich.] 12 Det. Leg. N. 936, 106 N. W. 541.

87. **Second-hand clothing. Georgia:** Pen. Code 1895, § 490, relating to the sale of second-hand clothing, is only applicable to imported clothing. Smith & Co. v. Evans, 125 Ga. 109, 53 S. E. 589. And hence a special plea in an action for goods sold attempting to set up the illegality of the transaction but which fails to allege importation is defective. Id.

Unvaccinated children, schools. Pennsylvania: Section 12 of Act of June 18, 1895 (P. L. 203), excluding unvaccinated children from the public schools, is applicable to districts where small-pox does not exist, notwithstanding § 11, relating to the vaccination of adults, is only applicable to small-pox districts. Stull v. Reber [Pa.] 64 A. 419.

State board supervision. Florida: Art. 15, § 3, of the constitution conferring "supervision" of matters of health upon the state board, has no bearing upon the validity of an ordinance where the board refuses to interfere. Logan v. Childs [Fla.] 41 So. 197.

Manufacture of cigarettes. Nebraska: The word "manufacture" as used in the statute prohibiting the manufacture of cigarettes does not include the rolling of a cigarette for the maker's own use. Dempsey v. Stout [Neb.] 107 N. W. 235.

Barns in cities. Massachusetts: Under St. 1893, p. 1135, c. 407; St. 1894, p. 11, c. 4; St. 1894, p. 283, c. 288, and St. 1894, p. 575, c. 483, giving to the park commissioners complete control over the parks and boulevards, contractors constructing a boulevard may erect a temporary stable for the horses so employed where necessary without a license from the board of health as required by Rev. Laws c. 102, § 69. Teasdale v. Newell & Snowling Const. Co. [Mass.] 78 N. E. 504.

Cattle districts. North Carolina: Laws 1901, p. 662, c. 479, § 4, subd. "b," authorizing the commissioner of agriculture, with the consent of the board, to establish and maintain cattle districts and quarantine lines, confers power to prohibit transportation across the established lines. State v. Southern R. Co. [N. C.] 54 S. E. 294. Acts imposing penalties upon carriers for refusing to transport freight do not repeal Laws 1901, p. 662, c. 479, § 4, subd. "b," prohibiting the transportation of cattle across quarantine lines, since the former will be construed as applying only where the offered shipment was entitled to be transported. Id.

Reporting of contagious diseases. D. C.: Act of Congress of Dec. 20, 1890, requiring a physician to report cases of scarlet fever and diphtheria "in his charge," does not require a physician in charge of a dispensary which does not treat such diseases, who examines a prospective patient and rejects the same on ascertaining that she has diphtheria, to report the case, since it was not in his charge. Johnson v. District of Columbia, 27 App. D. C. 259.

Powers of school board. Pennsylvania: Act Mar. 30, 1903 (P. L. 115), authorizing cities of the third class to establish hospitals for contagious diseases outside the city limits, does not repeal Act April 11, 1899 (P. L. 38), giving school boards certain powers over matters relating to the public health and the spread of contagious diseases through the schools. City of Allentown v. Wagner, 214 Pa. 210, 63 A. 697.

88. Where an injunction has been granted restraining the use of certain property for cemetery purposes because of its polluting effect upon the neighboring wells, an ordinance leaving it "discretionary" with the health commissioner to require the graves to be cemented at the bottom and sides does not so remove the cause as to justify a

§ 2. *Health boards and officers.*[90]—The Nebraska act creating the state board of health is valid.[91] While the fixing of the salaries of local health officers in Kentucky is left to the fiscal court, the allowance must be reasonable[92] and is subject to appellate review.[93] Neither the Georgia state board of health nor its individual members has capacity to maintain actions to enforce its rules and regulations.[94] Where the members of a municipal board of health are exceeding their jurisdiction, an action to enjoin them is properly brought against them individually.[95]

§ 3. *Care and control of sanitation and disease.*[96]—The duty[97] and manner of providing a place for the care of the sick is largely statutory.[98] A statute conferring the power to build hospitals impliedly confers the power to acquire by purchase or otherwise sites for such hospitals.[99] The county commissioners of Montana cannot of their own motion acquire property for the erection of a permanent detention hospital.[1] Members of health boards are not liable for negligence in locating in obedience to statute a hospital for contagious diseases,[2] but they have no power to take private property for hospital purposes without proceeding according to statute or obtaining the owner's consent,[3] and are liable for so doing.[4]

dissolution of the injunction, since the commissioner may not require the cementing. Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429. The United States may enjoin the maintenance of a fertilizer manufacturing plant so situated as to affect the health and comfort of patients and attendants in a Federal quarantine hospital. United States v. Luce, 141 F. 385.

89. In an action to suppress a business as offensive under Rev. Laws c. 75, § 91, the order of prohibition must be served upon the occupant or person in charge of the premises; notice by publication or mail is insufficient. Inhabitants of Belmont v. New England Brick Co., 190 Mass. 442, 77 N. E. 504.

90. See 5 C. L. 1643.

91. Act 1891 (Laws 1891, p. 280, c. 35) held not unconstitutional although it provides for the compensation of its secretaries by fees which are not required to be accounted for to or paid into the state treasury. Munk v. Frink [Neb.] 106 N. W. 425.

92. Acts 1904, p. 106, c. 35, construed. Butler County v. Gardner [Ky.] 96 S. W. 582.

93. And the salary fixed is not conclusive but subject to review under Ky. St. 1903, § 978. Butler County v. Gardner [Ky.] 96 S. W. 582.

94. Act 1903 (Acts 1903, p. 72) creating the board held not to confer upon the board or its members capacity to sue. Rules must be enforced by the state. Woodward v. Westmoreland, 124 Ga. 529, 52 S. E. 810.

95. Need not be brought against the municipality. Woodward v. Westmoreland, 124 Ga. 529, 52 S. E. 810.

96. See 5 C. L. 1643.

97. Rev. Laws c. 75, § 42, providing that if a disease dangerous to the public health breaks out in a "town" the board of health shall provide a hospital therefor, is applicable to cities. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

98. Act March 30, 1903 (P. L. 115), entitled "An act amending cl. 22, of § 3, art. 5, of the act of May 23, 1889 (P. L. 290), entitled 'An act providing for the incorporation and government of cities of the third class,' approved 23d day of May, 1889," and authorizing the establishment of hospitals for infectious diseases beyond the city, is sufficient as to title, though it does not expressly give notice of the power to so locate to those who may be affected thereby. City of Allentown v. Wagner, 214 Pa. 210, 63 A. 697. This statute in authorizing the establishment of hospitals within the limits of the city or "within the county adjacent" does not in the use of the word adjacent apply to the site or location of the hospital but to the county in which it and the city are situated. Id. The word "municipalities" as used in Laws 29th Gen. Assem. 1902, p. 68, c. 108; Code Supp. 1902, § 2575, providing that in the case of a controversy between municipalities as to the location of a pest house reference shall be made to the president of the state board of health, etc., includes "townships." Hanson v. Cresco [Iowa] 109 N. W. 1109.

99. Yegen v. Yellowstone County Com'rs [Mont.] 85 P. 740.

1. The title to Laws 1901, p. 80, having reference only to the creation of a state board of health and its powers, held insufficient to include a provision granting the "county commissioners" power to construct detention hospitals. Yegen v. Yellowstone County Com'rs [Mont.] 85 P. 740. Pol. Code § 2864, empowering the county board of health to provide for the temporary detention of persons suffering from a contagious disease, confers no authority on the county commissioners as such though they with a physician constitute the board of health. Id. Pol. Code § 4230, subds. 5-7, 9, authorizing the erection of hospitals for the "indigent" sick, etc., does not authorize the erection of a general detention hospital (Id.), and the phrase "and such other buildings as may be necessary" does not enlarge the purposes for which they may be erected (Id.).

2. Rev. Laws c. 75, § 42. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099. One cannot complain that a hospital for contagious diseases is located too near a dwelling in an adjoining town contrary to Rev. Laws c. 75, § 37, where he lives in the town in which it is located. Id.

3. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099; Sallinger v. Smith [Mass.] 78 N. E. 479. Where after the board has taken possession

Enforcement of health regulations.—A municipality is not civilly liable for injury resulting from the nonenforcement of health regulations.[5] The legislature may provide for the punishment of violation of rules and regulations of the state board of health.[6] In New Jersey the justice court proceeding to recover a penalty for the violation of a health ordinance is a civil action in the court of small causes.[7]

Liability for expenses.[8]—There is no common-law duty upon a county to care for persons afflicted with a contagious disease,[9] and, therefore, a county is liable only when made so by statute.[10] While a county in Kentucky is liable for expenses incurred by a city in maintaining a quarantine for small-pox,[11] it is liable only for lawful expenses[12] actually incurred in preventing the spread of the disease.[13] A board of health is bound to afford to quarantined persons such means of communication as will enable them to obtain supplies,[14] and to furnish necessary supplies,[15] if such persons cannot with reasonable effort obtain the same.[16] A third person furnishing supplies to a quarantined family can recover of the borough only when furnished at the request of one having authority to bind the borough,[17] unless it is subsequently ratified.[18] In Michigan the board of health must

and used private property the owner executes a lease and accepts rent thereunder, consent is given and renders a statutory action unnecessary. Sallinger v. Smith [Mass.] 78 N. E. 479. In an action by the owner for the original occupancy of a building taken for hospital purposes which was subsequently leased, evidence that she did not know when she executed the lease that she was signing away her right to recover for the original occupation and that the house has since been known as the pest house is inadmissible. Id.

4. Encroached upon private premises in maintaining a smallpox hospital. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

5. Failed to enforce ordinance relating to the maintenance of hog-pens and privies. Hull v. Roxboro [N. C.] 55 S. E. 351. Where a citizen fails to prosecute his neighbor for violation of a city ordinance regulating the maintenance of hog-pens and privies and to take steps to abate the nuisance, he cannot complain of the default of the city in enforcing the ordinance. Id.

6. Pierce v. Doolittle [Iowa] 106 N. W. 751. Code § 2573, providing for the punishment of violations of rules and regulations of the state board of health, is not unconstitutional as delegating legislative power to such board to determine what acts shall constitute a punishable offense. Id.

7. Penalty prescribed by Gen. St. p. 1638, § 18. Board of Health of Woodbury v. Cattell [N. J. Law] 64 A. 144. And hence the only matter reviewable by certiorari is lack of jurisdiction, and, in an action for recovery of a penalty for failing to make sewer connections after notice, want of such notice is not a jurisdictional defect but goes to the merits. Id.

8. See 5 C. L. 1643.

9. Martin v. Fond du Lac County, 127 Wis. 586, 106 N. W. 1095.

10. Rev. St. 1898, § 1416, providing that if any person be infected with a dangerous disease the proper board of health shall make provisions for him, etc., imposes the care on the municipality wherein the case arises and § 1512 imposing the care of paupers on the county is inapplicable. Martin v. Fond du Lac County, 127 Wis. 586, 106 N. W. 1095. Code § 2570, providing for the care of infected persons and for the payment of the expenses thereof, does not impose a duty on the county to care for a quarantined person's crop. Beeks v. Dickenson County [Iowa] 108 N. W. 311. And hence the local board of health could create no county liability by promising that the county would care for the crop, since no such duty was imposed by law. Id.

11. The action of the county board of health in diagnosing a case as smallpox and directing a quarantine to be established by a city is conclusive as to the latter and the fiscal court of the county. City of Bardstown v. Nelson County, 28 Ky. L. R. 710, 90 S. W. 246.

12. Not liable for money paid to a councilman for the construction of a guard house, since a contract between a municipality and an officer for city work is illegal and void. City of Bardstown v. Nelson County, 28 Ky. L. R. 710, 90 S. W. 246.

13. City of Bardstown v. Nelson County, 28 Ky. L. R. 710, 90 S. W. 246.

14. Borger v. Alliance Borough, 28 Pa. Super. Ct. 407.

15. The discretion of determining what are reasonably necessary is vested in the board of health (Borger v. Alliance Borough, 28 Pa. Super. Ct. 407), and the court cannot say as a matter of law that the borough is bound to furnish such supplies to all quarantined persons (Id.).

16. Borger v. Alliance Borough, 28 Pa. Super. Ct. 407.

17. Where furnished at the request of an employe of the board of health, it must be shown that the board of health as a body conferred such authority, indefinite remarks by individual members being insufficient. Borger v. Alliance Borough, 28 Pa. Super. Ct. 407.

18. Where a merchant furnishes supplies to several houses and keeps a separate and distinct account, he must show a ratification

furnish or certify an itemized statement of services rendered in the care of contagious diseases,[19] and the supervisors must audit the same[20] before recovery can be had.

Negligence.[21]—Members of boards of health are liable for maintaining hospitals in such manner as to make them a nuisance where the negligence is a misfeasance as distinguished from nonfeasance.[22] Where a discretionary power is conferred upon a board of health,[23] failure to act[24] or a mistake in exercising the power[25] creates no liability in the absence of corrupt motive. In the absence of a statute imposing a liability, a municipality is not liable for the negligence of its officers in executing health regulations, since it occurs in the discharge of a governmental function.[26]

HEARING; HEARSAY; HEIRS, DEVISEES, NEXT OF KIN AND LEGATEES; HERD LAWS, see latest topical index.

HIGHWAYS AND STREETS.[27]

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§ 1. *Definitions and classifications.*[28]—The meaning of the term highway as used in statutes depends largely upon the legislative intent,[29] but in the broad sense

by the board of health as a body of each item. Borger v. Alliance Borough, 25 Pa. Super. Ct. 407.

19. Where a board of health refuses to furnish such statement, mandamus to compel performance is the appropriate remedy and not an action against the municipality. Sawyer v. Manton [Mich.] 13 Det. Leg. N. 470, 108 N. W. 644.

20. By Pub. Acts 1903, p 124, No 101, the provision that the board of health shall audit all fees and charges of persons employed to execute the health laws was amended by the addition of the words "except as hereinafter provided in § 15 thereof with regard to dangerous communicable diseases," and § 15, as amended by Pub. Acts 1903, p. 6, No. 7, provides for auditing by the supervisors. Sawyer v. Manton [Mich.] 13 Det. Leg. N. 470, 108 N. W. 644. But the supervisors cannot pass upon whether the disease was a dangerous, communicable one. Thomas v. Ingham County Sup'rs [Mich.] 12 Det. Leg. N. 731, 105 N. W. 771. Where the board of health submits an account of services rendered with a statement that they were not rendered under an order of the board, it is the supervisor's duty to pass upon the same (Dows v Board of Health of Monroe [Mich.] 13 Det. Leg. N. 741, 109 N. W. 433), notwithstanding a change in the membership of the board of health (Id.).

21. See 5 C. L. 1645.

22. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

23. Comp. Laws § 4424, as amended by Pub. Laws 1903, p. 6, No. 7, leaves it to the board of health to decide whether a nurse

it is any way open to the general public for purposes of travel[30] and includes streets, alleys, etc.[31] It is the right of the public to use the way,[32] and not the size thereof or the number of people using the same which determines its highway character.[33]

§ 2. *Establishment by dedication, prescription, or user.*[34]—Highways may be created by legislative authority, by dedication, or by prescription.[35] In order to create a highway or street by dedication, there must be both[36] an offer with intent to dedicate[37] and an acceptance thereof[38] before withdrawal[39] and within a reason-

should be employed to care for the confined person. Rohn v. Osmun [Mich.] 12 Det. Leg. N. 920, 106 N. W. 697.

24. Failed to provide a nurse. Rohn v. Osmun [Mich.] 12 Det. Leg. N. 920, 106 N. W. 697.

25. Quarantined a family for smallpox when no such case existed, resulting in a loss of crops for lack of care. Beeks v. Dickinson County [Iowa] 108 N. W. 311.

26. Quarantined for smallpox where no case existed. Beeks v. Dickinson County [Iowa] 108 N. W. 311. Furthermore, health officers elected in a township pursuant to a state statute to discharge duties imposed by statute are not strictly county officers. Id.

27. **The scope of this topic,** while broadly including all questions pertinent to the law of highways, excludes that of Dedication (7 C. L. 1098); Easements (7 C. L. 1203); Eminent Domain (7 C. L. 1276); Public Works and Improvements (6 C. L. 1143); and Taxes (6 C. L. 1602).

28. See 5 C. L. 1645.

29. No fixed rule in regard to its meaning can be given. Southern R. Co. v. Combs, 124 Ga. 1004, 53 S. E. 508. The word road in its generic sense means all kinds of ways, whether they be carriageways, driftways, bridleways, or footways, but in the narrower statutory use of the term in Virginia it signifies a turnpike, state road, or county road, and contemplates a suitable way in width and grade for the convenient passage of vehicles, hence there is no authority for proceedings to establish a bridleway "for horseback travel" alone. Terry v. McClung, 104 Va. 599, 52 S. E. 355.

30. Under § 850 Rev. St. 1887, highways are roads, streets, alleys, and bridges, laid out or erected by the public, or, if laid out or erected by others, dedicated or abandoned to the public. Palmer v. Northern Pac. R. Co. [Idaho] 83 P. 947. The term "highway" in its popular sense, is a road or way open to the use of the public. A way open to all the public is a highway. It is not essential that every highway should be a thoroughfare. A road which leads only to the residence of a single individual may be a highway. Southern R. Co. v. Combs, 124 Ga. 1004, 53 S. E. 508.

31. Alleys in the city of Baltimore, obtained by dedication or condemnation, are public highways. City of Baltimore v. Rosenthal, 102 Md. 298, 62 A. 579. An alley, duly dedicated and accepted as such, becomes a public way and abutting premises are invested with an appurtenant easement therein. Schlemmer Co. v. Steinman-Meyer Furniture Co., 7 Ohio C. C. (N. S.) 468.

32. **The private right of individuals to demand a way of necessity** over lands of other individuals confers no right on a municipality to claim such way as a public street. Town of Como v. Pointer [Miss.] 40 So. 260.

33. Johnston v. Lonstorf [Wis.] 107 N. W. 459.

34. See 5 C. L. 1646.

35. Southern R. Co. v. Combs, 124 Ga. 1004, 53 S. E. 508.

36. Intention to dedicate and an acceptance must clearly appear. Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749; Dickerman v. Marion, 122 Ill. App. 154; Falter v. Packard, 219 Ill. 356, 76 N. E. 495.

Facts held to show a dedication and acceptance: Opening and grading of a street pursuant to a petition of the owner. Terrell v. Hart, 28 Ky. L. R. 901, 90 S. W. 963. Intentional building of fences and planting of trees by adjoining landowners so as to leave a space for travel by the public and user by the public for many years. Cassidy v. Sullivan [Neb.] 106 N. W. 1027.

To constitute a valid common-law dedication it is not necessary that the legal title to the streets should have passed by the plat out of the owner. It is sufficient that the owner of the title has clearly manifested an intention to set apart for public use the strip of land and that the public have enjoyed the use in such a manner and for such a time as that the public and private rights will be materially affected by an interruption of that enjoyment. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

37. Intent to dedicate must clearly appear. Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749. Mere use of one's property by a small portion of the public, even for an extended period of time, will not amount to a dedication, unless it clearly appears that there was an intention to dedicate. Id. The intention to dedicate need not be shown by an express declaration to that effect; such intent may be inferred from an acquiescence by the owner in the use of his property by the public. The use must be of such a character as to clearly indicate that the public has accepted the dedication. Id. Determining whether a dedication has been made is a conclusion of fact to be drawn from the circumstances of each particular case, the question being whether there is sufficient evidence of an intention on the part of the owner to dedicate the land to the public as a highway. Terrell v. Hart, 28 Ky. L. R. 901, 90 S. W. 953. Evidence held not to show a dedication. Town of Como v. Pointer [Miss.] 40 So. 260.

38. Watson v. Carver, 27 App. D. C. 555; McLean v. Llewellyn Iron Works [Cal. App.] 89 P. 1082; Fleck v. Collins, 28 Pa. Super. Ct. 113; City of Mobile v. Fowler [Ala.] 41 So. 168. A private contract whereby it is agreed

able time.[40] The dedication may be express[41] or may be implied from acts clearly manifesting an intent to dedicate,[42] and, likewise, there may be a formal acceptance by the proper authorities[43] or it may be implied from their acts.[44] User by the public constitutes an acceptance.[45] To work a statutory dedication all the essential provisions of the statute must be complied with,[46] though an attempted statutory dedication may result in a common-law dedication,[47] or the parties may

that a certain street shall be opened, while it may create a private right of way, cannot create a public street without an acceptance by the public. Fleck v. Collins, 28 Pa. Super. Ct. 443. Although only one-half of a platted street is within the city limits, the city may accept and improve that portion and the township authorities the other (Backman v. Oskaloosa [Iowa] 104 N. W. 347), and a trespasser cannot complain of such acceptance and improvement (Id.). In Virginia a dedication must be accepted by the county court upon its records. Terry v. McClung, 104 Va. 599, 52 S. E. 355.

39. Where platted property is still owned by the dedicators and the streets and alleys have not been thrown open to the public, they may revoke the same (Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21), and such revocation may be accomplished by an abandonment of the scheme under which it was platted (Id.). Where property was platted with the intention of making it a part of the incorporated city and of selling the same, but for 20 years no further steps were taken, the streets having never been thrown open to the public but used with the lots for farming purposes, there is a revocation of offered dedication. Id.

40. Acceptance of a dedication of streets by filing of a plat must be made within a reasonable time or the delay will be deemed an abandonment of an intention to accept. What is a reasonable time depends on the circumstances of each particular case. Burroughs v. Cherokee [Iowa] 109 N. W. 876.

41. Under Code 1873, § 561, the acknowledgment and recording of a plat is equivalent to a deed in fee simple to the municipality of that part set aside for street purposes. Burroughs v. Cherokee [Iowa] 109 N. W. 876. Acceptance by the municipality is necessary, however, to cast on the city the burden of caring for and being responsible for the safety of the highway so dedicated. Id.

42. Where the owner of land plats the same showing streets and alleys thereon and thereafter conveys lots by reference to the plat, he is deemed to have dedicated the streets and alleys to public use (Incorporated Town of Hope v. Shiver [Ark.] 90 S. W. 1003; Weida v. Hanover Tp., 30 Pa. Super. Ct. 424; Garvey v. Harbison-Walker Refractories Co., 213 Pa. 177, 62 A. 778; Flournoy v. Breard, 116 La. 224, 40 So. 684; City of Mobile v. Fowler [Ala.] 41 So. 468; McGourin v. De Funiak Springs [Fla.] 41 So. 541), and such dedication cannot be revoked (Brewer v. Pine Bluff [Ark.] 97 S. W. 1034; In re S. W. State Normal School, 213 Pa. 244, 62 A. 908; Garvey v. Harbison-Walker Refractories Co., 213 Pa. 177, 62 A. 778), as a private right of way exists in favor of the purchasers (Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149). Where property owned by tenants in common is platted and the lots and blocks divided among the tenants, the dedication is as effectual inter se as if sales had been made to third persons. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. The subdivision of land and recording of a map showing streets reserved only for future purchasers is not a sufficient offer of general dedication to the public. McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082. Under Code Iowa, § 916, in platting land the owner thereof where it is divided into blocks which are not subdivided into lots is not bound to lay out and dedicate to the public use alleys through the blocks. Giltner v. City Council of Albia, 128 Iowa, 658, 105 N. W. 194. Where the owner of land plats it showing blocks and streets and files the plat and sells lots with reference to the plat, title to the streets shown by the plat vests in the city. City of Tyler v. Boyette [Tex. Civ. App.] 16 Tex. Ct. Rep. 833, 96 S. W. 935.

The intention to dedicate should be considered in determining the existence and character of a dedication of land to public use. McGourin v. De Funiak Springs [Fla.] 41 So. 541.

43. Fleck v. Collins, 28 Pa. Super. Ct. 443; City of Mobile v. Fowler [Ala.] 41 So. 468.

44. As where work is performed upon or money expended in the improvement of streets dedicated by the owner (Weida v. Hanover Tp., 30 Pa. Super. Ct. 424), or an ordinance is passed providing for the laying of sewers and pipes therein (Burroughs v. Cherokee [Iowa] 109 N. W. 876).

45. Fleck v. Collins, 28 Pa. Super. Ct. 443; City of Mobile v. Fowler [Ala.] 41 So. 468; Weida v. Hanover Tp., 30 Pa. Super. Ct. 424; Cassidy v. Sullivan [Neb.] 106 N. W. 1027. And it is not necessary that such use continue for a time sufficient to create a way by prescription. Brewer v. Pine Bluff [Ark.] 97 S. W. 1034; Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749. A street may be an irrevocable public highway by dedication and general public use without official acceptance by the city. Owner could not restrain laying of gas mains. Palmer v. East River Gas Co., 101 N. Y. S. 347.

46. Watson v. Carver, 27 App. D. C. 555. Where a municipal order requires all public alleys to be 10 feet wide, the admission of record of a plat showing a five foot alley does not constitute an acceptance. Id. Where the statute provides that a plat shall be made and certified in a particular manner, as by the county surveyor, a plat not so made is insufficient to create a statutory dedication. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

47. Where lots have been sold with reference to a recorded plat which is not sufficient to constitute a statutory dedication, a common-law dedication exists. Nelson v.

be estopped to deny the legal existence of the streets.[48] Though a street may never have been so accepted as to give it an official status,[49] or may have lost the same,[50] if used by the public, it may be formally accepted or the acceptance renewed at any time. After a road has been dedicated and accepted, the rights of the public and of the dedicator in respect thereto are determined by principles relating to highways generally.[51] Equity will not enjoin the removal of obstructions wrongfully placed in a dedicated street by the dedicator though the city has not accepted the same in the manner prescribed by statute.[52]

Highway by prescription.[53]—A notorious, exclusive, continuous, and adverse user of a definite way, without substantial change by the general public for the statutory period, creates a highway by prescription[54] of the way actually used.[55] Mere use of land, however, is not sufficient,[56] as among other things it must be adverse[57] as well as continuous.[58] Statutory prescriptive roads arise from the use

Randolph, 222 Ill. 531, 78 N. E. 914. A common-law dedication does not require that there shall be a grantee or some well-defined body politic for whose benefit the dedication is made. The public is an ever-existing grantee, capable of taking dedications for public uses, and its interests are a sufficient consideration to support them. Id.

48. Where after platting land the owner conveys with reference to the streets therein described, both he and his grantees are estopped to deny the legal existence of such streets, although there is not a sufficient statutory dedication. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

49. Though a street used by the public generally may not be official so as to obligate the city to keep it in repair, the city may by formal acceptance or official act make it official at any time. Maintenance of street lamps and granting gas company permission to lay mains held act of acceptance. Palmer v. East River Gas Co., 101 N. Y. S. 347.

50. Though streets may have lost their official status by the city's failure to work them, yet so long as they are used by the public the city may renew its acceptance by official user. Palmer v. East River Gas Co., 101 N. Y. S. 347.

51. The town has a right to dispose of surface water coming onto the road only in such manner as it might in properly maintaining and repairing a public highway. Rudnyai v. Harwinton [Conn.] 63 A. 948.

52. Not accepted by ordinance as required by Kirby's Digest, § 5531, but lots had been sold with reference thereto. Brewer v. Pine Bluff [Ark.] 97 S. W. 1034.

53. See 5 C. L. 1647.

54. Nelson v. Sneed [Neb.] 107 N. W. 255; Kansas City & O. R. Co. v. State [Neb.] 105 N. W. 713; Falter v. Packard, 219 Ill. 356, 76 N. E. 495. 10 years of user. Dow v. Kansas City So. R. Co., 116 Mo. App. 555, 92 S. W. 744. 20 years of user. Healey v. Atlanta, 125 Ga. 736, 54 S. E. 749; Whetstone v. Hill [Iowa] 105 N. W. 193. Used and worked for 20 years. Southern R. Co. v. Combs, 124 Ga. 1004, 53 S. E. 508. Where the public actually used a road as a public highway for the prescriptive period, failure of the county to work the same does not affect prescriptive right. Dow v. Kansas City So. R. Co., 116 Mo. App. 555, 92 S. W. 744. Where the owners of land abutting on an alley have recognized it as an alley and used it as such, and it has been used by them and the public as an alley for over 20 years, this constitutes it an alley by prescription. Milwaukee Boiler Co. v. Wadhams Oil & Grease Co., 126 Wis. 32, 105 N. W. 312. Evidence that a road was laid out in 1889 on plaintiff's land while owned by his predecessors to reach a certain race track, and work was done thereon on various occasions without objection by plaintiff until 1900, the road being used in the meanwhile, held to create a road by prescription and dedication. Haan v. Meester [Iowa] 109 N. W. 211.

Use by public: The prescriptive right is not dependent upon the amount of travel but whether it is open and used by all having an occasion to use it. Dow v. Kansas City So. R. Co., 116 Mo. App. 555, 92 S. W. 744.

55. Where a road created by prescription was only used for one rod on each side of the section line, a decree establishing a road four rods wide is erroneous. Haan v. Meester [Iowa] 109 N. W. 211. Building that had stood for 50 years held monument establishing street line in absence of evidence that land covered by it had been used by public. Lighton v. Syracuse, 48 Misc. 134, 96 N. Y. S. 692.

56. Haan v. Meester [Iowa] 109 N. W. 211; City of McCook v. Parsons [Neb.] 108 N. W. 167; Terry v. McClung, 104 Va. 599, 52 S. E. 355. Although it may constitute prima facie proof of an easement. Falter v. Packard, 219 Ill. 356, 76 N. E. 495.

57. Where the owner of wild and unfenced land allows persons to pass over his land, such use is permissive and not adverse, and where from time to time by fencing, he changes such places of travel to other locations, no presumption of dedication by the owner and acceptance by the public of a highway arises. Potter v. Magruder [Ky.] 97 S. W. 732.

In Virginia: A mere permission to the public by the owner of land to pass over a road upon it is without more a mere license and revocable at the pleasure of the owner. Terry v. McClung, 104 Va. 599, 52 S. E. 355. A finding that a road had been traveled by the public for 14 years and was regarded as a public road, without any showing as to the character of country, whether the road was worked or not, or any notice to the

in the manner and for the time prescribed by the particular statutes.[59] A vacated street may be re-established by prescription.[60] The mere fact that the public uses a road over public lands will not create prescriptive rights therein.[61]

§ 3. *Establishment by statutory proceedings.*[62]—Municipalities[63] and public officials[64] have only such powers relative to the establishment of highways as are conferred upon them by statute. Proceedings commenced before one board may be continued and completed before their successors.[65] In New Jersey highways over public lands can only be laid with the consent of the legislature.[66] A point in a turnpike maintained by a duly incorporated company may be made the terminus of a public road.[67] The repeal of statutes relating to the establishment of highways nullifies proceedings pending thereunder.[68]

Occasion or necessity for road.[69]—A highway can only be established when it will be of public utility,[70] though it need not be an absolute necessity[71] and may

owners of the land than that the public had traveled the road, does not show a road by prescription. Rice v. Pershall, 41 Wash. 73, 82 P. 1038.

58. Dickerman v. Marion, 122 Ill. App. 154. Evidence held insufficient to show such continuous and uninterrupted use as is required to establish a public highway. Falter v. Packard, 219 Ill. 356, 76 N. E. 495.

59. A road constructed by private parties as a logging road and kept in repair by them, across which a gate is maintained, is not a public highway under Rev. St. 1887, § 851, as amended by Sess. Laws 1893, p. 12, providing that all roads used as highways for five years are highways by prescription if worked and kept up at public expense. Palmer v. Northern Pac. R. Co. [Idaho] 83 P. 947. Under Gen. St. 1894, § 1832, a road which has been used and kept in repair and worked continuously for six years or more as a highway is a legal highway although the landowner and the public authorities may have been mistaken as to the true location of a section line which they believed to have been the center of the highway as used. Meyer v. Petersburg [Minn.] 109 N. W. 840. Under § 851, Rev. St. 1887, five years' use of a road or highway constitutes a public highway (Town of Juliaetta v. Smith [Idaho] 85 P. 923), but by the amendment by Sess. Laws 1893, p. 12, it must be worked by the proper authorities during that period to create a highway by prescription (Id.).

60. Though an alley has been legally vacated, its use by the public for 10 years with the knowledge and consent of the city and abutting owners will constitute it a public alley again. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

61. Will be presumed to be permissive, though the federal government by Rev. St. § 2477 provides that the right of way for the construction of highways over public lands not reserved for public use is thereby granted. Cross v. State [Ala.] 41 So. 875.

62. See 5 C. L. 1648. See, also, Eminent Domain, 7 C. L. 1276.

63. Act (P. L. 1889, p. 206) authorizing cities on or near the ocean to lay out a street along the beach is not unconstitutional as a special act regulating the internal affairs of cities. Classification held proper. Johnson v. Ocean City [N. J. Law] 64 A. 987. The word "maintenance" as used in Const. art. 8, § 9, authorizing an additional ad valorem tax and the enactment of local laws for the maintenance of public highways, includes the original construction of the same, and hence Acts 24th Leg. (Laws 1895) p. 213, c. 132, creating a local road system for Dallas county, is valid. Dallas County v. Plowman [Tex.] 14 Tex. Ct. Rep. 848, 91 S. W. 221. And such system being inconsistent with the general road law, it controls as to the method of condemnation and awarding of damages. Id. A petition for the appointment of commissioners to assess damages for the taking of land for a road, describing the land as upon the "Beach" front, shows that the road was between high and low water mark so as to be authorized by P. L. 1889, p. 206. Johnson v. Ocean City [N. J. Law] 64 A. 987.

64. Where commissioners reported in favor of a proposed highway and that the probable cost would be $1,000, the sole highway commissioner of the town was not authorized by Highway Laws 1890, p. 1197, c. 568, § 98, to contract for the construction of such highway at an expense of $6,000 for the payment of which there was no provision in the statute and for which no means had been provided by the town. In re Niland, 99 N. Y. S. 914.

65. Terms of the councilmen and aldermen before whom the proceedings were pending expired before completion. Taintor v. Thurston [Mass.] 78 N. E. 545.

66. Ludlam v. Swain [N. J. Law] 62 A. 192. A taxpayer can object, in certiorari proceedings to review the action of the public officers in laying out a road which is to traverse state lands, that the consent of the legislature has not been obtained. Id.

67. Derry Township Road, 30 Pa. Super. Ct. 538. The fact that a turnpike company may be put to the extra expense of maintaining new toll gates does not prevent the public from opening new public roads into the turnpike. Id.

68. Unless there is a saving clause. Terry v. McClung, 104 Va. 599, 52 S. E. 355.

69. See 5 C. L. 1648.

70. Which must be determined by a tribunal acting officially. Aspinwall v. Boston, 191 Mass. 441, 78 N. E. 103. Where an order recited that public convenience and necessity required the laying out of a street, and hearings after notice were had by the council

even be designed principally to accommodate one who has no other access.[72] In Pennsylvania the determination of this question lies with the viewers[78] subject to review de novo by the court of quarter sessions.[74]

Application or petition.[75]—Where the application or petition is jurisdictional, it must substantially comply with the statute,[76] but the fact that it was inadvertently addressed to the wrong court is not fatal where it was filed in the proper court and all proceedings thereunder were had in such court.[77] In some states a denied application cannot be renewed within a prescribed period.[78]

Jurisdiction and notice.[79]—A petition, conforming to the statute,[80] is a prerequisite to jurisdiction,[81] unless the authorities may act of their own initiative.[82] In Washington personal service may be made on defendants out of the state in proceedings for condemnation of property for street purposes.[83] Where jurisdiction has been acquired, all subsequent proceedings are presumed to have been done in a lawful manner,[84] especially upon collateral attack.[85]

on the application, its adoption of the order for laying out the street is an adjudication of the necessity. Taintor v. Thurston [Mass.] 78 N. E. 545. An order of commissioners of highway in laying out and ordering a new highway, not based on considerations beneficial to the public, but on the other hand based on considerations of benefit or convenience to individuals, is invalid and will not be enforced. State v. Ryan, 127 Wis. 599, 106 N. W. 1093. A unilateral contract offering a city favorable terms as to land damages, as an inducement for the laying out of the street, may be considered by the board charged with the duty of laying out the street and may be accepted and made binding by performance of that which is referred to therein as the consideration. Aspinwall v. Boston, 191 Mass. 441, 78 N. E. 103.

71. Reasonable necessity is sufficient. State v. Superior Ct. of Pierce County [Wash.] 87 P. 521. Evidence that city had used a portion of land adjoining proposed alley held properly excluded. Id.

72. Under § 6044, Gen. St. 1901, a road may be legally established by the board of county commissioners if the proceedings prescribed for the establishment of highways generally are followed, and such road is established as a public highway. Board of Com'rs of Johnson County v. Minnear, 72 Kan. 326, 83 P. 828.

73. Where the report states unequivocally that the proposed road is necessary, a recital therein of an offer by a certain company to construct it without cost raises no presumption that they were thereby influenced to report favorably. East Whiteland Tp. Road, 30 Pa. Super. Ct. 211. Such offer being a proper element of consideration when the report came up for confirmation, it was not a fatal error to include it in the report. Id.

74. The determination of the necessity of a public road in Pennsylvania rests within the discretion of the court of quarter sessions and will not be reversed unless there is an abuse of discretion. Derry Township Road, 30 Pa. Super. Ct. 538.

75. See 5 C. L. 1648.

76. State v. Clyde Sup'rs [Wis.] 109 N. W. 985.

Description of road: The mere fact that the word privats is used in the petition and other proceedings to describe a road established under § 6044, Gen. St. 1901, authorizing the laying out of a road 16½ feet wide on petition of one whose land is completely surrounded by other lands so that he has no access to any public highway, does not affect the validity of the road. Board of Com'rs of Johnson County v. Minnear, 72 Kan. 326, 83 P. 828.

77. Addressed to the court of common pleas instead of to the quarter sessions. Union Township Road, 29 Pa. Super. Ct. 573.

78. Rev. St. 1898, § 1283, providing that an application to lay out a highway shall not be made where a previous application made within twelve months next preceding such application has been denied, has no application when the previous application was not a valid one, i. e., one on which a legal highway could be laid out. State v. Clyde Sup'rs [Wis.] 109 N. W. 985.

79. See 5 C. L. 1649.

80. Number of petitioners: Under Gen. Laws 1897, c. 199, authorizing the county commissioners to establish a highway on petition of 24 freeholders, the commissioners have no jurisdiction to lay out a highway on a petition signed by less than the number specified in the statutes. Johnson v. Clontarf [Minn.] 108 N. W. 521.

81. Under Acts 1903, c. 145, the presentation of a petition praying for the improvement and proof of posting of notice of the application substantially as required by the statute is a prerequisite to the jurisdiction of the board of commissioners to appoint viewers to lay out the road petitioned for in case they are of the opinion it will serve the public. Todd v. Crail [Ind.] 77 N. E. 402.

82. The jurisdiction of the council in a city of the fourth class is not affected by the fact that a petition for the establishment of an alley is not signed by a majority of the property owners in the district since the city has authority to open alleys and streets for public use on its own initiative without any petition. State v. Superior Ct. of Pierce County [Wash.] 87 P. 521.

83. Laws 1905, c. 55, § 5, providing for service of process as in civil actions, and Ballinger's Ann. Codes & St. § 4875, authoriz-

A notice complying substantially with the statute,[86] and duly posted in the manner prescribed,[87] is necessary to give jurisdiction. One who has actual notice of proceedings to lay out a highway across his lands may waive the formal notice.[88] A recital in a decree of a board of commissioners establishing a highway that notices were duly posted is not conclusive in a direct attack.[89]

Viewing, locating, and assessing, or recovery of damages.[90]—The viewing, locating, and assessing of damages must be by the persons designated by statute,[91] and where it is to be done by a specific number, they must all meet and deliberate, though a majority may decide.[92] In Pennsylvania the viewing commissioners need not be especially sworn,[93] and where viewers appointed at one term fail to act, they may be reappointed at the next term under the same petition.[94] The highway laid out must be definite[95] and must conform substantially to that described in the petition, order, and notice,[96] and in Texas it must be described by metes and bounds in their report.[97] The report of viewers must be confirmed or approved in the manner prescribed,[98] but in Pennsylvania, where the court has the report and exceptions thereto in its hands, it need not mark the case continued to carry the same over to succeeding terms.[99] The return of surveyors appointed to lay out a highway is a judicial record and not subject to collateral attack.[1] Where, after an

ing such service in civil actions. State v. Superior Court for Whatcom County, 42 Wash. 521, 85 P. 256.

84. Bigelow v. Ritter [Iowa] 108 N. W. 218.

85. Where the board of commissioners are authorized to lay out new or improve existing highways on presentation of a petition and notice of the application, it will be presumed, on collateral attack, that all the prerequisite facts essential to the doing of the acts were complied with. Todd v. Crail [Ind.] 77 N. E. 402.

86. In statutory proceedings for laying out a highway a notice is jurisdictional and must substantially comply with the statute in order to authorize action by the supervisors. State v. Clyde Sup'rs [Wis.] 109 N. W. 985.

87. Where not so posted absence of fraud or presence of **actual notice** to complainant does not give validity to the proceedings. Williams v. Routt County Com'rs [Colo.] 84 P. 1109. A notice posted a mile from the proposed highway is not a sufficient compliance with Mills' Ann. St. § 3934, requiring the **posting** of notices **"along" a road proposed** to be established (Id.), and the fact that it was in one of the "most public places" is of no avail as it must be in the **"most public places along"** the road, i. e., both must concur (Id.).

88. As by acquiescing in such proceedings. Young v. Milan, 73 N. H. 552, 64 A. 16.

89. Williams v. Routt County Com'rs [Colo] 84 P. 1109. In an action to enjoin the obstruction of a public road, an answer attacking the legality and validity of the proceedings establishing such road is a direct attack on the judgment of the commissioners. Id.

90. See 5 C. L. 1650.

91. The Act of Mar. 24th, 1892 (P. L. p. 255), providing for permanent commissioners of assessment in cities of the first class, applies to an assessment of damages for taking of land for street purposes in the city of Newark and is not rendered inapplicable to that city by the passage of the general condemnation act of 1900 (P. L. p. 79), the charter of Newark bringing that city within the exception contained in the 17th section of Act of 1902. Morris v. Newark [N. J. Law] 62 A. 1005.

92. One of the three viewers was absent. Pike Township Road, 30 Pa. Super. Ct. 644. Rev. Laws c. 48, § 94, does not require that a "view" of a proposed street should be made by the entire membership of a council; a view by the street committee is sufficient. Taintor v. Thurston [Mass.] 78 N. E. 545. The fact that only two viewers signed the report is not a ground for setting aside the proceedings three years after the final confirmation, especially where the objectors had notice of the defect during such time. Union Township Road, 29 Pa. Super. Ct. 573.

93. Under Act of March 30, 1846, P. L. 199, the general oath of office is sufficient. Pike Township Road, 30 Pa. Super. Ct. 644.

94. Union Township Road, 29 Pa. Super. Ct. 573.

95. Location of termini held not so indefinite as to authorize the setting aside of the proceedings, especially in view of the fact that it had been opened and used for years by the public. Union Township Road, 29 Pa. Super. Ct. 573.

96. A substantial variance is fatal. Ludlam v. Swain [N. J. Law] 62 A. 192. Where the report of road viewers locates the terminus 142 feet from the terminus designated in the petition and order, it must be set aside. Union Tp. Road, 29 Pa. Super. Ct. 179.

97. Isham v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 698, 92 S. W. 808.

98. Order of county court "approving" report of viewers in proceedings to establish a county road held compliance with Laws 1903, p. 262, § 11, requiring report to be "adopted." Miller v. Union County [Or.] 86 P. 3.

99. Act of June 13, 1836, P. L. 551, § 3,

ordinance had laid out a street some of the owners dedicated the land taken, it is not necessary that the order appointing commissioners to assess damages particularly describe the land remaining to be assessed.[2] In North Carolina the township trustees and the county commissioners are entitled to notice of proceedings to assess damages.[3] In Oregon damages may be finally determined before the road is declared a public highway.[4] The usual rules of evidence apply in the assessment of damages.[5]

The order locating a road.[6]—An order locating a road will be deemed sufficient upon collateral attack if its meaning and purpose is ascertainable by aid of the records, though it is technically inaccurate.[7] While the order must be by a lawfully constituted board, the fact that the supervisors of adjoining towns met together upon the site of a continuous road does not invalidate an order establishing the same made thereafter through separate action.[8] In Wisconsin the supervisors may vary the route petitioned for if the change does not create a materially different route.[9] In Washington cities of the fourth class may establish alleys upon motion without a formal ordinance or resolution.[10] An order of the court of common pleas of New Jersey establishing a highway is not open to collateral attack.[11]

Discontinuance and dismissal.[12] *Taking and compensation.*[13]—The general principles of eminent domain and the cases illustrating the same are elsewhere treated.[14] Since private property cannot be taken except for public use, the purposed highway must be for the public.[15] The proceeding for condemnation of land for highway purposes is frequently prescribed by statute[16] and must conform there-

is only applicable when the viewers fail to report. Barr Tp. Road, 29 Pa. Super. Ct. 203.

1. Central R. Co. v. Seabright [N. J. Err. & App.] 64 A. 131.

2. Johnson v. Ocean City [N. J. Law] 64 A. 987.

3. In a proceeding under Laws 1901, c. 50, § 5, as amended by Laws 1905, c. 770, § 1, to assess the damages of a landowner whose land has been taken for road purposes, the township trustees and county commissioners are entitled to notice of the proceedings, though not specifically required by the statute, since otherwise it would not be due process. In re Wittkowsky's Land [N. C.] 55 S. E. 617.

4. County court may, before such time, adopt report of viewers as to damages and time within which to appeal runs from time of such adoption. Miller v. Union County [Or.] 86 P. 3.

5. Opinion evidence as to the damage resulting to plaintiff's farm from the establishment of a road, is incompetent. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329. See Damages, 7 C. L. 1029; Eminent Domain, 7 C. L. 1276.

6. See 5 C. L. 1651.

7. Todd v. Crail [Ind.] 77 N. E. 402.

8. State v. Clyde Sup'rs [Wis.] 109 N. W. 985.

9. And in the absence of a showing to the contrary it will be presumed that the variation was reasonable and required by public interest. State v. Clyde Sup'rs [Wis.] 109 N. W. 985.

10. Under 1 Ballinger's Ann. Codes & St. § 1011, granting cities of the fourth class power to establish alleys, no formal ordinance or resolution is necessary, a motion amounting to a resolution being sufficient. State v. Superior Ct. of Pierce County [Wash.] 87 P. 521.

11. That there were other roads crossing a railroad track and parallel therewith within the distance prohibited by statute, and hence equity will enjoin the railroad from fencing up such road so established. Central R. Co. v. Seabright [N. J. Err. & App.] 64 A. 131.

12, 13. See 5 C. L. 1651.

14. See Eminent Domain, 7 C. L. 1276.

15. The common council cannot create a street for the especial benefit of a given number of people, and no use of it can be granted inconsistent with the use of the general public (In re Twenty-First St. [Mo.] 96 S. W. 201), and hence it cannot take land for the establishment of a street to be used by a railroad to the exclusion of the public (Id.), and evidence is admissible in the condemnation proceedings to show such real purpose (Id.). The taking of property for a public street is for a public use though the street ends in a cul-de-sac on either side of property belonging to the city. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256.

16. Laws 1893, p. 135, c. 62, providing for the procedure in condemnation proceedings by cities of the fourth class is not an amendment of 1 Ballinger's Ann. Codes & St. § 1017, and so is not unconstitutional for failure to set out the section as it would read as amended. State v. Superior Ct. of Pierce County [Wash.] 87 P. 521. Laws 1893, p. 135, c. 62, empowering cities to condemn property for corporate uses includes streets or alleys as well as property to be used by the corporation itself. Id.

to.[17] Such statutes must afford due process of law[18] and provide a tribunal for the assessment of damages, though not necessarily a jury.[19] As a rule the land may be taken before payment,[20] but where it cannot be so taken, the property owner cannot complain that the municipality is exceeding its debt limit.[21] The Federal grant of a right of way for public roads along all section lines of lands of the United States not reserved for public use[22] became effective in the different states as of the date of the grant upon its acceptance by the legislatures.[23] It did not apply to odd numbered sections which had previously been granted to railroad companies[24] but only to even numbered ones if not reserved for public use and no homestead or preemption rights had attached thereto.[25] In Texas presentment of claim to the commissioners' court for allowance is a condition precedent to the right to sue the county,[26] which presentment may be made any time after a definite intent to appropriate has been manifested.[27] In some states benefits are deducted from the assessed damages.[28] Right to damages may be waived by the parties entitled thereto.[29] The general rules of pleading[30] and evidence[31] apply.

17. City of Durham v. Rigsbee [N. C.] 53 S. E. 531. A complaint in an action to condemn land for a highway which shows that a hearing was had upon notice, that owner was present, that the report of the viewers was adopted and damages awarded, that the auditor was ordered to and did set apart the amount and draw his warrant on the same, and that the owner refused to accept the same, is sufficient under Pol. Code §§ 2688, 2689, and Code Civ. Proc. § 1963, subds. 15-20. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

18. A charter provision requiring the appointment of appraisers, one of whom is to be appointed by the owner of the land to be taken for street purposes, sufficiently provides for notice of the proceedings to fix compensation, the landowner being entitled to an appeal to the courts from the decision of the appraisers. State v. Jones, 139 N. C. 613, 52 S. E. 240.

19. State v. Jones, 139 N. C. 613, 52 S. E. 240.

20. Act (P. L. 1889, p. 206) held not unconstitutional for allowing the land to be first taken. Johnson v. Ocean City [N. J. Law] 64 A. 987. Where a city has appropriated land for a street under its power of eminent domain and initiated proceedings which will result in the awarding and determining of the owner's compensation, it may take possession of the land without awaiting the payment of damages. State v. Jones, 139 N. C. 613, 52 S. E. 240.

21. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256. And, moreover, where the ordinance providing for the street authorized a benefit assessment and the city took a penal bond from interested property owners conditioned to hold the city harmless from any debt, there could be no violation of the constitutional debt limit. Id.

22. Act Cong. July 26, 1866, c. 262, § 8 (14 Stat. 233; U. S. Rev. St. § 2477 [U. S. Comp. St. 1901, p. 1567]). Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

23. In Russell county, Kansas, upon passage of Laws 1873, p. 55, c. 22, declaring all section lines in that county public roads. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

24. Plaintiff could have damages for land taken for road. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

25. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

26. Rev. St. 1895, art. 790. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329. Presentation of a claim for $1,000 and two stock gaps is insufficient where the petition for $1,960 was composed of various enumerated items. Id.

27. Rev. St. 1895, art. 790, does not require that the claim be presented only after an actual appropriation. Bell County v. Flint [Tex. Civ. App.] 14 Tex. Ct. Rep. 256, 91 S. W. 329.

28. Act (P. L. 1889, p. 206) authorizing a deduction for benefits in assessing damages for the taking of land for street purposes is constitutional. Johnson v. Ocean City [N. J. Law] 64 A. 987.

29. Where the owners of land over which it is proposed to establish a highway agree to donate the land for the purpose and waive their claim for damage if the county would establish the road, they cannot thereafter claim the county commissioner's court had no jurisdiction to open and establish the road because of its failure to comply with statutory requirements and sue for damages for taking their land. Patterson v. Hill County [Tex. Civ. App.] 16 Tex. Ct. Rep. 182, 95 S. W. 39.

30. In a proceeding to condemn land for a public road, a denial upon want of information and belief, touching the report of the reviewers, the notice of hearing, etc., is insufficient as the means of ascertaining the truth of these matters is within defendant's reach. Mendocino County v. Peters [Cal. App.] 82 P. 1122.

31. In proceedings to condemn land for road purposes the auditor's warrant is admissible under Code Civ. Proc. § 1870, subd. 1, to show offer of payment of reviewer's reward. Mendocino County v. Peters [Cal. App.] 82 P. 1122. In a proceeding to condemn land for street purposes, the petition to the board of supervisors praying for the

Appeal or other review.[32]—By statute in most states an appeal from final orders[33] in highway proceedings[34] is allowed the parties thereto[35] if a sufficient bond is given[36] and the appeal is timely taken.[37] Appeals from the action of the county commissioners in establishing or altering highways in North Carolina are controlled by rules relating to appeals from justice's court.[38] In some states a review is allowed only in particular cases.[39] The matters reviewable depend on the nature of the review, not on what it is called.[40] New issues, however, cannot be raised on appeal.[41] A record statement of a fact found by the judge controls the "case" of counsel in conflict therewith.[42] Exceptions are not necessary where the sole purpose of the appeal is to submit the question of damages to a jury.[43] Where one appealing from an award of damages made by the county commissioners files an unnecessary petition, he is bound by the facts alleged therein.[44] Rules relating to the assignment of errors must be complied with.[45] The power given to the court

alteration and the report thereon are admissible as primary evidence under Code Civ. Proc. § 1829, as the best evidence. Id.

32. See 5 C. L. 1652.

33. An order in a proceeding under Act May 24, 1878 (P. L. 129), giving the petitioner and borough authorities the right to apply to the court for the appointment of viewers to assess petitioner's damages if they fail to agree upon the viewers, is an interlocutory order from which no appeal can be taken. Washington St., 30 Pa. Super. Ct. 542.

34. In North Carolina a right of appeal exists on the part of a landowner from an order laying out a "cart way." Cook v. Vickers [N. C.] 53 S. E. 740.

35. One who in proceedings to establish a highway files a claim for damages and asks for the appointment of commissioners to assess the same may appeal from the assessment of damages but not from the order establishing the highway. A notice of appeal held to be a notice of appeal from the assessment of damages. In re Dugan, 129 Iowa, 241, 105 N. W. 514.

36. Bond required by Ann. Code 1892, § 3896, on appeal from assessment of damages for land taken by board of supervisors for a highway, held void where not filed until after adjournment of the board and where it had not been approved by the president of the board nor been made payable to the county as required by the statute. Evans v. Sharkey County [Miss.] 42 So. 173.

37. In proceedings to establish a county highway under Laws 1903, p. 262, § 11, an appeal from an award of damages to a landowner must be made within 20 days from the time the report of the viewers is approved by the county court as to the damages, and an appeal within 20 days after order declaring the road a public highway may be too late. Miller v. Union County [Or.] 86 P. 3. Under Acts 1901, p. 175, c. 28, § 2, an appeal under Code § 2039 should be taken and returned to the next term of the superior court, though it is a criminal term. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804.

38. Under Code § 2039 providing that such appeals shall be taken "as provided in other cases of appeal," the rules of appeal from justices' court will control as being the most analogous. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804. Hence appellant must put the clerk under obligation to send up the proceedings by a tender of the transcript fees (Id.), and under Act 1889, p. 423, c. 443, if not timely brought up, the appellee may docket the case and dismiss the appeal. (Id.), which is equivalent to an affirmance, but the court need not go into the merits (Id.).

39. In Colorado appeal lies only from the assessment of damages and neither appeal nor certiorari will reach irregularities which are negatived by the record, as the lack of notice recited to have been given. Williams v. Routt County Com'rs [Colo.] 84 P. 1109. Act of April 13, 1868, P. L. 1004, is broad enough to permit an appeal where the local commissioners of Bradford county have "refused to vacate an old road." Pike Township Road, 30 Pa. Super. Ct. 644.

40. An appeal under Act of June 2, 1887, P. L. 306. from the overruling of exceptions to the report of the jury of reviewers, all bearing upon the propriety of condemning a turnpike, is in fact a certiorari and only the regularity of the proceedings below can be reviewed. Morrison's Cove Turnpike Road, 30 Pa. Super. Ct. 51.

41. Where commissioners appointed by a county court to lay out a highway report to the court and thereafter are allowed to amend their report, landowners who have been awarded damages by such commissioners, after appealing from the award of damages to the circuit court, cannot for the first time on appeal from the circuit court raise the objection that some of the commissioners were not appointed by the county court. Chamberlaine v. Hignite [Ky.] 97 S. W. 396.

42. Held to show that the motion to dismiss the cass was made after the dismissal of the appeal from the county commissioners altering a public road. Blair v. Coakley, 136 N. C. 405, 48 S. E. 804. Hence motion was too late. Id.

43. Under Ann. Code 1892, § 3896, providing for an appeal from proceedings of the board of supervisors in laying out roads, a bill of exceptions is required only when it is sought to review matters of law arising on the face of the proceedings. Evans v. Sharkey County [Miss.] 42 So. 173.

44. Though by reason of its former action the board of commissioners could not plead such facts as a defense. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

of common pleas to set aside road proceedings "in whole or in part" does not authorize it to confirm a part dependent upon the part rejected.[46] In Pennsylvania a city vacating a newly opened street pending an appeal by an abutting owner from the award of damages is liable for the costs incurred in the quarter sessions and in the court of common pleas.[47]

Injunction and other relief.[48]—At the instance of the owner equity will enjoin the establishment of a highway over uncondemned lands[49] or vacate irregular proceedings if the complainant acts timely.[50]

§ 4. *Boundaries and extent of way, ascertainment and resurvey.*[51]—Where a railway takes a public highway for a right of way under the Pennsylvania statute and substitutes another therefor, it is bound to furnish one of equal width.[52] In resurveying and replatting the road districts under its jurisdiction the fiscal court has power to let the work to the lowest bidder and is not bound to employ the county surveyor.[53]

§ 5. *Alterations and extensions.*[54]—In the absence of constitutional restrictions the legislature may delegate to municipalities power to change and alter streets,[55] but they have only such powers as are expressly conferred or which may be fairly and reasonably implied from powers expressly granted.[56] The advisability of widening a city street is one exclusively for the determination of the city council to which it is confided[57] and is the exercise of political power.[58] A petition for an alteration of an existing road must state the desired change.[59] The New York statutory notice to the highway commissioner of application for a commission to determine the necessity of a proposed change may be waived.[60] A city is liable for the damages resulting from a widening of a street.[61]

45. An assignment that "the court erred in dismissing the exceptions and confirming the report of reviewers" violates rule 14 requiring that each error be separately assigned, there being nine exceptions below. Barr Tp. Road, 29 Pa. Super. Ct. 203.

46. Where the purpose was to vacate an existing road and to open a more convenient one, it is error to set aside that portion of the report vacating the old road and confirming the opening of a new one, especially where it is not probable that the reviewers would have opened a new road unless the old one was vacated. Pike Township Road, 30 Pa. Super. Ct. 644.

47. Sensenig v. Lancaster County, 30 Pa. Super. Ct. 224.

48. See 5 C. L. 1653.

49. McGourin v. De Funiak Springs [Fla.] 41 So. 541; Johnson v. Clontarf [Minn.] 108 N. W. 521.

50. A party objecting at all times to the establishment of a road under proceedings of a county board is not guilty of laches precluding her from having the proceedings vacated in equity. Williams v. Routt County Com'rs [Colo.] 84 P. 1109.

51. See 5 C. L. 1653.

52. Taken under Act Feb. 19, 1849. And if it has no title to land within the boundaries of such new road of such width, an injunction will lie at the suit of the state to enjoin encroachments thereon by the railroad. Commonwealth v. Delaware, L. & W. R. Co. [Pa.] 64 A. 417.

53. Kennedy v. Kenton County, 28 Ky. L. R. 927, 90 S. W. 969.

54. See 5 C. L. 1654.

55. And even to obstruct or vacate. Patton v. Rome [Ga.] 52 S. E. 742.

56. Walter v. Macfarland, 27 App. D. C. 182. The power to make regulations for keeping the streets in repair conferred by § 77, D. C. Rev. St., does not imply the power to change the width of an established street (Id.), and the fact that the power has been exercised without challenge will not prevent its denial when challenged (Id.). Section 225, D. C. Rev. St., seems to indicate an intention of congress that streets in the city of Washington shall be at least 35 feet wide, thus limiting the municipal authorities in narrowing streets. Id. Where the charter of a city gives it power "to open, lay out, widen, straighten, or to otherwise change streets," the city has power to diminish the area of a street, especially where so doing will tend to straighten the street and to sell the land so withdrawn from use for street purposes. Patton v. Rome [Ga.] 52 S. E. 742.

57, 58. City of Durham v. Rigsbee [N. C.] 53 S. E. 531.

59. Where the purpose and intent can be gathered from the language used, it is sufficient though not clearly stated. Wisner v. Barber County Com'rs [Kan.] 85 P. 288.

60. The highway commissioner may waive the five days' notice of application for commission to determine the necessity of proposed highway alterations required by Highway Law § 813 (Laws 1890, p. 1193, c. 568, as amended by Laws 1894, p. 256, c. 334, and Laws 1897, p. 259, c. 344, § 1) by appearing in the proceedings without objection. In re Wood, 111 App. Div. 781, 97 N. Y. S. 871.

In Missouri no appeal can be taken from an order of the county court changing the course of a highway by persons whose lands have not been taken.[62]

§ 6. *Change of grade.*[63]—A municipality has only such power to change an established grade as the legislature has conferred upon it,[64] and where authority is given to change to the full width,[65] it is not exhausted by a partial exercise.[66] A change of grade must be reasonable[67] and made in the manner prescribed by law.[68]

At common law municipal corporations are not liable to abutting owners for consequential damages arising from a change of grade,[69] but under the constitutions[70] and statutes[71] of most states recovery can be had for the impairment or destruction of the means of ingress and egress,[72] the diminution of the value of the abutting property,[73] and damage to the buildings thereon,[74] if not waived,[75] but not for the temporary inconvenience experienced during the progress of the work.[76] No recovery, however, can be had for the physical change in bringing a street to the established grade,[77] and in some states municipalities may establish

61. Evidence in an action by a life tenant for damages occasioned by the taking of a part of the land in which he had such estate for widening the street held to justify a verdict that he had not been damaged, it appearing that the improvement increased the rental value. Himes v. Pittsburg, 213 Pa. 362, 63 A. 126.

62. Howe v. Callaway [Mo. App.] 95 S. W. 974.

63. See 5 C. L. 1655. Whether change of grade is a taking for public use, see Eminent Domain, 7 C. L. 1276.

64. The word "alter" as used in Attica City Charter, tit. 6, § 1, as amended by Laws 1890, p. 1006, c. 560, does not include a change of grade. Rogers v. Attica, 98 N. Y. S. 665.

65. The construction of a state statute by the highest court of the state as a legislative change of the grade of a street for the full width is conclusive on the federal court in passing on the question whether it impairs the obligation of a contract. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. 413.

66. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. 413.

67. An order of the board of railroad commissioners for a change of a highway crossing a railroad at grade to an undercrossing, which would render the highway impassable for considerable portions of the year on account of overflow, and the only relief afforded would be a proposed grade crossing maintained by the railroad, which it would permit the public to use at its will, is improper. In re Delaware, L. & W. R. Co., 101 N. Y. S. 9.

68. Where several ordinances had been passed establishing the grade of a certain street but no change in fact had been made upon the surface of the ground and an abutting owner had incurred no expense in improving the property with reference to the grade, the fact that the grade was re-established and improved without a petition of abutting owners as required by the city's charter (Laws 1896, p. 974, c. 747, § 148), in case of a change of an "established grade," did not invalidate an assessment against the owner first mentioned. People v. Common Council of Kingston, 99 N. Y. S. 657.

69. Swift & Co. v. Newport News, 58 Va. 119, 52 S. E. 821.

70. Under Va. Const. art. 1, § 6, and art. 4, § 58 (Va. Code 1904, pp. ccix, ccxxii), prohibiting the "taking or damaging" of private property for public use, compensation must be made (Swift & Co. v. Newport News [Va.] 52 S. E. 821), but under S. C. Const. art. 1, § 23, merely prohibiting the "taking," it need not be made (Kendall v. City Council of Columbia [S. C.] 54 S. E. 777).

71. N. J. Road Act of March 27, 1874, §§ 70, 72, 73, 74, and 75, as amended by Act May 8, 1905, awarding damages to unimproved property, does not apply to cities whose charters provide for assessing and paying compensations to persons injured by change of grades in streets. Manufacturers' Land & Improvement Co. v. Camden [N. J. Law] 63 A. 5.

72. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103. The construction of an approach to a bridge in front of plaintiff's property so as to shut off access thereto by driving, the approach being an embankment which is above the level of plaintiff's lot and the original grade, is a taking of private property for public use entitling the plaintiff to compensation. Ranson v. Sault Ste. Marie [Mich.] 13 Det. Leg. N. 113, 107 N. W. 439.

73. City of Louisville v. Caron, 28 Ky. L. R. 844, 90 S. W. 604.

74. The measure of damages for injury to a building resulting from a change of grade is limited to the damage done to the building by the change, under New York Charter, Laws 1901, p. 411, c. 466, § 980, providing that the commissioners of estimate and assessment shall make an equitable estimate of the damage to buildings not required to be taken. In re Vyse St., 95 N. Y. S. 893. Improvements on abutting property are not necessarily damaged in the same proportion as the property itself by a change of grade. Spokane Traction Co. v. Granath, 42 Wash. 506, 85 P. 261.

75. A petition by an abutting property owner to have the street paved does not constitute a waiver of damages resulting from a change of grade. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

76. Under Shannon's Code § 1988, no recovery can be had for such inconvenience. Acker v. Knoxville [Tenn.] 96 S. W. 973.

77. Unless done negligently. Leiper v. Denver [Colo.] 85 P. 849. Though a street has been open and used for many years and property owners have built thereon with reference to

paper grades of which abutting owners must take notice,[78] but this right does not in Pennsylvania extend to turnpike companies.[79] Municipalities are not liable for unauthorized changes.[80] The law existing at the time the change is actually made controls and not that in force when the change is ordered.[81] A statute awarding damages in force when property is conveyed to a village for street purposes becomes a part of the contract and is not subject to legislative change,[82] and when the village becomes an incorporated city and assumes the obligations of the former, it is bound thereby.[83] In some states a claim for damages must be timely presented to the appropriate officers.[84] In valid proceedings[85] for a change of grade one has no remedy for injuries sustained except that provided by the statute under which the proceedings are conducted.[86] The measure of damages is the difference in the value of the property before and after the change[87] less special benefits,[88] and in

the natural grade, where it appears that the change was a reasonable one. Taber v. Bowling Green, 7 Ohio C. C. (N. S.) 385. Where a street of a particular grade is dedicated but not actually opened, though accepted and the abutting property is sold, after which the street is opened at a new grade, the purchaser can recover only damages for the change of grade, not for the entire grade made. Uhle v. Philadelphia, 30 Pa. Super. Ct. 480. Where a sixty foot road had been established at a particular grade and a turnpike company establishes a forty-foot road at a lower grade, the establishment of such grade does not change the grade of the lateral ten-foot strips so as to relieve the borough from liability when it reduces to the level of the turnpike. Harp v. Glenolden Borough, 28 Pa. Super. Ct. 116.

78. Under Laws 1890, p. 965, c. 545, as amended by Laws 1893, p. 929, c. 443, maps showing a proposed change of grade of a street are binding upon the property owners when filed and damages cannot be awarded for parcels of land on which buildings are constructed after the filing, though at the time of such filing complete maps had not been filed. In re Vyse St., 95 N. Y. S. 893.

79. Hence the establishment of a particular paper grade by a turnpike company does not relieve the borough from damages for cutting down the rest of the highway to such grade. Harp v. Glenolden Borough, 28 Pa. Super. Ct. 116.

80. Where a street commissioner without lawful authorization by the city changes the grade of a street to the injury of an abutting owner, the latter cannot recover against the city but only against the commissioner. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115. In Missouri cities of the second class are not liable for unauthorized acts of one with whom it has contracted for the grading of one of its streets, hence, where a contractor in grading a street appropriates land not described in the ordinance directing the improvement, the city is not liable, though the contractor is liable for the damages. Calvert v. St. Joseph, 118 Mo. App. 503, 95 S. W. 308.

81. Change in the constitution allowing damages. Swift & Co. v. Newport News [Va.] 52 S. E. 821.

82, 83. Lawton v. New Rochelle, 51 Misc. 184, 100 N. Y. S. 771.

84. The presentation of a claim for damages on account of a change of grade, as required by Rev. St. § 2315, as it stood at the time the improvement in this case was made, is a prerequisite to the right to recover damages because of such change. Taber v. Bowling Green, 7 Ohio C. C. (N. S.) 385. Fulton City Charter, Laws 1902, p. 166, c. 63, § 63, subd. 3, requiring claims for damages from a change of grade to be presented to the board of public works within 60 days after the change of grade is completed, does not apply where the damage is a continuing nuisance recurring whenever there are heavy rains. Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703. Laws 1902, p. 219, c. 63, § 230, providing that no action to enforce any claim against a city shall be brought until 30 days after the claim has been presented for audit, held inapplicable. Id.

85. These proceedings are presumed valid until the contrary appears. Hence one who seeks to recover damages by independent action must affirmatively show that the authorities did not comply with the statute. Bernstein v. Mt. Vernon, 109 App. Div. 899, 96 N. Y. S. 458.

86. Laws 1892, c. 182, §§ 168, 187, provide for compensation to owners in proceedings thereunder. Bernstein v. Mt. Vernon, 109 App. Div. 899, 96 N. Y. S. 458.

87. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103; Swift & Co. v. Newport News [Va.] 52 S. E. 821; In re Sixty-Second St., 214 Pa. 137, 63 A. 426; Warren County v. Rand [Miss.] 40 So. 481; City of Louisville v. Caron, 28 Ky. L. R. 844, 90 S. W. 604; McMillan v. Columbia [Mo. App.] 97 S. W. 953. Shannon's Code, Tenn. § 1988. Acker v. Knoxville [Tenn.] 96 S. W. 973. Difference between the market value just before it became generally known that the improvement was to be made and just after it was completed. City of Henderson v. Crowder, 28 Ky. L. R. 1255, 91 S. W. 1120.

88. And where the assessment is to be paid by the abutting owner, he is not entitled to have the cost of the improvements deducted from the special benefits before the same are charged against the damages recoverable by him. Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763. Where by the construction of a bridge and the grading of the approaches adjacent to defendant's property access is furnished to and from the business portions of the city, the benefits are special (Spokane Traction Co. v. Granath, 42 Wash. 506, 85 P. 261), and may be offset against the damages though the

some states general benefits.[89] However, where the cost of bringing the property to the grade of the new street is less than the diminution in value, such cost is usually taken as the measure of damages,[90] and the fact that the grade of the lot was first changed is immaterial if made in contemplation of the street change.[91] Where the adjudication[92] and payment[93] of damages is a condition precedent to the right to make the change, an abutting owner, unless estopped by his acts,[94] may enjoin the city from making the improvement until payment is made[95] or a cash deposit and bond are given,[96] and if the work has commenced may have the street restored to its former condition.[97]

An applied theory of damages will be adhered to on appeal.[98] The Pennsylvania statute making the report of the viewers prima facie evidence on appeal of the benefits and damages is not applicable to proceedings had under a prior act.[99]

§ 7. *Improvement and repair.*[1]—The power of cities to improve its streets depends upon statute.[2] A city council can only direct the improvement of streets when it has jurisdiction of the subject-matter,[3] as upon proper petition,[4] due no-

improvement is made by a street railway company, it being done under the direction of the city and for its benefit as well as that of the railway company (Id.).

89. That is the increase common to all property in the same square. City of Louisville v. Kaye [Ky.] 92 S. W. 554.

90. Stroker v. St. Joseph, 117 Mo. App. 350, 93 S. W. 860. Where it became necessary to fill a lot adjoining two streets because of a change of grade in one which necessitated a retaining wall, the cost of such wall was recoverable under Const. art. 2, § 21. Id. Court's remarks held to amount to an exclusion of evidence as to the necessity of a retaining wall and not a mere colloquy. Id. Where a street was lowered 2 to 4½ feet for the length of plaintiff's lot, which necessitated a retaining wall or a terracing, $400 damage was not excessive. City of Henderson v. Crowder, 28 Ky. L. R. 1255, 91 S. W. 1120.

91. Witwer Bros. v. Cedar Rapids [Iowa] 107 N. W. 604.

92. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115.

93. In New York a village being authorized to change the grade of a street without limitation, it is not bound to pay damages sustained by an abutting property owner before making the change, such damages being recoverable by an action under Laws 1897, p. 420, c. 414, § 159. Rogers v. Attica, 98 N. Y. S. 665.

94. Where an abutting property owner upon being informed of a proposed change, requests the city to proceed and in reliance thereon the city incurs expense in preparing to make the change and in commencing the work, he cannot thereafter enjoin the work on the ground that he had not been compensated. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

95. In Alabama it may be enjoined irrespective of its solvency or the fact that the property owner has an adequate remedy at law. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

96. An injunction restraining the city from changing the grade of a street until it has compensated the abutting property owners should be dissolved upon the making of a cash deposit and the giving of a bond to cover the probable cost. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

97. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. And the fact that the city has not been negligent does not affect the right to have it restored. Id.

98. In an action to recover damages for change of grade where the case was tried on the theory that plaintiff was entitled to recover the difference in the market value just before and just after the change of grade, but if the benefit to the lots, if any, by the change of grade, more than compensated for the damages, if any, then there could be no recovery, the plaintiff on appeal cannot predicate error on the ground that, in reducing damages, only those benefits which are peculiar and special to the property in question and not common or general to properties generally can be considered. Fuess v. Kansas City, 191 Mo. 692, 90 S. W. 1029.

99. Act of April 2, 1903 (P. L. 127), held not applicable to Act of May 16, 1891 (P. L. p. 76). Carson v. Allegheny City, 213 Pa. 537, 62 A. 1070.

1. See 5 C. L. 1656.

Note: The matter described in this section is more particularly treated in Public Works and Improvements, 6 C. L. 1143.

2. Rev. St. 1889, § 1592, as amended by Laws 1893, c. 107, authorizing cities to grade, reconstruct, and pave its streets, authorizes it to contract for curbing a street proposed to be paved and to issue tax bills therefor. City of Excelsior Springs v. Ettenson [Mo. App.] 96 S. W. 701. The Act of April 4, 1900, relating to the improvement of streets in cities of the second class and fourth grade, is unconstitutional for lack of uniformity of operation. But a petition, evidently drawn with reference to the provisions of this act, is still good against demurrer when its allegations bring it within the provisions of the general laws on that subject. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317.

3. The facts giving council jurisdiction are, filing of a petition for the improvement with a statement as to the material to be used, publication of notice, a hearing before council, and a finding that the petition was signed by the requisite number of abutting owners and that the improvement is necessary. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317.

4. The county commissioners have power to grade and improve a road only in case a

tice[5] to the proper persons, etc.,[6] if required.[7] The authority and power granted to cities to grade and pave streets[8] and to regulate the construction of sidewalks[9] cannot be delegated, though if the work is subsequently accepted by the council such acceptance constitutes the entire proceeding so as to render it valid.[10] In Ohio a summary procedure is provided for the construction of sidewalks by municipalities.[11] In New Jersey[12] and Missouri[13] a city must proceed by ordinance to provide for street improvements. A special ordinance for the construction of a specific sidewalk is not necessary where there is a general ordinance.[14] A city has large discretion with reference to the character and quality of its sidewalks,[15] and under some statutes an order for any street improvement must designate the kind, nature, and extent of the proposed improvement.[16] A municipal council may provide

petition therefor is presented, signed by a majority of the "resident owners" of real estate within a mile of the road to be improved. A "resident owner" is one living in the county and owning land within a mile of the road proposed to be improved. Alexander v. Baker [Ohio] 78 N. E. 366.

5. An executor of a will, residing in the county and entitled to a written notice of the adoption of a resolution providing for a street improvement, is bound by a notice addressed to the heirs of the testator, where it appears that the notice was left at his residence and was actually received and examined by him and was submitted by him to his attorney. Roberts v. St. Bernard, 8 Ohio C. C. (N. S.) 422. Failure to give the notice of the approval of an ordinance for the making of street improvement as is required by Act of May 16, 1891 (P. L. 79), does not invalidate the ordinance but merely operates to give interested parties the right to contest the fact of the petition for the improvement having been signed by a majority in interest and owners of the abutting property. Duquesne Borough v. Keeler, 213 Pa. 518, 62 A. 1071.

6. Executors under a will which directs them to hold and manage real estate for a term of fifteen years, pay the taxes, etc., and at the end of said term sell and convey the same and distribute the proceeds of sale, are the "owners of the land" upon whom service of notice should be made. Roberts v. St. Bernard, 8 Ohio C. C. (N. S.) 422.

7. Act April 12, 1899 (Laws 1899, p. 78), authorizing improvements without petition and the issuing of special tax bills, is not unconstitutional as a taking of private property for public use without just compensation. Hund v. Rackliffe, 192 Mo. 312, 91 S. W. 500.

8. The authority granted to a city council to grade and pave streets is legislative so that the fixing of the amount of the improvement, its kind and character, cannot be delegated. Harton v. Avondale [Ala.] 41 So. 934. Ordinance authorized the city street committee to have the streets "graded, guttered, curbed and macadamized," and left the specification and selection of material to the committee. Id.

9. Under Kansas City charter art. 9, p. 137, conferring power on the city council to construct sidewalks "to such extent, of such dimensions, and in such manner" as may be prescribed by ordinance, prescribing the width is a legislative function which cannot be delegated. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350. Under an ordinance providing that the width of the sidewalk shall "not be less than five feet, laid so that the outer edge shall be as directed by the city engineer," since the contract must be let in the language of the ordinance and contractors will bid on the minimum width, there is no delegation. Id. Where there is a distance of 11 feet between the property lines and the curb and the sidewalk prescribed is only 5 feet wide, an ordinance leaving it to the engineer to locate it within those limits is an unlawful delegation of the power (Id.), and the fact that much of the walk has been constructed does not give validity to the ordinance so as to render tax bills issued thereunder valid (Id.). Nor can the ordinance be rendered valid by the rejection of the invalid section, since there would be left no provision whatever for the width or location of the walk. Id.

10. Assessments held valid because of such ratification. Harton v. Avondale [Ala.] 41 So. 934.

11. In the construction of sidewalks, municipalities are not confined to the mode of procedure provided under Rev. St. § 1536-210 of the municipal code, but they may proceed in the summary manner provided in Rev. St. § 1536-232. Westenhaver v. Hoytsville, 8 Ohio C. C. (N. S.) 284.

12. Under P. L. 1897, p. 301, and P. L. 1899, p. 171, a city has no authority to require the construction or repair of a sidewalk by resolution but must proceed by ordinance, and an assessment for work done pursuant to a resolution is invalid and will be set aside. Sproul v. Stockton [N. J. Law] 62 A. 275.

13. Rev. St. Mo. 1899, §§ 5954, 5955. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115.

14. Westenhaver v. Hoytsville, 8 Ohio C. C. (N. S.) 284.

15. Marshall v. People [Ill.] 76 N. E. 70.

16. Under Acts 1903, c. 145, where the report of the viewers, in proceedings for the improvement of a highway, contains the plans and specifications for the proposed improvement, stating the kind, width, and extent of the improvement, and is made a part of the order for the improvement, the order is sufficient as stating the kind and extent of the improvement. Spaulding v. Mott [Ind.] 76 N. E. 620.

for the pavement of streets with a patented substance when the bidders can obtain such material at a known fixed price.[17] In Indiana the board of commissioners have power to improve a highway though assessments therefor cannot be levied over the full district.[18] Where the owner deeds land to a city for street purposes on condition that it be macadamized, the city need macadamize only so much thereof as it was accustomed to do in the adjoining streets.[19]

In the absence of statute, neither the city[20] nor the contractor[21] is liable for consequential injuries to abutters from street improvements, but water cannot be collected and discharged in large quantities upon adjacent land,[22] and if so collected there is an absolute duty to find a safe means of discharge.[23] Where, however, without negligence it diverts water upon the adjoining lands, the owner cannot recover in trespass but must have his damages assessed by a statutory proceeding.[24] An abutting owner who dedicates property for street purposes is not entitled to damages for the original establishment of a grade where the grade is reasonable and the work is properly done.[25] In assessing damages it is competent for the jury, while disregarding the general benefits which may result to the property, to consider an incidental benefit which is blended with an incidental injury.[26] In many states a municipality may construct sidewalks and assess the cost of the same to the abutting owner after due notice to such owner to construct the sidewalk within specified time.[27] A city is liable for the wrongful acts of its servants while constructing and improving its streets though they exceed their authority.[28] Claims

17. Bye v. Atlantic City [N. J. Law] 64 A. 1056.

18. Under Acts 1903, c. 145, the board of commissioners have power to order the improvement of a highway which runs parallel with the county line and within less than two miles thereof, though the act provides that the cost of so doing shall be assessed on the lands benefited and within two miles of the road and the board is without power to assess land within two miles and lying in the adjoining county. Spaulding v. Mott [Ind.] 76 N. E. 620.

19. City of Versailles v. Brown [Ky.] 96 S. W. 1108.

20. Rudnyai v. Harwinton [Conn.] 63 A. 948. Discharge of surface water without negligence. Strauss v. Allentown [Pa.] 63 A. 1073. Damages resulting from the negligent construction of a ditch in the highway in the improvement thereof is not a taking or injury for which recovery can be had of the county. Zavalla County v. Akers [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 245.

21. In the absence of negligence. Linton Pharmacy v. McDonald, 48 Misc. 125, 96 N. Y. S. 675. Contractor engaged in excavating tunnel held to exercise proper care and skill in excavating from west side of street and elevating a street railway track to allow excavation underneath, where such elevation could have been avoided but would have entailed increased risks, expense, and delay. Id.

22. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514; Roe v. Howard County [Neb.] 106 N. W. 587. Especially where by a moderate expenditure it could be carried into a natural drainage course, nor is such a discharge authorized by Pub. Acts 1881, c. 65. Rudnyai v. Harwinton [Conn.] 63 A. 948. Cities and towns in the construction of streets may deal with surface water in a reasonable way. They may erect barriers to keep it from coming onto the street from adjacent land and they may turn it from the streets onto abutting lands if they do it in such a way as to cause no unreasonable damage, but they have no right to discharge a large quantity in volume onto adjoining land where it must stand and become a nuisance. Daley v. Watertown [Mass.] 78 N. E. 143.

23. The city is not excused by ordinary care. City of Houston v. Richardson [Tex. Civ. App.] 15 Tex. Ct. Rep. 107, 94 S. W. 454. The city is bound to furnish means for discharging the ordinary accumulations of surface water into natural drainage ways or otherwise care for it so it will not injure others, but it is not liable for failing to provide for extraordinary rain falls. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514.

24. Robinson v. Norwood Borough [Pa.] 64 A. 539.

25. Fletcher v. Seattle [Wash.] 86 P. 1046.

26. Carlisle v. Cincinnati, 8 Ohio C. C. (N. S.) 46.

27. Under an ordinance authorizing a city to construct walks in front of property of nonresidents and assess the cost against the abutting property, in case the owner fails to do so within a certain time after publication of a notice, a notice which stated that the city would construct if the owner did not within a certain time is sufficient though the time stated in the notice is less than that required by statute, when the construction was not done until after the expiration of such time, so as to assess the cost on the abutting owner. State v. Several Parcels of Land [Neb.] 107 N. W. 566.

28. Agent grading and paving street assaulted lessee of street railroad who at-

for damages arising from improvements have been held to be such as require statutory presentment.[29]

§ 8. *Abandonment and diminution.*[30]—While, as a general rule, title to a highway cannot be acquired by adverse possession,[31] the public may lose the same by estoppel[32] or by abandonment.[33] Mere nonuser, however, is not sufficient to constitute an abandonment.[34] Except as empowered by the legislature, municipal authorities cannot abandon or release the right of the public in a highway.[35] The New York statute providing that every dedicated highway not opened and worked or laid out within six years shall cease to be a highway does not apply to those becoming and remaining highways by general public use.[36] A statute empowering a court to establish or vacate a street does not give it power to narrow it.[37]

§ 9. *Vacation.*[38]—A highway can be vacated only in the manner provided by statute,[39] and after due service of notice upon the persons entitled thereto.[40] Usually a petition signed by a majority of abutting property owners is a jurisdictional requisite,[41] but where only a portion of a street is to be vacated, a petition signed by a majority of those abutting on that portion is sufficient.[42] The power

tempted to remove gravel from tracks. City liable for injuries by assault. Barree v. Cape Girardeau, 197 Mo. 382, 95 S. W. 330.

29. Seattle Charter, art. 4, § 29, allowing 30 days within which to present claims against the city, is applicable to such damages. Postel v. Seattle, 41 Wash. 432, 83 P. 1025. Provision valid. Id.

30. See 5 C. L. 1658.

31. Rapp v. Stratton, 41 Wash. 263, 83 P. 182; Oliver v. Synhorst [Or.] 86 P. 376; Bigelow v. Ritter [Iowa] 108 N. W. 218; City of Eldora v. Edgington [Iowa] 106 N. W. 503; Central R. Co. v. Seabright [N. J. Err. & App.] 64 A. 131. Acquiescence for a long time by the city of an abutting owner's occupancy of land under a claim that it is his own and not a part of the street is evidence of the location of the true line. City of Eldora v. Edgington [Iowa] 106 N. W. 503.

Contra. Seese v. Maumee, 7 Ohio C. C. (N. S. 497. Where the exclusion is entire for twenty-one years, the fact that the barrier was frail and unsubstantial does not prevent the possessor from successfully asserting title, and the public loses its rights both in and to the street. Id. The remark incidentally made by one who had fenced in a parcel of land that the street was included within the fence does not amount to a declaration on his part that the right of the public is superior to his own in the strip once platted as a street which has been enclosed. Id.

32. Permitting use of portion of unopened street in good faith for over 13 years. Oliver v. Synhorst [Or.] 86 P. 376. Allows persons asserting title thereto to build thereon and expend money in the belief that the city has abandoned the street as a highway. The city will be estopped to assert that it is a street. City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N. E. 296.

33. City of Eldora v. Edgington [Iowa] 106 N. W. 503. Acquiescence by the public in the adverse use of a highway for a long period of time raises a presumption of abandonment. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914. Statutory period. Burroughs v. Cherokee [Iowa] 109 N. W. 876. Mere interruption or interference temporarily with the public use is not sufficient to extinguish the easement. Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914.

34. Burroughs v. Cherokee [Iowa] 109 N. W. 876. The mere nonuser of a part of the street does not operate as a surrender or abandonment of the same for the purposes of a public street. Lins v. Seefeld, 126 Wis. 610, 105 N. W. 917.

35. Central R. Co. v. Seabright [N. J. Err. & App.] 64 A. 131.

36. Laws 1890, p. 1177, c. 568. Palmer v. East River Gas Co., 101 N. Y. S. 347.

37. Dorsch v. Beaumont Glass Co. [Ohio] 78 N. E. 215.

38. See 5 C. L. 1658.

39. The mere passage of an ordinance declaring a public alley vacated is not sufficient to accomplish such object. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111. A recital in the records of the city council showing that the petition for the vacation of an alley was referred to the committee on streets and received a favorable report, which on motion was granted, does not show compliance with Hill's Ann. Codes & St. §§ 752, 749, in regard to notice, etc. Rapp v. Stratton, 41 Wash. 263, 83 P. 182.

40. In Michigan the commissioner of highways has no jurisdiction to discontinue a highway through land without serving notice of the proceedings on the occupants of the land. A life tenant in possession must be served. The fact that the person not served makes no complaint does not validate the proceedings. Hatt v. Township Board of Napoleon Tp. [Mich.] 13 Det. Leg. N. 236, 107 N. W. 1058.

41. Where land, through which are streets which have been dedicated but not opened, is purchased by husband and wife and is therefore presumptively community property, management and control of which is given the husband by Ballinger's Ann. Codes & St. § 4491, the petition of the husband for vacation of the streets is presumptively in behalf of the community. Unzelman v. Snohomish, 40 Wash. 588, 82 P. 911.

42. So held under Sess. Laws 1901, p. 175, c. 84, § 1 (Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316), and under Comp.

given to the New Hampshire board of railroad commissioners to "change the location" of a highway for the purpose of avoiding or improving a crossing of the highway by the railroad does not authorize a discontinuance.[43] A charter provision authorizing a sale of the land included in streets frees the city of any special trust and it may vacate the same.[44] An ordinance pursuant to the Oklahoma statute granting the right to a railroad to occupy streets and alleys does not vacate the same.[45] A highway cannot be vacated by occasional acts of trespass.[46] In Ohio one securing a vacation of an alley without the consent of the other abutters cannot close the same.[47] A petitioner cannot invoke equitable estoppel by erecting permanent improvements in the street after submission but before the granting of his petition.[48] Streets and alleys upon being vacated revert to the abutting owners.[49]

A city cannot vacate a street without compensating the abutting owners,[50] but in the absence of constitutional[51] or statutory provisions, those not abutting on the closed portion are not entitled to damages unless they suffer special injury.[52]

The exercise of the power conferred upon municipalities to vacate highways is usually deemed a legislative function and hence not subject to judicial review,[53] in the absence of a showing of collusion or fraud.[54] but an order of an Indiana board of county commissioners vacating the streets and alleys of a tract disannexed from a town or city is reviewable,[55] and an appeal may be taken by a party to the proceeding, though not joined by the other remonstrators,[56] without filing an affidavit of interest and aggrievance.[57]

Charter, St. Paul, 1905, § 117 (State v. Common Council of St. Paul [Minn.] 107 N. W. 1129).

43. Pub. St. 1901, c. 159, § 14. Except as such discontinuance results from a change in location. The new route must serve substantially the same public need as the old and accommodate with greater or less convenience the same travel, otherwise it is a new highway. Blake v. Concord & M. R. Co. [N. H.] 64 A. 202.

44. Greater New York Charter, Laws 1901, p. 80, c. 466, § 205, empowering the commissioners of the sinking fund to sell the city title to lands within a closed street, frees the city of any special trust imposed by § 990 providing that the title acquired by the city to lands required for a street shall be in trust. Reis v. New York, 99 N. Y. S. 291.

45. An ordinance of a town incorporated under the laws of this territory granting to a railroad the right to occupy streets and alleys under § 1035, St. 1893, does not vacate such streets or alleys so as to allow the land to revert to abutting lot owners. Tonkawa Milling Co. v. Tonkawa, 15 Okl. 672, 83 P. 915. Ordinance considered and held to be one merely giving a railroad the right to occupy and use a certain alley and not an ordinance vacating such alley. Id.

46. Especially when such acts cover only a period of three or four years. Eldridge v. Collins [Neb.] 105 N. W. 1085.

47. Notwithstanding the nonconsenting owner has access to the front of his lot. Schlemmer Co. v. Steinman-Meyer Furniture Co., 7 Ohio C. C. (N. S.) 468.

48. Unzelman v. Snohomish, 40 Wash. 588, 82 P. 911.

49. See post, § 14.

50. Johnston v. Lonstorf [Wis.] 107 N. W. 459.

51. Under the constitutional provision that private property shall not be taken or damaged for public use, one whose right of ingress and egress to and from his property is impaired by the vacation of a street by a city is entitled to compensation for the depreciation in the value of his property, though his property does not abut on the vacated portion. Vanderburgh v. Minneapolis [Minn.] 108 N. W. 480.

52. Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316. One whose access is in no way interfered with and whose only inconvenience is being compelled to take a longer route to reach points beyond the closed portion suffers no special damages. Id.; Ruscomb St., 50 Pa. Super. Ct. 476. Under authority of Greater New York Charter, Laws 1901, p. 199, c. 466, § 442, the board of estimate and apportionment may close a portion of a street without compensation to the owner of lots not abutting on the portion closed where there is other access to the lots of such owner, though not as direct from certain points. Reis v. New York, 99 N. Y. S. 291.

53. Necessity and expediency not reviewable. Otto v. Conroy [Neb.] 107 N. W. 752. Power conferred by Laws 1901, p. 175, c. 84, is a political power and not reviewable. Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316.

54. The fact that a petitioner will be benefited by the vacation is not sufficient proof or abuse of discretion on the part of the city as to authorize a court of equity to declare a vacating ordinance void. Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316.

55. A judicial and not a legislative act. MacGinnitie v. Silvers [Ind.] 78 N. E. 1013.

56. Joined in a single document of re-

§ 10. *Street and highway officers and districts.*[58]—For a determination of the powers[59] and duties of highway officers one must consult the local statutes.[60] Power to grant a franchise to lay and maintain water pipes under a public highway can be granted only by the legislature or by some local or municipal authority empowered to confer it.[61] The fiscal court of Kentucky cannot appoint more than one supervisor for the free turnpikes of the county.[62] Mandamus will lie to compel a road supervisor to take charge of and put in repair a road which it is his duty to care for,[63] but not where a duty is discretionary[64] or is imposed upon some other board.[65] A highway officer may render himself civilly liable for trespass upon abutting property,[66] and in Alabama a road overseer may be proceeded against criminally for neglect of duty.[67] A municipality is not liable for the negligent

monstration which set out their respective interests separately. MacGinnitie v. Silvers [Ind.] 78 N. E. 1013.

57. Where one appears before the commissioners and files a remonstrance setting out his interest and how affected, he becomes a party to the proceeding and need not file an affidavit of interest and show aggrievance on appeal. MacGinnitie v. Silvers [Ind.] 78 N. E. 1013.

58. See 5 C. L. 1660.

59. Under Acts 1904, c. 274, and an ordinance of the city of Baltimore, the commissioners for opening streets were invested with the authority by the first act provisionally conferred on the annex improvement commissioners to pave and improve streets in the annex portion of the city of Baltimore. City of Baltimore v. Flack [Md.] 64 A. 702. Highway commissioners held empowered under R. S. c. 121, §§ 18, 62, 64, 86, 87, to contract with a railroad company for a right of way for a highway through an embankment of the railroad, and where the railroad company had fully performed and the public had accepted the benefits, such contract was enforceable despite certain irregularities in the method of procedure. Illinois C. R. Co. v. Road Dist. No. 1, 119 Ill. App. 251. Act April 24, 1894 (P. L. 1894, p. 128), abolishing public road boards and vesting their powers and duties in the boards of chosen freeholders, is not unconstitutional as a special law, though it transferred the special powers of the Essex public road board upon the board of chosen freeholders of that county. Bowman v. Essex County Chosen Freeholders [N. J. Err. & App.] 64 A. 1010.

60. Where a public road has been laid out and the assessment for damages paid, it is the duty of the township committee to open the road notwithstanding the inhabitants of the township have failed to provide money for the purpose. The committee is to call out the inhabitants to do the work under § 56 of the general road law (Gen. St. p. 2818), having first apportioned the labor required among the inhabitants of the town according to the provisions of § 52 of the same act, Kinmouth v. Township Committee of Wall Tp. [N. J. Law] 63 A. 861.

61. State v. Monroe, 40 Wash. 545, 82 P. 888. Under a statute authorizing a board to lay out, discontinue, or alter roads or highways and to do all other necessary acts, the board has no power to grant a franchise to lay and maintain water mains or pipes along or under public highways. 1 Ballinger's Ann. Codes & St. § 342, construed. Id. Doctrine of estoppel or ratification could not be invoked to defeat defense of ultra vires. Id.

62. Ky. St. 1903, §§ 4306, 4313, 4344, 4748b, held not to authorize the appointment of six supervisors. Fleming County Fiscal Ct. v. Howe, 28 Ky. L. R. 458, 89 S. W. 225. The fiscal court may maintain the free turnpikes under rules adopted for such purpose as provided by the statute relating thereto and avail itself of the general road statutes to appoint a supervisor. Id.

63. Rodenbarger v. State, 165 Ind. 685, 76 N. E. 398.

64. Mandamus will not lie to compel the county court to open a public road, though the petitioners offer to pay all the damages incident to the opening, as the county court is vested with discretion as to the public utility, taking into consideration the expense of maintaining the road. State v. McCutchan [Mo. App.] 96 S. W. 251.

65. Under P. L. 1891, p. 137, the duty of opening highways is placed on the township committee (State v. Wall [N. J. Law] 63 A. 863; Kinmouth v. Township Committee of Wall Tp. [N. J. Law] 63 A. 861), and hence mandamus will not lie to compel the overseers to open a public road (State v. Wall [N. J. Law] 63 A. 863).

66. In an action of trespass against a highway officer for removing a fence from plaintiff's land, an order previously given by the officer to plaintiff stating that the fence encroaches on the highway and directing plaintiff to remove it is not proof of the facts stated therein, and in absence of proof as to location of road is no justification for the trespass. Labo v. Asam [Mich.] 12 Det. Leg. N. 892, 106 N. W. 281.

67. An overseer of a particular road is properly called "overseer of a road precinct." Indictment following form 75, Code 1896, and charging failure of overseer to perform his duties, held correct. Ward v. State [Ala.] 39 So. 923. The fact that the apportioner failed to furnish defendant with a correct written list of hands apportioned to him was not a defense where apportioner at the time of giving him his commission called over a list of hands whom he could use to work the road. Id. That the roads in the county generally were in bad condition should have been excluded from the jury. Id. Defendant would have been entitled to a charge of acquittal if he worked the road within a reasonable time had it not been asked along with the general charge to which he was not entitled. Id.

acts of a highway officer in performing acts to remove an obstruction in a street.[68] The Missouri act authorizing the voters of a district to vote on the question of the organization of a special road district has no application to counties which have adopted the Township Organization Law.[69]

§ 11. *Fiscal affairs.*[70]—Many questions relating to revenue for highway purposes are controlled by rules applicable to fiscal matters involved in public improvements generally,[71] or by the ordinary principles of taxation,[72] a few illustrative cases being cited herein. Power to levy assessments or special taxes is conferred entirely by statute.[73] In condemnation proceedings by a city for the ex-

68. Wheeler v. Gilsum, 73 N. H. 429, 62 A. 597.

69. Rev. St. 1899, c. 151, art. 10. The Organization Law is Rev. St. 1899, c. 168. State v. Gordon, 197 Mo. 55, 94 S. W. 987.

70. See 5 C. L. 1661.

71. See Public Works and Improvements, 6 C. L. 1143; Public Contracts, 6 C. L. 1109. See, also, Counties, 7 C. L. 976; Municipal Corporations, 6 C. L. 714. Mandamus will not lie to compel the board of supervisors of a town to appropriate money to erect a bridge where it has no funds on hand for the purpose and it cannot borrow money for the reason that it has already reached its **debt limit.** Board of Sup'rs of Town of Phillips v. People [Ill.] 78 N. E. 13. In Pennsylvania the county commissioners are not bound to accept the **lowest bid** for the making of road improvements but may reject the low bid if in their opinion the bidder is not responsible. LeMoyne v. Washington County, 213 Pa. 123, 62 A. 516.

Letting contracts: One who unites in a petition to the council requesting the letting of a contract for improving a street to a third person thereby waives his right to object to the assessment for the expense because the contract was let before he himself was given an opportunity to do the work as provided by statute. People v. Clarke, 110 App. Div. 28, 96 N. Y. S. 1051. Where a statute authorizes the sale of county bonds to raise funds to improve particular roads, **taxpayers** whose taxes will be thereby increased may **enjoin** the **expenditure** on roads not authorized to be improved. Pope v. Dykes [Tenn.] 93 S. W. 85.

72. See Taxes, 6 C. L. 1602. Under Laws 1901, c. 466 (Charter Greater N. Y. § 995), where land owned by the city, purchased with funds raised by general taxation, is taken for street purposes, the city is entitled to compensation therefor and the abutting or adjoining owners are liable for a special assessment to pay such damage, since otherwise they would receive a benefit for which the general public had been taxed. In re Van Cortlandt Ave. [N. Y.] 78 N. E. 952. A percentage levy of road taxes based on the assessment roll of the previous year is valid. Rev. Codes 1895, § 1122. Need not be levied in a specific amount. Beggs v. Paine [N. D.] 109 N. W. 322. It is not essential to a valid assessment of a road tax on lands in unincorporated places that the commissioner should specifically, in terms, assert in their record and certificate of assessment (1) that the divisions they made of the townships and tracts "were equitable, conforming as nearly as was convenient to known divisions or ownerships," or (2) that the sum assessed was "proportionate to the value thereof," or (3) that it was not burdensome on the landowners to assess all the repairs on them, instead of part on the county. It is enough if findings to such effect can be inferred from their action. Greene v. Martin [Me.] 63 A. 814. In Massachusetts towns have an interest in shade trees in the public highways which warrants the expenditure of public money for their protection and preservation. Hixon v. Sharon, 190 Mass. 347, 76 N. E. 909.

73. **Statutes construed:** Sess. Laws 1887-88, p. 224, c. 126, authorizing municipalities to grade, etc., streets, etc., at the expense of occupants of adjacent lots by necessary inference confers upon municipalities power to create assessment districts. State v. Moss [Wash.] 86 P. 1129. Laws 1887-88, p. 16, c. 13, conferring power to create special assessment districts for public improvements, applies only to towns having a population of 6,000 or more. Id. Under Act N. J. 1897 (P. L. 46), § 48, clause 3, the council of a city has power to assess the cost and expense of grading and improving a street on the owners of the property benefited. Tusting v. Asbury Park [N. J. Law] 62 A. 183. Under Gen. Acts 1903, p. 307, authorizing the county commissioners to levy special taxes for any liability then existing "or that may hereafter be created" for the construction of roads, the commissioners could levy a special tax in advance of the creation of any liability for repairs on a public road. Southern R. Co. v. Cherokee County, 144 Ala. 579, 42 So. 66. Where a proceeding for the improvement of a public road was initiated by a petition under the eighth section of the road improvement act of March 22, 1895, before the passage of the Act of April 1, 1903, the right to assess land bordering on the road 10 per cent of the cost, which the act of 1895 conferred, was not revoked by the Act of 1903. Haines v. Burlington County Freeholders [N. J. Law] 62 A. 186. Act of April 18, 1899, providing that where a street has been graded, paved, or otherwise improved under an invalid ordinance such improvement is valid, operates to validate an ordinance for an improvement so as to authorize the assessment of the cost on abutting owners. In re Marshall Ave., 213 Pa. 516, 62 A. 1085. Laws 1902, p. 589, c. 219, amending Port Chester Charter, tit. 5, § 4, relative to the opening of streets, by authorizing the trustees to inaugurate the improvement without a petition of one-third of the property owners, and, in case a petition is presented, to allow the improvement notwithstanding a protest, should be construed together with the amended section so that the provisions for assessment apply though an

tension of a street, public school property may be assessed together with other property on the theory of special benefits,[74] and a constitutional exemption from taxation is inapplicable.[75] Equipment and fixtures within the area of an assessment, owned and used by public service corporations under their rights and franchises, cannot be assessed for benefits.[76] A special indebtedness for a street improvement incurred by a municipality created under a void statute cannot after a legal reincorporation of the city be so ratified by it as to convert it into a general liability enforceable against all the taxpayers.[77] Where a statute authorizing the issue of county bonds to improve certain roads vests discretion in the road commissioners as to how the fund will be expended,[78] a court of equity cannot interfere in the absence of fraud or corruption.[79] A street assessment being payable by instalments, limitations will run against each instalment separately.[80] In a proceeding to assess and enforce a tax to pay for a street improvement, the taxpayer cannot defeat the assessment on the ground that the contract by the city with the contractor was voidable, the work having been completed in accordance with the contract.[81] The burden of proving an estoppel against a property owner as to a street assessment is upon the treasurer seeking to enforce the collection.[82] As to

improvement is inaugurated by the trustees. In re Locust Ave. in Village of Port Chester, 110 App. Div. 774, 97 N. Y. S. 508. State Aid Law 1895, providing for the assessment on abutting owners of 10 per cent of the cost of improving a public road, is repealed by Act of April 1, 1903, so as to exempt such abutting owners from assessment as to improvements contracted for before the passage of the last act but as to which no actual work was done until after its enactment. Cortelyou v. Anderson [N. J. Law] 63 A. 1095. The levy of a tax for road purposes is for a "necessary" purpose within the meaning of a statute prohibiting a levy for other than necessary purposes without a vote of the people. Crocker v. Moore, 140 N. C. 429, 53 S. E. 229. A statute which provides that the board of road commissioners shall ascertain and decide as to the amount needed for working the roads and the rate necessary to raise that sum and report to the county commissioners, who shall levy the taxes, is not unconstitutional for the reason that the commissioners may report a sum which would require a levy in excess of the limitation, since in such case it could be reduced. Id. The Sidewalk Act of 1875 does not authorize an ordinance which provides for the laying of sidewalks on different streets, and hence a tax levied under an ordinance which ordered a construction on several disconnected streets cannot be sustained. Glos v. Cannata, 121 Ill. App. 215. One who has made a voluntary conveyance of land on the line of a street under Greater New York Charter as amended by Laws 1901, p. 1184, c. 466, § 992, is not entitled to have the land entirely excluded from proceedings for appointment of commissioners of estimate and assessment, his abutting land being still liable under such section for the fair proportion of the awards that may be made for buildings. In re Ave. L. in New York City, 107 App. Div. 581, 95 N. Y. S. 245. Under Ky. St. 1903, § 3706, the trustees of a city of the sixth class have power in their discretion to impose the cost of cross walks at street intersections on the abutting property or to charge it to the street improvement fund. Morton v. Sullivan [Ky.] 96 S. W. 807.

74. Under Sess. Laws 1893, p. 189, c. 84, though school lands are not specially mentioned in the act. In re Howard Ave. North [Wash.] 86 P. 1117.

75. In re Howard Ave. North [Wash.] 86 P. 1117. Not exempt by art. 8, § 11, subd. 8, of Seattle charter, providing that assessments on lands of school districts shall be paid by the city. Id.

76. In re West Farms Road, 47 Misc. 216, 95 N. Y. S. 894.

77. State v. Moss [Wash.] 86 P. 1129. Where a municipality created by a void statute created an assessment district for a street improvement and the larger part of the assessments were paid by the abutting owners and warrants were issued on the special fund for the balance of the cost, evidence held to show that the parties intended to rely on the special assessments, and there could be no general liability against the city even if it had been legally created. Id.

78. Acts 1903, p. 815, c. 290, designating eight roads upon which the improvements were to be spent, held not to require them to be completed in the order named. Pope v. Dykes [Tenn.] 93 S. W. 85.

79. No jurisdiction to require certain roads to be first improved, the statute vesting the discretion in the commissioners. Pope v. Dykes [Tenn.] 93 S. W. 85.

80. The bar of the statute against a municipality as to the collection of a street assessment, levied prior to the act of April 25, 1904, does not begin to run on the several instalments until each of said instalments becomes due and payable. Bell v. Norwood, 8 Ohio C. C. (N. S.) 435.

81. In re Brighton Road, 213 Pa. 521, 63 A. 124.

82. Bell v. Norwood, 8 Ohio C. C. (N. S.) 435. Estoppel against contesting the validity of a street assessment will not be inferred in the case of a grantee who purchased subsequent to the levying of the assessment, unless the language of the deed fairly warrants the conclusion that the grantee re-

offsets,[83] an abutting owner is not entitled to damages sustained by reason of subsequent and independent proceedings.[84]

In Mississippi a municipality the streets of which are worked by municipal authority is entitled to one-half of taxes levied by a county for road purposes on property within the city.[85] A resident of an incorporated town or city who pays a street tax thereto is not liable for a road tax while temporarily sojourning elsewhere.[86]

In New York a town is not liable for the price of a road machine purchased by its highway commissioner for the use of the town.[87] In Indiana a public road must be accepted by the county commissioners before a contractor is entitled to his final payment.[88]

§ 12. *Control by public and public regulations.*[89]—The state has the primary control over streets and highways[90] and may in the exercise of its police power, regulate their use.[91] It may delegate its power in this respect to local, administrative, or legislative officers or boards under appropriate provisions of law.[92] The

served from the purchase money an amount sufficient to satisfy the lien. Waldschmidt v. Bowland, 4 Ohio N. P. (N. S.) 411.

83. An abutting owner, upon whose property a street assessment was levied prior to the passage of the Municipal Code, is entitled to be credited with his proportion of the premium received from the sale of bonds to meet the cost of the improvement, but this credit can only be made upon the interest payable on the deferred instalments of his assessment. Mudge v. Evanston, 7 Ohio C. C. (N. S.) 197.

84. In an action to recover benefits accruing to defendant's property by grading, curbing, and paving the street in front thereof, the defendant cannot set off damages sustained by reason of the widening of the street pursuant to an ordinance passed subsequent to the one pursuant to which the paving and grading were done, where as to the widening separate proceedings were had. Duquesne Borough v. Keeler, 213 Pa. 518, 62 A. 1071.

85. Under Ann. Code Miss. § 3931, the city of Brookhaven held entitled to one-half of the tax levied by the county for road purposes on property within the city, since its streets are cared for and worked by "municipal authority," though no special tax is levied by it to defray the expense of so doing. Lincoln County v. Brookhaven [Miss.] 41 So. 449.

86. Taylor v. State [Ala.] 41 So. 776.

87. Under Laws 1890, cc. 568 and 569 and Laws 1896, c. 987. Acme Road Machinery Co. v. Bridgewater [N. Y.] 77 N. E. 879.

88. Act 1895, c. 21, § 5. Board of Com'rs of Jackson County v. Branaman [Ind.] 76 N. E. 1030.

89. See 5 C. L. 1663.

90. In the absence of constitutional restrictions and subject to the property rights of the abutting owners, the legislature has paramount authority over public ways and places. Scovel v. Detroit [Mich.] 13 Det. Leg. N. 681, 109 N. W. 20. Loc. Acts 1901, p. 413, § 33, No. 417, authorizing the commissioner to set aside a speedway on the boulevard, held valid, thus authorizing the construction of such way if the commissioner did not already have such power. Id.

91. A statute providing that persons using the highways for the hauling of unusually **heavy loads** shall be required to pay a license tax is a valid exercise of governmental powers by the legislature. State v. Holloman, 139 N. C. 642, 52 S. E. 408. Pub. Laws N. J. 1905, p. 484, requiring the licensing of **automobiles,** being an exercise of the police power of the state, is not in contravention of the Const. of New Jersey or of the United States. Unwen v. State [N. J. Law] 64 A. 163. Under Laws 1905, c. 86, § 4, a **traction engine** is entitled to registration and its operator to a license. Where an automobile, traction engine, or other vehicle described in the act is owned by a corporation or partnership, it should be registered in the name of the owner, but the license should be issued only to an individual. Emerson Troy Granite Co. v. Pearson [N. H.] 64 A. 582. The law relating to the establishment of **grade crossings** (97 O. L. 546) relates exclusively to **steam railroads,** and in the case of an application to the common pleas court under this act by a railroad for permission to lay its tracks at grade over street crossings, and to prescribe what gates, signals, etc., shall be maintained, if the court find from the testimony that such railroad is not a steam railroad, it is without jurisdiction in the premises. In re Avon Beach & So. R. Co., 3 Ohio N. P. (N. S.) 561. In the case of steam railroads the court, under 97 O. L. 546, may grant permission to construct a grade crossing conditional upon the acquirement by the company, either by agreement with the municipal or other officers in charge of the road or street, or by condemnation, of the right to do so. Such agreement or condemnation need not precede the permission granted by the court. Id. Under Railroad Law, Laws 1890, p. 1087, c. 565, § 11, a railroad company cannot extend its road over the streets of a village without an order of the court or notice to the trustees of the village. And in order to obtain such order it must at least be shown that the interests of the road or the public will be promoted thereby. In re Keeseville, etc., R. Co., 101 N. Y. S. 237.

92. Wilcox v. McClellan, 47 Misc. 465, 95 N. Y. S. 941. Laws 1905, pp. 1533, 1548, 1550,

powers of local authorities being thus delegated, municipalities have only such control as is granted them by the legislature.[93] This, however, ordinarily includes power to regulate the use of hacks[94] and automobiles,[95] to permit the erection of

cc. 629-631, transferring from the board of aldermen to the board of estimate and apportionment the authority to consent to the use of the public streets by corporations having franchises therefor, subject to the consent of the local authorities, merely extend the powers of the board of estimate and apportionment as given by previous laws and do not constitute a legislative appointment of the board of estimate and apportionment to office to perform new functions not germane to the duties of the board when elected, in violation of Const. art. 10, § 2, when construed with Const. art. 8, § 1, authorizing the enactment of special laws for municipalities. Wilcox v. McClellan, 110 App. Div. 378, 97 N. Y. S. 311; Id., 47 Misc. 465, 95 N. Y. S. 941. Do not contravene Const. art. 3, § 18, authorizing legislature to pass general laws providing for construction and operation of street railroads on consent of local authorities. Id. Statute not rendered invalid by Const. art. 3, §§ 26, 27, authorizing the transfer of the power of the board of supervisors in the counties comprising Greater New York to the "municipal assembly," etc., "or legislative body of the city," and authorizing legislature to confer further powers of legislation and administration on boards of supervisors. Id.

The control of the streets of the city of Washington for the purpose of protecting them from unlawful encroachments is vested in the district commissioners, whether the fee title be in the United States, the city, or in the abutting owners (Guerin v. Macfarland, 27 App. D. C. 478), and they may maintain an action to enjoin the maintenance of a projecting building in their own names (Id.).

93. Legislature may authorize use of streets for public purpose, in absence of constitutional provision, without consent of municipality. Village of Carthage v. Central New York Tel. & T. Co., 48 Misc. 423, 96 N. Y. S. 917. In the absence of express charter provision authorizing it to do so, a city has no power to grant a permanent easement to a railroad company to lay tracks in and operate its trains on such tracks in a city street. State v. Atlantic & N. C. R. Co. [N. C.] 53 S. E. 290. In the absence of authority from the legislature a municipality has no power to require a railroad to maintain gates at a grade crossing where its tracks cross a street at the expense of the railroad company. Statutory authority to make such ordinances as they shall deem necessary for the good order and government of the municipality will not support such an ordinance. In re Pennsylvania R. Co., 213 Pa. 373, 62 A. 986. The right or privilege of a telephone company to erect and maintain its telephone poles and wires in the streets of a city is not a franchise. It can be granted by the city only in pursuance of legislative authority and the right to hold the license or privilege may be questioned by quo warranto. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245. The sidewalks of the city of Washington which are wholly subject to municipal control extend from the curb line to the building line of the houses, and the fact that a portion of these sidewalks are set apart as parking does not diminish in any manner the control of the municipal authorities over them. Dotey v. District of Columbia, 25 App. D. C. 232.

94. Section 7, art. 10, police regulations of the District of Columbia, prohibiting hack drivers for hire from maintaining them except at public stands, is a valid exercise of the power conferred upon the commissioners by Congress. Barnes v. District of Columbia, 27 App. D. C. 101. Automobiles used for hire for which the owner has a public hack license, are vehicles within these regulations. Gassenheimer v. District of Columbia, 26 App. D. C. 557. One permitting them to stand in front of a particular hotel at which there was no stand to be let to the public generally is guilty though he maintained an agent in the hotel to contract with guests. Id. Prosecution under this regulation is not limited to the driver but extends to the master (Id.), nor is it necessary that the driver solicit business while the vehicle is loitering in order to constitute a violation (Id.). The rule that a hotelkeeper may maintain hacks for his guests which may stand in front of the hotel, notwithstanding § 7, art. 10, of the police regulations, is limited to the number reasonably necessary for the exclusive use of the guests (Barnes v. District of Columbia, 27 App. D. C. 101), and if this rule is erroneous it does not aid one who does not come thereunder (Id.). A hack driver standing in front of a hotel at the request of regular customers, guests of the hotel, if he has no actual engagement, is guilty. Id. The fact that others have violated the regulation with impunity is no defense to one being prosecuted. Id.

95. In a prosecution for driving an automobile at a speed in excess of the speed limit, the fact that the automobile was registered with the Massachusetts highway commission in defendant's name warranted a finding that he was the owner of it or had a special property in it which gave him control of it, and if he was riding in it though not driving, he is prima facie guilty of participating in its being run at an unlawful speed. Commonwealth v. Sherman, 191 Mass. 439, 78 N. E. 98. Such prima facie case may be rebutted. Id. An ordinance prohibiting the driving of an automobile on the street at a greater speed than six miles an hour is valid though Sess. Laws 1905, p. 293, c. 154, provides that no automobile shall be driven in the thickly settled portion of a city at a greater speed than one mile in five minutes, and that cities shall have no power to require of any operator of an automobile any license to use their streets, or to prohibit any automobile the "free use" of the streets. City of Bellingham v. Cissna [Wash.] 87 P. 481. Act of April 19, 1905, relating to licensing of automobiles, held not so inconsistent with a city ordinance of the city of Philadelphia as to supersede the ordinance.

awnings,[96] to license or restrict the placing of building material,[97] the moving of buildings,[98] or the transaction of business in streets,[99] and generally to make needful and reasonable regulations touching their use.[1] Cities and towns are generally also given power to authorize the use of their streets by public service corporations[2] on prescribed conditions,[3] but street franchises are construed against the grantee[4]

Brazier v. Philadelphia [Pa.] 64 A. 508. An ordinance prescribing the speed of automobiles at "crossings" means street crossings. A limitation of speed to six miles per hour between crossings and four miles per hour at crossings is not unreasonably low rate. Eichmann v. Buchheit [Wis.] 107 N. W. 325. Authority to a city to regulate the speed at which an automobile may be driven over its streets does not authorize an ordinance allowing automobiles to use a designated street on a designated day for speed contests by designated persons and such a use is unlawful notwithstanding such permission, but one who attended the races for the purpose of deriving entertainment therefrom could not recover for injuries sustained by reason of one of the cars leaving the road and striking her, in the absence of evidence of negligence on the part of the defendants, and absence of contributory negligence of plaintiff. Johnson v. New York [N. Y.] 78 N. E. 715.

96. Under Acts 1898, c. 123, § 10, as amended by Acts 1900, p. 117, permission to erect an awning extending over the walks in the city of Baltimore can only be granted by the board of estimate and a former ordinance vesting such power in the building inspector was repealed. Preston v. Likes, Berwanger & Co. [Md.] 62 A. 1024.

97. Where a permit gave the right to use one-third of the width of a street as a place for building material, but also provided that no material should be placed within two feet of any railroad track the contractor could not place material in any part of the street within two feet of a railroad track. Mulvey v. New York, 99 N. Y. S. 1114.

98. The common-law right of an owner to use the streets for the purpose of removing buildings may be restricted to a reasonable intent by the municipality. Hinman v. Clark, 51 Misc. 252, 100 N. Y. S. 1068.

99. Selling fruits and vegetables from a push cart held to be a violation of an ordinance prohibiting any person from carrying on a business in a street without a license. State v. Barbelais [Me.] 64 A. 881.

1. Merced Falls Gas & Elec. Co. v. Turner [Cal. App.] 84 P. 239.

2. The authority of the city of Chicago under Ill. acts of Feb. 14, 1859, and Feb. 21, 1861, to fix the conditions upon which street railroads chartered by those acts could occupy the streets, includes the power to fix the term of occupation. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. 801. The power to control streets and highways conferred upon the board of trustees of the town of Lakeview by Ill. act of March 5, 1867, § 7, includes the right to authorize street railways to occupy the streets. Id. In Illinois a railroad incorporated under Rev. St. c. 114, can cross any highway outside of cities and villages without further condition than that it shall not unnecessarily impair the usefulness of the highway, but it cannot construct its railroad on or across any street in any city or village without the consent of the municipality. City of Chicago v. Chicago Terminal Transfer R. Co., 121 Ill. App. 197. Persons who have signed a petition for the granting by a city council of authority to a railroad to use a street pursuant to a statute requiring a petition from the owners of a majority of the frontags on the street proposed to be used as a condition precedent to the granting of such authority may withdraw their names from such petition before it is acted on by the council. People v. Decatur, etc., R. Co., 120 Ill. App. 229. Under Rev. St. 1903, § 1536-185 (Municipal Code § 30), requiring the consent of the abutting owners as a condition precedent to the right of the council to grant a franchise to a street railroad company to lay its tracks in a street, and also providing the franchise shall be granted to the company agreeing to give service at lowest fare, a property owner cannot consent to the granting of the right to construct tracks to any particular company excluding all others. Forest City R. Co. v. Day [Ohio] 76 N. E. 398. See 6 Columbia L. R. 367. The granting of a license, privilege, or franchise to a street railway in the streets of a city, town, or village is an exercise of the police power of the city as a subordinate division of the state. It is not reviewable by certiorari. Wheeling & E. G. R. Co. v. Triadelphia, 58 W. Va. 487, 52 S. E. 499.

See, also, Franchises, 7 C. L. 1771.

3. Where a city grants to a street railroad company a franchise to lay tracks in its streets on a condition specified, its unjustifiable failure to comply with the condition operates as a forfeiture of the grant. Blocki v. People, 220 Ill. 444, 77 N. E. 172. Where a street railroad was granted a license to lay its tracks in a city street on condition that it build and operate the same within a specified time, the fact that it was enjoined from building a part of the line is no excuse for not having built the other parts thereof where it does not appear that the part enjoined was so connected with the balance of the line as to make it undesirable or inconvenient to build one without the other. Id. Where a telephone company fails to perform a condition precedent in a contract with a borough to complete its lines within a specified time, the borough may treat the poles and wires erected in the streets as a nuisance and remove them as such. Keystone State Tel. & T. Co. v. Ridley Park Borough, 28 Pa. Super. Ct. 635. Where a street railroad company accepts the conditions of an ordinance granting it a franchise and requiring it to pave the street or a part of it over which its tracks are to be laid, the obligation to pave devolves upon its successor in interest, though it has not expressly assumed such burden. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84. Mandamus will lie. Id.

and conferred and accepted subject to the police power of the city.[5] Regulations must be reasonable,[6] special ordinances being generally prohibited,[7] but the burden

4. And are regarded as licenses. Blocki v. People, 220 Ill. 444, 77 N. E. 172. Grants by a municipal corporation to railroads of the right to construct and maintain railroad tracks on or across its streets are strictly construed in favor of the grantor. City of Chicago v. Chicago Terminal Transfer R. Co., 121 Ill. App. 197.

5. State v. Atlantic & N. C. R. Co. [N. C.] 53 S. E. 290.

Railways: A municipal corporation having control over its streets may require a railroad which has laid tracks in one of its streets to change the location thereof when such change is necessary for the commerce and welfare of the public. Atlantic & B. R. Co. v. Cordele, 125 Ga. 373, 54 S. E. 155. Under Burns' Ann. St. 1901, § 5172a, a city can by mandamus compel a railroad company to plank a crossing of one of its streets, though the city has enacted an ordinance which requires the railroad company to do so and also provides that in case of the railroad's failure to do so such work may be done by the city and the cost thereof collected from the railroad. Vandalia R. Co. v. State [Ind.] 76 N. E. 980. In granting a franchise to use its streets, alleys, or public places, the city exercises its delegated legislative powers and for that purpose could not by contract barter away its future legislative control over such highways. Id.

A **street railway** company holds its franchise to operate its line in the streets of a city subject to the power of the city to regulate the use of the streets. People v. Geneva, etc., Traction Co., 112 App. Div. 581, 98 N. Y. S. 719. Geneva City Charter, Laws 1897, p. 444, c. 360, § 65, as amended by Laws 1905, p. 1032, c. 462, providing that upon the paving, alteration, etc., of a street a street railway company may be compelled by the board of public works to change its grade and line to conform to the alteration or improvement, does not impair the contract rights of a street railroad operating its line under a franchise from the city, though the change would necessitate a large expenditure on the part of the company. Id. An ordinance requiring a street railway to keep in good repair all that part of a street occupied by its tracks includes additional tracks to be laid as well as those already under operation. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Though a city has no power to impose on a street railroad the burden of repaving the street between its tracks and a certain distance to each side thereof, yet where the company agrees to do so in consideration of the grant to it of the franchise of operating its cars over such streets, the agreement is enforceable against it. Inhabitants of City of Trenton v. Trenton St. R. Co., 72 N. J. Law, 317, 63 A. 1. Agreement not ultra vires. Id. Not a tax on the corporation and so not affected by a subsequent law imposing a tax in lieu of all other taxes. Id.

Telegraphs and telephones: The right of a telegraph company to occupy the streets of a city is subordinate to the public use for travel. City could require removal of poles. Ganz v. Ohio Postal Tel. & Cable Co. [C. C. A.] 140 F. 692. The use of the streets and alleys of a city to carry the pole lines and wires necessary to the operation of a telephone exchange is a proper and legal use, but the right to such use is subject to regulation by the city and with it the power to impose a gross earnings charge as a condition to the enjoyment of such use. Such charge is not a tax but is in the nature of rent. City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S. W. 314. The city of Memphis has power to exact rentals of telegraph companies occupying and using its public streets. Acts Tenn. 1879, c. 11, § 3, p. 16, held to confer such power (City of Memphis v. Postal Tel. Cable Co. [C. C. A.] 145 F. 602), which was not nullified by Acts Tenn. 1885, c. 66, p. 120, § 1, authorizing telegraph companies to construct lines along public highways and streets (Id.). In New York telegraph and telephone companies derive their right to erect poles and string wires thereon in the streets of a city or village from the state, and while a village has power to regulate the placing of poles in its streets, it has no power to prohibit their erection and require the telephone company to put its wires in underground conduits. Village of Carthage v. Central New York Tel. & T. Co. [N. Y.] 78 N. E. 165, rvg. 110 App. Div. 625, 96 N. Y. S. 919.

Gas companies: The right of municipal corporations to improve and change the grade of streets for public purposes is fundamental, and where it changes the grade of a street to avoid a dangerous grade crossing it does so under its police power, and a gas company having pipes in the street the grade of which is changed cannot recover damages caused by changing its pipes. Scranton Gas & Water Co. v. Scranton, 214 Pa. 586, 64 A. 84. That by a city's permission a company erects poles or other obstructions in the streets under a franchise does not give the company an absolute right to maintain such obstructions for all time in the identical place where they were first located. Gas and electric company. Merced Falls Gas & Elec. Co. v. Turner [Cal. App.] 84 P. 239. That complainant had a constitutional franchise to use the streets did not prevent the proposed regulation where the constitution made such franchise subject to the supervision of the city authorities. Id.

6. Power to regulate the movement of teams and vehicles in a street does not imply power to prohibit such movement. Under Greater New York charter, Laws 1901, p. 127, c. 466, §§ 300, 315, police commissioner could not prohibit, by general rule, the movement of any teams or vehicles in parts of certain streets. Peace v. McAdoo, 110 App. Div. 13, 96 N. Y. S. 1039. Power to regulate the planting and protection of **shade trees** in the city's streets does not authorize an ordinance requiring the owner of a tree in a street to cut it down within ten days after notice from the city so to do. Nor does statutory power to prevent and remove all obstructions or encroachments on a street authorize the summary cutting down and removal of a growing tree without notice to the owner. Such trees are not necessarily

of establishing the unreasonableness of a rule is upon the party asserting it.[8] In the absence of express authority a city cannot delegate its legislative power of control over streets.[9]

Fire apparatus may be given the right of way when responding to an alarm.[10] Under the New York ordinance relative to the right of way for vehicles, those going in an easterly or westerly direction are required to stop and allow others to pass only when there is apparent danger of collision.[11] Horse racing on a public road is prohibited by statute in Indiana.[12]

An officer charged with the care of streets may be compelled by mandamus to allow one to lawfully excavate in a street in a proper manner and with suitable safeguards,[13] but plaintiff in such case must have an undoubted right to excavate.[14]

§ 13. *Rights of public use.*[15]—The general public has the right to use every portion of a highway including the space between street car tracks when not needed for the cars.[16] Pedestrians and operators of automobiles[17] and other common ve-

an encroachment and the owner is entitled to a judicial determination that it is an encroachment before it can be destroyed. Sproul v. Stockton [N. J. Law] 62 A. 275. An ordinance requiring a water company to obtain permission from the city council before excavating in any street for the purpose of laying water pipes is not unreasonable. Beaver Valley Water Co. v. Conway Borough, 213 Pa. 225, 62 A. 844. The question of whether an ordinance relative to the use of a city street is unreasonable and oppressive is one of law for the court. Ordinance prohibiting the carrying on of any business in a public street not unreasonable or oppressive. State v. Barbelale [Me.] 64 A. 881.

7. Special ordinance permitting automobile club to conduct speed trials and suspending other ordinances regulating speed held to confer no authority to conduct such trials, and city, club, and others connected therewith held liable for injuries sustained by plaintiff. Johnson v. New York, 109 App. Div. 821, 96 N. Y. S. 754. Council could not by special resolution stop removal of a building already in the street. Hinman v. Clark, 51 Misc. 252, 100 N. Y. S. 1068.

8. Though a city may be without power to impose unreasonable restrictions or conditions on a grant by it to a street railway of the right to use its streets, the reasonableness of the restrictions is a question of fact and the burden of proving that they are not is on a person asserting that they are unreasonable. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84. If reasonable such restrictions are not ultra vires the municipality. Id. One who seeks to restrain a city from regulating the use of streets must show that the proposed regulation is unreasonable and unnecessary. Injunction to prevent removal of poles. Merced Falls Gas & Elec. Co. v. Turner [Cal. App.] 84 P. 239.

9. Common council could not delegate to department of works power to regulate the right of an owner to move buildings in the streets. Hinman v. Clark, 51 Misc. 252, 100 N. Y. S. 1068. Power to regulate construction of sidewalks cannot be delegated. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350. Where an ordinance establishing the grade of streets is definite in its requirements, the fact that it provides for notice by the president or clerk of the village to one who violates it before proceedings to impose the penalty for its violation does not make it an attempted delegation of legislative power. Village of Hampton v. Chicago, etc., R. Co., 118 Ill. App. 621.

10. An ordinance giving fire apparatus the right of way controls a prior ordinance giving in general terms the street cars the right of way over vehicles, etc. (McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618), and the fact that they are republished together does not alter the rule (Id.). Under Greater New York Charter, Laws 1897, p. 260, c. 378, § 748, as amended by Laws 1900, p. 255, c. 155, giving the fire insurance patrol right of way in the streets over all vehicles except those carrying mail, it is abstractly the duty of a motorman of a street car to stop the car to give the street to a patrol truck, if it is seen, or by the exercise of reasonable care could be seen in time to stop the car. Duffghe v. Metropolitan St. R. Co., 109 App. Div. 603, 96 N. Y. S. 324. Law constitutional. Id.

11. Armour & Co. v. Carlas [C. C. A.] 142 F. 721. Evidence that plaintiff attempted to cross the street, which was only 28 feet wide when defendant was 80 feet distant, does not show negligence as a matter of law. Id. The facts being such as to call for the application of a municipal ordinance prescribing rights of way at street intersections, it was error for the court to leave it for the jury to determine whether the ordinance was applicable. McCarragher v. Proal, 114 App. Div. 470, 100 N. Y. S. 208.

12. Under Burns' Ann. St. 1901, § 2280, one who acts as a rider in a horse race held on a public road is guilty of an offense, as is also the owner of the horse who knowingly allows his horse to run in such a race. State v. New, 36 Ind. App. 521, 76 N. E. 181.

13. French v. Jones, 191 Mass. 522, 78 N. E. 118.

14. One who has purchased rails imbedded in a street from a railway company has no absolute right to dig up the street for the purpose of removing the rails, and mandamus will not lie to compel the street overseer to permit the digging up of the street for that purpose. French v. Jones, 191 Mass. 522, 78 N. E. 118.

hicles have equal rights to the use of public streets.[18] One who operates a street railway or railroad car,[19] steam roller,[20] automobile or motor car,[21] or other vehicle,[22]

15. See 5 C. L. 1665.

16. Pedestrians have a right to use any part of a highway, but the question of whether a particular use is such as a reasonably prudent person would make must depend on the attendant circumstances. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347. Street railways have no greater or superior right to use of streets than that enjoyed by general public and must use reasonable care. Dulaney v. United R. & Elec. Co. [Md.] 65 A. 45; United R. & Elec. Co. v. Watkins, 102 Md. 264, 62 A. 234; Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347. Where a city authorizes the laying of a temporary track in one of its streets, the street is not deprived of its character as a public street and one going thereon when the tracks are laid is not a trespasser. The railroad company in running cars on such track is bound to use reasonable care not to injure others who might choose to use the street. Keller v. Philadelphia & R. R. Co., 214 Pa. 82, 63 A. 413. Street railroads do not have an exclusive right to that portion of a highway covered by their tracks, but they do have the right of way over such portions and it is the duty of other travelers using the tracks to yield them to the cars on their approach. Daniels v Bay City Traction & Elec. Co. [Mich.] 13 Det. Leg. N. 15, 107 N. W. 94.

17. The owners of automobiles have the same rights in the streets and highways that the drivers of horses have. Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71; Hannigan v. Wright [Del.] 63 A. 234. The running of an automobile on a highway is a lawful use of the road and the owner or person using it is not liable for injuries caused by its frightening horses, unless it appears that he operated it at a time, or in a manner, or under circumstances, inconsistent with a proper regard for the rights of others. McIntyre v. Orner [Ind.] 76 N. E. 750.

18. The relative rights of pedestrians crossing a street and drivers of vehicles are equal and reciprocal. Neither is called on to anticipate negligence on the part of the other. The question of whether either one or the other has been negligent is for the jury, taking into consideration all the circumstances of the particular case. Stallman v. Shea [Minn.] 109 N. W. 824. A traveler on foot has the same right to the use of the public streets of a city as a vehicle of any kind. Hannigan v. Wright [Del.] 63 A. 234.

19. Keller v. Philadelphia & R. R. Co., 214 Pa. 82, 63 A. 413. A street railway company and the public are bound to use reasonable care and caution to prevent collisions and accidents. Garrett v. People's R. Co. [Del.] 64 A. 254. Servants of a street railway are bound to use diligent and constant watchfulness for persons on or crossing its tracks, and when the car is operated at a high rate of speed a high degree of vigilance is required. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347. Where a railroad has been given permission to lay its tracks temporarily in a public street, an engineer running a train thereon is not bound to continuously ring the bell as a warning to persons who may come onto the track, nor is he bound to presume that one walking on a sidewalk in such street would leave the walk and go onto the track so as to require the giving of warning signals. Keller v. Philadelphia & R. R. Co., 214 Pa. 82, 63 A. 413. It is negligence for a railroad company to stand a train of cars in a street where its tracks cross the street so as to leave only a small opening between the two parts of the train for the passage of pedestrians, and it is guilty of negligence in so doing where it attempts to connect the two parts of the train without warning, as the pedestrians have a right to cross the tracks in such roadway. Edwards v. Carolina & N. W. R. Co., 140 N. C. 49, 52 S. E. 234.

See, also, full collection of cases, Railroads, 6 C. L. 1194; Street Railways, 6 C. L. 1556.

20. Frightening horse by permitting steam roller to puff and whistle. Phelen v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440. Operator of steam roller held liable for damages caused by failure to warn persons of its approach. Runaway. Laws 1890, p. 1205, c. 568, § 155 construed. Buchanan's Sons v. Cranford Co., 112 App. Div. 278, 98 N. Y. S. 378. In an action for injuries caused by the frightening of a horse by the operation of a steam roller on a highway, evidence of the usable value of the horse during the period its owner was deprived of its use by reason of the injuries sustained is admissible. Id.

21. Driver of automobile bound to use reasonable care in view of means of locomotion employed. Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71; McFern v. Gardner [Mo. App.] 97 S. W. 972; Hannigan v. Wright [Del.] 63 A. 234. It is the duty of the driver of an automobile to keep a lookout ahead for the purpose of ascertaining whether the automobile is about to frighten horses attached to approaching vehicles. If it so appears it is his duty to diminish the speed or stop the car or do whatever is reasonably required to diminish the danger. McIntyre v. Orner [Ind.] 76 N. E. 750. Under St. 1903, c. 473, § 7, requiring that the driver of an automobile approaching a horse drawn vehicle shall operate it in such a manner as to exercise every reasonable precaution to prevent frightening the horses of the other vehicle, one approaching a horse drawn vehicle from the rear is "approaching" it and it is for the jury to say whether failure to sound the horn or bell is negligence on the part of the driver of the automobile. Gifford v. Jennings, 190 Mass. 54, 76 N. E. 233. Under Hurd's Rev. St. 1903, c. 121, § 4, in action to recover injuries sustained by reason of plaintiff's horse becoming frightened by an automobile, the plaintiff makes out a prima facie case by showing that he has been injured and that defendant was running his machine in excess of 15 miles an hour. Ward v. Meredith, 220 Ill. 66, 77 N. E. 118. One negligently driving an automobile upon the curb either through recklessness or inexperience and injuring a

or who drives a horse[23] or leaves him unattended,[24] is bound to act with due regard for the safety of others lawfully using the highway,[25] the care to be exercised being commensurate with the dangers reasonably[26] to be apprehended[27] in view of the cir-

pedestrian is liable. May v. Allison, 30 Pa. Super. Ct. 50. Evidence sufficient to support verdict for plaintiff who was struck by automobile. Spina v. New York Transp. Co., 96 N. Y. S. 270. Whether it is negligence to run an automobile at night without a light is for the jury. Wright v. Crane [Mich.] 12 Det. Leg. N. 794, 106 N. W. 71. In an action against the owner of an automobile to recover for injuries caused by plaintiff's horse becoming frightened, it being alleged that defendant was operating his machine at a high rate of speed, the question of defendant's negligence is for the jury. Weiskopf v. Ritter [Ky.] 97 S. W. 1120. One running an automobile past a team at the rate of four or five miles an hour with the engine shut off, clearing by five or six feet, and receiving no signal to stop, is not guilty of negligence, there being nothing to indicate that the team was frightened. Davis v. Maxwell, 108 App. Div. 128, 96 N. Y. S. 45. Where, in an action for personal injuries to plaintiff by her horse becoming frightened at defendant's automobile, the court instructed that if defendant drove his machine down towards plaintiff in the manner claimed by her the jury might determine whether he was negligent, but did not instruct as to defendant's evidence, a new trial should be granted, it being likely that the jury concluded that, though he passed as he testified, he was negligent in not stopping, which would not be true. Id. **Declaration in action** for injuries caused by defendant's negligent operation of an automobile held to state a cause of action. Hughes v. Connable [Del.] 64 A. 72. Under Hurd's Rev. St. 1903, c. 121, § 2, it is the duty of one driving a motor car to stop it whenever a horse being driven or ridden shows indication of fright on its approach. The driver of the motor car must use reasonable care and diligence to ascertain if an approaching horse is about to become frightened and if he is to stop the car. Ward v. Meredith, 220 Ill. 66, 77 N. E. 118. In an action to recover damages because of plaintiff's horse becoming frightened by a motor car, it is not error to permit a witness to testify that a horse became frightened and showed fright, as such is a statement of fact and not a conclusion of the witness. Id. The fact that a motor car otherwise operated lawfully emitted sounds or by its appearance frightened horses, if the sounds and appearance were ordinary, the owner of the machine is not guilty of negligence. Eichmann v. Buchheit [Wis.] 107 N. W. 325.

22. Bound to reasonably look out for others using street. Robinson v. Huber [Del.] 63 A. 873; American Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563. Looking backwards while driving a vehicle rapidly in a street and running over another held negligence. Charters v. Palmer, 98 N. Y. S. 887. Evidence that defendant's wagons are of a particular kind and bear a peculiar mark, and that such a wagon so marked produced plaintiff's damage, held sufficient to sustain a finding that the wagon belonged to defendant (Hennessey v. Baugh & Sons Co., 29 Pa. Super. Ct. 310), and proof of ownership raises an inferencs that the party in charge thereof was defendant's agent (Id.). In an action for injuries caused by the alleged negligence of defendant, a city ordinance which defendant was violating at the time the injury was sustained is not admissible where the violation complained of had no causal connection with the injury sustained. Shaffer v. Roesch [Pa.] 64 A. 511. Whether negligence was proximate cause is for the jury. American Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563.

23. In an action to recover damages caused by defendant's servant negligently driving against plaintiff's intestate, evidence held not to show that injuries were the proximate result of the collision. De Maet v. Fidelity Storage, Packing & Moving Co. [Mo. App.] 96 S. W. 1045. Evidence held for the jury whether defendant was negligent in attempting to make his horse stand near a track while an approaching train passed. West v. Woodruff, 112 App. Div. 133, 97 N. Y. S. 1054. Where the declaration alleges that the defendant's team ran into plaintiff's team, and the proof is that both teams were in motion up to the instant of collision, the fact that defendant's team was much slower in motion than the team of plaintiff does not constitute a fatal variance between the allegation and the proof. Neal v. Rendall, 100 Me. 574, 62 A. 706.

24. It is negligence to leave a horse standing in the street unhitched and unattended. Acker v. Stern, 49 Misc. 650, 97 N. Y. S. 1041. Where a pedestrian was injured by a runaway horse and it appeared that the strap with which the horse was tied was weak, was tied low, and was broken before the horse took fright, evidence held sufficient to show that the weak strap was the cause of the accident. Kern v. Snider [C. C. A.] 145 F. 327. Where the cause of a horse's fright is not shown but it was clear that he had broken loose before he was frightened, an instruction that, if the fright was so great that no strap such as an ordinary person would have used could have held him, defendant was not liable is properly refused as misleading in that the jury might conjecture that the fright first occurred as the result of some act not shown. Id.

25. The right of drivers of vehicles and of persons on foot to use the public streets must be exercised by each with due regard to the rights of the other and the right of each must be exercised in a reasonable and careful manner so as not unreasonably to abridge or interfere with the rights of the other. Robinson v. Huber [Del.] 63 A. 873. All persons bound to use reasonable care. Hannigan v. Wright [Del.] 63 A. 234.

26. A person using a public street is not guilty of negligence in failing to provide against a contingency which ordinary care and foresight would not have foreseen, to-wit, the forcing open of a gate on the rear end of a wagon by the force of wind caused by an approaching street car. Shaffer v. Roesch [Pa.] 64 A. 511.

27. Hannigan v. Wright [Del.] 63 A. 234.

cumstances of the case.[28] As in other cases contributory negligence defeats recovery[29] and the question of such negligence is generally for the jury.[30]

A municipality holds its streets in trust for the general public, to be used,

28. Robinson v. Huber [Del.] 63 A. 873.

29. Attempt to cross street 75 feet ahead of a team held not negligence as a matter of law. Gerber v. Boorstein, 99 N. Y. S. 1091. Evidence insufficient to show plaintiff's freedom from contributory negligence in action for injury from collision with automobile. McCarragher v. Proal, 114 App. Div. 470, 100 N. Y. S. 208. The **violation of an ordinance** regulating traffic in a street is not of itself contributory negligence. Ordinance prescribing rights of way at street intersections. Id.

Pedestrians: A person crossing a public street is required to make a reasonable use of all his senses to observe an impending danger. This means such use as an ordinarily prudent and careful person would have used under like circumstances. Hannigan v. Wright [Del.] 63 A. 234. One walking on a street car track has a right to assume that street cars thereon will not run at an excessive speed and that an approaching car will give warning. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347. There is no rule of law requiring a pedestrian when lawfully using the public highway to be continuously looking or listening to ascertain if autocars are approaching under penalty that, on failing to do so, if he is injured his negligence must be conclusively presumed. He has a right to presume that other persons using the highway with him will exercise a proper degree of care to avoid injuring him. Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224. Pedestrians in going from one side of a street to the other are not confined to the regular crossing at the intersections, but may cross at any point according to their convenience, but in so doing they are bound to exercise care according to the circumstances, and especially bound to the alert and watchful performance of the duty of all travelers on highways to look where they are going. McIlhenney v. Philadelphia, 214 Pa. 44, 63 A. 368. A telephone wire hung so low that when charged with electricity it is dangerous to one who comes in contact with it is not such a danger as to which he assumes the risk in crossing at a place other than a regular crossing. Southern Bell Tel. & Tel. Co. v. Howell, 124 Ga. 1050, 53 S. E. 577. A passenger in alighting from a car is not guilty of negligence as a matter of law in failing to look both ways so as to preclude a recovery for injuries received from a collision with an automobile. Question is one of fact under all the circumstances for the jury. Garside v. New York Transp. Co., 146 F. 588. The fact that plaintiff suddenly stepped back to avoid one automobile and was struck by another is not such contributory negligence as to preclude recovery where defendant saw the situation in time to avoid the accident by the exercise of reasonable care. Id.

Drivers: One who drives onto a track in front of an approaching car without looking to see if he can safely do so is guilty of contributory negligence. Daniels v. Bay City Traction & Elec. Co. [Mich.] 13 Det. Leg. N. 15, 107 N. W. 94; Brennan v. Pennsylvania R. Co. [N. J. Law] 62 A. 177. One driving on street railroad tracks to pass obstruction in the night held not guilty of contributory negligence for failing to look and listen before driving on tracks. Palmer v. Larchmont Horse R. Co., 112 App. Div. 341, 98 N. Y. S. 567.

Where a **child** is using a highway it is bound to use only such degree of care as under like conditions would have been exercised by the ordinarily prudent child of his years. Burns v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 740. The presence of a young child in a street unattended is prima facie evidence of the negligence of the child's custodian, but may be rebutted by evidence that the child had evaded the custody of its custodian under such circumstances as to show that the latter was not negligent. Norris v. Anthony [Mass.] 79 N. E. 258. In an action for injury to child from the falling of a pole cut down by a telephone company in a street, an instruction that due care in a child eight years old is such care as its capacity, mental and physical, fits it for exercising in the actual circumstances of the occasion and situation and is determined by the jury; such care as the capacity of the particular child enables it to use naturally and reasonably is what the law requires on the part of the child,—held not error. Stewart v. Southern Bell Tel. & T. Co., 124 Ga. 224, 52 S. E. 331. A child 5 years old is too young to be charged with contributory negligence. American Tobacco Co. v. Polisco, 104 Va. 777, 52 S. E. 563. The **burden of proving** contributory negligence is on defendant. Standard Oil Co. v. Hartman, 102 Md. 563, 62 A. 805. Where an injury results in death, the rule with respect to the evidence of freedom from contributory negligence is not so rigid as otherwise. Charters v. Palmer, 98 N. Y. S. 887.

30. Contributory negligence for the jury. Hennessey v. Taylor, 189 Mass. 583, 76 N. E. 224; Minnich v. Wright, 214 Pa. 201, 63 A. 428; Burns v. Worcester Consol. Co. [Mass.] 78 N. E. 740; Mathers v. Interurban St. R. Co., 112 App. Div. 397, 98 N. Y. S. 433; Charters v. Palmer, 98 N. Y. S. 887. One who is injured by the negligence of the driver of a vehicle can recover though at the time he was **violating an ordinance** of the city with reference to the use of the streets, where the acts constituting the violation did not contribute to the causing of the injury. Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827. One who when confronted with **imminent danger** of collision on a street turns his vehicle to the left instead of to the right in an endeavor to avoid the collision is not as a matter of law guilty of contributory negligence. McFern v. Gardner [Mo. App.] 97 S. W. 972.

Whether boy nine years old who in crossing a street was struck by a team was sui juris and capable of being guilty of contributory negligence. Gerber v. Boorstein, 99 N. Y. S. 1091. Whether a twelve year old boy playing ball in the street and injured by

principally, as thoroughfares.[31] Hence, though it may permit the maintenance of certain semi-private structures therein which tend to facilitate the public enjoyment of them as highways and interfere but slightly with travel,[32] it has no power to authorize either corporations or individuals to so use them as permanently to exclude the public therefrom,[33] and one cannot claim the right to such use.[34] Public highways must admit of new methods of use whenever it is found that the general benefit requires them.[35] One who buys a building has a common-law right to make a reasonable use of the streets of a city for the purpose of moving it.[36]

The fact that one makes a lawful and temporary use of a street as a place for building material does not deprive others of the right to use it.[37]

an automobile was guilty of contributory negligence. Turner v. Hall [N. J. Law] 64 A. 1060.

31. State v. Vandalia [Mo. App.] 94 S. W. 1009.

32. Such as **electric or cable railways.** State v. Vandalia [Mo. App.] 94 S. W. 1009. It may authorize **coal holes** in the walks which interfere but slightly with travel. Id. A city may grant to private persons a license to use its streets for the purpose of holding a **carnival** therein where such use is temporary and does not materially interfere with their use by the public for purposes of travel. State v. Stoner [Ind.] 79 N. E. 399. The city may allow the abutting owners to use the street in a manner not inconsistent with the use thereof by the public. Thus where the street is occupied by a bridge as an approach to a bridge over tracks, the city may allow the abutting owner to use the **space under the bridge** for his individual purposes. Adair v. Atlanta, 124 Ga. 288, 52 S. E. 739.

33. Cannot authorize use for purely private purpose. Kuhl v. St. Bernard Rendering & Fertilizing Co. [La.] 41 So. 361; City of Chicago v. Verdon, 119 Ill. App. 494; State v. Vandalia [Mo. App.] 94 S. W. 1009. And such an occupancy is none the less a nuisance when sanctioned by the city officials or governing body. Id. City could not authorize laying of waterpipes in street for private use. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149. The power of a city to grant the right to a railroad to use a street does not carry with it the power to authorize the company to obstruct the street so as to deprive the public and adjacent property owners of its use, even where the fee is in the city. Chicago etc., R. Co. v. People, 120 Ill. App. 306; Id., 222 Ill. 427, 78 N. E. 790. A permanent structure in a street may be a purpresture though it does not wholly deprive the public of the use of the street. Id., 120 Ill. App. 306. The power of a city to authorize the placing of obstructions in the street is not absolute but must be exercised for the public welfare, and private structures which are inconsistent with the primary use or which wholly destroy it cannot be licensed. Morie v. St. Louis Transit Co., 116 Mo. App. 12, 91 S. W. 962. A switch placed in the street under a license issued by the city under the power conferred by Rev. St. 1899, § 1187, and Mun. Code 1901, p. 220, on St. Louis to license and regulate railroad tracts in the street is prima facie a lawful occupation of the street and no liability exists for resulting injuries if due diligence is used in the selection and care of the same, unless the inconvenience is so great as to constitute a nuisance. Id. The fact that it is so constructed as to be "liable to catch and hold vehicles" does not of itself show that it is an obstruction which cannot be licensed. Id. Section 3337-1 is a statute penal in its nature and the maxim expressio uniue est exciusio alterius cannot be invoked in order to derive therefrom power vesting in the municipal corporation the right to grant to railroads the exclusive use of the public streets. City of Cincinnati v. Louisville & N. R. Co., 4 Ohio N. P. (N. S.) 217. But even if the power were lodged by the statutes in the council to grant some use of the city streets to railroads for placing piers, posts, or supports therein, the power could not be abused by council, and if it is abused in such a way as to interfere with the ordinary rights of the public in and to the ordinary use of such streets, a court of equity will interpose by injunction. Id. In Illinois a city council has no power to authorize a railroad to lay its tracks in a public street except on petition of the owners of land representing more than one-half the frontage of the street, where the use of the street by the railroad would be exclusive of the general public. Chicago etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790. An ordinance imposing a penalty for hindering or delaying the cars of a street railroad company will be construed to prohibit only an unreasonable hindrance. An abutting owner has a right to make a reasonable use of the street though so doing hinders or delays the cars. Dulaney v. United R. & Elec. Co. [Md.] 65 A. 45. There is an entire absence of power in council under the statutes as they exist today to authorize the erection of any structure, abutment, or support in a public way which will necessarily prevent a joint use by the public of the part so occupied. City of Cincinnati v. Louisville & N. R. Co., 4 Ohio N. P. (N. S.) 217.

34. On the ground that others are doing the same thing without interference. Could not require city to grant permit to use portion of sidewalk for sale of goods. City of Chicago v. Verdon, 119 Ill. App. 494.

35. McCarter v. Ludlum Steel & Spring Co. [N. J. Eq.] 63 A. 761. The use of a steam traction engine for purposes of hauling goods in trailers attached thereto is not per se a nuisance at common-law. Id.

36. Hinman v. Clark, 51 Misc. 252, 100 N. Y. S. 1068.

37. Not trespassers so as to lessen the care which such persons must exercise for

§ 14. *Rights of abutters.*[38]—An abutting owner may temporarily use a street for private purposes provided he does so in a reasonable manner,[39] but he may not put any part of the street to any such use as will injuriously affect his neighbor.[40] He also has a right of view up and down the street as well as immediately in front of his property.[41] An owner may enjoin a city from in bad faith tearing up a sidewalk which is in good repair, there being no intention to replace it,[42] and the fact that he refuses to pay for a sidewalk in front of his premises does not authorize a city officer to remove it.[43] Ordinarily he has such an interest in shade trees near his property as will entitle him to damages for their unlawful cutting.[44] He may enjoin the unauthorized manner of use of a street by a railway company if his property rights are injured thereby,[45] and also recover damages caused by such use.[46] While a city may take stone from one portion of a street for the purpose of repairing other portions,[47] it cannot do so without compensating an abutting owner who is injured thereby,[48] but abutting owners are not entitled to recover for slight injuries or temporary inconvenience incidental to a duly authorized public improvement.[49] A township in building an embankment to carry a road over a ravine has no right to place any part of the embankment on the land of an adjoining owner.[50] The use of a public road for the purpose of carrying a sewer beyond the limits of

their safety. Compty v. Starke Dredge & Dock Co. [Wis.] 109 N. W. 650.

38. See 5 C. L. 1669.

39. May maintain obstructions in a street incident to the erection or repair of buildings provided he does not unreasonably interfere with the rights of the public to use the street or the rights of adjoining owners. Culbertson v. Alexander [Okl.] 87 P. 863. Whether building material remained in a street an unreasonable length of time and whether reasonable care was exercised to prevent interference with property or business of adjacent owner held questions for the jury under all the circumstances. Id. Evidence that the owner of a carriage repository left a carriage standing in front of his repository and that his brother refused to remove it upon a request of an officer does not show unnecessary obstructing of a street within police regulations of Dist. of Columbia, art. 10, § 14. Probey v. District of Columbia, 26 App. D. C. 1. Evidence held to sustain a finding that defendant lawfully piling lumber in the street did so in a negligent manner. Addls v. Hess, 29 Pa. Super. Ct. 505.

40. A sidewalk in a street is a part of the street and an abutting owner has no right to put that part of it which fronts his property to a private use which operates injuriously to the property of his neighbor. Could not maintain stairway landing on line of adjoining lot. Perry v. Castner [Iowa] 107 N. W. 940.

41. First Nat. Bank v. Tyson [Ala.] 39 So. 560.

42. Nichols v. Sadorus, 120 Ill. App. 70.

43. A city officer who acting under direction of the city council removes a sidewalk from in front of plaintiff's premises, which plaintiff had refused to pay for, is guilty of trespass though the fee of the street is in the city. Jordan v. Thorp [Mich.] 12 Det. Leg. N. 463, 105 N. W. 1113, citing Rogers v. Randall, 29 Mich. 41.

44. One who plants trees along a street by acquiescence of the city has a sufficient interest in them to entitle him to damages against a telephone company wrongfully cutting them down, though his title does not include any part of the street. Osborne v. Auburn Tel. Co., 111 App. Div. 702, 97 N. Y. S. 874. Shade trees are not necessarily an encroachment, and power to remove encroachments or regulate the planting and protection of shade trees does not authorize the city council to summarily cut them down. Sproul v. Stockton [N. J. Law] 62 A. 275. Even if an abutting owner is entitled to compensation for the cutting of trees in the highway in the construction of a telephone system, his remedy is at law and not for an injunction. Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003. A declaration charging that it was the duty of the city and its contractor in digging up the streets for a sewerage system to furnish support to plaintiff's gas pipes laid therein "under competent and legal authority," failing to state facts showing such duty, is demurrable. Millville Gaslight Co. v. Sweeten [N. J. Law] 64 A. 959.

45. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798.

46. Where a street railroad authorized only to carry passengers uses its tracks for freight traffic, an abutting property owner can recover damages to his property caused by the unauthorized use of the street for freight traffic, and when the use threatens to be permanent, the depreciation in the market value of plaintiff's property is the measure of damages. Rockford & Interurban R. Co. v. Keyt, 117 Ill. App. 32.

47, 48. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115.

49. An abutting property owner cannot maintain trespass against a city for injuries to the walk in front of his premises caused by the making of a public improvement, whether the street was created by a common-law or statutory dedication. Nor for temporary interference with ingress or egress. City of Chicago v. Noonan, 121 Ill. App. 185.

50. Schneider v. Brown Tp. [Iowa] 12 Det. Leg. N. 622, 105 N. W. 13.

a city to a watercourse cannot be interfered with by an adjacent owner where the use of the sewer is restricted to surface or storm water.[51] In Massachusetts failure of the highway commission to award damages to landowners injuriously affected by their action is equivalent to an adjudication that there are none.[52]

Ownership of fee.[53]—In most jurisdictions the fee of public streets is in the abutting owners subject only to the public easement,[54] and such owners hold to the center of the street[55] with a reversion on vacation.[56] In Illinois, however, the presumption of law is that the fee of a city street is in the city.[57] In case of a common-law dedication and acceptance the fee remains in the dedicator, but the city may improve and use it for all legitimate purposes as a street.[58] A statutory dedication being insufficient to vest the fee of the streets in a city, the fee is not vested by estoppel on the ground of subsequent conduct.[59] A city has no title to ore underneath a street within the meaning of a statute giving it a fee of the streets.[60] The fact that a railroad company wrongfully supports a bridge upon a street does not give the owner of the fee therein title to the bridge so as to entitle him to rent for its use by the railroad company.[61] If an additional burden is thrown upon the property of an abutting owner by reason of the construction of a railroad, he may recover damages therefor from the company though he does not own the fee of the street,[62] but if he has no title in the street he cannot recover from the city.[63]

51. And its construction has been duly authorized by the city council with the approval of the state board of health and the county commissioners. Whitney v. Toledo, 8 Ohio C. C. (N. S.) 577.

52. Under Rev. Laws Mass. c. 47, § 9, it is the duty of the highway commission to take notice of cases in which their action causes damages to landowners and to make assessments of these damages without waiting for an application by the injured party, and its failure to award damages is to be treated as an adjudication that there are none and the party can apply to the court for the assessment of his damages. Hafey v. Com., 189 Mass. 540, 76 N. E. 208.

53. See 5 C. L. 1671.

54. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149; Adair v. Atlanta, 124 Ga. 288, 52 S. E. 739. The general rule both in England and in this state, is that the fee of the soil of the highway is presumed to belong to the adjoining owners and that a person holding land bounded on a highway between two estates is prima facie the owner to the center of such highway, subject to the easement of the public to the right of way, but such presumption can be rebutted by an express provision in a deed to the effect that the fee to the highway was not intended to be conveyed. Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33.

55. The owner of a lot bounded by a street within a recorded plat owns to the center of the street subject to the public easement. Lins v. Seefield, 126 Wis. 610, 105 N. W. 917. Both as to lots bounded by streets and those bounded by public alleys. Johnston v. Lonstorf [Wis.] 107 N. W. 459. The abutting owner in a town or city owns the fee to the center of the street, hence the abutting owner is the owner of a shade tree standing between the walk and roadway and can recover for the destruction thereof by a telephone company where it does not appear that it was necessary to do so to construct the telephone line. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207.

56. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111; Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21.

57. Rockford & I. R. Co. v. Keyt, 117 Ill. App. 32. Where the owner of land plats the same showing streets and records the same as provided by statute, the fee of the streets becomes vested in the city as trustee for the use of the public. City of Chicago v. Noonan, 121 Ill. App. 185.

58. City of Chicago v. Noonan, 121 Ill. App. 185.

59. Only a common-law dedication can result. City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034. That owner used the word "convey" on the plat did not transfer the fee. Id.

60. "Street" within Gen. Laws 1877, c. 100, § 6, includes the surface and such depth as is necessary for street purposes. City of Leadville v. Bohn Min. Co. [Colo.] 86 P. 1038.

61. Coatsworth v. Lehigh Valley R. Co., 100 N. Y. S. 504. Where a railroad company under municipal authority constructed a bridge over a street, plaintiff, the fee owner therein, was not entitled to relief unless he suffered substantial damages by the obstruction of his right of way appurtenant to adjoining land. Id.

62. Acker v. Knoxville [Tenn.] 96 S. W. 973. Interfering with his ingress. Little Rock, etc., R. Co. v. Greer [Ark.] 96 S. W. 129. In an action by abutting owner to recover damages caused by the construction of a railroad in front of his premises without paying him compensation, as is required by Laws 1897, § 6234, subd. 5, the plaintiff can recover only such damages as are reasonably permanent in their character and such as arise from the proper operation of the road in the usual way. Where plaintiff does not own the fee he cannot recover on account

A use beyond that charged on the street when it was acquired or dedicated is an additional burden.[64]

§ 15. *Defective or unsafe streets or highways. A. Liability of municipalities in general.*[65]—A municipality is bound to exercise reasonable care to maintain its public highways in a reasonably safe condition for ordinary travel[66] throughout the entire year[67] for infirm as well as strong travelers.[68] This duty extends to all thoroughfares used as public highways and recognized by the municipality as such[69] and to the entire width thereof;[70] and if a municipality wrongfully main-

of any interest in the soil. Keyser v. Lake Shore & M. S. R. Co. [Mich.] 12 Det. Leg. N. 653, 105 N. W. 143.

63. Acker v. Knoxville [Tenn.] 96 S. W. 973.

64. See Eminent Domain, 7 C. L. 1276.

65. See 5 C. L. 1671.

66. Oklahoma City v. Reed [Okl.] 87 P. 645; Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309; Finkle v. Valatie, 99 N. Y. S. 715; Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. S. 425; Herrington v. Macon, 125 Ga. 58, 54 S. E. 71; City of Louisville v. Romer [Ky.] 97 S. W. 348; Anders v. West Union [Iowa] 108 N. W. 226; City of Gibson v. Murray, 120 Ill. App. 296; City Council of Montgomery v. Reese [Ala.] 40 So. 760; Green v. Council of Newark [Del.] 62 A. 792; Town of Normal v. Bright, 223 Ill. 99, 79 N. E. 90; Eaton v. Weiser [Idaho] 86 P. 541. Liable for injury from charged sagged electric wire across street. Eaton v. Weiser [Idaho] 86 P. 541. And is liable for injuries sustained by reason of failure to do so provided the injured party exercised reasonable and ordinary care to avoid injury. City of Stillwater v. Swisher, 16 Okl. 585, 85 P. 1110. City liable to one who without fault drove into electric wire negligently left in street, though horse had become frightened so as to be beyond control. City of Emporia v. White [Kan.] 86 P. 295. In an action for injuries caused by a defective walk, it is error to charge that if the city had ordered an officer to make repairs it had a right to rest on the presumption that the repairs had been made. Lorf v. Detroit [Mich.] 13 Det. Leg. N. 502, 108 N. W. 661. A city which allows another to erect a dangerous structure in a street and after knowledge of its dangerous qualities allows it to remain there it is liable for damages sustained by one injured thereby. Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696. Under Code Iowa, § 422, subd. 18, giving to counties power to provide for the erection of bridges and to keep the same in repair, a county is liable for damages resulting from its negligence either in the erection or in failing to repair a bridge. Wilson v. Wapello County, 129 Iowa, 77, 105 N. W. 363.

Only reasonable care required: Where street was properly constructed, city held not liable for accident from cave-in as a team was passing over it after a rain, there being nothing to indicate the defect. Farrell v. New York, 99 N. Y. S. 947. The true test of a city's liability for injuries caused by a defective walk is "would a person of ordinary prudence, knowing of the particular defect shown, have repaired the same, believing that, if the same was continued, it was likely to produce injury?" City of Rockwall v. Heath [Tex. Civ. App.] 14 Tex. Ct. Rep. 230, 90 S. W. 514. City not liable for injury from slight slagging of planks temporarily placed over opening in sidewalk. City of Rock Island v. Littig, 118 Ill. App. 643. Municipal authorities are not responsible for latent defects in sidewalks which are not observable. They are liable only for the existence of defects which would become known to them in the exercise of reasonable supervision. Murdaugh v. Oxford Borough, 214 Pa. 384, 63 A. 696.

Need only maintain in reasonably safe condition: In an action to recover for injuries caused by an alleged defective walk, an instruction which allows the jury to determine whether or not the walk was in as good a condition as it ought to have been is erroneous, since the municipality is bound only to keep its walks in a reasonably safe condition. Reed v. Tarentum Borough, 213 Pa. 357, 62 A. 928. A city can only be found guilty of negligence where the defect in a street is such that a reasonably prudent man should anticipate some danger to persons passing over it. City of Chicago v. Boston, 117 Ill. App. 430. A street or sidewalk is defective when it is not in a reasonably safe condition for the use for which it is intended. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057.

For ordinary travel only: County not liable for accident due to wagon being driven on to a bridge with front end of tongue sliding on the ground so that it caught in the planking, it being bound only to keep the highway reasonably safe for ordinary travel. Dignan v. Spokane County [Wash.] 86 P. 649. A city is not required to light its streets so that obstructions of which it had no notice could be seen. No evidence that the lights were not sufficient for ordinary purposes. Hazelrigg v. Frankfort Councilmen [Ky.] 92 S. W. 584. When large crowd attending auction congregate on walk, breaking it down, city not liable. Zipkie v. Chicago, 117 Ill. App. 418.

67. The fact that walks are in such shape as to be safe during the summer but unsafe in winter does not relieve the city if it has notice of the condition. Short v. Spokane, 41 Wash. 257, 83 P. 183.

68. The city is charged with knowledge that the infirm and lame use the streets. Short v. Spokane, 41 Wash. 257, 83 P. 183.

69. Proof that a street or road is used by the public and that the county or city authorities have recognized it as a public street or road by performing work, even though slight, on it, is prima facie proof of its character as a public street or road so as to charge the county or city with liability for its defective condition. Campbell v. Elkins, 58 W. Va. 308, 52 S. E. 220. A municipality is liable for injuries resulting from the de-

tains an obstruction in its highway, thereby compelling the public to use a temporary road over private premises, it will be held liable for injuries resulting from obstructions subsequently placed in the temporary road of which it has notice and of which it fails to warn the public.[71] It is not an insurer of the safe condition of its highways[72] and so is not liable unless negligent,[73] but if the maintenance of a certain condition in a street is negligence in itself, a city cannot defend on the ground that it had no knowledge of any negligence on the part of those in charge.[74] Where a city owns land abutting upon a public highway it is liable, like an individual owner, for injuries to travelers resulting from the maintenance of those things

fective condition of a street not formally opened where it is being used by the public with its knowledge. Cady v. Seattle, 42 Wash. 402, 85 P. 19. Where a city extends its boundaries so as to include a part of a state road, which it thereafter allows the public to use, such acts convert it into a city street and the city is liable in damages for an injury sustained by its negligence in allowing the road to become out of repair. Foster v. Kansas City, 114 Mo. App. 728, 90 S. W. 751. Evidence held sufficient to show that the city had undertaken to keep the sidewalk in repair and had thereby invited pedestrians to use it. Dinsmore v. St. Louis, 192 Mo. 255, 91 S. W. 95. In a suit for personal injuries resulting from a fall on a defective board walk located on what is designated in the petition as Sycamore street, to which only a general denial was interposed, the existence of such a street is sufficiently established where it appears from the evidence that the way had long been used as a street and that it was known as Sycamore street, and houses were built upon it, and no evidence was offered and no suggestion made that it had not been accepted, notwithstanding as a matter of fact it was not an accepted and dedicated street. City of Toledo v. Fuller, 7 Ohio C. C. (N. S.) 598. Some act of acceptance by the municipality must be shown before it can be held liable for failure to keep in repair a street dedicated to the public use by the owner of the land over which it runs. Downing v. Coatesville Borough, 214 Pa. 291, 63 A. 696. A city is not liable for an injury caused by a defective walk on private property, though it constituted an approach to a public street. City of McCook v. Parsons [Neb.] 108 N. W. 167. The city of New York is charged with the care of streets and sidewalks in front of school property. Plaintiff injured by slipping on ice on the sidewalk in front of school property, which accumulation resulted from a leakage in the water system of the school. Pymm v. New York, 111 App. Div. 330, 97 N. Y. S. 1108.

70. To entire width of street. City Council of Montgomery v. Reese [Ala.] 40 So. 760.

71. That accident happened on private premises, no defense. Finkle v. Valatie, 99 N. Y. S. 715.

72. Village of Lockport v. Licht, 221 Ill. 35, 77 N. E. 581; Carr v. Degnon Contracting Co., 48 Misc. 531, 96 N. Y. S. 277; Martin v. Butte [Mont.] 86 P. 264; Scott v. District of Columbia, 27 App. D. C. 413. Nor is it bound so to construct its streets that accidents cannot happen. White v. Chicago, 120 Ill. App. 307. Whatever the season or whatever the cause which renders them dangerous. Campbell v. New Haven, 78 Conn. 394, 62 A. 665

73. Scott v. District of Columbia, 27 App. D. C. 413. Evidence held insufficient to show that the district was negligent in maintaining the sewer covering upon which plaintiff fell. Id. A village is not liable in allowing a street railroad to excavate in its streets for the purpose of laying tracks unless it permitted the railroad company after notice to do so in an unusual and negligent manner. Village of Lockport v. Licht, 221 Ill. 35, 77 N. E. 581. The fact that excavations for a street railway rendered a roadway on a slant, as a result of which a driver was hit by a barrel rolling on his wagon and seriously injured, is not proof of negligence on the part of the village. Id. City not negligent in allowing accumulation of strip of snow and ice four or five feet wide on outer edge of sidewalk 19 feet wide. Kleyle v. Oswego, 109 App. Div. 330, 95 N. Y. S. 879. In an action to recover damages resulting from plaintiff's horse becoming frightened at an obstruction placed in a city street and by the city allowed to remain there after reasonable notice, it must be alleged not only that plaintiff's horse was ordinarily roadworthy but that the obstruction was one reasonably probable to frighten an ordinarily roadworthy horse, otherwise a mere showing that such a horse was frightened and ran away does not prove negligence in allowing the obstruction to exist. Town of Royal Center v. Bingaman [Ind. App.] 77 N. E. 811.

Question for the jury: Whether or not a city has been negligent in allowing a walk constructed partly of glass and alleged to be slippery to be used and remain in such condition. Moynihan v. Holyoke [Mass.] 78 N. E. 742. Whether or not a city was negligent in leaving a flagstone 3½ inches thick on a walk for a long time. Wedderburn v. Detroit [Mich.] 12 Det. Leg. N. 319, 108 N. W. 102.

In **West Virginia** a municipality is liable for an injury caused by a defective street or sidewalk, irrespective of the question of whether the municipality has been guilty of negligence, provided the plaintiff is free from contributory negligence, but a walk is not regarded as defective if it is in such condition that it can be safely used by a person exercising care and prudence. A city is liable for an injury caused by a latent defect which the plaintiff could not have discovered by the use of ordinary care. Campbell v. Elkins, 58 W. Va. 308, 52 S. E. 220.

74. City held negligent in maintaining large opening on much traveled sidewalk covered by iron doors so that to open them at all was a constant menace to pedestrians. Hayes v. Seattle [Wash.] 86 P. 852.

upon the property which are likely to render travel upon the highway unsafe.[75] If danger to a traveler is not in the nature of an obstruction but proceeds from the negligence of a third person using the highway for a purpose authorized by law, a municipality should not be held liable unless it has notice thereof or the condition is apparent or the danger obvious.[76] Where street improvement is being done under the general supervision and control of city officials, the city is liable for injuries resulting from an unsafe temporary crossing,[77] but if a city is deprived of control over a street pending the prosecution of works therein under legislative authority, it cannot be held liable for injuries resulting therefrom.[78] A statute which merely gives the taxpayers an opportunity to repair roads if they so desire does not relieve a municipality from liability for failure to repair.[79] In New York towns are not liable for damages resulting from the breaking of a bridge by a vehicle and load together weighing four tons or more.[80]

Though the law authorizes the construction of electric light lines, power lines, telephone lines, and similar structures along streets and highways, this does not relieve a municipality from its duty to see that the streets and highways are kept reasonably safe and secure for the persons using them.[81] Principally the duty of a municipality is to see that its streets and highways are kept safe and secure for passage over the surface,[82] and it must therefore always be alert to prevent or guard obstructions.[83] But the obligation of the municipality is not coextensive with that of the company which maintains the line.[84] The company is primarily liable for its negligent or defective condition in these respects and should be solely so unless in cases of obvious danger or exceptional circumstances.[85]

(§ 15) *B. Notice of defect.*[86]—As a general rule a municipality is not liable for damages occasioned by defective streets or sidewalks until after notice to it,[87]

75. Failure to guard highway near artificial lake. City Council of Augusta v. Dozier [Ga.] 55 S. E. 234.

76. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116.

77. Barker v. Kalamazoo [Mich.] 13 Det. Leg. N. 765, 109 N. W. 427.

78. Under Rapid Transit Act § 34 (Laws 1891, p. 18, c. 4, as amended by Laws 1896, p. 719, c. 729), authorizing the board of rapid transit commissioners to enter into a contract for the construction of a road in cities of over 1,000,000 inhabitants, a city is not liable for injuries from an explosion of dynamite kept in a street in pursuance of such a contract. Carpenter v. New York, 101 N. Y. S. 402.

79. Act June 12, 1893, did not relieve township of obligation to repair bridge. Wagner v. Hazle Tp. [Pa.] 64 A. 405.

80. Under Highway Law, Laws 1890, p. 1205, c. 568, § 154, the weight of the front wheels of a buckboard fastened to a stone wagon by a chain and on a bridge when it fell must be considered in determining the weight transported. Kelly v. Saugerties, 110 App. Div. 561, 97 N. Y. S. 177. Evidence held to show load more than four tons in welght. Id.

81, 82, 83. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116.

84. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116. A municipality may well be held to the same degree of responsibility with regard to electric light poles, telephone poles, and the like, that is imposed upon it with reference to awnings, gratings, and similar incumbrances on the street, and so, also, as to fallen or hanging wires obstructing the street and likely to strike or come in contact with the traveler. Id. To go further, however, and impose upon a municipality the duty of inspecting the insulation of the wires, the position in which they are strung, and similar matters involving technical knowledge unless in the case of an obvious danger or exceptional occurrence, would place upon it a very onerous and unfair burden. Id. Held error to place duty of inspection on municipality. Id.

85. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116. See Electricity, 7 C. L. 1258; Telegraphs and Telephones, 6 C. L. 1665.

86. See 5 C. L. 1674.

87. Demurrer should be sustained to petition for damages from defective sidewalk where it fails to state that city had notice of the defect prior to injury. City of La Harpe v. Greer [Kan.] 85 P. 1015. Since a city is only responsible for a negligent breach of duty, it is not enough to show a defect and injury. It must be further shown that the officers knew or by reasonable diligence might have known of the defect, and that the character of the defect was such that injuries to travelers therefrom might reasonably be anticipated. Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309. Where the dangerous character of an obstruction on the sidewalk is the gravamen of a petition for damages on account of injuries sustained in walking thereon, the testimony must establish that the city had notice actual or constructive of the dangerous condition of the

either actual or constructive,[88] of the defects complained of, but where a city issues a permit to do an act which may render the street unsafe, it is charged with the absolute duty to see that it is kept in a safe condition.[89] Ordinarily the question of notice is for the jury.[90] To charge a city with notice a defect must be of such a character as would be apparent by ordinary inspection.[91]

(§ 15) *C. Sidewalks.*[92]—Sidewalks like other portions of a street must be kept reasonably safe,[93] and in the case of plank walks ordinary diligence requires

walk in time to remedy it, and that the obstruction was one it was the city's duty to remove, and having received such notice, it failed to remove it. Schneider v. Cincinnati, 4 Ohio N. P. (N. S.) 57. Evidence that a trench was dug in a city walk pursuant to permit issued by city officers at a place four or five squares from city hall held sufficient to sustain a presumption that the officers having charge of the streets had notice of it in time to erect or have barriers erected around it by evening. Bennett v. Everett, 191 Mass. 364, 77 N. E. 886. Evidence that the superintendent of works had been told by R. a week before an accident that the latter had just fallen on the sidewalk and that its condition was worse than at a certain other place held insufficient to show actual notice that the sidewalk was obstructed with snow and ice as required by the charter of Oswego. Kleyle v. Oswego, 109 App. Div. 330, 95 N. Y. S. 879. Notice of a defect given to a street commissioner whose duty it is to repair walks under the direction of the city council is notice to the municipality, though the statute does not expressly make it the duty of the commissioner to communicate to the council notice of defects which come to his knowledge. Weitzel v. Fowler [Mich.] 13 Det. Leg. N. 90, 107 N. W. 451. In an action to recover for injuries caused by an obstruction of a public street not placed there by the city or for its use or by its permission or authority, the plaintiff must allege and prove that the city had reasonably sufficient notice of the dangerous condition of the street to have removed the obstruction. Town of Royal Center v. Bingaman [Ind. App.] 77 N. E. 811.

88. A municipality is chargeable with notice where a defect has existed for such a length of time that by the exercise of reasonable diligence it could have been discovered in time for repair. City of Bowling Green v. Duncan, 28 Ky. L. R. 1177, 91 S. W. 268; Pfeffer v. Cedar Rapids [Iowa] 108 N. W. 313; York v. Everton [Mo. App.] 97 S. W. 604; Central City v. Morquis [Neb.] 106 N. W. 221; Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309; Short v. Spokane, 41 Wash. 257, 83 P. 183; Johnson v. Fargo [N. D.] 108 N. W. 243. Evidence held not to show that defect in sidewalk had existed so long that village was chargeable with notice thereof. Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. S. 512. To charge a borough with constructive notice of an obstruction. Munley v. Sugar Notch Borough [Pa.] 64 A. 377. In an action to recover for injuries sustained by reason of a defective walk, evidence is admissible to the effect that it had been out of repair for several months as showing constructive notice to the city. Ness v. Escanaba [Mich.] 12 Det. Leg. N. 753, 105 N. W. 879. To charge the city with constructive notice it is not necessary that all people who passed should have seen the defective condition. It is sufficient if it is such that it would be noticeable to those who consciously looked at it. Goff v. Philadelphia, 214 Pa. 172, 63 A. 431. The existence of a pile of rock in the street for three hours held not to charge the city with notice of the obstruction. Hazelrigg v. Frankfort Councilmen [Ky.] 92 S. W. 584. An instruction that it would be negligence for a city to allow a defect to exist for an unreasonable time and that if it had existed for 10 days it would be an unreasonable time held not erroneous. Brown v. Durham [N. C.] 53 S. E. 513. A city is bound to inspect the sidewalks and its duty is not fulfilled by taking such notice of their condition as an ordinary person in walking over the same would take. Short v. Spokane, 41 Wash. 257, 83 P. 183. Constructive notice cannot be based upon temporary conditions of recent operation. Schneider v. Cincinnati, 4 Ohio N. P. (N. S.) 57.

89. Held liable without regard to notice for injuries received from a defective temporary bridge where it issued a permit to an abutter to excavate under the sidewalk, thus necessitating the bridge. Parks v. New York, 111 App. Div. 836, 98 N. Y. S. 94.

90. Question of constructive notice. Brewster v. Elizabeth City [N. C.] 54 S. E. 784. Where depression in a walk had existed six or seven days. Goff v. Philadelphia, 214 Pa. 172, 63 A. 431; Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309. An instruction that fixes any time during the existence of which the defect existed as charging the city with constructive notice is erroneous. Hendershott v. Grand Rapids [Mich.] 12 Det. Leg. N. 666, 105 N. W. 140. Of actual notice. Parks v. New York, 111 App. Div. 836, 98 N. Y. S. 94. Where a condition has existed for a long time it may be said as a matter of law that the city had notice of it. In case of doubt it is a proper question to submit to the jury. Johnson v. Fargo [N. D.] 108 N. W. 243.

91. City of Omaha v. Kochem [Neb.] 105 N. W. 182. A city is not required to search for defects in its walks where it has no reason to believe that defects exist, nor is it charged with notice of a latent defect because of the existence of an obvious defect in the same walk which did not contribute to the injury. Id.

92. See 5 C. L. 1675. For responsibility of abutting owners or others for unsafe condition of sidewalks see post, Defects Created or Permitted by Abutting Owners and Others.

93. The maintenance of a spike in the sidewalk two inches high is a nuisance. Wile v. Los Angeles Ice & Cold Storage Co. [Cal. App.] 83 P. 271. Evidence that by reason

a city to make examinations with reasonable frequency in order to detect defects due to natural decay.[94] The fact that one occupies as a tenant premises abutting on a sidewalk does not relieve the city from liability for injuries to him caused by defects in the walk not due to any act on his part.[95] A statute exempting a city from liability for injuries caused by a defective sidewalk, as to injuries sustained after its passage, is not unconstitutional as taking property without due process of law.[96]

(§ 15) *D. Barriers, railings, and signals.*[97]—It is the duty of a city to exercise reasonable care to maintain proper guards or signs near dangerous places in its streets[98] where such guards are reasonably necessary,[99] and if a city maintains a dangerous place near a highway on land owned by it, it is bound to properly guard the highway;[1] but a municipality need not so barricade a place as to en-

of light coating of snow plaintiff slipped on a sloping stone in sidewalk and stumbled against next stone elevated about half an inch held insufficient to show negligence in maintenance of sidewalk. Rodrigues v. Ossining, 111 App. Div. 297, 97 N. Y. S. 742. Evidence as to character of defect in sidewalk held to warrant verdict in favor of injured pedestrian. Harris v. Mt. Vernon, 41 Wash. 444, 83 P. 1023. A city is not negligent in permitting a depression of 1⅞ inches in the center of a 10 foot cement sidewalk. Bennett v. St. Joseph [Mich.] 13 Det. Leg. N. 794, 109 N. W. 604. Where, in the sidewalk of a public and much traveled street, one flagstone rests upon another and is raised three inches above the walk, it constitutes such a dangerous condition on a dark night as to warrant a recovery on behalf of a person who stumbles and falls over the same receiving serious injury. Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112. Evidence insufficient to show that sidewalk was uneven and that nails were sticking up so as to cause plaintiff's injury. City of East Dubuque v. Brugger, 118 Ill. App. 421. In action for injuries from falling on defective sidewalk, evidence held to show that entire flagging had been removed so that there was no defect from which an injury could have occurred. Henry v. New York, 97 N. Y. S. 89. Verdict for plaintiff for injuries from defective sidewalk held against the weight of the evidence. Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. S. 512. In action for injuries from defective sidewalk evidence of numerous prior accidents caused by the defect held to require submission of case to jury. Corson v. New York, 99 N. Y. S. 921. The District of Columbia as a municipality is liable for injuries to a pedestrian arising from the unsafe condition of a walk leading from the front door of a dwelling house through a parking to the sidewalk, in the absence of contributory negligence. Dotey v. District of Columbia, 26 App. D. C. 232.

94. Fitzgerald v. Concord, 140 N. C. 110, 52 S. E. 309.

95. Hendershott v. Grand Rapids [Mich.] 12 Det. Leg. N. 666, 105 N. W. 140.

96. Williams v. Galveston [Tex. Civ. App.] 14 Tex. Ct. Rep. 178, 90 S. W. 505.

97. See 5 C. L. 1676.

98. A city is liable for injuries resulting from a negligent failure to properly guard and light an excavation in the street. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273. Evidence held to show that it was so dark at the time plaintiff was injured that it was negligence for the city to leave a ditch in a street unguarded. City of Rock Island v. Gingles, 118 Ill. App. 410. Petition for damages from falling into unguarded and unlighted ditch held sufficient against general demurrer. City of Iola v. Farmer, 72 Kan. 629, 84 P. 386. If a city negligently permits obstructions or excavations in one of its public sidewalks to remain after actual notice, or being charged with notice thereof, without proper guard or other protection, it is liable for a resulting injury, unless the injured person is prevented by reason of his own negligence. Herrington v. Macon, 125 Ga. 58, 54 S. E. 71. A city is bound to erect barriers and place lights around an unprotected trench in a public street of the existence of which it has notice, and if it chooses to rely on the person digging the trench doing so, it is liable for his failure to place them. Bennett v. Everett, 191 Mass. 364, 77 N. E. 886. In an action for personal injuries received by being precipitated into an excavation in the street, evidence held sufficient to sustain a finding that the excavation was not guarded by lights or barriers. Lindsay v. Kansas City, 195 Mo. 166, 93 S. W. 273.

99. A city is bound to maintain railings or barriers on the side of roads where the road or walk runs along a precipitous declivity or deep water or other unusually hazardous places, where reasonable care requires the maintenance of such railings or barriers. Cutting v. Shelburne [Mass.] 78 N. E. 752. Where municipal authorities in the reasonable exercise of their discretion believe guards unnecessary, no liability exists for injuries resulting from their absence. Evidence held sufficient to support the finding of the jury that failure to erect guards on the brink of a precipice some 20 or 30 feet deep could not be due to a reasonable belief that they were unnecessary. City of Paducah v. Johnson [Ky.] 93 S. W. 1035. Under Laws 1893, c. 59, § 1, a municipality is not liable for failure to maintain a railing on the side of steps in a street leading from the grade of one of two intersecting streets to the grade of another, where such railing is not necessary to protect pedestrians from a dangerous embankment, but which if it existed would be useful only as a hand rail to prevent slipping on snow or

tirely preclude injury,[2] a plain warning of danger being sufficient,[3] nor is it bound to protect one who leaves the highway for a private purpose at a place where it could not reasonably anticipate that one would wander off.[4] Where a city permits an owner to place building material in a street, it is not liable for failure to guard the place until after notice of the owner's failure to do so.[5]

(§ 15) *E. Snow and ice.*[6]—Municipalities are not liable for damages resulting from smooth and even natural accumulations of ice and snow on sidewalks.[7] Liability attaches only when such snow and ice are allowed to remain until by various causes the surface becomes rough, rounded, or slanting so as to render it unsafe for the ordinary traveler.[8] In such case the city is liable,[9] even though abutting owners may also be liable.[10] A city must so construct its walks as not to render them unusually unsafe when covered with ice or snow,[11] and the grade of a street being steep, an increased duty is imposed upon a city to prevent accumulations of ice or snow on its walks.[12] A charter provision relieving a municipality from liability for injuries resulting from ice and snow upon the streets and sidewalks, except where it had "written notice" of such accumulation and is thereafter negligent, is void.[13] In the case of artificial accumulations a city is liable for injuries

ice which might accumulate on the steps. Wentworth v. Pittsfield, 73 N. H. 358, 62 A. 218.

Question of necessity for the jury: McMahon v. Boston, 190 Mass. 388, 76 N. E. 957. In an action to recover for injuries caused by plaintiff's driving into a trench in a street at night, it is for the jury to say whether or not it was negligent for the city to not put both lights at and barriers around the excavation. It cannot be said as a matter of law that it was its duty to do both, nor that the placing of lights alone was due care. Keithley v. Independence [Mo. App.] 96 S. W. 733. Question of city's negligence in failing to erect barriers to prevent children from falling from the sidewalk into a pool of water impregnated with acid. Weida v. Hanover Tp., 30 Pa. Super. Ct. 424.

1. City liable for failure to guard highway near an artificial lake maintained on its land near highway. City Council of Augusta v. Dozier [Ga.] 55 S. E. 234.

2. Karrer v. Detroit [Mich.] 12 Det. Leg. N. 765, 106 N. W. 64. A trench dug transversely across a sidewalk is a defect, though dug with permission of defendant city, but the city would not be liable therefor if it used proper care to protect the public by barriers. Bennett v. Everett, 191 Mass. 364, 77 N. E. 886.

3. Karrer v. Detroit [Mich.] 12 Det. Leg. N. 765, 106 N. W. 64.

4. Rev. St. Ohio § 4941-1 et seq., requiring counties to construct guard rails on all bridges, approaches, etc., imposes no liability in case above stated. Schimberg v. Cutler [C. C. A.] 142 F. 701.

5. A permit by a city to use part of a street for the placing therein of building material for use in the construction of a building on adjoining property is the mere regulation of a right of the property owner to make such use thereof and is not a license to do an act which would be unlawful but for such license, and the city is not charged with seeing that the place is guarded by barriers and lights and is liable for damages only in case it is negligent in having the obstruction guarded after notice express or implied of the owner's failure to do so. City of Columbus v. Penrod [Ohio] 76 N. E. 826.

6. See 5 C. L. 1677.

7. Evans v. Concordia [Kan.] 85 P. 813. Though slippery because of smooth surface. Tobin v. Waterloo [Iowa] 107 N. W. 1031. Where condition due solely to actions of elements. City of Norwalk v. Tuttle [Ohio] 76 N. E. 617. Mere slipperiness of a sidewalk from ice or snow does not render a city liable, there being no obstruction. City of East Dubuque v. Brugger, 118 Ill. App. 421.

8. Tobin v. Waterloo [Iowa] 107 N. W. 1031.

9. Evidence sufficient to show that accident was occasioned by a ridge of ice negligently maintained by the city on a sidewalk and not by snow for which city was not responsible. Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. S. 425. In an action to recover for injuries caused by falling on a walk which it is alleged was defective because of the accumulation of rough and uneven snow and ice, where the evidence showed that at least a part of the walk was not rough but merely slippery, the burden was on plaintiff to show that he fell on the part of the walk where the snow and ice were uneven and because thereof. Tobin v. Waterloo [Iowa] 107 N. W. 1031. Charge that city was obliged to keep its streets in safe condition held not erroneous in view of charge that jury should determine whether ice on sidewalk had remained so long that city should have known of it, that nothing unreasonable was required of city and that jury should consider sudden changes of weather. Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. S. 425.

10. Bucher v. Sunbury Borough [Pa.] 64 A. 906.

11. Cross walk improperly constructed. Heether v. Huntsville [Mo. App.] 97 S. W. 239.

12. Kopper v. Yonkers, 110 App. Div. 747, 97 N. Y. S. 425.

13. Section 30 of the charter of the city of

resulting if it negligently maintains them on its sidewalks.[14] The question whether a municipality was negligent in not removing the snow and ice is generally one for the jury.[15]

(§ 15) *F. Defects created or permitted by abutting owners and others.*[16]—If a city permits the maintenance of a nuisance in a street it is liable for injuries caused thereby.[17] The fact that a city licenses the lawful digging of a trench in a street does not render it liable for negligence on the part of the contractor of the licensee.[18] Though a city may render itself liable for injuries resulting from negligence on its part in not properly barricading holes or excavations allowed by it to remain on private property so near a sidewalk as to render the use of the highway dangerous to travelers,[19] it owes no duty to the public with reference to the condition of a private drain beneath the surface of the earth on adjoining land,[20] neither is it liable for injuries caused by obstructions on private property near sidewalks over which it has no control.[21] A city is not liable for allowing a sign to be suspended over a sidewalk in violation of an ordinance where the sign is not a nuisance in itself but injury results solely from the negligence of another.[22] A statute granting to a gas company the right to lay pipes in public highways does not relieve the township from the duty of keeping the highways in safe condition.[23] An abutting owner is liable for negligent acts making a street or highway unsafe,[24]

Middletown (Laws 1902, p. 1367) held void under the 14th amend. to the Federal Const MacMullen v. Middletown, 112 App. Div. 81, 98 N. Y. S. 145.

14. Maintenance by city during summer and fall months of leaky hydrant forming pool on sidewalk, convertible into ice, held negligence. Walsh v. New York, 109 App. Div. 541, 96 N. Y. S. 540.

15. Barry v. Akron, 7 Ohio C. C. (N. S.) 575. Where the testimony goes to show that a plaintiff was injured by a fall in the nighttime upon a sidewalk on which ice had accumulated, and that the condition was peculiar to this place in the sidewalk and not general throughout the city, and that the city, through its officers, had knowledge of the condition of the walk while he was ignorant of its condition, a case is presented for the jury. Id.

16. See 5 C. L. 1678.

17. The public right goes to the width of the street and extends indefinitely upward. A wire stretched over a street on which an acrobat is to perform is a nuisance and the city is liable to one on whom the acrobat falls. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057.

18. City which granted permit for the digging of trench for making of a sewer connection not liable for injury caused by contractor's failure to guard the trench. Levenite v. Lancaster [Pa.] 64 A. 782.

19. Hoffman v. Maysville [Ky.] 97 S. W. 360.

20. And is not liable to one who falls into it by reason of the board covering thereof breaking through and injuring plaintiff. Hoffman v. Maysville [Ky.] 97 S. W. 360.

21. Not where bill board was blown against pedestrian. Temby v. Ishpeming [Mich.] 13 Det. Leg. N. 667, 108 N. W. 1114.

22. Where sign fell solely because of negligence of one who attempted to lower it for change of words thereon. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847.

23. Act of May 29, 1885 (P. L. 29). Township authorities liable for negligence in allowing a dangerous obstruction caused by the laying of such pipes to exist. Lamb v. Pike Tp. [Pa.] 64 A. 671.

24. Question of negligence for the jury in action for defective walk. Towner v. Public Ledger Co. [Pa.] 64 A. 787. If defendant piled up snow on any part of the walk in such an accumulated mass as essentially to interfere with travel thereon, or, by means of the operation of natural causes which he ought to have foreseen, to create danger by its melting and freezing, plaintiff could maintain an action against him for personal injury caused by such conduct. Dahlin v. Walsh [Mass.] 77 N. E. 830. One who allows water to flow from his property onto a public road where it freezes and becomes dangerous to persons using the road is guilty of maintaining a nuisance. Illinois Cent. R. Co. v. Com. [Ky.] 96 S. W. 467. An abutting owner who places any object calculated to frighten horses in proximity to the highway and allows it to stay there an unreasonable length of time is guilty of maintaining a nuisance and is liable to one who is injured by his horse becoming frightened thereby. Horr v. New York, etc., R. Co. [Mass.] 78 N. E. 776. Where a city ordinance prohibits the placing of a sign above a street or projecting from the side of a building into the street, the council cannot by resolution grant to a person a permit to place a sign in violation of the ordinance. One who unlawfully maintains such a sign is liable to one who is injured by its falling irrespective of whether he has been negligent in putting it up. Hearst's Chicago American v. Spiss, 117 Ill. App 436. Where an owner of a building in process of erection caused a temporary shed to be built over the sidewalk, in accordance with his building permit, the falling of the roof of the shed raises a presumption of negligence of the owner. Scheller v. Sibermintz, 98 N. Y. S. 230. Where the roof fell

and where a duty is imposed by ordinance or license,[25] or a defect results directly from the act done, it is not a defense that the work was performed by an independent contractor.[26] He is bound only to exercise ordinary care to maintain his property in such condition as will prevent injury to travelers,[27] and the rule that one creating a dangerous condition on his own property, but so near a sidewalk as to imperil pedestrians, must exercise commensurate care, has no application to a case where a pedestrian deliberately leaves the walk and trespasses upon private property.[28] A sign attached to a building and extending over the sidewalk is not necessarily a nuisance though there is no ordinance authorizing it.[29] A city charter making it the duty of abutting owners to keep sidewalks in repair or pay the expense incurred by the municipality in doing so does not impliedly make such owners or occupants liable to pedestrians for injuries occasioned by the walks being out of repair.[30] An abutting owner whose premises are in the possession of a ten-

after its completion the principle of delegating work to an independent contractor had no application. Id. Where a person who owns and occupies a building permits a perforated covering over a coal vault, constructed under a sidewalk in a municipality, and maintained for his own benefit, to remain unfastened below, and it can be easily displaced by lifting it from the rim in which it is placed either by inadvertence or design, and it is so displaced, and a footman lawfully walking upon the sidewalk after dark steps upon the covering after it is displaced, which tilts and throws him into the coal hole, thereby seriously injuring him, held that such owner is guilty of negligence, although such covering would not be displaced by ordinary travel over it, and that such negligence is the proximate cause of the injury. First Nat. Bank v. Gillen, 7 Ohio C. C. (N. S.) 33. In an action for injuries to one tripped by a spike in a plank on the sidewalk to admit the approach of teams to defendant's building it will be presumed that the driveway belongs to defendant and that the plank and spike are maintained by him with knowledge. Wile v. Los Angeles Ice & Cold Storage Co. [Cal. App.] 83 P. 271. And the question whether the testimony of defendant's manager and two or three employes that they did not place the boards there and did not know who placed them there is one for the court in the first instance. Id. A city ordinance authorizing planks to be placed on the sidewalks to create a driveway to a building being constructed is no defense to one negligently permitting a spike to project, resulting in injury. Id.

25. No defense that sign was erected by independent contractor contrary to ordinance. Hearst's Chicago American v. Spiss, 117 Ill. App. 436. The duty of an owner of a building to use reasonable care in erecting and maintaining a reasonably safe temporary shed over the sidewalk, in compliance with the requirements of a building permit, cannot be evaded by the employment of an independent contractor. Scheller v. Silbermintz, 98 N. Y. S. 230.

26. An abutting owner who employs an electric sign company to lower periodically an electric sign which extends over the street and changes the words thereon is liable to one injured by the falling of the sign because of the negligence of the employes of the contractor. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847. The owner of a building in the course of construction is liable for injuries from planks negligently placed on the sidewalk by his independent contractor for a driveway, if his manager knew or ought to have known of the fact. Wile v. Los Angeles Ice & Cold Storage Co. [Cal. App.] 83 P. 271. Question whether defendant's agents in the exercise of ordinary care ought to have known of the spike, held for the jury under the facts. Id. While an abutting owner is not bound to keep the sidewalk in repair unless by virtue of statutory requirements, and is not responsible to travelers for defects therein not caused by himself (Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112), yet if he employs others to work for him and the work itself creates a dangerous condition or injury, he is liable in damages, though the actual doing of the work was intrusted to independent contractors (Id.). Abutting owner held liable where flagging in sidewalk was disturbed and displaced by reason of heavily laden wagons and trucks belonging to an independent contractor doing work on the premises passing over the same. Id.

27. Presumption of negligence from the falling of a piece of stone out of a window sill above sidewalk held rebutted by defendant's evidence that no crack had been seen, etc. Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. S. 399. A property owner who has a lawful right to expose an object on or along a public highway, within view of passing horses for a temporary purpose, is bound only to take care that it shall not be calculated to frighten an ordinarily gentle and well trained horse. Town of Royal Center v. Bingaman [Ind. App.] 77 N. E. 811.

28. Johnson v. Paducah Laundry Co. [Ky.] 92 S. W. 330.

29. Where attached at such height as not to interfere with use of highway by public and perfectly safe in its structure. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847. An ordinance prohibiting the erection of a sign which shall extend more than a certain distance out from the building line and over the sidewalk does not authorize a sign which does not exceed the prescribed distance, and a priori has no application to one which extends beyond the distance so specified. Id.

ant is not liable for failure to repair a sidewalk without proof of obligation to repair and notice of the necessity therefor,[31] and a tenant of premises abutting on a sidewalk owes no duty to a pedestrian to keep the walk clear of ice and snow coming thereon from natural causes or to guard against the risk of accident by scattering ashes or using any other like precautions.[32] Corporations or individuals using a street or highway for building operations or the making of other improvements are required to use reasonable care[33] to prevent injuries to the public,[34] and to this end must erect and maintain proper signs and guards near dangerous places when such are reasonably necessary.[35] While a street railway company is charged with

30. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654. Under Rev. St. Wis. 1898, § 1339, and the charter of the city of Baraboo, an abutting owner is not liable for injuries caused by a sidewalk which has become out of repair. For injuries resulting from the active wrongdoing of the abutting owner, he is primarily and the city only secondarily liable. Id.

31. Chroust v. Acme Bldg. & Loan Ass'n 214 Pa. 179, 63 A. 595.

32. Whether or not any public duty was imposed on him by ordinance. Dahlin v. Walsh [Mass.] 77 N. E. 830.

33. A telephone company or any other person lawfully doing work in a street is not guilty of negligence in failing to provide against improbable dangers. Newport News & O. P. R. & Elec. Co. v. Clark's Adm'r [Va.] 52 S. E. 1010. A contractor who improves a street for a city is not required to exercise any greater care for the safety of travelers than that required of the city itself. Carr v. Degnon Contracting Co., 48 Misc. 531, 96 N. Y. S. 277. Contractor engaged in public work and lawfully replacing sidewalk with temporary planks held as a matter of law not negligent in leaving a plank projecting only one and one-half inches above general level of walk against which pedestrian stumbled. Id. That a company placed planking four inches thick over a hole which it had lawfully made in the pavement at some distance from the place where pedestrians usually crossed and at a point where there was heavy traffic, the street being well lighted, did not render it liable to one who stubbed her toe against the planking. Derby v. Degnon-McLean Contracting Co., 112 App. Div. 324, 98 N. Y. S. 592. When a contractor completes and covers up excavations in a street as required by the contract, his obligation to the public with respect to keeping the covers in position is no greater than that of any other member of the community, even though his work as a whole has not yet been accepted by the municipality. Handy v. Barber Asphalt Co., 117 La. 637, 42 So. 193.

34. Irrespective of ordinance, when a street railway takes possession of a portion of a street for the purpose of building and operating its line, it necessarily assumes a duty to the public to keep in a safe condition the part of the street occupied. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. The fact that the city engineer is overlooking work done by a street railway in a public street in repair of its tracks does not relieve the railway of the duty to keep such part of the street in a safe condition. Id. An allegation that a telephone company while engaged in stretching a wire along a public street permitted it to sag while charged with electricity, or to become heavily charged with electricity while thus sagging, at a place where it was likely to injure pedestrians, and gave no warning of the danger arising from the electricity, states facts showing negligence of the company. Southern Bell Tel. & T. Co. v. Howell, 124 Ga. 1050, 53 S. E. 577. Contractor held liable for negligence of its employes in either displacing the lid of a drain pool in a sidewalk or covering it with sand after it had been displaced by others, where pedestrian was injured by falling into the pool. Handy v. Barber Asphalt Co., 117 La. 637, 42 So. 193. Building material placed in portion of street not covered by a permit held to constitute a nuisance. Mulvey v. New York, 99 N. Y. S. 1114.

35. One who has contracted with a city to do certain work requiring excavating in the streets is under obligation to the city and the public to barricade the excavations so as to prevent persons using the highway from falling into the excavations, and is primarily liable for an injury so caused, and the city by giving the contractor notice can require him to defend the action. If not so notified and a recovery was had against the city it could recover over against the contractor, but in such case the judgment against the city would not be conclusive against the contractor. Fleming v. Anderson [Ind. App.] 76 N. E. 266. Defendant held guilty of actionable negligence for maintaining only a single light at night near trenches dug by him in a street where plaintiff was injured. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267. Street railway held liable for death of one who drove into unguarded excavation at night. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830. That a street railway is required by ordinance to keep in repair that part of a street over which its track passes does not make it less liable for negligence in leaving an excavation made by it in such street without the usual safeguards. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. One lawfully placing building material in the street must use reasonable diligence in providing warning signals during darkness. Christman v. Meierhoffer, 116 Mo. App. 46, 92 S. W. 141. Not excused by the fact that the city usually lighted its streets early enough to disclose the obstruction. Id. The Boonville ordinance authorizing the piling of building material in the streets by one constructing any "new building or in the removal, repair or alteration of any building" upon obtaining

the duty of knowing the condition of the highway along its right of way and the probable necessity of vehicles going onto the track,[36] a railroad company obligated to repair a crossway in a street when requested to do so by the common council cannot be held liable for injuries to pedestrians arising from disrepair until after it has been called upon to repair.[37] A telephone company is liable for injuries resulting from the negligent obstruction of a street or highway with its poles and wires.[38] Persons who use a street or sidewalk for other private purposes are charged with care commensurate with the danger to travelers incident thereto.[39] Persons placing obstructions on the sidewalk must have regard for the instincts of children to play therewith.[40] One who negligently places an explosive in a street is liable for resulting injuries.[41]

(§ 15) *G. Persons entitled to protection.*[42]—Children playing in a street are not trespassers precluded from recovering for injuries.[43] Whether an animal loose upon a highway is a "traveler" within the Vermont statute or an estray depends upon whether it is there through the negligence of the owner.[44]

(§ 15) *H. Remote and proximate cause of injury.*[45]—The general principle of proximate cause is applicable to cases of defective highways.[46] The cause of an injury is for the jury on conflicting evidence.[47]

a permit and requiring an artificial light to be placed thereon at night is applicable to the construction of a sidewalk. Id. An abutting lot owner erecting a retaining wall to retain a road grade, if done with the consent of the county commissioners, is under no obligation to construct a guard rail. If one is necessary, the duty rests upon the county. Schimberg v. Cutler [C. C. A.] 142 F. 701.

36. Poles with red lights projecting onto the highway on a dark night. Palmer v. Larchmont Horse R. Co., 112 App. Div. 341, 98 N. Y. S. 567.

37. Ross v. Metropolitan St. R. Co., 104 App. Div. 378, 93 N. Y. S. 679.

38. Louisville Home Tel. Co. v. Gasper [Ky.] 93 S. W. 1057. The anchoring of a guy wire of a telephone pole to a block of wood 18 inches within the side line of a public alley constitutes negligence, especially where the wire is of the same color as the wall and therefore almost indiscernible. Id.

39. Evidence sufficient to show negligence on part of defendant in leaving a coal hole in a sidewalk uncovered. Manney v. Curtiss, 99 N. Y. S. 288. One who has control of a sidewalk for a temporary use must maintain it in a reasonably safe condition during such use. Building operations. Lubelsky v. Silverman, 49 Misc. 133, 96 N. Y. S. 1056. Could not delegate duty to independent contractor. Id. One engaged in opening a trap door under a public sidewalk is required to use the greatest care to prevent injury to persons lawfully passing on the walk. Bowley v. Mangrum [Cal. App.] 84 P. 996. Evidence held to justify finding that operator of trap door elevator under a sidewalk was negligent in mistaking plaintiff's step on the trap door for the signal of his assistant to start, or that he was negligent in using the "tap of the foot" as a signal for which a pedestrian's step might readily be mistaken. Id. Held proper to refuse to charge that defendant could not be presumed negligent from the happening of the accident. Id. Gas company maintaining a gas plug projecting over four inches above traveled portion of street held liable for injury sustained by one who drove against the plug. Perry v. People's Gas Light Co., 119 Ill. App. 389. Where gas company had bought the plug as a part of the general plant and had maintained it in its place a long time, it was no defense that it had never been used by the company. Id. That the company had a license to maintain the plug in the traveled portion of the street did not relieve it from liability. Id. Evidence held to show that an open space in a town was a landing only and not a street, so that it was not per se negligence for defendant to leave machinery there over night against which a boy ran and was injured. Mayronne v. Keegan, 117 La. 661, 42 So. 212. Defendant not required to place a lamp or other signal at the place. Id.

40. One piling barrels on the sidewalk knowing that children would probably climb thereon is liable if he piles them in an unsafe manner. Kreiner v. Straubmuller, 30 Pa. Super. Ct. 609.

41. Where injuries resulted from defendant's act in placing an explosive in a public alley, it was immaterial how long it remained in such alley. Wells v. Gallagher [Ala.] 39 So. 747.

42. See 5 C. L. 1680.

43. A child touching an apparatus being operated by a telephone crew in stringing cable, distinguished from those cases where the child plays with an apparatus left on the highway, and his own trespass sets in motion the agencies which produce the injury. O'Leary v. Michigan State Tel. Co. [Mich.] 13 Det. Leg. N. 752, 109 N. W. 434. Could exact reasonable and ordinary care for its safety of one lawfully using the street for the storage of building material. Compty v. Starke Dredge & Dock Co. [Wis.] 109 N. W. 650.

44. V. S. 3490. Blind horse escaping from a meadow and injured by falling off a bridge. Howrigan v. Bakersfield [Vt.] 61 A. 1130.

45. See 5 C. L. 1630.

(§ 15) *I. Contributory negligence of person injured.*[48]—As in negligence cases generally, negligence of the party injured will defeat recovery,[49] but such negligence must be a proximate cause of the injury and not a mere condition.[50] Since persons using a highway or street have a right to assume, in the absence of actual knowledge,[51] that it is in a reasonably safe condition for travel,[52] for the entire width if paved,[53] the mere use thereof[54] and the failure to look for defects[55] do not constitute negligence. Nor is one guilty of negligence as a matter of law in using a highway known to be defective,[56] but he must exercise care com-

46. Proof that the sidewalk was defective and that plaintiff was injured while walking along it is insufficient to warrant recovery. Shannon v. Tacoma, 41 Wash. 220, 83 P. 186. Where plaintiff knew of a defect in a walk but at the time she approached it her attention was diverted by a boy running in front of her so as to startle her and her foot slipped into the hole, the defective condition is the proximate cause of the injury. Van Camp v. Keokuk [Iowa] 107 N. W. 933. Where a traveler attempted to drive a horse over the edge of an embankment so as to tie him to a telephone pole, the horse falling and injuring plaintiff, the absence of a guard rail was not the proximate cause of the accident. Morford v. Sharpsville Borough, 28 Pa. Super. Ct. 544. Where the defendant telephone company negligently placed a guy wire in a public alley and one was injured by being caught under a wagon overturned by it, the fact that the wagon was negligently driven does not render defendant's negligence any less the proximate cause. Louisville Home Tel. Co. v. Gasper [Ky.] 93 S. W. 1057. Defendant's negligence in leaving a bomb in a public alley was the proximate cause of injuries to a boy under 14 years old, whether the bomb was exploded in the alley or carried by the boy to an adjacent yard and there exploded by him. Wells v. Gallagher [Ala.] 39 So. 747. Where a city permits an acrobat to stretch a wire across a street for the purpose of performing thereon, and while so performing a part of his apparatus breaks, precipitating the performer onto one beneath, the wrongful act of the city in allowing the performer to exhibit over the street is the proximate cause of the injury. Wheeler v. Fort Dodge [Iowa] 108 N. W. 1057.

47. In an action against the city and the owner of a lot for injuries received from the tipping over of a pile of lumber in the street. Snydor v. Arnold, 28 Ky. L. R. 1250, 92 S. W. 289.

48. See 5 C. L. 1681.

49. Clark v. Torrington [Conn.] 63 A. 657. One driving among show paraphernalia when he might have taken another street cannot recover. Bechtel v. Mahanoy City Borough, 30 Pa. Super. Ct. 135. One voluntarily walking on a known defective walk when he could without inconvenience avoid it cannot recover for resulting injuries. White v. Chicago, 120 Ill. App. 607; Dwyer v. Port Allegheny Borough [Pa.] 64 A. 854; City of Norwalk v. Tuttle [Ohio] 76 N. E. 617. Whether one is guilty of negligence in stepping upon an accumulation of ice on the sidewalk depends upon the extent of the ice and the obviousness of the danger. Wertz v. Girardville Borough, 30 Pa. Super. Ct. 260. Where recent excavation in street was improperly lighted, plaintiff held not guilty of contributory negligence in walking into it. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267. Allegations of complaint held to show contributory negligence of a conductor struck by a pole while leaning out of car. Moore v. East Tennessee Tel. Co. [C. C. A.] 142 F. 963. Instruction as to the care required of plaintiff held correct. Buchholtz v. Radcliffe, 129 Iowa, 27, 105 N. W. 336; City of Stillwater v. Swisher, 16 Okl. 585, 85 P. 1110. Instructions held not open to objection that they did not require of pedestrian on sidewalk ordinary care. Id. If an intoxicated person is capable of exercising and does exercise the care which the law requires of a sober person, the fact of intoxication becomes immaterial. Epelett v. Saulte Ste. Marie [Mich.] 13 Det. Leg. N. 319, 108 N. W. 360.

50. Short v. Spokane, 41 Wash. 257, 83 P. 183.

51. Knew of the condition. Cassaday v. Kansas City [Mo. App.] 95 S. W. 948.

52. Elliott v. Kansas City [Mo.] 96 S. W. 1023; Perry v. People's Gas Light & Coke Co., 119 Ill. App. 389; Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757; Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112; Green v. Newark [Del.] 62 A. 792; City Council of Montgomery v. Reese [Ala.] 40 So. 760; Central City v. Morquis [Neb.] 106 N. W. 221; Stout v. City of Columbia, 118 Mo. App. 439, 94 S. W. 307; Machacek v. Hall [Iowa] 105 N. W. 690. May assume that is safe for travel by night as well as by day. City of Stillwater v. Swisher, 16 Okl. 585, 85 P. 1110; City of Dalias v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121; City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132.

53. Bicyclist riding near the edge. Christman v. Meierhoffer, 116 Mo. App. 46, 92 S. W. 141.

54. Dinsmore v. St. Louis, 192 Mo. 255, 91 S. W. 95. The use of a street when there is a safer one which might have been used is not of itself sufficient to constitute negligence. Cady v. Seattle, 42 Wash. 402, 85 P. 19.

55. Failure to give attention to sidewalk not contributory negligence on part of pedestrian who fell into coal hole on dark night. Manney v. Curtiss, 99 N. Y. S. 288. Tripped by loose board. Barker v. Kalamazoo [Mich.] 13 Det. Leg. N. 765, 109 N. W. 427. For the jury to say from all the facts whether failure to watch was negligence. Machacek v. Hall [Iowa] 105 N. W. 690; Johnson v. Fargo [N. D.] 108 N. W. 243.

56. Elliott v. Kansas City [Mo.] 96 S. W. 1023; Diamond v. Kansas City [Mo. App.] 96 S. W. 492; City of Mattoon v. Faller, 117

mensurate with the known danger.[57] One is not guilty of negligence as a matter of law in crossing a street where there is no sidewalk.[58] One voluntarily leaving the public highway for private purposes is usually precluded from recovery.[59] Children are not held to the same degree of care as adults but must exercise care commensurate with their capacity.[60] While the negligence of a parent may preclude a recovery by him for injuries sustained by a child,[61] in most states such negligence is not imputed to the child so as to defeat its rights.[62] While one may be guilty of negligence as a matter of law where the danger is obvious,[63] the question of negligence is usually for the jury to be determined from all the facts and circumstances of the particular case.[64] In some states disproving contributory negli-

Ill. App. 65; City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132; City of Garnett v. Smith, 72 Kan. 664, 83 P. 615. Fact of knowledge is a circumstance to be considered by the jury in determining the question of negligence. Elliott v. Kansas City [Mo.] 96 S. W. 1023; Pyke v. Jamestown [N. D.] 107 N. W. 359; Village of Gardner v. Paulson, 117 Ill. App. 17; Clark v. Torrington [Conn.] 63 A. 657; Shannon v. Tacoma, 41 Wash. 220, 83 P. 186. Using street known to be closed for repairs. McMahon v. Boston, 190 Mass. 388, 76 N. E. 957.

57. City of Garnett v. Smith, 72 Kan. 664, 83 P. 615; City of Mattoon v. Faller, 117 Ill. App. 65; Diamond v. Kansas City [Mo. App.] 96 S. W. 492; Clark v. Cedar Rapids, 129 Iowa, 358, 105 N. W. 651; Van Camp v. Keokuk [Iowa] 107 N. W. 933; Steck v. Allegheny, 213 Pa. 573, 62 A. 1115. Question whether he has exercised such care is for the jury. City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132. An affirmative answer of an uneducated plaintiff to the question on cross-examination if she used the same degree of care she would have used if she had known the walk to be safe held not to show negligence. City of Toledo v. Fuller, 7 Ohio C. C. (N. S.) 598. Must exercise the care of an ordinarily prudent man under the same circumstances. Green v. Newark [Del.] 62 A. 792; City of Toledo v. Fuller, 7 Ohio C. C. (N. S.) 598. Must look for the defect and avoid it. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Where a person using a highway is injured by an obstruction of which he knew, the presumption of want of reasonable care on his part raised thereby may be rebutted by evidence showing that he was not wanting in care, as that the accident occurred at night, that it was dark, and that plaintiff thought he had driven by the obstruction. Coppins v. Jefferson, 126 Wis. 578, 105 N. W. 1078. A pedestrian is guilty of contributory negligence as a matter of law in walking upon the edge of a sidewalk knowing that the boards were loose and would fly up, and using no extra care, there being nothing to divert his attention. Hodge v. St. Louis [Mich.] 13 Det. Leg. N. 749, 109 N. W. 252.

58. Action for wrongful death caused by contact with fallen electric wire. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116.

59. A pedestrian leaving the highway at an unknown place on a dark night for a private purpose and falling over an unguarded embankment held guilty of contributory negligence. Schimberg v. Cutler [C. C. A.] 142 F. 701. The rule that one who voluntarily leaves the traveled part of a highway and then comes in contact with some obstruction causing injury is guilty of contributory negligence has no application where the injury is caused by an obstruction so near the traveled part of the highway that a momentary deviation from the traveled part of the road or the shying of the horse would result in a collision. Coppins v. Jefferson, 126 Wis. 578, 105 N. W. 1078. Question of plaintiff's negligence in leaving the **beaten path** on the sidewalk in an attempt to find a less slippery way in the street held under the facts for the jury. Wertz v. Girardville Borough, 30 Pa. Super. Ct. 260.

60. Mental and physical. Herrington v. Macon, 125 Ga. 58, 54 S. E. 71. Child of five years held not guilty of contributory negligence in climbing on barrels unlawfully piled on the sidewalk. Kreiner v. Strauhmuller, 30 Pa. Super. Ct. 609.

61. Father held not guilty of contributory negligence as a matter of law in permitting the deceased child to play upon the sidewalk, it appearing that he was a workman and unable to exercise direct control and that the child was with several others at the time. Addes v. Hess, 29 Pa. Super. Ct. 505. Mother held not guilty of contributory negligence as a matter of law in permitting her child of tender years to escape from the house to the street while she was about her household duties. Weida v. Hanover Tp., 30 Pa. Super. Ct. 424.

62. Herrington v. Macon, 125 Ga. 58, 54 S. E. 71.

63. Where the dangerous character is so obvious that reasonable minds would agree that the injured one could not have exercised reasonable care, he is guilty of contributory negligence as a matter of law. Pyke v. Jamestown [N. D.] 107 N. W. 359. One taking a known slippery walk which could have been easily avoided is guilty of negligence justifying a directed verdict. Schneider v. Cincinnati, 4 Ohio N. P. (N. S.) 57. Walking over trap elevator doors in a sidewalk is not negligence per se. Bowley v. Mangrum [Cal. App.] 84 P. 996. Evidence that plaintiff knew of paths at the side of the walk and that she had been tripped by a wire some time before held not to show contributory negligence as a matter of law in using the sidewalk without watching for holes. Lewis v. Marshall [Mich.] 13 Det. Leg. N. 798, 109 N. W. 663.

64. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116; Gaffka v. Detroit United R. Co. [Mich.] 13 Det. Leg. N. 44, 106 N. W. 1121; Cutting v. Shelburne [Mass.] 78 N. E. 752;

gence is a part of plaintiff's case,[65] but it is usually a matter of defense to be shown by defendant.[66]

(§ 15) *J. Notice of claim for injury and intent to sue*[67] is a prerequisite to the maintenance of an action where required by statute.[68] It must be properly presented or served[69] within the time fixed by statute or ordinance,[70] and failure to so present it cannot be waived by the municipality.[71] Statutory provisions relative to notice should be liberally construed,[72] and ordinarily a notice is sufficient if it

Keithley v. Independence [Mo. App.] 96 S. W. 733. The question of contributory negligence is for the jury, unless it clearly appears from uncontradicted evidence that plaintiff was negligent. Van Camp v. Keokuk [Iowa] 107 N. W. 933.

Question of negligence held for the jury: Riding on a high spring seat, plaintiff being thrown by a jolt. Milliren v. Sandy Tp., 29 Pa. Super. Ct. 580. Collision with building material unlawfully placed in the street. Mulvey v. New York, 99 N. Y. S. 1114; Pack v. New York, 99 N. Y. S. 867. Putting a blind horse in pasture without closing the bars, thus allowing it to escape onto the highway. Howrigan v. Bakersfield [Vt.] 64 A. 1130. Question whether a hole in the street was so visible as to render plaintiff negligent in driving into it. Cody v. Seattle, 42 Wash. 402, 85 P. 19. Negligence of one falling into an excavation, the evidence as to the extent of his knowledge and as to the existence of warning signals being conflicting. Guild v. Pringle [C. C. A.] 145 F. 312. Bicyclist riding without light. Christman v. Meierhoffer, 116 Mo. App. 46, 92 S. W. 141. Negligence in using a street known to be closed for repairs. McMahon v. Boston, 190 Mass. 388, 76 N. E. 957. Using an icy walk. Walsh v. New York, 109 App. Div. 541, 96 N. Y. S. 540. Where a defective street can be used with safety by the exercise of reasonable care, it is for the jury to determine whether the injured party was using such care. Steck v. Allegheny, 213 Pa. 573, 62 A. 1115. Evidence that while plaintiff had some knowledge of the condition of the sidewalk she had frequently passed over the same, and in doing so earlier in the evening had noticed nothing unusual. Jordan v. Philadelphia, 29 Pa. Super. Ct. 502. Question of plaintiff's negligence in not driving onto the guarded portion of the road some 20 feet farther upon seeing the approaching train instead of stopping and trying to hold the horse by the head at an unguarded point. Fetterman v. Rush Tp., 28 Pa. Super. Ct. 77.

65. Buchholtz v. Radcliffe, 129 Iowa, 27, 105 N. W. 336. Where one knows of the unsafe condition of a sidewalk some proof of exercise of ordinary care is essential to recovery. City of Highland Park v. Gerkin, 122 Ill. App. 149. Under Code § 1347, one who seeks to recover for an injury caused by a defective highway must show that he is free from such contributory negligence as would constitute a proximate cause of the injury. An instruction that plaintiff must show that he did not, through any negligence, contribute in any way to his injury imposes a greater burden on plaintiff than the law requires. Duncan v. Greenville County, 73 S. C. 254, 53 S. E. 367.

66. City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132; Town of Royal Center v. Bingaman [Ind. App.] 77 N. E. 811; Oklahoma City v. Reed [Okl.] 87 P. 645. In Indiana by statute the burden is on the defendant. Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220.

67. See 5 C. L. 1683.

68. Notice to the council of want of repair and injury is a prerequisite to the creation of a right to compensation. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654. Statutes requiring the giving of notice to a city of an injury sustained by reason of a defective street within a specified time after the injury is mandatory and a complaint which does not allege the giving of such notice is demurrable. High v. Jacksonville [Fla.] 40 So. 1032.

69. Under Code N. D. §§ 2172 and 2173, providing that notice of injury shall be given to the mayor and common council within 60 days after the injury, a notice served on the mayor and the city auditor, the latter being charged with the keeping of the records of the council, is a service on the mayor and council and it makes no difference that the notice was served on or given to the auditor at place other than his office where he accepts it at such other place. Pyke v. Jamestown [N. D.] 107 N. W. 359.

70. Miller v. Birmingham [Mich.] 13 Det. Leg. N. 567, 108 N. W. 1015. Under Laws 1898, p. 438, c. 182, § 461, requiring notice to be served on common council within three months of accident, where fatal accident occurred August 1st, letters being issued October 19th, notice served by administratrix on president of common council October 22, and delivered by president to council at first meeting, held sufficient compliance though there was no meeting between October 1st and November 5th. Blount v. Troy, 110 App. Div. 609, 97 N. Y. S. 182. Where plaintiff was rendered mentally incompetent by injury received, notice of injuries served within three months after removal of mental incapacity held timely within Oswego Charter requiring notice of claim within three months after injury. Forsyth v. Oswego, 99 N. Y. S. 1022. Notice given within time permitted by charter was not given so long after injury that condition of sidewalk might have changed. Mulligan v. Seattle, 42 Wash. 264, 84 P. 721. Where an injury is caused by a broken plank, the fact that there was ice or snow thereon does not require that the notice be given within the time prescribed for injuries resulting from ice or snow. Short v. Spokane, 41 Wash. 257, 83 P. 183.

71. Miller v. Birmingham [Mich.] 13 Det. Leg. N. 567, 108 N. W. 1015.

72. Hammock v. Tacoma, 40 Wash. 539, 82 P. 893.

points out with reasonable certainty the place and character of a defect[73] and the nature of the injuries sustained.[74] Mere clerical errors may be disregarded[75] and failure to state the date of the injury may be waived by an examination of the plaintiff by the city.[76] In the absence of statute the court has no authority to permit amendments to the claim for injury.[77] Recovery will be limited to the amount set forth in the notice of claim.[78] A municipality has no power in the absence of statutory authority to enact an ordinance requiring the presentation of claims for allowance as a condition precedent to suing thereon.[79]

(§ 15) *K. Actions.*[80]—The Connecticut statute giving a cause of action to one injured by means of a defective road or bridge is not a penal statute in such sense that a right of action thereon does not survive the death of the person injured.[81]

Pleading.[82]—The ordinary rules of pleading apply.[83] Reasonable certainty is all that is required in describing the place of the accident[84] or the nature of the injury.[85] While a mere allegation of notice does not under strict rules of pleading

73. Johnson v. Fargo [N. D.] 108 N. W. 243; Beyer v. North Tonawanda, 183 N. Y. 338, 76 N. E. 214. Under a charter requiring that claims for damages owing to a defect in a sidewalk shall "accurately" locate and describe the defect. Mulligan v. Seattle, 42 Wash. 264, 84 P. 721. Notice stating that injuries were caused by a fall on the walk near the northeast corner of certain named streets held sufficient to enable city to locate the place. City of Ottawa v. Green, 72 Kan. 214, 83 P. 616. And so that the investigating officer can find it from the description aided by a reasonable inquiry. Notice that injury occurred "on J. street, between Forty-first and Forty-second streets," held sufficient, the injury having taken place on J. street between Forty-first and Forty-third streets, Forty-second street not having been extended through to J. street. Hammock v. Tacoma, 40 Wash. 539, 82 P. 893.

74. A notice of injury which states the facts in regard to an injury so far as claimant knows them is sufficient provided it gives the information which the statute reasonably contemplates. Notice of unsafe condition of highway by reason of elevated rails held sufficient as to place and cause of accident considering allegation of complaint that particulars were stated so far as they reasonably could be stated. Blount v. Troy, 110 App. Div. 609, 97 N. Y. S. 182. Under Comp. Laws 1897, providing that a notice of injury must substantially set forth the extent of the injury so far as known, the notice should be sufficiently specific to give the municipality information as to what the injury complained of was. Notice held not sufficiently specific. Miller v. Birmingham [Mich.] 13 Det. Leg. N. 567, 108 N. W. 1015.

75. Error in venue should be disregarded and so also error of one day in stating date of accident where not discovered until trial was nearly finished. Kleyle v. Oswego, 109 App. Div. 330, 95 N. Y. S. 879.

76. Full examination of plaintiff by city before committee of claims. Forsyth v. Oswego, 99 N. Y. S. 1022.

77. Authority not given by Code Civ. Proc. § 723, the claim not being a proceeding in an action. Kleyle v. Oswego, 109 App. Div. 330, 95 N. Y. S. 879.

78. Van Camp v. Keokuk [Iowa] 107 N. W. 933.

79. City of Bowling Green v. Duncan, 28 Ky. L. R. 1177, 91 S. W. 268.

80. See 5 C. L. 1684.

81. Gen. St. Conn. 1902, § 2020. Elson v. Waterford, 140 F. 800.

82. See 5 C. L. 1684.

83. It is unnecessary to aver in terms a duty implied of law. Law implies duty not to leave a bomb or other explosive in a public alley. Wells v. Gallagher [Ala.] 39 So. 747. The complaint must show a causal connection between the alleged negligence and the injury sustained. City of Crawfordsville v. Van Cleave [Ind. App.] 77 N. E. 1149. In action against street railway for injuries from falling into excavation made by it in a street, certain counts in complaint held not demurrable as charging disjunctively two causes of action. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Where a complaint for personal injuries alleges that the street was "regularly dedicated" as a public highway and the answer does not deny the allegation, the city cannot assert that the street was not dedicated. City of Louisville v. Hall, 28 Ky. L. R. 1064, 91 S. W. 1133.

84. Not necessary that the complaint should describe the place where the injury occurred with mathematical exactness, but only with such definiteness as to apprise the defendant of the place. Spaulding v. Edina [Mo. App.] 97 S. W. 545. A petition alleging that on a certain street and along the south side thereof and on the north side of a designated lot and block was a certain sidewalk in which there was a loose board which tripped plaintiff, etc., sufficiently locates the place of injury. City of Garnett v. Smith, 72 Kan. 664, 83 P. 615. Where the notice filed with the city stated a claim for injuries caused by "a fall on the walk near the northeast corner," etc., there was no variance between it and the petition where the place was referred to as a "crosswalk." City of Ottawa v. Green, 72 Kan. 214, 83 P. 616.

85. Petition sufficiently definite where it set forth in plain and concise language how plaintiff was hurt by falling on defective crosswalk without a needless recital of details. City of Ottawa v. Green, 72 Kan. 214, 83 P. 616. Held not error to refuse to re-

support proof of constructive notice,[86] an allegation of knowledge of a defect is sustained by proof of notice actual or constructive.[87] Where the city by its own acts creates the defect charged, it is not necessary to allege notice.[88]

Evidence.[89]—The burden of proving negligence is on the plaintiff.[90] In an action against a city the evidence must show that the injury occurred within the corporate limits and that the place was one which the city was bound to maintain in a safe condition.[91] On the question of notice or knowledge evidence is admissible which shows the general bad condition of a road or sidewalk in the vicinity of the place of injury,[92] or which shows the condition of the place a short time before or after the accident,[93] and on the same issue evidence of efforts to induce the city authorities to repair,[94] of statements of a sidewalk inspector,[95] and that a councilman had

quire plaintiff to make his petition more definite as to nature of internal injuries sustained by reason of falling into an unguarded ditch in a city where the petition stated all the information which plaintiff probably had. City of Iola v. Farmer, 72 Kan. 620, 84 P. 386.

86. Schneider v. Cincinnati, 4 Ohio N. P. (N. S.) 57.

87. An allegation "which condition of said walk, and which defects in said sidewalk were known to defendant, or by the exercise of ordinary care might have been known to defendant in time to have repaired the same before the injury," held to properly charge notice, actual or constructive. Spaulding v. Edina [Mo. App.] 97 S. W. 545. That the defect was "well known to defendant and its officers" sustained by proof of constructive knowledge. Dinsmore v. St. Louis, 192 Mo. 255, 91 S. W. 95. That the city "knew the dangerous and unsafe condition of said sidewalk and negligently neglected to nail down said planks" is broad enough to admit evidence of constructive notice. Brown v. Blaine, 41 Wash. 287, 83 P. 310.

88. A petition alleging that defendant opened up a certain street to the brink of a precipice and left the same unguarded is not defective for failing to allege notice. City of Paducah v. Johnson [Ky.] 93 S. W. 1035.

89. See 5 C. L. 1684.

90. Green v. Newark [Del.] 62 A. 792.

91. City of Topeka v. Cook, 72 Kan. 595, 84 P. 376. The court cannot take judicial notice that an alley between two designated streets is within the corporate limits of the city of Topeka. Id. Cities of the first class being given authority outside the corporate limits in regard to abating nuisances, the fact that a city may have caused the removal of a manure pile from a certain place does not of itself show that such place was in the city. Id.

92. Weitzel v. Fowler [Mich.] 13 Det. Leg. N. 90, 107 N. W. 451; City of Rockwall v. Heath [Tex. Civ. App.] 14 Tex. Ct. 230, 90 S. W. 514. Evidence is admissible as to the general bad condition of the walk for a reasonable distance on each side of the place of injury. Harris v. Mt. Vernon, 41 Wash. 444, 83 P. 1023. In an action to recover for injuries caused by the falling of a timber from a structure in a street, evidence that there were other similar structures on the street and that they were in a dangerous condition was admissible. Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696. Where defendant's notice had been called to the condition of a certain walk, held not error to admit evidence of the condition of the walk at places other than the place of the injury. Hunter v. Ithaca, 141 Mich. 539, 12 Det. Leg. N. 571, 105 N. W. 9.

93. Where the alleged negligence consisted of permitting boards to remain loose in a temporary crossing testimony of a witness that the boards were loose the next day was not too remote. Barker v. Kalamazoo [Mich.] 13 Det. Leg. N. 765, 109 N. W. 427. Not error to allow a witness to testify to the condition of the street two or three days after the accident when it appears that there had been no change in its condition. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. "That testimony of the condition of the walk for a considerable time before the accident may be given for the purpose of showing notice to the city, and that such testimony may relate to the walk in the immediate vicinity or to a stretch of walk as a whole is settled." Epelett v. Sault Ste. Marie [Mich.] 12 Det. Leg. N. 319, 108 N. W. 360. Evidence of the condition of a walk during previous winters is admissible where it appears from the evidence that the surrounding conditions were the same each year and tended to accumulate ice and snow at the point as bearing on the question of notice. Hanousek v. Marshalltown [Iowa] 107 N. W. 603. Under an allegation that the city knew of the defective condition of the walk, evidence that the defect had existed for such a length of time before the injury complained of that the proper authorities of the municipality could have discovered it by the use of reasonable diligence is admissible and supports the allegation. Village of Gardner v. Paulson, 117 Ill. App. 17. Not error to admit evidence of the condition of a walk on the following day to the effect that the boards were obviously rotten and loose. Clark v. Cedar Rapids, 129 Iowa, 358, 105 N. W. 651.

94. Evidence of efforts of the street commissioner to induce the council to repair the sidewalk where plaintiff was injured is admissible (City of Lexington v. Fleherty [Neb.] 104 N. W. 1056), though not complaints of the condition of the streets generally (Id.).

95. In an action to recover for injuries caused by the falling of a timber from a structure erected over the walks of a city, statements by a sidewalk inspector as to the

passed the place several times,[96] is also admissible; but the declaration of an officer or agent of a municipality made after the accident and relating to his previous knowledge is inadmissible to show notice or knowledge.[97] Evidence of other accidents caused by the same defect is generally not admissible[98] except as bearing on the question of notice;[99] nor can a previous similar accident at another place be shown.[1] In an action for injuries caused by a defective walk, an ordinance requiring a certain officer to see that the streets are kept in a good safe condition is not admissible against the city,[2] nor can plaintiff introduce a notice from the city to a contractor who created the defect calling upon him to defend.[3] The sufficiency of a light maintained near an excavation,[4] or the difficulty to be experienced in riding a bicycle over a depression in a sidewalk, is not a proper subject of expert testimony.[5] Applications of other general principles of evidence are collected in the note.[6] Failure of proof against one defendant does not necessarily affect the cause of action.[7]

dangerous condition of the structure is admissible. Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 696.

96. In an action against a city to recover for injuries caused by a trench in the street dug by a private person, evidence that one of the city councilmen passed the place several times each day held admissible. Keithley v. Independence [Mo. App.] 96 S. W. 733.

97. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116.

98. Where excavation in street was inadequately lighted. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267. Evidence that other persons had fallen into unguarded areaway in a walk not admissible. Stout v. Columbia, 118 Mo. App. 439, 94 S. W. 307. A condition in a street or sidewalk being unsafe, the fact of the non-occurrence of previous accidents does not bar relief. Morroney v. New York, 49 Misc. 307, 97 N. Y. S. 642.

99. Admissible on question of notice. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121.

1. Not in an action for death caused by a fallen electric wire. Fox v. Manchester, 183 N. Y. 141, 75 N. E. 1116.

2. City of Gibson v. Murray, 120 Ill. App. 296.

3. Keithley v. Independence [Mo. App.] 96 S. W. 733.

4. Carty v. Boeseke-Dawe Co. [Cal. App.] 84 P. 267.

5. Lee v. Salt Lake City [Utah] 83 P. 562. And an answer "It was not very much of a thing, if not going fast; that it was not bad; that a person could ride over it in pretty fair shape in going 4 or 5 miles per hour," is improper as argumentative. Id.

6. In an action against a municipal contractor for the death of a pedestrian by falling into a hole in the street, evidence of the chairman of the street committee as to the construction placed on an ordinance respecting the use of a covering, etc., at such holes is inadmissible. Guild v. Pringle [C. C. A.] 145 F. 312. Evidence that children were in the habit of playing in an alley held admissible as showing wantonness in leaving a bomb therein. Wells v. Gallagher [Ala.] 39 So. 747. Where in an action against an abutting owner for injuries caused by a defective sidewalk it was stipulated that previous to the injuries work had been done on the premises by independent contractors, who furnished their own teams, etc., held the stipulation was properly admitted in evidence over an objection that it had not been connected with defendant and did not show that defendant was responsible for the acts mentioned therein. Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112. In an action for injuries received from a defective crossing, witnesses are not rendered incompetent by the fact they were not produced before the committee on claims, it appearing that the evidence there produced was collected by the husband of plaintiff, she being confined to her bed, and he did not know of the witnesses. Barker v. Kalamazoo [Mich.] 13 Det. Leg. N. 765, 109 N. W. 427. Where an ordinance permits an abutting property owner to pile building material in the street upon obtaining a permit, and requires him to place a light thereon at night, the admission of such ordinance, where defendant is charged with negligence in not having such light, is not erroneous in that the jury may find against defendant for not having a permit, as defendant could have asked an instruction limiting the finding. Christman v. Meierhoffer, 116 Mo. App. 46, 92 S. W. 141. In an action for personal injuries caused by loose boards in a sidewalk, a question "What, if anything, do you know about the boards being loosened from the nails and fastenings," held properly allowed. Brown v. Blaine, 41 Wash. 287, 83 P. 310.

In Connecticut, where a witness in an action to recover for injuries sustained by reason of a defective walk has testified as to its condition, he may be required to state whether or not it was in a reasonably safe condition for travel, and such evidence is not inadmissible as calling for the opinion of the witness. Campbell v. New Haven, 78 Conn. 394, 62 A. 665.

7. Where in an action for personal injuries against a railroad company and the city it is alleged that the former negligently removed and failed to replace boards from the bridge and that the latter negligently permitted the bridge to become unsafe by allowing boards to become and remain loose, failure of proof against the railroad company does not affect the cause of action

Questions for the jury and instructions.[8]—Where reasonable minds may differ as to the nature of a defect,[9] the question of ordinary care,[10] the possibility of the happening of an accident,[11] or the result of an injury,[12] the question is for the jury.

Instructions are governed by the ordinary rules,[13] including those relating to inconsistent[14] or misleading instructions,[15] and those requiring them to conform

against the city since the negligence charged is independent. City of Louisville v. Hall, 28 Ky. L. R. 1064, 91 S. W. 1133.

8. Many holdings though nominally relating to jury questions or instructions really involve the existence of disputed facts or matters of substantive law and will be found in the sections of this article dealing with the particular subject-matter to which they pertain.

9. In an action to recover for injuries caused by a defective sidewalk, the fact that plaintiff's witnesses do not agree as to the nature and extent of the defect does not authorize the dismissal of the case where some of them testify to the existence of a dangerously defective condition. Goff v. Philadelphia, 214 Pa. 172, 63 A. 431. Where reasonable minds may differ as to whether a condition is such as to require the city to anticipate accident the question is for the jury. Where pedestrian's foot was caught and held fast in hole under flagstone in sidewalk. Morroney v. New York, 49 Misc. 307, 97 N. Y. S. 642.

10. The question of ordinary care on the part of the person injured must be left to the jury if it is open to a difference of opinion. Perry v. People's Gas Light & Coke Co., 119 Ill. App. 389. Where a city has notice of the defective condition of a walk, though not of the particular defect which caused the injury, it cannot be said as a matter of law that it exercised reasonable care in that one charged with repairing it walked over it in a casual way and did not discover the defect. When the city has notice it is bound to make a more minute inspection and it is for the jury to say whether it has used reasonable care. Hunter v. Ithaca, 141 Mich. 539, 12 Det. Leg. N. 571, 105 N. W. 9.

11. Where in an action for injuries alleged to have been caused by a defective road there is nothing in plaintiff's testimony making the accident physically impossible, the fact that defendant's witnesses testified to facts rendering it impossible does not justify a binding instruction. Newman v. Bullskin Tp., 28 Pa. Super. Ct. 170.

12. In action for injury from defective sidewalk, whether the injury was the cause of plaintiff's physical condition was for the jury. Harris v. Mt. Vernon, 41 Wash. 444, 83 P. 1023.

13. In an action to recover for injuries caused by an excavation in a street, an instruction which permits the jury to take into consideration their personal knowledge of the locus in quo and the use ordinarily made of the street is erroneous. Karrer v. Detroit [Mich.] 12 Det. Leg. N. 765, 106 N. W. 64. The judgment being clearly right, an instruction that it was the duty of the city to keep its streets in a reasonably safe condition held not reversible error. City of Rock Island v. Gingles, 118 Ill. App. 410. In an action against an abutting owner, instruction as to liability held properly refused, the court having previously given a substantially similar charge. Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112. Held not error to charge that the testimony of witnesses who passed over a walk to the effect that they did not see the defect is not of as much weight as is the testimony of witnesses that they saw the defective condition. Alft v. Clintonville, 126 Wis. 334, 105 N. W. 561. In an action for personal injuries received by plaintiff's horse becoming frightened at defendant's steam roller, an instruction that if by "reasonable exertion" defendant could have stopped the puffing, etc., construed to mean by the exercise of "reasonable care." Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440. Instruction that jury should consider plaintiff's knowledge of the condition of a sidewalk, the nature of the defect, etc., and then "determine in the light of all the circumstances" whether plaintiff exercised ordinary care, held not erroneous for failing to include the elements of time, light, locality, etc. City of Ottawa v. Green, 72 Kan. 214, 83 P. 616. Where in an action for death resulting from a collision between a street car and a hose cart an ordinance is introduced giving the cart the right of way, it is not error to instruct as to the legal effect of such ordinance. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Not error to refuse to define the word "reasonable." York v. Everton [Mo. App.] 97 S. W. 604. Instruction that plaintiff had a "perfect right," "while in the exercise of ordinary care," to use that portion of a street in which defendant's car tracks were laid, held not to assume that plaintiff was exercising ordinary care, or imply that defendant had no special or superior right of way upon its tracks. Chicago City R. Co. v. Rohe, 118 Ill. App. 322.

14. In an action against a railroad for obstructing a public alley, an instruction that plaintiff should be awarded such sum as would compensate him for "whatever damages he has sustained" is not in conflict with an instruction that the measure of damages is the difference in value of plaintiff's property before and after the construction of the road. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111. First part of an instruction that plaintiff was required to exercise care commensurate with the increased danger due to his physical infirmity, the darkness of the night, etc., held not inconsistent with the latter part, that he was not negligent if he exercised the care of an ordinarily prudent person under similar circumstances. City of Stillwater v. Swisher, 16 Okl. 585, 85 P. 1110. Not error to refuse an instruction that if the jury find that there was a loose plank in the walk and that plain-

to the law.[16] The court should not assume facts not in evidence[17] but should instruct as to all issues properly raised.[18]

§ 16. *Injury to, obstructions of, or encroachment on, street or highway.*[19]—A public highway is for the use of the general public and no part thereof can be permanently appropriated to private use to the impairment of its primary purpose.[20] A city, however, may authorize[21] the maintenance of a reasonable obstruction in the streets or on the sidewalks,[22] but it has no power to permit an unreasonable use by private individuals.[23] An abutting property owner while building thereon,[24] or the city while repairing a highway or laying a sewer therein, may

tiff was injured thereby, still the defendant is not liable if the walk was in a reasonably safe condition for travel in the ordinary modes. York v. Everton [Mo. App.] 97 S. W. 694.

15. In an action against street railway for injuries from falling into excavation in a street, charge properly refused as confusing, and liable to the construction that the court had already charged that plaintiff was guilty of contributory negligence. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Charge properly refused as leading jury to believe that greater care was required of plaintiff when off the sidewalk than when upon it. Id. Instruction as to plaintiff's duty to look out and detect excavation held properly refused as confusing. Id.

16. An instruction that the city is not negligent unless a person of ordinary prudence and diligence would reasonably believe that the defect complained of would injure a person in the manner claimed, while such person was exercising ordinary care, is erroneous, since the test is whether a person of ordinary prudence and diligence would reasonably believe the defect would produce not the particular injury but some such injury as alleged. City of Rockwall v. Heath [Tex. Civ. App.] 14 Tex. Ct. Rep. 230, 90 S. W. 514. An instruction held to properly define "proximate cause" as applied to the evidence in an action for injuries received from the alleged defective condition of a city street. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. In an action for injuries received through a defective road, an instruction that if there were two other safe roads which plaintiff might have taken no recovery can be had held properly refused as leaving out the question of his knowledge of such roads. Fetterman v. Rush Tp., 28 Pa. Super. Ct. 77. In action for injuries from a bomb left in a public alley, requested instructions held erroneous as pretermitting consideration of due care on part of defendant's servant in ascertaining the dangerous character of the bomb. Wells v. Gallagher [Ala.] 39 So. 747.

17. Where in an action for injuries received by plaintiff's horse becoming frightened at defendant's steam roller there was no evidence that it was making more noise than usual, an instruction that if defendant negligently ran the roller with "unusual noise," etc., is erroneous. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440. Where evidence was uncontradicted that plaintiff was on the regular crossing, requested charge that if travelers go off the cross walks they must use reasonable care, etc., was abstract. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Where the undisputed evidence showed that plaintiff was injured while in the public highway by an obstruction therein, it is not error to refuse to submit the issue whether plaintiff was trespassing upon defendant's property. San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 14 Tex. Ct. Rep. 489, 92 S. W. 259. Where in an action for personal injuries caused by an obstruction in the public highway there is no conflict of evidence as to its highway character, it is not error to assume such fact in an instruction. Id.

18. Where in an action for personal injuries plaintiff's evidence tended to show that his horse became frightened by defendant's negligent operation of a steam roller, while that of defendant was that he was frightened by the wagon striking a gravel cart through plaintiff's negligent driving, the latter issue should have been submitted. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440.

19. See 5 C. L. 1685.

20. First Nat. Bank v. Tyson [Ala.] 39 So. 560. The law against obstructions in a highway is not confined to the beaten track but embraces the entire width of the road. Sweet v. Perkins, 101 N. Y. S. 163. Farmer liable for leaving manure pile extending to within four feet of beaten track where a team frightened by an automobile ran against it and injured driver. Id.

21. Ordinances Nos. 2273, 2387, enacted by the city of Portland, construed not to give plaintiffs a contract right within the protection of the Federal Constitution to occupy Morrison street for wharfage purposes. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. 413.

22. The city has the same power to authorize obstructions on the sidewalks as in the streets. Pickup v. Philadelphia & R. R. Co., 29 Pa. Super. Ct. 631. An abutting property owner cannot enjoin the construction of a watch box partly on his sidewalk where defendant has the consent of the city and the boxes are constructed in the proper manner and leave ample room for pedestrians. Id.

23. Though a city charter gives it power to regulate the use of its street, it has no power to grant the use of its streets for private purposes, or to permit the erection of permanent advertising signs thereon, or to grant to another the right to use the whole or any part of a street in such a manner as to unreasonably interfere with its public use, or render it unsafe and dangerous. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847.

temporarily place obstructions in the highway,[25] and the latter may even temporarily close the same,[26] but an obstruction so placed in the street must be done in a reasonable manner[27] and removed within a reasonable time.[28] A reservation of "wharves and wharfing privileges" in the dedication of land for an addition to a city does not include the right to occupy the streets with such wharves.[29] An obstruction which materially impedes travel is a nuisance,[30] notwithstanding space is left for public travel,[31] as is also the illegal exaction of tolls.[32] One maintaining an obstruction in a public highway cannot acquire a prescriptive right to continue it.[33] An unlawful and unauthorized[34] occupation and use of a public highway[35] by obstructions placed therein[36] may be enjoined in equity[37] by a suit in behalf of the public[38] or by a private party[39] suffering special damages,[40] if he has no ade-

24. See § 14, Rights of Abutters.

25. Dirt piled in the street while constructing a sewer. Frick v. Kansas City. 117 Mo. App. 488, 93 S. W. 351.

26. Building a bridge over railroad tracks. Adair v. Atlanta, 124 Ga. 288, 52 S. E. 739. And where the railroad agrees to build the bridge, may close it while the railroad is building it. Id.

27. City is liable where it unnecessarily closed the way of ingress and egress and so piled the dirt as to back water upon plaintiff's adjoining lot in large quantities. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351.

28. Liable where it negligently failed to remove the dirt for nearly 9 months. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351.

29. At least to so occupy as to require the city to render compensation upon destroying the same. Mead v. Portland, 200 U. S. 148, 50 Law. Ed. 413.

30, 31. Bischof v. Merchant's Nat. Bank [Neb.] 106 N. W. 996.

32. And may be restrained by injunction. State v. Louisiana, B. G. & A. Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

33. Purpresture. State v. Vandalia [Mo. App.] 94 S. W. 1009. Poles of gas and electric company. Merced Falls Gas & Electric Co. v. Turner [Cal. App.] 84 P. 239.

34. Where consent to a railroad's occupation of a street is given upon condition such occupation is unauthorized after condition broken. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798.

35. On the issue of whether land on which it was sought to erect an encroachment was part of the public street, an ancient deed and map of the village were properly admitted in evidence to identify defendant's premises and the practical location of the line of the street. Village of Oxford v. Willoughby, 181 N. Y. 155, 72 N. E. 677. Finding that a city had no rights on a railroad right of way on which it claimed a building had been erected so as to obstruct a street held not erroneous where it could be based either on the fact that a deed of the property was delivered before a plat was recorded or on the fact that the plat showed that the streets were not intended to cross the right of way. City of Cheney v. Anderson, 72 Kan. 696, 84 P. 137.

36. A purpresture in a highway is a grievance of sufficient importance to justify its abatement at the instance of the state. State v. Vandalia [Mo. App.] 94 S. W. 1009.

37. Dickinson v. Arkansas City Imp. Co. [Ark.] 92 S. W. 21. A county court may maintain a suit in equity to abate an obstruction of one of its public highways and to enjoin the defendant from obstructing such highway. Franklin County v. Huff [Tex. Civ. App.] 15 Tex. Ct. Rep. 974, 95 S. W. 41.

38. Chicago, etc., R. Co. v. People, 120 Ill. App. 306. Action by attorney general to enjoin one so using a highway as to injure the roadbed. McCarter v. Ludlum Steel & Spring Co. [N. J. Eq.] 63 A. 761. The attorney general or the law officer of a county may maintain a suit in equity to abate a nuisance caused by an unlawful obstruction of a city street (State v. Vandalia [Mo. App.] 94 S. W. 1009), independent of statute (Id.), on the relation of a private person or without it, and if on the relation of a private person he may be charged with costs if the suit fails (Id.).

39. When the owner of land plats it and sells lots according to such plat, one who purchases lots with reference thereto can enjoin the maintenance of an obstruction by another grantee of the owner. Mere silence of the plaintiff in allowing defendant to encroach on the street does not estop him to maintain a suit to abate the obstruction. Garvey v. Harbison-Walker Refractories Co., 213 Pa. 177, 62 A. 778.

40. Bischof v. Merchants' Nat. Bank [Neb.] 106 N. W. 996; McLean v. Llewellyn Iron Works [Cal. App.] 83 P. 1082; Nelson v. Randolph, 222 Ill. 531, 78 N. E. 914; Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798. When the evidence as to special injury is conflicting, it is a question for the jury. Evans v. Scott [Tex. Civ. App.] 16 Tex. Ct. Rep. 885, 97 S. W. 116.

Held to constitute special injury: Projecting building cutting off view of plaintiff's building by passing pedestrians. Bischof v. Merchants' Nat. Bank [Wis.] 106 N. W. 996. Compelled by the dumping of slag in the street to take a circuitous route in going to and from his property. Sloss-Sheffield Steel & Iron Co. v. Johnson [Ala.] 41 So. 907. An abutting property owner whose use of his own premises is interfered with by an obstruction of a city street or alley suffers such a special injury as authorizes a suit by him to abate the obstruction. Milwaukee Boiler Co. v. Wadhams Oil & Grease Co., 126 Wis. 32, 105 N. W. 312. Erection of stone columns from 22 to 26 inches beyond building line and on to sidewalk on lot adjoining

quate remedy at law.[41] In some states actions to abate unlawful obstructions in the streets may be maintained by cities[42] and villages.[43] It is not essential to the maintenance of an action by the county to enjoin the unlawful appropriation of streets that the city consent thereto.[44] The fact that abutting owners are joined as parties plaintiff in an action by a public officer does not affect the right to grant relief.[45]

Civil liability.[46]—Persons unlawfully placing obstructions in a highway, or a way actually used by the public as such,[47] or negligently maintaining lawful obstructions therein,[48] are liable for injuries proximately resulting therefrom,[49] especially where they constitute public nuisances.[50] Where the city has full control of the streets and supervision of work being done therein, it is liable for permitting dirt to be so piled as to constitute a private nuisance, irrespective of negligence,[51] and though the nuisance[52] be placed there by a third person, the municipality is liable if it has actual or constructive knowledge of such obstruction.[53] A railroad constructing its road through a public alley is liable as a trespasser to the abutting property owners.[54] The Massachusetts statute providing that the aldermen shall designate polling places does not authorize the placing of the booth in the traveled portion of a public street.[55] Where ingress and egress are completely cut off by work preparatory to the construction of a bridge, an action therefor is not premature if the completion of the bridge will not better conditions.[56]

Crimes.[57]—In many states one willfully[58] obstructing a public highway[59] may

complainant's held such obstruction of complainant's view as to justify relief, though he proved no actual damages. First Nat. Bank v. Tyson [Ala.] 39 So. 560. That complainant proved only one of several grounds of special injuries alleged did not deprive him of relief. Id.

Held insufficient: An abutting owner cannot restrain obstruction opposite his premises where it does not interfere with his means of access. Ruthstrom v. Peterson, 72 Kan. 679, 83 P. 825. Petition showing obstruction of 20 feet opposite the land of an abutting owner held not to show interference with his right of access where the highway was 40 feet wide. Id. That plaintiffs had mutual interest in the common use of the streets and were interested in keeping them open was not sufficient. Thorpe v. Clanton [Ariz.] 85 P. 1061.

41. An abutting property owner who is compelled to take a circuitous route in going to and from his property because of the dumping of slag in the street has no adequate remedy at law. Sloss-Sheffield Steel & Iron Co. v. Johnson [Ala.] 41 So. 907.

42. A city can maintain a suit to abate a purpresture in its streets. City of New Orleans v. New Orleans Jockey Club, 115 La. 911, 40 So. 331.

43. A village may maintain an action to enjoin an encroachment on a public street under Laws 1890, p. 1131, c. 568, § 15, conferring the right on highway commissioners to maintain such action in the name of the town, and the village law (Laws 1897, p. 414, c. 414, § 141) giving the board of trustees of a village exclusive control over the streets. Village of Oxford v. Willoughby, 181 N. Y. 155, 73 N. E. 677.

44. People v. Decatur, etc., R. Co., 120 Ill. App. 229.

45. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.

46. See 5 C. L. 1687.

47. Immaterial whether a prescriptive highway had been established as against the owner (San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 14 Tex. Ct. Rep. 489, 92 S. W. 259), and such issue need not be submitted to the jury (Id.).

48. Where an obstruction or excavation is made with the consent of the municipal authorities having power to grant it, the rule of liability is less severe and rests on the ordinary principles of negligence. In such case the abutting owner is not liable in the absence of negligence on his part. Mixer v. Herrick, 78 Vt. 349, 62 A. 1019.

49. Liability for obstructions rendering the highway unsafe for travel is treated in § 15.

50. Mixer v. Herrick, 78 Vt. 349, 62 A. 1019.

51. Shut off ingress and egress and backed water upon the adjacent land in large quantities. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351.

52. Whether or not such a pole is dangerous to the public or a nuisance is a question for the jury to be determined under proper instructions from the court and all the circumstances of the case. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229.

53. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229.

54. Alley not legally vacated. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111.

55. Rev. Laws c. 11, § 186, held liable to person injured thereby. Haberlil v. Boston, 190 Mass. 358, 76 N. E. 907.

56. Star & Crescent Mill. Co. v. Sanitary Dist. of Chicago, 120 Ill. App. 555.

57. See 5 C. L. 1688.

be prosecuted criminally, especially where the obstruction constitutes a public nuisance.[60] Such statutes and ordinances do not extend to streets and highways not duly laid out and opened.[61] In Georgia a prosecution for obstructing a registered public road cannot be sustained unless the road has been registered in the book known as the "Public Road Register."[62] Where an indictment for maintaining a nuisance alleges facts showing the obstruction to be a nuisance per se, it need not conclude "to the common nuisance of all citizens of the commonwealth."[63] Hearsay evidence is inadmissible to establish the character of the road.[64] Where the court instructs as to how a road may be established, it is error to refuse a requested instruction as to what the jury's report should contain.[65]

HOLIDAYS.[66]

Legal holidays have no legal sanctity other than that conferred by statute,[67] hence acts not prohibited by statute remain lawful.[68] The holidays created by the Indiana Act of March 4, 1905, are legal holidays for all purposes and not merely for the presentment and payment of commercial paper.[69] A local holiday has no extraterritorial effect.[70] Service of legal process on holidays when such service is prohibited is void.[71] A holiday counts as one of the three days allowed for filing a motion for a new trial, unless the holiday is the last of the three days.[72]

58. A railroad which allows a freight car to stand across a public road, it not being alleged that it was placed there willfully, is not guilty of violating Crim. Code § 5388. Central of Georgia R. Co. v. State [Ala.] 40 So. 991. Evidence held insufficient to show a willful obstruction. Isham v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 698, 92 S. W. 808.

59. Criminal Code Ill. par. 221, subd. 5, does not authorize a prosecution for obstructing a "private highway," nor can an allegation charging the obstruction of a "private highway" sustain a conviction for obstructing a private way. Gilbert v. People, 121 Ill. App. 423. Evidence insufficient to show the existence of a public highway where appellant built a wall. Dickerman v. Marion, 122 Ill. App. 154.

60. The fact that Ky. St. 1903, § 4335, imposes a penalty for obstructing the public highway, recoverable in a civil action, does not prevent prosecution by indictment for maintaining a nuisance. Commonwealth v. Illinois Cent. R. Co. [Ky.] 92 S. W. 944.

61. Obstruction of an alley which had never been opened, used, or worked by the city held not to be a violation of an ordinance of the city of Detroit. People v. McNamara [Mich.] 12 Det. Leg. N. 919, 106 N. W. 698. One cannot he convicted of obstructing a road where the obstruction was placed before the statutory proceedings for laying out the road had been complied with. Green v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 831, 90 S. W. 1098.

62. McGowan v. State, 124 Ga. 422, 52 S. E. 738.

63. Illinois Cent. R. Co. v. Com. [Ky.] 96 S. W. 467.

64. In a prosecution for obstructing a public highway, a witness having no personal knowledge cannot testify that the road is a public highway. Isham v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 698, 92 S. W. 808.

65. Isham v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 698, 92 S. W. 808.

66. See 5 C. L. 1688. See, also, Sunday, 6 C. L. 1584.

67. Michel v. Boxholm Co-operative Creamery, 128 Iowa, 706, 105 N. W. 323. They are creatures of statute. State v. Shelton [Ind. App.] 77 N. E. 1052.

68. The appearance and answer contemplated by Code § 3541, providing that no person shall be held to "appear and answer" on certain designated legal holidays, is a submission to the jurisdiction of a court in response to the service of the original notice, and a trial is not forbidden. Michel v. Boxholm Co-operative Creamery, 128 Iowa, 706, 105 N. W. 323.

69. Hence sale of liquor on Labor Day violated Act March 10, 1905 (Laws 1905, p. 721, c. 169, § 579), prohibiting sale of liquor on certain days "or on any legal holiday." State v. Shelton [Ind. App.] 77 N. E. 1052.

70. The Saturday afternoon half holiday in the city of Shreveport is a local holiday and does not apply to the district court for the parish of Caddo, which is a court for the entire parish, sitting in Shreveport only because the place is the parish seat. State v. Westmoreland, 117 La. 958, 42 So. 440.

71. Under Sayles' Ann. Civ. St. 1897, art. 1180, prohibiting issuance or service of process on any legal holiday except in cases of injunction, etc., service without the state of process in action to try title on February 22, a legal holiday in Texas, is void. Norvell v. Pye [Tex. Civ. App.] 95 S. W. 666.

72. Oberer v. State, 8 Ohio C. C. (N. S.) 93.

HOMESTEADS.[73]

§ 1. **The Right to the Homestead in General (93).**
§ 2. **Persons Entitled (93).**
§ 3. **Properties and Estates in Which Homestead May be Claimed (94).** As Dependent on Nature of Claimant's Title (94). As Dependent on Use of Premises (94). As Dependent on Whether Lands are Rural or Urban (95). As Dependent on Whether Property is Realty or Personalty (95). Amount of Rent (95).
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§ 8. **Rights of Surviving Spouse, Children, Heirs or Dependents of Homestead Tenant (102).** Nature of Survivor's Homestead Estate (103). Loss of Survivor's Right (103). Partition and Assignment Out of Decedent's Estate (104). Election (104). Rights of Divorced Parties (105).
§ 9. **Exemption of Proceeds of Homestead or of Substituted Properties (105).**
§ 10. **Remedies and Procedure by Creditors (105).** Remedies of Creditors Against Excess (105). Decrees, and Judicial and Execution Sales (105).

§ 1. *The right to the homestead in general.*[74]—Homestead statutes should be liberally construed in favor of the claimant.[75]

Nature of homestead estate.[76]—A wife's interest in her husband's homestead during his life is not a freehold interest[77] and is not subject to alienation.[78] She is entitled to the quiet and peaceful enjoyment of the same and one disturbing her therein is liable in trespass.[79] Where any member of a family occupying a homestead acquires a tax title to the same, it operates as a mere payment or redemption.[80] In California community property ceases to be such upon the acquisition of a valid homestead therein.[81]

§ 2. *Persons entitled.*[82]—This depends on the statute.[83] In some states the right to acquire a homestead exists only in favor of a "family"[84] or "householder and head of a family."[85] Under the Louisiana constitution a wife supporting the family[86] may claim an exemption.[87] Cessation of family relationship does not always divest the right.[88]

An abandoned wife or family[89] may under statute have the homestead exemption in the husband's lands,[90] and she need not immediately or continuously re-

73. As to the personal or general property exemptions, see **Exemptions,** 7 C. L. 1631. Homestead entries and "claims," see **Public Lands,** 6 C. L. 1126.

74. See 5 C. L. 1689.

75. In re Thompson, 140 F. 257.

76. See, also, post §§ 2-9.

77. Taylor v. Taylor, 223 Ill. 423, 79 N. E. 139. Hence an appeal involving her rights lies to the appellate court of Illinois and not to the supreme court. Id.

78. At least not to one who does not own the fee. Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 S. W. 896.

79. Lesch v. Great Northern R. Co. [Minn.] 106 N. W. 955.

80. Holds legal title in trust for the head of the family. First Congregational Church v. Terry [Iowa] 107 N. W. 305. Irrespective of any fraud between a life tenant and his wife occupying an estate as a homestead, the latter cannot acquire a tax title and defeat the remaindermen. Id.

81. Yardley v. San Joaquin Valley Bank [Cal. App.] 86 P. 978. See, also, Stockton Sav. & Loan Soc. v. Saddlemire [Cal. App.] 86 P. 723.

82, 83. See 5 C. L. 1689.

84. A father living with and supporting an illegitimate daughter is such a family as may have homestead rights. Rutherford v. Mothershed [Tex. Civ. App.] 15 Tex. Ct. Rep. 620, 92 S. W. 1021.

85. A husband living with his family is the "householder and head of the family" contemplated by Hurd's St. 1903, c. 52, p. 943, § 1, and the homestead exists in him and only vests in the wife when he dies or abandons her. Taylor v. Taylor, 223 Ill. 423, 79 N. E. 139.

86. Where the only property of the spouses is the separate property of the wife which she uses as a residence and store, the fact that the husband also devotes his time to the business does not alter the fact that the family is dependent upon the wife. Ginsberg v. Groner [La.] 41 So. 569.

87. Const. art. 244, giving exemptions to every person having a person or persons dependent upon "him" or "her" for support. Ginsberg v. Groner [La.] 41 So. 569.

88. Dewees v. Dewees, 28 Ky. L. R. 726, 90 S. W. 256. See, also, post § 7.

89. See 5 C. L. 1690.

90. Where a husband separates from or abandons his wife, the homestead exemption continues in favor of the wife. Montgomery v. Dane [Ark.] 98 S. W. 715. Where a hus-

side there,[91] but in Missouri she does not acquire a title thereto, as where she succeeds on his death.[92]

§ 3. *Properties and estates in which homestead may be claimed.*[93]—The constitutional homestead exemption of North Carolina is only applicable to lands within the state.[94] The fact that the land is separated from the dwelling house is not conclusive of its nonhomestead character,[95] nor does the fact that a cabin on the land is small and dilapidated show that it is not a homestead.[96] Ungathered crops growing upon a homestead are exempt.[97] In Kentucky one inheriting land may establish a homestead therein as against preexisting debts,[98] and has a reasonable time within which to convert the inheritance into a homestead.[99]

As dependent on nature of claimant's title.[1]—While as a general rule some interest in the claimant is necessary to support a homestead, an equitable title,[2] a leasehold interest,[3] a curtesy consummate,[4] and a fee simple with condition subsequent,[5] have been held sufficient. In Illinois, if the claimant is in actual possession of the land as a residence, his title therein is immaterial.[6] In California a homestead cannot be selected or claimed in lands held as a tenant in common or as a joint tenant.[7] Under a homestead statute which gives merely a protected occupancy as against creditors, a homestead exemption can exist only in lands in which the debtor has a present right of occupancy.[8]

As dependent on use of premises.[9]—Under a statute requiring that a homestead claimant must occupy the land, it is not necessary that he actually reside thereon,[10] or that it be adjacent to the residential piece.[11] "Use in connection"

band abandons his family without cause, the wife becomes entitled to the use and profits of the homestead, and under Rev. St. 1899, § 3620, she may maintain possession as against a grantee of the husband. Metz v. Schneider [Mo. App.] 97 S. W. 187.

91. See Montgomery v. Dane [Ark.] 98 S. W. 715.

92. Abandonment of the family and homestead by the husband does not vest the homestead in the widow and children under Rev. St. 1879, c. 39, § 2693, providing that the homestead shall so vest upon the "death" of the husband. Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 S. W. 896.

93. See 5 C. L. 1690.

94. Const. art. 10, § 2, exempting from execution the homestead "owned and occupied by any resident of this state," does not authorize a bankruptcy court to set off a homestead in lands in Maryland. In re Owings 140 F. 739.

95. But may be considered with the other evidence. Gibbs v. Adams [Ark.] 89 S. W. 1008. The actual use of a contiguous tract as a part of the homestead farm is sufficient to impress it with the homestead character, if the aggregate of the two farms does not exceed the homestead limit. Cowley v. Spradlin [Ark.] 91 S. W. 550. Where one owns a tract of land contiguous to that upon which he lives, he may select enough thereof to make a homestead of 160 acres provided it does not exceed $2,500 in value. Cowley v. Thompson [Ark.] 91 S. W. 552.

96. Gibbs v. Adams [Ark.] 89 S. W. 1008.

97. Nunn-Weldon Dry Goods Co. v. Haden [Tex. Civ. App.] 16 Tex. Ct. Rep. 318, 95 S. W. 73.

98. Roberts v. Adams [Ky.] 96 S. W. 554.

99. What is a reasonable time is a question of fact. Roberts v. Adams [Ky.] 96 S. W. 554. Where the land inherited is not suitable for homestead purposes, or where he owns only an undivided interest and a division is infeasible, such reasonable time includes time to effect a judicial sale and divide the proceeds. Id.

1. See 5 C. L. 1690.

2. Stowell v. Kerr, 72 Kan. 330, 83 P. 827; Tracy v. Harbin [Tex. Civ. App.] 14 Tex. Ct. Rep. 53, 89 S. W. 999. Where a father agreed to give a married son a lot if he would build and live thereon, which he did, such lot becomes a homestead though the legal title has not been transferred. Holliday v. Mathewson [Mich.] 13 Det. Leg. N. 816, 109 N. W. 669.

3. Iowa. In re Ring's Estate [Iowa] 109 N. W. 710.

4. Wisconsin: Under the exemption statute of Wisconsin, providing that "such exemption shall extend * * * to any estate less than a fee held by any person by lease, contract or otherwise," a tenant by the curtesy consummate is entitled to an exemption. In re Kaufmann, 142 F. 898.

5. Tracy v. Harbin [Tex. Civ. App.] 14 Tex. Ct. Rep. 53, 89 S. W. 999.

6. Daughters v. Christy, 223 Ill. 612, 79 N. E. 292.

7. Schoonover v. Birnbaum, 148 Cal. 548, 83 P. 999.

8. Under Ky. St. 1903, § 1702 et seq., a remainderman has no homestead exemption during the life term. In re Sale [C. C. A.] 143 F. 310. And it is immaterial that he is in the actual occupancy of the land, as where remainderman and life tenant, husband and wife, are living thereon. Id.

9. See 5 C. L. 1690.

10. Gaar, Scott & Co. v. Reesor, 28 Ky. L. R. 1308, 91 S. W. 717.

with his place of residence must be more than merely occasional.[12] Buildings situated on and used as a part of the homestead may be claimed under some statutes as a part thereof.[13]

As dependent on whether lands are rural or urban.[14]—In Texas a homestead must be exclusively urban or rural.[15]

As dependent on whether property is realty or personalty.[16]

Amount exempt.[17]—In Mississippi a homestead in a town or village is measured by its value,[18] while in Arkansas, if in an incorporated town, by its territorial extent,[19] but the fact that the property exceeds the exemption limit does not prevent homestead rights from arising therein.[20]

§ 4. *Claiming, selecting, and setting apart of homesteads.*[21]—A mere intention to occupy land at some future time as a home is insufficient to impress it with a homestead character,[22] unless it is accompanied by overt acts clearly manifesting such intent,[23] and is followed by an actual occupation within a reasonable time, in which case the homestead character relates back and prevents liens from attaching in the meantime.[24] In the absence of statutory provisions prescribing the mode of setting out the homestead, occupation[25] of land with a bona fide intent to use it as a home[26] is sufficient to impress it with that character,[27] but in some states a written

11. Where a resident of a village uses land two miles distant as a part of the homestead and the two pieces do not exceed the limit allowed, such land may be claimed as a homestead. Gaar, Scott & Co. v. Reesor, 28 Ky. L. R. 1308, 91 S. W. 717.

12. A 12 acre lot in a city owned by a saloonkeeper, which was detached from the residence and leased on shares or occasionally used as a pasture, is not a part of the homestead, since the use was merely incidental. Levy & Co. v. Lacour [Tex. Civ. App.] 94 S. W. 380.

13. A storehouse on the homestead lot is exempt as **"appurtenant"** within Ky. St. 1903, § 1702, though leased, if the value of the lot and building do not exceed the maximum amount. Green & Sons v. Pennington [Ky.] 97 S. W. 766. Under Code § 2978, allowing **"a" shop** or other building situated on the homestead and actually used and occupied by the tenant in the prosecution of his business as appurtenant to the homestead, does not permit him to maintain several buildings. Shaffer Bros. v. Chernyk [Iowa] 107 N. W. 801.

14. See 5 C. L. 1691.

15. Hence one occupying an urban lot as a homestead cannot claim as a part thereof a disconnected tract outside of town. Parker v. W. L. Moody & Co. [Tex. Civ. App.] 96 S. W. 650.

16. See 3 C. L. 1633.

17. See 5 C. L. 1691.

18. May claim up to $2,000 in value irrespective of territorial extent. Stevens v. Wilbourn [Miss.] 41 So. 66.

19. The constitution limits the homestead to one acre. Gibbs v. Adams [Ark.] 89 S. W. 1008.

20. Rev. Codes 1899, § 3605, construed not as a definition of the term "homestead" but as a limitation of the homestead exemption. Calmer v. Calmer [N. D.] 106 N. W. 684.

21. See 5 C. L. 1691. See, also, post § 8, Partition, etc.

22. An intention to occupy land after repairs does not exempt it from a lien of attachment. Gibbs v. Adams [Ark.] 89 S. W. 1008.

23. Where a debtor in failing circumstances decided to give to his creditors the house in which he was living and to move upon a farm as a homestead, the latter did not become impressed with a homestead character, since there was no overt act manifesting the intent. Bush & Co. v. Adams, 72 Kan. 556, 84 P. 122.

24. Where one acquires property with intent to live thereon and take possession within a reasonable time, the homestead rights attach as of the time of purchase. Home Bldg. & L. Ass'n v. McKay, 118 Ill. App. 586. Therefore the lien of an existing judgment cannot attach. Stowell v. Kerr, 72 Kan. 330, 83 P. 827.

25. The clearing and planting of a portion and the moving of corn onto land intended for a home, where the house is yet incomplete, is not such occupation as to give it a homestead character. Shell v. Young [Ark.] 95 S. W. 798.

26. Where the wife of an absconded debtor moves a few household goods into a dilapidated cabin which creditors are about to seize, the court must consider all the circumstances to determine whether the claim of homestead is made in good faith or as a shield against creditors. Gibbs v. Adams [Ark.] 89 S. W. 1008. Where one upon separation from his wife gives her the house in which they are living and attempts but fails to buy out a tenant upon his farm and thereafter attempts to sell the same, no homestead is established in the farm. Swift v. Kleckner [Mich.] 13 Det. Leg. N. 690, 109 N. W. 34.

27. Where a wife owns a house and lot of the value of $750 and lives thereon, and neither she nor her husband owns any other lands in the state, she has a homestead right therein though unassigned. Ex parte Miley, 73 S. C. 325, 53 S. E. 535. Being of less value than $1,000, it was not subject to judgment liens. Id.

declaration, describing the land[28] and stating the value thereof,[29] is required. These declarations must be made by the proper party[30] and in the particular mode if any appropriate to the party claiming,[31] and state all facts required by the statute to entitle such claimant as distinguished from others,[32] but defects in the execution of a declaration which clearly manifests an intent to claim as a homestead lands which are thereafter occupied and used as such will not defeat the homestead rights.[33] In Texas the joinder of the wife is not necessary to a valid declaration by the husband.[34] In Michigan, where a debtor occupies three lots in one inclosure in an incorporated village as a homestead, such lots in the execution of a levy should be treated as a single tract and the statutory proceeding taken to set out the homestead therein.[35] In North Dakota where a homestead estate is decreed in the county court in land which exceeds the limit in value and is indivisible, the decree should show the amount of excess and the fact of indivisibility.[36] Some statutes allow the debtor to select which of available lands he will have,[37] which in Texas must include the mansion house, the appurtenant lands, and the improvements used therewith,[38] and need not be of unincumbered land available equally with that chosen.[39] The selection must be made in good faith.[40] In North Carolina, to allot homestead without according him opportunity to select is error.[41] Where parents die without having made the selection, the right inures in Arkansas to the minor children,[42] but not being sui juris the selection must be made through a commission appointed by the chancery court upon application;[43] and where minor

28. Under Civ. Code § 1263, a declaration describing a homestead as "lying in B County * * * being with other land * * * (describing land in a designated township) and all lands owned by" the husband of the declarant "in said township," is insufficient, as declarant evidently intended to claim lands in addition to that specifically described. Jones v. Gunn [Cal.] 87 P. 577.

29. Where a declaration contains a specific description of certain lands and a reference to other undescribed lands and an estimated value of them all, a disregard of the reference to make the description sufficient renders the declaration of value insufficient under Civ. Code § 1263. Jones v. Gunn [Cal.] 87 P. 577.

30, 31. Civ. Code §§ 1266-1269, prescribing the manner of declarations of "homestead of other persons," relates to persons other than a husband, wife, or head of a family whose rights to a homestead are prescribed by §§ 1262, 1263, and hence a wife cannot make a declaration thereunder. Hansen v. Union Sav. Bank, 148 Cal. 157, 82 P. 768.

32. A declaration by a wife which does not state that her husband has not made a declaration and that she is making it for their joint benefit is insufficient under Civ. Code § 1263. Hansen v. Union Sav. Bank, 148 Cal. 157, 82 P. 768.

33. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

34. Under Sayles' Rev. Civ. St. 1897, arts. 2403-2405, it is not necessary that the wife join in or acknowledge the designation or that she have knowledge of the same. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

35. Proceedings should have been had under Comp. Laws 1897, §§ 10,364-10,366. Averill v. Benzie County State Sav. Bank [Mich.] 12 Det. Leg. N. 1011, 106 N. W. 865.

36. Calmer v. Calmer [N. D.] 106 N. W. 684.

37. Where one entitled to a homestead is residing on a tract of more than the allowed amount and has so used the entire tract as to impress it with a homestead character, he may select the particular tract therein which shall be his homestead. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

38. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

39. A homestead may be designated upon mortgaged property notwithstanding the designator has other unincumbered property which might be designated. At least such designation is not invalid as a matter of law. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

40. Must be made to secure to himself and family the benefits of the exemption law and not to evade the law prohibiting the mortgaging of the homestead. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003. Letters containing admissions by defendant as to the land designated as a homestead in a larger tract are admissible in an action to foreclose a deed of trust on other lands in the same tract in which he attempts to assert a homestead interest. Id.

41. Under Const. art. 10, § 12, and Revisal 1905, §§ 688, 693, a debtor must be given an opportunity to make his own selection and an allotment by appraisers during his absence is void. McKeithen v. Blue [N. C.] 55 S. E. 285.

42. Const. art. 9, § 10. Cowley v. Spradlin [Ark.] 91 S. W. 550; Cowley v. Thompson [Ark.] 91 S. W. 552.

children bring two actions to redeem separate tracts from a tax sale as homestead property and the aggregate exceeds the constitutional amount, the court should compel them to elect which tract they will redeem or require the defendant in one case to be made a party to the other and allow a redemption of a portion of each.[44]

In North Carolina the regularity of an allotment by appraisers may be raised by exceptions seasonably taken in the manner prescribed by statute.[45] Exceptions to an official allotment of homestead, though defective, may be heard as a motion to vacate it when void on its face.[46]

§ 5. *Liabilities superior or inferior to homestead.*[47]—In all states the homestead is to a limited extent exempt and is usually not subject to debts contracted[48] and judgments entered subsequent to its acquisition,[49] unless there be a loss or relinquishment of the right,[50] though liable for preexisting debts.[51] A homestead is usually liable for debts incurred in the improvement thereof, but in some states, in order to create a lien, the contract for improvement must be signed by the wife,[52] though in Michigan her omission to sign merely prevents the lien from attaching to the lot,[53] while it attaches to the building,[54] though constructed on a lot not owned by the contracting party.[55] In Texas the renewal of a note secured by a mechanic's lien on the homestead by the husband without the wife's consent destroys the lien.[56] As a general rule a homestead is not exempt from obligations incurred in the purchase thereof,[57] but where a vendor's lien is only upon an undivided half, the owner may claim his exemption in the other half.[58] The execution of a mortgage on the homestead does not destroy the exemption against creditors generally.[59] Judgment liens attach upon the termination of the homestead

43. Cowley v. Spradlin [Ark.] 91 S. W. 550.
44. Cowley v. Thompson [Ark.] 91 S. W. 552.
45. Under Revisal 1905, § 699, authorizing a debtor within 10 days after the filing of the return to notify the adverse party and file exceptions attached to a transcript of the return, exceptions filed with the clerk and attached to the return of the appraisers on file, of which no notice was given, and the filing of additional exceptions after the 10 days had expired, are insufficient. McKeithen v. Blue [N. C.] 55 S. E. 285.
46. Though exceptions to appraiser's selection of homestead are irregular as exceptions within the statute prescribing a remedy for persons "dissatisfied with the allotment," yet where they call the court's attention to the fact that the debtor's constitutional right of selection had not been observed and the necessary parties were before the court and the facts found, the proceedings may be treated as a rule upon the sheriff to show cause why the appraisement should not be set aside. McKeithen v. Blue [N. C.] 55 S. E. 285.
47. See 5 C. L. 1693.
48. Griffin v. Dunn [Ark.] 96 S. W. 190.
49. Meikle v. Cloquet [Wash.] 87 P. 841. Code Civ. Proc. §§ 671, 690. Yardley v. San Joaquin Valley Bank [Cal. App.] 86 P. 978.
50. See post § 7.
51. Porter v. Hart County Deposit Bank & Trust Co. [Ky.] 96 S. W. 832. A homestead purchased with the proceeds of another homestead is exempt as against a debt incurred after the acquisition of the first homestead but before that of the latter, although a homestead is not exempt against prior debts. Green v. Pennington [Ky.] 97 S. W. 766.
52. The contract for improvements may be embodied in a deed of trust executed on the homestead (Walker v. Woody [Tex. Civ. App.] 13 Tex. Ct. Rep. 957, 89 S. W. 789), but such deed must show all the elements required of a separate instrument, and where the material consisted of fruit trees, a deed failing to show that the trees were to be used on the homestead or the consideration of the contract is insufficient under Const. art. 16, § 50 (Id.).
53. Holliday v. Mathewson [Mich.] 13 Det. Leg. N. 816, 109 N. W. 669.
54, 55. Comp. Laws 1897, § 10,712. Holliday v. Mathewson [Mich.] 13 Det. Leg. N. 816, 109 N. W. 669.
56. Sudduth v. Du Bose [Tex. Civ. App.] 15 Tex. Ct. Rep. 329, 93 S. W. 235.
57. While the constitutional exception making a homestead liable for obligations incurred in the purchase thereof must be strictly construed, the term must not be so restricted as to render it nugatory. Platt v. Platt [Fla.] 39 So. 536. The meaning of the word "obligations" as used in Const. art. 10, § 1, is any debt contracted to be paid or a duty assumed as the consideration of the purchase. Id.
58. Where the owner of an undivided half purchases the other and acquires a homestead in the whole, upon a sale under a vendor's lien, the owner may claim one-half of the proceeds as exempt. Iberia Cypress Co. v. Christen, 116 La. 53, 40 So. 529. The words "any part thereof" in the exception to the homestead exemption in favor of "the purchase price or any part thereof" re-

character while the land is still owned by the debtor,[60] and in Louisiana the land passes upon sale subject to judicial mortgages inscribed against the vendor.[61] The lien of a judgment revived by scire facias is inferior to existing homestead rights, though the lien of the original judgment was superior.[62] In Iowa the homestead of a pensioner purchased with pension money becomes subject, upon his death, to debts incurred before its acquisition.[63] In Wisconsin a homestead is exempt though purchased with unexempt funds after insolvency.[64] In Nebraska a judgment does not become a lien upon the homestead unless the debtor has a clear interest therein in excess of the exempted amount.[65] One may acquire by subrogation enforceable rights against the homestead.[66]

Application of payments to protect homestead.—Where no directions are given, payments on a debt should be so applied by the court as to preserve the homestead.[67]

§ 6. *Alienation and incumbrance.*[68]—A homestead is subject to sale and transfer by a properly executed instrument,[69] but where it is exempt from execution, it cannot be the subject of a fraudulent conveyance,[70] and a gift to the wife of a part of the proceeds of a loan thereon, to secure her signature to the mortgage,

fers to the purchase price and not the land. Id.

59. Hobson v. Noel [Ky.] 97 S. W. 388.

60. Business homestead. Bradley v. Janssen [Tex. Civ. App.] 15 Tex. Ct. Rep. 914, 93 S. W. 506.

61. Abbeville Rice Co. v. Shambaugh, 115 La. 1047, 40 So. 453.

62. Misener v. Glasbrenner, 221 Ill. 384, 77 N. E. 467.

63. Code § 4010 exempts such homestead from debts incurred prior to its acquisition only during the life of the pensioner. Beatty v. Wardell [Iowa] 105 N. W. 357.

64. Held no such fraud upon the creditors as will enable them to reach the property. In re Wood, 147 F. 877.

65. Hence, where one mortgage is discharged with the proceeds of another, each mortgage being sufficient to reduce the clear interest of the mortgagor below $2,000, an existing judgment never becomes a lien. Goble v. Brenneman [Neb.] 106 N. W. 440.

66. **NOTE. Subrogation to rights against the homestead:** "One may, under proper circumstances, be subrogated to rights which can be enforced against a homestead. Gilbert v. Neely, 35 Ark. 24; Luck v. Atkins, 53 Ark. 303, 13 S. W. 1097; Ayres v. Probasco, 14 Kan. 198; Markillie v. Allen, 120 Mich. 360, 79 N. W. 568; Roy v. Clark, 75 Tex. 28, 12 S. W. 845; Denecamp v. Townsend [Tex. Civ. App.] 33 S. W. 254. But see First Nat. Bank v. Browne, 128 Ala. 557, 29 So. 552, 86 Am. St. Rep. 156. Money advanced to pay a mortgage for the purchase price of a homestead is held equivalent to so much purchase money, and the second mortgagee is entitled to be subrogated to the rights of the first. Carr v. Caldwell, 10 Cal. 380, 70 Am. Dec. 740. And where one pays off a mortgage and his title afterward fails, he may be subrogated to the mortgagee's rights, although the property is a homestead. Murphy v. Smith [Tex. Civ. App.] 50 S. W. 1040. If a third person loans a vendee money with which to pay the purchase price of land, taking from the vendor a conveyance of the title as security, he is subrogated to the rights of the vendor, and the vendee's rights, homestead or otherwise, are subject to his lien for the money loaned. Heyderstadt v. Whalen, 54 Minn. 199, 55 N. W. 958. And it is said that one who discharges a vendor's lien upon land—even the homestead—either by paying as surety, or at the request of the debtor, or at a judicial sale which fails to convey the title, is entitled to be subrogated to the lien of the creditor to the extent of the payment so made. Faires v. Cockrill, 88 Tex. 428, 31 S. W. 190, 626, citing McDonough v. Cross, 40 Tex. 251; Burns v. Ledbetter, 54 Tex. 374; Texas, etc., Loan Co. v. Blalock, 76 Tex. 85, 13 S. W. 12. See, also, Hicks v. Morris, 57 Tex. 658; Pioneer Loan Co. v. Paschall, 12 Tex. Civ. App. 613, 34 S. W. 1001; Dixon v. National Loan, etc., Co. [Tex. Civ. App.] 40 S. W. 541; Ivory v. Kennedy, 57 F. 340; Western Mtg. Co. v. Gazner, 63 F. 647. If money is advanced to pay a purchase-money note, and the amount advanced is secured by a trust deed, it has been held that the person making the loan may be subrogated to the vendor's lien as against the homestead right of the borrower. Pridgen v. Warn, 79 Tex. 588, 15 S. W. 559."—From American Bonding Co. v. National Mechanics' Bank [Md.] 99 Am. St. Rep. 489.

67. Applied so as to discharge that part of the debt incurred before the homestead rights attached. Shaffer Bros. v. Chernyk [Iowa] 107 N. W. 801.

68. See 5 C. L. 1695.

69. Johnston v. Fraser [Tex. Civ. App.] 15 Tex. Ct. Rep. 80, 92 S. W. 49.

70. South Omaha Nat. Bank v. Boyd [Ark.] 97 S. W. 288; Dewees v. Dewees, 28 Ky. L. R. 726, 90 S. W. 256. Immaterial that it was made to defeat creditors. Hobson v. Noel [Ky.] 97 S. W. 388. A bona fide conveyance of a homestead to the wife is not rendered fraudulent as to creditors by a subsequent abandonment. Commercial State Bank v. Kendall [S. D.] 106 N. W. 53. The fact that on the day prior to a sale the vendor shipped certain goods to his future residence, and stayed that night at a neighbor's house, did not constitute an abandonment of the homestead before sale so as to render it fraudulent as to creditors to defeat whom he made the sale. Hobson v. Noel [Ky.] 97 S. W. 388.

is not a fraud on the creditors.[71] Where a homestead has been set aside to the head of a family under the Georgia Constitution of 1868, he may dispose of his interest therein.[72] Since in Colorado a tenant may voluntarily mortgage his homestead, an equitable lien created by a contract to execute a deed of trust will attach despite its homestead character.[73] In Louisiana, where the owner sells the property, recorded judgments follow it into the purchaser's hands.[74]

Necessity of consent of wife to conveyance or joinder therein.[75]—It is now almost a universal rule that a homestead cannot be conveyed or incumbered without the consent of the wife,[76] and in many states a joint deed is necessary to pass an interest therein[77] and estoppel will not supply such defect.[78] A statute imposing greater restrictions upon the right of the homestead tenant to convey is not objectionable as depriving the tenant of vested rights.[79] Where assent simply is required a wife may estop herself from denying that it was given.[80] In Texas a husband whose wife has abandoned him without cause[81] may convey the homestead by his separate deed, but under the Minnesota statute, declaring a deed not joined in by the wife void, such abandonment followed by adultery does not make the husband's deed valid,[82] nor does the termination of the homestead character give it validity.[83] Where a deed must be joined in by the husband and wife to be effective, a deed executed by a husband individually and as guardian of his wife,[84] or under a power

71. Becomes her separate property and cannot be reached. Yardley v. San Joaquin Valley Bank [Cal. App.] 86 P. 978.

72. Although he cannot defeat the rights of the minor children. Waters v. Waters, 124 Ga. 349, 52 S. E. 425.

73. Under Mills' Ann. St. § 2137, the entry of the word "homestead" on the margin of a decree awarding certain lots does not prevent the equitable lien created by a contract to execute a deed of trust to the same from attaching. Patrick v. Morrow, 33 Colo. 509, 81 P. 242.

74. Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 So. 453.

75. See 5 C. L. 1696.

76. Metz v. Schneider [Mo. App.] 97 S. W. 187.

77. Cushman v. Davis [Vt.] 64 A. 456. Rev. Codes § 5052. Gaar, Scott & Co. v. Collin [N. D.] 110 N. W. 81. Under Comp. St. 1903, c. 36, § 4 (Cobbey's Ann. St. 1903, § 6203), the instrument must be executed and acknowledged by both husband and wife. Weatherington v. Smith [Neb.] 109 N. W. 381. Under the Michigan constitution the wife must join in the same instrument, and two separate deeds pursuant to an oral contract of the husband to convey is insufficient. Lott v. Lott [Mich.] 13 Det. Leg. N. 883, 109 N. W. 1126. An agreement by a purchaser of land already occupied as a homestead that the title should be held by a third person advancing the purchase money as security therefor and for other indebtedness, which agreement is not joined in by the wife, is void as to all except the purchase-money indebtedness. Blake v. Lowry [Tex. Civ. App.] 15 Tex. Ct. Rep. 728, 93 S. W. 521. Incapacity of either renders the incumbrance void. Husband insane. Stafford v. Tarter [Ky.] 96 S. W. 1127. A **lease for two years** is void unless joined in by the wife (Haile v. Haile [Tex. Civ. App.] 15 Tex. Ct. Rep. 796, 93 S. W. 435), and cannot be sustained as a valid lease for one year, granting that the husband could make such a lease without the wife's consent (Id.).

78. Weatherington v. Smith [Neb.] 109 N. W. 381. Where at the time of executing a trust deed a tract covered thereby was in the actual possession of the grantor and wife and was being used as a homestead previously designated by them from a larger tract, a recital therein that the tract was not used as a homestead did not estop the grantor's wife from claiming it as a homestead. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

79. Rev. Codes 1899, § 3608 (Rev. Codes 1905, § 5052), requiring the wife's signature, though a nonresident, which was not required when the homestead character was impressed upon the land. Gaar, Scott & Co. v. Collin [N. D.] 110 N. W. 81. The right of individual conveyance is waived by imposing a homestead character upon the land, and it becomes subject to existing laws regulating its conveyance. Id.

80. Where a lease of the homestead must be assented to by the wife which might be oral, and the husband and wife stand by and see the lessee make extensive improvements in reliance on the lease, they are estopped to assert the invalidity of the lease for lack of the wife's assent, especially where they have abandoned the homestead in the meantime. Shay v. Bevis Rock Salt Co., 72 Kan. 208, 83 P. 202. Where a wife recognizes the validity of notes secured by a mechanic's lien on the homestead by securing extension of time for payment and a bona fide purchaser acquires them in reliance thereon, she is estopped to assert that they were improperly delivered by the trustee to the contractor. Roane v. Murphy [Tex. Civ. App.] 16 Tex. Ct. Rep. 24, 96 S. W. 782.

81. Evidence held to show an unjustifiable abandonment, and hence the husband's subsequent deed conveys title. Dugat v. Means [Tex. Civ. App.] 14 Tex. Ct. Rep. 557, 91 S. W. 363.

of attorney from her,[85] is void. In Illinois a deed insufficient to convey the homestead because improperly subscribed by the wife becomes effectual if possession is given.[86] Where a homestead can be alienated only with the joint consent of the husband and wife, nothing can be done by one to affect the title while the other lives,[87] though the estoppel may operate after the other's death.[88] In Nebraska an executory contract of sale of the homestead not joined in by the wife is void as to the whole without regard to its value,[89] but where it includes other lands it is valid as to them.[90] Renewed contracts of purchase need not be signed by the vendee's wife, though the property has become a homestead in the meanwhile.[91] Courts will scrutinize transactions in which a wife's assent to a disposition of a homestead is secured, yet she will not be relieved from the consequences of her own acts which she understood or should have understood.[92] Heirs seeking to recover land in the possession of a mortgagee under a mortgage void as an incumbrance on the homestead not joined in by the wife need not tender payment of the debt.[93]

Where a homestead can only be conveyed by the joint act of the husband and wife, the latter cannot, by separating from her husband, partition the homestead in which she has an undivided half interest.[94]

82, 83. Murphy v. Renner [Minn.] 109 N. W. 593.

84. 2 Hill's Ann. St. & Codes § 483. Curry v. Wilson [Wash.] 87 P. 1065.

85. Under Code § 2974. Keeline v. Clark [Iowa] 106 N. W. 257.

86. Possession is given "pursuant to a conveyance" within the Exemption Act (Hurd's Rev. St. 1905, c. 52), § 4, when the conveyance is the moving cause, and need not be immediately given, for where husband gave deed to wife, and subsequently moved away, the wife thereafter renting the same, there is sufficient possession. Coon v. Wilson, 222 Ill. 633, 78 N. E. 900.

87. Where a wife is insane no act of the husband will work an estoppel during her life. Withers v. Love, 72 Kan. 140, 83 P. 204.

88. Where one upon return from prison accepts the proceeds of a sale of the homestead by his attorney which was wholly void because of the insanity of the wife, and permits improvements to be made, he is not estopped where the facts are as well known to the purchaser as to him. Withers v. Love, 72 Kan. 140, 83 P. 204.

89. Neither an action for specific performance or for damages for breach of it will lie. Lichty v. Beale [Neb.] 106 N. W. 1018.

90. Johnson v. Higgins [Neb.] 108 N. W. 168.

91. Vendor retained title, which was to be conveyed upon the payment of the purchase price, which contract was several times renewed. Clifton Land Co. v. Davenport [Iowa] 106 N. W. 365.

92. Where the wife joins in a mortgage on the homestead to secure a note of the husband alone and she so understood or should have, a recital therein that it is given to secure a note signed by the wife in connection with the husband may be reformed. Bastin v. Schafer, 15 Okl. 607, 85 P. 349.

93. The equitable rule that he who seeks equity must do equity is inapplicable. Woods v. Campbell [Miss.] 40 So. 874.

94. Grace v. Grace, 96 Minn. 294, 104 N. W. 969.

NOTE. Right of a wife having an undivided interest in homestead to partition: "Defendant, in order to compromise a suit for divorce, deeded to his wife an undivided half of the homestead. Later she left because of his cruel treatment and brought an action for partition of the homestead. Held, that partition could not be decreed. Grace v. Grace [Minn.] 104 N. W. 969. The court held that even though all the homestead rights were in the husband's undivided half, the wife could not make a valid sale or conveyance destroying the homestead, under the statute which provided that the wife could not convey the homestead or any interest therein unless her husband joins with her in the conveyance. To allow the wife by leaving her husband to acquire the right to compel partition of the homestead in which she had an undivided half interest would be to allow her to do indirectly by partition what she could not do directly by sale or conveyance. Mitchell v. Mitchell, 101 Ala. 183, 13 So. 147; Brooks v. Hotchkiss, 4 Ill. App. 175; Ehrck v. Ehrck, 106 Iowa, 614, 76 N. W. 793, 68 Am. St. Rep. 330. By the weight of authority a conveyance of the property in which a homestead exists may be made by the husband alone to the wife, either directly or indirectly, though the statute provides that the homestead cannot be conveyed without the signature of both. Kindley v. Spraker, 72 Ark. 228, 105 Am. St. Rep. 32; Furrow v. Athey, 21 Neb. 671; Lynch v. Doran, 95 Mich. 395, 54 N. W. 882. The husband may have a homestead right in land owned in common by the husband and wife. Lozo v. Sutherland, 38 Mich. 168. The principal case seems in line with the reason of the homestead exemption since it is a law for the benefit of the family and the husband does not cease to be the head of a family, in the eye of the law, by reason of the desertion of the wife. Gates v. Steele, 48 Ark. 539; Brown v. Brown, 68 Mo. 388; Pardo v. Bittorf, 48 Mich. 275. The wife, however, is not left without a remedy. By an absolute divorce the homestead would be terminated. Kern v. Field, 68 Minn. 317, 71 N. W. 393, 64 Am. St. Rep. 479. "That the

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Acknowledgment of conveyance.[95]—Conveyances and incumbrances on the homestead defective because not acknowledged by the wife may be cured by legislative act.[96]

Contracts to convey.[97]—A contract to convey the homestead must as a general rule be joined in by the wife.[98]

§ 7. *Loss or relinquishment.*[99]—The right to acquire a homestead may be lost by destruction or cessation of some one or more of the requisite conditions before claim is made,[1] or a homestead acquired may be alienated[2] or lost by the bar of limitation,[3] which begins from the time of abandonment.[4] A sale of land does not preclude the vendor from asserting his homestead exemption therein when set aside as fraudulent.[5] In Kentucky the destruction of the family does not terminate an existing homestead.[6]

To constitute an abandonment there must be a departure with an intent to abandon;[7] a mere temporary absence, as for health, to afford educational advantages

legislature has not provided relief for her under such circumstances as would justify her in leaving her husband, though not necessarily entitling her to a divorce, does not alter the letter and spirit of the homestead law.' Grace v. Grace [Minn.] 104 N. W. 969." —From 4 Mich. L. Rev. 402.

95. See 5 C. L. 1696. See, also, Acknowledgments, 7 C. L. 25, and as to acknowledgment of waiver, see post § 7.

96. A defective mortgage on the homestead, because not acknowledged by the wife, executed Jan. 21, 1899, was cured by Kirby's Dig. § 785. Rhea v. Planters' Mut. Ins. Co. [Ark.] 90 S. W. 850.

97. See 5 C. L. 1696.

98. A contract for the sale of the homestead not joined in by the wife is wholly void under Rev. Codes 1899, § 3608 (Rev. Codes 1905, § 5052). Silander v. Gronna [N. D.] 108 N. W. 544.

99. See 5 C. L. 1696.

1. See ante §§ 2-4.

2. See ante § 6.

3. Rev. St. 1899, § 4262, providing that no action for the recovery of lands shall be commenced unless plaintiff or his predecessors have been seised or possessed within 10 years, is applicable to land claimed as a homestead. Joplin Brewing Co. v. Payne, 197 Mo. 422, 94 S. W. 896. Ann. Code 1892, § 2732, limiting the time in which to maintain an action to recover property in possession of a mortgagee after condition broken, has no application where the mortgage was void for nonjoinder of the wife. Woods v. Campbell [Miss.] 40 So. 874. In Arkansas the statute of limitations for the recovery of the homestead does not run against the heirs during the occupancy of the widow. Griffin v. Dunn [Ark.] 96 S. W. 190.

4. An attempted alienation of the homestead by the widow constitutes an abandonment. Griffin v. Dunn [Ark.] 96 S. W. 190.

5. Guinan v. Donnell [Mo.] 98 S. W. 478; In re Thompson, 140 F. 257. Especially where recovered by trustee in bankruptcy in view of the Bankr. Act July 1, 1898, c. 541, §§ 67e, 70a, (4), 30 Stat. 564, 566 [U. S. Comp. St. 1901, pp. 3449, 3451], vesting title to such property in the trustee "except in so far as it is to property which is exempt." Id.

6. A husband's homestead right is not affected by the death of his wife, leaving him without a family. Dewees v. Dewees, 28 Ky. L. R. 726, 90 S. W. 256.

7. Held to show an intent to abandon: Making a homestead entry on public land and executing the required affidavit that he intended the land as a home. Tracy v. Harbin [Tex. Civ. App.] 14 Tex. Ct. Rep. 53, 89 S. W. 999. Leased the land for a term of years and thereafter offered it for sale. Ungers v. Chapman [Mich.] 13 Det. Leg. N. 896, 109 N. W. 1124. Removal to neighboring town where he engaged in the practice of his profession and became a registered voter, though he expressed a desire to keep the old place for the children. McGregor v. Kellum [Fla.] 39 So. 697. Quits locality because of a lack of work and seeks employment elsewhere, and thereafter attempts to sell. Hollins v. Cropper, 115 La. 987, 40 So. 378. Leased farm, sold off his implements, and moved his family to the city where he purchased a house and lot, leaving only a few articles of furniture on the farm for which he had no room in the city. Swift v. Kleckner [Mich.] 13 Det. Leg. N. 690, 109 N. W. 34. Where the holder of a business homestead because of financial embarrassment closes out the business, leases the store, removes to and engages in business in another town, there is an abandonment of the homestead, notwithstanding he retains an office therein, it not appearing that he transacts any business there. Bradley v. Janssen [Tex. Civ. App.] 15 Tex. Ct. Rep. 914, 93 S. W. 506.

Held no abandonment: The positive testimony of homestead tenant that he left the farm with intent to return as soon as he could make a living thereon as against declarations to the contrary held sufficient to sustain the finding of the lower court that there was no abandonment. Lawson v. Hammond [Mo. App.] 94 S. W. 313. Where a homesteader, upon the destruction of the house, goes to live in a house of a son until such time as she can rebuild and leases the land for five years with the right to resume occupancy at any time by paying for the improvements, and frequently rejected offers of sale on the ground that she intended to rebuild, held no abandonment. Cazzola v. Savage [Ark.] 96 S. W. 981. Where a homesteader moves his family into a house owned

to children,[8] or under force of circumstances[9] comes short of it, especially where possession is retained through a tenant.[10] But where property is quitted with no intention of returning, it is immaterial that the departure was compelled by force of circumstances.[11] It is not essential to an abandonment of a homestead that the husband and wife should simultaneously leave the same,[12] or that a new homestead should be acquired.[13] It is not an abandonment of her right for a deserted wife to temporarily lease the homestead till she can occupy it.[14] It is not lost as to other creditors by executing a mortgage to one.[15] As a rule neither spouse can abandon the homestead for the other without his or her consent,[16] though where the husband establishes a new homestead the duty of the wife to conform thereto works an abandonment of the old.[17] A debtor waives his homestead by removing with his family to another state.[18] In most states[19] a homestead exemption may be waived,[20] but in Louisiana an express stipulation joined in by the wife is necessary,[21] though it is not essential to a renunciation of the homestead that the wife be examined out of the presence of her husband,[22] nor is it even necessary that there be a formal renunciation before a notary.[23]

§ 8. *Rights of surviving spouse, children, heirs, or dependents of homestead tenant.*[24]—The succession to the homestead in nearly every state differs from that of other real property and is almost wholly statutory.[25] The statute in force at the

by the wife, intending to return to the homestead as soon as a nearby saloon could be abated, renting it in the meantime but keeping tools, furniture, and chickens thereon, held that there was no intent to abandon. Victor v. Grimmer, 118 Mo. App. 592, 95 S. W. 274.

8. Where the owner of a farm upon the destruction of the house thereon moved his family into a house on adjoining land leaving stock on the farm, and shortly thereafter moved to a city for the winter to give his children school advantages, intending in the meanwhile to return, there is no abandonment. In re Thompson, 140 F. 257.

9. A homestead occupied by a husband and children while the wife is confined in an insane asylum is not abandoned by the husband's sentence and confinement in the penitentiary and the removal of the minor children. Withers v. Love, 72 Kan. 140, 83 P. 204.

10. Dewees v. Dewees, 28 Ky. L. R. 726, 90 S. W. 256. Committed to the insane hospital for treatment. Weatherington v. Smith [Neb.] 109 N. W. 381; Curry v. Wilson [Wash.] 87 P. 1065.

11. Buildings destroyed by fire. Cushman v. Davis [Vt.] 64 A. 456.

12. Wife continued to occupy for sometime after the desertion of the husband Cushman v. Davis [Vt.] 64 A. 456.

13. Especially under V. S. 2179, which requires that the property must be "used and kept" as a homestead in order to preserve its character. Cushman v. Davis [Vt.] 64 A. 456.

14. Where a wife separated from her husband is compelled to leave the homestead because she cannot live there alone, but intends to return, which she finally does, leasing it in the meantime, there is no abandonment so as to subject it to the husband's debts. Montgomery v. Dane [Ark.] 98 S. W. 715.

15. Hobson v. Noel [Ky.] 97 S. W. 388.

16. Where the husband is in the insane asylum for treatment, an abandonment by the wife does not effect an abandonment for the husband since he has no capacity to consent. Weatherington v. Smith [Neb.] 109 N. W. 381.

17. Where no facts are shown which authorize a wife to acquire a homestead while living apart from her husband, the establishment of another residence by the husband and the duty of the wife to conform thereto as imposed by Rev. Codes 1899, §§ 2764, 2740, subd. 8, terminate a prior homestead though she continues there. Currie v. Look [N. D.] 106 N. W. 131.

18. People's Independent Rice Mill Co. v. Benoit [La.] 42 So. 480.

19, 20. See 5 C. L. 1698 and earlier volumes. Failure of a bankrupt to make specific claim of a homestead in his schedule through ignorance does not constitute a waiver of the exemption. In re Kaufmann, 142 F. 898.

21. Iberia Cypress Co. v. Christen, 116 La. 53, 40 So. 529.

22. And hence not necessary that the deed of renunciation show such fact. Cormier v. Hoyt, 116 La. 602, 40 So. 912.

23. Cormier v. Hoyt, 116 La. 602, 40 So. 912.

24. See 5 C. L. 1699.

25. Alabama: The second section of the Alabama Act of 1885, giving the widow an interest in the homestead as if the estate had been regularly declared insolvent, was repealed by failure to adopt it into the Code of 1886 or otherwise preserve it. Bailes v. Daly [Ala.] 40 So. 420. Under Code 1896, § 2071, providing that title to a homestead set apart to a widow shall vest in her, the husband's interest in a homestead under a contract of sale passes to her. McWhorter v. Stein [Ala.] 39 So. 617.

Arkansas: Under Const. art. 9, §§ 4, 10, the homestead vests upon the death of the parents in the minor children. Cowley v. Spradlin [Ark.] 91 S. W. 550.

Florida: Chapter 4730, p. 119, of Laws of 1899, providing that where a homestead tenant dies without children but leaving a wid-

time of the homestead tenant's death determines the interest of the surviving spouse therein[26] and gives a vested right to all parties acquiring any interest which cannot be destroyed by subsequent legislation.[27] In California, upon the petition of the guardian of minor children,[28] the court may set aside a homestead for them, though they have no living parent,[29] in any lands of the deceased parent suitable for such purpose though he might not have been entitled to such rights,[30] and the temporary absence of the children from the state when the petition is heard does not deprive them of their right to have a homestead set apart or the court of power to make the order.[31] In Iowa where a homestead tenant devises it to one of his children it passes subject to the devisor's debts.[32]

Nature of survivor's homestead estate.[33]—Until a widow's homestead interest has been assigned[34] she cannot sell or lease the same.[35] The homestead interest of minor children of a deceased tenant is sufficient to authorize a redemption from tax sale of the entire fee.[36]

Loss of survivor's right.[37]—The right is by some statutes made to terminate on cessation of widowhood, minority, occupancy of premises, or other fact ingredient in it,[38] and is lost by alienation[39] or by abandonment,[40] which loss if by sale in ignorance of law is irremediable.[41]

ow it shall descent to her unaffected by any device, is not in conflict with Const. 1885, art. 10, § 4, providing that nothing therein shall be construed to prevent a homestead tenant without children from disposing of it by will "in a manner prescribed by law" (Thomas v. Williamson [Fla.] 40 So. 831; Saxon v. Rawls [Fla.] 41 So. 594), nor is it violative of art. 10, § 1, art. 3, § 16, of the Const. of 1885, or of § 1 of the 14th amend. to the Federal Const. (Saxon v. Rawls [Fla.] 41 So. 594).

Iowa: Under Code 2985, the homestead of a deceased tenant from year to year passes to the widow, and hence the administrator has no interest in crops planted thereafter. In re Ring's Estate [Iowa] 109 N. W. 710.

Kentucky: Under Ky. St. 1903, § 1707, unmarried minor children have a right of joint occupancy with the widow, and it is immaterial whether they were living with the decedent or not at the time of his death. Potter v. Redmon's Guardian [Ky.] 96 S. W. 529. If the widow abandons the homestead and a sale thereof works an abandonment (Davidson v. Marcum, 28 Ky. L. R. 562, 89 S. W. 703), the children acquire the immediate right to the sole use thereof until the youngest becomes of age [Ky. St. 1903, § 1707] (Id.).

26. Bailes v. Daly [Ala.] 40 So. 420. Not affected by any subsequent change. Perkins v. Perkins, 122 Ill. App. 370.

27. Where on the death of the tenant the homestead vests in the heirs subject to a life estate in the surviving spouse, the legislature can not thereafter enact a statute giving it to her in fee. Bailes v. Daly [Ala.] 40 So. 420.

28. Guardian held to have authority to petition. In re Pohlmann's Estate [Cal. App.] 84 P. 354.

29. Code Civ. Proc. § 1465. In re Pohlmann's Estate [Cal. App.] 84 P. 354.

30. Code Civ. Proc. § 1465 held to authorize a homestead for minor children in lands upon which the deceased parent had never resided. In re Pohlmann's Estate [Cal. App.] 84 P. 354.

31. In re Pohlmann's Estate [Cal. App.] 84 P. 354.

32. The exemption of Code § 2985 is applicable only when the issue takes by descent. Rice v. Burkhart [Iowa] 107 N. W. 308.

33. See 5 C. L. 1700.

34. An agreement between the surviving spouse and heirs as to a division of the "rents" held not an assignment of homestead interest. Chicago, B. & D. R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916.

35. Lease. Chicago, B. & D. R. Co. v. Kelly, 221 Ill. 498, 77 N. E. 916.

36. Cowley v. Spradlin [Ark.] 91 S. W. 550.

37. See 5 C. L. 1700, n. 58 et seq.

38. A childless widow's exemption in her deceased husband's homestead ceases upon remarriage, and it becomes subject to decedent's debts though the marriage does not occur until the estate has been closed (In re Emmons' Estate [Mich.] 105 N. W. 758), but proceedings to subject the same to his debts must be brought within a reasonable time (Id.). An unexcused delay of six years held to bar the same. Id. Under Ky. St. 1903, § 1707, providing that the homestead shall be for the use of the widow "so long as she occupies the same," a remarriage followed by a permanent removal to the home of the husband terminates her homestead interest therein. Bloch v. Tarrents' Adm'r, 28 Ky. L. R. 1066, 91 S. W. 275; Nelson v. Nelson [Ky.] 96 S. W. 794.

39. Sale by surviving widow works abandonment as to her. Davidson v. Marcum, 28 Ky. L. R. 562, 89 S. W. 703.

40. Where a widow testifies positively that she is living on certain premises, and that they are suitable for a residence, evidence that the house was small and lacked the usual conveniences and that she was away during a greater part of the day time attending to business in an adjoining town is insufficient to show abandonment. Smith v. Ferry [Wash.] 86 P. 658. Where a widow in ignorance of her homestead rights in cer-

Partition and assignment out of decedent's estate.[42]—Heirs cannot force a partition which would be destructive of homestead in survivors.[43] Though a widow in Missouri elects to take a child's interest and thereby acquires a specific undivided interest in fee, neither she nor her grantee can partition the homestead during the minority of the children.[44] In Mississippi, so long as a homestead is actually occupied and used by the widow, the heirs cannot have a partition thereof nor an accounting.[45] Under a statute giving to the widow the right to enjoy "the homestead," where dower has never been admeasured to her, she may either occupy or lease the property[46] and is under no obligation to pay rent.[47] A homestead where not subject to a decedent's debts may be partitioned before the debts are paid.[48] In Washington no appraisement is necessary in an action to set aside the widow's homestead where the value does not exceed $1,700.[49] The Alabama statute authorizing the homestead to be set apart to the widow before administration is only applicable where the estate does not exceed the exempt amount,[50] and the fact that she claims dower and thereby sufficiently reduces the acreage is immaterial.[51] A judgment under the California statute providing that if one of the spouses owning a homestead dies anyone interested may file a verified statement of the facts, and if, upon hearing, it shall appear that "such homestead * * * vested in the survivor, the court shall make a decree to that effect," merely establishes the fact of death and that if the petitioner has any rights they have accrued, but does not determine that any rights exist.[52]

Election.[53]—In Nebraska a life estate in the homestead descends to the surviving spouse absolutely,[54] and an attempted devise, being wholly nugatory, does not present an election.[55] Where lands descend to the surviving spouse and grandchildren, the former cannot thereafter acquire a homestead therein and defeat a partition.[56]

tain property quitclaims it to the holder of a tax title and, upon being advised, repurchases, such conveyance whether before or after selection does not constitute an abandonment of her homestead interest. Id.

41. A surviving spouse releasing her homestead rights in ignorance thereof, the mistake being one of law, cannot set the same aside. Accepted a money award in lieu. Daniels v. Dean [Cal. App.] 84 P. 332.

42. See 5 C. L. 1700, n. 61.

43. Under Const. art. 16, § 52, community property used as a homestead upon the death of the wife descends equally to the husband and children, but so long as he continues to use it as a homestead no partition can be made (Cox v. Oliver [Tex. Civ. App.] 15 Tex. Ct. Rep. 790, 95 S. W. 596), and upon his death, if he remarries and is still occupying it, the children by the first wife may partition off the one-half inherited from their mother but the widow has a life estate in one-third of the other half, with remainder in the children, the two-thirds vesting in them absolutely, but not subject to partition so long as she occupies it as a homestead (Id.). Until partition, such surviving wife is entitled to occupy the entire tract in conjunction with the children of the deceased first wife (Id.), and under said article her rights are not limited to mere occupancy but extends to the management and use (Id.), and where one in the interest of the children takes charge of things generally and proceeds to cultivate without her consent, she may maintain an action under Rev. St. 1895, art. 2049, subd. 4, to recover possession (Id.). A guardian of the minor children and their estate, if so authorized by the probate court, has the right to occupy jointly with her. Id. A widow ceasing to occupy and use a homestead set aside to her by the probate court loses all interest therein. Mecaskey v. Morris [Tex. Civ. App.] 89 S. W. 1085. The surviving widow and minor children are entitled to a homestead estate to the extent limited by the statute though the property owned and occupied by decedent exceeds in value the prescribed limit (Calmer v. Calmer [N. D.] 106 N. W. 684), and where the homestead is not capable of division, they are entitled as against the heirs to hold the entire premises (Id.).

44. Quail v. Lomas [Mo.] 98 S. W. 617.

45. Stevens v. Wilbourn [Miss.] 41 So. 66.

46, 47. Lloyd v. Turner [N. J. Eq.] 62 A. 771.

48. Hild v. Hild, 129 Iowa, 649, 106 N. W. 159.

49. Smith v. Ferry [Wash.] 86 P. 658.

50, 51. Dake v. Sewell [Ala.] 39 So. 819.

52. Code Civ. Proc. § 1723. Hansen v. Union Sav. Bank, 148 Cal. 157, 82 P. 768.

53. See 5 C. L. 1701.

54. Cobbey's Ann. St. 1903, § 6216. Brichacek v. Brichacek [Neb.] 106 N. W. 473.

55. Brichacek v. Brichacek [Neb.] 106 N. W. 473.

56. Oliver v. Sample, 72 Kan. 582, 84 P. 138.

Rights of divorced parties.[57]

Claim to reimbursement for expenditures.[58]

§ 9. *Exemption of proceeds of homestead or of substituted properties.*[59]—In many states the proceeds of a homestead are exempt[60] for a reasonable time if held for reinvestment in a homestead.[61] Where a homestead is sold at a judicial sale for a debt as against which it is not exempt, any resulting surplus is exempt,[62] and a claim interposed before the purchaser has paid out the money is timely asserted.[63] Under a statute exempting a new homestead to the same extent as the old, it is immaterial that the latter did not enter into the former.[64]

§ 10. *Remedies and procedure by creditors. Remedies by suit or action.*[65]—Where a mortgage covers the homestead and other lands,[66] or the value exceeds the amount exempt,[67] the unexempt property must first be resorted to. One claiming a homestead exemption in property sought to be subjected to the payment of debts must allege[68] and show[69] facts sufficient to impress it with such character. An allegation of waiver of the homestead exemption and the extent thereof is sufficient under the Alabama statute requiring waiver to be alleged in all actions wherein it is sought to be enforced.[70]

Remedies of creditors against excess.[71]—Where the homestead exceeds the statutory amount,[72] the creditors are entitled to the excess, but such right is lost by failure to exercise it before the tenant disposed of the homestead.[73] Where the homestead is indivisible, other available assets must be exhausted before the excess can be applied.[74]

Decrees, and judicial and execution sales.[75]—A judicial sale of land in which a homestead is claimed without proceeding according to statute to set the same off

57. See 5 C. L. 1701.

58. See 3 C. L. 1642.

59. See 5 C. L. 1701.

60. The homestead exemption under Rev. St. § 5441 includes the proceeds of a sale of the homestead by the debtor before judgment and execution. Warns v. Reeck, 8 Ohio C. C. (N. S.) 401.

61. Iowa. Campbell v. Campbell, 129 Iowa, 317, 105 N. W. 583.

Washington: Under Ballinger's Ann. Codes & St. § 5247, providing that in case of the sale of a homestead any subsequent homestead acquired with the proceeds thereof shall be exempt, the money due is exempt where there is an intent to reinvest. Becher v. Shaw [Wash.] 87 P. 71.

Minnesota: The proceeds of a homestead **prior to Rev. Laws 1905** were **not exempt** though the defendant intended to reinvest in another homestead within a year. Fred v. Bramen [Minn.] 107 N. W. 159.

62. Johnson v. Agurs, 116 La. 634, 40 So. 923. Unless the statute expressly or by implication negatives such exemption. Mortgage foreclosure. In re Barrett's Estate, 140 F. 569.

63. Johnson v. Agurs, 116 La. 634, 40 So. 923.

64. Code § 2981. Shaffer Bros. v. Chernyk [Iowa] 107 N. W. 801.

65. See 5 C. L. 1701.

66. A sale of the entire property in disregard of a demand that the other lands be first sold is not void but voidable. Weber v. McCleverty [Cal.] 86 P. 706. Hence where in an action by the purchaser to acquire possession from the widow of the grantor she files no cross complaint and does not ask that the sale be vacated, she was not entitled to relief. Id.

67. In a foreclosure of a mortgage on real estate wherein a homestead interest exists, the proceeds in excess of the homestead interest must be exhausted before the latter can be resorted to. Perkins v. Perkins, 122 Ill. App. 370. Surviving spouse's homestead need not contribute pro rata to the discharge of the debt though she joined in the mortgage. Id.

68. In an action by a trustee in bankruptcy to reach lands alleged to belong to the bankrupt but in the name of his wife, an answer by the wife claiming the property by purchase is insufficient to raise an issue as to a homestead exemption. Currie v. Look [N. D.] 106 N. W. 131.

69. Gibbs v. Adams [Ark.] 89 S. W. 1008.

70. Code 1896, §§ 2106, 2017, do not require that the complaint allege in detail all facts necessary to a valid waiver, as that the party is unmarried, etc. (Story Mercantile Co. v. McClellan [Ala.] 40 So. 123), nor need it particularize the lands (Id.).

71. See 5 C. L. 1702.

72. In determining the value of the property no deduction can be made for incumbrances. Calmer v. Calmer [N. D.] 106 N. W. 684. The enhanced value of land resulting from improvements necessary to the enjoyment of the same as a homestead is not considered in ascertaining the homestead exemption. Stable, sidewalk, fences, well, and pump excluded. Shaffer Bros. v. Chernyk [Iowa] 107 N. W. 801.

73. Meikle v. Cloquet [Wash.] 87 P. 841.

is void.[76] Where a trust deed was executed on property on which a homestead was subsequently declared and on other lands, possession of the widow of the grantor as executrix was consistent with the right of sale under the trust deed and did not give notice of a homestead claim therein.[77] A deed of trust given to secure a debt is not a "lien or incumbrance" within the California statute requiring the holder of a debt secured by a lien or incumbrance on a homestead to present the same for allowance against the estate of a deceased debtor as a condition to the right to foreclose.[78] A court of equity may declare a judgment in a cause accruing after the administration of a decedent's estate a lien upon the homestead, notwithstanding the constitutional provision that the homestead shall not be subject to the lien of any judgment or decree.[79]

HOMICIDE.

§ 1. **Elements of Crime in General and Parties Thereto (106).**
§ 2. **Murder (106).** Degrees (107).
§ 3. **Manslaughter (107).**
§ 4. **Assault with Intent to Kill or do Great Bodily Harm (108).**
§ 5. **Justification and Excuse (108).**
§ 6. **Indictment or Information (109).**
§ 7. **Evidence (110).**
A. Presumptions and Burden of Proof (110).
B. Admissibility in General (111). Justification (113).
C. Dying Declarations (115).
D. Sufficiency (115).
§ 8. **Trial and Punishment (117).**
A. Conduct of Trial in General (117).
B. Instructions (117).
C. Verdict (122).
D. Punishment (122).

Matters of procedure not strictly peculiar to the crime of homicide are elsewhere treated.[1]

§ 1. *Elements of crime in general and parties thereto.*[2]—Though malice is essential to some degrees of homicide,[3] motive is immaterial,[4] except as evidence of malice or as tending to connect accused with the offense.[5] The injury must be the proximate cause of death, but it is immaterial that the wound would not have been fatal had prompt medical attendance been procured.[6]

§ 2. *Murder*[7] is the unlawful killing of a human being with malice aforethought,[8] express or implied.[9] Intent to kill is essential,[10] but the intent need not be to kill the person actually slain.[11]

74. Calmer v. Calmer [N. D.] 106 N. W. 684.

75. See 3 C. L. 1695.

76. Where an execution includes the homestead which had been set off to the debtor under a former execution and no reallotment is made, a sale thereunder is void. Gulnan v. Donnell [Mo.] 98 S. W. 478. A sale on execution of land in which a homestead exemption is duly claimed without having it appraised, etc., as provided by Sess. Laws 1895, p. 109, c. 64, is absolutely void (Waldron v. Kineth, 41 Wash. 459, 84 P. 16), and under Sess. Laws 1899, p. 87, c. 53, § 6, requiring a court to confirm an execution sale unless it shall satisfactorily appear that there were substantial irregularities detrimental to the party objecting, it is proper to refuse to confirm the sale (Id.). A levy in disregard of a wife's homestead rights is not void but subject to her right if she timely asserts the same. Gilcreast v. Bartlett [N. H.] 64 A. 767.

77. Weber v. McCleverty [Cal.] 86 P. 706.

78. Code Civ. Proc. § 1475. Weber v. McCleverty [Cal.] 86 P. 706.

79. The same to be sold, however, only after the termination of the widow's and minor children's homestead interest therein. Scoggin v. Hudgins [Ark.] 94 S. W. 684.

1. See Indictment and Prosecution, 8 C. L. ——.

2. See 5 C. L. 1702.

3. See post § 2.

4. Morris v. State [Ala.] 41 So. 274.

5. See post § 7 B.

6. Bonner v. State, 125 Ga. 237, 54 S. E. 143. Where it is not disputed that the wound inflicted by defendant caused death, evidence that by different surgical treatment death might have been averted is immaterial. State v. Seery, 129 Iowa, 259, 105 N. W. 511.

7. See 5 C. L. 1703.

8. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127. Malice is the intent unlawfully to take life in cases where the law neither justifies nor mitigates such killing. Mann v. State, 124 Ga. 760, 53 S. E. 324. Where two agree to meet and fight with deadly weapons, and on their meeting by chance before the appointed time one shoots

Degrees.[12]—Murder is ordinarily divided by statute into degrees, murder in the first degree including premeditated homicide in general,[13] and specifically such murders as from their nature indicate premeditation[14] and also homicide committed in the perpetration of certain other offenses.[15] Murder in the second degree is usually defined as willful killing with malice aforethought but without premeditation.[16]

§ 3. *Manslaughter*[17] as defined by statute usually includes all unlawful, intentional killing without malice aforethought,[18] and unintentional killing by culpable negligence or recklessness.[19] Thus it is manslaughter if the killing was on sudden quarrel or mutual combat,[20] or in the heat of passion[21] induced by legally adequate

the other without new provocation, it is murder. Bundrick v. State, 125 Ga. 753, 54 S. E. 683. Malice is not restricted to personal malignity towards the person slain, but includes that general malignity and reckless disregard of human life which proceed from a heart devoid of a just sense of social duty and fatally bent on mischief. State v. Tilghman [Del.] 63 A. 772.

9. If homicide is deliberate or without adequate cause, malice is presumed. State v. Tilghman [Del.] 63 A. 772. Malice presumed from use of deadly weapon. Id.; State v. Collins [Del.] 62 A. 224; State v. Hayden [Iowa] 107 N. W. 929; Kennedy v. State [Ala.] 40 So. 658. The rule as stated in Colorado is that the jury are at liberty to find malice aforethought from deliberate shooting, but it is not proper to tell them that there is a presumption to that effect. Covington v. People [Colo.] 85 P. 832. Whether a small pocket knife is a deadly weapon from the use of which malice is to be presumed is for the jury. Benjamin v. State [Ala.] 41 So. 739.

10. Intent may be inferred from unlawful shooting. State v. Bennett, 128 Iowa, 713, 105 N. W. 324. Intentional shooting is presumed murder. State v. Prolow [Minn.] 108 N. W. 873. Though accused began an altercation without intent to kill, if he formed such intent later and killed in pursuance thereof it is murder. Franklin v. State [Ala.] 39 So. 979.

11. Killing of one by shot fired with intent to kill another is murder. State v. Briggs, 58 W. Va. 291, 52 S. E. 218. If two persons willingly fight with firearms in a public place and a bystander is killed, both are guilty of murder. State v. Lilliston [N. C.] 54 S. E. 427.

12. See 5 C. L. 1704.

13. State v. Collins [Del.] 62 A. 224; State v. Wilson [Del.] 62 A. 27. Need be no appreciable interval between formation of intention and act of killing. State v. Prolow [Minn.] 108 N. W. 873; State v. Tilghman [Del.] 63 A. 772. Premeditated design may be inferred from circumstances. People v. Mahatch, 148 Cal. 200, 82 P. 779. Premeditated design to kill if interfered with presumed from carrying of weapon by burglar. Conrad v. State [Ohio] 78 N. E. 957. If the purpose is weighed long enough for the formation of a fixed design, it is murder in the first degree, but if the intent to kill is formed simultâneously with the act of killing, it is not. Instant killing of officer on his announcing purpose to arrest defendant held murder in first degree. State v. Barrett [N. C.] 54 S. E. 856.

14. Homicide by poisoning is only presumptively murder in the first degree. State v. Matthews [N. C.] 55 S. E. 342.

15. Homicide caused by blowing up of gate in effort to escape from prison held murder. Miller v. State [Ala.] 40 So. 47. Killing of police officer in resistance of arrest for misdemeanor is not murder in the first degree unless there was premeditation. Melbourne v. State [Fla.] 40 So. 189. Where two engage in the commission of a felony and contemplate forcible resistance of arrest, if one kill in such resistance it is murder in both. Conrad v. State [Ohio] 78 N. E. 957. Killing by burglar in resistance of arrest after flight and pursuit from premises held to be in perpetration of burglary. Id. Where a homicide occurs within the res gestae of the felony, it is committed "in the perpetration" of such felony, though the felony was consummated before the homicide. Id. One who being detected in the commission of burglary, fled and to escape arrest killed his pursuer some distance from the scene of the burglary, held not engaged in commission of burglary at time of homicide. People v. Huter, 184 N. Y. 237, 77 N. E. 6. Where one kills a police officer to prevent arrest, the resistance of arrest merges in the homicide so that the homicide is not committed while engaged in the perpetration of another felony. Id.

16. State v. Wilson [Del.] 62 A. 227; State v. Collins [Del.] 62 A. 224; Miller v. State [Ala.] 40 So. 47.

17. See 5 C. L. 1704.

18. Unlawful killing of a human being without malice aforethought. State v. Collins [Del.] 62 A. 224.

19. A killing by an intentional shooting without intent to kill is not "involuntary" within the definition of involuntary manslaughter. Johnson v. State [Wis.] 108 N. W. 55. Manslaughter in second degree is the unlawful involuntary killing of a human being. Neilson v. State [Ala.] 40 So. 221. Evidence of reckless shooting held to show negligent manslaughter. State v. McGinnis [Idaho] 85 P. 1089. Express intent is not essential to manslaughter, negligent and reckless indifference to life being sufficient. Negligent driving. State v. Moore, 129 Iowa, 514, 106 N. W. 16. Evidence that accused engaged in a struggle for the possession of a pistol known by him to be loaded without warning the other person thereof warrants inference of criminal intent from gross neg-

provocation,[22] and before the lapse of reasonable cooling time.[23] What particular facts will reduce the degree of homicide to manslaughter usually arises in connection with the propriety of submitting that offense to the jury.[24]

§ 4. *Assault with intent to kill or do great bodily harm.*[25]—In most states the offense consists of an assault with the specific intent to kill[26] or to do great bodily harm, while in a few it is more narrowly defined as assault with intent to murder,[27] and in others as an assault with a deadly weapon.[28] Assault must have been of such character that had death ensued it would have been murder.[29] Kindred offenses consisting of unlawful wounding[30] or attempt to wound,[31] willful administration of poison,[32] etc., have been created by statute in some jurisdictions.

§ 5. *Justification and excuse.*[33]—Homicide is justifiable as committed in self-defense where defendant, without having provoked the difficulty,[34] is assaulted in

ligence. State v. Clardy, 73 S. C. 340, 53 S. E. 493.

20. While an assault is essential to mutual combat, mutual blows are not. Findley v. State, 125 Ga. 579, 54 S. E. 106.

21. Voluntary killing under influence of violent passion induced by adequate provocation is voluntary manslaughter. Wall v. State [Ga.] 55 S. E. 484. Heat of passion does not imply an unconsciousness of what one is doing and a definition requiring temporary dethronement of reason is error. Heat of passion defined. Johnson v. State [Wis.] 108 N. W. 55.

22. Mere words not sufficient provocation. Dow v. State [Ark.] 92 S. W. 28; Raines v. State [Ala.] 40 So. 932; Kennedy v. State [Ala.] 40 So. 658. Provocation must be so great as to produce transport of passion. State v. Tilghman [Del.] 63 A. 772. Provocation by discovery of deceased and defendant's wife in adultery discussed. O'Shields v. State, 125 Ga. 310, 54 S. E. 120. A statute providing that certain acts "or equivalent circumstances" constitute provocation makes it a question of fact what are such circumstances. Pen. Code 1895, § 65. Findley v. State, 125 Ga. 579, 54 S. E. 106. The circumstances which will constitute provocation need not necessarily be in the nature of an assault or an attempt to injure accused. Rumsey v. State [Ga.] 55 S. E. 167. Provocation by third person not sufficient. Dow v. State [Ark.] 92 S. W. 28.

23. Sufficiency of cooling time is for the jury. Should be submitted though two hours elapsed between provocation and killing. Williams v. State, 125 Ga. 302, 54 S. E. 108. Fifteen minutes during which the parties were not in each other's presence held sufficient cooling time. State v. Williams [N. C.] 53 S. E. 823.

24. See post § 8 B.

25. See 5 C. L. 1706.

26. Intent to kill is essential in the statutory crime of assault and robbing with intent to kill if resisted. People v. Scofield [Mich.] 12 Det. Leg. N. 654, 105 N. W. 610. Intent essential. State v. Wilson [Del.] 62 A. 227. Malicious intent to kill essential. Letcher v. State [Ala.] 39 So. 922. Deliberate shooting and wounding is presumptive evidence of intent to kill. Odom v. State [Fla.] 40 So. 182. Intent may be inferred from the use of a deadly weapon or from other attendant circumstances. Ray v. State [Ala.] 41 So. 519. A statute making killing with a concealed weapon murder does not dispense with proof of specific intent to murder in a prosecution for assault committed with a concealed weapon. Id. Though the shooting was for the purpose of robbery, it is none the less assault "with intent to kill." Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 S. W. 1044.

27. Intent to murder may be circumstantially proved. State v. Brown [Del.] 63 A. 328. Malice aforethought necessary. Elements of offense stated. Hibbler v. State [Miss.] 39 So. 896.

28. Pointing unloaded pistol is assault with deadly weapon in North Carolina. Laws 1899, c. 527. State v. Atkinson [N. C.] 53 S. E. 228. Pointing of pistol at another is an assault with a deadly weapon, though it is not exposed to his view. Pointed in coat pocket. Id. Weapon must be deadly under circumstances of use. If a gun, the charge and the distance from which fired are to be considered. Hibbler v. State [Miss.] 39 So. 896. In order to sustain a conviction of assault with intent to murder by excessive resistance to an assault, not only intent to kill but malice aforethought must appear. Cunningham v. State [Miss.] 39 So. 531.

29. State v. Brown [Del.] 63 A. 328. The offenses of murder and manslaughter not being defined by statute but only the several degrees of each, Crimes Act § 42 relating to the infliction of bodily harm under circumstances such that had death ensued it would have been "murder or manslaughter" refers to those crimes as defined by common law. State v. Ireland, 72 Kan. 265, 83 P. 1036.

30. One who unnecessarily shoots at an officer attempting to make an illegal arrest is guilty of the offense of unlawfully shooting at another not in his own defense. Porter v. State, 124 Ga. 297, 52 S. E. 283.

31. Drawing revolver, with threats, held sufficient to constitute offense. State v. McFadden, 42 Wash. 1, 84 P. 401.

32. Under a statute against administering poison with intent to kill which poison shall be "actually taken," the word "taken" means taken into the system in any manner. State v. Stuart [Miss.] 40 So. 1010.

33. See 5 C. L. 1706.

34. Since resistance of an officer is a misdemeanor, one who kills an officer in resistance of arrest is not justified, though the officer in attempting the arrest unlawfully

such manner that he in good faith believes[35] and has reasonable ground to believe that he is in imminent danger[36] of death or great bodily harm, or such other bodily injury as is not disproportionate to the manner of resistance,[37] and that no reasonably safe means of avoiding the same is open to him except the killing of his assailant,[38] and under the same limitations the right is extended to the defense of others,[39] and to the defense of home and family if the threatened wrong is proportioned to the force used in repelling it.[40] Some cases hold that one assailed must, unless upon his own premises,[41] retreat if he may safely do so,[42] but the better rule is that one need not retreat from a felonious assault.[43] Command of a parent is ordinarily no justification.[44]

Accidental homicide[45] is excusable though it results from the drawing by defendant of a deadly weapon in anger.[46]

§ 6. *Indictment or information.*[47]—An indictment for murder must ordinarily conform in substance to the statute defining the offense,[48] and must allege willful-

menaces the life of accused. State v. Durham [N. C.] 53 S. E. 720. One who engages by preappointment in a fight with fists cannot urge self-defense even though he reasonably apprehended resort by his adversary to a deadly weapon, unless he manifested a desire to withdraw from the combat. State v. Whitnah, 129 Iowa, 211, 105 N. W. 432. If the aggressor be pursued after clearly manifesting a desire to withdraw, his right of self-defense is revived. Collock v. State [Ala.] 41 So. 727. Though deceased was the aggressor and drew a weapon, if defendant took it from him and then shot him as he was retreating it is not self-defense. Outler v. State [Ala.] 41 So. 460. To deprive one of the right of self-defense because of having provoked the difficulty he must have acted with such intent. His intent and not how his acts were regarded by deceased is to be considered. Sprinkle v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 323, 91 S. W. 787. That defendant sought deceased for the purpose of provoking a difficulty does not deprive him of the right of self-defense if he in fact did nothing to provoke it. Leito v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 537, 92 S. W. 418. Evidence held not to suggest provocation of difficulty by accused. Reese v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 39, 91 S. W. 583. One who uses language calculated to provoke an altercation and manifests willingness to enter into it cannot justify. Stallworth v. State [Ala.] 41 So. 184.

35. Danger need not be actual. Weston v. State [Ind.] 78 N. E. 1014.

36. Need not wait until an impending blow is struck. State v. Wilson [Del.] 62 A. 227. Peril must appear to be urgent and pressing. Tolbirt v. State, 124 Ga. 767, 53 S. E. 327. Mere words will not justify an attack with a deadly weapon. Mathews v. State, 125 Ga. 50, 54 S. E. 196.

37. Where the killing was by a blow with the fist, it is not necessary to justification that death or great bodily harm be apprehended. Weston v. State [Ind.] 78 N. E. 1014.

38. It is sufficient if it appeared to accused in the exercise of a reasonable judgment under all the circumstances that there was no other safe means of avoiding danger. Austin v. Com., 28 Ky. L. R. 1087, 91 S. W. 267. Must have been no other reasonably safe means of escape. State v. Andrews, 73 Ga. 257, 53 S. E. 423. Evidence of resistance with knife to assault with fists held to require charge on self-defense. State v. Hill [N. C.] 53 S. E. 311.

39. Killing to save life of defendant's brother is justified though the brother was the aggressor, unless his aggression was with a deadly weapon and an apparent intent to kill. Little v. State [Miss.] 40 So. 165. Case where accused interfered in altercation on behalf of his brother without reasonable present ground to believe the brother's life in danger held to present no issue of self-defense. Untreiner v. State [Ala.] 41 So. 285.

40. Right to kill in defense of property is restricted to the domicile. Reed v. State [Neb.] 106 N. W. 649. Where both defendant and deceased were members of the household, the rules as to rights of householder against intruder have no application. House belonged to defendant's wife and deceased was her son by former marriage. Commonwealth v. Johnson, 213 Pa. 432, 62 A. 1064. Must be within curtilage. Dawson v. State [Ala.] 41 So. 803.

41. No duty to retreat when assaulted on own premises. State v. Bennett, 128 Iowa, 713, 105 N. W. 324.

42. Need not retreat if assault is so fierce that equal danger would be thereby incurred. State v. Wilson [Del.] 62 A. 227. Bound to retreat unless there was reasonable ground for believing that danger would be thereby increased. Patterson v. State [Ala.] 41 So. 157; Hill v. State [Ala.] 41 So. 621.

43. Austin v. Com., 28 Ky. L. R. 1087, 91 S. W. 267; People v. Maughs [Cal.] 86 P. 187. See note 5 C. L. 1707.

44. Command of father does not justify killing by boy 17 years old. State v. Thrailkill, 73 S. C. 314, 53 S. E. 482.

45. See 3 C. L. 1649.

46. Though one produce a weapon in the heat of passion with intent to kill, he is not guilty of manslaughter if it be accidentally discharged in a struggle for its possession. Suttle v. State [Miss.] 40 So. 552.

47. See 5 C. L. 1710.

48. The averments of a common-law indictment will sustain an information under the Montana statute. State v. Lu Sing [Mont.] 85 P. 521. Indictment as principal

ness, malice, and intent,[49] designate the deceased with reasonable certainty[50] and show that he was a living human being,[51] allege an assault,[52] and describe the manner and means thereof.[53] It need not designate the offense by name.[54] Indictment for manslaughter alleging failure to furnish "proper and necessary" medicines and medical aid is insufficient for failure to allege the act or omission causing death.[55] Under an indictment charging murder by several jointly, proof of conspiracy and killing by one pursuant to it is admissible.[56] An indictment for assault[57] must allege the assault[58] and the prescribed intent, but need designate only by name the offense intended[59] and need not allege malice aforethought unless the statute makes it an element.[60] If no motion be made to particularize an averment of assault with a "dangerous weapon," proof is admissible of assault with any weapon which the jury might find to be dangerous.[61] Unlike an indictment for assault with intent, an indictment for assault and battery with intent to commit murder need not aver present ability.[62] An indictment for assault with intent to kill is not vitiated by an unnecessary averment that it was with a deadly weapon.[63]

§ 7. *Evidence. A. Presumptions and burden of proof.*[64]—The burden is on the prosecution to prove every material fact as laid,[65] and on the accused to prove excuse or justification.[66] Killing with deadly weapon is, however, when proved,

in second degree sustained. Newton v. State [Fla.] 41 So. 19.

49. Averment of killing willfully and with malice aforethought sufficiently alleges intent to kill. Smith v. State [Ga.] 55 S. E. 475. The giving of the mortal wound must be charged to have been with premeditated design (Daniels v. State [Fla.] 41 So. 609), but an indictment alleging shooting with premeditated design "thereby and by thus" inflicting the mortal wound satisfies this requirement (Id.). Indictment not directly alleging intent to kill sustained. State v. Johnny [Nev.] 87 P. 3.

50. Indictment charging murder of a "certain man" whose name is unknown and thereafter referring to him as "such person" is sufficiently certain. Morgan v. Territory, 16 Okl. 530, 85 P. 718.

51. An indictment charging defendant with the murder of an infant "born to" defendant and his wife sufficiently charges that said infant was born alive. People v. Eldridge [Cal. App.] 86 P. 832.

52. Indictment for murder in the second degree held to sufficiently charge assault and killing. State v. Whitnah, 129 Iowa, 211, 105 N. W. 432. An averment that defendant "did an assault" is sufficient, the word "an" being surplusage. Hase v. State [Neb.] 105 N. W. 253.

53. Must be some description of weapon and the manner of its use. "Did assault with certain pieces of iron" insufficient. Walker v. State, 124 Ga. 440, 52 S. E. 738. Indictment held not defective for failure to allege that gun was discharged "at" deceased. State v. Flute [S. D.] 108 N. W. 248. Averment of killing with an unknown "instrument" sustained by proof of killing with rock. Williams v. State [Ala.] 40 So. 405.

54. State v. Johnny [Nev.] 87 P. 3.

55. People v. Quimby, 99 N. Y. S. 330.

56. McLeroy v. State, 125 Ga. 240, 54 S. E. 125.

57. Indictment held sufficient. Abbott v. State [Ark.] 91 S. W. 754. Indictment for assault with intent to kill by shooting held sufficient. McHugh v. Territory [Okl.] 86 P. 433.

58. An averment of assault and battery with intent to kill a certain person but not alleging upon whom the assault was committed is fatally defective. Padgett v. State [Ind.] 78 N. E. 663.

59. Indictment for assault with intent to murder need only describe the crime intended by name. State v. Hopkins, 115 La. 786, 40 So. 166. Indictment for act done with intent to commit a crime need not allege the elements of the intended crime. Shooting while lying in wait with intent to murder. State v. High, 116 La. 79, 40 So. 538.

60. People v. Wright [Mich.] 13 Det. Leg. N. 280, 108 N. W. 92. An information under Rev. St. § 1848 need not allege malice aforethought, as is required of one under section 1847. State v. Temple, 194 Mo. 228, 92 S. W. 494. An indictment for assault with intent to murder need not allege the requisites of the contemplated crime. Willfulness and malice aforethought. People v. Wright [Mich.] 13 Det. Leg. N. 280, 108 N. W. 92.

61. State v. Stewart [La.] 41 So. 798.

62. Guy v. State [Ind. App.] 77 N. E. 855.

63. People v. Owens [Cal. App.] 86 P. 980.

64. See 5 C. L. 1711.

65. The plea of not guilty puts in issue the name of deceased and the burden is on the state to prove it as laid beyond a reasonable doubt. Stallworth v. State [Ala.] 41 So. 184. The state must affirmatively prove every essential averment of the indictment but need not negative justification except so far as it is necessary, excluded by proof of unlawful and malicious killing. Blanton v. State [Fla.] 41 So. 789.

66. State v. Dillard [W. Va.] 53 S. E. 117. Where the killing is proved the burden of mitigation or excuse is on the accused. Parsons v. People, 218 Ill. 386, 75 N. E. 993. Burden of adducing evidence of justification is on accused unless justification appears from the evidence which shows the homicide. McCurley v. State [Ala.] 39 So. 1022. In Alabama the burden of showing reasonable

presumed to be murder in second degree,[67] if the facts and circumstances show that it was intentional,[68] malice being presumed from the intentional killing.[69] Reasonable doubt as to degree must be resolved in defendant's favor.[70]

(§ 7) *B. Admissibility in general.*[71]—Threats by defendant[72] but not by third persons, unless conspiracy be shown,[73] are admissible, as are previous difficulties,[74] preliminary arming,[75] declarations and conduct shortly before the homicide showing general malice,[76] the relation of the parties and the state of feeling between them,[77] any facts legitimately tending to show motive,[78] and to explain the cir-

appearance of necessity to kill is on defendant. Kennedy v. State [Ala.] 40 So. 658. Burden is on state to show that death resulted from the wound. Daniel v. State [Ga.] 55 S. E. 472.

67. State v. Minor, 193 Mo. 597, 92 S. W. 466. Malice presumed from killing with deadly weapon. State v. Worley [N. C.] 53 S. E. 128.

68. State v. Minor, 193 Mo. 597, 92 S. W. 466.

69. Mann v. State, 124 Ga. 760, 53 S. E. 324; State v. Trail [W. Va.] 53 S. E. 17; State v. Henderson [S. C.] 55 S. E. 117.

70. Miller v. State [Ala.] 40 So. 47.

71. See 5 C. L. 1712.

72. Threats are admissible though no person is named. State v. Rosa, 72 N. J. Law, 462, 62 A. 695. Threats immediately before attack by defendant's companion admissible. State v. Jarrell [N. C.] 53 S. E. 127. Threatening remark by accused at the time of borrowing a gun a few minutes before the homicide admissible. Graham v. State, 125 Ga. 48, 53 S. E. 816. A threat by defendant is not admissible where the witness knew only by hearsay that it applied to deceased. State v. Trueman [Mont.] 85 P. 1024. Where accused was killed by mistake in an attempt to shoot one who had killed defendant's brother, general threats by defendant at the brother's funeral are admissible. Ward v. Com. [Ky.] 91 S. W. 700.

Remote threats are admissible in connection with evidence of repetition from time to time until shortly before the alleged offense (People v. Johnson [N. Y.] 77 N. E. 1164), and friendly relations between the parties after the making of threats will not necessarily make the threats inadmissible (Id.). Defendant unsuccessfully tried by both threats and kindness to induce his wife to live with him. Id. Remoteness of threats in point of time goes to their weight but not to their admissibility. Two weeks before homicide. State v. Rosa, 72 N. J. Law, 462, 62 A. 695. Three months before homicide not too remote. Graham v. State, 125 Ga. 48, 53 S. E. 816.

73. After proof of killing by co-conspirator, proof of declaration by acused of intent to kill is admissible. Morris v. State [Ala.] 41 So. 274. Threats by a third person in the presence of defendant are inadmissible unless conspiracy is shown. State v. Quen [Or.] 86 P. 791.

74. Not only prior assaults on deceased but assaults on the mother of deceased are admissible when connected and growing out of the same animus. People v. Dinser, 49 Misc. 82, 98 N. Y. S. 314.

75. Purchase of revolver shortly before assault and determined resistance of arrest afterward are admissible to show intent. People v. Haxer [Mich.] 13 Det. Leg. N. 303, 108 N. W. 90. Borrowing of a pistol half an hour before the homicide. Glass v. State [Ala.] 41 So. 727.

76. Declaration of defendant before meeting deceased that he was "a straight shot and a game man" and witness would find it out is admissible to show general malice. State v. Feeley, 194 Mo. 300, 92 S. W. 663. Threatening conduct of accused toward the children of deceased immediately before the homicide though not in the presence of deceased is admissible. Smith v. Com. [Ky.] 92 S. W. 610. Ambiguous remarks by defendant about deceased shortly before homicide admissible to show his state of mind. Morris v. State [Ala.] 41 So. 274. Violent and turbulent conduct of defendant, including an assault on a third person shortly before the homicide, is admissible. State v. Miller, 73 S. C. 277, 53 S. E. 426. That accused was drunk and firing off his gun shortly before the homicide. State v. Smalls, 73 S. C. 516, 53 S. E. 976.

77. Ill feeling between the parties and previous aggravated trespasses by accused on the premises of deceased are admissible. State v. Crump, 116 La. 978, 41 So. 229. Fact of litigation is admissible without proof of accompanying ill will. Maloy v. State [Fla.] 41 So. 791. Ill feeling between the parties. Id. On trial for murder of wife who was living separate from defendant, evidence that separation was caused by his abuse of her held admissible. Dow v. State [Ark.] 92 S. W. 28. State of feeling between defendant and person assailed may be shown but not details of quarrels. State v. Baudoin, 115 La. 837, 40 So. 239. Evidence that deceased had been recently informed of the killing of his brother by defendant is admissible. State v. Thrailkill, 73 S. C. 314, 53 S. E. 482. Evidence that deceased was criminally intimate with the wife of a third person and that such fact had been communicated to defendant is irrelevant where the altercation grew out of a wholly disconnected subject. State v. Stukes, 73 S. C. 386, 53 S. E. 643. On trial for wife murder evidence of ill treatment of the wife at a time reasonably near the homicide or part of a course of ill treatment extending to such time is admissible. Green v. State, 125 Ga. 742, 54 S. E. 724. Not necessary that all such facts be proved by one witness. Id. Evidence that accused had insulted the daughter of the person assailed on the previous day admissible to show intent. State v. Weisenburger, 42 Wash. 426, 85 P. 20. Declarations of good will toward deceased not admissible to rebut threats. State v. Baudoin, 115 La. 837, 40 So. 239.

78. Letter of defendant held material to

cumstances leading to the fatal meeting.[79] The entire res gestae of the homicide may be shown, and it is generally deemed to include all that happened from the time the parties came into each other's presence until the killing.[80] Subsequent acts and declarations not part of the res gestae[81] are generally inadmissible except so far as they tend to identify accused as the perpetrator of the crime,[82] or consist of incriminating declarations.[83] Relevant conditions at the scene of the homicide

show his improper relations with wife of deceased. State v. Bond [Idaho] 86 P. 43. Pendency of prosecution against defendant for prior attempt to kill deceased. State v. Goodson, 116 La. 388, 40 So. 771. On trial of a wife for murder of her husband, proof of defendant's adultery is admissible. State v. Legg [W. Va.] 53 S. E. 545. Evidence that deceased testified against defendant on a former prosecution and the fact of conviction therein admissible to show motive. Hays v. State [Ga.] 54 S. E. 809. That defendant and deceased were in love with the same woman admissible. State v. Andrews, 73 S. C. 257, 53 S. E. 423. A son of twenty-one living with his father is presumed to have such knowledge of the extent of his father's wealth as to make proof thereof admissible on trial of the son for murder of his father. People v. Weber [Cal.] 86 P. 671. Seduction by defendant of deceased's daughter and threats by deceased to prosecute therefor. State v. Martin [Or.] 83 P. 849.

79. Where defendant interfered in an altercation on behalf of his brother, the entire difficulty may be shown. Untreiner v. State [Ala.] 41 So. 285. Where it appears that defendant, an officer, was attempting to arrest deceased for certain offenses, details of such offenses are not admissible. Hammond v. State [Ala.] 41 So. 761. A statement of defendant that he had been told that a certain woman had tried to persuade deceased to marry her rather than defendant's daughter is admissible to explain why defendant went to the house of deceased. Kennedy v. State [Ala.] 40 So. 658. A previous offense by defendant authorizing arrest by deceased may be shown. Carpenter v. Com. [Ky.] 92 S. W. 553. Statement of defendant to third person before the homicide that deceased was to come to his house on a certain peaceful mission admissible. Bondman v. State [Ala.] 40 So. §5. Expressed intention of accused in going to the house where the homicide occurred to break up a dance there. Glass v. State [Ala.] 41 So. 727. Remark of deceased on starting to place where homicide occurred, indicative of his purpose in going, is admissible. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Where it appears that defendant on going to the place where deceased was immediately challenged him to fight, evidence tending to show that defendant did not go there for the purpose of seeking deceased is immaterial. State v. Seery, 129 Iowa, 259, 105 N. W. 511. Where it appears that deceased went to defendant's house late at night and insistently sought entrance, it is admissible to show that he had an appointment with a woman residing therein and that she was of immoral character. Rumsey v. State [Ga.] 55 S. E. 167.

80. That some of the shot from defendant's gun went through the clothes of a witness is part of the res gestae. Hammond v. State [Ala.] 41 So. 761. Declaration of child immediately after the killing "you have shot mama" part of res gestae. Grant v. State, 124 Ga. 757, 53 S. E. 334. A remark of defendant from which the quarrel started. Wall v. State [Ga.] 54 S. E. 815. The entire transaction from the time the parties came together until the homicide is admissible. Glass v. State [Ala.] 41 So. 727. Though in a prosecution for assault with intent to murder the fact that the weapon was concealed is immaterial, yet it being part of the res gestae it is not error to admit it. Ray v. State [Ala.] 41 So. 519. Shooting of another person in same altercation part of res gestae. Hammond v. State [Ala.] 41 So. 761. What occurred between accused and deceased on their way to the scene of the homicide is part of the res gestae. Morris v. State [Ala.] 41 So. 274.

81. Narrative by defendant five minutes afterwards not admissible. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Declaration of accused 15 minutes after the homicide to one who was dressing wounds which he received in the altercation are not admissible. Cole v. State, 125 Ga. 276, 53 S. E. 958. That on the day after receiving the wounds from which he afterwards died deceased stated to defendant that he, deceased, was alone to blame, not admissible. Id. Conduct of injured person after the offense irrelevant. Morgan v. State, 124 Ga. 442, 52 S. E. 748. Exclamation "He has shot me" in presence of accused and immediately on being shot part of res gestae. Smith v. State [Ala.] 40 So. 959.

82. That one of two persons seen running from the scene of the homicide addressed his companion by the name of the codefendant and said that he had killed a man. Glass v. State [Ala.] 41 So. 727. Finding in defendant's possession of property of deceased several months after homicide admissible. State v. Barnes [Or.] 85 P. 998. Conduct of defendant which might be deemed unnatural and unfeeling, after the murder of his entire family, is admissible. People v. Weber [Cal.] 86 P. 671. That defendant had two months after the homicide a pistol of caliber corresponding with that of the bullet found in the body of deceased is admissible. State v. Green, 115 La. 1041, 40 So. 451.

83. On prosecution for assault with intent, declaration of defendant on the following day that he came near killing the person assailed is admissible to show intent. State v. McFadden, 42 Wash. 1, 84 P. 401. Inconsistent declarations of defendant as to whereabouts of deceased admissible. State v. Barnes [Or.] 85 P. 998. Expression of satisfaction by accused on being told of the death of deceased. Morris v. State [Ala.] 41 So. 274. Declaration of accused ten minutes after homicide, to intent to kill every one bearing the name of deceased, admissible. Id.

are admissible,[84] as are the nature and extent of the wounds received by deceased.[85] It is prejudicial error to allow proof that deceased had a wife where that fact was immaterial.[86] Where it appears that defendant lay in wait near the residence of deceased, it is error to exclude his testimony that his intention was to retake his child who had been kidnapped.[87] Where there was no evidence implicating anyone other than defendant in an assault with intent to kill and there was direct evidence of his guilt, evidence that other men had been criminally intimate with the prosecuting witness is too remote to show motive in others.[88] Testimony that two persons of the same general appearance as deceased and his companion seen near the place of the homicide were drunk is admissible.[89] On trial for homicide by negligent driving, a speed ordinance is admissible.[90] Where dissatisfaction of deceased with the manner in which defendant kept certain trust accounts is shown, evidence of defendant that they were correctly kept is inadmissible.[91] On trial for murder by arsenical poisoning, evidence that arsenic was found in the body of one who died in defendant's house before the homicide charged is not admissible to show that there was arsenic in the house.[92]

Justification.[93]—Where self-defense is urged the reputation of deceased is in issue,[94] but specific acts are inadmissible,[95] unless they were by way of previous

Declarations after homicide showing animus not inadmissible because deceased was not named. Id. Threats immediately after an assault with a deadly weapon admissible to show intent. Miller v. State [Ala.] 40 So. 342.

84. Tracks behind a building near the scene of the homicide indicating that some one had lain in wait. Harrison v. State [Ala.] 40 So. 57. Cartridges found on the person of defendant bearing same brand as empty shells found at the scene of the homicide are admissible. Fuller v. State [Ala.] 41 So. 774. Bullets fired from a weapon found on the premises are admissible for comparison with those taken from the body of deceased. People v. Weber [Cal.] 86 P. 671. Finding of bloody clothing a mile from the scene of the murder is inadmissible unless defendant is connected therewith. Commonwealth v. Johnson, 213 Pa. 607, 63 A. 134.

85. Evidence as to how long person assailed and wounded was under doctor's care, while of doubtful competency, is not prejudicial. State v. Weisenberger, 42 Wash. 426, 85 P. 20. Though the indictment alleges murder by poisoning, evidence of wounds on the body of deceased is admissible in connection with other evidence to show that death was not from suicide. Green v. State, 125 Ga. 742, 54 S. E. 724. Character and appearance of wounds may be shown. Hill v. State [Ala.] 41 So. 621. Wounds in body of deceased may be described. Harrison v. State [Ala.] 40 So. 57.

86. Melbourne v. State [Fla.] 40 So. 189.

87. Mathison v. State [Miss.] 40 So. 801.

88. State v. Baudoin, 115 La. 837, 40 So. 239.

89. Barden v. State [Ala.] 40 So. 948.

90. State v. Moore, 129 Iowa, 514, 106 N. W. 16.

91. Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

92. People v. Collins [Mich.] 13 Det. Leg N. 178, 107 N. W. 1114.

93. See 5 C. L. 1716.

94. Bad character of deceased. Hammond v. State [Ala.] 41 So. 761. Evidence held sufficient to show that defendant knew that deceased was intoxicated and that he was reputed to be dangerous when in that condition. People v. Lamar, 148 Cal. 564, 83 P. 993. Where evidence leaves it in doubt who was aggressor, evidence of reputation of deceased for violence is admissible. Id. Evidence that deceased was intoxicated sufficient to admit evidence of his reputation for violence when in that condition. Id. Where so much of a prior altercation between deceased and a witness as related to threats by deceased against defendant was admitted, it was not reversible error to exclude other details. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Where it appears that deceased was under the influence of cocaine at the time of the homicide, evidence of his character at such times is admissible. Moseley v. State [Miss.] 41 So. 384. As bearing on self-defense, intoxication of deceased at the time of the homicide may be shown but not his habits in that respect. Neilson v. State [Ala.] 40 So. 221. Habits of person assaulted as to drunkenness not admissible, it not appearing that he was drunk at the time of the assault. Teague v. State [Ala.] 40 So. 312. Evidence held to open door for proof of good character of deceased for peace and quiet. State v. Lejeune, 116 La. 193, 40 So. 632. Though defendant's evidence was confined to the dangerous character of deceased when drinking, the prosecution may show his general reputation for peace and quiet. State v. Feeley, 194 Mo. 300, 92 S. W. 663. General reputation of deceased for claiming property of others not admissible though the homicide grew out of conflicting claims to certain property. Maloy v. State [Fla.] 41 So. 791.

95. Bad character of deceased cannot be proved by specific acts. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Particular acts of deceased not connected with the homicide on trial so as to in some manner enter into defendant's contemplation not admissible. State v. Andrews, 73 S. C. 257, 53 S. E. 423.

difficulty with accused,[96] or unless it be shortly before the homicide and known to accused.[97] Threats by deceased may be shown[98] if communicated to defendant,[99] and if deceased at the time of the homicide committed some overt act threatening violence,[1] and uncommunicated threats have been held admissible when the evidence leaves it in doubt who was aggressor.[2] Threats by deceased are admissible though no hostile demonstration by him is shown to rebut the presumption of malice from arming by accused.[3] Evidence of previous assaults by deceased are inadmissible unless his conduct at time of homicide threatened repetition thereof.[4] Threats by third person not connected with deceased irrelevant.[5] Evidence as to how the appearance of deceased when drunk would impress a stranger is admissible.[6] Declarations of person assailed shortly after the assault that he intended to kill defendant and was sorry he had not is admissible on the question who was the aggressor.[7] Where the question who was aggressor is doubtful, proof that deceased under color of official authority had a warrant for defendant's arrest is admissible to show intent.[8] Whether defendant usually carried a gun is immaterial on the issue of self-defense.[9] The health and strength of deceased may be shown,[10] as may the fact that he was

That deceased had been tried for murder must, if admissible, be shown by the record. Id.

96. Where self-defense is claimed, evidence of other difficulties is not to be excluded because it tends to prove malice and the indictment is for manslaughter only. State v. Crump, 116 La. 978, 41 So. 229. Details of previous difficulty properly excluded. Stallworth v. State [Ala.] 41 So. 184. Particulars of previous difficulty properly excluded. Patterson v. State [Ala.] 41 So. 157. Evidence of previous difficulty between the parties and as to how long there had been ill feeling between them admissible. Shirley v. State [Ala.] 40 So. 269. An assault by deceased on defendant shortly before is admissible. McHugh v. Territory [Okl.] 86 P. 433. Previous difficulties between the parties may be shown in such detail as to determine who was the aggressor therein. Brown v. State [Miss.] 40 So. 737; Brown v. State [Miss.] 40 So. 1009. Where it appears that previous difficulties were about a certain woman, defendant may show where she was at the time of the homicide. Brown v. State [Miss.] 40 So. 737.

97. An unprovoked assault by deceased on a third person shortly before the homicide is, when witnessed by defendant, admissible to show defendant's knowledge of deceased's violent disposition. Sneed v. Territory, 16 Okl. 641, 86 P. 70.

98. Threats by deceased. Hammond v. State [Ala.] 41 So. 761. A statement of deceased that defendant would have to walk over his dead body to get his mother's property is not a threat. State v. Roupetz [Kan.] 85 P. 778. Declaration of deceased held, in view of past difficulty, a threat and not a mere idle statement. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Remoteness in point of time does not render threats inadmissible. 17 days. State v. Rodriguez, 115 La. 1004, 40 So. 438. Threats by deceased several weeks before are admissible in connection with others made on the day of the homicide. State v. Beckner, 194 Mo. 281, 91 S. W. 892.

99. Declaration of deceased of evil intention against members of defendant's family not admissible unless communicated to defendant. State v. Trail [W. Va.] 53 S. E. 17.

1. Hostile demonstration before threats. Martin v. State [Ala.] 40 So. 275. In Louisiana the proof of such hostile demonstration is regarded as foundation testimony, and it must be proved to the satisfaction of the trial judge. State v. Feazell, 116 La. 264, 40 So. 698. Assault by deceased on defendant and threats by him are admissible to explain the purpose of deceased in entering the sleeping room of defendant the following day. State v. Rideau, 116 La. 245, 40 So. 691. Preliminary question of hostile demonstration as foundation for proof of threats addressed to discretion. State v. Rambo [La.] 41 So. 359.

2. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Uncommunicated threats by deceased are admissible where there is doubt as to who was aggressor. Sinclair v. State [Miss.] 39 So. 522.

3. State v. Stockett, 115 La. 743, 39 So. 1000.

4. Previous indecent assaults by deceased held inadmissible. State v. Tolla, 72 N. J. Law, 515, 62 A. 675. See 4 Mich. L. R. 482. If the conduct of deceased at the time of the homicide threatened no injury to defendant, evidence of previous assaults by deceased is inadmissible to explain why defendant armed himself. State v. Tolla [N. J. Err. & App.] 62 A. 675.

5. State v. Mitchell [Iowa] 107 N. W. 804.

6. Jackson v. State [Ala.] 41 So. 178.

7. Shields v. State [Miss.] 39 So. 1010. Declaration by deceased as to past difficulty, not containing any threat, inadmissible. State v. Worley [N. C.] 53 S. E. 128.

8. Shields v. State [Miss.] 39 So. 1010.

9. Elliott v. Com. [Ky.] 91 S. W. 1136.

10. Where it appears that deceased had no weapon, the prosecution may show that he was a cripple. Hill v. State [Ala.] 41 So. 621. The cause of his crippled condition and that it existed from infancy may be shown. Id. The shoes which he wore may be introduced to show the condition of his feet. Id. Where defendant has shown dis-

or was not armed[11] and that he had carried the weapon several hours in apparent search for accused,[12] but not ordinarily his habit of carrying weapons,[13] unless defendant's knowledge thereof is shown so that it properly enters into his apprehensions of violence.[14]

(§ 7) *C. Dying declarations.*[15]—To admit dying declarations it must appear prima facie[16] that they were made in expectation of imminent death and after all hope of recovery had been abandoned.[17] Dying declarations are admissible if deceased was rational at time of making it though delirious before and after.[18] It is no objection to the admissibility of a dying declaration that it does not identify the perpetrator of the homicide.[19] That several questions were asked of declarant does not make the declaration involuntary,[20] nor is it material that the taking of the declaration was interrupted for several hours, it not appearing that declarant's condition or apprehension changed in the meantime.[21] It is sufficient if the witness can state the substance of the declaration.[22] Declarant may state all the res gestae of the homicide.[23] Statements after a dying declaration are inadmissible to corroborate it,[24] but inconsistent statements by the declarant are admissible to impeach a dying declaration.[25]

(§ 7) *D. Sufficiency.*[26]—In the foot notes are grouped cases dealing with sufficiency of evidence to show the corpus delicti,[27] to show conspiracy or other par-

parity of size between himself and deceased, the state may show that deceased was in poor health. State v. Beckner, 194 Mo. 281, 91 S. W. 892.

11. Where it appears that deceased approached defendant in a threatening manner, evidence as to what weapons he had is admissible. People v. Cook, 148 Cal. 334, 83 P. 43. That on a search of deceased's body immediately after the homicide no weapon was found is admissible. Jackson v. State [Ala.] 41 So. 178.

12. Where deceased struck defendant with a club, evidence that he had been carrying such club around during the day is admissible as tending to show that he sought the encounter. State v. Trueman [Mont.] 85 P. 1024.

13. Deceased's habit of carrying weapons not admissible without proof that defendant knew it. Jackson v. State [Ala.] 41 So. 178.

14. Deceased's habit of carrying weapons not admissible unless defendant's knowledge thereof is shown. Rogers v. State [Ala.] 40 So. 572.

15. See 5 C. L. 1719.

16. Question for court or jury. The admissibility of a dying declaration is in the first instance a question of law for the court. Willoughby v. Territory, 16 Okl. 577, 86 P. 56. A prima facie case is all that is necessary to admit the declarations, the question whether they were made under conviction of impending death being thereafter for the jury. Findley v. State, 125 Ga. 579, 54 S. E. 106. As to whether it should be submitted for the ultimate decision of the jury the authorities are in conflict. Willoughby v. Territory, 16 Okl. 577, 86 P. 56, discussing but not deciding the question. In any event it is harmless to submit it. Id.

17. Evidence held to sufficiently show belief in impending death. Pryor v. State [Miss.] 39 So. 1012; Asher v. Com., 28 Ky. L. R. 1342, 91 S. W. 662; Newton v. State [Fla.] 41 So. 19; Park v. State [Ga.] 55 S. E. 489; Brennan v. People [Colo.] 86 P. 79; Willoughby v. Territory, 16 Okl. 577, 86 P. 56. That the declarant was informed by his doctor that he was about to die and stated that he realized it is sufficient foundation. State v. Mayo, 42 Wash. 540, 85 P. 251. Condition of injured person and nature of wounds may be considered. Brennan v. People [Colo.] 86 P. 79. Declaration of deceased that he knew he was going to die sufficient predicate. Moore v. State [Ala.] 40 So. 345. Repeated declarations of deceased that he was going to die held a sufficient predicate. Smith v. State [Ala.] 40 So. 957. Statement of deceased that he was going to die sufficient predicate. Walker v. State [Ala.] 41 So. 878.

18. Keith v. Com. [Ky.] 92 S. W. 599.

19. State v. Mayo, 42 Wash. 540, 85 P. 251.

20, 21, 22. Park v. State [Ga.] 55 S. E. 489.

23. Walker v. State [Ala.] 41 So. 878.

24. Walton v. State [Miss.] 39 So. 689.

25. State v. Mayo, 42 Wash. 540, 85 P. 251. Where statements inconsistent with a dying declaration are being proved, the witness may be asked generally what was said at a time and place specified and it is error to require the alleged statements to be categorically put to the witness. Id.

26. See 5 C. L. 1720.

27. The corpus delicti of murder consists of death as the result and criminal agency as the means. Evidence of criminal agency as cause of death held insufficient to support confession. People v. Frank [Cal. App.] 83 P. 578. Circumstantial evidence held insufficient against claim that deceased died of heart disease. Allen v. State [Miss.] 40 So. 744. Evidence sufficient. Man found dead from gun shot wound. People v. Grill [Cal. App.] 86 P. 613. Corpus delicti may be shown by circumstantial evidence. State v. Gillis, 73 S. C. 318, 53 S. E. 487. Corpus delicti may be proved by circumstantial evidence. Evidence held sufficient in case where

ticipation by accused in a killing by another,[28] to identify accused as the perpetrator of the offense,[29] and to sustain generally convictions of murder,[30] manslaughter,[31] and assault with intent to kill and kindred offenses.[32]

skeleton and some articles of clothing were found. State v. Barnes [Or.] 85 P. 998. The precise manner of killing need not be proven. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Evidence of corpus delicti of arsenical poisoning held sufficient. Hoch v. People, 219 Ill. 265, 76 N. E. 356. Proof of corpus delicti of infanticide held insufficient. People v. Eldridge [Cal. App.] 86 P. 832. Evidence of corpus delicti of wife poisoning held insufficient. People v. Staples [Cal.] 86 P. 886.

28. Evidence of participation by accused in killing by his codefendant held sufficient. State v. Jarrell [N. C.] 53 S. E. 127. Evidence held sufficient to show conspiracy between several persons who all fired at deceased. McLeroy v. State, 125 Ga. 240, 54 S. E. 125. Evidence held to show that homicide was committed in pursuance of a conspiracy to escape from prison and that defendant was a party thereto. People v. Eldridge, 147 Cal. 782, 82 P. 442.

29. Evidence of an altercation in which shots were fired by several in a public place held to sustain a finding that the shot which killed a bystander was fired by defendant. State v. Lilliston [N. C.] 54 S. E. 427. Evidence that several persons fired at deceased and that two shots took effect is insufficient to convict any one in the absence of proof of conspiracy or concert. McLeroy v. State, 125 Ga. 240, 54 S. E. 125; Davis v. State, 125 Ga. 299, 54 S. E. 126. Evidence held sufficient to identify defendant as the perpetrator of murder of one who sought to protect the victim of rape. Boles v. People [Colo.] 86 P. 1030. Evidence of identity of defendant held sufficient. State v. Rogers, 129 Iowa, 229, 105 N. W. 455; White v. State, 125 Ga. 256, 54 S. E. 188. Circumstantial evidence of murder of old couple and burning of house to conceal crime held sufficient. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Evidence held sufficient as to identity of defendant, though the great preponderance in number of witnesses was with defendant. People v. Cascone [N. Y.] 78 N. E. 287. Circumstantial evidence of murder of defendant's parents, brothers, and sister held sufficient against evidence of alibi. People v. Weber [Cal.] 86 P. 671. Circumstantial evidence of murder of old man with axe for robbery held sufficient. State v. Shepherd, 129 Iowa, 705, 106 N. W. 190.

30. Motive need not be shown if malice otherwise appear. State v. Thrailkill, 73 S. C. 314, 53 S. E. 482; Campbell v. State, 124 Ga. 432, 52 S. E. 914. Evidence held to sustain conviction of murder in first degree. Keith v. Com. [Ky.] 92 S. W. 599. Evidence of assassination pursuant to conspiracy held sufficient. Moore v. State [Ala.] 40 So. 345. Evidence of instant killing of officer on his announcing purpose of arresting defendant held to sustain conviction of murder in the first degree. State v. Barrett [N. C.] 54 S. E. 856. Evidence of premeditation held sufficient. State v. Prolow [Minn.] 108 N. W. 873. Evidence of killing after altercation held to sustain conviction of murder in second degree. Johnson v. State [Wis.] 108 N. W. 55. Conviction of murder sustained against claim of accident. People v. Smith, 98 N. Y. S. 905. Evidence held sufficient to sustain conviction in first degree. People v. Mahatch, 148 Cal. 200, 82 P. 779. Circumstantial evidence of murder for robbery and destruction of body of deceased held sufficient. State v. Barnes [Or.] 85 P. 998. Corroboration of accomplice held sufficient to sustain conviction. Hargrove v. State, 125 Ga. 270, 54 S. E. 164. Evidence as to killing with a rock held not to show intent to kill or the deadly character of the weapon from which such intent might be inferred. Jordan v. State, 124 Ga. 780, 53 S. E. 331. Confession and corroborating circumstances held sufficient. Milner v. State, 124 Ga. 86, 52 S. E. 302. Evidence of killing by one endeavoring to force entrance to house where his wife was, held to sustain conviction of murder in first degree. People v. Feld [Cal.] 86 P. 1100. Corroboration of accomplice held sufficient to warrant conviction of murder of husband of defendant's paramour. State v. Bond [Idaho] 86 P. 43. Evidence held to sustain a conviction of murder in the second degree as against claim of manslaughter. Willoughby v. Territory, 16 Okl. 577, 86 P. 56. Evidence held not to suggest mutual combat. Reese v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 39, 91 S. W. 583. Evidence held to sustain conviction against claim of self-defense. Samaniego v. Territory [Ariz.] 85 P. 721; State v. Prolow [Minn.] 108 N. W. 873; State v. Hayden [Iowa] 107 N. W. 929; State v. Dillard [W. Va.] 53 S. E. 117. Evidence held insufficient to sustain conviction as against claim of self-defense. Lucas v. State [Neb.] 105 N. W. 976. Evidence held to show homicide in commission of robbery as against claim of acute alcoholic mania. People v. Pekarz [N. Y.] 78 N. E. 294. Evidence of insanity held such that conviction could not stand. People v. Merincola, 99 N. Y. S. 357. Evidence of momentary lapse of consciousness at time of shooting held insufficient to disturb conviction. State v. Williams, 96 Minn. 351, 105 N. W. 265. Evidence held to show unprovoked stabbing of wife. Jones v. State, 125 Ga. 307, 54 S. E. 122. Evidence of unprovoked shooting of wife held to sustain conviction in first degree. People v. Johnson [N. Y.] 77 N. E. 1164. Evidence of wife murder held sufficient against claim of accident. Parsons v. People, 218 Ill. 386, 75 N. E. 993. Evidence of murder of wife in conflict for possession of child held sufficient. State v. Hinchman [Kan.] 87 P. 186. Circumstantial evidence of wife poisoning held sufficient. Hoch v. People, 219 Ill. 265, 76 N. E. 356; State v. Woodard [Iowa] 108 N. W. 753; Rains v. Com. [Ky.] 92 S. W. 276. Circumstantial evidence of murder of husband held sufficient. Campbell v. State, 124 Ga. 432, 52 S. E. 914. Evidence of wife murder held insufficient as against claim of accident. Montgomery v. State [Wis.] 107 N. W. 14.

31. Evidence held to sustain conviction of manslaughter by abortion. State v. Finley,

§ 8. *Trial and punishment. A. Conduct of trial in general.*[33]

(§ 8) *B. Instructions.*[34]—The court must give, at least on proper request,[35] instructions as to such and only such issues,[36] defenses,[37] and aspects thereof,[38] and

193 Mo. 202, 91 S. W. 942. Evidence held to sustain conviction of voluntary manslaughter against claim of accident. Brown v. Com., 28 Ky. L. R. 1335, 92 S. W. 542. Evidence of killing in drunken quarrel held to sustain conviction of manslaughter. Hudson v. State [Ark.] 91 S. W. 299. Defendant's own testimony held to show manslaughter and negative self-defense. Clingan v. State [Ark.] 91 S. W. 12. Evidence held sufficient to sustain conviction of voluntary manslaughter. Wall v. State [Ga.] 55 S. E. 484. Evidence held to sustain conviction of manslaughter as against claim of self-defense and temporary insanity. State v. Mitchell [Iowa] 107 N. W. 804. Evidence held to sustain conviction of manslaughter as against claim of self-defense. Larrance v. People, 222 Ill. 155, 78 N. E. 50; People v. Gallanar [Cal. App.] 86 P. 814; State v. Smith [Iowa] 109 N. W. 115. Evidence of negligent driving held to sustain conviction of manslaughter. State v. Moore, 129 Iowa, 514, 106 N. W. 16. Evidence as to manslaughter by carelessness in struggle over loaded pistol held sufficient as to one defendant and insufficient as to another. State v. Clardy, 73 S. C. 340, 53 S. E. 493. Verdict of manslaughter set aside where evidence showed either murder or justification. Robinson v. State, 124 Ga. 787, 53 S. E. 99.

32. Conviction of assault sustained against contention of defendant that he acted only as peacemaker. State v. Stuart, 116 Mo. App. 327, 92 S. W. 345. Evidence of intent to do great bodily harm held sufficient. State v. Cummings, 128 Iowa, 522, 105 N. W. 57. Evidence held to sustain conviction of unlawful wounding by reckless shooting in public place. State v. Groves, 194 Mo. 452, 92 S. W. 631. Evidence held to sustain conviction of assault with intent to kill without malice. State v. Heimberger, 194 Mo. 362, 92 S. W. 479. Verdict that assault with rock the size of a man's fist did endanger life sustained. State v. Ireland, 72 Kan. 265, 83 P. 1036. Evidence of declarations and motive held to identify defendant as person who committed assault with intent to kill. State v. Romano, 41 Wash. 241, 83 P. 1. Evidence of assault with intent to disfigure, by throwing lye in woman's face, held sufficient. State v. Brown [Iowa] 106 N. W. 379. Evidence of assault with intent to stab street car conductor held sufficient. Smith v. State, 125 Ga. 300, 54 S. E. 124. Evidence of assault on railroad conductor with pistol held to show intent to kill. Williams v. State, 125 Ga. 235, 54 S. E. 186. Where the weapon is alleged to be such a knife as was likely to produce death, the deadly character thereof must be shown. Evidence held insufficient. Paschal v. State, 125 Ga. 279, 54 S. E. 172. Where evidence requires either acquittal or conviction of murder, verdict of manslaughter will be set aside. Herrington v. State, 125 Ga. 745, 54 S. E. 748; Lester v. State, 125 Ga. 747, 54 S. E. 749. Evidence held to make a question for the jury whether an assault with deadly weapon was committed within the jurisdiction. State v. Barrington [N. C.] 53 S. E. 663. Evidence on charge of unlawfully shooting at another held to negative accident. Ridgley v. State, 124 Ga. 454, 52 S. E. 761. Evidence of intent held sufficient to sustain conviction of assault with intent to kill. People v. Owens [Cal. App.] 86 P. 980. Evidence of intent insufficient. Simmons v. State [Ala.] 40 So. 660.

33. See 5 C. L. 1722. See Indictment and Prosecution, 8 C. L. — .

34. See 5 C. L. 1723.

35. See Indictment and Prosecution, 5 C. L. 1790.

36. Instruction as to deadliness of pistol when used to strike with properly refused when there was no evidence of intent to so use it. People v. Owens [Cal. App.] 86 P. 980. Evidence held sufficient to warrant submission of conspiracy between defendants. Crawford v. State, 125 Ga. 793, 54 S. E. 695. Evidence held to warrant instruction as to principal in second degree. Brown v. State, 125 Ga. 281, 54 S. E. 162. Evidence held not to justify an instruction that the fact of killing was not disputed. Young v. State, 125 Ga. 584, 54 S. E. 82. That the corpus delicti is proved by circumstantial evidence does not render improper an instruction as to presumption of malice from killing. Campbell v. State, 124 Ga. 432, 52 S. E. 914. Instruction that firing by person assailed after the assault was made constituted no defense is proper though accused did not rely on it as a defense. Adams v. State, 125 Ga. 11, 53 S. E. 804. Evidence held to show personal aggression by police officer rather than attempt to arrest defendant so that charge on homicide in resisting arrest was error. Melbourne v. State [Fla.] 40 So. 189. Evidence held to present no issue as to homicide in resisting unlawful arrest. McPhay v. State [Miss.] 40 So. 17. Evidence of the deadly character of knife held so slight that court was not required to submit question to jury. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795. Instruction that proof of a general **felonious intent** is insufficient on a charge of assault with a specific intent properly refused where there is no evidence of general felonious intent. People v. Owens [Cal. App.] 86 P. 980. An instruction that every man is presumed to intend the natural and ordinary consequences of his acts is proper only where the intent which it is sought to impute was actually accomplished. An instruction that every person is presumed to intend the natural and ordinary consequences of his acts is error on prosecution for assault with intent to kill where death did not result (State v. Romano, 41 Wash. 241, 83 P. 1), but is proper on a prosecution for assault with intent to do great bodily harm where such harm was inflicted (Id.). No evidence calling for instruction as to shooting with intent to frighten. Millender v. State [Ala.] 40 So. 664.

37. Evidence held not to require submission of **self-defense.** Deceased threw iron at defendant. Defendant with threat went for weapon and killed deceased before latter

such included offenses[39] as are presented by the evidence.[40] In Louisiana the court is required to submit the issue of manslaughter in every prosecution for murder,

made any other demonstration. State v. Seery, 129 Iowa, 259, 105 N. W. 511. Instruction as to self-defense held properly refused as ignoring evidence of conspiracy of defendant and another to kill deceased. Morris v. State [Ala.] 41 So. 274. That deceased drew a gun after a deadly assault had been made on him by defendant does not warrant submission of justification. Bowden v. State [Ga.] 55 S. E. 499. Instruction as to accidental killing held properly refused as inapplicable to the evidence. Covington v. People [Colo.] 85 P. 832. Where the evidence shows without conflict that accused brought on the combat and that he could with safety have retreated, self-defense need not be submitted. Gray v. State [Ala.] 39 So. 621. Evidence that deceased went to defendant's house at night on appointment with an immoral woman domiciled therein and sought admission did not require an instruction on defense of habitation. Rumsey v. State [Ga.] 55 S. E. 167. Evidence held to show that homicide was outside curtilage so as not to call for charge on defense of dwelling house. Dawson v. State [Ala.] 41 So. 803. Must submit **accidental homicide** where there is evidence thereof. State v. Legg [W. Va.] 53 S. E. 545. Evidence held to require instruction on **intoxication** as affecting capacity to form intent. Brennan v. People [Colo.] 86 P. 79. Evidence that after deceased had been in defendant's house and had shot at defendant the latter took his gun and went out to see if deceased was gone, and being fired on shot and killed deceased, entitles him to instruction on self-defense. State v. Williams [N. C.] 53 S. E. 823

38. General threats made by deceased held not to authorize charge on threats. Leito v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 537, 92 S. W. 418. Giving of instructions as pursuit of retreating adversary is error if there is no evidence on which to base them. People v. Maughs [Cal.] 86 P. 187. It is error to submit aggression by accused where there is no evidence thereof. Williams v. State, 125 Ga. 302, 54 S. E. 108. Evidence held to justify submission of theory that accused sought out deceased for the purpose of provoking an altercation. Brandenburgh v. Com., 28 Ky. L. R. 1050, 91 S. W. 269. Evidence tending to support accidental killing held capable of no interpretation making it proper to submit criminal carelessness as an exception to excuse by accident. State v Legg [W. Va.] 53 S. E. 545. Instruction on self-defense ignoring evidence that accused willingly entered the altercation properly refused. Morris v. State [Ala.] 41 So. 274. Evidence held to warrant instruction on provoking difficulty. State v. Feeley, 194 Mo. 300, 92 S. W. 663; Parker v. State [Neb.] 108 N. W. 121; Robinson v. Territory, 16 Okl. 241, 85 P. 451; Miller v. Com., 28 Ky. L. R. 1372, 91 S. W. 710. Charge on provoking difficulty is error if there is no evidence to sustain it. Leito v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 537, 92 S. W. 418. Evidence held not to warrant instruction on provocation of difficuty. Sprinkle v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 323, 91 S. W. 787.

39. Where the proof is by eye witnesses, only those degrees which the evidence will sustain should be submitted. Territory v. Hendricks [N. M.] 84 P. 523. Error to submit degree not shown. Herrington v. State, 125 Ga. 745, 54 S. E. 748. Circumstantial evidence of killing with axe held to justify submission of lower degrees. State v. Shepherd, 129 Iowa, 705, 106 N. W. 190. Failure to instruct as to lower degrees held error. Newton v. State [Fla.] 41 So. 19. Refusal to submit a lower degree than the jury found is harmless as tending to produce acquittal. People v. Brown [Cal. App.] 84 P. 670.

Murder: Error to submit first degree where only evidence of malice is presumption from use of deadly weapon. State v. Minor, 193 Mo. 597, 92 S. W. 466. That a burglar carried a revolver indicates an intent to use it against any person who should attempt to apprehend him, and accordingly justifies submission of premeditation in an indictment for killing police officer in effort to escape. People v. Huter, 184 N. Y. 237, 77 N. E. 6. Evidence as to intent to steal held sufficiently doubtful so that second degree as well as homicide in the perpetration of larceny should be submitted. State v. Rogers, 129 Iowa, 229, 105 N. W. 455. Evidence held to sustain charge as to murder by firing into a crowd with reckless indifference to life. Smith v. State, 124 Ga. 213, 52 S. E. 329. Evidence held not to justify submission of murder in the third degree. Territory v. Hendricks [N. M.] 84 P. 523.

Manslaughter: Where the state's evidence shows murder and the defendant's shows innocence, an instruction on manslaughter need not be given. Pinkerton v. State [Ala.] 40 So. 224; Greer v. State, 124 Ga. 688, 52 S. E. 884; Perdue v. State [Ga.] 54 S. E. 820; Devereaux v. State, 125 Ga. 740, 54 S. E. 666; Davis v. State, 125 Ga. 299, 54 S. E. 126. Evidence held to warrant submission of voluntary manslaughter. Green v. State, 124 Ga. 343, 52 S. E. 431. Held to require charge on involuntary manslaughter. Killing with weapon not deadly as a matter of law. Dorsey v. State [Ga.] 55 S. E. 479. Evidence held not to require submission of involuntary manslaughter. State v. Woodrow, 58 W. Va. 527, 52 S. E. 545. Where it clearly appears that the killing was intentional and unlawful, involuntary manslaughter need not be submitted. Ware v. State [Ala.] 41 So. 181. Held to require instruction on manslaughter. Ellington v. State [Ga.] 55 S. E. 403; Williams v. State, 125 Ga. 302, 54 S. E. 108. Evidence held not to require instruction on manslaughter. Dow v. State [Ark.] 92 S. W. 28; Hannah v. State [Miss.] 39 So. 855; Hicks v. State [Ga.] 54 S. E. 807. Where there is evidence that accused was angry at the time of the homicide and of adequate provocation, testimony of accused that he was not angry does not preclude him from asking submission of manslaughter. Montgomery v. State [Wis.] 107 N. W. 14. Evidence held not to require a charge on adultery of deceased and defendant's wife "just over or about to begin." O'Shields v. State, 125 Ga. 310, 54 S. E. 120. Evidence of shooting without new prov-

irrespective of the state of the evidence,[41] but it is not error to say to the jury in that connection that they are to be governed by the evidence.[42] The instructions must not intimate an opinion on the facts[43] or assume facts not proven,[44] nor must they impliedly exclude any defense or issue.[45] Cautionary instructions should, however, be given.[46] In the foot notes are grouped holdings as to the form and correctness of instructions relating to the issues and burden of proof generally,[47] presumptions,[48] the definition and elements of the crime charged or included offenses.[49] self-defense,[50] accident,[51] intoxication.[52]

ocation the day after a quarrel which had terminated in an agreement to fight a duel held not to warrant submission of manslaughter. Bundrick v. State, 125 Ga. 753, 54 S. E. 683. Evidence which strictly presented only murder or justifiable homicide held to admit of such influences that it was not improper to submit manslaughter. Jones v. State, 125 Ga. 254, 54 S. E. 144. Evidence of altercation between defendant and deceased who was bartender in a saloon held to warrant submission of manslaughter. People v. Gallanar [Cal. App.] 86 P. 814. Evidence held to justify charge on mutual combat. Moss v. State [Ga.] 55 S. E. 481. Evidence held to warrant submission of charge made by deceased against defendant's sister as provocation. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795. Evidence of deliberate killing for robbery mitigated only by evidence of intoxication does not require submission of manslaughter. State v. Johnny [Nev.] 87 P. 3. Evidence of homicide in escaping from prison held not to require submission of manslaughter. Miller v. State [Ala.] 40 So. 47.

Assault: Where the assault was with a pistol and a shot was fired, simple assault need not be submitted. Williams v. State, 125 Ga. 235, 54 S. E. 186. Where a deadly weapon was used, simple assault need not be submitted. State v. Kapelino [S. D.] 108 N. W. 335. Evidence of deliberate shooting and wounding held to warrant instruction on intent to kill. Odom v. State [Fla.] 40 So. 182. Where the evidence shows infliction of a wound with a deadly weapon, assault and battery need not be submitted. State v. Johnson, 116 La. 30, 40 So. 521.

40. Defendant's testimony alone requires charge on included offenses. State v. Richardson, 194 Mo. 326, 92 S. W. 649.

41. Instruction held a sufficient statement of the right to convict of manslaughter. State v. Parks, 115 La. 765, 40 So. 39. Even in a prosecution for homicide by poisoning. State v. Cook [La.] 41 So. 434.

42. State v. Parks, 115 La. 765, 40 So. 39.

43. Instruction held not to intimate an opinion that deceased was killed while fleeing. State v. Sudduth [S. C.] 54 S. E. 1013.

44. Instruction held to improperly assume that malice of a codefendant was not participated in by accused. Morris v. State [Ala.] 41 So. 274. Instruction held to improperly assume that first degree was shown. Commonwealth v. Frucci [Pa.] 64 A. 879.

45. An instruction that if the weapon used was not calculated to produce death the offense would be manslaughter is error as excluding justification. Cress v. State [Ga.] 55 S. E. 491. An instruction that "the defense" is justifiable self-defense is error as narrowing the issue. State v. Morris, 128 Iowa, 717, 105 N. W. 213.

46. Not error to refuse to charge that because of the danger of mistake, the infirmity of memory, and the possible failure of accused to express his own mind, evidence of threats should be received with great caution. Perdue v. State [Ga.] 54 S. E. 820. Instruction that dying declarations are testimony to be considered with all the other testimony in the case not error. Findley v. State, 125 Ga. 579, 54 S. E. 106. As to credibility of dying declarations must be requested. Hall v. State, 124 Ga. 649, 52 S. E. 891. Instruction that relation of husband and wife indicated an affection which created a strong presumption against wife murder properly refused. Montgomery v. State [Wis.] 107 N. W. 14. A cautionary instruction respecting dying declarations should be given where such declarations have been introduced. State v. Mayo, 42 Wash. 540, 85 P. 251.

47. An instruction that the prosecution must by "affirmative proof" exclude justification properly refused. Blanton v. State [Fla.] 41 So. 789. An instruction that where it is shown that one has taken human life the law requires of him a strict account is not error. State v. Jones [S. C.] 54 S. E. 1017.

48. Instruction as to presumption of malice from use of deadly weapon sustained. State v. Hayden [Iowa] 107 N. W. 929; White v. State, 125 Ga. 256, 54 S. E. 188; Nail v. State, 125 Ga. 234, 54 S. E. 145; Commonwealth v. Combs [Pa.] 64 A. 873. Instruction as to presumption of malice from use of deadly weapon should not be given in prosecution for assault. Adams v. State, 125 Ga. 11, 53 S. E. 804. An unqualified instruction that malice is presumed from killing with deadly weapon is not error where there is no issue of justification or excuse. Id. Instruction that unlawful act is presumed to be intentional misleading where defense is accident. People v. Grill [Cal. App.] 86 P. 613. Instruction as to inference of criminal intent from gross carelessness approved. State v. Clardy, 73 S. C. 340, 53 S. E. 493. An instruction that it was presumed that defendant intended to kill and that the law would not hold him guiltless unless the contrary appeared is error where there is evidence of self-defense. People v. Solani [Cal. App.] 83 P. 281. An instruction that from the firing of a revolver at another intent to kill is to be presumed is correct. State v. Bennett, 128 Iowa, 713, 105 N. W. 324. Instruction as to presumption of malice from use of deadly weapon held properly refused in view of evidence of willful and intentional killing. Ledbetter v. State [Ala.] 39 So. 618. Not

error to refuse to charge that there is a special presumption of innocence in case of a charge of wife murder growing from the relation of the parties. State v. Le Blanc, 116 La. 822, 41 So. 105.

49. Instruction held not to state what would constitute aiding and abetting by one present at homicide with sufficient fullness. Morris v. State [Ala.] 41 So. 274. Instruction defining with specific reference to facts in the case assault with intent to kill held not to assume facts or single out particular evidence. Odom v. State [Fla.] 40 So. 182. Instruction as a whole held to correctly define murder in first degree though statutory word "purposely" is omitted. Reed v. State [Neb.] 106 N. W. 649. Charge as to the necessity of overt act to assault held to sufficiently require that it be an actual physical act. Williams v. State, 125 Ga. 235, 54 S. E. 186. In defining murder and manslaughter the court is not confined to the terms of the statute but may use common-law definitions so far as they are applicable. State v. Stukes, 73 S. C. 386, 53 S. E. 643. Instruction that defendant cannot be convicted of "murder" unless certain elements peculiar to one degree of murder coexist properly refused. State v. Legg [W. Va.] 53 S. E. 545. Instruction as to aiding and abetting approved. State v. Worley [N. C.] 53 S. E. 128. In a prosecution under Kansas Crimes Act § 42, for infliction of bodily harm under such circumstances that had death ensued it would have been "murder or manslaughter," it is sufficient to define those offenses as at common law and the degrees thereof under the statutes need not be defined. State v. Ireland, 72 Kan. 265, 83 P. 1036.

Malice and premeditation: Instruction as to right to find malice aforethought from deliberate shooting sustained. Covington v. People [Colo.] 85 P. 832. Instruction defining malice aforethought approved. State v. Wetter [Idaho] 83 P. 341, citing 2 Blashfield, Instructions, 611. Instruction that while interval of premeditation may be short the jury are to take into consideration the shortness of such interval in determining whether the act should not be attributed to passion rather than deliberation approved. People v. Gallanar [Cal. App.] 86 P. 814. [This instruction is distinctly argumentative in defendant's favor. It is probable that the real cause of objection to it was that it tended toward a conviction of manslaughter, which defendant contended should not have been submitted on the evidence. Ed.] Instruction that malice aforethought was manifested by an unlawful act done intentionally and without legal cause or excuse, and does not imply pre-existing enmity, approved. People v. Fallon [Cal.] 86 P. 689. An instruction that it is necessary that the killing "be preceded by" a concurrence of will, deliberation, and premeditation without stating that it must be "the result of" such concurrence is error. People v. Maughs [Cal.] 86 P. 187. Instruction held not erroneous as confusing malice and wickedness. State v. Miller, 73 S. C. 277, 53 S. E. 426. Instructions held to properly define malice. Mann v. State, 124 Ga. 760, 53 S. E. 324. Instructions relating to specific as distinguished from general intent to kill are properly made inapplicable to murder in the second degree. State v. Seery, 129 Iowa, 259, 105 N. W. 511. Instruction omitting malice aforethought sustained in view of other instructions. State v. Houk [Mont.] 87 P. 175. Instruction for acquittal if malice of codefendant was not participated in by accused properly refused as excluding issue as to manslaughter. Morris v. State [Ala.] 41 So. 274. Definition of malice aforethought as predetermination to kill is error for not requiring absence of legal excuse. Hill v. Com., 28 Ky. L. R. 1320, 91 S. W. 1123. Instructions that premeditation need only be momentary sustained. Franklin v. State [Ala.] 39 So. 979. Instruction that to convict the jury must believe that the offense was committed willfully, deliberately, and with premeditation properly refused where the evidence warranted submission of second degree. Id.

Manslaughter: Error in definition of heat of passion harmless where jury convicted of murder in first degree. State v. Fuller [Mont.] 85 P. 369. Instruction as to manslaughter on sudden combat approved in the absence of request for specific explanation of some of its clauses. Robinson v. Territory, 16 Okl. 241, 85 P. 451. An instruction defining voluntary manslaughter as killing upon sudden quarrel "and" heat of passion is error. People v. Maughs [Cal.] 86 P. 187. Instruction as to mutual combat held sufficient. State v. Andrews, 73 S. C. 257, 53 S. E. 423. Instruction to convict of manslaughter if killing was in heat of passion "and" on sudden affray is error. Smith v. Com. [Ky.] 92 S. W. 610. Instruction as to heat of passion held improperly refused. Miller v. State [Ala.] 40 So. 342.

50. Instruction on self-defense held fully covered by those given. State v. Smith, 115 La. 801, 40 So. 171. Instructions on self-defense approved. Reed v. State [Neb.] 106 N. W. 649; Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795. Instruction that father may kill in defense of his son whenever he would have a right to kill in his own defense properly refused for failure to state the elements of self-defense. Morris v. State [Ala.] 41 So. 274. Where it appears that the first shot was not fired in self-defense and there is much evidence that the second was, an instruction on self-defense based on the hypothesis that the deceased was not killed by the first shot should be given. Mathison v. State [Miss.] 40 So. 801. An instruction requiring that defendant should have armed himself for his own defense is erroneous as the purpose of aiming is immaterial if he acted in self-defense. Instruction held harmless in view of others. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795. Inaccurate charge on self-defense held not misleading under the evidence. Little v. Com. [Ky.] 91 S. W. 1131. Instruction as to careful consideration of past relation of parties, on an issue of self-defense, held not to direct jury to resort to speculations outside the evidence. People v. Gallanar [Cal. App.] 86 P. 814. The sections of the statute relating to self-defense on sudden attack and self-defense in mutual combat should not be given in such conjunction as to confuse the jury. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Instruction that threats did not justify killing held error as withdrawing such threats from consideration on issue of reasonableness of defendant's apprehension. Clay v. State, 124

Ga. 795, 53 S. E. 179. If the law of self-defense is fully given, failure to refer to it while charging on manslaughter is not error. Williams v. State, 125 Ga. 265, 54 S. E. 167. Answer to question by jury as to whether accused was justified if person assailed fired first held too vague and general. Mathews v. State, 125 Ga. 50, 54 S. E. 196. Instruction to look to fact that deceased was armed and had made threats in determining whether he made a hostile demonstration, argumentative. Hill v. State [Ala.] 41 So. 621. Instruction that threats by deceased were to be considered only in determining who was aggressor and the reasonableness of defendant's apprehensions held proper. Long v. State [Ark.] 91 S. W. 26. Instruction held erroneous as excluding from consideration previous threats of deceased. Stevenson v. State [Ala.] 41 So. 526. Instruction for acquittal on reasonable doubt whether the killing was in self-defense properly refused for failure to state the elements of self-defense. Morris v. State [Ala.] 41 So. 274; Miller v. State [Ala.] 40 So. 342; Allen v. State [Ala.] 41 So. 624. Definition of justifiable homicide in the language of the statute is not error. Parsons v. People, 218 Ill. 386, 75 N. E. 993. Instruction on self-defense that the fact that one is in his own dwelling serves as a warning against intrusion properly refused as argumentative. Pearson v. State [Ala.] 41 So. 733.

Freedom from fault: Instruction on self-defense must hypothesize defendant's freedom from fault. Smith v. State [Ala.] 40 So. 957; Patterson v. State [Ala.] 41 So. 157; Outler v. State [Ala.] 41 So. 460; Kennedy v. State [Ala.] 40 So. 658. Must hypothesize that accused did not willingly enter into the altercation. Patterson v. State [Ala.] 41 So. 157. Where defendant entered into an altercation in support of his wife, an instruction on self-defense should hypothesize not only his freedom from fault but his wife's. Williams v. State [Ala.] 40 So. 405. Instruction that defendant must show that he was free from fault in bringing on the difficulty error as shifting burden of proof. Brown v. State [Ala.] 39 So. 719. Requested instruction as to defendant's freedom from fault in bringing on the difficulty held to ignore evidence. Franklin v. State [Ala.] 39 So. 979.

Provocation of difficulty: Instruction that if defendant was the aggressor and deceased having reasonable ground to believe his life in danger fired, defendant was not justified in returning the fire, approved. Von Haller v. State [Neb.] 107 N. W. 233. Instruction as to aggression by defendant, who was shown to have armed himself and sought out deceased, approved. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Instruction that one who with intent to kill provokes a conflict and kills therein cannot justify the killing held erroneous for not requiring that the killing be in pursuance of the original intention. Herring v. State [Miss.] 40 So. 230. An instruction on provocation of difficulty requiring that defendant should have armed himself for the purpose of killing deceased, while erroneous, is not prejudicial to defendant. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795. Instruction as to apparent danger must negative willingness of accused to enter into the altercation. Morris v. State [Ala.] 41 So. 274. The charge on provocation of difficulty should not be introduced into the instruction which presents the right of self-defense. Sprinkle v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 323, 91 S. W. 787. It is error to single out an act of defendant which is of ambiguous character in an instruction on provocation of difficulty. Id. Instructions on self-defense held properly refused as failing to negative encouragement of the altercation by defendant and willingness to enter into it. Raines v. State [Ala.] 40 So. 932.

Actual or apparent danger: Instruction held erroneous as making justification dependent on actual danger. Weston v. State [Ind.] 78 N. E. 1014; People v. Wright [Mich.] 13 Det. Leg. N. 280, 108 N. W. 92; State v. Morris, 128 Iowa, 717, 105 N. W. 213; State v. Mount [N. J. Err. & App.] 64 A. 124. Instruction held not erroneous as requiring necessity to be actual. State v. Miller, 73 S. C. 277, 53 S. E. 426. Instruction that danger must be such as to create apprehension in person of "ordinary courage, judgment and observation" approved. Von Haller v. State [Neb.] 107 N. W. 233. Use of the words "sound reason" and "honest belief" in reference to defendant's apprehension of danger is not erroneous. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Instruction that defendant was justified if immediate and great bodily harm "would be the apparent consequence" of waiting for the assistance of the law is correct. State v. Lilliston [N. C.] 54 S. E. 427. Charge that "bare fear" of the perpetration of a felony on defendant's person was not sufficient not error. Campbell v. State, 125 Ga. 752, 54 S. E. 666. Instructions as to reasonable appearance of danger sustained. State v. Houk [Mont.] 87 P. 175. Instruction held to sufficiently present right of accused to act on honest belief of danger. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 S. W. 1044. Instruction on apparent danger held properly refused because not requiring appearances to be reasonably sufficient. Neilson v. State [Ala.] 40 So. 221. An instruction that it was not enough that defendant believed himself in danger unless facts showing reasonable cause for such belief appeared is proper. State v. Beckner, 194 Mo. 281, 91 S. W. 892. Where after an altercation deceased followed defendant and began another quarrel ending in the homicide, an instruction on self-defense confining defendant's grounds for apprehension to what took place at the second altercation is error. Moseley v. State [Miss.] 41 So. 384. Instructions on self-defense properly modified by inserting requirement that defendant must have acted from reasonable present fear. Regan v. State [Miss.] 39 So. 1002. Instruction omitting requirement that overt acts of deceased might reasonably induce and did induce fear of imminent death or injury properly refused. Id. Instruction as to self-defense held properly refused as tending to mislead the jury into believing that it was not necessary that accused should believe himself in danger. Ledbetter v. State [Ala.] 39 So. 618. Must hypothesize defendant's belief that he was in imminent peril. Jackson v. State [Ala.] 41 So. 178. Instruction hypothesizing brandishing of ax by deceased and threat to kill but not apparent im-

(§ 8) *C. Verdict.*[53]

(§ 8) *D. Punishment.*[54]—Where a witness stood within a few feet of accused at the time of the homicide, the case is not one of circumstantial evidence within a statute forbidding the death penalty on such evidence, though the witness was not looking at accused when the shot was fired.[55]

HORSE RACING; HORSES; HOSPITALS; HOUSES OF REFUGE AND REFORMATORIES, see latest topical index.

HUSBAND AND WIFE.[56]

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§ 1. *Disabilities of coverture in general; statutory relaxations.*[57]—The common-law disabilities of married women, arising from the doctrine of the unity of

minence of danger properly refused. Patterson v. State [Ala.] 41 So. 157. Instruction properly modified to require that the attack afford reasonable ground for apprehension. State v. Lejeune, 116 La. 193, 40 So. 632. Instruction on self-defense held properly refused because not hypothesizing impending necessity. Smith v. State [Ala.] 40 So. 957. Instruction authorizing defense only against unlawful "and violent" assault is error. Sprinkle v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 323, 91 S. W. 787. Not hypothesizing that apprehension of injury was reasonable properly refused. Glass v. State [Ala.] 41 So. 727.

Withdrawal or retreat: Instruction ignoring right of aggressor to act in self-defense after attempt to withdraw held cured by other instructions. Clingan v. State [Ark.] 91 S. W. 12. Instruction that one attacked in his dwelling house need not retreat held properly refused because assuming that defendant was attacked. Pearson v. State [Ala.] 41 So. 733. Instructions on withdrawal from combat must hypothesize actual withdrawal and good faith. Collock v. State [Ala.] 41 So. 727. Must have reasonably believed that he had no other means of escape from death or great bodily harm. Commonwealth v. Johnson, 213 Pa. 432, 62 A. 1064. An instruction as to the duty of defendant to "decline further struggle" is misleading where the evidence shows sudden assault on him. Flynn v. People, 222 Ill. 303, 78 N. E. 617. Instruction as to right of accused to act in self-defense, though he was the original aggressor, held not to state with sufficient fullness the withdrawal which is pre-

husband and wife, have been largely removed by modern legislation.[58] Where the unity of legal identity and property in the husband has, by statute, been replaced by the equality of each in legal identity and ownership of property, the power of contracting with others and with each other is a necessary consequence.[59] The power to contract being thus created includes or involves the right to an appropriate remedy for violation of contract.[60] Property rights may also be enforced by the

requisite to such right. McCurley v. State [Ala.] 39 So. 1022. Instructions ignoring duty to retreat properly refused. Jackson v. State [Ala.] 41 So. 178. Instruction requiring that there be "no means" of avoiding danger is error. Austin v. Com., 28 Ky. L. R. 1087, 91 S. W. 267.

Extent of force used or warranted: An instruction that an assault without a deadly weapon "did not justify defendant in shooting at" his assailant is error where defendant's testimony was that he fired only to frighten. Cunningham v. State [Miss.] 39 So. 531. An instruction that defendant had the right to use such force as was necessary to avert the real or apparent danger "and no more" is error. Carroll v. Com. [Ky.] 92 S. W. 308. An instruction that defendant had no right to use a deadly weapon to eject a trespasser is not erroneous for failing to contain the qualification, given elsewhere in the charge, that he might use such weapon if the trespasser resisted by felonious assault. State v. Mitchell [Iowa] 107 N. W. 804.

51. Instruction to acquit if the homicide was accidental unless it was due to "criminal carelessness" should define criminal carelessness. State v. Legg [W. Va.] 53 S. E. 545. Instruction as to right to discharge a gun for pleasure on one's own premises held sufficiently favorable to defendant. People v. Sauer [Mich.] 12 Det. Leg. N. 999, 106 N. W. 866.

52. Instructions on effect of intoxication approved. State v. Johnny [Nev.] 87 P. 3. Instruction in language of statute on effect of intoxication on intent held sufficient. State v. Kapelino [S. D.] 108 N. W. 335. Instruction on effect of drunkenness on capacity to form intent should be given. Brennan v. People [Colo.] 86 P. 79. Instruction that intoxication is no defense or excuse, without referring to its effect on capacity to form intent, error. State v. Bennett, 128 Iowa, 713, 105 N. W. 324.

53. See 5 C. L. 1730. See Indictment and Prosecution, 8 C. L.

54. See 5 C. L. 1730.

55. Mills' Ann. St. § 1176. Covington v. People [Colo.] 85 P. 832.

56. Scope of title: The relationship created by marriage. and the rights and liabilities arising therefrom, are here treated. The formation of the relation (Marriage, 6 C. L. 515), its dissolution (Divorce, 7 C. L. 1175), annulment (Marriage, 6 C. L. 515), and suit money in such proceedings or support by way of alimony (Alimony, 7 C. L. 104), are specifically treated in other articles. See, also, Parent and Child, 6 C. L. 877 (custody of children).

57. See 5 C. L. 1731. See, also, post §§ 2 B, 3 C, 3 D, 3 E, and §§ 7 and 10.

58. Act April 20, 1877, destroys unity and makes spouses equal in legal identity and ownership of property. Mathewson v. Mathewson [Conn.] 63 A. 285. On effect of Kansas statutes in changing common law and placing married women on equality with others, see Harrington v. Lowe [Kan.] 84 P. 570.

59. Mathewson v. Mathewson [Conn.] 63 A. 285. See, also, § 2 B.

60. Under Act April 20, 1877, husband may give valid promissory note to wife and she may sue thereon. Mathewson v. Mathewson [Conn.] 63 A. 285.

NOTE. Effect of modern legislation on rights of married women: The following excerpt from the opinion in Mathewson v. Mathewson [Conn.] 63 A. 285, illustrates the change that has taken place in many of the states:

"In 1877 (when the reform act of Connecticut took effect) the law defining the legal status of married persons stood thus: By force of the marriage the husband acquired a life estate (under some circumstances during the wife's life only) in all property, real or personal, then owned or subsequently acquired by the wife. He acquired the control of the fee or reversion of all this property so that it could not be disposed of without his consent. He retained his own legal identity, the absolute ownership and control of his own property, and all the civil rights and powers belonging to an unmarried man; but, by reason of the merger of the wife's legal identity in his own, he could not contract with her. He became legally charged (so far as they might be enforced through law) with those duties of support and affection inherent in the relation of man and wife. By force of the marriage the wife acquired a right to support by her husband, but no right to charge his estate with this support unless through an agency, real or fictitious. Her capacity to own or acquire property became suspended. The management, income, and profits of her property vested solely in her husband. Her legal identity was lost in his, and therefore she had no power to make a contract with anyone, except a contract of necessity by which she might, with the consent of her husband, dispose of the fee or reversion of her property, and like him, she became charged with the duties of affection and assistance inherent in the marriage relation. When, however, the beneficial interest in property came to a married woman under the protection of a trustee, her rights in respect to such property came within the jurisdiction of equity, and, in entering that court in pursuance of that jurisdiction, man and wife alike dropped the legal status, and the incidents flowing from that status ceased to exist. In equity they were not one person, but two distinct persons, each capable of owning, enjoying, and disposing of property within equity jurisdiction, and conse-

wife in a court of equity even as against the husband, and though neither the common law nor any statute provides such a remedy.[61] Statutes repealing the disabilities of coverture are not retroactive.[62]

§ 2. *Mutual duties, obligations, and privileges. A. Inherent in the relationship.*[63]—The husband has the exclusive right to select the matrimonial domicile, and the wife is bound to follow him wherever he chooses to reside.[64] But the rule that the domicile of the wife is that of the husband does not apply where the wife has been wrongfully deserted by the husband;[65] in such case she may have a domicile in a state other than that in which the husband resides.[66] The status of the husband as head of the family is not affected by the fact that the family resides on premises owned by the wife.[67] The duty of the husband to support his wife and family, and the enforcement of that duty, are treated in a succeeding section.[68]

quently each capable within that jurisdiction of making contracts with all the world, and with each other, and of suing and being sued.

"The quasi equitable status recognized in courts of equity remains, within its prescribed and rapidly lessening limits, substantially unchanged. The foundation of the legal status, namely, the unity in the husband of his own and his wife's legal identity and capacity to own property, was removed, and a new foundation, namely, equality of husband and wife in legal identity and capacity of owning property, was laid by the act approved April 20, 1877 (Pub. Acts 1877, p. 211, c. 114; Revision 1902, §§ 4545, 4546, 391, 392). This legislation is remedial, not as ameliorating an existing evil, but as eradicating that evil. It is in the nature of fundamental legislation involving all of the results necessarily flowing from the principle established. The equal capacity to own property and the equal identity necessarily involve an equal power of making contracts and a power of contracting with each other. Such result has followed a similar radical change in other jurisdictions. May v. May, 9 Neb. 16, 2 N. W. 221, 31 Am. Rep. 399; Wilson v. Wilson, 36 Cal. 447, 95 Am. Dec. 194; Harrell v. Harrell, 117 Ind. 94, 19 N. E. 621; Wilson v. Wilson, 113 Ind. 415, 15 N. E. 513; Hamilton v. Hamilton, 89 Ill. 349; Bea v. People, 101 Ill. App. 133; Clark v. Clark, 49 Ill. App. 163; Thomas v. Mueller, 106 Ill. 36; Snell v. Snell, 123 Ill. 403, 14 N. E. 684, 5 Am. St. Rep. 526; Going v. Orns, 8 Kan. 85; Crater v. Crater, 118 Ind. 521, 21 N. E. 290, 10 Am. St. Rep. 161; Wood v. Wood, 83 N. Y. 575; Minier v. Minier, 4 Lans. [N. Y.] 421; White v. White, 58 Mich. 546, 25 N. W. 490; Howland v. Howland, 20 Hun [N. Y.] 472; McKendry v. McKendry, 131 Pa. 24, 18 A. 1078, 6 L. R. A. 506; Small v. Small, 129 Pa. 366, 18 A. 497. In the cases cited, and others that might be cited, courts differ somewhat in the application of the rule, owing mainly to the different legislative processes by which the change in status has been partially or fully accomplished, but all are consistent with the unquestionable proposition that, where the unity of legal identity and property in the husband has been replaced by the equality of each in legal identity and ownership of property, power of contracting with others and with each other is a necessary consequence."

The precise question passed upon by the court in the case of Mathewson v. Mathewson had never before been before the court. Numerous Connecticut cases are cited, however, which tend to support the position taken, that a wife may contract with her husband and sue him for a breach of such contract.

Coverture, as affecting capacity to be principal or agent, see Clark & Skyles, Agency, pp. 47, 62, 68. Effect to revoke agency, see Clark & Skyles, Agency, p. 450.—Special article, 4 C. L. 1295.

61. P. L. 1893, 158, prohibiting actions by married woman against husband, did not apply to suits in equity. Heckman v. Heckman [Pa.] 64 A. 425. Wife may maintain bill to set aside deed of separate property procured by husband on ground of fraud, undue influence, and want of consideration. Id.

62. In North Carolina adverse possession could not be counted against a married woman prior to February 13, 1899. Norcum v. Savage, 140 N. C. 472, 53 S. E. 289.

63. See 5 C. L. 1731.

64. No abandonment by husband where wife refused to come to home fixed by him. Birmingham v. O'Neil, 116 La. 1085, 41 So. 323. It is wife's duty to accept such residence as the husband may, without unwarranted parsimony or stubbornness, select. Klein v. Klein [Ky.] 96 S. W. 848. It is the right and privilege of the husband to fix in good faith a domicile for himself and wife, and when he does so it is the duty of the wife to follow her husband to such domicile and live with him there as his wife. Price v. Price [Neb.] 106 N. W. 657. A mere asylum at the sufferance of a stranger is not a home. Bernsdorff v. Bernsdorff, 26 App. D. C. 520.

65. Gordon v. Yost, 140 F. 79. Matrimonial domicile remains unchanged when husband abandons wife without justification. It does not follow that of husband. State v. Morse [Utah] 87 P. 705. See, also, Divorce, 7 C. L. 1175.

66. Where husband deserted wife and lived in another state with a paramour, federal court had jurisdiction of her action against the paramour for alienating her husband's affections. Gordon v. Yost, 140 F. 79. Where parties lived in Utah and husband deserted wife, her domicile, for purposes of bringing action for divorce, remained unchanged and did not follow that of the husband. State v. Morse [Utah] 87 P. 705.

67. That a married woman allows her husband to keep dogs on their home premises, which she owns, does not make her the "owner" of the dogs within the meaning of

(§ 2) *B. Contracts or other dealings.*[69]—The common-law rule that husband and wife cannot contract with each other still prevails in some jurisdictions,[70] and in some states contracts made through a third person are also void.[71] Statutes removing the disabilities of coverture have, however, in many jurisdictions, enabled the spouses to make valid contracts with each other directly.[72] In Massachusetts a promissory note made by a husband to his wife is void and cannot be enforced against the husband by any subsequent holder,[73] but if the wife indorses it to a holder in due course, she is bound by her contract of indorsement and may be compelled to pay it.[74] A statutory right to elect against a jointure does not apply to release a wife from a family settlement not intended to make provision in lieu of marital rights.[75]

Unlike antenuptial contracts, marriage is not a consideration sufficient to support a post-nuptial contract.[76] A post-nuptial contract providing merely that each spouse is to hold as his or her separate property the property each possessed before the marriage, and that the survivor is to have no claim to or interest in the property of the other, unaccompanied by mutual transfers of property or releases of marital rights, is not binding upon either.[77] Either spouse may, notwithstanding such agreement, repudiate a testamentary disposition of the other and claim marital rights in such other's estate conferred by law.[78]

Gifts.[79]—A gift from husband to wife, not made in prejudice of creditors, evidenced by a deed duly executed and recorded, is valid, and needs no consideration other than the marital relation to support it.[80] Where the husband buys property, placing title in the wife, the presumption is that he intended it as a provision for her.[81] In Louisiana interspousal donations are always revocable save as against third persons acquiring title by prescription of ten years.[82] Donations made by one spouse to the other before marriage are within the Louisiana statute providing

Code § 2340, making such owner liable for damage done by dogs. Burch v. Lowary [Iowa] 109 N. W. 282.

68. See § 11, post.

69. See 5 C. L. 1732.

70. Husband and wife cannot contract between themselves. Such a contract would be void. Spurlock v. Spurlock [Ark.] 96 S. W. 753. Husband cannot make valid note to wife for loan. Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515.

71. Note from husband to son, indorsed by son to wife immediately, for loan from wife to husband, held void. Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515.

72. In Missouri husband and wife have full power and authority to contract with each other concerning property rights during coverture. Agreement by husband to convey to wife certain property in full satisfaction of all claims for dower, alimony, or maintenance, upheld. O'Day v. Meadow, 194 Mo. 588, 92 S. W. 637. Under law of May, 1899, husband and wife could contract with each other respecting property rights. Joint and mutual wills held enforceable. Bower v. Daniel [Mo.] 95 S. W. 347. A married woman may assign directly to her husband her right of action against a carrier for loss of her personal baggage. Rossier v. Wabash R. Co., 115 Mo. App. 515, 91 S. W. 1018. Under Act April 20, 1877, creating equality of husband and wife, note of husband to wife is valid and wife may sue thereon. Mathewson v. Mathewson [Conn.] 63 A. 285.

73. Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781.

74. Firm of which husband was manager made a note and husband indorsed it and procured indorsement of wife, and he then negotiated it to bank. Wife was liable as accommodation indorser under Rev. Laws c. 73, §§ 82, 83. Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781.

75. A certain family settlement held not a jointure within Burns' Ann. St. 1901, §§ 2663, 2665, so as to entitle the wife to repudiate it on the ground that she had a right of election after the death of the husband, where the husband had only a life estate in certain land at the time of its execution. Case v. Collins [Ind. App.] 76 N. E. 781.

76, 77, 78. Unger v. Mellinger [Ind. App.] 77 N. E. 814.

79. See 5 C. L. 1732.

80. Deed of gift, made when there were no creditors, held valid. Savage v. Savage [C. C. A.] 141 F. 346.

81. Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105. See, also, 5 C. L. 1732, n. 10. Where the title to real estate is in a wife, evidence that the funds for its purchase and improvement were furnished by the husband does not afford ground for declaring that she holds in trust for him and his heirs. Bernhardt v. Bernhardt, 7 Ohio C. C. (N. S.) 517.

82. Title by prescription held good. Construing together Civ. Code articles 1749 and 3478. Leverett v. Loeb [La.] 41 So. 584.

that a spouse who marries a second time forfeits to the children of the first marriage all property acquired by donation from the deceased spouse.[83]

Antenuptial contracts.[84]—Antenuptial contracts executed without fraud and with full knowledge, settling the property rights of the parties, are not contrary to public policy[85] but are valid and enforceable according to their terms,[86] even where rights of the parties under such contract differ from those conferred by law.[87] Marriage is a sufficient consideration to support such a contract.[88] If, however, the provision made by such contract for the intended wife is disproportionate to the means of the intended husband, there is a presumption in her favor that the execution of the agreement was induced by a designed concealment of his means by the intended husband,[89] and the burden is upon him, or those claiming under him, to show that she had full knowledge, at the time, of the nature, character, and value of the intended husband's property, or that the circumstances were such that she reasonably ought to have had such knowledge.[90] The facts that the parties were well acquainted and lived near each other, and that the intended husband was reputed wealthy, do not charge the intended wife with such knowledge,[91] nor is the fact that a relative knew the financial condition of her intended husband sufficient.[92] What property is included within the scope of an antenuptial contract depends upon the intention of the parties as shown by the language of the contract and the surrounding facts and circumstances.[93] An antenuptial contract does not bar the right to a widow's award where it does not specifically release the same nor employ words capable of such construction,[94] but a contract whereby each party renounces

83. Civ. Code, art. 1753. Didlake v. Cappel, 116 La. 844, 41 So. 112.

84. See 5 C. L. 1733. Also note, "Antenuptial conveyance by husband in fraud of wife's marital rights," 5 C. L. 1736.

85. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63.

86. Antenuptial contracts settling and adjusting the property rights of the parties are valid and enforceable (Watson v. Watson [Ind. App.] 77 N. E. 355), when free from fraud and imposition and when they contain no provisions contrary to public policy (Id.). Parties who contemplate marriage may by an antenuptial contract, if there is a full knowledge on the part of the intended wife of all that materially affects the agreement, settle their property rights in each other's estates. Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57. Where by antenuptial contract each party released all claims on the other's property except as to any testamentary provision that might be made by one for the other, and the husband, dying, left $100,000 by will to his widow and left $60,000 undisposed of, she was not entitled to the property not disposed of. In re Birkbeck's Estate [Pa.] 64 A. 536. An antenuptial contract provided that wife should receive, in lieu of dower, the interest on a sum named. Held taxes on such sum were payable out of the interest. Dulaney's Adm'r v. Dulaney [Va.] 54 S. E. 40.

87. An antenuptial agreement will be effective to control the marital rights of each spouse in the property of the other, though the law may provide a different rule. Unger v. Mellinger [Ind. App.] 77 N. E. 814.

88. Antenuptial settlement. Unger v. Mellinger [Ind. App.] 77 N. E. 814; Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63; Savage v. Savage [C. C. A.] 141 F. 346. Where each party waived and quitclaimed all rights in the property of the other, the marriage and the mutual covenants constituted a sufficient consideration. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63. When a woman, capable of contracting marriage, and who assumes that the man with whom she contracts is also capable of doing so, agrees to marry him, her promise is a sufficient consideration to support an agreement by him to make a marriage settlement. Hosmer v. Tiffany, 100 N. Y. S. 797.

89. Provision disproportionate where wife was given life estate in homestead and $1,500, and husband owned life estate in large estate and was worth $35,000 at his death. Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57.

90. Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57. An antenuptial contract will be set aside where it appears that the affianced husband did not fully and fairly acquaint his future wife with the means at his disposal. Murdock v. Murdock, 121 Ill. App. 429.

91. Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57.

92. Knowledge of son-in-law, uncommunicated to her, did not bind her. Murdock v. Murdock, 219 Ill. 123, 76 N. E. 57.

93. Kleb v. Kleb [N. J. Eq.] 62 A. 396. Antenuptial contract made in Germany, at a time when neither party owned any property, by the terms of which the surviving spouse was made the sole heir of the predeceased spouse, held applicable to land in New Jersey, acquired by husband several years after the marriage. As to such land in New Jersey the contract was enforceable by the widow against the husband's heirs. Id.

94. Pavlicek v. Roessler, 121 Ill. App. 219.

and releases all rights in or claims to the property of the other constitutes a release by the wife of the right to a widow's award after the death of the husband and bars such right where there are no minor children surviving.[95] A contract between parties who had been divorced, whereby the divorced wife releases property of the husband from the lien of a decree for alimony, and the husband agrees to pay an annuity for life, in lieu of alimony, made upon contemplation of a remarriage, is valid.[96]

Agreements for separation and for separate support.[97]—Mere contracts for separation[98] and contracts looking to and tending to promote separation[99] are void as against public policy and do not bar the enforcement of legal marital rights.[1] But where a separation exists as a fact and is not produced or occasioned by the contract, an agreement that the parties will continue to live apart and that the husband will pay a certain sum for the maintenance of his wife and children is valid and enforceable[2] according to its terms.[3] Such a contract is sometimes made through a trustee,[4] but may be made by the parties directly without the intervention of a trustee.[5] A contract between a husband and wife for separation and a conveyance of the wife's property to the husband will be cancelled at the suit of the wife unless it clearly appears to be fair, just, equitable, and wholly free from exception.[6] Where parties who have separated and made a separation agreement become reconciled and enter into a new agreement, the entire separation contract falls.[7] An agreement between husband and wife whereby he agrees to convey certain lands to her in satisfaction of all

95. Kroell v. Kroell, 219 Ill. 105, 76 N. E. 63.

96. Savage v. Savage [C. C. A.] 141 F. 346.

97. See 5 C. L. 1733.

98. A mere contract between a husband and wife, then living together, to separate and live apart in the future, is contrary to public policy and void. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 286.

99. An antenuptial contract stipulating that in case of a separation the husband should pay the wife a certain sum, and that all other rights and claims of the parties should be waived, is contrary to public policy and void. Watson v. Watson [Ind. App.] 77 N. E. 355.

1. Contract fixing property rights in case of separation held not to bar wife's right to alimony in divorce action by her. Watson v. Watson [Ind. App.] 77 N. E. 355.

2. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 286. While divorce suit by wife was pending, parties became reconciled and a contract was entered into whereby it was agreed that if the wife should be compelled by the husband's conduct to leave him again he should pay her $50 a month in lieu of her contingent interest in his property. Held the contract was valid and not contrary to public policy, since parties were living apart when it was made and it allowed the wife no more than the court would have allowed in a suit for alimony without divorce. Woodruff v. Woodruff, 28 Ky. L. R. 757, 90 S. W. 266. Wife cannot recover attorney's fee in action to enforce above contract. Woodruff v. Woodruff, 28 Ky. L. R. 1082, 91 S. W. 265, denying a rehearing.

3. Where contract provided that wife should be paid for boarding husband's daughter, he was liable for such board after the daughter reached her maturity. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 286. Husband gave certain securities and agreed to see that she had an income of $1,000 and to make up the deficiency if securities did not produce that sum. Held, no accounting was necessary to determine husband's liability. Id. Where husband assigned one-half the income of a trust fund to his wife for her support and that of the children, no mention being made of wife's representatives, it was held that after the wife's death the children had no interest in the fund, but the husband then became solely entitled thereto. Wright v. Leupp [N. J. Eq.] 62 A. 464.

4. An agreement by a husband to pay a regular allowance to a trustee for the support of his wife, the trustee and the wife agreeing to hold him harmless from any other liability for her support, is valid. Domestic Relations Law (Laws 1896, p 220, c. 272, § 21), prohibiting contracts to alter or dissolve the marriage, or to relieve the husband from liability for support, does not render such contract invalid. Reardon v. Woerner, 111 App. Div. 259, 97 N. Y. S. 747.

5. Effray v. Effray, 110 App. Div. 545, 97 N. Y. S. 286.

6. Hartigan v. Hartigan, 58 W. Va. 610, 52 S. E. 720. Contract provided for perpetual separation, for conveyance of property of wife worth $10,000 or $12,000 to husband, that wife should have custody of 5 children and should support them, that husband should have certain rooms in the house and pay $50 a month to the wife, the agreement to continue until youngest child reached majority. Agreement set aside. Id.

7. As a part of a separation agreement a wife assigned to her husband her interest in a policy of insurance on his life. They were later reconciled. Held the assignment of the policy fell with the consideration, though

claims for dower, alimony, and maintenance is not rescinded by a suit for divorce and alimony by the wife wherein the husband makes no defense, and the court awards alimony without regard to the terms of the executed contract between them.[8] An agreement by one spouse not to defend an action by the other for a divorce is contrary to public policy and void.[9] A husband, who by written agreement receives money from his wife and agrees that she may take the children, leave, and obtain a divorce at her pleasure, cannot maintain an action against those whom he charges with carrying out said agreement and procuring such divorce.[10]

Conveyances, mortgages, and contracts concerning realty.[11]—Where by an oral agreement between the husband and wife the wife is to convey a portion of certain land to the husband in consideration of his agreement to join her in a deed of the remainder to her children, and the wife conveys, a court of equity will specifically enforce the agreement of the husband to convey to the children.[12] Where a husband conveys property to his wife who has been estranged from him upon her promise to renew marital relations with him and she fails to keep her promise, the husband is entitled to a cancellation of the deed.[13] It is held in Indiana that an oral agreement of the wife to hold land purchased by the husband and conveyed to the wife in trust for him, prior to the married woman's act, does not create a constructive trust in favor of the husband.[14] In Georgia it is held that a transfer by a married woman to her husband of a bond for titles, upon the consideration that he carry out her obligations as to the payment of the debt therein referred to, is a sale by the married woman of her separate property and is invalid, in the absence of an order of the superior court of her domicile allowing the same.[15] The payment by the husband of the debt referred to in the bond under such circumstances is a mere voluntary payment and will not entitle him to be subrogated to the rights of the creditor.[16]

§ 3. *Property rights inter se. A. In general.*[17]—The general rule is that the husband or wife cannot, while living together and in the joint possession of real estate, acquire title one against the other by prescription.[18] In such case both are presumed to occupy the premises in subordination to the title under which possession was taken in whichever of the parties it may be, and not in hostility to such title.[19] The inchoate interest of one spouse in the lands of another is not an estate which can be separately conveyed.[20] Conveyance of the real estate of the parties must be by joint deed where the law so requires.[21] Usually contracts to convey, or deeds

the reconciliation agreement did not mention it. Dudley v. Fifth Ave. Trust Co., 100 N. Y. S. 934.

8. O'Day v. Meadow, 194 Mo. 588, 92 S. W. 637.

9. A contract whereby a wife agrees to give her husband a note in consideration of his agreement not to defend an action for divorce by her is void as against public policy. Johnson v. Johnson's Committee, 28 Ky. L. R. 937, 90 S. W. 964. The parties thereto have the rights fixed by law prior to the execution of such contract. Id.

10. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

11. See 5 C. L. 1734.

12. The marital relation does not bar relief in a court of equity. Kittredge v. Kittredge [Vt.] 65 A. 89. The contract is taken out of the statute of frauds by the wife's performance. Id. The fact that Acts 1896, p. 42, No. 49, authorizing a court of equity to empower a wife, on her petition, to convey by separate deed, is unconstitutional, as depriving the husband of his property without due process, is not relevant to this suit. Id.

13. Held that wife intended to defraud husband and to renew relations with her paramour, as she did after the conveyance to her. Jennings v. Jennings [Or.] 85 P. 65.

14. Agreement prior to Acts 1881, p. 527, c. 60. Shipley v. Shipley [Ind. App.] 77 N. E. 965.

15, 16. Webb v. Harris, 124 Ga. 723, 53 S. E. 247.

17. See 5 C. L. 1735.

18. McPherson v. McPherson [Neb.] 106 N. W. 991.

19. Husband living on land with his wife claimed under tax title void on its face. Later he quitclaimed to his wife through a third person. Before his wife had acquired title by prescription he acquired the patent title but did not record it nor assert it in

of, the homestead, must be joint, or at least consented to by both parties,[22] and this is especially true of homestead, dower and curtesy.[23] A wife has an interest in the homestead of herself and husband, though the legal title is in him, and is entitled to the peaceful and quiet enjoyment thereof, and any unlawful invasion of such right is a legal wrong against her for which she may maintain an action.[24]

(§ 3) *B. Rights of husband in wife's property.*[25]—The subject of curtesy is elsewhere discussed.[26] In the absence of any consent or agreement, either expressed or implied, on the part of the husband that the earnings of the wife shall be retained by her as her separate estate, they belong to him.[27] Statutes vesting in a married woman all earnings acquired by her in carrying on any separate or independent business or in performing any labor or services on her sole and separate account[28] do not change the common-law rule that earnings acquired by the wife as such for services rendered about her household duties, or when assisting the husband in his business, belong to the husband.[29] Prior to 1894, in Kentucky, the husband acquired by marriage a right to all the personalty of the wife, which right was perfected by reducing the property to his possession.[30] But he could waive this right and allow the wife to own and control such property as her separate estate.[31] Since 1894 the husband does not acquire by the marriage any interest in property of the wife possessed before the marriage or acquired by her thereafter;[32] hence the reduction to possession of a note or chose in action does not give him any rights therein.[33] If he secures and disposes of a note belonging to her during the existence of the marriage relation, she may recover it, or its equivalent, after the parties have been divorced.[34] In New Jersey a husband is entitled to the administration of the wife's estate and also to all the net personalty of such estate.[35]

(§ 3) *C. Rights of wife in husband's property.*[36]—The widow's dower and homestead rights are elsewhere fully treated.[37] A wife has no vested interest in the personal estate of the husband.[38] He may dispose of it during his lifetime as he sees fit.[39] A gift of such property to his children during his lifetime after mak-

hostility to her. Held wife acquired title by prescription. McPherson v. McPherson [Neb.] 106 N. W. 991.

20. Unger v. Mellinger [Ind. App.] 77 N. E. 814.

21. In Missouri, prior to the act of 1889, and under Rev. St. 1865, p. 109, § 2, an executory contract of a husband and wife to convey real estate devised to the wife in remainder was absolutely void. The statute only authorized a conveyance by joint deed. O'Reilly v. Kluender, 193 Mo. 576, 91 S. W. 1033.

22. In Minnesota neither husband nor wife can dispose by sale or conveyance of a homestead right without the express consent of the other (Grace v. Grace, 96 Minn. 294, 104 N. W. 969), nor can either effect this result indirectly as by sale on partition (Id.). In Nebraska an executory contract for the sale of a homestead made by either husband or wife without joinder of the other is void as to the whole homestead tract without regard to value. Lichty v. Beale [Neb.] 106 N. W. 1018. Such a contract will not be specifically enforced nor will breach of it afford a cause of action for damages. Id.

23. See titles treating of those estates.

24. Where defendant's servants entered plaintiff's home without right and searched the premises, she could maintain an action and recover damages for injuries resulting from fright. Lesch v. Great Northern R. Co. [Minn.] 106 N. W. 955.

25. See 5 C. L. 1735.

26. See Curtesy, 7 C. L. 1016.

27. Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916. Husband's rights in realty during coverture, see Tiffany Real Prop., p. 410.

28. Act June 8, 1893 (P. L. 344). Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467.

29. Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467.

30. Boldrick v. Mills [Ky.] 96 S. W. 524.

31. As where husband at all times recognized wife's right to certain live stock and the proceeds thereof. Boldrick v. Mills [Ky.] 96 S. W. 524.

32. Ky. St. 1903, § 2127. Johnson v. Johnson's Committee, 28 Ky. L. R. 937, 90 S. W. 964.

33. Johnson v. Johnson's Committee, 28 Ky. L. R. 937, 90 S. W. 964.

34. Construing Civ. Code Prac. § 425, and Ky. St. 1903, § 2127. Johnson v. Johnson's Committee, 28 Ky. L. R. 937, 90 S. W. 964.

35. Wright v. Leupp [N. J. Eq.] 62 A. 464.

36. See 5 C. L. 1736.

37. See Dower, 7 C. L. 1197; Homestead, 8 C. L. 93.

38. Robertson v. Robertson [Ala.] 40 So. 104.

39. A gift of bonds to a trustee to pay the income to the donor for life and then to give the bonds to certain named persons held a gift inter vivos valid against the wife and

ing provision for her by will is not a fraud upon her.[40] A voluntary conveyance[41] made in contemplation of marriage, and with intent to deprive the spouse of her marital rights, is invalid so far as it affects such rights.[42] If the intent to defraud actually exists,[43] it is immaterial that there is no treaty of marriage existing with a particular person at the time of the conveyance;[44] but the fact that there existed no treaty of marriage and that no negotiations for a marriage were pending is a strong circumstance tending to disprove fraud.[45] The general rule that a voluntary conveyance made in contemplation of marriage will be declared fraudulent has a well settled exception in the case of conveyances to children by a former wife. Such conveyances are not necessarily invalid where no false representations are made to the prospective wife and only reasonable provision is made for such children.[46] If a deed by the husband is made and recorded prior to the institution of a suit for divorce by the wife, it is not void as against the rights of the wife.[47] To invalidate the deed the wife must show that it was recorded subsequent to the filing of her petition.[48] A conveyance by the husband pending a suit for maintenance by the wife, with intent to defraud her, is void where the grantee had notice of her rights and of the intent of the grantor.[49] The wife's right to maintenance is held within the protection of the California statute declaring void transfers intended to delay or defraud creditors.[50] But a transfer by a father to his child will not be held void as against the wife unless it has affected his power to provide for her.[51] The fact that the husband represented that he was worth a certain amount before the marriage is not a ground for declaring a trust in the land conveyed in favor of the wife.[52] Under the South Carolina statute, giving a wife and children a cause of action to recover property conveyed by the husband to a concubine or bastard issue, the cause of action accrues when the gift or conveyance takes effect and the wrong is discovered.[53] Such a conveyance may be set aside during the husband's life, but in such case he takes nothing by the action.[54] In Indiana, where, at a judicial sale of realty, a wife's inchoate interest therein is not directed by the judgment to be sold or barred, the wife's interest becomes absolute as upon death of the hus-

not a testamentary disposition. Robertson v. Robertson [Ala.] 40 So. 104. A wife has no vested interest in nonexempt personalty of the husband during his lifetime, and her assent is not necessary to enable him to dispose of it. Trabbic v. Trabbic [Mich.] 12 Det. Leg. N. 782, 105 N. W. 876.

40. Mortgage in favor of husband was canceled and a new one made running to a son with an agreement that proceeds were to be divided with others. Held a completed gift inter vivos and valid as against wife. Trabbic v. Trabbic [Mich.] 12 Det. Leg. N. 782, 105 N. W. 876.

41. Conveyance to son held not voluntary where grantee assumed mortgages nearly equal to expressed consideration and father retained life estate. Beechley v. Beechley [Iowa] 108 N. W. 762.

42. Beechley v. Beechley [Iowa] 108 N. W. 762.

43. Evidence insufficient to prove fraud intended by grantor who was wealthy and retained life estate in lands conveyed, and had sufficient property to provide for future wife. Beechley v. Beechley [Iowa] 108 N. W. 762.

44. If grantor intends to marry if he can find some person willing to marry him, and intends to defraud such person, the conveyance is fraudulent as to the wife selected, though no selection had been made at the time of the conveyance. Beechley v. Beechley [Iowa] 108 N. W. 762.

45. Beechley v. Beechley [Iowa] 108 N. W. 762.

46. The question in such cases is, was there an actual intent to defraud? Beechley v. Beechley [Iowa] 108 N. W. 762. Evidence held insufficient to prove fraud on part of son, or an estoppel, where father conveyed land to him prior to his third marriage. Id.

47. Rev. St. 1895, art. 2983. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

48. Where deed and petition were filed the same day, wife must show that petition was filed first. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

49. Ky. St. 1903, § 2126. Zumbiel v. Zumbiel [Ky.] 96 S. W. 542.

50. Civ. Code § 3439. Kessler v. Kessler [Cal. App.] 83 P. 257.

51. Husband conveyed land to daughter but had ability to earn wages and carry on business. Held wife had no interest in land conveyed. Kessler v. Kessler [Cal. App.] 83 P. 257.

52. Kessler v. Kessler [Cal. App.] 83 P. 257.

53. Limitations run from that time. Williams v. Halford, 73 S. C. 119, 53 S. E. 88.

band when by virtue of the sale the husband's title vests in the purchaser.[55] Under the statute which so provides, it is held that where a decree of foreclosure of a mortgage, in which the wife joined, orders sold only two-thirds of the realty, the wife's title to one-third becomes absolute when the purchaser acquires absolute title to the amount sold, and the wife's interest vests in her not only against the creditors but against her husband.[58] The statute thus construed is held not invalid as depriving the husband of his property, since if he redeems from the sale, as he may, the wife acquires nothing.[57]

(§ 3) *D. Estates in common, jointly, and by the entireties.*[58]—At the common law, circumstances making a joint tenancy generally, as to husband and wife, make them tenants by the entireties[59] differing from joint tenancies in that there is no right of severance terminating the right of survivorship.[60] The common-law rule still prevails in some states, and in these a conveyance to husband and wife creates a tenancy by the entirety[61] to which the same incidents attach as at common law.[62] Thus, upon the death of either spouse, the survivor takes the whole estate[63] regardless of any attempted testamentary disposition of the decedent.[64] The husband alone may maintain an action for damages to land held by the husband and wife by the entirety.[65] The husband may, by deed in which the wife does not join, convey or mortgage an estate so held, so as to entitle the grantee to the rents and profits during the life of the grantor,[66] but neither spouse can alone encumber or convey it so as to destroy the right of the survivor to receive the land unimpaired.[67] Thus, a conveyance by the husband alone does not give the grantee the right to cut timber on the land,[68] though by such deed both spouses are estopped to interfere with the possession of the grantee during their joint lives.[69] A mistake solely between the grantee husband and wife in taking a deed to the entirety instead of one in common was held reformable.[70]

Where the husband conveys land owned by him, the wife joining, to secure payment of a loan, and the grantee reconveys to the husband and wife as such, by quitclaim deed, the latter does not create an estate by the entireties.[71] The effect of the transaction is to release the mortgage and merge the title in the owner of the equity.[72]

54. Having parted with all his interest. Williams v. Halford, 73 S. C. 119, 53 S. E. 88.

55. Burns' Ann. St. 1901, § 2669. Green v. Estabrook [Ind.] 79 N. E. 373.

56. The opinion cites authorities and discusses holdings under statute fully. Green v. Estabrook [Ind.] 79 N. E. 373.

57. Green v. Estabrook [Ind.] 79 N. E. 373.

58. See 5 C. L. 1736.

59, 60. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032.

61. Bynum v. Wicker [N. C.] 53 S. E. 478; West v. Aberdeen & R. F. R. Co., 140 N. C. 620, 53 S. E. 477; Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918; Oliver v. Wright [Or.] 83 P. 870.

62. Bynum v. Wicker [N. C.] 53 S. E. 478; West v. Aberdeen & R. F. R. Co., 140 N. C. 620, 53 S. E. 477.

63. Oliver v. Wright [Or.] 83 P. 870. Land was to husband and wife jointly, making them tenants by the entirety. A judgment was entered against the husband. He then conveyed his interest, described as a one-half interest, to the wife. Judgment of revival was obtained against the husband with notice to the wife as terre-tenant. Held, on death of the husband, the wife took title to the whole as survivor, free from the lien of the judgment, since the lien disappeared with the husband's estate. Hetzel v. Lincoln [Pa.] 64 A. 866. Act June 8, 1893 (P. L. 344), relating to rights of married women, had no effect where conveyance to husband and wife jointly was prior to the act. Id.

64. Land held by husband and wife as tenants by the entirety, at the death of one passes to the survivor, regardless of any attempt of the decedent to dispose of it by testamentary devise. Young v. Biehl [Ind.] 77 N. E. 406.

65. West v. Aberdeen & R. F. R. Co., 140 N. C. 620, 53 S. E. 477.

66, 67, 68, 69. Bynum v. Wicker [N. C.] 53 S. E. 478.

70. Marshall v. Lane, 27 App. D. C. 276.

71. Haak Lumber Co. v. Crothers [Mich.] 13 Det. Leg. N. 957, 109 N. W. 1066.

72. Grantor in quitclaim deed never owned entire estate, since husband had the equity of redemption, essentially a legal estate in the land. Haak Lumber Co. v. Crothers [Mich.] 13 Det. Leg. N. 957, 109 N. W. 1066.

In some states, where at common law husband and wife became tenants by the entireties, they now become joint tenants[73] or common tenants.[74] A married woman as joint tenant is under all the disabilities of any joint tenant at common law and has the same rights as though she were unmarried.[75] She cannot devise property held in joint tenancy so as to defeat the husband's right of survivorship.[76] In Massachusetts a conveyance to a husband and wife makes them tenants in common, but the statute which so provides expressly excepts mortgages, and as to these the common-law rule applies.[77]

By a divorce a tenancy by entirety is destroyed and the parties become tenants in common.[78]

(§ 3) *E. Wife's separate property.*[79]—Property inherited by the wife, or acquired by her through gift or conveyance, becomes her separate property.[80] A married woman may make any disposition of her separate estate which she desires to make even though her husband be deprived of his distributive share upon her death.[81] Where the husband takes out an endowment policy of insurance, payable to his wife in case of his death before the expiration of the period named, the wife acquires a vested interest in the policy which is not affected by a decree of divorce.[82] The interest in the policy, being her separate property, is not affected by an agreement to release all claims and rights in the husband's property in consideration of the provision made for her by such agreement.[83] Her earnings do not lose their separate character, though the husband's labor contributes thereto.[84]

Trusteeship of husband.[85]—Whenever the husband acquires the separate property of his wife, with or without her consent, he must be deemed to hold it in trust for her benefit, in the absence of any direct evidence that she intended to make a gift of it to him.[86] As long as the husband is in possession of the property, using it for the wife's benefit and recognizing her ownership, no lapse of time will bar

73. Since revision of 1878, this is law of Wisconsin. Bassler v. Redwodlinski [Wis.] 109 N. W. 1032.

74. Prior to D. C. Code § 1031, a conveyance to husband and wife and their heirs gave a tenancy by the entirety, but now it creates a common tenancy. Marshall v. Lane, 27 App. D. C. 276.

75. The statute destroying common-law disabilities of married women does not give her greater rights as a joint tenant than she would have if unmarried. Bassler v. Redwodlinski [Wis.] 109 N. W. 1032.

76. Husband sold property held in joint tenancy and wife devised to husband subject to $200 payment to others. Held husband's grantees took free from wife's devise. Bassler v. Redwodlinski [Wis.] 109 N. W. 1032.

77. A note and mortgage to husband and wife and their heirs creates, as at common-law, an estate by the entirety, and after the husband's death the widow may collect as against her husband's executor. St. 1885, p. 679, c. 237. Boland v. McKowen, 189 Mass. 563, 76 N. E. 206.

78. Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918.

79. See 5 C. L. 1737.

80. Land inherited by wife, and proceeds thereof, are wife's separate property until reduced to husband's possession with wife's written consent. Under Rev. St. 1879, §§ 3295, 3296. Reed v. Sperry, 193 Mo. 167, 91 S. W. 62. In Ohio a policy of life insurance is not assignable to a married woman under the first clause of Rev. St. § 3629, for the reason that this clause has relation to a married woman simply. Without any qualifying words expressing the assignor's intention, such assignment is presumptively intended to make provision for a married woman and her children jointly. Reakirt v. Besuden, 3 Ohio N. P. (N. S.) 646. But an assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, creates an estate solely for her use, and is valid under the second clause or exception of the statute. Id.

81. In Maine, prior to June 1, 1903, when P. L. 1903, c. 160, p. 124, took effect, a married woman might make such disposition by gift, voluntary conveyance, or otherwise of her personalty during her lifetime as she wished, even if her husband was thereby deprived of his distributive share upon her death, and though she intended that he should be deprived thereof. Wright v. Holmes, 100 Me. 508, 62 A. 507.

82. Wallace v. Mutual Ben. Life Ins. Co. [Minn.] 106 N. W. 84.

83. Contract of parties settling property rights in divorce action held not to affect her interest in the policy. Wallace v. Mutual Ben. Life Ins. Co. [Minn.] 106 N. W. 84.

84. Martin v. Davis, 30 Pa. Super. Ct. 59. Antenuptial earnings and profits of keeping boarders after marriage. Id.

85. See 5 C. L. 1737.

86. Barber v. Barber, 125 Ga. 226, 53 S.

the wife from asserting her title or calling the husband to an accounting.[87] The statute of limitation does not run against the wife's right to an accounting until there has been an account rendered, accompanied by an offer to settle; a refusal upon demand to settle, a notice of adverse claim, an express repudiation of the fiduciary relation, such a change of circumstances of the parties as would be reasonably calculated to put the wife on notice that the relation was no longer recognized, or something to indicate to a reasonably prudent person that the relation had ceased.[88] Where the husband takes title to land bought with funds of the wife, there is a resulting trust in her favor.[89] Such a trust, however, can be established only by clear and strong proof.[90] Money raised by mortgage on the wife's separate real estate becomes her separate property, though the husband joins in the note,[91] and where the husband invests the money in land under an agreement to place title in the wife, and instead takes title in himself, he holds the land in trust for her to the extent of her investment.[92] To enforce her equity in such lands against persons holding under the husband she must prove that they were not bona fide purchasers.[93] They may be compelled to account for payments made after notice of her rights.[94] To recover from the husband's grantee on the ground of complicity in a scheme to defraud her, she must establish her rights against her husband and prove that his grantee joined with the husband in the scheme to defraud her.[95] The husband must account to the wife for her interest in all the lands; the husband's grantee must account for the value of the land received by him.[96] Where a husband buys land with his wife's money, taking title in his own name, and then conveys to a trustee for the use of his wife and her heirs, and the trust deed recites that she furnished the consideration, the wife takes absolute title and may alienate it.[97]

A husband may waive whatever marital rights he has in his wife's estate and settle it upon her to her separate use, and an agreement to this effect will be upheld in equity without the intervention of a trustee.[98] Thus, where proceeds of the wife's property is turned over to the husband under an agreement to hold them for her, and the agreement is recognized as a subsisting obligation by the husband during his lifetime, it will be enforced against his representative and heirs.[99] Such an agreement is based upon a valid consideration, and since it constitutes an express

E. 1017. Money of married woman received by her husband, but which is her separate property, under state laws, is presumably held by him as her agent. In re Cole [C. C. A.] 144 F. 392.

87. Barber v. Barber, 125 Ga. 226, 53 S. E. 1017.

88. Barber v. Barber, 125 Ga. 226, 53 S. E. 1017. A surrender by the husband of a portion of the property, being all that was then in his possession, a failure to account for the balance and an abandonment of all further control or management of the property, would be sufficient to indicate that the husband treated the fiduciary relation as at an end; and the statute would begin to run in his favor after the lapse of a reasonable time after such event. Id.

89. Reed v. Sperry, 193 Mo. 167, 91 S. W. 62. Wife's property was exchanged for real estate, husband taking title in himself. Held he held as trustee for her and her heirs. Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105.

90. Evidence insufficient. Reed v. Sperry, 193 Mo. 167, 91 S. W. 62. Evidence held insufficient to prove that land deeded to husband and wife was paid for with wife's funds. Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918. Evidence held not to show that property deeded to wife was bought with her money or was her separate property. Coleman v. Jaggers [Idaho] 85 P. 894.

91, 92. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

93. Held that grantees of husband's grantee acted in good faith as to a portion of their payments. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

94. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

95. By taking deed from husband and conveying to others. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

96. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

97. Griffith v. Eisenberg [Pa.] 64 A. 368.

98. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597.

99. Agreement enforced 30 years after it was made. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597.

trust relating to personalty it may be established by parol.[1] Under such agreement the widow is entitled to the trust fund out of the residue of the estate, after payment of debts, in preference to distributees of the deceased husband.[2]

§ 4. *Property rights under the community system.*[3] *A. What law governs.*[4]

(§ 4) *B. What property is community and what separate.*[5]—The presumption is that property acquired during the existence of the marriage relation is community property,[6] but this presumption is rebuttable[7] by proof that it was paid for wholly or in part by separate funds of one of the spouses.[8] In the absence of contrary evidence, property held by husband and wife at the dissolution of the marriage or death of one of them is presumed to be community property.[9] Where the wife consented to sign a mortgage on the homestead on condition that a part of the proceeds of the loan should be invested in corporate stock in her name, the stock so bought became her separate property.[10] In the case of public lands entered as a homestead they become community property if the community continues to exist when the estate vests,[11] though the title be not made till after dissolution;[12] but in the case of an adverse possession by the wife, ripened into title after marriage, it is hers separately.[13]

1, 2. Bohannon v. Bohannon's Adm'x [Ky.] 92 S. W. 597.

3. See Tiffany Real Property, 383.

4. See 3 C. L. 1676.

5. See 5 C. L. 1738.

6. Where ring was purchased by wife during coverture, it was presumptively community property. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442. Homestead acquired during existence of marriage relation, and at least 10 years after the marriage, is presumptively community property, and one asserting the contrary must prove it by clear and satisfactory evidence. Smith v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 933, 91 S. W. 815. Action to quiet title, plaintiffs claiming under deed from husband and defendants as heirs of wife. Evidence held to support finding that land was community property and was not purchased with funds of the wife. Jaegel v. Johnson, 148 Cal. 695, 84 P. 175.

7. Presumption that land bought during marriage was community property is rebuttable by proof to the contrary. Letot v. Peacock [Tex. Civ App.] 16 Tex. Ct. Rep. 345, 94 S. W. 1121.

8. Where husband furnished $1,500 of purchase price of land from his separate estate, the land was to that extent his separate estate. Letot v. Peacock [Tex. Civ. App.] 16 Tex. Ct. Rep. 345, 94 S. W. 1121.

9. In the absence of contrary evidence it may be presumed that property left by a decedent was acquired during the marriage. Under Rev. St. 1895, art. 2969, that effects of a husband and wife at time of dissolution of marriage may be regarded as common effects. Stein v. Mentz [Tex. Civ. App.] 15 Tex. Ct. Rep. 4, 94 S. W. 447. In the absence of evidence to show how property held by husband and wife at the death of the husband was acquired, it will be presumed that it was community property. Rev. St. 1895, art. 2969. Cope v. Blount [Tex. Civ. App.] 15 Tex. Ct. Rep. 99, 91 S. W. 615. Effects of husband and wife when marriage is dissolved are presumed to belong to the community and burden is on one claiming contrary to prove his contention. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

10. Not liable for husband's debts, nor was there any fraud on his creditors in the transaction. Yardley v. San Joaquin Valley Bank [Cal. App.] 86 P. 978.

11. Where parties were divorced at a time when the husband had entered upon public lands, before they were surveyed or thrown open for settlement and when he had a mere right of occupancy with a preference right to enter and acquire title under the homestead laws, the divorced wife acquired no interest in the lands, title to which was subsequently acquired by her former husband. Parties divorced in 1896, lands thrown open for settlement in 1898, and divorced husband made final proof in 1899, after five years' residence. Hall v. Hall, 41 Wash. 186, 83 P. 108. Where the husband enters upon lands under the homestead laws and resides thereon with his wife until her death, and thereafter commutes, makes final proof, and receives a patent, the land becomes his separate property not subject to a testamentary disposition of the wife. Wife had devised a one-half interest on the theory that it was community property. Cunningham v. Krutz, 41 Wash. 190, 83 P. 109.

12. The homestead acquired under the Federal homestead laws becomes the joint property of the husband and wife, if the community of acquets and gains existed between them at the time of entry, even though proofs were made and certificate and patent issued after dissolution of the community by death of the wife. Crochet v. McCamant, 116 La. 1, 40 So. 474.

13. Where land is conveyed to a woman before marriage and she begins assertion of ownership at once, and she and her husband take and hold possession for a sufficient time to perfect title by limitation, the land becomes the wife's separate property. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636.

(§ 4) *C. Rights and powers as to, and liability of, community property.*[14]—The husband has the right to the control and disposition of the community property,[15] which includes the right to sell or pledge such property[16] or to maintain an action for its recovery.[17] His general right to control community property ceases when it becomes a valid homestead.[18]

A contract to convey community property is binding on both parties only when both join therein or ratify each other's acts.[19] In Texas a married woman may, with the authority and assent of her husband, make a valid conveyance of community real estate.[20] A partition deed of community property signed by the wife is effective though her name does not appear in the body of the instrument.[21] The right of an abandoned wife to dispose of community property to provide for her support, upon default of her husband, is not exclusive as against the husband.[22] The husband does not forfeit his rights in the property by abandoning the wife but may sell it to pay community debts, and this right extends to personalty exempt from forced sale.[23]

Community property is liable for a community debt[24] or for a debt created by the husband for the benefit of the community.[25] Thus it is liable for an obligation of suretyship incurred by the husband in behalf of a corporation in which he is a stockholder when the stock belongs to the community.[26] Community property is not liable for a debt created by the tort of either spouse,[27] or one which is not for the benefit of the community.[28]

In an action of trespass to try title, a judgment against the husband binds the interest of the wife, unless she has a defense growing out of her homestead rights.[29] The wife is not a necessary party unless the fact that the land is a homestead is available as a defense.[30]

(§ 4) *D. Rights and powers as to, and liability of, separate property.*[31]

14. See 5 C. L. 1739.

15. Schaadt v. Mutual Life Ins. Co. [Cal. App.] 84 P. 249.

16. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442.

17. That note and mortgage to secure loan of community funds were payable to wife did not affect husband's right to sue. Husband and wife need not litigate question of ownership. Mortgagor could cause them to interplead if he was in doubt as to whom to pay. Brenneke v. Smallman [Cal. App.] 83 P. 302.

18. Yardley v. San Joaquin Valley Bank [Cal. App.] 86 P. 978.

19. Where wife conducted most of the negotiations for the sale of community realty, but husband sent one telegram in answer to one received and joined wife in deed sent to trust company for delivery, held each ratified acts of the other and husband as well as wife was bound by contract to convey, constituted by correspondence. Stevens v. Kittredge [Wash.] 87 P. 484.

20. Evidence held to show authorization by husband. Roos v. Basham [Tex. Civ. App.] 14 Tex. Ct. Rep. 851, 91 S. W. 656.

21. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. 23.

22, 23. King v. King [Tex. Civ. App.] 14 Tex. Ct. Rep. 936, 91 S. W. 633.

24, 25. Floding v. Denholm, 40 Wash. 463, 82 P. 738.

26. So held where part of stock was bought with community funds against the protest of the wife. Floding v. Denholm, 40 Wash. 463, 82 P. 738.

27. Floding v. Denholm, 40 Wash. 463, 82 P. 738.

Contra: The community property is liable for a judgment founded on the wife's tort, including a judgment for exemplary damages. Patterson v. Frazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146.

28. Floding v. Denholm, 40 Wash. 463, 82 P. 738.

29. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. 23. That occupants claimed property as community homestead held no defense in trespass to try title where claim was based only on adverse possession. Breath v. Flowers [Tex. Civ. App.] 16 Tex. Ct. Rep. 614, 95 S. W. 26.

30. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. 23. Judgment against husband held bar against wife where occupant's claim to land as homestead constituted no defense, though wife was not a party. Breath v. Flowers [Tex. Civ. App.] 16 Tex. Ct. Rep. 614, 95 S. W. 26. In trespass to try title the only possession had by married woman when suit was commenced was by occupancy by herself and husband. Hence, she was not a necessary party, since any title she could acquire by limitation would inure to community, and community would be bound by judgment against husband. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094.

31. See 5 C. L. 1739.

(§ 4) *E. Succession to and administration of the community.*[32]—Where no children survive the community estate vests in the surviving spouse.[33] Where there are children the surviving spouse usually takes one-half.[34] This interest, in Washington, passes immediately on death of the other spouse.[35]

Rights and powers of survivor.[36]—In Texas, a widow who is made independent executrix represents both the separate and community property.[37] Her control as survivor of the community does not exist while the estate is in her hands as such executrix.[39] A surviving second wife, entitled to one-sixth of the personalty which was community property of the decedent and his first wife, cannot, as against children of the first wife, recover more than her proportionate share or be restored to the enjoyment thereof jointly with the guardian of the children until partition of the property.[39] A sale by the surviving husband of land of the community will be presumed a valid sale to pay community debts where no objections are raised at the time nor for a long period thereafter.[40] In Louisiana the property of the community, dissolved by death of the wife, can be sold in the succession of the wife,[41] since the surviving husband would be left without remedy if he did not have the right to bring about the sale of the property.[42] The rule is different if the husband is dead and the wife survives or if both are dead.[43] The surviving father can represent the minors and have property of the community sold to pay debts of the community.[44] A family meeting can be held in the interest of minors and the sale ratified.[45]

Accountability to heirs and creditors.[46]—In Texas the surviving husband may administer regularly on his deceased wife's estate or may take charge as community administrator and survivor.[47] In either case one-half the community property vests in the children upon death of the wife.[48] Their title is not devested by the giving of a bond by the husband conditioned for administration of the community and payment of debts.[49] Where the husband has given such bond and committed devastavit and died, a right of action on the bond at once accrues to the creditors and the children.[50] Minor heirs of the deceased wife are not barred by limitations from such action, though the administrator of the community of the deceased husband and wife is barred.[51] Where it is sought to hold a widow liable for a debt of her deceased husband on the ground that there has been no administration of his estate and that she is in possession thereof, a petition stating such facts does not authorize a personal judgment against the widow for any sum where it does not also

32. See 5 C. L. 1740.

33. Evidence held to show that no children survived. Stein v. Mentz [Tex. Civ. App.] 15 Tex. Ct. Rep. 4, 94 S. W. 447.

34. Since usufructuary is entitled to fruits and revenues from day to day, held that, where husband died before expiration of lease, the succession was entitled to so much of the rental as had been earned at the date the succession was opened, though rent was not due until the end of the term, and widow was not entitled to the whole amount as usufructuary. Gaspard v. Coco, 116 La. 1096, 41 So. 326.

35. Under 1 Ball. Ann. Codes & St., on death of an owner of real estate it descends immediately to the heirs. Hence, where wife owned individually one-half of the realty and gave a deed of all her interest after her husband's death, the deed conveyed three-fourths of the property, subject to outstanding mortgages. Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 P. 8.

30. See 5 C. L. 1740.

37. Judgment against her as such executrix, with execution, reaches property of both kinds. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

38. A judgment against her as survivor by a creditor of the estate is invalid. Hartz v. Hausser [Tex. Civ. App.] 14 Tex. Ct. Rep. 141, 90 S. W. 63.

30. Cox v. Oliver [Tex. Civ. App.] 15 Tex. Ct. Rep. 790, 95 S. W. 596.

40. Sale in 1835, 2 years after wife's death, presumed valid. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178.

41, 42, 43, 44, 45. Elizardi v. Kelly, 115 La. 712, 39 So. 851.

46. See 5 C. L. 1741.

47, 48. Belt v. Cetti [Tex.] 16 Tex. Ct. Rep. 3, 93 S. W. 1000.

49. Bond required by Rev. St. 1895, art. 2225. Belt v. Cetti [Tex.] 16 Tex. Ct. Rep. 3, 93 S. W. 1000.

50, 51. Belt v. Cetti [Tex.] 16 Tex. Ct.

state the amount or value of the estate which she has received.[52] In such action a judgment against the widow for the sum demanded is a personal judgment, although it awards execution against the community, and such judgment cannot be sustained.[53] Where one spouse dies intestate or becomes insane, leaving no child or children and no separate property, the common property passes to the survivor charged with community debts and no administration is necessary.[54] Under the statute which so provides, in order that creditors may maintain an action against the surviving widow for a debt of the husband, facts must be alleged showing that no administration was necessary.[55]

Community debts and claims.[56]—A community estate passes charged with the debts against it.[57] The survivor cannot sell property of the deceased to pay community debts in disregard of other creditors or of the children's allowance.[58] When notes evidencing a community debt are sued on, the surviving widow is properly joined with the administrator as a defendant,[59] but a judgment on the notes is a lien on the community property without any adjudication against her.[60]

(§ 4) *F. Dissolution of community.*[61]—Where a husband has so commingled his separate property with the community as to be unable to identify it, he cannot at the dissolution of the marriage charge the community estate with the value of his separate estate.[62]

§ 5. *Liability for necessaries.*[63]—A debt incurred for necessaries of a married woman is presumably the debt of the husband when they are living together,[64] and, if incurred by the wife, it is presumed that she is acting as the agent of her husband,[65] unless it affirmatively appears that she intended to charge her separate estate.[66] The presumption of the wife's agency to pledge her husband's credit for necessaries exists so long as there is no open separation.[67] It does not obtain when they are living separate and apart by agreement,[68] and it does not appear that he has failed to supply her with necessaries.[69] The mere fact that she has the bill therefor sent to the husband does not make the husband liable nor relieve her.[70]

Rep. 3, 93 S. W. 1000, rvg. Id. [Tex. Civ. App.] 14 Tex. Ct. Rep. 739, 91 S. W. 1098.

52. Breck v. Coffield [Tex. Civ. App.] 14 Tex. Ct. Rep. 823, 91 S. W. 594.

53. Judgment against her would be enforceable by execution against her separate estate, notwithstanding such provision in the judgment. Breck v. Coffield [Tex. Civ. App.] 14 Tex. Ct. Rep. 823, 91 S. W. 594.

54. Rev. St. 1895, art. 2220. Whitmire v. Farmers' Nat. Bank [Tex. Civ. App.] 17 Tex. Ct. Rep. 18, 97 S. W. 512.

55. Allegations that husband left no separate property, and that widow had taken possession of common property, held insufficient. Whitmire v. Farmers' Nat. Bank [Tex. Civ. App.] 17 Tex. Ct. Rep. 18, 97 S. W. 512.

56. See 5 C. L. 1741.

57. Rev. St. 1895, art. 1697. Belt v. Cetti [Tex.] 16 Tex. Ct. Rep. 3, 93 S. W. 1000.

58. Latham v. Dawson [Tex. Civ. App.] 13 Tex. Ct. Rep. 675, 89 S. W. 315.

59, 60. Dashiell v. Moody & Co. [Tex. Civ. App.] 97 S. W. 843.

61. See 5 C. L. 1741.

62. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

63. See 5 C. L. 1742.

64. Necessary clothing. Feiner v. Boynton [N. J. Law] 62 A. 420. In the absence of evidence to show whether credit was given to the wife or husband, the presumption is that it was given the husband. Medical services. Montgomery St. R. Co. v. Smith Co. [Ala.] 39 So. 757.

What are necessaries: Set of "Stoddard's Lectures" held not necessaries for which, when purchased by wife, the husband would be liable by reason of the marital relation. Shuman v. Steinel [Wis.] 109 N. W. 74.

65. Feiner v. Boynton [N. J. Law] 62 A. 420.

66. Wife held not liable for clothing bought by her though she had previously given checks on a fund set apart for her by her husband. Feiner v. Boynton [N. J. Law] 62 A. 420. Married woman bought two-thirds of goods sued for and executed a joint and several note with her husband in payment of the same. Held her separate estate was properly charged, it appearing sufficiently that goods were used by herself and family and that she promised to pay. Hild v. Hellman [Tex. Civ. App.] 14 Tex. Ct. Rep. 31, 90 S. W. 44.

67. Ball v. Lovett, 98 N. Y. S. 815.

68. Husband cannot be held for necessaries for the wife where they are living separate and apart by agreement. Civ. Code § 175. McKee v. Cunningham [Cal. App.] 84 P. 260.

69. Husband not liable for wife's clothing when parties had separated. Hass v. Brady, 49 Misc. 235, 96 N. Y. S. 449.

The presumption of the wife's agency to bind the husband also obtains when she is living apart from him as a result of his wrongful desertion, and he refuses to furnish her with adequate support.[71] But in an action to recover for necessaries under such circumstances, plaintiff must prove that the husband is the deserter.[72] A husband who has driven his wife from his home is liable for the cost of her support, regardless of the cause of his act,[73] and in an action against him for necessaries supplied to her, he cannot prove justification for his act to defeat the claim.[74] An offer of reconciliation by him is also immaterial, unless it is unconditional.[75] In an action under the California statute to recover the reasonable value of goods furnished the wife of one who has neglected to support her, it must appear both that the goods supplied were necessaries and that the husband has failed to provide adequate support.[76]

Since a married woman living with her husband, and not engaged in business, cannot contract a debt for board,[77] there can be no legal lien therefor upon her separate property,[78] though there might under certain circumstances be an equitable lien or charge enforceable in a court of equity.[79]

In Iowa family expenses are a charge upon the property of both husband and wife.[80] This statutory liability of the wife cannot be enlarged by any act of the husband nor should it be extended by judicial construction.[81] The wife's liability depends upon and follows the original debt for such expenses. A note given by the husband therefor is not conclusive on the wife as to the existence or the amount of such debt.[82] To constitute a family expense within the meaning of the statute the thing for which the expense was incurred must be used or kept for use in the family.[83] In Washington family expenses are chargeable on the property of both husband and wife or either of them, and in relation thereto they may be sued jointly or separately.[84] Hence, where the family status continues to exist up to the time of the husband's death,[85] the wife is chargeable with medical and hospital expenses incurred in his last illness.[86] Under the Colorado statute making family expenses chargeable on the property of both husband and wife, domestic servants are held to constitute a part of the family, and for supplies for their use both husband and wife are liable.[87] In an action against the husband and wife to recover

70. Hass v. Brady, 49 Misc. 235, 96 N. Y. S. 449.

71. Clothier v. Sigle [N. J. Law] 63 A. 865.

72. Finding that husband was deserter held warranted by evidence. Clothier v. Sigle [N. J. Eq.] 63 A. 865.

73. Baker v. Oughton [Iowa] 106 N. W. 272.

74. Husband is liable for wife's support until such questions are litigated and settled by decree of divorce. Baker v. Oughton [Iowa] 106 N. W. 272.

75. Evidence of an offer to allow wife to return if she would agree to refrain from certain alleged misconduct held inadmissible. Baker v. Oughton [Iowa] 106 N. W. 272.

76. Complaint under Civ. Code § 174 insufficient because failing to allege that husband had failed to provide adequate support. Hoey v. Hechtman [Cal. App.] 83 P. 85.

77. Where husband and wife boarded together, husband alone was liable. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797.

78. No lien under inn-keepers lien law. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797.

79. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797.

80. Code § 3165. McCartney & Sons Co. v. Carter, 129 Iowa, 20, 105 N. W. 339.

81. McCartney & Sons Co. v. Carter, 129 Iowa, 20, 105 N. W. 339.

82. Where suit was on husband's note, wife should have been allowed to show state of account for family expenses. McCartney & Sons Co. v. Carter, 129 Iowa, 20, 105 N. W. 339.

83. Feed for horse used by husband in his business only is not a family expense and the wife's property is not liable therefor. Martin Bros. v. Vertres [Iowa] 106 N. W. 516.

84. Ball. Ann. Codes & St. § 4508. Russell v. Graumann, 40 Wash. 667, 82 P. 998.

85. Family status held to continue where husband was ill in a hospital in Washington and wife was in Pennsylvania, and she corresponded with him and assisted him, and after his death procured a decree awarding his estate to her. Russell v. Graumann, 40 Wash. 667, 82 P. 998.

86. These are "family expenses" within Ball. Ann. Codes & St. § 4508. Russell v. Graumann, 40 Wash. 667, 82 P. 998.

for supplies furnished the family, the burden is on defendants to prove that the supplies were used in part outside the household.[88] In Missouri the husband is primarily liable for family expenses, including the hire of domestic servants, and the wife cannot be held in the absence of a special contract by her.[89] In Texas the tuition of a child in a commercial school has been held a necessary for which the mother could contract, the father being absent.[90] But it was held that the wife could not adopt a child during the husband's absence and contract for the business education of such adopted child so as to bind her.[91]

§ 6. *Contract rights and liabilities of husband as to third persons.*[92]—If a wife contracts on her own credit the mere promise of the husband to pay is a promise to answer for the debt of another, without consideration, and is unenforceable.[93] Such a contract could not be ratified by the husband so as to make him liable,[94] but if the wife assumes to act as the husband's agent, as by signing his name to a contract, he may be made liable by ratification.[95] A mortgage signed only by the husband is enforceable against him though it cannot bar the wife's inchoate right of dower.[96]

Agency of wife for husband.[97]—Whether the wife acted as the husband's agent in a given transaction is usually a question of fact.[98] If a husband absents himself from home, keeping his whereabouts unknown and leaving his property wholly under the care of his wife, she is his agent by implication of law to do those things which customarily are delegated to wives having charge of property.[99] Beyond that the wife cannot bind the husband as his general agent.[1] The authority of the wife as the agent of her husband by implication of law does not in any case extend to selling and conveying his real estate.[2] The rule that a husband ratifies acts of his wife while assuming to act as his agent when he does not, within a reasonable time, disavow them does not apply when the benefit therefrom comes to the wife.[3] In such case ratification by some affirmative act with knowledge of the facts recognizing the wife as having had authority to act is necessary to bind the husband.[4]

§ 7. *Contract and property rights of wife as to third persons. A. Agency of husband for wife.*[5]—Agency of the husband for the wife will not be presumed, but

87. Mills' Ann. St. Rev. Supp. § 3021a. Perkins v. Morgan [Colo.] 85 P. 640.

88. Where supplies were used by servants, burden was on defendants to prove that servants lived outside and were not a part of the household. Perkins v. Morgan [Colo.] 85 P. 640.

89. Wife not liable for hire of servant employed by husband and induced by him to remain over wife's protests. Woods v. Kauffman, 115 Mo. App. 398, 91 S. W. 399.

90. Wife's note for tuition for a year held valid where husband was absent on a long visit and wife was managing affairs, and it was expected that daughter would assist mother in business. Sayles' Ann. Civ. St. 1897, art. 2970. Haas v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 985, 94 S. W. 439. Where the note was given for a year's instruction in the future and the sum agreed to be paid was reasonable, and the commercial course was to fit a daughter to assist her mother in business, the contract was held reasonable and proper and enforceable within Sayles' Ann. Civ. St. 1897, art. 2971. Id.

91. Haas v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 985, 94 S. W. 439.

92. See 5 C. L. 1743.

93, 94. Shuman v. Steinel [Wis.] 109 N. W. 74.

95. Question whether wife assumed to act as agent in buying books should have been submitted to jury. Shuman v. Steinel [Wis.] 109 N. W. 74.

96. Lowe v. Walker [Ark.] 91 S. W. 22.

97. See 5 C. L. 1743.

98. Evidence held sufficient to show that wife had authority, as agent, to sign husband's name to contract for sale of realty. Whitworth v. Pool [Ky.] 96 S. W. 880.

99. Wife held to have authority to make proofs of loss where property of which she was in charge burned. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952.

1. Regardless of whether her acts be judicious or not from a business standpoint. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952. Fraud of the wife in making proofs of fire loss is not binding on the husband unless he ratifies her act. Id.

2, 3, 4. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952.

5. See 5 C. L. 1743. See special article Agency Implied from Relation, 3 C. L. 101.

must be proved.[6] The wife is bound by acts of the husband which she has authorized[7] or ratified.[8]

(§ 7) *B. Contracts in general.*[9]—In most states, at the present time, married women may own and control property[10] and engage in business[11] as though unmarried. Hence their contracts with reference to such separate property or business are valid and enforceable.[12] Under the present law in Pennsylvania her contract is binding, unless of the kinds or for such objects as she is disabled to make.[13]

6. Husband of woman capable of consenting has no legal authority to authorize performance of surgical operation on wife. Pratt v. Davis, 118 Ill. App. 161. In an action to restrain a husband and wife from breaking a contract not to engage in a certain business, the contract having been signed by the husband for himself and wife, the burden is on complainants to prove that the husband had authority or that the wife ratified his contract. Sanders v. Brown [Ala.] 39 So. 732. While it may be presumed that husband was agent of the wife as to certain property of which he took charge, it cannot be presumed that he was her agent in buying other property of like kind. Du Bose v. Gladden [S. C.] 55 S. E. 152. Not implied from the marital relation alone (Rheam v. Martin, 26 App. D. C. 181), nor from the fact alone that the contract made will benefit her (Id.).

7. In action against husband and wife to recover for materials for house, evidence held sufficient to take issue of wife's liability, through agency of husband, to jury. Heidritter v. Wolf, 97 N. Y. S. 27. Wife's jewelry had been pawned in husband's name, with her consent, and she authorized him to redeem it but did not give him money enough. He had authority to procure another to redeem it and to hold it as security for the necessary advancement. Lesser v. Steindler, 110 App. Div. 262, 97 N. Y. S. 255. Wife was owner of business about which work was done and materials furnished, and her husband was her managing agent. She was liable as undisclosed principal on promise of her husband to pay. Keller v. Haug, 96 N. Y. S. 1058. Where husband signs wife's name to a mortgage purporting to be executed by her, in her immediate presence and by her express request and direction, the effect of such signature is the same as if she had signed the mortgage herself. Hawes v. Glover [Ga.] 55 S. E. 62. Married woman sold certain realty and accepted purchase-money mortgage which contained a waiver of priority in favor of a mortgage executed the same day by the purchaser, under an agreement between her husband and the mortgagee in the other mortgage. Held she was bound by the waiver, her husband having authority to act for her. Thomas v. Equitable Bldg. & Loan Ass'n [Pa.] 64 A. 531. Loan broker took and transferred notes and securities in his wife's name with her permission. She was therefore bound by his act in taking a nonnegotiable note in payment and in transferring the same. Barry v. Stover [S. D.] 107 N. W. 672. Where wife authorized husband to use certain proceeds of her lumber to buy merchandise, she could not thereafter recover a portion thereof. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636.

8. Husband of owner of land made agreement as to boundary with adjoining owner and wife lived on the land and claimed up to the line agreed upon. Held she thus ratified her husband's agreement and original authorization was immaterial. Matthews v. French, 194 Mo. 553, 92 S. W. 634.

9. See 5 C. L. 1744. Subscription by married woman for corporate stock, see Helliwell, Stock and Stockholders, § 68.

10. In Missouri a married woman can hold in her own right the possession of both real and personal property, and as to the latter she can act as a feme sole. Barnes v. Plessner [Mo. App.] 97 S. W. 626.

11. In Indiana a married woman may become a partner of her husband. Construing Burns' Ann. St. 1901, § 6967, making a married woman liable for debts incurred in carrying on a separate business or as partner of another, etc. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811. In Michigan husband and wife cannot, by contract between themselves, become copartners so as to bind the wife for firm debts. Hackley Nat. Bank v. Jeannot [Mich.] 13 Det. Leg. N. 7, 106 N. W. 1121.

12. By Sess. Laws 1903, p. 345, a married woman has absolute control of her separate property and estate, and has the unqualified right to contract with reference to such property and may sell or dispose of the same without the consent or approval of her husband. Bank of Commerce v. Baldwin [Idaho] 85 P. 497. A married woman possessed of a separate estate or business, or who is rendering personal services to some person other than her husband, may make all contracts necessary or convenient for the management or enjoyment of the estate or carrying on of the business, or relating to her personal services, and such contracts will be enforceable at law. Merrell v. Purdy [Wis.] 109 N. W. 82. A contract by married women providing for the support and maintenance of their mother, thereby relieving them from liability under the statute for her support, operated to the benefit of their separate estates and was therefore binding upon them in law. Payne v. Payne [Wis.] 109 N. W. 105. In Alabama, capacity of a married woman to contract is the rule and incapacity the exception. She can make all contracts, agreements, and conveyances in regard to her separate estate "except as otherwise provided by law," and the only prohibition upon her is that she cannot "directly or indirectly become the surety for her husband." Code 1896, §§ 2526, 2529. Sample v. Guyer, 143 Ala. 613, 42 So. 106. In Indiana a married woman may contract as a feme sole, except as expressly forbidden by

Usually married women are not authorized to make contracts of suretyship.[14] Where such is the law, to hold them upon their contracts it must be made to appear that such contracts were in fact made by them[15] for their separate benefit,[16] but where a contract is made by a married woman on her own credit, it is binding upon her, regardless of her intention as to the use of the property thereby obtained,[17] and regardless of the actual use which she afterwards makes of it.[18] Under the present law in the District of Columbia a married woman's contract for other than necessaries is presumptively for her separate estate,[19] and the retention of the husband's common-law liability for necessaries does not exclude her liability for such as she buys by her separate contract.[20] Liability to pay for property which has passed into her separate estate cannot be avoided in equity without return of property or proceeds thereof.[21] A married woman living in community with her husband may be held liable on contracts made by her, which inure to her separate benefit, when to hold otherwise would enable her to perpetrate a fraud.[22] In some states one seeking to hold a married woman upon a contract must show affirmatively that the contract is one which she is empowered by statute to make.[23] In Kansas it is held that coverture affords no ground for declaring invalid a married woman's contract, even though she possesses no separate estate or separate trade or business.[24] In Kentucky an assignment by a married woman, in which her husband joins, of her interest in a life insurance policy as beneficiary, to one having an insurable interest in the life of the insured, is valid.[25]

A general statute imposing an individual liability upon shareholders of corpora-

statute. She cannot become a surety and her right to convey and mortgage her real estate is restricted. Burns' Ann. St. 1901, §§ 6960, 6961, 6962, 6963. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811.

13. Purchase of land on her own credit held binding though she then had no separate estate. Act June 3, 1887 (P. L. 352). Crosby v. Waters, 28 Pa. Super. Ct. 559.

14. See post, § 7 C.

15. Though contract was signed with husband's name, evidence was competent to show that it was the wife's contract, and if she signed his name she would be liable, if it was in fact her contract. Wuertz v. Braun, 99 N. Y. S. 340. In action for work done on a house owned by the wife, evidence held to show contract was with wife; hence action could not be successfully maintained against husband. McClelland v. Lynch, 98 N. Y. S. 640.

16. Where a married woman joins her husband in a note, she cannot be held thereon in an action at law unless the note was necessary or convenient to the use and enjoyment of her separate property, or in carrying on her separate business, or in the performance of personal services for another than her husband. Bailey v. Fink [Wis.] 109 N. W. 86. Mere intention to charge her separate estate, or the existence of equitable grounds for charging it, is insufficient in law, though it may be good in equity. Id. Wife not liable in action at law on note in which she joined husband for sole purpose of releasing chattel mortgage on his property. Id.

17. A married woman, whether possessed of a separate estate or not, may purchase property, real or personal, and give her obligation for the purchase price, which obligation will bind her at law as if she were a feme sole, provided the title to the property purchased passes to her, and this she may do regardless of the purpose to which she intends to devote such property. Merrell v. Purdy [Wis.] 109 N. W. 82.

18. If a married woman purchases personal property on her own credit, she binds herself personally to pay for it, though the goods may be delivered at the matrimonial residence. Under Gen. St. 1860, c. 108, §§ 1, 3. Caldwell v. Blanchard, 191 Mass. 489, 77 N. E. 1036. To render a married woman liable for money borrowed by her it is only necessary that it should pass to her as her own property. It is immaterial whether she actually uses it for her own benefit or not. It becomes her separate property and she may do what she likes with it and still remain liable for it. Arnold v. McBride [Ark.] 93 S. W. 989.

19. 31 Stat. at L. 1374, c. 854. Dobbins v. Thomas, 26 App. D. C. 157.

20. 31 Stat. at L. 1377, c. 854. Dobbins v. Thomas, 26 App. D. C. 157.

21. Crosby v. Waters, 28 Pa. Super. Ct. 559.

22. Ackerman v. Larner, 116 La. 101, 40 So. 581.

23. As in Kentucky, in 1891, that it was for necessaries. Gilbert v. Brown [Ky.] 97 S. W. 40. A married woman's note being void as for a purpose not authorized by law, a renewal note given after she became discovert is also void. Id.

24. Note held enforceable against married woman who had no separate estate or business. Harrington v. Lowe [Kan.] 84 P. 570.

25. Such assignment was valid even before, the married woman's act of 1894. Doty v. Dickey [Ky.] 96 S. W. 544.

tions includes married women in the absence of an express exemption by reason of coverture.[26]

The liability of married women for necessaries and family expenses has already been discussed.[27]

(§ 7) *C. Contracts of suretyship.*[28]—In many jurisdictions married women cannot make binding contracts of suretyship[29] or bind themselves to pay their husband's debts.[30] Where this is the law a joint obligation of the husband and wife is enforceable against the wife only to the extent that she was benefited.[31] The wife's disability to bind herself for the payment of her husband's debts may be urged even after judgment,[32] but her claim must be timely urged and must be supported by sufficient proof.[33] She cannot assert her disability to the prejudice of innocent third persons.[34] Where a note and mortgage are signed by both husband and wife, the burden is upon the wife to show that she signed only as surety.[35] If she makes

26. Dickinson v. Traphagan [Ala.] 41 So. 272. Where married woman owned stock in corporation as her separate property and was president of the corporation, she was freed from the disabilities of coverture in regard thereto and was personally liable for debts of the corporation, having failed to file the annual statement required by Kirby's Dig. §§ 848, 859. Arkansas Stables v. Samstag [Ark.] 94 S. W. 699.

27. See supra, § 5.

28. See 5 C. L. 1745.

29. Gen. St. p. 2017, § 5. People's Nat. Bank v. Schepflin [N. J. Law] 62 A. 333. Note given by wife for accommodation of husband, she receiving no benefit therefrom and exercising no control over the proceeds held unenforceable against her, regardless of the form of the transaction by which the money was turned over to the husband by the bank. Id. Such note being unenforceable under Gen. St. p. 2017, § 5, is not made enforceable by Neg. Inst. Law (P. L. 1902, p. 583) providing that every negotiable instrument is deemed prima facie to have been given for a valuable consideration, etc. Id. Married woman cannot become a surety. Burns' Ann. St. 1901, § 6963. Anderson v. Citizens' Nat. Bank [Ind. App] 76 N. E. 811. In Alabama a married woman cannot directly or indirectly become the surety for her husband. Code 1896, §§ 2526, 2529. Sample v. Guyer, 143 Ala. 613, 42 So. 106. A married woman cannot bind herself personally for the payment of a debt that was not contracted for her own use, or for the use or benefit of her separate estate, or in connection with the control and management thereof, or in carrying on or conducting business therewith. Sess. Laws 1903, p. 345, gives full contractual rights only with respect to her own property or business. She cannot bind herself on a debt of her husband. Bank of Commerce v. Baldwin [Idaho] 85 P. 497.

30. Where husband applied for loan to pay taxes and grocers' bills, and there was no evidence as to the amount of either, and the check was made out to the husband, the note given therefor was for a debt of the husband though signed by the wife. Gilbert v. Brown [Ky.] 97 S. W. 40. Married woman was sued with her husband on a joint and several promissory note, and wife answered that she was an accommodation signer only and that note was without consideration as to her, being for a preexisting debt of her husband. Held answer stated a good defense as against demurrer. Hover v. Magley, 48 Misc. 430, 96 N. Y. S. 925.

31. Where wife joined husband in note and gave a mortgage of her own property as security, the note and mortgage could be enforced against her property only to the extent that she was benefited by the loan. Equitable Trust Co. v. Torphy [Ind. App.] 76 N. E. 639. Wife procured conveyance of husband's lands to herself and gave note and mortgage, signed by herself and husband, for money borrowed to pay off incumbrances on the land. Held the transaction was for her benefit, since she took title; hence she was liable on the note. Scott v. Collier [Ind. App.] 77 N. E. 666, afd. [Ind.] 78 N. E. 184.

32. Beasley v. Jenkins, 117 La. 577, 42 So. 145.

33. Wife urged disability in original suit but failed to prove the debt was her husband's and that she was surety. Held she was entitled to no relief by way of enjoining execution where she showed no further proof of her claim. Beasley v. Jenkins, 117 La. 577, 42 So. 145.

34. While the wife cannot be held as surety for the payment of her husband's debts, if she does not avail herself of the protection afforded and chooses to dispose of her property in his interest she cannot have the sale or other disposition made annulled to the prejudice of persons who have without notice dealt with the husband on the faith of recorded deeds. Clark v. Whitaker [La.] 41 So. 580. Wife sold home which belonged to her, to her son, taking a note and vendor's lien in part payment. The note was negotiated by the husband and came into the possession of bona fide holders. Held the note and securities could not be annulled to the prejudice of such third persons. Id. Married woman indorsed in blank, in New Jersey (where married women cannot become accommodation indorsers), her husband's promissory note without indicating that the indorsement was made in New Jersey. The note was discounted in New York, in good faith, without notice. Held indorser was estopped to deny that her contract of indorsement was a New York contract. Chemical Nat. Bank v. Kellogg, 183 N. Y. 92, 75 N. E. 1103.

35. Evidence held to show that loan was

a mortgage reciting an indebtedness of her own the presumption is that it speaks the truth.[36] It has been held that a married woman's note, given by her as surety for her husband's debt, though invalid, is sufficient as a moral consideration to support a renewal note given by her after her husband's death.[37]

The wife may, however, in some jurisdictions pledge or mortgage her own property for a debt of her husband.[38] While in Alabama a married woman cannot directly or indirectly become a surety for her husband,[39] she has the right to convey her property in absolute payment of her husband's debts, or on the consideration of the transfer to her of the obligation of her husband, and she can mortgage her property for these considerations.[40] In Georgia a married woman cannot bind her separate property by a contract of suretyship, nor by an assumption of her husband's debts, nor can she sell her property to pay his debts;[41] but the mere fact that she intends to use the proceeds of a loan to pay an indebtedness of her husband, and that this fact is known to the lender, does not invalidate her contract, if the party to be paid is not the creditor of the husband and he is not a party to a scheme between the husband and wife whereby the husband's debts are to be paid by the wife.[42] In Massachusetts, where a married woman becomes a surety for her husband, executing a note with him and giving a mortgage of her real estate as security, her estate is entitled to exoneration out of the estate of the deceased husband.[43]

(§ 7) *D. Conveyances, mortgages, contracts to convey, powers.*[44]—Married women may convey or mortgage their separate property, statutory requirements regarding the instrument of conveyance being duly complied with.[45] In some states the wife may convey alone;[46] in others joinder of the husband is essential,[47] unless

procured by husband as agent for wife and that wife signed instruments as a principal. Gibson v. Wallace [Ala.] 41 So. 960.

36. Where woman gave mortgage and had husband's note transferred to her, she became the principal debtor, not a surety. Sample v. Guyer, 143 Ala. 613, 42 So. 106.

37. Immaterial that note was antedated prior to husband's death, there being no fraud. Rathfon v. Locher [Pa.] 64 A. 790.

38. In Pennsylvania a wife has power to mortgage her separate estate to secure her husband's debt. This power is not taken away by the act of June 8, 1893 (P. L. 344). Righter v. Livingston, 214 Pa. 28, 63 A. 195. A married woman may by proper instrument charge her separate property for any obligation, even for her husband's debt, but this charge is only enforceable in equity. Merrell v. Purdy [Wis.] 109 N. W. 82. In Michigan a married woman may pledge her separate property to secure a debt of her husband's. Hackley Nat. Bank v. Jeannot [Mich.] 13 Det. Leg. N. 7, 106 N. W. 1121. Hence, when a married woman has engaged in business as her husband's partner and has joined him in a chattel mortgage to secure a firm debt, she binds her separate property, even though she cannot, by direct contract with her husband, become his partner. Id.

39, 40. Sample v. Guyer, 143 Ala. 613, 42 So. 106.

41. Rood v. Wright, 124 Ga. 849, 53 S. E. 390.

42. Answer held not to state a defense to an action on notes given by a married woman, the proceeds of which were used to pay his debts. Rood v. Wright, 124 Ga. 849, 53 S. E. 390.

43. Browne v. Bixby, 190 Mass. 69, 76 N. E. 454.

44. See 5 C. L. 1746. Power of married women to convey, see Tiffany, Real Prop. 1144.

45. A deed properly acknowledged by a married woman in which her husband joins passes title to the property, and, like any other instrument, its execution may be proved in any mode known to the common law. Lamberida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698. A mortgage by a married woman of her separate statutory property to secure a loan for the benefit of a business carried on by her, in which her husband joins and wherein he covenants to pay the loan, is valid (Mercantile Exch. Bank v. Taylor [Fla.] 41 So. 22) when it appears to have been made in good faith for a valuable consideration, and not for the purpose of hindering, delaying, or defrauding other creditors (Id.). Mortgage on $18,000 worth of property to secure debt of $4,400, giving mortgagee right to take immediate possession and sell, held valid. Id.

46. In Nebraska, where a married woman owns real estate in her own right, except when such real estate is a homestead, she may convey good title thereto without joining her husband in the conveyance. Jordan v. Jackson [Neb.] 106 N. W. 999.

47. A married woman cannot mortgage her separate estate except by an instrument

the wife has been permanently abandoned by him.[48] A married woman may accept, hold, and execute a trust relating to real estate and has power, in the execution of the trust, to convey the real estate without the concurrence of her husband or his joinder in the conveyance,[49] and this rule extends to trusts in which the husband of the trustee is the beneficiary and to conveyances made in its execution directly to him.[50] All transactions in which the joinder or assent of the wife is obtained in or to any disposition of the homestead will be closely scrutinized by the courts,[51] but this doctrine will not be carried to the extent of relieving her from the consequences of her own acts which she clearly understands or should have understood.[52] The statutes of Nebraska only authorize a married woman to contract with reference to and upon the faith and credit of her separate property.[53] In that state a married woman cannot bind her after-acquired property by covenants in a joint mortgage made by herself and her husband upon property in which she had only a life estate.[54] Such mortgage binds her separate property only to the extent of such life estate.[55] Her covenants do not, therefore, estop her from claiming an interest in the property covered by the mortgage, lawfully acquired by her after the date of the mortgage freed from its lien.[56] In Pennsylvania a wife who joins her husband in a warranty deed for the purpose of releasing her dower is bound by the covenants in the deed.[57] It is held in Kentucky that a married woman is not liable upon a covenant of warranty in a deed signed by her even in conveying her own estate.[58] In Texas a married woman can make a verbal partition of her real estate; hence her deed may be effective for that purpose though not acknowledged.[59] In North Carolina a married woman may make contracts affecting her separate property only with the written consent of her husband.[60] A contract for the improvement of her separate real estate, consented to by her husband, she being privately examined apart from him, is valid[61] and forms the basis for an enforceable mechanic's lien on the property.[62]

(§ 7) *E. Rights of creditors. Of wife.*[63]—The contract of a married woman can only be enforced against the separate estate which she possesses at the time of the contract.[64] For labor and materials furnished for improvements on a married woman's separate property with her knowledge or consent,[65] or under contract with

in which the husband joins. Burns' Ann. St. 1901, § 6962. Starkey v. Starkey [Ind.] 76 N. E. 876.

48. In North Carolina a deed by a married woman after she has been permanently abandoned by her husband is valid. Pardon v. Paschall [N. C.] 55 S. E. 365. Under Revisal 1905, § 2117, making women who have been abandoned free traders as to their right to contract concerning their separate estate. Id.

49. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

50. Code 1858, § 2076, requiring joinder of husband, does not apply. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

51. Bastin v. Schafer, 15 Okl. 607, 85 P. 349.

52. Bastin v. Schafer, 15 Okl. 607, 85 P. 349. A mortgage given by both husband and wife to secure a note upon sufficient consideration running to the husband alone is valid against the wife without any consideration moving to her separately. Id.

53. Statutes and decisions of Nebraska reviewed. Burns v. Cooper [C. C. A.] 140 F. 273.

54. Burns v. Cooper [C. C. A.] 140 F. 273.

55. Since it was not made in relation to or upon the faith of her separate property, except such life estate. Burns v. Cooper [C. C. A.] 140 F. 273.

56. Burns v. Cooper [C. C. A.] 140 F. 273.

57. She cannot acquire title in proceedings under mortgage which existed at the date of the deed and set it up against the grantee of the deed. George v. Brandon, 214 Pa. 623, 64 A. 371.

58. Bell v. Bair, 28 Ky. L. R. 614, 89 S. W. 732.

59. Cowan v. Brett [Tex. Civ. App.] 16 Tex. Ct. Rep. 776, 97 S. W. 330.

60. Code § 1826. Ball v. Paquin, 140 N. C. 83, 52 S. E. 410.

61, 62. Ball v. Paquin, 140 N. C. 83, 52 S. E. 410.

63. See 5 C. L. 1747.

64. Parratt v. Hartsuff [Neb.] 106 N. W. 966.

65. Where a married woman has knowledge of improvements being made upon her house under contract with her husband, those furnishing labor and materials have a valid mechanic's lien upon her house and lot. McGeever v. Harris [Ala.] 41 So. 930. House and premises owned by married wo-

her husband as her authorized agent,[66] a valid mechanic's lien may be acquired. The estate of a married woman who dies leaving separate property is primarily liable for her funeral expenses.[67] The contract of the husband to pay the wife an annuity secured by deed of trust makes the wife a creditor of the husband on the same footing as other creditors.[68] The plea of coverture is a personal privilege available only to the feme covert or her privies in blood or estate;[69] hence a mere creditor of a married woman, even in case of her insolvency, cannot attack a mortgage executed by her upon the ground that it was given to secure the debt of her husband and son.[70] It is usually desirable in making sale of a bankrupt's real estate, if the wife will consent, to sell free from her inchoate right of dower and to compensate her by a fair allowance out of the proceeds for her release of that right.[71]

Of husband.[72]—Separate property of the wife is not liable for debts of the husband.[73] The husband may render services in the management of his wife's property without rendering such property subject to the claims of his creditors.[74] Property sold by the husband to the wife is not liable for his debts, in Texas, if there is a delivery and change of possession.[75] The Massachusetts statute making

man held liable to mechanic's lien for furnace put in with her knowledge and necessary to the premises though charged to the husband. Work and materials were furnished with her consent as owner, within Lien Law § 3. Schummer v. Clark, 107 App. Div. 207, 95 N. Y. S. 836.

66. Property of married woman is subject to mechanic's lien if work and materials were furnished under contract with her husband acting as her authorized agent, whether or not she consented to repairs which were made. Saunders v. Tuscumbia Roofing & Plumbing Co. [Ala.] 41 So. 982.

67. Rev. St. 1898, § 3852, applies to estates of married women. Schneider v. Breier's Estate [Wis.] 109 N. W. 99. Where undertaker furnished labor and materials solely on the credit of the separate property of the deceased wife, her estate was primarily liable though the husband ordered the labor and materials to be furnished. Id.

68. Savage v. Savage [C. C. A.] 141 F. 346.

69, 70. Hawes v. Glover [Ga.] 55 S. E. 62.

71. Savage v. Savage [C. C. A.] 141 F. 346.

72. See 5 C. L. 1747.

73. Notes by husband for oil stock, not being for necessaries, held unenforceable against wife's property under statutes of Montana. Mantle v. Dabney [Wash.] 87 P. 122. Though the ordinary services of a wife with respect to the family household inure to the benefit of the husband, she may enter into an arrangement with her husband to perform other duties in connection therewith for compensation. Bodkin v. Kerr [Minn.] 107 N. W. 137. Money so acquired becomes her separate property and is not subject to her husband's debts. It is not impressed with a trust in favor of her husband's creditors. Id. Where husband was sheriff and he arranged with his wife to board prisoners and others, and the money paid by the county for such purpose was turned over to her, it was not held by her in trust for her husband's creditors, and property bought by the fund so accumulated was not subject to his debts. Id. Evidence held sufficient to sustain finding that wife acquired title to land in good faith for a valuable consideration, paid out of her own funds, from third persons who acquired it through foreclosure, and there was no fraud on husband's creditors. Id. It is error to enter judgment against husband and wife on a note signed only by the husband. Kossuth County State Bank v. Richardson [Iowa] 106 N. W. 923. Where a husband turns over to his wife his exempt wages to pay family expenses and she accumulates therefrom a fund which she invests in land in her own name, such fund is not subject to the husband's debts (Ehlers v. Blumer 129 Iowa, 168, 105 N. W. 406), and a fund acquired by the wife by keeping boarders on her own account and with her husband's consent and similarly invested, is also exempt as to his debts (Id.).

74. Foreman v. Citizens' State Bank, 128 Iowa, 661, 105 N. W. 163. Where land was set aside as the wife's homestead and the husband worked that and other land and stored all the crops so raised on the wife's homestead, where she lived, the burden was on the creditors of the husband to prove that such crops belonged to the husband. Id. The mere fact that the husband acts as the wife's agent in managing land purchased by her is not conclusive evidence of fraud but is entirely consistent with her ownership and possession. Bodkin v. Kerr [Minn.] 107 N. W. 137. Cotton raised on land owned by wife, mostly through her efforts and those of her children, held not liable for debts of husband though he also gave his labor and assisted in raising the cotton. Dollar v. Busha, 124 Ga. 521, 52 S. E. 615. Hay grown on wife's land belongs prima facie to the wife though seeded and harvested by her husband. Webster v. Sherman [Mont.] 84 P. 878.

75. Husband sold cattle to his wife together with the brand used by him, causing the transfer of the brand to appear of record. Held there was a sufficient delivery and change of possession so that sale was not void as to creditors, under Civ. Code § 4491, and property was not liable for hus-

personal property of the wife employed by her in business liable to attachment as property of the husband, unless a certain certificate is filed by the wife or husband, makes the wife's property liable for the husband's debts, no certificate being filed, only while such property is employed in business.[76]

Fraudulent conveyances.[77]—Whether a transfer from one spouse to another shall be deemed a fraud upon creditors depends upon the facts of the particular case.[78] Marriage is a sufficient consideration to support a conveyance from husband to wife,[79] and such a conveyance made pursuant to an oral promise made before the marriage will not be set aside at the suit of one who became a creditor of the husband after the conveyance.[80] A payment by a husband for his wife, at a time when he was indebted to her but had no other creditors, is not fraudulent as to one who became a creditor of the husband after such transaction.[81] Where the husband pays for land conveyed to the wife at a time when he is free from debt, the transaction is presumptively a voluntary settlement upon the wife, and one who asserts a resulting trust has the burden of proving the assertion.[82] As against the husband's creditors a post-nuptial settlement in consideration of the relinquishment of dower is good only to the extent of the dower relinquished.[83] While a wife who collected moneys on a contract assigned to her by an invalid post-nuptial settlement must answer to creditors for such moneys,[84] she will not be charged interest until demand where she acted in good faith.[85] At common law as well as under the Virginia practice, in equity, an answer alone will not suffice to prove that a post-nuptial settlement by an insolvent was on valuable consideration.[86]

(§ 7) *F. Estoppel.*[87]—A married woman is bound by an estoppel in pais the same as any other person.[88] To create an estoppel by deed against a married woman and those claiming under her, it is essential that she should be guilty of some positive act of fraud, or an act of concealment or suppression equivalent thereto.[89]

§ 8. *Torts by husband or wife or both.*[90]—At common law a tort committed by the wife in the presence of her husband is presumed to be the result of coercion on his part and his coercion excuses her from liability; and this rule still prevails

band's debts. Webster v. Sherman [Mont.] 84 P. 878. Held also that his creditors did not deal with him on the credit of such property of the wife. Id.

76. Under Rev. Laws c. 153, § 10, where a business of the wife was not continued after her death, her property was not liable to attachment for a debt of her husband in an action brought after her death. Allen v. Clark, 190 Mass. 556, 77 N. E. 691.

77. See 5 C. L. 1749.

78. Wife collected proceeds of tontine policy on life of husband and afterwards invested the same, with an additional sum, in improvements of homestead. She also advanced $2,000 to a company in which he was interested and which he guaranteed. Held a conveyance of his real estate to her before maturity of complainant's claim against husband was not fraudulent as to his creditors. Knickerbocker Trust Co. v. Carhart [N. J. Eq.] 64 A. 756. Wife borrowed money from husband to carry on her business, agreeing to build a house, out of proceeds, and convey to him. Some years later she carried out her agreement. Held the transaction was not fraudulent as to her creditors, though both knew of claims of creditors at the time of the conveyance by the wife. Clarke v. Black, 78 Conn. 467, 62 A. 757.

79. Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

80. Transfer held not fraudulent as to creditors. Welch v. Mann, 193 Mo. 304, 92 S. W. 98.

81. Boldrick v. Mills [Ky.] 96 S. W. 524.

82. In re Foss, 147 F. 790.

83. Moore v. Green [C. C. A.] 145 F. 472.

84, 85, 86. Vashon v. Barrett [Va.] 54 S. E. 705.

87. See 5 C. L. 1750.

88. Representations of married woman that she was her husband's partner and that she was borrowing money with him to carry on their business held binding on her. Anderson v. Citizens' Nat. Bank [Ind. App.] 76 N. E. 811. One who rendered services without objection, knowing no pay except support was expected to be given could not recover therefor. Smith v. Sisters of Good Shepherd [Ky.] 96 S. W. 549. A married woman possessing separate property may bind herself at law by estoppel. But it was held that wife was not estopped in this case to deny liability on note. Merrell v. Purdy [Wis.] 109 N. W. 82.

89. Since all who deal with married woman are chargeable with knowledge of disabilities and that she can convey only in the statutory manner. Kopke v. Votaw

in some states.[91] Usually the husband is not liable for torts committed by the wife in which he did not participate;[92] but in some jurisdictions he is liable for torts of the wife to the same extent as she is.[93] She is jointly liable for a wrongful discharge of surface water from her land due to her husband's act which she fails to rectify.[94]

§ 9. *Torts against husband or wife or both. A. Wrongs to the person.*[95]—For injuries to a married woman, she or her husband, or both, may sue.[96] In an action by the husband, he may recover for loss of the society of his wife[97] and for loss of her services, not only in the household[98] but also as his business assistant, when such assistance was being rendered at the time of her injury without any agreement for, or expectation of, compensation.[99] He may recover for loss of her services without showing that he employed another to take her place.[1] He is also entitled to recover his expenditures for medical care and attention.[2] The wife may also maintain an action for her injuries,[3] and the damages recovered by her are her separate property.[4] A recovery by the wife for personal injuries does not bar an action by the husband against the same defendant for expenses to which he has been put and for his loss of consortium.[5] Each spouse has a separate and distinct cause of action.[6] The wife may recover for medical expenses incurred by her upon

[Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15.

90. See 5 C. L. 1750.

91. Emmons v. Stevane [N. J. Law] 64 A. 1014.

92. Where evidence did not show that husband aided wife in blocking a road or encouraged her he was not liable merely by reason of the marital relation or because he did not by force restrain her. Sweezy v. Fisher [Mich.] 12 Det. Leg. N. 713, 105 N. W. 749.

93. Husband liable in exemplary damages for slanderous words of wife. Patterson v. Frazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146.

94. He made ditch on land whereof she later acquired title. Miller v. McGowan, 29 Pa. Super. Ct. 71.

95. See 5 C. L. 1750.

96. See 5 C. L. 1750, notes 62, 63, 64.

97. Loss of society of wife is a proper element of damages in an action by husband for injuries caused by a third person's negligence. Lyons v. New York City R. Co., 97 N. Y. S. 1033. Municipal court of New York has jurisdiction to award such damages. Construing Laws 1902, p. 1489, c. 580, § 1, subd. 14. Id.

98. Statutes enlarging the rights and privileges of married women do not affect the right of the husband to maintain an action for loss of her society and services as wife, as an action for injuries to her resulting in such loss to him. Construing Pub. St. 1901, c. 176, § 2. Booth v. Manchester St. R. Co., 73 N. H. 529, 63 A. 578.

Statutory exception: In an action by a married woman against a city for personal injuries, it is error to instruct that only her husband could recover for her services and medical expenses, since under the statute in an action of this kind, there can be a recovery only for bodily injuries. Lorf v. Detroit [Mich.] 13 Det. Leg. N. 502, 108 N. W. 661. See, also, Roberts v. Detroit, 102 Mich. 64, 60 N. W. 450, 27 L. R. A. 572.

99. In a joint action by the husband and wife to recover damages for injuries suffered by the wife, the husband may recover for loss of the services of the wife in his business. Her earnings as his assistant in his business belong to him. Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467. In action by husband for injuries to wife, he may recover not only for loss of services in the household but also for the value of her services rendered in his business, when she was rendering such services at the time of her injury without any contract or expectation of being paid therefor. Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916.

1. If he paid another he could recover his expenditure as an item of his damage, but not as the measure. Garside v. New York Transp. Co., 146 F. 588.

2. Husband may recover for expenditures made in the effort to cure his wife of sickness and injuries caused by third person. Booth v. Manchester St. R. Co., 73 N. H. 529, 63 A. 578. Since the husband is liable for medical expenses incurred in treating wife's injuries, he may recover damages therefor from the person liable, and any sum paid in settlement of the claim of the wife and husband on account of such expense is the property of the husband. Indiana Union Traction Co. v. McKinney [Ind. App.] 78 N. E. 203.

3. Engle v. Simmons [Ala.] 41 So. 1023; Duffee v. Boston El. R. Co., 191 Mass. 563, 77 N. E. 1036. Woman may sue though person causing her injuries was trespassing in the home which was the husband's property. Engle v. Simmons [Ala.] 41 So. 1023.

4. Under Code 1896, § 2523, damages recoverable are her separate property. Engle v. Simmons [Ala.] 41 So. 1023. Under the present law of Louisiana, damages resulting from personal injuries to the wife inure to her separate benefit. Act No. 68, p. 95, of 1902. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

5, 6. Duffee v. Boston El. R. Co., 191 Mass. 563, 77 N. E. 1036.

her individual contract.[7] Since services of the wife belong to the husband, she cannot recover for any diminution in her ability to perform them in an action by her.[8] In Alabama the action for the recovery of damages to the wife should be brought by the wife with the usual authorization by the husband or the court,[9] but where the action is brought by the husband and wife jointly, and the wife's testimony is excluded on the theory that the action should have been brought by the husband alone, and judgment is rendered for him, such judgment may be affirmed, with the reservation that the proceeds are to be collected by, and are to inure to the separate benefit of, the wife.[10] "Personal injuries," within the meaning of the statute, includes injuries to the feelings resulting from abuse, slander, or libel.[11]

(§ 9) *B. Criminal conversation and alienation of affections.*[12]—By weight of modern authority a married woman may maintain in her own name an action for damages for the alienation of her husband's affections.[13]

Defenses.—The motive moving a parent to interfere with the marital relations of a child is always of the essence of an action against the parent for inducing a separation between the child and his or her spouse, since the law recognizes the parental right to advise a child.[14] Where a parent and another are sued jointly, a conspiracy being charged, intention and co-operation in causing the separation must be made to appear.[15] In such case, if the conduct of the parent is justifiable, the law will also excuse the codefendant.[16]

Connivance on the part of the husband, when properly established, bars an action for criminal conversation.[17] The conduct of the husband must be such, when subjected to the test of reasonable human transactions, as to show an intention to connive.[18] Passive as well as active connivance constitutes a bar, provided the intention to connive be found.[19] Connivance is not proven as an independent fact but is usually established as a conclusion from the line of conduct pursued by the husband.[20] The question is usually one of fact for the jury,[21] but if but one reasonable conclusion can be drawn from the facts, the question becomes one of law for the court.[22]

Pleading and proof; admissibility of evidence.[23]—Evidence tending to show defendant's wrongful conduct or interference,[24] the motive therefor,[25] the effect of

7. Though the husband is ordinarily chargeable with medical bills of the wife, she may contract for such services and bind herself therefor, and may therefore recover the same of defendant. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347.

8. Instruction that she could recover for diminution in ability to perform "ordinary duties" held too broad. Norfolk R. & Light Co. v. Williar, 104 Va. 679, 52 S. E. 380.

9. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

10. Result would have been the same if case had been tried on the proper theory, and the testimony of both spouses admitted. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

11. Action for slander, damages inure to wife's benefit. Martin v. Derenbecker, 116 La. 495, 40 So. 849.

12. See 5 C. L. 1751.

13. Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890. Evidence sufficient to sustain verdict for plaintiff in action against father-in-law for alienating her husband's affections. King v. King, 122 Ill. App. 284.

Note: In Nolin v. Pearson, 191 Mass. 283, 77 N. E. 890, the common-law status of the wife and the changes wrought by modern statutes are discussed, and the authorities cited and reviewed, especially as relating to the rights of each spouse to the conjugal society of the other. See authorities cited, pro and con, on proposition stated in the text, also 5 C. L. 1751, n. 75.

14. Barton v. Barton [Mo. App.] 94 S. W. 574.

15. Barton v. Barton [Mo. App.] 94 S. W. 574. In action against mother and sister of plaintiff's husband for inducing husband to separate from plaintiff, held there was evidence to support a verdict and judgment for plaintiff. Id.

16. Barton v. Barton [Mo. App.] 94 S. W. 574.

17, 18, 19, 20, 21. Kohlhoss v. Mobley, 102 Md. 199, 62 A. 236.

22. Conduct of husband who knew of wife's wrongful conduct held, as matter of law, to amount to an implied consent or connivance so as to bar his action. Kohlhoss v. Mobley, 102 Md. 199, 62 A. 236.

23. See 5 C. L. 1752.

24. Certain evidence tending to show im-

such conduct in inducing separation,[26] and lack of justification[27] is admissible in an action for alienation of affections. In an action for criminal conversation, an alleged confession by the wife, who is not a party, not made in the presence of the husband or defendant, and relating to past events, is inadmissible.[28] In an action by a husband for damages for criminal conversation with an alienation of his wife's affections, positive proof of a legal marriage is required.[29] It must be proof of identity of person and not of name merely,[30] and plaintiff must establish the identity though not requested by the defendant to do so.[31]

Damages.[32]—Evidence to show that no affection existed between the husband and wife prior to the alleged wrongful act of defendant is admissible in mitigation of damages in an action for alienation of affections,[33] but not as a bar to the action.[34] The bad character of the plaintiff may also be shown in mitigation, when pleaded, in an action by the wife.[35] Evidence of the earning capacity and financial condition of the husband is admissible as affecting the quantum of damages recoverable for loss of support.[36] Proof that the wife had assisted in supporting the family is admissible on the issue of loss of support.[37] The wife's physical and financial condition after her husband's separation from her may be shown.[38] In an action for criminal conversation it may be shown in mitigation of damages that the plaintiff cohabited with his wife after her alleged misconduct.[39] Evidence of the previous unchastity and bad character of the wife is admissible on the same issue.[40]

§ 10. *Remedies and procedure generally as affected by coverture.*[41]—The ef-

proper visits by defendant to plaintiff's wife held admissible in action for alienation of affections. Dow v. Bulfinch [Mass.] 78 N. E. 416. Evidence that a suit for divorce had been commenced and dismissed by plaintiff's husband admissible, the inference being that defendant had instigated and participated in such suit. Hardwick v. Hardwick [Iowa] 106 N. W. 639.

25. To show a motive for defendant's interference between plaintiff and her husband, evidence that defendant served a notice to quit on plaintiff and her husband, who were living at defendant's home, was admissible. Hardwick v. Hardwick [Iowa] 106 N. W. 639. But instructions on this evidence should make it material only in case the notice was served with the desire to cause a separation. Id.

26. Acts and declarations of husband admissible in action by wife for alienating his affections to show effect on husband of defendant's alleged efforts to bring about a separation, but such evidence should be limited in its effect to such issue. Hardwick v. Hardwick [Iowa] 106 N. W. 639.

27. Evidence that wife's health had been impaired after going to live with her husband's father admissible to show that the father's, defendant's, interference between plaintiff and her husband was without cause or justification. Hardwick v. Hardwick [Iowa] 106 N. W. 639.

28. Kohlhoss v. Mobley, 102 Md. 199, 62 A. 236.

29. Snowman v. Mason, 99 Me. 490, 59 A. 1019.

30. A marriage certificate containing the names of the parties is insufficient without proof aliunde of identity. Snowman v. Mason, 99 Me. 490, 59 A. 1019.

31. It is one of the elements of proof in this class of cases. Snowman v. Mason, 99 Me. 490, 59 A. 1019.

32. See 5 C. L. 1752. Verdict for $1,500 in action for alienation of wife's affections held not excessive and supported by evidence. Korby v. Chesser [Minn.] 108 N. W. 520.

33, 34. Morris v. Warwick, 42 Wash. 480, 85 P. 42.

35. In an action by a wife for alienating her husband's affections and causing a separation, the bad character of the plaintiff was pleaded in mitigation of damages. Proof of the allegation was competent under Code § 3593, and the evidence should not be limited in its effect to the credibility of plaintiff as a witness. Hardwick v. Hardwick [Iowa] 106 N. W. 639.

36. Harvey v. Harvey [Neb.] 106 N. W. 660.

37. In action for alienation of husband's affections, wife having shown amount required to support her family in the style to which they were accustomed, defendant was properly allowed to show that husband had not supported family alone, but that wife had contributed from her own means. Dunham v. McMichael, 214 Pa. 485, 63 A. 1007.

38. Evidence of plaintiff's ill health and of necessary assistance given her by neighbors after her husband had been induced to separate from her admissible to show her loss. Hardwick v. Hardwick [Iowa] 106 N. W. 639.

39. Smith v. Hockenberry [Mich.] 13 Det. Leg. N. 684, 109 N. W. 23.

40. As that wife had been criminally intimate with other men and had associated with lewd women. Smith v. Hockenberry [Mich.] 13 Det. Leg. N. 684, 109 N. W. 23. Evidence tending to show that the alleged act of intercourse was brought about by the wife, and that she arranged for a discovery,

fect of the marriage relation on the competency of the parties thereto as witnesses is fully treated elsewhere.[42]

Right of action; parties.[43]—The right of action for injuries to the wife, and for criminal conversation and alienation of affections, and the procedure in such cases have already been treated.[44] In many jurisdictions a married woman may now sue or be sued as a feme sole[45] in respect to her separate property, business or individual earnings.[46] Where such is the law the husband cannot in his own name prosecute a right of action possessed by the wife.[47] Both must sue where the right of action is joint.[48] The husband is not a proper party to an action for damages to a married woman with respect to her separate property.[49] He is a proper party to an action for a tort to the wife personally.[50] A declaration containing a count for damages to the wife with respect to her separate property, and a count for a personal tort to the wife, is demurrable.[51] Ordinarily the wife is not a proper party in an action to recover community property;[52] but in an action for false imprisonment of the wife, though damages recoverable are community property, she is properly joined.[53] If the husband sues with the wife, when she neither must nor may be joined, the error is fatal.[54] The husband should sue alone for the support in his household of a third person, even though the wife performed most of the services,[55] unless there is an express contract to compensate the wife.[56] The wife, though a proper party, is not indispensable in a suit to cancel a conveyance to the husband of land occupied by them as a homestead.[57] The wife of a mortgagor in a purchase-money mortgage in which she did not join is not a necessary party in the suit to foreclose.[58] Where husband and wife commence an action for injuries to property, and the action is dismissed as to the husband, it may be continued by the wife to judgment.[59] In an action against a husband and wife, a defense common to both inures to the benefit of the wife though pleaded only by the husband.[60] In Texas, where the husband refuses to join the wife in a suit to protect her separate property, she may sue alone.[61] In North Carolina a justice court has jurisdiction of a

was also admissible to show her bad character. Id.

41. See 5 C. L. 1752.

42. See Witnesses, 6 C. L. 1975.

43. See 5 C. L. 1752.

44. See §§ 9 A, 9 B.

45. Rev. Laws, c. 153, § 6, permits married women to sue and be sued as if unmarried. Duffee v. Boston El. R. Co., 191 Mass. 563, 77 N. E. 1036.

46. Not necessary to join husband in action to enforce liability of wife as president of a corporation, for its debts, where she failed to file the annual statement required by Kirby's Dig. §§ 848, 859. Arkansas Stables v. Samstag [Ark.] 94 S. W. 699. In Delaware a married woman may maintain an action for wages for her personal labor performed for other persons than her own family. Lodge v. Fraim [Del.] 63 A. 233.

47. Ky. St. 1903, § 2128, authorizes married women to make contracts and sue and be sued as though unmarried. Hence the husband of a woman who made a settlement with her father of rights in his property could not, in his own name, sue to set the agreement aside. McGregor v. Overton's Ex'rs [Ky.] 96 S. W. 1114.

48. Husband sold hay which was wife's separate property under agreement with buyers to pay part of the proceeds to the creditors of the husband and wife. Upon failure of buyers to do as agreed, there was a cause of action enforceable by husband and wife jointly, but not by husband alone. Ives v. Sanguinetti [Ariz.] 85 P. 480.

49, 50. Ricardo v. News Pub. Co. [N. J. Law] 62 A. 301.

51. Misjoinder of separate causes of action. Ricardo v. News Pub. Co. [N. J. Law] 62 A. 301.

52. Gomez v. Scanlan [Cal. App.] 84 P. 50.

53. This class of cases forms an exception to the general rule. Gomez v. Scanlan [Cal. App.] 84 P. 50.

54, 55. Oakley v. Emmons [N. J. Law] 62 A. 996.

56. Evidence insufficient to show express contract to pay wife for support of third person, hence error to join wife in action by husband. Oakley v. Emmons [N. J. Law] 62 A. 996.

57. Since the wife's inchoate homestead and dower rights would not be affected, she not being made a party, and she has no right of possession of the homestead which would be disturbed by a decree. Mash v. Bloom, 126 Wis. 385, 105 N. W. 831.

58. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350.

59. Butler v. Boynton, 117 Mo. App. 462, 94 S. W. 723.

60. Defense of usury in foreclosure action. Lowe v. Walker [Ark.] 91 S. W. 22.

suit against a married woman for a debt due by her, or on a contract made by her before marriage, or for a debt contracted by her as a free trader after marriage.[62] In South Carolina a married woman who is also a minor can prosecute an action only by a guardian ad litem, even though her husband is properly joined with her as coplaintiff.[63]

As a general rule neither spouse can, during the existence of the marriage relation, sue the other at law[64] except as authorized by statute.[65] In Pennsylvania a wife may maintain a bill in equity to protect her separate property and enforce her property rights against her husband.[66]

That a judgment against a husband and wife does not specifically authorize execution against the wife's separate property does not invalidate it or prevent satisfaction thereof out of her separate property.[67] In Arkansas an erroneous judgment against a married woman may be modified or vacated where her coverture does not appear in the record nor the error in the proceedings.[68] This statute does not authorize vacation or modification of a valid judgment against a married woman merely because her coverture does not appear until a motion for a new trial is made.[69] In Florida a deficiency decree or judgment, though entered in a court of equity consequent upon a foreclosure sale, is not a "charging in equity of a married woman's separate estate."[70] Such a decree when entered against a married woman in ignorance of the fact of coverture may be vacated upon the petition of both spouses in the absence of laches or the intervention of rights of third parties.[71]

Limitations.[72]—At common law limitations do not run against married women,[73] but this rule has been abrogated by statute in many states[74] where the common-law disabilities of coverture have been removed. But a married woman who acquires the right to enter into possession of real estate prior to the enactment of such a statute is not within its operation.[75]

§ 11. *Proceedings to compel support of wife.*[76]—It is the duty of the husband to provide for the reasonable support and maintenance of his wife during the con-

61. Suit to restrain sale of her property for debt of husband. Western Bank & Trust Co. v. Gibbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 754, 96 S. W. 947.

62. A justice's judgment is not void unless the record shows that the cause of action is one over which the court had no jurisdiction as against a married woman. McAfee's Estate v. Gregg, 140 N. C. 448, 53 S. E. 304.

63. Construing Code Civ. Proc. 1902, §§ 135, 136. Hiers v. Atlantic Coast Line R. Co. [S. C.] 55 S. E. 457.

64. Muller v. Witte, 78 Conn. 495, 62 A. 756. In Minnesota a married woman cannot maintain a civil action against her husband for a personal tort committed by him against her during coverture. Strom v. Strom [Minn.] 107 N. W. 1047.

65. Muller v. Witte, 78 Conn. 495, 62 A. 756. Under Act April 20, 1877, wife may sue on note given her by her husband. Mathewson v. Mathewson [Conn.] 63 A. 285. Where court found that wife had not been abandoned by her husband, she could not maintain an action against him, under Gen. St. 1902, § 4543, permitting an abandoned wife to sue as a "feme sole." Muller v. Witte, 78 Conn. 495, 62 A. 756.

66. Under married woman's act, P. L. 1848, § 536. Heckman v. Heckman [Pa.] 64 A. 425. Bill to set aside conveyance of wife's separate property to her husband on ground of fraud, undue influence, and want of consideration. Id.

67. Love v. McGill [Tex. Civ. App.] 91 S. W. 246.

68. Kirby's Dig. § 4431. Arkansas Stables v. Samstag [Ark.] 94 S. W. 699.

69. Arkansas Stables v. Samstag [Ark.] 94 S. W. 699.

70. Rice v. Cummings [Fla.] 40 So. 889.

71. Decree vacated four years after rendition. Rice v. Cummings [Fla.] 40 So. 889.

72. See 5 C. L. 1753.

73. In North Carolina adverse possession could not be counted against a married woman prior to February 13, 1899, when the disabilities of coverture were repealed. Norcum v. Savage, 140 N. C. 472, 53 S. E. 289.

74. The common-law rule of the unity of interest between husband and wife, preventing the application of the statute of limitations to claims existing in favor of the wife against the husband during coverture, on grounds of public policy, has been abrogated in Ohio by statute. Liggett v. Estate of Liggett, 3 Ohio N. P. (N. S.) 518.

75. A married woman who acquires a right to enter into possession of real estate prior to Acts 1899, p. 209, c. 78, which removes disabilities of coverture, is not within the provisions of that act. Cherry v. Cape Fear Power Co. [N. C.] 55 S. E. 287.

76. See 5 C. L. 1754.

tinuance of the marriage relation.[77] This duty is enforceable by the wife in an action for support and maintenance,[78] or for alimony, without divorce,[79] or by means of a criminal prosecution of the husband. It is also held that a court of equity has inherent power, independent of statute, to enforce this duty of the husband in cases where no application for divorce is made.[80] To warrant a judgment against the husband in such a proceeding, the facts required by law must be made to appear;[81]

77. Price v. Price [Neb.] 106 N. W. 657. Husband is only bound to provide for the wife such a reasonably comfortable home as is consistent with his means and their station in life. Jones v. People, 119 Ill. App. 49. It is the duty of the husband and father to provide for the support of his wife and minor children, in necessitous circumstances, at the matrimonial domicile. In re Baurens [La.] 41 So. 442.

78. When husband fails to support wife without just cause, she may maintain action against him for reasonable maintenance. Price v. Price [Neb.] 106 N. W. 657.

79. In some states a wife may sue for and obtain alimony without praying for a divorce of any kind. Breen v. Breen, 28 Ky. L. R. 1216, 91 S. W. 251.

80. A court of equity has inherent power, independent of statute, to grant a wife a separate maintenance because of abandonment, failure to provide, cruelty, or other breach of marital duty by the husband justifying withdrawal by the wife, in cases where no application is made for divorce. Cureton v. Cureton [Tenn.] 96 S. W. 608.

NOTE. Equity jurisdiction: "There is a conflict of authority upon the question whether a court of equity has inherent power to grant a wife a separate maintenance out of her husband's estate, because of his abandonment of her, or his failure to provide, or his cruelty, or other breaches of marital duty, whereby she is forced to withdraw from his home and custody, in cases where no application for divorce is made (2 Am. & Eng. Enc. of Law [2nd Ed.] 93, 94; 14 Cyc. 744, 745); many of the authorities referred to, in their notes, holding that in the absence of statutes conferring the power it does not exist. However, there are other authorities, represented by decisions in the courts of last resort in Alabama, California, Colorado, Iowa, Kentucky, Maryland, Mississippi, North Carolina, Ohio, South Carolina, South Dakota, and Virginia, and also in the District of Columbia, which hold that the power exists. 2 Am. & Eng. Enc. of Law [2nd Ed.] 94, 95, n. 2; 14 Cyc. pp. 744, 745, n. 14. And with these latter courts must be ranked our own. Nicely v. Nicely, 3 Head [Tenn.] 184; Swan v. Harrison, 2 Cold. [Tenn.] 543; Corley v. Corley, 8 Baxt. [Tenn.] 7, 10.

"In Nicely v. Nicely, 3 Head [Tenn.] 184, the court said: 'The argument against the jurisdiction of a court of equity * * * is based upon the English authorities. The doctrine held there is that the obligation of the husband to provide a suitable maintenance for his wife is not a duty of which courts of equity will decree the specific performance, by requiring him to furnish a separate maintenance; that the remedy is in the courts of common law, by action against the husband, in favor of any one who may, under such circumstances, have supplied the wife with necessaries suitable to her station in life; that the jurisdiction of decreeing alimony belongs to the spiritual court, and can be properly exercised in that court as incidental to a decree of divorce only, and is not within the jurisdiction of a court of equity. Fonbl. Eq. 103, 104, n. n; 2 Story's Eq. [5th Ed.] § 1422. Such seems to be the general doctrine of the English cases, though the cases upon this subject do not altogether agree. But in some of the American courts a more reasonable doctrine has prevailed; and the jurisdiction of a court of equity, in such cases, has been maintained upon general principles, and especially upon the ground of the utter inadequacy of the remedy at law. See 2 Story's Eq. 1423, a, 4 Hen. & M. 507, and other American cases cited in Fonbl. Eq. 62, 63, and note; Id., 103, 104 and note.'"—From opinion by Neil, J., in Cureton v. Cureton [Tenn.] 96 S. W. 608.

81. In Iowa separate maintenance is allowed only on a showing which would authorize the court to grant an absolute divorce. Hancock v. Hancock [Iowa] 109 N. W. 1009. The act of the husband in finally separating himself from his wife and neglecting to support her constitutes an abandonment under the New Jersey statute, though the wife has recovered a decree of separation and separate maintenance in another state. Construing P. L. 1902, p. 508, § 20. Freund v. Freund [N. J. Eq.] 63 A. 756. Under the Connecticut statute there can be no recovery against a husband for neglect to support his wife, unless his neglect antedates the action. No recovery under Gen. St. 1902, § 2499, where husband, prior to action, was paying wife $50 a month, which she accepted without complaint. Lathrop v. Lathrop, 78 Conn. 650, 63 A. 514. Where husband procured apartments for himself and wife and she voluntarily left him and refused to return, and the evidence did not show mistreatment by him, nor that she was liable to become a public charge, a conviction for abandonment, and an order to support the wife (Laws 1901, c. 466), was not sustained. People v. Demos, 100 N. Y. S. 968. Husband, after marriage by Jewish rabbi in Austria, left his wife and went to New York. He never sent for her. She found him and prosecuted him for nonsupport and he denied the validity of the marriage, but there was no proof of laws of Austria except statement of counsel. Held he was properly found a disorderly person for failure to support his wife. People v. Rosenzweig, 47 Misc. 584, 96 N. Y. S. 103. Refusal of the husband to support his wife is not per se ground for a divorce or separation from bed and board in Louisiana, and in such case the wife cannot sue for alimony (Van Horn v. Arantes, 116 La. 130, 40 So. 592), but she may procure necessaries at the expense of the husband, or may have him prosecuted for nonsupport (Id.). Act No. 34, p. 42, of 1902,

in general, it must be shown that he has abandoned the wife without legal cause and has failed to provide adequately for her support,[82] or, if the wife has left the husband, that she was justified in so doing.[83] A wife who voluntarily and without justification abandons the matrimonial domicile,[84] or who is guilty of some other act wholly inconsistent with her duty as his wife,[85] forfeits her right to maintenance.

Procedure[86] in actions by the wife,[87] and in criminal prosecutions,[88] or in actions upon bonds given in such cases,[89] is largely statutory.

A bill in equity for separate maintenance is not objectionable for alleging facts which, if proved, would warrant the granting of a decree of divorce.[90] Residence in the state for the period required of one who seeks a divorce is not essential to the right to maintain a bill for separate maintenance where complainant and defendant were married and formerly resided in the state.[91]

makes desertion or willful neglect to provide for wife and family a misdemeanor. Id.

82. Wife held not to have consented to husband's leaving her so as to bar her right to limited divorce on ground of abandonment. Curtin v. Curtin, 111 App. Div. 447, 97 N. Y. S. 771. Evidence insufficient to prove charges of desertion, nonsupport, and cruelty in action by wife for separate maintenance. Bill dismissed. Faller v. Faller [Mich.] 13 Det. Leg. N. 691, 109 N. W. 47. Proof that husband turned his wife out of doors and neglected to support her warrants a finding of abandonment without means of support, and a decree compelling him to pay a weekly allowance to her. People v. Shrady, 47 Misc. 333, 95 N. Y. S. 991.

83. Evidence held to show wife was justified in leaving husband on account of his cruel treatment, and to sustain decree for separate maintenance. Kurz v. Kurz [Mo. App.] 96 S. W. 242. Husband's obligation is not discharged where the wife is compelled by his cruel treatment to find shelter with her children at the residence of her father in another parish (In re Baurens [La.] 41 So. 442), and no change of venue as to the offense of neglecting to provide for his family results from such conditions, under Act No. 34, p. 42, of 1902 (Id.). A wife may justifiably refuse to follow the husband to a place where he provides no dwelling except a license of habitation at another's sufferance. Bernsdorff v. Bernsdorff, 26 App. D. C. 520.

84. Bill for permanent alimony by wife dismissed where wife left husband without cause and refused to return at his request unless an orphan girl whom they had adopted should be sent away. Hilton v. Hilton [Miss.] 41 So. 262. To defeat a wife's claim for maintenance on the ground of voluntary abandonment of the husband's domicile, the fact of such abandonment must be established by cogent proof. Evidence insufficient to show abandonment by wife. Price v. Price [Neb.] 106 N. W. 657.

85. Price v. Price [Neb.] 106 N. W. 657. In California, when a wife abandons her husband and his home without justification, he is under no duty to solicit her return, and unless she offers to return he is under no duty to support her. Civ. Code § 175. Wife held to have deserted husband without cause, her charge of cruelty being unfounded. Kessler v. Kessler [Cal. App.] 83 P. 257. In New York, adultery of the wife, established in an action against her by her husband for divorce, wherein he was denied relief because of his own act of adultery, is not such misconduct of the wife as will bar her suit for separation. Hawkins v. Hawkins, 110 App. Div. 42, 96 N. Y. S. 804.

86. See 5 C. L. 1755.

87. In action for alimony, without divorce, wife may be allowed her **costs** including reasonable **attorney's fees.** Breen v. Breen, 28 Ky. L. R. 1216, 91 S. W. 251. But attorney's fee cannot be allowed in an action to enforce a contract fixing property rights of parties in case of separation. Woodruff v. Woodruff, 28 Ky. L. R. 1082, 91 S. W. 265. In New Jersey, where a suit by the wife for separate maintenance is found to be frivolous and without foundation, **costs** may be decreed against her. Construing P. L. 1902, pp. 508, 509, §§ 20, 21. Harris v. Harris [N. J. Eq.] 62 A. 703.

88. Instructions construed and criticised in prosecution for abandonment and failure to support family. Hopkins v. State, 126 Wis. 104, 105 N. W. 223.

Evidence: Where an information drawn under Rev. St. 1898, § 4587c, charged that husband abandoned his wife and children on a certain date and thereafter unreasonably refused and neglected to provide for them, evidence was admissible to show that he had unreasonably refused and neglected to support his family from the date mentioned to the time the information was filed. Hopkins v. State, 126 Wis. 104, 105 N. W. 223. In prosecution for wife abandonment it may be shown that husband had married wife to escape prosecution for seduction, and that he had said in effect that he would not live with her. State v. Jeffries, 117 Mo. App. 569, 92 S. W. 501. Evidence sufficient to sustain conviction. Id.

89. Bond given by one convicted as disorderly person to secure payments for support of wife is not invalid because it lacks a seal. Tully v. Lewitz, 98 N. Y. S. 829. A misdescription of the official payee in such bond does not invalidate it, as the payee designated by law will be presumed to have been intended. Id. In New York city, police magistrates have jurisdiction generally over proceedings against alleged disorderly persons; hence facts showing jurisdiction need not be alleged in an action on a bond given by one convicted to secure support of his abandoned wife. Id.

90. Cureton v. Cureton [Tenn.] 96 S. W. 608.

Suit money may be allowed in a proper case,[92] but the right to defend should not be conditioned on payment upon an ex parte showing.[93] Additional allowance will not be made for attorney's fees where needless cost has been incurred.[94] The allowance may be vacated if suitable support and a home be offered which she rejects.[95]

In an action to compel the husband to provide support for the wife, he cannot impeach the validity of a decree of divorce from a former wife obtained by himself in another state.[96] A foreign decree of maintenance by a court having jurisdiction, pleaded by plaintiff, is conclusive evidence of the husband's abandonment from the date fixed in the decree.[97]

Relief obtainable.[98]—The amount of the allowance to be awarded the wife depends upon the circumstances and condition of the parties.[99] A decree for separate maintenance, requiring monthly payments by the husband, should provide for its continuance within the discretion of the court until a reconciliation may be effected or the husband shall return to his marital duties.[1] In a suit for separate maintenance, without a divorce, provision may be made for the custody of the children.[2] In a suit for separate maintenance the wife cannot recover as additional relief an amount due under a decree for maintenance rendered by a foreign court.[3] In a suit for separation and maintenance, where the validity of a conveyance by the husband is made an issue, the court has no power to declare the conveyance void except as against the wife.[4]

In Louisiana the pendency, on appeal, of an action by the husband for separation from bed and board cannot affect execution of a sentence imposed on the husband in a prosecution for failure to provide for his wife and children.[5] A previous

91. Where wife had been in Tennessee only 20 days before bringing suit but was married there and forced to return by husband's acts, she could maintain the bill. Cureton v. Cureton [Tenn.] 96 S. W. 608.

92. Allowance of alimony pendente lite held improper in suit for maintenance where complainant's financial condition was superior to defendant's and serious charges were made against complainant. Steller v. Steller, 115 Ill. App. 323. Order for $75 temporary alimony proper in suit for separate maintenance where petition alleged desertion without cause, no means of support for wife and child except personal earnings, and ill health of wife, and that husband had an interest in land and $500 in personal property. Hancock v. Hancock [Iowa] 109 N. W. 1009. By analogy to the divorce statutes suit money is allowable in Missouri to a wife who sues for separate maintenance. Behrle v. Behrle [Mo. App.] 97 S. W. 1005.

93. Where in a suit for separate maintenance the only showing as to defendant's property is that made by the petition and amendments and the application for temporary alimony, it is error to order that defendant may not defend until he has complied with the order for temporary alimony. Hancock v. Hancock [Iowa] 109 N. W. 1009.

94, 95. Bernsdorff v. Bernsdorff, 26 App. D. C. 520.

96. People v. Shrady, 47 Misc. 333, 95 N. Y. S. 991.

97. New York decree held sufficient proof of abandonment in suit in New Jersey. Freund v. Freund [N. J. Eq.] 63 A. 756.

98. See 5 C. L. 1755.

99. Where wife separated from husband wholly on account of his unjustifiable acts, and in an action for alimony it appeared he had a reversionary interest in a farm worth $1,500 or $2,000, subject to a life estate in his mother, who was 70 years old, and that she kept a small store, an allowance of $1,250 to her was not inequitable. Breen v. Breen, 28 Ky. L. R. 1216, 91 S. W. 251. Wife was granted limited divorce from husband and permitted to use the dwelling house. Husband was 61 years old and received as wages $30 a week. He paid taxes and interest on mortgage, which rentals did not pay. Wife was life tenant and received $41 a month from property. Held an allowance of $10 a week from his wages should be reduced to $7.50. Curtin v. Curtin, 111 App. Div. 447, 97 N. Y. S. 771.

1. Cureton v. Cureton [Tenn.] 96 S. W. 608.

2. Decree awarding custody of children, aged 2 and 4, to wife, providing for visitation by husband, held proper. Such decree should not provide that the husband may take children out of the jurisdiction on giving a bond. They should be kept within the jurisdiction of the court. Cureton v. Cureton [Tenn.] 96 S. W. 608.

3. Separate action on New York decree held necessary. Freund v. Freund [N. J. Eq.] 63 A. 756.

4. Zumbiel v. Zumbiel [Ky.] 96 S. W. 542.

5. A fortiori is this true where, by the judgment appealed from, the demand for separation was rejected. In re Baurens [La.] 41 So. 442.

conviction is not a bar to a prosecution for neglect to provide for the family during a period not covered by the previous conviction.[6]

Effect of decree.[7]—A decree for future alimony subject to future modification by the court rendering it is not a final judgment within the meaning of the full faith and credit clause of the constitution.[8]

§ 12. *Crimes and criminal responsibility.*[9]—Proceedings to compel the husband to provide support for his wife and family have already been discussed.[10] The law presumes that the participation of the wife in a crime of the husband or the act of the wife in the commission of a crime in the presence of the husband is the result of coercion on his part,[11] and she is not legally chargeable with guilt until that presumption has been removed by evidence tending to show that she acted of her own will and accord.[12]

ICE; ILLEGAL CONTRACTS; IMMIGRATION; IMPAIRING OBLIGATION OF CONTRACT; IMPEACHMENT, see latest topical index.

IMPLIED CONTRACTS.

§ 1. Definitions and Distinctions (155).
§ 2. Work and Labor or Services and Material Furnished (156). Services and Material Furnished by Member of Family (158). Right to Recover for Improvements Made on Lands of Another (159).
§ 3. Moneys Had and Received and Money Paid (159).
§ 4. Use and Occupation (164).
§ 5. Torts Which May be Waived and Sued as Implied Contracts (164).
§ 6. Remedies and Procedure (165).

This article includes only quasi contracts implied in law. Contracts implied in fact, being real contracts, are treated elsewhere.[13]

§ 1. *Definitions and distinctions.*[14]—A contract may be express or implied. An express contract is one whose terms were openly and fully declared by the parties at the time of entering into it.[15] An implied contract in fact arises where the intent of the parties to contract is manifested only by indirect evidence, as by acts, conduct, etc.[16] A quasi contract, or contract implied of law, exists independently of the intention of the parties and is a fiction of law founded upon the doctrine of unjust enrichment.[17] The existence of an express contract excludes an implied contract covering the same subject-matter at the same time.[18]

6. In re Baurens [La.] 41 So. 442.
7. See 5 C. L. 1755.
8. Freund v. Freund [N. J. Eq.] 63 A. 756.
9. See 5 C. L. 1755.
10. See ante § 11. Proceedings to Compel Support of Wife.
11, 12. State v. Harvey [Iowa] 106 N. W. 938.
13. See Contracts, 7 C. L. 761.
14. See 5 C. L. 1756.
15. Turner v. Owen, 122 Ill. App. 501. A petition alleging that plaintiff and one Elliott had acquired certain land options, that defendant had agreed to pay plaintiff the sum sued for if he would procure an assignment of Elliott's interest, that the assignment was procured, and praying for recovery, held to set up an express contract. Ragley v. Godley [Tex. Civ. App.] 14 Tex. Ct. Rep. 153, 90 S. W. 66.
16. Turner v. Owen, 122 Ill. App. 501.
17. Thus, where an architect failed to draw plans of a building which could be constructed for the specified sum and, while not accepted, the city receives actual benefits thereunder, a recovery quantum meruit may be had. Horgan v. New York, 100 N. Y. S. 68. One furnishing labor and material in clearing and improving a tract of land under a contract of purchase which is nonenforceable because of indefiniteness may recover for the work done and labor furnished. Buck v. Pond, 126 Wis. 382, 105 N. W. 909. Where a city donated negotiable bonds, which were void for want of power, to a railroad to reimburse it for depot grounds already purchased and paid for by it, subsequent holders are not entitled to recover quantum meruit, since the railroad and not the city received the benefit of the money paid. Swanson v. Ottumwa [Iowa] 106 N. W. 9.
18. Beggs v. Hanley Brewing Co., 27 R. I. 385, 62 A. 373; Schiml v. Edgeworth, 118 Ill. App. 332; Ballard v. Shea, 121 Ill. App. 135. Where one who had guaranteed another, about to make a loan, against mechanics' liens, pays to such person the amount of such liens with the understanding that he should bid in the property at the sale for the amount of the liens and his loans and repay the ad-

§ 2. *Work and labor or services and material furnished.*[19]—Where beneficial services are rendered and accepted the law will imply a promise to pay their reasonable value,[20] and especially if rendered upon request.[21] Such services, however, must be rendered with an expectation of compensation[22] and must be accepted with knowledge, actual or constructive, that they are so rendered,[23] though if performed under a mistaken belief that they are a part of regular duties and accepted with full knowledge of the mistake, the law will imply a contract to pay for the same.[24] Since an express contract negatives an implied one, no recovery quantum meruit for services rendered or material furnished thereunder can be had,[25] though if the contract does not fix the amount of the compensation a promise to pay their reasonable value will be implied.[26] Where beneficial services are rendered or material is furnished under a void or nonenforceable contract, a recovery will be allowed,[27]

vancement if the property was redeemed, the money cannot be recovered if no redemption is made. Stone v. Mulvaine, 119 Ill. App. 443. Instructions predicating a right of recovery on an implied contract are erroneous where the subject-matter is covered by an express contract. Ballard v. Shea, 121 Ill. App. 135.

19. See 5 C. L. 1757.

20. Morrison v. New Haven & Wilkerson Min. Co. [N. C.] 55 S. E. 611; Dunn v. Currie [N. C.] 53 S. E. 533; Moriarty v. Board of Education of New York, 112 App. Div. 837, 98 N. Y. S. 251. The measure of recovery is such sum as the services are reasonably worth and not a sum which would reasonably compensate the party rendering them. Green's Adm'r v. Teutschmann [Ky.] 97 S. W. 7.

21. Snowden v. Snowden [Ky.] 96 S. W. 922. Where plans were made for decedent at his request and were at his disposal, the law will imply a promise to pay for the same. Buckler v. Kneezell [Tex. Civ. App.] 14 Tex. Ct. Rep. 800, 91 S. W. 367. Evidence held sufficient to show request. Id. One rendering services for another without a request or a reasonable occasion therefor cannot recover. Friedlander v. Lehman, 101 N. Y. S. 252. A request is necessary, but may be implied from facts and circumstances (Ice v. Maxwell [W. Va.] 55 S. E. 859), and if one sees beneficial services being rendered for him and does not object, he is estopped to deny that they were rendered at his request (Id.).

22. Sullivan & Co. v. Owens [Tex. Civ. App.] 90 S. W. 690. The presumption of contract which the law implies from the rendition of services does not arise where they are merely such offices as one friend would perform for another. Dallman v. Frank, 1 Cal. App. 541, 82 P. 564. Evidence held to sustain a finding that services rendered to decedent were those of a friend and given without expectation of pay. Id. No inference that services were rendered with expectation of compensation can be drawn from an agreed statement of facts. Mathie v. Hancock, 78 Vt. 414, 63 A. 143. Board and money held to have been furnished testator with the expectation that it was to create a liability on his part for its repayment, and with understanding on testator's part that it was not a mere gratuity, and plaintiff's right to recover it was not taken away by fact that he expected that his actual reimbursement would come through his wife's inheritance from testator. Wirth v. Kuehn, 191 Mass. 51, 77 N. E. 641. Question whether the services were rendered with expectation of pay held under the facts for the jury. Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997.

23. One rendering services knowing that they are accepted in consideration of support cannot recover. Smith v. Sisters of Good Shepherd [Ky.] 96 S. W. 549. Where one does work on demised premises under a contract with the tenant, the mere fact that the landlord has seen the workmen engaged thereon does not create an implied contract. Goode v. Illinois Trust & Sav. Bank, 121 Ill. App. 161.

24. A mail clerk whose only duty was to carry the mail to and fro between the trains and the post office transferred mail from one train to another. Blowers v. Southern R. Co. [S. C.] 54 S. E. 368.

25. Where there was an express contract that an attorney employed to collect back taxes should have 10 per cent of the amount collected as compensation, he cannot recover quantum meruit after a rightful dismissal. City of Wilmington v. Bryan [N. C.] 54 S. E. 543. Where one receives specific compensation for services, there can be no implied promise to pay an additional sum from the fact of rendition. Lucas v. Boss, 110 App. Div. 220, 97 N. Y. S. 112.

26. Chandler v. Baker, 191 Mass. 579, 78 N. E. 387; McGrew's Ex'r v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301. Where care and board are furnished and no price is agreed upon, the law will imply a promise to pay their reasonable value. Schuchler v. Cooper [Del.] 62 A. 261. Not such sum as will reasonably compensate the person rendering the services. McGrew's Ex'r v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301. Value of recipient's estate immaterial and an allegation with reference thereto should be stricken. Id. The value placed thereon, especially by the party accepting them, may be considered as evidence. Chandler v. Baker, 191 Mass. 579, 78 N. E. 387.

27. Contract between attorney and client void as restricting the latter's right to compromise the claim. Papineau v. White, 117 Ill. App. 51. Contract nonenforceable as within the statute of frauds and the party for whom rendered refuses to perform his part. Cozad v. Elam, 115 Mo. App. 136, 91

but the reasonable value of the services and material and not the contract price controls.[28] And again, if services are rendered under an entire contract,[29] which is abandoned before completion by the employer, an action quantum meruit will lie,[30] but if the employe wrongfully abandons the same, no recovery can be had[31] if no substantial benefits have resulted to the other party.[32] So, too, where there has been no abandonment but the work falls short of substantial performance, a recovery may be had for labor performed and materials furnished[33] if accepted by the other party to the contract.[34] Where services are rendered under an express understanding that they are to be compensated by a testamentary provision, an action quantum meruit will lie upon failure of such provision.[35] An unauthorized person acting as an agent or volunteer cannot recover[36] unless his acts are subsequently ratified.[37] Where an abutting owner has no interest in or control over the streets, no quantum meruit recovery can be had for benefits resulting from improving the same.[38] The law will usually imply a promise to pay for materials furnished and accepted; but in Kentucky no recovery may be had for board furnished by one other than the keeper of a tavern or house of private entertainment in

S. W. 434. City contract for lighting void because let without due advertisement as required by Const. § 164. City of Providence v. Providence Elec. Light Co., 28 Ky. L. R. 1015, 91 S. W. 664. Where recovery is allowed upon an executed contract void as being ultra vires, the relief granted is not upon the unlawful contract but upon quantum meruit (White Star Line v. Star Line of Steamers, 141 Mich. 604, 12 Det. Leg. N. 586, 105 N. W. 135), and will not be extended so as to affirmatively enforce the contract in regard to contribution for damages paid for injuries to a third person (Id.), especially where it is also illegal, as in violation of the Sherman Act (Id.).

28. Where services have been rendered under a contract whereby they were to be paid for in land, and the recipient refuses to convey on the ground that the contract is within the statute of frauds, the measure of recovery is the value of the services not of the land. Cozad v. Elam, 115 Mo. App. 136, 91 S. W. 434.

29. A contract by a daughter to remain with and care for her father until his death in consideration of a testamentary provision is entire and indivisible. Tussey v. Owen, 139 N. C. 457, 52 S. E. 128.

30. Plaintiff had contracted to sink a shaft 80 feet deep or until he struck coal, defendant to furnish appliances and material, which defendant refused to do after the shaft was partly completed. Davis v. Brown County Coal Co. [S. D.] 110 N. W. 113. Where a civil engineer contracts to draw the plans for a water works system and to install the same for 5% of the cost, and the project was abandoned by the city after satisfactory plans had been submitted and adopted, he may recover for the work actually done. Jenks v. Terry [Miss.] 40 So. 641. Where a daughter who had contracted to remain with and care for her father until his death left and married, the fact that he thereafter did not wish her to return is not a prevention of performance authorizing a quantum meruit recovery. Tussey v. Owen, 139 N. C. 457, 52 S. E. 128. Where plaintiff entered into a contract to furnish the material and to paper defendant's house for a specific sum and is prevented by defendant from carrying out the contract in full, he may recover that portion of the stated sum as the work done and material furnished bears to the whole. Limerick v. Lee [Okl.] 87 P. 859. Where plaintiff was to haul all the wood on a certain lot at $1 per cord, the wood to be cut by defendant, he may recover quantum meruit for the amount hauled if defendant fails to cut so as to enable him to haul all continuously. Bailey v. Marden [Mass.] 79 N. E. 257.

31. In North Carolina, where a contract is entire and indivisible, a party thereto failing without cause to fully perform cannot recover for the part performed. Tussey v. Owen, 139 N. C. 457, 52 S. E. 128.

32. Plaintiff voluntarily abandoned a well partially drilled under a contract which required that it be finished and accepted by defendant's engineer as a condition of recovery. Miller v. Mason City & Ft. D. R. Co. [Iowa] 108 N. W. 302.

33. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579.

34. Where plaintiff was to furnish and fit window screens and the house owner expressly notified him to remove the same, the fact that the owner did not remove them does not constitute an acceptance. Higgins Mfg. Co. v. Pearson [Ala.] 40 So. 579.

35. Was to receive a child's share for the care of decedent's mother. Bunting v. Dobson, 125 Ga. 447, 54 S. E. 102.

36. Where plaintiff after the death of his employer continued to feed and exercise his horses until they were taken by the administrator, it not being necessary for him so to do, he is a mere volunteer and cannot recover. Mathie v. Hancock, 78 Vt. 414, 63 A. 143. Nor was there any duty resting upon the administrator at the time the services were rendered and food furnished, he not having been yet appointed. Id.

37. Ice v. Maxwell [W. Va.] 55 S. E. 899.

38. Barber Asphalt Pav. Co. v. Loughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948.

the absence of an express contract.[39] A quantum meruit recovery for services cannot be had where no contractual relation exists.[40]

Services and material furnished by member of family.[41]—Since family life abounds in mutual favors rendered without expectation of pay, the general rule that a promise of compensation is implied from the rendition and acceptance of beneficial services does not obtain.[42] Accordingly, services rendered or support furnished by a parent to a child,[43] by a child to a parent[44] or one in loco parentis,[45] or between other near relatives,[46] living together as a family,[47] are presumed gratuitous. The fact that the child is illegitimate[48] or has attained his majority[49] does not destroy the presumption. This presumption, however, is not conclusive and will not be indulged where the surrounding facts and circumstances disclose a contrary intent,[50] nor is it applicable where the services are rendered without legal

39. Under Ky. St. 1903, § 2178, the law will imply no promise to pay for board furnished. Snowden v. Snowden [Ky.] 96 S. W. 922.

40. Plaintiff discovered property belonging to defendants which had been sold for taxes and advised them of the fact. Being unable to agree upon the compensation to be allowed to clear the title defendants employed another who effected a settlement suggested by plaintiff. Held no quantum meruit recovery can be had. Franck v. McGilvray [Mich.] 13 Det. Leg. N. 154, 107 N. W. 886.

41. See 5 C. L. 1762.

42. Key v. Harris [Tenn.] 92 S. W. 235. For liability of a husband for necessaries furnished the wife, etc., see Husband and Wife, 8 C. L. 122.

43. Mother rendering services for son. Begin v. Begin [Minn.] 107 N. W. 149.

44. Daughter caring for and supporting father. In re Bishop's Estate [Iowa] 106 N. W. 637. Where a son resides with and cares for his aged mother, there is no implied contract for compensation. Wallace v. Denny's Adm'r, 28 Ky. L. R. 978, 90 S. W. 1046.

45. Patteson v. Carter [Ala.] 41 So. 133.

46. Sister-in-law caring for brother-in-law. Lodge v. Fraim [Del.] 63 A. 233. There is no presumption that services rendered by a daughter-in-law, after the death of husband, for her father-in-law, is gratuitous, especially where she was maintaining a household of her own. Koebel v. Beetson, 112 App. Div. 639, 98 N. Y. S. 408. Question whether she expected compensation and whether he expected to pay held for the jury, under the facts of the case. Id. Where plaintiff, his wife and children rendered services for decedent, the fact that plaintiff's wife was decedent's daughter does not rebut an implied contract. Dunn v. Currie [N. C.] 53 S. E. 533. Where services are rendered by a stepdaughter for the stepfather, the question whether the circumstances justify reasonable expectation of compensation, is for the jury. Brown v. Cummings, 27 R. I. 369, 62 A. 378.

47. A family is a collective body of persons living under one roof and under one head or management. In re Bishop's Estate [Iowa] 106 N. W. 637. Where plaintiff was a widowed daughter living on her own farm with her sons and the decedent came to live with her, furnishing his own bed clothing, declining to do any work, and recognizing no headship in the family, the question whether he was a member of the family was for the jury. Id. A statement by decedent to plaintiff's mother that if plaintiff would come and live with her she would do a good part with her, is not conclusive that plaintiff was taken as a member of the family. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728.

No presumption if not living together as a family: Services of an adult child. Winkler v. Killian [N. C.] 54 S. E. 540. Stepdaughter not residing with stepfather. Brown v. Cummings, 27 R. I. 369, 62 A. 378.

48. Services of illegitimate children rendered while living with the father in ignorance of their illegitimacy will be presumed gratuitous. Williams v. Halford, 73 S. C. 119, 53 S. E. 88.

49. Where he continues a member of the family. In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. S. 480.

50. Brown v. Cummings, 27 R. I. 369, 62 A. 378. In order to rebut the presumption that services rendered by a child to the parents are gratuitous, it is not necessary to show an express contract, but an understanding to the contrary may be inferred from the circumstances. Fry v. Fry [Mo. App.] 94 S. W. 990. Where one of two sisters was almost an idiot and for a number of years practically helpless and was cared for and supported by her sister, held to create an implied contract. Key v. Harris [Tenn.] 92 S. W. 235. Compensation also allowable on the ground of necessaries. Id. Where a father and married daughter lived together, he furnishing the house and some garden truck and she boarding and nursing him, which arrangement continued for several years without complaint by the daughter of his failure to pay board, no recovery can be had. Conway v. Cooney, 111 App. Div. 864, 98 N. Y. S. 171. Declaration of decedent held sufficient to support a finding that she intended to pay and that plaintiff expected compensation for her services. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728. A statement by decedent of what she wished plaintiff to have after her death tends to show that the services were gratuitous rather than the contrary. Patteson v. Carter [Ala.] 41 So. 133.

Evidence held admissible: Declaration by decedent in the presence of one of the plaintiffs as to the meritorious nature of their services, their right to be paid, and his pur-

obligation under coercive circumstances,[51] or where the benefits of the family relationship are entirely unilateral.[52] In some states it must be overcome by an express contract.[53] Where a son has been compensated in advance for the care of his mother, the presumption that her services are gratuitous is less strong than if she was wholly dependent upon him.[54] The fact that a parent pays for board raises no presumption that it included compensation for care.[55]

Right to recover for improvements made on lands of another.[56]—The Washington betterment law authorizing recovery for improvements by one holding land in good faith and under color of title is not retroactive.[57]

§ 3. *Moneys had and received and money paid.*[58]—Where one has money which in equity and good conscience belongs to and ought to be paid to another, an action for money had and received will lie for its recovery,[59] though there be no

pose to do so, as showing an understanding that they were not gratuitous. Fry v. Fry [Mo. App.] 94 S. W. 990. Statements by the person for whom rendered with reference to her intention to give certain property are admissible as showing an understanding that they were to be paid for, but not as a measure of value. McGrew's Ex'r v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301.

51. It is the general rule of law that no allowance should be made to either father or mother out of the estate of a deceased minor child for past maintenance and support (Spink v. Spink, 7 Ohio C. C. [N. S.] 89), but where a mother who furnished support had little or no estate or an estate trifling in comparison with that of the minor, and the support was furnished under conditions which were coercive upon the mother and compelled her to assume a burden which was not naturally and legally hers alone, recovery may be had (Id.).

52. A sister performing unpleasant menial services for her brother at her home where his presence was an actual detriment, may recover for the same. Mark's Adm'r v. Boardman, 28 Ky. L. R. 455, 89 S. W. 481.

53. No liability for care rendered by a sister-in-law for her brother-in-law in the absence of an express contract. Lodge v. Fraim [Del.] 63 A. 233. A child can recover for services rendered to a parent only upon proof of an express contract (Griffith v. Robertson [Kan.] 85 P. 748), which may be established by conversations and declarations of the deceased parent (Id.). Evidence held sufficient. Id.

54. Compensated by the will of the father. Begin v. Begin [Minn.] 107 N. W. 149.

55. Fry v. Fry [Mo. App.] 94 S. W. 990.

56. See 5 C. L. 1763. See, also, Ejectment, etc., 7 C. L. 1212; Accession, etc., of Property, 7 C. L. 9.

57. Laws 1903, p. 262, c. 137, held not applicable to improvements made before its enactment. Barton v. Wickizer, 41 Wash. 293, 83 P. 312. As most of these statutes are by their terms only applicable to actions of ejectment, the rights of the parties thereunder are treated in that topic. See 7 C. L. 1221.

58. See 5 C. L. 1764.

59. Smith v. Farmers' & Merchants' Bank [Cal. App.] 84 P. 348.

Recovery allowed: Where the holder of a second mortgage assigns it to the first mortgagee to be foreclosed therewith and the proceeds to be used for the satisfaction of the mortgages, and the assignee, who has secretly become the owner of the property, discharges the mortgages of record and sells the land, he is liable as for money had and received, the second mortgagee's remedy not being limited to the pursuit of the mortgages taken in payment of the purchase price. Wagner v. Wedell [Cal. App.] 85 P. 126. Plaintiff's assignors entered into an agreement with a brewing company through defendant whereby they were to furnish $1,500 and the company the balance to build a saloon. The money was paid to the brewing company. Later defendant falsely represented to plaintiff's assignors that $500 more was required and procured the same. He also secured the $1,500 from the company upon a representation that the builders desired the money until the building was commenced. Recovery allowed on implied contract. Lefkowitz v. Reich, 98 N. Y. S. 695. Fees received by the city from the probate clerk in the mistaken belief that the statute putting the probate judge on a salary basis was valid, the judge protesting its invalidity and claiming such fees. Henderson v. Koenig, 192 Mo. 690, 91 S. W. 88. Where an employe of a bank by forged drafts drawn in favor of defendant caused money deposited with another bank by plaintiff's assignor to be paid to defendant, of which sum defendant was not a bona fide holder, recovery for money had and received will lie. Clifford Banking Co. v. Donovan Com. Co., 195 Mo. 262, 94 S. W. 527. Where bankers issue letters of credit to importers under an agreement whereby the goods together with the bill of lading and invoice are sent directly to them, and possession only given to the importers in trust to sell and apply the proceeds, and the goods are sold under a contract whereby the purchaser was to pay $1 per ton plus original cost, freight, etc., and by misrepresentation as to the freight an overcharge is made, recovery allowed of the bankers. Moors v. Bird, 190 Mass. 400, 77 N. E. 643. Where a lessee pays rent to the assignee of the lease, who turns the money over to the assignor as a part of the consideration for the assignment, and is subsequently held for rent by a prior assignee, he may recover of the lessor the money received by him. Egan v. Abbett [N. J. Law] 64 A. 991. Where a bank by mistake pays

express promise,[60] but there may be deducted, however, disbursements which the same equitable considerations require plaintiff in his turn to pay.[61] But the money must have been actually received by defendant,[62] unless he is estopped to deny its receipt,[63] and hence, where a debtor through the fraud of the creditor is led to believe a larger amount due than actually is and pays the same to a third person at his request, the action lies against the creditor and not such third person.[64]

Money extorted by unlawful means,[65] procured by duress or compulsion,[66] or

money of a depositor to one not entitled thereto through the order of a person of the same name, and the party receiving it knew or was charged with notice of the mistake, recovery may be had (Merchants' Bank v. Superior Candy & Cracker Co., 41 Wash. 653, 84 P. 604), though a note is accepted from the person on whose order it was paid and payments have been made thereon (Id.). Where plaintiff paid money to defendants to the account of G. & Co. at the direction of L. & Sohn, believing that the latter had been authorized by G. & Co. to so order, but in reality such money was intended to discharge an indebtedness of L. & Sohn to defendant guaranteed by G. & Co., such money may be recovered, the mistake of plaintiff being excusable under the ambiguity of the order. Kessler v. Herklotz, 101 N. Y. S. 418. Where defendant, manager and secretary of a corporation, drew a check in the name of the corporation, payable to himself, knowing that there were no funds to meet it, and deposited it with another bank for presentment, which check was inadvertently paid after being twice refused, such money may be recovered from the defendant, and it is immaterial that it was negotiable since he was not a bona fide holder. Iowa State Bank v. Cereal Refund & Brokerage Co. [Iowa] 109 N. W. 719.

Held not inequitable to retain it: Where a surety on a forthcoming bond pays a judgment rendered thereon against him, and it is subsequently ascertained that the court rendering the judgment had no legal existence, he cannot recover as for money paid under a mistake of law, it not appearing that the money was not rightfully due. Strange v. Franklin [Ga.] 55 S. E. 943. Held under the facts of the case that it was not inequitable for defendant association to retain the money paid by plaintiff for shares reissued to him. Foresters' Bldg. & L. Ass'n v. Quinn, 119 Ill. App. 572. Especially in view of the fact that he has estopped himself by voting such shares and accepting dividends thereunder. Id.

60. The law will imply such promise. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527.

61. In an action for money had and received by the receiver of the board of metropolitan police to recover of the city taxes imposed and collected for the benefit of the board, recovery cannot be had for the percentage allowed the sheriff for assuming all costs of collection. Hubert v. New Orleans, 116 La. 507, 40 So. 853. Where a city, erroneously believing a statute changing the office of probate judge from a fee to a salary basis valid, receives the fees and pays the salaries of clerks and assistants, a deduction for money so paid may be made in an action by the judge to recover the fees. Henderson v. Koenig, 192 Mo. 690, 91 S. W. 88.

62. A recital in a check payable to a third person that it is given in payment of plaintiff's note does not of itself charge plaintiff with the amount. Sheldon Canal Co. v. Miller [Tex. Civ. App.] 14 Tex. Ct. Rep. 279, 90 S. W. 206. Where defendant reinsured an insurance company in which plaintiff held a policy and defaulted, plaintiff could not elect to treat the contract as forfeited and sue for money had and received to recover premiums paid the original company. Illinois Life Ins. Co. v. Jaffe [Ala.] 40 So. 47. In assumpsit for money had and received under an agreement to invest, evidence held to show that it was never delivered to defendant by the messenger entrusted with it. Brady v. Messler, 27 R. I. 373, 62 A. 511. A creditor sent a claim to an attorney for collection, who in the seltlement of a claim of the debtor against a third person was credited with a deposit which plaintiff claims was to pay his debt. Held, under the evidence, that it was a question for the jury whether the money was so received. Millhiser & Co. v. Leatherwood, 140 N. C. 231, 52 S. E. 782.

63. Where the secret owner of property secures the assignment of a mortgage thereon for the purpose of foreclosing the same, and after discharging it of record sells the land, he is liable for money had and received though in fact he received only notes. Wagner v. Wedell [Cal. App.] 85 P. 126. Where the owner of a half interest in certain patents sells the entire interest with the coowner's consent and requests the purchaser to retain one-half of the price as he did not recognize plaintiff's interest, he cannot allege nonreceipt in an action for money had and received. Owens v. Goldie, 213 Pa. 579, 62 A. 1117.

64. Moors v. Bird, 190 Mass. 400, 77 N. E. 643.

65. Where a bricklayers' and plasterers' union secured $100 from a brick manufacturer by threats to refuse to handle his bricks, which sum was imposed as a penalty for having furnished bricks to an "unfair boss," it is in violation of Gen. St. 1902, § 1296 (March v. Bricklayers' & Plasterers' Union No. 1 [Conn.] 63 A. 291), and cannot be justified on the ground that the union had a right to decline to lay plaintiff's brick (Id.), nor as the exercise of the right of fair trade competition (Id.).

66. Where one deposits collateral to secure a debt due, the fact that such collateral was in danger of sale in case of default does not constitute duress in making the payment where there was no threat to sell in violation of the pledge agreement. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034

through fraud and deceit,[67] if it is against equity and good conscience that it be retained,[68] may be recovered as for money had and received.

Generally, money paid under a mistake of a material fact may be recovered,[69] though where a particular criterion is adopted as the basis for ascertaining the amount due, an overpayment resulting from an inaccuracy therein cannot be recovered.[70] Money voluntarily[71] paid, with full knowledge of all the facts,[72] cannot

Money paid as a condition to the right to continue an existing business has been held to be paid under duress. American Brewing Co. v. St. Louis, 187 Mo. 367, 86 S. W. 129. An allegation that plaintiff was entirely dependent upon the city waterworks for its water supply and that the ordinance required it to pay in advance for water used is sufficient as against a demurrer to show that the license was paid as a condition of continuing business. Id.

67. Where a debtor in ignorance of the amount due relies on misstatements of the creditor and pays an amount in excess of the real debt, he may recover such excess. Dotterer v. Scott, 29 Pa. Super. Ct. 553. Under Comp. Laws, § 10,421, one induced to enter into an option contract to purchase a manufacturing plant by false representations as to authority to sell may recover the money paid thereunder (Gubbins v. Ashley [Mich.] 13 Det. Leg. N. 844, 109 N. W. 841), and the fact that he demanded performance after discovering the fraud does not work an estoppel, the defendant having not been misled (Id.).

68. Payment under legal compulsion does not authorize a recovery if it is not against equity that it be retained. City of Chicago v. Malkan, 119 Ill. App. 542. Where one running two saloons under a single license pays a license fee under a threat of the city collector to close both if he does not, the fact that he paid the money under protest and shortly thereafter closed the saloon does not authorize a recovery. Id.

69. Money paid under the belief that a contract to furnish electric power had commenced to run when in fact it had not. Hudson River Water Power Co. v. Glens Falls Portland Cement Co., 107 App. Div. 548, 95 N. Y. S. 421. Where an electric company is bound to furnish service without discrimination, and one pays an excessive rate in ignorance that others pay less, there is a mistake of a material fact and recovery may be had. Armour Packing Co. v. Edison Elec. Illuminating Co., 100 N. Y. S. 605. And the fact that the payment was pursuant to contract is immaterial, the contract being a part of the unlawful discrimination. Id. Evidence held insufficient to show an overpayment of rent through a mistake as to the number of acres. Connerly v. Inman [Ark.] 95 S. W. 138.

70. Assignee of mining leases was to pay 7 cents per gross ton for ore of a certain quality found in the property, the same to be ascertained by making certain drills, assuming that the ore for a radius of 100 feet was the same as that revealed by the hole. No recovery for overpayment due to such erroneous assumption or to the fact that the test did not reveal the actual quality of the ore, as laconite was not revealed. Cleveland-Cliffs Iron Co. v. East Itaska Min. Co. [C. C. A.] 146 F. 232.

71. Held voluntary: Where property was assessable and the taxpayer paid the taxes without appearing before the board of review and without being forced by a threatened levy and without making a statutory protest, such payment is voluntary despite the words "Paid under protest" were entered on the tax roll and tax receipt. Traverse Beach Ass'n v. Elmwood Tp. [Mich.] 12 Det. Leg. N. 626, 105 N. W. 30. Payment of the amount of an execution to the marshal about to levy by one not liable thereunder and with full knowledge of the facts. Herald Square Cloak & Suit Co. v. Rocca, 48 Misc. 650, 96 N. Y. S. 189, Where a building association intentionally paid money to a stockholder as interest at the rate of six per cent, it cannot afterward recover a part of it back on the theory that it was a payment of a dividend mistakenly computed at 6 per cent instead of 5 per cent. Kellenberger v. Oskaloosa National Bldg. L. & Inv. Ass'n, 129 Iowa, 582, 105 N. W. 836. Payment of agreed price then in default for convict labor under a threat of the state authorities to discontinue such labor. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676. A payment of taxes and rent upon a leasehold by one having no interest therein, no fraud or deceit being practiced upon him. Sire v. Long Acre Square Bldg. Co., 50 Misc. 29, 100 N. Y. S. 307. Where a surety on a forthcoming bond against whom a judgment has been rendered pays the same upon being informed that a fi. fa. was about to issue, it appearing that the court rendering judgment had no legal existence. Strange v. Franklin [Ga.] 55 S. E. 943.

Held involuntary: A county in which a smallpox patient is stricken paying the expense of quarantine may recover of the county legally charged, since under Comp. Laws § 4424, such payment is not voluntary but obligatory in the first instance. Board of Sup'rs of Arenac Co. v. Iosco County Sup'rs [Mich.] 13 Det. Leg. N. 121, 107 N. W. 725. The payment of a back water rate which the lot owner was under no legal duty to pay, induced by a threat to shut off the water unless paid. City of Chicago v. Northwestern Mut. Life Ins. Co., 120 Ill. App. 497. A payment of illegal taxes under protest to prevent a threatened seizure. District of Columbia v. Glass, 27 App. D. C. 576. Where one arrested to compel the payment of an illegal license deposits such license under protest to procure his release and it is subsequently paid to county by the depositary to prevent his rearrest, the payment is involuntary notwithstanding he could have secured an acquittal on trial. Wheeler v. Plumas County [Cal.] 87 P. 802. Where a contractor secured by pledged bonds

be recovered.[73] While money paid to avoid litigation is usually deemed voluntary,[74] the payment of an illegal demand to protect a right where no opportunity to test its legality exists is not so considered.[75] The rule as to voluntary payment does not apply to a payment by public officials of a claim contracted without authority of law.[76]

Money paid for the use and benefit of defendant[77] may be recovered if paid upon an actual or implied request,[78] though a mere voluntary payment is insufficient.[79] Where one pays money which another in equity and good conscience ought to pay,[80] especially if done to protect himself,[81] he may recover the same under a promise implied of law.

sublets the contract and deposits the bonds to be repledged for advancements used in the work and they are repledged for money partly used for other purposes, a redemption by the contractor to preserve his security is not voluntary so as to preclude recovery for the money paid to redeem from the unauthorized pledge. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

72. Where sureties on a debtor's bond to take the poor debtor's oath are called upon to pay the same, notwithstanding the oath has been taken, and do so without consulting the debtor who is in their employ, they cannot recover. Ash v. McLellan [Me.] 62 A. 598.

73. American Brewing Co. v. St. Louis, 187 Mo. 367, 86 S. W. 129; Ash v. McLellan [Me.] 62 A. 598; Foresters' Bldg. & Loan Ass'n v. Quinn, 119 Ill. App. 572. Fees paid the secretary of state for filing certificates of corporate consolidation under mistaken construction of the law, no notice of reservation being given. Alton Light & Traction Co. v. Rose, 117 Ill. App. 83. A vendee voluntarily paying the full purchase price with knowledge of a shortage in acreage. Fields v. Fields [Va.] 54 S. E. 888. A tenant voluntarily paying rent in excess of the amount due. Connerly v. Inman [Ark.] 95 S. W. 138. One paying, by mistake, taxes on real estate not owned by but assessed to him. Bateson v. Phelps' Estate [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1079. A volunteer caring for and furnishing feed for stock of a deceased person until the adminstrator is appointed cannot recover upon the theory of unjust betterment. Mathie v. Hancock, 78 Vt. 414, 63 A. 143.

74. Especially after he has had time to deliberate and consult counsel or friends. Ash v. McLellan [Me.] 62 A. 598. A payment made by a lessee under a threat by the lessor to foreclose his landlord's lien if it was not paid is voluntary. Paulson v. Barger [Iowa] 109 N. W. 1081.

75. Where a clerk refuses to file an executor's inventory without the payment of an illegal fee, and a failure to file would render the executor liable to removal from office and other penalties, a payment under protest is not voluntary notwithstanding he might have resorted to mandamus. Lewis v. San Francisco [Cal. App.] 82 P. 1106.

76. Hunt v. Fronizer, 3 Ohio N. P. (N. S.) 303.

77. Where it is customary for a carrier to advance the freight charges of the preceding carrier and to collect of the shipper, money paid in advance by the shipper to meet such charges is paid for his own benefit and not of the carrier. Neville v. Pennsylvania & W. V. Co., 99 N. Y. S. 270.

78. Where one owing a debt induces another to pay it, an obligation to repay arises. Held to create a debt so that an absolute deed given as security will be construed a mortgage. Shreve v. McGowin, 143 Ala. 665, 42 So. 94. Where one party pays an obligation which another ought to pay in part, an implied promise to repay arises. Cosurety paying note. Caldwell v. Hurley, 41 Wash. 296, 83 P. 318.

79. An instruction that if plaintiff purchased stock for defendant and others and held in trust for them defendant is bound to pay his proportion of the price is erroneous as it ignores a request therefor. Donovan-McCormick v. Sparr [Mont.] 85 P 1029. One paying out money for another without a request or reasonable occasion therefor cannot recover. Friedlander v. Lehman, 101 N. Y. S. 252.

80. Where a member of a firm negotiates loans for the firm on notes and mortgage of a third person issued for that purpose, he becomes bound to pay such person or the debt and is liable for money had and received. Jones v. Jones [Me.] 64 A. 815.

81. Mortgagee paid taxes which were a lien upon the property and also a personal obligation of the mortgagor. Stone v. Tilley [Tex. Civ. App.] 15 Tex. Ct. Rep. 583, 95 S. W. 718. Immaterial whether the debt is a personal obligation of such other person or merely a lien upon his property. Phinney v. Foster, 189 Mass. 182, 75 N. E. 103. As where by the terms of a lease the buildings constructed by the tenant were to remain the personal property of the tenant, but were taxed as a part of the realty, which taxes the lessor paid to save his property. Id.

NOTE. Recovery of taxes paid for the benefit of another: "Under a lease of land, without buildings, the lessor covenanted to save the lessee harmless for all taxes upon 'said premises.' The lessee subsequently erected buildings, which were to be his own property. The lessor paid the tax, assessed as an entire tax, on land and buildings, and sought to recover from the lessee the proportion assessed against the latter's buildings. Held, that he can recover. Phinney v. Foster, 189 Mass. 182. The court interpreted the covenant to save harmless to apply only to the lot, so that, as between lessor and lessee, the tax on the buildings was intended to be borne by the lessee. Yet, since the tax was

One receiving money for a particular purpose and failing to so apply it is liable as for money had and received to the party entrusting him therewith.[82] Likewise, money deposited as a guaranty which is fulfilled,[83] or to be paid to a third person upon a contingency which never happened,[84] may be recovered. Where trust funds[85] are paid to another who receives the same with knowledge of the facts,[86] he takes them for the use and benefit of the true owner[87] and they may be recovered if the cestui que trust is not estopped.[88] An action for money had and received will lie to recover money held under a constructive trust.[89] In Missouri an action for money had and received will lie against a guardian de son tort for the value of services rendered by the ward.[90]

A party to a contract refusing to perform[91] cannot recover the money paid thereunder,[92] though the other party thereto may recover what he has parted with.[93]

not apportionable, the latter resisted the claim because no legal liability towards the city existed against him. But payment of the tax released the lien on the lessee's buildings—his property was bound, though not he personally. Mass. R. L. c. 12, § 60, and c. 13, § 35. McGee v. Salem, 149 Mass. 238. The plaintiff thus brought himself within two well recognized doctrines of quasi-contracts,—recovery for satisfaction of the defendant's obligation (here a real one) to redeem the plaintiff's property from an encumbrance referable to the defendant's non-payment; and secondly, for payment of a claim which in justice, as between the parties, was owing from the defendant. Keener, Quasi-Contracts, c. 9. So, recovery has been allowed for taxes for which the defendant was not personally liable but which he expressly agreed to pay. See Lageman v. Kloppenburg, 2 E. D. Smith [N. Y.] 126. And similarly, in an analogous case, when there was no statutory provision for apportionment of taxes between the tenant by dower and the reversioner, an equitable apportionment has been enforced. Graham v. Dunigan, 2 Bosw. [N. Y.] 516; see, also, Linden v. Graham, 34 Barb. [N. Y.] 316. Of course, payment of taxes by a volunteer gives no right to reimbursement."—From 19 Harv. L. Rev. 337.

82. Money paid to a mortgagee to be applied on the final decree of foreclosure. Brady v. Franklin Sav. Inst. [N. J. Law] 62 A. 277. And the fact that plaintiff applied to a court of chancery for his share of the excess proceeds of a subsequent sale does not estop him from such recovery. Id. One paying money to another in consideration of an agreement to secure him a liquor license may recover the money if he fails to secure the license (Richards v. Holford [Tex. Civ. App.] 16 Tex. Ct. Rep. 18, 94 S. W. 911), though he engages in the business without the license and is unmolested (Id.). Evidence held sufficient to sustain a finding that plaintiff paid money to defendant to be used to satisfy a judgment and that it was not so used. Shackleford v. Williams [Ark.] 96 S. W. 350. Evidence held to show that certain amounts paid by one partner to another as his share of the purchase price of certain property was not in fact so applied. Merino v. Munoz, 99 App. Div. 201, 90 N. Y. S. 985.

83. Where a grantor deposited with an agent of the grantee a certain sum to guaranty payment of the taxes by the grantor, he is entitled to recover upon paying the taxes, notwithstanding the grantee has sold the land subject to taxes and turned over the money for the payment of them if his grantor fails, and though his grantee refuses to refund. Cornet v. Boyle, 116 Mo. App. 430, 92 S. W. 725.

84. $4,200 deposited with defendant bank by prospective vendees to be paid to the vendor upon the execution of a deed and upon securing the division of a blanket mortgage. Held that, upon the inability of the vendor to convey, the vendees became entitled to the money. Schiffer v. Anderson [C. C. A.] 146 F. 457.

85. Tax deposits drawn upon by the sheriff. State v. Jahraus [La.] 41 So. 575.

86. Where a sheriff drawing on tax funds signs the checks with "T. C." after his name, payee is put on his guard. State v. Jahraus [La.] 41 So. 575.

87. Plaintiff delivered milk and cream to one McKerlie, who was to make butter therefrom, sell the same, and after deducting a specific amount for his labor pay the balance to plaintiff. Balance was deposited with defendant who had full knowledge. Smith v. Farmers' & Merchants' Bank [Cal. App.] 84 P. 348.

88. Failure of the auditor to promptly notify the county attorney of the sheriff's neglect to make due returns of his collections will not estop the state recovering tax funds paid to another. State v. Jahraus [La.] 41 So. 575.

89. Clifford Banking Co. v. Donovan Com. Co., 195 Mo. 262, 94 S. W. 527.

90. Zeldeman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

91. Where the purchaser of calves notified the seller that he could not receive them on designated day of delivery and was ready and willing to receive them later, he does not forfeit the advance payment. Trauerman v. Nebraska Land & Feeding Co. [Neb.] 109 N. W. 379.

92. The other party being ready and willing to perform. Trauerman v. Nebraska Land & Feeding Co. [Neb.] 109 N. W. 379.

93. Upon a rescission of a contract to convey land by the vendee after the vendor's refusal to convey, money paid thereunder may be recovered as for money had and received. Miller v. Shelburn [N. D.] 107 N. W. 51. Plaintiff made application for insurance

Likewise, where one party to a contract rescinds,[94] the other may recover the consideration paid therefor.[95]

Money paid under an executory illegal contract, void as malum prohibitum, can be recovered,[96] especially if such statute is for the protection of plaintiff,[97] but if it be fully executed,[98] or is malum in se and the parties are in pari delicto,[99] as a rule it cannot be recovered. Where an implied contract is separate and distinct from the illegal contract which is a part of the same transaction, it will be enforced.[1] Though an action for money had and received is technically an action at law, it partakes of the nature of a bill in equity, and it is no objection that equitable principles are to be applied or that the money sought to be recovered is impressed with a trust.[2]

§ 4. *Use and occupation.*[3]—Since the right to recover for the use and occupation of real estate involves the relation of landlord and tenant, it is treated in that topic.[4] One continuing to occupy space for storage purposes with knowledge that the owner expects pay therefor is liable for the reasonable value of such space.[5]

§ 5. *Torts which may be waived and sued as implied contracts.*[6]—The tort action for the conversion of goods,[7] or the wrongful appropriation of money,[8] may

and for appointment as special agent, the latter being the inducement for the former, and when the appointment came it contained substantially different terms than those orally agreed should be therein. Held that plaintiff could rescind and recover the premium paid. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102.

NOTE. Recovery of money paid under a contract void as within the statute of frauds: "The money paid by a vendee on a parol contract for the sale of land may be recovered back in an action of assumpsit for money had and received, when the vendor declines or is unable to perform the contract on his part. Allen v. Booker, 2 Stew. [Ala.] 21, 19 Am. Dec. 33; Hunt v. Sanders, 8 Ky. [1 A. K. Marsh.] 552; Bedinger v. Whittamore, 25 Ky. [2 J. J. Marsh.] 552. The recovery is not upon the parol contract, but for the money had and received by the vendor for which he has returned no consideration through his refusal to perform. Allen v. Booker, 2 Stew. [Ala.] 21, 19 Am. Dec. 33; Bedell v. Tracy, 65 Vt. 494, 26 A. 1031. It is well to note, in this connection, that the mere payment of the purchase money, in whole or in part, does not take the contract out of the operation of the statute of frauds and make it obligatory upon the vendor, and if the vendee cannot recover such payment when the vendor repudiates the agreement, he is remediless. Nelson v. Shelby Mfg., etc., Co., 96 Ala. 515, 11 So. 695, 38 Am. St. Rep. 116; Cooper v. Colson, 66 N. J. Eq. 328, 58 A. 337, 105 Am. St. Rep. 660. Where a vendee brings a suit for specific performance of a contract to convey land, and the vendor admits the making of an unwritten agreement and sets up the statute of frauds, the vendee, under his prayer for general relief, may be allowed to recover the amount he has paid. Wilkie v. Womble, 90 N. C. 254."—From note to Durham v. Wick [Pa.] 105 Am. St. Rep. 796.

94. Where one party to an entire contract refuses to fully perform, the other may treat his acts as a rescission (Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760), as where a teacher undertakes for a specific sum to give instructions until the pupil reaches a certain proficiency and abandons the contract (Id.).

95. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760.

96. Premium paid on an insurance contract illegal as granting special favors to the insurant may be recovered where he rejects the written contract as not containing the term which was orally agreed should be therein. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102.

97. A premium paid on an insurance contract void under Rev. St. 1898, § 1955a, as granting special favors to the insurant, may be recovered. Urwan v. Northwestern Nat. Life Ins. Co., 125 Wis. 349, 103 N. W. 1102.

98. Hirer of convict labor paid under a per diem system while Laws 1889, p. 531, c. 382, § 3, provided for piece work. Mills Co. v. State, 110 App. Div. 843, 97 N. Y. S. 676.

99. Plaintiff agreed to pay $10 per month for a liquor license issued to another and for defendant's services in procuring police protection. Walthier v. Weber [Mich.] 12 Det. Leg. N. 728, 105 N. W. 772.

1. Where a debtor conveyed property to a trustee with authority to convert it into cash and to pay the creditors, he verbally agreeing to settle the indebtedness as cheaply as possible, the illegal verbal agreement is distinct from the first undertaking, and the implied contract to return a balance to debtor may be enforced. Haswell v. Blake [Tex. Civ. App.] 14 Tex. Ct. Rep. 394, 90 S. W. 1125.

2. As that it is necessary to examine deceased's accounts and show the course of dealing with the vendors in the particular transaction (Merino v. Munoz, 99 App. Div. 201, 90 N. Y. S. 985), or that the money sought to be recovered is impressed with a trust (Id.).

3. See 5 C. L. 1770.

4. See Landlord and Tenant, 6 C. L. 345.

5. Head v. Pryor [Ky.] 96 S. W. 465.

be waived[9] and recovery had on an implied contract. Where the manager of a natural gas company wrongfully turns gas into the line of another company of which he is president, the latter may be held on an implied contract for the value thereof.[10] In Rhode Island an action for money had and received where based upon facts constituting a crime will not lie until a complaint has been made to a magistrate and process issued thereon.[11]

§ 6. *Remedies and procedure.*[12]—The action upon implied contract must be brought within the time prescribed by statute.[13]

An agent may maintain an action in his own name for the recovery of his principal's money paid by him through mistake,[14] and in an action by the principal against one receiving money from the agent with knowledge of the character of the money, the agent is not a necessary party.[15]

One suing for the return of the consideration of a contract on the theory of rescission cannot join therewith an action for damages,[16] nor can one suing for damages join a count for quantum meruit for services rendered.[17] In Virginia the implied contractual liability for conversion of goods may be pleaded as a set-off to an action on a liquidated claim.[18]

A complaint in an action for money had and received must allege all facts essential to a recovery,[19] among others, facts showing that defendant is not entitled to retain the money,[20] that he received it for plaintiff's use, etc.,[21] and, as in actions

6. See 5 C. L. 1770.

7. Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835.

8. Where one intrusted with the collection of a note and the reinvestment of the proceeds fraudulently issues a new note in the name of the company through which he is transacting private business, secured by wholly inadequate collateral, he may be charged as for money had and received. Donovan v. Purtell, 119 Ill. App. 116.

9. Notwithstanding the plaintiff used language in his pleading which would be appropriate to describe a tort, if he sues, not for damages but for money actually received by the defendant and belonging to the plaintiff and for no more, it is a waiver of the tort and an election to sue upon the implied contract. Kirchner v. Smith, 7 Ohio C. C. (N. S.) 22. Where a pledgor demanded an accounting by the pledgee not only of the proceeds derived from the use of the property but also of the sale price and sues for the sum found, he waives the tort in converting the property. Demars v. Hudon [Mont.] 82 P. 952.

10. McCullough v. Ford Natural Gas Co., 213 Pa. 110, 62 A. 521.

11. Gen. Laws 1896, c. 233, § 16. Brady v. Messler, 27 R. I. 373, 62 A. 511.

12. See 5 C. L. 1770.

13. The right of contribution among cosureties is an implied contractual liability arising out of a written contract, within Ballinger's Ann. Codes & St. § 4798, subd. 2, prescribing six years for bringing such actions. Caldwell v. Hurley, 41 Wash. 296, 83 P. 318. Where deceased promised to devise certain real estate to plaintiff in consideration of his services, which promise was within the statute of frauds but was never repudiated, the statute of limitations does not begin to run until her death, and hence, she having failed to so devise, recovery quantum meruit may be had for services rendered more than six years before bringing the suit. Goodloe v. Goodloe [Tenn.] 92 S. W. 767. Action for money had and received held barred. Jones v. Jones [Me.] 64 A. 815.

14. Purchasing agent overpaid. Parks v. Fogleman [Minn.] 105 N. W. 560. And it is not necessary to allege his agency, since he sues in his own right. Id.

15. Smith v. Farmers' & Merchants' Bank [Cal. App.] 84 P. 348.

16. Cannot treat the contract as rescinded and as in force. Timmerman v. Stanley, 123 Ga. 850, 51 S. E. 760.

17. Where a complaint alleges plaintiff's employment to perform services for defendant that she refused to permit him to perform whereby he was damaged, etc., he cannot join therewith a count charging that defendant is indebted to plaintiff for services rendered and money spent of the reasonable value, etc. Weil v. Fineran [Ark.] 93 S. W. 568.

18. Under Va. Code 1904, § 3298, not objectionable as unliquidated. Tidewater Quarry Co. v. Scott [Va.] 52 S. E. 835.

19. A complaint alleging that defendant, as agent for plaintiff, sold plaintiff's note and mortgage for a certain sum for and on plaintiff's account, and though demanded has not paid the same, states a cause of action. Wagner v. Wedell [Cal. App.] 85 P. 126.

20. In an action to recover money paid to secure the release of certain stolen bonds which had been pledged for such sum, a complaint failing to allege facts showing that defendants were not bona fide holders is insufficient. Lawyer's Title Ins. & Trust Co. v. Jones, 98 N. Y. S. 871.

21. Under B. & C. Comp. §§ 64, 67, abolishing forms of pleading and providing that the complaint shall contain a concise statement of the cause, a complaint alleging that defendant received, "as agent of plaintiff, cer-

generally, mere conclusions are insufficient.[22] And likewise, in an action for money paid, the complaint must allege facts showing that plaintiff is entitled to the money.[23] Several causes of action must not be set up in a single statement of facts.[24] Amendments not changing the cause of action are permissible.[25]

In an action to recover money alleged to have been paid under a mistake of fact,[26] duress,[27] or procured by false representations,[28] the plaintiff has the burden of establishing such facts as well as showing facts rendering its retention inequitable.[29] A plaintiff suing for services rendered to a member of his family has the burden of proving that he was to be compensated,[30] while if rendered to a stranger the law will presume such fact and the defendant must show that they were gratuitous.[31] And likewise, in an action to recover quantum meruit for services rendered or material furnished, plaintiff has the burden of showing the value thereof.[32] Where plaintiffs rely on a payment to their assignors to take the case from out of the statute of limitations, which payment is denied, defendant may cross-examine as to why the assignment and complaint were for the original amount.[33] In an action to establish a claim for services against a decedent's estate, evidence of his reputation for paying his debts is not admissible.[34] In an action for money re-

tain money," etc., sufficiently states a cause of action for money received, as it will be implied from the words "as agent" that the money was for plaintiff's use, especially where objection is raised on the admission of evidence. Keene v. Eldriedge [Or.] 82 P. 803.

22. An allegation that money was involuntarily paid, being an ultimate fact, is insufficient, and hence probative facts must be pleaded. Lewis v. San Francisco [Cal. App.] 82 P. 1106. A complaint of a vendee to recover money paid under a contract to convey land after the same had been rescinded upon the refusal of the vendor to convey as per contract held to sufficiently plead the fact of rescission and not merely a conclusion. Miller v. Shelburn [N. D.] 107 N. W. 51.

23. In an action to recover money paid under a judgment subsequently reversed, an allegation of payment and of the reversal of the judgment, without allegations showing that plaintiff is entitled to the money, does not state a cause of action. Horton v. Hayden [Neb.] 104 N. W. 757.

24. A complaint alleging that plaintiff rendered labor as a miner and as a foreman and paid out money for defendant, all at his request, is not objectionable as setting up several causes of action in a single statement of facts (Nelson v. Henrichsen [Utah] 87 P. 267), nor is it demurrable for failing to state each item more specifically, defendant's remedy being a bill of particulars if he wished more definite information (Id.).

25. Where a petition alleges an overpayment in that interest was charged from the date of the notes instead of the time advancements were actually made, an amendment alleging that the payment also included interest to a date six days after the payment does not state a new cause of action. Sullivan & Co. v. Owens [Tex. Civ. App.] 90 S. W. 690. In an action for material furnished and work done for the recovery of the contract price, plaintiff may amend his petition, stating no new facts constituting a new cause of action, so as to recover for material actually furnished and labor done upon quantum meruit. Limerick v. Lee [Okl.] 87 P. 859.

26. Morrison v. Morrison [Me.] 63 A. 392. Petition to recover excessive water rates held to fail to show that they were paid under a mistake of facts. American Brewing Co. v. St. Louis, 187 Mo. App. 367, 86 S. W. 129.

27. Buck v. Houghtaling, 110 App. Div. 52, 96 N. Y. S. 1034.

28. Where there is evidence of admissions of defendant of the falsity of the statements, if made, plaintiff need not directly prove such fact. Rosenblum v. Liener, 49 Misc. 559, 98 N. Y. S. 836. As where the alleged false statement was that the property rented for $1,300 when as a fact it rented for only $1,200, and there is evidence that when defendant was confronted with the fact he denied making the statement and claimed that he said that it could be rented for $1,300. It is error to dismiss because plaintiff did not prove that it was not rented for that sum. Id.

29. Morrison v. Morrison [Me.] 63 A. 392.

30, 31. McMorrow v. Dowell, 116 Mo. App. 289, 90 S. W. 728.

32. In an action to recover quantum meruit for services rendered in selecting a site for a powder magazine, the value of such services is not a matter of common knowledge so that a judgment may be sustained without evidence of value. Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997. There can be no recovery quantum meruit without proof of the value of the work done or materials furnished. Flanders v. Rosoff, 111 App. Div. 1, 97 N. Y. S. 514. A judgment for services rendered cannot be sustained on the theory of quantum meruit where there is no evidence of any contract except to procure a loan, nor of the value of any services short of actual procurement. Stone v. Goodstein, 49 Misc. 482, 97 N. Y. S. 1035.

33. Lefkowitz v. Reich, 98 N. Y. S. 695.

34. Especially where there is no evidence of an established system of business between

ceived, evidence that it was paid to defendant at plaintiff's request is admissible if the complaint alleges facts from which the law will imply a promise to pay.[35] The general rule as to the inadmissibility of hearsay evidence is applicable.[36] There must be no variance between the cause pleaded and proven.[37]

Instructions must not submit issues not raised by the pleadings,[38] nor exclude issues properly raised.[39] While an instruction stated in the negative is improper, it is not prejudicial where it imposes no additional burdens.[40]

Recovery quantum meruit cannot be had in an action on an express contract,[41] though such contract is void under the statute of frauds.[42] If, however, both special and common counts are pleaded, recovery may be had under the latter if proof of the contract fails.[43] The recovery must correspond to the case made.[44]

IMPLIED TRUSTS; IMPLIED WARRANTIES; IMPOUNDING; IMPRISONMENT FOR DEBT; IMPROVEMENTS, see latest topical index.

INCEST.[45]

The crime[46] is purely statutory[47] and distinct from statutory rape,[48] being founded on relationship between the parties.[49] The Louisiana statute defining incest to be marriage or cohabitation by persons within the degrees of consanguinity avoiding marriage applies to such persons only as were forbidden to marry when the criminal statute was adopted,[50] and the crime is not enlarged by a civil statute extending the incapacity to marry.[51] An illegitimate person may be "stepdaughter" to accused within the terms of the statute.[52] Each of the pair is guilty of a separate crime.[53]

them. Hammer v. Crawford [Mo. App.] 93 S. W. 348.

35. Specific allegation of a promise is not necessary. Keene v. Eldriedge [Or.] 82 P. 803.

36. In an action on an implied contract for services rendered decedent, a letter written by plaintiff's daughter to decedent without plaintiff's knowledge is inadmissible to show that the services are without expectation of compensation. Hammer v. Crawford [Mo. App.] 93 S. W. 348.

37. Evidence that plaintiff conveyed a farm to defendant to be sold, the proceeds to be applied to pay a debt due defendant and the balance to be paid plaintiff, is not a variance under a complaint for money received "as plaintiff's agent." Keene v. Eldriedge [Or.] 82 P. 803.

38. Where the complaint alleges that plaintiff purchased stocks for defendant at his special instance and request, the submission of the question whether the stocks were not purchased for plaintiff injected no new issue, since defendant could have shown that fact under the general denial. Donovan-McCormick v. Sparr [Mont.] 85 P. 1029.

39. In an action to establish a claim against decedent's estate, an instruction that if the jury found that plaintiff rendered services for decedent, for which he knowingly received the benefit, the jury should take such services into consideration in making up their verdict, was not erroneous as excluding an implied contract. Hammer v. Crawford [Mo. App.] 93 S. W. 348.

40. Where in an action for money spent in the purchase of stock for defendant at his request the burden is on plaintiff to show that it was purchased for defendant, an instruction that the burden is on plaintiff to show that it was not purchased for itself, while stated in the negative and not to be commended, is not prejudicial. Donovan-McCormick v. Sparr [Mont.] 85 P. 1029.

41. Services. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. Paving of street in front of defendant's premises. Barber Asphalt Pav. Co. v. Loughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948.

42. Ballantine v. Yung Wing, 146 F. 621.

43. Richards v. Richman [Del.] 64 A. 238.

44. Where in an action for money had and received it appeared that plaintiff's attorney was entitled to one-half of the adjustment, a judgment for the full amount is excessive. Neu v. Brooklyn Heights R. Co., 99 N. Y. S. 290.

45. See 5 C. L. 1774.

46. See 5 C. L. 1774, n. 80-87.

47. State v. Judd [Iowa] 109 N. W. 892; State v. Freddy [La.] 41 So. 436. The Nebraska statute is held to sufficiently define it. Crim. Code § 204. Cordson v. State [Neb.] 109 N. W. 764.

48, 49. **Former acquittal** of statutory rape does not bar incest. State v. Learned [Kan.] 85 P. 293.

50, 51. Not applicable to first cousins forbidden, by act No. 120, p. 188, of 1900, to marry. State v. Couvillion, 117 La. 935, 42 So. 481.

Though the contrary is sometimes implied from the words of the statutes, they are not generally such as to make consent of both parties essential.[54] The woman need not have reached puberty,[55] and, even in those states where mutual consent is essential,[56] a woman below the "age of consent" may give it.[57] Scienter is not essential in Iowa.[58] Emission is not essential to carnal knowledge.[59] The word "cohabit" in the Louisiana statute means to have intercourse.[60]

The statute declaring generally the criminality of attempts permits conviction of attempted incest under an indictment for incest.[61] Acts which if consummated would have been incest may constitute an attempt.[62]

Indictment.[63]—An accusation in the words of the statute suffices if it contains all the elements of the crime.[64] An averment of "sexual intercourse" is equivalent to adultery or fornication,[65] and "girl" may be used as equivalent to "woman."[66] In Louisiana the indictment accusing the parties of "cohabiting" need not add the statutory words "without marriage."[67] In Iowa it need not be stated that the act was feloniously done,[68] and being surplusage, proof of knowledge of the relationship is not essential.[69]

Evidence.[70]—Prior acts of undue intimacy or intercourse are admissible,[71] though they occurred outside the venue laid.[72] The medical condition of the woman may be admissible[73] when not too remote from the offense.[74] Complaints made by a child who was the nonconsenting victim are admissible[75] when not tardily made,[76] and such are not limited to the res gestae of the intercourse.[77] The question eliciting such complaints should refer to accused by name and not assume the relationship by designating accused as a relative.[78] The addressing of the other party's kin by terms of relationship may be proved as admissions on the question of relationship.[79] Corroboration of the positive testimony of a party is not neces-

52. Lipham v. State, 125 Ga. 52, 53 S. E. 817.

53. Dismissal as to one to qualify her as witness is not a bar as to the other. State v. Learned [Kan.] 85 P. 293.

54. Not essential in Utah. State v. Winslow [Utah] 85 P. 433. Not usually essential except where the act is described as committed "together" or "with each other." Id., citing many cases. Not essential in Louisiana. State v. Freddy [La.] 41 So. 436, collecting cases pro and con. The word "cohabit" held to carry no implication of mutual consent. Id.

55. Dixon v. State [Ala.] 41 So. 734.

56. So in Kansas. State v. Learned [Kan.] 85 P. 293.

57. Statutes construed as merely withdrawing consent as defense in rape but not as incapacitating her to consent. State v. Learned [Kan.] 85 P. 293.

58. State v. Judd [Iowa] 109 N. W. 892.

59. Penetration completes the crime. State v. Judd [Iowa] 109 N. W. 892, reviewing the cases on this doctrine.

60. State v. Spurling, 115 La. 789, 40 So. 167; State v. Freddy [La.] 41 So. 436.

61. State v. Winslow [Utah] 85 P. 433.

62. Proof of physical contact with some penetration held to show an attempt. State v. Winslow [Utah] 85 P. 433.

63. See 3 C. L. 1695.

64. Cordson v. State [Neb.] 109 N. W. 764.

65. Indictment sustained. State v. Learned [Kan.] 85 P. 293. Not necessary to particularize in the words of the statute that it was "incestuous adultery." Lipham v. State, 125 Ga. 52, 53 S. E. 817.

66. Dixon v. State [Ala.] 41 So. 734.

67. State v. Spurling, 115 La. 789, 40 So. 167.

68, 69. State v. Judd [Iowa] 109 N. W. 892.

70. See 5 C. L. 1774, n. 88 et seq. Discovery of the pair in unfrequented woods at night with impressions in the soil as of a recent act of intercourse coupled with pregnancy of the woman at the time **held not sufficient** in view of the absence of available evidence which must either have corroborated or weakened the case. Cude v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 144, 97 S. W. 485.

71. State v. Judd [Iowa] 109 N. W. 892. So notwithstanding they prove other acts of incest barred by limitations. Adams v. State [Ark.] 92 S. W. 1123.

72. Lipham v. State, 125 Ga. 52, 53 S. E. 817.

73. Inflammation observed by physician after alleged offense. State v. Winslow [Utah] 85 P. 433.

74. Five or six days not too remote. State v. Winslow [Utah] 85 P. 433.

75, 76. State v. Winslow [Utah] 85 P. 433.

77. State v. Winslow [Utah] 85 P. 433. But when not of the res gestae, other and collateral statements made by the victim to the witness should be excluded. Id.

78. Error to ask if she complained of her "father." State v. Winslow [Utah] 85 P. 433.

79. Not secondary evidence. State v. Judd [Iowa] 109 N. W. 892.

sary in Iowa,[80] and when necessary it need only "tend" to prove the charge.[81] If the woman submits, though unwillingly, but with the same intent and purpose as the man, she is an accomplice within the rule requiring corroboration.[82] The fact that a witness was of kin to both, when elicited solely to affect credibility should be limited to that, if tending also to prove the relationship between the parties.[83]

INCOMPETENCY.

§ 1. Mental Weakness Sufficient to Constitute Incapacity (169).
§ 2. Effect of Incompetency on Contracts (170).
§ 3. Remedies and Procedure (171).

Scope of topic.—This topic treats only of incompetency to contract. Incompetency to execute a will is discussed in another article.[84]

§ 1. *Mental weakness sufficient to constitute incapacity*[85] must be such as to render the person incapable of understanding the nature and terms of the contract.[86]

80. State v. Perry [Iowa] 105 N. W. 507.
81. State v. Mungeon [S. D.] 108 N. W. 552. Debased family life and demeanor of accused in presence of persons while arranging for care of incestuous child held corroborative. Id.
82. Gillesple v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 68, 93 S. W. 556.
83. State v. Judd [Iowa] 109 N. W. 892.
84. See Wills, 6 C. L. 1880.
85. See 5 C. L. 1775.
86. Swartwood v. Chance [Iowa] 109 N. W. 297. Proof must establish that the party was without understanding sufficient to know the consequences of his own act. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110.

To avoid a contract on the ground of intoxication one must have been so completely intoxicated as to be incapable of knowing what he was doing or of understanding the consequences of his acts. Cook v. Bagnell Timber Co. [Ark.] 94 S. W. 695. As not to have been able to understand the effect of the transaction. Kuhlman v. Wieben, 129 Iowa, 188, 105 N. W. 445; Spoonheim v. Spoonheim [N. D.] 104 N. W. 845. Court inclined to view that plaintiff was not within the rule. Spoonheim v. Spoonheim [N. D.] 104 N. W. 845. Evidence insufficient to show intoxication sufficient to authorize setting aside purchase of timber. Cook v. Bagnell Timber Co. [Ark.] 94 S. W. 695. Mere inadequacy or excessiveness of consideration coupled with partial intoxication will not authorize the avoidance of a contract. Id. In order to make a valid contract the minds of the parties must meet, and if one mind is so weak, unsound, or diseased that the party is incapable of understanding the nature and quality of the act to be performed or its consequences he is incompetent to make a valid contract whether such state of his mind be the result of sickness, accident, or voluntary intoxication. Instruction too favorable to plaintiff as imposing too great a burden upon defendant. Hauber v. Leibold [Neb.] 107 N. W. 1042.

Test of capacity to execute a deed is ability to understand the nature and effect of the transaction. Chadwell v. Reed [Mo.] 95 S. W. 227. In order to overcome the legal presumption of mental capacity in a grantor, the evidence must show that he did not have sufficient understanding to clearly comprehend the nature of the business he was transacting. Teter v. Teter [W. Va.] 53 S. E. 779. Whether grantor at the time fully understood, realized, and appreciated the probable results and consequences of the transaction. Corporation of Members of Church of Jesus Christ of Latter-Day-Saints v. Watson [Utah] 83 P. 731.

Evidence held insufficient to show mental incapacity in a grantor. Reese v. Shutte [Iowa] 108 N. W. 525; Critchfield v. Easterday, 26 App. D. C. 89; Chadwell v. Reed [Mo.] 95 S. W. 227; Boyle v. Robinson [Wis.] 109 N. W. 623. An infirm and old grantor who suffered from strokes of paralysis. Teter v. Teter [W. Va.] 53 S. E. 779. To show that parents were incompetent to make a deed to two children to the exclusion of others. Kamin v. Kamin [Mich.] 13 Det. Leg. N. 580, 108 N. W. 1077. To establish by clear and convincing proof the mental incapacity of a wife of advanced years at the time of executing a deed, on its face duly executed and acknowledged, to her husband, in order that he might dispose of the property by will. Willis v. Baker [Ohio] 79 N. E. 466. To establish insanity or mental incapacity of landowner at time of making a mortgage and at time of foreclosure so as to justify setting aside the sale. Goerz v. Barstow [C. C. A.] 148 F. 562. To sustain finding that the transfer of a note was void within Civ. Code § 38, declaring that a person entirely without understanding is without power to contract, though sufficient to render the transfer voidable under § 39, providing that the contract of a person of unsound mind but not entirely without understanding, made before his incapacity has been judicially determined is subject to rescission. Maionchi v. Nicholini, 1 Cal. App. 690, 82 P. 1052. In suit to have a deed declared a mortgage, evidence that grantor grieved over the loss of her children and acted curiously held not to show incapacity to consummate the contract. Hamilton v. Holmes [Or.] 87 P. 154. That primary purpose of a deed was to pass all the grantor's realty to his wife raised no presumption of his incapacity. Chadwell v. Reed [Mo.] 95 S. W. 227.

Mere infirmity of mind and body,[87] or a showing that one was the subject of delusions or in other respects mentally weak, is not sufficient;[88] but while mere mental weakness is not sufficient to authorize the cancellation of a contract, it may justify equitable interference where coupled with inadequacy of consideration.[89]

§ 2. *Effect of incompetency on contracts.*[90]—Contracts entered into by incompetent persons are generally held voidable,[91] though there are authorities which treat them as absolutely void.[92] A deed regular on its face and properly executed and delivered by a grantor who had not been adjudged incompetent is presumed valid in ejectment until set aside for the grantor's incompetency by a decree in equity.[93] An incompetent's agreement beneficial to him may be upheld in certain cases where of such a character that a court of chancery would have approved it.[94] One who seeks to establish a contract as against a person of mental weakness standing in a confidential relation to him has the burden of showing mental capacity in such person at the time the transaction took place;[95] and the fact that a grantee had notice of his grantor's incapacity raises a presumption of fraud.[96]

Evidence held to show capacity to make a deed. Corporation of Members of Church of Jesus Christ of Latter-Day-Saints v. Watson [Utah] 83 P. 731; Spicer v. Holbrook [Ky.] 96 S. W. 571. Though grantor was suffering from blood poisoning. Hermann v. Zachow, 126 Wis. 441, 105 N. W. 950. Deed of all of one's property to his housekeeper. Boggianna v. Anderson [Ark.] 94 S. W. 51. To show that **injured passenger** was rational at time of **executing release** for damages. McLoughlin v. Syracuse Rapid Transit R. Co., 101 N. Y. S. 196.

Evidence held sufficient to show incapacity in grantor. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666; Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216; Long v. Garey Inv. Co. [Iowa] 110 N. W. 26; Benson v. Raymond [Mich.] 12 Det. Leg. N. 769, 105 N. W. 870. Grantor 60 years of age who had suffered from stroke of apoplexy. Bidwell v. Piercy [N. J. Eq.] 63 A. 261. In action involving validity of deeds by **grantor over 80 years of age,** evidence held to show that disposition of property made by the deeds was not such as grantor would have made if competent to understand nature of transaction and left to exercise his own judgment. Koger v. Koger [Ky.] 92 S. W. 961. Evidence held to justify finding that **maker of a note and trust deed was insane** and that payee had notice. Amos v. American Trust & Sav. Bank, 221 Ill. 100, 77 N. E. 462. Evidence held not to show that a brother was "mentally sound and fully competent" to ratify a sale of stock made to his older brother. Shevlin v. Shevlin, 96 Minn. 398, 105 N. W. 257.

87. Not sufficient to overcome legal presumption of capacity in grantor. Teter v. Teter [W. Va.] 53 S. E. 779.

88. Swartwood v. Chance [Iowa] 109 N. W. 297. An act sought to be invalidated by reason of insanity must be the direct result thereof, and the fact that one is the subject of an insane delusion does not alone render him incompetent to make a deed, unless such delusion extended to the subject out of which the conveyance grew and thus affected his business capacity. Reese v. Shutte [Iowa] 108 N. W. 525. One affected by a progressive disease such as softening of the brain may have periods of complete comprehension so as to be able to execute a deed. Critchfield v. Easterday, 26 App. D. C. 89.

89. Evidence held to sustain finding that certain deeds and a power of attorney were obtained by reason of grantor's mental incapacity and undue influence exerted by his wife. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110. See Fraud and Undue Influence, 5 C. L. 1541.

90. See 5 C. L. 1775.

91. A deed is voidable if at the time of its execution the grantor was so intoxicated as to be incapable of understanding the nature and effect of the transaction. Spoonheim v. Spoonheim [N. D.] 104 N. W. 845. An executed contract may be avoided on the ground of mental incapacity of a party thereto where the other party may be put in statu quo. Swartwood v. Chance [Iowa] 109 N. W. 297. This seems to be the rule whether the other party knew of the insanity or not and regardless of the fairness of the transaction. Id. In an action by an executrix for the proceeds of a life insurance policy in which defendant set up a general release executed by decedent, plaintiff could show that at the time the release was executed decedent was mentally incompetent by reason of the use of drugs and liquors. Gould v. Hancock Mut. Life Ins. Co., 99 N. Y. S. 833. An injured passenger may disaffirm a release for damages if by reason of mental incapacity he was unable to understand its import. McLoughlin v. Syracuse Rapid Transit R. Co., 101 N. Y. S. 196. The **deed of a lunatic** is binding upon him if not disaffirmed when the disability is removed. Spicer v. Holbrook [Ky.] 96 S. W. 571.

92. A deed executed when the grantor is mentally unbalanced, has no intelligent comprehension of the act being performed, and is incapable of transacting any business, is absolutely void. Cason v. Cason [Tenn.] 93 S. W. 89.

93. Smith v. Ryan, 101 N. Y. S. 1011.

94. Where by compromise of contest of will of incompetent's father she retained more property than she would have received had will been avoided, and it was necessary under circumstances to save to her as much as possible. Sprigg v. Sprigg's Trustee, 28 Ky. L. R. 944, 90 S. W. 985.

§ 3. *Remedies and procedure.*[97]—One who seeks to avoid a contract on the ground of incompetency must act within a reasonable time after removal of his disability,[98] and the transaction being fair and having occurred before office found, it is ordinarily essential that the other party be placed in statu quo.[99] Sales made by a spendthrift who is under guardianship may be set aside.[1] In so doing it is not necessary to tender to the grantee taxes paid by him.[2] An adjudication that one is a spendthrift may be made by a probate court in Illinois,[3] and it is not excluded from jurisdiction by provision for trying it in the county court and certifying the result.[4] The burden of proving incapacity is upon the party asserting it. One who attacks the validity of a deed on the ground of the incompetency of the grantor has the burden of proving his incapacity.[5] A witness may testify that a certain person was drunk at a certain time and that he acted drunk.[6] A studied declaration as to one's own past mental condition is not admissible.[7] The conduct and conversations of a person having been given by a witness, it is for the court to draw inferences as to his ability to converse intelligently.[8] An expert opinion which assumes the point in dispute is valueless.[9]

INDECENCY, LEWDNESS, AND OBSCENITY.

Prostitution.[10]—Under a statute making it a crime for one to connive at, consent to, or permit the placing of his wife in a house of prostitution, all of the enumerated acts may be charged conjunctively.[11] The defendant's knowledge of the

95. Where aged grantor who had suffered from apoplexy conveyed land to wife of intimate friend. Bidwell v. Piercy [N. J. Eq.] 63 A. 261. Of showing that the infirm person acted intelligently and with full knowledge of the amount of her property and the effect of the contract. Assignment of mortgage as a gift by aged and infirm woman. In re Plankinton's Estate, 212 Pa. 235, 61 A. 888.

96. Evidence sufficient to sustain finding that grantee had notice. Sprinkle v. Wellborn, 140 N. C. 163, 52 S. E. 666. See Fraud and Undue Influence, 7 C. L. 1813.

97. See 5 C. L. 1776.

98. Unexplained delay of nearly seven years before seeking to set aside a deed on ground of intoxication held unreasonable, especially where land had increased in value. Spoonheim v. Spoonheim [N. D.] 104 N. W. 845. Complainant not guilty of laches in bringing suit to cancel deed executed when she was mentally unbalanced by reason of threats of her son's prosecution. Cason v. Cason [Tenn.] 93 S. W. 89.

99. Fair conveyance by one not judicially declared incapable will be set aside only on return of consideration of which grantor has had the benefit. Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216. Interest was also included where grantee had never received rents. Id. Where one was not a bona fide mortgagee, refunding of money paid by him, except taxes, was not necessary. Id. If one while incompetent executes a release for injuries sustained he is bound, upon discovering that he has been victimized, to promptly rescind the agreement and offer to restore the consideration. McLoughlin v. Syracuse Rapid Transit R. Co., 101 N. Y. S. 196. But where one knew that the maker of a note and trust deed was insane, and the maker had **squandered the consideration,** the note and deed could be canceled without return of the money to the lender. Amos v. American Trust & Sav. Bank, 221 Ill. 100, 77 N. E. 462. Evidence held not to show that defendant had paid taxes and insurance out of part of the money lent the insane person so as to be entitled to a lien for that amount. Id.

1, 2, 3, 4. Ure v. Ure, 223 Ill. 454, 79 N. E. 153.

5. Chadwell v. Reed [Mo.] 95 S. W. 227. Suit to set aside deed. Burden upon complainant. Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216. Suit by son to set aside for mental incapacity deeds of deceased father made while aged, infirm, and feeble minded, granting entire estate to wife and children to exclusion of others of mature age. Teter v. Teter [W. Va.] 53 S. E. 779. Action by guardian to set aside deed executed by ward. Reese v. Shutte [Iowa] 108 N. W. 525. Where incompetency of grantee at time of conveyance was not clearly established and price was not materially excessive, grantee's guardian appointed two weeks after sale held not entitled to set it aside, no fraud being charged. Fehr v. Edwards, 129 Iowa, 61, 105 N. W. 349.

6. Error to exclude as opinion evidence. Kuhlman v. Wieben, 129 Iowa, 188, 105 N. W. 445. See, also, Evidence, 7 C. L. 1511.

7. In suit to set aside deed, answer of grantor in another suit not admissible. Ames v. Ames [Neb.] 106 N. W. 584.

8. Ames v. Ames [Neb.] 106 N. W. 584.

9. Where facts assumed insanity. Ames v. Ames [Neb.] 106 N. W. 584.

10. See 5 C. L. 1776.

11. See Laws 1903, p. 280, c. 128, § 1. State v. Ilomaki, 40 Wash. 629, 82 P. 873.

character of the house need not be expressly alleged,[12] nor is it necessary to expressly instruct the jury that such knowledge is an essential element of the offense.[13] Evidence of general reputation is admissible to prove that the house was a house of prostitution.[14] Protests against the wife's remaining in the house do not constitute a defense unless they were made in good faith.[15] Under a statute making it crime for the keeper of a house of prostitution or assignation to allow any unmarried female under a certain age to live in such house, the questions of the virtue of the female[16] and the knowledge of her age on the part of the keeper of the house[17] are both immaterial.

Obscene words or publications.[18]—A boarding house is not per se a public place within a statute relating to the use of obscene, vulgar, or indecent language in a public place.[19] The offense of uttering and that of exposing indecent matter to view may be charged in separate counts,[20] but it is not esssential to the validity of the indictment that they should be so charged,[21] and when they are so charged proof of either offense will sustain a general verdict of guilty.[22] The indictment need not contain a copy of the alleged indecent matter.[23] In Georgia it is an offense to use profane, vulgar, or obscene language in the presence of a female without provocation or excuse.[24] An indictment under this statute need not allege that the language was used of or to another.[25] That the party in whose presence the language was used was a female may sufficiently appear by inference.[26] The character of the female is immaterial.[27]

Lascivious conduct.[28]—Under a statute relating to indecent exposure of the person in a public place, the place of exposure is a public one if it be such that the exposure is likely to be seen by a number of casual observers.[29] Under the California statute relating to lewd and lascivious acts which tend to arouse the sexual desires of any child under a certain age, the sex of the child is immaterial[30] and need not be alleged.[31] Where defendant under indictment for taking indecent liberties with a child was allowed to testify that the presence of the child in his room was required by his sickness, it was not error to exclude evidence of the cause of his sickness.[32] Under a constitutional provision requiring the subject of a legislative act to be expressed in its title, an act making lascivious conduct a felony but which does not indicate the degree of the offense in its title is unconstitu-

12. Charge that defendant did "connive at, consent to, and permit" the placing of his wife in a house of prostitution sufficiently charged, by inference, defendant's knowledge of the character of the house. State v. Barker [Wash.] 86 P. 387.

13. In prosecution under Laws 1903, p. 280, c. 123, § 1, relating to the placing or leaving of a wife in a house of prostitution, an instruction held sufficiently explicit on question of necessity of defendant's knowledge of the character of the house. State v. Ilomaki, 40 Wash. 629, 82 P. 873.

14, 15. State v. Ilomaki, 40 Wash. 629, 82 P. 873.

16, 17. Maguire v. People, 219 Ill. 16, 76 N. E. 67.

18. See 5 C. L. 1777.

19. Huffman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 547, 92 S. W. 419.

20. State v. Hill [N. J. Law] 62 A. 936.

21. The two offenses under Acts 1898, p. 808, § 53, may be charged in a single count. State v. Hill [N. J. Law] 62 A. 936.

22. Evidence held sufficient to support charge of exposing pictures to view of another but not a charge of uttering. State v. Hill [N. J. Law] 62 A. 936.

23. A description of the matter is sufficient to sustain an indictment for the offense described in Rev. St. 1892, § 7027. State v. Zurhorst [Ohio] 79 N. E. 238.

24. Pen. Code 1895, § 396. Finch v. State, 124 Ga. 657, 52 S. E. 890. Evidence held sufficient to sustain conviction. Id.

25. Kelly v. State [Ga.] 55 S. E. 482.

26. Fact inferred from reference of witnesses to the party as "Mrs.," "she," and "her." Kelly v. State [Ga.] 55 S. E. 482.

27. Kelly v. State [Ga.] 55 S. E. 482.

28. See 5 C. L. 1777.

29. Store with glass windows and doors held a public place as a matter of law. State v. Goldstein, 72 N. J. Law, 336, 62 A. 1006.

30, 31. People v. Zuell [Cal. App.] 82 P. 1128.

32. People v. Harris [Mich.] 13 Det. Leg. N. 139, 107 N. W. 715.

tional.[33] Clerical misprisions in the statute are not necessarily fatal to its validity.[34]

INDEMNITY.

§ 1. Definition and Distinctions (173).
§ 2. The Contract (173).
§ 3. Interpretation and Effect of Contract (173).
§ 4. Actions on Contract (175).
§ 5. Defenses (175).
§ 6. Measure of Recovery (176).

§ 1. *Definition and distinctions.*[35]—An indemnity contract is an agreement by one person to indemnify and save another harmless from loss or damage in connection with some transaction or from the claims of third persons.[36] A bond given to a mortgagee and conditioned that the mortgagor shall complete improvements on the mortgaged premises is not a guaranty of the mortgage debt,[37] and a surety on such bond is not entitled to the benefit of the mortgage.[38] Forthcoming and other bonds,[39] and the equitable right of indemnity as between co-obligors,[40] are discussed in their appropriate titles. Indemnity against a class of casualties or for protection of specific property is usually called insurance.[41]

§ 2. *The contract. Requisites and validity.*[42]—The agreement must be supported by a sufficient consideration[43] but need not be in writing.[44]

§ 3. *Interpretation and effect of contract.*[45]—The contract should receive a reasonable construction according to the intention of the parties.[46] A fidelity bond

33. Laws 1905, p. 188, relating to the taking of indecent liberties with children, held unconstitutional under Const. 1870, art. 4, § 13. Milne v. People, 224 Ill. 125, 79 N. E. 631.

34. Pen. Code § 288, providing against lewd or lascivious acts other than those constituting other crimes provided for in "part II" of the Code, is not unintelligible merely because of a clerical error in inserting the characters "II" for the character "I" in such section. People v. Bradford, 1 Cal. App. 41, 81 P. 712.

35. See 5 C. L. 1777.

36. See 16 Am. & Eng. Enc. L. [2d Ed.] 168. For distinction between indemnity and guaranty, see 5 C. L. 1777.

37. American Bonding & Trust Co. v. Progressive Permanent Bldg. Loan & Sav. Ass'n, 101 Md. 323, 61 A. 199.

38. The fact that after failure of the mortgagor to complete the buildings the mortgagee accepted payments on the debt and released certain lots from the operation of the mortgage did not discharge the surety. American Bonding & Trust Co. v. Progressive Permanent Bldg. Loan & Sav. Ass'n, 101 Md. 323, 61 A. 199. Surety on bond conditioned on completion of certain buildings by a mortgagor held liable, on default of principal, for any loss sustained by mortgagee because buildings were not completed within the time limited. Id.

39. See Attachments, 7 C. L. 300; Bonds, 7 C. L. 443; Executions, 7 C. L. 1614; Injunction, 6 C. L. 6; Replevin, 6 C. L. 1301, and the like.

40. See Contribution, 7 C. L. 844; Suretyship, 6 C. L. 1590; Torts, 6 C. L. 1700.

41. See Insurance, 6 C. L. 69; Fraternal Mutual Benefit Associations, 7 C. L. 1777.

Laws regulating casualty and indemnity companies are discussed in the title Insurance, 6 C. L. 69.

42. See 5 C. L. 1777.

43. Agreement by a contractor to pay a property owner all loss from injury to underground pipes dus to the construction of a sewer held supported by sufficient consideration where it imposed upon the contractor a greater liability than that imposed by his contract with the city. Hoffman v. St. Louis Refrigerator & Cold Storage Co. [Mo. App.] 97 S. W. 619. An insured, after a loss, gave a bond to indemnify the insurer against claims made or to be made against former. Later the insurer was garnished and thereafter the insured received ths amount of the loss. Held the bond was supported by a sufficient consideration and insurer could recover thereon the judgment in garnishment. Western Assur. Co. v. Walden, 117 Mo. App. 438, 94 S. W. 725.

44. Attachment plaintiff promising to save officer harmless from liability for damages to property in custody of plaintiff's servant held "the principal debtor," within Civ. Code § 2794, subd. 21, and promise was not void because not written. Burr v. Cross [Cal. App.] 86 P. 824.

45. See 5 C. L. 1778.

46. U. S. Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144.

Contracts construed: Bond held to show that the parties intended that the obligors should bind themselves to indemnify a county **against defalcations of a bank** which had been designated as a depository of county funds, whether it was a private or a corporate institution, despite certain recitals therein to the contrary. U. S. Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144. Where indemnity bond provided that it should not lapse at ths end of the term if rsnewed, but that the **liability** of the surety **should not be cumulative,** the total liability for both the original and

being in legal effect analogous to a policy of insurance[47] should be construed in favor of the indemnitee,[48] and declarations or statements by the insured should be regarded as representations and not warranties, unless the contract makes them so.[49] So also, unless otherwise expressly provided, warranties will be deemed to refer to material matters calculated to affect the risk and not to unimportant ones.[50] A warranty that the books of a cashier will be examined monthly does not require an examination at any fixed date in each month,[51] nor an examination by expert accountants.[52] A provision requiring immediate notice to the indemnitor of any fraudulent act on the part of an employe does not require the employer to report mere suspicions,[53] but after suspicion is aroused reasonable diligence must be used in inquiring as to the facts.[54] Unless the lapse of time is so long as clearly to show noncompliance with the contract the question of timely notice is for the jury.[55] Where by agreement the contract is continued in force to a certain date, there is no ground for a contention that it should continue for a reasonable time only.[56] A contract of absolute indemnity against loss on a purchase of stock passes to the estate of the indemnitee, though it contains no words of succession.[57] A continuing bond being given by a state officer, he is liable for the premium thereon until release is obtained by the furnishing of another bond or by returning the property in his possession to the state, or turning it over to his successor in office after he has been duly qualified.[58] One who gives a bond to indemnify a sheriff in making an unlawful seizure

renewal periods was limited to the amount specified in the bond. American Bonding Co. v. Morrow [Ark.] 96 S. W. 613. A bond was conditioned on the repayment to plaintiff of all of its deposits in a bank and contained no provisions limiting the amount of the deposits to the amount of the penalty of the bond. Held the bond secured plaintiff for any unpaid balance to the extent of the penalty of the bond in case of insolvency of the bank. Buffalo German Ins. Co. v. Title Guaranty & Trust Co., 99 N. Y. S. 883. A bond being conditioned that an insurance agent should deliver property belonging to the company to such person as the company or its representatives should direct, the **agent's failure to deliver the property** to the company's receiver constituted a breach. Urquhart v. Saner [Tex. Civ. App.] 16 Tex. Ct. Rep. 20, 94 S. W. 902. Where a contractor assigned to his surety **such plant as he might have** in case he should be unable to complete his contract, the surety's right to the property depended upon the facts existing at the time when the right was given and not when possession was taken, as against the contractor's trustee in bankruptcy. Wood v. U. S. Fidelity & Guaranty Co., 143 F. 424. The word "plant" held to include lumber and other building material, together with horses, carts, etc. Id. The liability of sureties on the **bonds of public officers** must be determined from the terms of the bond, which cannot be extended beyond their reasonable meaning, construed with reference to the purpose for which the bond was required. Bond conditioned that a constable should faithfully perform his duties did not render sureties liable because the constable unlawfully collected from the county excessive fees. Jennings v. Bobe [Fla.] 40 So. 194.

47. American Bonding & Trust Co. v. Burke [Colo.] 85 P. 692.

48. American Bonding & Trust Co. v. Burke [Colo.] 85 P. 692. Bond to be construed most strongly against insurer. American Bonding Co. v. Morrow [Ark.] 96 S. W. 613.

49. American Bonding & Trust Co. v. Burke [Colo.] 85 P. 692; Fidelity & Deposit Co. v. Guthrie Nat. Bank [Okl.] 87 P. 300. Ky. St. 1903, § 639, providing that all statements in any application or policy of insurance shall be deemed representations and not warranties and shall not prevent recovery unless material or fraudulent, applies to fidelity contracts. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3.

50. Where employer warranted that employe was not engaged in any other business, the fact that he wrote a little fire insurance and was secretary of a local board did not amount to a breach. American Bonding Co. v. Morrow [Ark.] 96 S. W. 613.

51. Monthly examinations sufficient. American Bonding Co. v. Morrow [Ark.] 96 S. W. 613.

52. Examination by auditing committee as warranted, sufficient. American Bonding Co. v. Morrow [Ark.] 96 S. W. 613.

53. Even though strong enough to justify in his opinion a discharge of employe. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3. Not necessary to give notice of each item or false entry appearing during the examination of a defaulting employe's account. Id.

54. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3.

55. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3. Where a fraudulent item was discovered April 7, but no notice given till April 20, there could be no recovery as to that item. Id.

56, 57. Plummer v. Emery, 191 Mass. 183, 77 N. E. 690.

58. Notice to bonding company that he no longer required bond, notwithstanding

and sale of personal property thereby renders himself jointly and severally liable with the sheriff for conversion.[59]

§ 4. *Actions on contract.*[60]—There can be no recovery unless a loss is sustained[61] by the indemnitee,[62] nor if plaintiff himself contributes to a loss.[63] One against whose claim an indemnity agreement is made cannot enforce the contract as against a person not a party thereto.[64] The right of a defendant to call another in warranty does not depend upon any privity between the warrantor and plaintiff in the main action,[65] but as a basis for the exercise of such right there must be a contract of warranty between such defendant and the person so called.[66] As in other cases the pleadings must be reasonably definite and certain.[67] Where one is responsible over to another and is notified of the pendency of a suit involving the subject-matter of the indemnity, the judgment rendered in such suit is admissible in evidence against him in an action on the contract of indemnity,[68] and his liability is conclusively fixed thereby.[69]

§ 5. *Defenses.*[70]—A material misrepresentation avoids the contract.[71] An employer on making application for a fidelity bond must not only state what he honestly believes but before answering questions must use reasonable care to acquaint himself with the facts,[72] but if representations are made in good faith the fact that

Officer of Ohio National Guard. American Bonding Co. v. Bryant, 7 Ohio C. C. (N. S.) 399.

59. At suit of mortgagee in possession. Sloan v. National Surety Co., 111 App. Div. 94, 97 N. Y. S. 561.

60. See 5 C. L. 1779.

61. Not where it was agreed that loss should be deemed to have been sustained if certain money was not recovered within one year, and the money was recovered after the year had expired. Robinson v. Pierce [Colo.] 83 P. 624. Loss is not established within an agreement to reimburse a vendee if he lost the land, by evidence that a company informed the vendee that the land belonged to it, and that he was advised by an attorney that the company owned it, and that the company executed a deed purporting to convey the land to him. Funk v. Church [Iowa] 109 N. W. 286.

62. A bond to indemnify an assignee in insolvency on account of the assignment and reassignment of the property was assigned by him to his surety in consideration of advancements to be made by the surety to the principal as assignee. Held the surety could not recover on the bond advancements made by him after the assignment on account of expenses and disbursements by the assignee. Dunham & Co. v. McCann, 110 App. Div. 157, 97 N. Y. S. 212.

63. Release of security. Robinson v. Pierce [Colo.] 83 P. 624.

64. Where on a sale of real estate a third person agrees to indemnify the vendor against any claim of a broker for commissions, the broker cannot enforce the contract of indemnity against the vendee. Kayser v. Silverberg, 98 N. Y. S. 222.

65. Muntz v. Algiers & G. R. Co., 114 La. 437, 38 So. 410.

66. Muntz v. Algiers & G. R. Co., 114 La. 437, 38 So. 410. A stipulation pour autrui when accepted may establish the contract required. Id. Railroad sued for negligence could call sublessee who had undertaken to defend, though railroad was not a direct party to the contract. Id.

67. In an action on a treasurer's bond for his failure to turn over certain interest on a deposit, affidavit of defense that it was agreed that the treasurer should keep the interest as compensation for his services, and that in part the interest was derived from money belonging to the treasurer held insufficient. Harp Bldg. & Loan Ass'n v. Sheehan, 29 Pa. Super. Ct. 382. Declaration in action on sheriff's indemnity bond in attachment held sufficient after verdict to support judgment for plaintiff as against objection that it failed to show title to the property in the person who recovered judgment against the sheriff. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392.

68. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392. Evidence held to show notice. Id. In an action on a contract conditioned that a contractor shall save plaintiff harmless from claims on account of work done or not done by him, the records of judgment against plaintiff in actions on such claims are relevant. Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co. [C. C. A.] 142 F. 41.

69. Especially where he participates in the defense. Meyer v. Purcell, 214 Ill. 62, 73 N. E. 392. In an action on a contractor's agreement to indemnify the owner against claims on account of the work, judgments against plaintiff in actions on such claims are conclusive on defendant so far as based on work done or omitted to be done by the contractor (Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co. [C. C. A.] 142 F. 41), and the extent to which they are so based may be shown by extrinsic evidence as to whether the contractor was in sole charge of the work at the time the injuries sued for occurred (Id.).

70. See 5 C. L. 1781.

71. And when made in response to a specific inquiry and relied upon the question of good faith is immaterial. American Bonding & Trust Co. v. Burke [Colo.] 85 P. 692.

they are not literally correct will not vitiate;[73] and the fact that a city pays the premium on the bond of its treasurer pursuant to a resolution of its council, as authorized by statute, does not render the bond invalid as against the surety company on account of false statements made by the treasurer in his application for the bond.[74] An employer who obtains the services of an examiner to determine the state of his employe's accounts prior to making application for a fidelity bond is chargeable only with ordinary care in selecting the examiner,[75] and if such care is exercised is not affected by the examiner's negligence.[76] An employer's statement may be made the basis of a fidelity bond by agreement of the parties, though made after execution and delivery of the bond.[77] The fact that an indemnitee has made himself responsible to third persons is not a defense where such responsibility is covered by the contract of indemnity.[78]

§ 6. *Measure of recovery.*[79]—The indemnitee having been cast in judgment, counsel fees in supplementary proceedings are ordinarily not recoverable.[80]

INDEPENDENT CONTRACTORS.[81]

Generally speaking, an independent contractor is one who exercises an independent occupation, being responsible to his employer only as to the results of his work and not as to manner and means of accomplishing it.[82] While the contractor

False answers to inquiries as to the correctness of an employe's accounts, etc., held to avoid fidelity bond. Id.

72. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3.

73. Where employe had not kept his accounts correctly and did not have on hand securities with which to settle, as represented by employer's answer in his application. Fidelity & Deposit Co. v. Guthrie Nat. Bank [Okl.] 87 P. 300. Where it was agreed that any material misstatement or suppression of fact by the employer or the fact that the employe within the knowledge of the employer had defaulted during his term of service should avoid the contract, the term "misrepresentation" referred to statements known to be untrue, or stated as true without knowledge, or made under circumstances calling for knowledge. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3.

74. Resolution to "furnish" the bond held in effect a resolution merely to pay the premium, so that all the city did was merely to accept the bond. Aetna Indemnity Co. v. Haverhill [C. C. A.] 142 F. 124.

75, 76. Fidelity & Guaranty Co. v. Western Bank [Ky.] 94 S. W. 3.

77. Where statement contained agreement that it should be deemed the basis of the bond, answers therein contained were material to the execution of the bond. American Bonding & Trust Co. v. Burke [Colo.] 85 P. 692.

78. Where contractor caused damages to a landowner by obstructing certain ditches, that plaintiff failed to reopen them was no defense. Lake Drummond Canal & Water Co. v. West End Trust & Safe Deposit Co. [C. C. A.] 142 F. 41.

79. See 5 C. L. 1782.

80. Where defendant had agreed to save plaintiff harmless from partnership debts. Ogilby v. Munro, 101 N. Y. S. 753.

81. See 5 C. L. 1782.

82. Engler v. Seattle, 40 Wash. 72, 82 P. 136.

Illustrations: A stevedore who is paid per ton for unloading vessels and who hires, pays, discharges, and has control of the men engaged in the work. Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048. One procuring timber for a mining company at a stipulated price per piece, the company retaining no supervision over the work or control of the manner of doing it, the contractor employing and paying his own men. Anderson v. Tug River Coal & Coke Co. [W. Va.] 53 S. E. 713.

Evidence held for the jury: Credence of the witness as to whether the owner of the house being shingled surrendered such control over the work as to constitute the party doing the work an independent contractor. Northrup v. Hayward [Minn.] 109 N. W. 241. Whether defendant who had undertaken to construct a building had given his codefendant such control over the work of erecting the walls as to constitute him an independent contractor. Decola v. Cowan, 102 Md. 551, 62 A. 1026. Whether defendants directed or controlled the person employed as to the method of doing the work and as to whether he submitted to their control and adopted their suggestions. Falender v. Blackwell [Ind. App.] 79 N. E. 393.

An allegation that defendants "employed and contracted with him to do and perform the work" does not show that such person was an independent contractor. Falender v. Blackwell [Ind. App.] 79 N. E. 393.

Admissibility of evidence: Evidence that the person employed to break up machinery with dynamite exploded it in the same manner as he did for other parties is inadmissible as tending to show that he was an independent contractor. Falender v. Blackwell [Ind. App.] 79 N. E. 393. As bearing upon the issue as to whether one doing street repair work was a servant of defendant or an independent contractor, evidence that the

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must be free to choose the means of obtaining the desired results, the mere fact that he is required to conform to plans and specifications,[83] or submit to the supervision of an architect or engineer who has power to discharge incompetent workmen,[84] does not render him any the less an independent contractor. While it is the province of the jury to determine the facts, the facts being undisputed the question whether the contractor is engaged in an independent employment is for the court.[85]

The doctrine of respondeat superior is inapplicable to the relation, and generally speaking the employer is not liable to third persons for negligent acts of the contractor or his servants.[86] There are, however, some important exceptions to this rule, thus the employer is liable where the work to be done is a nuisance or is intrinsically dangerous,[87] or where the injury is the direct result of the acts called for and made necessary by the contract,[88] and not from acts merely collateral to the contract.[89] Likewise, positive duties owed to a third person or to the public cannot be delegated, and the employer is liable for a failure to discharge the same though the negligence of the contractor causes the damage.[90] An employer accepting work with knowledge that converted material has been used therein is liable.[91] To relieve the employer from liability, however, the work must be let to the contractor in good faith and not for the purpose of escaping liability,[92] nor is the employer relieved where in fact he undertakes to do the work.[93]

permit was obtained by one stated to be defendant's manager is admissible. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Evidence that the employer told the witness on the morning of the accident that he would be away during the day is not admissible as a part of the res gestae as bearing upon the issue whether the party doing the work was an independent contractor. Falender v. Blackwell [Ind. App.] 79 N. E. 393. Inadmissible as self-serving. Id. As to distinctions between agents and independent contractors, see Clark & S. on Agency, 13.

83. One erecting a building according to his own methods, hiring and discharging his employes, and subject to the control of the employer except as to the finished result, is an independent contractor though he is required to conform to the plans, specifications, and supervision of the architect, Scharff v. Southern Ill. Const. Co., 115 Mo. App. 157, 92 S. W. 126.

84. Engler v. Seattle, 40 Wash. 72, 82 P. 136.

85. Anderson v. Tug River Coal & Coke Co. [W. Va.] 53 S. E. 713.

86. An independent contractor cutting wood for props above a mining camp negligently permitted a log to roll down into the camp, injuring one of the miners. Anderson v. Tug River Coal & Coke Co. [W. Va.] 53 S. E. 713. Contractors negligently left the chimney of the house which they were moving standing without guards. Wilmot v. McPadden, 78 Conn. 276, 61 A. 1069.

87. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Heavy blasting near a public street according to the terms of the contract. Falender v. Blackwell [Ind. App.] 79 N. E. 393. Evidence of the destructive effect of the blasting is admissible as tending to show the intrinsically hazardous nature of the work. Id. Injury to a pedestrian while a heavy sign was being lowered from its position over the street. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847.

88. An abutting owner letting construction work to an independent contractor, which necessitated heavy teaming over the sidewalk, is liable for defects created in such walk. Mullins v. Siegel-Cooper Co., 183 N. Y. 129, 75 N. E. 1112.

89. Injury due to the negligent manner of constructing the temporary walk and not as the direct result of the work called for in the contract. Massey v. Oates, 143 Ala. 248, 39 So. 142.

90. A general employer charged with the duty of keeping a sidewalk in a reasonably safe condition while temporarily occupying it for a private purpose is liable to a pedestrian injured by the falling of a shed temporarily erected over the street by an independent contractor. Lubelsky v. Silverman, 49 Misc. 133, 96 N. Y. S. 1056. A landlord remodeling a leased building through an independent contractor is liable to the tenant for damage to his goods through the negligence of the contractor, though the liability grows out of the contractual relation and is not an ordinary tort liability. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189. Duty of a street railway to keep that portion of the street occupied by its tracks in a reasonably safe condition cannot be escaped by doing repair work through an independent contractor. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. A municipality by granting a permit to an abutting property owner to put in a new sidewalk, reserving control of the work through its engineer, does not impose any duty upon the abutter which cannot be dele-

While a municipality is not liable for the negligent acts of an independent contractor improving its streets,[94] it is not relieved of the duty of keeping the streets in a reasonably safe condition and may become liable for its own negligence though the defect was created by an independent contractor.[95]

An independent or subcontractor is liable to third persons for damages resulting from his negligence,[96] providing it occurs before the work is completed and accepted by the general employer.[97] A principal or original contractor is not liable for the negligence of a subcontractor.[98] The general employer must exercise reasonable care to avoid injuring the servants of the contractor,[99] and since they are not trespassers,[1] nor even mere licensees,[2] he must see that the premises where the work is to be done are in a reasonably safe condition,[3] though his liability is limited to the original condition and does not extend to defects produced by the contractor or his servants.[4] The servants of the employer and those of the contractor, though working together, are not fellow-servants,[5] and hence the employer is liable for negligent acts of his servants resulting in injury to the latter.[6]

gated. Massey v. Oates, 143 Ala. 248, 39 So. 142.

91. Nature of the contract and evidence in the case held to raise a presumption that appellant railroad company had knowledge of respondent's claim for conversion of ties which was not met. Jones v. Minnesota & M. R. Co. [Minn.] 106 N. W. 1048.

92. A corporation undertaking construction work cannot escape liability by creating an irresponsible corporation under the control of its members and contracting with it for the performance of the work. Holbrook, C. & R. Corp. v. Perkins [C. C. A.] 147 F. 166. The separate corporate entity is not conclusive but the identity of its members may be investigated. Id.

93. Although defendant sublet the construction work to an independent contractor, who was to furnish the materials, etc., if as a fact the contract was not complied with but defendant purchased the materials and caused it to be delivered, it is liable for injuries occurring during delivery. Holbrook, C. & R. Corp. v. Perkins [C. C. A.] 147 F. 166.

94. Contractor employed by a property owner to lay a sewer negligently permitted the ditch to remain unguarded. Levenite v. Lancaster [Pa.] 64 A. 782. Unless it was negligent in not discovering and remedying the defect. Massey v. Oates, 143 Ala. 248, 39 So. 142. And hence, when it grants a permit to an abutting owner to make the repair, it imposes no special duty to keep the sidewalk in a safe condition which cannot be delegated to an independent contractor. Id.

95. Municipality not relieved from liability for injuries resulting from a defective sidewalk of which it has constructive knowledge. Goff v. Philadelphia, 214 Pa. 172, 63 A. 431.

96. A subcontractor engaged in constructing a public improvement is liable for a trespass to property and for negligence. Subcontractor in excavating for Rapid Transit Subway in New York negligently blasted near and broke a water main from which the water flowed over plaintiff's premises. Held subcontractor liable. Wheeler v. Norton, 92 App. Div. 368, 86 N. Y. S. 1095.

97. Independent contractor loading a vessel negligently fastened the hatches which resulted in injury to a third person after the work was accepted. Held not liable. Young v. Smith & Kelly Co., 124 Ga. 475, 52 S. E. 765.

98. Tenant's goods damaged during the remodeling of the building. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189.

99. Servant of an independent contractor run down while working in defendant's railroad yards. Caffi v. New York, etc., R. Co., 49 Misc. 620, 96 N. Y. S. 835; Loehring v. Westlake Const. Co., 118 Mo. App. 163, 94 S. W. 747. Question whether such care had been used in the construction of a girder plate for the support of a swinging scaffold, but which was frequently used by workmen in passing from one beam to another, held for the jury. Id.

1. A servant of an independent contractor employed to repair the depot of appellant is not a trespasser in leaving the immediate vicinity of his work and going upon other premises of appellant to secure a lifting jack, though nothing in the contract authorized the independent contractor to use such jack. Pittsburgh, etc., R. Co. v. Cozatt [Ind. App.] 79 N. E. 534.

2. There of lawful right, and hence the employer does not discharge his duty by simply refraining from wantonly injuring him. Lookout Mountain Iron Co. v. Lea [Ala.] 39 So. 1017.

3. The proprietor of a mill in which an independent contractor is installing machinery must keep the premises in a reasonably safe condition for the servants of such contractor. Insufficient lights. Dallas Mfg. Co. v. Townes [Ala.] 41 So. 988.

4. City held not liable to one injured from not being given a safe place to work while digging sand. Engler v. Seattle, 40 Wash. 72, 82 P. 136. Labor Law, Laws 1897, p. 467, c. 415, § 18, does not impose upon one erecting a building through an independent contractor any duty to see that a scaffolding erected by the latter's servants is safe (Antes v. Watkins, 112 App. Div. 860, 98 N. Y. S. 519), and the mere fact that he warned them that the scaffolding which they were building was unsafe is not an assumption of control creating a liability (Id.).

A general employer furnishing tools and machinery owes the same duty in respect thereto as masters generally.[7] Likewise, a contractor owes to the servants of a subcontractor the duty to exercise reasonable care to avoid exposing them to danger from defects existing in the premises.[8] The right to direct and control a workman determines his master.[9]

INDIANS.

§ 1. Who Are Indians and What is Their Legal Status (179).
§ 2. Federal and State Government of Indians and Their Habitat (180).
§ 3. Tribal Government Subject to Federal Dominion (181).
§ 4. Indian Lands and Properties (182).
§ 5. Rights and Liabilities of Others in Indian Country Dealing With Indians (187).
§ 6. Crimes and Offenses by and Relating to Indians (187).
§ 7. Indian Depredations (188).

§ 1. *Who are Indians and what is their legal status.*[10]—Where an Indian nation has a treaty right to determine who are citizens of such nation, its decision in this regard is conclusive upon the courts,[11] and where one whose claim to such citizenship has been rejected by the nation subsequently claims citizenship therein under a subsequent act of congress, he cannot deny the power of congress to prescribe the manner in which his citizenship shall be determined.[12] So also, judgments of citizenship rendered by a commission appointed by congress and by territorial courts, though conclusive upon the parties in the absence of subsequent legislation and final when rendered, are voidable and reviewable under subsequent acts of congress enacted before the acquisition of vested rights thereunder.[13]

5. Lookout Mountain Iron Co. v. Lea [Ala.] 39 So. 1017.

6. Relation of master and servant not necessary. Working in the same mine. Lookout Mountain Iron Co. v. Lea [Ala.] 39 So. 1017. General employer held liable for negligently attempting to transfer a heavy timber by hand instead of by available appropriate machinery. Carlson v. White Star S. S. Co., 39 Wash. 394, 81 P. 838.

7. So at common law and not changed by Rev. Laws c. 106, § 76. Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048. Not liable for assumed risks. Id. See Master and Servant, 6 C. L. 537.

8. Principal contractors in possession and control of a building owe the same duty as the owner. Steele v. Grahl-Peterson Co. [Iowa] 109 N. W. 882. Ordinarily the liability will be limited to the condition of the premises when the subcontractor begins and not extended to defects produced by the subcontractor or his servants. Id. Evidence held to sustain a finding of negligence. Id.

9. One working under the direction and control of an independent contractor is his servant and not that of the general employer, though hired and paid by him. Dallas Mfg. Co. v. Townes [Ala.] 41 So. 988. Hence liability for injury cannot be based upon the relation of master and servant. Id.

10. See 5 C. L. 1785.

11. Prior to the act of June 10, 1896, the right and the power to determine who were the citizens of the Choctaw and Chickasaw Nations was vested in those tribes. It was one of the fast disappearing attributes of the domestic dependent nationality of the Choctaws and Chickasaws, which was vested exclusively in their nations and was guaranteed to them by treaties with the United States. 7 Stat. 333, 334, art. 4; 11 Stat. 611, 613, art. 8. Wallace v. Adams [C. C. A.] 143 F. 716.

12. As the determination of this question of citizenship was a purely legislative and administrative function, and not a judicial one, congress necessarily had the authority under the constitution at any time before an allotment of land under its previous acts had been finally made to the defendant, and his right to the land had thereby become vested, to repeal its previous legislation, to change its method of determining the issue, to strike down any decision that had been made under its previous acts, to prescribe a new method of deciding the question, or to refuse to determine it altogether and leave the claim of the defendant as it found it, conclusively barred by its rejection by the nation. Wallace v. Adams [C. C. A.] 143 F. 716.

13. Such judgments might be rendered reviewable by another court at any time before allotments of land thereunder. Wallace v. Adams [C. C. A.] 143 F. 716. Since the United States courts in the territories and the supreme court in reviewing their decisions do not exercise the judicial power granted by article 3 of the Constitution, but a jurisdiction conferred upon them by the legislative department of the government by virtue of the sovereignty of the nation and the authority granted to congress by section 3, art. 4, of the Constitution, to dispose of and make all needful rules and regulations respecting the territory belonging to the United States, the power conferred upon the Dawes Commission and the United States courts in the Indian Territory by Act June

The ruling of the land department as to whether a person is an Indian is not always conclusive,[14] but the decision of the secretary of the interior in the exercise of judicial functions as to who are members of an Indian tribe is not controllable by mandamus.[15] Presumptively a person apparently of mixed blood, residing on an Indian reservation, drawing rations, and on the rolls as an Indian, is in fact an Indian.[16] An Indian nation may adopt a person of mixed blood as a member of the nation.[17] Under general powers to deal with Indians, the secretary of the interior may require that an adoption by an Indian tribe of a person not an Indian must be approved by such secretary or by the commissioner of Indian affairs.[18] The question of citizenship in connection with the right to share in the allotments of Indian lands or the distribution of the funds of Indian nations is treated elsewhere.[19]

Indians are the wards of the nation,[20] and while under the General Allotment Act Indian allottees are emancipated from Federal control for most intents and purposes and become citizens of the several states,[21] their civil and political status does not condition the power, authority, or duty of the United States to protect them in their rights and to faithfully discharge its legal and moral obligations to them.[22]

§ 2. *Federal and state government of Indians and their habitat.*[23]—The United States cannot retain its police power over lands which it has allotted to Indians in severalty where the effect of such allotment is to make the allottees citizens of a state,[24] nor can such power be retained as to lands ceded by Indians to the United States but patented by it to individuals or municipal corporations.[25] Where a state exercises exclusive sovereignty over an Indian reservation, the validity of its laws in regard to such reservation are not affected by the constitution and statutes of the United States;[26] but the courts of a state have no jurisdiction of controversies over

10, 1896, c. 398, 29 Stat. 339, 340, 3 Fed. Stat. Ann. 430, and upon the supreme court by Act July 1, 1898, c. 545, 30 Stat. 591, 3 Fed. Stat. Ann. 467, to determine who were citizens of the Choctaw and Chickasaw Nations, was legislative and not judicial, and judgments thereunder were subject to any subsequent legislation of the United States respecting the question of citizenship, which was enacted before allotments of lands were made to successful litigants. Id. Claimants of citizenship who secured judgments in their favor, which were final under these acts when they were rendered, and took possession of and demanded suitable lands as their allotments, before their judgments were made reviewable, acquired no vested rights therein against subsequent legislation enacted before the lands were allotted to them. Id. The Act July 1, 1902, c. 1362, 32 Stat. 641, whereby a citizenship court was created and empowered to review the final judgments of the courts of the United States under Act June 10, 1896, c. 398, 29 Stat. 339, 3 Fed. Stat. Ann. 430, which had been affirmed by the supreme court, was constitutional and valid against successful litigants who had not procured allotments before its passage. Id.

14. Not conclusive as to who are Indians within Act March 2, 1889, c. 405, 25 Stat. 892, providing for cession of Sioux Indian lands in Dakota. Waldron v. U. S., 143 F. 413.

15. Under agreement of June 4, 1891, with the Wichita Indians, ratified by Act March 2, 1895, the secretary of the interior had authority to determine who were members of the tribe either by nativity or by adoption and as such entitled to allotments of land. United States v. Hitchcock, 26 App. D. C. 290. Denial of application for enrollment as member of tribe was equivalent to a decision that applicant was not a member of the tribe either by nativity or adoption. Id.

16. Waldron v. U. S., 143 F. 413.

17. Person of **five-sixteenths** blood held to be a Sioux Indian within Act March 2, 1889, c. 405, 25 Stat. 892. Waldron v. U. S., 143 F. 413.

18. United States v. Hitchcock, 26 App. D. C. 290.

19. See post § 4, Indian Lands and Properties.

20. United States v. Thurston County [C. C. A.] 143 F. 287. Tribal Indians are the wards of the nation. Peano v. Brennan [S. D.] 106 N. W. 409.

21. Act Feb. 8, 1887, c. 119, 24 Stat. 388, 390, 3 Fed. Stat. Ann. 492, 496. Ex parte Dick [C. C. A.] 141 F. 5; Moore v. Nab-con-be, 72 Kan. 169, 83 P. 400.

22. United States v. Thurston County [C. C. A.] 143 F. 287. See, also, post § 2, Federal and State Government of Indians and their Habitat.

23. See 6 C. L. 1786.

24. Allotment under Act Feb. 8, 1887, c. 119, 24 Stat. 388, 3 Fed. Stat. Ann. 492, deprived United States of police power under Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 3 Fed. Stat. Ann. 382, 384, relating to introduction of intoxicating liquors

Indian lands where jurisdiction over such lands has been relinquished to the Federal government in the act admitting the state and the constitution of the state accepting such act.[27] State courts cannot interfere with the allotment or patenting of lands the title to which is still in the United States, the jurisdiction over such lands being within the exclusive cognizance of the land department.[28] A suit against the secretary of the interior or the commissioner of the general land office to restrain the allotment or patenting of Indian lands is a suit against the United States and cannot be maintained without its consent.[29] The authority of a state to tax Indian lands is treated elsewhere.[30]

In New York the right to the custody of an Onondaga Indian child as between its parents residing in the Onondaga reservation may be determined by the state courts.[31]

§ 3. *Tribal government subject to Federal dominion.*[32]—Congress has power to establish citizenship courts in an Indian nation.[33] A marriage between Indians according to the customs or usages of the Indians is valid[34] and will be enforced after the parties have become citizens of a state and the United States,[35] but either marriage or divorce thereafter must be according to the laws of the state in which the parties reside.[36]

State courts will not interfere with the exclusive jurisdiction conferred by statute upon Indian courts.[37] The Seneca nation is not within the administrative provisions of the constitution of the state of New York, and its internal government is controlled to a great extent by itself and by special legislative provisions,[38] and hence when such nation adopted a revised constitution providing for the creation of a surrogate's court it was acting within the recognized limits of its powers[39] and the legislature in ratifying and confirming such constitution did not transgress any

into Indian lands. Ex parte Dick [C. C. A.] 141 F. 5.

25. No police power over such lands under Rev. St. § 2139, as amended by Act Jan. 30, 1897, c. 109, 3 Fed. Stat. Ann. 382, 384, relating to introduction of intoxicating liquors into Indian lands. Ex parte Dick [C. C. A.] 141 F. 5.

26. The state of New York exercises exclusive sovereignty and jurisdiction over the Seneca nation of Indians. Jemison v. Bell Tel. Co. [N. Y.] 79 N. E. 728. Laws 1902, p. 853, c. 296, relating to erection of telephone poles on the Tonawanda reservation of Seneca Indians, is not, therefore, in conflict with U. S. Rev. St. 2116, 3 Fed. Stat. Ann. 373, or Act March 3, 1901, c. 832, 31 Stat. 1058, 3 Fed. Stat. Ann. 515, relating to grants from Indians and construction of telephone poles on their lands. Id. Such law does not impair the obligation of contracts. Id.

27. Jurisdiction over South Dakota Indians and their lands relinquished to the United States by act admitting the state, Act Feb. 22, 1890, c. 180, 25 Stat. 676, 7 Fed. Stat. Ann. 121, and the State Const. art. 22. Peano v. Brennan [S. D.] 106 N. W. 409.

28. Swamp lands which have never been patented. State of Oregon v. Hitchcock, 202 U. S. 60, 50 Law. Ed. 935.

29. State of Oregon v. Hitchcock, 202 U. S. 60, 50 Law. Ed. 935, dist'g Minnesota v. Hitchcock, 185 U. S. 373, 46 Law. Ed. 954, on the ground that the consent of the United States was given in such case.

30. See post § 4, Indian Lands and Properties.

31. Under Laws 1896, p. 222, c. 272, § 4, authorizing the use of the writ of habeas corpus to determine the right to the custody of a child as between undivorced parents living in a state of separation. People v. Rubin, 98 N. Y. S. 787.

32. See 5 C. L. 1786.

33. Wallace v. Adams [C. C. A.] 143 F. 716. See ante § 1, Who are Indians and What is Their Legal Status.

34. Laws 1849, p. 577, c. 420, §§ 3, 4, 2 Cumming and Gilbert's General Laws, p. 1686, § 3, Laws 1892, p. 1574, c. 679, § 3. People v. Rubin, 98 N. Y. S. 787. Agreement to live together as man and wife if carried out until by mutual consent or otherwise a separation occurs is a valid marriage according to customs of Onondaga Indians. Id.

35. Common-law marriage of Indians recognized. Moore v. Nab-con-be, 72 Kan. 169, 83 P. 400.

36. Moore v. Nab-con-be, 72 Kan. 169, 83 P. 400.

37. Since Laws 1892, p. 1585, c. 679, §§ 47, 51, confer exclusive jurisdiction of disputes between individual Indians residing upon the Allegany and Cattaraugus reservations as to the title to real estate in such reservations upon the Peacemakers' court of such reservations, with an appeal to the council of the Seneca nation, whose decree shall be conclusive, the state courts have no jurisdiction to enjoin a decree of the Peacemakers' court on the ground that it has been reversed by the council of the nation. Jones v. Gordon, 99 N. Y. S. 958. A state court of equity will not interfere with a decree of the Seneca nation's surrogate's

of the provisions of the state constitution with reference to the creation of surrogates' courts.[40]

§ 4. *Indian lands and properties.*[41]—The courts of a state will take judicial notice of treaty stipulations with regard to Indian lands within the state.[42] An act providing for the cession of the lands of an Indian nation subject to the approval and acceptance of such nation is not, for the purpose of construction, an ordinary act of congress, but, so far as the Indians are concerned, is a treaty or contract with the Indians and must be construed as such,[43] and the question whether a person is an Indian within the meaning of such act will be determined not according to the common law but according to the laws and usages of the Indians,[44] nor will the ruling of the Federal land department on such question be followed where such ruling is contrary to the usage of the Indians and to their interpretation of the act at the time of its acceptance.[45] The right to water for the purpose of irrigating lands reserved to Indians under a treaty may arise by implication from the terms and purposes of the treaty and the act ratifying the same.[46]

Where the secretary of the interior is clothed with the sole power of controlling the allotment of Indian lands and the designation of town sites thereon,[47] his ac-

court established pursuant to the constitution of such nation adopted Nov. 15, 1898, and ratified by Laws 1900, p. 506, c. 252, the remedy being by appeal to the council of the nation. Jimeson v. Lehley, 101 N. Y. S. 215.

38, 39. Jimeson v. Lehley, 101 N. Y. S. 215.

40. Laws 1900, p. 506, c. 252, ratifying such constitution, is not in violation of Const. art. 3, § 16, because it does not refer in its title to surrogates' courts. Jimeson v. Lehley, 101 N. Y. S. 215.

41. See 5 C. L. 1787.

42. That such lands have been set apart as a reservation and have not been subdivided or allotted in severalty but belong to the Indians as a tribe. Peano v. Brennan [S. D.] 106 N. W. 409.

43. Act March 2, 1889, c. 405, 25 Stat. 892, providing for the cession of the lands of the Sioux nation in Dakota, now South Dakota. Waldron v. U. S., 143 F. 413. See Treaties, 6 C. L. 1720.

The agreement for the purchase of the Cherokee Outlet reopened all the previous deals with the Cherokee nation from the treaty of 1817 down. See treaty May 3, 1836, 7 Stat. 488, Act March 3, 1893, c. 209, 27 Stat. 641. United States v. Cherokee Nation, 202 U. S. 101, 50 Law. Ed. 949. The United States was liable for the amount shown by an account taken pursuant to such agreement, transmitted to the secretary of the interior, and by him transmitted to the Cherokee nation and accepted by them. Id. Under such agreement interest was properly allowed on the amount found due. Id. The fund recovered was properly directed to be paid to the secretary of the interior for distribution. Id. The only parties entitled to share in such distribution were the eastern Cherokees, that is those domiciled east of the Mississippi at the time of the making of the treaty of 1835-1836, the great body of whom moved to lands west of the Mississippi in 1838. Id. The eastern emigrant Cherokees, residing in Georgia, North Carolina, Alabama, and Tenneseee, and a portion who went west, composing the eastern band of Cherokee Indians of North Carolina, were not entitled to distribution as a band, but only per capita with the other eastern Cherokees. Id. The "old settlers," that is those Cherokees who moved to the west of the Mississippi prior to May 23, 1836, were not entitled to share in the recovery, their claims having been previously adjudicated and disposed of. Id. In view of the jurisdictional acts July 1, 1902, § 68, and March 3, 1903, conferring jurisdiction on the court of claims in the premises, and of the various treaties and acts of congress and of the Cherokee councils, the award of costs to the Cherokee nation by the court of claims was not disturbed, though under acts June 7, 1897, June 28, 1898, 30 Stat. 62, 495, chaps. 3, 517, and July 1, 1902, the Cherokee nation was practically incapable of acting as a trustee, and by the Cherokee Allotment Act, c. 1375, § 63, 32 Stat. 725, it was provided that the tribal government of the Cherokee nation should not continue longer than March 4, 1896, Act March 2, 1906, however, continuing such relation until property rights have been disposed of. Id.

44. Nationality of mother controlled nationality of child of white father and Indian mother according to usage of Sioux nation. Waldron v. U. S., 143 F. 413.

45. Person of mixed blood held entitled to an allotment of land under Act March 2, 1889, 25 Stat. 892, though such person was held by the land department not to be an Indian. Waldron v. U. S. 143 F. 413.

46. The treaty of May 1, 1888, with the Montana Indians, Act May 1, 1888, c. 213, 25 Stat. 113 et seq., having in view the improvement of the condition of the Indians and their settlement in a pastoral and agricultural condition, and one of the boundaries of the reservation allowed to them under such treaty being the middle of the channel of the Milk River, and the lands so reserved being unfit for pastoral and agricultural purposes without irrigation, it was held that the Indians had the right to the waters of such river for the purpose of irrigating their lands, and that subsequent appropriators of

tions in the premises are not subject to review by the courts in the absence of a violation of the law in the exercise of such power.[48] So also, where under a treaty with Indians the secretary of the interior is charged with the duty of prescribing the rules and regulations in regard to sales of the lands of the Indians, they are entitled to the benefit of his judgment and discretion in the regulation of such sales,[49] and a regulation as to fees and compensation of officers in connection with such sales[50] is binding upon an officer accepting his position after the adoption of such regulation.[51] The United States courts in Indian Territory have jurisdiction of an action of ejectment brought by an Indian allottee against one in possession of his allotment,[52] and in a suit by Indians to determine their right to an allotment of lands alleged to have been wrongfully allotted to defendants the circuit court has power to appoint a receiver for the lands involved,[53] but such power is discretionary and will not be exercised where it does not appear that the appointment will be of any benefit.[54] The United States courts in the Indian Territory also have jurisdiction in equity to charge the legal title to land evidenced by a certificate of allotment issued by the Dawes Commission under the direction of the secretary of the interior with a trust in favor of the rightful claimant, either on account of an error of the commission in the construction of the law or its misapprehension of the facts induced through fraud or gross mistake.[55] The jurisdiction of the Dawes Commission, under the direction of the secretary of the interior, and the effect of its action in the allotment of lands of the Choctaw and Chickasaw nations, are the same as the jurisdiction and the effect of the action of the land department of the United States in the disposition by patent of the public lands within its control.[56]

such waters under the Desert Land Act of March 3, 1877, c. 107, 19 Stat. 377, as amended by Act March 3, 1891, c. 561, 26 Stat. 1096, 1 Supp. Rev. St. 137, acquired their rights subject to the rights of the Indians. Winters v. U. S. [C. C. A.] 143 F. 740; Winters v. U. S. [C. C. A.] 148 F. 684.

47. Secretary of interior was clothed with such power by the Creek Agreement, approved March 1, 1901, 31 Stat. c. 676. Capital Townsite Co. v. Fox [Ind. T.] 90 S. W. 614.

48. Capital Townsite Co. v. Fox [Ind. T.] 90 S. W. 614. Where the secretary of the interior is authorized to determine to whom allotments shall be made and what lands are subject to allotment, his actions in the premises are not controllable by mandamus. Such authority was given by agreement of June 4, 1891, with the Wichita Indians ratified by Act March 2, 1895. United States v. Hitchcock, 26 App. D. C. 290.

49. Under Osage Indian Treaty of Sept. 29, 1865. Stewart's Case, 39 Ct. Cl. 321.

50. The court of claims has jurisdiction of a claim by a receiver or register of the United States land office in Kansas for services in connection with sales of lands of the Osage Indians, ceded, held in trust, or reserved under the treaty of Sept. 29, 1865, with such Indians. Act March 3, 1903, 32 Stat. pt. 1, p. 1010. Stewart's Case, 39 Ct. Cl. 321.

51. Stewart's Case, 39 Ct. Cl. 321.

52. Under Act June 7, 1897, c. 3, 30 Stat. 83, 7 Fed. Stat. Ann. 243, and Act June 28, 1898, c. 517, § 3, 30 Stat. 496, 3 Fed. Stat. Ann. 439. Wallace v. Adams [C. C. A.] 143 F. 716. Mansfield's Dig. Ark. § 4476, Ind. T. Ann. St. 1899, § 2943, providing that no action for the recovery of real property, when the plaintiff does not claim title to the land, shall be maintained when the plaintiff or his testator or intestate has been five years out of possession, held applicable in an action of ejectment between two members of an Indian nation for the recovery of land the title to which was in such nation. Gooding v. Watkins [C. C. A.] 142 F. 112.

53. Under Act Aug. 15, 1894, c. 290, 28 Stat. 286-305, as amended by Act Feb. 6, 1901, c. 217, 31 Stat. 760, 3 Fed. Stat. Ann. 503. Smith v. U. S., 142 F. 225.

54. Application for receiver refused when it appeared that secretary of interior had forbidden the leasing of the land until the termination of the controversy. Smith v. U. S., 142 F. 225.

55. Wallace v. Adams [C. C. A.] 143 F. 716.

56. **Note:** "The Commission under the direction of the Secretary constitutes a special tribunal vested with the judicial power to hear and determine the claims of all parties to allotments of these lands and to execute its judgments by the issue of the allotment certificates which constitute conveyances of the right to the lands to the parties who it decides are entitled to the property. This tribunal undoubtedly has exclusive jurisdiction to determine such claims and to issue such a conveyance. The allotment certificate when issued, like a patent to land, is dual in its effect. It is an adjudication of the special tribunal, empowered to decide the question, that the party to whom it issues is entitled to the land, and it is a conveyance of the right to this title to the allottee. U. S. v. Winona & St. Peter R. Co. [C. C. A.] 67 F. 948, 955. Like a patent it is impervious to collateral attack. But, as in the case of a patent, if the Commission or the Secretary has been induced to issue the allotment certificate

Nature of title.[57]—A title in fee simple may pass to Indians by treaty without the aid of a patent or an act of congress.[58] As a general rule, however, Indians hold only a qualified interest in lands patented to them.[59] Restrictions upon alienation in government patents are not invalid as being inconsistent with a grant in fee[60] or contrary to public policy,[61] but where an absolute fee has been granted such restrictions cannot be imposed.[62] Where lands are allotted to Indians under allotment acts containing restrictions upon alienation, the United States holds such lands in trust for the allottees,[63] notwithstanding that such allotment emancipates the allottee from Federal control for certain intents and purposes;[64] and the sale of such lands by the heirs of the allottee pursuant to authority granted by act of congress[65] does not terminate the trust so long as the United States withholds possession of the proceeds of such sale from the persons equitably entitled thereto,[66] and hence where the United States assumes to control and direct the disposition of such proceeds[67] they are not subject to state taxation[68] nor to assignment by the beneficiary contrary to the rules prescribed for their disposition.[69] So also, where lands are allotted to an Indian with restrictions upon alienation pursuant to authority given by treaty, restrictions may be imposed on the disposition of the pro-

to the wrong party by an erroneous view of the law, or by a gross or fraudulent mistake of the facts, the rightful claimant is not remediless. He may avoid the decision and charge the legal title to the lands in the hands of the allottee, as he may that of the grant to a patentee, with his equitable right to it either on the ground that upon the facts found, conceded, or established without dispute at the hearing before the special tribunal, its officers fell into an error in the construction of the law applicable to the case which caused them to refuse to issue the certificate to him and to give it to another, or that through fraud or gross mistake it fell into a misapprehension of the facts proved before it which had a like effect. James v. Germania Iron Co. [C. C. A.] 107 F. 697, 600."—See Wallace v. Adams [C. C. A.] 143 F. 716.

57. See 5 C. L. 1787.

58. Such title held to have passed to a certain Indian by treaty of September 24, 1819, with the Chippewa nation. Francis v. Francis, 27 S. Ct. 129.

59. A member of the five civilized tribes of Indian Territory cannot convey his land to a citizen of the United States and the latter can acquire no title under such a conveyance. Capital Townsite Co. v. Fox [Ind. T.] 90 S. W. 614. An attempted conveyance to a white man will not affect the validity of a subsequent conveyance to an Indian, as where plaintiff's grantor who had previously conveyed to white man had reconveyed to such grantor prior to conveyance to plaintiff. Blocker v. McClendon [Ind. T.] 98 S. W. 166.

60. Guyatt v. Kantz, 41 Wash. 115, 83 P. 9; Nelson v. John [Wash.] 86 P. 933.

61. Nelson v. John [Wash.] 86 P. 933.

62. The President had no authority as such to impose restrictions upon alienation of lands patented to Indians pursuant to the treaty of September 24, 1819, with the Chippewa nation under which an absolute fee to such lands had passed. Francis v. Francis, 27 S. Ct. 129.

63. Allotments under Act Aug. 7, 1882, c. 434, § 6, 22 Stat. 342, and Act Feb. 8, 1887, c. 119, § 5, 24 Stat. 388, 3 Fed. Stat. Ann. 492. United States v. Thurston County, 140 F. 456; Id. [C. C. A.] 143 F. 287; National Bank of Commerce v. Anderson [C. C. A.] 147 F. 87.

64. The granting of citizenship under the Dawes Act (Act Feb. 8, 1887, c. 119, 3 Fed. Stat. Ann. 496), does not affect the character of the title to lands allotted to the Indian, nor is the restriction against alienation inconsistent with citizenship. National Bank of Commerce v. Anderson [C. C. A.] 147 F. 87; United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 456; Tomkins v. Campbell [Wis.] 108 N. W. 216; Williams v. Steinmetz, 16 Okl. 104, 82 P. 986; Nelson v. John [Wash.] 86 P. 933.

65. Act May 27, 1902, c. 888, § 7, 32 Stat. 245, 3 Fed. Stat. Ann. 505, authorizing such sale with consent of the secretary of the interior.

66. United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 456; National Bank of Commerce v. Anderson [C. C. A.] 147 F. 87.

67. In order to carry out the purpose of Act May 27, 1902, c. 888, § 7, 32 Stat. 245, 3 Fed. Stat. Ann. 505, authorizing the sale with the consent of the secretary of the interior, such officer had power to condition his consent upon the placing of the proceeds in a bank designated by the commissioner of Indian affairs and to limit the power of the beneficiary to check upon such deposit. See Amended Rules of Interior Department relating to Indian Affairs, approved Oct. 4, 1902, § 1, p. 1, as amended in Sept., 1904, and March, 1905. National Bank of Commerce v. Anderson [C. C. A.] 147 F. 87; United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 466, where, however, the question of the secretary's power to promulgate such rules was left undecided.

68. United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 456.

69. National Bank of Commerce v. Anderson [C. C. A.] 147 F. 87.

ceeds of sales of timber on such lands.[70] A patent to an Indian, subject to defeasance for breach of conditions, conveys a base or qualified fee[71] which, upon removal of the restrictions or conditions, ripens into an absolute fee.[72] Acts removing the restrictions on alienation do not operate to validate a conveyance prior to the enactment of such acts.[73] The interest of an allottee with restrictions on alienation is not a chattel real but an interest in real estate[74] and descends as such.[75]

A state court will not take judicial notice of the laws and customs of an Indian tribe as to the descent of real estate,[76] and hence, in the absence of proof of such laws and customs, the rules of descent under the state laws will be applied to the lands of an Indian patentee, although the tribal relations still existed at the time of his death,[77] and in determining what rule will be followed the intents and purposes of the patent will be considered.[78] When an Indian becomes a citizen of a state his lands descend according to the laws of such state.[79]

Lands allotted to a Seneca Indian of the Tonawanda reservation are not subject to the control of the national council of the Seneca nation.[80] The title to school lands ceded by the United States to a state is subject to any prior right of occupancy by Indians which the United States has previously stipulated to recognize.[81] Where the decisions of a state court as to the title to Indian lands in such state have become a rule of property therein, they will not be disturbed by the Federal courts unless clearly erroneous.[82]

Citizenship by adoption does not necessarily carry with it any property rights or interests in the property of the nation.[83] Where a tribal fund is intended for

70. Lands allotted under provisions of treaty of Sept. 30, 1854, with the Chippewa Indians of Lake Superior and the Mississippi. Tomkins v. Campbell [Wis.] 108 N. W. 216. The fact that under Act Feb. 8, 1887, c. 119, 3 Fed. Stat. Ann. 496, the allottee became a citizen and was emancipated from Federal control for certain intents and purposes, did not take away the power to impose such restrictions. Id.

71. Guyatt v. Kautz, 41 Wash. 115, 83 P. 9.

72. Act March 3, 1903, c. 1816, 32 Stat. 565, and Ballinger's Ann. Codes & St. Supp. § 4553, removed the restrictions upon the allotments and patents issued under treaty with the Puyallup Indians. Guyatt v. Kautz, 41 Wash. 115, 83 P. 9.

73. Sess. Laws 1889-90, p. 499, and Act March 3, 1893, c. 209, 27 Stat. 633, do not have this effect. Nelson v. John [Wash.] 86 P. 933.

74. Reese v. Harlan [Neb.] 109 N. W. 762.

75. The widow of an allottee of Omaha Indian lands under Act Aug. 7, 1882, c. 434, is entitled to a life estate in the equitable interest of her husband with remainder over to the issue of the marriage, or if no issue survive her, to the father or mother of the husband. Reese v. Harlan [Neb.] 109 N. W. 762.

76, 77. Guyatt v. Kautz, 41 Wash. 115, 83 P. 9.

78. Land patented to an Indian under treaty with Puyallup Indians held, in view of the manifest purpose that the land was for the benefit of the patentee's family, to be subject to the law of descent applicable to community property. Guyatt v. Kautz, 41 Wash. 115, 83 P. 9.

79. Such was the effect of Act Feb. 8, 1887, c. 119, 24 Stat. 388, 390, 3 Fed. Stat. Ann. 492, 496, as to lands held by a Puyallup Indian by descent from the original patentee, the latter dying before and the former after the enactment of such act. Guyatt v. Kautz, 41 Wash. 115, 83 P. 9.

80. Under Heydecker's Gen. Laws, p. 268, c. 5, § 56, providing that the lands of the Seneca Indians on the Tonawanda reservation, except such lands as have been allotted by the national council, shall be subject to the control of such council, and Laws 1902, p. 853, c. 296, providing that telephone companies desiring to place poles on allotted lands must agree with the allottees as to the damages or otherwise have the land condemned in the regular way, the national council had no authority to grant permission for the construction of telephone poles on allotted lands. Jemison v. Bell Tel. Co. [N. Y.] 79 N. E. 728.

81. Under the treaties of 1842, 1843, Act March 23, 1843, 7 Stat. 592, with the Chippewa Indians, their right to occupy the Bad River, La Pointe, and Flambeau reservations subsequently set aside for them under treaty of Sept. 30, 1854, Act Jan. 29, 1855, 10 Stat. 1119, was superior to the rights of the state of Wisconsin to such lands under the provisions of Act Aug. 6, 1846, authorizing the formation of such state and setting aside certain lands as school lands. State of Wisconsin v. Hitchcock, 201 U. S. 202, 50 Law. Ed. 727.

82. Decisions as to titles under treaty of September 24, 1819, with the Chippewa Indians. Francis v. Francis, 27 S. Ct. 139.

83. Such white persons residing in the Cherokee nation as became Cherokee citizens

the purchase of land, the right to maintain an action for the conversion of such fund is not dependent upon the designation of any particular land to be purchased,[84] or upon any demand upon defendant to pay over the money for the purchase of any particular land.[85] Individual members of an Indian tribe who are directed by the tribe, according to the usage thereof, to act as custodians of a tribal fund may maintain an action for the conversion of such fund outside of the reservation,[86] and the fact that one of the defendants was formerly a member of the tribe and one of the custodians will not defeat the action where he has severed his tribal relation and removed from the reservation;[87] and where the conversion took place outside of the Indian reservation, the state courts have jurisdiction.[88]

Leases.[89]—A lease of an Indian allotment is valid where it is in conformity with the act authorizing it,[90] but otherwise is absolutely void.[91] A lease to an Indian of land occupied by an Indian but not allotted under the Curtis Act was good until the allotment took place.[92] The provisions of this act for allowances for improvements placed on Indian lands by an occupant thereof under an invalid agreement gave rise to an equitable claim, but in a jurisdiction where equitable defenses might be interposed in an action at law such defense when so interposed did not carry the case into equity.[93]

under the Cherokee laws by intermarriage with Cherokees by blood prior to Nov. 1, 1875, are equally interested in and have per capita rights with Cherokee Indians by blood in the lands constituting the public domain of the Cherokee nation and are entitled to be enrolled for that purpose, but such intermarried whites acquired no rights and have no interest or share in any funds belonging to the Cherokee nation, except where such funds were derived by lease or sale of or otherwise from the lands of such nation conveyed to it by the United States by the patent of Dec., 1838; and the rights and privileges of those white citizens who intermarried with Cherokee citizens subsequent to Nov. 1, 1875, on which date a law of the Cherokee national council took effect, expressly providing that citizenship by intermarriage shall confer no property rights on white persons, do not extend to the right of soil or any interest in the vested funds of the Cherokee nation, and such persons are not entitled to share in the allotment of the lands or the distribution of the funds belonging to such nation, and are not entitled to be enrolled for that purpose. Red Bird v. U. S., 27 S. Ct. 29. White persons who intermarried with Delaware or Shawnee citizens of the Cherokee nation, either prior or subsequent to Nov. 1, 1875, acquired no property interests and are not entitled to share in the allotment of the lands or distribution of the funds of the nation. Id. Nor are white persons entitled to enrollment for the purpose of allotment and distribution, who, having become citizens by intermarriage, upon becoming widows or widowers, remarried outside of the nation, though not deprived of their citizenship by procedure under the Cherokee statute in the nature of the common-law procedure of office found. Id. White men who deserted their Cherokee wives were not entitled to such enrollment. Id. White persons who married Delaware or Shawnee citizens of the Cherokee nation did not become citizens and were not entitled to share in the Cherokee allotment and distribution. Id.

84, 85, 86, 87. Ain-Dus-Oke-Shig v. Beaulieu [Minn.] 107 N. W. 820.

88. District court. Ain-Dus-Oke-Shig v. Beaulieu [Minn.] 107 N. W. 820.

89. See 5 C. L. 1789.

90. A lease for five years, providing for possession at a future date on which rents shall commence, begins on the date of the lease, and hence is not contrary to Act June 30, 1902, c. 1323, 32 Stat. 504, authorizing the Creek Indians to lease their lands for terms not exceeding five years. Blackburn v. Muskogee Land Co. [Ind. T.] 91 S. W. 31.

91. Allotment under treaty of June 4, 1891, § 4, which provided for allotments pursuant to provisions of Act Feb. 8, 1887, c. 119, § 5, 24 Stat. 389, 3 Fed. Stat. Ann. 492 et seq., can be leased only with the consent of the secretary of the interior. Williams v. Steinmetz, 16 Okl. 104, 82 P. 986. Act Feb. 28, 1891, c. 383, § 3, 23 Stat. 794, 3 Fed. Stat. Ann. 500, does not authorize the leasing of the lands embraced within the allotment unless it is made to appear to the secretary of the interior that the allottee cannot, by reason of age or other disability, personally and with benefit to himself, occupy or improve his allotment or any part thereof. Id. Granting of citizenship to the allottee by the act of 1887 does not authorize him to lease the land. Id.

92. Under the proviso to section 16 of the Curtis Act, 30 Stat. 501, c. 517, to the effect that when an Indian citizen was in possession of only such amount of land as would be his just portion he might continue to occupy same or receive rents thereon until the allotment was made to him. Choctaw, etc., R. Co. v. Bond [Ind. T.] 98 S. W. 335.

93. Under the Curtis Act, approved June 28, 1898, § 3, such a claim could be interposed as a defense in an action of forcible detainer. Sharrock v. Kreiger [Ind. T.] 98 S. W. 161. See Equity, 7 C. L. 1323. Where the

Actions against intruders.[94]

§ 5. *Rights and liabilities of others in Indian country dealing with Indians.*[95]

§ 6. *Crimes and offenses by and relating to Indians.*[96]—Indians committing crimes outside of a reservation are subject to the state laws the same as white men,[97] and in some instances Federal statutes make state criminal laws applicable in Indian country.[98] Carrying or introducing intoxicating liquor into Indian country is a crime under the Federal statutes,[99] and the mere possession of such liquors within such country raises a presumption of guilt,[1] which presumption, however, may be overcome by any evidence which will raise a reasonable doubt in the minds of the jury.[2] Where the rule obtains that an indictment need not follow the exact language of the statute, an indictment charging the "introduction" of liquor into a certain territory is sufficient under a statute prohibiting the "carrying" of liquor into such territory.[3] A party soliciting orders for intoxicating liquors is guilty of selling or furnishing them,[4] and where the statute makes it a crime to sell or furnish liquor a sale may be charged in one count and furnishing in another, the person with whom both transactions were had being the same.[5] The Federal courts have jurisdiction to punish an Indian for arson committed within an Indian reservation, regardless of whether the owners or occupants of the building were white persons or Indians.[6] Larceny, where neither the offender nor the owner of the property is an Indian, does not come within the Federal statutes relating to crimes

parties tried the case as one in equity, they could not on appeal insist that it should have been tried as an action at law. Id. But section 3 of the Curtis Act having been repealed by Act Sept. 25, 1902, c. 1362, § 67, 32 Stat. 656, without any saving clause as to pending actions, a case of forcible detainer which was tried as an equity case on account of a claim under the Curtis Act should have been retransferred to the law docket. Id.

94, 95, 96. See 5 C. L. 1789.

97. Comp. Laws § 4655. State v. Johnny [Nev.] 87 P. 3.

98. United States v. Buckles [Ind. T.] 97 S. W. 1022. Under Act March 1, 1895, c. 145, § 4, 28 Stat. 695, 3 Fed. Stat. Ann. 422, providing that the provisions of Mansfield's Digest of Arkansas shall be applicable in Indian Territory in criminal matters, where a maximum punishment is fixed by the statute defining a crime, such as selling or furnishing liquor within the Territory, the defendant has the right to have the punishment to be fixed by the jury within the limit prescribed by the act. Taylor v. U. S. [Ind. T.] 98 S. W. 123. Act Feb. 2, 1903, c. 351, 32 Stat. 793, U. S. Comp. St. Supp. 1905, p. 719, giving Federal courts for South Dakota jurisdiction to punish for larceny and certain other crimes committed on Indian reservations within the state, is not invalid because it adopted the punishment then fixed by the state legislation for the same crimes, since it does not purport to give the state the right to fix the punishment under the Federal laws in the future. Hollister v. U. S. [C. C. A.] 145 F. 773.

99. Act March 1, 1895, c. 145, § 8, 28 Stat. 697, 3 Fed. Stat. Ann. 424, making it a crime to "carry" liquor into the "Indian Territory," was not repealed by Act Jan. 30, 1897, c. 109, 29 Stat. 506, 3 Fed. Stat. Ann. 384, making it an offense to "introduce" liquor into the "Indian Country." United States v. Buckles [Ind. T.] 97 S. W. 1022.

1. Ellis v. U. S. [Ind. T.] 97 S. W. 1013.

2. Ellis v. U. S. [Ind. T.] 97 S. W. 1013. It was error to instruct that possession of liquor within the Indian Territory was prima facie evidence of having introduced it therein, but the court should have instructed that if the jury found beyond a reasonable doubt that defendant was in possession of whiskey within such Territory the law presumed him guilty of having introduced it, unless by a reasonable, truthful explanation he could show that he obtained it in a lawful manner Id.

3. Under Mansfield's Digest, §§ 2119, 2120, Ind. T. Ann. St. 1899, §§ 1462, 1463, an indictment charging the "introduction" of liquor into the "Indian Territory" was sufficient under Act March 1, 1895, c. 148, § 8, 28 Stat. 697, 3 Fed. Stat. Ann. 424, prohibiting the "carrying" of liquor into such Territory, notwithstanding the existence of Act Jan. 30, 1897, c. 109, 29 Stat. 506, 3 Fed. Stat. Ann. 384, prohibiting the "introduction" of liquor into "Indian country," it being manifest that the crime intended to be charged was that defined by the former statute. United States v. Buckles [Ind. T.] 97 S. W. 1022.

4. Under Act March 1, 1895, c. 145, § 8, 28 Stat. 697, 3 Fed. Stat. Ann. 424. Taylor v. U. S. [Ind. T.] 98 S. W. 123.

5. Act March 1, 1895, c. 145, § 8, 28 Stat. 697, 3 Fed. Stat. Ann. 424, prohibiting the sale or furnishing of liquor in Indian Territory. Taylor v. U. S. [Ind. T.] 98 S. W. 123.

6. Rev. St. § 2143, 3 Fed. Stat. Ann. 386, relating to arson by Indians within reservations and confining the offense to cases where the building is owned or occupied by white persons, was repealed by implication by Act March 3, 1885, c. 341, § 9, 23 Stat. 385, 3 Fed. Stat. Ann. 388, in so far as the ownership or occupancy of the building is concerned. United States v. Cardish, 145 F. 242.

by or against Indians,[7] but the offense is indictable in the Federal courts under other statutes covering such cases, though the reservation be within the boundaries of a state[8] or territory,[9] the assumption of jurisdiction in such cases being fairly within the power of congress as an instrumentality employed in the discharge of the national duty towards the Indians,[10] especially where such jurisdiction is assumed with the consent of the state.[11]

Presentation by an Indian agent of a false voucher to the commissioner of Indian affairs constitutes a presentation of a false claim against the United States[12] and may be prosecuted[13] in the state where the voucher was made, though it was sent by mail to the commissioner at Washington.[14]

§ 7. *Indian depredations.*[15]—The owner of an Indian depredation claim cannot lawfully contract to pay, out of the sum collected, for expenses and as fees for prosecuting the claim, an amount in excess of the amount allowed for such purposes by the court of claims and the Indian Depredation Act,[16] nor can the personal representative of the claimant bind his estate therefor.[17]

7. In such a case Act March 3, 1885, c. 341, § 9, 23 Stat. 385, 3 Fed. Stat. 388, has no application. Hollister v. U. S. [C. C. A.] 145 F. 773; Brown v. U. S. [C. C. A.] 146 F. 975.

8. Act Feb. 2, 1903, c. 351, 32 Stat. 793, U. S. Comp. St. Supp. 1905, p. 719, giving Federal circuit and district courts for South Dakota jurisdiction to punish larceny and certain other crimes committed by any person within any Indian reservation in that state. Hollister v. U. S. [C. C. A.] 145 F. 773.

9. Rev. St. § 2145, 23 Stat. c. 341, § 9, 3 Fed. Stat. Ann. 387, extending the general laws of the United States as to crimes in places within the exclusive jurisdiction of the United States to the Indian country, extended the operation of Rev. St. § 5356, 4 Fed. Stat. Ann. 789, relating to larceny, to the Indian Reservations in the territory of Oklahoma, so that the district courts of Oklahoma could take cognizance of such offense while exercising the jurisdiction vested in the Federal circuit and district courts which was vested in the territorial courts by 26 Stat. c. 182, § 9, 7 Fed. Stat. Ann. 238. Brown v. U. S. [C. C. A.] 146 F. 975. Rev. St. 2145, 23 Stat. c. 341, § 9, 3 Fed. Stat. Ann. 387, was not rendered inapplicable to the Indian reservations in the territory of Oklahoma by 26 Stat. c. 182, §§ 1, 6, 7 Fed. Stat. Ann. 278, 282, organizing such territory and extending its legislative power to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States. Id.

10. Hollister v. U. S. [C. C. A.] 145 F. 773.

11. Act Feb. 2, 1903, c. 351, 32 Stat. 793, U. S. Comp. St. Supp. 1905, p. 719, was enacted pursuant to a cession of jurisdiction by the state of South Dakota by Sess. Laws 1901, p. 132, c. 106, relinquishing to the United States exclusive jurisdiction to punish all persons who might commit upon any Indian reservation within the state any offense that might be denounced by congress. Hollister v. U. S. [C. C. A.] 145 F. 773. Since Act Feb. 2, 1903, ex vi termini, became inoperative so far as any particular reservation was concerned upon the extinguishment of the Indian title, and since such title is rapidly being extinguished, the cession of jurisdiction by the state may be considered as a mere temporary expedient which was fairly within the general legislative power of the state. Id. Tested by the method prescribed by South Dakota Const., articles 22, 26, as construed by Rev. Code 1903, Pol. Code, p. 3, for securing the consent of the people of the state in kindred matters, the act of the legislature ceding criminal jurisdiction over Indian reservations to the United States sufficiently expressed the consent of the people to such cession. Id.

12. Under Rev. St. 463, 3 Fed. Stat. Ann. p. 337 et seq., p. 262, and subsequent sections, regulations of 1894 of Indian Department, §§ 61-63, 265, 268, 269, the commissioner is authorized and required to pass upon all claims and vouchers connected with Indian affairs. Bridgeman v. U. S. [C. C. A.] 140 F. 577. See 6 C. L. 1770.

13. Assignment of falsity contained in indictment held sufficient. Bridgeman v. U. S. [C. C. A.] 140 F. 577. No direct allegation of intent to defraud the government is necessary. Id. The false vouchers or claims need not be set out in haec verba in the indictment. Id. The particular place within the state where the crime was committed need not be alleged, it being sufficient if the allegations are sufficient to fix the venue. Id. A count charging both the making and the presenting of the false claim is not bad for duplicity. Id. Falsity of claim on which voucher was founded held sufficiently alleged. Id. Indictment need not allege to whom the false voucher was presented or in what manner it was used. Id. Evidence of custom of other Indian agents to send in their accounts without reading them over was inadmissible. Id. The date when the alleged claim was made and presented was not an essential part of the description of the offense, and only substantial proof of same was necessary. Id.

14. See U. S. Rev. St. § 731, U. S. Comp. St. 1901, p. 585, relating to offenses begun in one circuit and completed in another. Bridgeman v. U. S. [C. C. A.] 140 F. 577. See Indictment and Prosecution, 8 C. L. 189.

15. See 5 C. L. 1789.

16. Friend v. Boren [Tex. Civ. App.] 16 Tex Ct. Rep. 54, 95 S. W. 711.

17. Hence administrator was not entitled to allowance for payments made pursuant to such a contract. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711.

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Scope of topic.—This topic includes general criminal procedure from indictment to final judgment. The substantive law of crimes[18] and procedure before

indictment[19] are elsewhere treated, and matters of indictment, evidence, and procedure peculiar to particular crimes are treated under topics dealing with such crimes.[20]

Sources of the criminal procedure.—Aside from the inherent and common-law powers of court, procedure in criminal cases is regulated by the statutes in force at the time the prosecution is begun.[21] Statutes relating to civil procedure have no application,[22] even to prosecutions under city ordinances when regarded as civil in their nature.[23]

§ 1. *Limitation of time to institute.*[24]—The period of limitation is fixed by statutes and is sometimes varied according to the nature of the crime or the extent of punishment possible.[25] The statutory period runs until the commencement[26] of a valid prosecution;[27] but in Alabama where an indictment is quashed and record entry is made thereof, the time of its pendency is to be deducted.[28]

§ 2. *Jurisdiction.*[29]—A state court has no jurisdiction of offenses in another state.[30] Statutes cannot confer jurisdiction in derogation of the constitutional jurisdiction of another court.[31] The jurisdiction of municipal and other inferior courts is usually limited according to the penalty authorized,[32] which is measured by the penalty for any single offense charged and is not ousted by joining a number of distinct offenses in separate counts.[33] In order to give the county court of

18. See Criminal Law, 7 C. L. 1010.

19. See Arrest and Binding Over, 7 C. L. 265.

20. See Homicide, 8 C. L. 106; Larceny, 6 C. L. 402, and like topics.

21. Laws 1901, p. 146, relating to indeterminate sentences. Behnke v. People, 222 Ill. 540, 78 N. E. 889. Right to file amended affidavit on quashal. State v. Clark [Ind. App.] 76 N. E. 649. Act March 10, 1905, relating to original bill of exceptions. State v. Thompson [Ind.] 78 N. E. 328. Act March 10, 1905, relating to time to file motion for new trial. Miller v. State, 165 Ind. 566, 76 N. E. 245.

22. Act 1903, c. 193, civil only. State v. Thompson [Ind.] 78 N. E. 328. Act of 1903 relating to modification of requested instructions. Guy v. State [Ind. App.] 77 N. E. 855.

23. People v. Smith [Mich.] 13 Det. Leg. N. 1068, 109 N. W. 411.

24. See 5 C. L. 1791.

25. An offense which may be punished by imprisonment in the penitentiary is governed by the period of limitations fixed for offenses punished by such imprisonment. Schaumloeffel v. State, 102 Md. 470, 62 A. 803.

26. Filing of affidavit and issuance of warrant is commencement of prosecution. State v. Simpson [Ind.] 76 N. E. 544. Begun at return of indictment, not at issue of warrant thereon, if the latter is done within the statutory time. State v. Smith, 72 Kan. 244, 83 P. 832.

27. Return of justices' warrant not found renders it functus officio and no prosecution is thereafter pending. Ex parte Broadhead [Kan.] 86 P. 458. An indictment which is set aside does not toll the statute. State v. Disbrow, 130 Iowa, 19, 106 N. W. 263. Amendments of information which under statute are matter of right do not terminate the prosecution. State v. Simpson [Ind.] 76 N. E. 544.

28. Davis v. State [Ala.] 40 So. 663.

29. See 5 C. L. 1791.

30. Locality of offense of selling property without the consent of the owner discussed. Hylton v. Com., 29 Ky. L. R. 64, 91 S. W. 696.

31. San Francisco Freeholders Charter, § 2, relating to the jurisdiction of misdemeanors of the city police court, is void as infringing the constitutional jurisdiction of the superior court. Robert v. Police Ct. of San Francisco, 148 Cal. 131, 82 P. 838.

32. District court has no power to try indictment for liquor nuisance, since penalty may exceed $500 fine. State v. Collins, 27 R. I. 419, 62 A. 1010. Evidence held to show that value of stolen property exceeded $50, so that prosecution was not within jurisdiction of city court. Toliver v. State [Ga.] 55 S. E. 478. New York court of special sessions has jurisdiction of the offense of obtaining money by fraudulent draft. People v. Huggins, 110 App. Div. 613, 97 N. Y. S. 187. The municipal court of Portland has jurisdiction of embezzlement of an amount not exceeding $35. State v. Browning, 47 Or. 470, 82 P. 955. Municipal court of Minneapolis has jurisdiction to try all criminal cases arising in the city where the punishment cannot exceed $100 fine or 90 days' imprisonment. State v. Marciniak, 97 Minn. 355, 105 N. W. 965. The statute conferring on such court the jurisdiction previously had by justices does not limit them to offenses created before the enactment. Id. Municipal court of Minneapolis has jurisdiction to try all offenses committed in Hennepin county which under the general law are within jurisdiction of a justice. Keeping "blind pig." State v. Dreger, 97 Minn. 221, 106 N. W. 904. Magistrate has no jurisdiction of offense of sell-

Texas jurisdiction to try a proceeding on indictment, there must be an order transferring the case from the district court.[34]

Transfer.[35]—That civil rights of accused are denied by the manner of summoning jurors does not, in the absence of a state statute allowing it, authorize transfer of the case to a Federal court under Rev. St. § 641,[36] nor does the denial of effect to a pardon pleaded in bar.[37] The judge of the district court in transferring to the county court an indictment not within the jurisdiction of the district court acts in a ministerial capacity, and hence the fact that the district judge is related to accused does not invalidate the transfer.[38]

§ 3. *Place of prosecution and change of venue.*[39]—By statute, an offense against the United States commenced in one district and completed in another may be prosecuted in either.[40] Under a statute allowing offenses within half a mile of the county line to be prosecuted in either county, offenses on an island in the stream which is the boundary may be prosecuted in either county, regardless of which is nearer.[41] The venue of cheating[42] or obtaining money by false pretenses should be laid where the money or property was obtained, not where the pretenses were made,[43] though by statute in Iowa it may be laid in either county.[44] Conspiracy may be prosecuted where the agreement is made and an overt act committed.[45] Prosecution of seller for using counterfeit union label may be had in a county to which he shipped goods under an agreement that title should not pass until they reached the purchaser.[46] If county boundaries are changed pending a prosecution, the trial must be in the county which embraces the situs of the crime,[47] but where an act changing county boundaries is unconstitutional, venue should be laid according to the original boundary.[48] Statutes providing for trial in the county to which an unorganized county is attached look to the condition at the time of trial, and if the county where the offense was committed was then organized, the trial is properly had there.[49]

Change of venue.[50]—Under a statute not restricting the privilege to defendant, a change of venue may be had on application of the state,[51] and a statute allowing change of venue on application of the state, if fair trial cannot be otherwise had, does not infringe the constitutional right to a trial by a jury of the county where the offense was committed.[52] An application for change of venue for local prejudice presents an issue of fact[53] addressed to the discretion of the court,[54] and

ing property subject to lien where a single article sold was worth more than $20. State v. Pinckney [S. C.] 54 S. E. 606.

33. State v. Denhardt, 129 Iowa, 135, 105 N. W. 385.

34. Bird v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 322, 91 S. W. 791.

35. See 5 C. L. 1793.

36, 37. Commonwealth v. Powers, 201 U. S. 1, 50 Law. Ed. 633.

38. Oxford v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 229, 94 S. W. 463.

39. See 5 C. L. 1794.

40. Rev. St. § 731. False claim prepared in Montana and from there transmitted to the city of Washington. Bridgeman v. U. S. [C. C. A.] 140 F. 577. Prosecution of United States senator for agreeing to receive compensation for services before Federal department may be had in district where acceptance of his offer was mailed. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. 1057.

41. Patterson v. State [Ala.] 41 So. 157.

42. Dyas v. State [Ga.] 55 S. E. 488.

43. People v. Hoffmann, 142 Mich. 531, 13 Det. Leg. N. 805, 105 N. W. 838.

44. Code, § 5157. State v. Gibson [Iowa] 106 N. W. 270.

45. To defraud one in another county. People v. Murray, 95 N. Y. S. 107; People v. Summerfield, 48 Misc. 242, 96 N. Y. S. 502.

46. Commonwealth v. Meads, 29 Pa. Super. Ct. 321.

47. Pope v. State, 124 Ga. 801, 53 S. E. 384; Bundrick v. State, 125 Ga. 753, 54 S. E. 683.

48. Kline v. State [Ala.] 41 So. 952.

49. In re Moran, 27 S. Ct. 25.

50. See 5 C. L. 1794.

51, 52. State v. Durflinger, 73 Ohio St. 154, 76 N. E. 291.

53. Montgomery v. State, 128 Wis. 183, 107 N. W. 14; State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

54. State v. Mizis [Or.] 85 P. 611; Sweet v. State [Neb.] 106 N. W. 31. A trial judge

a ruling on conflicting affidavits will not ordinarily be disturbed,[55] but if prejudice appears there is no discretion as to granting the change.[56] A motion based on prejudice of the judge is addressed to discretion,[57] and the fact that the judge made erroneous rulings on the trial does not show that a motion for change of venue for his prejudice was improperly denied.[58] One applying for a change of venue at the first term after reversal on account of prejudice of the judge need not state in his affidavit that the ground of motion was not before known to him.[59] No certificate is required to original papers transferred.[60] Transmission of two original indictments for the same offense does not prevent acquirement of jurisdiction where it clearly appears on which the change of venue was had.[61] Selection of county to which venue is changed for local prejudice rests in discretion,[62] and the case need not be sent to an adjoining county.[63]

§ 4. *Indictment and information. A. Necessity of indictment.*[64]—A formal accusation is essential to a valid prosecution for crime.[65] In the Federal courts and in some states infamous crimes may be prosecuted only by indictment,[66] while other states have dispensed with this requirement.[67] That the grand jury on investigation of a transaction indicted for a misdemeanor does not prevent a prosecution by information for felony based on the same transaction.[68]

(§ 4) *B. Finding and filing and formal requisites. Indictment.*[69]—The indictment is usually required to be indorsed and signed by the foreman[70] and district attorney[71] and returned into open court[72] at a lawful term,[73] such indorsement

is not without discretion in the matter of granting a change of venue in a criminal case upon the filing of affidavits that a fair trial cannot be had in the county, but he must determine from the affidavits whether or not a change of venue should be granted. Lingafelter v. State, 8 Ohio C. C. (N. S.) 537.

55. State v. Smith, 47 Or. 485, 83 P. 865; State v. McCarver, 194 Mo. 717, 92 S. W. 684. Motion for change of venue for local prejudice held properly denied. Sweet v. State [Neb.] 106 N. W. 31; State v. Pointdexter, 117 La. 380, 41 So. 688; Butler v. State [Miss.] 39 So. 1005. An abuse of discretion on the part of the trial judge in overruling a motion for a change of venue is not shown where the record discloses that but one juror was examined on his voir dire and he was challenged for cause. Lingafelter v. State, 8 Ohio C. C. (N. S.) 537. Change of venue for local prejudice produced by newspaper reports held properly denied on the facts. State v. Brown, 130 Iowa, 57, 106 N. W. 379. Where it appears without contradiction that many sensational publications have been circulated and that an association has been formed for the purpose of securing defendant's conviction, it is error to deny a change of venue. State v. Hillman, 42 Wash. 615, 85 P. 63. Change of place of trial for local prejudice held improperly denied. People v. Jackson, 100 N. Y. S. 126.

56. Lucas v. State [Neb.] 105 N. W. 976.

57. That judge's brother was president of an organization for the prosecution of offenses such as that charged and the principal witness for the state does not require change. State v. Strodemier, 40 Wash. 608, 82 P. 915.

58. State v. Strodemier, 40 Wash. 608, 82 P. 915.

59. Rev. St. 1898, § 4680. State v. Williams, 127 Wis. 236, 106 N. W. 286.

60, 61. Thompson v. State [Fla.] 41 So. 899.

62. Discretion held not abused though case was not sent to nearest county where fair trial could be had. Murphy v. District Ct. [N. D.] 105 N. W. 728.

63. Murphy v. District Ct. [N. D.] 105 N. W. 728.

64. See 5 C. L. 1795.

65. County court of Elmore county cannot try without indictment one bound over by a justice of the peace. Ware v. State [Ala.] 41 So. 152.

66. The Federal courts hold that any offense punishable by imprisonment in the penitentiary is infamous (In re Claasen, 140 U. S. 200, 35 Law. Ed. 409), while many state courts confine the term to those offenses involving moral turpitude. Making an overcharge for prosecuting a pension claim is not. Garitee v. Bond, 102 Md. 379, 62 A. 631.

67. Offenses not capital may be prosecuted by either indictment or information. State v. O'Malley, 115 La. 1095, 40 So. 470.

68. State v. Roberts [Ind.] 77 N. E. 1093. The decision was based largely on a progressive statutory enlargement of prosecution by information and a corresponding derogation of the importance of the grand jury system.

69. See 5 C. L. 1795.

70. Endorsement of indictment not essential to its validity. State v. Sultan [N. C.] 54 S. E. 841. "Davey" and "David" as given name of foreman of grand jury idem sonans. Lamb v. People, 210 Ill. 399, 76 N. E. 576. An indictment endorsed "true bill" and presented in open court is sufficient though not signed by the foreman. State v. Abbott [Del.] 63 A. 231.

71. Signature of indictment by special counsel appointed in absence of solicitor is sufficient. It is the signature by the fore-

and return being presumptive evidence that the requisite number of grand jurors concurred in the finding.[74] The indorsement in the indictment of the style of the case is no part of the indictment and abbreviations therein are no ground of quashal.[75] Where preliminary information is requisite, the indictment must not be substantially variant therefrom.[76] Though each count is in form a complete indictment and signed by the district attorney, if they are fastened together and endorsed it is sufficient.[77] To warrant quashal of an indictment because found on the testimony of a witness whose name was not indorsed on the indictment, it must appear that the witness was sworn before the grand jury and not in open court.[78] The common-law strictness with respect to the caption[79] and conclusion[80] have been greatly relaxed. Documents used by the prosecuting attorney in examining witnesses before the grand jury need not be filed with the indictment under the Iowa statute.[81] Court has inherent common-law power to replace by a copy an indictment lost after verdict.[82] If the record shows the filing of an indictment, the court may permit its loss to be supplied by a copy.[83]

Information.[84]—Information by prosecuting attorney may be verified on information and belief.[85] It is no objection to an information that it was verified before one as notary who had been employed to procure evidence for the prosecution;[86] and mere identity of names raises no presumption that the notary before whom the accusation was verified was the solicitor who signed the accusation.[87] An information for murder not stating that its averments were on the oath of the prosecuting attorney is insufficient in Missouri,[88] but such recital is not required in informations for other crimes.[89] The "term" succeeding commitment at which an information must be filed means a jury term.[90] Filing of information in place of one lost is a continuation of the first prosecution, though given a new file number and though accused pleads anew.[91] After new trial granted a new information may be allowed,[92] and such filing may be allowed by nunc pro tunc order after plea in abatement to second information for pendency of first.[93] A file mark not stating in what county the information was filed is prima facie sufficient.[94]

man of the grand jury which imparts efficacy. Teague v. State, 144 Ala. 42, 40 So. 312.

72. Delivery to the clerk during a recess is not return into open court. Sampson v. State, 124 Ga. 776, 53 S. E. 332.

73. Where the indictment was returned at a term fixed by an unconstitutional law, it is invalid. McDaniel v. State [Ala.] 39 So. 919; Brewer v. State [Ala.] 39 So. 927.

74. Guy v. State [Ind. App.] 77 N. E. 855.

75. State v. Pointdexter, 117 La. 380, 41 So. 688.

76. Information charging conspiracy with named persons held to support indictment for conspiracy with such persons and others. Commonwealth v. Zayrook, 30 Pa. Super. Ct. 111.

77. Commonwealth v. Nailor, 29 Pa. Super Ct. 275.

78. Commonwealth v. Edmiston, 30 Pa. Super. Ct. 54.

79. Caption of indictment need not show that court was held at proper place in the county. It is sufficient if the record shows it. Coleman v. State [Miss.] 40 So. 230. Omission of the word "county" after the name of the county is not ground for quashal. State v. Douglass, 72 Kan. 673, 83 P. 621. Caption of indictment held to show that grand jury was empaneled from the proper district. Coleman v. State [Miss.] 40 So. 230.

80. And so the prosecuting attorney aforesaid "on his oath" doth say. State v. Hinchman [Kan.] 87 P. 186.

81. State v. Mulhern, 130 Iowa, 46, 106 N. W. 267.

82. State v. Strayer, 58 W. Va. 675, 52 S. E. 862.

83. State v. McCarver, 194 Mo. 717, 92 S. W. 684.

84. See 5 C. L. 1796.

85. Rev. St. 1899, §§ 2477, 2479. State v. Temple, 194 Mo. 237, 92 S. W. 869.

86. McNulty v. State [Ind. App.] 76 N. E. 547.

87. Shuler v. State, 125 Ga. 778, 54 S. E. 689.

88. State v. Minor, 193 Mo. 597, 92 S. W. 466.

89. State v. Platner, 196 Mo. 128, 93 S. W. 403.

90. Rev. Code, § 8497. State v. Foster [N. D.] 105 N. W. 938.

91. State v. McFadden, 42 Wash. 1, 84 P. 401.

92, 93. State v. Williams [Wash.] 85 P. 847.

94. Franklin v. State [Tex. Cr. App.] 92

Presentment.—Signature of presentment by twelve grand jurors is sufficient in Tennessee.[95]

(§ 4) *C. Requisites and sufficiency of the accusation. General rules.*[96]—The forms of indictment may be prescribed by statute if constitutional requirements are not violated,[97] but an information will not be upheld because in a form prescribed by statute or ordinance if it lacks certainty.[98] Public local acts need not be alleged.[99] A former conviction to aggravate the penalty must be alleged,[1] but it need not be alleged that it is a first offense, though found in a court having jurisdiction only of first offenses,[2] nor need an indictment state that it is for a first offense merely because increased punishment is authorized for a second.[3] The words of the statute need not be employed if equivalent words are used.[4] The averments of an information cannot be aided by intendment,[5] and though surplusage may be stricken, nothing can be interpolated.[6] A count is good if the matter therein and in other counts aptly referred to states an offense,[7] and abandonment of the count referred to does not impair the reference.[8] If one offense is well averred, the indictment is not bad because another is defectively averred in the same count.[9] A long established and uniform practice as to form of indictment is an authority of but little, if any, less weight than an adjudication to the same effect.[10] The allowance of a bill of particulars rests in discretion.[11]

Certainty.[12]—The indictment must be direct and certain as to the offense charged,[13] but where the indictment clearly avers all the elements of the offense, accused is not entitled to a particular averment of means;[14] and statutes in some states provide that where it clearly identifies the offense it shall not be held deficient for technical deficiencies of averment.[15] A charge in the alternative is bad for uncertainty,[16] though there is a statutory exception in North Dakota as to the means of committing the crime.[17]

S. W. 414; Bennett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 515, 92 S. W. 415; Bennett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 508, 92 S. W. 417.

95. Shannon's Code, § 7055. McCampbell v. State [Tenn.] 93 S. W. 100.

96. See 5 C. L. 1797.

97. Form of indictment for perjury held to apprise defendant of nature and cause of accusation. State v. Webber, 78 Vt. 463, 62 A. 1018.

98. Wong Sing v. Independence, 47 Or. 231, 83 P. 387.

99. State v. Piner [N. C.] 53 S. E. 305.

1. Paetz v. State [Wis.] 107 N. W. 1090. Indictment referring to former "judgments" instead of "convictions," sufficient. State v. Smith, 129 Iowa, 709, 106 N. W. 187.

2. Petit larceny in court of special sessions. People v. Johnston, 112 App. Div. 812, 99 N. Y. S. 411.

3. State v. Dawson [Ind. App.] 78 N. E. 352.

4, 5, 6. Hase v. State [Neb.] 105 N. W. 253.

7, 8. People v. Lewis, 111 App. Div. 558, 98 N. Y. S. 83.

9. State v. Dawson [Ind. App.] 78 N. E. 352.

10. State v. Ridgway, 73 Ohio St. 31, 76 N. E. 95.

11. Bill giving time and place of murder properly refused. State v. Goodson, 116 La. 388, 40 So. 771.

12. See 5 C. L. 1798.

13. Indictment charging murder of a "certain man" whose name was unknown and thereafter referring to him as "such person" is sufficiently certain. Morgan v. Territory, 16 Okl. 530, 85 P. 718. An indictment for presenting a false voucher is sufficiently certain as to place where it alleges that the offense was committed at a certain Indian agency in a state and district named. Bridgeman v. U. S. [C. C. A.] 140 F. 577.

14. Indictment of United States senator for agreeing to receive compensation for services before Federal department. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. 1057.

15. Liberal rules for construction of indictment under Nevada statutes stated. State v. Lovelace [Nev.] 83 P. 330.

16. Publishing "or" causing to be published a libel. State v. Singer, 101 Me. 299, 64 A. 586. Fraudulently appropriating "or" secreting. State v. Lonne [N. D.] 107 N. W. 524. "Spirituous and malt liquors or spirituous or malt liquors" uncertain. Wong Sing v. Independence, 47 Or. 231, 83 P. 387. Charge of gaming at a certain gaming table "or" bank is bad, and is not aided by a further description, "to-wit, a pool table." Taylor v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 580, 95 S. W. 119.

17. Rev. Codes 1899, § 8042. Averments in indictment for embezzlement held not of "means" within the statute. State v. Lonne [N. D.] 107 N. W. 524.

Bad spelling[18] *and ungrammatical construction*[19] do not vitiate an indictment where the meaning is apparent.

Intent or knowledge.[20]—Averment that timber was cut "maliciously" held after verdict sufficient to negative consent of owner.[21]

Venue.[22]—The indictment must allege that the offense was committed within the jurisdiction of the court,[23] the use of the words "then and there" being ordinarily sufficient if there is a preceding recital of place,[24] but not where the only averment of place was in recital of the official character of the informing officer.[25]

Surplusage.[26]—Words which if stricken out leave the offense well charged and which do not tend to negative any essential averment may be rejected as surplusage.[27]

Time.[28]—Though the date of the offense need not be proved precisely as laid, it must be specifically alleged,[29] and use of the words "then and there" in the charging part is insufficient if two dates have been before stated.[30] An indictment charging the offense as committed at a date after the finding of the indictment is bad,[31] but that the information in one place charged the offense as committed after the filing of the information is not fatal if it obviously is mere clerical error.[32]

Duplicity.[33]—A charge of two separate and distinct offenses in one count is bad,[34] and two persons cannot be charged in one count with crimes severally com-

18. See 5 C. L. 1799. "Offince" for "offense" and "bulet" for "bullet" held not to vitiate indictment. Gaither v. Com., 28 Ky. L. R. 1345, 91 S. W. 1124. "Commission" instead of "commissioner" in description of officer in indictment for evading inspection of animals. State v. Asbell [Kan.] 86 P. 457. "Deliberatedly" for "deliberately" immaterial. State v. Lu Sing [Mont.] 85 P. 521.

19. See 5 C. L. 1799. The fact that a pronoun designed to refer to deceased is in the first person, while the name of deceased in apposition thereto is in the objective case, is immaterial. Covington v. People [Colo.] 85 P. 832.

20. See 5 C. L. 1799. See also topics relating to crimes to which specific intent is essential, such as Homicide, 8 C. L. 106; Rape, 6 C. L. 1237, and the like.

21. Whim v. State [Tenn.] 94 S. W. 674.

22. See 5 C. L. 1799.

23. State v. Beeskove [Mont.] 85 P. 376.

24. An information alleging that accused being in a certain county "then and there" set fire to a certain structure sufficiently alleges that such structure was in the county named. State v. McLain [Wash.] 86 P. 388.

25. State v. Beeskove [Mont.] 85 P. 376.

26. See 5 C. L. 1799.

27. Hase v. State [Neb.] 105 N. W. 253; State v. Ameker, 73 S. C. 330, 53 S. E. 484; State v. Piner [N. C.] 53 S. E. 305.

28. See 5 C. L. 1800.

29. "On or about" a certain date insufficient. Morgan v. State [Fla.] 40 So. 828. In the nighttime of said day "or thereabout" not fatally defective. State v. Lovelace [Nev.] 83 P. 330.

30. Indictment for perjury alleging orginal and adjourned date of hearing and perjury "then and there" committed. Commonwealth v. Nailor, 29 Pa. Super. Ct. 275.

31. Commonwealth v. Nailor, 29 Pa. Super. Ct. 271; Wright v. State [Tex. Cr. App.] 92 S. W. 256.

32. State v. Roland, 11 Idaho, 490, 83 P. 337.

33. See 5 C. L. 1801. See, also, post, this section, as to misjoinder of counts.

34. **Held double:** An indictment charging in one count receipt of deposits from several persons, with knowledge of insolvency, and without notifying such depositors thereof, is bad. State v. Walker [Miss.] 41 So. 8. Larceny as bailee of several articles delivered to defendant at different times and for different purposes cannot be charged in one count. Trask v. People [Colo.] 83 P. 1010.

Held not double: Indictment for breaking and entering with intent to steal, and thereupon taking and stealing, not bad. Berry v. State, 124 Ga. 825, 53 S. E. 316. Indictment alleging the making of a contract with intent to defraud, and the subsequent doing of an act by which the fraud was accomplished, not double. Johnson v. State, 125 Ga. 243, 54 S. E. 184. Indictment for obstruction of railroad track held not double, as charging also an attempt to wreck a railroad train. Alsobrook v. State [Ga.] 54 S. E. 805. The statute prohibiting school director to act as agent "or" dealer in school books, and indictment charging one with acting as agent "and" dealer is not double. State v. Wick, 130 Iowa, 31, 106 N. W. 268. Indictment for taking at one time property of two persons not double. State v. Butte, 42 Wash. 455, 85 P. 33. An indictment is not double because the acts alleged might constitute another offense besides that charged. Johnson v. State [Fla.] 40 So. 678. Indictment alleging that defendant took, stole, and carried away money in his possession as officer, and also that he embezzled and converted it, held to state but one offense. State v. Shuman [Me.] 63 A. 665. Making and pre-

mitted.[35] Though either of two connected acts is a distinct crime, they may be alleged in one count as a single offense,[36] and several statutory means may be charged in the conjunctive[37] but not in the disjunctive.[38]

Designation and characterization of offense.[39]—In the absence of statute,[40] the offense charged need not be designated by name,[41] and an erroneous characterizing of the offense is immaterial if the averments of the facts constituting it are sufficient.[42]

Statutory crimes.[43]—Statutory crime must be charged substantially in language of the statute,[44] and where the statutory description is certain, averment in the language of the statute is sufficient,[45] but not where the statute defines the offense in generic terms.[46]

Exceptions and provisos.[47]—Exceptions in the descriptive clause of the statute must be negatived,[48] but exceptions and provisos in distinct clauses[49] or sections[50] need not.

Setting forth written or printed matter.[51]—A written instrument may ordinarily be described according to its legal effect.[52]

Designation of persons.[53]—One may be designated by an assumed name if it is that by which he is commonly known,[54] and the omission of additions,[55] or even their use in some parts of the indictment and omission in others,[56] is not error.

senting false claim to government. Bridgeman v. United States [C. C. A.] 140 F. 577.

35. An indictment charging two persons in the same count with perjury is double. State v. Wilson, 116 Tenn. 725, 91 S. W. 195.

36. Irvin v. State [Fla.] 41 So. 785. An indictment of a police officer for nonfeasance in failing to arrest the keepers of bawdy houses is not double because it enumerates several whom he failed to arrest. State v. Boyd, 196 Mo. 52, 94 S. W. 536. Indictment charging police officer with neglect of duty in permitting intimidation of several voters charges but one offense. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543.

37. People v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370; Territory v. Neatherlin [N. M.] 85 P. 1044. Forcibly seize and inveigle in indictment for kidnapping. State v. White [Or.] 87 P. 137. Conniving at, consenting to, and permitting wife to reside in house of prostitution. State v. Ilomaki, 40 Wash. 629, 82 P. 873; State v. Dawson [Ind. App.] 78 N. E 352. Where a statute makes criminal any one of several related acts, all may be charged in a single count. State v. Hill [N. J. Law] 62 A. 936.

38. Must be conjunctively charged, though the statute is in the disjunctive. State v. Hill [N. J. Law] 62 A. 936. If charged in disjunctive, uncertain. State v. Singer [Me.] 64 A. 586.

39. See 5 C. L. 1802.

40. See 5 C. L. 1802, n 63.

41. Lipham v. State, 125 Ga. 52, 53 S. E. 817; State v. Spurling, 115 La. 789, 40 So. 167; State v. Johnny [Nev.] 87 P. 3.

42. Offense designated "Sabbath breaking" but facts alleged showed wrongful sale of liquors. Harrington v. State, 77 Ark. 480, 91 S. W. 747.

43. See 5 C. L. 1802.

44. Commonwealth v. Nailor, 29 Pa. Super. Ct. 275.

45. False entries by officer of corporation. Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052. Keeping of intoxicating liquors for sale. State v. Paige, 78 Vt. 286, 62 A. 1017.

46. Obtaining money by false pretenses must aver ownership. Territory v. Hubbell [N. M.] 86 P. 747.

47. See 5 C. L. 1803.

48. That weapon was not used in military service. State v. Ring, 77 Ark. 139, 91 S. W. 11.

49. State v. Davis [Wash.] 86 P. 201. Indictment for illegal fishing. Richardson v. State, 77 Ark. 321, 91 S. W. 758. Unless an exception is so incorporated in the enactment as to form a material part of the description of the offense it need not be negatived. Need not allege that liquor sold was not of the kind excepted. State v. Paige, 78 Vt. 286, 62 A. 1017.

50. Exceptions enumerated in a separate section of the statute need not be negatived. State v. Doerring, 194 Mo. 398, 92 S. W. 489.

51. See 5 C. L. 1803. See, also, Forgery, 7 C. L. 1744.

52. An indictment for presenting a false voucher need not set out the voucher in haec verba. Bridgeman v. United States [C. C. A.] 140 F. 577.

53. See 5 C. L. 1803, n. 84-92.

54. One may be designated by an assumed name or one acquired by reputation, if it is that by which he is commonly known. Stallworth v. State [Ala.] 41 So. 184.

55. Failure of the indictment to use the word "junior" in describing the person assailed, it appearing that his father bore the same name, is not ground for quashal, it not appearing that such person was commonly or ever known by such addition. Teague v. State, 144 Ala. 42, 40 So. 312.

56. The addition "Sr." to the name of the injured person is mere matter of description, and that it is sometimes used and sometimes not is no objection to the infor-

Deceased may be designated by different names in separate counts.[57] If property is laid in one by a name not appropriate to a natural person, the capacity must be alleged.[58] Where the name of accused as written in the indictment may be correctly read, the fact that it may equally well be read as another name is no objection.[59]

Description and ownership of property.[60]—Property must be described with reasonable certainty as to its nature[61] and value,[62] and in crimes against property, ownership must be laid.[63] Where the facts on which it is predicated are set out and are insufficient, an averment of ownership is unavailing.[64]

Description of money.[65]—Money may be described generally as current or lawful money,[66] and an averment that it was current under the laws of a particular state may be rejected as surplusage.[67] The amount must be laid with reasonable certainty, but an averment of a certain sum will ordinarily sustain proof of a less sum,[68] as will an averment of "about" a stated sum,[69] or of a stated sum "or more."[70]

(§ 4) *D. Issues, proof, and variance.*[71]—The plea of not guilty puts in issue every material averment.[72] While every essential averment must be proved substantially as laid,[73] unnecessary allegations need not,[74] and immaterial variance may in any event be disregarded.[75] If the evidence shows the offense charged, it is no

mation. State v. Simpson [Ind.] 76 N. E. 544.

57. Walker v. State [Ala.] 41 So. 878.

58. Burrow v. State [Ala.] 41 So. 987.

59. State v. Pointdexter, 117 La. 380, 41 So. 688.

60. See 5 C. L. 1804. See, also, topics dealing with crimes against property, such as Larceny, 6 C. L. 402.

61. Property need not be so described as to distinguish it from other property of the same class. "Brass of the value of $25" sufficient. Miller v. State, 165 Ind. 566, 76 N. E. 245.

62. An indictment for obtaining by false pretences "about 180 head of cattle" worth "about $15,000" is uncertain. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

63. "Building commonly known as the storehouse of P" does not lay ownership. Davis v. State [Fla.] 40 So. 179.

64. Funds were bequeathed as follows, to-wit: "All the rest and residue of my estate, I give, devise and bequeath to the directors in trust and their successors in office of the Lorain County Infirmary, to be used by them to the best interests in caring for the poor and inmates of said infirmary." Held that said funds did not become the property of Lorain County, and that an indictment which set forth the above bequest and charged the infirmary directors with embezzlement of said funds as funds of Lorain County did not properly allege ownership of the property, and that a demurrer to such indictment should be sustained. State v. Forbes, 4 Ohio N. P. (N. S.) 394.

65. See 5 C. L. 1804.

66. "Good and lawful money of the value of $100 a better description of which is unknown" held sufficient. State v. Quackenbush [Minn.] 108 N. W. 953. "One bill of the lawful currency of the United States," the property of a person named, is sufficient. Knight v. State [Ala.] 39 So. 592. "Two nickels of the lawful coin of the United States" sufficient. Barddell v. State, 144 Ala. 54, 39 So. 975. Specified sum in lawful money sufficient without alleging the kind of coin. People v. Howard [Cal. App.] 84 P. 462. Specified sum in current money sufficient. Brewin v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 534, 92 S. W. 423.

67. State v. Quackenbush [Minn.] 108 N. W. 953.

68. Averment of embezzlement of stated sum sustained by proof of less sum. Robinson v. Com., 104 Va. 888, 52 S. E. 690.

69. Indictment for larceny of "about $80" charges larceny of an amount exceeding $50. People v. Peltin, 1 Cal. App. 612, 82 P. 980.

70. Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631.

71. See 5 C. L. 1804.

72. That the offense was not committed in the state may be shown under a plea of not guilty. State v. Barrington [N. C.] 53 S. E. 663.

73. Variance as to property obtained by false pretences held fatal. State v. McWhirter [N. C.] 53 S. E. 734. An averment of breaking into a "banking house owned and occupied by" a certain bank is not supported by proof of breaking into a part of the building occupied by tenants of the bank. Greenwood v. People [Colo.] 83 P. 646.

74. And see ante this section, Surplusage. Unnecessary averment that defendant was legally licensed to sell liquor in prosecution for keeping open on Sunday. State v. Grant [S. D.] 105 N. W. 97.

75. Averment of property in a named company is supported by proof of property in a firm of different name doing business in the name alleged. State v. Bartlett, 128 Iowa, 518, 105 N. W. 59. Averment of shooting in "stomach and body" not variant from proof of shooting in the lower part of the stomach. Freeman v. State, 50 Fla. 38, 39 So. 785. Proof of a half interest in one is not fatally variant from an indictment for larceny laying title in him. State v. Cotter-

variance that it also shows another,[78] and where several prohibited acts are properly charged in the conjunctive, proof of any one warrants conviction.[77] Under an indictment charging several jointly with a crime, commission by one in the presence of the others pursuant to a conspiracy may be shown,[78] and under a general indictment, defendant may be shown to have been a principal in the second degree.[79]

Names.[80]—The name of the injured person must be proved substantially as laid,[81] but the doctrine of idem sonans applies.[82] There is no variance between an indictment designating the injured female by the name by which she was commonly known and proof that she was married to a man of different name.[83]

Time,[84] unless an essential ingredient of the offense, is not material except to avoid the statute of limitations, and to show that the offense was committed before the finding of the indictment; and accordingly, while a specific averment of date is essential,[85] it need not ordinarily be proved as laid,[86] but if there is a variance of date, defendant is entitled to show that the offense proved is not the one as to which the grand jury heard evidence.[87]

(§ 4) *E. Defects, defenses, and objections.*[88]—Defects in the finding of an indictment[89] or formal defects apparent on its face[90] are ordinarily required to be raised by motion to quash or by plea in abatement before pleading to the merits,[91]

el [Idaho] 86 P. 527. Technical variance as to crime for which prisoner was held, on prosecution for aiding escape held immaterial. People v. Fox, 142 Mich. 528, 12 Det. Leg. N. 792, 105 N. W. 1111. Amount of money obtained by false pretenses need not be proved precisely as laid. State v. Gibson [Iowa] 106 N. W. 270. Proof of obtaining check not variant from averment of obtaining money. Id. Proof of obtaining check which was subsequently cashed not variant from averment of receiving money. Schaumloeffel v. State, 102 Md. 470, 62 A. 803. Averment of embezzlement of ward's money by guardian is supported by evidence of investment of money in note and conversion of note. State v. Disbrow, 130 Iowa, 19, 106 N. W. 263. Variance between alleged false report of financial condition of association as set out in indictment and original report as introduced held immaterial. Johnson v. People [Colo.] 84 P. 819. Variance between $53 alleged to have been stolen and proof of $50 immaterial. Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631.

76. Unlawful branding shown as part of circumstantial case of larceny of range cattle. State v. Wilson, 42 Wash. 56, 84 P. 409.

77. State v. Hill [N. J. Law] 62 A. 936.

78. McLeroy v. State, 125 Ga. 240, 54 S. E. 125; Davis v. State, 125 Ga. 299, 54 S. E. 126.

79. Lowe v. State, 125 Ga. 55, 53 S. E. 1038.

80. See 5 C. L. 1805.

81. Averment of owner's name by initial of given name not variant from proof of full given name. Knight v. State [Ala.] 41 So. 911.

82. "Matt" and "Max" not idem sonans. Vincendeau v. People, 219 Ill. 474, 76 N. E. 675. Variance between averment of robbery of "Frank Rex" and proof of name as "Frank Rock" is fatal. State v. Lee [Mont.] 83 P. 223. "Lydia" and "Liddie" idem sonans. Caldwell v. State [Ala.] 41 So. 473. "Rigley" and "Rigby" idem sonans. State v. Pointdexter, 117 La. 380, 41 So. 688. "Vester" and "Vister" idem sonans. Gaither v. Com., 28 Ky. L. R. 1345, 91 S. W. 1124.

83. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036.

84. See 5 C. L. 1805.

85. Morgan v. State [Fla.] 40 So. 828.

86. Time of the offense need be only substantially proved. Presenting false claim to government. Bridgeman v. United States [C. C. A.] 140 F. 577. The precise date named in an information for selling liquor without a license is not essential. People v. Dieterich, 142 Mich. 527, 12 Det. Leg. N. 798, 105 N. W. 1112. Variance as to time immaterial on indictment for obtaining money by false pretenses. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838.

87. Lee v. State [Ala.] 41 So. 677.

88. See 5 C. L. 1805.

89. The authenticity of the indictment must be raised by plea in abatement or motion to quash. State v. Sharpe, 119 Mo. App. 386, 95 S. W. 298.

90. Ambiguity of averment of property in goods stolen must be raised by demurrer or motion to quash. State v. Philips, 72 S. C. 236, 53 S. E. 370. Defect in verification of information waived by failure to move to quash. State v. Temple, 194 Mo. 237, 92 S. W. 869.

91. A statute requiring objection to an indictment for any defect apparent on its face to be made before the jury is sworn precludes objection for first appeal. State v. Sharkey [N. J. Law] 63 A. 866. It is discretionary whether motion to quash shall be allowed after plea. State v. Burnett [N. C.] 55 S. E. 72. Objection to want of preliminary examination waived by pleading. People v. Harris, 144 Mich. 12, 13 Det. Leg. N. 139, 107 N. W. 715. Motion to quash must be made before plea. Smith v. Com., 28 Ky. L. R. 1254, 91 S. W. 742.

or at least before verdict,[92] while substantial deficiency of averment may be raised at any time,[93] and pleas in abatement are waived by going to trial on the merits before they are passed on.[94] Vagueness in the indictment is cured by reception of evidence without objection,[95] and where some counts are deficient or unproven, a general verdict will be referred to the good count,[96] or that sustained by the evidence.[97] After verdict nolle prosequi may be entered to one count and sentence imposed on that remaining.[98] An indictment charging an offense substantially in the language of the statute cannot be assailed on habeas corpus after plea of guilty.[99] Whether want of or defects in a preliminary examination or information,[1] or defects in the organization,[2] or proceedings[3] of the grand jury, or lack of evidence before the grand jury,[4] or particular defects in the indictment itself,[5] are grounds for quashing the indictment depends largely on local statutes. Where the statute prescribes the grounds for quashing an indictment, the statutory grounds are exclusive.[6]

92. Duplicity of indictment must be raised before verdict. Irvin v. State [Fla.] 41 So. 785; State v. Hill [N. J. Law] 62 A. 936. Formal objection to complaint or warrant cannot be raised after conviction. People v. Huggins, 110 App. Div. 613, 97 N. Y. S. 187. Motion to quash after verdict is too late. State v. Summerlin, 116 La. 449, 40 So. 792. A motion to quash after plea to the merits is addressed to the discretion of the court and should be granted only on clear and substantial grounds. State v. Rester, 116 La. 985, 41 So. 231. Want of preliminary examination cannot be first raised after verdict. State v. Le Blanc, 116 La. 822, 41 So. 105.

93. See post, §§ 11, 14. Failure to allege venue is not a defect in matter of form within statutes allowing such defects to be disregarded, but is a defect of substance. State v. Beeskove [Mont.] 85 P. 376.

94. McCampbell v. State [Tenn.] 93 S. W. 100.

95. Vagueness cured by judgment where evidence on both sides was introduced without objection. State v. Maloney, 115 La. 498, 39 So. 539.

96. White v. State [Ala.] 39 So. 570; Grant v. State [Ala.] 40 So. 80; State v. Sheppard [N. C.] 55 S. E. 146.

97. Moran v. State, 125 Ga. 33, 53 S. E. 806.

98. State v. Perry, 116 La. 231, 40 So. 686.

99. Robbery. In re Myrtle, 2 Cal. App. 383, 84 P. 335.

1. That a witness refused at the preliminary examination to answer certain questions on cross examination held not to so deprive accused of a legal preliminary examination that the information should be set aside. State v. Bond [Idaho] 86 P. 43. Where an indictment is found after preliminary hearing on the information, motion to quash the indictment for insufficiency of the information is too late. Commonwealth v. Mallini, 214 Pa. 50, 63 A. 414. Termination of authority of the notary before whom the information was verified by accepting another office cannot be raised by attack on the information. McNulty v. State [Ind. App.] 76 N. E. 547.

2. That some members of the grand jury were irregularly drawn does not affect the validity of the indictment if they were duly qualified. State v. Cambron [S. D.] 105 N. W. 241. An objection to the indictment for disqualification of a grand juror imposes on defendant the burden of showing that he did not know of the facts before indictment. Parris v. State, 125 Ga. 777, 54 S. E. 751. Where there was a legal number of qualified grand jurors, a plea that one was disqualified must negative the presumption that the presentment was found by the qualified members on evidence adduced and not on the information of a grand juror. McCampbell v. State [Tenn.] 93 S. W. 100. Defects in organization of grand jury no ground for quashal. Raines v. State [Ala.] 40 So. 982. By statute in Iowa, objections because of the organization of the grand jury are not available to a defendant who has been held to answer before indictment. State v. Wheeler, 129 Iowa, 100, 105 N. W. 374. Exemption of grand jurors by reason of previous service within the year is personal and that exempt jurors served is no ground for quashal. State v. Hopkins, 115 La. 786, 40 So. 166.

3. That defendant was called as a witness before the grand jury is no ground for setting aside the indictment. State v. Sherherd, 129 Iowa, 705, 106 N. W. 190. Under a statute authorizing vacation of indictment if any person "not required or permitted by law" is present in the grand jury room, if a county attorney disqualified to act in the case appears, the indictment will be set aside. Code, § 5319. State v. Rocker, 130 Iowa, 239, 106 N. W. 645. An indictment will not be set aside because accused was a witness before the grand jury where it appears that the district attorney advised the grand jury that they must not consider his evidence in deciding whether to indict him, and it does not appear but that this instruction was regarded. People v. Hummel, 96 N. Y. S. 878.

4. Will not look to the sufficiency of the evidence before the grand jury. State v. Woodrow, 58 W. Va. 527, 52 S. E. 545.

5. Misnomer not ground for quashal. State v. Strayer, 58 W. Va. 676, 52 S. E. 869. Failure to indorse names of witnesses not ground of quashal. State v. Sultan [N. C.] 54 S. E. 841. Failure of indictment to show that witnesses before grand jury were sworn is not fatal. Id.

6. Neither failure to return exhibits with indictment nor failure of witnesses to sign

Under a statute providing that the only pleadings by defendant shall be either a demurrer or a plea, a motion to strike out part of an indictment is not allowable.[7] Demurrer for misjoinder must specify the offenses which it is claimed the indictment improperly joins.[8] Testimony of grand jurors and of the prosecuting attorney are inadmissible to impeach indictment.[9]

(§ 4) *F. Joinder, separation, and election.*[10]—Subject to a few exceptions,[11] distinct offenses cannot be joined in the same count.[12] Counts on separate misdemeanors of the same nature may be joined.[13] An offense which under the Florida constitution may be tried by a jury of five may be joined with one triable by a jury of twelve.[14] Where two independent offenses are shown, the prosecution should be required to elect,[15] but there need be no election between distinct though related offenses charged in separate counts,[16] nor between several counts charging the same offense and not necessarily inconsistent.[17] Where there were several counts for illegal sale and one for maintaining a liquor nuisance, an election respecting the counts for sale and silent as to the count for nuisance is not an abandonment of the latter.[18] An election when necessary must be made at or before the time when the state rests, but whether it shall be required before such time is discretionary.[19] Election made is conclusive at second trial.[20]

(§ 4) *G. Amendments.*[21]—Though amendment seems to be allowed in a few states without reference to statute,[22] an indictment ordinarily can be amended only by virtue of a statute,[23] except to conform to the proof.[24] Statute permitting

minutes of testimony. State v. O'Malley [Iowa] 109 N. W. 491. That too many persons were drawn to serve on grand jury not ground. Redgers v. State, 144 Ala. 32, 40 So. 572. Failure of jury commissioners to take prescribed oath not. Sims v. State [Ala.] 41 So. 413. Under Code 1896, § 5269, that grand jury was organized without authority of law and that there was no order for the venire not grounds for quashal. Bentley v. State [Ala.] 39 So. 649. Reception of hearsay evidence by grand jury in violation of Wilson's Ann. St. 1903, § 5339, is not. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Too many grand jurors drawn. Stevenson v. State [Ala.] 41 So. 526; Untreiner v. State [Ala.] 41 So. 285; Sanders v. State [Ala.] 41 So. 466. Failure to file at term succeeding commitment not ground. State v. Foster [N. D.] 105 N. W. 938. Under Code § 5269, defects in the formation of the grand jury such as failure to appoint a foreman are not ground for quashal. Shirley v. State, 144 Ala. 35, 40 So. 269.

7. B. & C. Comp. § 1355. State v. Conklin, 47 Or. 509, 84 P. 482.

8. Sowell v. State [Ga.] 54 S. E. 916. Field v. State [Ga.] 55 S. E. 502.

9. State v. Hopkins, 115 La. 786, 40 So. 166.

10. See 5 C. L. 1808. Joinder and severance in trials, see post, § 10.

11. Burglary and larceny may be joined in the same count. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 11[illegible]. Burglary and larceny may be joined either in the same count or in separate counts. State v. Perry, 116 La. 231, 40 So. 686.

12. Indictment charging in one count conspiracy to injure in person and in another conspiracy to destroy property charges two offenses. State v. Caine [Iowa] 105 N. W. 1018. Abduction and enticement of child beyond the limits of the state based on same transaction. State v. Burnett [N. C.] 55 S. E. 72.

13. Practicing medicine without license. Counts based on treatment of different persons. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

14. State v. Perry, 116 La. 231, 40 So. 686.

15. Liquor nuisance. State v. Poull [N. D.] 105 N. W. 717. Where several acts are proved, it is error to refuse to compel an election. Jamison v. State [Tenn.] 94 S. W. 675. Evidence of successive ravishment by several defendants held to show such cooperation that no election was necessary. Barrett v. People, 220 Ill. 304, 77 N. E. 224.

16. Illegal sale of liquor. Untreiner v. State [Ala.] 41 So. 170.

17. State v. Ricksecker [Kan.] 85 P. 547.

18. State v. Bailey [Kan.] 87 P. 189.

19. State v. Poull [N. D.] 105 N. W. 717. Where several counts charge the same act as committed under different circumstances, it is proper to refuse to require an election until the state's evidence is in. Sutton v. State, 124 Ga. 815, 53 S. E. 381.

20. Counts for rape and incest. Elliott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 93 S. W. 742.

21. See 5 C. L. 1809.

22. Misnomer may be cured by amendment during the trial. State v. Strayer, 58 W. Va. 676, 52 S. E. 862. Allowance at beginning of trial of amendment as to name of person assailed sustained. State v. Johnson, 116 La. 30, 40 So. 521.

23. In New Jersey indictment may be amended on trial to conform to evidence as to name of person injured. Laws 1898, p. 378. State v. Tolla, 72 N. J. Law, 515, 62 A. 675.

amendment on trial as to name of person injured is constitutional.[25] An information can ordinarily be amended at any time as to form or substance.[26]

(§ 4) *H. Conviction of lesser degrees and included offenses.*[27]—Conviction may be had of any offense included in that charged,[28] or of an attempt to commit the offense charged,[29] or of any lesser degree of the offense charged,[30] but not of an offense containing elements not included in that charged.[31] The most frequent illustration of this rule is in conviction of assault on indictment for felonies involving the use of force.[32] Assault with intent to kill is included in an indictment for murder,[33] but not in one for manslaughter.[34] When, and only when, an indictment for assault with intent to kill avers that it was without considerable provocation, a conviction of assault without considerable provocation with intent to do great bodily harm can be had.[35] Where burglary and theft are joined in one count, conviction may be had of either.[36]

§ 5. *Arraignment and plea.*[37]—A formal plea is prerequisite to trial on the merits[38] and is not waived by failure of accused to demand arraignment.[39] Where the arraignment and the swearing of the jury were practically simultaneous, it is immaterial that the jury was sworn before defendant was arraigned.[40] Where the information is amended by adding a verification after arraignment, defendant need not be rearraigned.[41] Reading of indictment by solicitor general at trial, and entry of plea of not guilty, is sufficiently formal arraignment in misdemeanor case.[42] De-

24. Amendment allowed to conform to proof as to state in which land to which false pretenses related was situated. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123.

25. State v. Tolla, 72 N. J. Law, 515, 62 A. 675.

26. Correction of misnomer of accused at his own suggestion not available as error. Kilcoyne v. State [Tex. Cr. App.] 92 S. W. 36. May be so amended as to charge the offense as committed in the county instead of in a particular division thereof. State v. Abrams [Iowa] 108 N. W. 1041. Verification may be added. State v. Speyer, 194 Mo. 459, 91 S. W. 1075.

27. See 5 C. L. 1809.

28. Under indictment for shooting with intent to kill, conviction may be had for unlawful wounding by reckless shooting in a public place. State v. Groves, 194 Mo. 452, 92 S. W. 631.

29. Under an indictment for statutory rape, defendant may be convicted of an attempt. State v. Marrselle [Wash.] 86 P. 586. Attempt to commit rape is included in an indictment for statutory rape. People v. Ah Lung, 2 Cal. App. 278, 83 P. 296. On an indictment for incest, conviction may be had of an attempt to commit the same. State v. Winslow [Utah] 85 P. 433.

30. Conviction of murder in the second degree may be had under indictment for murder by poisoning. State v. Matthews [N. C.] 55 S. E. 342. Manslaughter by negligence is included in an indictment for murder. State v. Moore, 129 Iowa, 514, 106 N. W. 16.

31. On indictment for assault by one armed with a dangerous weapon with intent to rob, conviction of robbery cannot be had. People v. Scofield, 142 Mich. 221, 12 Det. Leg. N. 654, 105 N. W. 610. Exhibition of dangerous weapon in angry and threatening manner not included in indictment for assault with intent to murder. State v. Campbell, 40 Wash. 480, 82 P. 752.

32. Assault and battery is included in indictment for rape. State v. Barkley, 129 Iowa, 484, 105 N. W. 506. Assault under indictment for assault with intent to murder. State v. Brown [Del.] 53 A. 328. Simple assault under indictment for assault with intent to murder. State v. Wilson [Del.] 60 A. 227. Conviction of assault with intent may be had on indictment for rape. People v. Murphy [Mich.] 13 Det. Leg. N. 602, 108 N. W. 1009. On indictment for assault with intent to murder, there may be a conviction of aggravated assault. Freeman v. State, 50 Fla. 38, 39 So. 785.

33. To warrant a conviction of assault with intent to kill on an indictment for murder, the assault must be connected with and a part of the killing alleged. Letcher v. State [Ala.] 39 So. 922. Conviction of assault with intent to kill may be had under indictment for murder which, while not alleging in terms intent to kill, alleged that the killing was willful and with malice aforethought. Smith v. State [Ga.] 55 S. E. 475.

34. People v. Huson, 99 N. Y. S. 1081.

35. State v. Romano, 41 Wash. 241, 83 P. 1.

36. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118.

37. See 5 C. L. 1810.

38. Hamilton v. State [Ala.] 41 So. 940; Sims v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 34, 91 S. W. 579.

39. Sims v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 34, 91 S. W. 579.

40. Elliott v. Com., 29 Ky. L. R. 48, 91 S. W. 1136.

41. State v. Speyer, 194 Mo. 459, 91 S. W. 1075.

fendants jointly indicted need not be jointly arraigned.[43] In Indiana a plea of guilty of an included offense can only be received by consent of the prosecuting attorney.[44] A plea of guilty will not be set aside because interposed in reliance on an assurance of the county attorney that the minimum penalty would be imposed;[45] but where defendant pleaded guilty without being fully informed of his right to counsel and after sentence makes oath that he was not guilty and that the plea was induced by the officers having him in charge, the sentence should be set aside;[46] and where on being examined after a plea of guilty defendant denies entertaining an intent which is essential to the crime charged a plea of not guilty should be entered.[47] Plea of guilty admits all that is well charged but does not preclude objection for defect of substance.[48] Defendant may at any time before trial move for leave to withdraw his plea and demur,[49] but such motion is addressed to the discretion of the court,[50] and being denied cannot be renewed of right.[51]

Pleas in abatement and special pleas.[52]—Former conviction must be raised by special plea.[53] Leave to withdraw a general plea and plead specially rests in discretion.[54] Plea of former acquittal failing to show sufficient facts may be adjudged bad on demurrer.[55] A general demurrer to a plea in abatement for that it "does not state facts sufficient to abate the action" is good.[56] A demurrer to a plea in abatement does not search the record.[57] A plea in abatement must exclude all supposable matters which might be alleged to defeat it,[58] though pleas in general terms are sometimes authorized by statute.[59] A plea in bar to a criminal charge does

42. Fears v. State, 125 Ga. 739, 54 S. E. 667.

43. State v. Goodson, 116 La. 388, 40 So. 771.

44. Where the statute provides that dismissal or nolle prosequi shall only be granted on motion of the prosecuting attorney, the court has no power against the objection of the prosecuting attorney to receive a plea of an included offense. State v. Morrison, 165 Ind. 461, 75 N. E. 968.

45. State v. Wyckoff [Iowa] 107 N. W. 420. The rule safeguarding the rights of a prisoner, which applies to extra-judicial confessions, should not necessarily be applied to a confession made in court, and were this not true, it would not follow that it should be applied where intelligent and shrewd business men, flanked by lawyers among the best in the state, have speculated for weeks as to the best thing to do, have consulted with the prosecutor, and, after turning the matter over in every possible light, conclude to plead guilty and throw themselves on the mercy of the court. State v. Hygeia Ice Co., 4 Ohio N. P. (N. S) 361. What the court said and did during the trial of this case did not mislead the defendants into withdrawing their pleas of not guilty and entering pleas of guilty, or to the taking of other action to the prejudice of their rights; they were surprised, not by any wrong or unfair thing which the court did, but by the severity of the sentence imposed, and in the entire absence of any promise or intimation of leniency, the misjudgment of the defendants and of their attorneys as to the attitude of the court with reference to the nature of the offense committed and the degree of punishment which should be imposed is not ground for vacation of the sentences which were pronounced. Id.

46. State v. Allen, 41 Wash. 63, 82 P. 1036.

47. People v. Scofield, 142 Mich. 221, 12 Det. Leg. N. 654, 105 N. W. 610.

48. Klawanski v. People, 218 Ill. 481, 75 N. E. 1028.

49. People v. Staples [Cal.] 86 P. 886.

50. Held properly denied where no ground of attack on the indictment was shown. People v. Staples [Cal.] 86 P. 886.

51. Leave to renew held properly denied. People v. Staples [Cal.] 86 P. 886.

52. See 5 C. L. 1810.

53. Logan v. State [Miss.] 40 So. 323.

54. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

55. Failure to aver that two homicides resulted from same act. State v. Rosa, 72 N. J. Law, 462, 62 A. 695.

56, 57. State v. Roberts [Ind.] 77 N. E. 1093.

58. Plea that grand juror was disqualified by having served before within two years held bad for not alleging that such previous service was not as a special or struck juror. State v. Waterman, 78 Vt. 379, 62 A. 1016. Pleas in abatement for mere irregularities must be drawn with great strictness obviating every supposable special answer. Colson v. State [Fla.] 40 So. 183. Plea of having testified before grand jury held bad for failure to show that testimony was given under compulsion. State v. Duncan, 78 Vt. 364, 63 A. 225.

59. Plea of former conviction in general terms as allowed by Cr. Code Prac. § 164, is sufficient. Standard Oil Co. v. Com., 28 Ky. L. R. 1369, 91 S. W. 1127. A plea in bar which merely sets forth that the defendant has been previously put upon trial on an accusation of the same offense, and does not set forth the indictment on which he was tried or even allege that it was a valid in-

not present an issue solely for the jury. Such a plea may be examined by the court as to its sufficiency, and if it be found that it is insufficient as a matter of law it may be so adjudged and the jury discharged without prejudice to a further prosecution for the same offense.[60] The burden of proving plea of former acquittal or conviction,[61] or of special matter in abatement,[62] is on defendant, and where the facts are not controverted the court may direct a verdict against defendant.[63] Separate trial of a special plea in bar is properly ordered unless it appears that the special plea cannot be intelligently heard except in connection with all the evidence.[64]

§ 6. *Preparation for, and matters preliminary to, trial.*[65]—Service of a copy of the indictment on accused a specified number of days before the trial[66] is usually required, but want of such service is waived by failure to demand it,[67] or by announcing ready for trial.[68] In most states a certain length of time after indictment must, if demanded, be allowed for preparation.[69] In like manner accused is entitled in some jurisdictions, if he shall demand it,[70] to a substantially correct copy[71] of the venire or jury panel,[72] and this is held not to include a list of the talesmen summoned on the exhausting of the regular venire.[73] A list of the state's witnesses is sometimes allowed,[74] and it must likewise be demanded.[75] A copy[76] of the minutes of the grand jury is allowed in Iowa. If counsel is misled into failure to obtain it, his remedy is by motion to postpone.[77] Mandamus will not issue to compel the clerk to deliver a copy of the testimony at the preliminary examination where it is not in his possession.[78]

dictment, is insufficient in law and presents no issue for the jury. Horner v. State, 8 Ohio C. C. (N. S.) 441.

60. Horner v. State, 8 Ohio C. C. (N. S.) 441.

61. State v. Williams [Wash.] 86 P. 847; Kilcoyne v. State [Tex. Cr. App.] 92 S. W. 36.

62. Spencer v. State, 125 Ga. 255, 54 S. E. 144.

63. Commonwealth v. Brown, 28 Pa. Super. Ct. 296.

64. State v. Murphy, 128 Wis. 201, 107 N. W. 470.

65. See 5 C. L. 1812.

66. The two days before trial required by Rev. St. § 992, relating to service of copy of information and venire, need not be judicial days. State v. Baudoin, 115 La. 837, 40 So. 239. Not entitled to copy of indictment before arraignment. Dix v. State [Ala.] 41 So. 924.

67. Fears v. State, 125 Ga. 739, 740, 54 S. E. 661, 667. Right to copy of indictment waived by failure to demand it before trial. Howard v. State [Ala.] 41 So. 301.

68. State v. Dilley [Wash.] 87 P. 133.

69. The two days time allowed by statute to prepare for trial cannot be first demanded after the jury has been selected. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220.

70. Discretionary to deny copy of venire when not demanded within statutory time. Rev. Code 1892, § 1408. Hannah v. State, 87 Miss. 375, 39 So. 855.

71. Slight variance in one of defendant's aliases in the address of the copy of the venire served on him is immaterial. Banks v. State [Ala.] 39 So. 921. Technical defects in the jury list furnished immaterial. Stoudenmire v. State [Ala.] 40 So. 48.

72. The statutes of Washington changing the method of drawing jurors so that several departments select from the same panel abrogated the right of accused to have the jury selected from the list required by Ballinger's Ann. Codes & St. § 6879, to be served on him. State v. Mayo, 42 Wash. 540, 85 P. 251. Order for service of jury list held erroneous as requiring service of list for week preceding that for which trial was set. Walker v. State [Ala.] 41 So. 878. List containing names of several persons drawn but not summoned, insufficient. Id. Names of persons not regularly drawn but summoned to fill vacancies on the venire need not be on the list served on accused. Smith v. State [Ala.] 40 So. 957.

73. Not entitled to list of talesmen. Untreiner v. State [Ala.] 41 So. 285; State v. Thompson, 116 La. 829, 41 So. 107.

74. Accused not entitled to list of state's witnesses. Baker v. State [Fla.] 40 So. 673.

75. Fears v. State, 125 Ga. 739, 740, 54 S. E. 661, 667.

76. Where defendant is furnished with a copy of the minutes of the testimony before the grand jury, it is immaterial that the county attorney took the original from the clerk's files and kept it some time. State v. McClain, 130 Iowa, 73, 106 N. W. 376.

77. That defendant's counsel was misled into failing to obtain a copy of the minutes of testimony before the grand jury by a statement of the county attorney that he did not intend to use the witnesses who were before the grand jury should be availed of by motion to continue, and is not ground for the exclusion of witnesses who were before the grand jury. State v. McClain, 130 Iowa, 73, 106 N. W. 376.

78. Clerk had delivered it to prosecuting

Preliminary inquest as to sanity.[79]—Refusal to appoint a medical board to examine into the sanity of accused is harmless where the physicians whose appointment was requested did examine accused and testified on the trial that he was sane.[80] To authorize a commitment to the asylum for present insanity the commission must report that accused is insane, report of mental impairment being insufficient.[81]

§ 7. *Postponement of trial.*[82]—An application for postponement is, particularly in case of a second application,[83] addressed to the discretion of the court[84] to an even greater extent than in civil cases by reason of the greater temptation to seek mere delay,[85] but this rule must not be so administered as to impair the constitutional guaranty of compulsory process.[86] Postponement should be allowed for lack of time for preparation[87] or for absence of counsel[88] or illness of accused.[89] Grant of continuance for absence of official stenographer is discretionary.[90] Where accused asked a continuance of the term instead of a postponement for want of preparation, denial will not be disturbed.[91]

Continuance should also be granted for the absence of a witness[92] where it appears what his testimony will be,[93] that the witness is competent[94] and that his testimony is competent and material,[95] credible,[96] necessary,[97] not merely cumulative

attorney and could not get it back. Gray v. Lindsey [Ala.] 39 So. 927.

79. See 4 C. L. 21, n. 38.

80. State v. Douglas, 116 La. 524, 40 So. 860.

81. People v. Sheriff of New York County, 100 N. Y. S. 193.

82. See 5 C. L. 1812.

83. Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 569, 95 S. W. 122.

84. Raines v. State [Ala.] 40 So. 932; State v. Mizis [Or.] 85 P. 611; State v. Temple, 194 Mo. 237, 92 S. W. 869; Stoudenmire v. State [Ala.] 40 So. 48. Not entitled of right to continuance to next term after indictment. State v. Sultan [N. C.] 54 S. E. 841.

85. Pittman v. State [Fla.] 41 So. 385; Clements v. State [Fla.] 40 So. 432.

86. Rogers v. State, 144 Ala. 32, 40 So. 572.

87. Two hours' time for preparation after employment of counsel held sufficient. Jones v. State, 125 Ga. 49, 53 S. E. 583. Postponement to allow further time for preparation held properly denied. Defendant's counsel did not know that papers on change of venue had been transmitted until two days before trial. State v. Steers [Idaho] 85 P. 104. That 15 days elapsed between arraignment and trial shows prima facie ample time for preparation. State v. Pointdexter, 117 La. 380, 41 So. 688. Allowance of four hours to prepare for trial held not an abuse of discretion. State v. Sultan [N. C.] 54 S. E. 841. After adjournment at request of defendant, held that he was allowed ample time for preparation. Commonwealth v. Hine, 213 Pa. 97, 62 A. 369.

88. Where accused has several attorneys, motion based on illness of one of them must show that he is the leading counsel and that the motion is in good faith and that the defendant expects to secure his services at the next term. Wall v. State [Ga.] 54 S. E. 815. Denial of continuance to allow time to obtain counsel sustained where accused was represented at the trial by the counsel whom he desired the time to procure. Carpenter v. Com., 29 Ky. L. R. 107, 92 S. W. 552.

89. Rests in discretion. Rowland v. State, 125 Ga. 792, 54 S. E. 694.

90. Odom v. State [Fla.] 40 So. 182.

91. State v. Mizis [Or.] 85 P. 611.

92. See 5 C. L. 1812. Denial of continuance to permit of production of alibi evidence held error where evidence of identification was very unsatisfactory. Leach v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 310, 91 S. W. 1088. Continuance to obtain testimony of defendant's wife to threats by deceased held improperly denied. Ware v. State [Tex. Cr. App.] 92 S. W. 1093. Where there was no time for preparation, it is an abuse of discretion to deny a postponement to permit the summoning of witnesses. Cremeans v. Com., 104 Va. 860, 52 S. E. 362. Where accused was brought to trial the day after the indictment was returned and made a proper showing as to an absent witness, it is error to deny a continuance on a showing that the prosecution had been unable to find such witness. Rumsey v. State [Ga.] 55 S. E. 167.

93. Must show names of witnesses and the testimony to be given by each separately. King v. State, 125 Ga. 35, 36, 53 S. E. 807. Court may require showing of what is to be proved by absent witness. State v. Stewart, 117 La. 476, 41 So. 798. Failure to show testimony of absent witness fatal. Raines v. State [Ala.] 40 So. 932. Affidavit of testimony of absent witness as to defendant's residence during time he was alleged to be living in adultery held too indefinite. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220.

94. Continuance not granted for absence of witness disqualified by conviction of felony. McIntyre v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 544, 94 S. W. 1048.

95. Continuance for absence of witness properly denied when proposed testimony is inadmissible. State v. Athey [Iowa] 108 N. W. 224. Testimony that witness saw third person going rapidly from scene of homicide not material. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726. To show the materiality of testimony of an-

or impeaching;[98] and the whereabouts of the witness,[99] the exercise of diligence to procure his attendance,[1] and the probability of his attendance at the postponed trial,[2] are shown. Continuance may be sometimes avoided by an admission that the witness will testify as stated,[3] but in some states such an admission is no answer to a first application for a continuance.[4] Where the state admits to avoid a continuance that an absent witness would have testified as stated in the affidavit, it may rebut such testimony.[5] Admission that witness would testify as alleged does not preclude objection to the admissibility of the evidence.[6]

cestral insanity there must be a showing that defendant was insane at the time of the offense charged. Clements v. State [Fla.] 40 So. 432. Third application for continuance for absence of witness to prove whereabouts of accused during a small part of the time during which the crime might have been committed properly refused. Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 569, 95 S. W. 122. Showing of cogency of testimony as to defendant's insanity held insufficient to make it error to deny a continuance to procure the same. State v. Wetter, 11 Idaho, 433, 83 P. 341.

96. Denial sustained where in view of evidence at trial testimony of absent witness was improbable. Holley v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 509, 92 S. W. 422. Denial of continuance of affidavit of belief that absent witnesses would testify that they were guilty and defendant innocent, sustained. State v. De Moss [Kan.] 85 P. 937. Denial of continuance not disturbed where defendant's testimony negatived that of absent witness as to whereabouts of defendant. Boyd v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053. Denial of continuance not disturbed where several witnesses testified in direct contradiction of proposed testimony. McIntyre v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 544, 94 S. W. 1048. Where the cross-examination of the state's witnesses did not suggest either the presence of an alleged absent witness or the fact to which it was claimed he would testify, denial of a continuance will not be disturbed. State v. Temple, 194 Mo. 237, 92 S. W. 869.

97. Continuance for absence of witness to testify to age of prosecutrix properly denied where it did not appear that he had any special knowledge with respect thereto. Hust v. State, 77 Ark. 146, 91 S. W. 8. Affidavits held to show that there were other witnesses by whom the facts could be as well proved. Jones v. State, 125 Ga. 307, 54 S. E. 122. Testimony of absent witness at coroner's inquest held to clearly indicate that defendant did not want his testimony. State v. Douglas, 116 La. 524, 40 So. 860.

98. Refusal of continuance for absence of impeaching witness not error. Powell v. State [Tex. Cr. App.] 93 S. W. 544. Denial of continuance for absence of impeaching witness not ground for new trial when no foundation was laid for impeachment. State v. Hayden [Iowa] 107 N. W. 929. Denial of a continuance for absence of impeaching evidence will not be disturbed where it does not appear that the state's witness was examined about the matter on which it was proposed to impeach him. Gaut v. State [Tex. Cr. App.] 94 S. W. 1034.

99. Affidavit not showing where absent witness was and only an opinion as to his expected testimony, insufficient. Carpenter v. Com., 29 Ky. L. R. 107, 92 S. W. 552. Application for continuance must state the residence of the absent witness. Donald v. State [Miss.] 41 So. 4.

1. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220. No diligence shown. State v. Tucker, 72 Kan. 481, 84 P. 126. Where the affidavit shows no attempt to communicate with absent witnesses and no effort to procure their attendance other than the issue of a subpoena, continuance is properly denied. State v. Freshwater [Utah] 85 P. 447. Where no effort was made to secure a witness except telephoning for him, refusal of an adjournment will not be reviewed. Jackson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 250, 91 S. W. 788. Where it does not appear where the witness was or that any effort was made to take his deposition, no sufficient diligence is shown. Gaut v. State [Tex. Cr. App.] 94 S. W. 1034. Showing of diligence insufficient. Jones v. State, 125 Ga. 307, 54 S. E. 122. Seven days' delay in issuing subpoenas after return of presentment held lack of diligence making proper denial of continuance. Fitzgerald v. State [Ga.] 55 S. E. 482. Extraordinary diligence must be shown on second application for continuance for absence of a witness. Melbourne v. State [Fla.] 40 So. 189. Sickness of absent witness held insufficiently shown to excuse lack of diligence in failure to subpoena. Weatherford v. State [Ark.] 93 S. W. 61. Defendant is not entitled to rely on the appearance of a witness because he is subpoenaed by the state. State v. Campbell [Kan.] 85 P. 784.

2. Should show that witness can probably be procured if continuance is granted. Weatherford v. State [Ark.] 93 S. W. 61. Where the absent witness is beyond the jurisdiction, motion must show some probability of his return. Wall v. State [Ga.] 54 S. E. 815.

3. Not an abuse of discretion to put defendant to a showing and refuse continuance on admission of the facts alleged as expected to be proved. Stallworth v. State [Ala.] 41 So. 184. If testimony of absent witness is conceded, denial of continuance is not error. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726. Denial of continuance not error where state admitted showing of what absent witness would testify to. Stoudenmire v. State [Ala.] 40 So. 48.

4. Defendant held entitled to continuance at first term for absence of witness, notwithstanding admission that witness would testify as stated. Walton v. State, 87 Miss. 296, 39 So. 689.

The application must be promptly made,[7] must show that it was not made for delay,[8] and must show the requisite facts specifically and not by statement of bare conclusions.[9]

§ 8. *Dismissal or nolle prosequi before trial.*[10]—Nolle prosequi may be entered before plea.[11] An assistant prosecuting attorney is not amenable to a charge of contempt for refusing to obey an order of court to prepare and present a nolle prosequi in a specified case. Such an order should be directed to the prosecuting attorney.[12] In many states defendant is entitled to a dismissal if without good cause[13] he is not brought to trial within a certain time after indictment.[14] Where accused has become entitled to discharge because not put on trial within four months, dismissal of the pending indictment and finding of another for the same offense does not affect his right to discharge.[15] Where an indictment is nolled and a new one found, the three terms within which accused must be put on trial are counted from the finding of the new indictment.[16]

Pendency of another indictment for the same offense,[17] or one included in that charged,[18] does not ordinarily work an abatement.

§ 9. *Evidence. Judicial notice.*[19]—Judicial notice is taken of the political subdivision of the state[20] and of the names of public officials therein,[21] of facts of common knowledge,[22] though not of conditions transitory in their nature,[23] of the coin of the realm,[24] and of conditions established by public proclamation.[25] A municipal court judicially notices ordinances but no other court can do so.[26]

5. Funderburk v. State [Ala.] 39 So. 672.

6. State v. High, 116 La. 79, 40 So. 538.

7. Application eleven days after filing of information and after beginning of trial properly denied. Clements v. State [Fla.] 40 So. 432.

8. Jones v. State [Ga.] 55 S. E. 171.

9. General statement that due diligence had been used insufficient. State v. Temple, 194 Mo. 237, 92 S. W. 869.

10. See 5 C. L. 1813.

11. Mitchell v. State [Ga.] 54 S. E. 931.

12. Ex parte Froome Morris, 8 Ohio C. C. (N. S.) 212.

13. Where a case was continued on a proper showing by the prosecution of absence of witness, the court will not on review consider a claim that such continuance was unavailing because there was no legal jury at the term before the testimony of such witness could have been heard. Quinn v. People, 220 Ill. 28, 77 N. E. 121. Failure to put accused on trial within the time required is justified only by the existence of one of the statutory exceptions and accordingly he is entitled to discharge where the term was not held because of the death of the judge. Newlin v. People, 221 Ill. 166, 77 N. E. 529. The terms of court which intervene pending an appeal by the state from the quashal of the indictment are not to be counted. State v. Campbell [Kan.] 85 P. 784. A term at which accused failed to object to a continuance is not to be counted. State v. Dewey [Kan.] 85 P. 796. No right to discharge at second term where case was continued at first for absence of a witness for the state. State v. Pratt [S. D.] 107 N. W. 538.

14. Lapse of two terms held to entitle accused to discharge. Dublin v. State [Ga.] 55 S. E. 487.

15. Newlin v. People, 221 Ill. 166, 77 N. E. 529.

16. State v. Wigger, 196 Mo. 90, 93 S. W. 390.

17. Pendency of one indictment does not abate a second, though accused has been tried on the first and a new trial granted. Pride v. State, 125 Ga. 750, 54 S. E. 688.

18. Pendency of a prosecution for assault and battery does not abate a prosecution for assault and battery with intent to murder based on the same transaction. State v. Roberts [Ind.] 77 N. E. 1093.

19. See 5 C. L. 1814.

20. Location of county seat with respect to range and township lines within the county. State v. Arthur, 129 Iowa, 235, 105 N. W. 422. That a certain city is within the county in which the court sits. Commonwealth v. Salawich, 28 Pa. Super. Ct. 330. That certain territory was part of that transferred by a change of county boundaries. Moore v. State [Ga.] 55 S. E. 327; Parker v. State [Ga.] 55 S. E. 329. Of the number of counties in a judicial district and the terms of court fixed by law therein. State v. Lu Sing [Mont.] 85 P. 521.

21. Names of circuit judges. Brunson v. State [Ala.] 39 So. 569.

22. That whiskey is intoxicating. Wilcoxson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581. That whiskey is a spirituous liquor. Fears v. State, 125 Ga. 140, 54 S. E. 661. That draw poker is a gambling game. City of Shreveport v. Bowen, 116 La. 522, 40 So. 859.

23. Judicial notice will not be taken of the bad condition of public roads in the county where the court sits. Ward v. State [Ala.] 39 So. 923.

24. That a "nickel" is lawful coin of the United States. Barddell v. State, 144 Ala. 54, 39 So. 975.

25. Where the classification of a city has been fixed by proclamation of the governor

Presumptions and burden of proof.[27]—The plea of not guilty puts in issue every essential fact, including the identity of accused, and the burden is on the prosecution to establish every essential fact beyond a reasonable doubt,[28] but this strictness of proof does not extend to the rebuttal of mere evidentiary presumptions.[29] Though by statute no inference of guilt is to be drawn from defendant's failure to testify,[30] the jury is warranted in taking most strongly against him the circumstances which if innocent he might have explained.[31] The burden is on the state to show that the offense was committed within the period limited for commencing the prosecution,[32] but it has been held that the burden of proving that the offense was committed in another state is on defendant.[33] In Georgia defendant must prove alibi to reasonable satisfaction of jury,[34] but the general rule is otherwise.[35] The burden of adducing evidence to bring the case within an exception in the statute is on accused, but a reasonable doubt on the whole case acquits.[36] The burden of adducing evidence of insanity is always on accused, but there is a conflict as to the burden of proof.[37]

Relevancy and competency in general.[38]—Every fact which is relevant to the issue as bearing on the circumstances of the crime, the identity of accused as the perpetrator thereof[39] or his motive or intent therein, or his mental capacity at the time of the offense,[40] and every fact relevant to facts in issue, either by way of substantiation[41] or disproof,[42] are admissible, irrespective of its weight if it has any

under a statute, it will be judicially noticed. State v. Ricksecker [Kan.] 85 P. 547.

26. Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354; Ex parte Luening [Cal. App.] 84 P. 445.

27. See 5 C. L. 1814.

28. People v. Wong Sang Lung [Cal. App.] 84 P. 843. Nature of conclusive and rebuttable presumptions discussed. Id.

29. The presumption of good character does not stand until disproved beyond a reasonable doubt. State v. Roupetz [Kan.] 85 P. 778.

30. See post, § 10E, for instructions.

31. People v Smith, 114 App. Div. 513, 100 N. Y. S. 259.

32. Stelle v. State, 77 Ark. 441, 92 S. W. 530.

33. State v. Barrington [N. C.] 53 S. E. 663.

34. Ryals v. State, 125 Ga. 266, 54 S. E. 168.

35. Evidence of alibi need only raise a reasonable doubt. Barton v. Territory [Ariz.] 85 P. 730. The adduction of proof of an alibi does not shift the burden. Hatch v. State, 144 Ala. 50, 40 So. 113.

36. Richardson v. State, 77 Ark. 321, 91 S. W. 758. Under an ordinance prohibiting saloonkeeper from allowing any woman to remain in a saloon, but making it a defense if such woman is of good repute, the burden of establishing such defense is on accused. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32.

37. When insanity of accused is a defense in a criminal proceeding, the burden of proving insanity to the satisfaction of the jury by a preponderance of the evidence is on the defendant. Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 S. W. 1057. Reasonable doubt as to sanity acquits. State v. Wetter, 11 Idaho, 433, 83 P. 341.

38. See 5 C. L. 1816.

39. Evidence that defendant was without money before the homicide and had money afterward is admissible in connection with proof that money was stolen at the time of the homicide. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127. Where there was no eye witness and the description of the offender in a dying declaration was vague, the fact that another person than accused was first arrested is not admissible for impeachment, and it is not admissible for any other purpose. People v. Gray, 148 Cal. 507, 83 P. 707. Where a witness to the purchase of a weapon by defendant testified to his clothing, evidence that defendant wore such clothing at that time is admissible in corroboration. People v. Weber [Cal.] 86 P. 671. Clothing worn by accused on the day of the alleged crime is admissible for purpose of identification. Boyd v State [Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053.

40. Evidence that carpenter work by defendant shortly before the homicide was well done is admissible to rebut insanity. Barnett v. State [Ala.] 39 So. 778. Letters of defendant exhibiting mental weakness are admissible on an issue of sanity. State v. Speyer, 194 Mo. 459, 91 S. W. 1075.

41. Corroborative evidence is relevant though addressed to a circumstance not essential to the offense. Where the prosecuting witness in incest testified that the intercourse was by force, evidence of a physical examination showing evidence of force is admissible. State v. Winslow [Utah] 85 P. 433. The opinion of the person to whom a dying declaration was made that another person than accused answered the description therein is inadmissible. People v. Gray, 148 Cal. 507, 83 P. 707. Where the fact of search for property is relevant, it is proper to show that it was made in consequence of certain information, but such testimony is not to be considered as proof of the facts noted. Cody v. State, 124 Ga. 446, 52 S. E. 750. Where the defense is that accused went to the

probative force;[43] but all such facts must, unless part of the res gestae of the crime,[44] be in some manner connected with the accused.[45] Evidence otherwise irrelevant may be admissible to explain or rebut similar evidence received.[46] Competent facts are not excluded by the fact that information leading thereto was derived from privileged sources,[47] and property found on illegal search of defendant's premises is admissible.[48] Evidence relating to a codefendant not on trial is admissible so far as it is inseparable from that relevant against defendant.[49] Where defendant lives and with whom he associates is relevant though it establishes that he is a person of lewd habits.[50] Taking of defendant's shoe for comparison with footprints was held not to violate prohibition against self-crimination,[51] and the result of such comparison is admissible;[52] that the comparison was made by putting the shoe into the tracks going to its weight, not to its admissibility.[53] To admit proof of trailing by bloodhounds, it must first be shown that the dogs were trained to track

wrong house by mistake, it is error to exclude testimony that he was drunk. Garrett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 263, 91 S. W. 577. Proof of the date of an occurrence by which a witness fixes a relevant date is relevant. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Where it appeared that the difficulty started because accused said that a statement by prosecutor was a lie, the truth or falsity of such statement is irrelevant. Coleman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 697, 91 S. W. 783. Where accused testified that he was joking when he made an insulting remark, it is proper to exclude evidence that he was in the habit of making joking remarks. Cross v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 701, 91 S. W. 223.

42. Where defendant claimed duress from fear of a secret society, proof that he was a member thereof is admissible in rebuttal. Commonwealth v. Campolla, 25 Pa. Super. Ct. 379. On trial for arson where insurance is shown, defendant may show that the property was not overinsured. State v. Harvey, 130 Iowa, 394, 106 N. W. 938. Evidence that a witness who testified to recognizing accused at considerable distance was very near sighted should be admitted. Mathison v. State, 87 Miss. 739, 40 So. 801. Evidence of the sale by accused of another animal not alleged to have been stolen held admissible for the purpose of identification. State v. Walker, 194 Mo. 253, 92 S. W. 659.

43. Where it appears that the fatal wounds must have been inflicted with a certain kind of weapon, evidence that before the homicide defendant had such a weapon in his possession is admissible, though the weapon was of a very common kind. Ordinary pocket knife. Morgan v. Ter., 16 Okl. 530, 85 P. 718. Testimony will not ordinarily be stricken merely because it is insufficient to prove the fact in question if it has some probative tendency. Maloy v. State [Fla.] 41 So. 791.

44. See post, this section. On trial for arson evidence of loss of life in the fire held irrelevant and prejudicial. State v. Harvey, 130 Iowa, 394, 106 N. W. 938.

45. Evidence of a declaration made by some one not named held error where there was evidence of killing pursuant to conspiracy, since the jury might make the unauthorized inference that it was by a conspirator. Morris v. State [Ala.] 41 So. 274. Articles of personal wear found at the scene of the crime are not admissible unless connected with accused. Testimony that one of a different given name than accused wore a pin like that found held insufficient. Field v. State [Ga.] 55 S. E. 502. On an issue whether defendant wrote certain typewritten letters, evidence that they were written on a machine in the town where defendant resided is relevant, though there is no showing of use of such machine by defendant. State v. Freshwater [Utah] 85 P. 447.

46. Where defendant testifies to his version of an interview, he cannot object to contradictory testimony as irrelevant. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. Though a conversation proved by the state is not relevant, accused has the right to give his version of it. Ray v. State [Ala.] 41 So. 519. Where the arresting officer has testified to a declaration by defendant, it is error to refuse to allow defendant to state his version thereof. Briggs v. People. 219 Ill. 330. 76 N. E. 499. Where prosecution proves statement, accused may show all that was said at that time but not what was said on another occasion. State v. Thompson, 116 La. 829, 41 So. 107.

47. Plan of house admissible though draftsman obtained information from defendant's wife and finding of cartridges admissible though found from information derived from defendant. Commonwealth v. Johnson, 213 Pa. 432, 62 A. 1064.

48. State v. Sulter, 78 Vt. 391, 63 A. 182. Property unlawfully taken from the person of defendant on his arrest is none the less admissible in evidence. Lawrence v. State [Md.] 63 A. 96; Duren v. Thomasville, 125 Ga. 1, 53 S. E. 814. Where officers making a search of defendant's premises did not act under a warrant which they had, the fact that their search was illegal does not exclude property found by them. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

49. Krens v. State [Neb.] 106 N. W. 27.

50. Osborn v. State [Tex. Cr. App.] 94 S. W. 900.

51. State v. Graham, 116 La. 779, 41 So. 90; Moss v. State [Ala.] 40 So. 340.

52. Identification of shoes as those taken from defendant held sufficient to admit evidence of comparison of tracks. Krens v. State [Neb.] 106 N. W. 27.

human beings.[54] Testimony as to a conversation is not to be excluded because the witness did not hear it all,[55] nor because he did not see the parties at the time.[56] Evidence on a trial for arson that the fire department had the premises watched for some days after the fire is not admissible.[57] It is not error to allow the prosecutrix in a rape case to testify that, being deserted by her husband, she supported herself.[58] Evidence of the argument of the prosecuting attorney on a former trial tending to show a change of theory is inadmissible.[59] On the issue whether deceased, a negro, had assumed the name by which he was designated in the indictment, evidence that many of the negroes on the plantation where he lived adopted such name is inadmissible.[60] Where it is doubtful whether an act shown under an indictment for a continuing offense was committed before or after the finding of the indictment, the court may admit the evidence and leave the question to the jury.[61]

Acts disclosing consciousness of guilt,[62] such as flight,[63] resistance of arrest,[64] false statements as to his knowledge of the offense,[65] attempt to escape from custody,[66] tampering with witnesses or attempt to suppress the prosecution,[67] are admissible; but attempts by a third person to bribe witnesses must be connected with accused,[68] and defendant is not entitled to prove that a third person attempted to suppress the prosecution.[69] Where flight is shown, defendant may prove that he voluntarily surrendered himself,[70] or that he fled from fear of violence,[71] or that he was insane,[72] but where no proof of flight has been offered, accused cannot prove that he made no effort to escape.[73]

53. State v. Graham, 116 La. 779, 41 So. 90.

54. Little v. State [Ala.] 39 So. 674. Trailing by dogs after proof of their training. Richardson v. State [Ala.] 41 So. 82. Evidence of training of bloodhounds held sufficient. Hargrove v. State [Ala.] 41 So. 972.

55. State v. Crump, 116 La. 978, 41 So. 229.

56. State v. Stukes, 73 S. C. 386, 53 S. E. 643.

57. People v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

58. People v. Murphy [Mich.] 13 Det. Leg. N. 602, 108 N. W. 1009.

59. People v. Darr [Cal. App.] 84 P. 457.

60. Stallworth v. State [Ala.] 41 So. 184.

61. Levan v. State, 125 Ga. 278, 54 S. E. 173.

62. See 5 C. L. 1818.

63. Allen v. State [Ala.] 41 So. 624. That defendant fled and was pursued by a crowd is admissible (Benjamin v. State [Ala.] 41 So. 739), but not that the pursuing crowd cried "murder" (Id.). Statements of accused that he intended to go away admissible to show preparation for flight. Bolton v. State [Ala.] 40 So. 409. Testimony of flight is admissible in case of open as well as secret crimes. State v. Nash, 115 La. 719, 39 So. 854. Where defendant was and what he was doing relevant in connection with proof of flight. Franklin v. State [Ala.] 39 So. 979.

64. Glass v. State [Ala.] 41 So. 727. Evidence of resistance of arrest is admissible where defense is temporary insanity. People v. Haxer, 144 Mich. 575, 13 Det. Leg. N. 303, 108 N. W. 90.

65. Denial of identity or false explanation of incriminating circumstances admissible. Franklin v. State [Ala.] 39 So. 979. That accused **under an unlawful "sweating" process by the police** denies all knowledge of the crime creates no inference against him, though on his trial he admits the killing and claims self-defense. Flynn v. People, 222 Ill. 303, 78 N. E. 617.

66. State v. Barnes, 47 Or. 592, 85 P. 998. Letter of defendant indicating intention to break jail. Bradford v. State [Ala.] 41 So. 462.

67. Evidence that prosecuting witness was offered money to stop the prosecution without evidence connecting defendant with the offer is error. People v. Long, 144 Mich. 585, 13 Det. Leg. N. 318, 108 N. W. 91. Offers to compromise cannot be shown. Sanders v. State [Ala.] 41 So. 466.

68. That defendant's father attempted to bribe a witness not admissible unless defendant is connected therewith. Sims v. State [Ala.] 41 So. 413.

69. Chamblees v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 145, 94 S. W. 220.

70. Allen v. State [Ala.] 41 So. 624. Where the evidence shows that accused surrendered himself and was released, no charge being made against him, proof that he was subsequently arrested outside the state is not such proof of flight as to admit self-serving declarations as to readiness to appear at any time. Sneed v. Ter., 16 Okl. 541, 85 P. 70.

71. People v. Easton, 148 Cal. 50, 82 P. 840. Turbulence and rioting after the homicide may be shown to rebut the inference from flight. Brown v. State [Miss.] 40 So. 737. Evidence that some one had threatened to shoot defendant not admissible to rebut inference from flight. Bolton v. State [Ala.] 40 So. 409.

72. No presumption from flight where de-

Remoteness[74] ordinarily goes to the weight of testimony rather than its admissibility.[75]

Other offenses, convictions, and acquittals.[76]—Other distinct offenses are ordinarily inadmissible.[77] Exception is made, however, of necessity, where the offenses are so blended that the proof of one necessarily involves the proof of the other,[78] or where evidence otherwise admissible incidentally tends to show another offense,[79] or when necessary to rebut an inference from a fact in evidence;[80] but where the evidence of a distinct crime has only a remote bearing on any issue in the case and its prejudicial effect is great, it is error to admit it.[81] Evidence of other

fendant was insane. People v. Easton, 148 Cal. 50, 82 P. 840.

73. Lingerfelt v. State, 125 Ga. 4, 53 S. E. 803.

74. See 5 C. L. 1818.

75. Finding of property of deceased in defendant's possession some months after homicide is admissible. State v. Barnes, 47 Or. 592, 85 P. 998. On a trial for murder by strychnine poisoning, a declaration by defendant several years before that he always kept strychnine on hand is admissible. State v. Woodard [Iowa] 108 N. W. 753.

76. See 5 C. L. 1818.

77. That accused made a business of stealing chickens not admissible, on trial for larceny of other property. Reagan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 239, 93 S. W. 733. It is error to allow prosecution for another crime twenty years before to be shown on cross-examination of accused. Ware v. State [Tex. Cr. App.] 92 S. W. 1093; Bryan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581. Another disconnected sale inadmissible on prosecution for violating local option law. Swalm v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 575. Independent offense not similar in incidents to that on trial not admissible to prove system. Illegal sale of liquor. Lane v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 882, 92 S. W. 839. That accused was actually guilty of a charge not admissible on trial for bribery of an officer with respect thereto. Haynes v. Com., 104 Va. 854, 52 S. E. 358. Subsequent assault on same person not admissible. Nesbit v. State, 125 Ga. 51, 54 S. E. 195. Similar previous assault on another person inadmissible in prosecution for rape. Nickolizack v. State [Neb.] 105 N. W. 895. Larceny from another some months previous to that charged. People v. Sekeson, 111 App. Div. 490, 97 N. Y. 917. In a trial for arson, proof that in past years other property of defendant was destroyed by fire. People v. Brown, 110 App. Div. 490, 96 N. Y. S. 957. Evidence that defendant in a homicide case lives on the earnings of a prostitute is incompetent. That a witness was cross-examined by defendant as to her prostitution does not make admissible evidence that defendant maintained her. People v. Cascone, 185 N. Y. 317, 78 N. E. 287.

78. Letter confessing another crime besides that on trial may go to the jury as a whole where they are so blended that the part relating to the offense on trial cannot be separately submitted. Taylor v. Com., 28 Ky. L. R. 1348, 92 S. W. 292. Shooting of another in same altercation. Hammond v. State [Ala.] 41 So. 761. Where one was both cut and shot by the same person, proof of the shooting is admissible though the information charges only the cutting. State v. Romano, 41 Wash. 241, 83 P. 1. Other property taken at same time. Bradford v. State [Ala.] 41 So. 452; Echols v. State [Ala.] 41 So. 298; Territory v. Livingston [N. M.] 84 P. 1021. On a trial for larceny, other property found on defendant's person and stolen at the same time as that described in the indictment is admissible. People v. Peltin, 1 Cal. App. 612, 82 P. 980. Killing of another person in same altercation. People v. McClure, 148 Cal. 418, 83 P. 437. Where defendant was accused of murder committed while in the perpetration of burglary, a confession is not inadmissible because it also tends to show the burglary. State v. Dalton [Wash.] 86 P. 590.

79. Pittman v. State [Fla.] 41 So. 385. Evidence, merely, that accused while on the way to the court house with the sheriff asked a certain person to go on his bond, does not show a previous offense. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220. Evidence that witness became acquainted with accused while acting as guard at a convict camp Hammock v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 905, 93 S. W. 549. That prosecutor on the day after the alleged assault assaulted a third person is not admissible to refute his testimony as to injuries received. Honeycutt v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 533, 92 S. W. 421. Testimony as to how long a witness has known defendant is not to be excluded because the witness is a prostitute. People v. Salas, 2 Cal. App. 537, 84 P. 295. Killing of officer in resistance of arrest. State v. High, 116 La. 79, 40 So. 538. No objection to declaration of accused that it incidentally appears that at the time of making it he was under arrest for other offenses. State v. Poole, 42 Wash. 192, 84 P. 727. Evidence of warden of foreign penitentiary that he had known defendant "three years and six months less good time" admissible to show absence of defendant to toll statute of limitations. State v. Moran [Iowa] 109 N. W. 187. Photograph of defendant in prison garb may be used for identification where it was alleged that at the time of the offense accused was smooth shaven. Id.

80. To rebut an inference that failure of officer to take down statement of prosecutrix was due to lack of belief therein, he may testify that it was because there were other girls making similar charges against accused. State v. Hummer, 72 N. J. Law, 328, 62 A. 388.

offenses is also admissible to show motive,[82] to prove knowledge or intent,[83] or where the several offenses form part of a single system,[84] and occasionally as part of a circumstantial case.[85] In crimes whose gravamen is voluntary sexual intercourse, other acts of the parties not too remote[86] are admissible to show inclination,[87] but not offenses by accused with other women.[88] Except for the purpose of impeachment,[89] or where the fact of conviction is in some manner relevant,[90] former convictions are not admissible, and in no event are the particulars of the former offense admissible merely because the fact of conviction is.[91] Previous indictment on which defendant was acquitted cannot be shown.[92] Where defendant was

81. On trial for murder by arsenical poisoning evidence that arsenic was found in the body of one who died in defendant's house, before the murder charged, offered ostensibly to show that there was arsenic in the house. People v. Collins, 144 Mich. 121, 13 Det. Leg. N. 178, 107 N. W. 1114.

82. Uttering of other forged notes. People v. Dolan [N. Y.] 78 N. E. 569. Evidence of incestuous relations of defendant and his daughter is admissible on a trial for murder in connection with proof that he was extremely jealous of deceased's attention to her. People v. Cook, 148 Cal. 334, 83 P. 43. On a trial for murder, evidence as to how many times defendant had visited a certain house of prostitution is admissible where jealousy over an inmate was the motive alleged. People v. Easton, 148 Cal. 50, 82 P. 840. Seduction of deceased's daughter and threats by deceased to prosecute him therefor. State v. Martin, 47 Or. 282, 83 P. 849.

83. Shooting at same person two hours later. State v. High, 116 La. 79, 40 So. 538. Other false pretenses. State v. Gibson [Iowa] 106 N. W. 270. To show that place where gambling occurred was public place. Winston v. State [Ala.] 41 So. 174. Other sales of liquor admissible to show defendant's authority on the premises. Untreiner v. State [Ala.] 41 So. 170. Where the crime charged is the making of a false receipt for the payment of money with intent to defraud, evidence of similar offenses or similar transactions by the same defendant is competent as tending to show the motive or intent with which the receipt in question was made, altered, or forged, and its use in connection with other instruments forged by the defendant. Lingafelter v. State, 8 Ohio C. C. (N. S.) 537. Proof of other forgeries held too remote to be admissible on scienter. People v. Dolan, 111 App. Div. 600, 97 N. Y. S. 929. Other debts than that alleged in prosecution for changing name with intent to defraud. Morris v. State, 144 Ala. 81, 39 So. 973. Similar false pretenses. State v. Briggs [Kan.] 86 P. 447. Obtaining money from others by similar false pretenses held not admissible to show intent. State v. Oppenheimer, 41 Wash. 630, 84 P. 588. Prior assaults admissible to show malice. People v. Dinser, 49 Misc. 82, 98 N. Y. S. 314. Possession of other stolen property on trial for receiving stolen goods. Beuchert v. State, 165 Ind. 523, 76 N. E. 111.

84. Other sales of liquor without license. State v. Peterson [Minn.] 108 N. W. 6. Other forgeries. Pittman v. State [Fla.] 41 So. 385. Operations of club designed to evade liquor laws. Walker v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 216, 94 S. W. 230. Must have been a connection in the mind of the author linking them together or it must be essential to identify the person by proving that the perpetrator of the offense shown must also have committed that on trial. Alsobrook v. State [Ga.] 54 S. E. 805. Unsuccessful attempts to rob, pursuant to a conspiracy, are admissible on trial of one conspirator for a robbery subsequently committed in pursuance of the same conspiracy. People v. Zimmerman [Cal. App.] 84 P. 446. Uttering of several forged notes drawn in the names of different persons held to be part of common plan. People v. Dolan [N. Y.] 78 N. E. 569.

85. On trial for theft of cattle, proof that hides of other cattle were found buried on defendant's land held admissible. Watters v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 524, 94 S. W. 1038.

86. Former acts at remote time held inadmissible in incest. Gillespie v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 68, 93 S. W. 556.

87. Adams v. State [Ark.] 92 S. W. 1123. Other acts of incest. Lipham v. State, 125 Ga. 52, 53 S. E. 817. Subsequent acts between same parties inadmissible in prosecution for rape. People v. Brown, 142 Mich. 622, 12 Det. Leg. N. 852, 106 N. W. 149. Prior and subsequent acts admissible on trial for statutory rape. People v. Morris [Cal. App.] 84 P. 463. Indecent liberties shortly previous to those charged may be shown. Grabowski v. State, 126 Wis. 447, 105 N. W. 805.

88. In a prosecution of statutory rape, evidence tending to show a like offense with another girl is inadmissible. State v. Marselle [Wash.] 86 P. 586. On trial for adultery prior intercourse with woman not identified as the one named in the indictment on trial, inadmissible. Commonwealth v. Shanor, 29 Pa. Super. Ct. 358.

89. See Witnesses, 6 C. L. 1975. Previous convictions cannot be proved unless defendant testifies. Code Cr. Proc. § 513, allows only proof of general bad character. People v. Gibson, 99 N. Y. S. 1052.

90. Former conviction of accused for gambling admissible on trial for murder where it appears that such conviction was procured on testimony of deceased. Hayes v. State [Ga.] 54 S. E. 809.

91. Prior conviction may be shown on cross-examination, but not particulars of the offense. State v. Mount [N. J. Err. & App.] 64 A. 124. Where admissions made by defendant while testifying in former prosecutions against him are offered as original evidence, it is error to permit proof of the fact of such prosecutions, but the admissions

separately indicted for killing two persons in a single altercation, the record of his acquittal on one is not admissible on trial for the other.[93]

Character and reputation.[94]—Defendant is entitled to show his general reputation in the community[95] before the offense[96] with respect to the traits involved in the charge made.[97]. Unless he shall do so, the prosecution is not entitled to prove his reputation.[98] Repute as to sanity is not admissible.[99] Testimony that witness knows defendant's reputation, and that it is good, is not to be stricken because he admits that he never heard it discussed.[1] Character being in the nature of a collateral issue, the court may, in its discretion, limit the number of witnesses thereon.[2]

Hearsay.[3]—Unsworn statements of third persons are inadmissible,[4] aside from a few well known exceptions.[5]

Admissions and declarations.[6]—Self-serving declarations by the accused are not admissible,[7] but incriminating declarations and admissions are whether made before[8] or after the commission of the offense,[9] including those implied from silence

should be shown without more. State v. Strodemier, 40 Wash. 608, 82 P. 915.

92. People v. Cascone, 185 N. Y. 317, 78 N. E. 287.

93. State v. Rosa, 72 N. J. Law, 462, 62 A. 695.

94. See 5 C. L. 1820.

95. Must be proved by general repute and not by particular acts. Jackson v. State [Ala.] 41 So. 178. That defendant had never been charged with crime is not admissible as part of proof of his good character for peace and quiet. Banks v. State [Ala.] 39 So. 921. Character cannot be proved by specific acts. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Cross-examination of one witness as to whether he knew of specific acts does not admit proof of such acts by another witness. Id.

96. What was said after the homicide as to defendant's reputation before is inadmissible. State v. Viscome, 78 Vt. 485, 63 A. 877.

97. Carter v. State [Ala.] 40 So. 82.

98. State v. Beckner, 194 Mo. 281, 91 S. W. 892. Evidence on a prosecution for vagrancy that defendant is reputed to be a pickpocket is error. State v. Stone, 96 Minn. 482, 105 N. W. 187.

99. Reed v. State [Neb.] 106 N. W. 649.

1. Sinclair v. State, 87 Miss. 330, 39 So. 522; Johnson v. State [Miss.] 40 So. 324.

2. Limitation of character witnesses to six held reasonable. State v. Rodriguez, 115 La. 1004, 40 So. 438.

3. See 5 C. L. 1820.

4. Conversation between third persons not in presence of accused. Smart v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 694, 92 S. W. 810; Marks v. State [Tex. Cr. App.] 92 S. W. 414. Admissions of victim of crime are not admissible as original evidence. State v. Hummer, 72 N. J. Law, 328, 62 A. 388. That one "claimed to be married," hearsay and inadmissible to support indictment for adultery. Tison v. State, 125 Ga. 7, 53 S. E. 809. A statement which might have been of the knowledge of the witness will not be presumed to be hearsay. That prosecutor had lost certain property. Nixon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 59, 93 S. W. 555. Inconsistent statements of witness not admissible as original evidence. Bishop v. State, 125 Ga. 29, 53 S. E. 807. Ex parte statements by physicians, since deceased, as to mental condition of defendant, are not admissible. Barnett v. State [Ala.] 39 So. 778. Declarations of codefendant when arrested inadmissible to corroborate his testimony in favor of defendant. Lewis v. State [Ala.] 39 So. 928. Statements of the injured person after the offense are not original evidence. Brown v. State, 127 Wis. 193, 106 N. W. 536. Ex parte declaration of third person of his own guilt inadmissible. State v. Bailey [Kan.] 87 P. 189. On indictment of public officer for assisting third person to wrongfully obtain certain public money, declaration of such third person out of court to receipt of such money is hearsay. State v. Mickler [N. J. Law] 64 A. 148. On an issue whether a certain payment was made to defendant, evidence that the person who testified to making the payment was credited therewith by the person on whose behalf he made it is hearsay. State v. Newman [N. J. Law] 62 A. 1008.

5. One may testify to his own age. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1053. Hearsay may be allowed as to a matter merely introductory. That witness started dogs on the trail at what he was told was the place of the homicide, the place being fully identified. Richardson v. State [Ala.] 41 So. 82. Family Bible kept by grandfather admissible. State v. Hazlett [N. D.] 105 N. W. 617.

6. See 5 C. L. 1821.

7. State v. Mitchell, 130 Iowa, 697, 107 N. W. 804. Letters of accused before homicide showing affection for deceased not admissible. State v. Speyer, 194 Mo. 459, 91 S. W. 1075. Exculpatory statement by accused five minutes after homicide not admissible. Little v. State, 87 Miss. 512, 40 So. 165.

8. General declaration of intent to commit a crime such as that charged, admissible on trial for assault with intent to rape. Bawcom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 222, 94 S. W. 462.

9. Admission of offense similar to that charged, admissible though it does not state time or place. Cook v. State, 124 Ga. 653, 53 S. E. 104. Ambiguous declaration

under accusation.[10] Declarations of third persons in the presence of defendant are not in themselves admissible. It is the conduct of defendant in respect thereto which alone is evidence.[11] That the witness did not understand all of a declaration by defendant does not exclude what he did understand.[12] Testimony as to a conversation between accused and his wife by one who overheard it is not inadmissible because the wife is incompetent to testify.[13] If defendant being subpoenaed before the grand jury voluntarily answers, his statements are not privileged.[14] The privilege against self-crimination extends only to testimonial crimination and does not exclude the result of a comparison of footprints with shoes taken from accused without his consent.[15] A sworn statement of defendant taken before his arrest and in a proceeding instituted wholly without authority is not privileged.[16] An affidavit for continuance made by defendant, in which he stated that a witness would testify to certain facts, is admissible against him where the witness when produced testified to the contrary.[17] It cannot be shown that defendant compromised a civil suit based on the same facts as the charge on trial.[18]

Confessions.[19]—Confessions of guilt are, if voluntary,[20] admissible, though ac-

admissible if in connection with other evidence it has an incriminating tendency. Allred v. State [Ga.] 55 S. E. 178. Declarations of defendant while under arrest not amounting to confession held not objectionable as unfairly obtained. Hoch v. People, 219 Ill. 265, 76 N. E. 356. Admission of defendant that he had "put on a little" on the check is admissible on a prosecution for raising a check. State v. Spiker [Iowa] 108 N. W. 233.

10. A remark of a codefendant to accused importing that their guilt was equal is admissible in connection with the failure of accused to reply. Finch v. Com., 29 Ky. L. R. 187, 92 S. W. 940. Statements in defendant's presence tending to incriminate him and not answered by him. Commonwealth v. Dewhirst, 190 Mass. 293, 76 N. E. 1052. Statements in defendant's presence are admissible, it being a question for the jury whether he heard them. State v. Rosa, 72 N. J. Law, 462, 62 A. 695. Defendant's silence when accused said "you will die some day and have to answer for this." State v. Sudduth [S. C.] 54 S. E. 1013. It must affirmatively appear that the statement was heard by accused and was of such a nature as to call for a denial by him. Lumpkin v. State, 125 Ga. 24, 53 S. E. 810 Accusations by deceased shortly before his death and the silence of accused. That accused was under arrest at the time held immaterial. People v. Sullivan [Cal. App.] 86 P. 834. Statements of third persons in presence of accused and his conduct with respect thereto. People v. Ah Lung, 2 Cal. App. 278, 83 P. 296.

11. People v. Weber [Cal.] 86 P. 671. Exclamation of bystander in presence of defendant shortly after homicide, admissible. Raine v. Com., 29 Ky. L. R. 66, 92 S. W. 276. Statements by third person in defendant's presence, which he promptly denies, are not admissible. Commonwealth v. Johnson, 213 Pa. 607, 63 A. 134. The admissibility of incriminating declarations in the presence of defendant depends on the theory that his silence is an admission, and accordingly it must clearly appear that he understood what was being said. Answer of injured person held inadmissible because it did not appear that defendant understood the questions. People v. Cascone, 185 N. Y. 317, 78 N. E. 287.

12. State v. Lu Sing [Mont.] 85 P. 521.

13. Ford v. State, 124 Ga. 793, 53 S. E. 335.

14. State v. Campbell [Kan.] 85 P. 784.

15. State v. Fuller [Mont.] 85 P. 369, collating the authorities. Result of comparison of defendant's footprints with those near the scene of the crime, where defendant made no objection to the comparison. State v. Arthur, 129 Iowa, 235, 105 N. W. 422.

16. Statement taken by justice to determine necessity of holding inquest. State v. Legg [W. Va.] 53 S. E. 545.

17. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838.

18. State v. Campbell, 129 Iowa, 154, 105 N. W. 395.

19. See 5 C. L. 1822.

20. Statements made by defendant while under arrest to a person with whom he was confronted for the purpose of identification, no threats or promises having been made, are admissible. Clay v. State [Wyo.] 86 P. 17. Whether accused was at the time of making a confession still under the influences which had induced a previous involuntary one held for the jury. Milner v. State, 124 Ga. 86, 52 S. E. 302. Confession induced by advice of employe of prosecutor held inadmissible. Smith v. State, 125 Ga. 252, 54 S. E. 190. Where it appeared that defendant was a weak minded person, a confession made while he was in custody in response to questions assuming his guilt is inadmissible, though no threats or promises were made. Peck v. State [Ala.] 41 So. 759. Confession held not to have been made under fear of mob violence. State v. High, 116 La. 79, 40 So. 538. Where the chief of police told defendant that it would be better for him if he made a certain statement and that he was liable to be hung, a confession is inadmissible. Maxwell v. State [Miss.] 40 So. 615. Confession made in response to a promise that witness would go to the solicitor and see what could be done held voluntary. State v. Perry [S. C.] 54 S. E. 764. Statement of officer that it would be better for

cused was at the time in custody.[21] In Texas, however, where accused was in custody, it must appear that he was warned that whatever he might say would be used against him.[22] Finding of stolen property at place indicated by confession is admissible even though the confession is not.[23] There should be a preliminary showing that the confession was voluntary,[24] or at least an absence of anything suggesting that it was not,[25] the sufficiency of the predicate being for the court[26] and resting largely in discretion.[27] Where it subsequently appears that a confession was procured by duress, it should be withdrawn.[28] Strict rules of proof require that the corpus delicti be first proved before a confession is admissible.[29] Several confessions at different times may be shown.[30] Transcript of shorthand notes of confession, verified by testimony of stenographer, is admissible.[31] Prosecution may contradict part of confession.[32]

Acts and declarations of co-conspirators[33] in furtherance of the conspiracy, not after object of conspiracy is completed,[34] are admissible after a preliminary showing of the fact of conspiracy.[35] Declarations of accused to a conspirator are admissible without preliminary proof of the conspiracy.[36] Testimony of a conspirator directly to the fact is not within the rule that conspiracy cannot be proved by declarations of a co-conspirator.[37]

Res gestae.[38]—Exclamations or other statements made at the time of the offense or so soon thereafter as to proceed from impulse rather than reflection are admissible,[39] whether made by the accused,[40] the person injured,[41] or third persons.[42]

accused if he confessed does not affect a confession to another officer several hours later. Pearsall v. Com., 29 Ky. L. R. 222, 92 S. W. 589.

21. Not necessarily involuntary because accused was in custody. State v. Baudoin, 115 La. 773, 40 So. 42; State v. Henderson [S. C.] 55 S. E. 117; Hamilton v. State [Ala.] 41 So. 940.

22. Incriminating acts under arrest are within the rule requiring warning. Lasister v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 67, 94 S. W. 233. Confession to another than the person warning accused is admissible if in such proximity to warning that accused may be presumed to have had it in mind. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 S. W. 545. Warning that any statement "might" be used sufficient. Garrett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 263, 91 S. W. 577. A confession is admissible, though after the statutory warning an officer told accused that he would die within an hour from a wound he had received. Jackson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 250, 91 S. W. 788.

23. State v. Moran [Iowa] 109 N. W. 187.

24. The rule as to preliminary proof of voluntariness applies to confessions and not to declarations of accused having only a circumstantially incriminating tendency. People v. Weber [Cal.] 86 P. 671. Statements designed to be exculpatory are not confessions within the rule requiring preliminary proof of voluntariness. State v. Campbell [Kan.] 85 P. 784. Formal predicate held sufficient. Richardson v. State [Ala.] 41 So. 82.

25. Confessions admissible in absence of showing that they were involuntary. Carpenter v. Com., 29 Ky. L. R. 107, 92 S. W. 552.

26. Admissibility of confession is for court. Pearsall v. Com., 29 Ky. L. R. 222, 92 S. W. 589.

27. State v. Henderson [S. C.] 55 S. E. 117.

28. State v. Willing, 129 Iowa, 72, 105 N. W. 355.

29. Proof of corpus delicti of murder held sufficient to admit confessions. People v. Fallon [Cal.] 86 P. 689.

30, 31. Lowe v. State, 125 Ga. 55, 53 S. E. 1038.

32. State v. Tilghman [Del. O. & T.] 63 A. 772.

33. See 5 C. L. 1823.

34. State v. Phillips, 73 S. C. 236, 53 S. E. 370; State v. Wells [Mont.] 83 P. 476. Fabrication of defense after arrest held within scope of conspiracy. State v. Dilley [Wash.] 87 P. 133.

35. Morris v. State [Ala.] 41 So. 274. Predicate held sufficient. State v. Brown, 130 Iowa, 57, 106 N. W. 379. Proof of conspiracy to rob held sufficient. State v. Dilley [Wash.] 87 P. 133; Lawrence v. State [Md.] 63 A. 96. Preliminary evidence of conspiracy to commit burglary held insufficient. State v. Arthur, 129 Iowa, 235, 105 N. W. 422. Preliminary proof of conspiracy to assault held insufficient. State v. Wheeler, 129 Iowa, 100, 105 N. W. 374. Sufficiency of the prima facie proof rests largely in discretion. State v. White [Or.] 87 P. 37. May be proved by the declarations of defendant alone. Morris v. State [Ala.] 41 So. 274. May be inferred from acts and circumstances. Id. Preliminary proof of conspiracy to defraud held sufficient. Lawrence v. State [Md.] 63 A. 96.

36. People v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370.

37. People v. Zimmerman [Cal. App.] 84 P. 446.

38. See 5 C. L. 1823.

39. Quarrel just prior to homicide at which deceased was present but took no part

An exclamation which is part of the res gestae is not to be excluded because made by an eye witness who is too young to testify.[43] Determination of what is part of res gestae rests largely in discretion.[44]

Expert and opinion evidence.[45]—Ordinarily, it is inadmissible for a witness to testify to a bare conclusion of fact.[46] An opinion or conclusion is admissible, however, where the nature of the facts on which it is founded makes their adequate statement impossible,[47] or where the matter is one involving such special knowledge that it is not to be supposed that the jury can unaided draw a proper inference therefrom.[48] As to such matters, any person shown to be of special learning and

not part of res gestae. State v. Kapelino [S. D.] 108 N. W. 335. On prosecution for larceny of check given to defendant as part of contribution to joint adventure, a check for the balance of such contribution given two days later held part of res gestae. People v. Hart, 99 N. Y. S. 758.

40. Resistance to persons endeavoring to separate accused and deceased is part of the res gestae. Powers v. Com., 29 Ky. L. R. 277, 92 S. W. 975. Self serving declaration of accused five minutes after the homicide no part of res gestae. Park v. State [Ga.] 55 S. E. 489. Narrative by defendant five minutes afterward no part of the res gestae, particularly where his mind has been diverted by another transaction since the homicide. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. Any statement of accused when first called on to explain the possession by him of stolen goods. Lanier v. State [Ga.] 55 S. E. 496. Statements of defendant some minutes after homicide while on his way to surrender himself not part of res gestae. Johnson v. State [Wis.] 108 N. W. 55.

41. Complaint by prosecutrix of aggravated assault made immediately after accused left the premises held part of the res gestae. Chambless v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 145, 94 S. W. 220. Remark of deceased in presence of defendant immediately after being shot held part of the res gestae. Smith v. State [Ala.] 40 So. 959. Statement that defendant had a pistol made by the person assailed during the altercation to persons who had come to his assistance, part of the res gestae. Simmons v. State [Ala.] 40 So. 660. Declarations of victim of abortion before going to see defendant held not part of res gestae. State v. Bly [Minn.] 108 N. W. 833. Statements by prosecutrix the day after a rape no part of the res gestae. In re Kelly, 28 Nev. 491, 83 P. 223. Statement by prosecutrix to a physician examining her the day after the alleged rape is not part of the res gestae. Brown v. State, 127 Wis. 193, 106 N. W. 536.

42. Frightened exclamation of bystander seeing defendant about to shoot part of res gestae. Shirley v. State, 144 Ala. 35, 40 So. 269. Evidence that after the homicide several persons got guns and started after defendant is not part of the res gestae. Teague v. State, 144 Ala. 42, 40 So. 312. Declaration of third person mortally wounded in same affray that defendant shot him and deceased held admissible as part of the res gestae. State v. Williams, 96 Minn. 351, 105 N. W. 265.

43. Grant v. State, 124 Ga. 757, 53 S. E. 334.

44. Johnson v. State [Wis.] 108 N. W. 55; State v. Kapelino [S. D.] 108 N. W. 335.

45. See 5 C. L. 1824.

46. Held conclusions: Whether appearance of accused when asleep was such as to indicate that he had recently committed offense. State v. Baudoin, 115 La. 837, 40 So. 239. That one was "gambling." Fleming v. State, 125 Ga. 17, 53 S. E. 579. Whether witness would have seen an exchange of weapons had it been made. Hammond v. State [Ala.] 41 So. 761. Statement of witness that he would not have made the mistake in brands which accused alleged in defense. Bryan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581. Opinion of express agent that package consigned to defendant contained whiskey. McNeely v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 516, 92 S. W. 419. That witness ceased attending church because of disturbance by accused. Deskin v. State [Tex. Cr. App.] 93 S. W. 742. Whether certain words operated to the terror of bystanders. Shuler v. State [Ga.] 55 S. E. 496. Defendant is not entitled to state for what purpose he carried a pistol. Smith v. State [Ala.] 40 So. 957.

Held not conclusions: Whether witness was close enough to have heard a remark had it been made. Hill v. State [Ala.] 40 So. 387. Whether a third person was joking when he made a certain statement. Hill v. State [Ala.] 41 So. 621. Evidence of comparison of footprints. Krens v. State [Neb.] 106 N. W. 27. That article purchased "looked like a bottle of wine." Dillard v. State [Ala.] 39 So. 584. That minor to whom liquor was sold did not look to be twenty-one years old. Ferguson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 572, 95 S. W. 111.

47. May state whether one was intoxicated. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569. Opinion as to identity when resting on facts known to witness is admissible. State v. James, 194 Mo. 268, 92 S. W. 679. Nonexpert may state whether a person was conscious. Walker v. State [Ala.] 41 So. 878. Any person may give an opinion of the time elapsing between two occurrences observed by him. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Nonexpert may state the character of the wounds found by him in the body of deceased. Hill v. State [Ala.] 41 So. 621.

48. Man familiar for many years with firearms competent to state opinion that report was that of a pistol. State v. Graham, 116 La. 779, 41 So. 90. Opinion of owner of dogs as to reason why they left the trail inadmissible. Richardson v. State [Ala.] 41 So. 82. Improper to allow witness to express

experience may express his opinion;[49] and some matters, such as sanity,[50] value of articles in ordinary use,[51] and other similar facts based on general observation,[52] are deemed subjects of nonexpert opinion in connection with the facts observed by him on which it is based.[53] When counsel states that he does not seek to examine a witness as an expert, questions proper only to an expert are properly excluded.[54] As hypothetical questions may assume any state of facts which might be found from the evidence, the latitude to be allowed in the framing of such questions rests in discretion.[55, 56] An expert may, as showing his qualification and familiarity with the subject, state that he has made experiments, but whether he shall be allowed to state the nature and detail of such experiments depends on the nature of the subject-matter and rests in the discretion of the court.[57] On an issue of handwriting, any properly authenticated writings may be received as standards for comparison.[58] The rule that standards of comparison must be proved by direct proof or other equivalent evidence means no more than that they cannot be proved by opinion or com-

an opinion as to course of bullet in plank which is before the jury. State v. Gallo, 115 La. 746, 39 So. 1001. Points of entrance and exit of fatal bullet where body is not before jury. People v. Weber [Cal.] 86 P. 671. How a loghouse would burn is not a subject of expert evidence. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. An expert in typewriting machines may testify that letters were written on a particular machine. State v. Freshwater [Utah] 85 P. 447. Whether a certain article is the one shown by a photograph is not a subject of expert testimony, the article and the photograph being before the jury. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127. Error to allow chief of fire department to express opinion that opening certain windows would produce a strong draft. People v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

49. One who has several times seen a person write is competent to express an opinion whether an instrument is in his handwriting. State v. Bond [Idaho] 86 P. 43; Pittman v. State [Fla.] 41 So. 385. A witness who has seen a person write but once may testify that a letter is in his writing. State v. Freshwater [Utah] 85 P. 447. One who has corresponded with a person is competent as to his handwriting, though never having seen him write. State v. Goldstein, 72 N. J. Law, 336, 62 A. 1006. The fact that letters have been the subject of conversation between recipient and alleged sender does not qualify the recipient to state by whom these and other letters in the same hand were written. State v. McBride [Utah] 85 P. 440. One who has been for years a merchant is competent as to the value of goods. Echols v. State [Ala.] 41 So. 298. One who has been a practicing physician for seventeen years is prima facie competent to express an opinion as to the cause of the physical condition of one examined by him. State v. White [Or.] 87 P. 137.

50. A lay witness may characterize acts observed by him as rational or irrational but may not state his conclusion as to the sanity of the person. People v. Pekarz, 185 N. Y. 470, 78 N. E. 294. A nonexpert cannot express an opinion as to defendant's ability to distinguish right and wrong. Reed v. State [Neb.] 106 N. W. 649. Nonexpert held competent to express opinion on sanity. State v. Hayden [Iowa] 107 N. W. 929.

51. Nonexpert opinion as to value of shoes. Moss v. State [Ala.] 40 So. 340.

52. Witness who states that he knows the smell of carbolic acid may state that the clothing of deceased smelled thereof. Green v. State, 125 Ga. 742, 54 S. E. 724. One not an expert may state whether a book before him shows certain entries. Lawrence v. State [Md.] 63 A. 96.

53. The mere personal appearance of a person as distinguished from his acts is not a sufficient basis of observation to admit a nonexpert opinion. People v. Pekarz, 185 N. Y. 470, 78 N. E. 294. Where a nonexpert has given an opinion with his reason therefor, repetition of the opinion without the reason is not error. People v. Easton, 148 Cal. 50, 82 P. 840. Lay witness to insanity may state facts on which opinion is based. State v. Speyer, 194 Mo. 459, 91 S. W. 1075. Nonexpert should not be allowed to state opinion on sanity without stating facts on which it is based. Henderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 76, 93 S. W. 550. Nonexperts cannot give an opinion as to an accused's mental condition on a prosecution for crime unless they state the facts on which the opinion is based. Fults v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 458, 98 S. W. 1057.

54. Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

55, 56. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127. Assumptions in hypothetical question as to health of deceased before alleged poisoning and as to subsequent symptoms held sustained by evidence. Hoch v. People, 219 Ill. 265, 76 N. E. 356.

57. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

58. On trial for forgery, signature of accused to motion for continuance held admissible as standard for comparison. Gaut v. State [Tex. Cr. App.] 94 S. W. 1034. Writings not proven and writings made at the trial for that purpose cannot be used as standards of comparison. Bolton v. State [Ala.] 40 So. 409. Evidence that certain sales slips were in defendant's writing held sufficient to admit them as standards for

parison and does not preclude circumstantial proof.[59] Expert may be allowed to use a photograph of an article in illustrating his testimony, though the article itself is in evidence.[60] The competency of an expert is regarded as a subordinate issue, and, accordingly, he may be examined on collateral matters bearing thereon.[61] Non-expert opinions are entitled to little or no weight unless supported by good reasons based on facts,[62] and the jury should consider an expert's qualifications and the reasons which he gives for his conclusions.[63]

Best and secondary evidence. Parol evidence to vary writings.[64]—The rule excluding parol evidence of the contents of a writing[65] or record,[66] except where it is but collaterally involved,[67] or the writing is lost or destroyed,[68] applies to criminal cases, as does the parol evidence rule and its well known exceptions.[69]

Documentary evidence,[70] if properly authenticated,[71] is admissible under the same rules as apply in civil cases.[72] A statute making certified copies of certain records admissible does not preclude proof of an examined copy as at common law,[73] and the copy need not have been taken by the custodian of the records.[74]

comparison. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

59, 60. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

61. People v. Pekarz, 185 N. Y. 470, 78 N. E. 294.

62. Reed v. State [Neb.] 106 N. W. 649.

63. State v. Collins [Del. O. & T.] 62 A. 224.

64. See 5 C. L. 1825.

65. Parol evidence of a letter shown to be in the possession of a known person not admissible. McCullough v. State [Tex. Cr. App.] 94 S. W. 1056. Secondary evidence of rent contract in prosecution based on violation thereof, error. Wilson v. State [Ala.] 39 So. 776. Parol evidence as to contents of insurance policy is inadmissible. State v. Harvey, 130 Iowa, 394, 106 N. W. 938. Original filed at sending office and not copy retained at delivery office is best evidence of telegram. Young v. People, 221 Ill. 51, 77 N. E. 536. Secondary evidence of contents of letters without accounting for original is error. Id.

66. Testimony of one that he was in occupation and control of burglarized premises is not secondary because he was agent of a corporation the minutes of which contained some entries as to his appointment. Calloway v. State [Tex. Cr. App.] 94 S. W. 902. That deceased had been tried for murder must be proved by the record. State v. Andrews, 73 S. C. 257, 53 S. E. 423.

67. Collateral fact may be proved by parol. Marriage of prosecutrix in rape case. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036. Description of accused as contained in notices published to secure his apprehension. Franklin v. State [Ala.] 39 So. 979. Public officer may testify to his official character. Bank examiner whom defendant was indicted for deceiving. State v. Twining [N. J. Law] 62 A. 402.

68. Designation of election officer may be proved by letter press copy if original is lost. People v. Ellenbogen, 99 N. Y. S. 897. Secondary evidence of the contents of letters sent to accused is admissible after demand on him to produce the originals. State v. Freshwater [Utah] 85 P. 447. Testimony of bank officers, based not on recollection but on the ordinary course of business, that certain papers had been delivered to accused ,held, in connection with notice to him to produce, foundation for secondary evidence. People v. Dolan [N. Y.] 78 N. E. 569.

69. Parol evidence is admissible to identify property as that covered by a chattel mortgage. State v. Jackson, 128 Iowa, 543, 105 N. W. 51. Receipt for money subject to demand of payor held ambiguous and subject to explanation by parol on prosecution for embezzlement. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 S. W. 545.

70. See 5 C. L. 1826.

71. The prosecution need not, preliminary to the introduction of a letter written by accused, show how it came into their possession. State v. Bond [Idaho] 86 P. 43. A letter signed with defendant's initials and relating to the charge against him, found on his person, is admissible without proof that it is in his writing. State v. Smith, 47 Or. 485, 83 P. 865. Where a letter is shown to be in defendant's writing and it and others relate to the same matter and are responsive to letters mailed to defendant, all are admissible. State v. Freshwater [Utah] 85 P. 447. Unsigned letter relating to fabrication of defense, apparently intended for defendant's alleged accomplices, which fell directly from his cell window, is admissible without proof of handwriting. State v. Dilley [Wash.] 87 P. 133.

72. Books of express company held admissible to show delivery of package. Jackson v. State [Tex. Cr. App.] 15 Tex. Ct, Rep. 572, 91 S. W. 574. An alteration in a writing signed by accused does not render it inadmissible. Application by defendant for gas on certain premises offered to show his ownership thereof. State v. Schaeffer [Kan.] 86 P. 477. Judgment against defendant in civil suit is not admissible to show facts therein adjudicated. Decree of divorce on ground of prior existing marriage not admissible on prosecution for bigamy. State v. Sharkey [N. J. Law] 63 A. 868. Railroad records made up from reports of car inspectors are

Demonstrative evidence and experiments.[76]—Objects connected with the offense,[76] and photographs[77] or reproductions[78] of such objects, are admissible. The allowance of experiments rests largely in discretion.[79]

Evidence at preliminary examination or at former trial.[80]—The information and affidavits are inadmissible as original evidence,[81] but if a witness be dead or absent from the jurisdiction, statutes in many states authorize the reception of his testimony on a former hearing of the case.[82] Ex parte declarations of absent witness are not within the rule.[83] Defendant's testimony at the inquest is not excluded by the fact that he was in custody at the time.[84] Testimony at coroner's inquest may be proved by the testimony of witnesses who heard it,[85] and the stenographer having testified to the correctness of his notes may read the same.[86]

Quantity required and probative effect.[87]—The evidence must establish every material averment of the indictment,[88] including the venue[89] and the time of the offense so far as that is material.[90] To warrant conviction on circumstantial evidence the circumstances must be consistent with each other and inconsistent with any rational hypothesis except guilt.[91] Affirmative evidence of good character is entitled to weight and in a close case may alone be sufficient to raise a reasonable

not admissible to show the result of such inspection. Commonwealth v. Berney, 28 Pa. Super. Ct. 61.

73. State v. Schaeffer [Kan.] 86 P. 477.

74. State v. Nippert [Kan.] 86 P. 478.

75. See 5 C. L. 1826.

76. Bullets fired from a weapon found on the premises are admissible for comparison with those taken from the body of deceased. People v. Weber [Cal.] 86 P. 671. Witness may use shoes of accused which are in evidence and describe tracks by reference to their peculiarities. State v. Langford [S. C.] 55 S. E. 120.

77. Photographs from which a party has been identified or from which a witness has been unable to identify him are admissible in evidence. State v. Rogers, 129 Iowa, 229, 105 N. W. 455. Photograph of article may be admitted though article itself is in evidence. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127. Photograph of scene of homicide with objects placed on ground where similar articles belonging to deceased were found is admissible. People v. Mahatch, 148 Cal. 200, 82 P. 779. A picture of the scene of the crime with a body representing that of deceased taken by a person who did not see the original situation is not admissible. People v. Maughs [Cal.] 86 P. 187. Photograph of deceased after death showing condition of body. Young v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 235, 92 S. W. 841. Changes in location of furniture not sufficient to exclude photograph of scene of crime taken several days after. State v. Rogers, 129 Iowa, 229, 105 N. W. 455.

78. A structure built in reproduction of the porch on which deceased was shot is admissible. People v. Maughs [Cal.] 86 P. 187.

79. Experiment as to power of child to fire pistol held proper. State v. Woodrow, 58 W. Va. 527, 52 S. E. 545.

80. See 5 C. L. 1827.

81. People v. Wolf, 183 N. Y. 464, 76 N. E. 592.

82. Morris v. State [Ala.] 41 So. 274. That a witness was absent from the county but within the state does not authorize use of testimony on former trial. Taylor v. State [Ga.] 55 S. E. 474. Testimony that one was a nonresident shortly before, though witness did not know where he was at the time of the trial, held sufficient to admit testimony at preliminary examination. Shirley v. State, 144 Ala. 35, 40 So. 269. Deposition before examining magistrate may be received where witness cannot be found, though prosecution might have bound him over to appear. People v. Flannery [Cal. App.] 84 P. 461.

83. Weatherford v. State [Ark.] 93 S. W. 61.

84, 85. Green v. State, 124 Ga. 343, 52 S. E. 431.

86. Morawitz v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 880, 91 S. W. 227.

87. See 5 C. L. 1827.

88. See, also, ante, § 4D, as to variance; ante, this section, as to burden of proof.

89. Miller v. State [Ga.] 55 S. E. 405; Walker v. State [Ala.] 41 So. 176; Odom v. State [Ala.] 40 So. 824. Venue of embezzlement held a question for jury. State v. Roland, 11 Idaho, 490, 83 P. 337. Testimony that the offense was committed "in the edge of" the City of T. sufficiently shows the jurisdiction of the city court of T. Lewis v. State, 124 Ga. 62, 52 S. E. 81. That the offense was committed at "Poncede Leon Park" not sufficient. Edwards v. Atlanta, 124 Ga. 78, 52 S. E. 297.

90. Where the accusation was filed January 9th, evidence that the offense was committed "in January" is insufficient to show that it was before the filing of the accusation. Lightner v. State [Ga.] 55 S. E. 477. See ante, § 4D, as to how far time is material.

91. Evidence of arson insufficient. State v. Morney, 196 Mo. 43, 93 S. W. 1117; State v. Sweizewski [Kan.] 85 P. 800. Must produce conviction beyond any reasonable doubt and the facts must be inconsistent with any other reasonable conclusion than guilt. State v. Collins [Del. O. & T.] 62 A. 224; State v. Tilghman [Del. O. & T.] 63 A. 772; State v. Hutchings [Utah] 84 P. 893. Discussion of theory and probative effect of circumstantial evidence. Dunn v. State [Ind.] 78 N. E. 198.

doubt of guilt, but the presumption of good character is a mere negation and not for the consideration of the jury.[92] Though only one witness testified for prosecution and six for defense, the question is for the jury.[93] Where the evidence for the state fixes the time of the offense as coincident with another occurrence, proof of an alibi need cover only the same time.[94] Testimony of an accomplice[95] is not ordinarily deemed sufficient unless corroborated by evidence tending in some manner to connect accused with the offense,[96] though in some states conviction may be had on uncorroborated testimony of an accomplice.[97] Corroborative evidence need not be beyond reasonable doubt.[98] A confession is not, unless made in open court,[99] sufficient to sustain a conviction unless there be independent proof of the corpus delicti;[1] and in Kentucky proof to corroborate confession must go to connection of accused with offense.[2] An admission coupled with a justification is not a confession.[3] Corpus delicti need not be established by proof entirely independent of the confession.[4] While entire confession is to be considered, jury may reject that which makes for defendant and credit that which incriminates him.[5] Statutes in some states require corroboration of the prosecuting witness[6] or testimony of more

92. People v. Pekarz, 185 N. Y. 470, 78 N. E. 294. Should be considered with the other evidence and given such weight as the jury may deem it justly entitled to. State v. Collins [Del. O. & T.] 62 A. 224.

93. Glover v. U. S. [Ind. T.] 91 S. W. 41.

94. Fortson v. State, 125 Ga. 16, 53 S. E. 767.

95. Whether a detective was an accomplice held a question for the jury. People v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370. Giving and receiving bribes being separate offenses under the statutes of California, the giver is not an accomplice of the receiver. Id. One falsely registering held not an accomplice of defendant who swore to the residence of such person. Prosecution for false oath before election officer. People v. Ellenbogen, 99 N. Y. S. 897. The fact that a witness is jointly indicted with defendant and has pleaded guilty does not as a matter of law make him an accomplice. Hargrove v. State, 125 Ga. 270, 54 S. E. 164. Owner who offers not to prosecute if goods are returned not an accomplice. Holley v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 509, 92 S. W. 422. One who merely knew that the crime was to be committed is not an accomplice. Best v. Com., 29 Ky. L. R. 137, 92 S. W. 555. Female not actively resisting is accomplice in incest. Pate v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 55, 93 S. W. 556; Gillespie v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 68, 93 S. W. 556. That an eye witness testified falsely in defendant's interest at the inquest does not make him an accomplice. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726. An officer administering an oath is not an accomplice to perjury therein because he knows at the time that the statement is false. Wilson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 939, 93 S. W. 547.

96. State v. Bond [Idaho] 86 P. 43. It is sufficient if standing alone it tends to connect defendant with the crime. People v. Bunkers, 2 Cal. App. 197, 84 P. 364, 370. Must be on some material fact which standing alone tends to connect defendant with the crime. State v. Knudtson, 11 Idaho, 524, 83 P. 226. Corroboration of accomplice held sufficient on prosecution for receiving stolen goods. Sexton v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 325, 92 S. W. 37. Evidence that defendant assisted in shipping stolen horses out of the state held sufficient corroboration of testimony of accomplice to his participation in larceny. Byrd v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 712, 93 S. W. 114.

97. State v. Wigger, 195 Mo. 90, 93 S. W. 390.

98. Lasater v. State, 77 Ark. 468, 94 S. W. 59.

99. Confession in justice court is not in the district court on appeal a "confession in open court" dispensing with independent proof of the corpus delicti. State v. Abrams [Iowa] 108 N. W. 1041.

1. Blacker v. State [Neb.] 105 N. W. 302; Hubbard v. State, 77 Ark. 126, 91 S. W. 11; People v. Frank, 2 Cal. App. 283, 83 P. 578. Evidence that death was by criminal agency held insufficient. Id. Arson. Williams v. State, 125 Ga. 741, 54 S. E. 651. Statutory rape. State v. Marselle [Wash.] 86 P. 586. Corpus delicti of infanticide held not proved. People v. Eldridge [Cal. App.] 86 P. 832. Corpus delicti of larceny of coal from railroad tracks held sufficiently proved to admit proof of confession. Daniels v. State [Ala.] 41 So. 525. Evidence of corpus delicti of rape held sufficient to support conviction on confession. State v. Lee [Mont.] 83 P. 223. Conviction may be had on confession and proof of corpus delicti. Bradshaw v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 149, 94 S. W. 223.

2. Corroborative evidence wanting on prosecution for forgery. Commonwealth v. Burgees, 28 Ky. L. R. 1128, 91 S. W. 266.

3. Admission of carrying concealed weapon with assertion of right as peace officer. State v. Abrams [Iowa] 108 N. W. 1041.

4. Hubbard v. State, 77 Ark. 125, 91 S. W. 11.

5. State v. Tilghman [Del. O. & T.] 63 A. 772. Evidence of admissions by accused is to be received with great caution, especially in a close case. State v. Hutchings [Utah] 84 P. 893.

6. Where corroboration of the injured

than a single witness in particular crimes.[7] Conviction may be had on the uncorroborated testimony of a member of a society for enforcement of the law under which the prosecution is had.[8]

§ 10. *Trial. A. Conduct of trial in general.*[9]—The regulation of proceedings rests largely in discretion, and appellate courts will rarely interfere with the decision of the trial judge on such matters as what persons not connected with the trial shall be allowed in the court room,[10] how many spectators shall be admitted,[11] where persons engaged in the trial shall sit in the court room,[12] allowing additional counsel to come into the case,[13] requiring repetition of testimony,[14] or permitting a witness to testify through an interpreter.[15] Where accused is deaf and dumb, the court should provide in some proper manner for the communication to him of the state's evidence.[16] Bringing of accused into court in irons is not ground of new trial.[17] Defendant is not entitled to be brought into court in company with other persons to guard against fabricated identification.[18] It is not improper for judge to call witness to the bench and converse with him in presence of jury but not in their hearing.[19] The court may allow use of magnifying glass in examining photograph in evidence.[20] Allowance of a view is discretionary,[21] but exhibition in court of clothing worn by accused on the day of the alleged crime is not a "view" within regulating statutes.[22]

Order of proof[23] is discretionary and the court may receive evidence out of order;[24] or reopen the case for additional evidence after argument has begun.[25]

person is required generally, it must extend to all the elements of the offense and connect defendant therewith. Pen. Code, § 283. People v. Smith, 114 App. Div. 513, 100 N. Y. S. 259. See, also, Rape, 6 C. L. 1237; Seduction 6 C. L. 1439.

7. One witness and corroborative circumstances to convict of false pretenses. Conduct of defendant when accusatory remark was made in his presence held a corroborating circumstance. People v. Smith [Cal. App.] 84 P. 449. See, also, Perjury, 6 C. L. 1000.

8. Practicing dentistry without a license. People v. Stein, 112 App. Div. 896, 97 N. Y. S. 923.

9. See 5 C. L. 1829.

10. Whether a codefendant not on trial shall be allowed to remain in the court room rests in discretion. Krens v. State [Neb.] 106 N. W. 27.

11. No reversal because spectators were permitted to overcrowd court room. Young v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 235, 92 S. W. 841. A rule of court which excludes from the court room all of the world, except officers of the court, witnesses, certain relatives, newspaper men, and those having special permission from the court to enter, is in violation of the guarantee of a public trial found in section 10 of article 1 of the State Constitution. Fields v. State, 4 Ohio N. P. (N. S.) 401.

12. It is not error to refuse to allow defendant to stand near the prosecuting witness while she is being examined as to her qualifications as a witness. Grabowski v. State, 126 Wis. 447, 105 N. W. 805.

13. That additional counsel for the state was permitted to come into the case after several jurors had been selected is not error where defendant was permitted to examine such jurors as to their relation to the attorney. State v. Flute [S. D.] 108 N. W. 248.

14. The court may require evidence to be repeated if it appears that a juror has not heard it, but the fact must clearly appear to require the court to do so of its own motion. Haddix v. State [Neb.] 107 N. W. 781.

15. No abuse of discretion in allowing interpreter where witness had but partial familiarity with English. People v. Salas, 2 Cal. App. 537 84 P. 295.

16. Requiring defendant's counsel to write down and exhibit to his client gist of the testimony as it was given, held not an abuse of discretion. Ralph v. State, 124 Ga. 81, 52 S. E. 298. Due process of law is not denied by failure to provide for reading of testimony to accused who was so deaf that he could not hear the witnesses. Felts v. Murphy, 201 U. S. 123, 50 Law. Ed. 689.

17. Burks v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 515, 94 S. W. 1040; State v. Temple, 194 Mo. 228, 92 S. W. 494; State v. Temple, 194 Mo. 237, 92 S. W. 869.

18. Boyd v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053.

19. Young v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 235, 92 S. W. 841.

20. State v. Wallace, 78 Conn. 677, 63 A. 448.

21. Thompson v. State [Fla.] 41 So. 899.

22. Boyd v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053.

23. See 5 C. L. 1829, n. 60. Crose v. State [Ala.] 41 So. 875; Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127; Pittman v. State [Fla.] 41 So. 385. Admission of alleged forged check before proof of forgery. People v. Tollefson [Mich.] 13 Det. Leg. N. 481, 108 N. W. 751. It is error to exclude evidence for want of foundation and then ex-

The court may properly refuse to receive hearsay testimony near the close of the trial, though the prosecuting attorney waives objection thereto.[26] That a witness was allowed to read from a book in evidence is not error in the absence of a showing that he read falsely.[27]

Conduct and remarks of judge.[28]—While the judge should avoid intimation of an opinion on the merits,[29] or needless interruption,[30] or reflection upon counsel,[31] it is not error for him to state the reasons for his rulings,[32] to characterize an objection as frivolous if it plainly is so,[33] to suggest to the prosecuting attorney that he supply certain proof,[34] to examine witnesses[35] though he should in so doing be careful to intimate no opinion on their credibility,[36] to give needful cautions to an ignorant or immature witness,[37] to reprimand[38] or fine for contempt[39] counsel or

clude the foundation when offered as repetition. People v. Harper [Mich.] 13 Det. Leg. N. 440, 108 N. W. 689.

24. Miller v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 35, 91 S. W. 582. Admitting in rebuttal evidence proper in chief rests in discretion. State v. Smith, 115 La. 801, 40 So. 171; Whitehead v. State [Ga.] 55 S. E. 404; State v. Douglas, 116 La. 524, 40 So. 860.

25. Fordham v. State, 125 Ga. 791, 54 S. E. 694; Thomas v. State, 125 Ga. 286, 54 S. E. 182. Receiving evidence in rebuttal after argument has commenced discretionary. McIntyre v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 544, 94 S. W. 1048. Held not an abuse of discretion. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 S. W. 1044. Discretionary to allow state to reopen case for further testimony. State v. Constatine [Wash.] 86 P. 384. Refusal to open case for further evidence, argument had begun, sustained. Bundrick v. State, 125 Ga. 753, 54 S. E. 683.

26. Grabowski v. State, 126 Wis. 447, 105 N. W. 805.

27. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838.

28. See 5 C. L. 1831.

29. Statement by court "the evidence is" that defendant did certain acts is error. Briggs v. People, 219 Ill. 330, 76 N. E. 499. Statement by court in ruling that witness had positively denied a certain statement error where witness only said he did not remember. Id.

30. Repeated, hostile, and unnecessary interruptions by the trial judge of cross-examination by defendant, held ground for reversal. State v. Hazlett [N. D.] 105 N. W. 617.

31. Reflections on good faith of counsel for defendant held improper but not ground for reversal. Miller v. Territory, 15 Okl. 422, 85 P. 239.

32. Statement in answer to request for charge that the evidence did not warrant it not an improper expression of opinion. Campbell v. State, 124 Ga. 432, 52 S. E. 914. It is not improper for the court in ruling out immaterial testimony to say that it is improper and has no bearing on the case. State v. Roland, 11 Idaho, 490, 83 P. 337. Remark of court in properly striking out an answer based on a report that the report itself would prove nothing is not error where the report was never offered. People v. Smith [Cal. App.] 84 P. 449. Remark of court in admitting testimony that it was admitted "for what it is worth" not ground for reversal. State v. Fuller [Mont.] 85 P. 369. It is not error for the court to state that a certain document has been destroyed, where he is passing on the admissibility of secondary evidence. Hoch v. People, 219 Ill. 265, 76 N. E. 356. That court in striking out testimony called attention to the fact that other testimony to the same issue remained not error. Commonwealth v. Combs [Pa.] 64 A. 873. Court may in presence of jury bind over witness on charge of perjury. Commonwealth v. Salawich, 28 Pa. Super. Ct. 330. Not error for court in allowing leading questions to state in presence of jury that witness is unwilling. State v. Cambron [S. D.] 105 N. W. 241. Where there is a controversy between counsel as to whether there is evidence of a fact, it is not error for the court to say that a certain witness testified thereto. Raven v. State, 125 Ga. 58, 53 S. E. 816.

33. Sawyer v. U. S., 202 U. S. 150, 50 Law. Ed. 972.

34. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036.

35. Miller v. Territory, 15 Okl. 422, 85 P. 239; People v. Dinser, 49 Misc. 82, 98 N. Y. S. 314.

36. State v. Hazlett [N. D.] 105 N. W. 617; Komp v. State [Wis.] 108 N. W. 46. Examination of witness on insanity held error. O'Shea v. People, 218 Ill. 352, 75 N. E. 981. Examining witness for defendant in hostile manner and then ordering him into custody is error. Huff v. Territory, 15 Okl. 376, 85 P. 241.

37. It is not error for the court to tell a little girl, prosecuting witness on a trial for indecent assault, that she need not be afraid of defendant or anyone else. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. Where a witness was asked on cross-examination how she saw certain things in view of other conditions testified to by her, it is not reversible error for the court to tell her that if she did in fact see them to say so. Boles v. People [Colo.] 86 P. 1030.

38. Where witness looked continually at defendant and, on the latter shaking his head, refused to answer, it is not error to admonish him and on his persistence to punish him for contempt. State v. Dalton [Wash.] 86 P. 590. Reprimand of defendant's attorney for persisting in improper questioning is not error. State v. Drake, 128 Iowa, 539, 105 N. W. 54.

39. Fining defendant's counsel in open

witnesses if just cause therefor be given, or to suggest to a witness the consequence of perjury,[30a] or to admonish officers of the court.[40] Where the court understands the foreign language in which a witness speaks, it is not error for him to suggest an alternative translation, the interpreter admitting its correctness.[41]

Consolidation[42] of several indictments may be made with defendant's consent.[43]

Severance[44] rests largely in discretion,[45] antagonism of defenses being the principal reason for its grant.[46] Motion for severance on ground that defenses are antagonistic must be verified or otherwise supported by proof.[47] Severance cannot be demanded of right after the jury is empaneled,[48] and, after entering on a joint trial, one defendant cannot rest on the state's evidence and demand that his case be submitted to the jury thereon before the evidence for the codefendant is heard.[49]

Appointment of counsel.[50]—Assistance of counsel being a constitutional guaranty, it is generally provided under legislative regulation[51] that, at defendant's request,[52] counsel may be appointed in case of inability to employ,[53] and an attorney may be appointed to assist one employed by the accused.[54] It is not ground for reversal that one of three attorneys appointed for defendant was permitted to withdraw.[55] When the attorney for a defendant has abandoned his client on the day of trial, it is proper for the court to appoint counsel for the defendant, if he has no means to employ a lawyer. This action of the court does not, however, discharge the paid attorney from the case.[56] *Private counsel* may appear to assist in the prosecution.[57]

Production, examination, and supervision of witnesses.[58]—The state need not call the prosecuting witness,[59] nor all the eye witnesses,[60] nor every witness whose

court for improper argument in defiance of admonition not ground for new trial. Spears v. People, 220 Ill. 72, 77 N. E. 112. Where a rule excluding witnesses was violated with defendant's knowledge and consent, he cannot complain of the commitment of a witness for contempt in the presence of the jury. Miller v. Territory, 15 Okl. 422, 85 P. 239. Punishment of witness for accused for flagrant contempt not error. Sims v. State [Ala.] 41 So. 413.

39a. People v. Soeder [Cal.] 87 P. 1016.

40. Public admonition to jury commissioners to draw no more jurors who would make affidavits impeaching their verdicts not harmful to one moving for a new trial on such affidavits, where the affidavits on which he relied were made before the admonition was given. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795.

41. Hoch v. People, 219 Ill. 265, 76 N. E. 356.

42. See 5 C. L. 1831.

43. Lucas v. State, 144 Ala. 63, 39 So. 821.

44. See 5 C. L. 1831.

45. State v. Barrett [N. C.] 54 S. E. 856; State v. Carrawan [N. C.] 54 S. E. 1002. Grant of separate trials to persons jointly indicted for misdemeanor is discretionary. State v. Sederstrom [Minn.] 109 N. W. 113.

46. Refusal of severance held harmless where neither defendant testified and no antagonism of interest developed. State v. Goodson, 116 La. 388, 40 So. 771. Grant of severance is discretionary and the fact that defenses may be antagonistic or that the defendants may disagree as to the challenge of jurors does not make the denial an abuse of discretion. State v. Johnson, 116 La. 855, 41 So. 117.

47. State v. Simon, 115 La. 732, 39 So. 971.

48. State v. Bush, 41 Wash. 13, 82 P. 1024.

49. State v. Johnny [Nev.] 87 P. 3. It is intimated that a defendant against whom the evidence has practically failed might claim such a severance. Id.

50. See 5 C. L. 1832.

51. Though the constitution guaranties to every person accused of crime the assistance of counsel, the legislature may make reasonable regulations as to appointment. Korf v. Jasper County [Iowa] 108 N. W. 1031.

52. Counsel can be appointed only at defendant's request (Korf v. Jasper County [Iowa] 108 N. W. 1031), but a request for appointment of an assistant made by defendant's employed counsel will be presumed to be made by defendant (Id.).

53. The order of appointment is conclusive on the county as to the propriety thereof. Korf v. Jasper County [Iowa] 108 N. W. 1031.

54. Korf v. Jasper County [Iowa] 108 N. W. 1031.

55. State v. Briggs, 58 W. Va. 291, 52 S. E. 218.

56. State v. Shay, 3 Ohio N. P. (N. S.) 657.

57. State v. Steers [Idaho] 85 P. 104.

58. The general rules relating to the interrogation of witnesses are found in the topic Examination of Witnesses, 7 C. L. 1598.

59. Prosecutrix was wife of accused. McCrear v. State [Tex. Cr. App.] 94 S. W. 899.

60. State v. Stewart, 117 La. 476, 41 So. 798; State v. Kapelino [S. D.] 108 N. W. 335.

name is indorsed on the indictment.[61] Counsel has no absolute right to a private interview with a person in custody who is subpoenaed as a witness for defendant.[62] Admitting the testimony of witnesses whose names are not indorsed on the indictment rests in discretion,[63] and the rule does not apply to rebuttal witnesses.[64] In Iowa, a witness is not confined to the matters as to which he was examined before the grand jury.[65] Where the prosecuting attorney refuses to make a preliminary examination of a witness in the absence of the jury as to the competency of a dying declaration, defendant should be permitted to examine him.[66] It is discretionary to exclude witnesses from the court room until they have testified,[67] or to allow the testimony of a witness who has violated a rule of exclusion,[68] or who has not been placed under it.[69]

Prisoner's statement under Georgia practice.—The prisoner in making his statement is not to be hampered by strict rules of evidence,[70] but cannot introduce inadmissible extrinsic matters to corroborate himself.[71]

Accused must be present[72] at all times during the trial,[73] at return of verdict,[74] but need not be present at proceedings preliminary to trial.[75] In a prosecution for misdemeanor accused may waive his right to be present at the return of the verdict,[76] and a holding by a state court that accused might in a felony case waive the right to be present at the examination of a juror does not deny due process of law.[77]

Absence of judge[78] from court room during argument is fatal.[79]

Where an alleged eye witness was not produced, it is error for the court to call such witness at the close of all the testimony where defendant's testimony tended to implicate such witness. People v. Harper [Mich.] 13 Det. Leg. N. 440, 108 N. W. 689.

61. State v. Campbell [Kan.] 85 P. 784.

62. State v. Goodson, 116 La. 388, 40 So. 771.

63. Error in given name of witness as indorsed on information not ground for excluding the witness where it is clear accused was not misled thereby. Reed v. State [Neb.] 106 N. W. 649. Admitting witnesses whose names are not on indictment rest in discretion and such witnesses are to be ordinarily excluded only where it appears that the state sought to conceal the identity of the witness. State v. Cambron [S. D.] 105 N. W. 241. Court may permit examination of witnesses not endorsed on indictment or named in bill of particulars. Schaumloeffel v. State, 102 Md. 470, 62 A. 803.

64. No objection lies to the admission in rebuttal of a witness whose name was not on the indictment. State v. Whitnah, 129 Iowa, 211, 105 N. W. 432.

65. State v. Seery, 129 Iowa, 259, 105 N. W. 511.

66. State v. Minor, 193 Mo. 697, 92 S. W. 466.

67. State v. Dalton [Wash.] 86 P. 590; McCullough v. State [Tex. Cr. App.] 94 S. W. 1056. Discretionary to excuse a witness from the rule. Brooks v. State [Ala.] 41 So. 156.

68. Benjamin v. State [Ala.] 41 So. 739; State v. Ilomaki, 40 Wash. 629, 82 P. 873; Green v. State, 125 Ga. 742, 54 S. E. 724. Refusal to exclude the testimony of a witness for violation of the rule held not an abuse of discretion where he testified only on a collateral issue and was the only witness thereon. State v. Goodson, 116 La. 388, 40 So. 771.

69. Watters v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 524, 94 S. W. 1038. Not abuse of discretion to exclude testimony of expert who had not been placed under the rule. McCullough v. State [Tex. Cr. App.] 94 S. W. 1056.

70. Nero v. State [Ga.] 55 S. E. 404.

71. Properly prevented from reading letters. Nero v. State [Ga.] 55 S. E. 404.

72. See 5 C. L. 1832.

73. Brief voluntary absence of accused during argument on motion not fatal. State v. McGinnis [Idaho] 86 P. 1089. It is error to deny the defendant the right to be present at a view if requested, and it is doubtful if he can waive such right. Id. Criticising State v. Reed, 3 Idaho, 754, 36 P. 706, as to the right to waive.

74. Dix v. State [Ala.] 41 So. 924; Wells v. State [Ala.] 41 So. 630.

75. That preliminary conference leading to announcement of ready for trial was had in absence of accused not material. Wooten v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 574, 94 S. W. 1060. Need not be present when the case is set down for trial. State v. LeBlanc, 116 La. 822, 41 So. 105. Accused need not be present during the ordering, drawing and calling of a venire. Colson v. State [Fla.] 40 So. 183.

76. Wells v. State [Ala.] 41 So. 630. A statute requiring defendant to be present in all cases "on the trial" is not inconsistent with one providing that his presence is unnecessary at the reception of the verdict in misdemeanor cases. Wyatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 148, 94 S. W. 219.

77. Howard v. Com., 200 U. S. 164, 50 Law. Ed. 421.

78. See 5 C. L. 1833.

79. Powers v. State [Neb.] 106 N. W. 332. Absence in adjoining room beyond hearing

(§ 10) *B. Argument and conduct of counsel.*[80]—While the offer of inadmissible evidence is not necessarily improper,[81] it is misconduct if persisted in after adverse rulings or is obviously done to get inadmissible matters before the jury.[82] It is ground for new trial that a private attorney of the prosecuting witness advised her by signals during her testimony without the knowledge of either defendant or prosecution.[83] Defendant cannot complain of a change of theory from the preliminary examination, though the theory advanced on the trial was first stated in the closing argument.[84]

Opening address.[85]—The prosecution is not required to make an opening statement, and, if one be made, need not outline all its proposed evidence,[86] but if such outline is attempted, evidence of doubtful admissibility should not be discussed,[87] but a narration of proper evidence in the opening does not become error on failure to produce it.[88]

In summing up[89] counsel may refer to any matter proved,[90] draw legitimate inferences from the testimony,[91] invite proper experiments by the jury,[92] and indulge in pertinent illustrations,[93] and may in illustration of argument make such arrangement of articles in evidence as he sees fit.[94] He should not state matters not

during argument is fatal. Miller v. State, 73 Ohio St. 195, 76 N. E. 823.

80. See 5 C. L. 1833.

81. Not misconduct to state in good faith the purpose for which testimony is offered, in answer to objection to its admission. Walker v. State, 124 Ga. 97, 52 S. E. 319. Repetition of offer of proof of prejudicial facts held not misconduct where the question of admissibility was a doubtful one. People v. Feld [Cal.] 86 P. 1100.

82. Offering a record which is plainly inadmissible with a statement of its contents, is misconduct. People v. Wolf, 183 N. Y. 464, 76 N. E. 592. Making repeated offer of proof of plainly inadmissible facts as to previous offense by defendant is ground for new trial. Nickolizack v. State [Neb.] 105 N. W. 895; People v. Collins, 144 Mich. 121, 13 Det. Leg. N. 178, 107 N. W. 1114. Improper for prosecutor to ask a witness for the state if he had been summoned by defendant, as this could not add to or detract from the weight of his testimony. Neilson v. State [Ala.] 40 So. 221. Insulting language to witness and efforts to prove that deceased left a widow and children after it had been ruled to be improper held prejudicial misconduct. State v. Trueman [Mont.] 85 P. 1024.

83. State v. Barker [Wash.] 86 P. 387.

84. People v. Weber [Cal.] 86 P. 671.

85. See 5 C. L. 1833.

86. People v. Weber [Cal.] 86 P. 671.

87. People v. Wolf, 183 N. Y. 464, 76 N. E. 592. Opening statement stating acts of others with respect to prosecutrix not connected with defendant held error. Id. Conviction set aside for improper statements in opening, notwithstanding instruction to disregard. Id. Statement that deceased had been a witness in a murder case growing out of a quarrel in defendant's saloon not error. Tended to show ill will between defendant and deceased. People v. Smith, 113 App. Div. 396, 99 N. Y. S. 118. May refer to another offense by defendant where proof thereof is admissible as bearing on motive. State v. Martin, 47 Or. 282, 83 P. 849.

88. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

89. See 5 C. L. 1834, n. 26 et seq.

90. Reference to other offenses shown by the evidence is permissible. State v. Cason, 115 La. 897, 40 So. 303. Where the jury have been allowed to examine a photograph with a magnifying glass, counsel may state what such examination will show. State v. Wallace, 78 Conn. 677, 63 A. 448.

91. Where it appears that several persons committed the crime in concert and that two of them spent a week together shortly before, it is proper to assert in argument that the conspiracy was then formed. Shirley v. State, 144 Ala. 35, 40 So. 269. Where the evidence justified an inference that the person assaulted was dead, it is proper to state in argument that he was. Id. Failure to produce a witness who is shown to be cognizant of material facts is proper subject of comment. Morgan v. State, 124 Ga. 442, 52 S. E. 748. That a knife found near the body of the deceased was accidentally dropped in drawing out a handkerchief. State v. Lee, 116 La. 607, 40 So. 914. Argument that the fact that the exact price was paid indicated that a transaction was a sale of liquor held not ground for reversal, though there was no evidence of the current price. Choran v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 508, 92 S. W. 422.

92. Not error to invite jury to experiment with a gun in evidence to see if the firing pin makes the same mark on shells as that on those found at the scene of the homicide. Fuller v. State [Ala.] 41 So. 774.

93. Reference by way of illustration to possibility of drunkenness being urged in extenuation of rape, held not error though the public mind was inflamed over a recent rape under the circumstances stated. State v. Bush, 117 La. 463, 41 So. 793. Statement that woman would know a man who assaulted her, made by way of illustration of an argument in a prosecution for forgery that one witness to identity was sufficient, not improper. Bolton v. State [Ala.] 40 So. 409.

94. People v. Weber [Cal.] 86 P. 671.

proved,[95] assert his personal belief as to the merits,[96] invoke the personal knowledge of jurors as to facts in issue,[97] discuss the question of punishment where the jury does not fix it,[98] refer to the possibility of pardon,[99] draw inferences which as a matter of law are unwarranted,[1] use abusive epithets,[2] or appeal to prejudice,[3] but warranted characterization of acts shown by the evidence is not improper.[4] Argument otherwise improper is sometimes excusable by reason of provocation by argument for accused.[5] Direct or indirect reference to the failure of the accused to

95. Neilson v. State [Ala.] 40 So. 221. Accusing defendant's counsel of fabricating defense and stating matters outside the record as to their conduct. Miller v. State, 73 Ohio St. 195, 76 N. E. 823. Statement by prosecuting attorney that defendant's employer was related to defendant's attorney, though improper, is harmless. White v. State [Ind. App.] 76 N. E. 544. Assumption without evidence of illicit relations between defendant and the wife of deceased held ground for reversal. State v. Williams, 116 La. 61, 40 So. 531. Statement that deceased's three orphan children were left to charity improper. Glass v. State [Ala.] 41 So. 727. Statement in argument that a previous conviction had been reversed on a bare technicality is ground for new trial. Whit v. State [Miss.] 40 So. 324. Statement of matters not in record held improper but not ground for reversal. State v. Burke, 11 Idaho, 420, 83 P. 228. Where incestuous relation between defendant and his daughter is proved as motive for murder of one paying attention to her, a statement in argument that defendant had caused to be sent to prison a man who was engaged to another daughter is error. People v. Cook, 148 Cal. 334, 83 P. 43. Inadvertent statement in argument of fact not in evidence cured by withdrawal and admonition. State v. Gordon, 115 La. 571, 39 So. 625. Error to relate previous case in which one convicted on similar evidence had confessed. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726. Though an accomplice testified to his own guilt, reference in argument to a confession by him not shown by the evidence is error. State v. Wigger, 196 Mo. 90, 93 S. W. 390. Where the affidavit on motion for continance is received as the testimony of an absent witness, it is ground for new trial for counsel to state that the witness if present would not have so testified. Carroll v. Com., 29 Ky. L. R. 33, 92 S. W. 308.

96. Statement of district attorney that he had investigated the case and believed accused guilty held not error in a case where the district attorney had testified to his investigations. State v. Gallo, 115 La. 746, 39 So. 1001. While the prosecuting attorney should not express a belief of defendant's guilt, it is entirely proper for him to assert a belief that the evidence shows guilt. People v. Weber [Cal.] 86 P. 671. Likewise, statement by district attorney that it was his habit to ask for conviction only in cases where he believed the accused guilty are not proper, in a homicide case (Cross v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 701, 91 S. W. 223) but would not be ground for reversal, especially in the absence of a requested written instruction and refusal of the same (Id.).

97. Reference to matter in issue as within the personal knowledge of the jurors is error. Ward v. State [Ala.] 39 So. 923.

98. Held harmless. People v. Salas, 2 Cal. App. 537, 84 P. 295.

99. Territory v. Neatherlin [N. M.] 85 P. 1044.

1. A prosecuting attorney in his argument to the jury should not refer to refusal of a witness to testify as to her relations with the defendant as an admission of guilt. Powers v. State [Neb.] 106 N. W. 332.

2. It is error to refer to defendant as an assassin. Ware v. State [Tex. Cr. App.] 92 S. W. 1093.

3. Denunciation of mulattoes of whom defendant was one held ground for new trial. Hampton v. State [Miss.] 40 So. 545. Statement that the blood of deceased called for a conviction and that the jury should be exiled unless they had the courage to render it. Patterson v. State, 124 Ga. 408, 52 S. E. 534. Reference to certain witnesses as "white men" held merely for identification and not an appeal to race prejudice. State v. Lee, 116 La. 607, 40 So. 914.

4. Evidence held to warrant statement that accused had "gone wrong" and "established a reputation as a gun man." Covington v. People [Colo.] 85 P. 832. Reference to defendant's testimony as "lies" not ground for reversal. State v. James County, 117 La. 419, 41 So. 702. Characterization of accused as a "white winged angel of peace with a Winchester rifle" not improper. State v. Cason, 115 La. 897, 40 So. 303. Statement that evidence showed that accused was a "monster" not improper on prosecution for incest. State v. Spurling, 115 La. 789, 40 So. 167. Argument reflecting on defendant's temper and suggesting intoxication held not ground for reversal. State v. Feazell, 116 La. 264, 40 So. 698. Where defendant testified, assertion in argument that he had added perjury to his other crimes not improper. People v. Salas, 2 Cal. App. 537, 84 P. 295. Defendant's testimony in a rape case such that it was not ground for reversal to refer to him in argument as a "thing" and a "brute." People v. Lambert, 144 Mich. 578, 13 Det. Leg. N. 299, 108 N. W. 345. Denunciation of witness not altogether unwarranted by evidence held not ground for reversal in view of instruction. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 S. W. 1044.

5. To justify improper argument as provoked by opponent, record must show alleged provocation. Flynn v. People, 222 Ill. 303, 78 N. E. 617. Statement by district attorney that if defendant had gone on stand it would have been shown that he had been previously convicted improper but not ground for reversal where provoked by improper argument of defendant's attorney and with-

testify is error.[6] The control of the argument[7] and the limitation of the time allowed therefor[8] rest largely in discretion, as does the question whether the reading of reported decisions shall be permitted.[9]

Defendant's counsel[10] is not entitled to refer to an informer's interest in the conviction where there is no evidence that any witness was the informer against defendant.[11]

Necessity of ruling and exception to preserve the objection to improper argument,[12] and *effect of instructions and admonitions* to cure improper argument,[13] are elsewhere treated.

(§ 10) *C. Questions of law and fact.*[14]—Questions of fact preliminary to the admission of evidence are for the court in the first instance, but should be submitted to the jury with instructions to reject the evidence if they find against its admissibility.[15] The competency of a witness of impaired mentality is for the court, his credibility for the jury.[16] Whether a witness is an accomplice is a question of fact.[17]

(§ 10) *D. Taking case from jury.*[18]—No material fact or issue should be taken from the jury if there is evidence supporting it;[19] but, in a prosecution for misdemeanor where the facts are all admitted, conviction may be directed.[20] Ordinarily, defendant is not entitled of right to a directed acquittal;[21] and in Idaho the court is not authorized to direct an acquittal but may so advise, which advice the

drawn at direction of court. State v. Suiter, 78 Vt. 391, 63 A. 182. Improper argument in answer to like argument for defendant not ordinarily ground of reversal. Mash v. People, 220 Ill. 86, 77 N. E. 92. Defendant's counsel having argued that if the state had proved the allegations in the indictment it was not entitled to a conviction because the indictment did not state an offense against the law, a statement in the argument of prosecuting attorney that the motion to quash the indictment had been overruled was justified. White v. State [Ind. App.] 76 N. E. 554. Improper argument by defendant's attorney does not justify counsel for the prosecution in stating a fact not in evidence. People v. Cook, 148 Cal. 334, 83 P. 43. In reply to improper statements. Denial of statement by defendant's counsel that only burglars who entered saloons were ever arrested. Jackson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 250, 91 S. W. 788.

6. The prohibition of comment "during trial" on failure of accused to testify applies to remarks to the court in the presence of the jury as well as in argument to jury (State v. Seery, 129 Iowa, 259, 105 N. W. 511), but not to statement to the court not in the presence of the jury. (Id.). Where all the eye witnesses except defendant testified, a statement that no one had denied that defendant killed deceased is a reference to defendant's failure to testify. Smith v. State, 87 Miss. 627, 40 So. 229. Explanation of absence of district attorney by his assistant that he had gone to the telephone, because he expected that one of the defendants would go on the stand no ground for reversal, the jury being properly instructed. State v. Thompson, 116 La. 829, 41 So. 107. Statement in answer to objection to secondary evidence of writing that the original was in defendant's possession is not a reference to defendant's failure to testify. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220. Statement on trial for theft of cattle that accused was bound to explain the fact that he and a large family were prospering on a fifteen acre place held not a reference to defendant's failure to testify. Watters v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 524, 94 S. W. 1038. Statement that certain incriminating circumstances were unexplained held not a reference to defendant's failure to testify. Wooten v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 574, 94 S. W. 1060. Comment on failure of accused to make a statement is ground for reversal. Caesar v. State, 125 Ga. 6, 53 S. E. 815.

7. State v. Carrowan [N. C.] 54 S. E. 1002.

8. On a trial for murder where over twenty witnesses were examined, a restriction to one and one-half hours for argument is error. State v. Mayo, 42 Wash. 540, 85 P. 251.

9. Chambless v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 145, 94 S. W. 220.

10. See 5 C. L. 1835.

11. Duke v. State [Ala.] 41 So. 170.

12. See post, § 14.

13. See post, § 15.

14. See 5 C. L. 1835.

15. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127. To determine whether witnesses are unwilling so as to allow leading questions. State v. Cambron [S. D.] 105 N. W. 241.

16. State v. Simes [Idaho] 85 P. 914.

17. Clay v. State [Wyo.] 86 P. 17.

18. See 5 C. L. 1836.

19. Morris v. State [Ala.] 41 So. 274; State v. Koch [Mont.] 85 P. 272; State v. Hill [N. C.] 53 S. E. 311.

20. Ligon v. State [Ala.] 39 So. 662; People v. Neal, 143 Mich. 271, 12 Det. Leg. N. 972, 106 N. W. 857; People v. Gardner, 143 Mich. 104, 12 Det. Leg. N. 936, 106 N. W. 541.

21. Leaptrot v. State [Fla.] 40 So. 616.

jury is not bound to follow,[22] but it has been held that where there is an entire failure of proof, it is the duty of the court to direct an acquittal.[23] An instruction in the nature of demurrer to evidence will be denied where there is any substantial evidence to show guilt.[24] Mistrial and continuance properly ordered on discovery of disqualification of juror.[25]

(§10) *E. Instructions. Necessity and duty of charging.*[26]—It is the duty of the court, if requested[27] in due time[28] and in writing if the rules so require,[29] to give proper instructions on the law relating to the case. Where a request is necessary, it may ordinarily be refused if erroneous,[30] though it has frequently been held the duty of the court to correct it.[31] Even as to those matters upon which the court

22. State v. Wright [Idaho] 85 P. 493.

23. State v. Miller, 47 Or. 562, 85 P. 81.

24. Indictment for assault with intent to kill. State v. Stuart, 116 Mo. App. 327, 92 S. W. 345.

25. Armor v. State, 125 Ga. 3, 53 S. E. 815.

26. See 5 C. L. 1836.

27. If defendant desires a special instruction or to have one given made more specific, he must present a request therefor. Huff v. Territory, 15 Okl. 376, 85 P. 241; Randall v. State, 124 Ga. 657, 52 S. E. 889; Thomas v. State [Ga.] 54 S. E. 813; State v. Worley [N. C.] 53 S. E. 128. Where the justification claimed was an assault on defendant while he was endeavoring to recover his hat, it is not error for the court to fail to charge of its own motion on his right to retake the hat. State v. Groves, 194 Mo. 452, 92 S. W. 631. Submission of included offense must be requested, at least when it is doubtful whether the evidence justifies its submission. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Definition of offense in language of statute sufficient in absence of request. People v. Castile [Cal. App.] 86 P. 746. Defensive matters shown only by the prisoner's statement need not be specially charged in the absence of a request. Young v. State, 125 Ga. 584, 54 S. E. 82; Jackson v. State, 125 Ga. 277, 54 S. E. 167; Crawford v. State, 125 Ga. 793, 54 S. E. 695. Definition of reasonable doubt must be requested. Commonwealth v. D'Angelo, 29 Pa. Super. Ct. 378. Instruction as to power to recommend that accused be punished for misdemeanor, without stating that the court could disregard such recommendation, is not error in the absence of a request. Lingerfelt v. State, 125 Ga. 4, 53 S. E. 803.

Instructions as to weight and effect of evidence must be requested: Instruction that two witnesses or equivalent needed to convict of perjury must be requested. Scott v. State, 77 Ark. 455, 92 S. W. 241. Not as to credibility of witnesses unless requested. Graham v. State, 125 Ga. 48, 53 S. E. 816; Lewis v. State, 125 Ga. 48, 53 S. E. 816. As to credibility of dying declarations must be requested. Hall v. State, 124 Ga. 649, 52 S. E. 891. No reversal for failure to charge without request as to weight of prisoner's statement unless prejudice appears. Culver v. State, 124 Ga. 822, 53 S. E. 316. If a more specific instruction as to alibi than a mere definition is desired, it should be requested. People v. Weber [Cal.] 86 P. 671. Instruction limiting evidence to purpose for which it was admitted must be requested. People v. Castile [Cal. App.] 86 P. 745. Charge that animus of witness might be considered must be requested. Fears v. State, 125 Ga. 740, 54 S. E. 661; Coody v. State, 125 Ga. 295, 54 S. E. 180. Specific instruction as to credibility of accomplice need not be given unless requested. State v. Heir, 78 Vt. 488, 63 A. 877. Instruction on credibility of expert testimony need not be given unless requested. State v. Hayden [Iowa] 107 N. W. 929. Charge on weight of confession must be requested. Nail v. State, 125 Ga. 234, 54 S. E. 145; Patterson v. State, 124 Ga. 408, 52 S. E. 534. Instruction on character need not be given unless requested. Sweet v. State [Neb.] 106 N. W. 31; State v. Smith, 47 Or. 485, 83 P. 865. Instruction limiting effect of evidence must be requested. Morris v. State [Ala.] 41 So. 274. Effect of impeachment of witnesses. Cress v. State [Ga.] 55 S. E. 491. Though it is good practice to give an instruction on circumstantial evidence in every case where the evidence demands it, it is not error to fail to do so in the absence of a request. State v. Bartlett, 128 Iowa, 518, 105 N. W. 59.

28. Requests not presented before argument as required by rule. State v. Gordon, 115 La. 571, 39 So. 625. Request first made when jury return for additional instructions on another question is too late. State v. Smith, 47 Or. 485, 83 P. 865.

29. Though a judge has customarily received oral requests, he cannot be put in error by the refusal of one. Campbell v. State, 124 Ga. 432, 52 S. E. 914.

30. Court may, but is not required to, modify an incorrect request. People v. Wong Sang Lung [Cal. App.] 84 P. 843. In a prosecution for misdemeanor, the court need not correct a request. Shaw v. State [Tex Cr. App.] 15 Tex. Ct. Rep. 403, 91 S. W. 1087. Request containing omissions which destroy the sense. McCurley v. State [Ala.] 39 So. 1022. Request using the word "defendant" for "deceased" properly denied. Banks v. State [Ala.] 39 So. 921. Instruction as to intoxication disabling from formation of specific intent need not be given if it ignores evidence that the intent was formed before accused became intoxicated. State v. Dillard [W. Va.] 53 S. E. 117. Request using "acquit" instead of "convict." Shirley v. State, 144 Ala. 135, 40 So. 269. The Indiana Act of 1903 relating to the modification of requested instructions does not apply to criminal cases. The title indicates that it is a regulation of civil procedure only. Guy v. State [Ind App.] 77 N. E. 855.

31. In prosecutions for serious crimes, re-

should charge without request, accused cannot complain that no charge other than a request by him was given.[32] All the instructions desired on the subject of defendant's character should be embraced in a single request.[33] Several instructions asked together are properly refused if any one is incorrect.[34] It is sufficient if requests are substantially given.[35] Requests adequately covered by the instructions given are properly refused,[36] but a brief, general, and colorless instruction limiting effect of evidence of other offenses has been held not to justify refusal of request.[37] An instruction need not be given unless there is evidence on which to predicate it,[38] and the matter is in issue.[39] Thus, while an instruction on circumstantial evidence should ordinarily be given where such evidence alone is relied on,[40] it need not be given if there is direct evidence as well.[41] On joint trial where the evidence is direct as to one defendant and circumstantial as to the other, the court may charge as circumstantial evidence as to one and refuse such charge as to the other.[42] Instructions should be given on the elements of the offense charged,[43] and all included offenses of which

quested instructions should not be refused for slight inaccuracy, but should be corrected and given. Montgomery v. State, 128 Wis. 183, 107 N. W. 14.

32. Walker v. State, 124 Ga. 97, 52 S. E. 319.

33. People v. Birnbaum, 114 App. Div. 480, 100 N. Y. S. 160.

34. Clover v. State [Ala.] 40 So. 354.

35. State v. Burnett [N. C.] 55 S. E. 72.

36. Stats v. Athey [Iowa] 108 N. W. 224; Mash v. Peopls, 220 Ill. 86. 77 N. E. 92; Spears v. People, 220 Ill. 72, 77 N. E. 112; Hoch v. Peopls, 219 Ill. 265, 76 N. E. 356; Morris v. State [Ala.] 41 So. 274; Sims v. State [Ala.] 41 So. 413; Hill v. State [Ala.] 41 So. 621; Hainey v. Stats [Ala.] 41 So. 968; Stats v. Wilson, 42 Wash. 66, 84 P. 409; People v. Smith [Mich.] 13 Det. Leg. N. 714, 108 N. W. 1072; People v. Cook, 148 Cal. 334, 83 P. 43; People v. Eldridge, 147 Cal. 782, 82 P. 442; State v. Roland, 11 Idaho, 490, 83 P. 337; State v. Shour, 196 Mo. 202, 95 S. W. 405; White v. State, 125 Ga. 256, 54 S. E. 188; Perdue v. State [Ga.] 54 S. E. 820; People v. Castille [Cal. App.] 86 P. 745; Robinson v. Com., 104 Va. 888, 52 S. E. 690; Robinson v. Territory, 16 Okl. 241, 85 P. 451; State v. Cotteral [Idaho] 86 P. 527; Blanton v. State [Fla.] 41 So. 789; Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220; State v. Davis, 194 Mo. 485, 92 S. W. 484; State v. Valle, 196 Mo. 29, 93 S. W. 1115. Request as to presumptions and burden of proof held embraced in instructions given. Parsons v. People, 218 Ill. 386, 75 N. E. 993. Where a general instruction is given to disregard all testimony stricken out, refusal of an instruction applicable to particular testimony is not error. People v. Weber [Cal.] 86 P. 671. Request as to circumstantial evidence held covered by instructions given. Parsons v. People, 218 Ill. 386, 75 N. E. 993. Instruction as to effect of single fact inconsistent with guilt on circumstantial case held not covered by instructions given. Dunn v. State [Ind.] 78 N. E. 198. If the requests are substantially covered by the charge, it is sufficient though the language used is not so emphatic. Reed v. State [Neb.] 106 N. W. 649.

37. People v. Cook, 148 Cal. 334, 83 P. 43.

38. Knight v. State [Ala.] 41 So. 734. Requests not based on evidence properly refused. People v. Trebilcox [Cal.] 86 P. 684. Unless the proof of an alibi covers the very time of the offense, an instruction on the subject need not be given. Barbs v. Territory, 16 Okl. 562, 86 P. 61. Evidence that accused was a boy of less than average intelligence held not to require submission of insanity. Kirby v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 73, 93 S. W. 1030. Statement held to show defendant guilty as principal in the second degree and accordingly to warrant charge on confessions. Lowe v. State, 125 Ga. 55, 53 S. E. 1038.

39. Where defendant's intent was obvious from his undisputed acts, it need not be submitted. Assault. Crowe v. Com., 29 Ky. L. R. 12, 91 S. W. 663. Not error to refuse an instruction to acquit unless name of prosecutrix was as alleged where the evidence as to her name was clear and undisputed. Coker v. State [Ala.] 41 So. 303.

40. Lasister v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 67, 94 S. W. 233.

41. Smith v. State, 125 Ga. 296, 54 S. E. 127; Perdue v. State [Ga.] 54 S. E. 820; Gaut v. State [Tex. Cr. App.] 94 S. W. 1034; State v. Gereke [Kan.] 86 P. 160; Rosenthal v. State [Ga.] 55 S. E. 497; State v. Gordon, 115 La. 571, 39 So. 625; Garrett v. Stats [Tex. Cr. App.] 15 Tex. Ct. Rep. 263, 91 S. W. 577; Nixon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 59, 93 S. W. 556; Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726. Where stolen property is found in defendant's possession and the only issue is as to the truth of his explanation of such possession, a charge on circumstantial evidence is not necessary. State v. Overson [Utah] 83 P. 557. Where a witness stood within a few feet of defendant at the time of the homicide, the case is not one of circumstantial evidence because he was not looking at defendant the instant that the shot was fired. Covington v. People [Colo.] 85 P. 832. Implied admission of guilt by accused held to make charge on circumstantial evidence unnecessary. McElroy v. State, 125 Ga. 37, 53 S. E. 759. Where thers is proof of a confession, need not charge on circumstantial evidence. Smith v. State, 125 Ga. 296, 54 S. E. 127.

42. Rosenthal v. State [Ga.] 55 S. E. 497.

conviction might be had,[44] and on every defensive issue raised by the evidence[45] as well as on the burden of proof and presumption of innocence;[46] but it has been held that reasonable doubt need not be defined,[47] and it is ordinarily held not error to refuse instructions on the weight and effect of particular evidence,[48] nor as to the consequences of acquittal or conviction.[49] It is reversible error to refuse to charge that defendant's failure to testify creates no presumption against him.[50] Defendant is not entitled to an instruction that his presumptive good character is to be considered. It is only when affirmative evidence of good character is given that the jury need be instructed to consider it.[51] An instruction to disregard testimony which has been stricken out on the trial is superfluous.[52]

Submission of charge.[53]—In some states it is required that instructions be in writing[54] unless they are taken down by a stenographer,[55] while in other jurisdictions it is optional.[56] Instruction on presumption of innocence is sufficiently given where the court overlooks it until the jury are about to retire and then recalls them and gives it in due form.[57] The court may without request give additional instructions after the retirement of the jury and if such instructions are fair and correct they will not be presumed to have coerced the verdict.[58] Inquiry by jury may be answered by reading the part of the charge that bears thereon and the court need not read the whole charge nor answer the question categorically.[59] The court should only answer questions of jury as to matters of law.[60]

43. "Malice" and "willfulness" should be defined where they are elements of the crime. State v. Harvey, 130 Iowa, 394, 106 N. W. 938. Where an offense is not divided into degrees, the court need instruct as to what would constitute such offense, only as the evidence requires. State v. Kapelino [S. D.] 108 N. W. 335.

44. Included offense of which conviction might be had under the evidence must be fully and fairly submitted. Newton v. State [Fla.] 41 So. 19. Because the jury found the defendant guilty of an included offense, it does not follow that instructions submitting the crime charged were inapplicable. Haddix v. State [Neb.] 107 N. E. 781.

45. Accident. State v. Legg [W. Va.] 53 S. E. 545.

46. When requested a specific instruction as to the presumption of innocence should be given. State v. Mayo, 42 Wash. 540, 85 P. 251. Instruction for acquittal, if evidence can be reconciled on any reasonable hypothesis other than guilt, should be given. Larrance v. People, 222 Ill. 155, 78 N. E. 50.

47. Nash v. State [Ga.] 55 S. E. 405.

48. Court is not required to instruct as to weight of accomplice testimony. Commonwealth v. Phelps [Mass.] 78 N. E. 741. Evidence as to the reputation of a witness is not ordinarily susceptible of improper use and accordingly it is not error to refuse an instruction limiting it to purposes of impeachment. Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 94 S. W. 227. It is not error to refuse to instruct that no inference against defendant is to be drawn from the failure of his codefendants to testify. State v. White [Or.] 87 P. 137. Need not charge that positive testimony should be given more weight than negative. State v. Green, 115 La. 1041, 40 So. 451.

Improperly refused: Failure to instruct in the terms of the statute as to the weight of the defendant's statement is ground for new trial. Vinson v. State, 124 Ga. 453, 52 S. E. 761. Where confession is principal evidence and there is testimony that it was involuntary, it is error not to instruct as to rejection of involuntary confessions. People v. Maxfield [Mich.] 13 Det. Leg. N. 680, 108 N. W. 1087. An instruction that the jury should consider the appearance of witnesses, manner of testifying, apparent candor or lack thereof, and their means of knowledge, should be given. State v. Beeskove [Mont.] 85 P. 376.

49. Jury need not be instructed as to imposition of costs in case of acquittal. Commonwealth v. Clymer, 30 Pa. Super. Ct. 61.

50. People v. Provost, 144 Mich. 17, 13 Det. Leg. N. 136, 107 N. W. 716, collating and analyzing the cases.

51. People v. Pekarz, 145 N. Y. 470, 78 N. E. 294.

52. State v. Roupetz [Kan.] 85 P. 778.

53. See 5 C. L. 1841.

54. Statement that definition of reasonable doubt given in argument is probably correct is not an instruction which must be in writing. State v. Logan [Kan.] 85 P. 798. Admonition to disregard improper argument coupled with a statement as to the presumption of innocence is not an instruction which must be in writing. State v. Smith [Iowa] 109 N. W. 115.

55. The stenographer whose presence will excuse the court from instructing in writing under Laws 1903, c. 81, § 1, must be an official stenographer. State v. Mayo, 42 Wash. 540, 85 P. 251.

56. Though it is better practice to instruct in writing, oral instructions are not error. State v. Woodrow, 58 W. Va. 527, 52 S. E. 545.

57. Perdue v. State [Ga.] 54 S. E. 820.

Form of instructions in general.[61]—It is proper to read the information to the jury in connection with the charge;[62] or to instruct that proof of all the allegations of the indictment warrants conviction is proper where such averments adequately describe the offense.[63] It is proper to frame the general charge on the evidence alone and instruct separately as to the prisoner's statement.[64] A charge correctly presenting one theory is not objectionable for failure to refer to another presented by a separate instruction.[65] Instructions correcting the effect of misstatement of law by defendant's counsel may be given.[66] It is improper in Kentucky to give an instruction reciting in brief the facts relating to the offense charged.[67] The instructions must be based on the evidence[68] and responsive to the issues,[69] and must not ignore any part thereof[70] nor so single out any particular matter as to give it undue prominence.[71] Elliptical phrases should be avoided.[72] Instructions must be consistent with each other[73] and free from vagueness,[74] misleading expressions,[75] and argumentation.[76]

58. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838.

59. Perdue v. State [Ga.] 54 S. E. 820.

60. Question as to whether one juror could hang jury by refusal to agree on question of penalty alone should not be answered. Wilkerson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 880, 91 S. W. 228.

61. Sec 5 C. L. 1841.

62. People v. Maughs [Cal.] 86 P. 187.

63. Walker v. State, 124 Ga. 97, 52 S. E. 319.

64. Toibirt v. State, 124 Ga. 767, 53 S. E. 327.

65. Bell v. State [Ga.] 55 S. E. 476.

66. In answer to argument that jurymen find verdict in defiance of law and evidence. People v. Smith [Mich.] 13 Det. Leg. N. 714, 108 N. W. 1072.

67. Farmer v. Com., 28 Ky. L. R. 1168, 91 S. W. 682.

68. Though instructions must be based on the evidence, it is sufficient if they are based on any state of facts which might be found therefrom. Instruction as to presumption from flight proper though there was some testimony that defendant feared mob violence. People v. Easton, 148 Cal. 50, 82 P. 840. Giving of an instruction which has no basis in the evidence is reversible error. Instruction on confession when none was proved. State v. Smith, 129 Iowa, 709, 106 N. W. 187. Error to give instructions not applicable to the evidence. People v. Maughs [Cal.] 86 P. 187. Instruction on the nature of crime in general held so abstract as to be properly refused. Spears v. People, 220 Ill. 72, 77 N. E. 112.

69. It is proper to charge that certain matters shown by the evidence are no defense though accused does not rely on them. Adams v. State, 125 Ga. 11, 53 S. E. 804. Where there is some evidence of insanity it is proper to charge thereon unless accused announces that he does not rely on it. Patterson v. State, 124 Ga. 408, 52 S. E. 534.

70. Instruction ignoring evidence properly refused. Morris v. State [Ala.] 41 So. 274. Instructions on prosecution for conspiracy to bribe held erroneous in not presenting defendant's theory. State v. Messner [Wash.] 86 P. 636. Instruction to convict on finding of certain facts is error if a defense which there is evidence to support is ignored. Prosecution for carrying concealed weapon. Defense that defendant's life had been threatened. State v. Venable, 117 Mo. App. 501, 93 S. W. 356.

71. Commonwealth v. Meads, 29 Pa. Super. Ct. 321; Whatley v. State, 144 Ala. 68, 39 So. 1014. General instruction on effect of impeachment not erroneous because only one witness had been impeached. State v. Feeley, 194 Mo. 300, 92 S. W. 663. One act of defendant referred to as provocation of difficulty. Sprinkle v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 323, 91 S. W. 787. Instruction that though accused is a competent witness the jury are the judges of the weight of his testimony held not error in connection with instruction as to interest, etc., made general as to all witnesses. Territory v. Livingston [N. M.] 84 P. 1021. Instruction that in considering credibility of defendant jury might consider the fact if it was a fact that he had been contradicted by other witnesses is proper. Maguire v. People, 219 Ill. 16, 76 N. E. 67.

72. "Before the jury is entitled to render a verdict of guilt, the state must prove his guilt to a moral certainty," properly refused. Little v. State [Ala.] 39 So. 674.

73. Weston v. State [Ind.] 78 N. E. 1014.

74. An instruction that the mere possession of "any article whether it can or cannot be used in the perpetration of crime" is insufficient to convict is too general and vague and is properly refused. People v. Weber [Cal.] 86 P. 671.

75. Instruction that the "aspect" of the evidence which will lead to acquittal should be adopted properly refused as misleading. Parsons v. People, 218 Ill. 386, 75 N. E. 993. An instruction on trial of two that there could be no conviction unless "defendants or one of them" committed the acts constituting the crime is error. State v. Harvey, 130 Iowa, 394, 106 N. W. 938. Giving of entire statutory definition of principal in second degree not error though part of it was not applicable to the evidence. Brown v. State, 125 Ga. 281, 54 S. E. 162. Instruction to disregard statements of accused after the crime, if he was found to be insane, misleading as warranting disregard of such statements in determining issue of sanity.

Invading province of jury or charging on the facts.[77]—Instructions must not invade the province of the jury[78] or assume the existence of disputed facts,[79] though

People v. Fallon [Cal.] 86 P. 689. Instruction requiring prosecution to prove every element necessary to conviction without stating what the elements were is properly refused. Whatley v. State, 144 Ala. 68, 39 So. 1014. Instruction to acquit in case of irreconcilable conflict in testimony is misleading. Little v. State [Ala.] 39 So. 674. A written instruction that the jury are to consider all testimony given by the witnesses is not misleading because not excepting testimony which had been orally stricken. State v. Roupetz [Kan.] 85 P. 778. Giving parts of statute not applicable to facts is harmless where other instructions correctly limited the prosecution. Brewin v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 534, 92 S. W. 420.

76. Instruction referring to accomplice as self-confessed felon properly denied. State v. Athey [Iowa] 108 N. W. 224. Instruction that indictment is not to be considered as showing either guilt or innocence, argumentative. Morris v. State [Ala.] 41 So. 274. Charge that of two persons present one might see an object and the other not see it and testify accordingly, yet both tell the truth, held argumentative. Crittendon v. State [Ala.] 40 So. 217. Instruction in abduction case inquiring for what purpose the parties went to a certain place and whether there was any evidence of a proper purpose sustained. People v. Smith, 100 N. Y. S. 259. Instructions in rape case calculated to arouse sympathy for prosecutrix and referring to the improbability that she would falsely confess intimacy with a negro held error. People v. Brown, 142 Mich. 622, 12 Det. Leg. N. 852, 106 N. W. 149. Instruction in prosecution for illegal sale of intoxicants, "Where did the bottle of whiskey come from? Miracles don't happen now," held not argumentative. State v. Bryant, 97 Minn. 8, 105 N. W. 974. Instruction that the people should be protected against crime and that every citizen should be protected against improper conviction not error. People v. Lambert, 144 Mich. 578, 13 Det. Leg. N. 299, 108 N. W. 345. Argumentative instructions pointing out particular circumstances which should be considered properly refused. People v. Trebilcox [Cal.] 86 P. 684. Long argumentative charge warning jury against influence of public sentiment properly refused. People v. Feld [Cal.] 86 P. 1100. Instruction that the fact that accused left the community shortly after the crime was only a circumstance, and that the fact that he afterward returned was a circumstance in favor of innocence, properly refused. Young v. State [Ala.] 40 So. 656. Instruction that defendant's failure to offer his clothing in evidence on the preliminary examination created no inference against him, argumentative. Barden v. State [Ala.] 40 So. 948. Requests which are mere argumentative refutations of statements in the argument for the prosecution are properly denied. That there was no evidence that defendant was going around like a roaring lion seeking whom he might devour. Whatley v. State, 144 Ala. 68, 39 So. 1014. Instruction that jury might conscientiously believe defendant guilty and yet not be convinced beyond a reasonable doubt properly refused. Regan v. State, 87 Miss. 422, 39 So. 1002. Instruction that "justice and humanity alike demand" acquittal on certain statements of proof properly refused. Banks v. State [Ala.] 39 So. 921. Instruction that no afflicted insane person should be convicted of any crime is argumentative and properly refused. Barnett v. State [Ala.] 39 So. 778. Instruction that there is no presumption of sanity from the fact that defendant was not sent to the asylum properly refused. Id. Instruction that certain testimony was undisputed and singling it out for special consideration on that account properly refused. Id. Instruction that defendant's failure to make a statement at the coroner's inquest is not to be considered against him properly refused as argumentative. Ledbetter v. State [Ala.] 39 So. 618. Instruction on sacredness of life and importance of discovery and punishment of murder held not error. Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

77. See 5 C. L. 1843.

78. Where a dying declaration named the assailant, and it appears that there are several persons of that name in the vicinity, an instruction that identity of person is presumed from identity of name is error. People v. Wong Sang Lung [Cal. App.] 84 P. 843. An instruction that statements by defendant against his interest are presumed true is error. Clay v. State [Wyo.] 86 P. 17. An instruction that absence of motive "affords a strong presumption" of innocence is properly refused. State v. Lu Sing [Mont.] 85 P. 521. Instruction to consider the interest of witnesses, their temper, feeling, or bias, if any, and their manner of testifying, does not invade the province of the jury. State v. Trail [W. Va.] 53 S. E. 17. Instruction that by the undisputed evidence defendant's character is good invades the province of the jury. Allen v. State [Ala.] 41 So. 624. Instruction that absence of motive might generate reasonable doubt properly refused. Glass v. State [Ala.] 41 So. 727. Instruction as to age of consent held not to invade province of jury. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Instruction that defendant's presence at the homicide and the fact of a previous difficulty with deceased raised no presumption against him properly refused as invading province of the jury. Morris v. State [Ala.] 41 So. 274. Instruction that "if you find from the evidence as you are instructed you must" that defendant is guilty held not an instruction for conviction, but, as interpreted in connection with other instructions, merely limited the jury to the evidence. State v. Seery, 129 Iowa, 259, 105 N. W. 511.

79. Instruction on alibi not objectionable because of reference to "the scene of the crime." Adams v. State, 125 Ga. 11, 53 S. E. 804. Instruction beginning "while no eyes but those of defendant and the slain woman may have looked upon the tragedy" error where the presence of defendant was a crucial fact in the case. Walton v. State, 87

conceded facts may be assumed.[80] In many states the court is forbidden to charge on the weight of evidence or intimate an opinion on the facts.[81]

Submission of questions of law[82] is error. An instruction that the jury are at liberty to consider whether the prosecution is to vindicate the criminal law or to collect a debt is error.[83] The statute providing for submission of *propositions of law* does not apply to criminal cases.[84]

Form and propriety of particular charges.[85]—Holdings as to the form and sufficiency of instructions as to the burden and degree of proof,[86] presumption of inno-

Miss. 296, 39 So. 689. Instruction as to corroboration of accomplice held not to assume truth of his testimony. Gillespie v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 68, 93 S. W. 556. Instruction held not to assume the making by accused of a certain false affidavit. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 699, 91 S. W. 225. Instruction that lapse of time between offense and arrest was immaterial is error where delay in making the arrest was urged as impairing the credibility of an eye witness. Clark v. State [Ga.] 54 S. E. 808. Charge held to assume that accused was present aiding and abetting. Brown v. State, 125 Ga. 281, 54 S. E. 162. Instruction to lay aside resentment against defendant for killing a public officer error where there was evidence that defendant did not do the killing. Melbourne v. State [Fla.] 40 So. 189.

80. Not error to assume fact as to which there is no dispute. State v. Watson, 47 Or. 543, 85 P. 336. Where there is no question as to the law under which the prosecution is had being in force, it is not error for the court to so state. Roberson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 264, 91 S. W. 578. Where defendant admits and justifies the killing, assumption thereof in the charge is not error. State v. Mitchell, 130 Iowa, 697, 107 N. W. 804.

81. An instruction that one who has testified falsely is not a credible witness is properly refused as on the weight of the evidence. Slayton v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 541, 94 S. W. 901. Instruction as to necessity of corroborative confession held not error. Griffin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 213, 93 S. W. 732. In Texas it is error to instruct that a certain witness is an accomplice and must be corroborated. Reagan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 239, 93 S. W. 733. Instruction limiting effect of evidence of other offenses is not on the weight of the evidence. Byrd v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 712, 93 S. W. 114; Hammock v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 906, 93 S. W. 549. Instruction that verbal admissions are to be received with great caution though on the weight of the evidence is favorable to accused. Griffin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 213, 93 S. W. 732. Instruction that confession cannot be considered unless voluntary held not on the weight of evidence. Id. Under a statute restricting the court to instruction on the law, an instruction as to the weight and effect of evidence of an alibi is properly refused. Smith v. Com., 29 Ky. L. R. 17, 91 S. W. 1130. Instruction that certain evidence should only be considered for a specified purpose held on the weight of the evidence. Mickey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 587. Instruction stating rule of evidence is not a comment on the facts. State v. Philips, 73 S. C. 236, 53 S. E. 370. An instruction that it is more probable that a man of bad character would commit a crime than that one of good character would do so is properly refused. Long v. State, 76 Ark. 493, 89 S. W. 93, 91 S. W. 26. Attention of jury may be directed to the salient features of the evidence on any point if they are instructed that the decision thereon is for them. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Instructions commenting on the conduct of defendant held not to indicate an opinion. Id. Statement that prosecutrix had answered questions well though severely examined held not error. People v. Smith, 100 N. Y. S. 259. Correction of a misstatement of the testimony by counsel is not within a prohibition of instruction on the facts. State v. Lane, 47 Or. 526, 84 P. 804. Statement of the main circumstances relied on for conviction held not a charge on the facts. State v. Langford [S. C.] 55 S. E. 120. May express opinion as to degree of crime if decision is left to jury. Commonwealth v. Frucci [Pa.] 64 A. 879. In Pennsylvania may express opinion on facts if fairly given and decision is left to jury. Commonwealth v. Meads, 29 Pa. Super. Ct. 321. May call attention to the character of evidence required if the question whether that in the present case meets the prescribed standard is left to the jury. Commonwealth v. Salawich, 28 Pa. Super. Ct. 330. That confessions are "entitled to great weight," error. State v. Willing, 129 Iowa, 72, 105 N. W. 355.

82. See 5 C. L. 1845. Charge for acquittal if jury had reasonable doubt that accused killed deceased "unlawfully" properly refused. Kennedy v. State [Ala.] 40 So. 658.

83. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

84. Jacobs v. People, 218 Ill. 500, 75 N. E. 1034.

85. See 5 C. L. 1845.

86. It is proper to instruct that if the jury find all the elements of the offense proven beyond a reasonable doubt they shall convict. Guy v. State [Ind. App.] 77 N. E. 855. Instruction that if any conclusion other than guilt could be drawn from circumstantial evidence "it is not safe to convict" is not erroneous for not requiring acquittal. State v. Langford [S. C.] 55 S. E. 120. An instruction that jury must be convinced to a reasonable and moral certainty is not erroneous for failing to state that they must be so convinced by the evidence. Field v. State [Ga.] 55 S. E. 502. Instruction for ac-

cence,[87] presumption from failure of accused to testify,[88] presumption from failure to call witnesses,[89] definition and description of crime charged[89a] and included offenses,[90] responsibility of principals and accessories,[91] definition of reasonable

quittal if evidence raises a probability of innocence should be given. Morris v. State [Ala.] 41 So. 274. Instruction requiring guilt to be proved beyond "all doubt" properly refused. Shirley v. State, 144 Ala. 35, 40 So. 269. Instruction that evidence must satisfy "to the exclusion of every probability of innocence," error. Neilson v. State [Ala.] 40 So. 221. Instruction to acquit if there is "any doubt" properly refused. Carter v. State [Ala.] 40 So. 82. Use of phrase "if for any reason you believe the defendant not guilty" held not error in connection with full and correct instructions as to burden of proof. Territory v. Livingston [N. M.] 84 P. 1021. Instruction that proof must be beyond a "doubt" properly refused. People v. Reiss, 99 N. Y. S. 1002. Instruction for acquittal "if you are satisfied from the evidence or if the evidence raises in your mind a reasonable doubt" of facts constituting justification not error. Von Haller v. State [Neb.] 107 N. W. 233. It is bad practice to charge as to the law of preponderance of evidence. Williams v. State, 125 Ga. 302, 54 S. E. 108. It is not error to modify an instruction as to the presumption of innocence by striking out a direction to acquit if it was not overcome where such matter was fully covered by other instructions. People v. Weber [Cal.] 86 P. 671. Instruction that "independent of evidence" defendant is presumed innocent is erroneous as not stating that the presumption obtains till rebutted beyond a reasonable doubt. People v. Maughs [Cal.] 86 P. 187. Instruction for acquittal unless the testimony of specified witnesses is believed properly refused. Barden v. State [Ala.] 40 So. 948. Instruction for acquittal on a "reasonable possibility" of innocence properly refused. Id. Instruction for acquittal if on consideration of the whole evidence it or any part thereof generates a well founded doubt of guilt is correct. Patterson v. State [Ala.] 41 So. 157. Instruction that accused is entitled to the benefit of all the evidence in his favor is not erroneous as depriving him of benefit of lack of evidence. State v. Miller, 73 S. C. 277, 53 S. E. 426. Where there is no affirmative defense no charge for acquittal is necessary other than an instruction that the elements of the offense must be found beyond reasonable doubt. Wright v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 935, 93 S. W. 548. Instruction on alibi held not to put burden of proof on defendant. State v. Bateman, 196 Mo. 35, 95 S. W. 413. Instruction requiring accused to "clearly" prove insanity by a preponderance of evidence is error (McCullough v. State [Tex. Cr. App.] 94 S. W. 1056), or at least such instruction should be accompanied by one that proof beyond a reasonable doubt is not necessary (Stanfield v. State [Tex. Cr. App.] 94 S. W. 1057). Charge for acquittal on "probability" of innocence properly refused. Baker v. State [Fla.] 40 So. 673.

87. Instruction as to presumption of innocence approved and its refusal held error. Neilson v. State [Ala.] 40 So. 221. Instruction that presumption of innocence continues throughout the entire trial properly refused as not stating that it may be overcome by evidence. Williams v. State, 144 Ala. 14, 40 So. 405. Instruction that defendant is presumed innocent "until" the introduction of evidence showing guilt beyond a reasonable doubt is error, for defendant is entitled to the benefit of such presumption throughout the trial. Flynn v. People, 222 Ill. 303, 78 N. E. 617, overruling People v. Dinser, 49 Misc. 82, 98 N. Y. S. 314.

88. It is not error for the court of its own motion to instruct that no presumption is to be drawn from defendant's failure to testify. People v. Murphy [Mich.] 13 Det. Leg. N. 602, 108 N. W. 1009. In a charge "Defendant has not taken the stand and you must not pay any attention to that. We are not here to save fools from the consequences of their folly," the last sentence construed as relating to victim of fraud charged and not to defendant's failure to testify. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123. Instruction that defendant may but need not testify and that the fact that he does not is not to be used to his prejudice not improper. State v. Fuller [Mont.] 85 P. 369.

89. Not entitled to instruction that failure to call eye witness raised presumption that his testimony would have been unfavorable to prosecution, but only that the jury might consider such failure. People v. Smith, 113 App. Div. 396, 99 N. Y. S. 118. Instruction that failure to use a witness subpoenaed raises a presumption that he would not have supported the contention is properly refused. State v. Hayden [Iowa] 107 N. W. 929. Instruction correctly stating that no presumption arose from failure of accused to call a witness but thereafter stating the rule as in civil cases and that it "applied to both parties" is error. Long v. State [Ga.] 54 S. E. 906.

89a. Definition of offense may be in language of statute where its terms are clear. State v. Stevenson [Kan.] 85 P. 797. The offense need not be defined in the language of the statute, and unless its words are plain it is better practice not to do so. State v. Ireland, 72 Kan. 265, 83 P. 1036. Omission of word "feloniously" in defining larceny harmless. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469.

90. Instruction for acquittal unless "the charge in the indictment" was made out properly refused where a lower degree might be found. Moore v. State [Ala.] 40 So. 345.

91. Instruction held erroneous as open to the construction that knowledge that crime was contemplated amounted to participation. State v. Bartlett, 128 Iowa, 518, 105 N. W. 59. An instruction that one who aids or abets the keeping of a house of prostitution is guilty as principal is not misleading in a prosecution for allowing a minor to dwell in such a house, as intimating that aiding and abetting the keeping of the

doubt,[92] the issues of insanity,[93] intoxication,[94] self defense,[95] alibi,[96] as to variance between indictment and proof,[97] consideration to be given to argument of counsel,[98] rules for considering evidence in general[99] and of particular kinds of evidence, such

house would alone warrant conviction. Nash v. People, 220 Ill. 86, 77 N. E. 92. Evidence held to show such concert in purpose and action between defendants in respect to successive ravishments as to justify court in instructing as to principals and accessories. Barrett v. People, 220 Ill. 304, 77 N. E. 224. Instruction that one is not an aider or abettor if he gave no assistance "or" uttered no word is properly refused. Morris v. State [Ala.] 41 So. 274.

92. Instructions on reasonable doubt approved. Carter v. State [Ala.] 40 So. 82. Substantial doubt founded on the evidence and not a mere possibility of innocence. State v. Temple, 194 Mo. 237, 92 S. W. 869. "To a reasonable and moral certainty" sustained in view of other instructions. Cole v. State, 125 Ga. 276, 53 S. E. 958. "Doubt which would satisfy a reasonable man" error. Vaughn v. State [Fla.] 41 So. 881. Charge that it is a doubt arising out of the evidence for which a reason can be given as distinguished from a mere possibility misleading but not ground for reversal. Hammond v. State [Ala.] 41 So. 761. Must be substantial and founded on the evidence and not a mere possibility of innocence. State v. Temple, 194 Mo. 228, 92 S. W. 494. "Which leads one to entertain a conscientious belief that there is an absence of necessary proof of guilt" sustained when given in connection with instructions on burden and degree of proof. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838. Instruction on reasonable doubt must require jury to acquit if it exists. Commonwealth v. Rider, 29 Pa. Super. Ct. 621. Not a mere imaginary, whimsical, or possible doubt, but such a real and substantial doubt as intelligent and impartial men would reasonably entertain on a careful consideration of the relevant facts proven in the case. State v. Wilson [Del.] 62 A. 227. Not a vague, fanciful, or merely possible doubt, but such a real and substantial one as intelligent and impartial men may reasonably entertain upon a careful consideration of all the evidence. State v. Truitt [Del.] 62 A. 790. Reasonable doubt must grow out of the evidence and be of such a character as to prevent the jury from reaching an honest conclusion of guilt. State v. Collins [Del.] 62 A. 224. "Doubt for which juror can give a reason" sustained in view of other parts of charge. State v. Grant [S. D.] 105 N. W. 97.

93. Instruction as to ability to distinguish between right and wrong as test of sanity approved. State v. Wetter, 11 Idaho, 433, 89 P. 341. Series of instructions on insanity approved. State v. Mitchell, 130 Iowa, 697, 107 N. W. 804. Instructions held to sufficiently cover insanity caused by fear, etc. State v. Speyer, 194 Mo. 459, 91 S. W. 1075.

94. The qualification "when sane and responsible" should be included in an instruction that intoxication is no defense. People v. Trebilcox [Cal.] 86 P. 684. Instruction in language of statute as to effect of intoxication on intent held sufficient. State v. Kapelino [S. D.] 108 N. W. 335. Instruction that intoxication is no defense or excuse without referring to its effect on capacity to form specific intent is error. State v. Bennett, 128 Iowa, 713, 105 N. W. 324.

95. Charge that a person of bad character has equal rights of self-defense is not harmful though defendant's character is not put in issue where it appears by plain inference that she is a woman of immoral life. Green v. State, 124 Ga. 343, 52 S. E. 431. Instruction postulating that defendant did not act in self-defense and not defining self-defense properly refused. Banks v. State [Ala.] 39 So. 921. An instruction that "the defense is justifiable self-defense" is error as narrowing the issue to the defense. State v. Morris, 128 Iowa, 717, 105 N. W. 213.

And see Homicide, 8 C. L. 106.

96. Instruction to the effect that the precise hour was not material misleading where the evidence narrowed the time to a specific hour and the defense was an alibi. People v. Morris [Cal. App.] 84 P. 463. Instruction that alibi was to be proved by a preponderance of evidence or to create a reasonable doubt of defendant's presence is contradictory and misleading. Id. Instruction that evidence of alibi to be satisfactory must cover the whole time of the transaction so as to render it impossible that defendant could have committed the act is error, both as casting the burden of proof on defendant and requiring that it make guilt "impossible." Briggs v. People, 219 Ill. 330, 76 N. E. 499. Instruction putting burden of proof of alibi on defendant but requiring acquittal in case of reasonable doubt on the whole case, including alibi, sustained. State v. Hier, 78 Vt. 488, 63 A. 877.

97. Where an alleged variance as to name of injured person was submitted to the jury on conflicting evidence as to his name, an instruction referring to the point as an "extreme technicality" is error. Vincendeau v. People, 219 Ill. 474, 76 N. E. 675.

98. Instruction that argument of counsel was to be used to aid the jury in "understanding the law" does not tend to mislead the jury into rejecting impressions produced by argument on the evidence. Mann v. State, 124 Ga. 760, 53 S. E. 324.

99. That no testimony should be rejected unless found to be in irreconcilable conflict with other testimony believed to be true, error. Von Haller v. State [Neb.] 107 N. W. 233. An instruction that the jury can look to certain evidence in determining a certain issue properly refused as tending to preclude consideration of other evidence. Shackleford v. State [Ala.] 40 So. 665. Instruction authorizing acquittal if testimony of a certain witness is disbelieved misleading where the other testimony would justify conviction. Outler v. State [Ala.] 41 So. 460. Instruction that nothing was to be considered except the law, the evidence, and the prisoner's statement, not improper. Moss v. State [Ga.] 55 S. E. 481. It is error to charge without qualification that positive

as circumstantial evidence,[1] expert and opinion evidence,[2] evidence of character of defendant,[3] testimony[4] or statement[5] of defendant, testimony of accomplices,[6] con-

testimony is entitled to more weight than negative. Such instruction should be given only in connection with the other rules by which the weight and credit of testimony is determined. Warrick v. State, 125 Ga. 133, 53 S. E. 1027. As instruction that the jury are not to consider their "personal opinions as to the facts proven" is misleading and properly refused. State v. Kremer [Mont.] 85 P. 736. An instruction that if conflicting evidence has two tendencies it is the duty of the jury to accept that which leads to acquittal properly refused. McCurley v. State [Ala.] 39 So. 1022. Instruction on impeachment not erroneous for use of pronoun "he," though female witnesses were impeached. Marek v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 229, 94 S. W. 469. Instruction limiting the use of another offense committed at the same time held sufficiently favorable to accused. People v. McClure, 148 Cal. 418, 83 P. 437.

1. Charge that circumstantial evidence should be received with great caution properly refused. State v. Le Blanc, 116 La. 822, 41 So. 105. There is no conflict between instructions that each circumstance must be proved beyond a reasonable doubt and one for conviction if whole evidence established guilt. People v. Weber [Cal.] 86 P. 671. An instruction on circumstantial evidence in a case where there is direct evidence should be hypothesized on disbelief of the direct evidence. Perdue v. State [Ga.] 54 S. E. 820. Instruction on circumstantial evidence held not argumentative. Parsons v. People. 218 Ill. 386, 75 N. E. 993. An instruction that each "link" must be proved beyond reasonable doubt is properly refused. Dunn v. State [Ind.] 78 N. E. 198. An instruction that if one fact inconsistent with the hypothesis of guilt is established to the satisfaction of the jury it breaks the chain of proof is proper. Dunn v. State [Ind.] 78 N. E. 198. Instruction that "evidence" instead of "proof" of good character may in connection with other evidence raise a reasonable doubt properly refused. Teague v. State, 144 Ala. 42, 40 So. 312. Several instructions as to circumstantial evidence considered. Neilson v. State [Ala.] 40 So. 221. Instruction disparaging circumstantial evidence is properly refused. State v. Foster [N. D.] 105 N. W. 938.

2. An instruction that the jury are to determine the value of nonexpert opinions largely from the reasons given for them is proper. Reed v. State [Neb.] 106 N. W. 649.

3. Instruction to acquit if evidence of good character convinces the jury that the other evidence is false is error, since defendant is entitled to have the evidence considered in the light of ths character evidence. Culver v. State, 124 Ga. 822, 53 S. E. 316. It is proper to charge that in determining whether character evidence is sufficient to raise a reasonable doubt it should be considered in connection with the other evidence. Fordham v. State, 125 Ga. 791, 54 S. E. 694. An instruction that proof of good character is not to raise doubts but only to assist in solving them is error. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. Instruction that jury "have a right" to act on defendant's testimony not misleading. State v. Johnny [Nev.] 87 P. 3. Instruction on character held sufficient though it did not state that character evidence alone might raise a doubt. People v. Birnbaum, 114 App. Div. 480, 100 N. Y. S. 160, citing Remsen v. People, 43 N. Y. 8, which lays down the rules as to instructions on this subject. An instruction that evidence of good character removes the presumption from possession of stolen goods is properly refused. People v. Peltin, 1 Cal. App. 612, 82 P. 980. While it is true that evidence of defendant's good character may raise a doubt when none would otherwise have existed, an instruction to that effect is properly refused as singling out particular testimony. Sweet v. State [Neb.] 106 N. W. 31. Instruction on effect of proof of defendant's bad moral character as bearing on credibility approved. State v. Hayden [Iowa] 107 N. W. 929.

4. Instruction that defendant's testimony is to be considered in the light of his interest, proper. Hammond v. State [Ala.] 41 So. 761. Instruction intimating that testimony of accused is to be given the same weight as that of a disinterested witness properly refused. Blanton v. State [Fla.] 41 So. 789. Instruction that defendant's testimony was not to be arbitrarily disregarded or blindly received, but was to be weighed with the other testimony and given such weight as it was entitled to, approved. Hudson v. State, 77 Ark. 334, 91 S. W. 299. An instruction that in determining defendant's credibility the influences and inducements of his situation are to be considered is error. People v. Maughs [Cal.] 86 P. 187, in which the court declares that it will hereafter consider the giving of such instructions ground for reversal. Error to instruct that jury should remember the interest which defendant necessarily has in the result. Keigans v. State [Fla.] 41 So. 886. Not error to instruct that interest of accused may be considered in weighing his testimony. State v. Bursaw [Kan.] 87 P. 183. Proper to instruct that jury may in weighing testimony of accused consider his interest. Weatherford v. State [Ark.] 93 S. W. 61.

5. The charge on the prisoner's statement should be in substantially the language of the Code and should in no way disparage its credibility. Instruction to consider the evidence "with such part of the statement as you believe if you believe any of it" held error. Field v. State [Ga.] 55 S. E. 502. It is not error to say at the end of a correct charge as to defendant's statement that it is not under oath and he incurs no penalty for falsity. Ryals v. State, 125 Ga. 266, 54 S. E. 168. Charge as to prisoner's statement held not erroneous as authorizing jury to arbitrarily disregard it. Adams v. State, 125 Ga. 11, 53 S. E. 804. Instruction as to prisoner's statement in language of statute is sufficient. Grant v. State, 124 Ga. 757, 53 S. E. 334.

6. Instruction in language of Cr. Code Prac. § 241, held sufficient as to accomplice

fessions,[7] credibility of witnesses and effect of impeachment,[8] necessity of unanimity of jury and effect of dissenting views,[9] form of verdict,[10] and nature and extent of the punishment,[11] are collated in the notes. The jury may be given

testimony. Henderson v. Com., 28 Ky. L. R. 1212, 91 S. W. 1141. It is the better practice to define an accomplice and leave it to the jury whether a particular witness is within the definition. Clay v. State [Wyo.] 86 P. 17. An instruction as to right to act on uncorroborated testimony of accomplice held misleading where there was corroborative evidence. Id. Instructions held to sufficiently define the extent of corroboration of an accomplice required. Id. Instruction leaving to jury whether witness was accomplice held cured by one stating that he was an accomplice. State v. Athey [Iowa] 108 N. W. 224. Instruction on corroboration of accomplice sustained. State v. Knudtson, 11 Idaho, 524, 83 P. 226. Instruction that any testimony other than that of an accomplice could be considered in corroboration of accomplice proper in answer to question whether testimony of accused could be so considered. Morawitz v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 880, 91 S. W. 227.

7. Refusal of instruction to disregard confession if defendant was found insane harmless where there was an instruction for acquittal in such event. People v. Fallon [Cal.] 86 P. 689.

8. A question by the jury as to their right to accept part of the testimony of a witness is properly answered by an instruction that the credibility of the witnesses is exclusively for the jury. Slayton v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 541, 94 S. W. 901. Instruction that impeaching evidence was to aid the jury in determining the credibility "or otherwise" of the witness is not misleading. Marek v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 229, 94 S. W. 469. Instruction as to falso in uno not authorizing jury to believe part and reject part is error. Little v. State [Ala.] 39 So. 674. Instruction directing instead of authorizing disregard of testimony of witness impeached by proof of bad character is error. Funderburk v. State [Ala.] 39 So. 672. An instruction that if the jury do not believe that certain inconsistent statements were made then the witness is not impeached should be given. Hammond v. State [Ala.] 41 So. 761. Instruction that jury might disregard testimony of a witness if he had exhibited such bias as to convince the jury that he had not testified truly should be given. Id. Instruction that if the proof of the good character of a witness was sufficient to overcome impeaching testimony the jury should weigh his testimony along with the other evidence should be given. Id. Instruction on falsus in uno rule should require evidence to be "entirely" rejected. Garland v. State, 124 Ga. 832, 53 S. E. 314. That instruction on impeachment was confined to a single method is not error where no witness was impeached in any other manner. McGirt v. State, 125 Ga. 269, 54 S. E. 171. Instruction that jury are sole judges of credibility of witnesses properly modified by adding injunction against arbitrary disregard of testimony. State v. Legg [W. Va.] 53 S. E. 545. Charge on rule falsus in uno without using the word "material" sustained. People v. Dinser, 49 Misc. 82, 98 N. Y. S. 314. Instruction as to rule falsus in uno not requiring falsity to have been intentional properly refused. Hamilton v. State [Ala.] 41 So. 940. Instruction to disregard testimony of witnesses found not to be credible held erroneous as pretermitting possibility of corroboration, Id. Instruction on falsus in uno rule not requiring falsity to be in material matter properly refused. Hill v. State [Ala.] 41 So. 621. Instruction requiring jury to disregard testimony of witness who has sworn falsely in part is error. Commonwealth v. Ieradi [Pa.] 64 A. 889. Instruction that witness testifying to a confession was not discredited by disproof of a statement in the confession held not error. State v. Rosa, 72 N. J. Law, 462, 62 A. 695. An instruction that the jury "must" consider previous inconsistent testimony as affecting the credibility of the witness is properly refused. Id. Instruction on falsus in uno rule approved. Titterington v. State [Neb.] 106 N. W. 421. Instruction that if witness is contradicted in material matter his entire testimony should be rejected is error. Commonwealth v. Pearl, 29 Pa. Super. Ct. 307.

9. Modification of instruction that "defendant" was entitled to the independent judgment of each juror so as to state that "each side" is so entitled is not error. People v. Weber [Cal.] 86 P. 671. Instruction for acquittal if any juror has doubt of guilt properly refused. Outler v. State [Ala.] 41 So. 460. An instruction as to the individual duty of each juror silent as to his duty to consult with his fellow jurors is properly refused. State v. Logan [Kan.] 85 P. 798. It is not error to charge that the jury cannot acquit unless every juror has a reasonable doubt. Whatley v. State, 144 Ala. 68, 39 So. 1014. "Unless each of the jurors were so convinced that they would act on their decision in matters of high concern and importance to their own interest," properly refused. Banks v. State [Ala.] 39 So. 921.

10. Proper to instruct as to form of verdict. Keigans v. State [Fla.] 41 So. 886.

11. Instruction that while jury may recommend mercy the court is not bound to observe the recommendation not erroneous as intimating that the present case is a bad one. State v. Jones [S. C.] 54 S. E. 1017. If any instruction is given as to the fact that the court must impose the death penalty unless the jury impose imprisonment, defendant must be given the full benefit of the law as to the discretion of the jury. Evans v. State, 87 Miss. 459, 40 So. 8. Under the Mississippi statute by which if the jury do not fix the penalty at imprisonment the court must impose the death penalty, it is error to instruct as to the consequences of a failure to fix the penalty and then charge that if the jury find the defendant guilty of murder they should return a verdict of "guilty as charged." Mathison v. State, 87

written forms of the different verdicts authorized by the charge,[12] and, where proper instructions are given, the submission of a form of verdict of guilty is not error as misleading the jury to think such a verdict is directed.[13]

The charge is to be construed as a whole[14] and omissions in one part may be supplied by statements elsewhere.[15] For like reason the burden and degree of proof need not be reiterated in connection with each instruction,[16] even in additional instructions given after the jury have retired.[17] An erroneous statement, however, is not cured by a correct one elsewhere made, for it cannot appear which the jury heeded.[18]

(§ 10) *F. Custody of jury, conduct and deliberations.*[19]—While it is discretionary to allow the jury to separate during the trial,[20] after an order is made for their confinement, it is error to allow them to separate,[21] though whether it is ground for new trial depends on the circumstances.[22] In California the admonition required by statute should be given at each adjournment.[23] Reading of news-

Miss. 739, 40 So. 801. An instruction that the jury had discretionary power to fix the penalty or return a general verdict is not erroneous for failing to explain the nature of such discretion. Grant v. State, 124 Ga. 757, 53 S. E. 334.

12. Park v. State [Ga.] 55 N. E. 489.

13. State v. Davis, 194 Mo. 485, 92 S. W. 484.

14. See 5 C. L. 1842, n. 25, 27.

15. Britten v. State, 124 Ga. 783, 53 S. E. 99; State v. Lillliston [N. C.] 54 S. E. 427; Williams v. State, 125 Ga. 265, 54 S. E. 167; Ward v. State [Fla.] 40 So. 177; People v. Johnson, 185 N. Y. 219, 77 N. E. 1154. Instruction apparently inadvertent putting burden on defendant to prove the allegations of the indictment is harmless where other instructions clearly state the burden of proof. White v. State [Ind. App.] 75 N. E. 554. Sufficient if good as a whole though excerps may be erroneous. Commonwealth v. D'Angelo, 29 Pa. Super. Ct. 378. Instruction not to convict on testimony of accomplice unless satisfied of its truth, but without mentioning the necessity of corroboration, held cured by instructions as to nature and extent of corroboration required. State v. Bond [Idaho] 86 P. 43. Omission of the words "feloniously" and "unlawfully" from one instruction harmless where they were used in others. Ward v. Com., 29 Ky. L. R. 62, 91 S. W. 700. Omission in one instruction of an ingredient of offense not material where it is supplied by another instruction. Sexton v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 325, 92 S. W. 37. Failure to mention alibi evidence in an instruction recapitulating the evidence rebutting presumption from possession of stolen goods is cured by an instruction on alibi. State v. Walker, 194 Mo. 253, 92 S. W. 659.

16. The doctrine of reasonable doubt need not be repeated in connection with every instruction. Cress v. State [Ga.] 55 S. E. 491; Steinkuhler v. State [Neb.] 109 N. W. 395; State v. Crouch, 130 Iowa, 478, 107 N. W. 173; State v. Calkins [S. D.] 109 N. W. 515; Nance v. State [Ga.] 54 S. E. 932; State v. Houk [Mont.] 87 P. 175; Davis v. State, 125 Ga. 399, 54 S. E. 126; Smith v. State, 124 Ga. 213, 52 S. E. 329.

17. That perjury must be proved by two witnesses. State v. Smith, 47 Or. 485, 83 P. 855.

18. Instruction misstating the law is not cured by a correct one on the same subject. People v. Maughs [Cal.] 86 P. 187. Instruction that defendant's statements against his interest are presumed true not cured by one that their weight is for the jury. Clay v. State [Wyo.] 86 P. 17. Where an instruction plainly operates to exclude a defense, other instructions submitting it do not cure the error. Cress v. State [Ga.] 55 S. E. 491. Instruction to convict on finding of certain facts and ignoring a defense is not cured by another submitting such defense. State v. Venable, 117 Mo. App. 501, 93 S. W. 356. Correct instruction does not cure former erroneous one if there is nothing to indicate which shall be followed. Weston v. State [Ind.] 78 N. E. 1014. Instruction ignoring self-defense held not cured by other instructions. People v. Solani, 2 Cal. App. 225, 83 P. 281. Assumption that disputed fact was conceded in one instruction not cured by the fact that other instructions did not contain such assumption. Garland v. State, 124 Ga. 832, 53 S. E. 314. Instruction assuming that weapon was deadly cured by one leaving it to jury. State v. Seery, 129 Iowa, 259, 105 N. W. 511.

19. See 5 C. L. 1848.

20. In cases not capital, it is discretionary to allow the jury to separate. State v. Baudoin, 115 La. 773, 40 So. 42. Whether the jury in a capital case should be permitted to separate rests in discretion. Allowance of separation sustained. State v. Williams, 95 Minn. 351, 105 N. W. 265; People v. Maughs [Cal.] 86 P. 187.

21. Part of jury kept in custody and others allowed to go to their homes. People v. Maughs [Cal.] 86 P. 187.

22. Where the jury are ordered kept together, it is misconduct requiring a new trial for one juror, accompanied by a bailiff, to go to a saloon and take a drink. State v. Strodemier, 41 Wash. 159, 83 P. 22. A showing merely that the jurors momentarily separated without more is not sufficient. State v. Stevenson [Kan.] 85 P. 797. Momentary separation of juror from his fellows, during

papers,[24] taking of notes by a juror,[25] use of intoxicants,[26] an unauthorized visit by jurors to the scene of the crime,[27] and communication with third persons during the trial,[28] while improper, have all been deemed harmless, and the same rule has been applied to improper entry of jury room by judge or bailiff.[29] That a verdict carrying the death penalty was returned in 15 minutes shows no misconduct.[30] Quotient verdict is ground for new trial only where jury agree beforehand to be bound by the result.[31] If not of right it is at least in the discretion of the court to allow the jury to take out the written testimony of a nonresident witness,[32] and the jury may be allowed to take out a magnifying glass to examine photograph in evidence.[33] That the jury took out exhibits without consent, while improper, is not ground of reversal unless prejudice appears.[34] Coercion of verdict by the court is fatal.[35] That a juror asked defendant when he was on the stand an improper question based on an assumption of guilt does not show such prejudice as to warrant a new trial.[36] Where jury, having asked to have certain testimony including defendant's read to them, express themselves as satisfied before the end of defendant's testimony, the court need not compel them to hear it all.[37] Defendant is not entitled during the trial to interrogate jurors as to whether they had been reading newspaper reports of the case.[38] Discussion by jurors during their deliberations of matters outside the evidence and operating to the prejudice of accused is in some states ground for new trial.[39] The jury should not be discharged before verdict

which time he spoke to no one about the case, not ground for new trial. Powell v. State [Tex. Cr. App.] 93 S. W. 544.

23. People v. Maughs [Cal.] 86 P. 187.

24. A bare showing that the jury read newspaper reports of the trial without showing what they were, or that they had any effect, is insufficient to require a new trial. People v. Fernandez [Cal. App.] 86 P. 899. Prejudice from reading of newspaper by jury must be shown. Newspaper articles held not such as to show prejudice from reading. People v. Feld [Cal.] 86 P. 1100.

25. While the taking of notes by a juror is not a commendable practice, it is not as a matter of law error. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

26. Moderate use of intoxicants by juror during adjournment no ground for new trial. State v. Smith [Iowa] 109 N. W. 115.

27. That some of the jurors went to the scene of the crime not ground for reversal, unless it appears that the verdict was thereby affected. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

28. Trivial remark of bystander to juror as the jury passed through the court room properly disregarded. State v. Goodson, 116 La. 388, 40 So. 771. Exchange of playful gestures between juror and prosecuting attorney held not such misconduct as to justify reversal. Trombley v. State [Ind.] 78 N. E. 976.

29. That officers in charge of jury looked through the key hole to see what the jury were doing, and that the jury knew of and commented on this, is not ground for reversal in the absence of proof that the action of the jury was thereby affected. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838. That the bailiff entered the jury room several times during the deliberations of the jury and in answer to a question referred them to the forms of verdict submitted, held not ground for new trial. Graves v. Ter., 16 Okl. 538, 86 P. 521. Not ground for reversal that judge went into jury room, where he merely referred them to the dictionary in answer to a question as to the meaning of a word. Denison v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 248, 93 S. W. 731. If it is desired to correct or withdraw an instruction after the jury have retired, the jury should be recalled and the correction made in the presence of accused. Morris v. State [Ala.] 41 So. 274.

30. State v. Le Blanc, 116 La. 822, 41 So. 105.

31. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795.

32. Shirley v. State, 144 Ala. 35, 40 So. 269.

33. State v. Wallace, 78 Conn. 677, 63 A. 448.

34. People v. Dolan [N. Y.] 78 N. E. 569.

35. Repeated declaration that jury would be kept together till they agreed held to have coerced verdict. State v. Place [S. D.] 107 N. W. 829. Not ground for new trial that judge left county, sending letter to jury that he would not return until they agreed, where it does not appear that deliberations of jury were in any manner affected. Wilkerson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 880, 91 S. W. 228. Facts held to show that two jurymen were by illness and desire to escape prolonged confinement coerced into agreement. Brown v. State, 127 Wis. 193, 106 N. W. 536.

36. State v. Rideau, 116 La. 245, 40 So. 691.

37. People v. Smith [Cal. App.] 84 P. 449.

38. People v. Fernandez [Cal. App.] 86 P. 899.

39. That the jurors discussed the question of looking at a copy of the statutes which was in the jury room but decided they had no right to do so is not prejudicial miscon-

except for manifest necessity,[40] and should not be discharged without asking them as to their ability to agree, though the court is entitled to accept their statement as to inability.[41]

(§ 10) *G. Verdict.*[42]—The verdict must clearly identify the case in which it is rendered[43] and the crime of which it convicts.[44] A general verdict on an indictment in several counts is good whether it charges one[45] or several offenses.[46] Age of accused should be found if a reformatory sentence is to be imposed.[47] An unauthorized fixing of the penalty,[48] or one fatally defective in form,[49] may be rejected as surplusage. A recommendation to mercy does not qualify the verdict but is mere surplusage.[50] While the court has power to order the jury to eliminate a recommendation to mercy and either fix the penalty at imprisonment or find defendant guilty without more, if he receives such a verdict, the death penalty cannot be imposed.[51] A verdict is not vitiated by the fact that it follows the indictment in adding an unnecessary element to the description of the offense.[52] Verdict is not insufficient because using the word "say" instead of "find" and not naming the defendant.[53] Where the indictment alleges value of the property stolen, verdict guilty "as charged" is a sufficient finding of value.[54] A verdict convicting of assault does not negative guilty intent by finding that it was "without design to effect death and without

duct. State v. Stevenson [Kan.] 85 P. 797. No impropriety in jurors discussing the fact that during the trial they had observed defendant use gestures described by witness as a means of identification. People v. Mullen, 49 Misc. 289, 99 N. Y. S. 227. Not misconduct for jurymen during deliberations to draw from memory of the testimony any chart of scene of crime. People v. Gallanar [Cal. App.] 86 P. 814. Reference by a juror to defendant's failure to testify is not ground for new trial, unless it clearly appears that the jury were influenced thereby. State v. Brooks [Kan.] 85 P. 1013. It is prejudicial misconduct for a juror to state to his fellows any fact which it would be reversible error to admit in evidence. Morawitz v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 880, 91 S. W. 227. Statement by juror that accused was convicted and received certain sentence on former trial is misconduct. Id. Statement of juror to his fellows as to sentence of codefendant ground for new trial. Tutt v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 38, 91 S. W. 584. Discussion of matters outside of evidence and coercion of dissenting juror held to require new trial. Gilford v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 513, 92 S. W. 424. Not ground for new trial that one juror asked why defendant did not go on the stand, to which another answered that that was not to be considered. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726.

40. Allen v. State [Fla.] 41 So. 593. Prosecution for misdemeanor withdrawn from jury to permit institution of prosecution for felony on same facts. Ingram v. State, 124 Ga. 448, 52 S. E. 759. Discharge of juror on suspicion of corruption based on ex parte investigation held abuse of discretion. People v. Parker [Mich.] 13 Det. Leg. N. 581, 108 N. W. 999.

41. People v. Parker [Mich.] 13 Det. Leg. N. 581, 108 N. W. 999.

42. See 5 C. L. 1850.

43. Verdict against "August Hase" not fatally variant from indictment against "Augustus Hays." Johnson v. State [Fla.] 40 So. 678.

44. Where the offense found by name is the same as that charged, reference to the indictment is implied. Hence value of stolen goods need not be found. State v. James County, 117 La. 419, 41 So. 702. "Guilty of harboring thieves" insufficient. State v. Modlin, 197 Mo. 376, 95 S. W. 345. "Guilty as charged" is sufficient. State v. Shour, 196 Mo. 202, 95 S. W. 405. A statute requiring the jury to find the degree does not apply when only one degree could be found under the indictment. Maxwell v. Territory [Ariz.] 85 P. 116. A verdict sufficiently specifies the degree if it states the acts constituting the offense and the section of the statute defining it, so that the court may from the verdict alone determine the degree. State v. Ireland, 72 Kan. 265, 83 P. 1036.

45. General verdict is sufficient on indictment in several counts charging the same offense in different ways. State v. Rickseckker [Kan.] 85 P. 547.

46. Where separate offenses are properly joined, a general verdict is a conviction on each and every count. Washington v. State [Fla.] 40 So. 765.

47. A verdict providing for imprisonment in the reformatory but not finding that accused is under sixteen years of age is defective. Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 72, 92 S. W. 807. Age of defendant need not be found if jury are unable to determine it. Beuchert v. State, 165 Ind. 523, 76 N. E. 111.

48. Genie v. State [Ala.] 39 So. 573; Moss v. State [Ala.] 39 So. 830.

49. State v. King, 194 Mo. 474, 92 S. W. 670.

50. State v. Cook, 117 La. 114, 41 So. 434.

51. Avant v. State [Miss.] 40 So. 483.

52. Assault "with a deadly weapon" with intent to kill. People v. Owens [Cal. App.] 86 P. 980.

53. Freeman v. State, 50 Fla. 38, 39 So. 785.

malice aforethought."[55] On a joint trial there may be a separate verdict as to each defendant,[56] or one verdict with separate clauses relating to each.[57] On a special verdict finding facts constituting the offense, judgment of conviction is properly rendered though the verdict contained a clause that the jury, "upon their opinion of the law," find defendant not guilty.[58]

Receiving verdict.[59]—The verdict must be returned in open court in the presence of accused.[60] If defective in form, the jury may be sent back to amend it[61] if they have not dispersed.[62] Defendant has the right to poll the jury, whether the trial is for felony or misdemeanor.[63] In case of misdemeanor, however, it may be waived.[64] The polling of the jury should be done by the clerk and it is proper to refuse to allow accused to do it.[65] It is proper to refuse to allow the jury to be interrogated further after polling.[66]

§ 11. *New trial, arrest of judgment, and writ of error coram nobis.*[67]—New trial should be granted where the substantial rights of accused have been so violated that a fair trial was not had.[68] Under a statute providing for a new trial if the verdict is contrary to the evidence, new trial may be granted if the evidence fails to sustain the charge, but not for mere insufficiency of evidence.[69] The New York court of general sessions has no inherent power to grant a new trial and is confined to statutory grounds,[70] but the county court has such power.[71]

54. Territory v. Neatherlin [N. M.] 85 P. 1044.

55. State v. Ireland, 72 Kan. 265, 83 P. 1036.

56. Where on a trial of several the jury returned separate verdicts, such verdicts are not invalidated by being entitled as if the defendant against whom it was found was the only one. State v. Cotterel [Idaho] 86 P. 527.

57. A verdict on the trial of several defendants consisting of a number of paragraphs each containing a finding against one defendant and the whole signed by the foreman is sufficient. State v. Kleinfield, 72 Kan. 674, 83 P. 831.

58. State v. Scott [N. C.] 55 S. E. 270.

59. See 6 C. L. 1851.

60. Wells v. State [Ala.] 41 So. 630. Return of verdict in recess during absence of prisoner and dispersal of jury cannot be cured by reconvening the jury. Id. If, however, the verdict is not received and read, it does not amount to an acquittal but is ground for new trial. Cowart v. State [Ala.] 41 So. 631.

61. Jury properly sent back to correct verdict by inserting alias of defendant. State v. Goodson, 116 La. 388, 40 So. 771. On return of a verdict for "assault and battery with intent to kill," the jury are properly sent back to amend their verdict. Thompson v. State [Miss.] 40 So. 545.

62. Where the jury seal their verdict and separate and the verdict is a nullity, the jury cannot be directed to amend it. Koch v. State, 126 Wis. 470, 106 N. W. 531.

63, 64. Cowart v. State [Ala.] 41 So. 631.

65. Jackson v. State [Ala.] 41 So. 178.

66. As to their reasons or motives. Jackson v. State [Ala.] 41 So. 178.

67. See 5 C. L. 1851.

68. **Coercion of verdict** by judge is within Code Cr. Proc. § 430, "when the verdict has been decided by lot or by any means other than a fair expression of opinion on the part of the jurors." State v. Place [S. D.] 107 N. W. 829. That a **juror was ineligible** because of service at the preceding term while cause for challenge is not ground for new trial. Jackson v. State, 125 Ga. 277, 54 S. E. 167. That the **district attorney was prejudiced** against defendant is no ground for new trial. People v. Birnbaum, 114 App. Div. 480, 100 N. Y. S. 160.

Misconduct of the jury in which accused participates is no ground for new trial. State v. Wilson, 42 Wash. 56, 84 P. 409. Discretion of court in denying new trial because juror took notes during trial held properly exercised. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127.

Relationship of juror to accused not ground of new trial though not known till after verdict. McCrimmon v. State [Ga.] 55 S. E. 481.

Surprise: Failure of sheriff to subpoena a witness for defendant is not ground for new trial where the evidence is beyond question on the point as to which the witness would have testified. State v. Brown, 130 Iowa, 57, 106 N. W. 379. That accused was deceived by the prosecutor as to the whereabouts of a witness and the likelihood of his attendance not ground for new trial where no continuance was asked at the time. Rubio v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 576, 95 S. W. 120. That a witness did not testify as he said he would is not such surprise as requires a new trial, though accused, in reliance on the witness' statement, failed to summon other witnesses. Hope v. State, 124 Ga. 438, 52 S. E. 747; Duggan v. State, 124 Ga. 438, 52 S. E. 748.

Excessive sentence not ground for motion. Truitt v. State, 124 Ga. 657, 57 S. E. 890; Mayson v. State, 124 Ga. 789, 53 S. E. 321; Guthrie v. State, 125 Ga. 291, 54 S. E. 180; Fears v. State, 125 Ga. 740, 739, 54 S. E. 661, 667.

69. De Tarr v. State [Ind. App.] 76 N. E. 897.

70. **The statute giving such court power**

Newly-discovered evidence.[72]—A motion based on newly-discovered evidence is addressed to discretion.[73] In North Carolina the court has no power to grant new trials on such ground except in civil cases.[74] To warrant a new trial for newly-discovered evidence it must appear that the proposed evidence is competent, credible,[75] not merely cumulative or impeaching[76] but such as to probably affect the result,[77] that the evidence can be produced on the new trial, and that it could not, by the exercise of proper diligence, have been procured at the trial.[78] Retraction by

to grant a new trial after judgment only for newly-discovered evidence, the court has no power to grant it on any other ground. Prohibition issued. People v. Ct. of General Sessions of the Peace, 185 N. Y. 504, 78 N. E. 149.

71. People v. Mullen, 49 Misc. 289, 99 N. Y. S. 227.

72. See 5 C. L. 1852.

73. People v. Feld [Cal.] 86 P. 1100.

74. State v. Lilliston [N. C.] 54 S. E. 427.

75. Affidavit of possession by third person of weapon at time when testimony for prosecution shows it was sold to accused held to present so many suspicious circumstances that trial court was justified in disbelieving it. People v. Weber [Cal.] 86 P. 671.

76. Watkins v. State, 125 Ga. 143, 53 S. E. 1024; Johnson v. State, 124 Ga. 656, 52 S. E. 880; Cole v. State, 125 Ga. 35, 53 S. E. 807; Walker v. State [Ga.] 55 S. E. 483; Rawlins v. State [Ga.] 54 S. E. 924; State v. Lilliston [N. C.] 74 S. E. 427; Slade v. State, 125 Ga. 788, 54 S. E. 760; Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631. Evidence impeaching or conflicting with that introduced on the trial. Jones v. State, 125 Ga. 254, 54 S. E. 144. Testimony of physician that wound could not have been inflicted by one standing in the position in which eye witnesses placed accused. Bonner v. State, 125 Ga. 237, 54 S. E. 143. As to threats by deceased held cumulative. Park v. State [Ga.] 55 S. E. 489. As to intoxicated condition of accused held cumulative. Commonwealth v. Hine, 213 Pa. 97, 62 A. 369. Newly-discovered evidence as to whether witness for defendant was in fact present at scene of crime held cumulative. State v. King, 194 Mo. 474, 92 S. W. 670. Denial of new trial for newly-discovered evidence tending to show defendant's ownership of alleged stolen property sustained. Hurst v. Territory, 16 Okl. 600, 86 P. 280. Declarations of prosecutor that he bribed witness and testimony of attempt by him to bribe other witnesses not ground for new trial. Duggan v. State, 124 Ga. 438, 52 S. E. 748. Testimony of disinterested eye witness is not cumulative to similar testimony by one jointly indicted with defendant. People v. O'Brien, 110 App. Div. 26, 96 N. Y. S. 1045.

77. Evidence that no license was issued to parents of prosecutrix in statutory rape during the year when they testified that they were married held immaterial, the parties being negroes. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Newly-discovered evidence on prosecution for violation of local option law held not to show that it related to the transaction on which the prosecution was based. Roberson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 264, 91 S. W. 578. New trial for newly-discovered evidence of declarations by prosecuting witness not only impeaching him but corroborating defendant's version of altercation held improperly denied. McHugh v. Ter. [Okl.] 86 P. 433. Newly-discovered evidence of finding in wall of room where deceased was killed a bullet fired from a different direction from those which entered his body held not of sufficient importance to warrant new trial. State v. Bond [Idaho] 86 P. 43. New trial on conflicting affidavits as to ownership by defendant of animals similar to those alleged to have been stolen by him held properly denied. State v. Williams [Idaho] 86 P. 53. Newly-discovered evidence of a highly credible person contradicting evidence of detectives on an important circumstance held ground for new trial. Johnson v. Com., 104 Va. 881, 52 S. E. 625. Though a witness to the purchase of a revolver by defendant stated that he remembered the transaction because it was the only such revolver in his store, newly-discovered evidence that at about the same time a third person bought such a revolver of him is not ground for new trial. People v. Weber [Cal.] 86 P. 671. Newly-discovered evidence to support an alibi held so inconsistent with defendant's statement that it probably would not affect the result. Battise v. State, 124 Ga. 866, 53 S. E. 678. Newly-discovered evidence that witness for prosecution was suborned held not convincing. People v. Birnbaum, 114 App. Div. 480, 100 N. Y. S. 160. Evidence of finding of weapon near scene of homicide not sufficient where the fact that deceased had such weapon at the time of the homicide was shown at the trial. People v. Feld [Cal.] 86 P. 1100. Alleged newly-discovered evidence of insanity of accused held not ground for an extraordinary motion. Rawlins v. State [Ga.] 54 S. E. 924.

78. State v. Lilliston [N. C.] 54 S. E. 427; Hurst v. Territory, 16 Okl. 600, 86 P. 280. Diligence in ascertaining date of marriage license of prosecutrix in statutory rape held insufficient. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Alibi evidence which must necessarily have been known to accused before trial. Wyatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 148, 94 S. W. 219. Where it is apparent that accused must have known at the trial that the witness would testify as alleged, a denial that he did know of it is insufficient to show diligence. Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631. New trial not granted to prove additional matters by one who testified at the trial. State v. King, 194 Mo. 474, 92 S. W. 670. Where affidavit of newly-discovered evidence was made on the day the verdict was rendered and affiant was present in court during the trial, lack of diligence appears. Id. It is not an abuse of discretion to refuse a new trial for evidence

a witness of his testimony against accused,[79] affidavit of a codefendant since convicted that he alone is guilty,[80] acquittal of a codefendant,[81] and indictment of another person for the same offense,[82] have all been held insufficient.

A motion in arrest of judgment[83] lies only to defects apparent on face of the record,[84] and when the defect alleged is in the indictment it must be substantial.[85] Defects in form of verdict are not ground for arrest of judgment.[86]

Motion to set aside the judgment[87] is not the proper remedy where the indictment is void.[88]

A writ of error coram nobis[89] will not ordinarily issue to review a question which has been adjudicated.[90] A petition for a writ of error coram nobis based on matter outside the record verified only by attorney is insufficient, at least when brought after affirmance on appeal.[91]

Practice on motion.[92]—The motion must be made within the time limited by rule or statute,[93] must specifically state the grounds relied on,[94] and be supported by

which could not have been discovered until the exact day of the offense was disclosed at the trial, where no postponement was then asked. Harrington v. State, 77 Ark. 480, 91 S. W. 747. New trial for newly-discovered evidence granted notwithstanding lack of diligence of defendant's attorney. People v. O'Brien, 110 App. Div. 26, 96 N. Y. S. 1045. Must appear that facts were not known to accused at time of trial. Logan v. State [Miss.] 40 So. 323. No inquiry made before trial of person known by accused to have been present at the homicide. Park v. State [Ga.] 55 S. E. 489.

79. Inconsistent declarations by a witness since the trial not sufficient. Collins v. State, 124 Ga. 788, 53 S. E. 193. Declarations by witness for state that his testimony was false not ground for new trial. Jordan v. State, 124 Ga. 417, 52 S. E. 768. New trial on affidavit of accomplice that he had testified falsely against accused held properly denied. State v. Morse [Idaho] 86 P. 53. Affidavit of prosecuting witness that he was mistaken in his identification of accused requires new trial. Green v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 39, 91 S. W. 585. Affidavit of prosecuting witness impeaching her own evidence held not ground for new trial, where it appeared to have been procured by undue influence and was subsequently retracted. State v. Jeffries, 117 Mo. App. 569, 92 S. W. 501. Court refused in the exercise of its supervisory power to order a new trial to one defendant on an affidavit by the other assuming the sole guilt. State v. Johnson, 116 La. 855, 41 So. 117.

80. Where a father and his sons were jointly convicted of murder, an affidavit of the father that he alone was guilty is not ground for an extraordinary motion. Rawlins v. State [Ga.] 54 S. E. 924. Denial of new trial on affidavit of codefendant previously convicted that defendant had nothing to do with the crime sustained. People v. Sullivan [Cal. App.] 86 P. 834.

81. Mere statement that one indicted for the same crime as principal had been acquitted without showing how such acquittal could inure to the benefit of accused not insufficient. Morales v. State [Tex. Cr. App.] 95 S. W. 125.

82. That another has been since indicted for the same offense is no ground for new trial. Nero v. State [Ga.] 55 S. E. 404.

83. See 5 C. L. 1853.

84. State v. Maloney, 115 La. 498, 39 So. 539. Variance between indictment and proof not ground for arrest. Freeman v. State, 50 Fla. 38, 39 So. 785; Commonwealth v. Zayrook, 30 Pa. Super. Ct. 111. Matter dehors the record cannot be considered on motion in arrest. State v. Summerlin, 116 La. 449, 40 So. 792. Error in the charge not ground. State v. Le Blanc, 116 La. 822, 41 So. 105.

85. Lack of particularity of averment is not ground of arrest of judgment. Failure to describe "dangerous weapon" used. State v. Stewart, 117 La. 476, 41 So. 798. Information for assault with intent to kill a certain person without alleging on whom the assault was committed fatally defective. Padgett v. State [Ind.] 78 N. E. 663. Failure to indorse names of witnesses on indictment not ground for arrest of judgment. State v. Sultan [N. C.] 54 S. E. 841. Vagueness of the indictment is not ground for arrest of judgment unless such as to mislead defendant or to afford no protection against second prosecution. Johnson v. State [Fla.] 40 So. 678.

86. Freeman v. State, 50 Fla. 38, 39 So. 785.

87. See 5 C. L. 1853.

88. McDonald v. State [Ga.] 55 S. E. 235.

89. See 5 C. L. 1853.

90. Whether a juror swore falsely on his voir dire. State v. Armstrong, 41 Wash. 601, 84 P. 584.

91. State v. Armstrong, 41 Wash. 601, 84 P. 584.

92. See 5 C. L. 1853.

93. Motion for new trial cannot be made in vacation. Perkins v. State [Ga.] 55 S. E. 501. Motion for new trial at term after judgment is too late. Act March 10, 1905, did not apply to prosecutions for offenses committed before its passage. Miller v. State, 165 Ind. 566, 76 N. E. 245. Defendant is entitled of right to make a motion for a new trial at any time within four days after verdict and during the term, and this right is not lost by imposition of sentence. Massey v. State, 50 Fla. 109, 39 So. 790. New trial cannot be granted except for want of jurisdiction after term at which judgment entered. Sentence and not appointment of date for execution is judgment. State v.

affidavit as to all matters of fact involved.[95] However devoid of merit a court may regard a motion to set aside a verdict, it is the duty of such court to grant a hearing on the motion.[96] Under a statute providing that proof on motion for new trial shall be made by affidavit, if the power to call witnesses for oral examination exists at all it arises only on a full and clear showing of the impossibility of obtaining their affidavits.[97] Where the alleged misconduct of the jury consisted of disclosure by some jurors of alleged attempts to bribe them to acquit, the moving papers must deny complicity in such bribery.[98] Affidavits of jurors are not admissible to impeach their verdict except as allowed by express statute,[99] nor are their statements after trial admissible for that purpose,[1] but jurors may testify to sustain the verdict against claim of improper communication with jury.[2] Counter affidavits may be allowed,[3] and the sufficiency of the proof is for the court.[4] While it is better practice to allow an amendment to the motion and then overrule it if insufficient, it is not error to refuse to permit an amendment which presents no ground for new trial.[5] Demurrer to the state's written objections to a motion for new trial is un-

Tolla [N. J. Law] 63 A. 338. Motion cannot be made after judgment. People v. Court of General Sessions of the Peace, 112 App. Div. 424, 98 N. Y. S. 557; State v. Hayden [Iowa] 107 N. W. 929.

Prohibition against consideration of motion after judgment granted. People v. Court of General Sessions of the Peace, 112 App. Div. 424, 98 N. Y. S. 557, overruling People v. Goff, 49 Misc. 72, 98 N. Y. S. 66.

94. Ground that entire charge was not clear, accurate, or impartial, is too general. Adams v. State, 125 Ga. 11, 53 S. E. 804. Ground that verdict is contrary to the charge equivalent to statement that it was contrary to law. Milner v. State, 124 Ga. 86, 52 S. E. 302. Ground of motion, "for other good and sufficient reasons apparent by the record," presents nothing. Douberly v. State [Fla.] 40 So. 675. Motion held insufficient to raise correctness of an additional instruction. Williams v. State, 124 Ga. 782, 53 S. E. 98. That court erred "in not charging the law of voluntary manslaughter" too general. Smith v. State, 125 Ga. 300, 54 S. E. 124. Motion for new trial stating ground generally as error in refusing to instruct as requested by defendant is insufficient. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. General averments of error in the part of the charge relating to specified subjects is too indefinite Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 214, 93 S. W. 726. It is of right to file an amendment to the motion for a new trial at any time during the term. Cowan v. State [Tex. Cr. App.] 93 S. W. 553. Where the ground of motion does not set forth the evidence objected to but refers to the brief of evidence therefor, the objection will not be considered. Langley v. State [Ga.] 54 S. E. 821. Motion for new trial must point out errors in charge. Norton v. State [Wis.] 109 N. W. 531. A motion for new trial on the ground that the verdict is contrary to law will permit review on the ground that the evidence falls as a matter of law to establish the charge. De Tarr v. State [Ind. App.] 76 N. E. 897. If ground is specifically stated as ground of new trial, it is sufficient though not stated in the language of the statute. State v. Place [S. D.] 107 N. W. 829. General averment of error in motion for new trial insufficient where no exceptions to refusal of charges. State v. King, 194 Mo. 474, 92 S. W. 670. Ground of motion for new trial that the court failed to fully charge the law applicable to the case raises no question for review. Henderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 706, 95 S. W. 131.

95. Motion based on newly-discovered evidence must be supported by affidavit of accused. State v. King, 194 Mo. 474, 92 S. W. 670. Motion on ground of newly-discovered evidence must be accompanied by affidavits of witnesses or good excuse for failure to produce them. State v. Clifford, 58 W. Va. 681, 52 S. E. 864. Affidavits must state facts showing diligence, general averment insufficient. Comoli v. State, 78 Vt. 423, 63 A. 186.

96. Fields v. State, 4 Ohio N. P. (N. S.) 401.

97. Showing of impossibility held insufficient. State v. Wilson, 42 Wash. 56, 84 P. 409.

98. State v. Wilson, 42 Wash. 56, 84 P. 409.

99. Pen. Code, § 2192, allows them only when the verdict was reached by resort to chance. State v. Beeskove [Mont.] 85 P. 376. Juror cannot make affidavit to his own incompetency or misconduct or that of his fellows. Bowden v. State [Ga.] 55 S. E. 499.

1. Hearsay and violation of rule forbidding impeachment by jurors. People v. Birnbaum, 114 App. Div. 480, 100 N. Y. S. 160.

2. Nunnery v. State, 87 Miss. 542, 40 So. 431.

3. Where motion is on ground of newly-discovered evidence, the state may be allowed time to procure counter affidavits. Collins v. State, 124 Ga. 788, 53 S. E. 193.

4. Evidence held to make prima facie case of improper communication with jury not overcome by testimony of three jurors that they were not communicated with. Nunnery v. State, 87 Miss. 542, 40 So. 431 On conflicting affidavits as to false answer by juror on voir dire, denial of new trial sustained. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. 805, 105 N. W. 838. Ex parte affidavit as to unfairness of interpreter held not sufficient. State v. Lee, 116 La. 607, 40 So. 914. Evidence of relationship of juror to prosecutrix held insufficient. Watkins v. State, 125 Ga. 142, 52 S. E. 1024.

known to the practice and the ruling thereon presents no question.[6] A statute allowing new trials in criminal cases in like manner and for like causes as in civil cases operates only so far as is consistent with other rules of law,[7] and, owing to the immunity of the state from suit, the remedy by action to secure a new trial is not applicable in criminal cases.[8]

§ 12. *Sentence and judgment.*[9]—Sentence may be pronounced at any time after verdict unless delay is required by statute.[10] Court may in its discretion suspend imposition of sentence for such time as it sees fit,[11] but has ordinarily no power to suspend sentence during good behavior.[12] In the absence of statutory enactments to the contrary, the power of a police judge to revoke the suspension of a sentence on his own motion continues after the term in which it was pronounced.[13] The court should fix the penalty[14] according to the statute in force at the time of trial,[15] unless it has been fixed by the verdict.[16] It is in the discretion of the court to act upon a recommendation of the jury that accused be punished as for misdemeanor.[17] The court may properly state its reasons for the sentence imposed.[18] On conviction by single verdict of two separate offenses jointly charged, the court may either impose separate sentences or treat the conviction as one for the highest offense charged and sentence therefor.[19] The sentence should definitely state the punishment imposed[20] and the alternative, if any.[21] Where the sentence contains two conflicting provisions as to the time within which a fine may be paid, both are nugatory and a reasonable time may be allowed as if the sentence were silent.[22] Under an indeterminate sentence law providing for imprisonment not less than the minimum or more than the maximum fixed by law, a provision in the sentence fixing a maximum less than that provided by law is surplusage.[23] While it is the proper practice to ask a defendant if he has anything to say why he should not be sentenced, the omission so to do is not ground for reversal in a case not capital.[24]

5. Walker v. State, 125 Ga. 30, 53 S. E. 807.
6. Miller v. State, 165 Ind. 566, 76 N. E. 245.
7. Crim. Code, § 210. State v. Appleton [Kan.] 84 P. 753.
8. State v. Appleton [Kan.] 84 P. 753.
9. See 5 C. L. 1855.
10. Pen. Code, § 2210, providing that sentence shall be deferred two days after verdict if the court intends to remain in session that long and "if not then at as remote a time as can be reasonably allowed," does not require sentence at the next term if the court does not remain in session two days, but only as remote a time as can reasonably be allowed in the present term. State v. Lu Sing [Mont] 85 P. 521.
11. Rev. St. c. 29, § 62, held directory. Ex parte St. Hilaire [Me.] 64 A. 882.
12. Gordon v. Johnson [Ga.] 55 S. E. 489. **Contra:** In the absence of a statutory enactment to the contrary, the power of a court to suspend execution of sentence during good behavior, or to revoke such suspension, is not impaired or limited by the passing of the term in which the suspension was made. In re Clara Lee, 3 Ohio N. P. (N. S.) 533.
13. Schaefer v. State, 7 Ohio C. C. (N. S.) 292.
14. The act of congress providing that persons convicted of robbery in the Indian Territory shall be punished "at the discretion of the court," punishment is to be fixed by the court and not by the jury as provided by the Arkansas Statutes. Act Congress, Feb. 15, 1888, c. 10, § 2. Glover v. U. S. [Ind. T.] 91 S. W. 41.
15. One convicted before the taking effect of Laws 1901, p. 146, relating to indeterminate sentence, is not entitled to the benefit of its provisions. Behnke v. People, 222 Ill. 540, 78 N. E. 889.
16. Where a plea of guilty of an included offense is received on indictment for murder, the statute requiring punishment to be assessed by the jury on plea of guilty of a capital crime does not apply. State v. Morrison, 165 Ind. 461, 75 N. E. 968.
17. Guthrie v. State, 125 Ga. 291, 54 S. E. 180.
18. State v. Farrington [N. C.] 53 S. E. 954.
19. Washington v. State [Fla.] 40 So. 765.
20. The sentence must state the number of days' imprisonment required to work out the costs. Bolton v. State [Ala.] 40 So. 409.
21. Sentence held not to impose imprisonment on nonpayment of fine. Ex parte Patterson [Nev.] 87 P. 2. Where the sentence is for imprisonment on default of payment of fine, a reasonable time is to be allowed to pay the fine, unless the sentence fixes the time for payment. Dunaway v. Hodge [Ga.] 55 S. E. 483.
22. Dunaway v. Hodge [Ga.] 55 S. E. 483.
23. In re Duff, 141 Mich. 623, 105 N. W. 138.

Judgment.[25]—When the verdict was indorsed on the information, a record entry of the verdict without the signature of the foreman is sufficient.[26] There should be an adjudication on the verdict,[27] but it has been held that entry of sentence on the verdict without a formal adjudication of guilt is sufficient.[28] Judgment in misdemeanor need not recite eo nomine the crime of which conviction was had.[29] Judgment of fine need not recite alternative of imprisonment if statute fixes it.[30] Slight verbal errors in the recital of the verdict are immaterial.[31] An unauthorized provision for imprisonment to enforce a fine is severable.[32] Judgment of conviction with indeterminate sentence must show the offense so that the maximum penalty can be certainly ascertained therefrom.[33] Sentence cannot be modified after commitment.[34]

§ 13. *Record or minutes and commitment.*[35]—The record must show every essential step, including drawing of jury and service of venire,[36] arraignment and plea,[37] the constitution of the court,[38] the impaneling and swearing of the jury,[39] presence of accused in court when the day for his trial is fixed[40] and during the entire trial,[41] that statutory admonition was given to jury,[42] the reasons for a discharge of the jury,[43] and that defendant was asked before sentence if he had anything to say.[44] Minute entries must be made during the term,[45] but error of the clerk in making entry of the sentence can be corrected at a subsequent term.[46]

24. Lamb v. People, 219 Ill. 399, 76 N. E. 576.

25. See 5 C. L. 1856. Order respecting costs held not a judgment. State v. French, 118 Mo. App. 15, 93 S. W. 295.

26. State v. Warren, 117 La. 84, 41 So. 361.

27. Pearson v. State [Ala.] 41 So. 733.

28. Shirley v. State, 144 Ala. 35, 40 So. 269. It is not necessary that the judgment contain a finding of defendant's guilt, sentence on the verdict being sufficient. Judgment held sufficient. Hoch v. People, 219 Ill. 265, 76 N. E. 356.

29. Klefel v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 228, 94 S. W. 463.

30. Bartlett v. Paducah, 28 Ky. L. R. 1174, 91 S. W. 264.

31. State v. McLain [Wash.] 86 P. 388.

32. In re Sullivan [Cal. App.] 84 P. 781.

33. Showing conviction of "grand larceny" insufficient when different acts defined as constituting grand larceny were subject to different penalties. In re Howard, 72 Kan. 273, 83 P. 1032.

34. In re Sullivan [Cal. App.] 84 P. 781.

35. See 5 C. L. 1856.

36. Record must show drawing of jury, order for service of venire, and service of a copy thereof on accused. Lomineck v. State [Ala.] 39 So. 676. Record held to sufficiently show that names were drawn from jury box by judge. Gray v. State [Ala.] 39 So. 621. The record should show an order on the sheriff to serve accused with a copy of the venire. Allen v. State [Ala.] 41 So. 624. The record must affirmatively show compliance with a statute requiring the judge in open court to draw from the jury box a specified number of names. Morris v. State [Ala.] 41 So. 274.

37. Entry that defendant was "duly arraigned" means arraigned according to law. Clements v. State [Ala.] 40 So. 432. Record held to sufficiently show arraignment. Knight v. State [Ala.] 41 So. 911. Record recital that defendant "stood mute" imports that he was requested to plead and refused. People v. Fisher, 144 Mich. 570, 13 Det. Leg. N. 346, 108 N. W. 280. Must show plea. Hamilton v. State [Ala.] 41 So. 940. Mere recital of overruling of certain pleas not sufficient. Bolton v. State [Ala.] 40 So. 409.

38. It is sufficient if the record shows that the court was in session and the names of its officers then present need not appear. Lamb v. People, 219 Ill. 399, 76 N. E. 576.

39. Recital of swearing of jury held sufficient. State v. Temple, 194 Mo. 237, 92 S. W. 869.

40. Lomineck v. State [Ala.] 39 So. 676.

41. That accused was in court when verdict was returned. Wells v. State [Ala.] 41 So. 630. Showing of presence of defendant at preliminary proceedings the same day the trial commenced held sufficient to show that he was present at the beginning of the trial. State v. Temple, 194 Mo. 237, 92 S. W. 869. If the record shows that defendant was present when the jury was sworn, presence at subsequent stages of the trial will be presumed. State v. Temple, 194 Mo. 228, 92 S. W. 494. Record affirmatively showing presence of accused at beginning of trial and at sentence held sufficient. People v. Fisher, 144 Mich. 570, 13 Det. Leg. N. 346, 108 N. W. 280. Must affirmatively show presence of accused at return of verdict. Dix v. State [Ala.] 41 So. 924. Recital of defendant's presence at beginning and end of trial held to imply continuous presence. Id.

42. The record should show that the jury were admonished at each adjournment. People v. Maughs [Cal.] 86 P. 187.

43. Record entry of discharge of jury held to sufficiently show inability to agree. State v. Keerl [Mont.] 85 P. 862.

44. A record statement "and now neither the said defendant nor his counsel for him saying anything further why the judgment of the court should not now be pronounced against him" imports that defendant was

Commitment[47] under indeterminate sentence must show the offense of which accused was convicted with such particularity that the maximum punishment therefor can be ascertained with certainty from the statute.[48] Commitment must show conviction[49] of an offense within the jurisdiction of the court,[50] and in New York must show the time and place of the offense.[51]

§ 14. *Saving questions for review. Necessity of objection, motion, or exception.*[52]—The case will be reviewed on the theory mutually adopted below,[53] and, so far as accused is entitled to waive irregularities,[54] errors once waived will not be considered.[55] If opportunity for revising a ruling is offered below and not availed of, the ruling cannot be questioned on appeal.[56] Invited error cannot be complained of; thus an answer responsive to a question by accused[57] or an instruction asked or similar to one asked by him[58] is not available as error. If a request is modified if becomes the court's instruction and is subject to exception by defendant.[59] Where defendant's counsel states his view of the rule of evidence, questions within such rule and not objected to cannot be assailed on appeal.[60] Aside from objections to the jurisdiction[61] and to the failure of the indictment to state an offense,[62] prompt objection and exception in the trial court is necessary to preserve the right to a re-

asked before sentence if he had aught to say. Lamb v. People, 219 Ill. 399, 76 N. E. 576.

45. Adjourned term held part of term within rule. Coker v. State, 144 Ala. 28, 40 So. 516.

46. Tyler v. State, 125 Ga. 46, 53 S. E. 818.

47. See 5 C. L. 1856.

48. Where two different punishments are provided for grand larceny, judgment and commitment reciting conviction of grand larceny and commitment until discharged by due course of law is uncertain. In re Howard, 72 Kan. 273, 83 P. 1032. And the commitment cannot be sustained as for the shorter of the statutory periods. Id.

49. "Having thereupon pleaded guilty," substantial compliance with statutory form "having been thereupon convicted upon a plea of guilty." People v. Pitts, 111 App. Div. 912, 97 N. Y. S. 511.

50. Where the commitment of a court having jurisdiction only of misdemeanors shows conviction of an "assault" without showing the degree, defendant will be discharged. People v. Jacobs, 51 Misc. 71, 100 N. Y. S. 734.

51. Certificate of conviction stating the offense as "petit larceny" without stating time or place is sufficient. People v. Pitts, 111 App. Div. 319, 97 N. Y. S. 509.

52. See 5 C. L. 1857.

53. State v. McWhirter [N. C.] 53 S. E. 734. Matters assumed on trial without question cannot be raised on appeal. People v. Stein 112 App. Div. 896, 97 N. Y. S. 923. Admissibility of evidence of facts to which accused testified. State v. Lamont, 115 La. 568, 39 So. 602. Where an order striking out testimony was by inadvertence not broad enough but no objection was made and it was treated by both sides as eliminating all the objectionable testimony, there is no available error. People v. Weber [Cal.] 86 P. 671.

54. In all matters of procedure, accused may waive statutory provisions designed for his protection. State v. Smith [Iowa] 109 N. W. 115.

55. Objection to testimony as to defendant's character is not waived by offering testimony to contradict it. State v. Beckner, 194 Mo. 281, 91 S. W. 892. That the prosecution was conducted by unsworn private counsel is no ground of reversal if defendant consented thereto. State v. Cato, 116 La. 195, 40 So. 633. Where defendant moves for discharge of the jury on improper argument in the state's opening, and then withdraws the motion and indicates willingness to proceed, all objection to the argument is waived. State v. Smith [Iowa] 109 N. W. 115.

56. Where a motion is denied with leave to renew, it is waived if not renewed. People v. Staples [Cal.] 86 P. 886. No error is available on the denial of a motion where counsel refuses a subsequent offer of the court to grant it. Langley v. State [Ga.] 54 S. E. 821. Where the court offers to withdraw a remark and defendant objects that it is too late to do so, the case stands as if it were withdrawn. Barddell v. State, 144 Ala. 54, 39 So. 975.

57. Hammond v. State [Ala.] 41 So. 761; State v. Weisenberger, 42 Wash. 426, 85 P. 20; Smith v. Com., 28 Ky. L. R. 1254, 91 S. W. 742.

58. Sparks v. Territory, 16 Okl. 127, 83 P. 712; State v. Morrison [Mont.] 85 P. 738. Defendant cannot complain of an instruction similar to one requested by him. Clay v. State [Wyo.] 86 P. 17.

59. People v. Wong Sang Lung [Cal. App.] 84 P. 843.

60. People v. Lambert, 144 Mich. 578, 13 Det. Leg. N. 299, 108 N. W. 345.

61. Jurisdiction of the trial court and insufficiency of the indictment to support a judgment may be presented for the first time on appeal, but errors occurring on the trial must be excepted to and presented by motion for a new trial. Huff v. Territory, 15 Okl. 376, 85 P. 241. Want of power to hear motion for new trial after affirmance and remand. State v. Adams, 73 S. C. 435, 53 S. E. 538.

62. Failure of the information to lay the

view of the ruling complained of.[63] This rule has been applied to formal defects in the indictment,[64] arraignment and plea,[65] variance between the indictment and the information on which it is based,[66] qualification of jurors,[67] objections to manner of summoning jury,[68] conduct of trial and reception of evidence,[69] ruling on application to give time to prepare affidavit as to testimony of absent witness,[70] examination of witnesses,[71] admission[72] or exclusion of evidence,[73] conduct and remarks of judge,[74] instructions,[75] refusal to instruct,[76] and manner of giving instructions,[77] objection to fairness of interpreter and to the legality of the appointment of the minute clerk,[78] objection that unauthorized person acted as clerk of court,[79] variance between indictment and proof,[80] failure to swear officer to take charge of jury,[81] misconduct of juror,[82] defects in verdict.[83] Prompt objection must be made

venue may be raised for the first time after verdict. State v. Beeskove [Mont.] 85 P. 376. Failure of indictment to state facts sufficient to constitute an offense may be raised after plea of guilty. Klawanski v. People, 218 Ill. 481, 75 N. E. 1028. Insufficiency of affidavit may be first raised on appeal. Telheard v. Bay St. Louis, 87 Miss. 580, 40 So. 326.

63. Huff v. Territory, 15 Okl. 376, 85 P. 241; Bowles v. State [Miss.] 40 So. 165. Objection not ruled on is not available. Huff v. Territory, 15 Okl. 376, 85 P. 241. Constitutionality of statute cannot be raised for first time on appeal. Griggs v. State [Ga.] 55 S. E. 179; Moore v. State [Ga.] 55 S. E. 327.

64. Authenticity of indictment cannot be first raised after verdict. State v. Sharpe, 119 Mo. App. 386, 95 S. W. 298. Objection that date of offense as alleged is after the finding of the indictment must be taken before the jury is sworn. State v. Weaver [S. C.] 54 S. E. 615. The objection that references in one count to matter in another was destroyed by withdrawal of the latter cannot be first raised after verdict. People v. Lewis, 111 App. Div. 558, 98 N. Y. S. 83. Correctness of a copy ordered filed to replace a lost indictment must be questioned below. State v. Strayer, 58 W. Va. 676, 52 N. E. 862.

65. Failure of accused to demand arraignment does not waive error in putting him on trial without a plea. Sims v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 34, 91 S. W. 579.

66. Commonwealth v. Zayrook, 30 Pa. Super. Ct. 111.

67. Disqualification of a juror known to accused during the trial cannot be raised after the verdict. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Incompetence of a juror cannot be raised after verdict. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. That a juror was disqualified because of having acted on a former trial, being a fact within the knowledge of defendant's counsel and a matter of public record, it is not ground for objection after verdict, though counsel had forgotten the facts. State v. Langford [S. C.] 55 S. E. 120.

68. Commonwealth v. Johnson, 213 Pa. 432, 62 A. 1064.

69. That a witness, recalled after submission to restate his testimony, varied therefrom, must be objected to at the time. Harper v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 585, 95 S. W. 125. Impeachment by state of its own witness must be objected to below. McGirt v. State, 125 Ga. 269, 54 S. E. 171. Hostile demonstration by spectators in presence of jury, known to accused at the time, cannot be first urged after verdict. State v. High, 116 La. 79, 40 So. 538.

70. State v. Douglass, 72 Kan. 673, 83 P. 621.

71. Scope of cross-examination. Maloy v. State [Fla.] 41 So. 791.

Answer expected must be shown by offer of proof. Martin v. State, 144 Ala. 8, 40 So. 275; State v. Rester, 116 La. 985, 41 So. 231.

72. Objection to evidence waived, unless made when it is offered. State v. Bateman, 198 Mo. 212, 94 S. W. 843; Coker v. State [Ala.] 41 So. 303. If objection is not made to question laying foundation for impeachment because time and place of alleged inconsistent statement is not given, it cannot be objected that the foundation is insufficient in that respect. State v. Brown [Del. Gen. Sess.] 63 A. 328.

73. Striking out of evidence. State v. Walker, 194 Mo. 253, 92 S. W. 659.

74. Hostile examination by court of defendant's witness, followed by ordering him into custody, is not such a fundamental error as will be reviewed in the absence of objection and exception. Huff v. Territory, 15 Okl. 376, 85 P. 241.

75. Objection to charge cannot be first made after verdict. State v. Le Blanc, 116 La. 822, 41 So. 105; Brown v. State, 127 Wis. 193, 106 N. W. 536; Pittman v. State [Fla.] 41 So. 385; Commonwealth v. Chartiers R. Co., 28 Pa. Super. St. 173; State v. Bush, 117 La. 463, 41 So. 793; Sparks v. Territory, 16 Okl. 127, 83 P. 712.

76. Failure to instruct as to all the law of the case must be raised by specific and timely objection. State v. McCarver, 194 Mo. 717, 92 S. W. 684.

77. Timely objection must be made to failure to instruct in writing. Mobile & O. R. Co. v. Com., 28 Ky. L. R. 1360, 92 S. W. 299.

78. State v. Lee, 116 La. 607, 40 So. 914.

79. State v. Baudoin, 115 La. 773, 40 So. 42.

80. Miller v. State, 165 Ind. 566, 76 N. E. 245.

81. Lamb v. People, 219 Ill. 399, 76 N. E. 576.

82. Where defendant has knowledge, during the trial, of misconduct of a juror, he cannot object for the first time after verdict. Trombley v. State [Ind.] 78 N. E. 976.

83. Failure of verdict to find value must be objected to when it is returned. State v. James County, 117 La. 419, 41 So. 702.

to alleged improper argument[84] and a ruling thereon procured,[85] and, unless the impropriety is obviously and necessarily hurtful,[86] an admonition to the jury to disregard it must be asked.[87] It must have clearly appeared that a juror failed to hear certain testimony to put the court in default for failure of its own motion to have it repeated.[88] Where a poll of the jury was not requested until the court had commenced to pronounce sentence, defendant cannot complain that in sentencing the court expressed an opinion on the facts though the poll revealed a disagreement and the jury were sent out again.[89]

A motion to strike[90] is essential to raise lack of responsiveness of an answer,[90a] and where evidence is admitted out of order, a motion to strike out is necessary to present error, on failure to supply the connection.[91] All errors committed on the trial, except rulings on evidence, must be pointed out on the motion for new trial or they will not be considered on appeal.[92]

Sufficiency of objection or motion.[93]—Objection must be made when the matter arises[94] and must state the specific ground,[95] general objection to evidence being unavailing if it is admissible for any purpose,[96] the objector being held on appeal

84. State v. High, 116 La. 79, 40 So. 538; Regan v. State, 87 Miss. 432, 39 So. 1002; Mash v. People, 220 Ill. 86, 77 N. E. 92; State v. Walker, 194 Mo. 253, 92 S. W. 659; People v. Owens [Cal. App.] 86 P. 980.

85. Objection to argument cannot be considered unless there was a ruling adverse to defendant. State v. Jeffries, 117 Mo. App. 569, 92 S. W. 501.

86. Improper argument, obviously hurtful, is ground for reversal, though no charge was asked. Jenkins v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 129, 93 S. W. 726. Unless argument is palpably improper, a request for an instruction is necessary to save error thereon. Wright v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 935, 93 S. W. 548.

87. To save error on remarks of counsel, an instruction to disregard must be asked. State v. Clifford, 58 W. Va. 681, 52 S. E. 864.

88. Haddix v. State [Neb.] 107 N. W. 781.

89. Battise v. State, 124 Ga. 866, 53 S. E. 678.

90. See 5 C. L. 1859, n. 35.

90a. State v. Bateman, 198 Mo. 212, 94 S. W. 843.

91. Commonwealth v. Tucker, 189 Mass. 457, 76 N. E. 127; Pittman v. State [Fla.] 41 So. 385.

92. Thompson v. Com., 28 Ky. L. R. 1137, 91 S. W. 701. Where a notice of intention to move for a new trial is treated below as a motion, the appellate court will so regard it. State v. Wright [Idaho] 85 P. 493.

93. See 5 C. L. 1859.

94. Objection to competency of witness must be made when he is offered. State v. O'Malley [Iowa] 109 N. W. 491. Irregularities in proceedings before examining magistrate must be made before plea. State v. Calkins [S. D.] 109 N. W. 515. Objection to testimony must be made when it is given and motion to strike after close of direct examination is too late. Franklin v. State [Ala.] 39 S. 979. No objection except to instructions may be made for the first time in the motion for new trial. Thompson v. Com., 28 Ky. L. R. 1137, 91 S. W. 701. Mental incompetency of juror may be urged after verdict if not sooner known. Wall v. State [Ga.] 55 S. E. 484. That juror's name was not in jury box must be urged at the time he is offered. Id.

95. Simmons v. State [Ga.] 55 S. E. 479. General objection to question does not raise indefiniteness as to time and place. Davis v. State [Ala.] 40 So. 663. Objection for want of foundation must point out wherein it is deficient. People v. Lamar, 148 Cal. 564, 83 P. 993. "Incompetent and immaterial" too general. Sparks v. Territory, 16 Okl. 127, 83 P. 712. Objection to competency of testimony of an expert does not raise the question of his qualifications. State v. Martin, 47 Or. 282, 83 P. 849. Objection that question is leading and calls for a conclusion does not raise competency of evidence. Sweet v. State [Neb.] 106 N. W. 31. Objection that evidence is irrelevant does not raise question that it is hearsay. State v. Wells [Mont.] 83 P. 476. Objection to testimony does not raise competency of witness. State v. Mizis [Or.] 85 P. 611. Objection to dying declaration as "hearsay" and "self-serving" does not reach the objection that parts of it are not confined to the circumstances of the homicide. State v. Crump, 116 La. 978, 41 So. 229. Objection to parol proof of part of a letter held not to raise the question whether it could be received without proof of the whole. Lasater v. State, 77 Ark. 468, 94 S. W. 59. Objection that evidence tended to show another distinct offense does not raise question whether it was part of res gestae of crime charged. Schweir v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 559, 94 S. W. 1049. Objection that evidence that prosecutrix in rape had never had intercourse with any other man was "immaterial" raises no question for review. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058.

96. Campbell v. State, 124 Ga. 432, 52 S. E. 914; State v. Lu Sing [Mont.] 85 P. 521; Lawrence v. State [Md.] 63 A. 96; State v. Finley, 193 Mo. 202, 91 S. W. 942; Pittman v. State [Fla.] 41 So. 385; Brooks v. State [Ala.] 41 So. 156; Harrison v. State, 125 Ga. 267, 53 S. E. 958. As to whether accused was under indictment for burglary committed near scene of crime charged. Boyd v. State

to specific ground of objection presented below.[97] Objection to introduction of "any evidence" made after some evidence is in raises no question.[98] A motion to strike is properly denied if any part of the evidence covered thereby is admissible.[99] Where a motion for a new trial is essential, the error sought to be raised must be distinctly stated as a ground of the motion.[1]

Sufficiency of exceptions.[2]—Exceptions must be promptly taken[3] and be specifically addressed to the matter complained of.[4] Exceptions to the instructions are sometimes required to state the ground.[5]

§ 15. *Harmless or prejudicial error.*[6]—In respect to some matters of procedure, notably argument and conduct of counsel[7] and custody and conduct of the jury,[8] the rulings usually blend the propriety of particular acts and their harmful effect in such manner that separate statement would be misleading, and sections of this article dealing therewith should be consulted in connection with the holdings which clearly present a proposition of harmless error. Error is presumptively prejudicial,[9] doubt as to its harmful effect being resolved in favor of accused.[10] Harmful effect of error is emphasized by the closeness of the case on the evidence,[11] and by the use made of it in argument.[12] The rule that errors occurring during a trial shall not be considered as ground for reversal of the resulting judgment, unless they are of such a character as to be material or prejudicial, is not applicable to an error in-

[Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053. Objection to entire testimony of witness properly overruled if part is admissible. Park v. State [Ga.] 55 S. E. 489.

97. Pittman v. State [Fla.] 41 So. 385.

98. State v. Calkins [S. D.] 109 N. W. 515.

99. State v. Crouch, 130 Iowa, 478, 107 N. W. 173; Freeman v. State, 50 Fla. 38, 39 So. 785; Johnson v. State, 125 Ga. 243, 54 S. E. 184; Thompson v. State [Fla.] 41 So. 899.

1. Smith v. State, 125 Ga. 300, 54 S. E. 124; Grabowski v. State, 126 Wis. 447, 105 N. W. 805; Douberly v. State [Fla.] 40 So. 676; Williams v. State, 124 Ga. 782, 53 S. E. 98; Adams v. State, 125 Ga. 11, 53 S. E. 804; Milner v. State, 124 Ga. 86, 52 S. E. 302; Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 214, 93 S. W. 726; Cowan v. State [Tex. Cr. App.] 93 S. W. 553; Langley v. State [Ga.] 54 S. E. 821; State v. King, 194 Mo. 474, 92 S. W. 670; State v. Place [S. D.] 107 N. W. 829; Norton v. State [Wis.] 109 N. W. 531; De Tarr v. State [Ind. App.] 76 N. E. 897; Henderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 706, 95 S. W. 131. As to sufficiency of particular motions, see ante, § 11.

2. See 5 C. L. 1859.

3. Exceptions to charge must be taken at time. State v. Finley, 193 Mo. 202, 91 S. W. 942. Exception to remarks of prosecuting attorney must be taken at the time they are made. State v. Spurling, 116 La. 789, 40 So. 167.

4. The part of the charge excepted to must be bad as a whole. Sims v. State [Ala.] 41 So. 413. General exception to entire charge unavailing. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. Exception to each distinct part of the charge unavailing. Untreiner v. State [Ala.] 41 So. 286. General exception to the charge will not avail if any part thereof is correct. Huff v. Territory, 15 Okl. 376, 85 P. 241. General exception to refusal to give several instructions insufficient if any one was good. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. General exception to denial of motion for new trial on several grounds insufficient. Koch v. State, 126 Wis. 470, 106 N. W. 531.

5. Exception to charge as irrelevant must state wherein it was prejudicial. State v. Simmons, 73 S. C. 234, 53 S. E. 286. Exception to instruction as erroneous will not support contention that it is not warranted by the evidence. Graham v. State, 125 Ga. 48, 53 S. E. 816. To review error in particular statements of an instruction, there must be specific objection and exception or a motion for a new trial specifically pointing out the defect. Grabowski v. State, 126 Wis. 447, 105 N. W. 805.

6. See 6 C. L. 1860.

7. See ante, § 10B.

8. See ante, § 10F.

9. State v. Wheeler, 129 Iowa, 100, 105 N. W. 374. If substantial error is committed on the trial of a criminal case, the natural tendency of which is to prejudice the defendant, it will be ground for a new trial unless it affirmatively appears from the whole record that defendant could not have been prejudiced. State v. Williams, 96 Minn. 351, 105 N. W. 265. The presumption of prejudice from the unauthorized separation of a juror from his fellows cannot be rebutted by proof that he was the last to agree to a conviction. State v. Strodemier, 41 Wash. 159, 83 P. 22. Erroneous admission of evidence is presumptively prejudicial. McCullough v. State [Tex. Cr. App.] 94 S. W. 1056. Unless it can be said that it could by no possibility have harmed defendant. People v. Brown, 110 App. Div. 490, 96 N. Y. S. 957.

10. Haynes v. Com., 104 Va. 854, 52 S. E. 358.

11. People v. Cascone, 185 N. Y. 317, 78 N. E. 287.

12. Lawrence v. People, 222 Ill. 155, 78 N.

volving the deprivation of a constitutional right. The law presumes in such a case that an injury has been suffered.[13]

Trivial or immaterial error.[14]—The rule that reversal will not ordinarily be had for errors in no manner affecting the result[15] has been applied to permitting amendment of indictment,[16] denial of change of venue,[17] denial of continuance,[18] selection of jury,[19] conduct and remarks of court,[20] admission of evidence,[21] exclusion of evidence,[22] examination of witnesses generally,[23] cross-examination of

E. 50. And see People v. Cascone, 185 N Y. 317, 78 N. E. 287.

13. Fields v. State, 4 Ohio N. P. (N. S.) 401.

14. See 5 C. L. 1860.

15. See, for strong general statement of policy to ignore technical error State v. Nelson, 91 Minn. 143, 97 N. W. 652; State v Crawford, 96 Minn. 95, 104 N. W. 768, 822.

16. Propriety of adding a count to the indictment after arraignment not considered where conviction was on another count. Denlson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 248, 93 S. W. 731.

17. Denial of change of venue for local prejudice is shown to be harmless by failure of defendant to exhaust his peremptory challenges. Regan v. State, 87 Miss. 422, 39 So. 1002.

18. Denial of postponement to allow summoning of witnesses harmless where it appears that there were no such persons as the alleged witnesses. Cremeans v. Com., 104 Va. 860, 52 S. E. 362.

19. Erroneous overruling of challenge for cause harmless where competent jury was secured and undisputed evidence showed guilt. Sullins v. State [Ark.] 95 S. W. 159. Overruling of challenge for cause where juror was challenged peremptorily. State v. Sultan [N. C.] 54 S. E. 841. No error can be predicated on the excusing of a juror where the panel was completed without exhausting defendant's peremptory challenges. State v. Gereke [Kan.] 86 P. 160. Errors in summoning jury held fatal. Hoback v. Com., 104 Va. 871, 52 S. E. 575.

20. Derogatory comment during trial on evidence which did not bear on any issue. Haddix v. State [Neb.] 107 N. W. 781. Remark of court derogatory to witness harmless where all his testimony was unfavorable to accused. People v. Fernandez [Cal. App.] 86 P. 899. Improper remarks of court not ground for reversal if proof of guilt is clear. Mash v. People, 220 Ill. 86, 77 N. E. 92. The refusal of the trial judge to permit the first wife to testify against defendant on trial for bigamy, on the ground that her testimony is incompetent on account of her relationship to the defendant, will not be regarded as prejudicial to the defendant where accompanied by an explicit statement by the court to the jury that no fact with reference to the first marriage is thereby determined by the court. State v. Bates, 4 Ohio N. P. (N. S.) 502.

21. Evidence in prosecution for statutory rape that prosecutrix had never had intercourse with any other man held harmless. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Parol proof of letter of accused held prejudicial to him on issue of sanity. McCullough v. State [Tex. Cr. App.] 94 S. W. 1056. Evidence of the age of the children of prosecutrix in rape held not prejudicial. Boyd v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053. Admission of evidence of previous disconnected offense ground for reversal. People v. Sekeson, 111 App. Div. 490, 97 N. Y. S. 917. Evidence that accused was in the habit of cursing. State v. Smalls, 73 S. C. 516, 53 S. E. 976. Proof of one inadmissible statement which adds nothing to another admitted without objection is harmless. People v. Cook, 148 Cal. 334, 83 P. 43. Declaration of injured person, a negro, that prosecution would be futile because defendant was a white man held harmful as injecting race prejudice. Talkington v. State, 87 Miss. 510, 40 So. 163. Admission of evidence that defendant's disposition was good when he was sober but bad when he was drunk is harmless where he admitted the killing and sought by proof of intoxication to reduce the degree. State v. Johnny [Nev.] 87 P. 3. Secondary evidence of ownership of burglarized premises harmless where possession was abundantly proven. Peck v. State [Ala.] 41 So. 759. Where a document is received in evidence, exclusion of identifying evidence relevant only to make the document admissible is harmless. Schwantes v. State, 127 Wis. 160, 106 N. W. 237. Admission of witness to conclusion harmless where such conclusion is obvious and inevitable from documents in evidence. People v. Hoffman, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838.

22. Exclusion of testimony of one witness to good reputation of accused harmless where two other witnesses testified thereto and there was no testimony to the contrary. Demaree v. Com., 28 Ky. L. R. 1374, 91 S. W. 1131. Exclusion of testimony impeaching a witness to identify held not ground for reversal where there was positive identification by four other witnesses. People v. Murphy, 113 App. Div. 363, 99 N. Y. S. 110. Exclusion of cumulative evidence not harmless unless the fact to which it is addressed is abundantly proved. State v. Trueman Mont.] 85 P. 1024.

23. Allowing prosecutor to testify in answer to a leading question that he gave up money because of fear harmless where the facts admitted of no other interpretation. Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 94 S. W. 227. Where a date was shown by several witnesses, error in permitting one to refresh his memory thereon is harmless. Hammock v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 906, 93 S. W. 549. Judgment reversed where conviction rested on suspicious evidence and cross-examination was unduly limited. People v. Meyers, 113 App. Div. 409, 99 N. Y. S. 308. Requiring witness to state that he had been several times arrested for gambling harmless. Hen-

accused,[24] argument and conduct of counsel,[25] submission to jury of question for court which court has decided against defendant,[26] instructions[27] and refusal to instruct,[28] misconduct of jurors[29] or of officers in charge of jury,[30] and conviction of lower degree than evidence warrants.[31]

Cure of error.[32]—Error in admitting evidence may be cured by striking it out

derson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 669. Permitting district attorney to examine his own witness as hostile harmless where the witness in no manner varied his story under such examination. Dodd v. State [Miss.] 40 So. 545. Requiring the form of a question to be changed harmless where the answer given is that which the original question sought. Chandler v. State, 124 Ga. 821, 53 S. E. 91. Allowing improper question harmless when witness answers that he does not know. Hill v. State [Ala.] 41 So. 621.

24. Permitting accused to be asked as to other offenses harmless where he denies them and no effort is made to contradict him. Sawyer v. U. S., 202 U. S. 150, 50 Law. Ed. 972. Permitting question to accused as to another offense held harmless where he denied it. Borck v. State [Ala.] 39 So. 580. Asking of improper question of accused harmless where objection was sustained and jury were told that no inference was to be drawn from failure to answer. Harding v. Com. [Va.] 52 S. E. 832. Allowing defendant to be asked if he had ever before been in trouble is harmless where he answers in the negative and the matter is dropped there. People v. Lambert, 144 Mich. 578, 13 Det. Leg. N. 299, 108 N. W. 345.

25. Improper argument held harmless where proof of guilt was clear. People v. Froelich, 110 App. Div. 873, 96 N. Y. S. 488. Exchange of pleasantries between juror and prosecuting attorney held harmless. Trombley v. State [Ind.] 78 N. E. 976.

26. Commonwealth v. Tucker, 189 Mass 457, 76 N. E. 127.

27. Misstatement of maximum penalty harmless where punishment assessed is within the statute. Choran v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 508, 92 S. W. 422. Error in form of instruction based on state's evidence harmless where defendant was guilty if the state's evidence was believed, while if his evidence was believed he was not guilty under any interpretation of the charge. Beattie v. State, 77 Ark. 247, 95 S. W. 163. Instruction inaccurately stating burden of proof on insanity held harmless where evidence of insanity was very slight. Stanfield v. State [Tex. Cr. App.] 94 S. W. 1057. Submission of a ground of manslaughter which the evidence does not authorize is harmless. Goodman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 252, 91 S. W. 795. Faulty statement of rule falsus in uno disregarded where evidence of guilt was clear. State v. Fuller [Mont.] 85 P. 369. Error in instruction on murder harmless where conviction was for manslaughter. Brown v. Com., 28 Ky. L. R. 1335, 92 S. W. 542. Erroneous instruction on self-defense harmless where there was no evidence requiring submission of that defense. Clingan v. State, 77 Ark. 141, 91 S. W. 12. Stating the maximum penalty and not the minimum is harmless where the jury awarded the minimum. Abbott v. State, 77 Ark. 337, 91 S. W. 754. Where the jury correctly fixed the punishment, error in stating the number of the instruction to which they were referred for directions in respect thereto is harmless. Ward v. Com., 29 Ky. L. R. 62, 91 S. W. 700. Instruction invading the province of the jury held prejudicial and not to be disregarded on the assumption that a correct result was reached. Clay v. State [Wyo.] 86 P. 17. Submitting to the jury admissibility of testimony against defendant when court ruled in first instance it was admissible. Willoughby v. Territory, 16 Okl. 577, 86 P. 56. Error in instruction as to the manner in which corroboration of accomplice should connect accused with the crime is harmless where accused admitted the killing and claimed justification. Morgan v. Territory, 16 Okl. 530, 85 P. 718. Erroneous definition of murder harmless where jury found manslaughter. Id. Erroneous instruction as to burden of proof of insanity held harmless where defendant failed to produce any evidence sufficient to go to the jury on that issue. State v. Wetter, 11 Idaho, 433, 83 P. 341. Inadvertent omission of the word "not" in an instruction that it is for the jury to find what has been proven and what has not been proven is harmless. White v. State [Ind. App.] 76 N. E. 554. Error in the definition of assault is harmless where defendant admits the assault and claims justification. State v. Cummings, 128 Iowa, 522, 105 N. W. 57.

28. Harmless to refuse instruction on corroboration of accomplice where defendant as witness admitted everything to which the accomplice testified. Finch v. Com., 29 Ky. L. R. 187, 92 S. W. 940. Refusal of instruction that no juror should agree to conviction because the majority favor it harmless where proof of guilt is beyond all question. Lawson v. State, 87 Miss. 562, 40 So. 325.

29. See, also, ante, § 10F. That jury took out exhibits without consent not ground of reversal unless prejudice appears. People v. Dolan [N. Y.] 78 N. E. 569. Misconduct of jurors in going to the scene of the crime where it does not appear that what they saw was referred to in the jury room or affected the verdict. State v. Crouch, 130 Iowa, 478, 107 N. W. 173. Conversation between juror and third person held not ground for new trial. State v. Clifford, 58 W. Va. 681, 52 S. E. 864. Reading by jurors of a newspaper account of an occurrence on the trial of a capital charge held harmless. State v. Williams, 96 Minn. 351, 105 N. W. 265.

30. Misconduct of officers in charge of jury not shown to have affected the verdict. People v. Hoffman, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838.

31. State v. Feeley, 194 Mo. 300, 92 S. W. 663; State v. Barkley, 129 Iowa, 484, 105 N. W. 506.

and instructing the jury to disregard it,[33] or by other proper evidence subsequently admitted,[34] and particularly by testimony of accused admitting the fact shown.[35] Exclusion of evidence is cured by its subsequent admission[36] or the admission of other evidence of like effect,[37] but permitting accused to testify to a fact does not cure exclusion of testimony of a disinterested witness thereto.[38] Error in instructions may be cured by the rendition of a verdict which such instructions could not have affected,[39] and a like rule applies to rulings at the trial.[40] Putting defendant

32. See 5 C. L. 1862.

33. Subsequent exclusion of evidence and instruction to disregard cures error. Coleman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 697, 91 S. W. 783. Error in admitting testimony of a prejudicial character is not cured by its subsequent exclusion. Narrative by prosecutrix in rape cured by withdrawal. State v. Bateman, 198 Mo. 212, 94 S. W. 843. Volunteering of prejudicial statements by witness held cured by striking out and admonition. State v. McGinnis [Idaho] 85 P. 1089. It is only testimony of a very prejudicial kind, the erroneous admission of which is not cured by striking out. Morgan v. Territory, 16 Okl. 530, 85 P. 718. Striking out and instruction to disregard held to cure erroneous admission of admission of guilt by defendant. People v. Tollefson [Mich.] 13 Det. Leg. N. 481, 108 N. W. 751. Withdrawal by charge held to cure admission of declarations by prosecutrix in rape case. People v. Harris, 144 Mich. 12, 13 Det. Leg. N. 139, 107 N. W. 715. Evidence in homicide case as to feeble appearance of deceased. State v. Mitchell, 130 Iowa, 697, 107 N. W. 804. Statement of deceased. People v. Smith, 113 App. Div. 150, 98 N. Y. S. 905. Refusal to strike out hearsay when given cured by subsequently striking it out and admonishing jury to disregard it. State v. Fuller [Mont.] 85 P. 369. Confession obtained under promise of immunity. State v. Moran [Iowa] 109 N. W. 187. Retention of evidence based on insufficient proof of conspiracy is not cured by instruction that it is not to be considered unless conspiracy is proved. State v. Wheeler, 129 Iowa, 100, 105 N. W. 374. Admission of a confession made without warning is harmless where it was withdrawn by instructions and a confession made after warning was in evidence. Griffin v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 213, 93 S. W. 732.

34. Error in admitting evidence sustaining the reputation of a state's witness before such reputation is attacked is harmless where attacking evidence is subsequently introduced. Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 94 S. W. 227. Opinion from wound as to caliber of bullet harmless where bullet was produced. People v. Weber [Cal.] 86 P. 671. Admission of declaration of third person cured by subsequent testimony connecting defendant therewith. People v. Murphy [Mich.] 13 Det. Leg. N. 602, 108 N. W. 1009. Admission of evidence without proper foundation is cured by the supplying of the foundation. Letter not shown when admitted to have been written by defendant. State v. Smith, 47 Or. 485, 83 P. 865. Admission of declarations of deceased harmless where same statements were contained in a dying declaration. State v. Smith, 115 La. 801, 40 So. 171. Admission of incompetent evidence on point abundantly proved by competent evidence. Sweet v. State [Neb.] 106 N. W. 31.

35. Erroneous admission of evidence harmless where accused voluntarily testified to the same facts. State v. Nash, 115 La. 719, 39 So. 854. Admission of involuntary confession cured when defendant on stand admits the truth of all statements therein. State v. Johnny [Nev.] 87 P. 3; Loyd v. State [Ala.] 39 So. 678. Admission of secondary evidence is cured by admission of fact by accused in his statement. McCoy v. State, 124 Ga. 218, 52 S. E. 434. Where former imprisonment was properly proved on cross-examination of accused, error in previously permitting proof thereof is cured. State v. James, 194 Mo. 268, 92 S. W. 679. Allowing incompetent witness to testify where accused subsequently admits the facts. Henry v. State, 77 Ark. 453, 92 S. W. 405.

36. State v. Falsetta [Wash.] 86 P. 168. Sustaining objection to proper question cured by subsequently allowing witness to answer it. State v. Porter, 130 Iowa, 690, 107 N. W. 923.

37. Mash v. People, 220 Ill. 86, 77 N. E. 92; Reed v. State [Neb.] 106 N. W. 649. Testimony that witness heard all that was said does not cure exclusion of question whether he was close enough to have heard a certain other remark had it been made. Hill v. State [Ala.] 40 So. 387.

38. Allen v. State [Ala.] 41 So. 624.

39. Instruction complained of for tendency to produce conviction of murder instead of manslaughter harmless where the conviction was for manslaughter. Raines v. State [Ala.] 40 So. 932. Error in instructions as to murder not prejudicial where conviction was of manslaughter and all the evidence plainly required such verdict. O'Shields v. State, 125 Ga. 310, 54 S. E. 120. That an instruction assumed intent to kill harmless where the verdict was for an offense into which such intent did not enter. Shockley v. State, 125 Ga. 778, 54 S. E. 692. Instructions on murder harmless where conviction was of manslaughter. Neilson v. State [Ala.] 40 So. 221. Error in charge on first degree harmless where conviction was of second. Pinkerton v. State [Ala.] 40 So. 224. Erroneous definition of malice harmless where verdict was for manslaughter. Morris v. State [Ala.] 41 So. 274.

40. Error in an instruction the tendency of which is to produce a conviction of the offense charged is harmless where the jury convict of an included offense as to which correct instructions were given. State v. Morris, 128 Iowa, 717, 105 N. W. 213. Rulings on evidence as to premeditation harmless where conviction was for murder in the second degree. State v. Worley [N. C.] 53

on trial on an information containing a count as to which he had no examination is cured by withdrawing such count from the jury.[41] Sentence on good count only cures conviction on both.[42] Improper argument is frequently held to be cured by withdrawal by counsel[43] or by instruction to disregard it,[44] and a prohibition of instructions on the facts does not prevent a correction by the court of misstatements of fact by counsel.[45] On trial by the court, erroneous admission of evidence is cured by disregarding it.[46] Refusal to allow law to be read to jury is cured by subsequently permitting it.[47] Denial of continuance for absence of witness is harmless where the witness appeared and testified,[48] or the facts sought to be proved are shown by other witnesses without contradiction.[49] Absence of judge during argument is not cured by allowing on his return a brief adjournment in which exceptions to improper argument might be presented in writing.[50] Trial together of several indictments is not reversible error where any one would sustain the verdict and sentence.[51]

§ 16. *Stay of proceedings after conviction.*[52]—Certificate of reasonable doubt should be granted where any question of law is raised sufficient for the consideration of the appellate court.[53]

§ 17. *Appeal and review. A. Right of review.*[54]—Though the right of appeal is guaranteed by the constitution, the legislature may regulate the time and manner of procedure to secure it.[55] In New York appeal is not a constitutional right but rests wholly on legislation,[56] the Code of Criminal Procedure supplanting all former regulations.[57] Right of appeal from special sessions is the same as that allowed by law from general sessions.[58] Appeal by the state is authorized in some jurisdictions, but statutes allowing such appeals are strictly construed.[59] Though the

S. E. 128. Evidence applicable only to one degree is rendered harmless by conviction of a lower degree. Evidence of penetration where defendant was convicted of attempt to rape. People v. Ah Lung, 2 Cal. App. 278, 83 P. 296. Verdict negativing specific intent cures exclusion of evidence and error in instructions bearing thereon. Guy v. State [Ind. App.] 77 N. E. 855.

41. People v. Harris, 144 Mich. 12, 13 Det. Leg. N. 139, 107 N. W. 715.

42. Burrow v. State [Ala.] 41 So. 987.

43. Withdrawal and apology ordinarily cures improper remark in argument. Sawyer v. U. S., 202 U. S. 150, 50 Law. Ed. 972.

44. Allusion to failure of accused to produce witnesses at preliminary examination held cured by admonition. State v. Wong Tung Hee, 41 Wash. 623, 84 P. 596. Erroneous statement of law corrected by the court. Robinson v. Com., 104 Va. 888, 52 S. E. 690. Comment in argument on extent of punishment possible held harmless in view of admonition. People v. Salas, 2 Cal. App. 537, 84 P. 295. Instruction to disregard cures abusive argument. State v. Clifford, 58 W. Va. 681, 52 S. E. 864.

Contra: Reference to defendant's failure to testify fatal though jury are promptly instructed to disregard it. People v. Morris [Cal. App.] 84 P. 463.

45. State v. Lane, 47 Or. 526, 84 P. 804.

46. Where the case is tried without a jury, statement of the judge that certain testimony did not enter into his conclusion must be accepted where the record does not show the connection of such testimony with the case. State v. O'Malley, 115 La. 1095, 40 So. 470.

47. Young v. State, 25 Ga. 584, 54 S. E. 82.

48. Franklin v. State [Ala.] 39 So. 979.

49. Lucas v. State [Neb.] 105 N. W. 976. Denial of continuance for absence of witness to prove declaration of prosecutrix harmless when prosecutrix admitted making it. State v. Athey [Iowa] 108 N. W. 224.

50. Miller v. State, 73 Ohio St. 195, 76 N. E. 823.

51. Lucas v. State, 144 Ala. 63, 39 So. 821.

52. See 5 C. L. 1864.

53. Charge on accomplice testimony and argument of district attorney held to raise doubt. People v. Hummel, 49 Misc. 136, 98 N. Y. S. 713.

54. See 5 C. L. 1865.

55. State v. White, 40 Wash. 428, 82 P. 743.

56. People v. Reardon, 112 App. Div. 866, 98 N. Y. S. 399.

57. People v. Reardon [N. Y.] 78 N. E. 860.

58. People v. Markham, 99 N. Y. S. 1092.

59. Cr. Code 1896, § 4315, allowing an appeal by the state where the act on which the prosecution is founded is declared to be unconstitutional, does not authorize such appeal where the act creating the court in which the prosecution was had was declared unconstitutional. State v. Morris [Ala.] 39 So. 589. A statute allowing appeal from the sustaining of a demurrer to an "indictment" does not authorize an appeal from the sustaining of a demurrer to an "information" despite a statute that practice on information shall be the same as on indictment. State v. Adams, 193 Mo. 196, 91 S. W. 946;

statute does not so require, as a general rule the supreme court of Ohio will not allow review by the prosecution until after final judgment.[60] The review of rulings adverse to the state authorized in Wyoming is based on the filing of a bill of exceptions, and a writ of error is not authorized.[61] Dismissal of proceedings may be an acquittal from which state cannot appeal.[62] The state is not entitled to a review of rulings at the trial if the indictment was insufficient to support a conviction.[63] Dismissal of an appeal on technical grounds does not preclude a second appeal.[64]

(§ 17) *B. The remedy for obtaining review.*[65]—The statutory remedies by appeal or error should where applicable be pursued,[66] and not certiorari,[67] prohibition,[68] mandamus,[69] injunction,[70] or habeas corpus.[71] Though the facts may warrant discharge on habeas corpus, the supreme court will not, when a case is brought up by attempted appeal from an unappealable order, exercise its original jurisdiction by habeas corpus to decide the case.[72]

(§ 17) *C. Adjudications which may be reviewed.*[73]—Appeal or error ordinarily lies only to a final judgment,[74] though in some states appeal from orders

State v. Ross, 119 Mo. App. 401, 94 S. W. 842. Appeal by people being authorized only from sustaining of demurrer or arrest of judgment, no appeal lies from dismissal of the indictment. People v. Dundon, 113 App. Div. 369, 98 N. Y. S. 1048.

60. State v. Dickerson, 73 Ohio St. 193, 76 N. E. 864.

61. Rev. St. §§ 5378-5381. State v. Cornwell, 14 Wyo. 526, 85 P. 977.

62. State v. Ivey, 73 S. C. 282, 53 S. E. 428.

63. State v. Jackson, 128 Iowa, 543, 105 N. W. 51.

64. Porter v. State [Ala.] 41 So. 421.

65. See 5 C. L. 1865.

66. Rev. Code Cr. Proc. § 479, providing that review in criminal actions shall be by writ of error, prevents appeal in prosecution for misdemeanor. State v. Cram [S. D.] 105 N. W. 99. Error lies from a judgment of conviction in circuit court of violation of city ordinance. People v. Smith [Mich.] 13 Det. Leg. N. 1068, 109 N. W. 411.

67. No appeal being provided from a city recorder's court, the remedy is by "writ of review." Wong Sing v. Independence, 47 Or. 231, 83 P. 387. Certiorari will lie in Nevada to review proceedings of the district court without jurisdiction on appeal from justice court (Chapman v. Justice Ct. of Tonopah Tp. [Nev.] 86 P. 552), and the fact that the remedy by appeal has been suffered to lapse confers no right to certiorari (Id.). That the justice is without jurisdiction because the statute under which the conviction was had is unconstitutional is not ground for certiorari. Remedy by appeal to district court adequate. Id. While the supreme court of Louisiana has a very broad supervisory power by certiorari, it will be exercised only to prevent obvious miscarriage of justice. State v. Summerlin, 116 La. 449, 40 So. 792. The supreme court will not under its supervisory power revise the decision of an inferior court on a mere question of law. Dismissal of prosecution because affidavit was not verified. State v. Hunter, 117 La. 294, 41 So. 578.

68. Prohibition will not lie to prevent proceeding with the trial of a charge alleged to be barred. Kinard v. Police Ct. of Oakland, 2 Cal. App. 179, 83 P. 175. Prohibition not allowed where there is adequate remedy by appeal. People v. Trial Term, Part I (Crim. Branch), 184 N. Y. 30, 76 N. E. 732. If the trial court is about to exceed its powers by granting a new trial, prohibition will lie. People v. Court of General Sessions of the Peace, 185 N. Y. 504, 78 N. E. 149. Prohibition will not lie to prevent trial involving second jeopardy. State v. Williams, 117 Mo. App. 564, 92 S. W. 151.

69. Held by divided court that mandamus would not issue to compel lower court to try a case of which it erroneously declines cognizance. Commonwealth v. McCann, 29 Ky. L. R. 707, 94 S. W. 645.

70. Prosecution under invalid ordinance will not be enjoined, remedy by appeal being adequate. Thompson v. Tucker, 15 Okl. 486, 83 P. 413.

71. Habeas corpus reviews only jurisdiction. State v. Pratt [S. D.] 107 N. W. 538.

72. State v. Sloan [Iowa] 109 N. W. 190.

73. See 5 C. L. 1866.

74. A petition in error lies only to a final judgment. State v. Cornwell, 14 Wyo. 526, 85 P. 977. Final judgment is prerequisite to the appeal allowed to the state from refusal to set aside an acquittal in a revenue case. State v. Peyton, 58 W. Va. 380, 52 S. E. 393. Judgment contingent on performance of certain acts by accused not final. State v. Peralta, 115 La. 529, 39 So. 550. Judgment by confession for a fine is not a "conviction" from which appeal will lie. Mayers v. State [Ala.] 40 So. 658; Collins v. State [Ala.] 41 So. 672. An order refusing to enter a verdict which the jury were directed to enter but inadvertently failed to do is not appealable. State v. Hill [S. C.] 54 S. E. 614. No appeal may be taken while sentence is suspended. People v. Markham, 99 N. Y. S. 1092. An order denying a motion in arrest of judgment is not appealable. People v. Feld [Cal.] 86 P. 1100. No appeal lies from order denying motion in arrest under Pen. Code, § 2272, allowing appeal from judgment, order denying new trial and orders after judgment affecting substantial rights. State

before[75] and after[76] judgment is authorized. The reviewability of orders of or in particular courts,[77] and the finality of decisions of courts of intermediate appeal,[78] is usually made to depend on the nature of the questions involved. Where the indictment is insufficient to support the conviction, the appeal must be dismissed.[79]

(§ 17) *D. Courts of review and their jurisdiction.*[80]—Consent cannot confer appellate jurisdiction.[81] Jurisdiction of Federal courts to review state decisions depends on the existence of a Federal question.[82] In Rhode Island it is only a court which has jurisdiction to try the case which may certify constitutional questions to the supreme court.[83]

(§ 17) *E. Procedure to bring up the cause.*[84]—A constitutional provision that writs of error shall not be prohibited does not prevent a reasonable limitation of the time for suing out the same,[85] and such limitations are usually made.[86] Proceedings for review are usually initiated by notice of appeal[87] or summons in error.[88] If one appeal is taken from two convictions of distinct offenses, defendant must elect or the appeal will be quashed.[89] A petition for certiorari is not defective in leaving blank the date of the judgment if it allege that the petition was presented within thirty days,[90] but if it appear on the answer that such averment is untrue, the proceeding falls.[91] Abstract questions should not be certified.[92] Ju-

v. Beeskove [Mont.] 85 P. 376. No appeal lies from an order refusing discharge for failure to prosecute at first term. State v. Sloan [Iowa] 109 N. W. 190.

75. Order denying change of place of trial in supreme court appealable. People v. Jackson, 100 N. Y. S. 126. In New York an appeal may be taken from an order denying a motion to dismiss the indictment, under Code Cr. Proc. § 517, allowing appeals from certain intermediate orders to be taken in connection with appeal from final judgment. People v. Trial Term, Part I (Crim. Branch), 184 N. Y. 30, 76 N. E. 732. Provision in Michigan for review on exceptions before sentence does not apply to prosecutions for violation of city ordinance. People v. Smith [Mich.] 13 Det. Leg. N. 1068, 109 N. W. 411.

76. Refusal to consider a timely motion for a new trial is an order affecting a substantial right and error lies thereto. Massey v. State, 50 Fla. 109, 39 So. 790. One may appeal from both the judgment of special sessions and the commitment thereunder. People v. Jacobs, 51 Misc. 71, 100 N. Y. S. 734.

77. Constitutional question confers jurisdiction on supreme court in criminal as in civil cases. State v. Kumpfert, 115 La. 950, 40 So. 365. Question as to legality of ordinance authorizes appeal to supreme court from mayor's court. Town of Homer v. Brown, 117 La. 425, 41 So. 711. The jurisdiction of the court of appeals being limited to cases where the fine exceeds $50, an appeal from a $50 fine will be dismissed. Bailey v. Com., 29 Ky. L. R. 105, 92 S. W. 545.

78. No appeal lies from order of circuit court of appeals affirming conviction. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. 963. No appeal lies from an order of the district court on appeal from the mayor's court. Town of Many v. Franklin, 115 La. 638, 39 So. 740; Id., 115 La. 641, 642, 39 So. 741.

79. McDaniel v. State [Ala.] 39 So. 919.

80. See 5 C. L. 1866.

81. Wong Sing v. Independence, 47 Or. 231, 83 P. 387; People v. Dundon, 113 App. Div. 369, 98 N. Y. S. 1048.

82. A writ of error will lie from the federal supreme court to review a denial of a federal right specially claimed if under the statutes of the state such court is the highest state court authorized to pass on such claim. Commonwealth of Kentucky v. Powers, 201 U. S. 1, 50 Law. Ed. 633. The question of former jeopardy in a capital case is a federal one. State v. Keerl [Mont.] 85 P. 862. See the topic Jurisdiction, 6 C. L. 267, where this question is fully treated.

83. District court, having power only to transmit prosecution for liquor nuisance to superior court for trial, cannot certify. State v. Collins, 27 R. I. 419, 62 A. 1010.

84. See 5 C. L. 1866.

85. O'Donnell v. State, 126 Wis. 599, 106 N. W. 18.

86. In Wisconsin writ of error must be sued out within two years from entry of judgment. O'Donnell v. State, 126 Wis. 599, 106 N. W. 18. Service of notice of appeal more than 60 days after denial of new trial is ineffectual. People v. Salas, 2 Cal. App. 537, 84 P. 295. In Ohio there is no limitation on the time within which error must be brought in criminal cases, Rev. St. 1906, § 6723, applying only to civil cases. Miller v. State, 73 Ohio St. 195, 76 N. E. 823.

87. Notice of appeal from special sessions held to appeal from commitment as well as judgment. People v. Jacobs, 51 Misc. 71, 100 N. Y. S. 734.

88. Failure to make timely service on the attorney general of summons in error is ground for dismissal. Foree v. State, 14 Wyo. 296, 83 P. 596. Acceptance of service of brief does not waive failure to serve summons in error. Id.

89. Commonwealth v. Pilnik, 29 Pa. Super. Ct. 285.

90, 91. Evans v. Forsyth [Ga.] 55 S. E. 490.

92. Whether plea in bar and general plea should be tried together on review of gener-

risdiction of the proceeding authorized by the Wyoming statutes to review rulings adverse to the state is conferred by the filing of a bill of exceptions[93] which must be sealed[94] and entitled as in the court below, not as an independent proceeding in the appellate court,[95] neither petition in error nor summons in error being authorized.[96] In Maine, if exceptions are certified to be frivolous, it is mandatory that they be transmitted to the chief justice for an immediate hearing, and exceptions so certified but without an order for transmission will not be considered.[97] Affidavit is usually prerequisite to appeal in forma pauperis.[98] Where the recognizance does not state that appellant was convicted of a misdemeanor nor the amount of the penalty, the appeal will be dismissed.[99] Sending up of a bond on certiorari to the county court is equivalent to an approval.[1] The bond on certiorari to the county court must be conditioned for the appearance of accused to abide the judgment.[2] An appeal bond approved by the lower court will confer appellate jurisdiction though it has no sureties as the statute requires.[3]

(§ 17) *F. Perpetuation of proceedings in the "record."*[4]—All that is properly part of the record proper must appear thereby[5] and it is insufficient that such matters appear by the bill of exceptions,[6] nor should the record proper be contained in the bill of exceptions.[7] Matters not part of the record proper cannot be reviewed unless brought into the record by bill of exceptions or its equivalent.[8] Whether the information was supported by a proper complaint not appearing of record, absence of such complaint must be shown by bill of exceptions.[9]

al verdict after they were tried separately. State v. Murphy, 128 Wis. 201, 107 N. W. 470.

93. Rev. St. §§ 5378-5381. State v. Cornwell, 14 Wyo. 526, 85 P. 977.

94, 95, 96. State v. Cornwell, 14 Wyo. 526, 85 P. 977.

97. State v. Edminister [Me.] 64 A. 611.

98. Affidavit in general terms held sufficient to support appeal in forma pauperis. McCoy v. State, 124 Ga. 218, 52 S. E. 434. Want of averment of good faith in affidavit for appeal without bond is fatal. State v. Atkinson [N. C.] 53 S. E. 228.

99. Weil v. State [Tex. Cr. App.] 91 S. W. 231. Recognizance on appeal from conviction of misdemeanor must show punishment. Ehlert v. State [Tex. Cr. App.] 92 S. W. 40.

1, 2. Brown v. State, 124 Ga. 411, 52 S. E. 745.

3. City of Ottawa v. Johnson [Kan.] 84 P. 749.

4. See 5 C. L. 1867.

5. Transcript must show arraignment and plea. State v. Sharpe, 119 Mo. App. 386, 95 S. W. 998. The transcript must show that accused is confined or has entered into a recognizance. Shrewder v. State [Tex. Cr. App.] 91 S. W. 580. Statement of facts on conviction of local option law must show that the law was in force. Young v. State [Tex. Cr. App.] 91 S. W. 589. Record of conviction in county court on indictment must show order for transfer from district court where the indictment was found. Bird v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 322, 91 S. W. 791. Record must show taking of appeal. State v Davis [Iowa] 108 N. W. 1056; People v. Brown, 148 Cal. 743, 84 P. 204. Motion to quash must appear by record proper. Johnson v. State [Fla.] 40 So. 678. Ruling on motion in arrest must be shown by record proper. Grant v. State [Ala.] 40 So. 80. Demurrer to indictment must appear by record proper. Broadhead v. State [Ala.] 40 So. 216. Motion for new trial must appear by record proper. Wurfel v. State [Ind.] 78 N. E. 535; Wurfel v. State [Ind.] 78 N. E. 567. The facts justifying a discharge of a juror must be placed in the record. People v. Parker [Mich.] 13 Det. Leg. N. 581, 108 N. W. 999. Though the record must show evidence sufficient to sustain the conviction, the fact that the identification by some witnesses does not appear of record because they identified defendant by gesture is immaterial if there is other evidence of identification. State v. Smith, 40 Wash. 615, 82 P. 918.

6. Matters pertaining to the record proper cannot be supplied by bill of exceptions. Lomineck v. State [Ala.] 39 So. 676. Demurrer. Woodall v. State [Ala.] 39 So. 718. Motion in arrest. Massey v. State, 50 Fla. 109, 39 So. 790. Verdict and judgment must appear by record proper and insertion in bill of exceptions is insufficient. Melbourne v. State, 50 Fla. 113, 39 So. 593.

7. Record proper included in bill of exceptions instead of being certified by clerk will not be considered. State v. Farriss [Mont.] 87 P. 177; State v. Morrison [Mont.] 85 P. 738.

8. Denial of continuance must be presented by bill of exceptions. Harper v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 585, 95 S. W. 125; Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036. Sustaining of a demurrer to the indictment cannot be reviewed without a bill of exceptions. People v. Druffel [Cal. App.] 86 P. 907. Demurrer must appear, showing merely of action thereon being insufficient. Bradford v. State [Ala.] 41 So. 471.

9. Quillen v. Com. [Va.] 54 S. E. 883. A

Exceptions must be in the bill.[10] The verdict is part of the record proper and unresponsiveness or uncertainty thereof arise on the record.[11] Affidavits filed on the motion for new trial are in Texas part of the record though no notice of filing was given.[12] Verdict being part of record proper, no exception is necessary to bring it up for review.[13]

Plea of former acquittal and proceedings thereon are part of record proper.[14] The bill of exceptions being jurisdictional to review rulings adverse to the state under the Wyoming statute, rulings apparent of record cannot be reviewed in the absence of a bill.[15]

Making, settling, and approval.[16]—The bill of exceptions or like memorial must be approved by the judge[17] under seal[18] in such manner as to verify the contents[19] in term[20] and within the time limited by statute or rule,[21] or an extension

motion to dismiss the indictment is part of the judgment roll. People v. Trial Term, Part I (Crim. Branch), 184 N. Y. 30, 76 N. E. 732. Errors in **drawing of jury** held presentable only by bill of exceptions. Dix v. State [Ala.] 41 So. 924. Alleged improper **argument** must be presented by bill of exceptions. Wright v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 935, 93 S. W. 548; State v. Valle, 196 Mo. 29, 93 S. W. 1115; State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. James, 194 Mo. 268, 92 S. W. 679.

Misconduct of counsel cannot be shown by affidavit unless the court unwarrantably refuses to sign the bill of exceptions. State v. Feeley, 194 Mo. 300, 92 S. W. 663; Butler v. State [Miss.] 39 So. 1005. Rev. St. 1906, § 7352, allowing misconduct of counsel to be presented by affidavit is not exclusive, and it may be presented by bill of exceptions. Miller v. State, 73 Ohio St. 195, 76 N. E. 823. Facts as to **failure to swear officer** to take charge of jury must appear by bill of exceptions, mere failure of the record to show that it was done being insufficient. Lamb v. People, 219 Ill. 399, 76 N. E. 576.

Instructions must be made part of record by bill of exceptions. Miller v. State, 165 Ind. 566, 76 N. E. 245.

Affidavit filed in the appellate court with reference to the motion for new trial cannot be considered. Lara v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 555, 95 S. W. 1083. Affidavits used on motion for new trial are no part of record proper. State v. Dalton [Wash.] 86 P. 590. Affidavits not part of record unless included in bill of exceptions. Loar v. State [Neb.] 107 N. W. 229.

Motion for new trial must be presented by bill of exceptions. State v. Kremer [Mont.] 85 P. 736; People v. Harris, 144 Mich. 12, 13 Det. Leg. N. 139, 107 N. W. 715; People v. Frank, 2 Cal. App. 283, 83 P. 578. Denial of motion for new trial not reviewed unless grounds appear in record. State v. Simmons, 73 S. C. 234, 53 S. E. 286.

10. Koch v. State, 126 Wis. 470, 106 N. W. 531; Grabowski v. State, 126 Wis. 447, 105 N. W. 805.

11. State v. Modlin, 197 Mo. 376, 95 S. W. 345.

12. Lara v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 555, 95 S. W. 1083.

13. State v. King, 194 Mo. 474, 92 S. W. 670.

14. State v. Morrison, 165 Ind. 461, 75 N. E. 968.

15. State v. Cornwell, 14 Wyo. 526, 85 P. 977.

16. See 5 C. L. 1868.

17. Dunn v. State [Tex. Cr. App.] 91 S. W. 224; Sykes v. State [Tex. Cr. App.] 95 S. W. 110. Bill not signed will not be considered. State v. Collins, 196 Mo. 87, 93 S. W. 1117.

18. The right of defendant under Rev. St. § 5377, to file unsealed bills, does not authorize such bills to review rulings adverse to the state under § 5378. State v. Cornwell, 14 Wyo. 526, 85 P. 977.

19. Where the bill states certain objections as grounds of objection and does not certify them as facts, they cannot be considered. Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 94 S. W. 227. Certification of an objection does not verify the facts on which it is based. Adams v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 699, 91 S. W. 225. Entry that amendment to motion for new trial was "allowed" does not sufficiently approve the stated grounds. Pollard v. State, 125 Ga. 270, 54 S. E. 171. If the note to a ground of the motion does not approve it, such ground cannot be considered. Perdue v. State [Ga.] 54 S. E. 820. Bill of exceptions must be certified to be true (Blnyard v. State [Ga.] 55 S. E. 498), and mere permission to file is not equivalent to such a certificate (Id.).

20. That a motion in arrest was continued till the next term does not extend the time to file bill of exceptions to the denial of a new trial. State v. Goehler, 193 Mo. 177, 91 S. W. 947. Bill signed in vacation without order or agreement extending time. Ray v. State [Ala.] 40 So. 224; Watts v. State [Ala.] 40 So. 90.

21. Diligence in preparation of bill of exceptions held insufficient to warrant consideration of bill filed out of time. Walker v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 245, 91 S. W. 229. Judgment and order allowing 30 days to file bill of exceptions being dated March 31, 1895, bill of exceptions dated May 24, 1905, will be disregarded. Brunson v. State [Ala.] 39 So. 569. Bill signed after time allowed by order. Collins v. State [Ala.] 39 So. 726. A rule of the trial court that bills of exceptions shall be presented for signature not later than the day following their reservation is not unreasonable. State v. Lee, 116 La. 607, 40 So. 914. The statutory period for signature is not affected by the fact that it extends into the next term, but where it does so extend additional

thereof properly allowed[22] and before the appeal is lodged in supreme court,[23] and must show such facts.[24] The making of skeleton bills[25] and the annexation of papers to the bill[26] is sometimes allowed, but the matter inserted or annexed must be well identified.[27] Where record entries are directed during the trial, it is incumbent on counsel to see that they are so made as to preserve his objection.[28] Defendant is not entitled to have cross-examination made part of the bill of exceptions unless it appears that it is material to the bill.[29] Certificates of evidence[30] with or without bills

time cannot be allowed by agreement. Dix v. State [Ala.] 41 So. 924. Time for filing of bill of exceptions begins to run on entry of judgment of dismissal of motion for new trial, not from date of the dismissal. Walker v. State, 124 Ga. 440, 52 S. E. 738. Bill signed more than 30 days after expiration of term not considered. State v. Strayer, 58 W. Va. 676, 52 S. E. 862. A nunc pro tunc order will not make of record evidence transcribed more than 30 days after the expiration of the term. Id. Under a statute limiting allowance of time to file bills of exceptions to 60 days, a bill filed after such time, though within a longer time allowed by the court, cannot be considered. Stieler v. State [Ind.] 77 N. E. 1083. The exception to the statute requiring a finding to be applied for within two weeks "unless the decision is filed in the months of July or August" does not do away with the limitation in case of decisions so filed but merely eliminates such months in computing the time. State v. Dobkin, 78 Conn. 642, 63 A. 349. Bill held filed too late. Dorsey v. State [Ala.] 39 So. 584.

22. Statutory time for filing bill of exceptions cannot be extended. State v. White, 40 Wash. 428, 82 P. 743. Not error to refuse extension of time to file bill of exceptions where it does not appear that it could not have been filed in term. Denison v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 248, 93 S. W. 731. Where counsel left the bill of exceptions with the judge for signature and later took it from the judge's desk and filed it on the supposition that it had been signed, there was such negligence as to preclude relief. Haskell v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 324, 92 S. W. 36. Where 30 days was allowed to file bill of exceptions an extension granted on the 31st day is unavailing though the 30th day is Sunday. Norman v. State [Ala.] 41 So. 295. Signature at succeeding term under agreement made at such term is of no effect. Davis v. State [Ala.] 41 So. 298. An order extending the time for filing bill of exceptions over the term must be express, and an order extending until a time to be fixed by five days' notice by either party is ineffective after the term. State v. Cole [Kan.] 85 P. 807. Where the statute provides for extension by the judge, an extension by the court is nugatory. Keith v. State [Ala.] 41 So. 953. Extension must be made during term. Ray v. State [Ala.] 40 So. 224; Johnson v. State [Ala.] 40 So. 86. Agreement extending time must be made before the expiration of the time allowed. Adams v. State [Ala.] 40 So. 85. An extension of time to file bill of exceptions granted without the notice and affidavit required by Pen. Code, §§ 1171, 1174, is nugatory. People v. Ellis [Cal. App.] 84 P. 676.

23. State v. Ruffin, 117 La. 357, 41 So. 647.

24. Must show approval. Ryans v. State [Tex. Cr. App.] 92 S. W. 413. Statement of facts not showing approval and signature will not be considered. Powell v. State [Tex. Cr. App.] 91 S. W. 787. Bill not showing that it was filed below not considered. State v. Walker, 194 Mo. 367, 91 S. W. 899. Bill of exceptions presumed to have been signed the day it was filed. Dorsey v. State [Ala.] 39 So. 584. The record must affirmatively show that the statutory notice of presentation of bill of exceptions for settlement was given. State v. Kremer [Mont.] 85 P. 736; State v. Morrison [Mont.] 85 P. 738. Record held to show that bill of exceptions was filed in term time. Sanders v. State [Ala.] 41 So. 466. Recital in bill of extension in open court unavailing where no order appears and there was no term at the time of the alleged extension. Johnson v. State [Ala.] 40 So. 86. Recital in record held to sufficiently show the filing of the bill of exceptions. Cameron v. State [Ind. App.] 76 N. E. 1021.

25. Instruction in skeleton bill to clerk to insert orders of commissioners' court for local option election is unauthorized. Davis v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 313, 92 S. W. 39. That the clerk without direction copied instructions into the bill of exceptions does not make them part of the record. State v. Ruck, 194 Mo. 416, 92 S. W. 706. A statement of facts with instructions to the clerk to copy into it certain omitted orders is insufficient. Jones v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 879, 91 S. W. 588. A skeleton bill calling for the insertion of testimony which is not filed in but accompanied by a transcript will not be considered. State v. Walker, 194 Mo. 367, 91 S. W. 899.

26. Papers attached at the end of the bill of exceptions and before the certificate are sufficiently identified. Taylor v. State [Ga.] 55 S. E. 474. Failure of the clerk to attach the statement of facts to the bill of exceptions to which it relates will not prevent consideration where the connection between them is clear. State v. Williams, 116 La. 61, 40 So. 531.

27. Original documents sent up without an order therefor and not in any way referred to or identified by the certificate will not be considered. Schweir v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 559, 94 S. W. 1049. The instructions in the transcript must be identified by the bill of exceptions. Commonwealth v. Campbell, 28 Ky. L. R. 1354, 91 S. W. 1128.

28. State v. Goodson, 116 La. 388, 40 So. 771.

29. State v. Green, 115 La. 1041, 40 So. 451.

30. Certificate of stenographer that transcript contains all "oral" evidence insufficient. Commonwealth v. Campbell, 28 Ky. L. R. 1354, 91 S. W. 1128. Certificate held to

of exceptions identifying them are authorized in some states.[31] If a bill of exceptions is taken in the statement of facts, the evidence explanatory thereof must appear in immediate connection therewith and the court will not search the entire statement.[32] While the perpetuation of evidence in the form of question and answer is authorized by statute, the narrative form is likewise proper and is ordinarily the better practice.[33] Service of proposed bill and notice of settlement is usually required.[34] The special bill of exceptions authorized by statute must be complete in itself without reference to the regular bill.[35] Bill of exceptions is construed against exceptor.[36] To support a bill attested by bystanders it must appear by the bill or the record that the judge refused to approve it.[37]

Form, transmission, and filing.—Bill of exceptions should state the facts and not inferences or the judge's conclusions.[38] In Louisiana it is proper for the judge to state in his per curiam any matters rendering harmless the ruling stated in the bill,[39] but the statements in a bill of exception made with the approval of the court at the time of its reservation prevail over the per curiam.[40] The bill or transcript must be prepared in a legible manner[41] with indexes and marginal notes[42] served[43] and filed within the time limited.[44] The docket entries should be printed in the paper book.[45] The Indiana statute relating to consideration of original bills certified up has no application to a prosecution commenced prior to such statute.[46] Supreme court will order return without payment of clerk's fees if defendant is unable to pay.[47]

Sufficiency of "record" to present particular questions.[48]—Since every presumption favors the correctness of the ruling below,[49] it is necessary to present error that the record show not only the ruling complained of, and objection and exception thereto,[50] but sufficient of the evidence and proceedings to affirmatively establish

make of record stenographer's notes of testimony taken by court on preliminary issue of competence of evidence. State v. May [Conn.] 64 A. 833.

31. A certificate of evidence and a separate bill of exceptions referring thereto and making it part of the record is sufficient to bring in the evidence. State v. Legg [W. Va.] 53 S. E. 545.

32. Stephens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 937, 93 S. W. 545; Schweir v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 559, 94 S. W. 1049.

33. St. Clair v. State [Tex. Cr. App] 16 Tex. Ct. Rep. 236, 92 S. W. 1095.

34. A bill sufficiently showing the facts will be considered though it does not appear that it was submitted to the district attorney before signature. State v. Stockett, 115 La. 743, 39 So. 1000. Service of proposed bill of exceptions does not satisfy requirement of notice of presentation for settlement. State v. Kremer [Mont.] 85 P. 736. The requirement of two days' notice of presentation of bill of exceptions for settlement under Pen. Code § 2171, and Acts 1903, c. 34, § 1, is mandatory. State v. Kremer [Mont.] 85 P. 736; State v. Morrison [Mont.] 85 P. 738.

35. Colson v. State [Fla.] 40 So. 183.

36. Moore v. State [Ala.] 40 So. 345.

37. Weatherford v. State [Tex. Cr. App.] 91 S. W. 591.

38. State v. Rodriguez, 115 La. 1004, 40 So. 438.

39. State v. Goodson, 116 La. 388, 40 So. 771.

40. State v. Williams, 116 La. 61, 40 So. 531.

41. A dim carbon copy of the bill of exceptions will not be considered. Teston v. State, 50 Fla. 137, 138, 39 So. 787.

42. Case involving sufficiency of evidence will not be considered if rule requiring index and marginal notes in transcript is not complied with. Tisdale v. State [Ind.] 78 N. E. 324.

43. Brief and transcript must be served on the attorney general. State v. Miles, 11 Idaho, 784, 83 P. 697.

44. Parties are not entitled to rely on the mails in transmission of bills of exceptions. Walker v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 245, 91 S. W. 229. Filing of transcript within prescribed 60 days is jurisdictional. Commonwealth v. Barbour, 29 Ky. L. R. 622, 94 S. W. 634.

45. Commonwealth v. Plinik, 29 Pa. Super. Ct. 285.

46. State v. Thompson [Ind.] 78 N. E. 328.

47. Laws 1903, c. 333, § 10, not applicable. State v. Fellows [Minn.] 107 N. W. 542.

48. See 5 C. L. 1869.

49. Presumed that special judge presiding was properly appointed. Reese v. State [Ala.] 39 So. 678. It will be presumed that a conflicting term had been so adjourned that the court lawfully sat on a day when proceedings in the cause were had. State v. Cotterel [Idaho] 86 P. 527. It will be presumed that documents put in evidence were

that error was committed. Where there is no bill of exceptions or statement of facts, only error apparent of record can be considered.[51]

read to the jury. People v. Wolf, 183 N. Y. 464, 76 N. E. 592.

50. Norton v. State [Wis.] 109 N. W. 531; State v. Briggs [W. Va.] 52 S. E. 218. A statement in the record at the end of a cross-examination that during its progress objections were made and exceptions taken is insufficient. Grabowski v. State, 126 Wis. 447, 105 N. W. 805. Must show what objection was made to evidence. Jones v. State, 125 Ga. 307, 54 S. E. 122. Must show that the exceptions were taken in due time. Moore v. State [Ala.] 40 So. 345. Recital after ruling that defendant "accepted it" does not show an exception. Bondman v. State [Ala.] 40 So. 85.

51. State v. White, 40 Wash. 428, 82 P. 743; Kelly v. State [Tex. Cr. App.] 91 S. W. 795.

Validity of ordinance cannot be considered unless it is in the record. Ferlita v. Jones [Fla.] 39 So. 593. Unless the record shows that a **special plea** was brought to the attention of the court and evidence introduced in support of it, it will be presumed to have been abandoned. Bolton v. State [Ala.] 40 So. 409.

Plea of former conviction not reviewed without statement of facts. Bennett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 508, 92 S. W. 417. Neither refusal of **continuance** nor denial of new trial will be reviewed in the absence of a statement of facts. State v. Bush, 41 Wash. 13, 82 P. 1024. Record must show motion for continuance and what was expected to be proved by absent witnesses. Rogers v. State, 144 Ala. 32, 40 So. 572.

Selection of jury: A bill of exceptions to the refusal of the county court to allow a panel of more than six must show that there were more than that many names in the jury box. Hackleman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 257, 91 S. W. 591.

Motion to quash not considered where motion is not in the record unless the information is bad on its face. State v. Finley, 193 Mo. 202, 91 S. W. 942.

Motions based on matter dehors the record and not presented by bill of exceptions cannot be reviewed. Morrow v. State [Ala.] 39 So. 765.

Ruling on demurrer not in record not reviewed. Bentley v. State [Ala.] 39 So. 649. Defects of the indictment which by statute must be raised by special exception are not available on a record showing that a demurrer was entered but not the grounds thereof. Coleman v. State [Miss.] 40 So. 230.

Admission of evidence: Admission of evidence not reviewed unless the evidence admitted is in the record. State v. Cook, 117 La. 114, 41 So. 434. Objection to admission of ordinance cannot be considered where the ordinance is not set out and an attempted explanation appended by the court does not supply the defect. Vann v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 251, 94 S. W. 224. Bill of exceptions to admission of evidence of acts between accused and a woman held not to show that it was not the woman with whom the indictment charged adultery. Counts v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 142, 94 S. W. 220. It will be presumed that the instructions limited the use of evidence to the purpose for which it was admissible. Farmer v. Com., 28 Ky. L. R. 1168, 91 S. W. 682. Whether the admissibility of proof of the giving of certain information to accused depended on whether it was given before or after a certain transaction, a bill to the admission of such proof which fails to show when the information was given is insufficient. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569. Where the record shows only the admission of confessions, it will be presumed that the court properly ascertained that they were voluntary. Whatley v. State, 144 Ala. 68, 39 So. 1014. Where the record shows only that a witness of tender years was permitted to testify without oath, it will be presumed that the trial court was satisfied on proper examination that he was incapable of appreciating the meaning of an oath. People v. Johnson, 185 N. Y. 219, 77 N. E. 1164; People v. Donohue, 100 N. Y. S. 202.

Exclusion of evidence: Exclusion of evidence will not be reviewed where foundation is necessary and record does not contain all the evidence. State v. Conklin, 47 Or. 509, 84 P. 482. Bill of exceptions to exclusion of evidence that certain property near that stolen was not taken held not to show that such property was so necessarily visible to the thief that the evidence could be relevant. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118. Bill to exclusion of testimony must show purpose for which it was offered. Cranfill v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 404, 92 S. W. 846. Bill to overruling of objection to question must show the answer. State v. Le Blanc, 116 La. 822, 41 So. 105; Holmes v. State [Ala.] 39 So. 569; Commonwealth v. Joy, 29 Pa. Super. Ct. 445. Assignment on rejection of document not printed not considered. Commonwealth v. Pearl, 29 Pa. Super. Ct. 307. Record showing merely that **witnesses whose names were not on information** were sworn as witnesses for the people does not import that they gave material testimony against defendant. People v. Fisher, 144 Mich. 570, 13 Det. Leg. N. 346, 108 N. W. 280. Where an overt act by deceased was shown but not its relation in time or circumstance to the homicide, exclusion of evidence of threats cannot be reviewed. State v. Warren, 117 La. 84, 41 So. 361.

Sufficiency of evidence not reviewed unless there is a statement of facts. State v. Sikes [Ala.] 41 So. 777; Henderson v. State [Tex. Cr. App.] 91 S. W. 794; Morales v. State [Tex. Cr. App.] 95 S. W. 125. Unless bill of exceptions purports to set it all out. Pearson v. State [Ala.] 41 So. 733. Where neither the evidence nor the instructions are in the record, it will be presumed that the evidence sustained the verdict and that the case was properly submitted to the jury. Clements v. State [Fla.] 40 So. 432.

Variance: That an alleged forged writing was variant from the indictment cannot be considered where the writing is not in the record. Bolton v. State [Ala.] 40 So. 409.

Judicial notice will not be taken of the adjournment of terms of the trial court.[52]

Amendment and correction.—After filing in supreme court, record can only be changed by leave of court.[53] Supplemental statement of facts if properly filed will be considered.[54] The supreme court has no power to require additional facts not appearing by the bill of exceptions to be certified up.[55] Where the minute entries are deficient, the court may remand the case for correction or a certiorari may issue.[56]

(§ 17) *G. Practice and procedure in reviewing court.*[57]—Where there is no appearance or brief, the court will not examine the record for errors of law except in a capital case.[58] Exceptions to bring up rulings adverse to the state is a "criminal case" in which the attorney general is authorized to appear.[59] A single justice of the supreme court has no power to permit defendant in charge of an officer to examine the records of the court below that he may act as his own attorney on appeal.[60]

Assignments, briefs, etc.[61]—Assignment of the specific errors complained of is generally required[62] and an assignment to several rulings is unavailing if any one is good.[63] Assignments of error cannot be supplied by amendment of the bill of exceptions in the supreme court.[64] Assignment of error on admission of evidence

Remark of court: Whether the court erred in saying to a witness that he was asked only for his opinion cannot be determined unless the record shows the subject-matter of the inquiry. Lingerfelt v. State, 125 Ga. 4, 53 S. E. 803. Must set out testimony in respect to which it is objected that improper **argument** was made. Scott v. State [Tex. Cr. App.] 81 S. W. 47. If the record shows improper argument by prosecuting attorney, it need not negative provocation thereof by defendant's counsel. Flynn v. People, 222 Ill. 303, 78 N. E. 617.

Instructions presumed to be supported by evidence when evidence is not in the record. Von Haller v. State [Neb.] 107 N. W. 233. Instructions not reviewed when evidence is not in the record. Sly v. State [Tex. Cr. App.] 91 S. W. 576. Bill must contain sufficient statement of facts to show pertinency of charges whose refusal is complained of. State v. Cook, 117 La. 114, 41 So. 434. Instructions refused not reviewed where evidence is not in the record. Stoudermire v. State [Ala.] 40 So. 48. Record showing that refusal was endorsed on requests for instructions sufficiently shows that the requests were in writing. Carter v. State [Ala.] 40 So. 82. Record held not to show that there was any evidence requiring charge of self-defense. State v. Williams, 116 La. 61, 40 So. 531. Refusal of instructions not reviewed unless evidence appears. Colson v. State [Fla.] 40 So. 183; Dunn v. State [Tex. Cr. App.] 91 S. W. 224. Instructions alleged to have been erroneously refused must appear either in the motion for new trial or in the bill of exceptions. Freeman v. State, 50 Fla. 38, 39 So. 785. Requests for instructions not in bill of exceptions not considered. Woodall v. State [Ala.] 39 So. 718. Refusal of an instruction as to circumstantial evidence will not be reviewed in the absence of the evidence. State v. Kremer [Mont.] 85 P. 736. Where error is claimed in not deferring **sentence** two days after verdict, the record must show that the court remained in session that long. State v. Lu Sing [Mont.] 85 P. 521.

Motion for new trial: Matters which must be saved by motion for new trial cannot be considered unless the motion is preserved by bill of exceptions. Instructions and evidence. State v. Modlin, 197 Mo. 376, 95 S. W. 345. Denial of motion for new trial cannot be reviewed where there is neither bill of exceptions nor statement of facts. Ferrell v. State [Tex. Cr. App.] 93 S. W. 538.

Motion in arrest not considered where neither motion nor ruling thereon is in record. State v. Finley, 193 Mo. 202, 91 S. W. 942.

52. State v. Cotterel [Idaho] 86 P. 527.
53. State v. Feeley, 194 Mo. 300, 92 S. W. 663.
54. Wolf v. State [Tex. Cr. App.] 93 S. W. 742.
55. Evans v. Forsyth [Ga.] 55 S. E. 490.
56. State v. Lee, 116 La. 607, 40 So. 914.
57. See 5 C. L. 1871.
58. People v. Sing, 2 Cal. App. 731, 84 P. 242.
59. Rev. St. 1899, § 99. State v. Cornwell, 14 Wyo. 526, 85 P. 977.
60. People v. Collins [Cal.] 86 P. 895.
61. See 5 C. L. 1871.
62. Assignments of error in instructions not setting out the instructions complained of in full as required by rule will not be considered. State v. Morrison [Mont.] 85 P. 738. Assignment to admission of evidence must show the objection. Smoot v. State, 125 Ga. 30, 53 S. E. 809.
63. Perdue v. State [Ga.] 54 S. E. 820. Assignment of error to refusal of several chargee not considered if any one is properly refused. Maloy v. State [Fla.] 41 So. 791. Where error is assigned on the denial of a motion based on several grounds, only those grounds which are argued will be considered. Colson v. State [Fla.] 40 So. 183.

must point out the page and line of the transcript where the ruling is shown.[65] Errors not specified in the reasons of appeal and inconsistent with those specified not considered.[66] Except as to fundamental errors[67] the brief must specifically point out[68] and argue[69] the error complained of, and assignments not argued are deemed to be waived.[70] Case involving sufficiency of evidence will not be considered if rule requiring statement of facts in brief is not complied with.[71]

Dismissal,[72] if timely moved for,[73] is the proper remedy in case of failure or delay in taking and perfecting the appeal[74] or fatal defect in the record.[75] Where the time for appealing has not expired, the court will dismiss rather than affirm for failure to comply with rule as to form of record and briefs.[76] Appeal abates on defendant's death.[77] Where the exceptions are in proper form, whether they present only questions of fact will not be determined on motion to dismiss.[78] Where an appeal was abandoned with full knowledge of the facts, it will not be reinstated.[79]

Rehearing[80] will not be allowed merely to reargue points decided.[81]

(§ 17) *H. Scope of review.*[82]—The supreme court cannot entertain a motion for a new trial for newly-discovered evidence.[83] The hearing will not be suspended to allow a motion for new trial below for newly-discovered evidence unless it is clear that the ends of justice require it.[84] An order denying a motion in arrest is reviewable on appeal from the judgment.[85] Abstract question will not be decided,[86] nor will the constitutionality of a statute be passed on if the case can be otherwise decided.[87] Where the evidence and not the facts are certified, the case stands as on demurrer to the evidence.[88]

64. Winn v. State, 124 Ga. 811, 53 S. E. 318.

65. Miller v. State, 165 Ind. 566, 76 N. E. 245.

66. State v. May [Conn.] 64 A. 833.

67. Insufficiency of information will be considered though not pointed out by counsel. State v. James, 194 Mo. 268, 92 S. W. 679.

68. Brief failing to point out the specific ruling complained of will not be considered. State v. Ilomaki, 40 Wash. 629, 82 P. 873.

69. A general statement in the brief that all the instructions requested by appellant were erroneously refused is not sufficient argument to call for an examination of the instructions. People v. Howard [Cal. App.] 84 P. 462. Where the sufficiency of the indictment is not questioned, a general statement in defendant's brief of the nature of the charge is sufficient. State v. Roberts [Ind.] 77 N. E. 1093. Assignments of error restated but not argued in the brief will not be examined further than to read the part of the record pertaining thereto to see if it presents patent error. Pittman v. State [Fla.] 41 So. 385.

70. Trombley v. State [Ind.] 78 N. E. 976; State v. Wetter, 11 Idaho, 433, 83 P. 341; Sweet v. State [Neb.] 106 N. W. 31; Cameron v. Territory, 16 Okl. 634, 86 P. 68; Mayson v. State, 124 Ga. 789, 53 S. E. 321.

71. Tisdale v. State [Ind.] 78 N. E. 324.

72. See 5 C. L. 1872.

73. Where certiorari was issued without hearing reserving the right to question the appropriateness of the remedy, objection at the hearing is timely. Chapman v. Justice Ct. of Tonopah Tp. [Nev.] 86 P. 552.

74. Failure to make timely service of summons in error is properly raised by motion to dismiss, not by demurrer to the petition in error. Force v. State, 14 Wyo. 296, 83 P. 596. Attorney general held not estopped to move for dismissal of writ of error not sued out in time. O'Donnell v. State, 126 Wis. 599, 106 N. W. 18. Failure to serve brief and transcript on attorney general ground for dismissal. State v. Miles, 11 Idaho, 784, 83 P. 697. If the case is brought up in a manner subject to limitation of time, it is no answer to a motion to dismiss for failure to proceed within such limitation that a method not subject thereto might have been chosen. Force v. State, 14 Wyo. 296, 83 P. 596.

75. Failure of transcript to show service of notice of appeal. People v. Brown, 148 Cal. 743, 84 P. 204.

76. Tisdale v. State [Ind.] 78 N. E. 324.

77. Commonwealth v. Crowley, 28 Pa. Super. Ct. 618. Appeal by the state will be dismissed on proof of the death of defendant. State v. Rogers, 117 La. 155, 41 So. 477.

78, 79. State v. Johnson [S. C.] 54 S. E. 601.

80. See 5 C. L. 1872.

81. People v. Patrick, 183 N. Y. 52, 75 N. E. 963.

82. See 5 C. L. 1872.

83. State v. Lilliston [N. C.] 54 S. E. 427.

84. State v. Johnson [S. C.] 54 S. E. 601.

85. People v. Feld [Cal.] 86 P. 1100. An order denying a motion in arrest is an intermediate order reviewable on appeal from the judgment. State v. Beeskove [Mont.] 85 P. 376.

86. Appeal by state from order quashing jury panel, it appearing that accused cannot in any event be tried before such panel. State v. Henderson, 73 S. C. 201, 53 S. E. 170.

87. Constitutionality of the statute on

Law of the case.[89] — Matters decided on a former appeal will not be again considered,[90] and decision of the United States supreme court on a Federal question is binding on the state court in future consideration of the case.[91] The ruling on demurrer to the indictment is the law of the case and rulings at the trial based on the same view of the law will not be reviewed.[92]

Rulings on matters within the discretion of the trial court,[93] such as rulings on motion for change of venue[94] or continuance,[95] ordering trial at special term,[96] refusal to quash the indictment,[97] rulings on qualification of jurors,[98] conduct of trial in general,[99] competency[1] and examination of witnesses,[2] rulings on the primary admissibility of evidence,[3] imposition of costs,[4] and in some states rulings on motion for new trial,[5] will be disturbed only for abuse of such discretion; and the Kentucky rule that ruling on motion for new trial will not be reviewed applies to all objections first made on the motion for new trial.[6]

On questions of fact,[7] the finding of the trial judge is conclusive unless plainly erroneous.[8] In like manner, the verdict of the jury will be sustained if there is

which the prosecution is based will not be considered where the information is fatally defective. Pressley v. State, 124 Ga. 446, 52 S. E. 750.

88. Johnson v. Com., 104 Va. 881, 52 S. E. 625.

89. See 5 C. L. 1876, n. 59.

90. Rawlins v. State [Ga.] 54 S. E. 924. Decision on former appeal that indictment is sufficient. State v. Campbell [Kan.] 85 P. 784.

91. State v. Keerl [Mont.] 85 P. 862.

92. Matthews v. State, 125 Ga. 248, 54 S. E. 192.

93. See 5 C. L. 1873.

94. Regan v. State, 87 Miss. 422, 39 So. 1002; Sweet v. State [Neb.] 106 N. W. 31. As to existence of local prejudice requiring change of venue. Lucas v. State [Neb.] 105 N. W. 976; Young v. State, 125 Ga. 584, 54 S. E. 82. Selection of county to which venue is changed. Murphy v. District Ct. [N. D.] 105 N. W. 728.

95. State v. Sultan [N. C.] 54 S. E. 841; State v. Wetter, 11 Idaho, 433, 83 P. 341. Will not be disturbed unless it works injustice. State v. Johnson, 116 La. 30, 40 So. 521.

96. Finding that an emergency existed under Ky. St. 1903, § 964, so that a criminal case should be tried at a term not devoted to criminal business, not disturbed in the absence of abuse of discretion. Powers v. Com., 29 Ky. L. R. 277, 92 S. W. 975.

97. Refusal to quash an indictment is subject to review but will be set aside only for abuse of discretion. Commonwealth v. Edmiston, 30 Pa. Super. Ct. 54.

98. McCrimmon v. State [Ga.] 55 S. E. 481; Leigh v. Territory [Ariz.] 85 P. 948; Leaptrot v. State [Fla.] 40 So. 616.

99. Order of proof. Pittman v. State [Fla.] 41 So. 385. Discharge of juror. People v. Parker [Mich.] 13 Det. Leg. N. 581, 108 N. W. 999; Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 592, 95 S. W. 1044. Allowing separation of jury. State v. Williams, 96 Minn. 351, 105 N. W. 265.

1. Competency of youthful witness. Young v. State, 125 Ga. 584, 54 S. E. 82.

2. Allowing leading questions. State v. Cambron [S. D.] 105 N. W. 241; State v. Bateman, 198 Mo. 212, 94 S. W. 843. Discretion held abused. State v. Hazlett [N. D.] 105 N. W. 617.

3. Ruling that no hostile demonstration is shown as foundation for proof of threats not disturbed in the absence of abuse of discretion. State v. Rambo, 117 La. 78, 41 So. 359; State v. Feazell, 116 La. 264, 40 So. 698.

4. Setting aside imposition of costs against defendant on acquittal. Commonwealth v. Chartier's R. Co., 28 Pa. Super. Ct. 173.

5. Brown v. Com., 28 Ky. L. R. 1335, 92 S. W. 542; Frederick v. State [Ala.] 39 So. 915; Jackson v. State [Ala.] 41 So. 178; Dawson v. State [Ala.] 41 So. 803; Grant v. State [Ala.] 40 So. 80; Coker v. State [Ala.] 41 So. 303. On conflicting affidavits as to misconduct of juror, the finding of the trial court will not ordinarily be disturbed. Trombley v. State [Ind.] 78 N. E. 976. Ruling on motion for new trial for prejudice of jurors. Hall v. State, 124 Ga. 649, 52 S. E. 891.

6. Elliott v. Com., 29 Ky. L. R. 48, 91 S. W. 1136.

7. See 5 C. L. 1874.

8. Finding on conflicting evidence as to misconduct of bailiff. Tolbirt v. State, 124 Ga. 467, 53 S. E. 327. Proof of venue is a matter of fact within the rule that decision on matters of fact will be reluctantly interfered with. State v. Crowley [S. D.] 108 N. W. 491. Finding on conflicting affidavit that juror did not make declaration showing prejudice. State v. Smith [Iowa] 109 N. W. 115. Conflicting affidavits as to misconduct of juror. State v. Storm [Kan.] 86 P. 145. Ruling on motion for new trial involving only issues of fact cannot be reviewed. State v. Warren, 117 La. 84, 41 So. 361; State v. Ashworth, 117 La. 212, 41 So. 550. Conflicting affidavits as to false answer by juror on voir dire. People v. Hoffman, 142 Mich. 531, 12 Det. Leg. N. 805, 105 N. W. 838. Finding on conflicting affidavits that attorney assisting prosecution was qualified. People v. Harris, 144 Mich. 12, 13 Det. Leg. N. 139, 107 N. W. 715. The denial of a new trial will be taken as a finding against defendant, on conflicting affidavits as to misconduct of the prosecuting attorney. State v. Campbell [Kan.] 85 P. 784. An order granting a new trial will not be reversed on appeal by the

any evidence to support,[9] or where the evidence is conflicting,[10] or its determination involves the credibility of witnesses,[11] though the greater number of witnesses supported defendant's contention;[12] appellate courts being generally without power to review questions of fact.[13] Where there is no evidence of guilt, denial of new trial is error of law.[14] Stronger case must be made to reverse grant than denial of new trial.[15] Where only written evidence was submitted below, it may be reviewed de novo.[16] In Alabama the findings of the county court sitting without a jury cannot be reviewed.[17] The Alabama Act of 1898, providing that findings of the Clay county court without a jury shall be reviewed by the supreme court without any presumption in favor of the finding, applies only where all the testimony is before the supreme court.[18]

(§ 17) *I. Decision and judgment of the reviewing court.*[19]—The supreme court of the Philippine Islands has power to reverse and convict of a higher degree than was found below.[20] Where it appears that there was no judgment below, the submission will be set aside and the case remanded for entry of judgment.[21] Where the only error is an unauthorized sentence, the case will be remanded for resentence.[22] Where the judgment is void, the court will remand for entry of a proper one.[23] A conviction of an offense not included in the indictment cannot be sustained.[24] Neither costs nor disbursements can be taxed either for or against the state on appeal.[25] On reversal of a sentence entered on a plea of guilty, a new trial will be ordered as on other reversals.[26] Where a former reversed conviction of manslaughter precludes conviction of any greater offense, a conviction of murder will be sustained as one for manslaughter, and the case remanded with direction to sentence for the latter offense.[27]

state where the ground does not appear and it might have been proved to have granted it on the evidence. State v. Driskell [Idaho] 85 P. 499. Whether the evidence conformed to the bill of particulars, held a question of fact not open to review. State v. Rabb, 115 La. 733, 39 So. 971.

9. Where there is evidence reasonably tending to support the verdict, the supreme court will not weigh the evidence or consider the credibility of witnesses. Huff v. Territory, 15 Okl. 376, 85 P. 241. Only when no evidence to support. People v. Mahatch, 148 Cal. 200, 82 P. 779. Where there is any substantial evidence. Territory v. Neatherlin [N. M.] 85 P. 1044; Hestand v. Com., 28 Ky. L. R. 1315, 92 S. W. 12; State v. Maloney, 115 La. 498, 39 So. 539; Hill v. State, 124 Ga. 141, 52 S. E. 322; Adkins v. State, 124 Ga. 437, 52 S. E. 656; Johnson v. State, 124 Ga. 437, 52 S. E. 656; Spivey v. State, 124 Ga. 437, 62 S. E. 656; Mahoney v. State, 124 Ga. 794, 53 S. E. 102; Dunham v. State, 124 Ga. 652, 52 S. E. 890; Givins v. State, 124 Ga. 655, 52 S. E. 890; Grant v. State, 125 Ga. 281, 54 S. E. 182; Flowers v. State [Ga.] 54 S. E. 811; Young v. State [Ga.] 55 S. E. 477; Stocks v. State [Ga.] 55 S. E. 478; Wright v. State [Ga.] 55 S. E. 167. Evidence wholly insufficient. Forrester v. State, 125 Ga. 28, 53 S. E. 767; Brown v. State, 125 Ga. 8, 53 S. E. 767. Failed to show whether sale of liquor was before finding of indictment. Bragg v. State [Ga.] 55 S. E. 232.

10. State v. Mulhólland [Iowa] 105 N. W. 111; Lamps v. State [Fla.] 40 So. 180. Conflicting evidence as to place of crime. People v. Lipp, 111 App. Div. 504, 98 N. Y. S. 86.

11. State v. Pingel, 128 Iowa, 515, 105 N. W. 58. Cannot reverse where there is any evidence to sustain the verdict, though the preponderance may be against the verdict. Powers v. Com., 29 Ky. L. R. 277, 92 S. W. 975.

12. Miller v. Territory, 15 Okl. 422, 85 P. 239. Though only one witness for prosecution and six for defense. Glover v. U. S. [Ind. T.] 91 S. W. 41.

13. State v. Johnson [S. C.] 54 S. E. 601; In re Baurens, 117 La. 136, 41 So. 442; State v. Dartez, 117 La. 213, 41 So. 653.

14. State v. Clardy, 73 S. C. 340, 53 S. E. 493.

15. State v. Crowley [S. D.] 108 N. W. 491.

16. Proceeding to bind over to keep the peace. Fitzpatrick v. People [Colo.] 86 P. 650.

17. Mayhall v. State [Ala.] 41 So. 290.

18. Holmes v. State [Ala.] 39 So. 569.

19. See 5 C. L. 1875.

20. Trono v. U. S., 199 U. S. 521, 50 Law. Ed. 292.

21. State v. Clapper, 196 Mo. 42, 93 S. W. 384.

22. Irvin v. State [Fla.] 41 So. 785.

23. Insufficient statement of nature of conviction. In re Howard, 72 Kan. 273, 83 P. 1032.

24. People v. Huson, 99 N. Y. S. 1081.

25. State v. Tetu [Minn.] 108 N. W. 470. Defendant's appeal costs held taxable against state. State v. Rutledge, 40 Wash. 9, 82 P. 126.

26. This may be done when the case is up on error and certiorari or even on cer-

(§ 17) *J. Proceedings after reversal and remand.*[28]—The court below has no power before remand[29] and no discretion with respect to matters embraced by the mandate.[30] Where on appeal from the judgment it is reversed without ordering new trial, defendant cannot be discharged without a showing as to the disposition of an appeal taken from the order denying a new trial.[31] Under a statute providing that on reversal without ordering new trial the appellate court shall direct defendant's discharge, the lower court has no power to so direct.[32] The decisions are conflicting as to whether after reversal of conviction of manslaughter on indictment for murder a higher offense can be found on retrial.[33] Accused cannot after release on habeas corpus recover back costs paid.[34]

§ 18. *Summary prosecutions and review thereof.*[35]—Prosecution for violation of city ordinance is deemed civil in Michigan.[36] The legislature may provide for the summary trial of petty offenses,[37] and, unless the jurisdiction of constitutional courts is interfered with, may create courts for the trial thereof.[38] Justice of the peace in New Jersey has no power to act as borough recorder and conviction before him as acting recorder is void.[39] A justice of the peace cannot hold court outside of the township in which he resides and was elected, and such authority is not conferred by consent of the accused.[40] Trial by one magistrate of a person bound over to appear for trial before another, without order for transfer of the case, is a nullity.[41] The practice in the criminal court of Atlanta is not governed by the act relating to city courts.[42] Whether change of venue is allowed depends on local statutes.[43] Summary prosecutions are usually initiated by affidavit or complaint, and while these have been held to be within the guaranteed right to be informed of the nature of the accusation,[44] much liberality is exercised as to their form and sufficiency.[45] Prosecution before justice abates on his death.[46] The provision in

tiorari alone. People v. Scofield, 142 Mich. 221, 12 Det. Leg. N. 654, 105 N. W. 610.

27. People v. Farrell [Mich.] 13 Det. Leg. N. 777, 109 N. W. 440.

28. See 5 C. L. 1876.

29. All proceedings before remand, void. Edwards v. State, 125 Ga. 5, 53 S. E. 579.

30. After affirmance the court below has no power to entertain a motion for new trial for newly-discovered evidence. State v. Adams, 73 S. C. 435, 53 S. E. 538.

31, 32. Ex parte Ballard [Cal.] 84 P. 832.

33. That conviction for higher degree cannot be had. Ex parte Vickery [Fla.] 40 So. 77; People v. Farrell [Mich.] 13 Det. Leg. N. 777, 109 N. W. 440. **Contra.** State v. Matthews [N. C.] 55 S. E. 342.

34. Tribble v. State [Ala.] 41 So. 183.

35. See 5 C. L. 1876.

36. People v. Smith [Mich.] 13 Det. Leg. N. 1068, 109 N. W. 411.

37. Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751.

38. Legislature may create city police courts and give them exclusive jurisdiction of local misdemeanors. State v. Baskerville [N. C.] 53 S. E. 742. Section 6454, Revised Statutes, giving the probate court in certain counties concurrent jurisdiction with the common pleas in all misdemeanors and proceedings to prevent crime, is not unconstitutional for lack of uniform operation. Oberer v. State, 8 Ohio C. C. (N. S.) 93.

39. Borough of Vineland v. Kelk [N. J. Law] 63 A. 5.

40. Ex parte Boswell, 3 Ohio N. P. (N. S.) 555.

41. State v. Spray [S. C.] 54 S. E. 600.

42. Mitchell v. State [Ga.] 54 S. E. 931.

43. Mayor issuing warrant for destruction of intoxicants held to be acting under Acts 1899, p. 11, and not under Kirby's Dig. § 5586, and, accordingly, change of venue is not allowed. Betts v. Ward [Ark.] 95 S. W. 148. One is entitled to change of venus for bias of police judge. City of Sioux Falls v. Neeb [S. D.] 105 N. W. 735.

44. Constitutional provision that accused shall have the right to demand the nature of the accusation applies. Telheard v. Bay St. Louis, 87 Miss. 580, 40 So. 326.

45. A summons defectively charging an offense against a municipal ordinance may be amended. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32. An ordinance providing that trials before the recorder should be conducted in the same manner as cases before a justice of the peace does not adopt the requirement that informations be verified by the prosecuting attorney. City of Kirksville v. Munyon, 114 Mo. App. 567, 91 S. W. 57. A verification of a criminal complaint on information and belief is sufficient for every purpose except the issuing of the warrant for arrest (Cameron v. Territory, 16 Okl. 634, 86 P. 68), and an appearance and pleading to the merits waives such defect (Id.). Preliminary affidavit under Alabama practice need not be signed. Holman v. State [Ala.] 39 So. 646. Ordinances need not be alleged by title and date of passage where the prosecution is in a court taking judicial notice of ordinances. Ex parte Luening [Cal. App.] 84 P. 445. Where the information

Georgia for "committal trials" looks only to binding over the accused and it cannot be demanded at the time set for a trial of the merits.[47]

Review.[48]—The right of appeal[49] and the courts having cognizance thereof[50] depend on statute, as do the proceedings to obtain review, the requisites of the record,[51] and the extent of review.[52]

In Georgia the decisions of the city courts are reviewed by certiorari.[53]

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does not show sufficient facts and the deposition of the informant was not taken, accused should be discharged. Ex parte Connor [Cal. App.] 84 P. 999. Accusation of violation at a specified time and place of an ordinance designated by number and section insufficient. Telheard v. Bay St. Louis, 87 Miss. 580, 40 So. 326. Accusation in the name of the "Citizens" instead of the "State" of Georgia held good. Mitchell v. State [Ga.] 54 S. E. 931. While it is better practice for the accusation to show that it is based on affidavit, it is sufficient if the affidavit appears on the record. Id. Complaint by police officer in municipal court of Milwaukee held sufficient under statute, though ordinance provides for complaint by prosecuting attorney. Morgenroth v. Milwaukee [Wis.] 105 N. W. 47. The act of 1891, requiring accusations in the city court of Atlanta to be signed by the "solicitor general," means the solicitor of such court and not the solicitor general of the superior court. Mitchell v. State [Ga.] 54 S. E. 931. It is not necessary that the information required under Rev. St. § 6455 in prosecutions before the probate court shall be sworn to, and the preliminary affidavit is sufficient to carry the matter through all the courts. Oberer v. State, 8 Ohio C. C. (N. S.) 93.

46. State v. Miesen, 96 Minn. 466, 105 N. W. 555.

47. Mitchell v. State [Ga.] 54 S. E. 931. Complaint in criminal court of Atlanta can be verified before notary public. Id.

48. See 5 C. L. 1877.

49. Proceeding for statutory trespass held criminal, so that appeal lies from justice to circuit court irrespective of the amount of the fine. Jernigan v. Com., 104 Va. 850, 52 S. E. 361. Allowance of appeal discretionary. Commonwealth v. Yocum, 29 Pa. Super. Ct. 428. Statute denying appeal where fine of $10 or less is imposed held valid. City of Chattanooga v. Keith, 115 Tenn. 588, 94 S. W. 62.

50. If averments of petition for appeal are sufficient to give jurisdiction, allowance thereof will be sustained. Commonwealth v. Ralston, 29 Pa. Super. Ct. 426.

51. Magistrate is bound to file in appellate court a written report of his proceedings. State v. Spray [S. C.] 54 S. E. 600. The record must show a conviction. Record held not to show conviction. City of Bridgeton v. Pierce [N. J. Law] 64 A. 693.

52. Acts 1896-97, p. 330, § 12, providing that the decision of the city court without a jury on evidence shall be reviewed without any presumption in its favor applies to criminal cases (Tony v. State, 144 Ala. 87, 40 So. 388), but on such review the decision will not be disturbed unless it is plainly erroneous (Id.). Where the mayor has final jurisdiction, the evidence will be reviewed on error. Koch v. State, 73 Ohio St. 131, 76 N. E. 868. Supreme court will not set aside conviction supported by legal evidence. Harris v. Atlantic City [N. J. Law] 62 A. 995. Correction of docket entry as to style of case held harmless. Blodgett v. McVey [Iowa] 103 N. W. 239. The judgment of a mayor upon an issue presented by a plea in bar may, under the authority of § 6565, Rev. Statutes, be reviewed independently of the other issues of the case where presented upon a bill of exceptions containing the evidence upon this issue alone. Whitman v. State, 7 Ohio C. C. (N. S.) 334. Certified transcripts attached to a bill of exceptions, but not referred to in or made a part of the bill, cannot be considered by a reviewing court as a part of the bill. Id.

53. Defendant has three months from the dismissal of exceptions from the city court of Savannah to file certiorari to the superior court. Winn v. State [Ga.] 55 S. E. 178. Unless the act creating a city court prescribes the procedure for certiorari to the superior court, the procedure established by Civ. Code 1895, § 4637, is to be followed. Miller v. State [Ga.] 55 S. E. 405. Must appear that offense was within corporate limits. Martin v. Gainesville [Ga.] 55 S. E. 499. An accusation in the city court of Bainbridge being required to be founded on affidavit without providing before whom it shall be taken, it may be taken before a notary public. Shuler v. State, 125 Ga. 778, 54 S. E. 689. The requirement of an affidavit that accused has not had a fair trial as condition precedent to grant of certiorari to county court is mandatory. Blassingame v. State, 125 Ga. 293, 54 S. E. 180. Since superior courts do not judicially notice ordinances, the petition for certiorari must set out the ordinance on which the prosecution is based. Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354. Petition for certiorari held to sufficiently show giving of bond. Stallworth v. Macon, 125 Ga. 250, 54 S. E. 142. Points made in a petition for certiorari not verified by the answer present nothing. Brown v. Gainesville, 125 Ga. 238, 53 S. E. 1002; Cooper v. Gainesville, 125 Ga. 240, 53 S. E. 1002; Manning v. Gainesville, 125 Ga. 239, 53 S. E. 1002. Where certiorari was dismissed on the petition, an amendment of the record by sending up the answer will not be ordered. Evans v. Forsyth [Ga.] 55 S. E. 490.

INFANTS.

§ 1. Status and Disabilities in General (267).
§ 2. Custody, Protection, Support, and Earnings (267).
§ 3. Statutes for the Protection of Infants (271). Crimes Against Children (272). Juvenile Courts (272).
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§ 7. Crimes (276).
§ 8. Actions by and Against (276).

§ 1. *Status and disabilities in general.*[1]—Rights and duties as beween parent and child,[2] powers and proceedings of guardians,[3] and guardians ad litem,[4] are elsewhere treated, also the application to infants of the doctrines of contributory negligence[5] and assumption of risk.[6] Until the full time of their majority[7] or by statute till a female infant marries,[8] infants are the wards of chancery, both as regards their custody[9] and their property,[10] and are not sui juris. An infant cannot estop himself by contract[11] nor by mere silence[12] unless his conduct has been intentional and fraudulent,[13] nor will the acts of a guardian, without authority and in excess of his powers, with reference to his ward's estate, operate as an estoppel against infant wards.[14] Infancy is a personal privilege to be taken advantage of by the infant alone,[15] and cannot be exercised by assignees or privies in estate,[16] and may not be used to work a wrong.[17] The domicile of an infant's father at the time of the father's decease determines the domicile of the infant when his mother is living and no change in the status of the infant's mother after the death of the father occurs.[18] Infancy of a particular person at a particular time is a question of fact.[19] Disabilities cannot be cumulated one upon another.[20]

§ 2. *Custody, protection, support, and earnings.*[21]—The custody of children is primarily in the father if living[22] but the power to dispose of this right by will to the exclusion of the surviving mother no longer exists in New York.[23] The

1. See 6 C. L. 1.
2. See Parent and Child 6 C. L. 877.
3. See Guardianship, 7 C. L. 1899.
4. See Guardians Ad Litem and Next Friends, 7 C. L. 1896.
5. See Negligence, 6 C. L. 748.
6. See Master and Servant, 6 C. L. 521.
7. The fact that an infant is near full age renders him none the less a ward of the court. In re Stevens, 99 N. Y. S. 1070.
8. Marriage of an infant female emancipates her from the disability of minority (Lawder v. Larkin [Tex. Civ. App.] 15 Tex. Ct. Rep. 809, 94 S. W. 171), but does not revoke a power coupled with an interest executed by her during infancy (Id.). Deed of trust containing power of sale held a power coupled with an interest. Id.
9. See post, § 2. See, also, Guardianship, 7 C. L. 1899.
10. See post, § 4.
11. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.
12. Headley v. Hoopengarner [W. Va.] 55 S. E. 744; Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508.
13. Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508. When an infant has reached that stage of maturity which indicates that he is of full age and enters into a contract falsely representing himself to be of age, accepting the benefits of the contract, he will be estopped to deny that he is not of age when the obligation of the contract is sought to be enforced against him. Commander v. Brazil [Miss.] 41 So. 497.
14. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.
15. Riley v. Dillon [Ala.] 41 So. 768. Stranger holding and asserting a hostile title to an infant held not entitled to assert the infant's privilege of infancy. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131.
16. Riley v. Dillon [Ala.] 41 So. 768.
17. Cole v. Manners [Neb.] 107 N. W. 777.
18. Nunn v. Robertson [Ark.] 97 S. W. 293.
19. Evidence held to establish attainment of majority by alleged infant at time of making contract. Lansing v. Michigan Cent. R. Co., 143 Mich. 48, 12 Det. Leg. N. 912, 106 N. W. 692. Evidence held to show attainment of majority of alleged infant at time of execution of deed in question. Bryant v. McKinney, 29 Ky. L. R. 951, 96 S. W. 809.
20. Disability of infancy of parent of infant held not cumulative with the disability of such infant. Robinson v. Allison, 192 Mo. 366, 91 S. W. 115.
21. See 6 C. L. 1.
22. So now by statute (Laws 1896, c. 272) in New York. In re Kellogg, 110 App. Div. 472, 96 N. Y. S. 965.
23. In re Kellogg, 110 App. Div. 472, 96 N. Y. S. 965. An attempt to do so held not supportable as a trust over property of the children. Id.

father, however, has no proprietary right or interest in or to the custody of his children,[24] nor can he by arbitrarily or capriciously yielding their custody to another deprive the mother of her rights as such.[25] As between parents the mother is generally entitled to the custody of children of tender years, other things being equal,[26] and as against any other than the putative father, the mother of an illegitimate child has the natural right to its custody.[27] The rights of a parent to the custody and control of infant children may be forfeited by misconduct or voluntary relinquishment.[28] A parent's agreement to relinquish the custody of minor children is not, however, absolute and irrevocable,[29] but when a contention arises, much will depend on the character of the parties, the length of time elapsed, and the circumstances of the particular case.[30]

The courts of chancery generally have power to superintend the affairs of infants[31] and to provide permanently for their custody.[32]

In determining the right to the custody of a child, that which is for the best interest of the child will control,[33] but neither the rights of parents nor the rights and interests of those to whom the care and custody of infants have been surrendered will be ignored.[34] A court will not exercise its power to remove an infant citizen from the country by awarding it to the custody of a foreigner unless the proof is clear and satisfactory that the best interests of the child so require.[35] As

24. Maternal grandparent of ten-year old child held entitled to retain custody against claim of child's father. Coulter v. Sypert [Ark.] 95 S. W. 457.

25. Mother of infants held entitled to custody thereof as against a brother of their father in whose care they had been placed by the father with directions not to deliver to their mother. Ex parte Cannon [S. C.] 55 S. E. 325.

26. Mother held entitled to custody of nine months' old baby against claim of father under Rev. Codes 1899, § 2817. Michels v. Fennell [N. D.] 107 N. W. 53.

27. Mother of illegitimate child held not to have forfeited right to its custody. Hesselman v. Haas [N. J. Eq.] 64 A. 165. Persons procuring possession of illegitimate child by answering advertisement offering it for adoption held not to have acquired any right to its possession as against the mother. Id.

28. Robertson v. Bass [Fla.] 42 So. 243. A mother having articled her children in Georgia to a stranger who has maintained them decently and lovingly, on a contest over their possession in Florida, the court need not inquire whether the Georgia statute governing apprenticeships has been strictly complied with, when the maternal right only is involved. Id.

29. Robertson v. Bass [Fla.] 42 So. 243.

30. Mother of infants held estopped to deny effect of her deed of them in apprenticeship. Robertson v. Bass [Fla.] 42 So. 243.

31. Hesselman v. Haas [N. J. Eq.] 64 A. 165.

32. Hesselman v. Haas [N. J. Eq.] 64 A. 165; Churchill v. Jackson, 125 Ga. 385, 53 S. E. 960. The jurisdiction of the question of the custody of a child on a writ of habeas corpus is of an equitable nature (Andrino v. Yates [Idaho] 87 P. 787), and courts have large discretion in the matter (Id.). In passing on questions raised in a habeas corpus case for the possession of minor children, the discretion given by the law is to the trial judge. Weathersby v. Jordan, 124 Ga. 68, 52 S. E. 83.

33. Mahon v. People, 218 Ill. 171, 75 N. E. 768; Weathersby v. Jordan, 124 Ga. 68, 52 S. E. 83; White v. Richeson [Tex. Civ. App.] 94 S. W. 202. The court will have regard to natural relationship. Hesselman v. Haas [N. J. Eq.] 64 A. 165. A parent who by conduct abandons or forfeits the legal right to custody of a child is equitably estopped from asserting the legal right. Andrino v. Yates [Idaho] 87 P. 787. Mother of infant held "unsuitable" for possession of child within Rev. St. 1887, § 5774, as amended by Sess. Laws 1899, p. 302. Id. Legal right of mother held abandoned, forfeited, or surrendered. Id. The question of education and wealth are proper matters for the consideration of the court in determining with whom the custody of a child shall vest as between persons having no vested interest in it (Mahon v. People, 218 Ill. 171, 75 N. E. 768), but they are not controlling (Id., rvg. 119 Ill. App. 497).

Evidence held to show that the best interests of a child whose custody was sought in habeas corpus proceedings by its foster parents, who had placed it in the custody of respondents with the ostensible purpose of leaving it with them permanently, required that it be allowed to remain with respondents. White v. Richeson [Tex. Civ. App.] 94 S. W. 202.

34. In a controversy between a parent and a person to whom an infant child has been apprenticed by such parent, the rights of the parent, the rights and interests of the person to whom the care and custody of the infant has been intrusted, and the welfare of the child, are to be considered. Robertson v. Bass [Fla.] 42 So. 243.

35. Evidence held to show that the best interest of the child would be subserved by denying its custody to a foreign relative as against the claim of a citizen stranger. Ma-

to the effect of and the authority of the courts to consult the predilections of infants concerning their custody, the decisions are inharmonious, some courts holding that the wishes of the child should be considered,[36] but in some jurisdictions this is denied.[37] It is held in Texas that the adoption of a child does not give the person adopting the child the right to custody thereof.[38] To constitute such abandonment by a parent as will deprive him of the right to prevent the adoption of his child, there must be some conduct on his part which evinces a settled purpose to forego all parental duties.[39]

A statutory provision for the award of the children of a marriage annulled on the ground of fraud or force to the innocent parent is inapplicable to marriages void ab initio.[40] Jurisdiction of custodial proceedings is at the place of the child's habitation.[41] Where a statute requires notice to parents of the surrender of a child to the court for disposition, both parents are included,[42] and the surrender of a child by its mother without notice to the father is a void act as to him, even though the complaint of the mother averred an abandonment of the child by the father.[43] A father cannot be deprived of his child without an adjudication by a court of competent jurisdiction that he has abandoned or deserted it or is unfit to have its custody and control,[44] the legislature having no power to deprive the father of all right or dominion over his child without an opportunity to be heard.[45] It is held in Illinois that habeas corpus for the custody of a child is a civil proceeding,[46] that an order of a court of competent jurisdiction therein disposing of the custody of a child is a final order,[47] and that persons charged with unlawfully withholding the custody of a child from petitioners in habeas corpus proceedings for the possession of the child are not only proper but necessary parties to the proceeding[48] who, on an adverse ruling, are entitled to have the record made against them in the trial court reviewed by writ of error.[49] The burden is on the claimant not of the blood or of kin seeking to remove the child from

hon v. People, 218 Ill. 171, 75 N. E. 768, rvg. 119 Ill. App. 497. That a six year old girl is surrounded by working people, that she attends the public schools, and that it may become necessary for her to work in order to support and educate herself, does not show that her environment is un-American (Id.) or furnish any sound reason why her domicile should be changed by awarding her custody to an aunt residing in England whose only claim of benefiting the child is that she will be afforded better educational advantages and more flattering prospects of inheriting wealth (Id.).

36. It is a proper practice to consult a child as to its wishes and desires in regard to who should have custody thereof as between claimants (Andrino v. Yates [Idaho] 87 P. 787), not that the wishes of the child should control but that the court may more wisely exercise its discretion (Id.). Where a child is old enough to exercise judgment, its wishes should be considered in determining the question of the right to its custody. Louisiana Soc. for Prevention of Cruelty to Children v. Tyler, 116 La. 425, 40 So. 784.

37. Child ten years of age. Hesselman v. Haas [N. J. Eq.] 64 A. 165.

38. White v. Richeson [Tex. Civ. App.] 94 S. W. 202.

39. Infant held not abandoned by father. State v. Wheeler [Wash.] 86 P. 394. Merely permitting the child to remain for a time undisturbed in the care of others is not such an abandonment. Id.

40. Marriage held void ab initio, within Rev. Codes 1899, § 2734, because of woman having living husband undivorced at time. Michels v. Finnell [N. D.] 107 N. W. 53.

41. Where a child is placed by a court in the custody of a society as the court's agent to find a home for the infant and it is placed by such society in the custody of another out of the court's jurisdiction, the courts of the place where the child is in custody are authorized to decide the question of the right to its custody. Louisiana Soc. for Prevention of Cruelty to Children v. Tyler, 116 La. 425, 40 So. 784.

42, 43. Acts 1903, p. 60, c. 49, § 2, construed. State v. Wheeler [Wash.] 86 P. 394.

44. Surrender of child by mother to charitable institution held invalid as against claim of father. State v. Wheeler [Wash.] 86 P. 394.

45. Acts 1903, c. 49, § 1, subd. "b," construed. State v. Wheeler [Wash.] 86 P. 394. Where an order of court purporting to adjudicate the surrender of a child to the court for disposition shows on its face that the father was not served with notice and that no sufficient time for service on him elapsed, it is void as to the father and, therefore, subject to collateral attack. Id.

46, 47, 48, 49. Mahon v. People, 218 Ill. 171, 75 N. E. 768.

another stranger.[50] Laws of the jurisdiction to which a claimant of the child would remove it are relevant to show capacity to serve the child's best interests.[51] A decree for commitment to an asylum will not be construed into one for custody[52] and a provision as to visits need not fix the exact time when they are allowable.[53] Custody decrees are binding on the parents,[54] but may be amended to attain certainty[55] or if conditions change.[56]

Parents are bound to support their children and are liable for expenses incurred in their maintenance,[57] and as a consequence parents are entitled to the earnings of their infant children;[58] but on the question whether the father suing as next friend for injuries to his minor child may recover for loss of the child's earnings or impairment of earning capacity, the decisions are inharmonious, some courts holding that he cannot[59] unless the minor has been emancipated,[60] while in other jurisdictions it is held that he is thereby estopped from making such claims as parent and is, therefore, entitled to recover.[61] It is the general rule of law that no allowance should be made to either father or mother out of the estate of a deceased minor child for past maintenance and support, except in special cases.[62] The wrongful impairment by a third person of the right to be supported is in some circumstances actionable.[63]

50. In habeas corpus proceedings to obtain possession of a foster child which had been placed by relators in the custody of respondents with the ostensible purpose of leaving it with them permanently, the burden was on relators to show that the best interests of the child would be conserved by taking it from respondents. White v. Richeson [Tex. Civ. App.] 94 S. W. 202.

51. The trial of the issue on habeas corpus for the possession of a child being to the court, it may receive evidence as to the laws of a sister state as to the capacity of a married woman to contract, even though such laws may not have been strictly complied with by the party offering the evidence. Robertson v. Bass [Fla.] 42 So. 243.

52. Where an order of court went only to the extent necessary to place a child in a home, the court's agent for the purpose has no absolute right to take the child from the custody of one to whom its custody had been given. Louisiana Soc. for Prevention of Cruelty to Children v. Tyler, 116 La. 425, 40 So. 784.

53. A decree providing that a child should be allowed to visit a certain relative once a month is not fatally defective for indefiniteness as to the length of such visits. Churchill v. Jackson, 125 Ga. 385, 53 S. E. 960.

54. A decree awarding the exclusive custody and control of infant children to one of the parents in a divorce proceeding is binding as between the parents in their future relations to the children. State v. Wheeler [Wash.] 86 P. 394.

55. Amendable to cure any indefiniteness regarding the length of visits. Churchill v. Jackson, 125 Ga. 385, 53 S. E. 960.

56. The continuing jurisdiction which is vested in the court of common pleas with reference to the custody of children for the purpose of modifying orders in divorce proceedings does not authorize a rehearing of a matter theretofore submitted and determined but is only to be called into exercise when a substantial change in the condition of the parties requires a modification of the former order. Graviese v. Graviess, 7 Ohio C. C. (N. S.) 135.

57. Hence an infant suing by next friend cannot recover for expenses of medical services paid by his father on account of the injuries which are the basis of the cause of action. Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877. Admission of testimony of father of infant as to amount of bill for medical services rendered the plaintiff and paid by witness held reversible error. Id.

58. Creditors of the father of infant children have the same right to look to the earnings of the children and to the property in which they are invested as to any other effects of their debtor. Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508.

59. Farrar v. Wheeler [C. C. A.] 145 F. 482; Comer v. Ritter Lumber Co. [W. Va.] 53 S. E. 906; Gallagher v. Public Service Corp. [N. J. Law] 64 A. 978.

60. Formal emancipation is not required to be shown, but the establishment of circumstances reasonably sufficient to justify the inference that an emancipation in fact actually existed will suffice. Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508. The earnings of an infant are his property when the parent permits him to make his own contracts, collect his wages, and appropriate them to his own use (Vance v. Calhoun, 77 Ark. 35, 90 S. W. 619), and in such case the infant is entitled to recover them (Id.).

61. Louisville R. Co. v. Esselman, 29 Ky. L. R. 333, 93 S. W. 50.

62. Spink v. Spink, 7 Ohio C. C. (N. S.) 89. A special case warranting an exception to this rule is presented where a mother who has furnished such support had little or no estate or an estate trifling in comparison with that of the minor, and the support was furnished to the minor for the benefit of the

§ 3. *Statutes for the protection of infants.*[64]—The state stands in the position of parens patriæ and may exercise unlimited supervision and control over their contracts, occupation, and conduct, and the liberty and right of those who assume to deal with them.[65] They are peculiarly entitled to legislative protection and form a class to which legislation may be exclusively directed.[66] The legislature may decide what employment is inimical to children's welfare,[67] and what protection is required,[68] and to what classes of children it shall apply,[69] and, unless its decision is manifestly unreasonable, it is binding on the courts.[70] Such legislation has been held void when coupled with an attempted regulation of the labor of adults.[71] Such statutes must be reasonably construed to meet the protective purpose of the statute.[72] Ignorance that a servant is a minor does not necessarily absolve the master from compliance with regulations of this character.[73] The abandonment of children by parents is criminal in Georgia only when they are left destitute.[74] Knowledge of infancy is not necessarily essential to guilt under statutes for the protection of infants.[75]

minor under conditions which were coercive upon the mother and compelled her to assume a burden which was not naturally and legally hers alone. Id. When such a claim is presented to the probate court under Rev. St. § 6100, there is drawn to that court the chancery jurisdiction necessary to a complete exercise of the jurisdiction specially conferred by the statute. Id.

63. See Death by Wrongful Act, 7 C. L. 1083; Intoxicating Liquors, 6 C. L. 204, 206, n. 36 (note "Rights of afterborn child").

64. See 6 C. L. 2.

65. State v. Shorey [Or.] 86 P. 881. This is a power which inheres in the government. Id.

66. Child-labor law (St. 1905, p. 11, c. 18) held not repugnant to Const. art. 1, § 21, prohibiting special privileges to any class of citizens. Ex parte Spencer [Cal.] 86 P. 896. The child-labor law (St. 1905, p. 11, c. 18, § 2), restricting the employment of children under fourteen years of age in certain places and occupations held not discriminatory against other trades. Id. Also held not undue restraint on minor's choice of trade. Id. Forbidding night work upheld. Id. Exception in favor of orphans and those deprived of parental support, sustained. Id. Exception that upon certificate public school children may work during vacation held valid. Id. Proviso upheld that no child shall work for gain during public school hours, save those who can read and write simple English or those who attend night school. Id. Exception upheld as to domestic labor and farming during the time the public schools are not in session or during other than school hours. Id. In Michigan the legislature has power to determine by rules and definitions the class or classes of children requiring state supervision and to impose it. Hunt v. Wayne Circuit Judges, 142 Mich. 93, 12 Det. Leg. N. 673, 105 N. W. 531. The Oregon statute, making the employment of children under sixteen years of age for more than ten hours a day a penal offense, is valid. Gen. Laws 1905, p. 343, § 5, held not repugnant to Const. U. S. amend. 14 (State v. Shorey [Or.] 86 P. 881), nor Const. Cal. art. 1, § 1, which declares that all men when they form a social compact are equal in rights (Id.). Section 2 of Act of May 13, 1903 (P. L. 359), relating to boys in bituminous coal mines, held defective in its title. Commonwealth v. Shulte, 26 Pa. Super. Ct. 95.

67. It is competent for the state to forbid the employment of children in certain callings merely because it believes such prohibition to be for their best interest, though the employment does not involve a direct danger to morals, decency, or to life or limb. State v. Shorey [Or.] 86 P. 881. The power to forbid the employment of infants in certain occupations and not in all depends on the questions whether any appreciable number of children are employed in the callings not forbidden (Ex parte Spencer [Cal.] 86 P. 896), and whether those callings are injurious to them or less injurious than those forbidden (Id.).

68. Ex parte Weber [Cal.] 86 P. 809.

69. Ex parte Weber [Cal.] 86 P. 809. Penal Code, §§ 272, 273 (St. 1905, p. 759, c. 568), applicable only to children under sixteen years of age, held valid. Id.

70. Penal Code, §§ 272, 273, forbidding employment to infant in certain lines, but permitting their employment as musicians, held valid. Ex parte Weber [Cal.] 86 P. 809.

71. The New York statute forbidding the employment in factories at night of women and infants under eighteen years of age has been declared unconstitutional. Laws 1903, p. 439, c. 184, § 77, held void as to employment of females of any age in factories at night. People v. Williams, 101 N. Y. S. 562.

72. The doctrine ejusdem generis held inapplicable in the construction of Act May 16, 1903, § 1, to prevent employment on machine included only in general description from falling within the meaning of the statute. Swift & Co. v. Rennard, 119 Ill. App. 173.

73. The fact that the infant conceals his true age does not relieve an employer from liability for injuries to an infant under the statutory age at which infants can be employed under Act May 16, 1903, § 11, prohibiting employment of infants at particular work. Swift & Co. v. Rennard, 119 Ill. App. 173.

74. Williams v. State [Ga.] 55 S. E. 480.

Crimes against children.—The New York statute making it criminal to sell, pay for, or furnish cigarettes or tobacco to any child actually or apparently under the age of sixteen years does not apply when the child is agent of another to the knowledge of accused.[76] The New York statute making junk dealers criminally liable for purchasing or receiving junk from a child under sixteen years of age warrants a conviction irrespective of whether the property was stolen,[77] and this construction of the statute does not render it unconstitutional.[78] As in other classes of offenses a conviction under a statute for the protection of the health and morals of infants is not warranted where the evidence of guilt is unsatisfactory.[79]

Juvenile courts for the protection and redemption of delinquent and incorrigible minors are not for the trial of crime[80] and, when properly enacted[81] within other constitutional limitations,[82] the legislature may create them. The acts apply to such minors only as are described,[83] but an erroneous decision that one committed was within the statute does not avoid the commitment.[84] The required affidavit or information is essential to jurisdiction[85] and notice to parents when required by statute,[86] but the ordinary procedure in case of crimes is not a part of "due process of law,"[87] and there is no right to a jury trial.[88]

§ 4. *Property and conveyances.*[89]—Chancery has inherent[90] power to super-

75. Rev. St. 1899, § 2193, forbidding pool selling or betting with minors, construed. State v. Delmar Jockey Club [Mo.] 92 S. W. 185. Not necessary under Acts 1905, p. 105, c. 75, relating to pool halls. Rainboldt v. State [Tex. Cr. App.] 93 S. W. 737.

76. Pen. Code, § 290, subd. 5, construed. People v. Zabor, 183 N. Y. 242, 76 N. E. 17. Evidence held to show that child was agent. Id.

77. Penal Code, § 290, construed. People v. McGuire, 113 App. Div. 631, 99 N. Y. S. 91.

78. People v. McGuire, 113 App. Div. 631, 99 N. Y. S. 91. On a prosecution for violation of the statute (Pen. Code, § 290), no presumption will be indulged that a boy under sixteen years of age from whom a junk dealer purchases or receives junk was the agent of another who had a lawful right to sell the junk. Id.

79. Evidence held insufficient to sustain conviction under Pen. Code, § 289, on a charge of endangering the health and morals of a girl. People v. Donohue, 100 N. Y. S. 202.

80. Act April 23, 1903 (P. L. 274), does not offend against the constitution in classifying infants, since it is not for the punishment of offenders but for the salvation of children. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198.

81. Pennsylvania Act held not repugnant to Const. art. 3, § 3, relating to **titles of acts.** Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198.

82. Pennsylvania Act does not create a **new court,** but merely gives different powers to the court of quarter sessions from those previously exercised. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198. The legislature has not power to confer on **circuit court commissioners** the powers required by the Act of 1905 (for the establishment of juvenile courts) to be exercised. Act Sept. 13, 1905 (Acts 1905, p. 485, No. 313), held repugnant to Const. Mich. Hunt v. Wayne Circuit Judges, 142 **Mich.** 93, 12 **Det. Leg. N.** 673, 105 **N. W.** 521.

83. St. 1905, p. 806, c. 610, § 2, subsec. 1, and p. 81, c. 84, § 3, held applicable only to children **under sixteen years** of age. Ex parte Lewis [Cal. App.] 86 P. 996.

Married female is not within the class known as children and minors amenable to the statute. Commitment of married female held invalid under St. 1905, p. 81, c. 84, § 3, and p. 806, c. 610, § 2, subsec. 1. Ex parte Lewis [Cal. App.] 86 P. 996. Fact that child is without guardianship is only material on question of its depending under St. 1905, c. 43, § 1, as applied to **one found wandering.** Ex parte Mundell [Cal. App.] 86 P. 833.

84. Habeas corpus held unavailable to procure release of married female infant from industrial school for girls committed under Burns' Ann. St. 1901, §§ 8273, 6180, as amended by Acts 1903, p. 91, c. 35. Ryan v. Rhodes [Ind.] 76 N. E. 249.

85. Under the Juvenile Court Act of California (St. 1905, p. 44, c. 43), the court does not obtain jurisdiction of a dependent child in the absence of an affidavit showing dependency within the definition of the statute. Ex parte Mundell [Cal. App.] 86 P. 833. Complaint held insufficient under St. 1905, p. 81, c. 84, § 3, and p. 806, c. 610, § 2, subsec. 1. Ex parte Lewis [Cal. App.] 86 P. 996.

86. Mother as petitioner in habeas corpus held entitled to be awarded custody of child committed under Hurd's Rev. St. 1905, p. 264, without notice to petitioner. People v. Lynch, 223 Ill. 346, 79 N. E. 70.

87. By providing **no process to bring a child into custody** it does not violate the constitutional guaranty that no one charged with a criminal offense shall be deprived of life, liberty, or property without due process of law. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198. A minor taken into court under the act is not deprived of his liberty without **due process** of law by commitment to a house of refuge. Id.

88. Since it is not for the trial of a child, it is not repugnant to the Bill of Rights provision **that** the right of **trial by jury** shall

intend the property affairs of infants[91] and to protect the same,[92] but no power save by statute to dispose of their real estate.[93] A statute investing the courts with power to sell for reinvestment has been held remedial[94] and subject to liberal construction to give effect to the act and enhance the remedy,[95] but a statute will not authorize exchange of the real estate of infants unless its terms bear that meaning.[96] A statute prohibiting the sale of real estate of infants in contravention of a will or deed under which their estate is created has no application where there are adult tenants in common who have an immediate right to the possession of their shares,[97] but when such statute has application another statute giving infants the right to institute partition, on leave of court, by showing they will be benefited, has no application.[98] In some states the mortgaging of an infant's real estate, when promotive of the infant's interest in the property, is permitted under order of court,[99] and when such mortgage is authorized, the court may properly direct redemption from a sale for delinquent taxes out of the proceeds of a loan secured thereby.[1] By statute in Kentucky a vested estate in possession in which infants are interested may be sold when indivisible without material impairment.[2]

In case of sale for reinvestment, the proceeds or what they purchase fall under the same trusts and limitations as the land,[3] but one is not a trustee who receives proceeds with neither right nor privity to the infant's estate.[4] A sale of land impressed with a trust in favor of an infant to the trustees will be carefully scrutinized in the interest of the infant.[5] A grantee who prior to taking a conveyance from an infant, knowing of the infancy, procures the infant to make an affidavit that he has attained majority, cannot predicate fraud on the giving of the affidavit.[6]

remain inviolate. Commonwealth v. Fisher, 213 Pa. 48, 62 A. 198.

89. See 6 C. L. 2.

90. In re Stevens, 99 N. Y. S. 1070, but see In re Adderley, 50 Misc. 189, 100 N. Y. S. 421. Inherent power of supreme court may be applied where in a case appealed from surrogate it appears that surrogate's decree abused infant's rights. In re Stevens, 99 N. Y. S. 1070.

91. Hesselman v. Haas [N. J. Eq.] 64 A. 165.

92. In re Stevens, 99 N. Y. S. 1070.

93. Anderson v. Anderson [Ky.] 98 S. W. 281. Courts of equity possess no inherent power, as guardians of infants, to sell their real estate for the purpose of reinvestment. Rhea v. Shields, 103 Va. 305, 49 S. E. 70. Supreme court has no inherent jurisdiction over the "real estate" of an infant. Order of sale refused except as warranted by Code Civ. Proc. § 2348. In re Adderley, 50 Misc. 189, 100 N. Y. S. 421.

94. Code 1887, § 2616 (2 Va. Code 1904, § 2616), construed. Rhea v. Shields, 103 Va. 305, 49 S. E. 70.

95. Rhea v. Shields, 103 Va. 305, 49 S. E. 70.

96. Code Civ. Proc. § 2348, held not to authorize an exchange for partition. In re Adderley, 50 Misc. 189, 100 N. Y. S. 421.

97. Laws 1785, c. 39, construed. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621.

98. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621.

99. Mortgage to secure loan to pay mortgage debt held within Laws 1899, c. 300, p. 525. In re Lueft [Wis.] 109 N. W. 652.

1. In re Lueft [Wis.] 109 N. W. 652.

2. Sale of real estate in which infant was interested, by partition proceeding under Civ. Code Prac. § 490, subsec. 2, held to confer on purchaser a good title. Harting's Ex'x v. Milward's Ex'r, 28 Ky. L. R. 776, 90 S. W. 260.

3. Under the Virginia statute investing courts of equity with power as guardians of infants to sell their real estate for the purpose of reinvestment, the practice is to sell or exchange the absolute estate—in place of which the proceeds of sale or the subject in which they are invested, or for which the property is exchanged, are held on the same trusts and subject to the same limitations as the original estate. Construction of Code 1887, § 2616 (2 Va. Code 1904, § 2616), held controlled by the rule of stare decisis. Rhea v. Shields, 103 Va. 305, 49 S. E. 70.

4. Where an infant's lands are sold, the proceeds can only be paid over for the purpose of investment into the hands of some person on special bond being given for the care of the same, under Code 1904, § 2622. Hence, one having no right to receive the fund as guardian de jure cannot be held liable for it as guardian de facto, nor can it be a preferred debt against his estate. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009.

5. Sale for $16,000 of property appraised at $21,200 held void. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

6. Reply in proceeding to recover land conveyed by infant held not obnoxious to demurrer. Pace v. Cawood [Ky.] 97 S. W. 412.

Infants may acquire title to realty by adverse possession[7] if the disseisin be by them or in their behalf.[8] It cannot be so acquired against them,[9] but an infant's property rights are barred by knowing failure to assert them within a reasonable time after majority.[10] Also whenever the statute of limitations is a bar to the recovery of real estate by one of several joint owners, it operates against the others notwithstanding they are infants,[11] and when the statute is put in motion against infant joint tenants by the attainment of majority by one of the female tenants, its running is not interfered with by the disability of coverture on marriage.[12] One is not relieved of liability to infants by being judicially required to account to a third person therefor who in no way represents the infants.[13] One who purchases at judicial sale to pay decedent's debts is not a bona fide purchaser as against infants not bound by the decree.[14] Infant heirs of one holding land in trust inherit the same charged with the trusts.[15] The deed of an infant is not void but only voidable[16] and subject to be defeated by timely disaffirmance,[17] or may be ratified on attaining majority.[18]

§ 5. *Contracts.*[19]—The contract of an infant, except for necessaries,[20] is voidable at his option[21] within a reasonable time after majority,[22] and he may rescind an executed contract at will by restoring or offering to restore what he received thereunder,[23] unless he has received nothing to offer back.[24] He may recover

7. Adverse possession of land by infants through administrator of their mother's estate, their guardian and agent for fourteen years from the death of their parents, held to give title to them thereto by adverse possession. Killebrew v. Mauldin [Ala.] 39 So. 575.

8. The father of infant children will not be presumed to have entered land in their behalf, when there is no evidence that he professed to do so, and none that the children had any title, but at most only color of title, which would make his entry a trespass from the start. Barrett v. Brewer [N. C.] 55 S. E. 414.

9. Ten year prescription does not run against minors. Civ. Code, § 3522. Scoveli v. St. Louis S. W. R. Co., 117 La. 459, 41 So. 723.

10. Five years held laches. Wenger v. Thompson, 128 Iowa, 750, 105 N. W. 333.

11, 12. Cameron v. Hicks [N. C.] 53 S. E. 728.

13. Hence he may justly complain of the error. McNeely v. South Penn. Oil Co., 58 W. Va. 438, 52 S. E. 480.

14. Parties to an action to sell a decedent's property to procure assets to pay debts, when the estate has assets for the purpose, are presumed to know the illegal method used in depriving infants affected by the sale of their land. Davidson v. Marcum, 28 Ky. L. R. 562, 89 S. W. 703. Purchaser held not a bona fide purchaser within Code § 391, authorizing infants to show cause against a judgment, but providing that the vacation of such judgment shall not affect the title of a bona fide purchaser. Id.

15. Cameron v. Hicks [N. C.] 53 S. E. 728.

16. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131; Robinson v. Allison, 192 Mo. 366, 91 S. W. 115; Lawder v. Larkin [Tex. Civ. App.] 15 Tex. Ct. Rep. 809, 94 S. W. 171.

17. Disaffirmance held too late to be available. Robinson v. Allison, 192 Mo. 366, 91 S. W. 115; Lawder v. Larkin [Tex. Civ. App.] 15 Tex. Ct. Rep. 809, 94 S. W. 171. Where property is conveyed to an infant absolutely, who conveys it, but promptly disaffirms the reconveyance on coming of age, the title is not lost to the quondam infant. Seed v. Jennings, 47 Or. 464, 83 P. 872.

18. Acceptance of balance of purchase price after attaining majority held a ratification of a conveyance made by an infant. Damron v. Ratliff [Ky.] 97 S. W. 401. An absolute conveyance for a valuable consideration does not relate back to and ratify a deed to another person executed while under the disability of infancy. Allen v. Anderson [Tex. Civ. App.] 16 Tex. Ct. Rep. 343, 96 S. W. 54.

19. See 6 C. L. 3.

20. Mauldin v. Southern Shorthand & Business University [Ga.] 55 S. E. 922.

21. Sale of judgment to attorney who procured same for infant held voidable by infant. Vance v. Calhoun, 77 Ark. 35, 90 S. W. 619. Note executed by minor in part payment for buggy and harness held voidable by the minor. Heffington v. Jackson [Tex. Civ. App.] 16 Tex. Ct. Rep. 646, 96 S. W. 108.

22. Disaffirmance of release of liability for personal injuries within two years after attaining majority held valid under Hurd's St. 1903, p. 1207, § 14. Chicago Tel. Co. v. Schulz, 121 Ill. App. 573.

23. Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. S. 458. Infant held entitled to rescind contract for erection of house and recover amount paid less expense of tearing down old structure. Thornton v. Holland, 87 Miss. 470, 40 So. 19.

24. Though a statute makes the contract of a minor voidable only by disaffirmance on restoring what he received, a contract from which he can derive no advantage may be avoided merely by disaffirmance. Contract of suretyship held disaffirmed with Civ. Code § 17. Helland v. Colton State Bank [S. D.] 106 N. W. 60.

what he gave though it was a gift to him.[25] To determine whether a particular item is a necessary for an infant it is essential that the state, degree, and condition in life of the infant be shown,[26] and that it affirmatively appear that the guardian of such infant has failed or refused to furnish it.[27] Where goods are sold to an infant as a merchant without reservation of title in the seller, the infant acquires title on delivery in the absence of fraud in the transaction,[28] and the fact that he neglects or refuses to pay for them after attaining his majority does not revest the title in the vendor,[29] nor does the fact that he sells them after coming of age render him liable to an action by the vendor either in tort or for money had and received.[30] The general rule that a valid defense as to one of two joint obligors inures to the benefit of both is subject to the exception that when such defense is infancy, the infant may be discharged and a recovery had as to his co-obligor,[31] and this exception applies though the obligee knew of the infancy when he took the obligation.[32]

An infant's promise to pay money for services of value is a contract[33] and such contract is ratified by continuing the payments after the promisor attains majority.[34] Such payments have that effect if at the promisor's instance though not made from his own funds.[35] By statute in Maine the contracts of a minor other than for necessaries and the purchase of realty are unenforceable unless ratified in writing after attaining majority.[36] The doctrine that one may not repudiate a contract and at the same time claim under it is inapplicable where an infant employe suing for injuries disaffirms an agreement to abide the defendant's rules, the violation of which is pleaded in defense as the proximate cause of the injuries.[37] When the situation does not admit of restoration, injunction lies to prevent a breach of the contract by him[38] where it would work an irremediable fraud.[39]

§ 6. *Torts.*[40]—A fraudulent act, to charge an infant in tort, must be wholly

25. Where one contracts with an infant and gives his receipt to the infant for the money paid as consideration, taking it as the infant's money, the fact that a third person gave the money to the infant does not affect the infant's right to rescind and recover the consideration. Thornton v. Holland, 87 Miss. 470, 40 So. 19.

26. Shorthand course held not to have been proven a necessity. Mauldin v. Southern Shorthand & Business University [Ga.] 55 S. E. 922. Buggy and harness held not necessaries for infant. Heffington v. Jackson [Tex. Civ. App.] 16 Tex. Ct. Rep. 646, 96 S. W. 108. Legal services rendered in connection with will contest on behalf of an infant held not necessaries. McIsaac v. Adams, 190 Mass. 117, 76 N. E. 654.

27. Mauldin v. Southern Shorthand & Business University [Ga.] 55 S. E. 922.

28, 29, 30. Lamkin v. Ledoux [Me.] 64 A. 1048.

31, 32. Cole v. Manners [Neb.] 107 N. W. 777.

33. Dwelling with an infant and rendering service as companion and otherwise are a consideration which give to the infant's promise to pay money and payment of it the nature of a contract and not a voluntary gift. Parsons v. Teller, 111 App. Div. 637, 97 N. Y. S. 803.

34, 35. Parsons v. Teller, 111 App. Div. 637, 97 N. Y. S. 808.

36. Signing of bond to release goods attached held not a ratification of a contract within Rev. St. c. 113, § 2. Lamkin v. Ledoux [Me.] 64 A. 1048.

37. Alabama Great Southern R. Co. v. Bonner [Ala.] 39 So. 619.

38. Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. S. 458. Where an infant has acquired knowledge while in another's employ as to his employer's customers and has become acquainted with them, equity will enjoin him after leaving his employer's service from using the information to the injury of his former employer in violation of the contract between them. Id.

39. Though infancy may protect one from the terms of a contract, it is not a license to use the advantage obtained by virtue of a contract to commit torts and inflict injuries on the obligee for which the law affords no adequate remedy. Injunction against infant lessee held properly granted. Cole v. Manners [Neb.] 107 N. W. 777. While an infant is in possession under a lease his plea of infancy is not available in a suit brought to restrain him from making use of his possession to inflict irreparable injuries on his landlord. Id.

40. See 6 C. L. 4. The topics Master and Servant, 6 C. L. 521; Negligence, 6 C. L. 743; Death by Wrongful Act, 7 C. L. 1083; Parent and Child, 6 C. L. 877, treat of phases of the law of torts as affected by the infancy of some of the persons involved; and topics like Assault and Battery, 7 C. L. 274; Seduction, 6 C. L. 1439; Trespass, 6 C. L. 1721, which

tortious,[41] and a matter arising ex contractu though infected with fraud cannot be changed into a tort, to charge the infant in trover or case, by a change in the form of the action.[42] An action for false representations by an infant as to his age, whereby plaintiff was misled to his injury into making a contract with the infant is for breach of contract,[43] and the fact that it is called one of tort in an action therefor does not alter its legal aspect.[44]

§ 7. *Crimes.*[45]—The age of criminal responsibility is fixed by statute in some states,[46] and in some, statutes provide for confinement of persons convicted of crime in early infancy in reformatories instead of in penitentiaries.[47] No command by a parent will justify a criminal act by a child mentally capable.[48] A minor who has arrived at the age of criminal responsibility is subject to punishment criminally for violation of the Georgia act penalizing fraudulent intent in contracting for services.[49] An infant's plea of guilty to a criminal charge is valid.[50]

§ 8. *Actions by and against.*[51]—In Louisiana district judges are vested with great discretion in the matter of taking steps to protect the interest of minors, when they are threatened with loss and have no legally qualified representative to guard their rights.[52]

Ordinarily infants, even though so young as to be unable to understand the nature of legal proceedings, must be regularly served with process to validate pro-

treat of particular torts, should also be consulted.

41. Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953. False representations by an infant as to his age, whereby another is, by reliance thereon, misled, to his injury, into making a contract with the infant, are not tortious. Id.

42. Where an infant by false representations as to his age procures another to pay him a sum of money for an option on the infant's realty, the injured person cannot recover as damages, for failure of the infant to carry out the agreement, the sum paid for the option. Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953.

43. Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953.

44. Hence there can be no recovery as for a tort. Brooks v. Sawyer, 191 Mass. 151, 76 N. E. 953.

45. See 6 C. L. 4.

46. A statutory provision (Pen. Code 1895, art. 34) that there shall be no conviction of an infant for crime committed before reaching the age of thirteen except where the state has proved that defendant had discretion sufficient to understand the nature and illegality of the act constituting the offense does not authorize a conviction on proof merely that defendant knew right from wrong (Price v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 545, 94 S. W. 901), but he must have a clear mental conception of the nature and illegality of the act (Id.). Under Pen. Code, art. 34, the state must show that the accused when under thirteen years of age understood the nature and illegality of the particular act constituting the crime. Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 S. W. 1052. The fact that accused knows good from evil, or right from wrong, or that he is possessed of intelligence of ordinary children of the same age, does not permit of conviction under Pen. Code, art. 34, when the accused is under thirteen years of age. Id. A minor under the age of sixteen years cannot be convicted of vagrancy in Georgia. Under Acts 1905, p. 109, subsec. 8. Johnson v. State, 124 Ga. 421, 52 S. E. 737.

47. Code Cr. Proc. 1895, art. 1145, held to require verdict finding accused, who has been sentenced to the reformatory, to be not more than sixteen years of age (Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 72, 92 S. W. 807; Simmons v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 380, 97 S. W. 1052), and a statement in the verdict as to whether confinement shall be in the reformatory or penitentiary (Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 72, 92 S. W. 807). Habeas corpus held not proper remedy to procure release of infant under sixteen years of age from confinement in penitentiary on plea of guilty. Ex parte White [Tex. Cr. App.] 17 Tex. Ct. Rep. 816, 98 S. W. 850.

48. Homicide by infant between seventeen and eighteen years of age held not excused by coercion of father. State v. Thrailkill, 73 S. C. 314, 53 S. E. 482.

49. Infant eighteen years of age held subject to conviction under Acts 1903, p. 90, making it illegal for any person to procure money or other thing of value on a contract to perform services with intent to defraud. Vinson v. State, 124 Ga. 19, 52 S. E. 79. Fact that minor told his employer that he had yielded to the command of a stranger held no excuse for violation of Acts 1903, p 90. Anthony v. State [Ga.] 55 S. E. 479.

50. Ex parte White [Tex. Cr. App.] 17 Tex. Ct. Rep. 816, 98 S. W. 850.

51. See 6 C. L. 4.

52. District judge held authorized to set aside executory proceedings up to point where a duly qualified representative of minors became necessary to give the proceedings validity against the minors, and to stay the proceedings until a legal representative has been qualified to represent them and been duly made a party. Gates v. Bank of Patterson, 116 La. 539, 40 So. 891.

ceedings in which they are interested,[53] but in some jurisdictions service of summons on very young infants has been dispensed with by statute.[54] Service of process on nonresident infants is not required to be made in a different manner from that used in serving nonresident adults under the statutes of Oregon,[55] and the same is true in New York as to known nonresident infants in partition suits.[56]

An answer by a guardian on behalf of his infant ward is not an appearance of the ward when the ward has not been served with process as required;[57] but where a resident ward temporarily absent from the state has been constructively served as a nonresident, the filing of an answer by his domiciliary guardian on behalf of the infant confers jurisdiction over the infant.[58] A married female infant cannot prosecute an action without a guardian ad litem even though her husband is joined with her as plaintiff.[59] The vacation of appointment of an attorney for minor heirs in probate proceedings is within the discretion of the district court.[60] Where the judgment in a proceeding must be satisfied from the estate of an infant, the infant is a necessary party.[61] One cannot be both plaintiff in one right and defendant representing infants in the same action.[62] In Louisiana co-owners of property are entitled to institute suit for partition thereof against minors who own it with them, without the prior sanction of a family meeting, authorizing the minors to stand in judgment,[63] nor is the right affected by the failure of the representatives of the minors to call for or obtain the fixing by a family meeting of the terms of sale so far as the interests of the minors are concerned;[64] but the sole duty of the plaintiff is to see that the minors are properly represented in the suit,[65] and when the representatives of the minors fail to have the terms fixed by a family meeting, the court itself is authorized to order the sale to be made for cash.[66]

By statute in some states no valid judgment can be rendered against an infant

53. An infant two months old cannot be divested of real estate, in which he owns the fee simple title, by a judicial proceeding to which he was not a party, of which he had no notice, and in which he was not represented by guardian or otherwise (Crapster v. Taylor [Kan.] 87 P. 1138), but in such case the lands may be recovered in an action for that purpose commenced within two years after the owner attains his majority (Id.). Appointment of guardian ad litem for infant defendants held void for want of valid service on infants. Wright v. Hink, 193 Mo. 130, 91 S. W. 933.

54. On application for sale of infant's property and reinvestment by guardians of proceeds, infants under fourteen years of age are not required to be served in Georgia. Civ. Code 1895, § 4987, construed. Furr v. Burns, 124 Ga. 742, 53 S. E. 201.

55. Mailing of copy of complaint and summons to person with whom infant resided in another state held not essential to valid service under B. & C. Comp. §§ 55, 56, 57. Cohen v. Portland Lodge No. 142, B. P. O. E., 144 F. 266.

56. Rev. St. [1st Ed.] pt. 3, c. 5, tit. 3, § 12, and Code Proc. § 448, held to authorize service on a known nonresident infant personally without publication by summons and complaint. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621.

57. Nunn v. Robertson [Ark.] 97 S. W. 293. Where an infant is sought to be brought into court on service by publication, the answer of a guardian ad litem will not operate as an appearance for the infant when the guardian was appointed before service had been perfected. Laflin v. Gato [Fla.] 42 So. 387. The acts of a guardian ad litem appointed prematurely on a defective constructive service cannot bind the infant for whom the appointment is made. Answer held not an appearance by infant. Id.

58. Nunn v. Robertson [Ark.] 97 S. W. 293.

59. Code Civ. Proc. 1902, §§ 135, 136, construed. Hiers v. Atlantic Coast Line R. Co. [S. C.] 55 S. E. 457.

60. Hence writ of review does not lie, but a petition for a writ of supervisory control may be proper remedy. State v. District Court of Second Judicial Dist. [Mont.] 87 P. 614.

61. Driscoll v. Pierce, 117 La. 264, 41 So. 568. Under Code Civ. Proc. § 442, a judgment against a minor may be set aside on a slight showing of defense, where application is made for that purpose within one year after attaining twenty-one years of age. McCreary v. Creighton [Neb.] 107 N. W. 240.

62. A father cannot legally represent his minor children as defendants in a partition suit, where he is joined with his wife as plaintiff in the suit, authorizing and assisting her in her demand against the infants. Succession of Becnel, 117 La. 744, 42 So. 256.

63, 64, 65. Succession of Becnel, 117 La. 744, 42 So. 256.

66. Civ. Code art. 1314, construed. Succession of Becnel, 117 La. 744, 42 So. 256.

until after a defense by a guardian;[67] but in the absence of fraud or collusion a decree of mortgage foreclosure is not vitiated by failure of guardian ad litem to file an answer in the case,[68] nor does the fact that no guardian ad litem is shown to have been appointed for an infant interested in partition proceedings for the sale of land, who at the time was without a guardian, render the proceedings void under the Texas statute.[69] Generally allegations in a petition or cross-petition against persons under disability must be proved though not traversed.[70] When minors are plaintiffs in a cause of action and the suit is brought and prosecuted in good faith for their benefit they will be bound by the judgment the same as adults would be.[71] It is held in Iowa that although defendant is an infant and a judgment is rendered against him without appointment of or a defense by guardian, it is not void,[72] and is, therefore, not ground for a new trial[73] in the absence of a showing of a valid defense in addition thereto.[74] A decree made in conformity with an unauthorized compromise of an infant's rights, by guardian, but neither approving nor disapproving the compromise, and without investigation as to whether the guardian should have made the compromise, is without jurisdiction and void.[75] An infant who is interested in mortgaged land is not bound by a foreclosure of the mortgage in proceedings to which he was not made a party.[76] Where a mortgage on land of infants is foreclosed without notice to them, it is a proper proceeding for the mortgagee, in an action by such infants to establish their rights in disregard of the mortgage, to answer the complaint, setting up the mortgage and proceedings had[77] thereunder, alleging itself to be a mortgagee in possession, and praying for a foreclosure against the infants,[78] and on foreclosure being decreed against the infants, the mortgagee is entitled to a reasonable attorney's fee pursuant to a provision of the mortgage therefor in case of foreclosure.[79] It will not be presumed that a grandparent suing did so as next friend of an infant.[80]

It is provided by statute in some states that a judgment rendered against infants may for cause shown be vacated or modified by proceeding before or after the infant attains majority[81] and the procedure must be such as the statute prescribes.[82]

67. Judgment against infants on cross-complaint held void under Kirby's Dig. § 6023, for failure of guardian ad litem to answer the cross complaint. Sexton v. Crebbins [Ark.] 98 S. W. 116.

68. Gravelle v. Canadian & American Mortgage & Trust Co., 42 Wash. 457, 85 P. 36.

69. Sayles' Ann. Civ. St. 1897, arts. 2155, 2156, construed. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

70. Decree for sale of infant's land and division of proceeds held invalid under Code, § 126, subsec. 1. Anderson v. Anderson [Ky.] 98 S. W. 281. Judgment against infants held void under Code Civ. Proc. § 126, for failure to prove allegations of petition. Choats v. Long, 29 Ky. L. R. 942, 96 S. W. 554.

71. McCreary v. Creighton [Neb.] 107 N. W. 240. After this period has expired practically the same showing must be made to set aside a judgment rendered against a minor as is required when the judgment is rendered against an adult. Id.

72. Reints v. Engle, 130 Iowa, 726, 107 N. W. 947.

73. Under Code §§ 4049, 4096, Reints v. Engle, 130 Iowa, 726, 107 N. W. 947.

74. See, also Guardians Ad Litem and Next Friends, 7 C. L. 1896.

75. Rankin v. Schofield [Ark.] 98 S. W. 674.

76, 77, 78, 79. Gravelle v. Canadian & American Mortgage & Trust Co., 42 Wash. 457, 85 P. 36.

80. Where a grandparent was shown to have prosecuted a suit in relation to land in which his interest was not disclosed, no presumption arises that he prosecuted the suit as next friend of an infant grandchild of which he was not the guardian. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572.

81. Code Civ. Prac. §§ 391, 518, subsecs. 8, 520, held to authorize proceeding by petition only. Leaveli v. Carter, 29 Ky. L. R. 920, 96 S. W. 597. Suit to vacate decree against infants for errors held authorized by Kirby's Dig. §§ 4431 (subd. 8), 6248, within 12 months after attaining majority (Jones v. Pond & Decker Mfg. Co. [Ark.] 96 S. W. 756), but a female over eighteen years of age at the time of its rendition is not within the benefit of the statute (Id.), nor is the statute applicable when the error appears in the proceedings and is, therefore, capable of being corrected on appeal or other form of review (Id.). Kirby's Dig. § 6248, held to authorize recovery of real and personal property passing under void decree

In order to be available the cause for reversing a decree must have existed at the time of entry thereof.[83] In equity an infant aggrieved by a decree in equity may file an original bill to impeach the decree for fraud or error appearing on its face[84] without asking for a rehearing or filing a bill of review,[85] or after attaining majority may exercise the right within the time during which he could prosecute a writ of error to reverse the decree.[86]

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INJUNCTION.

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§ 1. *Nature of remedy and grounds therefor.*[87]—Its province is to restrain the doing of acts which are wrongful,[88] and ordinarily it will not issue to disturb an existing status;[89] but a temporary order will protect the status quo[90] providing there be a suit pending in relation thereto.[91]

Equity courts take jurisdiction of injunction proceedings independent of stat-

rendered during infancy. Rankin v. Schofield [Ark.] 98 S. W. 674. In West Virginia infants are by statute given the right to show cause against an order or decree in a chancery suit against them at any time during minority or within six months thereafter. Code 1906, c. 132, § 7. Poling v. Poling [W. Va.] 55 S. E. 993. Quondam infants against whom during infancy a decree in chancery was rendered held barred from attacking decree by failure to commence proceedings within six months after attaining majority as required by Code 1906, c. 132, § 7. Id.

82. A motion to redocket the cause will not authorize the relief. Leavell v. Carter, 29 Ky. L. R. 920, 96 S. W. 597. Under Code 1896, c. 132, § 7, may proceed by original bill, bill of review, supplemental bill in the nature of a bill of review, petition or answer, and perhaps by other forms of procedure. Poling v. Poling [W. Va.] 55 S. E. 993.

83. Poling v. Poling [W. Va.] 55 S. E. 993.

84. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163. Infants by next friend held entitled under Code 1906, c. 132, § 7, to maintain original bill attacking decree in chancery suit against them. Poling v. Poling [W. Va.] 55 S. E. 993.

85, 86. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

87. See 6 C. L. 6.

88. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115.

89. The office of an injunction being merely to restrain and to compel the performance of an act, it is error for the court at the suit of one not in possession to enjoin one in possession of land, claiming title, from interfering with the use and enjoyment of the premises by the one not in possession, since in effect such an order would be an eviction. Beacham v. Wrightsville & T. R. Co., 125 Ga. 362, 54 S. E. 157.

90. Against payment of money when necessary to preserve subject-matter of litigation. Indian depredation allowance was claimed by personal representative and also by trustee in bankruptcy. Bryan v. Curtis, 26 App. D. C. 95.

ute,[92] but the legislature of a state may create a new ground for the issuance of an injunction by its own courts,[93] and authorize the institution of a suit by a private person which was previously maintainable only by a public law officer.[94] The granting of an injunction is a matter of sound discretion[95] and it will not be granted where it will operate oppressively,[96] or where it is not the appropriate remedy,[97] or where it may work immediate mischief.[98] An injunction acts only on a wrong in fieri[99] and issues only when the act sought to be enjoined is actually threatened.[1] Mere apprehension or possibility that it may be done is not, ordinarily, sufficient; there must be at least a showing of a reasonable probability of wrongful action by respondent.[2] That respondent has done similar acts in the past is not sufficient.[3] It will issue only for the protection of a property right or a right in the nature thereof,[4] hence it does not issue to protect a purely political right,[5] or to enforce a mere moral obligation,[6] or to prevent the doing of immoral or criminal acts which do not affect property rights.[7] It will not issue to restrain

91. See post, § 3, as to necessity of suit to support order.

92. McWilliams v. Burnes, 115 Mo. App. 6, 90 S. W. 735.

93. The legislature of a state may create a new ground of injunction cognizable and enforceable in a court of the state, and a state court may proceed to the granting of an injunction on such ground alone. In such case the relief is not granted by virtue of the equity powers of the court. Illinois Life Ins. Co. v. Newman, 141 F. 449. The legislature has power to create new grounds for the issuance of injunctions, nor does such a statute, at least in states where the code system is in force, deprive the party proceeded against of a right to a trial by jury, since the questions of fact in such jurisdiction could be submitted to a jury. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870; Id. [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492.

94. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870. An act providing that any citizen may maintain a suit to enjoin the maintenance of a public nuisance, such as a public gaming house, is not unconstitutional as depriving the party proceeded against of "due process." Id.

95, 96, 97, 98. Rabinovich v. Reith, 120 Ill. App. 409.

99. United States v. Atchison, etc., R. Co., 142 F. 176. An interlocutory injunction will not be denied merely because the defendant has at the time of the application partly done the thing sought to be enjoined. Brown v. Atlantic & B. R. Co. [Ga.] 55 S. E. 24.

1. Maine Product Co. v. Alexander, 100 N. Y. S. 709. An injunction will not issue to restrain the commission of an alleged illegal act where it is not alleged that defendant is threatening to do the act sought to be enjoined. McCaskill v. Bower [Ga.] 54 S. E. 942.

2. Hurd v. Atchison, etc., R. Co. [Kan.] 84 P. 553. The mere apprehension of fears of a complainant, unsustained by facts, do not constitute a sufficient ground for the interference of equity by injunction. The complaint must show facts from which the court can determine that a wrong is about to be committed which will be irreparable before the relief will be granted. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. The bill must show facts which will convince the court that an injury is threatened. Carswell v. Swindell, 102 Md. 636, 62 A. 956.

3. A court of equity will not enjoin the doing of certain acts where it is not shown that the doing of such acts is threatened or probable, though it appears that defendant has done similar acts in the past. Davis v. Hartwig, 195 Mo. 380, 94 S. W. 507.

4. Van Der Plaat v. Undertakers' & Liverymen's Ass'n [N. J. Eq.] 62 A. 453.

Rights based on equitable estoppel: Right of tenant based on equitable estoppel to crops after expiration of lease may be protected by injunction. Carmine v. Bowen [Md.] 64 A. 932.

5. The right to vote at an election is a political right pure and simple and equity does not interfere to protect or enforce political rights which are unconnected with any individual or property rights. Shoemaker v. Des Moines, 129 Iowa, 244, 105 N. W. 520. A court of equity will not by injunction undertake to supervise the acts and management of a political party for the protection of a purely political right. McDonald v. Lyon [Tex. Civ. App.] 95 S. W. 67. A taxpayer cannot enjoin the use of ballot machines at an election. United States Standard Voting Mach. Co. v. Hobson [Iowa] 109 N. W. 458.

6. Healy v. Smith, 14 Wyo. 263, 83 P. 583; Marshall v. Marksville, 116 La. 746, 41 So. 57.

7. McDonald v. Lyon [Tex. Civ. App.] 95 S. W. 67. While a court of equity will not enjoin the commission of a crime as such, it will enjoin acts which would be a crime when property rights are involved. Ex parte Allison [Tex. Cr. App.] 44 Tex. Ct. Rep. 409, 90 S. W. 492. An illegal act will not be enjoined merely because it is illegal. County of Henry v. Stevens, 120 Ill. App. 344. The mere fact that the acts sought to be enjoined are unlawful or criminal is not sufficient unless they injure property or property rights. Van Der Plaat v. Undertakers' & Liverymen's Ass'n of Passaic County [N. J. Eq.] 62 A. 453. The jurisdiction of courts of equity are purely civil and they are powerless to enjoin the commission of threatened crimes or to restrain threatened prosecutions for the commission of alleged crimes, even though the statute or ordinance violated is void and the prosecutions would

a judicial officer from doing any act which falls within his jurisdiction even though he threatens to act corruptly.[8] It will not issue where the title or property right sought to be enforced and protected is not clear and certain.[9] An infant may be enjoined from acts constituting breach of a lease where if disaffirmed the landlord's damage would be irreparable by any legal remedy.[10]

The relative consequences of granting the injunction and of refusing it will be considered,[11] and, ordinarily, an injunction that bears heavily on the defendant without benefiting the plaintiff will be withheld as oppressive,[12] but the relatively greater inconvenience to defendant while highly persuasive against the injunction is not controlling.[13] So too where it would cause serious injury to an individual or the community at large and a relatively slight benefit to the party asking for it, injunctive relief will be denied and the parties left to their action at law.[14] It has been said, however, that this doctrine is applicable only on an application for a preliminary and not for a permanent injunction.[15]

lead to a multiplicity of actions and irreparable injury to complainant. City Council of Montgomery v. West [Ala.] 40 So. 215. An injunction will not be granted for the purpose of preventing a criminal act nor to restrain a criminal proceeding, but where a right of private property is involved and is about to be invaded, by acts which are criminal in their nature, equity will interfere by injunction to protect such right and prevent the commission of the criminal act. Huxford v. Southern Pine Co., 124 Ga. 181, 52 S. E. 439. See, also, next succeeding section, What May Be Enjoined.

8. Grossman v. Davis, 117 Ill. App. 354.

9. Fox v. Lynch [N. J. Eq.] 64 A. 439; Smith v. Alexander, 146 F. 106; New Idea Pattern Co. v. Whitner [Pa.] 64 A. 518; Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003; Savidge v. Merrill [N. J. Eq.] 62 A. 946. Not enough that there is evidence of his right where there is evidence to the contrary. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1. The denial of an application for a temporary injunction, to restrain the violation of the restrictive covenants of a lease, is authorized where the affidavits presented in opposition to the motion make it doubtful as to whether the acts sought to be restrained would constitute a breach of the covenants. Grimm v. Krahmer, 112 App. Div. 489, 98 N. Y. S. 523. Evidence held insufficient. McCarthy v. Bunker Hill & S. Min. & Coal Co., 147 F. 981. Partnership relation held not clearly established in action to enjoin interference with plaintiff's participation in partnership affairs. Collier v. Dasher [Fla.] 41 So. 269.

No substantial dispute where plaintiff's right is clear and defendant's denial is based on evidence insufficient to warrant submission of question to jury if case were at law. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1.

10. Cole v. Manners [Neb.] 107 N. W. 777.

11. Injunction requested by complainants representing large farming interests against extensive mining operations, involving not only interests of operators but of over ten thousand employees, refused. McCarthy v. Bunker Hill & S. Min. & Coal Co., 147 F. 981.

12. McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961. Where the injury to plaintiff from a threatened act will be slight and the injury to defendant by the issuance of an injunction would be considerable and the defendant is solvent and responsible, equity will refuse to grant an injunction and relegate plaintiff to an action at law. Mann v. Parker [Or.] 86 P. 598.

13. Cleveland v. Martin, 218 Ill. 73, 75 N. E. 772.

14. Mt. Morris Bank v. New York, etc., R. Co., 50 Misc. 417, 100 N. Y. S. 544. That an injunction restraining the use of his property by the defendant so as to work a substantial injury to plaintiff will result in requiring defendant to close down a factory in which he has a large sum of money invested and throw many employees out of work is no reason for denying an injunction. When, however, the injury to plaintiff is comparatively small and only occasional, a court of equity may deny relief and relegate plaintiff to his actions for damages. Bentley v. Empire Portland Cement Co., 48 Misc. 457, 96 N. Y. S. 831. Whether a court of equity will interfere by injunction to prevent a continuance of an unlawful act rests in the discretion of the court, and in exercising such discretion the court may consider the actual injury sustained by plaintiff together with the resulting injury of an injunction to the defendant and the public. Knoth v. Manhattan R. Co., 109 App. Div. 802, 96 N. Y. S. 844. In a suit to enjoin the carrying on of a lawful business, smelting, on the ground that it is a nuisance and injurious to the property of adjoining owners, the court will consider the comparative convenience or inconvenience of the parties resulting from the issuance of the injunction. Mountain Copper Co. v. U. S., 142 F. 625. A court of equity is not bound to enjoin a public work authorized by statute until compensation is paid where no property is directly appropriated, especially where the damage is difficult of ascertainment at the time and a reasonable provision is made by the law for compensation. Manigault v. Springs, 199 U. S. 473, 50 Law. Ed. 274.

15. The doctrine of the comparative convenience or injury which would result from the issuance of an injunction, applicable on an application for a preliminary injunction, has no application on final hearing on full proofs. United States v. Luce, 141 F. 385.

One of the well known grounds of equitable jurisdiction is the want of an adequate remedy at law. Where injunction will afford relief such ground is sufficient to justify the court in taking jurisdiction.[16] It will not issue where there is an adequate remedy at law for the redress of the wrong threatened, or enforcement of the right relied on,[17] or that they have been unsuccessfully exhausted.[18] To preclude a court of equity from granting the injunction, the relief at law must be as complete and efficient as that which may be afforded by a court of equity.[19]

Whether or not an injunction will issue to prevent multiplicity of suits depends upon the circumstances of each particular case and upon whether the injunction is necessary to discountenance useless litigation or to prevent irreparable injury.[20] That the adjudication of the rights of the parties, in an injunction suit,

16. Kester v. Schuldt, 11 Idaho, 663, 85 P. 974.

17. Fox v. Lynch [N. J. Eq.] 64 A. 439; Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003; Carswell v. Swindell, 102 Md. 636, 62 A. 956; Mohat v. Hutt [Neb.] 106 N. W. 659; Thompson v. Tucker, 15 Okl. 486, 83 P. 413; Babcock v. Leonard, 111 App. Div. 294, 97 N. Y. S. 861; General Elec. Co. v. Westinghouse El. & Mfg. Co., 144 F. 458; Carstarphen Warehouse Co. v. Fried, 124 Ga. 544, 52 S. E. 598; Schumacher v. Wright County Com'rs, 97 Minn. 74, 105 N. W. 1125; Continental Hose Co. v. Mitchell [N. D.] 105 N. W. 1108. Thus equity will not enjoin the prosecution of a legal action for a reason that can be set up as a defense to such action. Murray v. Barnes [Ala.] 40 So. 348. See, also, next succeeding section, Who and What May be Enjoined.

Held adequate: It will not enjoin the garnishment of exempt moneys since defendant in garnishment can assert his exemption in that proceeding. Sturges v. Jackson [Miss.] 40 So. 547. Legal remedy for injury to farm lands from pollution of stream by mining operations held adequate. McCarthy v. Bunker Hill & S. Min. & Coal Co., 147 F. 981. Where parties have a remedy by appeal from the action of a public board with reference to a particular matter, equity will not ordinarily intervene to enjoin the board from taking action thereon. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247. Hence will not issue at instance of county court to enjoin refusal to allow inspection of records which the county court could compel respondent to allow to be inspected by its own order. McWilliams v. Burnes, 115 Mo. App. 6, 90 S. W. 735. The circuit court has no jurisdiction of a suit for a mandatory injunction directing a person who has the unlawful custody of an apprentice to surrender him to the master, the statutes affording the master a remedy therein provided. Brock v. Whittaker, 29 Ky. L. R. 477, 93 S. W. 623. Forcible entry and detainer and not injunction proper remedy where tenant wrongfully withholds possession after landlord's election to cancel lease pursuant to condition subsequent. Mitchell v. Hannah, 121 Ill. App. 597. For violation of covenant not to engage in certain business in certain place. Rice v. O'Neal, 120 Ill. App. 259. Equity will not restrain defendant from electing to waive a will, the probate court having power to afford ample relief. Clark v. Peck [Vt.] 65 A. 14. Where party in possession of estate with consent of executors is wasting it, remedy is by proceedings under V. S. 2380, 2384, and not by injunction to restrain waste, even though there is conspiracy between parties to rob estate. Id. Building of line fence on disputed boundary. Watkins v. Childs [Vt.] 65 A. 81. The proper remedy for one unlawfully arrested and whose vessels and fixtures are about to be seized for alleged unlawful sale of intoxicants under the "Jones Law" is in a petition in error, or a suit against the officials and their bondsmen for damages, or for a writ of habeas corpus, and not in an action for an injunction. Schmidt v. Brennan, 4 Ohio N. P. (N. S.) 239. Corrupt exercise of jurisdiction by justice of peace. Grossman v. Davis, 117 Ill. App. 354. In South Carolina injunction will not lie to enjoin the change of the grade of a street on the ground that it will cause plaintiff irreparable injury where the statute provides a mode for the assessment of damages, since there is an adequate remedy at law. Kendall v. City Council of Columbia [S. C.] 54 S. E. 777.

Held inadequate: Legal remedy of abutting owners for removal of sidewalk held inadequate. Nichols v. Sadorus, 120 Ill. App. 70. Conversion of railroad on a street into switch yard. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177. Quo warranto is not adequate in case of the unlawful collection of tolls on a highway, the damages being not therein recoverable. State v. Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

18. One seeking to enjoin the collection of a tax on the ground that the valuation is excessive and that the proceedings incident to the levy of the tax were not in accordance with law must show that he has unsuccessfully availed himself of all the remedies afforded by the tax laws for the correction of the errors complained of. Humbird Lumber Co. v. Thompson, 11 Idaho, 614, 83 P. 941.

19. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666. That the legislature has given to a defendant in an action at law the privilege at his election of asserting in defense thereof matters which were formerly cognizable only in equity does not deprive the defendant of his right to enjoin such an action pending the determination of his claims in a court of equity. Harvey v. Ryan [W. Va.] 53 S. E. 7.

20. Adams v. Oberndorf, 121 Ill. App. 497.

would prevent a multiplicity of actions is a persuasive but not conclusive reason for the taking of jurisdiction by a court of equity.[21] Jurisdiction will not be entertained on such ground where the court would have power to consolidate the actions,[22] or in a case not more subject to multiplied suits than others of its class.[23]

In some cases the books assert that one seeking an injunction must show that he will suffer great[24] or irreparable injury[25] if its relief is not extended. In such case the jurisdiction would be justified by the inadequacy of the remedy at law. But it has been said that insolvency of the person sought to be enjoined is never of itself a sufficient ground for the exercise of the extraordinary power. That there must be some other equitable ground with insolvency,[26] that the threatened wrong could not be adequately compensated for in damages, and that it would be impossible or difficult to measure them by any pecuniary standard, would alone seem to constitute irreparable injury justifying the jurisdiction, though the cases generally join with the foregoing elements the insolvency of the defendant.[27] An injunction will not issue at the request of a stranger to prevent conspiracy from coercing another unless irreparable injury to the stranger from such coercion is shown.[28] If the injury is irreparable and complainant is otherwise entitled to the relief, it is error to deny it on condition that defendant give bond to pay damages.[29] An injunction may be granted to enjoin the doing of acts of a continuous nature,[30] and under some circumstances the court may decree that the relief shall be afforded only in case the respondent fails or refuses to pay damages assessed by the court.[31]

21. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666. Equity will not enjoin the breach of a contract which is of such a character that it cannot decree its specific performance merely because from time to time complainant would have successive cause of action for damages on the ground that the injunction would prevent a multiplicity of actions. General Electric Co. v. Westinghouse El. & Mfg. Co., 144 F. 458. Equity will enjoin one engaged in the business of "ticket scalping" from buying and selling nontransferable railroad tickets for the reason that doing so would prevent a multiplicity of suits and that it would be difficult to detect each offense and determine the pecuniary injury suffered by the railroad company. Louisville & N. R. Co. v. Bitterman, 144 F. 34.

22. Equity will not enjoin the collection of alleged illegal taxes because the tax is levied on several separate tracts for the purpose of preventing a multiplicity of statutory proceedings to contest the validity of the tax where the court has power to consolidate such proceedings. City of Gainsville v. Dean, 124 Ga. 750, 53 S. E. 183.

23. Jurisdiction to enjoin waste of decedent's estate cannot be sustained on ground of prevention of multiplicity of suits where no special reason for such jurisdiction is urged which might not be urged in regard to every testate estate. Clark v. Peck [Vt.] 65 A. 14.

24. It is not necessary that irreparable injury should be threatened before equity will grant relief by injunction, but it is enough if it is shown that the party will suffer great injury. Brugh v. Denman [Ind. App.] 78 N. E. 349.

25. Brown v. Atlantic & B. R. Co. [Ga.] 55 S. E. 24. Remedy should never be allowed except in clear case of irreparable injury. County of Henry v. Stevens, 120 Ill. App. 344. In an action to enjoin a threatened trespass the bill must show that the complainant will suffer irreparable injury and that defendant is insolvent. Carswell v. Swindell, 102 Md. 636, 62 A. 956. An injury is irreparable when it is of such a character that it cannot be measured by money value, as where the property threatened with injury has a value aside from its intrinsic value. East Lake Lumber Co. v. East Coast Cedar Co. [N. C.] 55 S. E. 304. Held no irreparable injury from millinery trimmer employed by plaintiff engaging in employment with others during life of her contract with plaintiff. Rabinwich v. Reith, 120 Ill. App. 409. Repeated daily refusal to perform duty as common carrier at request of a stockyards company held irreparable. Louisville & N. R. Co. v. Central Stockyards Co. [Ky.] 97 S. W. 778.

26. Gossard Co. v. Crosby [Iowa] 109 N. W. 433; Godwin v. Phifer [Fla.] 41 So. 597. The mere fact that one of three joint trespassers is insolvent does not show that the injury is irreparable or that the remedy at law is inadequate. Bledsoe v. Robinett [Va.] 54 S. E. 861.

27. Cole v. Manners [Neb.] 107 N. W. 777.

28. Leonard v. Abner Drury Brew. Co., 25 App. D. C. 161.

29. Hart v. Lewis, Shore & Co. [Ga.] 55 S. E. 189.

30. Equity will enjoin the doing of acts of a continuous nature injurious to complainant and for which he has no adequate remedy at law and the complainant will not be required to apply for an injunction each time a wrong of such nature is threatened. Louisville & N. R. Co. v. Bitterman, 144 F. 34.

31. In a suit for injunction the right of a court of equity to assess damages for the continuance of acts by defendant which con-

Injury must be substantially harmful, particularly to warrant mandatory injunction.[32]

Equity will not enjoin the doing of anything which the respondent has a lawful right to do,[33] and being equitable it will not aid one engaged in a dishonest or immoral business in carrying on such business,[34] nor to one who is himself guilty of the unlawful practices he seeks to enjoin[35] or other inequity.[36]

Laches in asserting a right may,[37] though it does not necessarily,[38] defeat the right to injunctive relief.

§ 2. *Particular occasions for injunction; who and what may be enjoined. A. In general.*[39]—Every injunction is grounded on general rules growing out of the nature of the remedy[40] and the main principles of equity.[41] Statutory injunctions are allowable in particular situations or for the protection of particular rights.[42] The question who may be enjoined is usually reducible to one of par-

stitutes a continuous injury to complainant and order an injunction to issue only in case the damages are not paid does not depend on the consent of the complainants. Where the party suffering from a nuisance brings an action for damages, inducing the belief that the nuisance can be continued in case damages are paid and the defendant thereafter expends money in extending his business on such assumption and complainant is not diligent in applying for an injunction, equity will on an application for injunction assess damages for the continuance of the nuisance and issue an injunction only in case defendant refuses to pay. McCleery v. Highland Boy Gold Min. Co., 140 F. 951.

32. Mandatory injunction to compel replacing of drain where it had been refused because relocation was benefit and not detriment. Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321.

33. Thus will not restrain garnishment of workman's wages, though exempt and though employer enforces rule to discharge employees having wages garnished. Sturges v. Jackson [Miss.] 40 So. 547. The fact that the plaintiff in ejectment intends to make an unlawful disposition of the premises, if recovered, does not constitute a ground for enjoining the action of ejectment by the defendant therein. Murray v. Barnes [Ala.] 40 So. 348. Equity will not enjoin railroads from altering their route or condemning land for that purpose when necessary or desirable for the purpose of erecting and using a union depot as required by Revisal 1905, § 1097, subd. 3. Dewey v. Atlantic Coast Line [N. C.] 55 S. E. 292.

34. Toledo Computing Scale Co. v. Computing Scale Co., 142 F. 919.

35. A complainant who has himself by fraud obtained knowledge of a secret process for manufacturing an article cannot enjoin another who has similarly by fraud obtained such secret from him from using such process. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

36. Interference with construction of line fence will not be restrained where plaintiff destroyed previous fence in order to erect another and to charge defendant with one-half cost thereof. Auman v. Cunfer, 30 Pa. Super. Ct. 368. See Equity, 7 C. L. 1323.

37. Johnson v. Oldham [Ala.] 40 So. 213. See, also, Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. The complainant in a bill to enforce by injunction the restrictive covenants of a deed must apply promptly for the relief. If he is guilty of delay and the respondent has expended money in reliance on complainant's apparent acquiescence in the violation of the covenant, relief will be denied. Island Heights Ass'n v. Island Heights Water Power, Gas & Sewer Co. [N. J. Eq.] 62 A. 773. Where the owner of land has failed to seasonably assert his right to an injunction to prevent a trespass by overflowing his premises by the construction of a dam and has stated his willingness to accept damages and the dam has been built in reliance on such position, equity will refuse a mandatory injunction to compel the removal of the dam but will relegate the party to his action for damages. Andrus v. Berkshire Power Co. [C. C. A.] 147 F. 76. A mandatory injunction to require defendant to restore a way to the condition in which it was before defendant had unlawfully made excavations therein will not issue where it appears that it would be inequitable or oppressive to do so and that complainant has delayed an unreasonable time in seeking to enforce his right and the injury is not serious and can be compensated in damages. Levi v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 853. Delay of representatives of farming lands in seeking injunction against pollution of stream by mining operations until extensive improvements had been made in such operations. McCarthy v. Bunker Hill & S. Min. Co., 147 F. 981.

38. Delay in applying for injunctive relief, while not conclusive as to a continuing nuisance, is properly a matter for consideration in connection with other equities. Knoth v. Manhattan R. Co., 109 App. Div. 802, 96 N. Y. S. 844. Mere delay in asserting a right will not necessarily preclude relief, there must also be shown a change in the situation of the parties whereby the one has been put in a worse position by the delay of the other. Bishop v. Merchants' Nat. Bank [Neb.] 106 N. W. 996.

39. See 6 C. L. 10.

40. See ante, § 1.

41. See Equity, 7 C. L. 1328.

42. See topics treating of such rights, e. g. Corporations, 7 C. L. 862; Intoxicating Liquors, 6 C. L. 165.

ties[43] or one of the nature of the remedy[44] or one of the nature of the particular wrong.[45]

(§ 2) *B. Actions or proceedings.*[46]—Injunctive power is not designed to supplant another jurisdiction.[47] Because of the remedy at law an action will not be restrained where the equity relied on is available as a defense at law,[48] but only where the defense involves some equitable element which cannot be applied in the action at law,[49] or the party seeking it is entitled to some relief which cannot be afforded in the action at law.[50] Hence, where the courts possess both law and equity jurisdiction, they will not enjoin an action to enable the defendant therein to establish an equitable right, since it may be set up by answer in the action sought to be enjoined.[51] Actions jeopardizing the status quo may be restrained till rights therein are determined[52] but not to protect a fabricated and collusive bill of interpleader.[53]

43. See post, § 3.
44. See ante, § 1.
45. See post, § 2B-I.
46. See 6 C. L. 11.
47. Equity may use its restraining power to assist probate court in giving full relief but not to restrict or supplant the latter's jurisdiction. Clark v. Peck [Vt.] 65 A. 14.
48. Standard Roller Bearing Co. v. Crucible Steel Co. [N. J. Eq.] 63 A. 546; Fraley & Carey Co. v. Delmont, 110 App. Div. 468, 97 N. Y. S. 408; Ray v. Anderson, 125 Ga. 502, 54 S. E. 356; Waters v. Waters, 124 Ga. 349, 52 S. E. 425. A suit in equity to enjoin the prosecution of an action at law will not lie where the bill merely traverses the truth of the allegations of the complaint in the action at law. Gray v. Chicago, etc., R. Co. [C. C. A.] 140 F. 337.
49. Equity will enjoin the prosecution of an action of forcible entry and unlawful detainer where the interposition of a court of equity is necessary to first establish their title. Butler v. Topkis [Del.] 63 A. 646. Equity will enjoin the prosecution of an action at law on promissory notes pending the determination of an accounting between the parties to ascertain how much is owing on the notes where the making of a defense in the action at law requires the defendant to state under oath the sum actually due on them. Horner v. Nitsch [Md.] 63 A. 1052. Where all the parties are not before the court or where the issues involved cannot be disposed of in the action at law, its prosecution may be stayed and the issues determined in an equity action. Fraley & Carey Co. v. Delmont, 110 App. Div. 468, 97 N. Y. S. 408. A court of equity may enjoin an action in ejectment where it appears the complainant while in possession of the premises with the acquiescence of defendant made valuable improvements thereon. South & N. A. R. Co. v. Alabama G. S. R. Co. [Ala.] 41 So. 307. Equity has jurisdiction to restrain the prosecution of an action at law to recover on a guardian's bond where the wards, for years after reaching their majority, failed to demand an accounting and moved only after the death of the guardian and one of the sureties and by their laches the defendant is unable to find evidence of the guardian's transactions. Clark v. Chase [Me.] 64 A. 498. Equity will enjoin the prosecution of a mandamus proceeding against a corporation by a majority stockholder of a corporation whereby he seeks to compel an issue of stock to him in violation of his contract with complainants in the injunction suit, the corporation not being a party to the contract and hence unable to assert such contract as a defense to the mandamus proceeding. Hladovec v. Paul, 222 Ill. 254, 78 N. E. 619.
50. Standard Roller Bearing Co. v. Crucible Steel Co. [N. J. Eq.] 63 A. 546. Whether or not a court of equity will enjoin an action at law brought on a contract alleged to have been procured by fraud depends on the circumstances of the particular case and is within the discretion of the circuit judge. Fidelity Mut. Life Ins. Co. v. Blain, 144 Mich. 218, 13 Det. Leg. N. 145, 107 N. W. 877.
51. Chicago & N. W. R. Co. v. McKelgue, 126 Wis. 574, 105 N. W. 1030. Under the judicial system in vogue in Louisiana, where the courts possess equally law and equity powers, an injunction will not issue to restrain the prosecution of a suit by defendant pending an action by complainant concerning the same subject-matter. Lewis v. D'Albor, 116 La. 679, 41 So. 31. In Georgia, since the passage of the uniform procedure act of 1887, a plaintiff, in one action, may seek both legal and equitable relief, but in such an action he is not entitled to an interlocutory injunction under circumstances which are such that interlocutory relief could not be obtained prior to that act. Virginia-Carolina Chemical Co. v. Provident Sav. Life Assur. Soc. [Ga.] 54 S. E. 929.
52. In Virginia and West Virginia a purchaser of real estate may enjoin an action to collect the unpaid purchase price where he is in possession under a deed with covenants of general warranty and his title has been questioned by suit prosecuted or threatened or the title is clearly shown to be defective. Harvey v. Ryan [W. Va.] 53 S. E. 7. Where a school board has taken possession of land under an attempted exercise of the power of eminent domain, which, however, is void, and erected valuable improvements thereon, equity may enjoin the issuance of a writ of ouster against the board in an action brought by the lot owner where the board have commenced new condemnation proceedings. Aldridge v. Board of Education of Stillwater, 15 Okl. 354, 82 P. 827.
53. An injunction to restrain an action of replevin against one holding property

Multiplicity will support injunction where harassing suits are concertedly brought,[54] or where there are threatened successive actions on a cause of action resisted on a ground which would defeat, if successful, a recovery on any one of them,[55] or where the cause of action is already determined in favor of defendant,[56] or where an action is brought in a distant state for the purpose of harassing the defendant,[57] but disconnected actions will not be forbidden merely because they are numerous.[58] An injunction will not be granted to stay proceedings in another equitable suit, either on application of the parties to the proceeding to be restrained, their privies, or of strangers thereto, when the relief sought is procurable in the suit sought to be enjoined.[59] The Federal statutes expressly prohibit the Federal courts from enjoining actions in the state courts,[60] but this does not prevent Federal courts from enjoining acts concerning which actions are pending in the state courts at the suit of persons not parties to the actions sought to be enjoined.[61]

claimed by another, pending the determination of a bill of interpleader, will be dissolved where it is shown that it was procured by the collusive action of the defendant in replevin and the claimant and that the interpleader stood in collusion to the claimant. Mossman v. Thorson, 118 Ill. App. 574.

54. Granted against suits on false demands instructed by different parties pursuant to conspiracy to harass complainant. Adams v. Oberndorf, 121 Ill. App. 497.

55. A court of equity may enjoin the commencement of successive actions for the collection of instalments owing under a contract where in the first action the defendant therein disputed the plaintiff's right to recover at all on the contract, and an appeal from a judgment in favor of plaintiff is pending and undetermined. Fraley & Carey Co. v. Delmont, 110 App. Div. 468, 97 N. Y. S. 408. In an action to restrain successive actions for instalments accruing under a contract, where it appears that defendant in the first action brought has interposed a defense going to the right to collect anything under the contract sued on, the court should enjoin the commencement of new actions if security is given, but should not attempt to determine the merits of the action pending when the injunction order is issued. Id. A Federal court may enjoin the prosecution of separate actions at law instituted before it against the same defendant by different plaintiffs involving the same subject-matter so as to enable the defendant to make his defense thereto, though some of the parties defendant in the injunction suit may be citizens of the same state as plaintiff, since such suit is ancillary to the actions at law. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

56. A state court will not enjoin the prosecution of vexatious litigation in a Federal court commenced before the filing of the bill. Lyons v. Importers' & Traders' Nat. Bank, 214 Pa. 428, 63 A. 827.

57. Equity may enjoin the prosecution of actions in distant states, evidently brought for the purpose of harassing defendant therein by requiring him to produce evidence and records a long distance from its main place of business on condition complainant will appear to an action in the courts of its domicile. Standard Roller Bearing Co. v. Crucible Steel Co. [N. J. Eq.] 63 A. 546. A citizen can be enjoined by the courts of the state of which he is a resident from instituting a suit in another state where the institution of the foreign suit would embarrass the courts of the state of the defendant's domicile and they have jurisdiction of the subject-matter and defendant can assert all his rights therein. In re Williams' Estate, 130 Iowa, 552, 107 N. W. 608. A court of equity may enjoin a creditor of a decedent, who is a resident within its jurisdiction, from instituting probate proceedings in another jurisdiction where it appears that probate proceedings were properly commenced in the territorial jurisdiction of the court granting the injunction. Id.

58. Multiplicity not available as ground for injunction to restrain assignee of wages from suing employer in successive actions as wages become due. Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595. Equity will not enjoin an action on a contract to recover money due thereunder merely because many creditors of the plaintiff have garnished the defendant in the law action. Plaintiff has a right to trial by jury of which he will not be deprived. Deepwater R. Co. v. Motter & Co. [W. Va.] 53 S. E. 705.

59. Hence injunction will not issue at suit of an attorney to restrain his client from dismissing an action instituted by the attorney, and which it is alleged he fraudulently settled or is about to settle with intent to deprive the attorney of his lien, since the attorney can by giving notice continue the suit against the defendant to recover his fees. Jackson v. Stearns [Or.] 84 P. 798.

60. Rev. St. U. S. § 720, does not prohibit a Federal court from enjoining proceedings in a state court where such injunction is ancillary to a decree rendered in a suit over which the Federal court has jurisdiction. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. 477.

61. Rev. St. U. S. § 720, providing that the Federal courts shall not enjoin the prosecution of actions in the state courts, does not preclude a nonresident from bringing suit to enjoin a railroad from occupying its property, though it has commenced condemnation proceedings to which complainant is not a party. It will not, however, enjoin the prosecution of condemnation proceedings against

Equity has no jurisdiction to enjoin the prosecution of a criminal proceeding, even though the prosecution is based on a void or unconstitutional ordinance or statute,[62] unless some property or property right of the defendant will be injured thereby.[63]

A court of equity does not interfere with judgments at law unless the complainant has an equitable defense of which he could not avail himself at law, or had a good defense at law which he was prevented from availing himself of by fraud or accident, unmixed with negligence of himself or his agents.[64] It will not issue for a reason which would have constituted a defense to the action in which the judgment was rendered,[65] nor where after knowledge of the facts the judgment debtor had a complete and adequate remedy by appeal.[66] One seeking to enjoin the

the defendant. Colorado Eastern R. Co. v. Chicago, B. & Q. R. Co., 141 F. 898. U. S. Rev. St. § 720, prohibiting Federal courts from enjoining actions in the state courts, has no application and does not preclude the issuance of an injunction by the Federal courts to restrain certain acts, though the right to performance of such acts is involved in an action in the state courts in which the parties are not the same and other and different relief is sought. New York Cotton Exch. v. Hunt, 144 F. 511.

62. Littleton v. Burgess, 14 Wyo. 173, 82 P. 864; City of Chicago v. Chicago City R. Co., 222 Ill. 560, 78 N. E. 890; Smiser v. Cynthiana, 29 Ky. L. R. 1244, 97 S. W. 35. A prosecution for violating a municipal ordinance will not be enjoined on the ground the ordinance is illegal since the illegality is available as a defense to the prosecution. Thompson v. Tucker, 15 Okl. 486, 83 P. 413.

63. Courts of equity will in proper cases enjoin an attempt to enforce a law or ordinance making certain acts a criminal offense and imposing a punishment, where the law or ordinance is invalid and its enforcement will injure or destroy plaintiff's property or property rights, but it will not interfere where the law is valid and the defense is available in the criminal action. Sullivan v. San Francisco Gas & Elec. Co., 148 Cal. 368, 83 P. 156. Ordinarily, equity will not interfere by injunction with criminal proceedings. If, however, a statute concerning which an arrest or criminal prosecution is threatened affects civil property rights, equity in protecting the property right may enjoin the criminal proceeding; also where a suit is pending in equity and a criminal prosecution is instituted for the purpose of testing the same right the equity court may, as a condition of affording the party relief, require that he abandon the criminal proceeding. Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857. Ordinarily a court of equity has no jurisdiction to restrain the prosecution of a criminal proceeding unless such proceeding is instituted by a party to a suit already pending in equity to try the same right in issue in such suit. But where the ordinance or statute under which the prosecutions are had is clearly void and irreparable injury to property rights may result from their enforcement, equity may enjoin the prosecution. Cain v. Daly [S. C.] 55 S. E. 110.

64. Emerson v. Gray [Del.] 63 A. 768. Equity will enjoin the enforcement of a judgment entered against complainant by his excusable neglect, but where he admits that he owes a part of the debt on which the judgment was entered will dissolve the injunction so far as it restrains the enforcement of the judgment to the extent of the admitted indebtedness. Kirk v. Gover, 29 Ky. L. R. 1046, 96 S. W. 824. Refused where plaintiff neglected chance in scire facias to revive judgment to assert claim that it was fraudulent. McCormick v. McCormick [Md.] 65 A. 54.

Injunction allowed against enforcement of judgment based on forfeiture for breach of conditions where valid tender of performance was made after breach but before judgment was obtained. Ordway v. Farrow [Vt.] 64 A. 1116. To restrain collection of judgment by assignees thereof who were themselves equitably bound to pay it. Haas v. Holt [Ala.] 40 So. 51. Execution of a writ of habere facias at the suit of one in possession claiming title and who was not a party to the suit in which the writ was issued. Bennett v. Preston [W. Va.] 53 S. E. 562. Sale on execution of property which stands in the name of the debtor but which in fact and equity is the property of another. Neeley v. Bank of Independence, 114 Mo. App. 467, 89 S. W. 907. Collection of certain judgments by one to whom the claims on which the judgments are based was assigned with intent to defraud the creditors of the assignor pending a suit by a receiver of the latter to have the claims and judgments adjudged to him. Fine v. Rabinbauer, 49 Misc. 437, 99 N. Y. S. 896. Execution sale on a judgment in an action in which he was not served with a summons and in which he did not appear, irrespective of the solvency of the judgment creditor. Robinson v. Carlton, 29 Ky. L. R. 876, 96 S. W. 549.

65. Equity will not enjoin the enforcement of judgment for reasons which would have been a defense to the action in which the judgment was rendered and which the complainant was not prevented from pleading by any act of the judgment creditor. Wilson v. Cook [Tex. Civ. App.] 15 Tex. Ct. Rep. 144, 91 S. W. 236. Equity will not enjoin the enforcement of a judgmsnt in an ejectment suit on the ground that the defendant in such suit against whom the judgment was rendered had acquired title by adverse possession, since such defense was available in the ejectment proceeding. Johnson v. Oldham [Ala.] 40 So. 213.

66. Church v. Gallic, 75 Ark. 507, 88 S. W.

enforcement of a judgment rendered without service of process must allege and prove facts showing that he has a good defense to the action in which the judgment was rendered.[67] An allegation simply that he has a good defense to such action is insufficient.[68] In the absence of a showing of lack of jurisdiction to enter the judgment complained of, injunction will not lie to prevent the levy of execution on a foreign judgment.[69]

(§ 2) *C. Public, official, and municipal acts*[70] may be restrained when illegal and irremediable at law or when within some recognized head of equitable cognizance, as where they constitute a nuisance or continuing trespass.[71] Acts which are wholly nugatory and harmless will not be enjoined.[72] The discretionary powers of officers will not be controlled[73] nor will the function of mandamus be assumed.[74]

Injunction should not issue to compel the admission of one not in possession of a public office to the enjoyment thereof,[75] nor can one who has not a prima facie

67. Equity will not enjoin the collection of a judgment of which complainant had notice in time to appeal where the bill does not allege any circumstance of fraud, accident, or mistake which prevented him from so doing, the remedy by appeal being complete. Groesman v. Davis, 117 Ill. App. 354. Equity will not enjoin the enforcement of a judgment entered by reason of his excusable default where he failed to avail himself of the remedy by appeal, he having an opportunity to do so. Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926. A court of equity will not enjoin the enforcement of a judgment obtained without due service of process so long as there remains open to the aggrieved party an adequate remedy by appeal or writ of error or certiorari. Lasher v. Annunziata, 119 Ill. App. 653.

67. To enjoin a judgment as void on account of want of service of process, there being no appearance to the action, it is necessary to allege and prove that he has a meritorious defense to the action in which the judgment was rendered. Meyer v. Wilson [Ind.] 76 N. E. 748. By virtue of the Illinois statute and independently thereof a court of equity will not enjoin the enforcement of a judgment on the ground that the court did not lawfully acquire jurisdiction of the person of the debtor, unless it is alleged that complainant has a valid defense to the cause of action on which the judgment was entered. Young v. Deneen, 220 Ill. 350, 77 N. E. 193.

68. In a suit to enjoin the enforcement of a judgment the complainant must allege facts and circumstances which show that his defense to the action at law was good and sufficient; an allegation that he has and had a good defense is not sufficient. Emerson v. Gray [Del.] 63 A. 768. Equity will not enjoin the enforcement of a judgment even though rendered without service of summons on the judgment debtor, where the bill does not show that he has a good defense on the merits, by setting out the matter in controversy and the facts constituting his defense thereto or at least alleging ignorance of the basis of the plaintiff's claim. Lasher v. Annunziata, 119 Ill. App. 653.

69. Howard v. Kinney Co., 8 Ohio C. C. (N. S.) 568.

70. See 6 C. L. 14.

71. Equity will by injunction require a city to so care for surface water collected on its streets that it shall not be thrown or conducted onto plaintiff's premises in a greater quantity than it would have been but for its accumulation by the city improvements. Cromer v. Logansport [Ind. App.] 78 N. E. 1045. The provisions of a city **charter requiring** one asserting a claim against the city to present a **verified claim.** and for the appointment of commissioners to appraise the damages, as a prerequisite to the right to maintain an action therefor against the city, **has no application** to a suit to enjoin the maintenance by the city of a continuing nuisance, though incidentally damages for past injuries are asked for. Lamay v. Fulton, 109 App. Div. 424, 96 N. Y. S. 703.

72. An injunction restraining the mayor of a city from approving the grant of a franchise by the city council will be vacated where it is claimed that the grant is illegal since the mayor's approval of an illegal act will not give it any validity. Smith v. Buffalo, 99 N. Y. S. 986.

73. A mandatory injunction will not lie to compel a municipal corporation to do acts as to the doing of which it is vested with discretionary powers. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. 1102.

74. Where an officer refuses to perform a plain duty, unmixed with discretion, the remedy is by mandamus and not mandatory injunction. Mandamus is always issued after a trial and never in vacation by a judge. Hager v. New South Brewing Co., 28 Ky. L. R. 895, 90 S. W. 608. Where a school board has enacted an alleged unlawful requirement for admission to the public schools, the remedy of a parent whose child has been denied admission is by mandamus and not by injunction to restrain the enforcement of the requirement. McCaskill v. Bower [Ga.] 54 S. E. 942; Harley v. Lindemann [Wis.] 109 N. W. 570. The effect of filing affidavits of prejudice and bias against a common pleas judge is to disqualify him from presiding at the trial of the cause, and a declaration by the judge in open court of his intention to proceed with the trial, notwithstanding the filing of the affidavit, is sufficient ground for a proceeding in **mandamus and injunction.** State v. Dirlam, 7 Ohio C. C. (N. S.) 457.

title to an office enjoin another from exercising the duties thereof,[76] but where one peacefully in possession of an office is forcibly dispossessed he may have an injunction to compel his restoration and peaceable possession pending an orderly adjudication of his title.[77] So too, one in peaceable possession may restrain another from exercising the functions of the office or interfering with his doing so.[78] Violation of trust and abuse of power by municipal authorities may be enjoined,[79] and one may be protected who under proper permission has lawfully begun to move buildings on streets from an official withdrawal of permission.[80]

Unlawful disposition of the public moneys is remediable by injunction,[81] also the incurring of an unauthorized indebtedness to be paid out of public funds when it appears that the doing so will be prejudicial to complainant.[82]

Equity will enjoin the assessment and collection of an illegal tax or assessment[83] if there is, in addition to its illegality, some equitable ground for the interposition

75. Blain v. Chippewa Circuit Judge [Mich.] 13 Det. Leg. N. 394, 108 N. W. 440. The title to a public office and the right to exercise the functions thereof by a person claiming the title thereto cannot be determined in an action for injunction. Will not lie to restrain teacher from teaching under contract with de facto school board. School Dist. No. 77 v. Cowgill [Neb.] 107 N. W. 584; Hill v. Anderson, 28 Ky. L. R. 1032, 90 S. W. 1071.

76. One who has not a prima facie title to a public office cannot maintain a suit in equity to enjoin another from exercising the duties thereof or from obtaining the books, records, and paraphernalia belonging to it. Quo warranto is the proper remedy. Hubbell v. Armijo [N. M.] 85 P. 1046.

77. Blain v. Chippewa Circuit Judge [Mich.] 13 Det. Leg. N. 394, 108 N. W. 440.

78. Even a de facto officer may maintain such a proceeding. Callaghan v. Tobin [Tex. Civ. App.] 14 Tex. Ct. Rep. 269, 90 S. W. 328; Callaghan v. Irwin [Tex. Civ. App.] 14 Tex. Ct. Rep. 289, 90 S. W. 335. Injunction is the proper remedy where municipal authorities threaten to unlawfully appoint a successor of a municipal officer and to dispossess him of his office. Callaghan v. McGown [Tex. Civ. App.] 14 Tex. Ct. Rep. 280, 90 S. W. 319. A teacher who has entered into a valid contract to teach a certain school can enjoin another who also claims the right to teach such school from interfering with or molesting the complainant in teaching the school. Treadway v. Daniels' Adm'r, 29 Ky. L. R. 33, 92 S. W. 981.

79. Unauthorized adoption of resolution for removal of sidewalk and threatened removal of same held abuse of power and violation of trust to wanton injury of property rights. Nichols v. Sadorus, 120 Ill. App. 70. Where county commissioners have wrongfully interfered with the judicial duties of a township board relative to schools, and the illegality of their action does not appear on the face of the record of their proceedings but is shown by evidence contrary to what appears on the record, injunction is the proper remedy for the township board. Board of Education of Wayne Tp. v. Shaul, 4 Ohio N. P. (N. S.) 483.

80. Hinman v. Clark, 51 Misc. 252, 100 N. Y. S. 1068.

81. Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099. A taxpayer may enjoin the appropriation of public moneys to the payment of illegal claims against the municipality or any board or department thereof. Lindblad v. Board of Education of Normal School Dist., 221 Ill. 261, 77 N. E. 450. Equity at the suit of the attorney general will enjoin a board of county commissioners from paying out county funds under a void contract. Brown v. State [Kan.] 84 P. 549. An alderman of a city may in his individual capacity join with other taxpayers to enjoin an ultra vires act of the municipality. Gillespie v. Gibbs [Ala.] 41 So. 868. A suit to enjoin the officers of a municipal corporation from appropriating corporate funds for an ultra vires purpose, the corporation being under the control of the officers engaged in the unlawful act, may be maintained by taxpayers but in such case the corporation should be joined as a party defendant. Id.

82. Unlawful disposition of public money. Shoemaker v. Des Moines, 129 Iowa, 244, 105 N. W. 520. Evidence held not to show that complainant would be injured in his business or his property subjected to an unlawful assessment by reason of municipal corporation engaging in buying and selling of coal so as to confer jurisdiction on the superior court to restrain such business under Pub. Acts 1903, p. 260. Baker v. Grand Rapids, 142 Mich. 687, 12 Det. Leg. N. 879, 106 N. W. 208. That a contract entered into by a school board is null and void does not of itself afford a reason for the issuance of an injunction by a taxpayer where it does not appear that plaintiff is prejudiced in any way by its being performed. Lindblad v. Board of Education of Normal School Dist., 221 Ill. 261, 77 N. E. 450; Id., 122 Ill. App. 617. A private corporation which is a taxpayer may enjoin a municipality from entering into any contract which would entail a misappropriation of the city's funds, where the circumstances are such that an individual taxpayer could do so, irrespective of the fact that its motive in doing so is to prevent competition with its own business. Owensboro Waterworks Co. v. Owensboro, 29 Ky. L. R. 1118, 96 S. W. 867.

83. Campbell v. Bryant, 104 Va. 509, 53 S. E. 638; Arnold v. Knoxville, 115 Tenn. 195, 90 S. W. 469; City of Atlanta v. Jacobs, 125 Ga. 528, 54 S. E. 534.

of such relief[84] and there is no statutory method for contesting its validity;[86] and if the injunction will protect and not complicate rights.[86]

Equity will enjoin the holding of an election which is in violation of the laws and constitution of a state[87] at the suit of a resident and taxpayer of the district in which the election is to be held.[88] That a contract imposes an ill advised indebtedness is not alone a ground for injunction[89] and it will not issue against performance of a contract on the sole ground that it is ultra vires[90] or that there is a suffered illegality which the contract does not require.[91] Complainant must have an interest to be affected by a threatened illegal contract.[92]

(§ 2) *D. Enforcement of statutes and ordinances.*[93]—A court of equity may enjoin a public officer from attempting to enforce an unconstitutional statute by confiscation of complainant's property where its enforcement would result in a multiplicity of suits and irreparable injury which could not be redressed in an action at law.[94] Ordinarily it will not enjoin the prosecution of criminal proceedings under alleged illegal statutes or ordinances,[95] though such relief has been granted on the ground that such action would prevent numerous arrests and prosecutions.[96]

84. In California injunction will not lie to restrain the collection of a tax merely on the ground that it is illegal; it must appear that there is no adequate remedy at law for the protection of complainant's property rights. If the act sought to be enjoined would cloud complainant's title and the tax is illegal the injunction will issue. Crocker v. Scott [Cal.] 87 P. 102.

Federal courts of equity will not enjoin the levy or collection of a tax on the single ground of illegality, but there must be some special circumstance, such as the avoidance of a multiplicity of suits, or some injury that cannot be remedied by an action of law or some other equitable ground, in addition to its illegality. Illinois Life Ins. Co. v. Newman, 141 F. 449. Equity will not enjoin the collection of a tax levied by municipal authorities pursuant to law unless it appears that the officers charged with making the levy have acted fraudulently to complainant's prejudice. National Tube Co. v. Shearer [Del.] 62 A. 1093.

85. Equity will not enjoin the collection of taxes because of the alleged illegality of the levy where the taxpayer has a statutory remedy for contesting the validity. City of Gainesville v. Dean, 124 Ga. 750, 53 S. E. 183.

86. Injunction against collection in a city of taxes to pay county bonds alleged to be for debts chargeable only on that portion of the county outside the city refused because tending to complicate bondholders' rights. Slutts v. Dana [Iowa] 109 N. W. 794.

87. Will not interfere unless it is so. Conner v. Gray [Miss.] 41 So. 186.

88. Residents of a parish, but not within the limits of a municipality situate therein and having no property therein, have no right to an injunction restraining the citizens and inhabitants of the city from enacting ordinances touching local option and holding elections in the city. Marshall v. Mansura, 116 La. 743, 41 So. 56.

89. In a taxpayer's action to restrain the performance of a contract, equity will not grant relief unless the public officers are acting without authority or are guilty of fraud. That the contract is ill advised is not alone **sufficient.** Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479. Though a court of equity may **enjoin** a municipal corporation at the suit of a taxpayer from applying money raised by taxation to illegal or unauthorized uses, it cannot enjoin from carrying out a legal contract though such contract be an ill advised one. Cox v. Jones, 73 N. H. 504, 63 A. 178.

90. It must appear that the public revenues will be affected injuriously. County of Henry v. Stevens, 120 Ill. App. 344.

91. Permitting students in Normal school to teach in public school without certificate, contract being silent as to that. Lindblad v. Board of Education of Normal School Dist., 122 Ill. App. 617.

92. Complainant cannot enjoin a municipality from reletting a contract which he has voluntarily forfeited by failure to commence to perform within the time fixed for its completion. Brown & Co. v. Pottawattamie County Sup'rs, 129 Iowa, 533, 105 N. W. 1019.

93. See 6 C. L. 16.

94. Jewett Bros. v. Small [S. D.] 105 N. W. 738. Equity may enjoin the enforcement of an invalid ordinance where complainant has no adequate remedy at law. Angle v. Stroudsburg Borough, 29 Pa. Super. Ct. 601. In the absence of statutory authority the United States cannot maintain a suit in equity to enjoin a **violation of the Sherman interstate commerce act** prohibiting the giving of rebates, though giving of such rebates is clearly violative of the policy of the government. United States v. Atchison, etc., R. Co., 142 F. 176. A bill will lie to enjoin a city and its officers from taking any proceedings under an unconstitutional statute to **annex a smaller contiguous city.** Sample v. Pittsburg, 212 Pa. 533, 62 A. 201.

95. Salter v. Columbus, 125 Ga. 96, 54 S. E. 74. Will not restrain a threatened prosecution for a nuisance (keeping hogs) at the instance of one who has not established the lawfulness of such keeping and is not threatened with multiplied suits. City of Tyler v. Story [Tex. Civ. App.] 17 Tex. Ct. Rep. 402, 97 S. W. 856.

(§ 2) *E. Exercise of right of eminent domain.*[97]—A quasi public or municipal corporation may be enjoined from taking land under its power of eminent domain where the land is exempt from the exercise of such power,[98] or it is not proceeding to condemn the land in the manner provided by statute,[99] or is taking under a false assumption of a right acquired.[1] If the defendant has no power to take land under such power it will be enjoined from maintaining proceedings purporting to do so.[2]

(§ 2) *F. Acts affecting rights in highways and public or quasi public places.*[3]—Where an obstruction of a street will amount to a public nuisance it may be restrained[4] at the suit of the city or public law officer,[5] but not at the suit of a private person unless it appears that he will sustain some special injury aside from that sustained by the public.[6] The opening of a street will not be enjoined for one who has no interest in it.[7] In otherwise proper cases there may be injunction to enjoin the vacation of a street,[8] the laying of water pipes therein by a private corporation,[9] the habitual use thereof by a traction engine and trailers,[10] the unlawful collection of tolls by a turnpike company,[11] the maintenance of a free bridge within prohibited

96. The enforcement of a city ordinance "which has not been held invalid" may be enjoined where its validity is attacked and issuing of the injunction will prevent numerous arrests for its violation. Kappes v. Chicago, 119 Ill. App. 436.

97. See 6 C. L. 16.

98. Under Burns' Ann. St. 1901, §§ 4708 et seq., a railroad can be enjoined from taking any part of the land used and occupied by a cemetery for cemetery purposes, even though the land proposed to be taken is not actually occupied by graves. In such case it is immaterial whether the title to such land is held by an association or by individuals in trust for an association. McCann v. Trustees of Mt. Gilead Cemetery [Ind.] 77 N. E. 1090. A street railroad company can enjoin a railroad from entering on and appropriating a right of way previously located by it, though it has not yet purchased or condemned said right of way where it is proceeding to do so, and it may enjoin the defendant from proceeding to condemn land over which plaintiff has already located its right of way. Fayetteville St. R. Co. v. Aberdeen & R. R. Co. [N. C.] 55 S. E. 345.

99. A property owner in a city may enjoin a city from taking his property for a permanent public street where the city has not exercised its power of eminent domain in the manner specified by the statutes, irrespective of the solvency of the city and the ability of the plaintiff to recover damages in an action at law. Town of Syracuse v. Weyrick [Ind. App.] 76 N. E. 559. A court of equity has jurisdiction to enjoin a municipal corporation and its officers from opening up and using as a public street, without the owner's consent, land which has not been condemned, dedicated, or used as a street or highway. McGourin v. De Funiak Springs [Fla.] 41 So. 541. In Alabama a property owner may enjoin a municipal corporation from injuring his property by change in the grade of a street on which his property abuts without first compensating him for such injury, irrespective of the solvency of the corporation and the fact he could recover damages in an action at law. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

1. It is within the jurisdiction of a court of equity to restrain highway officers from trespassing on the lands of plaintiff under the claim that it is a public highway. Lawrence v. Kirby [Mich.] 13 Det. Leg. N. 497, 108 N. W. 770.

2. Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

3. See 6 C. L. 16.

4. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.

5. Elevated railroad. Thornton v. Stevens Coal Co., 117 Ill. App. 376.

6. Bischof v. Merchants' Nat. Bank [Neb.] 106 N. W. 996; Ruthstrom v. Peterson, 72 Kan. 679, 83 P. 825. Property owner may enjoin abutting owner from encroaching beyond building line of street. First Nat. Bank v. Tyson, 144 Ala. 457, 39 So. 560. Any unlawful obstruction of a street which to a substantial degree cuts off the view to the front of an adjoining business store, rendering it less valuable for the display of goods and advertising purposes, is a damage which is peculiar to the owner of such adjoining building and independent of the injury to the public. Bischof v. Merchants' Nat. Bank, [Neb.] 106 N. W. 996. Owner of property abutting on street sustains special injury from obstruction of street. Nichols v. Sadorus, 120 Ill. App. 70.

7. Will not issue to prevent opening of a platted but unaccepted street at the suit of one who claims but has no right to obstruct it. Brewer v. Pine Bluff [Ark.] 97 S. W. 1034.

8. A lot owner cannot enjoin the vacation of a part of a street which is in front of his lot if such vacation does not cut off his **means of ingress and egress** therefrom, **though** it make a **cul de sac** of the street. Ponischil v. Hoquiam Sash & Door Co., 41 Wash. 303, 83 P. 316.

9. The owner of the fee in a street can enjoin a private corporation from laying water pipes therein for its **private use.** Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149.

10. Equity may enjoin the use of a traction engine and trailers on public streets if it appears that the use is a **public nuisance.**

distance of toll bridge, the establishment of a grade crossing over a railroad,[12] and the granting of a franchise to use a public street.[13]

(§ 2) *G. Acts of quasi public and private corporations or associations.*[14]—Equity has jurisdiction to enjoin public service corporations from committing acts, resulting in private injury, violative or in excess of their franchise rights or obligations.[15] A public franchise may be protected[16] and a franchised corporation may

The attorney general is a proper person to institute such proceedings. McCarter v. Ludlum Steel & Spring Co. [N. J. Eq.] 63 A. 761.

11. Under Rev. St. Mo. 1899, § 3649, an injunction will lie to enjoin a turnpike company from **collecting tolls** on a certain road where it has **forfeited** its **right** to tolls by failure to keep the road in repair, though **quo warranto** would also lie to oust it from exercising such power, since the latter form of action is **not adequate** remedy in that damages are not recoverable. State v. Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 168. Equity will enjoin the unlawful exaction of toll on a toll road where such exactions are of daily occurrence and actions at law to recover the same would result in **multiplicity** of suits. Id.

12. It may be that the crossing of a railroad at grade might, under certain circumstances, be absolutely destructive of the franchise to operate a railway, and the damage so resulting irreparable at law. In such a case equity might enjoin the establishment of the crossing but it will not do so unless there is a threatened taking of property for the purpose which was forbidden by the statute as necessary to the enjoyment of the road's general franchise. Cincinnati, etc., R. Co. v. Morgan County [C. C. A.] 143 F. 798.

13. In New York the courts may at the suit of a taxpayer enjoin a park board from consenting to the granting of a franchise to use a public street under its control where it has not given notice, as required by law, of its intention to pass on the matter. Smith v. Buffalo, 99 N. Y. S. 986.

14. See 6 C. L. 17.

15. City of Madison v. Madison Gas & Elec. Co. [Wis.] 108 N. W. 65. Equity will enjoin a water company from **cutting off** the complainant's **water supply** to his premises because of the nonpayment of arrearages of water rent due from a former owner, where complainant is not obligated to pay same and the water company by its franchise is bound to furnish water to residents. McDowell v. Avon-by-the-Sea Land & Improvement Co. [N. J. Eq.] 63 A. 13. Where a **telephone** company had been charging plaintiff more for service than it charged other persons for like service and had discontinued service to plaintiff on his refusal to pay the excessive charges, equity will issue a **mandatory injunction** to compel it **to furnish services** at a reasonable rate to be fixed by the court. Wright v. Glen Tel. Co., 112 App. Div. 745, 99 N. Y. S. 85; Brown v. Atlantic & B. R. Co. [Ga.] 55 S. E. 24. Persons living along the line of a **railroad** and doing business at stations thereon who will suffer special damages, not merely as members of the public but by reason of their having located and invested money on the faith of the continuance of the existence of the railroad, can maintain a suit to enjoin the railroad from **changing** its **location** so as to leave them without service. Repeated daily **refusals to switch** complainant's **cars** as required by law of a common carrier held enjoinable. Louisville & N. R. Co. v. Central Stockyards Co. [Ky.] 97 S. W. 778.

NOTE. Power to control common carriers by injunction: In order to authorize issue of injunction it is not necessary that complainant's identical right must have been settled by a court of law, but the precise principle on which such right depends must have been settled; and in New Jersey no principle has been settled determinative of duty of a railroad company not to discontinue stations at certain points in absence of charter or statutory provisions in regard to such question. Right to control railroad company in this particular would logically imply right to control it in all matters not regulated by statute or charter and render discretion of directors reviewable by court in all unregulated matters. Courts will compel completion of railroad if charter clearly imposes such duty on company. They will also compel operation of road or any other duty clearly imposed. Spelling on Injunctions and Other Extraordinary Remedies [2d Ed.] par. 1593, p. 1377 et seq. See also note to 24 L. R. A. p. 564. Right of courts to determine duty of common carriers in unregulated matters finds some support in opinions in "Granger Cases" beginning with Munn v. Illinois, 94 U. S. 118, 24 Law. Ed. 77, but such power is clearly denied in later cases by same court. Tex. & Pac. R. Co. v. Marshall, 136 U. S. 393, 34 Law. Ed. 385; N. P. R. Co. v. Washington ex rel. Dustin, 142 U. S. 492, 35 Law. Ed. 1092; Jones v. Newport News Co. [C. C. A.] 65 F. 738; C., C., C. & St. L. R. Co. v. People, 177 U. S. 514, 44 Law. Ed. 868; L. S. & M. S. R. Co. v. Ohio, 173 U. S. 285, 43 Law. Ed. 702; Interstate Commerce Com. v. C. N. & T. R. Co., 162 U. S. 184, 40 Law. Ed. 935; Id., 167 U. S. 479, 42 Law. Ed. 243. In some jurisdictions there seems to be an inclination in default of positive legislation to draw to court power to regulate and enforce duties of common carriers in these unregulated matters. State v. Republican Valley R. R. Co., 17 Neb. 647, 34 N. W. 329, 52 Am. Rep. 424; Grinsfelder v. Spokane, etc., R. Co., 19 Wash. 518, 53 P. 719, 67 Am. St. Rep. 739, 41 L. R. A. 515; R. R. Com'rs v. P. & O. R. R. Co., 63 Me. 269, 18 Am. Rep. 208; State v. H. & N. H. R. R. Co., 29 Conn. 538; Concord & M. R. R. Co. v. Boston & M. R. R. Co. [N. H.] 41 A. 263. Illinois courts have not been consistent. See Ohio & M. R. Co. v. People, 120 Ill. 200, 11 N. E. 347; People v. C. & A. R. Co., 130 Ill. 175, 22 N. E. 867; Id., 152 Ill. 230, 38 N. E. 662, 26 L. R. A. 224; People v. St. L., etc., R. Co., 176 Ill. 512, 52 N. E. 292, 35 L. R. A. 656. A territorial court in Washington (N. P. R. Co.

sue as a taxpayer to redress the assumption of a public service without a franchise though its own is not exclusive.[17] It may enjoin the holding of a stockholders' meeting until the right to vote certain stock has been determined,[18] and may issue at the instance of a corporate director to prevent his unauthorized removal from office.[19] It will not enjoin a private corporation from performing an ultra vires contract at the suit of one who has accepted pecuniary benefits under such contract.[20]

(§ 2) *H. Breach or enforcement of contract or trust.*[21]—The restraining of a breach of contract[22] is a negative specific performance of the contract and depends on the same principles.[23] Ordinarily it will not lie to prevent a breach of a contract which cannot be specifically enforced.[24] There are exceptions to this rule, however, as where adequate damages cannot be ascertained for its breach,[25] but the contract right for which protection is prayed must be clear and plain.[26] Services of a special,

v. Territory, 3 Wash. 303, 13 P. 604) affirmed power of the court; but this case was reversed in United States supreme court, sub nom. N. P. R. Co. v. Territory, 142 U. S. 492, 35 Law. Ed. 1092. In other jurisdictions opposite view is taken and power or authority of the court is denied. N. P. R. Co. v. Territory, 142 U. S. 492, 35 Law. Ed. 1092; Texas & Pac. R. Co. v. Marshall, 136 U. S. 393, 34 Law. Ed. 385; Knight v. Helena P. & L. Co. [Mont.] 56 P. 685, 44 L. R. A. 692; People v. A. & V. R. Co., 24 N. Y. 261, 82 Am. Dec. 295; People v. N. Y., L. E. & W. R. Co., 104 N. Y. 58, 9 N. E. 856, 58 Am. Rep. 484 (see note); People v. B. H. R. Co., 172 N. Y. 90, 64 N. E. 788 (see note to this case); Florida Cent., etc., R. Co. v. Florida [Fla.] 12 So. 103, 20 L. R. A. 419; San Antonio R. Co. v. Texas [Tex.] 39 S. W. 926, 59 Am. St. Rep. 834, 35 L. R. A. 662; State v. Kansas City, etc., R. Co., 51 La. Ann. 205, 25 So. 129; Jones v. Newport News Co., 65 F. 738, 13 C. C. A. 95, 31 U. S. App. 92; Commonwealth v. Fitchburg R. R. Co., 12 Gray [Mass] 180; Whiting v. Sheboygan, etc., R. R., 25 Wis. 167, 3 Am. Rep. 47. It is therefore evident that duty to maintain station and power of court to compel such maintenance is not, in absence of charter or statutory regulation, so clear as to authorize injunction against discontinuing such station.—From Jacquelin v. Erie R. Co. [N. J. Eq.] 61 A. 18.

16. Police jury may enjoin operation of free bridge within prohibited distance from a **public toll bridge** in which parish is joint owner with another municipality. Police Jury of Lafourche v. Robichaux, 116 La. 286, 40 So. 705.

17. Merchants' Police & Dist. Tel. Co. v. Citizens' Tel. Co., 29 Ky. L. R. 512, 93 S. W. 642.

18. Villamil v. Hirsch, 143 F. 654.

19. Laughlin v. Geer, 121 Ill. App. 534.

20. A stockholder in a corporation cannot enjoin the corporation from carrying into effect a contract theretofore entered into by it on the ground that such contract is ultra vires, but which is neither mala prohibitum nor mala per se, where he has accepted pecuniary advantages from the operation of the contract complained of. Wormser v. Metropolitan St. R. Co., 184 N. Y. 83, 76 N. E. 1036.

21. See 6 C. L. 17.

22. A notice in a copyrighted book restricting the sale of the book to a price named in the notice **held not a contract** and hence injunction would not lie to prevent a breach. Bobbs-Merrill Co. v. Straus [C. C. A.] 147 F. 15.

23. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. See Specific Performance, 6 C. L. 1498. As a working rule injunction will issue only when the contract would be affirmatively specifically enforceable in the particular constituting the threatened breach. Cleveland v. Martin, 218 Ill. 73, 75 N. E. 772.

24. Where a contract covers a period of time requiring continual supervision of the court to specifically enforce it, specific performance will not be decreed, and where such is the case equity will not enjoin the breach of the contract by one of the parties thereto since such relief would be indirectly specific enforcement and remedy lacking in mutuality. General Elec. Co. v. Westinghouse Elec. & Mfg. Co., 144 F. 458. Under Civ. Code Cal. § 3423, equity will not enjoin the breach of a contract the performance of which cannot be specifically enforced, but if equity would decree specific performance a breach may be enjoined. Farnum v. Clarke, 148 Cal. 610, 84 P. 166.

25. Thus it will enjoin a breach of a contract to purchase all the electric energy required by defendant in operating certain premises where defendant threatens to purchase from another. Beck v. Indianapolis Light & Power Co., 36 Ind. App. 600, 76 N. E. 312. Equity will lie to restrain a publisher from issuing a book inferior in printing, paper, etc., to the grade which he had agreed with the author to use, since the author's injury would be impossible of computation. Martin v. Cleveland, 119 Ill. App. 516. In an action to enjoin the breach of a contract it is not necessary to allege actual injury to plaintiff already consummated. It is enough to allege that unless the threatened breach is enjoined it will cause an injury to plaintiff not remediable at law. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540.

26. Will not issue where the terms of the contract are vague or uncertain. Sanders v. Brown [Ala.] 39 So. 732. A contract held not so clearly to require that defendant sell plaintiff's patterns exclusively as to authorize an injunction restraining him from selling other makes. New Idea Pattern Co. v. Whitner [Pa.] 64 A. 518. A contract construed and held not an agreement for the

unique or intellectual quality[27] are not measurable in money value, and hence an agreement not to withdraw from such services and render them to another will be protected.[28] Where facts arising subsequent to the making of a contract and not within the contemplation of the parties at the time would make it inequitable to enforce it by injunction, equity will refuse to interfere and relegate the parties to their action at law for damages.[29] Equity will enjoin the malicious interference by a third person with the contract rights of parties to the contract.[30] It will not enjoin the breach of a contract at the suit of persons not parties thereto or in privity with such parties.[31] Equitable rights growing out of contract will be protected by injunction.[32] In the case of bills and notes a payment[33] or transfer[34] may be restrained to protect the equities. The defense of infancy is unavailing when the infant has received the benefits of the other's performance and restoration is impossible.[35] Thus a lease voidable for infancy of defendant may be protected against breach destructive of the landlord's property.[36] Ordinarily an action will not lie to enforce by injunction the right to possession under a lease,[37] though it will lie to restrain an unauthorized use of demised premises,[38] or the breach of the restrictive covenants of a deed[39] or a lease,[40] unless it would be inequitable to do so.[41] In-

exclusive sale of plaintiff's goods, hence injunction will not issue to restrain sale of competing goods by defendant. Butterick Pub. Co. v. Boynton, 191 Mass. 175, 77 N. E. 705.

27. Services of millinery trimmer are not within rule that contracts for certain kinds of services may be enforced by injunction. Rabinovich v. Reith, 120 Ill. App. 409.

28. Ordinarily contract for personal service cannot be specifically enforced, but one who has agreed not to render services to another during the period of his employment may be enjoined from so doing where his services are of special, unique, or intellectual quality, the loss of which cannot be reasonably or adequately compensated in damages. If the services are not of such extraordinary character injunction will not lie to restrain the breach. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. Whether American courts will act injunctively when there is no negative agreement seems increasingly doubtful. See Rabinovich v. Reith, 120 Ill. App. 409.

29. McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961.

30. Dr. Miles' Medical Co. v. Platt, 142 F. 606. Thus it will enjoin a sale of a patent medicine at a cut price by one who has purchased it from one who purchased from complainant under a contract whereby he agreed not to sell to any dealer who had not agreed with complainant to sell at a stipulated price, where it appears defendant knew of said contract and resorted to subterfuges to avoid it. Wells & Richardson Co. v. Abraham, 146 F. 190.

31. Where individuals enter into a contract for the publication of the literary products of another by a corporation which they propose to form, the corporation acquires no right which it can enforce by injunction. Pennell v. Lothrop, 191 Mass. 357, 77 N. E. 842.

32. Equitable right of tenant to crops after expiration of lease enforceable by injunction. Carmine v. Bowen [Md.] 64 A. 932.

33. In a suit to recover from bank moneys deposited by plaintiff's agent, it was proper on showing of agent's insolvency and indorsee's nonresidence to restrain payment of check against such fund. Singer Mfg. Co. v. Summers [N. C.] 55 S. E. 522.

34. It may enjoin the transfer of a note at the suit of an endorser thereof, who alleges his endorsement was procured by fraud, where it is held by defendant as collateral and complainant offers to purchase the debt for which it is held as security. Detwiler v. Patrick Hirsch Co., 49 Misc. 311, 99 N. Y. S. 207.

35. Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. S. 458.

36. Cole v. Manners [Neb.] 107 N. W. 777.

37. Goldman v. Corn, 111 App. Div. 674, 97 N. Y. S. 926.

38. Waldorf-Astoria Segar Co. v. Salomon, 109 App. Div. 65, 95 N. Y. S. 1053. An unauthorized use of demised premises may be enjoined where the use to which the premises are sought to be appropriated is inconsistent with the purpose for which they were let and when the change will operate to the injury of the lessor. Jalageas v. Winton, 119 Ill. App. 139.

39. Equity will enjoin the violation of restrictive covenants in a deed, relative to the sale of liquor on the premises conveyed, at the suit of one who has taken title to adjacent property under similar restrictions from a common grantor. De Lima v. Mitchell, 49 Misc. 171, 98 N. Y. S. 811.

40. Covenant that landlord be allowed to put "to rent" sign on premises enforced by injunction against removal of such sign. Stafford v. Swift, 121 Ill. App. 508.

41. Equity will not enjoin a breach of the restrictive covenants of a deed relative to the character of buildings which may be erected on land where subsequent to the making of the covenant buildings of the prohibited character have been placed on adjacent land not restricted, and the erection of such a building on the restricted land would not further injure complainant, but will relegate the party to his action for dam-

junctions have been granted to restrain violations of agreements not to manufacture certain articles,[42] or not to engage in a certain business at a specified place,[43] or not to solicit business from complainant's customers after quitting his employment,[44] or to maintain the general offices and shops of a railroad at a certain place,[45] or not to sell individual holdings of stock in a corporation until after the treasury stock has been sold.[46]

(§ 2) *I. Interference with property, business, or comfort of private persons.*[47] *Trade and firm name.*[48]—Equity will enjoin the unlawful use of a trade name or trade mark by another at the suit of the owner[49] as well as restrain the

ages. McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961.

42. Jarvis Adams Co. v. Knapp, 213 Pa. 567, 62 A. 1112.

43. Wolverton v. Bruce [Ind. T.] 89 S. W. 1018; Rice v. O'Neal, 120 Ill. App. 259. In such case intention to commit future breaches of covenant will be implied from repeated breaches in past. Id. Equity will enjoin a breach of a contract by one who has sold a business and the good will thereof not to engage in a similar business for a specified time. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540; American Ice Co. v. Meekel, 109 App. Div. 93, 95 N. Y. S. 1060. Breach of partnership agreement to same effect. Sanford Dairy Co. v. Sanford, 100 N. Y. S. 270. A covenant not to grind fire clay in the state for eight years held a negative one and coupled with financial irresponsibility of the promisor calling for injunction against his transferee. Lanyon v. Garden City Sand Co., 223 Ill. 616, 79 N. E. 313.

NOTE. Power to enjoin agreements in restraint of trade: Right of attorney general to enjoin insurance companies from carrying out agreement for establishment of rates seems to be without support in common-law precedent. Some states have statutes condemning combinations between certain kinds of companies, including insurance companies, and congress has enacted an act to protect interstate commerce against restraint and monopoly, but decisions under these statutes are not precedents in state having no such statute. Distinction between insurance and commerce suggested in Paul v. Virginia, 8 Wall. [U. S.] 168, 19 Law. Ed. 357, and cases following it, is important in its relation to the Federal Commerce Clause, but otherwise unimportant in state courts. Principle condemning such agreements is applied not only to strictly trade and commerce transactions but to others, such as agreements between physicians (Mandville v. Harman, 42 N. J. Eq. 185, 7 A. 37), attorneys and their articled clerks (Nicholls v. Stretton, 10 Q. B. 346), manufacturers relative to workmen's wages (Hilton v. Eckersley, 6 E. B. & Bl. 47), and stenographers (More v. Bennett, 140 Ill. 69, 29 N. E. 888, 33 Am. St. Rep. 216, 15 L. R. A. 361). But at common law such agreements are not illegal in ordinary sense but are only unenforceable. Mitchel v. Reynolds, 1 P. Wms. 181, Sm. L. C. *417, decided in 1711; Mogul Steamship Company v. McGregor, App. Cas. 1892, p. 39; United States v. Addyson Pipe & Steel Co., 85 F. 271, 29 C. C. A. 147, 46 L. R. A. 122; Ellicott v. Chamberlain, 38 N. J. Eq. 604, 48 Am. Rep. 327. Such agreements, therefore, not being illegal in any positive sense, no injunction will lie against them at instance of attorney general. Fact that they are against public policy is insufficient to give equity jurisdiction. Nor does jurisdiction attach where parties are private corporations, the rule in case of public or quasi public corporations as expounded in Atty. Gen. v. Central R. Co., 50 N. J. Eq. 52, 24 A. 964, 17 L. R. A. 97, and Atty. Gen. v. Amer. Tobacco Co., 55 N. J. Eq. 352, 366, 36 A. 971, 977, being inapplicable to private corporations.—From McCarter v. Firemen's Ins. Co. [N. J. Eq.] 61 A. 705.

44. Equity will enjoin one who has sold the good will of his business and agreed to remain in the employ of the purchaser for a certain time from, during such time, conducting a competing business and soliciting business from old customers of the business sold. Acker, Merrall & Condit Co. v. McGaw, 144 F. 864. An infant 19 years of age will be restrained from violating an agreement entered into by him as a condition of his employment by plaintiff to the effect that he would not after quitting plaintiff's employ solicit business from any of plaintiff's customers. The defense of infancy is unavailing, the contract being executed and it being impossible for defendant to restore what he had received, to wit, knowledge of plaintiff's business. Mutual Milk & Cream Co. v. Prigge, 112 App. Div. 652, 98 N. Y. S. 458.

45. A court of equity may enjoin a railroad from removing its general offices, round house, and machine shops from a city where they have contracted to keep them located, and by such writ practically compel a specific performance of the contract. City of Tyler v. St. Louis S. W. R. Co. [Tex.] 14 Tex. Ct. Rep. 839, 91 S. W. 1.

46. Evidence held to warrant an injunction to restrain certain promoters of a mining corporation from selling their individual holdings of stock until after treasury stock had been sold in accordance with agreement between promoters where defendants are insolvent. Brown v. Bracking, 11 Idaho, 678, 83 P. 950.

47. See 6 C. L. 18.

48. See 6 C. L. 19.

49. Cohen v. Nagle, 190 Mass. 4, 76 N. E. 276; Saxlehner v. Eisner [C. C. A.] 147 F. 189.

Hotel name: Equity will enjoin the unlawful use by defendant of a name for his hotel which is the same as that used by plaintiff and which name was first appropriated by plaintiff, even though such name be made up in part of the name of the place where the inn is kept, if such use by defend-

imitation of complainant's style of packing his goods.[50] It will enjoin the dissemination of false statements concerning goods manufactured by complainant where the wrongful acts threaten to be continuous on the ground that otherwise it would require numerous suits to redress the wrong.[51] The remedy will not restrain a mere libel consisting in the use of one's name.[52]

Copyrights, trade secrets, literary property, and the like.[53]—Equity may enjoin the unlawful receiving and using of stock quotations issued by a stock exchange.[54]

Waste.[55]—Injunction lies to prevent waste[56] or to prevent the cutting down or destruction of trees on complainant's land,[57] where it will result in irreparable injury to the land and defendant is insolvent,[58] or by reason of infancy might defeat action on a lease under which he entered.[59] So too it will lie to prevent the unlawful removal of buildings from land.[60]

Incorporeal property[61] may be protected, such as a right of fishery,[62] but the writ will not issue against a high fence on defendant's land not built in malice.[63]

Easements and rights of way.[64]—A court of equity has jurisdiction, by injunction, to prevent a continuing material interference with the enjoyment of an easement,[65] as well as the doing of acts which in time would ripen into an easement or adverse right.[66] It lies to prevent the wrongful obstruction of a private way[67] and to enforce the removal of such an obstruction.[68]

ant tends to mislead the public. Busch v. Gross [N. J. Eq.] 64 A. 754.

50. On an application for a preliminary injunction to enjoin defendant from putting up and selling his goods in a package resembling one used by complainant, it should be made to clearly appear that the complainants have established an exclusive right to pack and dress their goods in the way they assert and which the defendant is imitating. Lamont, Corliss & Co. v. Hershey, 140 F. 768. A preliminary injunction will not issue to enjoin defendant from using a style of package similar to that used by plaintiffs for containing its goods where it is not clear that plaintiff has not used his style of package to mislead the public as to quality and place of manufacture of its contents. National Starch Co. v. Koster, 146 F. 259. See, also, Trade Marks, Etc., 6 C. L. 1713.

51. Toledo Computing Scale Co. v. Computing Scale Co., 142 F. 919.

52. Falsely giving name of physician as attached to hospital in bad standing. Christian Hospital v. People, 223 Ill. 244, 79 N. E. 72.

53. See 6 C. L. 20.

54. New York Cotton Exch. v. Hunt, 144 F. 511; Board of Trade of Chicago v. McDearmott Commission Co., 143 F. 188.

55. See 6 C. L. 20.

56. Brugh v. Denman [Ind. App.] 78 N. E. 349; Webster v. De Bardeleben [Ala.] 41 So. 881; Hall v. Bowman, 28 Ky. L. R. 1004, 90 S. W. 1051.

57. Mountain Copper Co. v. U. S., 142 F. 629. In an equitable action the court, on adjudging that plaintiff and defendant are tenants in common of land and that each is threatening to cut timber therefrom, may issue an injunction restraining each of them from doing so pending a partition of the land. Baxter & Co. v. Camp [Ga.] 54 S. E. 1036.

58. An injunction to restrain the cutting of timber on land will not issue when it neither alleged or provided that cutting the timber would result in irreparable injury to the land nor that defendant is insolvent. Haggart v. Chapman & Dewey Land Co., 77 Ark. 527, 92 S. W. 792.

59. See Cole v. Manners [Neb.] 107 N. W. 777.

60. Where a person is in possession of a building standing partly on his own land and partly on the land of an adjoining owner, equity will enjoin the removal of the building at the suit of the latter pending the determination of an action of ejectment instituted by him. Cromwell v. Hughes, 144 Mich. 3, 13 Det. Leg. N. 107, 107 N. W. 323.

61. See 6 C. L. 20.

62. The owner of a fishing trap set in the public waters may enjoin another from unlawfully setting another within the distance from the one first set prohibited by statute of Washington. Johansen v. Mulligan, 41 Wash. 379, 83 P. 417.

63. Equity will not enjoin the erection of a fence on one's own land, though it interfere with the access of light and air to the premises of an adjoining owner where it does not appear that it was erected with a malicious intent to injure the property of such adjoining owner and that it serves no useful purpose for the person erecting it. Metz v. Tierney [N. M.] 83 P. 788.

64. See 6 C. L. 20.

65. Johnson v. Gould [W. Va.] 53 S. E. 798. Equity will enjoin an interference with the enjoyment by a railroad of an easement over the land of another acquired by it for a right of way, irrespective of the solvency of the defendant, on the ground of public policy. Seaboard Air Line R. Co. v. Olive [N. C.] 55 S. E. 263. Right to use of alley under deed may be protected by injunction as against grantor. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1.

66. Kenilworth Sanitarium v. Kenilworth, 220 Ill. 264, 77 N. E. 226. "It is the settled law of this state that, irrespective of other

Nuisances.[69]—A court of equity has jurisdiction to enjoin a continuing nuisance and compel its abatement[70] at the suit of one in superior right.[71] The acts of several persons may together constitute a nuisance which the court will restrain, though the damage occasioned by the acts of any one of them, taken alone, would be inappreciable.[72] The government, in the absence of a plain, adequate and complete remedy at law, has a right to maintain a suit for an injunction to restrain a nuisance materially and injuriously affecting the occupancy of government property.[73] Where the thing complained of is not a nuisance per se but may become so according to circumstances and the injury apprehended is eventual or contingent, equity will not interfere. The presumption is that defendant will do the threatened acts in a proper way and so as not to constitute a nuisance.[74] That the abatement of a nuisance by injunction will deprive respondent of the use of a large amount of invested capital is not alone a sufficient reason for denying the relief.[75] Cases discussing the relief as applied to nuisances caused by blasting,[76] the construction and operation of railroad tracks[77] in close proximity to complainant's premises, as well as in cases of the illegal sale of liquors,[78] pollution of waters,[79] and the operation of factories which emit noisome odors,[80] are referred to in the notes.

damage, an injunction will be granted to enjoin the continuance of wrongful acts that obstruct the complainant in the free use and enjoyment of his land where such action, if continued, will ripen into an easement." Winslow v. Vallejo, 148 Cal. 723, 84 P. 191.

67. Llewellyn v. Cauffiel [Pa.] 64 A. 388; Flaherty v. Fleming, 58 W. Va. 669, 52 S. E. 857. A party seeking an injunction to restrain the closing of an alley must show a clear title or at least a prima facie title and that irreparable or serious injury will result in case it is not granted. Where the title asserted by complainant is not clear, injunction will not issue until after it has been established in a court of law, unless it appears that irreparable injury is liable to be suffered pending litigation. Bernei v. Sappington [Md.] 62 A. 365. Injunction lies at instance of grantee or his successors to restrain grantor from obstructing alley called for by deed. Andreas v. Steigerwalt, 29 Pa. Super. Ct. 1.

68. A mandatory injunction will issue to compel one who has wrongfully obstructed a private way to remove the obstruction; another person who has placed another and independent obstruction in such way is not a necessary party to such suit. Hershman v. Stafford, 58 W. Va. 459, 52 S. E. 533.

69. See 6 C. L. 20.

70. Nixon v. Boling [Ala.] 40 So. 210; Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492. The jurisdiction is said to be founded on the ability of equity to prevent irreparable mischief and vexatious litigation and to furnish a more complete remedy than can be had at law. State v. Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

71. Injunction against mining operations refused where defendants had commenced operations before plaintiff's rights in land injured were acquired, and had done everything possible to prevent injury complained of. McCarthy v. Bunker Hill & S. Min. & Coal Co., 147 F. 981.

72. United States v. Luce, 141 F. 385; Warren v. Parkhurst [N. Y.] 78 N. E. 579. Where several factories together contribute to the creation of noisome odors which amount to a nuisance to the owners of the adjoining property, the owners of any or all may be enjoined from conducting their business so as to create such odors. United States v. Luce, 141 F. 385.

73. United States v. Luce, 141 F. 385. The United States may maintain a suit to enjoin the operation in the vicinity of a U. S. hospital of fish rendering establishments which emit noisome odors and collect flies which come onto the premises occupied by the hospital. Id.

74. Davis v. Baltimore & O. R. Co., 102 Md. 371, 62 A. 572.

75. Equity will enjoin the use by one person of his own premisee in such a manner as to work a substantial injury to the land and premises of another, though so doing will prevent the party enjoined from carrying on a business in which a large amount of capital is invested. (Discharge of sulphur fumes from smelter on vegetation of complainant's land). McCleery v. Highland Boy Gold Min. Co., 140 F. 951.

76. Equity will enjoin blasting which throws rocks and dirt onto plaintiff's premises, though the work of blasting be not negligently done. Central Iron & Coal Co. v. Vanderheurk [Ala.] 41 So. 145.

77. Davis v. Baltimore & O. R. Co., 102 Md. 371, 62 A. 572. A property owner cannot maintain a suit to enjoin a railroad company from constructing a freight house and tracks on its own land and operating trains on such tracks where the railroad company's land is separated from complainant's by a 60 foot street, such use by the railroad not depriving complainant of access to his land. Walther v. Chicago & W. I. R. Co., 117 Ill. App. 364. Will enjoin railroad company from ringing bells and sounding whistles unnecessarily and also standing of stock cars unreasonable length of time in residence section of city. Colgate v. New York, etc., R. Co., 100 N. Y. S. 650. Converting railroad on street in a city into switching yards consti-

Trespass.[81]—Injunction will issue to restrain a trespass,[82] if the nature and frequency of the threatened trespass is such as to prevent the substantial enjoyment of the right of possession and property in the land.[83] So too it will issue where it appears that frequent acts of trespass or a continuing trespass is threatened on the ground that it would require a multiplicity of suits to redress the wrong,[84] and in cases where the injury threatened is irreparable,[85] or where complainant has not an adequate remedy at law.[86] Possession may be kept in statu quo pending a determination of right.[87] The mere fact that a trespass has been committed on com-

tuting a nonpublic use and hence a nuisance. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

78. An injunction, without order for abatement, is properly awarded for the suppression of the illegal sale and giving away of intoxicating liquor, as such acts constitute a nuisance. McCracken v. Miller, 129 Iowa, 623, 106 N. W. 4. Under Code Iowa, c. 6, title 12, the court has jurisdiction to issue temporary injunctions restraining the maintenance of a liquor nuisance at the suit of the attorney general in vacation. Young v. Preston [Iowa] 108 N. W. 463.

79. Injunction will lie to restrain the pollution of the waters of a stream above plaintiff's land when such pollution renders it unfit for use in watering his cattle and for domestic purposes. Brown v. Gold Coin Min. Co. [Or.] 86 P. 361. Equity will restrain the pollution of the water of a stream or open drain, where the pollution threatens to be continuous, where the defendant has no legal right to discharge sewerage into it, though the plaintiff could only recover nominal damages at law. Kenilworth Sanitarium v. Kenilworth, 220 Ill. 264, 77 N. E. 226. The use by a city of a sewer emptying into a creek, for sewerage purposes, as distinguished from the draining of surface water, even in a slight degree, would be in derogation of the rights of an abutting landowner whose property would be traversed by the stream into which the sewer empties; and unless the right has been acquired by appropriation, such use may be enjoined by a landowner thus situated without waiting until the threatened injury has resulted in material damage. Whitney v. Toledo, 8 Ohio C. C. (N. S.) 577.

80. Injury resulting from noisome odors, producing personal discomfort, is not susceptible of compensation in damages according to any approximately accurate measure, and from its recurrence would lead to a multiplicity of suits and hence affords ground for equitable intervention by injunction. United States v. Luce, 141 F. 385.

81. See 6 C. L. 21.

82. Akin v. Jaudon, 124 Ga. 494, 52 S. E. 768. Equity will protect a land owner in possession from any unauthorized interference therewith. Town of Syracuse v. Weyrick [Ind. App.] 76 N. E. 559.

83. Sillasen v. Winterer [Neb.] 107 N. W. 124.

84. Musselshell Cattle Co. v. Woolfolk [Mont.] 85 P. 874; Huxford v. Southern Pine Co., 124 Ga. 181, 52 S. E. 439; Sadlier v. New York, 185 N. Y. 408, 78 N. E. 272; Martin v. Patillo [Ga.] 55 S. E. 240. Equity will enjoin the continuance of a trespass where it appears that the complainant has not an adequate remedy by an action at law, or would require numerous actions to redress the wrong. Coleman v. Elliott [Ala.] 40 So. 666. An injunction will not issue to restrain the commission of an ordinary trespass where the injury flowing from it is not irreparable and where an adequate remedy may be had in the recovery of damages against a solvent party. It will issue though where the injury threatened is continuous or would require a multiplicity of suits. Strother v. American Cooperage Co., 116 Mo. App. 518, 92 S. W. 758.

85. Brassington v. Waldron, 143 Mich. 364, 12 Det. Leg. N. 1011, 107 N. W. 100. When a bill to enjoin a trespass alleges facts showing that irreparable damage will result if not enjoined, it is not necessary to allege or prove the insolvency of the defendant. McConnell Bros. v. Jones Naval Stores Co., 125 Ga. 376, 54 S. E. 117. In order to sustain an injunction against an act of trespass on the ground that the injury occasioned thereby is irreparable, the facts constituting such irreparable injury must be alleged and proved. Pence v. Carney, 58 W. Va. 296, 52 S. E. 702. In ordinary cases of trespass the remedy at law is adequate and injunction to restrain a trespass will not lie except under special circumstances, hence the complaint ought to make out a clear case for equitable relief as the courts of law ought not otherwise to be deprived of jurisdiction. The complaint should allege facts showing that without equitable relief complainant will suffer irreparable injury or that his remedy at law is not adequate. Bledsoe v. Robinett [Va.] 54 S. E. 861.

86. Will not issue when adequate remedy at law in an action for damages. Musselshell Cattle Co. v. Woolfolk [Mont.] 85 P. 874. Injunction will not lie to restrain an ordinary trespass where injury resulting from it would not be irreparable, and where an adequate remedy may be had in a recovery of damages against a solvent party, but it will lie where acts threatened are ruinous to the property trespassed on or of a character to impair its just enjoyment in the future. Graden v. Parkville, 114 Mo. App. 527, 90 S. W. 115. When one stockgrower threatens to exclude the cattle of another from the public lands where both have an equal right to graze their cattle, equity will not enjoin such threatened exclusion where it does not appear defendant is insolvent, since plaintiff would have an adequate remedy by an action for damages. Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 P. 364.

87. Where there is a **dispute whether** the wall of a building stands wholly on the land of the owner of the building or in part on the land of the adjoining owner, equity will en-

plainant's land is not a sufficient ground for issuing an injunction where it does not appear that a repetition thereof is threatened,[89] though under some circumstances a mandatory injunction will issue to compel the restoration of the land to the condition in which the trespasser found it.[90] In such a suit the complainant must show that he has title[90] or possession and the entire right to possession as against the defendant,[91] and he must be free from laches.[92] Possession under color of title is sufficient.[93] Mere possession of public lands is not sufficient,[94] though one in possession under claim of right will be protected in his possession pending a proceeding before a government department to determine his claim.[95] Cases discussing the propriety of the granting of relief under various circumstances which constitute a trespass, such as cutting trees off of complainant's land,[96] navigating

join such adjoining owner from using the wall as a **party wall** pending the determination of the disputed fact by the courts when the owner of the building is in peaceable possession. Mathis v. Strunk [Kan.] 85 P. 590. Where a plaintiff is in possession of property which the **defendant claims by adverse title,** and the defendant is threatening acts which will tend to the destruction of the estate, the prayer of the plaintiff for an injunction will be granted until such time as the defendant establishes his title by an action at law. Harding v. Perin, 8 Ohio C. C. (N. S.) 533.

88. Healy v. Smith, 14 Wyo. 263, 83 P. 583; Hull v. Harker, 130 Iowa, 190, 106 N. W. 629.

89. Where a party trespasses on another's land and digs a ditch thereon which obstructs and is injurious to plaintiff's use of the land, equity will issue a mandatory injunction requiring defendant to fill the ditch and restore the land to its former condition. McRae v. Blakeley [Cal. App.] 84 P. 679.

90. Equity will not enjoin a trespass unless it appears that plaintiff has title to the land on which the trespass is threatened, unless it is sought to establish the title in an action at law and the injunction is sought pending its determination, nor unless the threatened injury is irreparable. East Lake Lumber Co. v. East Coast Cedar Co. [N. C.] 55 S. E. 304. In Virginia complainant in a suit to enjoin a trespass, where he claims under a paper title, should generally exhibit his title papers or copies thereof, or such of them at least as will make out a prima facie title. An allegation that he is the owner of the land is insufficient. If he relies upon possession to make out his title he should state facts on which he bases his claim of possession so that the court can see from the title papers filed and the facts stated that he has a prima facie title. Bledsoe v. Robinett [Va.] 54 S. E. 861.

Dowress may enjoin **before assignment** of dower. Delaney v. Manshum [Mich.] 13 Det. Leg. N. 876, 109 N. W. 1051.

91. One tenant in common cannot maintain such a suit against another tenant in common. Country Club Land Ass'n v. Lohbauer, 97 N. Y. S. 11. Before one claiming ownership of land can maintain a suit to enjoin the cutting of timber thereon, he must show that he has title or is in possession; if he relies only on possession he must show actual possession of that part of the land on which the cutting is threatened to be made. Downing v. Anderson [Ga.] 55 S. E. 184.

92. If a trespasser is permitted to expend a large sum of money in the erection of a permanent building without protest from the owner of the land, or any attempt by the owner to assert his rights for a long period, equity will not favor a late assertion of such stale rights by injunction, but will leave the parties to their remedy at law, or if estoppel is pleaded will lean favorably toward such a defense. McCleery v. Alton, 8 Ohio C. C. (N. S.) 481.

93. A railroad company in possession of a tract of land under color of title can restrain another from forcibly taking possession of it and tearing up its tracks; the latter's remedy if it claims title is by ejectment. Donora Southern R. Co. v. Pennsylvania R. Co., 213 Pa. 119, 62 A. 367. One in the lawful and peaceable possession of real estate, especially if it be his dwelling, may enjoin repeated and riotous acts of invasion and trespass until the title and right of possession can be determined in some regular and orderly way. Heaton v. Wireman [Neb.] 105 N. W. 634.

94. Clemmons v. Gillette [Mont.] 83 P. 879. One stock grower cannot enjoin another from pasturing his stock on public lands, though he had first occupied it for pasturage purposes. Healy v. Smith, 14 Wyo. 263, 83 P. 583.

95. Where two claimants of land under alleged homestead entries are litigating their rights in the tribunals having exclusive jurisdiction (Fed. Land Office), the state courts have jurisdiction to enjoin one of them from forcibly ousting the other from possession pending the determination of their rights before the land office officials. Zimmerman v. McCurdy [N. D.] 106 N. W. 125.

96. Equity will not enjoin the cutting of timber unless it is shown that an irreparable injury to the property will result, that the destruction of the timber will render the freehold less susceptible of enjoyment, or the acts of trespass are of a nature to constitute a nuisance, or unless it is shown that the defendant is insolvent and cannot be compelled to respond in damages. Thus it will issue where the market value of the timber would not compensate plaintiff, he having built a saw mill to saw it. Hall v. Wellman Lumber Co. [Ark.] 94 S. W. 43. Under Acts N. C. 1885, p. 684, c. 401, in an application for an injunction to restrain the outting of timber trees, it is not necessary

boats over complainant's oyster beds so as to injure them,[97] the removal of property constituting a part of complainant's land therefrom,[98] the imposition by a railroad of a greater servitude in its use of a track than was authorized by the grant of the right of way,[99] the appropriation and use by one railroad company of another's right of way,[1] the use of plaintiff's land on the bank of a river for storing logs,[2] are referred to in the notes.

Conspiracies by labor unions.—Equity will enjoin unlawful acts threatened in furtherance of a conspiracy by a labor union intended to ruin plaintiff's business unless he "unionizes" his place of business or accedes to demands made,[3] but not to restrain defendant from expressing his opinions when not accompanied by acts of intimidation.[4]

(§ 2) *J. Crimes.*[5]—Equity will not enjoin the commission of a crime as such.[6] If, however, the threatened criminal acts will interfere with the liberties, rights, and privileges of citizens, the state not only has the right but it is its duty to enjoin the commission thereof.[7] So too such a proceeding may be maintained by a private person where he would be injured in his property rights by the unlawful acts sought to be enjoined.[8] Equity will not interfere to prevent the enforcement of the

to allege and prove insolvency. Under Revisal 1905, § 808, if each of the parties in good faith asserts title both will be enjoined pending determination of title. Under § 809, if one party in the opinion of the trial judge asserts title in good faith and the other is not asserting title in good faith, the court may refuse an injunction against the former on his giving bond. East Lake Lumber Co. v. East Coast Cedar Co. [N. C.] 55 S. E. 304.

97. Cain v. Simonson [Ala.] 39 So. 571.

98. An injunction will lie to restrain the removal of property from the plaintiff's land which has been attached thereto so as to become a part thereof by one claiming title to it by a bill of sale from the former owner of the land. Plaintiff is not confined to his remedy at law. State Security Bank v. Hoskins, 130 Iowa, 339, 106 N. W. 764.

99. Where the grant permitted the laying of a spur-track across the land of the grantor with the condition and limitation that the track can be used only for certain specified business, injunction will lie to prevent the carrying of a greatly increased business over this track without compensation to the owner. Collins v. Craig Shipbuilding Co., 7 Ohio C. C. (N. S.) 350. The fact that the owner of the land in such a case might tender a deed and demand compensation for the land occupied by the track is no defense to an action to enjoin the railroad company from unlawfully continuing its use and possession of the property. Id.

1. Where one railroad company has adopted and taken possession of a right of way on which it proposes to locate its road bed, equity will enjoin another railroad from using or interfering with plaintiff's use of such right of way. Arizona & C. R. Co. v. Denver, etc., R. Co. [N. M.] 84 P. 1018. Equity will enjoin one railroad from entering on the right of way of another road and building a track thereon pending the determination of an action of ejectment. Colorado Eastern R. Co. v. Chicago, etc., R. Co., 141 F. 898.

2. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.

3. Purvis v. Local No. 500 United Brotherhood of Carpenters and Joiners, 214 Pa. 348, 63 A. 585; New York & L. I. R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316. An employer may maintain a suit to enjoin a labor union and its members from intimidating and bribing his nonunion employes to induce them to quit his service. Everett Waddey Co. v. Richmond Typographical Union No. 90 [Va.] 53 S. E. 273. Equity will enjoin persons who have conspired to boycott plaintiff and who picket his place of business and intimidate customers from entering such place of business. Goldberg, Bowen & Co. v. Stablemen's Union [Cal.] 86 P. 806.

4. An injunction in an action to enjoin a labor union from boycotting plaintiff and from picketing his place of business and intimidating prospective customers from entering such place of business, so far as it enjoins defendants from at any time or place expressing an opinion about plaintiff or his methods of business, is too broad and to that extent without the jurisdiction of the court and should be stricken from the decree. Goldberg, Bowen & Co. v. Stablemen's Union [Cal.] 86 P. 806.

5. See 6 C. L. 22.

6. People v. Tool [Colo.] 86 P. 224; Levy v. Kansas City [Kan.] 86 P. 149.

7. People v. Tool [Colo.] 86 P. 224. The attorney general of the United States may maintain a suit to enjoin violations of the Elkins Act. United States v. Milwaukee Refrigerator Transit Co., 145 F. 1007.

8. People v. Tool [Colo.] 86 P. 224. Equity may enjoin the doing of acts which would constitute a crime where such acts will affect property rights. United States v. Milwaukee Transit Co., 145 F. 1007. That the Anti-Trust Act makes a conspiracy in restraint of trade a crime and provides a penalty does not necessarily impair the ordinary jurisdiction of equity where the criminal acts work irreparable injury to property. Being but declaratory of the common

criminal laws,[9] nor will it enjoin the police from interfering with one who is about to commit a crime.[10] Hence it will not enjoin police officers from maintaining an espionage over suspected places,[11] or from entering and remaining in such suspected places,[12] unless it appears that they are acting willfully, ignorantly, or maliciously.[13] Any police espionage or picketing which does not amount to a trespass will not be enjoined under any circumstances.[14]

§ 3. *Suits or actions for injunction.*[15] *Necessity of suit or action.*—A judge has no power to issue an order for an injunction except in a pending suit,[16] and one cannot be summarily issued against a person not a party to the pending suit.[17] A second injunction will not be granted while the first is in force, even though at the suit of another party, if acting in the same interest,[18] nor should one be issued on a cause of action already determined in favor of respondent.[19] An ancillary injunction necessarily falls with the main suit.[20]

Jurisdiction.[21]—In some instances the appellate courts have original jurisdiction of certain classes of suits for injunction.[22] The jurisdiction may be dependent on the amount in controversy,[23] as is the case in the Federal courts,[24] unless the in-

law under which any one might invoke equitable jurisdiction in case of such conspiracies to prevent irreparable injuries. Leonard v. Abner-Drury Brew. Co., 25 App. D. C. 161.

9. Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209.

10. Though he claims to be doing so under a municipal license, since such license is void. Levy v. Kansas City [Kan.] 86 P. 149.

11. Stevens v. McAdoo, 112 App. Div. 458, 98 N. Y. S. 553. Will not enjoin police officers from standing outside a place having a liquor tax certificate when they suspect it of being a disorderly house and warning people about to enter that it is liable to be raided at any time as such and that persons found therein are liable to arrest. Delaney v. Flood, 183 N. Y. 323, 76 N. E. 209.

12. Cleary v. McAdoo, 113 App. Div. 178, 99 N. Y. S. 60.

13. The courts will not by injunction interfere to prevent arrests or the enforcement of the criminal laws by the police so long as they keep within their proper sphere, but will do so when they act without their authority and are either willfully, ignorantly, or maliciously committing or threatening to commit trespasses by posting officers in plaintiff's premises, where there is no evidence that the law has been or is about to be violated. Burns v. McAdoo, 113 App. Div. 165, 99 N. Y. S. 51. Police officers may be restrained from trespassing on complainant's premises, for the purpose of detecting unlawful acts which they bona fide suspect of being carried on there, where their suspicions are not founded on any recent act of complainant. Levy v. Bingham, 118 App. Div. 424, 99 N. Y. S. 258; McGorie v. McAdoo, 118 App. Div. 271, 99 N. Y. S. 47, rvg. 49 Misc. 601, 99 N. Y. S. 1107; Hagan v. McAdoo, 113 App. Div. 506, 99 N. Y. S. 255.

14. Hence officers will not be enjoined from standing in the approaches to plaintiff's premises where it appears he has no right therein other than an easement of access to his premises. Burns v. McAdoo, 113 App. Div. 165, 99 N. Y. S. 51.

15. See 6 C. L. 22.

16. Where immediately after the signing of the order the petition is filed with the clerk so as to institute the action, the two acts will be deemed to have been done simultaneously and the order issued in a pending action. Barnett v. Schad [Kan.] 85 P. 411.

17. State v. District Ct. of First Judicial Dist. [Mont.] 85 P. 525. An injunctional order cannot have any effect on persons who are not directly or indirectly parties to the bill in the action in which it is issued. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81.

18. Police Jury of Avoyelles v. Mansura, 116 La. 1043, 41 So. 251. Citizens and taxpayers of a city cannot institute a suit for an injunction to restrain action by a water company under the terms of an ordinance of the city, where the city itself has already commenced a similar suit on the same cause of action, since in such matters the city represents the taxpayers. Griffith v. Vicksburg Waterworks Co. [Miss.] 40 So. 1011.

19. The district court has no power or authority to again issue in the same case an injunction which has, on appeal, been dissolved by the supreme court. Kerns v. Morgan, 11 Idaho, 572, 83 P. 954.

20. Day v. Bailey, 117 La. 154, 41 So. 448.

21. See 6 C. L. 23, n. 75.

22. The supreme court of Colorado has jurisdiction to issue, in the first instance, an injunction to restrain the carrying out of a conspiracy to do acts which would result in the fraudulent perversion of the elective rights of citizens and the casting and counting of illegal votes at an election. People v. Tool [Colo.] 86 P. 224.

23. Under Gen. Laws Md. 1904, art. 16, § 102, a court of equity has no jurisdiction to issue an injunction to restrain the collection of a tax amounting to less than twenty dollars. Kenneweg v. Allegany County Com'rs, 102 Md. 119, 62 A. 249. In Texas the district courts have power to issue injunctions, in cases in which a court of chancery under the settled rules of equity would have power to issue them, without reference to the amount in controversy. Callaghan

junction is sought for the protection or enforcement of its jurisdiction in another suit.[25] A state court will not entertain a bill for an injunction where prior to the application to the state court a bill has been filed in the Federal courts on the same cause of action.[26] The Federal courts will not interfere with the management of a corporation organized under the laws of a state other than that in which it sits except on the clearest and most cogent grounds.[27] If the injunction is ancillary to other proceedings it may properly be brought in the court having jurisdiction of such proceedings.[28] Two or more courts may have concurrent jurisdiction.[29]

Parties.[30]—Anyone in interest may enjoin an unlawful act which operates to his prejudice and the wrongdoer cannot complain that another having a joint or common interest has not been joined as a party plaintiff.[31] Parties seeking relief against the same injury on same ground may join as complainants, though their interests are several.[32] The United States can maintain such a suit and can sue, not in its sovereign capacity, but as a property owner, when its property rights are affected, under the same circumstances as could a private person or corporation.[33] The commissioners of the District of Columbia may maintain a bill in their official capacity against nuisances in the streets though the fee of the streets is in the United States.[34] An injunction will not be granted at the suit of a private citizen to protect public interests,[35] unless he has suffered or is threatened with some damage peculiar to himself.[36] Thus, where a nuisance sought to be enjoined is of a public nature, the action

v. Tobin [Tex. Civ. App.] 14 Tex. Ct. Rep. 269, 90 S. W. 328.

24. A bill filed in the U. S. circuit court to enjoin the scalping of nontransferable railroad tickets held to show that the amount in controversy exceeded two thousand dollars and hence the court had jurisdiction. Louisville & N. R. Co. v. Bitterman [C. C. A.] 144 F. 34.

25. An injunction to sustain the jurisdiction of a court already rightfully acquired and held is not forbidden by U. S. Stat. § 720. Railroad Commission v. Texas & P. R. Co. [C. C. A.] 144 F. 68. A Federal court has jurisdiction, though there be no Federal question involved, nor diversity of citizenship, to enjoin an action, judgment, or proceeding of which the court has jurisdiction where equitable grounds for such intervention exist. In the absence of some such equitable ground the action at law will not be enjoined. Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610.

26. Griffith v. Vicksburg Waterworks Co. [Miss.] 40 So. 1011.

27. Gaines v. Supreme Council of Royal Arcanum, 140 F. 978.

28. In South Carolina a suit to enjoin condemnation proceedings should be brought in the court of common pleas, as such a suit is regarded as ancillary to the condemnation proceedings. Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996. Civ. Code Prac. Ky. 285, does not require that a suit to enjoin an execution sale should be brought in the court in which the judgment was rendered where such suit is instituted by a person not a party to the action in which the judgment was rendered. Robinson v. Carlton, 29 Ky. L. R. 876, 96 S. W. 549.

29. Under Laws 29th Leg. c. 153, the district court has jurisdiction to enjoin the maintenance of a gambling house, though the county court has concurrent jurisdiction. Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492.

30. See 4 C. L. 111.

31. Police Jury of Lafourche v. Robichaux, 118 La. 288, 40 So. 705. A lessee of a railroad has such an interest therein as will support a suit in equity to enjoin another road from unlawfully crossing its tracks. Pennsylvania Co. v. Lake Erie, etc., R. Co., 146 F. 446. Stockholders in a corporation may maintain a suit for injunction to protect the property of the corporation where the officers refuse or fail to act. Starr v. Shepard [Mich.] 13 Det. Leg. N. 528, 108 N. W. 709. Heirs need not be joined by dowress suing before assignment to restrain trespass. Delaney v. Manshum [Mich.] 13 Det. Leg. N. 876, 109 N. W. 1051.

32. Owners in severalty of property abutting on street may join in suit to restrain interference with street. Nichols v. Sadorus, 120 Ill. App. 70.

33. Mountain Copper Co. v. U. S. [C. C. A.] 142 F. 625.

34. They have control and regulation of streets and as such may sue. Guerin v. Macfarland, 27 App. D. C. 478. Query whether it could be maintained in the name of the district. Id.

35. Ruthstrom v. Peterson, 72 Kan. 679, 83 P. 825. Private person cannot maintain a suit to enjoin a state board from doing certain alleged unlawful acts where the injury which they would suffer does not differ in kind from that which would be suffered by the people at large. Such a suit could be maintained only by the state. Duncan v. Heyward [S. C.] 54 S. E. 780.

36. Will not enjoin holding political convention at inconvenient distance from petitioner's residence. McDonald v. Lyon [Tex. Civ. App.] 95 S. W. 67. To authorize an injunction to abate a public nuisance at the suit of a private person it must appear that

should be instituted by the appropriate public law officer,[37] but the fact that abutting owners are joined as complainants will not affect such attorney's right to maintain the suit.[38] Persons who suffer some special injury therefrom, aside from and independent of the general injury sustained by the public, can maintain such a suit. To be special the injury must differ in kind and not merely in extent and degree from that sustained by the public.[39] A private plaintiff must show that a public nuisance is specially injurious to him.[40] The attorney general[41] or a taxpayer may enjoin an unlawful disposal of public moneys,[42] but a private individual complainant must show special injury.[43] A taxpaying corporation may stand as plaintiff.[44] In some instances the statutes expressly authorize the maintenance of certain classes of injunction suits by taxpayers.[45] The performance of a public contract, though technically illegal, will not be restrained at the instance of a citizen who suffers no special injury or detriment.[46]

All persons whose rights would be affected by the granting of the relief should be joined as parties defendant.[47] It is not necessary to join a municipal corporation as a party defendant where relief is sought against one of its servants threatening an unlawful and unauthorized act,[48] nor when the officers who alone have power to do the act sought to be enjoined are made parties.[49]

he will be injured in some peculiar and special manner other than the general public. Davis v. Baltimore & O. R. Co., 102 Md. 371, 62 A. 572. One seeking to enjoin an unlawful use by another of public land must show that he will suffer some special damage different and greater than that suffered by the public. Thus an obstruction of a lake shore in front of the land of a riparian owner which depreciates the value of complainant's property is such special damage as will authorize the suit by such owner. Davies v. Epstein, 77 Ark. 221, 92 S. W. 19.

37. State v. Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153. Obstruction of street may be enjoined at the instance of the state's attorney on behalf of the public. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.

38. Regardless of right of such owners to maintain such suit. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.

39. Anthony Wilkinson Live Stock Co. v. McIlquam, 14 Wyo. 209, 83 P. 364. One who is prevented from traveling in a direct route to and from his residence sustains such special damage from obstruction of a highway as will authorize maintenance of suit by him. Sloss-Sheffield Steel & Iron Co. v. Johnson [Ala.] 41 So. 907.

In Illinois an abutting property owner cannot enjoin a railroad company from laying a switch track in or elevated over a public street of a city. The right of action is vested solely in the state or city and should be instituted by the attorney general or the city. Thornton v. Stevens Coal Co., 117 Ill. App. 376.

40. Ruthstrom v. Peterson, 72 Kan. 679, 83 P. 825; Bischof v. Merchants' Nat. Bank [Neb.] 106 N. W. 996; First Nat. Bank v. Tyson, 144 Ala. 457, 39 So. 560.

41. Brown v. State [Kan.] 84 P. 549.

42. Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099; Lindblad v. Board of Education, 221 Ill. 261, 77 N. E. 450; Shoemaker v. Des Moines, 129 Iowa, 244, 105 N. W. 520. Officer may sue as individual taxpayer (Gillespie v. Gibbs [Ala.] 41 So. 868) but city should be joined (Id.). Taxpayers and residents of a county can enjoin the illegal expenditure of the county funds. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540.

43. Competition due to city's engaging in complainant's line of merchandising. Baker v. Grand Rapids, 142 Mich. 687, 12 Det. Leg. N. 879, 106 N. W. 208.

44. Owensboro Water Works Co. v. Owensboro, 29 Ky. L. R. 1118, 96 S. W. 867.

45. Under Code Civ. Proc. S. C. 1902, § 138, taxpayers may maintain a bill to enjoin the illegal expenditure of county funds without joinder of the county as a party plaintiff. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540. In N. Y. under Laws 1881, c. 531, p. 709, a taxpayer upon an assesement exceeding $1,000 may maintain a suit to enjoin a municipality from issuing bonds for the erection of a municipal light plant, it not having taken the prerequisite steps to make such issue lawful. Potsdam Electric Light & Power Co. v. Potsdam, 49 Misc. 18, 97 N. Y. S. 190.

46. Agreement that students in state school of pedagogy shall teach in public schools held to divert local funds to state uses and hence enjoined. Lindblad v. Board of Education, 221 Ill. 261, 77 N. E. 450, rvg. 122 Ill. App. 617. The allegation that local school funds are being paid for trainers or critics for such student teachers supports the bill. Id. See, also, ante, § 2C.

47. An action against a municipal corporation to enjoin the payment of warrants issued by it is defective for want of parties defendant where the owners of the warrants are not joined as parties defendant. State v. Gormley, 40 Wash. 601, 82 P. 929. In an action by a taxpayer to enjoin the performance of a contract entered into by a municipal corporation on the ground the officers acting for the corporation are without authority, the contractor should on his application be joined as a party defendant. Walter v. McClellan, 48 Misc. 215, 96 N. Y. S. 479.

Pleading and evidence.[50]—In a suit for injunction the pleadings must allege clearly and definitely the facts on which complainant relies for the relief prayed.[51] It must allege facts and not opinions or legal conclusions,[52] thus, an allegation that the doing of the threatened acts will work an "irreparable injury" to complainant is insufficient.[53] So too, an allegation that complainant "has not an adequate remedy at law" is an allegation of a conclusion.[54] Plaintiff must aver an interest in the subject-matter or plead his liability to injury if the threatened act be done.[55] General allegations of threatened harm are insufficient.[56] An injunction will not issue to restrain the breach of a contract on a ground and for a reason not assigned in the bill seeking it,[57] nor will such relief be afforded when not asked for in the bill.[58] There must be a well pleaded cause of action to support injunction pendente lite.[59] A bill for an injunction is not multifarious where the several acts of the several de-

48. A city should not be joined as a party defendant in a suit to enjoin a trespass by one of its officers, since it is not doing the act and can in no way authorize another to do an unlawful act. Quinn v. Schneider, 118 Mo. App. 39, 94 S. W. 742.

49. In a suit to enjoin the collection of an illegal tax by a municipality it is not necessary to join the city as a party defendant when the council and mayor have been made parties. Campbell v. Bryant, 104 Va. 503, 52 S. E. 638.

50. See 6 C. L. 22-24.

51. Shulman v. Star Suburban Realty Co., 113 App. Div. 759, 99 N. Y. S. 419. Complainant must allege in his bill every fact clearly and definitely that is necessary to entitle him to the injunction. Godwin v. Phifer [Fla.] 41 So. 597.

52. Godwin v. Phifer [Fla.] 41 So. 597; Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 40 So. 981. An allegation in a suit to enjoin an officer purporting to act under a municipal ordinance, to restrain the officer from trespassing on complainant's property for the purpose of opening a street, that the ordinance is invalid is not sufficient but should allege the facts and circumstances which make it invalid. Quinn v. Schneider, 118 Mo. App. 39, 94 S. W. 742. Where an injunction is sought to enjoin a public board from accepting and paying for public work on the ground that they have fraudulently and collusively agreed to accept work not in accordance with the contract, the facts constituting the fraud must be alleged and proven. Board of Com'rs of La Porte County v. Wolff [Ind.] 76 N. E. 247.

53. Rabinovich v. Reith, 120 Ill. App. 409; Merced Falls Gas & Elec. Co. v. Turner, 2 Cal. App. 720, 84 P. 239. A mere general averment that the damages resulting from a wrongful act would be irreparable, being only a conclusion of the pleader, is generally not sufficient. It is necessary that the pleadings set forth the facts so that the court may determine whether the damages would be of that character. Huxford v. Southern Pine Co., 124 Ga. 181, 52 S. E. 439; Jennings-Heywood Oil Syndicate v. Heywood Oil Co., 117 La. 586, 42 So. 136. In a suit to enjoin another from maintaining an alleged nuisance on his own premises which will be injurious to plaintiff's occupancy of his residence, the bill must particularly allege facts showing how and to what extent the value and use of his premises will be impaired. Proximity of railroad siding as a private nuisance discussed. Davis v. Baltimore & O. R. Co., 102 Md. 371, 62 A. 572.

54. Where inadequacy of the remedy at law is alleged as a ground for injunctive relief in a court of equity, the bill must allege the facts showing that the remedy at law will be inadequate; a mere allegation that it will not is insufficient. Illinois Life Ins. Co. v. Newman, 141 F. 449. In a bill for an injunction to restrain the alleged unlawful sale of certain collateral held by defendant, an allegation "that the plaintiff would be irreparably damaged by the sale and that he has no adequate remedy at law" is an allegation of a conclusion, since it does not allege facts showing that defendant is insolvent and hence not amendable in an action for damages. Ehrich v. Grant, 111 App. Div. 195, 97 N. Y. S. 600.

55. Bill to restrain transfer of notes but failing to allege that complainants were liable on the notes. Leeds v. Illinois State Medical & Surgical Inst., 122 Ill. App. 650.

56. General allegation that executors in making settlement colluded with third party not sufficient to raise any question as to validity of settlement. Clark v. Peck [Vt.] 65 A. 14. General allegation that executors' account was misleading, untrue, and in fraud of petitioners' rights held insufficient to raise any question as to validity of account. Id. Bill held sufficient to plead a purposed sale of corporate stock to effect a monopoly. Dunbar v. American Tel. & T. Co., 224 Ill. 9, 79 N. E. 423. Bill to restrain disconnection of telephones held sufficient though general and vague in its allegations. Pekin Tel. Co. v. Farmers' Tel. Co., 120 Ill. App. 292.

57. Miles v. Pennsylvania Coal Co., 214 Pa. 544, 63 A. 1032. Injunction against disconnection of telephone lines was sought on contractual grounds. It could not be granted on grounds resting upon general nature and purpose of defendant company. Pekin Tel. Co. v. Farmers' Tel. Co., 120 Ill. App. 292.

58. N. Y. Code Civ. Proc. §§ 603-4 do not authorize the issuance of an injunction in an action for damages for breach of the covenants of a lease where the complaint does not ask for such relief. Leonard v. Schmidt, 103 App. Div. 549, 96 N. Y. S. 491.

59. Hollister v. Wohlfeil, 100 N. Y. S. 907.

fendants sought to be enjoined are parts of a conspiracy.[60] Ambiguity in the bill may be cured by admissions in the answer,[61] but the absence of necessary averments cannot be cured by an unresponsive answer.[62] Amendments may be allowed which do not change the character or substance of the bill.[63] The prayer for process should pray for an injunction.[64] An objection to a bill for an injunction that complainant has an adequate remedy at law should be taken before answering to the merits.[65] A bill for an injunction alleging the ownership of an island and of fishing rights pertaining thereto, and an answer admitting them, make a prima facie case for an injunction restraining trespass.[66] The officer of a corporation[67] or the agent or attorney of the complainant may verify,[68] but if so it must appear from the verification that he knows the contents of the bill. In Illinois the verification must be positive except as to matters peculiarly within defendant's knowledge,[69] and matter of positive verification should be distinguished from the other.[70]

Intention to commit injuries in the future may be implied from injuries of same kind in the past.[71] The effect of an allegation on information and belief may be destroyed by an antagonistic positive allegation.[72] Where the answer is responsive and denies the allegations of the bill, the burden is on complainant to establish its allegations.[73]

Trial.—In suits to enjoin a nuisance the defendant has no constitutional right to a jury trial of the issues of fact.[74] In a suit for injunction a court of equity will not undertake to determine in advance whether or not vessels and fixtures are being used for the unlawful sale of intoxicating liquor, as alleged by municipal officers who are about to seize and destroy them under authority found in 98 Ohio Laws, page 12.[75]

Appeals.—The general law of appeals,[76] and that relating specially to appeals from temporary injunctions,[77] are separately treated. Appeal must be by a party aggrieved[78] and the findings are reviewed as in chancery cases.[79]

60. Adams v. Oberndorf, 121 Ill. App. 497.
61. Admission that land embraced in ordinance granting defendant right to use its streets and public grounds was part of street obstruction of which was sought to be enjoined. Chicago, etc., R. Co. v. People, 120 Ill. App. 306.
62. County of Henry v. Stevens, 120 Ill. App. 344.
63. Striking out unnecessary averments permissible. Rice v. O'Neal, 120 Ill. App. 259.
64. Lasher v. Annunziata, 119 Ill. App. 653.
65. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 219.
66. Saginaw Lumber & Salt Co. v. Griffore [Mich.] 13 Det. Leg. N. 505, 108 N. W. 681.
67. A verification by the treasurer of an incorporated religious society suffices under standing rule 5, at least when first questioned on appeal. First Baptist Soc. v. Dexter [Mass.] 78 N. E. 342.
68. Baltimore Bargain House v. St. Clair, 55 W. Va. 565, 52 S. E. 660.
69. Leeds v. Illinois State Medical & Surgical Inst., 122 Ill. App. 650.
70. Christian Hospital v. People, 223 Ill. 244, 79 N. E. 72.
71. Breach of negative covenant in trade agreement. Rice v. O'Neal, 120 Ill. App. 259.
72. Allegation on information and belief that defendant was in possession of decedent's estate negatived by positive allegation that executors had possession. Clark v. Peck [Vt.] 65 A. 14.
73. Cain v. Simonson [Ala.] 39 So. 571.
74. People v. Tool [Colo.] 86 P. 224. Where in an equitable action to restrain waste and trespass the complainant has asked for treble damages for past acts of defendants in cutting timber, the frame of the bill being such as to indicate that the injunctive relief is the principal relief sought, the court will disregard the claim for damages and refuse defendant's motion for a jury trial. Page v. Herkimer Lumber Co., 109 App. Div. 391, 96 N. Y. S. 272.
75. Schmidt v. Brennan, 4 Ohio N. P. (N. S.) 289.
76. See Appeal and Review, 7 C. L. 128.
77. See post, § 4E.
78. A board of supervisors which has been enjoined from paying certain claims against their county which they had audited cannot maintain an appeal where the claimants were parties. The trial court should not, however, have taxed costs against the board, there being no substantiation of the allegation that they had acted fraudulently. Fitch v. Hay, 112 App. Div. 786, 98 N. Y. S. 1080.
79. While the findings of fact in injunction cases are not conclusive on appeal, still there is a presumption that the judgment and proceedings in the trial court are correct and the burden is on appellant to show error. Hyatt v. De Hart, 140 N. C. 270, 52 S. E. 781.

§ 4. *Preliminary injunction. A. Issuance and grounds.*[80]—A preliminary injunction is not a matter of right but rests in legal discretion,[81] and the exercise of such discretion will not be disturbed on appeal unless clearly erroneous.[82] It will not issue except where the complainant's bill and moving papers present a case clearly entitling him to the remedy.[83] On the other hand it is not necessary that he should make a showing which would entitle him to an injunction on final hearing.[84] A probable right and a probable danger that such right will be defeated in case the injunction is not issued is sufficient.[85] The relative hardships attendant upon granting or refusing the injunction will be considered.[86] The only purpose and effect of a temporary injunction is to preserve the existing status until the cause can be fully heard and determined.[87] It should not issue where its effect will be to deprive the defendant of the possession and use of his property.[88] Ordinarily a mandatory tem-

80. See 6 C. L. 24. See, also, ante, §§ 1, 2. For terms of order, see post, § 5.

81. Railroad Commission v. Texas & P. R. Co. [C. C. A.] 144 F. 68; Suwanee & S. P. R. Co. v. West Coast R. Co., 50 Fla. 609, 612, 39 So. 598; Godwin v. Phifer [Fla.] 41 So. 597; Colorado Eastern R. Co. v. Chicago, B. & Q. R. Co., 141 F. 898; Interborough Rapid Transit Co. v. New York, 47 Misc. 221, 95 N. Y. S. 886; Hurd v. Atchison, etc., R. Co. [Kan.] 84 P. 558; Hooks v. Brown, 125 Ga. 122, 53 S. E. 583. See, also, Ironclad Mfg. Co. v. Sugar Loaf Dairy Co., 140 F. 108; Isdale v. Hanson, 124 Ga. 393, 52 S. E. 618; McConnell Bros. v. Jones Naval Stores Co., 125 Ga. 376, 54 S. E. 117. In New York a court of equity has no inherent, absolute power to grant an interlocutory injunction, but only in such cases as is authorized by the Code of Civil Procedure. Bachman v. Harrington, 184 N. Y. 458, 77 N. E. 657. The granting or withholding of a preliminary injunction rests largely within the sound discretion of the trial court and will not be disturbed unless the court has erred in applying the legal principles which should have guided it. Where grave questions of law and disputed questions of fact, which the court must decide before rendering a final decree, are involved, it is within the discretion of the trial court to preserve the existing status until the final hearing, espscially where plaintiff gives bond. Railroad Commission v. Texas & P. R. Co. [C. C. A.] 144 F. 68. While a temporary injunction involves discretion, a permanent injunction does not, where the facts conclusively show that it would be inequitable and unjust. McClure v. Leaycraft, 183 N. Y. 36, 75 N. E. 961.

82. Currey v. McCurdy, 29 Pa. Super. Ct. 287; Gossard Co. v. Crosby [Iowa] 109 N. W. 483; Green v. Freeman [Ga.] 55 S. E. 45. Unless there has been a plain disregard of the facts or of the settled principles of equity applicable thereto, the exercise of discretion will not be disturbed on appeal. Vogel v. Warsing [C. C. A.] 146 F. 949. Decision of trial judge refusing temporary injunction will be reversed where it clearly appears from undisputed evidence that plaintiff is entitled to injunctive relief. Brown v. Atlantic & B. R. Co. [Ga.] 55 S. E. 24.

83. Star Co. v. Colver Pub. House, 141 F. 129. Where the plaintiff's right to the equitable relief sought is involved in doubt, the court will not grant an injunction pendente lite containing the same relief that would ultimately be granted if the plaintiff succeeded on the merits. Butterick Pub. Co. v. Typographical Union No. 6, 50 Misc. 1, 100 N. Y. S. 292. In granting a preliminary injunction great caution should be exercised. It ought not to be awarded merely for a tentative purpose but only in a case where it is shown that there is an impending injury or urgent necessity which demands the immediate interposition of a writ of injunction. City of Laporte v. Scott [Ind.] 76 N. E. 878. The supreme court will not issue a restraining order pending an appeal to preserve existing conditions where to do so would be inequitable and it appears from the record that appellant will not be entitled to the relief sought. State v. Newton County Com'rs [Ind. App.] 76 N. E. 308. The allegations of a bill seeking an injunction must be clear, direct and certain, and to authorize an injunction pendente lite allegations of the bill on information and belief must be substantiated by the affidavit of the person or persons having direct knowledge of the facts alleged. Godwin v. Phifer [Fla.] 41 So. 597. Injunction to restrain waste of decedent's estate and destruction of papers relating thereto refused on ground that bill did not show that estate was in defendant's possession but showed that it was in possession of executors. Clark v. Peck [Vt.] 65 A. 14.

84. City of Laporte v. Scott [Ind.] 76 N. E. 878.

85. Colorado Eastern R. Co. v. Chicago, etc., R. Co., 141 F. 898.

86. Rose v. Smith, 121 Ill. App. 591. See, also, ante, § 1.

87. Rose v. Smith, 121 Ill. App. 591. To restrain defendant from disposing of corporate stock given him by complainant pending suit to rescind gift. Swift v. McCormick, 121 Ill. App. 556; Colorado Eastern R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 898; Ford v. Taylor, 140 F. 356. In Georgia a mandatory interlocutory injunction will not issue if the substantial relief sought thereby is affirmative. Brown v. Atlantic & B. R. Co. [Ga.] 55 S. E. 24. Injunction allowed against sale of copyrighted book before certain date contrary to contract with owner of copyright. Authors & Newspapers Ass'n v. O'Gorman Co., 147 F. 616.

88. State Road Bridge Co. v. Saginaw Circuit Judge, 143 Mich. 337, 12 Det. Leg. N. 1015, 106 N. W. 394. Defendant not substantially harmed by being restrained from selling copyrighted book at a loss for ad-

porary injunction will issue only where some act on the part of defendant is necessary to preserve the existing status and the doing of such act is not the one sought to be coerced by the final decree.[89] A temporary injunction or restraining order can only be issued in a pending suit.[90] To authorize the issuance the bill or complaint should allege facts entitling complainant to injunctive relief.[91] If the allegations of the bill are on information and belief, such allegations should be corroborated by the affidavit of some person having personal knowledge of the facts.[92] A preliminary injunction will not be granted where the proofs leave the court in serious doubt respecting the plaintiff's right, or where it is not apparent that the ultimate determination of the suit in plaintiff's favor is reasonably probable.[93]

Notice of application.[94]—The granting or refusing of a temporary injunction without notice to the party sought to be enjoined rests largely in the discretion of the trial court.[95] Ordinarily it will issue without notice only where the exigency is extreme and the giving of notice would accelerate the doing of the threatened injury before the court would be able to act.[96] In some jurisdictions the statutes prohibit issuance without notice except where it appears that complainant will be unduly prejudiced unless it is issued without notice.[97] In such cases the bill or accompanying affidavits must allege facts showing the existence of the exigency, an allegation that plaintiff will be unduly prejudiced or that irreparable damage will be sustained if not issued without notice is insufficient,[98] and the bill or proofs must be verified.[99]

vertising purposes and for purpose of competing with owner of copyright. Authors & Newspapers Ass'n v. O'Gorman Co., 147 F. 616.

89. Mandatory injunction: Where the complaint presents a case showing or tending to show that affirmative action by the defendant of a temporary character is necessary to preserve the status quo, then a mandatory temporary injunction may issue, but if the act sought to be enforced is not continuous in its character, but solely the one sought to be decreed by final judgment, then the issuing of a mandatory temporary injunction is without authority. Bachman v. Harrington, 184 N. Y. 458, 77 N. E. 657. In a suit to enjoin the erection of a bow window extending beyond a certain line into the street in violation of the terms of an agreement, it is not proper for an injunction pendente lite to require the taking down of the structure completed at the time of the commencement of the suit, since such relief is the purpose of the suit and should be granted only on the final hearing. Williams v. Silverman Realty & Const. Co., 111 App. Div. 679, 97 S. W. 945.

90. Under Bal. Codes § 4869, an action is commenced by service of a summons or by the filing of a complaint, provided defendants are served within 90 days, hence an action is commenced by filing of a complaint so as to authorize the issuance of a restraining order in a suit for injunction. State v. Nicoll, 40 Wash. 517, 82 P. 895. See, also, ante, § 3.

91. Under N. Y. Code, § 603, an injunction pendente lite is not authorized unless the complaint sets up facts which would entitle complainant to injunctive relief; it is not enough that the facts are set up in affidavits presented in support of the motion. Goldman v. Corn, 111 App. Div. 674, 97 N. Y. S. 926.

92. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. But an injunction issued on notice will not be reversed on appeal, though the averments of the bill were made on information and belief and without the affidavit of any person having personal knowledge, where the averments of the bill were not denied by respondent. Id.

93. Injunction to restrain breach of contract refused. Empire Circuit Co. v. Jermon, 147 F. 532.

94. See 6 C. L. 26, n. 21.

95. State v. Nicoll, 40 Wash. 517, 82 P. 895. Whether a court has abused its discretion in issuing an injunction pendente lite without notice to respondent must of course be determined from the circumstances of the particular case. Anderson v. Hultberg, 117 Ill. App. 231.

96. The summary issuance of a mandatory injunction in vacation by a judge should not be done unless the exigency is extreme, the threatened danger practically certain, and the consequent irremediable injury imminent. If these conditions do not exist the injunction should issue only after a trial of the facts. Hager v. New South Brewing Co., 28 Ky. L. R. 895, 90 S. W. 608.

97. A temporary injunction against a municipal corporation should not be issued without notice except in a very clear case of urgency. City of Chicago v. Farson, 118 Ill. App. 291. An injunctional order at the suit of an abutting owner to restrain the corporation from levying an improvement assessment, and the issuance of certificates based on such assessments, cannot be considered as having the effect to stop the ordinary business of the corporation within the meaning of Code § 4359, and hence may issue without notice to the municipality. Wingert v. Snouffer [Iowa] 108 N. W. 1035.

98. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27; South Park Com'rs v. Farson, 119

Objection for want of notice of application for injunction is waived by appearance and motion to dissolve,[1] or by appearing and resisting an application for an injunction.[2]

(§ 4) *B. Bonds.*[3]—In most jurisdictions the giving of a bond is a condition precedent to the issuance of a preliminary injunction.[4] Failure to exact the prerequisite undertaking as required by a long established rule of court ousts the jurisdiction and voids the order.[5] Appearing to the suit does not waive this objection unless knowingly ignored.[6] Statutory requirements as to execution and justification of sureties on the bond must be complied with.[7] A motion to dissolve for inadequacy of the bond should not be granted without giving complainant an opportunity to give additional security.[8]

(§ 4) *C. Dissolution, modification or continuance; reinstatement.*[9]—The continuance, modification, or dissolution of a temporary injunction is largely within the discretion of the court issuing it.[10] It follows that the defendant is not entitled to a dissolution, as a matter of course, even though the answer denies all the equities of the bill.[11] The appellate courts will interfere only in case it clearly appears that there has been an abuse of such discretion.[12] A preliminary injunction once grant-

Ill. App. 337. An allegation that irreparable damage will be suffered if not issued without notice is a mere conclusion and insufficient. City of Chicago v. Farson, 118 Ill. App. 291. To authorize the issuance of an injunction without notice to respondent the bill or affidavit should state facts showing how and why the giving of notice would accelerate or precipitate the injury apprehended and sought to be enjoined. It is not enough to allege that such would be the case. Godwin v. Phifer [Fla.] 41 So. 597. Under Rev. St. c. 69, § 3, in order to authorize issuance of injunction without notice, either bill or affidavits must contain such allegations of fact under oath as will lead court to reasonable conclusion that otherwise complainant will be "unduly prejudiced." Rose v. Smith, 121 Ill. App. 590; Pepper Distributing Co. v. McLeod, 121 Ill. App. 592. Where tenant in violation of covenants in year's lease had twice removed "to rent" sign and only one month of term was unexpired, injunction without notice was authorized under R. S. c. 39, § 3, on ground that otherwise complainant would be "unduly prejudiced." Stafford v. Swift, 121 Ill. App. 508.

99. Verification of allegations on which injunction sought is essential in order to authorize issue of injunction without notice. Pepper Distributing Co. v. McLeod, 121 Ill. App. 592.

1. Adams v. Oberndorf, 121 Ill. App. 597.

2. Smith v. Miller, 28 Ky. L. R. 1205, 91 S. W. 1140.

3. See 6 C. L. 27.

4. Summers v. First Nat. Bank [Fla.] 40 So. 622. Under Rev. St. Ill. c. 69, § 8, a temporary injunction to restrain the enforcement of a judgment should not issue without a bond from complainant. Grossman v. Davis, 117 Ill. App. 354.

5. Such a rule (rule 42) held not suspendable at will. Drew v. Hogan, 26 App. D. C. 55.

6. Drew v. Hogan, 26 App. D. C. 55.

7. Potsdam Elec. Light & Power Co. v. Potsdam, 49 Misc. 18. 97 N. Y. S. 190.

8. Wingert v. Snouffer [Iowa] 108 N. W. 1035.

9. See 6 C. L. 27.

10. Wilder v. Alderman & Sons Co. [S. C.] 53 S. E. 950. The general rule is that when the injunctive relief sought is not merely ancillary to the principal relief demanded in the action, but is itself the main relief, the court will continue it to the hearing on the merits. If, however, the injunction tends to interfere with matters which would seriously inconvenience the public, it will be dissolved. Hyatt v. De Hart, 140 N. C. 270, 52 S. E. 781. The interests of the general public have weight. Suwanee, etc., R. Co. v. West Coast R. Co., 50 Fla. 609, 612, 39 So. 538. The dissolution of a preliminary injunction restraining trespass rests in the discretion of the trial judge and may be denied though there is a direct conflict in the affidavits presented on the motion to dissolve, especially where complainant might suffer irremediable injury in case of dissolution. McKenzie v. McCrory [Miss.] 40 So. 483. Whether a pendente lite order shall be continued is largely discretionary with the chancellor. Bryan v. Curtis, 26 App. D. C. 95.

11. Godwin v. Phifer [Fla.] 41 So. 597.

Where a dissolution would be practically a denial of the relief to which the complainant might show himself entitled on final hearing, although the equity of the bill may be fully answered, the court will continue the injunction to the final hearing, if the dissolution would work a greater injury than the continuance of the process. Ford v. Taylor, 140 F. 356. A restraining order will be discontinued where the answer denies the facts which would entitle the complainant to an injunction, and the party securing the order for a long time delays to procure and present any affidavits in support of the bill. In re Latimer, 141 F. 665. When the allegations of a bill upon which its equity depends are fully, directly, and completely denied in the answer, and none appear by the case made why the injunction should be retained, it

ed cannot be arbitrarily dissolved,[13] or where the complainant will be injured by a dissolution and the defendant will not be injured by a refusal to dissolve, though the case made by the complainant is contradicted by that made by the defendant.[14] A preliminary injunction granted to protect an important public service will not be dissolved on mere affidavits attacking the franchise for such service.[15] A dissolution should not be granted on an answer which is evasive as to any material allegations of the bill,[16] nor where the facts on which the right to a dissolution is based are disputed.[17] Where the complainant has himself violated the spirit of an injunction, the court may grant its dissolution unless the complainant restores the status he disturbed.[18] A bond for damages to procure a dissolution will not avail where injunction issued because of impossibility of estimating damage.[19]

Except as provided by statute,[20] application to vacate should be made to the court issuing the writ or the one to which the case has been transferred.[21] A motion to dissolve an injunction granted upon a bill for injunction only is in effect a demurrer[22] and will be denied if a supplemental bill has cured the defect.[23] On motion to dissolve on bill and answer the responsive allegations of the answer are taken as true[24] so far as they are responsive,[25] and if the equity of the bill is sworn away by the answer the injunction will be dissolved,[26] and other proofs supporting the bill will not be heard except on notice given[27] or after hearing of the motion,[28]

should be dissolved. Webster v. De Bardeleben [Ala.] 41 So. 831.

12. Godwin v. Phifer [Fla.] 41 So. 597; Jennings-Heywood Oil Syndicate v. Heywood Oil Co., 117 La. 536, 42 So. 126. On an appeal from an order granting a restraining order pending an action to enjoin the enforcement of an alleged unconstitutional statute, the appellate court ordinarily will consider only the question of whether there has been an abuse of discretion. Jewett Bros. v. Smail [S. D.] 105 N. W. 738. If the injury to defendant was slight and that of plaintiff considerable, if the injunction be not issued and the plaintiff ultimately prevail and there is a strong probability that plaintiff may prevail and it appears the court has not, in dissolving the injunction, applied the correct legal principles to the case, its action will be reversed and an injunction pendente lite ordered issued. Miocene Ditch Co. v. Jacobsen [C. C. A.] 146 F. 680.

13. Humphry v. Buena Vista Water Co., 2 Cal. App. 540, 84 P. 296.

14. Pekin Tel. Co. v. Farmers' Tel. Co., 120 Ill. App. 292.

15. New York, etc., R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316.

16. Ford v. Taylor, 140 F. 356.

17. Village of Carthage v. Central New York Tel. & T. Co., 110 App. Div. 625, 96 N. Y. S. 919.

18. Suwanee, etc., R. Co. v. West Coast R. Co., 50 Fla. 609, 612, 39 So. 538.

19. Where it appears that plaintiff will suffer irreparable damage from a trespass which he seeks to enjoin and that his damages would not be susceptible of computation or proof, it is error to dissolve a temporary injunction on the defendant's giving bond to pay damages, since such order deprives plaintiff of the relief which could only be obtained by the injunction. Wethington v. Baxter, 124 Ga. 1024, 53 S. E. 505.

20. Under Gen. St. Kan. 1901, § 1924, a district judge has power to vacate a temporary restraining order issued by a probate judge. Hurd v. Atchison, etc., R. Co. [Kan.] 84 P. 553.

21. **In New York:** When the time for appealing has expired and a change of venue has been taken, so that application cannot be made to the judge who granted it, application to vacate an injunction may properly be made to the supreme court of the branch to which it has been removed. McGorie v. McAdoo, 49 Misc. 601, 99 N. Y. S. 1107.

22. Marks v. Chicago Yacht Club, 121 Ill. App. 308.

23. An order dissolving a temporary injunction granted on a bill which was demurrable is erroneous where at the time of making the order dissolving the temporary injunction there was a supplemental bill on file which stated facts entitling plaintiff to injunctive relief and such facts were not controverted. Farnum v. Clarke, 148 Cal. 610, 84 P. 166.

24. McCormick v. McCormick [Md.] 65 A. 54.

25. New matter in an answer not responsive to the bill cannot be considered on a motion to dissolve a temporary injunction. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

26. Injunction against judgment dissolved. McCormick v. McCormick [Md.] 65 A. 54.

27. On a motion to dissolve the court should not consider the merits on affidavits. Wingert v. Snouffer [Iowa] 108 N. W. 1035. It is not competent for the complainant on hearing of a motion to dissolve a temporary injunction based on a sworn answer to support the averments of the bill by ex parte affidavits and documentary proof, especially where no notice was given the adverse party that such proof would be offered. Roman v. Long Distance Tel. & T. Co. [Ala.] 41 So. 292.

though in Iowa practice such motion may be on affidavits and counter affidavits.[29] A motion based on bill and answer should await the answering of all defendants, excepting in a proper case formal parties defendant.[30]

On the hearing of a motion to dissolve a temporary injunction the court has no jurisdiction to dismiss the suit.[31] In Colorado the verified answer is not conclusive on the complainant and hence the suit should not be dismissed when the temporary injunction is dissolved on the bill and answer,[32] though in other jurisdictions it is held the suit may be dismissed on hearing of a motion to dissolve, on sustaining a demurrer to the bill for want of equity,[33] or where it appears on such a motion that there is no ground for granting the relief on the merits.[34]

(§ 4) *D. Damages on dissolution and liability on bond.*[35]—The failure of a plaintiff to prosecute an action for an injunction, where a temporary restraining order has been granted and bond given, is a confession by him that he has no case to try, and that his interference with the rights of the defendant by injunction was without warrant, and the surety is liable, whether the action is dismissed at the request of the plaintiff or because of his neglect to prosecute.[36] A superseded permanent decree does not dissolve the undertaking.[37] In an action on an injunction bond the obligors are liable only for such damages as fall within the conditions of the bond,[38] and are the necessary and proximate result of the wrongful issuance of the

28. It is not error for a trial court on an application for a preliminary injunction to refuse to allow the reading of further affidavits on a day subsequent to that on which arguments were made and the cause was submitted, though he has not filed a decision, no reason being given for failure to present them at the hearing. Green v. Freeman [Ga.] 55 S. E. 45.

29. Under Code Iowa, § 4361 a motion to dissolve a temporary injunction may be made on affidavits and before filing of an answer, and the affidavits are to be given the same effect as a sworn answer. Gossard Co. v. Crosby [Iowa] 109 N. W. 483.

30. As a general rule, to authorize the dissolution of an injunction when the same is heard upon a motion to dissolve, all of the defendants must have answered, and to give effect to the answers they should be under oath, but the rule that all defendants must have answered is subject to the exception that the court may in its discretion entertain such a motion where the parties who have not answered are merely formal parties or are infants or nonresidents, and whose answers cannot be material in regard to the facts on which the injunction is sought. Davis v. Baltimore & O. R. Co., 102 Md. 371, 62 A. 572.

31. Lively v. Hunter, 124 Ga. 516, 52 S. E. 544; Welch v. Sheaffer, 29 Pa. Super. Ct. 619.

32. A dismissal of a suit for injunction on a motion to dissolve a temporary injunction, where the motion is based on the pleadings, is erroneous, though the answer is verified, since a verified answer is not conclusive on the plaintiff, but he should be afforded an opportunity to prove his case on the merits. Spar Consol. Min. Co. v. Casserleigh, 34 Colo. 454, 83 P. 1058.

33. Where an injunction is the only relief sought and it is dissolved on motion on a demurrer to the bill for want of equity, the order of dissolution is a final disposition of the case authorizing a dismissal of the bill. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. When the only relief sought by a bill is an injunction, a motion to dissolve for want of equity on the face of the bill operates as a demurrer to the bill admitting the truth of its allegations, and when such motion is allowed the case is virtually at an end and in such case complainant can dismiss his own bill and appeal. Carroll v. Barry Brothers Transp. Co., 118 Ill. App. 230.

34. Where the injunction asked for is not ancillary but the primary and principal relief prayed for, there is no reason for retaining the bill if upon hearing upon bill, answer, and deposition, on motion to dissolve the injunction, it appears there is no ground for granting the injunction on the merits. Davis v. Baltimore & O. R. Co., 102 Md. 371, 62 A. 572.

35. See 6 C. L. 28.

36. Machold v. Pittsburgh, etc., R. Co., 4 Ohio N. P. (N. S.) 273.

37. It continues till decision on the appeal and in case of reversal of the permanent decree is in force. Cortelyou v. Houghton, 27 App. D. C. 188.

38. State v. Crislip, 58 W. Va. 414, 52 S. E. 476. When a sheriff has been enjoined from selling on execution property of a debtor pending the determination of a bankruptcy proceeding against the debtor and a bond is filed, the bankrupt cannot recover, on dissolution of the injunction on dismissal of the bankruptcy proceeding, the damages authorized by section 3 E of the Bankruptcy Act as recoverable on a bond given pursuant to said section. In re Hines, 144 F. 147. The costs and expenses of opposing a motion made on an order to show cause why an injunction pendente lite should not be granted, where the temporary restraining order is limited to expire on the hearing of the motion, are not recoverable as damages because of the pre-

injunction,[38] including a reasonable attorney's fee for procuring a dissolution of the injunction.[40] In the absence of a statute attorney's fees are not recoverable as damages in suits brought in the Federal courts.[41] In some jurisdictions the court may on dissolution of a temporary injunction award damages to the defendant in the writ[42] without notice to the sureties.[43] In the absence of such a statute the sureties can be charged only in an action on the bond.[44] Among the items of damage allowable to the defendant on dissolution are a reasonable attorney's fee for services in procuring its dissolution,[45] or a reversal on appeal from an order grant-

liminary injunction. The motion on the order to show cause being denied there was no preliminary injunction for which the bond is responsible. Sargent v. St. Mary's Orphan Boys' Asylum, 112 App. Div. 674, 98 N. Y. S. 632. Damages sustained by the granting of an injunction on a bond given pursuant to Code of Civ. Proc. § 620 cannot be assessed until after the final determination of the suit, since the condition of such bond refers to the final termination of the action and not a dissolution of a temporary injunction. Slingerland v. Albany Typographical Union No. 4, 100 N. Y. S. 569.

39. Thus, where the injunction restrained defendant from interfering with the cutting of timber which a trial on the merits showed belonged to defendant in an action on the bond, defendant can recover the value of timber cut and carried away by plaintiff and with which defendant could not interfere. Miller v. Smyths, 29 Ky. L. R. 242, 92 S. W. 964.

Loss of wages: In an action on an injunction bond to recover for the wrongful issue of an injunction which prevented plaintiff from teaching a school pursuant to a contract, he can recover only the difference between what he would have earned and what he did earn during the time he was restrained or what by reasonable diligence he could have earned. Shepherd v. Gambill, 29 Ky. L. R. 1163, 96 S. W. 1104. Where the postal authorities are restrained from exacting a higher class postage rate, the **measure** is the difference in rates collected. Cortelyou v. Houghton, 27 App. D. C. 188.

40. Thompson v. Benson, 41 Wash. 70, 82 P. 1040; Sutliff v. Montgomery, 115 Mo. App. 592, 92 S. W. 515. Where the cutting of timber is enjoined and is vacated on the defendant's given bond and subsequently dissolved on the merits, attorney's fees and other expenses relating distinctly to the bonding of the injunction are recoverable as damages. Martin v. Tellotte, 111 La. 769, 40 So. 41.

Held not allowable: In an action on an injunction bond the defendant cannot recover for fees paid an attorney for an unsuccessful attempt to dissolve the injunction, though complainant thereafter voluntarily dismissed the injunction. Thompson v. Benson, 41 Wash. 70, 82 P. 1040. Where the injunction is the relief sought in the action and in fact gives the relief, if sustained, the defendant cannot recover attorney's fees in an action on the bond. Shepherd v. Gambill, 29 Ky. L. R. 1163, 96 S. W. 1104. In an action on a bond given as a condition precedent to the issuance of a restraining order the sureties are not liable for attorney's fees expended in resisting an application for an injunction pendente lite. White Pine Lumber Co. v. Aetna Indemnity Co., 42 Wash. 569, 85 P. 52.

41. **In the Federal courts,** in the absence of a statute authorizing it, attorney's fees for procuring a dissolution of an injunction are not recoverable in an action on the bond. Hence not allowable in suit in Alaska Territorial court. Lindeberg v. Howard [C. C. A.] 146 F. 467; Sullivan v. Cartier [C. C. A.] 147 F. 222. On dissolution of an injunction issued by the Federal courts, the defendant cannot recover attorney's fees in addition to the costs allowed to the successful defendant by Equity Rule 34. In re Hines, 144 F. 147.

42. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129. Where a motion for the dissolution of an injunction is granted, the party at whose instance it was issued in a proceeding for assessment of damages cannot assert that its issuance was not wrongful, nor is it material that a writ was not actually issued pursuant to the order therefor. Brown v. Peterson, 117 Ill. App. 401. Under Hurd's Rev. St. 1903, c. 69, p. 1042, § 12, providing that "when an injunction is dissolved * * * the court shall * * * assess damages," when dissolution was refused by circuit court and granted by appellate court, the former court had authority to assess damages. Fry v. Radzinski, 121 Ill. App. 303. Where injunction dissolved on interlocutory appeal trial court had authority to assess damages without waiting for mandate from appellate court. Id. Damages not assessed prior to final hearing where single order assesses damages and dismisses bill. Id.

43. Rev. St. Mo. 1899, § 3640. Sutliff v. Montgomery, 115 Mo. App. 592, 92 S. W. 515. Rev. St. 1899, § 3639, does not require that such damages shall be assessed at the term during which the injunction was dissolved; it is sufficient if the proceedings be commenced during such term. Id.

44. Costs and damages cannot be awarded on an injunction bond until the final determination of the action on its merits, and then they cannot be summarily assessed in the injunction suit but must be by a separate action against the sureties on the bond. Dougal v. Eby, 11 Idaho, 789, 85 P. 102. A complaint in an action on a bond held to state a cause of action. Henderson v. Roy [Ala.] 40 So. 59.

45. Mossman v. Thorson, 118 Ill. App. 574; Kingsbury v. Andrews, 119 Ill. App. 35. $150 sustained on dissolution on motion. Leeds v. Illinois State Medical & Surgical Inst., 122 Ill. App. 650. Under Hurd's Rev. St. Ill. 1908, c. 69, § 12, if an injunction is the primary relief sought and a motion to dissolve a temporary injunction is made, a reasonable attorney's fee for procuring the dissolution may be allowed as a part of the

ing a temporary injunction,[46] or for both,[47] but it is disallowed in Iowa where the injunction was sought as ancillary relief.[48] In fixing a counsel fee as damages it is good practice to inquire what if any fee was agreed.[49] The finding of the chancellor as to the amount of damages allowable will not be disturbed unless clearly erroneous,[50] but a reviewing court will not defer to the trial court's conclusion when the entire predicate for such conclusion is in the record.[51]

The successor of one restrained in a purely official capacity may sue for the damage and account to the public.[52] The personal representatives and not the heirs of a deceased obligee are the proper parties plaintiff, though the injunction was issued to prevent waste.[53] In Alabama, one not a party to the injunction suit may maintain an action on the bond,[54] but one who voluntarily obeys an injunction not directed to or binding on him cannot recover damages sustained thereby.[55]

Where in an action on a bond the damages are itemized, the recovery should be limited to the items alleged.[56]

(§ 4) *E. Appeal and review.*[57]—In many jurisdictions the statutes provide that an order granting a temporary injunction,[58] as well as one dissolving[59] or denying a motion to dissolve[60] a temporary injunction, shall be appealable.[61] An order enlarging a temporary injunction is not appealable.[62] Where the point in dispute and on which the right to an injunction must turn is a question of law, the supreme

damages. The fees can be allowed **only for such services as pertained to the dissolution.** Marks v. Columbia Yacht Club, 219 Ill. 417, 76 N. E. 582. Such counsel fees may be allowed as are necessarily incurred in procuring a dissolution, though such services might be equally applicable upon a demurrer going to the merits. Under Hurd's Rev. St. 1903, c. 69, § 12, providing for assessment of such damages as nature of case may require and to equity appertain, counsel fees for services on motion to dissolve injunction granted on bill for injunction only are allowable, regardless of whether such services might have been applicable on a demurrer to merits, there being no distinction in effect in such case between a motion to dissolve and a demurrer. Marks v. Chicago Yacht Club, 121 Ill. App. 308.

46. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. Under 2 Starr & C. Ann St. Ill. c. 69, § 12, on the reversal of an interlocutory injunction by the court of appeals, damages sustained by the defendant, if any, are to be assessed by the circuit court, nor is it necessary that a mandate should have been filed in the circuit court preliminary to such assessment. Id. Allowance on appeal of $30 the same as on the order reduced to $15, one-half the fee at trial. Curphy v. Terrell [Miss.] 42 So. 235.

47. Attorneys' fees on dissolution and also on appeal from the order of dissolution may be allowed. Curphy v. Terrell [Miss.] 42 So. 235.

48. Where an injunction is the sole relief sought, its dissolution entitles the party enjoined to recover his attorney's fees in procuring the dissolution, but where the injunction sought is merely collateral to the principal controversy, and its maintenance is not decisive of the question at issue, an attorney's fee is not recoverable. Weierhauser v. Cole [Iowa] 109 N. W. 301.

49. Mossman v. Thorson, 118 Ill. App. 574.

50. Marks v. Chicago Yacht Club, 121 Ill. App. 308.

51. Cortelyou v. Houghton, 27 App. D. C. 188.

52. Injunction against exaction of higher class postage rates. Cortelyou v. Houghton, 27 App. D. C. 188.

53. Miller v. Smythe, 29 Ky. L. R. 242, 92 S. W. 964.

54. Where an injunction bond is given pursuant to Code Ala. § 788, a person not an obligee therein nor a party to the suit can recover thereon for damages resulting to him from the direct effects of the injunction. In a suit on such a bond the plaintiff, if not a party to the suit nor the obligee named in the bond, must allege facts showing that he has been damaged. An allegation of breach of the bond and dissolution is insufficient. Marengo County v. Matkin, 144 Ala. 574, 42 So. 33.

55. An assignee of a contract for the construction of a court house is not bound by an injunction issued against his assignor, the county and certain of its officers subsequent to the assignment, enjoining them from performing the contract, and hence cannot recover damages on the bond sustained by reason of his voluntary discontinuance of construction. Marengo County v. Matkin, 144 Ala. 574, 42 So. 33.

56. Sullivan v. Cartier [C. C. A.] 147 F. 222.

57. See 6 C. L. 29.

58. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540.

59. Dougal v. Eby, 11 Idaho, 789, 85 P. 102.

60. Baltimore Bargain House v. St. Clair, 58 W. Va. 565, 52 S. E. 660; Lasher v. Annunziata, 119 Ill. App. 653.

61. See, also, Appeal and Review, 7 C. L. 128.

62. National Hollow Brake Beam Co. v. Leigh, 119 Ill. App. 344.

court in Michigan may compel its dissolution by mandamus.[63] Expiration of the right sought to be protected before the appeal is taken will cause dismissal of the appeal at appellant's cost.[64] In proper cases an injunction may be continued by order of court pending appeal.[65] One may appeal without superseding the injunctional order.[66] A supersedeas continuing a dissolved order ceases when the dissolution is affirmed.[67] On appeal from an order granting a temporary injunction the appellate court will not consider matters not shown by the record to have been passed on by the trial court.[68] The appellate court will respect, but is not bound by, the findings of fact made by the trial court.[69] It will not reverse a denial of an injunction based on a right which expired before the hearing on appeal.[70] The assignment of errors must be specific.[71]

§ 5. *Decree, judgment, or order for injunction.*[72]—A decree in an injunction suit should be definite and certain in its description of the acts inhibited,[73] and the terms must be so narrowed to the acts of wrong threatened as not to forbid the doing of acts not complained of.[74] It should be within the issues raised by the pleadings[75] and within the relief asked for in the bill.[76] A decree timed to operate from the period when defendant states that an unavoidable nuisance will be rectified by him is unobjectionable to defendant.[77]

63. Blain v. Chippewa Circuit Judge [Mich.] 13 Det. Leg. N. 394, 108 N. W. 440. A motion to dissolve an injunction is a necessary prerequisite to an application for a writ of mandamus from the supreme court to compel its dissolution. Id.

64. An order dissolving a temporary injunction which restrained the appellant from revoking a license which had expired by operation of law, at the time of the order dissolving the injunction, will not be reversed on appeal. Costs taxed against appellant. Syfer v. Spence [Md.] 68 A. 256.

65. Where on a supplemental bill, in the nature of a bill of review, a bill on which an injunction was granted is dismissed, the court has no jurisdiction to continue the injunction, in force pending an appeal from the decree dismissing the first bill. Kelley Bros. v. Diamond Drill & Mach. Co., 142 F. 868.

66. Failure to file a supersedeas bond does not deprive one against whom an injunction was issued of the right to appeal and his performance of the mandate of the court pending an appeal without a supersedeas bond does not entitle the appellee to a dismissal of the appeal, since in such case performance is not to be regarded as voluntary. Nixon v. Boling [Ala.] 40 So. 210.

67. Where on a dissolution of an injunction the complainant appeals and files a supersedeas bond, an affirmance by the appellate court works a dissolution of the injunction which the supersedeas bond continued in force. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515.

68. Hammond Elevator Co. v. Board of Trade of Chicago [C. C. A.] 143 F. 292.

69. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

70. On appeal, one who claims the right to maintain a lunch stand in a street pursuant to a license, which expired before the hearing of the appeal, is not entitled to a reversal of an order refusing to enjoin the police from requiring him to remove his lunch wagon. Spencer v. Mahon [S. C.] 55 S. E. 321.

71. An exception to a judgment denying an interlocutory injunction and an assignment of his refusal to grant it as error is sufficiently specific to preclude dismissal of an appeal, especially where it appears he passed on conflicting evidence in so determining. Kirkland v. Atlantic & B. R. Co. [Ga.] 55 S. E. 23.

72. See 6 C. L. 29.

73. A decree in a suit to enjoin members of a labor union from intimidating patrons of plaintiff's restaurant held sufficiently definite and certain to inform defendants of what acts they are to refrain from doing. Jordahl v. Hayda, 1 Cal. App. 696, 82 P. 1079. To authorize punishment as for contempt the acts enjoined must be clearly and definitely defined, so as to leave the party enjoined in no reasonable doubt or uncertainty as to what specific thing or act is prohibited. United States v. Atchison, etc., R. Co., 142 F. 176.

74. Injunction to protect agreement to refrain from a certain business in name of the "Harder Knitting Co." held too broad in forbidding use of "Harder Manufacturing Co." in different business. Union Mills v. Harder, 101 N. Y. S. 309.

75. A decree cannot be entered in a suit for injunction which is without the issue made by the pleadings. Tuckfield v. Crager, 29 Utah, 472, 82 P. 860.

76. In an action to enjoin trespass on certain premises, when that is the only relief sought, a judgment dismissing the bill and adjudging the title to be in defendant is, so far as it adjudges title, not authorized by the pleadings. Country Club Land Ass'n v. Lohbauer, 97 N. Y. S. 11. Acts cannot be enjoined as to which no injunction is prayed for. Maine Produot Co. v. Alexander, 100 N. Y. S. 709.

77. Using railroad as a switch yard pending improvements which it is promised will remove such use of tracks. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

Where equitable grounds for an injunction are lacking, the court cannot proceed to award damages which it is averred arose on the equitable action,[78] though in New York it has been held that the court may deny the relief on condition that defendant will pay such damages as are assessed by the court.[79] If, however, the court has jurisdiction on equitable grounds other than those relied on for the issuance of an injunction, it may, though denying injunctive relief, assess damages to plaintiff for the wrongful acts already committed.[80]

A mandatory injunction will not issue to compel the erection of a structure of a specific character.[81] The power of a court of equity to issue an injunction on final hearing is in no wise dependent on whether or not a temporary injunction has been granted, since the right to a temporary injunction is no part of complainant's cause of action.[82]

A court of equity has power to modify or vacate an injunction issued by it[83] for reasons arising subsequent to the decree,[84] and the injunction may be granted in general terms subject to the right to apply for such modification as may be equitable and proper,[85] but the decree is res adjudicata as to issues passed on at the time the injunction was issued.[86]

An interlocutory injunction will be construed in accordance with the bill and proof on which it is issued.[87] A temporary restraining order becomes binding on the party enjoined from the time he has notice of its issuance, though no formal notice is given him or the order is not personally served on him.[88]

Where a court has issued an injunction it has power to enforce it, not only by

78. American Ice Co. v. New York, 51 Misc. 114, 100 N. Y. S. 748; Rauch v. Bruckmann Brewing Co., 7 Ohio C. C. (N. S.) 460. In a suit for an injunction, where the court is of the opinion that the complainant has lost his right to an injunction by laches, the court is powerless to render damages as alternative relief where there is no other ground for equity jurisdiction. In such case his damages are recoverable in an action at law. Beers v. Chicago, etc., R. Co. [C. C. A.] 141 F. 957.

79. In a suit for injunction where all the parties submit the controversy to the court, the court has power to deny the injunction on condition that defendant pay such damages as are fixed by the court, leaving to the complainant the option of accepting the same or instituting an action at law for his damages. Knoth v. Manhattan R. Co., 109 App. Div. 802, 96 N. Y. S. 844.

80. In a suit for injunction the court on denying the relief may provide for the ascertainment of the damages which plaintiff has or may suffer by reason of the wrongful acts of defendant and decree their payment by defendant. Andrus v. Berkshire Power Co. [C. C. A.] 147 F. 76. In a suit for injunction the court may retain the cause for assessment of damages, though it denies the injunction. Levi v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 853. In an injunction suit, the court having found the existence of the primary right involved in favor of plaintiff, may not only enjoin future breaches of the contract but may award damages for prior breaches. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540.

81. Rauch v. Bruckmann Brewing Co., 7 Ohio C. C. (N. S.) 460.

82. Columbia Water Power Co. v. Nunamaker, 73 S. C. 550, 53 S. E. 996.

83. The district court, in the exercise of its general equity powers, is authorized and possesses jurisdiction to modify or vacate an order for a perpetual injunction which it has allowed, after the term at which rendered and at any time when the cause for which it was granted has ceased to exist and the danger to plaintiff's rights no longer exists. The burden is on defendant to show that the danger has been certainly removed, not that it possibly may have been. Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429.

84. Where subsequent to a final order for injunction events have transpired which render it inequitable to enforce the decree, it may be modified or vacated on motion and in a summary proceeding, provided the facts are not disputed. Lowe v. Prospect Hill Cemetery Ass'n [Neb.] 106 N. W. 429.

85. General injunction granted against sale of copyrighted books contrary to restrictive stipulations in contract of purchase, subject to right of modification so as to include such books as were purchased by defendant from parties who purchased from plaintiff without notice of such restrictions. Authors & Newspapere Ass'n v. O'Gorman Co., 147 F. 616.

86. A question tried and determined in the action in which a perpetual injunction is allowed cannot be relitigated on a motion to modify or vacate the order for injunction. Lowe v. Prospect Hill Csmetery Ass'n [Neb.] 106 N. W. 429.

87. Hammond Elevator Co. v. Board of Trade of Chicago [C. C. A.] 143 F. 292.

88. Blake v. Nesbet, 144 F. 279.

punishing persons violating its terms, but to make such additional remedial orders as may be necessary to give full effect to the injunction.[89]

§ 6. *Violation and punishment.*[90]—If the court issuing an injunction had jurisdiction of the subject-matter and person of the party enjoined, the fact that it was erroneously issued is no justification for its violation.[91] It must be obeyed until dissolved or reversed on appeal.[92] If on the other hand the court was without jurisdiction of the person or subject-matter of the suit,[93] or a jurisdictional bond was lacking,[94] the person attempted to be enjoined cannot be found guilty of contempt for not obeying it.[95] The fact that the court exceeded its jurisdiction as to some of the acts prohibited does not justify disobedience as to matters within its jurisdiction.[96] Payment by a public officer of funds in his possession to a receiver appointed by a Federal court is not a violation of an injunction of a state court restraining him from paying them over to the plaintiffs in the suit in the Federal court.[97]

Punishment for violation.—A court having jurisdiction to issue an injunction has the inherent power to punish for contempt those who violate its mandates.[98] In contempt proceedings for violation of an injunction there is no right to a trial by jury,[99] nor is the respondent entitled to be confronted with the witnesses against

89. People v. Tool [Colo.] 86 P. 229.

90. See 6 C. L. 30.

91. State v. District Ct. of Redwood County [Minn.] 107 N. W. 963; Huttig Sash & Door Co. v. Fuelle, 143 F. 363; Ex parte Breeding [Tex. Cr. App.] 90 S. W. 634. It is contempt to violate an order erroneously made but not one void for lack of power to make it. Christian Hospital v. People, 223 Ill. 244, 79 N. E. 72; Saginaw Lumber & Salt Co. v. Griffore [Mich.] 13 Det. Leg. N. 505, 108 N. W. 681. The fact that there was a defect of parties plaintiff to a bill does not render an injunction issued thereon void so as to exempt one violating it from punishment. Franklin Union, No. 4 v. People, 220 Ill. 355, 77 N. E. 176. Defects in the manner of bringing the injunction suit which are remediable by amendment will not affect the power to punish for contempt in violating the injunction. Franklin Union No. 4 v. People, 121 Ill. App. 647. In contempt proceedings for violation of a temporary injunction, the defendant cannot purge himself by showing that the injunction was erroneously issued or that on final hearing it would have been dissolved. Blake v. Nesbet, 144 F. 279. In trying a proceeding for contempt for violating an order of injunction the court will not inquire as to whether the order was erroneously made. Smith v. Miller, 28 Ky. L. R. 1205, 91 S. W. 1140. Where the court has jurisdiction of the persons and subject-matter, the fact that the injunction is broader than is justified by the bill does not exempt from contempt proceedings one who violates its terms. Franklin Union, No. 4 v. People, 220 Ill. 355, 77 N. E. 176.

92. Must be obeyed pending appeal when not superseded. Lytle v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 316. A restraining order has all the force of an injunction until vacated or modified and a defendant is bound to obey it. If he is in doubt as to what he may do without violating it he should ask for a modification or construction of its terms. Warner v. Martin, 124 Ga. 387, 52 S. E. 446.

93. Disobedience of an injunction issued in a suit of which the court issuing it had no jurisdiction of the subject-matter is a nullity and one adjudged guilty of contempt for its violation may be released on habeas corpus. Ex parte Robinson [C. C. A.] 144 F. 835. A defendant in an injunction can be punished for a violation thereof, though it was erroneously awarded, provided the court has jurisdiction to make the order, but he cannot be punished, at least in civil contempt proceedings, for a violation of an injunction which the court had no power to make. Bachman v. Harrington, 184 N. Y. 458, 77 N. E. 657.

94. No undertaking to support order disobeyed. Drew v. Hogan, 26 App. D. C. 55.

95. Blake v. Nesbet, 144 F. 279. A void order of injunction will not sustain a judgment for contempt for its violation, but where the court has jurisdiction to make the order it must be respected, though the party enjoined would be entitled to a dissolution on motion or on a hearing on the merits. Miles v. State [Neb.] 105 N. W. 301.

96. State v. District Ct. of Redwood County [Minn.] 107 N. W. 963.

97. Where a treasurer of a county has been enjoined by a state court from paying out funds in his hands in discharge of bond coupons at the suit of the county commissioners, his payment of such funds to a receiver appointed by a Federal court in a suit instituted by the coupon owners against the county is not a violation by him of the injunction order of the state court. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

98. People v. Tool [Colo.] 86 P. 224.

99. Ex parte Alleson [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870. The right of trial by jury does not extend to charges for contempt. If such violation constitutes a crime the court, by punishing for contempt, is not executing the criminal laws, but only securing to suitors the rights to which it has adjudged them entitled. People v. Tool [Colo.] 86 P. 224.

him.[1] The court on its own motion may issue an order to show cause against one whom it has reason to think has violated its injunction,[2] though the usual practice is for the interested parties to present the facts to the court by affidavits.[3] Such affidavits may be on information and belief.[4] Up to the time the party charged is found guilty of contempt the papers should be entitled in the suit in which the injunction was issued.[5] A sworn answer by the respondent in the contempt proceedings is not conclusive.[6] The party cited cannot be found guilty of any violations other than those specifically set forth in the moving papers,[7] nor can other violations be investigated,[8] unless notice be given.[9] An objection that the proceeding is not conducted by a public law officer is waived by a failure to make timely objection.[10] The burden of establishing a violation of an injunction is on the person instituting the contempt proceedings.[11] If it is instituted solely for the purpose of vindicating the affronted dignity of the court, it is regarded as a criminal contempt proceeding,[12] and the accused is entitled to the benefit of any reasonable doubt as to his willful disobedience or as to whether the acts charged constitute a violation.[13] If the con-

1. In proceedings to punish for contempt in violating an injunction, the accused is not entitled to be confronted by the witnesses against him. It is not a trial and under Rev. Codes 1899, § 5942, the court or judge may consider the affidavits on which the warrant was issued as well as other affidavits. State v. Harris [N. D.] 105 N. W. 621. In contempt proceedings for violation of a restraining order, affidavits are admissible against the accused; he is not entitled to be confronted with the witnesses. Warner v. Martin, 124 Ga. 387, 52 S. E. 446.

2. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679.

3. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679. In a prosecution for violation of an injunction, it is not necessary that the complaining party file a petition. It is sufficient if the facts are presented by affidavit. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. In a prosecution for violation of an injunction, the affidavits on which the warrant is issued take the place of the complaint and must state facts showing the offense complained of as an offense. State v. Harris [N. D.] 105 N. W. 621. Though the statute provides that a contempt committed without the presence of the court can only be prosecuted by affidavit setting forth the facts, an attorney for a city, in a contempt proceeding against other city officers for violation of a restrain-order, who admits that the violation charged was committed by them by his direction, may be fined for contempt, though no affidavit showing his connection has been filed. State v. Nicoll, 40 Wash. 517, 82 P. 895.

4. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679.

5. Where contempt proceedings are instituted against one not a party to the bill on which the injunction was ordered, the proper practice is to entitle the application for a rule to show cause in the civil action, and if the respondent is found guilty thereafter all orders should be entitled as in a suit by the government. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679.

6. A sworn answer of a respondent in contempt proceedings in a court of equity is not conclusive but may be traversed; this applies both to persons who were parties to the bill and others not specifically named. Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679.

7. In a proceeding to punish for contempt, the party cited cannot be found guilty for any other violations than those specifically set forth in the motion or petition which should be treated as an information in a criminal proceeding. Huttig Sash & Door Co. v. Fuelle, 143 F. 363.

8. Under Rev. Codes N. D. 1899, § 5942, providing for the propounding of interrogatories to a person charged with contempt for violation of injunctional order, unless he admits his guilt, the interrogatories must relate to the facts of the contempt charged and not to any other offense or contempt. State v. Harris [N. D.] 105 N. W. 621.

9. Hearing evidence of other violations than that charged in the affidavit is not error where the contemnor was fully apprised and given time to meet each offense by proof or excuse. Liquor nuisance injunction. State v. McCarley [Kan.] 87 P. 743.

10. An objection, in contempt proceedings for violation of an injunction, that the proceedings were not conducted by public law officer as required by Laws N. D. 1901, c. 178, § 9, is waived by failure to object at the time the proceedings are had and cannot be thereafter urged on appeal from a conviction. State v. Harris [N. D.] 105 N. W. 621.

11. General Elec. Co. v. McLaren, 140 F. 876.

12. Contempts arising out of injunction issued in a suit by the United States against a railroad company to prevent rebates in violation of the Interstate Commerce Act, the U. S. not having any pecuniary interest in the suit but having instituted it pro bono publico, is of the class known as a "criminal contempt" to vindicate the dignity of the court. United States v. Atchison, etc., R. Co., 142 F. 176. Contempts are criminal in their nature and must be tried in the county where committed. State v. District Ct. of Ninth Judicial Dist. [Mont.] 86 P. 798.

tempt charged is of the class known as civil, it is not necessary to prove the guilt of respondent beyond a reasonable doubt. If it clearly appears, a conviction is authorized.[14] Persons not parties to the injunction suit may be adjudged in contempt for doing acts in violation of its mandate after notice of its terms,[15] as may also persons who aid and abet its violation.[16] A private corporation can be punished for violation of an injunction by the imposition of a fine.[17] The court cannot inflict a cruel and unusual punishment,[18] and in many jurisdictions the maximum punishment is fixed by statute.[19] Costs may be taxed against the respondent where he is found guilty.[20] For a violation pending an appeal from an injunction which has not been superseded, the appellate court may punish as for contempt.[21] That the violation has ceased before the hearing in the contempt proceedings may be taken into consideration by the court.[22]

§ 7. *Liability for wrongful injunction.*[23]—Malicious prosecution of an injunction or abuse of the writ is elsewhere treated.[24]. One who has voluntarily obeyed an injunction issued without the giving of a bond cannot maintain an action for damages against the plaintiff in the injunction suit, though the injunction was erroneously issued.[25] The liability on the bond has already been discussed.[26]

INNS, RESTAURANTS, AND LODGING HOUSES.

Definitions.[27]—An innkeeper is one who regularly keeps open a public house

13. United States v. Atchison, etc., R. Co., 142 F. 176.

14. State v. Harris [N. D.] 105 N. W. 621. On a motion for an attachment for contempt on account of the violation of an injunction issued to restrain the infringement of a patent it must appear clearly and indisputably that the infringement continues. General Elec. Co. v. McLaren, 140 F. 876. Evidence held insufficient to show violation of an injunction against representing that complainant was head of defendant's hospital staff, complainant's name having been partially effaced from defendant's stationery and patrons having been informed of the facts though disingenuously. Christian Hospital v. People, 223 Ill. 244, 79 N. E. 72.

15. An agent of one against whom an injunction has been issued, who with knowledge of the decree and that an act done by him would be a violation of it, violates the injunction, is guilty of contempt and may be punished. Lytle v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 316. Under Rev. St. U. S. 1878, § 725, a court of equity has power to punish for contempt one who knowingly violates an injunction in a suit to which he was not joined as a party, where the writ is directed to the defendants named in the bill and all other persons "whomsoever after they have knowledge of the writ." Employers' Teaming Co. v. Teamsters' Joint Council, 141 F. 679. Generally speaking an injunction operates only in personam and affects only the parties to the action, and no one can be punished for contempt for a violation of it except parties having notice of it. To this rule there are exceptions, as where it runs against the agents, servants, employees, or grantees of a party, or where third persons act in collusion with a party in violating it. The injunction did not run against grantees of a party. They may nevertheless be held in contempt for violating it where it appears they had theretofore asserted rights under it as grantees of the property with reference to which it was issued. State v. District Ct. of Ninth Judicial Dist. [Mont.] 86 P. 798.

16. The court which has issued an injunction has power to punish as for contempt persons not named in the injunction who with knowledge of it, aid, abet, and assist the persons named in violating it. Huttig Sash & Door Co. v. Fuelle, 143 F. 363.

17. Franklin Union No. 4 v. People, 220 Ill. 355, 77 N. E. 176. Violation of injunction by strikers. Id., 121 Ill. App. 647.

18. A fine of $250, or in the alternative imprisonment not exceeding 6 months, held not an excessive fine or cruel and unusual punishment for violation of an injunction, as prohibited by Const. Minn. State v. District Ct. of Redwood County [Minn.] 107 N. W. 963.

19. Under Civ. Code Ga. 1895, § 4320, the superior courts cannot impose a fine exceeding $200 for contempt in violating a restraining order. Warner v. Martin, 124 Ga. 387, 52 S. E. 446.

20. Warner v. Martin, 124 Ga. 387, 52 S. E. 446.

21. Lytle v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 344, 90 S. W. 316.

22. A motion to punish for contempt for violating an injunction was properly denied where it appeared that the violation complained of had ceased before the hearing of the motion and in no way prejudiced or impaired the rights of the moving party. Jones v. Burgess, 109 App. Div. 888, 96 N. Y. S. 873.

23. See 6 C. L. 31.

24. See Malicious Prosecution and Abuse of Process, 6 C. L. 490, 4 C. L. 470.

for lodging and entertaining transient comers for hire.[28] The fact that an innkeeper also conducts a separate bathhouse on the seashore for the use of the general public as well as his guests does not create the relation of innkeeper and guest between him and persons resorting to such bathhouse.[29]

Public regulation.[30]—The power to license inns and taverns is generally vested in municipalities.[31]

Duty to receive guests.[32]

Liability for safety of guests.[33]—An innkeeper is bound to exercise reasonable care for the safety of his guests.[34] Contributory negligence will defeat the right of a guest to recover for personal injuries.[35]

Liens.[36]—There must be a debt due from the boarder to the boarding house keeper.[37] A pledge of property to secure a board debt does not constitute a statutory lien.[38] The lien of an innkeeper attaches to property in the possession of a guest, though title is in another, provided the innkeeper has no notice of the rights of the third person.[39]

Liability for effects.[40]—By statute in some states an innkeeper may be relieved of his strict common-law liability by maintaining a suitable safe for effects belonging to his guests.[41] The guest is of course required to exercise reasonable prudence on his own part.[42]

25. Batson v. Paris Mountain Water Co., 73 S. C. 368, 53 S. E. 500.

26. See ante, § 4D.

27. See 4 C. L. 123, and note.

28. Walpert v. Bohan [Ga.] 55 S. E. 181.

29. Not liable as innkeeper for goods lost at bathhouse. Walpert v. Bohan [Ga.] 55 S. E. 181.

30. See 6 C. L. 31.

31. The city council of Atlantic City has authority to license inns and taverns. Conover v. Atlantic City [N. J. Err. & App.] 64 A. 146.

32. See 6 C. L. 31.

33. See 6 C. L. 31. Assaults by employes, see special article, 5 C. L. 275.

34. Evidence held to require submission to jury of question whether proprietor of hotel knew of defect in stairway. Braman v. Stewart [Mich.] 13 Det. Leg. N. 639, 108 N. W. 964. Whether a stairway in a hotel was defective becauee brass strips fastened to the front edge of the steps were raised up from ¼ to ⅜ of an inch should have been left to the jury. Id.

35. Innkeeper not liable for injuries from falling down steps while groping through dark passageway. Dailey v. Distler, 100 N. Y. S. 679.

36. See 6 C. L. 32.

37. No lien under Rev. St. 1898, § 3344, on separate property of wife living at boarding house with her husband for board bill due from husband for their board. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797.

38. Where in replevin for a piano defendants claimed title solely by virtue of a boarding house keeper's lien, under Rev. St. 1898, § 3344, the fact that a wife had pledged the piano for a board debt due from her husband for their board did not show such lien. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797.

39. **Note:** An innkeeper has a lien on goods of a third party brought by a guest (York v. Grenaugh, 2 Ld. Raym. 866; Turrill v. Crawley [1840] 13 Q. B. 197; Kellogg v. Sweeney, 1 Lans. [N. Y.] 397), even if the goods were tortiously taken, provided the innkeeper has no knowledge of the tort (Johnson v. Hill, 3 Stark. 172). Some courts confine the lien to cases in which the innkeeper is ignorant as to the true ownership. Broadwood v. Granara, 10 Exch. 417; Singer Mfg. Co. v. Miller, 52 Minn. 516; Cook v. Prentice, 13 Or. 482. But if the innkeeper must receive all proper goods brought by the guest, irrespective of ownership, so creating a liability which gives rise to a co-extensive lien (Robinson v. Walter, 3 Buls. 269. But see Threfall v. Borwick, L. R. 10 Q. B. 210), it would seem the knowledge of ownership is immaterial (Robins & Co. v. Gray [1895] 2 Q. B. 501). And see Manning v. Hollenbeck, 27 Wis. 202.—See 5 Columbia L. R. 549.

40. See 6 C. L. 32.

41. Under Comp. Laws, § 5316, exempting innkeepers who maintain safes from liability for loss of valuables not therein deposited except for such amount of money or valuables as is usually common and prudent for a guest to retain in his rooms, a witness of experience in such matters could testify whether it was customary for guests to place property like that stolen from plaintiff in the safe or in their rooms. Kerlin v. Swart, 143 Mich. 228, 12 Det. Leg. N. 934, 106 N. W. 710.

42. Where defendant contended that loss of property was due to plaintiff's failure to close a window and the room had been robbed a month before, held, after giving a certain instruction as to the degree of care required of plaintiff, it was proper for the court to further instruct that defendant's failure to inform plaintiff that the room had been robbed before might be considered in

Offenses.[43]

INQUEST OF DAMAGES, see latest topical index.

INQUEST OF DEATH.[44]

INSANE PERSONS.

§ 1. Existence and Effect of Insanity in General (319).
§ 2. Inquisitions (320).
§ 3. Custody, Guardianship, and Support (321).
§ 4. Commitment to Asylums (323).
§ 5. Property and Debts (324).
§ 6. Contracts and Conveyances (325).
§ 7. Torts (327)
§ 8. Crimes (327)..
§ 9. Actions by or Against (327).

§ 1. *Existence and effect of insanity in general.*[45]—Sanity is presumed[46] and evidence of insanity should be clear and convincing,[47] but when insanity is shown to have existed its continuance is presumed,[48] this presumption being rebuttable.[49] It will not be presumed to have been existent at a time when official acts would thereby have been made illegal.[50] The general disposition of the alleged lunatic is not relevant,[51] and if so is not the subject of expert opinion.[52] His own self-serving declaration that he was insane at a stated time also is incompetent.[53] Opinion testimony should not assume the insanity,[54] and if nonexpert must be given with the facts which are its basis.[55] A physician may state whether a condition of mind observed by him might have arisen from a particular injury,[56] and the admission of one who dealt with the incompetent may be received.[57] The mere administration of medical treatment appropriate to insanity does not prove it.[58]

determining whether plaintiff was reasonably prudent. Kerlin v. Swart, 143 Mich. 228, 12 Det. Leg. N. 924, 106 N. W. 710.

43. See 6 C. L. 33.

44. No cases have been found for this subject since the last article. See 6 C. L. 33.

45. See 6 C. L. 34.

46. One claiming under a deed is not bound to prove the sanity of the person making it. Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227. The mere fact that a deed was executed for the primary purpose of vesting the title of the property thereby conveyed in the grantor's wife raises no presumption of incapacity to make the deed (Id.), but the burden of proving the unsoundness of mind and incapacity of the grantor at the time of its execution rests with the party seeking to impeach it (Id.).

47. Willis v. Baker [Ohio] 79 N. E. 466. Rule of preponderance stands aside. Id.

Sufficiency of evidence: Capacity to contract. Stafford v. Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127; Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075; Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227; Spicer v. Holbrook, 29 Ky. L. R. 865, 96 S. W. 571; Saffer v. Mast, 223 Ill. 108, 79 N. E. 32; Willis v. Baker [Ohio] 79 N. E. 466. See, also, Incompetency, 8 C. L. 169.

Need for guardian or committee. Wood v. Wood, 129 Iowa, 255, 105 N. W. 517; In re Colt [Pa.] 64 A. 597.

48. Stafford v. Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127.

49. Beard v. Southern R. Co. [N. C.] 55 S. E. 505. Evidence of witnesses and appearance, actions, and talk of insane held **not to show recovery.** Johnson v. Safe Deposit & Trust Co. [Md.] 65 A. 333.

50. Where the record on habeas corpus to obtain the release of a prisoner does not show that he was insane when he was guilty of insubordination for which he was deprived of good time, the legal presumption is that insanity thereafter found to exist arose subsequent to the insubordination. In re Terrill [C. C. A.] 144 F. 616.

51, 52. Simmons v. Kelsey [Neb.] 107 N. W. 122.

53. An **answer** filed by deceased in his life time in an action to which he was a party averring himself to have been mentally incompetent at the time of the execution of a deed is **inadmissible** in a suit by his representatives after his death to set the same deed aside. Ames v. Ames [Neb.] 106 N. W. 584.

54. Ames v. Ames [Neb.] 106 N. W. 584.

55. Stafford v. Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127. Question held not error though calling for general conclusion. Beard v. Southern R. Co. [N. C.] 55 S. E. 505.

56. Physician who, from having treated plaintiff, knew the conditions, was properly permitted to testify that in his opinion the fall described by plaintiff would produce the mental condition in which he found him (Beard v. Southern R. Co. [N. C.] 55 S. E. 505), and that a blow on the "outer skull," leaving no sign, might be sufficient to break the "inner skull," giving his reasons and describing the effect on the mind of a person sustaining such an injury, there being no controversy regarding the manner in which plaintiff sustained the injury (Id.).

Insanity is generally cause for removing a prisoner from a penal institution.[59] Insanity, however, does not relieve from the duty to pay taxes.[60]

§ 2. *Inquisitions*[61] of lunacy being governed by statute require such notice, if any, as it prescribes,[62] and the presence of the alleged incompetent or such proof as the statute exacts to dispense therewith.[63] Even in the absence of statutory requirement the person alleged to be non compos must have reasonable notice of the proceedings[64] and opportunity afforded him to contest the truth of the allegations in the petition,[65] and must be produced before the jury,[66] unless the court, for sufficient reasons shown, as in cases of dangerous madness, absence from the state, impracticability, or inconvenience and injury to the afflicted person, dispenses with personal notice and attendance.[67] Inquisition is ordinarily had where the lunatic is found.[68] An incompetent cannot stipulate away his statutory rights for a hearing nor waive jurisdictional defects.[69] Incompetency arising from old age, loss of memory and understanding, are included in the word "lunacy" by statute in New York.[70] Hence a petition for an inquiry into one's mental capacity is not rendered insufficient by the omission of the word lunacy.[71] An inquisition to establish a property guardianship is void if there is no property.[72] An adjudication of incompetency procured by fraud is a nullity[73] and may be attacked collaterally in another state.[74] The adjudication concludes only such matters as were investigated.[75] The inquiry as to competency is limited to the time of the hearing by statute in New York.[76] Medical examiners in lunacy proceedings are usually entitled to compensation for their services,[77] and the omission to procure the fixing of the fees by the officer required to be the moving party in the proceedings does not necessarily deprive an examiner of his right to compensation.[78]

57. The statement of a mortgagee that a few days prior to the execution of the mortgage he thought the mortgagor was bordering on insanity was admissible as against interest in a suit to foreclose the mortgage. Stafford v. Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127.

58. Attending physician prescribed drugs which are used in the treatment of mental disorders. Ames v. Ames [Neb.] 106 N. W. 584.

59. St. Okl. 1893, § 5485, authorizing removal of a prisoner for specified reasons "or other necessity," permits removal in case of insanity irrespective of the applicability of the specified reasons. In re Terrill [C. C. A.] 144 F. 616.

60. De Hatre v. Edmunds [Mo.] 98 S. W. 744.

61. See 6 C. L. 35.

62. Code Alaska, § 896, providing for notice to the supposed insane person on filing of application for appointment of a guardian, contemplates personal notice (Martin v. White [C. C. A.] 146 F. 461), and public notice in a newspaper or by posting in public places will not validate proceedings against a resident who did not appear at the hearing (Id.).

63. Ky. St. 1903, § 2157, requiring presence of alleged incompetent at the inquest or affidavits showing that his condition is such that it would be dangerous to bring him into court, held mandatory. Tipton v. Tipton's Committee [Ky.] 97 S. W. 413. Affidavits under Ky. St. 1903, § 2157, purporting to show condition of alleged incompetent rendering his presence at sanity inquest dangerous, held insufficient. Id.

64, 65, 66, 67. Supreme Council of Royal Arcanum v. Nicholson [Md.] 65 A. 320.

68. In Kansas, where an insane person escapes from the county of his residence and is apprehended and tried for insanity in another county the adjudication of insanity is conclusive. Gen. St. 1901, §§ 3941, 3945, 3948, 3977, 3978, construed. Foran v. Healy [Kan.] 85 P. 751; on rehearing, 86 P. 470.

69. An adjudication of incompetency made by the court prior to the hour fixed for the hearing and so heard on the stipulation of the alleged insane person acting without counsel, presents an irregularity on the face of the record (In re Ray [Neb.] 109 N. W. 496) of which the next of kin of the incompetent may complain (Id.).

70. Statutory construction law, § 7 (Laws 1892, p. 1487, c. 677). In re Preston's Will, 113 App. Div. 732, 99 N. Y. S. 312.

71. In re Preston's Will, 113 App. Div. 732, 99 N. Y. S. 312.

72. Carter v. Bolster [Mo. App.] 98 S. W. 105. Bequest of annuity in trust held not property of incompetent within Rev. St. 1899, § 3650, as amended by Laws 1903, p. 200. Id.

73, 74. In re Bergmann, 110 App. Div. 588, 97 N. Y. S. 346.

75. A statutory proceeding for the sole purpose of securing the custody of the person of an alleged insane person in an asylum has no effect on his property rights and cannot therefore be made the basis of an order superseding the inquisition. In re Ellis [N. J. Eq.] 62 A. 702.

In Maryland it is held that the court has power to set aside the inquisition, return, and order of confirmation of a finding of mental incapacity, though the order of confirmation is enrolled before the petition to quash is filed,[76] and that a petition to quash is the proper procedure to procure the setting aside of a finding of mental incapacity on the execution of the writ de lunatico inquirendo.[80] It is held in New Jersey that orders superseding the inquisition in lunacy and directing restoration of the lunatic's property are appropriate only when the proceedings against the lunatic are such as to divest him of the title to his property.[81]

§ 3. *Custody, guardianship, and support.*[82]—To warrant appointment of a committee there need not be proved utter lack of reason for all persons having an incapacitating unsoundness of mind are non compos mentis,[83] and because of the presumptive continuance of insanity these reasons are stronger when it is sought to discharge a committee,[84] but committees of persons who are merely weak minded should be appointed with great caution.[85] In New York a committee of an alleged incompetent resident can be appointed only after the issuing of a commission and the determination of a jury,[86] except where application is made in behalf of the state authorities and the incompetent is in a state hospital.[87] Justices of the peace do not generally have jurisdiction to appoint a committee for a person of unsound mind or to adjudicate finally as to insanity.[88] Except as limited by statute, probate courts in Kansas have the same power over the persons and estates of incompetents as that formerly possessed by the English courts of chancery,[89] and in the absence of statutory requirement no notice is necessary to confer authority on a probate court to appoint a guardian for a resident who has been adjudged incompetent.[90] In some jurisdictions a committee may be appointed for an insane convict.[91] In Louisiana a curator is not appointed pending appeal from an interdiction.[92]

Jurisdiction depends on the residence or presence of the alleged incompetent where his person is to be committed;[93] and statutes in Kansas provide that a guardi-

76. Code Civ. Proc. § 2335. In re Preston's Will, 113 App. Div. 732, 99 N. Y. S. 312.

77. New York City held liable to examiner under Insanity Law (Laws 1896, c. 545, § 64). Strong v. New York, 110 App. Div. 188, 96 N. Y. S. 1083.

78. Strong v. New York, 110 App. Div. 188, 96 N. Y. S. 1083.

79, 80. Supreme Council of Royal Arcanum v. Nicholson [Md.] 65 A. 320.

81. In re Ellis [N. J. Eq.] 62 A. 702.

82. See 6 C. L. 35.

83, 84. Johnson v. Safe Deposit & Trust Co. [Md.] 65 A. 333.

85. Act June 25, 1895 (P. L. 300), as amended June 19, 1901 (P. L. 574), held to authorize appointment of guardian of weak minded person. In re Colt [Pa.] 64 A. 597.

86. Under Code Civ. Proc. § 2327. In re Bergmann, 110 App. Div. 588, 97 N. Y. S. 346.

87. Under Code Civ. Proc. § 2223a. In re Bergmann, 110 App. Div. 588, 97 N. Y. S. 346. A statutory provision authorizing the appointment of a committee in the state to manage an incompetent's property therein, when a committee has been appointed for a nonresident incompetent, applies only where the alleged incompetent is a nonresident and where a committee has been duly appointed at the domicile of the alleged incompetent. Code Civ. Proc. § 2326, construed. Id.

88. A justice's order finding that a person is insane but leaving him freedom of person until the appointment of a committee, and then committing him to the custody of such committee, is not admissible as evidence of insanity in a proceeding to appoint a committee. Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658.

89, 90. Foran v. Healy [Kan.] 85 P. 751, on rehearing 86 P. 470.

91. Laws 1889, p. 550, c. 401, § 1, held not repealed by Laws 1895, p. 650, c. 824, as amended by Laws 1897, p. 58, c. 149, and Laws 1904, p. 1278, c. 509 (Code Civ. Proc. § 2323a). Trust Co. of America v. State Safe Deposit Co., 109 App. Div. 665, 96 N. Y. S. 585. A provision authorizing the appointment of a committee of an incompetent person when he has been committed to a state institution and is an inmate thereof has no application in the case of a life convict sane when convicted but who has been transferred to the state hospital for insane convicts without a formal determination of mental capacity. Code Civ. Proc. § 2323a. Id.

92. A judgment of interdiction is to be provisionally executed pending an appeal except in respect to the appointment of a curator. Civ. Code arts. 395, 404, and Code of Proc. art. 580, construed. In re Jones, 116 La. 776, 41 So. 89.

93. In Kansas jurisdiction to appoint a guardian over the person and estate of an incompetent belongs exclusively to the probate court of the county where such incom-

an may be appointed in his home county when an adjudication made where he was found is certified to it.[94] Notice is commonly required to be given to the alleged lunatic or his kin or custodians,[95] and likewise presence of the alleged incompetent at the hearing[96] if the person is to be committed. Where a guardian for property of a nonresident lunatic is asked by verified petition notice by publication may be ordered in Washington without affidavit to the nonresident.[97] Statutes often designate persons entitled to make or resist the application.[98] The right to a jury on demand satisfies a guaranty of right of jury trial.[99] Public policy will not permit one who institutes proceedings for the appointment of a guardian of an alleged incompetent to make the prosecution or abandonment thereof a source of personal profit.[1] Where appeal is allowed and is yet available, no equitable review will be made,[1a] and an appeal from the annulment of the appointment will not accomplish the same result.[1b] Acceptance by a special guardian of an incompetent of an allowance from the estate for his services does not deprive the special guardian of the right to appeal in behalf of the incompetent,[2] and on motion to dismiss an appeal in such case the presumption will be indulged that the special guardian is acting within the line of his duty in behalf of the incompetent.[3]

The committee of a person adjudged to be a lunatic takes no title to the real property belonging to the lunatic[4] but is a mere bailiff to take charge of his property and to administer it subject to the direction of the court.[5] An incompetent's guardian who executes a mortgage of his ward's property under a decree in equity has the same right to apply to the court for instructions and authority nec-

petent has a permanent residence. Foran v. Healy [Kan.] 85 P. 751, on rehearing 86 P. 470. That an alleged incompetent had not been a resident of the county for more than a year prior to application being filed therein for appointment of a guardian was fatal to the court's jurisdiction to appoint under the Washington statutes. State v. Superior Ct. of Lincoln County, 41 Wash. 450, 83 P. 726.

94. Where an adjudication of insanity by the probate court of a county in which an incompetent is found after escaping from his home county is recorded in the county of his residence, it gives the probate court power to appoint a guardian to take possession of his property and represent his interests therein without notice to the incompetent. Gen. St. 1901, §§ 3941, 3945, 3948, 3977, 3978, construed. Foran v. Healy [Kan.] 85 P. 751, on rehearing 86 P. 470.

95. The Washington statute is mandatory in the requirement that one for whom it is sought to have a guardian appointed on the ground of incompetency (State v. Superior Ct. of Lincoln County, 41 Wash. 450, 83 P. 726), as well as that those having the care, custody, and control of the alleged incompetent, shall have notice (Id.), and want of such notice deprives the court of jurisdiction (Id.).

96. It is also essential that the alleged incompetent be present at the hearing, if able to attend, under the Washington statute. State v. Superior Ct. of Lincoln County, 41 Wash. 450, 83 P. 726.

97. If the fact appears from the verified petition affidavit is needless. Laws 1903, p. 242, c. 130, § 1. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005. Notice by publication is the only notice required in such cases. Laws 1903, p. 242, c. 130, § 5. Id.

98. Petition held sufficient under Laws 1903, p. 242, c. 130, § 1, to show eligibility of petitioner. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005. In a proceeding on a petition for the appointment of a guardian for an alleged incompetent, his next of kin are proper parties (In re Ray [Neb.] 109 N. W. 496), and may appear in court and oppose the granting of the petition (Id.).

99. In re Colt [Pa.] 64 A. 597.

1. Dismissal by a child of proceedings instituted by her to have guardian appointed for her mother as an incompetent held no consideration for promise by the mother. Simmons v. Kelsey [Neb.] 107 N. W. 122.

1a. A review of an order by the probate court in Michigan, finding one incompetent and appointing a guardian, can only be had on an appeal therefrom as provided by statute (Jacqueth v. Benzie Circuit Judge, 142 Mich. 174, 12 Det. Leg. N. 664, 105 N. W. 148), hence the court obtains no jurisdiction by the filing of a proceeding to annul the appointment of the guardian within the time provided for the granting of an appeal (Id.).

1b. Notwithstanding the probate court hears the proceeding and denies the relief, the circuit court obtains no jurisdiction on appeal from the order therein. Jacqueth v. Benzie Circuit Judge, 142 Mich. 174, 12 Det. Leg. N. 664, 105 N. W. 148.

2, 3. In re Edwards, 110 App. Div. 623, 97 N. Y. S. 185.

4. Schribner v. Young, 111 App. Div. 814, 97 N. Y. S. 866; Ward v. Rogers, 51 Misc. 299, 100 N. Y. S. 1058.

5. Ward v. Rogers, 51 Misc. 299, 100 N. Y. S. 1058. Under Code Civ. Proc. § 2339, committee held to have no authority to authorize cutting of timber on lunatic's land (Schribner v. Young, 111 App. Div. 814, 97 N. Y. S.

essary in the execution of his trust as is accorded to other trustees.[6] Hence, until confirmed by the court, the sale is not complete and confers no rights, whether the the sale is public or private.[7] Where the property of an incompetent intended to be mortgaged was never designated by a decree of court, but the selection was left to the guardian, the mortgage was void in the absence of confirmation by the court.[8] Interference with the primary right of a person to control and dispose of his own estate should not be allowed except in clear cases for the benefit of a person unable to care for his property.[9] In Arkansas probate courts have exclusive original jurisdiction of the estates of insane persons and the settlement of the accounts of guardians of such persons,[10] and when the settlements have been confirmed the orders of confirmation have the effect of judgments,[11] which, if erroneous, may be corrected by appeal;[12] but courts of equity may interfere to correct fraud, or relieve against accident, or on some other ground of equity jurisdiction to prevent irremediable mischief,[13] and when fraud is the ground for impeaching such settlements, actual or constructive fraud will suffice when specifically alleged and proved.[14] Orders passed affecting the duties and liabilities of the committee are generally binding on the committee's sureties.[15]

Ordinarily one having the custody of an incompetent is entitled to recover the value of the services rendered from the incompetent's estate,[16] which, as a claim against a decedent's estate, should be such an amount as the incompetent would have accorded therefor had the incompetent acquired full mental faculties before death and had possessed an ordinary sense of justice.[17] The claim of a relative of an incompetent for services in caring for the incompetent may be sustainable on the ground of necessaries.[18] Where the law requires the presence of the alleged incompetent at the inquest, it will be presumed, in an action for services in caring for him, that he was present at the inquest,[19] but if he was not present that is a proper matter to be set up by plea.[20] An independent estate of an incompetent sufficient for her support will not deprive her of the beneficial enjoyment of a trust created by will directing that the income or so much thereof as may be necessary shall be used for the incompetent's comfortable maintenance and support.[21]

§ 4. *Commitment to asylums.*[22]—An appeal usually suspends a judgment ordering an alleged incompetent to be committed to an asylum,[23] and it is held in

866), nor to ratify authority given therefor by lunatic's husband and son (Id.), nor an alleged settlement between the persons cutting the timber and the lunatic's husband and son (Id.).

6, 7. Montgomery v. Perryman & Co. [Ala.] 41 So. 838.

8. And it could not be made the basis of a suit for reformation and correction of an error therein. Montgomery v. Perryman & Co. [Ala.] 41 So. 838.

9. In re Colt [Pa.] 64 A. 597.

10. Under Const. art. 7, § 34, and Kirby's Dig. § 4002. Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773.

11, 12, 13, 14. Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773.

15. Order removing committee and requiring him to pay a certain sum into court held prima facie binding on sureties on committee's bond. Grafflin v. State [Md.] 63 A. 373.

16. Evidence held to show $20 per week for care of incompetent during illness was not an unreasonable claim. Ball v. Lindsey, 29 Ky. L. R. 653, 94 S. W. 630.

17. Key v. Harris [Tenn.] 92 S. W. 235.

18. Sister of incompetent held entitled to allowance from estate of incompetent for care of incompetent. Key v. Harris [Tenn.] 92 S. W. 235.

19, 20. Porter v. Eastern Kentucky Asylum, 28 Ky. L. R. 796, 90 S. W. 263.

21. Minnich v. People's Trust, Savings & Deposit Co., 29 Pa. Super. Ct. 334.

22. See 6 C. L. 36.

23. Reagan v. Powell, 125 Ga. 89, 53 S. E. 580. Pending an appeal from the judgment of the ordinary, entered on the return of a committee appointed under the provisions of Civ. Code 1895, § 2573, to inquire whether a person alleged to be of unsound mind is a fit subject for commitment to the state sanitarium, such person cannot legally be confined therein (Id.), unless a guardian has been duly appointed for him or his mental condition becomes such as to justify recourse to the summary proceeding authorized by section 2581, whenever a person without a guardian is violently insane or, for other good and sufficient reason, should not be longer

Georgia that a superior court judge has not, on habeas corpus, discretionary power to commit an alleged incompetent to the custody of the superintendent of the state sanitarium or anyone else.[24] Justices of the peace may by statute have limited jurisdiction to inquire into the sanity of persons for the purpose of commitment to hospitals for the insane.[25] In some states town selectmen may commit persons to an insane asylum,[26] and where the original commitment is illegal they are sometimes authorized to recommit to cure the error.[27] The town where an indigent insane person has a settlement is on notice usually liable for the support of such person when committed to an asylum in a different town.[28] Asylums are generally entitled to compensation for the care of insane persons officially committed to them[29] and the rate is fixed by statute in Kentucky, but their charges may be affected by the value of services rendered by the incompetent where in the absence of a legal commitment recovery on quantum meruit is sought.[30]

§ 5. *Property and debts.*[31]—The involuntary absence of an insane person does not affect his homestead rights.[32] The trustee of an insane person is entitled to administer on an estate of which such insane person is entitled to the residue under a statute giving the right to administer to one entitled to the residue of an estate.[33]

Statutes generally permit the sale of an incompetent's lands when advantageous[34] and to pay debts.[35] The sale of a lunatic's property when allowed is usually required to be by public auction,[36] and a sale for a particular purpose can-

left at large (Id.), and the superintendent of the state sanitarium cannot successfully rely on a judgment which is appealed as authorizing the confinement of the appellant in that institution whilst the appeal remains undisposed of in the superior court (Id.).

24. Reagan v. Powell, 125 Ga. 89, 53 S. E. 580.

25. The appointment by a county court of a committee for a person as insane on a finding by a justice that such person is insane on an inquisition under Code 1899, c. 58, § 9, without notice to the alleged incompetent is void. Karnes v. Johnston, 58 W. Va. 595, 52 S. E. 658.

26. Under Rev. St. c. 144, § 17, requiring evidence of at least two reputable physicians to establish the fact of insanity as a prerequisite to commitment to an asylum by town selectmen, a commitment without such evidence is void. Inhabitants of Rockport v. Searsmont [Me.] 63 A. 820.

27. Rev. St. c. 144, § 42, providing for the recommitment of a person illegally committed to an insane hospital and authorizing the recovery of expenses of both commitments and for support under the original commitment, is valid. Inhabitants of Rockport v. Searsmont [Me.] 63 A. 820.

28. Proceedings under Rev. St. c. 144, with respect to expenses and support of a person committed to an insane hospital by the town committing, and not the pauper residence of such person, held within the purview of chapter 27 with reference to the notice required by one town to another in case of furnishing pauper supplies (Inhabitants of Rockport v. Searsmont [Me.] 63 A. 820); that is, the plaintiff town having given notice to the defendant town, under a recommitment, was entitled to recover for expenses and support either under the original or the new commitment only three months prior to giving such notice (Id.).

29. Porter v. Eastern Kentucky Asylum, 28 Ky. L. R. 796, 90 S. W. 263. Where it is not shown what would be a reasonable allowance for keeping an incompetent at an asylum nor any facts from which it may be determined, no recovery can be had on a quantum meruit. Id.

30. If the inquest was not void and if the incompetent was regularly committed to the asylum, then the statute regulates the measure of compensation to be allowed for his keeping and no deduction can be made for his labor (Porter v. Eastern Kentucky Asylum, 28 Ky. L. R. 796, 90 S. W. 263), but if the inquest was void and a recovery is had on a quantum meruit, then his labor at the asylum may be considered in determining what should be paid the asylum for keeping him (Id.).

31. See 6 C. L. 36.

32. Curry v. Wilson [Wash.] 87 P. 1065.

33. Boyd v. Cloud [Del.] 62 A. 294.

34. Under Rev. Laws, c. 145, § 26, c. 146, § 9, c. 148, § 4, sale of dower and homestead rights of insane widow to owner of fee before being set off held valid on finding that such sale would be advantageous (Robinson v. Dayton, 190 Mass. 459, 77 N. E. 503), and it is not necessary to have the widow's interest in her husband's real estate ascertained, paid over, and used for her maintenance before the real estate can be sold (Id.).

35. A domestic guardian is authorized by the statutes of Washington to sell the real estate of a nonresident incompetent to pay debts, under 1 Hill's Ann. St. & Codes §§ 3070, 3076, and Laws 1893, p. 286, c. 120, §§ 1-5. Coleman v. Cravens, 41 Wash. 1, 82 P. 1005.

36. In Louisiana it is only where the pur-

not without judicial sanction be enlarged to affect or divest titles extraneous thereto.[37] The title to the real estate of an incompetent is not in the guardian but in the ward,[38] and in case of a sale thereof, under a decree, the court is the vendor.[39] A mortgage of an incompetent's property depends for its efficacy on the transfer of title which must be by antecedent judicial decree or subsequent confirmation.[40] A statute authorizing persons aggrieved by a probate decree to appeal therefrom includes the heirs presumptive of an incompetent whose lands a probate decree has directed to be sold.[41]

The trustees of an incompetent will not be authorized to borrow money for his maintenance to be repaid when sale of his property is made when they have cash on hand belonging to the incompetent sufficient and capable of being used for the purpose.[42] An incompetent's guardian represents the incompetent's creditors in so far as the incompetent's property is needed to pay debts,[43] and as the creditors of a mortgagor are not estopped to deny the validity of a mortgage executed by the mortgagor,[44] neither is the guardian of an incompetent mortgagor, who executed the mortgage while sui juris in fraud of his creditors, estopped to deny the validity of the mortgage,[45] since a mortgagee having a claim against the mortgagor that is not included in the mortgage indebtedness cannot apply the mortgaged property in satisfaction of it without the mortgagor's consent.[46] The established practice with respect to the enforcement of claims against an incompetent for whom a committee has been appointed is to present a petition to the court praying that the claim be allowed and paid, or, in the alternative, that leave be granted to sue thereon.[47] Generally the property of an insolvent incompetent is applied pro rata in the payment of claims,[48] but it is otherwise when, prior to the adjudication of incompetency and appointment of the committee, the creditor has in good faith obtained a lien or acquired a right of property by contract or otherwise.[49]

§ 6. *Contracts and conveyances.*[50]—As a general rule the contract of a person of unsound mind is voidable only, not void,[51] and whether it will be avoided at the instance of the committee depends on the circumstances of the case.[52] In some jurisdictions the fact that lunacy has not been found is made the basis of the application of the rule.[53] For necessaries furnished to the lunatic and his family a

pose is to effect a partition by the sale of the whole property that the interest of an interdict can be alienated by private sale [Act No. 25, p. 47, of 1878] (Gallagher v. Lurges, 116 La. 755, 41 So. 60), otherwise it must be sold at public auction [Civ. Code, arts. 341, 415] (Id.).

37. One authorized to represent an interdict as guardian in and for the purpose of a partition is without authority to represent him in a proceeding to devest the interdict alone of his interest in property held in division and to transfer it by illegal methods for an inadequate price, and mainly at his expense, to one of the other litigants and co-owners. Gallagher v. Lurges, 116 La. 755, 41 So. 60. A proceeding which has for its purpose only the private sale, to one of the plaintiffs, of the interest of an interdict in property held in common is ineffectual to devest the title of the interdict, though there be included in such proceeding a family meeting recommending the sale and a judgment homologating the same. Hence, one agreeing to purchase the property from the grantor, subject to examination of title, is not bound to comply with his agreement, when the title is to be derived through such proceeding. Id.

38, 39, 40. Montgomery v. Perryman & Co. [Ala.] 41 So. 838.

41. Robinson v. Dayton, 190 Mass. 459, 77 N. E. 503.

42. Dulaney v. Devries, 102 Md. 349, 62 A. 743.

43, 44, 45, 46. Brigham v. Madden [N. H.] 64 A. 723.

47, 48, 49. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

50. See 6 C. L. 36. See ante, § 5, as to contracts of indebtedness by guardians and sales by decree.

51. Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075.

52. Mortgages of incompetent held unenforceable. Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075.

53. A deed by an incompetent to good faith grantees for a good and valuable consideration, prior to lunacy having been duly

recovery of their value will be allowed, even though his condition was known by the other party.[54] One seeking to hold an incompetent liable for merchandise furnished in part to a third person, and who was put on inquiry as to the incompetent's mental condition, has the burden of showing how much of it went to the benefit of the incompetent or his family and its reasonable value.[55]

In some states the statutes make a distinction as to the effect of a contract by a person of unsound mind and one without understanding, declaring the contract voidable in the one case and void in the other.[56] Placing the person dealing with an incompetent in statu quo is generally a prerequisite to the avoidance of his executed contract.[57] To avoid a contract or deed on the ground of insanity it must be satisfactorily shown that the party was incapable of transacting the particular business in question,[58] or, as is sometimes stated, that his insanity was of such character that he had no reasonable perception or understanding of the nature and terms of the contract,[59] it not being enough to show that he was subject to delusions not affecting the subject-matter of the transaction,[60] nor that he was in other respects mentally weak.[61] The relation of principal and agent does not exist between an insane person and his guardian,[62] and as all persons are presumed to know the law, one leasing defective premises from the guardian of an incompetent is presumed to know that the guardian cannot bind the incompetent by agreement.[63] Contracts of an incompetent executed during a lucid interval are valid,[64] especially in the absence of undue influence.[65] The deed of a lunatic is binding on him if not promptly disaffirmed when his disability is removed.[66] In the absence of statute a

found, is not void but only voidable. Miller v. Barber [N. J. Law] 62 A. 276.

54. Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075.

55. Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075. Evidence held sufficient to show that one dealing with incompetent was put on inquiry as to incompetent's mental condition. Id.

56. Civ. Code, §§ 38, 39. Evidence held to show mere unsoundness of mind within Civ. Code, § 39. Maionchi v. Nicholini, 1 Cal. App. 690, 82 P. 1052.

57. Swartwood v. Chance [Iowa] 109 N. W. 297; Miller v. Barber [N. J. Law] 62 A. 276. Before an inquisition of lunacy, contracts of the lunatic founded on adequate consideration of which the lunatic had the benefit, and made by the other party without fraud or undue influence and in good faith, in ignorance of the mental condition of the lunatic, will be upheld where the parties cannot be placed in statu quo. Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075.

58, 59, 60. Swartwood v. Chance [Iowa] 109 N. W. 297.

61. Swartwood v. Chance [Iowa] 109 N. W. 297; Saffer v. Mast, 223 Ill. 108, 79 N. E. 32. The legal test of mental capacity to make a deed is the capacity of the grantor to understand the nature and effect of the transaction. Chadwell v. Reed, 198 Mo. 359, 95 S. W. 227.

62. Reams v. Taylor [Utah] 87 P. 1089. Where plaintiff leased premises of an incompetent from the guardian, exacting a promise from the guardian to repair a certain defect and the repair not having been made as promised plaintiff fell and sustained injuries caused by the defect, she could not recover damages therefor in an action against the insane person as for breach of covenant. Id. See, also, Agency, 7 C. L. 61.

63. Reams v. Taylor [Utah] 87 P. 1089. The tenant of an insane person's real estate knowingly leased from the incompetent's guardian has no right to go on the assumption that the estate of the incompetent would be liable for injuries resulting from the guardian's failure to repair defects known to the tenant (Id.), but as against the estate of the incompetent it is the tenant's duty to guard against injury from such source (Id.).

64. Critchfield v. Easterday, 26 App. D. C. 89. Testimony of a larger number of witnesses as to mental unsoundness of a grantor, not showing actual insanity, is not conclusive as to the grantor's incapacity when there is testimony of unimpeached witnesses who were personally present at the time of execution that the deeds were executed knowingly and with a complete understanding of their purpose and effect. Id.

65. The fact that one, though not insane, was in such an infirm mental condition as to be dependent on her husband and subject to his superior will is immaterial on the question of setting aside deeds to her husband when no undue advantage was taken of her by her husband in procuring the deeds. Critchfield v. Easterday, 26 App. D. C. 89. Where property had been bought by the husband and the title placed in the wife, undue advantage of the wife is not shown to have been taken by the husband, in their extreme old age, procuring her to deed the property to him and he in turn making a will giving her, through a trustee, the absolute right to use it all for her support and maintenance during life. Id.

66. Lapse of ten years after removal of

husband as guardian of his insane wife has no authority to mortgage her interest in their property.[67] A valid joint mortgage by husband and wife being required to waive or convey the homestead in Kentucky, the insanity of one spouse at the time of joining in a mortgage of their homestead renders the mortgage void as to both.[68] Purchasers of an incompetent's property from a grantee of the incompetent cannot hold the property as innocent purchasers where they knew or were charged with knowledge of the incompetency.[69] In such case the purchasers, on being required to reconvey, are not chargeable with rents where they erected improvements on the land sufficient in value to compensate for the use of the land,[70] but where the grantee knows that the person with whom he is dealing is laboring under mental disability and overreaches him, he is not entitled to reimbursement or indemnity on account of the price paid on cancellation of the contract,[71] though the rule is otherwise where he deals fairly with the person under disability without knowledge of his misfortune, in which case the purchaser must usually be placed in statu quo.[72]

§ 7. *Torts.*[73]—A lunatic is liable for compensatory damages for a tort where intent is not material to its commission,[74] but is not liable for the negligence of his committee in the management of his real property,[75] nor is the committee liable therefor in his representative capacity.[76] An incorporated insane asylum with power to sue and be sued, but maintained by the state as a purely eleemosynary institution, is not liable for the tort of a lunatic in its charge.[77] A lunatic being liable for torts not partaking of a specific intent or scienter,[78] it is proper in an action to ignore an allegation that the act was wrongfully done.[79]

§ 8. *Crimes.*—One cannot be compelled to answer to or defend against crime when by reason of an insane mental condition he is unable to do so in a rational manner.[80]

§ 9. *Actions by or against.*[81]—An insane person must be prosecuted and defended by committee or guardian ad litem.[82] A statute requiring guardians ad litem

incompetency held fatal to right to disaffirm. Spicer v. Holbrook, 29 Ky. L. R. 865, 96 S. W. 571.

67. A statute authorizing the mortgage of a homestead but providing that no mortgage shall be valid against the wife of the mortgagor unless she shall sign and acknowledge the same does not authorize the execution of a mortgage by a husband as guardian of his insane wife. 2 Hill's Ann. St. & Codes, § 483, construed. Curry v. Wilson [Wash.] 87 P. 1065. This is shown by legislative construction in the subsequent enactment of a statute expressly authorizing mortgages of homesteads in case of the hopeless insanity of a spouse. Ballinger's Ann. Codes & St. § 5239. Id.

68. Stafford v. Tarter, 29 Ky. L. R. 1184, 96 S. W. 1127.

69, 70. Rush v. Handley [Ky.] 97 S. W. 726.

71, 72. Jackson v. Counts [Va.] 54 S. E. 870.

73. See 4 C. L. 129.

74. Assault and battery. Feld v. Borodofski, 87 Miss. 727, 40 So. 816.

75, 76. Ward v. Rogers, 51 Misc. 299, 100 N. Y. S. 1058.

77. Asylum held not liable for personal injuries to employe caused by lunatic starting machinery on which plaintiff was working. Leavell v. Western Kentucky Asylum, 28 Ky. L. R. 1129, 91 S. W. 671.

78, 79. Feld v. Borodofski, 87 Miss. 727, 40 So. 816.

80. Finding of insanity by probate court held binding on city court of Wichita under Gen. St. 1905, c. 60 (Ex parte Wright [Kan.] 86 P. 460), rendering void the preliminary examination of defendant charged with crime (Id.), as well as his commitment by the city court (Id.).

81. See 6 C. L. 37. An action on behalf of an incompetent against the estate of one who has willed to the incompetent all she has left cannot be maintained. Sprigg v. Sprigg's Trustee, 28 Ky. L. R. 944, 90 S. W. 985.

82. See 6 C. L. 38, n. 81, also Guardians Ad Litem and Next Friends, 7 C. L. 1896. An incompetent suing by next friend may maintain a suit to set aside his parent's will. Holland v. Couts [Tex.] 17 Tex. Ct. Rep. 113, 98 S. W. 236, afg. on certificate [Tex. Civ. App.] 17 Tex. Ct. Rep. 254, 98 S. W. 233. A judgment rendered on service of process merely on the guardian of an incompetent in any suit or proceeding in which his estate in the county of his residence is involved, as the forclosure of a mortgage, is binding on the incompetent though he is confined in an asylum in another county on a finding of incompetency there. Gen. St. 1901, §§ 3941, 3945, 3948, 3977, 3978, construed. Foran v. Healy [Kan.] 85 P. 751, on rehearing 86 P. 470.

of insane persons to prosecute and defend in actions by and against their wards is inapplicable where there has been no inquest,[83] nor is the fact in such case that knowledge of the insanity of one of several coplaintiffs first comes to defendant at the trial ground for suspending the proceedings on defendant's suggestion until a guardian ad litem has been appointed for the incompetent.[84] Leave of court is, in some jurisdictions, essential to the right to maintain an action against an incompetent.[85] As the committee of an incompetent has only such authority as is conferred by statute or order of court,[86] the appearance and answering for an incompetent by his committee and putting the case on the calendar is not a waiver of objection to the failure of plaintiff to obtain leave of court for the prosecution of the action,[87] especially where it did not appear whether the committee voluntarily defended or whether the answer was interposed by direction of the court.[88] It has been held in Virginia that suits may be commenced and prosecuted by the next friend of an incompetent without previous appointment or formal order of admission,[89] and hence the question of the validity of the appointment of committees is immaterial when it involves merely the right of the committee to maintain an action on behalf of the alleged incompetent.[90] By statute in Georgia the guardian appointed by the ordinary may be made a party to the record in the supreme court when it is made to appear that a party has been formally adjudged insane since the signing of the bill of exceptions.[91] Where the statute provides that the summons to an incompetent defendant must be served on him and others specified in a given order of precedence,[92] compliance therewith is a condition precedent to valid service. Whether one has mental capacity to maintain an action for personal injuries has been held to be a question proper to be submitted to the jury.[93] Appointment of a committee does not under the codes stay or abate an action.[94] Subsequent insanity does not avoid an attor-

An insane defendant's rights were sufficiently guarded where the hearing was on the merits participated in by his solicitors, who produced witnesses in his defense, and his subsequently appointed guardian ad litem was present and assisting in the defense as a witness. Eggert v. Eggert, 144 Mich. 182, 13 Det. Leg. N. 219, 107 N. W. 920.

83. Rev. St. 1899, § 3667, construed. Koenig v. Union Depot R. Co., 194 Mo. 564, 92 S. W. 497.

84. Koenig v. Union Depot R. Co., 194 Mo. 564, 92 S. W. 497.

85. An order by a single justice of the supreme court permitting service of summons on an inmate of an insane asylum, not intended as leave of court to bring action, cannot be construed as granting such leave, assuming leave to be essential to the right to maintain the action (Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44), but leave of court is not essential to the maintenance of an action against an incompetent prior to the appointment of a committee (Id.). Where a party has been declared an incompetent and the supreme court has appointed a committee of his person and estate and an accounting proceeding is brought in the surrogate's court relative to property in which the incompetent as well as others is interested (Meeks v. Meeks, 100 N. Y. S. 667), it is not necessary to apply to the supreme court for permission to serve the citation (Id.). Where an action has been properly commenced against an incompetent, authority to prosecute it to judgment may be granted before the discharge of the committee (Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44), but if leave should not be granted and the claim should not be paid in full, the plaintiff could, after the discharge of the committee, continue the action for any unpaid balance, and his right in due time to obtain a judgment on his cause of action could thus be preserved without the statute of limitation becoming a bar (Id.).

86, 87, 88. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

89. Jackson v. Counts [Va.] 54 S. E. 870.

90. It would in no way affect their rights to prosecute the suits, as the court would simply treat them as next friends of persons under disabilities whom they have undertaken to represent and permit the suits to proceed. Jackson v. Counts [Va.] 54 S. E. 870.

91. Under Civ. Code 1895, § 2570 et seq., guardian of incompetent defendant in error substituted as party. Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391.

92. Service of summons on father of incompetent without mentioning incompetent held not a compliance with Civ. Code Prac. § 53. Porter v. Eastern Kentucky Asylum, 28 Ky. L. R. 796, 90 S. W. 263.

93. Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391.

94. An action at law commenced against an incompetent prior to the appointment of a committee **need not necessarily be stayed** after the appointment until the committee is discharged **on further order of the court**

ney's contract authority to prosecute an action or proceeding[95] or suspend the cause of action,[96] and, as to a matter quasi in rem, such as probate of a will, the insane client will be bound[97] even without the substitution of a guardian or committee, there having been no judicial finding or commitment.[98] Prior to 1905 a judgment rendered against an insane person on personal service made after he had been adjudged insane and before a guardian had been appointed was void under the Kansas statutes.[99] A judgment against an incompetent can only be enforced by application to the court while the estate is in the custody of the court,[1] but on recovery of the incompetent or discharge of the committee the judgment is enforceable by execution.[2] The right to contest a judgment rendered against an incompetent may be lost by lapse of time where the circumstances disclose that the rights of the incompetent were protected.[3] But a statute limiting the time after removal of disability in which action may be brought to set aside a judgment rendered against a person of unsound mind has no application when the action is brought during continuance of the disability.[4] Relief in equity may be obtained against the enforcement of a judgment at law against an incompetent,[5] and injunction lies to prevent vexatious litigation against an incompetent where the remedy at law is not plain and adequate.[6]

A compromise in the interest of an incompetent such as a court of chancery would have approved, if submitted to it, will be upheld.[7]

INSOLVENCY.

§ 1. Effect of Federal Bankruptcy Act on State Insolvency Laws (330).
§ 2. Procedure and Parties to Adjudicate Insolvency (330).
§ 3. Property Passing to the Assignee (330).
§ 4. Administration of Insolvent Estate (330).
§ 5. Rights and Liabilities Affected by Insolvency and Discharge of Insolvent (332).

This article treats only of the general law of insolvency and insolvency pro-

(Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44), but may properly be prosecuted to judgment to enable the plaintiff to have his claim liquidated before applying to the court to have it paid by the committee (Id.).

95. As to all matters included in the original contract of employment, it was **not affected** by the commitment of the client to an insane hospital without the appointment of a guardian, in the absence of any other adjudication of insanity. McKenna v. Garvey, 191 Mass. 96, 77 N. E. 782. Hence, **service of notice of appeal on the attorney,** under statutes expressly providing for service on attorneys, **gave the appellate court jurisdiction,** notwithstanding the commitment of the client. Id.

96. Insanity of defendant in a **divorce proceeding** arising subsequent to the commission of the acts alleged to constitute the ground for divorce will not justify the court in refusing to proceed with the trial during the continuance of the insanity. State v. Murphy [Nev.] 85 P. 1004.

97. Incompetent was acting in a **representative capacity** in attempting to procure the probate of a will. McKenna v. Garvey, 191 Mass. 96, 77 N. E. 782.

98. Failure to substitute some one in place of incompetent held a mere informality which did not affect the result. McKenna v. Garvey, 191 Mass. 96, 77 N. E. 782.

99. Compliance with Gen. St. 1901, § 3958, requiring service on guardian of insane person, held jurisdictional prior to its repeal by Laws 1905, p. 450, c. 299. Marquis v. Wiren [Kan.] 87 P. 1135.

1, 2. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

3. Where, in an accounting proceeding brought in the surrogate's court relative to property in which an incompetent, as well as others, is interested, the rights of the incompetent were cared for by his committee, an eminent lawyer, represented by learned counsel, there is nothing in the case which calls for action by the supreme court, after the lapse of 13 years to interfere with the surrogate's decree. Meeks v. Meeks, 100 N. Y. S. 667.

4. Ballinger's Ann. Codes & St. § 5156, construed. Curry v. Wilson [Wash.] 87 P. 1065.

5. Where the statute of limitations was a bar to an action against an insane person, equity has jurisdiction after his death, at the suit of his representatives, to vacate a judgment rendered against him therein, no guardian ad litem having been appointed and the court not having been advised of his mental incapacity. Godde v. Marvin, 142 Mich. 518, 12 Det. Leg. N. 786, 105 N. W. 1112.

6. Incompetent held not to have an ads-

cedure and settlement. Matters pertinent to bankruptcy,[8] assignments for the benefit of creditors,[9] the appointment, rights, and duties of receivers,[10] the discharge of insolvents from imprisonment for debt,[11] the marshaling of assets,[12] and composition with creditors, are elsewhere treated.[13]

§ 1. *Effect of Federal bankruptcy act on state insolvency laws.*[14]—State statutes are suspended only as to persons who can be made subject to the Federal bankruptcy act.[15]

§ 2. *Procedure and parties to adjudicate insolvency.*[16]—Insolvency denotes the insufficiency of the entire property and assets of an individual to pay his debts,[17] and is to be determined by a comparison of resources with liabilities.[18] Solvency is presumed.[19] In Minnesota a duly certified copy of an order appointing a receiver of an insolvent, filed in the office of the register of deeds, is notice of the fact of the receivership to all who thereafter deal with lands of the insolvent situated in the county.[20]

§ 3. *Property passing to the assignee.*[21]—Ordinarily a trustee in insolvency is entitled to enforce against property claimed by others any rights which could be enforced by the creditors.[22] In Pennsylvania an insolvent debtor cannot waive the benefit of the exemption act.[23] A prior attachment of realty in a Federal court does not prevent a receiver in subsequent insolvency proceedings in a state court from taking possession of the property.[24]

§ 4. *Administration of insolvent estate.*[25]—Illegal demands are properly expunged.[26] The right of a creditor to priority generally depends upon the character of his claim.[27] As soon as a court determines that a corporation is insolvent and

quate remedy at law against threatened suits on notes and sales of collateral alleged to have been procured from the incompetent by undue influence. Heath v. Capital Sav. Bank & Trust Co. [Vt.] 64 A. 1127.

7. Where by the compromise of a contest of her father's will, and a deed executed by him, an alleged incompetent retained more of her father's estate than she would have received had the deed and will been set aside, the compromise was in the incompetent's interest. Sprigg v. Sprigg's Trustee, 28 Ky. L. R. 944, 90 S. W. 985.

8. See Bankruptcy, 7 C. L. 387.

9. See Assignments for Benefit of Creditors, 7 C. L. 286.

10. See Receivers, 6 C. L. 1250.

11. See Civil Arrest, 7 C. L. 653.

12. See Marshaling Assets and Securities, 6 C. L. 520.

13. See Composition with Creditors, 7 C. L. 674.

14. See 6 C. L. 38.

15. Pennsylvania Act of June 4, 1901 (P. L. 404), is in force as to farmers. Citizens' Nat. Bank v. Gass, 29 Pa. Super. Ct. 125. Where an assignee petitioned the court to set aside a writ of execution issued prior to assignment on ground that assignor was a farmer, held not error to refuse application where it was denied that assignor was a farmer and answer was not met by countervailing proof. Charles v. Smith, 29 Pa. Super. Ct. 594.

16. See 6 C. L. 39.

17. Rogers v. Odgen Bldg. & Sav. Ass'n [Utah] 83 P. 754.

18. Not alone from amount of money on hand or coming in. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754.

19. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754.

20. Gen. St. 1894, § 4228. Noyes v. American Freehold Land Mortg. Co., 97 Minn. 38, 105 N. W. 1126.

21. See 6 C. L. 39.

22. Not limited to rights of insolvent. Wilson v. Griswold [Conn.] 63 A. 659.

23. Under express provision of Act June 4, 1901 (P. L. 404, § 33), relating to creditors who do not participate in distribution of assigned estate, such creditors may not levy upon exempt property. Citizens' Nat. Bank v. Gass, 29 Pa. Super. Ct. 125.

24. Federal court would not enjoin state receivers from proceeding in a suit to enjoin sale under Federal process and attack validity of Federal attachment. Ingraham v. National Salt Co., 139 F. 684.

25. See 6 C. L. 39.

26. Note given by husband to wife for money borrowed from her held not an equitable liability provable aganst his insolvent estate. Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515. Where by a composition agreement the creditors were given notes for their respective claims, and at the time of expunging plaintiff's illegal claim her note therefor had not been fully paid and the assignees had not sufficient money in their hands to pay it, after making necessary deductions, the conditions had not so changed as to make the erroneous proof immaterial, and the claim was therefore properly expunged. Id.

27. An attorney who at the instance of all the creditors recovers for their benefit

restrains it from disposing of its property, it in effect takes possession of the property as a trust fund for the benefit of all its creditors,[28] and the fact that thereafter, but before the appointment of a receiver, a general creditor recovers a judgment and levies an execution thereon, does not entitle him to priority.[29] A seizure of property by a creditor must be lawful in order to give him priority.[30]

Payments to creditors can be made only when authorized by the court[31] and according to the legal priority of claims.[32] In Louisiana, unauthorized payments having been made, the creditors aggrieved may oppose the final account of the syndic and obtain a personal judgment against him where the claims cannot be satisfied out of funds in his hands.[33] If the assets of a corporation prove sufficient to pay all demands in full, the creditors are entitled to interest on their claims pending liquidation.[34]

An unlawful preference made by the insolvent may be recovered by the assignee.[35] If any part of the purpose of a transfer is fraudulent, the whole is void,[36]

funds belonging to an insolvent is entitled to have the reasonable value of such services preferred against the funds (Butler v. Conwell, 14 Wyo. 166, 82 P. 950), whether recovered before or after appointment of a receiver (Id.), and it is immaterial to the validity of the claim whether it is presented for allowance by the creditor or by the attorney himself (Id.). Complaint sufficient as against general demurrer. Id. A mere **voluntary loan** to a going concern used to pay claims entitled to a preference does not entitle the lender to a preference by subrogation on the subsequent insolvency of the concern. Bank of Commerce v. Lawrence County Bank [Ark.] 96 S. W. 749. Evidence held not to constitute a ground for declaring a preference against the receiver of an insolvent bank in favor of a creditor of another insolvent or of the receiver of such other insolvent. State v. Corning State Sav. Bank, 128 Iowa, 597, 105 N. W. 159.

28. Squier v. Princeton Lighting Co. [N. J. Eq.] 64 A. 474.

29. Rule not affected by Laws 1896, p. 299, c. 185, § 68, divesting an insolvent corporation of title to its property upon appointment of receiver. Squier v. Princeton Lighting Co. [N. J. Eq.] 64 A. 474.

30. No preference where officers of corporation turned over property to a creditor without authority. Jones v. Northern Pacific Fish & Oil Co., 42 Wash. 332, 84 P. 1122.

31. Zeigler v. Creditors, 116 La. 250, 40 So. 693.

32. Where syndic paid in full claims subordinate in rank to complainants' claims and thereby also threw upon complainants costs and expenses of administration. Zeigler v. Creditors, 116 La. 250, 40 So. 693.

33. Were not bound to proceed against creditors who had received the unauthorized payments as provided by Civil Code, art. 1188, where payments were made without "authorization of the judge." Zeigler v. Creditors, 116 La. 250, 40 So. 693. Not bound to proceed as per arts. 1055, 1056, Code of Prac., by obtaining order from court directing syndic to pay the claims, making demand, and issuing execution on failure of syndic to respond. Id. Complaint held to charge maladministration. Id.

34. See, also, Interest, 6 C. L. 157. Allowed to depositors of trust company declared insolvent. People v. Merchants' Trust Co., 101 N. Y. S. 255. Assuming possession of the property of a trust company by the state through temporary receivers dispenses with any formal demand by depositors for the payment of their deposits as a condition to recovery of interest. Id. Depositor held entitled to payment of interest after dissolution only upon balance which would have been due him had he accepted the several instalments of principal at the time they were respectively paid to creditors by receivers. Id.

Rules given as to the time and rate of interest in favor of depositors having interest contracts and those not having such contracts, and in favor of holders of certificates of deposit and of certified checks. People v. Merchants' Trust Co., 101 N. Y. S. 255.

35. To recover a preference under Pub. St. c. 157, § 96, an assignee need show only that the debtor was insolvent; that the transfer was made within six months of the filing of the petition in insolvency and with a view to give a preference; that the creditor had reasonable cause to believe the debtor insolvent; and that the transfer was made in fraud of the insolvency laws. Bolster v. Graves, 189 Mass. 301, 75 N. E. 714. Evidence sufficient to authorize judgment for assignee for money paid and goods converted. Id. Evidence insufficient to sustain action by assignee for conversion of tobacco. Jaquith v. Davenport, 191 Mass. 415, 78 N. E. 93. If sale was not to defendant but to another, the fact that it was not in the usual course of business was immaterial. Id. Transaction between insolvent and son-in-law in form of cash sale of realty followed shortly after by payment of unsecured note by vendor to vendee held a preference. New Orleans Acid & Fertilizer Co. v. Gulliory & Co., 117 La. 821, 42 So. 329. The right of an individual creditor to be paid by preference out of individual assets must be enforced in the bankruptcy proceedings, and is not a defense to an action in a state court by partnership creditors to set aside a sale as an undue preference. Id. On the issue of a debtor's insolvency at the time of making an alleged preference, evidence of the state of the money market at the time the payments were

and an agent's knowledge of its character is binding upon the creditor.[37] A transaction which does not diminish the insolvent's estate is not a preference.[38]

The assignee is ordinarily required to seasonably file an account with the court,[39] and generally he is allowed a reasonable compensation for his services.[40] Parties who appear and contest the issues before a master are not as a rule entitled to a jury trial after his determination.[41] The right of review is governed by statute.[42]

§ 5. *Rights and liabilities affected by insolvency and discharge of insolvent.*[43] —In New Jersey the affidavit of the assignee is not an essential preliminary to an order of discharge.[44]

INSPECTION, see latest topical index.

INSPECTION LAWS.[45]

Commodity inspection laws promotive of public safety are to be construed as remedial statutes so as reasonably to accomplish their end,[46] and, accordingly, oil once inspected is not subject to reinspection when again entered into the state.[47] Whether each container of oil must be separately inspected depends on the terms of the statute[48] and is not to be implied from mere authority to reinspect.[49] The Missouri statutes do not require official weighing of grain except where official in-

made was inadmissible. Bolster v. Graves, 189 Mass. 301, 75 N. E. 714.

36. Jaquith v. Davenport, 191 Mass. 415, 78 N. E. 93. Evidence held to require the giving of an instruction to this effect. Id. Other evidence held not to require it. Id.

37. Jaquith v. Davenport, 191 Mass. 415, 78 N. E. 93. Certain state of facts considered and some held to require the giving of this ruling and others not. Id. Where transfer was a fraudulent preference so far as securing a pre-existing debt, creditor held not entitled to a lien to the amount of loans made on faith thereof after transfer. Bolster v. Graves, 189 Mass. 301, 75 N. E. 714.

38. Swapping and payment of notes releasing collateral. Jaquith v. Davenport, 191 Mass. 415. 78 N. E. 93.

39. Under Pub. St. 1882, c. 157, § 59, requiring assignees to render accounts, where the duties of the assignees were to continue after the confirmation of the composition and discharge of the debtor, and the assignees had assets of the estate in their hands, their account was not filed too late. Caldwell v. Nash, 190 Mass 507, 77 N. E. 515.

40. Assignees who by terms of composition continued to discharge duties after its confirmation held entitled to compensation under Pub. St. 1882, c. 157, § 56, allowing reasonable compensation to assignees in discretion of judge. Caldwell v. Nash, 190 Mass. 507, 77 N. E. 515.

41. Are limited to presenting objections to master, and, on his failure to correct the findings, to require him to certify the evidence with his report for review of court. San Jacinto Oil Co. v. Culbertson [Tex. Civ. App.] 96 S. W. 110.

42. See, also, Appeal and Review, 7 C. L. 128. Under the present Connecticut statute a single appeal will not lie to contest the claims of two or more creditors held in severalty. In re Merwin's Estate [Conn.] 63 A. 784. The fact that an appeal is now allowed from the doings of commissioners generally without the qualifying words "in allowing or rejecting a claim," used in earlier statutes, does not authorize a single appeal. Revision 1902, § 409. Id. Insolvent Debtor's Act (Hurd's Rev. St. 1903, c. 72), § 26, providing for appeal to the circuit court from order of county court refusing to discharge an insolvent debtor, was repealed by § 8 of the act creating the appellate court (Hurd's Rev. St. 1903, c. 37, § 25), providing for appeals to that court from final judgments, orders, etc., of county courts, and hence such appeal must be taken to the appellate court and not to the circuit court. Groszglass v. Von Bergen, 220 Ill. 340, 77 N. E. 195. Where a bill to wind up the estate of a decedent as insolvent is brought in the county court under Shannon's Code, §§ 4066, 4102, instead of adopting the special procedure prescribed by §§ 4070-4101, an appeal from the decree of the county court lies directly to the supreme court under § 4907. Key v. Harris [Tenn.] 92 S. W. 235. Question not affected by Acts 1873, p. 100, c. 64 (Shannon's Code, §§ 4067, 6028), providing for concurrent jurisdiction in the county courts to sell real estate of decedents, etc. Id.

43. See 6 C. L. 41.

44. Under Insolvent Debtor's Act, § 22, requiring the oath to be made immediately after assignment is made. Stokes v. Hardy [N. J. Law] 62 A. 1002. Recital by court in order discharging debtor that assignment executed by debtor was filed before making of order held not overcome by file mark of clerk. Id.

45. See 6 C. L. 42.

46. Oil inspection. Richardson-Gay Oil Co. v. Ashton [Okl.] 87 P. 662.

47. Richardson-Gay Oil Co. v. Ashton [Okl.] 87 P. 662.

spection is required[50] and when the grain comes to or from a public warehouse.[51] In Tennessee a suit to restrain the oil inspector is a suit against the state or one of its officers tending to reach its property in the fees, and hence fails.[52]

INSTRUCTIONS.

§ 1. **Object and Purpose (333).**
§ 2. **Province of Court and Jury (333).**
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§ 17. **Review (373).** Objections and Exceptions Below (373). The Record on Appeal (373). Invited Error (374). Harmless Error (374). Instructions Must be Considered as a Whole (374). Curing Bad Instructions (376).

The scope of this topic is confined to instruction in civil cases. Instructions in criminal prosecutions are treated elsewhere.[1]

§ 1. *Object and purpose*[2] of instructions is to state and explain the law applicable to the case[3] and not to direct the jury to disregard evidence received without objection.[4]

§ 2. *Province of court and jury.*[5]—It is the exclusive province of the jury to determine all issues of fact,[6] the credibility of witnesses,[7] the weight to be given their testimony,[8] and to find the ultimate facts from all the evidence introduced.[9]

48, 49. In Jefferson County, Alabama, there need not be reinspection when oil inspected in tanks is drawn into barrels and sold. Construing Local Act, Feb. 27, 1901 (Acts 1900-01, p. 1262). Hawkins v. Louisville & N. R. Co. [Ala.] 40 So. 293.

50. The practice of inspecting at places not official does not require weighing there. State v. Goffee, 192 Mo. 670, 91 S. W. 486.

51. State v. Goffee, 192 Mo. 670, 91 S. W. 486. Whether warehouse is public is not open on motion for judgment on pleadings in quo warranto where the private character of warehouses stands admitted. Id.

52. General Oil Co. v. Crain [Tenn.] 95 S. W. 824.

1. See Indictment and Prosecution, 5 C. L. 1836.

2. See 6 C. L. 43.

3. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341.

4. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

5. See 6 C. L. 43.

6. It is error to take from the jury the determination of a material question of fact. Merry v. Calvin, 122 Ill. App. 469. Instructions taking from the jury a question of fact relative to fraud held erroneous. McDonough v. Williams [Ark.] 92 S. W. 783. As to whether failure of a brake valve to work would have averted an accident was controverted and under the evidence was a question for the jury and it was error for the court to withdraw it from their consideration. Louisville & N. R. Co. v. Bohan [Tenn.] 94 S. W. 84. It is error to charge that there is no evidence of certain material facts when there is evidence sufficient to require the submission of the question of the existence of such facts. Wiese v. Gerndorf [Neb.] 106 N. W. 1025. Request withdrawing from the jury an essential element of an oral contract supported by evidence properly refused. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499. Where a tax deed declared by statute to constitute prima facie evidence has been introduced, the court should instruct on the effect of evidence introduced to show that it was void. Ropes v. Minshew [Fla.] 41 So. 538.

7. See post § 12.

8. See post § 12. Whether one class of testimony is entitled to greater weight is a question of fact, and it is not the province of the court to instruct as to which class should be preferred. Coulter v. Thompson Lumber Co. [C. C. A.] 142 F. 706.

9. It is error to instruct that the jury may make concessions, providing their verdict is based on the law and evidence. Gulf, etc., R. Co. v. Johnson [Tex.] 14 Tex. Ct. Rep. 97, 90 S. W. 164.

Consequently, if the evidence is conflicting,[10] even though it preponderates heavily one way[11] or is all oral,[12] or if different minds acting within the limitations prescribed by law might draw different conclusions[13] or inferences therefrom,[14] it should be submitted; but where facts are undisputed,[15] and only one inference can be drawn from them, a question of law is presented.[16]

It is the province of the court to determine questions of law and it is error to submit them to the jury.[17] The construction of written instruments is a question of law.[18]

10. Where there is evidence upon which to base a finding either way, the court properly refuses to take the question from the jury. Matfield v. Kimbrough [Tex. Civ. App.] 13 Tex. Ct. Rep. 927, 90 S. W. 712. It is an invasion of the province of the jury to direct a verdict when there is a conflict of evidence relative to a material issue. Logan v. Meade [Tex. Civ. App.] 17 Tex. Ct. Rep. 158, 98 S. W. 210. On conflicting evidence an instruction that the evidence shows a certain fact invades the province of the jury. Calvert Bank v. Katz & Co., 102 Md. 56, 61 A. 411. Where evidence is conflicting a verdict should not be directed. Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643.

11. The jury should not be instructed to disregard defenses alleged unless there is no proof bearing thereon. Haney v. Blandino [Tex. Civ. App.] 13 Tex. Ct. Rep. 967, 89 S. W. 1108.

12. Where evidence is all oral, no matter how strong and convincing and though there may be no countervailing evidence, it must be submitted. McReynolds v. Quincy, etc., R. Co., 115 Mo. App. 676, 91 S. W. 446.

13. Should not suggest conclusions of fact to be drawn from the evidence. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927. If ordinary minds may draw different conclusions from the evidence it should be submitted. St. Louis S. W. R. Co. v. Demsey [Tex. Civ. App.] 13 Tex. Ct. Rep. 961, 89 S. W. 786. It is error to instruct that from one fact proved the plaintiff had a right to presume another material fact. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650.

14. It is not the province of the court to tell the jury what it may or may not infer from certain facts proved. Wood v. Oison, 117 Ill. App. 128. If diverse inferences of fact are warranted, the case should be submitted though the evidence is uncontradicted. Allen v. American Beet Sugar Co. [Neb.] 106 N. W. 469. Where there is evidence and inferences to be drawn from establishing a certain fact, the question should be submitted to the jury. Western Underwriters Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447. Inference to be drawn from letters which did not constitute a compact between the parties, but mere evidence was for the jury and not the court. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137.

15. Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737.

16. Whether they constitute negligence is a question of law. Isley v. Virginia Bridge & Iron Co. [N. C.] 53 S. E. 841. In an action on an insurance policy upon an issue as to whether the actual value of the insured's interest exceeded the loan value of the policy, where the only witness on the point testified that there was an excess, it was proper to so charge. New York Life Ins. Co. v. Mills [Fla.] 41 So. 603.

17. Held questions of law: The evidence being undisputed, the question whether one had conveyed his title is one of law and it is error to submit it to the jury. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. The question as to what constitutes "ownership" is one of law and should not be submitted. Ware v. Souders, 120 Ill. App. 209. It is error to permit the jury to determine what are the material allegations of a complaint. Peoria & P. Terminal R. Co. v. Hoerr, 120 Ill. App. 65. It is error to charge the jury that they are the judges of the law and facts submitted to them. Atlantic & B. R. Co. v. Bowen, 125 Ga. 460, 54 S. E. 105. A charge that a bill of lading constitutes the contract between the parties and conflicting parol evidence cannot be considered is properly refused as it leaves to the jury to review the rulings of the court in admitting such testimony and decide whether any evidence conflicted with such bill of lading. Norfolk & W. P. Co. v. Harman, 104 Va. 501, 52 S. E. 368. Request authorizing the jury to construe the legal effect of a letter properly refused. Ellis v. Littlefield [Tex. Civ. App.] 14 Tex. Ct. Rep. 514, 93 S. W. 171. Should not be left to determine what act was "outside and beyond the command of a writ." Taylor v. Crowe, 122 Ill. App. 518. Whether statements claimed to be a part of the res gestae are really such is a question of law and should not be submitted. Southern R. Co. v. Brown [Ga.] 54 S. E. 911. Instruction submitting whether a horse was lawfully in a certain field. Carpenter v. Chicago & A. R. Co. [Mo. App.] 95 S. W. 985. As to what constitutes a contract. Turner v. Owen, 122 Ill. App. 501. Authorizing a verdict on a finding of adverse possession without defining the term. Chambers v. Morris [Ala.] 42 So. 549. Instruction that if the jury believed that a contract was broken by a certain act. Jones Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191. Leaving the jury to determine what are the "material" allegations of a declaration. Illinois Cent. R. Co. v. Hicks, 122 Ill. App. 349.

Not a question of law: Instruction that if it is believed that plaintiff in a personal injury action has proved her allegations by a preponderance of evidence she can recover does not submit a question of law. Chicago & J. Elec. R. Co. v. Patton, 219 Ill. 214, 76 N. E. 381. An instruction that plaintiff was entitled to recover if the material allegations of his complaint were proven does not submit a question of law because not stating

§ 3. *Duty of instructing.*[19]—Each party is entitled to instructions presenting his theory of the case,[20] when such theory is presented and supported,[21] and he is entitled to have such instructions made specific[22] and correct,[23] and if the court's attention is called to a material omitted issue, he should instruct thereon.[24] In equity cases it is not proper to give instructions on the law.[25] In some jurisdictions the court is required to instruct of its own motion as to the general features of the law applicable to the case,[26] but in other jurisdictions the court is not required to instruct except upon request.[27] Under the latter rule, if the court instructs of its own motion, the instructions must be correct.[28]

Requests for instructions.[29]—The court in instructing is not required to see that

what such material allegations are. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. It is not error to set out an ordinance in an instruction where the jury are told the legal effect of it. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Instructions construed together and held not to submit a question of law. Steinmann v. St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799. Instruction not erroneous as submitting a question of law. Hartman v. Thompson [Md.] 65 A. 117.

18. See 6 C. L. 44. The construction of written instruments is for the court. Upchurch v. Mizell [Fla.] 40 So. 39. It is the duty of the court to construe a written contract and advise the jury as to its legal effect. Blair v. Baird [Tex. Civ. App.] 15 Tex. Ct. Rep. 59, 94 S. W. 116. Construction of a written contract. Standard Mfg. Co. v. Slaughter, 122 Ill. App. 479.

19. See 6 C. L. 44.

20. Chicago Consol. Traction Co. v. Schritter, 222 Ill. 364, 78 N. E. 820.

21. Hauber v. Leibold [Neb.] 107 N. W. 1042. A party has a right to have his theory of the case submitted when it is supported by evidence. Colgrove v. Pickett [Neb.] 106 N. W. 453. If there is evidence to support a party's contentions, they should be submitted. Horne v. Consolidated R. Light & Power Co. [N. C.] 53 S. E. 858. Where there is evidence of a defense, it is error to refuse to instruct as to it. Levenson v. Arnold, 100 N. Y. S. 1021.

22. One who tries his case on a certain theory is entitled to have such theory, including the evidence in support thereof, specifically submitted. Walsh v. Taitt [Mich.] 12 Det. Leg. N. 651, 105 N. W. 544. Where the court charges in general terms on contributory negligence, the defendant is entitled to have given an instruction grouping the facts and leaving the jury to determine whether such facts existed. Texas & P. R. Co. v. Cotts [Tex. Civ. App.] 95 S. W. 602. Where the court gives a general charge on an issue raised by the evidence, a party is entitled to have a special charge grouping the facts in evidence upon such issue given. St. Louis S. W. R. Co. v. Rose [Tex. Civ. App.] 16 Tex. Ct. Rep. 604, 93 S. W. 1105. Though instructions predicate a right to recover on the cause of action alleged, a party is entitled to a specific instruction that there can be no recovery for a cause not alleged. Prescott & N. W. R. Co. v. Weldy [Ark.] 97 S. W. 462.

23. A party has a legal right to have the rule governing his action stated correctly. Judgment founded upon improper instructions cannot be upheld. Stantial v. Union R. Co., 101 N. Y. S. 662.

24. Defective instruction held sufficient to require a charge on the subject. Ray v. Pecos & N. T. R. Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 582, 88 S. W. 468.

25. White v. Black, 115 Mo. App. 28, 90 S. W. 1158.

26. Failure to instruct the principles of law essential to a determination of the case is reversible error. Ball v. Interurban St. R. Co., 49 Misc. 129, 96 N. Y. S. 739. It is the duty of the court to instruct on subjects within the evidence without request. Schwaninger v. McNeeley & Co. [Wash.] 87 P. 614. In Texas a trial judge is required by statute to charge the jury generally, though no proper charges are requested. Wallace v. Shapard [Tex. Civ. App.] 16 Tex. Ct. Rep. 735, 94 S. W. 151. Independent of request the court must charge rules of law essential to the determination of the case. Overhouser v. American Cereal Co., 128 Iowa, 680, 105 N. W. 113. It is the duty of the court to charge on the facts pleaded and proved as a basis for recovery, and to charge on the law arising on the facts pleaded and proved as a defense. St. Louis S. W. R. Co. v. Connally [Tex. Civ. App.] 93 S. W. 206. In law it is the duty of the court to instruct, especially when so requested. White v. Black, 115 Mo. App. 28, 90 S. W. 1153.

27. In Kentucky the court is only required to instruct on issues relative to which instructions are requested. In an action against two persons for assault, failure to charge that the jury might assess either joint or several damages as provided by Ky. St. 1903, § 12, is not reversible error where no request was made. Beavers v. Bowen [Ky.] 93 S. W. 649. In Kentucky it is not the duty of the court to instruct unless desired instructions are tendered. Pilcher Mfg. Co. v. Teupe's Ex'x [Ky.] 91 S. W. 1125. It is the duty of the court upon request to specifically submit a charge presenting the negligence pleaded and proved. Texas & P. R. Co. v. Huber [Tex. Civ. App.] 16 Tex. Ct. Rep. 154, 95 S. W. 568.

28. Under the rule that the court is only required to give instructions upon request, if he instructs of his own motion, it is his duty to see that the instructions are correct. South Covington, etc., R. Co. v. Core [Ky.] 96 S. W. 562. In an action for negligence, though neither party asked for specific instructions as to the measure of damages, it is reversible error if those given are manifestly erroneous. Wilkinson v. Northeast Borough [Pa.] 64 A. 734.

instructions cover every feature of the case; an error of omission is not ground for reversal in the absence of a request supplying it.[30] If an instruction is not as full as desired[31] or omits reference to particular issues,[32] subjects,[33] defenses,[34] or

29. See 6 C. L. 46.

30. Omissions cannot be complained of in the absence of a request. De Blois v. Great Northern R. Co. [Minn.] 108 N. W. 293; Thomas v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 86 P. 499; Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499; Oneal v. Welsman [Tex. Civ. App.] 13 Tex. Ct. Rep. 503, 88 S. W. 290; Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 356; International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Where evidence is conflicting, a party cannot complain of lack of instruction as to the weight of the testimony of interested and disinterested witnesses where he did not make a request therefor. Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467. In the absence of a request it is not reversible error to fail to charge as to the weight to be given certain testimony. Sutton v. Pennsylvania R. Co., 214 Pa. 274, 63 A. 791. Where a court only stated its memory concerning certain evidence and charged that "the whole thing" was a matter for the jury, the fact that some evidence was overlooked or that some was mistakenly stated is not error. Green v. Dodge [Vt.] 64 A. 499. Omits to fully explain the doctrine of "res ipsa loquitur." Lyles v. Brannon Carbonating Co., 140 N. C. 25, 52 S. E. 233. Where the doctrine of "res ipsa loquitur" applies a party entitled to the benefit thereof can avail himself of it only by requesting an appropriate instruction at the proper time. Isley v. Virginia Bridge & Iron Co. [N. C.] 58 S. E. 841. Where instructions confined the delivery of a bond to the time of actual delivery, a party who did not request an instruction that prior conversations be included could not complain. Baker County v. Huntington [Or.] 87 P. 1036. Omits to charge that there is no evidence to sustain a verdict for punitive damages. Roundtree v. Charleston & W. C. R. Co., 72 S. C. 474, 52 S. E. 231. Failure to charge on the subject of burden of proof is not error in the absence of a request. Coppins v. Jefferson, 126 Wis. 578, 105 N. W. 1078. Failure to instruct as to the proximate cause of an injury to a servant by reason of dangerous place in which to work and defective machinery. Rice v. Lockhart Mills [S. C.] 55 S. E. 160. If a party conceives himself prejudiced by an omission, he should request an explanatory charge. Anthony v. Seed [Ala.] 40 So. 577. Instruction on discovered peril correct so far as it went but omitted to say that defendant would not be liable if plaintiff could have avoided the accident after discovering his peril. Houston, etc., R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. Not error to fail to submit to jury question of alleged indignities to a passenger in absence of request. Peok v. Atchison, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 534, 91 S. W. 323. Cannot complain of mere nondirection in the absence of request. Mills v. Missouri Pac. R. Co. [Mo.] 94 S. W. 973. Omission to mention a special phase of a contract. Louisiana & Texas Lumber Co. v. Carter [Tex. Civ. App.] 16 Tex. Ct. Rep. 265, 93 S. W. 714. Upon an issue as to whether a partnership or a corporation which succeeded it is liable for goods purchased, failure to specifically point out the issue of partnership dissolution. Weise v. Gray's Harbor Commercial Co., 111 Ill. App. 647. If in an action for negligence a party desires to have submitted whether or not the negligence caused or contributed to the injury, he must request it. Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688. If in summarizing the evidence the court omits important details, if counsel desires them brought to the attention of the jury he should so request. Horr v. Howard Co., 126 Wis. 160, 105 N. W. 668.

31. Pooler v. Smith, 78 S. C. 102, 52 S. E. 967. If an instruction is good as far as it goes but does not fully cover the subject it is the duty of counsel to ask additional instructions. Price v. Huddleston [Ind.] 79 N. E. 496. Instructions cannot be complained of as inadequate to cover the issues in the absence of a written request for further instructions. Van de Bogart v. Marinette & Menominee Paper Co., 127 Wis. 104, 106 N. W. 805. If he deems the charge insufficient on assumed risk. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446. If not as full as desired on a particular theory or contention. Savannah Elec. Co. v. Mullikin [Ga.] 55 S. E. 945. If a fuller and more specific instruction is desired. Missouri, etc., R. Co. v. Parrott [Tex. Civ. App.] 16 Tex. Ct. Rep. 879, 96 S. W. 950. If not as full and complete as a party deems they should be. Belknap v. Belknap [S. D.] 107 N. W. 692. If a party desires fuller instructions than those given and that the attention of the jury be specifically directed to any part of the testimony, he should respond to the suggestion of the court and request such detailed instruction as he desires. Grossbaum Ceramic Art Syndicate v. German Ins. Co., 218 Pa. 506, 62 A. 1107. "Transferred" on an issue relative to the gift of notes did not exclude the idea of delivery, and if a fuller instruction was desired it should have been requested. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097. If he desires an instruction that the jury might consider the age of a boy in determining the degree of care required of him, where the court in the instructions given had treated him as possessing the discretion of an adult. Tiffin v. St. Louis, etc., R. Co. [Ark.] 99 S. W. 564.

32. An instruction stating all the elements of contributory negligence conjunctively in the language of the complaint is not error where no request was made for a special charge submitting that less than all the facts stated would amount to contributory negligence. Galveston, etc., R. Co. v. Mohrmann [Tex. Civ. App.] 15 Tex. Ct. Rep. 649, 98 S. W. 1090. If he desires a special issue submitted. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 98 S. W. 134. If they do not fully state the issues.

theories,[35] or is deemed ambiguous[36] or misleading,[37] or not sufficiently explicit,[38] specific,[39] or definite,[40] or if amplification of a charge is desired[41] or a statement is

Hardesty v. Largey Lumber Co. [Mont.] 86 P. 28. Failure to charge on any particular phase of the case. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062. Omission to charge on certain issues raised by pleadings and evidence is not ground for reversal in absence of request to charge on such issues. Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 628, 91 S. W. 365. Where parties requested the submission of the case on special issues, they should prepare a charge submitting issues deemed essential, and, having failed to do so, issues not submitted should be resolved in favor of the judgment. Johnston v. Fraser [Tex. Civ. App.] 15 Tex. Ct. Rep. 80, 92 S. W. 49. Sayles' Ann. Civ. St. 1897, art. 1331, provides that where a cause is submitted on special issues, failure to submit an issue cannot be complained of in the absence of written request. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126. Omission to submit an issue which a party deems raised. Galveston, etc., R. Co. v. Holyfield [Tex. Civ. App.] 14 Tex. Ct. Rep. 545, 91 S. W. 353. Failed to request the submission of a certain issue of negligence. Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 866, 92 S. W. 426. Fails to state all the issues. Waxahachie Cotton Oil Co. v. Peters [Tex. Civ. App.] 16 Tex. Ct. Rep. 98, 94 S. W. 431. If he fails to submit issues. Smith v. Newberry, 140 N. C. 335, 53 S. E. 234. Under Sayles' Rev. Civ. St. § 1331, where a case is submitted on special issues, failure to request the submission of the issues on substantially proper form precludes the basing of error thereon. Moore v. Pierson [Tex. Civ. App.] 15 Tex. Ct. Rep. 219, 93 S. W. 1007. Omission to charge any of the contentions of a party. Gaither v. Carpenter [N. C.] 55 S. E. 625. As to the duty of a master to furnish a safe place for his servant to work in. Johnson v. Smith Lumber Co. [Minn.] 109 N. W. 810.

33. Where on an issue as to the location of a boundary line no instructions were requested directing the jury as to the location of the line. Patterson v. Moss Tie Co. [Ky.] 97 S. W. 379. Omits to charge on a particular subject. Marable v. Southern R. Co. [N. C.] 55 S. E. 355; Brickman v. Southern R. Co. [S. C.] 54 S. E. 553. Where the court struck out objectionable parts of a request and made additions thereto, it was the duty of the party making the request, if he desired an instruction on a point embraced in the request but not in the instruction as modified, to request a specific instruction. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757. If the court omits to instruct upon special phases of the case. Judy v. Buck, 72 Kan. 106, 82 P. 1104. A party cannot complain of failure to instruct with reference to items set up in his amended complaint when he requested no instructions. Thomas v. Stickler [Ky.] 93 S. W. 648.

34. Where an instruction is correct so far as it goes, the fact that it omits a defense is not reversible error in the absence of a request covering the point. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. If a defendant desires to have the question of assumption of risk submitted, he should so request. Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679. Failure to submit a separate question in the special verdict covering assumption of risk in addition to the general question covering contributory negligence is not error in the absence of a request. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. Failure to charge that an employe takes the ordinary risk incident to the employment. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203.

35. If the court does not properly present a party's theory, its attention should be called to the omission. Otherwise error cannot be predicated thereon. Proulx v. Bay City [Mich.] 13 Det. Leg. N. 56, 107 N. W. 273. Omission to instruct on a certain theory. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757.

36. If there is any ambiguity a correction should be requested. New Castle Bridge Co. v. Doty [Ind. App.] 76 N. E. 557. If the instructions lack clearness and completeness. Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539.

37. If he considers it misleading. Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280. If the definition of a technical term is misleading. Negligence. Id. Authorizing recovery for such future suffering as was found to "result" from the injuries instead of "naturally and directly" result. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446.

38. More explicit. Hanley v. Ft. Dodge Light & Power Co. [Iowa] 107 N. W. 593. If not as clear as desired an explanatory instruction should be requested. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129. If the language used by the court is not as clear and explicit as desired, a request should be made in express terms. An exception to an instruction that it expressed an erroneous idea is not sufficient. People v. Waters, 100 N. Y. S. 177.

39. If he deems it too general. Simmons v. Davenport, 140 N. C. 407, 53 S. E. 225; Gamache v. Johnston Tin Foil & Metal Co., 116 Mo. App. 596, 92 S. W. 918; Barrow v. Barrow [Tex. Civ. App.] 16 Tex. Ct. Rep. 951, 97 S. W. 120; Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394. If he desires a more particular charge he should request it. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. If a party desires a more specific instruction of his contentions as to the constituent elements of the alleged negligence. Stewart v. Southern Bell Tel. & T. Co., 124 Ga. 224, 52 S. E. 331. If not sufficiently specific in its application to the case. Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 866, 92 S. W. 426; Holland v. Williams [Ga.] 55 S. E. 1023; Houston & T. C. R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344; Murphy v. Hiltibridle [Iowa] 109 N. W. 471. On the question of proximate cause. Northern Tex. Traction Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 48, 95 S. W. 708. If a party desires a more specific statement of his contentions. Foote v. Kelley [Ga.] 55 S.

erroneous,[42] a suitable instruction should be requested.[43] So also a party may not complain of failure to define technical terms,[44] nor of an unsatisfactory definition[45] in the absence of a request, nor can he complain of omission to state the elements[46] or measure of damages.[47] If he desires evidence admitted for a special purpose limited to such purpose he must make a request,[48] especially when so limited when admitted.[49] If an instruction is deemed too restrictive,[50] or if one desires improper

E. 1045. If he desires an explanation of the meaning of the word "tender." Cave v. Osborne [Maes.] 79 N. E. 794. As to what constitutes ordinary care. Rattan v. Central Electric R. Co. [Mo. App.] 96 S. W. 735. Failure to charge on a matter except indirectly cannot be complained of in the absence of a request. San Antonio & A. P. R. Co. v. Kivlin [Tex. Civ. App.] 16 Tex. Ct. Rep. 115, 93 S. W. 709. An instruction that the verdict should be for defendant if it found that a bill of sale was without consideration is not objectionable as being too general in the absence of any request for special instructions. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784.

40. If he deems them indefinite and uncertain. Hain v. Mattes [Colo.] 83 P. 127. If not as definite and certain as desired. Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 401, 90 S. W. 185. If he desires that they state in greater detail the elements of damage. Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401. If an instruction is deemed insufficient because not stating a detailed statement of the grounds of negligence. Louisiana & Tex. Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140. If he desires it made more definite or specific. Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640. If he desires more definite instructions on a particular issue. Ives v. Atlantic & N. C. R. Co. [N. C.] 55 S. E. 74.

41. Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. If not as elaborate as desired. Southern R. Co. v. Brown [Ga.] 54 S. E. 911. If a general instruction is unsatisfactory. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. Where recovery is authorized only upon proof of all acts of negligence alleged, one cannot complain, conceding that proof of any of such acts would warrant a recovery, where he made no request. De Castillo v. Galveston, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 481, 95 S. W. 547.

42. Error in stating the issues to the jury. Brickman v. Southern R. Co. [S. C.] 54 S. E. 558. Slight inaccuracies in the charge. Waxahachie Cotton Oil Co. v. Peters [Tex. Civ. App.] 16 Tex. Ct. Rep. 98, 94 S. W. 431. If the pleadings are slightly misstated. Lewter v. Lindley [Tex. Civ. App.] 89 S. W. 784. If not technically correct. Instruction on proximate cause. Virginia Bridge & Iron Co. v. Jordon, 143 Ala. 603, 42 So. 73. Instruction on matter not in issue is not reversible error where the court's attention was not called to it. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. If the trial court's attention is not called to the fact that a refused instruction is marked "given," a party cannot complain. Fowler v. Prichard [Ala.] 41 So. 667.

43. An exception to a portion of a charge is not a request for a modification of it. Regling v. Lehmaier, 98 N. Y. S. 642.

44. See, also, in this connection, post, § 11. Louisville & E. R. Co. v. Vincent [Ky.] 96 S. W. 898. "Itinerant," "consideration," "fraud." Bugg v. Holt [Ky.] 97 S. W. 29. "Negligence" or "diligence." Cincinnati, etc., R. Co. v. Cecil, 28 Ky. L. R. 830, 90 S. W. 585. Failure to define "notice" in an action on a note. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 S. W. 122. Not error in the absence of a request to fail to define "specie," "in kind," and "for consumption," used in statutes read to the jury. Foote v. Kelley [Ga.] 55 S. E. 1045. Omission to define "compensatory damages." Louisville & N. R. Co. v. Fowler [Ky.] 96 S. W. 568. If a definition of "agency" is desired where the question whether one was an agent has been submitted. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633. "Probable cause." Ramsay v. Meade [Colo.] 86 P. 1018. In the absence of a request an instruction on "domicile" is not erroneous for failure to distinguish between "actual residence" and "legal residence." Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898. Failure to define "negligence." Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683.

45. Proximate cause. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446.

46. If a party desires the elements of damages given. Smith v. Fordyce, 190 Mo. 1, 88 S. W. 679. In an action for wrongful death, failure to instruct that recovery could be had for loss of society and companionship. Galveston, etc., R. Co. v. Currie [Tex. Civ. App.] 15 Tex. Ct. Rep. 18, 91 S. W. 1100.

47. Must request a charge on the subject of reducing damages because of contributory negligence. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. In an action for slander, if the defendant is not satisfied with a general instruction on compensation and punitive damages because it leaves out of view the plea of mitigation, he should request an instruction. Yager v. Bruce [Mo. App.] 93 S. W. 307. If the court omits to charge as to the plan or standard to be adopted in estimating damages. Bourke v. Butte Elec. & Power Co. [Mont.] 83 P. 470. Failure to give the measure of damages. Gulf, etc., R. Co. v. Moseley [Ind. T.] 98 S. W. 129; Houston. etc., R. Co. v. Craig [Tex. Civ. App.] 92 S. W. 1033.

48. Stewart v Raleigh & A. Air Line R. Co. [N. C.] 53 S. E. 877.

49. Corroborative testimony. Liles v. Fosburg Lumber Co. [N. C.] 54 S. E. 795.

50. On assumed risk. St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534.

argument of counsel disregarded,[51] or if he desires comment where evidence erroneously admitted is stricken,[52] or an instruction limited,[53] or an instruction defining the issues,[54] a suitable instruction should be requested, and if it is desired to make an application of certain facts, the rule to which they apply should be stated.[55] But where an instruction given is incorrect, the fact that no request was made does not preclude the injured party from asserting error on appeal.[56]

Limiting number of instructions.[57]

Form and sufficiency of request.[58]—A requested instruction should be strictly correct[59] and should not be too long[60] or involved.[61] It is not ground for refusal of an instruction that the paper on which it is written bears the name of a party's attorney,[62] and an instruction on the reverse side of a paper should not be overlooked.[63] Under some circumstances the request should relate to particular issues.[64] A desired instruction is not properly requested when contained only in a requested instruction which covers other propositions and is refused on other grounds.[65] Where a party requests more than one instruction covering the same issue, he cannot complain that the court gave the more general one and refused to give the other.[66] A requested instruction which is incorrect, if sufficient to call the court's attention to the issue, requires the giving of a correct instruction,[67] but this rule does not require the court to reduce inaccurate requests to proper form.[68]

51. Miller v. Nuckolls [Ark.] 91 S. W. 759.
52. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723.
53. Knoxville Woolen Mills v. Wallace, 28 Ky. L. R. 885, 90 S. W. 563.
54. If a party desires instructions defining the issues, he should prepare and submit them; the court is not required to. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.
55. Barclay v. Coman [Mich.] 13 Det. Leg. N. 915, 110 N. W. 49.
56. South Covington, etc., R. Co. v. Core [Ky.] 96 S. W. 562.
57, 58. See 6 C. L. 46.
59. Request partly erroneous is properly refused. Fisher v. St. Louis Transit Co. [Mo.] 95 S. W. 917. Partly correct and partly erroneous, properly refused. McManus v. Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176. One cannot complain of refusal to give instruction when part of those submitted were erroneous and the court offered to give the correct ones if counsel would separate them, which he refused to do. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 S. W. 375. Requests not stating correct propositions applicable to the case may be refused. Moore v. Lanier [Fla.] 42 So. 462.
60. Where a cause was submitted on special issues, a request covering six pages, general in its application to all the issues and requiring general findings, was properly refused. Moore v. Pierson [Tex. Civ. App.] 15 Tex. Ct. Rep. 219, 93 S. W. 1007. Request containing 2,000 words and covering three and one-half pages of printed matter properly refused. Maryland Steel Co. v. Engleman, 101 Md. 661, 61 A. 314.
61. It is proper to refuse requests so involved as to be confusing. Hanstad v. Canadian Pac. R. Co. [Wash.] 87 P. 832.
62. That the requests given at the request of the successful party were on paper bearing the name of one of his attorneys is not ground for reversal. Anthony v. Seed [Ala.] 40 So. 577.
63. The fact that a request is on the reverse side of the paper on which requests were written and was overlooked does not obviate the error of omission to give it. Hodge v. Hudson, 189 N. C. 358, 51 S. E. 954.
64. Where more than one question of fact is involved, and a directed verdict is requested by each party, a motion by the unsuccessful party for a submission of the cause without stating any particular issue may be denied. Murphy v. Metropolitan St. R. Co., 110 App. Div. 717, 97 N. Y. S. 483.
65. Cowan v. Brett [Tex. Civ. App.] 16 Tex. Ct. Rep. 776, 97 S. W. 330.
66. St. Louis S. W. R. Co. v. Haney [Tex. Civ. App.] 16 Tex. Ct. Rep. 19, 94 S. W. 386. Where several instructions on the same point are requested the court need give but one, and the party cannot complain that the one least favorable to him was given. National Enameling & Stamping Co. v. McCorkle, 219 Ill. 557, 76 N. E. 843. Where two instructions embodying the same proposition are requested, it is not error to refuse the one considered most important where the other is given. City of Evanston v. Richards, 224 Ill. 444, 79 N. E. 673.
67. Requested charge, though erroneous, held to suggest the issue raised by the evidence as to engineer's gross negligence in disobeying orders, and, there being no reference thereto in the main charge, to require correct instructions on that point. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. Where a request is defective in form and substance, the court should prepare or direct to be prepared a proper instruction on the point covered by the request. South Covington, etc., R. Co. v. Corre [Ky.] 96 S. W. 582.
68. It is not the duty of the court to reduce inaccurate requests to proper form though they are sufficient to direct atten-

Time of making request.[69]—The time within which requested instructions should be presented is generally regulated by statute,[70] but in some jurisdictions rests in the discretion of the court,[71] which is to be exercised fairly and liberally.[72] A rule requiring requests to be submitted before argument does not preclude receiving and passing on requests thereafter and allowing an exception to the aggrieved party.[73] To entitle a party to have requests considered which are presented after the court has concluded its charge, they must be made necessary by something the court has already charged or omitted to charge.[74]

Disposition of requests.[75]—A party is entitled to a distinct and positive ruling on his requests if they are properly drawn.[76] Where an instruction submitted contains an abstract proposition of law upon an assumed fact, it should be given or refused without qualification.[77] Ordinarily the court is not bound to give an instruction in the exact language of the request;[78] requests may be modified.[79] This rule,

tion to the question involved. Gulf, etc., R. Co. v. Minter [Tex. Civ. App.] 16 Tex. Ct. Rep. 40, 93 S. W. 516.

69. See 6 C. L. 47.

70. Under Code §§ 414, 415, requests may be made at any time before commencement of the argument. Craddock v. Barnes [N. C.] 54 S. E. 1003. Under Code Civ. Proc. § 1023, a statement of facts which a party deems proved, in order to require the court to pass upon them, must be presented before the case is finally submitted after completion of the testimony and argument. Hartmann v. Schnugg, 99 N. Y. S. 33. Requests must be presented at or before the close of the evidence and before the beginning of the argument. Dunne v. Jersey City Galvanizing Co. [N. J. Err. & App.] 64 A. 1076.

71. The time within which instructions should be requested is within the discretion of the court which should be exercised fairly and liberally with a view to a full hearing and trial. Craddock v. Barnes [N. C.] 54 S. E. 1003.

72. Code § 414, requiring that a request to put the instructions in writing shall be made at or before the close of the evidence, and § 415, providing that counsel shall reduce their prayers for special instructions to writing, relate to different subjects, and refusal to give requests because made too late, when made the day following the day on which the evidence closed, is error. Craddock v. Barnes [N. C.] 54 S. E. 1003.

73. Robertson v. Boston & N. St. R. Co., 190 Mass. 108, 76 N. E. 613. Rule requiring requests to be presented before argument does not mean that leave must be obtained to present them later but that requests presented later cannot be entertained without leave of court. Id. The act of the court in receiving and refusing requests after argument is in effect giving of special leave to present such requests at the time they were presented. Id.

74. Dunne v. Jersey City Galvanizing Co. [N. J. Err. & App.] 64 A. 1076.

75. See 6 C. L. 47.

76. Sutton v. Pennsylvania R. Co., 214 Pa. 274, 63 A. 791.

77. Where evidence is clear and unequivocal, it is error to qualify an affirmance of a point by "If you believe any of the witnesses who testify believe that they know what they are talking about." Lingle v. Scranton R. Co., 214 Pa. 500, 63 A. 890.

78. The court is not required to give an instruction in the language of the request. Stubbs v. Boston & N. St. R. Co. [Mass.] 79 N. E. 795; Southern R. Co. v. Reynolds [Ga.] 56 S. E. 1039. An instruction correctly stating the law is not erroneous because not in the exact language of the request. McGowan v. Court of Probate of Newport, 27 R. I. 394, 62 A. 571. It is sufficient if requests are given in substance. Smith v. Michigan Lumber Co. [Wash.] 86 P 653. Where the law is properly stated the court is not bound to change the language of written requests, though they were quoted from reported opinions. Crotty v. Danbury [Conn.] 65 A. 147. It is not essential that the charge be in the language of the written requests. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. A court is under no duty to notice requests specifically. It is the better practice for the court to instruct in his own language and make a simple, orderly, and clear statement. McGarry v. Healey, 78 Conn. 365, 62 A. 871.

79. An instruction that a case between a private citizen and a corporation should be considered the same as if it was between two private citizens is not rendered erroneous by modification eliminating the nature of the business the corporation was engaged in. Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827. It is not error for the court to strike from an instruction words which are merely descriptive of the manner of doing the substantive act of negligence alleged. Chicago City R. Co. v. Heydenburg, 118 Ill. App. 337. Where there was no evidence on which to predicate a request it was proper to modify it and give it as modified. Fisher v. St. Louis Transit Co. [Mo.] 95 S. W. 917. Modification of an instruction that the jury should not infer from the giving of it that plaintiff had been injured so as to charge that the jury should not understand that the court intended to express an opinion held not erroneous. Chicago Union Traction Co. v. Yarus, 231 Ill. 641, 77 N. E. 1139. Where giving of an instruction rested in the discretion of the court, the fact that it was marked "refused" and afterwards given as the jury were about to retire was harmless error. Harvey v. Chicago & A. R. Co., 221 Ill. 242, 77 N. E. 569.

however, is not universal.[80] A requested instruction which is correct and applicable and not adequately covered by other instructions should be given.[81] Refusal to give it is reversible error unless it affirmatively appears that no prejudice resulted.[82] If an instruction is erroneous the court is not required to correct and give it,[83] and if one of several requests is incorrect, all may be refused,[84] or those that are correct may be given and erroneous ones eliminated.[85] A request which adds nothing more than elaboration or emphasis,[86] or is merely for the purpose of answering an argument of counsel, may be refused.[87] Rejection of requests in the presence of the jury is not prejudicial because leading the jury to believe that the hypothesis contained therein was not included in certain proper instructions given.[88]

Repetition.[89]—A requested instruction substantially covered by the charge already given may be refused,[90] though correct and applicable to the case,[91] and con-

80. A party is entitled to have an instruction given in the language of the request if it is correct and not obscure or confusing. Morrison v. Fairmont & C. Traction Co. [W. Va.] 55 S. E. 669.

81. A party is entitled to have his whole case presented, and a requested instruction should be given where not covered by other instructions. Tully v. Louisville & N. R. Co. [Ky.] 97 S. W. 417. Where evidence tends to establish a particular theory which if established constitutes a defense, the party is entitled to have such theory submitted. Sorenson v. Townsend [Neb.] 109 N. W. 749; Frazier v. Poindexter [Ark.] 95 S. W. 464; Houston, etc., R. Co. v. McCarty [Tex. Civ. App.] 89 S. W. 805; Missouri, etc., R. Co. v. Criswell [Tex. Civ. App.] 18 Tex. Ct. Rep. 356, 88 S. W. 373. Error in refusing an appropriate instruction is not cured by an instruction not fully covering the matter contained in the request. St. Louis S. W. R. Co. v. Johnson [Tex.] 17 Tex. Ct. Rep. 167, 97 S. W. 1039. Refusal of a correct charge not covered is error. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195. It is error for the court to refuse an instruction limiting the effect of evidence to the purpose for which it was admitted. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex Ct. Rep. 29, 97 S. W. 712. Error in refusing a proper instruction not cured by giving one which did not cover the request. Truschel v. Dean [Ark.] 92 S. W. 781. Voluntary intoxication as bearing on the issue of contributory negligence not submitted by other instructions. International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90 S. W. 918. A request presenting an issue disconnected from other issues in the case and not covered by other instructions should be given. Texas & N. O. R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. Instruction in personal injury action held not to be covered by charges given. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. Plea held broad enough to cover a request on contributory negligence and it was error to refuse it. Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114.

82. Prescott & N. W. R. Co. v. Weldy [Ark.] 97 S. W. 452.

83. A request, though correct except for the concluding sentence, may be refused instead of correcting and giving it. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Use of "plaintiff" for "defendant" in a request need not be corrected by the court but the instruction may be refused. Western R. Co. v. Stone [Ala.] 39 So. 723. Where a requested instruction contained a statement which entirely vitiated it, the court was not required to modify and give it in proper form. Gulf, etc., R. Co. v. Moseley [Ind. T.] 98 S. W. 129. An instruction not strictly correct may be refused where the court has charged on the issue sought to be submitted. St. Louis S. W. R. Co. v. Morrow [Tex. Civ. App.] 93 S. W. 162.

84. A request to give a number of instructions may be refused unless all are correct. Southern R. Co. v. Bradford [Ala.] 40 So. 100. When special charges are asked in bulk the entire series may be refused if one is erroneous. Williamson Iron Co. v. McQueen [Ala.] 40 So. 306. When several instructions were submitted on the same sheet of paper and some were improper, all may be refused. The court is not required to select and give the proper ones. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 560, 98 S. W. 657.

85. Where a request consists of several subdivisions defining as many distinct conditions of facts to be found before verdict could be rendered for a party, and one of such subdivisions is not the law, the court may eliminate it and give the balance of the charge. St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 600, 93 S. W. 1107.

86. International & G. N. R. Co. v. Brisenio [Tex. Civ. App.] 14 Tex. Ct. Rep. 961, 92 S. W. 998.

87. Moss v. Mosley [Ala.] 41 So. 1012.

88. Baltimore & O. R. Co. v. State [Md.] 64 A. 304.

89. See 6 C. L. 48.

90. Requests may be refused where the court has sufficiently stated the issues and principles of law to the jury. McGarry v. Healey, 78 Conn 365, 62 A. 671; Creachen v. Bromley Bros. Carpet Co., 214 Pa. 15, 63 A. 195; Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591; Rubinovitch v. Boston El. R. Co. [Mass.] 77 N. E. 895; Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88; Koenig v. Union Depot R. Co., 194 Mo. 564, 92 S. W. 497; Stark v. Burke [Iowa] 109 N. W. 206; Perjue v. Citizens' Elec. Light & Gas Co. [Iowa] 109 N. W. 280; West Chicago St. R. Co. v. McCafferty, 220 Ill. 476, 77 N. E. 158; Heinmiller v. Winston Bros. [Iowa] 107 N.

tain a repetition of the law of the case.[92] Requests merely stating in different lan-

W. 1102; Missouri, etc., R. Co. v. Sloan [Tex. Civ. App.] 91 S. W. 243; El Paso Elec. R. Co. v. Davis [Tex. Civ. App.] 83 S. W. 718; Allen v. Field [C. C. A.] 144 F. 840; Ward v. Meredith, 220 Ill. 66, 77 N. E. 118; Home Ins. Co. v. Gagen [Ind. App. 76 N. E. 927; Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845; Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269; Springer v. Bricker, 165 Ind. 532, 76 N. E. 114; Hanstad v. Canadian Pac. R. Co. [Wash.] 87 P. 832; Latson v. St. Louis Transit Co., 192 Mo. 449, 91 S. W. 109; Saunders v. Tuscumbia Roofing & Plumbing Co. [Ala.] 41 So. 982; San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 14 Tex. Ct. Rep. 489, 92 S. W. 259; Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 581, 94 S. W. 345; Holcomb-Lobb Co. v. Kaufman [Ky.] 96 S. W. 813; Lexington R. Co. v. Herring [Ky.] 96 S. W. 558; Chicago Union Traction Co. v. Jackson, 217 Ill. 404, 75 N. E. 508; Salmon v. Helena Box Co. [C. C. A.] 147 F. 408; Magnolia Metal Co. v. Gale, 191 Mass. 487, 78 N. E. 128; Southern Ind. R. Co. v. Osborn [Ind. App.] 78 N. E. 248; Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505; Ousley v. Hampe, 128 Iowa, 675, 105 N. W. 122; Kline v. Huie [Iowa] 107 N. W. 310; Ladd v. Germain [Mich.] 13 Det. Leg. N. 443, 108 N. W. 679; Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514; Elbert v. Mitchell [Iowa] 109 N. W. 181; Sibley v. Morse [Mich.] 13 Det. Leg. N. 878, 109 N. W. 858; Brown v. Weaver Power Co., 140 N. C. 333, 52 S. E. 954; Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345; Forlaw v. Augusta Naval Stores Co., 124 Ga. 261, 52 S. E. 898; Moss v. Mosley [Ala.] 41 So. 1012; St. Louis S. W. R. Co. v. Selman [Tex. Civ. App.] 14 Tex. Ct. Rep. 88, 89 S. W. 1101; Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109; Smith v. Nixon [Mich.] 13 Det. Leg. N. 569, 108 N. W. 971; Buckler v. Kneezell [Tex. Civ. App.] 14 Tex. Ct. Rep. 800, 91 S. W. 367; Ellis v. Littlefield [Tex. Civ. App.] 14 Tex. Ct. Rep. 514, 93 S. W. 171; St. Louis S. W. R. Co. v. Haney [Tex. Civ. App.] 16 Tex. Ct. Rep. 19, 94 S. W. 386; Texas & P. R. Co. v. Brannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 844, 96 S. W. 1095; Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453; Gulf, etc., R. Co. v. Wynne [Tex. Civ. App.] 14 Tex. Ct. Rep. 600, 91 S. W. 823; Tiffin v. St. Louis, etc., R. Co. [Ark.] 93 S. W. 564; Lang v. Missouri Pac. R. Co. 115 Mo. App. 489, 91 S. W. 1012; Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184; Missouri, etc., R. Co. v. Houlihan [Tex. Civ. App.] 15 Tex. Ct. Rep. 559, 93 S. W. 495; St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613; Missouri, etc., R. Co. v. Dean [Tex. Civ. App.] 13 Tex. Ct. Rep. 989, 89 S. W. 797; International & G. N. R. Co. v. Glover [Tex. Civ. App.] 18 Tex. Ct. Rep. 268, 88 S. W. 515; Hubbard City Cotton Oil & Gin Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 1, 89 S. W. 795; Lexington R. Co. v. Fain, 28 Ky. L. R. 743, 90 S. W. 574; International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90 S. W. 918; May v. Hahn [Tex. Civ. App.] 16 Tex. Ct. Rep. 902, 97 S. W. 182; Bryan v. International & G. N. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693; Houston & T. C. R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886; Widman Inv. Co. v. St. Joseph, 191 Mo. 459, 90 S. W. 763; St. Louis S. W. R. Co. v. Groves [Tex. Civ. App.] 16 Tex. Ct. Rep. 895, 97 S. W. 1084; Southern R. Co. v. Reynolds [Ga.] 55 S. E. 1039; Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602; Jones & Co. v. Gammel-Statesman Pub. Co. [Tex. Civ. App.] 94 S. W. 191; Southern R. Co. v. Branyon [Ala.] 39 So. 675; Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55; Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511; City of Bowling Green v. Duncan, 28 Ky. L. R. 1177, 91 S. W. 268; Yarborough v. Mayes [Tex. Civ. App.] 14 Tex. Ct. Rep. 785, 91 S. W. 624; Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 16 Tex. Ct. Rep 750, 97 S. W. 332; Missouri, etc., R. Co. v. Parrott [Tex.] 15 Tex. Ct. Rep. 648, 92 S. W. 795; St. Louis S. W. R. Co. v. Bryant [Tex. Civ. App.] 15 Tex. Ct. Rep. 239, 92 S. W. 813; Missouri, etc., R. Co. v. Dumas [Tex. Civ. App.] 15 Tex. Ct. Rep. 538, 93 S. 493; St. Louis S. W. R. Co. v. Connally [Tex. Civ. App.] 93 S. W. 206; St. Louis, etc., R. Co. v. Saunders [Ark.] 94 S. W. 709; Southern Exp. Co. v. Hill [Ark.] 98 S. W. 371; St. Louis S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162; Texas & P. R. Co. v. Bump [Tex. Civ. App.] 16 Tex. Ct. Rep. 577, 95 S. W. 29; City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121; Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100; Wood v. Chicago, etc., R. Co. [Mo. App.] 95 S. W. 946; Hickey v. Texas & P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 88, 95 S. W. 763; Wellmeyer v. St. Louis Transit Co. [Mo.] 95 S. W. 925; Sprinkle v. Weliborn, 140 N. C. 163, 52 S. E. 566; Banks v. Southern Exp. Co., 73 S. C. 211, 53 S. E. 166; Parlin & Orendorff Co. v. Vawter [Tex. Civ. App.] 13 Tex. Ct. Rep. 47, 88 S. W. 407; Missouri, etc., R. Co. v. Jackson [Tex. Civ. App.] 90 S. W. 702; Missouri, etc., R. Co. v. Barnes [Tex. Civ. App.] 15 Tex Ct. Rep. 524, 95 S. W. 714; St. Louis S. W. R. Co. v. Lowe [Tex. Civ. App.] 17 Tex. Ct. Rep. 265, 97 S. W. 1087; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308; International & G. N. R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 987, 98 S. W. 423; McCarley v. Glenn-Lowry Mfg. Co. [S. C.] 56 S. E. 1; San Antonio & A. P. R. Co. v. Dickson [Tex. Civ. App.] 15 Tex. Ct. Rep. 51, 93 S. W. 481; Missouri, etc., R. Co. v. Hagan [Tex. Civ. App.] 15 Tex. Ct. Rep. 825, 93 S. W. 1014; Goff v. St. Louis Transit Co. [Mo.] 98 S. W. 49; Eirk's Adm'r v. Louisville R. Co. [Ky.] 98 S. W. 293; Bradford v. Malone [Tex. Civ. App.] 90 S. W. 706; St. Louis S. W. R. Co. v. Dixon [Tex. Civ. App.] 14 Tex. Ct. Rep. 782, 91 S. W. 626; Hirte v. Eastern Wisconsin R. & Light Co., 127 Wis. 230, 106 N. W. 1068; Cownie Glove Co. v. Merchants' Dispatch Transp. Co. [Iowa] 106 N. W. 749; Winchel v. Goodyear, 126 Wis. 271, 105 N. W. 824; Coppins v. Jefferson, 126 Wis. 578, 105 N. W. 1073; Louisville & N. R. Co. v. Hubbard [Ala.] 41 So. 814; Armour & Co. v. Carlas [C. C. A.] 142 F. 721; Electric R.,

guage a proposition already stated,[93] or which state a proposition in negative form,[94]

Light & Ice Co. v. Brickell [Kan.] 85 P. 297; Pooler v. Smith, 73 S. C. 102, 52 S. E. 967; Hoyle v. Mann [Ala.] 41 So. 835; King v. Gilson, 191 Mo. 307, 90 S. W. 367; City of Highland Park v. Gerkin, 122 Ill. App. 149; Crotty v. Danbury [Conn.] 65 A. 147; Baltimore & O. R. Co. v. Whitehill [Md.] 64 A. 1033; Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Gulf, etc., R. Co. v. Massenburg-Bankhead Dry Goods Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 180, 90 S. W. 68; St. Louis S. W. R. Co. v. Wester [Tex. Civ. App.] 16 Tex. Ct. Rep. 783, 96 S. W. 769; Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010; Gilliland v. Martin [Ala.] 42 So. 7; Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516; International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660; Smith v. Hubbell [Mich.] 12 Det. Leg. N. 860, 106 N. W. 547; Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526; Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313; Newport News Pub. Co. v. Beaumeister, 104 Va. 744, 52 S. E. 627; Marks v. Herfen [Or.] 83 P. 385; Hannah v. Anderson, 125 Ga. 407, 54 S. E. 131; Farrell v. Dubuque, 129 Iowa, 447, 105 N. W. 596. Refusal of request concerning certain statutes was not error when they were explained substantially in accordance with such request. Whitney v. Com., 190 Mass. 531, 77 N. E. 516. Where the issue of estoppel raised by the reply is fully instructed upon, it was not error to fail to refer to it in all other instructions given. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108. The defendant could ask for no stronger instruction than was given to the effect that, if the breaking of the plaintiff's millrace bank was caused by the joint or concurrent negligence of the plaintiff in not caring for the water and regulating its flow in the race and of the defendant in constructing a cofferdam therein, which improperly impeded and obstructed the flow of the water, then the verdict should be for the defendant. Northern Ohio R. Co. v. Akron Canal & Hydraulic Co., 7 Ohio C. C. (N. S.) 69. Where the law of contributory negligence has been charged, it is not necessary to repeat it in another instruction. Alft v. Clintonville, 126 Wis. 334, 105 N. W. 561. A request that the evidence will not support a verdict on a certain count is covered by an instruction refusing to give the jury the law on such count for the reason that the evidence would not support a verdict. Norfolk & W. R. Co. v. Birchfield [Va.] 54 S. E. 879. Where instructions aptly state the law, it is proper to refuse others. Tevis v. Carter, 28 Ky. L. R. 749, 90 S. W. 264. Where a party's theory of defense is fully presented, he cannot complain of refusal to give other instructions. Gilroy v. St. Louis Transit Co., 117 Mo. App. 663, 92 S. W. 1152. Where the jury were charged that they were the judges of the credibility of witnesses and in passing thereon might consider all facts in evidence, it is proper to refuse to instruct that the fact that a witness had been an inmate of a house of ill fame could be considered. Beasley v. Jefferson Bank, 114 Mo. App. 406, 89 S. W. 1040. Instruction defining "negligence" rendered unnecessary other like instructions. Baker & L. Mfg. Co. v. Clayton [Tex. Civ. App.] 14 Tex. Ct. Rep. 299, 90 S. W. 519. Covered so far as they state correct propositions and are called for. Houston & T. C. R. Co. v. Schuttee [Tex. Civ. App.] 14 Tex. Ct. Rep. 725, 91 S. W. 806. Where a court charges what elements may enter into the ascertainment of damages to the exclusion of all others, he need not even upon request enumerate and particularize certain of the elements which are necessarily excluded from consideration by the language or import of the instruction. Gottlieb v. North Jersey St. R. Co., 72 N. J. Law, 480, 63 A. 339. Where issues tried were sufficiently instructed upon, it was not error to refuse an instruction, in substance a copy of the pleadings. Nephler v. Woodward [Mo.] 98 S. W. 488. Where the court has charged that plaintiff must prove every allegation essential to his recovery, it is not error to refuse to instruct that he must prove his case by a preponderance of evidence. Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84. Where the law of contributory negligence is charged with substantial accuracy, it is not error to refuse requests stating in separate paragraphs portions of the law, etc. Hull v. Douglass [Conn.] 64 A. 351. Special interrogatories may be refused where the general ones cover every material point involved. City of Lawton v. McAdams, 15 Okl. 412, 83 P. 429. Where combined causes as a ground for recovery were submitted, a charge submitting the various causes as distinct grounds for recovery was not objectionable as a repetition. Texas & N. O. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. Under the testimony of this case it was not error to refuse a request for a charge to the jury to the effect that, if they found the defendant was guilty of negligence, but that the plaintiff under all the facts and circumstances of the case, which were known or should have been known to him, did not exercise reasonable and ordinary care to prevent the breaking of the bank of his millrace and overflow of adjacent property, then negligence on his part contributed proximately to the injury, and he cannot recover from the defendant the damages in which he has been compelled to respond on account of their joint negligence. Northern Ohio R. Co. v. Akron Canal & Hydraulic Co., 7 Ohio C. C. (N. S.) 69.

91. Chicago, etc., R. Co. v. Reuter, 228 Ill. 387, 79 N. E. 166; Town of Normal v. Bright, 223 Ill. 99, 79 N. E. 90; West Chicago St. R. Co. v. McCafferty, 220 Ill. 476, 77 N. E. 153; Sovereign Camp, Woodmen of the World v. Welch, 16 Okl. 188, 83 P. 547; Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903; Chicago Union Traction Co. v. Leach, 117 Ill. App. 169; Illinois Cent. R. Co. v. Coughlin [C. C. A.] 145 F. 37; Chicago, etc., R. Co. v. Reuter, 119 Ill. App. 232; Coulter v. Thompson Lumber Co. [C. C. A.] 142 F. 706; City of Garnett v. Smith, 72 Kan. 664, 83 P. 615.

92. North v. Woodland [Idaho] 85 P. 215.

may be refused, but it is not sufficient that a proper instruction is given inferentially;[95] and where instructions given are very general, it is error to refuse requests which are specific.[96] Where the court instructs correctly without undertaking to state the theory of either party, it may refuse requests embracing the theory of one party though the propositions therein embodied are sound.[97]

§ 4. *Assumption of facts.*[98]—The court in instructions may not assume the existence or nonexistence of controverted facts,[99] or facts not sustained,[1] but un-

93. Hanousek v. Marshalltown [Iowa] 107 N. W. 603.

94. Proper to refuse a like instruction in negative form. McCaffery v. St. Louis & M. R. Co., 192 Mo. 144, 90 S. W. 816.

95. Where negligence charged was breaking of a chain because it had become crystallized, an instruction that defendant was not guilty if the jury found that the chain had not become crystallized should be given. Isley v. Virginia Bridge & Iron Co. [N. C.] 55 S. E. 416.

96. Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394.

97. St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671.

98. See 6 C. L. 50.

99. Turner v. Righter, 120 Ill. App. 131; Foster, Waterbury & Co. v. Peer, 120 Ill. App. 199; Faulkner v. Birch, 120 Ill. App. 281; Springfield Consolidated R. Co. v. Gregory, 122 Ill. App. 607; Shickle-Harrison & Howard Iron Co. v. Beck, 112 Ill. App. 444. That a proposed ditch would reclaim wet lands. Beery v. Driver [Ind.] 76 N. E. 967. Instruction assuming that a wagon was driven across the street car track held erroneous where the testimony as to whether it was or not was conflicting. Dallas Consol. Elec. St. R. Co. v. Ely [Tex. Civ. App.] 14 Tex. Ct. Rep. 605, 91 S. W. 887. In an action for breach of contract to furnish water for irrigation, it should not be assumed that there were a certain number of acres planted when the evidence of such point is conflicting. Barstow Irr. Co. v. Cleghon [Tex. Civ. App.] 15 Tex. Ct. Rep. 218, 93 S. W. 1023. Assuming that one walking along the railroad track was a trespasser, when it was a question of fact whether he was a trespasser or licensee. Houston & T. C. R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. A request assuming a fact when there was evidence that it was not a fact held erroneous. Doe ex dem. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505. Where the evidence as to contributory negligence was conflicting, the jury could not be limited to the consideration of any assumed state of facts, though such assumption was supported. Dodge v. Lamont [Iowa] 107 N. W. 948. Where alleged negligence consisted of having a "low place" in the track which was denied, it was error to assume the existence of such "low place." Atlantic & B. R. Co. v. Hattaway [Ga.] 55 S. E. 21. Assuming the existence of a contract in dispute. Frasier v. Charleston & W. C. R. Co., 73 S. C. 140, 52 S. E. 964. Where the evidence warrants a certain conclusion, it is proper to refuse an instruction assuming such conclusion. Lyon v. United Moderns, 148 Cal. 470, 83 P. 804. Erroneous as assuming that an assignee of a chattel mortgage had paid value therefor. Lindsley v. McGrath [Mont.] 87 P. 961. Assuming the place where lights in a street were located, such location disputed. Karrer v. Detroit [Mich.] 12 Det. Leg. N. 765, 106 N. W. 64. Assumption of controverted fact held harmless. Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S. W. 1020.

Rule violated: Where a special contract was denied, an instruction that it was ratified by acts. Frasier v. Charleston & W. C. R. Co., 73 S. C. 140, 52 S. E. 964. In an action for injuries resulting to a passenger while alighting, an instruction was held erroneous as assuming that running the train past the platform was negligence. Illinois Cent. R. Co. v. Johnson, 221 Ill. 42, 77 N. E. 592. Instruction in an action for injuries resulting from defective street held erroneous because assuming the existence of barriers and their sufficiency. McMahon v. Boston, 190 Mass. 388, 76 N. E. 957. Held erroneous as assuming that alleged negligence was the proximate cause of the injury and that defendant's officers had constructive notice of defective condition of a bridge. Brewster v. Elizabeth City [N. C.] 54 S. E. 784. Instruction held improper as assuming that an injured person was guilty of contributory negligence and did not look and listen. Baltimore & O. R. Co. v. State [Md.] 64 A. 304. A fact is not assumed which is left to the jury to be found from the evidence. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. In an action for injuries to cattle in transit it was error to assume that the cattle were shipped under a written contract where such question was disputed. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 581, 94 S. W. 345. Instructions in an action for injuries to cattle in transit held erroneous as assuming that a certain act was negligence. Texas & P. R. Co. v. Felker [Tex. Civ. App.] 15 Tex. Ct. Rep. 466, 93 S. W. 477. In an action against a street railway for killing a dog, an instruction was held erroneous as assuming that the dog was on the track some time before he was run over. Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281. Where evidence required the submission of contributory negligence to the jury, an instruction that if a certain fact existed the injured person was guilty of contributory negligence assumes a fact. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616. Held erroneous as assuming that a check was not paid because the amount was not credited to the person presenting the check. Burns v. Yocum [Ark.] 98 S. W. 956. Held erroneous as assuming that a promise to pay a check if the drawee did not constituted a waiver of presentment. Id. In an action on services where a counterclaim on notes was pleaded, instruction held

controverted facts,[2] admitted facts,[3] facts established by uncontroverted evidence,[4]

erroneous as assuming that the amount due for services was greater than the amount of the notes. McGrew's Ex'r v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301. Held erroneous as assuming an injury and that it was caused by the defendant's negligence. Brewster v. Elizabeth City [N. C.] 54 S. E. 784. Erroneous as assuming that the condition of the place where a passenger alighted was fully known to her. Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560. Held erroneous as assuming that a carrier failed to provide proper means for passengers to alight and that the conductor failed to assist a passenger to alight. Missouri, etc., R. Co. v. Wolf [Tex. Civ. App.] 14 Tex. Ct. Rep. 52, 89 S. W. 778. Assuming that a certain act constituted negligence was not error. St. Louis & S. F. R. Co. v. Bussong [Tex. Civ. App.] 14 Tex. Ct. Rep. 189, 90 S. W. 73. An instruction that if plaintiff was guilty of any of the negligent acts charged in the answer he could not recover assumes that acts charged were negligent. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660. Held to assume that one traveler was entitled to the right of way in the street as against another. May v. Hahn [Tex. Civ. App.] 16 Tex. Ct. Rep. 902, 97 S. W. 132. In an action for goods sold a third person who was running a business in his own name and the evidence was conflicting as to whether he bought the goods for defendant, an instruction that if defendant ratified the acts of such third person he was liable assumes that the goods were bought for him. Hotel Cliff Ass'n v. Peterman [Tex. Civ. App.] 17 Tex. Ct. Rep. 349, 98 S. W. 407. Instruction that in estimating damages the jury might consider expenses paid or incurred in effecting a cure, and care and nursing during such period assumes that such expenses had been incurred. York v. Everton [Mo. App.] 97 S. W. 604. Request properly refused as assuming agency. Nesser v. Walton [Tex. Civ. App.] 15 Tex. Ct, Rep. 396, 92 S. W. 1037. Erroneous as assuming that there was negligent or rough handling of cattle. Houston & T. C. R. Co. v. Burns [Tex. Civ. App.] 14 Tex. Ct. Rep. 181, 90 S. W. 688. Held erroneous as assuming certain facts. Hanson v. Cresco [Iowa] 109 N. W. 1109. An instruction that if an injured person was at fault in doing a certain act he could not recover was erroneous as assuming that the act contributed to his injury. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91.

Rule not violated: Instruction that one had a right to assume that a street was in a reasonably safe condition held not erroneous as assuming that the street was in a safe condition. City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132. Instruction does not assume negligence where the jury is required to find such negligence from the evidence. Pittsburg, etc., R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128. Instruction that "if you believe from the evidence" certain facts held not to assume such facts. Indianapolis St. R. Co. v. Ray [Ind.] 78 N. E. 978. On an issue of mental capacity an instruction that drunkenness at other times would not invalidate the will did not invade the province of the jury by assuming that drunkenness was some evidence of insanity, there being evidence of excessive use of intoxicants by deceased. Swygart v. Willard [Ind.] 76 N. E. 755. Instruction reciting certain facts and stating "If you believe them," etc., is not an assumption of such facts. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709. Instruction speaking of one as "advancing for the purpose of getting on the boat as a passenger" and holding the carrier to provide a reasonably safe approach does not assume the existence of the relation of passenger and carrier. Burke v. St. Louis S. W. R. Co. [Mo. App.] 97 S. W. 981. Did not assume that a car was stopped or any attempt made to stop it before the collision. Indianapolis Traction & Terminal Co. v. Smith [Ind. App.] 77 N. E. 1140. Where one was injured by collision with a street car, an instruction did not assume that the car could have been stopped. Id. Instruction that if at the time of an accident from a hole in the street the hole was full of water such fact might be considered on the question of due care was not objectionable as assuming that the hole was a "dangerous" one. City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132. Instructions as a whole held not to assume a controverted fact. Brayton v. Boomer [Iowa] 107 N. W. 1099. Instruction that if A was the widow of B she would not be in unlawful possession of certain property does not assume that she was a widow in lawful possession. Pooler v. Smith, 73 S. C. 102, 52 S. E. 967. Held not objectionable as assuming that employes of a train had notice of the peril of a brakeman. International & G. N. R. Co. v. Hays [Tex. Civ. App.] 17 Tex. Ct. Rep. 605, 98 S. W. 911. Instruction that "where" the negligence of two unite in causing an injury it is no defense for one to show that the other was to blame was not misleading because the word "where" instead of "if" assumes negligence on the part of two. Frank Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652. Instruction in an action for injuries received by reason of a defective sidewalk stating the care required and following an instruction specifying the circumstances requisite to a recovery does not assume a fact. Elliott v. Kansas City [Mo.] 96 S. W. 1023. An instruction that damages are claimed for breach of "an alleged oral contract" does not assume that such contract was in fact made. Lindblom v. Fallett [C. C. A.] 145 F. 805. Charge that no recovery could be had if deceased failed to exercise ordinary care in looking out for his own safety, which contributed to his injury, does not assume that deceased was negligent. Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 866, 92 S. W. 426. In an action for death caused by a grounded wire where it was admitted that the current was not dangerous unless two "grounds" existed, instructions were held not to assume the existence of two "grounds." Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951. Held not to assume that a certain act was negligent. Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410. Instruction that if the jury find facts warranting a finding for plaintiff, followed

may be assumed. Facts may not be assumed, though undisputed, if ambiguous, and of such a nature that different conclusions may be drawn from them.[5]

by the measure of damages to be allowed, does not assume that the jury will find for plaintiff. Gray Tie Co. v. Clark [Ky.] 98 S. W. 1000. Held not to assume controverted facts in an action for the death of a street car passenger. Troll v. United R. Co. [Mo.] App.] 97 S. W. 234. Instructions in condemnation proceedings do not assume that property had been damaged because of failure to repeat in other instructions the words "if any" used in the first. Southern Missouri & A. R. Co. v. Woodard, 193 Mo. 656, 92 S. W. 470. An instruction in an action to recover land that a tenant cannot deny the title of his landlord does not assume that defendant held as tenant. Anthony v. Seed [Ala.] 40 So. 577. Instruction in an action for ejection of a passenger held not to assume facts. Southern Pac. Co. v. Balley [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820. An instruction merely stating the issues made by the pleadings is not an assumption of the proof of any of the issues. Missouri, etc., R. Co. v. Kyser [Tex. Civ. App.] 15 Tex. Ct. Rep. 891, 95 S. W. 747. Held not to assume that the manner of grinding a tool on an emery wheel was negligent. Gulf, etc., R. Co. v. Archambault [Tex. Civ. App.] 16 Tex. Ct. Rep. 293, 94 S. W. 1108. Held not to assume that a handhold on a car was insecurely fastened. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. Instruction held not to assume that a rail was defective. Moore v. St. Louis Transit Co., 193 Mo. 411, 91 S. W. 1060. Instructions on the measure of damages held not to assume proof or existence of disputed facts. Chicago, etc., R. Co. v. Stibbs [Okl.] 87 P. 293. In an action on an insurance policy instruction held not objectionable as assuming that there was certain evidence. Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8.

1. Facts not sustained may not be assumed. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co. [Va.] 54 S. E. 593. Request assuming facts contrary to the evidence properly refused. American Cent. Ins. Co. v. Antram [Miss.] 41 So. 257. Should not assume matters not appearing in the evidence. Johnson v. Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866. An instruction assuming a fact not shown by the evidence to exist may be refused. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. 903. On an issue of fraud where there was nothing to show that a false representation influenced or misled, it was error to assume that it was material. Weil v. Fineran [Ark.] 93 S. W. 568. Error to assume facts in controversy. Papineau v. White, 117 Ill. App. 51.

2. Roberts v. Chicago & A. R. Co. [Mo. App.] 94 S. W. 838. Uncontroverted fact may be. De Castillo v. Galveston, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 481, 95 S. W. 547; Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923; Houston & T. C. R. Co. v. Bath [Tex. Civ. App.] 14 Tex. Ct. Rep. 117, 90 S. W. 55; Town of Normal v. Bright, 223 Ill. 99, 79 N. E. 90. No issue raised as to the fact that there had been an accident, therefore it was held proper to assume it. Commercial Tel. Co. v. Davis [Tex. Civ. App.] 16 Tex. Ct. Rep. 645, 96 S. W. 939. No conflict in the testimony as to there being a highway at the point in question. San Antonio & A. P. R. Co. v. Wood [Tex. Civ. App.] 92 S. W. 259. Where it was not denied that property levied on was of a certain value, and the evidence showed that it was more, a charge that such was its value was justified. Craig v. Leschen & Sons Rope Co. [Colo.] 87 P. 1143. Where a fact is not disputed it may be assumed. Texas & N. O. R. Co. v. Moers [Tex. Civ. App.] 17 Tex. Ct. Rep. 400, 97 S. W. 1064. Well established and uncontroverted facts may be. Illinois Cent. R. Co. v. Becker, 119 Ill. App. 221. It was undisputed that there was time and space for a motorman to give warning of approach to a pedestrian and it was not error to assume such fact. Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737. In an action for obstructing an alley by running a railroad through it, it was not error to assume that the alley was obstructed. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111. No conflict in the evidence as to plaintiff's injuries, pain, and suffering, etc. Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220. Facts as to which there is no controversy may be. Murphy v. Hiltibridle [Iowa] 109 N. W. 471.

3. An instruction in an action of trespass de bonis was not objectionable for failure to include the fact of plaintiff's possession being rightful, where such fact was admitted. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108. Instruction that question of soundness of mind was not in the case held proper where counsel admitted, and uncontradicted evidence showed conclusively, that testatrix was of sound mind. Compher v. Browning, 219 Ill. 429, 76 N. E. 678. Fact admitted by the pleadings may be. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

4. Galveston, etc., R. Co. v. King [Tex. Civ. App.] 15 Tex. Ct. Rep. 75, 91 S. W. 622; Louisville & N. R. Co. v. Hubbard [Ala.] 41 So. 814. A fact as to which all witnesses are agreed. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. It is not error to fail to submit a fact which is established by clear and uncontroverted testimony. Parker v. Citizens' R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 718, 95 S. W. 38. Where in an action for deceit the uncontroverted evidence established scienter, it was not error to refuse to submit it. Serrano v. Miller & Teasdale Commission Co., 111 Mo. App. 185, 93 S. W. 810. Facts proved by uncontradicted evidence may be. McManus v. Metropolitan St. R. Co., 116 Mo. App. 110, 92 S. W. 176. That a scaffold fell by reason of moving a car to which it was attached. Louisiana & Tex. Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140. Where a fact is established it is proper to refuse to submit it. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121.

5. Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88. It is error to invite the jury

§ 5. *Charging with respect to matters of fact or commenting on the weight of evidence.*[6]—As a general rule trial courts are prohibited from charging with respect to matters of fact or commenting on the evidence,[7] or expressing or intimating an

to build up an inference of fact upon other inferences of fact which have no substantial basis in the proof. Johnson County Sav. Bank v. Walker [Conn.] 65 A. 132.

6. See 6 C. L. 51.

7. Request on the weight of evidence properly refused. Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640; Hardesty v. Largey Lumber Co. [Mont.] 86 P. 29.

Rule violated: Instruction that a certain act constituted contributory negligence properly refused where such question was for the jury. McMahon v. Boston, 190 Mass. 388, 76 N. E. 957; Texas & P. R. Co. v. Bailey [Tex. Civ. App.] 16 Tex. Ct. Rep. 843, 96 S. W. 1089; International & G. N. R. Co. v. Bingham [Tex. Civ. App.] 89 S. W. 1113; Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312; Houston & T. C. R. Co. v. Strickel [Tex. Civ. App.] 15 Tex. Ct. Rep. 395, 94 S. W. 427; Moore v. Northern Tex. Traction Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 354, 95 S. W. 652. An instruction that a certain act does not constitute negligence invades the province of the jury. Rubinovitch v. Boston El. R. Co. [Mass.] 77 N. E. 895. A charge that the testimony of a witness was uncertain in that he did not recollect certain matters. Holman v. Calhoun [Ala.] 40 So. 356. Charge that it is not negligence for one to drive along and near a street railway track where the evidence shows that the horse was unruly and unmanageable. Loofborrow v. Utah Light & R. Co. [Utah] 88 P. 19. Held erroneous as a charge on the effect of evidence in violation of Code 1896, § 3326. Theodore Land Co. v. Lyon [Ala.] 41 So. 682. Even in a case where the doctrine of "res ipsa loquitur" is applicable, it is erroneous to instruct that a given state of facts either constitutes or affords a prima facie proof of negligence where such is not so declared by statute. Augusta R. & Elec. Co. v. Weekly, 124 Ga. 384, 52 S. E. 444. Under Const. art. 6, § 19, prohibiting the charging with respect to matters of fact, it is error to instruct that a certain act does not constitute negligence. Wyckoff v. Southern Pac. Co. [Cal. App.] 87 P. 203. Instruction that a certain act did not constitute delivery of goods sold. Elliott v. Howison [Ala.] 40 So. 1018. An instruction that a certain act constituted negligence violates Const. art. 6, § 19, prohibiting the court from charging as to matters of fact. Manning v. App Consol. Gold Min. Co. [Cal.] 84 P. 657. In an action for goods sold a third person who was running a business in his own name and the evidence was conflicting as to whether he bought the goods for defendant, an instruction that if the defendant ratified the acts of the third person he was liable. Hotel Cliff Ass'n v. Peterman [Tex. Civ. App.] 17 Tex. Ct. Rep. 349, 98 S. W. 407. Where there was evidence that it was customary for shippers to ride on the engine, an instruction that the conductor had no authority to waive the provision in the contract requiring shippers to ride in the caboose. Missouri, etc., R. Co. v. Avis [Tex. Civ. App.] 14 Tex. Ct. Rep. 519, 91 S. W. 877. In a drainage case it is error for the court to instruct that any particular physical facts or state of facts constitutes benefits. Perdue v. Big Four Drainage Dist., 117 Ill. App. 600. Where in an action between the finder of money and the alleged owner the latter produces strong evidence of title which is practically unopposed, no instructions predicated on a conflict of evidence can be given. Kuykendall v. Fisher [W. Va.] 56 S. E. 48. In a boundary dispute where the true location of a corner was for the jury, an instruction that a call for an unmarked prairie line was not such a call for an artificial object as would control course and distance was on the weight of evidence because tending to make the jury believe that a call for course and distance was of greater weight than a call for a corner to be at a certain point. Clawson v. Wilkins [Tex. Civ. App.] 15 Tex. Ct. Rep. 662, 93 S. W. 1086. In an action for injuries to the shipper of a horse, a charge that the undisputed evidence showed a certain fact was not on the weight of evidence where such fact was alleged and the testimony relative to it undisputed. Houston & T. C. R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202. It is erroneous to instruct as to what facts constitute negligence. Illinois Cent. R. Co. v. Hicks, 122 Ill. App. 349. Instruction that the jury might give such weight to a receipt as it was entitled to, that they were not required to accept it as conclusive and if they believed the evidence preponderated against it they might so find, held to discredit such receipt. Connelly v. Illinois Cent. R. Co. [Mo. App.] 97 S. W. 616. That living together as husband and wife, that holding out that each is the lawful spouse of the other, execution of deeds as husband and wife, are not proofs of marriage but are circumstances to be considered. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 328, 95 S. W. 1126. Where evidence as to contributory negligence was conflicting, a request that the jury should consider all the surrounding circumstances in evidence before determining the question. Missouri, etc., R. Co. v. Barnes [Tex. Civ. App.] 15 Tex. Ct. Rep. 524, 95 S. W. 714. In an action for injuries to cattle in transit, an instruction that defendant would be liable for overloading the cattle. Ft. Worth, etc., R. Co. v. Cage Cattle Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 52, 95 S. W. 705. Held to assume that a sale was authorized in an action to recover the difference between the proceeds of a sale of mortgaged property and the amount of the debt. Ullman v. Devereux [Tex. Civ. App.] 15 Tex. Ct. Rep. 470, 93 S. W. 472. Where a passenger was injured by derailment of a train, a charge that the company was liable unless it showed that the accident could not have been avoided by the utmost care and foresight reasonably compatible with the prosecution of its business. Davis v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 989, 93 S. W. 222. In an action for an animal killed at a crossing in a district where stock was prohibited from running at large,

opinion as to its weight,[8] but this rule is not universally followed,[9] and it does not

it was held on the weight of evidence to instruct that it was negligence for the company to fail to blow the whistle, and if the company was guilty of gross negligence plaintiff could recover Missouri, etc., R. Co. v. Scofield [Tex. Civ. App.] 17 Tex. Ct. Rep. 319, 98 S. W. 435. In an action for injuries to property by reason of the maintenance of a railroad, stock pens, etc., a charge that if the company reduced the market value of the property as alleged and shown by the evidence it was liable. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425. Where on an issue as to the location of a survey there was evidence to establish the theory of plaintiff's on which the survey might be located, it was on the weight of evidence to charge that the survey might be located by certain courses and distances in effect in accordance with plaintiff's theory instead of charging that if the jury found from the evidence that the survey could be located as claimed. Thomson v. Kelley [Tex. Civ. App.] 16 Tex. Ct. Rep. 637, 97 S. W. 326. In an action for delay in transmitting a telegram, an instruction that if the company were notified of the importance of the message and of certain facts relative thereto and damages claimed were in the contemplation of the parties, plaintiff could recover. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062. Held erroneous as calculated to make the jury believe a fact in issue. International & G. N. R. Co. v. Startz [Tex. Civ. App.] 15 Tex. Ct. Rep. 384, 94 S. W. 207. Instruction in an action for injuries to cattle in transit. Texas & P. R. Co. v Felker [Tex. Civ. App.] 15 Tex. Ct. Rep. 466, 93 S. W. 477. Where it was a question of fact whether one was lawfully on the railroad track, an instruction assuming that he was a trespasser. Houston & T. C. R. Co. v. O'Donnell [Tex. Civ. App.] 90 S. W. 886. Instructions that certain facts are no proof of negligence. Missouri, etc., R. Co. v. Lynch [Tex. Civ. App.] 14 Tex. Ct. Rep. 237, 90 S. W. 511. Court may properly refuse a request to charge directing the jury to consider certain particular facts in reaching a conclusion on an ultimate fact in issue. Eckhard v. St. Louis Transit Co., 190 Mo. 593, 89 S. W. 602. Instruction authorizing a verdict for one party unless the adverse party has satisfied the jury by a preponderance of evidence of the existence of a particular fact requires too high a degree of proof, it being necessary to satisfy the jury only. Lawrence v. Alabama State Land Co. [Ala.] 41 So. 612. Request taking from the jury a matter which was for their determination properly refused. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. Where evidence is conflicting it is proper to refuse to instruct that a certain fact is uncontroverted. Alabama Great So. R. Co. v. Sanders [Ala.] 40 So. 402. It is proper to refuse an instruction to find for a party against the preponderance of evidence. Coker v. Payne [Ala.] 39 So. 1025. "If you believe from the evidence you cannot find" certain facts invades the province of the jury. Wells v. Gallagher [Ala.] 39 So. 747. Requests charging upon the facts are properly refused. Such instructions are forbidden by Rev. St. 1892, § 1088. Supreme Lodge K. P. v. Lipscomb [Fla.] 39 So. 637. An instruction that receiving through the mails an application for an insurance policy and filing it in the office may or may not be an acceptance of it. McGrath v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 218. Charge that if a pass on which an injured person was riding was issued pursuant to telegrams in evidence it was issued without consideration was on the facts. Nickles v. Seaboard Air Line R. Co. [S. C.] 54 S. E. 255. Held on the weight of evidence where there was one witness whose character for truth was impeached and the court charged as to the province of the jury relative to the weight to be given testimony. Tyler Ice Co. v. Tyler Water Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 114, 95 S. W. 649. Instruction in an action for fraud that if a person had knowledge of a certain fact he was put on inquiry as to the truth of the representations. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. On an issue as to whether an absolute deed is a mortgage, it is on the weight of evidence to instruct that the party alleging it must prove it by clear and satisfactory proof. Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 S. W. 405. Held on the weight of evidence in an action for damages to live stock in transit. Fort Worth & D. C. R. Co. v. Hamm [Tex. Civ. App.] 15 Tex. Ct. Rep. 202, 93 S. W. 215. An instruction intimating a doubt on the part of the court as to the right of the plaintiff to recover any amount. San Antonio & A. P. R. Co. v. Dickson [Tex. Civ. App.] 15 Tex. Ct. Rep. 51, 93 S. W. 481. When evidence as to whether a railroad waiting room was comfortable was conflicting, an instruction that it was the duty of the company to heat it. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195. It is error to charge that a certain act of a passenger rendered it necessary for the conductor to eject him. Nashville, etc., R. v. Moore [Ala.] 41 So. 984. It is an invasion of the province of the jury to instruct that there is no evidence of a certain fact. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. A charge that there was no evidence of a certain fact properly refused as invading the province of the jury. Alabama Great So. R. Co. v. Bonner [Ala.] 39 So. 619. That certain acts constitute negligence. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. The exception to this rule is where such acts are so declared by statute. Id. Statement by the court that there was no evidence of a certain fact held to violate Const. art. 4, § 16, prohibiting judges to charge with respect to matters of fact or to comment thereon. Patten v. Auburn, 41 Wash. 644, 84 P. 594. Charge that an oral contract was not in force properly refused as on the weight of evidence where a written contract under which defendant claimed was shown to have been abrogated. Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499. An instruction in an action on a promissory note that if there is anything in the circumstances to cast suspicion on the character of the instrument the holder will be deemed to have taken it in bad faith.

prevent the judge from referring to parts of the evidence nor to lines of evidence and making concrete applications of the law to them.[10]

Harrington v. Butte & B. Min. Co. [Mont.] 83 P. 467.

Rule not violated: An instruction stating the legal conclusion which would result from the establishment of certain facts. Kean v. Landrum, 72 S. C. 556, 52 S. E. 421. Held not on the weight of evidence. International & G. N. R. Co. v. Brice [Tex.] 16 Tex. Ct. Rep. 1005, 97 S. W. 461; Houston & T. C. R. Co. v. Wilkins [Tex. Civ. App.] 17 Tex. Ct. Rep. 247, 98 S. W. 202; Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. An instruction that the delivery of a deed need not be manual is not a charge on the facts in violation of Const. art. 5, § 26. Moss v. Smith, 73 S. C. 231, 53 S. E. 284. Held not objectionable as on the weight of evidence in that they led the jury to believe that the court was of the opinion that certain issuable facts had been proved. St. Louis S. W. R. Co. v. Morrow [Tex. Civ. App.] 93 S. W. 162. Instruction on a tax collector's bond held not to assume that the bond was left with the collector without restriction as to delivery. Baker County v. Huntington [Or.] 87 P. 1036. Instruction in suit to establish will that under the statutes of descent estate would go to testatrix's next of kin, naming them, held proper where beneficiaries were others than such kin. King v. Gilson, 191 Mo. 307, 90 S. W. 367. Held not a comment on the weight of evidence in an action for injuries to an employe because of the fall of a scaffold. Louisiana & Tex. Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140. In an action for injuries caused by the collapse of a scaffold in consequence of moving a car to which it was attached. Id. An instruction to consider facts in evidence in determining whether a fire was due to a specified cause. Murray v. Llewellyn Iron Works Co. [Cal. App.] 87 P. 202. An instruction that certain facts constitute negligence is not an invasion of the province of the jury where it pertains to the rights and duties of the parties under a contract for the sending of a telegram. Campbell v. Western Union Tel. Co. [S. C.] 54 S. E. 571. An instruction that if the evidence showed that one bought a ticket and the company failed to stop its train he could decline to use the ticket and demand his money "because the railroad failed to keep its contract with him." Caldwell v. Atlantic Coast Line R. Co. [S. C.] 55 S. E. 131. When there is no evidence of a certain fact it is proper to so instruct. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Charge that jury may say that failure to repair a roadbed after knowledge of its defects was wanton disregard of the duties to an employe held not an instruction that such facts constituted wantonness. Brickman v. Southern R. Co. [S. C.] 54 S. E. 663. An instruction submitting undisputed matters. Pacific Exp. Co. v. Walters [Tex. Civ. App.] 15 Tex. Ct. Rep. 549, 93 S. W. 496. In an action for injuries, an instruction reciting facts relative to a surgical operation, pain, and suffering. Missouri, etc., R. Co. v. Hagan [Tex. Civ. App.] 15 Tex. Ct. Rep. 325, 93 S. W. 1014. Not on the weight of evidence in an action for failure to deliver a telegram. Western Union Tel. Co. v. Carter [Tex. Civ. App.] 15 Tex. Ct. Rep. 657, 94 S. W. 205. Instruction defining the measure of damages and reciting that it was applicable only in the event that the jury previously found that there was failure to exercise ordinary care in handling stock in transit. Missouri, etc., R. Co. v. Garrett [Tex. Civ. App.] 96 S. W. 53. Instructions as to warranties of a manufacturer. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617. It is not a charge on the facts to construe the statute of a foreign state. Frasier v. Charleston & W. C. R. Co., 73 S. C. 140, 52 S. E. 964. That the preponderance of evidence is that which carries conviction with it depends on the character of the witness, his intelligence, opportunity for knowledge, and not necessarily on the number of witnesses. Montgomery v. Seaboard Air Line R. Co., 73 S. C. 503, 53 S. E. 987. It is not error to charge that a certain act constitutes negligence if it is so declared by statute. Wilson v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 257. Instruction as to the duty of a master to furnish a safe place and proper appliances for a servant. Rice v. Lockhart Mills [S. C.] 55 S. E. 160. To set forth the acts of negligence charged and refer to them as alleged. Id. To assume that goods in controversy had some value where such fact is conceded. Stewart v. Jacob Sachs & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 845, 96 S. W. 1091. In an action for injuries caused by a defective stirrup on a box car, an instruction that it was the duty of the company to maintain the stirrup in a reasonably safe condition, was not on the weight of evidence as intimating that the court was of the opinion that the stirrup was defective. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. Where there was an ordinance prescribing the rate of speed, an instruction leaving the jury to determine whether the ordinance had been violated, and if so declaring it to be negligence, and requiring the jury to determine whether it was the proximate cause of the injury. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. Leaving the jury to determine whether facts embraced in the charge exist before they could find as therein directed. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100. Instruction that a traveler had a right to travel on a street and in the absence of notice of its defective condition might presume that it was in a reasonably safe condition for travel. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. Instruction in an action for ejection of a passenger. Southern Pac. Co. v. Bailey [Tex. Civ. App.] 14 Tex. Ct. Rep. 921, 91 S. W. 820.

8. Request containing intimation of opinion of the court properly refused. Insurance Co. v. Leader, 121 Ga. 260, 48 S. E. 972.

Rule violated: Instruction that the jury could find for plaintiff in no greater sum than demanded, though they might think he was entitled to a great deal more, intimates

§ 6. *Form and general substance of instructions.*[11]—It is not essential that the entire law of the case be stated in a single instruction.[12] All instructions given are to be considered as a series,[13] but an instruction intended to cover the entire case,[14] or a particular phase of it,[15] and upon which a finding is predicated, should

an opinion of the judge on the proof. Proctor v. Pointer [Ga.] 56 S. E. 111. Instruction that one injured by fire spreading from a railroad right of way cannot recover because the engine was in good repair, carefully managed by a competent engineer, etc. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448. An instruction that certain testimony establishes a certain fact is an expression of opinion in violation of Civ. Code 1895, § 4334. Albany & N. R. Co. v. McArthy, 125 Ga. 205, 54 S. E. 193. In an action for injuries to property because of the maintenance of a railroad, stock pens, etc., in the vicinity, instructions held erroneous as leading the jury to infer that in the opinion of the court the property was injuriously affected. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425. In an action for assault and battery an instruction that fines imposed on account of such assault should be considered in mitigation of exemplary damages is an intimation of opinion that the case was one for the allowance of such damages. Holland v. Williams [Ga.] 55 S. E. 1023. Instruction that if there was an absence of slight care exemplary damages might be awarded as punishment for acts done with indifference to safety of life or limbs of others is improper as impressing the jury with the belief that the court thought the punishment ought to be great. Southern R. Co. v. Scanlon's Adm'r [Ky.] 92 S. W. 927. An opinion of the court on the evidence **is harmless** where the evidence conclusively establishes the fact. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 S. W. 375.

Rule not violated: Instructions construed together and held not an expression of opinion on the facts in violation of Revisal 1905, § 535. Gilliand v. Board of Education & School Committee of Buncombe County [N. C.] 54 S. E. 413. Held not to intimate any opinion of the court that a railroad track was in bad condition. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 S. W. 375. In condemnation proceedings the court directed the jury to consider "generally all matters owing to the peculiar location of the railroad over the land as might in the judgment of the jury affect the convenient enjoyment of the same." Held that use of the word "peculiar" did not intimate that the court was of the opinion that there was something peculiar in the location of the road. St. Louis, etc., R. Co. v. Continental Brick Co. [Mo.] 96 S. W. 1011. Instruction in a personal injury action that if plaintiff has suffered mental anguish in view of the dark days to come to his wife and little child such suffering cannot be considered is not on the facts as intimating a belief that injuries are permanent. Montgomery v. Seaboard Air Line R. Co., 73 S. C. 503, 53 S. E. 987. Instruction that the verdict must be found under the evidence and instructions combined does not intimate that the court is of the opinion that the defendant is chargeable with the negligence alleged. Kellyville Coal Co. v. Strine, 117 Ill. App. 115.

9. Where the court submits the issues without any direction as to how the facts should be found, the fact that it directly or inferentially expressed an opinion on the facts is not error in the absence of abuse of discretion. Crotty v. Danbury [Conn.] 65 A. 147. Instruction held not to go beyond the reasonable discretion of the court in commenting on the weight of evidence. Shupack v. Gordon [Conn.] 64 A. 740. In Minnesota the court may express its opinion on the facts provided the ultimate determination thereof is left to the jury. Bonness v. Felsing [Minn.] 106 N. W. 909. If a party be apprehensive that the jury will be unduly influenced he should request an instruction that the jury are the sole judges of the facts. Id.

10. Haines v. Goodlander [Kan.] 84 P. 986.

11. See 6 C. L. 53.

12. An instruction which does not authorize the basing of a verdict on the facts therein hypothesized, and when it is to be considered in connection with other instructions, need not sum up the entire case. Chicago, etc., R. Co. v. Reuter, 119 Ill. App. 232. Instruction summarizing the facts on which one party is entitled to recover and so charging unless the jury find for the other party on other instructions is not erroneous. St. Louis S. W. R. Co. v. Connally [Tex. Civ. App.] 93 S. W. 206. It is not necessary that each paragraph of the charge contain the limitations and modifications of the general rules announced. It is sufficient if they are contained in other instructions. Hammock v. Tacoma [Wash.] 87 P. 924.

13. See post § 17, Instructions are to be Considered as a Whole.

14. An instruction given as covering the entire case should embrace materially all points in the case. Hatton v. Mountford [Va.] 52 S. E. 847. Failure to hypothesize knowledge of fraud and facts necessary to constitute adverse possession properly refused. Fowler v. Prichard [Ala.] 41 So. 667. Where a request disregarded a material issue it was properly refused. Scanlan v. Gulick [Mo.] 97 S. W. 884. Instructions held to cover every element of the case. Helland v. Colton State Bank [S. D.] 106 N. W. 60. An instruction hypothesizing certain facts and making a finding depend thereon must contain all the facts essential to such finding. Tennessee Coal, Iron & R. Co. v. Bridges [Ala.] 39 So. 902. A charge of court as to the right of a purchaser to return a horse not coming up to the warranty should specify that the return must have been made within a reasonable time and under circumstances which placed the vendor in statu quo. Palmer v. Cowie, 7 Ohio C. C. (N. S.) 46. It is error to instruct a finding based on a partial view of the evidence. Vaughan Mach. Co. v. Stanton Tanning Co. [Va.] 56 S. E. 140. Failure to hypothesize contributory negli-

embrace all the necessary elements involved. The instructions should be stated in as simple, orderly, clear, and precise manner as is possible under the circumstances[16] and should contain only a single proposition.[17] If the rule is correctly stated it is not essential that it be in the exact language of the code.[18] The language should be intelligible,[19] clear,[20] free from ambiguity,[21] and not misleading.[22] The meaning

gence. Moss v. Mosley [Ala.] 41 So. 1012. An instruction which sets out a state of facts and authorizes a verdict on the finding thereof is erroneous unless it includes every fact necessary to sustain such verdict, unless the omitted facts are conclusively established. Standard Distilling & Distributing Co. v. Harris [Neb.] 106 N. W. 582. It was error to state to the jury that the petition contained the allegation that the ways and means for putting air into the tunnel and getting the gas out were insufficient and known to be so by the defendants, but unknown to the deceased, without adding the instruction that each and every fact contained in this averment was essential to constitute negligence. Gawne Co. v. Fry, 7 Ohio C. C. (N. S.) 317.

15. Instruction on contributory negligence properly refused as not postulating any acts of negligence averred in the pleas. Louisville & N. R. Co. v. Hubbard [Ala.] 41 So. 814. Held erroneous for failing to hypothesize negligence. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91.

16. It is sufficient if the charge embraces every phase of the case and clearly sets forth the issues in simplified though collective form. Kelly-Goodfellow Shoe Co. v. Sally, 114 Mo. App. 222, 89 S. W. 889. Instruction as to negligence while open to criticism held not prejudicial. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. It is erroneous to submit certain premises without stating what conclusions may be drawn therefrom. Harrington v. Butte & B. Min. Co. [Mont.] 83 P. 467. Instruction construed as an explanation of the complaint and an analysis of the allegations and not to take from the jury the question in issue. Early v. Early [S. C.] 54 S. E. 827. Terms of a purely technical or scientific character should be avoided where the questions are susceptible of being presented in plain and practical language. Maryland Casualty Co. v. Finch [C. C. A.] 147 F. 388.

17. In an action for libel a request to hold that a cut was libelous, that it constituted libel per se, and only the question of damages was for the jury, was properly refused as containing more than a single proposition. Klaw v. Life Pub. Co. [C. C. A.] 145 F. 184.

18. Alfriend v. Fox, 124 Ga. 563, 52 S. E. 925.

19. An unintelligible instruction is properly refused. Marx v. Ely [Ala.] 41 So. 411. Instruction in condemnation proceeding held incomprehensible and misleading. Magee v. Oklahoma City & T. R. Co. [Tex. Civ. App.] 95 S. W. 1092.

20. Request which tends to confuse the jury may be refused. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927. Properly refused as confusing. Montgomery St. R. Co. v. Smith [Ala.] 39 So. 757. Held confusing and misleading in an action on a note and to foreclose a chattel mortgage. Williams & Co. v. Smith [Tex. Civ. App.] 98 S. W. 916. Confusing and misleading. Louisville & N. R. Co. v. Fowler [Ky.] 96 S. W. 568. Properly refused as confusing. Romano v. Yazoo & M. V. R. Co. [Miss.] 40 So. 150. Properly refused as confused and misleading. McConnell v. Adair [Ala.] 41 So. 419. Must not be involved as confusing or misleading. Armour Packing Co. of Louisiana v. Vietch-Young Produce Co. [Ala.] 39 So. 680. Instruction that an engineer is not bound "to keep a lookout for animals beyond the light thrown from his engine; that is, on the outsides of the track," properly refused as obscure and misleading. Western R. Co. v. Stone [Ala.] 39 So. 723. Held not misleading or confusing in an action on a contract of employment. Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84.

21. Instruction on the question of negligence held ambiguous. Grand Trunk Western R. Co. v. Melrose [Ind.] 78 N. E. 190. Instructions as to warranties of a manufacturer held not ambiguous or misleading. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617.

22. **Held misleading.** Cone v. American Elec. Fuse Co. [Mich.] 13 Det. Leg. N. 637, 108 N. W. 991; Lawrence v. Ala. State Land Co. [Ala.] 41 So. 612; Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91; Mobile Light & R. Co. v. Walsh [Ala.] 40 So. 560; Texas & N. O. R. Co. v. Harrington [Tex. Civ. App.] 98 S. W. 653. And confusing. Southern R. Co. v. Forgey [Va.] 54 S. E. 477. To charge the jury to consider evidence as circumstantial when it is direct. Bryce v. Chicago, etc., R. Co., 129 Iowa, 342, 105 N. W. 497. Instruction in an action for injuries sustained in alighting from a car held misleading because not confining the opportunity to alight to the interval between when the passenger started to alight and when the car started. West Chicago St. R. Co. v. McCafferty, 220 Ill. 476, 77 N. E. 153. Where negligence is sought to be proved by circumstantial evidence, it is error to instruct to subject each circumstance to the test of due care since all the circumstances taken together may be negligence. Bryce v. Chicago, etc., R. Co., 129 Iowa, 342, 105 N. W. 497. Instruction in eminent domain proceedings. Newport News & O. P. R. & Elec. Co. v. Lake [Va.] 54 S. E. 328. Instructions in an action on a note given for a patent right. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. Instructions stating in immediate connection with each other, without proper explanation, two distinct rules of law, the latter qualifying the former, are erroneous. Macon R. & Light Co. v. Streyer, 123 Ga. 279, 51 S. E. 342. Instruction in an action for injuries caused by the premature starting of a train that alighting from a moving train was not negligence unless the then conditions and circumstances made it so. Gulf, etc., R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. In an action for injuries to horses in transit, an instruction that plaintiff must prove that

of instructions is to be determined by what ordinary men and jurors would understand them to mean under the evidence and circumstances of the trial.[23] Language used in an opinion of the supreme court in discussing facts is not always appropriate.[24] Instructions should state propositions of law[25] applicable to the issues as de-

there was an established market for the horses at their destination is misleading because of the word "established." St. Louis, etc., R. Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 600, 93 S. W. 1107. That a certain case superseded another on a certain principle. Gilliland v. Martin [Ala.] 42 So. 7. It is error to give two instructions as to the burden of proof, one of which is correctly qualified and the other not. Vermillion v. Parsons, 118 Mo. App. 260, 94 S. W. 298. Held misleading because introducing a new issue. Smith v. Jefferson Bank [Mo. App.] 97 S. W. 247. Held prejudicial and misleading where not based on evidence. Brixey v. New York, 145 F. 1016. Held misleading in an action for damages for injuries caused by a runaway horse because inapplicable to the facts or to any reasonable inferences from such facts. Kern v. Snider [C. C. A.] 145 F. 327. To instruct that the burden to prove contributory negligence is on the plaintiff, since it is proper to look to the evidence adduced by both parties. St. Louis S. W. R. Co. v. Groves [Tex. Civ. App.] 16 Tex. Ct. Rep. 895, 97 S. W. 1084. Submitting an issue whether a grantee failed to disclose other material facts necessary to understand the situation after authorizing a verdict on finding of facts alleged. White v. White [Tex. Civ. App.] 16 Tex. Ct. Rep. 134, 95 S. W. 733. On an issue as to the validity of a release of damages for pereonal injuries, an instruction that if the injured person was ignorant of its contents when he signed it, or was in such mental condition as not to know what he was doing, he was not bound was calculated to mislead the jury to believe that ignorance alone was sufficient to avoid it. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 S. W. 907. Instruction that a conductor may remove a disorderly passenger is erroneous if it omits the degree of force he may use. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984. An instruction on assumed risk without explaining that it is a form of contributory negligence. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077.

Misleading requests may be refused. Ainsfield Co. v. Rasmussen [Utah] 85 P. 1002. Properly refused as misleading. Holman v. Calhoun [Ala.] 40 So. 356; Gates v. O'Gara [Ala.] 39 So. 729. An instruction which is liable to mislead the jury as to which party must sustain the burden of proof is properly refused. Fuller v. Stevens [Ala.] 39 So. 623. Interrogatories which are calculated to mislead or confuse the jury may be refused. City of Lawton v. McAdams, 15 Okl. 412, 83 P. 429.

Misleading instruction not ground for reversal. Birmingham R., Light & Power Co. v. Ryan [Ala.] 41 So. 816; Kelly v. Louisville & N. R. Co. [Ala.] 41 So. 870. It is not generally ground for revereal that instructions are misleading and confusing. Smith v. Birmingham R., Light & Power Co. [Ala.] 41 So. 307.

Not misleading. Houston v. Chicago, etc., R. Co., 116 Mo. App. 484, 94 S. W. 560; International & G. N. R. Co. v. Muschamp [Tex. Civ. App.] 90 S. W. 706; Allyn v. Burns [Ind. App.] 76 N. E. 686. In an action for negligence. Liles v. Fosburg Lumber Co. [N. C.] 54 S. E. 795. As imposing on the defendant the burden of proving part of the plaintiff's case. Ramsay v. Meade [Colo.] 86 P. 1018. Instruotion that the jury should receive the law from the instructions does not mislead the jury to disregard requested instructions given. International & G. N. R. Co. v. Hays [Tex. Civ. App.] 17 Tex. Ct. Rep. 805, 98 S. W. 911. An instruction which states that the burden to prove contributory negligence is on defendant is not open to the objection that the jury might have been misled when none of the plaintiff's evidence tends to prove contributory negligence. St. Louis & S. F. R. Co. v. Johnson [Kan.] 86 P. 156. An instruction that manual delivery of a deed is very strong evidence of delivery. Moss v. Smith, 73 S. C. 231, 53 S. E. 284. Instruction in an action for death in a collision relative to the system of signals and rules in use at the time. Stewart v. Raleigh & A. Air Line R. Co. [N. C.] 53 S. E. 877. An instruction that the preponderance of evidence is not necessarily determined by the greater number of witnesses, and that weight must be given to those whom they most believe, is not misleading though one witness was contradicted by two who stood unimpeached. McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 P. 614. On the question of testamentary capacity. Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591.

23. Instruction on the burden of proof does not involve the character of evidence necessary to discharge such burden and is not bad for failing to state that circumstantial as well as direct evidence may be considered. New Castle Bridge Co. v. Doty [Ind. App.] 76 N. E. 557. The test as to what an instruction means is as to what ordinary men and jurors understand it to mean. Chicago Union Traction Co. v. Lowenrosen, 222 Ill. 506, 78 N. E. 813. Instruction that the jury might increase their verdict by the addition of interest is not erroneous for failure to state the rate, as it is presumed the jury understood that the legal rate would prevail. Hardwood Mfg. Co. v. Wooten [Ga.] 54 S. E. 814. Instructions are to be construed as meaning what ordinary men and jurors would take them to mean. Cook v. Smith-Lowe Co. [Iowa] 109 N. W. 798. In an action on a note to which the defense of forgery was set up, an instruction as to the effect of failure to affix a revenue stamp did not mislead the jury, as they must have understood that such failure did not relate to the issue of validity. Beem v. Farrell [Iowa] 108 N. W. 1044.

24. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110.

25. Instruction that the evidenoe shows that intestate was a bright boy of his age

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evidence and make concrete applications of the law to them.[6] Mere memorandum forming no part of the instruction does not accentuate the memorandum.[7] Giving undue prominence to part of the facts is not reversible error.[8]

§ 11. *Definition of terms used.*[9]—Technical terms employed in the instructions should be defined.[10] The definition given should be correct.[11] Failure to give such definitions is generally held not reversible error[12] unless requested,[13] or unless prejudice results.[14] Technical words need not be defined if the same used in the instructions as a whole are made definite and intelligible.[15] Where a term is once defined it is not necessary to define it a second time when it is again employed.[16] Terms in common use need not be defined.[17]

87 P. 452. Instruction enumerating certain facts but not telling the jury to make their verdict depend on them held not to give undue prominence where the jury were charged that their verdict must depend on all the evidence introduced. Indianapolis & E. R. Co. v. Bennett [Ind. App.] 79 N. E. 389. Instruction in an action against a railway company for backing its train into the train of another company did not give undue prominence to one feature of the case. Baltimore & O. S. R. Co. v. Kleespies [Ind. App.] 76 N. E. 1015. Instruction in an action for ejection from a train that if the conductor told the passenger something about getting off, etc., held not objectionable as abstract or singling out a portion of the testimony. Louisville & N. R. Co. v. Quinn [Ala.] 39 So. 616. Instruction correctly stating plaintiff's claims without expressing any opinion as to their justice or legality is proper. Richards v. Richman [Del.] 64 A. 238.

3. An instruction must not single out one particular issue where there are several important ones. Jacksonville Elec. Co. v. Adams [Fla.] 39 So. 183.

4. Haines v. Goodlander [Kan.] 84 P. 986.

5. Instruction inviting undue attention to a particular part of the evidence is erroneous. Drake v. Holbrook, 28 Ky. L. R. 1319, 92 S. W. 297.

6. Haines v. Goodlander [Kan.] 84 P. 986.

7. In a charge relative to rules and regulations of a master, the number of two rules were written underneath the charge. De Witt's Adm'r v. Louisville & N. R. Co. [Ky.] 96 S. W. 1122.

8. Southern R. Co. v. Bradford [Ala.] 40 So. 100.

9. See 6 C. L. 63.

10. Error to fail to define "actual notice" where such failure is likely to be misleading. Ware v. Souders, 120 Ill. App. 209. "Proximate cause" should be defined. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. A special charge is properly refused where it holds plaintiff to the exercise of proper care and caution, without defining what would constitute proper care and caution under the circumstances of the case under consideration. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581. Where in an action for injuries to a passenger on a freight train the court instructed as to the risks assumed and used the term "in a proper manner," it was proper to give an instruction explaining the meaning of the expression. International & G. N. R. Co. v. Cruseturner [Tex. Civ. App.] 16 Tex. Ct. Rep. 997, 98 S. W. 423. Under Rev. St. 1895, art. 1317, requiring the court to so frame its charge as to distinctly separate the questions of law from the questions of fact, it was held erroneous to fail to define "conversion." Davis v. Hardwick [Tex. Civ. App.] 15 Tex. Ct. Rep. 947, 94 S. W. 359.

11. Requested instruction defining "reasonable" as "in a reasonable manner; consistent with reason; in a moderate degree; tolerable," was properly refused. York v. Everton [Mo. App.] 97 S. W. 604. It is not erroneous to define "knowingly" in the language of the statute providing for an action against a public officer for knowingly collecting illegal fees. Skeen v. Chambers [Utah] 86 P. 492. Definition of "ordinary care" and "proximate cause" held proper. Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88. Definition of ordinary care of a boy held correct. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077. Definition of "prepondsrance of evidence" held proper. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096. Instruction on the preponderance of evidence, while inaccurate, held not ground for reversal. Royal Trust Co. v. Overstrom, 120 Ill. App. 479. Erroneous definition of "preponderance of evidence" as the greater number of witnesses held prejudicial error. Heald v. Western Union Tel. Co., 129 Iowa, 326, 105 N. W. 588.

12. Not error to fail to define "flying switch." Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989. Omission to define "riot" or "rout" not misleading. Louisville & E. R. Co. v. Vincent [Ky.] 96 S. W. 898. Failure to define "properly assist" as applied to a conductor assisting a passenger to alight held not misleading. Missouri, etc., R. Co. v. Wolf [Tex. Civ. App.] 14 Tex. Ct. Rep. 52, 89 S. W. 778.

13. It is error to refuse to define "ordinary or reasonable care" where an issue pertaining thereto is submitted. Denver, etc., R. Co. v. Norgate [C. C. A.] 141 F. 247. Failure to define "burden of proof" is not error in the absence of a request. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

14. Failure to define "city" so that it would include the city, the speed ordinance of which was alleged to have been violated. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Failure to define "independent contractor" held reversible error. Overhouse v. American Cereal Co., 128 Iowa, 580, 105 N. W. 113.

15. White v. Madison, 16 Okl. 212, 83 P. 798.

16. Where "ordinary" care is once defined, it is not necessary to define it when used in

§ 12. *Rules of evidence; credibility and conflicts.*[18]—*The credibility*[19] of witnesses[20] and the weight to be given their testimony are questions for the jury,[21] but it is proper to instruct that the interest of a witness[22] or his susceptibility of being influenced[23] may be considered, that expert testimony may be considered in the light of common observation and experience[24] to call attention to the means of knowledge of the witnesses,[25] and the relative weight to be given positive and negative testi-

connection with another circumstance in a subsequent instruction. Nephler v. Woodward [Mo.] 98 S. W. 488.

17. Not necessary to define negligence in an action for injuries to cattle caused by delay. Texas Cent. R. Co. v. West [Tex. Civ. App.] 13 Tex. Ct. Rep. 552, 88 S. W. 426. Not error to fail to define "tenant" and "rented." Pilcher Mfg. Co. v. Teupis' Ex'x [Ky.] 91 S. W. 1125.

18, 19. See 6 C. L. 64.

20. Where on an issue as to whether an insurance agent had knowledge of the ownership of property there is testimony that the true ownership was known by general reputation, it is error to instruct the jury to disregard such testimony though other witnesses have testified that there was no such general reputation. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48. It is error to charge that testimony concerning verbal statements of others should be received with great caution, that repetition of oral statements is subject to imperfection and should be scanned closely, and that where a witness testifies to what he thinks was the substance of what was said, the weight to be given such testimony depends on the strength of memory and intelligence of the witness. Ellis v. Republic Oil Co. [Iowa] 110 N. W. 20. Where a party's testimony on a former trial differed only in immaterial respects from his testimony on the second trial, and it does not appear that there was a deliberate misstatement made at either trial, an instruction that a deliberate misstatement was an admission that his claim was wrongful was properly refused. Bennett v. Susser, 191 Mass. 329, 77 N. E. 884. Instruction that an interested witness will not be as honest, candid and fair as a disinterested one is error. Muncie, etc., R. Co. v. Ladd [Ind. App.] 76 N. E. 790. Instruction that an interested witness will not be as fair, candid, and honest as a disinterested one is not rendered harmless by the fact that the party to the suit was the only interested witness. Id. It is error to instruct that the denunciation of a witness by counsel should not influence the jury to disregard his testimony if unimpeached. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341.

21. It is error to charge that if two witnesses of equal credibility testify directly opposite to each other the party holding the affirmative has the burden of proof. Holmes v. Horn, 120 Ill. App. 359. Instruction that when witnesses are otherwise credible and their testimony otherwise entitled to equal weight greater weight should be given to those whose means of information are superior invades the province of the jury. Muncie, etc., R. Co. v. Ladd [Ind. App.] 76 N. E. 790. An instruction that if the jury believed the testimony of certain lawyers who testified as to their opinion concerning the law of another state they should find accordingly deprives the jury of the right to determine for themselves the weight to be given such testimony. Hancock v. Western Union Tel. Co. [N. C.] 55 S. E. 82. An instruction that where the testimony of witnesses is in all respects entitled to equal weight the verdict should be in harmony with the greater number of witnesses invades the province of the jury. Indianapolis & E. R. Co. v. Bennett [Ind. App.] 79 N. E. 389.

22. Instruction that plaintiff in personal injury action is a competent witness, but that his interest may be considered in determining the weight to be given his testimony, and that the jury are the judges of his credibility, is proper. Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845. Where plaintiff in a personal injury action testifies in regard to his injuries in contradiction to other witnesses, the jury should be instructed to consider his interest. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. This rule is not satisfied by a general charge that the jury are the judges of credibility of witnesses. Id. It is proper to charge that a witness' interest may be considered. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902.

23. It is not an invasion of the province of the jury to instruct them that the testimony of a boy nine years old, who had talked the matter over with his mother, should be given such weight as in their judgment it was worth, where the transaction occurred a year before. Banks v. Connecticut R. & Lighting Co. [Conn.] 64 A. 14.

24. It is not erroneous to instruct to consider expert evidence in the light of common observation and experience. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211. An instruction that opinions of nonexpert witnesses based on personal knowledge should be given weight according to the knowledge upon which they were based should confine such opinions to such as were based on matters detailed by the witnesses who gave them as basis for their conclusion. In re Jones' Estate, 130 Iowa, 177, 106 N. W. 610. Instructions relative to the consideration of expert testimony held proper. Pritchett v. Moore, 125 Ga. 406, 54 S. E. 131.

It is erroneous to instruct that the jury may apply their observation and experience in life because they can apply only their common observation and experience. Sloss-Sheffield Steel & Iron Co. v. Hutchinson [Ala.] 40 So. 114.

25. Instruction that greater weight is to be given to testimony of witnesses whose means of knowledge are superior and those who testify affirmatively rather than those who testify negatively is not erroneous where all witnesses swore affirmatively.

mony,[26] but it is erroneous to instruct that an unimpeached witness has testified truly.[27] The jury may be instructed to scan admissions[28] and that a deposition is not to be believed any more than if the witness had testified in court.[29] The jury should not be led to disregard any testimony.[30] It is proper to instruct as to what constitutes the preponderance of evidence,[31] but not to charge that the number of witnesses has nothing to do with it.[32] It is error to instruct the jury to reconcile conflicting evidence if possible.[33] It is proper to instruct that it is the duty of the jury to reconcile the evidence of all the witnesses consistently with the truthfulness of all if it could be done reasonably.[34]

Falsus in uno, falsus in omnibus[35] should be given when justified by law,[36] but not unless a witness is shown to have sworn falsely.[37] In charging this doctrine it is proper to use the terms "willfully and corruptly,"[38] "palpably,"[39] and "worthy of no credit whatever."[40] The word "willfully" must be used.[41]

Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591. It is not error to instruct that the jury may consider the special knowledge or want of knowledge of a witness, where they are instructed that they are the sole judges of the weight to be given testimony. Indianapolis Northern Traction Co. v. Dunn [Ind. App.] 76 N. E. 269. Instruction that where witnesses are otherwise equally credible and their testimony entitled to equal weight greater weight should be given to those with superior means of information, and to those who testify affirmatively to a fact rather than to those who testify negatively, invades the province of the jury. Muncie Pulp Co. v. Keesling [Ind.] 76 N. E. 1002. An instruction in condemnation proceedings to disregard testimony of witness on the question of damages if it was not based on stipulations of the railroad company to do certain things not required of it did not invade the province of the jury. Prather v. Chicago Southern R. Co., 221 Ill. 190, 77 N. E. 430.

26. It is not error to instruct that witnesses, otherwise equally credible, who testify negatively, are entitled to less weight than those who testify affirmatively, where it is not shown that they had as good means of knowledge. In re Wharton's Will [Iowa] 109 N. W. 492. Instruction as to the consideration of the testimony of witnesses held proper. Russell v. Stewart [Ark.] 94 S. W. 47.

27. There is no such presumption and such charge invades the province of the jury. Chicago Union Traction Co. v. O'Brien, 219 Ill. 303, 76 N. E. 341.

28. It is not error to instruct that it is the duty of the jury to scan admissions, but that so scanning them they should be given such weight as the jury believe them entitled to. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674.

29. Johnson County Sav. Bank v. Walker [Conn.] 65 A. 132.

30. The jury should not be misled to believe that good character of a witness is not evidence to be considered by them. Peterman v. Henderson [Ala.] 40 So. 756.

31. Instruction as to what constitutes preponderance of evidence held correct. Quiggle v. Vining, 125 Ga. 98, 54 S. E. 74. Instructions as to burden of proof where the cause of action alleged was admitted, except so far as it might be defeated by facts pleaded, and evidence was admitted to disprove, the defense should go no farther than that admissions relieved the plaintiff of proving his allegations. Walker v. Dickey [Tex. Civ. App.] 16 Tex. Ct. Rep. 934, 98 S. W. 658. It is not error to tell the jury to return a verdict for a party if they believe his witnesses. Weir v. Union R. Co., 112 App. Div. 109, 98 N. Y. S. 268.

32. Dupuis v. Saginaw Valley Traction Co. [Mich.] 13 Det. Leg. N. 767, 109 N. W. 413.

33. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083.

34. Parulo v. Philadelphia & R. R. Co., 145 F. 664.

35. See 6 C. L. 64.

36. "Falsus in uno falsus in omnibus" held proper. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305; United Breweries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547; Williamson Iron Co. v. McQueen [Ala.] 40 So. 306.

37. It is error to authorize the jury to disregard the testimony of a witness not shown to have willfully sworn falsely, and in regard to a material matter. Geringer v. Novak, 117 Ill. App. 160.

38. It is not misleading to use "willfully and corruptly" in charging the doctrine of falsus in uno falsus in omnibus. Hancheft v. Haas, 219 Ill. 546, 76 N. E. 845.

39. Where one requests the charge of falsus in uno falsus in omnibus he cannot complain of another instruction that it is only where it is "palpablo" that a witness has intentionally and willfully sworn falsely that his testimony may be wholly disregarded. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139.

40. Instruction that if the jury should conclude that any witness had willfully sworn falsely in regard to any fact his testimony as to other material facts was "worthy of no credit whatever," that they might disregard it all, properly applied the maxim "falsus in uno, falsus in omnibus." Shupack v. Gordon [Conn.] 64 A. 740.

41. "Willfully" must be used in charging "falsus in uno falsus in omnibus." Bordeaux v. Hartman Furniture & Carpet Co., 115 Mo. App. 556, 91 S. W. 1020.

§ 13. *Admonitory and cautionary instructions.*[42]—The giving of cautionary instructions rests in the discretion of the court.[43] Courts have a reasonable discretion in urging an agreement,[44] but such discretion should not be abused,[45] nor should the jury be encouraged to disagree[46] or led to believe that a verdict should be returned in favor of one of the parties.[47]

§ 14. *Necessity of instructing in writing.*[48]—In some states it is required by statute that the instructions be in writing.[49] This rule does not apply to a mandatory direction to return a verdict,[50] nor to additional instructions,[51] nor to a recapitulation of the testimony.[52]

§ 15. *Presentation of instructions.*[53]—All instructions should be given in open court,[54] but instructions as to the form of verdict and which do not affect the sub-

42. See 6 C. L. 65.

43. Where a cautionary instruction, embodying a number of propositions is asked, it may be refused entirely where the court has properly determined to refuse it upon any one of the propositions enumerated. Springfield Elec. Light & Power Co. v. Mott, 120 Ill. App. 39. Instruction warning the jury not to be influenced by newspaper articles is cautionary and may be refused in the absence of an abuse of discretion. Beyer v. Martin, 120 Ill. App. 50.

44. Trial judges are allowed reasonable discretion in controlling the deliberation of jurors after a cause has been submitted and can refuse to discharge them when they fail to agree, and it is not error to urge them to endeavor to agree. Scarlotta v. Ash, 95 Minn. 240, 103 N. W. 1025.

45. A statement to a jury who have reported to the court they could not agree that it is necessary "for all of you, or some of you, to make concessions, I hope you will go out now with a view of getting a verdict," is improper. O'Neal v. Richardson [Ark.] 92 S. W. 1117. It is error to instruct that the amount involved is small and the case has already cost the county more than was involved to either of the litigants, and it was the desire of the court that the jury decide the case if they could do so without giving up their honest convictions. Little Rock R. & Elec. Co. v. Newman [Ark.] 92 S. W. 864. Instructions on sending a jury back to try and agree, as to their duty to reach a verdict, held erroneous Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 14 Tex. Ct. Rep. 401, 90 S. W. 185.

It is not error to refuse to instruct that it is the duty of the jury to find a verdict from the evidence under the instructions; that all instructions have application to the facts in controversy; that instructions must not be disregarded nor find a verdict by chance, nor consent to one which does not meet the approval of his conscience, etc. Springfield Consol. R. Co. v. Farrant, 121 Ill. App. 416. Instruction that the jury have no right to compromise their verdict; * * * that they must not reach a verdict by lot or chance; and no juror should consent to a verdict which does not meet with the approval of his conscience after deliberation with his fellow jurors, is properly refused. Chicago & A. R. Co. v. Kirkland, 120 Ill. App. 272.

46. A clause "no juror should consent to a verdict which does not meet with the approval of his own judgment and conscience after due deliberation with his fellow jurors, and after considering all the evidence and law as given in the instructions," is properly stricken as tending to encourage disagreement. City of Evanston v. Richards, 224 Ill. 444, 79 N. E. 673.

47. "The court does not in any of the instructions which it is giving you mean or intend to tell you, or even intimate to you, what any of the facts in this case are; but you are the sole judges of what the facts in this case are; and so also the court does not in any of its instructions to you mean or intend to say or even to intimate what your verdict should be," though not approved, is not ground for reversal. West Chicago St. R. Co. v. Vale, 117 Ill. App. 155. An excerpt which when taken in connection with preceding instructions is merely a caution against possible prejudice against either party is not erroneous. Atlantic & B. R. Co. v. Bowen, 125 Ga. 460, 54 S. E. 105.

48. See 6 C. L. 65.

49. Failure of the court to put its entire charge in writing as required by Revisal 1905, § 536, upon request of counsel before the close of the argument, is reversible error. Sawyer v. Roanoke R. & Lumber Co. [N. C.] 55 S. E. 84. Remarks of court during the examination of a witness held not objectionable as an oral instruction. Hayes v. Wagner, 220 Ill. 256, 77 N. E. 211.

50. A statute requiring instructions to be in writing does not apply to a mandatory direction to return a verdict. Salisbury v. Press Pub. Co. [Neb.] 108 N. W. 136. Not an instruction as to the law. Economy Light & Power Co. v. Hiller, 113 Ill. App. 103. Where an oral request to direct verdict is immediately reduced to writing by the court and given, the rule requiring instructions to be in writing is sufficiently complied with. Landt v. McCullough, 218 Ill. 607, 75 N. E. 1069.

51. Const. art. 7, § 23, requiring instructions to be in writing, does not require the court to reduce additional instructions to writing in the absence of a request. O'Neal v. Richardson [Ark.] 92 S. W. 1117.

52. A judge is not required to recapitulate the evidence in writing under Revisal 1905, § 356, requiring the court to put its charge in writing on request. Sawyer v. Roanoke R. & Lumber Co. [N. C.] 55 S. E. 84.

53. See 6 C. L. 65.

54. Where additional instructions are giv-

stance thereof may be given in the absence of the parties or their attorneys.[55] It is not error preliminary to the giving of the charge for the court to state certain immaterial matters contained in the pleadings, the jury being subsequently fully and clearly instructed.[56]

§ 16. *Additional instructions after retirement.*[57]—In some states the giving of additional instructions after retirement is forbidden by statute.[58] Where allowable they may be given when the jury returns to have the original instructions reread.[59]

§ 17. *Review.*[60]—It is presumed on appeal that the jury understood the charge of the court and applied it correctly.[61] Where evidence might have sustained an instruction, it is presumed to have been justified.[62]

Objections and exceptions below.[63]—Exceptions must be taken to instructions severally.[64] A general exception is insufficient unless the entire charge is erroneous.[65] An exception properly taken to one instruction brings up for review another embodying the same principle.[66] An objection must specifically point out wherein the error lies,[67] and must be made in a manner approved by law.[68] An instruction given of the court's own motion is reviewable on exception.[69] A party who has not asked for a proper instruction cannot complain of refusal to give an improper one.[70]

The record on appeal.[71]—Instructions must be made a part of the record by bill of exceptions.[72] Objections must be set out in the brief[73] and referred to in the argument.[74]

en after retirement, and are sent to the jury room by the bailiff, the record should show consent of the parties. Martin v. Martin [Neb.] 107 N. W. 580.

55. It is not reversible error for the trial judge after the jury have retired and in the absence of the parties and their counsel to give the jury at their request additional instructions as to the form of verdict to be used by them in case of certain findings where the instructions could not affect the substance of the verdict. Whitney v. Com., 190 Mass. 531, 77 N. E. 516.

56. Korby v. Chesser [Minn.] 108 N. W. 520.

57. See 6 C. L. 66.

58. Under Rev. St. 1901, par. 1410, prohibiting further instructions after argument begins, it is not error to refuse to give further instructions after retirement though the jury requests them, especially where objected to by a party. Southern Pac. Co. v. Wilson [Ariz.] 85 P. 401.

59. Where after the jury had deliberated a while they returned and asked that the instructions be reread, the giving of additional instructions at that time is not ground for reversal. Choctaw, etc., R. Co. v. Craig [Ark.] 95 S. W. 168.

60. See 6 C. L. 66.

61. Upson Coal Min. Co. v. Williams, 7 Ohio C. C. (N. S.) 293.

62. Appellant has the burden to show affirmatively that it was not. Flinn v. Crooks [Cal. App.] 83 P. 812.

63. See 6 C. L. 66. See, also, Appeal and Review, 7 C. L. 128.

64. An exception to instructions as a whole will not be considered unless all are erroneous. Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 76 N. E. 1015.

65. Foote v. Kelley [Ga.] 55 S. E. 1045. An exception to an instruction as a whole is insufficient if any part of such instruction is correct. Lindblom v. Fallet [C. C. A.] 145 F. 805. An exception to instructions as a series is of no avail if any one of the instructions is correct. Moore v. Lanier [Fla.] 42 So. 462.

66. Baltimore & O. R. Co. v. Lee [Va.] 55 S. E. 1.

67. An objection that instructions given were indefinite, uncertain, and inapplicable, is insufficient unless stating how or in what respect. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

68. A statement by an attorney to the judge outside the court room that he desired to change an instruction submitted by him is not sufficient to entitle him to set up error in giving such instruction. McDermott v. Mahoney [Iowa] 106 N. W. 925. Where at the close of the charge counsel stated that he had no exceptions, exceptions attempted to be taken after the jury had retired were too late. Klaw v. Life Pub. Co. [C. C. A.] 145 F. 184.

69. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234.

70. Western Union Tel. Co. v. Ford [Ark.] 92 S. W. 528.

71. See 6 C. L. 66. See, also, Appeal and Review, 7 C. L. 128.

72. Instruction copied into the record but not made a part of it by bill of exceptions cannot be reviewed on error. Newport News & O. P. R. & Elec. Co. v. Lake [Va.] 54 S. E. 328. Instructions held properly incorporated in the record of appeal. Beery v. Driver [Ind.] 76 N. E. 967.

73. Objections to instructions not set out in the brief are considered waived. Supreme Court Rule 22 (55 N. E. vi). Springer v. Bricker, 165 Ind. 532, 76 N. E. 114. Must point out the conflict in instructions objected to as conflicting. Galveston, etc., R. Co. v.

Invited error.[75]—A party cannot complain of instructions given at his own request,[76] nor of error in instructions given where instructions requested by himself contain like error,[77] nor of an instruction which follows the language of his pleading.[78]

Harmless error.[79]—A party cannot complain of an error favorable to himself,[80] nor of one by which he is not prejudiced[81] and which does not affect the verdict,[82] nor of an error which was cured by other instructions.[83]

Instructions must be considered as a whole,[84] and if when so considered they

Currie [Tex. Civ. App.] 16 Tex. Ct. Rep. 18, 91 S. W. 1100.

74. Defect not pointed out in argument and brief is waived. Lange v. Missouri Pac. R. Co., 115 Mo. App. 582, 91 S. W. 989.

75. See 6 C. L. 67. See, also, Harmless and Prejudicial Error, 8 C. L. 1.

76. Where a defendant requests the submission of the issue of contributory negligence, he cannot thereafter assert that the evidence shows contributory negligence as a matter of law. Ft. Smith Light & Traction Co. v. Barnes [Ark.] 96 S. W. 976. One who requests an instruction not based on evidence cannot complain of another correct charge as in conflict with his request. Hammer v. Crawford [Mo. App.] 93 S. W. 348. Cannot predicate error on an erroneous instruction given at his request. Haxton v. Kansas City, 190 Mo. 53, 88 S. W. 714. May not complain of an instruction given at his own request. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. A party cannot urge that an improperly worded instruction submitted by him may have led the jury to misconceive the rule it announced. Hellthaler v. Teft Weller Co., 98 N. Y. S. 823.

77. An instruction substantially the same as one requested cannot be complained of. Chicago, etc., R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; Louisiana & Texas Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 179, 94 S. W. 140; West Chicago St. R. Co. v. Vale, 117 Ill. App. 155; Chicago, B. & Q. R. Co. v. Wolfring, 118 Ill. App. 537; Springfield Consol. R. Co. v. Farrant, 121 Ill. App. 416; Reckteuwald v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 557; St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534. Invited error in an instruction cannot be complained of. Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. Cannot complain of an instruction practically identical with his own request. Chicago, etc., R. Co. v. Hollis' Adm'r, 28 Ky. L. R. 1102, 91 S. W. 258. A party cannot complain of a portion of an instruction which is invited by his own remarks. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062.

78. A plaintiff cannot complain of an instruction which follows the language of his complaint. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504.

79. See 6 C. L. 67. See also, Harmless and Prejudicial Error, 8 C. L. 1.

80. Matfield v. Kimbrough [Tex. Civ. App.] 13 Tex. Ct. Rep. 927, 90 S W. 712; Texas Midland R. Co. v. Byrd [Tex. Civ. App.] 14 Tex Ct. Rep. 401, 90 S. W. 185. Instruction though not strictly applicable is not reversible error where not unfavorable to the complaining party. Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923.

81. Where the court charged that plaintiff in order to recover must prove the material allegations of his complaint, the fact that an instruction stating the contents of the complaint included facts not alleged was not prejudicial to defendant. Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539. Where the jury found against a party on other issues, failure to charge on an issue of estoppel raised by the reply held harmless. Baum v. Palmer, 165 Ind. 513, 76 N. E. 108. The reading of erroneous instructions given by another court to another jury in order to show that they had been pronounced erroneous by the supreme court was harmless error. Brown v. Forest Water Co., 213 Pa. 440, 62 A. 1078.

82. Prather v. Chicago Southern R. Co., 221 Ill 190, 77 N. E. 430.

83. A party cannot complain of an alleged error in an instruction as to the terms and effect of a contract where four other instructions announced the construction contended for by him. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709.

84. See 6 C. L. 67. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616; Barrie v. St. Louis Transit Co. [Mo. App.] 96 S. W. 233; Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688; Roberts v. Chicago & A. R. Co. [Mo. App.] 94 S. W. 838; Barr v. St. Louis & S. R. Co., 114 Mo. App. 425, 90 S. W. 107; Texas Cent. R. Co. v. Miller [Tex. Civ. App.] 13 Tex. Ct. Rep. 587, 88 S. W. 499; Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516; Peterman v. Henderson [Ala.] 40 So. 756; Reiter-Conley Mfg. Co. v. Hamlin [Ala.] 40 So. 280; Wilson v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 257; Gletler v. Sheboygan Light, Power & R. Co. [Wis.] 109 N. W. 973; Murphy v. Hiltibridle [Iowa] 109 N. W. 471; Dalby v. Lauritzen [Minn.] 107 N. W. 826; Teal v. St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945; Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109; Sharpton v. Augusta & A. R. Co., 72 S. C. 162, 51 S. E. 553; Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220; Kirkham v. Wheeler-Osgood Co., 39 Wash. 415, 81 P. 869; Union Traction Co. v. Pfeil [Ind. App.] 78 N. E. 1052; Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923; Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325; Indianapolis Traction & Terminal Co. v. Smith [Ind. App.] 77 N. E. 1140; Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583; Chicago City R. Co. v. McDonough, 221 Ill. 69, 77 N. E. 577; Mefford v. Missouri, etc., R. Co. [Mo. App.] 97 S. W. 602. As whole **held proper.** Atascosa County v. Alderman [Tex. Civ.

fairly and correctly present the law applicable to the case,[85] it is not ground for reversal that the instructions were subject to criticism[86] or that a single instruction standing alone was erroneous[87] or omitted essential elements,[88] or was misleading.[89]

App.] 14 Tex. Ct. Rep. 925, 91 S. W. 846; Alabama G. S. R. Co. v. Guest [Ala.] 39 So. 654; Southern R. Co. v. Brown [Ga.] 54 S. E. 911; International, etc., R. Co. v. Hays [Tex. Civ. App.] 17 Tex. Ct. Rep. 605, 98 S. W. 911. As a whole held **not confusing.** Soper v. Crutcher [Ky.] 96 S. W. 907. As a whole held **not misleading.** Liles v. Fosburg Lumber Co. [N. C.] 54 S. E. 795. Reading instructions together, "calamity" would be understood as "mischance" or "misfortune" and not misleading. Beekman Lumber Co. v. Kittrell [Ark.] 96 S. W. 988. As a whole held not objectionable as withdrawing evidence of contributory negligence from the jury. Little Rock, etc., R. Co. v. McQueeney [Ark.] 92 S. W. 1120. Failure to define "express warranty" cured by other instructions. Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919. Construed as a whole, held not conflicting on the question of damages. Mitchell v. St. Louis, etc., R. Co., 116 Mo. App. 81, 92 S. W. 111. Must be read as a whole to determine whether it is on the weight of evidence or confusing. Missouri, etc., R. Co. v. Crisweli [Tex. Civ. App.] 13 Tex. Ct. Rep. 356, 88 S. W. 373. Held not erroneous in eminent domain proceedings. Warren County v. Rand [Miss.] 40 So. 481. Held not objectionable as minimizing an issue. McDermott v. Mahoney [Iowa] 106 N. W. 925. Charge that it is a carrier's duty to transport passengers safely held not erroneous in connection with other instructions. Blumenthal v. Union Elec. Co., 129 Iowa 322, 105 N. W. 588. Instruction in personal injury action that questions involved as to negligence, reasonable care, etc., are what are known as questions of fact which it is the duty of the jury to determine is not erroneous as summarizing the elements of recovery and directing a verdict without requiring proof of injury. Chicago & J. Elec. R. Co. v. Patton, 219 Ill. 214, 76 N. E. 381. Every phase of the case need not be covered in a single instruction. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Inasmuch as it is impossible to state all the law in a single paragraph or a single special charge, reversible error cannot be predicated upon the criticism of a special charge in this case in that regard. Cincinnati Interurban Co. v. Haines, 8 Ohio C. C. (N. S.) 77. Instruction correctly stating plaintiff's theory need not be incumbered with defensive matter and is sufficiently qualified by a subsequent charge submitting such defense. St. Louis S. W. R. Co. v. Fowler [Tex. Civ. App.] 93 S. W. 484. An instruction is not erroneous because embracing all the law pertaining to the case. Beacham v. Kennedy, 125 Ga. 113, 53 S. E. 589. An instruction which purports only to define the law as to one branch of the case need not embody every element essential to the conclusion of the cause. Where other instructions perform that office. Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592. Error in not charging that injury must have resulted from the negligence alleged is cured by subsequent instructions, especially where the jury are charged that they must consider the instructions as a series. Chicago City R. Co. v. McDonough, 221 Ill. 69, 77 N. E. 577. It is not necessary to cover all questions or phases of the case in one instruction. It is sufficient if the instructions as a whole cover the case. Pittsburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299. Not required to give all the law applicable to the case in one instruction. Allyn v. Burns [Ind. App.] 76 N. E. 636. Instruction defining negligence is not erroneous because not defining contributory negligence where such doctrine was instructed upon later. McIntyre v. Orner [Ind.] 76 N. E. 750. Instruction that the burden of proving contributory negligence is on the defendant is erroneous if standing alone but not when coupled with other instructions that if plaintiff committed any act which contributed to his injury he could not recover. Evansville & T. H. R. Co. v. Mills [Ind. App.] 77 N. E. 608.

85. Hayden v. Consolidated Min. & Dredging Co. [Cal. App.] 84 P. 422. If as a whole it presents a full and fair exposition of the law of the case, it is sufficient. Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622. Sufficient if taken together they announce the law of the case. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505.

86. If as a whole the case was fairly presented and it does not appear that substantial injustice has been done, the fact that instructions were subject to criticism is not ground for reversal. Harris v. Gaunt, 122 Ill. App. 290. Instruction which does not with technical accuracy limit damages for pain and suffering to such as result from the injury complained of is not error if such inference arises from reading other instructions. City of Gibson v. Murray, 120 Ill. App. 296. Inaccuracy in an instruction will not reverse where its meaning is indicated by other instructions and the evidence is such that it could not have been prejudicial. Id. An instruction that the action is several when in fact it is joint and several, but which further charges that any or all the defendants may be found guilty, is harmless. Earp v. Lilly, 120 Ill. App. 123.

87. If as a whole they fairly and correctly present the law it is not fatal error that a particular instruction or portion thereof standing alone is erroneous. Loofborrow v. Utah Light & R. Co. [Utah] 88 P. 19. Inaccuracy in particular instructions is not ground for reversal if as a whole the instructions are not misleading and fairly present the case. Niemyer v. Washington Water Power Co. [Wash.] 88 P. 103. Instruction in an action on a promissory note, if erroneous, was cured by other instructions. Waples-Painter Co. v. Bank of Commerce [Ind. T.] 97 S. W. 1025. If taken as a whole they present the case fairly and so clearly as to be understood by men of plain common sense it is sufficient, though isolated sections if standing alone might be mis-

This rule applies to special charges requested.[90] The instructions will not be read with a view to making them inconsistent.[91]

Curing bad instructions.[92]—An erroneous instruction is presumed to be prejudicial.[93] As a general rule a bad instruction cannot be cured by the giving of a correct one,[94] the two being in conflict.[95] It cannot be said that the jury accepted

leading. Kirby Lumber Co. v. Dickerson [Tex. Civ. App.] 15 Tex. Ct. Rep. 611, 94 S. W. 153. Error in a particular instruction standing alone does not justify reversal if explained by other instructions. Southern Ind. R. Co. v. Baker [Ind. App.] 77 N. E. 64. If as a whole the law is stated with substantial accuracy, it is immaterial that particular instructions or detached portions are not precisely correct. Springer v. Bricker, 165 Ind. 532, 76 N. E. 114.

88. Omissions in one may be supplied by the contents of another. Cable Co. v. Elliott, 122 Ill. App. 342. An instruction defective because incomplete in its statement of the law is cured where the omission is supplied by other instructions. Southern R. Co. v. Cullen, 122 Ill. App. 293. Failure to submit issue of proximate cause cured by subsequent instruction. Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737. Where an instruction was good so far as it went an omission therein was held to have been cured by other instructions. Nephler v. Woodward [Mo.] 98 S. W. 488. Ambiguous instruction that there could be recovery unless it was found that plaintiff was guilty "of contributory negligence and was not injured on account of assumed risk" was not fatal where the court subsequently instructed on assumed risk. International, etc., R. Co. v. Von Hoesen [Tex.] 15 Tex. Ct. Rep. 574, 92 S. W. 798.

89. Misleading charge as to the burden of proof of contributory negligence cured by other instructions. St. Louis S. W. R. Co. v. Groves [Tex Civ. App.] 16 Tex. Ct. Rep. 895, 97 S. W. 1084. It is not reversible error that a particular instruction if standing alone might be confusing. Starr v. Aetna Life Ins. Co. [Wash.] 87 P. 1119.

90. Texas & P. R. Co. v. Cotts [Tex. Civ. App.] 95 S. W. 602.

91. In reviewing a charge of court the word "if" will not be read as equivalent to "unless," where to do so would render the statement contradictory of a preceding paragraph. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581.

92. See 6 C. L. 68.

93. Smith v. Perham [Mont.] 83 P. 492.

94. **Erroneous instruction not cured.** International, etc., R. Co. v. Von Hoesen [Tex. Civ. App.] 14 Tex. Ct. Rep. 463, 91 S. W. 604; Hardin v. St. Louis S. W. R. Co. [Tex. Civ. App.] 88 S. W. 440; Bayles v. Daugherty [Ark] 91 S. W. 304. Instruction announcing an erroneous rule of law in regard to negligence is not cured by one announcing the correct rule. Rietveld v. Wabash R. Co., 129 Iowa, 249, 105 N. W. 515. Error in assuming a disputed fact is not presumed cured where the evidence introduced is not preserved. Turner v. Righter, 120 Ill. App. 131. Where an instruction stating facts upon a finding of which a verdict may be returned is erroneous, it cannot be cured by other instructions as the jury might have based their verdict on such instruction regardless of others and it cannot be known that they did not. Osner v. Zadek, 120 Ill. App. 444. Error in an instruction authorizing a verdict on the finding of facts therein recited in not stating all the facts is not cured by other instructions stating all the law and facts. Standard Distilling & Distributing Co. v. Harris [Neb.] 106 N. W. 582. Instruction placing the burden of proof as to damages in an action for wrongful death on defendant is not cured by specific charge on the question of damages. Hupfer v. National Distilling Co., 127 Wis. 306, 106 N. W. 831. Error in an instruction on the weight of evidence not cured by other instructions. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195. Erroneous instruction not cured by remarks of the court in refusing another instruction. Murphy v. Metropolitan St. R. Co., 110 App. Div. 717, 97 N. Y. S. 483. Instruction taking from the jury the question of negligence not cured. Damsky v. New York City R. Co., 101 N. Y. S. 579. One which erroneously casts the burden of proof is not cured by a subsequent contradictory one. Best v. Rocky Mountain Nat. Bank [Colo.] 85 P. 1124. Error in allowing a recovery of punitive damages without denominating them as such is not cured by a charge that punitive damages cannot be recovered. Wilson v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 257. Erroneous charge on duty of master to furnish a safe place for his servant to work in not cured by subsequent charge. Grayson-McLeod Lumber Co. v. Carter [Ark.] 88 S. W. 597. An instruction erroneous in not failing to condition recovery on the establishment of negligence alleged is not cured by a subsequent correct instruction. Hamilton v. Metropolitan St. R. Co., 114 Mo. App. 504, 89 S. W. 893. Error in submitting an issue not raised is not cured by a subsequent correct instruction. Dallas Consol. Elec. St. R. Co. v. McAllister [Tex. Civ. App.] 14 Tex. Ct. Rep. 388, 90 S. W. 933. Erroneous instruction as to presumption of negligence not cured. Philadelphia, etc., R. Co. v. Hand, 101 Md. 233, 61 A. 285. Instruction that an interested witness will not be as fair, honest, and candid as a disinterested one is not cured by an instruction that the credit to be given witnesses is for the jury. Muncie, etc., R. Co. v. Ladd [Ind. App.] 76 N. E. 790. An instruction that wanton and willful negligence results from a certain act is not cured by an instruction that the act must have been consciously done with knowledge that it was likely to result in injury. Louisville & N. R. Co. v. Muscat [Ala.] 41 So. 302. Erroneous charge in libel not cured. Miller v. Nuckolls [Ark.] 91 S. W. 759. Error in an instruction hypothesizing facts and directing a verdict thereon in not summing up all the facts cannot be cured by other instructions. Baltimore & Ohio Southwestern R. Co. v. Schell, 122 Ill. App. 346.

the correct and rejected the erroneous instructions.[96] But an error of omission in one instruction may be cured by other instructions,[97] and an erroneous statement may be cured by specifically calling attention to it.[98] And it is held that positively erroneous instructions may be cured by others without specific mention of the inconsistency of the two.[99] Any error in refusing an instruction is cured by stating the principle in the main charge,[1] and error in giving[2] or refusing an instruction may be cured by the verdict.[3]

INSURANCE.

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§ 23. **Subrogation and Other Secondary Rights of the Insurer (457).**

§ 24. **Remedies and Procedure (458).**

A. Rights of Action and Defenses and Parties (458). Parties (459). Limitations (460). Process (461).

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D. Verdict, Findings, Judgment, Costs, and Fees (471). Interest, Costs, and Penalties (472).

E. Enforcement of Judgment (472).

Matters relating to fraternal benefit[4] and marine insurance[5] are treated elsewhere.

95. The two being in conflict. St. Louis, etc., R. Co. v. Thompson-Hailey Co. [Ark.] 94 S. W. 707.

96. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Where an erroneous instruction is followed by a correct one, it cannot be said that the error was cured since it cannot be determined which was followed. Smith v. Perham [Mont.] 83 P. 492.

97. Omission to refer to a release in an action for injuries was cured by subsequent instructions on the subject. Austin v. St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450. Instruction ignoring defense of contributory negligence was cured by other instructions. Rodgers v. St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154. Failure to require negligence to be the proximate cause of the injury held cured by subsequent instruction. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Instruction requiring clear and conclusive proof where such degree is

§ 1. *Insurance laws, regulations and supervision in general.*[6]—Statutes in some states provide for the election of an insurance commissioner by the general assembly.[7]

§ 2. *Corporations and associations doing an insurance business. A. Corporate existence, character, management, rights and liabilities.*[8]—The constitutions and statutes of some states provide that the charters of corporations shall be subject to alteration, suspension, or repeal by the legislature at any time.[9] The company's property and the equitable property rights of the members are within the constitutional guarantees as regards the inhibition against laws impairing the obligations of contracts, the equal protection of the laws, and the deprivation of property without due process of law;[10] and the legislature, while it may under the power reserved to it in the constitution alter or amend the company's charter, cannot appropriate its property without the consent of all its members, either to its own use or that of a private party, though such party be a successor corporation, in the absence of a provision in the original charter to the contrary.[11] The New York stat-

not required is cured by one requiring only a preponderance of evidence. Roberge v. Bonner [N. Y.] 77 N. E. 1023.

98. Error in the language of the court is cured where on his attention being called to it he remarks that he did not think he made the error but if he did the jury should disregard what he said and try the case on their recollection of the testimony. Coles v. Interurban St. R. Co., 49 Misc. 246, 97 N. Y. S. 289. A charge inapplicable to the issues is cured on announcing that it does not apply to the case on trial. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203. An instruction which singles out and gives undue prominence to the facts proven by one party is cured by another instruction calling facts proved by the adverse party to the attention of the jury. Western Underwriters Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447. Error in instruction in an action for wrongful discharge as to condonation for offenses held cured by other instructions. Murray v. O'Donohue, 109 App. Div. 696, 96 N. Y. S. 335.

99. Error in one instruction may be cured by another. United Breweries Co. v. O'Donnell, 221 Ill. 334, 77 N. E. 547; St. Louis S. W. R. Co. v. Plumlee [Ark.] 95 S. W. 442; American Cent. Ins. Co. v. Antram [Miss.] 41 So. 257. Erroneous charge that any negligence, however slight, warranted a recovery held cured by other instructions. Louisville & N. R. Co. v. Rhoads, 28 Ky. L. R. 692, 90 S. W. 219. Instruction fixing an erroneous standard of ordinary care for a child held cured by a subsequent instruction. Stewart v. Southern Bell Tel. & T. Co., 124 Ga. 224, 52 S. E. 331. Erroneous definition of proximate cause cured by other instructions. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715.

1. Town of Oyster Bay v. Jacob, 109 App. Div. 613, 96 N. Y. S. 620.

2. Where in an action for damages a verdict is returned for defendant, an erroneous instruction on the question of damages is without prejudice. Elbert v. Mitchell [Iowa] 109 N. W. 181. An erroneous instruction is not ground for reversal where the verdict is right. Indianapolis St. R. v. Schomberg, 164 Ind. 111, 72 N. E. 1041.

3. Where there is no evidence of contributory negligence and the verdict against defendant is clearly right, giving or refusal of instructions relative to such doctrine is cured. Pittsburgh, etc., R. Co. v. Higgs, 165 Ind. 694, 76 N. E. 299. Refusal of a request on the issue of contributory negligence is cured by a verdict of guilty of such negligence. Edwards v. Carolina & N. W. R. Co., 140 N. C. 49, 52 S. E. 234.

4. See Fraternal Mutual Benefit Associations, 7 C. L. 1777. All cases having to do with the contracts of such associations are there treated though the general rules of insurance law may apply.

5. See Shipping and Water Traffic, 6 C. L. 1464.

6. See 6 C. L. 70.

7. Act March 9, 1906 (Laws 1906, p. 122, c. 112), is not in contravention of Const. art. 12, § 155, authorizing the corporation commission to appoint officers, etc., and to establish bureaus of insurance, etc., such provision not conferring the duty of appointing such commissioner on them. Button v. State Corporation Commission of Virginia [Va.] 54 S. E. 769.

8. See 6 C. L. 70.

9. Const. art. 8, § 1, providing that laws passed thereunder for organization of corporations may be altered or repealed, held to give legislature power to amend charter of corporation organized under such a law by means of an amendment to the law. Lord v. Equitable Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10. Hence legislature had authority to amend general law under which life insurance company was organized so as to provide that a majority of directors should be elected by policy holders instead of all being elected by stockholders, such action not operating to deprive the latter of any of their property rights. Id. Rev. St. pt. 1, c. 18, tit. 3, § 8, making the charter of every corporation subject to alteration, suspension, or repeal in the discretion of the legislature, held not to have been rendered inapplicable to life insurance companies organized under Laws 1853, p. 887, c. 463, by §§ 11 and 20 of the latter act. Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10.

10. Wis. Const. art. 1, § 12, U. S. Const.

ute authorizing the reincorporation of domestic companies under the general law does not contemplate or authorize any radical change in the character of companies taking advantage of its provisions.[12] Where an attempted reorganization is ineffectual because of the invalidity of the enabling act, the business continued in the name of the new company will be regarded as that of the old.[13] The law that corporate existence cannot be inquired into except by judicial proceedings in the name of the state does not apply to a pretended but not even a de facto corporation.[14] An unconstitutional provision is not a sufficient basis for a corporation de facto.[15]

The character of insurance which a company or association may write is to be determined from its charter or the general laws under which it is organized.[16]

In some states trustees of mutual insurance companies are required to nominate candidates for vacant offices a specified time before election and to file a statement of the same with the superintendent of insurance, and the company is required to mail a statement of the nominations approved by the superintendent of insurance to each policy holder.[17] The superintendent has no authority to change the nominations as made, or make any different statement of the nominees than the ones filed,[18] and hence mandamus will not lie to compel him to change the record of nominations

14th Amend. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

11. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135. Laws 1903, p. 341, c. 229, providing for changing certain mutual fire companies into stock corporations, held unconstitutional in that it authorizes appropriation of property of old company and equitable interests of members to use of new one and its members, in violation of corporate and charter rights of former, and in defiance of wishes of nonconsenting members. Id. Rev. St. 1898, c. 89, governing the incorporation of mutual companies, must be deemed to have been incorporated in the act of 1903 for a complete scheme of reincorporation of such companies, and the act of 1903 being the inducing feature of the legislative scheme under which the reincorporation occurred and being unconstitutional, the whole scheme is void. Id.

12. Laws 1892, p. 1955, c. 690, § 52, as amended by Laws 1893, p. 1797, c. 725, in connection with Laws 1853, p. 887, c. 463, under which defendant was organized, held not to authorize an amendment of its charter so as to provide for the election of a majority of its directors by the policy holders, instead of all being elected by the stockholders. Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10.

13. In case of success, in form, of an attempt to reorganize mutual company on stock plan under law authorizing it and insurance business formerly carried on by old company to be continued ostensibly by new company, using former's assets and good will, if the attempt is fruitless because the enabling act is void, such continued business is to be regarded as really that of the old corporation as belonging to it. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

14, 15. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

16. McClain's Code, § 1695, authorizing domestic companies to insure property against loss or damage by fire "or other casualty," held to authorize writing of burglary insurance, particularly in view of fact that officers from whom § 1685 required company to obtain permission to do business had so interpreted it and had authorized plaintiff to carry on such business, which authority had not been questioned for 10 years. Banker's Mut. Cas. Co. v. First Nat. Bank [Iowa] 108 N. W. 1046. Where company in articles of incorporation expressly assumed to carry on business of burglary insurance, and secured from proper state officers permission to do business, held that, since it could not escape liability on its policies by plea that statute did not authorize such insurance, policy holder could not defend action on premium note on that ground. Id. A foreign mutual casualty association, incorporated for the purpose of insuring its members against injuries of every nature and description to persons or property, held sufficiently empowered to write an assessable policy of insurance on the mutual plan, for a street railroad company in Ohio, indemnifying it against "injuries of every nature and description to persons or property, causing loss, damage, or liability." Stone v. C., D. T. Traction Co., 4 Ohio N. P. (N. S.) 104. On such casualty association becoming insolvent, its receiver, duly appointed by court, may maintain an action against said street railroad company to recover an assessment ordered by court to be levied on the members of said association, for the purpose of paying losses and expenses and otherwise liquidating the affairs of said mutual casualty association. Id. Sess. Laws 1899, p. 176, c. 17, art. 1, § 9, authorizing certain associations to insure growing wheat, etc., "and other crops" against loss by hail, held to authorize insurance of growing cotton so that company could recover on premium note given therefor. State Mut. Ins. Co. v. Clsvenger [Okl.] 87 P. 583.

17. Laws 1906, c. 326. People v. Kelsey, 100 N. Y. S. 391.

18. No such authority is conferred on him by Laws 1906, c. 326, or by Id. c. 354, providing that election shall be under his supervision. People v. Kelsey, 100 N. Y. S. 391.

filed with him,[19] nor will mandamus lie to compel the company to send a different statement of nominations to the policy holders than that required by the statute.[20] The acts of the de facto officers of a mutual company, while in possession of their offices, are the acts of the company and binding on it.[21] Officers and directors are personally liable for losses due to violations of their duty and the wrongful exercise of their power[22] or their negligence.[23] A stockholder may recover in the right of the company and in its behalf money owing to it by its directors,[24] provided he establishes both a right of action in the corporation[25] and facts entitling him to sue in its stead.[26] The donation of the funds of the company to a campaign committee for use in a political campaign is contrary to public policy and illegal.[27] Any member of a mutual company suing for himself and others similarly interested may invoke equity jurisdiction to prevent or redress any wrong injuriously affecting the property rights of the corporation when its officers will not move appropriately to that end.[28] The granting of mandamus to compel a mutual company, having no capital stock, to allow a policy holder to inspect its books rests in the sound discretion of the court.[29]

19, 20. People v. Kelsey, 100 N. Y. S. 391.

21. Acts of directors entering into office under color of election in voting to pay loss, though election was irregular. Gleason v. Canterbury Mut. Fire Ins. Co., 73 N. H. 583, 64 A. 187.

22. Acts of officers and directors of credit insurance company in procuring it to purchase from them stock in another company, organized to furnish additional reserve for insurance company, held a violation of their duty and a wrongful exercise of power making them personally responsible for resulting losses. Bowers v. Male, 111 App. Div. 209, 97 N. Y. S. 722.

23. Under Code Civ. Proc. §§ 1781, 1782, attorney general may maintain action to charge negligent officers and directors of insurance company with loss sustained by corporation through their misfeasance. People v. Equitable Life Assur. Soc., 101 N. Y. S. 354. Allegations as to lease of premises held to sufficiently aver loss through negligence. Id. Allegations that defendants caused funds of company to be kept on deposit in trust companies, of which they were stockholders, at small rate of interest, and at same time caused payments to be made to trust companies at greater rate for interest on ostensible loans carried on books but not actually made other than in form of credit which was not to be made basis of withdrawals, and that defendants permitted assets to be wasted and acquired to themselves or transferred to other sums so lost, held sufficient. Id. Allegations as to sale of stock for less than market value held sufficient to show neglect or malfeasance, it not being necessary to negative possible defenses. Id. Allegations charging defendants with having wastefully and improvidently permitted payment of excessive salaries held to show waste of assets through misfeasance. Id. Fact that every instance of loss alleged does not involve each defendant is unimportant, nor is it essential that the periods of service of the defendants as officers or directors should coincide. Id. Complete inaction on the part of directors is ground of liability. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446, afd. 112 App. Div. 760, 98 N. Y. S. 1052. Fact that some of the directors are charged with faults of commission and some with neglect of duty omitted to be performed held not to show misjoinder of causes of action. Id.

24. Laws 1892, p. 1958, c. 690, § 56, providing that no order, judgment, or decree providing for an accounting, or enjoining, restraining, or interfering with prosecution of business of any domestic insurance company, or appointing receiver therefor shall be made except upon application of attorney general or after his approval of a request therefor by superintendent of insurance, held not to preclude stockholder from maintaining suit. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446, afd. 112 App. Div. 760, 98 N. Y. S. 1052. One who was both a stockholder and policyholder in mutual company held entitled to maintain action, she having an interest in the corporation's property and being in one capacity or the other a cestui que trust. Id. Fact that plaintiff alleged that she was both stockholder and policyholder held not to show improper joinder of causes of action, the action being a stockholder's action simply. Id.

25. Complaint held to sufficiently allege liability to corporation for neglect of duty and damage. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446, afd. 112 App. Div. 760, 98 N. Y. S. 1052.

26. Suit may be brought by stockholder without a demand on corporation to bring it in its own name where it appears that corporation is still under control of the defendant directors and that such a demand would therefore have been futile. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446, afd. 112 App. Div. 760, 98 N. Y. S. 1052.

27. Hence trustee and officer who appropriates money to such use is guilty of larceny under Pen. Code § 528. People v. Mose, 50 Misc. 198, 100 N. Y. S. 427.

28. To prevent stock company from wrongfully disposing of assets of mutual company which it succeeded. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

29. Company not being required to keep

Stockholders may generally be assessed to restore impaired capital.[30] Where demand notes are given to the company by certain stockholders for the purpose of increasing the capital stock so as to prevent a forfeiture of its charter, and pursuant to a resolution of the board of directors providing that on the winding up of the corporation noncontributing stockholders shall not be entitled to share in the fund so derived, on the dissolution of the company and the payment of its debts in full, such noncontributing stockholders are not entitled to compel the collection of the notes and the distribution of the proceeds among the stockholders generally.[31]

A contract by a company to sell its good will and turn over a list of its policy holders to the purchaser, reciting that the seller is about to discontinue its business and wind up its affairs, is not broken by the subsequent insolvency of the seller.[32] The purchaser, after accepting the benefits of such sale, cannot contend that it was ultra vires.[33] In New York a life insurance company which, though not insolvent, is doing a losing business, and is unable to continue without further loss, may sell out its business to another company and cease operations, provided it acts in good faith and for the best interests of its creditors and stockholders.[34]

Insolvency.[35]—A member of a mutual company must pay his proportion of all liabilities occurring during the continuance of his policy up to the time of his withdrawal,[36] notwithstanding limitations on his liability in the contract.[37] The payment of a loss to him and the surrender and cancellation of the policy and of the premium note does not relieve him from liability for assessments for debts incurred by the company up to the end of the term for which he was insured,[38] unless a settlement of such future liability is made by the company and the insured at that

list of policy holders and not having done so, held that mandamus would not issue to compel it to allow policy holders to inspect card index containing in addition to names of policy holders, much private information for purpose of enabling petitioners to confer with other policy holders in regard to selection of trustees. People v. New York Life Ins. Co., 111 App. Div. 183, 97 N. Y. S. 465.

30. Code §§ 1731, 1732, providing that an insurance company which has received a requisition from the state auditor to make good impairments of its capital stock cannot enforce assessments made for that purpose as a personal liability of the stockholder, but on failure of a stockholder to pay the amount of his stock shall be reduced proportionally, does not prevent such company, before a requisition is made, from assessing its stockholders for the purpose of restoring its impaired capital, thus giving them the option to avoid requisition, assessment, and reduction, and stockholders may pay same if they see fit. Iowa Nat. Bank v. Cooper [Iowa] 107 N. W. 625.

31. Fact that statement filed with state auditor pursuant to Code 1896, § 1109, showed such notes as assets, held not to estop directors to deny that notes were unconditional obligations. Anderson v. Buckley [Ala.] 41 So. 748.

32. Especially where buyer had previously obtained all the benefit which could arise under contract. Bowers v. Ocean Acc. & G. Co., 110 App. Div. 691, 97 N. Y. S. 485.

33. Where company fully performed contract to sell good will of its business and to turn over list of policies, etc., to purchaser, held that latter, having accepted benefits thereof, was estopped to contend that the seller had no power to make the contract. Bowers v. Ocean Acc. & Guarantee Corp., 110 App. Div. 691, 97 N. Y. S. 485.

34. Raymond v. Security Trust Co., 111 App. Div. 191, 97 N. Y. S. 557. Unintentional omission to provide for certain scattered creditors, who can be, and undoubtedly will be, paid as fast as claims are presented, held not to make agreement void as matter of law. Id.

35. See 6 C. L. 71.

36. Company does not, by permitting member to withdraw, relieve him from obligation to pay his proportion of losses incurred during life of policy, even where it was not charged against him prior to his withdrawal, and member cannot, with its consent, pay less sum and receive release from remainder. Brown v. Spackman, 29 Pa. Super. Ct. 638.

37. A limitation in the contract cannot relieve members of a mutual fire company from a liability to pay a proportionate share of losses and expenses for the period during which they were members, when company's affairs are being closed up by a receiver. Nichol v. Murphy [Mich.] 108 N. W. 704. Comp. Laws § 5187, relating to liability of members of mutual company for assessments, in terms applies only to contracts made before it went into effect. Id.

38. Requested instruction held erroneously modified. Swing v. Rose [Ohio] 79 N. E. 757. Instruction that defendants were not liable unless they were policy holders when assessment was levied held misleading and also erroneous in view of the fact that it was conceded that policy was surrendered and canceled at time of payment of total loss some time previously. Id.

time.[39] Directors of a mutual company subscribing to a fund represented with their knowledge to be paid up capital are, on the company becoming insolvent, estopped to deny their liability to the extent of such subscriptions as against policy holders who were induced to become such in reliance on such representations.[40]

Creditors[41] and policy holders[42] of an insolvent company may ordinarily apply to a court of equity for the appointment of a receiver and the winding up of its affairs, but it is not within the province of a court of chancery to grant such relief at the sole instance of a stockholder upon the ground alone of such insolvency.[43] Statutes in some states require the insurance commissioner to be made a party to the proceedings.[44]

An order of court in insolvency proceedings, to which the company is a party, levying or directing the levying of an assessment on the members is conclusive on them both as to the necessity for an assessment and the amount thereof,[45] even though they are not individually made parties,[46] but is not conclusive as to who are members.[47] The power of the board of directors to levy assessments passes in such case to the receiver.[48] The court ordinarily has discretionary power to set aside an irregular and excessive assessment[49] and to authorize the levying of another in its place.[50] Limitations begin to run against the liability of a member for an assessment from the date when the assessment is made.[51] The fact that one was induced to become a member through fraud is no defense to an action by the receiver to recover an assessment as against the rights of bona fide creditors and members becom-

39. Swing v. Rose [Ohio] 79 N. E. 757. Evidence held to justify submission of question as to whether settlement by agent with defendants of their assessable liability at time of loss was subsequently ratified by the company. Id.

40. Dwinnell v. Minneapolis Fire & Marine Mut. Ins. Co. [Minn.] 106 N. W. 312. Creditors whose claims are based on cash or stock policies containing no reference to any mutual liability are presumed to have relied on such representations, but this is not true as to creditors accepting policies expressly providing for mutual liability. Id.

41. St. 1903, § 677, authorizing attorney general to apply for appointment of receivers for insolvent assessment companies, held not to deprive creditors of right. Richardson v. People's Life & Acc. Ins. Co., 28 Ky. L. R. 919, 92 S. W. 284.

42. Stands in relation of creditor. Commonwealth v. Richardson [Ky.] 94 S. W. 639.

43. Commonwealth v. Richardson [Ky.] 94 S. W. 639.

44. Defendant cannot raise objection that insurance commissioner was not made party to bill as required by Act April 4, 1873, § 5, par. 10 (P. L. 20), particularly where he is subsequently made a party as of the time of the filing of the bill on his petition in action to recover assessment, in which he alleges that he was fully informed of filing of bill, and agreed thereto. International Sav. & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200.

45. Swing v. Rose [Ohio] 79 N. E. 757; International Sav. & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200; Brown v. Spackman, 29 Pa. Super. Ct. 638. Order in proceeding under Comp. Laws 1897, § 7331. Collins v. Welch, 141 Mich. 676, 12 Det. Leg. N. 594, 105 N. W. 31. Decree of a foreign court is conclusive that an assessment of members of an insolvent mutual company organized in the foreign state is necessary, as to the amount of money required to be raised, and as to the pro rata of each policy. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899.

46. Colline v. Welch, 141 Mich. 676, 12 Det. Leg. N. 594, 105 N. W. 31; Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899; International Sav. & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200. Evidence to effect that defendants in action to recover assessments were not parties to or served with process in proceeding in which assessment was made held improperly admitted. Swing v. Rose [Ohio] 79 N. E. 757.

47. Swing v. Rose [Ohio] 79 N. E. 757. May show that he is not a policy holder, that he has paid in full, has been released, or has an offset. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899.

48. Where court of foreign state in which company was organized authorized receiver to sue for assesements and fixed percentages due from policy holders, held that member could not defend suit against him for amount of his assessment on ground that amount of assessment was not fixed by directors. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899. Immaterial in such case that receiver derived his authority from order of court rather than statute, and that percentage was fixed by court where it did not appear that court figured actual sum due and receiver adopted assessment, however made. Id.

49. Nichol v. Murphy [Mich.] 108 N. W. 704.

50. Where court made valid order setting aside assessment, held that further order authorizing new assessment by substituted receiver properly appointed was valid. Nichol v. Murphy [Mich.] 108 N. W. 704.

51. Swing v. Brister & Co. [Miss.] 40 So. 146; Schofield v. Turner, 213 Pa. 548, 62 A. 1068, afg. 28 Pa. Super. Ct. 177.

ing such after the date of his contract.[52] Where the basis rate at which the policy was issued and in force is made the basis of the assessment, the assessment books of the company, when properly identified,[53] and evidence of previous assessments laid by the company on defendant's policy and paid by him without objection, are admissible.[54]

Taxation[55] of the property of domestic and foreign companies is governed by the provisions of the general and special revenue laws, and is treated elsewhere.[56]

(§ 2) *B. Conditions necessary to engage in insurance business, and certification and withdrawal of right.*[57]—Statutes in some states require insurance companies to deposit securities to a specified value with the state treasurer or other officer for the protection of policy holders,[58] provision being made for their return to the company depositing them on a satisfactory showing that all debts and liabilities due or which may become due on any of its outstanding contracts are paid and extinguished.[59] Mandamus to compel the surrender of such securities is not an action against the state.[60] An association organized for the purpose of securing to each of its members a burial worth a specified sum in consideration of stipulated assessments paid by them during life is an insurance association within the meaning of the Kansas statute.[61] In order to recover on a bond given by the company to the state pursuant to statute and conditioned on the prompt payment of claims arising and accruing to any person by virtue of any policy upon the life of any citizen, the plaintiff must show that there is something due him on the policy which the company has refused to pay.[62]

§ 3. *Foreign insurers and companies.*[63]—The legislature may admit foreign insurance companies[64] to do business in the state subject to such conditions and

52. Van Dyke v. Baker, 214 Pa. 168, 63 A. 594. Rights attaching between date of membership and discovery of fraud is intervening equity. Instruction held erroneous. Id. Burden of showing intervening equities in such case is on plaintiff. Id.

53, 54. Moore v. Rohrbacker, 30 Pa. Super. Ct. 568.

55. See 6 C. L. 72.

56. See Taxes, 6 C. L. 1602; Licenses, 6 C. L. 436. Joint resolution passed by general assembly at January, 1905, session, in regard to refund of illegal taxes paid by New York companies on business done in Connecticut, held to impose on insurance commissioner the duty of deciding and certifying the sums which in his judgment ought, in view of existing laws, to be refunded, and not merely to determine the amount actually paid, and hence mandamus would not lie to compel him to certify the amount paid as the amount which should be refunded. State v. Upson [Conn.] 64 A. 2. Mutual companies doing insurance business held corporations for pecuniary profit within meaning of tax laws. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

57. See 6 C. L. 72.

58. St. 1903, § 648, does not apply to foreign companies. Prewitt v. Illinois Life Ins. Co. [Ky.] 93 S. W. 633. Superintendent of insurance held not personally liable for difference in value between government bonds deposited with him by insurance company and municipal bonds which he permitted to be substituted therefor, where latter met requirements of law as to value and no bad faith was shown. Raymond v. Security Trust & Life Ins. Co., 111 App. Div. 191, 97 N. Y. S. 557.

59. St. 1903, § 650, provides that treasurer and insurance commissioner may return them when satisfied of such facts. Prewitt v. Illinois Life Ins. Co. [Ky.] 93 S. W. 633. Where foreign company reinsured risks of domestic company with consent of latter's stockholders and the insurance commissioner, and domestic company transferred deposited securities to foreign one, and had no outstanding debts, held that foreign company could compel surrender of securities. Id. Agreement whereby foreign company reinsured risks of domestic company held not a consolidation within Const. § 200, providing that such consolidations shall not make domestic company a foreign one. Id.

60. Within Const. § 231, requiring legislative consent to such actions. Prewitt v. Illinois Life Ins. Co. [Ky.] 93 S. W. 633.

61. Within provisions of Gen. St. 1901, § 3386, prohibiting associations from carrying on business of insurance without first complying with provisions of act of which it is a part. State v. Wichita Mut. Burial Ass'n [Kan.] 84 P. 757.

62. McCulloch v. Mutual Reserve Fund Life Ass'n [Ark.] 93 S. W. 62. Where policy provided that company should not be liable on policy and that no suit should be brought thereon after the lapse of one year from insured's death, held that suit based on policy could not be maintained on bond after that time, since company then owed nothing on it. Id. Statute held designed to protect

restrictions as it may see fit to impose,[65] provided such conditions are not in conflict with the constitution or laws of the United States,[66] and may regulate the form and substance of their insurance contracts and prescribe what conditions may or may not be imposed upon the insured.[67] It may require them to appoint the insurance commissioner as their agent upon whom process may be served,[68] and may prohibit them from removing cases brought against them to the Federal courts.[69] It is generally held that neither a foreign company nor its receiver can enforce contracts made with residents of a state before complying with the statutory provisions regulating such companies,[70] though there seems to be some conflict of authority in this regard.[71]

policy holders, and not to have been intended to enlarge or extend the liability of the company. Id.

63. See 6 C. L. 73.

64. Foreign corporation whose sole business is defending physicians against suits for malpractice, and which issues contracts whereby it agrees to defend such suits but does not assume or agree to assume or pay any judgments recovered in such suits, is not engaged in insurance business. State v. Laylin [Ohio] 76 N. E. 567.

65. Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. 801.

66. Restrictions and conditions imposed by Rev. St. 1898, §§ 1220, 1947-1954, held not to contravene constitution. Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. 801.

67. May require all representations or warranties upon which company proposes to rely to be embodied in or attached to policy. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198. State of Missouri held to have right to make Rev. St. 7890, which in effect cuts off defenses based upon false representations unless matter misrepresented contributed to death of the insured, applicable to foreign companies, particularly where they came into state after its enactment. Northwestern Mut. Life Ins. Co. v. Riggs, 27 S. Ct. 126.

68. Provision in power of attorney that his authority should "continue in force irrevocable" so long as any liability of the company remained outstanding in the state held not to render such power irrevocable as to nonresident policy holders, and hence service on commissioner gave court no jurisdiction of suits by residents on claims assigned to them by nonresident policy holders after such revocation. Hunter v. Mutual Reserve Life Ins. Co., 184 N. Y. 136, 76 N. E. 1072. Authorization of service on commissioner being a condition precedent to right of company to transact business in state, company could not escape consequences of its agreement by any deceptive or apparent withdrawal and attempted revocation so long as transaction of such business actually continued. Id. Company having in good faith attempted to withdraw, held that its acts in dealing with contracts previously issued and settling liabilities thereunder did not amount to such a continuance of an ordinary, active, and substantial insurance business as would be necessary to keep alive power of attorney. Id. Service of process on agent appointed to receive it, and after company had ceased to do business in state and had revoked appointment, held to have given court no jurisdiction of suit by resident on contract made in another state with resident of latter and by him assigned to plaintiff. Hunter v. Mutual Reserve Life Ins. Co., 99 N. Y. S. 888.

69. Ky. St. § 631, providing for revocation of license on removal, held valid. Security Mut. Life Ins. Co. v. Prewitt, 200 U. S. 446, 50 Law. Ed. 545, afg. [Ky.] 83 S. W. 611.

70. Policy issued by foreign company before complying with St. c. 73 is void ab initio and cannot be enforced either by it or its receiver. Swing v. Thomas, 120 Ill. App. 235. Subsequent compliance does not render such contract valid. Id. Rules apply regardless of where contract was made, if made with citizen of state and covering property within the state. Id. Receiver of foreign company, which issued policy covering property in Michigan without having complied with laws of that state, held not entitled to recover assessment levied as provided by policy to pay losses, regardless of where contract was made. Comp. Laws §§ 5157, 5162, construed. Swing v. Cameron [Mich.] 13 Det. Leg. N. 419, 108 N. W. 506. In view of Rev. St. 1898, § 1978, prohibiting foreign companies which have not complied with statutory provisions in relation thereto from making insurance contracts with residents, held that such company could not recover on premium note given for policy. Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. 801. Contract of foreign corporation with resident being in conflict with letter and policy of laws of forum, held that comity did not require its enforcement. Id.

71. Citizen may make a contract of insurance with a foreign company in a foreign state covering property in state where such citizen resides, and such company, or its receiver or trustee, may sue thereon for assessments in the last named state though it has not complied with its laws regulating foreign corporations, a denial of the right to do so being a violation of the 14th amendment to the U. S. Constitution. Swing v. Brister & Co. [Miss.] 40 So. 146. Policy insuring property in Mississippi written at home office of foreign company in Ohio, and applied for by insured through a firm of brokers in Indiana who were his agents, the company not doing business in Mississippi and having no agents there, held an Ohio contract. Id. The bringing of a suit by the trustee for creditors and policy holders of an insolvent foreign mutual company to collect assessments imposed by the courts of a sister state is not the transacting of insurance business within the meaning of Code 1880, § 1073, and Laws 1890, p. 15, c. 4, re-

It is sometimes specifically provided that compliance is not necessary to enable such companies to deal in notes, bonds, mortgages, and other securities.[72] The refusal of the insurance commissioner to grant authority to a foreign company to do business in the state after the expiration of a former permit does not raise a Federal question.[73] A receiver cannot be appointed for a foreign mutual company which has no assets in the state other than the contingent liability of members to pay future assessments.[74] When a policy holder in such a company is sought to be held liable for a ratable proportion of its losses and expenses, under the laws of the state wherein the company was chartered, the plaintiff must affirmatively show by his pleadings that the laws of that state impose upon the policyholder a statutory liability to meet the demand upon him.[75]

§ 4. *Agents and solicitors for insurance. A. Distinctions and kinds of agency.*[76]

(§ 4) *B. The right to negotiate insurance and regulations thereabout.*[77]—Statutes in many states require agents to procure a license from a designated state officer[78] and make it a crime to act as agent without having done so.[79] No recovery can be had on contracts of employment made in violation of such statutes.[80]

quiring foreign companies to procure certificates from the auditor before doing business in the state. Id.

72. Fact that foreign company had not obtained permit to do business in state as required by Code § 1637, held not to preclude it from suing and recovering on a bond and mortgage executed to it to secure a loan. Prudential Ins. Co. v. Cushman, 130 Iowa, 378, 106 N. W. 934.

73. Law required annual renewal of permit. Security Mut. Life Ins. Co. v. Prewitt, 200 U. S. 446, 50 Law. Ed. 545.

74. Levying of assessment does not make member a debtor to the association authorizing it to sue him if he does not pay, but the only effect of nonpayment is to relieve association from liability to member, and receiver would have no greater rights in this regard than the association. Blackwell v. Mutual Reserve Fund Life Ass'n [N. C.] 53 S. E. 833. Court could not through receiver compel payment of assessments to be appropriated to claim of plaintiff for return of assessments paid by him in violation of terms of contract, which impresses assessments with trust for benefits of all policy holders and requires a certain part of them to be set apart for specified purposes. Id.

75. Swing v. Farrar, 124 Ga. 951, 53 S. E. 269. Petition in action by trustee, appointed by court of Ohio on dissolution of Ohio mutual fire company to represent stockholders and creditors, to collect assessment directed to be made by Ohio court for purpose of paying debts, etc., held insufficient for failure to show that laws of that state relied on were applicable to such company. Id. Since demurrer to declaration in action by receiver of foreign mutual company appointed by foreign court to collect assessment admitted allegations that company was duly incorporated, held that declaration was not objectionable for failure to set out various steps necessary to constitute such due incorporation, such as assumption by insured of his liability in writing and the fixing of the amount of the contingent liability. Swing v. Consolidated Fruit Jar Co. [N. J. Law] 63 A. 899.

76, 77. See 6 C. L. 75.

78. Under Laws 1902, p. 62, c. 59, no one may represent any character of insurance company unless the same has procured from the insurance commissioner a license to do business within the state, and unless such agent has himself received a certificate entitling him to solicit and write insurance. Fikes v. State [Miss.] 39 So. 783. Applies to a foreign company which agrees, in consideration of the payment of weekly dues, to provide members with sick and burial benefits. Id. Issuance of permit is a condition precedent to the exercise on the part of any agent of any of the powers of such agency, and such permit and license is the sole proof under the law of his authority to engage in insurance business in the state. Id. Uncontradicted testimony of commissioner and certified copies of records of his office held competent evidence in prosecution for unlawfully assuming to act as insurance agent, and conclusive evidence that neither company nor agent was lawfully authorized to operate in state. Id. The provisions of § 283, Rev. St., making it unlawful for one not duly authorized by the insurance company and licensed by the superintendent of insurance to procure, receive, or forward applications for insurance in any company, are not applicable to a contract by an insurance agent to pay another a commission on premiums received from persons recommended by him. Connelly v. Pickard, 4 Ohio N. P. (N. S.) 294.

79. Affidavit on which prosecution for unlawfully assuming to act as an insurance agent was based held fatally defective for failure to show what particular violation of Laws 1902, p. 62, c. 59, was intended to be charged, since that statute condemns numerous different acts by distinct provisions and prescribes varying punishments therefor. Fikes v. State [Miss.] 39 So. 783.

80. Subagent who had not obtained certificate from superintendent of insurance as required by Laws 1892, p. 1972, c. 690, § 91, held not entitled to recover commissions on his wrongful discharge, he not having the legal capacity to perform. Wyatt v. Mc-

(§ 4) *C. Rights and liabilities of agents.*[81]—The general rules of contract and agency apply as between the company and its agents.[82] One cannot act as agent for both parties where their interests conflict.[83] Writings relating to the same subject-matter, between the same parties, and delivered at the same time, are to be construed as one instrument in so far as they can stand together.[84] Cases construing provisions as to the duration of the contract,[85] commissions,[86] and advances,[87] will be found in the notes. Agency contracts contravening a penal statute against rebating are void, and the courts will not assist either party in enforcing them against the other.[88] Illegitimate acts done outside of the terms of a valid contract

Namee, 101 N. Y. S. 790. General agents who had paid him advance commissions pursuant to the contract and with knowledge of the fact that he had not procured such certificate held not entitled to recover same. Id. Complaint in action on contract of employment to solicit life insurance need not allege that plaintiff has secured certificate of authority from superintendent of insurance as required by statute, failure to do so being a matter of defense to be alleged in the answer. Wyatt v. McNamee, 98 N. Y. S. 749.

81. See 6 C. L. 76. For power of agents to make contracts, see § 7, post. For power to waive forfeitures, see §§ 16C and 19, post.

82. See, also, Agency, 7 C. L. 61; Contracts, 7 C. L. 761. Agreement to apply renewal commissions in payment of note and mortgage given to secure advances held one between company and agent only, so that it was not necessary that it be signed by third persons mentioned therein. Security Trust & Life Ins. Co. v. Ellsworth [Wis.] 109 N. W. 125.

83. Employe of certain firm, who was also the agent of the insurer, issued a policy to insured in which a clause was subsequently inserted making loss payable to said firm. Agent was not a creditor of the insured and had no interest in his business. Held that he was not the agent of the insured. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

84. Agency contract and note and mortgage given by agents to secure advances. Security Trust & Life Ins. Co. v. Ellsworth [Wis.] 109 N. W. 125.

85. Contract held to give company right to withdraw from district for which it had employed plaintiff to act as its agent, and its liability to plaintiff thereunder ceased on such withdrawal. National Life Ins. Co. v. Anderson [Ky.] 92 S. W. 976. Contract held neither expressly nor impliedly to prohibit agent from resigning after he had made a reasonable effort to successfully manage the business and failed. Security Trust & Life Ins. Co. v. Ellsworth [Wis.] 109 N. W. 125.

86. Broker held not entitled, under his contract, to commissions on insurance issued to railroads through other brokers where he never furnished to company schedules of property on which insurance was desired so that it could formulate a bid thereon. Helmick v. Western Assur. Co., 121 Ill. App. 281. Where agent resigned after procuring application and another agent subsequently induced applicant to apply for double the amount of insurance contemplated by the original application, held that first agent was entitled to commissions on basis of amount of first application, it appearing that he alone was responsible for placing that amount of insurance. New York Life Ins. Co. v. Rilling, 121 Ill. App. 169. He was not, however, entitled to commission on additional amount, it appearing that he had nothing to do with procuring it. Id. Questions asked in support of theory that agent's resignation was an abandonment of compensation for services previously rendered, even though such services contributed to insurance evidenced by policies subsequently issued, held properly excluded. Id. Resignation of agent held to terminate his right to renewal commissions. Scott v. Travelers' Ins. Co. [Md.] 63 A. 377. In determining the net profits of the monthly premium business of plaintiffs' agency on which their commissions were based, held that all losses paid for disabilities beginning before the termination of the agency were chargeable against the business as debits, whether the disabilities ceased before the date of such termination or continued thereafter. Perry v. U. S. Health & Acc. Ins. Co., 73 N. H. 608, 63 A. 489. Agent held not entitled to commissions on second year premiums where parties by mutual consent terminated their relations at end of first year. Butler v. New York Life Ins. Co. [Wash.] 87 P. 1119. Contract held to entitle agent to commissions on premium paid after he had left service so that company was not relieved from liability therefor by payment to broker. Watson v. Travelers' Ins. Co. [Wash.] 86 P. 659.

87. Contract construed to be that mortgage given to secure advances should be paid out of renewal commissions only. Security Trust & Life Ins. Co. v. Ellsworth [Wis.] 109 N. W. 125. Agency agreement whereby agent was to turn over commissions in satisfaction of future advances held not to supersede previous agreement whereby commissions were to be used to pay note and mortgage given to secure past advances, but the two, not being inconsistent, would both be given effect. Id. Liability of agent on mortgage given to secure advances and which it was agreed should be paid out of commissions held terminated where he lawfully exercised his right to resign. Id. Contract held not to mean that advances made by company to agent should be repaid only by moneys coming into its hands to which agent was entitled, called "equities" in contract, and that therefore court properly refused to charge that note given by agent for difference between advances and "equities" was without consideration. Whitestone v. American Ins. Union [C. C. A.] 143 F. 862.

88. Where company assents to rebating of

will not, however, vitiate it.[89] Where an agent breaches one of two contracts made between the same parties and at about the same time, the later of which was demanded by him as a condition of executing the first, and the observance of both of which is obligatory, he is in no position to sue the company for an alleged breach of the later contract.[90] An agent who, at the time of resigning, specifies certain grounds for so doing is estopped, in a subsequent action against the company for breach of the contract of employment, from alleging other grounds therefor.[91] A remedy fixed by the contract in case of a breach is exclusive.[92] If the company prevents performance or puts it out of its power to perform, the agent may treat the contract as terminated and at once recover whatever damages he has sustained thereby.[93] Performance is excused when made impossible by decree of court.[94] The receipt and retention of an account and a sum remitted as the balance claimed by the company to be due does not estop the agent to claim additional items where he notifies the company at the time that the statements are not correct and will not be accepted as final.[95] An agreement whereby a company purchasing the assets of another assumes and agrees to pay all its valid contractual liabilities renders it liable for damages for a breach of the contract of the seller with an agent resulting from the consummation of the contract of sale.[96]

Where a bond given by an agent to the company to secure the faithful performance of his contract of agency contains no description of the contract, except a statement of the agent's appointment, parol evidence is admissible to prove the terms of the contract for the purpose of showing the nature and extent of the surety's liability.[97] Any substantial change in the contract releases the surety if made without his knowledge.[98]

premiums in violation of St. 1903, § 656, it cannot collect from the agent the whole amount of the premium which he should have collected from the insured. National Life Ins. Co. v. Anderson [Ky.] 92 S. W. 976.

89. Where company accepted services of agent with knowledge that he had given rebates, held that it could not, after termination of contract, refuse to pay him for legitimate services rendered thereunder after the illegal acts were done. National Life Ins. Co. v. Anderson [Ky.] 92 S. W. 976.

90, 91. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

92. Plaintiff's contract with company provided that, if it should end for any cause, company would pay him commissions on renewed policies as same were paid. Company sold its business to another company which guaranteed performance of plaintiff's contract, but before any renewal commissions were received transfer was declared invalid by courts and parties were placed in statu quo. Held that plaintiff could not sue transferee for estimated value of renewal policies on ground that it had wrongfully rendered contract impossible of performance. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

93. Crowell v. Northwestern Life & Sav. Co. [Minn.] 108 N. W. 962. Sale and transfer by company of all its business and assets and going out of business held to put it out of its power to perform contract with agents whereby it agreed to pay them a certain percentage of the amount of outstanding premium notes when they were paid, since it rendered policies and notes voidable at election of policy holders, and notes thereby ceased to be absolute and became conditional. Complaint held to state cause of action. Id. Presumed that makers of such notes were solvent. Id. Burden held to be on purchasing company, sued by virtue of assumption of liability, to plead and prove, on issue of damages, the facts with reference to the election of the policy holders to continue the policies with it. Id.

94. Two companies entered into agreement whereby business and policies of one were taken over by the other. Agent of former took service with latter under agreement whereby it was to guaranty his commissions on renewal premiums. Before any such commissions were collected transfer agreement was declared invalid by court at suit of stockholders, statu quo was re-established, transferee was enjoined from collecting renewal premiums, and agent was enjoined from paying same except to transferor. Held that vis major preventing performance was intervention of court and its decree rendered performance impossible. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

95. Watson v. Travelers' Ins. Co. [Wash.] 86 P. 659.

96. Crowell v. Northwestern Life & Sav. Co. [Minn.] 108 N. W. 962.

97. Germania Fire Ins. Co. v. Lange [Mass.] 78 N. E. 746.

98. Change in contract of agent whereby he was to receive a commission, pay office expenses, and be responsible for premiums due on policies written by him or his subagents, instead of receiving a fixed salary

Special agents must act strictly within the limits of their powers.[99] The company is not ordinarily responsible for premiums paid to one having no authority to represent it.[1] By statute in some states the agent of any foreign company which fails to comply with the laws of the state is made personally liable on all contracts of insurance made by or through him, directly or indirectly, for or on its behalf.[2]

The usual rules of construction,[3] and as to the measure of damages for a breach,[4] apply to contracts made with brokers for the procuring of insurance.

§ 5. *Insurable risks and interests. Fire insurance.*[5]—The insured must have an insurable interest in the property, both when the policy is issued[6] and when the loss occurs.[7]

and the company paying expenses, held a substantial one which released surety on his bond when made without his knowledge. Germania Fire Ins. Co. v. Lange [Mass.] 78 N. E. 746.

99. Local soliciting agent appointed by general state agent to take applications and send them to him held to have no authority to appoint subagents. Mutual Life Ins. Co. v. Reynolds [Ark.] 98 S. W. 963.

1. Application was taken and binding receipt issued by, and first premium paid to, one having no authority to represent company. Application was forwarded through special and general agents to company and was rejected. Neither special nor general agent nor company knew that premium had been paid or receipt issued, nor was there any evidence authorizing finding that company held out person to whom payment was made as its agent. Held that such person was alone liable for amount collected by him. Mutual Life Ins. Co. v. Reynolds [Ark.] 98 S. W. 963.

2. Act May 1, 1876, § 48 (P. L. 66), applies to contracts made outside of the state. Bartlett v. Rothschild, 214 Pa. 421, 63 A. 1030. Evidence held to sustain burden of proving defendant's agency. Id. Evidence held to show that what was done was transaction of business, even if section only applies to agents of foreign companies transacting business in the state. Id. Where vessel insured was owned by residents of state and sailed from port of state, held that it was property, within the state when contract was made, if it was necessary that it should have been. Id.

3. Where contract required broker to furnish defendant a certain amount of fire insurance per year and to keep same good during the year, the defendant to pay therefor a certain per cent. on the amount as commission, held that, where a portion of the insurance so obtained and paid for was canceled during the year, broker was obliged to furnish other insurance for a similar amount without any further payment of commissions by defendant. Tanenbaum v. Federal Match Co., 111 App. Div. 416, 97 N. Y. S. 1101.

4. Where owner entered into contract with plaintiff whereby latter was to procure fire policies for him, but refused to accept policies when tendered to him before date on which by their terms they became effective, held that judgment awarding plaintiff full commissions which he would have received if premiums had been paid for entire period covered by terms of policies was erroneous. Weingrad v. Kletzky, 101 N. Y. S. 588.

5. See 6 C. L. 78.

6. Held to have insurable interest: One who has purchased property conditionally, the vendor retaining title until purchase money is paid. Hartford Fire Ins. Co. v. Enoch [Ark.] 96 S. W. 393. One to whom goods are consigned for sale on commission and who is required to account to the owner for all goods received. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160. Bailee, mortgagee, or other lienholder upon property. American Cereal Co. v. Western Assur. Co., 148 F. 77. Estate by the curtesy initiate given husband in wife's realty on birth of child, which was an insurable interest, held abolished by Const. 1874, only the possibility of an estate by the curtesy consummate being left. Lloyd v. Planters' Mut. Ins. Co. [Ark.] 97 S. W. 658. Under Civ. Code 1895, § 2090, parent has such an insurable interest in separate property of his children as to authorize him to make a contract of insurance in their behalf though he personally has no interest whatever in the property, but such contract, to be valid, must be made by the parent in his representative capacity and not as an individual since he has no insurable interest in the latter capacity. Fox v. Queen Ins. Co., 124 Ga. 948, 53 S. E. 271. Where policy is issued to parent individually, he must prove an individual insurable interest in order to recover. Id. Instruction in action on builder's policy held not erroneous in that it referred to the insured building as "the property of the plaintiff," since, under his contract, plaintiff was liable for any loss resulting before completion of the building, and hence had an insurable interest in the building and therefore a qualified interest in the realty, though a large part of the contract price had been paid to him. King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892.

Held not to have insurable interest: Realty belonging to plaintiff was sold to satisfy judgment and purchased by him in his wife's name, he and another becoming sureties on her bond for purchase money. Held that suretyship did not give plaintiff an insurable interest in such property, he never having had any lien thereon nor any control or custody thereof as security for his liability. Lloyd v. Planters' Mut. Ins. Co. [Ark.] 97 S. W. 658.

7. Mortgagor's insurable interest in premises is not extinguished by foreclosure since he has right to possession until expiration of period of redemption. Rawson v. Bethesda Baptist Church, 221 Ill. 216, 77 N. E. 560. Fire policy covered insured's stock of glass, "his own, or held by him in trust, or sold but

Life insurance.[8]—Life policies issued to one having no insurable interest in the life of the insured are in the nature of wagering contracts, and hence are void as contrary to public policy.[9] One may, however, insure his own life in favor of another having no insurable interest, provided he acts in good faith and pays the premiums himself.[10] By statute in some states the beneficiary must have an insurable interest when assessments are paid by any person other than the insured and without his written consent.[11] If the policy is originally valid it is generally held that it is not rendered void by reason of the cessation of interest in the subject of insurance.[12] One who advances money to the insurer to pay premiums is not precluded from recovering the same from the party for whose benefit the payment was made by reason of the invalidity of the policy.[13] The right to assign policies to persons having no insurable interest is treated in a subsequent section.[14]

§ 6. *Application.*[15]—The company has the right to provide a form of application for its business, to require that it be used by its agents and those desiring insurance of it, and that a separate application be made and signed for each policy,[16] and may reject all applications made otherwise than as required by its rules and regulations.[17] Questions and answers in the application will be construed liberally in favor of the insured.[18] The answer "no" may be construed to mean not any or none.[19]

not delivered, for which he may be held liable." Insured subsequently entered into agreement whereby it sold all glass manufactured or to be manufactured by it within a specified time to a certain company, it being provided that glass should become property of vendee as soon as manufactured, that it was to be stored in insured's warehouses leased to vendee for that purpose, that insured was to be responsible for all loss except loss by fire, and that glass was to be insured by vendee, the vendor to pay the premiums. Held that vendee was vested with title and entire insurable interest in case of loss by fire, and hence that insured could not recover. Burke v. Continental Ins. Co., 184 N. Y. 77, 76 N. E. 1086. Person holding title under land contract held not deprived of his insurable interest by agreement to surrender contract on payment of specified sum, where property was destroyed before day fixed for consummation of contract and on which it was consummated, and he was entitled to possession until such consummation, since title did not pass until date fixed. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952.

8. See 6 C. L. 79.

9. Interest must be a pecuniary one. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526.

Held to have insurable interest: Insured's mother-in-law to whom he assigned policy with intent that at his death she should become the custodian of his minor children. Matlock v. Bledsoe [Ark.] 90 S. W. 848. Plaintiff held to have insurable interest in life of brother to whom she and her husband had loaned money. Dewey v. Fleischer [Wis.] 109 N. W. 525.

Held not to have insurable interest: One has no insurable interest in the life of his mother-in-law. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. Uncle of insured by reason of kinship. Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 83 P. 410. Cousins. Ryan v. Metropolitan Life Ins. Co., 117 Mo. App. 688, 93 S. W. 347. Brothers. Locher v. Kuechenmiester [Mo. App.] 98 S. W. 92. The word "stranger" as used in 50 O. S. 601, having reference to insurable interest, includes a brother, and a policy of insurance taken out on the life of a brother who is in good health, is younger than the assured, does not depend upon him, and has no knowledge of the issuance of the policy, is not saved from the inhibition as to wagering contracts by the allegation that the purpose in taking out the policy was to provide a fund for the burial of the insured in case of his death. Newmore v. Western & So. Life Ins. Co., 8 Ohio C. C. (N. S.) 308.

10. Evidence held to show that each brother insured his own life for benefit of other, each to pay premiums on policy on his own life, and hence policies were valid. Locher v. Kuechenmiester [Mo. App.] 98 S. W. 92.

11. Under Burns' Ann. St. 1901, § 4902. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. Want of knowledge presumed in absence of averment to the contrary. Id.

12. Wife of insured named as beneficiary not deprived of her rights by subsequent divorce. Blum v. New York Life Ins. Co., 197 Mo. 513, 95 S. W. 317.

13. Fact that policy was invalid for lack of insurable interest held no defense to an action on due bill given by defendant to plaintiff for amount so advanced. Locher v. Kuechenmiester [Mo. App.] 98 S. W. 92.

14. See § 14, post.

15. See 6 C. L. 79.

16. Particularly in view of St. 1903, § 679, providing that application cannot be cons'd-ered a part of the policy unless attached thereto. Provident Sav. Life Assur. Soc. v. Elliott's Ex'r [Ky.] 93 S. W. 659.

17. Provident Sav. Life Assur. Soc. v. Elliott's Ex'r [Ky.] 93 S. W. 659.

18. As to occupation. Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290, 12 Det.

§ 7. *The contract of insurance in general, and general rules for its interpretation. Definitions and distinctions.*[20]—The contract of insurance is a contract of indemnity.[21] A contract whereby a company or association agrees to pay a certain sum of money on the death of a member, in consideration of the payment by him of fixed sums at fixed periods, is a life insurance policy by whatever name it may be called.[22] A charter provision that the business of the company shall be conducted on the mutual plan means that the premiums paid by each member for the insurance of his property or life constitute a common fund devoted to the payment of any losses that may occur.[23]

Essentials and validity; acceptance.[24]—Statutes in many states prescribe a standard form of fire policy and prohibit the incorporation into such contracts of any other provisions than those therein prescribed.[25] It is also frequently provided that the entire contract must be expressed in the policy,[26] that certain classes of policies and applications therefor must be printed in type not smaller than brevier,[27] and that the policies of assessment companies must specify the exact sum payable thereunder on the happening of the contingencies insured against.[28] Mutual fire companies sometimes require an appraisement of the property before a policy is issued.[29] The right to recover for a loss is not affected by the fact that the insured is a stockholder in the company issuing the policy.[30]

Leg. N. 978, 106 N. W. 860. Answers to questions written by medical examiner must be construed most strongly against company. Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155. Answer "ten" to question as to age of applicant's deceased brother held not a representation that brother was ten years old. Id. Word "no" held not an answer to question as to whether certain of applicant's relations had had certain diseases. Id. Where application signed in blank was to be filled in by agent from information in previous application, held that answers in second application were not such necessary inferences from those in the first as to be regarded as statement of applicant. Henry v. Metropolitan Life Ins. Co., 100 Me. 523, 62 A. 600.

19. Negative form of question as to use of explosives and negative answer held not to constitute two negatives amounting to an affirmative statement that explosives would be used. Employers' liability policy. Columbian Exposition Salvage Co. v. Union Casualty & Surety Co., 220 Ill. 172, 77 N. E. 128.

20. See 6 C. L. 80.

21. Contract whereby company undertakes to defend physicians against suits for malpractice, but does not assume or agree to pay any judgments rendered against them in such suits, is not an insurance contract. State v. Laylin, 73 Ohio, 90, 76 N. E. 567.

22. Certificate issued by society calling itself a fraternal mutual benefit society. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166. Society held to be doing life insurance business and not to be a purely fraternal benefit association within the meaning of Acts 1897-98, p. 734, c. 688, defining and regulating such societies. Id.

23. Lord v. Equitable Life Assur. Soc., 109 App. Div. 252, 96 N. Y. S. 10.

24. See 6 C. L. 80.

25. Standard form of fire policy prescribed by Gen. Laws 1895, p. 417, c. 175, as amended by Gen. Laws 1897, p. 468, c. 254, contains the only terms and conditions which can be incorporated in a contract of fire insurance, the only changes which may be made in the statutory form prescribed in the former statute being those specifically authorized by § 53 of the latter. Wild Rice Lumber Co. v. Royal Ins. Co. [Minn.] 108 N. W. 871. Section 52 of the act of 1895, providing that the conditions of insurance shall be stated in full, etc., though not repealed by the act of 1897, cannot be used to restrict the express requirements of the latter act and does not authorize insertion of other provisions than those allowed thereby. Id. Cannot attach clause whereby insured warrants the maintenance of a designated clear space about the insured premises. Id. Provision of § 53, subd. 2, of the act of 1897, that company may attach permits for the maintenance of sprinkling "or other improvements" held not to authorize such a clause. Id. Since statute expressly authorizes company to print or use forms of description and specification of the property insured, such "space clause," though void as a warranty, may contain effective language limiting the general descriptive language of the policy. Id.

26. Ky. St. 1903, § 656, does not apply to note given by insured for money borrowed on policy from insurer according to provisions of policy. Jagoe v. Aetna Life Ins. Co. [Ky.] 96 S. W. 598. Provision in such note authorizing issuance of paid up policy if it was not paid at maturity or if premiums were not paid held not inconsistent with policy. Id.

27. St. 1903, § 679, applies only to co-operative companies and not to old line companies. Provident Sav. Life Ins. Co. v. Elliott's Ex'r [Ky.] 93 S. W. 659.

28. Provision in by-laws limiting indemnity to be paid in case of disability resulting from illness to a period of ten weeks held not in conflict with Rev. St. 1899, § 7903. Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768.

In the absence of a statutory provision to the contrary,[31] an oral contract of insurance is valid.[32] Statutes in some states require contracts of fire insurance to be in writing and signed by the insurer or by some person authorized to sign for it.[33] The usual and proper place for the signature is at the end of the matter which it attests, but it is sufficient if, with intent to constitute a signing, it is inserted in the writing at another place.[34]

In order to constitute a valid contract of insurance the minds of the parties must meet as to all its essential terms.[35] The application is a mere offer which must be accepted[36] unconditionally[37] in order to constitute a binding contract, and may

29. Constitution required appraisement by trustees for purpose of protecting company against overinsurance. Shortly after policy was issued it became void by reason of a transfer of the property. Held that a new appraisement was not a condition precedent to the validity of an oral contract in favor of the transferee, it not appearing that property had deteriorated in value. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670.

30. Fire policy. Mississippi Fire Ass'n v. Stein [Miss.] 41 So. 66.

31. U. S. Internal Revenue Act (Act June 13, 1898, 30 St. 448) requiring stamps on insurance policies held not to render oral contracts void. King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892.

32. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670; Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025; Whitman v. Milwaukee Fire Ins. Co., 128 Wis. 124, 107 N. W. 291. Particularly in view of Rev. St. 1899, § 974, making parol contracts binding on corporations if made by their authorized agents. King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892. Provisions in charter or by-laws of company requiring the signature of the president to all policies, but containing no prohibitory words, do not prevent the making of oral contracts. Id. Such holding held not an impairment of obligation of contract in that agent had no power, under his contract of agency, to enter into oral contract. Id.

33. Civ. Code 1895, § 2089, providing the contracts must be in writing, held to contemplate signature. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330.

34. Allegations of petition in action on contract of reinsurance held sufficient to withstand demurrer on the ground that paper was not signed, where there was no signature at the end of the policy, but it commenced with name of company and its general agent, and proceeded "do insure" the plaintiff, etc. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330. Vacancy permit signed by reinsuring company acting as defendant's agent held an acknowledgment of the policy of the number stated therein, so that the signature thereto would supply the lack of signing the policy so referred to. Id. Allegations as to vacancy permit signed by company reinsuring defendant held to sufficiently show that such company was defendant's agent in so doing. Id.

35. Parties must have agreed on all essential elements, viz., the subject-matter insured, the risks covered, the amount of the insurance, the duration of the risk, and the premium to be paid. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670. Evidence held to sustain finding of valid oral contract. Id. Evidence held to show that there was no valid contract entered into between the parties covering liability for accident to plaintiff's employes while engaged in certain work, agent's agreement to bind risk being of limited duration. Bradley v. Standard Life & Acc. Ins. Co., 112 App. Div. 536, 98 N. Y. S. 797. Where sole issue in case was raised by conflicting testimony as to whether oral contracts were entered into covering property from time of application until written policy was issued, held that question was one for the jury. Grossbaum Ceramic Art Syndicate v. German Ins. Co., 213 Pa. 506, 62 A. 1107. Instruction calling attention to correspondence between plaintiff and defendant's brokers bearing on question whether oral contract had been completed held proper, that being the only issue in the case. Id. Charge in case where sole issue was as to whether there was binding oral contract held not unfair or partial to defendant or argumentative in its favor. Id. Must meet as to time of commencement of the risk. Whitman v. Milwaukee Fire Ins. Co., 128 Wis. 124, 107 N. W. 291. Evidence held insufficient to establish an oral contract in praesenti, but to show that only contract in contemplation was one to be evidenced by policy issued in usual way. Id. In order to be enforceable a parol contract of insurance, as distinguished from a parol contract to insure, must not be executory but must take effect in praesenti. Hartford Fire Ins. Co. v. Whitman [Ohio] 79 N. E. 459. Evidence held insufficient to show parol contract binding on defendant. Id.

36. New York Life Ins. Co. v. Levy's Adm'r [Ky.] 92 S. W. 325. The mere mailing and filing of the application can never be deemed an acceptance. McGrath v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 218. Instruction held erroneous as a charge on the facts. Id. There must be an actual acceptance, the mere fact that the company fails to notify the insured of the rejection of the application being insufficient to raise a presumption of acceptance. Hartford Fire Ins. Co. v. Whitman [Ohio] 79 N. E. 459. Waiver of provision in application that no liability should be incurred until application should be approved, the policy issued, and the premium paid while applicant was in good health, held not to deprive company of right to reject application. Provident Sav. Life Assur. Soc. v. Elliott's Ex'r [Ky.] 93 S. W. 659. Approval by medical board of report of local

be withdrawn at any time before acceptance.[38] Temporary insurance is sometimes provided for pending acceptance or rejection.[39] Where it is agreed that the contract is not to become effective until the performance of certain specified conditions, compliance therewith must be shown.[40]

board showing applicant to be a suitable risk held not an acceptance of application, the medical department having no authority to accept applications or grant insurance. Id. Contract is consummated upon the unconditional acceptance of the application of the insured by the insurer. Hartford Fire Ins. Co. v. Whitman [Ohio] 79 N. E. 459. When accepted applicant is to be deemed insured upon terms and conditions of the application. Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025. Nonpayment of premium for fire policy held not to defeat recovery where policy was completed and became executed contract and right of cancellation was never exercised. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35.

37. Deceased applied for policy for $10,000 and subsequently paid premium to agent. Before such payment was made, however, company rejected application for that amount but approved it for $5,000 and issued policy for that amount which it sent to agent. Latter did not receive it until after applicant's death but delivered it to applicant's son. Held no contract for any amount. New York Life Ins. Co. v. Levy's Adm'r [Ky.] 92 S. W. 325. Where application for policy under which insured could change beneficiary was rejected, but company prepared two new applications in accordance with their rules, attached each to a policy which did not provide for change of beneficiary, and forwarded them to agent to be delivered when applications were signed and premiums paid, and agent did not receive them until after death of applicant so that applications were never signed or policies delivered, held that there was no contract. Provident Sav. Life Assur. Soc. v. Elliott's Ex'r [Ky.] 93 S. W. 659.

38. Where agent to whom application and premium note were delivered received them with agreement and understanding that they were to be deposited in the bank until plaintiff "was satisfied that everything was right," held that there was no completed contract for insurance but the negotiations were still pending, and hence plaintiff had a right to withdraw therefrom and recall the note if he was not satisfied with the proposed contract. Hubbard v. State Life Ins. Co., 129 Iowa, 13, 105 N. W. 332.

39. Binding receipt held intended to effect present contract of insurance binding from date of receipt, which would be superseded by policy when issued or terminated by rejection of application and notice to insured, so that company was liable where insured died before policy was actually issued or delivered, notwithstanding provision in application that insurance should not take effect until policy was issued. Starr v. Mutual Life Ins. Co., 41 Wash. 228, 83 P. 116.

40. **Payment of premium:** Instruction requiring verdict for plaintiff if jury found that first premium was paid at any time before insured's death, and for defendant if they found that it was not, approved. Mutual Industrial Indemnity Co. v. Perkins [Ark.] 98 S. W. 709. An instruction that issuance of receipt for premium was not conclusive as to payment, but would authorize finding of payment in absence of countervailing evidence, and that when other evidence tended to show delivery without payment question was for jury on all the evidence, approved. Id. Evidence held to require submission to jury of question whether first premium had been paid. Id. Applicant held not bound to pay agreed premium until policy was issued and ready for delivery, so that failure to pay did not prevent there being a valid oral contract in the meantime. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670. Where application provided that policy should not take effect until premium was paid, and it appeared that premium had never been paid and that no note or obligation had been given therefor, and that application and medical examination, which had been deposited in postoffice by agent addressed to company, were withdrawn therefrom by him on learning of applicant's death, and hence were never delivered to company, held that there was no contract. Torpey v. National Life Ins. Co. [Ky.] 92 S. W. 982. Evidence held insufficient to sustain finding of payment of premium. Shoemaker v. Commercial Assur. Co. [Neb.] 106 N. W. 316. Evidence that soliciting agent and applicant agreed that contract was not to become obligatory on company until part of premium, for full amount of which applicant had given his note, had been paid in cash, and that no payment was made until three days prior to applicant's death, and while he was suffering from his last illness, and that payment was then made by third persons, evidently in contemplation of his death, held not to show binding oral contract, even if agent was authorized to make one. Harriman v. New Yok Life Ins. Co. [Wash.] 86 P. 656.

Delivery and payment of premium during good health: Provision that no obligation is assumed unless the insured is alive and in sound health when the policy is delivered is valid. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560. Evidence showing conclusively that between date of application and delivery of policy insured had been adjudged insane and committed to an asylum, held to relieve company from liability. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560. Contract held not to have been completed, policy not having been delivered or premium paid. Hill's Adm'r v. Penn. Mut. Life Ins. Co., 28 Ky. L. R. 790, 90 S. W. 544. Compliance with provision in application that no liability is to be incurred until application is approved, policy issued, and premium paid while insured is alive and in good health, is necessary in order to fix liability on the company. Provident Sav. Life Assur. Soc. v. Elliott's Ex'r [Ky.] 93 S. W. 659. Where application provided that policy

Some courts hold that delivery is conclusive proof of the completion of the contract in the absence of fraud;[41] others that the contract is prima facie incomplete before delivery.[42] Delivery is largely a question of intention.[43] In order to make a valid delivery there must be an intention on the part of the person executing the policy to give it legal effect as a completed instrument, which must be evidenced by some word or act indicating that the insurer has put it beyond his legal control, and which must be acquiesced in by the insurer.[44] Where nothing remains to be done by the insured, the mailing of the policy duly executed to an agent of the company for delivery to the insured constitutes a delivery, though insured dies before it is received.[45] In the absence of proof to the contrary the presumption is that the insured accepted the policy delivered to him as a binding contract of indemnity.[46] The rule that possession of the policy by the insured is presumptive evidence of delivery does not apply where upon the face of the instrument some act remains to be done to make it complete.[47]

An agent may bind the company by any contract within the actual[48] or ap-

should not be binding unless insured was alive and in sound health at noon upon its date, held that no recovery could be had thereon where it appeared that he was not in sound health on such date. Carmichael v. Hancock Mut. Life Ins. Co., 101 N. Y. S. 602. Finding of jury that insured was in good health when first premium was paid not disturbed on appeal. Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 A. 51.

Acceptance of application by home office: Where application for insurance in mutual company provided that there should be no contract until it was accepted by home office, and under the statute insurance could only be issued to members and there was no evidence that agent had authority to make or deliver contracts, held that his declarations made at the time he received application and delivered receipt that the property was insured from the time the receipt was given were inadmissible. McGrath v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 218.

41. Is conclusive proof that the contract is completed and is an acknowledgment that the premium was properly paid during good health, and in such case the policy takes effect from its date. Raburn v. Pennsylvania Casualty Co. [N. C.] 54 S. E. 283.

42. In the absence of an oral agreement for insurance prior to the taking effect of the policy, if the policy has been duly executed but has not passed out of the possession of the insurer or his agent and no payment of premium has been made, the contract is prima facie incomplete. Party asserting that there is contract has burden of showing that policy became operative by intention of both parties. Hartford Fire Ins. Co. v. Whitman [Ohio] 79 N. E. 459. Where there was no oral agreement for insurance to take effect prior to issue of policy, evidence that, upon application for insurance at regular rate, agent wrote up and countersigned policy and, without parting with possession thereof, wrote applicant that he had "issued" policy but would hold it until he had time to hear from company, and company thereafter rejected risk, whereupon agent forwarded policy to company, held not to show consummated contract. Id. In order to establish the relation of insurer and insured as existing before the delivery of the policy, the plaintiff must do so by full and clear proof. Id.

43, 44. Hartford Fire Ins. Co. v. Whitman [Ohio] 79 N. E. 459.

45. Where applicant pays first premium to agent, contract is consummated when company accepts application, executes policy, and deposits it in mail directed to agent for delivery to applicant. Kilborn v. Prudential Ins. Co. [Minn.] 108 N. W. 861.

46. Presumption may be overcome. Helbig v. Citizens' Ins. Co., 120 Ill. App. 58.

47. Amos-Richia v. Northwestern Mut. Life Ins. Co., 143 Mich. 684, 13 Det. Leg. N. 129, 107 N. W. 707. Where policy provided that it should not take effect until the first premium was paid while insured was in good health, and it appeared that internal revenue stamps required by law were not affixed, though placed in envelope attached to policy with directions to agent to attach them when put in force, held that burden was on plaintiff to prove delivery and payment of premium though policy was found among insured's papers after his death. Id.

48. Agent having power to issue policy on all cotton in warehouse held to have power to issue one covering a portion of it. Phoenix Assur. Co. v. Boyett [Ark.] 90 S. W. 284. A new building in process of construction held not an "unoccupied building" within the meaning of a list of prohibited risks furnished agents. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493. Application provided that no statements or promises made by person soliciting or taking application should be binding on company unless reduced to writing and presented to officers of company at home office in application. General agent of company authorized to procure applications and forward them to home office, concurrently with taking plaintiff's application, executed and delivered to him a writing to the effect that he was to examine applicants for the company until fees equaled amount of first year's premium for which insured had given notes. Company issued policy without knowledge thereof. Agent then sold notes and remitted proceeds, less commission, to

parent scope of his authority,[49] notwithstanding limitations on his authority of which the person dealing with him has no knowledge.[50]

Construction.[51]—The policy may contain conditions not found in the application, but outside of an independent agreement the application and policy together usually form the contract.[52] If there is a variance between the two, the policy controls.[53] By statute in some states the application cannot be considered a part of the contract or be received in evidence in an action thereon unless a correct copy thereof is attached to the policy.[54] A copy of the application is sometimes required

company. Plaintiff was appointed examiner but no applicants presented themselves to him for examination. He was compelled to pay notes which were in hands of bona fide holder. Held that he could not recover amount thereof from defendant, the agent having no authority to make contract binding company to furnish any applicants, even if contract could be construed as an attempt to do so, and company having in no way ratified his acts. Dickinson v. National Life & Trust Co. [S. D.] 107 N. W. 537. Evidence held to sustain finding that rule prohibiting local agents from insuring class of risks covered by policy declared on had been abrogated as far as agents' issuing such policy was concerned, and that they had authority to issue it. St. Paul Fire & Marine Ins. Co. v. Stogner [Tex. Civ. App.] 17 Tex. Ct. Rep. 260, 98 S. W. 218.

49. Authority of a general agent must be determined by the nature of his business and the apparent scope of his authority therein. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649. Evidence held to sustain finding that agent of foreign company was not a mere special agent with no other authority than that proved to have been specially given him, but that he possessed a broad general authority sufficiently large to make his delivery of policy to insured binding on company. Id. An agent intrusted with blank policies signed by the proper officers of the company and with authority to negotiate, fill up, and issue the same, may bind the company by an oral contract. King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892.

50. As to delivery of policy, which were not known to insured. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 619. Broker's agency for insured held to have ceased when policy had been prepared and countersigned by company's agent and had been given by latter to his clerk to be delivered to insured, so that insured was not chargeable with notice of actual limitation on agent's authority in letter which agent subsequently showed to broker, there being nothing to show that delivery of policy was to be made through broker. Id. Company held not entitled to rely on limitations on authority of soliciting agent to issue binding receipts. Starr v. Mutual Life Ins. Co., 41 Wash. 228, 83 P. 116.

51. See 6 C. L. 83.

52. Paquette v. Prudential Ins. Co. [Mass.] 79 N. E. 250. "Application" incorporated into policy by reference held to include all the statements on both pages of the application except medical examiner's report. Id. Application addressed to particular company contained warranty that insured would keep watchman in mill. Agent forwarded it to another who split up insurance between company named and two others. Held that policies of two latter companies, which in no way referred to application, could not be said to be issued on such application, nor was such application an application to them, and hence insured did not contract with them to keep watchman in mill. Waukau Mill. Co. v. Citizens' Mut. Fire Ins. Co. [Wis.] 109 N. W. 937. Application and policy are to be construed together, and any stipulation in the former, not inconsistent with the latter, becomes a part of the contract. As where beneficiary is named in application but not in the policy. Ogletree v. Hutchinson [Ga.] 55 S. E. 179.

53. Ogletree v. Hutchinson [Ga.] 55 S. E. 179.

54. Iowa: Under Code § 1819, failure to attach copy precludes company from pleading or proving application or representations therein or the falsity thereof. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198. Statute (Iowa Code 1897, § 1741) held to apply to fidelity bond insuring against loss through fraud or dishonesty of single employe. United States Fidelity & Guaranty Co. v. Egg Shippers' Strawboard & Filler Co. [C. C. A.] 148 F. 353. Writing executed by corporation for purpose of obtaining bond held an application or representation within meaning of statute. Id.

Massachusetts: Rev. Laws c. 118, § 73, held not to prevent proof of fraud by introduction of written application, no copy of which is attached, in cases where no application is referred to in the policy. Holden v. Prudential Life Ins. Co., 191 Mass. 153, 77 N. E. 309. Question and answer held properly excluded where copy of application attached to policy did not contain them, and no copy of the declarations and answers in which they were found was annexed. Paquette v. Prudential Ins. Co. [Mass.] 79 N. E. 250. Whenever a scheme of actual fraud in procuring the insurance, of which the negotiations form a part, is pleaded and shown, an unattached application may become material and admissible on that issue. Id. Where defendant sought to avoid policy because of concerted plan to defraud it existing at the inception of the contract, held that unattached application was inadmissible until foundation had been laid by the introduction of at least some evidence to sustain such claim. Id. Application held to form a part of the policy and to be admissible in evidence where copy was attached, though it did not have printed on it the words "under the laws of Mass., each applicant for a policy of insurance to be issued hereunder is entitled to be furnished with a copy of this application attached to any policy is-

to be returned at the time of a renewal as well as at the time of the original issuance of the policy.[55] The by-laws of mutual companies form a part of their contracts of insurance,[56] but where the insured agrees to be bound by by-laws annexed to the policy, and the policy requires special provisions not inserted therein to be attached thereto, by-laws not so inserted or annexed cannot be used to vary, contradict, or enlarge its terms.[57] Where the charter or by-laws are inconsistent with the provisions of the policy, the latter will ordinarily control.[58] Statutes of the state where the company is organized are a part of the contract and are binding on policy holders even though they are citizens of foreign states.[59]

In the interpretation of the contract the expressed intention of the parties controls if not in conflict with the statutes or public policy.[60] Language which is clear and unambiguous must be taken in its plain, ordinary, and popular sense.[61] The policy

sued thereon," as required by such section. Moore v. Northwestern Mut. Life Ins. Co. [Mass.] 78 N. E. 488.

Minnesota: Minn. Gen. Laws 1895, p. 430, c. 175, § 1, operates to exclude or eliminate from the contract all reference to an application a copy of which is not attached, and to render ineffective all defenses based upon anything contained in such application, and policy will be treated, construed, and enforced as if no written application had been made. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198. Demurrers to pleas of breaches of warranty and false representations in applications as to health and medical history and plea of false and fraudulent representations to medical examiner, the medical examination being a part of the application, held properly sustained. Id. Company failing to comply with provisions must be conclusively presumed to have elected to rely upon contract contained in policy without reference to any representation or warranty not contained in that instrument. Id. Plea in answer held to have raised question as to effect of statute so that it was proper for court to inquire into it. Id.

Pennsylvania: Under Act May 11, 1881 (P. L. 20), neither application nor its contents is admissible unless copy is attached. Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 A. 51. Where affidavit of defense admitted that written application had been made in which there were written questions and answers as to whether insured had kidney disease, held that defendant could not show false and fraudulent misrepresentations in that regard. Id. Are inadmissible in evidence and cannot be considered part of the contract. Hews v. Equitable Life Assur. Soc. [C. C. A.] 143 F. 850. Answers made by insured to medical examiner held not within statute where the policy and application constituted the entire contract and answers were neither referred to in former nor made part of latter. Id. Statute does not apply where contract is void by reason of fraud practiced by the insured in its inception. Id.

Wisconsin: Exception of certain "mutual companies in cities and villages" from operation of Rev. St. 1898, § 1945a, held to refer only to domestic companies, in view of Id. §§ 1941-1 to 1941-13. Waukau Milling Co. v. Citizens' Mut. Fire Ins. Co. [Wis.] 109 N. W. 937.

55. Rev. St. § 3623 clearly contemplates that there may be more than one application in connection with a life policy. Prudential Ins. Co. v. Gilligan, 7 Ohio C. C. (N. S.) 397.

56. When assented to by the member, as provided in the charter, constitutes the measure of duty and liability of the parties, if they are reasonable and not in violation of any principle of public law. Duffy v. Fidelity Mut. Life Ins. Co. [N. C.] 55 S. E. 79.

57. Gleason v. Canterbury Mut. Fire Ins. Co., 73 N. H. 583, 64 A. 187.

58. Insurer cannot invoke them to defeat policy claim. Bruger v. Princeton & St. M. Mut. Fire Ins. Co. [Wis.] 109 N. W. 95. Exclusion of copy of articles and by-laws offered for purpose of showing that they prohibited company from insuring more than two-thirds of the value of any property "including the insurance of other companies" held harmless where they were not referred to in policy or incorporated therein, and condition in policy did not contain the words quoted. Id. In view of Rev. St. 1899, § 7903, requiring policies of assessment companies to specify the exact sum payable thereunder on the happening of the contingencies insured against, the provisions of the policy in that regard control over inconsistent provisions in the by-laws. Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768.

59. N. Y. Laws 1892, p. 1958, c. 690, § 56, prohibiting appointment of receiver and accounting unless attorney general makes application or approves same. Brown v. Equitable Life Assur. Soc., 142 F. 835.

60. Policy to be given fair construction in harmony with meaning and intention when unambiguous and not unreasonable or against public policy. Jagoe v. Aetna Life Ins. Co. [Ky.] 96 S. W. 598. While policies are construed strictly against the insurer and forfeitures are not favored, yet courts cannot make new contracts for the parties or grant relief where a forfeiture has accrued under the plain and unambiguous terms of the contract. Jump v. North British & Mercantile Ins. Co. [Wash.] 87 P. 928. Cannot make new contracts. Ferguson v. Lumbermen's Ins. Co. [Wash.] 88 P. 128.

61. Kentucky Vermillion Min. & C. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. As to meaning of "cyclone," losses due to which were excepted from risk. Maryland Casualty Co. v. Finch [C. C. A.] 147 F. 388. Nontechnical words given ordinary meaning. Kansas Mut. Life Ins. Co. v. Whitehead [Ky.] 93 S. W. 609. Ordinary

should be construed as a whole and effect given to all its parts.[62] Written provisions control printed ones.[63] If two clauses are repugnant and cannot stand together, the first will stand and the latter be rejected.[64] The contract should be liberally construed in aid of the contemplated indemnity[65] and in favor of those who may naturally be presumed to have been the special objects of the insured's bounty.[66] A construction sustaining the contract will be preferred to one which would work a forfeiture.[67] In case of ambiguity or inconsistency the contract will be construed most strongly against the insurer and most favorably to the insured.[68] Where the written contract is susceptible on its face of a plain and unequivocal interpretation, resort cannot be had to evidence of custom or usage to explain its language or qualify its meaning.[69] Where it is ambiguous, however, it is to be construed in the light of the attendant circumstances and the intent of the parties.[70]

The ordinary office of an exception or proviso is to take special cases out of a general class or to guard against misinterpretation.[71] Where the exception is of something which would not without it have been included, it will be regarded as having been introduced merely from excessive caution and will not operate to include in the general class other matters of the same class as those excepted.[72] To ascer-

meaning of words. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 110 N. W. 246.

62. Herdic v. Maryland Casualty Co., 146 F. 396.

63. Binding receipt wholly in writing held to control conflicting provisions of application on printed form with blanks not filled out. Starr v. Mutual Life Ins. Co., 41 Wash. 228, 83 P. 116.

64. Particularly where latter is carelessly drawn and vague. Provision as to amount of indemnity for loss of arm. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750. A subsequent clause irreconcilable with a former one and repugnant to the general purpose and intent of the contract will be disregarded. Exception to risk in health policy removing from its operation every possible condition under which disease specifically insured against could occur. Jones v. Pennsylvania Casualty Co., 140 N. C. 262, 52 S. E. 578.

65. Fire policy where insured acts in good faith and fully and fairly discloses all information desired by company. Porter v. Insurance Co. of North America, 29 Pa. Super. Ct. 75.

66. Life policy. Lehman v. Lehman [Pa.] 64 A. 598, afg. 29 Pa. Super. Ct. 60.

67. If provisions are inconsistent or policy is open to two constructions, that which will sustain contract will be adopted rather than that which would work forfeiture. Kavanaugh v. Security Trust & Life Ins. Co. [Tenn.] 96 S. W. 499.

68. Brooks v. Conservative Life Ins. Co. [Iowa] 106 N. W. 913; Bickford v. Aetna Ins. Co. [Me.] 63 A. 552; President, etc., of Insurance Co. of N. A. v. Pitts [Miss.] 41 So. 5; Western Assur. Co. v. Ferrell [Miss.] 40 So. 8; Jones v. Pennsylvania Casualty Co., 140 N. C. 262, 52 S. E. 578; Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456; Edge v. St. Paul Fire & Marine Ins. Co. [S. D.] 105 N. W. 281; Kennedy v. Agricultural Ins. Co. [S. D.] 110 N. W. 116; Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204; Starr v. Aetna Life Ins. Co., 41 Wash. 199, 83 P. 112; Thomson v. United States Fidelity & Guaranty Co. [Wash.] 87 P. 486; Provident Sav. Life Assur. Soc. v. Taylor [C. C. A.] 142 F. 709, afg. 134 F. 932. Where it attempts to limit liability. Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, afg. 122 Ill. App. 507. So as not to defeat indemnity. National Fire Ins. Co. v. Three States Lumber Co., 119 Ill. App. 67; Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456. Provisions for forfeitures. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 110 N. W. 246. Provisions imposing forfeitures for collateral matters should be strictly construed against the insurer and confined in their application to the narrowest possible limits, particularly where they exact the disclosure of facts known to the insurer, or which it is bound to know, and of which the insured may be ignorant. Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211. Provision avoiding policy if there was in force another policy on same life previously issued by same company unless permission was indorsed thereon. Id. As to forfeiture for failure to give notice of loss. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013. Provision as to arbitration. Commercial Union Assur. Co. v. Parker, 119 Ill. App. 126. As to risk. Travelers' Ins. Co. v. Ayers, 119 Ill. App. 402. Appraisal. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35. Provision avoiding policy for vacancy of premises. Home Ins. Co. v. Gagen [Ind. App.] 75 N. E. 927.

69. Kentucky Vermillion Min. & Con. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Inadmissible to show meaning of term "watchman's clause" in provision "privileged to make alterations, etc., incidental to the business, to remain idle subject to the conditions of the watchman's clause." Id.

70. Bickford v. Aetna Ins. Co. [Me.] 63 A. 552.

71. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750.

72. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750. Exception of claim arising from death, etc., from proviso

tain the meaning of one of several exceptions from the risk, the rule noscitur a sociis will be applied.[73] A proviso utterly repugnant to the body of the contract and irreconcilable with it will be rejected.[74]

Conflict of laws.[75]—As a general rule the interpretation and validity of the contract are to be determined by the law of the place where the contract is made,[76] which is generally held to be the place where the policy is delivered and the premium paid.[77] Stipulations as to the place of the contract and as to what laws shall govern are valid and binding unless they impair contract obligations[78] or conflict with the laws of the state where the contract is made.[79]

§ 8. *Premiums and premium notes, dues and assessments, and payment of the same.*[80]—A promise to pay the premium may be implied from an acceptance and retention of the policy by the insured.[81] Policies sometimes provide for the deduction of the premiums from insured's wages in instalments, each instalment to pay for insurance for a specified period.[82] Entry of the payment in a premium receipt

that, in case of other insurance making total weekly indemnity in excess of value of insured's time, company should only be liable for such proportion of insurance as money value of time should bear to aggregate of weekly indemnity of total insurance, held not to operate to make proviso applicable to fixed indemnity payable on loss of arm. Id.

73. Word "cyclone," losses due to which were excepted from risk, held, when construed with other exceptions in connection with which it appeared, to refer to that character of windstorm distinguished by its concentrated force and violence, so resistless as to make it especially destructive to buildings in its pathway. Maryland Casualty Co. v. Finch [C. C. A.] 147 F. 388.

74. Removing from operation of policy every possible condition under which disease insured against could occur. Jones v. Pennsylvania Casualty Co., 140 N. C. 262, 52 S. E. 578.

75. See 6 C. L. 83.

76. Whenever the contract is silent as to the place of performance, the place of making the contract is presumed to be the place of performance and the interpretation and validity of the contract must be determined by the law of the place where the contract is made. Napier v. Bankers' Life Ins. Co., 51 Misc. 283, 100 N. Y. S. 1072.

77. In the absence of other evidence, the state where the application is made, the first premium paid, and the policy delivered. Napier v. Bankers' Life Ins. Co., 51 Misc. 283, 100 N. Y. S. 1072. Where policy purported to be signed and delivered in New York, consent to assignment thereof purported to be executed and delivered there, and policy provided that premiums were payable at home office in that state and that amount due should be payable after receipt at home office of proofs of death, held a New York contract though insured was a nonresident. Id. Contract is made by the insured when the contract is delivered to him and the premium paid or agreed to be paid. South Bay Co. v. Howey, 113 App. Div. 382, 98 N. Y. S. 909. Fact that policy insuring property of foreign corporation in New York was shown to have been subscribed by insurer's attorney in fact in that state, and that insurer had home office in that state, held not to show that contract was made there in absence of showing where it was delivered, so as to preclude plaintiff from recovering thereon because of its failure to obtain certificate authorizing it to do business there. Id. If a contract is made in one state to be performed in another, the place of payment and performance is the place of the contract. Where Pennsylvania company sent application to resident of Wisconsin, who filled it out and returned it, and policy was issued in former state and premium note was payable there, held that contract was made in Pennsylvania. Presbyterian Ministers' Fund v. Thomas, 126 Wis. 281, 105 N. W. 801.

78. See 6 C. L. 83, n. 11.

79. Provision that contract should be governed by, subject to, and construed only according to the laws of New York, and that the place of the contract was expressly agreed to be the home office of the company, held void under Revisal 1905, § 4806. Blackwell v. Mutual Reserve Fund Life Ass'n [N. C.] 53 S. E. 833.

80. See 6 C. L. 86.

81. In action for premium, evidence tending to show that fire policy was delivered by broker to insured, who promised to pay for it and kept it three months, held to make prima facie case. Westchester Fire Ins. Co. v. Gurian, 101 N. Y. S. 50.

82. Accident policy providing that premiums were to be paid by deductions from insured's wages construed, and held that where insured left employment after deduction of first instalment of premium, leaving no funds in employer's hands, and was injured after expiration of period covered by first instalment and while second remained unpaid, he could not recover. Aetna Life Ins. Co. v. Ricks [Ark.] 94 S. W. 923. Insurer agreed to accept orders on railroad company employing insured in payment of premiums, the company being the agent of the insurer and it being its duty to deduct premiums from insured's wages. Insured was told by insurer's agent that all that it was necessary for him to do was to execute assignment directing payment and premiums would be deducted in same manner as hospital fees. Insured executed orders. Subsequently he demanded from railroad all that was due him, and received full amount without de-

book provided for that purpose is sometimes required.[83] In the case of employers' liability insurance the premium is generally based on the compensation paid by the insured to his employes during the period covered by the policy.[84] Provision is often made for the payment of premiums in instalments,[85] any instalments remaining unpaid at the death of the insured to be deducted from the amount due under the policy.[86] Policies sometimes provide that the insured shall have a certain number of days of grace in which to make payment,[87] or that the agent may, under specified circumstances, accept premiums within a specified time after they come due.[88]

The delivery of the policy is prima facie evidence of the payment of the first

duction. He was ignorant and did not know how much was due him and supposed deduction had been made. Held insurer could not forfeit policy under provision that it should be void if insured failed to leave any instalment in paymaster's hands, failure being result of negligence of its agent. Johnson v. Standard Life & Acc. Ins. Co. [Tex. Civ. App.] 97 S. W. 831.

83. Provision that payment to be recognized must be entered in premium receipt book belonging with policy held to render inadmissible evidence of a premium not so entered, in the absence of any explanation as to why it was not entered. McNicholas v. Prudential Ins. Co., 191 Mass. 304, 77 N. E. 756. Plaintiff held not to have made out a case of fraud, accident, or mistake by testifying that payment had been made and then showing that it had not been entered. Id.

84. Evidence in action to recover additional premiums held not to sustain judgment for plaintiff. Fidelity & Casualty Co. v. Fischer, 101 N. Y. S. 545.

85. Evidence held to have conclusively shown that payment was made and accepted as and for a payment in full of a quarterly premium and not a payment on account of an annual premium with credit extended for the balance, so that policy was continued in force for only three months and had lapsed at time of insured's death, and verdict was properly directed for defendant. Battin v. Northwestern Mut. Life Ins. Co. [C. C. A.] 143 F. 473.

86. Whole year's premiums deducted from face of policy, though payable in quarterly instalments. Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016. Where policy contained a provision, made a part of the contract, that though "based on the receipt of premiums annually in advance, the premium may be made in semiannual or quarterly instalments in advance, but in such case any future instalments which at the maturity of the contract are necessary to complete the full year's premium shall be deducted from the amount of the claim," held that, on insured's death during first half of policy year, company was entitled to deduct premium for second half, though policy provided for semiannual instead of annual premiums. Bracher v. Equitable Life Assur. Soc. [N. Y.] 78 N. E. 714, rvg. 103 App. Div. 269, 92 N. Y. S. 1105. Provision for deduction held not inconsistent with absolute obligation on face of policy to pay amount of insurance. Id.

87. Where 30 days' grace given by policy and statute had not elapsed when agent received a part of the premium and agreed to continuance of the policy until the balance was paid, held that, policy being still in force, extension agreement did not "renew or create any liability on behalf of the company under the policy" within the meaning of a revival receipt given when such payment was made, and which provided that it should not be construed as having that effect. Carr v. Prudential Ins. Co., 101 N. Y. S. 158. Where policy provided that a grace of 30 days would be allowed and there was no express provision for forfeiture for nonpayment on the due date, held that it was not forfeited for nonpayment on such date but remained in full force during the period of grace so that beneficiary could recover where insured died during that period. Provident Sav. Life Assur. Soc. v. Taylor [C. C. A.] 142 F. 709, afg. 134 F. 932. Provision in regard to grace held an integral part of the policy and a contractual right of the assured, and not a mere personal privilege exercisable only in his lifetime or a mere continuing offer never accepted by him. Id. Notice specifying date when premium was due and that if not paid on that date policy would be forfeited held not to change contract, particularly where it provided that it did not do so. Id. Rights of parties being fixed by death of insured, no tender of premium after his death and during period of grace was necessary. Id. Provision for thirty days' grace held inapplicable to note given for part of second premium in view of provision therein that it should be payable at a specified time "without grace." Lefler v. New York Life Ins. Co. [C. C. A.] 143 F. 814. Further provision in note that policy should be void if note was not paid at maturity "except as otherwise provided in the policy" held not to change construction, words quoted referring only to automatic nonforfeiture provisions. Id. Similar provision held inapplicable to similar note given for past due premium. Bank of Commerce v. New York Life Ins. Co., 125 Ga. 552, 54 S. E. 643. Provision in note that policy should be void if note was not paid at maturity "except as otherwise provided in the policy itself" held not to require different construction. Id.

88. Where general agent had authority to accept premium within 30 days after it became due and deliver receipt of company renewing and continuing policy in force if he had no reason to doubt that insured was still insurable, held that his acceptance of premium within that time through a bank acting as his collecting agent and delivery of receipt to insured would operate as a renewal whether he had authority to extend the time for payment of premium or not,

premium.[89] In the absence of fraud an acknowledgment of payment in the policy is conclusive evidence thereof.[90] A provision that the policy shall not become effective until the first premium is paid does not require payment in cash in the absence of a further provision to that effect nor restrict the right of the company to accept notes therefor.[91] Failure of consideration is a defense to an action on premium notes.[92]

The liability of the applicant to pay the premium is a liability to the company and not to the agent, unless the latter pays the amount thereof to the company under an agreement that the applicant shall reimburse him.[93] Payment[94] to the company's duly authorized agent is binding on it.[95] The act of its agent in extending credit to the insured,[96] or in taking notes for the first premium, is binding on the company where he acts within the apparent scope of his authority in so doing,[97] regardless of express limitations on his authority of which the applicant has

and whether he made an agreement for 30 days' extension or not. Talbott v. Metropolitan Life Ins. Co. [C. C. A.] 142 F. 694.

89. Globe Mutual Life Ins. Ass'n v. Meyer, 118 Ill. App. 155. Is an acknowledgment of payment. Raburn v. Pennsylvania Casualty Co. [N. C.] 54 S. E. 283.

90. Company is estopped to prove, for the purpose of avoiding the policy, that the premium acknowledged in the policy to have been paid was not in fact paid. Helbig v. Citizens' Ins. Co., 120 Ill. App. 58. Provision that company insures a certain person in consideration of a specified sum, together with proof of the delivery of the policy to insured, is an acknowledgment of the receipt of the premium. Id.

91. Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025. Where company by its duly authorized agent delivers policy and accepts notes for premium, it is presumed that notes were accepted as payment. Kilborn v. Prudential Ins. Co. [Minn.] 108 N. W. 861.

92. Where agent inserted false answer in application though insured gave true ones, and insured discovered fraud before any part of contract had been performed by company or any real benefit received by insured or beneficiary, held that there was an entire failure of consideration for premium notes, since company was thereafter no longer estopped to rely on fraud. Curry v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 645, 92 S. W. 263.

93. Agent cannot become creditor of applicant without latter's consent, agreement, action, or acquiescence. Rafferty v. Romer, 122 Ill. App. 57. Whether defendant agreed to take policy only on condition that he was to render certain services to plaintiff's mother, the price of which was to be deducted from the premium, and whether he accepted policy without performance of such condition so as to become bound to pay premium in any event, held for jury under the evidence. Id.

94. Where company and bank to which note had been sent for collection notified insured that it was due, and insured, who had sufficient funds in bank for that purpose, told cashier to pay it, which latter promised to do, but money on deposit was never applied to payment of note and bank did not credit company or charge insured with the amount thereof on its books until after the fire, held that there was no payment. Driver v. Planters' Mut. Ins. Ass'n [Ark.] 93 S. W. 752. Evidence that amount of premium was left with child to be delivered to agent when he called held not to show payment, it not appearing that child gave it to agent. McNicholas v. Prudential Ins. Co., 191 Mass. 304, 77 N. E. 756.

95. Evidence of payment to third party, not defendant's agent, who undertook to remit it to defendant but did not do so, held insufficient. Shoemaker v. Commercial Assur. Co. [Neb.] 106 N. W. 316. Evidence held to sustain finding that person to whom insured paid premium was company's agent so that he could not be compelled to pay it again though agent failed to account therefor to the company. Globe & R. Fire Ins. Co. v. Robbins & Myers Co., 109 App. Div. 530, 96 N. Y. S. 378, afg. 88 N. Y. S. 996. Provision in policy that no person, unless duly authorized in writing, should be deemed the agent of the company held to apply only to matters connected with the making of the contract and not to collection of premium after contract was made. Id. Question whether bank, of which insured was a client and which acted as agent of company in collecting premium, took insured's draft for company or whether it discounted draft and advanced money for payment of premium, and hence whether transaction constituted payment on day when receipt was delivered, though draft was subsequently dishonored, held for jury under the evidence. Talbott v. Metropolitan Life Ins. Co. [C. C. A.] 142 F. 694.

96. Superintendent and general agent held to have had authority to receive part of premium and to consent to continuance of policy until balance was paid, and to subsequently receive balance, no limitation on his authority having been shown. Instruction approved. Carr v. Prudential Ins. Co., 101 N. Y. S. 758. Evidence held to sustain finding that agent when he accepted a payment of part of premium consented to continuance of policy until balance was paid. Id.

97. At least where policy contains no provision that premiums are to be paid in cash. Kilborn v. Prudential Ins. Co. [Minn.] 108 N. W. 861. Agent of foreign company acting for it in negotiating contract held company's agent for purpose of receiving premium by virtue of Laws 1895, p. 437, c. 175, § 88. Id.

no knowledge.[98] It is presumed that he is acting within the scope of his authority in this regard.[99] Where the company permits agents at their own risk to advance the first premium and take notes of the applicant therefor, the giving of such a note is regarded as a payment as between the applicant and the company,[1] provided the transaction is made in good faith.[2] The indorsement of the amount of an agent's commission on a note given by him for the premium on a policy on his own life is not the payment of an instalment of the premium in advance within the meaning of a provision allowing such payments.[3] So too, the act of the agent in crediting an applicant with the amount of his commission is not a payment in cash where such commission accrues only when the premium is paid to the company in cash.[4]

The giving of notice of the accrual of premiums is a condition precedent to forfeiture for their nonpayment when required by the contract[5] or by statute,[5] or

Agent of foreign life company, who has obtained license as provided by Gen. Laws 1895, p. 392, c. 175, and authorized to solicit insurance and collect first premium, has apparent authority to take promissory note therefor. Id.

98. Provision in policy that agent had no authority to extend time for payment of first premium held not binding on insured where he never saw the policy. Kilborn v. Prudential Ins. Co. [Minn.] 108 N. W. 861. Limitations on agent's authority in policy, of which applicant has no knowledge, have no application to matters occurring before policy is issued. Id.

99. Kilborn v. Prudential Ins. Co. [Minn.] 108 N. W. 861.

1. Delivery to agent who paid premium and took note from insured held to constitute complete delivery as between latter and the company, provided transaction was in good faith. Payne v. Mutual Life Ins. Co. [C. C. A.] 141 F. 339. Rule would be otherwise, however, if transaction was result of fraudulent device participated in by insured for purpose of increasing apparent amount of business done by agent so as to enable him to obtain a prize, and it was agreed that no premium should be paid or obligation assumed by insured. Id. Where it was a common practice, known to and approved by company, for agents to take notes for first premiums payable to themselves and to charge themselves therewith in their accounts, the company holding them responsible as for a cash collection, held that the giving of note was a payment. Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025. Where insured gave agent note for premium and company charged agent with amount thereof which he paid. Buckley v. Citizens' Ins. Co., 112 App. Div. 451, 98 N. Y. S. 622.

2. Question whether policy, on which agent paid full net first year's premium to company, taking, it was claimed, a note from insured and her husband therefor as company permitted him to do at his own risk, was taken out in good faith or was issued in pursuance of fraudulent scheme of agent, participated in by insured, to increase apparent amount of business done by him and thereby enable him to obtain a prize, held for the jury under the evidence. Payne v. Mutual Life Ins. Co. [C. C. A.] 141 F. 339. Alleged agreement that insured need not pay note held not to affect his liability thereon. Id.

3. Franklin Ins. Co. v. McAfee, 28 Ky. L. R. 676, 90 S. W. 216.

4. General agent of company had authority to issue binding receipt on payment of first premium in cash, which operated to effect insurance from date of its issuance if approved and accepted by company, and provided that if application was rejected amount paid was to be returned to applicant. He issued such a receipt on receiving a note for half the amount of the premium, which he discounted, and agreed to give applicant credit for other half, to which he claimed to be entitled on account of commissions. Agent's contract provided that he should have as commissions 50 per cent. of first premium, which was, however, to accrue only when premium was paid in cash to company, and that all sums collected by him should be held in trust for company. Applicant died before policy was issued. Held that, agent not having received payment in cash before issuing receipt, transaction was not binding on company in absence of proof that it ratified it with full knowledge, nor was acceptance and approval of contract evidenced by receipt binding on it without such knowledge. Union Cent. Life Ins. Co. v. Robinson [C. C. A.] 148 F. 358, rvg. 144 F. 1005. Attempted gift of commissions having been for purpose of enabling agent to earn bonus, held that he was acting in his own interest and adversely to that of the company so that his knowledge would not be notice to the company. Id.

5. Agreement by company to notify assignee of maturity of all premiums as they become due held not to require it to give notice of maturity of note given by assignor for past due premium prior to the assignment. Bank of Commerce v. New York Life Ins. Co., 125 Ga. 552, 54 S. E. 643. By-law of assessment company providing that notice of assessments may be given to members by mailing notices to them, properly addressed, is valid and binding. Duffy v. Fidelity Mut. Life Ins. Co. [N. C.] 55 S. E. 79. Where the mailing of a notice of assessments is a condition precedent to a right of forfeiture for nonpayment, the company must show that the notice was mailed, properly addrssed, within the time fixed. Id. A provision of the by-laws making the certificate of the treasurer that the notice was mailed

where the company has by long custom led the policy holder to believe that it will be given.[7]

Premiums paid under a mistake of fact may be recovered back, though there was negligence on the part of the person paying them.[8] So too, if the policy never attaches and no risk is assumed, the insured may recover back the premiums paid unless he has been guilty of fraud,[9] or unless the contract is illegal and he is in pari delicto.[10] As a general rule premiums paid on a policy void for want of insurable interest cannot be recovered, the parties being in pari delicto,[11] but this rule has been held not to apply where one has been induced to take out the policy through the fraud of the insurer and is himself innocent.[12] Mere ignorance of the law on the part of the insured will not, however, authorize a recovery.[13]

Statutes in some states prohibit the allowance of rebates on life insurance premiums and provide a fine for so doing.[14]

conclusive evidence of that fact is invalid and unreasonable, and does not preclude admission of evidence that notice was not received, particularly as by-law does not require treasurer to state fact within his own knowledge. Id. Where certificate relied on referred to attached affidavit of mailing clerk, held that it was hearsay. Id. Mailing of notice to last post office address of member appearing on books of company, in accordance with the terms of the policy, held sufficient, letter of insured not being an authorization to change his permanent address and company not being bound to send notice to beneficiary. Smith v. Mutual Reserve Life Ins. Co. [Wash.] 87 P. 347.

6. Laws 1892, p. 1972, c. 690, § 92, as amended by Laws 1897, p. 91, c. 218, providing that no life company shall within one year after default in payment of premium declare policy forfeited or lapsed, unless specified notice shall have been duly addressed and mailed to insured "at his last known post office address in this state," applies only to New York contracts made with persons having a known post office address in that state. Napier v. Bankers' Life Ins. Co., 51 Misc. 283, 100 N. Y. S. 1072. Notice not in form required held ineffective to enable defendant to declare policy forfeited or lapsed. Id. Where note given for premium expressly provided that policy should lapse if it was not paid at maturity, and action on policy was not brought within one year from the default day, held that it was unnecessary to determine whether notice required by statute was mailed or not. McGuire v. Union Mut. Ins. Co., 99 N. Y. S. 891. Where affidavit as to mailing of notice was defective, and there was evidence that notice was never received, held that question whether such notice was mailed was one of fact precluding nonsuit. Carr v. Prudential Ins. Co., 101 N. Y. S. 158. Statute held inapplicable where company made no attempt to cancel policy until more than a year after default. McDougald v. New York Life Ins. Co. [C. C. A.] 146 F. 674. Statute applies to defaults in payment of premiums under policies in force when it went into effect. Id. Laws 1898, p. 160, c. 85, providing for service of notice upon all policy holders irrespective of their place of residence, applies only to companies issuing "stipulated premium" policies. Napier v. Bankers' Life Ins. Co., 51 Misc. 283, 100 N. Y. S. 1072.

7. Kavanaugh v. Security Trust & Life Ins. Co. [Tenn.] 96 S. W. 499. In the absence of a statute or a provision in the contract making the mere mailing of the notice sufficient, it must be shown to have actually been received before a forfeiture for failure to pay on the day named therein can be based thereon. Id.

8. Particularly if payee was in any way responsible for mistake. Hopkins v. Northwestern Nat. Life Ins. Co., 41 Wash. 592, 83 P. 1019. Premiums paid by insured after he was entitled to endowment without further payment and which he was induced to make through company's false representations inducing fear that policy would be forfeited if they were not made. Id.

9. As where policy never attaches for breach of condition precedent as to ownership of property. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485.

10. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485.

11. Burden on plaintiff to bring himself within exceptions. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526.

12. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. Allegations that plaintiff paid a larger assessment during first year upon defendant's representations that it was necessary for him to do so in order to keep policy valid, and that when he made application he believed contract to be valid, held not to state facts entitling plaintiff to relief, there being nothing to show that he did not enter into the contract of his own volition and as a pure speculation, or that his belief that contract was valid was not due to a mistake of law. Id.

13. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. Complaint held not to state facts entitling plaintiff to relief where, from anything appearing therein, the representations of the defendant relied on by plaintiff were as to the legal effect of the contract based on facts known to both parties. Id.

14. St. 1903, § 656. United States Life Ins. Co. v. Com., 28 Ky. L. R. 948, 90 S. W. 970. Foreign company held not liable for fine for act of its soliciting agent in absence of evidence that his act was known to it or its general agent. Id.

Mutual companies.[15]—The purposes for which mutual companies may levy assessments,[16] and the amount[17] and disposition thereof,[18] are generally regulated by statute. In the absence of a charter provision to the contrary, the company may make rates for insurance with a view of creating a surplus and of subsequently distributing the same to members in so far as not needed in the business.[19] The levying of an assessment does not ordinarily make a member a debtor to the company so as to enable it to sue him therefor in the event of his neglect or refusal to pay, but the sole effect of a default is to relieve the company from further liability to him on the contract of insurance.[20] The company cannot suspend a member for nonpayment of an assessment when at the time such assessment becomes due it owes him a greater sum under the policy.[21]

§ 9. *Warranties, conditions, and representations. In general.*[22]—A warranty is a statement made by the assured which is susceptible of no construction other than that the parties mutually intend that the policy shall not be binding unless such statement be literally true.[23] An affirmative warranty consists of representations as to existing facts[24] and a promissory warranty of representations as to things to be done in the future.[25] In the absence of a statutory provision to the contrary,[26] the falsity of a statement which the parties have expressly warranted to be

15. See 6 C. L. 91. For collection of assessments by receiver in case of insolvency, see § 2A, ante.

16. May make assessments for purpose of paying license tax, under Code § 1765, authorizing assessments to meet expenses. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

17. Policy in mutual hail association organized under Gen. St. 1894, §§ 3333-3360, and acts amendatory thereof, which was issued in 1901, held subject to annual assessment of 5 per cent. of its face under by-laws and Laws 1899, p. 484, c. 357, § 3. Farmers' United Tp. Mut. Hail Ass'n v. Dally [Minn.] 107 N. W. 555. Laws 1903, p. 397, c. 271, relating to premiums and assessments and its incorporation into by-laws, held not to relieve old policy holders from obligations imposed on them by law in force when policy was issued, even though assessment was levied after it went into effect. Id.

18. Laws 1903, p. 339, c. 271, § 16, only requires mutual hail associations to credit to guaranty fund any of the income received each year remaining after paying all legal obligations. Farmers' United Tp. Mut. Hail Ass'n v. Dally [Minn.] 107 N. W. 555.

19. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135.

20. Blackwell v. Mutual Reserve Fund Life Ass'n [N. C.] 53 S. E. 833.

21. Mutual fire company. Freeman v. Farmers' Mut. Fire & Lightning Ins. Co. [Mo. App.] 97 S. W. 225.

22. See 6 C. L. 91.

23. Provision limiting total insurance to three-fourths of the cash value of the property held not a warranty, there being no provision for forfeiture for overvaluation, and hence overvaluation would not avoid policy where there was no fraud and no great excess. Pennsylvania Fire Ins. Co. v. Waggener [Tex. Civ. App.] 17 Tex. Ct. Rep. 8, 97 S. W. 541. Erroneous statements made by applicant as to what other companies were on the risk held not a warranty, the policy being in the standard form and containing no such warranty. Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances, 99 N. Y. S. 517.

24. Johnson v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 697.

25. Iron-safe clause. Johnson v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 697.

26. **Kentucky:** Provisions in policies and applications declaring representations warranties held in conflict with St. 1903, § 639, providing that all statements and descriptions in the application shall be deemed and held to be representations and not warranties, and that no misrepresentations shall prevent a recovery unless material or fraudulent. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Whether a fact is material depends upon whether prudent men of ordinary judgment engaged in the same business would, if it had been disclosed to them, either have raised the price or refused the risk. Id. Question is what would company probably have done had it known the truth, which is to be determined from usual course of those engaged in such business under similar circumstances. Instruction modified. Id. If information concerning a matter material to the risk is substantially untrue, the policy is avoided whether the misrepresentation caused the loss or not. Id. Misstatements as to health held to have avoided policy as matter of law. Metropolitan Life Ins. Co. v. Schmidt [Ky.] 93 S. W. 1055.

Maryland: Under Code Pub. Gen. Laws 1907, art. 23, § 196, when application for life policy contains clause of warranty of truth of answers to questions, no misrepresentation or untrue statement therein made in good faith works a forfeiture or is a defense unless in regard to a matter material to the risk. Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211.

Missouri: Rev. St. 1899, § 7890, providing

true,[27] or the breach of a promissory warranty,[28] avoids the policy whether actually material to the risk or not[29] and regardless of the insured's good faith.[30] False representations, on the other hand, avoid the policy only if material to the risk or fraudulent.[31]

Burglary insurance policies frequently provide that they shall be void if the conditions or circumstances of the risk are materially changed,[32] or if the premises are left unoccupied for more than a specified time[33] without the written consent of the insurer.

that no misrepresentation made in obtaining or securing life policies shall be deemed material or render the policy void unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and that whether it so contributed shall be a question for the jury, places warranties and representations on same footing, and company cannot avoid policy for warranty not material to risk. Keller v. Home Life Ins. Co. [Mo.] 95 S. W. 903. Company held to have precluded itself from questioning applicability of statute by requesting instruction predicated thereon. Id. Statute applies to representations in application for old line policy as to health of applicant and treatment by other physicians, and whether false representations in that regard contributed to insured's death is for the jury. Id. Statute does not deprive foreign company of its liberty or property without due process of law or deny it the equal protection of the laws. Northwestern Nat. Life Ins. Co. v. Riggs, 27 S. Ct. 126.

North Carolina: Under 2 Revisal § 4646, all statements or descriptions in application or policy are to be deemed representations and not warranties, and no representation prevents a recovery on the policy unless material or fraudulent. Fishblate v. Fidelity & Casualty Co., 140 N. C. 589, 53 S. E. 354. A fact is material to the risk if the insurer would naturally be influenced thereby in making the contract. Id. Instruction that to become material a misrepresentation must have been as to something contributing to loss of sight for which indemnity was claimed held harmless in view of finding as to waiver. Id.

27. Where answer in application, warranted to be true, is false as far as it goes, policy is avoided though it fails to answer whole inquiry. Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 A. 280. As to date when applicant was last attended by physician and complaint for which he was attended. Id. Evidence held to show that warranty that beneficiary in accident policy was insured's wife was false. Gaines v. Fidelity & Casualty Co., 111 App. Div. 386, 97 N. Y. S. 836.

28. Failure to substantially comply with promissory warranty does not avoid the contract of insurance but precludes a recovery thereon. Iron safe clause. Johnson v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 697.

29. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 S. W. 778. That insured had no reason to fear incendiarism. Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914. Answers in application made a part of the contract and incorporated into policy by reference held warranties so that policy was voidable at election of company if they were not literally true when made. Instruction held erroneous. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61. Stipulation in policy that if any statements in application were untrue policy should be void held reasonable. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918. Where by the express terms of the policy the application is made a part of the contract, and by the terms of both the application and the policy the statements in the former are made warranties, the question of their materiality is unimportant. Id.

30. Perry v. Hancock Mut. Life Ins. Co., 143 Mich. 290, 12 Det. Leg. N. 978, 106 N. W. 860.

31. Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211. Where application for reinsurance in effect represented that wheat insured was in a warehouse designated as such on certain maps when in fact it was in an elevator for property in which the rate was higher, held that there was a misrepresentation as to a material fact which avoided policy. Fireman's Fund Ins. Co. v. Aachen & M. Fire Ins. Co. [Cal. App.] 84 P. 253. Answer as to cause of mother's death held a representation and not a warranty so that its falsity did not avoid policy in absence of proof that insured knew that it was false. Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261. Under Rev. Laws c. 118, § 21, statements of insured that building insured was dwelling house was not completed and would not be occupied until completed, being material representations, became part of policy though not incorporated therein. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493. Fact that applicant for surplus line insurance, procured from companies not authorized to do business under the laws of the state and permitted to be taken out by Laws 1892, p. 1991, c. 690, as amended by Laws 1894, p. 1378, c. 611, § 1, on request for names of three admitted companies on the risk by mistake gave names of two who were not, held not to avoid policy where there were in fact four such companies on the risk, the error in the names having worked no prejudice to defendant. Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances, 99 N. Y. S. 517.

32. Insured held precluded from recovering on policy of burglary insurance by failure to notify company of fact that house had been left in charge of servants while repairs, etc., were being made. Katzenstein v. Fidelity & Casualty Co., 48 Misc. 496, 96 N. Y. S. 183.

Fire insurance.[34]—Fire policies ordinarily provide that they shall be void if the real interest of the insured in the property is not stated,[35] if his interest is other than unconditional and sole ownership[36] or if he is not the owner of the premises in fee,[37] or if without the consent of the insurer there is any change in the title, interest, or possession of the property,[38] if the property is or becomes incumbered by a mortgage or otherwise[39] in case of any increase in the hazard,[40] if gasoline is kept or

33. Policy insured against loss of property by theft from the building "actually occupied by the insured," and provided that it should be void if the "conditions or circumstances of the risk" were changed without the written consent of the company. It was further provided that policy should be void if the premises were left without an occupant for more than six consecutive months without written permission. Held that insured had right to leave premises unoccupied for a period not exceeding 6 months without consent, and hence could lease them for that period to persons not shown to be of a criminal or suspicious character since their possession would necessarily afford more protection to property. Thomson v. U. S. Fidelity & Guaranty Co. [Wash.] 87 P. 486.

34. See 6 C. L. 94.

35. Unconditional and sole ownership not having been affected by contract, held that failure to disclose it was not a misstatement of the insured's interest. National Fire Ins. Co. v. Three States Lumber Co., 119 Ill. App. 67. Agreement held not to have constituted insured and third persons partners. Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599, 98 N. Y. S. 760.

36. Such a provision is reasonable and will be given full force and effect unless waived. In re Millers' & Manuf'rs' Ins. Co. [Minn.] 106 N. W. 485. Provision held to relate to conditions existing at the time of the inception of the contract and not to subsequent changes of title. Id. Provision held inapplicable to piano which was not covered by the policy. Swift v. Teutonia Ins. Co., 28 Pa. Super. Ct. 253.

Insured held unconditional and sole owner. Insurance Co. v. Waller [Tenn.] 95 S. W. 811. Vendee in possession under conveyance in fee simple, notwithstanding part of purchase price was not yet due under terms of contract of sale, and law gave vendor a lien therefor. Clause relates to legal character of title. Insurance Co. of North America v. Pitts [Miss.] 41 So. 5. Vendor's lien does not work forfeiture. Planters' Mut. Ins. Co. v. Hamilton [Ark.] 90 S. W. 283. One who had equitable title and was in possession under a land contract. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952. Evidence held to show that insured had not parted with title and was sole owner. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987. Such ownership held not affected by contract in relation to cutting timber on land, etc., which at most was only an agreement which might ripen into an equitable title in the future. National Fire Ins. Co. v. Three States Lumber Co., 119 Ill. App. 67.

Policy held avoided: Where insured conveyed property by deed absolute on its face, under parol agreement that same should be held as collateral security for debt. O'Connor v. Decker, 30 Pa. Super. Ct. 579. Where policy was issued to plaintiff individually, held that petition in suit brought by him as trustee for children alleging that he held property in trust for children was properly dismissed. Fox v. Queen Ins. Co., 124 Ga. 948, 53 S. E. 271.

37. Provision held to relate to conditions existing at the inception of the contract and not to subsequent changes of title. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485. Insured held owner in fee. Insurance Co. v. Waller [Tenn.] 95 S. W. 811. Vendor's lien does not work forfeiture. Planters' Mut. Ins. Co. v. Hamilton [Ark.] 90 S. W. 283. Petition alleging that property was held by plaintiff in trust for his children, for whose benefit he sued, held properly dismissed where policy was issued to him individually. Fox v. Queen Ins. Co., 124 Ga. 948, 53 S. E. 271.

38. The word "interest" means a right in the property less than a title and has no application where the insured owns the title. Garner v. Milwaukee Mechanics' Ins. Co. [Kan.] 84 P. 717.

Policy held avoided: Where insured executed executory contract of sale providing for delivery of deed when final payment was made and giving vendee right to possession before passing of title, as tenant of vendor, without any pay or rent therefor, and that vendee should pay taxes, etc., from date of contract, and vendee went into possession thereunder. Brighton Beach Racing Ass'n v. Home Ins. Co., 113 App. Div. 728, 99 N. Y. S. 219. By conveyance of property by insured to his wife through third person. Kompa v. Franklin Fire Ins. Co., 28 Pa. Super. Ct. 425. Even though procured through fraud of wife and such person. Instructions held erroneous. Chulek v. U. S. Fire Ins. Co., 30 Pa. Super. Ct. 435. By absolute conveyance of property and the taking of a mortgage from the vendee to secure purchase money in whole or in part. Jump v. North British & Mercantile Ins. Co. [Wash.] 87 P. 928.

Policy held not avoided: By transfer of property by plaintiff to lienholders and retransfer by them to him, and execution by him of deed of trust to them, the object being to secure a change in the form of the security, though some time elapsed between two transfers. Pennsylvania Fire Ins. Co. v. Waggener [Tex. Civ. App.] 17 Tex. Ct. Rep. 8, 97 S. W. 541. Where insured, who owns the title, makes an executory contract to convey the property and consideration has been fully paid, but there has been no transfer either of title or possession at the time of the fire. Garner v. Milwaukee Mechanics' Ins. Co. [Kan.] 84 P. 717.

39. Such a provision is valid. Wedding-

used on the premises,[41] if the premises are occupied by a tenant[42] or remain vacant and unoccupied for more than a specified period,[43] if a manufacturing or other es-

ton v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271. Letter of president of company refusing to make loan to insured, to be secured by chattel mortgage on insured property, or to indorse his note, and wishing him "success in his undertaking," held not a consent to the insured incumbering the property, in any event where the incumbrance exceeded the amount of the requested loan. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271. Unrecorded mortgage avoids policy, being good as between parties. Rhea v. Planters' Mut. Ins. Co. [Ark.] 90 S. W. 850.

40. Hazard not necessarily increased by vacancy. Chismore v. Anchor Fire Ins. Co. [Iowa] 108 N. W. 230. Question whether risk was increased by allowing house to remain vacant after mechanics, who were building it, had left it, held one of fact under the circumstances. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493.

41. Temporary presence of small amount of gasoline in bottle, which was in no way connected with origin of fire, held not to avoid policy, it being a technical violation only. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. Where policy provided that it should be void if gasoline should be "kept, used, or allowed" on the premises, held that insured could not recover where her tenant set up a gasoline stove for domestic use and fire was caused by ignition of gasoline, though insured had forbidden tenant to use such a stove and was ignorant of the fact that he was doing so. McCurdy v. Orient Ins. Co., 30 Pa. Super. Ct. 77. There being no definite intention as to duration of use of gasoline stove, it could not be regarded as merely temporary. Id. Where policy authorized use of gasoline lighter, held that it was not error to refuse to allow amendment alleging that it was defective and that that fact was known to insured or could have been known by exercise of ordinary care for purpose of taking advantage of provision avoiding policy if risk was increased by any means within the knowledge or control of the insured, the liability of the lighter to get out of repair being a risk assumed by the insurer, and amendment not alleging that risk was increased by any means within insured's knowledge or control, particularly where insurer was permitted to attempt to prove allegations of amendment but failed. German Ins. Co. v. Goodfriend [Ky.] 97 S. W. 1098.

42. Provision held not intended to be applicable where policy covered building which insurer knew was so occupied when it was issued, in view of fact that condition was one of a class or group separated by "or" and appeared in policy executed upon a printed form which manifestly was designed for exclusive use in insuring houses to be occupied by owner. Ohio Farmers' Ins. Co. v. Vogel [Ind.] 76 N. E. 977.

43. Though insurance is suspended by vacancy it is revived by reoccupancy, and hence insured is entitled to recover when the premises are occupied when destroyed though they had previously been vacant for more than the prescribed period. Insurance Co. of North America v. Pitts [Miss.] 41 So. 5. The condition as to vacancy and unoccupancy must be construed with reference to the class or character of property to which it relates. Ohio Farmers' Ins. Co. v. Vogel [Ind.] 76 N. E. 977. When used in policies covering property occupied by tenants the condition will be deemed to have been made in view of the probability that there will be changes of tenants and that some time will be necessary to effect such changes, and the policy will not be avoided because of vacancy during the necessary and reasonable time between the leaving of one tenant and the coming in of another. Id. Where policy was issued with knowledge that building was occupied by tenant and was to be used as tenement, and term of insurance was for three years, held not avoided because tenant moved out four hours before fire without insured's knowledge or consent. Id. The words "become vacant by the removal of the owner or occupant" refer to a permanent removal and entire abandonment of the house. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493. Where building insured as dwelling house was in process of construction when policy was issued, and agent was informed and understood that insured had not occupied it and could not occupy it in sense of living in it as a home, until finally ready for occupancy, held that provision for forfeiture in case it became vacant for more than 30 days before fire by removal of owner without company's written permission was not intended to become applicable until occupancy had commenced. Id. Statements of insured, being material representations, were incorporated in policy under Rev. Laws c. 118, § 21, though not expressed in policy. Id. All that insured undertook to do was to use building as dwelling house when it was occupied. Id. Hence policy was not forfeited by reason of fact that house remained vacant for more than specified period after mechanics had left it while insured was waiting to occupy it until it could be supplied with water. Id. Insured never having occupied house held that it could not be said that it had ever become vacant by reason of his removal. Id. Permit allowing mechanics to work in and about premises for 30 days held designed to prevent forfeiture under provision prohibiting increase of risk and not to refer to provision prohibiting vacancy, and hence did not operate to make vacancy clause applicable immediately on termination of 30 days therein specified. Id. Where house is not described as occupied or unoccupied, and there is no warranty or presumption of present or future occupancy, parol evidence that it was in process of erection when policy was issued, and hence could not be inhabited in sense of being a residence until completion, does not contradict written instrument and is admissible. Id. Provision in policy of fire insurance on barn that it should be void if the "premises" should be or become vacant, unoccupied, or uninhabited, held to have reference to continued occupancy of farm by

tablishment covered by the policy shall cease to be operated for more than a specified time,[44] or if additional insurance is obtained.[45] Policies covering stocks of merchandise generally require the insured to take certain inventories[46] and keep certain books[47] and to keep the same in a fire-proof safe at night and produce them after the fire.[48] A substantial compliance with this provision is generally held to be sufficient,[49] and this rule is by statute in some states made applicable to all the terms, conditions, and warranties of policies covering personal property.[50]

human beings, the word "premises" meaning the farm, so that policy was not avoided because evidence showed that barn had never had anything in it. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 827. Vacancy held to preclude recovery though insured. whose title was a sheriff's certificate and who had not yet received deed, had neither the right to the possession nor control of the premises. Chismore v. Anchor Fire Ins. Co. [Iowa] 108 N. W. 230.

44. Provision that policy should immediately cease and determine if plant should be idle or shut down for more than 30 days unless notice was given to company and permission indorsed on policy held reasonable and valid. Kentucky Vermillion Min. & C. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Violation held to have avoided policy. Id. Where policy warranted that watchman should be constantly employed at all times when property should be idle, and provided that it should be void if idle for more than 30 days without permission indorsed on policy, held that proof of presence of watchman for 30 days prior to fire did not show compliance with warranty. Id. Mere temporary suspension is not ceasing to operate. Waukau Mill. Co. v. Citizens' Mut. Fire Ins. Co. [Wis.] 109 N. W. 937. Where it was known to company at time of issuing policy on mill run by water power that it could not be operated in severe winter weather because of lack of power, held that period of such necessary cessation must have been contemplated by the parties as not within the clause avoiding the policy for cessation of operation, and a failure to operate during such period did not avoid the policy. Id.

45. Provision held valid. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397. Question whether notice of the existence of other insurance was given to company as required by policy held for jury under the evidence. Bruger v. Princeton & St. M. Mut. Fire Ins. Co. [Wis.] 109 N. W. 95.

46. In determining what constitutes an inventory within the meaning of the iron-safe clause, regard must be had to the purpose for which it is required, in seeking which all parts of the clause should be read and considered together. Ruffner Bros. v. Dutchess Ins. Co. [W. Va.] 53 S. E. 943. An "inventory" of a stock of merchandise within the meaning of the iron-safe clause is a list of all the articles of merchandise in the stock sufficiently itemized to show the kinds and numbers or quantities thereof, together with their values at the time of making the same, as nearly as they can be ascertained. Id. In case of a store opening with an entirely new stock of goods at or about the date of the issuance of the policy, the invoices of the first lot of goods put into it, giving the quantities thereof and the cost prices, if preserved and kept for production upon demand of the insurer as and for an inventory, constitute such a list, and insured will have substantially and sufficiently complied with provision requiring taking of inventory. Id. Where iron-safe clause required inventory to be taken within 30 days from date of policy and that books should show condition of the business from the date of the inventory, held that there could be no breach of such provisions where fire occurred less than 30 days from date of policy. Parker & Co. v. Continental Ins. Co. [N. C.] 55 S. E. 717.

47. Iron-safe clause held to require books to be kept from issuance of policy and not from date of inventory. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137.

48. Provision requiring insured to keep books and inventory in fireproof safe and in case of loss to produce them for the inspection of the insurer, and that a failure to produce them shall avoid the policy, is reasonable and valid. Gish v. Insurance Co. [Okl.] 87 P. 869. Failure to comply with iron-safe clause held to prevent recovery, it being a condition precedent. Shawnee Fire Ins. Co. v. Knerr, 72 Kan. 385, 83 P. 611. Iron-safe clause is a promissory warranty and a failure to substantially comply therewith does not avoid the contract but defeats the right to recover thereon. Johnson v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 697. Evidence held insufficient to show either literal or substantial compliance. Id.

49. That is, though insured fails to keep it in all respects, yet his right to indemnity remains if he has so far complied that its purpose will not be defeated. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137. Plaintiff held to have substantially complied. Id. Proof of keeping of merchandise account and an account of cash sales, and production of same in court, held to show substantial compliance though invoice book was left on shelf in store and burned. People's Fire Ins. Ass'n v. Dully Gorham Co. [Ark.] 95 S. W. 152. Evidence held to show substantial compliance with provisions as to keeping books and preparing inventory. Security Mut. Ins. Co. v. Woodson & Co. [Ark.] 95 S. W. 481. Evidence held to show substantial compliance as to keeping books. Queen of Arkansas Ins. Co. v. Cooper-Cryer Co. [Ark.] 98 S. W. 694. Held substantial compliance though book containing credit sales was destroyed, where it appeared that such sales were small part of business and were copied from lost book into another book, which was preserved and presented for inspection. Security Mut. Life Ins. Co. v. Berry [Ark.] 98 S. W. 693.

50. Under Kirby's Dig. § 4375. Iron-safe clause. People's Fire Ins. Ass'n v. Dully Gorham Co. [Ark.] 95 S. W. 152; Security Mut.

In order that overvaluation in the application may avoid the policy on the ground of fraud, it must have been willful and made with an intent to deceive, which was successful.[51]

Life and accident insurance.[52]—Life policies generally provide that they shall be void if the applicant makes untrue answers to questions in regard to his health,[53] his use of intoxicants,[54] his occupation,[55] as to when he last consulted,[56] was attended by,[57] or was under the care of a physician,[58] or if his answers to questions in the application are not full and complete.[59] A provision in the application that where nothing is written in answer to a question it is agreed that the warranty is true

Ins. Co. v. J. E. Woodson & Co. [Ark.] 95 S. W. 481. Act makes a substantial, as contradistinguished from a strict, compliance with iron-safe clause sufficient, and is not confined in its operation to excusing technical and nonessential details of performance merely. Security Mut. Ins. Co. v. Berry [Ark.] 98 S. W. 693; Queen of Arkansas Ins. Co. v. Cooper-Cryer Co. [Ark.] 98 S. W. 694.

51. Evidence held to sustain finding that insured gave his honest judgment and opinion as to value. Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605. On issue of fraud in overvaluing property in application, evidence held to justify charge that company would be bound by any knowledge gained by agent while soliciting insurance though not communicated to it, and that, if he knew value when he received application, company must be deemed to have known it when it issued policy, and hence it could not be deemed to have been deceived by or to have relied upon insured's representations. Id. Evidence held to sustain finding that stock was worth substantially the amount stated when insurance was procured. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531.

52. See 6 C. L. 98.

53. Incorrect answers in application or statement made to medical examiner as to insured's health where policy provided that it should be void if answers were untrue, held false warranties rendering policy void regardless of whether applicant believed them to be true or false. Scofield's Adm'x v. Metropolitan Life Ins. Co. [Vt.] 64 A. 1107. Evidence as to whether or not insured had consumption when he answered that he had not held to justify submission of case to jury. Id. Fact that brother of insured received letter from him from Colorado held to have no tendency to prove that he had consumption or that he resided in that state, even if latter fact would tend to prove that he had consumption. Id. Question whether answers were true held for jury under the evidence. Perry v. Hancock Mut. Life Ins. Co., 143 Mich. 290, 12 Det. Leg. N. 978, 106 N. W. 860. Where only inference which could reasonably have been deduced from evidence was that material representations as to insured's physical condition and as to his use of alcoholic beverages were made by him both in application and answers to medical examiner, which he knew to be false, and made with intent that company should believe and act upon them, held that verdict was properly directed for defendant. Hews v. Equitable Life Assur. Soc. [C. C. A.] 143 F. 850. Illness means a disease or ailment of such a character as to affect the general soundness and healthfulness of the system seriously, and not a mere temporary indisposition which does not tend to undermine and weaken the constitution. Instruction approved. Scofield's Adm'x v. Metropolitan Life Ins. Co. [Vt.] 64 A. 1107.

54. Occasional use of intoxicating liquors, or an occasional case of using them to excess, does not render one a man of intemperate habits. Fludd v. Equitable Life Assur. Soc. [S. C.] 55 S. E. 762.

55. Question whether keeper of house of ill fame was a "housewife" as stated in application held for jury. Perry v. John Hancock Mut. Life Ins. Co., 143 Mich. 290, 12 Det. Leg. N. 978, 106 N. W. 860. Evidence held to clearly show that insured was keeping house of ill fame so that it was error to submit question to jury. Id.

56. Merely calling into the office of a doctor for some medicine to relieve a temporary indisposition, or simply for an examination to ascertain whether there is any ailment or complaint about the person, and for nothing more, is not a consultation by a physician. Superficial examination for which no charge was made and at which doctor gave no advice. Scofield's Adm'x v. Metropolitan Life Ins. Co. [Vt.] 64 A. 1107. Evidence held to require submission of question whether insured had consulted physician to the jury. Id.

57. Inquiry as to date of attendance held to refer to date of last attendance in view of preceding question. Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 A. 280.

58. Plea setting up breach of warranty that insured had not been "under the care of" a physician, except one named, for two years, held sustained by proof that within that time he had been attended by another physician eight times for rheumatism in the shoulder. Fish v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 64 A. 109.

59. Where statements in application and answers to medical examiner were warranted to be "full, complete, and true, and without suppression of any fact or circumstance which would tend to influence the company in issuing a policy," held that omission to name a physician who had treated insured, in answer to question calling for names of all such physicians, rendered answer incomplete and untrue, and as obnoxious to the warranty as though he had named a physician who had not treated him. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 S. W. 778. Words "without suppression of any fact or circumstance which would tend to influence the company," etc., held not to make answers mere representations. Id.

without exception makes it the duty of the applicant to state any exception he wishes to make.[60] Where the application and policy provide that the policy shall not take effect unless the insured is alive and in sound health when it is delivered, its acceptance by the insured is a representation that he is in sound health, and if he knows that he is not the policy is obtained through fraud.[61] Accident policies sometimes provide that they shall be void in case the insured makes false or incorrect statements as to his earnings.[62]

§ 10. *The risk or object of indemnity. Accident and health insurance.*[63]—Accident policies generally provide for an indemnity for death resulting solely and proximately[64] from injuries sustained through external, violent, and accidental means[65] leaving visible marks on the body.[66]

60. Where application provided that "wherever nothing is written in the following paragraphs it is agreed that the warranty is true without exception." Fish v. Metropolitan Life Ins. Co. [N. J. Err. & App.] 64 A. 109.

61. Thompson v. Metropolitan Life Ins. Co., 99 N. Y. S. 1006.

62. Provision held applicable only to the weekly indemnity to which the assured would be entitled in case of an injury which incapacitates him from following his vocation and not to an injury resulting in death. Travelers Ins. Co. v. Leibus, 8 Ohio C. C. (N. S.) 201.

63. See 6 C. L. 100.

64. Provision "if death should result solely from such injuries" means that injury must stand out as the predominant factor in the production of the result, and not that it must have been so virulent in character as necessarily and inevitably to have produced that result, regardless of all other conditions and circumstances. Driskell v. U. S. Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S. W. 880. The active, efficient cause that sets in motion a train of events which brings about a result without the intervention of any force started and working actively from a new and independent source is the direct and proximate cause. Id. If, under the peculiar temperament or condition of health of an individual upon whom it is inflicted, such injury appears as the active, efficient cause that sets in motion agencies that result in death without the intervention of any other independent force, then it should be regarded as the sole and proximate cause of death, notwithstanding the physical infirmity of the victim may be a necessary condition to the result. Id. Accident is sole and proximate cause of death though blood poison ensues, if the inoculation occurs at the time the wound is made and is a part of the accident. Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123. Where physician while preparing medicine for patient suffering with syphilis accidentally broke bottle and cut his finger, and blood poison resulted from which he subsequently died, held that the accidental injury and not the poisoning was the proximate cause of death. Instruction approved. Id., afg. 122 Ill. App. 507. Claim that inoculation was caused by pus discharged from ear of patient treated later held unsupported by evidence. Id. The proximate cause is not necessarily the immediate, near, or nearest cause, but the one that acts first, whether immediately to the injury or such injury be reached by setting other causes in motion, each in order being started naturally by the one that precedes it, and altogether constituting a complete chain or succession of events so united to each other by a close causal connection as to form a natural whole, reaching from the first or producing cause to the final result. Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055. Where insured accidentally fell and sustained abrasion of skin on his leg, which appeared red and inflamed on second day, and on eighth day physician examined wound and found him to be suffering from blood poison from which he died two days later, held that accidental falling was proximate and sole cause of death. Id. Evidence held to support finding that injuries were proximate and sole cause of death. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013. Evidence held to sustain finding that injuries solely and independently of all other causes necessarily resulted in insured's death. Instructions approved. Continental Casualty Co. v. Hunt, 28 Ky. L. R. 1006, 90 S. W. 1056. Death held not to have resulted from accident solely and independently of all other causes but to have been natural and proximate result of diseased condition of the heart. Shanberg v. Fidelity & Casualty Co., 143 F. 651.

65. Evidence held to sustain finding that injuries were sustained through external, violent, and purely accidental means. Instructions approved. Continental Casualty Co. v. Hunt, 28 Ky. L. R. 1006, 90 S. W. 1056. Death resulting from accidental falling of scalding water into ear held produced by external, violent, and accidental means. Driskell v. U. S. Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S. W. 880. Prima facie case of death by external violence and accidental means is made out by proof of death by unexplained violent external means, without direct or positive testimony as to accident. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013. Evidence held to sustain finding that death was so caused. Id. Where policy provided for monthly indemnity for total or partial loss of time resulting from bodily injuries caused solely and exclusively by external, violent, and accidental means, and for payment of specified sum "if death should result solely from such injuries," held that the words "such injuries" referred to bodily injuries caused solely and exclusively by external, violent, and accidental means

Weekly indemnity is generally made dependent on the insured being wholly and immediately disabled.[67] Confinement to the house is also sometimes required.[68]

Such policies frequently exempt the insurer from liability for death or injuries resulting from voluntary or unnecessary exposure to danger,[69] or from any gas or vapor,[70] or from poison,[71] or from bodily infirmity or disease,[72] or for injuries intentionally inflicted[73] or received while fighting,[74] or for injury, sickness, or disability

without regard to the extent of disablement that immediately followed the injury. Driskell v. U. S. Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S. W. 880. A result which is the natural and direct effect of acts voluntarily done or of conditions voluntarily assumed is not accidental, though it may not be designed, foreseen, or expected. Fidelity & Casualty Co. v. Stacey's Ex'rs [C. C. A.] 143 F. 271, rvg. 137 F. 1012. There can be no recovery for death due to disease unless it can be shown that the disease is the direct result of accidental means. Id. Where insured assaulted a person who made no resistance and in striking him in the face injured his hand and blood poison developed from which he died, held that there could be no recovery under policy insuring him against death resulting directly and independently of all other causes from bodily injuries sustained through external, violent, and accidental means, injury which was direct cause of death being natural result of voluntary act. Id. Where insured while assisting another to carry door along level street said that he was tired and suddenly fell down and died, and autopsy showed that death resulted from rupture of heart, which was badly diseased, held that death was not accidental. Shamberg v. Fidelity & Casualty Co., 143 F. 651.

66. Provision as to visible marks on body held applicable only to injuries not causing death within three months. Travelers' Ins. Co. v. Ayers, 119 Ill. App. 402. Instruction that there could be no recovery if insured came to his death from injuries leaving no visible mark on his body properly refused where uncontradicted evidence showed that there were such marks. Id.

67. Where insured after his injury continued in his regular employment for a week, when he left on account of disagreement with employer, and thereafter worked several days for others, held that he was not "immediately" disabled. Letherer v. U. S. Health & Acc. Ins. Co. [Mich.] 13 Det. Leg. N. 439, 108 N. W. 491. Insured held not entitled to recover under accident policy providing for weekly indemnity while he was "wholly, immediately and continuously disabled from transacting any and every kind of business pertaining to his occupation," which was stated to be that of a section foreman, where, though partially disabled by accident, he continued to follow the same occupation, work the same force of hands, and receive the same pay, at least in the absence of evidence showing that salary was paid him as a mere gratuity through the generosity of his employer. Raburn v. Pennsylvania Casualty Co. [N. C.] 54 S. E. 283.

68. Where policy provided for payment of specified sum per week to plaintiff for period of disability during which "he shall be necessarily confined to the house," held that he could not recover in absence of showing that he was so confined. Schneps v. Fidelity & Casualty Co., 101 N. Y. S. 106.

69. See 6 C. L. 99, n. 44, et seq. "Voluntary or unnecessary exposure to danger" means a conscious or intentional exposure involving gross or wanton negligence on the part of the insured. Hunt v. U. S. Acc. Ass'n [Mich.] 13 Det. Leg. N. 860, 109 N. W. 1042. Must be a realization that an accident will in all probability result, and an injury follow, from the action about to be taken. Danger of injury must be obvious. Id. Company held liable where insured broke his ankle while playing indoor baseball. Id. Question whether insured was killed because of unnecessarily exposing himself to danger from passing trains held, under the evidence, for the jury. Continental Casualty Co. v. Hagerty, 28 Ky. L. R. 925, 90 S. W. 561. Evidence held to support finding that death was not due to unnecessary exposure to danger or to obvious risk of injury. Continental Casualty Co. v. Johnson, 119 Ill. App. 93.

70. Exemption held not to exclude liability for death resulting from the involuntary inhalation of illuminating gas by insured while asleep. Travelers' Ins. Co. v. Ayers, 119 Ill. App. 402.

71. Where physician broke bottle and cut his finger while preparing medicine for syphilitic patient and blood poison was caused by wound coming in contact with virus, held that death was not caused by "coming in contact with poisonous substance" within meaning of exemption, since germs would have produced no injurious effect except for wound. Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, afg. 122 Ill. App. 507. Exemption from liability for injury "resulting from any poison or infection" held an exemption from liability only where resultant injury was proximately caused in manner specified, and did not relieve insurer from liability for death due to septicaemia but of which accidental injury was the proximate cause. Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055.

72. Exemption from liability for death "resulting, either directly or indirectly, wholly or in part, from bodily infirmity or disease of any kind," held not to apply to bodily infirmity or disease, such as septicaemia, resulting solely from the accident. Cary v. Preferred Acc. Ins. Co., 127 Wis. 67, 106 N. W. 1055. Evidence held to justify finding that plaintiff was not afflicted with diabetes when he applied for and received policy, and that disease which developed subsequent to accident was attributable to it and that gangrene and amputation necessitated thereby were wholly the result of the accident. Jiroch v. Travelers' Ins. Co. [Mich.] 13 Det. Leg. N. 461, 108 N. W. 728.

73. Company held not liable for loss of

resulting from certain specified diseases,[75] or for injuries occurring on any railroad right of way.[76] Injuries or death due to sunstroke[77] or blood poisoning[78] are often specifically insured against.

The insurer is, of course, not liable for accidents occurring after the policy has, by its terms, expired.[79]

Burglary insurance.—Whether or not the insurer is liable for specific losses is to be determined from the terms of the policy.[80] Burglary policies frequently cover damage to vaults, premises, furniture, and fixtures resulting from an attempt to enter such vaults.[81] Liability for money stolen from safes is sometimes limited to cases where they are entered by the use of tools or explosives directly thereupon.[82]

eye due to a blow struck by another, it not being necessary for company to show that person striking insured had a specific intention to inflict the particular character of injury which might flow from the assault. Travelers' Protective Ass'n v. Weil [Tex. Civ. App.] 14 Tex. Ct. Rep. 159, 91 S. W. 886. Not liable for injuries resulting from being hit with brick thrown by aggressor in difficulty in which insured became engaged, though insured was without fault. Washington v. Union Casualty & Surety Co., 115 Mo. App. 627, 91 S. W. 988. Evidence held to show that shooting of deceased was direct result of assault committed by him on third person and that injuries from which he died were intentionally inflicted. Gaines v. Fidelity & Casualty Co., 111 App. Div. 386, 97 N. Y. S. 836.

74. Evidence held to show that insured came to his death as direct result of assault committed by him on third person who shot him. Gaines v. Fidelity & Casualty Co., 111 App. Div. 386, 97 N. Y. S. 836.

75. Where policy provided that "no disability shall constitute a claim for accident, nor for injury, sickness, or disability which results from or is attributable to orchitis," held that no indemnity could be recovered thorough disability due to orchitis whether it resulted originally from an accident or not. Sweeney v. National Relief Assur. Ass'n, 101 N. Y. S. 797.

76. "Right of way" held to mean roadbed and not to include right of way outside of roadbed. Starr v. Aetna Life Ins. Co., 41 Wash. 199, 83 P. 113.

77. Unless the context or some other special considerations require a different meaning, the term "sunstroke" will not be construed as applying only to an effect produced by the heat of the sun, but it denotes a condition produced by any heat, solar or artificial, and provision authorizing recovery for loss of time due to sunstroke authorizes recovery for loss of time due to exposure to furnace heat. Continental Casualty Co. v. Johnson [Kan.] 85 P. 545. Provision that sunstroke "shall be deemed to be due to external, violent, and purely accidental causes" does not preclude a recovery for injuries due to heat other than that of the sun, such as the heat of a furnace, the one being as much in the nature of an accident as the other. Id. Evidence that insured had previously received payment for a similar affliction under a like policy issued by same company upon the basis of its being an ordinary sickness held not to show different interpretation by the parties. Id. Fact that jury found that overwork was a contributing cause of insured's ailment held not to preclude recovery under clause providing for an indemnity for loss of time due "solely" to sunstroke. Id.

78. Policy held to cover death from septicaemia only when resulting from external, violent, and accidental means, so that there was no liability where insured died of septicaemia resulting from operation for appendicitis. Herdic v. Maryland Casualty Co., 146 F. 396. Where physician broke bottle and cut his finger while preparing medicine for syphilitic patient and blood poison was caused by wound coming in contact with virus, held that company was liable under rider extending policy so as to cover septic wounds "caused by accident while performing any operation pertaining to the business of the insured," the word "operation" meaning treatment pertaining to the business of the insured. Central Acc. Ins. Co. v. Rembe, 220 Ill. 151, 77 N. E. 123, afg. 122 Ill. App. 507. Where health policy provided for indemnity for disability resulting from blood poisoning, further provisions that policy should not apply to any disease or illness resulting from injury or from other diseases, etc., held inoperative as to blood poisoning since they removed from operation of policy every possible condition under which it could occur. Jones v. Pennsylvania Casualty Co., 140 N. C. 262, 52 S. E. 578.

79. Policy insuring against accidents occurring within one year from 12 o'clock noon of Dec. 11, 1902, held not to cover accident occurring Dec. 11, 1903, at 4:30 o'clock p. m. Matthews v. Continental Casualty Co. [Ark.] 93 S. W. 55.

80. Where item one of rider specifically insured jewelry and money, held that insured was entitled to recover for its loss though it was stolen from a safe and though rider also contained a blank for insurance of property in safes in which blanks for amount of insurance and premium were not filled. Casner v. New Amsterdam Casualty Co., 116 Mo. App. 354, 91 S. W. 1001.

81. Insurer held not liable for damages to vault, furniture, and fixtures resulting from fact that someone broke into bank and built fire on floor, there being nothing to show that there was any attempt to enter vault or that fire was built for that purpose. Mt. Eden Bank v. Ocean Acc. & Guarantee Co. [Ky.] 96 S. W. 450.

82. Evidence held to justify submission of case to jury on issue as to whether safe

Employers' liability insurance.[83]—The actual payment by the insured of a judgment against him is generally made a condition precedent to liability on the part of the insurer.[84]

Fire insurance.[85]—What property is covered by the policy is a question of intention to be arrived at by a construction of the contract in accordance with the general rules of interpretation previously stated.[86] The construction of particular policies will be found in the note.[87] A policy of insurance upon a building is an

was so entered. Maryland Casualty Co. v. Bank of Murdock [Neb.] 107 N. W. 562.

83. See 6 C. L. 102.

84. Policy held a contract to indemnify insured against loss notwithstanding agreement to defend actions brought against him, so that no valid claim existed against insurer until judgment against insured had been paid by him, and hence insurer could not be held liable as garnishee in action by employe against insured. Allen v. Aetna Life Ins. Co. [C. C. A.] 145 F. 881, afg. 137 F. 136. Policy held contract of indemnity. Kennedy v. Fidelity & Casualty Co. [Minn.] 110 N. W. 97. Provision that no action shall lie "unless it shall be brought by the insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment within 60 days from date of such judgment and after trial of the issue" held to mean simply that judgment must have been paid and satisfied within 60 days from date of entry, and when so paid or satisfied the loss is actually sustained. Id. Execution and delivery of promissory notes by insured for amount of judgment and their acceptance in payment of judgment and the satisfaction of the judgment by the judgment creditor held sufficient in absence of showing of bad faith. Id. Insurer held liable for interest on amount of policy only from date when insured paid judgment recovered against him by employe. Henderson v. Maryland Casualty Co., 29 Pa. Super. Ct. 398. Policy held to make it a condition precedent to liability of company that insured must first pay judgment against him so that where total amount of judgment recovered against him, including costs and interest, exceeded stipulated limit of liability there could be no liability on the part of the company in excess of the limit for interest on the judgment until the judgment had been paid. Munro v. Maryland Casualty Co., 48 Misc. 183, 96 N. Y. S. 705. Where policy limited liability to a specified sum, held that a further provision that if any suit was brought against insured "the company will defend against such proceeding in the name and on behalf of the assured, or settle the same at its own cost, unless it shall elect to pay the insured the indemnity provided for," did not make the insurer liable for taxable costs of action against insured and interest thereon where judgment with interest was in excess of the limit of liability. Id. Company held not liable for interest accruing on verdict as result of its alleged delay in prosecuting an appeal, if not appearing that delay was unreasonable or that insured objected to it. Id.

85. See 6 C. L. 103.

86. See § 7, ante.

87. Provisions of two policies held consistent, clear, and unambiguous, and to contemplate the use and occupancy of the building as a normal school and dwelling and make the same a condition precedent to the acceptance and continuation of the risk. Connecticut Fire Ins. Co. v. Buchanan [C. C. A.] 141 F. 877. Condition held broken and policy avoided where at time of loss building was used for temporary storage of library and portion of personal effects of teacher formerly living therein, but its use for school purposes had been absolutely suspended for an indefinite time, and no one was living there and it was not the abode of any one temporarily absent. Id. Policy insuring buildings marked with certain numbers on a specified plan, and providing that it should cover additions, alterations, and repairs, held not to cover a building not numbered on the plan and constructed and in use before the policy was issued. Arlington Co. v. Empire City Fire Ins. Co., 101 N. Y. S. 772. Term **"machinery"** held to include boiler, pipes, and fittings in laundry in which steam was used to provide heat for drying purposes, etc., as well as for motive power. Tubbs v. Mechanics' Ins. Co. [Iowa] 108 N. W. 324. Building used in part as store and in part as dwelling held not covered by policy insuring a **dwelling house.** Bowdtich v. Norwich Union Fire Ins. Soc. [Mass.] 79 N. E. 788. Policy covering **lumber,** etc., **"contained in** their **yards"** held to cover lumber in shed located in yard. American Ins. Co. v. Meyers, 118 Ill. App. 484. Policy held to cover only lumber in yards or sheds in yards, and not that in sawmill buildings and additions. Ferguson v. Lumbermen's Ins. Co. [Wash.] 88 P. 128. Though **"space clause"** whereby insured warrants the maintenance of a designated clear space around the premises is void as a warranty because not authorized by statutes prescribing standard form of policy, it may contain effective language limiting the general descriptive language of the policy. Wild Rice Lumber Co. v. Royal Ins. Co. [Minn.] 108 N. W. 871. Language of space clause held to clearly show that parties did not understand that lumber piled within 200 feet of mill was insured, though there was no such provision in policy. Id. Evidence held to justify finding that policy covering lumber in **"mill sheds"** referred to sheds at some distance from mill. Wolverine Lumber Co. v. Phenix Ins. Co. [Mich.] 13 Det. Leg. N. 642, 108 N. W. 1088. Boiler and connected parts, being in building which was on leased ground and hence to be regarded as personalty, held covered by clause insuring **personalty** even if regarded as fixtures. Tubbs v. Mechanics' Ins. Co. [Iowa] 108 N. W. 324. Particularly true where engine was of portable type which could readily be removed without injury to realty. Id. Fixtures and utensils of slaughterhouse conducted by plaintiff and used in wholesale

insurance upon the building itself and not upon the materials of which it is composed.[88]

The insurer is generally exempted from liability for losses due to explosions,[89]

meat business, and dressed beef therein, held not covered by policy on **"farm products, farm implements,** and carriages and live stock on premises." Geraghty v. Washtenaw Mut. Fire Ins. Co. [Mich.] 108 N. W. 1102. Addition referred to in policy as containing insured **property** held **"used as a livery and sale stable"** where it was used in part for storage of sleighs and as place of occasional sale of carriages and sleighs, though also used in part as a repair and paint shop. Bickford v. Aetna Ins. Co. [Me.] 63 A. 552. Policy insuring household goods, etc., **"the property of the assured** or that of any member of his family," held not to cover piano held by insured under a lease. Swift v. Teutonia Ins. Co., 28 Pa. Super. Ct. 253. Agreement held to amount to sale and delivery of glass so that vendor could not recover on policy covering **property "sold but not delivered."** Burke v. Continental Ins. Co., 184 N. Y. 77, 570, 76 N. E. 1086. Where vendor of glass held it as bailee of vendee under agreement expressly providing that vendor should not be liable for loss by fire, held that he was not entitled to recover under fire policy covering **property held** by him **"in trust."** Id.

Property held by insured as warehousemen, etc.: Policy indemnifying transportation companies "and other owners as interest may appear" against loss by fire of certain described property contained in specified warehouses, including certain claims thereon, whether "their own, or in their custody as warehousemen," etc., held to insure the property in the custody of the companies, and not to be limited to their interest or liability in respect to it, or an insurance of so much of the property as they might select. Kellner v. Fire Ass'n [Wis.] 106 N. W. 1060. Construction not changed by further provision that "the companies named herein as the assured (although they may not be liable for any loss) shall, after a loss, give notice to said assurer who was insured thereby and said notice shall be conclusive upon the assurer as to who, in addition to said companies, was so insured," which operated only to bind insurance company by such notice as to who were owners of property destroyed, and did not give transportation companies power to cut off any right acquired by owners of property covered by insurance clause. Id. Policy held undertaking to indemnify all classes of owners of property in which transportation company had special interest, and hence included every person embraced in class so that owners had right, when loss occurred, to adopt acts of their agent, the transportation company, and thereby secure the benefit resulting from policy as though it had expressly been issued to them, and having done so could sue thereon where company refused to do so. Id. Where transportation company, in pursuance of long standing arrangement, permitted consignee of goods to leave them in its warehouse without charge until sold when it delivered them to purchasers, held that it held them for him "either as warehouseman, forwarders, carriers, or otherwise," within meaning of policy. Id.

Additions: Policy covering personalty in a certain building and "addition" held to cover property on upper floors of separate building connected with larger main building by a platform supported by posts and reached by a runway and from which doors opened into each building, erected at same time as buildings and constantly used in connection with them, there being no other structure to which term addition could apply. Bickford v. Aetna Ins. Co. [Me.] 63 A. 552. Contention that property in such building could not have been covered because established rate thereon was higher than upon main building held untenable since that fact was not known to insured and hence could not affect his rights. Id. Policy on building "and its additions adjoining and communicating, including foundations, occupied as a laundry," held to cover boiler house situated about four feet distant from main building and connected therewith by steam pipe conveying power for engine in latter, a partially completed platform and overhead arch, and a sidewalk. Guthrie Laundry Co. v. Northern Assur. Co. [Okl.] 87 P. 649. Planing mill held an addition to and a part of sawmill building, though there was a space of 18 inches between them, where they communicated directly with each other, lumber was passed from the sawmill directly into the planing mill, a short stepladder extended from the floor of the former to the second floor of the latter, and a large belt covered by a box communicated from one to the other, and hence lumber therein was not covered by policy which excluded lumber in sawmill building and additions thereto from the risk. Ferguson v. Lumbermen's Ins. Co. [Wash.] 88 P. 128.

88. Where owners of clubhouse procured from insurer a permit to make alterations and repairs to cover the building on of a new kitchen to take the place of the old one then attached to and forming a part of said building, and pursuant thereto old kitchen was detached and removed to a point 100 yards from building and was there destroyed by fire at a time when its final disposition had not been determined upon, held that insurer was not liable for the loss. Evanston Golf Club v. Home Ins. Co. [Mo. App.] 95 S. W. 980.

89. Where the fire occurs in the property insured and an explosion takes place therein during the progress of the fire, the effects of which are covered by the policy, and such explosion is a mere incident of the preceding fire, the latter is treated as the efficient cause and the whole loss is within the risk insured, though policy expressly excludes liability for loss by explosion. Hall v. National Fire Ins. Co., 115 Tenn. 513, 92 S. W. 402. Company held not liable for damage to goods caused solely by explosion in neighboring building as a result of a fire therein, where fire did not reach building in which such goods were located. Id. Where plaintiff made prima facie case of loss by fire and there was no

or in case the building or any part thereof falls except as a result of fire.[90] The participation by a corporation in incendiarism by a stockholder or officer, or its consent thereto, bars a recovery.[91]

The insurer is responsible for losses occasioned by a risk insured against though directly contributed to by the negligence or carelessness of the insured or his agent.[92]

Life insurance.[93]—Statutes in some states prohibit the insuring of persons under a specified age.[94] The insurer is frequently exempted from liability in case insured dies by his own hand or commits suicide[95] while sane or insane.[96] By statute in some states suicide is no defense unless it is shown to the satisfaction of the court or jury trying the case that the insured contemplated suicide at the time he made his application for the policy, and any provision in the policy to the contrary is declared to be void.[97] Such statutes have been held to leave the parties free to contract respecting the classification of the risks and the amount of insurance which shall be provided for each, so long as they do not thereby indirectly but substantially make suicide a defense to an action on the policy, and, with that limitation, not to invalidate a provision for the payment of a smaller sum than otherwise in case of suicide.[98]

evidence that explosion of gasoline can or stove did any damage in itself, held that court properly refused to direct verdict for defendant on ground that damages resulting from fire and from explosion were not apportioned. Walker v. Western Underwriters' Ass'n, 142 Mich. 162, 12 Det. Leg. N. 659, 105 N. W. 597.

90. Answers to points construing provision approved in view of uncontradicted evidence that fall of buildings was not caused by fire but was due to inherent weakness or defects, that fire was not caused by explosion, and that it originated after fall of buildings. Foster v. Home Ins. Co. [C. C. A.] 143 F. 307.

91. Evidence that fire was deliberately and purposely caused by act of president of corporation held admissible for purpose of showing that building was burned with consent of other stockholders where all the stock except one share was owned by his family and there was evidence that he had control, management, and disposition of property the same as if he had the title, and in view of action of other stockholders. Meily Co. v. London & L. Fire Ins. Co., 142 F. 873, afd. [C. C. A.] 148 F. 683. Evidence held to justify submission of question whether fire was caused by willful act of president under circumstances which would make his act a defense. Id. Instruction held not, in view of other instructions, objectionable as giving jury impression that independent act of president of corporation in setting fire would bar recovery. Id. Inadvertent references to president as the plaintiff held not prejudicial. Id. Instruction that plaintiff could not recover if jury found that president had control, management, and power of disposition of property the same as if he had the title, or if there was an understanding among the stockholders that he should burn the property in order that they might collect the insurance, held proper. Id. Evidence held to justify charge authorizing jury to take into consideration fact that fire started in three different places at once. Id. Evidence held sufficient to warrant verdict for defendant. Id.

92. German Ins. Co. v. Goodfriend [Ky.] 97 S. W. 1098. Evidence held not to show negligence on part of insured or his clerk in causing fire or in failing to extinguish it. Id.

93. See 6 C. L. 105.

94. Statute prohibiting the insuring of persons under 15 held not to render void a policy issued on life of person 14 years old, but having attached thereto a memorandum to the effect that company would not assume any risk on account of insured's death until he had arrived at age of 15 and had been examined and examination approved by medical director. Security Mut. Life Ins. Co. v. Miller [Neb.] 106 N. W. 229.

95. A provision that if insured within one year from the issuance of the policy dies by his own act or hand, whether sane or insane, the company shall not be liable for any greater sum than the premiums is valid. Thaxton v. Metropolitan Life Ins. Co. [N. C.] 55 S. E. 419. "Die by his own act or hand" refers to suicide only and does not include a killing by accident, even though the act of the insured may be the unintended means of causing death. Id. Evidence held insufficient to overcome presumption that insured, who was found dead with a gunshot wound in his side, did not commit suicide. Id. Evidence held sufficient to show suicide. Felix v. Fidelity Mut. Life Ins. Co. [Pa.] 64 A. 903. Evidence held insufficient to authorize court to disturb finding against suicide. Equitable Life Ins. Co. v. Hebert [Ind. App.] 76 N. E. 1023.

96. Provision that policy should be void if insured should die by his own hand "whether sane or insane" held to cover every case of suicide, regardless of his mental condition. Moore v. Northwestern Mut. Life Ins. Co. [Mass.] 78 N. E. 488. Evidence held to show suicide. Id.

97. Mo. Rev. St. 1899, § 7896, is applicable to insurance against loss of life by external, violent, and accidental means because that

Sprinkler insurance.—Policies insuring against the accidental discharge of automatic sprinkler systems frequently exempt the company from loss due to cyclones,[99] and confine the risk insured against to leakages or discharges in that part of the building occupied by the insured.[1]

Title insurance.[2]—Whether or not the insured is guaranteed a legal title is to be determined from a construction of the policy.[3] One suing on a policy guarantying him against loss or damage which he may sustain by reason of defects of title or specified liens or incumbrances must show some loss or damage before he can recover thereon.[4]

Tornado insurance.—Policies of tornado insurance sometimes exempt the company from liability for loss to buildings having board roofs.[5]

Reformation of policy for mistake.[6]—If, by reason of a mutual mistake of fact,[7] or because of the fraud of the company or its agent,[8] the policy fails to state

includes suicide while insane. Whitfield v. Aetna Life Ins. Co. [C. C. A.] 144 F. 356.

98. Being in derogation of the common law in restraint of freedom to contract, and subversive of sound morality in that it permits recovery for suicide while sane, should receive restrictive rather than an expansive construction. Whitfield v. Aetna Life Ins. Co. [C. C. A.] 144 F. 356. Provision in accident policy in which principal sum was $5,000 that only $500 should be paid in case of suicide, held not to show purpose to evade the statute but to be valid. Id.

99. "Cyclone" held to refer to that character of windstorm distinguished by its concentrated force and violence, so resistless as to make it especially destructive in its narrow pathway to property like buildings and not to be confined to storms characterized by high winds rotating around a center of low atmospheric pressure, and this center moving onward with greater or less velocity. Maryland Casualty Co. v. Finch [C. C. A.] 147 F. 388.

1. Risk insured against held confined to discharges or leakages from that part of the system "erected in or on that portion of the building occupied by the assured," so that he was not entitled to recover for loss due to leakage on an upper floor occupied by another tenant though water found its way down through intervening floors and injured his property. Bottomley v. Royal Ins. Co., 190 Mass. 73, 76 N. E. 463.

2. See 6 C. L. 105.

3. Testator, who owned half interest in mortgage, gave entire estate to widow for life with remainder to children in equal parts. Plaintiff acquired interests of two of the children in the mortgage by assignment and obtained from defendant policy guarantying him from loss due to existing defects in title or liens or incumbrances. Held that policy did not in terms or by implication guaranty to plaintiff a legal title to specified assigned interest, and he was not entitled to recover because legal title was in executrix or receiver of decedent's estate. Banes v. New Jersey Title Guarantee & Trust Co. [C. C. A.] 142 F. 957.

4. Banes v. New Jersey Title Guarantee & Trust Co. [C. C. A.] 142 F. 957. Testator, who owned half interest in mortgage, gave his entire estate to wife for life with remainder to seven children. Plaintiff acquired interest of two of the children by assignment and obtained from defendant a policy guarantying him against loss due to existing defects in title or liens or incumbrances. Held that no loss was shown by proof that the receiver of testator's estate had collected the portion of the mortgage belonging to the estate and had satisfied it to that extent, plaintiff's right being transferred to fund in receiver's hands and it not appearing that fund had been impaired or was in danger of diminution. Id.

5. Policy insuring all property "except buildings provided with board roofs" held to cover building with a roof part board and part shingled. Kennedy v. Agricultural Ins. Co. [S. D.] 110 N. W. 116.

6. See 6 C. L. 105.

7. In suit to reform policy for mistake and to recover thereon, petition must allege that mistake was mutual. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 14 Tex. Ct. Rep. 527, 91 S. W. 614. It is not essential that both parties agree that a mistake was made, question whether there was a mutual mistake being for court or jury on the evidence. Id. Where rider permitted $1,500 "total concurrent insurance, including this policy," and policy was itself for that amount and contained provision that it should be void in case other insurance should be taken out without company's consent, held that provisions of contract as to concurrent insurance were ambiguous, and, in absence of fraud or laches, policy was subject to reformation and enforcement as reformed in a proper action. Kelly v. Citizens' Mut. Fire Ass'n, 96 Minn. 477, 105 N. W. 675. Evidence held to justify finding that actual contract was to permit other concurrent insurance and that provision in rider limiting total concurrent insurance to a sum equal to the amount of the policy sued on was inserted by mistake. Id.

8. The fraud of an agent having authority to negotiate for insurance and to issue and deliver the policy, in misstating in the policy any fact essential to its validity, is chargeable to the company. Allegations as to fraud held sufficient. Aetna Ins. Co. v. Brannon [Tex. Civ. App.] 14 Tex. Ct. Rep. 527, 91 S. W. 614. Statement of agent to plaintiff when policy was issued that it was all right and would stand in any court held relevant on question of plaintiff's negligence in failing to read policy. Id. Evidence that agent told plaintiff when policy was deliv-

the contract as actually agreed upon, it may be reformed in a court of equity and a recovery had thereon as reformed. So too, a policy may be reformed by inserting provisions inadvertently omitted.[9] Reformation may be had for a mistake of law where the insured is led into it through reliance on the representations of the insurer's agent.[10]

§ 11. *The beneficiary and the insured.*[11]—The general rules of construction previously stated apply in determining who are the beneficiaries under the policy.[12] The person named in the application as the beneficiary will be regarded as such where none is named in the policy.[13] A statute providing that a policy in favor of a married woman shall inure to her separate use and benefit and that of her children gives them an inchoate interest only.[14] Where the policy is payable to the wife and children and one or more of them dies before the insured, the whole interest goes to the survivors.[15] The company is sometimes given the option to pay the proceeds of the policy to any person appearing to be equitably entitled thereto by reason of having incurred expense on behalf of the insured.[16] A provision that payment to any relative of the insured belonging to a designated class will discharge the company, while valid, does not operate to make the person actually receiving the money thereunder the beneficiary, but is merely an appointment by the parties of a person who may collect the amount due for the benefit of the person ultimately entitled thereto.[17] A fire policy payable to the estate of a deceased person is not void for

ered that it was all right and would stand in any court held not objectionable as mere conclusion or expression of opinion. Id. If there was a mutual agreement between agent and plaintiff to insure property in certain cabin, and by error, mistake, or fraud, agent described property as being located elsewhere, held that company would be bound, it not being necessary to enable plaintiff to have policy reformed and to recover thereon that agent intended to write policy to cover property in cabin or in some other building. Id.

9. Where agents had authority to issue vacancy permits, and were accustomed to do so for plaintiff at his request and to attach them to his policies to which they had access without first submitting them to him and without charge, held that where agents agreed to issue permit on expiration of one in force, but failed, through inattention or oversight, to do so, after loss, policy would be reformed by inserting such a permit. Mississippi Fire Ass'n v. Stein [Miss.] 41 So. 66.

10. Where agent and insured both intended that policy should cover only that part of the cotton in a certain warehouse which was held by insured on storage for farmers and not all the cotton therein, and insured relied on representations of agent that it covered only that part of the cotton so intended to be covered, held that it would be reformed so as to correspond with the intention and agreement. Phoenix Assur. Co. v. Boyett [Ark.] 90 S. W. 284. Fact that original mistake was made several years before issuance of policy in suit when that kind of insurance first came into use in the locality held immaterial. Id.

11. See 6 C. L. 106.

12. See § 7, ante. Policy payable to wife "in trust for herself and their children" held to include insured's children by a former wife. Lehman v. Lehman [Pa.] 64 A. 598, afg. 29 Pa. Super. Ct. 60. Policy provided that company agreed with "assured, his executors, administrators, and assigns" to pay the amount thereof to his "legal representatives." Assured was unmarried. Held that words "legal representatives" meant executors and administrators and not next of kin. New York Life Ins. Co. v. Kansas City Nat. Bank [Mo. App.] 97 S. W. 195. Heirs and next of kin held not real beneficiaries under fire policy payable to the estate of a decedent. Norwich Union Fire Ins. Co. v. Prude [Ala.] 40 So. 322.

13. Aliter if application names one person and policy, accepted by insured, another. Ogletree v. Hutchinson [Ga.] 55 S. E. 179.

14. St. 1903, § 654. Must survive insured in order to acquire fixed interest. Doty v. Dickey [Ky.] 96 S. W. 544.

15. Doty v. Dickey [Ky.] 96 S. W. 54[illegible].

16. Where policy provided that it should be payable to executors, administrators, or assigns, held that further provision that company might make payment to any relative of insured, or to any other person appearing to be equitably entitled thereto by reason of having incurred expense for burial of insured or otherwise, merely gave insurer option to make payment to such persons if it so desired, and hence it was under no legal obligation to make payment to one who had paid funeral expenses to an amount equaling that of the policy. Ferretti v. Prudential Ins. Co., 49 Misc. 489, 97 N. Y. S. 1007. Where policy provided that company might pay amount due thereon to any person appearing to it to be equitably entitled thereto by reason of having incurred expense on behalf of the insured or for her burial, and company promised by its authorized officer to pay undertaker the expense of burying insured, held that company was estopped, in action by such undertaker for such services, to deny that it had exercised its option to make such payment to it. Metropolitan Life

uncertainty.[18] In the absence of a charter provision to the contrary, membership in a mutual company commences only with the taking out of a policy and lasts only during the policy period.[19] The beneficiary is bound by representations made by the insured for the purpose of obtaining the policy and is subject to the consequence of his knowledge of their falsity.[20]

In the absence of a provision in the contract to the contrary,[21] the beneficiary in an ordinary life policy has a vested interest therein[22] of which he cannot be deprived without his consent.[23] He is, however, only entitled to the fruits of the contract and cannot recover damages for wrongs inflicted on the insured by the company through a breach of its contract with him.[24] The insured's wife is not deprived of her vested interest in policies in which she is named as beneficiary

Ins. Co. v. Johnson, 121 Ill. App. 257. Finding of jury as to making of agreement held conclusive. Id.

17. Person named in application as beneficiary held entitled to fund as against relative belonging to designated class, there being no beneficiary named in the policy. Ogletree v. Hutchinson [Ga.] 55 S. E. 179.

18. Since while payees or parties insured may be uncertain, they may be made certain by extrinsic evidence. Norwich Union Fire Ins. Co. v. Prude [Ala.] 40 So. 322.

19. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135. Same held true as to company organized under Laws 1854, p. 421, c. 278, § 3, providing that every person who shall at any time become interested in said company by insuring therein, and also his heirs, etc., continuing to be insured therein, shall be deemed members thereof during the terms specified in their respective policies and no longer. Id.

20. Stands in no better position than insured and hence his previous admissions in regard to matters so represented are not hearsay as to her. Hews v. Equitable Life Assur. Soc. [C. C. A.] 143 F. 850.

21. The rule that the beneficiary has a vested interest in the policy precluding its assignment without his consent has no application where it authorizes a change of beneficiaries. Aldrich v. Brinker, 143 F. 563. Where policy payable to insured's wife provided that insured might assign it or change beneficiary, held that wife had no vested interest therein notwithstanding St. 1903, § 654, providing that policy payable to married woman shall be her separate property free from claims of insured's creditors, and insured could assign it to insurer as collateral for loan without her consent. Crice v. Illinois Life Ins. Co. [Ky.] 92 S. W. 560. Same held true of policy in mutual company though its charter provided that policy should be for benefit of wife, children, etc., and should not be liable for insured's debts. Mutual Life Ins. Co. v. Twyman, 28 Ky. L. R. 1153, 92 S. W. 335. Accident policy held not to authorize insured to release company from liability to beneficiary for death indemnity and hence receipt given by insured for week's indemnity releasing company from any further liability to him or beneficiary growing out of a certain injury did not preclude latter from recovering death indemnity on insured's subsequent death as a result of such injury. Graham v. Union Casualty & Surety Co. [Mo. App.] 97 S. W. 614. Where insured to whom policy had been assigned by beneficiary, assigned it to plaintiffs on condition that he reserved the right to change the beneficiaries, held that plaintiffs acquired no vested interest in it or its proceeds, so that, where he subsequently exercised such right with the consent of the company, their interest in the policy was defeated and they were not entitled to its proceeds. Ogletree v. Ogletree [Ga.] 55 S. E. 954.

22. In old line policy. Blum v. New York Life Ins. Co., 197 Mo. 513, 95 S. W. 317. Acquires entire property interest in contract the moment the policy is executed and delivered. Lanier v. Eastern Life Ins. Co. [N. C.] 54 S. E. 786. The terms of the policy constitute a contract of the company to pay the specified amount to the beneficiary, and create direct legal obligations between him and the insurer. Id. Beneficiary held entitled to recover on policy if premiums had been paid and policy was otherwise in force, unless company could show that it had been lawfully surrendered with her consent or that insured had duly and legally exercised right to change beneficiary. Id. Where beneficiary proved issuance of policy for her benefit, the possession of it by her, the removal of it from her possession without her knowledge, the payment of premiums, the death of the insured, and the waiver of proofs of death, held that she made prima facie case and was not required to establish the affirmative facts in issue presented by company as to whether it had obtained possession of policy fraudulently. Id.

23. Blum v. New York Life Ins. Co., 197 Mo. 513, 95 S. W. 317. Where beneficiary under policy stipulating that there could be no change of beneficiary without her consent released all her interest present and prospective to the insured, held that he thereby became the sole and absolute owner and holder of the policy. Ogletree v. Ogletree [Ga.] 55 S. E. 954. The concurrence of the beneficiaries is a condition precedent to valid action on the part of the insured in the nature of treating a contract of life insurance as rescinded and basing thereon a suit for recovery of premiums paid; nor can a suit, without the concurrence of the beneficiaries, be based upon the wrongful refusal of the company to receive further premiums or continue the policy in force. Aetna Life Ins. Co. v. Penn, 4 Ohio N. P. (N. S. 97.

24. Cannot recover damages resulting from fact that company made illegal assessments upon insured, failed to set apart a

by her subsequent divorce.[25] Statutes in some states authorize a change of beneficiaries in such case.[26] Her interest being her individual property is not affected by a contract releasing all claims to any of her husband's property arising out of the marriage relation.[27] Where the assured has done all that is required of him in order to change the beneficiary and the company has consented to the change, it will be treated as accomplished though the assured dies before the formal indorsement of change on the policy by the company.[28]

Rights of employe under employer's liability policy.[29]—Where the policy indemnifies the insured against loss actually sustained and paid, an employe recovering judgment against him for an injury within the terms of the policy cannot recover the amount thereof from the insurer.[30]

Rights of mortgagees, creditors, trustees, etc., under loss payable clauses.[31]—While the insertion of a clause making the loss payable to a third person does not make the latter a party to the contract,[32] yet it gives him an interest in the policy of which he cannot be deprived without his consent.[33] In the absence of a provision to the contrary,[34] any act of the insured which would avoid the policy

reserve fund, did not place him in particular class, etc., right of action, if any, being in insured's personal representatives for benefit of his estate. Price v. Mutual Reserve Life Ins. Co., 102 Md. 683, 62 A. 1040.

25. Wife held to have acquired vested interest in endowment policy, payable to her in case insured did not live until by its terms it was payable to him unless she predeceased him, which was not divested by her subsequent divorce. Wallace v. Mutual Ben. Life Ins. Co., 97 Minn. 27, 106 N. W. 84.

26. Rev. St. 1899, § 7895, providing that, where policy is payable to insured's wife and she procures a divorce before his death, he may change the beneficiary, cannot be given retrospective operation so as to deprive beneficiary under old line policy of vested rights acquired under previously existing laws. Blum v. New York Life Ins. Co., 197 Mo. 513, 95 S. W. 317. Statute applies only where the wife is the sole beneficiary and not where the policy is payable to children in event of her death before that of the insured. Id.

27. Such interest was her individual property so that it was not affected by contract between her and her husband whereby he agreed that certain property might be awarded her as alimony, and she agreed to relinquish all claims to any of his property arising out of relation of husband and wife. Wallace v. Mutual Ben. Life Ins. Co., 97 Minn. 27, 106 N. W. 84.

28. Where policy provided that insured might "at any time" change beneficiary by written notice to company accompanied by the policy, held that company thereby gave its consent beforehand, it appearing that it had been accustomed to treat change as accomplished when it received notice and policy and to regard indorsement as a mere ministerial act. Freund v. Freund, 117 Ill. App. 565.

29. See 6 C. L. 108.

30. Where policy provided that no action should lie against company thereon unless brought by the insured for loss or expense actually sustained and paid in money by him after actual trial of the issue, nor unless such action should be brought within 90 days after such payment, held that where judgment was recovered against insured by employe but it could not be collected because of insured's insolvency, employe could not recover amount thereof from insurer, though latter had defended action against insured as it had a right to do under the policy. Beyer v. International Aluminum Co., 101 N. Y. S. 83.

31. See 6 C. L. 108.

32. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

33. After creditor, to whom loss was made payable unconditionally, had commenced an action on the policy, insurer paid to the clerk of court the amount of premiums paid on the policy and sought to avoid it for reasons set up in answer. Insured received the money from the clerk without the creditor's knowledge or consent. Held that creditor was not deprived of his interest in the policy or his right to prosecute the action. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. Insured could not, after loss, by an assignment of his claim defeat the rights of payees under loss payable clause. Id. Where the loss is payable to a mortgagee as his interest may appear, the company is not relieved from liability to him by paying the loss to the mortgagor without the mortgagee's consent. Mortgage clause is notice to company of mortgagee's rights. Ebensburg Bldg. & Loan Ass'n v. Westchester Fire Ins. Co., 28 Pa. Super. Ct. 341.

34. Where mortgage clause provided that interest of mortgagee was not to be affected by any act or neglect of the mortgagor or owner of the premises, held that the mortgagees were not bound to give notice and proofs of loss. Adams v. Farmers' Mut. Fire Ins Co., 115 Mo. App. 21, 90 S. W. 747. Policy was made payable to mortgagee as his interest might appear and it was further provided that as to his interest insurance should not be invalidated by foreclosure proceedings nor by any change in title or ownership of property. Loss occurred after mortgagee had purchased at foreclosure sale but before he had received deed from

as to him will ordinarily prevent a recovery by a mortgagee to whom the loss is made payable as his interest may appear.[35] It has, however, been held that fraudulent representations and concealments on the part of the mortgagor in procuring insurance payable to the mortgagee will not avoid the policy as to the latter where he is ignorant of the fraud.[36] Mortgage clauses sometimes require the mortgagee to notify the insurer of any change of ownership.[37] The amount of the mortgagee's recovery in case of a loss is limited to the damage to his interest in the premises as mortgagee.[38] The mortgage is not necessarily merged in the legal title on the subsequent conveyance of the property to the mortgagee.[39]

The rights of a trustee in a policy made payable to him as such are extinguished by foreclosure of the trust deed.[40]

Insurance by bailee or agent.[41]

§ 12. *Policy value in cash or loans and right to share in surplus before loss.*[42] —Agency to make a policy loan contract is sufficiently shown by a stipulation of counsel that it was executed by both parties and was ratified by the company's vice-president, or was entered into at his suggestion.[43] On failure of the insured to pay a loan the company has no right to forfeit or cancel the policy on any basis which will deprive him of any part of its cash surrender value over and above the amount of the debt.[44]

referee. Held that his interest as mortgagee continued until delivery of deed and hence he was entitled to recover to extent of damage to his interest. Uhlfelder v. Palatine Ins. Co., 111 App. Div. 57, 97 N. Y. S. 499, rvg. 44 Misc. 153, 89 N. Y. S. 792. Clause was attached to policy making loss payable to mortgagee as his interest might appear. Policy provided that it should be void for change in interest, title, or possession, without company's consent indorsed thereon, and also that if, with consent of company, an interest under policy should exist in favor of a mortgagee "the conditions hereinbefore contained shall apply in the manner expressed in such provisions and conditions of insurance relating to such interests as shall be written upon, attached, or appended hereto." Held that rights of mortgagee were not affected by act of owner in selling premises where condition as to change of title was not written upon, attached, or appended to provision by which mortgagee's interest in the policy was created. Edge v. St. Paul Fire & Marine Ins. Co. [S. D.] 105 N. W. 281.

35. Where policy was forfeited by commencement of foreclosure proceedings without written consent of insurer, held that mortgagee to whom loss was payable as his interest might appear, had no greater rights than the insured. Woodard v. German-American Ins. Co., 128 Wis. 1, 106 N. W. 681.

36. Mortgagor is not in any sense the agent of the mortgagee in procuring insurance on the mortgaged premises for the benefit of the mortgagee as his interest may appear and in accordance with an agreement so to do. Firemen's Ins. Co. v. Boland, 8 Ohio C. C. (N. S.) 325.

37. Acquisition of legal title by mortgagee through quitclaim deed from mortgagor held not such a change. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co. [Kan.] 86 P. 142.

38. Where mortgagee had, before fire, disposed of two-thirds of his interest under his bid, he was only entitled to recover one-third of the actual damage. Uhlfelder v. Palatine Ins. Co., 111 App. Div. 57, 97 N. Y. S. 499, rvg. 44 Misc. 153, 89 N. Y. S. 792.

39. Merger takes place or not as the mortgagee may desire or his interest may require. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co. [Kan.] 86 P. 142. Where mortgage was secured in part by policy issued to mortgagor and made payable to mortgagee, held that mortgage was not merged in the legal title subsequently conveyed to the mortgagee as security for the mortgage debt so as to relieve the insurer from liability to the mortgagee on a subsequent loss. Id.

40. Plaintiff executed trust deed of realty to defendant to secure loan to third person and procured a fire policy on building making loss payable to defendant as trustee. Deed was foreclosed and property sold to complainant in foreclosure suit, leaving deficiency for which judgment was entered. Held that, on subsequent destruction of the building, plaintiff was entitled to proceeds of policy paid before expiration of period of redemption, the foreclosure having put an end to the contract evidenced by the deed of trust and of all rights thereunder, and defendant, being no longer trustee, could only receive money as plaintiff's agent. Rawson v. Bethesda Baptist Church, 221 Ill. 216, 77 N. E. 560. Plaintiff's insurable interest was not extinguished by foreclosure since he was entitled to possession during period of redemption. Id. Foreclosure operated to extinguish lien of trust deed and hence purchaser had no lien on fund. Id. Where draft for proceeds was payable jointly to plaintiff's trustees and to defendant, indorsement thereof by plaintiff's trustees and delivery to defendant held not to amount to a payment to him by trustees so as to preclude plaintiff from recovering same from him. Id.

The legal title to the assets of a mutual company is in the corporation, but the equitable right thereto and real beneficiary interest therein is in the members, and the corporate property belongs to them after the corporate purposes are exhausted.[45] In case the company is wound up the net assets constitute a fund for distribution between the then members according to their respective contributions to the company's treasury, and the same is true in regard to distributions of surplus other than following a dissolution.[46] A member's right to any particular part of the surplus is, however, to be determined solely by the terms of his contract.[47] He cannot maintain an equitable suit against the company for an accounting and discovery solely because of an alleged breach of contract as to the distribution of the surplus where there is no trust or fiduciary relation between the parties and no necessity for adjusting complicated or mutual accounts,[48] and this is particularly true where the statute prohibits the appointment of a receiver or an accounting unless the attorney general makes the application therefor or approves the same.[49]

41. See 4 C. L. 192.

42. See 6 C. L. 110.

43. New York Life Ins. Co. v. Mills [Fla.] 41 So. 603.

44. Assignment of policy to company as collateral security for loan held not to give such right, but remedy in such case was by resort to court of equity to have surrender value determined in accordance with St. 1903, § 653, any excess thereof over the amount of the debt to be paid to the insured or used in purchasing paid up insurance at his election. Mutual Life Ins. Co. v. Twyman, 28 Ky. L. R. 1153, 92 S. W. 335. Cash surrender value is to be ascertained as of date when loan became enforceable in method provided by §§ 653, 659, for estimating the value of the reserve of life policies, any "dividends" in which policy was entitled to participate in addition to the reserve being taken into consideration. Mutual Life Ins. Co. v. Twyman [Ky.] 97 S. W. 391. Where it was shown that instead of exercising option to cancel the company opened up negotiations looking to a new loan which were still pending when insured died, held that beneficiary was entitled to recover amount of policy less amount of indebtedness. New York Life Ins. Co. v. Mills [Fla.] 41 So. 603. Evidence held to justify charge based on assumption that loan value did not constitute entire value of policy. Id.

45. Corporation owns property but members own the corporation. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135. In absence of charter provision to the contrary, policy holders, as regards rights and remedies, are stockholders therein the same as owners of stock in a stock corporation. Id. Are both insurers and insured, and in former capacity are entitled to share in losses and profits of the business on the basis of a partnership except in so far as policy or charter provides otherwise. Id.

46. Huber v. Martin, 127 Wis. 412, 105 N. W. 1031, 1135. Existing policy holders are the only legitimate distributees and are entitled to whole. Id. Supposed common-law rule that, upon termination of corporation, its debts become extinguished, its realty reverts to the grantor, and its personalty goes to the sovereign, if it ever existed, is obsolete except as to purely public corporations. Id. Surplus belongs equitably to the policy holders who contributed to it in the proportion in which they contributed to it. United States Life Ins. Co. v. Spinks [Ky.] 96 S. W. 889.

47. Interests of policy holder being strictly contractual where contract does not contemplate a management of the business by him. or give him the right to dictate the amount of the dividend to be declared from the surplus, or to question the result after the exercise of the discretion of the managers in that regard, he cannot maintain a suit in equity against it for an accounting and the appointment of a receiver on the ground of mismanagement and the misappropriation of funds by officers. Brown v. Equitable Life Assur. Soc., 142 F. 835. Where charter provided that after payment of interest on stock and that earnings over and above dividends, losses, and expenses should be accumulated and it and policy provided that policy holder should be entitled to participate in distribution of surplus according to such principles and methods as might be adopted by the company, held not to require distribution of entire net surplus above legal reserve to policy holders but only an equitable proportion thereof to be determined by officers in exercise of their discretion, their determination being prima facie equitable. Id. Policy holder has no interest in surplus until it is equitably apportioned and there is no trust relation, so that he cannot maintain suit in equity for an accounting on ground that discretion has been abused where there has been a distribution. Id. Policy merely entitling insured to "participation in profits," and charter as to distribution of surplus, held not to require distribution of entire net surplus above legal reserve. Buford v. Equitable Life Assur. Soc., 93 N. Y. S. 152.

48. Brown v. Equitable Life Assur. Soc., 142 F. 835. Rights and liabilities of company and holder of policy entitling him to share in surplus after payment of losses and expenses and accumulation of legal reserve are purely contractual, the relation being one of debtor and creditor, and not a trust or fiduciary relation. Id.

49. N. Y. Laws 1892, p. 1958, c. 690, § 56. Brown v. Equitable Life Assur. Soc., 142 F. 835. Whether officers should have credited greater portion of surplus as dividends upon

§ 13. *Options and privileges under policy.*[50]—Life policies frequently provide that, on default in the payment of premiums after a specified number of premiums have been paid,[51] the insured's share of the reserve fund shall be applied to the purchase of extended insurance from the date of the lapse[52] provided he is not then indebted to the company,[53] or that he shall be entitled to a paid up policy on a written request therefor in such amount as any excess of reserve over his indebtedness to the company will purchase,[54] or that he shall be given a paid up policy for a specified sum unless he elects within a certain time to take term or extended insurance in lieu thereof,[55] or that the insurance shall be continued in force for a specified period from the due date of the unpaid premium.[56] Statutes in some states provide that under such circumstances the insured's proportionate share of the surplus, including dividend additions,[57] or the net value of the policy at the time of default,[58]

outstanding policies, and, if so, how much, held to necessarily involve an accounting. Buford v. Equitable Life Assur. Soc., 98 N. Y. S. 152.

50. See 6 C. L. 110.

51. Acceptance by company of part of second premium in cash and a note for balance, which was not paid at maturity, held not such a payment as to entitle insured to extended insurance on basis of two payments, particularly where clause relied on was made applicable only if there was no indebtedness to the company. Bank of Commerce v. New York Life Ins. Co., 125 Ga. 552, 54 S. E. 643. Quoted words in provision in note that policy should be void if it was not paid at maturity "except as otherwise provided in the policy itself," held not to change construction. Id. After paying one premium on term policy insured exchanged it for regular life policy as he had a right to do under its provisions. Latter policy provided that after payment of three full years' premiums insured should, in case of lapse for nonpayment, be entitled to extended insurance. Insured paid two premiums under second policy but failed to pay third. Held that the two policies did not constitute one continuing contract but that each was a separate contract and insured was not entitled to extended insurance. McGuire v. Union Mut. Life Ins. Co., 99 N. Y. S. 891.

52. Evidence held to show that policy was antedated at request of insured and that it was mutual intention that yearly terms should commence and end on Nov. 11th instead of Jan. 15th, though policy was issued on latter date, and hence default for nonpayment of premiums and consequent lapse occurred on Nov. 11th, and period of extended insurance was to be calculated from that date. Johnson v. Mutual Ben. Life Ins. Co. [C. C. A.] 143 F. 950. Anniversary of policy being on Nov. 11th, and it having lapsed on that date, held that it was not entitled to participate in fund set apart by directors in previous January for payment of dividends on all participating policies which should be "continued in force on their anniversaries" in that calendar year, and a certain part of which was apportioned to it. Id. Settlement of interest charge on premium loan made at time of payment of premium cannot, in the absence of fraud or mistake, be opened up after the insured's death, several years later, for purpose of adding to the term of insurance. Id.

53. Insured held not entitled to extended insurance where he failed to repay loan. Jagoe v. Aetna Life Ins. Co. [Ky.] 96 S. W. 598.

54. Provision held unavailing where it did not appear that any request was made, or that there was such an excess of reserve as would have purchased paid up insurance for time extending beyond insured's death. Bank of Commerce v. New York Life Ins. Co., 125 Ga. 552, 54 S. E. 643. Policy and note given for loan thereon construed, and held that, on lapse of policy after loan was made for failure to pay premium, company was required to make immediate settlement, was bound to use total amount of reserve, less amount due on note at time of lapse, in purchasing nonparticipating policy, and had no right to make arbitrary deductions from the reserve or to deduct therefrom a sum sufficient to carry the policy to the maturity of the loan. Penn Mut. Life Ins. Co. v. Barnett's Adm'r [Ky.] 96 S. W. 1120.

55. Provision for paid up insurance held to have gone into effect automatically so that on his death within specified period, without having exercised option, his representative could not make election for him or recover more than amount of paid up policy. Michigan Mut. Life Ins. Co. v. Mayfield's Adm'r, 28 Ky. L. R. 825. 90 S. W. 607. In absence of election by insured to take term insurance and surrender of policy within time prescribed, held that beneficiary was only entitled to proceeds of paid up policy. Sugg v. Equitable Life Assur. Soc. [Tenn.] 94 S. W. 936.

56. Policy provided that premiums should be paid annually on June 1st, that one month's grace should be allowed during which policy should remain in force, and also that, after policy had been in force a year, if it should lapse for nonpayment of premiums company would continue insurance in force "a period of 60 days from the due date of such premium, as specified on the first page hereof." Held that 60-day period commenced to run on June 1st and not from expiration of 30 days' grace. Grattan v. Prudential Ins. Co. [Minn.] 108 N. W. 821.

57. Under N. Y. Laws 1892, p. 1869, c. 690, § 88, the proportionate share of the surplus, including dividend additions, of a policy lapsed for nonpayment of premiums after having been in force for three years must be applied to the payment of extended in-

shall be used in the purchase of extended insurance. There is a conflict of authority as to whether time is of the essence of a provision requiring the surrender of the policy within a specified time in order that the insured may be entitled to a paid up policy.[59]

§ 14. *Assignments and transfers of benefits or insurance. Life insurance.*[60] —There is a conflict of authority as to the validity of an assignment of a life policy to one having no insurable interest in the life of the insured,[61] but all courts unite in holding such assignments void where the transaction is a mere wager.[62]

Where choses in action are made assignable by statute a provision in the policy that it shall not be assignable is ineffectual.[63] Since the beneficiary has a vested interest in the policy,[64] it cannot ordinarily be assigned without his consent,[65] but

surance, unless policy holder elects to take paid up insurance therefor. United States Life Ins. Co. v. Spinks [Ky.] 96 S. W. 889. The words "dividend additions" as used in that act refer to that part of the premiums charged which was "loaded" onto the premium in excess of its share of expenses and losses sustained. Id. Such additions and the earnings thereon, which constitute the "surplus," must be valued and applied in purchasing extended insurance in the same way that the "reserve" of the policy is required to be valued and applied for that purpose. Id. The company must keep accurate accounts with policy holders as classes, failing which no presumptions will be indulged in its favor in the matter of valuing and applying surplus or dividend additions to lapsed policies. Id. Is not optional with directorate of company whether it will declare dividends from so-called surplus or to what extent they will do so. Id. Held that application of "dividend additions" as required would have extended policy until after insured's death so that company was liable for full amount of policy. Id.

58. Under Rev. St. 1899, §§ 5856, 5868, on default after payment of two annual premiums. Capp v. Security Mut. Life Ins. Co., 117 Mo. App. 532, 94 S. W. 734. Attempt to declare policy void held ineffectual, and hence insured was not entitled to recover damages by reason thereof. Id. Insured is not deprived of right to extended insurance by failure to demand, within 60 days after the beginning of the extended insurance, a paid up policy as authorized by § 5857. Id.

59. Time held not of the essence of provision requiring surrender within 6 months so that insured was entitled to paid up policies where he surrendered one policy 5 days, and other 18 days, after expiration of six months, a surrender within a reasonable time being all that was necessary. Lenon v. Mutual Life Ins. Co. [Ark.] 98 S. W. 117.

60. See 6 C. L. 112.

61. **Arkansas:** One may assign policy on his own life, payable to his administrator or assigns, to one having no insurable interest. Matlock v. Bledsoe [Ark.] 90 S. W. 848.

Georgia: One has the right to procure insurance on his own life and assign the policy to another, who has no insurable interest in the life insured, provided it is not done by way of cover for a wager policy, there being no limitation on right of assignment conferred by Code 1895, § 2116. Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032.

Kentucky: To make the sale or assignment valid as between the parties the assignee or purchaser must be related to the insured in such degree as would authorize him to take out insurance on the life of the assignor or vendor, or he must be a creditor, and, if a creditor, he can only participate in the proceeds of the policy to the extent of the indebtedness the policy was sold or assigned to secure. Bramblett v. Hargis' Ex'r [Ky.] 94 S. W. 20. This rule is equally applicable in the case of paid up policies. Id. Where policies were taken out by insured on his own life for express purpose of assigning them to one having no insurable interest under agreement that assignee was to pay insured a specified sum for them and to pay premiums, held that both assignment and policies were void and insured's administrator could not recover on them. Bromley's Adm'r v. Washington Life Ins. Co., 28 Ky. L. R. 1300, 92 S. W. 17.

Kansas: It is against public policy to permit one without insurable interest in the life of another to obtain insurance thereon, either directly or by assignment. Metropolitan Life Ins. Co. v. Elison, 72 Kan. 199, 83 P. 410. An assignment of one-half interest in a policy to one in consideration of the payment of the premiums by the assignee as they accrue renders the policy uncollectible both as to the beneficiary and the assignee. Id.

Ohio: Only those having an insurable interest in the life of the insured can become beneficiaries under a policy either by assignment or otherwise. Evans v. Moore, 7 Ohio C. C. (N. S.) 123.

Vermont: Policy taken out by insured on his own life and thereafter assigned to one having no insurable interest is not wagering policy though taken out for purpose of such assignment. Harrison's Adm'r v. Northwestern Mut. Life Ins. Co., 78 Vt. 473, 63 A. 321.

62. Petition held not to show an attempt to circumvent law against wagering policies. Rylander v. Allen, 125 Ga. 206, 53 S. E. 1032.

63. Doty v. Dickey [Ky.] 96 S. W. 544.

64. See ante § 11.

65. Evidence held to show that beneficiary joined in assignment to secure a specific loan to the insured so that, as against her, after insured's death, it could only be enforced to that extent, even though insured further agreed, without her knowledge or

this rule has no application where a change of beneficiaries is expressly authorized.[66] Policies payable to the insured, his executors or assigns, are assets in his hands belonging to himself alone, and he has the legal right to transfer them with or without consideration,[67] provided such transfer is not in fraud of his creditors,[68] or to pledge them as security for an existing debt.[69] The company assenting to a transfer is not affected by the fact that it is fraudulent as to creditors unless it has knowledge of the fraud or is in possession of such facts as would have put a prudent person upon such inquiry as would have discovered it.[70] The usual rules as to the sufficiency of the consideration for an assignment apply.[71]

Title passes by a verbal sale or gift accompanied by delivery.[72] An assignment for which the consideration has been paid is valid, though not delivered, except as to subsequent purchasers in good faith and for value.[73] So too, an agreement to assign made in good faith and while solvent, the consideration therefor being paid, gives the party with whom it is made an equitable lien on the policy, and a subsequent formal assignment to him will be upheld as against the assignor's trustee in bankruptcy, though made after the assignor becomes insolvent and within four

consent, that it should stand as security for other indebtedness. Aldrich v. Brinker, 143 F. 563.

66. Provision in charter that policy should be for benefit of wife, children, etc., of insured and should not be liable for his debts, being in meaning and effect the same as St. 1903, §§ 654, 655, held not to interfere with the right of the insured to change the beneficiary or assign the policy where that right is reserved in policy, and hence assignment to company as collateral security for loan was valid. Mutual Life Ins. Co. v. Twyman, 28 Ky. L. R. 1153, 92 S. W. 335. Where policy payable to insured's wife provided that insured might at any time assign it with assent of company or change beneficiary before assignment, held that wife had no vested interest therein notwithstanding St. 1903, § 654, providing that policy payable to married woman shall be her separate property free from claims of insured's creditors, and insured could assign it to company as collateral for loan without her consent. Crice v. Illinois Life Ins. Co. [Ky.] 92 S. W. 560. Insured held also to have had right, without her consent, to surrender policy for cancellation in payment of loan, he having received difference between loan and cash surrender value in cash, and settlement on that basis was valid as to her in absence of fraud. Id.

67. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577, afd. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380. Administrator of one insured by policy payable to his executors, administrators, or assigns held not entitled to recover on it against will and interest of one claiming under valid assignment thereof. Harrison's Adm'r v. Northwestern Mut. Life Ins. Co., 78 Vt. 473, 63 A. 321. Assignment held not void for want of consideration in absence of showing that it was not a gift. Id. Provision that insurer would pay amount of life policy on "proof of interest (if assigned or held as security)" and of insured's death held to show an intention to make policies assignable. New York Life Ins. Co. v. Kansas City Nat. Bank [Mo. App.] 97 S. W. 195. Evidence held insufficient to show that policy was given to plaintiff by insured in consideration of marriage or otherwise, and hence she was only entitled to recover thereon as administratrix of his estate and not individually. Baker v. Metropolitan Life Ins. Co., 111 App. Div. 500, 97 N. Y. S. 1088.

68. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577, afd. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

69. New York Life Ins. Co. v. Kansas City Nat. Bank [Mo. App.] 97 S. W. 195. Evidence held to support finding that policy was assigned as security for debt. New York Life Ins. Co. v. Kansas City Nat. Bank [Mo. App.] 97 S. W. 195. Possession of note executed by insured and of policies payable to his executors and administrators raises presumption that policies were held as collateral security for note. Id. Stockholders of defunct bank held not entitled to recover on policies assigned to it as collateral security, but sole surviving director and trustee entitled to possession of fund as trustee for shareholders. Id.

70. Pleadings held not to show that companies had been guilty of any wrong in indorsing on policies change of beneficiaries so as to deprive them of the right to interplead rival claimants to the proceeds. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577, afd. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

71. Love and affection held sufficient consideration to support assignment by children to father. Doty v. Dickey [Ky.] 96 S. W. 544. Agreement of assignee to become insured's wife held good consideration for assignment except as against prior creditors or an assignee for value. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86. Persons claiming under prior assignment held entitled to show by her and her letters that she was already married to another person when assignment was made. Id.

72. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577, afd. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

73. Where defendants loaned insured bonds, etc., relying on his promise to assign life policy to them as collateral, which

months prior to his bankruptcy.[74] Where the legal title to policies payable to insured's children is by order of court transferred to him and by him to a loan company for the purpose of keeping them alive for the benefit of the children, the equitable title remains in the children and the proceeds do not become assets of the insured's estate on his death.[75]

An assignment absolute in form may be shown by extrinsic evidence to have been made as security, in which event it will be valid only to the extent of the indebtedness secured.[76] But where a written assignment is complete in itself and there is no evidence of fraud or mistake, it cannot be shown by parol that the assignment was special and limited to a particular purpose and that the policy was to revest in the assignors when such purpose was accomplished.[77]

One to whom a policy is pledged or assigned as security for a loan is only entitled to so much of the proceeds as will reimburse him for the amount of the loan and the amount advanced by him on account of the policy with interest on both,[78] the beneficiary being entitled, in such case, to any balance remaining after the debt is paid.[79] A policy pledged to secure a particular debt cannot be held to secure other debts due the pledgee.[80] The right to redeem from a pledge cannot be held to have been lost by laches or to have been waived or abandoned by the pledgor so long as it is recognized by the pledgee and pledgor as still existing.[81] The fact that limitations have run against the debt is not a bar to the enforcement of the security.[82] Whether on default by the insured in the payment of the premiums the assignee is entitled to apply for and receive a paid up policy which the company is, by its contract, required to issue in such case, depends on the terms of the assignment.[83]

Married women may ordinarily assign policies in which they are named as beneficiaries.[84] Statutes in some states, however, require the written consent of

he did. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86.

74. Assignment by husband to wife. In re Grandy & Son, 146 F. 318.

75. In re Joost's Estate, 50 Misc. 78, 100 N. Y. S. 378.

76. Court bound to inquire into actual transaction. Aldrich v. Brinker, 143 F. 563. Evidence held not to support finding that assignment was as security for particular debt only. Reinhardt v. Marks' Adm'r [Ky.] 93 S. W. 32. Evidence held insufficient to show admission to that effect on part of assignee. Id. Evidence held to require submission of question to jury. Gould v. Hancock Mut. Life Ins. Co., 99 N. Y. S. 833.

77. Doty v. Dickey [Ky.] 96 S. W. 544.

78. Note, absolute conveyance of policy, and assignment of policy with defeasance clause by terms of which assignor was entitled to have policy reassigned on payment of note, held to show that policy was merely pledged to secure payment of note and not sold. Daly v. Spiller, 222 Ill. 421, 78 N. E. 782, afg. 119 Ill. App. 272. In view of fact that debt secured was much larger than paid up policy which assignee received in lieu thereof on default in payment of premiums by insured, that amount of policy could never have been increased, that more than a year had elapsed since any part of the debt had been paid, and that insured subsequently died without paying any part of it, held that assignee was justified in treating policy as so much money in its hands without attempting to sell it as pledged property. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467.

79. Beneficiary joining in assignment to bank held only entitled to such balance, particularly in view of Civ. Code, § 3054, giving bank general lien on property of customer in its hands for any balance due it. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467. Beneficiary has no right to policy or its proceeds until he tenders the amount of the debt. Id.

80. Bramblett v. Hargis' Ex'r [Ky.] 94 S. W. 20. Assignee held not entitled to recover on policy on theory that at time of the assignment he was a creditor of the insured where he rested his claim wholly on ground that it passed to him under a certain contract into the making of which such indebtedness did not enter and with which it had nothing to do. Id.

81. Evidence held to show that pledgee still regarded relation as existing at time of pledgor's death. Daly v. Spiller, 222 Ill. 421, 78 N. E. 782, afg. 119 Ill. App. 272.

82. Fact that limitations had run against note held not a bar to enforcement of policies, Rev. St. 1899, § 4276, applying to mortgages and deeds of trust only. New York Life Ins. Co. v. Kansas City Nat. Bank [Mo. App.] 97 S. W. 195.

83. Assignment held to have given assignee right to do so. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467.

84. May assign her interest in policy payable to herself and her children. Doty v.

the insured to such assignments.[85] A subsequent reconciliation agreement avoids an assignment by a wife to her husband of her interest in a policy on his life as a part of the consideration for a separation agreement.[86]

Life policies having an actual surrender value pass to the insured's trustee in bankruptcy.[87]

Fire insurance.[88]—Policies frequently provide that they shall be void if assigned before loss unless otherwise provided by agreement indorsed thereon or added thereto.[89] It is not necessary to use the blank form of assignment printed on the back of a policy.[90] Where the statute makes all contracts for the payment of money assignable by indorsement, a policy may be so assigned after loss notwithstanding a provision therein to the contrary.[91] An oral assignment after loss is ordinarily valid.[92] An agreement by a debtor to carry a specified amount of insurance as a protection of the claim of his creditor and which provides that he thereby assigns that amount of insurance to him as collateral security for the debt is not an assignment of the policies in praesenti but a mere executory agreement to create a lien upon a fund to arise in case of loss and collection from the insurer,[93] which, while enforceable inter partes, is not binding either upon the insurer or those claiming under the insured without notice thereof.[94] Where the property is conveyed and the policy assigned to the grantee with the company's consent, an allegation that the grantor had previously conveyed an equitable estate in the property to another will not defeat the grantee's right to recover thereon in the absence of evidence of such an outstanding interest as will defeat his legal title or a showing that any other person is in a position to recover the amount due on the policy.[95]

§ 15. *Change or substitution of contract, or risk, or of conditions thereupon.*[96] —Neither party may alter or modify the contract without the consent of the other,[97]

Dickey [Ky.] 96 S. W. 544. Policy is not assignable by married woman under first clause of Rev. St. § 3629, since that clause has relation to a married woman simply and without any qualifying words expressing the assignor's intention, and operates to fix upon such assignment a presumptive intention to make provision for a married woman and her children jointly. Reakirt v. Desuden, 3 Ohio N. P. (N. S.) 646. But an assignment to a wife and her assigns, with a reversion back to her husband in case of her prior death, creates an estate solely for her use and is valid under the second clause or exception of the statute. Id.

85. Under Laws 1896, p. 220, c. 272, assignment by wife of policy on life of husband to him was void where he failed to consent thereto in writing, though such assignment was made at his request. Dudley v. Fifth Avenue Trust Co., 100 N. Y. S. 934.

86. By subsequent reconciliation and abrogation of such agreement, though reconciliation agreement made no reference to policy. Dudley v. Fifth Ave. Trust Co., 100 N. Y. S. 934.

87. Where bankrupt does not avail himself of proviso of § 70a, cl. 5, of bankrupt act by paying cash surrender value to trustee. Clark v. Equitable Life Assur. Soc., 143 F. 175.

88. See 6 C. L. 114.

89. Policy held not forfeited by assignment indorsed thereon where it appeared that indorsement was made through mistake, that there was no consideration therefor, that there was no delivery, and that it was made subject to company's consent and hence was ineffective without such consent. Pennsylvania Fire Ins. Co. v. Waggener [Tex. Civ. App.] 17 Tex. Ct. Rep. 8, 97 S. W. 541. Instruction as to effect of mistake held justified by evidence. Id.

90. Failure to do so does not affect legality of assignment. Gragg v. Home Ins. Co., 28 Ky. L. R. 988, 90 S. W. 1045.

91. Under Code 1896, § 876, providing that all contracts for payment of money are assignable by indorsement so as to authorize an action thereon by assignee, held that indorsement of assignment on policy after fire constituted assignment thereof and authorized suit thereon by assignee, though policy prohibited its assignment. Ober & Sons Co. v. Phillips Buttorff Mfg. Co. [Ala.] 40 So. 278.

92. German Ins. Co. v. Gibbs, Wilson & Co. [Tex Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

93. Equitable lien would not arise until loss and collection, effect being same as a direction to pay in case of loss. Long v. Farmers' State Bank [C. C. A.] 147 F. 360.

94. Long v. Farmers' State Bank [C. C. A.] 147 F. 360.

95. Gartsee v. Citizens' Ins. Co., 30 Pa. Super. Ct. 602.

96. See 6 C. L. 115.

97. Company has no right to change contract without insured's consent merely to facilitate the reorganization of its business upon a more satisfactory basis. Cannot increase rate of insurance contrary to terms of contract. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962. Where policy

but changes may be made at any time by mutual consent,[98] and in any manner the parties may choose, regardless of provisions prohibiting alteration except in a specified manner.[99] The acts of its agent in this regard are binding on the company if within the actual or apparent scope of his authority.[1] The insured is entitled to a reasonable time in which to consider a proposition to exchange his policy for another.[2] The sale and transfer of the business of one company to another renders the outstanding policies of the former and premium notes given therefor void at the election of the insured.[3] In case an assessment company illegally increases assessments the insured is not bound to pay them,[4] nor is he bound to tender assessments at the old rate as they become due from time to time where it appears that such tender would have been a vain thing,[5] and upon his death while in arrears his bene-

in assessment company provided that if any unexpected emergency should arise whereby mortuary and reserve funds should be exhausted "then, and in such case only," the insured should be liable for such further assessment, in addition to payments theretofore specified, as might be necessary to meet such emergency and maintain solvency of company, held that company had no power, either under the contract or the law, to increase rate of assessment except for the purposes and under the circumstances stated in the policy. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962. Separation from policy and loss of slip containing three-fourths value clause held immaterial, loss being accidental, it being elsewhere stated in the policy that it applied, and the reply having admitted that it was a part of the contract contained in the policy. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987.

98. Slip attached to policy separately insuring house and furniture held to have modified it as to furniture only so as to cover it after it had been removed to another place, and clause therein permitting vacancy during change of tenants if subject was a dwelling house had no application to house covered by policy and did not prevent forfeiture of insurance thereon for vacancy. Alvey v. Continental Ins. Co. [Cal. App.] 83 P. 285. Indorsement held to constitute a new and independent contract so that the rights of the parties were dependent on conditions then existing and were not affected by matters of defense arising prior to that date, such as prior vacancy. Porter v. Insurance Co., 29 Pa. Super. Ct. 75.

99. See, also, § 16C, post. By subsequent agreement based on sufficient consideration. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397. A written policy may be changed by parol even though it provides that all changes must be in writing. Springfield F. & M. Ins. Co. v. Mattingly, 28 Ky. L. R. 795, 90 S. W. 577. Where insured conveyed premises retaining vendor's lien and at the time told insurer's agent, who was present when contract of sale was made, that he could either cancel policy and return unearned premium or transfer policy to vendee and thus give vendor benefit of insurance for protection of his lien, and agent said that he preferred that transfer should be made, held that there was in effect an agreement that policy should continue in force, and it was enforceable against company on subsequent loss, though policy was not actually transferred and though it provided that it should be void if any change took place in interest, title, or possession unless otherwise provided by agreement indorsed thereon or attached thereto. Id.

1. Act of special agent, who issued policy, in modifying contract by indorsement on envelope containing policy so as to provide that premiums should be paid by deductions from wages for different months than those specified in policy and in order given by insured on his employer held binding on company. Hagins v. Aetna Life Ins. Co. [S. C.] 55 S. E. 323. Where by-laws of mutual company conferred upon secretary power to consent in writing to mortgaging of insured dwelling or to increase of risk, held that he had authority to indorse on policy provision making loss payable to a mortgagee, notwithstanding further provisions that all policies must be approved by executive committee and all applications passed upon by them, and fact that no application was made to them to have mortgage clause attached. Adams v. Farmers' Mut. Fire Ins. Co., 115 Mo. App. 21, 90 S. W. 747.

2. Shortly before premium became due agent offered beneficiary, who paid premiums, a new policy in exchange for old. Beneficiary desired to consult with others in regard to exchange and agent consented. Beneficiary contended that he had arranged with agent to collect premium on old policy from his employer and supposed this had been done and that neither he nor his employer had received notice that premium was due. After expiration of 30 days' of grace beneficiary received notice that old policy had lapsed for nonpayment. He then obtained certificate of good health of insured and paid premium for purpose of having policy reinstated, but company refused reinstatement and returned premium. Held, in action to compel reinstatement, that six weeks was not an unreasonable time to allow for consideration of matter of exchanging policies, and that, under circumstances, company should not be allowed to both forfeit old policy and withdraw new one, and that insured was entitled to latter on performing conditions of exchange. Provident Sav. Life Ins. Co. v. Scboolfield [Ky.] 97 S. W. 345.

3. Crowell v. Northwestern Life & Sav. Co. [Minn.] 108 N. W. 962.

4. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962.

5. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962. Insured held not bound to tender premium due at contract rate from quarter to quarter where company had

ficiary is entitled to recover the full amount of the policy less the unpaid premiums at the lawful or contract rate.[6]

Renewals made by an agent are binding on the company if he acts within the actual or apparent scope of his authority.[7] Unless otherwise expressed, a renewal will be construed to be subject to the terms and conditions contained in the original policy.[8] A new and independent contract taking the place of one which has expired is not controlled, as to the property covered, by a judicial interpretation of the latter.[9]

§ 16. *Rescission, forfeiture, cancellation, and avoidance. A. By agreement.*[10] *Fire insurance.*—Fire policies generally provide that they may be canceled at any time by the insured on their being returned to the company,[11] and by the insurer on giving a specified number of days' notice to the insured[12] and a return of the unearned premium.[13] In the absence of a provision as to the manner of giving notice, actual personal service must be had.[14] Independently of the right of cancellation reserved

wholly changed its plan of business and new rates were based on new plan, insisted on payment at new rate though member expressed willingness to pay at old rate, gave no notice of assessment at old rate, notice being required by contract, and it did not even appear that assessment had been levied at old rate. Id.

6. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962.

7. Where agent had authority to issue and "renew" policies signed by secretary and president "subject to the rules and regulations" of the company and to such instructions as might be given by its officers. held that, in absence of any rules or instructions on the subject, he had authority to make an oral contract to take the place of a written one about to expire, it being in effect a mere renewal. King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892.

8. Insured is entitled to the benefit of the understanding when first policy was issued as to what was covered thereby in construing new contract. Bickford v. Aetna Ins. Co. [Me.] 63 A. 552.

9. Policy held not a renewal of a previous one but an independent contract so that a holding by the court of appeals that a certain building was insured under the provisions of the former policy as to "additions" did not require the new policy to be construed as covering the same building which was not referred to therein, though provisions in both as to additions were the same. Arlington Co. v. Empire City Fire Ins. Co., 101 N. Y. S. 772.

10. See 6 C. L. 115.

11. Whether returning policies to agent is an exercise of right to cancel them depends upon the intent with which they are returned. Ohio Farmers' Ins. Co. v. Hunter [Ind. App.] 77 N. E. 951. Return with letter clearly showing intent to cancel held to effect cancellation. Id.

12. Under standard policy (Rev. Laws c. 118, § 60), policy can be canceled by company only by giving written notice to insured. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649. Where policy provides for 5 days' notice, insurance does not terminate until expiration of such time after giving of notice. Home Ins. Co. v. Chattachoochee Lumber Co. [Ga.] 55 S. E. 11. Evidence held to sustain finding that company did not notify insured of cancellation. National Fire Ins. Co. v. Three States Lumber Co., 119 Ill. App. 67. Where agent told insured that company had ordered policy canceled and that he had come to get it, and insured stated that he would write to person having its custody and get it, held that policy stood canceled after expiration of 5 days from that time. Citizens' Ins. Co. v. Henderson Elevator Co. [Ky.] 96 S. W. 601, 97 S. W. 810. Where policy provided that it should continue in force as to the mortgagee 10 days after notice to him of its cancellation, held that insurance remained in force as to him where he had no notice whatever of cancellation. Adams v. Farmers' Mut. Fire Ins. Co., 115 Mo. App. 21, 90 S. W. 747. Insurance agents who obtained policy through defendant's agent, and to whom premium was to be paid, held defendant's agents and without authority to surrender policy for cancellation. O'Neill v. Northern Assur. Co. [Mich.] 13 Det. Leg. N. 620, 108 N. W. 996. Even if they were plaintiff's agents to procure policy held that there was no evidence that they had any authority to act for them after they had procured it. Id. Question whether agent of vendor of realty had authority to receive notice of and agree to cancellation of policy held for jury under the evidence. Id.

13. Tender of unearned premium necessary to cancel standard policy (Rev. Laws c. 118, § 60). Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649. Insurer held not entitled to cancel policy without a return of unearned premium, premium having been actually paid by giving note to agent for the amount of which he accounted to company. Buckley v. Citizens' Ins. Co., 112 App. Div. 451, 98 N. Y. S. 622. Evidence held to show agreement between insured and agent that policy should be canceled immediately on its receipt by latter so that insured could not contend that cancellation was unauthorized and without effect because unearned premium was not returned at time of such cancellation. Ragley Lumber Co. v. Insurance Co. [Tex. Civ. App.] 94 S. W. 185.

14. Placing notice in post office is insufficient, but five days does not commence to run until it is actually received. Potomac Ins. Co. v. Atwood, 118 Ill. App. 349.

by the policy, there may be an immediate cancellation by agreement,[15] provided the minds of the parties meet.[16] Such agreement may be shown by acts and conduct as well as by direct words.[17] If a proposition for cancellation by such an agreement is made by letter and a reply by letter is relied on as an acceptance completing the agreement, such reply takes effect from the time it is sent.[18] Unless the specific right to cancel is retained by the insured,[19] he cannot effect a cancellation without the consent of the company or its duly authorized agent.[20]

The payment of previous assessments is generally a condition precedent to the right of a member of a mutual company to cancel his policy and withdraw.[21] An agreement by the insurer's agent, after giving notice of cancellation, to keep the policy in force until he can procure other insurance is binding on the company, if within the apparent scope of his authority and the insured has no notice of limitations thereon.[22] The subsequent assertion by the company of a claim on a premium note is not inconsistent with a claim of cancellation where the policy makes the insured liable, in case of a cancellation, for premiums actually earned.[23]

Life insurance.—Cancellation with the consent of the insured prevents a recovery by the beneficiary[24] but an unexercised option to do so on insured's failure to repay a loan does not.[25] A statement by the insured to the insurer's agent during the days of grace allowed for the payment of the premium that he does not intend to continue the policy does not work a termination of his rights thereunder.[26]

(§ 16) *B. For breach of contract, condition, or warranty, or misrepresentation.*[27]—Policies generally provide that they shall be void if the premiums,[28] or

15. Home Ins. Co. v. Chattachoochee Lumber Co. [Ga.] 55 S. E. 11.

16. Mere pendency of negotiations not completed held no defense to action on policy. Home Ins. Co. v. Chattachoochee Lumber Co. [Ga.] 55 S. E. 11. Evidence held insufficient to show meeting of minds on proposition for immediate cancellation. Id.

17. Home Ins. Co. v. Chattachoochee Lumber Co. [Ga.] 55 S. E. 11.

18. Civ. Code 1895, § 3646. Home Ins. Co. v. Chattachoochee Lumber Co. [Ga.] 55 S. E. 11. If not sent until after fire no officer of insured corporation would then have authority to send it and thus destroy right of indemnity already accrued. Id.

19. Insurer's consent not necessary in such case. Ohio Farmers' Ins. Co. v. Hunter [Ind. App.] 77 N. E. 951.

20. Broker procuring fire policy for insured held not agent of company, and hence his consent to return of policy did not bind it or prevent recovery of premium. Westchester Fire Ins. Co. v. Gurian, 101 N. Y. S. 50.

21. Policy held not canceled so as to relieve insured from liability for further assessments by reason of fact that he delivered it to agent and asked to withdraw, where he did not pay or offer to pay previous assessment. Nichol v. Murphy [Mich.] 108 N. W. 704.

22. Agreement held binding on company for reasonable time, if insured had no notice that company had ordered immediate cancellation. Citizens' Ins. Co. v. Henderson Elevator Co. [Ky.] 97 S. W. 810. Company would not be liable after lapse of five days, however, if insured was notified of that fact. Id. Letter by company to agent held a notification to cancel policy immediately. Id.

23. Where insured returned policies with letter showing intent to cancel and requesting return of premium notes, held that insurer was relieved from liability for a subsequent loss, notwithstanding its assertion of a claim on the notes, it having a right under the contract to the part of the premium already earned and a demand for payment of the notes not operating to render insured liable for more than that amount. Ohio Farmers' Ins. Co. v. Hunter [Ind. App.] 77 N. E. 951.

24. Where allegations that insured with full knowledge of facts voluntarily elected to discontinue payment of dues and assessments and directed policy to be canceled, and same was canceled and thereby abandoned, were admitted, held that beneficiary was not entitled to recover. Price v. Mutual Reserve Life Ins. Co., 102 Md. 683, 62 A. 1040.

25. Where it was shown that, on making loan to insured, company reserved option to cancel policy if it was not repaid on returning the cash surrender value, but instead of canceling it, and without making such payment, company opened up negotiations for a new loan, pending which insured died, held that beneficiary was entitled to recover amount of policy less indebtedness. New York Life Ins. Co. v. Mills [Fla.] 41 So. 603.

26. Being without consideration, it is not binding on him. Provident Sav. Life Assur. Soc. v. Taylor [C. C. A.] 142 F. 709, afg. 134 F. 932.

27. See 6 C. L. 117.

28. Policy forfeited for nonpayment of premiums. McDougald v. New York Life Ins. Co. [C. C. A.] 146 F. 674; Wells v. Union Cent. Life Ins. Co. [Ark.] 98 S. W. 697. Evidence held insufficient to warrant finding that insured, who had been absent and unheard of for seven years, died before a specified

any instalment thereof,[29] or any premium notes,[30] shall not be paid when due. Nonpayment of notes sometimes operates merely to suspend the insurance while they remain overdue and unpaid.[31] The date when the policy actually goes into effect determines the time when it may be forfeited for nonpayment of premiums.[32] A lapse for failure to pay premiums cannot be claimed where the insurer has sufficient funds for that purpose in its hands.[33]

In the case of fire policies some courts hold that where the insurance is for a gross sum and a single consideration the contract is entire, although the amount of insurance is distributed over several distinct items of property, and hence that a breach as to one item avoids the whole.[34] Others regard such a contract as sev-

date, at which time policy lapsed for nonpayment of premiums. Spahr v. Mutual Life Ins. Co. [Minn.] 108 N. W. 4. Time is of the essence of the contract, and a failure to pay a premium when due works a forfeiture though the condition providing for such forfeiture be a condition subsequent, no affirmative act on the part of the insurer being necessary. Thompson v. Fidelity Mut. Life Ins. Co. [Tenn.] 92 S. W. 1098. Contract held not an assurance for single year with privilege of renewal from year to year by paying annual premiums but an entire contract of assurance for at least five years, impliedly subject to forfeiture by failure to perform condition subsequent of payment of premiums as provided in contract taken as a whole. Provident Life Assur. Soc. v. Taylor [C. C. A.] 142 F. 709, afg. 134 F. 932.

29. Where the annual premium is payable in instalments, a failure to pay any instalment works a forfeiture. Thompson v. Fidelity Mut. Life Ins. Co. [Tenn.] 92 S. W. 1098. Provision that in case of death the company would pay the amount of the policy "less the balance of the dues for the current year of the death of the insured," followed by a provision for forfeiture for failure to make payments when due, held not to deprive insurer of right to forfeit policy for nonpayment of instalment when due, but merely meant that, upon death of insured after paying all instalments when due, company might deduct any instalments for current year which were not yet due. Id.

30. Failure to pay notes given to agent for premium and by him indorsed to company held to avoid policy as provided in both policy and premium receipt. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 S. W. 778. Insured paid part of first premium in cash and gave notes for balance payable to agent, who indorsed them to company without recourse, and they were thereafter treated as belonging to it. Policy and receipt provided for forfeiture for nonpayment of premium notes when due. Held that failure to pay notes when due avoided policy even if amount of notes did not exceed amount of agent's commission and it was agreed that they were to be regarded as evidencing an indebtedness to him, the company never having received any of the premium in money and having no notice of any such agreement, and agent's commission on notes not being payable until they were paid in cash. Id.

31. Life: Provision in note that company should not be liable for loss by death "after this note is due and remains unpaid" held to operate merely to suspend insurance while note remained unpaid after maturity, and where death did not occur until after a valid tender of the amount due, payment at maturity being excused for failure to give notice, company was liable. Kavanaugh v. Security Trust & Life Ins. Co. [Tenn.] 96 S. W. 499. Rights of parties on nonpayment of notes given for part of premium held governed by provisions of such notes rather than those of the policy. Id.

Fire: Where premium note provided that if not paid at maturity whole amount of assessment should be deemed earned, and that contract should be null and void so long as note remained overdue and unpaid, and note was overdue at the time of the loss, held that attempt to pay it after the fire was too late to save the insurance. Driver v. Planters' Mut. Ins. Ass'n [Ark.] 93 S. W. 752.

32. Life: Policy held to have fixed time when insurance thereunder commenced to run as June 30, 1895, particularly when construed with application, so that, treating premium note as payment of premium for two years, it became subject to forfeiture at expiration of month of grace after June 30, 1897. McDougald v. New York Life Ins. Co. [C. C. A.] 146 F. 674. Claim that policy did not go into effect until after it was issued and that therefore payments were not due when they were made and last one was not due until after insured's death, held not supported by evidence, particularly in view of fact that for eight years payments had been made in accordance with terms of policy without any such contention. Smith v. Mutual Reserve Life Ins. Co. [Wash.] 87 P. 347.

Fire: Evidence held to show that application was made in November so that it was a mistake to make instalment notes for premium payable on the first of October of each year instead of on the first of November, and hence insured was entitled to recover for a loss occurring in October though he had not paid the note for that year and though policy provided that company should not be liable for any loss occurring while any instalment of the note remained due and unpaid. Home Ins. Co. v. Clements, 28 Ky. L. R. 953, 90 S. W. 973.

33. Policy running for one year with agreement to renew from year to year on payment of renewal premiums does not lapse upon failure to pay one of such premiums where company has fund in its hands

erable so that a breach as to one item does not ordinarily affect the policy as to the others unless such an intention clearly appears,[35] or unless the contract is fraudulent or contrary to public policy, or the breach increases the risk as to the whole property.[36]

If the policy received by the insured is different from that contracted for, it is his duty to ascertain that fact within a reasonable time and return it for cancellation,[37] and he cannot at the same time hold the policy and refuse on that ground to pay premium notes given therefor.[38] If the agent fraudulently inserts false answers in the application though insured makes true ones, it is the duty of the insured on discovery of such fraud to notify the company thereof and to surrender his policy for cancellation.[39] In case he fails to do so he becomes a party to the agent's fraud and thereby forfeits his rights under the policy.[40] So too, if he desires to rescind because of his incapacity when the contract was made, he must do so within a reasonable time.[41] Where the contract is entire the beneficiary cannot affirm it in part and disaffirm it in part.[42] If the insurer desires to avoid the policy by reason of the fact that its agent is also the agent of the insured, it must act promptly upon discovering the facts.[43]

If the company, before the time for performance arrives, refuses to perform or declares its intention not to perform, the insured may either treat such conduct as a rescission and sue for the money already paid in by him,[44] or he may refuse assent and keep the contract alive in order that his beneficiary may profit by its terms in the event of his death.[45] The election once made is final.[46] In New York

which by terms of policy is applicable to its extension. Provident Sav. Life Assur. Society v. King, 117 Ill. App. 556.

34. Sole effect of apportionment is to limit risk as to each of the items to the amount specified. Policy held entire. In re Millers' & Manuf'rs' Ins. Co. [Minn.] 106 N. W. 485.

35. Breach of warranty as to title and incumbrances held to avoid insurance as to barn only, and not to affect that on personalty. Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914. Fact that warranties were in application held not to change rule, particularly where application provided that they should be same as if written on face of policy. Id. Provision that entire policy should be void in case of breach held to mean the entire policy so far as it related to subject of insurance affected by breach only. Id.

36. Breach of condition as to ownership held to avoid whole policy even under this rule, the stock and machinery being in buildings insured which were all on leased ground, and hence whatever increased risk as to buildings increased it as to rest of property destroyed. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485.

37. Hutchinson v. Palmer [Ala.] 40 So. 339.

38. Fact that policy did not contain provisions contracted for held no defense to action on note. Hutchinson v. Palmer [Ala.] 40 So. 339.

39. Curry v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 645, 92 S. W. 263.

40. Knowledge of agent will not estop company under such circumstances. Curry v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 645, 92 S. W. 263.

41. Policy issued upon application obtained while insured was so drunk as not to know its contents held voidable only so that such a defense was unavailing to prevent forfeiture where no facts were averred excusing failure of insured to have policy canceled or reformed. Lowenstein v. Franklin Life Ins. Co., 122 Ill. App. 632.

42. Cannot contend that part of it was not binding on insured because he was intoxicated when he signed application, and at same time seek to recover insurance. Lowenstein v. Franklin Life Ins. Co., 122 Ill. App. 632.

43. Delay held unreasonable. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

44. Blakely v. Fidelity Mut. Life Ins. Co., 143 F. 619. Fact that member of mutual company and its president differed widely as to meaning of provision for assessments held not an anticipatory breach where neither party intended to refuse to be bound by the contract as he understood it. Id. In any event suit was premature when brought before larger sum had been demanded than plaintiff admitted was due. Id. Express renunciation is necessary, a mere denial of liability being insufficient. Kilsel v. Mutual Reserve Life Ins. Co. [Iowa] 107 N. W. 1027. Letter stating that policy had lapsed for nonpayment of premiums, but that if insured persisted in making claim thereunder the company would require the performance of all conditions precedent as provided by the policy, held not a renunciation of the contract which would give rise to cause of action and start running of contract limitation. Id.

45. Blakely v. Fidelity Mut. Life Ins. Co., 143 F. 619.

46. Where elects to continue contract in force by tendering payment of amount lawfully due thereon, cannot thereafter rescind. Blakely v. Fidelity Mut. Life Ins. Co., 143 F. 619.

this rule is held not to apply to policies issued by mutual life companies.[47] In case the company makes performance of conditions by the insured impossible, it is chargeable with the sum it would have had to pay in case of performance.[48] In case it wrongfully cancels the policy the insured is entitled to recover the actual damages thereby sustained.[49]

Life policies frequently provide that, after they have been in force for a specified time,[50] they shall be incontestable[51] except for certain specified causes.[52] A provision making a policy incontestable from date of issue is void in so far as it attempts to preclude the company from setting up as a defense the fact that it was induced to enter into the contract by the fraudulent representations of the insured,[53] but a provision making it incontestable for fraud after the expiration of a specified time, not unreasonably short, is valid.[54] The incontestable clause does not preclude a defense that the policy is illegal.[55] Since the reinstatement of the policy after lapse is the making of a new contract, as to fraud or false representations in procuring it, the incontestable clause begins to run from the date of the reinstatement.[56]

(§ 16) *C. Estoppel or waiver of right to cancel or avoid.*[57]—Provisions and conditions in the policy which are for the benefit of the insurer may be waived

47. Where only promise made was to pay a sum of money on the death of the plaintiff, held that an allegation that the defendant wrongfully declared the contract void and forfeited, denied that plaintiff had any rights thereunder, and refused to continue said policy in force, did not show a breach entitling plaintiff, in his lifetime, to recover damages in an action at law, his remedy being in equity. Kelly v. Security Mut. Life Ins. Co. [N. Y.] 78 N. E. 584, rvg. 106 App. Div. 352, 94 N. Y. S. 601.

48. Where company refused to defend action against insured as required by employers' liability policy, held that insured could recover from it a sum paid in the prudent settlement thereof, though policy provided that insured should not settle any claim except at his own cost without the written consent of the insurer, and that no action should lie against the insurer unless brought by insured himself to reimburse him for loss actually sustained and paid by him in satisfaction of a judgment after trial of the issue. St. Louis Dressed Beef & Provision Co. v. Maryland Casualty Co., 201 U. S. 173, 50 Law. Ed. 712.

49. Policy was issued on assessment plan, each year's premiums representing actual current cost to association of carrying the risk. At time of cancellation insured was an invalid and could not obtain other insurance. Held that the measure of damages was the amount of the policy, less the cost of carrying it to maturity had it remained in force, all amounts entering into the calculation to be valued upon a 6 per cent. basis as of the date of the cancellation. Mutual Reserve Fund Life Ass'n v. Ferrenbach [C. C. A.] 144 F. 342.

50. Provision that if policy should have been "in continuous force" for a specified time it should be incontestable held to preclude company from defending on ground that it was not delivered and first premium paid while insured was in good health, which was a condition precedent to its taking effect, such condition being of no higher effect than any other warranty. Mutual Reserve Fund Life Ass'n v. Austin [C. C. A.] 142 F. 398, afg. 132 F. 555.

51. Incontestable clause held to preclude defense of fraudulent misrepresentations as to health. Kansas Mut. Life Ins. Co. v. Whitehead [Ky.] 93 S. W. 609.

52. Provision that after three years, if the payments required should have been made when due, the policy should be incontestable held to mean only that it should be incontestable for causes other than nonpayment of premiums. Thompson v. Fidelity Mut. Life Ins. Co. [Tenn.] 92 S. W. 1098.

53. Reagan v. Union Mut. Life Ins. Co., 189 Mass. 555, 76 N. E. 217. Is either an implied exception as to fraud, or, if intended to cover it, provision is contrary to public policy to that extent, and in either case fraud inducing the making of the contract may be shown regardless of the fact that by the terms of the policy the entire contract is contained in it and the application. Id.

54. Reagan v. Union Mut. Life Ins. Co., 189 Mass. 555, 76 N. E. 217. Clause precluding defense of fraud after two years held not void as contrary to public policy. Kansas Mut. Life Ins. Co. v. Whitehead [Ky.] 93 S. W. 609.

55. Because taken out with intention of assigning it to one having no insurable interest, the incontestable clause being itself a part of the illegal contract. Bromley's Adm'r v. Washington Life Ins. Co., 28 Ky. L. R. 1300, 92 S. W. 17.

56. Where policy, which provided that it should be "indisputable after two years from its date of issue" provided premiums were duly paid, lapsed for nonpayment of premiums but was subsequently reinstated on insured furnishing a certificate of good health, held that insurer could take advantage of fraudulent representations in health certificate at any time within two years from the date of such reinstatement. Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204.

57. See 6 C. L. 120.

by it.[58] So too, the insured may waive provisions or conditions inserted for his benefit,[59] but the company cannot claim a waiver because of conduct induced by its own false representations.[60] Where the insured for a valuable consideration sells and assigns a policy and the company pays the same to the assignee, he is estopped as against the company to attack the validity of the assignment on the ground that the assignee has no insurable interest.[61]

A waiver is the intentional relinquishment of a known right.[62] It may be the express abandonment of a right[63] or may be implied from acts and conduct inconsistent with its continued assertion.[64] Slight evidence of the waiver of a forfeiture is sufficient.[65] In order that misrepresentations may work an estoppel they must be as to existing facts[66] and the other party must have relied thereon to his prejudice.[67]

58. Graham v. Security Mut. Life Ins. Co., 72 N. J. Law, 298, 62 A. 681.

Fire insurance: Iron-safe clause. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137. Instruction that sole and unconditional ownership was condition precedent to recovery held properly modified by adding clause that such was case unless provision requiring such ownership was waived. Hartford Fire Ins. Co. v. Enoch [Ark.] 96 S. W. 393.

Health insurance: Condition that all payments must be made to the company and not to its local agents. Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768.

Life insurance: Provision that policy is not assignable. Doty v. Dickey [Ky.] 96 S. W. 544.

59. **Fire insurance:** Held to have waived return of unearned premium as a condition of cancellation. Ragley Lumber Co. v. Insurance Co. [Tex. Civ. App.] 94 S. W. 185. Return of policy by insured to agents after receiving notice of cancellation held not a waiver of provision requiring return of unearned premium as condition precedent to cancellation, where premium was not actually returned. Buckley v. Citizens' Ins. Co., 112 App. Div. 451, 98 N. Y. S. 622.

Life insurance: Statement by insured to agent during days of grace that he did not intend to continue the insurance, being without consideration, held not binding on him and not to constitute a waiver of the grace or a termination of his rights under the contract. Provident Sav. Life Assur. Soc. v. Taylor [C. C. A.] 142 F. 709, afg. 134 F. 932. Company failed to pay endowment when due but returned policy to insured with request that he hold it until money could be raised by assessment of members, and informed him that it would notify him when it was ready to pay. Subsequently it induced him to continue to pay premiums by false representations that it was necessary to prevent forfeiture. Held that company was estopped to contend that insured had waived right to endowment by paying premiums, it being presumed that payments made for several years were all made by reason of same representations. Hopkins v. Northwestern Nat. Life Ins. Co., 41 Wash. 592, 83 P. 1019.

60. Insured held not to have waived right to endowment by continued payment of premiums after it became payable where he sent in policy for cancellation at proper time but company returned it with request that he would keep it until it had raised amount by assessment of members, and where company on his subsequent demands for payment represented that amount had not yet been raised, and where he was induced to continue to pay premiums by false representations that it was necessary in order to prevent forfeiture, he being old and inexperienced and having relied on such representations. Hopkins v. Northwestern Nat. Life Ins. Co., 41 Wash. 592, 83 P. 1019.

61. Clark v. Equitable Life Assur. Soc., 143 F. 175.

62. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485; Buckley v. Citizens' Ins. Co., 112 App. Div. 451, 98 N. Y. S. 622. Is essentially a matter of intention, and to establish it there must be some declaration or act from which the insured might reasonably infer that the insurer did not mean to insist upon a right which because of a change of position induced thereby it would be inequitable to enforce. Shay v. Phoenix Benefit Ass'n, 28 Pa. Super. Ct. 527.

63. Letter of agent in regard to cancellation of policy held not susceptible of construction as a waiver of breach of condition against increase of hazard, even though, if it were a waiver, it could be deemed to be one in writing annexed to the policy. Ruffner Bros. v. Dutchess Ins. Co. [W. Va.] 53 S. E. 943.

64. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397.

65. Forfeitures are not favored in the law and courts are always prompt to seize hold of any circumstances to indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Graham v. Security Mut. Life Ins. Co., 72 N. J. Law, 298, 62 A. 681.

66. Statement by clerk having no authority to waive provision avoiding policy for change of ownership that he was "going to fix it all right" held not to estop company from relying on breach. Kompa v. Franklin Fire Ins. Co., 28 Pa. Super. Ct. 425.

67. Letter of insurer to one to whom it might at its option pay amount of policy, though it was under no legal obligation to do so, promising to pay it to him, held not to estop it from thereafter paying it to representatives who were primarily entitled to it, plaintiff having lost nothing in reliance thereon. Ferreth v. Prudential Ins. Co., 49 Misc. 489, 97 N. Y. S. 1007. Nor was let-

Any acts, declarations, course of dealing or conduct on the part of the insurer leading the insured to believe that a strict performance of the terms and conditions of the policy will not be insisted upon will preclude it from thereafter claiming a forfeiture for failure to strictly perform,[68] provided it acts with full knowledge of

ter a waiver of any of the company's rights. Id.

68. **Fire insurance:** Insured may always show waiver of conditions or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. Gish v. Insurance Co. [Okl.] 87 P. 869. Allegations in regard to reinsurance and the obtaining of a vacancy permit from reinsurer held insufficient to show estoppel to deny that insurance was for term of three years, there being no allegations showing that company misled plaintiff or that he did or failed to do anything in reliance on its conduct or representations. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330. Objection that applicant for surplus line insurance misrepresented that two certain admitted companies were on the risk held waived where no questions were asked in regard to what other companies were on risk until after application had been accepted, company delivered policy after notice of facts, received notice of loss and list of companies on risk in which names of companies did not appear, asked for proofs, promised to pay promptly on their receipt, and received and retained proofs. Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances, 99 N. Y. S. 517. Evidence held to warrant submission of question of waiver of breach of warranty as to ownership and of iron-safe clause to jury. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48. Breach of provision as to keeping gasoline on the premises held waived where adjusting and supervising agent had knowledge of breach but company gave no intimation of its intention to consider policies terminated but retained premium and allowed plaintiff to rest on implied assurance that policies still remained in full force and effect, though policy provided that no officer or agent could waive its provisions unless waiver was in writing and attached thereto. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. Payment of premium on day of parol renewal of policy held waived where agent was accustomed to charge insured with amount of premiums and collect same at his convenience. German Ins. Co. v. Goodfriend [Ky.] 97 S. W. 1098. Payment of premium on day when it was due held waived by acts and conduct of agent in accepting overdue premiums, informing insured that premium might be paid after it became due, etc. Home Ins. Co. v. Ballew [Ky.] 96 S. W. 878.

Life insurance: Insured may always show a waiver of conditions or a course of conduct on the part of the insurer from which it might justly and reasonably be concluded that a forfeiture would not be exacted. Graham v. Security Mut. Life Ins. Co., 72 N. J. Law, 298, 62 A. 681. Evidence held to justify submission of question whether company intended to waive forfeiture for nonpayment of premium note when due to jury. Id. Letter written after premium note became due held to amount to agreement that if it was paid policy should not be forfeited, and hence to be a recognition of continued existence of policy and an election to waive forfeiture. Id. Agent's assurance to insured that he need not pay instalment of premium when due and crediting payment thereof on books held waiver of forfeiture for nonpayment. Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016. Company waives right to insist on a forfeiture for delay in payment of premiums if by its course of conduct it leads the insured to believe that they will be accepted after the appointed day. Morgan v. Northwestern Nat. Life Ins. Co., 42 Wash. 10, 84 P. 412. Policy provided that premiums should be paid quarterly on or before first of certain months, but were afterwards made payable monthly. During nine months preceding death of insured all premiums had been paid after 19th. Insured died on 13th of month for which premium had not been paid. Held that right of forfeiture for nonpayment on 1st was waived though policy provided that acceptance of premium after it was due should be regarded as an act of courtesy only and not as a waiver. Instruction approved. Id. No place was specified for payment of premiums and it was customary for collector to call for them weekly. After last payment he failed to call again, and when plaintiff inquired reason why informed him that he had been instructed not to call any more. Plaintiff then tendered premium to company's superintendent, who refused to receive it, claiming that policy had lapsed. Held that company was estopped to claim forfeiture for nonpayment. Carey v. Hancock Mut. Life Ins. Co., 100 N. Y. S. 289. A course of dealing under which company accepts overdue premiums while insured is in good health does not require it to accept overdue premiums tendered after his death. Thompson v. Fidelity Mut. Life Ins. Co. [Tenn.] 92 S. W. 1098. Mere indulgencies in payment do not constitute a waiver of the condition of forfeiture for failure to pay when due. Id. Evidence held insufficient to show an habitual course of dealing between the parties such as would justify insured in believing that company would not insist on forfeiture for nonpayment of premiums when due. Id. Evidence held not to show that previous premiums had been received after they were due and to be insufficient to show waiver of forfeiture for nonpayment on time. Suess v. Imperial Life Ins. Co., 193 Mo. 564, 91 S. W. 1041. Where agent was authorized to accept premiums within 30 days after they became due provided insured was alive and in sound health, fact that he received single overdue premium for which he gave receipt reciting that acceptance of past due premium should be regarded as an act of grace and not as a precedent or a waiver of the conditions of the policy, held not to constitute a course of

the facts.[69] The knowledge of the company's agent[70] acquired while acting within the scope of his authority[71] and while transacting the business of his principal[72] is imputed to it,[73] and his acts, if within the general scope of his authority,[74] and his

conduct leading insured to believe that he might delay payment of subsequent premiums. Kennedy v. Metropolitan Life Ins. Co., 116 La. 66, 40 So. 533. Acceptance of past due premiums upon such conditions and when insured was in good health held not to authorize assumption that it would accept overdue premiums in future when insured was in bad health or dead. Id. Where policy provided that it should not take effect until first premium was paid, held that it could not be said to be past due because not paid upon day which policy bore date. Id. Where policy provided that nonpayment of premiums when due should terminate company's liability, except that policy might be reinstated during insured's lifetime at any time within 12 months from date of lapse, by payment of all past due premiums and fine of 10 per cent., held that fact that company had previously accepted past due premiums was not a waiver of right to insist on payment when due and did not estop it to claim forfeiture where premium was overdue at insured's death. Northwestern Nat. Life Ins. Co. v. Brooker, 120 Ill. App. 301.

69. Credit insurance: Fact that adjuster, without knowledge of breach of warranty, stated that company owed holder of bond of indemnity against losses by failure of debtors to pay about a certain sum and asked him what he would take for cash, held not a waiver of breach where insured stated he would not accept less than full amount. Baer v. American Credit Indem. Co., 101 N. Y. S. 672.

Fire insurance: Evidence as to what was said by agent at time nonwaiver agreement was signed held inadmissible to show waiver of forfeiture for breach of condition against incumbrances where neither he nor company knew of the breach at that time. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271. Could be no implied ratification of custom of agents by company where there was no evidence showing that it had notice thereof or facts from which notice could be legitimately inferred. American Assur. Ass'n v. Hardiman, 124 Ga. 379, 52 S. E. 536.

Life insurance: One seeking to establish waiver must show that the person whose acts are relied on had knowledge of the essential facts necessary to enable a person of ordinary prudence and judgment to act understandingly. Germania Life Ins. Co. v. Lauer [Ky.] 97 S. W. 363. Acceptance of premium by agent with knowledge that insured was sick held not a waiver of provision that policy should not take effect unless premium was paid during continued good health of insured where agent did not know nature of illness or that insured was in dying condition, etc., it being manifest that he would not have accepted it had he known insured's condition. Id. Receipt and deposit of check for amount of premium note held not a waiver of forfeiture for nonpayment when due where insurer had no knowledge that, at time of its receipt, insured was dead. Franklin Life Ins. Co. v. McAfee, 28 Ky. L. R. 676, 90 S. W. 216. Company held chargeable with knowledge that it had another outstanding policy on insured's life so that fact that owing to its method of bookkeeping it had no actual knowledge did not prevent waiver of prohibition against other insurance by receipt of premiums. Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211.

70. Persons obtaining fire insurance for plaintiff through defendant's agents held not the agents of defendant in the matter but mere brokers so that their knowledge of the real interest of plaintiff in insured property could not be deemed information binding on defendant, or estop it, particularly as policy provided that no one unless duly authorized in writing should be deemed insurer's agent. Wisotzkey v. Hartford Fire Ins. Co., 112 App. Div. 596, 98 N. Y. S. 763. Knowledge of one of firm of local agents as to incumbrances held knowledge of company, though it was not communicated to partner who took application and issued policy. St. Paul Fire & Marine Ins. Co. v. Stogner [Tex. Civ. App.] 17 Tex. Ct. Rep. 260, 98 S. W. 218.

71. Rule that if insured truly answers questions and examiner records them falsely such falsity will not avoid the policy applies only when information is given to agent acting within scope of his authority. Butler v. Michigan Mut. Life Ins. Co., 184 N. Y. 337, 77 N. E. 398, rvg. 93 App. Div. 619, 87 N. Y. S. 1129.

72. Knowledge of agent as to ownership of property acquired several years before the issuance of the policy in suit and at the time of the issuance of other policies held not imputable to defendant where it did not appear that agent was at that time defendant's agent or that the former policies were issued by defendant. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48.

73. Life insurance: It being within scope of agency to collect premiums, held that knowledge of agent when he did so that insured was not in good health when policy was delivered was knowledge of company. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560.

Fire insurance: Knowledge of adjusting and supervising agent as to presence of gasoline on premises. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182.

False representations due to fault of company or agent: In order to defeat recovery upon the ground that the insured made misrepresentations as to the risk in his application, it is incumbent upon the company to show that the misrepresentations were his and not mistakes or misrepresentations of its own. Hewey v. Metropolitan Life Ins. Co., 100 Me. 523, 62 A. 600. When company or its agent undertakes to fill in an application from a previous application or statement by the insured, it will be held to the strictest adherence to the terms of such application or statement made. Id. Where applicant signed application in blank

declarations and representations made while transacting the business of his principal and within the scope of the agency, are deemed those of the company,[75] any

with understanding that answers to questions should be filled in from information contained in former application, held that he would be bound by second application if agent filled it in in accordance with the terms of the first one, but would not be bound if agent put in answers not in first one or put them in differently. Id. Answers in second application held not such necessary inferences from those in first as to be regarded as a statement of the applicant and therefore binding on him. Id. Company held estopped to forfeit fire policy for false representation as to ownership superinduced by agent authorized to solicit insurance and write application and who had knowledge of the facts. Security Mut. Ins. Co. v. Woodson & Co. [Ark.] 95 S. W. 481. In absence of showing that insured agreed that solicitor should be his agent in filling out application for life policy, held that it would be presumed that he was company's agent and that it was proper to show that insured gave true answers to questions and that agent inserted false ones through design or inadvertence. Williams v. Metropolitan Life Ins. Co., 109 App. Div. 843, 96 N. Y. S. 823. Where insured made false answers to questions asked by medical examiner, held that fact that he disclosed true state of his health and physical condition to a soliciting agent, who was not authorized to effect insurance or issue policies, was no answer to defense of breach of warranty. Butler v. Michigan Mut. Life Ins. Co., 184 N. Y. 337, 77 N. E. 398, rvg. 93 App. Div. 619, 87 N. Y. S. 1129. Application was made part of fire policy and both application and policy warranted answers to be true and policy provided that it should be void if any statements in application should be untrue and that no agent should be deemed to have waived provisions unless waiver was in writing and attached to policy. Application was made out by insurer's agent and forwarded to insured's agent to be signed if correct. Held that it was duty of latter to examine it and see that answers were correct, and policy was void where answer as to incumbrances was untrue though insurer's agent knew that it was false. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918. Fact that application for life policy was filled in by agent and that insured signed without reading it held no defense to breach of warranty where it did not appear that she was unable to read, it being her duty to use reasonable diligence to see that answers were correct. Rinker v. Aetna Life Ins. Co., 214 Pa. 608, 64 A. 82. Since inspection after delivery would have shown fraud which would have been her duty to disclose to company, she must be regarded as having knowledge of it. Id. Application for bond of indemnity against losses by failure of debtors to pay warranted that it had been made, prepared, and written by applicant or his own proper agent. It was in fact prepared by soliciting agent of company whose name did not appear on bond and who had no right to fix insurance or to issue the policy. There was no provision that application should be filled out by company's agent and questions did not require technical knowledge or experience. Held that knowledge of agent that warranties were false was not imputed to company and it was not estopped to assert breach of warranty as a defense. Baer v. American Credit Indemnity Co., 101 N. Y. S. 672.

74. Fire insurance: Company can, by its agents, waive forfeiture for nonpayment of premiums when due. Home Ins. Co. v. Ballew [Ky.] 96 S. W. 878. Evidence held to sustain finding that agent had authority to waive forfeiture for failure to pay note when due and provision requiring indorsement of transfer on policy. Queen of Arkansas Ins. Co. v. Cooper-Cryer Co. [Ark.] 98 S. W. 694. Waiver of iron-safe clause by agent who solicited, issued, and countersigned policy held binding on company. Riley v. American Cent. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147. Verbal consent of agent taking application and issuing policy to the taking out of other insurance waives the provision of the policy requiring written consent indorsed on the policy. Gorton v. Milwaukee Mechanics' Ins. Co., 115 Mo. App. 69, 90 S. W. 747. Where policy had been fully complied with by insured, held that fact that secretary had no authority to indorse mortgage clause on policy would be no defense in an action thereon by the mortgagee. Adams v. Farmers Mut. Fire Ins. Co., 115 Mo. App. 21, 90 S. W. 747. From mere fact that one delivered a policy in the preparation or execution of which he did not participate and is not shown to have been authorized to participate, it cannot be inferred that he had authority to modify the contract or to waive any of its covenants or stipulations. Shackelford v. Indemnity Fire Ins. Co. [Neb.] 106 N. W. 771. Where company is discharged from liability under the provisions of policy, responsibility will not reattach by waiver without proof of authority in party whose act of waiver is relied on. Kompa v. Franklin Fire Ins. Co., 28 Pa. Super. Ct. 425. Clerks in office of local agent held not to have authority to waive provision requiring indorsement of change of ownership on policy and not to have been shown to stand in such a relation to company that their declarations or undertakings could operate as an estoppel. Id.

Life insurance: Applicant paid premium and received receipt providing for return of premium if application was not accepted. Insurer sent a different policy than one applied for, which applicant refused to accept. Thereafter agent wrote him that he had been advised that company had reconsidered application and would issue policy covering full amount from the start on the plan applied for. Held that bill alleging such facts and that insured relied on agent's letter and considered his life insured set up facts constituting an estoppel on the part of the company to deny the issuance of a policy, though none was actually delivered because applicant was sick when agent received it. New York Life Ins. Co. v. McIntosh [Miss.] 41 So. 381. Allegation that

limitations thereon being ineffectual unless brought to the knowledge of the insured.[76] There is, however, a line of authorities holding that where the waiver relied on is an act of an agent of the insurer it must be shown that the agent had express authority from the insurer to make the waiver, or that the insurer subsequently, with knowledge of the facts, ratified the unauthorized acts of the agent,[77] which facts may be shown by proof of such acts and circumstances as would necessarily result in that conclusion.[78] There is a conflict of authority as to the effect of limitations in the policy as to who may waive its conditions[79] and of provisions that

when assignee of policy offered to pay premium he was informed by a "duly authorized agent" of the company that it had granted extended insurance to the insured as provided in policy, and promised to notify assignee if insurance had not been extended but failed to do so, and that assignee had relied thereon, etc., held that demurrer based on theory that allegations contravened provision that contract could only be varied by certain specified officers in writing was improperly sustained. Sugg v. Equitable Life Assur. Soc. [Tenn.] 94 S. W. 936. Agent having authority to issue policies and collect premiums held to have authority to waive payment of premiums when due. Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016. Manager of company for two states held such an agent as had authority to waive provision that policy should not become effectual unless first premium was paid during continued good health of insured. Germania Life Ins. Co. v. Lauer [Ky.] 97 S. W. 363. Where declaration alleged that agent solicited insured to take out policy, that as a special inducement he represented to him that company allowed 30 days of grace in payment of premiums, that company authorized agent to make such representation and to hold out such inducement, and that policy was taken out on the faith of them, held that it was not demurrable on ground that it appeared therefrom that second annual premium had not been paid when due where it showed that insured had died after the expiration of a year but within 13 months from time when first premium was paid. Boyd v. Fidelity Mut. Life Co. [Miss.] 41 So. 268. Applicant gave notes for first premium to local agent who sent application to company. Company sent agent different policy from that applied for and directed him to submit it to applicant for acceptance but not to deliver it until applicant had signed amended application. Agent wrote applicant that his policy had arrived and that he would deliver it to him on day when first note was due. Applicant died in the meantime without knowledge of the facts. Held that company was estopped to deny that applicant was insured in accordance with terms and conditions of application. Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025.

75. Letter tending to show waiver of payment of premium as a condition precedent to taking effect of policy held to amount merely to statement that agents had paid principal a premium for plaintiff and a demand on her for reimbursement, and hence not binding on company. Shoemaker v. Commercial Union Assur. Co. [Neb.] 106 N. W. 316. Principal will not be heard to deny the truth of the representations of his agent with respect to the matter which is the subject of such agency. Rule applies though agency is of a special or limited character. Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025. Representations that application had been accepted and policy issued in accordance therewith. Id.

76. Instructions not to write insurance on property of insolvent or financially crippled debtors will not avoid policy written on such prohibited risk unless it be shown that insured had knowledge of such inhibition. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

77. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918; Gish v. Insurance Co. [Okl.] 87 P. 869.

78. Gish v. Insurance Co. [Okl.] 87 P. 869. Question whether insurer had waived breach of iron-safe clause by ratifying acts of adjuster and agent in requiring insured to furnish duplicate invoices, etc., and by receipt and retention of premium after the fire, held for the jury. Id.

79. See, also, post this section.

Limitation Held To Prevent Waiver. Life insurance: Custom of mere local collecting agent of insurer to collect premiums every two weeks instead of weekly as required by policy held not to prevent a forfeiture where it was neither authorized nor ratified by the insurer, and policy provided that agents were not authorized to alter or discharge contracts, waive forfeitures, or receive premiums in arrears beyond time provided in policy. American Assur. Ass'n v. Hardiman, 124 Ga. 379, 52 S. E. 536. Acceptance by general agent of amount due on premium note after maturity held not a waiver of forfeiture for nonpayment where policy provided that only certain specified officers of the company had power to extend time for paying premiums. Bank of Commerce v. New York Life Ins. Co., 125 Ga. 552, 54 S. E. 643. Where policy provided that agents were not authorized to make, alter, or discharge contracts, or waive forfeitures, or receive premiums more than four weeks in arrears, held that proof of agreement by district superintendent that premiums need not be paid during strike was insufficient to show waiver of forfeiture for nonpayment, in absence of showing that he had authority to make agreement or that company ratified his acts. Murphy v. Prudential Ins. Co., 30 Pa. Super. Ct. 560.

Fire insurance: One dealing with a local agent authorized to issue policies and collect premiums is required to take notice that by their terms the scope of his authority does not include the power orally to change

all waivers and modifications must be in writing and attached to the policy.[80] The insurer may by its conduct estop itself to deny the authority of one assuming to act for it[81] and may waive limitations on the agent's authority contained in the policy.[82]

It is generally held that if the policy is issued with knowledge[83] on the part of

the clause of the contracts relating to vacancies but that any modification or alteration thereof can only be made with written or printed assent of the insurer. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493. Since agent had no authority to assure insured that company would not insist on strict compliance with provision as to vacancy, held that he could not, under doctrine of waiver, either by assent in words or by his conduct alter or surrender rights of company in that regard under the policy. Id. Fact that president of mutual company, which was authorized by statute to insure only farm property, knew, when he took application and issued policy, that insured wanted insurance on property in slaughterhouse and subsequent receipt of premiums, held not to estop company to claim that such property was not covered thereby, the insured as a member of a mutual company being chargeable with knowledge of its powers, and a copy of the charter and by-laws being contained in the policy. Geraghty v. Washtenaw Mut. Fire Ins. Co. [Mich.] 13 Det. Leg. N. 634, 108 N. W. 1102. Fact that after loss insured complied with request of member of board of directors to attend meeting of board in another city and was put to expense in so doing and was there examined as to the loss, held not a waiver of provision that association would not be liable for loss resulting from open fire within 50 feet from building, directors having, under by-laws, no right to adjust loss or waive conditions until they met together as a board. Draper v. Oswego County Fire Relief Ass'n, 101 N. Y. S. 168.

Limitation Held Not To Prevent Waiver. Accident Insurance: Agent clothed with power of soliciting insurance, delivering policies, and collecting premiums, is general agent of the company and not the agent of the insured, and has power to waive forfeitures and conditions of the policy notwithstanding a provision therein that no agent has such power. Continental Casualty Co. v. Johnson, 119 Ill. App. 93. Failure to pay premium when due held wholly the fault of the agent who refused to receive it when tendered so that company could not base forfeiture thereon. Id.

80. See, also, post this section.

Limitation held to prevent waiver: Where fire policy provided that it should be void unless otherwise provided by agreement indorsed thereon or attached thereto, if, with insured's knowledge, foreclosure proceedings were commenced, held that after execution of the policy neither knowledge of foreclosure proceedings after the commencement thereof coming to the agent, silence on his part, nor failure to return unearned premium, amounted to a waiver of forfeiture in the absence of the agreement provided by the policy indorsed thereon or added thereto. Woodard v. German American Ins. Co., 128 Wis. 1, 106 N. W. 681.

Limitation held not to prevent waiver: Agent having power to, and who did, solicit insurance, take applications, deliver policies, and collect premiums, held to stand in such a relation to the company that his action in waiving condition in employer's liability policy as to payment of further premium than that expressed in the policy by written agreement attached to the policy, prior to delivery of policy and payment of premium, was binding on company to extent that it could not recover any additional premium, though policy provided that no provision thereof could be waived or altered except by written consent of general manager. London Guaranty & Acc. Co. v. Hartman, 122 Ill. App. 315.

81. Company held estopped to deny agency of person to whom premiums were paid to receive them. Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768. Company held estopped by course of dealing to deny authority of clerk to promise undertaker that it would reimburse him for burying insured, it having an option to make such an agreement under the policy. Metropolitan Life Ins. Co. v. Johnson, 121 Ill. App. 257.

82. Provision that no person unless duly authorized in writing shall be deemed the agent of the insurer may be waived by mutual consent. Helbig v. Citizens Ins. Co., 120 Ill. App. 58. Testimony of special agent that he was verbally authorized to cancel policy, and as to efforts made by him to procure policy pursuant to such authority, held admissible where there was evidence tending to show that plaintiff waived such provision by his conduct. Id.

83. **Fire insurance:** What is not known cannot be waived. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485. Knowledge will not be presumed from mere fact that policy was issued without inquiry on theory that company itself procured all information it considered important. Id.

Life insurance: Answer to question requiring names of physicians who had treated insured and certificate of examining physician held not to have given company knowledge of facts or to have shown that answer was incomplete so as to make issuance of policy a waiver of breach of warranty resulting from incomplete answer. National Life Ins. Co. v. Reppond [Tex. Civ. App.] 16 Tex. Ct. Rep. 829, 96 S. W. 778. Fact that agent was informed that applicant had fits held not to charge him with knowledge that such fits were epileptic, or to prevent avoidance of policy for fraud in failing to disclose that fact. Thompson v. Metropolitan Life Ins. Co., 99 N. Y. S. 1006.

Employers' liability insurance: Fact that plaintiff had other policies issued by same company at higher rate of premium which were still in force and which permitted use of explosives held not to operate as notice to the company that plain-

the company[84] or its agent of facts rendering it void at its inception, it cannot avail itself of them as a defense to an action thereon,[85] and this is generally held to be true notwithstanding restrictions in the policy prescribing a particular mode in which its terms may be waived or limiting the authority to waive to particular persons,[86] though there seems to be some conflict of authority in this regard.[87] In

tiff would use explosives relying on the policy in suit for indemnity where such use was contrary to express terms of latter, and hence other policies were not admissible to show that company knew that plaintiff would use explosives. Columbian Exposition Salvage Co. v. Union Casualty & Surety Co., 220 Ill. 172, 77 N. E. 128.

Tornado insurance: Where at time policy was issued by defendant it was carrying other insurance on plaintiff's property under a contract of reinsurance, held that it was estopped to avoid policy because of the existence of other insurance without written permission. Kennedy v. Agricultural Ins. Co. [S. D.] 110 N. W. 116.

84. Fire insurance. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485; Porter v. Insurance Co., 29 Pa. Super. Ct. 75. Having accepted premium to take risk of indemnifying insured against loss, it is incompatible for insurer to attach condition which will from beginning relieve him from that risk. Ohio Farmers' Ins. Co. v. Vogel [Ind.] 76 N. E. 977. Provision that if the building insured was occupied by a tenant the policy should be void. Id. Provision as to ownership. Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599, 98 N. Y. S. 760. Vacancy and fact that it will remain vacant for more than time allowed by policy. New York Mut. Sav. & Loan Ass'n v. Westchester Fire Ins. Co., 110 App. Div. 760, 97 N. Y. S. 436. Existence of chattel mortgage. Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances, 99 N. Y. S. 517. Provision as to other insurance where insured obtained policy from agent after informing him that he wanted it so that he could procure another policy in another company conforming thereto and agent made no objection. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397. Knowledge that mill could not be operated in severe winter weather on account of lack of power held to prevent forfeiture under provision that policy should be void for nonoperation. Waukau Mill. Co. v. Citizens' Mut. Fire Ins. Co. [Wis.] 109 N. W. 937.

85. Fire insurance: As to state of title. Porter v. Insurance Co., 29 Pa. Super. Ct. 75. As to ownership of property. Pearlstine v. Phoenix Ins. Co. [S. C.] 54 S. E. 372. Knowledge of soliciting agent authorized to take applications and entrusted with policy for delivery to insured that applicant is carrying other insurance. Kelly v. Citizens' Mut. Fire Ass'n, 96 Minn. 477, 105 N. W. 675. Where general local agent knew that building was vacant and would remain so for longer period than allowed by policy. New York Mut. Sav. & Loan Ass'n v. Westchester Fire Ins. Co., 170 App. Div. 760, 97 N. Y. S. 436. Fact that agent was also acting as renting agent of plaintiff held immaterial. Id. Where plaintiff told defendant's agent that he wanted property insured for $7,000, and latter told him that he would try to get it for him and thereupon wrote out applications for policies issued by defendant for $4,000, and at same time and as part of same transaction undertook to get remaining $3,000, which he subsequently did in other companies, held that defendant would be held to have waived condition prohibiting concurrent insurance and was estopped to set up breach as a defense. Wensel v. Property Mut. Ins. Ass'n, 129 Iowa, 295, 105 N. W. 522.

Life insurance: That insured was not in sound health. Thompson v. Metropolitan Life Ins. Co., 99 N. Y. S. 1006. As to false representations and warranties as to use of intoxicants. Fludd v. Equitable Life Assur. Soc. [S. C.] 55 S. E. 762. Where agents procured application to be made and policy to be issued with knowledge of insured's intemperate habits, held that company could not avoid policy for fraud because of false representations in that regard in the answer. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524. Company affected with the knowledge of its agent and thus knowing the existence of a cause of forfeiture at the inception of the contract is estopped to assert such forfeiture by accepting the premium and delivering the policy as a valid contract of insurance. Doyle v. Hill [S. C.] 55 S. E. 446. In action against insured on premium note striking out evidence tending to show that medical examiner inserted false answer in application, though insured gave true one, offered for purpose of showing failure of consideration, held harmless. Id.

86. Fire insurance: Existence of such facts and the knowledge of the agent may be proved by parol though the policy expressly provides that no officer or agent shall have power to waive any of its conditions except by written indorsement thereon. Pearlstine v. Phoenix Ins. Co. [S. C.] 54 S. E. 372. Estoppel may be proved by parol, notwithstanding clauses providing that no waiver shall be effective unless indorsed in writing on the policy at the home office of the company. People's Fire Ins. Co. v. Goyne [Ark.] 96 S. W. 365. Company may be estopped by the conduct of its agent acting within the apparent scope of his authority from availing itself of a false answer to a material question or other breach of warranty or violation of the provisions of the application or warranty, though policy or application provides that company shall not be bound by any such conduct or representation of its agent. As to ownership, location, and occupancy of buildings. Id. Local agents vested with authority to make contracts of insurance, countersign, issue, and deliver policies, and receive premiums, stand in the place of the company in dealing with applicants for policies, and may waive stipulations which purport to be essential to the validity of the contract, regardless of limitations. Rudd v. American Guaran-

order to render this rule operative, however, the issuing of the policy with such knowledge must be inconsistent with an intention to enforce its provisions as written.[88] Knowledge of an intention to violate the policy in the future cannot be relied on for the purpose of showing an estoppel.[89] So too, notice of an intention to do something which the policy provides shall not be done without the company's consent will not estop the company from avoiding the policy where it is done without such consent, though it fails to object at the time.[90] There is a line of

tee Fund Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 237. Iron-safe clause held waived where policy was issued and premium accepted after insured told agent that it was impossible for him to comply therewith, and that he would take the insurance only if compliance was excused, and agent in effect told him that company would waive stipulation and that he need not comply with it. Id. Where evidence showed that agents knew that plainitiff was not the owner of the property insured but that policy was intended to protect him for loans, advances, and indorsements, held that company was estopped to deny liability on ground that insured's interest was not truly stated, though policy provided that no agent should have power to waive any provision or condition unless policy provided otherwise, and then only by agreement indorsed thereon or added thereto. Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599, 98 N. Y. S. 760.

Accident insurance: Where the local agent has actual knowledge of the falsity of a statement made by the insured in his application and forwards the application upon which the policy is issued, the knowledge of the agent is the knowledge of the company, and the false statement will not avoid the contract, though policy provides that no notice or knowledge of the agent shall be held to effect a waiver or change in the contract. Fishbate v. Fidelity & Casualty Co., 140 N. C. 589, 53 S. E. 354. As to physical and mental condition of applicant. Id.

87. Where application provided that no statement or declaration made to any agent, examiner, or other person, and not contained in application, should be considered as having been made to or brought to the notice of the company, or as charging it with any liability by reason thereof, held that, where question in application whether insured had ever had a severe surgical operation was answered in the negative and such answer was false though warranted true, evidence that insured had told the truth to the agent who filled out the application was inadmissible. Rinker v. Aetna Life Ins. Co., 214 Pa. 608, 64 A. 82. Knowledge of agent at time he wrote policy that insured did not own property in fee held not to operate as waiver of forfeiture on that ground. Beddall v. Citizens' Ins. Co., 28 Pa. Super. Ct. 600. Where application for semi-tontine policy provided that no statements, etc., of agent should bind company unless reduced to writing and presented to company with application, and policy issued pursuant thereto provided that agents were not authorized to waive forfeitures or to make, alter, or discharge contracts, and insured accepted and retained policy for 11 years without complaint, held that application and policy constituted contract and absolutely determined rights of parties, all prior negotiations and agreements being merged therein, regardless of alleged special contract in regard to dividends delivered to insured by subagent which was in fact a mere prospectus. Langdon v. Northwestern Mut. Life Ins. Co., 101 N. Y. S. 914.

88. Where house was occupied by owner when policy was issued, held that provision that policy should be void if premises should become vacant or unoccupied, and that it should be suspended during such vacancy and company should not be liable for loss occurring in the meantime, was not waived by reason of the fact that the policy was issued upon an application showing that the insured's title was a sheriff's certificate issued pursuant to an execution sale and that he would not get a deed for some months and hence had no right to possession or control. Chismore v. Anchor Fire Ins. Co. [Iowa] 108 N. W. 230. Fact that agent issued policy with knowledge as to store, building, and stock, and that insured did not keep an iron safe, held not a waiver of clause requiring insured to keep books at night and when store was not open for business in fireproof safe "or in some secure place not exposed to a fire which would destroy the" building. Shawnee Fire Ins. Co. v. Knerr, 72 Kan. 385, 83 P. 611. Where policy was issued on new building in process of construction, which, at the time of its destruction, had never been occupied as a dwelling, held that provision that it should be void in case of vacancy for more than a specified time without the written consent of the company referred only to future use of building, so that it was not waived because agent knew that building was unoccupied when policy was issued, either of his own knowledge or by reason of communications of insured. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493.

89. Knowledge of soliciting agent. Wensel v. Property Mut. Ins. Ass'n, 129 Iowa, 295, 105 N. W. 522.

90. Has right to infer that policy holder intends to obtain consent to the act before it is done. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271. Letter of president of company refusing to make loan to insured and wishing him "success in his undertaking" held not a waiver of right to avoid policy for incumbering property without company's consent, even if company could be deemed to have had notice of insured's intention to mortgage property which it had not. Id. Instructions held not open to objection that they permitted jury to find waiver if they found that before issuance of policy in suit insured declared his intention of procuring other insurance. Polk

cases which hold that a waiver of the provisions of the policy or an estoppel to enforce them cannot be shown by proof of parol contemporaneous agreements with the agent or of his knowledge at the time the policy was issued of facts which are in plain violation of its express terms,[91] particularly where the policy provides that no agent shall have authority to waive any of its terms or provisions except in writing indorsed thereon or attached thereto.[92] Still other courts hold that, while waiver cannot rest alone on an agent's prior knowledge or understanding which is inconsistent with the writing afterwards made,[93] evidence of such prior knowledge is admissible to connect with and aid in the proof that his acts after the execution of the contract were with knowledge that the insured was violating its conditions.[94] It has also been held that in the absence of fraud or deceit the insured cannot show that he understood or was told by the agent that the promised indemnity should be construed to include a risk excluded by the express terms of the written policy.[95]

v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397.

91. Rule that an unambiguous written contract cannot be altered or contradicted by parol evidence, in the absence of fraud or mutual mistake of fact, applies to contracts of insurance. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918; Gish v. Insurance Co. [Okl.] 87 P. 869. Where policy provided that insurance should cover a certain building while used and occupied as a normal school and dwelling and that it should be inoperative if and when not so used or occupied, held that in the absence of fraud or mistake parol evidence was inadmissible to show that the building was not so used and occupied when the policy was issued and that the agent knew that fact and hence that the company was estopped to set up breach of condition as a defense. Connecticut Fire Ins. Co. v. Buchanan [C. C. A.] 141 F. 877. Iowa Code 1897, §§ 1749, 1750, prohibiting limitations on agent's power by provisions in the contract, etc., held not to change the rule. Id. Inadmissible in action on policy to show that company is estopped to enforce provision in premium notes making provision in policy for 30 days' grace in payment of premiums inapplicable by reason of statement by agent to insured before notes were given. Lefler v. New York Life Ins. Co. [C. C. A.] 143 F. 814. Knowledge of company that property was vacant and idle when policy was issued held not a waiver of provision that it should be void if property remained idle for more than 30 days at any one time without permission of company, there being no proof of agreement to waive or that company gave plaintiff permission to leave property idle except upon compliance with provisions of policy. Kentucky Vermillion Min. & C. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Held that parol evidence was inadmissible to show understanding at time it was issued that it could remain vacant provided watchman was employed, for purpose of showing waiver. Id. Where policy described building as dwelling house when in fact it was occupied in part as a store, evidence that defendant's agent through whom policy was obtained had maps in his office showing the character of the building was inadmissible as contradicting the written contract. Bowditch v. Norwich Union Fire Ins. Co. [Mass.] 79 N. E. 788.

92. Such a provision is reasonable and valid and is measure of agent's authority, and when expressed in policy insured is presumed to have notice thereof and is bound thereby. Gish v. Insurance Co. [Okl.] 87 P. 869. Company held not estopped to claim forfeiture for breach of iron-safe clause by reason of the fact that company's agents knew when they issued the policy and received the premium that insured had no safe and would not keep his books in one as required, and told him that such provision would not be insisted upon and parol evidence was inadmissible to show such facts. Id. Waiver by acts and conduct cannot be shown where contract contains such a limitation. Deming Inv. Co. v. Shawnee Fire Ins. Co., 16 Okl. 1, 83 P. 918. Right to forfeit for failure to truly state insured's interest held not waived by fact that agent who filled out application knew true condition of his title. Id.

93. Since, in the absence of fraud or mistake, prior negotiations and understandings cannot be shown to contradict the terms of the written contract. Riley v. American Cent. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147.

94. Riley v. American Cent. Ins. Co., 117 Mo. App. 229, 92 S. W. 1147. Where agent was informed by insured when he issued policy that he would not comply with iron-safe clause and knew on day before fire that he was not doing so, but, instead of objecting or taking steps to procure a forfeiture, he solicited additional insurance, held that forfeiture was waived. Instruction approved. Id.

95. Where policy expressly provided that insured was only entitled to one-tenth of the indemnity for loss of time due to hernia accidentally produced, held that testimony of insured that agent told him that such provision applied only to hernia existing when the policy was issued or at the time of the accident was inadmissible. Kelsey v. Continental Casualty Co. [Iowa] 108 N. W. 221. Plaintiff's claim held not one of waiver but an attempt to establish a different contract by parol. Id. Contract held not one partly in writing and partly in parol, such contracts being never upheld when oral part

The unconditional[96] acceptance of premiums with knowledge of a breach of a condition avoiding the policy precludes the company from defending on that ground,[97] unless the insured is liable therefor in any event.[98] An attempt to return such premiums after loss is ineffectual to relieve the company from liability.[99] Some courts hold that a breach of condition is waived by the failure of the insurer to return the premium and claim a forfeiture within a reasonable time after knowledge of the facts,[1] while others require an affirmative act in addition thereto.[2]

serves merely to eliminate or destroy effect of writing. Id. Where policy and application plainly excluded from the risk lumber in sawmill building and additions held that parol evidence was inadmissible to show that the agent of the company, when the application was made and the policy issued, stated to the plaintiff that the policy was an "unlimited policy," meaning that it covered lumber in mill and adjoining buildings as well as that in the yards, and that he would not have taken it but for such statements. Ferguson v. Lumbermen's Ins. Co. [Wash.] 88 P. 128.

96. Acceptance of amount due on note after its maturity held not a waiver of forfeiture for nonpayment where it clearly appeared that money was being "held in suspense" pending the furnishing of a health certificate by the insured upon an invitation by the company to reinstate the policy where certificate was never furnished. Bank of Commerce v. New York Life Ins. Co., 125 Ga. 552, 54 S. E. 643.

97. Tornado insurance: Right to forfeit for vacancy waived where insurer after loss canceled policy and retained premium up to and including time of loss. Farmers' & Merchants' Ins. Co. v. Bodge [Neb.] 106 N. W. 1004.

Life insurance: Acceptance of renewal note by company after default in payment of original premium note and subsequent indorsement and transfer of renewal note to third person held waiver of provision that policy should be ipso facto forfeited by nonpayment of premium note when due, so that fact that renewal took place after maturity was no defense to an action by the indorsee. Neal v. Gray, 124 Ga. 510, 52 S. E. 622. Even though agent had no authority to waive forfeiture for nonpayment of premium note at maturity and to accept renewal note, held that the acquiescence of company in renewal and its receipt of renewal note and transfer of it by indorsement operated as such waiver. Id. Continued collection of premiums with knowledge that insured was insane held waiver of provision that no obligation should be assumed unless insured was in good health when policy was delivered. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560. Receipt of 41 premiums held waiver of provision that policy should be void if there was in force another policy on same life issued by same company, in absence of indorsement permitting it. Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211. Lapse for nonpayment waived by subsequent receipt of premiums. McNicholas v. Prudential Ins. Co., 191 Mass. 304, 77 N. E. 756. Acceptance of application and premiums by company's agent and superintendent with knowledge that insured was keeping house of ill fame held waiver of breach of warranty as to occupation where application was solicited by agent. Perry v. Hancock Mut. Life Ins. Co., 143 Mich. 290, 12 Det. Leg. N. 978, 106 N. W. 860. Question of knowledge held for jury. Id. Where policy issued to person 14 years old provided that insurer would not assume any risk thereunder until insured reached age of 15 and had passed medical examination, held that receipt and retention of premium after insured arrived at age of 15 without insisting on medical examination was, in absence of fraud, a waiver thereof, particularly where it appeared that insured would have been accepted if examined. Security Mut. Life Ins. Co. v. Miller [Neb.] 106 N. W. 229. Company held not entitled to contend that insured did not rightfully become a member, where it had received premiums regularly upon the policy from its inception. Maher v. Empire Life Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496. Having received premiums for more than three years, company held estopped by Rev. St. § 3626 from making a defense on the ground of false statements in the application. Prudential Ins. Co. v. Gilligan, 7 Ohio C. C. (N. S.) 397.

Health insurance: Nonpayment of monthly instalment of premium when due held waived, where agent, with knowledge of facts, received instalments subsequently becoming due, and transmitted them to company which received them without objection. Shay v. Phoenix Benefit Ass'n, 28 Pa. Super. Ct. 527.

98. Where health policy, though furnishing no indemnity for loss due to tuberculosis, entitled insured to indemnity against accident and insurable disease even if he had tuberculosis, receipt of advance premium was not a waiver of right to refuse to pay loss due to tuberculosis. Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 A. 356.

99. Where company was estopped by receipt of premiums to avoid policy because insured had other insurance in same company. Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211.

1. In order to rescind the company must seasonably return premiums received. Paragraph of answer held insufficient. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524. Violation of condition does not render policy void, though it so declares, but only voidable at the election of the insurer, and it will be confined to election to treat it as valid made by retaining premium. Ohio Farmers' Ins. Co. v. Vogel [Ind.] 76 N. E. 977. Contract is not ipso facto rendered void by breach of the conditions upon which it issues, or by fraud on the part of the insured, but voidable only at the election of the insurer. Aetna Life Ins. Co. v. Bockting

A failure to return unearned premiums will not estop the insurer from relying on a forfeiture where the policy provides for their return in such case only on surrender of the policy.[3]

The delivery of the policy is a waiver of the payment of the first premium in advance,[4] and the extension of credit to the insured precludes a subsequent objection that the premium was not paid in cash.[5]

If the insurer issues a policy upon an uncompleted application he cannot afterwards avoid it on the ground that the answers therein were not full and complete.[6] Thus, where upon the face of the application a question appears to be not answered at all or to be imperfectly answered, and the company issues a policy without further inquiry, it thereby waives the want or imperfection in the answer and renders the omission to answer more fully immaterial,[7] but the waiver in such case extends only to that part of the inquiry which is unanswered and does not preclude a forfeiture for breach of warranty where the answer so far as it goes is false.[8]

Some courts hold that if there is no written application and the insured has an insurable interest in the property, acts in good faith, and makes no actual misrepresentation or concealment of his interest, and the company issues the policy, and accepts and retains the premium without making any inquiry concerning it, it will be presumed to have knowledge of the condition of his title and to assure the property with such knowledge.[9] Others hold that, unless the insured has been mis-

[Ind. App.] 79 N. E. 524. Motion for judgment notwithstanding verdict for plaintiff held properly overruled though jury specially found that insured made false representations where there was no special finding that insurer elected to rescind or returned premiums. Id.

2. The insurer is not bound to tender back the amount of the premiums voluntarily paid to it before it has knowledge of the breach of a condition precedent rendering the policy void from its inception, as a condition precedent to availing itself thereof as a defense in an action on the policy. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485. Failure to make tender not a waiver, though insured may recover premiums. Id. May defend on ground of fraud or misrepresentation without previous tender. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Failure to return premium paid upon receipt of policy held not a waiver of right of company to forfeit policy for noncompliance of insured with its positive terms. Kentucky Vermillion Min. & C. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Where policy covered property while contained in a specified building and not elsewhere, held that contract was terminated by the removal of the property and could regain its vitality only from some affirmative act by or on behalf of the company equivalent to the making of a new contract. Shackelford v. Indemnity Fire Ins. Co. [Neb.] 106 N. W. 771. Mere fact that it was charged through agent with knowledge of removal after it had taken place and remained quiescent was insufficient to revive its liability. Id. Where by laws of association, which were part of contract, provided that it should not "be liable" for any loss resulting from any open fire within 50 feet of the building, held that such a fire resulting in loss of building destroyed contract and ipso facto ended all liability thereon so that it could not thereafter be the subject of an implied waiver. Draper v. Oswego County Fire Relief Ass'n, 101 N. Y. S. 168.

3. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271; Kompa v. Franklin Fire Ins. Co., 28 Pa. Super. Ct. 425.

4. Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. 155.

5. See, also, § 8, ante. Company having given credit by giving due bill. Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155. Due bill for premium and policy having been executed at same time are to be construed as one contract. Id. Evidence held to show that notes for first premium were taken with company's knowledge and consent so that it could not thereafter object that premium was not paid in cash. Kimbro v. New York Life Ins. Co. [Iowa] 108 N. W. 1025. Where application stated amount paid by insured and company issued policy and act of agent in accepting notes for first premium was held binding on it, held that fact that notes were for sum slightly less than sum due was immaterial, it being presumed that difference was waived. Kilborn v. Prudential Ins. Co. [Minn.] 108 N. W. 861. There being no provision in policy making actual payment of premium in cash a condition precedent to its taking effect, held that delivery of policy by general agent on receipt of part of premium and insured's promise to pay balance in future was waiver of payment of total premium in cash. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649.

6. Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 A 280.

7. Imperfections in or want of answers as to previous losses, etc., waived. Security Mut. Ins. Co. v. Berry [Ark.] 98 S. W. 693.

8. Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 A. 280.

led by some act of the insurer, he is in such case bound by the conditions found in the policy which he has accepted and retained without objection.[10]

An insurer who has assumed a particular position with reference to a loss being within the terms of the policy cannot thereafter assume an inconsistent one to the prejudice of the insured.[11]

Waiver may be inferred from acts of the insurer which show either recognition or denial of liability exclusively on other grounds.[12] A refusal to accept a tender of premiums on a particular ground is a waiver of all other grounds.[13]

Requiring proofs of loss is a waiver of breaches of conditions known to the insurer,[14] but the retention of proofs voluntarily furnished is not.[15]

In the absence of an agreement to the contrary,[16] the adjustment of a loss with knowledge of the facts waives a forfeiture for a previous violation of the policy.[17]

9. See 6 C. L. 125, n. 88.

10. Provision that policy shall be void if insured is not sole and unconditional owner not waived by issuance of policy without application. In re Millers' & Manufacturers' Ins. Co. [Minn.] 106 N. W. 485. Policy held void because building was on leased ground where application was oral, nothing was said by either party as to title, and it did not appear that company or agent had any knowledge of the condition of the title, notwithstanding fact that insured never read policy and did not know of provision that it should be avoided if building was not on ground owned by him in fee simple. Wyandotte Brewing Co. v. Hartford Fire Ins. Co., 144 Mich. 440, 13 Det. Leg. N. 295, 108 N. W. 393.

11. Employers' liability insurance: Where company was informed of all the facts and voluntarily assumed control of action against insured for damages for injuries to minor employe, held that it was estopped, in the absence of understanding or agreement to the contrary, to assert that it was not liable under contract on ground that employe was a minor employed contrary to law. Tozer v. Ocean Acc. & Guarantee Corp. [Minn.] 109 N. W. 410. Where company assumed defense of action commenced against insured by void attachment proceedings and by appearing and pleading to the merits subjected her to the jurisdiction of the court, held that it thereby waived objection that liability for costs of such attachment was not within the terms of its policy. Myton v. Fidelity & Casualty Co., 117 Mo. App. 442, 92 S. W. 1149. Action of company in taking control and dominion of action for damages against insured and keeping it until judgment was entered without notice to him that it did not consider itself liable under the policy, held such a construction of policy as to estop it from thereafter denying liability. Employers' Liability Assur. Corp. v. Chicago & B. M. Coal & Coke Co. [C. C. A.] 141 F. 962.

12. Shay v. Phoenix Benefit Ass'n, 28 Pa. Super. Ct. 527. Forfeiture for breach of iron-safe clause held waived where there was no demand for books or inventory which insured was required to produce, company claimed incendiarism and demanded appraisement, and went to trial on answer charging insured with perjury and arson, and never pleaded breach until second trial of case after reversal. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137. Refusal to pay a loss on a specified ground estops it from asserting other ground relieving it from liability of which it had full knowledge, after the insured has incurred expense and brought suit in the belief that the only objection is that stated. Shay v. Phoenix Ben. Ass'n, 28 Pa. Super. Ct. 527.

13. Refusal to accept tender of premiums on ground that company was not liable because of forfeiture for their nonpayment held waiver of objection that amount tendered was too small. Graham v. Security Mut. Life Ins. Co., 72 N. J. Law, 298, 62 A. 681.

14. Demanding further proofs of loss after knowledge that insured was not absolute and unconditional owner held waiver of provision requiring such ownership. Hartford Fire Ins. Co. v. Enoch [Ark.] 96 S. W. 393. Instruction that requirement of amended proofs of loss by company or agents authorized to represent it in adjusting losses would not preclude it from relying on invalidity of policy by reason of requirement therein that property belonged to insured as unconditional and sole owner held erroneous and properly refused. Id.

15. Held not a waiver of forfeiture for commencement of foreclosure proceedings. Woodard v. German American Ins. Co., 128 Wis. 1, 106 N. W. 681.

16. The acts of an adjuster while investigating the cause of the fire and the amount of loss sustained, made under a nonwaiver agreement, cannot be construed into a waiver by the company of the right to insist that the policy was void for noncompliance with the iron-safe clause. Shawnee Fire Ins. Co. v. Knerr, 72 Kan. 385, 83 P. 611. Breach of iron-safe clause held not waived by requesting production of other evidence to supply that destroyed by reason of such breach and by making examination thereof to determine amount of loss, where before insured was put to any inconvenience or expense in that connection he signed nonwaiver agreement. Phenix Ins. Co. v. Stahl, 72 Kan. 578, 83 P. 614.

17. Rudd v. American Guarantee Fund Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 237. Where agent testified that he had no knowledge of breach of iron-safe clause when he agreed on settlement, held error to instruct that settlement was waiver of breach without requiring a finding that, at the time it was made, agent had knowledge of the destruction of the books. Id. Cannot take advantage of breach of iron-safe clause

A nonwaiver agreement will not be extended beyond its plain terms.[18] Oral negotiations leading up to the making of the agreement cannot operate to vary or contradict its terms.[19] In the absence of a showing of fraud or mistake where the insured signs such an agreement, he will be conclusively presumed to know its contents.[20] He may, however, show that he was induced to sign it through the false and fraudulent representations of the company's adjuster.[21]

The cancellation of a policy is not a waiver of a previous breach of a condition or warranty therein, particularly when the company has the right to cancel at any time with or without cause.[22]

The waiver of one provision does not preclude reliance on the others,[23] and knowledge of the violation of a provision of a former policy is not a waiver of a similar provision in a subsequent one.[24]

(§ 16) *D. Reinstatement.*[25]—Life policies frequently provide that they may be revived within a specified time after a lapse for nonpayment of the premiums on the payment of all arrears and the furnishing of certain evidence of the good health of the insured.[26] Approval by certain officers of the company is sometimes required.[27] Where the insured does everything required of him to procure a rein-

though it had no knowledge thereof if it might have ascertained facts upon inquiry and they were not fraudulently prevented from coming to its knowledge by insured. Instruction approved. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. The action to recover after adjustment is based upon a new and independent contract and not upon the policy, and the insurer can defeat it only by showing fraud or mistake in the adjustment. Id.

18. Held not to apply after adjustment of loss. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. An agreement that any action taken by the company in investigating and ascertaining the cause of the fire and the amount of the damage shall not create a waiver or invalidate any of the conditions of the policy does not prevent an adjustment of the loss with full knowledge of the fact and an agreement to pay the same from operating as a waiver of the right to forfeit the policy for previous violation of iron-safe clause. Rudd v. American Guarantee Fund Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 237.

19. Evidence that prior to execution of nonwaiver agreement adjuster told insured that if he would furnish certain information after signing the agreement the company would settle with him and pay his claim. Phenix Ins. Co. v. Stahl, 72 Kan. 578, 83 P. 614.

20. Is bound thereby whether he actually knows its contents or not. Weddington v. Piedmont Fire Ins. Co. [N. C.] 54 S. E. 271.

21. Agreement, being without consideration, can only be received in evidence for the purpose of determining the intention of the parties at the time of its execution, and insured may show circumstances under which it was signed. Gish v. Insurance Co. [Okl.] 87 P. 869.

22. Of condition against increase of hazard. Ruffner Bros. v. Dutchess Ins. Co. [W. Va.] 53 S. E. 943.

23. Waiver by insurer of right to cancel policy because of excessive use of intoxicants held not to preclude reliance on provision that policy should be void in event of insured's death as a result of the use of alcoholic stimulants, Lowenstein v. Franklin Life Ins. Co., 122 Ill. App. 632.

24. Second policy held not a continuation of a former one, though identical except as to dates, but a separate and independent one, so that evidence that company knew of violation of clause in first one, avoiding policy if property remained idle for 30 days was inadmissible to show waiver of similar provision in second one. Kentucky Vermillion Min. & C. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695.

25. See 6 C. L. 130.

26. Where insured was in bad health when tender of overdue premium was made, held that policy could not be revived without consent of insurer. American Assur. Ass'n v. Hardiman, 124 Ga. 379, 52 S. E. 536. Policy held to give insured absolute right to reinstatement on compliance with specified conditions so that when he did so comply and submitted to required medical examination the company was bound to pass upon the matter within a reasonable time and notify him in case the result was unfavorable. Leonard v. Prudential Ins. Co., 128 Wis. 348, 107 N. W. 646. The company in such case held bound to act reasonably and fairly to the insured and to have no right to arbitrarily refuse to reinstate him or to act on information secretly obtained without giving him an opportunity to meet it. Id. It being the duty of company to act upon application for revival within a reasonable time, held that its silence for some two months after an apparently perfect case for revival was submitted to it, delay being due to its negligence and that of its agents, and no notice of rejection being given until after the death of the insured, estopped it from asserting a rejection against the beneficiary by reason of information secretly obtained without giving insured an opportunity to be heard. Id.

27. Provision that delinquent members might be reinstated "if approved by the

statement, equity will regard the policy as reinstated though he dies before an actual reinstatement.[28] A revival or reinstatement is the making of a new contract.[29]

§ 17. *Contracts of reinsurance and concurrent insurance. Reinsurance.*[30]—Whether or not a reinsurer is liable for a loss depends upon the terms of the contract of reinsurance and not those of the original policy.[31] In the absence of a specific provision on the subject in the contract of reinsurance, the original contract controls in determining whether some specific act is necessary to effectuate a forfeiture.[32]

An agreement whereby an insurance company in consideration of a transfer to it of all the assets of a fraternal benefit society assumes all liability of the latter on certificates on which death has been reported and which remain unpaid, and its subsequent specific assumption of all liability on a specific certificate, authorizes the beneficiary named in the latter to enforce the same directly against it.[33] In the absence of a statute[34] or a provision in the contract to the contrary,[35] an agreement to reinsure all policies in good standing creates no liability in the reinsurer on a policy which the original insurer has wrongfully attempted to forfeit, and hence is apparently not in good standing when the contract of reinsurance is made.[36]

medical director and president," by giving reasonable assurances that they were in good health, held valid and to make approval a condition precedent to reinstatement. Instruction held erroneous. Lane v. Fidelity Mut. Life Ins. Co. [N. C.] 54 S. E. 854. Provision held not to make approval a mere ministerial act but that it involved the exercise of judgment and discretion, and hence insured could not recover damages for refusal to reinstate him and cancellation of policy in absence of showing that approval had been fraudulently or arbitrarily withheld. Id.

28. Evidence held to show that insured had done everything required of him, it being presumed that application contained satisfactory evidence of good health in absence of showing to the contrary. Wichman v. Metropolitan Life Ins. Co. [Mo. App.] 96 S. W. 695.

29. Date of reinstatement held date of issue within meaning of incontestable clause so that insurer could defend on ground of false representations in health certificate on which reinstatement was based at any time within 2 years from date of reinstatement. Pacific Mut. Life Ins. Co. v. Galbraith, 115 Tenn. 471, 91 S. W. 204.

30. See 6 C. L. 130.

31. Fireman's Fund Ins. Co. v. Aachen & M. Fire Ins. Co. [Cal. App.] 84 P. 253. Subject-matter of reinsurance held to have been certain wheat while contained in a specified warehouse and not the risk assumed by the original insurer, and hence reinsurer was not liable where wheat was in different building when destroyed regardless of whether original insurer was or not. Id. Subsequent provision that policy was "subject to the same risks, valuations, conditions, and adjustments as or may be taken by the reinsured" held not to defeat the express provisions of the contract that the wheat was insured only while contained in the warehouse. Id.

32. In absence of specific provision in contract of reinsurance for forfeiture for nonpayment of premiums, held that some affirmative act was necessary as required by original contract. Life policy. Brooks v. Conservative Life Ins. Co. [Iowa] 106 N. W. 913.

33. Held a reinsurance directly to the several members of the society, and specifically a contract of reinsurance directly to plaintiff, which made plaintiff's certificate the contract of the reinsuring company and the measure of its liability to her. Cosmopolitan Life Ins. Ass'n v. Koegel, 104 Va. 619, 52 S. E. 166. Held also a contract for her benefit on which she could sue though a stranger to the consideration. Id.

34. Hurd's Rev. St. 1903, c. 73, par. 245, relating to transfers or reinsurance of risks by assessment companies, held to become a part of every contract of transfer and to require a transfer of all members actually in good standing except such as give notice of preference to be transferred to some other company, so that an attempt to tender to transferee company only such members as appeared to be in good standing on transferror's books and records would be invalid. Bolles v. Mutual Reserve Fund Life Ass'n, 220 Ill. 400, 77 N. E. 198, rvg. 120 Ill. App. 242. Transferee company cannot rely on books of transferring company, but is bound at its peril to ascertain who of the members are in fact members in good standing of such company. Id.

35. Transferring company held to have attempted to transfer all its members in good standing without reference to their standing on its books and records, and hence such a member became, by virtue of contract of transfer, a member of the transferee company though he did not appear as member in good standing on the books. Bolles v. Mutual Reserve Fund Life Ass'n, 220 Ill. 400, 77 N. E. 198, rvg. 120 Ill. App. 242. Such member was not bound, in absence of notice and where no requirements were made upon him by transferee, to notify latter of his claim to membership therein and to pay or offer to pay it such dues and assessments as might be required of him, in view of his original contract. Id.

36. Pursuant to statute and under order

Concurrent insurance.[37]—In the absence of a provision in the policy to the contrary, the procuring of additional insurance does not affect the validity of the contract.[38] Fire policies generally permit a certain amount of concurrent insurance[39] with a provision for the apportionment of the loss among all the insurers.[40] Similar provisions are sometimes found in accident policies.[41] A "standard guaranty to maintain eighty per cent insurance" does not entirely supersede a provision that the policy shall be void in case additional insurance shall be procured without the consent of the company, but at most impliedly gives permission to procure, or waives the provision against procuring, additional insurance only up to the amount specified.[42] Hence a policy containing both such provisions is avoided by procuring without consent additional insurance carrying the total insurance to a sum greater than the total value of the property.[43]

§ 18. *The loss or benefits, its extent, and extent of liability therefor.*[44]—Policies in mutual companies ordinarily only entitle the insured in case of loss to his proportionate share of the funds on hand available for the payment of losses.[45] Where the policy provides that the beneficiary shall be entitled to the proceeds of one assessment not exceeding a certain sum, he may recover the full amount of the insurance in the absence of a showing by the company that an assessment would have produced less, that being a matter of defense.[46]

Accident and health insurance.[47]—Accident policies frequently provide for an increased[48] or diminished[49] indemnity in case injuries or death results from cer-

of court, receivers of insolvent mutual company entered into agreement with defendant whereby latter agreed to reinsure all of its policies in good standing. In order to carry out contract actuaries appointed for that purpose prepared a list of such policies which was submitted to defendant as a basis of its contract. Previously thereto the insolvent company had wrongfully attempted to forfeit plaintiff's policy, and hence it did not appear in such list. Held that plaintiff could not maintain an action on policy against defendant. Kansas Mut. Life Ins. Co. v. Whitehead [Ky.] 93 S. W. 609.

37. See 6 C. L. 130.

38. Polk v. Western Assur. Co., 114 Mo. App. 514, 90 S. W. 397.

39. "$800 total concurrent insurance permitted, including this policy," held to authorize $800 in addition to amount of policy in which provision was contained. Western Assur. Co. v. Ferrell [Miss.] 40 So. 8. Where policy permitted concurrent insurance but provided that total insurance should at no time exceed three-fourths of the actual cash value of each item of property covered, held that an overvaluation in procuring concurrent insurance did not avoid policy where there was no intention to defraud. Pennsylvania Fire Ins. Co. v. Waggener [Tex. Civ. App.] 17 Tex. Ct. Rep. 8, 97 S. W. 541.

40. Where there was evidence tending to show that loss was in excess of amount of verdict, which was for full amount of policy, held that, if verdict was rendered without deducting from amount of loss the amount required to be deducted because of concurrent insurance, error was cured by remittitur of proper amount and supreme court could not reverse on ground that judgment was excessive, amount of recovery being question of fact. Western Underwriters Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447, afg. 122 Ill. App. 600. Where company, when it issued policy, was chargeable with knowledge that there was to be a specified amount of concurrent insurance on the building, held that the total amount of insurance and not merely the amount of defendant's policy was prima facie the value of the property for the purpose of determining defendant's pro rata share of the loss. Wensel v. Property Mut. Ins. Ass'n, 125 Iowa, 295, 105 N. W. 522. Code § 1742, providing that the amount stated in the policy is prima facie the insurable value of the property at the date of the policy, held not to change rule. Id.

41. Provision for apportionment of indemnity among insurers in case amount thereof was in excess of weekly wages of insured held to refer to weekly indemnity only, so that where insured lost hand he was entitled to recover total amount of lump sum which contract provided should be paid in such case, regardless of amount of his weekly wages or of whether he had other insurance. Employers' Liability Assur. Corp. v. Morrow [C. C. A.] 143 F. 750.

42. Conceding that guaranty clause imposes obligation to keep total amount of insurance equal to 80 per cent. of the changing actual value of the property covered. Woolford v. Phenix Ins. Co., 190 Mass. 233, 76 N. E. 722.

43. Woolford v. Phenix Ins. Co., 190 Mass. 233, 76 N. E. 722.

44. See 6 C. L. 131.

45. Insured in mutual hail association having received such sum held not entitled to set off any balance of his loss against a subsequent assessment. Farmers' United Tp. Mut. Hail Ass'n v. Daily [Minn.] 107 N. W. 555.

46. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962.

47. See 6 C. L. 99, n. 43.

48. One who while attempting to board a

tain specified causes. The duration of weekly indemnity is sometimes made to depend on the cause of the disability.[50] The insured can only recover the amount of indemnity due at the date of the writ.[51]

Employers' liability insurance.[52]—Where the insurer undertakes the defense of an action against the insured on a cause of action concededly within the terms of the policy, it is liable for costs which it makes a part of a consent judgment entered pursuant to a settlement made by it.[53]

Fire insurance.[54]—The insured in case of loss is ordinarily entitled to recover the amount of his actual damages[55] not exceeding the amount named in the policy.[56]

Valued policy laws[57] in many states make the insurer liable for the full amount of the insurance specified in the contract in case of a total loss.[58] A build-

moving train seized hand rail of car but failed to hold it and fell on platform and was run over, held not injured while riding as a passenger in or on a public conveyance within a provision for double indemnity. Anable v. Fidelity & Casualty Co. [N. J. Law] 63 A. 92.

49. Policy held to provide for payment of but one-tenth of the indemnity for loss of time resulting wholly or in part from hernia accidentally produced. Instructions held erroneous. Kelsey v. Continental Casualty Co. [Iowa] 108 N. W. 221. Whether assault committed on insured, from effects of which he died, was committed with the sole purpose of robbery, within the meaning of exception to provision for diminished indemnity in certain cases, held for jury under the evidence. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 110 N. W. 246.

50. Provision of by-laws that, where disability was result of sickness, indemnity should not be paid for longer period than ten weeks held not unreasonable nor in conflict with provision in policy for indemnity at a specified rate per month during illness (Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768), nor in conflict with Rev. St. 1899, § 7903, requiring policies issued by assessment company to specify the exact amount which it promises to pay on happening of contingency insured against (Id.).

51. Not amount due at date of trial. Raburn v. Pennsylvania Casualty Co. [N. C.] 54 S. E. 283.

52. See 6 C. L. 133.

53. Where it undertook to defend action commenced by attachment proceedings and afterwards made a settlement thereof pursuant to which a consent judgment was entered against insured for a certain sum and costs, held that it was liable for costs of attachment though attachment was void. Myton v. Fidelity & Casualty Co., 117 Mo. App. 442, 92 S. W. 1149.

54. See 6 C. L. 131.

55. Evidence as to value of personalty destroyed held to support the verdict. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987. Findings as to value and damage held sustained by evidence. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160. Evidence as to damages sustained held insufficient to sustain verdict for plaintiff. British American Ins. Co. v. Columbian Optical Co. [Neb.] 108 N. W. 130. Objection that there was no evidence to go to jury on question of value of personalty destroyed held untenable where sworn proofs of loss were introduced and insured testified that statement of values therein was correct, and there was no objection to competency of such evidence on ground that it was not directed to market value and no cross-examination to show that it was not so directed. Bruger v. Princeton & St. M. Mut. Fire Ins. Co. [Wis.] 109 N. W. 95. Where there was evidence from which jury might find that plaintiff lost in the fire the articles scheduled in proofs of loss, held that the fact that it might be difficult or impossible for jury to arrive at its actual cash value would not authorize direction of verdict for defendant. Walker v. Western Underwriters' Ass'n, 142 Mich. 162, 12 Det. Leg. N. 659, 105 N. W. 597. Instructions held prejudicially erroneous as giving jury to understand that there was evidence in the case that property was worth more than value fixed in proofs of loss, in view of absence of definite testimony as to value. Id.

56. Instruction held not misleading as authorizing a recovery of more than two-thirds of the value of certain provisions, which was limit of company's liability. Bruger v. Princeton & St. M. Mut. Fire Ins. Co. [Wis.] 109 N. W. 95.

57. See 6 C. L. 132.

58. Kentucky: Three-fourths value clause held applicable to personalty only and not to real estate under express provisions of St. 1903, § 700. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987.

Louisiana: Section 2 of Act No. 135, p. 209, of 1900, is merely complemental of § 1, and, the two sections considered together, the act must be held to relate exclusively to policies covering property which is immovable by nature. Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718.

Missouri: Rev. St. 1899, §§ 7969, 7970, provide that in the event of the total loss of an insured building by fire the measure of damages shall be the amount of the policy less only the depreciation in value during the interim between the issuance of the policy and the time of the loss, and require the insurer to show the amount of such depreciation. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684. Where defendant fails to make showing as to depreciation, measure of loss is conclusively fixed at amount of policy. Id. Section 7969 held applicable to builder's policy, the builder having contract-

ing is a total loss when it has lost its identity and specific character as such, and by means of the fire and as a result thereof has become so far disintegrated that it can no longer be properly designated as a building, though some part of it may remain standing.[59] It is also sometimes provided that the insurer cannot question the value of the property as fixed in the policy,[60] or that the amount therein stated shall be prima facie the insurable value of the property at the date of the policy.[61]

§ 19. *Notice, claim, and proof of loss.*[62]—As a general rule notice[63] and proof of loss[64] containing the information required by the policy[65] must be given by the

ed to turn over completed building and his interest being one in the land. King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892.

Washington: Mutual fire companies held to be exempted from operation of valued policy statute by Laws 1903, p. 150, c. 97, § 12. Davis v. Pioneer Mut. Ins. Ass'n [Wash.] 87 P. 829.

59. Instruction approved. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684. Policy of insurance on a building is an insurance upon the building as such and not upon the materials of which it is composed. Id. Evidence held to sustain finding of total loss. Id.

60. Rev. St. 1899, § 7979, providing that no company shall take a risk at a ratio greater than three-fourths of the value of the property insured, and when taken its value shall not be questioned in any proceeding, applies to losses under policies covering personalty as well as those covering realty. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684. Statute renders policy on chattels valued only in so far as it precludes company from denying that their value when policy was written was other than one-third more than the amount of the insurance thereon, and does not require payment of full amount of policy when loss is shown to have been only partial. Id.

61. In actions on policies covering buildings. Code § 1742. Wensel v. Property Mut. Ins. Ass'n, 129 Iowa, 295, 105 N. W. 522.

62. See 6 C. L. 133.

63. Accident insurance: Notification by company's agent in writing at beneficiary's request within time required held sufficient notice of death. Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016.

Burglary insurance: Policy held avoided by failure to give immediate notice of loss to insurer and police. Katzenstein v. Fidelity & Casualty Co., 48 Misc. 496, 96 N. Y. S. 183.

64. Fire insurance: Furnishing proofs by insured as required by Iowa Code Supp. 1902, § 1742a, is a condition precedent to right of action to recover for loss, unless waived. American Cereal Co. v. Western Assur. Co., 148 F. 77. Act No. 105 of 1898, p. 151, § 22, prescribing use of fire policies conforming to New York standard form, is not in conflict with, and hence is not repealed by, the valued policy law (Act No. 135, p. 209, of 1900), in so far as form of policy prescribed requires insured to furnish preliminary proof of loss and to furnish insurer with information as to character, situation, and value of the property destroyed or damaged. Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718. Policy held to require both notice of loss and sworn statement. Glazer v. Home Ins. Co., 113 App. Div. 235, 98 N. Y. S. 979 Sworn statement required by standard policy held not a condition precedent to insured's right to sue on policy. Pub. St. 1901, c. 170, §§ 7, 9, 18, construed. Gleason v. Canterbury Mut. Fire Ins. Co., 73 N. H. 583, 64 A. 187. Provision requiring insured to furnish, within 60 days after fire, a sworn statement stating, among other things, the cash value of the property and the amount of the loss, held a reasonable one as to time and insured was bound to comply therewith in the absence of a showing of circumstances excusing delay. Davis v. Pioneer Mut. Ins. Co. [Wash.] 87 P. 829. Failure of insured to make required statement held wholly due to his own negligence, he being familiar with the insurance business. Id. Requested instruction that insured could not recover unless she had furnished sworn statement as required by policy, unless company had waived same, held improperly refused. Levy v. Scottish Union & Nat. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

65. Accident insurance: Plaintiff held not required to furnish by way of preliminary proofs of death and the cause thereof more than would be necessary to make out a prima facie case in an action on the policy, and hence company could not require him to furnish affidavits of persons having personal knowledge of injuries resulting in death. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013.

Fire insurance: Notice required by Pub. St. 1901, c. 170, § 6, is sufficient if it is in writing and informs insurer of a loss or damage by fire under the policy without more specifically specifying property lost or damaged. Gleason v. Canterbury Mut. Fire Ins. Co., 73 N. H. 583, 64 A. 187. Policy covered property in possession of carriers as warehousemen, etc., and provided that in case of loss they should, although not liable for any loss, notify insurer who was insured thereby, which notice should be conclusive as to that fact on insurer. Insured notified insurer of fire and submitted an itemized statement of articles destroyed in form of two schedules, former containing those articles which insured claimed were included and latter those articles and names of the owners which might have been included and in regard to which there was a dispute. Held sufficient notice and proof of loss to entitle owner named in latter list to recover. Kellner v. Fire Ass'n [Wis.] 106 N. W. 1060. Letter not sworn to and not containing information required, while sufficient as notice of loss, held insufficient as such sworn statement, both notice and statement being necessary. Glazer v. Home Ins. Co., 113 App. Div. 235, 98 N. Y. S. 979. Sworn statements held insufficient for failure to state the cash value of the property at the time of the fire as re-

insured or the beneficiary, as the case may be,[66] within the time prescribed.[67] A notice by the insured's wife as his agent ex necessitate is sufficient.[68] It is often held that, in the absence of a provision in the contract to the contrary, a failure to furnish notice or proofs within the time prescribed will not work a forfeiture but will merely postpone the right to sue.[69]

Immediate notice means notice within a reasonable time, what is a reasonable time depending upon the facts and circumstances of each case.[70] Proof of mailing a notice properly addressed and stamped is prima facie proof of the giving of notice.[71] Formal proofs of loss have been held unnecessary in case of the total loss of a building worth more than the amount named in the policy where the company has been promptly notified of the loss and has inspected the premises.[72]

False swearing.[73] *Fire insurance.*—In the absence of a provision to the contrary false and fraudulent representations in the proofs of loss do not render the policy void.[74] In order that fraud or false swearing may avoid the policy under a provision to that effect, it must be intentional or the result of a reckless disregard of the truth.[75] A provision that false swearing on the part of the insured shall

quired by the policy. Davis v. Pioneer Mut. Ins. Co. [Wash.] 87 P. 829.

66. Fire insurance: Iowa Code Supp. 1902. § 1742a, relating to furnishing proofs of loss for loss or damage to personalty by the "assured," held to supersede provisions of policy in that regard. American Cereal Co. v. Western Assur. Co., 148 F. 77. Where policy insured I. Co. on certain property, held that such company was the "insured" though loss was payable to another company as its interest might appear. Id. Allegation in proofs attached to petition that party named in policy as insured was sole owner of property, subject to lien thereon in favor of plaintiff, to whom loss was made payable as its interest might appear, but that such party neglected and refused to make proofs and therefore plaintiff made same, held not sufficient to show excuse for failure of "insured" to furnish them. Id.

Life insurance: Where person signing proofs of death claimed proceeds in such proofs as executor, they were not rendered defective by failure to add word "executor" after his signature, the oath being a personal one. Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261.

67. Accident insurance: Immediate notice of accident held a condition precedent to right of beneficiary to recover amount stipulated to be paid in case of resulting death. Travelers' Ins. Co. v. Max [C. C. A.] 142 F. 653, rvg. 130 F. 985.

Fire insurance: Furnishing of a sworn statement such as was required by the policy and within the time therein specified held a condition precedent to suit thereon. Davis v. Pioneer Mut. Ins. Co. [Wash.] 87 P. 829.

Health insurance: Where policy provided for notice to company within 10 days from "termination of the disability," held that notice given during disability was in time. Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456.

68. If wife is left in charge of property and when loss occurs, her husband, from circumstances of his situation, cannot be reached so as to enable him to make proofs of loss, wife may do so by implied authority as his agent ex necessitate. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952.

69. Accident insurance. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013. Fact that policy provided for forfeiture for failure to furnish proofs of death within specified time, but not for failure to give immediate notice of loss, held to indicate that no forfeiture was intended in latter case. Id.

Fire insurance. Gragg v. Home Ins. Co., 28 Ky. L. R. 988, 90 S. W. 1045; Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718.

Life insurance. Continental Casualty Co. v. Waters [Ky.] 97 S. W. 1103.

70. Notice of sickness required by health policy. Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456. Where insured lived for 72 days after accident in full possession of his faculties, but no notice was given until 67 days after his death, held that unexcused delay was unreasonable. Travelers' Ins. Co. v. Max [C. C. A.] 142 F. 653, rvg. 130 F. 985.

71. Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456. Where witness testified to "mailing" letter, held that it would be presumed to have been properly stamped in absence of evidence to the contrary. Id.

72. Gartsee v. Citizens' Ins. Co., 30 Pa. Super. Ct. 602.

73. See 6 C. L. 135.

74. As to character and value of personalty destroyed. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987.

75. A mere innocent mistake will not. Requested instructions properly refused. Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8. After loss only moral fraud, as distinguished from legal fraud, can render the policy void. Id. Insured's property was under control of husband and she furnished proofs without stating whether she knew the facts of her own knowledge, and at her examination under oath agent agreed that husband might answer such questions as she could not provided she accepted his statements as her own. Held that company had notice that her answers were based on information derived from others, and hence she did not forfeit right to recover because husband

avoid the policy does not apply to false swearing on the part of an agent ex necessitate, unless the insured ratifies his acts with knowledge of the facts,[78] such ratification being necessary to render him responsible therefor.[77] A preponderance of the evidence is sufficient to sustain a charge of fraud or false swearing provided the proof is clear and strong enough to preponderate over the general presumption that men are honest and do not ordinarily commit fraud or act in bad faith.[78] It has been held that intentional false swearing will prevent a recovery regardless of whether the insured derived an advantage prejudicial to the defendant therefrom.[79] False swearing as to the damage to property covered by one policy does not affect the liability of the insurer on another separate policy covering different property.[80]

Examination under oath.[81]—Fire policies generally provide that after loss the insured shall submit to examination under oath as often as required.[82] A demand that the insured submit to such an examination must fix a time and place therefor, and designate an officer authorized by law to administer oaths before whom it shall take place.[83] A written demand supersedes all former oral ones.[84]

Waiver.[85]—Provisions requiring notice and proofs of loss, being for the bene-

made false statements which she adopted in the belief that they were true. Id. Requested instructions properly refused as failing to draw distinction between mere untrue statement and a fraudulent one. Id. Instruction held not objectionable as assuming that proofs and deposition of plaintiff were merely made on information, there being evidence showing that fact. Id. Contradictory or untrue statements held not to warrant direction of verdict for defendant if made in good faith and without intent to defraud. Walker v. Western Underwriters' Ass'n, 142 Mich. 162, 12 Det. Leg. N. 659, 105 N. W. 597. Evidence held to sustain finding that insured gave his honest judgment and opinion as to value. Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605. Willful false swearing cannot be predicated on claim for retail price of goods for freight, drayage, washing, setting up, etc., where such claim is made in good faith on advice of counsel regularly employed to advise and assist in making proofs of loss. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160. Policy not avoided for including in proofs damage to piano, the title to which was in another, where insured acted in good faith believing he had title and withdrew all claim therefor at trial on being advised that he had not. Swift v. Teutonia Ins. Co., 28 Pa. Super. Ct. 253. Evidence held to sustain finding that stock was worth substantially the amount stated in proofs of loss at time of its destruction. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531.

76. By wife having implied authority to make proofs of loss by reason of her husband's absence. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952. Husband who acts reasonably and in good faith to enforce policy according to proofs furnished by wife as his agent ex necessitate does not thereby become party to deceit or participant in her fraud by ratification merely because he has knowledge of the claim of the insurer. Id. No ratification as matter of law in such case by taking up litigation already commenced by wife in absence of showing of bad faith. Id.

77. Since such agent has no apparent authority beyond that necessary to effect the object of his implied appointment. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952. Evidence held not to show ratification. Id.

78. May be shown by facts and circumstances which would lead a reasonable man to conclusion that fraud exists. Instructions approved. Virginia Fire & Marine Ins. Co. v. Hogue [Va.] 54 S. E. 8. Clear and satisfactory proof in cases involving fraud or false swearing may be defined to be a preponderance of evidence sufficient to overcome the presumption of innocence of moral turpitude or crime. Instructions approved. Id.

79. Meyer v. Home Ins. Co., 127 Wis. 293, 106 N. W. 1087. Word "fraud" held to have been used in connection with "false swearing" so as to cover frauds otherwise committed and did not require showing of prejudice as in case of action for deceit. Id. Instruction held erroneous and not cured by finding that amount of insurance exceeded the loss, since false swearing forfeited entire policy. Id.

80. Where company issued two policies, one on store building and other on meat and corn contained therein, each of which provided that policy should be void in case of any fraud or false swearing by the insured. Williams v. Virginia State Ins. Co. [Va.] 55 S. E. 680.

81. See 6 C. L. 136.

82. Where member of firm submitted to examination and answered questions in so far as she had knowledge of facts, and proffered examination of her manager as to facts in regard to which she had no knowledge, who she said knew such facts, and also offered all books and information under her control, held that there was no violation of provision. Meyer v. Home Ins. Co., 127 Wis. 293, 106 N. W. 1087.

83. Demand held insufficient. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160.

84. Merges former verbal requests and must be regarded as final one. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160.

85. See 6 C. L. 136.

fit of the insurer, may be waived by it.[86] Waiver may be inferred from acts and conduct of the company inconsistent with an intention to insist on a strict performance.[87] Defects in or objections to notice or proofs are waived by a failure to disclose them to the insured within a reasonable time.[88] Written notice is waived by acting on knowledge otherwise acquired.[89] A failure to furnish proofs[90] and defects in proofs furnished[91] are waived by a distinct denial of liability on other grounds, but if the insurer has no notice, express or implied, or any claim of loss until suit is brought, it may answer both that there was in fact no loss and that the claimants never gave any notice of the alleged loss pursuant to the terms of the policy.[92] It has also been held that such a denial is not a waiver of proofs when made after the insurer has already been discharged for failure to furnish them in time.[93]

Proofs are waived by proceedings looking to an adjustment of the loss,[94] or by an agreement to pay a specified sum after examination,[95] or by an unqualified

86. Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447; Id., 122 Ill. App. 600.

87. Spring Garden Ins. Co. v. Whayland [Md.] 64 A. 925.

88. Accident insurance: Where company acquiesces in notice of death and enters upon an examination of the loss, it cannot thereafter question the sufficiency of the notice. Crowder v. Continental Casualty Co., 115 Mo. App. 533, 91 S. W. 1016. Where notice of insured's death is received and acted upon by accident company, the relation of the parties sending the notice to the deceased or the beneficiary is immaterial. Immaterial that coroner sending notice was not insured's representative. Continental Casualty Co. v. Buchtel [Neb.] 105 N. W. 707.

Fire insurance: By retaining them without pointing out objections, where insured attempts in good faith to comply with policy. Hartford Fire Ins. Co. v. Enoch [Ark.] 96 S. W. 393. By retention of list of damaged and destroyed property for nearly two months without a suggestion that it was not considered to be in conformity with the terms of the policy, though letter was subsequently written to insured's attorney which he never received. Instruction approved. Spring Garden Ins. Co. v. Whayland [Md.] 64 A. 925. Waiver held to include waiver of right to rely on defense that insured had not furnished list of undamaged property, if such list formed a part of the required proofs. Id.

Life insurance: Where proofs are delivered in apt time and are received and retained until time fixed by policy for payment without objection. Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261. Objection as to form of proofs held waived where they were made on blanks supplied by company in July and no objection was made thereto until the filing of an answer in a suit on the policy against the company in the following November denying liability. Thaxton v. Metropolitan Life Ins. Co. [N. C.] 55 S. E. 419.

89. Fire insurance: Right to object that notice of loss was not in writing as required by statute held waived where defendant knew of loss within time prescribed, and within that time entered upon an adjustment of the loss and made a payment on account thereof. Gleason v. Canterbury Mut. Fire Ins. Co., 73 N. H. 583, 64 A. 187.

99. Accident insurance. Continental Casualty Co. v. Buchtel [Neb.] 105 N. W. 707.

Fire insurance: Denial of any liability. Security Mut. Ins. Co. v. Woodson & Co. [Ark.] 95 S. W. 481. By denial of liability and refusal to pay on ground that insured burned the property. Planters' Mut. Ins. Co. v. Hamilton [Ark.] 90 S. W. 283; Phoenix Assur. Co. v. Boyett [Ark.] 90 S. W. 284. By denial of liability by alleging breach of iron-safe clause in answer. Parker & Co. v. Continental Ins. Co. [N. C.] 55 S. E. 717. By denial on ground of unauthorized additional insurance. Kennedy v. Agricultural Ins. Co. [S. D.] 110 N. W. 116. Filing of proofs held unnecessary where company denied existence of any contract of insurance at insured's death and on that ground declined to furnish blank proofs on request. Lanier v. Eastern Ins. Co. [N. C.] 54 S. E. 786.

91. Fire insurance. Phoenix Assur. Co. v. Boyett [Ark.] 90 S. W. 284. Denial by adjuster after investigation. Ohio Farmers' Ins. Co. v. Vogel [Ind.] 76 N. E. 977. By basing refusal to pay on ground that fire was of incendiary origin. Spring Garden Ins. Co. v. Whayland [Md.] 64 A. 925.

92. Accident insurance. Western Travelers' Acc. Ass'n v. Tomson [Neb.] 105 N. W. 293, modifying syllabus, 103 N. W. 695.

93. Accident insurance: Where no notice was given until 139 days after accident and 67 days after insured's death, failure to give immediate notice of accident held not waived by letter of agent denying liability on other grounds, since company had already been discharged by default and hence situation of beneficiary was not thereby changed in any manner detrimental to her rights. Travelers' Ins. Co. v. Nax [C. C. A.] 142 F. 653, rvg. 130 F. 985. By unconditional offer after inspection to pay specified sum in settlement, no question being raised as to liability, and subsequent attempt to procure appraisal. Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447, afg. 122 Ill. App. 600.

94. Fire insurance: Where company joins in arbitration and sets up an award as a defense. Commercial Union Assur. Co. v. Parker, 119 Ill. App. 126.

95. Fire insurance: By agreement between adjuster and insured as to amount of

admission after the expiration of the time for furnishing them that the property is a total loss,[96] but not by an unaccepted offer of settlement[97] or by the mere retention of a notice of loss without notifying the insured that formal proofs required by the policy must be furnished in addition thereto.[98] Where, however, the company undertakes to inform the insured what it is necessary to do in order to have his loss adjusted, it owes him the duty to inform him correctly, and if it fails to do so it thereby waives the requirements of the policy in that regard.[99] Failure to furnish proofs in time is waived by a subsequent agreement to pay on their being furnished.[1] A failure to object to proofs until shortly before the expiration of the time limit entitles the insured to a further reasonable time to furnish them.[2] Where proofs are required to be made on blanks to be furnished by the company, they are waived by a failure to furnish blanks after an offer of any information required.[3] So too, a failure to furnish them until after the time limited for making proofs is a waiver of the limitation.[4] It has been held that where a fire policy is severable and the insurer waives proofs as to one item by admitting liability for a total loss, the insured is entitled to judgment for the amount so admitted to be due without prejudice to his right to prosecute his claim for the balance on furnishing proofs as to it.[5]

The acts of the insurer's agent within the general scope of his authority are binding on it,[6] and knowledge acquired by him while engaged in its business will be imputed to it.[7]

§ 20. *Adjustment and arbitration.*[8]—Permitting the recovery of the amount

loss and subsequent ratification thereof by general agent. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649. Where special agent sent by company for that purpose examined property, made estimates of damage, and agreed upon amount of loss with mortgagee whose debt was secured by mortgage on insured property and by the policy. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co. [Kan.] 86 P. 142.

96. Fire insurance. Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718.

97. Fire insurance. Glazer v. Home Ins. Co., 96 N. Y. S. 1099; Id. 48 Misc. 515, 96 N. Y. S. 136. Fact that, after receipt of required notice of loss and before expiration of time within which sworn proofs were required to be furnished, adjuster offered to settle for specified sum, which offer was immediately refused, held not to show waiver, there being no further negotiations. Glazer v. Home Ins. Co., 113 App. Div. 235, 98 N. Y. S. 979.

98. Fire insurance. Glazer v. Home Ins. Co., 96 N. Y. S. 1099; Id., 48 Misc. 515, 96 N. Y. S. 136.

99. Fire insurance: Proofs held waived where insured was misled by act of company's officer into belief that he had done all that company required of him, and proof showed that officer knew that he had been misled and company failed to inform him, on inquiry, in what respect he had failed to comply with policy. Sidebotham v. Merchants Fire Ass'n, 41 Wash. 436, 83 P. 1028. Letter referring insured to policy for information in regard to what it was necessary for him to do held insufficient to inform him in what respect company claimed he had failed to comply with contract. Id.

1. Fire insurance. Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718.

2. Fire insurance: Where insured furnished proof 12 days after loss and insurer made no objection thereto until a day or two before the expiration of the 60 days allowed for furnishing the proof, held that insured was entitled to further reasonable time after notice of the alleged defects in proof to complete same. Planters' Mut. Ins. Co. v. Hamilton [Ark.] 90 S. W. 283.

3, 4. Accident insurance: Continental Casualty Co. v. Buchtel [Neb.] 105 N. W. 707.

5. Policy covering both immovables and movables and made up of distinct items held severable. Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718.

6. Adjuster has authority to waive preliminary proofs. Ohio Farmers' Ins. Co. v. Vogel [Ind.] 76 N. E. 977. Agent held a general one having authority to receive proofs of loss, adjust losses, etc., so that his acts amounting to waiver of proofs were binding on company. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649. Letter of agent held not an attempt to speak for company except as to rejection of claim, grounds of rejection being stated merely as agent's personal surmise. Travelers' Ins. Co. v. Nax [C. C. A.] 142 F. 653, rvg. 130 F. 985.

7. Where after being notified of fire company sent general agent to insured, who, after insured had at his request furnished him a detailed statement of loss and damage, informed him that there were no other papers for him to make out but that he would himself attend to the rest, held that condition requiring proofs of loss was waived and company was estopped to contend that waiver was not binding on it because not in writing as required by policy. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134.

agreed upon on an adjustment of the loss pursuant to the terms of the policy is not permitting recovery on an accord.[9] An adjustment made by the insured and the company's agent is evidence of the value of the goods destroyed and prima facie proof of the amount due.[10] One employed by the insured for the sole purpose of estimating and appraising the loss cannot recover for services rendered in adjusting it.[11]

Fire policies generally provide that, in case of a disagreement as to the amount of loss and damage,[12] it shall be determined by an appraisal or arbitration[13] by disinterested appraisers.[14] Whether the umpire or third appraiser can act where there has been no disagreement between the appraisers appointed by the insured and the insurer depends upon the terms of the policy or the submission.[15] A provision making an award by appraisers, when appraisal has been required, a condition precedent to an action on the policy is valid and precludes recovery in the absence of a showing of performance thereof or an excuse for nonperformance.[16] Whether an arbitration[17] or an award is a condition precedent is to be determined from a

8. See 6 C. L. 138.

9. Where policy provides for an adjustment, act of insurer's agent in adjusting loss is but a carrying out of the contract. Rudd v. American Guarantee Fund Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 237.

10. Proofs of loss held a part of the adjustment and admissible as evidence of the amount of the loss in an action on the policy by one to whom it was made payable unconditionally. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. Adjustment fixing amount of loss is prima facie evidence of the amount. Instruction approved. Id.

11. Evidence held to show that plaintiff was employed by defendant only to estimate and appraise fire loss. McCormack v. Herboth, 115 Mo. App. 193, 91 S. W. 164. Testimony as to reasonable value of services in adjusting loss held incompetent. Id. Testimony that plaintiff represented insured at adjustment of loss held incompetent as a mere conclusion, he having testified as to no facts warranting such conclusion. Id.

12. After amount of loss has been fixed by agreement there is nothing left for arbitration, and stipulation for reference to arbitrators has no further force. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649. Where the valued policy law conclusively fixes the measure of recovery at the amount of the policy in the event of a total loss, there can, in such case, be no disagreement as to the amount of the loss, and hence the arbitration clause is inoperative under such circumstances. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684.

13. Provisions requiring submission of amount of loss and damage to arbitration are reasonable and valid. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684.

14. All of the referees provided for in the standard policy must be disinterested men both in sense of being without pecuniary interest and also in sense of being competent, impartial, fair, and open minded, and substantially indifferent in thought and feeling between the parties, and without bias or partisanship either way. Young v. Aetna Ins. Co. [Me.] 64 A. 584. Award will be set aside where it appears that even one of them was not thus disinterested. Id. Unexplained refusal by referee nominated by company to agree upon one living in vicinity of property as third referee is unreasonable and is evidence of want of requisite disinterestedness, and when coupled with explanation that it is because company objects thereto shows disqualifying partisanship. Id. Evidence held to warrant submission of question as to whether person selected by company was a fair and impartial appraiser, and to warrant finding that award should not stand. Seibert Bros. & Co. v. Germania Fire Ins. Co. [Iowa] 106 N. W. 507.

15. Award by umpire and one appraiser held void. Commercial Union Assur. Co. v. Parker, 119 Ill. App. 126. Agreement for appraisal held to authorize umpire to act in case of disagreement only, so that umpire and one appraiser could not make valid award as to any items which both appraisers had not considered before withdrawal of one of them and as to which there had been no disagreement between them. Seibert Bros. & Co. v. Germania Fire Ins. Co. [Iowa] 106 N. W. 507.

16. Grady v. Home F. & M. Ins. Co., 27 R. I. 435, 63 A. 173. Agreement is one relating to preliminary matter and hence is valid, particularly in view of provision therefor in standard policy. Id. Stipulation that company should be liable only for such amount as should be determined by agreement of parties or by appraisers to be selected in specified manner, and making such determination a condition precedent to action by insured on policy, held valid, it not being a restriction on right of insured to enforce his rights by the usual legal proceedings in the ordinary tribunals within the meaning of Rev. Codes 1899, § 3925. Leu v. Commercial Mut. Fire Ins. Co. [N. D.] 107 N. W. 59.

17. A mere agreement to arbitrate does not prevent a suit at law in the absence of a further agreement which either in express terms or by a proper construction makes the award a condition precedent to the right of action. Chadwick v. Phoenix Acc. & Sick Ben. Ass'n, 143 Mich. 481, 13 Det. Leg. N. 50, 106 N. W. 1122. Policy held to make arbitration a condition precedent to right of ac-

construction of the policy.[18] There may be a verbal submission independently of the provisions of the policy.[19] An acceptance by the company of the insured's repudiation of an award under such a submission does not preclude it from insisting on an appraisement in accordance with the terms of the policy.[20]

It is the duty of both parties to act in good faith and make a fair effort to carry out the provisions for arbitration and accomplish their object.[21] Some courts hold that it is the duty of the company to take the initial step.[22] In case of the failure of an appraisal through the fault of either party[23] or of the appraiser selected by him,[24] the other is thereby excused from compliance with the conditions of the policy in that regard. As a general rule, on the failure of an attempted appraisal without the fault of the insured, he may immediately sue on the policy without a resubmission,[25] though some courts hold a resubmission necessary where an arbitration is made a condition precedent to suit.[20]

tion, so that insured could not recover where he refused to participate in appraisal when requested to do so. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684. Provision for an appraisement is a matter relating to a mere detail of proof as to the amount to be recovered and does not touch the fundamental right of recovery. Fire Ass'n of Philadelphia v. Appel, 4 Ohio N. P. (N. S.) 41.

18. As a general rule an award is held not to be a condition prerequisite to the maintenance of an action, notwithstanding a provision that the loss shall not be payable until a specified time after an award and that no action shall be maintained on the policy until after a compliance by the insured with all the requirements thereof. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134. Appraisal and award held not conditions precedent. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35. Contract held to make award condition precedent. Grady v. Home F. & M. Ins. Co., 27 R. I. 435, 63 A. 173.

19. Upon the issue as to whether there was a verbal submission between plaintiff and defendant and an award of arbitrators pursuant thereto, held that written award of appraisers to whom plaintiff and another company having a policy covering same loss had submitted their differences in writing, and to which defendant claimed to be a party under the alleged oral submission, was admissible, there being evidence tending to prove oral submission. Levy v. Scottish Union & Nat. Ins. Co., 58 W. Va. 546, 52 S. E. 449. After its admission plaintiff would be entitled to introduce any evidence tending to show that it was not an award as between him and the defendant, or to which defendant was a party. Id. Instruction that such award could not be considered in ascertaining amount of loss held misleading. Id.

20. Requested instruction improperly refused. Levy v. Scottish Union & Nat. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

21. Where award is not condition precedent. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134.

22. Waives provision by failing to appoint an arbitrator and requests insured to do likewise. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531.

23. Where arbitration failed because of unjustifiable and arbitrary refusal of referee chosen by company to act in selection of umpire, held that refusal of company to join in selection of new referees at insured's request was waiver of its right under policy to have loss determined by arbitration. O'Rourke v. German Ins. Co. [Minn.] 109 N. W. 401. Fact that building had been repaired in the meantime held not to have justified company in refusing. Id. Where appraisers are duly appointed and proceed with the work, the power of the contracting parties in that behalf becomes functus officio, and the arbitrary withdrawal thereafter of the appraiser representing the company and the refusal of the company to name a new appraiser renders the appraisement condition impossible and relieves the assured of its performance, and does not give to the company the right to demand a resubmission, and the loss thereafter becomes a fact to be proved like any other fact. Fire Ass'n of Philadelphia v. Appel, 4 Ohio N. P. (N. S.) 41.

24. Acts and conduct of an appraiser selected by the insurer which prevent an appraisal or an award will be treated as a waiver of provision requiring an appraisal. Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447, afg. 122 Ill. App. 600. Umpire selected by appraisers declined to act and appraiser selected by insured tried to get appraiser selected by company to select another umpire. Subsequently company's appraiser privately induced umpire to act but insured's appraiser then refused to consent to his selection and attempted to secure selection of another person but without success. Held that insured's appraiser was justified, under the circumstances, in refusing to act with umpire, and company would be deemed to have waived appraisal. Id.

25. Where award is not condition precedent some courts hold that if neither party is to blame for failure the insured need proceed no further but may sue at once (Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134), and others that the right to sue arises only on his failure to secure an award after he has taken all reasonable and proper steps to accomplish that result, whether through an original submission or another or others (Id.). Difference is merely as to what shall be deemed a fair effort to secure an award. Id. Where no award was ever made owing to disagreements between the appraisers without fault on their part or that of either party to the submission, and insured continued until repudiation of liability

After an award has been made and published, neither party can revoke the submission without the consent of the other.[27] The award is invalid unless in conformity to the submission.[28]

The appraisers must exercise their best judgment in making an award.[29] Every reasonable intendment and presumption is in favor of an award,[30] and matters which in no way affect its merits will be disregarded.[31] At law the award is conclusive as to questions of fact except in the case of fraud, misconduct, or mistake apparent on the face of the award or the submission, or where the arbitrators have refused or neglected to take into consideration a matter submitted to them,[32] and their decision is final even in equity except in cases of accident or mistake, or corruption or misconduct.[33] A failure on the part of the insured to establish that an appraisal was fraudulent does not preclude him from recovering the amount of the award.[34]

by the company to suggest means to break the deadlock between the appraisers or bring about a compromise, held that he was entitled to sue on the policy without an award, notwithstanding provisions that loss was not payable until 60 days after award, and forbidding suit on policy until after compliance with all the requirements thereof. Id. Failure without fault on the part of the insured of an attempt to adjust loss by an appraisal does not prevent him from recovering on the policy the amount of loss sustained by him. Fact that award is invalid because not in conformity to the submission. Home Ins. Co. v. Schiff's Sons [Md.] 64 A. 63. Where award was void because made by one appraiser and umpire without notice to other appraiser and in absence of disagreement, held that insured was not bound to take steps to secure another appraisement but could sue at once to have award set aside and recover on policy, award not being a condition precedent. Commercial Union Assur. Co. v. Parker, 119 Ill. App. 126.

26. An ineffectual attempt to procure an arbitration which fails without the fault of either party is not a compliance with the condition, but the insured must comply with the company's request for a resubmission before he can recover on the policy. Award not in conformity to agreement. Grady v. Home Fire & Marine Ins. Co., 27 R. I. 435, 63 A. 173.

27. Levy v. Scottish Union & Nat. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

28. Home Ins. Co. v. Schiff's Sons [Md.] 64 A. 63. Where new appraisal agreement entered into by the parties after the loss provided that appraisers appointed by them should select a third person who should "act as umpire on matters of difference only," held that such third person was not entitled to act as a third appraiser or to form one of a majority of three to render an award of the entire loss, but was an umpire in the strict sense of the term and could only act upon and decide matters on which appraisers failed to agree, and hence where it appeared that appraisers had agreed as to loss on all items except two, award covering all items signed by one appraiser and umpire only and not by other appraiser was void. Id. Fact that new agreement provided in general terms that appraisement was to be made in accordance with terms and conditions of policy held not to change rule though under policy provisions third person would have been merely a third appraiser, specific definition of his character and duties controlling general one. Id.

29. Instruction that it was their duty to give just and fair award held not misleading because law requires only that they exercise their best judgment. Seibert Bros. & Co. v. Germania Fire Ins. Co. [Iowa] 106 N. W. 507.

30. In the absence of a showing to the contrary it will be presumed that an umpire was rightly and properly appointed. Kaplan v. Niagara Fire Ins. Co. [N. J. Err. & App.] 65 A. 188.

31. Will not be set aside because umpire was present while appraisers were making their estimates of amount of loss and damage where insured was advised of manner in which work was being done, and award was made fairly and in good faith, the irregularity having in no way affected the merits of the award. Tyblewski v. Svea Fire & Life Assur. Co., 220 Ill. 436, 77 N. E. 196. Books of accounts were shown to one of the appraisers who stated that he would not stand for them They were not presented to umpire and appraisers while acting together. Umpire and appraisers visited place where fire occurred and had before them a schedule prepared by insured showing property claimed to have been destroyed or damaged and heard insured's statements. Held that award would not be set aside for failure to examine books. Id. In an action involving the validity of an award in which the umpire has taken no part, his qualifications for his office are immaterial. Kaplan v. Niagara Fire Ins. Co. [N. J. Err. & App.] 65 A. 188.

32. Cannot be impeached for erroneous judgment upon facts nor for the omission of items of account which are within the terms of the submission. Kaplan v. Niagara Fire Ins. Co. [N. J. Err. & App.] 65 A. 188. Cannot show omission of one of the items in controversy by parol where it is within terms of submission and no refusal to appraise it or other misconduct is shown. Id. Award held on its face to purport to include all goods specified in submission, whether destroyed or damaged. Id.

33. Kaplan v. Niagara Fire Ins. Co. [N. J. Err. & App.] 65 A. 188. Award made by one appraiser and umpire without notice to

Provisions for appraisal may be waived.[35] Repudiation of all liability by the company excuses further effort on the part of the insured to comply therewith.[36] A ratification of the award by the insured precludes him from subsequently attacking it.[37]

§ 21. *Option to pay loss or restore property.*[38]

§ 22. *Payment of loss or benefits and adjustment of interests in proceeds.*[39]—A parol agreement by the beneficiary to hold the proceeds of a policy in trust for another must be established by clear and convincing evidence.[40] A policy payable to the insured, his executors, administrators, or assigns, is, after his death, assets of his estate if not legally transferred during his lifetime.[41] A valid release precludes a further recovery on the policy,[42] but a release obtained through the fraud of the company[43] or its agent[44] may be repudiated. The payment of a less sum is no consideration for the release of a liquidated demand.[45] An unexecuted accord is no bar to an action on the original undertaking.[46]

other appraiser, and without disagreement, set aside. Commercial Union Assur. Co. v. Parker, 119 Ill. App. 126.

34. Bellinger v. German Ins. Co., 51 Misc. 463, 113 App. Div. 917, 100 N. Y. S. 424.

35. Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447, 122 Ill. App. 600.

36. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134.

37, Act of insured in filing proofs of loss in accordance with award and thereby seeking the benefit of its terms with full knowledge of the facts held a ratification and confirmation. Tyblewski v. Svea Fire & Life Assur. Co., 220 Ill. 436, 77 N. E. 196.

38. See 4 C. L. 219.

39. See 6 C. L. 140.

40. Evidence held insufficient to show parol agreement that beneficiary was to hold policy as collateral security for loans made by her and others to the insured and balance of proceeds in trust for insured's wife. Dewey v. Fleischer [Wis.] 109 N. W. 525.

41. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577, afd. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380. Widow held not only person interested in proceeds of life policy payable to estate so as to estop executor by her act in attempting to release claim, since, if she took under the will, the proceeds were subject to payment of debts, and if not her rights were not exclusive, since under Code, § 3313, such moneys are to be disposed of like other property left by deceased, and under § 1805 they inure to the separate benefit of his wife and children. Raven v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198.

42. Release held bar to further indemnity for sickness from which plaintiff was suffering regardless of fact that he and the agent whom he procured to sign it for him were illiterate, there being no fraud shown. Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 A. 356.

43. Where company represented to beneficiary that policy was void or voidable because of false statements or warranties in application when in fact no such defense existed by reason of fact that copy of application was not attached to policy, held that she could repudiate release executed by her for nominal consideration and in reliance on such representations. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198. Whether release was fairly obtained is a question of fact which may be raised in any action where release is relied on as a defense. Id.

44. Where the acts of an agent will bind his principal, his representations will also bind the principal if made at the same time and constituting a part of the res gestae. Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923. Where agent, to whom company sent checks for delivery to beneficiaries and receipts to be signed by them, by means of false representations obtained a release on paying a part of the amount in cash and giving his individual note for the balance, held that company was responsible for his acts. Id. Instructions approved. Id. Instruction in action to recover balance that one of the things to be proved was that agent had not paid insured more than amount alleged held not misleading as tending to lead jury to believe that payment by checks and through agent was not payment. Id. Evidence held to sustain finding that agent fraudulently concealed nature of receipt from beneficiary and that she supposed payment to be one on account. McNicholas v. Prudential Life Ins. Co., 191 Mass. 304, 77 N. E. 756. Where through fraud of agent beneficiary was induced to sign receipt in full when she supposed payment made to her to be one on account, held that she was not bound to return amount received before bringing suit. Id.

45. Rauen v. Prudential Ins. Co., 129 Iowa, 725, 106 N. W. 198. Whether refusal to pay and assertion of defense by which release was obtained were bona fide, or were advanced for mere purpose of preventing bona fide settlement, held question of fact. Id. Where no compromise of doubtful claim was pleaded or relied on, allegations in petition of fraud in obtaining release held mere surplusage. Continental Casualty Co. v. Waters [Ky.] 97 S. W. 1103. Payment of sum admitted to be due under accident policy held no consideration for release of balance. Weidner v. Standard Life & Acc. Ins. Co. [Wis.] 110 N. W. 246. Payment of less sum being no consideration for discharge of

The proceeds of life policies to a specified amount are frequently exempted from liability for insured's debts.[47]

The assured's interest in an unmatured life policy cannot be reached by attachment unless the policy has, at the time the attachment is issued, a cash surrender value.[48] A suit in equity may be maintained to compel the surrender of a life policy by the insured to the end that a lien acquired by a previous attachment may be enforced, provided such lien cannot be enforced until there has been an actual surrender.[49] A suit in equity in the nature of a creditors' bill to subject endowment policies, payable to insured in case he lives to a certain date, and to certain named beneficiaries in case he does not, and having a cash surrender value, to the payment of a judgment against the insured can only be maintained on a showing that the conditions exist under which a court of equity may, at the instance of a creditor, annul voluntary arrangements entered into between his debtor and third persons.[50] The interest of the insured in an endowment policy payable to him or his assigns on a specified date, or to a named beneficiary in the event of his prior death, is an interest the value of which can be ascertained by sale, appraisal, or by any means

liquidated amount due on policy, held that plaintiff was not bound to return amount thereof before seeking to have settlement set aside on ground of fraud. Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016.

46. Adjustment agreement whereby company agreed to pay amount claimed by insured in proofs of loss and insured to accept same in full satisfaction, no dispute having arisen, held without consideration and hence, until executed by payment of the money, it was revocable by either party and no bar to filing of subsequent proof of loss covering items alleged to have been omitted from original proofs, or to action on policy for full amount claimed, though company subsequently tendered amount agreed upon. Manley v. Vermont Mut. Fire Ins. Co., 78 Vt. 331, 62 A. 1020.

47. Mississippi: Ann. Code 1892, § 1965, providing that proceeds of life policies not exceeding $5,000, payable to executor or administrator of insured, shall inure to his heirs or legatees free from liability for his debts, and § 1896, providing that exemptions shall be allowed in favor of residents of state only, construed, and held that exemption depends on residence of insured, and, where he was a resident of the state, legatees were entitled to proceeds of policy though they were nonresidents. Borodofski v. Feld [Miss.] 40 So. 816. Policy for $1,000 prima facie belongs to heirs and they have prima facie right to sue thereon, and if there are other policies which together with one in suit aggregate more than $5,000, that is a matter of defense. Equitable Life Assur. Soc. v. Hartfield [Miss.] 40 So. 21.

New York: Under Laws 1896, p. 220, c. 272, § 22, where policy on life of her husband is payable to married woman, she is entitled to proceeds as her separate property free from claims of his creditors or representatives, except that where the premium actually paid annually out of the husband's property exceeds $500, that portion of the insurance purchased by such excess is primarily liable for his debts. In re Thompson, 184 N. Y. 36, 76 N. E. 870, rvg. 102 App. Div. 617, 92 N. Y. S. 1147. Amount purchased by excess premiums is not assets of the estate but is a special fund created by statute for benefit of creditors and upon which a lien is imposed for amount of their claims. Id. Is liable only for deficiency arising after all the assets of the estate have been applied upon the debts, the surplus, if any, belonging to the widow. Id. The surrogate has no jurisdiction of proceeding by a creditor to compel wife as executrix to account therefor, but proper procedure is by a representative action to establish and enforce the lien after the assets of the estate have been exhausted and the amount necessary to pay the balance of the husband's debts has been ascertained by a decree of the surrogate. Id.

48. In action to compel surrender of policy to end that lien acquired by attachment might be enforced, allegation in complaint that policy had a cash surrender value held a mere conclusion of law. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551.

49. Marks v. Equitable Life Assur. Soc., 109 App. Div. 675, 96 N. Y. S. 551. Complaint held defective in failing to allege that surrender was necessary, or to allege facts from which that fact could be inferred. Id. Complaint held defective in failing to show that there was anything due or payable by the insurance company on the policy when the action was commenced. Id. Or that plaintiff had requested a surrender of the policy, or that defendants had refused to surrender it. Id.

50. Insured cannot be compelled to surrender policies to company and accept value thereof, though insured has right to change beneficiaries without their consent, in absence of showing that when policies were issued or assigned to beneficiaries insured was insolvent, or that indebtedness sought to be enforced was in existence, or that insured was indebted to other parties, or that policies were taken out or assigned with view to future indebtedness, or that transaction was otherwise fraudulent as to creditors. National Bank of Commerce v. Appel Clothing Co. [Colo.] 83 P. 965.

within the ordinary procedure of the court, and hence one which may be reached by equitable trustee process under the Massachusetts statute.[51] The liability of a domestic company upon a life policy held by a citizen and resident of another state is property within the state where the company is organized such as to give jurisdiction to its courts to enter a decree in the nature of a judgment in rem against it.[52]

§ 23. *Subrogation and other secondary rights of the insurer.*[53]—In the absence of an express covenant in a fire policy requiring the insured to assign to the company any claims he may have against anyone whose negligence or fault may have caused the loss, no subrogation can be demanded until the company has paid the loss,[54] and the insured may settle with and release the negligent party as to damage other than that insured against without affecting his remedy against the insurer.[55] If, however, the insured recovers from such party his whole loss, he cannot sue the insurer.[56] Where the insured is expressly required to assign all claims he may have against anyone whom the insurer may claim caused the loss, an agreement whereby he releases a third person from liability for any loss caused by him relieves the company from any liability for a loss so caused.[57] Mortgage clauses frequently provide that the company shall be subrogated to any rights of the mortgagee on payment to him of any sum.[58] The insurer's rights in such case are not affected by the subsequent acquisition of the legal title to the property by the mortgagee,[59] but a voluntary release by the mortgagee of any of his rights releases the company from liability to that extent.[60]

On paying the full amount of a life policy to one holding an assignment thereof as security only, the company, without any formal assignment of the claim, becomes subrogated to all the rights of such assignee as against any claim by a subsequent assignee of the policy, and is entitled to have the amount paid the first assignee under his assignment deducted from the claim of the second.[61] Such right

51. May be reached under Rev. Laws c. 159, § 3, cl. 7, though value depended largely upon contingency of his surviving his wife. Biggert v. Straub [Mass.] 78 N. E. 770.

52. Liability of Massachusetts company upon policy held by citizen and resident of another state is property within the former state, and hence insured's interest may be reached by suit in equity in nature of an equitable trustee process brought under Rev. Laws c. 159, § 3, cl. 7. Biggert v. Straub [Mass.] 78 N. E. 770.

53. See 6 C. L. 142.

54. Farmers' Alliance Mut. Fire Ins. Co. v. Vallie [Colo.] 83 P. 962. In an action by the insurer against a railroad company for recovery of the amount paid on a policy covering a building destroyed by fire through the alleged negligence of the railroad company, an averment that the owner of the property had complied with all the conditions of the insurance contract is a proper averment, it being necessary for plaintiff to allege and prove that payment was not a voluntary one but was made under legal compulsion. Home Ins. Co. v. Pittsburgh, etc., R. Co., 4 Ohio N. P. [N. S.] 373.

55. Settlement with railroad company held not to preclude recovery on policy where there was no evidence in record that plaintiff was reimbursed for whole loss sustained. Farmers' Alliance Mut. Fire Ins. Co. v. Vallie [Colo.] 83 P. 962.

56. Farmers' Alliance Mut. Fire Ins. Co. v. Vallie [Colo.] 83 P. 962.

57. Held that contract by member with railroad company relieving it from liability for any fire loss caused by it invalidated the policy in event of a loss so caused, since member thereby put itself in position where it could not comply with subrogation clause. Downs Farmers' Warehouse Ass'n v. Pioneer Mut. Ins. Ass'n, 41 Wash. 372, 83 P. 423.

58. Payment or tender to mortgagee held condition precedent to subrogation. Affidavit of defense insufficient. Ebensburg Bldg. & Loan Ass'n v. Westchester Fire Ins. Co., 28 Pa. Super. Ct. 341.

59. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co. [Kan.] 86 P. 142.

60. Mortgage clause provided that rights of mortgagee should not be affected by any acts of mortgagor invalidating the policy, and that when company should make payment to mortgagee and claim that no right to recover existed in favor of mortgagor it should be subrogated to all rights of mortgagee under all securities held as collateral to mortgage debt. Mortgagor procured additional insurance and increased risk, thereby avoiding policy as to him, and after loss assigned such additional insurance to mortgagee. Held that company was entitled to benefit and advantage of such insurance, and if mortgagee voluntarily released her right to it company was thereby released from liability to her

of subrogation is at least equitable matter of defense to an action at law upon the policy by the second assignee, and under the statute it can, and hence should, be interposed in such action, and therefore is not ground for subsequent relief in equity against the judgment therein.[62]

§ 24. *Remedies and procedure. A. Rights of action and defenses and parties.*[63]—In the absence of a statute to the contrary a domestic company may be sued in any county in which it has a resident agent and transacts its corporate business.[64]

Equity will not entertain jurisdiction of an action on a policy where complainant has an adequate remedy at law.[65] It may entertain a bill to enjoin the prosecution of an action at law previously commenced on a policy and to cancel the policy though the grounds alleged could be urged as a defense to such action.[66] Where it takes jurisdiction for one purpose, it will retain it for the purpose of closing up all controversy between the parties incident to the subject-matter and meting out complete justice.[67] The fact that fraud is alleged as a defense in an action on a policy does not make an issue cognizable only in equity,[68] nor does a statute authorizing the insurer to institute proceedings to vacate a policy for false representations contained in the application deprive the plaintiff in an action on a policy of the right to a jury trial, though the company sets up such false representations as a defense.[69]

Where the company refuses to issue a paid up policy in accordance with its contract, the insured may compel it to do so by a suit in equity for specific performance.[70] In case this is not done and no paid up policy is issued, the beneficiary may, on the death of the insured, maintain an action at law for the amount of the paid up insurance.[71]

to that extent. Molaka v. American Fire Ins. Co., 29 Pa. Super. Ct. 149.

61. Aetna Life Ins. Co. v. Tremblay [Me.] 65 A. 22.

62. Judgment is conclusive as to all defenses which could have been made but were not, and equity cannot thereaftef afford relief because of them. Aetna Life Ins. Co. v. Tremblay [Me.] 65 A. 22. If claim was before court but was not considered or was erroneously disallowed, or if justice was not done, remedy is by petition for review of that action. Id.

63. See 6 C. L. 142.

64. Domestic corporation chartered as a mutual protection association under 1 Code Laws 1902, § 1912, et seq., held a resident of county in which it maintained agent and transacted corporate business, and court of that county had jurisdiction of suit against it under Code Proc. § 146, though its principal office was elsewhere. McGrath v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 218. Action on fire policy is within Code Proc. § 146, and must be brought in county where defendant resides, and hence defendant cannot be sued in county in which it has no agent. Nixon v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 657. Question relates to jurisdiction of subject-matter, and hence right to change of venue is not waived by an appearance and answer to the merits. McGrath v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 218; Nixon v. Piedmont Mut. Ins. Co. [S. C.] 54 S. E. 657.

65. Bill alleging that company refused to pay fire policy because of false representations in the application as to incumbrances, that false representations were made through mistake and because complainant did not understand English perfectly, etc., and praying that the loss sustained by destruction of the property be ascertained and that defendant be decreed to pay its share thereof, held demurrable for failure to state a case within jurisdiction of equity, complainant having an adequate remedy at law by action on the policy. Rupert v. Patron's Mut. Life Ins. Co. [Mich.] 13 Det. Leg. N. 568, 108 N. W. 968.

66. For fraud in application and because insured committed suicide, which avoided policy. Fidelity Mut. Life Ins. Co. v. Blain, 144 Mich. 218, 13 Det. Leg. N. 145, 107 N. W. 877. Evidence as to suicide held to justify decree for complainant. Id.

67. Where takes jurisdiction for purpose of setting aside award of appraisers. Commercial Union Assur. Co. v. Parker, 119 Ill. App. 126.

68. Fludd v. Equitable Life Assur. Soc. [S. C.] 55 S. E. 762. All the rights which company could maintain in action for cancellation for false representations are available as a defense alleging forfeiture in an action on the policy, and hence it is proper to refuse to refer issues so raised to master. Id.

69. Civ. Code 1902, § 1826, authorizing life insurance companies to institute proceedings to vacate policies within two years from the date of the policy, the action being a strictly legal one. Fludd v. Equitable Life Assur. Soc. [S. C.] 55 S. E. 762.

70. Where insured entitled to it under

The holder of two policies in the same company covering the same property on each of which he has a cause of action may bring a separate action on each.[72]

Insured may recover on an account stated without proof of antecedent matters on proof of an agreement to pay a fixed sum as the company's share of the loss.[73] Where nothing remains to be done but to pay over the amount of loss agreed upon, recovery may be had under the common counts.[74] In the absence of a statutory provision to the contrary, assumpsit cannot be maintained upon a policy under seal.[75] The company may in a proper case interplead several claimants.[76]

The insurer may contest plaintiff's title to the policy by showing a valid outstanding assignment.[77] The pendency of an action for one class of benefits is no defense to an action for another class whether plaintiff is only entitled to recover the latter or is entitled to one or the other at her election.[78] The insurer cannot plead ultra vires as a defense where the contract has been fully performed by the other party.[79]

Parties.[80]—All persons whose rights will be affected by the decree must be made defendants.[81] The policy holders or their representative must be joined in an action to compel distribution of the surplus,[82] but the officers and directors of the company are not necessary parties where the plaintiff accepts the surplus as appearing on the company's statement as the sum in which he claims to be entitled to participate.[83] Where the policy stipulates on its face the person to whom the loss

nonforfeiture provisions. Lenon v. Mutual Life Ins. Co. [Ark.] 98 S. W. 117.

71. Policy is not itself the contract but is merely evidence of it. Lenon v. Mutual Life Ins. Co. [Ark.] 98 S. W. 117.

72. Where he does so in state court and amounts sued for in each is less than $2,000, actions are not removable to federal court, though aggregate amount exceeds that sum. Holmes & Co. v. U. S. Fire Ins. Co., 142 F. 863.

73. Fire insurance. Manchester Fire Assur. Co. v. Fitzpatrick, 120 Ill. App. 535.

74. Evidence held to show agreement by company to pay insured fixed sum as its pro rata share of amount of loss as fixed by adjusters. Fire insurance. Manchester Fire Assur. Co. v. Fitzpatrick, 120 Ill. App. 535.

75. Unless there is a subsequent agreement founded upon a new consideration to pay the debt or perform the contract, or its terms are varied by a subsequent simple contract, or by other proceedings constituting an abandonment or waiver of the provisions of the sealed instrument. Health and accident. Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 A. 356. Where objection is not apparent on face of pleadings it can only be raised by motion for nonsuit. Id. Is not waived by submitting case to jury but may be taken advantage of at any stage of the trial. Id.

76. Interpleader held proper. Life insurance. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577, afd. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

77. In order to protect itself from danger of having to pay twice. Life insurance. Harrison's Adm'r v. Northwestern Mut. Life Ins. Co., 78 Vt. 473, 63 A. 321.

78. Pendency of suit for funeral expenses held no defense to action for sick benefits. Health insurance. Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768.

79. Where mutual company made policy issued to member payable to mortgagee, held that it could not plead ultra vires in an action thereon by the latter, though charter gave it no such power. Adams v. Farmers' Mut. Fire Ins. Co., 115 Mo. App. 21, 90 S. W. 747.

80. See 6 C. L. 143.

81. Rights of conflicting claimants to life policy assigned as collateral to secure performance of contract cannot be finally adjudicated as between themselves and the insurance company and company restrained from recognizing claims of some of them until court has acquired complete jurisdiction over all the parties to the controversy so that the rights of all of them may be finally determined. Winegardner v. Equitable Life Assur. Soc., 118 Ill. App. 251. Not where one of them is a nonresident and has possession of policy in foreign state so that process cannot be served on him except by publication. Id. Employe of railway company obtained judgment against it in action for injuries. Action was defended in its name by a casualty company which had issued to it an employer's liability policy covering its liability in that case. Subsequently railway company became insolvent. Held that the railway company's receiver was an indispensable party to a suit in equity by the employe to compel the casualty company to pay to him the amount for which it was liable to the railway company under its policy, since otherwise casualty company would not be protected against legal liability of a judgment against it in favor of receiver, and hence suit could not be maintained until court had acquired jurisdiction of him. Moore v. Maryland Casualty Co., 73 N. H. 518, 63 A. 490.

is payable, such person may sue alone and recover the entire loss, neither the assured nor his legal representatives being necessary parties.[84] The assent of the mortgagee, to whom a policy is payable as his interest may appear, to the prosecution of an action thereon by the mortgagor is sufficient to entitle the latter to maintain it.[85] Persons to whom a right of action accrues jointly may unite in a single suit thereon.[86] A provision that a foreign corporation which has not procured a certificate authorizing it to do business in the state cannot recover on contracts made therein does not preclude it from enforcing a policy of fire insurance on its property in the state.[87]

Limitations.[88]—An action on the policy cannot, of course, be maintained before the time when the loss is by its terms made payable,[89] unless such provision is waived.[90]

There is a conflict of authority as to the validity of contract limitations. Some courts hold them to be contrary to public policy if for a less period than that fixed by the statute of limitations,[91] and others hold them valid if reasonable.[92] The matter is regulated by statute in some states.[93] Such a limitation does not apply

82. People v. Equitable Life Assur. Soc., 101 N. Y. S. 354.

83. Buford v. Equitable Life Assur. Soc., 98 N. Y. S. 152.

84. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. Mortgagee to whom fire policy is payable as his interest may appear. Ebensburg Bldg. & Loan Ass'n v. Westchester Fire Ins. Co., 28 Pa. Super. Ct. 341. Persons holding fire policy as collateral security for an indebtedness largely in excess of the face of the loss, and to whom the loss is payable. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

85. Though not given until after action had been brought and tried in municipal court. Green v. Star Fire Ins. Co., 190 Mass. 586, 77 N. E. 649.

86. Where policy provided for payment of proceeds to certain named children, right of action accrued to them jointly so that guardians of three who were living and administratrix of deceased child could unite in single suit therefor. Continental Casualty Co. v. Johnson, 119 Ill. App. 93.

87. Laws 1901, p. 1326, c. 538, § 15. South Bay Co. v. Howey, 113 App. Div. 382, 98 N. Y. S. 909.

88. See 6 C. L. 144.

89. Where defects in proofs are waived, 60 days before payment is due commences to run from their receipt. Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261. Provision in health policy that no action should be maintained thereon before three months from the date when policy required proofs of loss to be filed held valid. Davis v. U. S. Health & Acc. Co., 73 N. H. 425, 62 A. 728.

90. Fire insurance: Where company returned proofs of loss with express denial in writing of any liability, it thereby waived provision allowing it 60 days after proofs were furnished before suit could be brought. Potomac Ins. Co. v. Atwood, 118 Ill. App. 349. Averment as to denial of liability held to, in effect, charge such a waiver and to dispense with necessity of averring that 60 days had elapsed. Id.

Accident insurance: Where the company refuses the preliminary proofs furnished and demands proofs not required by the contract, it thereby waives the right to insist on the expiration of the period provided in the policy after proofs are furnished before an action can be maintained on the policy. Preferred Acc. Ins. Co. v. Fielding. [Colo.] 83 P. 1013. Waiver of provisions requiring formal proofs of loss held not to affect provision that no action should be brought on policy before three months from date when policy required such proofs to be filed. Davis v. U. S. Health & Acc. Co., 73 N. H. 425, 62 A. 728.

91. See 6 C. L. 144, n. 72.

92. Fire insurance: Action held barred. McArdle v. German Alliance Ins. Co., 183 N. Y. 368, 76 N. E. 337, rvg. 98 App. Div. 594, 90 N. Y. S. 485. Issuance of draft payable to plaintiff and his tenant, both of whom claimed proceeds of policy, held not to have created a fund for the payment of the loss or a new liability on the company's part so as to relieve plaintiff from necessity of suing within time fixed by the policy, the draft not operating as an equitable assignment and plaintiff having refused to accept it. Id. Provision limiting the time within which a suit can be brought to six months after fire is valid in the absence of circumstances indicating that the effect of the limitation upon the insured is harsh and oppressive. Appel v. Cooper Ins. Co., 4 Ohio N. P. [N. S.] 229. The burden is upon the one complaining to show that the effect of the rule in a given case is such as to demand that its operation be suspended. Id.

Life insurance: In absence of statute to contrary, parties to life insurance contract may ignore general statute of limitations and provide by agreement for the time within which an action may be brought thereon. Kiisel v. Mutual Reserve Life Ins. Co. [Iowa] 107 N. W. 1027. Where limitation expired on Sunday, action commenced on following Monday held barred. Laws 1892 p. 1485, c. 677, § 26, relating to computation of time, construed. Ryer v. Prudential Ins. Co., 185 N. Y. 6, 77 N. E. 727, rvg. 110 App. Div. 897, 95 N. Y. S. 1158.

to the suing out of a writ of error to review a judgment on the policy.[94] Contract limitations do not begin to run until a cause of action accrues.[95] Where the policy provides that the action must be brought within a specified time next after the fire, the limitation begins to run from the time the fire breaks out and not from the date of its extinguishment.[96] Neither the filing of the common counts,[97] nor the submission of the amount of loss to arbitration,[98] suspends the running of such limitations.

The company may waive contract limitations or estop itself from relying thereon,[99] but such waiver or estoppel cannot be carried beyond the effect which the party claiming its benefit reasonably gave, or should have given, to the acts creating it, and may operate merely to temporarily suspend the running of such limitation.[1]

Process.[2]—Service on the defendant company must be made in conformity to the provisions of the statutes of the state where the action is brought.[3]

93. Arkansas: Act March 12, 1901 (Acts 1901, p 93), providing that actions on policies may be brought within period prescribed by law for bringing actions on promises in writing, notwithstanding provisions in policies fixing shorter period, is prospective only, and does not apply to policies executed before its enactment, and hence not to action barred by terms of life policy before its enactment. Wells v. Union Cent. Life Ins. Co. [Ark.] 98 S. W. 697.

North Carolina: Under Revisal 1905, § 4809, time for commencing action cannot be limited to less than one year after accrual of cause of action, or to less than six months from time a nonsuit is taken in an action brought upon the policy within the time originally prescribed. Fire. Parker & Co. v. Continental Ins. Co. [N. C.] 55 S. E. 717.

New York: Provision in standard fire policy that suit thereon must be commenced within 12 months after the fire, being authorized by statute prescribing a standard form of policy and forbidding the issuing of any other, is a limitation "specially prescribed by law" within meaning of exception from operation of general statute of limitations contained in Code Civ. Proc. § 414. Bellinger v. German Ins. Co., 51 Misc. 463, 113 App. Div. 917, 100 N. Y. S. 424. Code Civ. Proc. § 405, providing that on termination of action commenced within statutory period a new action for the same cause may, except in certain cases, be commenced after expiration of such period and within a year after such termination, applies to special limitation prescribed by standard policy. Id.

94. Though it is a new suit, it is suit on record and not on policy, and hence contract limitation does not apply. Helbig v. Citizens' Ins. Co., 120 Ill. App. 58.

95. Even though provision is that action on life policy must be brought within one year from the date of death. Kliisel v. Mutual Reserve Life Ins. Co. [Iowa] 107 N. W. 1027. Where contract provides that insurer shall have stated time after proofs are filed in which to make payment, cause of action does not accrue upon contract until after expiration of time agreed upon. Id.

96. Western Coal & Dock Co. v. Traders' Ins. Co., 122 Ill. App. 138.

97. Western Coal & Dock Co. v. Traders' Ins. Co., 122 Ill. App. 138.

98. Western Coal & Dock Co. v. Traders' Ins. Co., 122 Ill. App. 138.

99. Slight evidence of waiver is sufficient. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. Letters held waiver of limitation in accident policy. North American Acc. Ins. Co. v. Williamson, 118 Ill. App. 670. Limitation in life policy waived where proposition of compromise was made by beneficiary and company, without intimating that it would insist upon the limitation, did not reject terms of proposed settlement and did not return policy, which had been sent to it, until after such limitation had expired. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61. Evidence held insufficient to show waiver or estoppel. Fire insurance. McArdle v. German Alliance Ins. Co., 183 N. Y. 368, 76 N. E. 337, rvg. 98 App. Div. 594, 90 N. Y. S. 485. Evidence held insufficient to show promise on part of agent to hold draft pending settlement of dispute as to proceeds between plaintiff and tenant. Id. Fact that plaintiff had not previously learned of payment of insurance to his tenant, who also claimed it, held no excuse for delay, since such payment in no way affected plaintiff's rights and gave him no new cause of action. Id. Company held not to have waived limitation in life policy nor to have estopped itself from asserting it by offers of compromise, which were not accepted, etc., where it disclaimed liability some time before period expired. Curry v. Empire Life Ins. Co., 49 Misc. 65, 98 N. Y. S. 6.

1. Limitation in employers' liability policy held analogous to statutory limitation so that conduct of company inducing insured to delay until after specified time, while a waiver, operated only to suspend the running of the limitation and not as an entire abandonment or suspension thereof, and limitation commenced to run on a subsequent denial of liability. Lynchburg Cotton Mill Co. v. Travelers' Ins. Co., 140 F. 718. Letters and conduct inducing delay for express purpose of enabling company to investigate claim or to negotiate for a settlement held not calculated to induce insured to believe that more than a mere temporary delay was intended or that it intended to abandon limitation entirely. Id.

2. See 6 C. L. 143.

3. New York: Where superintendent of

(§ 24) *B. Pleading and practice.*[4]—The general rules of pleading apply,[5] including those as to amendments,[6] exhibits,[7] supplemental pleadings,[8] and the

insurance duly admitted service of process in action against foreign company as authorized by Laws 1892, p. 1945, c. 690, § 30, held that company could not contend that service was irregular because not made personally upon the superintendent. Appelbaum v. Star Fire Ins. Co., 100 N. Y. S. 747.

North Carolina: Revisal 1905, § 4750, requires service of legal process on any foreign company, licensed to do business in state, to be made by leaving same with insurance commissioner, and provides that no other service shall be valid. Parker & Co. v. Continental Ins. Co. [N. C.] 55 S. E. 717.

Washington: Service of writ of garnishment on soliciting agent of foreign company living in county where action was brought held to give court jurisdiction, the method provided by Bal. Ann. Codes & St. § 2818, for securing jurisdiction over foreign companies, not being exclusive in view of §§ 4875, 4854, 5297, as amended, and constitutional provision that foreign corporations shall not be allowed to do business on more favorable terms than domestic ones. Tatum v. Niagara Fire Ins. Co. [Wash.] 86 P. 660.

4. See 6 C. L. 145.

5. Complaint in action against company which had assumed and agreed to pay liability of another company on certificate or policy of insurance held a sufficient declaration in assumpsit as against demurrer. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166. Complaint in action on alleged oral contract showing that company was a mutual one and alleging that company agreed to insure plaintiff's property in consideration of her paying any amount assessed against her in proportion to amount of her insurance for benefit of any member sustaining a loss, and that she performed all the conditions of the contract to be performed by her, held to sufficiently show the premium she was to pay. Posey County Fire Ass'n v. Hogan [Ind. App.] 77 N. E. 670. Plea that company was not liable because of nonpayment of premium note held insufficient on demurrer where it set up that plaintiff was to pay same at such time and in such sums as the board of directors might require, and failed to show that board had ever made requisition on plaintiff for any payment. Farmers & Threshers' Mut. Ins. Co. v. Koons, 120 Ill. App. 303. Allegations of complaint held equivalent to statement that required proofs of loss had been furnished more than 60 days before commencement of action, in absence of demurrer or specific objection. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531. The statement in an action before a justice of the peace must advise the defendant of the nature of the plaintiff's demand and furnish a sufficient basis for the plea of former adjudication. Widman v. American Cent. Ins. Co., 115 Mo. App. 342, 91 S. W. 1003. Failure to state consideration for policy held not fatal after verdict. Id. Failure to allege that policy was in force at time of fire held not fatal after verdict, that fact being inferable from allegations that there was balance due under policy, and giving number and date of issuance of policy and the date of the fire. Id. Statement held to sufficiently allege that liability accrued two months before suit was brought, as required by Rev. St. 1899, § 8005. Id.

Must plead facts and not conclusions: Allegations as to knowledge that insured was endangering his life by use of intoxicants held mere conclusions. Lowensteln v. Franklin Life Ins. Co., 122 Ill. App. 632. Allegation "that plaintiff had no insurable interest in the life insured" held conclusion. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. Denial that proof of death of insured was furnished to, or received by, insured within 30 days thereafter as required under terms of policy, held mere conclusion, the language of the policy not being set out. Continental Casualty Co. v. Waters [Ky.] 97 S. W. 1103. Allegation that policy insured plaintiff, to whom loss was payable as its interest might appear, as well as owner of property, held conclusion of law, that being a fact to be determined from the policy. American Cereal Co. v. Western Assur. Co., 148 F. 77. It is not sufficient to allege generally that a particular condition has been waived, but such facts must be alleged as will, if taken to be true, be sufficient to establish the waiver. Allegations held insufficient to show waiver of proofs of loss. Glazer v. Home Ins. Co., 96 N. Y. S. 1099; Id., 48 Misc. 515, 96 N. Y. S. 136; Glazer v. Home Ins. Co., 113 App. Div. 235, 98 N. Y. S. 979.

Must be definite and certain: Plea seeking to avoid liability because of nonpayment of premium notes held contradictory and uncertain. Farmers' & Threshers' Mut. Ins. Co. v. Koons, 120 Ill. App. 303. Allegation that injury resulting in death of insured was caused by accidental falling of scalding water into his ear held to sufficiently show that death was caused by external violent and accidental means, rendering unnecessary a further specific allegation to that effect. Driskell v. U. S. Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S. W. 880. Allegation that insured died "from the effects of said accidental injury" 11 days thereafter held in effect an averment that the injury was the direct and not a remote cause of death, and equivalent to an allegation that death resulted solely from the injury. Id. In action by assignee of life policy, allegations in answer as to prior assignment to defendant held sufficiently definite to authorize proof of such an assignment as collateral, in absence of motion to make more definite and certain. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86.

6. Where plaintiff alleged as reason why policy was not forfeited for failure to pay premium when due that insurance in fact began at a later date than that named in policy, and hence that first premium paid for insurance until date subsequent to the fire, held that amendment setting up facts showing waiver was not a departure. Home Ins. Co. v. Ballew [Ky.] 96 S. W. 878. Where statement of claim, in action on policy covering building and

necessity of verification.[9] A special form of declaration is prescribed by the statutes of some states.[10] The policy is sometimes required to be filed.[11] It is not necessary to make the original or a copy of the policy a part of the complaint in an action to recover premiums paid on a policy claimed to have been void ab initio.[12] An affirmative allegation to the effect that certain facts did not exist is equivalent to a denial that they did exist.[13]

A cause of action against the company for failure to distribute the surplus cannot be joined with one by the attorney general against individual officers and directors for losses due to their negligence.[14]

The complaint must allege facts showing a loss within the terms of the policy[15] and that the plaintiffs are entitled to the proceeds thereof,[16] but need not allege

household furniture, claimed full amount of policy without specifying amount of loss on each item, amendment so as to make it formally declare that both building and personalty had been destroyed held not to have introduced new cause of action and to have been properly allowed. Chulek v. United States Fire Ins. Co., 30 Pa. Super. Ct. 435. Where defendant pleaded false warranty that insured had not within 15 years been under care of any physician, while proof was of warranty that last attendance by a physician was 15 years before, held that plea could be amended on appeal if necessary, plaintiff not having been misled. Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 A. 280.

7. Where letter was filed with petition in order to show a denial of liability and a consequent waiver of proofs of loss, and petition alleged that company knew of and consented through its agent to a sale of the property and a transfer of the policy, held that statements in the letter that person consenting to such transfer was not company's agent could not be considered against the petition on demurrer. Gragg v. Home Ins. Co., 28 Ky. L. R. 988, 90 S. W. 1045.

8. Life policy, payable to insured's representatives or assigns, was issued to resident of Vermont, was by him assigned to another resident of that state, who, after insured's death, moved to New York and commenced action thereon in courts of that state. Held that defendant was entitled to file supplemental answer in that action setting up the fact that insured's administrator had, since its commencement, recovered judgment on same policy in courts of Vermont, and that court of latter state had held that assignment was no defense to action by administrator but that he was entitled to recover on policy and hold proceeds in trust for assignee. Gleason v. Northwestern Mut. Life Ins. Co., 113 App. Div. 186, 98 N. Y. S. 991.

9. In absence of verified plea denying execution of policy or a verification of general issue, execution and delivery of policy and fact that it went into effect at that time must be taken as admitted. Helbig v. Citizens' Ins. Co., 120 Ill. App. 58.

10. Code 1887, § 3251, held applicable to action on certificate or policy issued by so called fraternal benefit association against insurance company which had reinsured its risks. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166. Certificate held a policy of insurance within the meaning of this section. Id.

11. Must be filed in action brought before a justice of the peace, unless a sufficient excuse for failure to do so is shown. Fact that policy is in defendant's possession held sufficient excuse. Widman v. American Cent. Ins. Co., 115 Mo. App. 342, 91 S. W. 1003. Failure to file it does not so wholly deprive the justice of jurisdiction as to make void any judgment rendered by him. Under Rev. St. 1899, § 3853, is ground for motion to dismiss, but instrument may be filed before jury is sworn or the trial begun. Id.

12. It is not necessary to make the original or a copy of the contract a part of the complaint in an action to recover premiums paid on a policy on the theory that it was void ab initio, the contract not being the foundation of the action. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526.

13. Allegations of answer in action on accident policy held to fairly deny allegations of complaint that death of insured came within the terms of the policy, and to present an issue on which it was necessary for plaintiff to give evidence before she could recover. Cilley v. Preferred Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S. 282.

14. People v. Equitable Life Assur. Soc., 101 N. Y. S. 354.

15. Where policy covers building while occupied as a dwelling house and furniture while in a specified house, complaint must allege that building was so occupied at time of fire and that furniture was in such house. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. Failure to do so is not cured by verdict and judgment, but objection may be made at any time. Id. Failure to allege that house was occupied as a dwelling house at the time of the fire held not cured by allegation of answer that a large part of the furniture had been removed therefrom at that time. Id. Count held to sufficiently allege that property was located at time of fire as described in policy. Potomac Ins. Co. v. Atwood, 118 Ill. App. 349. Complaint held not to allege specifically or by fair intendment that insured property was destroyed or injured by fire. Krank v. Continental Ins. Co., 50 Misc. 144, 100 N. Y. S. 399. In action on accident policy insuring "against the effects of bodily injury caused solely by external, violent, and accidental means," held necessary for plaintiff to allege that death of insured was so caused. Cilley v. Preferred

that the loss was not occasioned by excepted causes.[17] Fraud and mistake must be pleaded if relied on.[18] Where the statute requires the policy to be in writing the petition is not demurrable for failure to allege whether it was in writing or not.[19] Where a petition seeks to reform a policy and also to recover thereon, the allegations must be sufficient for both purposes.[20] A petition for reformation should set forth the policy itself and should also show the particular mistake, or the fraud and mistake complained of, and how it occurred.[21]

Plaintiff must plead the performance of all conditions precedent, or a waiver thereof by the insurer.[22] A general allegation of performance is sufficient in most states.[23] There is a conflict of authority as to whether waiver may be shown under an allegation of performance.[24] The failure to observe conditions subsequent being a matter of defense, plaintiff need not allege compliance therewith,[25] but noncompliance must be specially pleaded if relied on.[26] There is a conflict of authority as to the necessity of pleading an estoppel.[27]

The defenses that membership in the defendant company was not rightfully

Acc. Ins. Co., 109 App. Div. 394, 96 N. Y. S 282.

16. Must allege that plaintiffs are the beneficial owners of the proceeds of the policy, or facts showing that they are. Complaint in action on fire policy payable to estate of a decedent averring only that plaintiffs are heirs and next of kin of such decedent and are the real beneficiaries held insufficient. Norwich Union Fire Ins. Co. v. Prude [Ala.] 40 So. 322.

17. Where policy insured against all direct loss or damage by fire, allegation that premises were burned is sufficient. Scottish Nat. Ins. Co. v. Adams, 122 Ill. App. 471.

18. In the absence of an allegation of fraud or mistake on the part of the agent in filling out answers in the application, parol evidence thereof is inadmissible. Rinker v. Aetna Life Ins. Co., 214 Pa. 608, 64 A. 82.

19, 20. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330.

21. Petition held insufficient. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co. [Ga.] 55 S. E. 330.

22. Performance of condition in iron-safe clause held a condition precedent. Shawnee Fire Ins. Co. v. Knerr, 72 Kan. 385, 83 P. 611. Where policy makes a determination of amount of loss by agreement or appraisement a condition precedent to a right of action thereon, must allege that the amount has been so determined, or show that provision has been waived or otherwise rendered inoperative. Leu v. Commercial Mut. Fire Ins. Co. [N. D.] 107 N. W. 59. Furnishing of proofs of loss by insured or their waiver must be alleged. American Cereal Co. v. Western Assur. Co., 148 F. 77.

23. General allegation as to compliance with provisions requiring notice and proofs of loss held sufficient on demurrer, in view of Burns' Ann. St. 1901, §§ 341, 373. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927. Though determination of amount of loss by agreement or appraisement is a condition precedent to action on policy, it is not such a one as may be alleged in general form provided in Rev. Codes 1899, § 5286, the award being a necessary element of the cause of action and not the action of plaintiff but of third persons. Leu v. Commercial Mut. Fire Ins. Co. [N. D.] 107 N. W. 59.

24. **Held permissible.** Rudd v. American Guarantee Fund Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 237; Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137. Permitting plaintiff to prove waiver without pleading it, though an exception to the general rule, held not to deprive company of its property without due process of law, or to deny it the equal protection of the laws. Suess v. Imperial Life Ins. Co., 193 Mo. 564, 91 S. W. 1041.

Held not permissible. Napier v. Bankers' Life Ins. Co., 51 Misc. 283, 100 N. Y. S. 1072; Glazer v. Home Ins. Co., 113 App. Div. 235, 98 N. Y. S. 979. Plaintiff having pleaded payment of premium and court having instructed that payment must be established before plaintiff could recover, held that verdict was not authorized by proof of waiver or postponement of time of payment. Shoemaker v. Commercial Union Assur. Co. [Neb.] 106 N. W. 316.

25. Fire policy construed and held that appraisal and award were not necessary conditions precedent to suit so that plaintiff was not required to allege compliance therewith, but noncompliance was a matter of defense to be averred and proven by defendant if relied on. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35. Violations of conditions as to ownership and as to other insurance are matters of defense to be pleaded by the company if relied on. Allegations as to them in complaint held surplusage. Scottish Nat. Ins. Co. v. Adams, 122 Ill. App. 471. Nonobservance of condition requiring occupancy held a matter of defense not available unless specially pleaded. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927.

26. Fact that insured has other insurance which, with policy sued on, exceeds insurable value of property as fixed therein held a matter of defense to be pleaded. Western Assur. Co. v. Ferrell [Miss.] 40 So. 8.

27. All acts, representations and conduct relied on as an estoppel must be specially pleaded. Deming Inv. Co. v. Shawnee Fire Ins. Co. 16 Okl. 1, 83 P. 918. An estoppel in pais need not be pleaded. Estoppel to contend that proofs of loss were insufficient.

obtained,[28] and that the injuries causing insured's death left no visible marks on his body,[29] must be specially pleaded if relied on. Where an election to rescind and a return of premiums are necessary in order to avoid the policy for breach of conditions and false representations, they must be alleged.[30]

Allegations which are admitted by the pleadings of the opposite party need not be proven.[31] Allegations not denied are taken as admitted.[32] A general denial puts in issue all the allegations to which it is directed[33] and renders admissible all facts which directly tend to disprove any one or more of the averments of the complaint or to show that plaintiff never had a cause of action.[34] The necessity for a reply depends on the statutes of the various states.[35]

Variance.[36]—Immaterial variances will be disregarded.[37]

Practice.[38]—Only defects apparent on the face of the pleading can be raised by demurrer.[39] Defects may be cured by averments in the pleading of the opposite party.[40] Dilatory defenses are waived by pleading the general issue.[41] A party suing on one theory cannot recover on a different one.[42]

Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134.

28. Maher v. Empire Life Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496.

29. Instruction that there could be no recovery if insured came to his death from injuries leaving no visible mark on his body properly refused where absence was not specially pleaded. Travelers' Ins. Co. v. Ayers, 119 Ill. App. 402.

30. Paragraph held insufficient. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524.

31. Where answers in application were admitted by answer, instruction setting out questions held erroneous for omitting them Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Insurer held not entitled to object to quantum of proof of death where death was admitted in answer. Thaxton v. Metropolitan Life Ins. Co. [N. C.] 55 S. E. 419. Admission by defendant of allegations in statement that insured had performed all things on his part to be fulfilled precluded objection that policy was inadmissible until it had been proved that first premium had been paid during lifetime and good health of insured, which was condition precedent to its going into effect. Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 A. 51.

32. Failure to instruct on question of waiver held not error where answer did not traverse facts alleged in petition as constituting waiver. German Ins. Co. v. Goodfriend [Ky.] 97 S. W. 1098.

33. Where performance of conditions precedent is pleaded, puts in issue the performance of all such conditions. Shawnee Fire Ins. Co. v. Knerr, 72 Kan. 385, 83 P. 611.

34. Defendant, in action by receiver of foreign mutual company to recover assessment levied according to terms of policy, may avail himself of defense that contract is unenforceable because company failed to procure permit to do business in state under a plea of the general issue and without special notice. Swing v. Cameron [Mich.] 13 Det. Leg. N. 419, 108 N. W. 506. Under Code § 3615, proof of custom or usage as to meaning of terms in policy is inadmissible under a general denial. Tubbs v. Mechanics' Ins Co. [Iowa] 108 N. W. 324.

35. Where breach of condition subsequent making policy void for keeping gasoline on the premises is alleged in the answer, plaintiff may show waiver without further pleading. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. Where answer set up false representations as a defense, held that no reply was necessary in order to permit proof that agent knew facts when policy was issued. 1 Revisal, §§ 485-503. Fishblate v. Fidelity & Casualty Co., 140 N. C. 589, 53 S. E. 354.

36. See 6 C. L. 148.

37. Variance between allegations that injuries were received by being thrown against walls and floor of car and objects therein, and proof that they resulted from being thrown against the outside of the car while insured was attempting to board it while it was in motion, held immaterial. Continental Casualty Co. v. Hunt, 28 Ky. L. R. 1006, 90 S. W. 1056.

38. See 6 C. L. 148.

39. Plea that contract is ultra vires on the part of association cannot be urged on demurrer to a petition for recovery of assessment, as the contract is not on its face beyond the scope of the power of the corporation by which it was made, but a proper showing to support the application of such doctrine must be made by the defendant by way of answer. Stone v. C. D. & T. Traction Co., 4 Ohio N. P. (N. S.) 104.

40. Defects in petition in failing to allege that injuries were received through external and violent and purely accidental cause, which solely and independently of all other causes necessarily resulted in his death, and in failing to allege that there were external visible contusions on insured's body, held cured by answer denying such facts. Continental Casualty Co. v. Hunt, 28 Ky. L. R. 1006, 90 S. W. 1056. In action for recovery for death under accident policy containing the provision that the company insures against death resulting from injuries alone, the judgment against the company will not be reversed for failure to allege in the petition that death was caused solely by the ac-

(§ 24) *C. Evidence, questions of law and fact, instructions. Presumptions and burden of proof.*[43]—The presumption is against suicide and the burden is on the party seeking to establish it.[44] Plaintiff ordinarily has the burden of showing a loss within the terms of the policy[45] and a waiver of the right to forfeit the policy for nonpayment of premiums.[46] The burden of showing a complete cancellation before loss[47] that an assignment absolute in form was made as security only,[48] or that an assignment valid on its face is in derogation of existing rights,[49] is on the party asserting it. The burden of proving fraud and false warranties,[50] breaches of conditions,[51] misrepresentations,[52] that false representations were material,[53] nonpayment of premiums,[54] the happening of conditions authorizing an increase of assessments,[55] and that the loss was due to excepted causes,[56] is generally

cident, where the answer affirmatively alleged another cause, thereby presenting that issue. Travelers Ins. Co. v. Leibus, 8 Ohio C. C. (N. S.) 201.

41. Even if provisions for arbitration and award were to be regarded as conditions precedent, held that failure of plaintiff to allege performance could only be taken advantage of by demurrer or special plea. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35.

42. Evidence showing conclusively that policy had lapsed for nonpayment of premiums, held that plaintiff was not entitled to recover as an alternative the paid up value of the policy where she never consented to accept same but insisted that she was entitled to full amount of policy, and statement of claim demanded full amount and case was tried on that theory. Battin v. Northwestern Mut. Life Ins. Co. [C. C. A.] 143 F. 473.

43. See 6 C. L. 148.

44. Thaxton v. Metropolitan Life Ins. Co. [N. C.] 55 S. E. 419. Will not be presumed from death in unknown manner, but presumption is against suicide. Equitable Life Ins. Co. v. Hebert [Ind. App.] 76 N. E. 1023.

45. In an action on an accident policy the burden is on the plaintiff to show that the death of the insured was caused by external violence and by accidental means. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013. Prima facie case is made out within this rule by establishing death by unexplained violent external means, since law does not presume suicide, murder, or intentional injury. Id. The burden is on one seeking to recover on a life policy to establish that insured is dead and that he died before policy lapsed for nonpayment of premium. Spahr v. Mutual Life Ins. Co. [Minn.] 108 N. W. 4. Where building is insured as a dwelling house, burden is on insured to show that it was dwelling house. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493.

46. Where plaintiff sued on policy alleging that it was in full force and binding at insured's death, defendant in its answer denied this and alleged forfeiture for nonpayment of premium note when due, and plaintiff replied admitting nonpayment, but alleging waiver. Held that burden was on plaintiff to prove waiver and that policy was in force at insured's death. Franklin Life Ins. Co. v. McAfee, 28 Ky. L. R. 676, 90 S. W. 216.

47. By agreement for immediate cancellation independently of contract provisions. Home Ins. Co. v. Chattachoochee Lumber Co [Ga.] 55 S. E. 11. Where company relies on cancellation it has burden of showing that cancellation was requested, or that company had given five days' notice of cancellation as required by policy. National Fire Ins. Co. v. Three States Lumber Co., 119 Ill. App. 67.

48. Reinhardt v. Marks' Adm'r [Ky.] 93 S. W. 32.

49. Vested rights as beneficiary under previous policies for which those in suit were substituted. Baker v. Baker, 110 App. Div. 660, 97 N. Y. S. 455. Presumption that policies issued to named beneficiary created a vested interest in him, of which he could not be deprived without his consent, held not to prevail over presumption that company acted legally in issuing new policies in lieu thereof payable to different beneficiary, in absence of evidence to contrary. Baker v. Baker, 110 App. Div. 660, 97 N. Y. S. 455. Mere fact that after death of original beneficiary insured sent certificate to company requesting that plaintiff be substituted as beneficiary held insufficient to show vested interest in latter, where such certificate did not in itself effect a change of beneficiary but company had a right to determine on insured's death whether person therein named was properly designated, and where there was no evidence that original policies, which were lost, did not authorize insured to change beneficiaries at will. Id.

50. Scofield's Adm'x v. Metropolitan Life Ins. Co. [Vt.] 64 A. 1107.

51. Condition against vacancy. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493.

52. As to health and habits of sobriety. Paquette v. Prudential Ins. Co. [Mass.] 79 N. E. 250.

53. That false representation as to other companies on the risk affected the subject of the insurance in some material and substantial way. Hirsch v. Fidelitas Societe Anonyme D'Assurances & De Reassurances, 50 Misc. 582, 99 N. Y. S. 517.

54. Possession and production of policy and proof of death held to throw burden upon company. Globe Mut. Life Ins. Ass'n v. March, 118 Ill. App. 261.

55. Where policy provides that assessments may be increased only on happening of certain specified emergencies. Hicks v. Northwestern Aid Ass'n [Tenn.] 96 S. W. 962.

56. Where by-laws exempted insurer from liability where debility was caused by bron-

on the defendant. Some courts place the burden of proving compliance with promissory warranties on the plaintiff.[57] When a life policy shows on its face a degree of relationship not such as to give the beneficiary an insurable interest, the burden is on such beneficiary to show that he had some pecuniary interest entitling him to procure the insurance.[58]

Evidence.[59]—The usual rules of evidence apply,[60] including those as to the admission of expert[61] and opinion evidence,[62] secondary evidence,[63] hearsay,[64] and the declarations and admissions of agents[65] and of the parties in interest.[66]

chitis and evidence showed that insured suffered from senile bronchitis and catarrhal condition of the stomach and duodenum, held that burden was on insured to show that, as alleged in the answer, the debility was caused by bronchitis. Courtney v. Fidelity Mut. Aid Ass'n [Mo. App.] 94 S. W. 768. After plaintiff makes out prima facie case. Starr v. Aetna Life Ins. Co., 41 Wash. 199, 83 P. 113.

57. That if property should be idle, watchman should be constantly kept on duty. Kentucky Vermillion Min. & C. Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Where complaint alleges a due performance of all conditions of policy, and answer denies such allegation and pleads specially a breach of promissory warranties contained in the iron-safe clause, the burden is on plaintiff to show a substantial compliance with such warranties. Johnson v. Mercantile Town Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 697.

58. Policy is prima facie void at common law. Ryan v. Metropolitan Life Ins. Co., 117 Mo. App. 688, 93 S. W. 347.

59. See 6 C. L. 149.

60. See, also, Evidence, 7 C. L. 1511.

61. Witnesses held to have been sufficiently qualified to render opinions as to cost and value of burned property and cost of replacing building. Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605.

62. Owner of property may testify as to its value without further showing as to competency. Tubbs v. Mechanics' Ins. Co. [Iowa] 108 N. W. 324. In action by receiver against defendants as members of a copartnership to collect assessment, defendants held improperly allowed to state their opinions as to the existence of a copartnership. Swing v. Rose [Ohio] 79 N. E. 757.

63. Duplicate list of articles lost and damaged and testimony as to their value held admissible, where agent to whom original was given refused to return it because it was in company's possession. Spring Garden Ins. Co. v. Whayland [Md.] 64 A. 925. Where defendant failed to produce, after notice, the original policy which had been sent to it with proofs of death, or one which could be identified as the original, held that copy made by plaintiff's attorney was admissible. Carr v. Prudential Ins. Co., 101 N. Y. S. 158. Substantial copy of application made for former policy held inadmissible where there was no excuse offered for not producing original except that it was out of the jurisdiction of the court. Bruger v. Princeton & St. Marie Mut. Fire Ins. Co. [Wis.] 109 N. W. 95.

64. Life Insurance. Evidence held inadmissible: Evidence as to association of companies which exchanged information as to applicants offered for purpose of showing that insurer knew the truth as to matters alleged to have been misrepresented. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Census returns of Ireland on issue as to insured's age, particularly where they were unreliable, irreconcilable, and at variance one with another. Maher v. Empire Life Ins. Co., 110 App. Div. 723, 96 N. Y. S. 496. Statement in proofs of death as to date of insured's birth as an admission against beneficiary's interest where statement on its face showed that it was a mere repetition of what insured had said. Id.

Fire Insurance: Inventory and appraisement made by agents of insured ex parte and not under oath held not admissible as proof of facts therein stated. Melancon v. Phoenix Ins. Co., 116 La. 324, 40 So. 718.

65. Fire Insurance. Evidence held inadmissible: Ex parte statements of agent not part of res gestae on issue of payment of premium. Helbig v. Citizens' Ins. Co., 120 Ill. App. 58.

Life Insurance. Evidence held inadmissible: On issue as to making of contract, statements of agent that he had written insurance for deceased. Torpey v. National Life Ins. Co. [Ky.] 92 S. W. 982. General statements of agent as to his authority, as as to what his duties and powers were, and that he could not modify or issue policies. Carr v. Prudential Ins. Co., 101 N. Y. S. 158.

66. Life Insurance: Defendant's admissions that assignment of policy was made as security only held admissible as evidence of that fact, though plaintiff, having made him his witness, could not use them to impeach him. Gould v. Hancock Mut. Life Ins. Co., 99 N. Y. S. 833. Previous admissions of insured as to his diseased condition and intemperate habits held admissible on issue as to breach of warranties, they not being hearsay as against beneficiary since she stood in no better position than insured. Hews v. Equitable Life Assur. Soc. [C. C. A.] 143 F. 850. Previous admissions of insured as to his diseased condition and intemperate habits held not too remote. Id. Writing in which medical witness had written down statements of insured made at time he examined him for another company long before policy in suit was issued held inadmissible on issue of fraud. Holden v. Prudential Life Ins. Co., 191 Mass. 153, 77 N. E. 309. Proof of statement of assignor that assignment had been made as security for particular debt held inadmissible against assignee, in ab-

The policy is ordinarily admissible in actions thereon,[67] in actions for the recovery of premiums,[68] and actions by agents to recover their commissions for obtaining the insurance.[69] Parol evidence is inadmissible to contradict or vary the terms of the policy,[70] but is admissible to explain ambiguities.[71] Proofs of death are admissible as admissions against interest and are prima facie evidence of the facts therein stated,[72] though the plaintiff may ordinarily contradict them.[73] They may be admitted for the sole purpose of determining whether they comply with the requirements of the policy in that regard,[74] in which case they are in evidence and

sence of showing that it had been made in latter's presence or that he knew that it had been made. Reinhardt v. Marks' Adm'r [Ky.] 93 S. W. 32.

Fire insurance: Letter written by insured to company, after controversy had arisen between appraisers in regard to umpire in which he insisted on appointment of disinterested appraisers, held admissible as tending to show that insured was not refusing to submit question of loss to appraisal as required by policy. Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447, afg. 122 Ill. App. 600. Telegram of company to agent directing him to receive no premium on policy "which you report cancelled" and entry of cancellation on records held inadmissible as being self-serving, ex parte statements. Helbig v. Citizens' Ins. Co., 120 Ill. App. 58. Declarations and admissions of insured after loss that part of the destroyed property belonged to persons other than those named in loss payable clause and that policy was to be taken out to protect their interest held inadmissible. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068. Statements in suppressed deposition inadmissible in any event in absence of evidence that insured made them, that they were correctly written down, and that insured signed them. Id.

67. Where statement of claim alleged that copy of policy filed was a true one and that insured had performed all conditions, and affidavit admitted the issuing of the policy and alleged fraudulent misrepresentations, but failed to deny that policy was the contract of insurance and the entire contract, and supplemental affidavit merely alleged that affiant did not know that copy of application was not filed with copy of policy, held that policy was admissible though not accompanied by application and though its absence was not accounted for, notwithstanding printed notice on policy directing attention to copy of policy inside. Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 A. 51.

68. Printed slip attached to employers' liability policy and providing for flat premium and not inconsistent with application held admissible as part of policy, the burden being upon the company to show why it was of no effect. London Guaranty & Acc. Co. v. Hartman, 122 Ill. App. 315. When it was challenged, held proper for insured to show by oral evidence how it came to be attached to policy. Id.

69. New York Life Ins. Co. v. Rilling, 121 Ill. App. 169.

70. As to admissibility of parol evidence to show estoppel see § 16, ante. Where policy of title insurance did not, either expressly or by implication, guaranty a legal title, parol evidence held inadmissible to show circumstances under which it was issued and that insurance of legal title was demanded, and that deeds of assignment of mortgage were drawn by defendant's directions. Banes v. New Jersey Title Guarantee & Trust Co. [C. C. A.] 142 F. 957.

71. Where the language used is equivocal or susceptible of varying or conflicting interpretations, parol evidence of the facts and circumstances surrounding its execution is admissible to show the intention and understanding of the parties. Admissible to explain and apply writing where it does not vary it. American Ins. Co. v. Meyers, 118 Ill. App. 484. Acts and statements of agent when he solicited insurance and examined property held admissible on question whether policy covering lumber in yards covered lumber in sheds in yards. Id. Where policy of reinsurance covered wheat in a "warehouse," held that there was a latent ambiguity and parol evidence was admissible to show that warehouse referred to was one designated as such on maps and in rate books on which policy was based, and that policy did not cover wheat in building therein designated as an "elevator" for property in which the rate was higher. Fireman's Fund Ins. Co. v. Aachen & M. Fire Ins. Co. [Cal. App.] 84 P. 253. To show what were "mill sheds" and "sheds adjoining mill building" and whether there were mill sheds under which cars could be placed. Wolverine Lumber Co. v. Phenix Ins. Co. [Mich.] 13 Det. Leg. N. 642, 108 N. W. 1088.

72. Proofs showing suicide where suicide is relied on as a defense. Felix v. Fidelity Mut. Life Ins. Co. [Pa.] 64 A. 903. Certificates of death held admissible under Comp. Laws § 4617, to show cause of death, they not being privileged matter under § 10,181, relating to testimony of physicians. Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369, 12 Det. Leg. N. 1032, 106 N. W. 1107. Where policy provided that proofs of death should be evidence in behalf of company of facts therein stated, held that proofs showing that insured died of consumption were admissible on issue as to false statements in application as to insured's health, as being in nature of admissions, though not conclusive. Id.

73. Plaintiff held properly permitted to contradict statements made over her signature in "claimant's certificate," a part of the proofs of death, which was solicited by company's agent who wrote the answers therein. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61.

74. May postpone comparison of the statements therein contained with those in

may be considered for that purpose only.[75] Official reports as to the cause of death are inadmissible unless required by statute.[76] Unaccepted offers of compromise are inadmissible.[77]

Cases dealing with the admissibility of particular evidence to show whether there was a binding contract,[78] an agent's authority,[79] the cause of the loss,[80] false representations and breaches of warranty,[81] suicide,[82] waiver and estoppel,[83] an assignment of the policy,[84] and the death of the insured,[85] will be found in the notes.

the application until they are offered for that purpose by the defendant. Baldi v. Metropolitan Life Ins. Co., 30 Pa. Super. Ct. 213; Rondinella v. Metropolitan Life Ins. Co., 30 Pa. Super. Ct. 223.

75. Defendant cannot, where he fails to offer them or any other evidence, base motion for nonsuit and for binding instructions, on ground that they, in connection with application, show breach of warranty. Baldi v. Metropolitan Life Ins. Co., 30 Pa. Super. Ct. 213. Company is not thereby deprived of benefit of provision that proofs shall be evidence of facts therein stated in behalf of, but not against, it. Id.

76. Undertaker's report as to cause of death held incompetent. Globe Mut. Life Ins. Co. v. Meyer, 118 Ill. App. 155. Offer of certified copy of entire record of county clerk as to cause of death, including reports of both physician and undertaker, held properly rejected. Id.

77. Admission of letter held error. Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48.

78. Evidence that plaintiff did not regard policy as executed, binding contract, that he refused to accept it as such, that he had not paid premium and had promised to surrender policy, held admissible. Helbig v. Citizens Ins. Co., 120 Ill. App. 58.

79. Evidence as to manner of issuing previous similar policies tending to show approval by general agents of action of local agents in issuing policy declared on held admissible on issue of local agent's authority and to show abrogation of rule that only general agents had authority to issue such policies. St. Paul Fire & Marine Ins. Co. v. Stogner [Tex. Civ. App.] 17 Tex. Ct. Rep. 260, 98 S. W. 218.

80. **Accident insurance:** Statement of insured as to cause of accident from which he died held not so remote as to render it inadmissible as part of res gestae. Starr v. Aetna Life Ins. Co., 41 Wash. 199, 83 P. 113.

Life insurance: Nonexperts may testify that relatives of insured died of consumption. Krapp v. Metropolitan Life Ins. Co., 143 Mich. 369, 12 Det. Leg. N. 1032, 106 N. W. 1107. Testimony of attending physician as to cause of death held admissible, though he was not present when death occurred. Chadwick v. Phoenix Acc. & Sick Ben. Ass'n, 143 Mich. 481, 13 Det. Leg. N. 50, 106 N. W. 1122.

Lightning insurance: Where certain calves were not killed immediately but died after storm during which lightning struck in pasture, held that testimony of plaintiff as to their actions and symptoms after storm was admissible on issue as to whether loss was occasioned by lightning. Freeman v. Farmers' Mut. Fire & Lightning Ins. Co. [Mo. App.] 97 S. W. 225.

81. **Life insurance:** Witness held properly allowed to state that insured had told him cause of brother's death, it appearing that he had stated in application that he did not know it, but not what insured told him was cause. Globe Mut. Life Ins. Ass'n v. Meyer, 118 Ill. App. 155. Evidence tending to show that insured had been rejected by one company because medical director regarded application with suspicion because not taken by regular agent held admissible as tending to show whether he believed that he had not been rejected in good faith because of sugar in his urine, and hence as bearing on question whether in his subsequent representations in regard to that matter he was actuated by a fraudulent or innocent motive. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Where court admitted evidence as to whether there are drugs which will temporarily remove or destroy trace of sugar in urine, should have admitted all offered on both sides. Id. Entries in memorandum book of insured as to amount of insurance carried held self-serving declarations. Id. Descriptions of physical appearance of insured held admissible to rebut testimony of defendant that he appeared to be in unsound health and that his general appearance showed indications of excessive use of intoxicants. Paquette v. Prudential Ins. Co. [Mass.] 79 N. E. 250. Report of examining physician held admissible on issue as to truth of warranties as to health. Perry v. Hancock Mut. Life Ins. Co., 143 Mich. 290, 12 Det. Leg. N. 978, 106 N. W. 860. Where sole defense was breach of warranty that no proposal to insure insured's life had been declined, held error to exclude prior application to another company, subscribed with insured's name, for lack of identification of the subscriber with the insured, identity of names being presumptive of identity of persons, although it would not have established the defense in the absence of proof of failure to receive the policy or that the proposal had been declined. Spiegel v. Empire Life Ins. Co., 96 N. Y. S. 201.

Fire insurance: On an issue as to whether insured did or did not knowingly make false statements as to values he may himself testify as to his intent or motive. That he had no intention or purpose to mislead or deceive defendant. Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605. Where evidence showed that at time of issuing policy agent was informed that plaintiff did not intend to occupy house until arrangements had been made for supplying it with water, and that he knew that this could not be done until a date which was subsequent to the fire, held that evidence as to laying of water pipes in street by town and as to digging of trenches for pipes on plaintiff's land, etc., was not

A provision waiving statutory provisions prohibiting physicians from disclosing matters communicated to them by their patients is valid,[86] and the waiver extends to those claiming under the insured.[87]

An unqualified admission of a party against his interest does not preclude sending the issue involved to the jury where there is credible evidence fairly conflicting therewith.[88] The jury is not obliged to rely solely on the opinion of the witnesses as to the value of the property but may in connection therewith use and be guided by their own general knowledge and judgment.[89]

In an action on a fire policy the introduction of the policy and the proofs of loss makes out a prima facie case.[90]

Questions of law and fact.[91]—Whether insured is dead,[92] the truth or falsity of representations[93] and their materiality,[94] whether death was caused by external, violent, and accidental means,[95] the issue of proximate cause,[96] whether there has been

irrelevant. Harris v. North American Ins. Co., 190 Mass. 361, 77 N. E. 493. Evidence that property on farm owned by insured's wife and worked by him had been burned and that he had stated that fires were of incendiary origin and that some of them were set by persons having a grudge against him, held admissible as tending to show falsity of warranty that insured had no reason to fear incendiarism. Donley v. Glens Falls Ins. Co., 184 N. Y. 107, 76 N. E. 914, rvg. 100 App. Div. 69, 91 N. Y. S. 302.

82. Evidence that insured, shortly before his death, spoke hopefully of his business prospects held admissible. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049.

83. Employers' liability insurance: Question whether insured understood that claim for damages previously prosecuted against him by employe was within the terms of the policy, held proper, insured's understanding being material on question as to whether company was estopped to deny liability by reason of its conduct in defending former action. Tozer v. Ocean Acc. & Guaranty Corp. [Minn.] 109 N. W. 410.

Life insurance: Question and answer as to what local assistant superintendent said to plaintiff about the company paying the policy held proper on issue as to waiver of contract limitation. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61. Testimony of plaintiff's counsel as to conversation with defendant's superintendent, who had not testified, which related facts from which waiver might be implied, held admissible. Id. Permitting plaintiff to show that she had been at expense in furnishing further proof demanded by defendant after it was in possession of proofs showing that insured died of consumption held proper, evidence being admissible on issue as to waiver of warranty as to health. Id. Evidence as to association of companies which exchanged information as to applicants, offered to show that insurer knew that applicant had been rejected by other companies held inadmissible in absence of showing that such companies belonged to the association. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Where agent testified that he had no regular time for sending in money collected for premiums, held that question as to whether company objected as to time when he made reports and sent remittances was proper, defendant refusing to state that it was making no defense because money was not sent in on time. Crowder v. Continental Casualty Co., 115 Mo. App. 535, 91 S. W. 1016. Also proper as tending to show that company was not giving strict enforcement to prompt collection of premiums as they became due. Id.

Fire insurance: General reputation as to ownership of property is admissible to prove knowledge of agent on issue of waiver of false representations in regard thereto (Continental Ins. Co. v. Cummings [Tex. Civ. App.] 16 Tex. Ct. Rep. 279, 95 S. W. 48), but the impression, opinion, information, or understanding of any particular individual or limited number of individuals is not (Id.). Admission of latter class of evidence held prejudicial where evidence on the issue was sharply conflicting. Id.

84. Evidence of conversation between insured and plaintiffs shortly after loss in which insured recognized that loss was payable to plaintiffs and directed them to collect it and apply amount collected on his indebtedness to them held admissible. German Ins. Co. v. Gibbs, Wilson & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 798, 92 S. W. 1068.

85. On issue as to death of insured who had been absent for more than seven years, mortality tables held properly excluded, the precise expectancy of life of a man of 26 years, insured's age, not being material. Heagany v. National Union, 143 Mich. 186, 12 Det. Leg. N. 943, 106 N. W. 700.

86, 87. Metropolitan Life Ins. Co. v. Willis [Ind. App.] 76 N. E. 560.

88. Admission of plaintiff that he informed company's representatives that insurance previously taken out had expired. Requested instruction properly refused. Bruger v. Princeton & St. Marie Mut. Fire Ins. Co. [Wis.] 109 N. W. 95.

89. Instruction held proper. Helm v. Anchor Fire Ins. Co. [Iowa] 109 N. W. 605.

90. Helbig v. Citizens Ins. Co., 120 Ill. App. 58.

91. See 6 C. L. 153.

92. Where he had not been heard of for seven years. Heagany v. National Union, 143 Mich. 186, 12 Det. Leg. N. 943, 106 N. W. 700.

93. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049.

94. Provident Sav. Life Assur. Soc. v.

a substantial compliance with the iron-safe clause,[97] what is a reasonable time,[98] whether there has been a total loss,[99] incendiarism,[1] waiver,[2] and who was to blame for the failure of an appraisal,[3] have been held to be questions for the jury under conflicting evidence. Where the evidence is undisputed that a state of facts existed which was not disclosed in the application, and that the application was substantially untrue, and it further appears from the undisputed evidence that according to the usual course of business the application would have been refused had the true facts been stated, the court should peremptorily instruct the jury to find for the defendant on the policy.[4]

The construction of written instruments is for the court.[5]

Instructions.[6]—The ordinary rules as to instructions apply.[7] They should not be abstract,[8] inconsistent,[9] or confusing.[10]

(§ 24) *D. Verdict, findings, judgment, costs, and fees.*[11]—The relief will be

Whayne's Adm'r [Ky.] 93 S. W. 1049; Monahan v. Mutual Life Ins. Co. [Md.] 63 A. 211.

95. Preferred Acc. Ins. Co. v. Fielding [Colo.] 83 P. 1013.

96. When evidence is introduced that points to the injury as the sole active force that brings into operation death producing agencies. Driskell v. U. S. Health & Acc. Ins. Co., 117 Mo. App. 362, 93 S. W. 880.

97. Whether books were substantial compliance. Queen of Arkansas Ins. Co. v. Cooper-Cryer Co. [Ark.] 98 S. W. 694.

98. What is reasonable time within which to give notice of illness required by health policy, unless delay so great that court may with confidence decide question as one of law. Reynolds v. Maryland Casualty Co., 30 Pa. Super. Ct. 456.

99. Stevens v. Norwich Union Fire Ins. Co. [Mo. App.] 96 S. W. 684.

1. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137.

2. Waiver of appraisal and proofs of loss, where there is evidence in record which, with inferences which may be legitimately drawn therefrom, fairly tends to establish it. Western Underwriters' Ass'n v. Hankins, 221 Ill. 304, 77 N. E. 447, afg. 122 Ill. App. 600.

3. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137.

4. Where evidence showed that he had diabetes and that he died from it, and it was apparent that, if he had told examiner facts known to him, his application would have been rejected. Metropolitan Life Ins. Co. v. Schmidt [Ky.] 93 S. W. 1055.

5. Whether the answers in a written application are complete. Security Mut. Ins. Co. v. Berry [Ark.] 98 S. W. 693. Meaning of words "building" and "machinery." Tubbs v. Mechanics' Ins. Co. [Iowa] 103 N. W. 324.

6. See 6 C. L. 155.

7. Should be considered in connection with the case presented. Instruction that life policy was good during life of order for payment of premiums given by insured on his employer held not objectionable for failure to state that it might be forfeited through fault of insured, only question being whether it had been forfeited by changes in date of payment made by insurer's agent. Hagins v. Aetna Life Ins. Co. [S. C.] 55 S. E. 323. Requested instructions on issue as to whether loss was caused by wind or lightning held properly refused in view of those previously given. Home Ins. Co. v. Gagen [Ind. App.] 76 N. E. 927. Instruction held erroneous as omitting reference to defense of breach of iron-safe clause and permitting recovery on finding of facts not contested. Rudd v. American Guarantee Fund Mut. Fire Ins. Co. [Mo. App.] 96 S. W. 237. Defendant in action on accident policy held not entitled to an instruction limiting the amount of recovery to $1,000 instead of $5,000, if jury found that death was due to unnecessary exposure to obvious risk of injury or danger where no defense of that character was interposed by the answer and there was no evidence in the record calling for it, in the absence of such a defense being pleaded. Starr v. Aetna Life Ins. Co. [Wash.] 87 P. 1119. Where several policies were applied for and issued in two sets, and evidence was such that jury might have found for insurer on one set and insured on the other, instruction grouping all the policies in one sum and compelling jury to find whole sum for insured, if it found for him at all, held erroneous. Provident Sav. Life Assur. Soc. v. Whayne's Adm'r [Ky.] 93 S. W. 1049. Where proof indicated that only a few articles of no appreciable value belonged to third person, held that court did not err in failing to instruct that there could be no recovery as to them. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987.

8. Instruction that insured could not recover in any event for insurance on property which he did not own held improper where insured had an insurable interest though he was not the absolute owner. Hartford Fire Ins. Co. v. Enoch [Ark.] 96 S. W. 393.

9. Where court charged generally that the plaintiff must show that death resulted from the accident alone, and also charged that the burden was on the defendant to show the specific cause of death to have been other than the accident, apparent inconsistency held not of such a character as to require reversal. Travelers Ins. Co. v. Leibus, 8 Ohio C. C. (N. S.) 201.

10. Use of word "proximate" cause of death in the sense of "sole" cause, when taken in connection with other qualifying and restrictive words in the same connection, held to render the instruction confusing or erroneous to an extent requiring a reversal of the judgment. Travelers Ins. Co. v. Leibus, 8 Ohio C. C. (N. S.) 201.

confined to that asked for in the pleadings.[12] Where the insurer does not seek in its pleadings to recover unpaid instalments of premium, a judgment for plaintiff in an action on the policy does not bar a subsequent recovery thereof.[13] Though the probate court alone has authority to distribute the proceeds of a policy in the hands of an administrator to those entitled thereto, it cannot award the fund to one whose claim has been adversely passed upon by a court of general jurisdiction to which it has been properly submitted.[14]

Interest, costs, and penalties.[15]—Interest ordinarily runs from the date when the loss becomes payable.[16] An assessment company which merely collects assessments and disburses them in payment of matured claims is not liable for interest on assessments recovered by a policy holder on rescission of the contract for a breach.[17]

Statutes in some states provide for the allowance by the court or jury of a ten per cent penalty and a reasonable attorney's fee in actions on insurance contracts, where it appears from the evidence that the company has vexatiously refused to pay the loss sued for[18] or interposes a frivolous defense.[19] The contracts of mutual companies sometimes authorize the recovery of attorney's fees when it becomes necessary to collect assessments by suit.[20]

(§ 24) *E. Enforcement of judgment.*[21]

INTEREST.

§ 1. Right to Interest and Demands Bearing Interest (473).
§ 2. Rate and Computation (476).
§ 3. Remedies and Procedure to Recover Interest (478).

Interest on judgments,[22] taxes,[23] and on local improvement assessments, is discussed in separate articles.[24]

11. See 6 C. L. 156.

12. Failure to give company credit in judgment for unpaid installments of premium held not error where such recovery was not asked for. Home Ins. Co. v. Ballew [Ky.] 96 S. W. 878. Company held not entitled to deduct unpaid premium where there was no plea of set-off and insured testified that he did not consent to such a deduction. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35.

13. Home Ins. Co. v. Ballew [Ky.] 96 S. W. 878.

14. Orphans' court cannot award it to one who common pleas has determined is not entitled to it. In re Shortlidge's Estate, 214 Pa. 620, 64 A. 318.

15. See 6 C. L. 156.

16. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35. From the date the policy becomes payable and not from the date of the fire. Hartford Fire Ins. Co. v. Enoch [Ark.] 96 S. W. 393. From time when company put an end to prescribed process of adjustment by repudiating liability. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134. Where policies provided that loss should be payable immediately on adjustment, but furnishing proofs of loss was condition precedent to adjustment, held that interest did not begin to run until proofs were furnished. Wensel v. Property Mut. Ins. Ass'n, 129 Iowa, 295, 105 N. W. 522. Fact that policy provided that where appraisal was required award of appraisers must be furnished to company before loss became payable held not to prevent recovery of interest from date when loss would have been payable had there been no appraisal, where attempted appraisal was void because award was not in conformity to submission. Home Ins. Co. v. Schiff's Sons [Md.] 64 A. 63. Interest may be recovered on amount fixed upon settlement of account and ascertaining balance. R. S. c. 74, § 2. Manchester Fire Assur. Co. v. Fitzpatrick, 120 Ill. App. 535.

17. Assessment life company. Blakely v. Fidelity Mut. Life Ins. Co., 143 F. 619.

18. Rev. St. 1899, § 8012, held not unconstitutional. Keller v. Home Life Ins. Co. [Mo.] 95 S. W. 903. Question of whether there has been such delay is one of fact to be determined by a general survey of all the facts and circumstances in the case, plaintiff not being bound to explicitly prove that delay or refusal was vexatious. Id. Evidence held to warrant submission of question. Id. Statute does not violate 14th amendment to U. S. Const. by depriving insurance companies of the equal protection of the laws. Williamson v. Liverpool & London & Globe Ins. Co. [C. C. A.] 141 F. 54.

19. Case held not one for imposition of penalty. Kavanaugh v. Security Trust &

§ 1. *Right to interest and demands bearing interest.*[25]—Generally speaking, one who uses or detains the money of another without his consent must pay interest thereon during the period of such use or detention.[26] So also, interest is allowed in many cases out of considerations of equity and natural justice, as where one is entitled to the payment of money which owing to unavoidable causes he cannot obtain.[27] Ordinarily it is not recoverable on a special liability created by a statute which is silent on the subject of interest.[28] Taxes being mere statutory impositions do not bear interest at common law;[29] but the rule is otherwise in the case of a taxpayer who by his own voluntary action obstructs the collection of the public revenue and retains money which he ought to pay over as taxes.[30] A municipal corporation is liable for interest on money wrongfully obtained and illegally withheld.[31] In Maryland the allowance of interest is discretionary with the court or jury except in cases of contracts in writing to pay money on a day certain or where the money claimed has been actually used.[32] A plaintiff in ejectment should be allowed interest only so far as it is necessary to complete indemnity.[33]

It may rest in contract express[34] *or implied.*[35]—Money which by agreement of

Life Ins. Co. [Tenn.] 96 S. W. 499. Where plaintiff is not entitled to recover insurance she cannot recover penalty prescribed by Acts 1901, p. 248, c. 141, for withholding it. Thompson v. Fidelity Mut. Life Ins. Co. [Tenn.] 92 S. W. 1098.

20. Under terms of by-laws and application, mutual hail association held entitled to reasonable fee. Farmers' United Tp. Mut. Hail Ass'n v. Dally [Minn.] 107 N. W. 555.

21. See 6 C. L. 156.

22. See Judgments, 6 C. L. 214.

23. See Taxes, 6 C. L. 1602.

24. See Public Works and Improvements, 6 C. L. 1143.

25. See 6 C. L. 157.

26. County allowed interest on money illegally allowed by commissioners to county auditor and withheld by auditor from county. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

This rule is not invariably enforced in equity: Wife not required to pay interest until demand and refusal to pay amount of insurance policy which she received in good faith from husband, not knowing of a creditor's claim. Vashon v. Barrett [Va.] 54 S. E. 705. Trust company held not a mere stakeholder but a trustee of the residuum of a certain fund, and, having used the money, was chargeable with the legal rate of interest regardless of actual profit. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 194, 107 N. W. 1109.

27. Necessary delay pending liquidation in insolvency. People v. Merchants' Trust Co., 101 N. Y. S. 255. Where a conveyance was set aside on the ground of incompetency of the grantor and the grantee had received no rents or profits, he should be allowed interest on the purchase money required to be returned. Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216.

28. County not entitled to interest on award in proceedings to apportion cost of a bridge under St. 1893, p. 1062, c. 368, from time of filing report to entry of judgment. In re Bristol County [Mass.] 79 N. E. 339. Not within language of Rev. Laws, c. 177, § 8, relating to awards of county commissioners, referees, etc. Id.

Fines or penalties imposed by statute. No interest on judgment for penalties imposed by Acts 29th Leg. p. 324, c. 133, for failure of railroad to erect water closets. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 25, 97 S. W. 724.

29. City of Rochester v. Bloss, 185 N. Y. 42, 77 N. E. 794. Nor do statutes allowing interest on debts, contracts, and judgments apply to them. Id.

30. Where corporation prevented collection by injunction. Louisville & N. R. Co. v. Com., 29 Ky. L. R. 666, 668, 94 S. W. 655.

31. Illegal water rates paid under protest and threats of being shut off. City of Chicago v. Northwestern Mut. Life Ins. Co., 120 Ill. App. 497.

32. Safe Deposit & Trust Co. v. Gittings [Md.] 62 A. 1033. In an action on a deposit account against which the bank claimed the right to charge a note, held error to direct the jury to find interest for plaintiff as this should have been left to the discretion of the jury. Calvert Bank v. Katz, 102 Md. 56, 61 A. 411.

33. Where value of use and occupation was more than defendant had actually received in rents from the property, interest should not be computed on quarterly rents, but only from commencement of action. Fagan v. McDonnell, 100 N. Y. S. 641.

34. See 6 C. L. 157. Assignment of so much of a debtor's interest in a trust fund as would be sufficient to pay the principal and 7% interest on a note bearing 8% interest construed and held to entitle plaintiff to judgment for the principal and 8% but to a lien on the trust fund for the principal and only 7%. Agnew v. Agnew [Ind. App.] 77 N. E. 925. The fact that commissions for procuring a loan are computed at a certain per cent. thereon does not make them interest within the meaning of a contract for the sale of land requiring the vendee to pay the interest on the loan. Wilson v. Wilson, 115 Mo. App. 641, 92 S. W. 145. Where certain notes called for interest from maturity but the maker obtained an extension of time by which the maturity was postponed, the payee was nevertheless entitled to interest

the parties concerned is held by a depositary pending litigation as to its proper distribution generally does not bear interest during the period of such custody.[36]

Interest as damages ex contractu is recoverable[37] for the improper withholding[38] of liquidated demands[39] or claims, the amounts of which may be ascertained by mere computation.[40] Interest should be allowed also, though the demand is unliquidated, where fairness and justice require it.[41] Statutes in some states provide

from the maturity of the notes according to their terms. Dashiell v. Moody & Co. [Tex. Civ. App.] 97 S. W. 843. Agreement of a county to reduce the rate of interest on notes given for school lands held supported by a sufficient consideration. Delta County v. Blackburn [Tex. Civ. App.] 90 S. W. 902. Where a note recited a promise to pay F a certain sum with interest at a certain rate per annum, at the death of F the note to become the property of his granddaughter, and, if the interest should be paid annually, no part of the principal to be paid during the lifetime of F, interest for the period between the last annual payment and the death of F belonged to the granddaughter and not to the estate of F. Rogers v. Osborne [Mich.] 13 Det. Leg. N. 898, 109 N. W. 1123.

35. See 6 C. L. 157. Where mortgagee assumed charge of mortgagor's business, held equitable to allow him interest paid by him and interest on the indebtedness owed to himself. Pomeroy v. Noud [Mich.] 13 Det. Leg. N. 401, 108 N. W. 498. A purchaser of real estate goes into possession and enjoys the rents and profits during a period of several months while the title is being perfected. He is liable for interest on the purchase money from the time of going into possession until delivery of the deed. Carey v. Taylor, 8 Ohio C. C. (N. S.) 198.

36. Where the amount of an award for taking property for a street was held by the city chamberlain pending a controversy as to its distribution between the property owner and his attorney, neither was entitled to recover interest from the other during the period of such custody but interest paid by that officer should be treated as principal and divided accordingly. Deering v. Schreyer, 185 N. Y. 560, 78 N. E. 75, rvg. 110 App. Div. 200, 97 N. Y. S. 14. But if one party had at times more than his share in his possession, he should pay interest to the other on the excess during the time he held it. Id. In an action to determine the right to certain cotton, where it was agreed the cotton should be sold and the proceeds deposited in a bank subject to the judgment in the action, the several parties were entitled to interest on the amounts found due them only from the date of judgment. Citizens' Bank v. Arkansas Compress & Warehouse Co. [Ark.] 96 S. W. 997.

37. See 6 C. L. 157.

38. **Recoverable:** Where building and loan association failed to pay for matured stock as agreed, a stockholder was entitled to interest on his claim for the time it was wrongfully withheld. Rogers v. Ogden Bldg. & Sav. Ass'n [Utah] 83 P. 754. Where plaintiff refused defendant's offer to pay all the creditors of a debtor 50% of their claims but later agreed to accept it, he was entitled to interest from the date of notification of acceptance. Williams Shoe Co. v. C. Gotzian & Co., 130 Iowa, 710, 107 N. W. 807. Contractor held entitled to interest on contract price due after substantial performance and acceptance of work. Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626. Where value of wheat sold was due on demand, interest was recoverable from that time under B. & C. Comp. § 4595, allowing interest on money after it becomes due. Savage v. Salem Mills Co. [Or.] 85 P. 69. In an action for the price of logs, a verdict in accordance with the court's charge could not have included interest. Hence interest from commencement of action was properly added thereto. Hurst v. Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666. In suit to declare absolute conveyances to operate as mortgages and for redemption, though defendant denied plaintiff's claim and was defeated, she was nevertheless entitled to interest on the amount found due her less costs from date of final judgment until payment thereof or foreclosure ordered in case of nonpayment. Wadleigh v. Phelps [Cal.] 87 P. 93.

Not recoverable: Owner at all times admitting liability in a specified sum to materialmen and holding sum subject to order of court held not liable for interest thereon. Fall v. Nichols [Tex. Civ. App.] 16 Tex. Ct. Rep. 748, 97 S. W. 145. An obligation to pay a certain sum of money when able draws no interest until the obligor becomes able. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142.

39. Interest not allowed on unliquidated claim for services rendered under promise of compensation by will. Chambers v. Boyd, 101 N. Y. S. 486. Sums advanced by a mortgagee in conducting the mortgagor's business for purchase of materials and for labor held not unliquidated and noninterest bearing. Pomeroy v. Noud [Mich.] 13 Det. Leg. N. 401, 108 N. W. 498. That mortgagee, after paying notes of mortgagor, charged the amounts thereof in an account did not render such account open and unliquidated. Id. Where the vendors of a street railroad deposited bonds to "fully cover the cost of completion," the purchaser was entitled to interest on advances for labor and material from the time they were made, though the account for the advances was unliquidated in the sense that they were required to be proved or admitted. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 194, 107 N. W. 1109.

40. Landlord who made repairs which tenant was required to make under his lease held not entitled to interest, damages not being ascertainable by mere computation. Markham v. David Stevenson Brew. Co., 111 App. Div. 178, 97 N. Y. S. 604.

41. Interest in action on fire policy from time of repudiation by insurer of all liability. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134.

for interest on liquidated claims in cases of unreasonable and vexatious delay in payment.[42]

An account stated bears interest,[43] and so does one for goods sold on a definite term of credit after it becomes due.[44] In cases of annuities the allowance of interest on arrears is discretionary in the absence of agreement.[45] A creditor in an action to recover a stockholder's liability may recover interest on his claim from the time of filing suit.[46] Ordinarily, interest is the sole measure of damages for failure to pay money when due.[47]

Interest from the date of injury may be allowed in torts[48] where property is converted or wrongfully detained[49] or its value unlawfully diminished.[50]

Verdicts.[51]—By statute in Illinois, interest on a verdict from the time of its rendition to the time of entry of judgment is to be included in and made a part of the judgment.[52]

Interest ceases with the cessation or tender of the debt or obligation.[53]—A tender must be made to one having authority to receive payment.[54] An offer made dependent upon performance by the creditor of a binding condition precedent to, or concurrent with, performance by the debtor will stop the running of interest.[55]

Compound interest[56] is not allowable unless contracted for,[57] and partial pay-

42. Where there is an honest dispute as to an amount due for services, something more than mere delay and appearing and defending an action is necessary to constitute "unreasonable and vexatious delay in payment," within Rev. St. § 2, c. 74. Espert v. Ahlschlager, 117 Ill. App. 484. Held unreasonable and vexatious delay where defendant withheld a large amount admitted to be due merely to force a settlement for less than the whole amount claimed. Borden & Selleck Co. v. Fraser, 118 Ill. App. 655. Evidence held to show unreasonable and vexatious delay in payment of amount due contractor. Fitzgerald v. Benner, 219 Ill. 485, 76 N. E. 709.

43. Amounts due under insurance policies. Manchester Fire Assurance Co. v. Fitzpatrick, 120 Ill. App. 535. Interest allowed "on money due on settlement of account" where portion of a claim had been conceded by defendant. Borden & Selleck Co. v. Fraser, 118 Ill. App. 655.

44. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228.

45. Not allowed on arrears of annuity due from bankrupt to his wife under antenuptial contract making no provision therefor. Savage v. Savage [C. C. A.] 141 F. 346.

46. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626.

47. Contractor not entitled to additional damages though he could not proceed with his work. City of Chicago v. Duffy, 117 Ill. App. 261.

48. See 6 C. L. 158.

49. Under Okl. St. 1893, § 2640, a party is entitled as a matter of right to interest from the date of conversion of personal property. Drumm-Flato Commission Co. v. Edmisson [Okl.] 87 P. 311. Section 2615, making discretionary allowance of interest in certain cases, not applicable. Id. One who prevented delivery of tin plate to a paramount lien holder entitled to possession held properly chargeable with interest on its valuation during period of retention. **Pope v. Baltimore Warehouse Co.**, 103 Md. 9, 62 A. 1119.

Money obtained by deception bears interest, as where by untrue statements an excessive amount was obtained for oats. Meyer v. Johnson, 122 Ill. App. 87.

50. Riparian owner entitled to interest at legal rate from time of injury to his property. Gulf, etc., R. Co. v. Moseley [Ind. T.] 98 S. W. 129. Where in an action for negligently transporting cattle the petition claimed interest as a part of the damages, interest could be included in the damages found. Gulf, etc., R. Co. v. Batte [Tex. Civ. App.] 15 Tex. Ct. Rep. 581, 94 S. W. 345. In an action for damages to an abutting owner due to the operation of a railroad, the allowance of interest on an award for past or rental damages is entirely discretionary with the court or jury. Kerr v. New York El. R. Co., 49 Misc. 331, 96 N. Y. S. 1021.

51. See 6 C. L. 158.

52. Rev. St. § 2, c. 74. Verdict on note. Berry v. Kingsbaker, 118 Ill. App. 198.

53. See 6 C. L. 158.

54. Payment of amount of a mortgage to agent of mortgagee who did not have mortgage in his possession held not sufficient to discharge debt so as to stop running of interest. Hughes v. Clifton [Ala.] 41 So. 998.

55. Civ. Code, §§ 1498, 1504. Tender of debt on condition that creditor reconvey land held as security. Wadleigh v. Phelps [Cal.] 87 P. 93.

56. See 6 C. L. 159.

57. Inhabitants of Tisbury v. Vineyard Haven Water Co. [Mass.] 79 N. E. 256. Compound interest on money collected by an agent and not reported held properly disallowed. Sidway v. American Mortg. Co., 119 Ill. App. 502. Receiver failing to invest funds as required by the court held chargeable with simple interest only, notwithstanding Code 1887, § 3413 (Va. Code 1904, p. 1812), allowing compound interest on loans made to individuals by order of court unless principal is paid when due. **Roller v. Paul** [Va.] 55 S. E. 558.

ments on interest bearing obligations should be so applied as not to compound the interest accrued.[58]

§ 2. *Rate and computation.*[59]—The statutes of many states contain regulations as to the rate and computation of interest[60] in addition to the ordinary usury laws.[61] The Massachusetts or United States rule of computing interest is commonly used.[62] When a town buys the property of a water company under the Massachusetts statute, interest is computed on the company's investment as increased or diminished by expenditures or income for each year.[63] A trustee voluntarily using the money of the beneficiary at a profit must account to him for the legal rate of interest.[64] In the case of insolvency of a trust company, the rate of interest on deposits or other demands, and the period for which it should be computed, will depend upon the character of the obligations outstanding.[65]

58. Where partial payments are made on interest bearing notes and renewal notes are subsequently taken, it is proper to calculate interest on the amount of the original notes up to the time of the first renewal or payment, apply the payment to the discharge of the interest first and then on the principal, and add unpaid interest to the amount of the renewal notes allowing interest on the whole amount of such notes. Bramblett v Deposit Bank of Carlisle, 28 Ky. L. R. 1228 92 S. W. 283. In calculating interest on notes on which usurious interest was paid in advance, it was proper to reduce the face of the notes by the amount of the usury and interest thereon and compute interest on the balance at the legal rate from the date of maturity of the notes, and this did not result in the payment of interest twice. Id. A warehouse company advanced money to certain shippers of tobacco to enable them to purchase the same and sold the tobacco for them, small sales being made nearly every week. Held the company could not charge interest on each loan until a sale was made, credit the shippers with the proceeds thereof, and treat the balance as a new principal, but interest should be allowed on the loans at 6 per cent. and the shippers should have the same rate of interest on the proceeds of the sales from their date. Farmers' & Shippers' Leaf Tobacco Warehouse Co. v. Head, 29 Ky. L. R. 328, 93 S. W. 17.

59. See 6 C. L. 159.

60. A note being silent as to interest after maturity, an express statute will control as to the rate. Eight per cent. under Civ. Code Mont. § 2585, as amended by Laws 1899, p. 125, prescribing eight per cent. on all money due in absence of express contract. Bank v. Doherty, 42 Wash. 317, 84 P. 872. Under Kirby's Dig. § 5388, the interest due at the time of rendition of judgment on a contract becomes a part of the judgment, and the entire amount bears interest thereafter at the rate specified in the contract. Morris v. Carr, 77 Ark. 228, 91 S. W. 187. Mills' Ann. St. Colo. § 2252, allowing interest at the rate of eight per cent. from the time a sum of money becomes due, when there is no agreement as to the rate, is mandatory as to all demands within its provisions (City of Denver v. Barber Asphalt Pav. Co. [C. C. A.] 141 F. 69), and the court cannot, as in equity cases, consider plaintiff's laches in bringing suit (Id.). Action at law to recover for labor and materials. Interest should be allowed from date of demand of payment. Id.

61. See Usury, 6 C. L. 1774.

62. Subtracting from principal and interest at time of payment only when payment exceeds the interest. Rev. Civ. Code, § 1150, subd. 3, is consistent with this rule. Northwestern Mortg. Trust Co. v. Ellis [S. D.] 108 N. W. 22. Note dated December 10, 1890, contained indorsements of payments, the last one being on December 11, 1893, which payments exceeded the interest due at that time. Held error to direct verdict for principal and interest from December 10, 1893, there being no evidence that the payments were all payments of interest for the preceding three years. Dunlap v. Kelley, 115 Mo. App. 510, 92 S. W. 140.

63. Where a town bought the property under the provisions of St. 1887, p. 715, c. 157, § 6, the company's investment as increased or diminished by the excess of expenditures over the income, or vice versa, in any year, was the basis for computing interest for the next year, and so on up to the time of taking. Inhabitants of Tisbury v. Vineyard Haven Water Co. [Mass.] 79 N. E. 256.

64. Claimants not estopped as against a trustee to contend for more than the going rate of interest, by reason of their noninterference with the trustee's use of the money, where trustee made more than the going rate. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 144. 107 N. W. 1109.

65. Depositors who held special interest contracts held entitled to interest at rate therein specified from last payment of interest to date of appointment of receiver, and thereafter upon respective balances up to date of final payment of principal at legal rate. People v. Merchants' Trust Co., 101 N. Y. S. 255. Those holding no such contracts entitled to legal rate on respective balances from appointment of receiver to final payment of principal. Id. Holders of **certificates of deposit** held entitled to rates specified therein to date of appointment of receiver and thereafter at legal rate up to final payment. Id. A certain depositor held entitled to interest only on balances which would have been due to him had he accepted certain instalments of principal when they were paid to creditors by the receiver. Id.

Certified check holders held entitled to in-

The agreement of the parties will control as to the time from which interest is to be computed.[66] In the absence of contract the question is often dependent upon circumstances,[67] though the general rule is that interest is allowable as a legal incident of a debt from the day of default whenever the debtor knows the sum he is to pay and when he is to pay it.[68] Hence, unless the time of payment is definitely fixed,[69] or except in certain cases of insolvency,[70] it is often held that interest will not run until after demand of payment;[71] but under a statute allowing interest after demand, any intimation to the debtor that payment is desired is sufficient.[72] By custom in Pennsylvania, a book account for goods sold bears interest after six months from sale and delivery.[73] In the absence of proof of either contract or custom concerning the time of payment, the vendor is entitled to interest from the date of delivery.[74] Legacies do not bear interest until payable.[75] Interest on a

terest on their credit balances from date of appointment of receiver to date of final payment at legal rate. Id. Rule given for determination of respective balances. Id.

66. Where construction contract expressly waived suits of all kinds until final estimate and railroad company fraudulently delayed giving contractor a certificate of completion, interest could not begin to run until suit could be brought. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. Where a stipulation in a note as to interest does not fairly disclose that interest is to run from date, and can be applied to the period after maturity and without it the same rate would not be given by law, the note should be construed as drawing interest only from maturity. Promise to pay "$60 for value received, Int. at 8 per cent. per annum." Dunlap v. Kelley, 115 Mo. App. 610, 92 S. W. 140.

67. In an action to compel a purchaser of land to accept title and pay the price, defendant should be required to pay interest only from date of judgment, where he had reasonable ground to defend the suit. Fluker v. De Grange, 117 La. 331, 41 So. 591. Where for 54 years the state neglected to collect rents under a lease of water rights, an assignee of the lease was liable for interest on each payment of rent as it became due only from the time he began to use the water and not from the time of the first default. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343. Where vendor of land repudiated the sale by refusing to deliver the deed after payment of price, the purchaser was entitled to interest from date of payment and not merely from the date on which he was entitled to a deed. Lewis v. Williams [Tex. Civ. App.] 15 Tex. Ct. Rep. 86, 91 S. W. 247. In an action by an abutting owner for damages resulting from the operation of a railroad, an award of past or rental damages may be made up to the date of trial, and interest computed on that sum only from date of trial to date of judgment. Kerr v. New York El. R. Co., 49 Misc. 331, 96 N. Y. S. 1021.

68. A beneficial association is not chargeable with interest on claims for sick benefits prior to the date of demand upon it. Dary v. Providence Police Ass'n, 27 R. I. 377, 62 A. 513. Interest allowable only from date of decree for a sum certain in favor of estate of wife against estate of husband, where prior thereto the debt was uncertain and unliquidated and decree was entered in conformity with holding of appellate court that plaintiff was entitled to such sum without any provision as to interest. Safe Deposit & Trust Co. v. Gittings [Md.] 62 A. 1033.

69. A claim being payable immediately after settlement, it draws interest from such time without any demand. Dunnett v. Gibson, 78 Vt. 439, 63 A. 141. Where goods are sold on a definite term of credit, interest runs from the time the account becomes due without any demand unless there is a dispute as to the amount or deductions to be adjusted. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228.

70. Appointment of temporary receivers for trust company and assumption of possession by state obviates necessity of formal demand by depositors for deposits. People v. Merchants' Trust Co., 101 N. Y. S. 255.

71. Where there is no agreement to pay interest, a demand must be shown before interest can be allowed. Broker failing to make demand entitled to interest from commencement of suit only. Warren Commission & Inv. Co. v. Hull Real Estate Co., 120 Mo. App. 432, 96 S. W. 1038.

72. A letter requesting plaintiff to send a man to O. K. the bills held a sufficient demand within Rev. St. 1899, § 3705, allowing interest on mature accounts after demand. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 152, 94 S. W. 726.

73. Kamber v. Becker, 27 Pa. Super. Ct. 266.

74. McCarthy v. Nixon Grocery Co. [Ga.] 56 S. E. 72. Code 1863, § 2030, provided that "all accounts of merchants," etc., "which by custom become due at the end of the year, bear interest from that time upon the amount actually due whenever ascertained." Acts 1873, p. 22, added the words "all others" after the word "mechanics." This, however, still left the words "which by custom," etc., as qualifying the classes of accounts previously mentioned. Id. Sections 3550, 2885, Civ. Code 1895, are not in conflict. Id. Ruling in eighth headnote of Adkins v. Hutchins, 79 Ga. 261, 4 S. E. 887, superseded so far as conflicting with above rule. Id.

75. Where will directed executors to convert the property into money and pay over certain legacies not later than 6 years from testator's death, the legacies did not draw interest until after that period. Bank of

demand for work performed or materials furnished runs from the time the contract price becomes due,[76] regardless of a wrongful withholding of a certificate of completion.[77] In Louisiana, while an adjudicatee at public auction is not required to pay interest on the cash portion of the purchase price of land where there is a prima facie defect in the title tendered until the date of judgment affirming it,[78] he is nevertheless held liable for interest on the credit portion represented by notes from the date of the adjudication,[79] unless he relieves himself of such liability by depositing the price as provided by statute.[80] When a garnishee is indebted to the principal defendant upon a demand where interest would be recoverable only as damages for breach of contract, interest does not accrue during the pendency of the trustee process.[81]

§ 3. *Remedies and procedure to recover interest.*[82]—Where interest is allowed by statute it is not necessary to assert it in the bill of particulars,[83] and in many states, where it is the legal consequence of the debt, without express stipulation, it may be recovered though not demanded in the complaint.[84] The jury is competent to assess interest if any is allowable without the aid of an expert accountant.[85] Instructions on the subject of interest must conform to the pleadings.[86] If a verdict calls for a sum certain with interest at a specified rate from a given date, the court may properly compute the interest and render judgment including it.[87]

INTERNAL REVENUE LAWS.[88]

§ 1. **Provisions Common to All Acts (478).**
§ 2. **The Tax on Liquors and Tobacco (479).**
§ 3. **Oleomargarine Act, August 2, 1886 (481).**
§ 4. **War Revenue Acts, June 13, 1898, and March 2, 1901 (481).** The Stamp Act (481). The Legacy Tax (481).
§ 5. **Filled Cheese Act, June 6, 1896 (482).**

§ 1. *Provisions common to all acts.*—Revenue statutes should be strictly con-

Niagara v. Talbot, 110 App. Div. 519, 96 N. Y. S. 976. A bequest for life of the interest on a sum to be set apart within six years entitles the legatee, until such sum is set apart, to such proportion of the income of the entire estate as such sum bears to the value of the estate. Id. In Connecticut the general rule is that pecuniary legacies for the payment of which no time is fixed bear interest after one year from the death of the testator, the legacies not being payable until that time. Will held not to require payment of interest by trustee until one year from death of testator. Redfield v. Marvin, 78 Conn. 704, 63 A. 120. See, also, Wills, 6 C. L. 1880.

76. Where an employe was entitled to be paid when the work was completed to the satisfaction of the employer, interest began to run from the time of acceptance of the work and Rev. St. 1895, art. 3102, relative to interest on open accounts, did not apply. Guffy Petroleum Co. v. Hamill [Tex. Civ. App.] 15 Tex. Ct. Rep. 475, 94 S. W. 458. Under Civ. Code, § 3278, allowing every person entitled to damages, certain or capable of being made certain by calculation from a particular day, interest from that day, in an action for services rendered, interest held properly allowed from last day of employment both under a contract for a definite salary and on recovery of reasonable value of services. Mullenary v. Burton [Cal. App.] 84 P. 159.

77. Contractor held entitled to interest on balance due from time when certificate of completion should reasonably have been given him. Fruin-Bambrick Const. Co. v. Ft. Smith & W. R. Co., 140 F. 465. Where a contractor's certificate was wrongfully withheld, the contractor was entitled to interest on his claim after 30 days from the time of acceptance of the work according to the terms of the contract, and interest was not postponed until 30 days after filing the claim with the comptroller notwithstanding § 261 of the city charter providing that no action shall be commenced against the city until 30 days after presentation of the claim to the comptroller. Roebling's Sons Co. v. New York, 110 App. Div. 366, 97 N. Y. S. 278.

78. Tobin v. O'Kelly, 117 La. 753, 42 So. 258.

79. Right to suspend payment of price does not relieve from obligation to pay interest. Tobin v. O'Kelly, 117 La. 753, 42 So. 258.

80. Civ. Code, art. 2550. Tobin v. O'Kelly, 117 La. 753, 42 So. 258.

81. Walker v. Lancashire Ins. Co., 188 Mass. 560, 75 N. E. 66.

82. See 6 C. L. 161.

83. Meyer v. Johnson, 122 Ill. App. 87.

84. An injury claim paid by city and re-

strued[89] and no tax imposed unless expressed in clear and unequivocal language, all doubts in respect thereto being solved in favor of the taxpayer.[90]

Where property seized by the collector for violation of the revenue laws is returned to claimant and bond given therefor after attachment in forfeiture proceedings, a notice to the sureties of such proceedings is not necessary.[91]

The statutory remedy given for the wrongful seizure of property in the enforcement of the revenue laws is exclusive.[92] An action for the recovery of illegal taxes assessed and collected must be timely brought,[93] and all conditions precedent, as appeal to the commissioner for a refund thereof, must be complied with.[94] One cannot recover taxes paid which were in fact due though the manner of assessing and collecting the same was unauthorized.[95] An officer is not liable for an unlawful seizure made upon reasonable and probable cause[96] where the property is returned intact,[97] and the fact that the court rendering judgment for the claimant fails to make the statutory certificate of probable cause does not deprive him of such defense.[98] A collector acting within the limits of his duties is not liable for injury to one's business and reputation by a seizure of his property for violation of the revenue laws though condemnation proceedings fail.[99] While congress may make the violation of a regulation duly prescribed by the Commissioner of Internal Revenue a penal offense, it must be done by specific act and not left to inference.[1]

§ 2. *The tax on liquors and tobacco.*[2]—Concealment of the name and brand is not a violation of the Federal statute prohibiting the shipment of liquors under an erroneous name.[3] One who "sells or offers for sale" malt liquors is liable for the

covered over against contractor. City of Spokane v. Costello, 42 Wash. 182, 84 P. 652.

85. Not error to exclude expert testimony as to amount due on certain payments. Clements v. Mutersbaugh, 27 App. D. C. 165.

86. Where complaint prayed interest on the amount of principal and interest from December 10, 1899, held error to direct verdict for interest on principal from 1893, the date of last payment endorsed on note. Dunlap v. Kelley, 115 Mo. App. 610, 92 S. W. 140.

87. Meyer v. Johnson, 122 Ill. App. 87.

88. Tonnage taxes, see Shipping and Water Traffic. 6 C. L. 1464.

89. Disston v. McClain [C. C. A.] 147 F. 114. **Contra.** United States v. U. S. Fidelity & Guaranty Co., 144 F. 866.

90. Construing the legacy tax imposed by War Revenue Act, June 13, 1898, c. 448, §§ 29, 30, 30 Stat. 464, 465 (U. S. Comp. St. 1901, pp. 2307, 2308). Disston v. McClain [C. C. A.] 147 F. 114.

91. The proviso to § 3459 (U. S. Comp. St. 1901, p. 2281) is only applicable where the bond is given before the attachment. United States v. 59,650 Cigars [C. C. A.] 146 F. 130.

92. Action of replevin will not lie to recover property seised and sold by the collector. Allen v. Sheridan, 145 F. 963.

93. Since no action will lie without a decision of the commissioner on an appeal for a refund unless he fails to make a decision within six months, the two-year period of limitation under Rev. St. § 3227 does not commence to run until the expiration of such period. Schwarzchild & Sulzberger Co. v. Rucker, 143 F. 656.

94. Rev. St. § 3226 (U. S. Comp. St. 1901, p. 2088), does not require an appeal to the commissioner to refund the tax paid where the commissioner passed upon the merits of the case on an application for the abatement of the assessment. Schwarzchild & Sulzberger Co. v. Rucker, 143 F. 656.

95. Attempted recovery of the collector. Schafer v. Craft, 144 F. 907.

96. Where the defendant collector acted under direction of the commissioner, based upon information received from special agents which justified a suspicion, the court is warranted in charging the jury as a matter of law that there was probable cause. Agnew v. Haymes [C. C. A.] 141 F. 631.

97. Rev. St. § 989 (U. S. Comp. St. 1901, p. 702), providing that "when recovery is had in any suit or proceeding against a collector * * * for an act done by him * * * and the court certifies that there was probable cause for the act * * * no execution shall issue against such collector, but the amount shall be collected from the government," is not inconsistent with and does not repeal § 970 relieving the officer, where he acts upon reasonable cause and the property is returned intact. Agnew v. Haymes [C. C. A.] 141 F. 631.

98. Failure to make certificate as prescribed by Rev. St. § 970 (U. S. Comp. St. 1901, p. 702). Agnew v. Haymes [C. C. A.] 141 F. 631.

99. Agnew v. Haymes [C. C. A.] 141 F. 631.

1. Violation of the rule prohibiting the concealment of stamps, marks, and brands on casks and packages of distilled spirits held not a penal offense. United States v. Sandefuhr, 145 F. 49.

2. See 6 C. L. 161.

3. Section 3449, Rev. St. (U. S. Comp. St. 1901, p. 2277), applies solely to shipments of

special tax imposed upon dealers therein,[4] and this liability extends to commission merchants, though not to commercial brokers.[5] An assessment of the tax upon distilled spirits may be based upon an estimate, and a voluntary correction of a manifest error in the estimate does not invalidate the assessment.[6] The loss of liquors while in the possession of the revenue officers does not relieve the sureties on the distiller's bond from their liability for unpaid taxes,[7] but the sureties on the warehouse bond being primarily liable where the loss occurs in the warehouse,[8] they cannot be held in the first instance.[9] The proceeds of a forfeiture sale belongs to the government and cannot be applied to the payment of taxes due on the spirits[10] at the instance of the sureties on the distiller's bond.[11] Distilled spirits may be forfeited for misconduct of the distiller though the tax has been paid thereon,[12] and such forfeiture includes the tax.[13] One need not be both a rectifier and wholesale dealer to come within the statute requiring a book entry to be kept of all outgoing spirits and data relating thereto,[14] and in a prosecution for failure to keep such book the indictment need not allege to whom the liquor was sold,[15] nor the amount thereof in wine gallons.[16] Since the statute requires the tax to be paid by the distiller, another party paying the same has no standing to recover the tax of the government.[17] In actions to recover unpaid taxes, the general rule prohibiting the pleading of mere conclusions of law is applicable,[18] and since the assessment of internal revenue taxes is a quasi judicial function, the introduction of the assessment list makes a prima facie case.[19] The courts will take judicial notice of instructions, rules, and regulations duly prescribed by the Commissioner of Internal Revenue.[20] Since the Act of April 12, 1902, gave an absolute right of tax rebate in the cases prescribed therein, the provision empowering the commissioner to prescribe rules for carrying it into effect does not authorize a rule making it an absolute prerequisite to recovery that the proofs submitted by the claimant be "satisfactory" to the commissioner.[21] The interest recoverable on delinquent taxes is not

liquors under the proper name and brand known to the trade, as designating the kind and quality of the liquor. United States v. Sandefuhr, 145 F. 49.

4. Liable under Rev. St. § 3244 (U. S. Comp. St. 1901, p 2098), though he does not own the same. Western Exp. Co. v. U. S. [C. C. A.] 141 F 28.

5. An express company took orders from persons desiring beer and forwarded the same to breweries, which were filled and shipped to the express agent, the price being charged to the company. Stored until called for. Sometimes unrequested orders were sent in and delivered to those subsequently applying therefor. Express company returned and were credited with unsold beer. Only profit was the transportation charges. Held a commission merchant and not a commercial broker. Western Exp. Co. v. U. S. [C. C. A.] 141 F. 28.

6. United States v. U. S. Fidelity & Guaranty Co., 144 F. 866.

7. Remedy is an appeal to secretary of the treasury for an abatement of the tax under Rev. St. § 3221 (U. S. Comp. St. 1901, p. 2087). United States v. Guest [C. C. A.] 143 F. 456.

8, 9. United States v. Guest [C. C. A.] 143 F. 456.

10. Harkins v. Williard [C. C. A.] 146 F. 703.

11. The statutory lien of the government upon the distillery property for the payment of taxes on the product is only additional security, and when the lien is terminated by forfeiture for other cause, the liability of the sureties continues. United States v. U. S. Fidelity & Guaranty Co., 144 F. 866.

12. Harkins v. Williard [C. C. A.] 146 F. 703.

13. Rev. St. § 3334 (U. S. Comp. St. 1901, p. 2183). Harkins v. Williard [C. C. A.] 146 F. 703.

14. An allegation and proof that defendant was a wholesale dealer and failed to perform the duties imposed by Rev. St. § 3318 (U. S. Comp. St. 1901, p. 2164), is sufficient. Williams v. U. S. [Okl.] 87 P. 647.

15, 16. Williams v. U. S. [Okl.] 87 P. 647.

17. Must proceed against the distiller. Harkins v. Williard [C. C. A.] 146 F. 703.

18. An allegation in an answer to a suit on the distiller's bond to recover unpaid taxes that the assessment was "erroneous, unjust, and had no basis of fact to sustain the same" states a mere conclusion of law. United States v. U. S. Fidelity & Guaranty Co., 144 F. 866.

19. Western Exp. Co. v. U. S. [C. C. A.] 141 F. 28.

20. Admission of such rules and regulations held not error. Sprinkle v. U. S. [C. C. A.] 141 F. 811.

21. Act April 12, 1902, c. 500, § 4, 32 Stat. 97 (U. S. St. Supp. 1905, p. 445), allowing a

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a penalty and hence not barred by the five year statute of limitation relating thereto.[22] In prosecutions for the violation of internal revenue laws the general rules of criminal procedure are largely applicable.[23]

§ 3. *Oleomargarine Act, August 2, 1886.*[24]—An information for the forfeiture of an oleomargarine plant substantially in the words of the act is sufficient.[25] The general penalty prescribed for the nonpayment of revenue taxes is not applicable to the special taxes imposed by the Oleomargarine Act.[26] In an action to recover back taxes alleged to be excessive as based upon an erroneous finding that the oleomargarine sold by plaintiff contained coloring matter, plaintiff has the burden of disproving such fact.[27]

§ 4. *War Revenue Acts, June 13, 1898, and March 2, 1901.*[28]—A company engaged in the production and sale of natural gas and which incidentally pipes it from the point of production to the place of consumption is not engaged in transportation so as to render it taxable under the War Revenue Act;[29] and, moreover, the taxable excess contemplated by that act is that which grows out of the transportation business exclusively.[30]

The stamp act requiring certain documents, papers, etc., to be stamped does not render invalid oral contracts which if in writing would require stamps,[31] nor does the absence of stamps from a document render it inadmissible as evidence in the state courts.[32]

The legacy tax.—The Internal Revenue Department has prescribed special rules for the assessment of annuities and bequests of incomes.[33] Since the legacy tax did not attach until a year after the death of the testator, estates of decedents dying within the year prior to the repeal of the act are not taxable.[34] A contingent legacy[35] is not taxable until it becomes vested in actual possession and enjoyment;[36]

drawback on tobacco packages with unbroken seals, etc. United States v. Hyams [C. C. A.] 146 F. 15.

22. The interest prescribed by Rev. St. § 3184 (U. S. Comp. St. 1901, p. 2072) held not barred by Rev. St. § 1047 (U. S. Comp. 1901, p. 727). United States v. Guest [C. C. A.] 143 F. 456.

23. Where the indictment contains two counts based upon the same act and charging the same offense, one alleging the failure to provide the book and the other to make the proper entries therein, an election when the case goes to the jury is timely. Williams v. U. S. [Okl.] 87 P. 647.

24. See 4 C. L. 247.

25. Charged that the claimant was engaged in manufacturing oleomargarine and defrauded and attempted to defraud the United States of the tax on the oleomargarine produced. United States v. New Jersey Melting & Churning Mfg. Apparatus Co., 141 F. 475.

26. Rev. St. § 3176 (U. S. Comp. St. 1901, p. 2068), is not applicable to the collection of the special taxes imposed by the Oleomargarine Act, Aug. 2, 1886, c. 840, 24 Stat. 209 (U. S. Comp. St. 1901, p. 2228), being omitted from those enumerated in § 3. Schafer v. Craft, 144 F. 907.

27. Presumption exists that the tax was validity assessed. Schafer v. Craft, 144 F. 907.

28. See 6 C. L. 162.

29. Act June 13, 1898, § 27, c. 448, Schedule B, 30 Stat. 464 (U. S. Comp. St. 1901, p. 2306). United States v. Northwestern Ohio Natural Gas Co., 141 F. 198; United States v. Consumers' Gas Trust Co. [C. C. A.] 142 F. 134.

30. Cannot consider the profits made on the production and sale of the product itself. United States v. Northwestern Ohio Natural Gas Co., 141 F. 198.

31. An oral contract of insurance renewal held not invalid because of Act June 13, 1898, 30 Stat. 452, § 7 (U. S. Comp. St. 1901, p. 2292). King v. Phoenix Ins. Co., 195 Mo. 290, 92 S. W. 892.

32. Contract of sale of real estate. Phillips v. Hazen [Iowa] 109 N. W. 1096.

33. Where a specific sum is to be paid semi-annually to a designated beneficiary from trust funds and the income thereof, the bequest is taxable as an annuity and not as a bequest of income under the "regulations and instructions" of the department. Peck v. Kinney [C. C. A.] 143 F. 76.

34. Only taxes due and payable being saved by the repealing statute. McCoach v. Philadelphia Trust, Safe Deposit & Ins. Co. [C. C. A.] 142 F. 120.

35. A provision that the named sum shall be held in trust until the legatee shall arrive at his majority, "when the said sum * * * shall be his and shall be paid to him accordingly," etc., held contingent.

however, if the legatee is to have the income in the meantime, such present beneficial interest is taxable[37] if its value can be ascertained with reasonable certainty.[38] Legacies are not taxable until they come into actual possession and enjoyment,[39] and hence reversionary interests are not subject thereto until the termination of the precedent estate;[40] and, further, any method of assessment which tends to diminish the precedent estate is unauthorized,[41] and the use of the mortality tables to determine its value is error where there are other contingencies than death which may terminate the precedent estate.[42] While the legality of the use of mortality tables to ascertain the present value of life estates is questioned, it is error where the duration of such estate has been made certain by the death of the tenant.[43] Where legatees were to receive only the income from their respective shares until they attained certain ages which were not reached until after the repeal of the legacy act, only the amount actually received in excess of $10,000 is taxable;[44] and, in computing such amount, allowance made by the probate court for support pending the settlement of the estate cannot be included.[45] The personal estate of a testate is not subject to a legacy tax as an entirety for life because a fixed annuity for life is to be paid from the income thereof.[46] The legacy tax, being an ad valorem tax, is not "imposed" within the saving clause of the repealing act until assessed, which can be done only when the distributive share of the legatee has been fully ascertained.[47] Illegal taxes can only be recovered back when involuntarily paid[48] under protest,[49] notwithstanding the act authorizing the commissioner of internal revenue to make allowance for internal revenue stamps in "any manner wrongfully collected."[50] Illegal taxes paid under a mutual mistake of fact may be recovered.[51] One recovering taxes illegally exacted is entitled to interest thereon.[52]

§ 5. *Filled Cheese Act, June 6, 1896.*[53,54,55]

Shanley v. Herold, 141 F. 423; Herold v. Shanley [C. C. A.] 146 F. 20.

36. Contingent upon the legatee attaining his majority. Shanley v. Herold, 141 F. 423; Herold v. Shanley [C. C. A.] 146 F. 20.

37. Where the legatee is to receive the income until he reaches a certain age, the tax will be computed upon the amount he will receive before attaining that age if his life expectancy extends beyond such period. Shanley v. Herold, 141 F. 423.

38. Where the children were to receive one-fourth of the income of certain trust property until the widow died or remarried, when the property was to vest absolutely, there being no method of determining when, if ever, the widow was to remarry, the income is not taxable. Shanley v. Herold, 141 F. 423.

39. Though technically vested. Disston v. McClain [C. C. A.] 147 F. 114.

40. Where a testator left his estate in trust until the death or remarriage of his widow, when it was to go to his sons, such reversionary interest, not being "absolutely vested in possession and enjoyment," was not taxable. Shanley v. Herold, 141 F. 423; Herold v. Shanley [C. C. A.] 146 F. 20.

41. Herold v. Shanley [C. C. A.] 146 F. 20.

42. To vest upon the death or remarriage of the widow. Herold v. Shanley [C. C. A.] 146 F. 20.

43. Kahn v. Herold, 147 F. 575.

44, 45. Union Trust Co. v. Lynch, 148 F. 49.

46. Specific payments are alone taxable from time to time as they become payable. Disston v. McClain [C. C. A.] 147 F. 114.

47. Hence where the act was repealed before the settlement of disputed claims against the estate, no tax can be collected. United States v. Marion Trust Co. [C. C. A.] 143 F. 301.

48. The fact that a vessel departing for a foreign port without clearance papers was liable under Rev. Stat. § 4197 (U. S. Comp. St. 1901, p. 2840) and that such papers could not be obtained without presentation of stamped manifests of cargoes, does not render the purchase without protest of stamps for such purpose involuntary. United States v. New York & Cuba Mail S. S. Co., 200 U. S. 488, 50 Law. Ed. 569. Where executors paying a legacy tax on a life estate under protest were ignorant of the death of the life tenant, thus terminating the life estate, the payment was not voluntary so as to preclude a recovery. Kahn v. Herold, 147 F. 575.

49. A protest that the tax was illegal and invalid and had been illegally and improperly assessed, followed by a statement that it was paid only to avoid penalties, is sufficient, especially where there was a mutual mistake of fact. Kahn v. Herold, 147 F. 575.

50. Act May 12, 1900 (31 Stat. at L. 177, c. 393, U. S. Comp. St. 1901, p. 2276). United States v. New York & Cuba Mail S. S. Co., 200 U. S. 488, 50 Law. Ed. 569.

51. Tax upon a life estate assessed upon the probable duration as shown by the mortality tables, when as a fact it had been terminated by the death of the tenant. Kahn v. Herold, 147 F. 575.

52. Herold v. Shanley [C. C. A.] 146 F. 20.

53, 54, 55. See 4 C. L. 249.

INTERNATIONAL LAW.[56]

INTERPLEADER.[57]

§ 1. Nature of Remedy and Right to It (483). § 2. Procedure and Relief; Discharge of Stakeholder; Costs (484).

§ 1. *Nature of remedy and right to it.*[58] —One who invokes this relief must occupy the position of a neutral[59] in good faith[60] against whom the same duty or thing is claimed by different parties;[61] and he must have a reasonable doubt as to who is right.[62] He is not entitled to maintain the bill if by any act or fault of

56. No cases have been found for this subject since the last article. See 6 C. L. 163.

57. Chancery practice in interpleader, see Fletcher Eq. Pl. & Pr. §§ 772-792.

58. See 6 C. L. 163.

59. Between conflicting claimants who are in danger of being drawn into a controversy in which he has no concern save as an impartial stockholder. Green v. Davis, 118 Mo. App. 636, 96 S. W. 318. Cannot be maintained by one who has an interest in the subject of the controversy or who denies title in one of the claimants, or lends aid to another in establishing his claim. Id. Defendant in action on promissory note who had procured appointment of administrator with a view to having him claim the note because of the invalidity of a transfer of all of decedent's property, including the note to plaintiff, held not neutral, being interested as heir. Id. Must be mere stakeholder without any right of his own to be litigated. Defendant not entitled to file interpleader because another broker also claimed commission for selling land. Hartsook v. Chrissman, 114 Mo. App. 558, 90 S. W. 116. Where complaint against G and L alleged conversion of oil by G and that L asserted claim to it, G having delivered the oil to L on demand therefor and execution of bond, G was not entitled to protection as stakeholder, not occupying an impartial position. Trammell v. Guffey Petroleum Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 492, 94 S. W. 134.

60. Where a corporation sold all its property to another, a trust company with which was deposited the consideration and which was required to distribute it among the stockholders of the selling corporation, held not guilty of bad faith in informing the stockholders, who had already received what was thought to be their full share, of the existence of a further fund to which a bank claimed title by reason of being the holder of certain unissued treasury stock. Little v St. Louis Union Trust Co., 197 Mo. 281, 94 S. W. 890. Will not lie where complainant is obliged to admit, or where it appears that as to either of the defendants he is a tort feasor. Not where complainant must admit conversion of checks. Rauch v. Ft. Dearborn Nat. Bank, 223 Ill. 507, 79 N. E. 273. Insurance companies did not in their answer in nature of bill of interpleader admit fraud by merely alleging that plaintiff claimed that they were guilty of fraud in transferring certain policies. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577. Companies not guilty of any wrong in indorsing on the policies, at request of insured, a change of beneficiaries according to the terms of the policies. Id.

61. Where checks were wrongfully transferred to R, who indorsed them to complainant, who in turn received the money from the drawee banks who were thereafter sued thereon by the owners who claimed that the indorsements were forgeries, and the drawee banks called upon complainant for repayment, while R contended that the indorsements were valid, complainant could not compel the other parties to interplead. Rauch v. Ft. Dearborn Nat. Bank, 223 Ill. 507, 79 N. E. 273. Defendant in action for commissions for sale of land held not entitled to interpleader because another broker claimed a commission on the same sale, each claim being based upon a distinct contract alleged to have been made between claimant and defendant. Olsen v. Moran, 50 Misc. 655, 99 N. Y. S. 338.

62. To entitle one to maintain a bill of interpleader he must be a mere disinterested stakeholder or trustee, impartial in so far as his conduct may influence the judgment to be ultimately rendered, and he must act in good faith and have reasonable cause for a real doubt as to which of the claimants is entitled to the fund. Little v. St. Louis Union Trust Co., 197 Mo. 281, 94 S. W. 890. Trust company required to distribute a fund among stockholders of a selling corporation held to have reasonable cause for doubt as to whether holder of unissued stock was entitled to portion of fund. Id. One is entitled to file a bill of interpleader when he holds a fund or has a duty which he is ready and willing to pay or discharge, and defendants are claiming the same fund or duty, he being a mere disinterested stakeholder willing to abide by the judgment of the court as between the claimants and unable to determine to which he owes the debt or duty. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577. Insurance companies held entitled to file answer in nature of bill of interpleader where it was sought to subject proceeds of certain policies to payment of any judgment that might be recovered in a suit. Id.; Nixon v. Malone [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380. Not by contractor to call in one who furnished material to subcontractor where claim was clearly due the latter, who also claimed more than contractor admitted due. Mosier v. Kurchoff, 101 N. Y. S. 643. A drawee bank cannot demand that the drawer be made defendant and required to litigate with a bona fide holder the right to the amount called for by a check. Loan & Sav. Bank v. Farm-

his own he has created a double demand,[63] or incurred an independent liability to one of the claimants,[64] or instigated a contest for the fund in his possession,[65] nor where the effect would be to restrain a suit by one defendant against another in contract and compel him to sue complainant in tort.[66] It is immaterial whether the conflicting claims have all ripened into suits,[67] or whether the different claimants can adjust their differences in the one pending action.[68] Ordinarily the bill is maintainable only where the fund or property is claimed by hostile parties under adverse titles derived from a common source,[69] but an exception to this rule is presented in the case of a finder of personal property claimed by different persons.[70] The bill may be maintained though the claims are dependent only upon questions of law provided there is a sufficient doubt and hazzard.[71] The stakeholder's mere defending of suit by one of the claimants does not destroy indifferenee,[72] and if interpleader be brought before final judgment, it is sustainable,[73] at least where the law court was without jurisdiction of interpleader,[74] and providing the other claimant has been subjected to no added burden in asserting his claim.[75] In such a case, however, the law costs may be imposed on the stakeholder.[76]

Under a blended system of law and equity a defendant may set up as defensive pleading facts entitling him to this remedy.[77]

Statutory proceedings.[78]—The granting of an order of interpleader does not necessarily involve the exercise of equity jurisdiction.[79]

§ 2. *Procedure and relief; discharge of stakeholder; costs. Process and pleading.*[80]—One is not deprived of his right to maintain interpleader by reason

ers' & Merchants' Bank [S. C.] 54 S. E. 364. Petition held not to authorize judgment of court as to proper party to whom plaintiff should pay a note given to an executrix for certain land, since, if it were to be paid at all, the administrator of the executrix was evidently the only person who could be entitled to it. Clark v. Carter [Mo.] 98 S. W. 594.

63. Insurance companies did not create double demand by indorsing on certain policies a change in the name of beneficiaries as required by the policies. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

64. Where in action against estate of insured it was sought to subject the proceeds of certain insurance policies payable to insured himself and plaintiff contended that the beneficiaries had been changed with intent to defraud creditors, the insurance companies by indorsing on the policies a change in the name of the beneficiaries in good faith, as required by the policies, did not incur an independent liability to the new beneficiaries. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W 577; Id. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

65. Procuring appointment of administrator for purpose of having him claim note sued on. Green v. Davis, 118 Mo. App. 636, 96 S. W. 318.

66. Owners of checks could not be compelled to interplead where they had commenced suit thereon against drawee banks who had paid them to complainant to whom they had been wrongfully transferred, as complainant could be liable to owners only in conversion. Rauch v. Ft. Dearborn Nat. Bank, 223 Ill. 507, 79 N. E. 273.

67. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

68. Sufficient to offer to bring money into court and show that claims in fact exist. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

69. Lavelle v. Belliu [Mo. App.] 97 S. W. 200.

70. Bailee of finder held entitled to maintain bill in equity on ground of inadequacy of remedy at law, since he might be harassed by different lawsuits. Lavelle v. Belliu [Mo. App.] 97 S. W. 200. Where finder of $500 bill announced to plaintiff, his bailee, his intention to convert it to his own use, plaintiff was bound to retain it until the ownership could be determined. Id.

71. Question of law sufficiently serious to entitle trust company to interpleader for determination of right of a bank to a certain fund as holder of certain unissued stock of a corporation whose property was sold to another corporation. Little v. St. Louis Union Trust Co., 197 Mo. 281, 94 S. W. 890.

72, 73. Stakeholder defended in justice's court and being there defeated took an appeal which vacated the judgment. Lackmann v. Klauenberg [Cal. App.] 84 P. 776.

74. Lackmann v. Klauenberg [Cal. App.] 84 P. 776, citing Lozier's Ex'rs v. Van Saun's Adm'rs, 3 N. J. Eq. 325.

75, 76. Lackmann v. Klauenberg [Cal. App.] 84 P. 776.

77. Nixon v. Malone [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

78. See 6 C. L. 164.

79. So as to invalidate Municipal Court Act, § 187 (Laws 1902, p. 1546, c. 580), giving municipal court authority to make such order. Satkofsky v. Jarmulowsky, 49 Misc.

of the fact that one claimant resides in another county.[81] The bill must set out the particular facts upon which the right to relief is based.[82] A subsequent pleading in an already pending action may be treated as an original bill of interpleader provided it contains the necessary averments.[83] The defendants may voluntarily join issue as between themselves before trial of the action of interpleader so as to render unnecessary an order of court directing issues to be made thereafter.[84] An answer in the nature of a bill of interpleader praying no relief except by judgment at the end of the trial need not be verified.[85]

Discharge.[86]

Further proceedings.[87]—After the discharge of complainant the case ordinarily proceeds to trial as between the claimants.[88] Issues of fact in cases of interpleader are properly cognizable in equity.[89]

Statutory interpleaders.[90]—A defendant who moves for interpleader must state facts in his affidavit sufficient to throw a real doubt upon the right of plaintiff to recover.[91]

Costs.[92]—Upon his discharge complainant is ordinarily entitled to costs out of the fund held by him;[93] but not so where he institutes an unnecessary suit.[94]

INTERPRETATION; INTERPRETERS; INTERSTATE COMMERCE; INTERVENTION, see latest topical index.

624, 97 N. Y. S. 357. Municipal court has power to grant order of interpleader. Englander v. Fleck, 101 N. Y. S. 125.

80. See 6 C. L. 164.

81. Where money held by insurers was sought to be subjected in action for wrongful death, that defendant's executrix resided in another county did not deprive insurers of right to join her in interpleader in original action. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

82. Should include allegations relating to the character of the different claims made, that there is a reasonable doubt on the facts or law as to whom the money or duty belongs which petitioner cannot safely determine and that the claims made are but a single demand growing out of the same duty or obligation. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

83. Supplemental answer of bank suing on a note to cross bill of defendant claiming credit for a deposit and making another claimant a party. Ellis v. National Exch. Bank [Tex. Civ. App.] 86 S. W. 776.

84. Commission to take testimony authorized before trial of interpleader. National Bank of Commerce v. Irwin, 97 N. Y. S. 234.

85. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

86, 87. See 6 C. L. 164.

88. On issue in interpleader whether land the sale of which gave rise to the fund was purchased by one claimant under joint contract with the other or under a later contract, evidence held to support finding that purchase was under the second contract, Commercial Bank of Weldon, 148 Cal. 601, 84 P. 171.

89. Gen. St. 1902, § 720, provides for a jury trial in cases involving such issues of fact as prior to 1880 would not be properly cognizable in equity. Held an action by a stakeholder to require claimants of money to interplead did not require the statute (Gen. St. 1902, § 1019, first enacted in 1893, Pub. Acts 1893, p. 222, c. 42), to support it, but was properly cognizable in equity prior to 1880, and hence either defendant was not entitled to have it placed on the jury docket. Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338.

90. See 6 C. L. 165.

91. Mere statement that one P claimed the note in suit which was made payable to plaintiff or P held insufficient. Allen v. Quackenbush, 48 Misc. 627, 96 N. Y. S. 198.

92. See 6 C. L. 165.

93. Where in an action for damages it was sought to subject the proceeds of certain insurance policies to the payment of plaintiff's claims, insurance companies which filed an answer in the nature of a bill of interpleader were entitled to reasonable costs and attorney's fees out of the proceeds on the payment thereof into court, provided they acted in good faith. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577. Instructions to lower court in former appeal held not to allow interpleaders to judge of attorney's fees to which they were entitled. Id. [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

94. Where in an action for damages it was sought to subject the proceeds of certain insurance policies to the payment of plaintiff's claim and insurer filed answer in the nature of interpleader, but later instituted separate action of interpleader in the same court, the same was properly dismissed with costs against insured. Nixon v. Malone [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380.

INTOXICATING LIQUORS.

§ 1. **Control of Liquor Traffic; Validity of Statutes and Ordinances (486).**
§ 2. **Local Option Laws (488).**
§ 3. **Licenses and License Taxes (491).** Appeal and Review (495). Bonds (496). Transfer of Licenses (496). Revocation, Cancellation, and Surrender (497).
§ 4. **Regulation of Traffic (499).** Dispensary System (500).
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A. Offenses and Responsibility Therefor in General (500).
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§ 7. **Summary Proceedings (516).**
§ 8. **Abatement of Traffic as a Nuisance; Injunction (516).**
§ 9. **Civil Liabilities for Injuries Resulting From Sale (517).**
§ 10. **Property Rights In and Contracts Relating to Intoxicants (519).**
§ 11. **Drunkenness as an Offense (519).**

Matters relating to the Federal internal revenue laws,[1] and the sale of liquor to Indians,[2] are treated elsewhere.

§ 1. *Control of liquor traffic; validity of statutes and ordinances.*[3]—No one has a natural or inherent right to sell intoxicating liquors,[4] nor is their sale as a beverage a privilege guarantied to the citizens of the United States.[5] Hence, the state may, under its police power, regulate, restrict,[6] or prohibit,[7] the sale thereof, provided it does not thereby interfere with interstate commerce.[8] The Federal

1. See Internal Revenue Laws, 8 C. L. 478.
2. See Indians, 8 C. L. 179.
3. See 6 C. L. 165.
4. Harrison v. People, 222 Ill. 150, 78 N. E. 52; State v. Seebold, 192 Mo. 720, 91 S. W. 491; City of Joplin v. Jacobs, 119 Mo. App. 134, 96 S. W. 219; State v. Corron, 73 N. H. 434, 62 A. 1044. Retailing intoxicating liquors is not a privilege which the citizen could exercise as a right, and a statute prohibiting or curtailing that occupation is not a violation of the 14th Amendment of the Fed. Const., but after a license is issued, all licensees similarly situated are entitled to equal privileges as licensees. Meehan v. Jersey City Com'rs [N. J. Law] 64 A. 689.
5. State v. Richardson [Or.] 85 P. 225.
6. Harrison v. People, 222 Ill. 150, 78 N. E. 52. It is a privilege only, to which the state may annex any condition it sees fit, or it may prohibit sales altogether. City of Joplin v. Jacobs, 119 Mo. App. 134, 96 S. W. 219. May forbid or merely license sale. State v. Corron, 73 N. H. 434, 62 A. 1044. Right of ownership in intoxicants is subject to such regulation or restriction as is necessary to protection of public. Cain v. Allen [Ind.] 79 N. E. 201. Extent to which regulations or restraints may be carried is within sound discretion of legislature, except as it may be restrained by some constitutional fundamental law. Id. May regulate or restrict traffic under police power. Commonwealth v. McCann, 29 Ky. L. R. 707, 94 S. W. 645. Right to regulate is within police power and is practically limitless. Meehan v. Jersey City Com'rs [N. J. Law] 64 A. 689. Restrictions may be imposed which might be obnoxious as an illegal restraint of trade if applied to other pursuits. State v. Calloway [Idaho] 84 P. 27. No person has a vested constitutional right to retail intoxicants. City of New Orleans v. Smythe, 116 La. 685, 41 So. 33. State law regulating or prohibiting the selling, or keeping for sale, of intoxicating liquors, is a legal exercise of police power and is not in contravention of 14th amendment to Fed. Const. State v. Frederickson [Me.] 63 A. 535. Licensee cannot object to any conditions which have been attached to the grant of the privilege. State v. Corron, 73 N. H. 434, 62 A. 1044.
7. Within any designated locality. State v. Piner [N. C.] 53 S. E. 305. Prohibitory law (Pub. St. 1901, c. 112), held in force generally in license towns, except in so far as it is rendered inapplicable by special license legislation. State v. Langdon [N. H.] 64 A. 1099. Statute prohibiting sale in a district where sale has theretofore been lawful is not unconstitutional as depriving dealer of his property without due process of law, in that he is deprived of the use of property theretofore used in the carrying on of such business as well as the business itself. Clark v. Tower [Md.] 65 A. 3.
8. See, also, Commerce, 7 C. L. 667. Interstate commerce is not subject to local option laws of state into which liquor is brought by a carrier. Adams Exp. Co. v. Com., 29 Ky. L. R. 904, 96 S. W. 593. Where liquor is ordered at a point without the state and shipped C. O. D. by express to the purchaser at a point within a local option district and purchaser there pays C. O. D. charges and express charges, local option laws do not apply. Id. Transaction held not to be interstate commerce. Adams Exp. Co. v. Com., 29 Ky. L. R. 224, 92 S. W. 932. Act prohibiting sale of wines within a certain county, without a license, excepting wines made within county, will not be construed as an attempt to regulate interstate commerce and hence void, but will be construed so as to allow the sales of wines, irrespective of place where manufactured, without a license. Glover v. State [Ga.] 55 S. E. 592. Liquor dealer without state has right to there receive orders for liquors and ship them C. O. D. to persons in Iowa, since sale in such

statutes permit the police powers of a state to be applied to liquors, which have been shipped into such state as an article of interstate commerce, after they have reached the end of the shipment and have been delivered to the consignee.[9] Irrespective of the statute, liquors brought from another state are subject to state taxation after reaching their destination and while held in the state for sale in the original packages.[10] It is competent for the legislature, in the absence of constitutional restriction, to prohibit the sale of liquor within a certain territory, and it may also prohibit sales within territory within the state lying within a designated distance of a point without the state.[11]

The authority of municipalities to prohibit,[12] license,[13] or regulate [14] the sale of

case is not within state, and state has no power to prohibit such sale as so doing would infringe interstate commerce clause of U. S. Const. State v. Bernstein, 129 Iowa, 520, 105 N. W. 1015. Liquors shipped from one state into another are not subject to seizure in latter, on ground that they are intended for unlawful sale, until after they have been delivered to the consignee, as statutes authorizing such seizure are in derogation of the Federal Constitution regulating interstate commerce. Arrival at town of residence of consignee does not terminate transportation by an express company, as latter is bound to deliver personally or at consignee's residence. State v. Intoxicating Liquors, 101 Me. 430, 64 A. 812. Laws 1905, p. 379, c. 159, prohibiting soliciting of orders for sale of intoxicants in local option territory, held unconstitutional. Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 706, 92 S. W. 1086. Statute or ordinance requiring a license by one who sells beer in original packages which are shipped to him from other states, he being the purchaser from brewer, and delivering from his own warehouse, does not impose a restraint on interstate commerce. City of Mobile v. Phillips [Ala.] 40 So. 826.

9. Act Aug. 8, 1890, c. 728 (26 St. 313), in effect provides that it shall lose its character as interstate commerce upon the completion of delivery under the contract of interstate shipment and before sale in the original packages. Meyer, Jossen & Co. v. Mobile, 147 F. 843. Hence, city ordinance imposing license tax on dealers in such liquors is valid, provided it is enacted as a police regulation in the exercise of the police powers of the city and not merely as a revenue measure. Id. Any doubt will be resolved in favor of the law being within the police power, and unless it clearly appears on face of ordinance that its purpose was to exact a tax, it will be regarded as imposing a license for regulation. Id. Ordinance imposing license tax on dealers in beer held one enacted as police regulation in exercise of powers conferred on city by charter. Id. Liquors shipped into one state from another do not become subject to former's police regulations until delivered to the consignee. Samuel Westheimer & Sons v. Habinck [Iowa] 109 N. W. 189. Code 1896, § 5087, which makes it an offense to solicit an order for liquor to be shipped into a district where the sale of liquor is prohibited, is unconstitutional so far as it applies to residents of another state who solicit orders for liquors to be shipped from without the state to a person within such district, Wilson Act having no application to such a case. Moog v. State [Ala.] 41 So. 166.

10. Ordinance imposing license tax on dealers in beer valid as to beer brought from another state and sold in original packages. Meyer, Jossen & Co. v. Mobile, 147 F. 843.

11. Clark v. Tower [Md.] 65 A. 3.

12. Police jury has power to license sale of liquors and to regulate the business, but it has no power to prohibit their sale since the legislature has vested that power in the voters. State v. Police Jury, 116 La. 767, 41 So. 85. Charter provision authorizing city council to prohibit and suppress tippling houses, saloons, and dramshops, held not to confer power to enact an ordinance making it a criminal offense to solicit and receive orders for liquor within the city. Town of Homer v. Brown, 117 La. 425, 41 So. 711.

13. Municipal corporation has no inherent power to grant licenses or to exact license fees, but must derive all its authority from the state, and the power must be a direct grant and cannot be taken by implication. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423. Power to issue licenses and the term for which they may be issued, only such as is conferred by the legislature. City of Albion v. Boldt [Mich.] 13 Det. Leg. N. 430, 108 N. W. 703. Charter provision authorizing prohibition of illegal sales, held not to authorize ordinance making it unlawful for any railroad or express company, or any other person, to deliver any package of liquor without first paying into the city treasury a certain sum as a license. Southern Exp. Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185. City charter, giving council power "to suppress, regulate, and prohibit" the sale of intoxicants, held to give it no power to license sale. Pacific University v. Johnson, 47 Or. 448, 84 P. 704. Under Laws 1903, c. 5363, city of Tampa has authority to impose license tax. Lachman v. Walker [Fla.] 42 So. 461. Acts Ky. 1871-72, c. 976, authorizing the District of Highlands to license the sale of liquors, is not repealed by Ky. St. 1903, § 4203. Commonwealth v. Petri, 28 Ky. L. R. 940, 90 S. W. 987. City council of Atlantic City has power to license inns and taverns. Conover v. Atlantic City [N. J. Err. & App.] 64 A. 146.

14. Charter power to regulate saloons justifies penal ordinances prescribing the hours when they shall open and close. City charter held to authorize passage of certain or-

intoxicants depends upon the provisions of their charters and the general statutes regulating the subject.

§ 2. *Local option laws.*[15]—State constitutions[16] and statutes frequently provide for the submission to popular vote of the question whether or not the sale of liquor shall be allowed in the various subdivisions of the state[17] on the filing of a petition for that purpose,[18] signed by a certain number of qualified electors,[19] whose signatures are sometimes required to be acknowledged before an officer authorized to administer oaths.[20] Petitioners whose signatures have been obtained intelligently and without fraud, and have not been erased before presentation, ordinarily cannot withdraw their names from the petition after it has been filed without leave of court for good cause shown.[21]

Where the right to vote is inaugurated by petition, the election is a special one,[22] and hence all the statutory requirements as to proclamations, orders, or other

dinance. State v. Calloway [Idaho] 84 P. 27. Rev. St. § 5508, giving to cities of second class exclusive power to license, regulate, or suppress dramshops, operates to except from the operation of a state law the cities of that class, and the subsequent enactment of a general state law, prohibiting Sunday sales, does not operate to repeal an ordinance of a city allowing sale on Sunday between certain hours. State v. Binswanger [Mo. App.] 98 S. W. 103. Person selling within hours during which sale was permitted held not liable to conviction for selling goods on Sunday, under Rev. St. 1899, § 2243. Id.

15. See 6 C. L. 170.

16. Constitutional guaranty of local option to a county cannot be abrogated by the legislature by any provision in a charter subsequently granted to a city in such county, and hence local option law, adopted by county, controls provisions of city charter giving right to regulate sale of liquor, whether charter is granted before or after adoption of local option. Ex parte Elliott [Tex. Cr. App.] 15 Tex. Ct. Rep. 257, 91 S. W. 570.

17. Local option law (Laws 1905, p. 41, c. 2), does not violate Const. art. 2, § 1, providing that all elections shall be free and equal (State v. Richardson [Or.] 85 P. 225), or Const. art. 1, § 20, prohibiting the granting of privileges or immunities to any citizen, or class of citizens, which shall not, upon the same terms, belong equally to all citizens (Id.), or Const. art. 4, § 20, requiring every act to embrace but one subject, expressed in its title (Id.). Orders made by judges for elections under the Brannock law are not the judgments or orders of the court, and hence are not within the rule that one judge will not undertake to review the orders or judgments of another judge of the same court. Fulton v. Columbus, 3 Ohio N. P. (N. S.) 358.

18. Petition must request the submission of the four questions prescribed by statute. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

19. Petition for an election, under the Brannock law, which is legally insufficient in this regard, cannot take precedence over a legal petition, covering overlapping territory, properly filed before the insufficient petition is made sufficient. Petition not signed by sufficient number of electors. Fulton v. Columbus, 3 Ohio N. P. (N. S.) 358. Fact that names of all the petitioners are not on one paper is immaterial, if signatures are properly acknowledged. In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473. An order for a local option election, which recites that the election has been asked for "by the requisite number of electors," to wit, not less than one-third of the qualified electors, as shown by the transcripts of the poll lists, and return of the county canvassers, is sufficient, and need not state the number of petitioners or the number of electors voting at last election. Attorney General v. Van Buren Circuit Judge, 143 Mich. 366, 12 Det. Leg. N. 1017, 106 N. W. 1113. Will be presumed in criminal prosecution that petition was signed by requisite number, where board of supervisors have so found. People v. Hamilton, 143 Mich. 1, 12 Det. Leg. N. 897, 106 N. W. 275. An order of the county court reciting that a petition for the submission of the local option law was signed by over one-tenth of the qualified electors of the county is sufficient, though the statute requires that it shall be signed by at least one-tenth of the electors authorized to vote for members of the legislature, since all electors are authorized to vote for the members of the legislature. State v. Foreman [Mo. App.] 97 S. W. 269.

20. Under Laws 1896, p. 57, c. 112, § 16, signing and acknowledgment are both essential, and conditions precedent to valid submission. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616. Requirement as to acknowledgment is to be read in connection with statutory construction law (Laws 1892, p. 1488, c. 677, § 15), and Laws 1896, p. 611, c. 547, § 255, relating to acknowledgments of conveyances, and Code Civ. Proc. § 937. Id. Petition held insufficient where there was no certificate of acknowledgment, but merely a statement after some of the signatures, "Subscribed and sworn to before me," etc. Id. Certificate of justice, that the "above named persons" appeared before him and signed petition in his presence, held insufficient, as not showing an acknowledgment. Jackson v. Seeber, 50 Misc. 479, 100 N. Y. S. 563.

21. Held that names would not be stricken for reason that boys and old men residing in proposed prohibition district could buy whiskey in state of Missouri, that fact

means of giving notice, are mandatory and must be complied with in order to give it validity.[23] So, too, all statutory provisions in regard to putting the law into effect must be complied with.[24] The territorial limits within which the law may be put in force,[25] the manner of ordering,[26] the giving of notice of[27] and time of holding the election,[28] and the manner[29] and place of voting,[30] are governed entirely by statute. A resubmission is sometimes provided for where the matter has not been properly submitted the first time.[31] Provision is generally made for a con-

having been known to petitoners when they signed. Clark v. Daniel, 77 Ark. 122, 91 S. W. 9.

22, 23. Marsden v. Harlocker [Or.] 85 P. 328.

24. If election was not conducted in accordance with statutory requirements, it is void and not merely voidable, and all proceedings had under and by virtue thereof are void, and may be questioned directly or collaterally. Chenowith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 695, 96 S. W. 19.

25. Laws 1905, p. 41, c. 2, makes county utmost limit and precinct smallest territory in which law may be put in operation, and a majority vote in entire county in favor of prohibition prevents sale of intoxicante in any precinct, though majority of electors in such precinct may have voted against law. State v. Richardson [Or.] 85 P. 225. So, too, prohibition must be enforced in precinct where majority vote favors it, though majority vote in other parts of territory in which question is submitted oppose it. Id. Law can be put in operation only by a vote of the people and extends only to the limits of the territorial subdivision adopting it. Cross v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 218, 94 S. W. 1015. School districts cannot be combined for the purpose of holding election in the combined district. Anderson v. State [Tex. Cr. App.] 92 S. W. 39.

26. Under Laws Mich. 1899 (Act No. 183), the resolution of the board of supervisors, directing the submission of the adoption of the local option law to the electors, is a conclusive determination that the necessary steps have been taken to give it jurisdiction. Attorney General v. Van Buren Circuit Judge, 143 Mich. 366, 12 Det. Leg. N. 1017, 106 N. W. 1113. Statutory requirement that supervisors shall find by the adoption of a resolution that petition was signed by requisite number of electors is complied with by a resolution ordering the election to be held where the preamble of such resolution recites that the petition has been signed by the requisite number of electors. People v. Hamilton, 143 Mich. 1, 12 Det. Leg. N. 897, 106 N. W. 275. Laws 1905, p. 41, c. 2, §§ 1, 3, 6, 12, 14, construed and held that after county clerk has examined petition for an election, it is duty of county court to inspect petition and to examine its records to see whether application complies with act, and, if it does, to then order an election, which order is a condition precedent to a valid election. Marsden v. Harlocker [Or.] 85 P. 328. Where court did not meet in regular or special session, nor assemble at time and place prescribed by law, held that memorandum signed by members purporting to authorize election was not an order within accepted meaning of term, and election held pursuant thereto was void. Id. County judge and county commissioner, not having assembled at a time prescribed by law or by order of court, held that they did not compose county court for transaction of county business, and hence could not make valid order authorizing the calling of an election, and their attempt to do so was void. State v. Rhodes [Or.] 85 P. 332.

27. Must show that notice was given and posted as required by law. Brooks v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 98 S. W. 936. Local option law as to notices held not repealed by the Terrell Law (Laws 1903, c. 101), so that election held pursuant to notice given thereunder was valid. Parks v. State [Tex. Cr. App.] 96 S. W. 328. Notice published four successive times in a weekly paper, the last publication being more than ten days prior to the election, held sufficient. State v Dobbins, 116 Mo. App. 29, 92 S. W. 136.

28. Under Acts 1899, requiring question of local option to be presented to voters at next annual township election after petition, an order directing submission at election to be held on certain date, it being the day for the annual election, need not recite that such day is the day set for such annual election. Attorney General v. Van Buren Circuit Judge, 143 Mich. 366, 12 Det. Leg. N. 1017, 106 N. W. 1113. Acts Gen. Assembly 1903, p. 288, c. 233, prohibits holding of election within 90 days of any city, county, or general election, and mandamus will not lie to compel holding election contrary to terms of such provision. State v. Raleigh [N. C.] 55 S. E. 145. Act also requires election to be held in same year in which petition therefor is filed, and hence mandamus will not be granted to compel holding of election during subsequent year. Id.

29. Use of carbon copy outfit held to destroy secrecy of ballot and render votes illegal. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453. Failure of presiding judge of election district to write his name on the ballot precludes the counting of ballots not so endorsed. Brigance v. Horlock [Tex. Civ. App.] 17 Tex. Ct. Rep. 62, 97 S. W. 1060.

30. The fact that an election under the Beal law is general, the result affecting the entire community alike, does not furnish warrant for the casting of his ballot by a voter in some other ward than the one in which he resides, and a ballot so cast is an illegal ballot. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453.

31. Laws 1896, p. 57, c. 112, § 16, provides for resubmission to special town meeting in case, for any reason except failure to file petition, four propositions required to be submitted shall not have been properly sub-

test by persons interested,[32] in which case one charged with a violation of the law cannot defend on a ground which goes to the validity of the election and which was reviewable by a contest.[33] The validity of an election cannot be inquired into by certiorari.[34] Where the original submission is invalid for want of a sufficient petition, the remedy is not by mandamus[35] nor by a resubmission,[36] but an individual may maintain a suit to enjoin proceedings under the election to the prejudice of his rights.[37] The fact that illegal votes are cast or that the votes are not properly counted does not ordinarily vitiate the election, but the remedy is by a contest.[38]

The manner of putting the law in force in case the election results in favor of prohibition is wholly statutory and varies in the different states. Publication in a newspaper is sometimes provided for.[39] In some states the county court is required to make an order declaring the result of the vote and absolutely prohibiting the sale of intoxicants within the prescribed limits.[40] In others a certified copy of the result is required to be filed in the office of the licensing officer and made the basis of his action in issuing or refusing to issue licenses.[41] The county court is some-

mitted. In re Burrell, 50 Misc. 261, 100 N. Y. S. 470. Submission of four questions is not complete until vote is canvassed and result ascertained. Id. Resubmission will not be ordered for irregularities in canvassing votes where reasonable inference from all affidavits is that proper canvass would not have affected the result. Id. Where recanvass of votes is impossible, owing to fact that boxes were not locked, application for order directing special town meeting for purpose of resubmission is proper remedy. Id. Numbering of questions on voting machine held proper and legal and not misleading. In re Cipperley, 50 Misc. 266, 100 N. Y. S. 473. Serving of refreshments to voters, within prohibited limits, for purpose of influencing votes, held not to have invalidated election, or to require resubmission. Id. Fact that business interests of town will be injured, unless sale of liquors is permitted, is no ground for resubmission. Id. Is a condition precedent to resubmission that legal petition requesting original submission was presented, and hence question whether original petition was signed and acknowledged, according to law, cannot be raised on application for resubmission. Id.

32. Interest of liquor sellers in the result of a Beal Law election is not of such a character as to entitle them to be made parties to a suit contesting an election which resulted, on the face of the returns, in favor of the sale of liquors. Jackson v. Washington, 3 Ohio N. P. (N. S.) 453. Where a review is desired of proceedings under the Jones Local Option Law (98 O. L. 68), the qualified elector who feels aggrieved should appear as plaintiff and the mayor of the municipality in question as the defendant in error. In re The Jones Local Option Law, 8 Ohio C. C. (N. S.) 574.

33. Cannot defend on ground that election was void because of some irregularity in conducting it, but may do so on ground that county court had no jurisdiction to order election or that statute under which it was held was invalid, since such matters cannot be reached by a contest. Cole v. Com. [Ky.] 98 S. W. 1002.

34, 35. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

36. To special town meeting. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

37. Owner of building, leasing it with provision that lessee might cancel lease if local option election should result in negative vote, held entitled to injunction, though he did not sue in behalf of himself and all others interested. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

38. Bordwell v. State, 77 Ark. 161, 91 S. W. 555.

39. Under Sayles' Rev. Civ. St. § 3391, requiring notice to be published four times in a paper designated by the county judge, publication three times in a paper so designated and a subsequent publication in another paper with his permission is insufficient. Chenowith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 695, 96 S. W. 19. State held entitled to rely on local option law which went into effect under election of 1903, though another election had been held in 1905 previous to alleged sale by defendant, where it appeared that law adopted at last election had not been published, and it did not even appear that it had been put into operation. Givens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 361, 91 S. W. 1090. Where publication is enjoined, publication immediately after dissolution of injunction is sufficient. Riggs v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 293, 97 S. W. 482.

40. Laws 1905, c. 2, § 10, does not violate Const. art. 4, § 23, subd. 3, prohibiting special legislation regulating practice in courts (State v. Richardson [Or.] 85 P. 225), or Const. art. 7, §§ 1, 12, fixing jurisdiction of county court (Id.). Provision of Const. art. 7, § 12, vesting county court with such other powers and duties as may be prescribed by law, requires court to discharge duties imposed upon it by § 10 of the act. Id. Declaration of the result of vote and interdiction of sale of liquors is a ministerial act, in discharge of which court exercises neither judgment nor discretion, and hence mandamus lies to compel performance. Id.

41. County treasurer has no authority to look behind copy of statement of result filed with him pursuant to Laws 1896, p. 57, c. 112, § 16. In re Tinkcom, 50 Misc. 250, 100 N. Y. S. 467. On certiorari to review his

times authorized to grant licenses if the majority of votes cast are for licenses.[42] An order of the county court revoking an order prohibiting the sale of liquor in a certain territory is self-executing and remains in force until set aside or superseded, and hence is not suspended by an appeal therefrom.[43] Clerical errors in an order declaring the result of the election are immaterial.[44] It is generally provided that after the adoption of prohibition, a second election cannot be held for a specified time.[45]

There is a conflict of authority as to the effect of the adoption of the local option law on the general laws relating to the sale of intoxicants.[46]

As a general rule the local option law continues in force in a new county organized from territory forming a part of an old county in which it is in force,[47] and in the territory comprised in a municipality which has adopted it, though subsequently annexed to a municipality which has not.[48]

§ 3. *Licenses and license taxes.*[49]—The authority of municipal corporations to require licenses is treated in a prior section.[50] As a general rule the licensing authorities may exercise a reasonable discretion in granting or refusing a license.[51]

action in refusing to issue certificate he will not be compelled to make a part of his return a certified copy of the report of the votes cast, § 28 only requiring him to include copies of papers on which his action is based. Id.

42. Under Kirby's Dig. § 5120, its jurisdiction to grant licenses depends upon the actual result of the election and not upon the act of the county board of election commissioners in laying the returns of the election before it, and hence it is not deprived of jurisdiction by board's failure to do so. Bordwell v. State, 77 Ark. 161, 91 S. W. 555.

43. Bordwell v. State, 77 Ark. 161, 91 S. W. 555.

44. Fact that order recites that the election was held on the 16th instead of the 15th, the true date, the proceedings in other respects being regular, will not invalidate the election. Luck v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 358, 97 S. W. 1049.

45. Election cannot be held in a commissioners precinct, composed of two justices precincts, within two years after an election in one of said precincts which resulted in favor of the adoption of local option Ex parte Randall [Tex. Cr. App.] 17 Tex. Ct. Rep. 459, 98 S. W. 870. An election, held under the Brannock law, within a part of the territory which formerly constituted a municipal corporation in which a Beal law election was held, before it was annexed to another muicipality, and within two years of the date of such Beal law election, is invalid. In re Davis, 4 Ohio N. P. (N. S.) 417.

46. Georgia: One illegally selling liquor in county where selling thereof is altogether prohibited cannot properly be indicted for the statutory offense of selling without a license. Moore v. State [Ga.] 55 S. E. 327.

Texas: Where the local option law has been adopted in a specified territory, it supersedes all other statutory provisions in regard to the sale of intoxicating liquors. Cross v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 218, 94 S. W. 1015. Operates as a repeal of all laws in conflict with it and also their penalties, and exempts from punishment all persons who may have offended against the provisions of the repealed laws. Long v. Green & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 110, 95 S. W. 79. Suspends law prohibiting sales to minors, and hence one cannot be convicted of selling liquor to minors in local option territory. Dean v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 314, 92 S. W. 38. Hence, in such territory, an indictment simply charging a sale to a minor is insufficient, since the violation is of the local option law and not the statute prohibiting a sale to a minor. Tompkins v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 766, 90 S. W. 1019. Does not, however, suspend law prohibiting the "giving" of liquor to minors since two are not inconsistent. Deisher v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 680, 96 S. W. 28. There being no statute authorizing license for selling malt liquors in local option precinct, one cannot be convicted under an indictment charging sale thereof without license where record shows that sale, if any, was in such a precinct. Hail v. State [Tex. Cr. App.] 90 S. W. 503.

Virginia: General statutory provisions prohibiting unlawful sale of liquor, and imposing a penalty for so doing, are applicable in local option territory as well as elsewhere. Fletcher v. Com. [Va.] 56 S. W. 149.

47. Under express provisions of Acts 1905, p. 46, authorizing organization of new counties, held that the local prohibition law prevailing in Dooly County immediately became in full force and effect in Crisp County when latter was organized from territory embraced in former, and hence there could be no legal sale of liquor therein until law was changed. Moore v. State [Ga.] 55 S. E. 327; Parker v. State [Ga.] 55 S. E. 329. Court will take judicial notice that before organization of latter its territory was part of former. Id.

48. In re Davis, 4 Ohio N. P. (N. S.) 417.

49. See 6 C. L. 174.

50. See § 1, ante.

51. Where ordinance authorizes issuing

The contents of the petition or application for a license,[52] the amount of the license tax and the manner of determining[53] and collecting it,[54] whether separate licenses for sales at wholesale and at retail[55] and for each place where sales are made[56] are required, whether a dealer must have both a city and a county[57] or a city and a

of a license on certain conditions, licensing officers cannot arbitrarily refuse same, nor discriminate between persons, places, and regulations pertaining to the business, without reasonable grounds therefor; but unless expressly restricted by the ordinance, they may exercise a reasonable discretion. Harrison v. People, 222 Ill. 150, 78 N. E. 52. Licensing authorities exercise a sound discretion in granting or refusing an application, and may in their discretion refuse to license though no remonstrance is made. In re Jorgensen [Neb.] 106 N. W. 462. The power should not be exercised arbitrarily but it will be presumed that the action taken was in good faith and for right motives. Id.

52. Fact that names of proposed sureties on the bond proposed to be given by the licensee are omitted from the petition does not deprive court of power to issue the license, a bond with sufficient sureties being in fact presented. In re Matthew's License, 213 Pa. 269, 62 A. 837, afg. 28 Pa. Super. Ct. 384. Fact that spaces left in printed form of application for names of sureties were not filled in held not a fatal defect, but one of form only which was curable by amendment, where on same sheet with petition was a bond duly executed by applicant and his sureties, and motion to amend was accompanied by affidavit that names were omitted by mistake. Oberfell's License, 28 Pa. Super. Ct. 68. Act April 24, 1901 (P. L. 102), requiring certificate relating to financial standing of any person who is surety upon more than one liquor dealer's bond, requires such certificate to be made by the surety himself and not that it be made a part of the petition for a license. Fourney's License, 28 Pa. Super. Ct. 71. Even if Act March 31, 1856, § 9 (P. L. 200), providing that a place to be licensed as an hotel must have certain accommodations for travelers, were still in force, held that it would not be necessary to allege that it had such accommodations in the petition for the license. Knoblauch's License, 28 Pa. Super. Ct. 323.

53. State commissioner of excise caused to be made enumeration of inhabitants of certain city, certified result to county treasurer and increased amount of excise tax because of increased population. Relators paid increased tax, but stated in writing that they paid increase under protest. Held that payment was not made under mistake of fact. People v. Cullinan, 111 App. Div. 32, 97 N. Y. S. 194. Certificate by commissioner to treasurer did not compel payment of increased tax unless statute authorized enumeration. Id. Acts of commissioner of excise in procuring an enumeration of inhabitants of certain district, certifying result to county treasurer, and increasing amount of excise tax, held not such a final determination of rights of persons paying increased tax as to entitle them to common-law writ of certiorari to review same. Id.

Social club which sells liquor to its members is not "conducting the business of a drinking saloon or bar room." State v. New Orleans Chess, Checkers & Whist Club, 116 La. 46, 40 So. 526. Amount of license fee to be paid by such a club for privilege of selling liquors is to be determined by gross sale of intoxicating liquors and not gross bar sales, which include items other than liquors. Id. Under Act 171 of 1898, a tax collector, if dissatisfied with the sworn statement of the officers of the club as to the amount of sales during the preceding year, must traverse such affidavit promptly and cannot afterwards maintain a suit for fees of preceding years on the ground that such affidavit did not disclose the full amount of the sales. Id. License tax of $500 held not unreasonable or oppressive. Lachman v. Walker [Fla.] 42 So. 41. Ordinance requiring one desiring to engage in saloon business to procure and pay certain sum for a license held a police regulation and not a revenue measure and hence to require only a majority vote. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423.

54. St. 1903, §§ 4241, 4260, 4263, 4267, construed and held that revenue agents have no authority to institute actions to recover unpaid license fees from brewers unless directed by the auditor to do so. Commonwealth v. Central Consumers' Co., 28 Ky. L. R. 1363, 91 S. W. 711. County court has no jurisdiction of action by state to recover unpaid license fees from brewery. Id. Under St. 1903, § 4260, revenue agent has power, independent of auditor, to cause license tax to be listed for taxation, and may institute proper proceedings in county court to have omitted license tax listed. Id. Prayer for general relief held to entitle revenue agent to judgment requiring listing of license fees for taxation, though agent was not entitled to recover fees in such proceeding as prayed. Id. County treasurer held not entitled to commission on money collected for liquor license during the period intervening between the Act of March 9, 1901, and Laws 1905, c. 60, § 11. Hubbell v. Bernalillo County Com'rs [N. M.] 86 P. 430.

55. Charter of Mobile, § 43 (Acts 1901, p. 2374), does not exempt one who has a license to sell at retail from procuring additional license for sales of beer by the barrel. City of Mobile v. Phillips [Ala.] 40 So. 826.

56. Under Ky. St. 1903, § 4224, a foreign corporation engaged in selling beer must have a license for each place at which it sells same, and cannot establish agency at a town or city and send out wagons to other towns and cities and make sales and deliver in such other towns without license for such towns. Jung Brewing Co. v. Com. [Ky.] 98 S. W. 307.

57. Provisions of Montgomery City Charter, § 20, exempting persons procuring a license from city from paying any tax or license to county, was repealed by Gen. Acts

state license,[58] and the right to correct errors in the license,[59] depend upon the statutes of the various states. It is frequently provided that licenses may only be granted on the petition[60] or recommendation,[61] or with the consent, of a certain proportion of the property owners within a specified distance of the place where the business is to be carried on,[62] or that they may not be granted over the remonstrance

1903, p. 184. Gaston v. O'Neal [Ala.] 41 So. 742. A prosecution under Rev. St. 1870, § 910, charging defendant with selling without a license fails where defendant produces a license in due form either from the parish or municipality. State v. Lewis, 116 La. 762, 41 So. 63.

58. Under Rev. St. 1870, § 1212, providing that persons paying a license fee to a municipal corporation for the privilege of selling liquors shall also pay a license fee to the state, a person who sells without a municipal license in violation of an ordinance requiring such payment is not exempt from paying the state license tax. State v. White, 115 La. 779, 40 So. 44.

59. Where by mutual mistake premises were described by wrong number in liquor tax certificate held that special term could not, on hearing of order to show cause why certificate should not be amended, order an amendment nunc pro tunc on filing of a new application and bond containing a correct description, where commissioner of excise opposed such a course. In re Littleton, 113 App. Div. 471, 99 N. Y. S. 417.

60. Under Laws 1905, c. 71, in towns having population of less than 100, license or renewal thereof can be granted only on petition of 20 freeholders. State v. Settles [Mont.] 87 P. 445. Under a statute requiring petition signed by a specified number of freeholders, where the qualification of the signers is put in issue by a remonstrance, the burden of proving such qualification is on the applicant. Swibart v. Hansen [Neb.] 107 N. W. 862. When county court charged with the duty of issuing licenses fraudulently finds that the petition is signed by the requisite number of taxpayers, when as a fact it is not, equity will in a direct proceeding set aside their judgment granting the license, though it would not do so if they were without fraud merely mistaken as to the existence of such jurisdictional fact. Burkharth v. Stephens, 117 Mo. App. 425, 94 S. W. 720.

61. Under Inn and Tavern Act 1846. § 45, persons who have recommended any other application for a license cannot, during the year during which the license granted pursuant to their recommendation is in force, recommend the granting of a license which is to be operative in whole or in part during the term of the first license. Cope v. Common Council of Somers [N. J. Law] 64 A. 156. Under Rev. Code 1852, as amended 1893, c. 53, requiring an applicant for license to present a petition with certain recommendations and that each person signing it must either himself have read it or had it read to him, a petition signed by more than the requisite number, some of whom have neither read it nor heard it read, is insufficient, though signed by the statutory number who have read or heard it read. In re Veasey [Del.] 63 A. 801.

62. Purchaser of property from owner who has consented to maintenance of saloon within 50 feet of his property does not take property subject to such consent, but new statement of consent signed by him must be filed by saloonkeeper at beginning of next tax year. Code § 2448, construed. Conway v. District Ct. Fayette County [Iowa] 109 N. W. 1074. Under charter of city of New Orleans (Act No. 99, p. 224, of 1904), council cannot grant privilege of opening any bar room except upon the written consent of a majority of the bona fide "property owners" within 300 feet thereof. State v. New Orleans, 117 La. 715, 42 So. 245. Statute is remedial, and hence mode of proceeding may be changed, and change may have retroactive effect. Id. Where application was refused and applicant allowed five years to elapse before filing mandamus proceedings to compel council to issue permit, and such act was passed in meantime, held that its provisions and not those of the act in effect when application was made controlled in determining the sufficiency of the consent. Id. Is duty of city engineer to ascertain whether list has required number of signatures within prescribed limit, but his certificate is not conclusive on the question. Id. Ordinance requiring consent of a majority of the householders within a designated distance of the proposed location is not unconstitutional. City of New Orleans v. Smythe, 116 La. 685, 41 So. 33. Laws 1896, c. 112, § 17, require written consent of two-thirds of the owners of buildings used exclusively for residence purposes, the nearest entrance to which is within 200 feet of the nearest entrance to the premises in which liquor traffic is to be carried on. In re Bullard, 113 App. Div. 159, 98 N. Y. S. 1011. Consent by husband of owner of building without her knowledge or authority held insufficient. Id. Evidence held to show that necessary number of consents had not been obtained. Id. Revocation affirmed without costs owing to fact that state and property owners failed to investigate validity and sufficiency of consents filed by first owner of premises and thereby suffered subsequent purchaser to be misled to his prejudice by appearances. Id. Owner means person having legal title, and hence consent of owner of fee is sufficient without that of life tenant. In re Clement, 101 N. Y. S. 447. Building held to be counted as one building only, though occupied as double house, half of it being owned by husband and other half by wife. Id. Status at time of application for certificate held controlling. Id. Fact that second deputy commissioner of excise, without consulting legal department and without full knowledge of facts, stated when application was made that house was to be counted as two, held not binding upon department and not to estop commissioner

of the majority of the legal voters of the territory affected,[63] or that the consent of a town is necessary to the granting of a license for the sale of intoxicants within a specified distance of its borders.[64] It is sometimes provided that a place cannot be licensed as a hotel unless it has certain specified accommodations for travelers.[65] The applicant may be required to show that he is a person of respectable character and standing[66] or to take oath that he will not knowingly permit gambling on the premises.[67] One remonstrating against the issuance of a license on the ground that the applicant has sold liquor to minors during the previous year has the burden of proving that fact.[68] The required license fee or tax must be paid.[69] A li-

from instituting proceeding to cancel certificate on ground that sufficient number of consents had not been obtained. Id. Back door to residence not accessible to street is not an entrance within meaning of statute. McDougal v. Malaghan, 184 N. Y. 253, 77 N. E. 12.

63. Indiana: Acts 1895 (p. 251, c. 127, § 9), as amended by Act Feb. 15, 1905 (Acts 1905, p. 7, c. 6), prohibiting county commissioners from granting license when remonstrance signed by majority of voters of township is filed, and authorizing blanket remonstrance, held constitutional. Cain v. Allen [Ind.] 79 N. E. 201. Remonstrance will be construed as a remonstrance against each application for license thereafter filed and the applicant is entitled to an opportunity to controvert the legal sufficiency thereof. Id. The commissioners have no jurisdiction, except on a hearing of an application for a license, to enter an order on such a remonstrance to the effect that they will not issue a license to any person for two years. Id. The remonstrance may be signed by the voters, by attorney thereunto authorized in writing. Id. One who has signed a remonstrance has no right to withdraw his name after the beginning of the first day of the three days preceding the term at which it is presented and to be acted on. Id. Vote cast at the last preceding November election is basis of determining number of voters when the application is to sell in a town and without the limits of an incorporated city, and when the application is for a license to sell in a ward of a city, last preceding general city election, and it must be a majority of votes cast for candidate receiving highest number of votes. Kunkle v. Abell [Ind.] 79 N. E. 753. On application filed subsequent to the term of the commissioners at which the remonstrance is filed, applicant is entitled to hearing as to the sufficiency of the remonstrance, and is not precluded by previous ex parte adjudication by the commissioners that the remonstrance is signed by requisite number of voters, etc. Id. Ex parte finding that remonstrance is signed by a majority of the legal voters is inadmissible against an applicant, and the burden is on the remonstrators to show that it is so signed. Jones v. Alexander [Ind.] 79 N. E. 368. All remonstrances, designated as such by the statute, must be so filed as to come before the board of commissioners, from whose action on an application an appeal may be taken to circuit court, and a remonstrance cannot be filed originally in circuit court on appeal. Sanasack v. Ader [Ind. App.] 78 N. E. 675; Id. [Ind. App.] 79 N. E. 457. Remonstrance was filed against particular applicant pursuant to Burns' Ann. St. § 7283-i, and application denied. Pending an appeal, Act of 1905 was passed, and remonstrance against granting license to any applicant was filed pursuant to its provisions, which was determined by county board to be sufficient. Held that circuit court properly permitted filing of so called supplemental remonstrance showing such facts, and dismissed application without determining whether or not the original remonstrance against the applicant individually was sufficient. Id. Applicant under such circumstances has no rights referable to conditions when he presented original application, but court was bound by conditions properly shown to exist at time of hearing, and state of facts, which would constitute defense to application before board, will defeat it in circuit court. Id.

Kentucky: When a protest is made to the granting of a license, the county court should make an order defining the neighborhood, and then the burden is on the commonwealth to show that those who protest are a majority of the legal voters of the neighborhood so defined. Guinn v. Cumberland County Court, 28 Ky. L. R. 759, 90 S. W. 274. Protest not being by the statute required to be in writing may be made by the voter orally in court; but, if a writing is offered, the burden is on the commonwealth to show that it was signed by the persons by whom it purports to be signed and that they are legal voters in the neighborhood. Id. In determining whether or not a majority of the voters of a neighborhood are against the granting of a license, the court should count as remonstrators persons who, subsequent to signing a petition for the granting of a license, have signed a remonstrance. Simpson v. Com. [Ky.] 97 S. W. 404.

64. Under Laws 1905, c. 36, § 20, must procure consent to issuance of license to sell within two miles, and license issued without it is of no legal effect. Devanny v. Hanson [W. Va.] 53 S. E. 603.

65. Act March 31, 1856, § 9 (P. L. 200), providing that in order that a hotel may be granted a license as such it must have for the exclusive use of travelers at least four bedrooms and eight beds, held repealed by Act May 13, 1887 (P. L. 108). Knoblauch's License, 28 Pa. Super. Ct. 323.

66. Burden is on him to show such facts when denied by remonstrance. Brinkworth v. Shembeck [Neb.] 108 N. W. 150.

67. Shannon's Code, §§ 993, 6781, makes

cense cannot ordinarily be granted for the sale of liquor in local option territory.[70] The number of licenses which may be issued in certain territory is sometimes limited.[71] Municipalities frequently prescribe limits outside of which no licenses may be issued.[72] As a general rule a license in proper form cannot be collaterally impeached.[73]

A license is a mere privilege[74] which will be strictly construed.[75] As a general rule more than one saloon cannot be run under a single license.[76] Where a license is granted to two named persons who are partners and one of them sells out his interest to the other, the latter may continue the business individually under the same license.[77] If the license is transferable and has value it is property and is liable for the licensee's debts.[78]

The state cannot in a civil action recover the license fee from one who has sold liquor without a license.[79] In order to recover back a license tax claimed to have been illegally exacted, the plaintiff must show that the defendant had no authority to impose the tax, that it actually received the money, and that the payment was not voluntarily made.[80]

Appeal and review.[81]—The right to a review of the proceedings of the licensing authorities granting or refusing the license and the manner of obtaining it,[82]

violation of such oath perjury. State v. Wilson, 115 Tenn. 725, 91 S. W. 195.

68. In re MacRae [Neb.] 106 N. W. 1020.

69. Acts 1906, p. 430, fixing the license fee for retailing and vending liquors in Irwin County is not unconstitutional. Glover v. State [Ga.] 55 S. E. 592. Kirby's Dig., §§ 6881, 6882, requiring persons selling liquors to take out a license and providing a penalty for selling same without having first paid the tax required by the act of which they are a part, requires a payment for the procurement of a valid license, and hence a payment will not protect from the prescribed penalty after the license issued therefor has been annulled, nor will the subsequent issuance of a second license to him during the year, and after the annulment of the first, without another payment. Alexander v. State, 77 Ark. 294, 91 S. W. 181.

70. No officer or tribunal has power to lawfully grant or issue a license to a brewer to establish a depot or agency for the sale of beer by wholesale or otherwise in such territory. Hager v. Jung Brew. Co., 29 Ky. L. R. 176, 92 S. W. 573.

71. Laws 1901, p. 107, c. 101, limiting the number of licenses to be issued in places bordering on the "patrol limits" in all cities of a certain class, is unconstitutional as being in contravention of Const. art. 4, § 36, in that it is evidently intended to apply only to one city, since but one city in the specified class has patrol limits. State v. Schraps, 97 Minn. 62, 106 N. W. 106.

72. Under Comp. Laws, § 3107, authorizing cities to regulate and prescribe by ordinance the location of saloons, they may establish saloon limits and prohibit the issuing of licenses outside thereof. Johnson v. Common Council of Bessemer, 143 Mich. 313, 12 Det. Leg. N. 981, 106 N. W. 852. Such an ordinance is not void because it does not provide a penalty for its violation, since council has power to approve bonds which must state where the liquor business is to be conducted, and can refuse to approve bonds as to places not in the limits. Id.

73. If issued by municipality with general powers to regulate and license such business cannot be collaterally impeached in criminal prosecution by evidence tending to show that powers of corporation had been divested by parochial election in favor of prohibition. State v. Lewis, 116 La. 762, 41 So. 63.

74. City of Chicago v. Malkan, 119 Ill. App. 542. Not a contract. Meehan v. Jersey City Excise Com'rs [N. J. Law] 64 A. 689.

75. City of Chicago v. Malkan, 119 Ill. App. 542.

76. Under Hurd's Rev. St. 1903, c. 43, and Chicago city ordinances, even though they are in same building and rooms are connected by doors, openings, or stairways. City of Chicago v. Malkan, 119 Ill. App. 542. Evidence that collector told licensee that he could run two in same building held inadmissible, since he could not bind city by utterance of legal opinion. Id.

77. Lynch v. State [Ala.] 39 So. 912.

78. Where ordinance under which it was issued provided for its transfer upon observance of formalities about which there was no practical difficulty, and it had marketable value, held that receiver was entitled to it. Deggender v. Seattle Brew. & Malting Co., 41 Wash. 385, 83 P. 898.

79. Tax imposed by St. 1903, § 4224, on business of keeping hotel with privilege of selling liquor, since there can be no indebtedness to state on part of one who has not applied for and procured a license. Commonwealth v. Central Hotel Co., 28 Ky. L. R. 829, 90 S. W. 565.

80. Must show that he paid it under compulsion, it not being enough to show a payment under protest. Town of Phoebus v. Manhattan Social Club [Va.] 52 S. E. 839.

81. See 6 C. L. 178.

82. Applicant whose application is denied by board of commissioners may appeal

and the procedure on appeal,[83] is regulated by statute and varies in the different states. An appeal from a decision granting a petition for a license ordinarily operates as a stay of all proceedings, and a license should not be issued until it is determined.[84]

Bonds.[85]—Whether a surety company may act as surety on a liquor dealer's bond depends upon the statutes of the various states.[86]

Transfer of licenses.[87]—A license is a personal privilege and cannot be assigned by the licensee except when authorized by the legislature and then only in the mode prescribed by the statute.[88] A transfer under certain specified restrictions and conditions is generally provided for.[89] A resolution of a board of excise commissioners, transferring a license to one of their number who voted for it and whose vote was necessary to the adoption of the resolution, will be set aside on certiorari.[90]

to circuit court from their decision. Burns' Ann. St. 1901, § 7280, and Acts 1905, c. 6, § 9 construed. Lanham v. Woods [Ind.] 79 N. E. 376. See, also, Sanasack v. Ader [Ind. App.] 78 N. E. 675; Id. [Ind. App.] 79 N. E. 457. County court in granting license acts judicially, and from its decision there is no appeal but it can be reviewed only by certiorari. Burkharth v. Stephens, 117 Mo. App. 425, 94 S. W. 720. Hence, if it appears from the face of the record that the proceedings were regular, there can be no interference; but where the county court fraudulently and collusively decided that a petition for a license was signed by the requisite number of taxpayers resident in the neighborhood and fraudulently made up the record of their proceedings in such a way that certiorari would not show such fact, equity will set aside the judgment of the court granting the license. Id.

83. On appeal to circuit court from dismissal of application, answer was filed by one of the signers of a blanket remonstance and he was considered as only adversary party. Held that on appeal by him from an order granting license he would not be permitted to assign error on behalf of other signers of the remonstrance. Miller v. Givens [Ind. App.] 78 N. E. 1067. On appeal from order of county court refusing to grant license, commonwealth should be made the appellee, making the court the appellee being insufficient. Guinn v. Cumberland County Court, 28 Ky. L. R. 759, 90 S. W. 274. On appeal from decision of board of supervisors that a petition of consent to sale of liquors is sufficient, the notice of appeal may be served on person who actually deposited petition with county auditor, though he was acting merely as an agent or attorney for others. In re Intoxicating Liquors, 129 Iowa, 434, 105 N. W. 702. Any written statement or pleading apprising court that a citizen of the county appears and objects to, or denies the sufficiency of, the statement of consent, is sufficient. Id. General denial held to sufficiently allege citizenship of appellant. Id. On appeal from order granting license, court may by order require licensing board to furnish certified transcript of evidence adduced before it, upon payment by appellant of reasonable fees therefor. State v. Omaha Fire & Police Com'rs [Neb.] 108 N. W. 122. Peremptory mandamus to compel board to reduce evidence to writing and file same in its office is not necessary. Id. Board is not bound by stipulation of parties providing method of taking and transcribing evidence not prescribed by statute, and will not be compelled by mandamus to reduce same to writing in manner stipulated without payment of extra expense. Id. Remonstrator appealing from order of village board of trustees granting a license can require board to file certified transcript of the evidence with the court to which appeal is taken, but cannot by mandamus compel the filing of such transcript when it is not alleged that he has appealed or intends to, merely alleging that he has given notice of appeal being insufficient. State v. McGuire [Neb.] 105 N. W. 471. Appeal may be taken though transcript is not filed. Id. Where record plainly shows that court has not proceeded according to law, but has refused license for reason which law does not recognize as valid, its action stands on no legal basis and it is duty of appellate court to correct it. Knoblauch's License, 28 Pa. Super. Ct. 323.

84. Appeal from decision of board of county commissioners. Pallidy v. Beatty, 15 Okl. 626, 83 P. 428. In case a license is issued pending the appeal, mandamus will lie to compel its revocation. Id. Application for mandamus in such case is not to control judicial discretion, but to compel performance of duty imposed by law. Id.

85. See 6 C. L. 179. See, also, §§ 5, 9, post.

86. Under Sayles' Ann. St. 1897, art. 733, bond signed by company is sufficient, though Laws 1901, c. 136, requires that such bonds shall be signed by two sureties. Taggart v. Hillman [Tex. Civ. App.] 15 Tex. Ct. Rep. 273, 93 S. W. 245; Taggart v. Graham [Tex. Civ. App.] 93 S. W. 246.

87. See 6 C. L. 181.

88. Snyder v. Bougher, 214 Pa. 453, 63 A. 893.

89. License in cities of second class may be transferred by licensing authorities not only from one person to another but from one place to another. 2 Gen. St. §§ 153, 195, pp. 1815, 1823. Henkel v. Hoy [N. J. Law] 64 A. 960.

90. Treeftz v. Lambertville Excise Com'rs [N. J. Law] 62 A. 1004.

Revocation, cancellation, and surrender.[91]—A license is not a contract or a vested right but a mere permit which may ordinarily be revoked at any time.[92] In New York one who pays the license tax imposed by law and receives a liquor tax certificate thereby acquires a property right of which he cannot be deprived without due process of law.[93] In New Jersey a hotel license cannot be revoked except for statutory cause or on the ground of fraud.[94] Statutes and ordinances generally provide for revocation in case the licensee violates any provisions of the law relating to the sale of intoxicants,[95] and prescribe the necessary procedure[96] and the

91. See 6 C. L. 181.

92. Is merely a permit accepted with the burden of being subject to the imposition of future legislative control, and legislature may change, revoke, or annul it, though a license fee has been paid therefor. Sanasack v. Ader [Ind. App.] 78 N. E. 675. Licensee is bound by any conditions which are attached to the permission. State v. Corron, 73 N. H. 434, 62 A. 1044. Is mere privilege or permit subject to revocation for cause by the power granting it, or to such conditions as it may see fit to impose. State v. Seebold, 192 Mo. 720, 91 S. W. 491. Since licensee's personal property rights are not affected by revocation of license, he cannot question constitutionality of law under which it is revoked. Id. Revocation of license is not punishment and hence Rev. St. 1899, § 3021, authorizing excise commissioner to revoke licenses in cities of certain size for violations of law, is not a local or special law in violation of Const. art. 4, § 53, on theory that it inflicts different punishments for same offense in same locality. Id.

93. Tax imposed by Laws 1896, p. 45, c. 112. People v. Flynn, 110 App. Div. 279, 96 N. Y. S. 655, rvg. 48 Misc. 159, 96 N. Y. S. 653. Laws 1905, p. 1862, c. 697, in so far as it directs special deputy commissioner of excise to revoke certificate issued before its passage to one intending to carry on liquor traffic in connection with a hotel, without notice to the holder or giving him opportunity to be heard, is unconstitutional as depriving him of his property without due process of law. Id.

94. Vanaman v. Adams [N. J. Law] 65 204.

95. Laws 1905, p. 1862, c. 697, providing for cancellation of liquor tax certificate issued to one operating saloon in connection with hotel on finding that building does not comply with law regulating hotels, and that building superintendent shall cause all partitions forming bedrooms therein to be removed, held not to authorize removal of partitions without a judgment or order of a competent judicial authority. Born v. Hopper, 110 App. Div. 218, 96 N. Y. S. 671. Where special deputy excise commissioner had revoked certificate, but did not threaten and was not directed to do anything further, held that he would not be enjoined from taking possession and depriving proprietor of certificate regardless of constitutionality of such act. Id. Under Act May 13, 1887, § 7 (P. L. 108), it is mandatory upon court to revoke license upon proof being made that party holding it has violated any law of the state relating to sale of liquors. Arnold's License, 30 Pa. Super. Ct. 93. Where petition alleged that licensee sold liquor in three different buildings, one of which was not on or connected with licensed premises, held that dismissal of petition was error. Id. Under Rev. St. 1898, §§ 1558, 1559, council is required to revoke license on proof of allegations of complaint charging violation of any ordinance passed pursuant to law, word "order" in § 1558 not referring solely to orders prohibiting sales to certain persons authorized to be given by § 1554, and hence license should have been revoked for violation of ordinance requiring saloons to close at midnight. State v. Curtis [Wis.] 110 N. W. 189.

96. Under Rev. Laws, § 2677, and Pub. Acts 1903, c. 99, conviction of licensed dealer of violating any provisions of laws relating to sale of liquors, authorizes the revocation of his license by county commissioners without giving him notice or an opportunity to be heard in opposition to such proposed revocation, nor does Rev. Laws, § 2658, authorize an appeal from their action. Appeal of Londry [Conn.] 63 A. 293. Rev. St. 1899, § 3019, creating office of excise commissioner in cities of a certain size, § 3021, authorizing commissioner to revoke license of dramshop keeper violating any provision of the laws governing dramshops, and § 3011, providing that any dramshop keeper selling liquor on Sunday shall, upon conviction thereof, be punished by a fine and shall forfeit his license, construed, and held that commissioner of such a city has authority to revoke license for selling liquor on Sunday, which in no way depends on forfeiture or penalty which might be imposed on such an offender outside the city under § 3011. State v. Seebold, 192 Mo. 720, 91 S. W. 491. Section 3021 is not to be construed as authorizing such revocation only under the same circumstances and in the same manner in which licenses may be forfeited under § 3011, and after a trial and conviction, for the purpose of harmonizing the two sections, they having no connection with each other, and the legislature having intended to clothe commissioner with full and exclusive authority to revoke licenses in such cities. Id. Petition for cancellation of liquor tax certificate for failure to file consents required by Laws 1896, c. 112, § 17, held sufficient to confer jurisdiction and authorize taking of proof under § 28, subd. 2, though allegations were based on information and belief, where

manner in which the action of the officers passing on the matter may be reviewed.[97] Similar provisions are frequently found in the license itself[98] or are expressly made a part of the agreement under which it is issued.[99] The reversal on appeal of an order revoking a prohibitory order operates to set aside licenses granted after the making of the order appealed from.[1] The licensee may be enjoined from selling liquor pending the proceeding for revocation.[2] Certiorari will not lie to review acts of the officers ordering the revocation which are not judicial in their nature and have no relation to judicial functions.[3] Mandamus will lie to compel the common

sources of information were disclosed, and particular reference made thereto, and proof was presented in or with petition of existence of facts prima facie entitling petitioner to relief demanded. In re Clement, 101 N. Y. S. 683. In proceedings for cancellation of certificate, court may order reference under general provisions of Code Civ. Proc. § 1015, though provision for reference in such cases in subd. 2, § 28, of Liquor Tax Law (Laws 1896, c. 112, p. 69, as amended by Laws 1903, c. 486, p. 1125), was stricken out by Laws 1905, p. 1737, c. 680, subd. 3. In re Lawson, 109 App. Div. 195, 96 N. Y. S. 33; In re Cullinan, 109 App. Div. 816, 96 N. Y. S. 751. Provision that on presentation of petition and answer raising material issues "the said justice, judge, or court shall hear the proofs of the parties," etc., does not require proofs to be taken in open court. In re Cullinan, 109 App. Div. 816, 96 N. Y. S. 751. Proceeding by state commissioner of excise to revoke certificate is summary in its nature and no stay should be granted at defendant's instance on his appeal from an order of revocation at least until the coming in of the referee's report. Cullinan v. Devito, 99 N. Y. S. 976. Since delay defeats intention of statute, held that referee would be directed to proceed with hearings from day to day and to terminate same by specified date. Cullinan v. Sabating, 49 Misc. 442, 99 N. Y. S. 977. Under Act May 13, 1887, § 7 (P. L. 108), where petition for revocation of license for violation of law is presented to court which alleges all the jurisdictional facts and is duly verified, court has no discretionary power to refuse to hear case. Arnold's License, 30 Pa. Super. Ct. 93. Provisions of Milwaukee city charter giving city power to "license, regulate, and restrain" those engaged in saloon business, held not to give it power to provide by ordinance how a license to sell intoxicants might be revoked and to confer power of revocation on district court, Rev. St. 1898, §§ 1558, 1559, providing for revocation by common council upon complaint and notice to the party, being applicable to all municipalities, and the remedy thereby provided being exclusive. Ordinance held void. State v. Milwaukee [Wis.] 109 N. W. 421. Complaint alleging that saloonkeeper sold liquor on premises after 12 o'clock midnight on certain date, held not to charge violation of ordinance requiring closing of saloons between hours of 12 o'clock midnight and 5 o'clock A. M. State v. Curtis [Wis.] 110 N. W. 189. Defect held not to justify dismissal of complaint in absence of objection, where both answer and proofs showed clear violation of ordinance, in view of Rev. St. 1898, § 4706, providing that proceedings, etc., shall not be abated for any error or mistake, etc., where person and proceeding may be rightly understood by court. Id.

97. Rev. Laws, § 2658, does not authorize appeal from action of county commissioners in revoking license of one convicted of violating liquor laws. Appeal of Londry [Conn.] 63 A. 293. On refusal of court of quarter sessions to grant rule to show cause why license should not be revoked, remedy is by appeal to superior court under Act May 5, 1899, § 7 (P. L. 248), and not by mandamus. Arnold's License, 30 Pa. Super. Ct. 93. Ball. Ann. Codes & St. §§ 2934, 2935 construed, and held that mayor and city council have discretion as to revocation of licenses which is final and conclusive, and superior court has no jurisdiction to review their action. State v. Superior Ct. [Wash.] 87 P. 818.

98. Where license itself and city ordinance provided that it might be revoked by mayor for any violation of ordinances, and licensee kept open on Sunday in violation of ordinance, held that mayor had authority to revoke license. Anderson v. Galesburg, 118 Ill. App. 525. Where licensee was notified that mayor had revoked his license, held that he was chargeable with notice that ordinance required mayor to report revocation to next meeting of council, and that it would be required to confirm or reject the revocation, and he was not entitled to be notified that the matter would be so reported. Id.

99. Where condition that licensee would not sell on Sunday was broken, held that his right to sell liquor ceased and he could not complain that license was revoked by county court on complaint being filed with it, and after an investigation as stipulated in the agreement, there being no procedure specially prescribed by law for the enforcement of such agreements. Belt v. Paul, 77 Ark. 211, 91 S. W. 301.

1. Licenses granted by county court before appeal was taken. Licensees stand in position of persons without licenses. Bordwell v. State, 77 Ark. 161, 91 S. W. 555.

2. Defendant enjoined from trafficking in liquors under her certificate pending determination of proceeding to revoke it. Laws 1896, c. 112, p. 69. Cullinan v. Sabating, 49 Misc. 442, 99 N. Y. S. 977.

3. Since under Laws 1905, p. 1862, c. 697, acts of superintendent of buildings in inspecting hotels and reporting whether they comply with laws and of state deputy commissioner of excise in revoking liquor tax certificate in case he reports that they do not, are not judicial in their nature and have no relation to judicial functions, they

council of a city to revoke a license in a case where, upon complaint duly made, the facts requiring such revocation are established beyond dispute.[4] Whether or not the licensee is entitled to a return of any part of the license fee on the revocation of his license is to be determined by the provisions of the statute or ordinance under which it was issued.[5] Provision is sometimes made for the surrender of the license by the licensee and the return of a part of the license tax.[6]

§ 4. *Regulation of traffic.*[7]—The sale of liquor within a specified distance from any church[8] or state hospital[9] is sometimes prohibited. Provision is generally made for the granting of permits to pharmacists to sell intoxicants in places where the sale is otherwise prohibited.[10]

A club which is a mere subterfuge for the evasion of the liquor laws will be dissolved on a proper proceeding being instituted for that purpose.[11] The violation of regulations as a crime is treated in a subsequent section.[12]

cannot be reviewed by certiorori. In re Leverant, 110 App. Div. 371, 97 N. Y. S. 272.

4. Certiorari not a complete and adequate remedy where council dismisses proceedings when it should have revoked license. State v. Curtis [Wis.] 110 N. W. 189.

5. County court made order revoking prohibition order and issued license to defendant. On appeal to circuit court, revocation order was set aside and original prohibition order declared to be in full force. Subsequently county court again revoked prohibition order on a new petition. Held that judgment of circuit court operated as a revocation of defendant's license, which was not reinstated by subsequent revocation of prohibition order, and, as he was not entitled to return of money paid therefor, county court had no power to credit him therewith and issue a new license to him without further payment of the tax prescribed by law, the payment of which is made a condition precedent to the granting of a license by Kirby's Dig. § 5122, and new license so issued was void. Alexander v. State, 77 Ark. 294, 91 S. W. 181. Ordinance providing that no portion of money paid for license should be refunded, held to preclude recovery of any portion of license fee by licensee whose license was rightfully revoked for causes specified in license and ordinances referred to therein, viz. the violation of ordinances. Anderson v. Galesburg, 118 Ill. App. 525.

6. Where, on application for cancellation of certificate, an order directing a reference was affirmed, held that subsequent order directing discontinuance of proceeding and surrender of certificate would be reversed where it did not appear that it was made by consent, or whether holder of certificate agreed to waive his right to a rebate or consented to order on understanding that he should be entitled to legal rebate. In re Faber, 101 N. Y. S. 429.

7. See 6 C. L. 183.

8. Transfer of license to location within 200 feet of church in which religious services were regularly conducted set aside. Henkel v. Hoy [N. J. Law] 64 A. 960. A building wherein certain persons meet periodically for Bible study and also for secular instruction in the tenets of a certain faith, also in part occupied as a dwelling, and also in part for storage purposes, is not a church within the meaning of P. L. 1905, c. 21, prohibiting the licensing of a saloon to be within 200 feet of a church. George v. Elizabeth Excise Com'rs [N. J. Law] 63 A. 870.

9. Laws 1897, p. 225, c. 312, prohibited trafficking in liquor within half mile of building or "premises" of any state hospital. Laws 1905, p. 145, c. 104, added words "or lands" after word "premises." Held that words "lands" and "premises" are synonymous, and it having been stipulated that previous to passage of latter act defendant had legally sold liquor at certain place, sale continued to be legal thereafter whether within half mile of buildings of hospital, or of contiguous land owned and used by it. In re Cullinan, 113 App. Div. 485, 99 N. Y. S. 974.

10. Granting of permit to pharmacist under Iowa Code is a judicial act reposed in district court and not a mere ministerial or administrative duty of the clerk. State v. Brown [Iowa] 109 N. W. 1011. Real permit is order of court granting it and not certificate issued by clerk pursuant to § 2392, and clerk executing such certificate has no right to change or modify order, and his act in so doing will not protect pharmacist. Id. Where order provided that permit was to continue three years, held that certificate containing no limitation as to time except that right to sell was to continue so long as defendant's certificate of registration as a pharmacist was in effect, or until permit was otherwise revoked, was no protection to defendant after three years. Id. Under Code, §§ 2387-2392, a particular description of place where liquor is to be sold in petition and notice of application, is essential to give court jurisdiction to grant a permit, nor has court power to grant permit to sell without specifying the particular place at which sales are to be made. Muncey v. Collins [Iowa] 106 N. W. 262.

11. On quo warranto by attorney general. State v. Meramec Rod & Gun Club [Mo. App.] 98 S. W. 815. State v. Rose Hill Pastime Athletic Club [Mo. App.] 97 S. W. 978. Act Feb. 23, 1898, authorizing revocation of the charter of an incorporated social club which is being conducted in evasion of the laws with reference to the licensing and sale of liquors, is not repealed by act of April 16, 1903, or the act of May 21, 1903 (Acts 1902-4, c. 270). Eureka Club v. Com. [Va.] 54 S. E. 470.

Dispensary system.[13]—The operation of a dispensary for the sale of liquors is the exercise of a franchise, and the right to do so must be derived under authority granted by the state.[14] The manner of putting the system in force[15] and of choosing a dispenser[16] is governed by statute. The prescribed method of appropriating the proceeds of a dispensary does not give the designated beneficiaries a vested right, and hence may be changed by the legislature at any time.[17] Persons acting as dispensary commissioners under color of a law subsequently declared unconstitutional are not personally liable for liquor purchased by them in that capacity.[18]

§ 5. *Action for penalties.*[19]—Statutes sometimes provide for civil actions in the name of the state to recover penalties for the violation of municipal ordinances regulating the sale of intoxicants.[20]

The sum named in a bond running to the state and conditioned on the adherence by the licensee to the terms of his license and the statute under which it is granted will ordinarily be treated as liquidated damages and not as a penalty.[21] Where the purpose of giving the state a civil action on the bond for the violation of the statutes relating to the sale of intoxicants is compensation and not punishment, the prior conviction of the licensee is not essential to the maintenance of the suit, and his previous acquittal is not a defense;[22] but the determination of the proper authorities, in a proceeding to cancel his license, that he has violated the law, he having had notice and an opportunity to be heard, is res adjudicata in an action on the bond, both as to him and his sureties.[23]

§ 6. *Criminal prosecutions. A. Offenses and responsibility therefor in general.*[24]—The selling,[25] giving away,[26] or procuring for another,[27] of intoxicating

12. See § 6, post.

13. See 6 C. L. 183.

14. City of Uniontown v. State [Ala.] 39 So. 814. Hence quo warranto will lie against municipal corporation which usurps exercise of such a franchise, it being a person within meaning of Code 1896, § 3420, relating to quo warranto. Id. Notice of intention to apply for enactment of Local Acts 1903, p. 5, establishing liquor dispensary in certain city, held to sufficiently indicate substance of proposed law to satisfy requirements of Const. § 106. Id. An act authorizing the establishment of dispensaries in the "towns" of a county authorizes the establishment in a city of such county. City of Smithville v. Lee County Dispensary Com'rs, 125 Ga. 559, 54 S. E. 539.

15. Statutory provisions relating to notice of elections on question of establishment of dispensaries must be complied with. Croxton v. Truesdel [S. C.] 56 S. E. 45.

16. Mayor of a town cannot maintain mandamus proceedings to compel establishment of a dispensary therein, since under Gen. Acts 1898-99, p. 110, such right is one which must be enforced in name of town. Rose v. Lampley [Ala.] 41 So. 521.

17. Dispensary established by a town is not a contract but a privilege, and legislature may at any time it sees fit use the proceeds for any purpose it chooses. Crocker v. Moore, 140 N. C. 429, 53 S. E. 229.

18. Mistake is one of law, and both parties have equal opportunity to know that law is invalid, there being no fraud or misrepresentations and defendants not having promised to pay for liquor. Schloss v. McIntyre [Ala.] 41 So. 11.

19. See 6 C. L. 187.

20. Action under 2 Mills' Ann. St. § 4433, held a civil action, so that defects consisting of fact that it was brought in name of people of state to use of certain town instead of in name of people, and that it was not alleged to whom illegal sales charged therein were made, were cured by trial to the merits. Creighton v. People [Colo.] 83 P. 1057. Defects held harmless in any event, there being no surprise and defendant not being deprived of any defense, and the judgment having appropriated the recovery to the use provided by Id. § 4435. Id.

21. It being practically impossible to ascertain damages resulting to state from breach. State v. Corron, 73 N. H. 434, 62 A. 1044.

22. Acquittal in criminal prosecution for selling liquor to habitual drunkard held no defense. State v. Corron, 73 N. H. 434, 62 A. 1044.

23. Determination of excise commissioners. State v. Corron, 73 N. H. 434, 62 A. 1044.

24. See 6 C. L. 188.

25. One purchasing for himself or another does not violate law against selling. Hiers v. State [Fla.] 41 So. 881. Fact that defendant assisted in collecting money to pay charges on whiskey shipped to third person C. O. D. and which was divided among those contributing held not to make him the seller of the same. Hilterbrand v. State [Tex. Cr. App.] 91 S. W. 587. Defendant stated to another that latter could have some liquor, which such other stated was in express office addressed to defendant if he could get it, and such other thereupon forged defend-

liquors[28] without a license[29] or in violation of local option[30] or other prohibitory

ant's name to an order and paid C. O. D. charges and got liquor. Defendant did not own the whiskey and had not ordered it shipped to him. Held no sale by defendant. Boyd v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 404, 92 S. W. 845. State alleging sale must show beyond a reasonable doubt that defendant either delivered whiskey or placed it where the purchaser could get it, or received money for it, where it appears purchaser took it from a place on the premises where he found it. Isom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 431, 95 S. W. 518. Evidence that defendant owned whiskey which was in a wagon and that another person took some of it and left some money under wagon, not showing that defendant got money or that there was any previous agreement between parties that sale should be made in that manner, held insufficient to show sale. Lane v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 882, 92 S. W. 839. Sale is not complete if there is anything left to be done by seller, and hence soliciting order in local option territory and accepting payment therefor, liquor to be shipped from outside point, does not alone constitute a sale, it not being proven the liquor was set apart or shipped. Commonwealth v. McDermott, 29 Ky. L. R. 752, 96 S. W. 475. Consignee of C. O. D. express package who gives order to another, who pays charges and takes liquor, is guilty of making sale. Bennett v. State, 87 Miss. 803, 40 So. 554; Jackson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 572, 91 S. W. 574; McNeely v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 516, 92 S. W. 419; Caton v. State [Tex. Cr. App.] 95 S. W. 540; McElroy v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 424, 95 S. W. 539; Parks v. State [Tex. Cr. App.] 96 S. W. 328. Consignee of C. O. D. package, who in local option district receives from another part of money with which to pay charges and in consideration thereof delivers part of whiskey to him, is guilty of making sale. Hutchinson v. State [Tex. Cr. App.] 90 S. W. 178.

Place of sale: Where liquors are ordered from a point outside local option district and order is accepted there by vendor and goods shipped to purchaser, carrier is agent of the purchaser and sale is deemed to have been made at place of shipment; but if seller keeps an agent in district, who takes orders and transmits them and collects pay and attends to returning empty bottles, principal is guilty of violation of the law. George Wiedmann Brew. Co. v. Com. [Ky.] 96 S. W. 834. Where one within local option district orders liquor from one without and latter consigns it to him by express, delivering it to express company at point outside local option territory, seller extending credit to purchaser, sale is not within local option territory. McDermott v. Com., 29 Ky. L. R. 750, 96 S. W. 474. Evidence that defendant had whiskey in the local option territory, that another applied to him to purchase a specified quantity, that defendant took such whiskey and with prospective purchaser went out of local option district and there delivered it and received price, shows a sale in local option territory. Merritt v. Com., 29 Ky. L. R. 184, 92 S. W. 911. Where agent in local option territory takes order subject to acceptance by his principal outside of such territory, and under agreement that if accepted liquor was to become property of purchaser when delivered to carrier for transportation to him and that carrier was to be his agent, held that there is no sale in local option territory, though order is accepted and liquor delivered. Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 706, 92 S. W. 1086. Order for liquor given to dealer outside local option district and shipment by him to purchaser within district by express, express company to collect price and express charges, is not sale in district. Hirsch v. State [Tex. Cr. App.] 96 S. W. 40. Where agent of liquor dealer ships liquor to person in local option territory which was not ordered by consignee and express agent in the local option territory delivers it to the consignee and collects the C. O. D. charges and turns them over to agent of consignor, agent shipping liquor is guilty of a sale in local option territory. Weil v. State [Tex. Cr. App.] 90 S. W. 644. Where defendant conducted licensed saloon in S. county and there filled orders for liquor transmitted to him from C. county over the telephone, and it did not appear where delivery was to be made, held that sales were made in S. county, it being presumed that delivery was to be made there, and defendant neither sold nor contracted to sell liquor in C. county though he paid rent of telephone and placed it at the disposal of the public. Moore v. State [Ga.] 55 S. E. 327. Telephone Company in such case is the agent of the purchaser. Id. Evidence held to show that sale was made in the county and state when the prosecution was had. State v. Gilson, 114 Mo. App. 652, 90 S. W. 400. Under a license to sell liquors, a dealer may ship it by a carrier or by his own conveyance to customers beyond the county in which he is licensed on orders received in the regular course of business, or on orders obtained outside the county through a solicitor, the sale in such case being regarded as made at the dealer's place of business, though the price is to be collected by the carrier on delivery. Commonwealth v. Guja, 28 Pa. Super. Ct. 58. But when a dealer's agent takes orders in another county and fills them by delivering liquor furnished him by his employer in the county in which the latter is licensed, the sale is regarded as being made in the county where the order is taken and the liquor delivered and is in violation of law. Id. Sale held made by defendant with whom purchasers dealt solely, and to whom beer was shipped, though cases, etc., were labeled by brewery with customers' names. Id.

Consideration: Evidence that alleged purchaser gave to defendant, in exchange for liquor, metal checks with words 50 cents stamped thereon and that such checks were redeemable in money, is sufficient to show a sale. Duke v. State [Ala.] 41 So. 170. Word "sale" as used in Act Feb. 26, 1877 (Acts 1877, p. 335), prohibiting sale on certain island, is to be construed in the sense of any contract for the transfer thereof from one person to another for a valuable con-

laws,[31] or keeping the same for sale in violation of law,[32] the soliciting of orders,[33]

sideration, it not being essential that the transfer should be for a money consideration. James v. State, 124 Ga. 72, 52 S. E. 295. Where one gives liquor to another on his promise to pay for it at some future time, either in money or property, there is a sale, though purchaser has failed to pay as promised. Cook v. State, 124 Ga. 653, 53 S. E. 104. Is not necessary to conviction to show that defendant made any profit on sale. Oxford v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 303, 97 S. W. 484; Polk v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 302, 97 S. W. 467.

Sales through employes or agents: Where one is sought to be convicted for a sale made by his employe, it must be shown that the latter was acting for him and with his consent or at his direction. Evidence held insufficient to connect defendant with sale. Sweeney v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 262, 91 S. W. 575. Evidence held to justify finding that clerk was authorized to make sales in question. State v. Sederstrom [Minn.] 109 N. W. 113. Proof of sale by defendant's wife will not support conviction, where there is no other evidence that she was acting for him, and he testifies that he did not authorize her to make sales and had forbidden her to do so. Bailey v. Com., 29 Ky. L. R. 105, 92 S. W. 545. One selling through agent is guilty of making sale, though he has no personal knowledge of particular sale charged. McGovern v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 369, 90 S. W. 502. Defendant may be found guilty on proof that sale was made for him by an agent and with his connivance. Morgan v. Com. [Ky.] 97 S. W. 411. A party can sell through an agent, or an agent can assist the principal in making the sale, in violation of the local option law, and both may be guilty. Fields v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 815, 98 S. W. 867.

Liability of agents: One may be convicted of making sale of liquor not belonging to him. Polk v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 302, 97 S. W. 467; Owens v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 685, 96 S. W. 31. Where one other than consignee of an express package impersonates consignee and signs for it and pays charges and then delivers it to another, he may be found guilty of making a sale. Ingram v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 856, 90 S. W. 1098. Agent selling in violation of law, though he acts without compensation. Hiers v. State [Fla.] 41 So. 881. Agent who with others consumes liquor belonging to his principal pursuant to an agreement by them to pay him their proportion of its value for the purpose of compensating owner, and receives money therefor, makes sale. Nixon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 315, 97 S. W. 703. Where dealer outside state ships whiskey C. O. D. by express to one who has not ordered it and who does not know the consignor, and then notifies him of the fact, and he obtains same from express company on payment of charges, held that company is guilty of making sale. Adams Exp. Co. v. Com., 29 Ky. L. R. 224, 92 S. W. 932; Id., 29 Ky. L. R. 947, 96 S. W. 1104. Where agent of express company delivers liquor to one to whom it has been shipped by dealer outside of local option territory and collects C. O. D. charges thereon, there is a presumption of sale by company, and burden is on it to show that it was ordered by consignee, and hence that it was acting as agent for purchaser. American Exp. Co. v. Com. [Ky.] 97 S. W. 807.

Agent of purchaser not liable: One who merely acts as agent for another in procuring liquor and paying therefor cannot be convicted of making a sale. Mitchell v. State [Ala.] 41 So. 951; Hiers v. State [Fla.] 41 So. 881; Golightly v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 591, 90 S. W. 26; Dupree v. State [Tex. Cr. App.] 91 S. W. 578; Givens v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 361, 91 S. W. 1090; Winslow v. State [Tex. Cr. App.] 98 S. W. 241. Where evidence showed that F. agreed to chip in to pay for whiskey which had been shipped C. O. D. to third persons, and gave defendant money to pay for quart, and that defendant procured same from such persons and delivered it to F, held that defendant was F's agent. Short v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 312, 91 S. W. 1087. Rule is otherwise where it appears that the simulated agency is merely a subterfuge to cover a sale by the defendant. Smith v. State [Tex. Cr. App.] 97 S. W. 499. Question whether defendant acted for seller or purchaser is for the jury. Reynolds v. State [Fla.] 42 So. 373. Where evidence shows that defendant received money from another, who requested defendant to procure him some liquor and shortly thereafter defendant delivered to the other some liquor, burden is on defendant to show that he was acting as agent for purchaser, and, in absence of any evidence that he was acting as buyer's agent, jury would be authorized to find that sale was made by defendant. Gaskins v. State [Ga.] 55 S. E. 1045.

Evidence held to show sale in violation of the local option law. Young v. State [Tex. Cr. App.] 90 S. W. 1017; Renfro v. State [Tex. Cr. App.] 91 S. W. 576; Roberson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 264, 91 S. W. 578; Hays v. State [Tex. Cr. App.] 91 S. W. 585; O'Neal v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 548, 92 S. W. 417; Oxford v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 229, 94 S. W. 463; Teasley v. State, 124 Ga. 794, 53 S. E. 102; Hestand v. Com., 28 Ky. L. R. 1315, 92 S. W. 12. Evidence that witness signed order for whiskey in drug store and immediately received and paid for it. Brunson v. State [Tex. Cr. App.] 91 S. W. 582. That transaction was sale and not a loan. Choran v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 508, 92 S. W. 422. Where prosecutor had paid money and whiskey had been delivered to him by defendant, held that title had passed and sale was complete. Smith v. State [Tex. Cr. App.] 91 S. W. 592.

26. A simple gift of liquor to others than minors is not unlawful, Code, § 2382, making gifts illegal only when their purpose is to evade law by subterfuge or indirect dealing intended to conceal unlawful sales. State v. Bernstein, 129 Iowa, 520, 105 N. W. 1015 Hence, giving away of samples in soliciting

the keeping of a liquor nuisance,[34] or the violation of the laws relating to the keep-

legitimate orders is not unlawful. Id. Where traveling salesman for liquor house gave away samples of his goods, about a teaspoonful in each instance, in "dry" territory for the purpose of being tasted by prospective customers, held that he was guilty of giving away intoxicating liquor as a beverage. Capple v. Ohio, 4 Ohio N. P. (N. S.) 339. Gift is not a violation of Texas local option statute. Chenowith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 695, 96 S. W. 19.

27. Where defendant bought beer with fund contributed by himself and another and when it arrived latter took his share, held that defendant was not guilty of procuring malt liquor for another in violation of Acts 1883-84, p. 1116, c. 598, he having no interest in beer or its sale either as principal or as agent of the seller. Ball v. Com., 28 Ky. L. R. 1344, 91 S. W. 1123.

28. Definition of intoxicating liquor in charge held not sufficiently accurate. Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 S. W. 316. Is a liquor "intended for use as a beverage or capable of being so used, which contains alcohol either obtained by fermentation or distillation, in such proportion that it will produce intoxication when taken in such quantities as may practically be drunk." Walker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 385, 98 S. W. 265. Must be of sufficient alcoholic body to produce intoxication if drunk in reasonable quantities. Potts v. State [Tex. Cr. App.] 97 S. W. 477. Intoxicating properties of liquids do not depend on name used, or name under which they are sold, but the test is whether such liquid drank in reasonable quantities, such as the stomach will hold, will make drunk or intoxicate. James v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 881, 91 S. W. 227. Evidence held to show that liquid known as "Frosty" was an intoxicant. Id. Evidence held insufficient to show that "Frosty" sold by defendant, was intoxicating. Bird v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 322, 91 S. W. 791. Evidence held to sustain finding that beverage was intoxicating. State v. Sederstrom [Minn.] 109 N. W. 113; Steinkuhler v. State [Neb.] 109 N. W. 395. Is immaterial whether liquors, declared by Rev. St. c. 40, § 29, to be intoxicating, are so in fact. State v. Frederickson, 101 Me. 37, 63 A. 535. Statute does not violate state or Federal constitution. Id.

29. Intoxicating liquor cannot be sold for any purpose without a license. Stelle v. State, 77 Ark. 441, 92 S. W. 530. Evidence showing that "Peruna" is intoxicating, that it was used as a beverage, and that defendand sold it without a license, held to warrant a conviction, even though he sold it thinking in good faith that it was to be used as a medicine. Id. Under Kirby's Dig. §§ 5140-5141, it is sufficient to convict defendant of keepinig a blind tiger if the proof shows that he had control of the premises at the time of the unlawful sale, and it is not necessary that his control should have been habitual or permanent. Henry v. State, 77 Ark. 453, 92 S. W. 405. Ordinance prohibiting sale without license held applicable to bona fide restaurant keeper who sold liquors only to customers to be served with meals, and drunk on premises. Scanlon v. Denver [Colo.] 88 P. 156. Held that ordinance prohibited druggist, who was also a physician, and who did not have a permit, from selling liquor to one representing that he wanted it for medicinal purposes. Braisted v. People [Colo.] 88 P. 150. Ordinance held to apply to grocer who sold in packages, the contents not to be drunk on the premises. City of Chicago v. Slack, 121 Ill. App. 131. Provision of Act No. 171, p. 414, § 13, of 1898, are broad enough to cover any place or establishment where intoxicants are sold to be drunk on the premises including sales to boarders and visitors. State v. White, 115 La. 779, 40 So. 44. Right to sell intoxicating liquors is not a natural privilege, but is a calling which no one has right to pursue without first obtaining a license or permit from the proper authorities, and hence the sale of liquors without a license is unlawful, even in the absence of a statute so declaring. State v. Ingram, 118 Mo. App. 323, 94 S. W. 790. Druggists may be prosecuted for a violation of the dram shop act, though they have a merchant's license. State v. Heibel, 116 Mo. App. 43, 90 S. W. 758. Sale after surrender of certificate for cancellation and rebate pursuant to Laws 1896, p. 67, c. 112, § 25, is violation of Id. § 31, p. 73, prohibiting sale by any person who has not paid tax and obtained and posted certificate. Cullinan v. Garfinkle, 99 N. Y. S. 1119. Proprietor of billiard hall who had no certificate and whose employes took orders for liquor and filled same by procuring liquor from licensed bar in same building without extra charge for service, and without informing purchasers of the facts, held to have thereby violated § 31. Id. Where ordinance provided that no person should sell liquors "in less quantities than a gallon" without having obtained a license, and in subsequent section provided for punishment of person selling liquors without having obtained license, held that words quoted were necessarily incorporated in last section, and hence no offense was committed by selling more than gallon in same transaction. Wong Sing v. Independence, 47 Or. 231, 83 P. 387. Acts 1899, p. 309, c. 161, making it an offense to sell without a license, held not repealed by Acts 1899, p. 1051, c. 432, § 15, designed to raise revenue which prohibits the carrying on of certain businesses or occupations, including saloon business, without a license, since two are not inconsistent. McCampbell v. State [Tenn.] 93 S. W. 100.

30. Evidence that the liquor sold was mixed with another substance so that it was suitable for use as a medicine, but not as a beverage, does not show a violation of the law. Kincaid v. State [Tex. Cr. App.] 92 S. W. 415. Where statement of facts on appeal did not show that local option law was in force in county, held that conviction could not be sustained. Young v. State [Tex. Cr. App.] 91 S. W. 589. Evidence held insufficient to connect defendant with sale. Randell v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 308, 90 S. W. 1012.

31. Act Dec. 12, 1882 (Acts 1882-83, p. 234),

ing and storing of liquor[35] in territory where the sale of intoxicants is prohibited, the sale of liquor within a certain distance of any school[36] or church,[37] the giving[38] or selling of liquor to minors[39] or intoxicated persons,[40] its sale[41] or the keep-

prohibiting sale of vinous, spirituous, or malt liquors in Wilcox County, is valid to that extent though unconstitutional in other particulars. Davis v. State [Ala.] 40 So. 663. Word "Sale" in the title of Act Feb. 26, 1877 (Acts 1877, p. 335), is sufficient to support a provision prohibiting the "bartering" for liquor, and word "prohibit" to authorize a provision for the imposition of a penalty on one who makes a sale in violation of the prohibition. James v. State, 124 Ga. 72, 52 S. E. 295. Title of Laws 1901, p. 416, c. 232, "An act relating to the sale of intoxicating liquors," is broad enough to cover the prohibition of unlawful sales. State v. Kleinfield, 72 Kan 674, 83 P. 831. Each sale constitutes a separate offense though made to the same party within a short space of time. State v. Bursaw [Kan.] 87 P. 183.

32. Evidence held to justify finding that liquors belonged to, and were kept by, defendant with intent and for purpose of unlawfully selling them. Steinkuhler v. State [Neb.] 109 N. W. 395. One having control of liquors may be convicted though they are owned by another. State v. Suiter, 78 Vt. 391, 63 A. 182. Is not necessary to a conviction to show that defendant had ever made any sales. Id.

33. Code 1896, § 5087, held void as interfering with interstate commerce in so far as it applies to residents of another state who solicit orders for liquors to be shipped from outside state. Moog v. State [Ala.] 41 So. 166. Kirby's Dig. § 5133, does not make it an offense to advertise whiskey in paper published in prescribed territory. Carter v. State [Ark.] 98 S. W. 704. Where defendant conducted licensed saloon in S. County and there filled orders transmitted to him over the telephone from C. County, in which sale of intoxicants was prohibited, held that he did not thereby violate Pen. Code 1895, § 428, as amended by Act Dec. 9, 1897 (Acts 1897, p. 39), forbidding any person to "sell, contract to sell, take orders for, or solicit personally or by agent," the sale of intoxicants in any county where sale is prohibited, though he paid rent of telephone in C. county over which orders were transmitted and placed it at disposal of the public, it not appearing where deliveries were to be made. Moore v. State [Ga.] 55 S. E. 327. Laws 1905, p. 379, c. 159, held unconstitutional as in excess of power conferred on legislature by Const. art. 16, § 20. (Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 706, 92 S. W. 1086), and also as violating commerce clause of Federal constitution (Id.). Evidence held insufficient to show soliciting of order in local option district. Bruce v. State [Tex. Cr. App.] 92 S. W. 1092. Evidence held to sustain a conviction. Graves v. State [Ga.] 56 S. E. 72.

34. Instruction that accused would be guilty if it was found that illegal sales were made by his clerk held proper in view of Code, § 2401. State v. O'Malley [Iowa] 109 N W. 491. On a charge of keeping and maintaining a liquor nuisance, proof of actual sales is unnecessary. State v. De Moss [Kan.] 85 P. 937. Evidence held sufficient to sustain conviction. Id. The enumeration of liquors declared to be intoxicating, contained in Rev. St. Me. c. 29, § 40, is an enumeration of "intoxicating liquors" as used in Rev. St. Me. c. 22, § 1, and hence a place where any of the liquors named in c. 29 are sold is a place for the sale of intoxicating liquors and constitutes a nuisance. State v. Frederickson, 101 Me. 37, 63 A. 535. The maintenance of an unlicensed saloon is not a "public nuisance" as defined by Rev. St. Mo. 1899, § 2239, unless it annoys or injures a portion of the inhabitants of the state. State v. Ingram, 118 Mo. App. 323, 94 S. W. 790.

35. Gen. Laws 29th Leg. p. 91, c. 64, regulating occupation of keeping or storing liquor in local option territory, and prohibiting liquor so stored from being drunk on premises, held not unconstitutional as beyond power conferred on legislature by Const. art. 16, § 20 (Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 703, 92 S. W. 1083), or as being a local or special law (Id.), or as denying citizens the equal protection of the laws (Id.).

36. Local Acts Mich. 1905, p. 1157, held not to violate state or Federal constitution. White v. Bracelin, 144 Mich. 322, 13 Det. Leg. N. 156, 107 N. W. 1055. Acts 1901, c. 360, created a new corporation for the inhabitants and territory of South Pittsburg, so that Laws 1899, c. 221, prohibiting the sale of liquor within four miles of any school house in any town thereafter incorporated, became applicable thereto. Erwin v. State [Tenn.] 93 S. W. 73.

37. Act March 8, 1879 (Acts 1879, p. 33), as amended by Act March 26, 1883 (Acts 1883, p. 192), and Act March 21, 1881 (Acts 1881, p. 140), as amended by Act Feb. 20, 1883 (Acts 1883, p. 53), when construed together held to prohibit manufacturers of whiskey from selling same within three miles of any church or educational institution. Salmon v. State [Ark.] 98 S. W. 702.

38. Gen. St. 1901, § 2481, when construed in connection with other provisions of prohibitory law, held to have reference only to gifts properly so called, so that conviction upon information drawn thereunder cannot be sustained by proof of sale to minor. State v. Fletcher [Kan.] 87 P. 729. Under Code 1899, c. 32, § 16, providing that if any person, except a parent to his child, gives liquor to a minor, he shall be guilty, etc., one who in the presence of the father of a minor and with the father's consent allows the minor to drink liquor belonging to him is not guilty of giving liquor to the minor. State v. Hammons [W. Va.] 53 S. E. 630.

39. Sale to a minor, whether notice be given or not, is prohibited by Rev. Laws 1905, and violation thereof is made a public offense. §§ 1534, 1519, 1521, construed. State v. Stroschein [Minn.] 109 N. W. 235. Fact that greater penalty may be imposed under § 1519 where no notice is given, than under

ing open of places where it is sold on certain days,[42] or at certain hours,[43] permit-

§ 1559 when notice is given, does not indicate intention to abolish offense of selling to minors where no notice is given. Id. Penalty provided by Rev. Laws 1905, § 1519, applies to violations of § 1534, prohibiting sales to minors, etc. Id. Immaterial under Rev. Laws 1905, § 1534, for what purpose liquor was sold to minor, and hence allegation that it was to be drunk on the premises is unnecessary. Id. Laws 1903, p. 88, c. 95, § 15, as amended by Laws 1905, p. 450, c. 49, § 9, prohibiting sale, delivery, or giving away of liquor to certain classes of persons, applies only to licensees. State v. Langdon [N. H.] 64 A. 1099. An employer of a minor is not a person having the "management and control" of the minor, so as to authorize the employer to give permission for the sale of liquor to the minor so as to exempt the seller from prosecution for selling to a minor. Tony v. State, 144 Ala. 87, 40 So. 388. Proof that sale was made to person under twenty-one years of age makes out a prima facie case for state, and conceding that marriage of person to whom sale was made would remove bar of prohibition of sale, it was incumbent on defendant to show that such person was married. State v. Mulhern [Iowa] 106 N. W. 267. Holder of a permit for sale of liquors must, before filing a request for liquor presented by a person unknown to him, require an identification of persons presenting request by some person known to seller that purchaser is not a minor, and such identification is required in each instance that a sale is made, an identification on the occasion of a previous sale being insufficient. Id. Where minor was sent to procure beer for third person who furnished ticket to pay for it and defendant knew that fact when he sold it, held that there was not a sale to a minor within Pen. Code, § 290, subd. 3. People v. Hartstein, 49 Misc. 336, 99 N. Y. S. 272. Where liquor is delivered to a minor who is acting as agent for an adult, and it is in fact delivered to and consumed by the adult, and it is known to seller that it is intended so to be consumed, there is no sale to minor, but if the agency is not known to seller it is sale to minor, as is the case where sale is made under belief that it is for an adult, when in fact it was for minor's own use. In re MacRae [Neb.] 106 N. W. 1020. In a prosecution for selling to a minor, evidence of a sale to a minor of a bottle of whiskey which he carried to another of full age for whom he had purchased it, the minor not having disclosed to defendant that he was acting for another, will sustain a conviction. Tony v. State, 144 Ala. 87, 40 So. 388. Evidence by one who purchased for another that he asked for whiskey, and paid for whiskey, is sufficient to sustain a conviction for selling whiskey, though the bottle was wrapped so that witness could not see the contents. Id. Defendant at the request of a minor ordered beer for him from a dealer. Beer was shipped C. O. D. by dealer to minor who took it from carrier and paid charges thereon and put it in defendant's cold-storage warehouse, and got beer and drank it at various times, and paid defendant for storing it. Held neither a sale nor a gift by defendant to a minor. Potts v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 92, 96 S. W. 1084. Where defendant and another contributed money for purchase of liquor and when it came defendant procured it from the express office and gave the other the amount for which he paid, held that there was no sale by defendant. Dean v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 314, 92 S. W. 38. Owner may be convicted though sale was made by his bartender without his knowledge or consent and against his direction. State v. Constatine [Wash.] 86 P. 384.

40. Intoxication, within meaning of Code 1906, § 928, is such a mental condition, due to the use of liquor, as attracts the observation of, or becomes known to others, or gives them reason to believe the person is intoxicated. State v. Nethken [W. Va.] 55 S. E. 742. State must prove as a part of its case that defendant is a licensed seller. Id.

41. Election day: Word "day" as used in election law, § 79, means whole day of 24 hours on which election is held, without regard to hours during which polls are required to be open. Aimo v. People, 122 Ill. App. 398.

Sunday: Const. § 61, providing that the legislature shall provide a law whereby the voters of various municipal subdivisions of the state may determine whether liquor may be sold therein, does not deprive the legislature of power to regulate the sale of liquor in municipalities which have not voted under the local option law, and hence it can prohibit sales on Sunday. Commonwealth v. McCann, 29 Ky. L. R. 707, 94 S. W. 645. Fact that St. 1903, § 1303, makes keeping of a saloon open on Sunday and the making of a sale on that day separate offenses, and also makes each separate sale an offense for which prosecution may be instituted, does not render it unconstitutional. Id. Code Pub. Gen. Laws, art. 27, § 385, making it an offense to sell liquor on Sunday anywhere in the state, held not repealed by Acts 1886, c. 383, p. 615, prohibiting sale in Anne Arundel County with certain exceptions. Flood v. State, 103 Md. 692, 63 A. 684. Under Rev. St. 1899, § 5508, giving to cities of second class exclusive power to restrain, regulate, tax, or suppress dramshops, the enactment of an ordinance granting permission for the sale on Sunday of intoxicating liquors supersedes and suspends, in such city, the operation of Rev. St. 1899, § 3011, prohibiting such sales. State v. Kessels, 120 Mo. App. 233, 96 S. W. 494. Evidence that the sale was made by the defendant's barkeeper shows presumptively authority, and consent of the defendant. City of Liberty v. Moran [Mo. App.] 97 S. W. 948. The manager of a saloon, who was present in the saloon and saw certain persons employed as bartenders selling liquor, is privileged from answering questions in regard to such facts before a grand jury on the ground that his answers would incriminate him, since he must have been equally guilty. Ex parte Merrell [Tex. Cr. App.] 95 S. W. 1047.

Legal holidays: Under Laws 1905, c. 169, § 579, it is unlawful to sell intoxicating

ting persons other than the proprietor and members of his family in the room where liquor is sold during the hours when its sale is prohibited,[44] and the failure to so arrange doors and windows that an unobstructed view of the interior of the room may be had at such times,[45] or at all times,[46] permitting music in saloons,[47] permitting women to remain in saloons or to drink therein,[48] and the taking of intoxi-

liquors on Labor Day, it being made a legal holiday by Acts 1905, p. 196, c. 118. State v. Shelton [Ind. App.] 77 N. E. 1052.

42. **Election day:** One may be convicted of violating St. 1903, § 2565, where he opened the storeroom where the liquor was usually kept for sale though he did not attempt or intend to make any sales, nor is it material that he keeps other kinds of goods for sale in the room so opened. Mallon v. Com. [Ky.] 98 S. W. 315. Evidence that the chief executive officers of the city had told defendant that he could keep his saloon open, provided he closed the front door, held inadmissible, since law prohibits the keeping the saloon open and it is an offense irrespective of whether defendant acts willfully in so doing. Cranfill v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 404, 92 S. W. 846.

Sunday: Ordinance prohibiting saloons from being opened on Sunday, from being lighted in the evening of Sundays, from maintaining screens or curtains, etc., held not ultra vires the powers conferred by Act April 8, 1902, on excise commissioners, nor void as being unreasonable. Croker v. Camden Excise Com'rs [N. J. Law] 63 A. 901. Excise commissioners are in no sense a department or committee of city council, and hence charter provisions relative to publication of city ordinances have no application to ordinances of such commission. Derive their power direct from the legislature. Id. Sunday law held not to contravene local option section of constitution. Bennett v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 515, 92 S. W. 415.

43. One who took liquor from his saloon into an adjoining restaurant and there gave it to one who had previously solicited a sale to him, held to have violated ordinance prohibiting "selling or disposing" of liquors during certain hours. City of Jerseyville v. Becker, 117 Ill. App. 86. Prohibiting saloonkeeper from keeping place open from 12 o'clock midnight until 6 a. m. and on Sunday does not deprive him of his property without due process of law. State v. Calloway, 11 Idaho, 719, 84 P. 27. Ordinance held merely a restraint upon the business and a regulation thereof and in no wise to contemplate its destruction. Id. One who locks door of his saloon at ten o'clock and thereafter remains therein, even for a short time, for the purpose of counting up his cash, is guilty of violating Code, § 2448, par. 9, prohibiting keeping open of saloon after that hour. Lingelbach v. Hobson, 130 Iowa, 488, 107 N. W. 168.

44. Such a provision held reasonable and valid, and not repugnant to general laws of the state. State v. Calloway, 11 Idaho, 719, 84 P. 27. Purpose for which person is admitted during prohibited hours is immaterial. Id. Ordinance being equally applicable to all dealers in intoxicating liquors, and the classification being natural, practical, and reasonable, it is not invalid as class legislation. Id. Not rendered invalid because wholesale dealers are classed with retail ones. Id. Object of ordinance held to be to prohibit sale during specified hours. Id. Title of ordinance held to express its object and purpose and to be sufficiently comprehensive to include all its provisions. Id. Does not abridge privileges and immunities of citizens, right to sell liquor at retail not being inherent right of citizens. Id. Where defendant's saloon was open on Sunday and both he and his bartender were there, and customer came in and bought beer, held that he was properly convicted of admitting to room where liquors were sold persons other than members of his family on Sunday, though he did not personally escort customer into the room. People v. Rand, 100 N. Y. S. 174.

45. Burns' Rev. St. § 7283, requiring that places where liquors are sold shall have doors and windows so that a view of the interior may be had on days when the sale of liquor is prohibited, has no application to a cold-storage warehouse from which the manufacturer sells to retailers. Teegarden v. State [Ind. App.] 79 N. E. 211. In a prosecution for not removing screens and curtains so as to give a view of the interior of a saloon on Sunday, instruction that the screens and curtains need not be entirely removed, if their arrangement permitted a fair view of the interior, held not erroneous. People v. Smith [Mich.] 13 Det. Leg. N. 714, 108 N. W. 1072. Legislature has power to impose restrictions on one class of liquor dealers which it does not impose on others, such as requiring them to remove all obstructions to a view of their places of business, where such restriction applies to all dealers similarly situated, and they are classified with some regard to the differences in the conditions under which the sales are to be made. Meehan v. Jersey City Excise. Com'rs [N. J. Law] 64 A. 689.

46. Under Comp. St. c. 50, § 29, obstructions to view of interior of saloon, no matter where placed, whether at windows or doors or some distance from them, are unlawful. In re MacRae [Neb.] 106 N. W. 1020.

47. Burns' Ann. St. 1901, § 7283b, providing that "no devices for amusements or music of any kind or character" shall be permitted in room where liquor is sold, does not make it unlawful to keep a music box in such room where it is not used to furnish music or amusement. Collins v. State [Ind. App.] 78 N. E. 851.

48. Ordinance prohibiting women from going into a saloon or from drinking therein, providing that it shall be a defense to show that female was of good repute and at the time sober and had consent of guardian, parent, or husband, to go there, held not unreasonable or oppressive. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32. Cities of the third class held to have no

cants into polling places,[49] are frequently made criminal offenses. The sale or furnishing of liquor to another in Indian Territory is absolutely prohibited.[50]

Wholesalers[51] and manufacturers[52] and druggists making sales for medicinal purposes[53] are sometimes exempted from the operation of the license laws, and manufacturers[54] and bona fide clubs[55] from the operation of the local option or prohibition laws. Druggists are sometimes prohibited from making sales except upon a physician's prescription,[56] or on the affidavit of the purchaser that the liquor is to be used for medicinal purposes,[57] or to sell liquor to be drunk on the premises.[58]

power to enact an ordinance prohibiting the sale, by a licensed dramshop keeper, of liquor to women. City of Joplin v. Jacobs, 119 Mo. App. 134, 96 S. W. 219.

49. Provision in an act entitled "An Act to Regulate Elections," prohibiting taking intoxicating liquors into a polling place, held not unconstitutional as not being within the purview of the title of the act. State v. Johnson [N. J. Law] 63 A. 12.

50. One who solicits order in Indian Territory and sends it to dealer out of territory who accepts it and ships the liquor into territory where price is collected by agent who took order is guilty of making a sale within the purview of the Act of Congress. Taylor v. U. S. [Ind. T.] 98 S. W. 123.

51. Statute prohibiting sale without a license, and providing that its provisions shall not apply to "any person engaged in any business as a wholesale dealer who does not sell in less quantities than four gallons at a time," does not prohibit sale by an unlicensed dealer to a consumer of liquors in quantities of four gallons or more. State v. Bock [Ind.] 79 N. E. 493.

52. Ordinance prohibiting keeping liquors for sale, not excepting from its operations domestic wines, which may under the state laws be lawfully sold, held invalid. Duren v. Stephens [Ga.] 54 S. E. 1045. Tex. Rev. Civ. St. 1895, art. 5060i, providing that provisions of previous sections requiring liquor dealers to procure license, give bond, and pay tax, shall not apply to wines produced from grapes grown in the state while in hands of producers or manufacturers thereof, held not unconstitutional as denying the equal protection of the laws (Cox v. State, 202 U. S. 446, 50 Law. Ed. 1099), or as abridging the privileges or immunities of citizens (Id.). Acts 1902, p. 98, No. 90, § 21, permitting sale, without a license, of wine and cider manufactured within the state, while prohibiting sale of same products manufactured in another state without a license, held in contravention of the Fourteenth Amendment to the Federal Constitution guaranteeing the equal protection of the laws. State v. Hazelton, 78 Vt. 467, 63 A. 305. Statute is not void throughout, but exceptions will be extended to all manufacturers. Id.

53. The presumption is that every intoxicating liquor sold without a license is in violation of law, but a druggist selling a medicine possessing intoxicating qualities, if taken in sufficient quantities, is not guilty of selling without a license unless it is shown that he sold it to be drunk as a beverage and not as medicine. Goode v. State, 87 Miss. 495, 40 So. 12. Words quoted in Crimes Act N. J. 1898, § 66, prohibiting sale of liquor without a license "except such as shall be compounded and intended to be used as a medicine," held to relate only to the compositions mentioned in such section, and hence druggists selling whiskey violates act, though he intends it to be used as medicine. State v. Terry [N. J. Err. & App.] 64 A. 113.

54. Under Acts Ky. 1904, c. 76, only manufacturers manufacturing in a local option district are exempted from the prohibition of sales and even then their sales must be in quantities of five gallons or more and their own manufacture, manufacturers without such district being prohibited from selling their own manufacture therein in any quantity. New South Brewing & Ice Co. v. Com., 29 Ky. L. R. 873, 96 S. W. 835. Acts 1902, p. 92, prohibiting sale of intoxicating liquors, including cider, but excepting sales "by the barrel by farmers who raise sufficient apples to make the cider which they sell," is not in contravention of Const. c. 1, art. 7, which prohibits class legislation, since the word farmers would be construed to include any person owning land on which there are trees producing apples. State v. Hazelton, 78 Vt. 467, 63 A. 305.

55. Sale by managers of alleged social club to non-members held illegal, particularly where it appeared that operations of club were a clear evasion of the law, and it appeared to have been organized for that purpose, and its chief purpose was sale of liquors. Creighton v. People [Colo.] 83 P. 1057. Where an incorporated club was run under the direction and control of defendant, he is guilty of a violation of the local option law for a sale made by the club in accordance with the system established by defendant, though he was not present at the time the sale was made. Purchaser waited on himself. Feige v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 425, 95 S. W. 506. Evidence held to show that a distribution of beer through the agency of a so-called club was a mere device or subterfuge for the sale of beer by the club and sufficient to sustain a conviction of violation of the local option law. Id. Evidence held to show a sale of beer by a so called "steward" of a club in violation of the local option law. Adkins v. State [Tex. Cr. App.] 95 S. W. 506. Evidence that defendant organized a so-called club, that he purchased liquor for its members and kept the same for them in a cold storage warehouse where it was delivered to the "members" and in some instances drunk on the premises by them, held to justify a verdict finding him guilty of violating the Texas local option law. Walker v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 216, 94 S. W. 230.

Unless knowledge or a specific intent is an essential element of the crime,[59] good faith or the absence of an intention to violate the law is ordinarily no defense,[60] though the contrary has been held in regard to a mistake of fact.[61]

As in other cases, one cannot be twice put in jeopardy for the same offense.[62] Identity of offenses is necessary to sustain the plea of second jeopardy.[63]

(§ 6) *B. Indictment and prosecution.—The jurisdiction*[64] of the various courts is fixed by statute.[65]

56. Sale by druggist for medicinal purposes and actually used by sick person for medicinal purposes, made on the prescription of a reputable physician, held not unlawful because of the fact that the physician was not licensed to practice medicine in state. De Tarr v. State [Ind. App.] 76 N. E. 897. Statute prohibiting a druggist from selling intoxicating liquors without a prescription is violated by compounding and selling a medicine containing whiskey. State v. Sharpe, 119 Mo. App. 386, 95 S. W. 298. Prescription by physician which does not recite that "it is given and is necessary for medicinal use" is insufficient to authorize a sale by a licensed druggist. State v. McManus, 78 Vt. 433, 62 A. 1013.

57. Gen. St. 1905, § 3737, requiring druggists having a permit to sell only on affidavit of the purchaser, is mandatory, and a sale without such affidavit, even though for medical purposes, is unlawful. State v. Gregory [Kan.] 87 P. 370.

58. Druggist, though not a licensed pharmacist, who sells liquors to be drunk on the premises, is guilty of violating Rev. St. Mo. § 899, § 3051. State v. Chipp [Mo. App.] 97 S. W. 236. In a prosecution under a statute providing that any druggist who "suffers intoxicating liquor to be drunk at his place of business shall be guilty," etc., it is not error to refuse an instruction that required the state to show that defendant consented to the drinking. Id.

59. That defendant, in a prosecution for selling to a minor in good faith, believed that the purchaser was of full age, precludes finding him guilty. People v. Bronner [Mich.] 13 Det. Leg. N. 492, 103 N. W. 672. In order to convict one charged with giving liquor to minor without his parent's consent, the state must show that defendant knew that plaintiff was a minor. Ferguson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 572, 95 S. W. 111. One who knows that purchaser is minor, or has such information from appearance of minor or otherwise as would lead prudent man to believe that he was a minor, and which if followed by inquiry would bring home to him knowledge of purchaser's minority, is guilty of knowingly selling to a minor. State v. Constantine [Wash.] 86 P. 384. Seller is not absolutely bound to know age of purchaser but is bound to all reasonable means to ascertain the fact, and if after exercising such precaution he honestly believes purchaser to be over twenty-one years of age, he should not be found guilty. State v. Fahey [Del.] 65 A. 260.

60. Belief that liquor sold to minors is for use of adult held no defense to charge of selling to minor where he was in fact purchasing for himself and so used it. In re MacRae [Neb.] 106 N. W. 1020. It is no defense to a prosecution for making an unlawful sale of liquor to show that defendant did not intend to violate the law, this being one of the offenses from which the law implies the unlawful intent from the doing of the act prohibited. State v. Piner [N. C.] 53 S. E. 305. On prosecution for violating occupation tax law in not procuring license to pursue occupation of retail liquor dealer, fact that defendant arranged with another to pay tax and believed he had done so held no defense, statute requiring posting of license and authorizing dismissal of prosecutions on payment of tax. Meroney v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 883, 92 S. W. 844.

61. In a prosecution for selling intoxicating liquor without a license it is a good defense to show that defendant did not know that the liquor sold was intoxicating, and that he in good faith thought it was not. State v. Powell [N. C.] 53 S. E. 515. Where defendant sells in local option district a concoction that he does not believe was and had a right to believe was not an intoxicant, under a mistake of fact, he should not be found guilty. Walker v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 451, 98 S. W. 843.

62. Where indictment in the first count charges a violation of Rev. St. Ohio 1905, § 4364-20b, in keeping a place for the sale of intoxicating liquors, and in the second count charges a violation of Rev. St. 1905, § 6942, which also forbids the keeping of a place for the unlawful sale of intoxicating liquors, and the evidence discloses that defendant kept but one place during the time alleged in the indictment, a conviction under either count bars a punishment under the other, nor is defendant's right waived by failure to move that the state elect on which count it will stand. Weaver v. State, 74 Ohio St. 53, 77 N. E. 273.

63. Where a sale of a bottle of whiskey to each of two persons occurs at the same time there are two separate sales, and on a prosecution for one defendant cannot plead a previous conviction. Harris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 270, 97 S. W. 704.

64. See 6 C. L. 193.

65. **Rhode Island:** Offense of keeping and maintaining liquor nuisance in violation of Gen. Laws, c. 92, is without the jurisdiction of the district court to try and determine, nor can it on finding that defendant is probably guilty certify case to supreme court for determination of question of constitutionality of statute under which prosecution is had. State v. Collins, 27 R. I. 419, 62 A. 1010.

Vermont: City court of St. Albans has no jurisdiction of prosecution for furnishing

Limitations.—The prosecution must, of course, be instituted within the time fixed by the statute of limitations.[66]

Indictment, information, or complaint.[67]—An indictment must charge but one crime, and must be direct and certain as regards the crime charged,[68] but need not set forth the details of the transaction complained of.[69] The averments must be clear and direct and not argumentative.[70] In charging a statutory crime it is sufficient to follow the language of the statute.[71] Where an exception is so engrafted in the enacting clause of a statute that the offense cannot be described without meeting and negativing it, it must be alleged that the defendant is not within the excepted class;[72] but where the exceptions and provisos appear in distinct or subsequent clauses, negation is not necessary.[73] It is not necessary to allege that

liquor contrary to law. State v. Shappy [Vt.] 65 A. 78.

66. Prosecution for selling without a license is controlled by Code, § 577, and not § 3889, and hence may be instituted at any time within two years. Quillen v. Com. [Va.] 54 S. E. 333.

67. See 6 C. L. 193.

68. B. & C. Comp. §§ 1308, 1306. Wong Sing v. Independence, 47 Or. 231, 83 P. 387. Complaint in justice court takes place and performs service of indictment and is to be construed in same manner. B. & C. Comp. § 2265. Id. Where ordinance prohibited sale of "any spirituous, malt, or vinous liquors" without a license, and provided that every sale should be a distinct offense, held that complaint accusing defendant of selling "spirituous and malt liquors, or spirituous or malt liquors," was bad. Id. Where ordinance prohibited sale in less quantities than a gallon without a license, held that complaint failing to allege that quantity sold was less than amount specified failed to state facts sufficient to constitute a crime. Id. Under an ordinance which prohibits the selling, giving away, or disposing of liquor on Sunday, an information charging that defendant sold, gave away, and otherwise disposed of intoxicating liquor, is not bad for duplicity. It charges but one offense and the state cannot be required to elect whether it will prosecute for a sale or a gift. City of Liberty v. Moran [Mo. App.] 97 S. W. 948. Prohibitory law being in force generally in license towns except in so far as rendered inapplicable by special license legislation, indictment charging unlawful delivery of liquor contrary to provisions of Laws 1903, c. 95, §§ 15, 17, as amended by Laws 1905, c. 49, held bad for uncertainty in failing to allege that defendant was licensed to engage in liquor traffic, it being doubtful whether he was charged under the license or the prohibitory statute, to latter of which a less penalty is attached. State v. Langdon [N. H.] 64 A. 1099. Mere allegation that city had accepted license statute insufficient. Id. Information charging defendant in one count with having given several different persons liquor on election day charges commission of several different offenses and should be quashed. Thweatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 391, 95 S. W. 517. Information in prosecution for giving away liquor on election day charging that on that day election was held in subdivision of a county, but not alleging that an election was held in the county, is defective as not showing that election was a legal one, an election in a territorial subdivision less than a county being unauthorized. Id.

69. Under Laws 1905, c. 346, an indictment held to charge defendant with soliciting the sale of spirituous liquors without license, since statute may be violated by a solicitation either as principal or as agent of another. State v. Braun, 96 Minn. 521, 105 N. W. 975. An information charging defendant with keeping liquors for sale contrary to law need not allege how they were kept for sale. State v. Suiter, 78 Vt. 391, 63 A. 182.

70. Allegations in indictment for aiding in maintenance of nuisance as to fact that nuisance was maintained held insufficient. State v. Worden, 27 R. I. 484, 63 A. 486.

71. Information charging violation of Gen. St. 1901, § 2489, making it an offense for owner of building knowingly to permit it to be used in maintaining liquor nuisance. State v. Brooks [Kan.] 85 P. 1013.

72. Where an information charges both keeping a place open and selling, the exception of the statute is sufficiently negatived as to the first charge by stating that the place was "not a drug store," but is not negatived as to the second charge if it is not added that the accused is not "a regular druggist." Oberer v. State, 8 Ohio C. C. (N. S.) 93. Where statute prohibits sale on election days except in certain cases, an information should negative the existence of the exceptions as that it was not sold on the prescription of a physician. Thweatt v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 391, 95 S. W. 517.

73. In a prosecution for selling without a license is not necessary to negative that the sale was one of domestic wine. Sowell v. State [Ga.] 54 S. E. 916. Where a statute in one clause prohibits keeping for sale of liquors except as authorized by the act and a subsequent clause declares that act shall not apply to certain sales of cider and native wine. State v. Paige, 78 Vt. 286, 62 A. 1017. Where keeping of liquors for sale or sale thereof within state is itself unlawful unless the party is specially authorized to sell the same, such authority need not be negatived. State v. Brown [Iowa] 109 N. W. 1011. Indictment for keeping liquor nuisance need not allege that defendant

the offense was knowingly committed[74] unless knowledge is an essential element of the crime.[75] An indictment charging a sale of whiskey sufficiently alleges a sale of intoxicating liquor.[76] On a prosecution for selling without a license, the indictment or accusation must negative the possession of a license.[77] Where a statute denounces several distinct offenses, an indictment thereunder need allege the elements of but one.[78] An indictment for aiding in the maintenance of a liquor nuisance must allege the existence of such nuisance.[79] An indictment for violation of the local option law must show the adoption of the law in the territory where the offense is alleged to have been committed[80] and a sale in such territory.[81] An indictment for making a sale by an agent should charge a sale by the defendant.[82] As a general rule it is not necessary to give the name of the persons to whom the unlawful sale was made,[83] though there seems to be some conflict of authority in this regard,[84] nor to allege the precise consideration moving to the seller.[85] On a prosecution for keeping intoxicating liquor for sale it is not necessary to allege what kind

kept the place with intent to keep or sell liquors contrary to law, or that he intended to sell the liquors contrary to law. Code, § 2424. Id.

74. Affidavit charging a violation of the Beal Law (Rev. St. §§ 4364-20), in that defendant kept in place where intoxicating liquors were sold, purchased, or given away, need not aver that such place was "knowingly" kept. Page v. State, 8 Ohio C. C. (N. S.) 581.

75. Indictment held to sufficiently allege that defendant knew that person to whom he gave liquor was a minor. Ferguson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 572, 95 S. W. 111.

76. In a prosecution for violating the local option law where the indictment charges a sale of "whiskey," it is not necessary to allege that whiskey is an intoxicating liquor. Rutherford v. State [Tex. Cr. App.] 90 S. W. 172. Indictment for violation of local option law charging sale of "one package of whiskey" held sufficient, intoxicating liquor and whiskey being synonymous. Wilcoxson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581. Instruction that if defendant unlawfully sold "intoxicating liquor" as charged he was guilty, held to apply the facts to indictment charging sale of "one package of whiskey," the terms whiskey and intoxicating liquor being synonymous. Id.

77. Unless sale was made in county in which sale is prohibited altogether, it is not necessary to allege that it was made within limits of an incorporated town or city which was authorized to issue a license, since Pen. Code, § 433, makes it unlawful to sell anywhere without a license. Shuler v. State, 125 Ga. 778, 54 S. E. 689.

78. Election Law, § 79, providing that no intoxicating liquor shall be sold or given away at retail and that no saloon shall be open on election day, charges three separate offenses, and hence information need not allege that saloon was place where intoxicants were sold or given away at retail. Aimo v. People, 122 Ill. App. 398.

79. Under Gen. Laws, c. 92, § 5, an indictment charging one with aiding another to maintain a nuisance by letting to or allowing another to use a building under his control for illegal sale of liquor must not only charge a letting for the prohibited purpose but that place was thereafter actually used for illegal sale of liquors. Inferential allegations of such illegal use held insufficient. State v. Worden, 27 R. I. 484, 63 A. 486.

80. Indictment alleging that voters had determined that sale should be prohibited and that the commissioner's court had made an order prohibiting the sale of intoxicating liquor in said county held not defective in not alleging that commissioner's court had declared result of election, since such fact is implied from the allegations set forth. Stephens v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 292, 97 S. W. 483.

81. Emmons v. State [Tex. Cr. App.] 97 S. W. 1044.

82. Indictment charging that M for S sold, etc., is insufficient; it should charge that the defendant made the sale, as under Code, c. 32, § 17, principal is responsible for sale made by his agent. State v. Mayo [W. Va.] 53 S. E. 416.

83. Accusation on prosecution for selling without license. Shuler v. State, 125 Ga. 778, 54 S. E. 689. Prosecution under Act Cong. March 1, 1895, prohibiting the sale of liquor to any person in the Indian Territory. Parmenter v. U. S. [Ind. T.] 98 S. W. 340. Violation of dramshop law. State v. Heibel, 116 Mo. App. 43, 90 S. W. 758. Making unlawful sale. Fletcher v. Com. [Va.] 56 S. E. 149.

84. Information or indictment charging sale in violation of Rev. St. 1903, § 4364-20a et seq, should specify the name of the person to whom the sale was made or that it was unknown where such is the fact. State v. Ridgway, 73 Ohio St. 31, 76 N. E. 95.

85. Sale without license. Shuler v. State, 125 Ga. 778, 54 S. E. 689. Indictment under Pol. Code 1895, § 1548, and Pen. Code 1895, § 451, averring that accused "did sell and barter for valuable consideration" liquors of the character referred to in said sections, held sufficiently definite as to the consideration. Taylor v. State [Ga.] 55 S. E. 474. An indictment under a statute which makes "it unlawful to, sell * * * for a valuable consideration" which charges that the defendant "did unlawfully sell," held sufficient though it did not charge that sale was for

of liquor was kept.[86] Statutes in some states provide that in prosecutions under municipal ordinances it shall be sufficient to state the number of the section and the title of the ordinance violated, together with the date of its passage.[87] The fact that the complaint is in the form prescribed by the ordinance alleged to have been violated does not preclude defendant from attacking its sufficiency nor prevent the court from construing the law applicable thereto.[88] Documents used by the grand jury as evidence need not be attached to or returned with the indictment, in the absence of a statute to the contrary.[89]

Variance.[90]—If the sale is charged to have been made to a named person, the proof must support the allegation.[91] An allegation of a sale to two or more persons jointly is not supported by proof of a sale to one of them only.[92] An allegation of a sale by defendant is supported by proof of a sale by his agent.[93] Unless time is an essential ingredient of the offense,[94] it need not ordinarily be shown to have been committed on the precise day alleged,[95] provided it appears to have been committed before the finding of the indictment[96] and after the statute on which the prosecution is based went into effect.[97]

Trial.[97a]—Where the evidence shows several separate offenses, the state will be required to elect on which it will rely.[98] Statutes in some states provide for the appointment of special prosecuting officers.[99]

Evidence.[1]—The court takes judicial notice of the fact that whiskey[2] and wine[3]

a valuable consideration, since there must be a valuable consideration to constitute a sale. Howell v. State, 124 Ga. 698, 52 S. E. 649.

86. State v. Paige, 78 Vt. 286, 62 A. 1017.

87. Complaint alleging that defendant violated § 1 of an ordinance passed and approved on a specified day, in that on a specified day he sold, etc., certain intoxicating liquors, he not being a druggist or pharmacist lawfully permitted to do so not having a license from the town, held to sufficiently state the offense in view of Mills' Ann. St. § 4436. Braisted v. People [Colo.] 88 P. 150. Defendant being charged with violating § 1, held that it was not necessary to allege that § 7 had been amended. Id.

88. Wong Sing v. Independence, 47 Or. 231, 83 P. 387.

89. On prosecution of druggist for maintaining liquor nuisance, it is not necessary under Code, § 5276, to attach to indictment written requests for the sale of liquor obtained by the county attorney from the county auditor, which were used by county attorney in examining witnesses before grand jury but were not placed in evidence. State v. Mulhern [Iowa] 106 N. W. 267.

90. See 6 C. L. 196, n 4-11.

91. Evidence of unlawful sale to agent with notice that he was purchasing for his principal will not support allegation of a sale to the agent. Barlow v. State [Ga.] 56 S. E. 131. Proof of sale to one who was acting as agent for an undisclosed principal will support a conviction under an indictment charging sale to the person acting as agent. Oxford v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 303, 97 S. W. 484.

92. State v. Williams [S. D.] 107 N. W. 830; O'Shennessey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 423, 96 S. W. 790.

93. Selling or giving away on Sunday. City of Liberty v. Moran [Mo. App.] 97 S. W. 948.

94. Under an information charging a sale on a certain date, evidence of a sale on a different date held inadmissible. Harding v. Com. [Va.] 52 S. E. 832.

95. Sale without license. People v. Dieterich, 142 Mich. 527, 12 Det. Leg. N. 798, 105 N. W. 1112. Time is not a material ingredient of the crime of maintaining nuisance and a conviction may be had on evidence of sales at any time within three years prior to the indictment. State v. Moore [Iowa] 106 N. W. 268.

96. New trial granted though evidence was sufficient to support finding of illegal sale within statute of limitations, where evidence did not show whether date of sale was prior or subsequent to finding of indictment. Bragg v. State [Ga.] 55 S. E. 232. Evidence as to transaction prior to date of indictment does not warrant conviction. Vaughan v. State [Tex. Cr. App.] 93 S. W. 741.

97. On prosecution for violation of local option law, instruction authorizing a verdict of guilty in case jury found sale by defendant at any time within two years preceding the indictment is erroneous where it appears that law went into effect less than two years preceding the finding of the indictment. Rutherford v. State [Tex. Cr. App.] 90 S. W. 172.

97a. See 6 C. L. 200.

98. On prosecution for maintaining a liquor nuisance in a certain building on a certain lot, where evidence showed sales in each of two separate buildings on the lot described, state should be required to elect at close of its case as to which building it will claim the unlawful sales to have been made in. State v. Poull [N. D.] 105 N. W. 717.

are intoxicating, and of what constitutes a glass of beer, as to quantity,[4] but not that beer is intoxicating.[5]

The burden is on the state to establish every essential element of the crime charged.[6] On a prosecution for violation of the local option law, its adoption must be shown.[7] Where proof of a sale raises a presumption that it is unlawful, the burden is on the seller to prove the contrary.[8] One claiming exemption from the general prohibitions of a statute by reason of a special privilege not granted in the enacting clause must establish every fact on which such privilege rests.[9] Possession of intoxicating liquor is sometimes made prima facie evidence that it is being kept for sale in violation of law,[10] and proof of the delivery of liquor and of the receipt of money therefor prima facie evidence of ownership.[11] In some states where a sale is shown it is presumed to be unlawful.[12] Evidence that the defendant has paid the internal revenue tax required of retail liquor dealers is generally admissible,[13] and the possession of a Federal license is sometimes made prima facie evidence of guilt.[14]

99. Title of prohibitory law (Laws 1885, p. 243, c. 149, § 11), held broad enough to cover provision for appointment of assistants to attorney general to prosecute offenses against it in certain cases. State v. Brooks [Kan.] 85 P. 1013.

1. See 6 C. L. 197.

2. Wilcoxson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581.

3. State v. Piner [N. C.] 53 S. E. 305.

4. Allegation that quantity sold to minor was less than five gallons held not rendered uncertain by further allegation that it consisted of eight glasses. State v. Stroschein [Minn.] 109 N. W. 235.

5. Lager beer. Potts v. State [Tex. Cr. App.] 97 S. W. 477.

6. To establish beyond a reasonable doubt that liquors alleged to have been kept for sale in violation of law were intoxicating. Instruction held not misleading in view of other instructions. Steinkuhler v. State [Neb.] 109 N. W. 395. Evidence that defendant sold a liquor which he called "lager beer" is insufficient to sustain a conviction. Potts v. State [Tex. Cr. App.] 97 S. W. 477. Where sale is claimed to have been made by defendant's agent, burden is on state to show affirmatively such relation between defendant and person selling as would make the act of the seller the act of defendant. Robinson v. State, 125 Ga. 31, 53 S. E. 766.

7. See 6 C. L. 196, n 15. On appeal where record does not show adoption of law in county where prosecution was had, the supreme court cannot take judicial notice of that fact. Allen v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 450, 98 S. W. 869. Agreement by defendant that local option law was in force in county held to render failure to prove it immaterial. Hestand v. Com., 28 Ky. L. R. 1315, 92 S. W. 12. State need not show notice of election was given, failure to give it being matter of defense. State v. Foreman [Mo. App.] 97 S. W. 269. Unless county judge makes a certificate to effect that law has been properly published, state must prove each and every initiatory step requisite to its adoption, including the posting of notices of the election, but if judge makes such certificate the burden is on the defense to show that such proceedings were not had. McGovern v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 369, 90 S. W. 502. Is not error to admit evidence of two elections where it appears that only last was so conducted as to put in force prohibitory provisions of the law. Stephens v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 694, 96 S. W. 7. If information charges two elections, state may introduce evidence of either having been in favor of prohibition. Riggs v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 683, 96 S. W. 25.

8. State v. O'Malley [Iowa] 109 N. W. 491.

9. Druggist claiming exemption from law prohibiting sale without license. State v. Terry [N. J. Err. & App.] 64 A. 113. Where an ordinance declares that it shall be unlawful to permit female in a saloon or to drink therein, but that it shall be a defense to a prosecution thereunder to show that woman is of good repute and has consent of her parent, guardian, or husband to visit the saloon, burden is on accused to show that case falls within facts constituting a defense. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32.

10. In prosecution under Comp. St. 1903, c. 50, § 20, possession of such liquors by accused is presumptive evidence of guilt in district court as well as before examining magistrate, unless accused shall satisfactorily account for and explain the possession thereof and that they were not kept for an unlawful purpose. Instructions approved. Steinkuhler v. State [Neb.] 109 N. W. 395. One to whom a carrier delivered liquor without payment of the freight charges and the next day took them back to its depot because of the nonpayment of freight, where it was seized, does not have such possession as gives rise to the unlawful intent. O'Neill v. State [Neb.] 107 N. W. 119.

11. Laws 1901, c. 4930, may be rebutted. Hiers v. State [Fla.] 41 So. 881.

12. Burden is on the seller to prove the contrary. Prosecution for keeping liquor

The usual rules of criminal evidence apply,[15] including those as to the admissibility of opinion evidence,[16] the admissions of the defendant,[17] and the declarations of third persons.[18] Evidence of other offenses than the one charged is not generally admissible[19] unless part of a common scheme[20] or system.[21] On a prosecution for

nuisance. State v. O'Malley [Iowa] 109 N. W. 491.

13. Under Code 1896, § 5086, may show by parol that defendant has Federal license. Davis v. State [Ala.] 40 So. 663. On prosecution for selling in prohibition district, records of the U. S. Internal Revenue office for such territory are admissible to show that defendant paid a Federal tax as a retail seller. Since Federal authorities cannot be compelled to produce original record nor authenticate a copy, record may be proven by a copy, supported by testimony that it is a true copy. State v. Nippert [Kan.] 86 P. 478; State v. Schaeffer [Kan.] 86 P. 477.

14. Under Kirby's Dig. § 5144, where one charged with selling liquor unlawfully is proved to have had a Federal liquor license in his house or building, such license is made "prima facie evidence of the guilt of the party owning or controlling the house." Winton v. State, 77 Ark. 143, 91 S. W. 7. Where there was a conflict in evidence as to whether defendant was the owner or controller of boat at time when whiskey was sold and license was found there, held that it was error to instruct that, if defendant had revenue license at time he was charged with selling liquor, it was prima facie evidence of his guilt, and that they should convict him unless he showed that he did not sell any liquor. Id. Statute extends to all cases of unlawful selling of liquor where it is shown that defendant was, at the time of the sale, either the owner or controller of the house where the revenue license was kept or found. Id. Under St. 1903, § 2557b, possession of Federal special tax stamp authorizing sale of intoxicants or having same stuck up at place of business in territory where sale is forbidden by local option law is prima facie evidence of guilt. Hestand v. Com., 28 Ky. L. R. 1315, 92 S. W. 12. Since one engaged in sale of malt liquors is required to have Federal license regardless of their intoxicating qualities, charge on Pen. Code 1895, art. 407a, is improper in any case where accusation is for sale of malt liquors, intoxicating quality of which is in dispute. Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 S. W. 316. Where prosecution is for sale of whiskey and license is for sale of spirituous liquors, instruction is properly given. Magee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 383, 98 S. W. 245. Evidence that defendant had taken out internal revenue license held admissible. Park v. State [Tex. Cr. App.] 98 S. W. 243.

15. See Indictment and Prosecution, 8 C. L. 189.

16. On prosecution for selling in local option district where witness testified that he did not know or have any way of knowing what was in package, liquor having been in a package, held error to permit him to testify that in his opinion package contained whiskey. McNeely v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 516, 92 S. W. 419. Opinion of witness as to whether witness was intoxicated held inadmissible. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569.

17. Evidence that the wife of a certain person had brought suit against defendant to recover damages caused by intoxication of her husband on liquors sold by defendant and that he had settled the suit is inadmissible as an admission of an unlawful sale. State v. Campbell, 129 Iowa, 154, 105 N. W. 395.

18. In a prosecution for carrying liquor into polling place, testimony of one who was present that another who was drinking the liquor stated in defendant's hearing that it was "good beer" is admissible since, if defendant did not deny it was beer, such fact is a circumstance for the consideration of the jury. State v. Johnson [N. J. Law] 63 A. 12. In a prosecution under the Beal Law of a physician as an aider and abettor in the sale of liquor in dry town, in that he gave prescriptions to parties for liquor which was purchased at the drug store, declaration by purchaser to druggist as to what he wanted liquor for is incompetent when made in the absence of the physician. Garrison v. State, 4 Ohio N. P. (N. S.) 277. Evidence of conversation between witness and third person, in absence of accused, in which one told the other that they could get whiskey from defendant and they agreed to get a quart, and that one gave the other his half of the price, held admissible in view of evidence that defendant had proposed arrangement and had accepted money with knowledge of facts. Hays v. State [Tex. Cr. App.] 91 S. W. 585. Declarations of third persons as to intoxicating quality of liquor brought home to defendant are admissible if made before sale for which he is prosecuted, but not if made after his indictment. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569.

19. In a prosecution for "giving away liquor to induce trade" alleged to have been committed in a certain place, it is error to receive evidence of gifts at other places, or of shipments to persons in such place by wholesale house for whom defendant was salesman, it not being shown that shipments were on sales made by him. Stanley v. State [Miss.] 42 So. 284. Evidence of sales at another time and place and to a different person is inadmissible where no connection is shown between two transactions. Swalm v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 575. On prosecution for selling in violation of local option law, evidence that defendant had purchased and received whiskey prior to time of alleged sale is inadmissible where defendant does not testify that he did not have any whiskey. Harris v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 815, 98 S. W. 842.

20. On prosecution for selling without a license, evidence of sales other than that

selling without a license, the state is not required to confine the proof to the exact date named in the indictment, but may show other sales on and prior to the date of the sale in question.[22] Evidence tending to show subsequent sales is admissible in rebuttal of evidence that no liquor had been kept on the premises.[23] Evidence of a former conviction is inadmissible except on the question of credibility.[24] Liquor and paraphernalia used in its sale, found on the premises, and the testimony of the officers finding it, is admissible regardless of the legality of the search or the warrant under which it was made.[25] Evidence that defendant refused to make other illegal sales is inadmissible.[26] On a prosecution for making an unlawful sale, evidence that it is customary for certain persons to keep liquor for their own use and to give it to their employes is immaterial.[27] Cases dealing with the admissibility of particular evidence to show the adoption of local option laws,[28] the sale,[29] that an alleged nuisance was run by the defendant,[30] the knowledge of the defendant that his premises were being used in maintaining a liquor nuisance,[31] or that the liquor sold by him was intoxicating[32] on the issue as to whether liquor sold was in-

charged is admissible where it appears that they were made in pursuance of a general scheme to sell without a license and tend to establish existence of such a plan on the part of defendant. State v. Peterson [Minn.] 108 N. W. 6.

21. On prosecution for selling in violation of local option law, evidence of way another sale was made is admissible for purpose of showing the system or subterfuge resorted to by defendant in making sales where it appears that such method was followed in the making of sale charged. Stovall v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 299, 97 S. W. 92. But evidence of dissimilar transactions is not. Lane v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 882, 92 S. W. 839.

22. State v. Sederstrom [Minn.] 109 N. W. 113.

23. State v. Sederstrom [Minn.] 109 N. W. 113. On prosecution for keeping liquor for sale without a license, evidence of keeping it for sale after date alleged and before the finding of the indictment. State v. Kennard [N. H.] 65 A. 376.

24. Instruction authorizing jury to consider former conviction in determining whether defendant was kind of man who would keep violating statute held prejudicially erroneous. People v. Myers, 101 N. Y. S. 291.

25. State v. Suiter, 78 Vt. 391, 63 A. 182.

26. That others had tried to buy of defendant and been refused. Smart v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 694, 92 S. W. 810. Evidence of another minor that he was in saloon at time sale was made to complaining witness and that defendant refused to sell to him because he was a minor. Cross v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 218, 94 S. W. 1015.

27. Evidence as to such custom among mill owners, particularly where defendant is not shown to be one. Ward v. State [Fla.] 40 So. 177.

28. **Evidence held admissible:** On prosecution for selling without a license, record of town meeting of town in which sale was made showing that vote was adverse to licensing sale. State v. Bollenbach [Minn.] 108 N. W. 3.

29. On prosecution for unlawful selling, evidence that defendant kept liquors on storage for others which they could and did call for as they wished held immaterial. Donald v. State [Miss.] 41 So. 4. On prosecution for keeping liquor nuisance, evidence that witness while outside building furnished money to another to purchase liquor, that latter took money, went into defendant's store, and soon returned with bottle of liquor, held admissible as tending to show that intoxicating liquor was kept and sold in defendant's place of business. State v. O'Malley [Iowa] 109 N. W. 491.

Evidence held admissible: On prosecution for violating the local option law, that there was a quantity of liquor in bottles, like that it is claimed defendant sold, concealed on defendant's premises. King v. State [Tex. Cr. App.] 97 S. W. 488. Books of express agent held admissible to show delivery of C. O. D. package of whiskey to witness on order of defendant, agent having testified that they were correctly kept. Jackson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 572, 91 S. W. 574.

Held inadmissible: On prosecution for selling in violation of the local option law, evidence that there were a number of empty beer bottles in defendant's place of business. O'Shennessey v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 423, 96 S. W. 790.

30. An application for gas to be used at place where nuisance is claimed to have been kept, signed by defendant, is admissible. State v. Schaeffer [Kan.] 86 P. 477.

31. On a prosecution under Gen. St. 1901, § 2489, against owner of building for knowingly permitting its use in maintaining liquor nuisance, state, after introducing sufficient evidence to justify a finding that it was so used, may then, as tending to bring knowledge of that fact home to defendant, show that it had general reputation in community of being used for that purpose. State v. Brooks [Kan.] 85 P. 1018.

32. In prosecution for violating local option law, evidence that accused had been previously notified by county attorney that liquor he was charged with selling was intoxicating held admissible on issue of his mistake of fact. Henderson v. State [Tex.

toxicating,[33] and as to whether the person to whom the sale was made was a minor,[34] will be found in the notes.

Instructions.[35]—Defendant's theory of the case should be submitted if supported by the evidence.[36] It is not necessary to define a sale where a sale is conclusively shown.[37] Instructions should not assume the existence of facts[38] unless they are admitted or undisputed.[39] Instructions having no bearing on the issues should not be given.[40] It is not error to refuse to give an instruction relating to a crime for which the defendant is not on trial.[41]

Punishment.[42]—The punishment which may be inflicted is regulated entirely by statute.[43]

In some states where, upon a hearing, there is probable cause to suspect that one has sold liquors without a license, he may be required to give bond for the observance of the revenue laws.[44] Fines and costs imposed for maintaining a liquor nuisance are sometimes made a lien on the premises occupied, though belonging to a third person, provided they are so occupied with his consent or acquiescence.[45]

Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569. Evidence that defendant had previously been convicted for sale made subsequent to one on which he was then being tried and that he continued to run his place as before is inadmissible. Id.

33. Held admissible: On prosecution for violating local option law, evidence of the effect on other witnesses of drinking same kind of bitters is admissible. McRoberts v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 532, 92 S. W. 804.

Held inadmissible: On prosecution for violating local option law, evidence that prosecuting witness drank six bottles of the liquor in absence of showing that witness was not intoxicated. Henderson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 570, 91 S. W. 569. Testimony that witness had bought some intoxicating liquor from defendant and that it did not taste like that the prosecuting witness had bought but was much stronger, there being no standard of comparison and the two liquors not being shown to be of same character. Swalm v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 575.

34. One who knows or has seen the minor may testify that he did not appear to be twenty-one years of age. Ferguson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 572, 95 S. W. 111.

35. See 6 C. L. 201, n 75 et seq.

36. Refusal of request held not error in view of instructions given. Gibson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 144, 97 S. W. 468. Defendant in a prosecution for violating the local option law is entitled to a request in accordance with the evidence introduced in his behalf, though contradicted. Harper v. State [Tex. Cr. App.] 98 S. W. 839.

37. Stephens v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 694, 96 S. W. 7.

38. On prosecution for violating local option law, instruction held erroneous as assuming sale by defendant. Brookman v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 146, 96 S. W. 928.

39. Charge that sale of liquors had been prohibited in certain county since certain date held proper where evidence showed that fact and there was no contest over the issue. Roberson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 264, 91 S. W. 578.

40. On prosecution for selling intoxicants without certificate, where sole question was whether sale had been made, reference to vote of town against sale held prejudicial error. People v. Myers, 101 N. Y. S. 291. Instruction authorizing conviction if jury found that defendant was agent of third person and sold liquor as such agent held erroneous where evidence did not raise issue as to such agency. Harris v. State [Tex. Cr. App.] 15 Tex. Ct Rep. 256, 91 S. W. 590.

41. Instruction dealing with sale without license properly refused where prosecution was for keeping liquors for sale in violation of law. Steinkuhler v. State [Neb.] 109 N. W. 395.

42. See 6 C. L. 203. n 88 et seq.

43. Under Acts 1902-4, c. 148, in a prosecution for selling without a license, the court may impose both a fine and imprisonment as a penalty. Quillen v. Com. [Va.] 54 S. E. 333. One convicted of selling without license may be imprisoned in county jail with direction that he be worked on public roads, nor is a sentence for a period less than maximum fixed by statute a cruel and unusual punishment. State v. Farrington [N. C.] 53 S. E. 954.

44. Under Act Feb. 29th, 1892 (Acts 1891-92, c. 510), §§ 7, 8, county judge sitting in court after an indictment charging the defendant with selling liquor without a license has been presented may require bond. Anderson v. Com. [Va.] 54 S. E. 305. Where bond appeared on its face to have been executed in compromise of pending prosecution, principal and surety held to be estopped to deny validity and regularity of proceedings resulting in its execution. Id. Provision of § 8 authorizing issuance of scire facias on bond if it is forfeited held not to exclude other remedies or forms of action thereon. Id.

45. Under Rev. Codes, § 7610, providing that all fines assessed against any person convicted of maintaining a liquor nuisance shall be a lien against the property where

§ 7. *Summary proceedings.*[46]—Since intoxicating liquors are property, the owner can be deprived of them only by methods constituting due process of law.[47] Provision is sometimes made for the seizure and destruction of liquor kept in or slipped into any prohibition state or district to be sold contrary to law,[48] and for the seizure and sale of certain classes of conveyances transporting contraband liquor at night.[49] In Maine liquors properly purchased for a city or town liquor agency, and in the possession of a duly appointed and qualified liquor agent, are not subject to forfeiture.[50] A search and seizure warrant must definitely and clearly describe the premises to be searched.[51] In some states no warrant may be issued to search a dwelling house, occupied as such, unless some part of it is used as an inn or shop or for purposes of traffic, or unless the magistrate issuing it is satisfied by evidence presented to him, and so alleges in the warrant, that liquor is kept there intended for sale in the state, contrary to law.[52] The proper remedy for one unlawfully arrested, and whose vessels and fixtures are about to be seized for alleged unlawful sale of intoxicants, is by a petition in error or a suit against the officials and their bondsmen for damages, or for a writ of habeas corpus, and not in an action for an injunction.[53]

§ 8. *Abatement of traffic as a nuisance; injunction.*[54]—In some states the

unlawful sale was made, if such use was permitted by the owner, lien of a judgment against property cannot be enforced against the owner, he not having been the defendant in the criminal action, without an action against him to establish the lien and foreclose. Larson v. Christiansen [N. D.] 106 N. W. 51. To charge the premises of a third person it must appear that the unlawful use continued after he had notice. Id.

46. See 6 C. L. 203.

47. Constitute property even if kept within territory wherein sale has been prohibited under the local option statutes, and hence statute which authorizes their seizure in local option territory without providing any method for condemning them or for the judicial determination of whether they are kept for an unlawful purpose is unconstitutional. Beavers v. Goodwin [Tex. Civ. App.] 14 Tex. Ct. Rep. 429, 90 S. W. 930.

48. Under Kirby's Dig. § 5137, where distiller ships liquor into prohibition district to be there sold by his agent in quantities of more than five gallons at a time, as he has a right to do, and agent, in violation of his instruction and in violation of law, sells in less quantities, liquor in his possession is subject to confiscation and destruction. Osborne v. State, 77 Ark. 439, 92 S. W. 406. Proceeding is one in rem, liquor being contraband and subject to destruction when being used, no matter by whom, contrary to law. Id. Proceedings under Act 1899, p. 11, is a civil and not a criminal proceeding, and hence appeal will lie at instance of state. White v. State [Ark.] 98 S. W. 377. Rev. St. 1883, c. 27, § 31, as amended by Rev. St. 1903, c. 29, § 39, is unconstitutional in so far as it applies to interstate shipments. State v. Intoxicating Liquors, 101 Me. 430, 64 A. 812.

49. Under Cr. Code, § 694, horse and wagon of one who did not know that it was to be used for such purpose, and who did not consent thereto, is not subject to seizure and confiscation. Moody v. McKinney [S. C.] 63 S. E. 543. One in actual possession of liquors bought for himself and others, and procured for an unlawful traffic, is not beyond police power of state, merely because they are in course of transportation by purchaser in his own private vehicle from a point without to a place within state, but liquors and the conveyance may be confiscated as being engaged in unlawful enterprise. Jaro v. Holstein, 73 S. C. 111, 52 S. E. 870.

50. Liquors so purchased which have been taken by virtue of a search and liquor process and libeled, if not intended for sale in violation of law, are not forfeitable, although casks and vessels containing them are not marked in accordance with Rev. St. c. 29, § 34, nor are they subject to forfeiture, though intended for unlawful sale, if casks or vessels are at all times conspicuously marked with name of municipality owning them, or its agent. State v. Intoxicating Liquors & Vessels, 101 Me. 161, 63 A. 666.

51. Complaint and warrant must be construed together and if descriptive words are perfectly clear and designate the place to be searched that is all the constitution and law requires. State v. Comolli, 101 Me. 47, 63 A. 326. Description held sufficient. Id.

52. Rev. St. c. 29, § 62. State v. Comolli, 101 Me. 47, 63 A. 326. Warrant need not allege that it is used in part as an inn or shop for sale of liquors where it recites that magistrate issuing it is satisfied by evidence presented to him that intoxicating liquor is kept in such dwelling for purpose of unlawful sale. Id.

53. Under the "Jones Law." Schmidt v. Brennan, 4 Ohio N. P. (N. S.) 239. In suit for injunction, court of equity will not undertake to determine in advance whether or not vessels and fixtures are being used for the unlawful sale of liquor as alleged by municipal officers who are about to seize and destroy them under authority found in 98 Ohio Laws, p. 12. Id.

court may, on conviction of one charged with maintaining a place where liquor is unlawfully sold, abate such place unless the defendant gives bond not to make illegal sales and to pay all fines imposed.[55] Places where intoxicants are unlawfully sold are frequently declared to be nuisances which may be abated by injunction.[56] In some states any citizen may maintain a suit for that purpose.[57] The jurisdiction of the various courts is regulated by statute.[58] In some states the discovery of liquor on the premises is made presumptive evidence that it was kept for illegal sale.[59] Provision is sometimes made for the taxing of an attorney's fee as costs in plaintiff's favor if he is successful.[60] The violation of such an injunction is, of course, a contempt.[61]

§ 9. *Civil liabilities for injuries resulting from sale.*[62]—In some states a person selling liquor to another is liable in damages for injuries received by him while intoxicated.[63] In others he is liable in damages to certain persons injured in person, property, or means of support, by reason of the intoxication of the person to whom the sale is made.[64] A notice not to sell to such person is a necessary prerequisite in

54. See 6 C. L. 204.

55. Under Rev. St. 1905, § 6942, it is error to order abatement of defendant's saloon without giving him an opportunity to give a bond. Weaver v. State, 74 Ohio St. 53, 77 N. E. 273.

56. Under Code, § 2448, keeping and storing intoxicating liquors in warehouse, to be sold in saloon in city where stored, constitutes liquor nuisance. Bell v. Thompson [Iowa] 106 N. W. 949. In a suit to enjoin maintenance of nuisance, it is not error to refuse to direct "the effectual closing of the building" in which unlawful sales are carried on, where it does not appear that defendant is owner of building. Stahl v. Weston [Iowa] 106 N. W. 206. Evidence held to show that both tenant and owner of store maintained liquor nuisance and an order for injunction abating it properly issued. McCracken v. Miller, 129 Iowa, 623, 106 N. W. 4.

57. Under Code 1899, c. 32, § 24, one who is a resident of the county may maintain such suit, though he be not a "citizen" in technical sense of that word. Devanney v. Hanson [W. Va.] 53 S. E. 603.

58. Under Code, §§ 2405-6, judge of district court has power to issue an injunction in vacation. Young v. Preston [Iowa] 108 N. W. 463.

59. Code, § 2427. Bohstedt v. Teufel [Iowa] 106 N. W. 513; McCracken v. Miller, 129 Iowa, 623, 106 N. W. 4. But such finding is not sufficient evidence to support charge of making an unlawful sale, and hence will not support charge of contempt in violating injunction prohibiting an unlawful sale. State v. Thompson, 130 Iowa, 227, 106 N. W. 515.

60. Attorney's fee of $25 must be taxed as costs in plaintiff's favor if he is successful, whether suit is instituted in name of state or by a private individual. Code, § 2406. Plank v. Hertha [Iowa] 109 N. W. 732. Under Code, § 2429, court is required to allow attorney prosecuting suit by individual a reasonable sum for his services. Id. Plaintiff is entitled to have statutory fee taxed as costs even if attorney is paid by others. Id. Plaintiff held estopped to deny that certain person was his attorney and to have so recognized his appearance and adopted the proceeding as to entitle him to have fee taxed. Id. Where plaintiff was successful, but appealed from order refusing to tax attorney's fee as costs, held that supreme court had no authority to tax attorney's fee for services rendered on appeal. Id.

61. See, also, Contempt, 7 C. L. 746. Laws 1903, c. 338, authorizing issuance of injunction and fixing punishment of any person guilty of contempt for violating it, held not unconstitutional, because object is not expressed in title, nor as entrenching on inherent power of courts to punish contempt. State v. Thomas [Kan.] 86 P. 499. Court may institute contempt proceedings on an affidavit based on information and belief, and in such proceeding will take judicial notice that injunction was issued. Id. Defendant is not entitled to jury trial. Id.

62. See 6 C. L. 204.

63. In an action under Neb. statute it is not necessary to show that intoxication of plaintiff was primary cause of injury, but it is sufficient if it is shown to have been a contributing or assisting cause. Wiese v. Gerndorf [Neb.] 106 N. W. 1025. Fact of sale may be proven by circumstances, direct proof not being necessary. Id. Action cannot be maintained on bond for an assault by dealer not caused by intoxication of plaintiff. Andresen v. Jetter [Neb.] 107 N. W. 789.

64. **Illinois:** Dealer is liable if liquor sold materially contributed or assisted in producing condition. Danley v. Hibbard, 222 Ill. 88, 78 N. E. 39. Under Hurd's St. 1899, c. 43, widow may recover damages for sale of liquor to adult son which results in his habitual drunkenness and pauperism requiring her to support him, she being by law bound to support him. Id. If sale is made after notice, jury may award exemplary damages. Id. Wife of one who has become an habitual drunkard may maintain a joint and several action against several dramshop keepers where it appears that each sold liquor to husband which resulted in loss to plaintiff in causing him to neglect his busi-

some states.[65] One selling liquor to a minor, except on a written order therefor by his parent, is sometimes made liable in damages[66] or for a specified penalty.[67]

Provision is sometimes made for an action on a liquor dealer's bond by any person aggrieved by a breach thereof.[68] Neither the licensee nor his sureties are liable on the bond for the acts of an assignee of the license,[69] nor in the absence of a statute to the contrary, for acts committed before it is filed.[70] Such bonds are sometimes conditioned that the dealer shall pay all damages sustained by any person

ness, thus impairing plaintiff's support. Earp v. Lilly, 120 Ill. App. 123. Fact that some of the defendants had sold to husband for a longer time than others does not affect their joint liability. Id. Jury may award punitive damages where it appears that the sales were made with knowledge that defendant was an habitual drunkard. Id.

Indiana: Under Burns' Ann. St. § 7288, dealer is liable personally, and on his bonds, for injuries sustained by a person to whom he has sold liquors in violation of law, for injuries caused by intoxication resulting from such sale, and fact that sale was made by defendant's agent does not relieve him of liability. State v. Terheide [Ind.] 78 N. E. 195. Is not liable for assault on intoxicated person by one to whom it is not shown that he made sale, nor where no connection is shown between sale to injured party and assault. Id.

Iowa: Under Code, § 2418, giving wife right of action for damages to her property or means of support, in consequence of the intoxication of her husband by reason of wrongful sale of liquor to him by defendant, evidence that several years prior to acts complained of husband was addicted to the excessive use of intoxicating liquors is inadmissible. Mathre v. Devendorf, 130 Iowa, 107, 106 N. W. 366. Plaintiff is entitled to recover for "only what she has been deprived of by defendant's acts;" and hence an instruction that if plaintiff had not received the support she was entitled to she could recover is erroneous. Id. Defendant may show that wife had commenced an action against another dealer covering same time and had recovered damages but not that another action is pending. Id. That intoxication of husband prevented him from securing or holding a permanent position during time in question is admissible. Mathre v. Story City Drug Co., 130 Iowa, 111, 106 N. W. 368. Under §§ 1539, 2418, each member of a copartnership is liable for damages sustained by reason of sale by either member of the firm in the course of partnership business. Id.

Kansas: Gen. St. 1901, § 2465, authorizes a recovery for both proximate and remote injuries, and hence wife may recover for loss of support due to confinement of husband in penitentiary as a result of a murder committed by him while intoxicated. Zibold v. Reneer [Kan.] 85 P. 290. Where petition alleged that husband committed a homicide while intoxicated, was convicted of murder in first degree and sentenced to death and confinement in penitentiary until his execution, held that allegation that he was convicted of murder in first degree was not, as a matter of law, equivalent to an allegation that he was not intoxicated when he committed the homicide. Id.

Michigan: Under Comp. Laws 1897, § 5398, no action lies against one who sold liquor to a decedent where sale and use of liquor sold did not contribute to intoxication which caused his death. Johnson v. Johnson [Mich.] 13 Det. Leg. N. 655, 108 N. W. 1011. In an action for damages for death of plaintiff's husband, caused by unlawful sale of liquor to him, evidence of plaintiff's condition and her dependence on husband for support is admissible. Martin v. Fisher, 143 Mich. 462, 13 Det. Leg. N. 8, 107 N. W. 86.

65. Under Rev. St. 1892, § 4358, as amended by Act April 25, 1898, action may be maintained against liquor seller if notice has been given to him, though no notice has been given to the owner of the building in which the sale is alleged to have been made. Graham v. Cooley, 73 Ohio St. 127, 76 N. E. 397.

66. Under Comp. Laws § 5398, providing that anyone selling to minor shall be liable to father or mother for damages therefor, except a druggist upon the written request of a parent, a druggist who makes a sale on an order purporting to be signed by the minor's parent, but which in fact is a forgery, is liable. Bailey v. Briggs, 143 Mich. 303, 12 Det. Leg. N. 982, 106 N. W. 863. Evidence that minor had been intoxicated prior thereto, and that plaintiff knew of it, is admissible in mitigation of damages. Id.

67. Where defense is that sale was made in good faith believing minor to be of full age, proof must show not only that seller believed him to be of full age, but that there were reasonable grounds for such belief. Creel v. Cordon [Tex. Civ. App.] 17 Tex. Ct. Rep. 108, 98 S. W. 387.

68. Married woman can sue on bond for penalties prescribed in case of a sale to husband, after notice to saloonkeeper that husband is an habitual drunkard, without joining husband as a party plaintiff. Burlew v. Schiller [Tex. Civ. App.] 14 Tex. Ct. Rep. 357, 92 S. W. 814. Mother can maintain a suit for selling to minor after a suit instituted by father has been abated by his death, nor is she estopped because she objected to the abatement and asked to be substituted as party plaintiff. Brooks v. Ellis [Tex. Civ. App.] 16 Tex. Ct. Rep. 967, 98 S. W. 936.

69. Allen v. Houck & Dieter Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 996, 92 S. W. 993.

70. Though filed for purpose of procuring a license actually issued before the doing of the acts which would have constituted a breach if done after bond was filed, since license was unlawful before bond was

by reason of his selling liquor.[71] The burden is on defendant to support his plea of good faith.[72] The usual rules of evidence apply.[73]

The owner of a saloon does not owe to his patrons the same care that is due to the patrons of a hotel or railroad, and is not liable for an assault committed on a patron by his agent acting without the scope of his employment.[74]

§ 10. *Property rights in and contracts relating to intoxicants.*[75]—One who sells intoxicating liquor in violation of law cannot ordinarily recover the purchase price.[76] Recovery may be had for sales made in a foreign state if lawful where made, notwithstanding the prohibitory law of the state where delivery takes place, provided they were not made with intent to violate the laws of the latter state or to enable the purchaser to do so.[77] In states where prohibition is the rule, the burden is on one seeking to recover the price of liquor sold therein to show that the sales were lawful.[78] The presumption that the law of a foreign state is similar to that of the forum does not obtain if it would result in a forfeiture.[79] Statutes in some states provide for the recovery of money paid for liquor sold in violation of law.[80]

§ 11. *Drunkenness as an offense.*[81]

INTOXICATION; INVENTIONS; INVESTMENTS; IRRIGATION; ISLANDS; ISSUE; ISSUES TO JURY; JEOFAIL; JEOPARDY; JETTISON; JOINDER OF CAUSES, see latest topical index.

filed. Allen v. Houck & Dieter Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 996, 92 S. W. 993.

71. Where bond given by dramshopkeeper provided that he should pay to all persons all damages they might sustain either in person or property or means of support by reason of his selling liquor, and statute under which it was given that it might be sued upon for the use of any person so injured, held that minor children of one killed by reason of liquor so sold had right of action on bond, and it was immaterial so far as they were concerned that their mother was unsuccessful in previous action thereon, and hence record in such case was inadmissible. Strong v. People, 119 Ill. App. 79. Evidence held to justify refusal to give peremptory instruction for defendants. Id.

72. Farr v. Waterman [Tex. Civ. App.] 95 S. W. 65.

73. In an action on bond for selling to a minor, it is error to permit defendant to testify that he had never before been charged with selling to a minor and that he was very cautious not to do so. Farr v. Waterman [Tex. Civ. App.] 95 S. W. 65.

74. Peter Anderson & Co. v. Diaz, 77 Ark. 606, 92 S. W. 861.

75. See 6 C. L. 208.

76. Sale without license. Goldman v. Goodrum, 77 Ark. 580, 92 S. W. 865. One who sells to another liquors which purchaser intends to sell illegally cannot recover therefor, and it is immaterial whether seller had any knowledge for what purpose liquors were purchased. Heintz v. Le Page, 100 Me. 542, 62 A. 605. Is intoxicating if its composition is such that it is practicable to commonly and ordinarily drink it as a beverage, and to drink it in such quantities as to produce intoxication. Id.

77. Where orders for liquor were accepted by plaintiff at its place of business in Missouri, held that sales were made in that state though purchaser resided in Iowa and liquor was shipped to him there, and hence transactions were interstate commerce to which Iowa prohibitory law did not apply. Samuel Westheimer & Sons v. Habinck [Iowa] 109 N. W. 189. Sale held made in Missouri though liquor was first shipped to one of plaintiff's customers in Iowa, but never delivered, and was thereafter reshipped to defendant. Id. Contract for sale of liquor made in another state is enforceable in Iowa though it would not have been if made in that state. Bowlin Liquor Co. v. Brandenburg, 130 Iowa, 220, 106 N. W. 497. Where a salesman takes an order in Iowa for liquors to be sold by Minnesota seller, which order is subject to approval by salesman's principal, order having been approved and shipped to the purchaser, contract is made in Minnesota and may be enforced in Iowa. Id.

78. Samuel Westheimer & Sons v. Habinck [Iowa] 109 N. W. 189.

79. Where it would preclude recovery for liquor sold. Samuel Westheimer & Sons v. Habinck [Iowa] 109 N. W. 189.

80. Code, § 2423. Hamilton v. Schlitz Brew. Co., 129 Iowa, 172, 105 N. W. 438. Resident of Iowa who has paid brewer for beer sold to him under contract of sale made in Wisconsin cannot recover amount so paid, since sale is not unlawful nor within purview of statute. Id. Question of where sale takes place, goods being ordered from seller and shipped by him from another state, is to be determined by intention of parties as to when and where title passes to the purchaser. Id. Fact that a seller of liquor in shipping to purchaser in another state takes bill of lading in his own name raises prima facie presumption that title is not to pass until delivery by carrier to consignee, and that sale was made in state of consignee's residence, but this presumption may be rebutted by evidence of intention of parties and that vendor in so doing acted as bailee of purchaser. Id. Intention is question for jury. Id.

81. See 6 C. L. 208.

JOINT ADVENTURES.[82]

A joint adventure is a combination of two or more persons in a single enterprise.[83] Like other contracts the agreement should receive a reasonable construction.[84] A joint agreement to enter into contracts for municipal and government work includes such work in general and is not limited to contracts for sewers and drains,[85] nor to such contracts as are signed by all the parties to the venture.[86] A party to a joint enterprise is entitled to use his best judgment for the protection of the property and interests involved.[87] While joint adventurers are not partners unless clothed with an agency to act on behalf of each other and there is community of property,[88] they are nevertheless required to exercise good faith in connection with their joint dealings.[89] Under an agreement for the sale of land by which the time of payment of an installment is made of the essence of the contract, one joint purchaser is not, as against the other, bound to make the payment so as to save the forfeiture,[90] and, on failure of payment, either party is at liberty to make a new contract of purchase and exclude the other from its benefits.[91]

Upon a breach by one party the other may have a cause of action for damages incident thereto and also one for contribution to the expense necessarily incurred in the undertaking.[92] The ultimate agreement of the parties controls as to division of profits.[93] That one has a right to a certain share of the profits does not give him the right to such share of any gross amount received in the adventure.[94] After the termination of an adventure the court should, upon a proper application being made, direct a general accounting between the parties so that the business may be finally wound up in one proceeding.[95] Where, however the transactions are few and simple,

82. See 6 C. L. 208.

83. Evidence held to show a joint adventure for the purchase, development, and sale of real estate to be managed by certain trustees. Berg v. Mead, 100 N. Y. S. 792. In an action against defendant for fraud in connection with the purchase of realty, owing to defendant's secret agreement with the vendor, evidence held to require submission to the jury of question whether the parties purchased jointly or whether plaintiff purchased on his own account. Paddock v. Bray [Tex. Civ. App.] 13 Tex. Ct. Rep. 383, 88 S. W. 419.

84. Contract by which defendant was to buy in at execution sale land in which plaintiff had an interest construed, and held defendant had the right in a certain contingency to bid for the property for himself, and, in view of the subsequent actions of the parties, was deemed to have done so. Gloeckner v. Kittlaus, 192 Mo. 477, 91 S. W. 126. Held, though the contract was not clear on the point, it contemplated that defendant should be repaid the money advanced and should receive in addition a specified portion of the property. Id. A subsequent or modified agreement as to the rights of the parties in case the land should sell for more than a certain sum held to have no application to the contingency which actually arose. Id.

85. Stitzer v. Fonder, 214 Pa. 117, 63 A. 421.

86. That a contract was taken in the name of one of the parties was immaterial. Stitzer v. Fonder, 214 Pa. 117, 63 A. 421.

87. On breach by one party of agreement to deal in mining stock, the other could dispose of the stock to best advantage and pay what was unavoidable to prevent further loss. Davidor v. Bradford [Wis.] 109 N. W. 576.

88. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890. That defendant referred to himself as a "silent partner" and announced his purpose of paying outstanding accounts held not sufficient to charge him. Id. See Partnership, 6 C. L. 911.

89. Where one of two joint purchasers of land had a secret agreement by which a portion of the price was returned to him, he was bound to pay back to his partner the latter's share. Jordan v. Markham, 130 Iowa, 546, 107 N. W. 613.

90, 91. Commercial Bank v. Weldon, 148 Cal. 601, 84 P. 171.

92. Where plaintiff refused to pay his half of the price of certain stock and refused to sell it as agreed. Davidor v. Bradford [Wis.] 109 N. W. 576. Defendant held not guilty of breach in not procuring the issue of the stock to himself so that plaintiff could have possession in order to make sales. Id.

93. Written agreement as to division of profits from sale of real estate held to supersede a prior oral one and plaintiff could not share in profits of a particular sale to which it referred in any other manner than that specified therein. Keilich v. Blum, 214 Pa. 54, 63 A. 453.

94. Not entitled to one-third of stock received. Simmons v. Lima Oil Co. [N. J. Eq.] 63 A. 258.

and the venture has closed so that nothing remains but to pay over to one of the parties his share of the proceeds, an action at law may be maintained for the amount due.[96] A bill to compel an accounting for profits must show that the enterprise has reached a completion at a profit, or is being currently operated at a profit, or managed in fraud of complainant's rights.[97] Complainant must show performance on his part.[98] An illegal contract will not be enforced.[99] If a syndicate agreement is materially modified without the consent of a party thereto, he is no longer bound thereby.[100]

JOINT EXECUTORS AND TRUSTEES; JOINT LIABILITIES OR AGREEMENTS, see latest topical index.

JOINT STOCK COMPANIES.[1]

A joint stock company is a partnership with a capital divided into shares so as to be transferable without the express consent of all the copartners.[2] Joint stock companies differ from ordinary partnerships in that death of a member or the transfer of his interest does not dissolve the association;[3] and one member has no general power to bind his comembers by disposing of property or incurring indebtedness.[4] Hence, while these associations may be controlled to some extent by the principles applicable to general partnerships, they cannot be entirely governed thereby.[5] Organizations of this kind are legal at common law,[6] and under the constitution and statutes of Idaho, provided they do not have or exercise any of the powers or privileges of corporations not possessed by individuals or partnerships.[7] The members may as between themselves confer upon the association the attributes of a corporation without giving it any organized corporate form,[8] but a shareholder

95. Joint venture to deal in realty. Berg v. Mead, 100 N. Y. S. 792.

96. Ledford v. Emerson, 140 N. C. 288, 52 S. E. 641.

97. Bill insufficient. Simmons v. Lima Oil Co. [N. J. Eq.] 63 A. 258. That defendant corporation so voted certain stock as to eliminate complainant as manager of two underlying corporations was not sufficient misconduct. Id.

98. No proof that plaintiffs delivered to defendant certain stock and cash or protected him against loss as agreed. Merrill v. Milliken, 101 Me. 50, 63 A. 299.

99. No action maintainable for profits arising from real estate sale where transactions involved a breach of trust on the part of the agent of a third person. Williams v. Kendrick [Va.] 54 S. E. 865.

100. Proper to exclude a certain "construction contract" to which defendant never consented. Merrill v. Milliken, 101 Me. 50, 63 A. 299.

1. See 6 C. L. 209.

2. Bradford v. National Benefit Ass'n, 26 App. D. C. 268. An unincorporated joint stock company carrying on the business of a savings bank in the District of Columbia is a partnership and each member is liable for its debts. Norwood v. Francis, 25 App. D. C. 463.

3. Spotswood v. Morris [Idaho] 85 P. 1094.

4. Spotswood v. Morris [Idaho] 85 P. 1094. Held, under the articles of incorporation, the vice-president or secretary had no authority to list real estate of the association with a broker for sale. Id. Plaintiff failed to show that association ever authorized such listing or ratified the same. Id.

5, 6. Spotswood v. Morris [Idaho] 85 P. 1094.

7. Spotswood v. Morris [Idaho] 85 P. 1094. Under Const. §§ 2, 16, art. 11, an unincorporated association may be formed for the purchase of a single tract of real estate, title to be taken in a trustee, and the agreement may provide that death of a member shall not work a dissolution of the association and that members or officers shall not sell or dispose of property without concurrence of the shareholders. Id. Such association was neither a corporation nor a general partnership. Id. Limitation of agency of members results from lack of right of delectus personae and is not an incident of the association not possessed by a partnership. Id. Even if association exercised privileges not possessed by individuals or partnerships, § 2, art. 11, of the Constitution does not apply since it is not operating under any special law as therein prohibited, and the command in said section is directed exclusively to the legislature to provide a general law for its organization. Id.

8. Where agreement provided that death should not work a dissolution except at election of a stockholder, if it was intended to give the association the attributes of a

will nevertheless be entitled to maintain a bill for an accounting if trustees should refuse or fail to divide accrued or net profits.[9] Where a transferee of stock calls upon the seller to repurchase it under an agreement between the parties and arrangements are made for a settlement as of a certain date, he will not be permitted to select a later date for settlement,[10] and profits earned thereafter will belong to the seller.[11] Though the members are partners and may be held liable as such for firm debts, they may legally have contracts so drawn as to restrict liability to the assets of the association.[12] A member may be held liable for debts of the company notwithstanding his attempted withdrawal therefrom if subsequently he participates in its affairs or otherwise holds himself out as a member;[13] but one who has withdrawn from the company as authorized by its by-laws is not liable for debts subsequently incurred, though he is unable to procure a transfer of the stock on the association books to his purchaser.[14] A statute making it a misdemeanor for a corporation to do business in the state without filing a statement is ordinarily not applicable to joint stock companies.[15]

JOINT TENANCY, see latest topical index.

JUDGES.

§ 1. The Office; Appointment or Election; Qualifications and Tenure (522).
§ 2. Special, Substitute, and Assistant Judges (524).
§ 3. Powers, Duties, and Liabilities (526).
§ 4. Disqualification in Particular Cases (528).

This article treats only of judges as such and as distinguished from the courts over which they preside. The organization[16] and jurisdiction[17] of courts and matters common to the election, salary, and tenure of officers generally[18] are excluded.

§ 1. *The office; appointment or election; qualifications and tenure.*[19]—The laws generally provide when a judge must qualify.[20] The fact that the oath is filed

corporation without its form or any change in liability for firm debts, the right to contribution would be ascertained according to the shares held by each member and death would not work a dissolution but would entitle the legatees or distributees to succeed to the shares of the deceased. Taber v. Breck [Mass.] 78 N. E. 472.

9, 10. Taber v. Breck [Mass.] 78 N. E. 472.

11. Could not maintain accounting. Taber v. Breck [Mass.] 78 N. E. 472.

12. And thus create the same situation as if the association were a corporation and the members were its stockholders. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353. May issue bonds secured by assets with stipulation against personal liability. Id.

13. Evidence held admissible to show that defendant continued as a member of a banking association after plaintiff made deposits. Bradford v. National Benefit Ass'n, 26 App. D. C. 268. Held proper under the evidence to submit to jury question whether defendant had abandoned his intention to transfer his shares and waived his notice of withdrawal. Id.

14. Where former connection of member was not known to depositor at time of deposit. Norwood v. Francis, 25 App. D. C. 463.

15. Held that Ky. St. 1903, § 571, when considered in connection with the sections immediately preceding and following it, does not apply to such companies, though § 457 provides that "corporation" may be construed to include a joint stock company. Commonwealth v. Adams Exp. Co., 29 Ky. L. R. 1280, 97 S. W. 386.

16. See Courts, 7 C. L. 999.

17. See Jurisdiction, 6 C. L. 267.

18. See Elections, 7 C. L. 1230; Officers and Public Employes, 6 C. L. 841. Quo warranto to remove from office, see 6 C. L. 856, note 61.

19. See 6 C. L. 209.

20. A special judge of the municipal court of the city of Stillwater, elected at the November election for the term commencing on the second Tuesday of the following April, has until the commencement of the term to qualify as such officer, though the city charter provides that "any officer who shall refuse or neglect for 10 days after notice of his election or appointment to enter upon the discharge of the duties of his office shall be deemed to have vacated his office." State v. Jack [Minn.] 108 N. W. 10.

in the wrong office,[21] or that a bond is not recorded within the statutory period, will ordinarily not render the office vacant.[22] A judge having been duly elected and qualified, it is not competent for the legislature to annul the election without cause and designate some one else to fill the office.[23] The length of a term will depend upon constitutional provisions in force up to and including election day, and not upon such as may be adopted on that day.[24] Constitutional directions as to appointments and elections to fill vacancies must be complied with.[25] Justices of inferior courts not of record are removable in New York by such courts as may be prescribed by law.[26]

The acts of a de facto judge[27] are generally held valid[28] and not subject to collateral attack.[29]

Salaries[30] and fees are generally fixed by statute.[31] The salary attaches to the

21. That county judge filed oath with county clerk instead of in office of clerk of circuit court, as required by Rev. St. 1898, § 2442, did not render office vacant. State v. Bunnell [Wis.] 110 N. W. 177.

22. Not fatal that bond was not recorded until three months after it was executed and filed, though statute required recording before filing. State v. Bunnell [Wis.] 110 N. W. 177.

23. Laws 1905, p. 154, c. 91, §§ 1, 2, providing that all county judges theretofore appointed to fill vacancies should continue in office until January, 1906, could not extend the right of an appointee to hold the office to the prejudice of one who had been duly elected, and who had qualified as county judge before the act went into effect, to fill an unexpired term ending January 1, 1906. State v. Bunnell [Wis.] 110 N. W. 177. Repeal of the law June 6, 1905, would also seem to defeat the appointee's claim. Id.

24. Const. art. 4, § 7, was in force as to all its provisions until the close of the election on November 7, 1905, and a person elected on that day to succeed himself as probate judge was elected for only three years from the expiration of the term which he was already holding. State v. Pattison 73 Ohio St. 305, 76 N. E. 946. Section 2 of the amendment to the Constitution, now designated as article 17, providing that the term of office of a probate judge shall be four years, applies only to such persons as shall be elected to such office as provided in § 1 of such amendment. Id.

25. Upon the establishment of a new judicial district or the creation of a new judgeship in an old district a "vacancy" occurs within the meaning of Const. § 152, requiring that a vacancy in an elective office must be filled at the next ensuing election covering the territory in which the officer is to be voted for if the vacancy has existed for three months and the unexpired term does not end at such election, and the legislature had no power to order a special election of a new judge. Yates v. McDonald, 29 Ky. L. R. 1056, 96 S. W. 865.

26. The court of special sessions of the city of New York is an "inferior court not of record" within Const. art. 6, § 17, providing for the removal of justices of such courts by such courts as may be prescribed by law, and the omission of the word "not" by Laws 1895, p. 683, c. 880, amending Code Crim. Proc. § 11, should be regarded as a mere scrivener's error. In re Deuel, 101 N. Y. S. 1037. The supreme court of the county of New York has power to remove a justice of the court of special sessions for cause. Const. art. 6, § 17; Laws 1895, p. 1283, c. 601. Id., 112 App. Div. 99, 98 N. Y. S. 297.

27. See 6 C. L. 210. One who claims to act as judge pro tem of a city court by virtue of an appointment filed in a public office, and who is recognized by litigants, the officers of the court, and others as judge pro tem, is a de facto judge. Briggs v. Voss [Kan.] 85 P. 571.

28. Rev. St. 1899, § 1679, provides for the election of a special judge by the attorneys present when a judge shall be unable to hold court and fail to procure another judge. Held, where a judge died during term and the attorneys elected a special judge, he became a judge de facto and his acts during the term were valid, irrespective of whether there was a vacancy which should be filled by the governor. Usher v. Western Union Tel. Co. [Mo. App.] 98 S. W. 84.

29. By suit to enjoin execution. Briggs v. Voss [Kan.] 85 P. 571.

30. See 6 C. L. 210.

31. The salary of justices of the supreme court of the District of Columbia for the fiscal year ending June 30, 1893, was $5,000, being the salary fixed by the appropriation act for the year ending June 30, 1892, though the appropriation for the next year was a lump sum insufficient to pay more than the former salary, in view of the appropriation of March 2, 1895 (28 St. at L. 851, c. 187), to pay as a deficiency for the fiscal year ending June 30, 1893, a sum representing the difference between the compensation theretofore received and $5,000 per year. James v. U. S., 202 U. S. 401, 50 Law. Ed. 1079. Under Const. art. 18, § 7, and the law carrying it into effect, a probate judge must account to the county for all fees received by him for services rendered by virtue of his office over and above his actual and necessary expenses (Rhea v. Washington County Com'rs [Idaho] 88 P. 89), but under § 2438, Rev. St. 1887, he may retain any gratuity received by him over the statutory fee of $5 for solemnizing a marriage (Id.). Rev. St. 1899, § 2597, providing for the payment of a fee to a special judge in criminal

office, not to the incumbent.[32] The constitution of Connecticut does not prohibit an increase of judicial salaries by legislation so as to affect judges in office when the law is enacted.[33] Federal judges may resign on full pay after reaching the age of seventy.[34]

§ 2. *Special, substitute, and assistant judges.*[35]—Statutes generally provide for the election or appointment of a special judge when the regular judge is absent or disqualified,[36] or for the calling in of another judge, or an attorney, to preside.[37] In Oklahoma the supreme court or chief justice thereof may appoint another judge upon any notice that may be received that a change of judge has been granted in a lower court.[38] Under the Missouri statute a circuit judge need not state the reasons why he is unable to try a case before he can call in another judge.[39] In the

courts, applies also to special judges in the St. Louis court of criminal correction. Constitution and statutes considered. State v. Wilder, 198 Mo. 166, 95 S. W. 910. Under section 546 of the Revised Statutes, probate judges are entitled to receive six cents for each one hundred words of orders entered on the journal. Under the same section they are not entitled to thirty-five cents for each certificate under the seal of the court to the copies of the certificate of the medical witness and of his findings in the case as required by section 705. State v. Adams, 8 Ohio C. C. (N. S.) 513.

32. Under Const. art. 6, § 6, declaring that the legislature may provide for the election of more than one judge in the circuit including Saginaw county, and that such judge or judges, in addition to the salary provided by the constitution, shall receive from counties "such additional salary" as may "from time to time be fixed" by the board of supervisors; and Pub. Acts 1889, p. 79, No. 75 (Comp. Laws, § 279), providing for two judges in the circuit including Saginaw county, and that in case of illness or inability of either judge the business assigned to him shall be done by the other, the salaries provided for in the constitution are to be fixed in advance, and the board of supervisors of Saginaw county had no authority to allow one of the judges extra compensation for services performed by him during the illness of the other. Beach v. Kent, 142 Mich. 347, 12 Det. Leg. N. 747, 105 N. W. 867.

33. Laws 1905, p. 410, c. 213, increasing the salaries of members of the supreme court of errors and of the superior court, and going into effect from date of passage, does not violate art. 24 of the amendments to the constitution prohibiting extra compensation to public officers and providing that neither the general assembly nor any county, city, etc., shall increase the compensation of any public officer or employe to take effect during the continuance in office of any person whose salary might be increased thereby, such amendment prohibiting an increase only by grant other than legislation. McGovern v. Mitchell, 78 Conn. 536, 63 A. 433.

34. The supreme court of the District of Columbia is a "court of the United States" within U. S. Rev. St. § 714. U. S. Comp. St. 1901, p. 578, providing for full pay to judges seventy years of age who resign after having held their commissions for ten years. James v. U. S., 202 U. S. 401, 50 Law. Ed. 1079.

35. See 6 C. L. 210.

36. Rev. St. 1899, §§ 1679, 1681, providing for the election of a special judge and in case of his failure or inability to act then for the election of another, do not authorize the election of a special judge during the absence of a judge who has been called in from another district under § 1678 for disqualification of the regular judge so as to authorize the special judge to set aside an order made by the judge called in. Bower v. Daniel, 198 Mo. 289, 95 S. W. 347. Under Rev. St. 1895, art. 1071, the attorneys present could elect a special judge on the first day of the term where the regular judge was absent, the statute not providing that it could be done until some succeeding day. Cox v. Oliver [Tex. Civ. App.] 15 Tex. Ct. Rep. 790, 95 S. W. 596. Where after reversal of the judgment of a special judge agreed upon by the parties, and his refusal to serve farther, the governor appointed a judge of another district, under Sayles' Rev. St. 1897, art. 1069, to try the case, the latter judge had jurisdiction, the regular judge being disqualified. Sovereign Camp of Woodmen v. Boehme [Tex. Civ. App.] 97 S. W. 847 Under Const. 1874, art. 7, §§ 32, 34, and 36, providing that whenever the judge of the county or probate court may be disqualified the governor may appoint a special judge, the governor may appoint a special judge of a court of common pleas to try a case in which the judge of that court is disqualified. Beauman v. Wells, Fargo & Co. Exp., 77 Ark. 152, 91 S. W. 13. Record held to sufficiently disclose authority of such special judge to preside. Id.

37. Under Burns' Ann. St. 1901, § 1839, a judge from whom a change of venue is taken may, in his discretion, call an attorney to act as special judge instead of calling a regular judge. Juliana v. State [Ind.] 79 N. E. 359.

38. Act Cong. Dec. 31, 1893, c. 5, 28 St. 21. Barbe v. Territory, 16 Okl. 562, 86 P. 61. While the Territorial Legislature could make proper provision for the orderly transmission of notice to the clerk of the supreme court when an order for change of judge was granted, such provision was not a restriction upon the authority of the supreme court or chief justice thereof to act upon other notice. Id.

39. Under Rev. St. 1899, § 1678, providing

absence of constitutional restrictions the legislature has power to permit judges to interchange duties and hold court for each other.[40] A party may waive his right to object that a special judge was improperly appointed.[41]

Ordinarily, when judges interchange districts, each has power to perform all the duties imposed on a judge in the district over which he has been requested to preside.[42] In Alabama the statutes provide for a supernumerary judge,[43] and one holding a regular term may designate a day for holding an adjourned term and may preside at the adjourned term so fixed by him.[44] Where uncompleted business is referred to the judge of another district during the absence of the regular judge, the substitute judge may exercise the functions of a judge in chambers in connection with such business within his own district.[45] A judge of another circuit called in to try a case owing to disqualification of the regular judge is not deprived of jurisdiction on account of the expiration of his term of office where he is re-elected to succeed himself;[46] nor is a substitute judge necessarily disqualified because he may not have authority to try similar cases in his own district.[47] A second special judge duly appointed or elected may finish business not completed by the first.[48] The authority of a special judge appointed to act during the disability of the regular judge continues during such disability[49] and terminates with it.[50] A

that when "for any cause" he is unable to hold court he may call another judge. Dauwalter v. Missouri Pac. R. Co., 115 Mo. App. 577, 92 S. W. 516.

40. Sess. Laws 1899, p. 171, c. 91, authorizing county judges to interchange, is not unconstitutional because Const. art. 6, § 12, provides that district judges may hold court for each other, and § 22 relating to county judges grants no such privilege. Prudential Ins. Co. v. Hummer [Colo.] 84 P. 61. Municipal Court Act of New York, Laws 1902, p. 1494, § 12, and Laws 1904, p. 1429, c. 598, providing for such rotation of justices in that court that each justice shall sit in at least five other districts after sitting in his own district for one month, do not deny the equal protection of the laws, though when passed there was but one borough that had as many as six districts. Sakolski v. Schenkel, 50 Misc. 151, 98 N. Y. S. 190. The laws are authorized by Const. art. 6, § 17, providing that district court justices may be elected in cities in such manner and with such powers as shall be prescribed by law. Id.

41. By appearance before special judge and, after change of venue, demurring to complaint, excepting to ruling and filing answer to merits. Whitesell v. Strickler [Ind.] 78 N. E. 845.

42. Under Const. art. 5, § 11, providing that district judges may interchange districts when expedient and may do so when required by law, a judge assigned to try cases in another district had authority to try a case the indictment in which was returned while he was holding court, though the governor in appointing him had not designated such case as one of those to be tried, whatever construction may be insisted upon under Act June 19, 1897 (Acts 25th Leg. [Sp. Sess.] p. 39; Wilson's Supp. Code Cr. Proc. 1897-1900, p. 105, art. 610c). Miller v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 35, 91 S. W. 582.

43. The act creating the office of supernumerary judge is constitutional. Sims v. State [Ala.] 41 So. 413.

44. Whatley v. State, 144 Ala. 68, 39 So. 1014. Acts 1898, pp. 236, 237, §§ 1, 2, are sufficient in themselves to confer the power conceding that the other sections of the act are unconstitutional. Id.

45. Under Comp. Laws, § 2573, declaring that district judges may each exercise the functions of judges in chambers at any point in the state, he could extend the time for preparation of a statement on motion for a new trial without an affidavit that the trial judge was still absent, notwithstanding § 197 of the Practice Act (Comp. Laws, § 3292), providing that the time may be extended by the court or the judge before whom the case was tried, and court rule 43, providing that no judge except the one having charge of the cause shall do anything required to be done in a cause or proceeding unless absence or inability of the trial judge be shown by affidavit. Twaddle v. Winters [Nev.] 85 P. 280.

46. Could make nunc pro tunc entry of judgment and sentence in criminal case and extend time for filing bill of exceptions. State v. Gordon, 196 Mo. 185, 95 S. W. 420.

47. Under Rev. St. 1899, § 2597, a judge called to try a criminal case held not disqualified because he could not try criminal cases in the circuit over which he presided. State v. McCarver, 194 Mo. 717, 92 S. W. 684.

48. Could hear and determine motion for new trial where first special judge was called away after verdict. Texas & P. R. Co. v. Voliva [Tex. Civ. App.] 14 Tex. Ct. Rep. 501, 91 S. W. 354. Upon the resignation of a special judge elected by the bar, another special judge duly elected may hold the balance of the term. Cox v. Oliver [Tex. Civ. App.] 15 Tex. Ct. Rep. 790, 95 S. W. 595.

49. Not limited to term at which he was appointed. Warner v. Ford Lumber & Mfg. Co., 29 Ky. L. R. 527, 93 S. W. 650.

50. Where not appointed to try a special

special judge being only a substitute, it is not contemplated that both the regular and the special judges should hold court in the same county or district at the same time.[51]

§ 3. *Powers, duties, and liabilities.*[52]—One circuit judge cannot review, reverse, or modify an order of another unless it is administrative in character.[53] In New York a justice of the appellate division of the supreme court cannot exercise any of the powers of a justice of the supreme court other than those of a justice at chambers and those pertaining to the appellate court of which he is a member.[54] In Alabama the probate judge, and not the probate court, has power to hear or grant a petition for a writ of habeas corpus when a person has been confined for a felony.[55] In Texas the regular district judge alone has power to create a special term of court.[56] The provision of the constitution of Pennsylvania exempting judges from the imposition of nonjudicial duties applies only to judges of the supreme court.[57] A mandate from an appellate court directing a judge to forthwith secure the services of another judge, or show cause on a day named, operates to stay all his action in the case until entry of remittitur on the judgment of the appellate court.[58] An official judicial signature should be by name and not initials.[59]

Powers during vacation or at chambers[60] *or after term of office.*[61]—Powers in chambers or out of term are derived from statute[62] and generally extend to inter-

case but merely during illness of regular judge. Hall Com. Co. v. Crook & Co., 87 Miss. 445, 40 So. 1006.

51. Bedford v. Stone [Tex. Civ. App.] 95 S. W. 1086. But since in this case defendant had no defense whatever to the suit, and the judgment of the special judge was clearly correct, the error was harmless. Id.

52. See 6 C. L. 211.

53. Orders held not conflicting. Lockwood v. Lockwood, 73 S. C. 18, 52 S. E. 735.

54. Under Const. art. 6, § 2, and Code Civ. Proc. § 222. Owasco Lake Cemetery v. Teller, 110 App. Div. 450, 96 N. Y. S. 985; Williamson v. Randolph, 111 App. Div. 539, 97 N. Y. S. 949. Where a justice before whom an issue of fact was tried filed an opinion but no decision was signed or judgment entered within 20 days after the final adjournment of the term and the judge was designated as justice of the appellate division for a term of five years, he could not enter judgment and an order restoring the action for retrial was proper. Id. Parties cannot by consent confer upon a justice of the appellate division power to hold a special term of the supreme court for the hearing of motions and to enter an order such as an order of reference on a motion there pending. Owasco Lake Cemetery v. Teller, 110 App. Div. 450, 96 N. Y. S. 985. A justice, who after the trial of a cause becomes a member of the appellate division, cannot thereafter decide a motion for a nonsuit reserved at the trial. Milliman v. New York, etc., R. Co., 109 App. Div. 139, 95 N. Y. S. 1097. Where a justice refuses to settle and sign a formal decision in the supreme court because of his designation to the appellate division, plaintiff has an absolute right to a new trial without terms or conditions. Williamson v. Randolph, 185 N. Y. 603, 78 N. E. 545.

55. Code 1896, §§ 3372, 4817. Carwile v. State [Ala.] 39 So. 1024.

56. That judge who had been of counsel made an order setting the case for trial at a special term called by himself was not a tenable objection. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

57. It is the duty of judges of courts of common pleas to appoint members of county tax boards. Commonwealth v. Collier, 213 Pa. 138, 62 A. 567.

58. Noel v. Smith, 2 Cal. App. 158, 83 P. 167. Where before remittitur had been filed in the superior court the judge made an order with reference to certain motions in the case, such order constituted a technical contempt. Id.

59. Allowance of an order at chambers by "W. B. S." held bad. Conery v. His Creditors, 115 La. 807, 40 So. 173.

60. See 6 C. L. 211.

61. See 2 C. L. 579; 6 C. L. 210.

62. By § 260, Civil Code (Cobbey's Ann. St. 1903, § 1239), a judge of the district court at chambers is given jurisdiction to enforce obedience of an injunction or restraining order whether the same was allowed by the court or by a judge thereof, but he has no jurisdiction to punish a violation of such order, as a criminal offense, by imprisonment. Back v. State [Neb.] 106 N. W. 787. Under Acts 1894-95, p. 831, conferring upon the circuit court of Jefferson county the same jurisdiction "now conferred on courts of chancery," and providing that the chancery rules of practice shall apply, the judge of the circuit court of Jefferson county has jurisdiction to appoint a receiver in vacation. Ensley Development Co. v. Powell [Ala.] 40 So. 137. A district judge at chambers has power to dissolve a restraining order granted by a probate judge under the provisions of Civil Code, § 239, as amended. Hurd v. Atchison, etc., R. Co. [Kan.] 84 P. 553. Judge could not sign bill of exceptions in vacation after adjournment of court

locutory and provisional orders,[63] but not to matters affecting the merits.[64] Power to do an act "in vacation within 30 days" after term will not extend into a new term beginning less than thirty days after the old.[65] Power to "enter" a judgment does not imply power to "render" one.[66] A judge in vacation has no power to summarily issue a mandatory injunction except in extreme cases where irreparable injury is threatened;[67] and a peremptory writ of mandamus issued in vacation on the petition only is void.[68] In Illinois it requires a majority of the judges of a judicial circuit to dispense with a jury for a term of court by an order in vacation.[69]

By statute, a judge who has tried a case may settle a bill of exceptions or case made after his term of office expires.[70] A succeeding judge may modify administrative, as distinguished from final, orders made by his predecessor,[71] and may cause a case to be placed upon its appropriate calendar.[72] Upon the death of a Federal judge after rendition of verdict in a criminal case, his successor has power to hear and determine a motion for a new trial on the merits where he is satisfied that he can fairly pass upon the motion,[73] and he may also pass sentence if there is sufficient evidence in the record to enable him to fairly and intelligently exercise his discretion.[74] In a contest in the orphans' court of New Jersey, a succeeding judge may use evidence previously taken in open court and reproduced from stenographer's notes.[75]

without order of court or agreement of counsel required by statute. Meyer v. Alverson [Ala.] 39 So. 984.

63. Under Code, §§ 2405, 2406, 4356, 4357, a judge has jurisdiction in vacation to issue a temporary writ of injunction against a liquor nuisance, whether the proceeding is brought by the county attorney or a citizen. Young v. Preston [Iowa] 108 N. W. 463. Under Rev. St. 1892, § 1196, a circuit judge has full power either in term time or in vacation to stay an execution issued from and returnable to the circuit court in cases at law. Barnett v. Hickson [Fla.] 41 So. 606. Under Rev. St. 1892, § 2913, an order for the issuance of a commission to take the testimony of absent witnesses may be made by the judge either in term or in vacation on application of defendant in a criminal case. Clements v. State [Fla.] 40 So. 432. Under Rev. St. 1899, § 3951, the circuit judge in vacation may remand to a justice of the peace an action of unlawful detainer originally brought before the justice and certified by him to the circuit court. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727.

64. Under Code Civ. Proc. § 168, in a default case, testimony must be taken by the court or referee, and a judge in chambers in one county cannot hear testimony and render judgment in a default case pending in another county. Hotchkiss v. First National Bank [Colo.] 85 P. 1007. A judge has no authority acting outside of court to alter a judgment previously duly rendered in open court. O'Brophy v. Era Gold Min. Co. [Colo.] 85 P. 679.

65. Signing bills of exceptions. Hoover v. Saunders, 104 Va. 783, 52 S. E. 657.

66. Rev. St. 1901, par. 1442, providing that a judgment may be "entered" in vacation, does not justify the "rendition" of a judgment in vacation and outside the district in which the case was tried. Meade v. Scribner [Ariz.] 85 P. 729.

67. Could not on petition alone compel issuance of license to brewer to establish an agency. Hager v. New South Brew. Co., 28 Ky. L. R. 895, 90 S. W. 608.

68. Hager v. New South Brewing Co., 28 Ky. L. R. 895, 90 S. W. 608.

69. Hurd's Rev. St. 1903, c. 37, § 79. Newlin v. People, 221 Ill. 166, 77 N. E. 529.

70. Rev. St. 1898, § 3290, does not violate Const. art. 8, § 5, limiting the term of office of district judges to four years. Larkin v. Saltair Beach Co. [Utah] 83 P. 686. Where within the time fixed by the trial judge for settling a case-made, his successor orders another extension and provides therein that within a definite time the trial judge shall settle and sign the case-made, the trial judge may settle and sign within such time. Stanton v. Barnes, 72 Kan. 541, 84 P. 116. Evidence held to show that no time had been fixed for settling and signing a case-made when the term of office of the trial judge expired. State v. Lewis, 72 Kan. 234, 83 P. 619.

71. An order allowing time to answer after default but which does not authorize judgment for plaintiff on failure to answer within the prescribed time is an administrative and not a final order, and, not involving the merits, a succeeding circuit judge has power to modify it by permitting an answer to be filed after a second default. Kaylor v. Hiller, 72 S. C. 433, 52 S. E. 120.

72. Kaylor v. Hiller, 72 S. C. 433, 52 S. E. 120.

73. Rev. St. § 953, and Act June 5, 1900 (c. 717, § 1, 31 Stat. 270 [U. S. Comp. St. 1901, p. 696]), and law as it previously existed. United States v. Meldrum, 146 F. 390.

74. United States v. Meldrum, 146 F. 390.

75. Where trial judge resigned it was not necessary to try case de novo. In re Nolan's Will [N. J. Eq.] 63 A. 618.

Immunities and exemptions.[76]—Judicial officers are not civilly liable for judicial acts within the jurisdiction of the court,[77] and while they may be held liable for acts outside the jurisdiction, this does not mean jurisdiction dependent upon the existence of facts to be determined by them from evidence adduced, but jurisdiction as a matter of law.[78]

Disability to practice or hold other office.[79]—In New York, a justice of the court of special sessions is disqualified to hold any other public office or carry on any other business.[80]

§ 4. *Disqualification in particular cases.*[81]—A judge is not required to vacate the bench merely because a friend of his boasts of his influence over him.[82] Though the disqualification of a judge deprives him of authority to render judgment in a court, it does not take from the court jurisdiction of a cause properly brought in the county.[83] There is a conflict as to the status of a judgment rendered by a disqualified judge,[84] and as to the extent to which disqualifications can be waived.[85]

Interest and kinship.[86]—Mere interest in the question at issue as distinguished from interest in the cause does not disqualify.[87] Relationship to a party within a certain degree is a disqualification in most states.[88] In Texas a judge is disqualified when related to either of the parties by consanguinity or affinity within the third degree.[89] In Louisiana, when a judge recuses himself for interest, he is required to appoint a judge of an adjoining district to try the case.[90] Disqualification may be waived when the statute so provides.[91]

76. See 6 C. L. 212.

77. And the reason and policy of the rule apply with equal force against the maintenance of an action alleging an act to have been negligently or corruptly done. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

78. Therefore a finding by a judge that the evidence established one year's residence of the plaintiff within the state, in a divorce trial, will not be inquired into in an action against such judge on the ground that such finding was erroneous and therefore no right or jurisdiction existed to grant the divorce. MacBride v. Gould, 3 Ohio N. P. (N. S.) 469.

79. See 4 C. L. 285.

80. Or practicing as attorney or counselor at law. Laws 1895, p. 1294, c. 601, § 25, is constitutional. In re Deuel, 112 App. Div. 99, 98 N. Y. S. 297.

81. See 6 C. L. 212.

82. Not where brother-in-law of judge boasted that he could influence judge's decision in election contest. Browning v. Lovett, 29 Ky. L. R. 692, 94 S. W. 661.

83. So as to authorize prohibition. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129.

84. Rev. St. 1837, c. 43, § 24, provides that no justice of the peace shall sit in any case where he is related to either party within the fourth degree. Kirby's Dig. § 4571, provides that where a justice of the peace "is of near relation" to one party the other may have a change of venue. Held relationship of the justice to one of the parties did not avoid his judgment but was merely a ground for change of venue. Morrow v. Watts [Ark.] 95 S. W. 988, and authority cited.

85. Objection to jurisdiction of a justice of the peace on the ground of his relationship to one of the parties held waived where the statute provided that disqualification on such ground could be waived by consent and the question was not raised until after judgment and appeal to the circuit court. Morrow v. Watts [Ark.] 95 S. W. 988.

86. See 6 C. L. 212.

87. Under Const. art. 5, § 11, and Rev. St. 1895, art. 1068, disqualifying a judge in a cause wherein he is interested, though the judge was a taxpayer, he was not disqualified in a suit to restrain the collection of city taxes where judgment therein could in no manner affect him. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141.

88. A register of wills with whom a petition for review is filed, who is the great-uncle of the wife of one of the petitioners for review, is disqualified to hear the petition. Layton v. Jacobs [Del.] 62 A. 691.

89. Where great-grandmother of plaintiff's wife, who was interested in the case, and of the judge who tried it, were one and the same person, the judge was disqualified by relationship within the third degree. Gulf, etc., R. Co. v. Looney [Tex. Civ. App.] 15 Tex. Ct. Rep. 46, 95 S. W. 691. Where the damages recovered would be community property, plaintiff's wife, though not mentioned in the pleadings, was a party within the statute disqualifying a judge related to either party. Id.

90. That a judge had advised the police jury that it was authorized to build a courthouse, while showing that he had formed an opinion, did not indicate any personal interest in the matter, and where he stated that he had no reason for his recusation, he could appoint a lawyer having the qualification of a judge of his court. Murphy v. Police Jury of St. Mary, 116 La. 939, 41 So. 216.

91. Cause determined by supreme court of errors, though all the justices of that

Disqualification because of having been counsel [92] disables a judge to sit in the case,[93] and he having been consulted, the extent of his knowledge of the facts or the probable effect upon his mind is immaterial.[94]

Bias and prejudice.[95]—Public confidence in our judicial system and courts of justice demands, even when there is no statute, that causes be tried by unprejudiced and unbiased judges.[96] The employment by a mayor of detectives to obtain testimony for use in a prosecution for liquor selling, and the payment of such detectives by the mayor for the services so rendered, does not disqualify the mayor from sitting at the trial of the case.[97]

Procedure and trial of fact of disqualification.[98]—The objection must be made promptly,[99] and the party who seeks to disqualify a judge has the burden of presenting facts showing disqualification,[1] legal conclusions being nugatory.[2] A judge who sits upon the return of a motion should refer it to the trial judge if it can be entertained only by him.[3] In California, the judge whose bias is alleged must himself hear and determine the motion for a change of judge,[4] and his own affidavit stating facts disproving bias may be used in opposition to the motion.[5] In some states the mere filing of an affidavit of prejudice disqualifies a judge in certain cases,[6] and a declaration in open court by a judge so disqualified of his intention to

court and all but two of the judges of the superior court were interested, but the disqualification was waived by stipulation in open court as authorized by Gen. St. 1902, § 498. McGovern v. Mitchell, 78 Conn. 536, 63 A. 433.

92. See 6 C. L. 213.

93. Could not settle bill of exceptions without consent of parties. State v. Bradley, 194 Mo. 166, 92 S. W. 464. The fact that the regular judge appeared to some extent as counsel for the successful party is not ground for reversing the judgment where on the agreed statement of facts no other result is possible than the verdict directed. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

94. Criminal case. Juliana v. State [Ind.] 79 N. E. 359.

95. See 6 C. L. 213.

96. Day v. Day [Idaho] 86 P. 531. Const. § 18, art. 1, is self-executing, and the legislature, by failing to provide by proper legislation that prejudice of a judge is cause for change of venue, cannot nullify its provisions and thus compel the trial of a cause before a prejudiced judge. Id.

97. Nor is he disqualified by opinions he may entertain regarding the offense. Garrison v. State, 4 Ohio N. P. (N. S.) 277.

98. See 6 C. L. 213.

99. Where relators failed during a full term to apply for election of a special judge to settle bill of exceptions on account of the regular judge having been of counsel, mandamus would not thereafter lie to compel the judge to extend the time for filing. State v. Bradley, 194 Mo. 166, 92 S. W. 464. Affidavit too late where not filed until after demurrer to ruling charging accused with contempt, and after accused had moved to strike out parts thereof, had obtained continuances, etc. French v. Com. [Ky.] 97 S. W. 427. But a judge being disqualified by reason of relationship, it was immaterial that the objection was not made until the making of a motion for a new trial. Gulf, etc., R. Co. v. Looney [Tex. Civ. App.] 15 Tex. Ct. Rep. 46, 95 S. W. 691.

1. Change of venue. Dakan v. Superior Ct. of Santa Cruz County [Cal. App.] 82 P. 1129. An affidavit that the judge has shown great partiality and favoritism to the attorney in opposition to the interests of defendant is insufficient. Id. Affidavit merely showing belief that judge disliked affiant because of his failure to bring about a reconciliation held insufficient. French v. Com. [Ky.] 97 S. W. 427. Averment in cross petition that the chancellor was disqualified to take charge of assignment proceedings because "a party to said suit and interested therein" held insufficient, it not appearing from the pleadings that he was a party and it not being shown how he was interested. Metcalfe v. Merchants' & Planters' Bank [Miss.] 41 So. 377. That 16 years before the judge, as district attorney, had caused defendant and others to be convicted for battery and later had laid the facts before the governor for his information on passing on petition for pardon held not to require change of judge. Hoyt v. Zumwalt [Cal.] 86 P. 600. After defendant's motion for a change of venue the court could not merely, on plaintiff's affidavit and without hearing other proof, find the judge of another division disqualified. Leslie v. Chase & Son Mercantile Co. [Mo.] 98 S. W. 523.

2. Where administrator sought to avoid order of removal. Milton v. Hundley [Fla.] 42 So. 185.

3. Motion for resettlement of case on appeal. Henry v. Interurban St. R. Co., 100 N. Y. S. 811.

4, 5. Hoyt v. Zumwalt [Cal.] 86 P. 600.

6. The object of § 550, Rev. St. 1892, is to secure the attendance of a judge of the court of common pleas of another subdivision when the judges of the subdivision in which the case is pending are disqualified, and an affidavit filed for that purpose is of no effect unless it alleges the disqualification of all the judges of the latter subdivision. Wolfe

proceed with the trial, notwithstanding the filing of the affidavit, is sufficient ground for a proceeding in mandamus and injunction.[7] In Louisiana no appeal lies from an order recusing a judge.[8]

JUDGMENT NOTES, see latest topical index.

JUDGMENTS.

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This topic excludes all matters relating to foreign[9] or criminal[10] judgments, the conclusiveness of judgments,[11] and the specific modes of enforcing judgments.[12]

§ 1. *Definition, nature, and classification of judgments.*[13]—A judgment is the decision or sentence of the law given by a court of justice or other competent tribunal as the result of proceedings instituted therein for the redress of an injury,[14] and is the final determination and adjudication of the controversy or proceeding.[15] Hence it follows that a finding of facts or a declaration of the rights

v. Marmet, 72 Ohio St. 578, 74 N. E. 1076. The provision found in § 550, for the filing of affidavits of bias and prejudice against a common pleas judge, is not an abridgement by the legislature of the powers and rights of the judiciary, nor an interference with the proper administration of justice, and is constitutional. State v. Diriam, 7 Ohio C. C. (N. S.) 457.

7. State v. Dirlam, 7 Ohio C. C. (N. S.) 457.

8. State v. Reid, 115 La. 959, 40 So. 369.

9. See Foreign Judgments, 7 C. L. 1734.

10. See Indictment and Prosecution, 8 C. L. 245.

11. See Former Adjudication, 7 C. L. 1750.

12. See Creditors' Suit, 7 C. L. 1007; Executions, 7 C. L. 1614; Sequestration, 6 C. L. 1441; Supplementary Proceedings, 6 C. L. 1586. Decrees in equity, see Equity, 7 C. L. 1323. See, also, **Fletcher, Equity Pl. & Pr. §§ 699-741.** Interlocutory orders. Id. §§ 429-440.

13. See 6 C. L. 214.

This section is definitive in its nature, the manner of taking and the requisites of the various kinds of judgments enumerated being treated later on in this article or in separate articles. See topics Confession of Judgment, 7 C. L. 675; Defaults, 7 C. L. 1122.

14. State v. French, 118 Mo. App. 15, 93 S. W. 295.

15. State v. Weber, 96 Minn. 422, 105 N. W. 490. In naturalization proceedings recital in record: "Whereupon it is ordered by the court that a certificate of naturalization be issued to him on payment of the costs of this application," held to amount to a judgment admitting the applicant to citizenship. Id.

of the parties are not final judgments.[16] There must be a sentence of the court that the parties have the rights to which they are found to be entitled.[17]

Judgments on offer, consent, stipulation, or confession.[18]

Defaults and office judgments.[19]—Strictly speaking, a judgment by default cannot be taken after issue is joined.[20]

Final and interlocutory judgments.[21]—The word "final" is used of a judgment in several senses, and when used in any qualified sense, that fact must be kept clearly in mind.[22] A judgment which terminates and completely disposes of the action is final, regardless of the further action of the court,[23] hence it follows that unless an action is severed there can be but one final judgment in an action.[24]

Judgments in personam and in rem.[25]—A judgment in personam is one against the person; a judgment in rem one against the property.[26]

§ 2. *Requisites. A. In general.*[27]—In order to have a valid judgment, the court must have jurisdiction of the cause of action and the subject-matter thereof,[28] and, except in actions in rem, of all necessary[29] parties.[30] Personal service within

16. State v. French, 118 Mo. App. 15, 93 S. W. 295.

17. A so-called judgment to the effect that the grand jury having failed to indict a certain person, it was ordered, in accordance with Rev. St. 1899, § 2834, that all costs be taxed against the prosecuting witness, held not to amount to a judgment. Rev. St. 1899, § 766, construed. State v. French, 118 Mo. App. 15, 93 S. W. 295. An order admitting an alien to citizenship is a judgment possessing all the characteristics of an ordinary judgment. Tinn v. U. S. District Attorney, 148 Cal. 773, 84 P. 152. The approval by a circuit court of a coroner's claim for expenses of an inquisition is not a judgment. Comp. Laws. § 11,828, construed. People v. Hoffmann, 142 Mich. 531, 12 Det. Leg. N. 792, 105 N. W. 838. A declaration of the court upon full hearing of a divorce proceeding that "judgment is ordered for plaintiff and against defendant" constitutes a pronouncing of a judgment of divorce, and not a mere order for judgment not affecting status of the parties. In re Geith's Estate [Wis.] 109 N. W. 552.

18. See 6 C. L. 215; Confession of Judgment, 7 C. L. 675. See, also, Stipulations, 6 C. L. 1554.

19. See 6 C. L. 215. Also see the topic Defaults, 7 C. L. 1122, where the mode and manner of taking and opening default and office judgments is fully treated.

20. Leahy v. Wayne Circuit Judge, 144 Mich. 304, 13 Det. Leg. N. 158, 107 N. W. 1060.

21. See 6 C. L. 215.

22. What judgments are final for the purposes of appeal or res judicata is treated respectively in Appeal and Review, 7 C. L. 128, and Former Adjudication, 7 C. L. 1750. A judgment or decree may be final as to some things and not as to others. See topics just cited.

23. A judgment of dismissal held the final judgment in the action, though followed two days later by another judgment of dismissal. Darlington v. Butler [Cal. App.] 86 P. 194. In a code action embracing an equitable counterclaim, the decree thereon may become the final and complete judgment if no issues remain in the main action. Cotton v. Butterfield [N. D.] 105 N. W. 236.

24. Where interlocutory judgment was reversed as to the codefendants appealing, held not to warrant entry of final judgment as against codefendant not appealing. Action against corporate directors to enforce statutory liability. Bauer v. Parker, 101 N. Y. S. 455.

25. See 6 C. L. 216.

26. A decree for discovery is a personal one. Wallace v. United Elec. Co., 211 Pa. 473, 60 A. 1046. Judgment in short note case after appearance held in personam. Philbin v. Thurn [Md.] 63 A. 571. While an adjudication of bankruptcy in involuntary proceedings is a judgment in rem in the sense that it determines the status of the bankrupt, the ordinary proceedings taken in the bankruptcy proceeding are not proceedings in rem. Whitney v. Wenman, 140 F. 959.

27. See 6 C. L. 216.

28. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371. Jurisdiction of the subject-matter alone is insufficient. Probate decree of adoption. Petition must show jurisdictional facts. Taber v. Douglass, 101 Me. 363, 64 A. 653.

29. In the absence of a necessary party, judgment on the pleading will not be rendered. Hadley v. Ellis & Co., 7 Ohio C. C. (N. S.) 313. In Florida a court of equity which has entered up a deficiency judgment against a woman, in ignorance of the fact of her coverture, may four years thereafter vacate such judgment upon the petition of such woman and her husband, in the absence of laches or intervention of the rights of third parties. Rice v. Cummings [Fla.] 40 So. 889.

30. Barfield v. Saunders, 116 La. 136, 40 So. 593; Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371. Partition decree, ordering sale of land of persons not parties, held void as to such persons. Suburban Co. v. Turner's Adm'r [Va.] 54 S. E. 29. Where a case is tried on the theory that the defendants compose a voluntary joint stock company and that service must be made upon each defendant to give jurisdiction, a judgment against unserved defendants is erroneous. Spotswood v. Dernham [Idaho] 85 P. 1108. Gen. St. p. 2336, § 2, is valid so far as authorizing plaintiff to proceed to judg-

the jurisdiction of the court or an appearance is essential to a judgment in personam,[31] a judgment against a nonresident not so served or appearing being effective only as to property attached in the action,[32] though in some states, where the judgment is based on substituted service, it is sufficient if the complaint or affidavit on which publication is based describes the property of defendant within the state,[33] and this fact must affirmatively appear on the record.[34] It follows that there must be a legal service of valid process,[35] or its equivalent, i. e., an authorized appearance,[36] though mere irregularities therein will not render the judgment void.[37] One being legally served but not appearing, irregularities in the method of taking the judgment does not render the latter void.[38] There must have been a formal commencement of a suit or action by one of the methods prescribed by law,[39] hence it is essential to the validity of the judgment that proper pleadings be filed,[40] and, the court being one of record, that such pleadings are in writing.[41]

ment against one of two joint debtors on his being properly brought into court, though invalid so far as authorizing judgment against the defendant not so brought in. Sayre & Fisher Co. v. Griefen [N. J. Law] 62 A. 993. A judgment cannot be rendered against one who has not been summoned and against whom relief is not asked in the pleadings, though there is a verbal agreement that if judgment should go against defendant he should recover against such person, and a verdict is rendered against him. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 510, 98 S. W. 428.

31. Bank of Horton v. Knox [Iowa] 109 N. W. 201; Clark v. Wells, 27 S. Ct. 43. Default personal judgment. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 182, 95 S. W. 572. A personal judgment, rendered in an action for money only in a state court, against a nonresident of the state who was served by a publication of summons without personal service of process within the state, and who did not appear in the action, is without any validity. Judgment foreclosing second mortgage given to secure sureties on a purchase-money note held not to bar an action on the note to establish the personal liability of the maker, there being no recital in the decree, nor showing otherwise that in the foreclosure suit personal service was had on the maker. Hunter v. Porter [Iowa] 109 N. W. 283.

32. May v. Getty, 140 N. C. 310, 53 S. E. 75. In cases of attachment where no personal service is sought the levy takes the place of service. Albright-Prior Co. v. Pacific Selling Co. [Ga.] 55 S. E. 251. Seizure of property or effects within the jurisdiction is essential. Id. In the absence of consent or of property in the state, which by attachment or otherwise has become the subject or object of the action, nothing short of service of a summons upon the defendant within the state on his appearance in the action will give to a court the jurisdiction requisite to sustain a personal judgment against a nonresident of the state or a foreign corporation. Cella Commission Co. v. Bohlinger [C. C. A.] 147 F. 419.

33, 34. Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N. W. 821.

35. Judgment in action to quiet title held void as to those not named in the published summons, and who are not personally served and who do not appear in the action. Skjelbred v. Southard [N. D.] 108 N. W. 487. Decree foreclosing a tax lien and confiscating property without actual or legal notice to the owner, rendered by a court previous to the formal entering of any suit or action by one of the methods prescribed by law, is absolutely void. Klenk v. Byrne, 143 F. 1008. Where in an action to recover land a third person intervened and defendant did not appear and no citation was served upon defendant notifying him of the intervention, a judgment against defendant in favor of the intervener is void. Barrett v. McKinney [Tex. Civ. App.] 15 Tex. Ct. Rep. 258, 93 S. W. 240.

36. A judgment against a corporation on a stipulation between plaintiff and an attorney claiming to represent the corporation, but employed by one having no authority, is void. Tabor v. Bank of Leadville [Colo.] 83 P. 1060. The effect of a general appearance is to waive the want of personal jurisdiction under personal service, and changes the action into one in personam. Luetzke v. Roberts [Wis.] 109 N. W. 949.

37. Mere irregularity of service or in the form of the notice given by a summons does not, however, render a judgment of a court of general jurisdiction void so as to be subject to collateral attack. Bail v. Hartman [Ariz.] 83 P. 358.

38. Where defendant was duly served but did not appear and the court unlawfully appointed an attorney to represent him, a judgment rendered by agreement between such attorney and plaintiff is merely voidable. Barrett v. McKinney [Tex. Civ. App.] 15 Tex. Ct. Rep. 258, 93 S. W. 240.

39. Decree foreclosing tax lien. Klenk v. Byrne, 143 F. 1008.

40. Lilly v. Claypool [W. Va.] 53 S. E. 22; Perkins v. Pfalzgraff [W. Va.] 53 S. E. 913; Orchard v. National Exch. Bank [Mo. App.] 98 S. W. 824. Where plaintiff claimed to be appointed trustee by a foreign court and defendant denied the allegation, held he must not only produce the judgment appointing him but must prove such pleadings and proceedings as empowered the court to render judgment. Swing v. St. Louis Refrigerator & Wooden Gutter Co. [Ark.] 93 S. W. 978. A judgment following a declaration seeking to combine in one count a declaration in

There must be competent parties[41a] and in determining this question, the court will reject descriptive words of surplusage.[42] Failure of the pleadings to show that a party is a corporation does not render the judgment void.[43] There is a conflict as to whether or not the failure of the complaint to state a cause of action renders the judgment void.[44] There must also be an order for the judgment,[45] and a verdict[46] or findings[47] covering every material issue made by the pleadings. There is no prescribed form for a conclusion of law.[48] A mistrial will not support a judgment.[49] Where a cause is dismissed a judgment subsequently entered therein without notice is void.[50] The cause must be tried at a time fixed by law for holding court.[51] A judgment rendered by a de facto judge is valid.[52] On a motion to set aside a judgment entered on the report of a referee on the ground of his insanity, the test is whether he was able to comprehend the nature of the act and its relations, effects, and legal consequences, without regard to his sanity on other subjects,[53] and is determined as of the date on which the decision was signed and notice given to the party entitled to it.[54] A judgment against several parties may be valid as to one though void as to the others.[55] The validity of the judgment is not affected by irregularities in proceedings to enforce the same.[56]

replevin with one in assumpsit for the balance due on a promissory note, and adjudging plaintiff entitled to the possession of the property taken on the writ and to judgment for the balance due on the note held void. Knowles & Son v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

41. Tinn v. U. S. Dist. Attorney, 148 Cal. 773, 84 P. 152. A written consent of one admitted to citizenship that the order admitting him be set aside for fraud, filed in support of an oral motion to that effect, cannot be considered a complaint. Id.

41a. Oral representations and motion held insufficient to support decree of sale of timber on land of infant. Lilly v. Claypool [W. Va.] 53 S. E. 22.

42. Action by "McAfee's Estate, by Cora McAfee" held an action by Cora McAfee. McAfee's Estate v. Gregg, 140 N. C. 448, 53 S. E. 304.

43. A judgment is not void because the action is brought in the name of the Augusta Drug Company, there being no allegation that the same was a corporation. Glenn v. Augusta Drug Co. [Ga.] 55 S. E. 1032.

44. In order to support a judgment for plaintiff it is essential that the complaint state a cause of action. Petition for mandamus. Commissioners' Ct. of Chilton County v. State [Ala.] 41 So. 463. A judgment rendered on an insufficient complaint is not for that reason void. Meyer v. Wilson [Ind.] 76 N. E. 748.

45. Where docket recited "Judgment for plaintiff for," etc., held sufficient to warrant a finding that there was an order for judgment. Washington Nat. Bank v. Williams, 190 Mass. 497, 77 N. E. 383.

46. Dailey v. Columbia [Mo. App.] 97 S. W. 954.

47. Sandstrom v. Smith [Idaho] 86 P. 416. The judgment must be supported by findings of the ultimate facts material to the issues, even though there is no request for express findings. Kierbow v. Young [S. D.] 110 N. W. 116. In an action for royalty on stone removed from a quarry, a finding that if any stone was removed after the rescission of the contract, it was done by mistake, will not support a judgment for plaintiff, there being no finding that stone was removed. Dishman v. Huetter, 41 Wash. 626, 84 P. 590.

48. Conclusion "that plaintiff recover $100" held sufficient to support a judgment. Western Union Tel. Co. v. Sanders [Ind. App.] 79 N. E. 406.

49. A case does not result in a new trial with the effect that there is nothing to support a judgment because the trial judge becomes disqualified to act on the motion to set aside the verdict and for new trial. Stern v. Wabash R. Co., 101 N. Y. S. 181.

50. Aikman v. South, 29 Ky. L. R. 1201, 97 S. W. 4.

51. Mattox Cigar & Tobacco Co. v. Gato Cigar Co. [Ala.] 39 So. 777.

52. Justice of the peace. Stephens v. Davis [Ala.] 39 So. 831.

53. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650.

54. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650.

Evidence: An adjudication of lunacy entered on such day is prima facie evidence of insanity and casts the burden on the party alleging sanity. Schoenberg & Co. v. Ulman Co., 99 N. Y. S. 650. Evidence of business men for whom he transacted professional matters on such date as to facts they observed and conversations with him, and even their opinions as to his sanity, is admissible. Id.

55. Judgment against defendant held valid as against him, though it wrongfully included judgment against sureties on his replevin bond. Stephens v. Davis [Ala.] 39 So. 831.

56. The validity of a judgment under which a sale of land is made is not affected by a variance between the report of the appraisers and the commissioner's report of sale. Machen v. Bernheim, 29 Ky. L. R. 427, 93 S. W. 621. It is no ground for setting aside a judgment under which land is sold

(§ 2) *B. Conformity to process, pleading, proof and verdict or findings.*[57]—No judgment or decree can be entered in the absence of pleadings on which to found the same.[58] A judgment must conform to the process in the action[59] and, except where the rule has been changed by statute,[60] unless the issues are changed by agreement[61] or by a consent decree, the judgment must conform to the pleadings,[62] though in equity and in some of the code states the demand of the plaintiff

that the bond for the purchase price is defective; this, at most, only affects the validity of the sale. Id.

57. See 6 C. L. 219.

58. Duress extending time for getting timber off an infant's lands and making rebate of purchase-money held void. Lilly v. Claypool [W. Va.] 53 S. E. 22.

59. A judgment rendered against J. M. Peters on process issued against him is void as against M. J. Peters. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428.

60. Under Code Civ. Proc. §§ 274, 1205, where a plaintiff pleads a joint liability against several defendants, but proved a several liability against one of them only, held he was entitled to judgment against him. Lawton v. Partridge, 111 App. Div. 8, 97 N. Y. S. 516.

61. Under a stipulation that if defendant's demurrer was overruled, plaintiff's recovery should be limited to a certain sum to be paid to plaintiff's attorney or the clerk of the court, where the demurrer is overruled and defendant elected to stand on his answer, held proper to render judgment for the amount stipulated. Grouse v. Moody, 130 Iowa, 320, 106 N. W. 757.

62. Roden v. Helm, 192 Mo. 71, 90 S. W. 798. Judgment held not to conform to pleadings where declaration set out instrument sued on. Id. Personal judgment held unwarranted where complaint failed to demand same. Kervan v. Hellman, 110 App. Div. 655, 97 N. Y. S. 55. Where in an action for rent for the month of May, defendant pleaded payment to May 1st, held insufficient to warrant a judgment for defendant though payment is proved. Manhattan Leasing Co. v. Weill, 98 N. Y. S. 686. Pleadings demanding a return of pledged stock or an accounting held not to sustain a money judgment. Hebblethwaite v. Flint, 101 N. Y. S. 43. Where plaintiff sued to recover specific deposits and the court found that they had been paid but that defendant owed plaintiff for other deposits, held not to warrant a judgment for plaintiff. Boothe v. Farmers' Nat. Bank, 47 Or. 299, 83 P. 785. A complaint for board furnished, labor done, and the value of broom brush will not support a judgment for team hired or gasoline furnished. Cannon v. McKenzie [Cal. App.] 85 P. 130. In an equitable action to enjoin a trespass, judgment that defendants were "possessed of the premises in question and the entirety thereof" held unauthorized by the issues. Country Club Land Ass'n v. Lohbauer, 97 N. Y. S. 11. A plaintiff cannot recover on a cause of action not only not alleged, but destructive of his judicial allegations and evidence in the particular suit. Lazarus v. Friedrichs, 117 La. 711, 42 So. 230. One failing to ask in his pleadings for the foreclosure of an equitable lien is not entitled thereto even though the evidence is sufficient to warrant such relief. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866. Where ejected passenger based his claim to damages upon the tender of a cash fare, held he could not recover, the evidence showing that he possessed a ticket. Gulf, etc., R. Co. v. Riney [Tex. Civ. App.] 14 Tex. Ct. Rep. 804, 92 S. W. 54. Where in a suit to recover against a firm the action is dismissed as against one of the partners, a judgment cannot be rendered against the other member. King v. Monitor Drill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046. In personal injury action, held there could be no recovery for doctor's fees or loss of time in excess of the amount claimed in the petition therefor. Smoot v. Kansas City, 194 Mo. 513, 92 S. W. 363. Action for damages for negligent blasting held not to warrant judgment as for a nuisance. Hoyne v. Slattery, 49 Misc. 260, 97 N. Y. S. 352. Where in an action on an insurance policy, insurer did not ask for a recovery of an unpaid premium, held failure of the court to give credit for such premium in the judgment for plaintiff was not error. Home Ins. Co. v. Ballew, 29 Ky. L. R. 1059, 96 S. W. 878. Findings by the court outside the issues made by the pleadings are mere nullities and will not sustain a judgment. Boothe v. Farmers' Nat. Bank, 47 Or. 299, 83 P. 785. A judgment for more than is asked in complaint is erroneous. Moore v. St. Louis, etc., R. Co., 117 Mo. App. 384, 93 S. W. 869. Complaint asking for amendment of judgment for clerical or other error held not to warrant amendment distributing certain dividends. Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 N. E. 480. Where an action is brought to recover "damages to real property and trespass in taking * * * and converting mortgaged property," a recovery should not be permitted without an amendment of the complaint for an impairment of plaintiff's mortgage security, though the evidence shows such a cause of action. Jackson v. Brandon Realty Co., 100 N. Y. S. 1005. Where a counterclaim for a certain amount includes two items, and only one of such items is specified, and there is no evidence of any damage under such specified item, judgment is authorized for no more than the balance between the total amount claimed and the amount claimed on such item. Garrett & Co. v. Josey [Tex. Civ. App.] 16 Tex. Ct. Rep. 824, 97 S. W. 139. A decree ordering sale of the land and timber and division of the proceeds is not authorized by the pleadings in a suit by the grantees of land against the grantees of the standing timber to quiet title to the premises and restrain the removal of the timber on the ground that a reasonable time for removal of the timber has expired, though there is a general prayer

in his petition does not necessarily limit the court in the judgment which it may render; it is the case made by the pleadings and the facts proven and not the prayer of the pleader which measure the relief that the court may award.[63] A judgment will be sustained by a declaration containing one good count which the record affirmatively shows is the basis of the judgment.[64] Nonconformity between the pleadings and the judgment cannot be cured by the amendment of the pleadings after the rendition of judgment.[65] A judgment proceeding upon inconsistent theories is not maintainable.[66] A court will not decide academic questions.[67] The relief awarded must not be for a greater amount than is claimed in the summons.[68]

for relief. Liston v. Chapman & Dewey Land Co., 77 Ark. 116, 91 S. W. 27. The complaint in an action on a note alleged that by a separate instrument defendant waived the right to claim any homestead or other exemptions. The judgment for the plaintiff recited that as against the judgment and executions thereon there were no exemptions of real or personal property. Held that the recital was sufficient, though it did not follow the averments of the complaint. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123. Where the petition in an action is framed upon the theory that an alleged accident caused an injury, and the proof offered by the plaintiff corresponds to the allegations of the petition and is repugnant to the theory of an aggravation of an existing infirmity, the defendant is entitled to have the plaintiff confined in his recovery to the scope of his allegation and proof. Where the issue raised by the pleadings was whether or not the accident caused hernia, proof that plaintiff had hernia prior to the accident constitutes a complete defense. Pittsburg, etc., R. Co. v. Boswell, 7 Ohio C. C. (N. S.) 413. In an action to recover for putting in a well for defendant, held proper not to allow defendant credits, though plaintiff admitted that he had run up an account with defendant for that amount where defendant failed to plead either offset or credit, or in reconvention, and it did not appear whether the items were incurred wholly under the contract with reference to the well. Hahl v. Deutsch [Tex. Civ. App.] 14 Tex. Ct. Rep. 901, 94 S. W. 443. Where petition alleged that note sued on provided for a 10% attorney's fee if placed in the hands of an attorney for collection, that note had been placed in the hands of plaintiff's attorney for collection and prayed for 10% on the amount of the principal and interest as attorney's fees, held to warrant the award of such 10%. Ellis v. National City Bank of Waco [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437. Where a judgment allowing certain claims against a decedent's estate was sought to be vacated solely on the ground that the claims were barred by limitations and it was not alleged that the claimant and deceased were sureties on the original indebtedness only, and that claimant had paid the entire indebtedness as surety, held error to set aside original judgment and award the claimant only one-half of the amount so paid, on the theory that he was only entitled, as a co-surety, to contribution in that amount. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. A judgment for plaintiff in an action for specific performance of the contract of defendant village for the purchase of land for opening a street cannot be sustained on the ground of neglect or refusal of defendant to levy a local assessment for the improvement; the complaint presenting no such issue, but the theory of the action being that there could be no local assessments. Theall v. Port Chester, 110 App. Div. 776, 97 N. Y. S. 442. Where petition in an election contest attacked the vote on the ground that the voter had not paid his poll tax, the court had no authority to declare his vote illegal because the voter lived in another precinct. Bigham v. Clubb [Tex. Civ. App.] 15 Tex. Ct. Rep. 479, 95 S. W. 675.

63. Hardy v. Ladow, 72 Kan. 174, 83 P. 401. An allegation in a complaint that the value of timber removed from plaintiff's land was $150, and a prayer for relief in the same amount, held not to preclude the court from giving any appropriate relief. Davis v. Wall [N. C.] 55 S. E. 350. Where petition prayed for cancellation of instrument and for general relief, held proper to reform instrument. Id. In an action for an accounting, if a balance is found in favor of defendant, judgment may be rendered in his favor, although his answer contains no demand for an affirmative judgment. Consolidated Fruit Jar Co. v. Wisner, 110 App. Div. 99, 97 N. Y. S. 52.

64. Where complaint contained two counts, one for specific performance and one for damages, a judgment for damages only must be considered as resting on the second count. Grau v. Grau [Ind. App.] 77 N. E. 816.

65. King v. Monitor Drill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046.

66. Meyer v. Page, 112 App. Div. 625, 98 N. Y. S. 739. Where the pleadings and the evidence show that a certain verbal contract was either for a contingent fee or for promoting an organization, held a judgment based on both theories was unsustainable. Lazarus v. Friedrichs, 117 La. 711, 42 So. 230.

67. In probating will, court will not determine validity of conditional, alternative dispositions of the remainder. In re Mount's Will, 107 App. Div. 1, 95 N. Y. S. 490. A board and its officer not being parties to a record, the court should not undertake to define the officer's powers. Logan v. Childs [Fla.] 41 So. 197.

68. Foreclosure decree for an amount larger than that stated in the summons held unsustainable. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47. In an action for the recovery of money only in case of default by the defendant, judgment can be rendered for no greater sum than is indorsed upon the summons. Elmen v. Chicago, etc., R. Co. [Neb.] 105 N. W. 987.

The judgment must also be supported by the proof[69] and must conform to the verdict[70] or finding.[71] This rule of conformity is subject to the right of the court

69. Judgment allowing damages to the extent of $500 held not supported by proof of $300 damages. Carlo v. Lippman, 101 N. Y. S. 768. Defendants not having sought nor made any proof as to attorney's fees or other expenses, held error to allow them such items as a set-off. Galt v. Provan [Iowa] 108 N. W. 760. A judgment for defendant on a counterclaim for improper work cannot be sustained in the absence of any evidence as to the amount of damages. Simon v. Danziger, 98 N. Y. S. 674. Where in an action to establish a claim against a decedent, the creditor neither alleged nor proved that the heirs of the decedent had received any part of his estate, the court was only authorized to render a judgment against the administrator to be levied on the assets in his hands as such; the liability of the heirs being expressly limited by Ky. St. 1903, § 2088, to the extent of the assets received. Cline v. Waters, 28 Ky. L. R. 679, 90 S. W. 231. Where in an action against two persons as partners for conversion there was no evidence that one of them was a member of the firm, or that he had any connection with the conversion or that there was any such firm as that designated, held error to render judgment against him and against the firm named. Russell v. Bellinger [Ala.] 40 So. 132.

70. Letot v. Peacock [Tex. Civ. App.] 16 Tex. Ct. Rep. 345, 94 S. W. 1121; Williams & Co. v. Smith [Tex. Civ. App.] 98 S. W. 916. Where in an action to foreclose a chattel mortgage the jury found for defendant for a specified sum without making any disposition of the proceeds arising from a sale of some of the chattels in sequestration proceedings, held that a judgment for defendant for the amount of the verdict and adjudging that plaintiff retain the proceeds of the sale of the chattels sequestrated was erroneous. Id. Where in an action for breach of a contract for architect's services there was no finding as to plaintiff's earnings and expenses, held plaintiff was not entitled to judgment for a percentage of the actual cost of the building less his earnings and expenses. Fitzhugh v. Mason, 2 Cal. App. 220, 83 P. 282. In ejectment general finding for plaintiff held to entitle the latter to a judgment according to the description of the lot in his complaint. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663. Verdict being in favor of defendant, it is proper to render judgment in his favor. Main & Co. v. Galloway [Ala.] 39 So. 770. Where verdict is against two joint tort feasors, a judgment against one only is erroneous. McMahon v. Hetchhetchy, etc., R. Co., 2 Cal. App. 400, 84 P. 350. In ejectment judgment must conform to the verdict in designating the extent of recovery and must be rendered for the premises described in the complaint. Crawford v. Masters, 140 N. C. 205, 52 S. E. 663. Finding showing that the jury intended to give plaintiff the entire value of the horse in controversy, on the assumption that title and possession would remain in defendant, held not to warrant judgment for plaintiff for the entire value of the horse and the right to its possession. Romano v. Boyd, 97 N. Y. S. 994. Where in condemnation proceedings the jury awarded defendant a certain sum as damages held court was not justified in rendering judgment for such sum with interest from the date of the occupation. Butte Electric R. Co. v. Mathews [Mont.] 87 P. 460. In an action against the principal and surety on a bond, a verdict for plaintiff against the surety and against the principal in favor of the surety is sufficient to sustain a judgment for plaintiff against both; a finding against the principal being implied from the verdict against the surety. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229.

71. Lambert v. Bates, 148 Cal. 146, 82 P. 767. A judgment exceeding the terms of the decision upon which it is based may be reversed. So held as to a judgment partly reversed on appeal. Carolan v. O'Donnell, 109 App. Div. 700, 96 N. Y. S. 493. Where findings show a technical breach of the contract but fail to show the damage sustained, held sufficient to support a judgment for nominal damages. Hotel Co. v. Merchants' Ice & Fuel Co., 41 Wash. 620, 84 P. 402. A judgment in a suit by a minority stockholder, adjudging that certain property belonged to the corporation, held unsupported by the findings. Steinfeld v. Zeckendorf [Ariz.] 86 P. 7. Where a note sued on stipulated that it should be collectible without relief from appraisement laws, a finding containing the statement that the amount due was without relief was essential before a judgment containing such stipulation could be rendered. Polley v. Pogue [Ind. App.] 78 N. E. 1051. Where in a case tried to the court it finds that if plaintiff's testimony in an action for injuries is true, he is entitled to recover $2,500, and, if it is not true, he is not entitled to recover at all, a judgment for $1,000 cannot be sustained. St. Louis S. W. R. Co. v. Black [Tex. Civ. App.] 15 Tex. Ct. Rep. 553, 93 S. W. 1071. Where court found that defendant had the absolute prescriptive right to divert water from an irrigation ditch, held it could not decree that the right should only be exercised upon giving certain notice. Wutchumna Water Co. v. Ragle, 148 Cal. 759, 84 P. 162. Where in an action for services the only question litigated was the question of the authority of defendant's agent to employ plaintiff and the court found in plaintiff's favor on such question, held error to give him judgment for only half his claim. Ross v. New Endicott Co., 50 Misc. 650, 98 N. Y. S. 758. Where cross petition is sufficient to support a decree for specific performance, a general finding in favor of the cross petitioner is sufficient to support a decree for specific performance. Jordan v. Jackson [Neb.] 106 N. W. 999. Where by codicil a certain bequest was to be paid to the five children of a deceased daughter of the testator and a portion was paid to the daughter of a deceased sixth child of such daughter, in an action to recover the same a finding that the money was paid under the belief that the defendant was entitled to it as a child of the deceased son is insufficient to sustain a judgment for plaintiffs as there is no

to amend the verdict for irregularities appearing on its face,[72] to render a judgment non obstante,[73] and to disregard a verdict contrary to law.[74] The judgment in a joint action must be for or against all of the plaintiffs or defendants or none of them,[75] but the rule does not apply to actions against persons jointly and severally liable.[76]

Judgment non obstante.[77]—The rule allowing the trial court to render a judgment non obstante veredicto when the evidence is conclusive in favor of one of the parties is in force in most[78] but not all[79] of the states. The remedy is only available after a verdict has been reached[80] and it conclusively[81] appears that such verdict is contrary to the evidence[82] and that there is a reasonable probability that the defects in the proof or pleadings can be remedied at another trial.[83] The evidence being conflicting, a judgment non obstante will not be granted[84] even though the verdict be against the weight of the evidence.[85] A motion for judgment on answers to special interrogatories notwithstanding the general verdict can only be sustained when the antagonism between such answers and the general verdict is beyond the possibility of being removed or reconciled by any evidence legitimately admissible under the issues in the case.[86] Failure to answer special interrogatories material to the conclusions reached in the general verdict is not ground for rendering judgment non obstante,[87] nor is the fact that the general and special verdicts are inconsistent, the general verdict being in fact warranted by law.[88] The

finding that it would be unconscionable for defendant to retain it. Scott v. Ford, 45 Or. 531, 78 P. 742, 80 P. 899. And a further finding that it does not appear that plaintiffs had any knowledge or belief as to whether the father of defendant was living at the time the codicil was executed, and hence one of the five children mentioned, is insufficient to support the judgment as it does not show an excusable error of fact. Id.

72. See Verdicts and Findings, 6 C. L. 1814.

73. See infra this section.

74. See New Trial and Arrest of Judgment, 6 C. L. 796.

75. Where a joint action at law, not involving any equitable proceeding, is brought by several plaintiffs to recover land, and there is no prayer for a several recovery, the action cannot be sustained except by proof showing a joint right of recovery in all of the plaintiffs. Glore v. Scroggins, 124 Ga. 922, 53 S. E. 690.

76. Where there is more than one defendant in an action of trover, one or more defendants may be acquitted and a verdict and judgment taken against the others; the verdict and judgment being shaped so as to hold liable those only who are shown by the evidence to have been guilty of conversion. Peacock v. Feaster [Fla.] 40 So. 74.

77. See 6 C. L. 222.

78. Practice rule prohibiting judgments non obstante held obsolete. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654.

79. In Texas trial court has no authority to render a judgment non obstante veredicto. May only set verdict aside if erroneous and grant a new trial. Southwestern Tel. & T. Co. v. James [Tex. Civ. App.] 14 Tex. Ct. Rep. 751, 91 S. W. 654.

80. Not authorized where the jury disagreed. Pa. Act, April 22, 1905 (P. L. 286) construed. McKinnon v. Rynkievicz, 145 F. 863.

81. In order to have judgment non obstante, evidence must be conclusive—a mere preponderance is insufficient and merely warrants a new trial. Kinney v. Brotherhood of American Yeomen [N. D.] 106 N. W. 44; Mohr v. Williams [Minn.] 108 N. W. 818. Answers showing misrepresentation as to temperance in application for an insurance policy, but that the company never rescinder therefor, its agent having knowledge thereof, held not to authorize judgment non obstante general verdict for beneficiary. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524.

82. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654.

83. Houghton Imp. Co. v. Vavrousky [N. D.] 109 N. W. 1024.

84. Blazosseck v. Remington & Sherman Co., 141 F. 1022. Judgment non obstante not warranted where clear conflict in evidence on material issues. Hess v. Great Northern R. Co. [Minn.] 108 N. W. 7. A judgment non obstante cannot be awarded where there is a conflict of evidence on a material fact. Dalmas v. Kemble [Pa.] 64 A. 559. Act April 22, 1905 (P. L. 286) does not enlarge the court's power in this respect. Id.

85. County of Montmorency v. Putman, 144 Mich. 135, 13 Det. Leg. N. 229, 107 N. W. 895.

86. Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490. Where in an action against two defendants for malicious prosecution the jury found in favor of plaintiff as against both defendants and specially found that there was no malice on the part of one defendant, held to warrant judgment non obstante as to such defendant. Id. See Verdicts and Findings, 6 C. L. 1814.

87. Connell v. Keokuk Elec. R. & Power Co. [Iowa] 109 N. W. 177.

motion for a judgment non obstante should be made before the rendition of judgment and a motion and grounds for a new trial have been entered.[89] The motion being granted, it is proper practice for the trial court to render final judgment in favor of the party entitled thereto.[90] The motion being erroneously denied, judgment may be directed by an appellate court on appeal.[91]

§ 3. *Arrest of judgment.*[92]—The grounds for, the procedure on, and the effect of a motion for an arrest of judgment are treated elsewhere.[93]

§ 4. *Rendition, entry, and docketing.*[94]—The judgment whenever made must be by order of the court,[95] and the duty of the clerk is simply to record this order.[96] The judgment may, under the common-law procedure, be formally entered in a so-called judgment book kept by the clerk, orally announced by the court, or in the form of an order signed by the presiding judge finally disposing of the case.[97] Statutes generally fix the time within which a motion for judgment must be made.[98] In New York, where the decision upon a trial by the court directs an interlocutory judgment and the party afterwards becomes entitled to a final judgment, application for the latter may be made as on motion.[99] While it is essential that the judgment be rendered within the time authorized by law,[1] still it is not generally deemed essential that it be rendered during the term, a judgment rendered in vacation being in most states deemed valid,[2] though a few courts hold such a judgment void,[3] but even in such courts a decree rendered after the term will be upheld, in the absence of a showing that the court was not in session by adjournment from the term.[4] In some states statutes provide for the rendition of the

88. A motion for judgment on special findings notwithstanding the general verdict, the jury having failed to reach the conclusion in the general verdict made necessary by applying to its special findings the law as laid down in the instructions will not be granted, the law having been erroneously given, and in fact authorizing the general verdict. Connell v. Keokuk Elec. R. & Power Co. [Iowa] 109 N. W. 177.

89. Marshall v. Davis, 28 Ky. L. R. 1327. 91 S. W. 714.

90. Ballinger's Ann. Codes & St. §§ 5056. 6521, construed. Roe v. Standard Furniture Co., 41 Wash. 546, 83 P. 1109.

91. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654. See Appeal and Review, 7 C. L. 128.

92. See 6 C. L. 223.

93. See New Trial and Arrest of Judgment, 6 C. L. 736.

94. See 6 C. L. 223.

95. Gardner v. Butler [Mass.] 78 N. E. 885. A judgment in an action in personam should not provide for payment out of a particular fund. Judgment in an action in assumpsit for construction of water tunnel erroneously directed payment out of water fund. City of Chicago v. Duffy, 117 Ill. App. 261.

96. Gardner v. Butler [Mass.] 78 N. E. 885.

97. State v. Webber, 96 Minn. 422, 105 N. W. 490.

98. In Wisconsin the prevailing party must move for judgment on a referee's report within one year after such report is filed. Rev. St. 1898, § 2867, held mandatory and time cannot be enlarged by the court under § 2831. Miami County Nat. Bank v. Goldberg, 126 Wis. 432, 105 N. W. 816.

99. Code Civ. Proc. § 1230. Where appellate court overruled lower court and sustained demurrer, held defendants were entitled on motion to an order directing final judgment. McCrea v. Robinson, 51 Misc. 330, 100 N. Y. S. 328.

1. Rev. St. 1899, § 4011, construed, and held that the failure of a justice of the peace to render judgment within three days after the submission of the case does not invalidate the judgment. Wissman v. Meagher, 115 Mo. App. 82, 91 S. W. 448. Jurisdiction cannot be conferred by consent of parties upon a justice of the peace to reserve a case for decision to a later date than that authorized by statute. Thompson v. Ackerman, 21 Ohio C. C. 740, not followed. Tussing v. Evans, 7 Ohio C. C. (N. S.) 237. A judgment rendered by a justice of the peace during interim of terms is void and of no effect and ought to be enjoined. Bushnell v. Koon, 8 Ohio C. C. (N. S.) 163.

2. Tax foreclosure decree. Hoffman v. Flint Land Co., 144 Mich. 564, 13 Det. Leg. N. 374, 108 N. W. 356. Judgment may be entered in vacation by consent. Westhall v. Hoyle [N. C.] 53 S. E. 863. Stipulation that case should be continued to next term upon payment of costs within ten days and that if costs are not paid in that time plaintiff should have judgment which might be signed out of term held to authorize entry of judgment in vacation upon nonpayment of costs within the stated time. Id. In those states where the courts are declared to be always open for the transaction of court business and where special terms may be called at any time by the court for the trial of causes, a judgment rendered when the court is not regularly in session for the trial of contested cases is not void but merely erroneous. Lockard v. Lockard [S. D.] 110 N. W. 104.

3. Rev. St. 1901, par. 1442, providing that a judgment may be "entered" in vacation,

judgment during a subsequent term.[5] Generally, where time is given in which to file briefs, the time within which judgment must be filed runs from the submission of such briefs.[6] Where a proceeding properly triable at term is brought on at chambers and the complaint is defective, the better practice is to transmit an appropriate order to the clerk to be extended into judgment in term if the complaint is not amended.[7] Premature entry of judgment renders the same merely voidable.[8]

The practice of preparing entries for the court to sign and enter of record is proper.[9] There is no impropriety for a judge of a lower court to file a written opinion in a case.[10] The memorandum made by the judge on his calendar is neither a judgment nor the entry thereof.[11] While in the absence of statutory provisions the judge need not generally sign the judgment,[12] still in some states, in the absence of an agreement to the contrary, a judgment must be signed by the judge during the term of rendition.[13]

Form and contents.[14]—A judgment in favor of or against a firm in their firm name,[15] or in favor of or against a person by his surname alone,[16] or by a name in which an initial letter is used instead of his Christian name,[17] is not void but is merely irregular. A judgment decreeing specific relief with respect to realty must specifically describe the land, and, while it is the better practice to so describe the land in the pleadings and judgment that it may be identified by the commissioner executing the judgment and by persons interested without reference to any other paper or record, still, if it can be identified from the description given, the judgment is not void.[18] In a county court of North Dakota the final decree consists of the findings of fact, conclusions of law, and statements of the relief awarded, and all these should be embodied in one document signed by the judge and filed.[19] In New York, where it is shown upon oath and without controversy that defendant has converted to his own use money received by him in a fiduciary capacity, plaintiff is entitled to have the judgment recite that defendant

does not authorize the rendition of a judgment during vacation. Meade v. Scribner [Ariz.] 85 P. 729. See 6 C. L. 224, n. 91.

4. Williams v. Ritchie, 77 Ark. 303, 91 S. W. 183.

5. Under Rev. St. 1901, par. 1386, providing that business remaining undetermined at the adjournment of a term shall stand continued until the next term, a judgment may be rendered at a term subsequent to that of the hearing. Meade v. Scribner [Ariz.] 85 P. 729.

6. Municipal Court Act (Laws 1902, p. 1486, c. 580), providing that judgment must be rendered within 14 days from the time questions of law and fact are submitted. Hill v. Hill, 50 Misc. 654, 99 N. Y. S. 410.

7. Glenn v. Moore County Com'rs, 139 N. C. 412, 52 S. E. 58.

8. Horrigan v. Savannah Grocery Co. [Ga.] 54 S. E. 961. Judgment approving report of commissioners appointed to partition real estate of a decedent before the service of citations on the heirs. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 95 S. W. 622. A judgment based on substituted service is not void because rendered before the expiration of five days after the day set for hearing, if the court thereafter remains in session for the five-day period (Goodell v. Auditor General, 143 Mich. 240, 12 Det. Leg. N. 947, 106 N. W. 890), and in such a case it will not be set aside even on a direct attack in the absence of a showing that appearance was entered and objection made within the five-day period (Id.).

9. Stephens v. City Council of Marion [Iowa] 107 N. W. 614

10. Stover v. Stover [W. Va.] 54 S. E. 350.

11. Hoffman-Bruner Granite Co. v. Stark [Iowa] 108 N. W. 329.

12. Darlington v. Butler [Cal. App.] 86 P. 194.

13. Knowles v. Savage, Son & Co., 140 N. C. 372, 52 S. E. 930.

14. See 6 C. L. 225.

15. Meyer v. Wilson [Ind.] 76 N. E. 748. A judgment against a partnership is not void because it does not set forth the names of the individual members. Justice v. Meeker, 30 Pa. Super. Ct. 207.

16, 17. Meyer v. Wilson [Ind.] 76 N. E. 748.

18. Brumley v. Nichols & Shepherd Co., 29 Ky. L. R. 139, 92 S. W. 548. See Foreclosure of Mortgages on Land, 7 C. L. 1678; Specific Performance, 6 C. L. 1498, etc.

19. In re Lemery's Estate [N. D.] 107 N. W. 365. Where the judge made and filed findings and conclusions and subsequently made and filed a separate document purporting to be the judgment, held that the so-called judgment should be regarded as a completion or amendment of the previous document containing the findings and that both documents, taken together, constitute the final decree. Id.

is subject to arrest and imprisonment.[20] In Texas the failure of a judgment against a husband and wife to specifically authorize execution against the wife's separate property does not invalidate it or prevent satisfaction thereof out of such property.[21] It is in accordance with the ancient practice in equity courts for the court to make special findings of the facts in issue and recite the same in its decree, and this is still practiced in some states.[22] Where a referee has made and delivered his report, the duty of settling a decree devolves upon the court at special term and not upon the referee.[23]

Entry, docketing and recording.[24]—Courts of record speak only through their records. The law requires records to be made of their proceedings and that they be signed.[25] That a judgment or decree was pronounced avails nothing if it be not spread upon the minutes of the court required to be kept for that purpose.[26] Failure of the clerk to enter up the decree until after the expiration of the term does not affect its validity.[27] A motion for a new trial does not operate as a stay in the entry of judgment unless an order to that effect is procured and served.[28] There being an appearance and defense bonds are not generally required before entry of judgment.[29] In New York there is no limitation of time for docketing a deficiency judgment.[30] For some purposes an entry of judgment will relate back to the time when it was actually ordered, but not for all, and especially not for the purpose of an appeal.[31] The record imports verity,[32] and docket entries are presumed to have been authorized by the court.[33] In order to be effective for the purpose of a lien a judgment must be properly indexed,[34] though as against a third person having actual notice this requisite is immaterial.[35] The first or Christian name of a defendant in a judgment must appear in the judgment index for the protection of an innocent purchaser who is not bound to look beyond it for judgment liens against his vendor, but this rule must have a reasonable construction.[36] Ordinarily the

20. Goddin v. Butler, 96 N. Y. S. 839.
21. Love v. McGill [Tex. Civ. App.] 91 S. W. 246.
22. Rev. Stat. 1899, § 695, does not alter the rule. Patterson v. Patterson [Mo.] 98 S. W. 613.
23. Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. S. 368.
24. See 6 C. L. 223 et seq.
25. State v. True [Tenn.] 95 S. W. 1028.
26. So held as to order of county court ratifying the act of its chairman in employing an attorney to bring suit for the recovery of school funds. State v. True [Tenn.] 95 S. W. 1028.
27. Williams v. Ritchie, 77 Ark. 303, 91 S. W. 183.
28. Stern v. Wabash R. Co., 101 N. Y. S. 181.
29. Kirby's Dig. § 6254, only applies in cases of constructive service. Nunn v. Robertson [Ark.] 97 S. W. 293.
30. Lapse of ten years after filing judgment roll before docketing judgment held no ground for cancelling judgment. Brown v. Faile, 112 App. Div. 302, 98 N. Y. S. 420.
31. Hoffman-Bruner Granite Co. v. Stark [Iowa] 108 N. W. 329.
32. Date of entry of judgment as shown by record held to prevail over custom of clerk. Gardner v. Butler [Mass.] 78 N. E. 885.
33. Where docket recited: "Judgment for plaintiff," etc., held sufficient to warrant finding that there was an order for judgment. Washington Nat. Bank v. Williams, 190 Mass. 497, 77 N. E. 383.
34. A judgment was recovered by a corporation suing in the name "Webb-Freyschlag Mercantile Company." It was indexed in the direct index in the name "Webb-Frey Schlog Mer. Co." and in the reverse index as "Webb-Freyscholg Mercantile Co." Held such indexing was substantially correct and sufficient to fix a lien on the property of the judgment debtor. Bradley v. Janssen [Tex. Civ. App.] 15 Tex. Ct. Rep. 914, 93 S. W. 506. Where a judgment was recovered by the "Webb-Freyschlag Mercantile Company" and the record showed that such company was a corporation, an index of the judgment in such name is not fatally defective for failure to disclose whether it was a corporation, joint stock company, or a partnership, and if the latter to disclose the names of the individuals composing it. Id.
35. Judgment against married woman held binding on land standing in her maiden name. State Sav. Bank v. Shinn, 130 Iowa, 365, 106 N. W. 921.
36. Purchaser of Francis Ross held bound to look for judgments indexed against Frank Ross. Burns v. Ross [Pa.] 64 A. 526. Act April 22, 1856 (P. L. 532), relating to the indexing of judgments, is sufficiently complied with when the first or Christian name of a defendant is so indexed that a prospective purchaser examining the index ought to

clerk, when entering a judgment of record, should follow the memorandum made by the judge on his calendar not only with reference to the substance thereof but also as to date.[37] In some states a notice of entry is required, and in such cases the copy of the judgment must be substantially correct.[38] The court may set aside erroneous entry of judgment by the clerk.[39]

Nunc pro tunc entries.[40]—Judgment having been actually rendered by the court, but owing to the misprision of the clerk has not been entered[41] or has been erroneously entered,[42] the court of rendition has the inherent power, even after the expiration of the term of rendition[43] or after the judgment has become final,[44] and after the taking of an appeal,[45] to correct the record so as to make it recite the truth. The power to correct by nunc pro tunc entries extends only to clerical misprisions,[46] though the rule has been broadened by statute in some states[47] and should be distinguished from the other amendatory powers of the court.[48] While a nunc pro tunc entry of judgment renders the

know from it of the existence of a lien against the property which he is about to purchase. Id.

37. Hoffman-Bruner Granite Co. v. Stark [Iowa] 108 N. W. 329.

38. The simple abbreviation of the word "Thomas" to "Thos." in the clerk's signature upon the copy judgment served upon the defendant's attorney is of itself insufficient to invalidate the notice of entry so as to prevent the running of time in which to appeal. Salzman v. Mendee, 49 Misc. 625, 97 N. Y. S. 298.

39. Fink v. Herrick, 28 Ky. L. R. 763, 90 S. W. 268.

40. See 6 C. L. 227.

41. In re Geith's Estate [Wis.] 109 N. W. 552; Oberndorfer v. Moyer [Utah] 84 P. 1102.

42. The record of a judgment may be corrected so as to speak the truth even after the expiration of the term at which it was rendered. Martindale v. Battey [Kan.] 84 P. 527. Clerical omissions and mistakes may be corrected at any time. Name of adopting parent in order of adoption. Cubitt v. Cubitt [Kan.] 86 P. 475.

43. Williams v. Ulmer, 73 S. C. 579, 53 S. E. 999. Where court by granting a new trial in effect vacated a judgment improperly entered, held it had the power at a subsequent term to correct its record by a nunc pro tunc order so as to show such vacation in terms. Evans v. Freeman, 140 F. 419.

44. Court established by Code 1894-95, p. 1227, has power to correct clerical errors in its judgments even after they have become final by the expiration of 30 days. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123. Nunc pro tunc entry of judgment at subsequent term held proper. Smith v. Wofford [Tex. Civ. App.] 16 Tex. Ct. Rep. 815, 97 S. W. 143.

45. If the record as made of a judgment does not show the date of actual entry, the trial court on motion, even after an attempted appeal, has the power and it is its duty to correct it, on a showing as to the actual date when entry was made, to show such date. Hoffman-Bruner Granite Co. v. Stark [Iowa] 108 N. W. 329.

46. Error in giving plaintiff judgment for more than he is entitled to on the averments of the petition held a clerical misprision to be corrected by the trial court. United States Fidelity & Guaranty Co. v. Boyd, 29 Ky. L. R. 598, 94 S. W. 35. A failure of the court to act on its incorrect action can never authorize a nunc pro tunc entry. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123. A clerical error in a decree rendered out of term, in that the date of a Congressional Act was given as 1901 instead of 1891, may be corrected at the next regular term under Code Civ. Proc. subsec. 85. United States v. Rio Grande Dam & Irrigation Co. [N. M.] 85 P. 393. Where a judgment was rendered affecting real estate the court could, upon motion of the judgment creditor, correct the description thereof at a succeeding term. Eisman v. Whalen [Ind. App.] 79 N. E. 514. Distribution of certain dividends held not a clerical or other error within the meaning of Code Civ. Proc. § 723, authorizing amendment of judgment therefor. Chester v. Buffalo Car Mfg. Co., 183 N. Y. 425, 76 N. E. 480. Altering decree so as to order a sale of other lands than those described in the complaint held not a mere clerical error. Williams v. Ulmer, 73 S. C. 579, 53 S. E. 999. Misnomer of adopting parent in order of adoption held a clerical mistake. Cubitt v. Cubitt [Kan.] 86 P. 475. Where in an action on an assessment for street improvement it appeared on the face of the papers that the city engineer's estimate was too large and hence erroneous, and consequently judgment was too large, held error could have been corrected as a clerical misprision on motion. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1. A court may at subsequent terms set right mere forms in its judgments by correcting misprisions of its clerk or mere clerical errors so as to make the record conform to the truth. In making such corrections the judge's docket or the clerk's minutes or other records pertaining to the cause may be used, but not extraneous testimony. McGourin v. De Funiak Springs [Fla.] 42 So. 187.

47. Under Code Civ. Proc. §§ 721-724, held a nunc pro tunc entry of an order of reference was proper in order to uphold a judgment entered upon a report of a referee, the first order of reference being void but the parties having gone to trial upon the assumption that it was valid. Owasco Lake Cemetery v. Teller, 110 App. Div. 450, 96 N. Y. S. 985.

same operative as of the date of its rendition,[49] still it can give retroactive operation and effect to the judgment it records only in the furtherance of justice, and such can never be its office and effect where it would operate to deprive a party of a substantial right.[50] In order to be entitled to an entry nunc pro tunc the party must show that the entry of judgment, on account of clerical errors, does not conform to the judgment intended by the court.[51] The right to a nunc pro tunc entry may become barred by time.[52] Mere recitals in the journal entry will not have the effect of a nunc pro tunc entry.[53] The amendment of a clerical misprision in the judgment does not constitute the latter a new and different judgment from the one originally entered.[54] While some courts hold that an amendment may be based on any satisfactory evidence,[55] the weight of authority supports the view that amendment must be based on authority contained in the record.[56]

Contents of judgment roll.[57]—An order permitting an amendment of a complaint and refusing a continuance is properly a part of the judgment roll.[58] Under a statute providing among other specified papers that each paper on file and a copy of each order which in any way involves the merits or affects the judgment shall be included in the judgment roll, affidavits and notice of motion for reference are not a part of the roll.[59]

Filing transcripts in other courts or offices.[60]—A transcripted judgment has for the purposes of lien and execution the same effect as a judgment originally rendered by and entered in the court to which it is transferred.[61] In this connection an abstract is not equivalent to a transcript.[62] Generally the judgment of an inferior court must be transcribed to the court of general jurisdiction in the same county before a transcript can be filed in another county.[63] To be effective

48. See post, § 5.

49. In re Geith's Estate [Wis.] 109 N. W. 552.

50. Deprive him of his right to a new trial. Eldridge & Higgins Co. v. Barrere, 74 Ohio St. 389, 78 N. E. 516. A party may prosecute an appeal within the statutory period after the entry of a nunc pro tunc judgment. Slayden & Co. v. Palmo [Tex. Civ. App.] 90 S. W. 908.

51. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123.

52. Eight years' delay held not to bar application for a nunc pro tunc entry. Liddell v. Bodenheimer, Landau & Co. [Ark.] 95 S. W. 475.

53. Recital in journal entry that decree was rendered on October 24, 1904, held not to have the effect of a nunc pro tunc entry nor control over a previous recital stating that on November 4, 1904, the cause came on for hearing and the court found for the plaintiff. Eldridge & Higgins Co. v. Barrere, 74 Ohio St. 389, 78 N. E. 516.

54. Correction of name of party. Fox v. Stubenrauch, 2 Cal. App. 88, 83 P. 82.

55. Satisfactory parol evidence is sufficient to authorize nunc pro tunc entry. Liddell v. Bodenheimer, Landau & Co. [Ark.] 95 S. W. 475. In order to warrant the correction the proof must be clear and satisfactory, but it need not be founded upon any record, memorandum, or other writing. Martindale v. Battey [Kan.] 84 P. 527. A district court has power to correct the entry of a judgment so as to cause it to speak the truth, after the expiration of the term at which it was rendered and upon the personal knowledge of the judge of what took place in court at the time of its rendition. Christisen v. Bartlett [Kan.] 84 P. 530.

56. Where there is no minute or memorandum on the court's docket, the clerk's minute book, or the files in the case supporting a nunc pro tunc entry of an extension of time for filing a bill of exceptions, court cannot make such entry. State v. Ryan, 115 Mo. App. 414, 90 S. W. 418. The general rule is that evidence dehors the record is inadmissible on a motion to enter a judgment nunc pro tunc. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123.

57. See 6 C. L. 228.

58. Code Civ. Proc. §§ 1151, 1196, construed. Borden v. Lynch [Mont.] 87 P. 609.

59. Code Civ. Proc. § 1237, construed. Schrader v. Fraenckel, 113 App. Div. 395, 99 N. Y. S. 137.

60. See 6 C. L. 228.

61. Holton v. Schmarback [N. D.] 106 N. W. 36. Under the statutes of most states, where a judgment of an inferior court is transcribed to a superior court, the power of the inferior court to issue execution is terminated and the superior court may thereafter order the issuance of execution as upon judgments originally rendered and entered therein. Rev. Codes 1899, §§ 6717, 5498, so construed. Id.

62. The filing of an abstract of the judgment prepared in accordance with Code Civ. Proc. § 897, in the office of a county auditor, is insufficient to entitle plaintiff to the benefits of § 710 which contemplates a transcript or copy of the judgment. Erkson v. Parker [Cal. App.] 84 P. 437.

the register is sometimes required to show the name of the owner of the judgment.[64] It is essential that the judgment debtor must be correctly described and in this connection one Christian name is important.[65] In New York a transcribed judgment becomes a lien from the time the statutory notice is indexed and recorded.[66]

§ 5. *Occasion and propriety of amending, opening, vacating, or restraining enforcement. A. Before finality.*[67]—During the term[68] or until the judgment has become a finality,[69] the court has the inherent,[70] exclusive,[71] plenary[72] power in the exercise of its discretion[73] to vacate, alter, revise, or amend[74] the judgment for clerical or judicial errors,[75] and unless abused an exercise of this

63. Under Code § 273, the filing of a transcript of a judgment of a superior court in the district court of another county, without having filed a transcript in the district court of the same county, is insufficient to create a lien on real estate in the county where it is filed. Drahos v. Kopesky [Iowa] 109 N. W. 1021.

64. Registration of a judgment in the probate court under Code 1896, § 1920, must state the name of the owner of the judgment or it is invalid. Jefferson County Sav. Bank v. Miller [Ala.] 40 So. 513.

65. A transcript of a judgment of a justice of the peace rendered in an action against Mrs. Wm. Rogers, whose first name is unknown, filed in the office of the clerk of the court of common pleas of the county wherein such judgment was rendered, does not constitute such judgment a lien on the lands of Lucy Rogers, although she may in fact be Mrs. Wm. Rogers. Uihlein v. Gladieux, 74 Ohio St. 232, 78 N. E. 363.

66. Burch v. Burch, 51 Misc. 232, 100 N. Y. S. 814.

67. See 6 C. L. 229.

68. A trial court has the power at any time previous to the end of the trial to correct errors theretofore committed by him in the progress of the cause, and to this end his power to alter, amend, or set aside the judgment rendered by him exists until the expiration of the term of rendition. Wells v. Moore [Tex. Civ. App.] 14 Tex. Ct. Rep. 1003, 93 S. W. 220.

69. First Nat. Bank v. Kromer, 126 Wis. 436, 105 N. W. 823. So long as the proceedings are in fieri, court may amend record so as to show overruling of motion for separate trial and exception thereto, though record is made up and trial passed. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529. Proceedings held in fieri until motion for a new trial was filed. Id. Pending motion for a new trial court held to have power to modify judgment. Guinan v. Donnell [Mo.] 98 S. W. 478. Where a mistake is made in the date of the return and answer days of a summons, the same may be amended by the district court even after objections to the jurisdiction of the court are pending based upon that particular defect. Barker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985. An interlocutory order or ruling may be reversed and vacated at a subsequent term by the same court without compliance with the provisions of Code Civ. Proc. § 1612 et seq., relating to the vacation and modification of judgments and final orders at a term subsequent to the one of rendition. Godfrey v. Cunningham [Neb.] 109 N. W. 765. Where motion for judgment was continued but the clerk erroneously entered judgment before the date to which the motion was continued, held the court had authority on the date fixed in the order of continuance to set aside such judgment and re-enter the judgment as of that date. Fink v. Herrick, 28 Ky. L. R. 763, 90 S. W. 268.

70. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529; Dedrick v. Charrier [N. D.] 108 N. W. 38.

71. Where a party relies upon an order of the district court which he alleges was made, but which the record of that court does not disclose, he must apply to that court for a correction of the record. An appellate court can only consider the record of the proceedings of the district court as it appears in transcript. Barker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985.

72. Hews v. Hews [Mich.] 13 Det. Leg. N. 482, 108 N. W. 694.

73. Dedrick v. Charrier [N. D.] 108 N. W. 38; Jackson v. Tenney [Okl.] 87 P. 867.

74. May set decree aside upon good cause shown. Krieger v. Krieger, 120 Ill. App. 634. May modify judgment during term. O'Brophy v. Era Gold Min. Co. [Colo.] 85 P. 679. Judgment set aside where return of officer was ambiguous and the evidence conclusively showed that no service was had upon one defendant. Jackson v. Tenney [Okl.] 87 P. 867. Vacation of default judgment for defective proof of service and vacation of second judgment based on a new proof of service on the ground of lack of jurisdiction in the clerk held not to deprive court of jurisdiction to enter judgment on application to it and competent proof that service was made as stated in the return. First Nat. Bank v. Kromer, 126 Wis. 436, 105 N. W. 823; Hews v. Hews [Mich.] 13 Det. Leg. N. 482, 108 N. W. 694. During term or while proceedings are in fieri, court may modify order vacating decree. A consent order may be modified or vacated where it does not express the real intent of the parties, and this though the mistake be unilateral. Id.

75. Where a dismissal on the merits is erroneously entered instead of a nonsuit, it is proper to move to correct the record. Freedman v. Sirota, 109 App. Div. 874, 96 N. Y. S. 812. Improper entry of judgment. Evans v. Freeman, 140 F. 419. Judgment for defendant, in a suit brought by C & Son, a corporation, that defendant recover of "C & B, composing the firm of C & Son," though technically incorrect, is susceptible of amendment at any time under Rev. Code 1892, §

discretion will not be reversed on appeal.[76] Where an appeal is taken the trial court may correct its judgment as to an error in the amount thereof at any time prior to the action of the appellate court upon the judgment.[77] It follows that irregularities or informalities in the judgment should be remedied on motion in the trial court,[78] and do not constitute reversible error.[79] In North Dakota the word "term" as applied to the district court is deemed to have lost its common law meaning, hence it follows that such court may amend or set aside the judgment after the term of rendition.[80] In some states the jurisdiction of inferior courts in this matter,[81] and the period of finality of their judgments,[82] are regulated by statutes.

(§ 5) *B. Right to relief after the judgment has become final, as by the expiration of the term of rendition or of the statutory extension thereof.*[83]—In the absence of statutes,[84] and except as to matters of form,[85] a judgment cannot be vacated, altered, or amended after it has become a finality,[86] unless it is void[87] or was pro-

940. Carrier & Son v. Poulas. 87 Miss. 595, 40 So. 164. Court may upon proper application correct errors of its own commission. First Nat. Bank v. Kromer, 126 Wis. 436, 105 N. W. 823. May set aside an improvident judgment. Livesley v. Johnston, 47 Or. 193, 82 P. 854. Where a general verdict was directed for defendant but on a motion for a new trial defendant admitted certain indebtedness, held proper to reform judgment so as to allow plaintiff amount so admitted to be due. Alabama Oil & Pipe Line Co. v. Sun Co. [Tex. Civ. App.] 13 Tex. Ct. Rep. 973, 90 S. W. 202. Held proper for court during term to vacate judgment for plaintiff and reinstate defendant's plea. Phillips v. Phillips, 124 Ga. 912, 53 S. E. 457. Under Code Civ. Proc. § 663, the superior court may vacate one of its judgments where it is not supported by the findings of fact and enter the proper judgment. Ballerino v. Superior Ct. of Los Angeles County, 2 Cal. App. 759, 84 P. 225. Where through an erroneous calculation judgment is rendered for a lesser amount than the evidence clearly showed the party entitled to, it may be corrected on motion. Evidence showed 16 weeks' salary due at $30 per week, but through a mistake of calculation only $450 was demanded in the summons, for which amount judgment was rendered. Held that plaintiff's motion to increase the judgment should have been allowed. Kemp v. Tonnele Co., 99 N. Y. S. 885.

76. Dedrick v. Charrier [N. D.] 108 N. W. 38. Unless an abuse of discretion of the trial court in setting aside an interlocutory order is shown, an appellate court will not interfere therewith. Godfrey v. Cunningham [Neb.] 109 N. W. 765. A trial judge vacating a judgment must do so only upon good grounds. A belief that further evidence might be obtained is not sufficient to authorize the vacation of a judgment under Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254. Ellenbogen v. Martin, 99 N. Y. S. 463.

77. So held where defendant had filed a petition and supersedeas bond for writ of error and had citation thereon. Blain v. Park Bank & Trust Co. [Tex. Civ. App.] 94 S. W. 1091.

78. Rapp v. Hansen [N. D.] 107 N. W. 48.

79. So held where judgment did not show that trial was on the merits. Rapp v. Hansen [N. D.] 107 N. W. 48.

80. Dedrick v. Charrier [N. D.] 108 N. W. 38.

81. New York: The municipal court of the City of New York has no authority to vacate a judgment for nonservice of summons where the defendant has not appeared. Diehl v. Steele, 49 Misc. 456, 97 N. Y. S. 1024. Appropriate remedy is by appeal. Municipal Court Act, Laws 1902, p. 1578, c. 580, § 311, construed. Id.

82. A municipal court judge has no jurisdiction to vacate a judgment not rendered upon default where the motion to vacate was not made within five days from the rendition of judgment. So held as to judgment entered after court had lost jurisdiction of the cause by lapse of time. Municipal Court Act, Laws 1902, p. 1563, c. 580, § 254, construed. Quinn v. Schneider, 50 Misc. 630, 98 N. Y. S. 657.

83. See 6 C. L. 230. Nunc pro tunc entries, see ante, § 4. Statutes extending time before judgment becomes final, see ante, this section, subdivision A.

84. A miscalculation of interest held amendable. Rev. St. 1895, art. 1357, considered. Ellis v. National City Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437; Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

85. Beavers v. Rennels, 122 Ill. App. 483. See ante, § 4, subd. Nunc pro Tunc Entries.

86. Cannot amend judgment after expiration of the term of rendition. So held on an application for a nunc pro tunc entry of an order made in the cause. Liddell v. Bodenheimer, Landau & Co. [Ark.] 95 S. W. 475. The judgment of the supreme court becomes final with the close of the term during which it was rendered and that court cannot thereafter modify or enlarge such judgment. Collins v. Hawkins, 77 Ark. 101, 91 S. W. 26. The judgment of the court established by Acts 1894-95, p. 1227, becomes, under such act, final in 30 days, and the court cannot after such time correct any judicial errors in it and cannot set it aside unless it is void on its face. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123. Motion to vacate on the ground of insufficient

cured by the fraud[88] of an adverse party[89] or by accident[90] or mistake of fact,[91] or unless the vacation or modification is ordered by an appellate court.[92] In many states the rule has been enlarged by statutes providing for the vacation of a judgment, and especially a default judgment,[93] taken against a party through his mistake, inadvertence, surprise, or excusable neglect. Fraud in the procurement of a judgment does not render the judgment void but only voidable and is ineffective unless taken advantage of by motion or a proceeding in equity.[94] That the judg-

service denied where motion was filed more than three years after the expiration of the term of rendition. Heffernan v. Ragsdale [Mo.] 97 S. W. 890. The district court cannot, after the adjournment of the term at which a judgment is entered, amend the same by changing the award of coste to one of the parties, except for some reason mentioned in Code Civ. Proc. § 602, as ground for vacating or modifying a judgment. Meade Plumbing, Heating & Lighting Co. v. Irwin [Neb.] 109 N. W. 391. A decree made in a suit brought to enforce the liens of judgments and a deed of trust, fixing the amounts and priorities of the liens, decreeing payment thereof, and directing a sale of the debtor's land on default of payment, is final and conclusive as to the amounts of the debts after the expiration of the term at which it is pronounced, and an answer praying the elimination of usury from one of the debts so adjudicated cannot be received thereafter. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707. Where a judgment of a superior court had become final, no appeal having been taken therefrom, and had been so adjudged by the supreme court by ordering the cancellation of a lis pendens filed thereafter, the superior court was without jurisdiction to thereafter entertain a motion to reinstate the cause or try it anew. State v. Washington Dredging & Imp. Co. [Wash.] 86 P. 936.

87. Skjelbred v. Southard [N. D.] 108 N. W. 487; Rankin v. Schofield [Ark.] 98 S. W. 674; Bader v. Jones, 119 Mo. App. 685, 96 S. W. 305. Judgment void on its face. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123. Rev. St. 1887, § 4229, does not alter rule. Kerns v. Morgan, 11 Idaho, 572, 83 P. 954. Superior court may set aside void judgment after term of rendition, Huffman v. Huffman, 47 Or. 610, 86 P. 593. A decree can only be vacated after entry term when void for want of jurisdiction. Krieger v. Krieger, 121 Ill. App. 11. An absolutely void judgment may be stricken from the record on motion at any time and may be collaterally assailed. Lord v. Dowling Co. [Fla.] 42 So. 585. Where a judgment is void so far as it directs foreclosure of an alleged lien, the court has jurisdiction to modify it by striking out the part that is invalid. Stark Bros. v. Royce [Wash.] 87 P. 340. A judgment which is entirely outside of the issues in the case and upon a matter not submitted to the court for its determination is a nullity and may be vacated and set aside at any time on motion of a party or any person affected thereby. Anglea v. McMaster [Okl.] 87 P. 660. Judgment on question of waiver of homestead exemption held not void on its face and part of it could not be struck out by the court after it had become a finality. Story Mercantile Co. v. McClellan [Ala.] 40 So. 123. Where a decree of divorce is void for want of jurisdiction, it will be set aside after the death of the party who procured it by fraud. Rodgers v. Nichols, 15 Okl. 579, 83 P. 923. In a direct proceeding to set aside a decree of divorce, where the evidence clearly and conclusively shows that no service either actual or constructive was had upon the defendant, the decree will be set aside as void. Id.

88. De Garcia v. San Antonio, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 336, 90 S. W. 670; Fisher v. Fisher, 114 Mo. 627, 90 S. W. 413; Wood v. Stewart [Ark.] 98 S. W. 711. District court has inherent power to vacate a judgment procured by means of proceedings which are in effect fraudulent. Gilbreath v. Teufel [N. D.] 107 N. W. 49. County court may vacate its decrees for fraud more than one year after knowledge of the judgment. Parsons v. Balson [Wis.] 109 N. W. 136. Under Wilson's Rev. & Ann. St. 1903, § 4760, must be fraud to authorize vacation. Williamson v. Williamson, 15 Okl. 680, 83 P. 718. Court having jurisdiction, held error to set aside decree more than six months after rendition, no fraud being alleged. Probate decree. Camplin v. Jackson, 34 Colo. 447, 83 P. 1017. What constitutes fraud, see post next subdivision.

89. Jordan v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 929, 94 S. W. 398. A decree of divorce will be annulled upon the ground of fraud and imposition practiced upon the court or adverse party. Rodgers v. Nichols, 15 Okl. 579, 83 P. 923. Fraud of coplaintiffs held not to warrant setting aside of judgment in favor of defendant. De Garcia v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 336, 90 S. W. 670. Where a widow in an action for the death of her husband joined minor children without their knowledge or consent, no matter how fraudulent her conduct as against the children, the judgment against defendant could not be set aside where it had no knowledge of the fraud. Taylor v. San Antonio Gas & Elec. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 344, 93 S. W. 674.

90. Jordan v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 929, 94 S. W. 398. What constitutes accident, see post next subdivision.

91. Wood v. Stewart [Ark.] 98 S. W. 711. What constitutes mistake, see post next subdivision.

92. Appellate court may on appeal amend or modify judgment. So held as to the appellate term. Municipal Court Act, Laws 1902, p. 1578, c. 580, § 310, construed. Ostrom v. Sapolsky, 49 Misc. 610, 96 N. Y. S. 1070. See Appeal and Review, 7 C. L. 128.

93. See Defaults, 7 C. L. 1122.

94. A judgment rendered by a court of competent jurisdiction and regular upon its face is to be deemed conclusive until it is

ment is irregular[95] or erroneous[96] is no ground for setting it aside except on appeal.[97] In Georgia, however, an irregularity in the judgment apparent on the face of the record may be corrected after the expiration of the term and irregular judgments may be made perfect.[98] Where a decree settled on a referee's decision does not contain all that is decided by the referee, the remedy is to amend by motion and not to vacate.[99] Relief should be sought in the court of rendition and not in that of another jurisdiction.[1] The power to set aside and annul judgments procured by fraud is lodged in courts of superior general jurisdiction which are invested with the power to grant relief in equity or chancery cases;[2] and in those

duly set aside, either on motion in the court of rendition or in an equitable proceeding. Civ. Code 1895, § 3511, referring to the discharge of executors and administrators, does not alter the rule. Summerlin v. Floyd, 124 Ga. 980, 53 S. E. 452. The construction to be placed upon Civ. Code 1895, § 3511, providing that a discharge obtained by an administrator "by means of any fraud practiced on the heirs or ordinary is void and may be set aside on motion and proof of the fraud," is that, while the judgment of the court of ordinary discharging an administrator is open to attack on the ground that it was fraudulently procured, it is to be deemed "void" only when in a proceeding to set it aside the proof shows it was secured by practicing a fraud upon the heirs at law or upon the ordinary. Read in connection with the context the term "void" is to be understood as the equivalent of "voidable." Id.

95. Surviving heirs of adopting parent held not entitled to have order of adoption set aside for irregularities. Cubitt v. Cubitt [Kan.] 86 P. 475. A judgment entered by default extending beyond the scope of the pleadings is irregular rather than erroneous. May be corrected on motion. Stark Bros. v. Royce [Wash.] 87 P. 340. On a motion to set aside a judgment against a principal and surety, the principal cannot take advantage of an irregularity in the judgment against the surety. The surety, a corporation, was dissolved before rendition of judgment. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650.

96. Becton v. Dunn [N. C.] 55 S. E. 101; Philbrook v. Newman, 148 Cal. 172, 82 P. 772; Crockett v. Crockett [Iowa] 106 N. W. 944. Probate decree. Camplin v. Jackson, 34 Colo. 447, 83 P. 1017. Because based on a erroneous ruling. Martindale v. Battey [Kan.] 84 P. 527. Allowance of counsel fees in divorce decree. Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537. Erroneous decree is valid until set aside by a court of competent jurisdiction. Rankin v. Schofield [Ark.] 98 S. W. 674. So held where an action was irregularly proceeded in against the heir of a defendant dying pending suit. Process was served on the heir who made no appearance. Judgment was rendered against her. City of Louisville v. Hughes [Ky.] 97 S. W. 1096. Where judgment followed finding, held motion to modify it for reasons going to the correctness of the finding and the sufficiency of the evidence to support the same would be denied. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776. A proceeding cannot be maintained to set aside or vacate a decree based on an allegation of fact which was in issue and was determined in the trial which resulted in such decree. City of Lincoln v. Lincoln St. R. Co. [Neb.] 106 N. W. 317. A judgment entered for amounts actually due and also for an amount not due at the time of the commencement of the action, but due when the declaration was filed and when the judgment was entered, held merely irregular or erroneous. Lord v. Dowling Co. [Fla.] 42 So. 585. A voidable, irregular, or erroneous judgment must be moved against in time by motion to vacate or by proper appellate proceedings, and, if no such step is taken within the prescribed time, the judgment becomes an absolute verity and passes beyond the control of the court. Id. Code Civ. Proc. tit. 3, c. 11, providing for the vacation of judgments for irregularity or error in fact, does not authorize the vacation of a municipal court judgment by that court upon the ground of irregularity or error in fact. Barron v. Feist, 101 N. Y. S. 72. Where it appears from the judgment roll that judgment was rendered after the introduction and consideration of evidence, upon motion of plaintiff, an error not apparent on the face of the record cannot be reached by motion to vacate. Must be corrected by appeal or a motion for a new trial. Worth v. Emerson [Cal. App.] 85 P. 664.

97. Crockett v. Crockett [Iowa] 106 N. W. 944. See Appeal and Review, 7 C. L. 128.

98. Judgment in attachment proceedings amended so as to strike out general judgment against defendant. Latimer v. Sweat, 125 Ga. 475, 54 S. E. 673. Amendment held broader than application and facts warranted. Id.

99. Union Bag & Paper Co. v. Allen Bros. Co., 94 App. Div. 595, 88 N. Y. S. 368.

1. A Federal court cannot revise or set aside a final decree rendered by a state court which had jurisdiction of the parties and the subject-matter of the suit, upon the ground that the decree was obtained by fraud, when the injured party has had an opportunity to apply to the state court to revise the decree. Strand v. Griffith [C. C. A.] 144 F. 828. The bankruptcy court deciding a question over which it and the state courts have concurrent jurisdiction, an aggrieved party's remedy is by appeal and not by motion in the state court. Fees of sheriff levying on property of a debtor of one who is afterwards declared a bankrupt. Johnson v. Woodend, 44 Misc. 524, 90 N. Y. S. 43.

2. Steinmetz v. Hammond Co. [Ind.] 78 N. E. 628. City court has no such jurisdiction. Id.

courts wherein the distinction between legal and equitable forms of action is preserved, the court has no power in a proceeding at law, by motion or petition, to vacate a judgment rendered at a previous term,[3] but in such cases the remedy to set aside or enjoin the execution of judgments at law wrongfully or fraudulently obtained is by bill in equity.[4]

Where one moves to open or set aside the judgment, the court should weigh the evidence and its discretion will not be reversed unless an abuse of discretion is shown,[5] and, though the evidence be conflicting, the court is not bound to send the case to the jury to determine the weight of the evidence and the credibility of the witnesses.[6] The discretion vested in courts to open judgments is a "legal discretion," not mere personal choice, a discretion to be exercised in discerning the course prescribed by law which must be followed when ascertained.[7] Except in the case of judgments void for want of jurisdiction,[8] relief will be denied if the applicant has been guilty of unexcused[9] negligence or laches,[10]

3, 4. O'Connor v. O'Connor [C. C. A.] 142 F. 449.

5. Augustine v. Wolf [Pa.] 64 A. 777. The rule that a refusal of the lower court to open a judgment will only be reversed where there was an abuse of discretion does not prevent a reversal where the evidence in favor of the application strongly preponderates and the lower court's opinion was not based on the whole case but upon a fact not in itself a bar. Ripple v. Succop, 30 Pa. Super. Ct. 638. Superior court will not interfere with the refusal of the lower court to open a judgment on a bond where the only question is one of fact as to credits allowed and the evidence was carefully considered and no error is manifest. St. James Bldg. & L. Ass'n v. Kelly, 29 Pa. Super. Ct. 470. In an action to open judgment, while a mere conflict of evidence is not generally sufficient, it should be opened where the party seeking shows a defense by a preponderance of evidence sufficient to sustain a verdict in his favor. Augustine v. Wolf, 29 Pa. Super. Ct. 336. Where forgery is charged there is no inflexible rule which requires the court to open judgment. Id.

6. Augustine v. Wolf [Pa.] 64 A. 777.

7. Augustine v. Wolf, 29 Pa. Super. Ct. 336.

8. The rule as to laches never operates as against a judgment void for want of jurisdiction. Davis v. Preston, 129 Iowa, 670, 106 N. W. 151.

9. Applicant must be without fault or negligence. Jordan v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 929, 94 S. W. 398. One who knowingly neglects to appear and defend action held not entitled to have judgment vacated. Williamson v. Williamson, 15 Okl. 680, 83 P. 718. Where owing to sickness one failed to file a plea of personal privilege to be sued in the county of his residence, held default judgment would be set aside. Mistrot Bros. & Co. v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 314, 91 S. W. 870. Default set aside where plaintiff's attorneys failed to notify defendant's attorney of overruling of motion to make complaint more specific, defendant's attorney residing at a distance. Douglas v. Badger State Mine, 41 Wash. 266, 83 P. 178. Unexpected detention of counsel in Europe where he had gone to obtain evidence held to warrant opening default. Marchesini v. Scaccianoce, 110 App. Div. 130, 96 N. Y. S. 1095. A client who fails to repudiate the authority of an attorney who assumes to represent him cannot, when unsuccessful in his suit, allege as a ground for vacating the judgment that the attorney who conducted the trial had no authority. Bacon v. Mitchell [N. D.] 106 N. W. 129. Where defendant left city when he was aware that his case was about to come on the day calendar, and paid no attention to a letter written him by his attorney, and he could have been informed within an hour by telegraph that the cause was coming on for trial, held proper to refuse to open default. Iron Clad Mfg. Co. v. Steffen, 100 N. Y. S. 196. A judgment against a garnishee for want of appearance will be opened on a showing that the nonappearance was due to oversight and that the garnishee has no money or goods of the defendant, especially where the sheriff's return does not show an attachment of goods or moneys in his hands, and plaintiff has failed to comply with the rules of court as to service of interrogations and notice of rule on the garnishee. McFadden v. Millerstown Deposit Bk., 28 Pa. Super. Ct. 583. Where judgment in action for conspiracy was reversed and new trial had, and plaintiff during the progress of the trial refused to proceed and judgment was entered for defendant, held judgment would not be set aside so as to allow plaintiff to bring in another party as defendant where plaintiff knew prior to the commencement of the action that such person was the most active participator in the conspiracy complained of. Lederer v. Adler, 101 N. Y. S. 53.

10. Eleven years' delay held to bar right to have judgment erroneously entered for want of an affidavit of defense vacated. Johnson v. Frothingham, 214 Pa. 523, 63 A. 823. Where a sheriff permitted three months to elapse before moving to set aside a default and judgment entered thereon, it was not an abuse of discretion for the trial court to deny his motion, though failure to act sooner was due to the cares and pressure of official business. Lewis v. Cunningham [Ariz.] 85 P. 244. Where a mortgagor attempting to open a judgment on the ground of a tender delayed two years from the time of tender to the entry of judgment and for

and in this connection an attorney's mistake of judgment as to the law[11] or negligence[12] is likewise fatal; but mere delay in making application to open judgment is not always sufficient ground for refusing to open judgment when rights of third parties are not affected,[13] nor is it always the legal equivalent of laches to take effect as an estoppel.[14] Except in the case of a judgment void for want of jurisdiction,[15] the petition must show that petitioner has a meritorious defense[16] and that another trial will probably produce a different result.[17] Clerical errors and omissions in the record may be corrected at any time.[18]

Courts of equity.[19]—A court of general equity jurisdiction[20] has the inherent, discretionary power to set aside or enjoin the enforcement of a judgment rendered in an action at law, for fraud in the procurement of the decree[21] unaccompanied by unexcused[22] negligence,[23] or laches,[24] or fault,[25] on the part of him who invokes the

several months thereafter, he is guilty of laches. Freemansburg Bldg. & L. Ass'n v. Billig, 30 Pa. Super. Ct. 101.

11. Bacon v. Mitchell [N. D.] 106 N. W. 129.

12. Ignorance of facts which he ought to have known. Bacon v. Mitchell [N. D.] 106 N. W. 129. Negligence of defendant's attorney in failing to answer is no ground for setting aside a default judgment. United States v. Rio Grande Dam & Irrigation Co. [N. M.] 85 P. 393. Opening of default denied where attorney filed an affidavit stating that he would probably be engaged in another case at the time of trial but the court refused to adjourn, it actually appearing that he was not engaged in the other trial at the time. Turtel v. Greenwald, 96 N. Y. S. 1074; One's attorney having full knowledge of all the facts connected with the action and consenting to the judgment, he cannot have the same set aside for mistake, surprise, or excusable neglect. Dixon v. Floyd, 73 S. C. 202, 53 S. E. 167.

13. Attempt to open judgment for fraud. Augustine v. Wolf, 29 Pa. Super. Ct. 336.

14. Augustine v. Wolf, 29 Pa. Super. Ct. 336.

15. Judgment void for want of service. Skjelbred v. Southard [N. D.] 108 N. W. 487.

16. Plea of limitations held not good cause for setting aside judgment based on service by publication. Rev. St. 1895, art. 1375, construed. Polk v. Herndon [Tex. Civ. App.] 15 Tex. Ct. Rep. 397, 93 S. W. 531. The mere setting out of the record of a complaint and a denial by answer with judgment against defendant and a showing that he was a minor and that no guardian was appointed does not show a defense on the merits in addition to an avoiding irregularity. Code, §§ 4049, 4096. Reints v. Engle, 130 Iowa, 726, 107 N. W. 947.

17. A judgment rendered on report of a referee should not be vacated because of the subsequent amendment of a stipulation introduced in the case to prove certain facts by striking out certain words therein, where there was no evidence that the words stricken out had any material bearing on the issues between the parties. Cullin v. Alvord, 109 App. Div. 918, 96 N. Y. S. 494.

18. See ante, § 4, subd. Nunc pro Tunc Entries.

19. See 6 C. L. 235.

20. The equitable jurisdiction of the probate court over claims against the estates of decedents does not extend to setting aside a decree for fraud after the lapse of the entry term. Beavers v. Rennels, 122 Ill. App. 483. The court of claims has equitable powers with reference to subjects committed to its jurisdiction by the Tucker Act, and hence may correct a mistake occurring in a former judicial proceeding which would have materially affected the judgment had it been known, and court having jurisdiction in the first action having lost jurisdiction of the case. Le More & Co.'s Case, 39 Ct. Cl. 484.

21. Collusive agreement between attorneys. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19. Notwithstanding the well settled rule that the judgment, when sued upon in another state, cannot be impeached or attacked for fraud by any plea known to the common-law system of pleading, it is equally clear that upon sufficient allegation and proof defendant is entitled, in a court of equity, to enjoin the plaintiff from suing upon or enforcing his judgment. Levin v. Gladstein [N. C.] 55 S. E. 371. Code, § 4091, provides for a new trial on application by petition within one year, where the final judgment or order was obtained by fraud practiced in obtaining the same. Held that where the fraud is not discovered within the year, equity has jurisdiction to grant a new trial. Graves v. Graves [Iowa] 109 N. W. 707. A bill in equity, which attacks and seeks to set aside a decree rendered in another suit as a cloud on the title to complainant's land, which does not allege that the decree attacked was obtained by fraud under such circumstances as will give jurisdiction to a court of equity, or that complainant's title was equitable, or that the lands were wild and uncultivated, or that he was in possession of them, shows no ground for equitable relief. Ropes v. Goldman [Fla.] 42 So. 322. What constitutes fraud, see next subdivision.

22. Where defendant's attorney became ill and wrongly told defendant that he would be well enough to attend to the case but that it would have to go over to the next term, held judgment rendered at former term would be set aside. Kirk v. Gover, 29 Ky. L. R. 1046, 96 S. W. 824.

23. Must be fraud, accident, or mistake, unmixed with any fraud or negligence on the part of the petitioner. Knight v. Hollings, 73 N. H. 495, 63 A. 38. Failure to use ordinary diligence to make or attempt to

remedy, or his attorney.[20] The remedy cannot be utilized for the correction of errors or irregularities,[27] to correct or modify the judgment,[28] nor where the petitioner had or has an adequate legal remedy.[29] Where it would be proper for a court of law to grant a new trial, if the application had been made while that court had the power, it is equally proper for a court of equity to do so, if the application is made when the court of law has no means of granting such a trial;[30] but a court of

make a defense will bar relief in equity. Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973. Evidence held insufficient to show that complainant was free from negligence. Collier v. Parish [Ala.] 41 So. 772. Equity will not grant relief unless, without any neglect or default on his part, the petitioner was prevented by fraud or accident, or the act of the opposite party, from availing himself of the defense. Valley City Desk Co. v. Travelers' Ins. Co., 143 Mich. 468, 13 Det. Leg. N. 39, 106 N. W. 1125. A court of equity will not assume jurisdiction to set aside a judgment of a court of law of competent jurisdiction on the ground that it is contrary to equity unless the defendant in the judgment was ignorant of the fact in question pending suit. Id. One failing to defend scire facias proceedings to revive a judgment cannot subsequently obtain relief in equity on the ground that the original judgment was obtained by fraud. McCormick v. McCormick [Md.] 65 A. 64. Bill for a new trial in an ejectment suit alleging that at the time of the trial complainants were not able to take an appeal on account of their poverty and ignorance, and that they had since the trial discovered a deed of gift to the premises, executed some fifteen years before, stated no facts justifying the court in granting a new trial at law. Rosenbaum v. Scott [Miss.] 40 So. 485. Where, in an action at law, process was by mistake served on defendant's daughter instead of on defendant, though defendant had notice of the service or the same day and failed to appear, and judgment was entered against defendant, equity has jurisdiction to set aside the judgment. Wilcke v. Duross, 144 Mich. 242, 13 Det. Leg. N. 227, 107 N. W. 907.

24. Two years' delay held not to bar suit to set aside judgment for fraud. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19. Three years' delay held to bar equitable relief. Field v. Jordan, 124 Ga. 685, 52 S. E. 885. Six years' delay held to bar suit to cancel decree confirming a tax title. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371. Delay of twelve and one-half years held to bar relief against probate decree. Knight v. Hollings, 73 N. H. 495, 63 A. 38. Seventeen years' delay held to bar suit to set aside divorce decree, former wife having remarried and conveyed property in reliance on decree. Buffington v. Carty, 195 Mo. 490, 93 S. W. 779.

25. Failure of assignee of principal debtor to intervene in garnishment proceedings held to bar right to have enforcement of judgment enjoined. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. Must be fraud, accident, or mistake, unmixed with any fraud or negligence on the part of the petitioner. Knight v. Hollings, 73 N. H. 495, 63 A. 38.

26. Where attorney relied on opposing parties' statements that land had been enclosed with a fence for ten years, and consented to the entry of judgment on opposing parties' pleas of limitation, held judgment would not be set aside. Gilbert v. Cooper [Tex. Civ. App.] 16 Tex. Ct. Rep. 376, 95 S. W. 753. Failure of counsel to file statement of facts on appeal. Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830. Where the law of a foreign country was not proved, the fact that if it had been proved the judgment would have been different, held no ground for equitable relief. Id. Mistake or unskillfulness of an attorney will not warrant equitable relief. Donovan v. Miller [Idaho] 88 P. 82. The fact that the advice of his attorney was erroneous will not warrant equitable relief. Id.

27. Gorman v. Bonner [Ark.] 97 S. W. 282. Equity will not relieve against mere mistakes of law. Donovan v. Miller [Idaho] 88 P. 82. Errors reviewable on appeal are not ground for setting aside judgment. Avocato v. Dell'Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830. No exception having been taken to the decree, equity will not set it aside for mere errors apparent on the face of the record. Decree unsupported by verdict. Booth & Co. v. Mohr & Sons, 125 Ga. 472, 54 S. E. 147. Where, under the general rules of the common law or by express provision of statute, the existence of some particular fact must be established at the trial to enable the court having cognizance of such cases to pronounce judgment in favor of one party or the other, an erroneous conclusion of the court in respect thereof is merely an error in the course of the trial, and not a jurisdictional defect. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371.

28. Beavers v. Rennels, 122 Ill. App. 483.

29. Failure of assignee of principal debtor to intervene in garnishment proceedings held bar to right to have enforcement of judgment enjoined. Fry v. Radzinski, 219 Ill. 526, 76 N. E. 694. Equity will not interfere because defenses existed which might have been, but were not, interposed (Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926), or where the party had a remedy by appeal but failed to do so (Id.). A summary motion to be supported by affidavits is not an adequate remedy. Studillo v. Security Loan & Trust Co. [Cal.] 87 P. 19. An injunction will not lie to enjoin the collection of a justice's judgment where the complainant has an adequate remedy by way of appeal. Lasher v. Annunziata, 119 Ill. App. 653. An injunction will not issue, restraining the collection of a judgment of the justice of the peace where defendant failed to appeal, in the absence of fraud, accident, or mistake, to prevent such appeal. Grossman v. Davis, 117 Ill. App. 354. In an equitable proceeding, remedy of party to vacate or modify the judgment for fraud or mistake in its procurement held complete at law by proceedings instituted for that purpose in the court in which it was rendered. Wood v. Stewart [Ark.] 98 S. W. 711.

equity will only grant such relief in case of newly discovered evidence, surprise, or fraud, or where a party is deprived of the means of defense by circumstances beyond his control.[31] A court of equity will not interfere with the enforcement of judgments at law unless the complainant has an equitable defense of which he could not avail himself at law,[32] or had a good defense at law which he was prevented from availing himself of by fraud, or accident, unmixed with negligence of himself or agents.[33] The effect of the Code procedure has modified and, to a large extent, rendered obsolete the ancient jurisdiction of equity over judgments at law. The rule now generally is that parties must litigate the whole controversy in one action, and a defendant who has an equitable defense to an action at law is not now without remedy against such action, for he can interpose such defense by answer or counterclaim, and, if necessary, have the case transferred to the chancery court. If he fails to do this, and allows judgment at law to go against him, he may find his defenses have been cut off by such judgment, and that he is without a remedy either in law or equity.[34] To obtain relief the petitioner must himself do equity,[35] and it must appear that it will be contrary to equity and good conscience to deny the petition.[36] While generally a suit to set aside will not lie where the judgment

30. Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973.

31. Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973. Failure to use ordinary diligence to make, or attempt to make, defense, will bar relief in equity. Id.

32. Emerson v. Gray [Del.] 63 A. 768. Defendant having knowledge of facts in question, equity will not afford relief unless they could not be received as a defense at law. Valley City Desk Co. v. Travelers' Ins. Co., 142 Mich. 468, 13 Det. Leg. N. 39, 106 N. W. 425.

33. Emerson v. Gray [Del.] 63 A. 768; Collier v. Parish [Ala.] 41 So. 772. Plaintiff must show that there will probably be a different result. Owens v. Foley [Tex. Civ App.] 15 Tex. Ct. Rep. 3, 93 S. W. 1003. Must plead and prove meritorious defense. Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973. Proceeding to enjoin judgment as void for want of service of process. Meyer v. Wilson [Ind.] 76 N. E. 748. Statute of limitations held a meritorious defense. Goode v. Marvin, 142 Mich. 518, 12 Det. Leg. N. 786, 105 N. W. 1112. Failure to interpose a defense is no ground for relief in equity. Aetna Life Ins. Co. v. Tremblay [Me.] 65 A. 22. Want of consideration in a contract (Donovan v. Miller [Idaho] 88 P. 82), or that it was against public policy (Id.), will not warrant a court of equity in enjoining the collection of a judgment at law where the defendant through the negligence of his attorneys fails to set up such defenses (Id.). A judgment will not be enjoined merely because the process or the service thereof, in the action in which it was entered, was insufficient to give jurisdiction of the person of defendant therein. 2 Starr & C. Ann. St. 1896, p. 2144, c. 69, § 7, considered. Young v. Deneen, 220 Ill. 350, 77 N. E. 193. Equity will interfere to restrain the collection of a judgment entered in an action at law wherein the plaintiff procured or was responsible for a false return of process, provided that the defendant in such action had a good and sufficient defense thereto. Emerson v. Gray [Del.] 63 A. 768. Married woman held to have no right to enjoin enforcement of a judgment rendered in a suit in which she alleged, but failed to prove, her disability. Beasley v. Robson, 117 La. 584, 42 So. 147. Where judgment is obtained against an administrator by collusion with him, or owing to his failure to use due diligence in defending the action, chancery will relieve the heirs unless it was for a valid and subsisting claim. Patteson v. Carter [Ala.] 41 So. 133.

34. Gorman v. Bonner [Ark.] 97 S. W. 282. In those states where equitable defenses may be interposed in actions at law, the failure to interpose such a defense in an action at law is no ground for relief in equity. Aetna Life Ins. Co. v. Tremblay [Me.] 65 A. 22. So held where a life insurance company paid the amount of the policy to an assignee of the policy for security, and failed to assert its right by subrogation to the rights of such assignee as against the claim of a subsequent assignee. Id.

35. Where the judgment debtor admits the validity of part of the indebtedness sued on, he will be required to pay such portion as condition precedent to the granting of equitable relief. Kirk v. Gover, 29 Ky. L. R. 1046, 96 S. W. 824. The ability of certain mortgagors to pay the amount found due on an accounting held not a condition to their right to maintain a suit to vacate a foreclosure decree collusively and fraudulently entered for an amount largely in excess of that due. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19.

36. In order to obtain the exercise of the equitable power to set aside a decree, there must be some substantial ground, such as fraud, accident, or mistake, which renders it against conscience to execute the decree they attack. Wright v. Hollings, 73 N. H. 495, 63 A. 38. Injunction held not to lie against enforcement of a judgment, the remedy being in effect to enforce an agreement which was a fraud on a third person and the court. Wood v. Stewart [Ark.] 98 S. W. 711. Judgment against an insane person set aside where summons was served on such insane person,

is absolutely void,[37] still it has been held that a judgment rendered without jurisdiction may be set aside in equity.[38] When the court entering the decree had jurisdiction of the parties and the subject-matter of the suit, and persons who are not parties to the suit and who have dealt with the subject-matter of the suit in good faith, relying upon the decree, have acquired interests in the subject-matter of the suit, the court will not set aside the decree and thereby divest and destroy their interests in the subject-matter of the suit.[39] An infant has a right to file by his next friend or guardian, at any time during his minority,[40] or within the period allowed after reaching majority for the prosecution of a writ of error,[41] an original bill to impeach a decree either for fraud or for error apparent upon the face of the proceedings,[42] and which existed at the time of the entry of the decree,[43] without asking for a rehearing or filing a bill of review.[44]

(§ 5) *C. Fraud, accident, mistake, surprise, and other particular grounds.*[45]—Fraud must lie in the procurement of the decree[46] and must be extrinsic or collateral

no guardian ad litem was appointed, and neither general guardian nor relatives knew of suit. Godde v. Marvin, 142 Mich. 518, 12 Det. Leg. N. 786, 105 N. W. 1112.

37. Buffington v. Carty, 195 Mo. 490, 93 S. W. 779.

38. Barron v. Feist, 101 N. Y. S. 72. In the absence of a showing of lack of jurisdiction to enter the judgment complained of, injunction will not lie to prevent the levy of execution on a foreign judgment. Howard v. Kinney Co., 8 Ohio C. C. (N. S.) 568.

39. Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906.

40. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163; Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906. Infant defendants to a suit in chancery may, before attaining the age of twenty-one years, maintain an original bill by next friend, showing such error, fraud, or surprise as entitles them to a reversal of the decree in such suit. Poling v. Poling [W. Va.] 55 S. E. 993.

41, 42. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163; Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906.

43. Poling v. Poling [W. Va.] 55 S. E. 993.

44. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

45. See 6 C. L. 238. The general doctrines of fraud, accident, and mistake are treated in Fraud and Undue Influence, 7 C. L. 1813, and Mistake and Accident, 6 C. L. 678.

46. Evidence held insufficient to show fraud. Collier v. Parish [Ala.] 41 So. 772; Smith v. Gowdy, 29 Ky. L. R. 832, 96 S. W. 566. Equity will interfere where plaintiff procured or was responsible for a false return of process. Emerson v. Gray [Del.] 63 A. 768. Allegations of fraud and coercion in procuring judgment notes held to warrant opening of judgment. McDermott v. Bennett, 213 Pa. 129, 62 A. 637. Where consent judgment was rendered without concealment or misrepresentation, held it would not be set aside for fraud. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094. Collusive agreement between attorneys held fraud in procurement. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19. So held where defendant was guilty of no negligence but plaintiff's counsel told the court no defense would be made. Fisher v. Fisher, 114 Mo. App. 627, 90 S. W. 413. In suit to determine adverse claims to realty held in effect fraudulent where party failed to disclose and name as defendants all adverse claimants whose names and places of residence could be easily ascertained. Gilbreath v. Teufel [N. D.] 107 N. W. 49. A judgment on a judgment note will be opened where the strongly corroborated testimony of defendant tends to show that it was forged. Thornton v. Meyers, 30 Pa. Super. Ct. 472. Failure of guardian ad litem of infant in probate proceedings to object to illegal probate of will disinheriting his ward held a constructive fraud upon the latter and authorized the setting aside of the probate decree. Parsons v. Balson [Wis.] 109 N. W. 136. Evidence that owner of the land had paid the taxes for the three years preceding the confirmation of the tax title does not warrant the setting aside of the decree of confirmation. Boynton v. Ashabranner, 75 Ark. 415, 91 S. W. 20. Where jury found that plaintiffs and their agents by false statements induced the court to render the judgment it did, held judgment would be set aside. Cowan v. Brett [Tex. Civ. App.] 16 Tex. Ct. Rep. 776, 97 S. W. 330. The intentional act of a city in assessing property owners for the paving of a street which a railroad company was legally bound, under a contract with the city, to pave, constituted such fraud on the property owners as would justify the court in vacating a judgment for such assessment at a subsequent term. City of Chicago v. Newberry Library, 224 Ill. 330, 79 N. E. 666. Mere false swearing or perjury on the trial is insufficient to warrant setting the judgment aside unless accompanied by fraud extrinsic or collateral to the matter involved in the original case sufficient to justify the conclusion that but for such fraud the result would have been different. Graves v. Graves [Iowa] 109 N. W. 707. When the issues are clearly defined by the pleadings and no deceit is practiced which misleads a party as to the character of the proofs intended to be offered, an action will not lie to vacate a judgment on the ground that it was obtained by fraud or perjury. Gen. St. 1894, § 5434, construed. Bisseberg v. Ree [Minn.] 109 N. W. 1115. Evidence that plaintiff had told a third party to tell defendant that the cause had been

to the questions examined and determined in the action.[47] The fraud must be proven, it cannot be inferred.[48] Cases in which the facts are deemed to show surprise,[49] accident, and mistake,[50] as the terms are used here, are shown in the notes.

(§ 5) *D. Procedure to amend, open, vacate or enjoin. Time for application.*[51]—Application must be seasonably made[52] and within the statutory time.[53] In order

continued, and that defendant relying on the notification did not appear at the trial in person or by attorney, was sufficient to justify the setting aside of the judgment on the ground of fraud and mistake. Jordan v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 929, 94 S. W. 398. Where heirs of a decedent agreed that the personal property of the estate should be sold to pay the decedent's debts and the real estate divided among themselves, and a few of the heirs subsequently procured the appointment of an administrator and induced him to bring a settlement suit that they might themselves acquire title to the land, held judgment would be set aside as procured by fraud. May v. Vaughn, 28 Ky. L. R. 1088, 91 S. W. 273. Where judgment is obtained against an administrator by collusion with him, or owing to his failure to use due diligence in defending the action, chancery will relieve the heirs unless it was for a valid and subsisting claim. Patteson v. Carter [Ala.] 41 So. 133. Failure to carry out promises which were made to procure a consent decree is not such fraud as to impeach the decree though the promisor did not intend to fulfill them when he made them. Divorce action dismissed on a promise of the defendant to give the custody of a minor child to the complainant except during one day of the week which was violated. Krieger v. Krieger, 120 Ill. App. 634. The mere fact that the administrator overestimated the widow's interest in an action to sell real estate to pay debts does not constitute fraud, accident, or mistake, authorizing a modification of the decree ordering the sale which allowed the widow a certain portion of the proceeds. Beavers v. Rennels, 122 Ill. App. 483.

47. Donovan v. Miller [Idaho] 88 P. 82. Equity will not relieve on the grounds that the judgment was obtained by perjury. Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926. Suit in equity to set aside probate of will and distribution decree. Goodrich v. Ferris, 145 F. 844.

Contra: That the decree was obtained by false testimony will be a ground for setting it aside in equity (Avocato v. Dell' Ara [Tex. Civ. App.] 14 Tex. Ct. Rep. 794, 91 S. W. 830), the parties having exercised due diligence (Id.). Failure to obtain rebuttal testimony held to bar relief. Id.

48. Hamilton v. Blackburn [Tex. Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094.

49. Disregard of service of summons by "business agent" of corporation held to warrant opening default judgment against corporation on the ground of surprise. Roberts v. Wilson [Cal. App.] 84 P. 216. Where parties could not by the use of reasonable diligence have discovered that a certain marriage was illegal owing to the wife having another husband living, held default judgment would be set aside. Wellinger v. Wellinger [Ind. App.] 79 N. E. 214.

50. An error of fact to warrant a court in setting aside an order of dismissal entered at a prior term must be such as would have precluded such order had it been known. The fact that plaintiff's attorney's death was unknown to the court dismissing an action for want of prosecution is insufficient since it might still have been dismissed on the ground of negligence in procuring another attorney. Green v. Union El. R. Co., 118 Ill. App. 1. One knowingly failing to contest the probate of a will, held decree admitting will to probate was not the result of accident, mistake, or any unforeseen cause within the meaning of Gen. Laws 1896, c. 251, § 2. Seward v. Johnson, 27 R. I. 396, 62 A. 569. Mislaying summons and complaint held to warrant opening default judgment. Appelbaum v. Star Fire Ins. Co., 100 N. Y. S. 747. Where one failed to take ordinary precautions as to his defense, held default judgment would not be set aside on the ground that he was in the hospital at the time the judgment was taken against him. Iowa Saving & Loan Ass'n v. Kent [Iowa] 109 N. W. 773. Failure to answer because of the failure of the clerk to keep the declaration in the files of the case and to make an entry of filing in the register as required by the court rules is such error of fact as will warrant the vacating of a default judgment at subsequent term. Domitski v. American Linseed Co., 117 Ill. App. 292.

51. See 6 C. L. 239. Practice on bills to impeach for fraud, see Fletcher Equity Pl. & Pr. § 952.

52. What constitutes laches, see ante this section, subd. B.

53. Ten years' delay held to bar right. Civ. Code Proc. § 518, construed. Forrester v. Howard [Ky.] 98 S. W. 984. Under Code Civ. Proc. § 473, motion to annul must be made within six months after the rendition of judgment. Tinn v. U. S. Dist. Attorney, 148 Cal. 773, 84 P. 152. Where a motion to annul an order admitting an alien to citizenship was made more than three years after the original order, the appearance of the naturalized citizen and his consent to the granting of the motion will not give the court jurisdiction; Code Civ. Proc. § 473, authorizing a motion to set aside a judgment only within six months after its rendition. Id. Code Civ. Proc. § 473, allowing one year within which to move to set aside a judgment not based on personal service held not affected as to the length of time allowed by the amendment of § 939. Fox v. Townsend, 2 Cal. App. 193, 83 P. 272. Under Civ. Code 1895, § 3764, judgment discharging administrator cannot be set aside at the instance of adult heirs unless they attack it by a proceeding commenced within three years from the date of its rendition. Summerlin v. Floyd, 124 Ga. 980, 53 S. E. 452. Eleven years' delay held to bar relief. Id. A judgment apparently valid on its face and rendered in an action wherein the

to toll the statute limiting the time within which a direct attack may be made on the judgment, there must not only have been fraud in obtaining the judgment, but it must have been coupled with such concealment of the fraud as to prevent the attacking party from ascertaining the fraud by the use of reasonable diligence.[54] In order to avoid the effect of a statute providing that a motion to vacate a final judgment for irregularity shall not be heard after one year from the filing of the judgment roll, a clear case of fraud must be shown.[55] Infants are generally allowed to make application within a short time after reaching majority.[56]

Parties.[57]—Persons who are not parties nor privies and do not, upon the record, appear to be affected, will not be heard upon a motion to vacate a judgment,[58] even though they might have become parties to the action.[59] In order to institute such proceedings one must have a real interest in the controversy;[60] that he was a party to the original action is not of itself sufficient.[61] A party interested in property affected by a judgment or to be affected by it, though not a party to the record, may move to vacate and set aside the judgment vacated therein.[62] That one is the

court had jurisdiction of the parties and the subject-matter cannot be set aside and vacated as void after the expiration of the statutory time for taking an appeal or for making a motion to vacate. Lockard v. Lockard [S. D.] 110 N. W. 104. Under Municipal Court Act (Laws 1902, p. 1563, c. 580, § 254), an application to vacate or modify a judgment rendered by the court upon a trial without a jury must be made within five days after the rendition of judgment. Barron v. Feist, 101 N. Y. S. 72. A motion to insert in the judgment a clause providing that defendant was liable to arrest and imprisonment on execution held a motion to amend or modify. Ostrom v. Sapolsky, 49 Misc. 610, 96 N. Y. S. 1070. The only power conferred on a municipal court justice to vacate, amend, or modify a judgment rendered by him is given by Municipal Court Act [Laws 1902, p. 1563, c. 580, § 254] (Ryan v. Brown, 99 N. Y. S. 868), and a motion to "correct" is a motion to amend within this act and must be made within the statutory time (Id.). Five days. Id. Under Municipal Court Act (Laws 1902, p. 1563, c. 580, § 254), a motion for an order to amend a judgment by striking therefrom an allowance of costs must be made within five days after the rendition of judgment. Lissner v. Dochtermann, 49 Misc. 624, 97 N. Y. S. 230. Where plaintiff fails to prove a cause of action in excess of a tender and judgment is nevertheless rendered for him, the municipal court after the expiration of five days has no power to correct the error by amending the judgment so as to make it a judgment in favor of defendant for costs. Municipal Court Act (Laws 1902, p. 1563, c. 580, § 254), construed. Lackner v. American Clothing Co., 112 App. Div. 438, 98 N. Y. S. 376. Proper method of relief in such cases is by suit in equity. Id. Code Civ. Proc. § 724, authorizing the vacation of a judgment within a year for causes arising from the mistake of "the party seeking the relief," has no application to a motion for the vacation of a municipal court judgment which was entered by the mistake of the trial judge and was not the result of error of either party. Barron v. Feist, 101 N. Y. S. 72. The above statute does not apply to a motion to set aside a judgment for an irregularity in entering it due to an inadvertent mistake of the court. Id. The motion to vacate a judgment after term, contemplated by Rev. St. 1899, § 795, providing that a judgment shall not be set aside for irregularity except on motion filed within three years after the term in which the judgment was rendered, does not apply where the defective service relied on in the motion is not an irregularity upon the record proper. Heffernan v. Ragsdale [Mo.] 97 S. W. 890. Failure to appoint a guardian ad litem for a married woman below majority held to have been an "error in fact not arising at the trial" and hence not barred till two years. Code Civ. Proc. §§ 1283, 1290, 1291. Byrnes v. Byrnes, 109 App. Div. 535, 96 N. Y. S. 306.

54. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347.

55. Eichner v. Metropolitan St. R. Co., 99 N. Y. S. 870.

56. Under Kirby's Dig. § 6248, an infant within 12 months after arriving at age may show cause against a decree divesting him of an interest in real estate, and on showing that the decree is void for want of jurisdiction may recover the realty against a purchaser bound to take notice that the decree is void. Rankin v. Schofield [Ark.] 98 S. W. 674.

57. See 6 C. L. 239.

58. Devisee not made a party to proceeding to sell realty to pay debts cannot move to vacate judgment of sale, he not being a party to the record. Card v. Finch [N. C.] 54 S. E. 1009.

59. Creditor of heir of a testator, he, the creditor, not becoming a party to probate proceedings of a will disinheriting his debtor. Seward v. Johnson, 27 R. I. 396, 62 A. 569.

60. A creditor of an absent heir held not entitled to represent the heir in a petition to set aside a judgment admitting the will to probate. Seward v. Johnson, 27 R. I. 396, 62 A. 569.

61. Son of trustee held not entitled to sue to vacate a decree affecting the trust

successful party does not deprive him of the right to institute such proceedings.[63] So also, where the judgment fails to conform to the verdict, the party in whose favor the court erred may have the judgment corrected.[64] The judgment being void for want of service on one of the defendants, it is proper to set it aside although it appears that such defendant had no further interest in the subject-matter of the suit.[65] Fraud being alleged all the parties thereto must be made parties to the attack.[66]

Modes and manner of procedure.[67]—A final judgment can be vacated and set aside only on some proceeding authorized by law.[68] Besides error and appeal,[69] the common-law remedies were on the law side error coram nobis and audita querela and later a motion during term to vacate; and on the chancery side by bill of review or other bill appropriate to the case.[70] The judgment being void, certiorari may be employed.[71] The remedy of a party seeking to prevent the execution of a decree because of matters outside of, though related to, the case in which the decree was rendered, is by petition filed in the pending cause for a restraining order, or an order to suspend proceedings in the cause.[72] Statutory methods must be followed.[73] A motion to set aside or strike off a judgment must be on the ground of irregularity appearing on the face of the record.[74] A motion to open the judgment is an appeal to the equitable power of the court to let the defendant into a defense.[75] The court may of its own motion strike from its records judgments void for want of jurisdiction.[76] If an erroneous judgment is entered, the remedy is by a motion to modify.[77] A consent decree cannot be impeached for fraud on a mere motion, but an original bill in the nature of a bill of review is necessary.[78] A proceeding to vacate a judgment is not like an action or law suit in the first instance, and where the court is entirely without jurisdiction except as it obtains it from the action of

estate, though he was made a party to the action in which such decree was rendered. Ford v. Kimble, 41 Wash. 573, 84 P. 414.

62. Stockholders held properly permitted to represent corporation so far as was necessary to move to vacate a judgment rendered against the corporation on a stipulation signed by the president without authority. Frederick Mill. Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298.

63. Successful party held entitled to have judgment set aside so that he could bring in additional parties. Dedrick v. Charrier [N. D.] 108 N. W. 38.

64. Williams & Co. v. Smith [Tex. Civ. App.] 98 S. W. 916.

65. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

66. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347.

67. See 6 C. L. 240.

68. After the expiration of the term of rendition, court rendering decree cannot materially alter it except upon some proceeding instituted in said court for setting aside and annulling the judgment or correcting error therein. Equity decree. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707. Under Code Civ. Proc. § 405, providing that civil actions shall be commenced by filing a complaint, a proceeding to annul an order admitting an alien to citizenship in which no complaint is filed cannot be considered as an equity action to set aside the order. Tinn v. U. S. Dist. Attorney, 148 Cal. 773, 84 P. 152. A written consent of one admitted to citizenship that the order admitting him be set aside for fraud, filed in support of an oral motion to that effect, cannot be considered a complaint. Id.

69. See Appeal and Review, 7 C. L. 128.

70. Audita Querela, see post, § 15. Bill of Review, see Equity, 7 C. L. 1323.

71. Davis v. Preston, 129 Iowa, 670, 106 N. W. 151. See Certiorari, 7 C. L. 606.

72. Hoffman v. Sewell [Ala.] 42 So. 556. Bill to set aside decree and dismiss suit alleging that while action was pending property in controversy was transferred to a third person, and the register was by written agreement authorized to dismiss the suit. held insufficient, especially where the third person had knowledge of the pendency of the suit. Id.

73. Under Ballinger's Ann. Codes & St. § 5155, an application for the modification or vacation of a judgment should be by motion whether the judgment was void or erroneous because of irregularity in obtaining it. Stark Bros. v. Royce [Wash.] 87 P. 340.

74. Motion to strike judgment regular on its face but entered after the death of the defendant denied. Lawrence v. Smith [Pa.] 64 A. 776.

75. Proper remedy where judgment, regular on its face, was entered after death of the defendant. Lawrence v. Smith [Pa.] 64 A. 776.

76. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453.

77. Not by a motion for a new trial. Migatz v. Stieglitz [Ind.] 77 N. E. 400.

78. Motion to set aside insufficient. Krieger v. Krieger, 120 Ill. App. 634.

the litigants acting under authority of law, but in the vacation proceedings the parties are already before the court, the subject-matter of the controversy is in the custody of the court, and the parties to the action are in a measure presumed to have knowledge of the standing of the case;[79] consequently, the fact that an application to vacate a judgment is made by motion instead of by petition as required by statute does not render a judgment of vacation made thereon void for want of jurisdiction.[80] The Illinois statutory proceeding in place of the writ of error coram nobis is deemed a new suit at law, independent of the proceeding in which the judgment sought to be set aside was rendered.[81] A proceeding to correct a judgment may be joined with one to revive it.[82]

Pleadings and practice.[83]—Statutes generally prescribe the method to be pursued.[84] In other than very exceptional cases, a motion to vacate and set aside a judgment should be made in the action in which the judgment was rendered,[85] and generally a suit to set aside must be brought in the court which rendered the judgment.[86] The failure of a party to proceed in the proper court is frequently held not ground for a dismissal of his complaint, but the same should be transferred to the proper court.[87] One suing to set aside a judgment must in his pleading set up facts sufficient to enable the court to determine the issues presented in the original action and render such judgment as will be an effective substitute for the one set aside.[88] The petition should set forth a meritorious defense to the action.[89] The allegations of the petition must not be mere conclusions of law,[90] hence, except in a few exceptional cases[91] where fraud is relied on, the facts

79, 80. State v. Washington Dredging & Imp. Co. [Wash.] 86 P. 936.

81. Domitzki v. American Linseed Co., 221 Ill. 161, 77 N. E. 428.

82. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4. Under Rev. St. 1895, art. 1357, authorizing the corrections of judgments arising from miscalculation of sums of money, a clerical error in a judgment arising from an error in the calculation of interest may be corrected in a suit to revive and correct the judgment. Id.

83. See 6 C. L. 241.

84. In an action to have a judgment set aside under Burns' Ann. St. 1901, § 399, no pleadings are contemplated except the complaint or motion, and the proceeding is to be determined in a summary manner. Wellinger v. Wellinger [Ind. App.] 79 N. E. 214. In **Kentucky** proceedings to open up a void judgment because of fraud in its procurement, or because rendered without service of process or appearance, are not governed by the Code of Practice regulating the granting of new trials, but rest upon the common law and the statutes for relief from fraud or misadventure. Francis v. Lilly's Ex'x [Ky.] 98 S. W. 996.

85. Frederick Milling Co. v. Frederick Farmers' Alliance Co. [S. D.] 106 N. W. 298.

86. A suit to set aside a judgment voidable on a showing of the facts alleged in the petition and to annul deeds forming in part the basis thereof is in its nature an equitable suit for a new trial which must be brought in the court which rendered judgment. Owens v. Foley [Tex. Civ. App.] 15 Tex. Ct. Rep. 3, 93 S. W. 1003.

87. Kirby's Dig. § 5991, construed. Wood v. Stewart [Ark.] 98 S. W. 711.

88. Owens v. Foley [Tex. Civ. App.] 15 Tex. Ct. Rep. 3, 93 S. W. 1003.

89. Machen v. Bernheim, 29 Ky. L. R. 427, 93 S. W. 621; Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973. In a suit to set aside a judgment in an action for the recovery of land, the petition must set out the claim of title relied upon by the plaintiff. Gilbert v. Cooper [Tex. Civ. App.] 16 Tex. Ct. Rep. 376, 95 S. W. 753. A petition for an injunction restraining the enforcement of a judgment must show the matters relied on as a defense or allege ignorance of plaintiff's claim though the judgment was rendered without jurisdiction of complainant. Lasher v. Annunziata, 119 Ill. App. 653.

90. Defects must be specifically set forth. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371. A petition by a defendant to vacate a judgment must, under 2 Ballinger's Codes & St. §§ 5156, 5158, be verified by an affidavit showing facts from which it may be adjudged that a meritorious defense exists; a mere allegation that such defense exists is insufficient. Hoefer v. Sawtelle [Wash.] 85 P. 853. The general averment of a petition to set aside a judgment that it was against a **person under disability** without the averment of any fact to show the disability is unavailing. Machen v. Bernheim, 29 Ky. L. R. 427, 93 S. W. 621. The petition in a suit attacking a judgment should point out the particulars in which the **service was defective.** Martin v. Castle, 193 Mo. 183, 91 S. W. 930. Allegation that the record fails to show that defendant was **served with process** as required by law held a mere conclusion of law. Id. Allegation that one has a **good and valid defense** is a mere conclusion of law. Bankers' Union of the World v. Lan-

constituting the fraud must be alleged.[92] While the petition should generally be verified,[93] it has been held that the answer in an action to set aside a judgment on the ground that it was procured by false and fraudulent testimony of one of defendant's witnesses need not be verified,[94] and it may be filed and presented by an attorney.[95] An answer filed in connection with an application to open a judgment rendered on service by publication must be full and complete as a pleading by the defendant in the cause.[96] It need not present a defense coextensive with the entire demand or with every demand of the petition, but whatever defense it proposes must be complete and perfect in the sense of fully overcoming the portions of the plaintiff's claim against which it is directed,[97] and it must subvert sufficient of the cause of action set forth in the petition to make it worthy of consideration in the doing of substantial justice between the parties.[98] Statutory provisions prohibiting the addition of new causes of action by amendment have no application to a motion to set aside a judgment[99] and the latter is amendable by the addition of grounds other than those taken in the original motion.[1] The construction of various pleadings is shown in the notes.[2] Unless an appearance is entered,[3] notice is generally deemed essential,[4] statutes of some states requiring the service of a copy of the motion upon the opposite party.[5]

Burden of proof and evidence.[6]—All intendments are in favor of the regularity of the proceedings,[7] and, while not conclusive, recitals of jurisdictional facts

dis [Neb.] 106 N. W. 973. Must set forth the nature of defense. Emerson v. Gray [Del.] 63 A. 768. The petition in a suit attacking a judgment for **want of jurisdiction** of the subject-matter of the action must allege wherein the court lacked jurisdiction. Martin v. Castle, 193 Mo. 183, 91 S. W. 930. A mere allegation of want of jurisdiction is insufficient. Id. In a suit to set aside a judgment in an action for the recovery of land, allegations in the petition that the grant under which defendants claim and that his **title is superior** to theirs, and that on a trial in trespass to try title he is prepared to show that his title is superior to theirs, held mere conclusions of the pleader. Gilbert v. Cooper [Tex. Civ. App.] 16 Tex. Ct. Rep. 376, 95 S. W. 753.

91. So held where an appeal was dismissed as to the appellant and judgment taken against the surety on the appeal bond. Crow v. Reliable Jewelry Co., 116 Mo. App. 624, 92 S. W. 742.

92. Stephens v. City Council of Marion [Iowa] 107 N. W. 614; Machen v. Bernheim, 29 Ky. L. R. 427, 93 S. W. 621.

93. Gilbert v. Cooper [Tex. Civ. App.] 16 Tex. Ct. Rep. 376, 95 S. W. 753.

94, 95. Lee v Hickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 91, 91 S. W. 636.

96, 97. Williams v. Kiowa County Com'rs [Kan.] 88 P. 70.

98. Williams v. Kiowa County Com'rs [Kan.] 88 P. 70. Tax judgment. Answer showing that 1 per cent of the judgment consisted of taxes intentionally levied for specific purposes not sanctioned by any provision of law and interest on such taxes held sufficient. Id.

99, 1. Albright-Prior Co. v. Pacific Selling Co. [Ga.] 55 S. E. 251.

2. A motion to set aside a judgment establishing a railroad lien held to raise the objection that one company made a party was not brought into court in any manner, and that another company served with process was not made a party to the action. Little Rock Trust Co. v. Southern Missouri, etc., R. Co., 195 Mo. 669, 93 S. W. 944.

3. One appearing without objection at the hearing of a motion to modify cannot thereafter object that the order modifying the judgment was invalid for want of notice. Stark Bros. v. Royce [Wash.] 87 P. 340.

4. A judgment cannot be vacated or altered even during the term of rendition, except upon notice to the parties. Allowance of claims in probate proceedings. Ault v. Bradley, 191 Mo. 709, 90 S. W. 775. Purchase at a sale under a judgment valid on its face held not affected by a subsequent vacation of the judgment of which he had no notice. Heffernan v. Ragsdale [Mo.] 97 S. W. 890.

5. Under Code Civ. Proc. § 134, a motion to set aside a decree rendered out of term will not be entertained unless the same is filed and a copy served on the opposite party within 10 days after such decree is rendered, especially where the judgment is regular. United States v. Rio Grande Dam & Irr. Co. [N. M.] 85 P. 393.

6. See 6 C. L. 242.

7. After verdict and judgment it will be presumed that facts necessary to support the judgment were proved and in all formal and technical matters the complaint will be treated as amended to conform to the facts. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332. Where the judgment is regular on its face, it will be presumed that the court acted within its jurisdiction, although the only summons in the record is defective, there being nothing to show that another summons was not issued or that the defendant did not appear, etc. Snider v. Badere, 39 Wash. 130, 81 P. 302. Courts of general jurisdiction. Probate courts. Knight v. Hollings, 73 N. H. 495, 63 A. 38. It will be

are prima facie evidence thereof, and if the court had jurisdiction, so long as its decree stands, it must be conclusively presumed that all of the proceedings which culminated in the judgment were in due conformity with the requirements of the law.[9] The petitioner must prove that he was free from negligence,[10] and has a meritorious defense[11] which can be established by evidence on another trial.[12] There must be a clear showing of fraud in order to overcome the presumption that the judgment was properly obtained.[13] A modification being sought, the petitioner has the burden of proving the error.[14] While a judgment should not be opened upon the defendant's oath when contradicted by the oath of the plaintiff, yet where there are corroborative circumstances or circumstances from which inferences may be drawn corroborating the defendant, it is proper to open the judgment.[15] The evidence may consist of affidavits, depositions, or oral testimony,[16] and as a general rule counter affidavits may be submitted,[17] though if the application is required to show a meritorious defense, counter affidavits or countervailing evidence should not be received on that question although affidavits or oral evidence may be heard to controvert the alleged excuse for suffering the judgment to be taken.[18] While judgment should not be opened where defendant's oath is contradicted by plaintiff's oath, yet where there are circumstances corroborating the defendant it is proper to open it.[19] In the Illinois statutory proceeding in place of the writ of error coram nobis,

presumed that testator was a resident of or had an estate in county in which proceedings were had. Id. Where the probate of a will is in common form, it will be presumed that there was no conflict. Id. Where it appears of record that a summons was duly issued by plaintiff's attorney as authorized by Mills' Ann. Code, § 33, and that the summons with proof of service was filed and returned into court, it was error to set aside a default judgment for lack of jurisdiction though another summons issued by the clerk had not been returned. Whitmore v. Gaston [Colo.] 85 P. 427.

8. Recitals of service held rebuttable. Francis v. Lilly's Ex'x [Ky.] 98 S. W. 996; Rodgers v. Nichols, 15 Okl. 579, 83 P. 923. Where judgment recited that defendants had been duly notified by publication and had defaulted, held it would be presumed that the court acted on competent evidence that the notice had been given. Harbert v. Durden, 116 Mo. App. 512, 92 S. W. 746. Where docket recited: "Judgment for plaintiff for," etc., held sufficient to warrant finding that there was an order for judgment. Washington Nat. Bank v. Williams, 190 Mass. 497, 77 N. E. 383. Where the return to a summons failed to show that it was served by one qualified to serve it, the recital of the judgment to the effect that defendant was "personally served" held not to conclusively show legal service. French v. Ajax Oil & Development Co. [Wash.] 87 P. 359. A recital in a judgment on a bond to dissolve the garnishment that a judgment had been rendered against the garnishee is not conclusive but may be rebutted on direct attack. Smith v. Kennedy, 125 Ga. 830, 54 S. E. 731. To warrant the setting aside of an order allowing certain claims against a decedent's estate because the claims were barred by limitations, mere proof of the claims themselves appearing on their face to be barred is insufficient, without evidence that the facts and circumstances which would have taken the claim out of the operation of the statute at the time it was allowed did not exist. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. The entry of a default judgment reciting due service of process based on a return of service signed by one styling himself a deputy sheriff is not conclusive of the official character of the signer of the return, and the judgment may be avoided for want of jurisdiction where it is shown that the person making the return was not in fact a deputy sheriff and the process was not in fact served as recited by the return. Code 1897, § 3524, considered. Buck v. Hawley, 129 Iowa, 406, 105 N. W. 688.

9. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371.

10. Collier v. Parish [Ala.] 41 So. 772.

11. Collier v. Parish [Ala.] 41 So. 772; Bankers' Union of the World v. Landis [Neb.] 106 N. W. 973. In a suit by a married woman to restrain enforcement of judgment as obtained against her for her husband's debt, where she made no showing that the debt was her husband's, the cause does not fall within decisions that even after judgment the wife may prove, in proper proceedings, that she was the surety of her husband. Beasley v. Jenkins, 117 La. 577, 42 So. 145.

12. Collier v. Parish [Ala.] 41 So. 772.

13. Stephens v. City Council of Marion [Iowa] 107 N. W. 614.

14. One seeking to open a judgment on the ground that it includes too much interest because of a tender of the debt has the burden of showing such tender. Freemansburg Bldg. & L. Ass'n v. Billig, 30 Pa. Super. Ct. 101.

15. Augustine v. Wolf [Pa.] 64 A. 777.

16. Burns' Ann. St. 1901, § 399, construed. Wellinger v. Wellinger [Ind. App.] 79 N. E. 214.

17, 18. Wellinger v. Wellinger [Ind. App.] 79 N. E. 214.

19. Augustine v. Wolf, 29 Pa. Super. Ct. 336.

it is proper to hear the proceedings on affidavits and counter affidavits.[20] Affidavits upon which a motion to vacate applies must state facts and the rule against hearsay evidence applies;[21] affidavits upon information and belief being generally insufficient.[22] An affidavit by an attorney must show why it was not made by the moving party.[23] Cases dealing with the sufficiency of the evidence are shown in the notes.[24]

Questions of law and fact.[25]—Whether there is sufficient evidence to authorize an amendment is a question of fact,[26] and the amendment being ordered and the record not revealing the fact whether the court acted on any further evidence than the verified application and the affidavit in support thereof, an appellate court will presume that the evidence was sufficient to warrant the amendment of the order.[27]

Judgment or order of vacation and extent and effect thereof.[28]—The imposition of conditions on opening the judgment is discretionary with the court.[29] In Illinois it is error to enjoin the collection of a judgment without requiring the statutory bond.[30] Generally a formal order is essential,[31] though pleading to issue will operate to set aside an office judgment.[32] A judge has no power out of court to modify a judgment duly rendered in open court.[33] An order granting a new trial is in effect an order vacating a judgment irregularly entered.[34] The court should only grant such relief as is consistent with the pleadings, facts, and nature of the proceeding.[35] An order setting aside a judgment should also set aside a sale thereunder.[36] That the judgment is rendered after the expiration of a statutory period is immaterial, the application having been seasonably made.[37]

20. Domitzki v. American Linseed Co., 221 Ill. 161, 77 N. E. 428.

21. Kipp v. Clinger, 97 Minn. 135, 106 N. W. 108.

22. A decree will not be stricken from the files upon an affidavit of a party that he "believes" such decree was never approved by the court. Andrews v. Ragel, 119 Ill. App. 51. An affidavit in support of a motion to vacate for misconduct of a juror based upon information and belief, and failing to set out the source of information or the grounds of belief, is insufficient. Eichner v. Metropolitan St. R. Co., 99 N. Y. S. 870.

23. On application to set aside a judgment and to permit the bringing in of an additional party defendant. Lederer v. Adler, 101 N. Y. S. 53.

24. In proceedings to vacate, evidence held to sustain a finding that judgment was void for want of service. Francis v. Lilly's Ex'x [Ky.] 98 S. W. 996.

25. See 6 C. L. 243.

26, 27. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

28. See 6 C. L. 243.

29. Imposition of $50 attorney's fee held reasonable though statutory fee was $10. Redding v. Puget Sound Iron & Steel Works [Wash.] 87 P. 119. In setting aside a judgment under Rev. Codes 1899, § 5298, the court is vested with an extremely wide discretion as to the imposition of costs and terms, and, if no terms are allowed, such action is not necessarily an abuse of discretion. Olson v. Sargent County [N. D.] 107 N. W. 43. In an action at law, process was not served on defendant, but on her daughter by mistake. The same day defendant learned of the service, but failed to appear and make any objection, but after a levy on her real estate she sued to set aside the judgment. Held she was not entitled to costs in the trial court nor any greater costs than actual disbursements on an appeal by her. Wilcke v. Duross, 144 Mich. 242, 13 Det. Leg. N. 227, 107 N. W. 907. Where an attorney practiced an imposition on the court by answering "ready" on the call of the calendar for three successive days, and then absented himself and permitted a default judgment to be taken, such judgment should be opened only upon payment of costs, $25 fees to the opposing attorney, and the giving of an undertaking to pay any judgment which may be rendered against him. Herbert Land Co. v. Lorenzen, 113 App. Div. 802, 99 N. Y. S. 937.

30. Grossman v. Davis, 117 Ill. App. 354.

31. Statement of justice that he would treat judgment as a nullity is ineffectual, it being merely voidable. Field v. Jordan, 124 Ga. 685, 52 S. E. 885.

32. No formal entry setting aside judgment is necessary. Hi Williamson & Co. v. Nigh, 58 W. Va. 629, 53 S. E. 124.

33. Telephoned from another county directing the clerk to modify a judgment duly rendered on the previous day in open court making a temporary injunction perpetual. O'Brophy v. Era Gold Min. Co. [Colo.] 85 P. 679.

34. Evans v. Freeman, 140 F. 419.

35. Where, upon an original bill by infant parties, a decree restoring a lost deed is reversed, the court cannot proceed to adjudicate the question of title to the land between them and a purchaser under a decree in a suit subsequent to the suit restoring the deed, and between different parties, when the decree restoring the deed did not adjudicate the title to, or otherwise dispose of the land, and when the bill of the infants canno-

Appeal or review.[38]—The appealability of the order is largely statutory.[39] The Illinois statutory proceeding in place of the writ of error coram nobis is deemed a new suit at law, independent of the proceeding in which the judgment sought to be aside was rendered,[40] and the question whether a motion shows on its face any error in fact can only be reviewed by appeal or writ of error from the judgment rendered in the particular case upon proper assignments of error in the court of review.[41] In order to present to the appellate court the question as one of law, whether there is any evidence in the record to sustain the order or judgment of the lower court, it is necessary to submit such question to the lower court as one at law by demurring to the evidence or by some other mode that would call upon the trial court for a ruling upon that question.[42] The power of a court to amend its decree should be questioned upon the appeal from the decree so amended, and cannot be raised on an appeal from a subsequent decree confirming a master's report under such decree.[43]

§ 6. *Construction, operation, and effect of judgment.*[44]—Judgments are to be interpreted with reference to their language, the record, the pleadings, and the subject-matter of the suit.[45] A judgment which recites a general finding in favor of one party to an action is a finding in favor of that party upon every issue raised by the pleadings and supported by the evidence.[46] Surplusage may be disregarded.[47] Where the journal entry of judgment is complete it speaks for itself and

be maintained for the purpose of removing a cloud upon the title to the land. Poling v. Poling [W. Va.] 55 S. E. 993.

36. In an action to set aside a judgment and a sale of land thereunder for fraud, the judgment should order that the judgment in question and the sale thereunder be set aside and the deed canceled, and that the parties are entitled to their proportionate interests in the land sold instead of adjudging that the land was purchased and held in trust for the parties entitled thereto. May v. Vaughn, 28 Ky. L. R. 1088, 91 S. W. 273.

37. Gaar, Scott & Co. v. Collin [N. D.] 110 N. W. 81.

38. See 6 C. L. 244.

39. An order of the municipal court opening a default and vacating the judgment is not appealable in the first instance. Laws 1902, p. 1563, c. 580, § 257, considered. Dutch v. Parker, 101 N. Y. S. 271.

40, 41, 42. Domitzki v. American Linseed Co., 221 Ill. 161, 77 N. E. 428.

43. Heyman v. Heyman, 117 Ill. App. 542.

44. See 6 C. L. 245.

45. Judgment forever barring and estopping plaintiffs from thereafter "instituting or prosecuting any action or proceeding against the defendant or the real estate described in the complaint" construed as referring solely to the case made by the pleadings and the subject-matter before the court. Gray v. Cohen [Cal. App.] 84 P. 444. A judgment for defendants against "C. & Son," the plaintiff, is good although not alleging that it is a corporation, this appearing in the declaration. Carrier v. Poulas, 87 Miss. 595, 40 So. 164. Judgment of justice of the peace reciting that he was a "justice of the peace in the city" held to mean a justice in the township in which the city is situated, under Rev. St. 1899, § 3805, making justices township officers. Carpenter v. Roth, 192 Mo. 658, 91 S. W. 540. A judgment awarding a certain sum of money "with interest thereon" held to be construed as allowing legal interest from the date of its rendition only. Mixer v. Mixer, 2 Cal. App. 227, 83 P. 273. Where a judgment entry recited that defendant demurred to the petition as amended, whereupon it was considered and adjudged by the court that the demurrers to the petition as amended be sustained, and, plaintiff declining to plead further, it was adjudged that the information be dismissed at petitioner's cost, held the entry showed a proper judgment sustaining the demurrer. State v. Kitchens [Ala.] 41 So. 871. Where judgment adjudged that taxes due city were to be deducted from fund which was to be distributed and city subsequently disclaimed the taxes, held no deduction should be made. Deering v. Schreyer, 185 N. Y. 560, 78 N. E. 75. Where in ejectment by a vendee at tax sale against tenants under the former owner there is nothing to show the relation of landlord and tenant between plaintiff and defendants a dismissal for want of notice is not an adjudication that the relation exists, though a notice is only required in such case. Carlson v. Curran, 42 Wash. 647, 85 P. 627. Where a judgment is inconsistent but the record reveals that a part of it is a nullity which renders it consistent, it will stand. Greenberg v. Stevens, 114 Ill. App. 483. Where judgment is rendered in favor of one partner against another for his interest in property alleged to have been acquired by use of partnership property, the court must have found that it was so acquired and that plaintiff had been denied his rights therein. Deaner v. O'Hara [Colo.] 85 P. 1123.

46. Hopper v. Arnold [Kan.] 86 P. 469.

47. Where a trustee refusee to execute the trust and a suit is instituted to have the respective rights of the parties adjusted and the property sold, the use of the formula

controls,[48] and it cannot be limited by the bill of exceptions.[49] Judgments may be final[50] on the merits[51] in personam[52] or in rem.[53] A judgment may be a unit or it may be severable.[54] The doctrines of estoppel by judgment and the merger and bar of causes of action in and by the judgment are treated elsewhere.[55] A decree merely describing a prior judgment and reciting the amount due thereon for the purpose of identification is not an adjudication that such amount is due.[56]

The rule applies that in cases of ambiguity introduced into the judgment roll by verbal changes, which either should have been made in additional places or not at all, the presumption in favor of the validity of affirmative action should prevail.[57] Defects in the pleadings may be cured by the judgment.[58] In Louisiana judgment in a petitory action may be taken as a title.[59]

§ 7. *Collateral attack.*[60] *What is collateral.*[61]—A collateral attack is an attempt to impeach a judgment in a proceeding not instituted for the express purpose of annulling, correcting, or modifying such judgment.[62]

"barred and foreclosed of and from the equity of redemption" in the prayer of the complaint and in the judgment does not conclusively establish the nature of the action nor impair the validity of the judgment. Curtin v. Krohn [Cal. App.] 87 P. 243.

48, 49. Hopper v. Arnold [Kan.] 86 P. 469.

50, 51, 52, 53. See ante, § 1.

54. A judgment in a suit to revive and correct a dormant judgment which revives the judgment and corrects it, if void in so far as it seeks to correct the amount of the original judgment, is nevertheless valid in so far as it revives such judgment. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

55. See Former Adjudication, 7 C. L. 1750.

56. O'Brien v. Allen, 42 Wash. 393, 85 P. 8.

57. In re Peterson's Estate, 212 Pa. 453, 61 A. 1005. Where a petition for adoption of a child originally executed by the husband was subsequently altered in one or two places with the intention of making the wife a fellow petitioner, resulting in an ambiguity, presumption will be that not enough alterations were made rather than that those made were unintentional or accidental. Id.

58. See Pleading, 6 C. L. 1008.

59. Barfield v. Saunders, 116 La. 136, 40 So. 593.

60, 61. See 6 C. L. 247.

62. 17 A. & E. Ency. of Law [2nd Ed.] 848. Attacking judgment when cited in contempt for failure to obey the judgment is collateral. Trombly v. Keeray [Mich.] 13 Det. Leg. N. 891, 110 N. W. 44. Ejectment held collateral attack on decree constituting link in chain of title. Morris v. Sadler [Kan.] 88 P. 69. Attack on judgment offered for allowance as a claim against decedent's estate held collateral. Plummer v. M. D. Wells & Co. [Ind. T.] 90 S. W. 303. Bill attacking tax deeds and asking that they be set aside held a collateral attack on the foreclosure decrees. Hoffman v. Flint Land Co., 144 Mich. 564, 13 Det. Leg. N. 374, 108 N. W. 356. A suit to enjoin the construction of a drain which has been ordered by the board of county commissioners is a collateral attack on their action. Brooks v. Morgan, 36 Ind. App. 672, 76 N. E. 331. It is requisite to a direct attack for fraud that the suit should be brought in the court rendering the judgment and that all of the parties to the fraud be made parties. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347. A cross action attacking a judgment for fraud but failing to make all the original parties parties is collateral. Id. A prosecution for conspiracy to defraud the United States, averred to have been effected in part by the appointment of an administrator by a state court which was without jurisdiction, is not a collateral attack upon the judgment of such court. United States v. Bradford, 148 F. 413. A contest for an application for confirmation of a sale of real estate belonging to a deceased person to pay debts held a direct attack on the decree allowing the claims for the payment of which the property was to be sold. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. Attack on mechanics' lien judgments in an action on a building contractor's bond, in which they were proved as part of the damages, held collateral. Gritman v. U. S. Fidelity & Guaranty Co., 41 Wash. 77, 83 P. 6. The assertion of jurisdictional defenses as concerns the main action by a garnishee is not a collateral attack upon the judgment against the principal defendant. Tabor v. Bank of Leadville [Colo.] 83 P. 1060. An answer and petition in response to a petition for the distribution of an estate alleging that the will under which distribution is asked is a forgery and that the probate of the same was fraudulently obtained is a collateral attack on the judgment admitting the will to probate. In re Davis' Estate [Cal.] 86 P. 183. Where the court on the final settlement of an executor has directed the share of a nonresident heir to be paid to the other heirs of the decedent, a proceeding by such heir to vacate the order approving the executor's report and discharging the executor is not a collateral attack. Reizer v. Mertz, 223 Ill. 555, 79 N. E. 283. Where in trespass to try title plaintiff claimed under mesne conveyances from one to whom the land was awarded in partition as heir of the deceased owner, evidence of defendant, another heir, showing that the judgment of partition was a nullity constituted a collateral attack on the judgment and was inadmissible. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. A suit to redeem from a mortgage

Grounds.[63]—If the court had jurisdiction of the subject-matter, and, except in actions in rem, of the parties, its judgment in a judicial action[64] cannot be collaterally assailed by the parties or their privies.[65] The court having had no jurisdiction, its judgment may be collaterally attacked[66] at any time by any person who has not by his conduct estopped himself from questioning its validity,[67] though, being a court of general jurisdiction, want of jurisdiction must affirmatively appear on the face of the record.[68] The reason for this is that, as to a court of general jurisdiction, all jurisdictional facts as to which the record is silent will be presumed.[69] Want of

which has been foreclosed by a decree of court on the ground that complainant, who was made a defendant in the foreclosure suit, was not legally served with process therein, and his right of redemption was therefore not cut off, is a collateral attack on the foreclosure decree. Cohen v. Portland Lodge No. 142, 144 F. 266. In trespass to try title an attack on the judgment under which the land was sold on execution is collateral, the action in which the judgment was rendered being in a different court though between the same parties. Parker v. Moody & Co. [Tex. Civ. App.] 96 S. W. 650. Where in an action to foreclose a trust deed defendant pleads a superior title under a prior judgment in the same court, and a codefendant, admitting the validity of plaintiff's cause of action, by way of cross petition attacks the defendant's alleged superior title for lack of jurisdiction in the court rendering it, the attack is direct and not collateral. Southern Pine Lumber Co. v. Ward, 16 Okl. 131, 85 P. 459.

63. See 6 C. L. 247.

64. Judgment establishing ferry held a judicial act and not collaterally assailable. Hatten v. Turman [Ky.] 97 S. W. 770.

65. In proceedings in rem, the court having jurisdiction of the subject-matter, its determination is not open to collateral attack. Appointment of administrator. Jordan v. Chicago, etc., R. Co., 125 Wis. 581, 104 N. W. 803. See 19 Harv. L. R. 384.

66. Robyn v. Peckard [Ind.] 76 N. E. 642. Order of board of county commissioners. Brooks v. Morgan, 36 Ind. App. 672, 76 N. E. 331. Void judgment can be collaterally attacked at any time. McDermott v. Gray, 198 Mo. 266, 95 S. W. 431; Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572; Buffington v. Carty, 195 Mo. 490, 93 S. W. 779. The jurisdiction of any court exercising authority over a subject may be inquired into in every court where the proceedings of the former are relied on. Southern Pine Lumber Co. v. Ward, 16 Okl. 131, 85 P. 459. Part of order admitting will to probate and which construed will held subject to collateral attack, it not being proper in such order. Gray v. Russell [Tex. Civ. App.] 14 Tex. Ct. Rep. 836, 91 S. W. 235. Summons issued without being authenticated by the seal of the court. Kelso v. Norton [Kan.] 87 P. 184.

67. One held not entitled to collaterally assail a tax foreclosure decree, though he acquired his title subsequent to such decree. Hoffman v. Flint Land Co., 144 Mich. 564, 13 Det. Leg. N. 374, 108 N. W. 356. Where a fund is being administered in equity, one who files a petition in the cause asserting a lien by judgment has the right to except to a master's report giving priority to another judgment and show that the other judgment was void. Crockett v. Etter [Va.] 54 S. E. 864. A testator owed debts and his land was liable for their payment and the land sold pursuant to the decree brought a fair price and the proceeds were properly applied. Held not to defeat the right of the devisees to collaterally attack the decree and to recover the land subject to the right of the purchaser to repayment of the amount which he had expended, for which the land was liable. Card v. Finch [N. C.] 54 S. E. 1009.

68. McDevitt v. Connell [N. J. Eq.] 63 A. 504; Bail v. Hartman [Ariz.] 83 P. 358; Plummer v. Wells & Co. [Ind. T.] 90 S. W. 303; Fenton v. Minnesota Title Ins. & Trust Co. [N. D.] 109 N. W. 363; In re Davis' Estate [Cal.] 86 P. 183; United States v. Bradford, 148 F. 413. District court held court of general jurisdiction. McDevitt v. Connell [N. J. Eq.] 63 A. 504. Board of county commissioners. Brooks v. Morgan, 36 Ind. App. 672, 76 N. E. 331. The fact that an order directing payment of a widow's dower in the course of the administration on her husband's estate was made on the same day that the application was filed did not show that the order was granted without notice. Briggs v. Manning [Ark.] 97 S. W. 289. Where the affidavit and order for publication and the notice of publication were set out in full in the record, held judgment could not be collaterally assailed. Rose v. Davis, 140 N. C. 266, 52 S. E. 780. The judgment or decree of a court of general jurisdiction acting within the scope of its ordinary powers, and in pursuance of the course of the common law, is aided by a presumption that jurisdiction was regularly acquired as to both the subject-matter and the person, until the contrary appears. Cohen v. Portland Lodge No. 142, 144 F. 266. Where a default personal judgment recited citation by publication and the petition and process showed that defendant was a nonresident, held judgment could be collaterally attacked. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572. Where judgment failed to show on its face that defendant was a married woman, held not void for nonjoinder of husband. Schnitger v. Rankin, 192 Mo. 35, 91 S. W. 122. Where the record of a judgment on a cross bill showed that it was rendered on the same day that the cross bill was filed, so that service could not have been had and that the persons against whom the judgment was rendered did not appear, held the judgment was subject to collateral attack. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

69. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572; Hearn v.

jurisdiction may be ascertained from the whole record.[70] Except as to persons not parties to the suit,[71] the record controls and the recitals of jurisdictional facts are conclusive,[72] and while the presumption in favor of the judgment is rebuttable, still

Ayres, 77 Ark. 497, 92 S. W. 768; State v. Settle [N. C.] 54 S. E. 445. Presumption supplies the essential requisites to jurisdiction as to which the record is silent. Cohen v. Portland Lodge No. 142, 144 F. 266. Service of process. Harrow v. Grogan, 219 Ill. 228, 76 N. E. 350. That summons was served on proper defendants. Livingston v. New England Mortg. Sec. Co., 77 Ark. 379, 91 S. W. 752. Presumed that parties were properly served and statutory notice given, the record not showing the contrary. Probate decree. Johnson v. Grace [Tex. Civ. App.] 15 Tex. Ct. Rep. 793, 94 S. W. 1064. Service of citation presumed. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622. Partition suit that necessary parties were before the court. Waldron v. Taenzer [Ark.] 94 S. W. 925. Posting of notice of application for a ferry franchise presumed. Hatten v. Turman [Ky.] 97 S. W. 770. Will be presumed that sufficient affidavit was filed to authorize service by publication. Stoneman v. Bilby [Tex. Civ. App.] 96 S. W. 50. Presumed that some disposition was made of a party not mentioned in the judgment prior to its rendition. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347. Court of common pleas is a court of general jurisdiction over the subject-matter of laying out roads and recording returns. Central R. Co. v. Seabright [N. J. Err. & App.] 64 A. 131. Order to record and nonexistence of parallel roads presumed. Id. On collateral attack of proceedings of a board of public works in ordering the construction of a sidewalk, presumed that notice sufficiently described property. Dyer v. Woods [Ind.] 76 N. E. 624. Judgment distributing trust fund to an association on a use and trust specified in the decree, it will be presumed in support thereof that the society had power to accept the bequest and was a person competent to act as trustee. Kauffman v. Foster [Cal. App.] 86 P. 1103. In a proceeding to recover taxes by a city tax collector, where the defendant was properly served, a default judgment for taxes generally was not subject to collateral attack either on the ground that it did not appear that the judgment did not include state and county taxes, which the city collector could not recover, or because the suit was brought in the name of the state. Rankin v. Porter Real Estate Co. [Mo.] 97 S. W. 877. In order to collaterally attack a judgment of a court of general jurisdiction for want of jurisdiction, the facts showing the lack of jurisdiction must be alleged and proved. Demurrer overruled. McDevitt v. Connell [N. J. Eq.] 63 A. 504; Leman v. MacLennan, 7 Ohio C. C. (N. S.) 205.

70. If a default judgment recites a valid service, that controls the balance of the record, but where the judgment sets out the particular kind of citation made on defendant, the record, including at least the citation, return, and petition, may be consulted to support or destroy the recital in the judgment. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572.

71. Card v. Finch [N. C.] 54 S. E. 1009.

72. The recitation in a judgment of jurisdictional facts, if not contradicted by the record, will be presumed to be true, and they cannot be denied or questioned in any collateral proceeding. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347. Recital that cause had been retained for further orders. State v. Settle [N. C.] 54 S. E. 445. Where judgment recited appearance of defendant, held it could not be shown that he was never served and did not appear. Plummer v. Wells & Co. [Ind. T.] 90 S. W. 303. Findings that court had jurisdiction of parties held not overcome by return of sheriff on summons showing that an infant purporting to have been served with process as a defendant was in fact a complainant. Teel v. Dunnihoo, 221 Ill. 471, 77 N. E. 906. In a collateral attack on a default judgment reciting that defendant, though legally cited by publication, had failed to appear, parol evidence showing the nonresidence of defendant was inadmissible. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572. Where judgment recited that it appeared to the court's satisfaction that defendants had been duly summoned, etc., held it would be presumed on collateral attack that proof of valid service was regularly made apart from an alleged defective affidavit of service. County Bank of San Luis Obispo v. Jack, 148 Cal. 437, 83 P. 705. Where there was no affirmative statement in an affidavit of service on two defendants that but one copy of the complaint and summons was delivered to the two, held it would be presumed that a copy was properly delivered to each of the defendants. Id. Recital in judgment that required notice was "given to the defendants in conformity of law" raises the presumption of due service and of jurisdiction of the persons, in the absence of any inconsistent record or evidence. Wallace v. Adams [C. C. A.] 143 F. 716. Where decree recites due and legal notice, the mere absence from the judgment roll of proofs of notice which should have been included therein does not affirmatively establish that the court had no jurisdiction because the required notice was not given. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042. Where the record affirmatively recites that it appears to the court that defendant has been duly summoned, it will be presumed in the absence of evidence to the contrary, on collateral attack, that the court had evidence before it on which to base a finding in favor of its jurisdiction. Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768. Under B. & C. Comp. Or. § 56, providing for service by publication where the affidavit upon which the order of the court or judge for such service is based contains evidence which tends to prove the requisite facts, the court's adjudication of its sufficiency is conclusive on collateral attack, although it might be erroneous and reversible on direct appeal for insufficiency of the evidence. Cohen v. Portland Lodge No. 142, 144 F. 266. An affidavit filed to obtain an order for service by publication un-

such impeachment is not permissible if it involves a contradiction of the record,[73] but, where the record speaks, it imports verity and nothing to the contrary can be presumed in aid of jurisdiction,[74] and the same rule applies where nonjurisdictional facts are admitted by demurrer.[75] It will be readily seen that under this rule any judgment not containing evidence in its record of its own invalidity should never be termed void for the purposes of collateral attack, for whenever it is necessary to present proof aliunde to show its nullity it must necessarily be a voidable judgment.[76] While generally no presumption will be indulged in in favor of the jurisdiction of an inferior court, still it will be presumed that an officer of such court has done his duty,[77] hence, from taking action which presupposes a decision of the question of jurisdiction, a finding thereon is implied,[78] and in that case the judgment is unassailable unless the record shows affirmatively a lack of jurisdiction.[79]

Where the jurisdiction of an inferior court over the subject-matter and the par-

der B. & C. Comp. Or. § 56, held sufficient to sustain the order made thereon upon a collateral attack on the decree for want of jurisdiction. Id.

73. Presumption in favor of the judgment is rebuttable unless rebutting it involves a contradiction of the record. Stoneman v Bilby [Tex. Civ. App.] 96 S. W. 50. Judgment of court of competent jurisdiction held not subject to collateral attack by evidence aliunde the record. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. The record or judgment roll may not be impeached for want of jurisdiction by the minutes and files of the court or by other extrinsic evidence. Ballarino v. Superior Ct. of Los Angeles County, 2 Cal. App. 759, 84 P. 225. The law precludes inquiry by evidence aliunde the record in a collateral attack upon a judgment of a domestic court of general jurisdiction, regular on its face, into any fact which the court rendering such judgment must have passed upon in proceeding to its rendition. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. Parol evidence of the understanding of the parties to a suit for partition with respect to the line between them and that a material mistake was made by the commissioners in running the division line was inadmissible as varying the judgment. Id.

74. Cohen v. Portland Lodge No. 142, 144 F. 266. A judgment reciting proper service is not for that reason impervious to collateral attack where it clearly and affirmatively appears from the record itself that no service was made. State v. Wheeler [Wash.] 86 P. 394. Default judgment held not binding as to facts showing lack of jurisdiction, the question of jurisdiction not being litigated. In re McGarren's Estate, 112 App. Div. 503, 98 N. Y. S. 415. If record shows that recitals of jurisdictional facts are untrue, the judgment may be collaterally assailed. Reizer v. Mertz, 223 Ill. 555, 79 N. E. 283. When the recitals in the judgment are such as to demonstrate the impossibility of there having been jurisdiction of the person or subject-matter the judgment is void and subject to collateral attack. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347. A judgment for taxes showing on its face that it was against unknown owners of land, rendered prior to the passage of Sayles' Ann. Civ. St. art. 5232o, authorizing service by publication on unknown owners of land in proceedings to collect taxes, there being no provision for that purpose prior to that time, is void. Id. Where the judgment recited the filing of an affidavit for service by publication and the record showed an insufficient affidavit, held it would be inferred that the service by publication was based on the defective affidavit and the presumption that a sufficient affidavit had been filed was overcome. Stoneman v. Bilby [Tex. Civ. App.] 96 S. W. 50. The presumptions which the law implies in support of the judgments of superior courts of general jurisdiction only arise with respect to jurisdictional facts concerning which the record is silent, and when it discloses the evidence upon which service by publication was had, and this was ineffectual for the purpose, it will not be presumed that other or different evidence was presented, but the judgment will be void and open to collateral attack. Johnson v. Hunter [C. C. A.] 147 F. 133.

75. Allegations in bill that no service or appearance was had being admitted by demurrer, it will not be presumed that court erroneously found that it had jurisdiction or that any officer of the court made a false return. Cohen v. Portland Lodge, No. 142, 140 F. 774.

76. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347. Such must be the case with a judgment fully reciting personal service which is not contradicted by the record when in fact there has been no such service. Id.

77. Presumption indulged in favor of inquest by justice of the peace. Morgan v. San Diego County [Cal. App.] 86 P. 720.

78, 79. Where an inferior tribunal to which the subject-matter is committed has necessarily passed on its jurisdiction by proceeding to act, a judgment roll showing that some notice was had and failing to show any defect therein is invulnerable, since the presumption concluding a jurisdiction decided then applies. Brooks v. Morgan, 36 Ind. App. 672, 76 N. E. 331. Where a court has passed on a defective service of process and held the same sufficient, the judgment is not subject to collateral attack, though the court be one of inferior jurisdiction. Meyer v. Wilson [Ind.]

ties is established, the same presumptions exist in favor of the regularity of the action of such court as exist in favor of the action of a court of general jurisdiction, and the judgment rendered by such inferior court in such case is not subject to collateral attack.[80] Fraud, unless perhaps when it goes to the jurisdiction of the court,[81] is not ground for a collateral attack.[82] An erroneous judgment,[83] or

76 N. E. 748. Board of public works; jurisdiction presumed. Dyer v. Woods [Ind.] 76 N. E. 624.

80. Brooks v. Morgan, 36 Ind. App. 672, 76 N. E. 331.

81. Decree can only be collaterally attacked for fraud going to the jurisdiction of the court. Pratt v. Griffin, 223 Ill. 349, 79 N. E. 102. Foreign judgment obtained by fraud may be collaterally attacked. In re Bergmann, 110 App. Div. 588, 97 N. Y. S. 346. Where an alleged incompetent was inveigled into an insane hospital and there incarcerated and a guardian appointed for her for the fraudulent purpose of obtaining possession of her property, she being in fact sane, held judgment could be attacked collaterally. Id. Where a county employs one to bring suit against it to declare void certain warrants and to enjoin it from paying and the holding bank from collecting the same, a decree obtained therein is invalid. Multnomah County v. White [Or.] 85 P. 78. Order approving an administrator's account and ordering final distribution cannot be reviewed or set aside in a suit on the administrator's bond unless it is impeached for fraud. McDonald v. People, 222 Ill. 325, 78 N. E. 609. Purchasers pendente lite cannot question the validity of a judgment unless they can show fraud or collusion, and in the absence of such a showing it is presumed that the court ascertained all the facts necessary to its jurisdiction. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433.

82. Morris v. Sadler [Kan.] 88 P. 69. False and perjured testimony is no ground for collateral attack and it is immaterial that the alleged fraud was not discovered until long after the judgment by reason of the death of a person. El Capitan Land & Cattle Co. v. Lees [N. M.] 86 P. 924. Code Civ. Proc. Kan. § 575, permitting a direct attack upon the judgment, does not alter the rule. Id. In a collateral attack on a judgment, the judgment cannot be set aside for fraud in the procuring of a jury; the alleged fraud not appearing on the face of the judgment roll. In re Davis' Estate [Cal.] 86 P. 183. The allegation in a plea that a judgment was procured through fraud is not a good common-law defense to a suit brought upon it in the same or a sister state. Levin v. Gladstein [N. C.] 55 S. E. 371.

83. Propriety of determining question adjudged. Sanger Bros. v. Corsicana Nat. Bank [Tex.] 91 S. W. 1083. Denial of motion to vacate held conclusive. Griffis v. First Nat. Bank [Ind. App.] 79 N. E. 230. Validity of cause of action cannot be inquired into collaterally. May v. Getty, 140 N. C. 310, 53 S. E. 75. A valid judgment closes all inquiry as to the grounds upon which it was rendered. Love v. McGill [Tex. Civ. App.] 91 S. W. 246. Allowance of counsel fees in divorce decree. Van Dyke v. Van Dyke, 125 Ga. 491, 54 S. E. 537. In an action to recover property sold under an order of the court in a previous action, the action will not be reviewed, the only remedy being by appeal. Metz v. Dayton, 28 Ky. L. R. 1053, 91 S. W. 745. In an action on a ball bond the sufficiency of the complaint in the action in which the bond was given cannot be attacked. Banning v. Roy, 47 Or. 119, 82 P. 708. That refusal of court to dismiss bill on the ground of an adequate remedy at law was erroneous is no grounud for collateral attack. Trombly v. Klersy [Mich.] 110 N. W. 44. Decree against land for taxes held not collaterally assailable on the ground that the taxes had in fact been paid. Shaaf v. Bradley [Mich.] 109 N. W. 1061. That guardian was negligent in failing to rent ward's land held not ground for collaterally assailing order confirming guardian's settlement. Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773. Judgment of probate court approving report of commissioners appointed to partition the real estate of a decedent. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622. Failure of probate court to bring personalty and advancements into hotchpot in partition proceedings held not ground for collateral attack. Id. Where a residuary legatee was party to a hearing of final distribution setting aside a sum as a perpetual trust to maintain decedent's burial lot, she cannot maintain a suit in equity to avoid such decree on the ground that the trust was violative of the provision against perpetuities, whether such question was formerly considered or not. Smith v. Vandepeer [Cal. App.] 85 P. 136. A judgment by a lower court in conformity with a permissible interpretation of an obscure or ambiguous mandate from an appellate court is not subject to collateral attack. Clark v. Parks [Neb.] 106 N. W. 770. Judgment cannot be collaterally attacked by a party to the suit in which it was rendered because of mistakes made by the court in construing the testimony. Ropes v. Goldman [Fla.] 42 So. 322. Where in a foreclosure suit an issue as to the metes and bounds of a certain lot is presented and determined, the decree cannot be collaterally attacked in confirmation proceedings for irregularity in the description. Medland v. Van Etten [Neb.] 106 N. W. 1022. An order vacating a judgment cannot be collaterally attacked on the ground that as to certain of the lands to which the judgment related there was no contest, and the judgment should therefore have been allowed to stand as to them, the order being at most erroneous only and reviewable only on appeal. State v. Washington Dredging & Improvement Co. [Wash.] 86 P. 936. A judgment in favor of a trustee in a deed of trust against an attaching creditor held conclusive against such creditor in a suit by one of the beneficiaries under the deed against the creditor and the trustee for alleged collusive diversion of the fund. Sawyer v. First Nat. Bank

one voidable for mere irregularities of procedure,[84] cannot be collaterally attacked. That the statute of limitations had run against the cause of action is no basis for collateral attack.[85] A collateral attack may be made in a criminal case when its purpose is to punish a crime committed by means of the decree, judgment or record collaterally attacked.[86] The same general rules apply to foreign judgments[87] and to decisions of boards acting judicially.[88] In most states probate courts are regarded as courts of general jurisdiction.[89] Cases dealing with the weight and sufficiency of the evidence are shown in the notes.[90]

[Tex. Civ. App.] 14 Tex. Ct. Rep. 701; 93 S. W. 151.

84. Robyn v. Peckard [Ind. App.] 76 N. E. 642; McDermott v. Gray, 198 Mo. 266, 95 S. W. 431. Failure of clerk to sign and attest order of publication of process held not ground for collateral attack. Id. Fact that decree recited that publication of process was made in a different paper than it really was held not ground for collateral attack. Id. Proceedings of municipal board of public works. Dyer v. Woods [Ind.] 76 N. E. 624. Mechanics' lien judgments held sufficient as against collateral attack. Gritman v. U. S. Fidelity & Guaranty Co., 41 Wash. 77, 83 P. 6. Irregularity in entry of judgment. Grantee of judgment debtor held not entitled to assail judgment in ejectment against purchaser at execution sale. Ross v. Dewey [Pa.] 64 A. 674. Irregularity in summons. Barker Co. v. Central West Inv. Co. [Neb.] 105 N. W. 985. Voidable judgment not subject to collateral attack. Barrett v. McKinney [Tex. Civ. App.] 15 Tex. Ct. Rep. 258, 93 S. W. 240. Premature entry of judgment no ground for collateral attack. Horrigan v. Savannah Grocery Co. [Ga.] 54 S. E. 961. That the venue was laid in the wrong county is no ground for collaterally attacking the judgment. Snyder v. Pike [Utah] 83 P. 692. Failure to give notice of entry of decree in vacation held a mere irregularity if required and not ground for collateral attack. Hoffman v. Flint Land Co., 144 Mich. 564, 13 Det. Leg. N. 374, 108 N. W. 356. Order appointing special guardian and authorizing sale of interests of minors held not subject to collateral attack. Hagerman v. Meeks [N. M.] 86 P. 801. Failure to make proof in the statutory manner of due publication of a warning order on nonresident defendants in a foreclosure suit held a mere irregularity. Johnson v. Lesser, 76 Ark. 465, 91 S. W. 763. So, also, as to failure of clerk to make statutory indorsement of warning order on complaint. Id. A judgment of foreclosure of a mortgage cannot be collaterally attacked in an action by the mortgagor for an accounting and to redeem on the ground that the foreclosure suit was premature. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56. Irregularities in permitting amendments to the bill for the purpose of bringing in other parties and the ordering of publication without formal affidavit and the insufficiency of publication held not grounds for collateral attack. Alabama & V. R. Co. v. Thomas, 86 Miss. 27, 38 So. 770. An irregularity in a judgment in a suit to revive and correct a dormant judgment arising from the fact that it attempts to correct the original judgment cannot be questioned in a collateral proceeding. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4. Failure of involuntary petition in bankruptcy to state nature and amount of claims of petitioners held not jurisdictional so as to render judgment open to collateral attack. Bail v. Hartman [Ariz.] 83 P. 358. An affidavit for service by publication which did not use the precise language of the statute in stating that personal service could not be made within the state, but in which that fact appeared inferentially from the statement that the parties to be served were absent from the state, held to render judgment rendered thereon voidable only and not subject to collateral attack. Morris v. Sadler [Kan.] 88 P. 69.

85. Probate decree. Van Dusen v. Topeka Woolen Mill Co. [Kan.] 87 P. 74.

86. United States v. Bradford, 148 F. 413.

87. Personal judgment reciting due notice assailed for the want thereof. In re Culp, 2 Cal. App. 70, 83 P. 89.

88. So held as to county board of equalization, equalizing assessments for benefits for the construction of a levee in a levee district. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333.

89. In re Davis' Estate [Cal.] 86 P. 183; Smith v. Vandepeer [Cal. App.] 85 P. 136. Probate courts are courts of record having general jurisdiction within the sphere of the subject-matters assigned to them by the legislature. Their orders and decrees import absolute verity and require no affirmative evidence to indicate such jurisdiction. Ferguson v. Ferguson, 3 Ohio N. P. (N. S.) 549. Same presumptions in favor of probate courts as of other courts of record. Desloge v. Tucker, 196 Mo. 587, 94 S. W. 283. The probate court being a court of superior jurisdiction, it would be presumed that notice of an application for payment of a widow's dower was duly given where the record is silent as to notice of such application. Briggs v. Manning [Ark.] 97 S. W. 289. Determination of probate court that creditor was entitled to letters of administration upon an estate within the court's jurisdiction is not open to collateral attack. Ackerman v. Pfent [Mich.] 13 Det. Leg. N. 647, 108 N. W. 1084. Probate court having jurisdiction, its order setting aside homestead as exempt held not subject to collateral attack. Jenkins v. Clisby [Ala.] 39 So. 735. In collateral attack on probate decree, held it would be presumed that orders continuing the hearing had been regularly made. In re Davis' Estate [Cal.] 86 P. 183. Probate decree cannot be collaterally attacked. In re Wohlgemuth, 110 App. Div. 644, 97 N. Y. S. 367. Unappealed from order granting allowance to widow held not subject to collateral attack. In re Dougherty's Estate [Mont.] 86 P. 38.

§ 8. *Lien. When and to what it attaches.*[91]—Until levy a judgment lien, while reaching all of the debtor's property, is not specific.[92] The lien covers all the real property[93] of the judgment debtor. It, however, only reaches the actual interest of the judgment debtor in such property.[94] A creditor of the party selected as the medium through whom a conveyance of land is made by a husband to his wife acquires no right, title, or interest in the land by virtue of a judgment existing against such medium, and it is immaterial that such conveyance was made by the husband to defraud his creditors.[95] A judgment is not a lien on property not subject to levy and sale on execution.[96] A duly recorded judgment against the owner of land exempt as a business homestead attaches as a lien on the land when it ceases to be such homestead, if at such time it is still the property of the judgment debtor.[97] Where a judgment in rem is obtained against a nonresident in an action by attachment, the docketing of such judgment does not extend the lien to the general property of the defendant.[98] As regards the lien of a judgment, an award in eminent domain proceedings is personal property.[99] The indexing and transcribing a judgment for the purposes of a lien is treated elsewhere.[1]

Duration of lien.[2]—The duration of the judgment lien is largely statutory.[3] At common law and under many, but not all,[4] statutory provisions, the lien of the judgment takes effect as of the first day of the term at which it is rendered,[5] and the term being adjourned, the first day of the term as here used means the first day upon which the court was present and ready to transact business.[6] There is a conflict as to whether the transcribing of a judgment extends its life.[7] A judg-

Probate court is one of general jurisdiction in all matters pertaining to the estate of deceased persons, and its orders and decrees made in the administration of an estate must upon collateral attack be presumed valid, unless the orders themselves or the record of the proceedings in which they were made affirmatively show want of authority in the court to make them. Murphy v. Sisters of the Incarnate Word of San Antonio [Tex. Civ. App.] 16 Tex. Ct. Rep. 821, 97 S. W. 135. The fact that a court of probate in giving judgment passed upon the question of jurisdiction does not preclude courts of common law from inquiring into the jurisdictional facts collaterally and declaring the judgment of the probate court valid or void as the facts are found true or false. Adoption proceedings. Decree declared that written consent required by law had been given. Taber v. Douglass [Me.] 64 A. 653.

99. Affidavit of party as to personal service held insufficient to overcome affidavit and testimony of officer supported by corroborating evidence. In re McGarren's Estate, 112 App. Div. 503, 98 N. Y. S. 415.

91. See 6 C. L. 250. Judgment liens on land, see Tiffany Real Property, 1306.

92. Judgment in attachment proceedings. Oliver v. Wright, 47 Or. 322, 83 P. 870.

93. Unpatented mining claim held real property within the meaning of Acts 1891, p. 70, No. 50, § 4, declaring judgments a lien on real property. Bradford v. Morrison [Ariz.] 86 P. 6.

94. Moore v. Scruggs [Iowa] 109 N. W. 205. Real purchaser of land title to which was taken in his daughter's name held not estopped to assert title as against judgment creditor of daughter. Id.

95. Sokolowski v. Ward [Minn.] 107 N. W. 961.

96. Not a lien on the redemption right of a mortgagor of a leasehold interest. Commerce Vault Co. v. Barrett, 222 Ill. 169, 78 N. E. 47.

97. Bradley v. Janssen [Tex. Civ. App.] 15 Tex. Ct. Rep. 914, 93 S. W. 506.

98. Katz v. Obenchain [Or.] 85 P. 617.

99. Ten year limitation as to liens on real estate has no application. Fawcett v. New York, 112 App. Div. 155, 98 N. Y. S. 286.

1. See ante, § 4.

2. See 6 C. L. 251.

3. Life of judgment is ten years under Rev. Codes 1899, § 5200, and § 6723, relating to the time within which execution may issue, does not control. Holton v. Schmarback [N. D.] 106 N. W. 36. Under Ballinger's Ann. Codes & St. § 5132, a judgment ceases to be a lien on land of the judgment debtor at the expiration of five years from the date of its rendition, and this notwithstanding the judgment debtor's absence from the state. Heman v. Rinehart [Wash.] 87 P. 953. D. C. Code, § 1214 [31 Stat. at L. 1381, c. 854], giving a lien on judgments from the time they "shall be rendered," does not operate in favor of judgments rendered prior to its enactment. Ohio Nat. Bank v. Berlin, 26 App. D. C. 218.

4. Nebraska: The provision of Code Civ. Proc. § 509, relative to a judgment lien dating from the filing of a special mandate from the supreme court to the lower court, has exclusive reference to the special mandate required by § 594 in cases where the supreme court renders such judgment as the lower court should have rendered. Harvey v. Godding [Neb.] 109 N. W. 220.

ment lien does not generally abate upon the death of the judgment debtor,[8] though in some states it does upon his making a declaration of insolvency.[9] When the judgment becomes dormant the lien ceases to exist.[10] As a general rule a lien cannot be prolonged by an ancillary action.[11] The mere pendency of a restraining order does not always suspend the statute of limitations.[12]

Rank and priority of lien.[13]—The lien of the judgment may be given priority by the filing of a lis pendens,[14] or by the levy of execution.[15] A judgment creditor has a lien on his debtor's real estate, but he has no interest in it so as to make him a privy in estate with his debtor,[16] nor does he occupy the position of a purchaser under the recording acts.[17] The lien of a judgment for a tort committed by a corporation is superior to a mortgage lien previously given.[18] Cases determining the rank of the judgment lien with reference to other liens and rights are shown in the notes.[19]

5, 6. Parrott v. Wolcott [Neb.] 106 N. W. 607.

7. That it does not. Rev. Codes 1899, § 5500, construed. Holton v. Schmarback [N. D.] 106 N. W. 36; Acme Harvester Co. v. Magill [N. D.] 106 N. W. 563.

Note: That it does extend its life, see Williams v. Rice, 6 S. D. 9, 60 N. W. 153.

8. Under Code 1896, §§ 1920-1922, as amended by Gen. Acts 1898-99, p. 34, giving a lien to the judgment creditor against the property of the judgment debtor for 10 years, on the recording of the judgment as provided by the act, the lien does not abate on the death of the judgment debtor within such time. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62. Where judgment is rendered against two and one dies, execution thereafter issued against both is valid against the survivor and keeps alive the judgment lien upon the survivor's lands. Dieboldt Brew. Co. v. Grabski, 7 Ohio C. C. (N. S.) 221.

9. Though Code 1896, §§ 1920-1922, as amended by Gen. Acts 1898-99, p. 34, gives a lien to the judgment debtor for 10 years on the recording of the judgment as provided by the act, the lien abates on the declaration of insolvency of the judgment debtor within that time. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62.

10. Harvey v. Godding [Neb.] 109 N. W. 220. A sale of real estate under an execution issued on a dormant judgment is void as to one who acquired title to the property from the judgment debtor during the life of the judgment lien. Id. See post, § 9, Suspension, Dormancy and Revival.

11. Under Laws 1897, p. 52, c. 39, providing that a judgment on a contract liability ceases to be a lien after the expiration of six years, the lien of such judgment cannot be continued for a longer period than six years by an ancillary action brought to remove fraudulent conveyances made to cover up property subject to execution. Meikle v. Cloquet [Wash.] 87 P. 841.

12. Where an order was granted restraining the collection of a judgment but no service was had on the defendant nor the proceeding prosecuted to determination, it was the duty of the judgment creditor after the expiration of a reasonable time to have applied for a dissolution of the order, and hence the mere pendency thereof did not suspend limitations in so far as it affected the lien of the judgment. Heman v. Rinehart [Wash.] 87 P. 953.

13. See 6 C. L. 252.

14. Where complainant in partition filed a lis pendens on the commencement of the suit, a judgment in his favor for costs against certain of the parties held a prior lien over a mortgage executed on their share pendente lite. Barbour v. Patterson [Mich.] 13 Det. Leg. N. 605, 108 N. W. 973.

15. Lippincott v. Smith [N. J. Err. & App.] 64 A. 141.

16. Though owner of land is estopped from asserting his title as against the grantee in a deed by a person having no title, a judgment creditor of the true owner has a lien superior to one claiming under the grantee in such deed. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599.

17. A judgment creditor has no lien on land conveyed by unrecorded deed by the judgment debtor prior to the judgment. Foster v. Hobson [Iowa] 107 N. W. 1101.

18. A judgment recovered in an action against a water company for loss by fire because of inadequate water supply is in tort, though the contractual relations of defendant to the city be also set out. Guardian Trust & D. Co. v. Fisher, 200 U .S. 57, 50 Law. Ed. 367. Where a corporation places a mortgage on property and sells to another corporation subject thereto, a judgment lien for a tort of the latter in North Carolina is superior to the mortgage. The priority given by N. C. Code 1883, § 1255, is not limited to the property taken over by the latter. Id.

19. Equitable right to a conveyance of land held superior to the general lien of subsequent judgment creditors of the holder of the legal title. New York Water Co. v. Crow, 110 App. Div. 32, 96 N. Y. S. 899. In proceedings to determine priority of judgment over deed of trust, held evidence was insufficient to establish that the judgment debtor was induced to extend credit upon the defendant's fraudulent representations as to the debtor's solvency. Jones v. Levering, 116 Mo. App. 377, 91 S. W. 980. Where one defendant buys land while incumbered by three mortgages and two judgments and agrees to pay the mortgages and pays one of them, he is not entitled to enjoin a sheriff's sale of the land under execution issued

Mode of asserting lien.[20]—In a suit to foreclose a judgment lien on land, the judgment debtor, having conveyed the land subsequent to the recording of a proper abstract of the judgment, is not a necessary party.[21] The judgment in such a suit should award such relief as is consistent with the rights of all the parties.[22]

Release.[23]

"Judicial mortgages." [24]

§ 9. *Suspension, dormancy, and revival.*[25]—A dormant judgment is without any generative vitality, to have efficiency it must be revived,[26] and hence such a judgment will not authorize the issuance of execution[27] nor will it support an action.[28] In the absence of a supersedeas, an appeal will not prolong the life of the judgment,[29] nor in some states will the issuance of an execution in the absence of required recordation.[30] The life of a judgment is generally regulated by statute[31] and cannot be affected by an agreement to which the judgment debtor is not a party.[32] Within the meaning of constitutional provisions the taking away of the right to revive a judgment has only to do with the remedy,[33] and a statute altering such right but leaving the judgment creditor a reasonable time within which to enforce the judgment is constitutional.[34] Upon the death of one of the members of a partnership in whose favor a judgment has been recovered, the judgment becomes dormant.[35]

In most states statutes prescribe the method of procedure for reviving a judgment.[36] A suit to revive a judgment is not a new suit but a continuation of the original one,[37] and hence a judgment can only be revived in the name of the orig-

on such judgments subject to the two unpaid mortgages. Kuhn v. National Bank of Holton [Kan.] 87 P. 551.

20. See 6 C. L. 252. See, also, Executions, 7 C. L. 1614; Judicial Sales, 6 C. L. 260, etc.

21. McDowell v. Jones Lumber Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 465, 93 S. W. 476.

22. A judgment debtor, after the recording of a proper abstract of the judgment, conveyed his land to a third person. The judgment creditor instituted a suit against the debtor and the third person to foreclose the judgment lien. Held that a judgment reciting the existence of the judgment against the debtor and foreclosing the lien was proper. McDowell v. Jones Lumber Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 465, 93 S. W. 476. A judgment debtor, after the recording of a proper abstract of the judgment, conveyed his land to a third person. The judgment creditor instituted a suit against the debtor and the third person to foreclose the judgment lien. Held that a judgment foreclosing the lien, except as to a specified number of acres to be designated by the third person as to his homestead, sufficiently protected the rights of the third person. Id.

23. See 6 C. L. 252.

24, 25. See 6 C. L. 253.

26. An equitable petition seeking to subject property to the payment of a dormant judgment, without any revival of such judgment and without suing upon it, held properly dismissed on demurrer. Palmer v. Inman [Ga.] 55 S. E. 229.

27. Execution issued 15 years after entry of decree held invalid. Quinnin v. Quinnin, 144 Mich. 232, 13 Det. Leg. N. 215, 107 N. W. 906.

28. No action can be maintained on a judgment which has been allowed to remain dormant for over one year. Brown v. Akeson [Kan.] 86 P. 299.

29. Harvey v. Godding [Neb.] 109 N. W. 220.

30. An entry made by a proper officer upon an execution issued on a judgment, unless recorded upon the proper execution docket, will not even as between the parties to the judgment arrest the running of the dormancy statute. Palmer v. Inman [Ga.] 55 S. E. 229.

31. Code Civ. Proc. § 482, providing when a judgment shall become dormant and cease to operate as a lien on the debtor's real estate, does not apply to a decree for the sale of specific property. Medland v. Van Etten [Neb.] 106 N. W. 1022. Under Stat. 1893, § 4337, a judgment against a city of the first class becomes dormant after five years from the date of its rendition, unless the judgment creditor within such time causes execution to issue thereon. Beadles v. Smyser [Okl.] 87 P. 292.

32. An agreement between the judgment creditors of a city held not to change the status of the city against any such creditors, nor excuse a creditor from suing out a judgment within five years from the date the judgment was rendered, or from securing a revivor within one year after it becomes dormant. Beadles v. Smyser [Okl.] 87 P. 292.

33. Gaffney v. Jones [Wash.] 87 P. 114.

34. Laws 1897, p. 52, c. 39, construed. Gaffney v. Jones [Wash.] 87 P. 114.

35. Code Civ. Proc. § 439, construed. Emrich v. Heilbrun [Kan.] 86 P. 145.

36. A judgment rendered on a contract entered into prior to the passage of Act 1897 (Laws 1897, p. 52, c. 39), providing for the revival of judgments, was capable of being revived either by a direct action at law

inal judgment debtor,[38] though under the statutes of some states proceedings to revive a judgment should not be had in the name of an administrator except where the administrator has succeeded to the rights of the judgment creditor;[39] consequently in such states, where the judgment creditor assigns the judgment and dies, his assignee should proceed in his own name,[40] and it has been held sufficient if the plaintiff in an action of revival has any color of right or interest for himself or others.[41] A judgment against a decedent may be revived against the personal representative by an amicable scire facias as well as by writ,[42] though where a judgment debtor dies after the rendition of a judgment not awarding any personal relief, his administrator is not a necessary party to revivor proceedings.[43] The rules of procedure in original actions, so far as applicable, govern proceedings to revive,[44] consequently, statutory provisions providing that in actions against persons jointly indebted upon contract the plaintiff may proceed against the parties served unless the court otherwise directs are applicable to revivor proceedings.[45] Statutes generally provide the method of service upon minors.[46] Where a scire facias to revive a judgment erroneously states the amount of the judgment, the writ may be amended.[47] Where enforcement of the judgment is barred by lapse of time, revival proceedings can be taken only on notice and hearing.[48] In Nebraska an action for revivor after the expiration of one year may be maintained, either by a supplemental petition or by an original bill.[49] A failure of a guardian ad litem to file an answer in proceedings to revive a judgment against infant heirs of the judgment debtor is a mere irregularity.[50] On a scire facias to revive a judgment, matters only appropriate in a proceeding to open the original judgment cannot be set up as a defense.[51] The revival in a cause where judgment was rendered for plaintiff before the death of defendant will be considered that of the judgment and not of the action, though the notice and order are in terms for revival of the action.[52] A judgment on scire facias is not a new judgment but is a revival of the original judgment.[53] The premature revival of a judgment against the heirs of the judgment debtor is a mere irregularity.[54] Where notice to show cause why a judgment should not be revived is served, failure to defend gives the revived judgment no more efficacy than the original judgment possessed.[55] A judgment can be revived only by an order of court made in conformity with statutory requirements,[56] and while an order of revivor need not award execution,[57] still the entry should be that

on the judgment or by a special proceeding authorized by 2 Hill's Ann. St. & Codes, §§ 262, 263. Melkle v. Cloquet [Wash.] 87 P. 841.

37. Lawrence County Bank v. Lambert, 116 Mo. App. 620, 92 S. W. 755.

38. Assignee held not entitled to sue in his own name. Lawrence County Bank v. Lambert, 116 Mo. App. 620, 92 S. W. 755; Strother v. Hilliker, 120 Mo. App. 165, 96 S. W. 482.

39, 40. Code Civ. Proc. §§ 45, 463, 472, considered. Vogt v. Binder [Neb.] 107 N. W. 383.

41. Gelsenberger v. Cotton, 116 La. 651, 40 So. 929.

42. Bowman v. Hoke, 30 Pa. Super. Ct. 633.

43. So held where judgment was for the sale of land. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320.

44, 45. Thornhill v. Hargreaves [Neb.] 107 N. W. 847.

46. Under Code 1854, § 437, service in revivor proceedings against infant heirs of the judgment debtor upon such minors and their mother is sufficient, their father being dead and it not appearing that they had a guardian. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320.

47. Since it can be done from the record itself. Schmidt v. Zeigler, 30 Pa. Super. Ct. 104.

48. National Bank v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 84 P. 466, 468.

49. Keith v. Bruder [Neb.] 109 N. W. 172. Petition held sufficient. Id.

50. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320.

51. Schmidt v. Zeigler, 30 Pa. Super. Ct. 104.

52. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320.

53. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

54. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320.

55. Hatcher v. Faison [N. C.] 55 S. E. 284.

56. Giving a mortgage to pay the indebtedness represented by the judgment will not

plaintiff have execution.[58] Where a motion upon affidavit and notice to revive a dormant judgment is before the judge on appeal from an improper refusal of the clerk to revive the judgment, it is optional with the judge to reverse and remand the case with directions, or to himself grant the motion and order execution to issue.[59]

§ 10. *Assignment of judgment.*[60]—Judgments are generally deemed assignable;[61] but a sale of a judgment does not amount to an equitable assignment of the cause of action upon which it is based, and hence on the reversal of the judgment the parties thereto are relegated to their respective rights and liabilities as they existed prior to the judgment.[62] The assignment of a judgment does not operate as an assignment of the personal privilege conferred by statute on the judgment creditor to compel a redemption of personal property of the debtor sold under execution,[63] and in such case the assignor is not entitled to sue to compel a redemption of such property.[64] In some states it is held that an assignment of a judgment does not vest the legal title in the assignee, but only an equitable interest.[65] The assignee of a satisfied judgment acquires no rights thereunder.[66] The doctrine of caveat emptor applies to the purchaser of a judgment,[67] and though there may be an express warranty,[68] still there is no implied warranty from the mere assignment of a judgment that it is valid and impregnable.[69] Except where fraudulent as to third parties, such as creditors, the consideration for the assignment is immaterial.[70] The transfer of a judgment does not bind the judgment debtor or third persons unless it has been notified to the debtor or it is clearly shown that he has knowledge of it.[71] Where there are two assignments of the same judgment, the first notified to the debtor will have priority.[72] Though the assignment of a judgment expressly appoints the assignee irrevocable attorney with power of substitution, such stipulation does not prevent the assignor from rescinding such authority unless coupled with an interest independent of compensation for the collection of the judgment.[73]

§ 11. *Payment, discharge, and satisfaction.*[74]—Unless the judgment is kept alive for the benefit of one of several judgment debtors paying the same, the judgment becomes extinguished by payment.[75] Where a judgment is paid by one of

revive the latter. Brown v. Akeson [Kan.] 86 P. 299.

57. Thornhill v. Hargreaves [Neb.] 107 N. W. 847.

58. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

59. Martin v. Briscoe [N. C.] 55 S. E. 782.

60. See 6 C. L. 255.

61. Under Code Civ. Proc. § 1910, a judgment against an administrator on a claim against a decedent's estate is assignable Bamberger v. American Surety Co., 48 Misc. 221, 109 App. Div. 917, 96 N. Y. S. 665.

62. Rev. St. 1895, art. 4647, construed. St. Louis S. W. R. Co. v. Parks [Tex. Civ. App.] 14 Tex. Ct. Rep. 232, 90 S. W. 343.

63, 64. Sloss v. Steiner Bros. [Ala.] 40 So. 511.

65. Hence, execution must issue in the name of the assignor. Adams v. Connelly, 118 Ill. App. 441.

66. Tarlton v. Orr [Tex. Civ. App.] 13 Tex. Ct. Rep. 913, 90 S. W. 534.

67. Hinkley v. Champaign Nat. Bank, 117 Ill. App. 584.

68. A covenant in an assignment of a judgment that there is "now due on said judgment" a stated amount construed as a covenant that it had not been satisfied and not a warranty of validity. Hinkley v. Champaign Nat. Bank, 117 Ill. App. 584.

69. Hinkley v. Champaign Nat. Bank, 117 Ill. App. 584.

70. In an action for the renewal of a judgment which plaintiff had procured by assignment held not error to instruct that it was immaterial what plaintiff paid for the judgment and whether the assignor was solvent or not at the time of the assignment or at any time thereafter. Dalby v. Lauritzen [Minn.] 107 N. W. 826. Another instruction to same effect held not erroneous. Id.

71, 72. Geisenberger v. Cotton, 116 La. 651, 40 So. 929.

73. First Nat. Bank v. Miller [Or.] 87 P. 892. Held proper to admit in evidence a letter from the assignee to the assignor stating that the assignment had been "entered for collection, proceeds of which when collected shall be subject to your order." Id. Held permissible for assignor to testify what interest the assignee possessed. Id.

74. See 6 C. L. 256.

75. Where none of the proceedings specified in Code Civ. Proc. § 709 were taken to keep a judgment alive for the benefit of one

the defendants and is assigned for his benefit, the right of the assignee is equitable in its nature and extends no farther than the right to use the judgment as security for the payment of the amounts properly due from the other judgment debtors.[76] It therefore would seem to be a right that can be exercised only after an affirmative showing to the court and a determination of the indebtedness of the other defendants,[77] and while no new suit is required, it is essential that application should in all cases be made to the court.[78] Where a judgment is rendered against two persons as joint obligors, a payment of the judgment by one of them extinguishes it,[79] and the remedy of the payor as against his joint obligor is based on an implied contract.[80] So also a judgment against several joint tort feasors being released as to one is released as to all, though the release contains a stipulation to the contrary,[81] but this rule does not apply to a mere agreement not to sue.[82] A whole or partial satisfaction of the judgment inures to the benefit of the judgment debtor as against a subsequent assignee of the judgment.[83] In most of the states where one suing as next friend of an infant is required to give a bond, he has authority to receive payment of the judgment which may be recovered and to satisfy the same.[84] A judgment is presumed to be paid after the lapse of twenty years from the time it was rendered, and such time having elapsed, the burden is on plaintiff to prove nonpayment,[85] but the rule is otherwise where twenty years has not elapsed,[86] though in such case all relevant facts and circumstances may be shown.[87] A levy of an execution upon real estate of the debtor is not prima facie satisfaction of the judgment.[88] The judgment creditor having received full satisfaction of the judgment, the judgment debtor is entitled, on motion, to have the same satisfied.[89] It is the duty of the court to order a judgment satisfied to the extent of money collected through attachment proceedings in the action.[90] In most states the entry of satisfaction by the clerk is deemed a ministerial act.[91] The satisfaction of a judgment entered through a mistake of fact may ordinarily be set

of the judgment debtors paying the same, the judgment was extinguished by such payment. National Bank v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 84 P. 466. The payment of a judgment by one of the sureties against whom it is rendered and the taking of an assignment of the same does not operate as a satisfaction of the judgment as against the other judgment debtors. Honce v. Schram [Kan.] 85 P. 535.

76, 77, 78. National Bank v. Los Angeles Iron & Steel Co., 2 Cal. App. 659, 84 P. 466, 468.

79. Tarlton v. Orr [Tex. Civ. App.] 13 Tex. Ct. Rep. 913, 90 S. W. 534. A judgment against one of two or more joint tort feasors, followed by an acceptance of satisfaction of such judgment by the plaintiff, the judgment and satisfaction may be successfully pleaded by the other joint tort feasor to the further maintenance of suit by the same plaintiff involving the same cause of action. McCoy v. Louisville & N. R. Co. [Ala.] 40 So. 106.

80. Not upon the judgment. Tarlton v. Orr [Tex. Civ. App.] 13 Tex. Ct. Rep. 913, 90 S. W. 534.

81. Ducey v. Patterson [Colo.] 86 P. 109.

82. A stipulation between a judgment creditor and a portion of the judgment debtors that a settlement has been made of all controversies between them, that the judgment was thereby "satisfied and discharged" as to such debtors and that a writ of error should be dismissed, the court to make the proper orders, held not an agreement not to sue. Ducay v. Patterson [Colo.] 86 P. 109.

83. The assignee of a satisfied judgment acquires no rights. Tarlton v. Orr [Tex. Civ. App.] 13 Tex. Ct. Rep. 913, 90 S. W. 534. Where complainant paid one-third of a judgment rendered against him and two others before the judgment was assigned to the latter, held he was entitled to restrain their collection of the one-third. Haas v. Holt [Ala.] 40 So. 51.

84. So held under Comp. Laws 1897, § 10,458. Baker v. Pere Marquette R. Co., 142 Mich. 497, 12 Det. Leg. N. 780, 105 N. W. 1116.

85, 86. Janvier v. Culbreth [Del.] 63 A. 309.

87. Jury may consider the financial condition of the parties and the habits of the creditor as to promptness in the collection of his claims. Janvier v. Culbreth [Del.] 63 A. 309.

88. Ackerman v. Pfent [Mich.] 13 Det. Leg. N. 647, 108 N. W. 1084.

89. So held where creditor gave debtor a receipt in full and agreed to satisfy judgment. Pilcher v. Hickman [Ala.] 41 So. 741.

90. So held under Rev. St. 1898, §§ 3210, 3211. Blake v. Farrell [Utah] 86 P. 805.

91. The act of the clerk of a court in satisfying a judgment on the return of an execution fully satisfied as required by the Mon-

aside on a motion based on affidavits made in the action;[92] but a docket entry of a justice of the peace showing satisfaction of the judgment in full cannot be contradicted by parol in an action by the plaintiff against the constable for failure to pay over the money.[93] If damages are claimed, or equitable relief is asked which cannot be had on motion, or disputed questions of fact on material issues arise, the court may compel the parties to resort to an action or hear the motion upon oral evidence as in the trial of cases.[94] A motion to set aside satisfaction is based upon the inherent right of courts to correct its records to conform to the facts.[95]

Restitution after reversal.—The petition in an action to recover back money paid under a judgment subsequently reversed must show that plaintiff is justly entitled to the funds in controversy.[96]

§ 12. *Set-off.*[97]—A judgment which has been unconditionally opened cannot be set off against an unopened judgment.[98] In order to defeat the right of the parties to offset judgments held against each other, an attorney's lien must be filed before such right to offset accrues.[99]

§ 13. *Interest.*[1]—Under the statutes of Arkansas the interest due at the time of the rendition of the judgment becomes a part of the judgment, and the amount of the judgment bears interest at the rate specified in the contract sued on.[2]

§ 14. *Enforcement of judgment.*[3]—Where a court has the authority to render a final judgment and cause the same to be executed, it has authority to make any necessary legal orders to carry such judgment into effect.[4] A court has no discretion to refuse to obey its own final judgments and decrees so long as they remain unopened, unreversed, and unimpeached.[5] When there is no perversion of justice or frustration of the decree, the court is without power to restrict a party's right to publish the fact that his claims have been sustained.[6] Executions, other final process, and creditors' suits are treated elsewhere.[7]

§ 15. *Audita querela.*[8]

§ 16. *Actions on judgment; merger.*[9]—The action must be brought within the period of limitations[10] existing at the time of the rendition of the judgment,[11]

tana statutes, is a mere ministerial act and follows from the return of the execution, if it is shown by the execution itself that it has been fully satisfied. Cambers v. First Nat. Bank, 144 F. 717.

92. Acme Harvester Co. v. Magill [N. D.] 106 N. W. 563.

93. Downey v. People, 117 Ill. App. 591.

94. Acme Harvester Co. v. Magill [N. D.] 106 N. W. 563.

95. May be made after the lapse of one year from the entry of the satisfaction. Rev. Codes 1899, § 5298, is not applicable. Acme Harvester Co. v. Magill [N. D.] 106 N. W. 563.

96. Horton v. Hayden [Neb.] 104 N. W. 757. See 6 Columbia L. R. 203.

97. See 6 C. L. 257.

98. Bowles v. Wright, 28 Pa. Super. Ct. 160.

99. Park v. Hutchinson [Ark.] 96 S. W. 751.

1. See 6 C. L. 258.

2. Kirby's Digest, § 5388, construed. Morris v. Carr, 77 Ark. 228, 91 S. W. 187.

3. See 6 C. L. 259.

4. Wilson's Rev. & Ann. St. 1903, § 201, c. 19, construed. Board of Com'rs of Logan County v. State Capital Co., 16 Okl. 625, 86 P. 518. Where a judgment has been entered the court has a right to make such orders as are necessary to make the decree effective. Dixon v. Floyd, 73 S. C. 202, 53 S. E. 167.

5. Gallitzin Bldg. & Loan Ass'n v. Steigers, 28 Pa. Super. Ct. 336. Where a partition sale has been confirmed and the sheriff directed to execute a deed to the purchaser, the purchaser is entitled to an order directing a succeeding sheriff to execute such deed (Id.), and it is error to refuse such order because of objections which could have been made in the partition suit and to postpone until plaintiff should establish title in ejectment (Id.).

6. This even though he is over hasty and not entirely in good faith, e. g., circularizing patrons respecting patent decision before appeal. Victor Talking Mach. Co. v. American Graphophone Co., 145 F. 188.

7. See separate articles, Creditors' Suit, 7 C. L. 1007; Executions, 7 C. L. 1614, etc. Chancery practice on bill to carry decree into execution, see Fletcher Equity Pl. & Pr., § 958.

8. See 6 C. L. 259.

9. See 6 C. L. 259. Merger of the cause of action in the judgment, see Former Adjudication, 7 C. L. 1750.

10. Where plaintiff recovered a judgment before a justice on April 12, 1880, and filed a

unless a subsequent law is retroactive in character.[12] Within the meaning of such statutes a judgment for alimony is a judgment for a sum of money only.[13] Generally, so long as any portion of the action remains undisposed of, limitations do not start to run.[14] The right of action on a deficiency judgment entered after foreclosure sale accrues at the date the amount of the deficiency is ascertained and not at the time the foreclosure decree is made.[15] Within the meaning of statutes of limitation, an execution is issued when made out and signed by the clerk ready for the sheriff.[16] An appeal unless it suspends the judgment is no bar to an action thereon.[17] The judgment must be a subsisting obligation.[18] A judgment against an administrator in one state furnishes no cause of action against an administrator in another state so as to affect assets of the estate of the latter,[19] nor will such judgment support an action against one in his individual capacity whether as heir or devisee of the estate.[20] The assignee of a judgment becomes the real party in interest within the meaning of statutes requiring the real party in interest to sue in his own name.[21] An assignee of a part interest in the subject-matter of the action may sue on the judgment to recover the taxed costs in the action.[22] A mere change in the name of a court does not affect its prior judgments so as to prevent an action thereon.[23] Judgments of courts of general jurisdiction may be pleaded in general terms without alleging jurisdictional facts.[24] In an action on a judgment of a court of record in another state alleged to be in full force and effect, it is not necessary that the complaint should allege that no appeal from the judgment has ever been taken, nor that the time for appeal has expired.[25] The date of the judgment is a matter of description and the variance is fatal to the right of the plaintiff to recover.[26] In an action on a judgment, pleas of general denial, payment, and that the judgment was compromised and defendant released, are consistent.[27] Where judgment is obtained against one by an erroneous name but in a suit upon such judgment the correct name of the judgment debtor is asserted and

transcript thereof in the district court on the same day, an action brought on such judgment on June 29, 1903, was not, under the laws of Iowa, barred by limitations. Haugen v. Oldford, 129 Iowa, 156, 105 N. W. 393.

11. Gaar, Scott & Co. v. Black [Mo. App.] 96 S. W. 683.

12. Laws 1896, p. 647, c. 568, amending Code Civ. Proc. § 1913, by an additional provision permitting an action on a judgment where 10 years have elapsed since the taking of the judgment, is retroactive and applicable to a judgment rendered before its passage. Peace v. Wilson [N. Y.] 79 N. E. 329.

13. Shepherd v. Shepherd, 51 Misc. 418, 100 N. Y. S. 401.

14. Where after the issuance of an execution a decree was made in the cause directing that no more than a certain amount should be collected on the execution until the further order of the court to be made subsequently, the time between the two orders should be excluded in computing limitations under the statute. Davis v. Roller [Va.] 55 S. E. 4.

15. Howe v. Sears [Utah] 84 P. 1107.

16. Code 1904, § 3577, construed. Davis v. Rolier [Va.] 55 S. E. 4.

17. Coolot Co. v. Kahner & Co. [C. C. A.] 140 F. 836.

18. A judgment satisfied and paid in full cannot be made the basis of an action. Southern Pine Lumber Co. v. Ward, 16 Okl. 131, 85 P. 459.

19, 20. Clark v. Webster [Tex. Civ. App.] 16 Tex. Ct. Rep. 320, 94 S. W. 1008.

21. Bamberger v. American Surety Co., 48 Misc. 221, 109 App. Div. 917, 96 N. Y. S. 665.

22. So held as to an attorney taking a half interest in the subject-matter of the suit as his fee for services and agreeing to reimburse himself for all costs from such share. Blondel v. Ohlman [Iowa] 109 N. W. 806.

23. So held as to Laws 1883, p. 20, c. 26, changing name of marine court of the city of New York. Peace v. Wilson [N. Y.] 79 N. E. 329.

24. Lear v. Brown County [Neb.] 109 N. W. 174. Judgments of a superior court of record of general jurisdiction are prima facie valid, and in proceeding upon such judgments it is not necessary to set out the facts conferring jurisdiction, as in such cases the presumption is in favor of the jurisdiction and of all things requisite to the validity of the judgment. Suit by judgment creditor to set aside conveyance as fraudulent. McDevitt v. Connell [N. J. Eq.] 63 A. 504.

25. Coolot Co. v. Kahner & Co. [C. C. A.] 140 F. 836.

26. Fulenwider v. Ridgway [Ala.] 41 So. 846.

his identity with the present defendant shown, the misnomer is no defense to the action[28] but can only be taken advantage of by a plea in abatement in the action in which the first judgment was recovered.[29] Within the meaning of statutory provisions, an action on a transcripted judgment is an action for the enforcement of the judgment.[30] The terms and conditions of a judgment cannot be altered by bringing another action on it.[31] A common-law judgment does not merge in a decree in a creditor's suit prosecuted for its enforcement.[32]

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JUDICIAL SALES.

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§ 1. *Occasion for and nature of judicial sales.*[33]—This topic excludes matters peculiar to special kinds of sales under order or process of court[34] and is confined to such matters of law as are common to judicial sales generally. A judicial sale is generally defined as one by authority of some competent tribunal by an officer authorized by law for the purpose;[35] and it has been held that a sale of land under a trust deed without resort to court when the statute permits such deeds to be foreclosed according to their terms, is a judicial sale.[36] In making a judicial sale the law regards the court as the vendor.[37]

§ 2. *The petition, order, writ, or decree.*[38]—A statute requiring a petition for the subjection of land to a demand of the plaintiff to describe it so that it may be identified does not require a description by metes and bounds,[39] but it is sufficient if the description is such that the parties desiring to purchase or purchasing the land can locate and identify it with reasonable certainty.[40]

27. Gaar, Scott & Co. v. Black [Mo. App.] 96 S. W. 683.

28, 29. El Capitan Land & Cattle Co. v. Lees [N. M.] 86 P. 924.

30. Code § 4538, construed. Haugen v. Oldford, 129 Iowa, 156, 105 N. W. 393.

31. Weaver v. City and County of San Francisco, 146 Cal. 728, 81 P. 119.

32. Davis v. Sanders, 25 App. D. C. 26. Nor does the adjudication of the liabilities of the several defendants among themselves under a cross bill work such merger. Id.

33. See 6 C. L. 260.

34. See Executions, 7 C. L. 1614; Foreclosure of Mortgages on Land, 7 C. L. 1678; Estates of Decedents, 7 C. L. 1386.

35. Cyc. Law Dict., "Judicial Sale;" Bouvier's Dict., Id. Staser v. Gaar Scott & Co. [Ind. App.] 78 N. E. 987. A sale under a decree condemning specific property to be sold to obtain money to satisfy a claim or judgment is essentially a judicial sale (McGaugh v. Deposit Bank [Ala.] 40 So. 984), and the fact that the decree directs the procedure incident to sales under execution does not change its nature (Id.). A sale made under the process of a court by an officer appointed and commissioned to sell, which becomes absolute only on confirmation by the court, is in every essential respect a judicial sale. Partition sale held within Burns' Ann. St. 1901, § 2669, vesting the wife's inchoate interest in her husband's lands on a judicial sale thereof. Staser v. Gaar, Scott & Co. [Ind. App.] 78 N. E. 987.

36. Code 1851, § 2096. Pierce v. O'Neil [Iowa] 109 N. W. 1082.

37. McGaugh v. Deposit Bank [Ala.] 40 So. 984.

38. See 6 C. L. 260.

39. Civ. Code Prac. § 125, construed. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

40. It is the proper practice to have real estate sought to be sold described in the same way in the petition, judgment, and report of sale. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

§ 3. *Levy, seizure, appraisal, and the like.*[41]—An appraisement is generally required to be made on an actual view of the premises,[42] and the valuation of the property by appraisers is conclusive in the absence of fraud.[43] Lands constituting one body and used as a single tract ordinarily may, for judicial sale, be appraised together.[44]

§ 4. *Notice and advertisements of sale.*[45]—A statutory notice of sale on execution does not apply.[46] When a decree specifies the manner of notices, they must be published accordingly to make a valid sale.[47] In Nebraska it is held that publication in a newspaper for thirty days before sale requires insertion in all the regular issues of the paper preceding the sale of the notice.[48] The notice of sale is required to state the amount of money to be made by the sale under the Kentucky statute.[49]

§ 5. *Sale and conduct of it and return.*[50]—Where there is no statute the court may direct how the sale is to be conducted and by whom.[51] Unless required by statute or by terms of the decree, a master need not give bond or oath.[52]

§ 6. *Confirmation and setting aside sales.*[53]—Confirmation is a condition precedent to the completion of a sale,[54] and it is ordinarily the duty of the court, where a judicial sale is fairly conducted and is made in conformity with the decree, to ratify it,[55] but where the price bid is inadequate, the court is acting within its discretion in refusing to confirm the sale.[56] When a sale has been confirmed the reversal of the order of sale does not affect the sale,[57] and if the purchaser has conveyed to another the property cannot be recovered,[58] especially where those in possession are not made parties to the proceeding to effect that result.[59] An order expressly recognizing the validity of the sale may be sufficient as a confirmation,[60] and it has been held that an order of court directing that a deed be made is equivalent to a confirmation of a sale[61] and obviates a record recital of confirmation.[62] In opposing confirmation of a sale an attack upon the decree on which the sale was made, going to the merits of the case, cannot be made.[63]

41. See 6 C. L. 261.

42. Evidence held insufficient to impeach return of appraisers that appraisement was made on an actual view of the premises. Moore v. Neece [Neb.] 108 N. W. 156.

43. Medland v. Van Etten [Neb.] 106 N. W. 1022.

44. Moore v. Neece [Neb.] 108 N. W. 156.

45. See 6 C. L. 261.

46. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

47. Posting held sufficient. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106.

48. Omission of notice in issue of weekly paper preceding sale held fatal to validity of sale, though publication had been made in four preceding consecutive issues. Stevens v. Naylor [Neb.] 106 N. W. 446.

49. Sale on notice omitting to state amount to be made by sale held void under Civ. Code Prac. § 696. Fink v. Herrick, 28 Ky. L. R. 763, 90 S. W. 268.

50. See 6 C. L. 261.

51. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

52. A bond and oath by a master are not necessary merely because they are required of a receiver and because the sale is in course of such receivership. The bond of the receiver to whom the money is paid suffices. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

53. See 6 C. L. 262.

54. Rev. St. § 6600, construed. Schwartz v. Williamson, 8 Ohio C. C. (N. S.) 532; McGaugh v. Deposit Bank [Ala.] 40 So. 984. Before confirmation of a judicial sale a purchase cannot be regarded as a satisfaction of a decree in favor of the purchaser. McGaugh v. Deposit Bank [Ala.] 40 So. 984.

Note: In an execution or statutory sale it depends on the statute whether confirmation is requisite. See Executions, 7 C. L. 1614; Estates of Decedents, 7 C. L. 1438.

55. Omaha Loan & Bldg. Ass'n v. Hendee [Neb.] 108 N. W. 190. Where the price bid is adequate and there is no fraud or misconduct, the refusal of the chancellor to confirm the sale is an abuse of discretion warranting the interference of the supreme court. George v. Norwood, 77 Ark. 216, 91 S. W. 557.

56. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232.

57. Harding v. Wooldridge, 29 Ky. L. R. 576, 93 S. W. 1056.

58, 59. Metz v. Dayton, 28 Ky. L. R. 1053, 91 S. W. 745.

60. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

61, 62. Forrester v. Howard [Ky.] 98 S. W. 984.

63. Medland v. Van Etten [Neb.] 106 N. W. 1022.

Setting aside a sale.[64]—When the sale has been fraudulently conducted[65] or the order of sale procured by fraud, the court in the exercise of its equity jurisdiction may deny confirmation and set aside the sale;[66] but in the absence of fraud, irregularity, or misconduct affecting the validity of a judicial sale, the sale will not be set aside and confirmation refused to allow the bid of a purchaser to be advanced by another person,[67] nor on account of inadequacy of price unless the inadequacy be so gross as to shock the conscience or raise a presumption of fraud or unfairness.[68] It is held in Nebraska that the district courts of that state are vested with discretion to set aside a judicial sale for fraud or unfairness prejudicial to the rights of a party.[69] Nothing of substantial value having been received by one interested in property which has been the subject of a judicial sale, an offer to return the consideration received is not a prerequisite to setting aside the sale.[70] The judge who hears and decides a motion to set aside a sale may view the premises,[71] and such motion is not waived by later filing a motion to set aside interlocutory orders,[72] but both motions may be considered at the same time.[73] When the plaintiffs succeed in an action to set aside a judgment and sale thereunder for fraud, the decree should be that the judgment and sale be set aside and the deed cancelled.[74] The existence of tax liens on property sold at judicial sale is not ground for setting aside the sale.[75]

Costs.[76]

Proceedings on resale.[77]—One through whose default a resale is made necessary cannot complain of a requirement of a cash deposit to secure the transaction before being declared the successful bidder at the second sale.[78]

§ 7. *Completion of sale; deeds, payments, and credits.*[79]—The title to land sold at a judicial sale vests when the deed conveying the same is made,[80] and it will be presumed that the deed executed in consummation of a judicial sale followed the description of the land contained in the pleadings and judgment;[81] but when through oversight or neglect the description in the deed does not conform to that contained in the judgment and report of sale, the court may at any time permit its commissioner to correct the deed or make a new deed conforming to the judgment and report.[82] Ordinarily, statutes requiring the officer making a sale of real estate to execute a deed to the purchaser on compliance with the terms of sale are not applicable to judicial sales.[83] In some states a sale may be delayed when the rents and profits of the land subject to sale appear to be sufficient to discharge the liens in a reasonable time, but this does not permit a delay in violation of agreement.[84]

64. See 6 C. L. 263.

65, 66. Omaha Loan & Bldg. Ass'n v. Hendee [Neb.] 108 N. W. 190.

67. George v. Norwood, 77 Ark. 216, 91 S. W. 557.

68. Difference of $1,000 between the price bid and valuation held not gross inadequacy as to land of the total value of $5,000. George v. Norwood, 77 Ark. 216, 91 S. W. 557.

69. Filing objections to appraisement as ground for setting aside sale. Strode v. Hoagland [Neb.] 107 N. W. 754.

70. Austin v. Jones [Ala.] 41 So. 408.

71. Medland v. Van Etten [Neb.] 106 N. W. 1022.

72, 73. Godfrey v. Cunningham [Neb.] 109 N. W. 765.

74. Form of decree held not reversible error. May v. Vaughn, 28 Ky. L. R. 1088, 91 S. W. 273.

75. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

76. See 6 C. L. 264.

77. See 4 C. L. 322.

78. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106.

79. See 6 C. L. 264.

80, 81, 82. Forrester v. Howard [Ky.] 98 S. W. 984.

83. Code 1876, § 3208, as amended by Code 1886, § 2917, and as carried into Code 1896, § 1914, held applicable only to sales made by sheriff. McGaugh v. Deposit Bank [Ala.] 40 So. 984.

84. If after a decree of sale of real estate to satisfy liens a lease of part thereof is executed by consent of all interested, but under an agreement that its execution shall not prejudice the right of any creditor to ask for sale of the land subject to the

In Louisiana, rule to show cause is the proper procedure where a judicial sale has been made and its consummation is negligently delayed.[85] A purchaser who pays taxes against property sold at a judicial sale is entitled to credit for the sum paid.[86]

§ 8. *Title and rights under sales and deed. A. Defects and collateral attack.*[87]—Short statutes of limitation in Kansas operate to cure any defects in the title acquired at a judicial sale,[88] and retrospective validation of judicial sales is within the power of the legislature as to matters of procedure.[89] A sale under a judgment which is merely erroneous is not vulnerable to a collateral attack.[90] When the purchaser seeks relief from a judicial sale for defect of title, the burden is on him to show the defect.[91] After a sale of property under a decree of the chancery court and a confirmation thereof, it will not be set aside in a collateral proceeding unless the party seeking relief acquits himself of want of diligence in resisting confirmation.[92] Fraud will not be presumed in a judicial sale by a court of general jurisdiction in a case where it had jurisdiction of the subject-matter and the parties.[93] One interested in land sold at judicial sale is not estopped to assert the invalidity of the sale because of defects of which he had no knowledge when no reliance has been placed on his apparent acquiescence.[94] A sale under a judgment which is merely erroneous is valid when made to a stranger before it is set aside or reversed,[95] but a sale under a void judgment is void as a judicial sale.[96] In the absence of a governing statute, a sale conducted as prescribed in the decree is valid.[97] Mere irregularities in the appraisement are not, however, usually deemed fatal to the validity of a sale,[98] and, where no fraud is charged, objections to an appraisement must be made prior to a sale.[99] It will be presumed that the commissioner made the sale at the time and place directed by the judgment,[1] and neither the fact that the commissioner made his report of sale three days earlier than directed by the judgment,[2] nor that the report was not at the time recorded, affects the validity of the sale.[3] A conveyance by a guardian of ward's property indirectly to the guardian is not a nullity,[4] nor is a sale by a guardian officially to the guardian individually absolutely void.[5] Sale will not be avoided for misapplication of mesne rents and profits.[6]

lease, and by reason of the development of the land under the lease, its market and rental values are increased, sale will not be delayed for an inquiry as to whether its rents and profits will be sufficient to discharge the liens thereon in five years. Barbour v. Tompkins, 58 W. Va. 572, 52 S. E. 707.

85. Decuir v. Decuir, 117 La. 249, 41 So. 563.

86. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

87. See 6 C. L. 265. Setting aside at motion, see ante, § 6.

88. Validity of sale by guardian of incompetent held not open to attack after five years for failure of guardian to publish notice of appointment. Steward v. Rea [Kan.] 87 P. 1150.

89. Laws 1899, p. 64, § 3, held to cure guardian's failure to take oath prescribed by B. & C. Comp. §§ 5602, 5611, before fixing time and place of sale. Fuller v. Hager, 47 Or. 242, 83 P. 782.

90. Galloway v. Craig, 27 Ky. L. R. 1, 92 S. W. 320.

91. Sonn v. Kennedy, 51 Misc. 234, 100 N. Y. S. 885.

92. Harris v. Stephenson [Ala.] 41 So. 1008.

93. Cohn v. Pitzele, 117 Ill. App. 342.

94. Austin v. Jones [Ala.] 41 So. 408.

95. Rankin v. Schofield [Ark.] 98 S. W. 674. A purchase at decretal sale is valid unless the decree is void, although it may be reversible. Erroneous appointment of receiver held not to avoid sale. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

96. Aultman & Taylor Co. v. Meade, 28 Ky. L. R. 208, 89 S. W. 137. Rankin v. Schofield [Ark.] 98 S. W. 674.

97. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

98. Where no injury or prejudice in an appraisement is shown, a sale which has been confirmed will not be set aside on the mere irregularity of the selection of a tenant on the premises to be sold as one of the appraisers. Brockway v. Pomeroy [Neb.] 106 N. W. 781.

99. Lewis v. Morearty [Neb.] 106 N. W. 447.

1, 2, 3. Downing v. Thompson's Ex'r, 28 Ky. L. R. 1182, 92 S. W. 290.

4, 5. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497.

(§ 8) *B. Outstanding titles and interests.—The rule of caveat emptor*[7] applies to judicial sales.[8] The deduction of an apparent prior lien in the appraisement of real estate for the purpose of a judicial sale is not conclusive as to the validity of such lien or the priority thereof,[9] but one who purchases at the sale without questioning the validity or priority of an apparent lien is estopped from thereafter so doing.[10] Likewise where the lien merged in the decree.[11] Where title to land is claimed through sale under a judgment, every presumption in favor of the judgment will be indulged when the land has been in the adverse and peaceful possession of bona fide owners for more than 20 years.[12] The Kentucky statute against champerty does not apply to judicial sales.[13] A judicial sale of land in litigation does not abate the suit.[14] The commissioner's deed can convey no more than the estate which the court has subject to sale,[15] and a sale under a decree in a personal action passes only such title as the parties thereto had at the time of the decree or sale.[16] A judicial sale free and clear of restrictions and incumbrances other than those specifically assumed is not binding on the purchaser when there are covenants in prior deeds of the property, unknown at the time of the sale, restricting the uses to which it may be put.[17] Where the purpose sought by a judicial proceeding is to expose real estate to public sale, the better practice is to make all persons who have any interest, contingent or otherwise, in the property parties to the action.[18]

(§ 8) *C. Rights of parties under sale and in proceeds.*[19]—Where a judicial sale passes title[20] a redemption, though abortive, will not reinstate the rights of junior judgment creditors bound by the decree and sale.[21] Where no crops have been planted at the time of rendition of decree of sale and the decree is silent as to the disposition of crops, the land may be sold and the crops conveyed to the purchaser.[22] Where the purchase is of a part of the title only and confirmation is delayed, the purchaser cannot be compelled to pay rent to the holders of the remainder of the title during the intervening period.[23] Where there is a deficiency in quantity of land sold, the purchaser's remedy, if any, is on an implied contract for money paid by mistake and not by way of subrogation to the lien which merged in the sale and

6. Fact that purchaser at foreclosure sale collected rent which accrued before the sale, and hence was payable to the estate of the deceased mortgagor, held no ground for setting aside the sale at the instance of a subsequently appointed administratrix, her remedy being an action against the tenant for rent unpaid, or, if the tenant had paid and the misapplication lay with the executor, against him. Bell v. Thompson, 147 Cal. 689, 82 P. 327. Special administratrix of mortgagor's estate held not entitled to have foreclosure sale set aside on ground that judgment of foreclosure against executor made counsel fees a lien on mortgaged property, where such fees would otherwise have been payable out of the general assets of the estate, and there was no contention that redemption was thereby interfered with. Id.

7. See 6 C. L. 265.

8. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

9. State v. Several Parcels of Land [Neb.] 106 N. W. 601.

10. State v. Several Parcels of Land [Neb.] 106 N. W. 601; Topliff v. Richardson [Neb.] 107 N. W. 114.

11. Purchaser at sale under judgment subject to a first and second mortgage could not avoid the lien of the second mortgage on ground that it was invalid as to mortgagor's creditors. Youd v. German Sav. & Loan Soc. [Cal. App.] 86 P. 991.

12. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320.

13. Woodward v. Johnson, 28 Ky. L. R. 1091, 90 S. W. 1076; Cook v. Burton, 29 Ky. L. R. 28, 92 S. W. 322.

14. Woodward v. Johnson, 28 Ky. L. R. 1091, 90 S. W. 1076.

15. Commissioner's deed held in excess of his powers. Bellenot v. Laube's Ex'r, 104 Va. 842, 52 S. E. 698.

16. Proof held insufficient to show title derived from purchase at judicial sale. Wilson v. Gaylord, 77 Ark. 477, 92 S. W. 26.

17. Heim v. Schwoerer, 100 N. Y. S. 808, afg. 99 N. Y. S. 553.

18. Roden v. Helm, 192 Mo. 71, 90 S. W. 798.

19. See 6 C. L. 266.

20, 21. Youd v. German Sav. & L. Soc. [Cal. App.] 86 P. 991.

22. Hence a tenant in possession of lands sold in partition proceedings was not entitled to complain that reservation of only

was discharged by the proceeds.[24] The grantee of a purchaser at a judicial sale is not necessarily incompetent to prosecute an application for a writ of assistance to put him into possession,[25] and whether he shall be permitted to do so or not is a matter dependent on circumstances and resting largely in the discretion of the court;[26] but a purchaser is entitled to a writ of possession as against the debtor for whom he bought in where the debtor practiced fraud in procuring him to buy in.[27] The rule that a pledgee who is a trustee cannot become a purchaser of the pledge at his own sale thereof has no application to judicial sales.[28]

Rights in proceeds and on bid.[29]—The purchaser at a judicial sale becomes a party to the proceedings in which the sale is made,[30] is generally bound by his bid,[31] and may be compelled to perform what he has undertaken,[32] by motion in the same court in which the undertaking occurred,[33] but has no title till confirmation.[34] The right under the Louisiana code to suspend payment of the price does not necessarily imply a forfeiture of any part of the debt or its accessories,[35] and an adjudicatee at public auction who has been condemned to comply with the terms of the adjudication must pay interest on the credit portion of the price represented by notes.[36] The purchaser must either deposit the amount of his bid or pay interest thereon.[37] Insufficient service on defendants will ordinarily entitle a purchaser to be relieved from his bid.[38] The court will exercise its discretion in favor of a purchaser at a judicial sale to a greater degree than if the transaction had been only between the parties.[39] One holding the equity of redemption cannot be heard to complain that the purchaser at a judicial sale, who bids as trustee for the plaintiff, is not such trustee.[40] A purchaser refusing to make good his bid is liable on a resale being made for the difference between his bid and the amount for which the property is sold, in case of deficiency.[41] In some states special bond must be given before the proceeds will be paid over to a fiduciary.[42]

JURISDICTION.

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Scope of title.—This topic deals with the principles of civil jurisdiction in general. Questions relating to the jurisdiction of criminal courts are discussed else-

one-half of crops in her behalf avoided the sale. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106.

23. Schwartz v. Williamson, 8 Ohio C. C. (N. S.) 532.

24. Consequently, action held barred as one ex contractu. Peacock v. Barnes [N. C.] 55 S. E. 99.

25, 26. Clark & Leonard Inv. Co. v. Lindgren [Neb.] 107 N. W. 116.

27. Cupp v. Lester, 104 Va. 350, 51 S. E. 840.

where.[43] Equity jurisdiction as dependent upon the inadequacy of legal remedies or the existence of some principle of equity falls more properly under another topic,[44] and the articles on process[45] and appearance[46] should also be consulted in connection herewith.

§ 1. *Definitions and distinctions.*[47]—Jurisdiction is the power of a court to hear and determine a cause or question,[48] and is therefore not dependent upon the regularity of the exercise of that power or upon the correctness of the decision made.[49] Jurisdiction of the subject-matter is power to deal with the general subject involved in a controversy without reference to jurisdiction of a particular case.[50]

There is a clear distinction between want of jurisdiction and an erroneous exercise of it in a case where no cause of action is stated or proven,[51] and where a court is one of general jurisdiction, the fact that the venue is improperly laid is not always jurisdictional.[52] As to courts proceeding according to the course of the common law, an error, to be jurisdictional, must relate to either the person or the subject-matter;[53] as to other tribunals it may extend to clear errors of law.[54]

§ 2. *Elements and extent in general.*[55]—Essential to jurisdiction is a subject-

28. Anderson v. Messinger [C. C. A.] 146 F. 929.

29. See 6 C. L. 267.

30. Watrous v. Hilliard [Colo.] 88 P. 185.

31. Where a judgment has been rendered against an insolvent corporation and the president thereof, with others, has been ruled to show cause why it should not be allowed as a preferred claim, that officer cannot be excused from liability on his bid at a subsequent judicial sale of the corporation's property on the ground that he believed the claim would be disallowed when no ground for disallowance is shown. Watrous v. Hilliard [Colo.] 88 P. 185.

32, 33. Watrous v. Hilliard [Colo.] 88 P. 185.

34. Where land is sold under a decree of court, the purchaser acquires no independent right, but he is regarded as a mere preferred proposer until confirmation by the court. Harrell v. Blythe, 140 N. C. 415, 53 S. E. 232.

35, 36, 37. Tobin v. O'Kelly, 117 La. 753, 42 So. 258.

38. Service on incompetents held insufficient under Code, §§ 426, 438. Sonn v. Kennedy, 51 Misc. 234, 100 N. Y. S. 885.

39. Heim v. Schwoerer, 99 N. Y. S. 553, afd. 100 N. Y. S. 808.

40. Medland v. Van Etten [Neb.] 106 N. W. 1022.

41. Watrous v. Hilliard [Colo.] 88 P. 185.

42. In Virginia the statutory guardian of an infant has no right, without giving special bond, to receive the proceeds of a sale of his ward's real estate under Code 1894, § 2622. Pope v. Prince's Adm'r [Va.] 52 S. E. 1009.

43. See Indictment and Prosecution, 8 C. L. 189.

44. See Equity, 7 C. L. 1323.

45. See Process, 6 C. L. 1078.

46. See Appearance, 7 C. L. 251.

47. See 6 C. L. 267.

48. Camplin v. Jackson, 34 Colo. 447, 83 P. 1017; Ex parte Moran [C. C. A.] 144 F. 594; State v. Stobie, 194 Mo. 14, 92 S. W. 191.

49. Camplin v. Jackson, 34 Colo. 447, 83 P. 1017. Held error for district court in direct proceeding to set aside as void a decree of the probate court having jurisdiction of parties and subject-matter where there was no fraud, though there may have been reversible error. Id. Necessarily includes power to decide wrong as well as right. Ex parte Moran [C. C. A.] 144 F. 594. The fact that a court misconstrues a pleading and renders judgment accordingly does not show want of jurisdiction. Error in considering allegations in defendant's answer a counterclaim could not be reviewed by certiorari. Davis v. Preston, 129 Iowa, 670, 105 N. W. 151. Where the existence of some particular fact must be established at the trial to enable the court to pronounce judgment one way or the other, an erroneous conclusion of the court in respect thereof is merely an error and not a jurisdictional defect. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371.

50. Snyder v. Pike [Utah] 83 P. 692.

51. Prohibition will not lie in the latter case. State v. Stobie, 194 Mo. 14, 92 S. W. 191. Where plaintiff in an action of which the court had no jurisdiction by amendment changed his cause to one of which the court had jurisdiction but failed to introduce any evidence in support thereof, a contention that defendant waived his objection to the jurisdiction of the court by failure to move for dismissal at the end of the case was untenable. Herald Square Cloak & Suit Co. v. Rocca, 48 Misc. 650, 96 N. Y. S. 189.

52. Court of general jurisdiction could not dismiss action to try title on ground that it had no jurisdiction, though venue was improperly laid because land was located in another county and defendant resided there. Wolf v. Willingham [Tex. Civ. App.] 15 Tex. Ct. Rep. 718, 94 S. W. 362. Court could foreclose mortgage on land in another county where objection was not seasonably made. Snyder v. Pike [Utah] 83 P. 692.

53. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

54. Such as deciding an issue of fact one way when the evidence so strongly points the other way as to leave no reasonable basis for the decision. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

matter upon which adjudication is regularly invoked[56] in a competent form,[57] either against adversary parties or in respect to the subject-matter itself, which must be at least constructively in court.[58] Jurisdiction of the parties before the court is not affected by the absence of other proper or necessary parties.[59]

Jurisdiction to afford a particular kind of relief carries with it by implication power to do all things necessary to effectuate the purpose for which the jurisdiction was conferred;[60] but jurisdiction is not conferred by a statute which merely provides for the means and manner of exercising a jurisdiction conferred by other laws.[61] A constitutional grant of equity jurisdiction confers power to grant relief in all cases in which chancery could have granted relief under the established rules at the time the constitution was adopted.[62] Courts of equity having once acquired jurisdiction of a cause for a particular purpose will retain it for complete relief regardless of the existence of questions properly cognizable at law.[63]

§ 3. *Legislative power respecting jurisdiction.*[64]—Legislatures can neither

55. See 6 C. L. 268.

56. See Process, 6 C. L. 1078; Appearance, 7 C. L. 251. A decree foreclosing a tax lien and confiscating property without actual or legal notice to the owner, rendered by a court previous to the formal entering of any action by any of the methods prescribed by law, is absolutely void for want of jurisdiction. Klenk v. Byrne, 143 F. 1008. Where the court has jurisdiction of the subject-matter, irregularities in the manner of bringing suit which may be remedied by amendment are not jurisdictional. Contention that certain necessary parties were not made plaintiff. Franklin Union No. 4 v. People, 121 Ill. App. 647.

57. Facts necessary to jurisdiction of the subject-matter must be pleaded as well as proven. Failure of plaintiff in divorce suit to allege residence within state. Stansbury v. Stansbury, 118 Mo. App. 427, 94 S. W. 566. Judgment could not be rendered against one not summoned and against whom no relief was asked in pleadings though there had been a verbal agreement that if judgment should go against defendant he should recover against such person. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428.

58. In order that a court may act directly upon property, the property must be within its territorial jurisdiction. Bunker v. Hanson [Minn.] 109 N. W. 827. Absentees can be brought into court on a demand for a money judgment only by an actual seizure of property in the suit in which the demand is made. A seizure in another suit is not sufficient. Levy v. Collins, 115 La. 204, 38 So. 966. Immaterial that claim is secured by privilege on property within jurisdiction. Id. A court of equity has no jurisdiction over a foreign corporation where the res with reference to which relief is sought is in another jurisdiction, and no decree can be made effective. American Fruit & Steamship Co. v. Dox, 4 Ohio N. P. (N. S.) 155. When an attachment has been issued against a nonresident and executed by service of summons of garnishment, the court is without jurisdiction to render a judgment on the attachment until it appears from the answer of the garnishee that property of or a debt due defendant within the jurisdiction has been seized under the garnishment. Albright-Prior Co. v. Pacific Selling Co. [Ga.] 55 S. E. 251. District court has no jurisdiction of garnishment proceeding in which only $7.75 is attached in suit for that amount and $2,000 unliquidated damages, defendant being a nonresident and not brought before the court so that personal judgment may be rendered against it. Meek v. Houston Ice & Brew. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 761, 96 S. W. 937.

59. Franklin Union No. 4 v. People, 121 Ill. App. 647.

60. Under Rev. St. 1899, § 4327, requiring the circuit court to award separate maintenance to a wife who has been abandoned by her husband without cause, the court has jurisdiction to award suit money to a wife who is without means. Behrle v. Behrle, 120 Mo. App. 677, 97 S. W. 1005. The orphan's court in proceedings to distribute the proceeds of a sale of real estate of a decedent among his heirs has jurisdiction to decide all questions necessary for such distribution. In re King's Estate [Pa.] 64 A. 324. Where an attorney claims a lien on money collected for his client, the supreme court has power to determine the whole question summarily on application by the client for payment. In re Klein, 101 N. Y. S. 663.

61. Not by a statute which provides that when a court or officer is given jurisdiction by the constitution or other laws all means to carry it into effect are also given, and that any suitable procedure may be adopted if any other course is not pointed out. The court or officer is merely enabled to exercise a jurisdiction otherwise created. Martin v. White [C. C. A.] 146 F. 461. Under Code Civ. Proc. § 187, court could not compel giving of information as to whereabouts of absent defendants. Union Collection Co. v. Superior Ct. of San Francisco [Cal.] 87 P. 1035.

62. Court could compel discovery only in cases where such relief could have been granted at time constitution was adopted. Union Collection Co. v. Superior Ct. of San Francisco [Cal.] 87 P. 1035.

63. See Equity, 7 C. L. 1323. Where court took jurisdiction of proceeding for sale of real estate to pay debts, it could retain the same for all relief necessary within scope of petition. State v. Settle [N. C.] 54 S. E. 445.

limit nor enlarge the constitutional jurisdiction of constitutional courts unless expressly authorized by the constitution,[65] but they may enlarge or restrict the jurisdiction of a court as fixed by the common law or by statute,[66] and they may enlarge its equity powers.[67] Where the constitution does not define the specific limits of an appellate jurisdiction, this may be abridged or extended by statute as public policy may require.[68] State statutes cannot directly enlarge or contract the jurisdiction of Federal courts.[69]

64. See 6 C. L. 269.

65. Cannot create an inferior appellate court designed to exercise the prerogative powers of the supreme court, although certiorari may lie to this new tribunal from the supreme court to review its proceedings. Acts 1906, p. 18, directing a justice of the supreme court to rehear the charges against policemen who have been suspended or dismissed, is void, because it is an attempt to confer upon a statutory tribunal the prerogative right of the supreme court to review by certiorari the proceedings of the municipal board. City of New Brunswick v. McCann [N. J. Law] 64 A. 159. Court and Practice Act 1905, p. 4, § 12, giving the superior court power to issue prerogative writs but also providing for appeal to the supreme court, does not violate Const. Amend. art. 12, giving the supreme court power to issue such writs and providing that inferior courts shall have such jurisdiction as shall be prescribed by law. Higgins v. Pawtucket Tax Assessors, 27 R. I. 401, 63 A. 34. The "remedial cases" in which the legislature is authorized by the constitution to confer original jurisdiction upon the supreme court include only those in which the remedy is afforded summarily through extraordinary writs, such as mandamus, quo warranto, etc. In re Lauritsen [Minn.] 109 N. W. 404. Rev. St. 1905, § 203, in so far as it attempts to confer upon the supreme court original jurisdiction in election contests, is unconstitutional. Id. When jurisdiction in cases remediable through extraordinary writs having a recognized technical use is conferred upon a court by the constitution, the jurisdiction is limited to cases which were determinable through such writs at the time the constitution was adopted. In re Lauritsen [Minn.] 109 N. W. 404. Legislature could not empower supreme court to grant mandamus to determine election contests. Id. The jurisdiction conferred upon the superior court by Const. art. 6, § 5, in cases of misdemeanor, must be exercised by it exclusively or not at all, and hence San Francisco Freeholder's Charter, § 2, attempting to confer upon the city police court "concurrent jurisdiction with the superior court" of certain misdemeanors, is unconstitutional. Robert v. Police Ct. of San Francisco, 148 Cal. 131, 82 P. 838. The words "concurrent jurisdiction with the superior court" could not be regarded as surplusage and the act construed to confer exclusive jurisdiction upon the police court. Id. The legislature cannot enlarge the scope of the original jurisdiction of the supreme court either directly by authorizing the primary consideration of cases not specified in the constitution, or indirectly by including such cases within its review power on appeal. In re Burnette [Kan.] 85 P. 575. The statute relating to appeals in disbarment cases being ambiguous should be construed not to authorize a trial de novo but merely to create a special method of bringing up such causes to be considered according to the appellate jurisdiction of the supreme court. Id. Act approved February 27, 1903 (Sess. Laws 1903, p. 94), amending subd. 9, § 3841, Rev. St. 1887, granting to probate courts jurisdiction to enforce mechanics' and laborers' liens and mortgages and other liens on real property, is unconstitutional. Dewey v. Schreiber Implement Co. [Idaho] 85 P. 921. The legislature may enlarge the appellate jurisdiction of the district courts so as to embrace cases not otherwise appealable to any court. State v. Melies, 117 La. 656, 42 So. 199. The constitutional power to regulate the jurisdiction of the commissioners' court authorizes the legislature to make such jurisdiction dependent upon the approval of claims by the county auditor. Anderson v. Ashe [Tex.] 14 Tex. Ct. Rep. 637, 90 S. W. 872. Acts 1905, p. 782, attempting to vest in a chancery court power to hear and determine election contests for nominations, violates Const. art. 7, § 1, limiting the jurisdiction of chancery courts to matters of equitable cognizance. Hester v. Bourland [Ark.] 95 S. W. 992. In view of the history of constitutional provisions in regard to the jurisdiction of circuit and chancery courts, Acts 1894-95, p. 881, conferring chancery jurisdiction on the circuit court of Jefferson County, is not unconstitutional. Ensley Development Co. v. Powell [Ala.] 40 So. 137.

66. A state may provide by statute that title to real estate within its limits shall be determined by suit in which defendant, being a nonresident, is brought into court by publication. Clem v. Given's Ex'r [Va.] 55 S. E. 567.

67. American Exp. Co. v. Southern Ind. Exp. Co. [Ind.] 78 N. E. 1021.

68. City of Chattanooga v. Keith, 115 Tenn. 588, 94 S. W. 62. But the establishment of an appellate court by the constitution is an implied declaration that some right of appeal exists which cannot be unreasonably restricted by statute. Id. Charter making civil judgments of only $10 final held constitutional. Id.

69. See, also, post, § 11A. That state statute authorized creditors' suit before exhaustion of legal remedies did not authorize such suit in Federal court. Davidson-Wesson Implement Co. v. Parlin & Orendorff Co. [C. C. A.] 141 F. 37. Mills' Ann. St. Colo. §§ 1716, 1726, authorizing plaintiff in condemnation proceedings to proceed against the apparent record owner of the land, and merely

§ 4. *Territorial limitations.*[70]—All jurisdictions are bounded territorially either by the limits of the state,[71] the nation, or by those of the district or circuit in which they are established.[72]

§ 5. *Limitations resting in situs of subject-matter or status of litigants.*[73]—While power to adjudicate upon a subject-matter which can have no existence save at a fixed place pertains to the courts erected for that place,[74] other courts may have jurisdiction for the purpose of adjudicating personal rights of parties present in court which are in respect to, but do not directly affect, such subject-matter.[75] Alienage or nonresidence of litigants who are subject to the personal jurisdiction of a court is no obstacle to an action which is transitory and therefore may follow the

permissively allowing persons not made parties to intervene, do not operate to deny to a nonresident the right to appeal by injunction to the Federal circuit court to prevent the appropriation of his land. Colorado Eastern R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 898. A state statute creating liens for labor and materials furnished in the construction of vessels is not invalid as being in derogation of the admiralty jurisdiction of the Federal district courts. The Winnebago [C. C. A.] 141 F. 945.

70. See 6 C. L. 270.

71. A court of general jurisdiction may send its original process to any part of the state unless restricted by statute. Eager v. Eager [Neb.] 105 N. W. 636. Comp. St. 1903, c. 25, § 6, confers jurisdiction upon the district court of an action for divorce in any county in the state where the parties or one of them resides (Id.), and summons may issue from the county in which plaintiff resides and the action is commenced to any county where defendant resides (Id.). The agreement of 1833, between the representatives of the states of New Jersey and New York fixing the boundaries between these states and providing that the state of New York shall retain jurisdiction over the islands in the bay of New York, did not deprive the New Jersey courts of jurisdiction to decree a foreclosure sale of islands in the harbor of New York but within the New Jersey boundary. Cook v. Weigley [N. J. Eq.] 65 A. 196. Plea of privilege of connecting carrier having no line in the state held properly sustained, no facts being shown to give the court jurisdiction of such carrier. American Refrigerator Transit Co. v. Chandler [Tex. Civ. App.] 15 Tex. Ct. Rep. 243, 93 S. W. 243. An action against a railway company for injuries inflicted outside the state may be brought in a county in the state through which the company operates its road, there being no proof that the law of the state where the accident occurred is different from that of Texas. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469. Kirby's Dig. § 6776, localizing to the place of injury actions for the wounding and killing of stock by railroads, does not apply to causes of action arising outside the state. Kansas City Southern R. Co. v. Ingram [Ark.] 97 S. W. 55. A citizen of one state may maintain a suit in the United States circuit court in another state to enjoin the unlawful diversion of water in the state where suit is brought which prevents its flowing to his lands in the state of his residence. Morris v. Bean, 146 F. 423.

72. Act March 3, 1905, c. 1419, § 3, 33 St. 988 (U. S. Comp. St. Supp. 1905, p. 78), creating the Eastern division of the northern district of Alabama, limits the territorial jurisdiction of the court therein to the counties conposing the division. Kibbler v. St. Louis, etc., R. Co. 147 F. 879. A foreign corporation which by the state laws can be sued only in counties wherein it does business is not suable in a Federal court in the state unless it does business in a county within the territorial jurisdiction of such court. Id. Though the statute makes a decree for money a lien upon the lands and tenements of the party against whom it is entered, such a decree is only operative within the territorial jurisdiction of the court entering it. Hollahan v. Sowers, 111 Ill. App. 263. Court in county where contract was made held to have jurisdiction of connecting carrier in action for wrongful ejection from train, under Code Civ. Proc. § 72, relative to venue. Southern R. Co. v. Cassell, 28 Ky. L. R. 1230, 92 S. W. 281. Act Feb. 28, 1901 (Acts 1900-01, p. 1854), creating the city court of Bessemer and giving such court jurisdiction of personal actions the causes of which arise within certain designated limits, whether the parties reside there or not, does not limit the jurisdiction to causes arising within such limits, but the court has also jurisdiction when either of the parties reside therein. Harris v. Alabama Great So. R. Co. [Ala.] 40 So. 267. Jurisdiction is not in its nature territorial, and hence in the absence of constitutional restrictions the legislature may confer upon a court jurisdiction of actions arising outside of the judicial district. Municipal court could try offense committed in county beyond city limits. State v. Dreger, 97 Minn. 221, 106 N. W. 904.

73, 74. See 6 C. L. 271.

75. While a court cannot by its decree directly affect the legal title to lands situated in another state, yet, if all the parties interested are brought personally before it, its decree establishing their equities in the land becomes conclusive upon them, and thus in effect determines the title. Wife could maintain suit to quiet title to land set aside in divorce suit in another state. Fall v. Fall [Neb.] 106 N. W. 412. Courts of equity have jurisdiction to adjudicate the rights of parties to a contract respecting realty located in another state. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.

person,[76] though alienage or diversity of citizenship may often draw the case into the Federal courts.[77] Where statutory cause and residence coexist and the matrimonial domicile is in the state, a court therein has full jurisdiction to render a decree of divorce on constructive service.[78]

§ 6. *Limitations resting in amount or value in controversy.*[79]—The division of jurisdiction between courts is often accomplished by statutes fixing a maximum[80] or minimum[81] jurisdictional amount or value "involved,"[82] "demanded,"[83] "claim-

On the question of the jurisdiction of equity over suits affecting real property in another state or county, see exhaustive note to the case of Proctor v. Proctor [Ill.] 69 L. R. A. 673.

76. A court has jurisdiction to render a valid judgment in garnishment against a nonresident, though he is only temporarily within the state, if he is served with process therein and the principal debtor could have sued him there and the debt is attachable under the local law. Harris v. Balk, 198 U. S. 215, 49 Law. Ed. 1023. In Illinois a defendant cannot be sued out of the county of his residence except in local actions and personal actions at law where there are more than one defendant, in which case suit may be commenced where either of them resides. Plea to jurisdiction held good. Goldberg v. Harney, 122 Ill. App. 106.

77. See post, § 11B.

78. Where husband abandoned wife in state of marriage, she could have divorce in that state. State v. Morse [Utah] 87 P. 705. Where the marriage status is out of a state, a court therein cannot render such a judgment of divorce against a nonresident on constructive service alone as will be entitled to recognition in other states under the Federal constitution. Husband who wrongfully went to another state did not carry marriage relation with him so as to give interstate jurisdiction. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. 867. Under P. L. 1902, p. 503, § 4, par. 1, giving the chancery court jurisdiction of a divorce suit for adultery in certain cases, mere residence in the state, of either party at the times specified, is enough to give the court jurisdiction of the subject-matter. Duke v. Duke [N. J. Eq.] 62 A. 466. Evidence held to show existence of the marriage state within the territorial jurisdiction of the court authorizing procedure against nonresident defendant in a divorce case. Id. By express provision of Rev. Laws, c. 152, § 5, jurisdiction in divorce is given by residence of libelant in the state for five years without regard to where the cause of divorce occurred. Franklin v. Franklin, 190 Mass. 349, 77 N. E. 48. Where one spouse abandons the other and the latter moves to and acquires a domicile in another state, substituted service of summons, in an action for divorce commenced by him in that state, gives the court thereof full jurisdiction so that its judgment will have extraterritorial effect. North v. North, 47 Misc. 180, 93 N. Y. S. 512.

Note: This case must be distinguished from the other New York cases where the abandoning spouse goes to another state, acquires a domicile there, and sues. North v. North, 93 N. Y. S. 512.

79. See 6 C. L. 273.

80. Under Const. art. 7, § 40, giving justices of the peace jurisdiction of suits to recover personal property where its value does not exceed $300, the real value and not the alleged value is controlling. Kaufman v. Kelley [Ark.] 95 S. W. 448. The amount of each separate demand or cause of action and not the aggregate of various causes which may be joined in one action determines the jurisdiction of the justice of the peace. Had jurisdiction, though aggregate amount of notes sued on exceeded jurisdiction. Brooks v. Hornberger [Ark.] 94 S. W. 708. The court of appeals, and not the supreme court, has jurisdiction where the amount in dispute exclusive of interest and costs does not exceed $4,500, in the absence of grounds conferring jurisdiction on the supreme court. McKinney v. Wright Lumber Co., 192 Mo. 32, 90 S. W. 726. District court has no jurisdiction of a set-off the amount of which exceeds $300. P. L. 1902, p. 368. Bowler v. Osborne [N. J. Law] 64 A. 697; Kienzle v. Gardner [N. J. Law] 63 A. 10. Instruction that jury might bring in verdict not to exceed $300, improper. Bowler v. Osborne [N. J. Law] 64 A. 697. County court has exclusive jurisdiction of money demand not exceeding $500. Waller v. Gray [Tex. Civ. App.] 16 Tex. Ct. Rep. 194, 94 S. W. 1098. An action to recover $400 earnest money paid on a contract for the purchase of land is within the jurisdiction of the county court, though the price of the land was $4,000 and plaintiffs alleged that if title had been good they would have paid the balance and were still willing to do so. Davis v. Fant [Tex. Civ. App.] 93 S. W. 193. A justice court has no jurisdiction to foreclose a laborer's lien on eighteen miles of railroad, a locomotive and other property. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104.

81. Under the constitution providing that the circuit court shall have jurisdiction in civil cases only when the matter in controversy exceeds $50, a complaint for $50 which does not claim interest states no cause of action in the city court which has only the same jurisdiction as that exercised by the circuit court. Reese v. Bessemer Plumbing & Mfg. Co. [Ala.] 42 So. 56. That the suit was for enforcement of a lien did not aid the jurisdiction as Code, § 2733, provides for the enforcement thereof in the circuit court only when the amount exceeds $50. Id. Where in an action to recover more than $100 due under a contract certain orders were offered in evidence only to show the different items of the claim, the circuit court had jurisdiction, though none of the orders exceeded in amount $100. St. Louis & S. W. R. Co. v. James [Ark.] 95 S. W. 804. Circuit court had jurisdiction to set aside judgment for less than $100 where real estate levied on under execution thereon exceeded such amount. Wilcke v. Duross, 144

ed,"[84] or "in controversy,"[85] and these amounts include or exclude interest[86] and the

Mich. 242, 13 Det. Leg. N. 227, 107 N. W. 907. Final orders of circuit court of appeals are appealable to supreme court only where matter in dispute exceeds in value $1,000. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. 963.

82. Under Hurd's Rev. St. 1903, c. 37, § 25, making final judgments of the appellate court in actions ex contractu involving less than $1,000, a judgment affirming a decree foreclosing a trust deed except in the matter of solicitor's fees of $150 allowed by the trial court is final as to the solicitor's fees, though the trust deed exceeded $1,000, and the supreme court has no jurisdiction to review the part of the judgment relating to solicitor's fees in the absence of a certificate of importance. McCagg v. Touhy, 220 Ill. 216, 77 N. E. 207. Before the right to appeal to the supreme court in an equity case attaches it must appear that there is involved in the controversy independent of all contingencies the amount of $1,000 exclusive of costs. The amount involved does not necessarily amount to $1,000 under a decree directing payment of $18 per month from a certain date. Kouka v. Kouka [Ill.] 77 N. E. 556. A suit by a judgment creditor to annul a judicial sale on the ground that there was no appraisement but a fraudulent combination to prevent competitive bidding is a petitory rather than a revocatory action, and the value of the property is the test of appellate jurisdiction. Moresi v. Coleman, 115 La. 792, 40 So. 168. Where a boundary suit involves the ownership of an intervening strip of property, the value of that property determines the appellate jurisdiction of the supreme court. Gasquet v. Conway, 116 La. 709, 41 So. 44. Sections 3, 4, 5, and 6, pp. 225, 226, Act 136 of 1898, providing for the changing of boundaries of municipalities, are not void as conferring jurisdiction on the courts regardless of the amount in dispute and in violation of the constitution. New Orleans, etc., R. Co. v. Vidalia, 117 La. 561, 42 So. 139. Appeal properly brought to supreme court where damages exceeding $2,000 were alleged and a law had been declared unconstitutional. Id. Motion to transfer appeal to court of appeal denied where notes sued on were for an amount within jurisdiction of supreme court. Parker & Co. v. Succession of Griffin, 117 La. 977, 42 So. 473. In a suit to enjoin the erection of a clubhouse in front of certain property, a mere allegation that the value of the combined properties was $3,500 and that the constructions would destroy the value of all the property bounded by certain streets held too indefinite and uncertain to authorize the supreme court to take jurisdiction. Krantz v. Noonan, 117 La. 94, 41 So. 364.

83. Where an amended petition reduced a claim to $500 but the prayer was sufficient to authorize interest, and the interest was such as was permitted by way of damages, the amount demanded exceeded $500 and the suit was within the jurisdiction of the district court. Waller v. Gray [Tex. Civ. App.] 16 Tex. Ct. Rep. 194, 94 S. W. 1098. Where the notes sued on had two credits indorsed thereon reducing the amount sued for to less than $200, the justice court had jurisdiction. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428.

84. **Alabama:** Jurisdictional test is amount claimed and not amount recovered. Where claim did not exceed $50, city court had no jurisdiction. Reese v. Bessemer Plumbing & Mfg. Co. [Ala.] 42 So. 56.

California: Where the amount claimed was in excess of $2,000, an appeal was properly taken to the supreme court which alone had jurisdiction. Const. art. 6, § 4. McAuley v. Tahoe Ice Co. [Cal. App.] 86 P. 912.

Florida: Claim against telegraph company for withholding money and thus causing plaintiff to go without food held to state a cause within the jurisdiction of the circuit court, though amount withheld was below the jurisdictional amount. Western Union Tel. Co. v. Wells, 50 Fla. 474, 39 So. 838.

North Carolina: Where jewelry intended for sale was carried by a passenger together with wearing apparel, his action for loss of the jewelry was in tort for negligence, and the claim for such loss being in excess of $50 was not within the jurisdiction of the justice of the peace. Brick v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 194.

85. **Federal courts:** The "amount in controversy" is that for which plaintiff sues in good faith, not that defended against by defendant. Where in ejectment plaintiff claimed the value of the land to be over $2,000, jurisdiction was not ousted because the answer disclaimed as to all except a tract worth less. Way v. Clay, 140 F. 352. In a **suit for an injunction** the amount involved is the value of the right sought to be protected or the object to be gained by the bill and not the sum that might be recovered in an action at law for damages already sustained, and complainant is not required to wait until the damages reach the jurisdictional amount. Board of Trade of Chicago v. Cella Commission Co. [C. C. A.] 145 F. 28. Where a carrier sought to restrain the scalping of nontransferable tickets, the value of the business sought to be protected determined the amount in controversy. Louisville & N. R. Co. v. Bitterman [C. C. A.] 144 F. 34. Suit to enjoin use of market quotations held to involve a sufficient amount where complainant realized $30,000 per year from right sought to be protected and defendant denied such right. Board of Trade of Chicago v. Cella Commission Co. [C. C. A.] 145 F. 28. Suit by railway company to restrain enforcement of penalties in excess of $2,000, and which involves also the right of the company to conduct interstate commerce unhampered by state regulations which right was found to be of the necessary jurisdictional value, held within jurisdiction of Federal circuit court, though origin of litigation may have been a dispute of some $146 demurrage. McNeill v. Southern R. Co., 202 U. S. 543, 50 Law. Ed. 1142. Where the United States contended on appeal that a claim for tobacco rebates was not sufficient in amount, the finding of the circuit court necessarily disposed of the proposition. United States v. Hyams [C. C. A.] 146 F. 15. In a suit concerning water rights, the thing in

like[87] according as the terms of the various statutes provide. Whether or not such

controversy is the right to the use of the water, and this exceeding in value $2,000 exclusive of interest and costs, a Federal court has jurisdiction. Morris v. Bean, 146 F. 423. Amount in controversy held sufficient where bill alleged that railroad commission had imposed a fine of $2,000 on each of two connecting carriers for having made charges on shipments in alleged violation of its order and that commission threatened to enforce its order with respect to future shipments. Railroad Commission v. Texas & P. R. Co. [C. C. A.] 144 F. 68. Where declaration contained common counts and a special count each stating the amount involved to be $5,000 and verdict was directed for more than $2,000, the jurisdictional amount sufficiently appeared. State Bank of Chicago v. Cox [C C. A.] 143 F. 91. Where a suit is brought in a Federal court to have street improvement certificates declared invalid, the amount of the certificates and not the value of complainant's land is the subject-matter of the action. Could not successfully contend that value of land was criterion of jurisdiction on theory that assessments constituted a cloud upon the title. Shewalter v. Lexington, 143 F. 161. Complainant could not, under the facts, sustain the jurisdiction of the court by claiming that the improvement ordinance immediately vested title to the street in the adjoining owners and that the subsequent appropriation of part of the property for a street was illegal. Id. The United States circuit court is without jurisdiction of an action to enforce payment of a number of claims against a corporation, all but one of which were assigned to plaintiff merely for collection and for the express purpose of enabling him to sue in such court where no single claim is sufficient to give the court jurisdiction. Woodside v. Vasey, 142 F. 617. That plaintiff had obtained a judgment on such claims in a state court for an amount exceeding $2,000 was immaterial. Id. Where one rightfully brings separate actions against the same defendant in a state court, the amount sued for in each being less than $2,000, the actions are not removable to the Federal court, though the aggregate amount sued for exceeds that sum. Holmes & Co. v. U. S. Fire Ins. Co., 142 F. 863. The fact that the actions were consolidated on defendant's motion for "taking proof and hearing" does not render the consolidated cause removable. Id. In suit for wrongful death of one person, complaint of several counts, each demanding $1,990, held not to show a demand sufficient to justify removal to Federal court. Nashville, etc., R. v. Hill [Ala.] 40 So. 612. The fact that a suit in a Federal court involves a Federal question does not give jurisdiction unless the jurisdictional amount is involved. Shewalter v. Lexington, 143 F. 161. A trustee or receiver in bankruptcy cannot remove a cause into a Federal court on the ground that it arises under the laws of the United States, unless it clearly appears that the jurisdictional amount is involved. Swofford v. Cornucopia Mines, 140 F. 957.

Indiana: Under Burns' Ann. St. 1905, § 1337f, the appellate court has no jurisdiction of an appeal in a case where the amount in controversy inclusive of interest and costs does not exceed $50 except as provided in § 8. Yakey v. Leich [Ind. App.] 76 N. E. 926.

Indian Territory: The justice court has exclusive original jurisdiction of an action for use and occupation seeking judgment for $100 and costs. Act Cong. March 1, 1895, c. 145, 28 St. 696; Mansf. Dig. § 4026 (Ind. T. Ann. St. 1899, § 2706). District court without jurisdiction. Tally v. Kirk [Ind. T.] 97 S. W. 1027.

Kentucky: The court of appeals has no jurisdiction of an appeal from a judgment for plaintiff for $200 in an action for $200 in which defendant controverted only $171 of the claim, since the amount in controversy is less than $200. Citizens' Sav. Bank v. Mitchell Tea & Coffee Co., 28 Ky. L. R. 1200, 91 S. W. 261.

Michigan: Under Comp. Laws 1897, § 435, providing that chancery courts shall dismiss suits concerning property, with certain exceptions, where the matter in dispute shall not exceed $100, held, in so far as the office of a bill was to prevent a town treasurer from paying over money on a contract for the purchase of a road machine, it involved only $6.50, the amount of the tax which complainant had paid. Bartlett v. Austin & Western Co. [Mich.] 13 Det. Leg. N. 940, 110 N. W. 123. In so far as the object of the bill was to prevent the levy of a tax on land, the suit is within Pub. Acts 1903, p. 260, No. 183, § 1, prohibiting the entry of any decree to restrain proceedings taken by an officer of any township, etc., which may result in a tax upon property unless complainant's tax shall amount to $100, though the bill does not in terms pray a decree restraining such proceedings, and hence the court was without jurisdiction. Id.

Texas: Action on bond conditioned on payment of $2,000 legacy held within exclusive original jurisdiction of district court and not of probate court, the amount in controversy exclusive of interest exceeding $1,000. Hummel v. Del Greco [Tex. Civ. App.] 14 Tex. Ct. Rep. 246, 90 S. W. 339. In a suit to restrain the wrongful taking of a chattel under color of an execution levied on an alleged invalid judgment, the value of the chattel and not the amount of the judgment determines the amount in controversy. Jesse French Piano & Organ Co. v. Clay [Tex. Civ. App.] 14 Tex. Ct. Rep. 155, 90 S. W. 682. The amount of damages claimed for procuring the judgment and levying on the property is involved in the suit and must be considered. Id. In action by obligor on a bond against co-obligors for contribution, jurisdiction is determined by amount claimed from all defendants, and not by the share shown to be due from each. Jarvis v. Matson [Tex. Civ. App.] 16 Tex. Ct. Rep. 314, 94 S. W. 1079.

86. Prior to the act of 1905, where an amount demanded in the municipal court of New York did not draw interest as a matter of right and did not exceed $500, the court had jurisdiction, but if an amount plus interest demandable as of right exceeded $500, the court was without jurisdiction. The fact that an amount demanded plus interest, if allowed, would exceed $500 did not necessar-

an amount shall be determined from the pleadings will depend largely upon the precise words of the statute.[88] In order that two or more claims may be united so as to make up the jurisdictional amount, they must belong to a class which under the statute will permit them to be properly joined in one suit.[89] If two counts are improperly joined and one of them is dismissed so as to leave a demand below the jurisdictional amount, the court cannot take cognizance of it[90] even though defendant fails to raise the question of misjoinder,[91] but jurisdiction having once attached, it will not be divested by the establishment of only a sum below the jurisdictional amount.[92] Parties will not, however, be permitted to purposely allege a fictitious amount in order to confer jurisdiction.[93] A plaintiff is not bound to sue for the full amount of his claim as previously presented to defendant in order to preserve the latter's right to appeal,[94] and failure to do so is not a fraud upon the

ily oust the court of jurisdiction. Spitzer v. Korminsky, 49 Misc. 466, 97 N. Y. S. 1030. By express provision of Laws 1905, p. 1172, c. 513, the jurisdiction of the municipal court of New York city is extended to include a case for $500, interest and costs. Rappaport v. Feder, 50 Misc. 653, 99 N. Y. S. 385. An action filed January 11, 1904, for $999 for actual damages for negligent acts done in October, 1903, with legal interest thereon, is for more than $1,000, and hence not within the jurisdiction of the county court. Ft. Worth, etc., R. Co. v. Everett [Tex. Civ. App.] 95 S. W. 1085. An action under Rev. St. 1895, art. 4528, to recover for the killing of stock by trains irrespective of negligence, is within the jurisdiction of the county court, though the alleged value is $1,000 and interest is demanded from the time of loss, no interest being recoverable in such case until after judgment. St. Louis S. W. R. Co. v. Earl [Tex. Civ. App.] 16 Tex. Ct. Rep. 199, 95 S. W. 1086.

87. Under Rev. St. 1899, § 1674, giving the circuit court jurisdiction of an action for money when the "sum demanded, exclusive of interest and costs" exceeds $50, attorney's fees allowed by § 1140, in an action against a carrier under the statute, cannot be considered as a part of plaintiff's demand. Knight v. Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716. Under the Oregon statute providing for attorney's fees as "part of the costs" in suits to foreclose miners' liens, the attorney's fee cannot be added to the amount of the lien so as to make the requisite amount to give a Federal court jurisdiction on removal. Swofford v. Cornucopia Mines of Oregon, 140 F. 957.

88. Amount in good faith demanded in petition and not amount recovered determines jurisdiction. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971; O'Neil v. Murray [Tex. Civ. App.] 94 S. W. 1090; Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. In absence of plea that the sum claimed is fraudulently alleged. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex.] 15 Tex. Ct. Rep. 678, 93 S. W. 431. In ejectment, where no special acts of damage are averred, the amount of damages laid in the ad damnum clause will not give the Federal court jurisdiction, the value of the land being insufficient. Way v. Clay, 140 F. 352. A court whose appellate jurisdiction depends upon the "amount in dispute" will not always be controlled by the amount claimed in the petition, but if the entire case is before it, it will examine the evidence and refuse to take jurisdiction if it clearly appears that the amount is below its jurisdiction. Vanderberg v. Kansas City Gas Co. [Mo.] 97 S. W. 908.

89. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971. An action on account consisting of two items, balances for price of articles sold at different times, does not include separate causes of action so as to deprive the court of jurisdiction as to one item because it is too small. Hasty v. Hampton Stave Co. [Ark.] 97 S. W. 675. Where two steers were struck by a locomotive at different times but within a few seconds of time there was only one cause of action and the amount involved was sufficient to give trial court jurisdiction. Chicago, etc., R. Co. v. Ramsey [Ind. App.] 78 N. E. 669. Where several complainants are joined in a suit in equity merely for convenience and their demands are distinct, the demands cannot be aggregated for the purpose of conferring jurisdiction. Suit to enjoin obstruction of stream. Eaton v. Hoge [C. C. A.] 141 F. 64.

90. Joinder of tort and contract claims. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971.

91. There never having been any jurisdiction of subject-matter, it cannot be conferred by consent or waiver. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971.

92. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971; Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617.

93. A claim for damages manifestly and preposterously inflated will not confer jurisdiction on the supreme court. Samuel Israelite Baptist Church v. Thomas, 117 La. 253, 41 So. 564. A counterclaim for expenses incurred by defendant in order to establish fraudulent acts by plaintiff in relation to his claim constitutes no predicate for the right of appeal. Where plaintiff's claim was so small that there could be no appeal to district court. Texas, etc., R. Co. v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 166, 95 S. W. 746. Mere failure to establish a claim necessary to make the jurisdictional amount is not a fraud on the jurisdiction of the court, there having been a bona fide attempt. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971.

appellate jurisdiction of the higher courts.[95] The jurisdiction of a court may sometimes be affected by amendment,[96] and under some statutes by a waiver of an excess of a demand over the jurisdictional amount.[97] Where a claim is within the jurisdiction of a court, the fact that defendant pleads in bar a settlement by delivery of property exceeding in value such jurisdiction does not deprive the court of power to inquire as to the fact of such settlement,[98] and the court has jurisdiction of a counterclaim in such case provided it does not exceed the jurisdictional amount.[99] The amount in controversy is immaterial where jurisdiction is dependent upon other considerations.[1]

§ 7. *Limitations resting in character of subject-matter or object of action.*[2]—Particularly with respect to courts below those of general original jurisdiction and in case of appeals is jurisdiction denied or conferred where the action involves the title to land,[3] a freehold,[4] constitutional questions[5] properly raised and passed

94, 95. Texas, etc., R. Co. v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 166, 95 S. W. 746.

96. In courts not of record it is permissible by amendment before trial to reduce the amount claimed so as to bring it within the jurisdiction of the court. Summons in justice's court amended by entry of credit on contract attached thereto. Smith v. Puett, 124 Ga. 921, 53 S. E. 457. Where a complaint in an action under a statute demands less than the jurisdictional amount but states facts which would have authorized a recovery at common law together with exemplary damages, plaintiff may file an amended petition based on the common law and therein demand exemplary damages so as to bring the case within the jurisdiction of the court. Knight v. Quincy, etc., R. Co., 120 Mo. App. 311, 96 S. W. 716. Amended petition against nonresident filed in vacation and without notice and reducing claim from $5,000 to $1,999 held to deprive defendant of right to remove cause to Federal court. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312. In cases appealed from the justice to the county court the law provides that they shall be tried de novo, and the amount in controversy cannot be increased by amendment on appeal to an amount beyond the justice's jurisdiction. Missouri, etc., R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 318, 98 S. W. 415. Error not cured by failure of county court to include in his charge the items which increased the amount beyond the jurisdiction of the justice. Id. Where county court rightfully obtained jurisdiction it could retain it notwithstanding amended complaint included interest as damages and thus raised amount prayed for to over $1,000. Ft. Worth & D. C. R. Co. v. Underwood [Tex. Civ. App.] 98 S. W. 453.

97. The statutory waiver of an excess of a demand over $300 must be made by a defendant in his set-off. Statement in court not sufficient. Bowler v. Osborne [N. J. Law] 64 A. 697.

98. Where defendant sought no recovery. Eule v. Dorn [Tex. Civ. App.] 14 Tex. Ct. Rep. 833, 92 S. W. 828.

99. That property exceeded in value $1,000 did not defeat jurisdiction of county court. Eule v. Dorn [Tex. Civ. App.] 14 Tex. Ct. Rep. 833, 92 S. W. 828.

1. Under the constitution, district courts have authority to issue writs of injunction irrespective of the amount involved. Callaghan v. Tobin [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 328. District court has jurisdiction of mandamus proceedings to compel commissioners' court to enter orders directing drafts to be drawn for an amount previously allowed where there is no question as to the amount or validity of the claim, though its amount is less than $500. Denman v. Coffee [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 888, 91 S. W. 800. In mandamus to compel a county auditor to sign a warrant, the amount thereof did not affect the jurisdiction of the district court where petitioner did not seek any judgment as to the amount or validity of his claim. Anderson v. Ashe [Tex.] 14 Tex. Ct. Rep. 637, 90 S. W. 872. Where the district court had jurisdiction by reason of the suit being one to foreclose a mechanic's lien, it could retain it for the purpose of rendering judgment on the debt, though the lien was invalid and the claim was below the jurisdictional amount, no fraud being asserted. Sudduth v. Du Bose [Tex. Civ. App.] 15 Tex. Ct. Rep. 329, 93 S. W. 235. Where an appeal is not taken from a judgment for money or personal property but from one refusing to restrain the collection of a judgment and to vacate it, the court of appeals has jurisdiction though the amount is less than $200. Cincinnati, etc., Packet Co. v. Malone & Co., 29 Ky. L. R. 44, 92 S. W. 306. Where suit to enforce unpaid subscriptions was brought by corporate creditors whose claims were large enough to give court jurisdiction, court had jurisdiction of demands of other creditors whose claims were not large enough to give jurisdiction in the first instance, since the fund sought to be subjected was a trust fund for the benefit of all the creditors who could join in the suit. Williams v. Chamberlain, 29 Ky. L. R. 606, 94 S. W. 29. An appeal from an order denying a motion to quash an execution issued upon a judgment for costs in a felony case is not within the jurisdiction of the supreme court where the amount of such judgment is not sufficiently large to confer jurisdiction, though the execution was issued in the name of the state. State v. Butler, 191 Mo. 201, 90 S. W. 378.

2. See 6 C. L. 279.

3. Where the relation of landlord and tenant does not exist and plaintiff's right to re-

upon below,[6] saved for review[7] and assigned as error in the appellate court,[8] ques-

cover rent depends entirely upon his title to the property, a justice of the peace has no jurisdiction. Minton v. Minton [Ark.] 98 S. W. 976. Under Act Cong. March 1, 1895, c. 145, § 4, 28 St. 696, the commissioners' court has jurisdiction of all matters, including a claim for damages for trespass to real estate, where plaintiff's demand does not exceed $100. Mansf. Dig. Ark. c. 91, does not apply. Choctaw, etc., R. Co. v. Loper Bros. [Ind. T.] 98 S. W. 150. The supreme court has jurisdiction of all suits "involving homestead exemptions" whether the issues be raised by the debtor or by his creditors. Suit held to involve homestead exemptions. People's Independent Rice Mill Co. v. Benoit, 117 La. 999, 42 So. 480. Title is involved when the necessary result of the judgment is that one party gains and the other loses a freehold. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915. Suit to prevent resale of land bought at foreclosure, on ground that sale would cloud title, does not involve title. Id. Suit to enjoin sale of land under execution on ground that sale would cast cloud on title does not involve title. Payne v. Daviess County Sav. Ass'n, 198 Mo. 617, 96 S. W. 1016. Judgment must directly affect title. Lawson v. Hammond, 191 Mo. 522, 90 S. W. 431. The question as to the right to levy on realty is not sufficient to confer jurisdiction on ground that title to realty is involved. Lawson v. Hammond, 191 Mo. 522, 90 S. W. 431; Moore v. Stemmons, 192 Mo. 46, 90 S. W. 434; Stinson v. Cail, 163 Mo. 323, 63 S. W. 729, based on McAnaw v. Matthis, 129 Mo. 142, 31 S. W. 344, declared no longer to be authority for jurisdiction of the supreme court in such cases. Lawson v. Hammond, 191 Mo. 522, 90 S. W. 431. The supreme court has no jurisdiction where title is brought into the case only incidentally for the purpose of determining to whom money is to be paid. McKinney v. Wright Lumber Co., 192 Mo. 32, 90 S. W. 726. Supreme court has jurisdiction of appeal in proceedings to open a highway if a contest concerns the right to take private property for the road. State v. McCutchan, 119 Mo. App. 69, 96 S. W. 251. Court of appeals has no jurisdiction to issue writ of error in action to quiet title to land. Keimel v. Nine [Mo. App.] 97 S. W. 635. Under the statute to quiet title (Rev. St. 1899, § 650), the jurisdiction of the court is limited to the quieting of title, and the court cannot order an accounting arising under a contract whereby the interests of the parties in the land were fixed. Howard v. Brown, 197 Mo. 36, 95 S. W. 191. An action to recover on a note given for the purchase price of land does not necessarily involve title to land and a justice of the peace has jurisdiction thereof. McPeters v. English [N. C.] 54 S. E. 417; Davis v. Evans [N. C.] 55 S. E. 344. Where a contract required the making of title to land by a certain date and the pleadings showed that it was not made if at all till later, the question of title was eliminated and it was not again drawn in issue by evidence which did not show that the contract was varied in that particular. Jaffe v. Ohlan, 97 N. Y. S. 296. The peacemakers' court of the Alleghany and Cattaraugus reservation has exclusive jurisdiction of questions between individual Indians involving the title to real estate on the reservation and the decision of the council of the Seneca Nation on appeal from the peacemakers' court is conclusive, so that the supreme court has no jurisdiction to restrain the peacemakers' court from carrying out its judgment and to declare fraudulent the deed of the successful party. Jones v. Gordon, 99 N. Y. S. 958. In summary proceedings by a tenant against subtenants to recover possession, the municipal court is not ousted of jurisdiction because the answer raises the question whether plaintiff's lease has been forfeited. Hollister v. Wohlfeil, 100 N. Y. S. 997.

4. A freehold is involved only where the necessary result of the decree or judgment is that one party gains or the other loses a freehold estate or where the title is so put in issue by the pleadings that the decision of the case necessarily involves the decision of such issue. In re Ross' Estate, 220 Ill. 142, 77 N. E. 126. To justify an appeal to the supreme court on the ground that a freehold is involved, a freehold must be involved in the questions to be determined on appeal. Hutchinson v. Spoehr, 221 Ill. 312, 77 N. E. 580. Where a freehold is involved in the original decree but is not the point assigned for error, the appeal should be to the appellate court. In re Ross' Estate, 220 Ill. 142, 77 N. E. 126.

Freehold involved: Bill in the nature of a bill of review which seeks to impeach a decree in partition ascertaining and declaring the title to a freehold estate. Crane v. Stafford, 117 Ill. App. 57. To remove tax deed as cloud upon title to realty. Glos v. Shedd, 118 Ill. App. 238. Contest of will disposing of real estate in manner different from that in which the property would have descended in case of intestacy. Gottmanshausen v. Wolfing, 224 Ill. 270, 79 N. E. 611. Suit for specific performance of contract for sale of freehold. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915. A party in possession of a mining claim who has complied with the Federal laws relating thereto has a freehold estate, although he has failed to take out a patent and the legal title consequently remains in the United States. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327. That land was located in another state was immaterial. Id. Where a tax deed was removed as a cloud upon the title to realty, appellant could not waive all questions as to the validity of the deed and raise only the questions of reimbursement to him and costs so as to confer jurisdiction upon the appellate court, on the theory that these questions were only matters of practice. Glos v. Shedd, 118 Ill. App. 238.

Freehold not involved: Where part of a street was taken for a private purpose but no part of appellant's property subject to the public easement was taken. Hoffman Bros. Brew. Co. v. Cicero, 223 Ill. 155, 79 N. E. 121. In suit to enjoin issuance of tax deed on ground that it will cloud title (Glos v. Sanitary Dist. of Chicago, 224 Ill. 272, 79 N. E. 562) or on ground that property belonged to plaintiff and that deed should issue to her

tions of law decided erroneously or contrary to the court of last resort,[9] the construction of a statute,[10] taxes or revenue,[11] a penalty,[12] certain tort liabilities,[13] and

(Bush v. Caldwell, 224 Ill. 93, 79 N. E. 434). In suit to restrain further issuance of executions on a judgment and to set aside certificate of sale. First Nat. Bank v. Gibson, 221 Ill. 295, 77 N. E. 562. Bill to have absolute deed declared mortgage and to redeem. Caraway v. Sly, 122 Ill. App. 648. Questions on appeal whether appellant's share in partition was subject to a lien and whether the lien was subject to an inchoate right of dower. Hutchinson v. Spoehr, 221 Ill. 312, 77 N. E. 580. Where the only effect of an order awarding a writ of mandamus was to compel a sale of real estate to satisfy a lien of an assessment for a street improvement. Murphy v. People, 221 Ill. 127, 77 N. E. 439. Where question was merely one of priority as between a lien claim and a claim for dower and homestead. Lidster v. Poole, 122 Ill. App. 227. The homestead right of a wife living with her husband on premises occupied by the two as a homestead is not a freehold so as to authorize an appeal to the supreme court. Taylor v. Taylor, 223 Ill. 423, 79 N. E. 139.

5. For constitutional questions in Federal practice, see post, § 11C.

Indiana: Cases appealed to the appellate court must be transferred to the supreme court for a determination of questions as to the constitutionality of statutes involved therein. Shelbyville Coal & Min. Co. v. McGlosson [Ind. App.] 76 N. E. 562.

Louisiana: Supreme court held to have no jurisdiction of suit to recover taxes paid in error since the constitutionality or legality of the tax could not be considered after it had been paid. McCaleb v. Buras Levee Dist. Com'rs, 116 La. 942, 41 So. 217.

Missouri: Where appeal in prosecution for peddling without a license involved construction of revenue laws and interstate commerce clause of Federal constitution, the supreme court, and not the court of appeals, had jurisdiction. State v. Looney [Mo. App.] 96 S. W. 316. The fact that defendant alleges that the decision of his case by the court of appeals contravenes a prior decision of that court, and that its construction of statutes involved in the case violate the state and Federal constitutions, do not raise any constitutional or Federal questions so as to confer jurisdiction upon the supreme court. Sublette v. St. Louis, etc., R. Co., 198 Mo. 190, 95 S. W. 430. The supreme court has no jurisdiction of an appeal in a prosecution for a misdemeanor where no constitutional question is involved, but merely the construction of a statute. State v. McKee, 196 Mo. 106, 95 S. W. 401. Where a verdict was rendered by nine jurors as authorized by an instruction, an appeal on the ground that the instruction was not authorized by the state constitution raised a constitutional question of which the supreme court had jurisdiction. Logan v. Field, 192 Mo. 54, 90 S. W. 127. Constitutionality of a statute held still an open question, though it had been considered in a previous case where the case was pending in the Federal supreme court. O'Donnell v. Kansas City, etc., R. Co., 197 Mo. 110, 95 S. W. 196.

Virginia: Since Const. art. 6, § 88, providing that the supreme court shall have appellate jurisdiction "in all cases involving the constitutionality of a law," does not of its own force confer jurisdiction, the judgment of the circuit court in determining the validity of an election as to the licensing of liquor is final as provided by Code 1904, § 586a, though the constitutionality of a law is involved. Hulvey v. Roberts [Va.] 55 S. E. 585.

6. The supreme court has no jurisdiction of an appeal on the ground that a statute has been declared unconstitutional unless it appears that the question was raised in the pleadings below and that a law has in fact been so declared, or that a holding to that effect was necessarily involved in the judgment. State v. Yazoo & M. V. R. Co., 116 La. 189, 40 So. 630. Where the judgment may have been predicated upon another ground, it will not be assumed that a law was declared unconstitutional. Id. Failure to call the attention of the trial court, on a motion for a new trial, to constitutional questions urged at the trial is an abandonment of such questions, and an appeal cannot be sustained by reason thereof. State v. Grant, 194 Mo. 364, 92 S. W. 698.

7. See Saving Questions for Review, 6 C. L. 1385.

8. See Appeal and Review, 7 C. L. 128.

9. Under Burns' Ann. St. 1901, § 1337j, subd. 2, allowing a transfer of a case from the appellate to the supreme court on the ground that the opinion of the appellate court contravenes a prior ruling of the supreme court or that a new question of law is directly involved and was decided erroneously, the petition should show the particular decision of the supreme court contravened, or the particular new question of law involved and decided erroneously. American Quarries Co. v. Lay [Ind.] 76 N. E. 517. Petition for transfer "on account of error in the decision of the cause in the appellate court" held insufficient. Id. If the opinion of the appellate court contains a correct statement of the law as applied to the facts stated therein, a petition to transfer the cause to the supreme court on the ground that the court decided new questions of law erroneously will be denied, regardless of questions actually presented by the record. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981.

10. Under Burns' Ann. St. 1901, § 1337h (Acts 1903, p. 280, c. 156), allowing an appeal to the supreme court from civil judgments of $50 or less when the proper construction of a statute is involved, the record must disclose a real controversy as to the meaning of a statute susceptible of an honest difference of opinion, and it is not sufficient to claim that the construction of a statute is involved. Hood v. Baker, 165 Ind. 562, 76 N. E. 243. An ordinance is not a "statute" within § 88 of the Practice Act, and a suit involving the validity of an ordinance is appealable to the appellate court and not to the supreme court, unless a construction of the constitution or a statute is also in-

where any kind of equitable relief or cognizance is sought.[14] More often the statute simply provides what jurisdiction inferior courts shall have, impliedly excluding all else.[15] By statute such jurisdictions as those exercised by bankruptcy courts,[16] courts of probate and the like,[17] often become exclusive or at least primary.[18] Spe-

volved. People v. Harrison, 223 Ill. 550, 79 N. E. 164.

11. To authorize a direct appeal to the supreme court revenue must be directly involved, as where some authority authorized to assess or collect taxes is attempting to proceed under the law and questions arise between it and those from whom the taxes are demanded. City of Chicago v. Cook County, 224 Ill. 246, 79 N. E. 571. A suit by a city against a county for an accounting as to money alleged to be illegally retained as fees to the county clerk for extending taxes for a free library held not to involve revenue directly, there being no controversy between the city and the taxpayer. Id. Where in mandamus to compel a sale of realty to satisfy a street assessment the legality of the assessment, or the property owner's liability to pay, or the amount to be paid, was not in controversy, the case related to revenue only incidentally and could not be reviewed by the supreme court. Murphy v. People, 221 Ill. 127, 77 N. E. 439. Where the questions on appeal did not involve the validity of certain taxes and the amount claimed was less than $2,000, the supreme court was without jurisdiction. Page v. Thompson, 117 La. 274, 41 So. 571. A suit to recover from the United States for salvage of duties collected by the government on a cargo afterwards saved does not arise under the revenue laws so as to deny jurisdiction to the Federal district court under the Tucker act, because liability is founded on the assumption that the secretary of the treasury would have refunded the duties if the property had been destroyed. United States v. Cornell Steamboat Co., 202 U. S. 184, 50 Law. Ed. 984.

12. Pleadings construed most strongly against pleader held to set forth a cause of action for a penalty not cognizable in justice court. Atlanta, etc., R. Co. v. Shippen [Ga.] 55 S. E. 1031.

13. Complaint against a carrier stating that defendant violated the contract of carriage by doing certain things held to state a cause of action on contract within the jurisdiction of the municipal court, and not one for assault and battery, though the facts pleaded showed that an assault was committed. Busch v. Interborough Rapid Transit Co., 110 App. Div. 705, 96 N. Y. S. 747. An action to recover for loss of rent due to delay of work on a building occasioned by defendant's wrongfully filing a notice of mechanics' lien against the property is one for an "injury to property" within the definition given in Code Civ. Proc. § 3343 (10), so as to give the municipal court jurisdiction. Ghiglione v. Friedman, 100 N. Y. S. 1024. Under Municipal Court Act 1902, p. 1489, c. 580, § 1, subd. 14, the municipal court of New York has no jurisdiction of actions to recover for loss of society to husband or wife, but the "loss of society" referred to means intentional injury, and the court may award damages for loss of society resulting from mere negligence. Lyons v. New York City R. Co., 97 N. Y. S. 1033.

14. Justice of peace had no jurisdiction of a set-off which only equity could entertain. Cornett v. Ault, 124 Ga. 944, 53 S. E. 460. Under the constitution, the district court has original jurisdiction both at law and in equity, as well as certain appellate jurisdiction. Coleman v. Jaggers [Idaho] 85 P. 894. A court having jurisdiction over the estates of decedents, though having no general chancery powers, has authority to administer equity principles in the exercise of its jurisdiction. Wheeler v. Wheeler, 105 Ill. App. 48. The superior court has equitable jurisdiction formerly exercised by courts of equity unless limited by statute. State v. Settle [N. C.] 54 S. E. 445. Municipal court of New York city has no jurisdiction of equitable action by mortgagor to regain possession of chattels voluntarily surrendered by him to mortgagee. De Luca v. Archer Mfg. Co., 49 Misc. 645, 97 N. Y. S. 1026. An action for a deficiency on a chattel mortgage is not an action on the mortgage of which the court is denied jurisdiction by Laws 1902, p. 1533, c. 580, § 139, the liability arising as a matter of law. Wilcox v. Perez, 101 N. Y. S. 391. Is not powerless to grant an order of interpleader in a proper case on the ground that it is an exercise of equity jurisdiction. Englander v. Fleck, 101 N. Y. S. 125. Permitting defendant to show that he was led to make an absolute promise to pay a sum of money by false representations held not to involve any question of the assumption of equitable jurisdiction by the municipal court. Alexander v. Vidootzky, 49 Misc. 471, 97 N. Y. S. 992.

15. See post, § 9C.

16. The title to the property of a bankrupt becomes vested in the trustee when the latter's bond is confirmed by the court, and thereafter a state court has no jurisdiction to establish an equitable lien against the property regardless of whether it was in the possession of the trustee at the time the suit was instituted or in the possession of the sheriff under an attachment from a state court. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

17. District court has jurisdiction of action by widow to recover homestead left by deceased husband from which she was wrongfully ejected, and personal property connected therewith, together with damages for use and for mental distress and humiliation. Contention that probate court had jurisdiction was without merit. Cox v. Oliver [Tex. Civ. App.] 15 Tex. Ct. Rep. 790, 95 S. W. 596. Where a vendor procured a rescission of his executory contract of sale, a claim by him for rents pending the action was not one against the estate of the deceased purchaser, and the district court had jurisdiction regardless of whether such estate had been closed in probate. Fidelity & Deposit Co. v. Texas Land & Mortg. Co. [Tex. Civ App.] 14 Tex. Ct. Rep. 183, 90 S. W. 197.

cial statutory or constitutional jurisdictions are limited to occasions and objects contemplated by the law creating them.[19]

Courts have no power to control or supervise legislative or official administrative discretion.[20]

§ 8. *Limitations resting in character or capacity of parties litigant.*[21]—In Indian Territory the court has no jurisdiction to issue a writ of quo warranto at the instance of a private relator.[22]

§ 9. *Original jurisdiction. A. Exclusive, concurrent, and conflicting.*[23]—When by reason of any of the statutes or rules discussed in the preceding sections only one court can act authoritatively, its jurisdiction is exclusive.[24] If two or more courts have jurisdiction either inherent or conferred, this jurisdiction is called concurrent.[25] When two courts of concurrent jurisdiction both assume to act, there is a conflict,[26] and the court which first acquired jurisdiction retains it to the exclusion of the other[27] and may restrain the litigants from interfering,[28] but may not ordi-

18. See, also, post, § 9A.

19. See post, § 9C.

20. See Constitutional Law, 7 C. L. 691; Compare Elections, 7 C. L. 1230; Highways and Streets, 8 C. L. 40; Eminent Domain, 7 C. L. 1276; Municipal Corporations, 6 C. L. 714; Public Works and Improvements, 6 C. L. 1143. In the absence of statute, courts cannot interfere by injunction or otherwise with the exercise of governmental powers or functions. Circuit court could not restrain county court from ordering an election. Mann v. Mercer County Ct., 58 W. Va. 651, 52 S. E. 776.

21. See 4 C. L. 335.

22. The statute of 9 Anne, c. 20, authorizing the issuance of quo warranto at the instance of a private relator, was never in force in Indian Territory. Painter v. U. S. [Ind. T.] 98 S. W. 352.

23. See 6 C. L. 283.

24. See §§ 4 to 8, ante. A constitutional grant of jurisdiction to a particular court of certain matters does not of itself imply that such jurisdiction is to be exclusive. Legislature could empower superior court to issue prerogative writs, though supreme court had that power. Higgins v. Pawtucket Tax Assessors, 27 R. I. 401, 63 A. 34. The orphan's court has exclusive jurisdiction of the probate of a will and has general power to revise proceedings tainted with fraud, mistake, or illegality. Vincent v. Vincent [N. J. Eq.] 62 A. 700. The distribution of assets recovered by a trustee in bankruptcy in a state court is within the exclusive jurisdiction of the Federal court of bankruptcy. Treseder v. Burgor [Wis.] 109 N. W. 957.

25. The superior courts of California have concurrent jurisdiction in matters of probate, but this does not mean that they have concurrent jurisdiction of every probate matter, but the legislature may prescribe which court shall exercise jurisdiction over a particular estate. Dungan v. Superior Ct, of Fresno County [Cal.] 84 P. 767.

Validity of statutes: Rev. St., § 6454, giving the probate court in certain counties concurrent jurisdiction with the common pleas in all misdemeanors and proceedings to prevent crime, is not unconstitutional for lack of uniform operation. Oberer v. State, 8 Ohio C. C. (N. S.) 93. Acts 1896-97, p. 802, creating the county court of Cleburne county, are not unconstitutional for conferring on the county court the same jurisdiction as that of the circuit courts. State v. Fuller [Ala.] 41 So. 990.

26. One not a party to an equity suit in a Federal court may apply to any court of competent jurisdiction to enforce his private rights, though they be the same as those involved in the suit first brought in the Federal court. That gas company had brought suit against state and city officers to restrain enforcement of statute lowering price of gas did not deprive state court of jurisdiction to restrain the company from shutting off gas supply from a consumer. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81. Suit in Federal court was not in rem so as to give Federal court exclusive jurisdiction. Id. That a final decision by Federal supreme court on appeal from circuit court may first be had is no ground for refusing jurisdiction. Id. Where a temporary injunction was issued by the United States circuit court restraining a city, a gas commission, and the officers of the city and the state from enforcing a statute reducing the price which a gas company was authorized to charge consumers for gas, but as construed by that court did not affect consumers not made parties, the supreme court of the state could grant a temporary injunction restraining the gas company from shutting off the gas because of his refusal to pay the price fixed by the commission under the statute. Richman v. Consolidated Gas Co. [N. Y.] 78 N. E. 871, afg. 114 App. Div. 216, 100 N. Y. S. 81. Comity did not require such court to decline jurisdiction. Id.

27. Kastor v. Elliott, 77 Ark. 148, 91 S. W. 8; Whittier v. McFarland [Vt.] 65 A. 81. Though the statutory jurisdiction of the probate and chancery courts to sell property for partition is concurrent, the tribunal first acquiring jurisdiction is entitled to exercise it exclusive of the other. Finch v. Smith [Ala.] 41 So. 819. Where partition is sought in the probate court either in kind or by sale, the decree on final hearing is conclusive until reversed and excludes the jurisdiction of the chancery court in the absence of some special ground for the interposition

narily control the other court.[29] Where similar proceedings are pending in courts of concurrent jurisdiction, the later proceeding should be stayed until the court which first acquired jurisdiction has disposed of the action before it.[30] A final judgment in a court of competent jurisdiction renders a similar suit res adjudicata in a court of concurrent jurisdiction.[31] While the states have no control of the primary disposition of public lands belonging to the United States, yet, when title passes from the government, state courts have jurisdiction to determine controversies between adverse claimants thereto.[32]

of equity. Id. The superior courts of California have concurrent jurisdiction in matters of probate. Where the estate of a nonresident decedent is in more than one county, the court in which application for letters is first made acquires exclusive jurisdiction of the estate. Dungan v. Superior Ct. of Fresno County [Cal.] 84 P. 767. The application is made when a proper petition is filed with the clerk. Code Civ. Proc. §§ 1371-1379, and § 1295, construed. Id. In prohibition to prevent another court from subsequently assuming jurisdiction, the question whether decedent had any estate in the county where proceedings were first instituted cannot be raised. Id. Where one court placed a child in plaintiff's charge for the purpose of finding a home for her, another court could determine the question whether the child should remain at the home permanently, she being without the jurisdiction of the court of first instance. Louisiana Soc. for Prevention of Cruelty to Children v. Tyler, 116 La. 425, 40 So. 784. Filing of bill for injunction held improper where the matter was already in litigation in Federal court. Griffith v. Vicksburg Waterworks Co. [Miss.] 40 So. 1011. A municipality represents its citizens in litigation as to matters in regard to which all citizens and taxpayers have a common interest, and where a city was a party to the litigation in the Federal court, it was improper for citizens of the city to file the bill in the state court. Id. The rule that prior possession of a res vests a court of concurrent jurisdiction with exclusive power to determine all matters relating thereto does not apply to a mere controversy, and so an ordinary action in a state court does not bar a subsequent action for the same relief in a Federal court or vice versa, even when the parties are the same. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81. The rule that a levy of an attachment upon property places it within the custody of the court so as to prevent interference by another court applies to real as well as to personal property (Beardslee v. Ingraham, 183 N. Y. 441, 76 N. E. 476), and after a legal attachment by a Federal court of the property of a corporation a state court, in subsequent proceedings to dissolve the corporation, cannot enjoin the United States marshal from selling the property, nor enjoin further proceedings in the Federal court (Id., rvg. 106 App. Div. 506, 94 N. Y. S. 937). To give a court priority of jurisdiction over property, there must have been a valid seizure and actual control taken of the res. Levy on timber held not sufficient to give state court prior exclusive jurisdiction as against Federal court. Fountain v. 624 Pieces of Timber, 140 F. 381. Suit in state court against county treasurer to restrain payment of railroad bond coupons, there being no attempt to have court take possession of any funds, held no ground for refusal of Federal court to take jurisdiction of suit by coupon holder to enforce payment and an alleged trust. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753. Under V. S. 2698, providing that at any time after granting a divorce the court may make further orders respecting the custody of children, the county court could determine the question of the custody of a child notwithstanding habeas corpus proceedings before a judge of the supreme court. Whittier v. McFarland [Vt.] 65 A. 81.

28. Where a Federal court has first acquired jurisdiction of a suit to determine rights in the waters of a stream, it is its right and duty to protect such jurisdiction from interference (Miller v. Rickey, 146 F. 574), and it will enjoin a defendant from prosecuting a later suit against complainant in a state court relating to the same subject-matter (Id.). A corporation organized by defendant, and to which he has pending the Federal suit conveyed his rights which are the subject of the litigation, takes the same subject to orders against its grantor and may also be enjoined from bringing suit in the state court. Id.

29. The fact that a court assumes jurisdiction of a cause already pending in a court of concurrent jurisdiction does not authorize interference by prohibition when there is a remedy by appeal. Objection must be taken by demurrer or answer as per Kirby's Dig. §§ 6093, 6096. Kastor v. Elliott, 77 Ark. 148, 91 S. W. 8.

30. Where a previous suit in the supreme court would completely cover all questions arising in the settlement of an executor's accounts in the surrogate court the accounting was stayed until the determination of the suit in the supreme court. In re Llado's Estate, 50 Misc. 227, 100 N. Y. S. 495. Where a Federal receiver sues on a claim in a state court having equity powers, the Federal court will not direct him to suspend the action to enable defendant to sue in equity therein to establish the right to a set-off merely because the two courts entertain different views on the right of set-off under the facts. Frees v. John Shields Const. Co., 145 F. 1020. See, also, Abatement and Revival, 7 C. L. 1; Stay of Proceedings, 6 C. L. 1550.

31. The jurisdiction of the United States circuit court in respect to customs duties is concurrent with that of the board of general appraisers created by Customs Act, June

While courts of equity have no power to control or stay proceedings in a foreign court, they may restrain persons within their own jurisdiction from the use of foreign tribunals as instruments of wrong and oppression.[33] State courts have no power to enjoin proceedings in the Federal courts,[34] and the power of Federal courts over suits in state courts is restricted by statute.[35] A court of concurrent jurisdiction ordinarily cannot review the judgments of another such court.[36]

(§ 9) *B. Ancillary or assistant.*[37]—Jurisdiction having attached to one court or being in the process of acquisition, other courts may exercise ancillary or assistant jurisdiction,[38] and the court of principal jurisdiction may also exercise it.[39] A court is without power to restrain or punish the violation of a decree of another court.[40] Protection of property in custodia legis must be sought in the court that has possession.[41]

(§ 9) *C. General or inferior, limited and special jurisdiction.*[42]—General jurisdiction is that which within the territorial bounds is not limited as to nature of subject-matter, amount in controversy, or character of parties.[43]

Statutes conferring jurisdiction upon inferior courts are strictly construed.[44] The jurisdiction of probate,[45] county,[46] justice,[47] city,[48] municipal,[49] and other

10, 1890, c. 407, 26 St. 131 (U. S. Comp. St. 1901, p. 1886). United States v. J. G. Johnson & Co., 145 F. 1018.

See, also, Former Adjudication, 7 C. L. 1750.

32. Wilcox v. Phillips [Mo.] 97 S. W. 886.

33. Where a will was probated in Washington and the widow had accepted full settlement, court in Washington could restrain her from prosecuting suit in Oregon for settlement of her rights. Rader v. Stubbiefield [Wash.] 86 P. 560.

34. Could not enjoin execution sale. Beardslee v. Ingraham, 183 N. Y. 411, 76 N. E. 476.

35. See post, § 11A, and see, also, Injunction, 8 C. L. 279.

36. The district courts of this state have concurrent jurisdiction only, and one of them cannot review by habeas corpus the judgment of another such court. Martin v. Dist. Ct. of Second Judicial Dist. [Colo.] 86 P. 82; People v. Dist. Ct. of Second Judicial Dist. [Colo.] 86 P. 87. One special term has no power to review the order of another special term. In re Cullinan, 109 App. Div. 816, 96 N. Y. S. 751.

37. See 6 C. L. 286.

38. A district court has no ancillary jurisdiction under the bankruptcy act to make a summary order on the application of the trustee of a bankrupt whose estate is being administered in another district requiring a person to turn over property to the trustee. In re Von Hartz [C. C. A.] 142 F. 726.

39. Where receivers have possession of property under a decree of a Federal court, such court may entertain jurisdiction of an ancillary bill filed by them to remove a cloud cast upon the title to such property by the claims of others with reference thereto. Where a city claimed that the franchises of certain street railway companies would expire on a certain date and threatened to take possession. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. 801.

40. Could not restrain or punish violation of foreign injunction. Jarvis Adams Co. v. Knapp, 213 Pa. 567, 62 A. 1112.

41. Plaintiffs could not protect lien of attachment in Federal court by independent action in state court. Coffin v. Harris [N. C.] 54 S. E. 437.

42. See 6 C. L. 286.

43. Jurisdiction of an action for usurpation of office of road overseer falls within the general jurisdiction of the circuit court, not being expressly vested in any other court. State v. Sams [Ark.] 98 S. W. 955. The courts of Indian Territory have only common-law jurisdiction to grant writs of quo warranto. Painter v. U. S. [Ind. T.] 98 S. W. 352. The civil district court has jurisdiction of a complaint if it relates to a personal right, such as the right to be left alone. Schulman v. Whitaker, 117 La. 704, 42 So. 227. The original jurisdiction of the district court of an action to quiet title to real estate is not affected by the fact that incidental thereto there is involved the construction of a will. St. James Orphan Asylum v. Shelby [Neb.] 106 N. W. 604. The circuit court has jurisdiction in habeas corpus in the case of one committed for contempt by a common pleas judge who was without jurisdiction in the premises. Ex parte Froome Morris, 8 Ohio C. C. (N. S.) 212. Under the constitution of this state the district courts have original jurisdiction of all subjects over which jurisdiction has not been granted to some other court. Callaghan v. Tobin [Tex. Civ. App.] 14 Tex. Ct. Rep. 269, 90 S. W. 328.

44. St. 1904, p. 448, c. 448, § 1, transferring the jurisdiction of the superior court over real actions to the land court, did not transfer to that court jurisdiction of a suit to remove a cloud from a title. First Congregational Soc. v. Metcalf [Mass.] 79 N. E. 343. The county courts are courts of limited jurisdiction drawing all their powers from special statutory enactment. Commonwealth v. Central Consumers' Co., 28 Ky. L. R. 1363, 91 S. W. 711. The law court in Maine is a creature of the statute and has no powers except such as are by statute conferred. Could not hear motion for new trial where evidence could not be produced because of death of stenographer. Morin v. Claflin, 100 Me. 271, 61 A. 782.

45. **Alabama:** The probate court has ju-

inferior courts, varies with the statutes of the different states. A court of general

risdiction of a suit for the partition of personal property held by tenants in common. Code 1896, § 3161. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962. But where the only interest that the parties to a partition suit had to land was by virtue of a will, and such interest was only the right to a distributive share of the proceeds of a sale after a deduction on account of advancements, the probate court was without jurisdiction to adjust such matters in a statutory proceeding to sell the land for partition among joint owners. Greer v. Herren [Ala.] 41 So. 783.

Idaho: Probate courts have original jurisdiction in matters of probate and appointment of guardian, and may also determine civil cases where the amount claimed does not exceed $500 exclusive of interest. They have concurrent jurisdiction with justices of the peace in criminal cases. Dewey v. Schreiber Implement Co. [Idaho] 85 P. 921. The civil cases referred to do not include suits in equity, such as suits to foreclose liens or mortgages on real estate. Id. Act approved February 27, 1903 (Sess. Laws 1903, p. 94), amending Rev. St. 1887, § 3841, subd. 9, extending jurisdiction to enforcement of liens on real estate, held unconstitutional. Id. They have exclusive jurisdiction of the settlement of estates of decedents subject to appeal to the district court for review of any proceeding had therein. Abrams v. White, 11 Idaho, 497, 83 P. 602.

Illinois: While a probate court has incidental chancery powers in respect to estates within its jurisdiction, it has no general chancery powers and cannot determine the validity of collateral agreements between heirs and legatees executed after the death of the ancestor or adjust equities arising therefrom. Its sole province is to see that the will of the testator is executed in the manner therein provided. Teel v. Mills, 117 Ill. App. 97.

Kansas: Except as limited by statute, probate courts have the same power over the persons and estates of lunatics as that formerly possessed by courts of chancery under the common law. Foran v. Healy [Kan.] 86 P. 470.

Maine: Probate courts have special and limited jurisdiction only. Taber v. Douglass [Me.] 64 A. 653.

Massachusetts: Agreement whereby a widow was to be appointed administratrix and certain property rights were adjusted held not to oust probate court of jurisdiction of the estate of a decedent, such court having exclusive jurisdiction over the settlement of estates of decedents. Fletcher v. Fletcher, 191 Mass. 211, 77 N. E. 758.

Michigan: While a court of probate as a part of the administration of an intestate's estate may order the distribution of land to those apparently entitled to possession, it has no jurisdiction to adjudicate in respect to the extent of their title or the validity of the titles and interests of others. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

Missouri: Probate courts cannot determine the conflicting claims of distributees and outside parties to funds in the hands of an administrator awaiting distribution. Could not determine claim of husband to surplus of proceeds of sale of land held by deceased wife for life remainder to husband subject to her debts. In re Winnegar's Estate, 118 Mo. App. 445, 94 S. W. 833. Has no jurisdiction of a claim the allowance of which requires the interposition of equity to set aside a contract between claimant and decedent. Ivie v. Ewing, 120 Mo. App. 124, 96 S. W. 481.

New Jersey: The orphan's court is a superior court of general jurisdiction in probate and other special cases and has the same authority over its decrees by inquiring into the authority of attorneys to appear as may be exercised by any court of general jurisdiction. Vincent v. Vincent [N. J. Eq.] 62 A. 700.

New York: The surrogate has no jurisdiction of a controversy between the surety of a temporary administrator and a third person alleged to have fraudulently obtained property of the estate from the temporary administrator. In re Weisell's Estate, 101 N. Y. S. 273. Has no general equity powers but has only such jurisdiction as is expressly or by necessary implication conferred by statute. In re Thompson, 184 N. Y. 36, 76 N. E. 870. Has no jurisdiction of an action in the nature of a creditors' bill to reach the part of the insurance on the life of a decedent in favor of his wife, the executrix, which was purchased with the part of the premium paid from the property in excess of $500 a year. Id., 185 N. Y. 574, 78 N. E. 74.

North Carolina: Where a petition for the sale of a decedent's real estate alleges that the purpose of the sale is to provide a fund to pay debts and preserve the personalty, the clerk has no power to order a sale under proceeding provided by Revisal 1905, § 68, but relief must be had in a court of general equity jurisdiction. State v. Settle [N. C.] 54 S. E. 445.

46. Kentucky: A county court has no jurisdiction of an action for money due from a corporation for unpaid license fees. Commonwealth v. Central Consumers' Co., 28 Ky. L. R. 1363, 91 S. W. 711. Under Ky. St. 1903, § 87, relating to sales of property assigned for creditors, and § 75, the county court of the county where the assignee qualifies, and not where the business is carried on, has jurisdiction to order a sale of the assigned estate. Lexington & Carter County Min. Co. v. Columbia Finance & Trust Co. [Ky.] 98 S. W. 332.

Tennessee: The jurisdiction of the county court to wind up estates as insolvent was not affected by Acts 1873, p. 100, c. 64 (Shannon's Code, §§ 4067, 6028), giving the county courts concurrent jurisdiction with the chancery and circuit courts to sell real estate of decedents. Key v. Harris [Tenn.] 92 S. W. 235. The quarterly county court has no power to bring a suit to prevent the misappropriation of public school funds or to charge such funds with counsel fees or expenses in the suit. State v. True [Tenn.] 95 S. W. 1028. Under Acts 1899, p. 293, c. 153, creating the office of county judge of Campbell county, and general provisions of the Code, the county judge succeeded to all

jurisdiction sitting as an inferior court has only such powers as are conferred by statute.[50]

(§ 9) *D. Original jurisdiction of courts of last resort.*[51]—This includes the prerogative common-law jurisdiction necessary to the proper control and supervision of the courts below,[52] and in its more common sense includes such as the con-

the powers of the monthly quorum court. Could accept resignation of justice of peace. Murray v. State, 115 Tenn. 303, 89 S. W. 101.

47. See Justices of the Peace, 6 C. L. 331.

48. **Georgia:** A city court has no jurisdiction to foreclose a mortgage on realty. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453.

Illinois: The city court has jurisdiction within the territorial limits of the city to entertain proceedings to foreclose mortgages and may acquire jurisdiction of the parties to such proceedings in the same manner as circuit courts. Service by publication outside corporate limits sufficient. Spitznagle v. Cobleigh, 120 Ill. App. 191.

Indiana: Under Burns' Ann. St. 1901, § 3669, conferring upon city courts original and concurrent jurisdiction with justices of the peace and city mayors, a city court has no general equity jurisdiction and cannot set aside its own judgment for fraud. Steinmetz v. Hammond Co. [Ind.] 78 N. E. 628.

49. **Minnesota:** The municipal court of Minneapolis has no jurisdiction in forcible entry and detainer proceedings based upon breach of a lease to lands lying only partly within Hennepin county. Bunker v. Hanson [Minn.] 109 N. W. 829. Cause of action could not be split so as to make two suits and thus bring one of them within the limited jurisdiction of the court. Id.

New York: Under Municipal Court Act Laws 1902, p. 1488, c. 580, § 1, subd. 11, the municipal court, in an action to enforce a mechanic's lien, has no power to render judgment for foreclosure and sale, its jurisdiction being limited to the rendition of a personal judgment against defendant to be enforced by execution. Drall v. Gordon, 101 N. Y. S. 171. Cannot adjudge the priority of liens nor permit another lienor to be made a party and establish his lien. Id. Municipal courts are creatures of statute and have no jurisdiction except such as is specially conferred thereby. Weinstein v. Douglas, 107 N. Y. S. 251. The municipal court of New York city has jurisdiction of an action on a quasi contract. Devery v. Winton Motor Carriage Co., 49 Misc. 626, 97 N. Y. S. 392; Harrington v. New York, 40 Misc. 165, 81 N. Y. S. 667 and Goldstein v. Abramson, 86 N. Y. S. 30, have been overruled. Id. Having no equity powers, it cannot declare invalid an agreement by a city employe to waive compensation on being granted a leave of absence on the ground that such employe was ignorant of the language. Tepidino v. New York, 50 Misc. 324, 98 N. Y. S. 693. Has no power to enforce an attorney's lien. Van Der Beek v. Thomason, 50 Misc. 524, 99 N. Y. S. 538. Has no jurisdiction of an action to recover money paid under duress. Herald Square Cloak & Suit Co. v. Rocca, 48 Misc. 650, 96 N. Y. S. 189. A defense that it was understood when a contract was executed that it was to have no efficacy is a legal and not an equitable one, and so within the jurisdiction of the municipal court. Koehler & Co. v. Duggan, 49 Misc. 100, 96 N. Y. S. 1025. Under Municipal Court Act (Laws 1902, p. 1489, c. 580, § 1, subd. 14), giving the court jurisdiction of actions for personal injuries or loss of services excepting among other things loss of society to husband or wife, the "loss of society" mentioned refers only to actions founded on intentional injury to the consortium and the court may award damages for loss of society resulting from unintentional acts, such as mere negligence. Lyons v. New York City R. Co., 97 N. Y. S. 1033.

50. The district court sitting as a court of probate has only such powers as are conferred by statute either expressly or by necessary implication. Could not try title to real estate on application for its sale to pay debts. In re Tuohy's Estate [Mont.] 83 P. 486.

51. See 6 C. L. 289.

52. See, also, Appeal and Review, 7 C. L. 128; Mandamus, 6 C. L. 496; Prohibition, Writ of, 6 C. L. 1102; Quo Warranto, 6 C. L. 1190, etc.

The extraordinary supervisory jurisdiction of the supreme court will not be exercised on an application showing no injury beyond the ordinary delays of litigation. Murphy v. Police Jury of St. Mary Parish, 117 La. 355, 41 So. 647. The supreme court will assume jurisdiction of an original proceeding in certiorari to review a judgment claimed to deprive the election judge of one party of the joint custody of the registration lists and of his share of the official ballots. People v. District Ct. Second Judicial Dist. [Colo.] 84 P. 694. An appellate court will not require a useless application to a lower court as a condition precedent to the exercise of its original jurisdiction in mandamus to compel action on the part of the clerk of that court. Where lower court had previously decided that a suit could not be brought therein. State v. Woodbury [Kan.] 87 P. 701. Under Const. 1875, art. 6, § 12, as amended in 1884, relating to the power of the court of appeals and the supreme court to issue original writs, the St. Louis court of appeals has no supervisory control by prohibition or otherwise over inferior courts in cases which are appealable directly to the supreme court only. Where constitutional question was involved. State v. Nortoni [Mo.] 98 S. W. 554. Has such jurisdiction only in cases where its jurisdiction is co-ordinate with that of supreme court. Id. That petition for writ of prohibition did not disclose that constitutional questions were involved in lower court did not confer jurisdiction to grant the writ, and supreme court could prohibit court of appeals from hearing issues thereon. Id. The power of superintending control given to circuit courts is limited by the means afforded for its exercise, viz., the functions of the original writs

stitution and statutes enumerate.[53] Except in these cases, their jurisdiction is appellate only.[54] Jurisdiction to grant injunctive relief pending an appeal is limited to cases where the appeal would be rendered ineffectual by a continuation of the acts complained of.[55]

§ 10. *Appellate jurisdiction*[56] depends upon the existence of a judgment or order of which the court below had jurisdiction[57] and which is subject to review independently of other judgments.[58] This jurisdiction varies in the different states,[59]

referred to in connection with the grant, all of which pertain only to mattere of jurisdiction. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

53. **Arkansas:** Supreme court has no original jurisdiction to issue writs of quo warranto to prevent usurpation of office of road overseer, this not being included within its powers as to such writs given by the constitution. State v. Sams [Ark.] 98 S. W. 955.

Colorado: Under Const. art. 6, § 3, giving the supreme court power to issue write of habeas corpus, injunction, and other remedial writs, and to hear and determine the same, such court has original jurisdiction of a suit by the state to enjoin a conspiracy to perpetrate an election fraud. People v. Tool [Colo.] 86 P. 224.

Kansas: By the constitution of this state the original jurisdiction of the supreme court is limited to proceedings in quo warranto, mandamus, and habeas corpus, and even in these matters some special reason must exist for invoking its powers or parties will be relegated to courts of general jurisdiction for relief. In re Burnette [Kan.] 85 P. 575. Where an action is brought by the state to nullify an incorporation and the corporation alone, and not its corporators or officers, is made defendant, the supreme court on decreeing the incorporation void and ousting the corporation from exercising corporate power may make such orders restraining the officers or others related to the corporation from acting by virtue of such relation as may be necessary to make the decree of ouster effective (State v. Inner Belt R. Co. [Kan.] 87 P. 696), but it has no jurisdiction to grant an injunction against another corporation or individual to protect the rights of a third person or corporation (Id.).

United States: A conflict between the authorities of the states of Louisiana and Mississippi, arising out of the enforcement of the oyster legislation of those states and involving a dispute respecting the true boundary line, is within the original jurisdiction of the supreme court of the United States. Louisiana v. Mississippi, 202 U. S. 1, 50 Law. Ed. 913.

Wisconsin: The original jurisdiction of the supreme court to protect the general interest and welfare of the state and its people by the use of prerogative or quasi prerogative writs will not be exercised except with reference to questions affecting the sovereignty of the state, its franchisee, prerogatives, or the liberties of the people. State v. Goff [Wis.] 109 N. W. 628. Where a proceeding in the supreme court to determine which of two candidates at a primary election was entitled to have his name placed on the ballot also involved abstract legal questions as to the proper construction of the primary law which were of interest to the whole state, the proceeding would be retained for the purpose of determining those questions only. Id.

54. Being without original equity jurisdiction, supreme court had no power to issue injunction restraining landowner from interfering with operation of a railroad pending condemnation. Grand Rapids, etc., R. Co. v. Stevens, 143 Mich. 646, 13 Det. Leg. N. 86, 107 N. W. 436. Where a railroad entered defendant's property without authority under an invalid option which was set aside on appeal in a suit by the company to compel specific performance thereof, the supreme court had no jurisdiction to determine defendant's damages for the appropriation of the right of way. Const. art. 15, § 9, providing that the necessity and compensation for taking property for public use shall be ascertained by jury. Id. A constitutional jurisdiction which is solely appellate except the supervisory control of inferior courts and the original prerogative writs excludes power to supplant a lower judge disqualified by another judge. Substitute for Senate bill No. 71, eighth legislative assembly, held unconstitutional. In re Weston, 28 Mont. 207, 72 P. 512.

55. Appellant who had been enjoined from using defendant's premises as a passageway could not restrain defendant from interfering with the passageway pending appeal. Van Sicien v. Muir [Wash.] 87 P. 498.

56. See 6 C. L. 290.

57. Appellate jurisdiction of superior court depends upon jurisdiction of justice below. State v. Baskerville [N. C.] 53 S. E. 742. Where the foreclosure of a laborer's lien was clearly outside the jurisdiction of a justice of the peace, the county court on appeal had no jurisdiction to foreclose. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104. Where city court had no jurisdiction of subject-matter of an action to set aside its judgment for fraud, circuit court could acquire none by appeal. Steinmetz v. Hammond Co. [Ind.] 78 N. E. 628. A complaint stating a cause of action in ejectment gives a justice of the peace no jurisdiction. Hence, he cannot confer jurisdiction upon the district court by certifying the case to it. State v. District Ct. of Fifth Judicial Dist. [Mont.] 83 P. 597.

58. See Appeal and Review, 7 C. L. 128. There being no law authorizing an appeal to the supreme or to the appellate court from an order of the railroad commission as to interlocking crossings, the supreme court cannot, on an appeal from such an order to the appellate court, order a transfer of the cause to itself on the ground that constitutional questions are presented

especially where there are courts of intermediate appellate jurisdiction, and each statute must be consulted, since no general rule can be framed.[60] Whether the jurisdictional facts exist in the particular case and the tests thereof are considered in preceding sections.[61] In certain classes of cases courts of intermediate appeals

for decision. Grand Rapids & S. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981.

59. Colorado: The supreme court may review on certiorari a judgment in habeas corpus, whether such proceeding be considered civil or criminal, the judgment being in excess of the jurisdiction of the lower court. Martin v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 82; People v. District Ct. of Second Judicial Dist. [Colo.] 86 P. 87.

Kansas: The appellate jurisdiction of the supreme court is limited under the constitution to expounding the law and correcting errors appearing on the record in the proceedings of inferior courts, whether such proceedings be presented by appeal or error. In re Burnette [Kan.] 85 P. 575.

Louisiana: The supreme court has no jurisdiction of an appeal in a mandamus suit to compel a district attorney to join in a suit not yet instituted to annul a municipal charter or to recuse himself so that a district attorney pro tem might be appointed. State v. Lancaster [La.] 42 So. 583. When the court of appeal by a judgment which is allowed to become final declines jurisdiction of a cause and orders it transferred to the supreme court, and this court finds that it is without jurisdiction, the cause will be stricken. State v. Yazoo, etc., R. Co., 116 La. 189, 40 So. 630.

New York: Under Municipal Court Act, Laws 1902, p. 1583, c. 580, § 326, requiring the appellate court to order a new trial when the judgment is contrary to the evidence, the appellate term may on appeal from a judgment of the municipal court review the facts to determine whether the verdict is contrary to the evidence, though there is no appeal from an order denying a new trial. Feuer v. Brooklyn, etc., R. Co., 49 Misc. 629, 97 N. Y. S. 293. There being no provision in the constitution for a review by the court of appeals of the decision of the supreme court in reviewing an apportionment of legislative districts, such court has only its general appellate jurisdiction and cannot review the denial of a writ of mandamus to compel election notices to be made according to the old apportionment where it does not appear that the order was not made in the exercise of discretion. Sherill v. O'Brien [N. Y.] 79 N. E. 7.

Virginia: The appellate court has no authority to file a mere advisory opinion touching extraneous questions expressed for the purpose of influencing future litigation. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co. [Va.] 54 S. E. 593.

60. Illinois: Under Hurd's Rev. St. 1903, pp. 776, 777, c. 42, §§ 204-209, relating to proceedings to determine the amount of contribution to be made by a district which is benefited by the enlargement of a drain of another district, and not providing for an appeal, the general statute as to appeals from the county court governs and an appeal not involving a franchise, a freehold, the revenue, or the construction of the constitution, should be taken to the appellate and not to the supreme court. Union Drainage Dist. No. 1 v. Drainage Dist. No. 1, 220 Ill. 104, 77 N. E. 98.

Indiana: An appeal from a judgment in a suit to review the action of the railroad commission in proceedings under the interlocking switch act, brought under Railroad Commission Act (Acts 1905, pp. 89, 90, c. 53), § 6, must be taken to the appellate court under the express provision of the statute. Grand Trunk Western R. Co. v. Hunt [Ind.] 78 N. E. 975. The appellate court has no jurisdiction of an appeal from an order of the railroad commission in a proceeding under Acts 1897, pp. 237, 239, c. 157 (Burns' Ann. St. 1901, §§ 5158a-5158h), authorizing a petition by one road to compel the use of an interlocking device at a crossing with another road. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981. Where in the opinion of the Indiana appellate court a former case, decisive of the one at bar, should be overruled, the case will be transferred to the supreme court. State v. New, 36 Ind. App. 521, 76 N. E. 181. Jurisdiction on appeal in an action of mandate is in the supreme court. Funk v. State [Ind. App.] 76 N. E. 635.

Ohio: Inasmuch as the rank of courts and the right of appeal is a matter regulated by statute, the fact of the concurrent jurisdiction of the probate and common pleas courts in certain matters does not require that an appeal from the probate court in any one of those matters should be to the circuit instead of the common pleas court. Oberer v. State of Ohio, 8 Ohio C. C. (N. S.) 93. The circuit court has jurisdiction to review an order by the common pleas made on appeal from the overruling by a justice of the peace of a motion to discharge an attachment. Nemit v. Vargo, 8 Ohio C. C. (N. S.) 97. Under Rev. St. 1892, § 6709, it also has jurisdiction to review on error an order of the court of common pleas made on appeal from the probate court removing a guardian for cause. North v. Smith, 73 Ohio St. 247, 76 N. E. 619.

Tennessee: When the county court proceeds in an equity cause "according to the forms of chancery," an appeal lies from its judgment directly to the supreme court. Shannon's Code, § 4907. Key v. Harris [Tenn.] 92 S. W. 235.

Minnesota: Chapter 397, p. 664, Laws 1901, is constitutional, and limits the right of appeal from the municipal court of Duluth to the district court. No appeal lies direct to the supreme court. Dahlsten v. Anderson [Minn.] 109 N. W. 697.

Wisconsin: The constitutional grant of appellate jurisdiction given to circuit courts does not include power to review the proceedings of an inferior tribunal on the merits by the use of a writ of certiorari. The use thereof relates to judicial authority to supervise inferior courts and jurisdictions. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

61. See ante, §§ 4-8.

are given final jurisdiction and as to such it is exclusive of the courts of last resort.[62]

Jurisdiction to consider causes de novo on appeal and decide them on the law and the evidence according to the right of the case independent of the judgment and rulings of the lower court is original and not appellate.[63] A general constitutional appellate jurisdiction is distinct from the right of appeal in a given case[64] and can be exercised only after a legislative creation of the latter, either expressly or by necessary implication.[65] An appellate jurisdiction whose limits have not been prescribed by the constitution may be abridged or extended by statute as public policy may dictate.[66] The right of appeal being granted by the organic act of a territory, the repeal of a statute pursuant to which an appeal is taken does not deprive the appellate court of jurisdiction in the case.[67] A statute denying appellate jurisdiction of a cause which a lower court might have had original or appellate jurisdiction to try applies to the case made by the original petition and not to the case as actually tried.[68]

Appellate jurisdiction cannot be conferred by waiver or consent.[69] Where an appellate court is without jurisdiction of the subject-matter of an appeal, the only judgment it can render is one dismissing the appeal.[70]

§ 11. *Federal jurisdiction. A. Generally.*[71]—The Federal district courts have no general equity jurisdiction,[72] and a Federal court cannot consider equitable defenses in an action at law,[73] neither can jurisdiction to do so be conferred by consent or waiver.[74] Rights and remedies created by state statutes may be enforced and administered in the national courts if the statutory jurisdictional facts exist,[75] and providing they come within the general jurisdiction of such courts,[76] and

62. The supreme court, as at present constituted, has power to review questions of law involved in a judgment in proceedings to determine a boundary between towns, though Pub. St. 1901, c. 52, § 6, declares that the decision of the supreme court of the county shall be final in case of disagreement of the selectmen. Laws 1901, c. 78, §§ 2, 5. Town of Bath v. Haverhill, 73 N. H. 511, 63 A. 307.

63. Statute relating to appeals in disbarment cases held not to confer upon supreme court power to consider cause de novo. In re Burnette [Kan.] 85 P. 575. Supreme court after reversing judgment of disbarment could remand cause to trial court. Id.

64. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

65. State v. Chittenden, 127 Wis. 468, 107 N. W. 500. See, also, Appeal and Review, 7 C. L. 128.

66. City of Chattanooga v. Keith, 115 Tenn. 588, 94 S. W. 62.

67. Sena v. U. S. [C. C. A.] 147 F. 485.

68. Rev. St. 1895, art. 996, does not deprive supreme court of jurisdiction of a suit tried in the district court and appealed to the civil court of appeals where the original petition claimed an amount beyond the jurisdiction of the county court, though an amended petition on which the case was tried claimed a sum within the jurisdiction of such court. Nashville, etc., R. Co. v. Grayson County Nat. Bank [Tex.] 15 Tex. Ct. Rep. 678, 93 S. W. 431.

69. Wong Sing v. Independence, 47 Or. 231, 83 P. 387. An appeal must be taken within the statutory time in order to give the supreme court jurisdiction, and the parties cannot by stipulation extend such time. Anderson v. Halthusen Mercantile Co. [Utah] 83 P. 560.

70. Sena v. U. S. [C. C. A.] 147 F. 485.

71. See 6 C. L. 292.

72. Equity jurisdiction conferred by bankruptcy act limited to matters connected with administration of bankrupt estates. Brumby v. Jones [C. C. A.] 141 F. 318.

73. In action at law, defense that contract was procured by fraud not cognizable. Levi v. Mathews [C. C. A.] 145 F. 152.

74. That plaintiff filed replication to equitable defense did not confer jurisdiction. Levi v. Mathews [C. C. A.] 145 F. 152.

75. Such as diversity of citizenship, etc. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Since a railroad company in Louisiana has the right under the state constitution to proceed against the railroad commission to test the validity of a rule or order of the commission, foreign company may maintain a suit for the same purpose in a Federal court, the jurisdictional amount being involved. Railroad Commission v. Texas & P. R. Co. [C. C. A.] 144 F. 68. A state statute giving a tenant a right to maintain an action to remove a cloud upon the title to the leased premises will be given effect by the Federal courts. New York, etc., R. Co. v. New York, 145 F. 661.

76. Rev. Laws Mass. c. 159, § 3, cl. 7, giving the supreme and superior courts jurisdiction in equity of creditors' suits, is a statute enlarging the equitable jurisdiction of such courts rather than one merely enlarging equitable rights, and a Federal court is without jurisdiction of a suit thereunder. Ma-

rights acquired under Federal laws may be enforced by state courts competent to enforce rights of a like character, unless congress has given the Federal courts exclusive jurisdiction.[77] A suit in equity dependent upon a former suit of which a Federal court had jurisdiction may be maintained in that court without diversity of citizenship or a Federal question either to aid, enjoin, or regulate the original suit,[78] or to restrain, avoid, explain, or enforce the judgment or decree therein,[79] or to enforce or adjudicate liens upon or claims to property in the custody of the court in the original suit,[80] but the pendency in a state or other court of an action in personam involving no issue of which the Federal court has acquired exclusive jurisdiction and no claim to or lien upon any specific property under the control of a Federal court of equity presents no ground to sustain a bill to stay the action.[81]

A Federal court has no jurisdiction of an action against a state brought by a citizen of another state,[82] nor can it issue any injunction to stay proceedings in a state court;[83] but this prohibition is inapplicable where it acts in aid of its own jurisdiction already rightfully acquired,[84] or where the state court is without jurisdiction.[85]

thews Slate Co. v. Mathews, 148 F. 490. An enlargement of equitable rights may be administered by the Federal as well as by the state courts. Ames Realty Co. v. Big Indian Min. Co., 146 F. 166.

77. Laborers and materialmen could bring suit in state court in name of United States to enforce bond required by Act Cong. Aug. 13, 1894, c. 280, 28 Stat. 278 (U. S. Comp. St. 1901, p. 2523), to be given by contractors for the construction of public buildings. United States v. U. S. Fidelity & Guaranty Co., 78 Vt. 445, 63 A. 581. Under Kan. Civ. Code, § 23, providing that when plaintiff fails in an action otherwise than upon the merits he may commence a new action within one year, when the first action was prosecuted in a state court, a new action may be maintained in a Federal court. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

78. Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610.

79. Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610. A Federal court sitting in equity may by means of a dependent suit and by means of injunctions or writs of assistance enforce its decrees and protect titles made thereunder against relitigation in state or other courts of issues it has determined (Guardian Trust Co. v. Kansas City Southern R. Co. [C. C. A.] 146 F. 337), and against litigation of questions of which it has acquired and retained exclusive jurisdiction (Id.).

80. Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610. A dependent suit must be for one of the purposes specified, though after jurisdiction is acquired by means of such a suit the court may determine the entire controversy in a proper case. Id. Cannot be maintained to adjudicate the rights of persons not parties to or in privity with the original action, except where they claim an interest in property in the custody of the court. Id.

81. Guardian Trust Co. v. Kansas City Southern R. Co. [C. C. A.] 146 F. 337. An action in personam against purchaser at a foreclosure sale upon his alleged liability to pay a debt of the mortgagor is not an invasion of the exclusive jurisdiction of the court which rendered the decree reserving jurisdiction to determine the superiority of other liens to the lien of the mortgage, in a case in which the purchaser's liability for such a debt has not been litigated in the foreclosure suit. Id.

82. Suit to restrain state officers from enforcing by judicial proceedings a statute alleged to be unconstitutional is a suit against the state prohibited by eleventh amendment to Federal Constitution. Hutchinson v. Smith, 140 F. 982. In a Federal suit against state commissioners for an injunction, the jurisdiction of the court is so doubtful that a preliminary injunction will not be granted where the real purpose is to enforce a contract with the state according to complainant's interpretation thereof which is denied by defendants. Smith v. Alexander, 146 F. 106. A suit by railroad companies against a state railroad commission to enjoin the enforcement of illegal rates and fines imposed by it for past violation of its orders is not a suit against the state prohibited by the eleventh constitutional amendment. Railroad Commission of Louisiana v. Texas & P. R. Co. [C. C. A.] 144 F. 68.

83. Mississippi railroad commission is not a state court within the prohibition against enjoining proceedings in a state court. Mississippi R. Commission v. Illinois Cent. R. Co., 27 S. Ct. 90. Application to commission for an order against a railway company was not a proceeding in a state court merely because the commission would require the aid of the state court in the enforcement of its order. Id.

84. Railroad Commission of Louisiana v. Texas & P. R. Co. [C. C. A.] 144 F. 68; St. Louis Min. & Mill. Co. v. Montana Min. Co., 148 F. 450. A party who has prosecuted an action in the Federal courts until judgment is finally rendered against him on appeal will not be permitted to render such judgment ineffectual by maintaining a new suit for the same purpose in a state court. Id. Injunction to restrain enforcement by railroad commission of illegal rates and fines for violation of its orders held not prohibited by Rev. St. § 720 (U. S. Comp. St. 1901, p. 581), prohibiting injunctions in Federal courts to

Suits arising under the patent[86] and copyright laws[87] are within the jurisdiction of the United States courts.

The supreme court and circuit courts of appeals are each invested with the same power to issue writs of habeas corpus within their respective territorial appellate jurisdictions,[88] and this power extends to cases not reviewable in these courts by error or appeal.[89] No Federal question being involved and no diversity of citizenship alleged, a Federal court is without jurisdiction of an original proceeding in habeas corpus for the discharge of a state prisoner.[90] The jurisdiction of a Federal court to release on habeas corpus persons in the military service of the United States held in the custody of state authorities should be exercised only in cases of peculiar urgency.[91] The circuit court of appeals has no jurisdiction of an original and independent proceeding in habeas corpus[92] or certiorari,[93] and the circuit courts may issue mandamus only in aid of a jurisdiction already acquired.[94] A Federal court has power to enter judgment on an award of arbitrators.[95]

The United States courts in the territories, and the supreme court in reviewing their decisions, do not exercise a constitutional but a legislative jurisdiction conferred by congress.[96] The United States courts in the Indian Territory have juris-

stay proceedings in a state court. Railroad Commission of Louisiana v. Texas & P. R. Co. [C. C. A.] 144 F. 68. Ancillary relief in a Federal court by way of injunction in aid of its former decree enjoining the collection of state taxes rendered in a suit in which jurisdiction of the state and its officers had been acquired is not forbidden, either as a suit against the state, or as an injunction to stay proceedings in a state court. Gunter v. Atlantic Coast Line R. Co., 200 U. S. 273, 50 Law. Ed. 477. Question of adequate remedy at law was foreclosed by original decree and could not be urged against relief. Id. A Federal court is not prevented from granting an injunction restraining a party from making a wrongful use of an execution on a judgment in a state court for the purpose of defeating a trust sought to be established in the Federal court. Linton v. Safe Deposit & Title Guaranty Co., 147 F. 824.

85. Nonresident land owner not made party to condemnation proceedings could restrain the trespass. Colorado Eastern R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 898.

86. If a suit involves the question of infringement of a patent, it is within the jurisdiction of the United States circuit court, though the ownership of the patent or other contract rights are also involved. Harrington v. Atlantic & Pacific Tel. Co., 143 F. 329. Where manager of a corporation transferred to it certain patents in violation of a trust under which they had been assigned to him by the owners, and corporation thereafter used the patents, a suit against him and the corporation arose under the patent laws. Id. The Federal courts have exclusive jurisdiction of suits for infringement of patents, whether brought against original patentees or others. Aberthaw Const. Co. v. Ransome [Mass.] 78 N. E. 485.

87. A suit the primary and controlling purpose of which is to enforce a right secured by the copyright laws which is being infringed is a suit under those laws and within the jurisdiction of the Federal circuit courts, although it incidentally involves the validity and effect of a contract through which complainant derives title. Wooster v. Crane & Co. [C. C. A.] 147 F. 515. Where in a suit to restrain the sale of complainant's copyrighted publications at less than the regular prices there was neither diversity of citizenship nor a claim for damages in the sum of $2,000, questions not arising out of the copyright law could not be considered. Scribner v. Straus [C. C. A.] 147 F. 28.

88. Ex parte Moran [C. C. A.] 144 F. 594. Power of supreme court to issue writ except in cases affecting ambassadors, other public ministers or consuls, and those in which state is a party, is a part of its appellate jurisdiction. Id.

89. Circuit court of appeals has jurisdiction to issue writ of habeas corpus to inquire into power of a court in Oklahoma Territory to imprison a person convicted of a capital crime. Ex parte Moran [C. C. A.] 144 F. 594.

90. Ex parte Moebus, 148 F. 39.

91. Not where prisoners contended that homicide was committed by them in discharge of Federal duty to apprehend deceased for larceny, but evidence was conflicting as to whether deceased refused to surrender. United States v. Lewis, 200 U. S. 1, 50 Law. Ed. 343.

92. Under court of appeals act it may issue the writ only when necessary for exercise of a jurisdiction already existing. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. 963.

93. Authority to issue as independent proceeding not given by court of appeals act where only question was whether an offense was within jurisdiction of Federal courts. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. 963.

94. Circuit court without jurisdiction of original action in mandamus to compel return of franchise tax collected under state law, though ground of relief is alleged violation of interstate commerce clause of Federal constitution. Covington & C. Bridge Co. v. Hager, 27 S. Ct. 24.

95. Burrell v. U. S. [C. C. A.] 147 F. 44.

96. By virtue of sovereignty of nation and

diction of an action of ejectment brought by an Indian allottee against one in possession of the allotment.[97] The circuit court special term of the supreme court of the District of Columbia has jurisdiction of an action against a railroad company for a violation of the so-called Federal "safety appliance acts" committed within the District.[98] The district court of Porto Rico sitting as a circuit court has no jurisdiction of a common-law action for a wrongful attachment.[99]

A Federal court has jurisdiction of a suit by citizens of other states to determine and award their shares in the estate of a decedent, no property having passed into the hands of an administrator or into the possession of a state court.[1]

A national bank receiver may sue in the Federal courts in actions at law regardless of the amount in controversy,[2] and in equity where the amount involved exceeds $500.[3]

A state court may entertain jurisdiction of a suit based on common-law rights relative to an interstate shipment of goods,[4] and such suit is not within the exclusive jurisdiction of the Federal courts by reason of the Interstate Commerce Act.[5] The fact that a vessel subject to mechanics' liens under a state statute may become subject to superior maritime liens by reason of being engaged in interstate commerce does not deprive the state courts of jurisdiction to enforce the statutory liens.[6] Under the statute admitting South Dakota into the Union and the constitution of that state, the state courts have no jurisdiction of actions involving the possession of Indian reservation lands.[7]

If a creditor has a justiciable demand and the requisite diversity of citizenship exists, his motive in seeking the jurisdiction of a Federal court is immaterial.[8] In order that the United States may become a party to a suit so as to confer Federal jurisdiction, it must have an interest in the suit.[9] The rule that the construction of the constitution or laws of a state by its supreme court is binding upon the Federal courts does not apply where such construction affects the jurisdiction of a Federal court.[10] Whether a state statute is strictly penal or so far remedial as to allow

power to make rules respecting Federal territory. Wallace v. Adams [C. C. A.] 143 F. 716. Before accrual of vested rights congress may disregard or review their decisions, though they were final under the law as it stood when they were rendered. Id. Power of supreme court and circuit court of appeals exclusively legislative. Ex parte Moran [C. C. A.] 144 F. 594.

97. Wallace v. Adams [C. C. A.] 143 F. 716. The fact that the Dawes Commission and the secretary of state have exclusive jurisdiction to determine matters relating to the allotment of land and to issue certificates which are conclusive evidence of the right of the allottee to the land therein described does not deprive these courts of jurisdiction to grant equitable relief on account of legal error, fraud, or mistake. Id.

98. Act Cong. March 2, 1893, and amendments. Statutes considered. United States v. Baltimore, etc., R. Co., 26 App. D. C. 581.

99. Must conform to local practice relative to attachments and damages in cases where attachments are wrongfully issued. Fernandez y Perez v. Perez y Fernandez, 200 U. S. 80, 50 Law. Ed. 942.

1. But is in part held by a receiver of the Federal court and in part by the surviving partner of decedent. Pourier v. McKinzie, 147 F. 287. Where in such case the right of a sole heir to all the property has been established, the court may order payment directly to him. Id.

2. Rankin v. Herod, 140 F. 661.

3. Act March 3, 1887, c. 373, § 4, 24 St. 554 (U. S. Comp. St. 1901, p. 514). Rankin v. Herod, 140 F. 661.

4. Halliday Mill. Co. v. Louisiana, etc., R. Co. [Ark.] 98 S. W. 374.

5. By its terms the provisions of the act are in addition to common-law rights. Suit for overcharges. Halliday Mill. Co. v. Louisiana, etc., R. Co. [Ark.] 98 S. W. 374. A state court has jurisdiction of actions against carriers to recover overcharges for shipments provided the overcharges are not such as fall within the meaning of the Interstate Commerce Act. Where carrier failed to post schedules as required by the act, shipper could recover charge in excess of contract rate. Wabash R. Co. v. Sloop [Mo.] 98 S. W. 607.

6. The Winnebago [C. C. A.] 141 F. 945.

7. Such as an action by a tribal Indian against an Indian agent for damages for destroying fences. Peano v. Brennan [S. D.] 106 N. W. 409.

8. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. 801.

9. The United States as plaintiff in a suit by materialmen on the bond of a contractor

an action thereon in a Federal court is a question of general jurisprudence to be determined by that court without regard to local decisions.[11]

Court of claims.[12]—The court of claims has jurisdiction of claims against the United States founded on the constitution or any law of congress except claims for pensions,[13] and claims for unliquidated damages in cases not sounding in tort which could be enforced in a court of admiralty if the United States were suable.[14] It may entertain a suit for the reformation of a contract with the Federal government and for recovery thereon as reformed.[15]

(§ 11) *B. As affected by diversity of citizenship.*[16]—The circuit courts of the United States have original jurisdiction of controversies between citizens of the state where suit is brought and citizens of other states,[17] provided the requisite amount is involved.[18] All the parties on one side of the suit must have a citizenship different from that of any of the parties on the other side,[19] but the real matter in dispute should determine how the parties are to be arranged for jurisdictional purposes,[20] hence, if a defendant is not an indispensable party, although a proper one, complainant may, if he chooses, dismiss his bill as to him;[21] and the fact that a co-defendant to a partnership bill may derive an incidental benefit from the litigation does not of itself render him an indispensable co-complainant so as to defeat the jurisdiction.[22] That a citizen defendant against whom no cause of action is stated is joined

for a public building is a mere nominal party whose presence cannot confer Federal jurisdiction. Burrell v. U. S. [C. C. A.] 147 F. 44.

10. United States v. Tully, 140 F. 899.

11. Malloy v. American Hide & Leather Co., 148 F. 482. The Massachusetts Employers' Liability act (Rev. Laws, c. 106, §§ 71-74), authorizing recovery for the death of an employee, is not a penal statute in such sense that an action based thereon may not be maintained in a Federal court. Id.

12. See 6 C. L. 297.

13. Tucker Act (Act March 3, 1887, c. 359, 24 St. 505 [U. S. Comp. St. 1901, pp. 752, 753]) § 1. Circuit court held to have jurisdiction of claim for tobacco tax rebate, though it involved no contractual obligation. United States v. Hyams [C. C. A.] 146 F. 15.

14. A bill which is in effect a libel in personam for the salvage of duties paid over to the Federal government presents a claim which may properly be said to be one for unliquidated damages in a case "not sounding in tort" which could be enforced in a court of admiralty, if the United States were suable, so as to give jurisdiction thereof under the Tucker Act (24 St. 505, c. 359 [U. S. Comp. St. 1901, pp. 752, 753]), and the Federal district court therefore had jurisdiction, its jurisdiction being concurrent up to $1,000. United States v. Cornell Steamboat Co., 202 U. S. 184, 50 Law. Ed. 987.

15. Under act March 3, 1887, c. 359, § 1 (24 St. 505, U. S. Comp. St. 1901, p. 752), as against contention that court of claims has no equity jurisdiction. United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980.

16. See 6 C. L. 298.

17. Where an action on a public contractor's bond was brought by a bank in the state of Washington, and the contractor was a resident of California and his surety a corporation organized under the laws of Connecticut, the requisite diversity of citizenship existed. Burrell v. U. S. [C. C. A.] 147 F. 44. Where two or more corporations consolidate under the laws of different states into one corporation, the stockholders of the old corporations becoming stockholders of the new, the new creature is deemed, for the purpose of Federal jurisdiction, a corporation of each of the states under whose laws it is so consolidated. Wasley v. Chicago, etc., R. Co., 147 F. 608. Railroad companies held to have consolidated as above and the new corporation could not have a cause removed to the Federal court on the ground of diversity of citizenship where suit was brought against it in a court of one of the states. Id.

18. See ante, § 6.

19. Court has no jurisdiction when one defendant is citizen of same state with plaintiff. Mirabile Corp. v. Purvis, 143 F. 920. Where a cause of action is stated against several defendants, one or more of whom are citizens of the same state as plaintiff, the fact that they all join in a petition for removal to a Federal court does not confer jurisdiction on that court on the ground of diversity of citizenship. Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838.

20. One joint vendor who refused to join the others as complainant in suit for specific performance held properly made defendant where there was no dispute between her and the other defendant, but there was a dispute between her and the other vendors, though she was necessarily given a decree against her codefendant. Wood v. Deskins [C. C. A.] 141 F. 500.

21. In a suit by a lessee to set aside an invalid assessment against the property, the lessor is not an indispensable party and complainant may dismiss the bill as to him so as to give the court jurisdiction on the ground of diversity of citizenship. New York, etc., R. Co. v. New York, 145 F. 661.

22. Gaddie v. Mann, 147 F. 955. Where

with a non-citizen does not prevent the Federal court from taking jurisdiction by removal.[23] The jurisdiction of the district court of Porto Rico extends to causes in which the parties on both sides are subjects of a foreign state.[24]

When the jurisdiction of the circuit court is based solely upon diversity of citizenship, the suit may be maintained in the district in which either the plaintiff or defendant resides,[25] but this relates only to suits between citizens of different states of the Union;[26] and so an alien, though a resident in a state, can maintain a suit against a citizen of the United States only in the district of defendant's residence where jurisdiction is founded solely on diversity of citizenship.[27]

A suit will not lie in a Federal court by an assignee to recover the contents of a promissory note or chose in action if the instrument is payable to bearer and is not made by any corporation, unless such suit might have been prosecuted if no transfer had been made.[28] But where a transaction constitutes in effect a direct delivery of a chose by defendant to plaintiff, the right of a mere go-between to have sued is immaterial.[29] In a suit in a Federal circuit court by a trustee in bankruptcy to recover money alleged to have been due the bankrupt at or prior to the adjudication, the citizenship of the trustee is immaterial provided the citizenship of the bankrupt and defendant is such that the former might have sued in a Federal court but for the bankruptcy proceedings.[30] Colorable transfers of property or arrangements of parties are not tolerated.[31] The motives of the parties to a trans-

one partner commits acts which render the continuation of the partnership impossible, all the other partners are not required to join as complainants in a suit for dissolution; but such suit may be maintained by one joining the others as defendants, and the facts that the interest of other partners may be similar to his own and that they are citizens of the same state as the offending partner will not defeat the jurisdiction of a Federal court, complainant being a citizen of another state. Id.

23. Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838.

24. Subjects of Spain. Act March 2, 1901, § 3, 31 St. 953, c. 812. Ortega v. Lara, 202 U. S. 339, 50 Law. Ed. 1055.

25. United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144. An action cannot be maintained in a Federal court against a nonresident of the district over his objection when plaintiff is also a nonresident and jurisdiction is founded only on diversity of citizenship (Tice v. Hurley, 145 F. 391), though the court has jurisdiction of other defendants by reason of their residence within the district (Id.).

26. Miller v. New York Cent., etc., R. Co., 147 F. 771. Where jurisdiction is based solely on diversity of citizenship, a suit must be brought in a state of which plaintiff or defendant is a citizen and in the district therein of which he is an inhabitant or resident. Act Aug. 13, 1888, c. 866, § 1, 25 St. 433 (U. S. Comp. St. 1901, p. 508). Id.

27. Clause of judiciary act providing that where jurisdiction is based solely on diversity of citizenship suit shall be brought only in the district of the residence of either plaintiff or defendant relates only to suits between citizens of different states of the Union. Miller v. New York, etc., R. Co., 147 F. 771.

28. A suit to foreclose trust deeds is within the prohibition of the act of August 13, 1888 (25 St. 434, c. 866, U. S. Comp. St. 1901, p. 508), § 1, though bill also prays for cancellation of a release of the deeds to grantor in fraud of complainant's rights. Kolze v. Hoadley, 200 U. S. 76, 50 Law. Ed. 377.

29. That defendant's treasurer to whom a promissory note sued on was made payable was a citizen of the same state as defendant did not prevent a nonresident from suing on the note where the note was indorsed to plaintiff before delivery and the consideration was paid by plaintiff directly to defendant. Blair v. Chicago, 201 U. S. 400, 50 Law. Ed. 801. An original beneficial owner can sue upon a note in a Federal court though an original but nominal payee by reason of his citizenship would have no such right. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288.

30. Under Act July 1, 1898 (30 St. 552, c. 541, U. S. Comp. St. 1901, p. 3431), § 23. Bush v. Elliott, 202 U. S. 477, 50 Law. Ed. 1114.

31. Where partners organized a corporation for the purpose of getting their separate interests in the form of collateral and to prevent partnership affairs going into court in case of death, the transfer was not colorable and collusive for the purpose of bringing into the Federal court a suit to quiet title to land constituting but a small part of the property. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282. To establish a claim that a suit in a Federal court by a nonresident stockholder of a local corporation against a city and the corporation to enjoin the enforcement of an ordinance is in fraud of the jurisdiction of the court, it is not sufficient that the company would be benefited by complainant's success, or that its officers express a wish for his success, or that his counsel represented the company in a prior suit brought by it. An agreement

fer of property will, however, not be inquired into if the transferror retains no interest.[32] In suits ancillary to litigation already pending, the citizenship of the parties is immaterial.[33]

(§ 11) *C. As affected by existence of Federal question.*[34]—A Federal question exists whenever a Federal statute,[35] a treaty, or the Federal constitution[36] is to be con-

between complainant and the company pursuant to which the suit was brought must be shown either directly or inferentially. Mills v. Chicago, 143 F. 430.

32. The fact that property is assigned to enable a nonresident to bring suit in a Federal court does not prevent the attaching of jurisdiction where the vendor does not reserve any right to a reconveyance and plaintiff is the real party in interest. Cole v. Philadelphia & E. R. Co., 140 F. 944.

33. Where a Federal court once acquires jurisdiction by reason of diverse citizenship of a suit against a railway company and has appointed a receiver, it does not lose jurisdiction when other parties interested in the property intervene and are made parties, even though some of them be citizens of the same state with those whose interests in the property are adverse to the interveners. Cole v. Philadelphia & E. R. Co., 140 F. 944. A suit in equity in a Federal court to enjoin the further prosecution of actions at law pending therein and of which the court has jurisdiction by reason of diversity of citizenship, and to enable complainant to make his defense, is ancillary thereto and within the jurisdiction of the court regardless of the citizenship of parties joined as defendants. South Penn Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507. A suit on the equity side of a Federal court to set aside a judgment of dismissal entered on the law side of the same court is ancillary to the action at law and within the jurisdiction of the court without regard to the citizenship of the parties. O'Connor v. O'Connor, 146 F. 994.

Cross bills beween defendants in a Federal suit to determine rights in the waters of a stream of which the court has jurisdiction by reason of diversity of citizenship between complainant and defendants are ancillary to the original suit and within the court's jurisdiction without regard to the citizenship of the parties thereto. Miller v. Rickey, 146 F. 574; Ames Realty Co. v. Big Indian Min. Co., 146 F. 166. That some of the cross bills were not filed until after service upon the parties in a suit brought by defendant in a state court after institution of the original suit in the Federal court did not affect the jurisdiction of the Federal court. Miller v. Rickey, 146 F. 574. Where a Federal court has jurisdiction of a suit against several defendants and plaintiff's relief is granted, but the case is retained for a determination of matters arising on a cross bill and growing directly out of matters involved in the original suit, jurisdiction is still retained and is not affected by the citizenship of the parties to the cross bill. Suit against grantor and grantees to set aside a conveyance and cross bill by latter against former. Craig v. Dorr [C. C. A.] 145 F. 307.

34. See 6 C. L. 302.

35. Federal question involved: Contention on part of railway company in suit for infection of cattle that the statute pursuant to which certain quarantine regulations were made was unconstitutional, and if constitutional did not authorize the secretary of agriculture to make the rules in question. Illinois Cent. R. Co. v. McKendree, 27 S. Ct. 153. Bill filed by holder of nonnegotiable note given by a bank which afterwards went into voluntary liquidation to exact stockholders' liability enforceable under Act June 30, 1876 (19 St. 63, c. 156, U. S. Comp. St. 1901, p. 3509), § 2. Wyman v. Wallace, 201 U. S. 230, 50 Law. Ed. 738.

Not involved: In ejectment, the mere fact that plaintiff's title is derived from an act of congress does not show a Federal question. Joy v. St. Louis, 201 U. S. 332, 50 Law. Ed. 776. A state suit for maliciously prosecuting a Federal trade mark suit does not in deciding for defendant imply that the trade mark suit was with probable cause; and if it did does not thereby raise a Federal question by withholding full faith and credit from the Federal decree which dismissed the trade mark suit on the merits, for a decree that there was no sufficient cause for the relief sought involves no decision that there was or was not probable cause. Burt v. Smith, 27 S. Ct. 37. The doctrine of the "Removal Cases" (115 U. S. 1, 5 Sup. Ct. 1113, 29 L. Ed. 319), that the fact that a corporation is created by act of congress makes a case arising under the laws of the United States should not be extended so as to apply to a defendant who is a mere servant of such corporation, and the circuit court has no jurisdiction of an action against an employer and an employee for the latter's negligence solely because the employer is a corporation created by act of congress. Texas & P. R. Co. v. Huber [Tex.] 15 Tex. Ct. Rep. 642, 92 S. W. 832.

36. Federal question involved: Bill to restrain municipal construction of water system on ground that it would impair obligation of contract held by complainant with municipality. Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 Law. Ed. 353; Mercantile Trust & Deposit Co. v. Columbus, 27 S. Ct. 83; City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. 1102. Suit to enjoin state officers from exercising powers conferred on them by a state statute where the ground of suit was that the action of the officers violated complainant's property rights under the Federal constitution. Douglas Park Jockey Club v. Grainger, 146 F. 414. Suit to enjoin the enforcement of an ordinance requiring a street railroad company to carry passengers without pay, where it was alleged that the ordinance deprived the company of its property without due process of law. Chicago City R. Co. v. Chicago, 142 F. 844. Bill by telephone company to enjoin unreasonable maximum telephone rates fixed by city under authority conferred by the legislature, alleging that complainant would be deprived of property without due

strued, or its effect or operation is involved, but not if the question is a local one[37] or involves only the state constitutions or statutes.[38] The suit must really and substantially involve a dispute as to the effect or construction of the constitution or some law or treaty of the United States,[39] and this must appear from plaintiff's statement of his own claim and cannot be aided by allegations as to defenses which might be interposed.[40] In addition to a Federal question, the jurisdictional amount must also be involved.[41]

(§ 11) *D. Averments and objections as to jurisdiction.*[42]—The jurisdictional fact of diversity of citizenship,[43] amount in controversy,[44] or existence of a Federal

process of law, though it also averred as a legal conclusion that ordinance also violated state constitution prohibiting impairment of freedom of contract. Ozark-Bell Tel. Co. v. Springfield, 140 F. 666.

Not involved: Assertion of invalidity under Federal constitution of certain statutes and ordinances alleged to constitute cloud on title which bill seeks to remove. Devine v. Los Angeles, 202 U. S. 313, 50 Law. Ed. 1046. Averments that grantees of land from Spain and Mexico whose titles had been confirmed by the United States were deprived of their property without due process, and that contract obligations were impaired by certain state statutes and a city charter which conferred upon defendant city only such rights as might have been vested in the state. Id. Suit to enjoin diversion by municipality of funds collected by it under legislative sanction, for a specific object, on theory that such diversion may cause increased taxation and thus deprive taxpayers of property without due process of law. Owensboro Water Works Co. v. Owensboro, 200 U. S. 38, 50 Law. Ed. 361.

37. Local questions: In ejectment where plaintiff claimed title to certain land under a patent from the United States and certain acts of congress, but petition showed that real controversy was whether plaintiff was entitled to accretions formed long after issuance of patent and passage of the acts. Joy v. St. Louis, 201 U. S. 332, 50 Law. Ed. 776. Nature and extent of riparian rights and rights in percolating waters of grantees of land from Spain and Mexico whose titles had been confirmed by the United States. Devine v. Los Angeles, 202 U. S. 313, 50 Law. Ed. 1046. A defense in an action by a state to recover land, so far as based upon a Spanish grant involved no Federal question, where neither the validity of any treaty nor of the grant was challenged. O'Conor v. Texas, 202 U. S. 501, 50 Law. Ed. 1120. What facts constitute a common-law marriage. Keen v. Keen, 201 U. S. 319, 50 Law. Ed. 772.

38. Questions respecting the construction of state statutes on which title to land depended held not to present Federal question reviewable by supreme court on error to state court. O'Conor v. Texas, 202 U. S. 501, 50 Law. Ed. 1120.

39. Devine v. Los Angeles, 202 U. S. 313, 50 Law. Ed. 1046; Montana Catholic Missions v. Missoula County, 200 U. S. 118, 50 Law. Ed. 398. Complaint in action to recover state taxes paid on cattle kept by a Jesuit society on an Indian reservation held not to show the existence of any Federal question, either on the theory that the beneficial ownership of the cattle was in the Indians or that the government by appropriations or otherwise had made complainant its agent to carry out its obligations to the Indians. Montana Catholic Missions v. Missoula County, 200 U. S. 118, 50 Law. Ed. 398. Carrier sued for loss of goods could not inject Federal question into case so as to confer appellate jurisdiction upon United States supreme court by contending that plaintiff having accepted a bill of lading limiting defendant's liability he must be presumed to know that only a reduced rate would be charged pursuant to schedules filed with Interstate Commerce Commission, and that any other construction of the contract would violate the Federal constitution. Phoenix Powder Mfg. Co. v. Wabash R. Co., 196 Mo. 663, 94 S. W. 235. Contention that proceedings under Conn. Pub. Laws, §§ 3694, 3995, by a railway company to condemn shares of stock of owner who refused to agree to the terms of a purchase, violated due process of law clause of Federal constitution and impaired contract obligations held not so frivolous as to justify dismissal of error to state court. Offield v. New York, etc., R. Co., 27 S. Ct. 72. Question whether California legislature could ratify conveyances made by the city of Monterey of pueblo lands, and afterwards patented to plaintiff, held not so far unsubstantial as to justify dismissal. City of Monterey v. Jacks, 27 S. Ct. 67.

40. In suit to quiet title under Cal. Code Civ. Proc. § 738, allegations that defendant's claims were based upon an erroneous construction of a treaty, certain acts of Congress, and the legislature of California, and the ordinances and charters of a city, did not give circuit court jurisdiction. Devine v. Los Angeles, 202 U. S. 313, 50 Law. Ed. 1046.

41. Shewalter v. Lexington, 143 F. 161. See ante, § 6.

42. See 6 C. L. 304.

43. Where in a suit against certain labor associations and its members to restrain a boycott the individual numbers were designated as citizens of the state, the naming of the associations as such and not as corporations was sufficient. Seattle Brew. & Malting Co. v. Hansen, 144 F. 1011. Allegation that plaintiff was "a resident of Washington and a citizen of Sweden" held to sufficiently allege plaintiff's alienage so as to sustain the jurisdiction of the circuit court, though Sweden was under a monarchial form of government, since the statement "citizen of Sweden" could refer only to plaintiff's nationality. Nichols Lumber Co. v. Franson, 27 S. Ct. 102.

question, must be distinctly alleged and not left to mere argument or inference. An averment of residence is not equivalent to one of citizenship,[45] but an allegation that plaintiff is a citizen of the United States and a resident of a certain state is a sufficient allegation of his citizenship in such state.[46] An amendment to show citizenship must allege its existence not only at the time the amendment is filed but also at the time the action was commenced.[47] The fact that a Federal question is involved must appear from a legal and logical statement of the facts such as is required in good pleading,[48] and it is not sufficient for a plaintiff to merely assert that the defense raises or will raise such question.[49] An allegation of jurisdictional facts is prima facie true and the burden is upon the opposing party both to allege and prove facts relied upon to defeat the jurisdiction.[50] A bill in equity filed in a Federal court and the issue of process thereon, and not the opinion or order of the court, determine the extent of the jurisdiction acquired.[51]

The removal of a cause does not preclude a defendant from challenging in the Federal court the jurisdiction of either the state or the Federal court over his person.[52] The right of a defendant to be sued only in the district of his residence when jurisdiction is founded only on diversity of citizenship is a personal privilege which he may waive[53] and does waive by removing a state action into the Federal court of another district,[54] but this rule is inapplicable where no personal jurisdiction is acquired in the state court and there is only a special appearance for the sole purpose of removal.[55] A defendant who is sued in his own state by a nonresident plaintiff cannot object to the jurisdiction of the court on the ground that a codefendant is being sued in a state other than that of his residence,[56] and the codefendant not being a necessary party, the fact that he is not served and does not appear does not affect the jurisdiction over defendant.[57]

44. Averments as to value of land held argumentative and to leave the court to make a calculation so as not to give jurisdiction. Dupree v. Leggette, 140 F. 776.

45. Averment of residence of plaintiff is not equivalent to averment of citizenship and does not give circuit court jurisdiction. Sanbo v. Union Pac. Coal Co. [C. C. A.] 140 F. 713.

46. Under fourteenth amendment to constitution. Clausen v. American Ice Co., 144 F. 723.

47. Sanbo v. Union Pac. Coal Co., 146 F. 80.

48. Where cause of action in ejectment did not show Federal question. Joy v. St. Louis, 201 U. S. 332, 50 Law. Ed. 776.

49. Not sufficient in ejectment to assert that construction of a patent and certain acts of Congress was in dispute where cause of action did not show a Federal question. Joy v. St. Louis, 201 U. S. 332, 50 Law. Ed. 776.

50. Gaddie v. Mann, 147 F. 955. Where complainant alleged citizenship in North Carolina and it was shown that he was a native of that state, had a family there, etc., evidence that he had been in Georgia in business, had taken part in a political meeting and voted at a party primary, held insufficient to defeat jurisdiction. Id. Proper allegation of plaintiff's citizenship can be controverted only by suitable pleading supported by proof. Every Evening Print. Co. v. Butler [C. C. A.] 144 F. 916. To justify the removal to a Federal court of a cause in which a citizen defendant against whom no cause of action is stated is joined with a noncitizen, defendant must allege facts showing a fraudulent joinder. Eastin v. Texas & P. R. Co. [Tex.] 92 S. W. 838.

Contra: Where jurisdictional facts are put in issue, the burden is upon the alleging party to prove them. Amount in controversy. Oregon R. & Nav. Co. v. Shell, 143 F. 1004.

51. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81.

52. Davis v. Cleveland, etc., R. Co., 146 F. 403.

53. Morris v. Clark Const. Co., 140 F. 756. Jurisdiction on account of diversity of citizenship is conferred on the circuit court by the first part of Act March 3, 1887, c. 373, § 1, 24 St. 552 (U. S. Comp. St. 1901, p. 508), the second part relating merely to the place where the jurisdiction may be exercised and is a mere personal exemption granted to defendant which he may waive. Iowa Lillooet Gold Min. Co. v. Bliss, 144 F. 446. A defendant who appears generally in the circuit court without claiming the benefit of his privilege to be sued in the district of his residence thereby waives his exemption. Id.

54. Where plaintiff was alien and defendant a foreign corporation. Morris v. Clark Const. Co., 140 F. 756. Removal from state to national court or joinder of objection to district with general demurrer waives objection that suit is pending in wrong district. United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144.

55. Applied on motion in Federal court to

Jurisdictional facts should be determined on an issue taken by plea with opportunity to both parties to adduce evidence in the regular way rather than on motion and ex parte affidavits.[58] In equity they may be put in issue by answer.[59]

§ 12. *Federal appellate jurisdiction. A. Inquiry into jurisdiction.*[60]—When it affirmatively appears that a subordinate Federal court has attemped to assume jurisdiction of a cause by removal from a state court without authority under any act of congress, orders of such court in furtherance of the removal will be reversed by the supreme court, and mandamus will be granted to compel such court to remand the cause.[61]

(§ 12) *B. Appeals between Federal courts.*[62]—An appeal lies directly to the supreme court in cases in which the jurisdiction of the circuit or district court is in issue,[63] or those involving the construction or application of the Federal constitution;[64] but if in addition to a constitutional question the case involves the construction of an act of congress,[65] or the jurisdiction of the lower court is grounded upon diversity of citizenship,[66] the jurisdiction of the supreme court is not exclusive but an appeal may be taken to the court of appeals. In certain private land claim cases an appeal is required to be taken directly to the United States supreme court if the decision is against the United States.[67]

quash writ of attachment issued in state court. Davis v. Cleveland, etc., R. Co., 146 F. 403.

56, 57. Schiffer v. Anderson [C. C. A.] 146 F. 457.

58. Diversity of citizenship. Gaddie v. Mann, 147 F. 955. Under the Kentucky practice the objection of a defendant to the maintenance of an action against him in a Federal court on the ground that neither he nor plaintiff is a resident of the district may be taken by demurrer where the facts appear on the face of the petition. Tice v. Hurley, 145 F. 391.

59. Oregon R. & Nav. Co. v. Shell, 143 F. 1004.

60. See 6 C. L. 306.

61. Commonwealth v. Powers, 201 U. S. 1, 50 Law. Ed. 633.

62. See 6 C. L. 307.

63. Where a demurrer to a bill in the circuit court assigned as grounds want of jurisdiction as a Federal court because neither diversity of citizenship nor any Federal question was disclosed and also want of "jurisdiction" for lack of equity in the bill, a decree dismissing the bill "for want of jurisdiction" must be construed to refer to real jurisdictional grounds and an appeal lies to the supreme court and not to the circuit court. Crawford v. McCarthy [C. C. A.] 148 F. 198. The circuit court of appeals has no jurisdiction to review a decision of the circuit court to the effect that it has no jurisdiction of an action (Campbell v. Golden Cycle Min. Co. [C. C. A.] 141 F. 610), but it may review a judgment for defendant on the merits rendered after jurisdiction has been sustained (Id.). Decree of dismissal without more is a decree that the court has jurisdiction and is reviewable by circuit court of appeals. Id. Under Act March 3, 1891 (26 St. 826, c. 517, U. S. Comp. St. 1901, p. 488), the supreme court, on a direct review of the question of the jurisdiction of the circuit court, may consider the certificate of the latter court for the purpose of supplying the failure of the record to show when and how the question of jurisdiction was raised (Nichols Lumber Co. v. Franson, 27 S. Ct. 102), but may not consider statements therein for the purpose of supplying elements of decision which it could not properly consider in an action at law without a bill of exceptions (Id.). It is better practice, however, to make apparent on the record the fact that the question of jurisdiction was raised and the elements upon which the decision of the question was based. Id.

64. A constitutional question must be real and substantial to establish a right to a direct appeal to the supreme court. Harris v. Rosenberger [C. C. A.] 145 F. 449. After it has once been directly determined by this court, it is no longer real and substantial. Id.

65. Where a suit though not one of diversity of citizenship depends not only upon a constitutional question but also upon the proper construction of an act of congress, the appellate jurisdiction of the supreme court is not exclusive (Harris v. Rosenberger [C. C. A.] 145 F. 449), but an appeal may be taken to the court of appeals (Id.).

66. Where the jurisdiction of the circuit court is grounded both upon diversity of citizenship and upon an independent constitutional question, the losing party may appeal to the circuit court of appeals and is not bound to resort directly to the supreme court. Mississippi R. Commission v. Illinois Cent. R. Co., 27 S. Ct. 90. Where it was alleged that a state statute violated Federal constitution. Love v. Busch [C. C. A.] 142 F. 429.

67. The appeal required by the act of June 22, 1860 (12 St. 85, 87, c. 188), § 11, to be taken to the supreme court of the United States if the decree is against the United States, is "otherwise provided by law" within Act March 3, 1891 (26 St. 828, c. 517, U. S. Comp. St. 1901, p. 550), § 6, making the circuit court of appeals the proper tribunal for review of final decisions of dis-

Judgments or decrees of the supreme court of the District of Columbia or of any of the territories of the United States in which is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, may be reviewed by the supreme court without regard to the sum or value in dispute,[68] providing there is a matter in dispute measurable by some sum or value in money.[69] The supreme court may review the final judgments of the Federal district court of Porto Rico in cases where a right claimed under an act of congress is denied.[70] An appeal lies from the supreme court of Arizona to the Federal supreme court in a habeas corpus proceeding only when the decision involves the question of personal freedom.[71]

The circuit court of appeals now has jurisdiction to review an interlocutory order granting or continuing an injunction or appointing a receiver, though it would not have jurisdiction of a final decree in the cause.[72] It has power under the bankruptcy act to superintend and revise in matter of law the proceedings of the several inferior courts of bankruptcy.[73] It has jurisdiction to review judgments of the supreme court of the territory of New Mexico in cases of conviction of crime not capital,[74] but criminal cases are reviewable by writ of error and not by appeal.[75] No appeal lies from a final order of the court of appeals to the supreme court where there is no amount in controversy.[76]

The circuit court is without jurisdiction to review a judgment of a district court in bankruptcy even though rendered coram non judice.[77]

trict court except, among other cases, "where it is otherwise provided by law." United States v. Dalcour, 27 S. Ct. 58.

68. A controversy as to the constitutional right of a territorial legislature to pass a specified law under the broad powers conferred by congress involves the validity of an authority exercised under the United States within Act March 3, 1885 (23 St. 443, c. 355, U. S. Comp. St. 1901, p. 572), § 2, defining the appellate jurisdiction of the Federal supreme court over the supreme courts of the territories. Territory of New Mexico v. Denver, etc., R. Co., 27 S. Ct. 1. The validity of an authority exercised under the United States is not drawn in question so as to become the basis of an appeal by a contention which goes only to the manner in which it was exercised. That requisite formalities prescribed for plaintiff's dismissal from classified civil service were not complied with did not sustain error to court of appeals of District of Columbia under Code D. C. § 233. United States v. Taft, 27 S. Ct. 148. On appeal from the supreme court of a territory, the jurisdiction of the supreme court of the United States is limited to a determination of whether the findings of fact support the judgment, in the absence of exceptions duly taken to rulings on the admission or rejection of evidence. Herrick v. Boquillas Land & Cattle Co., 200 U. S. 96, 50 Law. Ed. 388.

69. No appeal or error lies unless there is a matter in dispute measurable by some sum or value in money. Both sections of the act of March 3, 1885, c. 355, 23 St. 443, apply to cases where there is a matter in dispute measurable by some sum or value in money, although the amount is immaterial under § 2. Albright v. New Mexico, 200 U. S. 9, 50 Law. Ed. 346. Some sum or value must be in dispute. Territory of New Mexico v. Denver, etc., R. Co., 27 S. Ct. 1. Right of consignor to have a consignment shipped by a common carrier is measurable in money. Id. Liability to a fine on judgment of ouster in quo warranto, or the effect of such judgment in subsequent litigation over the emoluments of the office, does not make the matter in dispute in the quo warranto proceedings measurable by some sum or value in money. Albright v. New Mexico, 200 U. S. 9, 50 Law. Ed. 346.

70. Ruling of United district court of Porto Rico that recovery in an action should not be limited by a provision in the Porto Rico Civil Code held not a denial of a right claimed under a United States law on theory that such provision became a law of the United States by reason of the act of April 12, 1900 (31 St. 77, c. 91), § 8, continuing local laws in force. Ortega v. Lara, 202 U. S. 339, 50 Law. Ed. 1055.

71. A determination on habeas corpus as to who is the proper custodian of a child is not a decision "involving the question of personal freedom" so as to authorize an appeal. Under Rev. St. § 1909. New York Foundling Hospital v. Gatti, 27 S. Ct. 53.

72. Act Apr. 14, 1906, c. 1627, 34 St. 116, amending § 7 of Act March 3, 1891, 26 St. 828 (U. S. Comp. St. 1901, p. 550). Where jurisdiction of circuit court was based entirely on existence of Federal question. Grainger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513.

73. Question of validity of trust deed arising in bankruptcy proceedings in determining priority of claims held reviewable on petition to superintend and revise and not by appeal. Morgan v. First Nat. Bank [C. C. A.] 145 F. 466.

74, 75. Sena v. U. S. [C. C. A.] 147 F. 485.

76. Not from order of discharge on cer-

The general rule that the Federal courts have no jurisdiction of the subjects of divorce and alimony does not preclude an appeal under the statute relating to appeals from the supreme court of the Philippine Islands to review a decree denying divorce, alimony, and a division of the conjugal property.[78]

(§ 12) *C. Control over state courts.*[79]—Final judgments of the highest court of a state in which a decision in the suit could be had[80] where any title, right, privilege, or immunity is claimed under the constitution or statutes of the United States,[81] and the decision is against such rights specially set up and claimed,[82] may be reviewed by writ of error in the Federal supreme court.[83] The failure of a state court to pass upon a Federal question specially presented and relied upon does not defeat the appellate jurisdiction of the Federal supreme court if the necessary effect of the decision is to deny a Federal right, which, if recognized, would require a different judgment.[84] While the certificate of the state court may not import into the record a Federal question which in fact did not arise, it may serve to elucidate the determination of the existence of a Federal question.[85]

tiorari and habeas corpus. Whitney v. Dick, 202 U. S. 132, 50 Law. Ed. 963.

77. Hatch v. Curtin, 146 F. 200. And suit by adverse claimant of property against trustee in bankruptcy is expressly excluded by Bankruptcy Act where court would not have had jurisdiction if suit had been against bankrupt. Id.

78. Where alimony pendente lite and complainant's share of property amounted to over $25,000, appeal lay under act of July 1, 1902, § 10 (32 St. 691-695, c. 1369, U. S. Comp. St. Supp. 1905, p. 154). De La Rama v. De La Rama, 201 U. S. 303, 50 Law. Ed. 765. Where in such case the correctness of the denial of alimony and of a separation of the property cannot be determined without passing upon the weight of the evidence on which divorce was refused, the supreme court will review such evidence where the appeal is taken from the whole case. Id.

79. See 6 C. L. 308.

80. An inferior state court is the final court of a state where a Federal question can be decided, and is therefore the court to which error must be directed from the Federal supreme court where the highest state court dismisses an appeal to it solely for want of jurisdiction, even though it also considers the question and declares it to be without merit. Western Union Tel. Co. v. Hughes, 27 S. Ct. 162.

81. A party who insists that judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held to assert a right and immunity under such statutes within Rev. St. § 709, U. S. Comp. St. 1901, p. 575, providing for a writ of error from the Federal supreme court to the highest court of a state, though he may have a personal or affirmative right enforceable by direct action against his adversary. Contention that assignment of contract sued on was void under Federal statute. Nutt v. Knut, 200 U. S. 12, 50 Law. Ed. 348; Illinois Cent. R. Co. v. McKendree, 27 S. Ct. 153. Suit by trustee in bankruptcy to recover assets under bankruptcy law. Rector v. City Deposit Bank Co., 200 U. S. 405, 50 Law. Ed. 527.

82. A mere claim of right under the Federal constitution in objections to confirmation of an assessment, never afterwards brought to attention of trial or supreme court of the state is not sufficient to sustain error from United States supreme court. Hulbert v. Chicago, 202 U. S. 275, 50 Law. Ed. 1026. Statement in writ of error and petition for citation that certain rights and privileges were claimed under United States constitution and that state court decided against such rights held insufficient. Id. That chief justice of state court allowed the writ did not avail. Id. Federal questions which may be disregarded by highest state court either because not assigned or relied upon in argument will not serve as basis for error from Federal supreme court. Id. Contention that state court failed to give full faith and credit to Federal decree could not sustain error to supreme court where record failed to show such claim in state court. Burt v. Smith, 27 S. Ct. 37. Showing at every stage of litigation in state courts of intention of national bank to rely on Federal statute for immunity from liability as owner of shares in a partnership held sufficient to sustain appellate jurisdiction of United States supreme court, though bank did not in first instance anticipate the form in which immunity was finally denied, especially where state court certified that Federal question was involved. Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 Law. Ed. 1036.

83. A writ of error will lie from the supreme court of the United States to review the final judgment of a subordinate state court denying a Federal right specially set up or claimed if that court is the highest court of the state entitled to pass upon such claim of Federal right. Commonwealth v. Powers, 201 U. S. 1, 50 Law. Ed. 633.

84. Failure of state court to consider contention that acts of drainage commissioners would deprive defendant of property and deny equal protection of laws. Chicago, etc., R. Co. v. People, 200 U. S. 561, 50 Law. Ed. 596. Where street railway contended that city could not compel lowering or removal of a tunnel without impairing contract and depriving company of property. West Chicago St. R. Co. v. People, 201 U. S. 506, 50 Law. Ed. 845.

§ 13. *Acquisition and divestiture.*[86]—Jurisdiction is acquired by process or appearance. Process includes both personal and constructive service and judicial process against the res.[87] In suits in rem or quasi in rem, personal service within the jurisdiction is not necessary,[88] but the adjudication can affect only the res[89] and there can be no judgment in personam,[90] except in so far as the person is affected by the judgment in rem.[91] Constructive service may be had in a Federal court when the suit is one to enforce a lien upon or claim to property,[92] or to remove an incumbrance or cloud upon its title,[93] and in an ancillary suit, parties or privies in the original action may be served though they reside beyond the limits of the district.[94] Constructive service must be complete in order to give jurisdiction.[95] Jurisdiction acquired by process relates only to the cause of action alleged and not

85. Illinois Cent. R. Co. v. McKendree, 27 S. Ct. 153; Rector v. City Deposit Bank Co., 200 U. S. 405, 50 Law. Ed. 527. Held to make clear the fact that rights under bankrupt law were relied on and passed upon by state court in action by trustee in bankruptcy to recover assets alleged to belong to estate. Id. A certificate by the highest court of a state that a Federal question was raised and necessarily considered will sustain a writ of error to the United States supreme court as against an objection that the question was raised too late under the local procedure. Cincinnati, etc., Packet Co. v. Bay, 200 U. S. 179, 50 Law. Ed. 428.

86. See 6 C. L. 309. For manner of obtaining jurisdiction over corporations, see Corporations, 7 C. L. 862.

87. See Process, 6 C. L. 1078.

88. A decree for specific performance, acting upon the land itself, may be based upon service by publication. Clem v. Given's Ex'r [Va.] 55 S. E. 567. Upon removal by defendant of a cause to a Federal court, want of personal jurisdiction both in the state and Federal courts does not deprive the latter court of jurisdiction to render a judgment in rem by virtue of an attachment in the state court. Attachment lien preserved by Act March 3, 1875. Clark v. Wells, 27 S. Ct. 43.

89. Where substituted service is properly made under Municipal Court Act, Laws 1902, p. 1517, c. 580, § 83, in an attachment proceeding, the court may render judgment against defendant though he has not personally appeared but such judgment can be satisfied only out of the property attached. Dixon v. Carrucci, 49 Misc. 222, 97 N. Y. S. 380. General judgment against nonresident defendant based solely on attachment of real estate held effective only so far as relating to the property attached. May v. Getty, 140 N. C. 310, 53 S. E. 75.

90. Where Federal court had jurisdiction only by virtue of attachment in a state court it could not render a judgment in personam. Clark v. Wells, 27 S. Ct. 43. A libelant who has attached a foreign vessel on a bill in rem based on a claim which does not constitute a maritime lien cannot convert such libel by amendment into one in personam and proceed against the owner thereon where no monition was served and the owner has not entered a general appearance. The Lowlands, 147 F. 986.

91. In suit between partners to divide real property located within the state, court had jurisdiction to direct payment of amount found due plaintiff out of the undivided one-half of the property the title of which was independent, though the latter was a nonresident and made no appearance. Williams v. Williams, 221 Ill. 541, 77 N. E. 928.

92. To authorize a suit under Judiciary Act March 3, 1875, c. 137, § 8, 18 St. 472 (U. S. Comp. St. 1901, p. 513), to enforce a lien upon or claim to property or to remove an incumbrance or cloud upon its title after giving notice to nonresident defendants by order of court, the suit must be one directed primarily against specific property within the district and, if to enforce a lien, the lien must exist when suit is brought and must not be one sought to be created thereby. Jones v. Gould, 141 F. 698. Suit held to be primarily against certain syndicates for failure to perform their duty and not against property within the district purchased with plaintiff's money under the syndicate agreement and the syndicates being nonresidents, the court was without jurisdiction. Id.

93. A suit by a receiver to adjust equities existing between himself and nonresident defendants in whose behalf another defendant had obtained a judgment in his own name, which he is seeking to enforce against a fund in the receiver's hands, is one to remove an "incumbrance or lien or cloud upon the title to property within the district" within § 8, Act March 3, 1875, 18 St. 472, c. 137 (U. S. Comp. St. 1901, p. 513), and in which substituted service may be made upon the nonresident defendants as provided therein. Brown v. Pegram, 143 F. 701.

94. Where defendants in a suit on the equity side of a Federal court to set aside a judgment of dismissal entered on the law side of the same court were parties to the original action or in privity with them, service could be made upon them though they resided beyond the limits of the district. O'Connor v. O'Connor, 146 F. 994.

95. Where the papers on which an order allowing substituted service were not filed the required length of time before return day of the summons, the court acquired no jurisdiction. Stephens v. Molloy, 50 Misc. 518, 99 N. Y. S. 385. In an action against a nonresident upon substituted service only, the court acquires no jurisdiction of property within the state not seized by any process, unless such property is described in the moving papers upon which the order of publication is based. Disconto Gesellschaft v. Umbreit, 127 Wis. 651, 106 N. W. 821.

to matters constituting a new cause.[96] Personal service within the jurisdiction[97] or general voluntary appearance only can give jurisdiction in personam.[98] The necessity of process as notice may be waived.[99] While jurisdiction of the person may be conferred by the acts or consent of the parties,[1] jurisdiction of the subject-matter cannot be so conferred.[2]

96. Amendment held no new cause of action. Moore's Guardian v. Robinson, 29 Ky. L. R. 43, 91 S. W. 659.

97. See Process, 6 C. L. 1078. No valid judgment in personam can be rendered against a defendant without personal service upon him in a court of competent jurisdiction, or waiver of summons and voluntary appearance therein. Clark v. Wells, 27 S. Ct. 43. A personal judgment against a nonresident rendered by default on constructive service is void. Record held to show void judgment. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 672. Court held without authority to appoint guardian ad litem for infant defendant in partition not properly served with process, and judgment as to him was void. McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902. Court of Delaware could not acquire jurisdiction by constructive service over nonresidents who were representatives of one who was trustee under a will but not by order of any court. Martin v. Martin, 214 Pa. 389, 63 A. 1026. Nonresident not served and not a party to receivership proceedings except as represented by the corporation not conclusively bound by order assessing his stockholder's liability and professing to charge him with an obligation which he never assumed. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. A personal judgment for money only against a nonresident without personal service of process within the state where defendant did not appear in the action, is without any validity; and where the record of said judgment contains an affirmative finding that the service was by publication, and no statement that the court otherwise acquired jurisdiction over him, said record cannot be contradicted by evidence aliunde. Leman v. MacLennan, 7 Ohio C. C. (N. S.) 205. A judgment in personam in Nebraska against a citizen of Iowa is not authorized on personal service in Iowa. Bank of Horton v. Knox [Iowa] 109 N. W. 201.

98. See, also, Appearance, 7 C. L. 251. County court has jurisdiction of the persons of heirs who enter a personal appearance in proceedings to probate a will and expressly consent to the admission of the instrument offered as the last will of testator. Camplin v. Jackson, 34 Colo. 447, 83 P. 1017. Where court had jurisdiction of subject-matter and record recited that defendant appeared by counsel, the court prima facie had jurisdiction to enter judgment. Everett v. Wilson, 34 Colo. 476, 83 P. 211. The question of the jurisdiction of the circuit court to hear an appeal from a justice of the peace arising from the absence of one of the defendants cannot be raised by another defendant who entered a general appearance and took part in the trial, especially where the question is raised for the first time in the appellate court. Goode v. Illinois Tr. & Sav. Bank, 121 Ill. App. 161. Jurisdiction of a defendant cannot be questioned on appeal where defendant has demurred to and answered the bill in the cause. Rosenbleet v. Rosenbleet, 122 Ill. App. 408. Where by appearance defendant waived objection to jurisdiction in personam and as to the subject-matter the suit could be brought before any justice in the county, the justice thereby obtained jurisdiction of both defendant and the subject matter. Thompson v. Wood [Ind. T.] 91 S. W. 36. A defendant not served may not make a special appearance to resist an interlocutory order and then say that he was not in court for the purpose of a judgment on the merits. Blondel v. Ohlman [Iowa] 109 N. W. 806. Where the parties to a cause pending in justice court by consent transfer it to the district court before judgment, their appearance in such court confers jurisdiction of the cause. Farmers' Mut. Tel. Co. v. Howell [Iowa] 109 N. W. 294. Where one was not made defendant in justice court but was served and appeared in the county court after an appeal thereto and pleaded to the jurisdiction of the justice on the ground that the amount involved was too great, he could not attack collaterally the judgment rendered against him in the county court on the ground that this court had no jurisdiction of his person. Artusy v. Houston Ice & Brew. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 312, 94 S. W. 1106. Where one appears specially and objects to the jurisdiction of the court over his person and his objection is overruled, he does not waive his objection by answering and proceeding to trial (Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 P. 293; Stephens v. Molloy, 50 Misc. 518, 99 N. Y. S. 385; St. Louis, etc., R. Co. v. Clark [Okl.] 87 P. 430), but if he files a cross petition asking affirmative relief against plaintiff, he submits himself to the jurisdiction for the purposes of the entire action (Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 P. 293). A special appearance in a state court for the sole purpose of removing the case to a Federal court does not submit the person of a defendant who was not served to the jurisdiction of the state court, nor, upon removal to the Federal court, deprive him of the right to object to the manner of service upon him in that court. Clark v. Wells, 27 S. Ct. 43.

99. Held waived where note embodied a power of attorney authorizing an appearance and confession of judgment on failure to pay note at maturity. Hutchinson v. Palmer [Ala.] 40 So. 339. See Confession of Judgment, 7 C. L. 676.

1. When court has jurisdiction of subject-matter. State v. Fuller [Ala.] 41 So. 990. Where parties consented to transfer a cause from justice to district court before judgment and appeared in district court. Farmers' Mut. Tel. Co. v. Howell [Iowa] 109 N. W. 294. Voluntary appearance and making defense held waiver by express company of ob-

Special proceedings[3] and proceedings in courts of limited jurisdiction[4] must conform strictly to statute in order that jurisdiction may be conferred. When causes are transferred from one judicial district to another[5] or new judicial districts are established, the effect upon the jurisdictions involved depends upon the statute under which the change is made.[6]

Divestiture may be by ouster, termination, or suspension. Ouster of jurisdiction occurs when any plea or condition intervenes which takes it away,[7] transfers it, or shows reasons why it should be transferred to some other court.[8]

jection to jurisdiction on ground that suit was brought in wrong county where court had jurisdiction of subject-matter. Southern Exp. Co. v. B. R. Elec. Co. [Ga.] 55 S. E. 254. After joinder of issue by judgment by default, an exception to the jurisdiction of the court, ratione personae, comes too late. Code Prac. art. 333. West v. Lehmer, 115 La. 213, 38 So. 969. Jurisdiction of person of initial carrier held waived by letter stating that no point would be raised thereon. Farmers' Bank v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286.

2. Weinstein v. Douglas, 101 N. Y. S. 251; City of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co. [Md.] 65 A. 35. Parties cannot confer upon an appellate court jurisdiction by stipulation extending the time for appeal. Anderson v. Halthusen Merc. Co. [Utah] 83 P. 560. If a court has no jurisdiction of the subject-matter, a general appearance of the parties cannot confer jurisdiction upon the court to hear and determine the cause. Murphy v. People, 221 Ill. 127, 77 N. E. 439. Where the record did not show that a justice of the peace had jurisdiction of the subject-matter, the defect was not waived by defendant's appearance. Barnes v. Plessner [Mo. App.] 97 S. W. 626. Trustee in bankruptcy did not waive objection to jurisdiction of state court over subject-matter by answering over and asking affirmative relief after his demurrer to the jurisdiction had been overruled. Goodnough Merc. Co. v. Galloway [Or.] 84 P. 1049.

3. The district court has no jurisdiction of an action to require the water commissioner to recognize a change in the point of diversion by an owner of a water right who has not complied with Laws 1899, p. 235, c. 105, providing for notice to interested parties, though he had made the change before the act took effect. New Cache La Poudre Irr. Co. v. Arthur Irr. Co. [Colo.] 87 P. 799. Under Municipal Court Act (Lawe 1902, p. 1560, c. 580, § 241), an affidavit of good faith and that a controversy is real is essential to confer upon the municipal court jurisdiction of the subject-matter in a case brought before the court on an agreed statement of facts, and such affidavit cannot be waived. Weinstein v. Douglas, 101 N. Y. S. 251. The jurisdiction of a United States commissioner as ex officio probate judge to appoint guardians for insane and incompetent persons is wholly statutory, and to obtain such jurisdiction it must affirmatively appear that the essential provisions of the statute have been complied with. Martin v. White [C. C. A.] 146 F. 461. Proceeding void where person affected was not personally served. Id. Code Alaska, § 723, declaring that when jurisdiction is conferred upon a court or judicial officer all means of carrying it into effect are also given, and providing that if no course of procedure is pointed out any suitable mode of proceeding may be adopted, applies only to proceedings after jurisdiction has been acquired and where the course of proceeding is not specially provided. Id.

4. Probate courts being courts of limited jurisdiction, the preliminary statutory steps to acquire jurisdiction must be complied with, otherwise the decree is void. Jurisdiction of the subject-matter alone is not sufficient. Taber v. Douglass [Me.] 64 A. 653. A petition to the probate court is the foundation upon which to base its jurisdiction and petition must show authority in the court to make the decree prayed for. Id.

5. Under Gen. Laws 1899, p. 113, c. 75, authorizing the district judges of the district courts of Bexar county to transfer causes from one district to another, a judge of one district court may transfer to another district court a suit to set aside a judgment rendered in the former court and thus invest the latter court with jurisdiction inherent in the former to set aside the judgment. International & G. N. R. Co. v. Brisenio [Tex. Civ. App.] 14 Tex. Ct. Rep. 961, 92 S. W. 998.

6. Where a new county is created from a portion of an old one, and is attached to another district for judicial purposes, the records affecting property therein being transferred to it, the courts in such district have power to enforce judgments affecting property within the new county, though they were rendered in the old county and district. State v. Dist. Ct. of Ninth Judicial Dist. [Mont.] 86 P. 798. Under Act March 11, 1902, c. 183, § 7, 32 St. 66 (U. S. Comp. St. Supp. 1905, p. 114), dividing Texas into four Federal judicial districts and transferring to the courts of the new district causes of which such courts would have had jurisdiction if they had been constituted when such causes were commenced except that cases in which evidence had been taken should be retained in the courts where pending, an action in which evidence had been taken and in which a judgment of dismissal had been entered remains in the court which entered the judgment for the purpose of determining jurisdiction of an ancillary bill in equity to set aside the dismissal, though if an original suit it would be within the jurisdiction of the courts of the new district. O'Connor v. O'Connor, 146 F. 994.

7. A court of equity which has acquired jurisdiction of a suit to enjoin the infringement of a patent and recover damages will not lose it because pending suit the patent is assigned to another who is made complainant, but may grant injunction and also

Termination of jurisdiction takes place when there is a final adjudication completed which the court is without power to recall or alter[9] except by original proceeding, or when there is such an interruption in the proceedings as disables the court legally to resume or to effect a continuance thereof.[10] Where a plaintiff dismisses his case, the jurisdiction of the court ceases in the absence of any counterclaim upon which the court may proceed.[11]

award damages to both complainants. Leadam v. Ringgold & Co., 140 F. 611. Prior agreement in suit for damages and to enjoin infringement of patent, as to terms of settlement in case plaintiff's patent should be sustained, held not to oust equity jurisdiction. Victor Talking Mach. Co. v. American Graphophone Co., 140 F. 860. The circuit court having acquired full jurisdiction of a cause by removal from a state court does not lose it because service of summons is quashed on defendant's motion, but may permit plaintiff to file an amended petition and permit a new summons to issue thereon. United States Fidelity & Guaranty Co. v Woodson County Com'rs [C. C. A.] 145 F. 144.

8. Where the court assumed jurisdiction without objection and proceeded to final judgment, its jurisdiction could not be ousted pending a motion for a new trial as of right by a motion for change of venue. Bonham v. Doyle [Ind. App.] 79 N. E. 458.

9. Where a judge of the city court of New York took the default of the debtor in supplementary proceedings, he had jurisdiction to entertain a motion to open the default, and after his denial of the motion had power to hear a reargument and nullify his previous determination by opening the default. Morrison v. Stember, 49 Misc. 464, 98 N. Y. S. 850. Defective notice of a conditional order vacating a default judgment before a justice of the peace does not deprive the justice of jurisdiction over the subject-matter and he may on application of the moving party continue the hearing for proper notice. Brainard v. Butler Ryan & Co. [Neb.] 109 N. W. 766.

10. Ballinger's Ann. Codes & St. § 5090, is not mandatory so as to require the court to enter judgment, in an action on contract for money only, immediately upon the filing of proof of service on defendants or forfeit its jurisdiction. Delay of over four years held not to divest court of jurisdiction. Peirce v. National Bank [Wash.] 87 P. 488. After a judgment of the supreme court in an appeal in disbarment proceedings remanding the cause to the district court for trial, it is not essential to jurisdiction that the accusation be refiled in the district court. In re Burnette [Kan.] 85 P. 575. The omission of the supreme court to make a specific order relating to the transfer of the accusation to the district court and its custody pending the proceedings there does not deprive the district court of jurisdiction. Id. In view of recital in previous order that a proceeding to settle and distribute an estate had been retained for further orders, held the court had jurisdiction to confirm administrator's report. State v. Settle [N. C.] 54 S. E. 445. The municipal court has no power to render a judgment after the expiration of 14 days from the time a case is submitted to it for decision. City Button Works v. Cohn, 101 N. Y. S. 765. Where at the close of a trial it was stipulated that briefs should be submitted by January 15th, and that the time for decision should run from that date, the court was without jurisdiction to render judgment January 31st. Stewart v. New York City R. Co., 50 Misc. 631, 98 N. Y. S. 617. Where a plaintiff fails to appear in the municipal court at the time specified in the summons or on adjournment the action must be dismissed (Laws 1902, p. 1561, c. 580, § 248), and the court has no power to enter an order in favor of plaintiff merely because he had appeared on a previous date. Katz v. Schreckinger, 101 N. Y. S. 743. Under Municipal Court Act (Laws 1902, p. 1563, c. 580, § 254), limiting to five days the time in which the municipal court may amend its judgment, the court had no power after five days to amend a judgment erroneously rendered for plaintiff notwithstanding a tender so as to make it a judgment for defendant for costs. Lackner v. American Clothing Co., 112 App. Div. 438, 98 N. Y. S. 376. Has no jurisdiction to vacate an erroneous judgment not rendered on default after five days have expired from date of rendition. Quinn v. Schneider, 50 Misc. 630, 98 N. Y. S. 657. State of the record held to show that defendant in municipal court did not consent to an adjournment of more than eight days, and that the court therefore lost jurisdiction. Clemens v. Werner Co., 101 N. Y. S. 755. Court held without jurisdiction to set aside a default after six months from entry. Biensteadt v. Clinton Circuit Judge, 142 Mich. 633, 12 Det. Leg. N. 849, 105 N. W. 875. Where the rules of the quarter sessions provided for certain adjourned terms of court for the hearing of arguments and exceptions to the incorporation of a borough were filed at a regular term, the hearing thereon could be had at the next adjourned term though a regular term intervened, and in such case it was not necessary that the court should have entered a formal order adjourning the hearing to a day certain. Ivyland Borough, 27 Pa. Super. Ct. 19. Court cannot alter or vacate a decree after expiration of term of rendition. Spitznagle v. Cobleigh, 120 Ill. App. 191.

11. Where plaintiff dismissed action to set aside probate of will, court held without jurisdiction to proceed further on defendant's counterclaim to have the probate confirmed, since defendant could not have brought a direct action asking such relief. Davis v. Preston, 129 Iowa, 670, 106 N. W. 151. Plaintiff by remaining in the case and taking exceptions and waiting until the time for appeal had expired before instituting certiorari proceedings did not lose his right to question the jurisdiction of the court to proceed further in the case and render judgment for defendant on an invalid counterclaim. Id.

§ 14. *Objections to jurisdiction, inquiry thereof, and presumptions respecting it.*[12]—The fundamental facts of jurisdiction must always appear and courts will at all stages inquire thereof or entertain objections thereto.[13] The duty of spontaneously inquiring into their own jurisdiction is particularly emphasized in the Federal courts[14] and some of the courts of appeal,[15] but it exists in all the courts.[16] While want of jurisdiction is usually raised by plea in abatement or other proper pleading,[17] such procedure is not always essential.[18] Mere informalities are waived if

12. See 6 C. L. 312.

13. Where want of jurisdiction of the subject-matter is apparent on the face of the proceedings or record in a cause, the objection may be raised for the first time in the supreme court. Steinmetz v. Hammond Co. [Ind.] 78 N. E. 628. An appellate court will determine for itself whether it has jurisdiction of an appeal and may determine its jurisdiction as a matter of fact on motion to dismiss. Not necessary to object to jurisdiction below. Yockey v. Woodbury County, 130 Iowa, 412, 106 N. W. 950. Objection to jurisdiction of subject-matter will be considered on appeal whether raised below or not. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. But where the parties agree to the settlement of a controversy in an equity court, the jurisdiction of equity will not be inquired into where the objection is raised for the first time on appeal and the record does not show an entire absence of general jurisdiction over the subject-matter. Williams v. Wetmore [Fla.] 41 So. 545. See Equity, 7 C. L. 1323. Objection to jurisdiction in divorce suit because of failure to allege residence within state could be raised for first time by motion in arrest of judgment. Stanbury v. Stanbury, 118 Mo. App. 427, 94 S. W. 566. A personal judgment by default may be attacked collaterally by showing by other parts of the record that at the time service was obtained and judgment rendered defendant was in fact a nonresident. See Judgments, 8 C. L. 530. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572.

14. The United States supreme court will of its own motion inquire into its own jurisdiction and that of the court below without any special exception being taken. Fernandez y Perez v. Perez y Fernandez, 202 U. S. 80, 50 Law. Ed. 942. Under Act March 3, 1875, c. 137, § 5, 18 St. 472 (U. S. Comp. St. 1901, p. 511), requiring the circuit court to stop proceedings in a case at any time when fraud upon its jurisdiction is discovered, it is immaterial in what manner or by what pleading the issue is raised. Briggs v. Traders' Co., 145 F. 254. When the pleadings show that a jurisdictional fact is in issue, the court must require proof to eliminate such question or else assume that it has no jurisdiction. Klenk v. Byrne, 143 F. 1008. A Federal judge becoming satisfied from the evidence that the subject-matter of the suit was transferred in fraud of the jurisdiction of the court, he may properly direct a verdict for defendant or dismiss the action, notwithstanding he had previously overruled motion to dismiss for that reason (Turnbull v. Ross [C. C. A.] 141 F. 649), and the circuit court of appeals may dismiss upon the same ground (Id.). If want of jurisdiction of a Federal court appears upon the face of the bill, it is the duty of the court to dismiss the suit as soon as the fact is discovered, no matter how far the cause has progressed (Briggs v. Traders' Co., 145 F. 254), but the objection being based merely on alleged extrinsic facts, the court should exercise its discretion to determine whether it will allow such issues of fact to be raised in view of the relations existing between the parties by reason of the proceedings already had (Id.). Where suit to dissolve a corporation of which court had jurisdiction on face of record had proceeded for 16 months and the relations of the parties had changed, a nonparticipating creditor could not intervene and raise an issue of fact upon the question of jurisdiction in respect to which it did not claim to have any more knowledge than it had when suit was commenced. Id.

15. The appellate court must take notice of its want of jurisdiction of a case appealed to it. Yakey v. Leich [Ind. App.] 76 N. E. 926.

16. Whenever a court becomes satisfied from well founded reasons that it has no jurisdiction, it is its duty to refuse to try the case. Abrams v. White, 11 Idaho, 497, 83 P. 602. A judge of a court of record may of his own motion, when approving the minutes at the close of the term, expunge therefrom a judgment which the court is, as to the subject-matter, without jurisdiction to render. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453. A judge being doubtful of his jurisdiction to try a case on account of irregularities in the proceedings, he should call counsel's attention to such irregularities in order that they may be corrected and should not arbitrarily refuse to try the case. Defects in service of summons, etc. State v. Murphy [Nev.] 85 P. 1004.

17. Fraudulent use of process properly asserted by plea in abatement. Frohlich v. Independent Glass Co., 144 Mich. 278, 13 Det. Leg. N. 152, 107 N. W. 889. Plea to jurisdiction commencing and terminating as follows held sufficient: "And the said A. G. in his own proper person comes and defends, etc., and says" * * * "and this the defendant is ready to verify, wherefore he prays judgment if the court here will take cognizance of the action aforesaid." Goldberg v. Harney, 122 Ill. App. 106. Want of jurisdiction of the person of a defendant is waived unless taken by demurrer or answer. Farmers' Bank v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286.

18. Jurisdictional facts need not necessarily appear from the pleadings, it being sufficient if they appear from the evidence. Amount involved on appeal. Martin v. Tellotte, 115 La. 769, 40 So. 41. Lack of jurisdiction of subject-matter, unlike lack of ju-

not seasonably challenged by proper objection.[19] In Missouri a defendant who makes timely objection to the jurisdiction of the justice court does not waive such objection by appealing to the circuit court.[20] An objection to jurisdiction over the subject-matter is a waiver of objection to jurisdiction over the person.[21] A defendant who is called as a witness for plaintiff does not waive want of jurisdiction over him as a party by testifying without raising any objection to such jurisdiction.[22]

A nonresident defendant served by publication may not object to jurisdiction over property seized on the ground that he was not the owner of it.[23] Jurisdiction of the subject-matter being conceded, a statutory requirement as to the place of its exercise is now generally regarded as conferring a mere personal privilege which may be waived by the party for whose benefit it is provided.[24]

Evidence and presumptions.[25]—Courts of general jurisdiction will be presumed to have acted within their jurisdiction,[26] but such presumption does not obtain as to courts which exercise only a limited or special jurisdiction.[27]

risdiction of person, may be set up by answer to the merits and need not be raised by plea. Divorce. Duke v. Duke [N. J. Eq.] 62 A. 466.

19. Absence of seal from summons and omission from praecipe of statement of nature of action held at most amendable defects in no way affecting jurisdiction, and defendant could not take advantage of them after default. Benedict v. Hadlow Co. [Fla.] 42 So. 239. Where a court has jurisdiction of the subject-matter of an information in the nature of quo warranto, any want of jurisdiction because of failure to obtain leave of court to file the information may be waived. Attorney General v. A. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868. A defendant waives his objection to the jurisdiction of the court on the ground of a fraudulent use of its process by pleading the general issue after his plea in abatement is overruled. Frohlich v. Independent Glass Co., 144 Mich. 278, 13 Det. Leg. N. 152, 107 N. W. 889. Where a cause is transferred to another court having jurisdiction of the subject-matter and defendant proceeds to trial without taking exception to a denial of his motion to strike from the docket, the court has jurisdiction to render judgment though the transfer was made pursuant to an invalid law. Pelham v. Miller [Ala.] 41 So. 418. Plea that amount sued for was too small could not be considered after continuance and long after answer to merits. O'Neil v. Murray [Tex. Civ. App.] 94 S. W. 1090. In a bill to foreclose a mortgage even if it is essential to allege that the personal property was within the jurisdiction of the court at the time of the commencement of the action, if there are allegations from which such fact may be inferred, the bill is good as against a demurrer not directed to this point. Tyler v. Toph [Fla.] 40 So. 624.

20. Bente v. Remington Typewriter Co., 116 Mo. App. 77, 91 S. W. 397. Objection to jurisdiction of person not waived by appeal after judgment. State v. Ayers, 116 Mo. App. 90, 91 S. W. 398.

21. Brainard v. Butler, Ryan & Co. [Neb.] 109 N. W. 766.

22. Where he had filed no plea and made no appearance. Mauck v. Rosser [Ga.] 55 S. E. 32.

23. He could in no wise be affected. Kneeland v. Weigley [Neb.] 107 N. W. 574.

24. Failure to challenge jurisdiction of court to foreclose mortgage on land in another county held waiver of objection. Snyder v. Pike [Utah] 83 P. 692. Initial carrier sued in county where it had no road or agent held to waive jurisdiction as to person by answering and participating in trial. Farmers' Bank v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286.

25. See 6 C. L. 314.

26. In such courts all presumptions are made in favor of the regularity of judgments and the jurisdiction of the court to render them. State v. Settle [N. C.] 54 S. E. 445. It will be presumed that the judgment of the circuit court was within its jurisdiction. Hawthorne v. Cartier Lumber Co., 121 Ill. App. 494. If in an action in a court of general jurisdiction there is nothing in the complaint to show whether the court has or has not jurisdiction, the question cannot be raised by demurrer, since jurisdiction will be presumed. Rudisell v. Jennings [Ind. App.] 77 N. E. 959. The district courts of Colorado have general jurisdiction both at law and in equity in proceedings to adjudicate water rights, and where a decree establishing such rights recites that notice was duly given, the absence from the record of proofs of notice does not show that the court was without jurisdiction. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042. Where the record does not show that a party appeared in a cause, the fact of such appearance will be presumed where essential to the jurisdiction of the lower court to enter an order dismissing an appeal to it for want of prosecution. Long v. Frank, 117 Ill. App. 207. A recital in a judgment or decree that a required notice was given to the defendants "in conformity of law" raises the presumption of due service and of jurisdiction of the persons in the absence of any inconsistent record or evidence. Wallace v. Adams [C. C. A.] 143 F. 716. Where record does not contain appellee's superseded pleadings, the presumption is that they stated an amount within jurisdiction of county court. Ft. Worth & D. C. R. Co. v. Underwood [Tex. Civ. App.] 98 S. W. 453.

27. The commissioners' court in exercising statutory powers is of limited jurisdiction and its records must affirmatively show the facts on which its authority rests. Com-

Hearing and trial of objections.[28]—An issue of fact upon which the jurisdiction of a Federal court depends may be submitted to the jury,[29] but not going to the right of action itself, it should not be submitted with other issues in the case.[30]

JURY.

§ 1. Necessity or Occasion for a Jury Trial (617).
A. As "Preserved" by the Constitutions (617). Denial of the Right; Conditions (619). The Character of Jury Guaranteed (619).
B. As Conferred Where the Common Law Did Not Give it (620).
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A. Challenge to the Array or Panel (629).
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C. Peremptory Challenges and Standing Jurors Aside (630). Number Allowed (631). Time for Challenge (631). The Order of Challenges (631).
D. Examination of Jurors and Trial and Decision of Challenges (632). Scope of Examination (632). Review of Trial of Challenges (633). Improper Overruling or Sustaining of a Challenge as a Ground for Reversal (633).
§ 9. Talesmen, Special Venires and Additional Jurors (633).
§ 10. Special and Struck Juries and Juries of Less than Twelve (635).
§ 11. Swearing (635).
§ 12. Custody and Discharge of Jurors and Jury (635).
§ 13. Compensation, Sustenance, and Comfort of Jurors (635).

§ 1. *Necessity or occasion for a jury trial. A. As "preserved" by the constitutions*[31] the right as it existed at common law is superior to legislative abridgment[32] and a general provision that the right "shall remain inviolate" creates no new rights but secures only those existing at the time of adoption or such as were recognized at common law.[33] No absolute right to a jury exists in equitable actions.[34] Where

missioners' Ct. v. Johnson [Ala.] 39 So. 910. In exercising the powers conferred upon it by Acts 1894-95, p. 749, relating to the establishment of stock law districts, its jurisdiction is limited and its records must show the existence of facts on which its authority to act rests. Order held to show jurisdiction, an error therein being merely clerical. Mayfield v. Tuscaloosa County Ct. Com'rs [Ala.] 41 So. 932. One other than an officer claiming a justification under a proceeding or process of a justice of the peace must affirmatively show the existence of the material facts upon which the jurisdiction of the justice depends. Rice v. Travis, 117 Ill. App. 644. The records of proceedings in the probate court must show its jurisdiction. Taber v. Douglass [Me.] 64 A. 653. Where in replevin before a justice of the peace the record did not disclose the township in which defendant resided or in what township the goods were found, it did not appear that the justice had jurisdiction and the judgment was void. Barnes v. Plessner [Mo. App.] 97 S. W. 626. Jurisdiction of municipal court not presumed. City Button Works v. Cohn, 101 N. Y. S. 765; Katz v. Schreckinger, 101 N. Y. S. 743. The county court, whether quorum or quarterly, has only statutory powers, and when its jurisdiction is questioned the party relying thereon is bound to point out the statute conferring jurisdiction. State v. True [Tenn.] 95 S. W. 1028.

28. See 6 C. L. 315.

29. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288.

30. Rule not changed by Act of 1875 authorizing the court to dismiss a case at any stage upon discovery of fraud upon its jurisdiction. Kirven v. Virginia-Carolina Chemical Co. [C. C. A.] 145 F. 288.

31. See 6 C. L. 316.

32. Constitutional provisions guarantying a trial by an impartial jury cannot be limited or modified by legislation. Lucas v. State [Neb.] 105 N. W. 976.

33. Const. art. 1, § 6. Marler v. Wear [Tenn.] 96 S. W. 447.

Cases in which the right did not exist at common law, and hence is not secured by such provision: Application for letters of administration. In re McClellan's Estate [S. D.] 107 N. W. 681. Contempt proceedings. Ex parte Allison [Tex.] 14 Tex. Ct. Rep. 687, 90 S. W. 870. Mandamus proceedings. Marler v. Wear [Tenn.] 96 S. W. 447. Equitable actions. Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338.

Act June 25, 1895 (P. L. 300), as amended by Act June 19, 1901 (P. L. 574), gives the party against whom proceedings for the appointment of a guardian are instituted a right to demand a jury, and hence does not violate the Declaration of Rights providing that the right to a jury shall remain inviolate. In re Coit [Pa.] 64 A. 597. The pro-

an action involves both legal and equitable relief, the primary relief sought, if warranted by the pleadings,[35] determines the right,[36] and the fact that the equitable relief is ultimately denied does not require the submission of the legal cause to a jury.[37] The right to trial by jury does not exist in contempt proceedings,[38] nor in proceedings for an alternative writ of mandate in Idaho.[39] The right as secured by the Federal constitution and the amendments thereto[40] extends to actions in the Federal courts of the territories,[41] but not to actions in the various state courts.[42]

ceeding provided by Porto Rico Code Civ. Proc. arts. 1409-1415, for the assessment of damages where an attachment has been wrongfully issued, is a special proceeding and not a suit at common law within the 7th amendment to Fed. Const. Fernandez y Perez v. Perez y Fernandez, 202 U. S. 80, 50 Law. Ed. 942. The 7th amendment to the Federal constitution is not applicable to a proceeding for an alternative writ to compel the trial court to submit certain issues to the jury. Nelson v. Steele [Idaho] 88 P. 95. Under U. S. Const. Amend. 7, one in possession of real estate, claiming the whole title, is entitled to a trial by jury of the issue of title. Carlson v. Sullivan [C. C. A.] 146 F. 476. Scire facias on a recognizance. Hollister v. U. S. [C. C. A.] 145 F. 773. Under Const. art. 6, § 6, declaring that the right to trial by jury shall remain inviolate and shall extend to all cases at law without regard to amount in controversy, parties petitioning for letters of administration are not entitled to a jury, such proceedings not being a "case at law." In re McClellan's Estate [S. D.] 107 N. W. 681.

34. Actions construed as proceedings in equity: Cancellation of a written instrument for alleged fraud whereby plaintiff's intestate was deprived of property. Curtice v. Dixon, 73 N. H. 393, 62 A. 492. An action to determine adverse claims tried under § 5630, Rev. Codes 1899. Blakemore v. Cooper [N. D.] 106 N. W. 566. Action for an injunction exclusively despite allegations for treble damages for trespass under Code Civ. Proc. §§ 1667, 1668. Page v. Herkimer Lumber Co. 109 App. Div. 391, 96 N. Y. S. 272. Action to cancel a deed and for relief against fraud and breach of trust and not an action in ejectment. Bluett v. Wilce [Wash.] 86 P. 853. Parties to a suit to quiet title, brought under 3 Gen. St. p. 3486, are not entitled to a trial by jury in an action at law as distinguished from the trial of an issue of law directed by the court of chancery. Brady v. Cartaret Realty Co. [N. J. Err. & App.] 64 A. 1078. A suit to determine title to stock in a building association, to cancel the certificate representing the stock, to restrain the payment of money thereon, and to require the issuance of a new certificate to plaintiff, is an action in equity, and, under Code Civ. Proc. § 592, triable by the court. Noble v. Learned [Cal. App.] 87 P. 402. A complaint alleging that plaintiff held money claimed by two defendants, that plaintiff was ignorant of their respective rights but was willing to pay it to the one entitled thereto, that they were threatening to sue, and praying that they be required to interplead together, etc., states an action in equity as well as within Gen. St. 1902, § 1019, and, under Gen. St. 1902, § 720, defendants had no right to a jury trial. Meriden Sav. Bank v. McCormack [Conn.] 64 A. 338. Where a receiver in bankruptcy takes possession of goods under order of court and a third person files an intervening petition claiming to be a bona fide purchaser, the proceeding is essentially in equity. Dokken v. Page [C. C. A.] 147 F. 438. Held, in an action against a trustee for a specific amount, that when the evidence developed that the amount was unliquidated and required an accounting, it was error for the court not to grant a motion to take the case from the jury and try it as an equity court. Goupille v. Chaput [Wash.] 86 P. 1058.

35. In a suit for a threshing bill and to foreclose the statutory lien, the equitable relief held not warranted by the pleadings. Gorthy v. Jarvis [N. D.] 108 N. W. 39.

36. Held, where the main issue was the right to a money judgment, that mere incidental equitable questions did not destroy the right to a jury trial. Heintz v. Anthony, 7 Ohio C. C. (N. S.) 235. In an action to abate a nuisance and for damages, the latter being merely incidental to the primary equitable action, neither party is entitled to a jury as of right. Meek v. De Latour, 2 Cal. App. 261, 83 P. 300.

37. Where in an action for equitable relief and damages the former is denied, the action for damages does not thereupon become triable by jury as of right. Miller v. Edison Elec. Illuminating Co., 184 N. Y. 17, 76 N. E. 734.

38. Violation of an injunction. Ex parte Allison [Tex. Cr. App.] 14 Tex. Ct. Rep. 409, 90 S. W. 492; People v. Tool [Colo.] 86 P. 224. One charged with the violation of an injunction under the prohibitory liquor law is not entitled to a jury trial by virtue of § 10 of the Bill of Rights (State v. Thomas [Kan.] 86 P. 499), nor under c. 106, p. 205, Laws 1897, since the amendment thereto by c. 123, p. 231, Laws 1901, abolishing the provision for jury trial, is valid as to title (Id.).

39. A special proceeding and not a common-law action. Nelson v. Steele [Idaho] 88 P. 95. Under Rev. St. 1887, § 4982, the submission of issues of fact made by the return to an alternative writ of mandate rests in the discretion of the court. Id.

40. Under the 7th amendment to the U. S. Const. and Rev. St. U. S. § 566 (U. S. Comp. St. 1901, p. 461), defendants, in a proceeding by scire facias on a forfeited recognizance in the Federal court in which the United States claims $1,000, are entitled to a jury trial. Hollister v. U. S. [C. C. A.] 145 F. 773.

41. Alaska: Though the proceedings are under a territorial statute. Carlson v. Sullivan [C. C. A.] 146 F. 476. Oklahoma. Bettge v. Territory [Okl.] 87 P. 897.

It is not essential to due process of law as secured by the 14th amendment that a jury be afforded.[43]

Neither the Federal constitution nor the ordinance of the Northwest Territory secures the right to a jury trial for violation of municipal ordinances,[44] and such right is not guaranteed by the Minnesota[45] or Georgia[46] state constitutions.

Denial of the right; conditions.[47]—The payment of the jury fee is sometimes made a condition precedent to the right to a jury.[48] The Federal guaranty of a trial by jury is not satisfied by affording accused such trial on appeal.[49] The right to trial by jury is not denied by a directed verdict upon unconflicting evidence,[50] by assessment of punishment by the court,[51] by restricting the right of the trial court to set aside verdicts of its own initiative,[52] or by an appellate court in making conclusive findings of fact,[53] or in reducing the degree of conviction in a criminal case.[54] Where issues of fact in equity are triable by jury, a statute authorizing an injunction to restrain the use of premises for gaming purposes does not deprive one of a trial by jury.[55] Since a summary investigation of the affairs of an office in no way involves the officers, it is not objectionable as depriving them of a jury trial.[56]

The character of jury guaranteed[57] requires a unanimous verdict except as modified by the constitution.[58] The jury contemplated by the Federal constitution and the amendments thereto is a common-law jury of twelve men.[59]

42. Ex parte Brown, 140 F. 461; Darden v. State [Ark.] 97 S. W. 449. The 4th, 5th and 6th Amendments. State v. Marciniak, 97 Minn. 355, 105 N. W. 965; Howard v. Com. of Ky., 200 U. S. 164, 50 Law. Ed. 421.

43. Where not authorized by the state statute. Ex parte Brown, 140 F. 461; State v. Marciniak, 97 Minn. 355, 105 N. W. 965.

44. Special Laws 1889, p. 601, c. 34, § 7, authorizing the municipal court of Minneapolis to try cases violating ordinance without a jury, held valid. State v. Marciniak, 97 Minn. 355, 105 N. W. 965.

45. Art. 1, § 6, held not to secure such right. State v. Marciniak, 97 Minn. 355, 105 N. W. 965.

46. Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751; Duren v. Thomasville, 125 Ga. 1, 53 S. E. 814.

47. See 6 C. L. 318.

48. Where no jury fee has been paid, plaintiff may have the case tried without a jury, notwithstanding it is on the jury docket. Ranson v. Leggett [Tex. Civ App.] 14 Tex. Ct. Rep. 250, 90 S. W. 668. Where in Wyoming a jury before a justice is discharged and paid from the deposit made, a party to the suit is not entitled to another jury trial unless he renews his demand and deposit. Rev. St. 1899, §§ 4375, 4381, 4382, construed. Pointer v. Jones [Wyo.] 85 P. 1050.

49. Bettge v. Territory [Okl.] 87 P. 897. Entitled to such right from the commencement of the trial. Id.

50. Civ. Code 1895, § 5331, authorizing the court to direct a verdict where there is no conflict in the evidence, held constitutional. Price v. Central of Georgia R. Co., 124 Ga. 899, 53 S. E. 455. Where a bill in equity was filed by a bankrupt's trustee to recover an alleged preference and the facts are admitted by demurrer, there is no case for the jury. In re Plant, 148 F. 37.

51. Rev. St. 1899, § 1838, providing that it shall be a felony for any person over sixteen years of age to have carnal knowledge of an unmarried female of previous chaste character between the ages of fourteen and eighteen, is not unconstitutional in that it permits the court, instead of the jury, to assess the punishment, and the offense is a felony whatever the punishment assessed may be. State v. Eubanks [Mo.] 97 S. W. 876.

52. Rev. Laws, c. 173, § 112, authorizing the court to set aside a verdict only upon motion in writing and on the grounds assigned therein. Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769.

53. The right to trial by jury as enjoyed at the time of the adoption of the constitution of 1870 is not infringed by Hurd's Rev. St. 1903, c. 110, § 88, authorizing the appellate court in the proper case to make conclusive findings of fact. Larkins v. Terminal R. Ass'n, 221 Ill. 428, 77 N. E. 678.

54. The modification of a conviction from murder to manslaughter does not violate any right to trial by jury under the constitution or statutes of Arkansas. Darden v. State [Ark.] 97 S. W 449.

55. Acts 1905 (29th Leg.), p. 372, c. 153, held valid. Ex parte Allison [Tex.] 16 Tex. Ct. Rep. 687, 90 S. W. 870, afg. [Tex. Cr. App.] 14 Tex. Ct Rep. 409, 90 S. W. 492.

56. Act Feb. 1879 (P. L. 1879, p. 27), as amended by Act March 23, 1898 (P. L. 1898, p. 155), authorizing such investigation upon petition, held constitutional. City of Hoboken v. O'Neill [N. J. Law] 64 A. 981.

57. See 6 C. L. 319.

58. Nine concurring jurors authorized to render a verdict. Logan v. Field, 192 Mo. 54, 90 S. W 127.

59. Bettge v. Territory [Okl.] 87 P. 897. The Oklahoma statute, providing that a person charged with a misdemeanor may be tried in the probate court by a jury of six, is void. Id. Code Civ. Proc. Alaska, § 171, p. 179 (Carter's Ann. Alaska Codes), author-

(§ 1) *B. As conferred where the common law did not give it.*[60]—The right to a trial by jury as existing at common law has been extended by statute in many states, thus, the assessment of damages resulting from the establishment of a drainage system,[61] injunction to restrain trespass where the real issue is the ownership of the land,[62] the validity of a will,[63] issues in bankruptcy,[64] contempt,[65] mandamus proceedings,[66] and the issue of adultery in divorce suits,[67] have been made triable by jury. Proceedings for the violation of an ordinance in Georgia,[68] for admeasurement of dower in South Carolina,[69] and the assessment of damages for wrongful attachment in Porto Rico,[70] are not triable by jury, nor are proceedings for the deportation of Chinese persons from the United States.[71] One prosecuted for cruelty to animals in Ohio is entitled to a jury trial.[72]

In equitable actions, submission rests in the discretion of the court.[73] In Idaho the right is given if legal issues are involved.[74] A controverted plea of privilege, as affecting jurisdiction, is triable by jury in Texas.[75]

izing juries of six in the trial of misdemeanors, held unconstitutional. Gius v. U. S. [C. C. A.] 141 F. 956.

60. See 6 C. L. 319.

61. Illinois: Drainage Act (2 Starr & C. Ann. St. 1896, p. 1508, c. 42). And since the assessment of damages includes the determination of benefits, the commissioners cannot assess the latter. Hull v. Sangamon River Drainage Dist., 219 Ill. 464, 76 N. E. 701.

62. Kentucky: Civ. Code Prac. § 12 (Bush v. Eastern Kentucky Timber & Lumber Co., 28 Ky. L. R. 773, 90 S. W. 547), and the fact that defendant admits plaintiff's ownership of a part does not affect the right where the ownership of the rest is put in issue (Id.).

63. Missouri: Rev. St. 1899, § 4622, allowing five years within which to appear in the circuit court to establish or contest a will after the probate court has acted thereon, and which provides that the issue of "will" or "no will" shall be submitted to the jury, makes such proceeding one at law triable by jury. Schaaf v. Peters [Mo. App.] 90 S. W. 1037.

64. In an involuntary bankruptcy proceeding against the members of an insolvent partnership, the question of membership is not an issue to be submitted to the jury under Bankr. Act July 1, 1898, c. 541, § 19a (In re Neasmith [C. C. A.] 147 F. 160), but where such issue is blended with the larger question of insolvency and is material in determining the liabilities, it may be submitted (Id.).

65. Georgia: Civ. Code 1895, § 4046, providing for a jury trial in certain proceedings for contempt, is inapplicable to a rule for contempt issued in an alimony case requiring the respondent to show cause why he should not comply with the order of the court requiring him to pay the same together with attorney's fees. Stokes v. Stokes [Ga.] 55 S. E. 1023.

66. Tennessee: Under Shannon's Code, § 5336, the submission of issues of fact in mandamus proceedings to the jury lies in the discretion of the court. Marler v. Wear [Tenn.] 96 S. W. 447.

67. New York: Code Civ. Proc. § 1757 (Wilcox v. Wilcox, 101 N. Y. S. 828), but where defendant alleges that she was insane at the time of the alleged adultery, she is not entitled to have such issue tried by a jury (Id.).

68. Civ. Code 1895, § 5702, providing that every person charged with an offense "against the laws of this state" shall be entitled to a jury trial, does not secure a jury trial to one charged with violating a city ordinance. Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 761.

69. Not an action for the recovery of money only or the possession of specific real property within Code Civ. Proc. 1902, § 274, providing for jury in such cases, but is within § 275 which leaves it to the court to submit the issue as he sees fit. Frierson v. Jenkins [S. C.] 56 S. E. 890.

70. The general provisions for a jury trial as to issues of fact in the Federal circuit courts, contained in U. S. Rev. St. § 648, U. S. Comp. St. 1901, p. 526, do not, in view of the act of April 12, 1900, § 8, continuing local laws in force in Porto Rico, prevent the district court, while exercising the jurisdiction of the circuit court, from following the special proceedings of Porto Rico Code Civ. Proc. arts. 1409-1415, for the assessment of damages for wrongful attachment without a jury. Fernandez y Perez v. Perez y Fernandez, 202 U. S. 80, 50 Law. Ed. 942.

71. Proceedings for the deportation of Chinese persons are not "causes" within Rev. St. § 566 (U. S. Comp. St. 1901, p. 461), providing that trials of issues of fact in the United States district courts in all causes, except cases in equity, etc., shall be by jury. Toy Tong v. U. S. [C. C. A.] 146 F. 343.

72. In a prosecution under Rev. St. 1906, § 3718a, upon a plea of not guilty, a justice has no jurisdiction to try the case without a jury unless it is waived. Simmons v. State [Ohio] 79 N. E. 555.

73. If an issue of fact is not one which comes within § 19a of the Bankr. Act July 1, 1898, c. 541, the submission thereof to the jury lies within the discretion of the court. In re Neasmith [C. C. A.] 147 F. 160. Where an ordinary action involved a firm settlement and the recasting of accounts, it was error to submit such issues to a jury instead of transferring it to the equity docket despite the failure of the movant to give bond for

(§ 1) *C. Demand, loss or waiver of right.*[76]—Where the right to trial by jury is absolute, no demand or order is necessary,[77] and the jury cannot be dispensed with unless waived.[78] But in many cases the right to a jury is conditioned upon a timely demand,[79] made in the prescribed manner,[80] and duly entered of record.[81] Where only particular issues remain[82] or are triable by jury,[83] the demand must be specifically directed to those issues. A demand by one party is usually sufficient to secure the rights of both.[84] The court may deny a demand for jury where the only purpose is for delay.[85] Where a jury trial was had in the court below, it will be presumed on appeal that the proper demand was made, nothing appearing to the contrary.[86]

What constitutes waiver.[87]—Waiver may be implied from the acts of the parties,[88] thus, one consenting to a trial to the court,[89] to a master in chancery,[90] or to

the performance of an adverse judgment. Davis v. Ferguson, 29 Ky. L. R. 214, 92 S. W. 968.

74. Where an answer in a suit to foreclose a mechanic's lien alleges a cross action for damages for nonperformance, the legal issues are triable by jury. Sandstrom v. Smith [Idaho] 86 P. 416.

75. Based upon nonresidence in the county where the action is brought. Hudgins v. Low [Tex. Civ. App.] 94 S. W. 411.

76. See 6 C. L. 319.

77. A defendant in an action to determine adverse claims under Code Civ. Proc. § 1638, who claims an estate in his answer, is entitled to a jury of right under Code Civ. Proc. §§ 1642, 968, and no application under § 970 is required. Ryan v. Murphy, 101 N. Y. S. 553. Since the right to have the issue of adultery in divorce proceedings submitted to the jury is secured by the Code, a notice of a special motion to submit, as provided by rule 31, is not necessary. Wilcox v. Wilcox, 101 N. Y. S. 828.

78. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 623. In a prosecution under Rev. St. 1906, § 3718a, a justice has no jurisdiction to try the case without a jury unless it is waived (Simmons v. State [Ohio] 79 N. E. 555), and a mere silence or failure to demand a jury does not constitute a waiver (Id.).

79. The demand for a jury in chancery proceeding in Tennessee may be made on the first day of the "trial term" and not of the first term at which it is triable. Rule 35 construed. Harris v. Bogle, 115 Tenn. 701, 92 S. W. 849. And where a jury in an equity action is not demanded in the pleadings, neither party can demand a jury until the rights of the other, under Shannon's Code, § 6284, and Chancery Rule 2, § 4, allowing time for taking evidence, have been enjoyed. Id. Under Acts 1901, p. 112, § 8, providing that in misdemeanor cases a demand must be made within 10 days after the court assumes jurisdiction, a demand made on January 1, is too late where the court acquired jurisdiction by appeal on November 23. Jones v. State [Ala.] 41 So. 299. A demand in the justice's court before removal is insufficient. Id. Failure of an alleged involuntary bankrupt to apply for a jury in writing at or before the time for answering, as provided by Bankr. Act July 1, 1898, c. 541, § 19a, 30 Stat. 551 (U. S. Comp. St. 1901, p. 3429), waives the right to a jury. In re Neasmith [C. C. A.] 147 F. 160.

80. One applying for a rehearing on a default judgment under Code 1896, § 3342, waives, under Acts 1888-89, p. 997, a right to a jury by failing to make a demand therefor in his petition. Baker v. Jackson [Ala.] 40 So. 348. The fact that the objections filed closed with a demand is insufficient where it was **not called to the court's attention** until the hearing began. Id. Under act of Sept. 27, 1883 (Acts 1882-83, p. 538, § 9), a trial by jury can be had in the city court of Floyd county only upon demand **in writing** of either party to a civil suit and the defendant in a criminal action. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395. Under Code Civ. Proc. §§ 2923, 2340, objectors to a sale of lands to pay the debts of a decedent must make a written demand for a jury. In re Tuohy's Estate [Mont.] 83 P. 486.

81. In Tennessee the entry must show that the demand was timely, and an entry on the judge's docket "Jury demanded," and on the clerk's docket "5 jury," is insufficient under Shannon's Code, §§ 4611-4613, which makes time of the demand an essential of the right. Louisville & N. R. Co. v. Timmons [Tenn.] 91 S. W. 1116.

82. Defendant had defaulted and the only issue was the assessment of damages. Clark v. Baker, 222 Mass. 13, 78 N. E. 455. A motion to reinstate on the jury docket or for leave to file a claim for a jury is insufficient. Id.

83. A general demand for a jury is insufficient in an action involving legal and equitable issues to require the submission of the former. Meek v. De Latour, 2 Cal. App. 261, 83 P. 300.

84. Elmore v. New York City R. Co., 100 N. Y. S. 1019.

85. Where plaintiff after filing a claim for a jury waives the same, motions made by defendant to reinstate the case on the jury calendar and for leave to file a claim for a jury are properly denied where their purpose is delay. Clark v. Baker, 222 Mass. 13, 78 N. E. 455.

86. Maryland Casualty Co. v. Lanham, 124 Ga. 859, 53 S. E. 395.

87. See 6 C. L. 320.

88. Where a single bill is filed against several defendants alleged to have received fraudulent preferences from a bankrupt to

a reference,[91] without objection, waives the jury. So too, the creation of equitable issues,[92] and failure to demand that the case be brought to trial while the jury is in attendance,[93] constitutes a waiver. The right to a jury trial of the issue of adultery in divorce proceedings as secured by statute in New York is not waived by defendant's noticing the cause for trial at special term, after a similar notice by plaintiff.[94] Waiver of right to trial by jury must be strictly construed.[95] Where the accused in a prosecution before the Jefferson city court in Georgia waives the jury, the court has no discretion but must try the case without a jury.[96]

§ 2. *Eligibility to and exemption from jury service.*[97]—In some states only freeholders are eligible to jury service,[98] but the fact that a juror who sat upon the case was not a freeholder or householder as required does not vitiate the verdict.[99]

A state may exempt certain classes from jury service,[1] and such exemptions are mere privileges[2] revocable at will,[3] though stated to be "permanent" in the act creating them.[4] Exemptions are frequently made in favor of those who have rendered jury service within a stated time.[5] The exemptions, however, are usually mere personal privileges[6] and not a disqualification.[7]

set the same aside, and defendants filed separate answers, they did not thereby waive the right to have their good faith tried by a jury. Boonville Nat. Bank v. Blakey [Ind.] 76 N. E. 529.

89. Where plaintiff consented to a trial to the court, did not object to the discharge of the jury or the reservation of the judge's decision, and presents requests to find, he waives his right to a jury. Hutchinson v. Ward, 99 N. Y. S. 708.

90. Where one in receivership proceedings tries issues of fact before the master in chancery without objection, he waives the right to demand a jury trial upon report to the court (San Jacinto Oil Co. v. Culbertson [Tex. Civ. App.] 96 S. W. 110), though the court may in its discretion order the issues submitted to a jury (Id.).

91. One making a successful application for a reference to a master cannot have a jury trial on a hearing on the report. Harris v. Bogle, 115 Tenn. 701, 92 S. W. 849. Where parties to an action acquiesced in the transfer of a case from the law to the equity docket and thereafter agreed that certain issues be referred to a master, they waived the right to a jury trial, though the case was irregularly transferred. Sharrock v. Kreiger [Ind. T.] 98 S. W. 161. A stipulation agreeing to submit all the differences to a referee who was to hear evidence and make report thereof constitutes a waiver of the right to a jury. Lindstrom v. Hope Lumber Co. [Idaho] 88 P. 92.

92. Where, in an action of replevin, intervenors secured an order which required plaintiff to amend his summons and complaint so as to meet the claim asserted by them under a bill of sale, which plaintiff did by alleging fraud and praying for cancellation, upon which issue was joined, the intervenors by creating equitable issues waived their right to jury trial. Hurley v. Walter [Wis.] 109 N. W. 558.

93. There being ample time. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141.

94. Wilcox v. Wilcox, 101 N. Y. S. 828.

95. Sharrock v. Kreiger [Ind. T.] 98 S. W. 161. Where, after a jury has been waived and the case transferred to the equity docket, Congress changes the existing law depriving the case of its equitable features, the parties have a right to have the case transferred back and are entitled to a trial by jury. Id.

96. Acts 1903, pp. 138, 145, construed. Wadkins v. State [Ga.] 56 S. E. 74.

97. See 6 C. L. 320.

98. Interest as tenant by curtesy initiate constitutes a freehold notwithstanding Const. art. 10, § 6, providing that the property of a female acquired before or after marriage shall remain her separate property, and may be devised, etc. Hodgin v. Southern R. Co. [N. C.] 55 S. E. 413. Under the express provisions of Act March 2, 1901 (Acts 1900-01, pp. 2003, 2004), which is in force in Montgomery county, a juror called in a **criminal case need not be** a freeholder or householder of the county. Gaines v. State [Ala.] 41 So. 865.

99. Reum v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 857, 90 S. W. 1109.

1. The excluding of lawyers, physicians, ministers, etc., from jury service does not deny to one accused due process of law as guaranteed by the 14th Amendment. Rawlins v. Georgia, 201 U. S. 638, 50 Law. Ed. 899.

2. Not a vested right. State v. Cantwell [N. C.] 55 S. E. 820.

3. Rev. 1905, § 1957, directing the county commissioners to place the names of all taxpayers of good character on the jury list, held to repeal Private Acts 1868-69, p. 72, c. 55, granting exemptions to the members of Wilmington fire company. State v. Cantwell [N. C.] 55 S. E. 820.

4. A permanent exemption acquired by five years of active service in the Wilmington fire department under Private Acts 1868-69, p. 72, c. 55, is not a protected contract right. State v. Cantwell [N. C.] 55 S. E. 820. Especially under Const. art 8, § 1, providing that all acts passed pursuant to such section creating corporations "may be altered," etc. Id.

5. Service as a grand juror within a year does not disqualify one under Act Cong. June

§ 3. *Disqualifications pertaining to the particular cause. Right to an unbiased and unprejudiced jury.*[8]—Parties are entitled to a jury that will decide the case upon the law as given[9] and the evidence adduced, hence, an opinion upon any material fact disqualifies,[10] and one who was a juror in an exactly similar case will be regarded as having such an opinion.[11] Such opinion, however, must be fixed[12] wheresoever derived,[13] and such as will prevent the juror from deciding the case upon the evidence,[14] and consequently qualified opinions based upon rumors[15] or newspaper reports[16] are not grounds for challenge, where the juror testifies he can render a fair and impartial verdict notwithstanding. Where, however, the news-

30, 1879, c. 52, § 2, 21 Stat. 43 (Ind. T. Ann. St. 1899, § 4193), to service as a petit juror. National Bank v. Schufelt [C. C. A.] 145 F. 509. The Act of Aug. 15, 1903 (Acts 1903, p. 83), declaring a juror who has served at any session of court ineligible for service at the next succeeding term, does not disqualify **jurors of a regular term** for service at a succeeding special term. Wall v. State [Ga.] 54 S. E. 815. By express provision of Code 1896, § 4988, **persons specially summoned in capital cases** are excepted from disqualification because of having rendered other service on juries. Harrison v. State, 144 Ala. 20, 40 So. 568. That a juror, who has been summoned on the **regular panel,** which has been **quashed** on a challenge to the array, has **again** been **summoned** under a special venire at the same term of court, is not good ground for challenge. Sheibley v. Fales [Neb.] 106 N. W. 1032.

6. Prior service. State v. Hopkins, 115 La. 786, 40 So. 166.

7. Exemption under Mansf. Dig. § 3995 (Ind. T. Ann. St. 1899, § 2675), for service within one year. National Bank v. Schufelt [C. C. A.] 145 F. 509. Rev. Civ. St. art. 3159a, and Code Cr. Proc. 1895, art. 647a, construed as granting personal exemptions to those who have served as a petit juror for one week and been called once on the special venire or called twice on the latter, and hence the court cannot set aside a venire in advance because they may all claim an exemption. Moore v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 252, 95 S. W. 514.

8. See 6 C. L. 321.

9. Mistaken ideas as to the effect of contributory negligence upon the liability of defendant do not disqualify a juror if he evinces an intention when the true rule is stated to him, of regarding it in rendering his verdict. Wheeling & L. E. R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28. Where a juror manifests an intention to decide correctly, the mere fact that he hesitates in answering whether he will comply with a certain provision of the law does not necessarily disqualify him. State v. Rodriguez, 115 La. 1004, 40 So. 438.

10. Preconceived opinion as to guilt or innocence of accused. Commonwealth v. Minney [Pa.] 65 A. 31. Believed that defendant left the country contrary to law and was therefore guilty. State v. Smith [Kan.] 85 P. 1020.

11. Under Rev. St. 1899, § 3785, a juror who assessed damages resulting to another lot from the same change of grade is disqualified. Hunt v. Columbia [Mo. App.] 97 S. W. 955. See, also, 6 C. L. 322, n. 90, 91.

12. Commonwealth v. Minney [Pa.] 65 A. 31.

13. Under Pen. Code, §§ 910, 915, an abiding opinion disqualifies notwithstanding it is based upon newspaper reports. Leigh v. Territory [Ariz.] 85 P. 948.

14. **Opinion held not to disqualify, it appearing that a fair and impartial verdict could be rendered:** Assumption that there was some evidence against accused from the fact that he was informed against. Stats v. Kinney [Wash.] 87 P. 1123. "Fixed" opinion which would require some evidence to remove. Walker v. State [Ala.] 41 So. 878. A feeling that, unless the evidence showed that accused was not connected, he would not be inclined to acquit, held not to disqualify under Code, § 5360. State v. Brown, 130 Iowa, 57, 106 N. W. 379. Opinion from newspaper reports and conversation with a juror who sat on a former trial, it not appearing what the conversation was. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 S. W. 224. Under Cr. Code, § 468. Lucas v. State [Neb.] 105 N. W. 976.

15. **Held not disqualified.** Melbourne v. State [Fla.] 40 So. 189. Rev. Code 1892, § 2355. Evans v. State, 87 Miss. 459, 40 So. 8. Kirby's Dig. § 2366. Sullins v. State [Ark.] 95 S. W. 159. Though it would require evidence to remove. People v. Brown, 148 Cal. 743, 84 P. 204; Leigh v. Territory [Ariz.] 85 P. 948. Opinion was fixed if the facts upon which it was based were true. Leigh v. Territory [Ariz.] 85 P. 948. Had not talked to any witness. State v. Miles [Mo.] 98 S. W. 25.

16. **Held not to disqualify.** State v. McCarver, 194 Mo. 717, 92 S. W. 684; Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 569, 95 S. W. 122; Daughtry v. State [Ark.] 96 S. W. 748; Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 S. W. 100. "Guessed" he could disregard his opinion. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723. Newspaper report of a confession of accused. State v. Church [Mo.] 98 S. W. 16. Though it would require some evidence to remove the opinion. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723; Williams v. Supreme Ct. of Honor, 221 Ill. 152, 77 N. E. 542. Especially where he testifies that he will give defendant the benefit of a reasonable doubt. People v. Brown, 148 Cal. 743, 84 P. 204. Rev. St. 1899, § 2616. State v. Darling [Mo.] 97 S. W. 592. Pen. Code, § 915. Leigh v. Territory [Ariz.] 85 P. 948. Kirby's Dig. § 2366. Sullins v. State [Ark.] 95 S. W. 159. Report of the confession and trial of an accomplice held not to disqualify under Rev. St. 1899, § 2616. State v. Myers, 198 Mo. 225, 94 S. W. 242.

papers report the evidence taken at the coroner's inquest,[17] a different rule seems to prevail. The fact that a juror has sat upon the trial of similar cases during the term does not render him incompetent.[18]

Prejudice of any kind which materially affects the case[19] as prejudice against one of the parties,[20] against a material witness,[21] or against the accused as a witness,[22] against corporations,[23] or for or against the particular business in which one of the parties is engaged,[24] disqualifies.

Conscientious scruples against convictions upon circumstantial evidence,[25] capital punishment,[26] or capital punishment on circumstantial evidence,[27] disqualifies, even though the infliction of the death penalty is discretionary with the jury.[28]

An opinion based upon a newspaper report written by one in whom the juror has confidence and who is to be a witness renders the juror incompetent, though, under Kirby's Dig. § 2366, an opinion based upon a newspaper report does not generally have such effect. Sullins v. State [Ark.] 95 S. W. 159.

17. Mere statements of jurors that they thought that the newspaper reports contained accurate statements of the evidence taken before the coroner's inquest and the preliminary hearing does not establish such fact. State v. Darling [Mo.] 97 S. W. 592.

18. Offenses against the liquor laws. Fletcher v. Com. [Va.] 56 S. E. 149.

19. Held error to overrule a challenge to a juror who states that he has a prejudice which "would probably unconsciously bias his opinion." Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. The fact that a juror was in possession of a free pass book upon defendant's railroad, which book had been issued to him as a trustee of a certain society long before his selection as juror, is not a ground for setting aside the verdict in the absence of a showing of prejudice. Shepard v. Lewiston, etc., R. Co. [Me.] 65 A. 20. Rev. St. c. 84, § 104, providing that the court may set aside a verdict where either party "during the same term" gave to any of the jurors a gift, is not applicable. Id.

20. A statement that he would convict defendant if he sat on any jury which tried him made in reference to a prior indictment returned by a grand jury of which the juror was a member does not disqualify, where he states that he can give the accused a fair trial. Robinson v. Com., 104 Va. 883, 52 S. E. 690. The fact that a juror was one of 500 who signed a petition urging a special term of court to try defendant, the petition reciting that signers believed that the facts and circumstances connected with the killing of decedent by defendant "more than amply justifies the court" in so doing, does not conclusively establish his incompetency. Hicks v. State [Ga.] 54 S. E. 807. A statement by a juror in a homicide case that it was strange that defendant's father sacrificed his home and team for his boy when he might be hanged or sent to the penitentiary, such comment being upon the sacrifice a father would make for his son, and not an expression of the guilt of the accused, does not show prejudice. Wallace v. State [Tex. Cr. App.] 97 S. W. 1050.

21. Prejudice against a material witness is not a ground of challenge under Rev. St. 1895, art. 3141, making prejudice against a "party" a disqualification (Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074), but is a ground for exercising the discretion vested by Rev. St. 1895, art. 3208, in the court to excuse persons in his opinion unfit for service (Id.). Being a discretionary ruling, it will not be disturbed unless it appears that the objecting party did not have a fair trial. Id.

22. Evidence held insufficient to show an undue prejudice. State v. Rodriguez, 115 La. 1004, 40 So. 438.

23. Not an abuse of discretion to overrule a challenge to a juror who stated that as between a corporation and individuals he would resolve doubts in favor of the latter, where he states that he has no prejudice against corporations and will render a verdict on the evidence. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096.

24. Held prejudiced in favor of railroads because of his former relations with them and a belief that they were unjustly held liable in many similar personal injury cases. Fitts v. Southern Pac. Co. [Cal.] 86 P. 710. Prejudiced against street car companies for having been thrown from a car some years before. Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. A juror who was "fearful" that he could not help being influenced by the fact that he had had trouble with another railroad properly excused. St. Louis & S. F. R. Co. v. Hooser [Tex. Civ. App.] 17 Tex. St. Rep. 27, 97 S. W. 708. In the prosecution for an unlawful sale of liquors, the fact that a juror belonged to an anti-saloon league (State v. Sultan [N. C.] 54 S. E. 841), or was an uncle of a witness who belonged to a vigilance committee that had employed attorneys to prosecute such violations, does not disqualify (King v. State [Tex. Cr. App.] 97 S. W. 488), nor does membership in an organization known as "Actual Settlers" disqualify in an action to try title (Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010).

25. Code 1896, § 5018. Whatley v. State, 144 Ala. 68, 39 So. 1014.

26. Commonwealth v. Minney [Pa.] 65 A. 31. Disqualified under Cr. Code 1896, § 5018, though he stated that he "would hang some men." Untreimer v. State [Ala.] 41 So. 285.

27. Under Code 1896, § 5019, authorizing the court to excuse any juror who appears unfit to serve, the court may properly excuse a juror in a homicide case who states that he would not hang a man on circumstantial evidence. Coker v. State, 144 Ala. 28, 40 So. 516.

Mere acquaintance or friendship,[29] or relationship,[30] unless within the prohibited degrees,[31] are not usually grounds for challenge, and the fact that one of the jurors was related within the prohibited degree does not vitiate the verdict.[32] One who is directly interested,[33] or in the employment of one who is interested in the litigation,[34] is usually disqualified for jury service.

Proof of disqualification.[35]—In passing upon the qualifications of a juror, the court is not concluded by the juror's statement that he could render a fair and impartial verdict,[36] but may consider the entire evidence in determining his fitness.[37]

§ 4. *Discretion of the court to excuse juror.*[38]—The court may excuse a juror for "good and sufficient cause,"[39] and it is not an abuse of discretion to excuse a juror whose family requires his personal attention because of sickness,[40] or a juror hostile to the accused where the defendant refuses to act.[41]

§ 5. *The jury list and drawing for the term.*[42]—The making of the jury list and the drawing for the term are largely regulated by statute.[43] The legal number

28. Under Pen. Code, § 910, subd. 14. Leigh v. Territory [Ariz.] 85 P. 948. Such discretion is to be exercised in view of the facts of the case, and not pursuant to the whim of the jurors. Haddix v. State [Neb.] 107 N. W. 781.

29. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907. The fact that a juror says that he thinks he is incompetent because the deceased was his friend is not disqualified where he further states that if sworn he will try the case upon the law and evidence just as if he had not known the deceased. State v. Bush, 117 La. 463, 41 So. 793. Sustaining a challenge to an uncle of one who was a close friend of defendant and who was present when the homicide was committed, held proper. Melbourne v. State [Fla.] 40 So. 189.

30. The fact that one of the jurors is a brother of one of the counsel in an expropriation proceeding is no ground for excusing him. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236.

31. One related within the prohibited degree to one jointly indicted with defendant though not on trial is disqualified. Moore v. State [Ala.] 40 So. 345.

32. Not a ground for a new trial though the relationship was unknown to the accused or his counsel until after trial. McCrimmon v. State [Ga.] 55 S. E. 481.

33. In an action against a county, the fact that a juror is a taxpayer therein does not disqualify him, especially in view of plaintiff's absolute right to have the case transferred to the adjoining county. Wilson v. Wapello County, 129 Iowa, 77, 105 N. W. 363.

34. Held in a prosecution of a baggage master for embezzlement of baggage that it is the better practice to exclude employes of the railroad, although not decided that it was error for the court to refuse so to do. Hopkins v. State [Fla.] 42 So. 52. Since a lessor railroad company is liable for negligence of the lessee resulting in injury to third persons, thus making the servants of the latter in effect servants of the former, they are disqualified to sit as a juror in an action against the lessor by a party injured. Georgia R. & Banking Co. v. Tice, 124 Ga. 459, 52 S. E. 916.

35. See 6 C. L. 323.

36. In determining whether a juror is so prejudiced as to disqualify him, the court should consider the facts stated as to the condition of his mind rather than his statement whether he could divest himself of such prejudice. Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354. Under Cr. Code, § 468, the statement by a juror that he can render an impartial verdict is not sufficient to qualify him. Lucas v. State [Neb.] 105 N. W. 976.

37. Must consider the conduct and demeanor, etc. Lucas v. State [Neb.] 105 N. W. 976. A juror who stated that he could disregard his scruples and be governed by the evidence held properly excused where he testified it would do violence to his conscience. Commonwealth v. Minney [Pa.] 65 A. 31.

Evidence held insufficient to show that a jury could render an impartial verdict despite his opinion. Lucas v. State [Neb.] 105 N. W. 976.

38. See 6 C. L. 323.

39. Gaines v. State [Ala.] 41 So. 865. Held no abuse of discretion for the court to discharge an accepted juror, it appearing that he was to be a witness in a case following and might not be in a condition to testify if the jury should be out all night. Stats v. White [Or.] 87 P. 137. Where it developed after a juror had been accepted that he was distantly related to defendant and his counsel, it was not an abuse of discretion for the court to dismiss him, he preferring not to sit (Id.), even though one of the parties has voluntarily exhausted his peremptory challenges (Id.).

40. Criminal case. Williams v. State [Ala.] 41 So. 992.

41. State v. Pointdexter, 117 La. 380, 41 So. 688.

42. See 6 C. L. 324.

43. Chap. 176, p. 659, Laws 1905, prescribing the manner of selecting the jurors in counties of less than 30,000, held unconstitutional, as its requirements are impossible of execution in some counties and therefore delays the administration of justice, contrary to art. 1, § 6, Const. State v. Reneau [Neb.] 106 N. W. 451. Venires for the second and succeeding weeks of the term of

should be drawn[44] at the proper time[45] and a list made as required.[46] The list must be prepared and the jurors drawn by the persons designated,[47] impartially[48] and free from outside influence,[49] under such oath as is prescribed[50] pursuant to a sufficient order where one is necessary,[51] and where the drawing or list is by jury commissioners, all should sanction the names chosen.[52] If the list drawn is the act of proper officers, it is not vitiated by their having adopted acts or information of others.[53] The fact that the jury list does not contain a full quota of names is not ground for challenge to the array in the municipal court of New York.[54] In striking from the list those who have become disqualified, any mark or check showing that they are no longer subject to service is sufficient.[55] In Florida the drawings are to be made from the box provided at the time of drawing, and the fact that a new

a circuit court should be drawn from the jury box. Colson v. State [Fla.] 40 So. 183.

44. It is an irregularity for clerk of circuit court to draw thirty-six names from jury box to serve as grand and petit jurors instead of thirty names, as is provided by Laws 1895, c. 4386, p. 153, § 2, and it is duty of judge to quash venire and panel upon discovering it. Colson v. State [Fla.] 40 So. 183. Held not so prejudicial as to be a fatal irregularity vitiating judgment. Id.

45. The fact that the jury list was made up in January instead of in December, as required by law, does not vitiate the panel. Hutto v. Southern R. Co. [S. C.] 55 S. E. 445. The mere fact that the jury commissioners met late is not a ground for quashing the venire, under Act No. 135, p. 223, 1898, where no fraud or injury is shown. State v. Stewart, 117 La. 476, 41 So. 798.

46. Under Code 1896, § 4333, providing that a judgment of conviction shall not be reversed for error not prejudicial to the accused, the fact that the clerk did not immediately make out the list as the jurors were drawn but placed the names in an envelope and made the list later, is not reversible error. Hammond v. State [Ala.] 41 So. 761.

47. Code 1904, p. 2114, § 4018, requiring the list furnished the sheriff with the venire to be drawn by the clerk, is mandatory, and a venire drawn from a list furnished by the court may be quashed (Hoback v. Com., 104 Va. 871, 52 S. E. 575), and, where quashed, a second venire, summoned pursuant to a list furnished by the judge of those before summoned, is insufficient for the same reason (Id.). The fact that certain men were put on the jury list at the suggestion of the clerk is not a ground for reversing a verdict where it is not shown that any of them served. State v. Johnny [Nev.] 87 P. 3.

48. The fact that a jury commissioner is related within the sixth degree to the person for the killing of whom the accused is charged, does not vitiate the array. State v. Henderson, 73 S. C. 201, 53 S. E. 170.

49. The fact that an attorney was present and made some suggestion to the jury commissioners as to selections is not a ground for setting aside a venire where the commissioners were not influenced by such suggestions, especially in view of act No. 135, p. 216, 1898. State v. Sheppard, 115 La. 942, 40 So. 363. Where none of the jurors suggested to the jury commissioners by an attorney were drawn to serve on the jury, no harm is done defendant. Id.

50. Failure of the jury commissioners to take the oath prescribed by Code 1896, § 4997, is no ground for quashing the special venire, no fraud being charged. Sims v. State [Ala.] 41 So. 413. An oath by the jury commissioners that they will impartially perform "all" duties incumbent upon them as commissioner, etc., is sufficient without specifically mentioning that they will discharge those imposed by the act of 1898. State v. Stewart, 117 La. 476, 41 So. 798.

51. Under Code 1904, p. 2114, § 4018, authorizing the judge to order more than twenty names to be drawn and listed in a felony case, but providing that he shall, in such case, specify the number of names to be drawn and the number to be summoned, a letter directing the clerk to summon thirty first-class men is insufficient to authorize the clerk to draw a list of that many. Hoback v. Com., 104 Va. 871, 52 S. E. 575.

52. In the absence of fraud, the fact that each jury commissioner selected a specific number of proposed jurors does not vitiate the venire where the commissioners as a body finally passed upon the ones selected. State v. Sheppard, 115 La. 942, 40 So. 363.

53. The fact that the supervisors and not the jury commissioners prepared the lists from which names were selected to fill the jury box, though an irregularity, is not fatal where the commissioners revised the same. Hutto v. Southern R. Co. [S. C.] 55 S. E. 445. Where the selection of jurors is imposed upon the board of county commissioners, the clerk thereof cannot select or urge the selection of any juror, though the board may take advantage of information in the possession of the clerk so long as it exercises its own judgment in the selection. State v. Johnny [Nev.] 87 P. 3.

54. Jury list contained only 170 names instead of 200, as required by Municipal Court Act, § 233 (Laws 1902, p. 1558, c. 580). Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

55. It is not necessary, under act 135, p. 216, of 1898, as amended by act 58, p. 136, of 1904, requiring a list of 300 names for jury service to be made up and every six months corrected by striking those who have served, died, removed, etc., and filling in new names, to draw a line through the names stricken, but any check mark is sufficient. State v. Johnson, 116 La. 855, 41 So. 117.

box is provided before the time of service does not affect the venire.[56] In Kansas the jury list must be made from the real estate assessment roll as well as the personal property roll[57] and if no list is made or is vitiated by irregularities, the district judge may select a sufficient number of jurors for the term.[58]

Irregularities in drawing, where no prejudice is shown, will not vitiate a verdict.[59] Such matters are usually regarded as directory, and substantial compliance is sufficient[60] unless there is fraud.[61] A jury commissioner cannot be heard to impeach the return of proces verbal made by him.[62]

Jurors must be drawn from the appropriate district.[63]

While the Federal constitution does not insure one a jury composed of his own race or even a mixed one,[64] it entitles him to a jury drawn without race discrimination.[65] One alleging discrimination has the burden of establishing the fact.[66] The failure of the court to appoint a negro to the jury commission charged with the selection of the jury does not of itself show discrimination.[67]

56. Thompson v. State [Fla.] 41 So. 899.

57. Gen. St. 1901, § 3796, requiring the original jury list to be selected from the "assessment roll," held to refer to both rolls. State v. Gereke [Kan.] 86 P. 160.

58. Chap. 117, p. 158, Laws 1886. State v. Schmidt [Kan.] 87 P. 742. Chap. 236, p. 427, Laws 1901, held not inconsistent therewith so as to work an implied repeal. Id. And the fact that he fails to select jurors from all the cities and townships of the county does not invalidate the selection, there being no evidence that the omission was intentional. Id.

59. Where a juror was qualified and no prejudice is shown, an objection after verdict that he was not regularly drawn is too late. Oates v. Union R. Co., 27 R. I. 499, 63 A. 675.

60. Where it affirmatively appears that no possible injury could accrue to a defendant by an irregularity not amounting to a substiantial departure from the law in the drawing, an objection thereto should not prevail. Colson v. State [Fla.] 40 So. 183. See, also, notes preceding.

61. Statute to be deemed mandatory where fraud or wrong was committed. State v. Sheppard, 115 La. 942, 40 So. 363. Fraud in not keeping the list up to date to authorize the quashing of the venire, under § 15, act 135, p. 223, of 1898, must be actual fraud or such noncompliance as will justify an inference of fraud, and the mere failure to draw a line through the names stricken off is insufficient where they are checked. State v. Johnson, 116 La. 855, 41 So. 117.

62. State v. Johnson, 116 La. 855, 41 So. 117.

63. The jury in an expropriation case should be taken, as far as possible, from the vicinage. Louisiana R. & Nav. Co. v. Morere, 116 La. 997, 41 So. 236. But the fact that they were drawn from the opposite side of the river, there being nothing to show that those on the same side were qualified or that the sheriff acted from a sinister motive, does not vitiate the jury. Id. Where the territorial extent of a Federal district is changed after the commission of a crime, the Federal jurors for the trial thereof must be drawn from the district as it originally stood. U. S. Const. Amend. 6. United States v. Greene, 146 F. 776. In all cases where crime is charged, the jury district should be coextensive with the trial district; and one charged with an offense committed beyond municipal limits, but within police court jurisdiction as fixed by 97 O. L. 7, cannot be legally tried by a jury drawn from residents of the municipality only. Fendrick v. State, 9 Ohio C. C. (N. S.) 49.

64. Martin v. Texas, 200 U. S. 316, 50 Law. Ed. 497; Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

65. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069; State v. West, 116 La. 626, 40 So. 920. The fact that the negroes are not given a pro rata representation on the jury is not a violation of the Federal constitution where there was no discrimination in fact. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

66. As it will be presumed that the statute was followed in the selection. State v. West, 116 La. 626, 40 So. 920.

Held insufficient to show discrimination: Affidavit of defendant verifying this motion to quash. Rivers v. State [Tenn.] 96 S. W. 956; Martin v. Texas, 200 U. S. 316, 50 Law. Ed. 497. The fact that no negro was drawn on the trial jury. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069; State v. West, 116 La. 626, 40 So. 920: Martin v. Texas, 200 U. S. 316, 50 Law. Ed. 497. Affidavits that affiants had not seen or heard of a colored man being called to serve on a jury. Ransom v. State [Tenn.] 96 S. W. 953. Evidence that of the 10,000 voters in the county 3,000 were negroes of whom 10 to 25 per cent were disqualified for jury service and that only one negro was drawn for service for each week, is insufficient to show discrimination as against the testimony of the commissioners that no disorimination was made. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069. An affidavit made by defendant, a negro, alleging that his race was discriminated against in the selection of the jury, that about 20 per cent of the voters were negroes, and that 15 per cent of them were eligible to jury service, but that none had ever been selected which was the result of discrimination, held insufficient to present the question. Smith v. Com., 28 Ky. L. R. 1254, 91 S. W. 742.

67. Especially where the judge instructs

§ 6. *The venire and like process.*[68]—An objection that the notice summoning the jurors failed to state that they were to serve in the oyer and terminer cannot be raised by defendant,[69] and in Alabama a mistake in the name of a juror does not vitiate the venire,[70] although the juror is subject to challenge.[71] In Virginia the venire facias need not state that the jury summoned pursuant thereto is to try all the cases at that term,[72] nor need it contain the names of those to be tried.[73] Where the return of the writ shows what was done thereunder, it is not error, on objection thereto, to permit an amendment making it more definite.[74] The venire must be served by the proper officer.[75]

§ 7. *Empaneling the trial jury.*[76]—The trial jury must be organized and empaneled by the designated authority,[77] and be drawn from the proper panel.[78] Unless waived,[79] a party, especially the accused in a criminal case, is entitled to the attendance of the full panel;[80] but before an accused can complain of the absence of a juror, he must ask for a continuance[81] and demand process to secure such absentee.[82] Where some of the jurors are deliberating in another case, their names

the commissioners not to discriminate. Thomas v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 535, 95 S. W. 1069.

68. See 6 C. L. 325.

69. Only available to the jurors. Commonwealth v. Johnson, 213 Pa. 432, 62 A. 1064.

70. Code 1896, § 5007. Criminal case. Hammond v. State [Ala.] 41 So. 761; Martin v. State, 144 Ala. 8, 40 So. 275. It may be shown that a petit juror, in the middle initial of whose name a mistake was made, was the only person of that name residing in the precinct. Harrison v. State, 144 Ala. 20, 40 So. 568.

71. A variance in the middle initial of the name of a juror is no ground for discarding it. Untreiner v. State [Ala.] 41 So. 285. Under Code 1896, § 5007, it is error to allow one whose name is Hiram Warner Prickett, called as H. Dudley Prickett, to sit, over the defendant's objection. Martin v. State, 144 Ala. 8, 40 So. 275.

72, 73. Bennett v. Com. [Va.] 55 S. E. 698.

74. Where the return at the beginning contained a clause "Summoned by sheriff of Johnson County to serve as a special venire," and then followed a list of 250 names opposite 42 of which was written "not found," amended so as to show that 208 were summoned and that 42 were not served. Rice v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 396, 94 S. W. 1024.

75. Act May 24, 1887 (P. L. 185), authorizing in general terms the appointment of a deputy sheriff to discharge the duties of the sheriff, does not repeal Act April 14, 1834 (P. L. 333), specifically authorizing the selecting and summoning of jurors by the coroner in case of the inability of the sheriff to act (Commonwealth v. Mallini, 214 Pa. 50, 63 A. 414), and the selection and summoning by the coroner was valid, especially where it does not appear that a deputy was appointed (Id.).

76. See 6 C. L. 325.

77. Under Acts 1890-91, p. 561, § 3, the jury should be organized and empaneled by the court and not the judge. Laws v. State, 144 Ala. 118, 42 So. 40.

78. When a capital case is set for trial on a day of the second or any subsequent week of the term, the special jurors together with the regular jurors summoned for that week constitute the special venire from which the trial jury is to be selected, as provided by Code 1896, § 5005. Smith v. State [Ala.] 40 So. 957.

79. Where a party announces that he is ready for trial, knowing that a part of the regular panel of jurors has been excused for the day, and upon failing to secure a jury from the remainder makes no objection to the court's order to summon talesmen except to say that he preferred the regular panel, he waives his right to have the case postponed until the next day in order to secure the full panel. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715.

80. Where a return shows that twenty-four of the special venire have not been served, twelve of whom were not served for want of time, it is error to overrule a motion to quash for the want of a showing of due diligence and to direct the sheriff to summon the remainder, compelling the defendant to proceed in the meantime. Horn v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 271, 97 S. W. 822.

81. Before accused can complain of being compelled to proceed in the absence of certain jurors who had been summoned, he must ask that the case be postponed a reasonable time to enable the jurors to be procured. Mays v. State [Tex. Cr. App.] 96 S. W. 329.

82. When a party desires the presence of an absent juror, he must ask for an attachment, and he can not avail himself of such absence on appeal unless he makes such request. Hughes v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 525, 95 S. W. 1034. Where a special judge excused certain jurors with the consent of the parties but no memorandum is made of those excused, and upon call of the regular judge many were absent and the court, being unable to determine whether they were excused or not, excused them without objection by the parties and ordered talesmen summoned, the defendant thereafter cannot object. Id.

may be passed when called and replaced in the box when they come in.[83] Technical nonprejudicial irregularities in the manner of empaneling are not grounds for reversal,[84] especially if caused by appellant,[85] and where the names put in the box to be drawn are numbered merely for convenience, a mistake therein does not affect the venire.[86] In Alabama the court may call six jurors in a criminal case and, after asking each the qualifying questions, permit them to answer together.[87] Where it is discovered after a jury has been empaneled but before any evidence is submitted that a juror is disqualified, he may be set aside and a new jury empaneled.[88] One claiming an irregularity has the burden of establishing it.[89]

§ 8. *Arraying and challenging. A. Challenge to the array or panel.*[90]—The ground of challenge to the array must be one which affects the entire panel and not particular jurors,[91] must be seasonably made,[92] and, where the common law has not been abrogated by statute, must be in writing.[93] Evidence in support of a motion to quash must be responsive to the particular motion made.[94]

(§ 8) *B. Challenge for cause.*[95]—Failure to appear at the trial[96] or to challenge[97] for a known disqualification,[98] or one which could have been discovered by reasonable diligence,[99] waives the objection, and an objection after verdict is usually

83. Spencer v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 594, 90 S. W. 638.

84. Under Va. Code 1904, § 3158, providing that in the selection of a special jury sixteen shall be chosen by lot from the twenty qualified names in the box, it is not error to draw four by lot and excuse them instead of drawing sixteen and excusing the remaining four. Duke v. Norfolk & W. R. Co. [Va.] 55 S. E. 548.

85. Where a juror who has been stood aside is recalled at the instance of defendant, the defendant cannot complain of such recalling Coker v. State, 144 Ala. 28, 40 So. 516.

86. Cr. Code 1896, § 5009, does not require such numbering. Gaines v. State [Ala.] 41 So. 865.

87. Untreiner v. State [Ala.] 41 So. 285.

88. Armor v. State, 125 Ga. 3, 53 S. E. 815. And the fact that the solicitor's first motion for the declaration of a mistrial was withdrawn but renewed again upon the refusal of the defendant to proceed before the jury as empaneled, or before the remaining qualified jurors, does not alter the case. Id.

89. An affidavit that two jurors were not called whose names were left on the jury list by defendant does not show irregularity, it not appearing that such names were not stricken off by the opposing counsel. Cowan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 313, 92 S. W. 37.

90. See 6 C. L. 326.

91. Where, after a panel was selected, a newspaper printed an account of an alleged confession of the accused which was read by four members of the panel, held that the court properly overruled a motion to quash the array and discharged the four. State v. Hottman, 196 Mo. 110, 94 S. W. 237.

92. Too late: Motion to quash because of a mistake in the name of a juror drawn made after three jurors have been accepted. Smith v. State [Ala.] 40 So. 957. Motion filed on the day of trial, under act Feb. 18, 1897 (Acts 1896-97, p. 1248), requiring it to be filed not later than 6 o'clock p. m. of the preceding day. Raines v. State [Ala.] 40 So. 932.

Timely: A motion to quash a venire is timely where the trial has not been entered upon, though defendant has announced that he is ready for trial. Porter v. State [Ala.] 41 So. 421.

93. State v. Hottman, 196 Mo. 110, 94 S. W. 237. A challenge to the array must be in writing. State v. Church [Mo.] 98 S. W. 16. Where a challenge was heard and overruled without a written one being filed, unknown to the court at the time, and the court gave permission to file but requested to see it when filed, one filed but not shown to him does not avoid a waiver. People v. Tubbs [Mich.] 110 N. W. 132.

94. Where trial jury is composed entirely of talesmen, evidence as to the manner in which they were drawn is not responsive to a motion to quash because of irregularities in making up the jury list and jury box, and therefore immaterial. Hill v. State [Miss.] 42 So. 380.

95. See 6 C. L. 327. Grounds for disqualification, see ante, §§ 2, 3, 5, 6.

96. Where the defendant had notice of the regular call of his case, it was not an abuse of discretion for the court to proceed to the selection of the jury and the defendant cannot thereafter have more jurors called that he may challenge some selected. Dotterer v. Scott, 29 Pa. Super. Ct. 553.

97. A juror incompetent propter defectum is rendered specially competent by a failure to challenge, and a verdict will not be set aside for such defect. Parris v. State, 125 Ga. 777, 54 S. E. 751. Where a party fails to object to a juror and obtain a ruling on his qualications, he cannot thereafter complain, especially in view of Cr. Code of Prac. § 281, providing the decision of the trial court in the formation of the jury is not reviewable. Day v. Com., 29 Ky. L. R. 816, 96 S. W. 510.

98. A known ground of disqualification of a juror before or during the progress of a

too late.[1] A challenge for cause must be timely exercised[2] and must specifically state the ground of challenge.[3] The challenging party has the burden of proving the disqualification.[4]

Right to list of jurors.[5]—In some states an accused upon timely demand,[6] is entitled to a copy of the venire from which the trial jury is to be selected,[7] but not of talesmen thereafter summoned.[8] A defendant is not deprived of his list by a voluntary loan of the same.[9] The list should contain only the names of the jurors summoned,[10] and a mistake in a name therein is not a ground for quashing the venire.[11]

(§ 8) *C. Peremptory challenges and standing jurors aside.*[12]—The Federal government may in criminal cases stand aside a juror until the panel is exhausted

trial is waived by failure to object until after verdict. Robinson v. Territory, 16 Okl. 241, 85 P. 451.

99. Failure to examine a juror as to his competency, full opportunity having been given, especially where only objection is made after trial. Partially blind and an ex-convict for felony. Reed v. State [Neb.] 106 N. W. 649. A party who has been diligent as to the examination of proposed jurors cannot be required to submit his case to jurors who are disqualified by law and but for their own misconduct would have been subject to challenge. Bershiet v. Cincinnati Trac. Co., 3 Ohio N. P. (N. S.) 575.

1. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. Under Civ. Code 1902, § 2946, requiring objections to jurors to be made before the jury is empaneled or charged with the trial, the fact that a juror had sat upon the former trial of the case is no ground for setting aside the verdict where the appellant was guilty of negligence in not discovering the fact, and especially where it appears that the juror himself had forgotten the fact. State v. Langford [S. C.] 55 S. E. 120. Where after verdict an attack is made upon a juror as disqualified, the findings of the trial judge will not be reversed unless there was an abuse of discretion. McCrimmon v. State [Ga.] 55 S. E. 481. Where an alien was accepted and served for a day before the fact was discovered, when he took out his second papers and continued not only without objection but with the express consent of the accused, his right to object was waived. Schwantes v. State, 127 Wis. 160, 106 N. W. 237.

2. A challenge for cause after acceptance but before the juror is sworn is timely, if the cause was unknown before acceptance. Moore v. State [Ala.] 40 So. 345.

3. State v. McCarver, 194 Mo. 717, 92 S. W. 684; State v. Miles [Mo.] 98 S. W. 25. Failed to specify that the challenge was on the ground of having an opinion. State v. Myers, 198 Mo. 225, 94 S. W. 242. A challenge in the form "I challenge the juror for cause" may be disregarded. Robinson v. Territory, 16 Okl. 241, 85 P. 451. Pen. Code § 914, declaring that every challenge for any of the causes stated in § 910 must state the particular clause, is mandatory. Leigh v. Territory [Ariz.] 85 P. 948.

4. In the absence of a showing, it is presumed that jurors have no disqualifying opinion. Day v. Com., 29 Ky. L. R. 816, 96 S. W. 510. Testimony of a juror that he had rendered jury service within a year is insufficient to show disqualification under Gen. St. 1905, c. 54, § 1, requiring the trustees to exclude from the jury list persons who have served within a year, since such service may have been subsequent to the making of the list. State v. Hamilton [Kan.] 87 P. 363.

5. See 6 C. L. 327.

6. A motion under Rev. Code 1892, § 1408, after the completion of the drawing of a special venire for a list thereof, is untimely and its refusal lies within the discretion of the court. Hannah v. State, 87 Miss. 375, 39 So. 855.

7. Where a capital case is set for trial at the second or any later week of the term, the special venire, a copy of which must be served on defendant, consists of the special jurors drawn and the regular jurors for the week (Smith v. State [Ala.] 40 So. 957; Walker v. State [Ala.] 41 So. 878); hence, an order of the court during the first week directing the sheriff to serve upon the defendant a list of the special jurors summoned and those drawn for "this week" is erroneous (Walker v. State [Ala.] 41 So. 878), and names of persons not regularly drawn and summoned for that week, but called to complete the panel because of the absence of the regular jurors, should not be put on such list (Smith v. State [Ala.] 40 So. 957).

8. State v. Thompson, 116 La. 829, 41 So. 107. Cr. Code 1896, § 5009. Untreiner v. State [Ala.] 41 So. 285.

9. Especially where the sheriff promptly returns the same upon demand. Martin v. State, 144 Ala. 8, 40 So. 275.

10. A list served upon defendant containing names drawn but not summoned is erroneous. Walker v. State [Ala.] 41 So. 878. Not a ground for quashing the venire where the list contained an indorsement showing that particular jurors therein were not served. Porter v. State [Ala.] 41 So. 421.

11. Untreiner v. State [Ala.] 41 So. 285. Code 1896, § 5007. Hammond v. State [Ala.] 41 So. 761. "Bachlor" for "Bachelor." Skipper v. State, 144 Ala. 100, 42 So. 43. "Rodes" for "Rhodes" (Coleman v. State [Ala.] 40 So. 977), or "B. W. Clifton" for "B. W. Clifton, Jr.," is no ground for quashing the venire in view of Code 1896, § 5007, providing that a mistake in the name of a person summoned in a capital case is not sufficient to quash the venire (Smith v. State [Ala.] 40 So. 957).

12. See 6 C. L. 327.

without assigning any cause, in those states where the right of qualified challenge exists in favor of the sovereign, providing such practice has been adopted by court rule in the Federal courts.[13]

Peremptory challenges.[14]—The right of peremptory challenge is statutory and not constitutional.[15]

Number allowed.[16]—The number of peremptory challenges to which a party is entitled is statutory, but usually joint parties are only entitled in the aggregate to the number allowed to a single party,[17] unless their interests are antagonistic.[18] The number of challenges to which an accused is entitled in the territorial district court of Oklahoma, exercising the jurisdiction common to the Federal courts, is determined by the territorial law.[19] Where the number is dependent upon the offense, the phrase "the offense charged" means the offense for which the accused may be tried.[20] A party cannot object to an insufficient allowance unless he exhausts those granted,[21] and an objectionable juror is thereafter called.[22] Where too many challenges are allowed, a party does not waive the error by accepting the jury as selected without objection.[23] In California where after the completion of the jury a juror is dismissed, a motion before another is called to determine the number of peremptory challenges the parties will be allowed is premature.[24]

Time for challenge.[25]—A peremptory challenge must be seasonably exercised,[26] and a defendant is not entitled to examine on voir dire the entire panel before exercising the challenge as to those called.[27] A party by passing his unexhausted peremptory challenges and accepting the jury does not thereby waive his right to peremptorily challenge a juror subsequently called to take the place of one peremptorily challenged by his opponent.[28]

The order of challenges.[29]—Federal courts are not bound by state statutes as to the order in which peremptory challenges shall be exercised.[30] Where the jurors

13. Notwithstanding acts of March 3, 1865 (13 Stat. at L. 500, c. 86) and June 8, 1872 (17 Stat. at L. 282, c. 333), giving peremptory challenges to the government. Sawyer v. U. S., 202 U. S. 150, 50 Law. Ed. 972. Permitting the Federal government to exercise a qualified right of challenge is not prejudicial where, at the time the jury is completed, both the government and the defendant have unused peremptory challenges. Id.

14. See 6 C. L. 327.

15. State v. Smith [Iowa] 109 N. W. 115.

16. See 6 C. L. 328.

17. Where two actions are tried together by one jury, the plaintiffs are entitled to only four peremptory challenges. Hodges v. Southern Pac. Co. [Cal. App.] 86 P. 620. In condemnation proceedings against the owner of the fee and his tenant, defendants constitute one party and are entitled to but three peremptory challenges. Freiberg v. South Side El. R. Co., 221 Ill. 508, 77 N. E. 920. Ky. St. 1903, § 2258, giving "each party litigant" three challenges, construed to allow only three challenges to the antagonistic sides. Pendley v. Illinois Cent. R. Co., 28 Ky. L. R. 1324, 92 S. W. 1. Under Kirby's Dig. § 4536, declaring that in civil cases each party shall have three peremptory challenges, and § 4540 providing that where there are several persons on the same side, the challenge of one shall be the challenge of all, all the defendants are only entitled to three challenges in the aggregate. Waters-Pierce Oil Co. v. Burrows, 77 Ark. 74, 96 S. W. 336.

18. If interests are antagonistic must be considered as distinct parties. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442.

19. Cochran v. U. S. [C. C. A.] 147 F. 206.

20. Hence under Code, § 5365, although charged with murder in the first degree, a defendant on a retrial after a conviction of manslaughter is entitled only to the number applicable to manslaughter since he cannot be convicted of a higher degree. State v. Smith [Iowa] 109 N. W. 115.

21. Krause v. U. S. [C. C. A.] 147 F. 442. None exercised. People v. Weber [Cal.] 86 P. 671.

22. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442.

23. Pendley v. Illinois Cent. R. Co., 28 Ky. L. R. 1324, 92 S. W. 1.

24. People v. Weber [Cal.] 86 P. 671.

25. See 6 C. L. 328.

26. The temporary passing of the jury and waiver of the right to peremptory challenges by counsel for plaintiff does not deprive him of the right of exercising such challenges after challenges for cause by the defendant, provided no injustice will result to the defendant. Wheeling & Lake Erie R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28.

27. Browne v. U. S. [C. C. A.] 145 F. 1.

28. Lerum v. Geving, 97 Minn. 269, 105 N. W. 967.

have been pronounced competent by the court, the right to strike must be exercised in the same manner as if no challenge of incompetency had been interposed.[31]

(§ 8) *D. Examination of jurors and trial and decision of challenges.*[32]—Jurors are required by their oath to answer questions propounded without concealment or evasion.[33]

Scope of examination.[34]—The scope of examination rests largely within the discretion of the court,[35] and while a juror may be examined as to whether he would convict upon circumstantial evidence,[36] or is opposed to punitive damage where such is sought,[37] he cannot be asked whether he wishes to serve.[38] The object being to ascertain a juror's qualification, questions should be directed toward that end exclusively,[39] and both attorney and court should refrain from prejudicial remarks[40] and conduct.[41] An examination testing a juror's knowledge of material facts should be limited to facts involved in the present case.[42] Plaintiff in an action for personal injuries against his employer may examine jurors as to their interest or connection with any indemnity insurance company,[43] and, while he has a right to ascertain

29. See 6 C. L. 328.

30. Cr. Code. N. Y. § 385, held not controlling. Browne v. U. S. [C. C. A.] 145 F 1.

31. Parties must strike alternately. Nobles v. State [Ga.] 56 S. E. 125.

32. See 6 C. L. 329.

33. When proposed jurors are sworn on their voir dire, they are sworn to tell the whole truth and not part of it, and their answers should squarely meet, without evasion, what is fairly expressed by the terms of the questions, and where one undergoing such an examination was guilty of evasion or concealment, the party examining him was deprived of a substantial right and is entitled to a new trial. Bershiet v. Cincinnati Traction Co., 3 Ohio N. P. (N. S.) 575.

34. See 6 C. L. 329.

35. Especially in misdemeanor cases, and such discretion should be guided largely by the ground of attack. Held, where the only objection was that the jurors had heard certain affidavits and evidence for a continuance, it was not an abuse of discretion to refuse the other statutory questions where the one relative to opinions was asked. Nobles v. State [Ga.] 56 S. E. 125.

36. In a prosecution punishable with death, such question is not objectionable as assuming that the state has only circumstantial evidence. State v. Stephens, 116 La. 36, 40 So. 523.

37. Yazoo, etc., R. Co. v. Roberts [Miss.] 40 So. 481.

38. Abby v. Wood [Wash.] 86 P. 558.

39. Question of a venireman as to whether he was a stockholder in any indemnifying insurance company held to show that the real purpose was to get the fact of insurance before the jurors. Hoyt v. Davis Mfg. Co., 112 App. Div. 755, 98 N. Y. S. 1031. Record held to show that plaintiff's counsel acted in good faith in examining a supposed agent of an insurance company in the presence of the jury as to the relation of the company to defendant, and not for the purpose of getting the fact of insurance before the jury. Viou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891. In a suit for injuries resulting from the falling of an elevator held not error to permit counsel while examining a juror on his voir dire to question him in the presence of other jurors as to what conditions he found to exist while examining the elevator. Alexander v. McGaffey [Tex. Civ. App.] 88 S. W. 462.

40. Preliminary statement of counsel before asking a juror in a personal injury case whether he was interested in any indemnity insurance company, and long colloquy between counsel and court held to give undue prominence to such insurance. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

41. Where, after a juror has been accepted, the court is informed that there is sickness in the juror's family, it is not reversible error for the court, after examining the juror as to the extent of the sickness, to ask the defendant if he would excuse the juror, at the same time telling him he could do as he pleased. Boyd v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 564, 94 S. W. 1053. Where plaintiff's counsel is informed after the empaneling of the jury that one has expressed an adverse opinion and defendant refuses to consent to the excusing of the juror, it is not error to permit counsel to ask the juror in the presence of the other jurors if he had expressed such opinion. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446.

42. In a prosecution for unlawfully carrying a pistol, it is not error to refuse to allow jurors to be examined as to whether they knew anything about the facts of a former case in which defendant was charged with assault with intent to murder, which case grew out of the same transaction, the purpose of such questions not appearing. Woodroe v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 682, 96 S. W. 30.

43. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313; Cripple Creek Min. Co. v. Brabant [Colo.] 87 P. 794; Dow Wire Works v. Morgan, 29 Ky. L. R. 854, 96 S. W. 530. And, within reasonable limits, plaintiff will be protected in the exercise of the right, and, strictly within the right, admissions of the defendant may be received, although indirectly involving the company. Viou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891. Question must be so asked as to not give undue importance

whether any such insurance exists in order to intelligently select the jury,[44] he cannot interrogate defendant's counsel[45] or his assistant[46] upon such question.

Review of trial of challenges.[47]—A party desiring to review questions propounded to the jurors by the court must object thereto and save exceptions at the time and make such assigned errors a ground for new trial.[48] While the court is vested with great discretion in passing upon the fitness of a juror, such rulings are subject to the same review as other discretionary rulings[49] if brought up on a sufficient record.[50] Rulings involving issues of fact will not be reviewed unless the bill of exceptions states that it contains all the evidence as required by supreme court rule.[51]

Improper overruling or sustaining of a challenge as a ground for reversal.[52]—Since litigants are not entitled to the service of any particular juror but only to a fair and impartial jury, error in excluding a juror is not a ground for reversal where such a jury is secured,[53] nor will a reversal be granted for the erroneous overruling of a challenge where the juror was thereafter excluded,[54] or where the objecting party waives[55] or fails to exhaust his peremptory challenges,[56] although, if the party is thereby compelled to use a peremptory challenge and an objectionable juror is thereafter forced upon him, relief will be granted.[57] In Arkansas a case will not be reversed for an erroneous ruling on a challenge for cause where the state will accept conviction in the lowest degree possible under the evilence.[58]

§ 9. *Talesmen, special venires and additional jurors.*[59]—Where no jury has

to the fact of insurance. Coolidge v. Hallauer, 126 Wis. 244, 105 N. W. 568.

44. Antletz v. Smith, 97 Minn. 217, 106 N. W. 517.

45. At the bar or as a witness. Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833.

46. Attempted examination under oath. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

47. See 6 C. L. 329.

48. State v. Hottman, 196 Mo. 110, 94 S. W. 237.

49. Not a question whether there is any evidence to sustain the ruling but whether there was an abuse of discretion. Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354.

50. Where the record on appeal fails to show the cause for which a juror was excused, such ruling will not be reviewed. Gaines v. State [Ala.] 41 So. 865.

51. Ruling on motion to discharge the jury because of alleged discriminations against the negroes. Ransom v. State [Tenn.] 96 S. W. 953.

52. See 6 C. L. 329.

53. Commonwealth v. Minney [Pa.] 65 A. 31; Howard v. Com. of Ky., 200 U. S. 164, 50 Law. Ed. 421; Ives v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 74; Melbourne v. State [Fla.] 40 So. 189. Qualified juror excused during the empaneling. State v. Gereke [Kan.] 86 P. 160. Rejection of a juror is no ground of complaint as defendant is not entitled to select the jury, and this rule is equally applicable where the judge refuses to allow an excused juror to be cross-examined. Act No. 135, p. 216, of 1898, § 1. State v. Thompson, 116 La. 829, 41 So. 107. The decision of the Kentucky court of appeals, that, under Ky. Cr. Code, § 281, a conviction could not be reversed for error in discharging a juror, does not deny the accused equal protection of the law where such application is uniformly made. Howard v. Com. of Ky., 200 U. S. 164, 50 Law. Ed. 421.

54. Excluded by peremptory challenge and an unobjectionable jury was thereafter secured. State v. Sultan [N. C.] 54 S. E. 841. The overruling of a challenge to jurors who state that they would give less credence to negro witnesses because of their race is not a ground for reversal where it does not appear whether they sat upon the jury. Woodroe v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 682, 96 S. W. 30.

55. State v. Mathews [Iowa] 109 N. W. 616.

56. Hodgin v. Southern R. Co. [N. C.] 55 S. E. 413; Ives v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 74; State v. Gereke [Kan.] 86 P. 160. **Contra.** Theobald v. St. Louis Transit Co., 191 Mo. 395, 90 S. W. 354.

57. St. Louis, etc., R. Co. v. Hooser [Tex. Civ. App.] 17 Tex. Ct. Rep. 27, 97 S. W. 708; Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 244, 94 S. W. 224. A mere statement in a bill of exceptions that certain jurors called after he had exhausted his peremptory challenges were unacceptable does not show that they were. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 S. W. 100. The mere fact that it appears that some objection was made to a juror but the nature is not stated, shows no prejudice. Id. A bill of exceptions reciting that accused was forced to use a peremptory challenge to get rid of a juror alleged to have been disqualified for cause and was thereby compelled to accept S., an objectionable juror, is insufficient in that it does not show that accused exhausted his peremptory challenges, or in what manner S. was objectionable. Mays v. State [Tex. Cr. App.] 96 S. W. 329.

58. Sullins v. State [Ark.] 95 S. W. 159.

59. See 6 C. L. 330.

been called,[60] or where the regular panel has been quashed[61] or discharged,[62] the court is authorized, in many states, to summon a special venire. Where the special venire in a criminal case[63] proves insufficient, talesmen may be called,[64] and the fact that such talesmen are present at the request of the sheriff does not disqualify them.[65] The Alabama statute, requiring the special venire in a criminal case to be drawn by the "presiding judge,"[66] means the judge presiding at the time of drawing and not necessarily the trial judge.[67] The special venire summoned in any felony case in Virginia may be used for the trial of all felony cases pending at that term.[68] The summoning of additional jurors is authorized in some instances.[69] The manner of drawing talesmen[70] and special venire[71] is usually provided by statute. In Ala-

60. Code 1896, § 4998. Jacobs v. State [Ala.] 42 So. 70. In Texas where no jury is drawn for the sixth week by the commissioners, it being believed the term would not continue that long, the court may order the sheriff to summon jurors for such week. Davis v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 402, 92 S. W. 256.

61. Where venire and panel were quashed because of irregularities, held that, on being satisfied that the public interest would be best subserved thereby, the circuit judge had authority, under Laws 1899, c. 4736, p. 125, to order the sheriff to summon from the body of the county thirty persons to serve as grand and petit jurors for the term. Colson v. State [Fla.] 40 So. 183. Such statute was not amended in the particular or repealed by Laws 1903, c. 5127, p. 67. Id. Code 1904, p. 2115, § 4019, providing that if a sufficient number of jurors cannot be secured from those summoned, the court may direct another venire facias and cause to be summoned from bystanders as many as may be necessary, does not apply where the first writ was quashed. Hoback v. Com., 104 Va. 871, 52 S. E. 575.

62. Where the regular panel is discharged because of having been engaged in the trial of another case involving similar facts and in which many of the same witnesses appeared, it is not error to summon a new jury, under § 664, Code Civ. Proc., instead of under § 2600, Cobbey's Ann. St. 1903. Barber v. State [Neb.] 106 N. W. 423.

63. Where the return of the special venire shows that the jurors have not all been served, those in attendance constitute the special venire, and after they have been exhausted, it is error to direct the remaining jurors to be summoned as a part of the venire. Horn v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 271, 97 S. W. 822.

64. Horn v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 271, 97 S W. 822. Where it develops that a juror on the list furnished defendant was not a resident of the county, it was proper to strike his name and direct the sheriff to summon a qualified person to serve in his stead. Cr. Code 1896, § 5007. Skipper v. State, 144 Ala. 100, 42 So. 43.

65. Especially where the sheriff was not interested in the case and did not act from improper motive. Haddix v. State [Neb.] 107 N. W. 781.

66. A record reciting that the special venire was drawn by "the judge of this court" sufficiently shows that it was drawn by the "presiding judge." Laws v. State, 144 Ala. 118, 42 So. 40.

67. Laws v. State, 144 Ala. 118, 42 So. 40.

68. May try one whose indictment was pending at the time of issuing the venire, though he was in another state and not a fugitive from justice. Bennett v. Com. [Va.] 55 S. E. 698.

69. Where only thirty-six jurors were drawn for the term, under the express provisions of Code Cr. Proc. 1895, art. 648, the special venire properly included additional jurors. Delaney v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 580, 90 S. W. 642. A trial court, in anticipation of a failure to obtain a jury from the regular or special venire, may order additional jurors summoned to be in readiness. Colson v. State [Fla.] 40 So. 183.

70. Gen. Laws (29th Leg.) p. 17, c. 14, amending Code Cr. Proc. 1895, art. 647a, is intended to equalize jury service and has no application to the selection of talesmen, and it is proper for the court to direct the sheriff to summon talesmen according to his selection, as authorized by Code Cr. Proc. 1895, art. 649. Mays v. State [Tex. Cr. App.] 96 S. W. 329; Wallace v. State [Tex. Cr. App.] 97 S. W. 1050. Under Act No. 135, p. 222, of 1898, § 11, a trial judge, in his discretion, may order talesmen summoned from that portion of the parish remote from the scene of crime, and where his orders are disobeyed, he may stand aside jurors so drawn. State v. Thompson, 116 La. 829, 41 So. 107.

71. Code Cr. Proc. 1895, art. 647, providing the method of drawing a special venire in a capital case, is not in conflict with art. 647a (Acts 29th Leg. p. 17, c. 14), providing for a special venire list out of which talesmen are to be drawn when the special venire has been exhausted, and hence not repealed by it. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 S. W. 521. Acts 29th Leg. p. 17, c. 14 (art. 3159a), does not change the venire law which requires that the names of all the veniremen for the term be placed in the box prior to the drawing of the special venire. Wallace v. State [Tex. Cr. App.] 97 S. W. 471. Under Acts 29th Leg. p. 17, c. 14, providing that, after the exhaustion of a special venire, an additional venire shall be drawn from the list selected by the jury commissioners, the court has no authority, in capital cases, to order the sheriff to summon talesmen, except as selected by the commissioners and drawn by the clerk. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 S. W. 1044. The manner of selection prescribed by Comp. Laws, § 344, is only directory, and upon the exhaustion of the regular panel the court may, with the consent of

bama the venire for a capital case must be drawn by the judge,[72] who must draw not less than twenty-five nor more than fifty names.[73] The judge need not announce the names as he draws them.[74]

§ 10. *Special and struck juries and juries of less than twelve.*[75]—In the county court of Texas, a case may be tried before a jury of less than twelve if there are less than that number of names in the box; provided there are at least six.[76] In order to entitle one to a jury of twelve, under the Municipal Court Act of New York, demand must be made at the time of joining issue.[77]

§ 11. *Swearing.*[78]—Mere irregularities in administering the oath where substantial compliance with the statute is made is not reversible error,[79] especially where the party fails to object.[80]

§ 12. *Custody and discharge of jurors and jury.*[81]

§ 13. *Compensation, sustenance, and comfort of jurors.*[82]—The Missouri statute, relating to compensation of jurors called but not used in the more serious criminal cases, applies only to those who qualify on the panel of forty from which the trial jury is selected.[83]

JUSTICES OF THE PEACE.

§ 1. The Office (635).
§ 2. Compensation, Duties, and Liabilities (636).
§ 3. Civil Jurisdiction (637). Residence Determining Jurisdiction (637). The Amount in Controversy (638). Title to Realty (639). Objections to the Jurisdiction (639).
§ 4. Procedure in Justices' Courts (639). The Docket and Other Records (640). Change of Venue (641). Transfer of Cause (641) Process and Appearance (641). Pleadings, Issues and Proof (642). Verdict and Judgment (644). Execution (646).
§ 5. Appeal and Error and Remedies Extraordinary (646). Bonds (649). Process or Appearance (650). The Transcript (651). The Record (651). Dismissal (651). Pleadings on Appeal (652). The Case is Tried De Novo on Appeal (653). Judgment (654). Further Appeal or Error (654).
§ 6. Certiorari (655).
§ 7. Criminal Jurisdiction and Procedure (656).

§ 1. *The office.*[84]—A justice of the peace is generally a civil magistrate, whose office is of statutory creation and whose jurisdiction is limited.[85] Where it appears

defendant, have persons summoned from particular townships. People v. Wheeler, 142 Mich. 212, 12 Det. Leg. N. 684, 105 N. W. 607. The fact that the names of the forty jurors, drawn on the special venire, began with a letter between G and K inclusive, does not of itself show that they were not drawn in the legal manner. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 S. W. 499.

72. Under Code 1896, § 5004, in capital cases the judge must draw the names of the veniremen from the box, and a judgment entry not showing that the names were drawn by him will not support conviction. Allen v. State [Ala.] 40 So. 660.

73. Code 1896, § 5004, held mandatory. Morris v. State [Ala.] 41 So. 274. Record failing to show the names of those drawn or the number thereof held insufficient. Id.

74. Not necessary under Code 1896, § 5004. Hammond v. State [Ala.] 41 So. 761.

75. See 6 C. L. 330.

76. Under Code Cr. Proc. 1895, § 683, providing that the clerk shall draw from the box, if in the county court, the names of twelve jurors or as many as there may be, if there is a less number, and § 684, providing that if there be not as many as six the court shall summon, etc., held that if there are only six in the box the court may refuse a larger panel, and when those names are stricken off, call talesmen. Hackleman v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 257, 91 S. W. 591. Bill of exceptions held not to affirmatively show that there were more than six in the box, and therefore does not show an error. Id.

77. Where at the close of plaintiff's case his complaint was amended so as to state a new cause of action and an adjournment was taken with an understanding that issue had been joined, a demand thereafter was too late. Bunk v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

78. See 6 C. L. 331.

79. Swearing upon the Evangelists by requiring them to kiss the Book held sufficient. Preston v. State, 115 Tenn. 343, 90 S. W. 856.

80. Where a party fails to object at the time to the manner of administering the oath to the talesmen and makes no motion to have the jurors resworn and reexamined he cannot complain of the error. Preston v. State, 115 Tenn. 343, 90 S. W. 856.

81, 82. See 6 C. L. 331.

83. Rev. St. 1899, § 3784. State v. Wilder, 196 Mo. 418, 95 S. W. 396.

84. See 6 C. L. 331.

85. See 4 C. L. 373.

that his bond has been approved, it is presumed that statutory requirements in connection therewith have to be complied with.[86] Recordation of his oath of office is not essential to the validity of his official acts.[87] If he is a de facto officer,[88] his official acts are valid and binding,[89] but if he is neither a de jure nor a de facto officer, they are not.[90]

§ 2. *Compensation, duties, and liabilities.*[91]—A justice's right to salary or fees rests entirely in legislative enactment,[92] and, where regulated on the basis of population to be determined from the last official census,[93] a judicial finding as to such population is presumed to be based on such census.[94] A justice waives the unconstitutional statute relative to his compensation, when, knowing of such invalidity, he accepts the salary therein provided for a number of years, and takes no steps to recover the fees prescribed by the valid law.[95] He is liable for the statutory penalty for illegally taking fees.[96] After a justice has rendered judgment in a case, he may recover unpaid fees in an action on implied contract.[97]

A justice who acts corruptly and falsifies his record is answerable both civilly and criminally,[98] but he may not be enjoined from acting in his judicial capacity upon a judgment upon his docket regular upon its face.[99] He is not personally liable for a wrongful execution by a constable acting under his instructions,[1] unless the

86. When the superior court approves the bond of a justice, it is presumed that it was accompanied as required by statute by an affidavit showing that the sureties were freeholders, though such affidavit is not shown. Guiberson v. Argabrite [Cal. App.] 87 P. 226.

87. Where it does not appear from the record that the justice's oath of office had been recorded as required by statute, such fact does not show that the oath had not been taken, and is insufficient to show that he acted without jurisdiction. Lund v. Ozanne [N. M.] 84 P. 710.

88. Where a justice is elected for a certain term or until his successor has qualified, and by a change in the election laws the election of a successor is postponed, the justice is a de facto official from the expiration of his term until the election of his successor. Stephens v. Davis [Ala.] 39 So. 831.

89. A judgment by a de facto justice is valid. Stephens v. Davis [Ala.] 39 So. 831.

90. Where a justice issues an attachment after his office has expired, and he had failed to give an official bond as required by statute, which provides that failure to give such bond vacates the office, the attachment is void. Smith v. Hilton [Ala.] 41 So. 747. A judgment rendered by a justice of the peace during interim of terms is void and of no effect, and ought to be enjoined where his term is limited to a certain period from date of his commission. Bushnell v. Koon, 8 Ohio C. C. (N. S.) 163.

91. See 6 C. L. 332.

92. Under Laws 1897, superseding Laws 1891, a justice who was not elected at the biennial city election after the adoption of the Laws of 1897, nor serving as the successor by appointment of one so elected, is not entitled to any salary. Ogden v. Chehalis County, 41 Wash. 45, 82 P. 1095. County Government Act, regulating compensation of justices in a certain class of townships as shown by the Federal Census of 1900, authorizes no salaries for justices in a township created after such census was taken, where it affords no means for ascertaining the population of such townships. Chinn v. Gunn, 148 Cal. 755, 84 P. 669.

93. The mode provided in County Government Act, § 184, subd. 13, amended by St. 1901, p. 750, c. 234, for ascertaining the population for the purpose of fixing the compensation of justices, being unconstitutional, it could be ascertained as provided in St. 1897, p. 460, c. 277. Chinn v. Gunn [Cal. App.] 84 P. 374.

94. Though the township in which a justice was appointed was formed after the taking of the census of 1900, by which only can its population be determined for the purpose of fixing his compensation, the finding by the court of the population is presumed to be based on such census. Guiberson v. Argabrite [Cal. App.] 87 P. 226.

95. State v. Messerly, 198 Mo. 35, 95 S. W. 913. The Barnett Law, amending Rev. St. 1889, § 5005, relative to fees of justices in certain cities, is void as a special law. Id.

96. The taking of fees by a justice for services for which no fee is allowed is actionable under Comp. St. 1903, § 34, c. 28. Leese v. Courier Pub. & Print. Co. [Neb.] 106 N. W. 443.

97. A judgment was rendered by a justice and affirmed on appeal. No judgment was entered because the suit was settled, and plaintiff in the action retained the fees fixed by the order of the appellate court. Held the justice could recover from him. Conlon v. Holste [Minn.] 110 N. W. 2.

98. Reddish v. Shaw, 111 Ill. App. 337.

99. Lasher v. Annunziata, 119 Ill. App. 653. Equity will not enjoin him concerning a matter over which he has jurisdiction. Grossman v. Davis, 117 Ill. App. 354.

1. A justice who instructs a constable as to his duty to sell property levied on is personally liable for wrongful sale only in case the constable was influenced by the instructions. Stallings v. Gilbreath [Ala.] 41 So. 423.

constable was influenced and guided by such instructions.[2] He is not liable on his bond for unofficial acts.[3] If he is indicted for malfeasance, it must appear that he acted in bad faith.[4] A complaint against him for an unlawful act must state what such wrongful act consisted in.[5] A private individual who justifies under process issued by a justice must show his jurisdiction.[6]

§ 3. *Civil jurisdiction.*[7]—Justice courts are courts of limited and special jurisdiction and are without power to hear any case when such power is not conferred specifically or by clear implication by statute,[8] but they have such jurisdition as is conferred by statute.[9] Justice courts have no equity jurisdiction,[10] but an equitable defense may be interposed.[11] Jurisdiction cannot be conferred by consent of parties upon a justice to reserve a case for decision to a later date than that authorized by statute.[12]

Residence determining jurisdiction.[13]—His jurisdiction is generally limited to the county of which the defendant is a resident,[14] and a nonresident does not waive lack of jurisdiction by merely appearing as a witness.[15] A defendant is not

2. But if the constable was influenced, the justice was liable as a joint tort feasor whether he was acting in his capacity as a justice or not. Stallings v. Gilbreath [Ala.] 41 So. 423.

3. Under the rule that an official who collects money on execution shall be liable on his bond for failure or refusal to turn it over to the party entitled, a justice, who is under no official duty to receive money collected by a constable on an execution issued by him, is not liable on his bond for failure to pay over the same, the bond being not liable for unofficial acts. Polk v. Peterson [Tex. Civ. App.] 15 Tex. Ct. Rep. 922, 93 S. W. 504.

4. Where a justice is indicted for malfeasance, it must appear that he acted in bad faith. Hohenstein v. State [Ga.] 55 S. E. 238.

5. A complaint on the official bond of a justice alleging that he wrongfully issued a warrant for arrest is demurrable for failure to state what the wrongful acts were. Bufford v. Chambers [Ala.] 42 So. 597.

6. One, not an officer, who justifies under a process issued by a justice, must show the existence of the material facts upon which jurisdiction of the justice depends. Rice v. Travis, 117 Ill. App. 644.

7. See 6 C. L. 333. For jurisdiction in criminal proceedings, see Indictment and Prosecution, 8 C. L. 189.

8. Under the Montana statutes a justice has no jurisdiction of an action for deceit in connection with a sale of property. State v. Taylor [Mont.] 83 P. 484. Under Code 1896, § 2733, he has no jurisdiction where the amount of the claim exceeds $50. Tolbert v. Falkenberry [Ala.] 40 So. 120. A conviction for violation of a borough ordinance, had before a justice who is described as acting recorder of the borough, is void for want of jurisdiction. Borough of Vineland v. Kelk [N. J. Law] 63 A. 5. He has no jurisdiction to foreclose a laborer's lien on eighteen miles of railroad, a locomotive, and other property. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104. An action to recover the amount of a lien is not an action to enforce it and a justice has jurisdiction. Where a client failed to recognize a lien of his attorney. O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150.

9. The proceedings before a justice **to recover a penalty** for violation of the provisions of an ordinance passed by the Board of Health pursuant to Gen. Laws, p. 1638, § 18, is a civil action in the court of small causes. Board of Health of Woodbury v. Cattell [N. J. Law] 64 A. 144. A justice has jurisdiction of an action on the case to recover **for injuries to a horse** as the result of negligence in maintaining a fence. Smithley v. Snowden, 120 Ill. App. 86. A **married woman** may be sued in a justice court for a debt due by her, or on a contract made by her before marriage, or on a contract made after marriage as a free trader. McAfee's Estate v. Gregg, 140 N. C. 448, 53 S. E. 304. Under a statute providing that an action on tax bills not exceeding a certain amount may be brought in a justice court in the city issuing them, a justice of the peace of the township in which a city is located has such jurisdiction. Carpenter v. Roth, 192 Mo. 658, 91 S. W. 540.

10. Where an equitable set-off is set up and judgment rendered thereon, such judgment is void. Cornett v. Ault, 124 Ga. 944, 53 S. E. 460.

11. In an action on a foreign judgment that the judgment was procured by fraud. Levin v. Gladstein [N. C.] 55 S. E. 371.

12. Tussing v. Evans, 7 Ohio C. C. (N. S.) 237; Thompson v. Ackerman, 21 Ohio C. C. 740, not followed.

13. See 6 C. L. 333.

14. Under a statute providing that the action must be brought in the county in which the defendant resides, a justice has no jurisdiction over a defendant who resides in another county. Mauck v. Rosser [Ga.] 55 S. E. 32. A defendant, who desires to obtain judgment over against a nonresident, may not bring in such person outside the county of his residence. Scott v. Fitch [Tex. Civ. App.] 97 S. W. 841. Where in an action for services defendant pleaded that he was agent for another whom he asked to be made defendant, the third person was entitled to be sued in the county of his residence. Id.

required to file his plea of personal privilege to be sued in the county of his residence, before the trial day.[16]

The amount in controversy[17] is determined by the sum demanded,[18] with interest and incidentals provided for,[19] but, under a statute fixing the jurisdictional amount in actions for the recovery of personal property, the jurisdiction depends on the real value and not the value alleged.[20] The amount of each separate demand or cause of action and not the aggregate of the various causes which may be joined determines the jurisdictional amount.[21] The jurisdictional amount cannot be increased by stipulation.[22] A plaintiff may lay his damages in an amount within the jurisdiction, though the actual damages sustained exceeds such amount,[23]

15. A defendant in a proceeding in which the justice has no jurisdiction over him, who files no plea and makes no appearance or defense, does not waive want of jurisdiction by appearing as a witness for plaintiff, though when placed on the stand he does not raise the question of jurisdiction over him as a party. Mauck v. Rosser [Ga.] 55 S. E. 32.

16. Mistrot Bros. & Co. v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 314, 91 S. W. 870.

17. See 6 C. L. 333.

18. A complaint alleging the conversion of property of the value of over $100 shows that the justice has no jurisdiction. Storm v. Montgomery [Ark.] 95 S. W. 149. Where the jurisdictional amount in an action for tort is $50, an action by a passenger for loss of his trunk is for negligence and a claim in excess of $50 is beyond the jurisdiction of the justice. Brick v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 194. The jurisdiction of an action for injury to property is measured by the amount demanded, not by the value of the property injured. Watson v. Farmer [N. C.] 54 S. E. 419. Where issues in an action on a note showed credits which reduced the amount sued for to less than the jurisdictional amount, and judgment was for less, the justice had jurisdiction. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428.

19. Where a note containing an agreement to pay interest and costs of collection is sued upon and including such incident exceeds the jurisdictional amount, the justice is without jurisdiction. Hamilton v. Rogers [Ga.] 54 S. E. 926.

Held to be within the jurisdiction: Under the rule that a justice has jurisdiction of controversies when the amount involved does not exceed $300, he has jurisdiction of an action in unlawful detainer where rent claimed amounted to $262.50, and a judgment for over $300 was not void but merely erroneous. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727. In replevin where the value of the property does not exceed $200. Johnson v. Hartman, 119 Ill. App. 206. In replevin his jurisdiction is confined to cases in which the value of the property taken on the writ does not exceed $200 in value. Rice v. Travis, 117 Ill. App. 644. Under Rev. St. 1899, § 4131, a plaintiff in unlawful detainer may recover possession and rent due if the amount does not exceed the justice's jurisdiction. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727. Where it does exceed such amount, the judgment is void only as to the part relating to rent. Id. An affidavit in replevin for a schooner valued it at $150. A constable levied the writ and valued it at $200. Defendant replevied and gave a bond for $400. The justice gave a consent judgment for the restoration of the property or the payment of $150. Defendant appealed. Held that there was no appeal in excess of $200, the jurisdictional amount. Mellini v. Duly [Miss.] 40 So. 546. Since the adoption of Acts 1900, p. 53, where plaintiff suing on a note and by summons cites defendant to answer the complaint "in an action upon a note, a copy of which note is annexed to this summons," the copy of the note being for $100 and ten per cent as attorney's fees, but the summons being silent as to the giving of the notice specified in such act, such summons is not to be construed as a suit for attorney's fees and the court has jurisdiction. Godfree v. Brooks [Ga.] 55 S. E. 938. Under Const. art. 4, § 27, and Revisal 1905, § 1420, a justice has jurisdiction of all actions ex delicto where the demand does not exceed $50, and not merely tort involving property to the value of such sum. Duckworth v. Mull [N. C.] 55 S. E. 850.

20. Under Const. art. 7, § 40. Kaufman v. Kelley [Ark.] 95 S. W. 448.

21. Where each of several notes sued upon were within the jurisdictional amount, a justice has jurisdiction of an action on all the notes filed as original causes of action, though they aggregate a sum in excess of his jurisdiction. Brooks v. Hornberger [Ark.] 94 S. W. 708. Separate actions on several notes may be maintained where the amount of each does not exceed the jurisdiction, and where if consolidated the amount would exceed such jurisdiction. McDowell County Bank v. Wood [W. Va.] 55 S. E. 753. Ann. Code 1906, § 1899, providing that several demands arising out of contract against the same person must be brought for the whole amount due and payable, does not apply where the aggregate amount exceeds the jurisdiction of the justice. Id.

22. A stipulation on each of two notes, each less but aggregating more than $100, giving a justice jurisdiction, does not give him jurisdiction of an action on the two notes in one case. Cole v. Bock [Iowa] 105 N. W. 331.

23. Watson v. Farmer [N. C.] 54 S. E. 419. A claim may be reduced so as to bring it within the jurisdictional amount. Cable Co. v. Elliott, 122 Ill. App. 342.

and it is permissible to amend so as to bring the demand within the jurisdictional amount.[24] A verdict in excess of the jurisdictional amount demanded may be remitted.[25]

Title to realty.[26]—A justice has no jurisdiction of an action where title to realty is involved,[27] but he has jurisdiction where it is incidentally[28] or not necessarily[29] involved. A purely specious claim of ownership will not oust his jurisdiction in forcible entry and detainer.[30] In some states, if title to real estate is put in issue, he loses jurisdiction for all purposes[31] and in others he is authorized to certify the case to the higher court,[32] but under the latter rule he may do so only where statutory requirements are complied with.[33]

Objections to the jurisdiction.[34]—An objection to the jurisdiction should be taken by demurrer for want of jurisdiction.[35] An objection to the jurisdiction is not waived by appealing,[36] but an objection to jurisdiction over the subject-matter is a waiver of objections to the jurisdiction over the person.[37]

§ 4. *Procedure in justices' courts*[38] is regulated by statute.[39] The hearing and

24. Where a contract attached to a summons obligated a payment of $125, which was subsequently amended to show a credit which brought the amount below $100, the judgment was not void for want of jurisdiction. Smith v. Puett, 124 Ga. 921, 53 S. E. 457.

25. Where an amount within the jurisdiction was demanded and a verdict in excess of the jurisdictional amount rendered, which excess was remitted, the justice had jurisdiction to enter judgment. Watson v. Farmer [N. C.] 54 S. E. 419.

26. See 6 C. L. 334.

27. Has no jurisdiction of an action for damages for breach of covenant seisin, which involves an inquiry as to title. Brown v. Southerland [N. C.] 55 S. E. 108. Where one had gone into possession of land as tenant of a former owner, and one suing him for rent had purchased the land at execution sale, and the title being disputed and the tenant not having agreed to pay rent to such purchaser but declared his intention to retain possession until the title was settled, a justice has no jurisdiction of an action for rent by such purchaser. Minton v. Minton [Ark.] 98 S. W. 976.

Title not involved: Has jurisdiction of an action on a note given for the purchase price of land where title is not involved. Davis v. Evans [N. C.] 55 S. E. 344. Has jurisdiction of an action on a note given for the purchase price of land. McPeters v. English [N. C.] 54 S. E. 417. Where in trespass no evidence of title was introduced the justice had jurisdiction to enter judgment. State v. Justice Ct. of Carson [Nev.] 87 P. 1.

28. Evidence of title may be received in forcible entry and detainer where it is necessary to determine the question of possession. Dineen v. Olson [Kan.] 85 P. 538.

29. Bill of particulars examined and held not to show title to real estate involved within the meaning of Gen. St. 1901, § 5233. Wilkins v. Lee [Kan.] 85 P. 140. In trespass where plaintiff or defendant did not claim ownership of the land and there was no evidence that it belonged to a third person, title was not necessarily involved. State v. Justice Ct. of Carson [Nev.] 87 P. 1. Evidence held not to show that title to land was necessarily involved. Id. An action for trespass where possession alone is relied upon is not within 2 Mills' Ann. St. § 2630, providing that where title is involved the case shall be certified up. Patrick v. Brown [Colo.] 85 P. 325. Under a law requiring the maintenance of right of way fences, a complaint in an action for killing a horse alleging that the railroad passed through lands of private owners, which was denied, did not raise a material issue of title. Oregon Short Line R. Co. v. District Ct. of Third Judicial Dist. [Utah] 85 P. 360.

30. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328.

31. In Montana if title to real estate is put in issue, the justice has jurisdiction for no purpose, and cannot confer jurisdiction on the district court by certifying the case to it. State v. District Ct. of Fifth Judicial Dist. [Mont.] 83 P. 597.

32. Under the statutes of North Dakota, a justice does not lose complete jurisdiction because the question of title arises. He is authorized to and must certify the case to the district court for trial. Johnson v. Erickson [N. D.] 105 N. W. 1104.

33. Under Code Civ. Proc. § 1486, a bond must be given. State v. District Ct. of Fifth Judicial Dist. [Mont.] 83 P. 597.

34. See 6 C. L. 335.

35. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234. The question of jurisdiction should be raised by plea in the justice court and not by motion to dismiss an appeal. Crew v. Heard [Ala.] 40 So. 337.

36. Bente v. Remington Typewriter Co., 116 Mo. App. 77, 91 S. W. 397. The defendant does not waive an objection to the jurisdiction of his person by appealing. State v. Ayers, 116 Mo. App. 90, 91 S. W. 398.

37. Brainard v. Butler, Ryan & Co. [Neb.] 109 N. W. 766.

38. See 6 C. L. 335.

39. Under a statute providing for the institution of an action by attachment, and providing that in such case the action is deemed commenced on delivery of the writ to the constable, the truth of the affidavit as to the causes of attachment must be determined as of the date the writ was de-

determination of a question of law is a trial.[40] Forms of action are not recognized.[41] The nature of the action is to be determined from the evidence introduced.[42] The trial may be adjourned by consent.[43] A justice does not lose jurisdiction through the absence of the summons and return on the return and adjourned days.[44] Failure to require security for costs prior to the return day does not invalidate the judgment.[45] Where disqualification of the justice is not fatal to his judgment,[46] objection thereto may be waived.[47]

The docket and other records[48] need not be kept with the particularity required in courts of general jurisdiction.[49] It is sufficient if the entries made show jurisdiction,[50] and statutory requirements are complied with.[51] That an entry relative

livered to the constable. Rosenthal v. Widensohler, 115 Mo. App. 237, 91 S. W. 432. The return of the writ that it was executed by leaving a copy at the usual place of abode of the defendant conclusively negatives the grounds of attachment that defendant has absconded, absented, or concealed himself so that the ordinary process of law cannot be served upon him. Id. Under the statutes of Wyoming relative to jury trials in justices' courts where the jury failed to agree at the first trial, or were paid by defendant who failed to appear at the adjourned day, the justice properly tried the case without empaneling a new jury. Pointer v. Jones [Wyo.] 85 P. 1050.

40. The hearing and determination of the issue of law raised by a demurrer to a complaint in a justice court is a "trial" within Rev. Codes 1899, § 6652. Walker v. Maronda [N. D.] 106 N. W. 296.

41. Where an action in replevin was commenced and the evidence showed conversion, a judgment in trover was properly entered. Morley v. Roach, 116 Ill. App. 534.

42. Schwarzschild v. Goldstein, 121 Ill. App. 1.

43. A second adjournment, on motion of plaintiff, defendant and his counsel being present and making no objection until after departure of the plaintiff, is equivalent to adjournment by consent. Beam v. Reynolds, 144 Mich. 383, 13 Det. Leg. N. 257, 108 N. W. 83.

44. Both being in his possession though not in the court room. Beam v. Reynolds, 144 Mich. 383, 13 Det. Leg. N. 257, 108 N. W. 83.

45. A judgment in favor of a nonresident plaintiff will not be reversed because the justice did not require security for costs, where security was given after the return day. Bakrow & Co. v. Totten [Mich.] 13 Det. Leg. N. 707, 109 N. W. 31.

46. Under statutes providing that a justice who is related to a party or who shall have been of counsel shall not hear a case, relationship does not avoid the judgment for disqualification but is merely ground for change of venue. Morrow v. Watts [Ark.] 95 S. W. 988.

47. Where a party knowing of the relationship of the justice to his opponent permits judgment to go against himself by default, and does not raise the question until the case is appealed, his objection on the ground of disqualification is waived. Morrow v. Watts [Ark.] 95 S. W. 988.

48. See 6 C. L. 336.

49. An entry on the docket, referring to the written petition on file, complies with a statute requiring a brief statement of the nature and amount of the demand (Pointer v. Jones [Wyo.] 85 P. 1050), and an entry that the complaint filed in the case presented a claim for an indebtedness for a certain sum sufficiently complies with the requirement of a brief statement of the nature of the pleadings and of a reference to those filed (McGeehan v. Bedford, 128 Wis. 167, 107 N. W. 296). Docket entry that the case was called and after waiting one hour defendant came not, and plaintiff appeared in person and by attorney, sufficiently shows that plaintiff appeared within the hour. Pointer v. Jones [Wyo.] 85 P. 1050. An entry in the docket that summons directing the defendant to appear and answer at a certain time sufficiently shows the particular nature of the process. Id. An entry in the docket that the jury returned a verdict of disagreement shows that the justice was satisfied that they could not agree after being out a reasonable time. Id. The record of a justice in a foreign attachment case is not bad because not setting forth what the notices contained, or that they stated the facts required to be stated by Rev. Code 1852, amended by Rev. Code 1893, p. 759, c. 677, § 33. Hazel v. Cacy [Del.] 63 A. 196. The record of a justice in a foreign attachment case, setting out that five legal notices of attachment were prepared and issued to a certain constable, is not bad because not stating that the justice prepared the notices as required to do by Rev. Code 1852, amended in 1893, p. 759, c. 677, § 33. Id.

50. Failure to refer in the docket to the written answer filed, as required by statute, is not a jurisdictional error, the answer having in fact been filed. Pointer v. Jones [Wyo.] 85 P. 1050. Record of landlord's proceeding must either state, or by reference to a complaint which so states, imply, all the facts entitling landlord to prevail. Judgment simply for possession and damages held bad. Ballou v. Mehring, 28 Pa. Super. Ct. 156.

51. In order that a justice's docket should establish the invalidity of his judgment it must fail to disclose some fact which is not only essential to jurisdiction but which the statute requires shall be entered upon the docket. McGeehan v. Bedford, 128 Wis. 167, 107 N. W. 296. Where no statute requires the fact that evidence was heard to be entered

to process is insufficient is not available to one who appears and answers.[52] Failure to make proper docket entries does not invalidate the judgment where such error is not prejudicial,[53] and a nonprejudicial irregularity will not invalidate the judgment of the appellate court.[54] The docket, like other court records, imports verity and cannot be contradicted, varied, or impeached except by evidence de hors such record.[55] It is a book required by law to be kept, and is competent evidence to establish facts recited therein, and entries properly recorded cannot be contradicted by parol.[56] But it is not evidence of facts not required to be recited therein.[57]

Change of venue[58] is regulated by statute.[59] Timely application therefor must be made[60] and affidavits must meet statutory requirements.[61]

Transfer of cause.[62]—A cause may be removed to a higher court by consent.[63]

Process and appearance.[64]—Application for process, returnable forthwith, must comply with statutory requirements.[65] Service may be made in the manner prescribed by law,[66] and the full time to appear must be given.[67] If the real name of the defendant is unknown,[68] process containing "real name unknown" must

upon the docket, the absence of such entry does not show that the judgment is void. Id.

52. Objection that the docket does not sufficiently state the nature of process issued is not available to the defendant where he appears and answers without objecting. Pointer v. Jones [Wyo.] 85 P. 1050.

53. Under Rev. St. 1899, § 4031, mistake in docketing an action against a guarantor on a note under his contract of guaranty, as an action on the note. Warder, Bushnell & Glessner Co. v. Johnson, 114 Mo. App. 571, 90 S. W. 392.

54. Warder, Bushnell & Glessner Co. v. Johnson, 114 Mo. App. 571, 90 S. W. 392.

55. Reddish v. Shaw, 111 Ill. App. 337.

56. Downey v. People, 117 Ill. App. 591. If a judgment has been rendered against a defendant in the court in which garnishment is pending, the justice may look to such judgment to ascertain the amount of the judgment to be rendered against the garnishee without such judgment being introduced. Morrison v. Hilburn [Ga.] 54 S. E. 938.

A transcript of the docket showing a judgment entered thereon and other entries relating to the case, where certified by the justice having custody of the docket, is admissible in the courts of the county in which the justice holds office. Patterson v. Drake [Ga.] 55 S. E. 175.

57. Under the rule that a justice's docket is evidence only of facts required to be noted therein, it is not evidence of other facts therein recited. Carpenter v. Roth, 192 Mo. 658, 91 S. W. 540.

58. See 6 C. L. 336.

59. "May" in Rev. Codes 1899, § 6652, relating to change of venue in justice court, should be construed to mean "must." Walker v. Maronda [N. D.] 106 N. W. 296.

60. It is too late to demand a change of venue after demurrer to the complaint has been argued and overruled. Walker v. Maronda [N. D.] 106 N. W. 296.

61. Under Rev. Code Civ. Proc. § 88, an affidavit for change of venue stating that, in the opinion of affiant based on rulings of the magistrate at a former trial, a fair hearing cannot be had, is insufficient. Affiant must believe. Witte v. Cave, 73 S. C. 15, 52 S. E. 736.

62. See 6 C. L. 336.

63. Where the parties agreed to transfer the cause to the district court, and pursuant to such agreement the plaintiff filed a petition in the district court and defendant appeared and answered and the court had jurisdiction of the subject-matter, it was proper to refuse to dismiss for want of jurisdiction. Farmers' Mut. Tel. Co. v. Howell [Iowa] 109 N. W. 294.

64. See 6 C. L. 337.

65. Where a summons is issued by a justice, returnable forthwith, the plaintiff's application for such summons must be accompanied by the statutory affidavit that there was danger of losing the benefit of his process by delay. Smith v. Fryling [Del.] 63 A. 801.

66. Burns' Ann. St. 1901, § 1520, expressly provides that process may be served on the defendant by leaving a copy thereof at his last usual place of abode. Meyer v. Wilson [Ind.] 76 N. E. 748. Jurisdiction of the person is acquired by personal service on him in the county, he appearing in court pursuant to such service. People v. Wait, 99 N. Y. S. 807. One claiming title to personal property through sale under attachment proceedings in justice court must show legal notice to the defendant of the pendency of the action and that the property claimed was attached therein. Beckwith v. Dierks Lumber & Coal Co. [Neb.] 106 N. W. 442.

67. A summons issued May 17, and returnable May 22, allows the statutory five days as computed in Pennsylvania. Justice v. Meeker, 30 Pa. Super. Ct. 207.

68. A statement in a bill of particulars filed before a justice that the first name of the defendant is unknown, is in effect an allegation that the real name is unknown. Uihlein v. Gladieux, 74 Ohio St. 232, 78 N. E. 363.

be served on him personally.[69] Irregularities in the return are not fatal if service was duly and legally made.[70] A return by a constable is not subject to collateral attack.[71] Nonappearance of the defendant within the hour, on the trial day, may be waived.[72]

Pleadings, issues and proof.[73]—Pleadings are sufficient if they advise the opposite party with what he is charged, and bar another action for the same cause.[74] Formality is not required;[75] but what is required to be set forth is subject to the rule that pleadings are to be taken most strongly against the pleader.[76] They are to be liberally construed,[77] and a technical error will not render them bad.[78] Redundancy and surplusage may be disregarded.[79] A pleading, though in writing, need not be more specific than if the case had been tried on oral statements;[80] and if the language of the written complaint is insufficient it may be supplemented orally.[81] But jurisdictional facts must be alleged,[82] and statutory requirements complied

69. Under Rev. St. 1906, § 5118, in such case the plaintiff must allege that he could not discover the true name. Uihlein v. Gladieux, 74 Ohio St. 232, 78 N. E. 363. A return showing service by leaving a copy at the usual place of residence is insufficient. Id. An action against Wm. Rogers and Mrs. Wm. Rogers, whose first name is unknown, is, as to the latter, an action against one whose real name is unknown and brings the case within Rev. St. 1906, §§ 5118, 6475, requiring personal service. Id.

70. Under P. L. 1903, p. 280, providing that judgment of a justice shall not be reversed "for any error made by a constable in the proper return of a summons, as to its service, if it appears that the defendant was duly and legally served" where a corporation alleges as sole ground for reversal that the person served was not such an officer as service could be made upon, it may be shown that service was duly and legally made. Hampton v. Elberon Automobile Co. [N. J. Law] 63 A. 869.

71. An entry of service by a constable on a summons issued by a justice court may be set aside on a traverse of the entry duly filed, but cannot be collaterally attacked. Patterson v. Drake [Ga.] 55 S. E. 175.

72. Failure of defendant to leave or move for dismissal for non-appearance after the expiration of the hour on the return day is a waiver of non-appearance. Where the plaintiff was delayed and telephoned the justice, and appeared five minutes after the hour expired. Bakrow & Co. v. Totten [Mich.] 13 Det. Leg. N. 707, 109 N. W. 31.

73. See 6 C. L. 337.

74. Held sufficient: A statement claiming a balance due under an insurance policy, giving the number and date of the policy and date of the loss, is sufficient. Widman v. American Cent. Ins. Co., 115 Mo. App. 342, 91 S. W. 1003. Statement that plaintiff contracted to rent certain premises on condition that defendant would put them in repair, and in reliance on his promise to do so paid $5 rent, and defendant refused to repair the premises or repay the money, does not state a cause of action on a promise to repay, but for money had and received on breach of condition precedent. Fallis v. Gray, 115 Mo. App. 253, 91 S. W. 175. Statement in an action for services rendered held not insufficient because counting on an express contract and not setting up the terms thereof; the amount of compensation being left open under the contract became a matter of quantum meruit rather than contract. Sexton v. Snyder, 119 Mo. App. 668, 94 S. W. 562. Where an action was commenced by filing an account showing a debt due for the privilege of filling in a certain lot, and before trial the contract on which the action was based was filed, the account and contract sufficiently stated the cause of action. Johnston v. O'Shea, 118 Mo. App. 287, 94 S. W. 783. Statement for a certain amount due on settlement held sufficient. Warner v. Close, 120 Mo. App. 211, 96 S. W. 491.

Affidavit and process in replevin held not so insufficient as to oust the justice of jurisdiction. The reference in the mortgage in the affidavit sufficiently identified the plaintiff. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

Held insufficient: An account charging defendant with merchandise as per bills without specifying the kind of merchandise or date of sale is insufficient. Rechnitzer v. Vogelsang, 117 Mo. App. 148, 93 S. W. 326.

75. In a suit for breach of contract of sale, it is not necessary to allege an acceptance of the offer by conduct in order to entitle plaintiff to introduce parol evidence of such acceptance. Gaus & Sons Mfg. Co. v. Chicago Lumber & Coal Co., 115 Mo. App. 114, 92 S. W. 121.

76. Held ambiguous and under this rule to state a cause of action for a penalty which was not within the jurisdictioin of the justice. Atlanta, etc., R. Co. v. Shippen [Ga.] 55 S. E. 1031.

77. A pleading which purports to amend a plea theretofore filed, if sufficient in itself to constitute a complete answer, may, in accordance with the liberal rules of practice in force, be treated as a new and distinct plea. Glessner v. Longley, 125 Ga. 676, 54 S. E. 753.

78. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727.

79. McReynolds v. Quincy, etc., R. Co., 115 Mo. App. 676, 91 S. W. 446.

80. Howard v. Fabj [Tex. Civ. App.] 14 Tex. Ct. Rep. 1004, 93 S. W. 225.

with.[85] Omission of such allegation may, however, be cured by the judgment.[84] In some states, if the action is founded on a written instrument, the instrument must be filed.[85] Such requirement, however, is not jurisdictional[86] and need not be complied with if the instrument is in the possession of the opposite party.[87] Defects in a pleading may be waived.[88] A statement of claim for goods sold must be an intelligible showing of what they were, to require an affidavit of defense.[89] A justice has no power with respect to the time when pleadings shall take place, except such as is conferred by statute.[90] Generally they are not required to be filed prior to the trial day.[91] The defendant may file contradictory pleas.[92]

The general rules governing the exercise of the discretionary power of the court with respect to allowing amendments to pleadings are the same in justice as in the district court,[93] but the rules of procedure relative to them are not.[94] A defective statement may be sufficient to support an amendment.[95] An amendment adding a sum to the original account,[96] or reducing the sum demanded to the jurisdictional amount,[97] may be filed, but not one alleging a cause of action proved, but not set

81. Gulf, etc., R. Co. v. Funk [Tex. Civ. App.] 15 Tex. Ct. Rep. 393, 92 S. W. 1032.

82. A complaint on an agister's lien is on a right of statutory creation, and must allege all facts necessary to give the justice jurisdiction. Patchen v. Durrett, 116 Mo. App. 437, 92 S. W. 721.

83. Verification of a complaint by the attorney for plaintiff in an action on a note held a sufficient compliance with Laws 1881, p. 562, c. 414, to sustain default judgment. Johnson v. Freeman, 49 Misc. 304, 99 N. Y. S. 225.

84. Failure of the petition to foreclose a mechanic's lien, to allege that notice had been filed in the circuit court showing when and before what justice suit would be instituted as required by statute, is cured by a recital in the judgment that the notice had been filed. Wissman v. Meagher, 115 Mo. App. 82, 91 S. W. 448.

85. Under Rev. St. 1899, § 3852, providing that the instrument sued on shall be filed with the justice, in an action on a contract of guaranty endorsed on a note, it is sufficient to file the note. Warder v. Johnson, 114 Mo. App. 571, 90 S. W. 392. Burns' Ann. St. 1901, § 1529, provides that a copy of the contract sued on is a sufficient complaint in the justice court. Cordes v. Bailey [Ind. App.] 78 N. E. 678.

86. Under a statute providing that failure to file a written instrument which is the foundation of the action is not ground for dismissal, but such instrument may be filed before the jury is sworn or trial begun, failure to file such instrument does not deprive the justice of jurisdiction. Widman v. American Cent. Ins. Co., 115 Mo. App. 342, 91 S. W. 1003.

87. In an action on an insurance policy, failure to file the policy is cured by an allegation that it is in defendant's possession. Widman v. American Cent. Ins. Co., 115 Mo. App. 342, 91 S. W. 1003.

88. A defendant who goes to trial without objecting to the statement waives defects therein. Warner v. Close, 120 Mo. App. 211, 96 S. W. 491.

89. Leek v. Livingston Manor Mfg. Co., 30 Pa. Super. Ct. 377. Statement of account for lumber held bad. Id.

90. Under Gen. St. 1894, § 4977, pleadings cannot take place before the time mentioned in the summons for the appearance of the parties. Taylor v. Walther, 97 Minn. 490, 107 N. W. 162. In this case the defendant appeared and pleaded three days before the return day. There being no appearance for him on return day, judgment was properly entered against him. Id.

91. Where the parties appear on the return day named in the writ and on motion of plaintiff the hearing is adjourned one week, the answer may be filed on the adjourned day. By implication the justice designates that day for the pleading, and by his motion plaintiff consents thereto. Nohre v. Wright [Minn.] 108 N. W. 865.

92. Glessner v. Longley, 125 Ga. 676, 54 S. E. 753.

93. Rae v. Chicago, etc., R. Co. [N. D.] 105 N. W. 721. A justice may allow a complaint alleging that cattle were killed by the negligent running of a train, to be amended to allege that the injury was due to failure of the defendant to keep its right of way fence in repair. Id. 1 Comp. Laws, § 764, relative to amendments in actions by or against partners, does not deprive the justice of the power, theretofore possessed, of granting amendments, but gives the parties the absolute right to amend at any time before the pleadings are closed, leaving with the court its original discretionary power to permit amendments thereafter. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

94. The provision of the practice act that an amendment to a plea containing new facts shall have affixed to it an affidavit that such facts were not omitted from the original plea for the purpose of delay does not apply in justice court. Glessner v. Longley, 125 Ga. 676, 54 S. E. 753.

95. Statement in an action to recover payments made on a contract for the purchase of lumber after rescission, made out on plaintiff's bill heads, held not so defective but that it could be amended. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585.

96. Davidson v. McCall Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 640, 95 S. W. 32.

up in the original complaint.[98] An amendment may be served on the opposite party at any time before trial.[99]

The proof must be consistent with the pleadings.[1] Evidence given by a witness at a prior trial cannot be proved by the justice's minutes.[2]

Verdict and judgment.[3]—A judgment entered without jurisdiction of the subject-matter is void,[4] and one irregular on its face is not a lien on the property of the judgment defendant.[5] But a judgment relative to a matter of which he has jurisdiction is not subject to collateral attack.[6] It is bad in so far as unauthorized relief is awarded.[7] A petition attacking a judgment because of defective service of process should point out the particulars in which it is defective,[8] and one attacking on the ground of want of jurisdiction should show wherein jurisdiction was lacking.[9] The judgment must conform to statutory requirements.[10] Under a statute providing that a judgment shall direct the issuance of process necessary to carry it into execution, the fact that it does not in terms so direct does not render it void.[11] Statutes requiring judgment to be entered immediately are generally directory and not mandatory,[12] and entry within a reasonable time is sufficient,[13] and failure to enter it within the period prescribed does not invalidate it.[14] A judg-

97. Under Code Civ. Proc. § 2944, permitting amendments at any time during trial if substantial justice will be done, a complaint to recover a penalty is properly permitted to be amended so as to bring it within the jurisdiction of the justice when too much has been claimed in the first instance. People v. Wait, 99 N. Y. S. 867.

98. Where a plaintiff fails to prove the contract alleged, it was proper to refuse to allow him to amend after the close of the evidence so as to allege a different contract. Genger v. Westphal, 128 Wis. 426, 107 N. W. 330.

99. The law does not prescribe the method of service of an amendment consisting of a bill of particulars and it is sufficient if it is handed to defendant's counsel before the trial. Carter v. Pitts, 125 Ga. 792, 54 S. E. 695.

1. A statement that defendant is indebted to plaintiff for "one telephone and telephone stock" is consistent with evidence of a contract for the sale of a telephone instrument and stock at a certain price. Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781. A complaint for false representations is not sustained by proof of breach of warranty. Vandervort v. Mink, 113 App. Div. 601, 98 N. Y. S. 772. Evidence sufficient to show that defendant's dog killed plaintiff's sheep. Ferguson v. Loudermilk [Ga.] 56 S. E. 119.

2. McRavy v. Barto, 99 N. Y. S. 712.

3. See 6 C. L. 337.

4. Did not appear, in an action of replevin, that the defendant resided in the township where the goods were found. Barnes v. Plessner [Mo. App.] 97 S. W. 626.

5. A transcript of a judgment rendered in an action against Wm. Rogers and Mrs. Wm. Rogers, whose first name is unknown, filed in the office of the clerk of the common pleas, does not constitute such judgment a lien on the lands of Lucy Rogers, though she is Mrs. Wm. Rogers. Ulhlein v. Gladieux, 74 Ohio St. 232, 78 N. E. 363.

6. The judgment that a defective service of process is sufficient. Meyer v. Wilson [Ind.] 76 N. E. 748.

7. In landlord's possessory action, under Act Dec. 14, 1863 (P. L. 1864, 1125), no recovery of rent is allowable but damages only. Ballou v. Mehring, 28 Pa. Super. Ct. 156.

8. An allegation that the record and proceedings by which the judgment was procured nowhere showed that process was served as required by law, states a conclusion and is insufficient. Martin v. Castle, 193 Mo. 183, 91 S. W. 930.

9. Martin v. Castle, 193 Mo. 183, 91 S. W. 930. The judgment against a partnership, without setting out the names of the partners, is irregular but not void, and unassailable after time for ordinary modes for review. Justice v. Meeker, 30 Pa. Super. Ct. 207.

10. A judgment upon confession which fails to show the cause of action or indebtness as required by Rev. St. 1892, § 1632, is void. Palmer v. Parker [Fla.] 42 So. 398.

11. Such provision being merely directory, not mandatory. Texas, etc., R. Co. v. Garrett [Tex. Civ. App.] 15 Tex. Ct. Rep. 270, 92 S. W. 1040.

12. Ann. Code 1906, § 2065, providing that a confessed judgment shall be entered without delay, is directory, and not mandatory. McDowell County Bank v. Wood [W. Va.] 55 S. E. 753. The California statute requiring judgment to be entered at the close of the trial is directory only. Reilly v. Cooper, 119 Ill. App. 347.

Contra: Under a statute requiring that the justice enter judgment on the report of referees, a transcript of the record which fails to show such entry will not support certiorari. Ruhl v. Cooper [Del.] 63 A. 575.

13. Rev. Codes 1899, § 5707, requiring a justice to enter judgment on the receipt of the verdict at once, construed to mean within a reasonable time in view of the circumstances of each case. Peterson v. Hansen [N. D.] 107 N. W. 528.

ment without a trial on the merits is not a bar to another action.[15] A determination on the question of exemptions is not conclusive.[16] Where the property of a garnishee is sold and the judgment is reversed, he may, on compliance with required conditions, obtain restitution.[17] A default judgment[18] may be set aside if justice will be thereby furthered,[19] but not to aid a dilatory or negligent party;[20] and failure to appeal precludes the setting aside, as obtained by perjury, or because defenses existed which were not interposed, of a default judgment.[21] The application therefor must be filed within the period prescribed by law,[22] and where not so filed the remedy is by appeal.[23] Statutory requirements[24] must be substantially complied with.[25] In some states it is provided by statute that a transcript of the judgment may be filed in the district court, and when so filed it is to be regarded as a judgment of that court,[26] and jurisdiction of the justice relative to it is terminated,[27] but such transcript is not prima facie evidence of the validity of the judgment.[28]

14. Where one of the defendants appears before the return day and confesses judgment, the fact that it is not entered until the return day does not avoid it. McDowell County Bank v. Wood [W. Va.] 55 S. E. 753. Failure of the justice to enter judgment within the period prescribed by statute does not invalidate it. Wissman v. Meagher, 115 Mo. App. 82, 91 S. W. 448. The mere fact that a justice did not enter judgment on the same day on which verdict was returned is too indefinite a showing to sustain an objection to the offer of the judgment in evidence. Peterson v. Hansen [N. D.] 107 N. W. 528.

15. Where the justice determines as a matter of law that the evidence adduced by plaintiff is insufficient and grants a nonsuit, there has been no trial on the merits, and the judgment is not a bar to another action. Smith v. Superior Ct., 2 Cal. App. 529, 84 P. 54.

16. The decision of a motion to discharge from seizure property taken on attachment on the ground that it is exempt, is not conclusive, and the question of exemption may thereafter be tried in an action of replevin by the judgment debtor. Brunson v. Merrill [Okl.] 86 P. 431.

17. Where a justice renders judgment against the garnishee, who appeals, but pending the appeal his property is sold, and he recovers judgment on appeal, he may obtain an order for restitution, on motion after verdict in his favor and an opportunity given the other party to resist the motion. Woolverton v. Fresman, 77 Ark. 234, 91 S. W. 190.

18. If a garnishee fails to answer within the time required by law, the justice may enter a default against him. Morrison v. Hilburn [Ga.] 54 S. E. 938.

19. Where the return on appeal from a default judgment does not show that proof was taken by the justice to sustain such judgment, it will be set aside. Jackson v. Lurie, 49 Misc. 634, 97 N. Y. S. 1040. Where a defendant could not be present at the trial day, because of sickness, and did not notify the justice or the plaintiff's attorney of his excuse, a default judgment against him will be set aside. Mistrot Bros. & Co. v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 314, 91 S. W. 870.

20. Where one relied on an officer of the court to notify him of the date of trial, and made no inquiry for several days after judgment was entered. Bullard v. Edwards, 140 N. C. 644, 53 S. E. 445.

21. Equity will not act where there is remedy by appeal. Hoskins v. Nichols, 48 Misc. 465, 96 N. Y. S. 926.

22. A justice has no jurisdiction to set aside a default judgment on an application not filed within the statutory period. Under Revisal 1905, § 1478, it must be filed within ten days. Bullard v. Edwards, 140 N. C. 644, 53 S. E. 445.

23. Where the statutory period within which a justice may set aside a default judgment entered by him has expired, the defendant's remedy is by appeal or certiorari. Bullard v. Edwards, 140 N. C. 644, 53 S. E. 445.

24. Defective notice of a conditional order vacating a default judgment does not deprive the justice of jurisdiction over the subject-matter, and he may on application of the moving party, continue the hearing on proper notice. Brainard v. Butler, Ryan & Co. [Neb.] 109 N. W. 766.

25. Under Sayles' Rev. Civ. St. art. 1651, authorizing a justice to set aside a default judgment on motion, notice of which shall be given to the successful party one full day before the hearing, when a motion was filed, and the attorney for the successful party was present and protested on the ground that the statutory notice had not been given, which protest was ignored, the action of the justice was held irregular but not void. Lummus Sons Co. v. Wade [Tex. Civ. App.] 16 Tex. Ct. Rep. 160, 95 S. W. 17.

26. Under a statute providing that transcripts of justices' judgments may be filed in the office of the clerk of the district court and when so filed shall be treated in all respects as judgments of the district court, an action to renew a judgment so transcribed is an action for its enforcement and is to be considered the same as a judgment of the district court. Haugen v. Oldford, 129 Iowa, 156, 105 N. W. 393. Where a justice's judgment has been regularly transferred to the district court by the filing of a transcript, it has, for the purposes of a lien and execution, the same effect as a

Execution[29] must be issued upon the judgment within the period prescribed by law.[30] A docket entry of the issuance of execution is not essential to the validity of the process.[31] Where authorized by statute, an execution may be renewed.[32] Pending an appeal, an execution cannot issue on a transcript filed in the district court by the judgment creditor.[33] In Alabama, in case of levy on real estate, the papers must be returned to the circuit court.[34]

§ 5. *Appeal and error and remedies extraordinary.*[35]—Mandamus is the proper remedy to review an order of the circuit court denying leave to take a special appeal from a justice's judgment.[36] The denial of the writ for such purpose is reviewable by certiorari, and not by mandamus sued out of the supreme court.[37] Prohibition will not lie on refusal of the justice to set aside defective service of summons.[38] In Georgia, if the amount in controversy exceeds $50 and only a question of law is involved, and the nature of the ruling complained of is not such as to dismiss the case, the losing party may appeal to the jury in the justice court,[39] appeal to the superior court,[40] or have his remedy by certiorari.[41] If both questions of law and fact are raised, but the petition for certiorari only complains of rulings which involve questions of law, certiorari is available.[42]

The right of appeal is statutory,[43] and statutory requirements must be complied

judgment originally entered therein. Holton v. Schmarback [N. D.] 106 N. W. 36.

27. Under Rev. Codes 1899, §§ 5498, 6717, the filing of a transcript of a justice's judgment in the district court terminates the power of the justice to issue execution, and authorizes the district court to issue its execution as upon judgments originally entered therein. Holton v. Schmarback [N. D.] 106 N. W. 36.

28. Under Acts 1899, c. 4723, p. 115, judgments of a justice, docketed in the office of the clerk of the circuit court, as provided by Rev. St. 1892, § 1624, are not prima facie evidence of the validity of such judgments. Palmer v. Parker [Fla.] 42 So. 398.

29. See 6 C. L. 338.

30. Rev Codes, 1899, § 6723, authorizing a justice to issue execution within five years after the entry of judgment and not thereafter, is a limitation on the justice court and not upon the life of the judgment. The limitation upon the latter is ten years, as prescribed by § 5200. Holton v. Schmarback [N. D.] 106 N. W. 36. Code Civ. Proc. § 685, authorizing enforcement of a judgment in certain cases after the period of limitation has expired, and § 925, providing that only those provisions of the code specifically applying to justice courts are applicable thereto, does not authorize enforcement of a judgment of a justice after the limitation period has expired. Heinlen Co. v. Cadwell [Cal. App.] 84 P. 443. Under Rev. Codes 1899, § 5500, limiting the period of execution to ten years from entry of judgment, execution may be issued on a justice's judgment transcribed in the district court within ten years from its entry by the justice and not within ten years from filing the transcript. Holton v. Schmarback [N. D.] 106 N. W. 36.

31. Commercial Real Estate Brokerage Co v. Riemann [Mo. App.] 93 S. W. 305.

32. An alias execution, issued before the first one has expired and which runs only for the period the first would if renewed, is tantamount to a renewal which is authorized by Rev. St. 1899, § 4038. Commercial Real Estate & Brokerage Co. v. Riemann [Mo. App.] 93 S. W. 305.

33. Where pending an appeal from a justice judgment, the judgment creditor filed in the district court a transcript of the proceedings had before the justice, and after dismissal of the appeal and an order remanding the cause to the justice for further proceedings, caused an execution to issue out of the district court on such transcript, held the execution was void. Jenkins v. Campbell [Neb.] 107 N. W. 221.

34. Under the statutes of Alabama, in case of levy on real estate under an attachment issuing from a justice, the papers must be returned to the circuit court, the city court is without jurisdiction. Moog v. McDermott [Ala.] 40 So. 390.

35. See 6 C. L. 339.

36, 37. Graham v. Wayne Circuit Judge, 143 Mich. 360, 12 Det. Leg. N. 1017, 106 N. W. 1109.

38. Remedy by appeal. People v. Smith, 184 N. Y. 96, 76 N. E. 925. Where a justice refuses to set aside a defective service of summons on special appearance of defendant with a statement of facts on which he claims his privilege, his remedy is by appeal, under Code Civ. Proc. §§ 3053, 3057. People v. Smith, 184 N. Y. 96, 76 N. E. 925.

39, 40, 41. Ansley v. Farley [Ga.] 55 S. E. 180.

42. The right to complain of disputed questions of fact being waived. Ansley v. Farley [Ga.] 55 S. E. 180. Where there is no conflict in the evidence on any material point, the use of the expression that the rulings of the magistrate "was contrary to law and evidence and weight of evidence" and the "evidence as undisputed" demanded a certain finding, did not authorize dismissal of a petition for certiorari. Id.

43. The amendment of 1880 of § 978, Code Civ. Proc., did not repeal § 926, relative to

with,[44] or substantially so.[45] There must be an appealable judgment[46] for an amount sufficient to give the appellate court jurisdiction.[47] The appeal must be properly entitled[48] and be taken within the period prescribed by law[49] unless good cause is shown for delay;[50] and to entitle one to a special appeal provided for by statute,

appeals from justices' courts. Swem v. Monroe, 148 Cal. 741, 83 P. 1074. There is no distinction between appeals in actions of forcible entry and other cases. Hoffman v. Lewis [Utah] 87 P. 167.

44. The appeal is statutory, and statutes must be substantially complied with. Hoffman v. Lewis [Utah] 87 P. 167. Under the rule that an advance fee shall be paid for dismissal of an appeal when entered on the records of the court, and the rule that an appeal may be dismissed when the appeal papers are not filed and the advance fee paid within thirty days after the transcript was sent up, where defendant appealed, but did not pay the filing fee within the period, plaintiff was entitled to pay it and have the appeal dismissed, though defendant tendered the fee after plaintiff had paid it and before hearing on the motion to dismiss Little v. Blank [Utah] 87 P. 708. Affidavit of appeal held sufficient where from the entire instrument it was to be gathered that it was made by affiant on behalf of the appellant company. Brown-Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

45. Under Rev. St. 1899, § 471, providing that the circuit court shall be possessed of the cause on lodgment of the papers therein, and § 4072, providing that a defective affidavit shall not be ground for dismissing an appeal, a defective affidavit confers jurisdiction where the papers in the case are sent up, though § 4062 forbids the justice to allow an appeal where the affidavit is insufficient. Bader v. Jones, 119 Mo. App. 685, 96 S. W. 305. An appellee who does not avail himself of the right to demand a sufficient affidavit of appeal or move for dismissal, as authorized by Rev. St. 1899, § 4072, thereby waives a defective affidavit. Id.

46. A record reciting that defendant and plaintiff both being present defendant acknowledging the debt and after hearing the allegations and proof and maturely considering the same, judgment was rendered for plaintiff, does not clearly show that judgment was rendered on confession, and was not appealable. Burke v. Silcox [Del.] 64 A. 73. Section 6524, Rev. Statutes, is broad enough to permit of a review of proceedings before a justice of the peace on the weight of the evidence. Karch v. Bacciocco, 7 Ohio C. C. (N. S.) 190. Where a justice dismisses a cass instead of certifying it to the district court as required by law, and the plaintiff appeals generally from the judgment, the district court has jurisdiction to try the action. Johnson v. Erickson [N. D.] 105 N. W. 1104. An appeal lies from a default judgment taken after proper service of process. Jackson v. Lurie, 49 Misc. 634, 97 N. Y. S. 1040. Under the Act of 1810, § 22, no appeal lies to the judgment of the common pleas on certiorari to a justice who had jurisdiction. It is final. Fry v. Spatz, 29 Pa Super. Ct. 592; Adams v. Berge, 30 Pa. Super. Ct. 422.

47. Where one was sued for $12 and filed a counter claim on one account for $7.25 and another for $26, and recovered judgment and remitted $6 on the $26 claim, held that the remittitur did not reduce the amount in controversy to less than $25, so as to deprive plaintiff of the right to appeal. Bell v. Hartwig [Iowa] 105 N. W. 833. When a judgment is rendered in favor of an intervener and the amount exceeds $20, the plaintiff may appeal, though the cause as between him and the defendant was not appealable. Howard v. Gammon, 78 Vt. 420, 62 A. 1014. When the compiaint was amended so as to reduce the amount demanded below, the sum which would authorize an appeal, the appeal was properly dismissed. Atianta, etc., R. Co. v. Georgia R. & Elec. Co., 125 Ga. 798, 54 S. E. 753. Where a party sues in a less sum than he is entitled to recover for the purpose of depriving the defendant of the right to appeal, it is not a fraud on the appeliate jurisdiction of the higher courts. Texas, etc., R. Co. v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 166, 95 S. W. 746. A counter claim absolutely without merit, and filed for the sole purpose of forming the basis for an appeal, is insufficient upon which to predicate an appeal where the judgment for the amount sued for was not appealable. Id. Where an action for less than the jurisdictional amount of the appellate court was appealed and by amendment another party who had agreed to assume the liabilities of the appellee was made defendant and answered, the appellate court had no jurisdiction. Little Rock Trac. & Elec. Co. v. Hicks [Ark.] 96 S. W. 385.

48. Where an appeal was entered in the name of a person not a party and was first amended "to the use of" a party and afterwards so as to make it appear that it was taken by a party, the appeal was void. Head v. Marietta Guano Co., 24 Ga. 983, 53 S. E. 676.

49. An appeal granted, under Code 1906, § 2125, after the expiration of the statutory psriod, for causes which could not have prejudiced the appellant if he had been diligent in attending to his interests, is properly dismissed as having been improvidently awarded. McClung v. Price [W. Va.] 55 S. E. 996.

50. That the justice, before rendition of judgment but after the trial, expressed to attorney for appellant his intention to render judgment for him, but had later given judgment against him, that petitioner heard through his attorneys that judgment had been rendered for him, is not good cause for not appealing within the statutory period. McClung v. Price [W. Va.] 55 S. E. 996. Under a statute granting relief to a party who fails to appeal within the statutory period, where he has been prevented by circumstances not within his control, he must not be guilty of

after the period within which the appeal may be regularly taken has elapsed, the statutory conditions must be complied with.[51] There must be a notice of appeal conforming to statutory requirements[52] and duly served.[53] The appeal must be prosecuted with due diligence.[54] The right to appeal should not be denied unless it is clear that the defeated party is not entitled to appeal.[55] Under the rule permitting appeal as a matter of right, the act of a party in insisting on a judgment below for less than he is entitled to does not preclude him,[56] and an appeal may be taken from part of a judgment.[57] The appellate court acquires jurisdiction on the filing therein of the transcript of records.[58] A party objecting to an appeal on the ground that the appeal bond has not been filed need not wait until the expiration of the statutory period,[59] but if he desires to attack on the ground that the papers are not filed or the advance fee paid, he must.[60] It is presumed on appeal that proceedings in the justice court were regular.[61] Costs of appeal may, for good cause, be taxed to the appellant.[62]

laches. Evidence held to show laches precluding relief. Pickell v. Coates [Mich.] 13 Det. Leg. N. 947, 110 N. W. 125. Under the Michigan statutes providing that appeals may be allowed after the expiration of the statutory period of five days under certain circumstances a circuit court has no authority to grant such an appeal after the five day period has elapsed, in the absence of the existence of the statutory conditions. Stock v. Wayne Circuit Judge, 143 Mich. 339, 12 Det. Leg. N. 1042, 106 N. W. 897.

51. In this case the affidavit and bond for appeal were tendered to the justice's deputy clerk who had no authority to receive them in the absence of the justice and no effort was made to leave them with the justice as required. Graham v. Wayne Circuit Judge, 143 Mich. 360, 12 Det. Leg. N. 1017, 106 N. W. 1109.

52. Under Code Civ. Proc. § 1760, the filing of the notice of appeal must precede or be contemporaneous with its service on the adverse party. State v. District Ct. of Fifth Judicial Dist. [Mont.] 85 P. 872. Under Rev. St. 1899, § 4076, providing that if appellant fail to give notice of the appeal ten days before the second term of the appellate court the judgment shall be affirmed or the appeal dismissed at the option of the appellee, where plaintiff on appeal gave no notice and on the second day of the second term took a voluntary nonsuit, the same would be set aside as defendant was deprived of the right to exercise his option. Butler v. Pierce, 115 Mo. App. 40, 90 S. W. 425. A notice of appeal entitled "J. W. Teasdale, Plaintiff," instead of J. W. Teasdale & Co., is sufficient where it designates the justice from whom the appeal is taken, gives the date and amount of the judgment, and is addressed to the above-named plaintiff. Teasdale & Co. v. American Fruit Product Co., 120 Mo. App. 584, 97 S. W. 655. A notice of appeal containing an erroneous statement of the date on which the judgment was rendered is insufficient. Cooper v. Northern Acc. Co., 117 Mo. App. 423, 93 S. W. 871.

53. Under a statute that notice of appeal must be served on the justice personally, and on the attorney for respondent, or respondent personally, within a specified time, it is sufficient to serve the justice personally and the respondent's attorney by mail. Wright v. Southern R. Co. [S. C.] 54 S. E. 211. Under the statutes of Missouri an appeal may not be dismissed for failure to give notice of appeal at the second term after the appeal was taken, but notice need not be given until the third term, the action not being triable until then. Statutes construed. Roll v. Cummings, 117 Mo. App. 312, 93 S. W. 864.

54. Statutes construed, and held that an affirmance for failure to prosecute an appeal was proper when the justice was negligent but no steps were taken by the appellant to urge action. Young v. School Dist., 119 Mo. App. 108, 95 S. W. 947.

55. Burke v. Silcox [Del.] 64 A. 73.

56. Under the rule that any party to a judgment may appeal, the fact that plaintiff insists on taking judgment for less than the evidence shows him to be entitled to is no ground for dismissing the appeal. Texas & P. R. Co. v. Wheeler [Tex.] 14 Tex. Ct. Rep. 502, 90 S. W. 481.

57. Where judgment was rendered for wages and a statutory penalty for nonpayment thereof, an appeal may be taken from the judgment for the penalty. Chicago, etc., R. Co. v. Langley [Ark.] 94 S. W. 58.

58. An appeal from the justice court, the superior court, by the filing with it of the transcript and records, acquires jurisdiction of the person of appellant and the subject matter of the suit. Brown v. Wagar, 110 Ill. App. 354. Jurisdiction of an appeal in forcible entry and detainer is acquired by the circuit court where the bond has been entered into before the justice, and the bond and transcript filed in the circuit court. Dickerson v. Johnson, 119 Ill. App. 325.

59, 60. Hoffman v. Lewis [Utah] 87 P. 167.

61. Where a case is submitted to the jury by a justice and judgment entered on their verdict, it is presumed on appeal that they considered all the evidence in the case. Murphy v. Drew, 99 N. Y. S. 1007. Where the record recites that plaintiff, a corporation, was not present but was represented by affidavit and other papers and letters in evidence, and defendant being present, judgment was rendered for plaintiff "after hearing all the allegations of the parties and their proofs and maturely considering the

Bonds.[63]—A bond or other security for costs is usually required[64] unless the appeal is from a judgment for costs only.[65] Such bond or security must substantially conform to the statute by which it is required,[66] must be signed by a surety,[67] and conditioned to pay costs or costs and judgment as required,[68] and be filed within the statutory period.[69] In order to stay or supersede the judgment, if the appeal does not have that effect, larger security and appropriately broader conditions are requisite.[70] In some states sureties may be required to justify[71] within a certain period.[72] A bond is not rendered invalid by mere descriptive matter in the title,[73]

same," it is not presumed that judgment was rendered on the affidavit but that there was sufficient evidence in the other papers and letters to sustain the same. Emory v. Columbia Wagon Co. [Del.] 63 A. 874. A judgment against a married woman is not void unless it appears from the record that the case was one over which the court had no jurisdiction. McAfee's Estate v. Gregg, 140 N. C. 448, 53 S. E. 304. When it is desired to review a justice's judgment on a motion dependent on extraneous facts, it must be made to appear what proof was offered to establish such facts in the justice court. Hayes v. Eubanks, 125 Ga. 349, 54 S. E. 174.

62. Under the rule that where appellant recovers a greater sum than in the justice court, he is entitled to the costs of both courts, but that the court may for good cause adjudge costs otherwise, an appellant who insisted on a judgment in the justice court for less than he was entitled to and appealed was properly assessed with the costs of the appellate court. Texas & P. R. Co. v. Wheeler [Tex.] 14 Tex. Ct. Rep. 502, 90 S. W. 481.

63. See 6 C. L. 340.

64. Where an appeal bond is expressly required by statute, the appellate court acquires no jurisdiction unless the bond is given. Carter v. Wyrick [Tex. Civ. App.] 17 Tex. Ct. Rep. 105, 98 S. W. 644. A statute requiring an appeal bond applies to a judgment against one who claimed property levied upon under a judgment against another, though the statutory claimant's bond was given. Id. In an appeal, not forma pauperis, it is essential that appellant give a bond for the eventual condemnation money. Civ. Code 1895 §§ 4140, 4458. Roberts v. Napier Bros. [Ga.] 55 S. E. 914.

65. Where no judgment is rendered except for costs, no appeal bond is required. Feagan v. Barton-Parker Mfg. Co. [Tex Civ. App.] 15 Tex. Ct. Rep. 665, 93 S. W. 1076.

66. Where an undertaking on appeal is required, an appeal may be dismissed where the bond is insufficient. Hoffman v. Lewis [Utah] 87 P. 167. Code Civ. Proc. § 978, providing for appeal bonds, is not inconsistent with § 926, providing for a deposit in lieu thereof. Swem v. Monroe, 148 Cal. 741, 83 P. 1074.

67. A bond is fatally defective if not signed by a surety. Roberts v. Napier Bros. [Ga.] 55 S. E. 914.

68. Cost bond alone will support tenant's appeal in landlord's action to recover premises in District of Columbia. D. C. Code, §§ 1218-1236. Dowling v. Buckley, 27 App. D. C. 205. Bond intended for supersedeas, but having only one surety, held good as cost bond. D. C. Code, §§ 20, 30, 1218-1236. Id. The bond on appeal need not be sufficient as a supersedeas but only as a cost bond where the statute after requiring a bond specifies additional requirements "in order" that it shall "operate as a supersedeas." Id.

69. Under a mandatory statute requiring an appeal bond to be filed within a certain period from judgment entered, failure to file it within such period ousts the jurisdiction of the appellate court. 2 Mills' Ann. St. § 2679. Horn v. Martin [Colo.] 87 P. 1073.

70. An appeal bond which stipulates for payment of costs and promises to pay and abide by any judgment which may be rendered, but not given for any specific amount or penalty is not a supersedeas bond within Code 1896, § 2145. Helton v. Ft. Gaines Oil & Guano Co. [Ala.] 39 So. 925. Where an appeal is taken and the appellant claims a stay of proceedings, under § 4842, Rev. St. 1887, it is necessary to give two bonds, one to cover the costs of the appeal, and the other in twice the amount of the judgment. Wilson v. Doyle [Idaho] 85 P. 928. An obligation in twice the amount of the judgment, including costs, for a stay of proceedings, is ineffectual where there is no obligation for costs on appeal. Id. Under Code Civ. Proc. § 978, providing for an appeal bond of $100, and § 926, providing for a deposit in lieu thereof, a deposit of less than $100, is ineffectual, though the judgment and costs do not exceed the sum deposited. Swem v. Monroe, 148 Cal. 741, 83 P. 1074. An appeal may be dismissed for failure to file an appeal bond within the statutory period. Nolan v. Fidelity & Deposit Co., 2 Cal. App. 1, 82 P. 1119.

71. As soon as the circuit court acquires jurisdiction of the parties and subject-matter it may enter a rule upon the sureties to justify, notwithstanding such rule may be entered at a term at which no dismissal could be had for want of prosecution and no trial could be entered upon. Jackson v. Sherman House Hotel Co., 120 Ill. App. 507.

72. Under the Utah statutes, failure to have the sureties justify within two days after exception taken to their sufficiency nullifies the undertaking given. Hoffman v. Lewis [Utah] 87 P. 167. An appeal may be dismissed for failure to comply with a rule, properly entered, requiring the sureties on the appeal bond to justify within a time fixed, where effort is made to justify and no extension of time is asked or new bond tendered. Jackson v. Sherman House Hotel Co., 120 Ill. App. 507.

73. Where an action was against "Wells, Fargo & Co., Express," "Express" was not alleged as part of the corporate name but

or because it misstates the amount of the judgment appealed from,[74] or because it does not designate the particular court appealed from,[75] or because coupled with an invalid stay bond,[76] or because the costs accrued exceed the amount of the obligation,[77] and it will be held good if it can be made complete by looking to other parts of the record.[78] Failure of the justice to place a filing mark on it does not affect its validity where he approves it.[79] If the bond is delivered[80] and the conditions performed, the sureties are liable,[81] but, on dismissal, judgment may not be rendered against the surety alone.[82]

Process or appearance.[83]—Voluntary general appearance in the appellate court confers jurisdiction,[84] providing the justice had jurisdiction,[85] but special appearance does not.[86]

merely descriptive, and an appeal bond to "Wells, Fargo & Co." was sufficient to sustain the appeal. Wells, Fargo & Co. v. Hanson [Tex. Civ. App.] 14 Tex. Ct. Rep. 495, 91 S. W. 321.

74. A bond correctly stating the date of the judgment and showing the style of the cause and the court in which it was rendered is sufficient, though it misstates the amount. Burger v. Weatherby [Tex. Civ. App.] 91 S. W. 250.

75. An appeal bond is sufficient though it did not state the particular justice court in which the action originated, nor the county in which the superior court to which the appeal was taken was situated. Hayes v. Eubanks, 125 Ga. 349, 54 S. E. 174.

76. Where there is no uncertainty as to the conditions and obligations of an appeal bond, it will be held good for the purposes of appeal though coupled with an invalid stay bond. Edminston v. Steele [Idaho] 87 P. 677. An undertaking for the payment of costs on the appeal to the district court and for a stay of execution, and wherein the sureties are bound in a sum exceeding $200 though not in an amount sufficient to stay the proceedings, and the undertaking contains all the obligations required in appeal bonds, is sufficient. Id.

77. Where a certiorari bond is executed for the statutory amount, it is not reversible error to refuse to require an additional bond, though the costs already exceed the obligation of the bond. Giddens & Co. v. Rutledge [Ala.] 40 So. 759.

78. Where an appeal bond may be made complete by looking to other parts of the record, it is not rendered void by failure to set out that the judgment included the foreclosure of a laborer's lien. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104.

79. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104.

80. Where in an action on an appeal bond such bond was produced at the trial, was found among the papers of the justice, and the docket entries disclosed that it had been filed, a finding that it was delivered was justified. Nolan v. Fidelity & Deposit Co., 2 Cal. App. 1, 82 P. 1119.

81. Under Code Civ. Proc. §§ 974, 975, authorizing an appeal by a party dissatisfied with the judgment "rendered," an action on an appeal bond alleging that the judgment was rendered need not allege that it was duly made and given. Nolan v. Fidelity & Deposit Co., 2 Cal. App. 1, 82 P. 1119. Where there is a condition in an appeal bond that the sureties would pay the judgment and costs if the appeal was dismissed, the sureties assumed the risk that it might be erroneously dismissed. Id.

82. Under a statute providing only for a judgment against a surety on an appeal bond, in connection with a judgment against the principal, an action may not be dismissed against an appellant and judgment rendered against the surety alone. Crow v. Reliable Jewelry Co., 116 Mo. App. 624, 92 S. W. 742. Where an appellee dismissed the appeal and took judgment against the surety alone, the fact that the surety did not know of the judgment until after its rendition did not show negligence on his part. Id.

83. See 6 C. L. 340.

84. Where defendant appeals and perfects his appeal in the circuit court and the plaintiff voluntarily appears, the circuit court has jurisdiction of the parties and subject-matter. Jackson v. Sherman House Hotel Co., 120 Ill. App. 507. Where an appeal is perfected so as to give jurisdiction of the subject-matter at a particular term, appellee may, by voluntary appearance at such term, give full jurisdiction of both subject-matter and parties. Dickerson v. Johnson, 119 Ill. App. 325. The question of jurisdiction arising from absence of one of the defendants cannot be raised by another defendant who has voluntarily entered a general appearance in the cause, especially where the one appearing has entered various stipulations in the cause and does not raise the question until the cause has reached the appellate court. Goode v. Illinois Trust & Sav. Bank, 121 Ill. App. 161.

The giving of an appeal bond constitutes an appearance in the appellate court and authorizes it to enter judgment without inquiry as to the character of service of process in the justice court. Whether or not the service was defective is immaterial, since the case is tried de novo. Hairston v. Southern Pac. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 121, 94 S. W. 1078.

85. Where the record does not show that the justice had jurisdiction of the subject-matter, the defect is not waived by appearance. Barnes v. Plessner [Mo. App.] 97 S. W. 626.

86. Appearance on appeal for the purpose of moving to dismiss for failure to give the statutory notice of appeal is not general

The transcript[87] of the proceedings in the justice court must be sent up as required by statute;[88] it must be authenticated.[89] But failure to send it up within the statutory period does not affect the rights of an appellant not lacking in diligence.[90] The transcript filed in the common pleas may be amended when incorrect or deficient.[91] Recitals not properly a part of the transcript are of no effect.[92] Cost of transcript may be exacted before sending it up, particularly when a statute so provides.[93]

The record[94] must affirmatively show facts which give the justice jurisdiction over the person of the defendant,[95] and conform to statutory requirements.[96] Where the fact that the amount in controversy exceeded the jurisdictional amount of the justice does not appear, it may be established by evidence.[97] Questions to be reviewed must be properly saved.[98]

Dismissal.[99]—A prevailing party who appeals may dismiss without the consent of the opposite party.[1] An appeal may be dismissed for failure to comply with statutory requirements,[2] but not for failure to pay a fee required by rule of court

appearance waiving such notice. Roll v. Cummings, 117 Mo. App. 312, 93 S. W. 864.

87. See 6 C. L. 340.

88. Under B. & C. Comp. § 2246, it must be authenticated by the justice or some person authorized by law. Shaw v. Hemphill [Or.] 86 P. 373.

89. The authenticity of the transcript, where the seal is lacking, is sufficiently established by the evidence of the justice that it is the transcript of his docket. Foster v. People, 121 Ill. App. 165.

90. It is error for the common pleas to dismiss an appeal for failure of the justice to send up the transcript within the time fixed by statute where the appellant is not guilty of laches. Danenhower v. Lippincott [N. J. Law] 63 A. 868. The failure of the justice of the peace to certify and send up the papers within the time fixed by statute does not affect the rights of the appellant. Cain v. State, 36 Ind. App. 51, 74 N. E. 1103.

91. Justice v. Meeker, 30 Pa. Super. Ct. 207; Leek v. Livingston Manor Mfg. Co., 30 Pa. Super. Ct. 377.

92. A recital in the transcript, "plaintiff claims $25" is properly no part of such transcript, and does not limit the right of recovery on appeal. Chamberlain v. McCoy-Howe Co., 117 Ill. App. 571.

93. In Northumberland county appeal costs to which he is entitled must be tendered before the justice is required to furnish a transcript. If more is demanded, a tender of the proper amount should be made. Llewellyn Min. Co. v. Lloyd, 29 Pa. Super. Ct. 129.

94. See 6 C. L. 341.

95. Where the real name of one of the defendants is unknown, and the record shows a continuance by agreement, it does not show that both parties were present consenting to such continuance, and the defect in not making personal service is not cured. Uihlein v. Gladieux, 74 Ohio St. 232, 78 N. E. 363.

96. Under § 100, Revised Justice's Code, requiring a statement of necessary evidence where an appeal is taken on questions of law, or a review is desired on questions of law and fact, and § 101, obviating such requirement if a trial de novo is demanded, an appeal on questions of law and fact is defective without such statement where a new trial is not demanded. Aldrich v. Ramoe [S. D.] 109 N. W. 641.

97. Where a case was dismissed because the sum sued for exceeded the jurisdictional amount, and such facts did not appear from the record, it was proper to allow it to be established by evidence. Singer v. Atlantic Rice Mills Co. [Ga.] 54 S. E. 821.

98. Where a declaration sought to combine a count in replevin and one in assumpsit, and neither the affidavit nor process gave the individual names of the members of the plaintiff, partnership objections to such defects, though not made in justice court, were properly raised in an affidavit for special appeal. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073. Error in discharging the jury for disagreement cannot be considered on writ of error in the absence of a bill of exceptions showing exception to the order. Pointer v. Jones [Wyo.] 85 P. 1050. Where specifications of error in the notice of appeal from a justice's judgment on questions of law only do not raise any question as to the sufficiency of the pleadings, that question cannot be raised on appeal, where the defect is one of statement of a cause of action or defense as distinguished from failure to state a cause of action or defense. Rae v. Chicago, etc., R. Co. [N. D.] 105 N. W. 721. On appeal from a judgment on verdict of a jury, an exception that it is contrary to the law and evidence brings up the verdict for review. McKee v. Linton [S. C.] 54 S. E. 1016.

99. See 6 C. L. 341.

1. A plaintiff who recovered judgment in the justice court and thereupon appealed to the circuit court could dismiss his suit in the circuit court without the consent of defendant. Mundt v. Cooke-Rutledge Coal Co., 118 Ill. App. 124.

2. Where the clerk of the appellate court is prohibited from filing papers until the advance filing fee is paid, and defendant who appealed failed to pay it within the statutory period, payment by plaintiff in order to move for dismissal was not a voluntary payment waiving his right to have it dismissed. Little v. Blank [Utah] 87 P. 708.

but not authorized by law.[3] An appeal may not be dismissed on preliminary call.[4] An appeal should not be dismissed for want of prosecution unless it appears that a nonappealing party is negligent.[5] A premature and erroneous dismissal is not conclusive.[6]

Pleadings on appeal.[7]—The rule that written pleadings need not be more specific than oral ones applies on appeal.[8] Pleadings on appeal need not be in the same language as those in the justice court.[9] Amendments not changing the cause of action but only perfecting the one originally attempted to be stated[10] or to allege jurisdictional facts,[11] or to promote substantial justice,[12] or increasing the amount of the demand,[13] may be allowed, but those setting up a new or different cause of action may not,[14] and a counterclaim not asserted below cannot be set up on appeal.[15] If the discretionary power of the justice to permit amendments was not invoked, permission to amend may be denied.[16]

3. Rule of court requiring a docketing fee in the county court. Dille v. Rice, 120 Ill. App. 353. Such a rule is contrary to law and is void. Id.

4. A dismissal of an appeal upon preliminary call is not within the rules of the court and is erroneous. Doppelt v. Blum, 118 Ill. App. 64.

5. An appeal should not be dismissed for want of prosecution unless summons had been entered upon the nonappealing party, or an original and alias summons returned "not found," or the appearance of such nonappealing party had been entered in writing ten days before the order was entered. Jackson v. Sherman House Hotel Co., 120 Ill. App. 507.

6. An erroneous and premature dismissal of an appeal for failure to give the statutory notice does not prevent appellants from thereafter giving the statutory notice or excuse failure to do so. Roll v. Cummings, 117 Mo. App. 312, 93 S. W. 864.

7. See 6 C. L. 342.

8. Howard v. Fabj [Tex. Civ. App.] 14 Tex. Ct. Rep. 1004, 93 S. W. 225.

9. On appeal the defendant is not required to allege a counterclaim in the same language in which it was pleaded in the justice court. It is sufficient if the identity of the counterclaim is preserved. Brockway v. Reynolds [Neb.] 109 N. W. 154.

10. Under the rule that the statement or account sued on may be amended on appeal, but no new cause of action or item can be added, an account may be amended to state what the items are due for and by prefixing the dollar sign to the items of the account. Keene v. Sappington, 115 Mo. App. 33, 90 S. W. 752. A statement in the justice court for cutting trees on a part of a certain league of land does not vary from an amendment on appeal for cutting timber on the same league and the amendment does not state a different cause of action. Wright v. Dotson [Tex. Civ. App.] 15 Tex. Ct. Rep. 682, 93 S. W. 1075.

11. Rev. St. 1899, c. 47, art. 2, creating an agister's lien does not prohibit amendments on appeal from the justice court to show existence of jurisdictional facts, and § 4236 provides that proceedings under the act not specially provided for shall be governed by general laws. Held a complaint to enforce such lien may be amended on appeal to show jurisdictional facts under the rule allowing amendments to promote substantial justice. Patchen v. Dunett, 116 Mo. App. 437, 92 S. W. 721.

12. Where an account filed before the justice was insufficient to state a cause of action because of failure to state the kinds of merchandise or date of sale, it may be amended on appeal. Rechnitzer v. Vogelsang, 117 Mo. App. 148, 93 S. W. 326.

13. A defendant who is appellant may increase the amount of an account claimed as a set-off. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104. A landlord suing for rent is entitled, on his case being called for trial in the county court to amend, to claim recovery of rent coming due since the commencement of the action. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903.

14. Where an action in justice court was based on contracts for the sale of standing timber and machinery, it may not be amended on appeal to set up another contract relative to saw logs not mentioned in the contracts sued upon in the justice court. Wall v. Melton [Tex. Civ. App.] 16 Tex. Ct. Rep. 112, 94 S. W. 358. An amendment on appeal that the plaintiff was also an employe of another party and had agreed that his purchases from such other might be deducted from his salary does not make such other person a party. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104.

15. Rev. St. 1899, § 4078, expressly provides that a counterclaim not set up in the justice court cannot be asserted on appeal. Sexton v. Snyder, 119 Mo. App. 668, 94 S. W. 562. Under Sayles' Ann. Civ. St. 1897, art. 358, a counterclaim which was not pleaded in a trial before a justice until after judgment cannot be considered on appeal to the county court. Comer v. Floore [Tex. Civ. App.] 13 Tex. Ct. Rep. 410, 88 S. W. 246.

16. Where in replevin the justice was not requested to and did not exercise his discretionary power to permit amendment after the pleadings were closed, a circuit judge was justified in refusing to permit amendment on special appeal. If such amendment was essential to the validity of the judgment in the circuit court, it was also essen-

The case is tried de novo on appeal[17] and the appellate court acquires only such jurisdiction as the justice had,[18] consequently, the complaint cannot be amended to demand a sum in excess of the jurisdictional amount of the justice,[19] and error in permitting such amendment cannot be cured by a remittitur.[20] The case must be tried upon the issues presented in the justice court.[21] The appellant must prove his case to entitle him to recover.[22] But competent evidence not introduced before the justice may be admitted.[23] The appellate court has before it the original papers and may take judicial notice of the time when the action was instituted.[24] The procedure is governed by the rules of the appellate court[25] unless otherwise provided by statute.[26] In Michigan the powers of the appellate court on general appeal do not apply on a

tial to the validity of the justice's judgment. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

17. See 6 C. L. 342. When plaintiff sued for $49 and defendant set up a counterclaim for $64, on appeal defendant was entitled to a new trial on the merits under Code Civ. Proc. § 3068, authorizing a new trial when the sum demanded by either party exceeds $50. Vandevort v. Mink, 113 App. Div. 601, 98 N. Y. S. 772.

18. The appellate court acquires only such jurisdiction as the justice had and can render only such judgment as the justice could have rendered. Kirby's Dig. § 4682. Woolverton v. Freeman, 77 Ark. 234, 91 S. W. 190. Where the amount in controversy exceeded the jurisdictional amount, the appellate court had jurisdiction. Storm v. Montgomery [Ark.] 95 S. W. 149. Where the amount in controversy exceeded the jurisdictional amount of the justice, the appellate court has no jurisdiction. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104. If a justice had no jurisdiction, the appellate court has none. Patrick v. Brown [Colo.] 85 P. 325.

19. A complaint cannot be amended on appeal so as to state a cause of action for a sum in excess of the justice's jurisdiction. Rose v. Christinet, 77 Ark. 582, 92 S. W. 866. Though the case is tried de novo, the complaint cannot be amended to demand an amount exceeding the jurisdictional amount of the justice. Missouri, etc., R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 318, 98 S. W. 415.

20. After judgment. Rose v. Christinet, 77 Ark. 582, 92 S. W. 866. An error in permitting such amendment is not cured by omission to include in the charge the items which increased the amount beyond the justice's jurisdiction. Missouri, etc., R. Co. v. Hughes [Tex. Civ. App.] 17 Tex. Ct. Rep. 318, 98 S. W. 415.

21. North & Co. v. Angelo [Neb.] 105 N. W. 1089. Where the summons commanded defendant to answer a complaint "for deceit and breach of warranty and false warranty," and the justice's return on appeal failed to make any statement of the complaint and there was no motion that it be made more specific, the superior court properly submitted the issue of false warranty which was sustained and refused to submit the issue of deceit. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234. On appeal from a judgment of a justice of the peace, an exhibit attached to the record of the circuit court without further return from the justice cannot be considered. Village of Wayne v. Goldsmith, 141 Mich. 528, 12 Det. Leg. N. 516, 104 N. W. 689.

22. The case is tried de novo and, where an appeal is taken by defendant who does not appear, plaintiff must prove his case, and it is error to dismiss the appeal without such proof. Chenowith v. Keenan [W. Va.] 55 S. E. 991. On appeal from a justice to a jury in the superior court where the plaintiff fails to make out a prima facie case, a verdict may be directed for defendant. Callaway v. Southern R. Co. [Ga.] 55 S. E. 23.

23. Competent evidence not introduced on the trial before the justice may be admitted. Equity Savings & Loan Co. v. Boisfontaine, 115 La. 842, 40 So. 241. The admission of competent evidence not introduced in the justice court does not change the cause of action. Hasse v. Herring [Colo.] 85 P. 629.

24. For the purpose of limitations. Van Burg v. Van Engen [Neb.] 107 N. W. 1006.

25. Under a statute providing that the trial in the appellate court shall be governed by the practice of such court, the verdict in the appellate court should be in conformity with the statutes governing the action and not in conformity with the statutes prescribing the form of verdict in justices' courts. Absher v. Franklin [Mo. App.] 97 S. W. 1002. Where an action in forcible entry and detainer is removed to the circuit court as provided by statute on the affidavit of the defendant that he entered peaceably and under claim of title, and under a statute which provides that on such removal plaintiff must recover on the strength of his legal title, unless defendant entered under contract or by force, defendants are not entitled to a separate trial of the issue of force vel non. Fowler v. Prichard [Ala.] 41 So. 667.

26. In Georgia it is provided by statute that, where plaintiff obtains judgment and the defendant appeals, the appeal must be tried by a jury. Callaway v. Southern R. Co. [Ga.] 55 S. E. 22. In such case, if the evidence demands a verdict for the defendant, the judge may so direct, and, if the plaintiff does not wish to be concluded by the verdict, he must dismiss before verdict is directed. Id. Where action is brought on an unconditional contract in writing and defendant appears at the first term and files a plea and the case is appealed and the plea stricken in the superior court, judgment cannot be entered against defendant without a jury verdict. Montgomery v.

special appeal.[27] In New York a justice's judgment may be set aside as against the weight of evidence.[28]

Judgment.[29]—The right of recovery on appeal is limited only by the jurisdictional amount of the justice,[30] and such amount may be exceeded by interest accruing during the pendency of the appeal.[31] Where the appeal is taken on a question of law, the decision should be reversed or affirmed and if reversed the case should be remanded,[32] and under a statute limiting the appellate court to affirming or reversing the judgment in whole or in part, it has no power to modify it.[33] Failure of the appellate court to take statutory measures looking to enforcement of the judgment does not avoid it.[34] A motion to set aside a default judgment of the appellate court must be filed within the statutory period.[35]

Further appeal or error[36] may be allowed only where so provided by statute,[37] but one who does not take an appeal where it is allowable may not complain of the judgment.[38] The paper book from the common pleas must include the justice's rec-

Fouche, 125 Ga. 43, 53 S. E. 767. Under Code Civ. Proc. § 3342, a county court may grant a reargument on appeal from a justice. Bumpus v. Anderson, 49 Misc. 417, 99 N. Y. S. 826. Where the opinion of the court affirming a justice's judgment shows that all matters involved were considered and the decision was not in conflict with law to which the attention of the court had not been directed, a motion to argue before the successor of the county judge who heard the appeal will be denied. Id.

27. Statutes, Comp. Laws §§ 918, 10,268, relative to the powers of a circuit judge when the case is tried de novo, do not apply on special appeal. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

28. Under Code Civ. Proc. § 3063, amended by Laws 1900, p. 1277, c. 553, a county court is authorized to set aside a justice's judgment against the weight of evidence only where it is so plainly against the preponderance of evidence that the justice could not reasonably have reached his decision. International Tailoring Co. v. Bennett, 113 App. Div. 476, 99 N. Y. S. 438. If it is evenly balanced so that different inferences may be drawn from it, the county court should not set it aside. Id.; McRavy v. Barto, 99 N. Y. S. 712; McDonald v. Dunbar, 99 N. Y. S. 768. Held not to so preponderate in favor of the defeated party as to justify setting it aside. International Tailoring Co. v. Bennett, 113 App. Div. 476, 99 N. Y. S. 438. Under this statute, the county court is a court of review without original jurisdiction to determine the facts. McRavy v. Barto, 99 N. Y. S. 712; McDonald v. Dunbar, 99 N. Y. S. 768.

29. See 6 C. L. 343.

30. Limited in no way by the amount recovered before him. Chamberlin v. McCoy-Howe Co., 117 Ill. App. 571.

31. A judgment rendered in the district court on appeal is not erroneous in that it includes interest upon the claim sued upon during the pendency of the action in that court, though it is thereby made to exceed in amount the jurisdiction of the justice from which the appeal was taken. Butler v. Bruce & Co. [Neb.] 106 N. W. 445.

32. Decision by the justice on the question of venue that he was without jurisdiction. Null v. Superior Ct. [Cal. App.] 87 P. 392. Under Code Civ. Proc. §§ 976, 980, if an appeal is based on questions of law alone and the judgment is reversed, the case may be remanded to the justice court for trial. Smith v. Superior Ct., 2 Cal. App. 529, 84 P. 54. The jurisdiction of the court of common pleas is limited, in an attachment suit presented on error to a justice of the peace, to the entering of a judgment of reversal with judgment for costs accrued up to that time. Foote v. Central American Commercial Co., 7 Ohio C. C. (N. S.) 531. In Missouri a circuit court may in vacation remand a case of unlawful detainer to the justice court from which is was certified. Rev. St. 1899, § 3951. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727.

33. Where summons was accompanied by attachment and was personally served on defendant who moved to vacate the attachment, and on denial appeared generally, and judgment was rendered for money only, it will be affirmed, though the attachment is erroneous, and the appeal is from the part of the order denying motion to vacate it. Hindes v. Mills, 101 N. Y. S. 843.

34. Failure of the district court on affirmance of a justice's judgment to order the clerk to certify the decision or award execution out of the district court as required by statute does not vitiate the judgment of affirmance. Pointer v. Jones [Wyo.] 85 P. 1050.

35. Where plaintiff appealed and recovered judgment by default at the November term, a petition to set aside such judgment filed at the February term is too late. Bader v. Jones, 119 Mo. App. 685, 96 S. W. 305.

36. See 6 C. L. 343. Also Appeal and Error, 7 C. L. 128.

37. Code Civ. Proc. § 1357, relative to the right of appeal to the appellate division of the supreme court from a court of record, does not apply to a summary proceeding originating before a justice and transferred to the county court on appeal. Nor is such appeal allowed by Code Civ. Proc. § 2260. Barrus v. Parsons, 109 App. Div. 634, 96 N. Y. S. 359.

38. A plaintiff, who does not appeal from the judgment of the county court reversing a justice's judgment as against the

ord and this cannot be supplied by the continuance docket entries or by recitals in the opinion or the exceptions.[39] The court of first appeal will be followed in the construction of its own rules.[40]

§ 6. *Certiorari.*[41]—Certiorari will issue where the justice acted without jurisdiction,[42] and in some states to review errors of law,[43] but not to review a verdict properly returned,[44] or the determination of a matter within the jurisdiction of the court.[45] Points made in the petition must be verified by the answer.[46] An answer containing all material evidence introduced is sufficient.[47] The return is to be given a reasonable construction.[48] Certiorari will not be dismissed for a mere irregularity.[49] On the hearing of a petition for certiorari, the power of the superior court extends only to errors committed at the trial.[50] Where the case is up on objections

weight of evidence and granting a new trial, cannot urge that the judgment should be affirmed because a new trial was granted, instead of an absolute reversal. International Tailoring Co. v. Bennett, 113 App. Div. 476, 99 N. Y. S. 438.

39. Cunningham v. Everett, 24 Pa. Super. Ct. 469.

40. A common pleas rule requiring affidavits of claim or defense and construed as applying only to contract cases will be similarly construed by the appellate court when it is urged that the judgment below was erroneous because of adherence to such practice. Livingston v. Kerbaugh, 30 Pa. Super. Ct. 534.

41. See 6 C. L. 343. See, also, Certiorari, 7 C. L. 606.

42. Under P. L. 1903, p. 279, § 93, where a justice lacks jurisdiction over defendant because of illegality in the service of summons upon him and yet proceeds to render judgment against him, such judgment may be reviewed on certiorari. Richardson v. Smith [N. J. Law] 65 A. 162. The only question reviewable on certiorari bringing up a judgment in a proceeding to recover a statutory penalty is whether the court had jurisdiction of the parties and subject-matter. Board of Health of Woodbury v. Cattell [N. J. Law] 64 A. 144. To deprive a party of the remedy by certiorari, the justice court must have had jurisdiction over the subject-matter and party with reference thereto. City of Bridgeton v. Pierce [N. J. Law] 64 A. 693. Where an action is dismissed because plaintiff's evidence shows that the amount in controversy exceeded the jurisdictional amount, certiorari and not appeal was the proper remedy for plaintiff. Singer v. Atlantic Rice Mills Co. [Ga.] 54 S. E. 821. The docket of the justice is admissible to show such fact. Civ. Code 1895, §§ 5214, 5215, does not prohibit the introduction of the original docket. Id.

43. A petition for certiorari to review a judgment is sufficient where it is alleged that the attorney for the prevailing party promised that no judgment would be taken until a bill of particulars had been furnished, that the judgment was entered in breach of such promise, and that the clerk of the justice's court became a party to the deception by informing petitioner after the judgment had been entered that nothing had been done. Fisher v. Pennsylvania Co., 118 Ill. App. 662. Petition for certiorari properly overruled. Glenn v. Augusta Drug Co. [Ga.] 55 S. E. 1032. Where a jury renders a verdict against the defendant and requests the magistrate to decide which party shall bear the costs, and no exception is taken to such request, the party against whom costs are taxed may review the judgment by certiorari. Hewett v. Robertson, 124 Ga. 920, 53 S. E. 456.

44. Where the uncontradicted evidence demanded the verdict rendered, a petition for certiorari complaining of the rendition of verdict was properly overruled. Quaglino v. Benedette [Ga.] 55 S. E. 938.

45. Where an appeal is taken on a statement of the case, the court has jurisdiction to determine the nature of the appeal and certiorari will not lie to review the order of the court based on a determination that the appeal involved questions of law only, though such determination is erroneous. Smith v. Superior Ct. 2 Cal. App. 529, 84 P. 54.

46. Points made in a petition for certiorari not verified by the answer of the magistrate furnish no ground for reversal. Raymond v. Garden [Ga.] 55 S. E. 944.

47. It is not error to overrule exceptions to the answer of a justice to a writ of certiorari, where the evidence alleged in such exceptions to have been omitted was immaterial, and the answer contained all the evidence introduced that was favorable to the excepting party. Baird v. Smith, 124 Ga. 251, 52 S. E. 655.

48. The return to a writ of certiorari that an adjournment on motion by plaintiff was against objection, implies presence of defendant at the time of the adjournment. Beam v. Reynolds, 144 Mich. 383, 13 Det. Leg. N. 257, 108 N. W. 83. Notice to defendant in certiorari held sufficient to designate the county in which the writ was to be heard, and the fact that the date of the term at which it was to be heard was incorrect, would not invalidate it. American Bonding & Surety Co. v. Adams, 124 Ga. 510, 52 S. E. 622.

49. Where a claimant of property on which execution against defendant had been levied, styled himself as defendant. Baker v. Drake [Ala.] 41 So. 845.

50. An assignment that a juror was related to a party within the prohibited degrees of consanguinity, that the opposite party furnished liquor to the jury, and improper remarks of counsel to the jury, cannot be considered where no ruling was made thereon

to the record, the record cannot be supplemented.[51] Certiorari may be sustained as to the erroneous portion of a judgment brought up.[52] Where the error complained of in a writ of certiorari is one of law, the superior court may render final judgment.[53]

§ 7. *Criminal jurisdiction and procedure.*[54]—The power of a justice to issue warrants, and as a committing magistrate, and the procedure looking thereto,[55] and his jurisdiction of prosecutions for crime and the procedure therein,[56] are elsewhere fully treated.

KIDNAPPING.[57]

An indictment that accused did forcibly seize and confine and did inveigle and kidnap charges but a single crime as defined in Oregon.[58] Evidence that the kidnapped person had signed seaman's articles is not objectionable, as tending to prove criminal enticement of seaman where properly limited to kidnapping.[59]

LABELS; LABOR UNIONS; LACHES; LAKES AND PONDS, see latest topical index.

LANDLORD AND TENANT.

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§ 1. *Definitions and distinctions.*[60]—A lease is a contract by which a per-

Ferguson v. Loudermilk [Ga.] 56 S. E. 119.

51. Where on certiorari to review a justice's judgment the case is before the court on exceptions to the record, the record cannot be supplemented by affidavit, no diminution thereof being alleged. Emory v. Columbia Wagon Co. [Del.] 63 A. 874.

52. Where a judgment is rendered against husband and wife on a joint note and the case is carried to the superior court by certiorari and the defendant agrees that the judgment against the wife is erroneous because the contract is one of suretyship, certiorari may be sustained as to the wife and overruled as to the husband. Walker v. Hillyer, 124 Ga. 857, 53 S. E. 313.

53. Civ. Code 1895, § 4652. Hewett v. Robertson, 124 Ga. 920, 53 S. E. 456. Where facts are undisputed and the determination of the case rests solely upon a question of law, it is not error to finally dispose of the case on certiorari in the superior court. King & Co. v. Georgia R. & Elec. Co., 125 Ga. 827, 54 S. E. 756. Judgment in certiorari reducing the verdict so as to conform to the evidence held proper. Carter v. Pitts, 125 Ga. 792, 54 S. E. 695.

son owning or controlling lands or tenements permits another to occupy the same for a period less than that to which the right of the lessor extends.[61] It is distinguished from a sale[62] in that it gives no right in the fee,[63] and from a contract of hire,[64] or a license, in that it creates an estate in the premises.[65] There seems to be a conflict of authority as to whether a contract for the use of walls and roofs for display advertising purposes is a lease or a license.[66]

§ 2. *The contract of lease and creation of tenancy. How created or established.*[67]—The relation of landlord and tenant is founded upon a contract whereby one is to have the use and occupation of lands or tenements of another for a term or period.[68] Reservation of rent is not essential to the creation of the relation.[69]

54. See 6 C. L. 344.

55. See Arrest and Binding Over, 7 C. L. 265.

56. See Indictment and Prosecution, 8 C. L. 189.

57. See 6 C. L. 344.

58. B. & C. Comp. § 1774. State v. White [Or.] 87 P. 137.

59. State v. White [Or.] 87 P. 137.

60. See 6 C. L. 345.

61. See Cyc. Law Dict. 537. A contract by which one street railway company divested itself of the use and possession of the road and appliances in consideration of specific rent, and the performance of other duties by another company, held to be a lease. Moorshead v. United Rys. Co., 119 Mo. App. 541, 96 S. W. 261. A contract by which was leased a quantity of rails, a steam shovel, and dump cars, provided for rental payments and for purchase on payment of a stated sum, also on default in payment of rent, the owner might take possession. The articles were referred to as "said equipment" but were separately valued. Cars and shovel were marked property of the owner and were not to be removed from the work. Held a lease as to all the articles. Cincinnati Equipment Co. v. Strang [Pa.] 64 A. 678. Instrument by which a board of supervisors leased a school section for 99 years, held in view of the terms of the conveyance and the statute pursuant to which it was executed to be a lease. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

Whether contract is lease or agency, see Clark & Skyles Agency, 28.

62. A contract by which one rents land to another, providing for the payment of three installments of rent and agreeing to convey when the last installment is paid, is a lease and not a contract of sale. Thomas v. Johnson [Ark.] 95 S. W. 468.

63. A lease for 99 years gives no right in the fee. Is an estate for years. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290. 873.

64. A contract by which one was to raise a crop, title to remain in the owner of the land and the worker to have one-half the proceeds after deducting all debts due the owner, is one of employment and does not create the relation of landlord and tenant. Bourland v. McKnight [Ark.] 96 S. W. 179. The relation is not created where one fixes up an athletic field under an agreement that he is to be reimbursed out of revenue derived therefrom so as to entitle him to recover rental value. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906. Under a statute providing that a contract for hire exists where one party furnishes land and a team and another labor, with stipulations to divide the crop, and a statute providing that persons who raise a crop by joint contributions in such manner as to make them cotenants therein shall have a lien for their shares, a contract which contains all the elements prescribed by the former statute, and in addition that each shall furnish one-half the fertilizer used, creates a cotenancy in the crop. Hendricks v. Clemmons [Ala.] 41 So. 306.

65. An instrument by which is granted the right to use certain land as a game preserve and providing for forfeiture for breach of the conditions construed to be a lease creating the relation of landlord and tenant. Shafter Estate Co. v. Alvord, 2 Cal. App. 602, 84 P. 279. A conveyance of standing timber, with rights of way over the premises and the privileges usually accorded lumbermen, providing that the timber should be removed within a certain period and that all improvements remaining on the premises should belong to the landlord, is a lease, not a mere license. Alexander v. Gardner, 29 Ky. L. R. 958, 96 S. W. 818.

66. **Held a lease:** A contract by which one is given the right to use a roof for advertising purposes, and such use involves the maintenance of a structure for signs, is a lease and not a mere license. Pocher v. Hall, 50 Misc. 639, 98 N. Y. S. 754.

Held an irrevocable license: An instrument by which one leases the right to use the wall of a building for display advertising for a definite period, and providing for abatement of rent in case the building is destroyed, whether a lease or a license, is not revocable at the will of the owner. Levy v. Louisville Gunning System, 28 Ky. L. R. 481, 89 S. W. 528. The interest of the grantee in such case is in the nature of an easement. Id. Such a right is not revoked where the owner leases the premises to another by an instrument which does not mention the license. Id.

67. See 6 C. L. 346.

68. Where one in possession under a contract of sale takes a lease by the express terms of which he surrenders all rights including right to possession under the original contract his possession thereafter is that of tenant, though there is no physical vacation and re-entry. Chambers v. Irish [Iowa] 109 N. W. 787. A parol agreement between land-

Like other contractual relations it may be express or implied.[70] The contract upon which it is founded must possess the elements essential to the validity of any contract; it must be mutual,[71] based on a consideration,[72] and be free from fraud,[73] but it need not be signed by the lessee in order to give it binding effect,[74] and irregularities in execution may be cured by subsequent ratification.[75] It must contain a description of the property leased.[76] It must be made by a person who has some estate in the premises leased[77] and authority to enter into the contract,[78] and, if made by one in a representative capacity, he must have authority.[79] It must not fall within

lord and a tenant whose lease is about to expire that the tenant should remain in possession four months longer, followed by possession by the tenant after expiration of his term, is a valid lease for such period, though the amount of rent is not specified. The law implies that he will pay a reasonable rent. Schickedantz v. Rincker [Neb.] 106 N. W. 441. Such parol lease is not abrogated by notice to the tenant that, if he held over after expiration of his first term, he would be taken as occupying for another like term at an increased rental. Id. The relation is not shown to exist between one who takes title to land and states that he takes it for another's benefit and such other remains in possession claiming ownership. Meyer v. Beyer [Wash.] 86 P. 661. Evidence sufficient to show that a parol lease for one year was made, to take effect on a certain date. Fishman v. Wolf, 101 N. Y. S. 16.

69. Alexander v. Gardner, 29 Ky. L. R. 958, 96 S. W. 818.

70. Evidence sufficient to show that one entered premises as tenant from month to month, under an implied agreement to pay a certain rental in advance, and that he agreed to pay such rent according to such implied agreement. Coney v. Lovett [Cal. App.] 84 P. 428.

71. Where in a preliminary agreement for a lease, whether verbal or written, it is stipulated that the lease shall be in writing, the contract or lease is not completed until the writing is made and signed, and until then either party may withdraw. In re Woodville, 115 La. 810, 40 So. 174. Where an owner states to one who had leased premises from one who had no title that such lease was good and that the tenant could stay there for two years, it does not constitute ratification of such void lease, nor a letting for two years, nor for any other period. Hebberd v. Mayo, 97 N. Y. S. 396. An acknowledgment to a lease by an alleged lessee is insufficient to establish that the subscriber to the acknowledgment is a party to the lease. Sims v. McLaren, 117 Mo. App. 67, 94 S. W. 792. Evidence insufficient to show that a certain person was a party to a lease. Id.

72. A contract not based on a consideration giving the tenant the right to occupy the premises after the expiration of the lease at a certain rental until he could rent another house, but containing no agreement on the part of the tenant to occupy, is unilateral in its nature. Glessner v. Longley, 125 Ga. 676, 54 S. E. 753. Mere inadequacy of consideration or other inequality in the terms of a lease does not of itself constitute ground to avoid it in equity. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Inadequacy of consideration is no ground for cancelling a lease unless it is so gross as to shock the conscience. Smith v. Collins [Ala.] 41 So. 825. To prove fraud in such case there must be more than a mere preponderance of evidence. Id.

73. A lease is void for fraud, where the landlord misreads it to a tenant who cannot read at the time it is executed. Knoepker v. Redel, 116 Mo. App. 621, 92 S. W. 171. Where evidence relied on to show the relation of landlord and tenant consisted in part of a promissory note describing the lands, it is competent to show by parol that such description was not in the note when it was executed. Bullard v. Hudson, 125 Ga. 393, 54 S. E. 132.

74. Baragiano v. Villani, 117 Ill. App. 372.

75. The recognition of a lease of school lands made by county commissioners on behalf of the county, by receiving rent, and making other contracts expressly subject thereto, is a ratification of such lease and cures informality in original execution. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

76. A description in a lease "314 acres out of the southern part of" a section leases an interest in the south half of the survey. Santa Rosa Irr. Co. v. Pecos River Irr. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 27, 92 S. W. 1014.

77. The state has no title to and cannot lease school lands granted to it by the Federal government until the official survey has been made and approved by Federal authorities. Clemmons v. Gillette [Mont.] 83 P. 879. A lease by a life tenant and the widow of one of the remaindermen reciting that the widow executed on behalf of her minor children and which lease was assigned did not confer on one claiming te have purchased the interest of such minors at guardian's sale the right to recover from the assignees, pending the term, on the ground that the assignee failed to perform the covenant to pay rent. Furr v. Burns, 124 Ga. 742, 53 S. E. 201.

78. It is not ultra vires for a corporation, which has no use for land and an old meeting house on it, to lease it to one who agrees to buy the house, and also to buy on termination of the lease a house to be built by the lessee. Hollywood v. First Parish in Brockton [Mass.] 78 N. E. 124.

79. It is presumed that a guardian has taken all necessary legal steps in leasing his ward's land. Norton v. Stroud State Bank [Okl.] 87 P. 848. Laws 1893, p. 907, c. 433, expressly provides that two-thirds of the stockholders of a railroad corporation may, at a meeting called for that purpose,

the inhibition against champertous contracts.[80] The relation does not exist between the vendee at a tax sale, of the premises and a tenant in possession under the former owner,[81] but does between a grantee of the leased premises and a tenant in possession,[82] and between a subtenant and the owner where the mesne lessee surrenders.[83] Whether a sublease for an entire term creates the relation between tenant and sublessee depends on the intention of the parties.[84]

Construction of leases and proof of the terms of tenancy.[85]—If the contract upon which the relation of landlord and tenant is based is an express one, it is governed by the rules of construction applicable to all such contracts.[86] It is to be construed in connection with contracts contemporaneously executed,[87] and, if executed by virtue of statutory authority in connection with the statute,[88] a lease will be construed in the light of statutes pertaining to leasehold estates,[89] and to give effect to the intentions of the parties[90] as expressed in the terms of the instrument.[91]

authorize a lease of the road. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

80. Under the rule that adverse possession does not prevent a person from selling his interest in land, one whose title rests on a contract to purchase may lease though it is not shown who was in actual or constructive possession of the land at the time the lease was executed. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032.

81. Such vendee takes free from contracts or obligations of such former owner. Carlson v. Curran, 42 Wash. 647, 85 P. 627. An offer to pay rent by tenants under a former owner to one who purchased the premises at tax sale, which tender was refused, was an offer to pay to whomsoever was entitled to it and does not create the relation between the parties. Id. Where in a suit in ejectment by a purchaser at tax sale of the premises against one in possession as tenant of a former owner it is adjudged that he is entitled to notice to quit or demand for possession before suit brought, such judgment is not an adjudication that the relation of landlord and tenant existed. Id.

82. A grantee of the landlord becomes landlord of the tenants. Chambers v. Irish [Iowa] 109 N. W. 787.

83. Where a tenant who has sublet surrenders his lease, the subtenant is made tenant of the owner. His rights under his lease are not affected. Moskowitz v. Diringen, 48 Misc. 543, 96 N. Y. S. 173.

84. A lease to a subtenant for the full term creates the relation of landlord and tenant between the sublessee and the original lessee if so intended. Boyd v. Kinzy [Ga.] 56 S. E. 420.

85. See 6 C. L. 349.

86. See in this connection, Contracts, 7 C. L. 761. Leases are to be reasonably construed according to the apparent intention of the parties. City of New York v. U. S. Trust Co., 101 N. Y. S. 574.

87. Lease of railroad and contracts executed contemporaneously between the same parties and relative to the same subject-matter should be construed together. Marklove v. Utica, etc., R. Co., 48 Misc. 258, 96 N. Y. S. 795. Alleged oral agreement made some time after execution of the lease held not to change its terms or authorize forfeiture for breach of conditions of such agreement. Madden v. McKenzie [C. C. A.] 144 F. 64.

88. The provisions of a statute authorizing a lease of school lands for 99 years, requiring the lessee to pay taxes and giving him the right to sue for waste, is not inconsistent with a leasehold estate only. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

89. Instrument so construed held an agreement to give a new lease at the expiration of the term, presumably for one year. Brill v. Carsley, 2 Cal. App. 331, 84 P. 57.

90. A lease of personal property, providing that the lessee shall pay expenses incurred in retaking it at expiration of the lease, does not indicate that the parties contemplated attorney's fees as an incident of such expense (White River, etc., R. Co. v. Star Ranch & Land Co., 77 Ark. 128, 91 S. W. 14), nor does it show that the lessee intended to pay such fees in case the lessor should be drawn into litigation with third persons concerning ownership or right to possession (Id.). Under a contract by which one was to work land of another and have one-half the proceeds after paying all advances made by the landlord to enable him to make the crop, whether a cow and calf and certain medical bills were within the terms of such contract, held a question for the jury. Bourland v. McKnight [Ark] 96 S. W. 179. The rights of a lessee for a term of 99 years must be determined from the instrument under which he holds and not by conditions existing when the lease was made. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

91. A lease providing that the lessee guarantees his annual receipts shall be $10,000, and agreeing to pay 20 per cent of such receipts as rent, is an agreement to pay $2,000 rental per annum, and the lessee was required to make up the difference if his receipts did not amount to $2,000. Shartenberg v. Ellbey, 27 R. I. 414, 62 A. 979. Where a lease gives the tenant the right to purchase, also binds him to make needed repairs and improvements of a certain value during the term "and to leave the same" on the premises if the purchase is not consummated, **held a binding obligation to increase the value of the property** to such an amount forming part of the consideration of the lease. Peters v. Stone [Mass.] 79 N. E. 336. The term "im-

Whatever is implied in a lease is as effectual as what is expressed.[92] It is to be construed most favorably to the lessee, especially where the clause to be construed is claimed to be one defeating his estate,[93] and presumptions are to be indulged in his favor.[94] Technical terms will be construed in connection with the nature of the estate conveyed and authorized.[95] Terms merely descriptive[96] and manifest clerical errors[97] will be disregarded. A lease will be construed to take effect from its date,[98] and, if for a certain term at a specified rental, is one entire contract.[99] The term[1] and tenements included must be determined from the recitals of the

provements" as used covers new buildings as well as additions and repairs. A provision that in case the tenant defaulted in the performance of any of his covenants, the landlord might collect rent from subtenants, and that the lease should be cancelled, only **authorizes cancellation** at the option of the landlord in case of the tenant's default. O'Brien v. Levine, 50 Misc. 303, 98 N. Y. S. 636. A lease of a portion of a building required the lessee to pay to the lessee of another portion, which contained the heating plant of the entire building, one-half the cost of operating the boiler and provided that if the part of the building containing the heating plant became vacant the lessor would pay the excess expense of operating the heating plant. Held the lessor did not impliedly covenant to furnish heat. New Era Mfg. Co. v. O'Reilly, 197 Mo. 466, 95 S. W. 322.

92. If an implication arises from the language of the lease and is not gathered from mere expectations, it is controlling. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. A lease granting all oil and gas under the leased premises and the right to enter for the purpose of developing, and reserving royalties on the product, which were the controlling inducement of the grant, and expressly requiring the drilling of one well during the first five years but not expressly defining the diligence to be exercised in the work of development, implies a covenant that it should be continued with reasonable diligence if oil and gas are found in paying quantities during the period allowed for original exploration. Id.

93. Where an instrument partly written and partly printed may be construed to defeat or save the tenant's estate, the latter construction will be given. Moskowitz v. Diringen, 48 Misc. 543, 96 N. Y. S. 123. Where one claimed that an insolvent held possession as a tenant under him but did not produce the lease nor excuse nonproduction or prove its terms, it may be inferred that its provisions as to the right of the tenant to remove fodder, etc., from the premises was unfavorable to him. Wilson v. Griswold [Conn.] 63 A. 659.

94. Where a landlord assents to the removal of a plate glass window so that a tenant may bring in an article of furniture, he assents to taking it out the same way and a refusal to allow it to be so removed is a conversion. Marder v. Heinemann, 100 N. Y. S. 250.

95. The phrase "the right, title, use, interest, and occupation" used in a lease of school lands is to be construed in connection with the character of the estate authorized to be conveyed, and the nature of the estate. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

96. Where lease of apartments in a building contains "known as the Bristol Apartment Hotel," such term is descriptive only and does not indicate an agreement that no portion of the building should be used for purposes inconsistent with use of the building as an apartment hotel. Bristol Hotel Co. v. Pegram, 49 Misc. 535, 98 N. Y. S. 512.

97. Where through a clearly clerical error in the lease, the landlord instead of the tenant was given the right to renew, it was the duty of the parties to so read the lease, hence there was no necessity for action on the part of either as preliminary to the tenant's right to renew and no delay of either in calling attention to the error could impair the tenant's right to exercise his option. Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 P. 280.

98. Under a lease providing that rent should commence when possession should be taken at a future date, but that if possession should not be given on such date then from the date of possession, the term commences to run from the date of the lease. Where such lease was for five years and was of Indian lands which under Acts of Congress could not be leased for more than five years, it was not void. Blackburn v. Muskogee Land Co. [Ind. T.] 91 S. W. 31.

99. Where a lease is made of premises at a monthly rental and a six months' term, the contract is entire and there can be but a single breach and recovery; and where the lessee refuses to enter, a recovery of judgment for the first month's rent and its payment constitute a bar to further actions for recovery under the lease. Burckhardt v. Greene, 7 Ohio C. C. (N. S.) 515.

1. Under an oil and gas lease for twelve years and so long thereafter as minerals should be found in paying quantities, "or" the payments hereinafter provided for are made, "or" should be read "and" and the term limited to twelve years unless oil or gas is found. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006. A lease for one year with an option to the tenant to extend for four years upon notice, and a further option for an additional term of five years at an advanced rental, upon proper notice, is a lease for ten years at the option of the lessee, absolute for one year, and optional as to the future continuance. Walker v. Wadley, 124 Ga. 275, 52 S. E. 904. Where a lessee takes possession and pays rent under a lease for ten months, he waives any condition on which such lease was made that it should

contract.[2] "Appurtenances" include everything essential to the beneficial use and enjoyment of the thing leased.[3]

A written lease is presumed to contain the entire agreement of the parties and cannot be varied by parol testimony[4] of preliminary negotiations,[5] or that the parties intended to make a contract other than appears from the instrument,[6] unless it appears that a mistake was made in drafting the instrument.[7] The consideration may be explained by parol.[8] The contract may be proved by an unsigned draft thereof.[9] It is presumed that one who executes a lease is owner of the property.[10] A lessor is estopped to deny that he had title at the time the lease was made.[11]

not take effect until certain repairs had been made in the absence of evidence which would justify a contrary conclusion. Hallenbeck v. Chapman, 72 N. J. Law, 201, 63 A. 498.

2. A lease of the first floor of a building described as "the store * * * with the basement under the same" and a room on the fourth floor left the vestibule and stairway in possession of the landlord, but entitled the lessee to the unobstructed use of a window facing the vestibule, which it was contemplated he should use. Whitehouse v. Aiken, 190 Mass. 468, 77 N. E. 499. Where a tenant held a store and two apartments under the same lease and on its expiration took a lease of the store which did not include the apartments, held not to show that such apartments were covered by the new lease so as to prevent an advance of the rent. Dickinson v. Brown, 99 N. Y. S. 838. A lessee cannot sustain his right to a corner basement under a lease covering a basement adjoining a corner, where it appeared that there was a basement other than the one occupied by the tenant answering the description, in the absence of reformation of the lease or acts of the landlord after making the lease recognizing the identity of the basements. Kasower v. Sandler, 96 N. Y. S. 734. Where a subtenant claimed the right to hold a corner basement under the lease of a basement adjoining the corner, the tenant under whom he claimed could not testify that the lease to him describing the basement adjoining the corner referred to the corner basement, as such would be a conclusion. Id. A lease of premises described as "the lands near Marshallville, Ga., known as the C. A. Johnson place" entitles the tenant to the use of the cultivable land and also to the fruit on an orchard on such premises, unless the lease is reformed so as to except such fruit. Quiggle v. Vining, 125 Ga. 98, 54 S. E. 74. A lease of the upper floors of a building carries with it as an appurtenant the entrance and hallway leading to the only stairway in the building, and a right reserved by the landlord to change, alter, or repair the stairway gives him no right to lease part of the space. Lindblom v. Berkman [Wash.] 86 P. 567.

3. "Appurtenances" in a lease covers a heating plant which constitutes the only means of heating the premises. Stevens v. Taylor, 111 App. Div. 561, 97 N. Y. S. 925.

4. Oral evidence of the intent of the parties at the time the lease was executed is inadmissible. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012.

5. Where a lease of apartments does not provide that the building shall be used exclusively as an apartment house, it is not competent to show a parol representation by the landlord made prior to the letting that the building would be so rented. Bristol Hotel Co. v. Pegram, 49 Misc. 535, 98 N. Y. S. 512. Where a written lease purports to contain the whole contract but makes no reference to repairs except that the tenant should keep in good repair, it cannot be shown by parol that there was delivered with the lease an unsigned list of repairs to be made and that it was verbally agreed that such list should be a part of the lease and that the repairs should be made by the landlord. Hallenbeck v. Chapman, 72 N. J. Law, 201, 63 A. 498.

6. A contract in the form of a lease with an option to purchase cannot be shown by parol to have been intended as a contract for sale of the land. Smith v. Caldwell [Ark.] 95 S. W. 467. In an action for breach of contract of lease, evidence of a written contract signed by the lessor and lessee and also by a third person not mentioned in the lease held not to vary from the contract sued on. Hlass v. Fulford, 77 Ark. 603, 92 S. W. 862.

7. Where an oral lease reserved to the lessor the right to reconstruct the front of the building, and a subsequent written lease failed to make such reservation, evidence of the terms of the verbal lease, and that such terms were contained in rent receipts, and that the receipts were shown to the clerk who drew the lease, was admissible to show that the reservation was omitted from the written lease by mistake. Cage v. Patton [Tex. Civ. App.] 14 Tex. Ct. Rep. 525, 91 S. W. 311.

8. Though a deed does not reserve rents, it is competent to show a parol reservation thereof as explaining the consideration. Applegate v. Kilgore [Tex. Civ. App.] 15 Tex. Ct. Rep. 17, 91 S. W. 238. In an action for such rents, it was proper to permit the landlord to testify that he had reserved them verbally. Id.

9. On an issue as to the terms of a cropping contract, a draft of such contract not signed by either party but shown to have been read by both was admissible on the terms of the contract. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832.

10. A lease executed by a certain person creates a presumption that he is owner of the premises. Blake v. Meyer, 110 App. Div. 734, 97 N. Y. S. 424.

The statute of frauds.[12]—A lease being a contract for the conveyance of an estate in lands is within the statute of frauds and must be in writing if for a longer period than one year.[13] Such lease may, however, be valid as to provisions for rent, repairs, and termination.[14] In order to bring an oral lease for a longer period than one year within the rule that the landlord will not be permitted to enforce the statute of frauds to perpetrate a fraud, it must appear that the tenant would suffer material injury;[15] and a tenant who seeks to bring himself within the equitable principle that the landlord will not be permitted to invoke the statute of frauds to perpetrate a fraud has the burden to show that he would suffer material injury.[16]

Covenants.[17]—The word "grant," "demise," or "lease," in a lease for years creates a covenant in law for good title and quiet enjoyment during the term.[18] A covenant for quiet enjoyment extends to all incidents and appurtenances.[19] Whether a covenant is also a condition is a question of intention.[20] A covenant restricting the power of alienation is void.[21] The landlord may retain money deposited to secure performance of the covenant to pay rent until expiration of the term.[22]

Reformation[23] may be had wherever a party shows himself equitably entitled to it.[24]

Breach of contract to make lease.[25]—A contract to give a lease may be specifi-

11. Blackburn v. Muskogee Land Co. [Ind. T.] 91 S. W. 31.

12. See 6 C. L. 347. See, also, Frauds, Statute of, 7 C. L. 1826.

13. Under a statute providing that no person shall be charged on a parol lease for more than one year, a lease for one year to commence at a future date is unenforceable. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212. A parol lease for a year to begin at a future date is unenforceable. Wessells v. Rodifer [Ky.] 97 S. W. 341. **But see** Fishman v. Wolf, 101 N. Y. S. 16, holding it valid, though made to take effect at a future date. Under Ball. Ann. Codes & St. § 4568, providing that an unacknowledged lease is good for one year, and § 4569, providing that lease for an indefinite term may be terminated by a notice given thirty days prior to the expiration of a rent paying period, held that an unacknowledged lease for four years is terminable by proper notice at the end of the first year, though there has been part performance. Dorman v. Plowman, 41 Wash. 477, 83 P. 322.

14. A parol lease for longer than one year which under the statute of frauds is void, is, where the tenant takes possession and attorns to his landlord, valid as to the provisions relative to repairs, rent, and termination. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212.

15. Such injury is not shown by proof of permanent improvements without showing to what extent such improvements increased the rental value. Watkins v. Balch, 41 Wash. 310, 83 P. 321. Where a lessee in a parol lease which is void under the statute of frauds takes possession and makes improvements which can be removed, it is not such part peformance as takes the case out of the statute. Wessells v. Rodifer [Ky.] 97 S. W. 341. An oral lease for a period longer than one year is within the statute of frauds, though possession has been taken under it. Mollitor v. Thom Van Co., 118 Ill. App. 293.

16. Watkins v. Balch, 41 Wash. 310, 83 P. 321.

17. See 6 C. L. 351. See, also, post, §§ 4-6.

18. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

19. A covenant for quiet enjoyment applies to a vault under the street which is necessary to enjoyment of the premises, which was constructed by permission from the city, and such covenant is broken where the city revokes the license to maintain it. Pabst Brew. Co. v. Thorley [C. C. A.] 145 F. 117.

20. In an oil and gas lease where the covenants state that the lease is made on certain terms and is to be rendered void by failure of the lessee to comply with "any of the above conditions," if, by necessary implication, a covenant by the lessee to exercise reasonable diligence in developing the property is contained, such covenant is also a condition, a breach of which in view of the circumstances will entitle the lessor to avoid the lease. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

21. A covenant restricting the right of a railroad company, which leased its road to mortgage its reversion is void as restraining alienation. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

22. When a lessee deposited money to secure performance of the covenants of the lease, one of which was that in case of abandonment the landlord might relet as agent of the tenant and he should be liable for any difference in rent received and the lessee abandoned the premises without cause, held that the landlord was entitled to retain the deposit until expiration of the term. O'Brien v. Levine, 50 Misc. 303, 98 N. Y. S. 636.

23. See 6 C. L. 351. See, also, Reformation of Instruments, 6 C. L. 1279.

24. Where because of mistake the lease does not conform to the agreement pursuant to which it was made, it may be re-

cally enforced according to its terms.[26] One seeking such remedy must be equitably entitled to it.[27] Specific performance may be had against the real party in interest, though no jurisdiction is obtained of the holder of the record title.[28] Whether a contract to give a lease has been broken may be a question of fact.[29] Where a sum is deposited as security for the execution of a lease, the person receiving it is not entitled to retain it where the depositor fails to execute in the absence of proof of damage.[30] One who agreed to obtain a term and sublease to defendant cannot in an action for breach show that he obtained the term without offering therewith proof of damage by defendant's nonperformance.[31]

§ 3. *The different kinds of tenancies and their incidents. Periodical tenancies.*[32]—A periodical tenancy for the rent paying period generally results where a tenant for a term holds over,[33] or where one enters under a lease which is void under the statute of frauds.[34] A notice intended as one to quit at the termination of an existing term will not be construed to create a new tenancy from month to month.[35] A tenancy otherwise at will may be converted into a periodical tenancy

formed. Hardy v. Ladow, 72 Kan. 174, 83 P. 401. Where a landlord in forcible entry seeks to have a forfeiture declared for noncompliance with conditions, the court in the exercise of its equitable powers may examine all the equities of the parties and grant a decree reforming the lease. Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 P. 280.

25. See 6 C. L. 351.

26. Where a contract did not provide for a provision against subletting without the landlord's consent, he was not entitled to have such provision inserted. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801.

27. Under the circumstances of this case, it is held that a lessee is not entitled to specific performance of a contract to execute a lease without first paying a mortgage indebtedness. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801.

28. Where a lessee contracted to obtain a renewal and sublease a portion of the premises, and the renewal at his request was made to run to his son who was a nonresident, but provided that the original lessee should be his agent and he guarantied performance of the conditions of the lease, held specific performance of the agreement to sublease could be had though the court had no jurisdiction of the son as the original lessee was the real party in interest. Capps v. Frederick [Wash.] 86 P. 1128.

29. Where one agreed to give another a lease and put him in possession within thirty days or as soon thereafter as he could get the present tenant out, and the tenant deposited the first month's rent in a bank to be turned over to the landlord when possession was given, held a question for the jury whether after nine months the landlord had done all that was required of him to put the tenant in possession. Leininger v. Clarke Nat. Bank, 97 Minn. 364, 107 N. W. 396.

30. Rosenfeld v. Silver, 49 Misc. 117, 96 N. Y. S. 1027. An instrument acknowledging receipt of a certain amount on a house proposed to be leased to the depositor, the security to be a specified greater amount, followed by a lease executed and the greater sum deposited, held to show that the first deposit was secured for execution of the lease and the depositor was entitled to recover it when that event took place. Id.

31. Pollock v. Talcott, 30 Pa. Super. Ct. 622.

32. See 6 C. L. 352.

33. Under Laws 1901, c. 31, a tenant in possession under a lease which contains no provision for renewal, but provides for monthly payment of rental, by holding over becomes tenant from month to month, but in other respects the covenants in the original lease are presumed in force. Slafter v. Siddall, 97 Minn. 291, 106 N. W. 308.

34. Where possession is taken under any oral lease void under the statute of frauds, a tenancy from month to month is created by operation of law. Mollitor v. Thom Van Co., 118 Ill. App. 293. Under the statute of frauds of Washington, an oral lease for a longer period than one year is a lease from period to period for the rent paying period. Watkins v. Balch, 41 Wash. 310, 83 P. 321. Where one entered under a void lease for five years at a certain monthly rental, such entry implied a new contract for tenancy from month to month. The fact that the rent was $135 per month and that $300 was deposited to secure payment of rent is of no importance in determining whether the tenancy was from month to month or from year to year, as such deposit was made under the void five year lease. Julian v. Berardini, 49 Misc. 119, 96 N. Y. S. 1064. A parol lease of a vacant city lot for the purpose of enabling the tenant to erect a house thereon for a real estate office is a tenancy from month to month under Rev. St. 1899, § 4110, making all oral leases of tenements in cities such tenancies and not a tenancy from year to year, which requires 60 days' notice to quit. Edmonston v. Webb, 119 Mo. App. 679, 94 S. W. 314.

35. Where a tenant was in possession under a lease for three years, a new tenancy from month to month is not created under Civ. Code, § 827, by notices served on him by the landlord to the effect that after the expiration of the term the rent would be advanced; that his lease should terminate

by operation of law.[36] A tenancy which, if it was of city property, would by virtue of statute be from month to month, is, when relative to urban property, one from year to year.[37] The interest of a tenant from year to year is a chattel real.[38]

Tenancy at will[39] results where a lease is made by parol for a period longer than one year,[40] but not necessarily from the fact that the estate is at the will of one party.[41] To constitute one holding over a tenant at will, there must be something implying an assent of the landlord.[42] One is a tenant at will who after discharge from employment continues to occupy rooms, the use of which was part of his compensation.[43]

Tenancy at sufferance[44] results where a tenant from month to month defaults in the payment of rent and holds over after such default.[45]

§ 4. *Rights and interests remaining in the landlord. A. Reversion, seisin and right of re-entry.*[46]—The landlord is the owner of all of the estate save that demised[47] and he may maintain action to protect his interest.[48] Where the lease passes an interest there is, at law, no estoppel on the landlord as to an after acquired interest.[49] Equity, however, does not inflexibly follow this rule, and where the parties in addition to the usual lease covenants have contracted specially as to such after acquired interest their contract may be treated as a covenant for a further assurance, and the estoppel will be extended to bind such after-acquired interest, particularly as fairness and good conscience seem to require it.[50]

(§ 4) *B. Estoppel of tenant to deny title.*[51]—A tenant while occupying

on such date, and a further notice stating that the notices were intended as a notice to quit for the purpose of terminating the tenancy, the tenant also having notice that the landlord had leased the premises to another. Vatuone v. Cannobio [Cal. App.] 88 P. 374.

36. Under Rev. St. 1899, § 3414, providing that a tenancy for a term of years created by parol contract is one at will, held, where such estate is followed by possession and payment of rent, the estate is from year to year by operation of law. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212. In Missouri a parol lease, until the lessor should want possession for the purpose of improving the premises or should sell, creates a tenancy from year to year, though under Rev. St. 1899, § 3414, it was a tenancy at will. Kroeger v. Bohrer, 116 Mo. App. 208, 91 S. W. 159.

37. A lease of a city tract of land containing five or six acres for agricultural purposes under a lease providing that it should run until the owner should sell or desire to improve, is not one relating to occupation of tenements in cities or towns, terminable by thirty days' notice under Rev. St. 1899, § 4110, but was a tenancy from year to year and could be terminated only by 60 days' notice prior to expiration of a year. Blackburn v. Muskogee Land Co. [Ind. T.] 91 S. W. 31.

38. Passes to his administrator as personalty. In re Ring's Estate [Iowa] 109 N. W. 710. Crops planted after the death of the lessee during the life of the lease belongs to the estate of the lessee. Id. Unharvested crops on a leasehold estate pass to the administrator of the tenant. Id.

39. See 6 C. L. 352.

40. A tenant in possession under a parol lease for a term longer than one year is a tenant at will. Wessells v. Rodifer [Ky.] 97 S. W. 341.

41. A lease for a definite and permissible term, but which reserves to the lessee the option to terminate it before the expiration of the term, does not create a mere tenancy at will within the rule that an estate at the will of one party is equally at the will of the other. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

42. Guenther v. Gilchrist Imp. Jar Co., 28 Pa. Super. Ct. 232.

43. Huggins v. Bridges, 29 Pa. Super. Ct. 82.

44. See 6 C. L. 353.

45. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328.

46. See 6 C. L. 353.

47. The owner of land in possession of a tenant whose lease provides that the lessor may sell any part thereof by making a corresponding reduction in rent may without the consent of the lessee dedicate a portion thereof as a highway. Segear v. Westcott [Neb.] 110 N. W. 379.

48. Where a portion of a cellar and first floor room having an outside wall in a building parts of which were occupied by different tenants was rented by lease requiring the landlord to make outside repairs and the landlord shored up the wall when it was necessary, held he was in possession of it and could maintain forcible entry against an adjoiner who injured it. Holzhausen v. Hoskins, 115 Mo. App. 261, 91 S. W. 410.

49, 50. Globe Soap Co. v. Louisville & N. R. Co., 7 Ohio C. C. (N. S.) 218.

51. See 6 C. L. 353.

the premises cannot deny his landlord's title,[52] or impeach his capacity to own the premises,[53] even after expiration of the term.[54] This is so though he was in possession prior to the lease,[55] but where parties are claiming adversely to each other, the fact that by operation of law the relation of landlord and tenant exists between them does not preclude either from strengthening his claim by obtaining a tax or street assessment deed.[56]. The rule which estops a tenant to deny his landlord's title applies to all persons who enter into possession under him.[57]

Adverse possession does not run in favor of a tenant while the relation exists.[58]

§ 5. *Mutual rights and liabilities in demised premises.*[59]—Violation of negative or restrictive covenants may be enjoined.[60] Contractual rights between the parties must be determined from the nature of the transaction.[61]

52. Gies v. Storz Brewing Co. [Neb.] 106 N. W. 775. A successor to the title of a lessee after transfer of the legal fee, by entering upon the estats and paying rent to the grantee of the fee for a period of years, attorned to such grantee as the reversioner, and is estopped from denying his title. A subsequent conveyance by the grantee to her daughter, with a reservation of a life estate, was not an eviction, nor a breach of covenant for quiet enjoyment. Bates v. Winifrede Coal Co., 4 Ohio N. P. (N. S.) 265. It is no defense, in an action for rent by a national bank which built an office building and rented offices, that the bank had no authority to do so. Farmers' Deposit Nat. Bank v. Western Pennsylvania Fuel Co. [Pa.] 64 A. 374. A tenant may not, during the continuance of his lease, change the character of his possession and oust his lessor by purchasing or leasing from a third person. Moulierre v. Coco, 116 La. 845, 41 So. 113. A tenant of building located on land held under a lease by another party does not, by accepting a lease of the land from a stranger before the expiration of the lease without the consent of the landlord or lessee of the land, place the stranger in possession of the land so as to enable him maintain a suit to quiet title. Trimble v. Lake Superior & Puget Sound Co. [Minn.] 108 N. W. 867. Whether or not a landlord has any title to the demised premises, it cannot be questioned by the lessee before expiration of the lease and while he remains in possession under it. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032.

53. Cannot say that the landlord, a national bank, had transcended its corporate power in erecting the building for rental purposes chiefly. Farmers' Deposit Nat. Bk. v. Western Pennsylvania Fuel Co., 29 Pa. Super. Ct. 69.

54. Where one in possession of land attorns to another by agreeing to pay him rent, he may not set up title in himself as against such person until he surrenders possession even after expiration of the period during which he agreed to pay rent. Bullard v. Hudson, 125 Ga. 393, 54 S. E. 132.

55. A tenant who has paid rent up to the time of being served with notice terminating the lease cannot deny the landlord's title in an action for possession, though he was in possession prior to the lease. Wallace v. Ocean Grove Camp Meeting Ass'n [C. C. A.] 148 F. 672.

56. Wright v. Jessup [Wash.] 87 P. 930. A tenant may purchase the premises at an execution sale against his landlord. Nodine v. Richmond [Or.] 87 P. 775.

57. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032. Where a decree of divorce awarded certain property to the wife and thereafter it was leased to a son of the husband by a former marriage by a lease to which the husband affixed his approval and guarantied its faithful performance, held the husband thereafter stood in the same position as the lessee and was estopped to deny the wife's title. Smith v. Smith, 144 Mich. 139, 13 Det. Leg. N. 237, 107 N. W. 894. In a proceeding by the lessor at the term to recover possession, the lessee or sublessee cannot defend on the ground that the landlord had leased the premises to another without connecting themselves with the title of such lessee. Vatuone v. Cannobio [Cal. App.] 88 P. 374.

58. Where a tenant constructed a building which partially extended on other land of the landlord, he was not in adverse possession of it until he purchased the leased premises. Ross v. Guentherodt, 142 Mich. 634, 12 Det. Leg. N. 850, 105 N. W. 1120. Adverse possession **under a tax deed** does not run in favor of a tenant. Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21. Limitations do not run in favor of a tenant who purchases at tax sale until he repudiates his tenancy by notice to the landlord. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

59. See 6 C. L. 354.

60. Where a lease gives the landlord a right to maintain a "To Let" sign, its removal by the tenant may be enjoined. Stafford v. Swift, 121 Ill. App. 508. Where premises are leased for a grocery store, use of them for a dramshop may be enjoined. Jalageas v. Winton, 119 Ill. App. 139.

61. Where a lessee covenanted to pay for water used in the portion of the building occupied by him and there was a meter in such portion, he was liable for his proportion of the water used in the entire building where the water company refused to render separate bills for different portions but rendered one bill for all water used in the building. Myers v. Reade, 112 App. Div. 363, 98 N. Y. S. 620. Lessees operating a mill on their own account kept a bank account and transacted their business in the lessor's name, overdrew their deposit and executed notes for the overdraft without authority from the lessor. The managing officer of the

(§ 5) *A. Occupation and enjoyment. Right to enter.*[62]—A lessee is entitled to possession according to the terms of the lease.[63] Where a lessor fails to give possession, the measure of damages is the difference between the rental value and the rent reserved,[64] together with special damages, if authorized by the circumstances;[65] but prospective profits may not be recovered unless the tenant's business has been interrupted.[66] All damages sustained may be recovered in a single action.[67] Where a lessor refuses to give possession, the lessee in order to recover general or special damages need not prove any effort to rent other land or engage in other occupation.[68]

A covenant for quiet enjoyment[69] does not protect the lessee from acts of a stranger[70] except by express terms,[71] nor from a lawful entry by the landlord,[72] nor protect him except as to his interest.[73] But for breach of such covenant by the landlord he may recover damages proximately resulting,[74] hence, where a tenant is en-

bank was one of the lessees and had notice of the facts. Held, the lessor was not estopped to deny liability. Skillern v. Arkansas Woolen Mills, 77 Ark. 172, 91 S. W. 303. Where a tenant defaults in his covenant to assume an unperformed contract and the landlord pays a judgment recovered against him because of the breach, he may recover in assumpsit against the lessee. Pocono Spring Water Ice Co. v. American Ice Co., 214 Pa. 640, 64 A. 398. Where a lease of personal property provided that the lessee on termination of the lease should deliver it at a certain place and gave bond for performance of the conditions of the lease, and the lessor accepted the property at another than the place specified, he could not hold the sureties for costs of removal nor collect rent after he accepted it. White River, etc., R. Co. v. Star Ranch & Land Co., 77 Ark. 128, 91 S. W. 14.

62. See 6 C. L. 354.

63. A lessee who is unable to obtain possession because the premises are occupied by another under a lease to the occupant's assignor taken from him with the owner's consent may recover in damages from the landlord for breach of his contract to give possession. Rothman v. Kosower, 48 Misc. 538, 96 N. Y. S. 268.

64. Jarrait v. Peters [Mich.] 13 Det. Leg. N. 415, 108 N. W. 432.

65. The lessee's measure of damages for the landlord's refusal to give possession is the difference between the rental value and the agreed rent with special damages if authorized by the circumstances. Devers v. May [Ky.] 99 S. W. 255. On an issue of damages where the lessor refused to give possession, evidence that the premises were worth a epecified sum more than the agreed rent for the purposes for which the lessee rented was admissible. Id.

66. Where prior to the commencement of the term the lessor allowed the lessee to bring his desk and some of his tools to the premises and to use the lessor's horse and wagon, such fact did not, where the landlord subsequently refused to give possession, bring the case within the rule that where a business has been interrupted prospective profits may be recovered. Jarrait v. Petere [Mich.] 13 Det. Leg. N. 415, 108 N. W. 432.

67. Devers v. May [Ky.] 99 S. W. 255.

68. The recovery being for breach of contract and not for loss of time or services. Devers v. May [Ky.] 99 S. W. 255.

69. See 6 C. L. 357.

70. A landlord is not liable for injuries to tenants caused by the acts of third persons over whom he has no control. Where the building was injured by blasting during the excavation of a tunnel on adjoining property. Farnandis v. Great Northern R. Co., 41 Wash. 486, 84 P. 18.

71. The implied covenant covers disturbances by the landlord or those paramount to his title and an express covenant is necessary if he is to be liable for disturbances by strangers. Hastings v. Burchfield, 28 Pa. Super. Ct. 309. If there be a verbal express covenant against strangers proof of fraudulent, accidental, or mistaken omission is essential. Id.

72. Where rent was overdue and tenants had sold crops from the premises without paying rent, it was not an unwarranted interference with the tenants for the landlord to go onto the premises and threaten to attach the balance of the crop. Smith v. Caldwell [Ark.] 95 S. W. 467.

73. Where, after a railway company had acquired a right of way across land from the owners of an undivided half thereof, it was leased and the lessee built fences over the right of way which the railway company tore down and stock injured the tenant's crop, held the company was not liable. Casteel v. St. Louis, etc., R. Co. [Ark.] 99 S. W. 540.

74. After a landlord has rented rooms for a certain purpose he cannot so tear down and mutilate the building as to render the rooms unsuitable for the purposes for which they were leased without being liable in damages. Frepans v. Grostein [Idaho] 87 P. 1004. Evidence sufficient to sustain a verdict for $200 for injury by the landlord to the leased premises. Id. A sublessee, with a privilege of purchase, who loses this privilege and is compelled to attorn to the owner, because of the failure of the lessee to renew the lease or exercise his own privilege of purchase, suffers a breach of the covenant for quiet enjoyment and is entitled to any damages he may have sustained by reason of eviction from his privilege. McHugh v. Regan, 8 Ohio C. C. (N. S.) 406. Where a life tenant leases the premises for a certain

joined by the landlord from making a proper use of the premises, he may recover damages.[75] There is no breach of the covenant of quiet enjoyment because of defective condition of the premises in the absence of legal eviction,[76] nor is there such breach where a lessor conveys reserving a life estate.[77]

Nature of the tenant's estate.[78]—A tenant has an estate in the premises and should be made a party to any action wherein his rights are liable to be affected.[79] He may defend his rights under the title of his landlord.[80] He possesses an estate as susceptible to damage, by reason of the closing of the street on which the property abuts, as if he owned the fee.[81] Where work and labor is done for, and materials furnished, a lessee of mining property, no lien therefor can be enforced against the owner.[82] A vendee of land in possession of a tenant takes subject to the unexpired term[83] but he takes all rights of the landlord.[84]

(§ 5) *B. Assignment and subletting.*[85]—The right to assign is incident to

term and dies before the expiration of the term and the tenant is ejected by the fee owners, he may recover from his lessor's administrator for breach of covenant. Duker's Adm'r v. Kaelin, 28 Ky. L. R. 900, 90 S. W. 959. Where one leased from a life tenant for a certain term with privilege of renewal for a further term, and on death of the lessor before expiration of the first term he was evicted, it was no defense to his action for breach of covenant of quiet enjoyment that he never elected to take for the additional term. Id. Where the defective condition of a brick wall in a leased storehouse rendered it dangerous to life and property and necessitated its reconstruction by the lessor, held the lessee is entitled to recover direct pecuniary loss occasioned by the work of reparation in addition to reduction of rent provided by Civ. Code art. 2700. Lazare Levy & Co. v. Madden, 116 La. 374, 40 So. 766.

75. Where a tenant leased premises on a third floor for a roller skating rink and fitted it up for such purpose and conducted it with no more noise than necessary, and at the instigation of the landlord was enjoined from carrying on his business by tenants of the lower floors. Williams v. Getman, 99 N. Y. S. 977. The fact that rent was paid for some months after the injunction was granted does not change the situation. Id.

76. Pratt, Hurst & Co. v. Tailer, 100 N. Y. S. 16. Damages for breach of covenant of quiet enjoyment cannot be set off in an action by the landlord to recover for breach of covenant to assume an unperformed contract where there had been no eviction at the time the action was brought. Pocono Spring Water Ice Co. v. American Ice Co., 214 Pa. 640, 64 A. 398.

77. Bates v. Winifrede Coal Co., 4 Ohio N. P. (N. S.) 265.

78. See 6 C. L. 359.

79. Where there is a judicial sale of the property and a general writ of possession awarded against tenants in favor of an assignee of the purchaser, one who claimed to have a lease from the purchaser antedating the assignment is entitled to be made a party. Aull v. Bowling Green Opera House Co. [Ky.] 92 S. W. 943. Notice of a proposed street improvement is binding upon all parties interested in the property, when served on a lessee for ten years with privilege of purchase to whom the care and control of the property is entrusted as completely as in this case. Clemmer v. Cincinnati, 7 Ohio C. C. (N. S.) 31.

80. The tenant of an agricultural society has a right to defend under the title of that society derived from the county, and cannot be ousted from the property by the county unless it be made to appear that the agricultural society has lost its rights therein, and a judgment against the tenant on the pleadings was therefore erroneous. Toledo Exposition Co. v. Kerr, 8 Ohio C. C. (N. S.) 369.

81. Coleman v. Holden [Miss.] 41 So. 374. A lessee during the period of his term has all the rights, as to ingress and egress, as to obstructing or interfering therewith, as the owner of the fee would have, except as to the extent of damages. Id.

82. Williams v. Eldora Enterprise Gold Min. Co. [Colo.] 83 P. 780.

83. Stone v. Snell [Neb.] 109 N. W. 750.

84. Where a lease provided that the lessee should at the end of the term leave a certain amount of cotton seed on the place, and the landlord conveyed his reversion and assigned his rights under the lease, the purchaser acquired all the rights of the vendor to have the cotton seed left on the place, and the vendor could not recover it from the lessee during the term. Cobb v. Johnson [Ga.] 55 S. E. 935.

85. See 6 C. L. 360.

Note: A lease, by a tenant, of the demised premises for his entire term, is an assignment and not a sublease, though the rent reserved is different from that reserved in the original lease, and though the second lease provides for forfeiture and re-entry for condition broken and for surrender of the premises on expiration of the term. Sexton v. Chicago Storage Co., 129 Ill. 318, 21 N. E. 920, 16 Am. St. Rep. 274. In this case the court says: "The general principle as held by all the authorities is that where the lessee assigns his whole estate, without reserving to himself a reversion therein, a privity of estate is at once created between his assignee and the original lessor, and the latter then has a right of action directly against the assignee on the covenants running with the land, one of which is that to pay rent; but if the lessee sublets the premises, reserving or retaining any re-

the lessee's estate, especially if assignment is authorized.[86] A covenant against assignment is liberally construed in favor of the tenant[87] but will not be so construed as to defeat its purpose.[88] A covenant against assignment or subletting without the consent of the landlord, in a lease absolute for one year and optional with the tenant as to future continuances, is not confined to the first year but extends during a continuance.[89] A provision against assignment without consent of the lessor is for his benefit and may be waived by him, and where waived an assignment without his assent is valid.[90] If an instrument by which a lessee conveys operates to transfer

version, however small, the privity of estate between the sublessee and the original landlord is not established and the latter has no right of action against the former for breach of covenant, there being no privity of contract nor privity of estate between them." Whenever a lessee grants or transfers the whole term for which the premises were leased to him, reserving no reversionary interest in himself, it amounts to an assignment and is not a sublease. This results by operation of law without regard to the form of the instrument. A mere reservation of rent, or of the right of re-entry for a breach of any of the conditions of the lease, will not change the legal relations of the parties, and the introduction of covenants into the instrument, whatever may be their effect between the immediate parties thereto, does not change the legal effect of giving up the reversion. Craig v. Summers, 47 Minn. 189, 49 N. W. 742, 15 L. R. A. 236. To constitute an assignee it is not necessary that the instrument of transfer should be designated as an assignment. Any conveyance by the lessee of his whole interest, leaving no reversionary interest in himself, operates as an assignment, regardless of the form of the transfer. McLennan v. Grant, 8 Wash. 603. See, also, Smiley v. Van Winkle, 6 Cal. 607; Lee v. Payne, 4 Mich. 117; Cook v. Jones, 28 S. W. 692; Woods, Landlord and Tenant, par. 65; Woodhull v. Rosenthal, 61 N. Y. 382, 391; Bedford v. Terhune, 30 N. Y. 457; St. Joseph, etc., R. Co. v. St. Louis, etc., R. Co., 135 Mo. 173, 36 S. W. 602, 33 L. R. A. 607. [Editor.]

86. Provision in a lease authorizing assignment held to entitle the lessee to assign regardless of the wishes of the landlord. Harris v. Sheffel, 117 Mo. App. 514, 94 S. W. 738. Where a landlord owed a tenant a debt which wae to be paid in merchandise to be retailed on the leased premises, the fact that the lessee who sold his business and assigned his lease did not assign the claim did not relieve the lessor from paying it. Id.

87. A transfer to a trustee in bankruptcy is not a "voluntary assignment" nor a "transfer under execution or other legal process" and does not authorize forfeiture under a provision for forfeiture for such transfer. Gazlay v. Williams [C. C. A.] 147 F. 678.

Note: Covenants against assignment and underletting are not favorably regarded by the courts, and are liberally construed in favor of the lessee, so as to prevent the restriction from extending any further than is necessary. Jones, Landlord and Tenant, § 464. In Riggs v. Pursell, 66 N. Y. 193, it is said: "Such covenants are restraints which the courts do not favor. They are construed with the utmost jealousy, and very easy modes have also been countenanced for defeating them." The cases go very far towards holding that the mere letter of the covenant is controlling. Illustrations of this attitude and how far it has led the courts to go are abundant. As, for instance, it has been held that an underletting is not a breach of the covenant against assignment (Jackson v. Silvernail, 15 Johns. [N. Y.] 277); that an assignment is not a breach of the covenant against underletting (Field v. Mills, 33 N. J. Law, 254), though there are other cases holding to the contrary of this; that a sublease of part of the premises is not a breach of the covenant against underletting the premises (Roosevelt v. Hopkins, 33 N. Y. 81); that the placing one in charge of leased premises as servant or caretaker is not an assignment or subletting (Presby v. Benjamin, 169 N. Y. 377, 57 L. R. A. 317); that a mortgage of the leasehold interest and a sale thereunder is not an assignment (Riggs v. Pursell, 66 N. Y. 193); that a delivery of a lease or security for money loaned operating as an equitable mortgage of the term is not a breach of the covenant not to let, set, assign, transfer, or turn over or otherwise part with the premises demised (Doe v. Hogg, 4 Dowl. & Ry. 266); that a sale under execution against the tenant is not a breach of the covenant against assigning or underletting (Farnum v. Hefner, 79 Cal. 575, 12 Am. St. Rep. 174); that an assignment by an assignee appointed in voluntary proceedings in insolvency is not a breach of a covenant not to lease or underlet (Bemis v. Wilder, 100 Mass. 446, 97 Am. St. Rep. 115); and that an assignment by one of two joint lessees is not a breach of the covenant against assignment by the lessee (Randol v. Scott, 110 Cal. 590). See Gaylay v. Williams, 147 F. 678.

88. Where a lease to one, his executors and administrators, contains a covenant against assigning or subletting without consent of the landlord and upon death of the tenant letters of administration are granted to an heir at law, a written assignment by all the heirs at law, without the consent of the lessor and an entry by the assignee with the acquiescence of the administrator, is a breach of the covenant. Walker v. Wadley, 124 Ga. 275, 52 S. E. 904.

89. Walker v. Wadley, 124 Ga. 275, 52 S. E. 904.

90. Livingston County Tel. Co. v. Herzberg, 118 Ill. App. 599. An assignment by

his entire estate, it is generally held to constitute an assignment,[91] and an assignment may be inferred from facts and circumstances in the absence of a formal contract,[92] but not from an instrument not purporting to assign.[93] In the absence of fraud, an assignment passes all interests it purports to convey.[94] An assignee of a lease without warranty stands in the position of a grantee in a quitclaim deed and in the absence of fraud cannot set up a defect in title.[95] In Washington an instrument, in form a lease and containing all the covenants of the original lease but reserving a right of entry at the termination of the term or for breach of condition, was held an assignment,[96] but in New York such reservations were held to constitute the instrument a sublease.[97] A covenant against assignment without consent of the lessor may be waived.[98] Such waiver does not result from a subsequent acceptance of rent unless at the time the lessor has full knowledge of all the facts.[99] A provision against subletting without the consent of the landlord but providing no penalty for its violation on breach gives the landlord an action for damages or a right to enjoin con-

parol of a lease cannot be questioned in an action for rent unless denied by the pleadings. Id.

91. Agreement whereby the lessee sold the premises properly construed between lessor and lessee as an assignment of the lease. Waggoner v. Wyatt [Tex. Civ. App.] 16 Tex. Ct. Rep. 196, 94 S. W. 1076. Where three or four beneficiaries conveyed their interest, and trustee in a lease reciting such conveyances leased the remaining undivided fourth for the term of the trust, held he had completely parted with his right to possession of any of the property. Smith v. Myers, 212 Pa. 51, 61 A. 573. One who acquires the whole estate of a lessee in a portion of the leased premises is an assignee and not a subtenant. Hollywood v. First Parish in Brockton [Mass.] 78 N. E. 124.

92. Where a lessee of a building joined others in organizing a corporation and put into it as payment for stock the goods he used in connection with his business and the lease which, however, was not formally assigned, and thereafter the corporation paid the rent usually with its checks, evidence held to show that the corporation owned the lease and was liable to a sublessee. James Sheehan & Co. v. Maison Barberis, 41 Wash. 671, 84 P. 607.

93. A bill of sale of all right and title to the "following described personal property" enumerating it, and all property used in conducting the livery and dray business sold, does not transfer a lease of the premises held by the seller. Johnson v. Levy [Cal. App.] 86 P. 810.

94. Where a lessee who had deposited a sum as security to be applied on the last month's rent, before the expiration of the term executed a bill of sale of the business with the "lease with security thereon," the mere fact that she could not read the bill of sale did not entitle her to avoid the effect of the provision assigning the sum deposited. Wackerow v. Engel, 96 N. Y. S. 1071. The assignee of a lessor of a saw mill and facilities, of such lessor's rights under the lease, takes title to "crossers" which the lessee had agreed under the lease to return or pay for. St. Regis Paper Co. v. Watson-Page Lumber Co., 111 App. Div. 108. 97 N. Y. S. 636. An assignment by a lessor of his rights in a lease of a saw mill and facilities, which included "covers" or boards for covering lumber piles, does not entitle the assignee to such covers on termination of the lease, but they remain property of the lessor. Id.

95. Norton v. Stroud State Bank [Okl.] 87 P. 848.

96. An instrument in form a lease by which a lessee transfers his entire term to another, and which contains the same covenants as the lease under which he holds, is an assignment and not a sublease, though a right of re-entry at the end of the term is reserved, and also a right to re-enter for breach of any covenant or for default in the payment of rent. Weander v. Claussen Brew. Ass'n, 42 Wash. 226, 84 P. 735.

97. Where a lessee leased to another "so long as the landlord herein shall have the lease on said premises" for an increased rent with right of re-entry on breach of certain conditions and providing for delivery of possession on termination of the lease and later consented to a transfer of such lease, held not an assignment, but a sublease. Shumer v. Hurwitz, 49 Misc. 121, 96 N. Y. S. 1026.

98. A provision against subletting without written consent of the landlord is waived where the lessee informs the landlord of his intention to sublet and the landlord acquiesces therein. Knoepker v. Redel, 116 Mo. App. 621, 92 S. W. 171. Where a lease provides against assignment without consent of the lessor but the lessor agrees to consent if the lessee procures a suitable tenant, such promise is without consideration when made, but efforts expended by the lessee in procuring a tenant constitute a consideration and render the promise enforceable. Underwood Typewriter Co. v. Century Realty Co., 118 Mo. App. 197, 94 S. W. 787. Where the lessee procured a tenant, mutuality was imported into the contract which related back to its date. Id.

99. Walker v. Wadley, 124 Ga. 275, 52 S. E. 904. Where the rent is payable annually, knowledge of the lessor that there has been a breach of such covenant during the year for which rent is received is a waiver of the breach as to that year, but not as to

tinuance thereof.[1] A waiver of a breach of covenant may be pleaded in bar of an action brought by the lessor against the lessee and his assignee because of an alleged forfeiture growing out of breach of covenant against assigning without consent of the landlord,[2] but the establishment of such defense will not entitle the lessee or his assignee to be reimbursed for expenses incurred in making permanent improvements upon the premises.[3]

A tenant need not be in possession in order to sublet.[4] A subtenant is chargeable with notice of the provisions of his lessor's lease[5] and is bound thereby,[6] but his interest cannot be defeated by the mesne lessee's surrender of his estate in the premises to the lessor.[7] The rights and liabilities of the parties under a contract for subletting rests in the terms of the contract.[8]

(§ 5) *C. Repairs and improvements.*[9]—In the absence of statutory provision or express agreement, the tenant and not the landlord is bound to keep the premises in repair,[10] consequently, promises by the landlord to repair, made after execution of the lease, are without consideration,[11] and a contemporaneous agreement to repair must have been a condition to the making of the lease.[12] This rule, however,

the whole term where the lessor had no knowledge that such an assignment had been made. Id.

1. Knoepker v. Redel, 116 Mo. App. 621, 92 S. W. 171.

2, 3. Walker v. Wadley, 124 Ga. 275, 52 S. E. 904.

4. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032.

5. He takes the chance of its being canceled when under the terms of the lease and the facts the lessor has the right to cancel it. Cuschner v. Westlake [Wash.] 86 P. 948.

6. Sublessees, equally with lessees, of rights under a street railway franchise, are bound by all the limitations embodied in the grant to the original company. City of Cincinnati v. Cincinnati St. R. Co., 3 Ohio N. P. (N. S.) 489. Under a lease giving an option to purchase and binding the lessee to make needed repairs, also to make improvements of a certain value, to remain on the premises in case the option to purchase was not exercised, and containing no restriction against assignment, binds an assignee to the covenants as to use and improvement. Peters v. Stone [Mass.] 79 N. E. 336. Where the assignee erected buildings on the premises and before completion of the term abandoned the premises, the buildings were a part of the realty and not subject to attachment as property of the assignee. Id.

7. Cuschner v. Westlake [Wash.] 86 P. 948. Where under a lease the rent was payable on the first of the month, and the lessee assigned and after the first he and his assignee paid the rent and the same day notice was served that the lease was terminated for non-payment of rent, and it did not appear that it was terminated before payment, the facts showed as to sublessees only a voluntary relinquishment of his estate by the lessee. Id. Where subletting is not prohibited, the interest of sublessee continues after surrender by the lessee. Mitchell v. Young [Ark.] 97 S. W. 454.

8. Where a lessee, in subletting, agrees to stand good for the rent of the sublessee, but not for advances made to him, the lessee is not liable for goods advanced by the lessor though charged in an account in which the lessee is without his consent named as surety. Poindexter v. Cunningham [Miss.] 41 So. 3. Where an heir of a lessee consents to the taking of goods by the lessor in payment of the lessee's debt, the lessor could not apply any of such goods on a debt due from a sublessee. Id.

9. See 6 C. L. 361.

10. At common law, the burden of making repairs was on the tenant unless the landlord expressly agreed to repair. Brett v. Berger [Cal. App.] 87 P. 222. In absence of an agreement to the contrary, it is the duty of the tenant to keep up the fences. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832. A landlord is not bound to make repairs unless he agrees to do so in the lease. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903. A landlord is not obliged to make repairs during the tenancy unless he has agreed to do so. Mylander v. Beimschla, 102 Md. 689, 62 A. 1038. It is presumed that a lease of an apartment includes the ceilings, so that the landlord is under no obligation to repair them. Schiff v. Pottlitzer, 101 N. Y. S. 249.

11. Where under the express terms of a written lease the tenant agrees to furnish the house, keep the lawn mowed and the hedges trimmed, he cannot enforce a contemporaneous parol agreement by which the landlord agrees to do so. Leeming v. Duryea 49 Misc. 240, 97 N. Y. S. 355. Promises of the landlord after execution of the lease to furnish a house and keep the lawn in shape, and hedges trimmed are without consideration. Id.

12. An oral agreement to repair during the term, as distinguished from repairs to be made before tenancy commenced, is not collateral and is inadmissible. Greene v. Kerr, 48 Misc. 609, 95 N. Y. S. 568. An oral agreement relative to certain specified repairs entirely separate and independent of the lease does not constitute a modification of a provision in the lease requiring the tenant to make inside repairs. Auer v. Vahl [Wis.] 109 N. W. 529. Answer in an action

does not require the tenant to remedy an existing nuisance,[13] nor make repairs essential to the enjoyment of his estate.[14] It is the duty of the landlord to repair all portions of the premises not demised and which are essential parts of the entire building.[15] The liability of the landlord for repairs must be found in the terms of the contract,[16] and where a stated sum per annum, to be deducted from the rent, is allowed by the lease for repairs, the legal inference is that this is the extent of the landlord's liability.[17] A covenant by the landlord to repair is obligatory on him during the entire term.[18] The fact that a tenant remains in possession at the request of the landlord, after the latter has failed to repair pursuant to his covenant, is not a waiver of any right under the lease.[19] There can be no recovery for failure to repair in the absence of proof of damage.[20] A covenant with a lessee and his assigns, binding the landlord to pay for improvements, runs with the land.[21] Failure of the landlord to make certain improvements must be seasonably taken advantage of.[22] A tenant may recover for failure of the landlord to furnish water for irrigating purposes pursuant to his covenant.[23] Where the lessee's liability for repairs is speci-

for rent alleging certain agreements, stating the terms of the lease, and also in the same sentence and as part of the agreements on the part of the landlord to do certain things relative to the premises, held to show one complete contract and not a contract collateral to the lease. Leeming v. Duryea, 49 Misc. 240, 97 N. Y. S. 355.

13. Where premises are leased with an existing public nuisance thereon, there is no implied agreement that the tenant will pay for remedying it. City of New York v. U. S. Trust Co., 101 N. Y. S. 574.

14. A lessee who is required to remove and rebuild a portion of the leased building because of orders of the building inspector and in order to avoid delay in securing the benefit of his lease may recover expense incurred in so doing but not expense incurred in doing things which were discretionary with him in the absence of contract. Clark v. Gerke [Md.] 65 A. 326.

15. Roofs and chimneys. Fairmount Lodge No. 590 v. Tilton, 122 Ill. App. 636.

16. A contract by which it was agreed that the tenant should make improvements and that the account therefor should be kept and paid by the landlord at the time the tenant removed, held not too vague and indefinite to be enforced. Busby v. Marshall, 125 Ga. 645, 54 S. E. 646. Where the landlord contracted to furnish materials for repairs and one man's labor, the tenant to furnish the remainder of materials and labor, the landlord was only required to perform when requested by the tenant to do so. Brett v. Berger [Cal. App.] 87 P. 222. Where the landlord is sued for failure to furnish heat, it is not competent to show that he made an allowance on the rent for time required to make certain improvements. New Era Mfg. Co. v. O'Reilly, 197 Mo. 466, 95 S. W. 322. Where it is agreed between landlord and tenant that the latter shall make certain improvements and that the account for such improvements shall be payable by the landlord on the date the tenant removes from the premises, limitations do not run against an action on such account until the tenant removes and surrenders possession. Busby v. Marshall, 125 Ga. 645, 54 S. E. 646.

17. Faron v. Jones, 49 Misc. 47, 96 N. Y. S. 316. Where a lease of a building and machinery provides for an allowance by the landlord of a certain sum for repairs to the building, the landlord is not liable for new machinery, installed by the tenant when the old machinery became useless, in the absence of express or implied agreement to replace it. Id.

18. A verbal agreement to make certain improvements in the premises, in consideration of which a written lease is executed, remains obligatory upon the lessor during the term, and if, after that period, the lessee remains in possession and becomes a tenant from month to month, such agreement is presumed to remain in force. Damages caused by leakage because of failure to make such improvement in a workmanlike manner are not limited to the period covered by the written lease. Slafter v. Siddell, 97 Minn. 291, 106 N. W. 308.

19. Vincent v. Central City L. & Inv. Co. [Tex. Civ. App.] 99 S. W. 428.

20. Damages for breach of covenant to repair cannot be set off in the absence of proof of damage. Pocono Spring Water Ice Co. v. American Ice Co., 214 Pa. 640, 64 A. 398. It is no evidence of damage to a sublessee that the landlord paid the lessee a certain sum for the privilege of making repairs. McConnell v. Adair [Ala.] 41 So. 419.

21. Hollywood v. First Parish in Brockton [Mass.] 78 N. E. 124. A covenant in a lease to a lessee, "his heirs and assigns," binding the lessor to pay for improvements made during the term, binds him to pay for improvements made by an assignee of the lessee. Id.

22. Where a lessee used a dynamo and engine, placed in the building by the landlord under his agreement to do so, for a year prior to the landlord's death, he was precluded from thereafter asserting that they did not comply with the stipulations in the lease. New Era Mfg. Co. v. O'Rielly, 197 Mo. 466, 95 S. W. 322. In an action by a lessee for failure of the landlord to install in the building an engine and dynamo of the character called for by the lease, evidence that the one installed had broken

fied in the lease, it cannot be extended by construction.[24] A covenant by the tenant to make needful repairs is to be so construed as to effectuate the intention of the parties.[25] A covenant to make necessary repairs and surrender in good repair, ordinary wear and tear excepted, does not require the rebuilding of a worthless building burned,[26] but does require the repairing of existing defects[27] and the keeping up of fences.[28] Under such a covenant a tenant can remove old fixtures and replace them at the end of the term with repairs necessary to make their condition as good as when received,[29] and he need not replace fixtures becoming useless from ordinary wear and tear.[30] The right to enforce such covenant may be waived by the landlord,[31] but the liability of the tenant is not affected by the fact that a subsequent tenant made repairs that he should have made.[32] A right of action for failure to return the premises in good condition, based on reparable damages, does not accrue

down within two years thereafter was incompetent, where offered six months after it had broken, to show that the machinery installed did not comply with the agreement. Id.

23. Where the landlord breaches his agreement to furnish water to irrigate the crop, one-half of which was to be his, the tenant may recover the value of his share of the crop less the cost of producing the entire crop. Dunlap v. Raywood Rice Canal & Mill. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 86, 95 S. W. 43. Evidence sufficient to sustain judgment for the amount awarded. Id. Where a landlord fails to furnish water for irrigation as he has agreed to do, the measure of the tenant's damages is the difference between the crop raised, less cost of harvesting, etc., and the crop which should have been raised, less cost of harvesting, etc. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335. Where a landlord sues for rent and advances and the tenant sets up failure to furnish water for irrigation and damages for negligently handling the crop, allegations that the tenant was an experienced farmer, etc., held irrelevant and should have been stricken. Id.

24. City of New York v. U. S. Trust Co., 101 N. Y. S. 574.

25. A lease by which the lessee covenanted to make all repairs, comply with all rules and regulations of the health, fire and building departments, but not to make additions or alterations, does not impose on him the duty of removing stone steps and a railed areaway extending into the street as required by the city. City of New York v. U. S. Trust Co., 101 N. Y. S. 574. A provision requiring the tenant to keep in good repair, that if water meters are installed he shall pay water charges, that if the authorities require toilets to be removed from the yard to the building, or any other structural change, the landlord shall do it, does not make the tenant liable for expense of putting in new sinks and water meters. Epstein v. Saviano, 99 N. Y. S. 910. Covenants requiring the lessee to keep in good repair, except for ordinary wear and tear, and that alterations shall be made at his expense, do not require him to surrender the property in an improved condition, nor pay for removal of a portion of the building as ordered by the building inspector, which change was necessary to the enjoyment of his lease. Clark v. Gerke [Md.] 65 A. 326. An agreement executed concurrent with the lease by which the tenant agreed to save his landlord harmless as to making alterations recited in the lease does not require the tenant to stand expenses incurred in making alterations required by the building inspector where such alterations were not recited in the lease. Id. A lessee who in order to enjoy his lease makes alterations required by the building inspector under an agreement by which rent was to be regularly paid until it could be legally determined who was liable for the repairs is not a volunteer but stands in the position of one who repairs at the request of the landlord. Id.

26. A covenant to surrender the premises in good repair, ordinary wear and tear excepted, but not requiring the tenant to rebuild, does not require him to rebuild worthless building burned where he was not negligent. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902.

27. A tenant who covenants to make all needful repairs and to leave the premises in good repair, ordinary wear and tear excepted, is liable for his failure to surrender up in good repair regardless of their condition and existing defects when he took possession. Appleton v. Marx, 102 N. Y. S. 2.

28. A lessee who agrees to build, repair, and keep in good condition houses sufficient to accommodate laborers necessary to cultivate the premises, and to keep fences in repair, is liable for failure to deliver in good repair at the end of the term. Franklin v. Triplett [Ark.] 94 S. W. 929.

29, 30. Fox v. Lynch [N. J. Eq.] 64 A. 439.

31. Though a tenant covenants to make all needful repairs and to leave the premises in good order, where he fails to repair an elevator and pump and the landlord does so by putting in new ones, he thereby waives the right to collect the cost of repair from the tenant. Appleton v. Marx, 102 N. Y. S. 2. Where a landlord sued to recover the cost of repairs which the tenant had covenanted to make but failed to do, evidence held insufficient to authorize an allowance of an item for painting. Id.

32. A tenant who covenants to make needful repairs and to leave the premises in good repair is liable for his failure to do so, though a subsequent tenant who made the same covenant made repairs which the first tenant should have made. Appleton v. Marx, 102 N. Y. S. 2.

until expiration of the lease.[33] Such right of action passes to a grantee of the leased premises.[34] A landlord who repairs on failure of the tenant to perform his covenant to do so, may recover the cost thereof[35] but not interest thereon.[36] A covenant by which a landlord agrees to repair as speedily as possible in case of partial destruction of the building is a personal one.[37] A covenant by the landlord to make repairs but that the lessee at his option may do so and be reimbursed is a personal obligation on the part of the original lessor and does not run with the reversion.[38]

Waste.[39]—A tenant is liable for waste irrespective of the term of his lease unless exempted from liability therefor by the terms of his lease.[40] What constitutes waste is to be determined by a consideration as to whether the act done results in injury to the inheritance in view of the conditions which exist at the time the act is committed.[41]

(§ 5) *D. Insurance and taxes.*[42]—A covenant to pay taxes does not cover special assessments for public improvements,[43] nor does a covenant to comply with police and sanitary regulations.[44] Where a lessee agrees to pay increase in taxes resulting from proposed erection of a building by him, an increase in the assessed valuation subsequent to the improvement is prima facie due thereto.[45] A previous breach by the sublessee of a covenant for payment of taxes does not afford a ground of action against him by the lessee where every circumstance surrounding the matter indicates that the forfeiture of the estate for nonpayment of taxes was waived.[46]

(§ 5) *E. Injuries from defects and dangerous condition.*[47]—The tenant takes the premises in the condition in which they are at the time in the absence of any

33. Knutsen v. Cinque, 113 App. Div. 677, 99 N. Y. S. 911. Under a covenant to deliver up the premises at the end of the term in good repair, the tenant has the whole time until the end of the term to put the premises in good repair. Fox v. Lynch [N. J. Eq.] 64 A. 439.

34. Knutsen v. Cinque, 113 App. Div. 677, 99 N. Y. S. 911.

35. Where a tenant fails to repair as he has covenanted to do and the landlord does so, he may recover the cost thereof on proof that it is reasonable. Markham v. Stevenson Brewing Co., 111 App. Div. 178, 97 N. Y. S. 604.

36. Where a tenant fails to repair as he has covenanted to do and the landlord repairs, he may not recover interest on the cost of such repairs as it is unliquidated. Markham v. Stevenson Brew. Co., 111 App. Div. 178, 97 N. Y. S. 604.

37. The landlord may not, by delegating its performance to a contractor absolve himself from liability for the contractor's negligence. Eberson v. Continental Inv. Co., 118 Mo. App. 67, 93 S. W. 297.

38. Willcox v. Kehoe, 124 Ga. 484, 52 S. E. 896. One who purchases land subject to a lease containing a covenant on the part of the landlord to repair or to reimburse the lessee for repairs made by him is not bound for breach of such covenant. Id.

39. See 6 C. L. 362.

40. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873. Under the Mississippi statute enacted in 1883, authorizing a lease of school lands for 99 years instead of for three years, as previously authorized, a tenant is liable for waste. Id. In the absence of a stipulation to the contrary, a lessee of school lands is presumed to have taken them for agricultural purposes and may not cut timber for commercial purposes. Id. Cutting timber for commercial purposes by a lessee for 99 years, held waste. Id. This is so though the timber was valueless when he acquired the lease and matured during the term. Id.

41. Moss Point Lumber Co. Harrison County Sup'rs [Miss.] 42 So. 290, 873. A tenant for years may cut timber for clearing as much of the premises as his family may need, and he may clear for cultivation such portions of the land as a prudent owner of the fee would clear providing he leaves enough timber for the permanent use of the inheritance. Id.

42. See 6 C. L. 363.

43. McVickar Gaillard Realty Co. v. Garth, 111 App. Div. 924, 97 N. Y. S. 640.

44. A covenant to comply with and execute all laws, orders, and regulations of state and municipal authorities, has reference to police and sanitary rules and regulations, and does not require payment of special assessments for public improvemente. McVickar Gaillard Realty Co. v. Garth, 111 App. Div. 924, 97 N. Y. S. 640.

45. Eichner v. Cohen, 48 Misc. 541, 96 N. Y. S. 279. Where a lessee proposed to erect a building and the lease provided that he should pay any increase in taxes resulting from the improvement, and an assignee of the lease assumed such obligation and executed a written agreement to pay taxes on a fixed amount of increased valuation, the agreement was valid and imposed no different obligation than the lease, but merely fixed the sum due by reaeon of the increase. Id.

46. McHugh v. Regan, 8 Ohio C. C. (N. S.) 406.

secret defect, deceit, warranty or agreement on the part of the landlord to repair,[48] and a landlord who discovers a defect after the beginning of the tenancy is under no obligation to communicate such fact to the tenant.[49]

In the absence of a covenant to repair, the landlord is not liable for injuries resulting to a tenant,[50] his guest,[51] or servant,[52] by reason of the premises being out of repair,[53] but he is liable for injuries resulting from concealed defects,[54] or where he causes repairs to be made and the work is negligently done.[55] In such case he is liable for the negligence of a person he employs to do the work.[56] The landlord

47. See 6 C. L. 363.

48. Auer v. Vahl [Wis.] 109 N. W. 599. A lessee assumes the risk of injury from a wire extending from an electric light pole without the premises to an anchor two feet within the premises which was so located to his knowledge at the time the lease was made. Hatch v. McCloud River Lumber Co. [Cal.] 88 P. 355. Where a tenant and his wife knew of the existence of a wire anchored on the premises, the wife was guilty of negligence in running against it in the evening. Id.

49. Shute v. Bills, 191 Mass. 433, 78 N. E. 96.

50. Under Civ. Code arts. 2693, 2694, the tenant is bound to make ordinary repairs and cannot recover for personal injuries caused by the want of such repairs. Brodtman v. Finerty, 116 La. 1103, 41 So. 329. Where the tenant of the first floor of a building covenanted to make repairs, but the landlord at his request repaired the roof so as to prevent leaking which was injuring the ceiling of the first floor, such work could not be regarded as admission of liability to repair. Dalton v. Gibson [Mass.] 77 N. E. 1035. Where a landlord had made some repairs and had promised to repair a ceiling, it did not show that he retained control of it and was required to repair it. Schiff v. Pottlitzer, 101 N. Y. S. 249. A landlord who has the premises examined monthly, and who repaired the roof and examined all the slats thereon four weeks prior to the accident, is not guilty of negligence and liable for damages where a tenant is injured because one of the slats on the roof was loose. Schwartz v. Monday, 49 Misc. 527, 97 N. Y. S. 978.

51. A third person living with the tenant cannot recover from the landlord for injuries caused by a hidden defect, where it is not shown that the landlord knew or should have known of its existence. Shute v. Bills, 191 Mass. 433, 78 N. E. 96. A landlord is not liable for injuries to a third person living with the tenant for injuries sustained because of a defect in the roof and gutter of the house, where it is not shown that the roof and gutter did not remain in as good condition as when the premises were let. Id. In an action by a third person living with a tenant for injuries caused by an alleged hidden defect in the outside of the premises, evidence held insufficient to show that the landlord had assumed to repair such defects, that notice had been given his agent and that he had unsuccessfully undertaken to repair. Id.

52. A servant of the tenant has no greater right to recover from the landlord for injuries for defects in the premises than the tenant has. Dalton v. Gibson [Mass.] 77 N. E. 1035.

53. A landlord is not liable for an injury sustained because the elevator was not guarded as required by New York City Building Code, § 91, unless the elevator was in such condition at the time of the lease. Washington v. Episcopal Church, 111 App. Div. 402, 97 N. Y. S. 1072. A landlord is not liable where, after he leased the premises, a rainspout became defective and cast water upon adjoining premises where he had not agreed to make repairs. Mylander v. Beimschla, 102 Md. 689, 62 A. 1038. Where a tenant rented the ground floor of a building and covenanted to make repairs, he was required to repair the ceiling. His servant who was injured by falling plaster could not recover from the landlord. Dalton v. Gibson [Mass.] 77 N. E. 1035.

54. Where prior to leasing premises in which a person had been sick with a contagious disease the landlord employed a skilled nurse and physician to disinfect them, he was not liable when thereafter a child of a tenant to whom he rented such premises died of the disease, though experts testified that there were better means of disinfecting than those used by the nurse and doctor. Finney v. Steele [Ala.] 41 So. 976. Whether a building was caused to collapse by the negligence of the landlord held a question of fact. Di Palma v. Weinman [N. M.] 82 P. 360. Where a landlord had not agreed to make repairs and during the tenancy a rainspout became defective and cast water on adjoining premises, but subsequently the building was re-rented in its defective condition, the landlord was liable only for the damages occurring after the second lease was made. Mylander v. Beimsehla, 102 Md. 689, 62 A. 1038.

55. Upham v. Head [Kan.] 85 P. 1017. Where the landlord undertakes to remodel a leased building, he must do so in such manner as not to injure the tenant's property or interfere with the enjoyment of his tenancy. He is liable for damages resulting to the tenant if he does not properly supervise the work done by subcontractors. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189. Where a landlord was bound to repair and attempted to do so, but the work was ineffectual, proof of such fact justifies an inference that the work was negligently done. Shute v. Bills, 191 Mass. 433, 78 N. E. 96.

56. A landlord who on request of his tenant undertakes to repair defects existing upon the leased property and employs a mechanic to do the work is chargeable with knowledge of the manner in which the work is done. Upham v. Head [Kan.] 85 P. 1017.

is liable for injuries flowing from defective construction of the building.[57] A provision exempting the landlord from liability for specified defects does not apply where injury from such defects is the result of his own negligence.[58] The landlord is not liable for injuries resulting from the wrongful act of a cotenant.[59] For failure to perform his covenant to furnish heat only proximate damages can be recovered.[60]

Though a landlord fails to comply with his agreement to repair, yet the duty rests on the tenant to use all reasonable means to protect his property from unnecessary exposure,[61] and if necessary make repairs himself and recoup from the rent,[62] and, if he fails to do so, he may not recover from the landlord.[63]

Where a landlord was liable for damages caused a tenant by negligence of contractors doing the work of remodeling the building, the verdict will not be set aside because of an erroneous instruction that the landlord was not liable for negligence of the contractors. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189. Where it is the duty of the landlord to repair the plumbing, the fact that he contracted with plumbers to do the work does not relieve him from liability for injuries to an infant child of the tenant by the negligence of workmen. Rosenberg v. Zeitchik, 101 N. Y. S. 591. Where a plumber employed by a landlord to make repairs left a portable furnace unattended on the floor, and an infant child of the tenant in passing overturned the furnace and was burned, held the leaving of the furnace unattended constituted negligence. Id. A landlord who authorized the tenant of a second floor to reconstruct a porch and stairway suitable for his purposes, at his own cost, the same to be under his exclusive control, is liable to a tenant of the first floor for failure to exercise ordinary care to see that the improvement is made reasonably safe. In such case he stands in the same relation to the lower tenant as though he had made the improvement himself. Myhre v. Schleuder [Minn.] 108 N. W. 276. Evidence sufficient to show that the work was defective and that the landlord failed to exercise the proper degree of care to supervise the improvement. Id.

57. Evidence sufficient to show that a landlord was negligent where water was permitted to leak through from the second floor onto the tenant's goods. James Sheehan & Co. v. Maison Barberis, 41 Wash. 671, 84 P. 607.

58. A provision exempting the landlord from liability for injury caused by leakage of gas, steam, or water pipes of any kind whatsoever, does not exempt him where overflow of a tank resulted from negligence of his servants in defectively adjusting a manhole cover to the tank. Lewis Co. v. Metropolitan Realty Co., 112 App. Div. 385, 98 N. Y. S. 391. A provision exempting the landlord from liability "for acts or neglect of cotenants or other occupants" does not apply to acts or neglect of such parties authorized or committed under any right given by the landlord. Wade v. Herndl, 127 Wis. 544, 107 N. W. 4. A provision exempting the landlord from liability for damage caused by leaky roof, unless he neglects to repair after written notice, does not exempt him from liability where leaks were occasioned by his own negligence. Pratt, Hurst & Co. v. Tailer, 100 N. Y. S. 16. As where the landlord permitted the roof to be used for an unsuitable purpose and in a manner which caused it to leak. Id.

59. A landlord is not liable where tenants of an upper floor leave a faucet open and water leaks into the rooms of a tenant below. Brick v. Favilla, 101 N. Y. S. 970.

60. Failure of the landlord to furnish heat as he covenanted to do does not entitle the tenant to maintain action against him for death of his child from sickness. Dancy v. Walz, 112 App. Div. 355, 98 N. Y. S. 407.

61. Where a lease provided that injuries by fire should be repaired by the landlord, and after a fire destroyed the roof, of which fact the landlord was immediately notified, no repairs were made for six days when a rain injured the tenant's goods, held the tenant could not recover as it was his duty to protect his goods or make repairs and charge them to the landlord. Weinberg v. Ely, 100 N. Y. S. 283. Whether a tenant was guilty of contributory negligence in bringing new goods into the building while the landlord was making repairs, and whether the tarpaulin covering the hole in the roof was sufficient, held questions of fact. Eberson v. Continental Inv. Co., 118 Mo. App. 67, 93 S. W. 297.

62. Where a landlord fails to repair as he has agreed to do and the ceiling falls, injuring the tenant, the measure of damages is merely the expense of doing the work which the landlord failed to do. Schiff v. Pottlitzer, 101 N. Y. S. 249. Where a landlord refuses to perform his covenant to repair, the tenant may not stand by and see his crops destroyed because thereof, but must himself repair and recover the cost thereof from the landlord. Brett v. Berger [Cal. App.] 87 P. 222.

63. Where a tenant fails to repair and recoup from the rent, members of his family who are injured because of the lack of repair have no cause of action against the landlord. Brodtman v. Finerty, 116 La. 1103, 41 So. 329. Where the tenant may recoup as against the rent for damages flowing from patent defects existing at the time of renting, as to the existence of which both parties had notice, he cannot do so where the landlord wae not notified to repair, or the tenant could by ordinary care have avoided the injury. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672. A landlord is not liable for injuries to a tenant occasioned by defects in the premises which he has covenanted to repair, where knowing of the defect the tenant fails to exercise his right to repair and recoup from the rent or surrender the premises. Reams v. Taylor [Utah] 87 P.

A landlord is liable for injuries resulting from his negligence in failing to keep in a reasonably safe condition portions of the building over which he retains control,[64] and, though such liability is contingent upon notice, notice is not necessary where the defective condition results from his own act,[65] but he is liable in this respect only where he has been guilty of negligence[66] after notice of the defective condition,[67] and the person injured has not been guilty of contributory negligence.[68]

1089. Where it was not the duty of the landlord to repair and the tenant did not as required by Civ. Code art. 2694, the landlord was not liable for injuries resulting from the defect to the tenant's wife. Bianchi v. Del Valle, 117 La. 587, 42 So. 148. Especially was the landlord not liable where there was no serious injury but only an abrasion of the skin. Id.

64. A custom by which a landlord letting dwelling houses to tenants at will retained control of the outside, yard, roof, etc., is invalid. Shute v. Bills, 191 Mass. 433, 78 N. E. 96. A landlord must use reasonable care to keep the **roof of the premises** in a reasonably safe condition. Schwartz v. Monday, 49 Misc. 527, 97 N. Y. S. 978. A landlord who reserves control of **balconies, stairways, and steps,** for the common use of tenants, is bound to use ordinary care to keep them in a reasonably safe condition. Walsh v. Frey, 101 N. Y. S. 774. Where several floors of a building are leased to different tenants who jointly use the **elevator,** the duty to keep it in repair devolves on the landlord. A tenant is not liable to a servant for injuries occasioned by a defect in such elevator. Andrus v. Bradley-Aiderson Co., 117 Mo. App. 322, 93 S. W. 872. A landlord is liable for injuries to a tenant or a stranger for his failure to guard an elevator shaft where the elevator is under his control. Shoninger Co. v. Mann, 121 Ill. App. 275. The landlord is liable for injuries to the infant child of a tenant resulting from the dangerous condition of a **water closet** if, under express or implied contract with the tenant, the closet was for the common use of tenants of the flat. In the absence of such contract, however, the landlord is not liable, though the closet was used by other tenants with his knowledge or approval. Hess v. Hinkson's Adm'r, 29 Ky. L. R. 762, 96 S. W. 436. A landlord who retains control of a **cistern** for the purpose of repairs is liable for injuries resulting from failure to repair after reasonable notice, and is liable where a child of a tenant was drowned in the cistern. Mills' Adm'r v. Cavanaugh, 29 Ky. L. R. 685, 94 S. W. 651. Owners of an office **building,** the offices in which are **heated by a single plant** of which they retain control, are liable where steam is negligently allowed to escape from the radiators and injure property in the offices. Bryant v. Carr, 101 N. Y. S. 646. Where a **freight elevator** in a building, portions of which were let to several tenants, remained under the control of the owner, he was bound to maintain it in a reasonably safe condition for the use of those who had a right to use it. Rosenberg v. Schoolherr, 101 N. Y. S. 505. Where the elevator was partially enclosed by slats, and the lower part of two slats had been broken off, and one using the car allowed his foot to protrude through the hole and it was crushed, the landlord was held negligent. Id. Where a third person living with the tenant was injured by an alleged hidden defect in the outside of the premises, it is admissible to show a custom or usage which required the landlord to furnish outside repairs where premises like those in question were leased to a tenant at will. Shute v. Bills, 191 Mass. 433, 78 N. E. 96.

65. Where a landlord leases each floor of a building to separate tenants but remains in possession of the roof and covenants to repair it on written notice, and leases such roof for a purpose for which it is not suitable, and it becomes broken and leakage damages a tenant and he has actual notice of the leakage, he is liable for damages caused without being given written notice. Pratt, Hurst & Co. v. Taller [N. Y.] 79 N. E. 328.

66. Where a tenant was injured by catching her foot in a hole in the hallway of a tenement house, the question of the landlord's negligence was held for the jury. Acker v. Stiner, 101 N. Y. S. 766. The landlord is responsible for injuries to tenants resulting from the dangerous condition of parts of the premises which he reserves for common use, and over which he retains control only when he has been guilty of actual negligence with regard thereto. Hanselman v. Broad, 113 App. Div. 447, 99 N. Y. S. 404.

67. He must have notice of the condition of things or circumstances equivalent to notice must exist, where injuries resulted to a tenant of a tenement house because of the fall of a clothes pole in the yard where the tenant was hanging wash clothes, unless he had notice of the rotten condition of the pole. Hanselman v. Broad, 113 App. Div. 447, 99 N. Y. S. 404. Evidence that another similar pole set out the same time had previously fallen was admissible on the question of notice. Id. Where a tenant was injured because of a defect in the roof, evidence held insufficient to show that the landlord had knowledge of such defect. Schwartz v. Monday, 49 Misc. 527, 97 N. Y. S. 978.

68. Where a servant of a tenant was injured by falling down an elevator shaft which he asserted was because the hallway was dark, and the landlord asserted that he opened the door when the elevator was not there and stepped in, instructions as to the duty of each in the premises held proper. Pascieszny v. Boydell Bros. White Lead & Color Co. [Mich.] 13 Det. Leg. N. 726, 109 N. W. 417. It is not error to leave it to the jury to say whether the facts and circumstances under which the plaintiff stepped into the open elevator shaft were such as to lull him into a sense of security, by leading him to think the cab was there to receive him. Breuer v. Frank, 3 Ohio N. P. (N. S.) 581. Where the landlord was making extensive repairs in a tenement house, and

The landlord is not liable where a tenant is injured while making an exclusive use of a portion of the premises over which he retains control.[69] A landlord who maintains a common passage for the use of several tenants must use due care to keep it in the condition it was when the lease was made, but is not bound to change the mode of construction.[70] A landlord who leases separate portions of the same building to different tenants but reserves control of halls, stairways, and outer doors, must use reasonable diligence to keep such part of the premises free from improper obstruction.[71] His duty in this respect is measured and limited by the uses to which it is reasonable, from the nature of the building, to infer that such portions of the building were intended to be subjected in making the leases.[72]

To strangers.[73]—The landlord is not liable to third persons for injuries occasioned by defects which do not constitute a nuisance,[74] nor from an injury resulting

piled debris so as to leave only a narrow path to the toilet, the questions of negligence and contributory negligence were for the jury, where a tenant was injured by falling over an obstruction in the hall in the evening, where such obstruction had been carelessly left there that day and the tenant had never seen it. Sacks v. Segal, 101 N. Y. S. 41.

69. Where a landlord provided a place for hanging clothes but a tenant strung lines for that purpose between the uprights of a rear porch over which the landlord had control, and while hanging clothes the rail gave way and she was injured, held that the use the tenant made of the porch was an exclusive one for her own convenience and the landlord was not liable. Walsh v. Frey, 101 N. Y. S. 774.

70. It is proper to instruct in an action by a tenant for injuries sustained because of a defect in a common stairway that, if the defect was obvious at the time of the letting, he could not recover, but, if they appeared strong and safe, the landlord was bound to keep them in such condition. Andrews v. Williamson [Mass.] 78 N. E. 737.

71. Whitcomb v. Mason, 102 Md. 275, 62 A. 749.

72. Whitcomb v. Mason, 102 Md. 275, 62 A. 749. The owner of an office building is not required to keep the outer doors open or unlocked on Sunday. Where the building is occupied principally by lawyers, the landlord is not liable for destruction of furniture by an unusual fire which occurred on Sunday because he was unable to remove them. Id. Where in such case it appeared that the only door by which the furniture could be removed was securely locked, a request to take the case from the jury for want of evidence that the landlord prevented the removal of the furniture was properly denied. Id.

73. See 6 C. L. 365.

Note: As a general rule a landlord cannot be charged with liability for injuries to adjoining premises if, at the time of the letting, the demised premises are in a proper state of repair and the tenant permits them to get into a condition injurious to adjacent property. Edgar v. Walker, 106 Ga. 454, 32 S. E. 582. An exception to this rule exists in a case in which the lessor covenants to keep in repair, and by reason of his failure to do so, the building gets into a dangerous condition and falls. Benson v. Saurez, 43 Barb. [N. Y.] 408. Injuries from a nuisance not existing at the time of the demise but created by the tenant, impose no liability on the part of the landlord as where the tenant obstructs the natural flow of surface water (Baker v. Allen, 66 Ark. 271, 50 S. W. 511, 74 Am. St. Rep. 93), nor is the landlord liable where the tenant digs a ditch and constructs a dam on the leased premises causing water to overflow adjacent property (Jansen v. Barnum, 89 Ill. 100; Sargent v. Stark, 12 N. H. 332). No liability can be imposed upon him for the filtration of sewage from a cesspool or privy vault into the cellar or well of adjoining premises which is not the result of defective construction, but of failure of the tenant to keep in repair (Anheuser Busch Brewing Ass'n v. Peterson, 41 Neb. 897, 60 N. W. 373; Pope v. Boyle, 98 Mo. 527, 11 S. W. 1010; Wunder v. McLean, 134 Pa. 334, 19 A. 749, 19 Am. St. Rep. 702), nor is he liable if the tenant allows offensive or impure matter to accumulate on the demised premises in such a way as to be washed by rains onto the adjoining lands (Edgar v. Walker, 106 Ga. 454). A tenant who allows offensive odors to escape from a livery stable to an adjoining house, thereby rendering it unfit for habitation, is alone liable, where the stable is so constructed that it can be used for livery purposes in a lawful manner. Metropolitan Sav. Bank v. Manion, 87 Md. 68, 39 A. 90; Packard v. Collins, 23 Barb [N. Y.] 444. But a landlord who renews a lease after the creation of a nuisance by the tenant, which did not exist at the time of the original letting, is liable for injury to adjoining property by the continuance of the nuisance. Fleischner v. Citizens' Real Estate & Invest. Co., 25 Or. 119, 35 P. 174.—See note to Mylander v. Beimschla [Md.] 5 L. R. A. (N. S.) 316.

74. A cellarway under a sidewalk constructed by permission of the authorities and provided with doors is not a nuisance, and the landlord is not liable for injuries to a pedestrian who fell into it while the door was open, the premises being in the exclusive control of the tenant. Opper v. Hellinger, 101 N. Y. S. 616. Where there is no covenant on either side to repair, but the landlord reserved the right to enter to see if repairs were necessary, and it does not appear that the premises were a nuisance when leased, the landlord is not liable where snow drops from the building onto

from a defect which the tenant is bound to repair,[75] but, where a duty to repair is imposed on both landlord and tenant, either is liable.[76] A judgment against a landlord for injuries inflicted by a vicious dog kept by a tenant is based on negligence.[77]

(§ 5) *F. Emblements and fixtures.*[78]—Where the renting is for a time certain, the tenant is not entitled to crops which mature after expiration of the term in the absence of custom of the country or express contract.[79] But though there be no custom of the country or express agreement, there may be other circumstances that in equity will estop the landlord to claim the crop which but for such circumstances he would be entitled to hold.[80] Where the right of a tenant to a crop maturing after expiration of the lease is equitable and rests on estoppel, injunction will issue to protect such right.[81] The right to emblements is in some states fixed by statute.[82]

The general rule is that fixtures placed on the premises by the tenant may be removed by him[83] unless otherwise agreed,[84] and covenants restricting this right

a passenger on the highway, where it appears that the accident happened because of failure of the tenant to remove the snow after a storm as it was his habit of doing. Neas v. Lowell [Mass.] 79 N. E. 810. Where an obstruction to a sidewalk is not one which an owner is bound to remove if the premises are in the actual possession of a tenant, the landlord cannot be held liable without proof of an obligation to repair and notice of the necessity of doing so. Chroust v. Acme Building & Loan Ass'n, 214 Pa. 179, 63 A. 595.

75. Landlord is not liable for injuries to one delivering goods to a tenant of a tenement house, caused by fall of a dumb waiter because of a defective rope, where he had no notice of such defects. Russo v. McLaughlin, 99 N. Y. S. 839. Where a lease of premises not shown to have been out of repair at the time provides that the lessee shall make repairs, the lessor, though he makes repairs on notice that they are needed, is not liable to a third person for injuries sustained because of a defect of which the landlord had not reasonable notice. Rice v. Boston University Trustees, 191 Mass. 30, 77 N. E. 308.

76. Where a pedestrian on the street was killed by an iron pipe which fell from the side of the building because of getting out of repair, the tenant is liable. Mitchell's Adm'r v. Brady [Ky.] 99 S. W. 266. Where a pedestrian on the street was killed by an iron pipe which fell from the side of a building because of getting out of repair, the landlord is liable, though the tenant had covenanted to repair. Id.

77. A judgment against a landlord for injuries inflicted by a vicious dog kept by a tenant is based on negligence and not "willful and malicious injury to the person" within the bankruptcy act, and the defendant is released from it by his discharge in bankruptcy. In re Lorde, 144 F. 320.

78. See 6 C. L. 366.

79. Carmine v. Bowen [Md.] 64 A. 932. A lease for three years beginning March 1st, by which the tenant agrees to rotate crops, though implying that he must sow wheat and rye in the fall preceding termination of his lease, does not show an express contract entitling him to remove the crop after termination of the lease. Id.

80. As when the tenant sowed a crop of grass which would not mature during the term and stated to the landlord who was present that he anticipated no trouble in harvesting it. Carmine v. Bowen [Md.] 64 A. 932. A lessee under a cropping contract who plants a crop with the lessor's consent is entitled to it, and to ingress and egress to remove it, though it had not matured when the lease expired. Crow v. Ball [Tex. Civ. App.] 99 S. W. 583.

81. Carmine v. Bowen [Md.] 64 A. 932.

82. Under Ky. St. §§ 3862, 3863, providing that emblements on land of a person dying after March 1, which shall be severed prior to the following December, shall go to the personal representative, if not to the heirs, where the owner of an estate per autre vie leased it in September for a year from the following March, and the per autre vie died in October, but previous to his death the lessee had sown wheat, held the lessee occupied the same position as his lessor and could not claim emblements. Devers v. May [Ky.] 99 S. W. 255.

83. Under a lease by which the tenant agreed to deliver up the premises in as good condition as when he received them, ordinary wear and tear excepted, and to make no alterations without consent of the landlord, the landlord has no claim on fixtures put in by tenant to replace those worn out, and threatened removal would not justify an injunction, the remedy at law for waste or breach of covenant being adequate. Fox v. Lynch [N. J. Eq.] 64 A. 439. Under the rule that fixtures may be removed, held that one who rented land for a game preserve and erected a house and barn thereon which could be removed without injury to the freehold was entitled to remove them during the term. Shafter Estate Co. v. Alvord, 2 Cal. App. 602, 84 P. 279.

84. Under a lease providing that the tenant should make certain improvements which should belong to the lessor at the end of the term, where the premises were destroyed by fire and the lease rescinded because of lack of diligence of the lessors in performing their covenant to rebuild, the lessor was entitled to recover such proportion of the insurance money received by the lessee as the portion of the expired term bore to the entire term. Lincoln Trust Co. v. Nathan [Mo. App.] 99 S. W. 484. Where at the time a lease was executed certain store fixtures

are strictly construed,[85] but the reserved right to remove may be waived where the tenant takes a new lease not containing such reservation.[86] In such case the fixtures become the property of the landlord at the date of renewal.[87] Intention to annex trade appliances will be presumed on their being left after surrender of the premises, otherwise not.[88] The duty to remove before surrender has, therefore, no application where the landlord prevents it,[89] and a license to remove them thereafter when relied on by the tenant cannot be revoked for slight causes,[90] but in case articles are enumerated, no other can be taken after surrender.[91]

(§ 5) *G. Options of purchase or sale.*[92]—An option to purchase must be definite and certain in its terms[93] and is to be given effect according to the plain import of its terms.[94] Where a mining lease containing an option to purchase was not signed by the lessee and as to the option was nudum pactum, it is converted into an enforceable contract on payment of part of the purchase price.[95]

§ 6. *Rent and the payment thereof, and actionable use and occupation.*[96]—The obligation to pay rent rests on the relation of landlord and tenant[97] but does not depend on possession,[98] and the full amount stipulated may be recovered, though the premises are not used all the time,[99] or where only a portion of them are oc-

were on the premises and were attached to and used as part of the store, the lease confirmed the property in the lessor and precluded the tenant from claiming it against a purchaser from the lessor. Baringer v. Evenson, 127 Wis. 36, 106 N. W. 801.

85. Fox v. Lynch [N. J. Eq.] 64 A. 439. A covenant not to claim a rebate for alterations to fixtures does not relate to the tenant's right to remove trade fixtures put in by him. Id.

86. Where a lease for twenty-one years provided for purchase by the lessor of a building erected by the tenant or a new lease for a like term, and a second lease was given containing a like provision, also a third which did not contain such provision but provided that the premises should be yielded up at the end of the term, held that the building belonged to the landlord from the execution of the third lease, and his title was not affected by an agreement entered into the day prior to the expiration of the last lease to extend for thirty days the time within which the lessor should exercise his option to purchase or grant a new lease. Precht v. Howard [N. Y.] 79 N. E. 847.

87. Where a lease for a long period provided that the tenant should erect a building which the landlord agreed to buy at the expiration of the lease or execute a renewal, the renewal contained like covenants, but a second renewal did not. A contract entered into prior to termination of the lease, whereby the landlord agreed to purchase the building, was without consideration. Precht v. Howard, 110 App. Div. 680, 97 N. Y. S. 462. Where the lessees were not injured by such contract, the landlord is not estopped to assert that it is without consideration. Id.

88, 89, 90, 91. Stopper v. Kantner, 29 Pa. Super. Ct. 48.

92. See 6 C. L. 368. See, also, Vendors and Purchasers, 6 C. L. 1781.

93. A provision in a lease by a county of school lands that if the county desired to sell them at the expiration of the term the lessees should have the preference right to purchase at any bona fide offer acceptable to the county is not void for uncertainty. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

94. Under a lease giving the tenant an option to purchase for a stated sum, "and in case the landlord decided to sell to any one he would give notice and the refusal to purchase," the option is to purchase for a stated sum. Bennett v. Farkas [Ga.] 54 S. E. 942. Under the facts of this case a tender was necessary, and a tender of a less sum than that stated was not a compliance with the tenant's obligation, and did not give him such equitable title as would preclude eviction at the end of the term. Id. Where lessees of school land were given a preference right to purchase, it is immaterial to a third person who had a contract subject to such right that the terms of the sale varied from the terms of the lease. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

95. Williams v. Eldora-Enterprise Gold Min. Co. [Colo.] 83 P. 780.

96. See 6 C. L. 368.

97. Instruction in an action for rent held not to assume that the relation of landlord and tenant existed between the owner of the premises and a purchaser from the tenant. Brayton v. Boomer [Iowa] 107 N. W. 1099.

98. The tenant is liable for rent from the time he is entitled to possession under his lease, regardless of whether he actually obtained it. Smith v. Barber, 112 App. Div. 187, 98 N. Y. S. 365. Liability for rent does not depend upon possession. Landt v. McCullough, 121 Ill. App. 328. It is no defense to an action for rent that the landlord was wanting in diligence in re-renting the premises after abandonment by the tenant. Rau v. Baker, 118 Ill. App. 150.

99. Under a lease of a hall for an indefinite period, failure of the lessee to use the hall does not release him from liability for rent, where with his knowledge it was kept ready for use by him. Buffington v. McNally [Mass.] 78 N. E. 309.

cupied,[1] but a tenant precluded from taking possession because of a paramount title is not liable for rent.[2] A covenant to pay rent runs with the land.[3] Rents may be mortgaged.[4] Under a covenanted re-entry with a right to relet at the defaulting lessee's risk, he remaining liable and entitled to credit for actual receipts only, a reasonable effort to relet must be made in order to hold the lessee.[5] Also where a landlord relets premises for a portion of the term for which a tenant has paid rent, the latter is entitled to recover the sum received.[6] As a general rule rent is not payable in advance[7] in the absence of express contract.[8] The amount of rent rests in the terms of the lease,[9] and such stipulation governs where a tenant holds over with the consent of the landlord,[10] but in some states a different rental is imposed by statute in case of willful holdover.[11] A provision for abatement of rent in case no beneficial use is had of the premises is to be given effect according to the intent of the parties.[12] A provision for the deduction from the rent of a specified sum for care of the premises operates to reduce the rent to such extent.[13] The parties

1. Where a tenant had for several years rented two stores and basements and had paid a certain monthly rental for each store and basement, and it was agreed that he should vacate one store after a certain date but he continued to occupy the basement beneath such store after that date, he was liable for the full rental of store and basement. Katz v. Schreckinger, 101 N. Y. S. 743.

2. Where at the beginning of the term the premises are in possession of a third person claiming under a paramount title, a tenant thereby excluded is not liable for rent. Smith v. Barber, 112 App. Div. 187, 98 N. Y. S. 365.

3. Is binding on whoever becomes owner of the leasehold estate. Livingston County Tel. Co. v. Herzberg, 118 Ill. App. 599.

4. Where pledged as further security in a mortgage of the land. Schaeppi v. Bartholomae, 118 Ill. App. 316. A purchaser at foreclosure sale is entitled to them. Id.

5. International Trust Co. v. Weeks, 27 S. Ct. 69.

6. Fallis v. Gray, 115 Mo. App. 253, 91 S. W. 175.

7. Under an agreement for a lease "all conditions and covenants to be the usual ones," the rent is not payable in advance. Arcade Realty Co. v. Tunney, 101 N. Y. S. 593.

8. Letters constituting the lease construed and held that a covenant to pay rent in advance was not contained. Arcade Realty Co. v. Tunney, 101 N. Y. S. 593. Where rent was payable in instalments, the last instalment being payable on a certain date, or before if the "party renting" desires it. The landlord was spoken of in the lease as having "rented" her farm. Held the last instalment was payable before the specified date at the option of the landlord. Muse-wald v. Seeker, 101 N. Y. S. 287.

9. Where a tenant remains in possession after expiration of the term and was unable to agree with the landlord as to the terms of a lease except as to the rent, the lessor's agreement to rent for such sum is an admission that it was a proper amount of rental. Dickinson v. Arkansas City Imp. Co., 77 Ark. 570, 92 S. W. 21.

10. A tenant who by consent of the landlord holds over another year after expiration of the term is liable only for the annual rent stipulated in the lease. Stevens v. New York, 111 App. Div. 362, 97 N. Y. S. 1062. Where a tenant held over under an agreement that the rent was to be on the same terms, but that all improvements were to be considered property of the landlord, held the landlord was entitled to recover rent for the entire premises, including a house built by the tenant. Mentz v. Haight [Tex. Civ. App.] 16 Tex. Ct. Rep. 943, 97 S. W. 1076.

11. Real property law, Laws 1896, p. 590, providing for rent in double the yearly value of the premises where a tenant willfully holds over, does not apply where he holds over with consent of the landlord. Stevens v. New York, 111 App. Div. 362, 97 N. Y. S. 1062.

12. Where a lease of land at so much per acre provided that in case the land became inundated the rent was to be deemed paid, held that it was not necessary that the entire crop should be destroyed before such provision took effect, but if part of the land was flooded, the rent was to be reduced $5 per acre. Knoepker v. Redel, 116 Mo. App. 621, 92 S. W. 171. Where a lease of reclaimed land provided that if by reason of overflow it could not be cultivated prior to June 1st of any year the lessee should not be liable for rent, and also provided for termination if the land could not be cultivated, where the land was submerged in February and the lease cancelled in May and it was impossible to cultivate prior to June, the lessee was not liable for rent for the first half of the year payable April 1st. Donnellan v. Wood, Curtis & Co. [Cal. App.] 87 P. 235.

13. Where in a lease providing for a yearly rental the landlord agreed to allow $150 per month for repairs, lighting, etc., to be deducted from the rent, and the tenants agreed to do the work, such provision operated to reduce the rent so much absolutely, whether or not the tenants performed the work of lighting, keeping the halls clean, etc. Pakas v. Shinberg, 49 Misc. 238, 97 N. Y. S. 209. Under a lease providing that the landlord should allow a certain sum per month to compensate tenants for lighting, sweeping halls, etc., such sum to be deducted from the rent, the landlord's remedy for breach

may by oral agreement reduce the stipulated rent.[14] The consideration for an agreement reducing rent for the remainder of a term may be shown by parol.[15] A provision for reduction in case of renewal, if the lessor remains the owner, confers no rights if the landlord sells prior to the expiration of the term.[16] Taxes to be paid by the tenant may constitute part of the rent,[17] as may sums provided for for other purposes.[18] The tenant's obligation for rent may be assumed by one who acquires his estate.[19] An assignee of the lease[20] or other persons holding by virtue of it are liable for the stipulated rent.[21] A surety for the payment of rent is not discharged as to accrued rent where the landlord accepts a surrender of the premises.[22] A tenant who so agrees is liable for diminution of rent.[23] Where a statutory method of payment is prescribed, the statute must be complied with,[24] and, if the manner of pay-

of the tenant's duty to perform was an action for damages. Id.

14. Where action is brought for rent after a lease under seal has expired, and it appears that it had been fully performed, it is competent to show by parol that the parties had orally agreed to a reduced rental in consideration of alterations made by the lessee and that the lessor had thereafter accepted checks for the reduced rental as payment in full thereof. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110. It is sufficient consideration for the reduction of rent during the remainder of the term that the tenant agrees to make additions to and alterations in the premises not required of him by the terms of the lease. Natelsohn v. Reich, 50 Misc. 585, 99 N. Y. S. 327.

15. Natelsohn v. Reich, 50 Misc. 585, 99 N. Y. S. 327.

16. Where a lease provides that in case of renewal the tenant shall have a reduction in rent in case the lessor remained the owner, the tenant has no rights under such provision where the lessor sold prior to the termination of the lease and the tenant leased from the purchaser. Newberger v. Matchak, 99 N. Y. S. 470.

17. Where a lessee covenants to erect a building which he will be entitled to remove, and to pay a specified rental for the land, also taxes against the land and against the improvements, the taxes provided for are a part of the rent. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337.

18. Where a contract creating the relation of landlord and tenant embraces a sum to be paid as rent and another sum as hire of animals used on the premises, the entire sum is rent and may be collected by distress. Sapp v. Elkins, 125 Ga. 459, 54 S. E. 98. No conflict in the evidence as to the amount of rent due. Id.

19. Where one conveyed land and reserved rents by parol reservation, and the grantee conveyed to another who obtained possession of the land and crops, held, if the grantee had notice of the reservation, he assumed the tenant's obligation to pay rent. Applegate v. Kilgore [Tex. Civ. App.] 15 Tex. Ct. Rep. 17, 91 S. W. 238.

20. Where a lease provides that it shall not be assigned without the consent of the lessor, and after several assignments the landlord brings action against the assignee for an increased rental, he thereby admits the tenancy and cannot assert that it was terminated by the assignments, and the assignee holds under a void lease, nor can he recover more than the rent reserved in the original lease. Shalet v. Rauch, 50 Misc. 311, 98 N. Y. S. 883.

21. Where a lease provided that the lessee should erect a building which he would have a right to remove, and when the building was nearly completed receivers appointed for the lessee were authorized to take charge of the building and complete it, held they held the premises under the lease and were liable for the portion of the rent falling due during their occupancy. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337. The claim for rent takes priority over certificates issued by the receivers for completing the building. Id. The claim for rent does not lose its priority because the lease was not recorded. The recording acts are for the protection of persons acquiring an interest in the property and holders of the certificates do not by reason thereof acquire an interest. Id.

22. Sureties on a bond to secure payment of rent are not discharged by the lessor's retaking of possession on surrender by the lessee. White River, etc., R. Co., v. Star Ranch & Land Co., 77 Ark. 128, 91 S. W. 14. Under a lease providing for monthly rental, not assignable except by consent of the landlord and for re-entry by the landlord for failure to perform any of the covenants, and on such entry the term should cease, one who guarantied the prompt payment of rent, and faithful performance of the covenants, was not discharged by a surrender of the lease after default in payment of rent. Bothfeld v. Gordon, 190 Mass. 567, 77 N. E. 639.

23. Where a landlord sued for diminution of rent under a covenant making the tenant responsible for loss or diminution of rent in case of re-entry for condition broken, and there was no claim for rent as such, a requested ruling as to whether the tenant continued to hold as such after the entry was immaterial. Edmands v. Rust & Richardson Drug Co., 191 Mass. 123, 77 N. E. 713. Where a lease provided that the lessee should be responsible for loss or diminution of rent sustained in consequence of entry because of breach of conditions by the lessee, the lessor was not required to accept a prospective tenant with whose financial responsibility the lessee was satisfied. Id.

ment is prescribed by the lease, compliance therewith is sufficient.[25] If no place of payment is fixed by the terms of the lease, demand on the premises is not essential.[26] A tender of an amount less than is due does not constitute payment.[27] A plea of payment for one month is no defense to an action for rent for a different month.[28] The application of payments rests with the pleasure of the landlord.[29]

Defenses, set-offs, and reductions.[30]—Eviction is a defense to an action for rent,[31] but a constructive eviction is not if the tenant remains in possession.[32] In the case of an apartment lease, destruction by fire destroys the liability.[33] Vacation of premises and surrender of key to lessor does not discharge a liability for rent reserved for a term.[34] A surrender of the premises and an acceptance thereof is no defense to an action for accrued rent.[35] A tenant who sets up that he had surrendered the premises prior to the date from which rent was claimed, has the burden to prove it.[36] In order to discharge the liability by execution of a contract for purchase, it is essential to prove one binding on the lessor.[37] Since rents accruing after the landlord's death belong to the heirs, the landlord cannot release them even though he may cause the sale of the land to pay debts.[38] The assignee of such rents from the heirs may recover the rents.[39] An assignment of the lease terminates the liability for rent to the owner where he had no privity with the assignor.[40] An assignee of a

24. Payment is not made by depositing money in a bank in the absence of an offer to pay or notice of the deposit to the landlord under the rule that an obligation may be paid by an offer and deposit in the name of the creditor and notice to him of such fact. Owen v. Herzihoff, 2 Cal. App. 622, 84 P. 274.

25. Where a lease provided that deposit in a certain bank should constitute payment of rental, a deposit after the expiration of the term which was accepted by the bank without notice from the lessor constituted payment. American Window Glass Co. v. Indiana Nat. Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

26. If a lease contains no provision fixing the place for payment of rent, a demand on the leased premises is not essential to establish liability of the lessee to forfeiture for failure to pay rent, if the practice of the parties had been to make and receive payment elsewhere. Lund v. Ozanne [N. M.] 84 P. 710.

27. Where a lessee covenanted to repair and tendered a check for a month's rent less a certain amount for repairs, which check was immediately returned to him, there was no payment of rent. O'Brien v. Levine, 50 Misc. 303, 98 N. Y. S. 636.

28. Pleading payment of rent to May 1st in an action for rent for the month of May is not a plea of payment. Manhattan Leasing Co. v. Weill, 98 N. Y. S. 686. If one party to a joint lease when sued alone pleads general denial and makes no objection either by answer or at the trial, he is not after decision entitled to amend so as to set up such fact. Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

29. A landlord is not required to apply the proceeds of cotton received from a tenant to a secured claim, but could apply it to a subsequent claim for supplies. Cadenhead v. Rogers & Bro. [Tex. Civ. App.] 16 Tex. Ct. Rep. 837, 96 S. W. 952.

30. See 6 C. L. 370.

31. If the premises are made unfit for the purposes for which they are leased by the act of the landlord, the tenant may abandon them and he is not liable for rent. Frepons v. Grostein [Idaho] 87 P. 1004. Where in an action for rent the tenant counterclaims for constructive eviction, he is properly allowed for time lost and expense of moving. Wade v. Herndl, 127 Wis. 544, 107 N. W. 4.

32. Laws 1860, p. 592, c. 345, releasing the tenant from liability for rent if the premises without his fault becomes untenantable, and also providing that the tenant may surrender possession, does not apply where the tenant continues in possession. Faron v. Jones, 49 Misc. 47, 96 N. Y. S. 316.

33. Paxson & Comfort Co. v. Potter, 30 Pa. Super. Ct. 615.

34. Hastings v. Burchfield, 28 Pa. Super. Ct. 309.

35. Though a lease was surrendered and accepted after the occurrence of facts constituting a constructive eviction, it was no defense to an action for rent during the time the tenant was in possession. Henning v. Savage, 100 N. Y. S. 1015.

36. Sammis v. Day, 48 Misc. 327, 96 N. Y. S. 777. Evidence insufficient to show that a lease had been surrendered and accepted and the tenant relieved from liability for rent. Id. Where a tenant set up surrender of the premises in an action for rent and introduced evidence that the landlord had entered on the premises to repair them, he had the burden to show that the entry for such purpose was made prior to payment of the last installment of rent. Id. Where a tenant pleaded a surrender in an action for rent, evidence that a "to let" sign was placed on the house on a certain date is no proof that it was placed there by authority of the landlord. Id.

37. Nesbitt v. Tarbrake, 30 Pa. Super. Ct. 460.

38, 39. Winkle v. Meany, 30 Pa. Super. Ct. 339.

40. Where there is no privity of contract

leasehold who sets up reassignment as a defense to an action for rent has the burden to prove such fact.[41] Rent may not be recovered if the premises were let for immoral purposes,[42] but if the lease be for lawful uses and the circumstances do not show the transaction to be colorable, subsequent knowledge of the landlord of the immoral or illegal purposes to which the tenant has subjected the premises will not invalidate the lease nor preclude collection of rent.[43] If, however, the landlord after being made aware of the illegal use does any affirmative act indicating his sanction of it, he becomes pari delicto and the courts will not aid him.[44] Fraud is a defense to an action for rent.[45] Damages for trespass by the landlord,[46] and taxes paid by the tenant, may be set off.[47] Under the rule that a written lease implies a consideration, want of consideration cannot be pleaded against an action for rent because of the fact that the landlord had no title.[48] A provision in the lease exempting the tenant from liability for rent if the premises became untenantable applies only on the occurrence of such condition,[49] and a statute exempting him from payment of rent in case of total destruction does not apply in case of partial destruction.[50] A covenant by the landlord to make the premises tenantable before a lessee shall be bound to occupy or pay rent is a condition precedent and until complied with the tenant is not bound to pay rent,[51] and is ground for the recovery of rent already paid,[52] but breach of the landlord's covenant to make repairs is no defense,[53] though

between an assignee of a lease and the owner of the reversion, the liability of such assignee for rent is terminated by an assignment to a third person under an assumed name. Hartman v. Thompson [Md.] 65 A. 117.

41. Hartman v. Thompson [Md.] 65 A. 117. Where an assignee of a lease was sued for rent, the question of whether she had parted with all her estate in the premises was held for the jury. Id.

42. If a house be let with intent that it shall be used for purposes of prostitution, rent cannot be recovered. Kessler v. Pearson [Ga.] 55 S. E. 963.

43, 44. Kessler v. Pearson [Ga.] 55 S. E. 963.

45. Under the rule of the municipal court that in actions on a written contract fraud may not be proved as a basis for affirmative relief but may be set up as a defense, in an action for rent, it may be shown that the tenant was induced to take the lease by fraudulent representations as to the apartment he was to have. Pelgram v. Ehrensweig, 99 N. Y. S. 913. Where a landlord represented at the time the lease was made that the roof did not leak, and it appeared that he had reason to believe that repairs recently made had accomplished the purpose, it was held that he was not guilty of fraud. Bayles v. Clark, 100 N. Y. S. 586. Where after a tenant entered under an oral lease for a year and had paid a month's rent the lease was reduced to writing, alleged false representations inducing the signing of the lease held not to alter the relations of the parties and not available as a defense to an action for rent. Id.

46. Within Va. Code 1904, p. 1740, authorizing the defendant in an action on contract to file a plea or set-off, a motion by a lessor for judgment for rent is an action at law. Newport News & O. P. R. & Elec. Co. v. Bickford [Va.] 52 S. E. 1011. Under such rule a claim for damages for trespass committed by the lessor is directly connected with and grows out of the contract forming the basis of the lessor's action and may be asserted as an offset. Id.

47. Where a son cultivates his mother's lands under an agreement that he is to have a portion of the crop, he is entitled after the death of his mother to set off as against her estate taxes paid and other charges properly chargeable to the landlord. Burwell v. Burwell, 103 Va. 314, 49 S. E. 68.

48. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032.

49. A provision exempting the tenant from liability for rent if the premises became untenantable does not exempt him if he stays in possession after a fire to enable the insurance commissioner to examine his goods and adjust the loss. Beers v. Taussig, 49 Misc. 619, 96 N. Y. S. 738.

50. A partial destruction of a leased building, though it may render the premises untenantable for the purposes of the lease until repairs are made, does not amount to "total destruction" within Landlord and Tenant Act, § 35 (Gen. St. p. 1923). Booraem v. Morris [N. J. Law] 64 A. 953.

51. Fallis v. Gray, 115 Mo. App. 253, 91 S. W. 175. The fact that a landlord fails to make certain repairs necessary to fit the premises for occupancy as he has covenanted to do is cause for abandonment by the tenant and a defense to an action for rent accruing thereafter. Vincent v. Central City Loan & Inv. Co. [Tex. Civ. App.] 99 S. W. 428.

52. Where a landlord covenants to put the premises in repair before the tenant shall be bound to occupy or pay rent and refuses to do so, the tenant may recover rent paid. Fallis v. Gray, 115 Mo. App. 253, 91 S. W. 175.

53. The tenant's remedy is an action for damages or recoupment from rent. Lewis v. Ritoff, 101 N. Y. S. 40. Failure of the landlord to put the premises in repair pursuant to his agreement at the time of making the

a promise to pay additional rent for additional conveniences to be installed on the premises may be avoided if the landlord fails to provide them.[54] Where in an action for rent the tenant sets up special damages in that goods in the premises were damaged by water because of the roof being defective, expense of moving, etc., he must specially plead each item.[55] A judgment for counterclaim in an action for rent cannot stand where there is no proper evidence of rental value upon which such damages can be estimated.[56]

Ground rents and perpetual leases.[57]—The creation of ground rent may be presumed from circumstances.[58] An agreement to reduce the granted rate of a "ground rent" payable by a fee owner of land is binding only as to executed payments if voluntary,[59] but where the "ground rent" is redeemable and the tenant's grantee has paid the reduced rate only, notice of intention to exact the granted rate must be given.[60]

Use and occupation.[61]—A contract to pay the reasonable value of use and occupation may be implied.[62] There must be proof of a stipulated sum to be paid or of the reasonable worth of the use of the land.[63]

§ 7. *Rental on shares.*[64]—Whether a landlord has a mere lien upon a crop raised on shares for the amount of his rent, or whether he becomes owner of a part so raised, is to be determined from the rental contract.[65] The right of the landlord to title and possession of the crop until division thereof may be waived.[66] Where a cropping contract does not give the tenant the first bale of cotton, the landlord is entitled to distrain the tenant's crop where he removes a portion of the crop from the premises without the landlord's consent.[67] A judgment creditor of a tenant who levies on a crop raised on the premises and thereafter pays a judgment recovered by the landlord for conversion, in which he established a landlord's lien, becomes

lease is no defense to an action for rent if the lessee has taken possession. Henning v. Savage, 100 N. Y. S. 1015. The alleged failure of the landlord to make necessary repairs is no justification for refusal to pay monthly rent as it accrues. The right of the lessee under Rev. Civ. Code, art. 2694, to retain rents for the purpose of making indispensable repairs, does not arise until after notice to the lessor and his failure or refusal to make them, and is restricted to rents coming due after his default. Mullen v. Kerlec, 115 La. 783, 40 So. 46.

54. An agreement to pay additional rent made after the lease on consideration of a promise to put in heating facilities may be avoided if they were not put in, and if in consequence there was a deficiency of heat. Yinger v. Youngman, 30 Pa. Super. Ct. 139.

55. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903.

56. Maas v. Kramer, 101 N. Y. S. 800.

57. See 6 C. L. 372.

58. Where deeds executed between 1810 and 1833 reserved an annual ground rent payable to one, his heirs and assigns forever, and payments were made during such interval, the creation of ground rent would be presumed, though the deeds were lost. Braunstein v. Black [Del.] 62 A. 1091.

59, 60. Fidelity Trust Co. v. Carson, 28 Pa. Super. Ct. 418.

61. See 6 C. L. 371. See, also Implied Contracts, 8 C. L. 155.

62. Where an occupant of premises is notified that the owner will not pay him rent for certain premises of such occupant the owner held possession of, the owner was liable for the reasonable value of the use of such premises. Head v. Pryor, 29 Ky. L. R. 719, 96 S. W. 465. Where the state enters upon and uses land of an owner with his consent, there is an implied agreement to pay what the use and occupation is reasonably worth. Remington v. State, 101 N. Y. S. 952.

63. Tourison v. Engard, 30 Pa. Super. Ct. 179.

64. See 6 C. L. 373. Cropping contracts not involving tenancy, see Agriculture, 7 C. L. 94.

65. Miles v. Dorn [Tex. Civ. App.] 14 Tex. Ct. Rep. 257, 90 S. W. 707. Where evidence shows that a crop was raised on shares, it is error to charge that the landlord only has a lien. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 380, 94 S. W. 428.

66. Where a lease secured to the landlord possession and title of the crop until personally divided by him, evidence held to show that he had waived his right and authorized the tenant to make division. Baumann v. Jerome [S. D.] 109 N. W. 513.

67. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832. Where a cropper removes a part of the crop from the premises without the landlord's consent, it is immaterial that he had no intent to defraud. Id. Where in an action for wrongful distress the landlord pleaded that the tenant had wrongfully removed a bale of cotton from the premises, the law implied a denial of such allegation

subrogated to the landlord's interest.[68] One who asserts a right to a crop grown on leased premises and partially housed there under purchase from the tenant has the burden to show his right thereto as against the owner of the land.[69]

§ 8. *The term, termination of tenancy, renewals, holding over.*[70]—A lease for a definite term expires at the expiration of such term,[71] and if subject to termination on the happening of an event or contingency, it will terminate when such event occurs.[72] A lease by a life tenant terminates at his death by operation of law.[73] A lease may be terminated prior to the expiration of the term by agreement of the parties[74] or under statutory authority for making illegal use of the premises.[75] The term may be prolonged by subsequent agreement, though the lease is silent on the subject,[76] and if subject to be extended at the election of a party, such election must be timely exercised.[77] Acceptance of rent is an admission of the continuance of tenancy.[78] A lease may be terminated by annulment,[79] by custom,[80] or by the

and justified the admission of evidence that the tenant was entitled to the first bale. Id.

68. Miles v. Dorn [Tex. Civ. App.] 14 Tex. Ct. Rep. 257, 90 S. W. 707.

69. Wilson's Adm'r v. Wilson [Ky.] 99 S. W. 319.

70. See 6 C. L. 373.

71. A provision that the lessees were to take the premises "for one year and the privilege of four years" means a one year term but that it might be four years at the election of the tenant. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012. A lease executed January 5, providing for a term of five years from the first of the following February, and in the last paragraph providing that any holding over should be taken as a renewal for one year, is a lease for an extreme term of five years from February 1. Connors v. Clark [Conn.] 63 A. 951. The parties must abide by the agreement as entered into at the time of the lease. Jackson Brew. Co. v. Wagner, 117 La. 875, 42 So. 356. Ky. St. 1903, § 2295, providing that where a lease is to expire on a certain day and the tenant is to abandon on such date, if he holds over for 90 days he cannot be ousted for another year, does not apply to a parol lease void under the statute of frauds. Wessells v. Rodifer [Ky.] 97 S. W. 341. Where payment of rent as it became due was made of the essence of the contract, the lessee in default is not entitled to hold possession for the succeeding year nor claim reimbursement for improvements made. Smith v. Caldwell [Ark.] 95 S. W. 467. Whether a lease has "expired by its terms" is a **question of law.** Owen v. Herzihoff, 2 Cal. App. 622, 84 P. 274.

72. As to wells already in existence on land under lease so long as oil or gas shall be found in paying quantities, it is for the lessee to say whether the production will warrant their further operation; and the fact that, for reasons which seem to be sufficient, he has failed to pump the wells for some time, is not ground for the cancellation of the lease if in his judgment he can still make some profit from the operation of the wells. Zeller v. Book, 7 Ohio C. C. (N. S.) 429. Failure to drill additional wells is not ground for terminating a lease for oil and gas lands, where it has been satisfactorily shown that the territory is light and the production would not warrant the sinking of more wells. Id. Under a provision that the lessee agrees to vacate within a reasonable time after sale of the premises, the time within which he could procure a like house similarly situated was not the test of a reasonable time. Cooper v. Gambill [Ala.] 40 So. 827.

73. Bidwell v. Piercy [N. J. Eq.] 63 A. 261.

74. Where in an action for rent the tenant claimed that his term was ended by agreement and did not claim to have served the statutory notice, it was proper to instruct respecting the conditions under which a tenancy at will may be terminated. Brayton v. Boomer [Iowa] 107 N. W. 1099. Evidence insufficient to show an agreement terminating the tenancy prior to expiration of the time. Latham v. Woodward, 50 Misc. 306, 98 N. Y. S. 639.

75. Code Civ. Proc. § 2231, authorizing summary eviction where tenant or subtenant uses the premises for illegal trade, authorizes such eviction for sale of liquor without a license, six months prior to action brought, where he was convicted only one month prior thereto, be being still in possession. Conforti v. Romano, 50 Misc. 148, 98 N. Y. S. 194.

76. De Friest v. Bradley [Mass.] 78 N. E. 467. A written agreement for an extension supersedes prior oral negotiations. Where improvements were made on an oral understanding that the lease should be continued for five years and afterwards a written contract was made granting the extension under the conditions of the original lease, one of which was that the lease could be terminated on notice, the condition in the original lease is binding. Id. An agreement made during the term for a continuation of the term for a year from the date of the agreement, the rental to run to the end of the old lease at the rate stated therein and thereafter at a reduced rate, though unusual, may be established by parol. Withers v. Massengill, 148 Cal. 769, 84 P. 153.

77. Where a lease gave the option to renew for another term of five years, and also an option to extend for a further term of five years thereafter, where the first option was exercised but the second one was not until some time after the expiration of the term, the lease and options had expired. Atlantic Product Co. v. Dunn [N. C.] 55 S. E. 299.

78. Where the assignee of a lease accepts

merger of estates.[81] Conditions that render a demise void for breach of covenants by the lessee will work an avoidance only at the election of the lessor.[82] Under the circumstances specified in the lease, the relation of landlord and tenant may be continued after forfeiture,[83] or after eviction by the compliance with statutory requirements.[84] The running of time is not suspended by an action by the landlord which does not prevent the tenant from fully exercising his rights under the lease.[85] A terminated tenancy is not restored by the fact that goods of the tenant remain on the premises.[86]

Surrender, abandonment and eviction.[87]—A surrender may be made by an abandonment by the tenant and reentry by the landlord,[88] by a substitution of tenants,[89] or by offer and acceptance.[90] The surrender must be accepted by the landlord.[91] Whether there has been an acceptance may be a question of fact[92] and in such case the burden of proof rests on the tenant.[93]

rent from a sublessee. Cuschner v. Westlake [Wash.] 86 P. 948. Acceptance of rent after it is due is a waiver of the right to terminate the lease for failure to pay when due. Id.

79. Date on which a lease was annulled held a question of fact where the landlord asserted one date and the tenant another. Harden v. Card [Wyo.] 88 P. 217. Verdict that a lease was annulled on a certain date as testified to by the tenant and one other witness held sustained, though the landlord testified that it was annulled on a different date. Id.

80. On a question of title in defendant who claims as lessor, it was improper to submit to jury "usual custom" as to termination of a lease, in the absence of any evidence thereon. Wilson v. Griswold [Conn.] 63 A. 659.

81. A lessee may purchase the landlord's title at execution sale, acquire it by deed from him, and thereby end the relation. Reed v. Munn [C. C. A.] 148 F. 737.

82. Williams v. Beach Pirates Chemical Engine Co. [N. J. Eq.] 63 A. 990.

83. Under a provision in the lease that should the lessee hold possession after forfeiture or expiration of the term, whether with or against the consent of the landlord, such tenancy should be in accordance with the lease, the relation of landlord and tenant existed after forfeiture and the tenant did not become one at sufferance entitled to notice prior to bringing forcible entry proceedings. Marshall v. Davis, 28 Ky. L. R. 1327, 91 S. W. 714.

84. Where the tenant traversed the inquisition and stayed judgment in forcible entry proceedings and before the traverse was tried paid rent in arrears and the traverse was dismissed by agreement, held the judgment of eviction was thereby set aside, and the tenant continued to hold under the lease and not by sufferance. Marshall v. Davis, 28 Ky. L. R. 1327, 91 S. W. 714.

85. The mere bringing of an action by the landlord to have a lease declared void, unaccompanied by restraining order, even if decided in favor of the lessee, does not prevent him from at all times exercising his rights under his lease and is not ground upon which to invoke the equity power of the court to extend the lease for a period equal to the time the action was pending. Lanyon Zinc Co. v. Burtiss, 72 Kan. 441, 83 P. 989.

86. Where the purchaser of a business was substituted as tenant, the fact that the original tenant took part of the goods on a mortgage and that they remained on the premises a short time did not restore his tenancy. Brayton v. Boomer [Iowa] 107 N. W. 1099.

87. See 6 C. L. 374.

88. Abandonment by the tenant and reentry and reletting by the landlord operate as a rescission of a lease which contains no provision authorizing reentry upon default in its conditions without causing forfeiture. Haycock v. Johnston, 97 Minn. 289, 106 N. W. 304. Where the contract between landlord and tenant provided that the tenant was to take possession, put hands to work and cultivate, and the contract involved mutual obligations as to furnishing stock, feed, etc., and thereafter the tenant removed the help and abandoned the premises and the landlord without notice to him took possession and rented portions of the land to others and received rents from them, such facts amounted to a surrender and acceptance, relieving the tenant from further obligation. Rucker v. Taber [Ga.] 56 S. E. 124.

89. Where a tenant of a business building sells out and the purchaser agrees to pay the rent and the landlord on being notified of the fact tacitly consents thereto, the original tenant was relieved from liability for rent accruing thereafter. Brayton v. Boomer [Iowa] 107 N. W. 1099.

90. Where a tenant of a mill informed the landlord that he would have to give it up and was told that he could do so if he could get a man as good as himself to run it, and no rent was paid thereafter and the leased premises were surrendered and accepted by the landlord who took possession, the tenants were relieved from further payment of rent. West Concord Mill. Co. v. Hosmer [Wis.] 107 N. W. 12. Declarations of the lessee's son when he delivered keys to the janitor held admissible as declarations of an agent. Trainor v. Schutz [Minn.] 107 N. W. 812. Evidence insufficient to show an agreement releasing the tenant from his obligation to perform the covenants of his lease. Brasher v. McCaskrin, 120 Ill. App. 343.

A lease will be treated as abandoned where acts of one of the parties inconsistent with it are acquiesced in by the other,[94] but under a provision for forfeiture for nonpayment of rent, such nonpayment does not constitute an abandonment.[95] The landlord may market a crop abandoned by the tenant and apply the proceeds on the tenant's debt to him.[96]

An eviction may be actual or constructive.[97] Any act of the lessor by which his tenant is deprived of the enjoyment of the whole or a part of the premises,[98] or

91. Where a tenant quit prior to the expiration of the term, evidence held insufficient to show that the landlord accepted a surrender of the lease. Diker v. Hutchinson, 98 N. Y. S. 616.

92. Question of acceptance of a surrender of premises held for the jury where a hold-over tenant gave notice that he would vacate on a certain date and did so and left the key with the landlord's agent and was accepted, and it appeared that immediately thereafter some furniture was stored on the premises but the landlord denied that it was with his consent. Leggett v. Louisiana Purchase Exposition Co. [Mo. App.] 97 S. W. 976. Where a tenant from month to month vacated without giving notice of his intention to move and on the landlord's refusal to accept the keys left them on the premises and thereafter the landlord used the building to some extent for storage purposes, the question of his acceptance of the surrender was one for the jury. Sander v. Holstein Com. Co. [Mo. App.] 99 S. W. 12.

93. Where in an action for rent against an alleged hold-over tenant, the tenant sets up that he remained in possession with the landlord's consent and subsequently vacated and surrendered the premises and they were accepted by the landlord, the tenant has the burden to prove it. Leggett v. Louisiana Purchase Exposition Co. [Mo. App.] 97 S. W. 976.

94. Herpolsheimer v. Christopher [Neb.] 107 N. W. 382.

95. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

96. Cunningham v. Skinner [Tex. Civ. App.] 97 S. W. 509.

97. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

98. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

Not an eviction: Where the state, in a lease of water from a canal, reserved the right to keep a certain bulkhead in repair and dictate where and in what manner water was to be taken, the putting in of a new bulkhead and shutting off the tenant's water at a time when he was not using it was not in hostility to his rights. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343. An eviction does not result where the landlord, without intention to deprive the tenant of possession, enters to put in fire escapes and makes permanent use of a portion of them for such purpose, in obedience to law. Cassard v. Thornton, 119 Ill. App. 397. Under a lease providing that the landlord should make outside and the tenant inside repairs, the lessee may not abandon the premises because of defective inside condition. Auer v. Vahl [Wis.] 109 N. W. 529. Where a lessee agreed in the lease to build a shed for drying tobacco, and such shed would have materially increased the value of the use of the farm, the fact that the landlord informed the dealer in lumber who was to furnish the material that he would not pay for it, and also gave notice to the lessee's employes building the shed that he did not want it built and threatened to stop work by legal proceedings, held not to constitute a breach of the lease nor grounds for abandonment of the premises by the lessee. Buhler v. Smith [Wis.] 110 N. W. 412. There is no eviction of apartment tenants holding leases for a year where part of the building is used as a transient hotel. Bristol Hotel Co. v. Pegram, 49 Misc. 535, 98 N. Y. S. 512. A mere trespass by the landlord does not amount to an eviction though it may be accompanied by such acts and committed under such circumstances as to be equivalent thereto. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. Under a provision giving the landlord right to enter to repair, an entry and occupation of part of a floor space in order to make repairs required by the building department is not an eviction. Ernst v. Strauss, 99 N. Y. S. 597.

Constructive eviction: Where premises become untenantable because of dampness, leakage of water into the premises, lack of protection, and negligent management of boilers, there is a constructive eviction, authorizing the tenant to vacate. November v. Wilson, 49 Misc. 533, 97 N. Y. S. 989. Under Building Code providing that in case of excavations by an adjoiner he shall support the wall by proper foundation, where a leased building fell because of an excavation of an adjoiner, there was constructive eviction, entitling the tenant to damages on proof that the accident would not have occurred if the obligation had been discharged. Lindwall v. May, 111 App. Div. 457, 97 N. Y. S. 821.

A constructive eviction of a tenant of rooms is not shown, by an answer in an action for rent, by allegations that the landlady habitually received visits in her bedroom from a man and at such times kept her door locked, and that by reason of the immoral conduct of plaintiff and the character the house had acquired defendant was obliged to quit, where the allegations did not show that the house was one of ill fame. Molineux v. Hurlbut [Conn.] 64 A. 350.

No eviction: Under a provision that the obligation to pay rent should cease if the premises became untenantable and the lessor could not repair them in a reasonable time, but if he could rent should cease only for such period, where the premises were destroyed by fire and the landlord restored

which shows an intent upon the part of the lessor permanently to deprive,[99] or seriously to obstruct or interfere with the tenant's quiet and peaceable enjoyment of the premises[1] amounts in law to an eviction. The measure of damages for wrongful eviction,[2] or for wrongfully withholding possession,[3] is ordinarily the difference between the rental value and the rent reserved for the unexpired term. Special damages may be awarded where they are certain and are the natural result of the wrong complained of.[4] A waiver of damages for trespass against adjoining lessees does not relieve the landlord from liability for an eviction caused by adverse occupancy of such adjoiners acting in collusion with the landlord.[5]

Forfeiture.[6]—As a general rule, forfeitures are not favored[7] and the right thereto must be promptly asserted,[8] but they will be enforced according to the terms of the lease, if expressly provided for,[9] unless the right thereto has been waived.[10] When

it as a three story building, it having been four, and the tenant retained possession after having notice that it would be restored as a three story building, held there was no eviction and the tenant was liable for rent under the lease after the repairs were made. Rogers v. Grote Paint Co., 118 Mo. App. 300, 94 S. W. 548.

Question of eviction held for the jury: Whether there was an eviction where a landlord, prior to the end of the term, moved out the furniture of one left in possession by the tenant and changed the locks on the doors, held a question of fact. Such person was left in possession after the landlord refused to consent to an assignment of the lease to him, and such lease could not be assigned without the landlord's consent. Broadway Bldg. Co. v. Myers, 49 Misc. 531, 97 N. Y. S. 977.

99. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

1. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. If a landlord who rents an apartment in his apartment house permits the main drainpipe of the building to become clogged with offensive matter dangerous to the health of the tenant, and fails after notice to remedy the defect and the tenant moves out, such fact constitutes an eviction and relieves the tenant from paying rent after removal. McCurdy v. Wyckoff [N. J. Law] 63 A. 992. An eviction results where a landlord leases a portion of a building for one purpose and another portion for another purpose by which the first portion rented is rendered unfit for the purposes intended. Where an upper room is rented for a studio and a lower one rented for an automobile shop. Wade v. Herndl, 127 Wis. 544, 107 N. W. 4. Where a tenant asserted a constructive eviction because of disturbance caused by other tenants and it appeared that the landlord was present when such disturbance was being made to note its effect, it is presumed that the tenants had a right to do the act which caused it, it being essential to the conduct of their business. Id.

2, 3, 4. Shutt v. Lockner [Neb.] 109 N. W. 883.

5. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

6. See 6 C. L. 875.

7. See Penalties and Forfeitures, 6 C. L. 996.

8. Under a provision for forfeiture for nonpayment of rent in the lease of water rights from a canal, the state lessor could not wait 50 years after default before declaring forfeiture. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343. Where a lease by the state of water from a canal provided for forfeiture for nonpayment of rent, failure of the state authorities to collect rent or enforce forfeiture does not make user of the water by the tenant unlawful. Id. Where a lease of water rights by a state provided for forfeiture for nonpayment of rent, and no rent was collected for 50 years, an assignee of the lease was liable for interest on the rent only from the time he commenced to use water. Id.

9. Equity will not relieve against a breach of condition, in the absence of fraud, accident, or mistake, where the measure of compensation is uncertain, but will permit forfeiture if such is the remedy provided for. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Where a corporation lessee had forfeited its rights under the lease, and after notice of forfeiture according to the terms of the lease it was adjudicated a bankrupt, the court of bankruptcy properly decreed a forfeiture and directed the trustee to surrender possession. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630. Evidence held to support a verdict for the tenant, there being evidence that the written lease was superseded by an oral one the terms of which were not clearly shown to have warranted the eviction in question. Frantz v. Lehigh Valley R. Co., 30 Pa. Super. Ct. 343.

10. Under a provision for forfeiture for default for one year in payment of rent, where forfeiture was not declared for the first default, equity will not consider prior or subsequent defaults as an absolute forfeiture until some action is taken to enforce it. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343. A lessor who sells part of the leased land cannot enforce a forfeiture of the lease as to such land for a subsequent breach of condition. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Where one purchased a lease from the lessee at a time when rent was due, and also took a new lease from the lessor stating that it was subject to the one purchased, and such transactions occurred before the lessor attempted to forfeit the prior one for nonpayment of rent, the lessee and assignee

rent is payable at the office of the lessor's agent, a demand there is not necessary to fix a default and forfeiture.[11] A lessor who has a right to declare a forfeiture and has given notice does not waive it by accepting rent for a period which will expire before he is entitled to reenter under the terms of the lease.[12] Under the statutes of California, the effect of a forfeiture for nonpayment of rent may be averted by payment of arrearages into court,[13] but such payment must be made before possession is surrendered.[14] The conditions upon which forfeiture may be declared rests in the terms of the lease,[15] and whether conditions precluding the right to forfeiture have been complied with depends upon the nature of the lease and circumstances.[16] Where a lease has been forfeited and the lessee is not entitled to equitable relief, the lessor may maintain a bill to establish the forfeiture as a matter of record and cancel the lease as a cloud.[17] It is said to be an open question whether equity will relieve a tenant from a forfeiture for breach of collateral covenants, such as that to pay taxes,[18] but it will not allow the defaulting tenant to litigate the validity of an irredeemable tax title at the risk of concluding the lessor who was free from misleading conduct, while the omission was wholly the oversight of the tenant.[19] And the purchase of the tax title by a stranger, to whom the landlord thereupon agreed to lease and did lease the premises, is not a fraud on the defaulting tenant warranting relief.[20]

Notice to vacate and demand of possession.[21]—Where notice of termination is expressly provided for, it must be given,[22] but no notice is necessary where the re-

could not take advantage of the fact of nonpayment of rent as against sublessee under the original lease. Cuschner v. Westlake [Wash.] 86 P. 948. Right of forfeiture for failure to pay rent is waived where pending the trial of a traverse in unlawful detainer proceedings the tenant pays rent in arrears and also in advance which the landlord accepts, and the traverse is dismissed. Marshall v. Davis, 28 Ky. L. R. 1327, 91 S. W. 714.

11. Singer v. Sheriff, 28 Pa. Super. Ct. 305.

12. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630.

13. Under Civ. Code, § 1946, providing that an implied tenancy from month to month may be terminated by a month's notice, and Code Civ. Proc. § 1174, providing that where a lease is forfeited for nonpayment of rent, the judgment shall be satisfied and the tenant restored to his estate by payment into court of rent due, where a tenancy from month to month is forfeited in forcible entry for nonpayment of rent and not by giving notice to quit, the tenant by paying the rent due into court during the period allowed him for a stay of execution was entitled to satisfaction of the judgment for treble rent. Owen v. Herzihoff, 2 Cal. App. 622, 84 P. 274.

14. Under Code Civ. Proc. § 1174, providing that a tenant who has forfeited his rights by nonpayment of rent may be restored to his estate by payment into court, such right is waived by his surrender of possession before making payment into court. Owen v. Herzihoff, 2 Cal. App. 622, 84 P. 274.

15. Where a lease for 50 years provided for forfeiture for default in payment of rent, taxes, etc., or in the performance of covenants, and there was among others a covenant to erect a building, it was held that the right to forfeiture extended to default in performance of any of the covenants, especially the one to build, which was one of the principal objects of the lease. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630. An oil and gas lease by which the lessee is required to drill a well within two years but providing that the period might be extended by the payment of a rental after the second year, and also providing that the lease should be void if no well was dug in five years, defines the diligence with which the work of exploration must be conducted during the first five years, and where a rental was paid and one well sunk during the fifth year the lease was not avoidable because other wells were not sunk. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

16. Where the object of operations contemplated by an oil and gas lease is to obtain a profit for both lessor and lessee, neither is the arbiter of the diligence or extent with or to which operations shall proceed. The criterion is what would reasonably be expected of operators of ordinary prudence under the circumstances. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. In the circumstances of this case the work of development was not prosecuted with reasonable diligence and the lessor was held entitled to terminate the lease. Id.

17. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

18, 19, 20. Kann v. King, 27 S. Ct. 213.

21. See 6 C. L. 377.

22. Under a covenant that the lessee would, thirty days before expiration of the lease, give notice that the premises would be vacated at that time, otherwise the lessor might at his option continue the lease for another year, held where the notice was not given the lessor exercised his option by permitting the lessee to remain in possession after expiration of the term. Trainor v.

lation of landlord and tenant does not exist,[23] or has been repudiated by the tenant,[24] nor after expiration of the term.[25] The right to notice may be waived,[26] but a waiver will not be read from acts wholly inconsistent therewith.[27] The notice to quit, given by the landlord, may be waived by him.[28] The waiver may result from any conduct sufficiently manifesting such intention.[29] The term of the notice varies with the differing tenancies and the statutes pertaining to them.[30] What constitutes reasonable notice depends on the circumstances of the case.[31] The requisites of the notice[32] and what constitutes a sufficient service thereof rest in the terms of a statute,[33] or the circumstances which require it.[34] A service upon the treasurer of a corporation tenant is service upon the corporation.[35]

Renewal under express agreement.[36]—The right to renewal even in the absence of stipulation therefor is a property right.[37] Where a lessee is given the privilege

Schutz [Minn.] 107 N. W. 812. Under Rev. St. 1899, § 4131, authorizing the landlord to recover possession after demand for rent and default in payment, it is not necessary to give notice of intention to declare forfeiture as authorized by the lease. Rogers v. Grote Paint Co., 118 Mo. App. 334, 94 S. W. 549.

23. Where the relation of landlord and tenant does not exist between the parties to an action in ejectment, no notice or demand for possession is necessary. Carlson v. Curran, 42 Wash. 647, 85 P. 627.

24. A tenant who repudiates that relation and claims title adversely cannot defend an action for possession on the ground of insufficiency of the notice to terminate the lease. Wallace v. Ocean Grove Camp Meeting Ass'n [C. C. A.] 148 F. 672.

25. Notice to quit is not essential to the maintenance of ejectment after expiration of the term. Blocker v. McClendon [Ind. T.] 98 S. W. 166. Rev. St. 1899, § 4111, providing that no notice is necessary to terminate a tenancy, expiration of which is prescribed by the lease, is not limited to contracts not affected by the statute of frauds. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212.

26. A provision waiving all right to notice to quit, though found in the paragraph dealing solely with terminations from other causes than lapse of time, and stipulating for such terminations, held to apply to all right to notice, and was not limited to a termination for a cause specified. Connors v. Clark [Conn.] 63 A. 951.

27. Where a tenant from month to month stated to the landlord that he intended to move and the landlord stated that he could not hold him, but later repeatedly demanded written notice of his intention to move, there was no waiver of written notice. Sander v. Holstein Com. Co. [Mo. App.] 99 S. W. 12.

28. Where the landlord subsequent to the service of such notice agrees that the tenant may remain in possession notwithstanding such notice, its effect is waived. Arcade Inv. Co. v. Gieriet [Minn.] 109 N. W. 250.

29. Subsequent acceptance of rent. Arcade Inv. Co. v. Gieriet [Minn.] 109 N. W. 250.

30. Rev. St. 1899, § 4110, providing for the termination of tenancies at will, in tenements in cities and towns by one month's notice, does not affect § 4109, providing for the termination of a tenancy from year to year by 60 days' notice before the end of the year. Kroeger v. Bohrer, 116 Mo. App. 208, 91 S. W. 159. A tenancy at sufferance may be terminated by the statutory three days' notice to quit. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328. A lease from month to month may be terminated by a month's notice by either party. Pulliam v. Sells [Ky.] 99 S. W. 289. Under Ky. St. 1903, § 2326, a tenant at will may be ejected after thirty days' notice. Wessells v. Rodifer [Ky.] 97 S. W. 341. Under Rev. St. 1899, § 4109, 60 days' notice prior to any current year is essential to terminate a parol lease for a term of years. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212.

31. Under a provision by which the lessee agreed to vacate within a reasonable time after sale of the premises, where a notice was given April 23 to vacate in thirty days and the purchaser accepted rent for May, the reasonable time expired June 1 by operation of law. Cooper v. Gambill [Ala.] 40 So. 827.

32. The notice to quit provided by Comp. Laws 1897, § 3347, should be sufficiently definite to inform the tenant of the origin and meaning of the notice, but it is not indispensable that it should bear the signature of the landlord. Lund v. Ozanne [N. M.] 84 P. 710.

33. Under Gen. Laws 1896, c. 269, § 4, requiring written notice to terminate a tenancy from month to month but not prescribing the form thereof or manner of service, it is sufficient to serve notice on the wife of a tenant during his absence. Cranston Print Works v. Whalen, 27 R. I. 445, 63 A. 176.

34. Where leased land is sold under a contract which entitles the purchasers to possession, a notice to quit is properly signed and caused to be served by only one of the purchasers. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012. Under a provision by which the lessee agrees to vacate within a reasonable time after a sale of the premises, notice to vacate is properly given by the purchaser instead of the lessor. Cooper v. Gambill [Ala.] 40 So. 827.

35. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630. Subsequent adjudication of the corporation as a bankrupt did not affect the efficacy of the notice nor necessitate new notice upon the trustees in bankruptcy. Id.

36. See 6 C. L. 379.

of renewal upon the performance of conditions he must comply with the conditions,[38] and mere holding over without such compliance is not an exercise of his privilege;[39] but where he does exercise his option it constitutes a present demise, subject to all the covenants and conditions of the original lease,[40] and cannot be defeated by the landlord's subsequent refusal to renew.[41] Where a lease is to two tenants as joint lessees it is necessary for both to exercise the option to renew.[42] If a renewal is made by an agent, his authority must appear.[43] A privilege of renewal may be defeated by the tenant's own act.[44]

Holding over without agreement.[45]—Under a provision that a holding over shall constitute the lease a yearly one to be terminated by thirty days' notice by either party before the expiration of any year, a holding over by the lessee after giving

37. While in the absence of stipulation therefor a tenant has no right to a renewal as against the landlord, he has a reasonable expectancy which is regarded in equity as property, and if one standing in a fiduciary relation to him secures a renewal for himself equity will treat him as a trustee of it. McCourt v. Singers-Bigger [C. C. A.] 145 F. 103.

38. Where 60 days' notice prior to expiration of the term is required he must give it. Jackson Brew. Co. v. Wagner, 117 La. 875, 42 So. 356. A provision that at the expiration of the term the tenant should have the privilege of leasing for a further term is a covenant for a renewal and not for an extension, and notice was required to entitle the tenant to exercise his right. Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 P. 280. Where a lease provided for its termination on October 1, and also provided that the tenant should have the privilege of renewal for a further term commencing on such date, held the tenant had all of October 1 to give notice of his election to renew though the old lease expired at midnight on September 30. Id.

39. Under a lease for five years with a privilege of renewal for five years longer on three months' notice, mere holding over is not an acceptance of such option where no notice is given. English v. Murtland [Pa.] 63 A. 882. Under an oil and gas lease for a period of twelve years and so long thereafter as the minerals should be found in paying quantities, and providing for a rental, the acceptance of rent after the expiration of twelve years did not continue the lease for another like period but did preclude the lessee from terminating the lease without reasonable notice. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

40. Where the lease contains a provision for an additional term at the election of the lessee, the exercise of the option constitutes a present demise subject to all the conditions and covenants of the original lease, taking effect at the expiration of the first term without other agreement. De Friest v. Bradley [Mass.] 78 N. E. 467. Under a lease wherein the lessee covenants to erect certain improvements or a new modern store and office building and containing a covenant for renewal at the expiration of the first term, and also providing that the new lease should provide that if a new office building was erected the lessor should purchase it at the end of the term or grant a new lease for a third term, held that on the expiration of the first term the lessee was entitled to a new lease containing the covenant specified, though it made the improvements and did not erect the new building. Martin v. Babcock & Wilcox Co. [N. Y.] 79 N. E. 726. Under the Illinois statute providing for recovery of possession of the premises in forcible entry and detainer where a tenant holds over "without right," it is a defense to such action that the lease gave the tenant the right to renew and that the lessor refused to sign a renewal lease which was tendered him. Holt v. Nixon [C. C. A.] 141 F. 952. A provision that rent "shall be paid quarterly on the (blank)" requires payment on the last day of each quarter; and a renewal lease, where the tenant had a right to renew, tendered to the landlord for execution, providing for payment on the last day of each quarter, is an election to review. Id.

41. Where right of renewal is given by the terms of the lease and notice of an election to renew is given the lessor, the right cannot be affected by the fact that after the landlord refused to renew the tenant sought other premises, with a view to surrendering those leased if he thought advisable. Holt v. Nixon [C. C. A.] 141 F. 952.

42. The intention to renew, however, may be expressed jointly or independently or by remaining in possession and may be a question of fact. Tweedie v. Olson Hardware & Furniture Co. [Minn.] 107 N. W. 557.

43. Proof that an agent has authority to collect rent does not show that he is authorized to renew the lease. Such fact, however, is to be considered as a circumstance tending to show such authority. Noble v. Burney, 124 Ga. 960, 53 S. E. 463. On an issue as to the authority of an agent to renew a lease, evidence as to his prior authority is admissible where it appears that he had the same authority at the time of renewal. Id.

44. Where one rented for five years from a tenant who held under a lease expiring before the sublease did, but provided for renewal unless the owner could get more rent, and such subtenant competed with his landlord in an effort to get a lease on its expiration, he rendered it impossible for his landlord to acquire a lease, and could not recover damages for his failure to perform the lease under which he then held. Maas v. Kramer, 101 N. Y. S. 800.

such notice amounts to a renewal of the lease for another year at the option of the landlord.[46]

§ 9. *Landlord's remedies for recovery of rent. Parties and procedure generally.*[47]—Where the landlord has a lien on crops, he may sue any person who takes with notice.[48] A lessee from an assignee is a surety, and the lessor has his remedy against either.[49] An action for rent may not be maintained in the justice court if adjudication of title is necessary.[50] A Federal circuit court may entertain a suit by the lessor against the agent of shareholders of an insolvent national bank which was the lessee and is in liquidation.[51] A justice of the peace must in his judgment find the facts which give him jurisdiction of such cases[52] and he cannot give greater relief than is authorized.[53] A complaint for rent under a terminated lease should allege that the tenant held over or occupied the premises during the period for which rent was claimed.[54] Under a general denial in an action for rent, the tenant may not prove an eviction or accord and satisfaction.[55] A plea of eviction must set out facts amounting to it,[56] but a defendant need not deny an allegation that he requested a statement of the amount of rent demanded.[57] Where a landlord sues for rent in a justice court, he may when the cause is called for trial in the district court amend to claim recovery for rent coming due since commencement of the action.[58] The proof must not vary from the complaint.[59]

Distress.[60]—Distress in Illinois will not lie to recover damages for poor husbandry,[61] nor to recover general damages for breach of the general covenants of a lease.[62] The landlord need not enforce his lien by distress where the tenant admits liability and delivers the crop in satisfaction of the claim.[63] Demand for payment of rent is not a condition precedent to suing out a distress warrant in Georgia.[64] In that state a distress warrant returnable to a justice may be tried in the superior

45. See 6 C. L. 379.

46. Crawford v. Kline [N. J. Law] 65 A. 441.

47. See 6 C. L. 381.

48. See post, this section, Liens, etc.

49. Bates v. Winifrede Coal Co., 4 Ohio N. P. (N. S.) 265.

50. Where one had taken possession under a former owner and, the premises being sold under execution, had refused to pay the purchaser rent until the title was settled, the purchaser may not against a denial of his title recover in the justice court. Minton v. Minton [Ark.] 98 S. W. 976.

51. It is a suit to wind up the affairs of the bank. International Trust Co. v. Weeks, 27 S. Ct. 69.

52, 53. Ballou v. Mehring, 28 Pa. Super. Ct. 156.

54. Allegations that defendant is indebted to plaintiff for rent for certain months are demurrable. Nealis v. Marks, 96 N. Y. S. 740. Are mere conclusions. Id.

55. The landlord not being called upon to plead or prove lack of either. Schwartz v. Ribaudo, 101 N. Y. S. 599.

56. Affidavit that building was partially destroyed and that there was an eviction by reletting and that heat and elevator service for defendant's apartment was not given as agreed held sufficient. Paxson & Comfort Co. v. Potter, 30 Pa. Super. Ct. 615.

57. An affidavit of defense totally denying any agreement or liability for rent is good without traversing a request for a bill of rent from the lessor. Such request would not admit liability. Ferris v. Lutes, 30 Pa. Super. Ct. 72.

58. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903.

59. Where in an action for rent the plaintiff alleged that defendant held under a lease from him, which was admitted, but the answer alleged that no rent was due because it had been applied on repairs pursuant to agreement, proof that the lease was made by plaintiff's ancestor and not by him was not a variance. Taylor v. Gossett, 114 Mo. App. 723, 90 S. W. 1030.

60. See 6 C. L. 381.

61. Under Landlord and Tenant Act, § 16, providing for distress for rent, and § 31, providing for a lien for rent on crops and for faithful performance of the terms of the lease, where a lease provides for rent in half the crop and that damages for poor husbandry should be added to the rent, such damages cannot be recovered by distress. Bates v. Hallinan, 220 Ill. 21, 77 N. E. 115.

62. Lord v. Johnson; 120 Ill. App. 55. Distress does not lie to enforce a lien given by Landlord and Tenant Act, § 31. Id. Sections 29 and 31 of Landlord and Tenant Act are separate and distinct and should not be construed together. Id.

63. Colean Mfg. Co. v. Jones, 122 Ill. App. 172.

64. When rent is due and unpaid, the landlord is entitled to a distress warrant without having previously made a demand for payment of rent. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672.

court,[65] and where a distress warrant has been converted into mesne process, the pleadings may be amended.[66] Necessary expense incident to the proceeding may be taxed as costs.[67] An acceptance of the excess of proceeds of a sale under a distress warrant is not a waiver of the wrongful act of the landlord in suing it out.[68] In an action for wrongful distress, it is not necessary to specifically describe the goods taken.[69] Where the evidence in that regard is not clear, it is for the jury to say what goods of a stranger were wrongfully distrained though their value is not disputed.[70]

Liens and securities for the payment of rent.[71]—A landlord has no warehouseman's lien for rent on personal property of a third person brought onto the premises by a tenant, where the tenant abandons the premises and the landlord notifies the owner that he will be held for rent until the property is removed.[72] A clause attempting to create a lien on crops to be raised for the payment of rent reserved is ineffectual to create either a legal or equitable lien on crops grown thereafter.[73] A landlord who has title to the crop has rights therein superior to attaching creditors of the tenant, with notice.[74]

There are numerous statutes creating liens for rent[75] and for advances to make a crop,[76] which liens attach by force of statute and do not require levy, seizure, or process.[77] Such special liens are usually superior to others created after the tenancy or term originates[78] and to liens expressly made subject to them.[79] A provisional

65. Though a distress warrant issued by a justice is on its face made returnable to the justice court, yet if it be actually returned to the superior court it is sufficient, and the latter may entertain jurisdiction to try the issue formed by the counter affidavit. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672.

66. Where the amount due a landlord is measured by the value of the specifics in which the rent is payable, it is competent for the landlord, after a distress warrant has been converted into a mesne process by filing a counter affidavit, to amend his pleadings by alleging that the value of the specifics claimed is a larger sum than that originally named in the affidavit upon which the warrant issued. Cornwell v. Leverette [Ga.] 56 S. E. 300.

67. Where corn is levied on under a distress warrant, expense for storage during disposition of the case may be taxed as costs. Coates v. Hill, 120 Ill. App. 1. If the tenant is successful, he may recover such charges where he has paid and given bond. Id.

68. Where a tenant accepts the excess of proceeds of an officer's sale under a distress warrant, he ratifies the act of selling more than he should have sold but does not thereby waive the wrong of the landlord in suing out the distress warrant. Manchester Home Bldg. & Loan Ass'n v. Porter [Va.] 56 S. E. 337.

69. It is sufficient to describe them as divers goods and chattels. Manchester Home Bldg. & Loan Ass'n v. Porter [Va.] 56 S. E. 337.

70. Welsh v. Warrington, 28 Pa. Super. Ct. 229.

71. See 6 C. L. 382.

72. Brunswick-Balke-Collender Co. v. Murphy [Miss.] 42 So. 288. Laws 1894, p. 44, c. 52, does not subject the property of third persons on the premises to liability for rent, and where a tenant purchases chattels and gives a purchase money mortgage thereon and takes them onto the premises, they cannot be held. Id.

73. Thostesen v. Doxsee [Neb.] 110 N. W. 567.

74. Where a tenant is indebted to his landlord for rent and advances and agrees that the landlord may have all the crop, sell it, and pay the tenant the surplus above the debt, and in gathering and shipping the crop the tenant acts as the landlord's agent, the landlord has possession of the crop and may maintain it against attaching creditors of the tenant who had notice of the agreement. Evans v. Groesbeck [Tex. Civ. App.] 93 S. W. 1005.

75. In Georgia a landlord's special lien for rent upon the crop takes effect upon maturity of the crop. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241.

76. **Georgia:** The special lien upon the crop for advances to make the same arises by mere operation of law when the supplies are furnished. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241.

77. In re McIntire, 142 F. 593. No levy is necessary to fix the lien either for rent or for advances. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241.

78. Where products are levied on under such judgments, and the liens are foreclosed and execution placed in the hands of the levying officer but the property is sold under the judgments, the liens have precedence. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241. Equitable rights in the fund determined. Id. Under Code W. Va. 1899, c. 93, § 11, a landlord has a lien for one year's rent whether accrued or not on the tenant's goods. Such lien is superior to any other created after the goods are taken onto the premises whether distress warrant has is-

seizure to enforce a lien does not discharge it and substitute the lien of the seizure.[80] A superiority conferred particularly over levy of execution has no application when the levy is void[81] and is not a lien recognized in bankruptcy.[82] The statutory lien attaches only to the property specified by the statute,[83] and hence will not make one year's advances a lien on a different year's crops.[84] The lien for advances is for all advances contemplated by the statute.[85] In Iowa the lien attaches to secure rents reserved but not yet due.[86] The lien on personal property does not ordinarily follow or attach to the proceeds of its sale.[87] A landlord has not by virtue of his lien such possessory right to the crop as entitles him to prevent removal thereof from the premises by the tenant's creditor under an execution, and to maintain an action to try the right of property in order to have it returned if removed.[88] One who takes crops from a tenant takes subject to the lien[89] if according to one statute he had

sued for the rent or not. In re McIntire, 142 F. 593. Civ. Code 1896, §§ 2703, 2706, expressly provides that the landlord's lien for rent on the crop is superior to that of a mortgagee. Wilson & Son v. Curry [Ala.] 42 So. 753. Liens of the landlord and other creditors and rights thereunder adjusted. Bowles' Ex'r v. Jones, 29 Ky. L. R. 1022, 96 S. W. 1121.

79. Where a crop mortgage by a tenant expressly refers to a rent claim, the mortgagee may not thereafter assert that his claim is superior to the landlord's. Bowles' Ex'r v. Jones, 29 Ky. L. R. 1022, 96 S. W. 1121.

80. Where a lessor sues his tenant for rent due under the lease, and simultaneously seizes movables under the conservatory writ of provisional seizure, the privilege which secures payment of the rent does not spring from the seizure but is a lien granted as of the date of lease. Schall v. Kinsella, 117 La. 687, 42 So. 221. In such case where before judgment the tenant is adjudicated a bankrupt and the trustee makes himself a party, he is not entitled to the property but only to the surplus over the amount of the lien. Id.

81, 82. Although Act Pa. 1836, §§ 83, 85, provides that chattels upon demised premises liable to distress, which shall have been taken by virtue of an execution, shall be liable for rent in arrears for one year at the time of taking, the landlord's lien will not be preserved in a court of bankruptcy, where such proceedings were instituted within four months of the issuing of execution. In re Whealton Restaurant Co., 143 F. 921.

83. Under Code, § 2992, giving a lien on crops grown, the landlord has a lien on crops produced by a subtenant. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032. Rev. St. 1895, arts. 3235, 3251, giving the landlord a lien on crops and on property in the building, does not give a lien on a building erected by the tenant on a vacant lot. Allen v. Houston Ice Brew. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 942, 97 S. W. 1063.

84. The special statutory lien for money or supplies furnished in making a crop exists and can be foreclosed as a lien only on the crops of the year in which the advances were made. A balance of indebtedness for a prior year cannot be included in a foreclosure of such lien even though the parties agreed at the beginning of the year that such balance should be included with the advances of that year. Parks v. Simpson, 124 Ga. 523, 52 S. E. 616.

85. Under Kirby's Dig. § 5033, giving the landlord a lien for advances of necessary supplies, a sewing machine and money for ginning and wrapping and also for plastering held proper advances. Earl Bros. & Co. v. Malone [Ark.] 96 S. W. 1062. Kirby's Dig. §§ 5032, 5033, gives a landlord a lien only for rent and advances, and not for damages for the tenant's neglect of the crop or rental value of land not cultivated, and as to such claims it is inferior to a mortgagee of the tenant for supplies. Few v. Mitchell [Ark.] 96 S. W. 983.

86. Where the lessee gives notes for annual rent payable yearly for a term of years, the landlord has a lien on the crops and personal property used on the premises for rent to become due. Miller v. Bider [Iowa] 105 N. W. 594.

87. A tenant of a building, contemplating a sale to one person, gave a bill of sale to a trustee to secure claims against himself. The trustee took possession and on being paid the amount of the debts against the seller surrendered possession, the sale was completed and the purchaser removed the goods. The trustee then gave the money received to another to distribute among creditors. Held that the trustee and such other were not liable to the landlord, even if he had a lien, they not taking part in the sale but merely receiving a portion of the purchase price. Hartwig v. Iles [Iowa] 109 N. W. 18. Where one signed a note as surety for a tenant and took a chattel mortgage on his property which was voluntarily sold and the proceeds, at the tenant's request, applied on the note, the landlord could not recover it, though he had a lien on the property. Overholser v. Christensen [Iowa] 110 N. W. 321.

88. Evans v. Groesbeck [Tex. Civ. App.] 93 S. W. 1005.

89. A buyer of a crop subject to a landlord's lien for rent acquires subject to the lien, and, in appropriating it to his own use, is liable to the extent of the lien. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032. Where one testified that he had authority from the landlord to collect rent, and also that he demanded the value of the crop from an agent of one who purchased it when it was subject to the land-

notice;[90] and where a landlord has a lien on the entire crop, an attaching creditor may not take any part of it without showing that such lien had been satisfied.[91] But a landlord who represents that he has no lien,[92] or permits the tenant to deal with the property as his own,[93] thereby waives his lien. Where he permits the tenant to sell the crop, the waiver takes effect only from the date of the sale and only in favor of the purchaser.[94] The lien must be enforced within the period prescribed.[95] Injunction will issue to prevent a tenant from selling property which is subject to a lien for rent to become due in the future, regardless of the solvency of the tenant.[96] Where in an action by an insolvent tenant against a sublessee for rent a receiver is appointed to collect rent, the original lessor is entitled to the fund collected by the receiver,[97] and he may maintain an action therefor without reducing his claim to judgment.[98]

lord's lien, evidence held to show a demand prior to action brought conceding it to be necessary. Id. An agent of the landlord who had authority to collect rent has authority to demand of a purchaser of a crop which is subject to the landlord's lien the value of the crop. Id. Complaint in an action by the landlord against a third person who had purchased cotton from the tenant on which the landlord had a lien held sufficient. Cadenhead v. Rogers & Bro. [Tex. Civ. App.] 16 Tex. Ct. Rep. 837, 96 S. W. 952. One who takes, from a tenant, cotton seed which is subject to a landlord's lien, is liable in conversion only when he takes it under such circumstances as destroys the lien; and the owner of a gin, to which a tenant takes cotton, who mixes the seed with his own, but does not claim to be a purchaser of it, is not liable. Maddox v. Maddox [Ala.] 41 So. 426.

90. Where one purchasing grain knew it was raised on leased premises, his liability to the landlord is not affected by the fact that he thought it had been grown on demised premises other than those rented from the person suing him for the price of the crop. King v. Rowlett, 120 Mo. App. 120, 96 S. W. 493. Where a landlord sues one who purchases the crop from the tenant, while he is required to show that the purchaser had notice that the crop was grown on leased premises, he is not required to show that the purchaser knew that the premises belonged to him. Id.

91. Such fact is not shown by proof that the remainder of the property is sufficient to satisfy the lien. Evans v. Groesbeck [Tex. Civ. App.] 93 S. W. 1005.

92. A landlord who for the purpose of procuring advances to his tenant states to another that the tenant is to have the land rent free and that he had no claim on the crop grown is estopped to assert as landlord a claim for rent and advances, where the person to whom the representations were made made advances and took a mortgage on the crop. Chancellor v. Law [Ala.] 41 So. 514. Where a lease provides that a building erected by the tenant shall not be removed until rent is paid, and the landlord does not record the lease but tells another that the building belongs to the tenant without stating his rights, he may not assert them against such person acquiring a mechanic's lien on the building. Allen v. Houston Ice & Brew. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 942, 97 S. W. 1063.

93. Where a landlord permits a tenant to sell to a certain buyer parts of the crop on which he has a lien and receives from the tenant his share of the proceeds, he waives his lien and the buyer takes subsequent purchases free therefrom. Planters' Compress Co. v. Howard [Tex. Civ. App.] 14 Tex. Ct. Rep. 815, 92 S. W. 44.

94. A landlord who has a lien on a portion of the crop and authorizes his tenant to sell the entire crop waives his lien only when the sale is made and then only in favor of the purchaser. Not as to creditors of the tenant. Sparks v. Ponder [Tex. Civ. App.] 15 Tex. Ct. Rep. 380, 94 S. W. 428.

95. Code, § 2992, gives a landlord a lien for a year, but not continuing more than six months after expiration of the lease. Held that an action is timely when brought to enforce a lien on a crop raised by a subtenant, though commenced more than a year after such subtenant's rent became due but within a year from the time the tenant's rent became due and within six months of termination of the lease. Beck v. Minnesota & Western Grain Co. [Iowa] 107 N. W. 1032.

96. Miller v. Bider [Iowa] 105 N. W. 594.

97. Kemp v. San Antonio Catering Co., 118 Mo. App. 134, 93 S. W. 342. Where property subject to an existing lease was leased expressly subject to rights under the first lease and the lessor orally agreed to cancel such prior lease but the lessee procured an assignment of it and made no demand that it be canceled, held failure of the lessor to cause it to be canceled did not entitle the second lessee to deny the lessor's right to claim as rent a fund paid into court by a sublessee. Id.

98. An insolvent lessee, who had sublet, procured the appointment of a receiver to collect rents. He admitted that he owed his lessor a certain amount of rent. Held that as a judgment against him would be fruitless, and as the appointment of a receiver rendered it impossible for the lessor to garnish the sublessee, he was not required to reduce his claim to judgment before claiming the fund collected by the receiver. Kemp v. San Antonio Catering Co., 118 Mo. App. 134, 93 S. W. 342. Where a lease of land provided that the lessee should erect a building which he could remove at the end of the term and he did so and sublet portions of it, and in litigation between lessee and sublessee a receiver was appointed to collect rent, the original lessee was insolvent

§ 10. *Landlord's remedies for recovery of premises.*[99]—A landlord may at his election, eject a tenant at the expiration of his term.[1] In such case he must prove his title independent of the tenancy.[2] But he cannot maintain ejectment before the end of the term unless the tenant has in some way violated the terms of the lease.[3] Injunction is not the appropriate remedy for the recovery of possession.[4] Injunction should not issue against execution of a landlord's warrant until answer to the bill,[5] and even then cannot do injury to the tenant in order to force him out.[6]

A covenant not to seek the opening of a judgment of ejectment binds subtenants as well as tenants,[7] and a judgment entered pursuant to a warrant in the lease for that purpose will not be opened save on clear proof.[8]

Summary proceedings[9] are statutory and the statute must be strictly followed.[10] A mortgagee of the lease is not a necessary party.[11] The pleadings must conform to statutory requirements.[12] A jurisdictional defect cannot be remedied by amend-

and the lessor claimed this fund as rent, held that the fact that the lessee was entitled to remove the building did not make the fund paid by a sublessee issue out of personalty instead of the realty so as to prevent the lessor from claiming it as rent. Id.

99. See 6 C. L. 384.

1. Blocker v. McClendon [Ind. T.] 98 S. W. 166. The statute provides that the lessor may sue his lessee upon termination of the lease by failure to pay rent, or by any other breach of the contract, to oust him from the premises. Jackson Brew. Co. v. Wagner, 116 La. 51, 40 So. 528.

2. A landlord who brings ejectment after expiration of the term must prove his title independent of the tenancy. Blocker v. McClendon [Ind. T.] 98 S. W. 166.

3. Jackson Brew. Co. v. Wagner, 116 La. 51, 40 So. 528.

4. Injunction will not issue to restrain a tenant from withholding possession upon the ground that the landlord is entitled to possession by reason of his election to terminate the lease on the ground that the premises have been rendered uninhabitable by fire. Forcible entry is the remedy. Mitchell v. Hannah, 121 Ill. App. 597.

5. Currey v. McCurdy, 29 Pa. Super. Ct. 287.

6. The landlord who contaminates the atmosphere in the premises to force a defaulting tenant out and thereby injures him must answer in damages. Stopping chimneys in order to force smoke into tenant's rooms. Huggins v. Bridges, 29 Pa. Super. Ct. 32.

7. Guenther v. Gilchrist Imp. Jar Co., 28 Pa. Super. Ct. 232.

8. On appeal from refusal to set aside a judgment entered under an ejectment clause, a waiver of the right to appeal will necessitate a quashal of the appeal if the record does not show that a new lease was made as alleged, lacking such waiver. Seagrave v. Lacy, 28 Pa. Super. Ct. 586. The tenant cannot have the judgment, entered under an ejectment clause in the lessor's name, vacated on the mere allegation that there had been an assignment by such lessor, especially when the assignee, if there be one, does not object. Singer v. Sheriff, 28 Pa. Super. Ct. 305.

9. See 6 C. L. 384.

10. There is no authority for an entry of final order where the parties do not appear. Katz v. Schreckinger, 101 N. Y. S. 743. Where in summary proceedings there was no motion to dismiss the petition because of insufficient service of notice, but the motion was made on the ground of no proof of demand for rent or taxes, such proof under the circumstances was sufficient. Peabody v. Long Acre Square Bldg. Co., 112 App. Div. 114, 98 N. Y. S. 242. Where in summary proceedings to recover possession the treasurer of the corporation tenant testified that the notice to quit or pay taxes was served upon him, it constituted an admission that such service was properly and duly made. Id. Under Code Civ. Proc. § 2247, providing that issues in summary proceedings for possession must be tried by the court, where lessees did not pay taxes as required by their lease until after issue joined, and such fact was not set up in the answer, there was sufficient foundation for final order of dispossession. Id. Where counter affidavit to a warrant to evict in part claimed an equitable title, after such part had been dismissed, it was competent for the court to receive evidence on the remaining issue, tenancy or no tenancy, raised by the affidavit. Bennett v. Farkas, 126 Ga. 228, 54 S. E. 942.

11. A final order in summary proceedings in favor of the landlord will not be set aside in order to permit a mortgagee of the lease to come in and defend, as he is not a necessary or proper party to such proceeding. Rubenstein v. Rosenthal, 50 Misc. 313, 98 N. Y. S. 681.

12. An allegation in a petition in summary proceeding "that the said petitioners are the landlords of the premises hereinafter described" is not a sufficient allegation of the interest of the petitioners under Code Civ. Proc. § 2235. Bell v. Karsch Brew. Co., 101 N. Y. S. 803. Code Civ. Proc. § 2235, requiring the petition in summary proceedings to state the interest of the petitioner in the land, is not complied with by an allegation that he is the lessee and landlord thereof. Ferber v. Apfel, 113 App. Div. 720, 99 N. Y. S. 215. Petition in summary proceedings alleging that notice requiring in the alternative payment of rent or possession of the premises or payment of taxes or possession, was served on an officer of a corporation tenant, held to confer jurisdiction on the mu-

ment.[13] Where a tenant is evicted from a portion of the premises, summary proceedings cannot be maintained against him for nonpayment of rent during the continuance of such partial eviction.[14] The mortgagee of a lease may pay rent due by his mortgagor at any time before final order in summary proceedings in order to protect his security, and the landlord is bound to accept it.[15] In New York only the final order in such proceedings is appealable,[16] and in Connecticut a judgment of restitution is not.[17] A writ of dispossession gives the landlord no right to exercise dominion over or to use or retain the tenant's personalty on the premises.[18]

Forcible entry and unlawful detainer.[19]—In forcible entry and detainer it must appear that the relation of landlord and tenant exists.[20] But in some states it may be maintained by a grantee of the premises, though the tenant has not attorned to him.[21] Where a lessee refuses to perform his covenant to vacate within a reasonable time after sale of the premises, the proceeding is properly brought by the lessor for the use of his vendee though the vendee might have sued.[22] The proceeding must be brought within the limitation period.[23] In such proceeding only the right to possession is involved.[24] The proceeding must be instituted in a court having juris-

nicipal court. Peabody v. Long Acre Square Bldg. Co., 112 App. Div. 114, 98 N. Y. S. 242. If such notice was insufficient, failure to object at the trial was a waiver of such insufficiency. Id. In dispossessory proceedings, under Code 1895, § 4318, an equitable petition by the tenant seeking to enjoin such proceeding held demurrable. Hays v. Clay, 124 Ga. 908, 53 S. E. 399.

13. Where process in a summary proceeding to dispossess was insufficient in the first instance to confer jurisdiction, it may not be amended under Municipal Court Act. Eighty William St. Bldg. Co. v. Jones, 101 N. Y. S. 757. The provision of the New York code requiring a petition in summary proceedings to state the interest of the petitioner is jurisdictional. Where not complied with, the court is without power to permit it to be stated by amendment. Ferber v. Apfel, 113 App. Div. 720, 99 N. Y. S. 215. Failure to allege it is not waived by an answer admitting that the respondents held as tenant of the petitioner. Id. In such case an amendment to conform to proof that petitioner was the landlord does not cure the defect. Id.

14. Ferber v. Apfel, 113 App. Div. 720, 99 N. Y. S. 215.

15. Rubenstein v. Rosenthal, 50 Misc. 313, 98 N. Y. S. 681.

16. Under Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, only the final order in summary proceedings is appealable. Dickinson v. Brown, 50 Misc. 640, 98 N. Y. S. 694. Record held not to show a final order. Id.

17. Under the statutes of Connecticut, a judgment of restitution in a summary proceeding, as authorized by 14 Sp. Laws, p. 600, is not appealable. Marsh v. Burhans [Conn.] 64 A. 739.

18. Reich v. Cochran, 99 N. Y. S. 755. Evidence as to conversion of a tenant's chattels by a landlord on dispossessing the tenant held for the jury. Id. On an issue as to conversion of a tenant's goods by the landlord on dispossessing the tenant, evidence that the landlord placed a person in possession of the goods and charged him to keep them was admissible. Id.

19. See 6 C. L. 385. Ses Forcible Entry and Unlawful Detainer, 7 C. L. 1671. Section 6601, providing that judgments either before a justice of the peace or in the court of common pleas, under the forcible entry and detainer chapter, "shall not be a bar to any further action brought by either party," is not class legislation and unconstitutional because in the interest of landlords, and should be literally construed. Laver v. Canfield, 7 Ohio C. C. (N. S.) 389.

20. Chambers v. Irish [Iowa] 109 N. W. 787. To authorize an action in forcible entry and detainer the relation of landlord and tenant must be established at the time action was instituted. Gies v. Storz Brewing Co. [Neb.] 106 N. W. 775. In unlawful detainer, evidence held insufficient to show that the landlord was entitled to possession and to a certain sum as rent. Ahlers v. Barrett [Cal. App.] 87 P. 232.

21. Under Rev. St. 1899, § 3352, giving a grantee the same remedy to recover possession as his grantor had, where the tenant is holding over at the time of the grant, the grantee may maintain unlawful detainer though the tenant had never attorned to him. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212.

22. Cooper v. Gambill [Ala.] 40 So. 827.

23. Limitations against an action of forcible entry against a tenant at sufferance begins to run on termination of the tenancy. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328.

24. In forcible entry, the tenant cannot deny the landlord's title nor defeat the action by pleading pendency of an action to settle contract rights in the land alleged to exist between himself and a former owner, not his landlord. Chambers v. Irish [Iowa] 109 N. W. 787. Where in forcible entry and detainer the relation of landlord and tenant is shown to exist, the questions to be determined are, is the tenant holding over after expiration of the lease, or contrary to its terms? Id. In an action to evict a tenant holding over where the sole defense consists of a denial of the relation of landlord and tenant, it is not error to exclude a deed

diction.[25] It may be maintained after forfeiture[26] and after expiration of the term without demand for possession.[27] Statutory requirements must be complied with.[28] The judgment may be for possession, rent due,[29] and damages for withholding,[30] providing the landlord shows himself entitled to recover.[31] A judgment in one action is not a bar to another proceeding based on a different cause.[32]

§ 11. *Liability of third persons to landlord or tenant.*[33]—For any injury to the estate vested in him[34] the tenant may recover and the landlord for any to that which remains in him.[35] A landlord cannot recover damages for a temporary nuisance maintained on adjoining premises which depreciates rental value during pendency of the lease, as such right belongs to the lessee;[36] but it is no defense to an

from a third person to the tenant which was executed prior to the date of the alleged creation of the relation of landlord and tenant. Allen v. Lawson, 125 Ga. 336, 54 S. E. 176.

25. The municipal court of Minneapolis has no jurisdiction of forcible entry and detainer based upon breach of contract of a lease to lands situated partly within and partly without Hennepin County. Bunker v. Hanson [Minn.] 109 N. W. 827.

26. Under Civ. Code Proc. § 452, defining forcible detainer, and Ky. St. 1903, § 2292, providing that unless a landlord consents in writing every assignment or transfer by a lessee having a term less than two years shall work a forfeiture and the landlord may maintain forcible entry or detainer, where one who has received possession from a tenant who has a lease for more than two years providing against assignment or subletting without the landlord's consent, he may, on failure to pay rent, be dispossessed by forcible detainer. Haase v. Schickner, 29 Ky. L. R. 87, 92 S. W. 949.

27. Under Rev. St. § 3321, where a lessee holds over, the landlord may maintain unlawful detainer without demand for possession. Ray v. Blackman, 120 Mo. App. 497, 97 S. W. 212. A tenant may be ejected by forcible detainer after expiration of his term. Alexander v. Gardner, 29 Ky. L. R. 958, 96 S. W. 818.

28. Where, after expiration of a lease, the lessee held over and continued to pay rent in advance on the first day of each month, and the lessor served notice that the rent would be advanced from the fifteenth of a certain month and on the third of such month served a demand for one-half a month's rent at the old and one-half at the new rate, and the lessee tendered a full month's rent at the old rate, held forcible entry and detainer could not be maintained, conceding that the term expired on the fifteenth, and the notice was sufficient under Civ. Code, § 827, to change the terms of the lease to take effect at the expiration of the month because no part of the rent for the month beginning the fifteenth would be due prior to that date. Dawson v. Cerf [Cal. App.] 87 P. 559. Evidence held sufficient to show service of notice in an action of forcible entry and detainer. Martin v. Hartshorne [Okl.] 87 P. 854. Where on appeal, in proceedings to dispossess a tenant from month to month, the notice to quit does not appear in the record, and the testimony is contradictory, the proceeding will be dismissed. Benedict v. Heffman, 101 N. Y. S. 37. Where in forcible entry and detainer an allegation of the giving of the statutory notice was not denied, the fact that it was given was not in issue. Coney v. Lovett [Cal. App.] 84 P. 428. Forcible entry and detainer may not be maintained without notice for nonpayment of rent where the lease did not provide for forfeiture for nonpayment or that such default should terminate the lease. Lane v. Brooks, 120 Ill. App. 501. The institution of such proceeding does not constitute such notice of an election to terminate as will enable the proceeding to be maintained. Id.

29. Under Rev. St. 1899, § 4131, giving justices of the peace jurisdiction of actions of forcible entry and unlawful detainer, a landlord, if entitled to recover, may have judgment for possession and for rent due if the amount does not exceed the jurisdiction of the court. South St. Joseph Town Co. v. Scott, 115 Mo. App. 16, 90 S. W. 727. Where in landlord and tenant proceedings the jury returns a verdict for an amount stated for use and occupation after the expiration of the lease, the court in rendering judgment for the money may also enter judgment for possession. English v. Murtland [Pa.] 63 A. 882.

30. In an action in unlawful detainer where the landlord seeks to recover the land but not the buildings, his assignee may not recover damages for detention of the building in an action on the supersedeas bond. Ellis v. Cross [Ind. T.] 97 S. W. 1030. In such action the premises, the amount of the judgment superseded, rental value, costs, and any other damages shown, may be recovered. Id. Under Ind. T. Ann. St. 1899, § 2296, providing that in unlawful detainer where the tenant gives bond to retain possession the plaintiff may show damage by being kept out of possession, rental value may be shown as an element of damages but rent as such cannot be recovered. Id.

31. Where a tenant was entitled to possession at the time an action for unlawful detainer was brought, it was proper to render judgment that plaintiff take nothing. Teater v. King, 41 Wash. 134, 83 P. 8.

32. Where a landlord was defeated in forcible detainer against a tenant from month to month, the judgment is not conclusive where he gives new notice and commences another action. Pulliam v. Sells [Ky.] 99 S. W. 289.

33. See 6 C. L. 387.

34, 35. See ante, §§ 4, 5.

36. The premises had been leased at a

action by the landlord against a third person for permanent injuries to the leased premises that the tenant has an option to purchase.[37] In Georgia a landlord may recover damages from one who entices the tenant away.[38] A landlord suing for injuries to crops may recover only for injuries to his share,[39] but where the landlord sues and the tenant testifies in the cause, the defense that the crop belongs to the tenant cannot be maintained.[40] A tenant may recover for a trespass.[41] Where the premises are taken under the power of eminent domain, the tenant is entitled to have his damages apportioned between the landlord and himself, according to their respective rights.[42] If he fails to plead any interest in the land he thereby assents to recovery of all damages by the landlord.[43] Where a tenant was injured by negligence of a subcontractor doing work of remodeling building without supervision of the original contractor, the subcontractor and not the original contractor was responsible to him.[44]

§ 12. *Crimes and penalties.*[45]—A statute making criminal a certain act in respect of contracts of hire does not apply where the relation of landlord and tenant exists.[46]

LAND PATENTS, see latest topical index.

LARCENY.

§ 1. Common-Law Larceny (699).
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A. Indictment (703).
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§ 1. *Common-law larceny.*[47]—Larceny is the taking[48] and carrying away[49] of the personal property[50] of another[51] from his possession[52] without his consent,[53]

reduced rental after the creation of the nuisance but it did not appear that the difference was the result of its maintenance. Miller v. Edison Elec. Illuminating Co., 184 N. Y. 17, 76 N. E. 734.

37. In case he exercised his option he would also be entitled to recover. Hayden v. Consolidated Min. & Dredging Co. [Cal. App.] 84 P. 422.

38. A promissory note promising to pay a certain amount of cotton for rent of a certain tract of land is within Acts 1901, p. 63, providing that it shall be unlawful for a person during the existence of the relation of landlord and tenant as to agricultural lands to disturb the relation or employ the tenant, and giving the landlord in such case the right to recover double the rent. Pace v. Goodson [Ga.] 56 S. E. 363. A contract contemplated by the statute must be shown to have existed where it is sought to recover under the statute. Id.

39. Where a landlord sues for injuries to crops alleging that they are his own, but the proof shows that a share belongs to his tenant, he can only recover for injury to his share, though the evidence also shows that the tenant authorized him to collect for injuries sustained by him. Gulf, etc., R. Co. v. McMurrough [Tex. Civ. App.] 14 Tex. Ct. Rep. 476, 91 S. W. 320.

40. Where a landowner sues a railroad company for injury to crops by fire, it cannot defend on the ground that the crops belonged to a tenant where the tenant testified in the case and made no claim thereto. Toledo, etc., R. Co. v. Farris, 117 Ill. App. 108.

41. Under Comp. Laws, § 11,153, providing that no entry shall be made on lands except in cases specified, and then only peaceably, where one had surrendered possession of his farm which had been leased to another, the former had no right to enter and forcibly obstruct the latter from harvesting crops though the latter claimed title thereto. Byers v. Anderson, 143 Mich. 178, 12 Det. Leg. N. 971, 106 N. W. 734. Where under his lease a tenant was entitled to the full and unobstructed use of a window, the placing of a show case in front of such window in such manner as to interfere with the unobstructed use was a trespass, and its removal by him was lawful. Whitehouse v. Aiken, 190 Mass. 468, 77 N. E. 499.

42. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892. A railroad company, upon purchasing a right of way across leased premises, cannot enter upon the same without first compensating the tenant. Ft. Smith Suburban R. Co. v. Maledon [Ark.] 95 S. W. 472.

43. Douglas v. Indianapolis & N. W. Traction Co. [Ind. App.] 76 N. E. 892.

44. Bancroft v. Godwin, 41 Wash. 253, 83 P. 189.

45. See 6 C. L. 388.

46. Acts 1903, p. 90, making it illegal for any person to procure money on a contract

unlawfully,[54] and with a felonious intent[55] entertained at the time of taking,[56] to deprive the owner therof[57] and to convert the same to the use of the taker.[58]

The property must have some value,[59] and where the offense is continuous the values of the several items stolen may be added.[60]

to perform services with intent to defraud, has reference to contracts of hiring and does not apply where persons occupy the relation of landlord and tenant, and a tenant is not liable under such statute where as part of the contract of rental he agrees to clear up certain land. Young v. State, 124 Ga. 788, 53 S. E. 101.

47. See 6 C. L. 402.

48. Acts of ownership over inherited property do not constitute larceny, though ancestor may have stolen property. Havard v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 531, 92 S. W. 804.

49. Where defendant lifted harness from hooks, but, on being discovered, dropped it and ran away, asportation complete. State v. Williams [Mo.] 97 S. W. 562. Mere sale of another's property not in seller's possession, the latter not participating in delivery, not larceny. Henderson v. State [Ark.] 96 S. W. 359.

50. Gas supplied to consumers through pipes and measured by meters, as where a party disconnected meter and obtained gas by making rubber hose connection. Woods v. People, 222 Ill. 293, 78 N. E. 607. Such offense is larceny under Starr & C. Ann. St. 2nd Ed. par. 305, c. 38, p. 1316, and does not fall under Crim. Code, § 117, relating to offense of tampering with gas meters. Id.

51. Mere lawful possession on the part of the party from whom the property is stolen is sufficient. State v. Philips, 73 S. C. 236, 53 S. E. 370; Cain v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 881, 92 S. W. 808. Exclusive possession and control sufficient. Cook v. State [Ark.] 97 S. W. 683. One in possession of an estray has sufficient property interest therein, or one in possession of property purchased from thief, or a thief in possession of the property as against another than the owner. Maxwell v. Territory [Ariz.] 85 P. 116. Possession by jailor of property belonging to discharged prisoner. Cain v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 881, 92 S. W. 808. Party charged with authority to take possession of animals if he should find them, but who never found them, had no special ownership in them Bryan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 37, 91 S. W. 580.

52. Custodian of property on owner's premises takes same from the owner's possession if he converts it. Daniels v. State [Ala.] 41 So. 525. Property must at one time have been in the possession, actual or constructive, of the person in whom the ownership is laid, and, hence, inducing a party to include in a check an amount to which drawee is not entitled is not larceny. Commonwealth v. Barrett, 28 Pa. Super. Ct. 112.

53. Hurst v. Territory, 16 Okl. 600, 86 P. 280; Commonwealth v. Barrett, 28 Pa. Super. Ct. 112; Underwood v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 548, 91 S. W. 572; State v. Kosky, 191 Mo. 1, 90 S. W. 454; Welch v. State, 126 Ga. 496, 55 S. E. 183; Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 469, 98 S. W. 863. No larceny where intent to steal is not formed until after taking with owner's consent. McMahon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 699, 96 S. W. 17. Where particular goods are obtained from **officers of a corporation** having their custody and authority to sell them, consent of other officers is immaterial. Beuchert v. State, 165 Ind. 523, 76 N. E. 111. Where party with **consent of servant** in charge of horse drove and assisted servant in driving off the horse with intent to appropriate it, he was not guilty of larceny. Pearce v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 447, 98 S. W. 861.

54. Trespass an essential element. Topolewski v. State [Wis.] 109 N. W. 1037; Commonwealth v. Barrett, 28 Pa. Super. Ct. 112.

55. Felonious intent an essential element. Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281; Barbe v. Territory, 16 Okl. 562, 86 P. 61; People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138. Intent is a **question for the jury** where facts are in dispute or intent is doubtful. Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281. As a general rule the question of intent is for the jury, but if in connection with the alleged criminal act there are other facts and circumstances which negative the existence of a criminal intent or are consistent with innocence, it is the duty of the court to hold as a matter of law that a conviction cannot be had, whether the question be presented on demurrer or on motion to discharge at the close of the state's case, or on habeas corpus. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138.

56. Where original taking is without criminal intent, no subsequent appropriation will constitute larceny. Leak v. State [Tex. Cr. App.] 97 S. W. 476.

57. Barbe v. Territory, 16 Okl. 562, 86 P. 61. Trespass or unlawful taking for which a civil action would lie is not sufficient but must be coupled with intent to steal. Ryan v. U. S., 26 App. D. C. 74.

58. Barbe v. Territory, 16 Okl. 562, 86 P. 61; Miller v. Territory of Oklahoma [C. C. A.] 149 F. 330; Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281.

59. People v. Fletcher, 110 App. Div. 231, 97 N. Y. S. 62; Portwood v. State, 124 Ga. 783, 53 S. E. 99. Value not determined by market value generally. Glover v. State [Ala.] 40 So. 354. Ordinary test of the value of the property is the price it will command in the market if offered for sale, as where gas is stolen its value will be determined by selling price to consumer in district where crime is committed and not by cost value of material from which gas was made. Woods v. People, 222 Ill. 293, 78 N. E. 607.

60. Where gas is stolen from time to time by means of connection cutting out meter. Woods v. People, 222 Ill. 293, 78 N. E. 607. Fact that Shannon's Code, § 6650, makes it a misdemeanor to sell or dispose of a pistol in the state does not prevent theft of pistol from being larceny. Osborne v. State, 115 Tenn. 717, 92 S. W. 853.

That the owner furnishes the opportunity for the execution of a formed design to commit larceny will not prevent the offense when committed from being larceny,[61] but it is not larceny where the owner induces the original intent to steal,[62] nor where the acts of the owner amount to a consent to the taking.[63]

A taking through mistake or inadvertence is not larceny,[64] nor is a taking under bona fide claim of ownership.[65] So also, a party may be incapacitated by drunkenness from forming the intent to steal.[66]

The distinction between larceny and some of the kindred offenses,[67] such as robbery and embezzlement, lies in the manner in which the possession is acquired. Thus, where the possession is acquired by violence or by putting in fear, the offense is robbery,[68] and where the possession is honestly obtained and the conversion occurs thereafter, the offense is embezzlement.[69] On the other hand, the distinction between larceny and obtaining property by false pretenses lies in the intention of the owner in parting with the property, it being the latter offense where he is induced by fraud to part with both possession and title,[70] and the former where he parts with the mere possession intending to retain the title.[71]

Where a party aids in the larceny of goods, he will be guilty of larceny of the whole of them if he appropriates any portion.[72]

§ 2. *Statutory larceny, theft, etc.*[73]—Under the statutes many offenses are larceny which were not such at common-law, such as embezzlement,[74] obtaining prop-

61. Topolewski v. State [Wis.] 109 N. W. 1037. Merely directing another to encourage the thief's design. Crowder v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 101, 96 S. W. 934.

62. Crowder v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 101, 96 S. W. 934.

63. Where owner arranged with defendant's accomplice for consummation of offense and directed agent to let defendant have property. Topolewski v. State [Wis.] 109 N. W. 1037.

64. Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281.

65. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138.

66. Ryan v. U. S., 26 App. D. C. 74. Where property is returned before intent to steal arises or as soon as he realizes his possession, and this embraces cases where property is recovered or taker is apprehended before his return to conscious realization of his offense with reasonable opportunity to act upon reflection. Id.

67. Such distinctions have to a great extent been abolished by statute. See post, § 2, Statutory Larceny, Theft, etc.

68. See 6 C. L. 1317. Robbery is sometimes called compound larceny and is constituted by the unlawful and felonious taking and asportation of the personal property of another by violence or by putting him in fear. Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281. Robbery is larceny aggravated by circumstances of violence or putting in fear, and the former includes the latter. State v. Smith, 190 Mo. 706, 90 S. W. 440.

69. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138. See 7 C. L. 1267.

70. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138; State v. Kosky, 191 Mo. 1, 90 S. W. 454; Aldrich v. People, 224 Ill. 622, 79 N. E. 964; Welch v. State, 126 Ga. 495, 55 S. E. 183. See False Pretenses and Cheats, 7 C. L. 1646. False representation that certain cases were pending against party, thereby inducing him to give defendant money to get cases dismissed. Underwood v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 548, 91 S. W. 572. False representations that party had authority to collect a debt and thus inducing debtor to include such amount in check payable to such party. Commonwealth v. Barrett, 28 Pa. Super. Ct. 112. The doctrine that there is no larceny where party is induced by false pretenses to part with title to his property recognizes no distinction between money and other property. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 469, 98 S. W. 863.

71. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138. In such case the subsequent felonious conversion of the property will relate back and make the taking and conversion a larceny. Aldrich v. People, 224 Ill. 622, 79 N. E. 964; Welch v. State, 126 Ga. 495, 55 S. E. 183; State v. Kosky, 191 Mo. 1, 90 S. W. 454. The rule that it is not larceny where the intention is to pass title does not apply to a case where the party from whom the possession is obtained has no authority to pass the title, as where possession of trunk was obtained from transportation company by fraudulent interchange of checks. Aldrich v. People, 224 Ill. 622, 79 N. E. 964.

72. Foster v. Com., 29 Ky. L. R. 824, 96 S. W. 544.

73. See 6 C. L. 405.

74. See Embezzlement, 7 C. L. 1267. Penal Code, § 528. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138. Comp. Laws, § 11,570. People v. Peck [Mich.] 110 N. W. 495. Where vice-president of corporation, at president's request, made contribution out of own funds to political party, it was not larceny for him to receive reimbursement from the corporation after full revelation of facts. Id.; People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138.

erty by false representations, trick, or deception,[75] breach of trust,[76] conversion by bailee,[77] and bringing stolen property into the state.[78] Other statutes specify the property which may be the subject of larceny,[79] make special provision relative to

75. See, also, False Pretenses, etc., 7 C. L. 1646. Towns v. State [Ind.] 78 N. E. 1012. Pen. Code, art. 861. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 369, 98. S. W. 249. Pen. Code, §§ 528-530. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469; People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138. Not larceny where taking is under open, notorious, and bona fide claim of title. Id. Where the **representation is as to the financial ability** of the party making it, such representation must be in writing. Pen. Code, § 544. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469. Representation by defendant that he was a member of a firm, one of the partners of which was his brother who had a good financial rating, was a representation of an independent fact not relating solely to financial ability. Id. In New York the willful and **fraudulent use of check or draft** or order for payment of money or delivery of property, in obtaining money or property, is larceny. Pen. Code, § 529. People v. Lipp, 111 App. Div. 504, 98 N. Y. S. 86. When there is no question as to intention of defendant in using such check or draft, his conduct toward party from whom money or property is obtained both prior and subsequent to the transaction are circumstances to be considered in determining good faith and lack of criminal intent. Id.

In Texas the distinction between larceny and swindling still exists, notwithstanding Pen. Code, art. 861, providing that if possession of property is wrongfully obtained with intent to convert it the offense is larceny. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. App. 369, 98 S. W. 249. Statute does not include case where money is borrowed and it is not intention of parties that same identical money shall be returned. Id.

The illegal purpose of the owner in surrendering possession of the property will prevent a conviction under the statute relating to larceny by false pretense, trick, or device. People v. Tompkins [N. Y.] 79 N. E. 326, following McCord v. People, 46 N. Y. 470. "The law of this state, as set forth in McCord v. People, 46 N. Y. 470, has been in existence since 1837. It has become a rule of personal liberty quite as firmly established in this state as the rule of property recently reaffirmed in the case of Peck v. Schenectady R. Co., 170 N. Y. 298, 63 N. E. 357. Although it may be admitted that this rule, which exists only in New York and Wisconsin, is at variance with what now appears to be the more reasonable view adopted in at least twelve of our sister states, and although it may be conceded to be too narrow for the practical administration of criminal justice as applied to modern conditions, we are admonished that the remedy is not with the courts, but in the legislature. We cannot change the existing rule without enacting, in effect, an ex post facto law. This cannot be done without judicial usurpation of legislative power." Id. This rule does not apply where the illegality affects merely the validity of the contract or transaction between the parties, and hence the fact that a loan induced by false representations was usurious was no defense to a charge of larceny in obtaining such loan. People v. Koller, 101 N. Y. S. 518.

76. Pen. Code, § 528. People v. Moss, 113 App. Div. 329, 99 N. Y. S. 138. Officer of corporation is not guilty of larceny by breach of trust merely because he receives reimbursement from the corporation for money paid out by him for ultra vires purposes, such as contributions to political campaign funds. Id. Conversion by party to whom property is delivered for transportation is larceny after the trust without element of simple larceny. Barron v. State, 126 Ga. 92, 54 S. E. 812.

77. Pen. Code 1895, § 877. Butler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 146, 93 S. W. 743; Simpson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 87, 96 S. W. 925. Borrowed property. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 369, 98 S. W. 249. Where bailor for repairs failed to pay charges, bailee not guilty of larceny because he took property away with him. Simpson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 87, 96 S. W. 925. Conversion by agent comes under bailment statute where possession obtained by agent from owner by virtue of agency. Peters v. State [Tex. Cr. App.] 91 S. W. 224. Leave granted by the owner of a horse to keep charge of the same, after party is seen going off with it, creates a bailment. Harding v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 S. W. 528.

78. Under Pen. Code, arts. 951, 952, a party is not guilty of larceny where he brings into state property acquired by swindling. Bink v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 369, 98 S. W. 249.

79. Where partner receives **check** from his copartner for a specific purpose, fact that identical check is not used for such purpose does not make him guilty of larceny where amount of check is subsequently appropriated and applied to designated purpose. People v. Hart, 99 N. Y. S. 758. Conviction for grand larceny under Kirby's Dig. §§ 1821-1824, for stealing check is no bar to an indictment for forging the check. Crossland v. State, 77 Ark. 537, 92 S. W. 776. Under Code 1896, §§ 5049, 5050, a **mortgage** may be subject of a larceny. Shannon v. Sims [Ala.] 40 So. 574.

Evidences of debt or creation of demand, right, or obligation. Pen. Code, §§ 536, 545. People v. Fletcher, 110 App. Div. 231, 97 N. Y. S. 62. Under Code, § 545, it is not necessary that evidence of debt or demand should bear upon its face an obligation to pay money, and hence load ticket issued by contractor for removal of snow which entitled holder to payment of certain sum was a subject of larceny though it did not specify such sum on its face or recite any promise to pay. Id. In determining the grade of larceny where subject thereof is evidence of debt, amount of money which in any contingency might be collected thereon or there-

larceny of particular kinds of property,[80] define property rights the invasion of which will constitute larceny,[81] and define particular kinds of larceny,[82] but whatever the statutory definition of the crime may be, criminal intent is a necessary ingredient;[83] and an unlawful taking without a felonious intent, though a statutory crime, is not larceny where the statute defining the latter offense is merely declaratory of the common law.[84]

§ 3. *Indictment and prosecution. A. Indictment.*[85]—In the absence of objection, until the close of the evidence, to a trial on several counts as charging a single offense, the court may look to the evidence to determine whether the several counts charge the same offense.[86] Burglary and larceny may be charged in the same count,[87] and a conviction may be had for either offense,[88] and a conviction of either offense alone will be an acquittal of the other,[89] but the fact that the indictment is insufficient on the charge of burglary will not prevent a conviction for larceny.[90]

by is deemed to be the value of the thing stolen. Id. Under statute, **railroad tickets** may be subject of larceny where they have been stamped or are in such a condition as to authorize transportation. Patrick v. State [Tex. Cr. App.] 98 S. W. 840.

Chattels real: Under Revisal 1905, § 3511, relating to larceny of wood or "other kind of property whatsoever," taking of brass railing attached partly to freehold and partly to ice plant engine attached to freehold was larceny, the meaning of the phrase "other kind of property" being extended beyond its usual scope by use of the word "whatsoever." State v. Beck, 141 N. C. 829, 53 S. E. 843.

80. Larceny **of domestic animals.** Section 561 of the Crimes Act (Wilson's Rev. & Ann. St. 1903, § 2480). Hurst v. Territory, 16 Okl. 600, 86 P. 230. Pen. Code 1895, art. 867. Hasley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 530, 94 S. W. 899. Grand larceny without regard to value. Rev. St. 1887, § 7048. State v. Williams [Idaho] 86 P. 53. Word "horse" as used in this statute includes colts. Word "colt" is merely descriptive of age of horse. Id. Under Rev. St. 1899, § 4988, it is felony to steal cattle of value of $5 or over. Long v. State [Wyo.] 88 P. 617. Pen. Code, § 487, subd. 3, making it grand larceny to steal any horse, mare, gelding, etc., uses word "horse" in a generic sense, word "mare" being used merely to make statute more definite. People v. Melandrez [Cal. App.] 88 P. 372.

81. Under Pen. Code 1895, art. 864, it may be larceny for party to take own property from one to whom it has been pawned as security for a debt. Lewis v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 301, 97 S. W. 481.

82. Mere taking of personal property from person of another is not of itself sufficient to constitute **larceny from the person** since taking may have been without intent to steal or may have been with the actual or implied assent of owner. People v. Stofer [Cal. App.] 86 P. 734. Under Pen. Code 1895, art. 880, subd. 2, theft from the person must be committed without the knowledge of the owner of the property or so suddenly as not to allow time to make resistance before the property is carried away. Roquemore v. State [Tex. Cr. App.] 99 S. W. 547. Though owner may be too drunk to make resistance, where property is not taken suddenly and he knows that it is being taken, the offense is not larceny from the person under this statute. Id. Robbery from person in nighttime. State v. Smith, 190 Mo. 706, 90 S. W. 440.

Larceny from house was not committed where a party's only opportunity to steal money was while she had the custody of it in the owner's presence, and while the compartment into which it was to be placed was unlocked. Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601. But where such circumstances were stated to an officer, question was properly submitted to the jury as to whether the officer, who imprisoned the plaintiff at the defendant's request, had reasonable ground for believing that plaintiff had committed larceny in a building as distinguished from simple larceny. Id. Larceny from dismantled box car, set off the track and used as tool and supply house, was neither larceny from a building nor from a railroad car within Gen. St. 1901, § 2073. In re Spaulding [Kan.] 88 P. 547.

83. State v. Allen [Mont.] 87 P. 177.

84. Offense under St. 1903, § 1256, of unlawfully, but without criminal intent, taking and carrying away the property of another is not a degree of common-law larceny. Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281. This statute has no application to a case where one unlawfully takes his own property from another who has the legal right to its possession. Id.

85. See 6 C. L. 405.

86. Count charging statutory larceny by embezzlement of money, and one charging such larceny by embezzlement of draft, held to charge the same offense. People v. Peck [Mich.] 110 N. W. 495.

87. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118.

88. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118. An acquittal on the charge of burglary does not require an acquittal on the charge of larceny. Though both offenses were shown by the same evidence and with the same degree of certainty. Cook v. State [Ark.] 97 S. W. 683.

89. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118.

90. Where indictment failed to allege ownership of house from which property was stolen, conviction for both burglary and larceny was erroneous but did not necessi-

Under an indictment for robbery a conviction cannot be had for a statutory crime akin to larceny but not larceny or any degree thereof.[91] Where the larceny charged is included in a greater crime proved, a conviction for larceny may be had.[92] Evidence tending to establish the larceny charge does not constitute a variance merely because it also tends to prove another crime.[93]

Special facts upon which the jurisdiction of the grand jury depends must be alleged.[94] Under certain circumstances the venue may be laid in any one of several counties.[95]

The property must be described with such certainty as will advise the defendant of the charge against him and will furnish a bar against a future prosecution.[96] Insufficiency of the description of a part of the property is not fatal where the other part is sufficiently described.[97]

tate a reversal, being correctible by modification of the judgment. State v. James, 194 Mo. 268, 92 S. W. 679.

91. Offense of taking and carrying away property of another without felonious intent, defined by St. 1903, § 1256, is not a degree of common-law larceny, and a conviction therefor cannot be had under an indictment for robbery. Triplett v. Com., 28 Ky. L. R. 974, 91 S. W. 281.

92. Robbery in first degree committed at night includes larceny from person at night as defined by Rev. St. 1899, § 1900. State v. Smith, 190 Mo. 706, 90 S. W. 440. Defendant not thereby deprived of any constitutional right to be apprised of the nature of crime charged against him. Id.

93. Proof of branding of cattle by person in whose possession they were found, being admissible to show intent, does not constitute a variance from a charge of larceny merely because it also tends to prove crime of unlawful branding denounced by Ball. Ann. Codes & St. § 125. State v. Wilson, 42 Wash. 56, 84 P. 409.

94. Under Code Crim. Proc. § 56, the court of special sessions has, except in certain cities, exclusive jurisdiction of all complaints for petit larceny, except where, as provided by section 57, a certificate of the county judge or a justice of the supreme court is filed with the magistrate before whom the charge is pending, recommending an indictment, and an indictment for petit larceny must allege the filing of such certificate. Cleveland v. Cromwell, 110 App. Div. 82, 96 N. Y. S. 475.

95. Under Code Cr. Proc. 1895, arts. 235, 240, and Act 28th Legislature, p. 194, c. 74, defendant may defend an indictment in one county on the ground of a previous indictment in another county. Pearce v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 447, 98 S. W. 861.

96. Indictment for larceny or **railroad tickets** should allege name of railroad issuing tickets, that it was incorporated, and that tickets had been issued by company, or if they had not been issued such fact should be stated, and whether tickets entitled holder to transportation. Patrick v. State [Tex. Cr. App.] 98 S. W. 840. Description of railroad ticket merely as being between certain points and of a certain value was insufficient. Id. Description as "one **promissory note** of the value of $81.80" was not sufficient. Calentine v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 574, 94 S. W. 1061. A description as two **diamond rings** of a certain value and one **diamond brooch** of a certain value was sufficient. Butler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 146, 93 S. W. 743. Description as certain **bank bills**, or national bank notes, or United States treasury notes, lawful money of the United States of America or the U. S. A., is sufficient. Hamilton v. State [Ala.] 41 So. 940. Character, kind, or denomination of **money** need not be alleged. Code Cr. Proc. art. 446. Dalton v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 462, 98 S. W. 855. Coin number, denomination, or kind of money need not be alleged. Crim. Code of Prac. § 135. Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631. Description as "one hundred and ten and no-100 dollars in money, then and there current money of the United States, and of the value of one hundred and ten and no-100 dollars," was sufficient. Dalton v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 462, 98 S. W. 855. Description as "twenty-seven dollars in money which passed current as money of the United States of America, of the value of twenty-seven dollars," was sufficient. Brewin v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 534, 92 S. W. 420. Description as "six dollars in money, of the value of six dollars," without alleging whether it was gold, silver or paper money, was not sufficient under Kirby's Dig. § 1844. Cook v. State [Ark.] 97 S. W. 683. Description as "one hundred dollars in money, the same being current money of the United States of the value of one hundred dollars," was sufficient. Butler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 146, 93 S. W. 743. Description as "nine dollars in money of the value of nine dollars" was not subject to a special demurrer upon the ground that the property alleged to have been stolen was not sufficiently described. Frederick v. State [Ga.] 55 S. E. 1044. Indictment for stealing a **horse** is sustained by proof of the stealing of a mare where the statute uses the word "horse" in a generic sense. People v. Melandrez [Cal. App.] 88 P. 372. Indictment charging the larceny of a colt is sufficient under a statute relating to the larceny of horses, though the statute does not mention colts. State v. Williams [Idaho] 86 P. 53.

97. Indictment for larceny of money and property, and money not sufficiently describ-

The ownership of the property must be laid either in a natural person or one alleged to be a partnership or a corporation,[98] and in one who had the actual or constructive possession of the property.[99] It may be laid in the actual owner[1] or in one who merely had the lawful possession.[2] Proof of special ownership will sustain an allegation of general ownership,[3] and a general allegation of ownership is sustained by proof of a partial interest.[4] A charge of larceny from the house of a married man is sustained by proof that the property stolen was the separate property of his wife, where the two were living in the same house.[5] An allegation that land from which corn was stolen "belonged to" a certain party does not necessarily refer to the owner in fee but to any person who had the management and control of the property.[6] An indictment for larceny by a bailee[7] may allege the bailment generally.[8] Objections to allegations of ownership cannot be raised by motion for a new trial.[9]

The owner's nonconsent to the taking and appropriation need not be alleged.[10]

The use of the term "feloniously" sufficiently imports a criminal intent.[11] A

ed, indictment was good for larceny of the property. Cook v. State [Ark.] 97 S. W. 683.

98. Allegation that property was owned by Southern Railway Company, without alleging whether such company was a natural person, partnership, or corporation, was insufficient. Burrow v. State [Ala.] 41 So. 987.

Partnership: Allegation of ownership by "R. Bros., a mercantile firm composed of C. F. R. and H. R.," sustained by proof that it was owned by the firm of C. F. R., composed of C. F. R. and H. R. Duncan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 248, 91 S. W. 572.

99. Charge of larceny of money from certain person not sustained by proof that money was obtained from bank by means of such person's check. Commonwealth v. Barrett, 28 Pa. Super. Ct. 112.

1. Where party in custody of property at time of larceny was mere servant of another, ownership or possession may be laid in the latter. Duncan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 248, 91 S. W. 572. Where property consisted of horses in pasture under a simple contract of pasturage, and owner of pasture had no control over them but owner of horses retained and exercised such control, ownership was properly laid in the latter. Byrd v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 712, 93 S. W. 114.

2. State v. Phillips, 73 S. C. 236, 53 S. E. 870. May be laid in mere custodian. Cain v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 881, 92 S. W. 808.

3. Cook v. State [Ark.] 97 S. W. 683.

4. Where it is alleged in the information that the stolen property is owned by a certain person and the evidence shows that such person only has a half interest therein. State v. Cotterel [Idaho] 86 P. 527. Under Code Cr. Proc. 1895, art. 445, proof of joint ownership will sustain allegation of ownership by one of the joint owners. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 S. W. 594. Code Cr. Proc. 1895, art. 445, does not refer solely to a technical joint ownership or possession, but refers to any case where the parties exercise a joint or common possession. Id.; Duncan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 248, 91 S. W. 572. Fact that one of possessors was mere servant of other does not change rule under this statute. Id. Where stolen cattle belonged to owner of land leased to another and were kept on the land and looked after by both parties, ownership was properly laid in the actual owner. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 S. W. 594.

5. Thomas v. State, 125 Ga. 286, 54 S. E. 182.

6. Allegation that corn was property of A, growing in field belonging to W, was sustained by proof that land belonged to G and was leased by him to W who had sublet it to A, and that A raised the corn. Williams v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 896, 98 S. W. 246.

7. Where defendant procured property as agent of owner, indictment must be under bailment statute. Peters v. State [Tex. Cr. App.] 91 S. W. 224.

8. Allegation that property was given to defendant for safe keeping to be returned to the owner was sufficient. Butler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 146, 93 S. W. 743. Where bailee was a hotel clerk, it was not necessary to allege that he came into possession as such clerk. Id.

9. Question as to whether allegation of agency was mere descriptio personae or was intended to indicate a qualified right in property should have been raised by demurrer or motion to quash. State v. Philips, 73 S. C. 236, 53 S. E. 870.

10. Either at common law or in a prosecution for larceny of domestic animals, under section 561 of the Crimes Act (Wilson's Rev. & Ann. St. 1903, § 2480). Hurst v. Territory, 16 Okl. 600, 86 P. 280.

11. State v. Allen [Mont.] 87 P. 177. Allegation that defendants "did then and there unlawfully, willfully, and feloniously, by stealth take, steal and carry away, without the consent and against the will of the true owner," certain personal property, "with the unlawful and felonious intent then and there" of the defendants "to deprive the said * * * thereof and to convert the same to their own use and benefit," sufficiently charges felonious intent to convert. Barbe v. Territory, 16 Okl. 562, 85 P. 51.

warrant for petit larceny need not allege that the caption was felonious where the statutory definition of petit larceny does not use the term "felonious" or make the crime a felony.[12]

Value need not be alleged where it is not of the essence of the offense.[13] Where a statute relating to subsequent offenses is not exclusive of the right to prosecute for such offense independently, a conviction may be had as for an independent offense, though the indictment is insufficient under the statute,[14] and though the former conviction be not proved.[15] The jurisdiction of the court in which the former conviction was had need not be alleged where it is such that judicial notice will be taken thereof.[16]

Under statutory provisions, amendments may be allowed to cure variance between allegations and proof as to the description of places, persons, or things, where the defendant will not be prejudiced thereby.[17]

(§ 3) *B. Admissibility of evidence.*[18]—The general rules of criminal evidence apply,[19] including those governing the admission of evidence of the corpus delicti,[20] intent,[21] ownership of property,[22] value,[23] the defendant's identity,[24] opinions of witnesses,[25] hearsay,[26] res gestae,[27] and credibility.[28]

12. Satterfield v. Com., 105 Va. 867, 52 S. E. 979.

13. Variance as to value or amount of money stolen is immaterial where degree of offense is not affected thereby. Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631. Rev. St. U. S. §§ 5356, U. S. Comp. St. 1901, p. 3688, does not make value an element of offense therein defined. Brown v. U. S. [C. C. A.] 146 F. 975. Value need not be alleged in indictment under Sess. Laws 1895, c. 20, p. 104, art. 1, § 1, relating to larceny of any "stallion, mare, colt, gelding," etc. Howard v. Territory, 15 Okl. 199, 79 P. 773.

14. Indictment for third offense held sufficient as indictment for independent offense, though it alleged that accused was fined for second offense, whereas penalty under Code 1904, § 3907, is not fine but imprisonment. Satterfield v. Com., 105 Va. 867, 52 S. E. 979.

15. Satterfield v. Com., 105 Va. 867, 52 S. E. 979.

16. Indictment for a subsequent offense alleging a former conviction by the mayor's court of the city of Danville. Satterfield v. Com., 105 Va. 867, 52 S. E. 979.

17. Code Civ. Proc. § 293. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123. Indictment charging larceny by obtaining money by false representations as to the ownership of land alleged to be situated in Virginia was amendable to conform to proof that land was situated in West Virginia. Id.

18. See 6 C. L. 408.

19. Where defense was that property was taken with consent of partner, evidence that charge of larceny was part of scheme of other partner to get rid of copartner was irrelevant. State v. Baird [Vt.] 65 A. 101. Where there was evidence that party from whom defendant claimed to have bought the property sent defendant's purchase-money draft to drawees without indorsement and requested them to deposit its proceeds in bank to his credit, evidence of custom of banks to require indorsement of drafts was irrelevant, and its admission error. Sparks v. Territory of Oklahoma [C. C. A.] 146 F. 371. On prosecution for larceny by bailee, it was error to allow bailor to testify that he would have paid bailee's charges if he had demanded them. Simpson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 87, 96 S. W. 925.

Harmless error: Where accused confesses guilt. Ryan v. U. S., 26 App. D. C. 74. Permitting a witness to refresh memory as to date of offense where date was otherwise established. Hammock v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 906, 93 S. W. 549.

20. Evidence that prosecutor's watch was in pawnshop admissible to establish fact of larceny of watch. State v. Welle [Mont.] 83 P. 476.

21. Fact that stolen cattle had been branded by person in whose possession they were found was evidence of intent. State v. Wilson, 42 Wash. 56, 84 P. 409.

22. On a prosecution for larceny by obtaining money by false representations as to the ownership of land, it was proper to allow witness to testify that he was owner and not defendant nor person represented by defendant as the owner. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123. On prosecution for larceny by obtaining money by false representations as to the ownership of land, abstract of title admissible. Id. On prosecution for larceny of domestic animals, under section 561 of the Crimes Act (Wilson's Rev. & Ann. St. 1903, § 2480), evidence of marks and brands is competent to prove ownership, although such marks or brands are not recorded. Hurst v. Territory, 16 Okl. 600, 86 P. 280. Article 4, c. 3, § 101, Wilson's Rev. & Ann. St. 1903, does not make unrecorded brands incompetent as evidence of ownership. Id.

23. Witness who had been in jewelry business four years competent to testify as to material of which watch was composed, and as to its reasonable value. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118. Witness held qualified to testify as to value of shoes, though he had never bought, sold, or owned any of that particular brand. Moss v. State [Ala.] 40 So. 840. Sufficient where it was shown that witness had been merchant and had some knowledge as to value of goods stolen. Echols v. State [Ala.] 41 So. 298.

(§ 3) *C. Effect of possession of stolen property.*[29]—In some jurisdictions the recent possession of the stolen property raises a legal presumption of guilt,[30] while in others such possession, though unexplained, raises no such presumption[31] but is merely an incriminating circumstance.[32] It is always a circumstance to be considered,[33] but in all cases its probative force may be rebutted.[34] In Washington, possession of stolen cattle casts upon the possessor the burden of explaining such possession.[35] The concealment of the property is very strong evidence of felonious intent.[36] Under certain circumstances evidence of the possession of other stolen

24. For purpose of identification, any fact connecting defendant with the crime may be proved, such as fact that a few days before he sold stolen property to certain party he had sold other property to such party. State v. Walker, 194 Mo. 253, 92 S. W. 659.

25. Testimony that witness could not have driven a head of cattle the distance defendant drove it without discovering its brand and seeing what it was held inadmissible. Bryan v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 33, 91 S. W. 581. Where defendant claimed that he had borrowed property from certain party, it was proper for him to show relations existing between him and such party, but not what such party would have done in a certain contingency, as that he would have loaned him property, especially where such party denied the loan. Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 569, 95 S. W. 122. Opinion or belief of witnesses as to the identity of the property is admissible when such opinion or belief rests upon facts within witness' own knowledge, although witness does not testify positively as to such identity. State v. James, 194 Mo. 268, 92 S. W. 679. Opinion or belief of a witness based upon facts within witness' own knowledge is sufficient to carry the case to the jury upon the question of identity. Id.

26. Testimony that owner of property had lost it, was looking for and had regained it from one who had purchased it from defendant, was not inadmissible as being hearsay where it did not appear that witness derived information from owner or otherwise than through his own personal knowledge. Nixon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 59, 93 S. W. 555.

Harmless error: Hearsay as to fact otherwise proved. Castevens v. State [Ark.] 96 S. W. 150.

Held prejudicial: On prosecution for larceny from the person it was prejudicial error to allow saloonkeeper to testify that when defendant and others were in back room of saloon, the door being slightly open, policeman came in and characterized defendant as crook, whereupon saloonkeeper told him that defendant and others were back in the room and had a watch which they wanted to sell for $3, and that officer did not have courage to go and arrest them. People v. Cahill [Mich.] 110 N. W. 520.

27. Where check was given to defendant by partner as part of latter's partnership contribution, another check for balance given two days later and its stub were admissible as part of res gestae. People v. Hart, 99 N. Y. S. 758. On charge of larceny by obtaining money by false representations, evidence as to what the representations were was admissible. Towns v. State [Ind.] 78 N. E. 1012.

28. Where check alleged to have been stolen was given to defendant by partner as part of contribution to partnership, a second check for balance payable to defendant was admissible as bearing upon drawer's credibility in testifying that he did not know that first check was payable to defendant's individual creditor. People v. Hart, 99 N. Y. S. 758. Drawer of two checks to defendant having testified that at time he gave first check he did not know whether his bank account would warrant giving check for full amount of both checks, other checks drawn by him during period between giving of first and second checks were admissible as bearing upon drawer's credibility. Id.

29. See 6 C. L. 409.

30. State v. Wright [Mo.] 97 S. W. 874; State v. James, 194 Mo. 268, 92 S. W. 679; State v. Walker, 194 Mo. 253, 92 S. W. 659. See, also, State v. Gebey, 196 Mo. 104, 93 S. W. 402.

31. Territory v. Livingston [N. M.] 84 P. 1021; Blair v. Territory, 15 Okl. 549, 82 P. 653. Recent possession not alone sufficient to warrant conviction. State v. Allen [Mont.] 87 P. 177.

32. Blair v. Territory, 15 Okl. 549, 82 P. 653; State v. Allen [Mont.] 87 P. 177. Merely circumstance to be considered by jury and given by them such weight as they deem it entitled to. Territory v. Livingston [N. M.] 84 P. 1021.

33. State v. Gebey, 196 Mo. 104, 93 S. W. 402; Perry v. People [Colo.] 87 P. 796; State v. McClain, 130 Iowa, 73, 106 N. W. 376. Fact that property was found in letter written by defendant was admissible as circumstance against him where letter was opened in presence of addressee and with his consent, though not in presence of defendant. State v. Broxton [La.] 42 So. 721. Rule that recent possession of the property is evidence of guilt not affected by rule relating to self-incrimination after arrest. Roquemore v. State [Tex. Cr. App.] 99 S. W. 547.

34. Presumption of guilt may be rebutted by evidence of defendant's good character. State v. Wright [Mo.] 97 S. W. 874. Defendant may explain possession of property by showing that another party brought it to his house. Echols v. State [Ala.] 41 So. 293. Possession and sale of property by defendant held explained by his testimony, which was corroborated, that he had found it. Whitsel v. State [Tex. Civ. App.] 90 S. W. 505. Explanation held sufficient to entitle defendant to acquittal. State v. Seymour, 10 Idaho, 699, 79 P. 825.

35. Ball. Ann. Codes & St. § 7114. State v. Wilson, 42 Wash. 56, 84 P. 409.

property is admissible,[37] and so also possession by a joint perpetrator of the larceny charged.[38] It may also be shown that the defendant was impecunious before the crime and that he had money thereafter,[39] and the same fact may be shown as to a joint perpetrator.[40] In order to convict of larceny because of the possession of stolen property, it must appear that the possession was recent,[41] but the law does not declare just what period will be considered recent, much depending upon the character of the property and the circumstances of the case.[42]

(§ 3) *D. Sufficiency of evidence.*[43]—The defendant's connection with the crime may be established by circumstantial evidence.[44] Intent need not be specifically proved but may be inferred from the manner of the taking or acquisition of the property.[45] Where the evidence shows that persons other than the defendant were present and concerned in the offense, it is not necessary to prove that the defendant and no one else committed the crime.[46] Parties who enter a dwelling house and steal therefrom will not be permitted to raise nice and delicate questions as to the ownership of the article stolen.[47] The incorporation of the owner need not be proved by the articles of incorporation but may be proved by reputation.[48] On a prosecution for simple larceny, proof that the thing stolen was of some value is indispensable,[49] and specific value must be proved when it is a material element of the offense.[50] Otherwise, it need not be proved as laid.[51] Except where the nonconsent of the owner is made an affirmative element of the offense,[52] it need not be proved, the consent of the owner being an element of defense.[53] In proving the nonconsent of a corporation it is necessary to prove the nonconsent of only those officers having custody of the goods stolen.[54]

In the notes are collated cases involving the sufficiency of evidence as a whole[55]

36. Luddy v. People, 219 Ill. 413, 76 N. E. 581.

37. Possession of other stolen property by defendant is admissible as tending to establish a conspiracy and to show intent. State v. Allen [Mont.] 87 P. 177. Possession of other property stolen at same time and under same circumstances as that described in indictment where there was evidence that defendant was also in recent possession of such latter property. Territory v. Livingston [N. M.] 84 P. 1021.

38. Roquemore v. State [Tex. Cr. App.] 99 S. W. 547; Stapleton v. State [Ark.] 97 S. W. 296.

39, 40. Roquemore v. State [Tex. Cr. App.] 99 S. W. 547.

41. Commonwealth v. Berney, 28 Pa. Super. Ct. 61.

42. Lapse of time held to be such that no inference of larceny necessarily arose from defendant's possession. Commonwealth v. Berney, 28 Pa. Super. Ct. 61.

43. See 6 C. L. 410.

44. That he was concerned in or aided and abetted the crime. State v. Foster [N. D.] 105 N. W. 938. Not necessary in order to make party a principal that there be direct and positive evidence of his presence and participancy in the original taking. If circumstances exclude every reasonable hypothesis except guilt, this will be sufficient. Harper v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 125.

45. Where party obtained property upon a false representation jury had right to find that by his false representation he intended to induce the owners of the property to part therewith, and with intent to appropriate it to his own uss. People v. Snyder, 110 App. Div. 699, 97 N. Y. S. 469.

46. People v. Roberts, 1 Cal. App. 447, 82 P. 624.

47. Thomas v. State, 125 Ga. 286, 54 S. E. 182.

48. Perry v. People [Colo.] 87 P. 796.

49. Evidence held insufficient in that there was no evidence whatever as to value. Portwood v. State, 124 Ga. 783, 53 S. E. 99.

50. Under Pen. Code 1895, art. 867, relating to larceny of domesticated animals, etc., "when they are proved to be of any specific value." Hasley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 530, 94 S. W. 899. On prosecution for **grand larceny,** evidence must show, beyond a reasonable doubt, that value of property is such as to make crime grand larceny. Evidence held insufficient. Francis v. State, 87 Miss. 493, 39 So. 897.

51. Mose v. State [Ala.] 40 So. 340.

52. In larceny from the person, **owner's** nonconsent must be proved beyond reasonable doubt. McMahan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 699, 96 S. W. 17. This burden is not shifted by fact that prosecuting witness is reluctant and desires to shield defendant. Id.

53. Hurst v. Territory, 16 Okl. 600, 86 P. 280.

54. Beuchert v. State, 165 Ind. 523, 76 N. E. 111.

55. **Held sufficient.** Carter v. State [Ala.] 40 So. 82; Maxwell v. Territory [Ariz.] 85 P. 116; Stapleton v. State [Ark.] 97 S. W. 296; Grant v. State, 125 Ga. 281, 54 S. E. 182; State v. Wright [Idaho] 85 P. 493; State v.

and to establish the corpus delicti,[56] the defendant's connection with crime,[57] his opportunity to commit it,[58] his identity,[59] his intent,[60] and his possession of the property,[61] possession by the party from whom the property was charged to have been stolen,[62] his nonconsent to its taking[63] and its value,[64] the time of the larceny,[65] identification of the property found in defendant's possession,[66] his explanation of such possession,[67] and the sufficiency of corroboration of testimony of accomplices.[68]

(§ 3) *E. Instructions.*[69]—The general rules as to instructions apply.[70] Thus, it is not error to refuse an instruction covered by others,[71] and those given must be

Connor [Kan.] 87 P. 703; State v. Wells [Mont.] 83 P. 476; State v. Williams [Mo.] 97 S. W. 562; State v. Reed [Mo. App.] 99 S. W. 521. Opportunity on part of the defendant, lack of explanation of the loss of property, and defendant's flight. Young v. State [Ala.] 40 So. 656. Larceny by defendant pursuant to prearranged agreement with another. Foster v. Com., 29 Ky. L. R. 824, 96 S. W. 544. On prosecution for larceny **by bailee,** evidence held sufficient to establish bailment. Harding v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 S. W. 528. Larceny **by a constable** by means of a conspiracy with justice of peace and collecting agent. Luddy v. People, 219 Ill. 413, 76 N. E. 581. Under Sess. Laws 1895, c. 20, art. 1, § 1, relating to larceny of **domestic animals.** Howard v. Territory, 15 Okl. 199, 79 P. 773. Cattle. Watters v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 524, 94 S. W. 1038. Cow. State v. Walker, 194 Mo. 253, 92 S. W. 659. Horse. Harper v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 585, 95 S. W. 125; People v. Melandrez [Cal. App.] 88 P. 372; Territory v. Clark [N. M.] 79 P. 708. Larceny **from the person.** People v. Flannery [Cal. App.] 84 P. 461; Koch v. State, 126 Wis. 470, 106 N. W. 531; People v. Klein, 102 N. Y. S. 289. From the person in the nighttime, as defined by Rev. St. 1899, § 1900. State v. Smith, 190 Mo. 706, 90 S. W. 440. Larceny by **picking pocket.** State v. Gebey, 196 Mo. 104, 93 S. W. 402. Grand larceny of **money.** Todd v. Com., 29 Ky. L. R. 473, 93 S. W. 631. Larceny of money by workman from employer's safe. State v. Baird [Vt.] 65 A. 101.

Held insufficient. State v. Baird [Idaho] 88 P. 233; Peters v. State [Tex. Cr. App.] 91 S. W. 224. No identification of the money, no positive testimony of taking, and sole incriminating fact was the possession of a large sum of money by defendant corresponding in denomination with that alleged to have been stolen. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 543, 94 S. W. 900. Larceny of **check** or proceeds. People v. Hart, 99 N. Y. S. 753. Larceny of watch **from the person.** Bogan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 631, 95 S. W. 131. Larceny **by bailee** under Pen. Code 1895, § 877. Simpson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 87, 96 S. W. 925.

56. Proof of corpus delicti held sufficient to take case to jury. Harris v. State, 144 Ala. 61, 40 So. 571.

57. Evidence of witnesses other than accomplices held sufficient. Barbe v. Territory, 16 Okl. 562, 86 P. 61. That stolen cattle had been gathered by others and driven some distance, and defendants met them according to agreement and assisted in mutilating brands and driving cattle across into another state, held sufficient. State v. Morse [Idaho] 86 P. 53.

58. That prosecutor's diamond pin was in his scarf at time defendant had the opportunity to steal it. People v. Flannery [Cal. App.] 84 P. 461.

59. Identification by one witness sufficient to carry case to jury. State v. Connor [Kan.] 87 P. 703.

60. Evidence of criminal intent held sufficient. Thrash v. State [Ark.] 96 S. W. 360. Held sufficient to sustain finding that defendant did not believe the stolen colt was his at the time he took possession of it and branded it as his own. State v. Williams [Idaho] 86 P. 53. Evidence of defendant's intention to take property merely for temporary use held sufficient to go to the jury. Cain v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 881, 92 S. W. 808.

61. Insufficient to show defendant's fraudulent possession. Lowrie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 787, 98 S. W. 838. Sufficient to sustain finding that defendant received proceeds from agent whom he had employed to get note discounted for the owner. People v. Conlon, 101 N. Y. S. 597.

62. Insufficient. Lowrie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 787, 98 S. W. 838.

63. Nixon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 59, 93 S. W. 555. Held sufficient to show nonconsent of officers of corporation to the taking of goods belonging to corporation. Beuchert v. State, 165 Ind. 523, 76 N. E. 111.

64. Ramon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 468, 98 S. W. 872.

65. Evidence insufficient to show that theft was committed before finding of indictment. McDaniel v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 361, 90 S. W. 504.

66. Held sufficient. Commonwealth v. Berney, 28 Pa. Super. Ct. 61; Perry v. People [Colo.] 87 P. 796. Uncontradicted testimony of prosecuting witness. State v. James, 194 Mo. 268, 92 S. W. 679.

Held insufficient. Lowrie v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 787, 98 S. W. 838; McDaniel v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 361, 90 S. W. 504.

67. Where defendant testified that he found property and was corroborated by two witnesses, and only evidence against him was that he had sold property, stating that he had found it and agreeing to refund price if owner claimed property, a conviction was unauthorized. Whitsel v. State [Tex. Cr. App.] 90 S. W. 505.

68. Corroboration held sufficient. Cook v. State [Ark.] 97 S. W. 683.

69. See 6 C. L. 411.

considered as a whole,[72] especially where the instructions are connected by reference.[73] Instructions need not be given exactly as requested.[74] They must be within the evidence[75] and must not be upon the weight of the evidence.[76] Instructions must conform to the indictment[77] and must not be abstract[78] or argumentative.[79]

Where there is evidence that a witness was an accomplice of the defendant, an instruction as to the testimony of accomplices should be given.[80] Where the case is wholly dependent on circumstantial evidence, the court is required to charge thereon,[81] but where the main fact, that is the taking, is proved by positive testimony and the intent and other elements are proved by circumstantial evidence, no instruction on circumstantial evidence is necessary.[82] Where larceny of several articles is charged, the defendant is not entitled to an instruction for acquittal upon the failure of the evidence to establish one only of the larcenies charged.[83]

An instruction defining larceny[84] need not include kinds of larceny not charged[85] or excluded by the evidence.[86] All the degrees and kinds of larceny covered by

70. State v. Wright [Idaho] 85 P. 493. Held correct and sufficient. State v. Williams [Mo.] 97 S. W. 562.

71. People v. Roberts, 1 Cal. App. 447, 82 P. 624; Glover v. State [Ala.] 40 So. 354; State v. Cotterel [Idaho] 86 P. 527. Instruction as to **intent.** State v. Wilson, 42 Wash. 56, 84 P. 409. Instruction given held to fully cover question of **consent of owner.** Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 S. W. 694.

72. Castevens v. State [Ark.] 96 S. W. 150. Where material **element of crime omitted** from one instruction is specifically given in another. Blair v. Territory, 15 Okl. 549, 82 P. 653. As to **recent possession** of stolen property. Territory v. Livingston [N. M.] 84 P. 1021. As to **alibi** in connection with effect of recent possession. State v. Walker, 194 Mo. 253, 92 S. W. 659. As to honesty of **defendant's belief as to ownership** of property. Johnson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 709, 95 S. W. 1062.

73. Where instruction stated that if defendant broke into a store with intent to steal therein, and subsequent instruction stated that if defendant broke into such store "as defined and explained in preceding instruction," part of first instruction referred to, especially that part charging an "intent to steal," was thereby made part of second instruction. State v. Speritus, 191 Mo. 24, 90 S. W. 459.

74. Sufficient if given in substance. State v. Wells [Mont.] 83 P. 476.

75. Held erroneous as assuming facts not testified to. Hazlett v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 603, 96 S. W. 36. Erroneous in assuming that defendant claimed property when he disclaimed any interest therein. Johnson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 380, 90 S. W. 633. Not error to refuse to charge that defendant is presumed to have a good character where no evidence has been introduced as to his character. People v. Langley, 114 App. Div. 427, 100 N. Y. S. 123.

76. Hazlett v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 603, 96 S. W. 36; Mickey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 587. Instruction that jury could only consider certain testimony in order to establish identity of transaction, or could use same in developing res gestae and to aid in proving guilt by circumstances connected with offense, was not upon weight of evidence. Byrd v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 712, 93 S. W. 114.

77. Variance between instruction and indictment for larceny from the person, in that instruction included in definition the element of suddenness in taking which element was not included in indictment, was harmless where court limited jury to charge as made in indictment. Brewin v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 534, 92 S. W. 420.

78. Held abstract. Young v. State [Ala.] 40 So. 656.

79. Held argumentative. Young v. State [Ala.] 40 So. 656.

80. Leak v. State [Tex. Cr. App.] 97 S. W. 476. Charge on law as to accomplices should be broad enough to apply to all persons shown by evidence to have been accomplices. Mickey v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 587.

81. Nixon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 59, 93 S. W. 555. Where state's case was circumstantial and depended mainly on identification of head of stolen animal, a special instruction on circumstantial evidence in this connection should have bsen given. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 S. W. 694.

82. Nixon v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 59, 93 S. W. 555. Where defendant admitted taking of property. Welch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 522, 95 S. W. 1035. Only when conviction sought upon circumstantial evidence alone that charge or circumstantial evidence is required. State v. Foster [N. D.] 105 N. W. 933.

83. Where defendant was charged with larceny of two hogs, an instruction for acquittal on reasonable doubt as to ownership of either of the hogs was improper. Glover v. State [Ala.] 40 So. 354. Where larceny of a pocketbook and money was charged, instruction for acquittal if evidence failed to show larceny of money was properly refused. Harris v. State, 144 Ala. 61, 40 So. 571.

84. Instruction purporting to define larceny, but falling short of statutory definition, is erroneous. Miller v. Territory of Oklahoma [C. C. A.] 149 F. 330.

85. People v. Roberts, 1 Cal. App. 447, 82 P. 624.

86. Held not error under evidence to fail to charge with reference to statutes making

the indictment and the evidence should be charged upon,[87] but not those not so covered.[88] Where a statute defining larceny makes no mention of a criminal intent, such intent must be imported into the statutory definition by the court in applying such definition to a particular case.[89]

All proper issues raised by the evidence must be submitted,[90] and so also all defenses as to which there is evidence.[91]

In the notes are collated cases involving instructions and refusals to instruct in regard to particular matters, such as description of property,[92] its ownership[93] and the nonconsent of the owner,[94] the defendant's intent,[95] his flight,[96] his recent possession of the property[97] and his explanation of such possession.[98]

it penal offense to drive or remove live stock from its accustomed range, evidence showing that defendant was either guilty of theft or that he borrowed property for temporary use from third party. Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 569, 95 S. W. 122.

87. Evidence on prosecution for grand larceny held such as to require instruction on petit larceny. People v. Stofer [Cal. App.] 86 P. 734. In such case grand larceny also should be defined. Id. Evidence held such as to require definition of larceny from person. Id. Request for instruction that stealing of money less than $50 would not constitute grand larceny unless it was taken from person of another, and that there were two degrees of larceny, and that, although guilty of stealing money, jury must determine whether crime was grand or petit larceny, was a **sufficient request** for an instruction as to larceny from the person. Id.

88. On prosecution for theft by bailee, it was improper but not reversible error to give definition of theft in general. Harding v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 422, 95 S. W. 528. Where offense is larceny after trust without element of simple larceny, it is error to instruct upon simple larceny. Barron v. State, 126 Ga. 92, 54 S. E. 812. Where no evidence of larceny by trick or device, it was error to instruct in regard thereto. People v. Roberts, 1 Cal. App. 447, 82 P. 624.

89. Mere casual use of word "felonious" in one paragraph of charge held insufficient to import into formal definition of crime theretofore given the necessary modification to make it correct statement of law. State v. Allen [Mont.] 87 P. 177.

90. Where there was evidence tending to show that defendant may have been a receiver of the property instead of the thief, it was error to refuse to submit issue thus raised. Mickey v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 321, 91 S. W. 537. On prosecution for larceny of check given defendant by partner, it was error to refuse to instruct as to what would constitute a partnership. People v. Hart, 99 N. Y. S. 758.

91. Simpson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 87, 96 S. W. 925; Cain v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 881, 92 S. W. 808. Where party when accused of crime denied it and did not produce property until after his arrest, he was not entitled to a charge on the **voluntary return** of stolen property. Dalton v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 462, 98 S. W. 855. Held not error under evidence to refuse to submit defense of **temporary appropriation.** Kegans v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 569, 95 S. W. 122. Evidence held such that instruction as to **mistake** as to ownership should have been given. Hazlett v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 603, 96 S. W. 36. Charge for acquittal if defendant took property with fair color of title and believing it to be his own held sufficient presentation of defense that property was owned by defendant and was being wrongfully withheld by pawnee, there being no evidence that taking was as claimed by defendant or that pawnee had refused defendant's tender. Lewis v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 301, 97 S. W. 481. Charge held correct in abstract but insufficient in failing to specify that intention subsequently formed to appropriate the property would not sustain conviction. Leak v. State [Tex. Cr. App.] 97 S. W. 476.

92. Instruction that defendant cannot be convicted unless property stolen be shown to have been of kind described in indictment should be given. Hamilton v. State [Ala.] 41 So. 940.

93. Instruction held proper and correct as to effect of variance in that general ownership was charged and partial intent proved. State v. Cotterel [Idaho] 86 P. 527.

94. Upon issue as to larceny of particular goods from corporation, instruction that prosecution must prove nonconsent of all officers authorized to sell "goods" was too broad and was properly refused. Beuchert v. State, 165 Ind. 523, 76 N. E. 111. Instruction that it was larceny if defendant took and carried away property with intent to "permanently deprive the owner thereof without his consent" sufficiently charges necessity of lack of owner's consent to taking. State v. Spertus, 191 Mo. 24, 90 S. W. 459. Held too restrictive on question of consent of owner to taking. McMahan v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 699, 96 S. W. 17.

95. Where question of defendant's intent in using check, draft, or order was in issue, defendant's conduct toward party from whom money or property was obtained both prior and subsequent to transaction must be considered in determining his good faith. People v. Lipp, 111 App. Div. 504, 98 N. Y. S. 86.

96. **Instruction that fact, if it be a fact,** that defendant left place where larceny was committed soon after it was committed is only a circumstance to be considered along with all other evidence of guilt, and that defendant is entitled to have jury consider fact, if it be a fact, that return to such place before his arrest was circumstance tending to show his innocence was properly

(§ 3) *F. Trial, sentence, and review.*[99]—A finding of guilty necessarily implies a finding of all the elements of the crime charged,[1] but a verdict of guilty of larceny will not sustain a conviction for larceny from the person.[2] Where different offenses of the same grade are charged in several counts, a general verdict of guilty will be sufficient if the verdict indicates which offense defendant is found guilty of,[3] and such a verdict will operate as an acquittal of the other offense,[4] but where the particular offense is not thus indicated, the effect of a general verdict is a conviction of both offenses[5] and the court may impose separate sentences as prescribed by law for each of the two offenses,[6] or the conviction may be treated as being for the highest crime charged and the penalty appropriate therefor may be im-

refused as being not only abstract but argumentative. Young v. State [Ala.] 40 So. 656.

97. Instruction as to presumption, if explanation of possession of recently stolen goods was found to be false, approved. Green v. State [Tex. Cr. App.] 90 S. W. 1114. In determining propriety of instruction as to recent possession, court not confined to mere fact that defendant had possession of only part of property, but any other circumstances may be taken into consideration which tend to show unlawful possession and that defendant wrongfully obtained goods. State v. James, 194 Mo. 268, 92 S. W. 679. Evidence held such as to authorize instruction on recent possession. Id. Evidence held such as to require instruction as to effect of recent possession. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 S. W. 694. An instruction that recent possession raises presumption that defendant either stole property or received it, knowing it to be stolen, was properly refused, since such possession raises no presumption as to knowledge of receiver of goods as to whether they were stolen. State v. Speritus, 191 Mo. 24, 90 S. W. 459. Instruction as to effect of recent possession held erroneous in that it did not submit evidence of defendant's good character. State v. Wright [Mo.] 97 S. W. 874. Instruction merely giving defendant benefit of good character as in ordinary cases was insufficient. Id.

98. **Sufficiency of instruction:** Held sufficient. Ramon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 468, 98 S. W. 872; Williams v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 396, 98 S. W. 246. Instruction to effect that if jury found beyond reasonable doubt that defendant's explanation of how he came by property is false they must convict is erroneous. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118. For proper charge on subject of explanation, see Wheeler v. State, 34 Tex. Cr. App. 350, 30 S. W. 913, the charge in such case being approved in Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118.

Propriety of instruction: Evidence held such as to require instruction as to defendant's explanation. Bailey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 304, 97 S. W. 694; Johnson v. State [Tex. Cr. App.] 14 Tex. Ct. Rep. 380, 90 S. W. 633. Refusal not error where defendant gave no explanation. State v. McClain, 130 Iowa, 73, 106 N. W. 376. Where on prosecution for larceny of horse there was no evidence of the larceny of bridle found in defendant's possession, there was no error in refusing to charge with reference to explanation as to possession of bridle. Hammock v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 906, 93 S. W. 549.

99. See 6 C. L. 413.

1. Animus furandi. Grant v. State, 125 Ga. 281, 54 S. E. 182. On prosecution for third offense of petit larceny, punishment for which was confinement in the penitentiary for not less than one or more than two years, verdict of guilty as charged in the indictment, and fixing punishment at confinement in penitentiary for one year, necessarily implies finding that defendant had been twice before convicted for same offense. Satterfield v. Com., 105 Va. 867, 52 S. E. 979.

2. Verdict containing no finding of larceny from person or of value of property taken was insufficient to sustain a conviction of larceny from person. Koch v. State, 126 Wis. 470, 106 N. W. 531. Verdict that finding defendant guilty of larceny from person in nighttime, as charged in information, and fixing term of imprisonment, was in **proper form** on charge for the offense defined by Rev. St. 1899, § 1900. State v. Smith, 190 Mo. 706, 90 S. W. 440.

3. Verdict on indictment charging burglary and grand larceny held sufficient to sustain judgment of conviction for grand larceny. Perry v. People [Colo.] 87 P. 796. On indictment for larceny and for receiving stolen property, general verdict of guilty as charged in the indictment, coupled with finding of value of property, is sufficient to sustain judgment of conviction for larceny where case was tried entirely as involving larceny only, and verdict is in form a proper verdict on the charge of larceny and not in form on charge of receiving stolen property. Long v. State [Wyo.] 88 P. 617.

4. Verdict of guilty of larceny on an indictment for burglary and larceny is an acquittal on the charge of burglary. State v. James County, 117 La. 419, 41 So. 702. Conviction on count charging larceny of money will or will not constitute an acquittal on a count charging larceny of draft, according to whether both counts do or do not charge the same offense. People v. Peck [Mich.] 110 N. W. 495. See ante, § 8A, Indictment.

5. Grand larceny and receiving stolen goods. Washington v. State [Fla.] 40 So. 765.

posed.[7] Where the offense charged does not embrace any other degree, no finding as to degree is necessary;[8] nor is it usually necessary to make any finding as to value.[9]

The jury is sometimes given more or less discretion as to the punishment to be imposed.[10] Additional punishment is sometimes imposed for subsequent offenses.[11] On the other hand, provision is sometimes made for a lighter punishment where the property is voluntarily returned.[12]

On appellate review the general rules apply as to saving questions for review.[13] A judgment will not be reversed on the ground of excessive punishment where the punishment assessed by the jury is within the limits prescribed by law and there is no showing of passion or prejudice.[14]

Lasciviousness; Lateral Railroads; Lateral Support; Law of the Case; Law of the Road; Leases; Legacies and Devises; Legal Conclusions; Legatees; Letters; Letters of Credit; Levees; Lewdness, see latest topical index.

LIBEL AND SLANDER.

§ 1. **Definition and Distinctions, Nature of Tort, and Persons Liable or Damnifiable (713).**
§ 2. **Elements of Tort (714).**
A. Actionable Words (714).
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D. Trial (728).
§ 6. **Criminal Libel and Slander (731).** The Prosecution (732).
§ 7. **Jactitation or Slander of Title (733).**

§ 1. *Definition and distinctions, nature of tort, and persons liable or damnifiable.*[15]—One who procures another to publish a libel is answerable as though he published it himself.[16] Any words which directly or indirectly charge a person[17]

6, 7. Washington v. State [Fla.] 40 So. 765.

8. Where larceny of steer was charged and verdict was guilty as charged in indictment. Maxwell v. Territory [Ariz.] 85 P. 116. Statute providing that where a crime is distinguished into degrees the jury must find the degree of which defendant is guilty has no application to such a case. Id., distinguishing McLane v. Territory [Ariz.] 71 P. 938.

9. Verdict of guilty as charged in the indictment includes finding of value as charged. State v. James County, 117 La. 419, 41 So. 702. Finding that certain property was stolen and that its value was certain amount will be construed as a finding that value of property was such amount at time it was stolen. Long v. State [Wyo.] 88 P. 617.

10. Rev. St. 1899, § 1900, relating to larceny from the person in the nighttime. State v. Smith, 190 Mo. 706, 90 S. W. 440. Crim. Code, § 5050, providing that the jury may return a general verdict of guilty of petit larceny, leaving to the court the imposition of punishment by imprisonment or by hard labor, or they may in their discretion impose a fine not exceeding $500, the discretion of the jury relates only to the matter of superadding a money fine, and they had no authority to fix the time of imprisonment or of hard labor. Moss v. State [Ala.] 39 So. 830.

11. Redress afforded by Code 1904, § 3907, relating to subsequent offenses of petit larceny, is not exclusive and leaves unimpaired the authority of the commonwealth to prosecute an offender independently for successive offenses of petit larceny. Satterfield v. Com., 105 Va. 867, 52 S. E. 979.

12. See 6 C. L. 413. Not a voluntary return where party denied the crime when accused of it, refused to take advantage of an invitation to return property, and did not produce it until after his arrest. Dalton v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 462, 98 S. W. 855.

13. See Indictment and Prosecution, 8 C. L. 249.

14. Five years in penitentiary held not excessive punishment for larceny from the person in the nighttime, as defined by Rev. St. 1899, § 1900. State v. Smith, 190 Mo. 706, 90 S. W. 440.

15. See 6 C. L. 414.

16. Noyes v. Thorpe, 73 N. H. 481, 62 A. 787.

17. Where plaintiff is merely mentioned in a publication in which others are charged with disreputable practices and police repute, but no other association of the plaintiff with them, nor other implication of similarity in practices and police repute than

with crime, or which tend to injure his reputation in any other way, or to expose him to public hatred, contempt, or ridicule, are defamatory.[18] The action of libel is not based on neglect of duty but is for a positive tort.[19] A corporation is liable in damages for the publication of a defamation[20] and may likewise maintain an action for defamation,[21] but it has been held that it cannot recover for injury to its reputation[22] nor for imputations affecting particular members.[23] Official connection with a newspaper corporation does not of itself render either the president[24] or editor in chief[25] responsible for a defamatory publication in the paper. A parent cannot recover in an individual capacity for defamation of a minor child.[26] Mental incapacity to publish a defamation is a defense unless there is a ratification.[27]

§ 2. *Elements of tort. A. Actionable words.*[28]—Words actionable per se without proof of special damage[29] include words imputing crime[30] or want of chas-

what may be found from having been spoken of in the course of the article, the publication is not rendered libelous per se as to plaintiff. Reporters' Ass'n of America v. Sun Printing & Pub. Ass'n [N. Y.] 79 N. E. 710. When a publication has no intelligent application or reference to the plaintiff in a defamatory sense, and the language, fairly construed, is incapable of such construction, an action for libel based thereon cannot be maintained. Lanston Monotype Mach. Co. v. Mergenthaler Linotype Co., 147 F. 871.

18. Richardson v. Thorpe, 73 N. H. 532, 63 A. 580. Other definitions. Goldsborough v. Orem, 103 Md. 671, 64 A. 36. Civ. Code 1895, § 3832. Witham v. Atlanta Journal, 124 Ga. 688, 53 S. E. 105; Chambers v. Leiser [Wash.] 86 P. 627; Kenworthy v. Journal Co., 117 Mo. App. 327, 93 S. W. 882.

19. Hence, one guiltless of complicity in it cannot be held responsible therefor because of mere official connection with the instrumentality of publication, as an editor in chief of a newspaper. Folwell v. Miller [C. C. A.] 145 F. 495.

20. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551. A corporation is responsible for libel published with the sanction of its manager in a matter concerning the business of the company. Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224. The failure of a corporation to disapprove or repudiate a libel published by its agent, after obtaining knowledge of its publication, is a ratification thereof. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551. Corporation held liable for act of agent in publishing libel. Id. The fact that a corporation did not authorize its agent to incorporate a libel in a communication written by him without its knowledge or consent does not exonerate it from liability for a wrong perpetrated by the agent in an effort to obtain business for it. Id.

21. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551. A corporation may recover for pecuniary loss as a result of a libelous publication the same as an individual in a like situation. Union Refrigerator Transit Co. v. McClure Co., 146 F. 623. When a defamatory publication assails the management or credit of a corporation and inflicts injury on its business or property, it may maintain an action therefor. Reporters' Ass'n of America v. Sun Printing & Pub. Ass'n [N. Y.] 79 N. E. 710. For criminal libel of corporation see post, § 6.

22. In determining whether a publication respecting a corporation is libelous per se, it is necessary to consider that the injury to be redressed must be one to its property or business resulting in pecuniary loss, since it has no reputation in a personal sense. Memphis Tel. Co. v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 904.

23. An imputation that certain members of a corporation have been guilty of acts which would injuriously affect their standing in society, or render them liable to criminal prosecution, does not constitute a defamation of the corporation itself. Memphis Tel. Co. v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 904.

24. The president of a newspaper corporation who is also its principal stockholder is not liable merely as such for the publication of a defamatory article therein. Folwell v. Miller [C. C. A.] 145 F. 495.

25. When it affirmatively appears that an editor in chief of a newspaper published by a corporation was not on duty during any part of the time between the reception of libelous matter and its publication in the paper, and could have had no actual part in composing or publishing it, he is not liable for the publication. Folwell v. Miller [C. C. A.] 145 F. 495.

26. Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224.

27. Proctor v. Pointer [Ga.] 56 S. E. 111. Averments in a plea filed after bringing an action cannot ratify a defamation for which defendant was not responsible because of defendant's mental disability at the time the publication was made. Id.

28. See 6 C. L. 414.

29. When language is used concerning a person or his affairs which from its nature necessarily must, or presumably will, as its natural and proximate consequence, occasion him pecuniary loss, its publication is actionable per se. Nichols v. Daily Reporter Co. [Utah] 83 P. 573. To constitute language libelous per se it must be either such as necessarily in fact or by presumption of evidence occasions damage to him of whom or whose affairs it is spoken. Memphis Tel. Co. v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 904.

30. Held actionable per se: When blackmailing is made a criminal offense by statute, charging a person with being a black-

tity,[31] or exposing one to scorn, ridicule, contempt,[32] or injuring one in his busi-

mailer is actionable per se. Sheibley v. Nelson [Neb.] 106 N. W. 1034. Charging criminal neglect of one's wife. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966. Charging the commission of a crime and imputing wrongdoing in the plaintiff's trade calculated to injuriously affect the commercial relations of the plaintiff. Union Refrigerator Transit Co. v. McClure Co., 146 F. 623. Charging one with perjury. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 360, 106 N. W. 547. Endeavoring by fraudulent means to obtain from treasury of village for which plaintiff was attorney a sum of money for which village was not responsible. Id. The words "Grafters foiled" in the headlines of an alleged defamatory article held to imply reprehensible conduct, if not a crime, on the part of plaintiff. Craig v. Warren [Minn.] 109 N. W. 231. Charging one's own agent in a report to a surety on the bond of such agent with a shortage in his account in a given sum. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463. Charging burglary and larceny. Rose v. Imperial Engine Co., 110 App. Div. 437, 96 N. Y. S. 808. A publication which in effect charges plaintiff with blackmail is actionable per se. Town Topics Pub. Co. v. Collier, 99 N. Y. S. 575. "He stole my hoe." Abraham v. Baldwin [Fla.] 42 So. 591. "You stole my cabbage." Lee v. Crump [Ala.] 40 So. 609. Charge that there were criminal cases pending against plaintiff growing out of his connection with a bank named. Witham v. Atlanta Journal, 124 Ga. 688, 53 S. E. 105. Imputation of pecuniary interest in contracts awarded by plaintiff as school director held libelous per se under B. & C. Comp. §§ 3389, 3391, making such transaction a misdemeanor. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473. A statute making criminal the offense of fraudulently converting property held in a trust relation, without the consent of the owner, makes a charge by an employer of his employee dishonestly taking goods from the store wherein the employee was a clerk actionable per se, even if it is not actionable in the absence of such statute. Shipp v. Patton, 29 Ky. L. R. 480, 93 S. W. 1033. Charging a person with being the proprietor of a gambling house (Washington Post Co. v. Wells, 27 App. D. C. 495), or of a building used for the purpose of gambling and for disorderly purposes (Id.). Charging plaintiff with whipping her mother held slanderous per se under Rev. St. 1898, § 4388, making the crime charged punishable by imprisonment in the county jail. Earley v. Winn [Wis.] 109 N. W. 633. See, also, post, § 6.

Held not actionable per se: A publication concerning the trustees of a hospital that "Of course Mr. Kenedy had to make his statement from the books as they appear; but it occurs to me that the proper entries were not made in the books as to certain items, or were omitted to be made, so that the books do not present proper data from which to make a proper comparative statement," held not libelous of the plaintiff, one of the trustees. Phythian v. Raison, 29 Ky. L. R. 293, 92 S. W. 591. "Why don't you take that damned crape off your hat. You didn't think anything of your brother. You are a robber. You robbed widows and would steal the gold from a dead man's teeth." Flaacke v. Stratford, 72 N. J. Law, 487, 64 A. 146. "Robbing the taxpayers." Dow v. Long, 190 Mass. 138, 76 N. E. 667. Charging plaintiff with exacting a commission or fee on the wages of persons employed for his employer. Russell v. Barron, 111 App. Div. 382, 97 N. Y. S. 1061. Where neither the name nor the nature of the society referred to nor the relation of the parties thereto was disclosed, charging plaintiff and his son with having paid arrears for the purpose of cheating the society, does not impute crime so as to render the words actionable per se. Casale v. Calderone, 49 Misc. 555, 97 N. Y. S. 1102. A newspaper publication purporting to be a San Francisco, Cal., telegram, that plaintiff's brother had arrived from New York and announced in court that he was prepared to see that his brother returned to New York and that the judge thereupon ordered him [using plaintiff's surname] released. Rees v. New York Herald Co., 112 App. Div. 456, 98 N. Y. S. 548. To publish that one was wrongfully put in jail. Hughes v. New York Evening Post, 100 N. Y. S. 982.

31. Actionable per se: Charging a young woman with having a record well known to the police is actionable per se. Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33. To charge a woman with being a lewd character, using her body for commercial purposes, and with keeping a gambling room, is actionable per se. Battles v. Tyson [Neb.] 110 N. W. 299. Defamatory utterance concerning a woman's chastity held actionable per se under Acts 1838, c. 114, and Acts 1888, p. 723, c. 444. Cairnes v. Pelton, 103 Md. 40, 63 A. 105.

Not actionable per se: No fault, impropriety, or bad reputation is charged by saying, even of a young woman, that she has had an eventful life. Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33. "What right have you to his [a certain man's] key or papers? You are not his wife," and "You could not be his wife as your husband [naming another man] is still living." Maerlender v. Porter, 99 N. Y. S. 533. See, also, post, § 6.

32. Actionable per se: Publication that a person is a suicide fiend, had attempted suicide 25 times before succeeding, and would usually go to the hospital and ask to be pumped out. Wandt v. Hearst's Chicago American [Wis.] 109 N. W. 70. A publication charging a notary public with inducing a person to libel another in an affidavit procured by such notary. Sheibley v. Ashton, 130 Iowa, 195, 106 N. W. 618. A publication charging one with originating and circulating false and malicious reports attacking the character of another. Sheibley v. Huse [Neb.] 106 N. W. 1028. Charging plaintiff with false statements and malicious motives and unscrupulous attempts to injure defendant's business, and with bad faith, fraud, and deceit. Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417, 12 Det. Leg. N. 754, 105 N. W. 858. To say of church vestrymen that they had turned their

ness or occupation.[33] Hence it is not essential to libel that participation in criminal misconduct be imputed.[34] Circumstances may render words of praise actionable,[35] and defamatory words are none the less actionable because commingled with matter of a complimentary nature.[36] The language of an alleged defamation must

back on moral and legal obligation in the matter of choosing a rector. Goldsborough v. Orem, 103 Md. 671, 64 A. 36. Statement as to discrepancies in books kept by trustees of hospital held not libelous of particular trustee. Phythian v. Raison, 29 Ky. L. R. 293, 92 S. W. 591. Charging one employed as janitress with having as such obtained possession of her employer's property, refused to perform the duties, barricaded the rooms so that her employer could not get access to them, shut off the gas and water from the rest of the building, and using the landlord's coal to supply herself with hot water against the landlord's wishes. Flaherty v. New York Times Co., 109 App. Div. 489, 96 N. Y. S. 381. Statement that plaintiff allowed her picture to be taken and used as an advertisement when it was repulsive to look at. Hart v. Woodbury Dermatological Institute, 113 App. Div. 281, 98 N. Y. S. 1000. Unauthorized testimonial of a dermatological institute representing plaintiff as having been partially relieved of the markings of smallpox. Id. Portions of letter from stockholder to fellow stockholder concerning another stockholder and officer of the company making accusations of attempts to wreck the company and putting land of no value into the company. Chambers v. Leiser [Wash.] 86 P. 627. Charging plaintiff as employee in a college laundry with swinging out of a window in her night robe, having cursed the boss like a sailor, thrown a cup of hot tea in the face of another employee, with being the favorite of the boss and thereby relieved of labor and awarded better fare than the rest. Washington Times Co. v. Downey, 26 App. D. C. 258. Charging, inter alia, that plaintiff was dishonest and acted fraudulently in his business transactions immediately prior to his adjudication in bankruptcy. Richardson v. Thorpe, 73 N. H. 532, 63 A. 580.

Not actionable per se: Publication of the story of a practical joke, which leaves unimpaired the repute and affairs of the butt of the pleasantry. Story of wager that plaintiff had a black hand tatooed on his back decided against plaintiff because of the joker using burnt cork and slapping his own hand on plaintiff's back and leaving the imprint. Lamberti v. Sun Printing & Pub. Ass'n, 111 App. Div. 437, 97 N. Y. S. 694. To write and publish of one not a trader or merchant and not of or concerning his business or affairs that he is indebted to the publisher, and, though able to pay, has neglected or refused to do so. Nichols v. Daily Reporter Co. [Utah] 83 P. 573. A publication merely charging that the vestrymen of a church promised not to call a certain person as rector unless it was satisfactory to the congregation and that because of the promise no effort was made to change the vestry is not libelous of a vestryman. Goldsborough v. Orem, 103 Md. 671, 64 A. 36.

33. **Actionable per se:** Attempting to loot treasury of village for which plaintiff was attorney. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547. Using position as village attorney for the purpose of exacting illegal fees from the village. Id. Charging a village attorney with being a pettifogger. Id. Charging plaintiff as village attorney with having misled village council by means of dishonest advice. Id. Incompetency as village attorney. Id. An imputation of plaintiff's dishonesty and unfaithfulness to his employer is actionable per se. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463. A newspaper publication charging a graduate of reputable educational and theological institutions, and student of medical subjects, who had served the government as clerk under the title "Specialist in Education as a Preventive of Pauperism and Crime," with being a humbug and pseudo-scientist. McDonald v. Sun Printing & Pub. Ass'n, 111 App. Div. 465, 98 N. Y. S. 116. Charging that a factory girl was discharged, not for the violation of the rules but for a reason that the manager of the factory preferred not to disclose, such that she could not be retained in the factory. Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224. Letter written by rival of plaintiff in the ice machine business that plaintiff was a second-hand dealer, that it put in a class of inferior work, that it was a scab establishment, and that it did not have a mechanic in its establishment. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551.

Held not actionable per se: "He is not worth a dollar and everything is in his wife's name." Dallavo v. Snider, 143 Mich. 542, 13 Det. Leg. N. 69, 107 N. W. 271. Charging plaintiff with exacting a commission or fee on the wages of persons employed for his employer. Russell v. Barron, 111 App. Div. 382, 97 N. Y. S. 1061. A publication merely asserting that defendant is co-owner and translator of a book offered for sale by plaintiff and for that reason the defendant objects to plaintiff offering the book under his own name or soliciting subscriptions in that manner. Jockin v. Brassler, 99 N. Y. S. 586.

34. Shelbley v. Huse [Neb.] 106 N. W. 1028. "Robbing the taxpayers" held to be in fact capable of carrying defamation, though not importing any crime. Dow v. Long, 190 Mass. 138, 76 N. E. 667. An imputation that plaintiff was such a man that, from his standpoint, one who would unlawfully and improperly spend the public money was his ideal as a public official and that plaintiff supported a particular candidate because he was such a man is libelous. Id.

35. Martin v. The Picayune, 115 La. 979, 40 So. 376. See 19 Harv. L. R. 539. Publication detailing in newspaper cure of difficult case by physician opposed to advertising and member of society so opposed held actionable. Martin v. The Picayune, 115 La. 979, 40 So. 376. See 19 Harv. L. R. 527.

36. Hart v. Woodbury Dermatological Institute, 113 App. Div. 281, 98 N. Y. S. 1000.

be construed as used in its ordinary meaning according to the scope and object of the whole article.[37] Hence the head lines or title of an alleged libelous article must be construed as a part thereof.[38] It is a rule of construction that in an alleged defamatory publication the words will be given their natural and ordinary signification,[39] not necessarily what the defendant intended to express but what would be naturally understood.[40] Generic defamation or that which is predicated of a class containing a large and indefinite number of persons is not actionable by particular members of the group,[41] but defamation of a class of ascertainable persons is ordinarily actionable by particular members of the class who by proper allegations connect themselves therewith.[42] Defamatory language is not actionable when it is merely in disparagement of one's property or the quality of the articles which he manufactures or sells,[43] but when it occasions special damage the rule is otherwise.[44] By statute in some states the common-law rule that no verbal defamation, no matter how vile, affecting the chastity of a female, whether married or unmarried, would constitute slander per se has been changed.[45] Statutes making all classes of libel misdemeanors and defining libel as at common law do not make publications libelous other than as at common law.[46] False matter is none the less actionable because appearing in the same publication with truthful statements.[47] The fact that actual damage has followed from the publication is immaterial in arriving at the true construction of an alleged defamation.[48] It is held in Wisconsin that fine or imprisonment in the county jail constitutes infamous punishment within the rule that a false charge which will subject the party charged to indictment for a crime involving moral turpitude or subject him to an infamous punishment is slanderous per se.[49] Repetitions of defamatory matter are in themselves actionable,[50] and damages caused thereby are not

37. Hughes v. New York Evening Post Co., 100 N. Y. S. 982. "The whole of a libelous article must be submitted to the jury when any part of it is to be construed by the jury. Berger v. Freeman Tribune Co. [Iowa] 109 N. W. 784.

38. Berger v. Freeman Tribune Co. [Iowa] 109 N. W. 784; Sheibley v. Nelson [Neb.] 106 N. W. 1034; Craig v. Warren [Minn.] 109 N. W. 231.

39. Sheibley v. Ashton, 130 Iowa, 195, 106 N. W. 618. The words of an alleged libelous article are to be construed as they would naturally and ordinarily be interpreted by the general reader. Dow v. Long, 190 Mass. 138, 76 N. E. 667.

40. Sheibley v. Ashton, 130 Iowa, 195, 106 N. W. 618; Flaacke v. Stratford, 72 N. J. Law, 487, 64 A. 146; Goldsborough v. Orem, 103 Md. 671, 64 A. 36.

41. A publication referring to trading stamp concerns generally in a defamatory manner is not actionable by particular concerns or individual trading stamp dealers. Watson v. Detroit Journal Co., 143 Mich. 430, 13 Det. Leg. N. 26, 107 N. W. 81.

42. Publication charging graft on the part of coroner's physicians of whom there were four held actionable by one of the four. Weston v. Commercial Advertiser Ass'n, 184 N. Y. 479, 77 N. E. 660. Where a publication is defamatory in character, a petition basing a cause of action thereon which alleges by way of innuendo that the plaintiff was the person defamed, other proper averments being made, is not demurrable though the publication applies equally well to more than one person. Kenworthy v. Journal Co., 117 Mo. App. 327, 93 S. W. 882. Whether a statement that functionaries turned "their back on moral and legal obligations" was written of them as individuals or of the body in which they were members, held for the jury. Goldsborough v. Orem, 103 Md. 671, 64 A. 36.

43. Language of letter held merely in disparagement of the quality of plaintiff's safes and therefore not actionable in the absence of special damage. Victor Safe & Lock Co. v. Deright [C. C. A.] 147 F. 211.

44. To knowingly cause a notice of mechanic's lien to be filed against plaintiff's property on a fictitious claim, thereby causing delay of the work on a building in process of construction resulting in loss of rent, is actionable. Ghiglione v. Friedman, 100 N. Y. S. 1024. See, also, post, § 7.

45. Acts 1838, c. 114, and Acts 1888, p. 723, c. 444. Cairnes v. Pelton, 103 Md. 40, 63 A. 105. See, also, post, § 6.

46. Rev. St. 1899, §§ 635, 2259, 2260, construed. Kenworthy v. Journal Co., 117 Mo. App. 327, 93 S. W. 882.

47. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

48. Nicknames "Blackhand" and "Blackhand Kidnapper" resulting from playing practical joke on plaintiff, which was told in the publication, held immaterial in construing publication. Lamberti v. Sun Printing & Pub. Ass'n, 111 App. Div. 437, 97 N. Y. S. 694.

49. Earley v. Winn [Wis.] 109 N. W. 633.

50. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008. That a libel was copied from another's publication is no defense in an ac-

chargeable to one who made the statements to persons guilty of the repetition.[51] The publication of one's picture may be actionable by the use of it in connection with defamatory matter referring to another.[52] A publication is none the less defamatory because put in the form of a question[53] or opinion[54] or is indirect.[55]

(§ 2) *B. Publication*[56] is essential and consists in making known a defamatory statement to any person other than the object thereof,[57] but the author is not responsible in damages for a publication by the plaintiff himself.[58]

(§ 2) *C. Malice*[59] is said to be essential but is presumed from the publication of defamatory matter.[60] Express malice may be shown in the publication of a defamation actionable per se to enhance the damages.[61] Reiteration of a defamatory statement is evidence of malice,[62] as is also the refusal of a demand for retraction,[63] and it may be inferred from the fact alone that a slanderous utterance was false and known by the publisher to be false.[64] An ulterior motive of professional jealousy may be sufficient to show malice.[65] When defamatory words are false and used by the publisher because of anger and ill will towards the injured person, malice is express as well as implied.[66] Where a slanderous publication affecting a married woman was not made publicly nor at all except in answer to questions by her husband, and the answers disclosed no hatred or ill will, malice is not shown.[67] The existence of malice is a conclusion which may be drawn from the face of the alleged libel itself and from the facts and circumstances which surround and characterize it.[68] Where in the absence of the master his servants without authority from him publish libelous matter which is not ratified by him, he cannot be charged with malice in the publication.[69] It is held in Washington that in determining the amount of damages for defamation the question of malice is of no moment.[70] Proof of pub-

tion therefor. Sheibley v. Huse [Neb.] 106 N. W. 1028.

51. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008.

52. A defamatory article referring to a person of another name than plaintiff, but having plaintiff's picture printed in connection therewith as the person referred to in the article, is libelous as to plaintiff. Wandt v. Hearst's Chicago American [Wis.] 109 N. W. 740. Article concerning a person of a different given name but having the surname of plaintiff, in connection with which plaintiff's picture was published as the person mentioned, held libelous as applied to plaintiff. Ball v. The Tribune Co., 123 Ill. App. 235.

53. Ward v. Merriam [Mass.] 78 N. E. 745.

54. The introduction of a defamatory utterance with a phrase showing it to be opinionative merely does not alter its definiteness and injurious effect as a matter of law. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966.

55. It is immaterial whether the words spoken impute an offense to the plaintiff in a direct manner or indirectly by such hints or modes of expression as are likely to convey the intended meaning to the person addressed. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966.

56. See 6 C. L. 417.

57. Cairnes v. Pelton, 103 Md. 40, 63 A. 105. Where a slanderous utterance is made concerning a married woman in the presence of and to her husband alone (Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348, 108 N. W. 96), or in the presence of both the husband and wife when no one else besides defendant is present, under circumstances from which it is inferable that the wife had no part in procuring or being present at the interviews, it cannot be said as matter of law there was no publication (Id.). See, also, post, § 6.

58. Kenkle v. Haven, 144 Mich. 667, 13 Det. Leg. N. 369, 108 N. W. 98. A letter alleged to be defamatory of the recipient is not shown to have been published when it was received, opened, and read, and the contents made known by the plaintiff voluntarily reading them to an illiterate person mentioned therein. Lyon v. Lash [Kan.] 88 P. 262.

59. See 6 C. L. 418.

60. See post, § 5C.

61. Berger v. Freeman Tribune Co. [Iowa] 109 N. W. 784.

62. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251. Reiteration eight months after original publication. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547.

63. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251.

64. Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348, 108 N. W. 96.

65. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251.

66. Lee v. Crump [Ala.] 40 So. 609.

67. Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348, 108 N. W. 96.

68. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463.

69. Neafie v. Hoboken Printing & Pub. Co., 72 N. J. Law, 340, 62 A. 1129.

lication is in itself insufficient to prove malice,[71] but it may be inferred from the style and tone of the publication.[72] Malice of one not a party to the publication cannot be shown.[73] Malice as a jury question is treated elsewhere in this topic.[74]

§ 3. *Privilege and justification.*[75]—Statements made in the course of judicial proceedings are generally accorded an absolute privilege[76] when pertinent,[77] but in Louisiana the rule has been held not to extend to allegations made without probable cause,[78] though when probable cause exists the rule would seem to be the same in that state as elsewhere,[79] and the absolute privilege accorded statements made in the course of judicial proceedings is applicable to the case of a hearing before a legislative committee[80] when pertinent to the matter under investigation.[81] Ordinarily, a fair publication of judicial proceedings is privileged,[82] but defamatory, ex parte, preliminary proceedings cannot with impunity be published before the adverse party has been afforded opportunity to be heard.[83] Occasions when a qualified privilege may be invoked extend to a variety of communications made in good faith from honest motives,[84] such as publications made in endeavors to bring suspected criminals to justice,[85] honest criticism of those in official conduct[86] or of persons of public char-

70. Woodhouse v. Powles [Wash.] 86 P. 1063.

71, 72. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636.

73. Konkle v. Haven, 144 Mich. 667, 13 Det. Leg. N. 369, 108 N. W. 98.

74. See post, § 5D.

75. See 6 C. L. 418.

76. Accusatory statements made before a grand jury resulting in an indictment for extortion and bribery are privileged (Schultz v. Strauss, 127 Wis. 325, 106 N. W. 1066), and one who has made such statements cannot be compelled to disclose them under a statute permitting an examination of a defendant under oath to procure information for framing a complaint (Id.).

77. A statutory provision declaring privileged statements made in the proper discharge of official duty or in a judicial proceeding is inapplicable to a charge having no pertinency, relevancy, or reference to the subject-matter of a pending proceeding. Civ. Code § 47, construed. Carpenter v. Ashley, 148 Cal. 422, 83 P. 444. Under Civ. Code, § 47, a district attorney is not privileged in conducting a larceny case to charge opposing counsel with perjury and subornation of perjury. Id.

78. Lescale v. Schwartz Co., 116 La. 293, 40 So. 708. The common-law rule that in a suit for libel based on judicial allegations the verity of material allegations cannot be inquired into, but that such allegations are absolutely privileged, is inapplicable under the Louisiana Code [Code art. 2315, construed] (Id.), and the same is true of the French amendments to the Code Napoleon from which the Louisiana Code provision is taken [Code art. 2315, construed] (Id.).

79. Buford Bros. v. Sontheimer, 116 La. 500, 40 So. 851. Evidence held to show probable cause for making false defamatory allegations in a judicial proceeding. Id.

80. Sheppard v. Bryant, 191 Mass. 591, 78 N. E. 394.

81. Testimony of witness as to the effect of a combination of coal dealers held pertinent to matter before a committee appointed to investigate the subject. Sheppard v. Bryant, 191 Mass. 591, 78 N. E. 394.

82. Todd v. Every Evening Printing Co. [Del.] 62 A. 1089. Investigations by persons connected with coroner's officers and members of municipal police force held not within Code Civ. Proc. § 1907. Nunnally v. Press Pub. Co., 110 App. Div. 10, 96 N. Y. S. 1042.

83. Publication of affidavit for capias ad respondendum held actionable. Todd v. Every Evening Printing Co. [Del.] 62 A. 1089.

84. Good faith, a right, duty, or interest in a proper subject, a proper occasion, and a proper communication to those having a like right, duty, or interest, are all essential to constitute a per se defamation a privileged communication. Abraham v. Baldwin [Fla.] 42 So. 591.

Good faith essential. Overton v. White, 117 Mo. App. 576, 93 S. W. 363; Rose v. Imperial Engine Co., 110 App. Div. 437, 96 N. Y. S. 808; Chapman v. Battle, 124 Ga. 574, 52 S. E. 812; Ambrosius v. O'Farrell, 119 Ill. App. 265. Good faith can be established only by showing the exercise of ordinary care and prudence to ascertain whether the charges were true or false. Rose v. Imperial Engine Co., 110 App. Div. 437, 96 N. Y. S. 808. Privileged occasion, without more, can justify only in cases where the publication itself or the circumstances connected therewith negative the presumption of malice. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636.

85. Chapman v. Battle, 124 Ga. 574, 52 S. E. 812; Robineon v. Van Auken, 190 Mass. 161, 76 N. E. 601. Where plaintiff was erroneously suspected of theft and a police officer was called by defendant and the officer in carrying out a plan he conceived for extorting a confession arrested and had plaintiff locked up on a charge of being "dangerous and suspicious," defendant was not liable to plaintiff in an action of slander. Scheurrmann v. Vaccaro [La.] 42 So. 648.

86. Conduct of village clerk in presenting for audit by trustees a bill owing by him individually complained of by citizen to president of village. Howarth v. Barlow, 113 App. Div. 510, 99 N. Y. S. 457. Petition of citizens complaining of police magistrate to mayor and city council charging malfeasance. Ambrosius v. O'Farrell, 119 Ill. App. 265. Any

acter,[87] fitness of candidates for office,[88] publications growing from the duties of the relations of master and servant,[89] principal and agent,[90] husband and wife,[91] and communications between public officials and contractors for public work relative to persons engaged by the contractor to do the work,[92] dealers in a common line of goods relative to credit ratings of their customers,[93] stockholders relative to officials of the corporation;[94] but the rule of qualified privilege does not grant immunity for statements maliciously made without probable cause to believe them to be true,[95] nor warrant specific defamatory accusations when applied to aspirants for office.[96] Qualified privilege will not avail as a defense when actual malice is shown,[97] but mere falsity does not render actionable a publication subject to a qualified privilege,[98] unless the falsity is known by the publisher at the time of publication.[99] When the claim of privilege is lost, plaintiff is not required to prove special damage.[1] A

person who has business transactions with a city official may complain to a superior officer of any ill treatment without subjecting himself to liability for defamation. Fleming v. Brauer, 110 App. Div. 876, 96 N. Y. S. 594.

87. A newspaper reference to a public character by a nickname without casting any reflections on his private character or business held not without the limit of privilege (Duffy v. New York Evening Post Co., 109 App. Div. 471, 96 N. Y. S. 629), nor to say of him that he is absolutely devoid of any knowledge of the customs of polite men (Id.), nor that he does well in business, especially during Tammany regimes (Id.), nor that he devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party (Id.), nor that he is reported to be about to join Tammany openly soon (Id.), nor that he apparently knows no more of and cares no more for political principles than he does of the Silurian age of geology (Id.), nor that he mixes in Tammany factional fights to the detriment of the republican party when his position in that party is not shown to be in any way affected by the accusation (Id.), nor that, as respects those who are dictating nominations in a certain political district, he is a most unworthy choice (Id.).

88. The privilege of discussing the character and fitness of a candidate for office is at most a qualified one. Yager v. Bruce [Mo. App.] 93 S. W. 307.

89. A letter written by former employer of plaintiff to his mother, with whom he was residing, his father being dead, charging him with crime, held not privileged. Rose v. Imperial Engine Co., 110 App. Div. 437, 96 N. Y. S. 808.

90. The privilege of a principal in reporting a default of an agent to a surety on the agent's bond is a qualified one. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463.

91. When a publication of a slanderous statement concerning a married woman is made to her husband and only in answer to questions by him in the presence only of the husband or husband and wife, it is an occasion of qualified privilege. Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348, 108 N. W. 96.

92. Communications between a member of a school board and a contractor of the board for the erection of a school house as to the competency or fitness of a person suggested by the contractor to do part of the work as subcontractor are privileged. Vial v. Larson [Iowa] 109 N. W. 1007.

93. Report of delinquency in a legitimate method for ascertaining who is in default held privileged. Woodhouse v. Powles [Wash] 86 P. 1063.

94. Chambers v. Leiser [Wash.] 86 P. 627.

95. Petition of citizen to obtain redress for alleged official malfeasance. Ambrosius v. O'Farrell, 119 Ill. App. 265. Report of merchant to fellow merchants as to delinquency of patron in meeting account. Woodhouse v. Powles [Wash.] 86 P. 1063. The privilege is lost by making the charge wantonly, recklessly, maliciously, and in disregard of the rights of the person accused. Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601. Libelous matter maliciously published affecting the plaintiff's title to a trade mark and extending to its business character and methods, its honesty and fair dealing. Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417, 12 Det. Leg. N. 754, 105 N. W. 858. A statement of rumors concerning the birth of a child, its concealment and burial, which defendant claimed to have made to a justice of the peace that the justice might order an investigation made of the facts. Miller v. Nuckolls, 77 Ark. 64, 91 S. W. 759. A newspaper publication imputing to an author indecent and lascivious conduct towards young girls under the cloak of professional investigation is not privileged as within the purview of fair criticism of a work of plaintiff from which defendant claimed to deduce its conclusions. McDonald v. Sun Printing & Pub. Ass'n, 111 App. Div. 467, 98 N. Y. S. 118. Charging civil magistrate with conspiracy to humiliate a person. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636. Newspaper publication held not within the rule of qualified privilege. Washington Post Co. v. Wells, 27 App. D. C. 495.

96. "If you vote for" a certain candidate "you vote for a damned thief" held not privileged. Yager v. Bruce [Mo. App.] 93 S. W. 307.

97. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463.

98. Howarth v. Barlow, 113 App. Div. 510, 99 N. Y. S. 457; German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008; Vial v. Larson [Iowa] 109 N. W. 1007.

99. Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348 108 N. W. 96; Abraham v. Baldwin [Fla.] 42 So. 591.

retraction, to be given any effect, must be a retraction of all the defamatory statements complained of, and not merely a portion of them.[2] It is provided by statute in some states that one concerning whom a defamatory publication is made may notify the publisher for the purpose of procuring retraction.[3] To demand the particulars of a published insinuation is not to license the publication of defamatory falsehoods as replies.[4] A newspaper has no greater privilege than an ordinary person to publish false and defamatory statements.[5] Privilege as a plea and denial of uttering the slander charged are inconsistent defenses when the denial is inclusive of all defamatory words,[6] and when pleaded together the defendant may be required to elect on which he will stand.[7] The justification must be as broad as the charge and of the very charge.[8] Mistake as to the identity of persons will not excuse a defamation.[9] A publication relating to a private person with reference to whom there was no occasion to make any publication whatever is not privileged.[10] Privilege as a jury question is treated elsewhere in this topic.[11] The defense that the words used were nonslanderous is not established by proof that some but not all of the hearers so understood.[12]

Truth.[13]—In a civil action the substantial truth of the publication is a complete defense if the publication was for a proper purpose,[14] but proof of the truth of a part only of a defamatory charge will not defeat the action,[15] and the benefit of the defense may be lost, where the matter published is private or where even though proper the manner and style render the publication libelous.[16] Pleading the truth in justification as a partial defense for an alleged defamation has no effect as a ratification of the act when no cause of action against the defendant existed at the time of the commencement of the action.[17]

§ 4. *Damages and the aggravation and mitigation thereof.*[18]—Mental suffering

1. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463.

2. Publication held insufficient as a retraction. Monaghan v. Globe Newspaper Co., 190 Mass. 394, 77 N. E. 476.

3. Notice under Gen. St. 1894, § 5417, is not required to specify each particular part of an alleged defamatory article which contains the essence of the false and defamatory matter. Craig v. Warren [Minn.] 109 N. W. 231.

4, 5. Luzenberg v. O'Malley, 116 La. 699, 41 So. 41.

6. Shipp v. Patton, 29 Ky. L. R. 480, 93 S. W. 1033.

7. When defendant desires to plead privilege as justification in slander and deny the utterance as charged in the petition, he can only be required to admit so much of the charge as leaves plaintiff an apparent cause of action in electing to stand on privilege as a defense. Shipp v. Patton, 29 Ky. L. R. 480, 93 S. W. 1033.

8. Berger v. Freeman Tribune Pub. Co. [Iowa] 109 N. W. 784. The charge that plaintiff participated in a reprehensible act of his brother is not justified by showing that plaintiff did not, as district attorney, impart to the proper authorities the conduct of his brother as soon as knowledge of it came to him. Luzenberg v. O'Malley, 116 La. 699, 41 So. 41. Where the defamatory charge was larceny and there was no proof that the hearers of the words either knew or were informed that the defendant had reference to a mere trespass, the fact that plaintiff had committed neither crime nor trespass was no defense. Lee v. Crump [Ala.] 40 So. 609.

9. Every Evening Printing Co. v. Butler [C. C. A.] 144 F. 916, afg. 140 F. 934.

10. Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33. No privilege attaches to communications between officers of the poor as to the mother of children on her making application for relief on behalf of the children. Pier v. Speer [N. J. Err. & App.] 64 A. 161.

11. See post, § 6 D.

12. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251.

13. See 6 C. L. 421.

14. Rollins v. Louisville Times Co., 28 Ky. L. R. 1054, 90 S. W. 1081; Chambers v. Leiser [Wash.] 86 P. 627; Burkhart v. North American Co., 214 Pa. 39, 63 A. 410. Where by statute it is made unlawful for a public official to maintain membership in a political club, a newspaper publication declaring an official who is a member of a political club unfit for office is not actionable. McAvoy v. Press Pub. Co., 99 N. Y. S. 1041. See, also, post, § 6.

15. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257. When several unprivileged publications, actionable per se, are sued on together, the defendant in order to defeat the action must establish the truth of each one. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547.

16. Burkhart v. North American Co., 214 Pa. 39, 63 A. 410.

17. Folwell v. Miller [C. C. A.] 145 F. 495.

18. See 6 C. L. 421.

is generally held to be an element of damages for defamation.[19] When punitive damages are eliminated in an action for defamation only the effect which the publication is calculated to have on the minds of its readers is material in arriving at the amount of damages.[20] For the publication of that which is defamatory per se, the plaintiff may recover without proof of special damage.[21] To warrant recovery of special damages a causal connection between the defamation and the damages claimed must be shown.[22] Injury to reputation does not constitute special damage.[23] As a general rule it is held that punitive or exemplary damages can be allowed only when there was express malice in making the publication,[24] the existence of which must be established by a fair preponderance of the evidence,[25] but in Kentucky it is held they may be recovered without proof of express malice when the publication is defamatory per se,[26] while in Washington it is held that exemplary damages cannot be recovered unless specially provided for by statute,[27] and consequently that a plaintiff may recover all the damages to which he is entitled, regardless of any motive the defendant may have in publishing a defamation.[28] In fixing the amount of punitory damages the Louisiana supreme court will take into consideration the fact that defendants in libel have been before the court on similar charges.[29] It is held in Missouri that the failure of defendant to establish a plea of truth in justification is not ground for awarding punitive damages unless the jury finds it was filed in bad faith.[30] Defendant's means and wealth may be considered in assessing damages for a defamation.[31] The plaintiff is entitled to such damages as the jury believe he ought to receive rather than such as defendant ought to pay.[32] Damages assessed by the jury will not be interfered with in the absence of an abuse of discretion.[33] The fact

19. Where an article sued on is libelous per se as tending to bring plaintiff into contempt, ridicule, and disgrace, damages may be recovered for injury to plaintiff's feelings and mental suffering endured as the natural result of the publication. Washington Times Co. v. Downey, 26 App. D. C. 258. The amount of damages to which one is entitled to recover for a malicious defamation depends in part on the effect of the malice on the plaintiff's mind. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966. Proof of mental suffering insufficient. Woodhouse v. Powles [Wash.] 86 P. 1063.

20. Butler v. Every Evening Printing Co., 140 F. 934.

21. Cairnes v. Pelton, 103 Md. 40, 63 A. 105. It is not necessary to prove special damages in any action for libel whenever the words are spoken of the plaintiff in the way of his profession or trade. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551.

22. Communication of slanderous utterance concerning financial condition of bank held not to warrant recovery of special damages for ensuing run on the bank. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008. Expenditures which are not the immediate and legal consequence of a defamatory article are not recoverable as special damages because of its publication. Lanston Monotype Mach. Co. v. Mergenthaler Linotype Co., 147 F. 871. When the plaintiff's own admissions are the efficient cause of his dismissal from office, mere contribution to the effect proceeding from defamatory utterances of the defendant is not actionable. Potter v. Batt, 72 N. J. Law, 470, 63 A. 282.

23. Casale v. Calderone, 49 Misc. 566, 97 N. Y. S. 1102.

24. Yager v. Bruce [Mo. App.] 93 S. W. 307; Neafie v. Hoboken Printing & Pub. Co., 72 N. J. Law, 340, 62 A. 1129; Kloths v. Hess, 126 Wis. 587, 106 N. W. 251; Lee v. Crump [Ala.] 40 So. 609; Carpenter v. New York Evening Pub. Co., 111 App. Div. 266, 97 N. Y. S. 478; Cairnes v. Pelton, 103 Md. 40, 63 A. 105.

25. Carpenter v. New York Evening Pub. Co., 111 App. Div. 266, 97 N. Y. S. 478.

26. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551.

27, 28. Woodhouse v. Powles [Wash.] 86 P. 1063.

29. Luzenberg v. O'Malley, 116 La. 699, 41 So. 41.

30. Under Rev. St. 1899, § 636. Yager v. Bruce [Mo. App.] 93 S. W. 307.

31. Cairnes v. Pelton, 103 Md. 40, 63 A. 105.

32. Instruction held erroneous. Geringer v. Novak, 117 Ill. App. 160.

33. $2,000 damages held not excessive in an action for defamation of a female's character for chastity. Overton v. White, 117 Mo. App. 576, 93 S. W. 363. $5,000 damages held not excessive on a charge of being an ally of an alleged criminal politician, a liar, and trickster. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 267. An award of $300 as compensatory damages for a charge of child murder against a woman of apparent respectability officiating as obstetrician at the birth is not excessive. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251. $50 held not excessive damages for slander imputing criminal neglect of plaintiff's wife. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966.

that plaintiff is not damaged in the estimation of friends by a defamatory publication goes only in mitigation of damages,[34] as does the fact that a libel is a copy of another's publication.[35]

§ 5. *Actions and procedure. A. Conditions precedent.*[36]—When statements made in judicial proceedings are actionable, the plaintiff need not await the termination of the particular proceeding before bringing his suit.[37]

(§ 5) *B. Pleading.*[38]—When the words of a publication are capable of a defamatory or innocent meaning, dependent on extrinsic facts, the complaint must allege the defamatory meaning to state a cause of action.[39] Defamatory words uttered in a foreign language must be set out in the complaint or declaration and a translation given,[40] and this rule is applicable in actions for slander.[41] The ordinary rules governing uncertainty and ambiguity in pleading apply in actions for defamation,[42] as do those relating to the pleading of evidence[43] and irrelevant and redundant matter,[44] as well as to the construction of pleadings in general.[45] By statute a general allegation that an alleged defamatory article was published concerning the plaintiff is sufficient in some jurisdictions,[46] and a complaint containing such allegation is not rendered insufficient by other allegations tending to show that plaintiff was not referred to.[47] When the words of an alleged defamatory publication are capable of more than one meaning, it is the office of the innuendo to explain or point out the sense in which it is claimed they were used,[48] but an innuendo cannot enlarge or extend the meaning of language used.[49] Part of an alleged libel being libelous per

$3,600 held not excessive as compensatory damages. Butler v. Every Evening Printing Co., 140 F. 934, afd. [C. C. A.] 144 F. 916.

34. Wandt v. Hearst's Chicago American [Wis.] 109 N. W. 70.

35. Sheibley v. Huse [Neb.] 106 N. W. 1028.

36. See 6 C. L. 423.

37. Lescale v. Schwartz Co., 116 La. 293, 40 So. 708.

38. See 6 C. L. 423.

39. Russell v. Barron, 111 App. Div. 382, 97 N. Y. S. 1061.

40, 41. Romano v. De Vito, 191 Mass. 457, 78 N. E. 105.

42. Complaint for injury to hotel business by publication of article falsely stating that the hotel had been sold and business suspended held sufficiently free from uncertainty and ambiguity. Wright v. Coules [Cal. App.] 87 P. 809.

43. Allegations of answer held allegations of evidence. Hanson Co. v. Collier, 101 N. Y. S. 690. Where the charge was robbery and murder, a defense in justification setting forth the dying declarations of the alleged victim as disclosing plaintiff's guilt of the homicide by the administration of chloral hydrate or "knockout drops" is insufficient as pleading the evidence. Nunnally v. Mail & Exp. Co., 113 App. Div. 831, 99 N. Y. S. 647.

44. Answers held subject to be stricken out as being irrelevant and redundant. Hanson Co. v. Collier, 101 N. Y. S. 690.

45. The language of a complaint for slander in charging plaintiff with the death of a child at whose birth she officiated as obstetrician, alleging the utterance to be that "That child [with the innuendo 'the dead child of certain parents meaning'] has been murdered," is not susceptible of the construction that the child was born dead. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251. Complaint for defamation held to show that the words were spoken of and concerning the plaintiff in his marital relation and the performance of the legal duties he owed his wife by reason of that relation. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966.

46. Code Civ. Proc. § 535. Nunnally v. New Yorker Staats-Zeitung, 111 App. Div. 482, 97 N. Y. S. 911, afd. [N. Y.] 78 N. E. 1107; Nunnally v. Tribune Ass'n [N. Y.] 78 N. E. 1108; Nunnally v. New Yorker Zeitung Pub. & Printing Co., 101 N. Y. S. 1041. Code Civ. Proc. § 131. Sheibley v. Huse [Neb.] 106 N. W. 1028. B. & C. Comp. § 91. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473. Libel alleged to be "of and concerning the plaintiff" need not be connected by innuendo with plaintiff's name. Dow v. Long, 190 Mass. 138, 76 N. E. 667.

47. Soper v. Associated Press, 101 N. Y. S. 342; Soper v. Butler, 101 N. Y. S. 345.

48. Richardson v. Thorpe, 73 N. H. 532, 63 A. 580. Publication not open to construction that it intended to charge that plaintiff was living with a man though not married to him in the absence of innuendo. Maerlender v. Porter, 99 N. Y. S. 533.

49. Nichols v. Daily Reporter Co. [Utah] 83 P. 573. See 15 Yale L. J. 377. Goldsborough v. Orem, 103 Md. 671, 64 A. 36. Innuendo explaining an alleged defamatory statement introduced by the phrase "I think" held not to extend the sense of the words. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966. A publication relating wholly to a corporation except that plaintiff's surname was used as an introductory word in a headline could not be made to apply to plaintiff by innuendo alleging that it was published of and concerning him. Witham v. Atlanta Journal, 124 Ga. 688, 53 S. E. 105. Publication held not to warrant innuendo that it charged plaintiff with membership in the "Black Hand." Lamberti v. Sun Printing & Pub.

se, it is unnecessary to adopt innuendoes for other parts which are ambiguous.[50] Whether an innuendo is fairly warranted by the language declared on, when that language is read either by itself or in connection with the inducement and colloquium, is a matter of law.[51] The truth of an innuendo must always appear from precedent averments and be warranted by the inducement and colloquium.[52] A publication which is defamatory per se is not restricted by innuendoes,[53] but where plaintiff avers a special meaning for alleged defamatory words, that is the only meaning the defendant need meet.[54] Where a defamation is actionable per se, special damages need not be alleged,[55] and, conversely, special damages must be alleged to entitle one to maintain an action for defamation which is not actionable per se.[56] As a general rule the special damage must be fully and accurately stated,[57] but the names of particular persons dissuaded from dealing with plaintiff need not be alleged.[58] Where an alleged libel is justified by a plea of the truth thereof, the withdrawal of the plea of the general issue does not admit that the article was false[59] nor that it was malicious.[60] Where the answer specifically states the facts showing the alleged defamation to have been a privileged communication, and it is averred that the words were spoken without malice and in good faith, there is a sufficient pleading of privilege as a defense.[61] The rule that the truth of an alleged defamation must be pleaded as a defense has no application when the plaintiff's petition shows the substantial truth of the publication.[62] A partial defense which is pleaded to the whole cause of action is demurrable.[63] A demurrer to the declaration raises the question of the

Ass'n, 111 App. Div. 437, 97 N. Y. S. 694. Charges against trustees of hospital held not capable of libelous meaning. Phythian v. Raison, 29 Ky. L. R. 293, 92 S. W. 591. Publication referring to promoters of a corporation held not capable of being made referable to the corporation by innuendo. Memphis Tel. Co. v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 904. Petition to president of the United States to recall an order for typesetting machines given by the public printer held not libelous on the corporation receiving the order. Lanston Monotype Mach. Co. v. Mergenthaler Linotype Co., 147 F. 871. Publication held not capable of being extended by innuendo to accuse plaintiff of the crime of bigamy. Maerlender v. Porter, 99 N. Y. S. 533.

50. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473.

51. Goldsborough v. Orem, 103 Md. 671, 64 A. 36.

52. Declaration for libel held to be without proper averment that plaintiffs had commenced one of two suits referred to in the alleged libel. Watson v. Detroit Journal Co., 143 Mich. 430, 13 Det. Leg. N. 26, 107 N. W. 81.

53. Hart v. Woodbury Dermatological Institute, 113 App. Div. 281, 98 N. Y. S. 1000. Innuendo ascribing a charge of murder and robbery held not restrictive of plaintiff's right to recover on a charge of fornication made in same alleged libel. Nunnally v. Press Pub. Co., 110 App. Div. 10, 96 N. Y. S. 1042.

54. Nichols v. Daily Reporter Co. [Utah] 83 P. 573.

55. McDonald v. Sun Printing & Pub. Ass'n, 111 App. Div. 465, 98 N. Y. S. 116; Witham v. Atlanta Journal, 124 Ga. 688, 53 S. E. 105.

56. Casale v. Calderone, 49 Misc. 555, 97 N. Y. S. 1102; Jockin v. Brassler, 99 N. Y. S. 586.

57. Allegation that publication has caused to plaintiff a serious loss in business, the refusal by clients to pay the just claims due by contract, and has greatly damaged the plaintiff in credit and reputation, held insufficient. Reporters' Ass'n of America v. Sun Printing and Pub. Ass'n [N. Y.] 79 N. E. 710, rvg. 112 App. Div. 246, 98 N. Y. S. 294. An allegation that plaintiff has suffered great loss in its revenues and profits, but in connection with which no facts are stated from which damages could be inferred other than that "persons have declined and refused further to deal with the plaintiff," held insufficient. Town Topics Pub. Co. v. Collier, 99 N. Y. S. 575. The allegation that a publication had the tendency to prevent and retard the sale of copies of a certain book by plaintiff and to prevent and retard the obtaining of subscriptions therefor and the sale of matter therein contained, and that by reason of such publication plaintiff was injured in his reputation, held insufficient. Jockin v. Brassler, 99 N. Y. S. 586. The allegation that plaintiff was expelled from a society, neither the name nor nature of which is disclosed, held insufficient. Casale v. Calderone, 49 Misc. 555, 97 N. Y. S. 1102.

58. Damages to a hotel business by a libelous publication may be shown without alleging the specific name or giving the personal description of each guest who was driven away from the place or prevented from coming. Wright v. Coules [Cal. App.] 87 P. 809.

59, 60. Geringer v. Novak, 117 Ill. App. 160.

61. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008.

62. Rollins v. Louisville Times Co., 28 Ky. L. R. 1054, 90 S. W. 1081.

actionable quality of the publication.[64] The general rule that failure to demur to the declaration waives defects therein applies.[65] The insufficiency of an allegation of special damages may be raised by demurrer.[66] A demurrer to a complaint for defamation does not admit the truth of unintelligent innuendoes.[67] A statute permitting a plaintiff to state generally in his complaint that an alleged defamatory article was published concerning him makes the allegation one of fact which a demurrer necessarily admits.[68] While the general rule as to allegata et probata applies, immaterial variances in libel cases are not fatal,[69] and by statute in some states the same is made true as to slander cases.[70]

Bills of particulars.[71]—A bill of particulars as to elements of damage will not be granted in actions for defamation when no special damages are alleged.[72]

(§ 5) *C. Evidence.*[73]—The Louisiana supreme court holds that it is bound to take notice that defendants in libel have been before the court on a similar charge.[74] The legal presumption is that all persons are of good name and fame,[75] and that a good character is of value to everyone.[76] Malice is presumed from the publication of matter defamatory on its face,[77] and this presumption continues until the truth of the publication or other justification is shown,[78] and the burden of proving privilege is on defendant;[79] but when it is established that the communication was privileged, the burden is on the plaintiff to show malice,[80] and the burden of establishing malice to warrant exemplary damages is on the plaintiff.[81] The burden

63. Answer in justification of charge of unchastity held insufficient where the libel included charges also of murder and robbery. Nunnally v. New Yorker Zeitung Pub. & Printing Co., 101 N. Y. S. 1041.

64. Goldshorough v. Orem, 103 Md. 671, 64 A. 36. When the plaintiff's petition in an action for defamation shows the substantial truth of a publication concerning him, justification may be decided on demurrer. Rollins v. Louisville Times Co., 28 Ky. L. R. 1054, 90 S. W. 1081. Counts of declaration for libel of levy court commissioner held sufficient as against demurrer (Benson v. Dunn [Del. Super.] 63 A. 32), and others held demurrable (Id.).

65. After verdict in slander, when no demurrer has been interposed to the declaration, it is held in Massachusetts that it is only open to the defendant to argue that on all the evidence the words were spoken under such conditions as not to amount to the charge of a crime. Ward v. Merriam [Mass.] 78 N. E. 745.

66. Casale v. Calderone, 49 Misc. 555, 97 N. Y. S. 1102.

67. Lanston Monotype Mach. Co. v. Mergenthaler Linotype Co., 147 F. 871.

68. Complaint held sufficient under Code Civ. Proc. § 535. Townes v. New York Evening Journal Pub. Co., 109 App. Div. 852, 96 N. Y. S. 822.

69. Where an alleged defamation consisted in printing plaintiff's picture in connection with a defamatory article concerning another person and there were averments in the declaration connecting the article with the plaintiff, no variance was shown by the introduction of the article and picture in evidence. Ball v. The Tribune Co., 123 Ill. App. 235. Variance between allegation and proof of translation of publication in foreign language held immaterial. Lubrano v. Curzio, 27 R. I. 594, 65 A. 273.

70. Instruction in slander that finding one or more of the statements of the slanderous words charged in the complaint substantially proven would be sufficient held warranted under Rev. St. 1898, § 2669. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251.

71. See 6 C. L. 426.

72. Hanson Co. v. Collier, 101 N. Y. S. 690; Town Topics Pub. Co. v. Collier, 99 N. Y. S. 575.

73. See 6 C. L. 426.

74. Luzenberg v. O'Malley, 116 La. 699, 41 So. 41.

75, 76. Pier v. Speer [N. J. Err. & App.] 64 A. 161.

77. Abraham v. Baldwin [Fla.] 42 So. 591; Washington Times Co. v. Downey, 26 App. D. C. 258; Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. R. 861, 96 S. W. 551; Shelbley v. Ashton, 130 Iowa, 195, 106 N. W. 618; Sheibley v. Fales [Neb.] 106 N. W. 1032; Chambers v. Leiser [Wash.] 86 P. 627; Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966; Lee v. Crump [Ala.] 40 So. 609.

78. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636; Abraham v. Baldwin [Fla.] 42 So. 591.

79. Abraham v. Baldwin [Fla.] 42 So. 591.

80. Abraham v. Baldwin [Fla.] 42 So. 591; Chambers v. Leiser [Wash.] 86 P. 627; Ambrosius v. O'Farrell, 119 Ill. App. 265; Howarth v. Barlow, 113 App. Div. 510, 99 N. Y. S. 457; Vial v. Larson [Iowa] 109 N. W. 1007; German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008. The burden is on plaintiff to prove defendant's knowledge of the falsity of a charge made on an occasion of qualified privilege. Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348, 108 N. W. 96.

81. Carpenter v. New York Evening Pub. Co., 111 App. Div. 266, 97 N. Y. S. 478; Neafie v. Hoboken Printing & Pub. Co., 72 N. J. Law, 340, 62 A. 1129.

is on plaintiff to prove the correctness of the translation of a defamation uttered in a foreign language.[82] In slander the burden is on the plaintiff to prove by a preponderance of the evidence that defendant made some one or more of the so called defamatory accusations precisely as alleged.[83] As a general rule the burden is on defendant to show the truth of the alleged defamation or probable ground for believing it to be true,[84] but the proof need not be beyond a reasonable doubt in justification, though the alleged libel was a charge of crime.[85] Where a defamatory publication was made which is applicable as well to others as to plaintiff, the burden is on plaintiff to show its application to him.[86] Ordinarily, the plaintiff may show all the circumstances which give character to the defamation and the injury occasioned thereby.[87] Plaintiff's general reputation is in issue in suits for defamation,[88] and evidence touching his general reputation for integrity and moral worth prior to the date of the publication is admissible.[89] It is held, however, that he cannot prove his own reputation until it has been attacked.[90] His general reputation for truth and veracity may of course be shown for the purpose of impeachment.[91] Testimony of particular facts affecting the reputation of plaintiff as to the quality impugned by the defamation is ordinarily not admissible,[92] and the rule is the same when the publication was under a qualified privilege,[93] but is otherwise when the testimony is elicited by the party to whom it is unfavorable[94] or on cross-examination.[95] In any attempt to prove reputation in mitigation or partial denial of damages, the proof must be confined to reputation in respect to the fault or trait of character involved in the offense charged,[96] and confined to a period prior to the alleged slander.[97] Evidence of the financial standing of the defendant is admissible in actions for defamation as a basis for both compensatory and punitive damages.[98] In an action for slander the time of publication need not be exactly proved when laid under a videlicet.[99] A substantial agreement between the allegations and the proof of an alleged slander is all that is required to entitle plaintiff to recover.[1] The fact that a publication

82. Romano v. De Vito, 191 Mass. 457, 78 N. E. 105.

83. Comer v. McDonnell, 117 Ill. App. 450.

84. When there is that in the publication which furnishes a basis for reasonable inference that malice was back of it, the burden remains with the defendant to establish either its truth or probable ground for believing it true. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636.

85. Abraham v. Baldwin [Fla.] 42 So. 591. Where a felony other than perjury is imputed, proof of the truth of the charge in justification by a preponderance of the evidence is sufficient. Fleming v. Wallace [Tenn.] 91 S. W. 47.

86. Kenworthy v. Journal Co., 117 Mo. App. 327, 93 S. W. 882; Every Evening Printing Co. v. Butler [C. C. A.] 144 F. 916, afg. 140 F. 934.

87. Plaintiff held entitled to show that she had no parents living and was dependent on her own exertions. Washington Times Co. v. Downey, 26 App. D. C. 258. May show number of children he has (Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547), and the amount of property when he settled in the place of his residence (Id.).

88. Yager v. Bruce [Mo. App.] 93 S. W. 307.

89. Yager v. Bruce [Mo. App.] 93 S. W. 307. Evidence of plaintiff's general bad character held admissible. Pier v. Speer [N. J. Err. & App.] 64 A. 161; Corning v. Dollmeyer, 123 Ill. App. 188. In an action for defamation of an officer, evidence that the general reputation of the plaintiff is very high as an officer and a man, without extending to minuter details, is admissible. New York Evening Journal Pub. Co. v. Simon [C. C. A.] 147 F. 224.

90. Burkhart v. North American Co., 214 Pa. 39, 63 A. 410.

91. Corning v. Dollmeyer, 123 Ill. App. 188.

92. Yager v. Bruce [Mo. App.] 93 S. W. 307; Corning v. Dollmeyer, 123 Ill. App. 188; Earley v. Winn [Wis.] 109 N. W. 633; Pier v. Speer [N. J. Err. & App.] 64 A. 161.

93. Ambrosius v. O'Farrell, 119 Ill. App. 265.

94, 95. Yager v. Bruce [Mo. App.] 93 S. W. 307.

96. Earley v. Winn [Wis.] 109 N. W. 633. In action for slander in charging plaintiff with whipping her mother, evidence of plaintiff's general reputation for quarreling with and ill treating her mother is admissible. Id.

97. Earley v. Winn [Wis.] 109 N. W. 633.

98. Flaacke v. Stratford, 72 N. J. Law, 487, 64 A. 146; Geringer v. Novak, 117 Ill. App. 160.

99. Lee v. Crump [Ala.] 40 So. 609.

1. Patterson v. Frazer [Tex.] 94 S. W. 324, rvg. [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146; Yager v. Bruce [Mo. App.] 93 S. W. 307; Lee v. Crump [Ala.] 40 So. 609; Mil-

is made under a qualified privilege does not affect its admissibility.[2] Evidence of other defamations than those charged is not ordinarily admissible.[3] As a general rule, proof of the effect of the publication on others is admissible,[4] but their declarations out of court cannot be shown,[5] nor can their declarations of ill will towards plaintiff be shown.[6] Contrary to the general rule, witnesses may testify as to their understanding of slanderous words heard by them.[7] The application of the defamation to plaintiff may be shown.[8] Abandoned answers of defendant are admissible as admissions against interest.[9] Collateral evidence tending even in slight degree to establish the plea of justification is admissible[10] as well as that tending to show injury to plaintiff by the publication sued on.[11] When a defamatory petition has been published under a qualified privilege, the defendants in an action for the defamation may testify as to their belief in the facts recited therein,[12] and in a general way the grounds of their belief,[13] and also on whose instigation and request they signed it.[14] The rule which precludes evidence of the truth of the charge without a plea in justification has only a limited application when the alleged defamation has been published under a qualified privilege.[15] When plaintiff sues for a defamatory charge of adultery, evidence of repute of marriage, in the absence of any other evidence, is all that is required of plaintiff.[16] Pursuant to the general rule, one party may show the whole of a conversation of which the other has proved a part.[17] The rule that to prove statements by a witness contradictory to cross-examination the statements must be material is applicable in actions for defamation,[18] as is also the rule requiring a proper foundation to be laid for impeachment.[19] Where an article is libelous per se, defendant cannot show that his motives were pure.[20] Where a

ler v. Nuckolls, 77 Ark. 64, 91 S. W. 759; Comer v. McDonnell, 117 Ill. App. 450; Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601; Earley v. Winn [Wis.] 109 N. W. 633.

2. Ambrosius v. O'Farrell, 119 Ill. App. 265.

3. Where a complaint for slander charged the uttering of the slander in the presence of specified persons and divers other persons at divers times and places, evidence of a similar slander to one charged uttered on another occasion to a witness not specifically mentioned was inadmissible. Earley v. Winn [Wis.] 109 N. W. 633.

4. When the damages claimed for a defamation resulting in a dismissal from office are special as to the dismissal, the testimony of those who exercised the power of dismissal as to the motives which brought about their action is legitimate evidence. Potter v. Batt, 72 N. J. Law, 470, 63 A. 282.

5. Potter v. Batt, 72 N. J. Law, 470, 63 A. 282.

6. Yager v. Brnce [Mo. App.] 93 S. W. 307.

7. Proctor v. Pointer [Ga.] 56 S. E. 111.

8. Where a class is described in a defamation, evidence is admissible to show that it referred to a particular individual. Goldsborough v. Orem, 103 Md. 671, 64 A. 36. Where the defamatory words apply equally well to more persons than one, evidence may be given both of the cause and occasion of publication and of all the surrounding circumstances affecting the relation between the parties. Kenworthy v. Journal Co., 117 Mo. App. 327, 93 S. W. 882.

9. Overton v. White, 117 Mo. App. 576, 93 S. W. 363.

10. Plaintiff's affirmative action as legislative committeeman and his vote in favor of certain bills held admissible in favor of defendant under the plea of justification. Geringer v. Novak, 117 Ill. App. 160. Where plaintiff in an alleged libel was accused of being pecuniarily interested in contracts awarded by him as school director, bills rendered for goods supplied to a school in plaintiff's district by a firm of which plaintiff was a member were admissible in mitigation of damages and to show the truth of the publication. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473.

11. Where plaintiff charged that in publications prior to the one made the basis of his action defendant denounced another individual as a criminal politician and in the article sued on charged plaintiff with being his associate in crime, the prior publications were admissible. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

12, 13, 14, 15. Ambrosius v. O'Farrell, 119 Ill. App. 265.

16. Ward v. Merriam [Mass.] 78 N. E. 745.

17. Earley v. Winn [Wis.] 109 N. W. 633.

18. In slander for charging plaintiff with whipping her mother, statements of the mother to defendant before and after the alleged slander held immaterial. Earley v. Winn [Wis.] 109 N. W. 633.

19. In slander for charging plaintiff with whipping her mother, testimony of defendant as to statements made by the mother to him before and after the alleged slander held inadmissible. Earley v. Winn [Wis.] 109 N. W. 633.

20. Author of libel held not entitled to testify that he had no intention of defaming plaintiff. Berger v. Freeman Tribune Pub. Co. [Iowa] 109 N. W. 784.

libel does not on its own face purport to be derived from another, but is stated as of the writer's own knowledge, it is not admissible to show that it was copied or communicated.[21] When a privileged communication is sued on as defamatory, any evidence tending to show express malice is admissible in behalf of the plaintiff,[22] and any tending to show good faith on the part of defendant.[23] The relevancy of evidence must appear to render it admissible.[24] The rule excluding the conclusion of a witness is applicable on the question of damages for defamation.[25] In an action for slander, newspaper reports of the language used by defendant are inadmissible.[26] Refusal to entertain a compromise proposition renders admissible reiterations of the defamation made at the time.[27] The fact of repetition of a defamation has no tendency to show falsity or knowledge of falsity of the publication.[28] Correspondence to which plaintiff was not a party is inadmissible to contradict him as to the truth of an accusation.[29] As tending to show absence of malice, defendant may testify to what others told him of a transaction he had in mind in making the accusation,[30] but otherwise the ordinary rules as to hearsay[31] and current rumor[32] apply. Ordinarily, the rules for testing the sufficiency of evidence in civil actions apply.[33]

(§ 5) *D. Trial.*[34]—Where there are special pleas only, the right to open and close the evidence and argument remains with the plaintiff.[35] The meaning of words is for the court unless they may have either a harmless or a defamatory meaning, when it is for the jury to say which is carried and to determine their injurious

21. Berger v. Freeman Tribune Pub. Co. [Iowa] 109 N. W. 784.

22, 23. Vial v. Larson [Iowa] 109 N. W. 1007.

24. No connection being shown between an alleged slanderous communication as to the soundness of a bank and a withdrawal of funds by depositors, evidence relating to the withdrawal of funds was properly excluded. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008. In an action for slander in charging plaintiff with whipping her mother, evidence of high words and jangling being heard between them from 6 to 12 hours before the alleged whipping had no tendency to prove the whipping. Earley v. Winn [Wis.] 109 N. W. 633. On an issue as to whether plaintiff had a police record as charged in an alleged libelous article, testimony of police officers having knowledge of the record at the time charged and anterior thereto is competent (Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33), but testimony of such officers having no knowledge of the record except subsequent to the time charged is incompetent (Id.).

25. Plaintiff held not entitled to state, in answer to a question calling therefor, the amount of damages sustained. Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33.

26. Carpenter v. Ashley, 148 Cal. 422, 83 P. 444.

27. Yager v. Bruce [Mo. App.] 93 S. W. 307.

28. Schultz v. Guldenstein, 144 Mich. 636, 13 Det. Leg. N. 348, 108 N. W. 96.

29. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463.

30. In an action for defamation in charging plaintiff with being a thief, testimony of defendant is admissible to show that a certain person told him of a transaction in which plaintiff was alleged to have been guilty of larceny. Yager v. Bruce [Mo. App.] 93 S. W. 307.

31. In slander for charging plaintiff with whipping her mother, testimony of defendant as to what plaintiff's mother had said to him before and after the alleged slander was inadmissible. Earley v. Winn [Wis.] 109 N. W. 633. In slander for charging plaintiff with whipping her mother, testimony of defendant as to statements of the mother to him tending to show that she was subject to ill treatment at the hands of plaintiff held inadmissible to show the truth of the charge. Id. The declarations and particulars of conversations between witnesses and third persons not produced as witnesses concerning their having seen the alleged libelous publication and the effect it produced in their minds is hearsay and inadmissible when objected to on that ground. Salem News Pub. Co. v. Caliga [C. C. A.] 144 F. 965. Publication cannot be shown by hearsay. Corning v. Dollmeyer, 123 Ill. App. 188.

32. Where defendant was charged with impugning the chastity of plaintiff, he was not entitled to show that current rumor prior to the publication was unfavorable to plaintiff's chastity. Overton v. White, 117 Mo. App. 576, 93 S. W. 363.

33. Evidence held insufficient to show theft of wrench alleged in justification of imputation that plaintiff was a thief. Yager v. Bruce [Mo. App.] 93 S. W. 307. Evidence held not to warrant a ruling that alleged libelous statements were, as matter of law, substantially proved. Monaghan v. Globe Newspaper Co., 190 Mass. 394, 77 N. E. 476. Evidence held insufficient to show publication of a letter at a certain place other than by plaintiff himself. Konkle v. Haven, 144 Mich. 667, 13 Det. Leg. N. 369, 108 N. W. 98.

34. See 6 C. L. 427.

35. Geringer v. Novak, 117 Ill. App. 160.

effect.[36] Whether words are capable of use in the sense ascribed by innuendo is for the court, but whether in fact so used is for the jury.[37] Whether a publication is privileged is generally a question of law for the court, but when all the essential facts and circumstances are not conceded, the existence or non-existence of privilege should be submitted to the jury,[38] and in some jurisdictions the publication itself, it is held, may present a jury question to determine whether it is privileged.[39]

36. In the absence of extrinsic evidence giving to alleged defamatory language a meaning different from that it bears on its face, its meaning is for the court. Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33. Unless words on which a charge of slander is based are plain and unambiguous, the meaning intended by the defendant and the understanding of those hearing the charge should be submitted to the jury. Battles v. Tyson [Neb.] 110 N. W. 299. The meaning of the alleged slanderous words: "Why don't you take that damned crape off your hat? You didn't think anything of your brother. You are a robber. You robbed widows, and would steal the gold from a dead man's teeth," held for the jury. Flaacke v. Stratford, 72 N. J. Law, 487, 64 A. 146. Whatever effect the introduction of a defamatory utterance with a phrase showing it to be opinionative merely has as to its definiteness and injurious effect is a question for the jury. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966. Whether it was libelous to publish of plaintiff that he was ally and coworker with another in political matters held a question for the jury. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257. Whether plaintiff was entitled to damages for a libelous publication affecting her in her occupation and calling as a laundress held a question for the jury. Washington Times Co. v. Downey, 26 App. D. C. 258. Where defendant was the author of a false charge which led a surety company to withdraw from a bond to a prospective employer of plaintiff, and thus to deprive him of his position, the jury were justified in finding that the severance of relations between plaintiff and his prospective employer was the immediate result of the false charge. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463. Whether witnesses to a slander charging plaintiff with the death of a child at whose birth she officiated as obstetrician knew at the time that the child was born dead held a question for the jury. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251.

37. Berger v. Freeman Tribune Pub. Co. [Iowa] 109 N. W. 784. Certain words held incapable of application to plaintiff corporation by innuendo. Memphis Tel. Co. v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 904. Certain words held capable of the construction that plaintiff was dishonest and acted fraudulently in his business transactions immediately prior to his adjudication of bankruptcy. Richardson v. Thorpe, 73 N. H. 532, 63 A. 580.

38. Abraham v. Baldwin [Fla.] 42 So. 591; Ambrosius v. O'Farrell, 119 Ill. App. 265; Carpenter v. Ashley, 148 Cal. 422, 83 P. 444; Shipp v. Patton, 29 Ky. L. R. 480, 93 S. W. 1033. Whether defamatory utterance was privileged in being made to employer of plaintiff in objecting to plaintiff working on defendant's premises held a question for the jury. Abraham v. Baldwin [Fla.] 42 So. 591. Whether complaint of defendant to plaintiff's superior officer of official misconduct by plaintiff as city dockmaster was privileged held a question for the jury. Fleming v. Brauer, 110 App. Div. 876, 96 N. Y. S. 594. Whether a communication of information concerning the insolvency of a bank made by plaintiff to his business associates who were depositors was privileged held a question for the jury. German Sav. Bank v. Fritz [Iowa] 109 N. W. 1008.

Truth or falsity: Defendant held not entitled to ruling that truth of charge that plaintiff had been arrested on larceny charge was substantially proved. Monaghan v. Globe Newspaper Co., 190 Mass. 394, 77 N. E. 476. Charge of neglect of official duties as city dockmaster, criminal acts of oppression, and conspiracy for the criminal extortion of money. Fleming v. Brauer, 110 App. Div. 876, 96 N. Y. S. 594. Whether letter of plaintiff to defendant preceding the publication of its alleged libelous answer or the answer spoke the truth. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

Actual malice. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463; Kloths v. Hess, 126 Wis. 587, 106 N. W. 251; Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636; Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601; Ambrosius v. O'Farrell, 119 Ill. App. 265. When a defamatory communication contains expressions which exceed the limits of privilege, such expressions are evidence of malice warranting the submission of the case to the jury. Mulderig v. Wilkes-Barre Times [Pa.] 64 A. 636. When it is the jury's province to find the existence or non-existence of privilege and they find the alleged defamation was privileged, it is then their duty to ascertain whether the publication was malicious. Chambers v. Leiser [Wash.] 86 P. 627. Whether report of insurance company to surety of agent that the agent was short in his accounts was malicious held a question for the jury. Sunley v. Metropolitan Life Ins. Co. [Iowa] 109 N. W. 463. Whether a charge of child murder against a woman officiating at the birth as obstetrician was maliciously uttered held a question for the jury. Kloths v. Hess, 126 Wis. 587, 106 N. W. 251. Whether defendant, in an action for slander in making a charge of crime against plaintiff in the presence of a police officer for the purpose of procuring plaintiff's arrest and imprisonment on the charge, was acting in good faith or in part from malice held a question for the jury. Robinson v. Van Auken, 190 Mass. 161, 76 N. E. 601. Where defamatory language is uttered while the publisher is enjoying a qualified privilege, evidence in an action therefor tending to show express malice renders the

Whether words that are not on their face mere criticism are privileged as fair newspaper comment is for the jury and not a question of law.[40] The construction of doubtful collateral documentary evidence bearing on the truth of the charge is for the jury.[41] When a plaintiff not named is identified by imprecise description, it is proper to submit his identity generally to the jury,[42] but it is good practice to fully explain the law in that respect.[43] It is error to assume the defamatory character of a doubtful publication in charging the jury[44] or to give conflicting instructions,[45] or to exclude competent evidence from the consideration of the jury therein,[46] or to ignore the case made by the pleadings,[47] though a failure to request an instruction to cure an omission of the latter character may be fatal to the claim of error.[48] The general rules of construction apply to instructions in actions for defamation.[49] Where the publication of defamatory matter which is actionable per se is admitted by failure to deny, the court should so charge.[50] The jury are pre-

question of the actionable quality of the language one for the jury. Yager v. Bruce [Mo. App.] 93 S. W. 307.

39. Criticism of officer of corporation in letter from one stockholder to another. Chambers v. Leiser [Wash.] 86 P. 627.

40. Publication that a corrupt candidate was being supported by plaintiff and others using reprehensible if not illegal means Dow v. Long, 190 Mass. 138, 76 N. E. 667.

41. In libel on charge of association with alleged criminal politician and being a liar and trickster, whether political agreement to which plaintiff was a party was in fact corrupt held a question for the jury. Merlwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

42. Charge held appropriate. Burkhart v. North American Co., 214 Pa. 39, 63 A. 410. Whether the allegations of a declaration that the words of a defamatory article were intended to apply to the plaintiff as vestryman of a church where the vestry as a class were referred to therein held a question for the jury. Goldsborough v. Orem, 103 Md. 671, 64 A. 36. When defamatory language points to no person in particular, whether or not it applies to the plaintiff is a question of fact. Id. Whether plaintiff was the person meant as charged in an innuendo held a question for the jury. Every Evening Printing Co. v. Butler [C. C. A.] 144 F. 916, afg. 140 F. 934. In the face of direct evidence of an admission by defendant that a publication referred to plaintiff, the case cannot be taken from the jury on that issue. Lubrano v. Curzio, 27 R. I. 594, 65 A. 273. Whether an article concerning a person of a different given name, but having the surname of plaintiff and in connection with which plaintiff's picture was published as the person mentioned, referred to the plaintiff held a question for the jury. Ball v. The Tribune Co., 123 Ill. App. 235.

43. Burkhart v. North American Co., 214 Pa. 39, 63 A. 410. Charge held adequate when read as a whole. Id.

44. Defendant is not entitled to a ruling that it is enough to prove that the things written were in substance true when the evidence is insufficient as matter of law to prove such statements to have been substantially true. Monaghan v. Globe Newspaper Co., 190 Mass. 394, 77 N. E. 476.

45. A charge that the publication was undisputed, that it meant what plaintiff alleged it to mean and that "all other matters alleged in plaintiff's declaration are true," was in conflict with an instruction that the jury were the sole judges of the fact whether the words of the alleged libel bore the meaning attributed to them in the innuendoes. Geringer v. Novak, 117 Ill. App. 160.

46. Geringer v. Novak, 117 Ill. App. 160.

47. An instruction stating the contentions of the parties which averred that defendant claimed the alleged libelous articles were true and that the same constituted facts and as such are privileged, followed by an instruction that the articles were not privileged, tended to deprive defendant of the full benefit of the allegation of the truth of the matter published. Harriman v. New Nonpareil Co. [Iowa] 110 N. W. 33. Notwithstanding the plea of the general issue was withdrawn, an instruction that the publication was undisputed, that it meant what plaintiff alleged it to mean, and that "all other matters alleged in plaintiff's declaration are true," was too broad where defendant had on file a plea of justification declaring the alleged libel to be true. Geringer v. Novak, 117 Ill. App. 160. Where the publication of a libel actionable per se is admitted and justification pleaded, an instruction that the burden is on plaintiff to establish the allegations of his petition is unwarranted. Sheibley v. Fales [Neb.] 106 N. W. 1032.

48. When defendant is not satisfied with a general instruction regarding compensatory and punitive damages because it leaves out of view the plea in mitigation, he should request an instruction calling the jury's attention to his plea, and if he does not the general instruction ignoring the plea will not constitute error. Yager v. Bruce [Mo. App.] 93 S. W. 307.

49. In an action for defamation, an instruction that from a charge of criminal conduct the law imports liability means no more than an accountability to an action to determine liability and is not erroneous. Abraham v. Baldwin [Fla.] 42 So. 591. Instruction on compensatory damages held not erroneous as authorizing assessment of damages for portion of accusation which might be found to be true. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

sumed to have followed the court's instructions in returning their verdict.[51] A verdict for defendant in slander is seldom set aside.[52]

§ 6. *Criminal libel and slander. The offense.*[53]—The malicious publication of a libelous article is a common-law crime and punishable as a misdemeanor.[54] A statute defining criminal slander and fixing the punishment therefor does not affect previous statutes defining criminal libel and fixing the punishment.[55] A private corporation may be the subject of a criminal libel.[56] By statute in some states, persons delivering to papers untrue statements for publication are punishable criminally.[57] To constitute a criminal libel the language published must injure, or at least tend to injure, the reputation in which a man is held by his fellow men.[58] It is as much a crime to cause to be printed as to print a libel.[59] Malice and falsity are generally held to be essential elements.[60] A charge of one crime cannot be justified hy proof of guilt of another distinct crime.[61] Malice in criminal libel may be inferred from the character of the accusation and the absence of probable or reasonable grounds for making it.[62] That a libelous article is published by the pastor

50. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473.

51. Verdict held not to include punitive damages. Meriwether v. Publishers: George Knapp & Co., 120 Mo. App. 354, 97 S. W. 257.

52. To warrant setting aside a verdict for defendant in slander, the evidence must be so clearly overwhelming that the court can see injustice has been done and that the verdict is due to passion or prejudice. Fleming v. Brauer, 110 App. Div. 876, 96 N. Y. S. 594.

53. See 6 C. L. 429.

54. Defendant in an action for libel held not required to discover authorship of alleged libel or to produce the original from which publication was made because of its tendency to incriminate him. Noyes v. Thorpe, 73 N. H. 481, 62 A. 787.

55. Act No. 107, p. 161, § 4 of 1902, and Rev. St. §§ 804, 982, construed. State v. Kiernan, 116 La. 741, 41 So. 55.

56. The word "person" in Gen. St. 1901, § 2271, held to include a corporation. State v. Williams [Kan.] 85 P. 938.

57. Indictment held insufficient under P. L. 1898, p. 476. State v. Renner [N. J. Law] 64 A. 988.

58. State v. O'Hagan [N. J. Law] 63 A. 95. To publish of a corporation that it made an authorized change in its contract with one of its patrons is not libelous per se. State v. Williams [Kan.] 85 P. 938. To publish of a man that he has done that which is legal and proper without ironical innuendo does not, under ordinary circumstances, tend to injure his reputation, as that plaintiff, a baker, refused to recognize the Bakers' Union or use the label and advising against patronizing him. State v. O'Hagan [N. J. Law] 63 A. 95. A charge of breach of trust amounting to statutory embezzlement makes out a criminal defamation. A publication that a third person had prosecutor collect some money and after collecting it prosecutor failed to turn it over to her, but finally admitted that he had used it and would give his notes for the same, charges the commission of a crime by prosecutor, under B. & C. Comp. § 1805, making such act embezzlement and punishable as larceny. State v. Conklin, 47 Or. 509, 84 P. 482.

59. Indictment charging in disjunctive held defective. State v. Singer, 101 Me. 299, 64 A. 586.

60. Under Rev. St. 1899, § 2262. State v. Collins, 117 Mo. App. 658, 93 S. W. 325. Where defendant was charged with falsely imputing want of chastity to a female in stating that she had been caught using a pump or syringe for the purpose of getting away with a child, his guilt depended on whether he had falsely and maliciously spoken words which imputed to the prosecuting witness the act of fornication when she was in fact innocent of the commission of that act within a period to which the language used must have referred. Id. To constitute the offense of criminal defamation the accusation must have been false and malicious. Cornelius v. State [Ala.] 40 So. 670. Falsity and publication without justification or excuse warrant an inference of malice. Stutts v. State [Fla.] 42 So. 51. Under a statute requiring a defamation to be false and malicious to render it criminal, the state is not required to show by direct proof that defendant entertained ill will or hatred towards the injured person or a purpose to injure, but malice may be inferred from the character of the accusation and the absence of probable or reasonable grounds for making it. Cornelius v. State [Ala.] 40 So. 670. Proof of the falsity of the publication alleged to be criminally libelous is not essential to show malice. State v. Lomack, 130 Iowa, 79, 106 N. W. 386. Where defendant was charged with falsely imputing want of chastity to a female in stating that she had been caught using a pump or syringe for the purpose of getting away with a child, testimony tending to show that such female had had illicit intercourse within the time during which defendant's alleged words imputed the act to her was to be considered by the jury in determining whether or not the imputation of lewdness was true, not whether defendant's words were true in their full meaning. State v. Collins, 117 Mo. App. 658, 93 S. W. 325. Where defendant published of prosecutor that he was proven guilty as corespondent in defendant's divorce case and had caused the separation of two men from their wives, proof of prosecutor's

of a church on the authority of the official board of his church does not render the publication privileged.[63] It is no justification for criminal libel that the person libeled has said unkind things of defendant.[64] In the absence of statute, an imputation of unchastity to a female may be a criminal offense,[65] and it is made a criminal offense by statute in some states;[66] and it is no defense under the statutes that the language was used at a meeting when defendant was discussing with the father of prosecuting witness other charges against her character,[67] nor that he gave the name of his informant.[68] The imputation of unchasity must be direct.[69] Such imputations are published when made in the presence of one person without repetition to a third person.[70]

The prosecution.[71]—When a publication is defamatory only because of special conditions, the conditions must be alleged in an indictment therefor by way of prefatory averment.[72] In those jurisdictions where falsity is not regarded as an essential element, an allegation of falsity will be treated as surplusage and need not be proved.[73] An indictment for criminal libel need not expressly aver that it was published of and concerning the prosecutor, but it is sufficient to allege that the article was intended to and did charge the prosecutor with crime.[74] An innuendo cannot in criminal, any more than in civil, proceedings, extend the meaning of language.[75] Mere inaccuracies in language charging the crime will not vitiate an indictment,[76] and is unnecessary when the publication is per se defamatory.[77] The indictment must not charge the commission of two or more separate crimes in the disjunctive.[78] In Oregon the sufficiency of an indictment or information must be raised by demurrer or plea.[79] Any proof tending to mitigate the offense or punishment is admissible.[80] On a prosecution for libel all portions of the publication which

adultery with defendant's wife and his causing the separation of another woman from her husband was sufficient to justify the publication. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

61. Proof of guilt of subornation of perjury is not admissible in justification of an alleged libel charging a person with having committed perjury, since they are distinct offenses under Code, §§ 4872, 4873. Id.

62, 63, 64. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

65. State v. Clifford, 58 W. Va. 681, 52 S. E. 864.

66. Rev. St. 1899, § 2258. State v. Collins, 117 Mo. App. 658, 93 S. W. 325.

67, 68. State v. Collins, 117 Mo. App. 658, 93 S. W. 325.

69. For defendant to say of a female that he had had a big time with her does not render him guilty of criminal slander as imputing carnal intercourse. Gooing v. State [Tex. Cr. App.] 98 S. W. 857.

70. Rev. St. 1892, § 2419, construed. Stutts v. State [Fla.] 42 So. 51.

71. See 6 C. L. 429.

72. Indictment for alleged defamation of plaintiff, a baker, who was charged with having refused to recognize the Bakers' Union or use the label held insufficient. State v. O'Hagan [N. J. Law] 63 A. 95. When a publication does not necessarily on the face of it import a libel, it is requisite to connect it with certain facts by way of inducement in order that so explained it may amount to libel. State v. Renner [N. J. Law] 64 A. 988.

73, 74. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

75. An innuendo that defendant, by saying of a female that he had had a big time with her, meant that he had had improper communication with her person in the nature of carnal intercourse is unwarranted. Gooing v. State [Tex. Cr. App.] 98 S. W. 851. See ante, § 5B.

76. An indictment for malicious imputation of unchastity of a woman using the word "saying" for "speaking" followed by the clause "in the presence of and in the hearing of" a person named is not thereby rendered defective. Stutts v. State [Fla.] 42 So. 51.

77. An indictment for publishing of a female that she had had a young one before she was married requires no innuendo to show the imputation of unchastity. Cornelius v. State [Ala.] 40 So. 670. Innuendoes in an indictment for defamation imputing want of chastity in a woman may be disregarded as surplusage. State v. Clifford, 58 W. Va. 681, 52 S. E. 864.

78. Charging in the disjunctive in an indictment for criminal libel that defendant printed or caused to be printed the alleged defamation is a fatal defect. State v. Singer, 101 Me. 299, 64 A. 586.

79. Motion to strike out innuendoes in information for criminal libel held not proper mode of raising objection under B. & C. Comp. § 1355, providing that the only pleading by defendant is either a demurrer or plea. State v. Conklin, 47 Or. 509, 84 P. 482.

80. In a criminal action for defamation,

in any way relate to the subject-matter of the portion or portions alleged to be libelous should be introduced in evidence by the state in proving its case in connection with the portion alleged to be libelous,[81] but where any portion is on a different subject, and in no way qualifies or explains the portion alleged to be libelous, it is within the discretion of the trial court to exclude such portion.[82] Collateral publications must be relevant to warrant their admission.[83] Defendant is entitled to show the basis for making the charge.[84] A proper foundation must be laid to admit evidence in justification,[85] nor can justification be shown by threats long anterior to the publication.[86] When the alleged defamatory matter is unambiguous, it is the duty of the court to interpret its legal effect.[87] The questions whether a publication was true and published with good motives and for justifiable ends are generally for the jury.[88] Where the elements of a crime are charged, an instruction is not erroneous which names a crime of which they are constituents,[89] but instructions must not ignore case made by the pleadings and evidence.[90]

§ 7. *Jactitation or slander of title.*—The suit in jactitation is a form of the action in revendication.[91] A mere incidental charge of slander of title does not suffice to make a suit one in jactitation.[92] Defendant is not entitled to oyer of plaintiff's title.[93] Joint owners may join in a jactitation suit.[94] When involving property held in severalty by one of the plaintiffs, it cannot be engrafted by supplemental petition on a suit in jactitation involving property held in indivision by several plaintiffs.[95] When a suit in jactitation is against a succession, it need not be brought before the court in which the succession is pending, but may be brought in the parish where the property is situated,[96] but when brought against a succession in the court of another parish than that where the succession is pending, a suit in damages cannot be coupled with it.[97]

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where the punishment is graduated according to the enormity of the offense, defendant is entitled to show that he was merely repeating what others had said. Cornelius v. State [Ala.] 40 So. 670.

81, 82. State v. Williams [Kan.] 85 P. 938.

83. Where defendant on a prosecution for criminal libel denied having in a sermon made certain statements attributed to him by prosecutor, it was proper to refuse to permit him to testify regarding other portions of the sermon. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

84. Where defendant charged in an alleged libelous publication that prosecutor would have been indicted for perjury but for certain things, he should have been permitted after having testified that he had presented the matter to the grand jury and caused other witnesses to go before that body, to state who the others were. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

85. Defendant on a prosecution for criminal libel cannot show that the alleged libel was published in reply to articles which he believed had been written by prosecutor when the prosecutor has not been shown to have had anything to do with the articles in question. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

86. On a prosecution for criminal libel, evidence tending to show the state of feeling on the part of the person libeled against the defendant the year previous to the publication is inadmissible. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

87. State v. Conklin, 47 Or. 509, 84 P. 482.

88. Whether obscene publication imputing, among other calumnious things, want of chastity to a woman was true and published with good motives and for justifiable ends held a question for the jury on a prosecution for criminal libel. State v. Clifford, 58 W. Va. 681, 52 S. E. 864.

89. A libelous publication charging prosecutor with breaking and entering, contrary to the statutes, warrants an instruction that defendant had charged the prosecutor with burglary. State v. Lomack, 130 Iowa, 79, 106 N. W. 386.

90. Where an alleged criminal libel charged no more than a rightful change in a contract between prosecutor and a third person, an instruction wholly on the theory that the change was wrongful and fraudulent was erroneous. State v. Williams [Kan.] 85 P. 938.

91. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153.

92. Where plaintiff in suing for trespass and seeking to enjoin further trespasses on land of which he was in possession incidentally alleged that defendant, by claiming a right to go on the land, had wrongfully and maliciously slandered plaintiff's title, the ac-

LICENSES.

§ 1. Definition and Nature (734).
§ 2. Power to Require and Validity of Statutes (735).
§ 3. Issuance and Revocation (746).
§ 4. Interpretation of Statutes and Ordinances and Persons Subject (747).
§ 5. Assessment and Recovery of License Fees; Prosecutions for Failure to Pay (750).
§ 6. Effect of Failure to Obtain (752).
§ 7. Disposition of License Moneys (752).

§ 1. *Definition and nature.*[98]—The distinction between a privilege tax imposed for revenue and an ordinary tax is that the former involves a contractual obligation while the latter does not,[99] and the same distinction obtains between such a privilege tax and a license fee exacted under the police power,[1] and there is no difference, as regards the contractual basis of a privilege revenue tax, between exactions from foreign corporations and those from domestic corporations.[2] This distinction[3] is important not only as bearing upon the validity of the taxing statute[4] but also in de-

tion was not thereby made one of jactitation or slander of title. Ramos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898.

93, 94, 95, 96, 97. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153.

98. See 6 C. L. 436.

99, 1, 2. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

3. Note: "There is some confusion in judicial expressions as to whether an ordinary tax is a debt. * * * For example, in Warden v. Fond du Lac County Sup'rs, 14 Wis. 618-620; Peters v. Meyers, 22 Wis. 602; March v. Board of Sup'rs, 42 Wis. 502-509; Flanders v. Merrimack, 48 Wis. 567-572, 4 N. W. 74; State v. Pors, 107 Wis. 420-425, 83 N. W. 706, 51 L. R. A. 917—an ordinary tax is in each instance spoken of as a debt, the precise nature of the liability however not being involved. In Re Assignment of Riddell, 93 Wis. 564, 67 N. W. 1135, such question was directly involved and the conclusion was that such taxes are not debts in the ordinary sense, Cooley on Taxation and other authorities being cited, which hold that they do not involve any contractual element. Again at one time in Iowa the court was inclined to treat such taxes as debts, and to hold that ordinary remedies were usable to collect them. During such period they will be found spoken of as debts, though there was not entire harmony, by any means, as to whether they were collectible as ordinary contractual obligations, nor was there any definite decision to that effect. City of Dubuque v. Illinois Cent. R. Co., 39 Iowa, 56; City of Burlington v. Burlington & M. R. Co., 41 Iowa, 134. Later that idea was criticised and still later entirely discarded. Marshall County v. Knoll, 102 Iowa, 573, 69 N. W. 1146, 71 N. W. 571; Crawford County v. Laub, 110 Iowa, 355-357, 81 N. W. 590; Plymouth County v. Moore, 114 Iowa, 700-701, 87 N. W. 662. All text writers and judicial authorities substantially agree that the distinguishing feature between a debt and a tax, in the ordinary sense, is that in case of the former there is express or implied promise to pay, enforceable by ordinary remedies, and in case of the latter, such element does not exist and such remedies are ordinarily not applicable. City of Carondelet v. Picot, 38 Mo. 125; Pierce v. Boston, 3 Met. [Mass.] 520; Camden v. Allen, 26 N. J. Law, 398; State v. Synder, 139 Mo. 549-553, 41 S. W. 216; Blevins v. Smith, 104 Mo. 583-595, 16 S. W. 213, 13 L. R. A. 441; City of Augusta v. North, 57 Me. 392, 2 Am. Rep. 55; Shaw v. Peckett, 26 Vt. 482; Loeber v. Leininger, 175 Ill. 484, 51 N. E. 703; Mechanics' & Traders' Bank v. Debolt, 1 Ohio St. 591; Danforth v. McCook Co., 11 S. D. 258, 76 N. W. 940, 74 Am. St. Rep. 808; Hibbard v. Clark, 56 N. H. 155, 22 Am. Rep. 442; State of Georgia v. Railroad, 70 Ga. 11; Burroughs on Taxation, 253; Blackwell on Tax Titles, 205; 1 Desty, § 6. * * * It has many times been held that a law exempting property from taxation coupled with an obligation to contribute to the public funds other than by taxation in the ordinary sense, direct taxation of property, in consideration of some privilege granted by the state within its power to grant, refuse or prohibit, is valid and creates a contract between the owner of the property and the state. Louisville City Ry. Co. v. Louisville, 4 Bush [Ky.] 478; City of Newport v. So. Covington & Cincinnati R. Co., 89 Ky. 29, 11 S. W. 954; Pac. R. R. v. McGuire, 20 Wall. [U. S.] 36, 22 Law. Ed. 282; State v. Miller, 30 N. J. Law, 368, 86 Am. Dec. 188; Mobile & Ohio R. R. v. Tenn., 153 U. S. 486, 38 Law. Ed. 793; Wilmington, etc., R. R. v. Alsbrook, 146 U. S. 279, 36 Law. Ed. 972; Mobile & Ohio R. R. v. Moseley, 52 Miss. 127; State Board v. Morris, etc., R. R., 49 N. J. Law, 193, 7 A. 826; Dodge v. Woolsey, 18 How. [U. S.] 331, 15 Law. Ed. 401; State v. Miller, 30 N. J. Law, 368, 86 Am. Dec. 188; State v. Butler, 86 Tenn. 614, 8 S. W. 586; Detroit St. R. Co. v. Guthard, 51 Mich. 180, 16 N. W. 328. No constitutional provision on the subject of taxation of property is involved in such a law except that feature permitting exemptions from taxation. In the very latest expression of the Federal supreme court on this subject (Powers v. Detroit, etc., R. Co., 201 U. S. 543, 50 Law. Ed. 860), the law then under consideration characterized the exaction as a tax and so it was called over and over again in the opinion by Mr. Justice Brewer. But it was held that the obligation upon which it was based was contractual and the court treated the law as not dealing with taxes in the ordinary sense."—See State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

4. See post, § 2, Power to Require and Validity of Statutes.

terminiñg the liability for the penalty prescribed for nonpayment of the tax.[5] Exemptions from property taxation are not applicable to license taxes.[6] A municipal occupation license is not a franchise.[7] A theatre license does not place the proprietor under any obligation to keep the theatre open,[8] and the license of a ticket speculator, so far as it has any validity, simply authorizes him to conduct his business on the sidewalk,[9] and neither of such licenses adds to or takes from the rights of the parties to the contract evidenced by a theatre ticket.[10]

Where the license fee is apportioned to earnings or property as shown by a return made by the licensee, and provision is made for contesting the truth of such return, the fee cannot be changed after having been fixed,[11] but where the duties of the licensing officers in regard to the approval of the return are purely ministerial and no provision is made for contesting the return, the licensee's obligation is not discharged by payment of a fee based upon an erroneous return.[12]

Licenses are granted subject to the criminal laws,[13] but an occupation or act otherwise illegal may be legalized by license.[14] A municipal corporation, however, cannot, without express authority, legally license a public nuisance.[15]

§ 2. *Power to require and validity of statutes.*[16]—Any business that endangers the public morals, safety, or welfare may be subjected to regulation and license under the police power of the state,[17] but occupations relating only remotely to the public health and safety do not come within this rule,[18] and there is some conflict as to what matters do so relate to the public health and safety as to be subject to such regulation.[19] The usual rules as to the title[20] and as to the separability of constitu-

5. See post, § 5, Assessment and Recovery of License Fees; Prosecution for Failure to Pay.

6. Code, § 1304, exempting property of charitable institutions from taxation held not applicable to license taxes. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153. Code 1887, § 488, Code 1904, p. 250, exempting lessee of state property from taxation, held not to exempt lessee of ferry from license tax imposed by city. Norfolk, etc., R. Co. v. Norfolk, 105 Va. 139, 52 S. E. 851.

7. Within requirements as to manner of enacting ordinances granting franchises. Shugars v. Hamilton, 29 Ky. L. R. 127, 92 S. W. 564. See post, § 2, Power to Require and Validity of Statutes.

8, 9. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20.

10. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20. See Licenses to Enter on Land, 6 C. L. 449.

11. Act 1898, No. 171, p. 417, § 19, provides method of contesting truth of affidavit on which license tax is based, and if no such contest is made additional taxes cannot thereafter be recovered on ground of erroneous affidavits. State v. New Orleans Chess, Checkers & Whist Club, 116 La. 46, 40 So. 526.

12. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

13. License to run slot machine not exempt from operation of law against doing business on Sunday. Cain v. Daly, 74 S. C. 480, 55 S. E. 110.

14. Dealing in cotton futures being expressly licensed by the legislature, Civ. Code 1895, § 3668, relating to gaming contracts, is inapplicable thereto, regardless of whether such dealing is gaming or not. Miller & Co. v. Shropshire, 124 Ga. 829, 53 S. E. 335. Seems that no license can be granted to establish a depot or agency for sale of beer, by wholesale or otherwise, in **local option** community. See Hager v. Jung Brewing Co., 29 Ky. L. R. 176, 92 S. W. 573.

15. Obstruction of streets by movable store. Spencer v. Mahon [S. C.] 55 S. E. 321.

16. See 6 C. L. 437.

17. State v. Cohen, 73 N. H. 543, 63 A. 928. It is within the legislative discretion to place such restrictions upon the use of any property or the conduct of any business as may reasonably be necessary for the public comfort, safety, or health. Plumas County v. Wheeler [Cal.] 87 P. 909.

18. State v. Smith, 42 Wash. 237, 84 P. 851.

19. Laws 1905, p. 130, c. 66, requiring licensing of **plumbers** and examination by board of examiners, held contrary to Const. art. 1, §§ 3, 12, and U. S. Const. Amend. 14, § 1. State v. Smith, 42 Wash. 237, 84 P. 851. Laws 1897, p. 236, c. 163, providing for creation of examining board of plumbers and requiring plumbers to obtain license from such board, held within police power. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774. **Herding and pasturing sheep** held subject to police regulation. Plumas County v. Wheeler [Cal.] 87 P. 909. **Motor vehicles** held subject. Unwen v. State [N. J. Law] 64 A. 163. **Hawking and peddling** held subject. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853. **Dentistry** held subject. Kettles v. People, 221 Ill. 221, 77 N. E. 472. Dealing in **junk** held subject. City of New York v. Vandewater, 113 App. Div. 456, 99 N. Y. S. 306; State v. Cohen, 73 N. H. 543, 63 A. 928. Under authority to pass regulations for promotion of health and prevention of disease,

tional from unconstitutional provisions[21] apply to regulating and licensing statutes, but a statute or ordinance imposing an occupation or privilege tax need not conform to the constitutional[22] or other limitations[23] applicable to property taxes in a constitutional sense, and though a privilege tax is referable to the taxing power in a broad sense, it is not a tax in a constitutional sense[24] although imposed in lieu of the constitutional tax.[25] The Fourteenth Amendment does not prohibit the assessment of

dealing in second-hand bottles is not necessarily subject to city's license power. City of Chicago v. Reinschreiber, 121 Ill. App. 114.

Note: The following matters have been **held subject to regulation:** Practice of medicine and surgery, Stats v. Carey, 4 Wash. 424, 30 P. 729. Practice of dentistry, State v. Dental Examiners, 31 Wash. 492, 72 P. 110. Profession of barber, In re Thompson, 36 Wash. 377, 78 P. 899. Plumbing, Singer v. State, 72 Md. 464, 19 A. 1044, 8 L. R. A. 551; State v. Gardner, 58 Ohio, 599, 51 N. E. 136, 65 Am. St. Rep. 785, 41 L. R. A. 689; State v. Benzenberg [Wis.] 76 N. W. 345; State v. Justus, 90 Minn. 474, 97 N. W. 124; People v. Warden, 144 N. Y. 529, 39 N. E. 686, 27 L. R. A. 718. Bakers and confectioners, People v. Lochner, 177 N. Y. 145, 69 N. E. 373, 101 Am. St. Rep. 773. The following matters have been held **not subject to regulation** under police power. Plumbing. State v. Smith, 42 Wash. 237, 84 P. 851, 5 L. R. A. (N. S.) 674. Horseshoeing. In re Aubrey, 36 Wash. 308, 78 P. 900, 104 Am. St. Rep. 952. Bakeries and confectioneries as to working hours of employes. Lochner v. New York, 198 U. S. 45, 49 Law. Ed. 937.—From State v. Smith [Wash.] 84 P. 851.

20. Act May 18, 1893, P. L. 94, relating to examination, licensing and regulation of practice of medicine and surgery, as expressed in its title, held not unconstitutional because title does not show that practicing without license is made a misdemeanor. Commonwealth v. Clymer, 30 Pa. Super. Ct. 61. There is no such relationship between occupation licenses in addition to ad valorem taxes and such licenses in lieu of such taxes as to lead the ordinary mind to conclude that a statute whose title is expressly limited to the one might also contain the other. Acts 1904, p. 93, c. 33, entitled "An act to amend the revenue laws * * * so as to carry into effect the amendment of section 181 of the present constitution," which constitutional amendment related solely to occupation taxes in lieu of ad valorem taxes, held not sufficient in its title to include section two of such act repealing Ky. St. 1903, § 3011, providing for occupation taxes in addition to ad valorem taxes. Wiemer v. Louisville Sinking Fund Com'rs [Ky.] 99 S. W. 242. The title of Act 30th General Assembly, p. 41, c. 48, "An Act to repeal section 1347a of the supplement of the Code, relative to the vocation of peddlers and to enact a substitute therefor," held not sufficient to authorize definition of peddlers as including itinerant venders selling by sample, whether for immediate or future delivery. State v. Bristow [Iowa] 109 N. W. 199.

21. Gen. Laws 1905, p. 336, § 141, imposing an annual privilege tax on railroads, held not retroactive and unconstitutional under Const. art. 1, § 16, merely because it purports to impose the tax for a portion of the current year already expired, but will be enforced merely for the unexpired portion of such year. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. Validity of license imposed on junk dealers by Pub. St. 1901, c. 124, § 1, as amended by Laws 1905, p. 484, c. 76, not affected by any question of constitutionality of section three, requiring such dealers to keep records open to police inspection. State v. Cohen, 73 N. H. 543, 63 A. 928. Provision for forfeiture of money lender's license on ground of usury held not to invalidate portion of ordinance imposing license. City of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881. Ordinance prohibiting "peddling, or in any other manner" selling merchandise on certain streets, held severable so as to cut out phrase "in any other manner" selling. Ex parte Henson [Tex. Cr. App.] 14 Tex. Ct. Rep. 757, 90 S. W. 874. Pub. Acts 1895, p. 311, No. 214, providing for licensing of transient merchants, held invalid because of proviso authorizing municipality to suspend operation of act in any specific case. Brown v. Stuart [Mich.] 13 Det. Leg. N. 507, 108 N. W. 717.

22. Ordinance imposing license tax on occupations enacted pursuant to authority of Const. § 181, and Ky. St. 1903, § 3637, need not comply with requirement of ordinances levying taxes contemplated by Const. § 180, with respect to specification of purpose of tax. Shugars v. Hamilton, 29 Ky. L. R. 127, 92 S. W. 564. Code Supp. 1902, § 1333d, imposing license tax on insurance companies, held not subject to Const. art. 8, § 2, relating to taxation of corporate property. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

23. License on saloons and public resorts held not a tax so as to require two-thirds vote under city charter. Kenaston v. Riker [Mich.] 13 Det. Leg. N. 709, 109 N. W. 278; Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423. Civil rights act, known as Rev. St. § 1977, has no application to Code Supp. 1902, § 1333d, imposing license tax on insurance companies, with exception of county mutuals not organized for profit. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

24. License fee based on gross earnings of railroads imposed by Laws 1899, c. 308, p. 541, Rev. St. 1898, § 1212, held not a tax within Const. art. 8, § 1. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

25. Exactions from railroads, under Laws 1854, c. 74, p. 92, Laws 1860, c. 174, p. 153, Revision of 1878, § 2, Rev. St. 1898, §§ 1211-1214, in lieu of taxation of their property. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

Note on Wisconsin privilege tax on railroads: In Milwaukee & Miss. Ry. Co. v. Board of Sup'rs, 9 Wis. 431, Laws 1854, c.

either regulative license taxes[26] or occupation or privilege taxes.[27] Occupations may be classified for the purpose of license taxation[28] and the classification will not be interfered with by the courts unless it is unreasonable or arbitrary,[29] but the class-

74, p. 92, was upheld on the ground that though the exaction therein required of railroads was in lieu of constitutional taxes it was not a constitutional tax. That such was the decision in this case was challenged to a certain extent by Justice Cole, who took part in the decision, and who, in his dissent from what he considered a practical overruling of the case in Knowlton v. Sup'rs of Rock County, 9 Wis. 410, said that the former case did not decide that the law of 1854 "did not impose a tax in the just and proper sense of that term." But in Atty. Gen'l v. Winnebago Lake & Fox Plank Road Co., 11 Wis. 35, the same justice agreed that the case decided in 1855 did decide that the exaction was not a tax in a constitutional sense. Thus it would seem that the seeming disagreement between him and his colleagues was based upon a distinction without a difference, since the exaction might not be a constitutional tax, and yet still be a tax "in the just and proper sense of that word," in that it imposed upon the owners of the property the duty of contributing indirectly on account thereof to the public revenue. Milwaukee & Miss. Ry. Co. v. Board of Sup'rs, 9 Wis. 431, was seemingly overruled by Knowlton v. Rock County Sup'rs, 9 Wis. 410, and Attorney General v. Winnebago Lake & Fox River Plank Road Co., 11 Wis. 35, but was reaffirmed by Kneeland v. Milwaukee, 15 Wis. 454, and again by Wisconsin Cent. R. Co. v. Taylor County, 52 Wis. 37, 8 N. W. 833, upon the ground that the exaction imposed by the law of 1854 was not a constitutional tax, but an exemption therefrom in consideration of an equivalent. The idea of compensation for the privilege of operating in the state did not enter into the law of 1854 or the decisions thereunder. This feature was added by Laws 1860, c. 174, p. 153, and has been retained by the subsequent enactments on the subject, Revision of 1878, and Rev. St. 1898, §§ 1211-1214. Kneeland v. Milwaukee, 15 Wis. 454, was not decided until 1862, but it was decided under the law of 1854, and the validity of the law of 1860 was not passed upon. The latter law, however, must have been valid if the former one was, especially as it was adopted in the light of the decisions under the former law and with the manifest intention to make the tax contractual, a compensation for a privilege, thus relieving it of objections available against a constitutional tax. And Rev. St. 1898, §§ 1211-1214, being merely a perpetuation of the same compensatory or contractual scheme is not subject to the objections and construction applicable to a constitutional tax. The law of 1860 and the subsequent laws perpetuating it may be sustained also on the ground that they are in the nature of acts amending corporate charters pursuant to authority reserved in the constitution.—See State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

26. On resident and nonresident owners of motor vehicles. Unwen v. State [N. J. Law] 64 A. 163.

27. The assessment of a privilege tax enforceable only by regular proceedings in court is not a deprivation of property without due process of law. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. Equal protection not denied foreign corporation by imposing occupation tax in its interstate business. N. C. Pub. Laws 1903, c. 247, imposing license tax on meat packing business. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451. Code Supp. 1902, § 1333d, imposing license tax on insurance companies. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

28. City Council of Augusta v. Clark & Co., 124 Ga. 254, 62 S. E. 881. Fourteenth Amendment does not preclude reasonable classification. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451. Constitutional inhibitions against inequality do not preclude a reasonable classification for the purpose of regulation and taxation. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

Note: If purpose is within powers of legislature and classification has reference to that purpose (excludes no persons or objects that are affected by the purpose; includes all persons that are), logically speaking, it will be appropriate; legally speaking, a law based upon it will have equality of operation. Billings v. Illinois, 188 U. S. 97, 47 Law. Ed. 403. Differences must bear just and proper relation to attempted classification. Gulf, etc., R. Co. v. Ellis, 165 U. S. 150, 41 Law. Ed. 666. Ordinance requiring dealers in oils to pay a license of $250 per year, and providing that this license shall not apply to dealers handling oils on which license has been paid, is unconstitutional because there is no reasonable ground for classification. Standard Oil Co. v. Spartanburg, 66 S. C. 37, 44 S. E. 377. No greater burdens shall be laid upon one than are laid upon others in same calling and condition. Barbier v. Connolly, 113 U. S. 27, 31, 28 Law. Ed. 924. If inequality and want of uniformity in burden it imposes are stamped upon face of law, it must be pronounced invalid. Helfrick's Case, 29 Grat. [Va.] 849. Uniformity must be such as is compatible with the subject-matter; and as to licenses, only uniformity required is that tax shall be the same on all those in the business. Newport News, etc., R. Co. v. Newport News, 100 Va. 161, 40 S. E. 645; Commonwealth v. Moore, 25 Grat. [Va.] 958.—See Standard Oil Co. v. Fredericksburg [Va.] 52 S. E. 817.

In classifying corporations for purpose of imposing licenses, the legislature has a wider scope than in case of individuals. Thus, a license may be imposed on state mutual insurance companies and exempt county mutuals not organized for profit, and classify all county mutuals as corporations not organized for profit. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

29. City Council of Augusta v. Clark &

ification must rest upon reasons of public policy or difference of situation or circumstances,[30] and the tax or regulation must operate equally upon all within the same class,[31] and the same rule applies to exemptions from license.[32] The bur-

Co., 124 Ga. 254, 52 S. E. 881. Classification of **persons lending money** on personal property or personal security in different class from chartered banks, real estate loan brokers, real estate agents, and stockbrokers, held not unreasonable or arbitrary. Id. License fees on **street cars** operated in a city are sustainable as occupation fees or taxes. Bloomington & Normal R., etc., Co. v. Bloomington, 123 Ill. App. 639. Municipal license on **attorneys** at law, imposed under authority of statute enacted pursuant to Const. § 181, conferring legislative authority to authorize municipalities to impose license fees on professions, held valid. Yantis v. Lexington, 29 Ky. L. R. 689, 94 S. W. 653. **Railroad companies** may be segregated from other persons, natural and artificial, for purpose of regulation and taxation. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. **Oil producers or operators** of oil wells may be subjected to separate classifications for purpose of levying occupation tax. Producers' Oil Co. v. Stevens [Tex. Civ. App.] 99 S. W. 157; Stephens v. Morning Star Oil Co. [Tex. Civ. App.] 99 S. W. 159; Southwestern Oil Co. v. State [Tex. Civ. App.] 99 S. W. 159; Texas Co. v. Stephens [Tex. Civ. App.] 99 S. W. 160. N. C. Pub. Laws 1903, c. 247, taxing business of **meat packing,** held valid, though other dealers in packing-house products and other kinds of packing businesses are not taxed. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451. Code Supp. 1902, § 1333d, providing for license tax on **insurance companies,** held not unequal in its operation in that it exempts certain kinds of insurance companies, since it operates equally upon all companies in a like position. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153. Higher license tax on **liquor dealers** than on dealers in other commodities held valid. Lachman v. Walker [Fla.] 42 So. 461.

30. Larger tax on sale of oil in city transported thereto in bulk, tank cars, or pipes, than on sale of oil produced within city or otherwise brought thereto, held discriminatory and unequal. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817. Manner of distribution of oil in city and sale of same by means of tank wagons or in barrels is reasonable basis of classification for licensing purposes. Id.

31. Held discriminative: Ordinance imposing license tax on **fire and wreck sales** of merchandise but exempting salvage from fire and wreck in city of Atlanta. City of Atlanta v. Jacobs, 125 Ga. 523, 54 S. E. 534. Laws 1905, pp. 372, 373, requiring license for **peddling** or selling by sample "after shipment to the state," held discriminative against nonresidents, and hence invalid under U. S. Const. art. 1, § 8, art. 4, § 2, 14th Amend. § 1, and state Const. art. 1, § 12. Bacon v. Locke, 42 Wash. 215, 83 P. 721. Buffalo city charter, tit. 2, § 17, Laws 1891, c. 105, p. 137, authorizing city to license and regulate hawkers and peddlers and to make regulations deemed expedient for good government of city, does not authorize prohibition of peddling produce between hours of 5 a. m. and 1 p. m. City of Buffalo v. Linsman, 113 App. Div. 584, 98 N. Y. S. 737. Discrimination in favor of religious and benevolent associations and resident merchants in matter of bill-posting and distribution of samples. City of Watertown v. Rodenbaugh, 112 App. Div. 723, 98 N. Y. S. 885. Pub. Acts, 1895, p. 311, No. 214, providing for licensing of transient merchants, held invalid under state Const. art. 6, § 32, and Federal Const. Amend. 14, in that it authorizes the municipality to suspend the operation of the act in any specific case. Brown v. Stuart [Mich.] 13 Det. Leg. N. 507, 108 N. W. 717.

Held not discriminative: License on **ferries** between certain points not unequal because ferries between other points not included where license imposed on such other ferries by other ordinances. Norfolk, etc., Co. v. Norfolk, 105 Va. 139, 52 S. E. 851. Code Supp. 1902, § 1333d, providing for license tax on **insurance companies,** held not discriminative in that it exempts county mutuals and not state mutuals. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153. Laws 1897, p. 236, c. 163, providing that no license shall issue to any person or firm to do **plumbing** until he or they shall have passed examination before board of plumbers, and that every plumbing firm shall have at least one practical plumber, makes a distinction between a licensed plumber and a practical plumber, and does not exempt all members of a firm except one from examination, and hence does not discriminate in favor of firms. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774. Act July 1, 1905, §§ 3, 5, is not contrary to Const. 1870, art. 4, § 22, prohibiting granting of special privileges, in that it requires resident **applicants for examination by dental examiners,** except such as are already licensed, to produce diplomas while nonresidents of five years' practice are not required to produce diplomas, and also authorizes licensed physicians to extract teeth, and authorizes students of recognized dental schools to practice under instructor's supervision without license. Kettles v. People, 221 Ill. 221, 77 N. E. 472. A privilege tax on **railroads** based upon percentage of gross earnings in a ratio of its track mileage within to that without the state is not unequal because the gross earnings of some of the roads operating in the state consist more largely of receipts from interstate business than those of others. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

32. 24 St. at Large, p. 441, exempting from business license tax all confederate veterans of civil war who enlisted from state, held invalid in that it denies equal protection of laws to veterans of other wars and confederate veterans of Civil war who enlisted from other states. City of Laurens v. Anderson [S. C.] 55 S. E. 136.

den of showing inequality of a licensing ordinance is upon the party alleging such inequality.[33] The fact that only one person, firm, or corporation falls within a class, does not render the classification discriminative,[34] nor does failure to exact the license from one party subject thereto while exacting it from another constitute discrimination.[35] An excise or privilege tax need not be designated as such.[36] On the other hand, the mere fact that a license purports to be assessed under the police power will not exempt it from objections applicable to constitutional taxation,[37] nor may police regulation be used as a guise for the arbitrary invasion of personal and property rights.[38] Whether a statute is a revenue or a licensing measure must be determined according to its terms, purpose, effect, and the constitutional authority under which it was enacted.[39] It is not necessary that the applicant for license, required under police power, be given any hearing or that any provision be made for review by the courts.[40]

A license fee imposed under the police power and not for revenue is not subject to objections based upon questions of double or special taxation.[41] Nor is it double taxation to impose an occupation tax in addition to an ad valorem tax on the property used in such occupation.[42] An ad valorem tax on corporate franchises does not necessarily include a privilege tax upon the exercise of such franchises;[43] nor does the granting of a franchise by the state impliedly exempt the holder from regulative restrictions and burdens,[44] especially where the right to impose such regulations is reserved in the statute granting the franchise;[45] but a city having only a general regulative authority over its streets cannot impose a privilege tax on a telephone company holding a state franchise,[46] and where a municipal tax on corpo-

33. Burden not sustained as to license on ferries between certain points where it appears that there are other ordinances authorizing imposition of license on ferries between other points and it does not appear that the licenses are unequal or that license on such other ferries is not enforced. Norfolk, etc., Co. v. Norfolk, 105 Va. 139, 52 S. E. 851.

34. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 867. License on ferries. Norfolk, etc., Co. v. Norfolk, 105 Va. 139, 52 S. E. 851.

35. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

36. Tax of 1% on gross earnings of railroads imposed by Gen. Laws 1905, p. 336, c. 141, held an excise or privilege tax, though not designated as such in the act. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

37. Laws 1905, p. 130, c. 66, requiring license of plumbers, held contrary to Const. art. 1, §§ 3, 12, relative to uniformity of taxation, plumbing being held not a proper subject of police regulation. State v. Smith, 42 Wash. 237, 84 P. 851.

38. Laws 1905, p. 130, c. 66, requiring examination of plumbers by board of examiners, held contrary to U. S. Const. Amend. 14, § 1. State v. Smith, 42 Wash. 237, 84 P. 851.

39. Ky. St. 1903, § 3637, authorizing municipalities to impose license fees on franchises, held a revenue measure, being so treated in its classification in Const. § 181, conferring legislative authority to delegate the powers, though it is classified in the statute with matters purtaining to police power. Cumberland Tel. & T. Co. v. Hopkins, 28 Ky. L. R. 846, 90 S. W. 594.

40. Municipal liquor license. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423.

41. License on motor vehicles. Unwen v. State [N. J. Law] 64 A. 163.

42. Producers' Oil Co. v. Stevens [Tex. Civ. App.] 99 S. W. 157; Stevens v. Morning Star Oil Co. [Tex. Civ. App.] 99 S. W. 159; Southwestern Oil Co. v. State [Tex. Civ. App.] 99 S. W. 159; Texas Co. v. Stephens [Tex. Civ. App.] 99 S. W. 160.

43. Gen. Laws 1905, p. 336, § 141, imposing privilege tax on railroads, held not double taxation because of ad valorem tax on franchises. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

44. Franchise to operate street railroad does not exempt company from licensing power of city. Bloomington & Normal R. etc., Co. v. Bloomington, 123 Ill. App. 639.

45. Bloomington & Normal R., etc., Co. v. Bloomington, 123 Ill. App. 639.

46. Note: In Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009, it was held that a city having only a general police power over its streets and the right to regulate them, but without authority to grant any franchises or privileges in the use thereof, could not exact a privilege license fee of a telephone company doing business in the city and occupying its streets pursuant to legislative authority. In support of the holding that defendant city had no authority over its streets than that arising from its general police power and the right to control its streets and public places, and that it had no right to grant privileges or impose conditions, the court cited State ex rel. Wisconsin Telephone Co. v. Sheboygan, 111 Wis.

rate franchises covers the franchise to do business or operate in the municipality, such franchise cannot be subjected to an additional license tax for revenue,[47] and so also a sale of a franchise by a municipality precludes the subsequent imposition of a franchise tax,[48] since the effect in either case would be double taxation.[49] The same privilege cannot be taxed twice in the same year as against the same person,[50] and a privilege upon which a tax is imposed cannot be curtailed by constructing out of it another privilege and taxing it also;[51] but a special privilege, in order to be entitled to the protection as a part of a general privilege, must be an essential element thereof,[52] and several license taxes may be imposed on the same person acting in several capacities.[53]

23, 86 N. W. 657; Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565. And that defendant city had no power to require a license, Wisconsin Telephone Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828. Western Union Tel. Co. v. Philadelphia [Pa.] 12 A. 144, and other cases cited by defendant city, were distinguished on ground that the license fees therein involved were imposed in connection with the granting of some privilege, or the ordinances upheld merely imposed regulations and not licenses. Chicago, etc., R. Co. v. Milwaukee, 97 Wis. 418, 72 N. W. 1118, holding that charter of corporation does not exempt it from police regulation, was distinguished on ground that question in case at bar was not one of escape from police supervision, but whether the ordinance was within the police power. People v. Squire, 107 N. Y. 593, 14 N. E. 820, 1 Am. St. Rep. 893, involved a regulation under a statute, and power to require defendant to pay expense of placing their wires under ground was sustained. In State v. Janesville, 87 Wis. 72, 57 N. W. 970, 41 Am. St. Rep. 23, 22 L. R. A. 759, the question involved was one of regulation of electric wires and no question of license was involved. Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565, involved merely regulation as to placing of telephone poles. In Baltimore v. Baltimore, T. & G. Co., 166 U. S. 673, 41 Law. Ed. 1160, it was held that a street railroad company occupying streets with permission of municipality was subject to reasonable regulations by subsequent ordinances, and that city did not exhaust power by the exercise thereof. Ash v. People, 11 Mich. 347, 83 Am. Dec. 740, upholds power of city to license butchers and shop and stall keepers, such power being expressly conferred by charter. In Marmet v. State, 45 Ohio St. 63, 12 N. E. 463, license upheld under express legislative authority. So, also, in State v. Herod, 29 Iowa, 123. In St. Louis the title to the streets is in the city and it has right to grant privileges and express power to license, tax, and regulate telegraph companies. St. Louis v. Western U. Tel. Co., 149 U. S. 465, 37 Law. Ed. 810. None of these cases support the authority of a city without title to its streets and without power to grant privileges therein to license a telephone company having a state franchise. Power is in state to determine what occupations shall be licensed. Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Cooley's Const. Lim. (7th Ed.) 884. No power having been delegated to defendant city to license telephone companies, it could not exact a fee as means of raising revenues. Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State v. Sheboygan, 114 Wis. 505, 90 N. W. 441; State v. Sheboygan, 111 Wis. 23, 86 N. W. 657; Marshfield v. Wisconsin Tel. Co., 102 Wis. 604, 78 N. W. 735, 44 L. R. A. 565; Michigan Tel. Co. v. Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104. Whether defendant city in case at bar could have exacted a fee for supervision was not decided, it being decided that the license imposed was a privilege license and a revenue measure and unsustainable as such. The ordinance required telephone and telegraph companies to pay an annual license of one dollar on each pole maintained in the city, such fees to go into the general city fund, and provided for a penalty for its violation, and the fee exacted was a privilege license. Neuman v. State, 76 Wis. 112, 45 N. W. 30; Chilvers v. People, 11 Mich. 43; Home Ins. Co. v. Augusta, 50 Ga. 530. And when the court can clearly see that revenue and not regulation is the aim and not the incident, and no power is given to license the occupation, the license is void. Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State v. Sheboygan, 111 Wis. 40, 86 N. W. 657; Postal T. C. Co. v. Taylor, 192 U. S. 64, 48 Law. Ed. 342; Michigan Tel. Co. v. Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; Mayor, etc., v. Second Ave. R. Co., 32 N. Y. 261; Memphis v. American Ex. Co. [Tenn.] 52 S. W. 172.—See Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009.

47. Such is effect of Ky. St. 1903, § 4077, providing for franchise tax on public service corporations. Cumberland Tel. & T. Co. v. Hopkins, 28 Ky. L. R. 846, 90 S. W. 594.

48. Telephone franchise. Cumberland Tel. & T. Co. v. Hopkins, 28 Ky. L. R. 846, 90 S. W. 594.

49. And hence in violation of Const. 171, requiring taxes to be uniform, other property not being similarly taxed. Cumberland Tel. & T. Co. v. Hopkins, 28 Ky. L. R. 846, 90 S. W. 594.

50. Constitutional grant of legislative authority to delegate authority to tax and license to municipalities does not contemplate taxing of the same privilege twice in the same year as against the same person. Cumberland Tel. & T. Co. v. Hopkins, 28 Ky. L. R. 846, 90 S. W. 594.

51. Mefford v. City Council of Sheffield [Ala.] 41 So. 970.

52. Right to sell oil at wholesale held not an essential constituent of right to main-

Interstate commerce cannot be burdened with state regulation or license taxes,[54] but when goods from other states have become a part of the general mass of property within the taxing state the exemption from state control does not apply.[55] The intrastate business of a foreign corporation may be taxed,[56] and so also the intrastate business of interstate carriers,[57] and the decision of the highest court of a state that a licensing statute does not apply to the interstate business of a foreign corporation is binding on the Federal courts.[58] Dealing in futures is not commerce.[59]

Authority to regulate and license may be delegated to municipal corporations[60] or to a board;[61] but a municipal corporation cannot delegate the authority thus delegated to it,[62] though it may commit the performance of merely ministerial duties to executive agents.[63] One who has never received or applied for a license cannot

tain grocery or drug store. Mefford v. City Council of Sheffield [Ala.] 41 So. 970.

53. Corporation engaged as a dealer and also as a contractor. State v. Hartwell Co., 117 La. 144, 41 So. 444.

54. Soliciting agent or drummer selling by sample goods to be shipped from another state cannot be subjected to a license tax. Rearick v. Com., 27 S. Ct. 159; State v. Looney [Mo.] 97 S. W. 934. Fact that purchaser had right to reject goods if not equal to sample did not change rule. Rearick v. Com., 27 S. Ct. 159. Fact that goods distributed in original packages or otherwise specifically applied to the contracts were shipped to the agent did not prevent the transaction from being interstate commerce. Id. Fact that brooms which were tagged and marked to the various purchasers were tied together in bundles convenient for shipment did not render them a part of the mass of property within the state, and hence not subjects of interstate commerce. Id. Transaction held interstate commerce though goods were deliverable only upon payment of price to agent. Id.

55. License tax on all itinerant venders without distinction or discrimination against goods from other states is valid. Territory v. Russell [N. M.] 86 P. 551. Peddling goods supplied by foreign corporation from distribution warehouse within state held not interstate commerce. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853; following City of Muskegon v. Zeeryp, 134 Mich. 181, 96 N. W. 502. Selling oil that has become included in general mass of property in state whether sales are from original barrels or not. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817. Under Act Aug. 8, 1890, c. 728, 26 St. 313, U. S. Comp. St. 1901, p. 3177, known as the Wilson Act, a state may regulate and license sale of liquor coming in original packages from other states. Meyer, Jossen & Co. v. Mobile, 147 F. 843. Irrespective of Act Aug. 8, 1890, c. 728, 26 St. 313, U. S. Comp. St. 1901, p. 3177, authorizing state regulation of sale of liquor coming from other states in original packages, where such packages have reached their destination a license fee may be imposed whether for regulation or for revenue. Id. Where portraits to be made in another state were ordered from soliciting agents to be delivered in frames but purchaser of portrait not being bound to purchase the frame, the subsequent delivery of the portraits and sale of the frames to such purchasers of portraits as desired to purchase frames was not interstate commerce, though sale of portraits was interstate commerce. State v. Looney [Mo.] 97 S. W. 934.

56. N. C. Pub. Laws 1903, c. 247, taxing business of meat packing, held valid as to business of foreign packer maintaining a cold storage and distributing depot within the state. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451.

57. Tax imposed on railroads by Gen. Laws 1905, p. 336, c. 141. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

58. N. C. Pub. Laws 1903, c. 247, taxing meat packing business, construed. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451.

59. Ware v. Mobile County [Ala.] 41 So. 153. Fact that contracts executed in dealing in futures may sometimes result in interstate shipment does not render dealing in futures commerce. Id.

60. To regulate peddling. Ex parte Henson [Tex. Cr. App.] 14 Tex. Ct. Rep. 757, 90 S. W. 874; City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853. Pub. St. 1901, c. 124, § 1, authorizing municipal authorities to determine who are "suitable" persons to receive license as **junk dealers,** and Laws 1905, p. 484, c. 76, authorizing such authorities to grant such licenses to "persons deemed by them to be suitable," do not grant such authorities such arbitrary power as renders the acts unconstitutional. State v. Cohen, 73 N. H. 543, 63 A. 928.

61. Act July 1, 1905, § 4, authorizing board of dental examiners to adopt rules and regulations to establish a uniform and reasonable educational standard to be observed by dental colleges, and to determine reputability of such colleges by their conformity to such regulations, held not invalid as granting arbitrary power. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

62. Requirement that applicant for license as ticket broker be member of some association of ticket brokers held unwarranted delegation. Munson v. Colorado Springs [Colo.] 84 P. 683.

63. Requirement that applications for license to store gasoline be addressed to fire marshal. Cahill v. District of Columbia, 26 App. D. C. 163. Requirement that applications for license to store gasoline be passed

urge the invalidity of the licensing statute or ordinance on the ground that it delegates too broad a discretion in the matter of granting and revoking licenses.[64] Authority under special charters is not necessarily revoked by subsequent constitutional[65] or statutory provisions relating to the matter of licenses.[66] Authority under a general law to license the sale of liquor is not inconsistent with authority previously granted by special charter to license inns and taverns.[67] The authority of a municipality to license may be granted in general terms,[68] or in terms applicable to particular matters only.[69] Authority to impose a license tax on all occupations upon which such a tax is imposed by the state does not necessarily authorize a municipal tax on occupations thereafter taxed by the state.[70] Authority to license cannot be implied from a mere statutory specification of matters which may be licensed,[71] or from a constitutional limitation on the amount of license assessable.[72] Authority to regulate does not include authority to suppress,[73] but authority to restrict as well as to regulate the sale of a certain article implies the power to regulate the sale of other articles adapted exclusively to the making of the former.[74] Authority to license for revenue may be implied from the terms of the authorizing statute,[75] but authority to license for regulation does not include authority to li-

upon by fire marshal and building inspector held not unwarranted delegation of authority of commissioners. Id. Ordinance requiring applicants for liquor license to be recommended by citizens sustained. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423.

64. Statutory delegation of authority to examining board. Kettles v. People, 221 Ill. 221, 77 N. E. 472. Ordinance giving city council right to grant or refuse license without hearing and to revoke for cause after hearing. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423.

65. Authority of cities under special charters to levy license taxes held not repealed by Const. 1904, § 117, conforming city charters to constitution, and section 168, requiring license taxes to be imposed under a general law. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817.

66. Acts 1820-21, p. 133, c. 114, giving city of Fredericksburg general power to tax, held not repealed by Acts 1870-71, p. 265, c. 187, § 7, authorizing such city to levy license taxes on all matters for which state license might be required, nor by similar general provision of Code 1887, § 1042, Code 1904, p. 504. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817.

67. Authority of Atlantic City under its charter of 1854, as amended by P. L. 1866, p. 314, to license inns and taverns was not repealed by P. L. 1902, p. 284, relating to government of cities, §§ 20, 21, of latter act relating to liquor licenses not being repugnant to authority under charter to license inns and taverns. Conover v. Atlantic City [N. J. Err. & App.] 64 A. 146.

68. General power of city of Fredericksburg under its charter, Acts 1820-21, p. 133, c. 114, § 7, for purpose of raising city revenues in such manner as city authorities may deem expedient held to authorize license tax on sale of oil from tank wagons, etc. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817.

69. Under Pub. Acts 1895, No. 215, p. 389, authorizing cities of fourth class to regulate and license hawkers and peddlers, such a city held to have power to license one selling by sample for future delivery. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853, following City of Muskegon v. Zeeryp, 134 Mich. 181, 96 N. W. 502. Under Laws 1903, c. 122, p. 208, § 134, authorizing city to impose license tax on business and callings operated within city limits, city may license express agencies transporting packages from residents of city to nonresidents thereof and vice versa. City of Topeka v. Jones [Kan.] 86 P. 162.

70. Rev. St. 1895, art. 5050, giving counties right to levy one-half of occupation tax levied by state on all occupations not otherwise exempted therein, held to confer no power to tax occupations not then taxed by state, and hence does not authorize county license tax on railroads similar to that imposed by Gen. Laws 1905, p. 336, § 141. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

71. Acts 1898, No. 171, § 16, does not confer power to license upon municipalities having no such power under Acts 1898, No. 136, but merely specifies the objects upon which power to license may be exercised, although in terms it grants such power to license to "any municipal or parochial corporation in the state." Arnold v. Jones [La.] 42 So. 727.

72. Const. art. 8, § 1, providing that the occupation tax levied by any municipality shall not exceed 50% of that levied by the state, is a mere limitation and confers no authority to levy. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

73. Under Comp. St. c. 14, art. 1, § 40 et seq., villages have authority at most to regulate and license billiard and pool tables but not to suppress them. State v. McMonies [Neb.] 106 N. W. 454.

74. Under power to regulate and restrict sale of cigarettes, city had power to require license for sale of cigarette papers. Kappes v. Chicago, 119 Ill. App. 436. In passing on validity of license on sale of cigarette pa-

cense for revenue,[76] and the latter may be taken away by a grant of the former.[77] In determining whether authority to license for revenue is conferred, the purpose of the authorizing statute must be considered.[78] So also, in determining whether a municipal tax is for regulation or for revenue, the real purpose of the tax will control,[79] and if the license fee is so great as to plainly indicate that it is for revenue under the guise of regulation, it cannot stand as an exercise of police power.[80] The fact that civil suit is authorized for the recovery of the fee does not necessarily imply an authority to tax for revenue;[81] nor will the fact that the amount of the tax is measured by a percentage of the products of the taxpayer's business make it a property tax.[82] On the other hand, the fact that an ordinance assessing a license tax provides no penalty for failure to pay the tax does not deprive it of its regulative character where a penalty is provided by a general law.[83] State regulation and license does not necessarily preclude municipal regulation and license,[84] nor will the fact that the state imposes no tax on a certain occupation deprive a municipality of authority to do so.[85] No question of conflict between state and munic-

pers, court will take judicial notice of the nature of cigarettes and of how they are made. Id.

75. Laws 1903, p. 558, c. 5363, § 20, giving city of Tampa power to license privileges, etc., regardless, as to amount of license, of the state revenue law, held to confer power to license for revenue. Lachman v. Walker [Fla.] 42 So. 461.

76. Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 P. 277. General welfare clause in charter did not authorize license of $1,000 on selling or delivering liquors in city. Southern Exp. Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185.

77. Authority of county to license for both regulation and revenue under St. 1891, p. 306, c. 216, § 25, subd. 27, and County Gov. Act 1897, c. 277, § 25, subd. 25, taken away by implication by Pol. Code, § 3366, as amended by St. 1901, p. 635, c. 209, granting power to license for regulation only. Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 P. 277; Plumas County v. Wheeler [Cal.] 87 P. 909.

78. Tax on social clubs under Acts 1902-04, c. 148, cl. 144, held a license tax for revenue, and hence, under Code 1904, § 1042, authorizing cities to impose licenses on all matters for which state license is required, city had power to impose such a license tax on such clubs for privilege of dispensing liquors. Town of Phoebus v. Manhattan Social Club, 105 Va. 354, 52 S. E. 839.

79. License of three cents on each head of sheep herded in state imposed by county supervisors, adopted when board had power under St. 1901, p. 306, c. 216, § 25, subd. 27, and County Government Act 1897, § 25, and containing no regulatory provisions, held a revenue measure and not within power to regulate conferred by Pol. Code, § 3366, as amended by St. 1901, p. 635, c. 209. Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 P. 277. License under County Gov. Act 1897, p. 465, c. 277, § 25, subd. 25, of $10 on every hundred sheep owned or controlled by raisers, grazers, or pasturers of sheep, held, in view of title and lack of regulatory provisions, for revenue, and repealed by Pol. Code, § 3366. Wheeler v. Plumas County [Cal.] 87 P. 902.

80. Plumas County v. Wheeler [Cal.] 87 P. 909.

Note: "Where the court can clearly see that revenue and not regulation is the aim and not the incident, and no power is given to license the occupation, the ordinance is void. Wisconsin Tel. Co. v. Oshkosh, 62 Wis. 32, 21 N. W. 828; State v. Sheboygan, 111 Wis. 40, 41, 86 N. W. 657; Postal Tel. Cable v. Taylor, 192 U. S. 64, 48 Law. Ed. 342; Michigan Tel. Co. v. Benton Harbor, 121 Mich. 512, 80 N. W. 386, 47 L. R. A. 104; Mayor, etc., v. Second Ave. R. Co., 32 N. Y. 261; Memphis v. American Ex. Co., 102 Tenn. 336, 52 S. W. 172."—Wisconsin Tel. Co. v. Milwaukee [Wis.] 104 N. W. 1009.

81. Plumas County v. Wheeler [Cal.] 87 P. 909.

82. Acts 29th Leg. p. 358, c. 148, imposing on operators of oil wells a tax of certain per cent of gross products, held an occupation tax and not tax on gross products themselves. Producers' Oil Co. v. Stevens [Tex. Civ. App.] 99 S. W. 157; Stephens v. Morning Star Oil Co. [Tex. Civ. App.] 99 S. W. 159; Southwestern Oil Co. v. State [Tex. Civ. App.] 99 S. W. 159; Texas Co. v. Stephens [Tex. Civ. App.] 99 S. W. 160.

83. A county ordinance is a law within Pen. Code, § 435, making it a misdemeanor to transact without license any business for which license required by "law." Plumas County v. Wheeler [Cal.] 87 P. 909.

84. Hawking and peddling. Ex parte Henson [Tex. Cr. App.] 14 Tex. Ct. Rep. 757, 90 S. W. 874. Ordinance of City of Philadelphia of 1902, regulating and licensing automobiles, not superseded by Act Apr. 19, 1905, P. L. 217. Brazier v. Philadelphia [Pa.] 64 A. 508. Acts 1902-04, pp. 155, 226, c. 148, cl. 144, providing for payment of certain amount to county treasurer by social clubs for privilege of dispensing liquors to members, and that such amount shall be "in lieu of all other taxes" for the privilege granted, held to apply to state taxes and not to exempt such clubs from municipal taxation. Town of Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

85. Norfolk, etc., Co. v. Norfolk, 105 Va. 139, 52 S. E. 851.

ipal regulation arises when the party charged under the municipal law has no state license.[86]

The necessity and reasonableness of statutory regulation are primarily legislative questions which will not be reviewed by the courts except on constitutional grounds.[87] So also, when the manner in which a municipality shall exercise its regulating authority is prescribed by statute, the question of the reasonableness of municipal regulation is not open to the courts except on constitutional grounds,[88] but where the regulating authority is conferred in general terms and the method of exercising such authority is not prescribed, the question of reasonableness is open to the courts regardless of constitutional grounds.[89] The reasonableness of a municipal regulation tax is tested by the amount probably necessary to cover the expense of the regulation and the licensing,[90] and the same test applies when the tax is imposed by the state.[91] The fact that it subsequently develops that it is somewhat in excess of the necessary amount will not invalidate it;[92] but when a municipality has no power to prohibit, a license tax may be invalid because prohibitive in amount.[93] Where, however, the tax is within the limits prescribed by law, it will be presumed to be valid until its invalidity has been established by proper evidence.[94] Disproportion between amount of fee and value of property affected is immaterial.[95]

86. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853.

87. Plumas County v. Wheeler [Cal.] 87 P. 909. Necessity and reasonableness of Pub. St. 1901, c. 124, § 1, as amended by Laws 1905, p. 484, c. 76, relating to junk dealers, held not reviewable by courts. State v. Cohen, 73 N. H. 543, 63 A. 928. Junk dealing may be localized. State v. Cohen, 73 N. H. 543, 63 A. 928.

88. Munson v. Colorado Springs [Colo.] 84 P. 683.

89. Mills' Ann. St. § 4403, subd. 4, authorizing city councils to fix time, terms, and manner of issuing licenses, and subd. 61, authorizing the licensing and regulation of brokers, confer only general power without prescribing mode of exercise. Munson v. Colorado Springs [Colo.] 84 P. 683. Requiring **ticket broker** to be member of some association of ticket brokers as condition to right to license held unreasonable. Id. Not unreasonable to limit amount of **explosive fluid stored in city** to 50 gallons and to require it to be stored in underground tank outside of buildings. Cahill v. District of Columbia, 26 App. D. C. 163. Ordinance requiring license of **pawnbrokers** and that records be kept open to police inspection, and requiring reports to police, prohibiting redemption within certain time, regulating hours of business, and providing for revocation of license for failure to comply with regulation or on conviction of violation of regulations, held not unconstitutional or unreasonable. Harrison v. People, 121 Ill. App. 189. Requirement of P. L. 1903, p. 484, that every owner of **motor vehicle** file declaration of competency as driver, name and address of owner, maker, number of machine and horse power, and payment of registration fee and registration by secretary of state, held not unreasonable. Unwen v. State [N. J. Law] 64 A. 163.

90. West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7; Plumas County v. Wheeler [Cal.] 87 P. 909. Ten cents per head on sheep imposed on sheep raisers, grazers, etc., held not so grossly disproportionate to regulation provided for as to render it a revenue measure. Plumas County v. Wheeler [Cal.] 87 P. 909; Sierra County v. Flanigan [Cal.] 87 P. 913. License fee of $300 on temporary stores and transient dealers held unreasonable. Uhrlaub v. Cincinnati, 4 Ohio N. P. (N. S.) 505. License of $500 on sale of liquors held not unreasonable. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423.

91. Registration fee of $1 on owners of automobiles held valid. Unwen v. State [N. J. Law] 64 A. 163.

92. West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7.

93. Johnson v. Fayette [Ala.] 42 So. 621. An ordinance which imposes a license fee of $300 on temporary stores and transient dealers is invalid, because prohibitive as to some classes, unreasonable as to others, and in restraint of trade. Uhrlaub v. Cincinnati, 4 Ohio N. P. (N. S.) 505. Acts 1904, p. 71, c. 76, imposing tax of $500 and an ordinance imposing tax of $250 on business of lending money on personal property, such as household goods, held to be class legislation and to be in violation of constitutional inhibitions against depriving persons of liberty or property without due process of law. Rodge v. Kelly [Miss.] 40 So. 552. A license of $500 on all saloons, without regard to whether they are for sale of intoxicating liquors, held unreasonable. Kenaston v. Riker [Mich.] 13 Det. Leg. N. 709, 109 N. W. 278.

94. Where limit was $1,000, a tax of $750 on liquor dealers in town of 700 people held not prohibitive where of the four dealers during the previous year only one went out of business and other three made net profit of from $460 to $800 respectively, and two dealers took out license for the current year at $750. Johnson v. Fayette [Ala.] 42 So. 621.

95. Fee on electric light and power poles.

When there is no conflict in the evidence, the reasonableness of a license fee is for the court.[96] A city ordinance may require a licensee to comply with state laws,[97] and the fact that such laws are unconstitutional will not render the ordinance invalid,[98] nor can the constitutionality of such laws be questioned by a party who has not paid his license and has not been called upon to comply with the state laws.[99] It is immaterial how reasonable a regulating ordinance is where it is authorized by neither charter nor statute.[1]

A licensing ordinance passed pursuant to authority to license generally need not except specific matters beyond its authority to legalize by license.[2] The amount of a license fee required by a city ordinance cannot be reduced by a mere resolution of the city council.[3] An ordinance imposing a license tax need not conform to requirements as to the enactment of ordinances granting franchises.[4] A collecting officer is personally liable when he collects a license tax which a party is under no legal obligation to pay,[5] but, in order to recover back a license tax which has been paid, it must appear that such tax was imposed without authority,[6] that it was actually paid,[7] and that the payment was involuntary.[8] All payments are presumed to be voluntary until the contrary is made to appear,[9] and the burden of proof is on the plaintiff to negative such presumption.[10] Equity will enjoin the collection of an invalid license tax[11] when there is no adequate remedy at law.[12] A suit to restrain state officers from collecting an occupation tax is a suit against the state.[13]

West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7.

96. There being no Federal question involved, the state and not Federal decisions were followed in reaching this decision. West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7.

97. Requirement that money lenders give bond required by Acts 1904, p. 79. City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881.

98. City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881.

99. Question of constitutionality of Acts 1904, p. 79, requiring bond of money lender prematurely raised in prosecution by city for nonpayment of license. City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881.

1. City of Chicago v. Reinschreiber, 121 Ill. App. 114.

2. Under charter power to license and regulate saloons, etc., but not to license sale of intoxicating liquors, an ordinance providing for the licensing of "saloons" without reference to the kind held valid. Kenaston v. Riker [Mich.] 13 Det. Leg. N. 709, 109 N. W. 278, distinguishing Dewar v. People, 40 Mich. 401, 29 Am. Rep. 545, and following Kittson v. Ann Arbor, 26 Mich. 45, and Wolf v. Lansing, 53 Mich. 357, 19 N. W. 38.

3. Bloomington & Normal R., Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639.

4. License not a franchise within Ky. St. 1903, § 3636, forbidding enactment of ordinance granting franchise within five days after introduction of resolution therefor. Shugars v. Hamilton, 29 Ky. L. R. 127, 92 S. W. 564.

5. Collection from party not within licensing statute. Florida Packing & Ice Co. v. Carney [Fla.] 41 So. 190.

6, 7. Town of Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

8. Town of Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839. Payment to secure release from arrest for failure to obtain license held not voluntary, though validity of license might have been litigated in proceedings in which arrest was made. Wheeler v. Plumas County [Cal.] 87 P. 802. Payment to county, under protest, by party to whom defendant had paid license to secure release from arrest, in order to prevent defendant's rearrest held not voluntary. Id.

9. Town of Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

10. Mere declaration that payment is made under protest is insufficient. Town of Phoebus v. Manhattan Social Club, 105 Va. 144, 52 S. E. 839.

11. To prevent multiplicity of suits equity jurisdiction attaches though ordinance has not been declared invalid. Kappes v. Chicago, 119 Ill. App. 436.

12. Injunction against enforcement of execution to collect invalid license tax under ordinance of City of Atlanta. City of Atlanta v. Jacobs, 125 Ga. 523, 54 S. E. 534. Injunction to restrain state treasurer, comptroller, and attorney general from enforcing Gen. Laws 1905, p. 336, c. 141, imposing privilege tax on railroads, refused on ground that the tax and penalties for nonpayment were enforceable only by legal proceedings and such a tax was not a lien on land. Stephens v. Tex. & P. R. Co. [Tex.] 16 Tex. Ct. Rep. 918, 97 S. W. 309.

13. And cannot be maintained. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157; Texas Co. v. Stephens [Tex. Civ. App.] 99 S. W. 160; Stephens v. Texas & P. R. Co. [Tex.] 16 Tex. Ct. Rep. 918, 97 S. W. 309. In a suit to enjoin state officers from enforcing an occupation tax, a judgment in favor

§ 3. *Issuance and revocation.*—When the licensing officers are vested with judicial discretion in the matter of issuing licenses,[14] they may be compelled to act,[15] and their authority may be reviewed where they have assumed to exercise powers not conferred,[16] but their judgment in the exercise of such discretion will not be reviewed.[17] A municipal council may be compelled by mandamus to provide such regulations as are positively required by statute;[18] but mandamus will not lie to compel the granting of a license to a party whose application has been refused by the duly constituted authority for good cause;[19] nor will it lie to compel the acceptance of a license fee before it is due.[20] A state license granted under the police power is not a contract[21] and may be revoked at any time.[22] Even a privilege license, though contractual in its nature, may be revoked where authority to do so is reserved.[23] The authority of a municipal corporation to revoke a license to pursue a lawful occupation must clearly appear;[24] and will not be implied from authority to license and regulate;[25] and specific penalties provided by statute for the enforcement of municipal regulation will be deemed exclusive of the right of revocation.[26] Nor can a municipal corporation, in the absence of express authority, revoke a license on account of matters regulated exclusively by state laws.[27] But where authority to revoke is essential to efficient regulation, a reservation of such authority in granting the license is not an unreasonable condition.[28] Authority to revoke is sometimes expressly delegated to municipalities,[29] and in a proper case mandamus lies to compel the exercise of such power.[30] Mandamus lies to compel the restora-

of the defendant should be in favor of the state and not of officers nominally defendant. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157.

14. Board of medical examiners under Sess. Laws 1899, p. 345. Raaf v. State Board of Medical Examiners, 11 Idaho, 707, 84 P. 33.

15. Raaf v. State Board of Medical Examiners, 11 Idaho, 707, 84 P. 33.

16. Action of state board of medical examiners reviewable by certiorari under Sess. Laws 1899, p. 348, § 9, and not by appeal, and scope of review is same as that on writ of review. Raaf v. State Board of Medical Examiners, 11 Idaho, 707, 84 P. 33.

17. Raaf v. State Board of Medical Examiners, 11 Idaho, 707, 84 P. 33.

18. Creation of examining and supervising board of plumbers as required by Laws 1897, p. 236, c. 163, including enactment of such ordinances and creation of such offices as are necessary to creation of such board. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774.

19. Mandamus to compel mayor, vested with discretion to determine fitness of applicants, to grant pawnbroker's license to one who had previously violated regulations and whose license had been revoked, refused. Harrison v. People, 121 Ill. App. 189.

20. State v. McMonies [Neb.] 106 N. W. 454.

21. Liquor license. State v. Corron, 73 N. H. 434, 62 A. 1044.

22. State v. Corron, 73 N. H. 434, 62 A. 1044.

23. Under Rev. St. 1898, § 1212, it seems that state, under power of revocation therein reserved, may revoke license of railroad company for nonpayment of any portion of license fee provided for in sections 1211-1214. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

24. United States v. MacFarland, 28 App. D. C. 552.

25. Plumbing. United States v MacFarland, 28 App. D. C. 552.

26. Acts Cong. Apr. 23, 1892, §§ 1, 2, 27 Stat. 21, c. 53, Acts June 18, 1898, §§ 1-4, 30 Stat. 477, c. 467, and ordinances of District of Columbia relating to plumbing, construed. United States v. MacFarland, 28 App. D. C. 552, distinguishing Czarra v. Medical Supervisors, 25 App. D. C. 443, on ground that in such cases the right of revocation was expressly conferred.

27. City held to have no power to revoke money lender's license on ground of usury. City Council of Augusta v. Clark & Co., 124 Ga. 254, 52 S. E. 881.

28. Revocation of license to sell milk by board of health pursuant to reserved power to revoke and for cause, sustained. Metropolitan Milk & Cream Co. v. New York, 113 App. Div. 377, 98 N. Y. S. 894. Special license to use streets for sale of lunches held revokable under authority to revoke reserved in license. Spencer v. Mahon [S. C.] 55 S. E. 321. Reservation of power to revoke liquor license for cause and after hearing held not unreasonable. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423.

29. Hurd's Rev. St. 1903, relating to peddlers, pawnbrokers, etc. Harrison v. People, 121 Ill. App. 189. Authority of mayor under ordinance to revoke pawnbroker's license upon conviction of violation of regulations not affected by appeal from judgment of conviction. Id.

30. Certiorari is not complete remedy for refusal to revoke, since reversal of order of refusal would be barren of result except to remove possible bar to further application for revocation. State v. Curtis [Wis.] 110 N. W. 189. Revocation of liquor license under Rev. St. 1898, § 1558, for viola-

tion of a license revoked without authority,[31] but revocation of a license already expired will not be enjoined.[32]

§ 4. *Interpretation of statutes and ordinances and persons subject.*[33]—License laws being penal are construed strictly,[34] but not with such technicality as to defeat their purpose and the clearly expressed intention of the lawmakers.[35] Where a licensing statute is attacked as unconstitutional, it is the court's duty to so construe it as to obviate the objection if possible,[36] but where the act is plain and unambiguous a strained construction will not be adopted in order to uphold it,[37] nor will a presumption not necessary to uphold an ordinance at the time of its adoption be indulged subsequently under changed conditions giving rise to the necessity of such a presumption.[38] Contemporaneous executive construction will be considered only when the statute is ambiguous,[39] and in no case is such construction binding on the courts.[40] Such construction is not available to one who did not invoke it and who by reason thereof merely has not been called upon to pay the license fee.[41] Legislative construction of constitutional provisions is entitled to more or less weight.[42]

The scope of a classification for licensing purposes is sometimes defined by statute,[43] and interpretation clauses are generally regarded as mandatory when construing the identical act.[44] In the absence of an interpretation clause, the ques-

tion of closing ordinance. Id. Complaint charging sale after closing hour held not to charge violation of ordinance requiring closing after such hour, but not so defective as to require its dismissal by municipal council. Id.

31. United States v. MacFarland, 28 App. D. C. 552.

32. Spencer v. Mahon [S. C.] 55 S. E. 321; Syfer v. Spencer, 103 Md. 66, 63 A. 256.

33. See 6 C. L. 445.

34. Kettles v. People, 221 Ill. 221, 77 N. E. 472; Wilson v. District of Columbia, 26 App. D. C. 110. The words of the statute itself must indicate with reasonable certainty whether a tax is imposed on an occupation, especially where failure to pay is made a criminal offense. Wilson v. District of Columbia, 26 App. D. C. 110.

35. Act July 1, 1905 (Laws 1905, p. 320), § 3, providing that no one, unless previously licensed, "shall begin" to practice dentistry without license from board of dental examiners, does not exempt from necessity of obtaining such license one previously practicing without a license as previously required by law. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

36. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153. Gen. Laws 1905, p. 336, c. 141, construed in favor of its validity as imposing privilege tax on railroads and not property tax which would be contrary to Federal commerce clause. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. Doubt as to whether license fee imposed on beer dealers was for regulation or for revenue resolved in favor of former in order to obviate objections based on Federal commerce clause. Meyer, Jossen & Co. v. Mobile, 147 F. 843.

37. Laws 1905, pp. 372, 373, requiring license of every person who "peddles out or, after shipment to the state, canvasses and sells by sample" certain kinds of property, held not susceptible to construction that phrase "after shipment to the state" refers to persons and not property, and that only persons exempted from license are nonresidents sending agents to state. Bacon v. Locke, 42 Wash. 215, 83 P. 721.

38. Since county supervisors had power under St. 1891, p. 306, c. 216, § 25, subd. 27, and County Gov. Act, § 25, subd. 25, to license for both regulation and revenue, an ordinance enacted pursuant to such power will not be presumed, after repeal of such acts, to have been passed for regulation only so as to be sustained by the repealing act. Pol. Code, § 3366, granting power to license for regulation only. Placer County v. Whitney Estate Co., 2 Cal. App. 614, 84 P. 277.

39, 40. United States v. McFarland, 28 App. D. C. 552.

41. State v. Hartwell Co., 117 La. 144, 41 So. 444. Utmost effect, as to such parties, of such construction and resultant failure to call for payment of license, was to relieve such parties of interest and attorney's fees until from and after judicial demand. Id.

42. Fact that under two constitutions of the state the legislature for more than twenty years imposed license taxes on gas, electric, waterworks, telegraph and telephone companies, held entitled to great weight in determining whether such business constituted manufacturing within constitutional exemptions. State v. New Orleans R. & Light Co., 116 La. 144, 40 So. 597.

43. Laws 1903, c. 122, § 134, includes the business of express companies or agencies as a calling or occupation which may be licensed thereunder. City of Topeka v. Jones [Kan.] 86 P. 162.

44. Soliciting agent taking orders subject to principal's approval, and thereafter delivering the goods and making collection, held not a transient merchant or itinerant vender within Act 30th General Assembly, p.

tion as to whether a particular person or matter falls within a particular class is a matter of statutory construction,[45] and so also as to the amount of the license fee,[46]

41, c. 48, defining the word "peddler" as including all transient merchants and itinerant venders selling by samples or taking orders, whether for immediate or future delivery. State v. Bristow [Iowa] 109 N. W. 199. Ordinance defining hawking and peddling so as to include agent taking orders for future delivery. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853.

45. Party taking orders for medicines for future delivery by another held not a **hawker or peddler** of medicines within Act Feb. 26, 1902, Laws 1902, pp. 1101, 1102. State v. Ivey, 73 S. C. 282, 53 S. E. 428. Party going from house to house in wagon furnished by certain merchants and soliciting orders by sample which he subsequently filled by ordering goods from such merchants and delivering them to purchasers, collecting therefor, and remitting proceeds to said merchants less commissions, held a hawker or peddler or one who went about selling goods. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853, following City of Muskegon v. Zeeryp, 134 Mich. 181, 96 N. W. 502. Under Pub. Acts 1895, No. 215, p. 389, authorizing licensing of hawkers and peddlers, city had authority to license agents selling for future delivery. Id. Sale of oil from wagon to retail dealers held not peddling, though such dealer used some of the oil for manufacturing purposes. Commonwealth v. Standard Oil Co., 29 Ky. L. R. 433, 93 S. W. 613. One who delivers portraits already sold in frames which purchasers of portraits have option of buying or not as they please is guilty of peddling in selling frames to such purchasers. State v. Looney [Mo.] 97 S. W. 934, refusing to follow and disapproving of State v. Coop, 52 S. C. 508, 30 S. E. 609, 41 L. R. A. 501, and City of Laurens v. Elmore, 55 S. C. 477, 33 S. E. 560, 45 L. R. A. 249, which two cases decided that such transaction was not peddling. Seems that ordinance prohibiting **peddling or in any other manner selling** merchandise on certain streets will be construed as being merely prohibitive of peddling, and hence not in restraint of trade. See Ex parte Henson [Tex. Cr. App.] 14 Tex. Ct. Rep. 757, 90 S. W. 874. Authority to require license of **hackmen,** draymen, omnibus drivers, cabmen, porters, expressmen, **and all others pursuing like occupations,** includes authority to license and regulate street cars operated within the city. Bloomington & Normal R. Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639. Pub. St. 1901, c. 124, § 1, as amended by Laws 1905, p. 484, c. 76, requiring license of **dealers** in, "and persons keeping shops for purchase and sale of junk," etc., includes wholesale dealers. State v. Cohen, 73 N. H. 543, 63 A. 928. Traction engine held a **motor vehicle** within Laws 1905, p. 498, c. 86. Emerson Troy Granite Co. v. Pearson [N. H.] 64 A. 582. A store where bottles, both new and old, are bought and sold, is not a **second-hand store** within R. S. c. 24, art. 5, par. 95, authorizing cities to license and regulate "second-hand and junk stores." City of Chicago v. Reinschreiber, 121 Ill App. 114. Question as to who is a **junk** dealer must be determined by general character of the business and not solely from character of materials handled. Dealer who handled old iron in large quantities, not buying or selling single pieces, held not a junk dealer. City of New York v. Vanrewater, 113 App. Div. 456, 99 N. Y. S. 306. Second-hand bottles are not junk. City of Chicago v. Reinschreiber, 121 Ill. App. 114. Party selling cotton seed which must be purchased in open market in order to furnish amount sold held a **cotton seed buyer and seller.** Gloster Oil Works v. Buckeye Cotton Oil Co., 87 Miss. 618, 40 So. 225. Agent hiring labor for his principal on a particular occasion and for no one else held not a **labor agent** within Code 1904, p. 2247. Watts v. Com. [Va.] 56 S. E. 223. Brewing company maintaining brewery in city and selling at wholesale at such brewery held to maintain a **storehouse or place of business** in the city, and hence subject to city license under Code 1906, § 996. City of Charleston v. Charleston Brew. Co. [W. Va.] 56 S. E. 198. As to work executed by a corporation for other parties pursuant to contract with such parties, a corporation is a **contractor who employs assistants** within license law. State v. Hartwell Co., 117 La. 144, 41 So. 444. A **building contractor** is one who contracts with the owner to become his builder and erect his structure according to certain plans and for certain compensation. Wilson v. District of Columbia, 26 App. D. C. 110. Bricklayer who did not contract with owner or furnish brick held not a building contractor within Act Cong. July 1, 1902, requiring license of building contractors. Id. Acts 1898, p. 412, No. 171, § 12, imposing license tax on business of **dealing in railroad or steamship tickets,** includes agents for nonresident companies who sells transportation, receives price thereof, and gives orders for delivery of tickets outside of state. State v. Orfila, 116 La. 972, 41 So. 227. Party purchasing fresh meat, storing it in refrigerators and then curing it by salting, smoking, etc., and selling it in its new form, held not a **dealer in fresh meat** packed or refrigerated, within Laws 1903, p. 9, c. 5106, § 16. Florida Packing & Ice Co. v. Carney [Fla.] 41 So. 190. Foreign meat packing corporation whose sole busines within the state was distributing its meats, packed in another state but stored within the state, held to be engaged in a **meat packing business** within the state, within N. C. Pub. Laws 1903, c. 247. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451. Dealing in coco-cola by the case as part of wholesale grocery business held not maintaining coco-cola **distributing depot** within Acts 1904, p. 62, c. 76, § 18. Carney v. Hamilton [Miss.] 42 So. 378. Under Laws 1905, p. 30, par. 28, § 2, imposing on **brewing companies and all other persons, firms or corporations engaged in sale of beer,** "including all other persons, corporations, or agencies maintaining storage depots," etc., a tax in each county where they do any business, a brewing company which had paid

exemptions from license,[47] person in whose name license must issue,[48] and statutory prohibitions against license.[49]

its tax as manufacturer under first section of act is not liable to tax on storage depot and agency in another county, since the act divides dealers in beer into two classes, to wit (1) brewing companies, (2) all other dealers. Whittlesey v. Acme Brew. Co. [Ga.] 56 S. E. 299. Tax imposed on **trading cars** by Laws 1904, p. 79, c. 76, § 93, held to be an occupation tax and not tax on specific car. Simon Zemurray & Co. v. Bouldin, 87 Miss. 583, 40 So. 15. License issued under such law confined to one particular route. Id. Under a license for operation of trading car certain number of miles in state, the distance is to be computed from the point where the car is opened for business and not from point where it entered the state. Id. Social club dispensing liquors to members held not liable for license tax on **conducting business of drinking saloon** or bar room. State v. New Orleans Chess, Checkers & Whist Club, 116 La. 46, 40 So. 526. Social club dispensing liquors to members is liable to license for conducting an **establishment selling or giving away or otherwise disposing of intoxicating liquors.** Id. Seems that single transaction of distributing samples for resident merchant was not **engaging in business** of advertising by distribution of samples, etc., especially in view of exemption in favor of resident merchants. City of Watertown v. Rodenbaugh, 112 App. Div. 723, 98 N. Y. S. 885. Under a statute authorizing city to license callings operated **within city,** express company not exempted because it does not receive packages from residents of city consigned to residents. City of Topeka v. Jones [Kan.] 86 P. 162. An ordinance requiring license from owners and drivers of vehicles for transportation for hire of goods, etc., **"from place to place within the city,"** applies to a local express company engaged in taking orders for goods to be shipped to the city by freight and transferred by company's wagon to purchasers, fees or drayage being charged for such transfer." Commonwealth v. Beck [Mass.] 79 N. E. 744.

46. Social clubs dispensing liquors to members held liable to license tax only on gross sales of liquors, not including sales of other articles. State v. New Orleans Chess, Checkers & Whist Club, 116 La. 46, 40 So. 526. Under Gen. Laws 1905, p. 336, c. 141, the amount of the privilege tax on railroads is based on the gross receipts of the railroads from every source whatever in the operation of such roads in the state. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71.

47. Electric light company not a **manufacturer** within exemption clause of Const. 1898, art. 229. State v. New Orleans R. & Light Co., 116 La. 144, 40 So. 597. Merely cutting leather into convenient shapes for sale is not such manufacturing as will exempt dealer from mercantile tax under an exemption applicable to manufacturers. Commonwealth v. Cover [Pa.] 64 A. 686. Cotton seed dealer not exempt from tax on buying and selling cotton seed on account of being also a cotton seed oil manufacturer. Gloster Oil Works v. Buckeye Cotton Oil Co., 87 Miss. 618, 40 So. 225. Under a proviso exempting from a mercantile license tax **manufacturers who keep a store** or warehouse at their own factory for the purpose of selling their own goods exclusively, a manufacturer who has two factories for the manufacture of the same kind of goods but who sells at only one of such factories is exempt. Under Acts 1846, 1868. Commonwealth v. Vetterlein, 29 Pa. Super. Ct. 294, afd. 214 Pa. 21, 63 A. 192. Exemption under Const. of 1898, art. 229, in favor of **persons engaged in mechanical pursuits,** held not inapplicable to a corporation as such, but inapplicable to a corporation doing mechanical work for other parties under contract with such parties, such a corporation being essentially a contractor and not one personally engaged in such pursuits. State v. Hartwell Co., 117 La. 144, 41 So. 444. Mutual insurance companies not exempt from license tax imposed by Code Supp. 1902, § 1333d, under Code, § 1304, exempting the property of **charitable institutions** from taxation. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153. Phrase **domestic machinery** as used in the excepting clause of Sess. Laws 1903, p. 271, c. 16, relating to licensing of itinerant venders, does not include buggy or wagon used at purchaser's home. Territory v. Russell [N. M.] 86 P. 551. Concern having storage tank and warehouse, but no fixed place of business within city from which it sold oil, but on contrary sold it from tank wagons, held not a **merchant** so as to be exempt from city license tax on account of having paid state license tax on merchants. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817. Exemption from license on bill-posting and distribution of samples in favor of resident **merchants advertising own business** may be claimed by employe of resident. City of Watertown v. Rodenbaugh, 112 App. Div. 723, 98 N. Y. S. 885. Code 1896, § 4122, subd. 55, imposing license tax on **corporations not otherwise specifically required to pay tax,** exempts only those corporations which have been required to pay a tax specifically applicable to them as corporations, and not those that have merely paid a tax on some particular business, such as maintaining a brewery. Spira v. State [Ala.] 41 So. 465.

Note on scope of personal exemptions: Exemption from occupation tax of persons engaged in mechanical, agricultural, and mining pursuits, under Const. 1898, art. 229, applies to corporations as well as to natural persons (State v. C. C. Hartwell Co., 117 La. 144, 41 So. 444), but not to a corporation doing the business of a contractor in such pursuits (Id.). In reaching these conclusions the court made a recapitulation of cases involving personal exemptions, of which the following is an epitome: Farmer held exempt, as one **engaged in agricultural pursuits,** from tax on hawkers and peddlers, though it did not appear whether he did physical labor on his farm. Roy v. Schuff, 51 La. 86, 24 So. 788. Plasterer who worked himself and also employed others held ex-

§ 5. *Assessment and recovery of license fees; prosecutions for failure to pay.*[50]—Jurisdiction of a suit to recover a license fee depends upon statute,[51] as does also the right of a particular officer to sue for such fee.[52] Assumpsit lies to collect an annual license fee.[53] Failure of a municipality in previous years to exercise the supervision and control for which the license fee is imposed is no defense to an action for the fee for the forthcoming year.[54] Where an ordinance imposing a license fee is not unreasonable on its face, the party alleging unreasonableness must allege and prove the facts supporting such allegation.[55] It is improper to submit the question of reasonableness to the jury with instruction to return a verdict for such a fee as they deem reasonable.[56] A license tax assessed by an ordinance which has been repealed cannot be collected.[57] A license, unless made so expressly, is not conclusive evidence of the facts therein recited;[58] and where the license fee is computed upon a return made by the licensee and issues as of course without investigation as to correctness of the return, the license is not conclusive evidence that the amount required by law has been paid,[59] even though the officer issuing the license has power to refuse it on the ground of an incorrect return.[60] Nor is the license conclusive evidence of the payment of the proper fee where the return is required to be approved by an officer acting in a merely administrative

empt as one **engaged in mechanical pursuits.** City of New Orleans v. Bayley, 35 La. Ann. 545. Brick mason who did no manual labor himself but executed construction contracts with employed labor held liable as a master builder or mechanic who employs assistance, and not entitled to exemption as one engaged in mechanical pursuits. Theobolds v. Connor, 42 La. Ann. 787, 7 So. 689. Contractor who continuously performed labor on constructions contracted for held exempt. City of New Orleans v. Leagman & Son, 43 La. Ann. 1180, 10 So. 244. Contractor who did no manual labor held not exempt. City v. O'Neil, 43 La. Ann. 1182, 10 So. 245. Barber held to be one engaged in mechanical pursuit. State v. Dielenschneider, 44 La. Ann. 1116, 11 So. 823.

48. Under Laws 1905, p. 498, c. 86, § 2, motor vehicle owned by firm or corporation should be registered in firm or corporate name. Emerson Troy Granite Co. v. Pearson [N. H.] 64 A. 582. License to operate motor vehicle issues to operator and not to owner if they be different. Id.

49. Prohibition against keeping pool table "in any house where liquors are sold" held not to prohibit licensing of pool table "in connection with" bar room. Bailey v. Opelika [Ala.] 40 So. 968.

50. See 6 C. L. 447.

51. County court has no jurisdiction of suit against corporation to recover license fees. Commonwealth v. Central Consumers' Co., 28 Ky. L. R. 1363, 91 S. W. 711. The county court may, in a proceeding instituted in that court, list for taxation any omitted license fees or taxes, and the amount found due may be recovered in the proper court, under the prayer for general relief in an action instituted by the state revenue collector to collect unpaid license fees from a corporation. Id.

52. Under Ky. St. 1903, §§ 4241, 4260, 4263, 4267, defining powers of revenue agents, such an agent cannot, unless directed to do so by the auditor, sue for omitted license taxes or fees. Commonwealth v. Central Consumers' Co., 28 Ky. L. R. 1201, 91 S. W. 711. Under Ky. St. 1903, § 4260, revenue agent may, without direction from auditor, institute proceedings to list omitted license taxes. Id.

53. License fee imposed as condition of right to pursue occupation as distinguished from penalty for pursuing occupation without license. Bloomington & Normal R., Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639.

54. Fee on electric light poles recoverable though no supervision exercised or expense incurred in connection with such poles in previous years since adoption of ordinance. West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7.

55. Allegation that fee is not based on cost of supervision not alone sufficient to raise question of reasonableness. West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7.

56. West Conshohocken Borough v. Conshohocken Elec. Light & Power Co., 29 Pa. Super. Ct. 7.

57. Business tax accruing under ordinance after repeal of same by Pol. Code, § 3366. Sierra County v. Flanigan [Cal.] 87 P. 801. Tax under ordinance repealed by Pol. Code, § 3366, though accrued prior to such repeal. Wheeler v. Plumas County [Cal.] 87 P. 802.

58. License issued to railroad company under Laws 1860, 1878, 1898. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594. Provision of Law of 1860, c. 174, p. 153, that the certificate of payment of fee should be evidence of the facts therein contained, did not make such certificate conclusive as to such facts. Id.

59. License issued to railroad company under Laws 1860, § 2, and Revision of 1878, § 1212. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

60. As was done in State v. McFetridge, 56 Wis. 256, 14 N. W. 185; State v. McFet-

capacity,[61] but it is otherwise where provision is made for contesting the truth of the return and the acceptance of the return renders it conclusive.[62]

No penalty can be imposed for failure to take out a license unless a penalty is provided for by statute or ordinance,[63] but the penalty need not be specified by the licensing statute when a penalty is provided by general law.[64] Municipal authorities cannot change the penalty where it is fixed by law.[65] Penalties are within constitutional limitations in regard to fines;[66] but no matter how harsh the penalty for violation of a licensing statute may be, the court has no right to invade the legislative domain in regard thereto, provided it does not exceed constitutional limitations,[67] and subject to such limitations a penalty for nonpayment of a property tax proper cannot, in the absence of legislative authority, be avoided upon any ground whatsoever,[68] and so also as regards a penalty under a police regulation,[69] but a penalty for nonpayment of a privilege tax, contractual in its nature,[70] will not be enforced regardless of equitable and moral considerations.[71]

Where the penalty attaches only upon conviction of a default, it can be exacted only under a judgment of court.[72] The offense charged must be specifically and

ridge, 64 Wis. 130; 24 N. W. 140; State v. Harshaw, 76 Wis. 230, 45 N. W. 308; all decided under the Revision of 1878, § 1212, relating to licensing of railroads. See State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594. Seems probably true under the law of 1860, notwithstanding the provision requiring payment of fee based upon gross earnings as "ascertained from such report." Id.

61. Rev. St. 1898, § 1212, imposes an absolute obligation on railroads to pay license fee based on gross earnings as specified in § 1214, and other provisions of §§ 1211, 1213, 1214, including approval of railroad's return as to earnings by railroad commissioner, are merely administrative in their character. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

62. See Act 1898, No. 171, p. 417, § 19. State v. New Orleans Chess, Checkers & Whist Club, 116 La. 46, 40 So. 526.

63. Thompson v. Atlanta [Ga.] 56 S. E. 114.

64. Hurd's Rev. St. 1903, c. 38, § 452 [Cr. Code, div. 14, § 14], authorizing imprisonment in default of payment of fine, is a general law and applies to fines for violation of Act July 1, 1905, relating to the licensing of dentists. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

65. Acts 1902, p. 134, c. 80, § 10, giving levee board power to levy and collect privilege taxes, fixes damages for nonpayment at 10 per cent. of the tax, and is unaffected by Acts 1904, p. 84, c. 76, § 112, relating to penalty for nonpayment of taxes generally, and levee board has no power to change such penalty. Simon Zemurray v. Bouldin, 87 Miss. 583, 40 So. 15.

66. Penalties amounting to from 100 to 4,000 per cent of the tax held unreasonable and contrary to Const. art. 1, § 13, forbidding the imposing of excessive fines. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. A fine of $50 to $100 per day and an additional penalty of $25 per day for violation of Act 29th Leg. p. 358, c. 148, imposing tax of 1% of gross products of oil wells, held excessive and unenforceable. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157; Stephens v. Morning Star Oil Co. [Tex. Civ. App.] 99 S. W. 159; Southwestern Oil Co. v. State [Tex. Civ. App.] 99 S. W. 159; Texas Co. v. Stephens [Tex. Civ. App.] 99 S. W. 160.

67, 68, 69. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

70. See ante, § 1, Definition and Nature.

71. Penalty of $10,000, imposed by Rev. St. 1898, § 1214, for failure to pay railroad license fee. State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594. Use of term "absolutely forfeit" in such section 1214 does not unmistakably show legislative intent to require enforcement of penalty under all circumstances. Id.

Note: "Numerous instances might be referred to, where remedial statutes to secure performance of contractual duties have been held, notwithstanding their literal sense to the contrary, to apply only to cases of failure to perform through inexcusable conduct. Schumacher v. Falter, 113 Wis. 563, 89 N. W. 485; Johnson v. Huber, 117 Wis. 58, 93 N. W. 826, are significant cases on that in this state and have established a definite rule here on the subject. * * * The basic theory of these cases is that the court will apply substantially the same rule of construction to such statutes as is applicable to stipulated forfeitures in ordinary contracts, to the extent of determining whether they were intended to apply literally or not, the presumption being indulged in that nothing absurd or unreasonable was in the legislative mind; and that when the literal sense would lead to the contrary, it should be restrained accordingly by a somewhat arbitrary assumption that the legislature had in mind defaults only of a nature in harmony with the remedial feature provided, in the absence of some clearly expressed indication to the contrary. That rule for construction may not, as said in Seeman v. Biemann, 108 Wis. 365, 84 N. W. 490, be very logical, but it is a just one and has been so firmly established that it may well be thought to be in the legislative mind in enacting laws, the same as it is presumed to be in the minds of parties in entering

definitely alleged.[73] The date of the offense, however, need not be proved as laid except that the time proved must be prior to the indictment and within the period of limitations.[74] Several defaults may be charged in several counts.[75] On a prosecution for the doing of an act prohibited to be done except by licensees, the defendant has the burden of proving that he had a license,[76] and error in admitting evidence to show that defendant had no license is harmless.[77] Other ordinances relating to the licensing of similar occupations are admissible on the question of the propriety of the classification.[78] The evidence must show that the defendant is guilty of such acts as bring him within the class of which a license is required.[79] Where several acts violating a liquor law constitute a continuous offense, conviction for one of the acts will bar prosecution for the others.[80] The state cannot appeal from a judgment of acquittal.[81]

§ 6. *Effect of failure to obtain.*[82]—Where the statute imposing the license is a purely revenue measure, the contracts of an unlicensed party are not affected thereby.[83] The defense that plaintiff had no license must be pleaded.[84]

§ 7. *Disposition of license moneys.*[85]—An officer entitled to commissions on licenses "collected" by him is not entitled to commissions on licenses the collection of which is entrusted to other officers,[86] and in all cases the right to such commissions depends entirely upon statute.[87]

into contractual relations."—See State v. Chicago, etc., R. Co. [Wis.] 108 N. W. 594.

72. Penalty fixed by Acts 1902, p. 133, c. 80, § 4, for nonpayment of privilege tax, cannot be exacted by tax collector. Simon Zemurray v. Bouldin, 87 Miss. 583, 40 So. 15.

73. Indictment under Ky. St. 1903, § 2223a, for acting as officer or agent for a corporation which had not paid its license, held insufficient under Crim. Code Prac. § 122, requiring indictments to state the charge in ordinary and concise language so as to be intelligible by person of ordinary understanding when it did not state the specific capacity in which defendant acted. Commonwealth v. Loving, 29 Ky. L. R. 175, 92 S. W. 575.

74. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

75. Where several counts charge practice of dentistry on several different persons, state not required to elect on which count it will proceed. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

76. Practicing dentistry without license. Laws 1905, p. 320, § 3. Kettles v. People, 221 Ill. 221, 77 N. E. 472. Where prothonotory's record did not show that defendant was licensed, under Act May 18, 1893, P. L. 94, to practice medicine, it was not incumbent upon commonwealth to show in first instance that defendant had no license. Commonwealth v. Clymer, 30 Pa. Super. Ct. 61. Where evidence failed to show that defendant had license to practice medicine as required by Act May 18, 1893, P. L. 94, it was not error for court to express opinion in favor of conviction. Id. Burden on party selling liquor to show that he is member of class exempted from license or that he has license. Commonwealth v. Wenzel, 24 Pa. Super. Ct. 467.

77. Allowing clerk of board of medical examiners to testify that he could not find defendant's name on record of such board was harmless. Commonwealth v. Clymer, 30 Pa. Super. Ct. 61.

78. On prosecution for dealing in second-hand bottles without license, contrary to city ordinance, other ordinances relating to second-hand and junk stores were admissible as bearing upon reasonableness of and statutory authority for classifying defendant's business of dealing in bottles, both old and new, with the business of keeping a second-hand or junk store. City of Chicago v. Reinschreiber, 121 Ill. App. 114.

79. Held sufficient to sustain finding that defendant stored and kept gasoline for sale. Cohill v. District of Columbia, 26 App. D. C. 163.

80. Conviction of selling oil from wagon held bar to prosecution for another sale from same wagon during same license year, the license being imposed on selling from the wagon and the offense being a continuous one. Commonwealth v. Standard Oil Co., 28 Ky. L. R. 1376, 91 S. W. 1126; Standard Oil Co. v. Com., 28 Ky. L. R. 1369, 91 S. W. 1127.

81. Where circuit court on appeal from justice found that defendant was not hawker or peddler. State v. Ivey, 73 S. C. 282, 53 S. E. 428.

82. See 6 C. L. 448.

83. Right of real estate broker to recover commissions. Coates v. Locust Point Co., 102 Md. 291, 62 A. 625; Watkins Land Mortg. Co. v. Thetford [Tex. Civ. App.] 16 Tex. Ct. Rep. 175, 96 S. W. 72.

84. In action by plumber for services. Margolys & Co. v. Goldstein, 96 N. Y. S. 185.

85. See 6 C. L. 449.

86. County treasurer not entitled to commissions on gaming and liquor licenses collected by sheriff during period from Laws 1901, p. 46, c. 19, and Laws 1905, p. 115, c. 60, § 11. Hubbell v. Bernalillo County Com'rs [N. M.] 86 P. 430.

87. County assessors, since Sess. Laws

LICENSES TO ENTER ON LAND.

§ 1. Nature, Creation, and Indicia of a License and Distinction from Easements and Other Estates (753).

§ 2. Rights and Liabilities of Licensees (755).

§ 1. *Nature, creation, and indicia of a license and distinction from easements and other estates.*[88]—A license is authority to enter upon the land of another for the purpose of doing some act thereon, without passing any estate in the land,[89] but a property interest may be acquired under a license involving a grant.[90] A license, being a mere personal privilege, is not assignable and does not run with the land,[91] and ordinarily is revocable at the will of the licensor;[92] but an executed paid license, whose execution has involved an expenditure of money or its equivalent and which in its very nature involves a continuous use is irrevocable,[93] and will continue

1901, p. 205, c. 108, was enacted, not entitled to commissions on gaming and liquor licenses collected in their respective counties. Sandoval v. Bernalillo County Com'rs [N. M.] 86 P. 427.

88. See 6 C. L. 449.

89. Driveway partly on each of two lots established by mutual consent and for mutual convenience held not a way of necessity but a mere license. Wilkinson v. Hutzel, 142 Mich. 674, 12 Det. Leg. N. 870, 106 N. W. 207. Certificate entitling purchaser of lot from springs company to privileges of grounds, etc., held mere license, having been issued subsequently to the purchase and the company, furthermore, having no charter power to deal in real estate. Stacy v. Glen Ellyn Hotel & Spring Co., 223 Ill. 546, 79 N. E. 1133. Reservation in deed of right to string wash lines from tenement house on one lot to pole on lot conveyed held an easement inuring to benefit of tenants and not a mere license for personal benefit of owner of tenement. Steiner v. Peterman [N. J. Eq.] 63 A. 1102.

90. License to cut and take away timber will confer property right in timber cut. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

91. License to drain water onto land. Jones v. Stover [Iowa] 108 N. W. 112.

92. Stacy v. Glen Ellyn Hotel & Springs Co., 223 Ill. 546, 79 N. E. 133. Parol license, without consideration, to drain water onto land of another. Jones v. Stover [Iowa] 108 N. W. 112. Mutual license between adjoining lot owners to use part of each lot as driveway revocable by either party. Wilkinson v. Hutzel, 142 Mich. 674, 12 Det. Leg. N. 870, 106 N. W. 207. License to attach telephone wires to building. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. License to cut timber resulting from parol agreement to sell standing timber. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

93. License to construct irrigation ditch. Stoner v. Zucker, 148 Cal. 516, 83 P. 808.

Note: Authorities are in conflict on this point. Doctrine that such license is revocable is supported by Cooley on Torts [2d Ed.] 364, but in Maxwell v. Bay City Bridge Co., 41 Mich. 453, 2 N. W. 639, Judge Cooley recognizes the injustice of the rule. A leading case denying right of revocation is Rerick v. Kern, 14 Serg. & R. [Pa.] 267, 16 Am. Dec. 497, and this decision was approved in Flickinger v. Shaw, 87 Cal. 126, 25 P. 268, 22 Am. St. Rep. 234, 11 L. R. A. 134, and followed in Smith v. Green, 109 Cal. 234, 41 P. 1024. See, also, Gould on Waters, §§ 232, 324. Rerick v. Kern, 14 Serg. & R. [Pa.] 267, 16 Am. Dec. 497, is also followed in Hepburn v. McDowell, 17 Serg. & R. [Pa.] 384; Killip v. McIlhenny, 4 Watts [Pa.] 322; Swartz v. Swartz, 4 Pa. 358; Campbell v. McCoy, 31 Pa. 263; Meigs' Appeal, 62 Pa. 34; Kay v. Penn. R. Co., 65 Pa. 269; Dark v. Johnston, 55 Pa. 164; Thompson v. McElarney, 82 Pa. 174; Hoff v. McCauley, 53 Pa. 206. This last case holding that the Pennsylvania doctrine is that the license is irrevocable only when parties cannot be restored to original status by payment of compensations. See, also, 1 Washb. on Real Prop., § 400; Big Mountain Imp. Co.'s Appeal, 54 Pa. 372. The following cases illustrate this principle, holding the license irrevocable: License to lay conduit pipes through land, Le Fevre v. Le Fevre, 4 Serg. & R. [Pa.] 341, 8 Am. Dec. 696. To flood licensor's land, McKellip v. McIlhenny, 4 Watts [Pa.] 317; Campbell v. McCoy, 31 Pa. 263. To erect structures on licensor's land, Meigs' Appeal, 62 Pa. 34. To sink oil wells, Dark v. Johnston, 55 Pa. 164. The doctrine of irrevocability is also sustained by the following: Snowden v. Wilas, 19 Ind. 10; Stephens v. Benson, 19 Ind. 367; Lane v. Miller, 27 Ind. 534; Miller v. State, 39 Ind. 267; Hodgson v. Jeffries, 52 Ind. 34; Wickersham v. Orr, 9 Iowa, 260; Beatty v. Gregory, 17 Iowa, 114; Upton v. Brozin, 17 Iowa, 157; Russell v. Hubbard, 59 Ill. 335; Stuffield v. Collier, 3 Kelly [Ga.] 82; Mayer v. Franklin, 12 Ga. 243; Cook v. Pridgen, 45 Ga. 331; Lee v. McLeod, 12 Nev. 280; Harrison v. Dillingham, 6 N. H. 9; Putney v. Day, 6 N. H. 430; Woodbury v. Parshley, 7 N. H. 237; Ameriscoggin Bridge Co. v. Bragg, 11 N. H. 108; Sanborn v. Burnside, 13 N. H. 264; Carleton v. Redington, 21 N. H. 291; Cowles v. Kidder, 24 N. H. 364; Miller v. Tobie, 41 N. H. 86; Grimshaw v. Belcher, 88 Cal. 217, 22 Am. St. Rep. 298; Raritan Water Power Co. v. Veghte, 21 N. J. Eq. 463; Hulme v. Shreve, 3 Green's Ch. [N. J.] 116; Wilson v. Calfont, 15 Ohio, 248; Hornback v. Cincinnati R. R. Co., 20 Ohio St. 81; Pope v. Henry, 24 Vt. 565. See, also, Hall v. Chaffee, 13 Vt. 157; Lowe v. Miller, 3 Grat. [Va.] 205, 46 Am. Dec. 188; Addesin v. Hock, 2 Gill [Md.] 221, 41

as long as it is natural for it to do so,[94] nor can an executed license involving a grant be revoked so as to defeat the grant.[95] Permission to enter land for the purpose of performance of a condition precedent to its conveyance creates a mere license,[96] revocable upon the nonperformance of the condition within the time specified,[97] at the will of either the licensor[98] or his grantee.[99] Failure to declare a forfeiture at the expiration of the time fixed for the performance of the condition is not a waiver of the right to revoke the license.[1] So also the grant to a street railroad company of the right to construct its track upon city streets is a mere license,[2] revocable for nonperformance of conditions,[3] unless there is sufficient excuse for such nonperformance.[4] Such a license will be construed most strongly against the grantee and in favor of the public.[5] A theatre ticket, though issued upon a consideration, is a mere license subject to revocation for breach of conditions.[6] A subsequent conveyance of the fee without reservation revokes the license,[7] and the li-

Am. Dec. 421; Parkhurst v. Van Cortland, 14 Johns. [N. Y.] 15, 7 Am. Dec. 427; Dyer v. Sandford, 9 Metc. [Mass.] 395, 43 Am. Dec. 399. On the other hand there is a strong line of authority to the effect that no interest in realty can be acquired by a parol license, though executed. Prince v. Case, 10 Conn. 375, 27 Am. Dec. 675; Long v. Buchanan, 27 Md. 502, 92 Am. Dec. 653; Hays v. Richardson, 1 Gill & J. [Md.] 266; Partridge v. First Ind. Church, 39 Md. 631; Foster v. Browning, 4 R. I. 47; Stevens v. Stevens, 11 Metc. [Mass.] 248; Owen v. Field, 12 Allen [Mass.] 457; Maxwell v. Bay City Bridge Co., 41 Mich. 467; Jamieson v. Milleman, 3 Duer [N. Y.] 255; Babcock v. Utter, 1 Keyes [N. Y.] 397; Merrill v. Calkins, 73 N. Y. 584; Mamford v. Whitney, 15 Wend. [N. Y.] 381; Miller v. The Auburn & Syracuse R. R. Co., 6 Hill [N. Y.] 61; Selden v. Del. & H. Canal Co., 29 N. Y. 639; Wolfe v. Frost, 4 Sandf. Ch. [N. Y.] 77. See, also, Kamphouse v. Goffner, 73 Ind. 453; Huston v. Laffee, 46 N. H. 505; Dodge v. McClintock, 47 N. H. 386; Hazelton v. Putnam [Wis.] 54 Am. Dec. 158; Lockhart v. Gier, 54 Wis. 135. Whether a consideration is an element in determining question of revocability, see Putney v. Day, 6 N. H. 430, 25 Am. Dec. 470; Reading v. Commonwealth, 11 Pa. 196, 51 Am. Dec. 534. Doctrine of equitable estoppel cannot be invoked against city. Branson v. City of Philadelphia, 47 Pa. 329.—See Stoner v. Zucker [Cal.] 83 P. 808, and notes to Rerick v. Kern [Pa.] 16 Am. Dec. 497; Flickinger v. Shaw [Cal.] 22 Am. St. Rep. 234; Ricker v. Kelly [Me.] 10 Am. Dec. 38; Grimshaw v. Belcher [Cal.] 22 Am. St. Rep. 298; Hazelton v. Putnam [Wis.] 54 Am. Dec. 158; Long v. Buchanan [Md.] 92 Am. Dec. 653.

94. License to construct irrigation ditch on land becomes in effect an easement, continuing so long as the use of the ditch may continue. Stoner v. Zucker, 148 Cal. 516, 83 P. 808.

Note: License is not revocable to defeat a grant or interest to which it is incident. Foster v. Browning, 4 R. I. 47, 67 Am. Dec. 505; Beatty v. Gregory, 17 Iowa, 109, 85 Am. Dec. 546; Hazelton v. Putnam [Wis.] 54 Am. Dec. 166; Walsh v. Taylor, 39 Md. 599. See Long v. Buchanan [Md.] 92 Am. Dec. 653 and note thereto.

95. License to cut and carry away standing timber not revocable as to timber cut. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

96. Agreement to convey railroad right of way upon building of railroad over certain route and permission to enter land to build such road. Littlejohn v. Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840. Fact that owner in subsequently granting the property traversed by the right of way to a third party granted such party a reversionary right to the right of way in the event of its abandonment by the railroad company was not such a recognition of the railroad company's rights as to confer any title upon it. Id.

97, 98, 99. Littlejohn v. Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840.

1. Littlejohn v. Chicago, etc., R. Co., 219 Ill. 584, 76 N. E. 840, distinguishing Sands v. Wacover, 149 Ill. 530, 36 N. E. 960, on ground that in that case the condition had been performed before any attempt to declare a forfeiture.

2. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

3. Conditions as to time of construction. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

4. Injunction against construction of small and comparatively unimportant connecting line no excuse for not constructing main line. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

5. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

6. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20, citing Purcell v. Daly, 19 Abb. N. C. [N. Y.] 301; Wood v. Ledbitter, 3 M. & A. 838; Benton v. Scherff, 1 Allen [Mass.] 133, 79 Am. Dec. 717; McCrea v. Marsh, 12 Gray [Mass.] 211, 71 Am. Dec. 745; Greenburg v. Western Turf Ass'n, 140 Cal. 357, 73 P. 1050; 28 Am. & Eng. Enc. Law [2d Ed.] 124; Pingrey's Extraordinary Contracts, § 509; Wandell's Law of the Theatre, 221; Goddard's Bailments and Carriers, § 333. A condition that the ticket shall be invalid if resold at the sidewalk is reasonable as tending to prevent ticket speculators from selling at an advance price. Collister v. Hayman, 183 N. Y. 250, 76 N. E. 20.

7. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. Owner of lot married owner of adjoining lot and joined in conveyance of latter to third party thereby revoking a mutual license to use part of each lot as driveway. Wilkinson v. Hutzel,

censee is charged with notice of such revocation.[8] Entry and occupation after revocation constitute trespass.[9]

A license will not be presumed from the fact of entry and occupation either as against the original owner[10] or a subsequent grantee.[11] A city cannot license such a use of its streets as will amount to a public nuisance,[12] nor such as will impair the public use thereof.[13] A mere license can never ripen into title by adverse possession or prescription.[14]

§ 2. *Rights and liabilities of licensees.*[15]—A license must not be exercised in a manner likely to produce unnecessary damage to the licensor,[16] but a licensee is not liable in damages for failure to execute a revocable license,[17] nor will such a failure deprive him of the right to the fruits of the license so far as it has been executed.[18] The duty of the licensor to exercise care to protect the licensee from personal injury is elsewhere treated.[19]

LIENS.

§ 1. **Definition and Nature (755).**
§ 2. **Common-Law, Equitable, and Statutory Liens (756).**
A. Common-Law Liens (756).
B. Equitable Liens (756).
C. Statutory Liens (757). Construction (757).
§ 3. **Rank and Priorities of Liens (758).**
§ 4. **Waiver, Extinguishment, Discharge, and Revival (759).**
§ 5. **Enforcement and Protection of Liens (760).** Statutory Proceedings to Enforce or Foreclose (761). Equitable Remedies and Procedure (761).

Scope of topic.—This article treats only of liens in general, particular kinds of liens being discussed in articles devoted specifically thereto or articles devoted to the subject-matter to which the particular liens relate.[20]

§ 1. *Definition and nature.*[21]—A lien is a hold or claim which one person has upon the property of another as a security for some debt or charge.[22] A partnership creditor must work out his lien on the partnership property through one of the part-

142 Mich. 674, 12 Det. Leg. N. 870, 106 N. W. 207.

8. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

9. License to attach telephone wires to building. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

10. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66.

11. When telephone wires were attached to building at time of conveyance. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. But see Denton v. Cumberland Tel. & T. Co., 29 Ky. L. R. 1218, 96 S. W. 1112, where an injunction was refused because complainant did not allege that defendant's entry and occupation, of which complainant had notice at time of his purchase, was wrongful.

12. License to occupy streets with movable store. Spencer v. Mahon [S. C.] 55 S. E. 321. See Licenses, 8 C. L. 734.

13. See Municipal Corporations, 6 C. L. 715.

14. Woodbury v. Allan [Pa.] 64 A. 590; Zerbey v. Allan [Pa.] 64 A. 587. License to drain water onto land. Jones v. Stover [Iowa] 108 N. W. 112. Mutual license between adjoining lot owners to use part of each lot as driveway. Wilkinson v. Hutzel, 142 Mich. 674, 12 Det. Leg. N. 870, 106 N. W. 207. See Adverse Possession, 7 C. L. 41.

15. See 6 C. L. 451.

16. Trespass for entering plaintiff's land and laying defective water pipe not justified by license to lay good water pipe. Graham v. Redlands Heights Water Co. [Cal. App.] 86 P. 989.

17. License to cut timber arising from parol contract for sale thereof. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

18. License to cut timber to be divided between parties. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

19. See Negligence, 6 C. L. 748.

20. See Agency, 7 C. L. 61; Agriculture, 7 C. L. 94; Animals, 7 C. L. 120; Attachment, 7 C. L. 300; Attorneys and Counsellors, 7 C. L. 319; Auctions and Auctioneers, 7 C. L. 347; Brokers, 7 C. L. 465; Carriers, 7 C. L. 522; Corporations, 7 C. L. 862; Executions, 7 C. L. 1614; Factors, 7 C. L. 1642; Forestry and Timber, 7 C. L. 1737; Inns, Restaurants and Lodging Houses, 8 C. L. 317; Judgments, 8 C. L. 530; Landlord and Tenant, 8 C. L. 693; Mechanics' Liens, 6 C. L. 611; Mortgages, 6 C. L. 681; Pawnbrokers, 4 C. L. 955; Pledges, 6 C. L. 1065; Railroads, 6 C. L. 1194; Sales, 6 C. L. 1320; Shipping and Water Traffic, 6 C. L. 1464; Vendors and Purchasers, 6 C. L. 1781.

21. See 6 C. L. 451.

22. See 4 C. L. 434.

ners, otherwise he has no enforceable lien.[23] As a rule, recording acts are inapplicable as between the lienor and the debtor.[24]

§ 2. *Common-law, equitable, and statutory liens. A. Common-law liens.*[25]—A lien arises at common law in favor of one who improves by his labor or expense the chattels of another at the latter's request.[26] It is not a conversion, therefore, for a bailee for repairs to hold the property until payment for such repairs,[27] unless the property is also held upon a claim other than that based on the repairer's lien.[28] The lien of a seller of personal property is dependent upon possession,[29] and so also an artisan's lien for making an article or repairing it,[30] but where a single contract for making or repairing covers several articles, delivery of part of such articles does not discharge the lien and the balance may be retained to secure the whole amount due on all.[31] Services rendered in caring for land create no lien thereon,[32] nor is there any lien for cutting and hauling logs to a saw-mill.[33]

(§ 2) *B. Equitable liens.*[34]—The doctrine of equitable lien follows closely on that of subrogation, both coming under the maxim that equality is equity, and are applied only where the law fails to give relief and justice would suffer without them.[35] The lien usually rests upon the intent of the parties predicated upon their express declaration[36] or implied from their acts and agreements,[37] or resting upon both acts and expressed intention.[38] In the absence of an intent to create a lien, none will arise,[39] and the mere fact, therefore, that money is advanced for the purchase of property will not create a lien on the property in the absence of any agreement to that effect.[40] A lien arises where one party, at the request of another under legal disability, advances money to be applied and which is applied to the discharge of an obligation or debt of the latter,[41] but no such lien arises in favor of a mere volunteer, as where the money is advanced to discharge an obligation for which the

23. Merkley v. Gravel Switch Roller Mills Co.'s Assignee, 28 Ky. L. R. 1010, 90 S. W. 1059.

24. Statute relating to recording of conditional sales. Cameron & Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 1129.

25. See 6 C. L. 451.

26. Bergman v. Gay [Vt.] 64 A. 1106. Such a lien may be acquired on mortgaged property subject to the mortgage. Id.

27. Martin v. Houck Music Co. [Ark.] 94 S. W. 932.

28. Evidence held to show no such claim. Martin v. Houck Music Co. [Ark.] 94 S. W. 932.

29. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820.

30. No lien on automobile repaired while in garage when owner exercised control over machine at all times, taking it out from time to time whenever he wanted to do so. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. S. 673.

31. Solomon v. Bok, 49 Misc. 493, 98 N. Y. S. 838.

32. Morrison v. New Haven & Wilkerson Min. Co. [N. C.] 55 S. E. 611.

33. Brackett v. Pierson, 99 N. Y. S. 770.

34. See 6 C. L. 452.

35. Capen v. Garrison, 193 Mo. 335, 92 S. W. 368.

36. Where purchaser of chattels agreed to execute mortgage on them to secure price but failed to do so. Star Drilling Mach. Co. v. McLeod, 29 Ky. L. R. 84, 92 S. W. 558. Equitable lien on horse created by promise to deliver him to lender as security for loan. Reardon v. Higgins [Ind. App.] 79 N. E. 208. Where purchaser agreed to execute mortgage on chattels and real property to which same were to be attached, but refused to carry out such agreement, and equitable lien was declared on both personalty and realty. Barnard & Leas Mfg. Co. v. Smith, 77 Ark. 590, 92 S. W. 858.

37. Materialman taking assignment from contractor of funds to become due under contract has equitable lien on such fund. In re Cramond, 145 F. 966. Party advancing money to contractor and taking order on money to become due under contract held to have equitable lien on such money. Id. Agreement by adjoining owner to pay part of cost of party wall creates equitable lien on lot on which wall is built. Rugg v. Lemley [Ark.] 93 S. W. 570.

38. Equitable lien on goods in hands of commission merchant created by delivery of latter's receipts to bank and execution of note and memorandum showing intent to create lien. Smith v. Equitable Trust Co. [Pa.] 64 A. 594.

39. Assignment of profits of wheat shipments to party furnishing wheat held to create no lien on cargo where such party did not rely on assignment as creating lien but retained receipts evidencing ownership of wheat until same was practically paid for. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820.

40. Sanders v. Helfrich Lumber & Mfg. Co., 29 Ky. L. R. 466, 93 S. W. 54.

41. Capen v. Garrison, 193 Mo. 335, 92 S. W. 368.

owner of the property is not liable,[42] nor can the lien arise out of a mistake of law.[43] The lien of a vendor of land arises from the fact that the vendee has received from the vendor an estate for which he has not paid the full consideration and is not dependent upon the express agreement of the parties,[44] An equitable lien will not be declared where the effect would be a violation of the law.[45] A court of equity may declare an equitable lien on the estate of a bankrupt, and the lien so declared will be recognized by a court of bankruptcy.[46]

(§ 2) *C. Statutory liens.*[47]—For the purpose of creating liens, a statutory classification is permissible both as to those in whose favor[48] and those against whom the lien is to operate.[49] To acquire a statutory lien the terms of the statute must be complied with,[50] and a party claiming such a lien must bring himself clearly within the statute,[51] and the property upon which the lien is claimed must be definitely described.[52]

Construction.[53]—Statutes giving artisans the right to retain property made or repaired by them until payment for such services are held to be merely declaratory of the common law.[54] A special lien is not necessarily exclusive of a general lien.[55] Upon the construction of the particular statute depends the question whether the lien therein provided for applies in favor of any particular person or class[56] or against a particular person,[57] or against particular property,[58] or on account of particular services.[59] The question as to when the lien takes effect is also one of statutory construction.[60] The priority of liens as dependent upon statutory construction is treated of elsewhere.[61]

42. Money advanced to curator to discharge encumbrance on land of ward but for which ward was not liable. Capen v. Garrison, 193 Mo. 335, 92 S. W. 368.

43. Mortgage executed by curator by order of probate court to secure advance to discharge encumbrance on ward's land for which ward was not liable, parties believing curator had power to execute the mortgage. Capen v. Garrison, 193 Mo. 335, 92 S. W. 368.

44. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591.

45. No equitable lien arises out of contract of street railroad company to deliver bonds when they are authorized by law where such bonds are never authorized by the railroad commissioners as required by Rev. Laws, c. 109, §§ 24, 25, c. 111, § 63, c. 112, §§ 20, 23, Acts 1902, p. 285, c. 320, § 1. Augusta Trust Co. v. Federal Trust Co., 140 F. 930.

46. Crosby v. Ridout, 27 App. D. C. 481.

47. See 6 C. L. 455.

48. Mechanics and materialmen. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158.

49. Code 1887, § 2485, Code 1904, p. 1246, giving lien for supplies furnished to mining and manufacturing corporations. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158.

50. Filing of notice of lien necessary to creation of labor or material lien under Laws N. Y. 1897, p. 517, c. 418, §§ 5, 12, 17. In re Cramond, 145 F. 966.

51. Palin v. Cooke, 125 Ga. 442, 54 S. E. 90.

52. Description in cropper's lien that the lien is intended to cover the entire crop produced for the year held sufficient. Beckstrad v. Griffith, 11 Idaho, 738, 83 P. 764.

53. See 6 C. L. 455.

54. Laws 1897, p. 532, c. 418. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. S. 673; Brackett v. Pierson, 99 N. Y. S. 770. V. S. 2279. Bergman v. Gay [Vt.] 64 A. 1106.

55. Special lien in favor of farm laborer under Civ. Code 1905, § 2793, on product of his labor, not exclusive of general lien under § 2792 upon employer's property generally. Faircloth v. Webb, 125 Ga. 230, 53 S. E. 592.

56. **Livery stable keeper's lien** not available to garage keeper. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. S. 673. Garage keeper has no **warehouseman's lien** on machine controlled and taken out by owner at will. Id.

Lien for labor or material under Laws N. Y. 1897, c. 418, not available to party advancing money to contractor and taking assignment of funds to become due under the contract. In re Cramond, 145 F. 966. Artisan's lien under Laws 1897, p. 532, c. 418, does not attach to automobile on account of repairs while in garage where owner is allowed to use and operate machine at will. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. S. 673.

57. Corporation manufacturing ships and equipment therefor held a **manufacturing company** within Code 1887, § 2485, Code 1904, p. 1246, giving lien for supplies furnished manufacturing companies. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158.

58. Rev. St. 1898, § 3344, giving **innkeepers and boarding house keepers** a **lien** on baggage and effects of guests or boarders gives no lien on separate property of married woman living with her husband at boarding house, and, even where the wife charges her separate property with such board bill, only an equitable lien is created which is not enforceable as a statutory lien. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797. Under Sess. Laws 1899, p. 153, c. 8, § 11, giving **lien in favor of**

§ 3. *Rank and priorities of liens.*[62]—Money in the hands of an officer derived from a general lien is subject to a superior special lien.[63] No supervening equity arises from the order of assignment of purchase-money bonds executed on a sale of land by a special receiver.[64] A vendor's lien on land takes priority over a mortgage subsequently executed to secure an advance applied in part payment for the land,[65] though the vendor knew that the advance was made to enable the vendee to make such part payment, the lender also having knowledge of the vendor's lien.[66] Individual liens upon property contributed to a firm by its several members, all of such members knowing of and consenting to such liens take precedence over firm debts subsequently incurred.[67] It is not necessary for a party taking a lien on personal property by agreement with the owner to take possession of the property as against the latter's general creditors or his assignee for creditors.[68] The priority of a statutory lien is sometimes purely a matter of statutory construction,[69] and in many instances priority depends upon their being filed or recorded.[70] Where sev-

laborers assisting in producing crops on "all such crop or crops," the lien is not confined merely to that part of the crop on which labor was performed. Beckstead v. Griffith, 11 Idaho, 738, 83 P. 764.

59. Artisans' lien does not cover services in cutting and hauling logs to saw-mill. Brackett v. Pierson, 99 N. Y. S. 770.

60. Landlord's special lien for rent upon crops grown on rented premises takes effect upon maturity of crop, and his special lien for supplies furnished tenant to make crop arises where supplies are furnished, and in neither case is a levy necessary to fix the lien. Civ. Code 1895, §§ 2795, 2796, 2800. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241.

61. See post, § 3, Rank and Priorities of Liens.

62. See 6 C. L. 455.

63. Landlord's liens on crops under Civ. Code 1895, §§ 2795, 2796, 2800, superior to judgment lien. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241.

64. Davis v. Roller [Va.] 55 S. E. 4.

65, 66. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591.

67. Merkley v. Gravel Switch Roller Mills Co.'s Assignee, 28 Ky. L. R. 1010, 90 S. W. 1059.

68. Party gave to bank lien on goods in hands of commission merchant and thereafter made assignment for creditors. Smith v. Equitable Trust Co. [Pa.] 64 A. 594.

69. Under Code, § 4019, the priority of liens for labor is not dependent upon the suspension of the employer's business by the legal process under which his property is seised. Anundsen v. Standard Printing Co., 129 Iowa, 200, 105 N. W. 424. Where all of debtor's property was not attached but all that was not attached had been disposed of at the time another creditor intervened, it was held that, so far as intervener was concerned, all the debtor's property had been seised so that it was not necessary to the priority of liens for labor over intervener's claim to decide whether Code, § 4019, providing for priority of labor liens "when the property" of the employer is seised under legal process, requires "all" of the employer's property to be seised. Id. For other constructions of this statute, see Goodenow v. Foster, 108 Iowa 508, 79 N. W. 288; St. Paul Co. v. Diagonal Co., 95 Iowa, 551, 64 N. W. 606; Wells v. Kelly, 121 Iowa, 557, 96 N. W. 1104; Haw v. Burch, 110 Iowa, 234, 81 N. W. 460; Stuart v. Twining, 112 Iowa, 154, 83 N. W. 891; all of which cases are cited in Anundsen v. Standard Printing Co., 129 Iowa, 200, 105 N. W. 424. Landlord's lien on crops superior to deed of trust securing advances for supplies, whether the relation of landlord and tenant arose out of simple rental contract or out of uncompleted conditional purchase under contract according to which purchaser was to become tenant on failure to pay price. Bedford v. Gartrell [Miss.] 40 So. 801.

70. Under Laws N. Y. 1897, c. 418, laborers or materialmen have liens ranking in priority according to date of filing. In re Cramond, 145 F. 966. Chattel mortgage superior to attachment levied after recording of mortgage. Crismon v. Barse Live Stock Commission Co. [Okl.] 87 P. 876. Under Laws 1903, p. 56, c. 36, § 1, a stipulation reserving title or lien to secure purchase price of personalty delivered to purchaser must be in writing and filed with register of deeds in order to create lien as against third persons having notice. Webber v. Conklin [S. D.] 104 N. W. 675. Stipulation that purchaser shall hold goods in trust to secure purchase price is neither conditional sale nor chattel mortgage, and hence when not recorded assignee for creditors not liable for sale of goods when he had no actual notice. Id. Under Rev. St. 1898, § 2315, providing that a chattel mortgage shall cease to be valid as against creditors or mortgagee after two years unless, within thirty days of the expiration of the two years, the mortgagee, his agent or attorney, shall make and file an affidavit setting forth the mortgagee's interest in the property, the affidavit, when made by anyone other than mortgagee, as in case of corporate mortgagee, must state under oath that affiant is agent or attorney of mortgagee, description of affiant as "of and for" the mortgagee corporation being insufficient. Chickering-Chase Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797. Where a lien is recorded and judgment of foreclosure is obtained prior to the consummation of a sale by a receiver, the purchaser from the

eral items of work or material are furnished under a single contract, the time for filing is computed from the date of the last item,[71] but it is otherwise where the items are furnished under separate contracts, the time being computed in such cases from the last item of each contract.[72] A general contract to do repair work on various articles as needed does not constitute the work done thereunder a single job,[73] nor can the debtor and creditor bring such a contract within the rule applicable to a single job by an agreement that the bill for such work shall become due only on demand.[74] An equitable lien, though unrecorded, is superior to the lien of a subsequent attachment by a general creditor.[75] A lienor may be estopped from asserting his lien as against other liens.[76] Parties to a suit to enforce a lien are bound by the determination as to priorities, as are also their privies.[77]

§ 4. *Waiver, extinguishment, discharge, and revival.*[78]—A statutory lien will continue until the debt has been paid or the property subjected to the lien or until the lien has been discharged in some manner provided by law.[79] Where a statute provides for the continuation of a lien for a specified period, such lien will not abate upon the death of the debtor,[80] but may abate upon his insolvency.[81] A lien may be discharged by a conveyance of the property to the lienor,[82] by a merger,[83] by lapse of time,[84] by abandonment of the contract out of which the lien arose,[85] by redemption,[86] by tender,[87] by parting with the possession of the property where the lien is dependent upon possession,[88] by asserting claims inconsistent with the lien,[89] or by

receiver takes subject to the judgment of foreclosure, as where purchase was made from receiver before citation in the foreclosure suit, but price was not paid or deed delivered until after judgment of foreclosure. Cameron & Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 1129.

71. Code 1887, § 2485, Code 1904, p. 1246, giving lien for supplies furnished to mining and manufacturing companies. construed. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158.

72. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158.

73. Mechanic's lien under Civ. Code 1905, § 2805. Palin v. Cooke, 125 Ga. 442, 54 S. E. 90.

74. Palin v. Cooke, 125 Ga. 442, 54 S. E. 90.

75. Lien for purchase money of personalty held superior to lien of attachment by general creditor of purchaser. Star Drilling Mach. Co. v. McLeod, 29 Ky. L. R. 84, 92 S. W. 558.

76. Where purchase-money bond executed on sale of land under judgment and secured by vendor's lien is assigned to party to such judgment who stands as surety for payment thereof, the assignee cannot enforce his lien to prejudice of judgment creditor upon whose judgment an execution constituting a lien upon personal property of all judgment debtors has been issued. Davis v. Roller [Va.] 55 S. E. 4.

77. Parties to suit to enforce lien on personalty who failed to set up any claim thereto by reason of liens on realty to which personalty had been attached held precluded from thereafter asserting any such claim. Cameron & Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 1129.

78. See 6 C. L. 457.

79. Attachment. Katz v. Obenchain [Or.] 85 P. 617.

80, 81. Judgment lien under Code 1896, §§ 1920, 1922, as amended by Gen. Acts 1898-99, p. 34. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62.

82. Such conveyance good as against subsequent creditors of debtor. Sentel v. Jennings, 123 Ill. App. 469.

83. Conditional sale merged in absolute sale secured by mortgage. Anundsen v. Standard Printing Co., 129 Iowa, 200, 105 N. W. 424. Attachment lien merged in judgment lien, but lien on land not lost, since lien of judgment attaches as soon as attachment lien is merged. Katz v. Obenchain [Or.] 85 P. 617. Continuation of lien in such case not prevented by failure to record judgment on lien docket. Id.

84. The inchoate lien created by furnishing material for building ceases under mechanics' lien law after sixty days from completion of building. Provident Mut. Bldg. Loan Ass'n v. Shaffer, 2 Cal. App. 216, 83 P. 274.

85. Farm laborers' lien under Civ. Code 1905, §§ 2792, 2793, waived by abandonment of contract and submission to arbitration. Faircloth v. Webb, 125 Ga. 230, 53 S. E. 592.

86. The buyer's right under Laws 1897, p. 535, c. 418, §§ 83, 112, to redeem from lien of conditional sale by payment of amount due at any time before property is sold to satisfy the lien passes to a purchaser from the original buyer. Tweedie v. Clark, 99 N. Y. S. 856.

87. Purchase-money lien in form of reservation of title in conditional sale is discharged by valid tender of amount due. Tweedie v. Clark, 99 N. Y. S. 856.

88. Lien at common law and under Laws 1897, p. 532, c. 418, for repairs. Smith v. O'Brien, 46 Misc. 325, 94 N. Y. S. 673. Receipt of 95% of purchase money of personalty and surrender of indicia of possession and ownership held release of purchase-money lien, both at common law and under

legal proceedings inconsistent with the lien.[90] The taking of a note does not amount to a waiver of a lien securing the account in the absence of any showing that such was the intention of the parties,[91] nor is the taking of additional security by way of a lien on other property inconsistent with the original lien.[92] A lien on personalty is not lost by the attaching of the personalty to realty.[93] Whether or not there has been a waiver sometimes depends upon the intent of the parties.[94] An attorney at law has no authority as such to waive his client's lien.[95] A waiver is not within the statute of frauds.[96] The mutual promises of two lienors constitute a sufficient consideration for mutual waivers of conflicting liens.[97] A mutual waiver of conflicting liens operates in praesenti and cannot be repudiated by one of the parties so as to relieve him from liability for a subsequent conversion of the property which he has released.[98] A release of a lien is not an advance to the debtor within a contract of suretyship for an advance.[99] A party cannot invoke an estoppel to assert a lien on account of acts upon which he has not relied.[1]

§ 5. *Enforcement and protection of liens.*[2]—A lienor may in a proper case sue for the conversion of the property;[3] and though a lienor cannot sue a trustee or receiver in bankruptcy in replevin or otherwise interfere with the possession of the

Civ. Code, §§ 2872, 2875, 2988, 3049. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820.

89. Where artisan in possession of personalty fails to assert lien upon demand by owner and claims property as his own. Brackett v. Pierson, 99 N. Y. S. 770. Assertion of lien for specific work precludes lien for any other work. Id.

90. Special lien under Wilson's Rev. & Ann. St. 1903, c. 3, §§ 108, 110, for pasturing stock, waived by attachment of stock. Crismon v. Barse Live Stock Com. Co. [Okl.] 87 P. 876. Party holding mechanic's lien established by state court held to have waived same by becoming party to suit in Federal court and consenting to a decree for sale of property to pay other debts and claims. Harrington v. Union Oil Co., 144 F. 235. Where a bankrupt's property is sold free from liens, a suit in trover by a lienor against the trustee in bankruptcy is a waiver of the plaintiff's lien. In re Platteville Foundry & Mach. Co., 147 F. 828.

91. Lien under Code 1887, § 2485, Code 1904, p. 1246, for supplies furnished mining and manufacturing corporations. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158. Vendor's lien on land not waived by taking vendee's unsecured note or bond. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591. Vendor's lien not waived by taking vendee's unsecured note or bond in renewal of vendee's original note or bond. Id.

92. Party holding mortgage on horse took mortgage on ox for which the mortgagor had traded the horse subsequently to the recording of the mortgage thereon, the mortgagee having no notice of an unrecorded boot money lien on the ox. Holden v. Gilfeather, 78 Vt. 405, 63 A. 144.

93. Lien reserved in conditional sale. Cameron & Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 1129.

94. No waiver of attachment lien where attorney directed sheriff not to sell at certain time because property would not bring amount of debt, it not appearing that a waiver was intended or that attorney was authorized to waive lien. Katz v. Obenchain [Or.] 85 P. 617.

95. Attorney in attachment proceedings. Katz v. Obenchain [Or.] 85 P. 617.

96. Purchaser of horse waived lien on ox on which other party also had a lien in consideration of such other party's release of a lien on the horse. Holden v. Gilfeather, 78 Vt. 405, 63 A. 144.

97. Party who traded ox for horse waived boot money lien on ox in consideration of waiver of mortgage on horse held by party who had also, subsequently to the trade, acquired a mortgage on the ox. Holden v. Gilfeather, 78 Vt. 405, 63 A. 144.

98. Party who traded ox for mortgaged horse waived boot money lien on ox, on which mortgagee had taken a mortgage subsequently to the trade, in consideration of release of mortgage on horse, and then sold the ox under the boot money lien. Holden v. Gilfeather, 78 Vt. 405, 63 A. 144.

99. Hirsch & Co. v. Meldrim, 124 Ga. 717, 52 S. E. 813.

1. Party purchasing land on which attachment has been levied cannot invoke estoppel against attaching creditor on account of latter's attorney having directed sheriff not to sell under previous execution, where purchaser had no knowledge of such fact at time of purchase. Katz v. Obenchain [Or.] 85 P. 617.

2. See 6 C. L. 458.

3. Chattel mortgagee may maintain trover against one who converts chattels. Holden v. Gilfeather, 78 Vt. 405, 63 A. 144. Lienor's right to sue not defeated by insufficient tender. Peterman v. Henderson [Ala.] 40 So. 756. Assignee for creditors not liable to seller for conversion of goods sold to assignor under stipulation that title was to be held in trust to secure purchase price where contract was not filed with register of deeds as provided by Laws 1903, p. 56, c. 36, § 1, and assignee had no actual notice of seller's claim until after goods had been disposed of. Webber v. Conklin [S. D.] 104 N. W. 675.

court of bankruptcy,[4] he may maintain trover in a state court against such officers where the property covered by the lien has been sold free from liens.[5] A lien may sometimes be asserted as a defense to an action for the recovery of the property,[6] or to an action to foreclose another lien,[7] and in either case the burden is on the defendant to establish the lien so asserted.[8] A lien may also be asserted as a counterclaim.[9] Where the owner of personalty replevies it from a lienor rightfully in possession, he cannot justify failure to return it on the ground that it has been sold under a superior lien.[10] A surplus arising on a sale under a junior lien subject to the senior lien is applicable to the latter only in the event of a deficiency after a sale thereunder.[11] The proper method of enforcing a lien against funds in the hands of an officer is by rule to distribute.[12] A judicial lien may be foreclosed by judgment without a verdict.[13]

Statutory proceedings to enforce or foreclose.[14]—The creation of a new remedy does not necessarily take away existing remedies.[15] The rule that the pleadings and proof must correspond is especially applicable where a lien is sought to be enforced under a statute in derogation of the common law.[16] In enforcing the Georgia farm laborer's lien, the laborer must show that he complied with the contract declared on[17] and that he demanded his wages after they became due,[18] and cannot rely on an award of arbitrators after the abandonment of the contract.[19] Many matters relating to statutory proceedings to enforce liens necessarily depend upon the construction of particular statutes.[20]

Equitable remedies and procedure.[21]—Equity has jurisdiction to enforce liens

4. In re Platteville Foundry & Mach. Co., 147 F. 828.

5. In re Platteville Foundry & Mach. Co., 147 F. 828. The taking possession of the property by the bankruptcy court does not operate as a caveat or sequestration so as to make the lienor a party to the bankruptcy proceedings. Id.

6. Artisan's lien. Solomon v. Bok, 49 Misc. 493, 98 N. Y. S. 838.

7. Laborer's lien on cotton asserted in suit to foreclose mortgage thereon. McCarty v. Key, 87 Miss. 248, 39 So. 780.

8. Where it appeared prima facie that bale of cotton was covered by mortgage, burden was on laborer to show that such bale was not so covered by reason of laborer's statutory lien. McCarty v. Key, 87 Miss. 248, 39 So. 780. Where defendant asserted artisan's lien on articles sued for not only as to such articles but also as to articles delivered, he had burden of proving that all articles were covered by single contract. Solomon v. Bok, 49 Misc. 493, 98 N. Y. S. 838.

9. Though replevin sounds in tort, an equitable lien on the property arising out of promise to deliver it as security for loan may be pleaded as a counterclaim. Reardon v. Higgins, [Ind. App.] 79 N. E. 208. In such case the counterclaim is connected with the cause of action within Burns' Ann. St. 1901, § 353. Id.

10. Mortgagor replevied property from one to whom he had delivered it for repairs. Bergman v. Gay [Vt.] 64 A. 1106.

11. Sale under mortgage subject to vendor's lien. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591.

12. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241.

13. Attachment lien. Slayden & Co. v. Palmo [Tex. Civ. App.] 13 Tex. Ct. Rep. 964, 90 S. W. 908.

14. See 6 C. L. 459.

15. Remedy by attachment not taken away by V. S. 2279-2281, providing for enforcement of lien for repairs. Bergman v. Gay [Vt.] 64 A. 1106.

16. Enforcement of farm laborer's lien under Civ. Code 1895, §§ 2792, 2793. Faircloth v. Webb, 125 Ga. 230, 53 S. E. 592. Where return of execution to enforce farm laborer's liens shows levy on other property in addition to crops, it is not wholly invalid because crops are growing and hence not subject to levy, but will be upheld for enforcement of general lien on other property under Civ. Code, § 2792. Id.

17, 18, 19. Faircloth v. Webb, 125 Ga. 230, 53 S. E. 592.

20. Under Civ. Code 1905, § 2816, farm laborers' liens may be enforced at any time within year after maturity of debt, and hence execution to enforce special lien given by § 2793 is not void because issued while crops are growing, but may, under § 5425, be levied when crops mature. Faircloth v. Webb, 125 Ga. 230, 53 S. E. 592. Under Municipal Court Act, § 138 [Laws 1902, p. 1332, c. 580], providing that in action to foreclose lien on chattels "if the plaintiff is not in possession of the chattel" a warrant may issue for its seizure in like manner as a warrant of attachment, and that provisions relating to issue of attachments shall apply to issue of such warrant, grounds of attachment are not necessary to issue of warrant of seizure, only ground necessary for such warrant being that plaintiff be not in possession. Wuertz v. Braun, 113 App. Div. 459, 99 N. Y. S. 340,

21. See 6 C. L. 459.

where the lienor has no other remedy;[22] but an injunction will not issue to restrain the application of funds in the hands of an officer to an inferior lien, the remedy being by rule to distribute.[23] Payment or tender of a prior lien is not a condition precedent to a suit to enforce the junior lien.[24] That the property is in the hands of a receiver and that the lienor should intervene in the receivership suit instead of suing to foreclose is a matter of defense which is waived if not interposed in the foreclosure suit.[25] Where there are several liens, one or more of which do not cover all the property involved in the suit, the property should not be sold as a whole.[26]

LIFE ESTATES, REVERSIONS, AND REMAINDERS.

§ 1. Nature and Definitions (762).
§ 2. Mutual and Relative Rights and Remedies of Life Tenants, Future Tenants, and Their Privies (765). Taxes, Incumbrances, and Contribution (767). The Possession of the Life Tenant is Not Adverse (767). Increment to Funds (768).
§ 3. Rights and Remedies Between Third Persons and Life Tenants, Remaindermen, and Reversioners (768).

§ 1. *Nature and definitions.—A life estate is a freehold limited to determine with the life or lives of particular persons, or at an uncertain period which may continue for life.*[27] A life tenant must have an estate in the lands,[28] but he has no estate which passes to his heirs.[29] A life estate created in express and certain terms is not converted into a fee by a power of disposition.[30]

22. Judgment lien under Code 1896, §§ 1920, 1922, as amended by Gen. Act 1898-99, p. 34, unenforceable at law because of death of debtor. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62. Will enforce lien on lot arising out of agreement of owner to pay part of expense of party wall. Rugg v. Lemley [Ark.] 93 S. W. 570.

23. Landlord's liens on crops under Civ. Code 1895, §§ 2795, 2796, 2800, as against proceeds of sale under common-law execution. Cochran v. Waits, Johnson & Co. [Ga.] 56 S. E. 241. Fact that common-law executions against tenant had been levied also on personal property other than the crops upon which landlord asserted lien afforded no room for equity to interpose to consolidate the claim case with the controversy between the same parties over the funds realized from sale under such executions. Id.

24. Where attorney's lien under Code Civ. Proc. § 430, was for services rendered mortgagor in suit in which deed absolute was declared a mortgage, payment or tender of the amount of a prior mortgage was not a condition precedent to right to sue for enforcement of the lien against the property. Gilchrist v. Hore [Mont.] 87 P. 443.

25. Cameron & Co. v. Jones [Tex. Civ. App.] 14 Tex. Ct. Rep. 131, 90 S. W. 1129.

26. Mechanic's lien, judgment lien, and deed of trust, the last covering only part of property, and such part should have been sold separately. O'Neil v. Taylor, 59 W. Va. 370, 53 S. E. 471.

27. See 6 C. L. 460. Under Ky. St. 2345, providing that, when an estate is given to one for life and after his death to his heirs or the heirs of his body or his issue, he shall take only a life estate, a deed to one for life, without power to alienate, remainder to his bodily heirs, gives the first taker a life estate only. Jones v. Carlin, 29 Ky. L. R. 1077, 96 S. W. 885. A bequest of personalty to be invested for the benefit of a person for life, and for the benefit of his wife and children after his death, gives the legatee a life estate only, remainder to his widow and children. Illensworth v. Illensworth, 110 App. Div. 399, 97 N. Y. S. 44. Under Rev. St. (1st Ed.) p. 2, c. 1, relative to fee tail estates, a devise to one for life and to the heirs of her body gives a life estate only and on her death without descendants the estate does not vest in her heirs at law. Webb v. Sweet [N. Y.] 79 N. E. 1024. An estate to one "and to his children forever" gives a fee and not a life estate. "Children" held to mean heirs generally and not issue. This under a statute providing that a fee is created if a less estate be not limited by express words. Strawbridge v. Strawbridge, 220 Ill. 61, 77 N. E. 78. An estate to one for life remainder to her issue if any, if not to revert, creates a life estate in the first taker. West v. Vernon [Pa.] 64 A. 686. Where by a will executed in another state a testator devises land situated in Ohio to his daughter "during her natural life and at her decease to go to her lawful heirs," although under the rule prevailing in such other state such will would have conveyed a fee simple in accordance with the rule in Shelley's case, yet, under the rule prevailing in Ohio, these words created only a life estate in such Ohio lands. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261. A provision for a trust fund, the income of which is to be paid to one and the principal to his heirs at his death, gives him a life estate only. Vogt v. Vogt, 26 App. D. C. 46.

28. An agreement under which a person is to take charge of a building, collect rents, pay expenses, and retain a certain weekly

A reversion is an estate remaining by operation of law in the grantor or his heirs to commence in possession after a particular estate granted out by him is determined.[31]

A remainder is an estate expressly limited to take effect in possession immediately on the expiration of a particular estate,[32] *not in derogation thereof and created by the same instrument.*[33] A remainder is vested if there is a present right to future enjoyment,[34] and the fact that possession and enjoyment is postponed until a future date,[35] or that it is subject to open and let in others of the class,[36] will not destroy its

stipend for life, does not vest him with a life estate or any other interest. Durfee v. Meadowcroft [Mass.] 79 N. E. 268.

29. Furr v. Burns, 124 Ga. 742, 53 S. E. 201.

30. Cross v. Hendry [Ind. App.] 79 N. E. 531.

31. See 6 C. L. 460. An estate to one for life remainder to the grantor if he survived the grantee, if not to his heirs, creates a reversion in the grantor and passes no estate to the heirs. Robinson v. Blankinship [Tenn.] 92 S. W. 854.

32. See 6 C. L. 460. A remainder limited to heirs at law gives no estate to an adopted daughter. Kettell v. Baxter, 50 Misc. 428, 100 N. Y. S. 529. An estate in trust to one for life remainder to her children or issue of a deceased child creates no estate in a child of the testator who died prior to the testator's death. Crapo v. Price, 190 Mass. 317, 76 N. E. 1043. Under Hurd's Rev. St. 1905, c. 30, converting a fee tail into a life estate, remainder in fee to the person to whom the estate tail would pass, a conveyance to one and her children, to the grantee for life, remainder to her children in fee, creates, where the grantee had two children, one of whom died in infancy and one survived her parent and died without issue, a remainder in fee in the child who survived. Dick v. Ricker, 222 Ill. 413, 78 N. E. 823. Under the express provisions of Comp. Laws Mich. 1857, pp. 858, 859, where an intestate is survived by a widow and father but no issue, the widow takes a life estate, the father a remainder. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

33. See 6 C. L. 460.

34. An estate to one "upon his becoming 21 years of age" is vested but enjoyment thereof is postponed. Hooker v. Bryan, 140 N. C. 402, 53 S. E. 130.

35. A vested remainder is one that takes effect in interest and right immediately, though possession and enjoyment may be postponed. Where created by will it must take effect on the death of the testator, though possession be postponed until after the termination of a present estate. In re Kountz's Estate, 213 Pa. 390, 62 A. 1103.

36. A bequest to one for life, remainder to his children, as a general rule creates a vested remainder in each of the children alive at the death of the testator, subject to open and let in after born children, though it is also provided that the children of a deceased child shall take its parent's share. Crapo v. Price, 190 Mass. 317, 76 N. E. 1043.

Note: In Spencer v. Wilson, L. R. 16 Eq. 501, and the following cases there cited: Batsford v. Kebbell, 3 Ves. 363; Leake v. Robinson, 2 Mer. 362; Vawdry v. Geddes, 1 Russ. & My. 203; Watson v. Hayes, 5 My. & Cr. 125; Peek's Trusts, L. R. 16 Eq. 221,—it was held that, where there are separate gifts of the income and the capital of the estate, the latter does not vest until the period of distribution. A concise rule is found in Tiffany on the Modern Law of Real Property, § 120 (b), as follows: "It is frequently stated that the capacity of a remainder to take effect immediately in possession, if the particular estate were to terminate, is the criterion of a vested, as distinguished from a contingent, remainder." In the authorities cited by the author in support of this proposition we find the following: "It is not the uncertainty of ever taking effect in possession that makes a remainder contingent; for to that, every remainder for life or in tail is and must be liable, as the remainderman may die, or die without issue before the death of the tenant for life. The present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent." Fearne on Contingent Remainder, 216. "As distinguished from a vested remainder, a contingent remainder is an estate in remainder which is not ready, from its commencement to its end, to come into possession at any moment when the prior estate may happen to determine." Williams on Real Property, *267. "It is the uncertainty of the right of enjoyment, and not the uncertainty of its actual enjoyment, which renders a remainder contingent. The present capacity of taking effect in possession, if the possession were to become vacant, distinguishes a vested from a contingent remainder, and not the certainty that the possession will ever become vacant while the remainder continues." Quoted from 4 Kent's Commentaries, *203, note a, in Doe, Lessee of Poor v. Considine, 73 U. S. 458, 476, 18 Law. Ed. 869. "A vested remainder is one by which a present interest passes to the party, though to be enjoyed in future, and by which the estate is fixed to remain to a determinate person after the particular estate is spent. He has an immediate fixed right of future enjoyment. A remainder is contingent when it is limited to take effect on an event which may never happen till after the preceding particular estate ends, or is limited to a person not in being or not ascertained. It is the present capacity of taking effect in possession, if the possession were to become vacant, not the certainty that it will ever become vacant while the remainder continues, which distinguishes a vested from a contingent remainder. In other words in

character as a vested estate. A trust limited to lives is no obstacle to the present vesting of a subsequent estate.[37] A right to enjoy the proceeds of a future sale of property is not a vested estate.[38] In some states a particular estate is not essential to support a remainder.[39] A remainder is contingent when limited to a dubious and uncertain person,[40] or to take effect on a dubious and uncertain event.[41] The vesting of an estate which is subject to be defeated by an event is not accelerated by a conveyance by the life tenant of his estate;[42] but where an estate is vested but enjoyment thereof is postponed until the owner attains majority, his death prior to attaining majority accelerates the right to enjoyment.[43]

An estate in expectancy is subject to sale.[44] Under the Real Property Laws of New York a future estate, whether it be vested or contingent, may be assigned if the uncertainty be not as to the person.[45]

The sale of future estates,[46] though contingent[47] or limited to infants, is in some

the former the enjoyment is uncertain; in the latter the right to that enjoyment." Williamson v. Field's Ex'rs, 2 Sandf. Ch. [N. Y.] 533, 552. "A vested remainder is one that takes effect in interest and right immediately on the death of the testator, although it may not take effect; indeed, if it be a remainder, it cannot take effect, in possession and enjoyment, until the death of the devisee for life, or other determination of the particular estate. A present capacity of taking effect in possession, if the possession were to become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. In general, the law favors that construction which holds a remainder vested, rather than that which considers it contingent, when the question is doubtful." This is from the opinion of Chief Justice Shaw, in Brown v. Lawrence, 57 Mass. 390, 397. "A remainder is contingent when it is limited to take effect on an event which may never happen, or which may not happen until after the preceding particular estate ends, or is limited to a person not in esse or not ascertained. A present capacity of taking effect in possession, if the possession were to become vacant, and not the certainty that the possession will become vacant before the estate limited in remainder determines, universally distinguishes a vested remainder from one that is contingent. In other words, in the former the enjoyment is uncertain, in the latter the right to that enjoyment is uncertain." 1 Boone on Real Property (2d Ed.) § 173. In addition to these authorities, we find the following from Mitchell on Real Estate & Conveyancing in Pa., 227: "A vested remainder is an estate to take effect after another estate, for years, for life, or in tail, which is so limited that if the particular estate were to expire or end in any way at the present time some certain person would become thereupon entitled to the immediate enjoyment."—See In re Kountz's Estate [Pa.] 62 A. 1103.

37. Stringer v. Barker, 110 App. Div. 37, 96 N. Y. S. 1052.

38. An estate to a wife for life to be sold and the proceeds divided among children within two years after her death creates no vested estate in the children at their father's death, but only a right to the money when the land should be sold. Darst v. Swearingen, 224 Ill. 229, 79 N. E. 635.

39. Under the rule that an estate may be created to commence in the future, a future estate unsupported by a particular estate may be created to commence at a future date. O'Day v. Meadow, 194 Mo. 588, 92 S. W. 637.

40. An estate limited to take effect after the termination of a life estate to a class of persons or their children is contingent where it cannot be presently determined who will be members of such class at the time the estate will take effect in possession. Brownback v. Keister, 220 Ill. 544, 77 N. E. 75. An estate to one class for life remainder to another class 10 years after the youngest of such class should attain majority is contingent. In re Kountz's Estate, 213 Pa. 390, 62 A. 1103. An estate limited to persons of a class who shall be living after the expiration of two intermediate estates is contingent. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

41. An estate to one for life remainder to three, and in case of the death of one of such three prior to termination of the life estate, his interest to his children, if any, creates a contingent remainder in the second persons named. Cummings v. Hamilton [Ill.] 77 N. E. 264. An estate to a husband in trust for his wife for their joint lives and in fee if she survived her husband, and if she died under coverture to her children, gives her an equitable life estate and contingent remainder. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287.

42. Where one holds a remainder subject to be defeated by his death prior to the death of the life tenant, a conveyance of his estate by the life tenant does not accelerate the vesting of the remainder. Cummings v. Hamilton [Ill.] 77 N. E. 264.

43. His heirs have a right to immediate enjoyment. Hooker v. Bryan, 140 N. C. 402, 53 S. E. 130.

44. Hudson v. Hudson, 222 Ill. 527, 78 N. E. 917.

45. Stringer v. Barker, 110 App. Div. 37, 96 N. Y. S. 1052. Future income may not be. Id.

46. Civ. Code Prac. § 491, expressly provides for the sale of future estates for reinvestment. Haggin v. Rogers, 29 Ky. L. R. 1263, 97 S. W. 362. Under Civ. Code, § 490, authorizing partition sale, if the estate be in possession and incapable of division with-

states authorized by statute, and future estates limited to persons not in esse may be bound by decrees in proceedings to which all persons in being, who would have taken the property if the contingency had then happened, are made parties,[48] but this rule may not be applied to defeat a vested remainder.[49] A fund raised by the sale of lands under the New Jersey statute authorizing the sale of lands limited over to infants or in contingency, where such sale would be beneficial, is substituted for the land, and the persons who had an interest in the land have a like interest in the fund.[50] The income from the fund or such part thereof as is directed to be paid to the tenant for life is payable up to the day of his death, and so much thereof as has not been paid to him must be paid to his personal representative.[51]

A merger may result where life estates and future estates are acquired by one person,[52] but no merger results where a life estate and future estates, subject to be defeated, are so acquired.[53]

§ 2. *Mutual and relative rights and remedies of life tenants, future tenants, and their privies.*[54]—A life tenant under a will should be required to execute a bond for the forthcoming of the estate before he is given possession,[55] but where a life tenant is entitled to manage the land and to its profits, he may not be required to give security for the protection of the remainderman.[56]

A life tenant may not commit waste,[57] hence he may not cut growing timber,[58] but where all timber on the premises is necessary to make needed repairs, he is entitled to it all as against the remainderman,[59] and where damages are paid for in-

out impairing its value, a life tenant of a half of an estate may maintain partition against the fee owner in such half and the fee owner of the other half. Craddock v. Smythe [Ky.] 99 S. W. 216. Laws 1899, p. 525, c. 300, authorizing the sale of contingent estates, does not confer additional power on the courts but merely prescribes the procedure, and remaindermen's estates cannot be sold to satisfy charges on the land under the will as there can be no separation of interests of life tenant and remainderman, but the land should be mortgaged or portion of it sold. In re Kingston's Estate [Wis.] 110 N. W. 417.

47. Revisal 1905, § 1590, authorizes a sale of contingent remainders. McAfee v. Green [N. C.] 55 S. E. 828.

48. Revisal 1905, § 1591, providing that all parties not in esse who may take property in expectancy or upon a contingency, under limitations in deeds or wills, are bound by any proceedings theretofore had for the sale thereof in which all persons in being who would have taken such property, if the contingency had then happened, have been made parties, and expressly providing that the act shall not affect any vested right or estate, is valid and operates restrospectively so as to apply to contingent interests previously created. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272. Where will gave child a fee determinable on her death without children, held that a conveyance pursuant to a decree in special proceedings for sale of land, to which all persons in being interested under the will were made parties, passed good title. Id.

49. The rule that contingent remainders limited to persons not in esse may be bound by decrees against the owners cannot be applied to divest a vested remainder. Card v. Finch, 142 N. C. 140, 54 S. E. 1009.

50. In re Dowe, 68 N. J. Eq. 11, 64 A. 803. One entitled to a dower interest in the land takes an equivalent interest in the fund. Id. In this case there was a life estate and vested remainders in fee subject to be divested. Id.

51. In re Dowe, 68 N. J. Eq. 11, 64 A. 803.

52. An estate to one for life remainder to his issue if any, if not to another in fee, gives the last taker a fee after termination of the life estate with the contingent remainders limited thereon, and where he acquired the life estate the contingent remainders were merged if not contrary to the intent of the parties. McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978.

53. There is no merger where one acquires the interest of a life tenant and of contingent remaindermen whose estate is liable to be defeated and go to another. Brownback v. Keister, 220 Ill. 544, 77 N. E. 75.

54. See 6 C. L. 462.

55. Powell's Ex'rs v. Cosby, 29 Ky. L. R. 46, 91 S. W. 1133. But a bond should not be required of the devisee of a defeasible fee. Id. A life tenant under a will is entitled to possession on giving bond for his proper conduct satisfactory to the remainderman. In re Fleming's Estate, 102 N. Y. S. 204.

56. Vanatta v. Carr, 223 Ill. 160, 79 N. E. 86.

57. May not authorize the cutting of growing timber. Zimmerman Mfg. Co. v. Wilson [Ala.] 40 So. 515.

58. A life tenant may not cut timber from the land. Bynum v. Wicker, 141 N. C. 95, 53 S. E. 478.

59. Brugh v. Denman [Ind. App.] 78 N. E. 349. Where a remainderman wrongfully cut timber during the existence of the life estate, he may not retain what he cut prior to a suit brought to restrain the cutting and removal. Id.

juries to timber, though he would have no right to cut it, he is entitled to a life estate in the fund derived because of its injury.[60] Where land on which oil and gas wells have been developed devolves upon life tenants and remaindermen, the life tenant may enjoy the use of such wells,[61] but where no such operations have been developed, he may not himself operate for such minerals,[62] and the fact that by operations on neighboring lands all the minerals will be taken before the remainderman comes into possession does not change the rule.[63]

It is the duty of the life tenant to keep up repairs.[64] On termination of the life estate all improvements go to the remainderman though made under erroneous belief as to ownership,[65] but he may not claim rents therefrom pending a determination of the question of title.[66]

Rights in future estates may not be affected by act of the life tenant,[67] nor can he prejudice or defeat the estate of the remainderman by an attempted declaration of trust of the property,[68] and if he conveys by deed purporting to convey the fee, and lapse of time will destroy the evidence of title of the remainderman, he may maintain action to quiet title though not in possession.[69] A remainderman may not enter on the premises during the existence of the life estate.[70] A mortgage executed by a life tenant as part of the transaction by which the estates were created for a portion of the purchase price binds the remainder,[71] but one subsequently executed does not where he had no power to execute it.[72] A lease executed by the life tenant may be assumed,[73] or a sale of the fee by him may be ratified by the remainderman.[74]

The estate of a life tenant is not liable to a remainderman for the value of slaves so limited, who were freed by the Emancipation Proclamation,[75] nor for other liability especially provided against.[76]

60. Kenlston v. Gorrell [N. H.] 64 A. 1101. An apportionment of such fund by paying to the life tenant the present worth of his interest therein according to the mortality tables is proper. Id.

61, 62, 63. Richmond Natural Gas Co. v. Davenport [Ind. App.] 76 N. E. 525.

64. The life tenant is primarily liable for the cost of constructing a sidewalk in front of the land. Delker v. Owensboro [Ky.] 98 S. W. 1031.

65. A grantee of a life tenant may not charge the remainder with improvements though made under the false assumption that he was the owner. Robsion v. Gray, 29 Ky. L. R. 1296, 97 S. W. 347.

66. Where a grantee of the life tenant after the latter's death made valuable improvements under the assumption that he owned the fee, the remainderman could not claim rents after the death of the life tenant before he established his right to the property. Robsion v. Gray, 29 Ky. L. R. 1296, 97 S. W. 347.

67. Rev. Code 1892, § 3097, expressly provides that rights in reversion or remainder cannot be affected by partition, hence such persons need not be made parties. Lawson v. Bonner [Miss.] 40 So. 488. Remaindermen's interests cannot be taxed with costs where they are made parties. Id.

68. Anderson v. Messinger [C. C. A.] 146 F. 929.

69. Alley v. Alley, 28 Ky. L. R. 1073, 91 S. W. 291.

70. It is a trespass for a remainderman to go onto the premises and cut timber during the existence of the life estate. Brugh v. Denman [Ind. App.] 78 N. E. 349.

71. Where land is conveyed to a husband in trust for his wife for life, remainder over, with power to the wife with the husband's consent to convey, a purchase money mortgage executed by husband and wife as part of the transaction is valid against the remainderman. Stump v. Warfield [Md.] 65 A. 346.

72. Where land is conveyed to a husband in trust for his wife for life, remainder over, with power in the wife to sell with the consent of her husband, a mortgage subsequently executed by them for part of the purchase price, interest, and other debts, is not valid as against remaindermen. Stump v. Warfield [Md.] 65 A. 346. A curative act validating certain mortgage foreclosure sales does not validate a sale as against a remainderman whose interest was not included in the mortgage. Id.

73. Remainderman held not to have assumed a lease which the life tenant was negotiating for at the time of her death. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

74. Where after termination of the life estate they take possession of other property purchased with the proceeds of the sale with full knowledge of all the facts. Hicks v. Webb [Ga.] 56 S. E. 307.

75. Estate of one to whom slaves were given for life held not liable for value thereof to remaindermen where they were freed by Emancipation Proclamation during her lifetime. Mimms v. Lawrence, 28 Ky. L. R. 1317, 91 S. W. 715.

Charges attached to an estate by the instrument by which it is created become an incumbrance upon it.[77]

Taxes, incumbrances, and contribution.[78]—It is the duty of the life tenant to pay taxes[79] and a failure to do so is waste for which the remainderman may recover any amount paid by him in satisfaction of a tax lien.[80] But it does not authorize a recovery by him of the lands held in life tenancy[81] unless specially authorized by statute.[82] A life tenant may not permit the property to be sold for taxes and himself acquire a tax title[83] either directly or from a purchaser at the tax sale,[84] nor can his wife[85] or any member of his family occupying and using the premises acquire a tax title valid against the remainderman.[86]

The possession of the life tenant is not adverse.[87]—A reversioner or remainderman has no right of entry during the existence of the life estate,[88] consequently limitations do not, ordinarily, run against them during such period,[89] but a remainderman who has full knowledge of his rights as remainderman, or who ought to have had such knowledge, and who knows or ought to know that such rights depend upon an affirmative act on his part to be performed, cannot, by standing by and refusing or failing to perform that act, postpone the time at which the statute of limitations will commence to run against him,[90] and where an estate is held in trust for both life tenant and remainderman, if the statute of limitations has barred the trustee it has also barred both life tenant and remainderman.[91]

76. Where will provided that share of life tenant should not be subject to debts, liabilities, contracts, or control of her husband, held that the turning over to her and her husband a note of the insolvent husband was not a payment to her of the amount thereof so as to make her estate liable to the remaindermen for the amount thereof. Mimms v. Lawrence, 28 Ky. L. R. 1317, 91 S. W. 715. Burden held to be on remaindermen to prove that estate of life tenant was liable for certain personalty alleged to have been distributed to her. Id.

77. A provision in a will creating a life estate that the mother of the testator should have a home on the farm makes such right an incumbrance of the life estate and the life tenant is not entitled to compensation for caring for her. Linzy v. Whitney, 110 App. Div. 462, 96 N. Y. S. 1075. Such incumbrance attaches to the fund derived from a sale of the premises. Id.

78. See 6 C. L. 463.

79. Magness v. Harris [Ark.] 98 S. W. 362. It is the duty of the life tenant to keep the premises in repair and pay the taxes. In re Sheldon's Estate, 96 N. Y. S. 225.

80. Magness v. Harris [Ark.] 98 S. W. 362. Where a remainderman pays taxes during the existence of the life estate, he is entitled to reimbursement from the life tenant. Ure v. Ure, 223 Ill. 454, 79 N. E. 153.

81. Magness v. Harris [Ark.] 98 S. W. 362.

82. Kirby's Dig. § 7132, providing for the forfeiture of a life estate for failure of the life tenant to pay taxes, applies only where there is a valid tax sale of the property, and does not apply where statutory requirements relative to the sale have not been complied with. Magness v. Harris [Ark.] 98 S. W. 362. Kirby's Dig. § 7132, providing for forfeiture of the life estate for waste in nonpayment of current taxes, supersedes the common law rule as to forfeiture for waste arising from failure of the life tenant to pay taxes. Id.

83. First Congregational Church v. Terry, 130 Iowa, 513, 107 N. W. 305.

84. Where a tax title was acquired by a third person who conveyed through another to the life tenant's wife, evidence held to show a fraudulent scheme to defeat the rights of the remainderman. First Congregational Church v. Terry, 130 Iowa, 513, 107 N. W. 305.

85. Where she was occupying the premises with her husband. First Congregational Church v. Terry, 130 Iowa, 513, 107 N. W. 305.

86. Such acquisition operates as a mere payment of the tax or redemption from the sale as trustee for the head of the family. First Congregational Church v. Terry, 130 Iowa, 513, 107 N. W. 305.

87. See 6 C. L. 463.

88. See ante, § 2, Mutual and relative rights.

89. Limitations do not run against reversioners or remaindermen during the existence of the life estate. Schroeder v. Bozarth, 224 Ill. 310, 79 N. E. 583; McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902; Glore v. Scroggins, 124 Ga. 922, 53 S. E. 690. A cause of action in a remainderman in fee to recover the estate does not accrue until the termination of the particular estate. Davis v. Dyer, 29 Ky. L. R. 430, 93 S. W. 629. Under Comp. Laws Mich. 1897, § 9716, where a parent of a decedent was entitled to land only after termination of the widow's life estate, adverse possession does not run against him during the existence of such estate. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

90. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261. Where a husband and wife holding a life estate conveyed by deed purporting to pass the fee, on death of the wife, the remainderman had a right of entry at that date. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287.

Increment to funds.[92]—Distributions of assets among stockholders by corporations in liquidation are to be regarded as capital and not income as between life tenant and remaindermen.[93]

§ 3. *Rights and remedies between third persons and life tenants, remaindermen, and reversioners.*[94]—A life tenant may not recover for injury to the freehold where it appears that his estate is benefitted rather than prejudiced.[95] A lease by a life tenant terminates on his death by operation of law,[96] and where he leases for a certain term by a lease containing a covenant for quiet enjoyment, and dies before the expiration of such term, his administrator is liable for breach of the covenant.[97] A contract whereby a life tenant agrees to convey his estate is one within the statute of frauds.[98] A purchaser from a life tenant who has power to sell for the purpose of reinvestment is not required to see that the investment is made.[99] A reversioner may maintain trespass against a third person for trespass causing permanent injuries to the estate.[1] Such action must be brought within the statutory period.[2]

LIFE INSURANCE; LIGHT AND AIR, see latest topical index.

LIMITATION OF ACTIONS.

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B. Against Whom Available (789).

C. To Whom Available (789).

§ 8. Pleading and Evidence (789).

This title relates to general statutes of limitation and relegates to more specific titles the various special limitations (which are not purely limitation statutes) pertaining to particular actions,[3] and to those proceedings which do not fall within the meaning given to the terms "actions" and "suits."[4] The doctrine of laches is also treated elsewhere.[5]

§ 1. *The statutes; validity and application generally.*[6]—Reasonable statutes

91. Watkins v. Pfeiffer, 116 Ky. 593, 92 S. W. 562.

92. See 6 C. L. 464.

93. Bulkeley v. Worthington Ecclesiastical Soc., 78 Conn. 526, 63 A. 351.

94. See 6 C. L. 465.

95. A life tenant may not recover damages for the taking of a portion of the premises for a street where it appears that rental value of the property was increased and she was not put to any expense. Himes v. Pittsburg, 213 Pa. 362, 63 A. 126.

96. Bidwell v. Piercy [N. J. Eq.] 63 A. 261.

97. Duker's Adm'r v. Kaelin, 28 Ky. L. R. 900, 90 S. W. 959.

98. Must be in writing under Ky. St. 1903, § 458. Miller v. Hart, 29 Ky. L. R. 73, 91 S. W. 698.

99. Whitfield v. Burke, 86 Miss. 435, 38 So. 550.

1. Cherry v. Lake Drummond Canal & Water Co., 140 N. C. 422, 53 S. E. 138.

2. An action for injuries by a canal company by throwing dirt on the premises is barred in three years under Revisal 1905, § 395. Cherry v. Lake Drummond Canal & Water Co., 140 N. C. 422, 53 S. E. 138.

3. See Estates of Decedents, § 6B, 7 C. L. 1422; Bankruptcy, § 14, 7 C. L. 416; Death by Wrongful Act, 7 C. L. 1083.

4. See Appeal and Review, 7 C. L. 128;

of limitation are valid,[7] as are changes of the period of limitation, unless completed periods be reopened or existing rights of action cut off without reasonable opportunity to sue.[8] A statute saving "rights" accrued under statutes replaced saves a completed bar.[9] The underlying purpose of the statutes is to prevent the unexpected enforcement of claims concerning which persons interested have been thrown off their guard by want of prosecution,[10] and they should be construed liberally so as to attain the object for which they are enacted.[11] Statutes of limitation must not prescribe an unreasonably short period within which to bring an action,[12] and where the opportunity allowed is reasonably sufficient, there can be no just complaint that a debarred litigant was deprived of his property without due process.[13] The statutes apply to actions, not to defenses.[14] Special statutes are applicable only where specifically made to apply,[15] but in determining their applicability a reasonable interpretation will be given,[16] and they are sometimes applied by analogy.[17] A statute applicable to an action does not apply to a special proceeding,[18] and one by its terms applicable only to cases arising under it applies to no other.[19] They do

New Trial and Arrest of Judgment, 6 C. L. 796.

5. See Equity, 7 C. L. 1323.

6. See 6 C. L. 466.

7. See Constitutional Law, 7 C. L. 731, n. 69.

8. Laws 1896, p. 646, c. 568, amending Code Civ. Proc. § 1913, by permitting an action on a judgment after the lapse of 10 years, is retroactive and applies to a judgment rendered before its enactment. Peace v. Wilson [N. Y.] 79 N. E. 329. Rev. St. 1899, § 4270, providing that the statute shall not run against an action to recover land granted to a public use, etc., is **not retroactive**, and where the statute had commenced to run prior to its enactment, it does not apply. Hunter v. Pinnell, 193 Mo. 142, 91 S. W. 472. Ariz. Rev. St. 1901, § 2938, does not apply to suits brought between enactment of statute and time when revision of statutes took effect. Herrick v. Boquillas Land & Cattle Co., 200 U. S. 96, 50 Law. Ed. 388. Not construed as retroactive if contrary interpretation is possible. Hathaway v. Merchants' Loan & Trust Co., 218 Ill. 580, 75 N. E. 1060.

9. McKay v. Bradley, 26 App. D. C. 449.

10. This is especially true of short limitations in lien laws. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

11. Warren v. Clemenger, 120 Ill. App. 435.

12. **Not unreasonable:** Six months held not an unreasonable period as applied to actions assailing a tax deed. People v. Christian, 144 Mich. 247, 13 Det. Leg. N. 222, 107 N. W. 919. Sand. & H. Dig. § 4819, prescribing a 2-year period for the recovery of land sold for taxes, is not unreasonable; actual possession being necessary, and the deed cannot be executed until the expiration of the 2-year redemption period. Ross v. Royal, 77 Ark. 324, 91 S. W. 178. Whether the fact that a statute allowed only 34 days to bring action is so unreasonable as to be void does not apply where fully one-half the time is permitted to elapse before taking proceedings to remove an obstacle to the action. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2.

13. Terry v. Heisen, 115 La. 1070, 40 So. 461.

14. Affirmative relief by way of reformation of a deed set up in an action of ejectment. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

15. Code Civ. Proc. § 16, applies to ordinary civil actions only and not to an action to collect local assessments. Mercer Co. v. Omaha [Neb.] 107 N. W. 565. The statute limiting the period for the recovery of land does not apply to an action to abate an obstruction in a street where it is provided by law that no lapse of time can abate a public nuisance which obstructs a street. McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082, 1085. Gen. St. 1888, § 3896, providing that liens for assessments for public improvements shall be foreclosed as tax liens, does not impose the same limitation applicable to such actions. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658. Code, § 3369, providing that the application of a survivor to have his share set off must be made within 10 years, does not apply to an action in equity for partition of a distributive share. Britt v. Gordon [Iowa] 108 N. W. 319.

16. The limitation prescribed by statute in a standard form insurance policy is one "specially prescribed by law" within another statute providing the only limitation except where otherwise specially prescribed. Bellinger v. German Ins. Co., 51 Misc. 463, 113 App. Div. 917, 100 N. Y. S. 424. The action at law for damages for fraud is governed by the statute of limitations and not by the doctrine of laches. Neibuhr v. Gage [Minn.] 108 N. W. 884.

17. By analogy to the statute of limitations relative to the lien of judgments, a petition to enforce execution of an order to sell land of a decedent to pay debts is barred after 20 years, unless good reason is shown for delay. No statute of limitations on this subject. White v. Horn, 224 Ill. 238, 79 N. E. 629.

18. Code Civ. Proc. § 1819, providing the period within which action to recover a legacy must be brought, does not apply to a proceeding in the surrogate court to compel payment of a legacy. In re Cooper, 101 N. Y. S. 283.

19. Comp. Laws 1897, § 9745, relative to the effect of partial payment by one joint

not apply to actions for divorce,[20] nor to recover taxes,[21] nor to compel the performance of a continuing public duty,[22] nor to recover property given away in contravention of prohibitory law.[23]

The statutes do not run against the state[24] unless expressly so provided,[25] and all doubts as to whether it does so run are to be resolved in favor of the state.[26] This rule extends to minor municipalities created as local governmental agencies in respect to governmental affairs affecting the general public.[27] But as to matters involving private rights, they are subject to the statutes to the same extent as private individuals.[28] Where a suit is brought in the name of the state but the state has no real interest, the defense may be pleaded,[29] but if it is brought for the sole benefit of the state, the defense is not available though not brought in the name of the state.[30]

Limitation is governed by the law of the forum[31] except where otherwise provided by statute.[32] Such provisions are literally construed.[33]

debtor. Brown v. Hayes [Mich.] 13 Det. Leg. N. 875, 109 N. W. 845.

20. Cullison v. Cullison [Kan.] 85 P. 289.

21. A tax is not a debt in the sense that a statute barring actions on contract will apply to it. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

22. Does not run against a right to compel a public officer to perform a prescriptive and continuing duty. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427. Duty of county commissioners to apportion railroad taxes. Id.

23. The statute does not apply to an action by one to recover property which he has given away and not retained sufficient to support himself because the gift is void as contravening prohibitory law. Ackerman v. Larner, 116 La. 101, 40 So. 581.

24. See 6 C. L. 467. Statutes of limitation do not run against the state in respect to public rights unless the state is expressly included within the terms of the statute. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579. Does not run against the state as to collection of taxes during the time the comptroller general was enjoined by the Federal court from issuing execution for the taxes. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. Rev. St. 1899, § 4270, providing that limitations do not apply as to land granted to public, etc., uses, applies to an action by the state to abate a structure in the street, and § 4299, providing that limitations do run against the state, does not. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009. Not as to debts of a personal nature or as to real estate. Eastern State Hospital v. Graves' Committee, 105 Va. 151, 52 S. E. 837.

25. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009. The statute limiting actions to enforce a liability created by statute does not apply to suits to enforce tax liens. Whitney v. Morton County Com'rs [Kan.] 85 P. 530. Rev. St. 1899, § 4299, providing that limitations shall run against the state, does not apply to an action to abate a public nuisance. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

Applicable to the state: Under Pol. Code, §§ 890, 891, the lien of the state for taxes is barred by failure to have proper entries made on the tax execution and recorded and by failure to issue tax execution within seven years. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. Pol. Code 1895, §§ 890, 891, interpose a bar to the collection of taxes only after they have been placed in execution and not before. Id.

26. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009. Civ. Code 1895, § 3777, providing a bar against the state in certain cases when a citizen would be barred, is in derogation of the common-law right of the state to collect taxes and is to be strictly construed. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251.

27. Counties, cities, towns, and minor municipalities. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579. Under a constitutional provision that counties hold school lands and proceeds of a sale thereof in trust, the statute does not run against an action by a county to recover the purchase price of school lands, though the title of school lands is expressly exempted from limitations. Delta County v. Blackburn [Tex.] 15 Tex. Ct. Rep. 908, 93 S. W. 419.

28. Under Hurd's Rev. St. 1905, c. 122, §§ 60, 61, relative to the sale by school trustees of school house sites which have become unnecessary or inadequate, the people of the state in general have no interest in the site or proceeds of a sale of it, and the statute may be pleaded in ejectment by the trustees to recover possession. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579.

29. Eastern State Hospital v. Graves' Committee, 105 Va. 151, 52 S. E. 837.

30. An action by a hospital created for purely governmental purposes, and where the expense of caring for paupers is borne by the state, to collect for caring for an insane person is not barred. Eastern State Hospital v. Graves' Committee, 105 Va. 151, 52 S. E. 837.

31. See 6 C. L. 467. The limitation of the forum governs. Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77. Ball. Ann. Codes & St. § 4818, providing that where a cause of action has arisen in another state between nonresidents, it is governed by the laws of such state, does not apply to an action on a consent judgment in this state for and against nonresidents, as such cause of action accrued here. Omaha Nat. Bank v. Lindsay, 41 Wash. 531, 84 P. 11. The fact that an action on a note was barred under the laws of Iowa before judgment thereon

Admiralty and equity[34] are not bound by statutes of limitation in suits of purely equitable cognizance,[35] but where jurisdiction in equity is concurrent with that at law, the suit if barred at law is barred in equity.[36]

The defense of the statute may be waived[37] by failure to plead it as a defense.[38] The defense is not waived by failing to set it up where the nature of the demand is not known.[39]

§ 2. *Classes of actions and the respective periods.*[40]—The period within which an action must be brought is expressly prescribed. The only difficulty rests in determining which statute is applicable to a particular case.[41] The form and not the cause of action determines the statute applicable.[42] Different periods are prescribed for actions for the recovery of land[43] or for injuries thereto;[44] actions on contracts,[45]

was confessed in Delaware where the contract was made does not entitle the judgment debtor to set up limitations against an action on the judgment. Cuykendall v. Doe, 129 Iowa, 453, 105 N. W. 698.

32. The laws of Kansas apply exclusively in the state except when the requirements of the statute permitting the law of another state to be applied have been complied with. Croan v. Baden [Kan.] 85 P. 532. An action to recover upon a policy of fire insurance, though transitory when brought in this state upon a cause of action arising in another state, is by Rev. St. 1905, § 4990, governed by the statute of that state. Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 76 N. E. 563. Code Civ. Proc. § 390, providing that when a cause of action accrues against a nonresident "the limitation of his residence" controls, means the limitation in force when the cause accrued. Utah Nat. Bank v. Jones, 109 App. Div. 526, 96 N. Y. S. 338. In an action on a note made in a foreign state it is presumed that the maker was a resident of such state when the note was given and when it matured. Id.

33. Under a statute providing that if a cause of action between nonresidents arising in another state is barred by the laws of the state where made it is barred here, a cause of action made in one state which is barred by the laws of another where a party resides is not barred by this statute. Doughty v. Funk, 15 Okl. 643, 84 P. 484.

34. See 6 C. L. 468.

35. In a case of purely equitable cognizance courts of equity are not governed by the statutes. Ferrell v. Lord [Wash.] 86 P. 1060. Equity will not interpose the bar of the statute to prevent recovery from officers and directors of a corporation of dividends paid them out of the capital stock, in fraud of the corporation and its creditors. Mills v. Hendershot [N. J. Eq.] 62 A. 542. The only remedy of a mortgagor against a mortgagee in possession is a suit in equity and is governed by the ten-year statute, Rev. Codes 1905, § 6793, and not by the twenty-year statute, §§ 6774, 6775. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

36. Bill to cancel a mortgage for fraud and recover damages for false representations as to the value of the mortgaged property cannot be maintained as to the damages after the expiration of the period within which an action could be maintained at law. Smith v. Krueger [N. J. Eq.] 63 A. 850. If barred at law it will generally be held barred in equity. Hesley v. Shaw, 120 Ill. App. 92. Where one deposited money with another who agreed to pay his debts and return the balance, and the depositor made no demand for return for twenty years, the right to recover was not within the exclusive jurisdiction of equity and was subject to limitations. Francis v. Gisborn [Utah] 83 P. 571. Where a legatee's notes to a testator are barred, the amount thereof cannot be set off from his distributive share. Hesley v. Shaw, 120 Ill. App. 92.

37. See 6 C. L. 468. The defense is a personal privilege and may be waived by a municipality where a fund for the payment of the claim has been provided. Hewel v. Hogin [Cal. App.] 84 P. 1002. The defense is waived where notes evidencing the obligation are introduced in evidence without objection and the defense not asserted until the close of the trial. Savage v. Madelia Farmers' Warehouse Co. [Minn.] 108 N. W. 296.

38. Croan v. Baden [Kan.] 85 P. 532; Geisenberger v. Cotton, 116 La. 651, 40 So. 929. In an action against a public officer to enforce a claim against a municipality. Hewel v. Hogin [Cal. App.] 84 P. 1002.

39. Widner v. Wilcox [Iowa] 108 N. W. 238. The defense is not waived by appearing and pleading where the summons does not give notice of the particular claim asserted. Colling v. McGregor, 144 Mich. 651, 13 Det. Leg. N. 310, 108 N. W. 87.

40. See 6 C. L. 468.

41. See, also, Contracts, 7 C. L. 761; Mortgages, 6 C. L. 681; Trespass, 6 C. L. 1721, and like topics.

42. Stringer v. Stephens' Estate [Mich.] 13 Det. Leg. N. 732, 109 N. W. 269.

43. Mills' Ann. St. §§ 2923, 2924, prescribing a five year period for the recovery of land is repealed by Laws 1893, p. 327, c. 118, prescribing a seven year period. Ballard v. Golob, 34 Colo. 417, 83 P. 376. Where one had held the legal title to land which had never been occupied by another, he was not barred from maintaining an action to quiet title after thirty years. Haarstick v. Gabriel [Mo.] 98 S. W. 760. Rev. St. 1899, § 650, authorizing **suits to quiet title,** does not prescribe a limitation period, and is governed by the statute relative to real actions and not that relating to personal actions. Id. Trespass to try title to recover land on payment of a vendor's lien is not equivalent to a suit for specific performance and is not barred in four years. Mason v. Bender [Tex. Civ. App.] 97 S. W. 715. Rev. St. 1899, §

oral[46] or written,[47] express[48] or implied;[49] on specialties;[50] on accounts[51] and for ac-

4262, prescribing the period for the recovery of lands, applies to an **action to recover a homestead.** Joplin Brew. Co. v. Payne, 197 Mo. 422, 94 S. W. 896. Also to recover an **assignment of dower.** Id. Under Rev. St. 1899, § 4263, prescribing a ten year period for the recovery of land, an action by the grantor on **breach of condition subsequent** is barred in ten years. Hoke v. Central Tp. Farmers' Club, 194 Mo. 576, 91 S. W. 394. Ejectment by the owner to recover **land sold for delinquent taxes** is barred in five years from confirmation of the sale. Gavin v. Ashworth, 77 Ark. 242, 91 S. W. 303. Sand. & H. Dig. § 4819, prescribing a two year period for action to recover **land sold for taxes,** applies where the tax sale is absolutely void for jurisdictional defects. Ross v. Royal, 77 Ark. 324, 91 S. W. 178. The prescription of ten years applies to a **petitory action.** Fellman v. Succession of Guitterez, 117 La. 736, 42 So. 252. Act No. 96, p. 142, of 1896, applies only where property is **taken in pursuance of a judgment of expropriation.** Scoveli v. St. Louis S. W. R. Co., 117 La. 459, 41 So. 723. Rev. St. 1899, § 4262, prescribing a ten year period to recover real estate, applies to an **action to recover mineral rights** beneath the surface and a right of ingress and egress to conduct mining operations. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. Code Civ. Proc. § 318, barring an action to recover real property in five years, applies to one seeking to recover **land she had delivered upon wrong advice** and believing she was not entitled to hold it as a homestead. Daniels v. Dean, 2 Cal. App. 421, 84 P. 332. Under Rev. St. 1887, §§ 4036, 4037, an action to recover land is barred in ten years. Fountain v. Lewiston Nat. Bank, 11 Idaho, 451, 83 P. 505. 2 Ball. Ann. Codes & St. § 4797, barring an action to recover land after ten years, bars an **action for partition** against one who has been in adverse possession for such period. Hyde v. Britton, 41 Wash. 277, 83 P. 307. Code, § 3447, limiting action for the recovery of real property to ten years, applies to an action for partition by a widow against a stranger claiming under her husband, where he has been in possession for the statutory period since the death of the husband. Britt v. Gordon [Iowa] 108 N. W. 319. There is a marked differences between an **encroachment upon a part of a street** and the entire occupation of the street. Where the exclusion is entire for twenty-one years, the fact that the barrier was frail and unsubstantial does not prevent the possessor from successfully asserting title, and the public loses its rights both in and to the street (Wright v. Oberlin, 3 Ohio C. C. (N. S.) 242, and Morehouse v. Burgot 22 Ohio C. C. 174, questioned; Mott v. Toledo, 17 Ohio C. C. 472, approved). Seese v. Maumee, 7 Ohio C. C. (N. S.) 497. Under Rev. Laws, c. 146, § 2, providing "no claim by entry or by action to land fraudulently conveyed by the deceased shall be made unless within five years after the death of the grantor," bars a suit brought after the expiration of such period, though a premature action for the same cause has been dismissed, ch. 202, § 21, authorizing a new action on the abatement of a former one, does not apply. Tyndale v. Stanwood, 190 Mass. 513, 77 N. E. 481. The three, five, and ten years' statutes of Texas apply only to suits to recover land and **not to a suit to foreclose a trust deed.** Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925. The ten year statute does not apply to an action to enforce a vendor's lien. Reynolds v. Lawrence [Ala.] 40 So. 576.

44. Under Revisal 1905, § 395, the three year statute applies to an action against a canal company for injuries to a reversionary interest by throwing dirt on the land. Cherry v. Lake Drummond Canal & Water Co., 140 N. C. 422, 53 S. E. 138.

45. An action **against a carrier for damage by fire to goods in transit** is on contract and not barred in one year. Kansas City, etc., R. Co. v. Spann [Ala.] 40 So. 33. Where in assumpsit an alias writ is returned "not found," a pluries writ issued more than six years later is barred for want of prosecution. Ross v. Clark, 213 Pa. 617, 63 A. 364. The statute applicable to actions on contract and not the one applicable to tort actions applies to an action for compensation by one who fixed up an athletic field under a contract that he was to be paid from revenues from the ground, where the owner refused to permit use of the grounds for the purposes of revenue. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906.

46. An action **on the implied warranty of title** by the seller of chattels is not on the written instrument evidencing the sale but upon an obligation not founded on a writing. Pincus v. Muntzer [Mont.] 87 P. 612. An **offer of reward by publication** does not become a contract in writing within Comp. Laws 1897, § 2915, by performance upon discovery. Cunningham v. Fiske [N. M.] 83 P. 789. An action for breach of an alleged **warranty of the merchantableness of certain fruit trees** accrued on the purchase of the trees, and is governed by Code Civ. Proc. § 339, subd. 1. Brackett v. Martens [Cal. App.] 87 P. 410. An action by a depositor against a bank to recover damages for **unwarranted refusal to honor a check** is barred in two years under Code Civ. Proc. § 339, as an action upon an obligation not founded on a written instrument. Smith's Cash Store v. First Nat. Bank [Cal.] 84 P. 663.

47. An action in case to recover damages for breach of written contract is barred in five years. Bates v. Bates Mach. Co., 120 Ill. App. 563. An **action to recover an overdraft from a depositor** is based on a written instrument, the honored check. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467. The right of action by a covenantee against the successor in title of the covenantor, **upon a covenant running with the land,** contained in a deed not signed by the covenantor is barred in six years. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701. **Action to have a mortgage executed** by a guardian adjudged a valid lien on his ward's property held governed by the three year statute prescribing the period for actions founded on written instruments, and not by the statute relative to mistake. Banks v. Stockton [Cal.] 87 P. 83. Code Civ. Proc. § 337, prescribing a three year period for actions on written instruments, applies to an action to

counting;[52] suits to enforce a statutory liability;[53] to enforce mechanic's liens;[54]

have adjudged as a valid lien on a ward's property a mortgage executed by a guardian. Id. An action against a purchaser from the landlord for failure to repair according to the terms of a written lease is on a contract in writing and within the four year statute. Houston Saengerbund v. Dunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 429, 92 S. W. 429. The ten year statute of Illinois bars an **action on a promissory note,** though during such period the maker had lived in several jurisdictions but in none long enough to bar an action. Warren v. Clemenger, 120 Ill. App. 435. Where parties contracted to build a levee which was to be a mutual benefit to their lands and one built his portion and also the other's portion on his refusal to do so, held that an action to recover the cost of such portion was on the written contract and governed by the four year statute. Fabian v. Lammers [Cal. App.] 84 P. 432. Code Civ. Proc. § 337, barring an action on a written contract in four years, applies to an action against the sureties of a deceased executor. Hewlett v. Beede, 2 Cal. App. 561, 83 P. 1086. An action **for contribution between sureties on a note** is barred in six years under Ball. Ann. Codes & St. § 4798. Caldwell v. Hurley, 41 Wash. 296, 83 P. 318. The holder of a draft who does not present it to the drawee nor take steps against the drawer is barred after five years. Wrigley v. Farmers' & Merchants' State Bank [Neb.] 108 N. W. 132. A cause of action on a contract consisting of **written propositions by one party accepted by the other** is on a written contract and the five year statute does not apply. Bauer v. Hindley, 222 Ill. 319, 78 N. E. 626.

48. A provision in a conveyance imposing on the grantee the payment of the grantor's debts creates an express assumpsit and as between grantor and grantee is barred in five years. Collings v. Collings' Adm'r, 29 Ky. L. R. 51, 92 S. W. 577.

49. A claim arising on implied contract is barred in six years. In re Primmer's Estate, 49 Misc. 413, 99 N. Y. S. 830. When a plaintiff in his pleading **waives a tort** committed by the defendant, which consisted of the conversion of money that belonged to the plaintiff, and he sues upon an implied contract, his action is barred in six years from the time the defendant received the money, and not in four years from that time. Kirchner v. Smith, 7 Ohio C. C. (N. S.) 22. When one devised property to his son on condition that he pay certain annuities secured by a lien, **an action to recover annuities in arrears** without regard to the lien is on an implied contract. Stringer v. Stephens' Estate [Mich.] 13 Det. Leg. N. 732, 109 N. W. 269. Section 294, subd. 2, Burns' Ann. St. 1901, limiting suits on bonds of public officers for breach of official duty to five years, does not apply to an action against a county auditor to recover from him personally **sums collected by him** and **wrongfully withheld.** Zuelly v. Casper [Ind. App.] 76 N. E. 646. An action on the **implied obligation of a landlord to repair** a portion of the building not under the control of the tenant is barred in two years. Houston Saengerbund v. Dunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 699, 92 S. W. 429. The five year statute applies to a cause of action arising on **payment of the principal's debt by a guarantor.** Thompson & Thompson v. Brown [Mo. App.] 97 S. W. 242.

50. An action **to foreclose a trust deed** is not barred for twenty years. Sprague v. Lovett [S. D.] 106 N. W. 134. Under Rev. St. 1898, § 3968, limiting the period within which an action on **a guardian's bond** may be brought to four years after he is discharged, a guardian is discharged when his ward attains majority, though the same person is also guardian of other minors under the same order of appointment, and performance of his duties to them is secured by the same bond. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2. This statute applies to a bond given in a special real estate sale proceeding under Rev. St. 1898, c. 171. Id. Code Pub. Gen. Laws 1904, art. 57, § 3, providing the limitation period within which a bill, testamentary, administration or other bond, or specialty, etc., may be presented against the estate of a decedent, does not apply to a suit by a widow to enforce against her husband's estate a claim for money advanced him during his lifetime. Cross v. Iler, 103 Md. 592, 64 A. 33.

51. Evidence held to show that an account between an employer and an employe to whom he was indebted was a **mutual, open, and current** account and not barred until two years after the last item was entered. Copriviza v. Rilovich [Cal. App.] 87 P. 398. Actions on accounts stated accrued at the date rendered and are not affected by Smith's Laws, p. 76, relative to accounts concerning trade of merchandise between merchants, their factors or servants. Morgan v. Lehigh Valley Coal Co. [Pa.] 64 A. 633. Where an agreed indebtedness was in fact only a part of a running account and the agreement was only to ascertain a part of the indebtedness, the last item of the account having been rendered within five years, the amount due at the time of the agreement was not barred. Hammer v. Crawford [Mo. App.] 93 S. W. 348. **A mutual account** within Code Civ. Proc. § 344, implies one in which there is reciprocity of dealing, whereon each party has a right of action against the other. Flynn v. Seale, 2 Cal. App. 665, 84 P. 263. When a bank credited an over draft to a life policy which it held as security, the two year statute applying to mutual accounts is not available to one who seeks to recover the amount of the policy from the bank. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467. Evidence insufficient to show a mutual account so as to make the statute relative to actions on such accounts applicable. Brock v. Wildey, 125 Ga. 82, 54 S. E. 195.

52. Payments claimed to have been made by a partner two years before an action for accounting are barred. Flynn v. Seale, 2 Cal. App. 665, 84 P. 263.

53. N. Y. Code Civ. Proc. § 394, prescribing a three year period for suits against corporation stockholders to enforce a statutory liability, applies to an action brought in that state against a stockholder of a foreign corporation. Ramsden v. Gately, 142

to foreclose mortgages;[55] attacking a mortgage foreclosure sale;[56] on a tax lien;[57] to annul judicial sales[58] or recover property sold;[59] special proceedings;[60] on judgments;[61] to enforce a constructive trust;[62] to recover a penalty;[63] to recover personal property;[64] actions against public officers for neglect of duty;[65] actions based

F. 912. An action for the recovery of money lost in the purchase of debentures is barred by the statute of limitations if not brought within one year from the time the cause accrued. Harrington v. Halliday, 4 Ohio N. P. (N. S.) 281. A suit for damages against a municipal corporation for change of grade is subject to the four year statute. Civ. Code 1895 § 3898. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103. Evidence held to show that the grade was changed within four years. Id. In a suit against stockholders to enforce individual liability for debts of a bank imposed by charter, the twenty year period applies, it being a suit under a statute within the meaning of Civ. Code 1895, § 3766. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. Actions to recover usury are barred in one year. Ky. St. 1903, § 2517. Norman v. Warsaw Bldg. & Loan Ass'n, 29 Ky. L. R. 50, 91 S. W. 695. The right to have a certificate of acknowledgment corrected is barred in four years. Kopke v. Votaw [Tex. Civ. App.] 16 Tex. Ct. Rep. 316, 95 S. W. 15. Action under Act July 2, 1890, § 7, for threefold damages for injury to property or business by an unlawful combination, is an action not expressly provided for, and not an action for statute penalties or one for penalties or forfeitures, or one to recover for injuries to real or personal property. Chattanooga Foundry & Pipe Works v. Atlanta, 27 S. Ct. 65.

54. Under Laws 1895, p. 225, a suit to enforce a mechanic's lien must be brought within four months. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22.

55. Rev. St. 1899, § 4277, cuts down the period, within which a suit to foreclose a mortgage securing a barred obligation may be brought, to two years. Martin v. Teasdale [Mo. App.] 92 S. W. 133.

56. Rev. St. 1898, § 3543, expressly provides that no mortgage sale may be attacked for defect in notice of publication or proceedings unless action be commenced within five years from the date of sale. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290.

57. Kansas City charter, art. 9, § 23, providing that a lien for taxes shall continue only one year after maturity of the last installment, etc., does not apply to a suit by the holder of a tax bill against the owner to enforce the lien. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856.

58. The three year prescription prescribed by Constitution of 1898, art. 233, against actions to annul tax sales, applies to a case where the property in question was assessed to one who was without color of title and was sold without notice to the owner. Terry v. Heisen, 115 La. 1070, 40 So. 461.

59. A statute providing that an action to recover property sold by order of a court of chancery, except within two years after possession taken by the purchaser, does not apply to a sale under order of a court which had no jurisdiction. Moores v. Flurry, 87 Miss. 707, 40 So. 226.

60. A special proceeding in the surrogate court to compel payment of a legacy is barred in twenty years. In re Cooper, 101 N. Y. S. 283. A writ of mandamus against the state to compel the refunding of taxes paid as a condition on which the relator might purchase a state bid for delinquent taxes is barred in six years. McRae v. Auditor General [Mich.] 13 Det. Leg. N. 895, 109 N. W. 1122.

61. Under Code 1904, § 3577, providing that an action may be brought on a judgment within ten years from execution issued, an execution duly attested and marked "to lie" was issued though never delivered to an officer. Davis v. Roller [Va.] 55 S. E. 4. An action under Code Civ. Proc. § 1937, providing for an action for the balance against other joint debtors after an action against one, is not on a judgment and is not barred in ten years. Hofferberth v. Nash, 50 Misc. 328, 98 N. Y. S. 684. Action on a decree against the estate of a decedent held not barred though limitations had run against an assertion of a claim against the estate. Sipe v. Taylor [Va.] 55 S. E. 542. An order requiring one to pay a sum stated for the support of a parent is a judgment and the six years' statute does not apply. Henry's Estate, 28 Pa. Super. Ct. 541.

62. An action against a stockholder to recover dividends received by him in good faith without knowledge that they had been paid out of the capital is barred in six years. Mills v. Hendershot [N. J. Eq.] 62 A. 542.

63. Under Rev. St. § 3184, providing for the recovery of delinquent revenue taxes with penalty and interest, such interest is not a penalty and an action to recover it is not governed by Rev. St. § 1047, limiting actions to recover a penalty to five years. United States v. Guest [C. C. A.] 143 F. 456. A proceeding under a statute authorizing revocation of a physician's license for fraud in its procurement is not to enforce a penalty or forfeiture, and the statutes applicable to such actions do not apply. State v. Schaeffer [Wis.] 109 N. W. 522.

64. Action to recover personal property held barred. Hodges v. Wheeler, 126 Ga. 848, 56 S. E. 76. Replevin to recover a horse is barred in eleven years. Leavitt v. Shook, 47 Or. 239, 83 P. 391. Under Code Civ. Proc. § 338, prescribing a three year period for the recovery of chattels after the discovery of the facts by the aggrieved party, an action against one who administered on the estate of a person supposed to be dead, but is not, is barred in three years. Fay v. Costa, 2 Cal. App. 241, 83 P. 275.

65. A cause of action because of failure of the clerk to enter and index a judgment transcript is governed by the limitation of actions against officers for neglect, and not the statute applicable to relief on the ground of mistake. Lougee v. Reed [Iowa] 110 N. W. 165.

on tort,[66] as for damages for nuisance,[67] trespass,[68] to recover for personal injuries,[69] or fraud,[70] and an omnibus clause usually covers all actions not otherwise expressly provided for.[71]

§ 3. *Accrual of cause of action and beginning of period.*[72]—The statute commences to run from the accrual of a cause of action and not before.[73] A cause of action accrues when there exists a demand capable of present enforcement,[74] a suable

66. An action by one partner against another and a surety on a bond given by such other partner on having the partnership property sequestered is not an action ex delicto and the one year statute does not apply. St. Geme v. Boimare, 117 La. 232, 41 So. 557.

67. For a continuing nuisance, damages may be recovered for five years preceding the commencement of the action. Jones v. Stover [Iowa] 108 N. W. 112. For permanent nuisances two years. Brown v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 762, 94 S. W. 134. Where a city negligently permitted a drainpipe to fill up, causing abutting property to overflow, limitations did not run from the date the drainpipe was obstructed, but damages accruing within five years from action commenced might be recovered. Town of Central Covington v. Beiser, 29 Ky. L. R. 261, 92 S. W. 973.

68. A right of action for damages caused by constructing a switch in front of premises is barred in six years. Romano v. Yazoo, etc., R. Co., 87 Miss. 721, 40 So. 150. For damages from flooding, caused by constructing an embankment across the channel of a stream, is a continuing tort and damages accruing within six years may be recovered. Lawton v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 128. An action for trespass is not barred for four years. Burns v. Herkan, 126 Ga. 161, 54 S. E. 946. The three and not the two year statute applies to an action under Laws 1895, p. 352, c. 163, § 7, to recover treble damages for **willful trespass to pine timber of the state.** State v. Bonness [Minn.] 109 N. W. 703.

69. Ky. St. 1903, § 2516, barring action for personal injuries in one year, bars an action by the personal representative of a decedent where more than a year elapsed between the date of death from the injury and the qualification of his administrator. Wilson's Adm'r v. Illinois Cent. R. Co., 29 Ky. L. R. 148, 92 S. W. 572.

70. Rev. St. 1898, § 4222, expressly provides that an action based on fraud, cognizable only in equity, is barred in six years after discovery of the fraud. Figge v. Bergenthal [Wis.] 109 N. W. 581. In an action based on fraud the fact that different causes of action are asserted does not affect the applicability of Rev. St. 1898, § 4222. Id. Contention in an action based on fraud that it was on an account held untenable. Id. A cause not dependent on proof of fraud but where it is involved only incidentally is not within 2 Mills' Ann. St. § 2911, prescribing a three year period. Fraudulent conveyances involved. Equitable Securities Co. v. Johnson [Colo.] 85 P. 840.

71. Mills' Ann. St. § 2912, prescribing a five year period for all actions not otherwise provided for, applies to an action to have sales of excess water rights canceled. Patterson v. Ft. Lyon Canal Co. [Colo.] 84 P. 807. Code, § 152, omnibus clause applies to a claim to have an entryman under a later grant declared a trustee. McAden v. Palmer, 140 N. C. 258, 52 S. E. 1034; Frasier v. Gibson, 140 N. C. 272, 52 S. E. 1035.

72. See 6 C. L. 471.

73. A devisee who is not made a party to a proceeding which directs the sale of the estate to pay debts is not barred from maintaining ejectment against the purchaser until limitations have run. Card v. Finch, 142 N. C. 140, 54 S. E. 1009.

74. Limitations **against assessment by receiver of mutual benefit company** does not begin to run from the decree declaring insolvency but only from that authorizing the assessment. Schofield v. Turner, 28 Pa. Super. Ct. 177. Right of action on **deficiency judgment** entered after a foreclosure, under Comp. Laws 1888, § 3460, accrues where the fact of deficiency is ascertained and not at the date of the foreclosure. Howe v. Sears [Utah] 84 P. 1107. Where a school teacher quit her employment at which she was getting a weekly stipend to go to work for a relative **under an implied contract** that she would be paid double the amount she was there receiving, a cause of action accrued at the end of each week. Greenwood v. Judson, 109 App. Div. 398, 96 N. Y. S. 147. Sand. & H. Dig. § 4819, prescribing a two-year period for **actions to recover land sold for taxes,** commences to run not from date of sale but from the date possession is taken under the deed. Ross v. Royal, 77 Ark. 324, 91 S. W. 178. A cause of action **by a policeman for his salary** for the current month does not accrue until the first day of the following month when it becomes due. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925. Where a railroad company constructed an embankment along the side of a ditch and dirt therefrom fell into the ditch and caused it to overflow, a cause of **action for injuries caused by such overflow** accrues at the time the dirt fell into the ditch and not when the embankment was constructed. Chicago, etc., R. Co. v. McCutchen [Ark.] 96 S. W. 1054.

On an obligation to pay when able, a cause does not accrue until the promisor is able to pay, notwithstanding a subsequent writing acknowledging the justness of the claim. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142. Where a purchaser had been in adverse possession of land for 50 years and the grantor or his sole heir had made no effort to recover the land or the purchase price, an action by the heir was barred by the fifteen and thirty-year statutes. Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 638. A cause of **action against a carrier for conversion of goods delivered to it for carriage,** but which were never delivered to the consignee, accrues at the time of delivery to the carrier. Hooks v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 995, 97 S. W. 516. Where a company agreed to pay a certain sum of money in case it

party against whom it may be enforced,[75] and a party who has a present right to

abandoned its intention to build a railroad, evidence held to show that such **intention was abandoned** more than the statutory period prior to commencement of the action. Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508. Under Rev. St. 1895, art. 3290, providing that a judgment is barred in 10 years, where a judgment debtor within 10 years conveyed to one who went into possession, **limitations commenced to run as against the judgment lienor** from the date of sale and possession given. White v. Pingenot [Tex. Civ. App.] 14 Tex. Ct. Rep. 338, 90 S. W. 672.

The action to a wife and children to recover from a concubine or bastard child property conveyed by the husband and father, authorized by Civ. Code 1902, § 2368, accrues when the wrong is discovered. Williams v. Halford, 73 S. C. 119, 53 S. E. 88. Where one fraudulently represented the value of certain shares of stock put up to secure the discount of notes under an agreement that if the notes were not paid when due the stock might be sold, **a cause of action for the fraud accrued** at the time of discount of the notes and acceptance of the stock as security. First Nat. Bank v. Steel [Mich.] 13 Det. Leg. N. 762, 109 N. W. 423. No cause of action **for unlawful detainer** accrues to a successful contestant in a land case until the homestead entry is canceled. Bilyeu v. Pilcher, 16 Okl. 228, 83 P. 546. Where a deed and bond for reconveyance were made and the bond delivered and a new one given on the grantor's borrowing more money, an **action to have the deed declared a mortgage** accrued when the last loan was made. Fox v. Bernard [Nev.] 85 P. 351. A mortgagee is charged with notice of a deed of the premises by the mortgagor which is duly recorded five years before the action to foreclose is commenced. California Title Ins. & Trust Co. v. Muller [Cal. App.] 84 P. 453. An **executor's right of action to recover from the sureties of a coexecutor** assets of the estate lost by such coexecutor immediately on the death of the coexecutor. Hewlett v. Beede, 2 Cal. App. 561, 83 P. 1086.

For a reward, an allegation that the plaintiffs "discovered" the criminal for whom the reward sought to be recovered was offered, on a certain date fixes the date on which their cause of action accrued. Cunningham v. Fiske [N. M.] 83 P. 789.

Where one promised to make compensation by will, an action to recover it did not accrue until his death. Chambers v. Boyd, 101 N. Y. S. 486. Against a claim for services rendered under a promise to pay by will upon the death of the promisor. Estate of Switzer v. Gertenbach, 122 Ill. App. 26. Where one promises to compensate another by will, limitations do not run until the death of the debtor. Goodloe v. Goodloe [Tenn.] 92 S. W. 767. Under Code Civ. Proc. § 1937, providing that after **recovery of judgment against one joint debtor** an action may be maintained against the other for the balance, such cause does not accrue until the first is terminated. Hofferberth v. Nash, 50 Misc. 328, 98 N. Y. S. 684. Where one is in possession and claiming title under a void foreclosure with the consent of the **mortgagor, his possession is adverse** and starts limitations against remedies of the mortgagor. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. The **limitation prescribed in an insurance policy runs** from the date of refusal to pay after proof of loss and not from the date the insurer gave notice before proof of loss that he would not pay. Munn v. Masonic Life Ass'n, 101 N. Y. S. 91. Comp. Laws, § 8727, limiting actions **on a guardian's bond** to four years from his discharge, bars an action four years after the guardian's death. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493. Where a broker sold property giving the purchaser the right to lease it for a period with the option to purchase, his right of **action for commissions** did not accrue until the option was exercised. Coates v. Locust Point Co., 102 Md. 291, 62 A. 625. Evidence held to show that a cause of action **for services rendered** was barred. Ryan v. Canton Nat. Bank, 103 Md. 428, 63 A. 1062. Against a claim for services rendered, where there is no contract, immediately upon the performance of the services. Estate of Switzer v. Gertenbach, 122 Ill. App. 26. The **removal of timber from mortgaged premises by which security is impaired** starts limitations as to the mortgagee's right of action therefor, though his mortgage has not matured. This is so as to a second mortgagee. Jenks v. Hart Cedar & Lumber Co., 143 Mich., 449, 13 Det. Leg. N. 44, 106 N. W. 1119. Begins to run against the right **of action in a landlord for forcible entry and detainer** against a tenant at sufferance on the termination of the tenancy. Clark v. Tukey Land Co. [Neb.] 106 N. W. 328. The bar of the statute against a municipality as to the **collection of a street assessment,** levied prior to the Act of April 25, 1904, does not begin to run on the several instalments until each of said instalments becomes due and payable. Bell v. Norwood, 8 Ohio C. C. (N. S.) 435.

On note given for lost note: Where one executed a note for a debt evidenced by a note which he claimed he had paid and lost, and the second note was paid under the agreement that if the lost note marked paid was found the amount of the second note should be returned, an action for such return did not accrue until such note was found. Grouse v. Moody, 130 Iowa, 320, 106 N. W. 757.

75. Where the charter of a bank provides that the stockholders shall be individually liable "at the time of suits" for the payment of debts of the bank, a cause of action does not accrue against them until after suit by a creditor. Wheatley v. Glover, 125 Ga. 710, 54 S. E. 626. If one having a **claim against the state** cannot prosecute the same without leave of the legislature, limitations do not commence to run until such leave is given. Lancaster County v. State [Neb.] 107 N. W. 388. The statute of limitations runs **in favor of a bailee** only after conversion. Austin v. Van Loon [Colo.] 85 P. 183. An action in **ejectment by the holder of a tax deed** out of possession is not barred by the two-year statute while the land is vacant or while in the possession of tenants or agents of a nonresident owner. Gibson v. Hinchman, 72 Kan. 382, 83 P. 981. Rev. St. 1906, §§ 4976, 4981, does not commence to run against a **debt based upon a contract** not in

enforce it.[76] If a demand is necessary to the creation of a cause of action, it does not accrue until demand is made[77] or should be made.[78] Where a liability accrues only upon the performance of a condition, the statute does not commence to run until such condition is performed[79] or performance is refused.[80] A permissive condition for accelerated maturity does not necessarily accelerate the accrual of a cause of action.[81] A cause of action does not accrue on a continuing contract until breach thereof.[82] Where a permanent nuisance is created, a cause of action for the entire damages accrues at once.[83] Where a stream is obstructed, causing intermittent overflows, a cause of action ac-

writing **which becomes due by reason of the decease of the debtor** until the appointment of an administrator or executor of such debtor and notice thereof. Hollies v. Riddle, 74 Ohio St. 173, 78 N. E. 219.

An action for wrongful death will not lie until the appointment of the administrator has been completed, and where completion of the appointment is delayed by failure of the administrator to give bond for more than two years, the right of action is abated by the statute, which runs against the beneficiaries without interruption from the date of the decedent's death. Archdeacon v. Cincinnati Gas & Elec. Co., 3 Ohio N. P. (N. S.) 606.

76. Where a husband abandoned his wife and the homestead was sold under execution proceedings against him, from which the wife redeemed, the statute did not run in her favor against him until she obtained a divorce. Kenady v. Gilkey [Ark.] 98 S. W. 969. Not against a right to recover dower until it has been allotted. Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535.

77. The date of delivery of an antedated note payable "on demand after date" determines the date on which a cause of action thereon accrues. Webber v. Webber [Mich.] 13 Det. Leg. N. 703, 109 N. W. 50. Where land was conveyed under an oral agreement to reconvey on demand, the statute does not commence to run against an action to recover the land or the value thereof until demand and refusal to reconvey. Cromwell v. Norton [Mass.] 79 N. E. 433. No demand for the righting of the fraud is necessary to set Rev. St. 1898, § 4222, in operation. Figge v. Bergenthal [Wis.] 109 N. W. 581.

78. Where a demand is necessary to create a cause of action, such demand must be made within a reasonable time which is to be ascertained by analogy to the statute of limitations. One who holds an elevator check stating that the grain is held subject to his order of sale on or before a certain date must demand delivery within 6 years in order to create a cause of action for conversion. Freeman v. Ingerson, 143 Mich. 7, 12 Det. Leg. N. 866, 106 N. W. 278. Where land was conveyed under an oral contract to reconvey on demand, the fact that the grantee sold part of the land and accounted for the proceeds is not such a repudiation of the agreement as to the remaining land as to start limitations against the action to recover it. Cromwell v. Norton [Mass.] 79 N. E. 433.

79. Greenley v. Greenley, 100 N. Y. S. 114. Where after issuing an execution a decree was made that no more than a certain amount be collected thereon until further order, the time between the two orders should be excluded. Davis v. Roller [Va.] 55 S. E. 4. Under Rev. St. 1899, § 4274, providing that an action against a public officer for an official act is barred in three years, an action against a sheriff for conversion of the proceeds of a sale on execution does not accrue until termination of an action determining the right to the property. State v. O'Neill, 114 Mo. App. 611, 90 S. W. 410. This rule extends to determination on appeal, though no appeal bond was given. Id. Not on an escrow until performance of the conditions and delivery. Daniels v. Daniels [Cal. App.] 85 P. 134. Where one agreed to pay a grantor's debts upon the performance of certain conditions, the fact that he repudiated the contract before the conditions were performed did not set the statute in motion as to the debts he agreed to pay. Greenley v. Greenley, 100 N. Y. S. 114. An action on city warrants drawn on a particular fund is not barred if brought within three years after notice of the conversion of the fund by paying subsequent warrants. The holders of warrants not being required to take notice of the misappropriation or of the records within the time the city might collect the fund. Northwestern Lumber Co. v. Aberdeen [Wash.] 87 P. 260. Where one agreed to pay certain notes upon the performance of conditions, the fact that an action on the notes was barred was no defense to him. Greenley v. Greenley, 100 N. Y. S. 114.

80. Where a vendor agreed to make title in the vendee when the land was surveyed and divided a cause of action accrued to the vendee when it appeared that the vendor did not intend to survey and divide the land. Abercrombie v. Shapira [Tex. Civ. App.] 15 Tex. Ct. Rep. 864, 94 S. W. 392.

81. Where a note was secured by a mortgage providing for foreclosure at the option of the creditor upon default in payment of interest, failure of the creditor to exercise his option does not start the operation of the statute. First Nat. Bank v. Park [Colo.] 86 P. 106. Complaint held not to show that the option had been exercised. Id.

82. A covenant to repair and renew in a deed of a right of way that the grantee is to erect and maintain a retaining wall is a continuing contract unaffected by the statute until breach thereof. Fiege v. Covington & C. El. R. & Transfer & Bridge Co., 28 Ky. L. R. 1257, 91 S. W. 738. Where one wrongfully appropriates the water rights of another for a period longer than the statute of limitations, the injured person is not precluded from maintaining action of injuries sustained within the period. Henshaw v. Salt River Valley Canal Co. [Ariz.] 84 P. 908.

crues at the date of each overflow.[84] A right of action on a mutual account does not accrue until the account is closed.[85] A cause of action in or against a remainderman or reversioner relative to the estate does not accrue during the continuance of the life estate,[86] unless by virtue of wrongful acts of the life tenant he is given a right to maintain action.[87] If the right be in possession, the statute does not run while the right of or remedy by possession is being exercised.[88] Hence, it does not run in favor of a mortgagee in possession, nor in favor of one cotenant as against another,[89] until ouster.[90] The statute does not run as between husband and wife during the existence of the marital relation,[91] unless otherwise provided by statute.[92] The right of action by a principal against an agent does not accrue until the agency is terminated.[93]

As between stockholder, corporation, and creditor.[94]—A cause of action in favor of a creditor on an unpaid subscription to stock of an insolvent corporation accrues after call[95] or insolvency of the corporation,[96] or as soon as it ceases to be a going concern,[97] or at the date prescribed by law.[99]

83. Brown v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 762, 94 S. W. 134.

84. Where a stream is obstructed by a mining company and poisonous water backed up on land, a fresh cause of action is created by each overflow and all damages accruing within five years may be recovered. Crabtree Coal Min. Co. v. Hamby's Adm'r, 28 Ky. L. R. 687, 90 S. W. 226. A cause of action for injuries to land by deposit thereon of minerals from mines further up the stream accrues when the material is deposited on the land. Day v. Louisville Coal & Coke Co. [W. Va.] 53 S. E. 776.

85. Account between merchant and planter for the furnishing by the merchant of supplies, the planter to turn over his crop as matured to be sold. Godley v. Hopkins, 126 Ga. 178, 54 S. E. 974.

86. Not as against reversioners or remaindermen during the life of the life tenant. Schroeder v. Bozarth, 224 Ill. 310, 79 N. E. 583; McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902. Do not run against heirs for the recovery of a homestead during the occupancy of the widow. Griffin v. Dunn [Ark.] 96 S. W. 190. Limitations do not run against a purchaser at an execution sale of a remainder, subject to a preceding life estate, until the death of the life tenant. Davis v. Dyer, 29 Ky. L. R. 430, 93 S. W. 629.

87. Where a widow abandons the homestead by an ineffectual attempt to alienate it, a cause of action at once accrues to the heirs. Griffin v. Dunn [Ark.] 96 S. W. 190. Where life tenants convey the fee, the grantee's right of entry accrued at the date of the deed. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287. A remainderman who has full knowledge of his rights as remainderman, or who ought to have had such knowledge, and who knows or ought to know that such rights depend upon an affirmative act on his part to be performed, cannot, by standing by and refusing or failing to perform that act, postpone the time at which the statute of limitations will commence to run against him. Hosler v. Haines, 7 Ohio C. C. (N. S.) 261.

88. Does not run against an action for specific performance of a contract to sell land against a purchaser in possession. Phillips v. Jones [Ark.] 95 S. W. 164. Where a tenant purchases at tax sale, the statute does not run in favor of his claim until he repudiates his tenancy and the landlord has notice. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

89. The giving of a mortgage by one cotenant where possession was not taken under it is not an ouster so as to start the statute of limitations as to other cotenants. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502. As a general rule limitations do not run as between tenants in common. Steele v. Steele, 220 Ill. 318, 77 N. E. 232.

90. Unless one is in possession adverse to the others of which fact they are charged with notice. Steele v. Steele, 220 Ill. 318, 77 N. E. 232.

91. Does not run against a claim of a husband against his wife during the existence of the marriage relation. Bennett v. Finnegan [N. J. Eq.] 65 A. 239.

92. The common-law rule of the unity of interest between husband and wife preventing the application of the statute of limitations to claims existing in favor of the wife against the husband during coverture, on grounds of public policy, has been abrogated in Ohio by statute. Liggett v. Estate of Liggett, 3 Ohio N. P. (N. S.) 518.

93. Where a purchaser at tax sale agreed to rent the premises for the owner and apply the rents on his claim, he was the owner's agent. Hall v. Semple [Tex. Civ. App.] 14 Tex. Ct. Rep. 536, 91 S. W. 248. As a general rule in cases where the agency is a general and continuing one, the statute runs as to the principal's right of action from the termination of the agency, or from an accounting, or from the time the principal has demanded an accounting and the agent has refused or neglected to render it. Knowles v. Rome Tribune Co. [Ga.] 56 S. E. 109.

94. See 6 C. L. 474. See, also, Corporations, 7 C. L. 862.

95. The statute commences to run as to unpaid subscriptions on corporate stock where the corporation is insolvent after the call and assessment has been made for the amounts necessary to pay creditors. McCarter v. Ketcham, 72 N. J. Law, 247, 62 A. 693. Limitations run against an action to recover

Mistake and fraud.[99]—A cause of action for mistake[1] or fraud[2] accrues at the time it was or should, by the exercise of ordinary diligence, have been discovered.[3] A party is charged with notice of facts contained in public records,[4] and with notice of facts which it is impossible to conceal,[5] and of fraud which an ordinarily prudent man would have discovered.[6]

§ 4. *Time tolled and computation of the period.*[7]—Besides the circumstances enumerated in the statute as postponing or interrupting it,[8] the commencement of an action tolls the statute[9] and continuance of the suit continues the tolling.[10] An

from a member of a mutual insurance company an assessment levied by a receiver from the date of the decree authorizing the assessment and not from the date of insolvency of the company. Schofield v. Turner, 213 Pa. 548, 62 A. 1068. Under the statutes of Ohio a cause of action for assessments against policy holders in a mutual insurance company does not accrue until such assessments are made absolute, and, where a company is adjudged insolvent, not until the assessments are decreed. Until this time the liability was contingent. Swing v. Brister, 87 Miss. 516, 40 So. 146.

96. As to a claim for unpaid stock subscriptions, the statute begins to run and a right of action accrues from the appointment of a receiver or other act of insolvency on the part of the corporation. John A. Roebling Sons Co. v. Shawnee Valley Coal & Iron Co., 4 Ohio N. P. (N. S.) 113.

97. A right of action in a creditor to enforce the unpaid subscription of the holders of corporate stock accrues as soon as the corporation disposes of its property and ceases to be a going concern. Chilberg v. Siebenbaum, 41 Wash. 663, 84 P. 598.

98. Under Kan. Gen. St. 1868, c. 23, § 40, amended by Laws 1883, p. 88, § 46, a cause of action accrues in favor of a creditor of a corporation as against a stockholder one year after the corporation has suspended business. Ramsden v. Gately, 142 F. 912.

99. See 6 C. L. 474.

1. A cause of action to have a mistake in a deed corrected accrues when the mistake should or ought to have been discovered. Wright v. Isaacks [Tex. Civ. App.] 15 Tex. Ct. Rep. 991, 95 S. W. 55. Under Revisal 1905, § 395, providing a limitation of three years from the discovery of mistake, a cause of action for shortage of land sold by the acre does not necessarily accrue at the time the deed is executed. Peacock v. Barnes, 142 N. C. 215, 55 S. E. 99. Under the rule that a cause of action for mistake does not accrue until discovery thereof, it is deemed to accrue when the mistake should by the exercise of ordinary diligence have been discovered. Id. Whether it should have been discovered before it was held a question for the jury. Id.

2. Bal. Ann. Codes & St. § 4800, prescribing a 3-year period after discovery of fraud for actions for relief on the ground of fraud, does not apply to an action by a purchaser at execution sale to set aside an alleged fraudulent certificate of redemption, though after discovery of fraud the suit was delayed by negotiations to settle and sickness of plaintiff. Carroll v. Hill Tract Imp. Co. [Wash.] 87 P. 835. Not as against an action founded on fraud until the fraud should or ought to have been discovered. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866; Western Cottage Piano & Organ Co. v. Griffin [Tex. Civ. App.] 14 Tex. Ct. Rep. 332, 90 S. W. 884.

3. A replication to a plea of limitations that the fraud was not discovered until within the statutory period must allege that it was not and could not have been discovered by the exercise of ordinary diligence. Price v. Mutual Reserve Life Ins. Co., 102 Md. 683, 62 A. 1040. Petition setting up a cause of action based on fraud held not to show that the cause was barred. McGregor v. Witham, 126 Ga. 702, 56 S. E. 55. Petition in an action of fraud in the sale of land held sufficient to admit evidence on the purchaser's part that he was not negligent in failing to discover the fraud before he did. Waller v. Gray [Tex. Civ. App.] 16 Tex. Ct. Rep. 194, 94 S. W. 1098.

4. Where an agent acting for a seller left the grantee's name blank and later filled in his own and sold the property at an advance, an action by the owner for the proceeds accrued when the deed was recorded. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. One is charged with notice of fraud in a deed from the date of the recording of the instrument. Id.

5. Where concealment of what is done is impossible, the statute is not suspended. Thornton v. Natchez [Miss.] 41 So. 498.

6. Facts held sufficient to put one on inquiry so as to take the case out of Comp. Laws, § 9739, providing for an extension of the period on a concealed cause of action. First Nat. Bank v. Steel [Mich.] 13 Det. Leg. N. 762, 109 N. W. 423. To suspend the statute as to a judgment for taxes it must appear that there was fraud in obtaining the judgment and it must have been concealed so that it could not have been ascertained by the exercise of reasonable diligence. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347. Evidence held to show that one defrauded in the sale of corporate stock should have discovered the fraud in time where he lived close to the plant of the corporation and knew a receiver had been appointed for the corporation. Coffin v. Barber, 101 N. Y. S. 147. As to the statute in favor of one occupying a confidential relation toward another. See Rucker v. Maddox, 114 Ga. 899, 41 S. E. 68; Brock v. Wildey, 125 Ga. 82, 54 S. E. 195.

7. See 6 C. L. 475.

8. See post, § 6.

9. Where a second assignee sues to revive a judgment and the first assignee intervenes, claiming ownership, and praying also for revival, but does not cite the defendant to appear, the suit will toll the stat-

alias writ to continue the action must issue within six years of the issue of the first.[11] It is immaterial in what jurisdiction the action is commenced if it is instituted when the creditor has a right to sue,[12] but it only tolls the statute as to parties affected by the judgment.[13] The statute is tolled during pendency of an action in which the demand is set up as a counterclaim, though such action is subsequently discontinued.[14] The statute is tolled by a valid extension agreement.[15] Where a cause of action has accrued as to an ancestor, his death does not toll the statute as to his minor heir[16] or administrator.[17] The statute is tolled where one subject to an action conceals himself.[18] It is not tolled by a proceeding which does not prevent the commencement of an action.[19]

The period commences on the date the cause of action accrues,[20] and expires with the last hour of the last day of the last year,[21] and where the last day of the period falls on Sunday, it is not extended, though it is provided by law that if a proceeding is directed by law to take place on a certain day and such day fall on Sunday, it shall take place the day following.[22]

§ 5. *What is commencement of action. A. In general.*[23]—An action is com-

ute as to both. Geisenberger v. Cotton, 116 La. 651, 40 So. 929. Under Code Civ. Proc. § 544, relative to attachment, the serving of a garnishee summons does not toll the statute as to the debtor, as such statute applies only where the indebtedness is admitted. Clyne v. Easton, Eldridge & Co., 148 Cal. 287, 83 P. 36.

10. Where a summons was issued within the period and returned "not found" and within the period after such return an alias summons was issued and returned "not found" and within the period a pluries summons was issued and returned found. Bovaird & Seyfang Mfg. Co. v. Ferguson [Pa.] 64 A. 513.

11. O'Neill's Estate, 29 Pa. Super. Ct. 415.

12. Where the suit is brought at the domicile of the creditor and kept alive, the defendant may not complain that for ten years before issue of the pluries summons he lived in another county to the knowledge of the creditor. Bovaird & Seyfang Mfg. Co. v. Ferguson [Pa.] 64 A. 513.

13. An action by a tenant of abutting property against an elevated railway for injuries to easements does not toll the statute as to a right of action by the owner. Interests of one not affected by the conduct of the other. Goldstrom v. Interborough Rapid Transit Co., 100 N. Y. S. 911. Where a purchaser was not made a party in a suit to foreclose against the mortgagors, he could not assert the statute. Livingston v. New England Mortg. Sec. Co., 77 Ark. 379, 91 S. W. 752.

14. United States v. Gillies, 144 F. 991.

15. Agreement by a community survivor extending the time of payment on contracts made by her deceased husband. Dashiell v. Moody & Co. [Tex. Civ. App.] 97 S. W. 843. An endorsement on a note showing payment and extension of time tolls the statute. Carter v. Johnson [Tex. Civ. App.] 90 S. W. 701.

16. Action to recover land sold or the purchase price thereof. Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 638.

17. Where an action had accrued to one prior to his death, the statute was not suspended until his administrator commenced action. Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 638.

18. Under Ind. T. Ann. St. 1899, § 2969, providing that where a person by leaving the jurisdiction or concealing himself prevents the commencement of an action against him the statute does not run, a complaint in replevin which does not show the nonexistence of grounds tolling the statute, but alleges that the property was removed from the jurisdiction, shows facts tolling the statute. Gatlin v. Vaut [Ind. T.] 91 S. W. 38. Where a thief removes the stolen goods from the jurisdiction and does not start limitations against an action to recover them by returning them so the owner knows of their whereabouts, a buyer from the thief cannot tack his possession to that of the thief. Id.

19. Injunction in the settlement of a partnership held not to prevent the bringing of an action by a partner, hence the statute was not tolled. Gibbons v. Bush Co., 101 N. Y. S. 721. In Oklahoma a judgment against a city of the first class is barred unless execution is sued not within five years, and this rule is not affected by an agreement by the city to pay judgments in the order of their priority. Beadles v. Smyser [Okl.] 87 P. 292.

20. Under Ky. St. 1903, § 2516, limiting the period within which actions for personal injuries must be brought, the day of the injury is counted. Geneva Cooperage Co. v. Brown [Ky.] 98 S. W. 279. An action on a draft drawn Sept. 17, 1896, payable 90 days after date, does not accrue until December 17, 1896, as the drawer had the whole of December 16 to pay. Jocque v. McRae, 142 Mich. 370, 12 Det. Leg. N. 779, 105 N. W. 874. Where the defense of the statute is set up in trespass to try title, time should be computed from the date of the deeds under which possession was taken to the commencement of the action. Wade v. Goza [Ark.] 96 S. W. 388.

21. Breaux v. Broussard, 116 La. 215, 40 So. 639.

22. Geneva Cooperage Co. v. Brown [Ky.] 98 S. W. 279.

menced by suing out summons and delivering it to an officer for service,[24] but not by the mere issuance of summons.[25] Suit is not commenced in justice court until citation is issued.[26] A criminal prosecution is deemed commenced by the return of the indictment.[27] An assertion of a claim in one of two consolidated actions tolls the statute,[28] and where an action is commenced, the fact that it is stayed does not affect the rights of the plaintiff.[29] The commencement of action against a concern alleged to be a corporation but which is in fact a partnership does not toll the statute as to individual members of the firm.[30]

(§ 5) *B. Amendment of pleading.*[31]—An amendment founded on the same wrong and pleading the same substantial facts as the original complaint, but in different form,[32] or which alters the statement of a defectively stated cause of action,[33] or which merely amplifies the original complaint,[34] or sets up an additional ground

23. See 6 C. L. 475.

Note: In some states it is held that the bringing of an action in a court which has no jurisdiction does not toll the statute, Gray v. Hodge, 50 Ga. 262; Sweet v. Electric Light Co., 97 Tenn. 252; Donnell v. Getchell, 38 Me. 217; while the contrary doctrine is held elsewhere, Smith v. McNeal, 109 U. S. 426, 27 Law. Ed. 986; L. R. M. R. & T. R. Co. v. Mannes, 49 Ark. 248, 4 S. W. 778, 4 Am. St. Rep. 45; Ball v. Biggam, 6 Kan. App. 42, 49 P. 678; Blume v. New Orleans, 104 La. Ann. 345, 29 So. 106; Woods v. Houghton, 67 Mass. 580.—See Fay v. Costa [Cal. App.] 83 P. 275.

24. Dedenbach v. Detroit [Mich.] 13 Det. Leg. N. 922, 110 N. W. 60. In Michigan failure to take out a second summons for more than two months after the return day of the first interrupts the continuity of the action. Colling v. McGregor, 144 Mich. 651, 13 Det. Leg. N. 310, 108 N. W. 87.

25. An action is not commenced by the mere issuance of summons. Consists in suing out summons and delivering it to an officer with the bona fide intention of having it served. Dedenbach v. Detroit [Mich.] 13 Det. Leg. N. 922, 110 N. W. 60.

26. Hooks v. Gulf, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 995, 97 S. W. 516.

27. State v. Smith, 72 Kan. 244, 83 P. 882.

28. Beddow v. Wilson, 28 Ky. L. R. 661, 90 S. W. 228.

29. Grant v. Humbert, 114 App. Div. 462, 100 N. Y. S. 44.

30. Geneva Cooperage Co. v. Brown [Ky.] 98 S. W. 279.

31. See 6 C. L. 476.

32. Amendment setting forth the correct name of one killed by the alleged negligence of another held not to state a new cause of action. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. An amendment which is merely a different statement of the same cause of action relates back. Curry v. Southern R. Co. [Ala.] 42 So. 447. An amendment in an action by a passenger for injuries, changing "defendant" to "defendant's servant or agent acting within the line of his authority as such," relates back. Hess' v. Birmingham R. L. & P. Co. [Ala.] 42 So. 595. Amendment held not to set up a different cause of action. Nashville, etc., R. Co. v. Hill [Ala.] 40 So. 612. Amendment alleging that defendant negligently permitted the railroad track to become out of repair, rough, and uneven, does not state a different cause of action from the original complaint which alleged negligence in the construction of the track so that there was a sharp depression therein. Gordon v. Chicago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177. Where an accident happened in 1896 and action began in 1897, and in 1902 an additional count was filed which did not change the cause of action but merely alleged another way in which negligence already charged in 1897 caused the death, a demurrer to a plea of the statute of limitations will be upheld. South Chicago City R. Co. v. Kinnare, 117 Ill. App. 1. Amendment in mechanic's lien proceeding against the same premises, on the same contract, and between the same owner and contractor, and naming the same parties defendant, does not state a new cause of action. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56. An amended bill in an action to enforce a mechanic's lien setting forth the same cause of action, involving the same property, building, work, price, parties, and date and amount of the architect's certificate, is allowable. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22. Where on a praecipe in trespass the prothonotary issued a summons in assumpsit, it is not an amendment changing the cause of action for the court to amend its record to show an action in trespass. Wilkinson v. Northeast Borough [Pa.] 64 A. 754. A complaint in an action for negligence may be amended to allege the giving of statutory notice required by the employer's liability act and other matters essential to bring the case within the act. Miller v. Erie R. Co., 109 App. Div. 612, 96 N. Y. S. 244. A count added after the statute has run is not barred if it is based on the same transaction as those originally brought. Beasley v. Baltimore & P. R. Co., 27 App. D. C. 595.

33. Additional counts based on the same grounds of negligence are permissible though the original pleadings stated the cause of action defectively. North Chicago St. R. Co. v. Aufmann, 221 Ill. 614, 77 N. E. 1120. An amendment supplying a defect in a cause of action defectively stated is permissible. Salmon v. Libby, 219 Ill. 421, 76 N. E. 573. Original declaration held to state cause of action so that demurrer to pleas of limitations to amended declaration were properly overruled. Salmon v. Libby, 114 Ill. App. 258.

34. An amendment which merely amplifies the original allegations, or states new grounds or specifications germane to such allegations, is allowable. Gordon v. Chi-

of recovery,[35] relates back to the date of filing the original complaint; but an amendment stating a cause of action requiring different evidence and the application of a different measure of damages,[36] or one changing a cause of action in trespass to one in case,[37] or one purporting to correct a void process,[38] or which otherwise sets up a new or different cause of action,[39] does not relate back, and if the bar of the statute has become complete in the interim, no relief can be had on the amendment.[40]

(§ 5) *C. Nonsuit and dismissal.*[41]—In many states it is provided by law that if an action fail otherwise than on the merits,[42] or is reversed on appeal,[43] a new action may be commenced within a prescribed period. Such statutes are literally construed.[44] Where the first action is prosecuted in a state court, a new action may be maintained in the Federal court.[45]

cago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177.

35. In an action for injuries sustained while attempting to board a train, an amendment setting up an additional ground of negligence does not set up a new cause of action. Johnson v. Texas Cent. R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 807, 93 S. W. 433.

36. Kramer v. Gille, 140 F. 682.

37. Hess v. Birmingham R. L. & P. Co. [Ala.] 42 So. 595.

38. Where in an action for money only the praecipe omitted to direct the clerk to indorse upon the summons the amount for which judgment would be taken if defendant failed to appear, and the summons issued bore no such indorsement, an amendment made by leave of court allowing such indorsement and the issuance of an alias summons, the defendant having made no appearance, does not relate back. Elmen v. Chicago, etc., R. Co. [Neb.] 105 N. W. 987.

39. Cause of action cannot first be stated by way of amendment after the running of limitations. Salmon v. Libby, 114 Ill. App. 258. Original bill in action to redeem from sale under a trust deed held insufficient to raise objections specifically stated by an amended bill. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. In an action to redeem from sale under a trust deed, an amendment alleging that the sale was conducted by an unauthorized person states a new cause of action. Id. An amendment alleging a defective sidewalk to be on one street where the original complaint alleged it to be on another states a different cause of action. Gilmore v. Chicago, 224 Ill. 490, 79 N. E. 596. Plea of limitations to an amendment to a complaint which did not state a cause of action held not vulnerable to demurrer. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603. Where in an action against two defendants no cause of action was stated as to one, an amendment may not be allowed stating a cause of action against him. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673.

40. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

41. See 6 C. L. 477.

42. A voluntary dismissal without prejudice to a future action is a failure otherwise than upon the merits within the meaning of Kan. Civ. Code, § 23, providing that, if an action is commenced in time and plaintiff fails in it otherwise than upon the merits, a new action may be commenced within one year after the failure. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385. Where plaintiff took an order discontinuing the action on objection being taken to the jurisdiction of the court, it did not appear that the discontinuance was not voluntary, which is not within Code Civ. Proc. § 405. Bannister v. Michigan Mut. Life Ins. Co., 111 App. Div. 765, 97 N. Y. S. 843. A judgment of affirmance of a judgment of dismissal is not on the merits and a new action may be commenced within one year under Code Civ. Proc. § 547. Glass v. Basin & Bay State Min. Co. [Mont.] 85 P. 746. Code 1899, ch. 104, § 19, applies to a dismissal of a bill in equity setting up an account against the estate of a decedent. Hevener v. Hannah, 59 W. Va. 476, 53 S. E. 635. Code 1899, c. 104, § 19, applies in equity as well as at law. Id. Hurd's Rev. St. 1905, c. 83, providing that if a plaintiff be nonsuited, and the time for bringing the action has expired, he may bring a new action within one year, does not apply to a voluntary nonsuit. Koch v. Sheppard, 223 Ill. 172, 79 N. E. 52. Where the court ruled that no evidence had been introduced on which a verdict could be found and plaintiff asked for an involuntary nonsuit, the nonsuit granted is a voluntary one. Id. Under Kirby's Dig. §, 5083, where plaintiff in foreclosure suffered a nonsuit, the issuance and service of summons anew is the commencement of a new action. Livingston v. New England Mortg. Sec. Co., 77 Ark. 379, 91 S. W. 752. Where on dismissal a writ of error is sued out, the statutory period of six months within which a suit which has been dismissed may be renewed so as to prevent the cause from being barred does not run while such writ is pending. Seaboard Air Line R. Co. v. Randolph, 126 Ga. 238, 55 S. E. 47.

43. Where a cause is reversed and a new trial ordered, the plaintiff may commence a new action under Code Civ. Proc. § 405. Bellinger v. German Ins. Co., 51 Misc. 463, 113 App. Div. 917, 100 N. Y. S. 424. This rule is not abrogated by Code Civ. Proc. § 414. Under Hurd's Rev. St. 1903, c. 83, .25, providing for a new action if judgment for plaintiff is reversed, or if he be nonsuited, etc., and § 88 (ch. 110), providing that a finding of facts by the appellate court different from that of the court appealed from is conclusive, where the appellate court found facts different from the finding of the trial court, such finding was res judicata and § 25 does not apply. Larkins v. Terminal R. Ass'n, 221 Ill. 428, 77 N. E. 678.

44. A statute providing for a new action

§ 6. *Postponement, interruption, and revival. A. General rules.*[46]—Subject to the rule that time does not run against the sovereignty the statutes apply generally and in all cases where exception is not specifically made,[47] and after they have once commenced, run over all subsequent disabilities, acts, and events,[48] unless otherwise expressly provided.[49] The rule that limitations do not run against the

in case of reversal on "appeal" does not apply where decree is annulled on a "writ of review." Fay v. Costa, 2 Cal. App. 241, 83 P. 275.

45. The effect of the Kansas statute is to make an exception on the general statute of limitations which is justiciable in the Federal as well as in the state courts. Harrison v. Remington Paper Co. [C. C. A.] 140 F. 385.

46. See 6 C. L. 477.

47. See ante, § 1. The holders of excess water rights in possession under their contracts are not trespassers so as to suspend an action to cancel such rights until the rights of such excess holders are adjudicated. Patterson v. Ft. Lyon Canal Co. [Colo.] 84 P. 807.

48. **An injunction against the commencement of an action** does not toll the statute, unless so provided by statute. No such statutes in Ohio or Florida. Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 76 N. E. 563. When proceedings to sell real estate of a decedent to pay debts were commenced in good faith, proceeds fully accounted for, and the land involved was that intended to be sold, the fact that the land sought to be sold was misdescribed did not suspend the statute as to the right of an heir to compel the estate of the administratrix to account for the proceeds. Cunningham v. Cunningham's Estate, 220 Ill. 45, 77 N. E. 95. Under the rule that a creditor of a corporation may ascertain its stockholders by an inspection of its books, **mere ignorance** as to the names of stockholders does not toll the statute as to a right of action to recover unpaid subscriptions. Chilberg v. Siebenbaum, 41 Wash. 663, 84 P. 598. The statutes of Missouri operate except in the case of specific exceptions, and all actions are barred in twenty-four years whether disabilities have been removed or not. De Hatre v. Edmunds [Mo.] 98 S. W. 744. When a cause of action for the recovery of land accrued on the breach of one condition, the grantor could not postpone the operation of the statute until the breach of another. Tower v. Compton Hill Imp. Co., 192 Mo. 379, 91 S. W. 104. Under Rev. St. 1899, § 4262, prescribing a ten-year period for the recovery of land, where a grantor on breach of condition in a deed was entitled to recover, he was not entitled to set up an injunction brought by the grantee to prevent him from platting property contrary to his agreement for postponing the operation of the statute. Id. Under a statute that a judgment ceases to be a lien after six years and cannot be extended by direct action, such lien **cannot be continued by an ancillary action** brought to remove fraudulent conveyances. Meikle v. Cloquet [Wash.] 87 P. 841. The running of the statute prescribed by Pub. Acts 1899, p. 235, No. 155, limiting the time within which actions for personal injuries must be brought, is **not suspended by the death of the injured person** until an administrator is appointed. Comp. Laws, § 9737, providing that if a party entitled to bring action die and the cause survive, it may be commenced within two years. The act of 1899 not making an exception in favor of such actions. Colling v. McGregor, 144 Mich. 651, 13 Det. Leg. N. 310, 108 N. W. 87.

An **appeal from an order of the county court** in an accounting between guardian and ward does not stay institution of an action on his bond, and such time is not deducted from the period within which an action on the guardian's bond must be brought. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2. Prescription running in favor of certain seizing creditors was not interrupted by a rule obtained by a third opponent or by an agreement made under the rule. Succession of Marchand, 116 La. 207, 40 So. 637.

49. Under the rule that where a cause of action is interposed as a defense, and such action is dismissed, the period of the pendency of such action is not computed in determining limitations as to the cause set up in defense where suit to quiet title was brought by the owner of tax deeds and it was set up that the tax deeds were void, and such suit was dismissed, the time of its pendency would not be reckoned in computing the period as against an action to set aside the tax deed. Preston v. Thayer, 127 Wis. 123, 106 N. W. 672. Where one brings suit which is obstructed by the pendency of another, the time of the pendency is not to be counted as it is an obstruction under Code 1899, c. 104, § 18. Hevener v. Hannah, 59 W. Va. 476, 53 S. E. 635. Statutes construed and held that if a person was under disability when a cause accrued he was entitled to three years after the removal of the disability, and if the three years did not complete the full statutory period, he was entitled to such full period. De Hatre v. Edmunds [Mo.] 98 S. W. 744. Under Ind. T. Ann. St. 1899, § 2969, providing that, if a person subject to an action by improper act prevents it, limitations do not run, **where stolen property was removed from the jurisdiction,** the statute did not ran until it was returned and the owner learned of its whereabouts. Gatlin v. Vaut [Ind. T.] 91 S. W. 38. Under Comp. Laws, § 9737, providing that **where one liable to an action dies** an action may be commenced within two years after letters of administration are granted, a ward may bring suit for an accounting against the administrator of her guardian though he was not appointed for over twenty years after the guardian's death. Murphy v. Cady [Mich.] 13 Det. Leg. N. 412, 108 N. W. 493.

"Under [any] legal disability to sue" means personal disability as distinguished from a mere obstacle to the maintenance of an action and does not apply to inability to sue during the period of accounting and settlement of a guardian's account. Wescott v. Upham, 127 Wis. 590, 107 N. W. 2.

A fraudulent concealment to be sufficient must be founded upon some affirmative acts or proof of some act of negligence so gross

right to abate a public nuisance applies only where the proceeding is brought by the state.[50] The operation of the statute may be suspended by the pendency of legal proceedings which delays enforcement of the right.[51] Disabilities cannot be tacked.[52] In Kentucky it would seem that disabilities may be tacked if the period be not thereby extended beyond the thirty year statute which bars all actions.[53] Disability of an heir at the time of descent cast does not suspend the operation of the statute which had commenced to run against the ancestor.[54] Ignorance of title does not suspend the operation of the statute as to one in adverse possession in the absence of fraud, concealment or misrepresentation, or fiduciary relations.[55] One asserting suspension of the operation of the statute has the burden of proving it.[56] A statute imposing a condition or limitation on the right to maintain an action is not a statute of limitation.[57]

(§ 6) *B. Trusts.*[58]—The statute does not run in favor of the trustee of an express, active, or continuing trust until repudiation thereof by the trustee and notice brought home to the beneficiary,[59] but does run thereafter.[60] The statute runs

as to be equivalent to intentional fraud. Cunningham v. Dougherty, 121 Ill. App. 395.

Note: Independent of a statute suspending the operation of the statute of limitations during absence of the defendant, the plaintiff's inability to prosecute a suit during the period of the defendant's absence by necessity stopped the running of the statute at common law. 19 Am. & Eng. Ency. of Law, p. 215. In United States v. Wiley, 78 U. S. 508, 20 L. Ed. 211, there being no statute to fit the case, the court held that during the continuance of the Rebellion its effect was to toll the statutes in regard to claims against citizens residing in the rebellious states. Judge Strong writing the opinion (at page 513 of 78 U. S. [20 Law. Ed. 211]) said: "It is the loss of the ability to sue rather than loss of the right that stops the running of the statute." The same judge in Braum v. Sauerwein, 77 U. S., loc. cit. 223, 19 Law. Ed. 895, after reviewing many authorities said: "It seems, therefore, to be established that the running of the statute of limitations may be suspended by causes not mentioned in the statute itself." In Amy v. Watertown, 130 U. S. 323, 32 Law. Ed. 953, this language of Judge Strong is pronounced "undoubtedly correct."—See Cobb v. Houston [Mo. App.] 94 S. W. 299.

50. Not where the name of the state is used for the benefit of a private relator. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

51. Where proceedings causing delay in settlement and enforcement of a cause were brought about by acts of the defendants, a cause was held not to be barred. Sipe v. Taylor [Va.] 55 S. E. 542. Only those who are actors in procuring the injunction can, on that account, be estopped from pleading the statute. Hunter v. Niagara Fire Ins. Co., 73 Ohio St. 110, 76 N. E. 563.

52. Messinger v. Foster, 101 N. Y. S. 387. Where one entitled to maintain an action was insane at the time of her death, the disability of her divisee who was under coverture could not be tacked to that of her ancestor. De Hatre v. Edmunds [Mo.] 98 S. W. 744. Where a cause of action accrued to a married woman and she died while it existed, her minor heirs could not set up their infancy as an excuse for not bringing action. Lamberida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698. Under the rule that if one entitled to maintain an action dies his heirs may maintain an action after the period limited and within three years from his death, where an infant dies his infant heirs are not entitled to the benefit of the statute. Robinson v. Allison, 192 Mo. 366, 91 S. W. 115.

53. Disability of infancy and coverture tacked. Smith v. Cornett [Ky.] 98 S. W. 297.

54. De Hatre v. Edmunds [Mo.] 98 S. W. 744. See, also, ante, § 3. Where the statute has commenced to run against an ancestor before descent cast, they continue as against his heir under disability. Shaffer v. Detie, 191 Mo. 377, 90 S. W. 131. Where one dies after a cause of action accrues, the statute is not tolled as to his infant heirs. Messinger v. Foster, 101 N. Y. S. 387.

55. Steele v. Steele, 220 Ill. 318, 77 N. E. 232. The fact that the owner of land did not know he had title does not toll the statute as to one in adverse possession. Waterman Hall v. Waterman, 220 Ill. 569, 77 N. E. 142.

56. Breaux v. Broussard, 116 La. 215, 40 So. 639.

57. Rev. St. 1898, § 4222, providing that no action for personal injuries shall be maintained unless notice be given to the person charged within one year from the injury, is not a statute of limitations within the rule that a period of disability shall not be a part of the time limited. Hoffmann v. Milwaukee Elec. R. & Light Co., 127 Wis. 76, 106 N. W. 808.

58. See 6 C. L. 477.

59. Not in favor of the trustee of an express trust until termination or repudiation thereof. Andrews v. Tuttle-Smith Co., 191 Mass. 461, 78 N. E. 99; Putnam v. Lincoln Safe-Deposit Co., 49 Misc. 578, 100 N. Y. S. 101; Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508. Where one located a certificate for certain lands under an agreement for a patent in the name of another who was to hold title to a portion of the land for the locater's benefit, an express trust was created. Morris v. Unknown Heirs

against implied or constructive trusts,[61] and as between a trustee and a stranger it runs as in other cases, and if the trustee is barred the beneficiary is also barred.[62]

(§ 6) *C. Insanity and death.*[63]—The statute does not run against an insane person during the continuance of the disability,[64] but it is extended no longer than expressly provided.[65] Death of the debtor does not suspend the statute,[66] but in such event it is generally provided that the period shall be extended.[67]

(§ 6) *D. Infancy and coverture.*[68]—Statutes of limitation run against minors in the absence of exemption in their favor,[69] but it is generally provided that, if

of Hamilton [Tex. Civ. App.] 16 Tex. Ct. Rep. 327, 95 S. W. 66. Not against the **right of a piedgor of corporate stock to recover it from the piedgee** until he has notice of the repudiation of the trust and conversion of the stock. Davis v. Hardwick [Tex. Civ. App.] 15 Tex. Ct. Rep. 947, 94 S. W. 359.

Where one purchases land with his wife's money and takes title in his own name, the statute does not commence to run until repudiation of the trust. Smith v. Smith [Iowa] 109 N. W. 194. Suit for breach of a trust where co-owners of a mine procured the issuance of patent without mention of another co-owner. Mills' Ann. St. § 2912, does not apply. Ballard v. Golob, 34 Colo. 417, 83 P. 376. Mills' Ann. St. § 2911, requiring bills for relief on the ground of fraud to be brought within three years after discovery of the fraud, does not apply to a suit involving an express trust. Id. Where a trustee brought suit against the beneficiary for the purpose of selling the estate and reinvesting the proceeds, a sale under such decree started limitations as against the beneficiaries from the date possession was taken by the purchaser. Watkins v. Pfeiffer, 116 Ky. 593, 92 S. W. 562.

An executor who has duly qualified and received assets for which he has not accounted is an active trustee, and the statute does not run in his favor until he has repudiated his trust. In re Ashheim's Estate, 185 N. Y. 609, 78 N. E. 1099. Where one admits by demurrer that he received rents and profits as trustee, his assertion that the claim therefor is barred is disposed of. Beckman v. Waters [Cal. App.] 86 P. 997.

Where one **takes title to land, part of the purchase price of which is paid by another,** and recognizes his rights, the statute does not run against the person paying the portion of the purchase price. Miller v. Saxton [S. C.] 55 S. E. 310.

Where a **husband received the proceeds of a sale of his wife's property** under an agreement to hold it in trust for her, limitations did not run against the wife. Bohannon v. Bohannon's Adm'x, 29 Ky. L. R. 143, 92 S. W. 597.

Not a trust: Where land deeded to a city for cemetery purposes only was abandoned for such purposes, the city is not a trustee for the purpose of limitations as to an action to recover the land. Thornton v. Natchez [Miss.] 41 So. 498. The relation of the executor or administrator to the estate does not create a continuing and subsisting trust under § 4974, Rev. St. Liggett v. Estate of Liggett, 3 Ohio N. P. (N. S.) 518. The appointment of an executor or administrator under the laws of Ohio does not suspend the operation of the statute of limitations. Id.

60. This is so whether the trust be created by power of attorney, appointment as administrator, executor, or guardian. Jolly v. Miller [Ky.] 98 S. W. 326. Where an heir conveys to an administrator all his interest in the estate, the trust relation between them terminates and the statute commences to run though there has been no final accounting. Id.

61. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. But as to a trustee ex maleficio, it runs from the time the wrong was committed. Putnam v. Lincoln Safe-Deposit Co., 49 Misc. 578, 100 N. Y. S. 101.

62. Waterman Hall v. Waterman, 220 Ill. 569, 77 N. E. 142. Where the right of a trustee is barred, all equitable estates dependent on the legal estate are barred though the beneficiary is an infant. Watkins v. Pfeiffer, 116 Ky. 593, 92 S. W. 562.

63. See 6 C. L. 478.

64. Not as against an incompetent as to an action accruing while he was incompetent during the period of his disability. Fowler v. Prichard [Ala.] 41 So. 667. Ball. Ann. Codes & St. § 5156, expressly provides that proceedings to set aside a judgment against a person of unsound mind are not barred until one year after the disability is removed. Curry v. Wilson [Wash.] 87 P. 1065.

65. Under Code Civ. Proc. § 396, insanity or imprisonment does not extend the period for more than five years. Messinger v. Foster, 101 N. Y. S. 387. Rev. Laws 1905, § 4084, expressly provide that insanity shall not suspend the period for more than one year after the disability ceases. Langer v. Newmann [Minn.] 110 N. W. 68.

66. As against an action to recover money, it is not tolled by the death of the borrower. Widner v. Wilcox [Iowa] 108 N. W. 238. As to an action to foreclose a mortgage, the statute is not tolled by the death of the mortgagor unknown to the mortgagee. Fuhrman v. Power [Wash.] 86 P. 940. A right to foreclose a mortgage against the grantee of a mortgagor accrues when the debt falls due, and the statute is not tolled by the death of the mortgagor. Code Civ. Proc. § 353, applies only as to an action against the mortgagor. California Title Ins. & Trust Co. v. Miller [Cal. App.] 84 P. 453.

67. Code Pub. Gen. Laws, art. 57, § 7, expressly provides that when a person dies and his interest in real estate is subject to his debts, because his personal estate is insufficient, limitation is suspended as to heirs and devisees for eighteen months from the date of death. Eirley v. Eirley, 102 Md. 452, 62 A. 962.

68. See 6 C. L. 478.

69. Hoffmann v. Milwaukee Elec. R. & Light Co., 127 Wis. 76, 106 N. W. 808.

infancy exists when the cause of action accrues, the time for commencing the action is extended for a period after majority is attained.[70] But if the statute has already commenced to run against the ancestor, it is not interrupted by his death and the supervening disability of his infant heirs.[71] It is generally provided that the statutes shall not run against married women during coverture.[72] This rule applies though she is living apart from her husband.[73]

(§ 6) *E. Absence and nonresidence.*[74]—It is generally provided that the statute shall not run during the absence[75] or nonresidence from the state of the defendant.[76] This was the rule at common law.[77] It does not apply to nonresidence of the plaintiff,[78] and is only effective as to statutes of limitation.[79]

(§ 6) *F. A new promise to pay or acknowledgment of the obligation,*[80] which

70. Scallon v. Manhattan R. Co., 185 N. Y. 359, 78 N. E. 284. Not against minors. Scovell v. St. Louis S. W. R. Co., 117 La. 459, 41 So. 723. Under Rev. St. 1899, § 4265, providing that when one is under disability when a cause of action accrues, the period of disability shall not be counted but that an action may be brought after the time so limited and within three years after removal of the disability, but no action shall be commenced after 24 years, the period of disability though greater than the statutory period does not bar the action; if less than such period, an action may be brought within three years after removal. Robinson v. Allison, 192 Mo. 366, 91 S. W. 115. Under Ball. Ann. Codes & St. § 4809, where a cause of action for the recovery of land accrues to an infant, the period of his infancy is not a part of the time limited for the commencement of his action. May v. Sutherlin, 41 Wash. 609, 84 P. 585. Laws 1886, p. 801, c. 572, providing that no action for negligence shall be maintained against cities having a certain population unless commenced within one year, are subject to the exception of Code Civ. Proc. § 396, providing that, if one entitled to maintain an action for negligence be an infant when the cause accrues, the period of disability shall not be computed. McKnight v. New York [N. Y.] 78 N. E. 576.

71. Under the New York statutes where an ancestor had a cause of action for injuries to his premises by the construction of a railroad in front of them, the statute was not interrupted by his death and the infancy of his heirs. Scallon v. Manhattan R. Co., 185 N. Y. 359, 78 N. E. 284. Where an administrator of the community estate of a deceased husband and wife is barred from bringing action on the community bond of the husband for devastavit committed by him, the heirs of the wife are barred, notwithstanding their minority. Belt v. Cetti [Tex. Civ. App.] 14 Tex. Ct. Rep. 739, 91 S. W. 1098.

72. Not as against a married woman during coverture. Surghenor v. Taliaferro [Tex. Civ. App.] 17 Tex. Ct. Rep. 411, 98 S. W. 648. Not against a married woman during coverture where the cause accrues during coverture. Bucher v. Hohl [Mo.] 97 S. W. 922. The Married Woman's Act of Missouri is prospective and where a cause accrued to a married woman prior to its enactment she could not sue until the death of her husband though he died subsequent to such enactment. Graham v. Ketchum, 192 Mo. 15, 90 S. W. 350. A married woman who acquired a right to enter possession prior to Acts 1899, p. 209, c. 78, amending Code Civ. Proc. §§ 148, 163, removing her disabilities, is not within the act. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287. Where one was under the disability of coverture at the time a cause of action to recover land accrued, the statute did not commence to run until the disability was removed. McMurray v. Dixon, 105 Va. 605, 54 S. E. 481.

73. The mere fact that a married woman is living apart from her husband which would authorize her to sue for possession of her real estate does not compel her to do so and thus start the operation of the statute. Graham v. Ketchum, 192 Mo. 15, 90 S. W. 350.

74. See 6 C. L. 479.

75. A resident of a foreign state is not "absent from the state" within Code Civ. Proc. § 2653a. Such exception applies only to residents who are absent from the state. Bell v. Villard, 48 Misc. 587, 110 App. Div. 916, 97 N. Y. S. 244. Under Code Civ. Proc. § 401, providing that when a cause accrues against a person "absent from the state" it may be commenced within the time limited after his return, where there is evidence that defendant was absent when the cause accrued, he has the burden of showing the time of his residence within the state. Phillips v. Lindley, 112 App. Div. 283, 98 N. Y. S. 423.

76. Ball. Ann. Codes & St. § 4808, suspending the statute as to persons out of the state, applies to former residents who have removed, as well as to persons who have never resided here. Omaha Nat. Bank v. Lindsay, 41 Wash. 531, 84 P. 11. An allegation that at the time the cause of action accrued the defendant was and ever since has been a nonresident is sufficient to bring the case within the rule that the period of absence shall not be computed. Willis v. Rice [Ala.] 39 So. 991.

77. At common law the statute is suspended during nonresidence of the defendant. Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299.

78. Nonresidence of the plaintiff does not suspend the operation of the statute. Thornton v. Natchez [Miss.] 41 So. 498.

79. Gen. Laws 1865, p. 749, c. 191, § 31, providing that a judgment is presumed paid after 20 years, is not a statute of limitation so that absence of the debtor does not affect its operation. Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299.

is required in some states to be in writing,[81] will toll the statute or revive a barred cause. The acknowledgment must contain an unqualified and direct admission of a subsisting obligation for which there is liability and must be unaccompanied by any circumstances repelling the presumption of a promise or intention to pay.[82] There must be a clear and express promise to pay.[83] Loose declarations,[84] or a conditional acknowledgment and promise,[85] are insufficient.

(§ 6) *G. A partial payment*[86] tolls the statute and starts it running anew.[87] It must have been made within the statutory period[88] by authority from the debtor,[89] and on account of a debt[90] for which the action is brought,[91] and it must appear

80. See 6 C. L. 480. A judgment debt is is one ex contractu within a statute allowing causes of action ex contractu to be revived by a new promise to pay. Spilde v. Johnson [Iowa] 109 N. W. 1023.

81. Under Rev. St. 1895, art. 3370, the new promise must be in writing. An oral promise is not sufficient. Wells v. Moore [Tex. Civ. App.] 14 Tex. Ct. Rep. 1003, 93 S. W. 220.

82. Throop v. Russell [Mich.] 13 Det. Leg. N. 589, 108 N. W. 1013.

Held sufficient: A letter containing a proposition to deed land in consideration of the release of a void debt is a sufficient acknowledgment. Disney v. Healy [Kan.] 85 P. 287. Where one gives his property away in consideration of future support, the transaction is contrary to public policy and limitations as to an action to recover the property are tolled by each act acknowledging the obligation. Ackerman v. Larner, 116 La. 101, 40 So. 581. Letters written stating that the debtor desired to hold the money another year, and directing the plaintiff to send the note to the bank and have it fixed for a part payment, held a sufficient acknowledgment. Morris v. Carr, 77 Ark. 228, 91 S. W. 187. When a grantor acknowledges a barred debt secured by a mortgage and his grantee assumes it by a contract not set forth in the deed, he is liable for it. Disney v. Healy [Kan.] 85 P. 287. A sufficient acknowledgment is shown where executors appear before the county court and one of them admits that he is indebted to the other in a certain sum, which admission is entered in the court records. Hendrix's Adm'r v. Hendrix, 29 Ky. L. R. 1084, 96 S. W. 921. Evidence sufficient to show a pre-existing indebtedness where one executor acknowledged it and such admission was entered on the records of the county court. Id. An acknowledgment of an indebtedness is presumed to relate to the entire demand and the acknowledging party has the burden to show that it related to part of the demand only. Chicago Chronicle Co. v. Franklin, 119 Ill. App. 384.

Held insufficient: An action on an account cannot be taken out of the statute by evidence of a sealed instrument promising to pay interest on monthly balances. Moore v. Rush [Fla.] 42 So. 238. Letter from an assignee stating that he had not taken up the matter but assuring a square deal held not a sufficient acknowledgment to toll the statute. Sargent v. Perry, 101 Me. 527, 64 A. 888.

83, 84. McGrew's Ex'r v. O'Donnell, 28 Ky. L. R. 1366, 92 S. W. 301.

85. Where a debtor wrote stating that the fact that the notes were outlawed need not enter into the present question but that if the creditor would accept $1,000 he would endeavor to pay that amount, also stating that he "was not backing up or repudiating anything," is insufficient. Throop v. Russell [Mich.] 13 Det. Leg. N. 589, 108 N. W. 1013.

86. See 6 C. L. 481.

Held sufficient: Where one who had a running account delivered some bales of cotton thereon to be held for a rise in price, sold, and the proceeds credited, and after the account was closed a sale was made and the proceeds credited, and the debtor on learning of such fact stated that he was glad the cotton had brought so much but did not directly authorize crediting of the proceeds. Held to constitute a part payment. Nunn v. McKnight [Ark.] 96 S. W. 193. A payment made on a running account is presumed to be made to apply on the balance unpaid and is sufficient. Van Name v. Barber, 100 N. Y. S. 987. Where record of payments for services continuing over a period of twenty years was kept in a book, evidence held to show that they tolled the statute. Greenwood v. Judson, 109 App. Div. 398, 96 N. Y. S. 147. The delivery of potatoes on account is a proper item of credit to toll the statute. Green v. Dodge [Vt.] 64 A. 499. Indorsement on a note, "Received on within 26 sheep, $45.50," is sufficient. Brown v. Hayes [Mich.] 13 Det. Leg. N. 875, 109 N. W. 845.

Held insufficient: The indorsement upon a promissory note of the proceeds of a sale of collateral securities which were deposited with the note at the time it was given is not such part payment as will toll the statute. Atwood v. Lammers, 97 Minn. 214, 106 N. W. 310. Where there was a dispute between the maker and holder of a note as to the amount of credit the maker was entitled to and such amount was never adjusted, the holder could not indorse credits on the note so as to toll the statute. Reinhard v. Fluckiger, 119 Mo. App. 465, 94 S. W. 994.

87. Where interest was paid on a note for twenty-three years either by the debtor or with money supplied by him, the running of the statute was tolled where the note was all this time held by the payee. In re Clad's Estate, 214 Pa. 141, 63 A. 542.

88. In re Primmer's Estate, 49 Misc. 413, 99 N. Y. S. 830.

89. Where an officer of a corporation who was surety on its debt paid interest on its behalf, such payment held not to toll the statute as to him where the payee did not know he was such officer, or had notice that interest was being paid. Ulster County Sav. Institution v. Deyo, 101 N. Y. S. 263. Where

that the payment was made as part payment of a greater debt.[92] A mere gratuity is not a payment which will toll the statute.[93] A payment by one joint debtor does not toll the statute as to another[94] but does as to himself,[95] and a payment by one secondarily liable on a negotiable instrument does not toll the statute as to the maker.[96] A payment by one partner tolls the statute as to all.[97] In Utah a partial payment will not revive a barred debt.[98] Endorsement of payment of interest on a note must, to toll the statute, be made by one having an interest therein,[99] and since such an endorsement is competent only as a declaration against interest, it must appear that it was made before the statute had run.[1] The rule that a partial payment tolls the statute applies to contracts, express or implied,[2] but not to judgments.[3] One setting up partial payment has the burden to prove that it was made on the particular debt, under circumstances showing an acknowledgment of the debt.[4]

§ 7. *Operation and effect of bar. A. Bar of debt as affecting security.*[5]—There is a conflict of authority as to whether the bar of the principal obligation bars

one gave money to an agent to apply on a mortgage and such agent converted it but paid interest on the mortgage, such payment tolled the statute as to the mortgage and as to an action against the agent for conversion. In re Lowerre, 48 Misc. 317, 96 N. Y. S. 764. Under B. & C. Comp. §§ 24, 25, providing that the statute runs on a note from the last payment of principal or interest, a payment by the trustee in bankruptcy of one maker tolls the statute as to all. Sheak v. Wilbur [Or.] 86 P. 375. A holder of collateral security, placed in his hands coincident with the making of the note secured, is not such an agent of the debtor as has authority to make a part payment sufficient to toll the statute, of which payment the debtor is ignorant. Wanamaker v. Plank, 117 Ill. App. 327.

90. Ryan v. Canton Nat. Bank, 103 Md. 428, 63 A. 1062. That a payment on a note will toll the statute, it must affirmatively appear that the debtor intended to make the payment on the note. Wanamaker v. Plank, 117 Ill. App. 327. The balance due on an account stated is one debt, and a payment thereon tolls the statute as to all items. Nunn v. McKnight [Ark.] 96 S. W. 193.

91. Ryan v. Canton Nat. Bank, 103 Md. 428, 63 A. 1062. Payments by a debtor of a corporation to an officer of such corporation, not expressly stated at the time to be intended to apply on the debt, and not accounted for to the corporation by the officer, do not toll the statute. In re Watkinson, 143 F. 602.

92. Ryan v. Canton Nat. Bank, 103 Md. 428, 63 A. 1062.

93. Where one was paid a certain monthly stipend which was understood to be compensation, and after quitting the place his employer understood that he was not satisfied and paid him another sum. Ryan v. Canton Nat. Bank, 103 Md. 428, 63 A. 1062.

94. Keese v. Dewey, 111 App. Div. 16, 97 N. Y. S. 519. Part payment on a promissory note by one of two joint makers does not toll the statute as to the other. Atwood v. Lammers, 97 Minn. 214, 106 N. W. 310.

Contra: A payment by one of two joint mortgagors tolls the statute where such statute contains no restriction as to the effect of a payment by one. Brown v. Hayes [Mich.] 13 Det. Leg. N. 875, 109 N. W. 845. The mere presence of a co-obligor at the time of payment of interest on a note is insufficient to keep the demand alive against him. Godde v. Marvin, 142 Mich. 518, 12 Det. Leg. N. 786, 105 N. W. 1112.

95. Where one maker of a joint and several note, after the bar of the statute is complete, gives his note in payment of interest on such barred obligation, it constitutes a new promise and revives the barred note as to himself. Medomak Nat. Bank v. Wyman, 100 Me. 556, 62 A. 658.

96. Payments by a guarantor of a negotiable note do not toll the statute in favor of the maker. Thompson v. Brown [Mo. App.] 97 S. W. 242. But it tolls the statute as to himself. Id. Where a guarantor's claim against his principal for payments made is barred, he cannot revive it by making further payments after an action on the note is barred. Id.

97. A partial payment on a partnership debt, after dissolution, will suspend the statute as to other partners in favor of a creditor receiving such payment who has had dealings with the partnership and has no notice of the dissolution. Robertson Lumber Co. v. Anderson, 96 Minn. 527, 105 N. W. 972.

98. In Utah a payment will not revive a barred obligation which was twelve years barred at the time the statute, providing that part payment should toll the statute, was enacted. Francis v. Gisborn [Utah] 83 P. 571.

99. Husband of intestate payee has sufficient interest. Peters v. Rothermel, 30 Pa. Super. Ct. 281.

1. Peters v. Rothermel, 30 Pa. Super. Ct. 281.

2. Olson v. Dahl [Minn.] 109 N. W. 1001.

3. A judgment is not a contract within this rule. Olson v. Dahl [Minn.] 109 N. W. 1001. A cause of action becomes merged in a judgment thereon and is extinct, and a part payment after the bar is complete does not by implication revive ths original cause of action. Id.

4. Murphy v. Walsh, 99 N. Y. S. 346. Evidence sufficient to show such fact. Id.

an action to foreclose the security.[5] The weight of authority, however, seems to be that it does not.[7] In some states this rule is covered by statute,[8] but such statutes are no broader than their express terms.[9] If the principal obligation is not barred, incidents thereto are not.[10] A claim for advances made to protect the security may be barred, though an action to foreclose the security is not.[11] A lien for a debt created by statute endures no longer than the period during which an action on the debt may be maintained.[12]

(§ 7) *B. Against whom available.*[13]—The bar of the statute is available against all persons in privity.[14]

(§ 7) *C. To whom available.*[15]—The defense is available to the state[16] and to implied trustees.[17] One may be estopped to plead the defense[18] especially where the delay is occasioned by his own act.[19]

§ 8. *Pleading and evidence.*[20]—The statute, being one of repose only, to be available as a defense must be specially pleaded.[21] This rule applies in equity.[22]

5, 6. See 6 C. L. 482.

7. That it does not: Where suit to foreclose a mortgage but not for a deficiency judgment was not commenced within the statutory period after the claim had been rejected by an executrix. Fox v. Bernard [Nev.] 85 P. 351. The right of action on a bond given as security is not barred though the right of action on the debt itself may be. United States v. Mercantile Trust Co., 213 Pa. 411, 62 A. 1062. Under a trust deed containing a power of sale, the fact that the debt is barred does not affect the power to sell, though such plea would prevail in an action to foreclose. Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925.

That it does: Where a debt is barred the mortgage is barred. McCormick v. Perry, 29 Ky. L. R. 420, 93 S. W. 607. An action on a contractor's bond for material furnished cannot be maintained if an action against the contractor is barred. Towle v. Sweeney, 2 Cal. App. 29, 83 P. 74. Where the principal claim is barred, incidental equitable rights are also barred. Banks v. Stockton [Cal.] 87 P. 83.

8. Rev. St. 1899, § 4276, providing that no action to foreclose a mortgage shall be maintained after the debt is barred, is not retroactive. Martin v. Teasdale [Mo. App.] 92 S. W. 133.

9. Rev. St. 1899, § 4672, providing that a bar of the debt bars the security, does not apply to a suit to enforce the assignment of a life policy under an assignment thereof as security. New York Life Ins. Co. v. Kansas City Nat. Bank [Mo. App.] 97 S. W. 195.

10. Interest coupons attached to a bond. First Nat. Bank v. Park [Colo.] 86 P. 106.

11. A mortgagee's claim for advances made by him to protect his security is barred in two years, though his secured claim is not barred and is continued by giving a new note. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155.

12. Where a lien for an assessment is by statute made perpetual, an action to foreclose it is not barred though an action on the assessment as a debt may be. City of Hartford v. Mechanic's Sav. Bank [Conn.] 63 A. 658.

13. See 6 C. L. 482.

14. Where a judgment recovered by an administrator was barred prior to his death, it was barred as to an assignee. Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 688.

15. See 6 C. L. 482. Where an opponent claiming the proceeds of a sale on execution allowed the statute to run against his rights against the debtor, his rights as against a creditor who received the proceeds of the sale were also barred. Succession of Marchand, 116 La. 207, 40 So. 637.

16. Claim against the state is subject to the same statute as it would be if against a private person. McRae v. Auditor General [Mich.] 13 Det. Leg. N. 895, 109 N. W. 1122. Runs in favor of the state where there is an available remedy. Claim for local assessments on state property. City of Buffalo v. State, 101 N. Y. S. 595.

17. Directors of a national bank are not technical trustees, and after they cease to be directors may plead limitations to a suit by a receiver to recover losses sustained by their negligence or malfeasance. Emerson v. Gaither, 103 Md. 564, 64 A. 26.

18. Where one agreed to credit another's account and had in fact made such application, he could not afterward assert that the claim was barred. Lowry v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 90, 94 S. W. 450. Where parties under a deed construed it to convey a life estate and remainder and such construction was acted on for a long period of years, one of them could not assert that it created estates in common. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

19. Missouri, etc., R. Co. v. Pratt [Kan.] 85 P. 141.

20. See 6 C. L. 483.

21. Scott v. Christenson, 46 Or. 417, 80 P. 731; Towle v. Sweeney, 2 Cal. App. 29, 83 P. 74; Hewel v. Hogin [Cal. App.] 84 P. 1002; Croan v. Baden [Kan.] 85 P. 532; Blocker v. McClendon [Ind. T.] 98 S. W. 166. A plaintiff need not anticipate the defense of limitation and set up facts in avoidance thereof. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25. Must be set up by answer and not by demurrer. Hodgdon v. Haverhill [Mass.] 79 N. E. 818; Curry v. Southern R. Co. [Ala.] 42 So. 447; Jolly v. Miller [Ky.] 98 S. W. 326; McCormick v. Perry, 29 Ky. L. R. 420, 93 S. W. 607. Complaint in replevin to recover

Indulgence will not be granted to a party who fails in due time and proper form to invoke the protection of the statute.[23] If, however, the complaint shows on its face that the cause of action stated is barred, the defense may be set up by demurrer.[24] The plea must state facts showing the cause to be barred.[25] It is sufficient if set forth in the form of the statute.[26] The subdivision of the section relied on need not be designated,[27] but the particular statute relied upon must be.[28] A complaint for an apparently barred cause must set up facts showing that it falls within an exception,[29] and, if the statute is pleaded, such facts must be set up in the reply.[30]

Whether the statute has run is a question of law.[31] One relying on the statute

stolen goods held not subject to demurrer. Gatlin v. Vaut [Ind. T.] 91 S. W. 38. Must be specially pleaded in a suit to foreclose a mortgage. Livingston v. New England Mortg. Sec. Co., 77 Ark. 379, 91 S. W. 752. Must be specially pleaded unless the complaint shows on its face that the cause stated is barred. Betz v. Wilson [Okl.] 87 P. 844. The statute must be specially pleaded unless the facts that raise it appear to be admitted. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Err. & App.] 64 A. 917. The defense is affirmative and must be specially pleaded. Perkins v. Morgan [Colo.] 85 P. 640. In New York the statement contained in an alternative writ of mandamus is subject to the same rules as pleading, and the objection that the right to relief asked is barred must be taken in the return or by demurrer, and not by motion to dismiss. People v. Bingham, 99 N. Y. S. 593.

22. Must be pleaded in equity. Strayhorn v. McCall [Ark.] 95 S. W. 455. Must be pleaded in a suit to have a deed reformed. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

23. May not assert it on appeal. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Err. & App.] 64 A. 917; Matlock v. Stone, 77 Ark. 195, 91 S. W. 553. Refusal of permission to amend by pleading the statute held not an abuse of discretion. Hewel v. Hogin [Cal. App.] 84 P. 1002.

24. If it appears from the complaint that the action is barred, the defense may be raised by demurrer. Fay v. Costa, 2 Cal. App. 241, 83 P. 275. The defense cannot be raised by demurrer unless the complaint shows the cause to be barred, and also the facts necessary to take it out of exceptions to the statute. Gatlin v. Vaut [Ind. T.] 91 S. W. 38.

25. **Plea of the statute held sufficient** where it set up that the complaint showed the cause to be barred and set out facts by which the cause was barred. Evans v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 812, 92 S. W. 47. Pleading held to insufficiently set forth the bar of the statute as a defense. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. A plea that an amendment states "another and different cause of action" is equivalent to one that it states "a new and different cause" where the original complaint stated no cause of action. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603. How the statute of limitations may be successfully pleaded as a defense to an action to quiet title. Chambers v. Wilcox, 3 Ohio N. P. (N. S.) 269.

Held insufficient: In an action against husband and wife for supplies used in the family, an answer setting up that none of the supplies furnished within the past six years were used in the family is insufficient to show that the statute was relied upon. Perkins v. Morgan [Colo.] 85 P. 640. Under Code Civ. Proc. § 381, limiting actions on sealed instruments to ten years, an answer suggesting that the action is not on a sealed instrument is demurrable. Burstein v. Levy, 49 Misc. 469, 98 N. Y. S. 853.

26. A plea in effect the form prescribed by the Code is sufficient. Nashville, etc., R. Co. v. Hill [Ala.] 40 So. 612.

27. Mullenary v. Burton [Cal. App.] 84 P. 159. It is sufficient to set up the statute. The particular section relied on need not be specified. Fay v. Costa, 2 Cal. App. 241, 83 P. 275.

28. A plea of the six year statute is not unavailing when the three year statute is applicable. Ramsden v. Gately, 142 F. 912.

29. Under the rule that an action for fraud does not accrue until discovery thereof, a complaint alleging that the fraud was not discovered until within the statutory period is not demurrable. Alexander v. Cleland [N. M.] 86 P. 425. A pleading which shows a cause of action for fraud to be barred must show that the fraud was not discovered and could not, by the exercise of ordinary diligence, have been discovered within the period. Kramer v. Gille, 140 F. 682. Where a complaint shows on its face that the cause of action stated is barred, it is not rendered sufficient as against demurrer by the fact that it is brought by a next friend, there being no allegation that complainants were under disability. Thames v. Mangum, 87 Miss. 575, 40 So. 327 The fact that the plaintiff set up that his cause of action was concealed and that he did not know of it is a conclusion and insufficient and not binding on demurrer. Thornton v. Natchez [Miss.] 41 So. 498.

30. No defense to the plea of limitations is raised by traversing it. Jolly v. Miller [Ky.] 98 S. W. 326. Disabilities must be pleaded in order to be relied upon as tolling the statute. Lamberida v. Barnum [Tex. Civ. App.] 14 Tex. Ct. Rep. 434, 90 S. W. 698. Coverture is not available as a defense to the plea when it is not pleaded by reply. Lawder v. Larkin [Tex. Civ. App.] 15 Tex. Ct. Rep. 809, 94 S. W. 171. One who desires to take the case out of the statute because of undiscovered fraud must plead such fact. Keese v. Dewey, 111 App. Div. 16, 97 N. Y. S. 519.

has the burden of proving that the cause is barred,[32] and one who relies on an exception to the statute must prove that the case falls within the exception.[33]

LIMITED PARTNERSHIP; LIQUIDATED DAMAGES, see latest topical index.

LIS PENDENS.

General Rule (791).
Statutory Lis Pendens (792).
Property Within the Rule (793).
Continuity of Lis Pendens (793).

General rule.[34]—The rule that a purchaser pendente lite of property in litigation takes subject to the event of the action[35] is of legal origin and does not rest on equitable doctrines of notice,[36] nor is the doctrine peculiar to courts of equity.[37] A lis pendens affects not only a purchaser from a party but also those who hold under him,[38] and applies as well to purchasers from the plaintiff as from the defendant.[39] A purchaser at a tax sale, having actual notice of the pendency of an action for possession of the property, is to be treated as a purchaser pendente lite;[40] as is a judgment creditor whose rights as an incumbrancer are acquired during the existence of the lis pendens,[41] or a purchaser of the property at a judicial sale had in execution of a judgment in favor of a person whose interests in the property sold are affected by the lis pendens.[42] A pendente lite incumbrancer cannot take advantage of

31. Munn v. Masonic Life Ass'n, 101 N. Y. S. 91. Where the statute is set up, the court must determine the issue from the facts connected with the transaction out of which the action arose, whether presented in the form of an agreed statement or by evidence. Towle v. Sweeney, 2 Cal. App. 29, 83 P. 74. The finding on an issue of limitations is a conclusion of law and does not cease to be such because found among the findings of fact. Id. Where a demurrer to a plea of the statute is sustained and no leave to plead over is obtained, there is no issue of fact as to the statute. Gilmore v. Chicago, 224 Ill. 490, 79 N. E. 596.

32. The defendant has the burden to prove his plea of limitations. Green v. Dodge [Vt.] 64 A. 499. The defendant has the burden to prove the defense when it is in issue. Van Burg v. Van Engen [Neb.] 107 N. W. 1006. Where the defense is pleaded, the plaintiff has the burden to show that the action was commenced in time. Swing v. St. Louis Refrigerator & Wooden Gutter Co. [Ark.] 93 S. W. 978.

33. Plaintiff has the burden to prove matter set up as taking the case out of the operation of the statute. Gatlin v. Vaut [Ind. T.] 91 S. W. 38. One who is sued on a promise to repay a loan "when he is able" has the burden to prove ability to pay more than the statutory period prior to the commencement of the action. Porter v. Magnetic Separator Co., 100 N. Y. S. 888. Where he shows his assets, the plaintiff is entitled to show that they were not available to pay debts. Id. Evidence held to show that an action on notes was barred. Evans v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 812, 92 S. W. 47. Where title is alleged by regular chain from the sovereign and by virtue of the statutes of limitation, either or both titles may be proven. Alford Bros. v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636. Where suit is brought for a balance due on an account and a copy of the account taken from the books of defendant does not show such relations between the parties as will afford an answer to a plea of the statute and no other evidence is afforded, the plea is properly maintained, especially where the action is against the administrator of a succession and is brought after what appears an unnecessary delay. Succession of Gragard, 116 La. 96, 40 So. 543. A plaintiff on a barred note who alleges partial payment tolling the statute has the burden to prove such payment. Scott v. Christenson, 46 Or. 417, 80 P. 731. A plaintiff who in making out his case shows his cause of action to be barred has the burden of showing facts which take it out of the statute. Ryan v. Canton Nat. Bank, 103 Md. 428, 63 A. 1062.

34. See 6 C. L. 484.

35. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433; Bank v. Doherty, 42 Wash. 317, 84 P. 872. Lis pendens is simply a rule to give effect to the rights ultimately established by the judgment. McVay v. Tousley [S. D.] 105 N. W. 932; Wingfield v. Neal [W. Va.] 54 S. E. 47. A purchaser pendente lite occupies no better position than his vendor. Cannot enforce specific performance of option contract when his vendor cannbt by reason of violation of the terms of the contract. Bennett v. Giles, 220 Ill. 393, 77 N. E. 214.

36. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433; Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97.

37. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433.

38, 39. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97.

40. Hicks v. Porter [Tex. Civ. App.] 85 S. W. 437.

41, 42. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97.

mere formal defects to defeat the judgment or decree.[43] While a suit is not lis pendens as to the unlitigated rights of coparties between themselves in the subject-matter[44] but only as to their united rights against the adversary,[45] yet, one who comes into the adversary's rights under the decree will prevail against the coparty's transferee.[46] The failure of the clerk of the court, when suit is filed, to enter on the file docket the object of the suit, cannot prejudice the defendant, or, as to him, affect the rule of lis pendens.[47] The burden is on those asserting the validity of a judgment over pendente lite purchaser to show that the rule lis pendens was effective.[48]

Statutory lis pendens.[49]—The notice provided by statute ordinarily takes the place of such notice as theretofore arose by operation of law,[50] being considered not as constructive notice but as affording a convenient method of enforcing the common-law doctrine of lis pendens.[51] Hence, when the action has ceased to be pending under the law of lis pendens, the statutory notice ceases to be effectual for any purpose.[52] The filing of lis pendens notice under a statute does not usually have any retroactive effect,[53] but it is held in New York that as there is no property right in a lis pendens, a law permitting cancellation of the notice may be made applicable to cases in which notices were filed prior to the taking effect of the law.[54] The decisions are inharmonious as to whether the holder of an unrecorded deed acquires title without reference to a subsequent lis pendens as to a litigant having no notice of the deed.[55] A statute making the record and filing of lis pendens notice of the

43. The fact that the sheriff, by his notice, levied on and sold the interest of defendants in lands, sought to be partitioned, for costs duly decreed on appeal in the suit, following the usual form of blank used on levy of execution, is of no avail to one taking an incumbrance on the land with full knowledge of the pendency of the suit. Barbour v. Patterson [Mich.] 13 Det. Leg. N. 605, 108 N. W. 973.

44. Mayes v. Rust [Tex. Civ. App.] 15 Tex. Ct. Rep. 485, 94 S. W. 110. A suit by joint claimants against claimants adverse to both is not lis pendens as to the several rights which the joint tenants had wholly between themselves and not in litigation. Hence, a pendente lite purchaser from one of the joint claimants is not solely, by reason of a decree awarding a share severally to the other joint claimant, bound not to dispute such share. Id.

45. Mayes v. Rust [Tex. Civ. App.] 15 Tex. Ct. Rep. 485, 94 S. W. 110.

46. Mayes v. Rust [Tex. Civ. App.] 15 Tex. Ct. Rep. 485, 94 S. W. 110. When a decree is entered pursuant to compromise and is therefore tantamount to a conveyance by the paramount adversary to one joint claimant severally, such joint claimant acquires against his coclaimant the strength of the adversary's title. Id.

47. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433.

48. Humphrey v. Beaumont Irr. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 677, 93 S. W. 180.

49. See 6 C. L. 486.

50. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433.

51. The filing of notice under Rev. Code Civ. Proc. §§ 108, 109, it is held in South Dakota, is designed to effect the result of precluding any change in the subject-matter to the prejudice of the plaintiff during the pendency of the action, not to give constructive notice of the plaintiff's claim as does the recording of a deed or mortgage. McVay v. Tousley [S. D.] 105 N. W. 932.

52. Purchasers after suit had been dismissed without final judgment having been rendered therein held not bound as purchasers pendente lite. McVay v. Tousley [S. D.] 105 N. W. 932.

53. A vendee, under an unrecorded contract for the sale of lands entitling him to possession, who has paid only part of the purchase price before the filing of a lis pendens notice under Gen. St. 1894, § 5866, is not injuriously affected by the notice (Moulton v. Kolodzik, 97 Minn. 423, 107 N. W. 154); but when he come to pay the balance of the price, after the notice is filed and he has legal knowledge of the lis pendens, he may protect himself against a payment to the wrong party by agreement, paying the money into court or otherwise (Id.).

54. Laws 1905, p. 71, c. 60, construed. Bressel v. Browning, 109 App. Div. 588, 96 N. Y. S. 402.

55. **Minnesota:** The rule that the holder of an unrecorded deed acquires title without reference to a lis pendens subsequently filed is applicable to unrecorded executory contract to convey. Moulton v. Kolodzik, 97 Minn. 423, 107 N. W. 154.

Oregon: Holders of unrecorded assignment of certificate of purchase of real property held bound by decree foreclosing street grade assessment, under Ball. Ann. Codes & St. § 4887. Wright v. Jessup [Wash.] 87. P. 930.

Texas: One claiming under an unrecorded deed at the time suit is commenced involving title to the land conveyed thereby is a pendente lite purchaser as to litigant having no

liens, rights, and interests involved in the proceeding, protects costs in a partition suit,[56] even though such costs are decreed on appeal.[57] The New York statute expressly makes a notice of lis pendens binding on subsequent purchasers and incumbrancers to the same extent as if parties,[58] but this does not extend the doctrine of res judicata to persons not parties. It embraces only such matters as were actually litigated, and binds only to the extent of proceedings actually taken.[59] Hence, a purchaser or incumbrancer pendente lite is not deprived of the right to litigate any issue not raised or passed on or involved in any proceeding taken in the action.[60] A purchaser pendente lite before leaving of lis pendens notice with the clerk, as required in Virginia, is bound by the notice when it is left with the clerk prior to recording his deed.[61] When an action is brought to recover a judgment affecting the title to, or the possession, use, or enjoyment of, real property, the statutory right to file notice of lis pendens is absolute in New York.[62] Usually, actual notice obviates the necessity for statutory notice.[63] Statutes requiring the filing of notice of lis pendens in actions affecting real property do not supersede or control statutes in relation to the same subject applicable to a particular class of actions making no such requirement,[64] nor is a statute requiring the filing of lis pendens in suits brought to charge real estate, applicable in suits to enforce rights in choses in action.[65]

Property within the rule.[66]—As a general rule the doctrine does not apply to suits involving the right to personalty,[67] but, under some circumstances, the rule has been held to apply to suits involving mere choses.[68]

Continuity of lis pendens.[69]—Lis pendens does not begin until service of citation or process or such voluntary appearance as gives the court jurisdiction.[70] In

notice of the existence of the deed. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

56. Comp. Laws 1897, § 8980. Barbour v. Patterson [Mich.] 13 Det. Leg. N. 605, 108 N. W. 973.

57. Barbour v. Patterson [Mich.] 13 Det. Leg. N. 605, 108 N. W. 973.

58. Code Civ. Proc. § 1671. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299.

59, 60. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299.

61. Code 1887, § 3566 [Va. Code 1904, p. 1903]. Breeden v. Peale [Va.] 55 S. E. 2.

62. Code Civ. Proc. § 1670. M. Linheim & Co. v. Central Nat. Realty & Const. Co., 111 App. Div. 275, 97 N. Y. S. 619.

63. Where a purchaser has notice of the pending suit or lien being asserted in it, it is the same so far as he is concerned as if the lis pendens notice had been filed. Thompson's Ex'rs v. Stiltz, 29 Ky. L. R. 1075, 96 S. W. 884.

64. May v. Sutherlin, 41 Wash. 609, 84 P. 585. Pendente lite purchaser held bound by judgment in action for recovery of real estate, notwithstanding failure to file notice of lis pendens under Code 1881, § 61, or Ballinger's Ann. Codes & St. § 488, in view of particular application of §§ 5515, 5518, Ballinger's Ann. Codes & St. Id.

65. Code 1899, c. 139, § 12, construed. Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154.

66. See 6 C. L. 486.

67. It is held in South Dakota that the doctrine is inapplicable where the possession of personalty is the object of a suit capable of being aided by the usual auxiliary remedies. As claim and delivery, etc. (Calkins v. First Nat. Bank [S. D.] 107 N. W. 675), but that, while one taking a chattel mortgage on personalty pendente lite, with notice, actual or constructive, of the pendency of the action, is bound by the judgment under the statutes of that state [Rev. Civ. Code, §§ 2449-2452] (Id.), the converse is true as to an incumbrancer pendente lite without notice, actual or constructive, of the pendency of the action (Id.).

68. The rule extends to non-negotiable choses in action and funds for the subjection of which to the payment of a debt a suit in equity has been instituted. Dent v. Pickens, 59 W. Va. 274, 53 S. E. 154. Where an insurance company takes over the risks of another company and the latter fails to disclose the pendency of an action for reinstatement by a member whose risk is not reported as one to be assumed, the doctrine applies to bind the reinsurer by the decree of reinstatement. Mutual Reserve Fund Life Ass'n v. Bolles, 120 Ill. App. 242.

69. See 6 C. L. 487.

70. Service by publication on nonresident under Rev. St. 1895, art. 1235, held insufficient to put lis pendens in force. Humphrey v. Beaumont Irr. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 677, 93 S. W. 180. Record held to show no service of process on or entry of appearance by defendant as putting lis pendens in force. Id. A sale before citation, served on the grantor, is not affected by the rule. Sparks v. Taylor [Tex.] 14 Tex. Ct. Rep. 506, 90 S. W. 485.

Georgia the rule is applicable from the time the petition is filed and docketed when followed by the issuance and service of process and due prosecution.[71] Lis pendens operates only so long as the suit is diligently prosecuted,[72] but a purchaser pendente lite from the party charged with the prosecution of the suit cannot avoid the rule of lis pendens on the ground of his vendor's inexcusable delay,[73] nor will incorrect advice of counsel excuse an unreasonable delay.[74] Neglect to proceed entitles any person aggrieved to cancellation of notice of lis pendens, filed under the New York statute,[75] unless a defendant wrongfully prevents service of process by refusing to disclose his whereabouts or place of residence,[76] and the court may direct the cancellation of notice of lis pendens and substitute an undertaking or deposit when it is made to appear that only money damages are recoverable,[77] but not, however, when the right to relief against particular property is doubtful.[78] On a motion to cancel a lis pendens it is held in New York that the court is not authorized to look into the facts as on a trial nor search the complaint as on demurrer.[79] The right to retain the notice of pendency of actions must be determined on the allegations of the complaint or facts clearly established.[80] Notice of lis pendens when filed holds good until the determination of the case,[81] but there is a contrariety of opinion as to when lis pendens ends.[82, 83] As to the plaintiff's complaint and pleas

71. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97.

72. Woodward v. Johnson, 28 Ky. L. R. 1091, 90 S. W. 1076. A similar rule would seem to apply to a cross complaint, creating a new lis pendens when filed, if there be laches on the part of the person filing it in failing to duly prosecute it. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97. The protection afforded to a plaintiff under the doctrine that lis pendens is notice to all the world may be lost by a failure on his part to prosecute his action with due diligence. Id. Delay of thirty years is as matter of law fatal laches. Woodward v. Johnson, 28 Ky. L. R. 1091, 90 S. W. 1076. Gross negligence in the prosecution of a suit by which others have been permitted to acquire rights in its subject-matter estops a party to a suit as against purchasers for value to rely on lis pendens. Id. The disturbed condition of the country from 1860 to 1870 is held in Texas to be sufficient excuse for delay in the trial of a cause then pending. Humphrey v. Beaumont Irr. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 677, 93 S. W. 180. The delay which may relieve a purchaser from the rule must proceed from gross or inexcusable negligence (Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433), and is usually one of fact and not of law (Id.). Mere lapse of time in which the party who ought to prosecute an action has failed to do so, though it may be for a considerable period, is not conclusive, but may be explained by showing a reasonable excuse for the delay. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97.

73. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433.

74. Party erroneously advised by counsel not to purchase at judicial sale so long as squatters were in possession, because such purchase would violate champerty statute. Woodward v. Johnson, 28 Ky. L. R. 1091, 90 S. W. 1076.

75. Code Civ. Proc. § 1674. Lindheim & Co. v. Central Nat. Realty & Const. Co., 111 App. Div. 275, 97 N. Y. S. 619. Failure to follow filing of notice within 60 days by either personal service or the publication of summons entitles defendant to cancellation of the notice. Lipschitz v. Watson, 113 App. Div. 408, 99 N. Y. S. 418.

76. Levy v. Kon, 100 N. Y. S. 205.

77. Laws 1905, p. 71, c. 60, held applicable in suit for specific performance of contract for sale of realty which the complaint showed to be impossible to procure. Bressel v. Browning, 109 App. Div. 588, 96 N. Y. S. 402.

78. A doubtful right to specific performance of contract for sale of realty will not permit of a cancellation under Code Civ. Proc. § 1671, as amended by Laws 1905, p. 71, c. 60. Tishman v. Acritelli, 111 App. Div. 237, 97 N. Y. S. 668; Wolinsky v. Okun, 111 App. Div. 536, 97 N. Y. S. 943; McCrum v. Lex Realty Co., 113 App. Div. 58, 98 N. Y. S. 1021; Kennedy v. Hall, 99 N. Y. S. 162. Lis pendens notice will not be canceled where the action is for specific performance of a contract for the sale of real property prior to the determination of the issue whether the title offered was marketable. Mishkind-Feinberg Realty Co. v. Sidorsky, 100 N. Y. S. 714. Code Civ. Proc. § 1671, as amended by Laws 1905, p. 71, c. 60, held inapplicable in suit to cancel conveyance of realty and surrender lease thereof. Schenkein v. Horowitz, 99 N. Y. S. 161.

79. Lindheim & Co. v. Central Nat. Realty & Const. Co., 111 App. Div. 275, 97 N. Y. S. 619; McCrum v. Lex Realty Co., 113 App. Div. 58, 98 N. Y. S. 1021; Werner v. Jackson, 100 N. Y. S. 763.

80. Tishman v. Acritelli, 111 App. Div. 237, 97 N. Y. S. 668; Schenkein v. Horowitz, 99 N. Y. S. 161; Kennedy v. Hall, 99 N. Y. S. 162; Werner v. Jackson, 100 N. Y. S. 763.

81. Hyde v. Heaton [Wash.] 86 P. 664.

82, 83. **Missouri:** A suit is pending until the expiration of the time for filing a bill of exceptions. Board of Trustees of Westmins-

or answers to it defensive in character and seeking merely to prevent a recovery, the lis pendens arises in favor of the defendant, as against a purchaser from the plaintiff, from the time of the commencement of the plaintiff's action,[84] but as to a cross action or cross complaint by the defendant, setting up affirmative rights and praying affirmative relief against the plaintiff, the lis pendens begins from the filing of such cross action or cross complaint.[85] The loss of the papers in a case has no effect on the operation of lis pendens,[86] nor a change of venue where made by agreement of the parties.[87] Dismissal of the main action does not interfere with the rule so as to give purchasers from defendant, whose cross bill was pending at the time of the purchase, other rights than as purchasers pendente lite.[88]

LITERARY PROPERTY; LIVERY STABLE KEEPERS; LIVE STOCK INSURANCE; LLOYD'S; LOAN AND TRUST COMPANIES; LOANS; LOCAL IMPROVEMENTS AND ASSESSMENTS; LOCAL OPTION; LOGS AND LOGGING; LOST INSTRUMENTS; LOST PROPERTY, see latest topical index.

LOTTERIES.

What constitutes.[89]—A lottery is a scheme for the distribution of property by chance among persons who have paid, or agreed to pay, a valuable consideration for the chance.[90] Chance is an essential element of a lottery or gift enterprise.[91]

Recovery back of losses.—One having a proprietary interest in a lottery cannot enforce a civil remedy against the assets of the concern provided for those who lose money in lotteries.[92]

Offenses and prosecution.—The offenses of establishing a lottery and disposing of property by lottery are distinct under the Texas Code.[93] The transaction of a

ter College v. Fry, 192 Mo. 552, 91 S. W. 472.

Texas: Where writ of error is sued out within the period required by law, lis pendens continues. Bryson v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

West Virginia: A suit as a lis pendens ends with final decree. Dunfee v. Childs, 59 W. Va. 225, 53 S. E. 209. Hence, a bill of review or appeal to reverse such a decree is a new lis pendens as regards purchasers claiming title under the decree. Id. One who after final decree and before an appeal is obtained purchases in good faith property which is the subject of litigation is not affected by the lis pendens rule. Wingfield v. Neal [W. Va.] 54 S. E. 47. A purchaser for value without notice after final decree is not affected by reversal thereof on a subsequent appeal restricted to operate as a mere review. Perkins v. Pfalzgraff [W. Va.] 53 S. E. 913.

84, 85. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97.

86. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433. When the papers in a case are lost, their contents may be shown by parol to establish that a purchase was made pendente lite. Id.

87. Latta v. Wiley [Tex. Civ. App.] 14 Tex. Ct. Rep. 621, 92 S. W. 433.

88. Bryson v. Boyce, 14 Tex. Ct. Rep. 651, 92 S. W. 820.

89. See 6 C. L. 487.

90. See 6 C. L. 487.

Schemes held to be lotteries: Diamond distributing concern held properly denied use of mails as lottery under Rev. St. §§ 3929, 4041, as amended by Act Sept. 19, 1890, c. 908, §§ 2, 3, 26 Stat. 466. Preferred Mercantile Co. v. Hibbard, 142 F. 877. Scheme for distribution of prizes to those who procure from packages of food product on the market a set of seven animal pictures, one of which is placed in each package. United States v. McKenna, 149 F. 252. Scheme for making purported "loans" dependent on chance as to the amount and making no provision for security as repayment, Jacobs v. People, 117 Ill. App. 195.

Held not to be lottery or gift enterprise: Trading stamp scheme. City & County of Denver v. Frueauff [Colo.] 88 P. 389.

91. Trading stamp scheme held lacking in element of chance to constitute it a gift enterprise. City & County of Denver v. Frueauff [Colo.] 88 P. 389. An ordinance prohibiting gift enterprises from which the element of chance is eliminated is unauthorized by statutory and constitutional provisions prohibiting the sale of lottery and gift enterprise tickets. Id.

92. The provisions of Rev. St. § 4271, for the recovery of money lost in lotteries, are not available to a purchaser of certificates commonly called debentures where the purchaser becomes a member of the corporation issuing the debentures and a part owner thereof and participates in the profits. Harrington v. Halliday, 4 Ohio N. P. (N. S.) 281 An allegation that a plaintiff, suing for the recovery of money lost in the purchase of debentures, has shares in the distribution of the assets of the company by its receivers constitutes, if proven, a pro tanto defense,

lottery business through an agent is the setting up of the lottery at the place where the agent's transactions occur.[94] One concerned as agent in managing any policy lottery is punishable under the District of Columbia statutes without regard to the place where the principal office or shop may be located.[95] The Federal statutes prohibit the carrying of lottery tickets and the like from one state to another.[96] The general rules of criminal pleading apply as to certainty of the charge.[97] As a general rule evidence is admissible though illegally obtained.[98] Evidence of the commission of a different offense from that charged is without probative force to sustain a conviction.[99]

MAIMING; MAYHEM.[1]

One may be guilty of mayhem in shooting unlawfully at a third person but wounding a bystander against whom he had no homicidal intent which would make the crime an assault with intent to kill.[2]

MALICE; MALICIOUS ABUSE OF PROCESS, see latest topical index.

MALICIOUS MISCHIEF.[3]

To constitute malicious mischief at common law, the act must have destroyed the property[4] and must have been committed with malice towards the owner.[5] Under the West Virginia statute, the extent of the injury must be such as to impair the utility or diminish the value of the property.[6] An electric street car is personalty within a statute penalizing a wanton and willful injury to the personal property of another.[7] The offense created by the Alabama statute prohibiting the injuring or defacing of public or private buildings is one against the possession only and

and also states the further defensive fact that the plaintiff was a part owner of the business. Id.

93. Pen. Code, art. 373. Howard v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 696, 91 S. W. 785.

94. Jacobs v. People, 117 Ill. App. 195.

95. Code, art. 863, construed. Knoll v. U. S. 26 App. D. C. 457.

96. A scheme for the distribution of prizes to those who procure from packages of food product on the market a set of seven animal pictures, one of which is placed in each package, held violative of Rev. St. § 3929 (Act March 2, 1895, c. 191, 28 Stat. 964). United States v. McKenna, 149 F. 252.

97. Indictment for being concerned as agent in managing a policy lottery following language of Code, art. 863, held sufficiently certain. Knoll v. U. S., 26 App. D. C. 457. Where the offense of being an agent in managing a policy lottery is charged in the language of the statute and it is averred "A more particular description whereof is unknown to the grand jurors," the indictment is sufficiently certain. Id. Policy lottery, or policy, as it is sometimes called, has a common, well-understood meaning. Hence it is unnecessary to set out in indictment of agent ordinary constituent features of the game or device. Id.

98. Lottery papers taken by search warrant, even though illegally taken, are admissible on a prosecution for setting up and promoting the lottery. Jacobs v. People, 117 Ill. App. 195.

99. On a prosecution under Pen. Code, art. 373, for establishing a lottery, evidence that defendant was seen at one time with money in his hand in the house where many people were assembled and betting at the lottery has no tendency to prove the charge (Howard v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 696, 91 S. W. 785), and the same is true as to evidence that he at one time turned the policy wheel which could have been done by one of the interested parties or by any one designated by the holders of the tickets. Id. On a prosecution for establishing a lottery in violation of Pen. Code, art. 373, evidence held insufficient to warrant conviction. Id.

1. See 6 C. L. 489.

2. The wound being inflicted under circumstances which would have constituted murder or manslaughter if the man had died, defendant is guilty of violating Rev. St. 1899, § 1849, defining mayhem. State v. Mulhall [Mo.] 97 S. W. 583.

3. See 6 C. L. 489.

4, 5. State v. Martin, 141 N. C. 832, 53 S. E. 874.

6. Fraudulently remaining on a train without more not sufficient under Code 1906, c. 145, § 27. Davis v. Chesapeake & O. R. Co. [W. Va.] 56 S. E. 400.

7. Revisal 1905, § 3676. State v. Martin, 141 N. C. 832, 53 S. E. 874.

does not involve ownership.[8] One who removes a building from his own property is not guilty of willful injury to real estate.[9]

The essential facts must be charged that the property was of value and that the act was malicious,[10] but under the Georgia statute the indictment need not allege that the owner of the property injured suffered loss or damage or that the property was of any stated value.[11] An allegation of ownership is not necessary where the offense is against the possession only.[12] A statement of the value of a building alleged to have been a part of the realty and to have been injured by the accused is sufficient without alleging the value of the land.[13] An indictment is not objectionable for charging several defendants with committing the offense jointly.[14] The court is not bound to require an election between counts which are so much alike that no possible injury can result to accused from a failure to do so.[15]

Ownership of the property injured or destroyed must be proved as charged.[16] If the injured property be attached to realty, ownership will be inferred from proof of possession of the alleged owner,[17] but no possession being shown, proof of title to property so attached cannot be made by a mere oral statement of the witness that he was the owner.[18] It will be presumed that the court charged the jury fully and correctly and that the jury found all the facts necessary to constitute the crime.[19] Evidence which merely raises a suspicion of guilt is not sufficient.[20]

MALICIOUS PROSECUTION AND ABUSE OF PROCESS.

§ 1. Nature and Elements of the Wrong (797).
A. Malicious Prosecution (797).
B. Abuse of Process (798).
§ 2. Responsibility of Defendant for the Prosecution or Suit and His Participation Therein (799).
§ 3. The Prosecution of the Plaintiff (799).
§ 4. Termination of Prosecution in Plaintiff's Favor (800).
§ 5. Want of Reasonable and Probable Cause (800).
§ 6. Malice (801).
§ 7. Advice of Private Counsel, Prosecuting Attorney, or Magistrate (802).
§ 8. Damages (803).
§ 9. General Matters of Pleading and Practice (804). The Burden of Proof (805). Evidence (806).

§ 1. *Nature and elements of the wrong. A. Malicious prosecution.*[21]—The five (sometimes stated as three) elements of the tort are: a prosecution, the

8. Defendant cannot inquire as to whether an occupant was rightfully in possession. Code 1896, § 5620. Perry v. State [Ala.] 43 So. 18.

9. The original purchaser of land is the holder of the legal title thereto after a foreclosure of the vendor's lien thereon, but before sale under the foreclosure so that his act in removing a building therefrom is not a violation of a statute prohibiting willful injury to real estate. Price v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 713, 92 S. W. 811.

10. Indictment under Code 1858, § 4652, subsec. 14 (Shannon's Code, § 6496), for mutilating and destroying election tickets, held bad for failing to state that tickets were "valuable papers" and that conduct of accused was malicious. State v. Click, 116 Tenn. 283, 90 S. W. 855.

11. Indictment under Pen. Code 1895, § 729, punishing willful and malicious injuring or destroying public or private property. Holder v. State [Ga.] 56 S. E. 71.

12. Indictment under Code 1896, § 5620. Perry v. State [Ala.] 43 So. 18.

13. Prosecution under Pen. Code 1895, art. 791. Price v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 713, 92 S. W. 811.

14. Perry v. State [Ala.] 43 So. 18.

15. Where one count charged the cutting of a fence and one charged the cutting of a part of the fence. Henderson v. State [Tex. Cr. App.] 96 S. W. 37.

16, 17. Holder v. State [Ga.] 56 S. E. 71.

18. Parol statement that a fence attached to realty was "the property" of a named person should have been excluded. Holder v. State [Ga.] 56 S. E. 71.

19. Where it was claimed that the evidence tended to show that a rock was thrown by accused impulsively at the conductor of a car under the influence of a sudden passion, but so far as the record showed the jury might have found under proper instructions that it was the deliberate intention to injure the car. State v. Martin, 141 N. C. 832, 53 S. E. 874.

20. Insufficient to sustain conviction for entering and defacing a school house. Weatherford v. State [Tex. Cr. App.] 91 S. W. 591.

responsibility of defendant for it, the want of probable cause, malice, and a termination in the now plaintiff's favor.[22] The necessity that each of these elements be found frequently takes expression in the rule that malice will not be presumed in law from want of probable cause, though inferable by the jury, or the rule that the two must concur.[23] These expressions are usually looked on as exceptions to the sufficiency of evidence to go to the jury.[24] There are dicta that the action for malicious prosecution is not favored in law[25] unless oppression and malice is shown,[26] but it has been held proper to refuse to instruct the jury that it is not favored.[27] Unlike abuse of process,[28] malicious prosecution does not rest on any perversion or ulterior use of legal process.[29] A valid arrest distinguishes malicious prosecution from false imprisonment,[30] and important elements of malicious prosecution are absent in false imprisonment.[31] Damage is presumed from proof of the wrong.[32]

(§ 1) *B. Abuse of process.*[33]—There is abuse of process where a party, under process legally and properly issued, employs it wrongfully and unlawfully and not for the purpose it is intended.[34] Willful misuse of process to the injury of plaintiff is essential.[35] There must be shown an ulterior purpose[36] and some act done in the use of the process not proper in the regular prosecution of the case,[37] but it is not necessary to show a want of probable cause[38] nor malice,[39] nor that the proceeding has terminated;[40] but a mere malicious use of legal process, otherwise within one's rights, does not amount to abuse of process,[41] nor does a mere seizure of one's prop-

21. See 6 C. L. 490. See, also, exhaustive monograph 4 C. L. 471.

22. See **definition,** 4 C. L. 471. See, also, dicta in Russell v. Chamberlain [Idaho] 85 P. 926; Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320; Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751; Staples v. Johnson, 25 App. D. C. 155; Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422; Whitesell v. Study [Ind. App.] 76 N. E. 1010. Where plaintiff was a passenger on a street car and growing out of an altercation with the conductor as to payment of fare the latter made a criminal charge against plaintiff to procure his arrest, whereupon an officer took plaintiff and locked him up, it was indispensable to plaintiff's right of action against the carrier to show a termination of the criminal charge in his favor. Leonard v. St. Louis Transit Co., 115 Mo. App. 349, 91 S. W. 452.

23. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862; Ton v. Stetson [Wash.] 86 P. 668; Staples v. Johnson, 25 App. D. C. 155; Gaither v. Carpenter [N. C.] 55 S. E. 625; Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490.

24. As to that, see post, §§ 2-7, 9.

25. Hence it has been hedged about by limitations more stringent than in the case of almost any other act causing damage to another. Russell v. Chamberlain [Idaho] 85 P. 926.

26. Gaither v. Carpenter [N. C.] 55 S. E. 625.

27. Reynolds v. Dunlap [Kan.] 84 P. 720.

28. See post, § 1 B.

29. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

30. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749. There is malicious prosecution when legal process, civil or criminal, is used out of malice and without probable cause, but only its regular execution is contemplated. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815. When arrest is under a legal warrant maliciously and without probable cause, followed by judicial investigation and discharge, malicious prosecution, rather than false imprisonment, is the tort committed. Western Union Tel. Co. v. Thompson [C. C. A.] 144 F. 578.

31. The distinguishing features of false imprisonment and malicious prosecution, are that reasonable cause, absence of malice, and advice of counsel are immaterial in the former but are valid defenses in malicious prosecution. Pandjiris v. Hartman, 196 Mo. 539, 94 S. W. 270.

32. See post, § 8.

33. See 6 C. L. 490. See, also, exhaustive monograph, 4 C. L. 472, n. 95 et seq.

34. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815; Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422.

35. Complaint held insufficient to charge abuse of process. McClerg v. Vielee, 102 N. Y. S. 45.

36. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

37. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815. In other words, a willful perversion of the process of the court to effect some collateral end and one not within the scope of the action when regularly and properly pursued. Id.

38. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815; Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422, overruling a dictum in the same case in an earlier stage [138 N. C. 174, 50 S. E. 571, cited 6 C. L. 491, n. 10] to the effect that it was essential.

39. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422.

40. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815; Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422.

erty on execution against another, in the absence of malice, oppression, or injury in the manner, method, or hour of seizure, amount to actionable abuse of process.[42]

§ 2. *Responsibility of defendant for the prosecution or suit and his participation therein.*[43]—The principal is responsible for the act of his agent in beginning a prosecution,[44] hence a corporation may be liable.[45] A corporation, however, is not liable when the act of the employe is beyond the scope of his authorized employment, not authorized nor ratified by the company.[46] One committing the tort as agent is equally liable individually.[47] A levying officer, however, is not ordinarily an agent within this rule;[48] and conversely, an informer is not responsible where public officers without his procurement execute invalid process,[49] the tort, if any, being then a false arrest.[50] Affirmative ratification of the commencement of a prosecution by another is essential to charge one with malicious prosecution by such person as his agent.[51] One may be liable, though not the actual prosecutor, if he aided, abetted, and assisted in the prosecution,[52] and it is not essential that joint defendants were all active in the institution of the prosecution; they are liable if in malice and without probable cause they came in and participated.[53] Defendant is estopped to question the sufficiency of an affidavit and warrant which he himself made and on which plaintiff was arrested.[54] When plaintiff in a wrongful attachment directs a levy thereunder, he is liable with the officer making the levy as a cotrespasser.[55] It is no defense that plaintiff, through defendant's neglect, was charged with a crime different from that defendant intended.[56]

§ 3. *The prosecution of the plaintiff.*[57]—The now plaintiff must have been

41. Whitesell v. Study [Ind. App.] 76 N. E. 1010.

42. Williams v. Ellis, 101 Me. 247, 63 A. 818.

43. See 6 C. L. 491. See, also, exhaustive monograph, 4 C. L. 480. Responsibility of defendant as a jury question, see § 9.

44. Coyle v. Snellenburg, 30 Pa. Super. Ct. 246.

45. A private corporation, like an individual, is liable for the acts of its agents in instituting a malicious prosecution, authorized or ratified by the corporation, or within the scope of the authority conferred. Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490. Where a warrant was sworn out for the arrest of a person charged with stealing from a railroad company solely on the information of one of the railroad's detectives, the detective is to be regarded as the agent of the railroad in that behalf. Evans v. Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

46. Dobbins v. Little Rock R. & Elec. Co. [Ark.] 95 S. W. 794.

47. One charged with malicious prosecution as agent is liable therefor though the proof shows the prosecution by him was his individual act unauthorized by his principal. Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490. An individual is liable though in making the complaint he was acting as an officer of a corporation, and not in his private capacity. Murphy v. Eidlitz, 99 N. Y. S. 950.

48. An officer levying a writ unlawfully issued is not liable for the consequences of its issuance, as distinguished from an unlawful and oppressive levy, unless he participated in its procurement. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

49. Under Ballinger's Ann. Codes & St. §§ 7010, 7012, which do not authorize the arrest of a person on a search warrant prior to its execution and finding the property sought in his possession, malicious prosecution will not lie for the arrest and imprisonment of a person on a search warrant prior to its execution where defendant as plaintiff in the search warrant proceeding neither counseled, authorized, nor approved, the illegal acts of the officers. Ton v. Stetson [Wash.] 86 P. 668.

50. Ton v. Stetson [Wash.] 86 P. 668.

51. Mere acquiescence by silence is insufficient. Shannon v. Sims [Ala.] 40 So. 574. Where the only evidence of ratification or authorization by defendant was the inference to be drawn from a conversation by plaintiff's husband with defendant soon after the arrest in which defendant remarked that plaintiff would not have been arrested had she not stolen the mortgage, it is insufficient to overcome the testimony of defendant and his alleged agent that there was no authorization or ratification. Id.

52. Baker v. Moore, 29 Pa. Super. Ct. 301.

53. Russell v. Chamberlain [Idaho] 85 P. 926.

54. Rutherford v. Dyer [Ala.] 40 So. 974.

55. Goldstein v. Drysdale [Ala.] 42 So. 744.

56. Plaintiff was arrested for speaking to a crowd in a prohibitive district in a city and charged therewith but the formal complaint sworn to by the defendant charged plaintiff with the use of indecent language. Meyer v. Lally, 143 Mich. 578, 13 Det. Leg. N. 67, 107 N. W. 109.

prosecuted; damage from prosecuting another is not enough.[58] The general rule is that the malicious prosecution of an ordinary civil suit is not actionable,[59] but the malicious prosecution of bankruptcy proceedings is actionable,[60] as is a wrongful attachment.[61]

§ 4. *Termination of prosecution in plaintiff's favor.*[62]—The termination[63] must have been in the plaintiff's favor,[64] and as to all indictments growing out of the same alleged criminal act.[65] The action when brought on the same day the discharge is obtained is not as matter of law prematurely brought.[66]

§ 5. *Want of reasonable and probable cause.*[67]—Since there must have been no probable cause, proof of the commission of the offense charged is a good defense.[68] Knowledge of facts, actual or apparent, strong enough to justify a reasonable man in the belief that lawful grounds existed for the prosecution, constitutes reasonable cause.[69] Belief in the guilt of accused and reasonable cause for the belief are essential in establishing probable cause.[70] It is not necessary that the defendant

57. See 6 C. L. 491. See, also, exhaustive monograph, 4 C. L. 483, n. 14 et seq.

58. Malicious prosecution cannot arise out of a mere seizure of one's property on an execution against another. Williams v. Ellis, 101 Me. 247, 63 A. 818.

59. Motion against sheriff and sureties on bond under Sayles' Civ. St. art. 2386, for failure to levy an execution, held an ordinary civil suit within the rule. Nowotny v. Grona [Tex. Civ. App.] 17 Tex. Ct. Rep. 44, 98 S. W. 416.

60. King v. Sullivan & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 77, 92 S. W. 51. A proceeding in involuntary bankruptcy, without arrest of person or seizure of property, is nevertheless a proper predicate for an action. Wilkinson v. Goodfellow-Brooks Shoe Co., 141 F. 218.

61. When attachment is sued out wrongfully, maliciously, and without probable cause, the right of plaintiff to recover for the tort does not depend on whether the property levied on was subject to execution. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

62. See 6 C. L. 492. See, also, exhaustive monograph, 4 C. L. 485.

63. A discharge by a court or magistrate having jurisdiction to determine whether accused should be held for trial by another court is a termination of the proceeding. Shattuck v. Simonds, 191 Mass. 506, 78 N. E. 122.

64. Where a prosecution was tried before a justice of the peace and accused found guilty, and on appeal to the county court, after continuance from time to time, was dismissed and the prosecution finally terminated, the rule requiring termination of the prosecution in favor of accused was met. Evans v. Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

65. When a plurality of indictments for different crimes are found by the grand jury against an accused based on the same transaction, he cannot maintain malicious prosecution on the termination of proceedings under one indictment in his favor while another of the indictments is pending. Gaiser v. Hurleman, 74 Ohio St. 271, 78 N. E. 372.

66. Enright v. Gibson, 119 Ill. App. 411, afd. 219 Ill. 550, 76 N. E. 689.

67. See 6 C. L. 492. See, also exhaustive monograph, 4 C. L. 489. Probable cause as a jury question, see § 9.

68. Shannon v. Sims [Ala.] 40 So. 574.

69. Rawson v. Leggett, 184 N. Y. 504, 77 N. E. 662.

70. Malich v. Josephson, 50 Misc. 315, 98 N. Y. S. 671; Moore v. First Nat. Bank, 140 N. C. 293, 52 S. E. 944; Martin v. Corscadden [Mont.] 86 P. 33; Izzo v. Viscount [N. J. Law] 64 A. 953. Where it appears, after a prudent and conscientious inquiry is made, that testimony is at hand or obtainable justifying a well founded belief that accused's guilt can be shown, there is probable cause. Martin v. Corscadden [Mont.] 86 P. 33. When one prosecutes another for apparent guilt arising from circumstances which the prosecutor himself believes, there can be no liability as for malicious prosecution. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815. There must be such an appearance of guilt arising from facts and circumstances as to produce belief. Coyle v. Snellenburg, 30 Pa. Super. Ct. 246. There must be such a state of facts as would lead a man of ordinary caution and prudence to believe and entertain an honest and strong suspicion that the accused is guilty. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. The test of the propriety of commencing prosecution is whether such a state of facts was known at the time the prosecution was undertaken as could induce a person of ordinary caution and prudence to entertain an honest belief and strong suspicion of guilt. Coyle v. Snellenburg, 30 Pa. Super. Ct. 246. Probable cause does not necessarily depend on the actual guilt of the accused but may rest on the prosecutor's belief in his guilt when based on reasonable grounds. Conner v. Wetmore, 110 App. Div. 440, 96 N. Y. S. 999; Hobson v. Koch, 100 N. Y. S. 893. The mere falsity of statements in an affidavit on which an arrest is made is insufficient as a basis for malicious prosecution. Izzo v. Viscount [N. J. Law] 64 A. 953. Conduct sufficient to excite a well grounded suspicion in men unskilled in technical rules of law is not the test of probable cause. Reynolds v. Dunlap [Kan.] 84 P. 720. Where a charge of crime is made under circumstances indicating it to be well founded and worthy of belief, no liability as for malicious prose-

should have seen and conversed with the witnesses themselves to establish probable cause.[71] The test of probable cause is to be applied as of the time when the action complained of was taken.[72] An existing probable cause is not destroyed by advice of one in charge of an investigation of the guilt of the accused that he was not sufficiently connected with the crime.[73]

Want of probable cause cannot be inferred from malice,[74] nor from the fact alone that defendant who saw a burglary committed persisted in the belief that plaintiff was the burglar and assisted in the prosecution.[75] When probable cause exists it is an absolute defense irrespective of malice.[76] Acting in an official capacity is not necessarily an absolute defense but is to be considered in determining the question of probable cause.[77] While the finding of a true bill is prima facie proof of probable cause[78] and a conviction is conclusive,[79] a verdict or result favorable to the then defendant is not conclusive as to want of probable cause,[80] and it is the better rule that the discharge of plaintiff from the prosecution is not ground to infer that there was no probable cause, its procurement by defendant not having been shown.[81] In malicious civil prosecutions the former judgment unlike criminal proceedings is between the same parties and concludes them as to matters litigated.[82]

§ 6. *Malice.*[83]—Malice in law exists where there has been a wrongful act knowingly and intentionally done without just cause or excuse.[84] The specific

cution arises, though it is afterwards made to appear that the charge was false. Morgan v. Illinois Cent. R. Co., 117 La. 671, 42 So. 216.

Want of probable cause: Representations of a third person as to matters not tending to establish guilt of the accused do not, in the absence of further inquiry, amount to probable cause. Coyle v. Snellenburg, 30 Pa. Super. Ct. 246. Commencement of a criminal prosecution to compel payment of a debt raises a presumption of want of probable cause. MacDonald v. Schroeder, 214 Pa. 411, 63 A. 1024, rvg. 28 Pa. Super. Ct. 128.

Probable cause: Possession of stolen property under circumstances warranting a conviction for the larceny thereof constitutes probable cause for instituting a prosecution. Tyson v. Bauland Co. [N. Y.] 79 N. E. 3.

71. Martin v. Corscadden [Mont.] 86 P. 33.

72. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. In ascertaining whether defendant had probable cause for alleged wrongful suing out of an attachment, only the facts which were known to him at the time he sued out the attachment will be considered. Moore v. First Nat. Bank, 140 N. C. 293, 52 S. E. 944.

73. Where plaintiff, a mail carrier, was suspected of crime and a postoffice inspector was detailed to investigate, his report of insufficient connection of plaintiff with the crime did not overcome the probable cause arising from prior and subsequent occurrences. Hobson v. Koch, 100 N. Y. S. 893.

74. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

75. Baker v. Moore, 29 Pa. Super. Ct. 301.

76. Conner v. Wetmore, 110 App. Div. 440, 96 N. Y. S. 999.

77. Skeffington v. Eylward, 97 Minn. 244, 105 N. W. 628.

78. The finding of an indictment by the grand jury is prima facie evidence of probable cause. Jones v. Louisville & N. R. Co., 29 Ky. L. R. 945, 96 S. W. 793. Where a committing magistrate has bound the party over or a grand jury has found a true bill, such action makes out a case of probable cause. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

79. Guilt of the offense, as matter of course, furnishes probable cause. East v. Brooklyn Heights R. Co., 101 N. Y. S. 364. So irrespective of the question of malice. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

80. A verdict of guilty which is set aside and followed by a new trial and verdict of not guilty is not conclusive evidence of probable cause. MacDonald v. Schroeder, 214 Pa. 411, 63 A. 1024, rvg. 28 Pa. Super. Ct. 128.

81. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862, exhaustively discussing both doctrines. A discharge by a magistrate for lack of jurisdiction has no tendency to show want of probable cause. Pierce v. Doolittle, 130 Iowa 333, 106 N. W. 751. Discharge by a magistrate on request of the prosecuting attorney is not prima facie evidence of want of probable cause. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862. The plaintiff in an action for malicious prosecution must prove some other facts than acquittal as tending to show want of probable cause. Jones v. Louisville & N. R. Co., 29 Ky. L. R. 945, 96 S. W. 793.

82. A previous judgment in favor of defendant in an action on a note in which attachment was sued out is conclusive of the wrongfulness of the attachment as to such defendant. Goldstein v. Drysdale [Ala.] 42 So. 744.

83. See 6 C. L. 494. See, also, exhaustive monograph, 4 C. L. 498. Malice as a jury question, see § 9.

84. An instruction defining a malicious

malice which characterizes the tort is not the same as the actual malice or personal ill will essential to a recovery of punitive damages.[85] Malice is never found as matter of law from want of probable cause; the jury, and only the jury, may infer it therefrom.[86] As to whether the existence of want of probable cause alone gives rise to an inference of malice the decisions are inharmonious, it being held in most jurisdictions, without qualification, that malice may be inferred from want of probable cause,[87] while in others it is held that though an inference of malice may be drawn from the existence of want of probable cause, the inference does not necessarily follow.[88] It is held in Washington that mere prima facie proof of want of probable cause will not justify an inference of malice,[89] and in Kentucky that when other facts besides acquittal are introduced tending to show want of probable cause, malice will be inferred.[90] Malice is presumed when a criminal prosecution is instituted to compel payment of a debt,[91] but cannot be inferred from an ordinary act of negligence,[92] nor from the fact alone that defendant, who saw a crime committed, persisted in the belief that plaintiff was the guilty person and assisted in the prosecution.[93]

§ 7. *Advice of private counsel, prosecuting attorney, or magistrate.*[94]—To make the defense of advice of counsel complete, it is necessary that the advice be sought and acted upon in good faith,[95] and that a full disclosure of all material facts be made to counsel.[96] Following advice of counsel in institution of prosecution re-

act, in law, as whatever is wrongfully, vexatiously, and purposely done, held not erroneous. Rutherford v. Dyer [Ala.] 40 So. 974. Any other motive than a bona fide purpose to bring the accused to punishment as a violator of the criminal law, or associated with such bona fide purpose, is malicious. Id. To constitute malice there must have been a motive or purpose and it must have been an improper one. Jenkins v. Gilligan [Iowa] 108 N. W. 237. Plaintiff cannot complain of an instruction defining malice as a disposition to do the person prosecuted a wrong without legal excuse. Gaither v. Carpenter [N. C.] 55 S. E. 625.

85. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815. Malice in the sense of fixing responsibility need not necessarily be personal ill will, but may be said to exist where there has been a wrongful act knowingly and intentionally done without just cause or excuse. Id.

86. McCarthy v. Weir, 113 App. Div. 435, 99 N. Y. S. 372, citing Stewart v. Sonneborn, 98 U. S. 193, 25 Law. Ed. 116, and other cases.

87. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862; Evans v. Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3; Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320; Rutherford v. Dyer [Ala.] 40 So. 974. When want of probable cause is shown, a prima facie case is made for the jury. Martin v. Corscadden [Mont.] 86 P. 33.

88. Cook v. Bartlett, 100 N. Y. S. 1032; Jenkins v. Gilligan [Iowa] 108 N. W. 237; Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751; Fetzer v. Burlew, 99 N. Y. S. 1100; Baker v. Moore, 29 Pa. Super. Ct. 301.

89. Ton v. Stetson [Wash.] 86 P. 668.

90. Jones v. Louisville & N. R. Co., 29 Ky. L. R. 945, 96 S. W. 793.

91. MacDonald v. Schroeder, 214 Pa. 411, 63 A. 1024, rvg. 28 Pa. Super. Ct. 128.

92. Malice cannot be inferred from doing an act without that ordinary prudence and discretion which persons of mature mind and sound judgment are presumed to have. Jenkins v. Gilligan [Iowa] 108 N. W. 237.

93. Baker v. Moore, 29 Pa. Super. Ct. 301.

94. See 6 C. L. 494. See, also, exhaustive monograph, 4 C. L. 502, 503. Advice of counsel as a jury question, see post, § 9.

95. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862; Gurden v. Stevens [Mich.] 13 Det. Leg. N. 840, 109 N. W. 856. Where the facts are all consistent with the reasonable theory of the innocence of the party, and the prosecutor knows or has good reason to believe that the person is not guilty, he cannot have reasonable cause for the prosecution and would still be responsible for his actions, regardless of advice of counsel. Gurden v. Stevens [Mich.] 13 Det. Leg. N. 840, 109 N. W. 856. The advice of counsel is no protection to one who acts maliciously and knows that the party whom he is prosecuting is not guilty, and that all of the acts which the party against whom he complains has been guilty of are all consistent with the natural innocence of the accused, and if he proceeds under such circumstances, advice of counsel is no protection. Id. To fulfill the requirements of seeking and following in good faith advice of counsel, it is essential that a full and fair statement of material facts and prosecutor's knowledge of the transaction be made to counsel, and that the advice lead to the honest belief of the accused's guilt. Haas v. Powers [Wis.] 110 N. W. 205.

96. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 772, 105 N. W. 862; Shannon v. Sims [Ala.] 40 So. 574; Haas v. Powers [Wis.] 110 N. W. 205.

Disclosure held insufficient: Where the actual false pretense was that plaintiff's brother told, etc., while the pretense pleaded was that plaintiff told, etc., it could not be said

buts malice.[97] Where plaintiff in attachment does not make the affidavit until advised to do so by an attorney after all the facts have been fairly submitted, he is not liable.[98]

§ 8. *Damages.*[99]—Proof of malicious prosecution is sufficient proof of actual damages.[1] The fact that a person arrested does not secure his release on his own recognizance does not as matter of law indicate that he attached small importance to his arrest or incarceration or deprive him of the right to damages on the ground that he does not consider himself injured.[2] Mental suffering proximately caused by the injury is an element of actual damage,[3] but damages for mental shock and distress of a parent caused by a malicious prosecution of infant children are not recoverable.[4] Hence the ill health and death of a parent in consequence of the malicious prosecution of infant children of deceased are not elements of damages in an action for the tort.[5] Plaintiff is entitled to recover as damages in malicious prosecution a reasonable attorney's fee paid by him in the case in which the prosecution was had.[6] Advice of counsel, unless such as legally recognized as a defense, is ordinarily no protection in the matter of actual damages.[7] One subjected to a malicious prosecution or abuse of process must, pursuant to the general rule, do whatever he reasonably can to improve all reasonable and proper opportunities to lessen the injury.[8] Ordinarily the general rules for the measure of damages apply.[9] As a general rule the jury are not bound as matter of law to give more than nominal damages,[10] and the amount rests largely in their discretion.[11] For the issuance and levy of a writ of attachment in the absence of statutory grounds, the plaintiff in the writ is liable in actual damages.[12] When the sureties on an attachment bond take no other part in the transaction beyond the execution of the bond, they cannot be held for anything more than actual damages in the event of the illegality

as matter of law that there had been a full and accurate statement of the facts to counsel. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862.

97. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422.

98. Goldstein v. Drysdale [Ala.] 42 So. 744. The advice of counsel, whether private or attorney for the commonwealth in the prosecution against plaintiff, is important, if not conclusive in determining the question of malice. Baker v. Moore, 29 Pa. Super. Ct. 301.

99. See 6 C. L. 495. See, also, exhaustive monograph, 4 C. L. 503.

1. Enright v. Gibson, 119 Ill. App. 411, afd. 219 Ill. 550, 76 N. E. 689.

2. Instruction held properly refused. Reynolds v. Dunlap [Kan.] 84 P. 720.

3. Shannon v. Sims [Ala.] 40 So. 574. Where plaintiff was arrested and had to give bond, mental suffering would be inferred therefrom as a natural and proximate result. Id.

4, 5. Sperier v. Ott, 116 La. 1087, 41 So. 323.

6. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

7. King v. Erskins, 116 La. 480, 40 So. 844. Defendants, even in the absence of actual malice, are not protected by the advice of counsel from liability for actual damages, such as expenses incurred, inconvenience suffered, and injury to feelings and character, unless it be clearly shown that all the facts were laid before counsel and that he actually gave the advice relied on. Id.

8. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422. Where wrongful attachment of property is claimed, testimony of an agent of a bonding company, surety on the prosecution bond, is admissible to show the cost of a replevy bond to secure the release of the property. Id.

9. The measure of damages for the wrongful attachment of a railroad company's cars is the interest on their value, increased or diminished, as the case may be, by the difference between the deterioration in the cars if in daily use and their deterioration while wrongfully tied up, if all injury could not have been avoided by giving bond. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422.

10. Instruction held erroneous as equivalent to directing a substantial verdict for plaintiff. Cook v. Bartlett, 100 N. Y. S. 1032.

11. **Excessiveness:** $150 held not excessive in action for malicious prosecution of a boy charged with embezzlement of money received for goods delivered C. O. D. Coyle v. Snellenburg, 30 Pa. Super. Ct. 246. $550 held not excessive damages for malicious prosecution for felonious larceny, though plaintiff was not committed to jail or required to give bail. Martin v. Corscadden [Mont.] 86 P. 33. $400 held not excessive compensatory damages for malicious prosecution on charge of larceny. Haas v. Powers [Wis.] 110 N. W. 205. $1,200 held not excessive damages for malicious prosecution for threatening to assault with intent to kill. Shea v. Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552.

of the attachment,[13] and the same is true of the levying officer's sureties and his indemnitors.[14] On a verdict for plaintiff in malicious prosecution, punitive or exemplary damages may be awarded by the jury,[15] but the right does not attach as a conclusion of law because the jury have found the issue of malice against the defendant.[16] Such damages cannot, however, be awarded unless there is an element of fraud, malice, gross negligence, insult, or other cause of aggravation in the act which causes the injury.[17] For maliciously and without probable cause procuring a writ of attachment to be issued, the plaintiff in the writ is liable for exemplary damages,[18] and, if levied on exempt property by order of the plaintiff, both he and a levying officer participating therein,[19] under circumstances of oppression and aggravation, would be liable for exemplary damages.[20] Malice and want of probable cause must concur to authorize a recovery for exemplary damages for wrongful issuance of a writ of attachment.[21] By statute in some states malice, actual or presumed, warrants a recovery of damages for the sake of example,[22] and in such jurisdictions punitive damages are recoverable though not so designated in the pleading.[23] The size of a verdict does not necessarily characterize the damages assessed as punitive.[24] Infants may recover exemplary damages for malicious prosecution.[25] In an action against a master for the act of his servant, exemplary damages are not recoverable for the malice of the servant.[26]

§ 9. *General matters of pleading and practice.*[27]—In Louisiana the prescription affecting quasi offenses applies in actions for malicious prosecution,[28] and begins to run from the time damage is sustained.[29] A complaint should with reasonable certainty set forth all the elements of the tort.[30] Ordinarily, a count containing a plurality of causes of action is subject to motion to separately state and number,[31] and under the New York Code this rule applies when the actions are false imprisonment and malicious prosecution,[32] but the motion is not well taken when the count in question is subject to the construction, in harmony with plaintiff's concession, that the cause of action is malicious prosecution only.[33] A motion to strike will not reach a count which does not aggrieve the movant, notwithstanding its irrelevancy.[34] Evidence when pleaded is ordinarily subject to be stricken out on

12, 13, 14. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

15, 16. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

17. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815. It is held in North Carolina that malice in reference to the question of punitive damages, unlike its meaning in fixing responsibility, means actual ill will. Id.

18, 19, 20. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

21. Petition failing to allege want of probable cause will not sustain recovery of exemplary damages. Faroux v. Cornwell [Tex. Civ. App.] 13 Tex. Ct. Rep. 977, 90 S. W. 537.

22. Civ. Code, § 4290. Martin v. Corscadden [Mont.] 86 P. 33.

23. Instruction authorizing assessment of punitive damages held warranted in the absence of demand therefor in pleading. Martin v. Corscadden [Mont.] 86 P. 33.

24. Verdict for $550 and $102.60 costs held not to include punitive damages. Martin v. Corscadden [Mont.] 86 P. 33.

25. Sperier v. Ott, 116 La. 1037, 41 So. 323.

26. East v. Brooklyn Heights R. Co., 101 N. Y. S. 364.

27. See 6 C. L. 495. See, also, exhaustive monograph, 4 C. L. 505.

28. To charge a person with a crime without actual malice, but also without probable cause, is a quasi offense, the action to recover damages resulting from which is barred by the prescription of one year from the day on which the damage was sustained. King v. Erskins, 116 La. 480, 40 So. 844.

29. When there is an interval of time between the date on which the charge is preferred and that on which it is made known to the person so charged and to the public by the arrest of such person, the damage is sustained on and the prescription runs from the day of the arrest. King v. Erskins, 116 La. 480, 40 So. 844.

30. Complaint held sufficient as against demurrer. Russell v. Chamberlain [Idaho] 85 P. 926. Complaint held deficient to plead either malicious prosecution or abuse of process. McClerg v. Vielee, 102 N. Y. S. 45.

31. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

32. Code Civ. Proc. § 484, construed. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

33. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

34. Count in action for malicious prose-

motion.[35] Averments of special damages are permissible.[36] When a conspiracy is charged against several defendants to injure plaintiff by the abuse of judicial process, the failure to prove the conspiracy puts the plaintiff to his election which of defendants he will sue,[37] but a failure of defendants to move the court to require the election to be made is a waiver of the right.[38] A complaint for malicious prosecution will not be construed as one for false imprisonment unless it fairly bears that construction.[39] Under the Codes a general denial alone is the correct and scientific answer to a complaint for malicious prosecution and raises the whole issue on the complaint.[40] Advice of counsel to be available as a defense must be specially pleaded.[41]

The ordinary rule as to presumed denial of defensive matter applies.[42] Proof of wrongful attachment will not support a count for malicious prosecution of the attachment suit.[43]

The burden of proof is on the plaintiff to show want of probable cause,[44] the termination of the prosecution on which his action is based prior to its commencement,[45] and each of the elements of the action,[46] but when a criminal prosecution is instituted to compel payment of a debt, the burden of showing absence of malice and want of probable cause is shifted to defendant.[47] It is held in Montana that when the proof tends to show want of probable cause, the burden then rests on defendant to rebut the prima facie case by showing probable cause and want of malice.[48] The burden is on defendant to prove that he sought counsel with an honest purpose of being informed as to the law in order that advice of counsel shall be available as a defense,[49] that he made a full, correct, and honest disclosure to his counsel of all material facts in his knowledge bearing on the guilt of accused,[50] and that he was in good faith guided by the advice of counsel,[51] though where it is shown that defendants received advice of counsel, the presumption arises that it was relied on.[52] It is presumed that proceedings commenced, which are not shown to have been terminated, are still pending.[53]

cution stating plaintiff's residence and business held not subject to motion to strike. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

35. Count in action for malicious prosecution held merely a narration of evidence to prove malice. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749.

36. Complaint setting out fact of newspaper publications of charge and arrest held not subject to motion to strike. Ring v. Mitchell, 45 Misc. 493, 92 N. Y. S. 749, discussing conflict of New York cases.

37, 38. Sehon v. Whitt, 28 Ky. L. R. 1222, 29 Ky. L. R. 691, 92 S. W. 280.

39. The allegation of a complaint that the defendant, without just or probable cause, made complaint against the plaintiff and wrongfully and unlawfully caused his arrest and imprisonment on a certain false charge is not equivalent to an averment that the warrant was illegal or improperly issued, hence a contention that the action was because of such allegation one for false imprisonment as well as malicious prosecution was untenable. Clark v. Palmer, 101 N. Y. S. 759.

40. East v. Brooklyn Heights R. Co., 101 N. Y. S. 364.

41. Sehon v. Whitt, 28 Ky. L. R. 1222, 29 Ky. L. R. 691, 92 S. W. 280.

42. Where plaintiff before the suing out of a distress warrant for the illegality of which he was suing had removed the first bail of cotton from the rented premises and sold it, and defendant alleged that it was removed and sold without his consent, plaintiff could show that by the lease he was to have the first bail, notwithstanding his failure to plead such stipulation. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832.

43. Goldstein v. Drysdale [Ala] 42 So. 744.

44. Malich v. Josephson, 50 Misc. 315, 98 N. Y. S. 671; Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862.

45. Gaiser v. Hurleman, 74 Ohio St. 271, 78 N. E. 372.

46. See ante, § 1 A. Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751.

47. MacDonald v. Schroeder, 214 Pa. 411, 63 A. 1024, rvg. 28 Pa. Super. Ct. 128.

48. Martin v. Corscadden [Mont.] 86 P. 33.

49, 50, 51. Evans v. Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3.

52. Rawson v. Leggett, 184 N. Y. 504, 77 N. E. 662.

53. Where plaintiff alleges as actionable a seizure of property in his lawful possession on an execution against another, and the beginning of proceedings by plaintiff for its recovery, but not alleging their termination, it will be presumed that they are still pending. Williams v. Ellis, 101 Me. 247, 63 A. 818.

Evidence.[54]—In some jurisdictions it is held that the guilt or innocence of the plaintiff on the charge preferred is not in issue and evidence thereof is inadmissible,[55] but in Alabama this rule is not adhered to.[56] A claim of collusion with the magistrate before whom prosecution is instituted makes evidence of his good faith admissible.[57] The general reputation of the plaintiff at the time the prosecution was instituted against him is in issue,[58] and evidence of his previous bad reputation is admissible to rebut proof of want of probable cause as well as to mitigate damages,[59] but proof of particular instances of bad conduct cannot be received.[60] Plaintiff's motives and the extent of his injury are in issue and may be shown on cross-examination of himself as a witness,[61] and defendant's intent and motive are also in issue.[62] Though parol evidence is admissible to explain a receipt, one may be estopped to take advantage of the rule.[63] When defendant is not responsible for plaintiff's arrest, the sufficiency of the warrant for arrest is immaterial.[64] Defendant is not concluded from giving evidence on the question of malice because the prosecution was instituted to collect a debt.[65] Hence, it is proper to prove advice of counsel even though there is lack of probable cause on the existence as well as the degree of malice,[66] and also on probable cause and absence of malice.[67] An entry in the judgment terminating the alleged malicious prosecution, that "there seeming to be no grounds for complaint, judgment is hereby entered" against complaining witness for costs, is inadmissible as a prior adjudication of want of probable cause or as an expression of opinion by the magistrate thereon.[68] In malicious prosecution for levy of an attachment, evidence of an excessive levy is immaterial,[69] though the rule

54. See 6 C. L. 495.

55. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. Where plaintiff had been prosecuted for embezzlement, a debtor and creditor account showing the prosecution indebted to plaintiff, of which account prosecutor had no knowledge at the time of beginning the prosecution, was inadmissible. Id. Acquittal of the charge is irrelevant on the issue of probable cause. Id.

56. In malicious prosecution for trespass, plaintiff is entitled to show possession of the premises at the time of the alleged trespass by another than defendant. Rutherford v. Dyer [Ala.] 40 So. 974. Notwithstanding the affidavit on which a warrant for arrest is based is void, defendant in malicious prosecution may show in bar that plaintiff had committed the offense which the affidavit attempted to charge. Shannon v. Sims [Ala.] 40 So. 574.

57. In an action for malicious prosecution for malicious injury to a church, wherein it was claimed that the justice before whom the prosecution was instituted and the defendant colluded to extort pay for the injury to the church and the fees of the justice, when both knew that the admitted breaking of the glass was not malicious, it was proper to show the good faith of the justice (Gurden v. Stevens [Mich.] 13 Det. Leg. N. 840, 109 N. W. 856), and the fact that in his examination as a witness he gave his opinion of plaintiff's guilt was not cause for reversal, though his opinion was not material to the issue except as made by such claim (Id.).

58. Martin v. Corscadden [Mont.] 86 P. 33. As negativing probable cause of a charge of threatening to assault another with intent to kill, plaintiff was entitled to prove his general good reputation as a peaceable citizen. Shea v. Cloquet Lumber Co., 97 Minn. 41, 105 N. W. 552.

59. Martin v. Corscadden [Mont.] 86 P. 33.

60. Proof of confession by plaintiff of prior larcenies held inadmissible. Martin v. Corscadden [Mont.] 86 P. 33. An offer to prove particular items of prior bad conduct in rebuttal of malice must be definite. Id.

61. Gurden v. Stevens [Mich.] 13 Det. Leg. N. 840, 109 N. W. 856. In an action for malicious prosecution for malicious injury to a church, a full cross-examination of the plaintiff as to his knowledge of or connection with the injuries to the church both before and after the injury complained of was properly permitted. Id.

62. In an action for malicious prosecution for malicious injury to a church, the defendant was entitled to show the fact that for months injuries to the church had been serious and frequent as characterizing his intent and motive. Gurden v. Stevens [Mich.] 13 Det. Leg. N. 840, 109 N. W. 856.

63. Where plaintiff as an agent has, pursuant to a rule of his employer, certified at regular intervals the condition of his accounts and that there is nothing due him, and the employer has relied thereon, plaintiff is estopped to dispute the recitals thereof. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

64. Morgan v. Illinois Cent. R. Co., 117 La. 671, 42 So. 216.

65, 66. Cook v. Bartlett, 100 N. Y. S. 1032.

67. Sehon, Blake & Stevenson v. Whitt, 28 Ky. L. R. 1222, 29 Ky. L. R. 691, 92 S. W. 280.

68. But a failure to object until after admission renders a motion to strike out such entry a discretional matter with the trial court. Martin v. Corscadden [Mont.] 86 P. 33.

would be otherwise in a suit for abuse of process.[70] The wealth of a defendant may be shown for the purpose of estimating exemplary damages;[71] but in an action against two or more defendants, the pecuniary ability of one should not be considered in determining the damages to be assessed jointly.[72] The declarations of the defendant at the time he instituted the prosecution and accompanying the act are a part of the transaction and admissible,[73] and this rule applies to declarations of officers of a corporation when the corporation is defendant.[74] Defendant may also prove what was said in his presence as well as what was said to him tending to show probable cause and absence of malice.[75] Plaintiff is entitled to show a termination of the prosecution by abandonment or otherwise.[76] Defendant cannot show that some of the jury voted for conviction prior to voting for acquittal on the previous proceeding.[77]

Pursuant to general rule, mere self-serving declarations are inadmissible to establish that money retained was under claim of right and not embezzled from defendant,[78] and this is particularly true of statements in that regard made to an attorney at law,[79] and defendant cannot in this way prove his unwillingness to forward the prosecution.[80] The declarations of a party, to come within the rule admitting them in favor of the party by whom made, must accompany and explain an act done which is a fact in issue or is relevant to the issue.[81] Public acts or regulations

69, 70. Moore v. First Nat. Bank, 140 N. C. 293, 52 S. E. 944.

71. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

72. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. Where there was evidence as to the wealth of one only of several defendants and that in generalizations, like the "biggest" and "wealthiest" sewing machine company in the world, it was error to instruct that the wealth, if any, of the defendants was to be considered as an element in estimating damages. Id.

73. Evidence as to what occurred between the magistrate and defendant at the time the information was sworn to charging plaintiff with crime is admissible on the question of malice. Fetzer v. Burlew, 99 N. Y. S. 1100. In an action for malicious prosecution for obstruction of a highway, evidence of defendant's statements and conduct with reference to plaintiff's fence in the alleged highway was admissible as tending to show the animus of the defendant. Skeffington v. Eylward, 97 Minn. 244, 105 N. W. 638.

74. The declarations of the manager of a corporation made to a justice of the peace at the time a warrant was procured on which plaintiff was arrested are admissible in an action against the corporation for malicious prosecution arising out of the proceedings so instituted. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

75. In action for malicious prosecution by search warrant proceeding, testimony of police officer detailed to investigate as to what was said by witness to the clerk of the court in presence of defendant at the time warrant was requested held admissible. Conner v. Wetmore, 110 App. Div. 440, 96 N. Y. S. 999. In an action for malicious prosecution on a charge of embezzling the proceeds of consigned goods, statements of defendant's agent to defendant on returning from plaintiff's place of business, just after effecting the deal, were admissible both as corroborative of the agent and as substantive testimony. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

76. Grand jury docket showing an investigation and "no bill" is good evidence of a termination of the prosecution. Shannon v. Sims [Ala.] 40 So. 574. So is also such a docket showing an investigation and that the cause had not been continued for further investigation. Id. The judgment of acquittal is admissible only to show termination of the prosecution. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

77. Testimony of a juror who sat in the criminal prosecution that the jury was out a considerable time, and at first stood seven for acquittal and five for conviction before acquitting, is irrelevant. Gaither v. Carpenter [N. C.] 55 S. E. 625.

78. Where plaintiff was prosecuted for embezzling from his principal, he could not show that he had disclosed to a subemploye of his own, owing no duty to report to the principal, the fact that he was withholding funds for a debt of the principal to him. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. Nor could he show what such subemploye stated he would do in such circumstances, in the absence of any showing that the conversation was communicated to defendants. Id.

79. Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. Nor the advice of his attorney relative to an account made up by him against the prosecutor to rebut the theory of embezzlement after having repeatedly certified to prosecutor that no such claim existed. Id.

80. Defendant held not entitled to prove statement he made to justice of peace as to his desire to dismiss prosecution as to plaintiff. Rutherford v. Dyer [Ala.] 40 So. 974.

81. Declaration of plaintiff as to retention of money on account which he was prosecuted for embezzling held irrelevant.

on which the prosecution was based,[82] or papers which were the subject of the crime charged,[83] and papers in the prosecution,[84] are admissible as documents ordinarily are.

The sufficiency of evidence to prove probable cause[85] and its absence,[86] and the absence of malice,[87] has been declared in numerous cases cited in the foot notes. Though acquittal of accused is evidence of innocence in an action for malicious prosecution, it does not of itself prove malice or want of probable cause,[88] nor is a conviction, which has been reversed on appeal, conclusive as to the existence of probable cause.[89] A judgment foreclosing a distress warrant is not necessarily conclusive as to the legality of the use of the warrant.[90]

Generally the right to open and close is with defendant when the action is a counterclaim.[91]

Instructions should not be argumentative[92] nor misleading,[93] nor should they single out and make prominent particular facts,[94] and should be technically correct[95] and in harmony with the theory of the case,[96] nor should they assume as es-

Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320.

82. In an action for malicious prosecution on a charge of violating a rule of a board of health which was made an offense by statute, a certified copy of a publication containing the rules of the board was admissible. Pierce v. Doolittle, 130 Iowa, 333, 106 N. W. 751.

83. In an action for malicious prosecution on a charge of stealing a mortgage, a copy of the alleged stolen instrument is admissible when a proper predicate has been laid therefor. Shannon v. Sims [Ala.] 40 So. 574.

84. An affidavit and warrant made by defendant and on which plaintiff was arrested are competent evidence as constituting the basis of the action. Rutherford v. Dyer [Ala.] 40 So. 974.

85. Evidence held sufficient to show probable cause for instituting a prosecution for **embezzlement.** Singer Mfg. Co. v. Bryant, 105 Va. 403, 54 S. E. 320. Evidence held to show existence of probable cause to institute prosecution for **forgery.** Hobson v. Koch, 100 N. Y. S. 893. Evidence held sufficient to show probable cause for making a charge of **larceny.** Morgan v. Illinois Cent. R. Co., 117 La. 671, 42 So. 216; Freer v. Schmitt, 101 N. Y. S. 737; Fetzer v. Burlew, 99 N. Y. S. 1100; Molich v. Josephson, 50 Misc. 315, 98 N. Y. S. 671; Rawson v. Leggett, 184 N. Y. 504, 77 N. E. 662. Evidence held sufficient to show probable cause for prosecution for **obstructing track of railroad.** Clark v. Palmer, 101 N. Y. S. 759. Evidence held to show probable cause for **levy of attachment** on a complaint charging defendant with having left the state and conveying his property with intent to defraud creditors. Moore v. First Nat. Bank, 140 N. C. 293, 52 S. E. 944.

86. Shattuck v. Simonds, 191 Mass. 506, 78 N. E. 122.

Evidence, in connection with verdict of acquittal, held sufficient to overcome presumption arising from indictments that reasonable ground for prosecution for **murder** and **obstructing railroad track** existed. Jones v. Louisville & N. R. Co., 29 Ky. L. R. 945, 96 S. W. 793.

87. Evidence held to show that charge of **larceny** was not made maliciously. Morgan v. Illinois Cent. R. Co., 117 La. 671, 42 So. 216; Rawson v. Leggett, 184 N. Y. 504, 77 N. E. 662. Evidence held insufficient in connection with prima facie proof of want of probable cause to warrant a finding of malice in search warrant proceeding. Ton v. Stetson [Wash.] 86 P. 668.

88. Jones v. Louisville & N. R. Co., 29 Ky. L. R. 945, 96 S. W. 793.

89. A conviction reversed on appeal is not conclusive but strong prima facie evidence of probable cause which may be rebutted, not only by evidence tending to show that the conviction was obtained by fraud or perjury, but also by any competent evidence which satisfies the jury as to want of probable cause. Skeffington v. Eylward, 97 Minn. 244, 105 N. W. 638.

90. A judgment foreclosing a distress warrant at the suit of a landlord against his tenant is not conclusive of the legality and justification for suing out the warrant, the tenant not having reconvened therein for damages. Morgan v. Tims [Tex. Civ. App.] 97 S. W. 832.

91. When malicious prosecution is made a counterclaim to another cause of action and the advice of counsel is relied on exclusively to defeat it, the right to open and close in relation thereto, considered by itself, is with defendant. Farmer v. Norton, 129 Iowa, 88, 105 N. W. 371.

92. Requested instruction as to effect of dismissal of prosecution to disprove malice. Rutherford v. Dyer [Ala.] 40 So. 974.

93. Requested instruction as to advice of counsel held properly refused. Rutherford v. Dyer [Ala.] 40 So. 974.

94. Requested instruction as to effect of dismissal of prosecution to disprove malice. Rutherford v. Dyer [Ala.] 40 So. 974. Requested instruction that "the court charges the jury that under the undisputed evidence in this case Mr. Parker advised the defendant, through Mr. Koon, that the prosecution could be maintained against" plaintiff. Id.

95. Requested instruction that **malice** is a formed design to unlawfully do mischief held properly refused. Rutherford v. Dyer [Ala.] 40 So. 974. Instruction on **probable cause**

tablished facts which are essential elements of the offense[97] but should be based on the evidence.[98] When specific instructions are desired, they must be asked for as in other cases.[99] A request for instructions will be refused when covered by the instructions given.[1] Instructions are subject to construction as a whole[2] and are to be construed as in other civil cases.[3]

Whether the alleged malicious prosecution was instituted by, or abuse of process chargeable to, defendant,[4] whether a full and fair statement of all the facts was made to counsel,[5] and whether advice of counsel was sought and acted on in good faith, are generally questions for the jury.[6] Malice is a question exclusively for the jury.[7] On the question whether the existence of probable cause should be submitted to the jury, the decisions are inharmonious, the courts, in some jurisdictions, holding that on undisputed or conceded facts the question is one of law for the

to charge embezzlement held too indefinite and uncertain. Staples v. Johnson, 25 App. D. C. 155. Instruction that just or legal cause was defense held not equivalent to charge that probable cause was defense. Sehon v. Whitt, 28 Ky. L. R. 1222, 29 Ky. L. R. 691, 92 S. W. 280. Error in omitting qualifying words "ordinarily or reasonably" preceding phrase "prudent and cautious man," in charge on reasonable and probable cause, held not ground for reversal. Jenkins v. Gilligan [Iowa] 108 N. W. 237. The jury should not be told to allow for the prejudice, partiality, and excitement of a person instituting a prosecution in which he is interested in determining liability. The standard is that which a reasonably prudent man would do. Reynolds v. Dunlap [Kan.] 84 P. 720.

96. Where advice of counsel was relied on exclusively to defeat a cause of action set up as a counterclaim, and there was no evidence of defendant's actual guilt, failure to instruct that if defendant was guilty of the crime there was sufficient probable cause was proper as in consonance with the theory of the case. Farmer v. Norton, 129 Iowa, 88, 105 N. W. 371.

97. Instruction stating that "It is sufficient that" defendant "acting maliciously and without probable cause was one of the originators of the prosecution" is bad. Baker v. Moore, 29 Pa. Super. Ct. 301.

98. In an action for malicious prosecution under a city ordinance, where there was no evidence that defendant knew of the invalidity of the ordinance at the time of filing the information, it was not proper for the court to leave the fact of defendant's knowledge to the jury for determination with a view to their finding malice therefrom. Pierce v. Doolittle, 130 Iowa 333, 106 N. W. 751. Where an action is for malicious prosecution and abuse of process and there is no evidence supporting the action for abuse of process, but the testimony discloses a cause of action for malicious prosecution only, the issue of abuse of process should not be submitted. Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815.

99. Failure to instruct that proof that a prosecution was instituted for the purpose of collecting a debt imposed on defendant the burden of showing probable cause held warranted by failure to request. Buel v. Bergman, 213 Pa. 355, 62 A. 927.

1. Request for instruction as to effect of advice of counsel held properly refused. Staples v. Johnson, 25 App. D. C. 155.

2. Instructions as a whole construed and held that one to the effect that if the defendant did not make a full, fair, and honest statement of all the facts in his knowledge to his counsel and act on the advice given thereon, but did act on a fixed determination of his own, then such advice could avail him nothing, did not forbid a consideration of defendant's reliance on his own honest belief. Martin v. Corscadden [Mont.] 86 P. 33.

3. Instruction held not open to criticism that it told the jury that mere belief that plaintiff committed the offense charged was sufficient cause to make a defense. Gurden v. Stevens [Mich.] 13 Det. Leg. N. 840, 109 N. W. 856. Instruction that "if the jury find the issue in this case in favor of the plaintiff, the form of their verdict should be as follows: 'We, the jury, find the issues in favor of the plaintiff and assess his damages at —— dollars. ——, Foreman,'" held proper in action prosecuted in name of next friend of infant plaintiff. Rutherford v. Dyer [Ala.] 40 So. 974.

4. Shattuck v. Simonds, 191 Mass. 506, 78 N. E. 122; Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862. When plaintiff in a wrongful attachment directs a levy with knowledge of all the facts, the question whether he caused the seizure is for the jury. Goldstein v. Drysdale [Ala.] 42 So. 744. See ante, §§ 1 A, 1 B.

5. In wrongful attachment. Goldstein v. Drysdale [Ala.] 42 So. 744; Haas v. Powers [Wis.] 110 N. W. 205; Staples v. Johnson, 25 App. D. C. 155. On the issue of abuse of process by an excessive attachment, when the plaintiff in attachment denies directing, advising, or encouraging the act, the question is for the jury. Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422.

6. Staples v. Johnson, 25 App. D. C. 155; Haas v. Powers [Wis.] 110 N. W. 205. See ante, § 7.

7. Staples v. Johnson, 25 App. D. C. 155; Fetzer v. Burlew, 99 N. Y. S. 1100; Shattuck v. Simonds, 191 Mass. 506, 78 N. E. 122; Haas v. Powers [Wis.] 110 N. W. 205; Pierce v. Doolittle, 130 Iowa 333, 106 N. W. 751; Mills v. Larrance, 217 Ill. 446, 75 N. E. 555; Stanford v. Messick Grocery Co. [N. C.] 55 S. E. 815; Goldstein v. Drysdale [Ala.] 42 So. 744. Other elements being present, the cause should not be taken from the jury when

court;[8] though it is held that when the question is erroneously submitted to the jury and they find in accordance with the law, the error is not prejudicial,[9] but in other jurisdictions, and in some of the courts whose decisions have just been cited, the question of the existence of probable cause is held to be one for the jury.[10]

A general verdict for plaintiff cannot be harmonized with a special one that there was no malice.[11]

MANDAMUS.

§ 1. Nature and Office of Remedy in General (810). Other Adequate Remedy (813). Loss of Remedy by Limitations, Laches, Delay, Estoppel, etc. (815).
§ 2. Duties and Rights Enforceable by Mandamus (816).
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A. Trial and Hearing (829).
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§ 1. *Nature and office of remedy in general.*[12]—Mandamus is the counterpart of injunction, the former issuing to compel action, the latter to restrain it.[13] The writ early lost its prerogative character and no longer creates duties but merely compels performance of existing ones[14] which must be imposed by law.[15] It does

there is evidence from which malice may be inferred. Meyer v. Lally, 143 Mich. 578, 13 Det. Leg. N. 67, 107 N. W. 109. See ante, § 6.

8. Rawson v. Leggett, 184 N. Y. 504, 77 N. E. 662; Tyson v. Bauland Co. [N. Y.] 79 N. E. 3; Holson v. Koch, 100 N. Y. S. 893; Malich v. Josephson, 50 Misc. 315, 98 N. Y. S. 671; Freer v. Schmitt, 101 N. Y. S. 737; Clark v. Palmer, 101 N. Y. S. 759; Moore v. First Nat. Bank, 140 N. C. 293, 52 S. E. 944. When contrary inferences may not fairly be drawn therefrom. Fetzer v. Burlew, 99 N. Y. S. 1100. When there is a dispute as to the facts, it is for the jury to determine what the true facts are, the responsibility still resting on the court of determining whether the facts as found amount to probable cause. Malich v. Josephson, 50 Misc. 315, 98 N. Y. S. 671; Staples v. Johnson, 25 App. D. C. 155.

9. Staples v. Johnson, 25 App. D. C. 155.

10. Davis v. McMillan, 142 Mich. 391, 12 Det. Leg. N. 771, 105 N. W. 862; Haas v. Powers [Wis.] 110 N. W. 205; Pittsburg, etc., R. Co. v. Wakefield Hardware Co. [N. C.] 55 S. E. 422; Evans v. Atlantic Coast Line R. Co., 105 Va. 72, 53 S. E. 3; Krasnow v. Singer Mfg. Co., 100 N. Y. S. 591, contrary to other courts of the state. Coyle v. Snellenburg, 30 Pa. Super. Ct. 246; MacDonald v. Schroeder, 214 Pa. 411, 63 A. 1024, rvg. 28 Pa. Super. Ct. 128; Shattuck v. Simonds, 191 Mass. 506, 78 N. E. 122. In an action for wrongfully, maliciously, and without probable cause, suing out an attachment, when plaintiff shows its wrongfulness, malice, and want of probable cause, are questions for the jury. Goldstein v. Drysdale [Ala.] 42 So. 744. See ante, § 5.

11. Finding that prosecution was without malice by corporation defendant held in irreconcilable conflict with general verdict against it and other defendants. Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490.

12. See 6 C. L. 496.

This section treats only of the **general rules,** the specific application to various duties being treated in § 2.

13. Where private rights are about to suffer from the enforcement of the result of an election on local option questions held upon insufficient petition, injunction and not mandamus is the proper remedy. Kennedy v. Warner, 51 Misc. 362, 100 N. Y. S. 616.

14. Page v. McClure [Vt.] 64 A. 451. So construed at the time of the adoption of the Minnesota Constitution. In re Lauritsen [Minn.] 109 N. W. 404.

15. The law imposes the duty on a corporation to transfer stocks on its books when sold at a private sale and mandamus will lie to enforce such transfer. Smith v. Automatic Photographic Co., 118 Ill. App. 649. The members of the board of civil authority of a town being under no duty to canvas the ballots of a local option election, do not, by assuming such duty, render themselves liable to a mandate to compel its completion. Page v. McClure [Vt.] 64 A. 451. Where the statute provides for the refunding of taxes paid under an illegal assessment upon the reduction of the same, the phraseology of

not issue as a matter of right but only in the discretion of the court,[16] such discretion, however, being legal or judicial as distinguished from a personal one.[17] The relator must come with clean hands[18] and seek the enforcement of a clear legal duty,[19] having perfected his right by complying with all precedent conditions.[20] The

the order directing repayment in the proceedings reducing the assessment is immaterial in mandamus to compel a refund, since the statute fixes the duty. People v. Erie County Sup'rs, 99 N. Y. S. 1062.

16. State v. Hendee [Neb.] 105 N. W. 892; Bibb v. Gaston [Ala.] 40 So. 936.

Held no abuse of discretion: To refuse a writ to compel the recorder of mortgages to cancel a lien inscribed against relator on the ground that the lien was waived, the fact being disputed. State v. Acme Lumber Co., 115 La. 893, 40 So. 301. To deny a writ to transfer a trust fund from the custody of an official whose bond is sufficient to protect it to one whose bond is insufficient, though the latter may be technically entitled to its possession. State v. Hendee [Neb.] 105 N. W. 892. To deny a writ to compel the printing of a void statute for distribution, though the provision for printing be regarded as independent and valid. Smith v. Baker [N. J. Law] 63 A. 619. Mandamus refused to compel the judge of the orphans' court to proceeding with the probating of a will pending an appeal from the probation of a later will of the testator. Bibb v. Gaston [Ala.] 40 So. 936.

17. Funk v. State [Ind.] 77 N. E. 854. In the exercise of its discretion a court cannot refuse a mandamus to compel the state auditor to permit an inspection of his records where the relator has a clear right of inspection merely because it would be an inconvenience. Clement v. Graham, 78 Vt. 290, 63 A. 146.

18. A relator who has escaped payment of taxes for ten years is not entitled to a writ of mandamus compelling payment of a county warrant without deducting the delinquent taxes. Funk v. State [Ind.] 77 N. E. 854. Highway commissioners will not be compelled by mandamus to reimburse the road fund to the extent of moneys expended in improving a road within an incorporated village, where such improvement was made pursuant to a petition of relators and with taxes voluntarily paid by them for such illegal purpose. Lee v. People, 123 Ill. App. 520.

19. State v. Acme Lumber Co., 115 La. 893, 40 So. 301; Case v. Sullivan, 222 Ill. 56, 78 N. E. 37; People v. East St. Louis & Suburban R. Co., 122 Ill. App. 431; State v. Spinney [Ind.] 76 N. E. 971; Commonwealth v. James, 214 Pa. 319, 63 A. 743. Mandamus will not lie to compel the performance of duties imposed by a statute which has been repealed. Browne v. State [Ala.] 41 So. 407.

Properly refused for lack of clear legal duty: Mandamus to compel insurance companies to send to policy holders a different statement of nominations to fill vacancies from that required by Laws 1906, c. 326. People v. Kelsey, 100 N. Y. S. 391. Mandamus to compel the superintendent of insurance to change the list of nominations to fill vacancies in offices of a company filed with him pursuant to Laws 1906, c. 326, he having no authority so to do. Id. Mandamus to compel a railroad company to furnish passenger service between designated points, where it does not appear that the respondent has a right of trackage over the entire route. People v. St. Louis & Belleville Elec. R. Co., 122 Ill. App. 422. Mandamus to compel the issuing of improvement bonds before the board of local improvements has filed a certificate of substantial performance confirmed by the court as provided by § 84, Local Improvement Act (Hurd's Rev. St., 1903, c. 24), as amended in 1903 (Hurd's Rev. St. 1903, c. 24). Case v. Sullivan, 222 Ill. 56, 78 N. E. 37. Mandamus to compel the opening of a liquor dispensary where in order to do so the court would have to set aside an election, alleged to be irregular, which decided against such opening. Wilson v. Cox, 73 S. C. 398, 53 S. E. 613. Mandamus by taxpayers to compel the county officials to pay the governmental expenses in preference to a judgment ordered paid by a prior mandate, the taxes collectible under the maximum rate law being insufficient for both. People v. Coles County, 224 Ill. 41, 79 N. E. 561. Plaintiff held to have shown no right to mandamus compelling the judge a quo to issue an injunction restraining the execution of a judgment. Beasley v. Robson, 117 La. 584, 42 So. 147.

Legal duty held sufficiently clear: A delay of ten years after default in the contract of purchase of school lands before the tender of the amount sufficient to redeem does not work a forfeiture, especially where the land has increased greatly, and mandamus will lie to compel the county treasurer to accept payment and to issue receipt for the same. True v. Brandt, 72 Kan. 502, 83 P. 826. Relator being entitled to a refund of all the excessive tax collected, the fact of a partial refund is no defense even though three years has elapsed since such payment. People v. Erie County Sup'rs, 99 N. Y. S. 1062. In mandamus to compel the refunding of taxes paid on an illegal assessment, it is no defense that the relator now relies on a case for the return of the school and highway tax which had not been decided at the time the excessive state, county, and town taxes were refunded, such case in no way changing the law. Id. Under Pub. Laws 1905, p. 105, Act No. 79, amending Comp. Laws, § 2622, authorizing the supervisors to designate a fireproof vault for the records of the surveyor and an order designating the vault of the register of deeds, a writ directing that the books, excepting field notes in use in the field, should be kept therein, held proper, the legislature, the board, and the court acting within their authority. Board of Sup'rs of Grand Traverse County v. Allyn, 144 Mich. 300, 13 Det. Leg. N. 217, 107 N. W. 1062.

20. Mandamus refused to compel the granting of permission to relator to construct subways, his plans having not been approved as required by Laws 1885, p. 852,

writ will be denied where respondent has no power to act[21] and in cases of doubtful right,[22] but such doubt must be one of law and not merely one growing out of uncertainty of fact.[23] The writ will not compel an illegal[24] or prohibited act,[25] nor command the performance of an impossible one,[26] and issues only when a beneficial purpose will be served.[27] Hence, it will not lie where it will produce confusion and

c. 499, as a condition to the right. People v. Ellison, 101 N. Y. S. 55. Mandamus will lie to compel the Consolidated Telegraph & Electrical Subway Company to give an applicant space in the subway, though the relator has not obtained the consent of the commissioner of water supply, gas, and electricity to place its electrical conductors therein, such consent being a condition subsequent. In re Long Acre Elec. Light & Power Co., 101 N. Y. S. 460, afd. 102 N. Y. S. 242.

21. No power being given to the registrars to erase names improperly upon the registration books after the five days allowed for the correction of clerical errors, mandamus will not issue to compel such erasure. State v. Willett [Tenn.] 97 S. W. 299.

22. State v. Acme Lumber Co., 115 La. 959, 40 So. 301. Within the discretion of the court to refuse in case of doubtful right. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155. Such discretion may be exercised where the original application is made to the circuit court. Id. Under Pub. Acts 1903, p. 205, No. 159, authorizing the purchase of toll roads by cities and providing that funds for the purpose shall be raised by special assessment, mandamus to compel a levy will not issue pending a suit to declare the contract of purchase and time warrants issued for the purchase price void and to enjoin payment of the latter. Detroit & B. Plank Road Co. v. Highland Park, 142 Mich. 326, 12 Det. Leg. N. 756, 105 N. W. 775. Where mandamus to compel the recorder of mortgages to cancel a lien inscribed against the relator involves a disputed question whether such lien was waived, the action should be dismissed. State v. Acme Lumber Co., 115 La. 893, 40 So. 301.

23. Especially where the statute provides for a trial of fact. Board of Jackson County Com'rs v. Branaman [Ind. App.] 79 N. E. 923.

24. Supervisors will not be compelled to make an appropriation where there are no funds and taxes have been levied to the maximum amount. Board of Sup'rs of Town of Phillips v. People [Ill.] 78 N. E. 13. It is no defense to an application for a writ of mandamus to compel a town to levy a tax that the authority of the town to tax is limited unless it is also shown that the authority has been exhausted. Rose v. McKie [C. C. A.] 145 F. 584. Where, pending an appeal from an order refusing to grant a mandamus compelling the clerk of the circuit court to issue an execution on a judgment, the judgment becomes dormant, the appeal will be dismissed. Norwood v. Clem [Ala.] 42 So. 6 [Advance sheets only].

25. Under Acts 1903, p. 288, c. 233, providing that local option elections shall be held in the same year in which the petition is filed, but not within 90 days of any city, county, or general election, mandamus will not issue to compel an election at a prohibited time. State v. Raleigh [N. C.] 55 S. E. 145. Where, pending mandamus proceedings to compel the holding of a local option election, the duty of defendant to perform or the right of relator to exact performance ceases by lapse of time, relief will be denied. Id.

26. Writ compelling a recanvass refused where the ballot boxes have been left open to the public and have been tampered with. In re Burrell, 50 Misc. 261, 100 N. Y. S. 470. In mandamus to compel the treasurer of an irrigation district to pay certain interest coupons, it appearing that there was a fund created by an assessment for the payment of interest on 5 and 6 per cent bonds to which class relator's bonds belonged, there was evidence showing funds available for paying relator's interest (Hewel v. Hogin [Cal. App.] 84 P. 1002), and it was not error to reject parol evidence showing that the purpose of the assessment was different from that declared in the resolution (Id.). Board of directors could not defeat relator's right by a transfer of the fund immediately after his demand to another purpose. Id.

27. **Writs denied:** Mandamus to compel the county commissioners to invest certain taxes in a sinking fund, as required by Laws 1895, p. 182, c. 131, § 2, to pay designated bonds, where such bonds have been discharged. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427. To compel a circuit judge to frame an issue in a mandamus proceeding pending before him to require a city council to approve a druggist's bond, where it appears that the sureties have withdrawn from their undertaking. Young v. Van Buren Circuit Judge [Mich.] 13 Det. Leg. N. 416, 108 N. W. 506. To compel the county treasurer to publish the delinquent tax lists and notices in the paper designated by the county commissioner where the time is too short to enable the relator to legally print the same. State v. Cronin [Neb.], 106 N. W. 986. To require the city to designate streets upon which relator might erect its telephone poles, the relator having the absolute right to use any street subject to location therein by the city. State v. Red Lodge [Mont.] 83 P. 642.

Writs allowed: In mandamus to compel the removal of a tunnel obstructing the free navigation of a river, it is no defense that there are other tunnels which will prevent navigation even if it is removed. West Chicago St. R. Co. v. People, 214 Ill. 9, 73 N. E. 393. It is no defense to an application for a mandamus to compel officers of a town to perform the duties imposed upon them by statute toward providing for the payment of a judgment, that such duties do not include all the acts necessary to a full satisfaction of the judgment, as that they had power only to call a meeting to levy the tax. Rose v. McKie [C. C. A.] 145 F. 584.

disorder,[28] or impose unnecessary burdensome duties.[29] While, as a general rule, respondent must be in default,[30] the writ may in exceptional cases be invoked to command performance of a future duty.[31] A demand and refusal is usually necessary to put respondent in default,[32] especially if the duty is of a private nature.[33] While the writ will not usually issue where the same issues are involved in another case, the creation of such issues after the commencement of the latter action[34] is no defense.

Other adequate remedy.[35]—Mandamus, being an extraordinary remedy, will issue only in the absence of other adequate remedy,[36] except in Illinois.[37] Hence, it

28. Within the discretion of the court. Bibb v. Gaston [Ala.] 40 So. 936.

29. Where an application for a warrant is made to the judge as distinct from the court, mandamus will not issue to compel him to take action thereon where he would be required to leave his own county and go to another for the sole purpose of executing it. State v. Yakey [Wash.] 85 P. 990.

30. **Writ denied:** To compel a village treasurer to accept an occupation tax before the same is due and payable. State v. McMonies [Neb.] 106 N. W. 454. To compel a judge to proceed to try a case or to certify his disqualification, the verified answer showing that the judge was qualified and was willing to try the case as soon as it was ready and was reached on the call. Kruegel v. Morgan [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1095. To compel a railroad company to switch cars on a private track properly denied where reepondent had actually resumed such switching before the filing of the petition. Mystic Milling Co. v. Chicago, etc., R. Co. [Iowa] 107 N. W. 943. Where a judge has until the end of the term in which to rule upon an application for change of venue because of prejudice, mandamus will not lie to compel a change where it appears he has the application under advisement and intends to make a timely ruling. State v. Goodland, 128 Wis. 57, 107 N. W. 29. Where the question involved was not the relators' right to purchase certain school lands, but the right of the commissioner to reserve the minerals therein, until the accrual of the right to demand patents relators cannot maintain mandamus to settle the issue. Thaxton v. Terrell [Tex.] 15 Tex. Ct. Rep. 121, 91 S. W. 559.

In a proceeding to compel a judge to settle and certify certain testimony it is no defense under Ballinger's Ann. Codes & St. § 5060, that he has certified a statement of facts which does not embody the testimony in question. State v. Superior Court for Douglas County, 41 Wash. 439, 83 P. 1027. Where, after plaintiff brought mandamus to compel a city to pay the balance due on a condemnation jndgment, the city paid the money into the court rendering judgment accompanied with a petition to refund the same, such payment constituted no defense. State v. Fairley [Wash.] 87 P. 1052. Where, prior to the application for a writ to compel payment to petitioner of a portion of a police pension fund, the defendant audited and allowed a demand greater than petitioner is entitled to under the facts pleaded, mandamus will not issue, there being nothing to show that she had ever demanded the same or why she had not received it. Burke v. San Francisco Police Relief & Pension Fund Trustees [Cal. App.] 87 P. 421.

31. Where the county clerk was not required to print the official ballot until four days before election and threatened to omit a name which properly belonged thereon, mandamus may issue before default. State v. Goff [Wis.] 109 N. W. 628.

32. The refusal of a board of supervisors to appoint the election judges legally selected by the minority members, as it is required to do by Act May 18, 1905 (Laws 1905, p. 203), § 33, and its adjournment to another date, when the judges were to be "selected," is a sufficient demand and refusal to authorize mandamus to compel appointment. People v. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 123.

33. Right to have cars switched on a private track. Mystic Milling Co. v. Chicago, etc., R. Co. [Iowa] 107 N. W. 943.

34. Where, after the institution of mandamus proceedings to compel the payment of the balance of a judgment against a city, the defendant pays the money into the court rendering judgment accompanied with a motion to have it refunded, the pendency of such motion is no bar. State v. Fairley [Wash.] 87 P. 1052.

35. See 6 C. L. 499.

36. State v. Milwaukee Medical College [Wis.] 106 N. W. 116; Commonwealth v. James, 214 Pa. 319, 63 A. 743; State v. Acme Lumber Co., 115 La. 893, 40 So. 301. Code, § 4344. Kinzer v. Independent School Dist. Directors, 129 Iowa, 441, 105 N. W. 686. Under Cobbey's Ann. St. 1903, § 1662; Civ. Code, § 646, mandamus will not issue where there is a plain and adequate remedy in the ordinary course of law. State v. Drexel [Neb.] 107 N. W. 110. In the absence of statute, mandamus will not lie to compel a private individual to abate a nuisance as ordered by the board of health where the statute expressly provides for abatement by the board upon the refusal of the individual to act. People v. Fries, 109 App. Div. 358, 96 N. Y. S. 327. The pleading of a verdict recovered in an action involving the title to land in subsequent actions is not such an adequate remedy as to defeat mandamus to compel the entry of a judgment thereon. Texas Tram & Lumber Co. v. Hightower [Tex.] 16 Tex. Ct. Rep. 790, 96 S. W. 1071.

37. The fact that the purchaser of corporate stock at private sale might secure the transfer of the same on the books of the company through equity or recover damages at law will not defeat an application for mandamus. Smith v. Automatic Photographic Co., 118 Ill. App. 649.

will not lie where relief may be had by proceeding in the original action,[38] by appeal,[39] writ of error,[40] certiorari,[41] quo warranto,[42] or by a suit in equity or an action

38. A motion to dissolve a preliminary injunction (Blain v. Chippewa Circuit Judge [Mich.] 13 Det. Leg. N. 394, 108 N. W. 440), and to vacate an order setting aside a default and order of reference, are prerequisite to mandamus compelling such action (Aitken v. Chippewa Circuit Judge [Mich.] 13 Det. Leg. N. 708, 109 N. W. 223). Where, in a suit commenced by capias, defendant gave special bail and pleaded former adjudication and waiver of the tort, mandamus will not lie to compel the court to vacate its order denying his motion to release him from bail and to dismiss the capias action on the ground of waiver and adjudication, the proper way of determining those issues being by proceeding in the case. Polasky v. Kalamazoo Circuit Judge [Mich.] 13 Det. Leg. N. 1010, 110 N. W. 521. Where the court has ordered the clerk to pay over the purchase money deposited with him upon the tender of a good and sufficient warranty deed, mandamus will not lie to compel such payment where a dispute exists as to the sufficiency of the deed which could be settled by a motion in the original case. State v. Brown, 8 Ohio C. C. (N. S.) 547.

39. **Mandamus refused because of the right of appeal:** To compel the granting of an injunction. Hanson v. Police Jury of St. Mary Parish, 116 La. 1080, 41 So. 321. To compel the county board of education to issue a teacher's certificate where, under Civ. Code 1902, § 1183, an appeal will lie to the state board of education. Greenville College for Women v. Board of Education [S. C.] 55 S. E. 132. To compel the lower court to set aside a decree dismissing a suit for injunction for lack of jurisdiction. Hitchcock v. Wayne Circuit Judge, 144 Mich. 362, 13 Det. Leg. N. 242, 107 N. W. 1123. To compel the court to proceed with a case which it has refused to do on the ground of lack of jurisdiction, it not being shown that the court was asked or refused to dismiss the case from which an appeal would lie. State v. Superior Court of Spokane County [Wash.] 87 P. 1120. To compel the vacation of an order appointing a receiver of a railroad, since an order appointng a receiver whereby possession of property is divested is appealable. Pontiac, etc., R. Co. v. Oakland Circuit Judge, 142 Mich. 257, 12 Det. Leg. N. 711, 105 N. W. 745. An order dismissing a petition filed as the commencement of condemnation proceedings is appealable, and hence not subject to review by mandamus. Detroit United R. Co. v. Oakland County Circuit Judge [Mich.] 13 Det. Leg. 842, 109 N. W. 846. Mandamus will not lie to correct errors of the county board in determining the assessability of particular property, since under § 124 of the Revenue Act (Laws 1903, p. 430, c. 73; Cobbey's Ann. St. 1903, § 10,523), relator has an adequate remedy by appeal. State v. Drexel [Neb.] 107 N. W. 110. Refusal to dismiss an appeal from the probate to the circuit court may be reviewed by appeal, and hence mandamus will not lie to compel the circuit judge to dismiss the same. Sharp v. Montcalm Circuit Judge, 144 Mich. 328, 13 Det. Leg. N. 149, 107 N. W. 874. The refusal of the clerk to allow any costs is a taxation of costs within Municipal Court Act, Laws 1902, p. 1589, c. 580, § 342, authorizing an appeal to the justice from a taxation by the clerk. People v. Lang, 109 App. Div. 706, 96 N. Y. S. 555. Where relatrix had an opportunity to disprove her liability in the original suit and again urged it in a suit for an injunction restraining execution of the judgment, and still has a remedy by appeal in the two cases, mandamus will not issue to compel the judge to grant the injunction. Beasley v. Robson, 117 La. 584, 42 So. 147. Mandamus will not lie to compel the judge a quo to issue an injunction restraining the execution of a judgment on the ground that the relatrix was a married woman and that the judgment debt was that of her husband, she having taken an appeal in the original case in which her defense could be presented and having also the right of appeal from the court's refusal to grant the injunction. Beasley v. Jenkins, 117 La. 577, 42 So. 145.

No adequate remedy by appeal: Laws 1901, p. 98, c. 62, § 1, authorizing an appeal from orders or decisions of the board of state land commissioners, does not authorize an appeal from an order of the public land commissioner, hence mandamus will lie to compel the latter to reinstate a lease wrongfully canceled by his order. State v. Ross, 42 Wash. 439, 85 P. 29. The presentation of a claim by an official court reporter to the judge or court for allowance is not an action or special proceeding within Code Civ. Proc. § 963, subd. 1, authorizing an appeal. Pipher v. Superior Ct. of California [Cal. App.] 86 P. 904. Where the board of county commissioners wrongfully declares the office of one commissioner vacant, mandamus will lie to compel them to recognize the excluded one and to restore him to office notwithstanding he might have appealed from the decision declaring his office vacant. Gray v. Beadle County Com'rs [S. D.] 110 N. W. 36.

40. City of Flint v. Genesee Circuit Judge [Mich.] 13 Det. Leg. N. 829, 109 N. W. 769. Mandamus will not lie compelling a circuit judge to vacate an erroneous order extending the time within which the relator might appeal from the justice court, the remedy being by writ of error. Cosgrove v. Wayne Circuit Judge, 144 Mich. 682, 13 Det. Leg. N. 311, 108 N. W. 361. An order of the circuit court dismissing an appeal taken in relator's name from the probate court, for the reason that there was not sufficient showing of authority to take the appeal, is reviewable by writ of error under Comp. Laws, § 10,484. City of Flint v. Genesee Circuit Judge [Mich.] 13 Det. Leg. N. 829, 109 N. W. 769.

41. Mandamus will lie to compel the common council to revoke a liquor license in a case where, upon complaint duly made, the facts requiring such revocation are established beyond dispute, certiorari being inadequate, since reversing the judgment of dismissal would simply remove the bar to a new proceeding. State v. Curtis [Wis.] 110 N. W. 189.

42. Where at the time of election to fill an alleged vacancy in the council the re-

at law for damages.[43] It will not ordinarily issue to enforce contract obligations,[44] although, if the duty is one clearly imposed by law and the contract is merely declaratory thereof, mandamus has been held applicable.[45] Such other remedy, however, must afford substantial relief,[46] and in Kansas must be "in the ordinary course of the law."[47] By statute in Georgia, mandamus will issue to compel a corporation to discharge a public duty irrespective of other adequate remedies.[48]

Loss of remedy by limitations, laches, delay, estoppel, etc.[49]—One invoking mandamus must act with due diligence[50] as such right may be lost by laches,[51] or be-

lator could try his right to office, which was dependent upon whether a vacancy existed, by quo warranto, mandamus will not lie though at the time of filing the petition a vacanoy did exist. Commonwealth v. Jamee, 214 Pa. 319, 63 A. 743.

43. Action at law held adequate: Where a claim against the county has been passed upon and disallowed by the commissioners' court, the remedy is a suit against the county and mandamus will not lie for the purpose of collecting the same. Commissioners' Court of Chilton County v. State [Ala.] 41 So. 463. Attorneys discharged pending suit have an adequate remedy on contract or quantum meruit, and mandamus will not issue to compel the trial judge to refuse to recognize the discharge until relators are paid. Kelly v. Horsley [Ala.] 41 So. 902. A person having a contract with an irrigation company binding it to furnish water has an adequate remedy on the contract, and under Ballinger's Ann. Codes & St. § 5756, mandamus will not lie, notwithstanding the defendant may be a common carrier of water and under a legal duty to furnish water. State v. Washington Irr. Co., 41 Wash. 283, 83 P. 308.

Action for damages held insufficient: Where the refusal of a carrier to receive goods for shipment as required by law is a continuing one. Southern Exp. Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185. Where an old veteran is wrongfully discharged from municipal service, and mandamus compelling reinstatement will issue. Ranson v. Boston [Mass.] 79 N. E. 823.

44. Vandalia R. Co. v. State [Ind.] 76 N. E. 980.

Note: For illustrations, see § 2C.

45. Duty imposed by Burns' Ann. St. 1901, § 5153, cl. 5, and § 5172a, requiring railroads to maintain its street crossings in a safe condition, may be enforced by mandamus, notwithstanding the same duty is imposed by the ordinance granting the right to cross. Vandalia R. Co. v. State [Ind.] 76 N. E. 980. The fact that a railroad company has entered into an agreement with the coal shippers of a certain field fixing a basis which should be considered equitable for the distribution of cars does not deprive one of the shippers of his right to mandamus proceedings under Act March 2, 1889 (25 Stat. 62, c. 382, § 10 [U. S. Comp. St. 1901, p. 3172]), to compel the company to furnish him such equitable portion of cars. United States v. Norfolk & Western R. Co. [C. C. A.] 143 F. 266. Under Const. art. 14, § 1, providing that the right of water appropriated for sale, rental, or distribution is a public trust, and Civ. Code § 552, declaring that whenever any person who is cultivating land on the line and within the flow of any ditch owned by an irrigation corporation has been furnished water he shall be entitled to the continued use of said water on the same terms as those who had purchased their land from the company, such a corporation owes a duty to supply water irrespective of contract which may be enforced by mandamus. Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 84 P. 342.

46. Appeal from appointment of curator in disregard of the minors' right of selection held not to preclude mandamus, such appeal practically destroying the right because of its delay. State v. Reynolds [Mo. App.] 97 S. W. 650. The fact that relator may procure the doing of the act at his own expense and then recover from the respondent is not an adequate remedy so as to defeat mandamus. Vandalia R. Co. v. State [Ind.] 76 N. E. 980. Express authority by relator city to grade and plank the crossings which it was the duty of respondent to make safe, and to collect the cost with a penalty from respondent, is not an adequate remedy. Id. Where after setting aside a judgment rendered against joint tort feasors as to one of them the judgment is attempted to be enforced as to the other, it is no defense to a writ for mandamus to compel the trial and disposition of the case that there is a remedy by injunction, that by mandamus being more expeditious. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 99 S. W. 171.

47. Under Gen. St. 1901, § 5185, the adequate remedy must be "in the ordinary course of the law" which is not afforded by § 4, c. 340, p. 557, Laws 1905, conferring certain powers on the railroad commission, to a shipper who has been wrongfully refused switching service. Larabee Flour Mills Co. v. Missouri Pac. R. Co. [Kan.] 88 P. 72.

48. Under § 4869, Civil Code of 1895, a shipper specially interested may compel a carrier by mandamus to receive goods for shipment irrespective of other adequate remedies. Southern Exp. Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185.

49. See 6 C. L. 499.

50. What constitutes due diligence is dependent upon the circumstances of the particular case. Hill v. Fitzgerald [Mass.] 79 N. E. 825. The granting of a writ of mandamus to reinstate petitioner to office being discretionary, the remedy is barred if petitioner unreasonably neglects his rights. Id.

51. Delays constituting laches: Policeman waiting **six years** after wrongful discharge before instituting proceedings to restore his name to the pay roll. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155. A delay of **16 months** before applying for mandamus to compel reinstatement as auditor

come barred by limitations,[52] unless the duty is a continuing one.[53] In determining laches the commencement of the action dates from the filing of a valid and sufficient petition.[54] By failure to act[55] or by taking inconsistent action,[56] one may be estopped from demanding performance.

§ 2. *Duties and rights enforceable by mandamus. A. Judicial procedure and process.*[57]—Mandamus will lie to compel a court to act[58] where it is under a

of the board of education after transfer to another department. People v. Board of Education of New York, 99 N. Y. S. 737. Delay of **three years** by a school teacher wrongfully discharged, the position being filled in the meantime. Harby v. Board of Education of San Francisco, 2 Cal. App. 418, 83 P. 1081.

Held not barred: A party illegally removed from office did not lose his right to mandamus for reinstatement by laches in failing to institute such suit at the time of commencing an ineffectual action at law where there was no intentional abandonment of the claim to the office. Hill v. Fitzgerald [Mass.] 79 N. E. 825. A police officer is not guilty of laches in permitting a year and a half to elapse between the time he was notified of an erroneous rating on the eligible list for promotion before commencing mandamus proceedings to compel a correction, where such time was taken up by ineffectual attempts to get redress from the police and civil service commissioners. People v. Baker, 49 Misc. 143, 97 N. Y. S. 453.

52. Where the property owners can and will successfully interpose the statute of limitation to the enforcement of an improvement assessment, the municipal authorities may interpose such defense in mandamus to compel them to make the assessment. Frye v. Mt. Vernon, 42 Wash. 268, 84 P. 864.

Held barred: Mandamus to compel the auditor general to refund money paid for a void tax title is barred by limitations where no demand is made or action brought for fourteen years. Wilkinson v. Auditor General [Mich.] 13 Det. Leg. N. 945, 110 N. W. 123. The right of a school teacher in California to be reinstated to a position from which she was wrongfully removed is afforded by Pol. Code, § 1793, and hence mandatory proceedings to compel reinstatement is barred in three years under Code Civ. Proc. § 338, subd. 1, requiring an action on a liability created by statute to be brought within such period. Harby v. Board of Education of San Francisco, 2 Cal. App. 418, 83 P. 1081. Where an assessment for a street improvement was ordered in 1890 and was adjudged void in 1893, mandamus to compel a reassessment instituted in 1904 was barred by Laws 1895, p. 270, barring an action to enforce an assessment in ten years. Frye v. Mt. Vernon, 42 Wash. 268, 84 P. 864. Where a creditor fails to have execution issued within five years on a judgment against a city of the first class and fails to revive the same within one year after it becomes dormant, mandamus will not issue to compel payment (Beadles v. Smyser [Okl.] 87 P. 292), and the fact that the city had entered into an agreement with most of its creditors to pay the judgments in the order of their rendition did not affect the running of the statute (Id.).

Not barred: Mandamus to compel commissioners to apportion and apply certain railroad taxes in conformity with Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, said taxes accruing in the future, the proceedings cannot be barred by limitation. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427. Laws 1903, p. 1106, c. 482, § 6, constituting a part of the charter of Mt. Vernon, limiting the time within which "all proceedings" to vacate or reduce assessments must be commenced, has no application to mandamus proceedings to compel the formal act of canceling an assessment which has already been adjudicated void. People v. Brush, 101 N. Y. S. 312.

53. Where, because of void attempts to detach territory from an incorporated city, practically destroying its corporate existence, no officers are elected, there is a continuing right to petition for the appointment of commissioners of election, and limitation cannot run against such right. Elliott v. Pardee [Cal.] 86 P. 1087.

54. Where the original petition for mandamus fails to state a cause of action, the commencement of the action in determining laches dates from the filing of the amended petition. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155.

55. A contractor who has agreed to accept bonds payable out of a fund to be raised by a benefit assessment is not such a party in interest to the assessment that a failure to appeal therefrom will estop him from rejecting the bonds and institute mandamus to compel the city to make a valid assessment. State v. Seattle, 42 Wash. 370, 85 P. 11.

56. A veteran wrongfully discharged from city service does not lose his right to mandamus for reinstatement by bringing an action for wages while excluded from service. Ranson v. Boston [Mass.] 79 N. E. 823. The fact that the holders of improvement warrants accepted money collected under certain assessment ordinance subsequently held void does not estop them from compelling by mandamus the taking of proper action to pay the balance due. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106.

57. See 6 C. L. 499.

58. State v. Steiner [Wash.] 87 P. 66; Taylor County Court v. Holt [W. Va.] 56 S. E. 205. The writ of mandate, as defined by Rev. St. 1898, §§ 3640, 3641, is designed to compel action where the law enjoins it and the person or tribunal refuses to act in accordance therewith. Hoffman v. Lewis [Utah] 87 P. 167. Where a ruling on a motion for a new trial is essential to complete the appeal record, mandamus will issue to compel the court to take action thereon. Bleakley v. Smart [Kan.] 87 P. 76. Proper remedy to compel a committing magistrate to take action upon a complaint duly made. State v. Yakey

clear legal duty to do so,[59] and has wrongfully refused,[60] and to assume jurisdiction of a case which it has wrongfully rejected without a hearing.[61] While mandamus will not issue to control discretion or revise judicial action,[62] it will lie to compel performance of purely ministerial duties,[63] and where a court adjourns

[Wash.] 85 P. 990. Mandamus will lie to compel the judge of the district court to grant a hearing in respect to motions to dissolve writs under which movant's property has been seized, where under the law and rules of the court the parties are entitled to a hearing. Berthelot v. Hotard, 117 La. 524, 42 So. 90. Mandamus to compel a police judge to try persons charged with violations of the liquor law prohibiting sale on Sunday denied by a court divided as to its power under the constitution to issue such writ. Commonwealth v. McCann, 29 Ky. L. R. 707, 94 S. W. 645.

59. In proceedings for a writ of mandate to compel the district court to vacate an order dismissing an appeal from the justice's court, the legal duty to do so must be free from doubt. Hoffman v. Lewis [Utah] 87 P 167. A judgment of disbarment being self-executing, it cannot be superseded as a matter of right. Hence mandamus will not issue to compel the lower court to accept a supersedeas bond pending appeal. State v. Poindexter [Wash.] 86 P. 176. Under Ballinger's Ann. Codes & St. § 6695, making it the duty of a magistrate, when a complaint is made to him of the commission of a criminal offense, to examine the complainant and to issue a warrant if the facts justify, such duty is obligatory upon him and he cannot refer the matter to the prosecuting attorney. State v. Yakey [Wash.] 85 P. 990. Mandamus will not lie to compel a trial court to order a stay or fix a bond to supersede a prohibitory injunction pending appeal. State v. Superior Ct. of Chehalis County [Wash.] 86 P. 632.

60. Dismissal of an appeal from the justice of the peace on the ground that all steps had not been taken to give the court jurisdiction is not a refusal to act. Taylor County Ct. v. Holt [W. Va.] 56 S. E. 205. Mandamus will not lie to compel the circuit court to reduce the bail of an accused, no application having been made to the court for such a reduction. Monroe v. Berry, 29 Ky. L. R. 602, 94 S. W. 38. The filing of affidavits of prejudice and bias against a common pleas judge disqualifies him, and a declaration by the judge in open court of his intention to proceed is sufficient ground for a proceeding in mandamus and injunction. State v. Dirlam, 7 Ohio C. C. (N. S.) 457.

61. Under Laws 1896, p. 874, c. 908, § 230, declaring that the surrogate shall direct the county treasurer or an appraiser to fix the value of property of persons whose estates are subject to the payment of the transfer tax, mandamus is the proper remedy to compel him to act, even though he has erroneously determined that he has no jurisdiction if such determination has not been arrived at after a due hearing. Kelsey v. Church, 112 App. Div. 408, 98 N. Y. S. 535.

62. State v. Steiner [Wash.] 87 P. 66; State v. Yakey [Wash.] 85 P. 990; Collins v. Hawkins, 77 Ark. 101, 91 S. W. 26; Taylor County Ct. v. Holt [W. Va.] 56 S. E. 205. The transfer of an accused from one jail to another in the same county is within the discretion of the court and not reviewable by mandamus. Monroe v. Berry, 29 Ky. L. R. 602, 94 S. W. 38. Where petitioners requested the board of supervisors to fix an additional water rate, the proceeds thereof to be used in the replacement of worn out pipes of the irrigation system, and the board denied the petition by an order reciting that the law made no provision for reconstruction, held that such refusal re-established the old rate, which was a clear exercising of their judgment which could not be controlled by mandamus. Berger v. Justice [Cal. App.] 88 P. 591. Where a judge is vested with a discretion in issuing an injunction, mandamus will not lie to compel him to set aside his order declining to issue an injunction nor to compel him to issue such a writ, there being no arbitrary abuse of discretion. Hanson v. Police Jury of St. Mary Parish, 116 La. 1080, 41 So. 321; Lewis v. D'Albor, 116 La. 679, 41 So. 31. Where a court in the proper exercise of its discretion refuses to permit a party to intervene in a suit, mandamus will not issue from superior court to compel it to admit the relator. Fink v. Bay Shore Terminal Co. [C. C. A.] 144 F. 837. Where a plaintiff who has suffered a nonsuit in an action for the possession of land in which a temporary injunction restraining the use thereof had been issued, it is not an abuse of discretion to refuse to proceed with the assessment of damages on the injunction bond where the plaintiff has instituted a second action to determine title, the determination of which will materially affect the amount of damages allowable. State v. Steiner [Wash.] 87 P. 66. Where a case is remanded to the chancellor with directions to "enter a decree for plaintiffs for an undivided half of the lands in controversy and for further proceedings * * * in accordance with the opinion," an amendment asking for an accounting of the timber removed during the suit by defendant does not come within the judgment of reversal, and the court's action thereon cannot be reviewed by mandamus. Collins v. Hawkins, 77 Ark. 101, 91 S. W. 26. Dismissal of appeal from the justice of the peace for lack of jurisdiction because no appeal bond was given is the exercise of a judicial function and mandamus will not lie to compel the reinstatement of the case. Taylor County Ct. v. Holt [W. Va.] 56 S. E. 205.

63. State v. Richardson [Or.] 86 P. 225.

Duties held ministerial and enforceable by mandamus: The issuing of an order by the county court as required by Laws 1905, p. 47, c. 2, § 10, declaring the result of a local option election if in favor of prohibition and prohibiting the sale of liquors. State v. Richardson [Or.] 85 P. 225. The duty imposed upon county courts by § 15 of chap. 39 of the Code of 1899, as amended by chap. 95, p. 206, of the Acts of 1901, to call an election to consider the removal of the

without discharging a mandatory duty, it may be reconvened and compelled to act by such writ.[64] Though mandamus is not the proper remedy to correct judicial error,[65] it may be employed where no other remedy is applicable.[66] Such remedy is appropriate to compel an inferior court to execute the mandate of a superior tribunal[67] and to modify its decree so as to conform thereto.[68] Mandamus may be awarded to compel the granting of an appeal wrongfully refused,[69] to enforce the sending up of the papers and transcript from the justice court,[70] or to reinstate an appeal wrongfully dismissed.[71] Mandamus rather than prohibition is the proper remedy to compel the Federal circuit court to remand a case to the state court from which it came where it has no jurisdiction.[72]

county seat. Mann v. Mercer County Ct., 58 W. Va. 651, 52 S. E. 776. Where a claim against a county has been audited and allowed, the duty of the judge of probate to issue a warrant therefor as required by Code 1896, § 1416. Smith v. McCutchen [Ala.] 41 So. 619. Where the sheriff's account has been allowed by the commissioners' court, the duty of the court under Code Cr. Proc. art. 1104, to order a draft drawn. Denman v. Coffee [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 888, 91 S. W. 800. The duty of the county court under Rev. St. 1899, § 1110, to construct drainage ditches along railroad rights of way upon default of the railroad companies so to do. Sanders v. St. Louis, etc., R. Co., 116 Mo. App. 614, 92 S. W. 736. The duty of the probate court to appoint, under Rev. St. Mo. 1899, § 3486, as curator the person selected by a minor over fourteen years of age, such person having been found suitable. State v. Reynolds [Mo. App.] 97 S. W. 650. Under Code Civ. Proc. § 274, providing that in criminal cases the fees for reporting and transcribing when ordered by the court must be paid out of the county treasury, the allowance by the court where the fact of order and rendition is not disputed is ministerial. Pipher v. Superior Ct. of California [Cal. App.] 86 P. 904.

NOTE: Mandamus as a remedy to compel the rendition, entry, and correction of judgments, see 6 C. L. 224.

64. To order an election to consider the removal of the county seat, a sufficient petition having been presented. Such session will be considered as a part of the original term or session. Mann v. Mercer County Court, 58 W. Va. 651, 52 S. E. 776.

65. Mandamus denied to annul an order setting aside a judgment upon immaterial issues and granting a repleader. Birmingham R., Light & Power Co. v. Tanner [Ala.] 40 So. 58. Where on presentation of claim to the judge for allowance by the official reporter of fees for alleged transcriptions under order of court the judge rejected an item on the ground that such transcription was not ordered, mandamus will not lie to compel him to change the finding. Pipher v. Superior Ct. of California [Cal. App.] 86 P. 904.

66. Under § 110 of the constitution giving the court of appeals of Kentucky power to issue such writs as may be necessary to control inferior courts, mandamus will issue to compel the judge of the circuit court to set aside an order directing a stenographer to take testimony before the grand jury, said order being in violation of statute, appeal being inapplicable. Commonwealth v. Berry, 29 Ky. L. R. 234, 92 S. W. 936. The denial of a writ of mandamus by the circuit court to compel the clerk of a justice of the peace to file an appeal is reviewable by certiorari as provided by rule 12, and not by mandamus sued out in the supreme court. Graham v. Wayne Circuit Judge, 143 Mich. 360, 12 Det. Leg. N. 1017, 106 N. W. 1109.

67. While appeal lies from any attempt to pronounce a different decree, such relief is not adequate. King v. Mason [W. Va.] 56 S. E. 377. Where a cause was remanded with directions to the court below to permit K. to redeem such parts of a specified tract as he should designate, and the lower court refused to allow him to redeem certain tracts claimed by no one within the boundary lines, mandamus will lie to compel the reception and action upon his designating petition. King v. Mason [W. Va.] 56 S. E. 377. Where a case is remanded to the trial court with a mandate that judgment be entered for plaintiff and that plaintiff's rents and profits be determined, mandamus will lie to compel the entry of such judgment and to determine the rents and profits where the trial court refuses to act on the erroneous belief that jurisdiction had not been obtained of one of the parties. Nunn v. Robertson [Ark.] 97 S. W. 293.

68. There being no other available means of securing the right of the parties. Ex parte Chicago Title & Trust Co. [C. C. A.] 146 F. 742.

69. Wenar v. Schwartz, 116 La. 151, 40 So. 599. Mandamus is a proper writ to review an order of the circuit court denying a special appeal from a judgment of a justice of the peace. Graham v. Wayne Circuit Judge, 143 Mich. 360, 12 Det. Leg. N. 1017, 106 N. W. 1109.

70. Where a justice of the peace refuses to send up the papers and transcript to the county court on the ground that appellant had failed to make strict proof of his inability to pay cost, as required by Rev. St. 1895, art. 1401, the county court upon being satisfied with such proof may issue mandamus to compel the justice to send them up. Trapp v. Frizzell [Tex. Civ. App.] 17 Tex. Ct. Rep. 525, 98 S. W. 947.

71. Where the district court, without legal cause, dismisses an appeal from a justice's court, the remedy is by mandamus under Rev. St. 1898, §§ 3640, 3641, and not by certiorari. Hoffman v. Lewis [Utah] 87 P. 167.

72. Ex parte Wisner, 27 S. Ct. 150.

The writ of supervisory control.[73]—The issuing of mandamus by the supreme court of Louisiana as provided by the constitution to control inferior courts is discretionary.[74]

(§ 2) *B. Administrative and legislative functions of public officers.*[75]—While the power of the judicial department to interfere with the other co-ordinate departments has been denied,[76] the more general rule seems to be that it may enforce purely ministerial duties[77] and determine whether they are acting within the scope of their authority.[78]

The court has jurisdiction in mandamus proceedings to determine the constitutionality of the statute imposing the duty,[79] and, while there is a conflict as to the right of ministerial officers to raise the question, the majority holdings seem to favor the right.[80] While mandamus may issue to compel administrative officers to discharge purely ministerial duties,[81] it will not compel them to act in a particular

73. See 6 C. L. 501.

74. Const. art. 94. State v. Summit Lumber Co., 117 La. 643, 42 So. 195.

75. See 6 C. L. 501.

76. Under the Code of Civil Procedure, authorizing mandamus in cases where it would issue at common law, it cannot issue to the executive, legislative, or judicial branches of the government, except to such inferior courts as are subject to review by the judicial branch. People v. Best [N. Y.] 79 N. E. 890.

77. Under Rev. St. 1899, § 4194, defining the writ of mandamus as a writ issued in the name of the state to an inferior tribunal, a corporation, a board, or a person, commanding the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, and Const. art. 5, § 3, declaring that the supreme court shall have original jurisdiction in quo warranto and mandamus as to all state officers, the supreme court has jurisdiction to compel the governor to perform ministerial duties. State v. Brooks, 14 Wyo. 393, 84 P. 488. Will lie against the state auditor to compel him to permit inspection of records notwithstanding his office is a branch of the executive department. Clement v. Graham, 78 Vt. 290, 63 A. 146. Where the state grants to the parishes power to license and regulate the sale of intoxicating liquors but withholds the power to prohibit, the exercise of the power to license so as to prohibit presents a case where the judiciary may be invoked. State v. Police Jury of Red River Parish, 116 La. 767, 41 So. 85.

78. Mandamus to reinstate an expelled pupil will lie to determine whether the rule promulgated by the school board under which the expulsion occurred was within the scope of the board's authority. Kinzer v. Marion Independent School Dist. Directors, 129 Iowa, 441, 105 N. W. 686.

79. Under a petition for a writ of mandamus to the building commissioner and board of appeals to compel them to give the petitioner a permit to erect a building, the court has jurisdiction to determine the constitutionality of the statutes under which the board justifies its refusal. Welch v. Swasey [Mass.] 79 N. E. 745.

80. Municipal authorities charged by Act 1903, p. 393, c. 186, with the duty of submitting proposed charter amendments to the voters upon a proper petition held entitled to raise its constitutionality. Hindman v. Boyd, 42 Wash. 17, 84 P. 609. The rule that a ministerial officer cannot invoke the unconstitutionality of a statute imposing a duty to defeat a mandamus proceeding held inapplicable to proceedings to compel a clerk to publish copies of a void statute creating new assembly districts. Smith v. Baker [N. J. Law] 63 A. 619.

81. Mandamus is the proper remedy to compel a city council to perform a purely ministerial duty. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774.

Duties held ministerial and enforceable by law: Duty of the supervisors to make an appropriation for one-half of the cost of repairing a bridge, the township highway commissioners having done everything essential to obligate the county under the act in regard to roads and bridges in counties under township organization, § 19, as amended by Act June 17, 1891 (Laws 1891, p. 188). Board of Sup'rs of Phillips v. People [Ill.] 78 N. E. 13. Duty of the governor to appoint a commissioner of election upon petition of seventy-five electors of a city of the sixth class, as required by St. 1895, p. 136, c. 147, he being satisfied as to the truth of the averments. Elliott v. Pardee [Cal.] 86 P. 1087. Duty of the presiding officer of the common council to put the motion that the common council proceed to appoint the standing committees, his belief that it was ultra vires not justifying a ruling that it was out of order. People v. Brush, 110 App. Div. 720, 96 N. Y. S. 500. Duty of the board of county commissioners to convene and revoke a liquor license issued pending an appeal from the order granting the petition. Pallady v. Beatty, 15 Okl. 626, 83 P. 428. The duty of the mayor of Wilmington to sign and affix the corporate seal to a contract made by the council for the removal of garbage. State v. Fisher [Del.] 64 A. 68. Under Rev. St. 1899, § 8775, providing for the establishment of a school for colored children whenever the last enumeration of children of school age shows a specified number of negro children, mandamus will issue to compel the establishment of such school, notwithstanding the year in which the enumeration was taken is passed, there being no valid enumeration since. State v. Cartwright [Mo. App.] 99 S. W. 48. It is obligatory and not discretion-

manner, where they are vested with a discretion in respect thereto,[82] nor will it lie to control discretionary action generally[83] in the absence of abuse,[84] though it may be invoked to compel officers to exercise their judgment or discretion in the premises.[85] By express statute in many states, mandamus is the proper remedy to enforce duties resulting from an office.[86] The duty must be clear and plain.[87] While man-

ary for a city coming within the provisions of Act 25th Leg., Laws 1897, p. 236, c. 163, requiring cities having underground sewerage to appoint an examining board of plumbers, to consist of the city engineer and a member of the board of health, to put itself in a position to appoint such board by creating a city engineer's office and a board of health, and mandamus will lie to compel such action. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774. Mandamus will lie to compel the board of review to assess property which the local assessors have omitted. People v. Upham, 221 Ill. 555, 77 N. E. 931.

82. State v. Upson [Conn.] 64 A. 2. While mandamus will lie to compel the board of taxes and assessments to pass upon an application for the correction of an assessment, the board will not be compelled to act in any particular manner, there being an adequate remedy by certiorari to review an erroneous decision. People v. Wells, 110 App. Div. 336, 97 N. Y. S. 333.

83. State v. Upson [Conn.] 64 A. 2. Code § 4341. Kinzer v. Marion Independent School Dist. Directors, 129 Iowa, 441, 105 N. W. 686. Mandamus will not issue to disturb or overrule determinations of questions of fact committed to the discretion of the officer or body whose action is under review. Gleistman v. West New York [N. J. Law] 64 A. 1084. Under Act 43, p. 51, of 1902, making the decision of the board of trustees of the fireman's pension and relief fund final, mandamus will not lie to compel the granting of a pension refused upon a hearing (State v. Fireman's Pension & Relief Fund Trustees, 117 La. 1071, 42 So. 506), especially where it involves the exercise of judgment on the law and facts of the case (Id.). The discretionary power of the trustees of school townships to establish schools is not subject to control by mandamus in the absence of bad faith. State v. Black [Ind.] 76 N. E. 882. Mandamus will not issue to interfere with the body having control of the police force of a town in the management of that force. Gleistman v. West New York [N. J. Law] 64 A. 1084. Where control over boulevards has been vested in the park commissioners, the granting of a permit to a railroad to lay another track across the boulevard lies within their discretion, and mandamus will not lie to compel the issuing of such permit. People v. South Park Com'rs, 221 Ill. 522, 77 N. E. 925. Under agreement of June 4, 1891, between the United States and the Wichita Indians, and under the Act of Congress of March 2, 1895, the secretary of the interior is given authority to decide whether an applicant is entitled to an allotment on the Wichita reservation, and mandamus will not lie to control his judgment and discretion. United States v. Hitchcock, 26 App. D. C. 291. The resolution of the legislature, adopted in 1905, providing for the refunding of taxes collected from New York insurance companies under Gen. St. 1902, §§ 2450, 3606, in such sums as the insurance commission "shall determine should be so refunded under the provisions of existing laws," held to impose on the insurance commissioner the exercise of his judgment in determining the amount to be refunded. State v. Upson [Conn.] 64 A. 2. Upon the report of the surveyor the court found that the proposed road was of great public utility. An appeal was taken by a landowner from the award of damages, the award was affirmed, leaving it discretionary with the county court as to whether the expense of opening the road should be paid from the county funds. Held it was not obligatory upon the county court to open such road even if the petitioners offered to pay the expense thereof, and mandamus will not lie to compel such act. State v. McCutchan, 119 Mo. App. 69, 96 S. W. 251. Mandamus against public officers will only issue where the action to be enforced is purely ministerial and the duty to perform it in a definite way is clear. Gleistman v. West New York [N. J. Law] 64 A. 1084.

84. Mandamus and not certiorari is the appropriate remedy to correct an abuse of the discretion vested in the civil service commission in classifying an office in the competitive or noncompetitive class. Retracting and overruling People v. Collier, 175 N. Y. 196, 67 N. E. 309; People v. McWilliams, 185 N. Y. 62, 77 N. E. 785. Classification by the civil service commission of the office of battalion chief in the fire department in the competitive class held not such abuse of discretion as to authorize judicial interference. People v. McWilliams, 185 N. Y. 62, 77 N. E. 785; In re Dill, 185 N. Y. 106, 77 N. E. 789.

85. Mandamus lies to compel the reconvening of the board of supervisors of a county for the purpose of making a constitutional apportionment of the county into assembly districts. In re Timmerman, 51 Misc. 192, 100 N. Y. S. 57. Where the board of taxes and assessments refuses to hear an application to correct an assessment made under New York City Charter, Laws 1901, p. 382, § 897, as amended by Laws 1902, p. 486, c. 192, on the ground of absence from the city during the time for correction as prescribed by New York Charter, Laws 1901, p. 381, c. 466, § 895, mandamus to compel such hearing is the proper remedy. People v. Wells, 110 App. Div. 336, 97 N. Y. S. 333.

86. Mayor and councilmen receiving money as a special lobbying committee do not receive it as city officials, and hence mandamus will not lie to compel its return under Burns' Ann. St. 1901, § 1182, declaring that mandamus will lie to enforce a duty resulting from an office, etc. State v. Hale [Ind.] 77 N. E. 802.

87. Territory v. Yavapai County Sup'rs [Ariz.] 84 P. 519. Under Rev. St. 1901, pars. 3881, 3882, it is the plain duty of the board

damus will issue to enforce performance of a series of specific and definite acts, it will not enforce or control a general course of official duty.[88] Where the postmaster general has illegally discontinued a post office, mandamus will lie to compel its re-establishment.[89] The writ lies to compel an officer to permit books and papers belonging to his office to be inspected by a legislative committee.[90]

Duties relating to allowance and payment of claims against municipalities.[91]—Ministerial duties,[92] and in Washington discretionary duties,[93] relative to the allowance and payment of claims, may be enforced by mandamus, such as allowing the proper proofs of work done,[94] auditing and passing upon duly presented claims, etc.[95] But the officers must be under a clear legal duty to act,[96] and the law must

of supervisors, upon receiving of the territorial auditor a statement of changes made in the assessment, to have noted upon the assessment roll and computed and carried out in the proper column the territorial tax at the rate fixed. Id. The fact that the city is about to take steps to acquire title to a lot for street purposes is not a valid reason for refusing a permit to the owner thereof to locate a house thereon, and mandamus will lie to compel the superintendent of buildings to approve the plans and specifications. People v. Reville, 50 Misc. 474, 100 N. Y. S. 584. Where the court stenographer refuses to transcribe and file the notes taken in felony cases as provided by Penal Code 1895, § 981, mandamus will lie at the instance of the defendant, and the fact that the jury recommended that the defendant be punished as for a misdemeanor which was granted does not relieve him of the duty to transcribe and file. Williams v. Cooley [Ga.] 55 S. E. 917. Where a school board under a contract with the state board of education permits practice schools to be held in the public school, injunction will not lie at the instance of a taxpayer to enjoin the carrying out of the contract, though mandamus will lie to compel the local board to furnish such teachers as the law intends. Lindblad v. Board of Education of Normal School Dist., 221 Ill. 261, 77 N. E. 450. In mandamus to compel a city council to submit to the voters a charter amendment upon petition of voters, a peremptory writ should not issue without proof of the validity of the petition, the answer alleging that it was not signed by the requisite number of qualified voters and that the signatures were obtained by fraud. Hindman v. Boyd, 42 Wash. 17, 84 P. 609.

88. Application for leave to file a petition for a writ to compel Mayor Dunne of Chicago to enforce the Sunday closing law denied. People v. Dunne, 219 Ill. 346, 76 N. E. 570.

89. Not objectionable as undoing an act done, the postmaster general being under a clear duty to restore it. United States v. Cortelyou, 26 App. D. C. 298.

90. Where a county dispenser refuses to permit a legislative investigating committee to examine certain papers, claiming them to be private and in no way connected with the business, neither the officer attempting to seize the papers nor the committee has the right to decide such question, but upon application the court will examine the papers, and, if found to relate to the business, issue mandamus compelling him to permit an investigation. State v. Farnum, 73 S. C. 165, 53 S. E. 83.

91. See 6 C. L. 505.

92. Mandamus will lie to compel the mayor to sign an order for payment passed by the council upon a duly allowed claim. State v. Vasaly [Minn.] 107 N. W. 818. Officers failing to comply with Acts 1895, p. 146, c. 63, providing that the county commissioners shall issue bonds the proceeds of which shall be kept as a fund for the construction of roads, and be paid to the contractor upon warrants of the auditor as directed by the commissioners, may be compelled by the contractor so to do. Board of Jackson County Com'rs v. Branaman [Ind. App.] 79 N. E. 923.

93. Mandamus under the Washington statute possesses all the elements of a civil action, and it is no objection to its issuance against an officer that the act sought to be enforced is one requiring the exercise of judgment and discretion. Proceeding to compel the state auditor to issue a warrant for an amount claimed to be due petitioner for services. State v. Clausen [Wash.] 87 P. 498.

94. Mandamus will lie to compel the board of health to furnish an itemized statement or to certify to a properly itemized statement, under § 15, as amended by Pub. Acts 1903, p. 6, No. 7, of services rendered by one employed to nurse diphtheria, so as to enable such party to present it to the supervisors for allowance. Sawyer v. Manton [Mich.] 13 Det. Leg. N. 470, 108 N. W. 644. The commissioner of buildings may be compelled by mandamus to make return of the precept directing him to tear down an unsafe building, showing the cost thereof so as to enable the contractor to recover for the work done. John H. Parker Co. v. New York, 110 App. Div. 360, 97 N. Y. S. 200.

95. Commissioners' court compelled to act as required by Code 1896, § 1416, upon a duly presented claim. Commissioners' Ct. of Chilton County v. State [Ala.] 41 So. 463. Mandamus will lie to compel the county commissioners to pass upon a claim for fees in a criminal case where the defendant has been acquitted. De Soto County Com'rs v. Howell [Fla.] 40 So. 192. Mandamus will lie to compel the county commissioners to audit, approve and pay an expenditure by a county authorized by a valid law, the amount being ascertained and approved as the law directs and there being no question as to bona fides. Board of Com'rs of Escambia County v. Port of Pensacola Com'rs [Fla.] 42 So. 697.

96. Mandamus will not lie to compel the

provide the means by which they can perform the same.[97] Before the writ will issue, however, the party must be without other adequate relief.[98] Where a claim is duly established, mandamus will lie to compel the payment of the same,[99] or to levy a tax for such purpose if necessary.[1] Where the original assessment for the payment of warrants or bonds is invalid, mandamus will issue to compel a reassessment.[2] A judgment at law is not essential to procuring a writ extending a tax levy where the amount due has been made certain by official act.[3] Mandamus is the appropriate remedy to compel a county treasurer to pay to the town treasurer funds belonging to the latter[4] if he has such funds in his possession.[5]

Duties of election officers.[6]—Mandamus will issue to compel election officials to act[7] and to discharge purely ministerial duties,[8] provided the duty be clear.[9] The

judge of probate to draw a warrant for a claim against the county, unless the same is definite and the record shows it to have been audited and allowed as required by Code 1896, §§ 1416, 1417. Smith v. McCutchen [Ala.] 41 So. 619. Under Code Civ. Proc. § 1961, mandamus will not issue to compel a county to allow and pay a claim which is not a legal charge against it. State v. Lewis and Clarke County [Mont.] 86 P. 419. Mandamus will not lie to compel payment of orders issued for pavement work under contracts apparently illegal under Greater New York Charter, Laws 1901, p. 186, c. 466, § 419, not having let after competitive bidding. People v. Grout, 111 App. Div. 924, 98 N. Y. S. 185. Where the taxing power of the city has been exhausted and its estimated revenues are not more than sufficient to meet the statutory, necessary, and usual expenses, mandamus will not lie to compel the appropriation in advance of any surplus which may result to the payment of a particular judgment. State v. City Council of New Orleans, 116 La. 851, 41 So. 115. A contract making the certificate of the engineer conclusive of the amount of work done thereunder, but not as to the legal interpretation of the terms thereof, mandamus will not lie to compel the comptroller to pay an alleged claim thereunder, there being a dispute as to the amount legally authorized to be done thereunder. In re Morris & Cummings Dredging Co., 101 N. Y. S. 726. A purchaser of construction bonds, being in no better position than the contractor, is not entitled to mandamus compelling the city to reconstruct the improvement with its general funds and to pay the bonds. Northern Trust Co. v. Wilmette, 220 Ill. 417, 77 N. E. 169. Denied to compel the township authorities to provide for the payment of a debt illegally contracted by the commissioner upon a false petition. Indiana Road Mach. Co. v. Keeney [Mich.] 13 Det. Leg. N. 976, 110 N. W. 530.

97. Territory v. Yavapai County Com'rs [Ariz.] 84 P. 519. Rev. St. 1901, p. 973, giving the supervisors general supervision over all officials charged with the collection and disbursement of revenue, held to give them authority to make changes in the assessment roll even after the duplicate has been issued to the collector. Id.

98. An action at law and not mandamus is the proper remedy to realize upon a claim against a city for the rental of land and for services of watchman in caring for property stored thereon. People v. Metz, 100 N. Y. S. 913. Where the county commissioners have passed upon a claim for witness charges in a criminal case where the defendant was acquitted, mandamus will not lie to compel them to allow a particular item, a suit against the county being the proper remedy. De Soto County Com'rs v. Howell [Fla.] 40 So. 192.

99. Under Code Civ. Proc. § 1085, mandamus will lie to compel the treasurer of an irrigation district to pay interest coupons on bonds issued by the district. Hewel v. Hogin [Cal. App.] 84 P. 1002.

1. Where a contract for the construction of a sewer provided for payment as soon after the completion and acceptance of the work "as the assessment for the construction of the same shall have been collected by the trustees and not before," the contractor may compel the levy and assessment by mandamus if the trustees refuse to act. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246. A judgment creditor of a city authorized to levy a tax to pay a debt, who secures an execution which is returned "no property found" and who demands payment from the appropriate officers which is refused, may by mandamus compel the levying of a tax to pay the same. Graham v. Tuscumbia [Ala.] 42 So. 400.

2. State v. Seattle, 42 Wash. 370, 85 P. 11; Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106.

3. Amount due a new school district from the old district from whose territory it had been formed fixed by statutory appraisement. School Directors of Dist. 25 v. People, 123 Ill. App. 73.

4. State v. Spinney [Ind.] 76 N. E. 971.

5. No funds a good defense. State v. Spinney [Ind.] 76 N. E. 971.

6. See 6 C. L. 505.

7. Where the inspectors of a town meeting adjourned without counting the ballots at all as required by statute, mandamus will lie to compel them to reconvene, open the box, canvass the votes, and the clerk to properly enter and file the results. People v. Armstrong, 101 N. Y. S. 712. Where it is the duty of the mayor and council to canvass election returns and to issue certificates of election, mandamus will lie to compel them to act. State v. Kendall [Wash.] 87 P. 821.

8. Where a certificate of nomination at a primary has been issued to a candidate and no steps have been taken to contest

writ will also be awarded to compel inspectors to permit a qualified voter to exercise the right.[10] A discrepancy appearing between the ballot clerk's return and the tally sheet in New York, mandamus will issue to compel a recount.[11] Mandamus proceeding, however, is not the proper remedy to decide election contests involving charges of fraud and illegal voting.[12]

Enforcement of right to public office.[13]—While mandamus will not lie to try the right to a public office,[14] it will issue to compel the reinstatement of one wrongfully removed,[15] as where one entitled to a hearing under the civil service rules[16] has been peremptorily dismissed.[17] But where such a hearing has been awarded, the writ will not issue to reinstate because of errors therein so long as the hearing preserves the nature of a judicial proceeding.[18] One prima facie entitled to an office[19] may compel the delivery of the books, records, and other paraphernalia belonging thereto by mandamus.[20] The fact that the answer puts in issue the right to the office which cannot be litigated does not render it demurrable.[21]

his election, mandamus will lie to compel the county clerk to place his name on the official ballot. State v. Goff [Wis.] 109 N. W. 628. The duty of the mayor and council to canvass election returns is purely ministerial and they cannot refuse to act on the ground that the preliminary proceedings leading up to the election were irregular, especially where their own negligence caused the irregularities. State v. Mason [Wash.] 88 P. 126. Mandamus will lie to compel the clerk of the county court to print on the official ballot the name of a candidate duly nominated and entitled to be placed thereon. Robinson v. McCandless, 29 Ky. L. R. 1088, 96 S. W. 877. The duty of the governor to grant a certificate of election to state officers after the canvassing board has filed its certificate showing them to have been elected, as provided by Rev. St. 1899, § 351, is ministerial. State v. Brooks, 14 Wyo. 393, 84 P. 488. A person acting as the secretary of two rival nominating conventions of the same party will be compelled by mandamus to certify the nominations made by each convention, so as to enable the rival candidates to present their claims for determination before the election board. State v. Jonee, 74 Ohio St. 418, 78 N. E. 505.

9. Where the republican county convention nominated no county commissioner, a party designated as a "republican" in his petition or certificate signed by electors only is not entitled to go upon the ballot as the republican nominee, and mandamus will not lie. Nelson v. King [S. D.] 109 N. W. 649.

10. People v. Doe, 109 App. Div. 670, 96 N. Y. S. 389.

11. Mandamus will lie to compel a recount of ballots as provided by Election Law, Laws 1896, pp. 938, 951, c. 909, §§ 84, 103, where a discrepancy appears between the ballot clerk's return and the tally sheet. In re Hearst, 110 App. Div. 346, 96 N. Y. S. 341.

12. In re Lauritsen [Minn.] 109 N. W. 404.

13. See 6 C. L. 505.

14. State v. Hyland [Neb.] 107 N. W. 113; Briggs v. Carr, 27 R. I. 477, 63 A. 487. Especially where the office is filled by a de facto officer recognized by his associate members. Caffrey v. Caffrey, 28 Pa. Super. Ct. 22. Since title to office cannot be tried by mandamus, such writ will not issue to reinstate one who has been wrongfully discharged contrary to the civil service rules, where the office has been filled by another, notwithstanding § 21 of Laws 1904, c. 697, p. 1694, providing that "every person whose rights may be in any way prejudiced contrary to any of the provisions of this section shall be entitled to a writ of mandamus." People v. Cahill, 102 N. Y. S. 325. Mandamus will not lie to compel the judge of probate to issue certificates for mileage and per diem to county commissioners where the allowance involves the determination of the right to the office in possession of other de facto commissioners. Goodwin v. Sherer [Ala.] 40 So. 279. Where a captain in the police department and a veteran who was entitled to preference were appointed to the office of inspector when only one vacancy existed, and after both qualifying the captain was directed to resume his former duties, mandamus will not lie to compel his reinstatement as an inspector. People v. McAdoo, 110 App. Div. 432, 96 N. Y. S. 362. Where four eligibles certified by the civil service commissioners are appointed as police inspectors when only two vacancies in fact existed, one of whom was a veteran, entitled to preference, and another was expressly appointed to a particular vacancy, one reduced to his former position cannot maintain mandamus to compel reinstatement. Id.

15. Hill v. Fitzgerald [Mass.] 79 N. E. 825.

16. A veteran is not entitled to a hearing before discharge under the civil service rules where the office is abolished. People v. Bermel, 51 Misc. 75, 100 N. Y. S. 728.

17. A veteran employed in the service of a city pursuant to the civil service statutes and rules of the civil service commission may compel reinstatement by mandamus if wrongfully discharged. Ransom v. Boston [Mass.] 79 N. E. 823.

18. People v. McAdoo, 110 App. Div. 894, 96 N. Y. S. 1069.

19. One who holds a certificate of election and has duly qualified by taking the required oath and giving the prescribed bond. State v. Hyland [Neb.] 107 N. W. 113.

20. State v. Hyland [Neb.] 107 N. W. 113.

21. Goodwin v. Sherer [Ala.] 40 So. 279.

(§ 2) *C. Quasi public and private duties.*[22]—While mandamus will not issue to enforce a penalty[23] or private contractual rights,[24] it may be invoked to compel performance of a public duty imposed by contract.[25] Mandamus is the proper remedy to enforce obedience to valid orders of the railroad commissioners,[26] but not to orders of the board of health in New York,[27] to compel a gas company to furnish gas at the statutory rate,[28] to secure indiscriminative service from a common carrier,[29] to compel the transfer of shares of stock on the corporate books, there being no dispute as to the validity of the transfer,[30] to compel corporation officials to permit stockholders to inspect corporate records[31] when the right of inspection exists,[32] to restore one to the rights and privileges of membership in a fraternal society where the same have been wrongfully denied,[33] and to compel the granting of school privileges to a child entitled thereto.[34] The legal duty of a street car company to change the location of its tracks preparatory to a street improvement may be enforced by the writ,[35] but in all cases respondent must owe a clear legal duty.[36]

22. See 6 C. L. 506.

23. The personal liability of the treasurer of an irrigation district for interest on overdue interest coupons which he wrongfully refused to pay is in effect a penalty and will not be enforced in mandamus. Hewel v. Hogin [Cal. App.] 84 P. 1002. Reaffirmed on rehearing.

24. **Mandamus refused** to enforce a contract of an educational corporation to grant a diploma upon the fulfillment of certain conditions by the student. State v. Milwaukee Medical College [Wis.] 106 N. W. 116. To compel the furnishing of water by an irrigation company under a contract obligation. Perrine v. San Jacinto Valley Water Co. [Cal. App.] 88 P. 293. Where a street railway assents to certain void ordinances requiring it to issue transfers in return for favors received, the right to transfers is a contractual one in favor of the individual passengers and not enforceable by mandamus. City of Newark v. North Jersey St. R. Co. [N. J. Law] 62 A. 1003.

25. Duty of a street car company to pave the streets as required by the ordinance granting it the right to occupy the streets held more than a contractual obligation. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84.

26. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875.

27. Section 31 of Laws 1903, p. 883, c. 383, amendatory of Public Health Laws, Laws 1893, p. 1506, c. 661, providing that any duty "enjoined, prescribed or required by this article" may be enforced by mandamus, relates only to the duties imposed upon the board. People v. Fries, 109 App. Div. 358, 96 N. Y. S. 327.

28. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. S. 81.

29. Where a carrier wrongfully discontinues switching service as to a disfavored shipper and discriminates against him, mandamus will lie to compel such service. Larrabee Flour Mills Co. v. Missouri Pac. R. Co. [Kan.] 88 P. 72.

30. State v. Consumers' Brew. Co., 116 La. 782, 40 So. 45.

31. Gavin v. Pacific Coast Marine Firemen's Union, 2 Cal. App. 638, 84 P. 270. Writ allowable under Rev. St. 1899, §§ 4194, 4197. Wyoming Coal Min. Co. v. State [Wyo.] 87 P. 984. Under Rev. St. 1899, § 4194, authorizing a writ of mandamus to compel the performance of an act which the law specifically enjoins as a duty resulting from an office, trust, or station, it will lie to compel the secretary of a corporation to permit a stockholder to examine the books as provided by the by-laws, which has the effect of statutory enactments as far as entitling relator to inspect. Wyoming Coal Min. Co. v. State [Wyo.] 87 P. 337.

32. Since a corporation will be compelled to exhibit its books to a stockholder only in the protection of his stock interest, mandamus will not lie to aid him in a suit against directors of a corporation for the publication of a false report whereby he was induced to become a stockholder and incurred a loss. In re Taylor, 101 N. Y. S. 1039.

33. United Bros. v. Williams, 126 Ga. 19, 54 S. E. 907. Though removed in the manner prescribed by the constitution and by-laws of the society, there being a controversy as to the facts relied on to justify the removal. People v. Independent Order Brith Abraham, 101 N. Y. S. 866.

34. Where a school board acting without authority orders a change of text books, mandamus will lie to compel the granting of school privileges to a child not complying with such regulation. Harley v. Lindemann [Wis.] 109 N. W. 670. Where a pupil has been denied admission for failure to comply with an alleged illegal requirement, the proper remedy is mandamus to compel the authorities to admit him and not injunction to restrain the enforcement of the requirement. McCaskill v. Bower, 126 Ga. 341, 54 S. E. 942.

35. People v. Geneva, etc., Traction Co., 112 App. Div. 581, 98 N. Y. S. 719.

36. The right to compel the Baltimore & Ohio Railroad Company to proceed to condemn land under § 9, Act of Congress of Feb. 28, 1908 (32 Stat. at L. 909, chap. 856), relates only to land within the location selected by the company for terminal facilities within the general boundaries fixed by the act, and mandamus will not lie to compel the condemnation of land not needed, though within the general boundaries. United States v. Baltimore & O. R. Co., 27 App. D. C. 105.

§ 3. *Jurisdiction and venue.*[37]—A state court has no power to issue a writ to control the action of a foreign body.[38] As in proceedings generally, the court must have jurisdiction of the subject-matter,[39] and must acquire jurisdiction of the respondent by service of process as required by statute.[40] The supreme court of Texas has no jurisdiction to determine issues of fact.[41] The fact that the prayer sought to have administrative officers discharge a discretionary duty in a particular manner does not deprive the court of jurisdiction to command action in the premises.[42] The supreme court of Minnesota has original jurisdiction to issue orders relative to the placing of names on election ballots.[43]

Federal courts.[44]

§ 4. *Parties. A. Parties plaintiff.*[45]—While mandamus proceedings can be maintained only by one interested in the right to be enforced,[46] and who will be substantially benefited,[47] which must be made to appear,[48] interest as a citizen is sufficient if the duty be a public one.[49] An officer can enforce only such duties as

37. See 6 C. L. 507.

38. To control the supreme council of a foreign assessment insurance society by mandamus. Brenizer v. Supreme Council, Royal Arcanum, 141 N. C. 409, 53 S. E. 835.

39. In mandamus to compel the commissioners' court to enter orders directing drafts to be drawn on the treasurer for claims due relator, there being no question as to the amount and validity of the claims, the district court has jurisdiction without regard to the size of the amount. Denman v. Coffee [Tex. Civ. App.] 14 Tex. Ct. Rep. 29, 888, 91 S. W. 800.

40. Under Pierce's Code, § 1420, in mandamus to compel the council to canvass election returns, service upon a majority of the board is sufficient. State v. Kendall [Wash.] 87 P. 821. Under Shannon's Code, §§ 5335, 5337, providing for the presence of persons interested in mandamus, or a notice to them, names of persons improperly on the registration books will not be ordered to be stricken where such persons are not before the court. State v. Willett [Tenn.] 97 S. W. 299.

41. Edwards v. Terrell [Tex.] 15 Tex. Ct. Rep. 755, 93 S. W. 426; Davis v. Terrell [Tex.] 99 S. W. 404.

42. Where the board of commissioners has failed to make a legal designation of newspapers to publish election notices, the court acquired jurisdiction to compel them to discharge the duty though the prayer in the mandamus proceeding asked for the designation of a particular paper. People v. Voorhis, 100 N. Y. S. 927.

43. Rev. St. 1905, § 202, giving the supreme court jurisdiction to issue orders relative to placing names on the election ballots, etc., provides a proceeding which is, in substance, mandamus, and, therefore, original jurisdiction therein could be given the supreme court. In re Lauritsen [Minn.] 109 N. W. 404.

44, 45. See 6 C. L. 508.

46. Interest held sufficient: Under Ballinger's Ann. Codes & St. § 6695, permitting any person to make complaint that a crime has been committed, a complainant has sufficient interest in the matter to enable him to institute mandamus where the magistrate wholly refuses to act. State v. Yakey [Wash.] 85 P. 990. A wholesale liquor dealer who has been accustomed to ship liquors to the point to which a carrier refuses to receive for shipment has such a special interest as to entitle him to enforce the carriage by mandamus under § 4869, Civil Code of 1895. Southern Exp. Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185. Where a parent is liable criminally for failure to send his children to school, he has such interest as to enable him to maintain an action in his own name to compel the board of education to admit his child to the public school. Cartwright v. Board of Education of Coffeyville [Kan.] 84 P. 382. An independent school district coextensive with the boundaries of a city may enforce a contract entered into between the city and one accepting a franchise to furnish water, such contract being for its benefit. Independent School Dist. v. Le Mars City Water & Light Co. [Iowa] 107 N. W. 944. Where a city is interested in the taxation of certain property, it is the proper relator to compel the assessment of the same. People v. Upham, 221 Ill. 555, 77 N. E. 931.

Insufficient interest: Acts 1869, p. 96, c. 44, and acts amendatory thereof, construed to give a railroad company no interest in a tax levied to raise money for a donation until the same was collected, and hence could not maintain mandamus to compel the collection thereof after levy. State v. Clinton County Com'rs [Ind.] 76 N. E. 986. A defendant in a criminal action who has been acquitted and discharged and who is, therefore, not liable for his witnesses' mileage, cannot be a relator to compel the county to allow the same. De Soto County Com'rs v. Howell [Fla.] 40 So. 192.

47. Mandamus refused to compel a railroad company to furnish passenger service between designated points where there is ample service by another road. People v. St. Louis & Belleville Elec. R. Co., 122 Ill. App. 422.

48. Where a defendant in a criminal case has been acquitted and is not liable for his witnesses' fees, he cannot maintain mandamus to compel the county to allow the same in the absence of a showing that he has paid such fees. De Soto County Com'rs v. Howell [Fla.] 40 So. 192.

49. State v. Yakey [Wash.] 85 P. 990. A citizen and voter of a city has a sufficient interest to apply for mandamus to compel

are owed to him in his official capacity,[50] or with which he is charged with the enforcement.[51] While persons seeking the enforcement of the same duty may become corelators,[52] each must have a clear legal right with respect to the entire cause of action.[53] An application for a writ in the interest of a private party is properly instituted in the name of the state.[54]

(§ 4) *B. Parties defendant.*[55]—The party charged with the duty sought to be enforced is the proper party defendant.[56] In mandamus to secure reinstatement in office, the present incumbent is not a necessary party.[57] Where the mayor is ex officio the presiding officer of the city council, he is a proper party to mandamus proceedings to compel the discharge of a duty imposed on the council.[58]

§ 5. *Pleading and procedure in general.*[59]—Where by practice mandamus proceeding is an action at law, the ordinary rules of pleading apply,[60] and conclusions of law[61] need not be pleaded.[62] Conclusions of fact are insufficient.[63] Neither

the mayor and council to canvass the returns of a municipal election. State v. Mason [Wash.] 88 P. 126. Where the commissioners of Stokes County refuse to comply with Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, providing that certain railroad taxes shall be expended in a particular manner in certain townships, tax payers of the township have capacity to maintain mandamus proceedings to compel compliance. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427. Whether or not the municipal officers of a town can maintain mandamus to compel the postmaster general to reestablish a post-office, private citizens residing in the city can do so. United States v. Cortelyou, 26 App. D. C. 298.

50. Although under the dispensary act (Gen. Acts 1898-99, p. 110) it is the duty of the mayor to certify to the judge of probate the fact of vacancy in the office of dispenser, the duty of the judge to call a meeting of the court of county commissioners of his court to select the names of three qualified men, etc., is owed to the municipality, and the mayor as such cannot maintain mandamus to compel the judge to act. Rose v. Lampley [Ala.] 41 So. 521. School directors, being charged with expenditure of the school funds, are proper relators to compel the tax officials to include in the tax certificate the amount due the district. School Directors of Dist. 25 v. People, 123 Ill. App. 73.

51. The tax commissioner may invoke mandamus to compel an assessor to perform a legal duty. State v. Graybeal [W. Va.] 55 S. E. 398.

52. Two persons claiming to have been elected members of the council may unite in mandamus proceedings to compel the mayor and council to canvass the returns and issue certificates of election. State v. Kendall [Wash.] 87 P. 821.

53. Two persons cannot jointly maintain mandamus to compel the judge of probate to issue certificates of mileage and per diem as commissioners, the one having no interest in the claims of the other. Goodwin v. Sherer [Ala.] 40 So. 279.

54. State v. Superior Ct. for Douglas County, 41 Wash. 439, 83 P. 1027.

55. See 6 C. L. 508.

56. Where a janitor of a police station is removed without a hearing, in violation of Rev. Laws, c. 19, § 23, providing that no veteran employed by any city shall be removed without a discharge signed by the mayor after a hearing, mandamus to compel reinstatement should be brought against the police board who have control of the police station and not against the mayor of Boston, Sims v. Boston, 191 Mass. 382, 77 N. E. 714. The power to detail patrolmen for detective duty in the city of Buffalo and to revoke such details being vested exclusively in the superintendent of police, mandamus to the police board to compel reinstatement to detail detective duty is properly denied. In re Pritchard, 101 N. Y. S. 711.

57. People v. Ahearn, 111 App. Div. 741, 98 N. Y. S. 492.

58. Canvassing of election returns. State v. Kendall [Wash.] 87 P. 821.

59. See 6 C. L. 509.

60. Clement v. Graham, 78 Vt. 290, 63 A. 146.

61. In mandamus to compel the restoration of a police patrolman's name to the pay rolls, allegations that the city had by ordinance authorized the appointment of a large number of policemen, and that petitioner was duly appointed, state mere conclusions. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155. An allegation in a petition for mandamus to compel the board of civil authority of a town to canvass and count the ballots voted at a local option election, that it was the duty of the board to so act, is a mere conclusion of law. Page v. McClure [Vt.] 64 A. 451.

62. A complaint for mandamus to compel the exhibition of vouchers need not allege that they are public records, since they are such as a matter of law if at all. Clement v. Graham, 78 Vt. 290, 63 A. 146.

63. An answer to an alternative writ to compel respondent to furnish gas at the statutory rate, alleging that such rate would give respondent very little above actual cost and would certainly not yield an adequate return, so would deprive respondent of property without due process of law and without just compensation, was insufficient. In re Rebecchi, 51 Misc. 403, 100 N. Y. S. 513. In mandamus to compel the warden of the state penitentiary to remove convicts from a leased farm to one owned by the state, averments that the board of control is not having timbered land opened as "rapidly as practicable," and that all the convicts can "easily and profitably be employed," are

conclusions of law[64] nor fact[65] are admitted by demurrer. A mere conclusion of fact will be controlled by the facts pleaded.[66] The pleadings must be sufficiently definite to enable the court to direct the performance of specific acts.[67]

§ 6. *Petition or affidavit.*[68]—Every intendment is against the petitioner.[69] The petition must allege facts showing relator's right to the relief demanded,[70] the clear legal duty of respondent to act,[71] that he is in default,[72] and that it lies within his power to perform the act sought to be enforced.[73] While the petition must show that relator has no other adequate remedy, it need not specifically allege such fact, it appearing from the facts pleaded,[74] nor need it allege matters which the law will presume[75] or of which judicial notice is taken.[76] A fatally

mere conclusions. State v. Henry, 87 Miss. 125, 40 So. 152.

64. Page v. McClure [Vt.] 64 A. 451.

65. State v. Henry, 87 Miss. 125, 40 So. 152.

66. In mandamus to compel the trustees of the police relief and pension fund to pay the relator a claim which she alleges to be due her, an allegation that defendant had more than sufficient money applicable to and with which to pay the claim is a conclusion and will be controlled by the facts alleged. Burke v. San Francisco Police Relief & Pension Fund Trustees [Cal. App.] 87 P. 421.

67. Mandamus will not lie to compel the erasure of names from the registration books where such names are not set out in the pleadings except under the general designation of "residents of the Soldiers' Home," especially where some of such inmates are qualified voters. State v. Willett [Tenn.] 97 S. W. 299.

68. See 6 C. L. 509.

69. Leatherwood v. Hill [Ariz.] 85 P. 405. An application by a corporation for a writ compelling the territorial auditor to issue his warrant for the payment of an appropriation, and setting out the act making the corporation a trustee of the money to be disbursed in a certain manner, is demurrable if it fails to show corporate capacity to so administer it. Id.

70. Where according to the terms of a contract to supply water for irrigation purposes the supply to each receiving water was to be scaled proportionately if there was insufficient water to furnish the full amount, a petition to compel respondent to furnish relator the contract amount must allege that there is a sufficient supply for all. Cozzens v. North Fork Ditch Co., 2 Cal. App. 404, 84 P. 342. An allegation that there is sufficient to supply relator is insufficient. Id. In mandamus to compel the commissioner of public works to issue a permit to construct tracks in the streets after the lapse of the time fixed by ordinance within which it was to construct the same, the petition must allege facts excusing the delay. Blocki v. People, 220 Ill. 444, 77 N. E. 172.

71. In mandamus to compel election commissioners to place names on the official ballot in a certain column and under a given device and party name, the petition must allege that the certificate of nomination designated the title of the party and the figure or device by which its candidate was to be recognized, as required by Burns' Ann. St. 1901, § 6215. State v. Marshall County Com'rs [Ind.] 78 N. E. 1016. In mandamus to compel the restoration of a police patrolman's name to the pay rolls, an allegation that petitioner was appointed before the civil service act was adopted, thereafter took the examination, passed the same, and continued to be carried on the pay rolls, does not show that he ever held office under the provisions of the act so as to render him liable to discharge only for cause, etc. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155. Under 1 Starr & C. Ann. St. 1896, p. 722, c. 24, par. 75 (City and Village Act. art. 6, § 3), providing the term of appointive offices shall not exceed two years, an allegation in mandamus to compel the certification of a policeman's name on the pay rolls that he was appointed in 1888, and continued to hold office and draw the salary until his name was dropped in 1898, is not sufficient to show that he was a de jure officer when his name was dropped. Id. In mandamus to compel the board of review to assess certain tunnels, the petition need not allege the ownership of the tunnels on the date when the assessment should have been made, since it should have been assessed irrespective of ownership. People v. Upham, 221 Ill. 555, 77 N. E. 931.

72. Dye v. State, 73 Ohio St. 231, 76 N. E. 829. In a petition for mandamus to compel an auditor to transfer a portion of lands on the tax list to the purchaser thereof, failure to allege that proper proof of the relative value of the parts was offered is fatal. Id.

73. In mandamus to compel the advisory board of a township to make an appropriation to build a school house, a complaint failing to show that there were funds from which the appropriation could be made is demurrable. Advisory Board of Harrison Tp. v. State [Ind.] 76 N. E. 986. A petition for mandamus to compel the council of a city, as required by Act 25th Leg., Laws 1897, p. 236, c. 163, to appoint an examining board of plumbers, to consist of a member of the local board of health, the city engineer, etc., which alleged that if the city had no board of health or city engineer it had power to create and appoint them which it was its duty to do, is not subject to the objection that it failed to allege that the city had a board of health and a city engineer. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774.

74. Clement v. Graham, 78 Vt. 290, 63 A. 146.

75. Since under V. S. 305, the auditor is required to keep vouchers for claims presented against the state and it will be presumed that he performed his duty, a complaint for mandamus to compel him to exhibit vouchers need not allege that there are

defective petition will not support a judgment granting the writ, though a demurrer thereto be stricken out.[77] Insufficiency of complaint to allege facts authorizing a recovery must be raised by a motion to quash.[78] An affidavit must be sworn to in the manner prescribed by law.[79]

§ 7. *Alternative writ.*[80]—The writ must show that relator is entitled to the relief demanded,[81] and that it is within respondent's power to comply therewith.[82] An alternative writ to enforce orders of statutory officers must show that the order was one within the power of the officers.[83] The mandatory clause must not command greater relief than relator is entitled to under the allegations of the petition and writ.[84] Where relator's petition entitles him to an alternative writ, the court has no power to attach a condition thereto.[85]

§ 8. *Demurrer to petition or writ; answer or return; subsequent pleadings.*[86]—A demurrer to a petition admits all facts well pleaded.[87] Material allegations must be directly traversed,[88] and a denial on information and belief,[89] or a call for proof,[90] admits the same, unless they are mere conclusions of law.[91] Failure to deny an allegation[92] or to frame or settle an issue in respect thereto[93] admits the fact alleged,

such vouchers in his possession. Clement v. Graham, 78 Vt. 290, 63 A. 146.

76. Complaint for mandamus to compel state auditor to exhibit certain vouchers held to sufficiently allege the duty to exhibit, though it did not expressly allege the source of such duty, such duty being a common-law duty if it exists at all of which the court will take notice. Clement v. Graham, 78 Vt. 290, 63 A. 146.

77. Notwithstanding the demurrer thereto is stricken out. Commissioners' Ct. of Chilton County v. State [Ala.] 41 So. 463.

78. Clement v. Graham, 78 Vt. 290, 63 A. 146. And not by a motion to dismiss. Id.

79. An affidavit of the attorney of the party applying for the writ stating that the facts set forth in the application are within his personal knowledge, sufficiently complies with § 4318, Wilson's Rev. & Ann. St. 1903, specifying what the affidavit shall contain when made by an attorney. Pallady v. Beatty, 15 Okl. 626, 83 P. 428. The words, "Subscribed and sworn to before me" in the certificate of an officer taking an affidavit shows a sufficient compliance with § 4317, Wilson's Rev. & Ann. St. 1903, requiring an affidavit to be "sworn to or affirmed" before the officer and "signed in his presence." Id.

80. See 6 C. L. 510.

81. Laws 1901, p. 636, c. 466, § 1543, providing that no head of a bureau shall be removed except upon a hearing, being applicable only to bureaus established by the charter or by an official authorized by charter to create bureaus, an alternative writ for reinstatement must allege that the bureau from the head of which relator was removed without a hearing was one within the protection of the statute. People v. Ahearn, 111 App. Div. 741, 98 N. Y. S. 492.

82. In mandamus to compel an appropriation, a writ failing to show that there were funds from which an appropriation could be made is demurrable. Advisory Board of Harrison Tp. v. State [Ind.] 76 N. E. 986.

83. Order of the railroad commissioners fixing rates. Where the alternative writ commands obedience to the order, the entire order must be within the power of the commissioners, since it must be enforced as a whole. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875.

84. Renders the same insufficient against a demurrer for want of facts or a motion to quash. Advisory Board of Harrison Tp. v. State [Ind.] 76 N. E. 986.

85. Where, in mandamus to compel the reinstatement of relator to a municipal office, his petition entitled him to an alternative writ, the court had no power to attach a condition that he waive all claims for back salary in case of ultimate success. People v. Ahearn, 100 N. Y. S. 716.

86. See 6 C. L. 511.

87. Eddy v. People, 118 Ill. App. 138.

88. In mandamus to compel a gas company to furnish gas at the statutory rate, an answer denying that it "refused to supply petitioner with gas" does not put in issue its refusal to "furnish at the statutory rate." In re Rebecchi, 51 Misc. 327, 100 N. Y. S. 335. Where the answer without ambiguity or evasion responds to and denies the assertions of the petition, it is sufficient as against a general demurrer. People v. Board of Trade, 224 Ill. 370, 79 N. E. 611.

89. In re Long Acre Elec. Light & Power Co., 101 N. Y. S. 460, afd. 102 N. Y. S. 242; Clement v. Graham, 78 Vt. 290, 63 A. 146. In mandamus to compel the payment of interest coupons on irrigation district bonds, a denial upon information and belief that the secretary ever signed the bond is insufficient. Hewel v. Hogin [Cal. App.] 84 P. 1002. Reaffirmed on a rehearing.

90. Clement v. Graham, 78 Vt. 290, 63 A. 146.

91. An allegation that it was the duty of the auditor to exhibit certain vouchers to compel which exhibition mandamus is sought is a conclusion of law. Clement v. Graham, 78 Vt. 290, 63 A. 146.

92. Where the respondent judge did not deny or answer the allegations of a petition for a writ that he had refused ever to try the divorce case on account of the insanity of defendant, such allegation is admitted. State v. Murphy [Nev.] 85 P. 1004.

93. Indiana Road Mach. Co. v. Keeney [Mich.] 13 Det. Leg. N. 976, 110 N. W. 530.

but no more.[94] Answering affidavits alleging conclusions of law or fact do not create issues.[95] A return cannot in a single paragraph both deny the cause of action and confess and avoid it.[96] Defenses not interposed by the return cannot be considered,[97] and municipalities must plead the statute of limitations as well as individuals.[98] In the absence of a statute allowing them to be traversed, answering affidavits are conclusive upon disputed questions of fact.[99] St. 9 Anne, c. 20, allowing pleadings subsequent to the return in mandamus to municipalities and their officers, is a part of the common law of Vermont.[1] Laches which have been made the ground of an unsuccessful motion to dismiss the alternative writ may again be interposed as a defense in the answer.[2] Where the alternative writ partakes of the nature of a complaint, the bar of limitations is not a ground for dismissal.[3] Objection to an answer on the ground of the generality of the denials must be raised by a special demurrer.[4] Affidavits replying to the answer are not allowable in New York if objected to.[5] In the permitting of amendments[6] and the striking of averments,[7] the rules applicable to actions generally apply. The evidence offered must correspond to the allegations of the pleadings.[8]

§ 9. *Trial, hearing, and judgment. A. Trial and hearing.*[9]—In original proceedings before the supreme court of Washington, complicated issues of fact may be certified to the superior court for findings.[10] Where relator so acts as to con-

94. Where in mandamus to compel a railroad to lower its tunnel under a river on the ground that it obstructed navigation, failure to deny an allegation that there are other tunnels as near the surface as the one in question is not an admission that it is not an obstruction. West Chicago St. R. Co., v. People, 214 Ill. 9, 73 N. E. 393.

95. In re Long Acre Elec. Light & Power Co., 101 N. Y. S. 460, afd. 102 N. Y. S. 242.

96. Vandalia R. Co. v. State [Ind.] 76 N. E. 980. A return to mandamus proceeding to compel a railroad company to construct a highway crossing, stating facts tending to show the invalidity of the proceedings establishing the highway and setting up a contract for erecting a viaduct in lieu of a crossing, construed as a plea in confession and avoidance alone. Id.

97. Though argued in respondent's brief. State v. Yakey [Wash.] 85 P. 990.

98. Waived if not pleaded. Hewel v. Hogin [Cal. App.] 84 P. 1002.

99. People v. Bermel, 51 Misc. 75, 100 N. Y. S. 728.

1. V. S. 898. Clement v. Graham, 78 Vt. 290, 63 A. 146.

2. People v. Board of Education of New York, 99 N. Y. S. 737.

3. Under Code Civ. Proc. § 2076, making the statement in the alternative writ subject to the provisions of the Code relating to complaints and authorizing a demurrer, and under § 2075, providing that the writ cannot be set aside on motion for any matter involving the merits, defense of limitations must be raised by demurrer. People v. Bingham, 99 N. Y. S. 593.

4. General demurrer insufficient. People v. Board of Trade, 224 Ill. 370, 79 N. E. 611.

5. Under Code, § 2070, requiring "that a copy of the affidavits setting forth the facts upon which the right of the relator to the writ depends must be served with the notice of motion or order to show cause," affidavits replying to the answer are not allowable if objected to. People v. Bermel, 51 Misc. 75, 100 N. Y. S. 728.

6. Where the petition for a writ to compel the treasurer of an irrigation company to pay interest on certain bonds fails to show an available fund and the answer alleges that there never was any, it is not an abuse of discretion to refuse permission to amend so as to plead the statute of limitations. Hewel v. Hogin [Cal. App.] 84 P. 1002. Where a judgment sustaining a demurrer to an alternative writ is affirmed on appeal and the order of affirmance concludes: "It is further ordered that the cause be remanded to the said court below, and that a judgment be entered and docketed in accordance therewith," the trial court may allow an amendment to the alternative writ. State v. Richardson [Or.] 85 P. 225. Under B. & C. Comp. § 612, providing that pleadings in mandamus are to be construed and amended in the same manner as pleadings in actions, etc., an amendment to the alternative writ is authorized, and the action of the court in respect thereto will not be disturbed in the absence of abuse. Id.

7. The striking out of particular averments in the answer to an alternative writ is not error where evidence of the facts therein stated was admissible under other allegations. State v. Richardson [Or.] 85 P. 225.

8. The fact that the application in mandamus to compel a reassessment alleged that the original ordinance under which the work was done was "duly" passed did not preclude the relator from showing its invalidity where it also alleged that such ordinance had been adjudged void by the superior court (Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106), nor is it material that it failed to allege that such adjudication was "duly and regularly made" (Id.), nor that the ordinance was in fact void (Id.).

9. See 6 C. L. 512.

10. Application for mandamus to compel

stitute an abandonement of his claim,[11] the writ will be denied. Relator may dismiss the proceedings any time before determination.[12] In mandamus proceedings, only those questions essential to the right sought to be enforced will be considered.[13]

Relator must show the clear legal duty of respondent to act,[14] though where the right sought is given generally but qualified specifically, defendant has the burden of showing that relator's case comes within the exceptions.[15] On motion for a peremptory writ, denials of the answer as to which no findings have been made on the trial of the alternative writ must be taken as true.[16]

Jury.—In Pennsylvania disputed questions of fact must be submitted to the jury,[17] but in California,[18] Idaho,[19] and Tennessee,[20] the submission lies in the discretion of the trial court. The certification of settled issues of fact from the supreme court to the circuit court with directions that they be "submitted to a jury" does not preclude the latter from directing a verdict where the evidence justifies it.[21]

Damages.—Upon reinstatement to a public office only nominal damages are recoverable, since relator becomes entitled to the accrued emoluments.[22] The New York statute allowing damages in the main action for a false return permits recovery of only such damages as were recoverable in an independent action.[23]

the commissioner of public lands to deliver a deed to relator raising issues of fact as to fraud and collusion in purchasing the land. State v. Ross [Wash.] 87 P. 262.

11. Where, after filing a petition for mandamus to compel the commissioner of the general land office to accept relators' applications to purchase certain school lands without the reservation of minerals therein, relators agree to accept the land without the minerals, the petition will be refused, though the agreement of relators is filed under protest. Thaxton v. Terrell [Tex.] 15 Tex. Ct. Rep. 121, 91 S. W. 559.

12. Dismissed after argument. People v. Bingham, 101 N. Y. S. 410. But the order should not state that it is without prejudice to a new proceeding. Id.

13. In mandamus to compel the vacation of an order extending the time within which a garnishee might move for a new trial, the court will not determine the effect of a nunc pro tunc entry of a judgment against the defendant upon a pending motion to set aside the judgment against the garnishee. Travelers' Ins. Co. v. Kent Circuit Judge, 144 Mich. 687, 13 Det. Leg. N. 279, 108 N. W. 363. In mandamus to compel the secretary of two rival nominating conventions to certify the nominations of each, the court will consider only the relator's right to the certificate and not the validity of his nomination. State v. Jones, 74 Ohio St. 418, 78 N. E. 505. In mandamus to enforce an order of the railroad commissioners, the court will not review the findings of fact supporting the order in the absence of allegations of fraud. Railroad Com'rs v. Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224.

14. In mandamus to compel the granting of an injunction, the writ will not iseue in the absence of any of the facts which were before the trial judge. Standard Import Co. v. New Orleans Import Co., 117 La. 632, 42 So. 192. Writ denied to compel the issuing of an injunction restraining the use of an alleged imitation trade mark where copies of the marks were before the respondent and not before superior court. Id.

15. Where the constitution gives to the stockholders in a corporation the right to inspect its books, except in the case of particular designated kinds of corporations, defendant in mandamus to compel a corporation to permit inspection has the burden of showing that the corporation is one of the excepted ones. Gavin v. Pacific Coast Marine Firemen's Union, 2 Cal. App. 638, 84 P. 270.

16. People v. Board of Education of New York, 99 N. Y. S. 737.

17. Where in proceedings to secure school privileges alleged to have been denied on account of color contrary to Act June 8, 1881 (P. L. 76), the evidence is conflicting as to the discrimination, the question is for the jury. Taylor v. Entriken, 214 Pa. 303, 63 A. 606.

18. Under Code Civ. Proc. § 1090, it is discretionary. Hewel v. Hogin [Cal. App.] 84 P. 1002. Reaffirmed on rehearing.

19. Rev. St. 1887, § 4982, does not secure a jury trial to the litigants as a matter of right (Nelson v. Steele [Idaho] 88 P. 95), but the court may submit the same in his discretion (Id.). The seventh amendment to the Federal Constitution affording a jury trial in suits at common law is not applicable to proceedings for mandamus under a state statute. Id. The proceedings for a writ of mandate under the statute of Idaho is a special proceeding of a civil nature and not a suit at common law so as to entitle the parties to a jury as a matter of right. Id.

20. Shannon's Code, § 5336. Marler v. Wear [Tenn.] 96 S. W. 447.

21. People v. Alton, 221 Ill. 275, 77 N. E. 429.

22. Hill v. Fitzgerald [Mase.] 79 N. E. 825.

23. Code of Civ. Proc. § 2088, does not include counsel fees or other expenses of the trial. People v. New York Cent., etc., R. Co., 102 N. Y. S. 385.

Abatement and dismissal.[24]—Proceedings against an officer in his official capacity to enforce a continuing duty do not abate upon his resignation,[25] but his successor may be substituted[26] and service of the writ and demand upon the latter is not necessary.[27]

(§ 9) *B. Judgment.*[28]

Scope of relief.[29]—The judgment must not infringe upon the rights of persons not parties to the proceedings.[30] A judgment in a proceeding to compel respondent to act should not unnecessarily prescribe the manner of performance,[31] but should be specific as to what should be done.[32] Relief necessarily preliminary to that expressly sought is within the prayer.[33]

Costs[34] follow the judgment.[35] Costs may be imposed upon respondent where the writ is denied as unavailing if the respondent recklessly disregarded a plain duty.[36]

§ 10. *Peremptory writ.*[37]—A peremptory writ must not command inconsistent action.[38] An alternative and not a peremptory writ should issue where there is a material question of fact involved.[39]

§ 11. *Performance.*[40]—Facts arising subsequent to judgment rendering its modification proper are no ground for disobeying the same,[41] and it is no excuse for

24. See 6 C. L. 513.

25. Mandamus for reinstatement as principal assistant engineer. People v. Best [N. Y.] 79 N. E. 890.

26. Where pending mandamus proceedings for reinstatement as assistant engineer the defendant, commissioner of bridges, resigned, his successor should be substituted in the manner specified by Code Civil Proc. § 1930. People v. Best [N. Y.] 79 N. E. 890.

27. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106.

28. See 6 C. L. 513. A judgment directing the issuance of a peremptory writ of mandamus, which is within the authority and jurisdiction of the court to command, cannot be collaterally impeached in contempt proceedings for disobedience. State v. Giddings [Minn.] 107 N. W. 1048.

29. See 6 C. L. 513.

30. In mandamus to compel the board of county commissioners to convene and pass upon the merits of a petition to remove the county seat, the court exceeds its authority in commanding it to convene on a given date without further requiring notice to be given to the voters as provided by § 396, p. 71, Rev. Laws 1905, so that they may appear and object. Kaufer v. Ford [Minn.] 110 N. W. 364.

31. A judgment in proceedings to compel a railroad company to construct a safe street crossing is not too specific in requiring it to use planks instead of leaving choice of materials to the company. Vandalia R. Co. v. State [Ind.] 76 N. E. 980. In mandamus to compel a city and a private concern to remove a platform built on a sidewalk, it is proper for the judgment to order the sidewalk restored to the substantial level of the street in the absence of proof that such level is not the proper one. Chicago Cold Storage Warehouse Co. v. People, 224 Ill. 287, 79 N. E. 692.

32. An order awarding a peremptory mandamus to compel the levy of a tax is not fatally defective for failure to specify the amount to be collected where it specifies that it is to collect the amount specified in a named judgment. Estill County v. Embry [C. C. A.] 144 F. 913.

33. Where the relief sought was to compel the inspectors of a town meeting to make and sign an original statement of the canvass of the votes at such meeting and the clerk to enter the result, it appearing upon trial that no count had been made, a count, being a necessary preliminary to the relief sought, is within the prayer. People v. Armstrong, 101 N. Y. S. 712.

34. See 6 C. L. 514.

35. Where the mayor and council refused to canvass election returns upon the issuing of a peremptory writ to compel them to act, costs are properly awarded against them. State v. Kendall [Wash.] 87 P. 821.

36. Where the county treasurer refused to print the delinquent tax lists in the paper designated by the commissioners, he will be taxed with costs in mandamus to compel such publication, though the writ is denied because it is too late to so publish it. State v. Cronin [Neb.] 106 N. W. 986.

37. See 6 C. L. 514.

38. A peremptory writ cannot order the probate court to allow an appeal from its refusal to appoint as curator of a minor the person designated by him, and also command such appointment, since the granting of the appeal deprives the court of jurisdiction. State v. Reynolds [Mo. App.] 97 S. W. 650. The remedy commanding the appointment adopted as best suited to work substantial justice. Id.

39. A peremptory writ to compel the auditing and allowance by the city of a claim for rent of lots upon which debris from a wrecked building was piled is improperly granted where the reasonable value is made the basis of the claim. People v. Metz, 100 N. Y. S. 913.

40. See 6 C. L. 514.

41. The fact that the voters of a school

failing to obey a writ which required the expenditure of money that there were no available funds, since the order of the court to do the act impliedly authorized the incurring of a debt, if necessary.[42]

§ 12. *Review.*[43]—If the proceedings involve a freehold[44] or relate to the revenue,[45] an appeal in Illinois may be taken directly to the supreme court. Writ of error to review cases decided by the supreme court is in New Jersey limited to those decided upon the constitutionality of a statute.[46]

The ordinary rules of appeal, such as the necessity of arguing assignments of error in the brief,[47] presumptions,[48] etc., apply. Neither partial performance[49] nor complete performance under coercion[50] destroys respondent's right of appeal from an order granting the writ, and on appeal from an order of an intermediate appellate court dismissing an appeal on the ground of performance, the court will not consider the merits of the order granting the writ.[51] An appellate court may take judicial notice of facts which it has acquired at a prior hearing.[52] Rehearing cannot be had on orders of the supreme court granting or refusing a rule nisi on an application for a mandamus to control the inferior courts.[53] Appellant is not estopped from urging on appeal a different understanding of the law from that advanced in argument below.[54]

MANDATE; MARINE INSURANCE; MARITIME LIENS; MARKETS, see latest topical index.

district had at a special meeting voted to retain the old site of the schoolhouse is no defense to the trustees in contempt proceedings for failure to remove to new site as ordered. State v. Giddings [Minn.] 107 N. W. 1048.

42. In contempt for failing to remove a schoolhouse to a new site as ordered. State v. Giddings [Minn.] 107 N. W. 1048.

43. See 6 C. L. 514.

44. An order awarding mandamus compelling the proper officer to enforce a judgment and order of sale of certain lots for delinquent special assessments does not involve a freehold so as to authorize an appeal direct to the supreme court. Murphy v. People, 221 Ill. 127, 77 N. E. 439. Where, in mandamus to compel park commissioners to grant a permit to relator railroad company to lay another track across a boulevard, the relator's title to the right of way is involved, appeal direct to the supreme court lies. People v. South Park Com'rs, 221 Ill. 522, 77 N. E. 925.

45. Where, in mandamus to compel the sale of real estate under a special assessment judgment, the legality of the assessment or the amount thereof is not involved, the case relates only incidentally to the revenue, and is not appealable directly from the superior court to the supreme court under Prac. Act § 88 (Hurd's Rev. St. 1903, c. 110, § 89), authorizing direct appeal in "all cases relating to revenue." Murphy v. People, 221 Ill. 127, 77 N. E. 439.

46. Mandamus Act 1903, § 6. Case decided upon the nonapplicability of a statute. School Dist. of Neptune Tp. v. Mannion [N. J. Err. & App.] 65 A. 440.

47. Only points discussed and argued in the briefs will be reviewed on appeal. Hewel v. Hogin [Cal. App.] 84 P. 1002.

48. Where, in mandamus, appellant's motion included one to strike certain defenses and to require defendant to state his defenses separately, and the record shows a ruling on the former branch but not on the latter, and that the relator thereafter demurred and replied, the motion to require defendant to state his defenses separately will be deemed waived. State v. Tanner [Wash.] 88 P. 321. In mandamus to compel the treasurer of an irrigation district to pay interest on certain bonds, the failure of the court, after clearly indicating that defendant's application for leave to amend so as to plead the statute of limitations would be denied, to make any final or formal ruling, is not reversible error, as it would be assumed that the application was denied. Hewel v. Hogin [Cal. App.] 84 P. 1002.

49. Error to dismiss an appeal from an order imposing duties on election officers which continued until election, though they were complying therewith. People v. Voorhis [N. Y.] 78 N. E. 1001.

50. Appeal will not be denied to defendante in mandamus to compel submission of a proposed charter amendment to the people on the ground of the waiver of the right of appeal because of compliance, they having previously unsuccessfully applied for a supersedeas bond. Hindman v. Boyd, 42 Wash. 17, 84 P. 609.

51. People v. Voorhis [N. Y.] 78 N. E. 1001.

52. On appeal from the granting of a motion to amend an alternative writ after the case had been reversed and remanded, the appellate court may consult its record of the former case to see what disposition was ordered. State v. Richardson [Or.] 85 P. 225.

53. The ruling thereon is not a judgment entitled to a rehearing under the constitution, and Rule 12 (28 South. IV), making the ruling final, is valid. State v. Summit Lumber Co., 117 La. 643, 42 So. 195.

54. People v. Armstrong, 101 N. Y. S. 712.

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MARRIAGE.

§ 1. Nature of Marriage; Capacity of Parties; Fraud and Duress (833).
§ 2. Essentials of a Contract of Marriage (833). A Common-Law Marriage (834). Evidence of Marriage (834). Competency of Witnesses (835).
§ 3. Validity and Effect (836).
§ 4. Proceedings for Annulment (837).
§ 5. Criminal Offenses and Penalties (838).

§ 1. *Nature of marriage; capacity of parties; fraud and duress.*[55]—While marriage is a civil contract,[56] it so directly affects the body politic that the interest of the state should always be considered in dealing with it and the status resulting therefrom.[57] A marriage entered into by one having a living undivorced[58] spouse is void.[59] However, at common law and by statute in many states, if a spouse is absent and unheard of for a specified time, a presumption of death arises and the other may remarry.[60] These statutes have no extraterritorial effect,[61] and cannot be invoked by the guilty party.[62] While the presumption of death does not arise until the expiration of the prescribed time, a marriage contracted within the period becomes valid if cohabitation continues thereafter,[63] in which case death will be presumed to have occurred prior to the marriage.[64] A statute prohibiting marriage between persons consanguineously related within specified degrees is not retroactive.[65] Interracial marriages are prohibited in many states.[66] A marriage induced by fraud or duress may be annulled,[67] unless ratified[68] or the fraud is waived.[69]

§ 2. *Essentials of a contract of marriage.*[70]—A ceremonial celebration is not essential unless required by statute.[71] Under the Domestic Relation Law of New

55. See 6 C. L. 515.

56. Marriage is a civil contract by which a man and a woman agree to become husband and wife and to assume the duties which the law imposes upon such relation. Topper v. Perry, 197 Mo. 531, 95 S. W. 203.

57. Willits v. Willits [Neb.] 107 N. W. 379.

58. Where a divorce judgment is pronounced, a party thereto may again marry though it has not been entered, as the rights attach upon rendition. Mock v. Chaney [Colo.] 87 P. 538.

59. See post, § 3.

60. Where the husband of plaintiff's alleged wife had been absent and unheard of for more than seven years at the time of her marriage to plaintiff, there being no direct evidence that he was living, such fact, together with the presumption that she thought he was dead, justifies a finding of a valid marriage with plaintiff. Gilroy v. Brady, 195 Mo. 205, 93 S. W. 279.

61. Code Tenn. 1858, § 2438, held to have no force in Missouri. Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983.

62. Man deserted a wife in Germany and came to this country. State v. Rocker, 130 Iowa, 239, 106 N. W. 645. A husband who wrongfully deserts his wife in Tennessee and goes to Missouri and secretly remains there without communication with her cannot invoke Code Tenn. 1858, § 2438, authorizing a second marriage after a spouse has been absent and unheard of for five years. Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983.

63. Smith v. Fuller [Iowa] 108 N. W. 765.

64. In re McCausland's Estate, 213 Pa. 189, 62 A. 780.

65. Laws 1893, p. 1387, c. 601, as amended by Laws 1896, p. 215, c. 272, prohibiting marriage between uncles and nieces. Weisberg v. Weisberg, 112 App. Div. 231, 98 N. Y. S. 260. The legislature has no power to declare that the law prior thereto prohibited marriage between uncles and nieces. Id. Hence a niece cannot annul a marriage with her uncle on the ground of relationship where it was valid when contracted. Id.

66. Under Ky. St. 1903, §§ 2097, 2098, a marriage between a negro and a white person is void, and their children illegitimate. Moore v. Moore [Ky.] 98 S. W. 1027.

67. Defendant's father and brother compelled plaintiff to marry defendant by threats and intimidation, being armed with deadly weapons. Marsh v. Whittington [Miss.] 40 So. 326.

68. One compelled to marry under fear of bodily harm does not ratify the marriage by taking the wife to another city where he immediately abandons her. Marsh v. Whittington [Miss.] 40 So. 326.

69. Where a husband continues to cohabit with his wife after discovering that she had a living husband at the time of marriage and who induces her to return to him after he has driven her away waives the fraud, if there was any, in bringing about the marriage by misrepresentations as to the death of her husband. Michels v. Fennell [N. D.] 107 N. W. 53.

70. See 6 C. L. 516.

71. Under the Civil Codes of 1825 and 1870 marriage must be celebrated by a priest or minister or a magistrate, in the presence of three witnesses. Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

York, a marriage between Indians according to Indian custom is valid.[72] Marriages among slaves in Louisiana were void unless due form of ceremony was observed.[73] Failure to procure a marriage license does not invalidate the marriage.[74]

A common-law marriage[75] is a contract by which the parties agree to be or to become husband and wife, and do so in fact,[76] and is valid in many states.[77] In order to establish a common-law marriage de praesenti, there must be a present assumption of the relation.[78] While a cohabitation meretricious in its inception will be presumed to continue as such, very slight circumstances will overcome the presumption.[79]

Evidence of marriage.[80]—Marriage may be proved without record evidence[81]

72. Where an Indian man and woman agreed to live together as husband and wife and followed it with actual cohabitation which constituted a marriage according to the custom of the Onondago Nation, the marriage was valid. People v. Rubin, 98 N. Y. S. 787.

73. While art. 182 of the Civil Code of 1825 inferentially permitted the marriage of slaves with the consent of their masters, it did not dispense with the celebration of such nuptials (Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470), as is shown by Act 1868, No. 210, p. 278, providing for their validation by a formal declaration before a notary (Id.). Where a negro man and woman "took up with each other" during slavery without any celebration of any kind, though with the consent of their master, this did not constitute a valid marriage. A slave marriage without celebration discontinued before emancipation, the parties to which were subsequently married to other persons, was not valid. Id.

74. Burks v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 515, 94 S. W. 1040.

75. See 6 C. L. 516.

76. Any mutual agreement between the parties to be husband and wife in praesenti, especially if followed by cohabitation, constitutes a valid marriage. Smith v. Fuller [Iowa] 108 N. W. 765; State v. Bates, 4 Ohio N. P. (N. S.) 502. Where parties living in illicit relations agree, after the dissolution of a prior marriage of one of them, to become husband and wife, a valid marriage exists. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126. Where a man and woman upon the birth of their illegitimate child agreed to become husband and wife and thereafter lived and held themselves out to the world as such, a common-law marriage is established. In re McCausland's Estate, 213 Pa. 189, 62 A. 780.

Evidence held to show a common-law marriage: Evidence that on the evening of the day set for marriage defendant came to plaintiff's house and took up cohabitation with her, telling her it was all right, that she was his wife, and that he held her out as such, despite the fact that plaintiff stated that she knew from a previous marriage that a license was necessary. Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457. Where a man and woman cohabited together for years, holding themselves out as husband and wife, and baptizing their children in the family name, the jury may find a common-law marriage. State v. Rocker, 130 Iowa, 239, 106 N. W. 645. The fact that parties living together as husband and wife formally marry, after each had in the meantime married third parties, is not conclusive against a common-law marriage in the first instance. Smith v. Fuller [Iowa] 108 N. W. 765. Where the evidence almost conclusively established a common-law marriage, the fact that they both married again, the wife, however, waiting until the husband had been absent for seven years, is not conclusive against the common-law marriage. Id.

Evidence held insufficient: Plaintiff's evidence to establish a common-law marriage held so highly improbable, and her subsequent action so inconsistent, as not to sustain a finding in favor of the marriage, in view of affirmative evidence against it. Herrmann v. Herrmann, 98 N. Y. S. 654. Where an alleged wife by common-law marriage testified positively that they were not married, that she had a living husband, and that their relations were meretricious and adulterous, while the alleged husband testified that they were never married but intended to be, no common-law marriage was established. State v. Hancock, 28 Nev. 300, 82 P. 95. Where the alleged common-law wife testified that she had never lived with deceased as his wife and that she was never held out to the world as such, but that deceased had promised to marry her shortly before his death, no common-law marriage is established. Moore v. Flack [Neb.] 108 N. W. 143.

77. **States permitting common-law marriages:** Texas. Burks v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 515, 94 S. W. 1040. Pennsylvania and Colorado. In re McCausland's Estate, 213 Pa. 189, 62 A. 780.

78. Topper v. Perry, 197 Mo. 531, 95 S. W. 203. Where there was no present promise on the part of the woman to become a wife but she merely consented to having marriage relations upon the man's assertion that she was as much his wife as if a ceremony had been performed, she still regarding a ceremony as necessary, no common-law marriage was entered into. Id. Where the agreement was not to assume marital relations but merely to live together as husband and wife, and was followed by illicit relations, this does not constitute a common-law marriage. Gaines v. Fidelity & Casualty Co., 111 App. Div. 386, 97 N. Y. S. 836.

79. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126. Where parties living in illicit relations, after the removal of all impediments to marriage, continue to cohabit, hold themselves out as husband and wife, and execute deeds as such,

by the declarations[82] or testimony of a party thereto,[83] or of the officiating officer,[84] by facts, circumstances and conduct of the parties,[85] and by reputation in the community.[86] Generally speaking, any evidence showing that the parties conducted themselves toward each other and the public as husband and wife is admissible.[87] If the marriage certificate or a certified copy of a record is resorted to, it must be accompanied by proof of identity,[88] and evidence is admissible to show that the real name of a party thereto is not the name contained therein.[89] Hearsay evidence is inadmissible.[90] In civil actions the fact of marriage need only be proved by a fair preponderance of the evidence,[91] and, hence, a record in a civil suit is inadmissible in a criminal prosecution to establish marriage where proof beyond a reasonable doubt is required.[92]

Competency of witnesses.[93]—While one spouse is not usually a competent witness against the other to establish marriage, in prosecutions for bigamy[94] and in actions for criminal conversation[95] the disability has been quite generally removed by

a finding of common-law marriage is authorized. Id.

80. See 6 C. L. 517.

81. Smith v. Fuller [Iowa] 108 N. W. 765.

82. Declarations of an alleged husband by common-law marriage made in the absence of the wife are admissible to disprove marriage after his death. Topper v. Perry, 197 Mo. 531, 95 S. W. 203.

83. State v. Thompson [Utah] 87 P. 709; State v. Rocker, 130 Iowa, 239, 106 N. W. 645. Objection that the original or certified copy of the marriage license with the entries thereon is the best evidence, held without merit. Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911. Testimony of a witness that she married Nelson "under the old resolution as the colored people were married then," and that she lived with him for two years as his wife, held to establish a customary slave marriage within Act 1866, rendering their children legitimate. Talbott v. Owen, 29 Ky. L. R. 550, 93 S. W. 658. The testimony of a single witness that defendant married her in 1890 and lived with her for six years is insufficient to establish the marriage where the incontestable fact is that he married plaintiff in 1895. Ingram v. Ingram, 143 Ala. 129, 42 So. 24.

84. State v. Thompson [Utah] 87 P. 709.

85. Common-law marriage. Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457; State v. Thompson [Utah] 87 P. 709. The law presumes a marriage from acknowledgment, cohabitation, reputation, and birth of issue. Plattner v. Plattner, 116 Mo. App. 405, 91 S. W. 457. Marriage between a white man and Indian woman held established by cohabitation, admissions, and reputation, together with the presumption under Civ. Code Mont. §§ 280, 282, in favor of the legitimacy of their child. Pourier v. McKinzie, 147 F. 287. An inference of lawful marriage is justified from evidence of open cohabitation as man and wife in her father's house, and her introduction to friends and neighbors under her husband's name and as his wife. Cramsey v. Sterling, 111 App. Div. 568, 97 N. Y. S. 1082. Evidence that the parties left for the ostensible purpose of marrying, and on returning announced the marriage and lived together as husband and wife, held to establish a marriage. Smith v. Fuller [Iowa] 108 N. W. 765. Where parties cohabit as husband and wife, acknowledging themselves as such, and being so reputed and treated among friends and relatives, these facts are sufficient to establish the fact of marriage. Id. Where one who has been married is remarried, the fact that he obtained a divorce from the latter in order to marry again has no evidentiary force in proving the dissolution of the first, except possibly as showing that he thought himself validly married to the second. In re Colton's Estate, 129 Iowa, 542, 105 N. W. 1008.

86. Repute held sufficient. Ward v. Merriam [Mass.] 78 N. E. 745; Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535. Evidence held to show no such settled reputation as to support a finding of marriage. Topper v. Perry, 197 Mo. 531, 95 S. W. 203.

87. The fact that the parties joined as husband and wife in the execution of deeds is admissible in proof of marriage. Smith v. Fuller [Iowa] 108 N. W. 765.

88, 89. State v. Thompson [Utah] 87 P. 709.

90. In a contest between two women each claiming to be the widow of a decedent, declarations of the deceased are hearsay and inadmissible to establish the validity of the subsequent marriage. In re Colton's Estate, 129 Iowa, 542, 105 N. W. 1008.

91. Pooler v. Smith, 73 S. C. 102, 52 S. E. 967. To establish a common-law marriage in a civil action it is not necessary that each fact and circumstance relied on be so conclusive as to admit of no other reasonable conclusion, but it is sufficient if all the facts and circumstances are fairly sufficient to justify a finding that there was a marriage. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

92. Records of a divorce granted on the ground that defendant had a living spouse at the time of contracting the marriage are not admissible to prove the fact of marriage in a prosecution for bigamy. State v. Sharkey [N. J. Law] 63 A. 866.

93. See 6 C. L. 517.

94. Code Pub. Gen. Laws 1904, art. 35, § 4. Richardson v. State, 103 Md. 112, 63 A. 317.

95. Revision P. L. 1900, p. 363, § 5, expressly recognizes and affirms the competency of the husband, in an action for criminal conversation, to testify to the fact

statute. Statutes rendering a person incompetent to testify in his own behalf concerning transactions with a decedent disqualify an interested surviving spouse,[96] but do not prevent a party from testifying as to the conduct of the alleged husband and wife.[97]

An instruction must not mislead by the manner in which the words "legal marriage" are used,[98] or comment upon the weight of the evidence.[99]

§ 3. *Validity and effect.*[1]—All marriages are presumed valid,[2] hence, a second marriage raises a presumption that all bars resulting from a former one have been removed,[3] but there is no presumption that the first was illegal and void,[4] or that it has been dissolved by divorce where no grounds existed therefor.[5] Where the relation is once shown to exist, it will be presumed to continue, at least as against the immediate parties.[6] A marriage between parties, one of whom has a living spouse, is void,[7] though it may be ratified after the impediment ceases,[8] and in Colorado a void marriage becomes valid from the time the impediment ceases if the parties are cohabiting in good faith, believing they are husband and wife.[9] A marriage between Indians, valid according to tribal customs, is valid after the rights of citizenship have been conferred.[10] Slave marriages in Louisiana produced no civil effect unless ratified by continued cohabitation after emancipation or by acknowledgment under act of 1868.[11] A customary marriage among slaves is voidable only,[12] and until disaffirmed[13] has all the effects of a valid marriage.[14]

of marriage. Hill v. Pomelear, 72 N. J. Law, 528, 63 A. 269.

96. A widow asserting dower rights is incompetent to testify to the fact of marriage under Code Civ. Proc. § 606. Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535. In an action by children of a deceased woman to recover her community interest, the alleged defendant husband cannot, under Rev. St. 1895, art. 2302, testify that he was never married to plaintiff's mother, and that no agreement to become husband and wife was ever made. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

97. Do not constitute transactions with decedent within Rev. St. 1895, art. 2302. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

98. An instruction that cohabitation meretricious in its inception is presumed to continue so unless overcome by proof of a "legal marriage" is misleading in that legal marriage and statutory marriage might be treated as synonymous. Edelstein v. Brown, [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

99. An instruction that living together as husband and wife, and the holding out by each that the other is his or her lawful spouse, and the execution of deeds as husband and wife, were not in themselves proof of marriage but were facts and circumstances to be considered in connection with other evidence, and that such facts were but circumstances to be considered by the jury, was properly refused as upon the weight of the evidence. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

1. See 6 C. L. 518.

2. State v. Rocker, 130 Iowa, 239, 106 N. W. 645. Where there are rival claimants to the rights of surviving widow of a deceased person, proof of the last marriage makes out a prima facie case of its validity. In re Colton's Estate, 129 Iowa, 542, 105 N. W. 1008.

3. Smith v. Fuller [Iowa] 108 N. W. 765. Where one marries whose spouse has not been absent for a sufficient length of time to raise a presumption of death, the presumption in favor of the second marriage will overcome the presumption that the former spouse still lives. Id.

4. The presumption of innocence attending the second will not raise a presumption of guilt as to the first. Hallums v. Hallums, 74 S. C. 407, 54 S. E. 613.

5. Where a husband deserts his wife against whom he has no ground for divorce, it will not be presumed to sustain a subsequent marriage that he procured a divorce on false testimony. In re Colton's Estate, 129 Iowa, 542, 105 N. W. 1008.

6. State v. Rocker, 130 Iowa, 239, 106 N. W. 645. Husband sought to be held for goods sold to the wife. Stoutenborough v. Rammel, 123 Ill. App. 487.

7. Burks v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 515, 94 S. W. 1040. Especially where the other contracting party has knowledge. Miller v. Prelle, 122 Ill. App. 380. Under Rev. St. 1898, §§ 2349, 2330, a marriage between parties, one of whom is married, is absolutely void without legal process. In re Geith's Estate [Wis.] 109 N. W. 552.

8. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

9. Parties, one of whom was a recent divorcee, and hence could not marry for a year, went to another state to be married and returned and cohabited for more than a year, believing themselves to be validly married. Mock v. Chaney [Colo.] 87 P. 538.

10. Therefore, a party thereto could not marry without a divorce according to law. Moore v. Nah-con-be, 72 Kan. 169, 83 P. 400.

11. Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

A marriage by one under the age of consent but competent at common law is voidable and not void,[15] and is valid for all civil purposes until annulled by judicial decree.[16] The Kentucky Act legitimizing the children of customary slave marriages did not legalize the marriages.[17]

§ 4. *Proceedings for annulment.*[18]—While divorce actions and annulment suits are distinct in that the former dissolve valid marriages while the latter merely judicially declare invalid ones void,[19] the distinction is not always observed.[20] In some states a court may award suit money to the defendant wife in annulment proceedings,[21] especially if the marriage was voidable only,[22] in which case expenditures made by the wife in behalf of the family[23] and a reasonable sum for the support of the issue,[24] as well as a counsel fee,[25] may be included in the final decree.[26] This may be allowed on a cross bill to an action by the wife for maintenance.[27] In New York a wife who was under the age of consent at the time of marriage may sue to annul her marriage.[28] An action to annul a marriage on the ground that defendant had a living spouse is not based upon fraud, though plaintiff was a victim of fraudulent representations.[29] A marriage may be annulled upon sufficient proof[30] of the impotency of a party thereto; and a motion for an order compelling defendant to submit to a physical examination is properly denied where she waives the incompetency as witness of her attending physicians who have examined her in respect thereto.[31] Evidence which was known and which was omitted as inconsistent with the defense made is not newly discovered evidence justifying a new trial.[32] A judg-

12. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123.

13. A customary marriage legalized by statute but left voidable is not disaffirmed by cohabitation with another woman after the customary wife's death. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123.

14. Children are legitimate until disaffirmance. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123.

15, 16. Willits v. Willits [Neb.] 107 N. W. 379.

17. Act Ky. Feb. 14, 1866 (Pub. Acts 1865-66, p. 37, c. 556) § 2. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123.

18. See 6 C. L. 518.

19. Rev. St. 1895, art. 1194, subd. 16, relating to the venue of divorce actions, held inapplicable to a suit to annul a marriage because of the incapacity of one of the parties thereto. Schneider v. Rabb [Tex.] 16 Tex. Ct. Rep. 1001, 97 S. W. 463. Comp. Laws, § 8628, allowing solicitor's fees to the wife in divorce actions, is inapplicable to an action under § 8618, to annul a marriage contracted while the wife had a living husband. Webb v. Wayne Circuit Judge, 144 Mich. 674, 13 Det. Leg. N. 268, 108 N. W. 358.

20. A suit to annul a marriage on the ground that plaintiff was mentally incompetent to enter into a valid contract is a divorce proceeding, and a verifying affidavit is jurisdictional. Johnson v. Johnson, 142 N. C. 462, 55 S. E. 341.

21. The power is incidental to the action and not dependent upon statute. Webb v. Wayne Circuit Judge, 144 Mich. 674, 13 Det. Leg. N. 268, 108 N. W. 358.

22. Willits v. Willits [Neb.] 107 N. W. 379.

23. Lying-in expenses allowed. Willits v. Willits [Neb.] 107 N. W. 379.

24. Under Comp. St. 1903, c. 25, § 15, a court annulling a marriage at the suit of one under the age of consent may require plaintiff to pay a reasonable sum for the support of issue. Willits v. Willits [Neb.] 107 N. W. 379.

25. Willits v. Willits [Neb.] 107 N. W. 379.

26. Lies within the discretion of the court as to time of allowance. Willits v. Willits [Neb.] 107 N. W. 379.

27. Willits v. Willits [Neb.] 107 N. W. 379.

28. She may sue under Code Civ. Proc. § 1743, and is not limited to § 1742, which is only applicable where the marriage is without the parent's consent. Wander v. Wander, 117 App. Div. 189, 97 N. Y. S. 586.

29. Not within § 2734, Rev. Codes 1899, giving the children to the innocent party where a marriage is annulled for fraud. Michels v. Fennell [N. D.] 107 N. W. 53.

30. Where, in an action to annul a marriage on the ground of impotency, it was admitted that sexual relation had never been sustained, evidence of a physician that the wife was capable of complete sexual intercourse held sufficient to sustain a finding that the husband was impotent. Hebert v. Hebert, 118 Ill. App. 448.

31. Geis v. Geis, 101 N. Y. S. 845.

32. Where, in an action to annul a marriage induced by representations that defendant had been delivered of a child of which plaintiff was the father, the defense was that the representations were true, defendant is not entitled to a new trial on the ground of newly discovered evidence that plaintiff was living with her during the months immediately preceding the alleged delivery and, therefore, knew that representations were false and was not deceived. Di Lorenzo v. Di Lorenzo, 111 App. Div. 920, 97 N. Y. S. 644.

ment annulling a marriage on the ground of incapacity of a party thereto cannot be set aside by consent of the parties,[33] but must be done in adversary proceedings[34] after due notice to the other party.[35] Counsel in the original action are not necessary parties,[36] and a third party whose property rights will be affected by the vacation cannot intervene.[37]

§ 5. *Criminal offenses and penalties.*[38]—In North Carolina a register of deeds issuing a license for the marriage of one under the age of consent, without a written consent of the parent, and without reasonable inquiry,[39] is liable to the parent for a prescribed penalty. The parent has the burden of proving lack of reasonable inquiry,[40] and where the evidence is conflicting, it is a question for the jury, but otherwise for the court.[41] Failure to place the parties examined under oath does not of itself show lack of reasonable inquiry.[42]

MARRIAGE SETTLEMENTS, see latest topical index.

MARSHALING ASSETS AND SECURITIES.

The doctrine[43] of marshaling assets is that where one creditor has recourse to two funds to one of which only other creditors may resort the former will be required to first exhaust the fund in which he has an exclusive interest where equity demands it for the protection of the latter.[44] There must be two funds to which the paramount creditor may resort for the payment of the same claim.[45] The doctrine must be so applied as not to work substantial injustice or injury to the paramount creditor or other party in interest,[46] and so as to protect, not to destroy,

33. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

34. On a hearing to set aside a judgment annulling a marriage the same counsel cannot appear for both parties thereto. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

35. Notice to counsel of record is insufficient. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

36. Johnson v. Johnson, 141 N. C. 91, 53 S. E. 623.

37. Johnson v. Johnson, 142 N. C. 462, 55 S. E. 341.

38. See 6 C. L. 520. See, also, Husband and Wife, 8 C. L. 122; Crimes Against Morality, see Adultery, 7 C. L. 39, and the like.

39. The register of deeds before issuing a marriage license must make such inquiry for legal objections to the marriage as a prudent business man, acting in the most important affairs of life, would make, and to exercise his duties in such respect carefully and conscientiously and not as a mere matter of form. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664. Where the prospective groom, who was well known to the register of deeds as a man of good character, stated that the girl was eighteen years of age, that he had seen her age in the Bible and that she had told him that she was that old, held that the register of deeds had made reasonable inquiry. Id.

40. Action under Code 1883, p. 691, § 1816. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664.

41. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664. Where, in an action to recover a penalty under Revisal 1905, § 2090, it appears that after having his suspicions as to the girl's age aroused, the register of deeds accepted the statement of the bridegroom and his companion as to her age, he failed to make reasonable inquiry as a matter of law. Morrison v. Teague [N. C.] 55 S. E. 521.

42. Under Act 1877 (Acts 1877, p. 583, c. 331), now Revisal § 2067, the administering of the oath is discretionary. Furr v. Johnson, 140 N. C. 157, 52 S. E. 664.

43. See 6 C. L. 520.

44. Where a landlord has a lien on grain for advances to his tenant and a creditor attaches part of it and notifies the landlord who allows the remainder, sufficient to satisfy his claim, to be disposed of, the doctrine of marshaling assets will prevent the landlord from satisfying his claim out of the attached grain until the attachment is satisfied. Wolfe v. Houston Land & Irr. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 127, 98 S. W. 1069.

45. Doctrine did not apply where creditor had only one fund from which to satisfy his mortgage debt and one from which to satisfy an unsecured debt. Weideman v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162.

46. Where the paramount creditor's primary security was disputed and a compromise offered by the debtor required such creditor to resort to the secondary fund, but before accepting the compromise the paramount creditor offered to permit the junior creditor to continue the litigation or to buy out the former's interest, held, the latter having refused either alternative, the paramount creditor could complete the settlement without becoming liable for a pro tanto portion of the securities realized by the compromise. Pope v. Baltimore Warehouse Co., 103 Md.

equities.[47] It does not apply where the senior lienor by agreement with the debtor, in good faith and without knowledge of any junior claim, applies one fund to the payment of an unsecured debt,[48] nor where a claim of exemption cannot be determined in the suit and the rule would sanction the bad faith and illegal conduct of one through whom the party who invokes it claims,[49] nor where both funds are necessary to the satisfaction of the paramount claim.[50] Where a single mortgage covers land a part of which only is owned by the real debtor, such part must be first exhausted before the interest of the other owners can be affected.[51] When a mortgage given to secure the purchase price of a homestead also covers other property of a mere surety, it must be satisfied from the homestead first.[52] One who holds collateral to secure the secondary liability of another for a debt due from a third person is not bound to realize on such collateral before receiving his share of the assets of the person primarily liable.[53]

Partnership assets.[54]

Inverse order of alienation.[55]—Where land subject to a general judgment lien is conveyed by the debtor in separate tracts to different persons, the creditor, if obliged to resort to execution, must satisfy his judgment by a sale of the land in the inverse order of alienation.[56]

MARSHALING ESTATE, see latest topical index.

9, 62 A. 1119. Mortgagee failing to record in time could not require subsequent creditor to resort to sureties on his note first in order that a large part of the creditor's property could be applied to the mortgage debt. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658.

47. Where a mortgagor while insolvent paid for an assignment of a first mortgage to his daughter in fraud of his general creditors, his administrator would not be compelled to pay advancements for insurance and taxes from rents collected by him which would inure to the sole benefit of another mortgagee to the prejudice of the general creditors. Hatch v. Daugherty [Mich.] 13 Det. Leg. N. 657, 108 N. W. 986.

48. Where mortgagee as further security took an assignment of certain insurance money, and without knowledge of a subsequent mortgage and per supplemental agreement with mortgagor applied the money collected to an unsecured debt, junior mortgagee held not entitled to have the money applied in satisfaction of the senior mortgage. Weideman v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162.

49. A purchaser of personalty at a junior mortgagee's sale, who had actual knowledge of the prior mortgage and notice that the seller obtained possession from the prior mortgagee by deceit and force, and who paid for the property only the amount secured by the junior mortgage, cannot defeat a replevin suit by the prior mortgagee by contending that plaintiff could have satisfied his claim out of the mortgagor's homestead on which he had another mortgage; the value of the personalty being materially in excess of both chattel mortgages. Youngberg v. Walsh, 72 Kan. 220, 83 P. 972.

50. Where defendant converted property on which plaintiff held a landlord's lien, plaintiff was not bound to apply other property received from the tenant to the satisfaction of his claim but could apply it on subsequent claims for supplies to the tenant. Cadenhead v. Rogers & Bro. [Tex. Civ. App.] 16 Tex. Ct. Rep. 837, 96 S. W. 952.

51. Blanchard v. Naquin, 116 La. 806, 41 So. 99. Where one of two owners assumed the debt and agreed that the other should be subrogated to the rights of the mortgagee in case he was required to pay any part of it, neither the former nor any creditor who was party to the contracts by which the titles were acquired, or who claimed under subsequent mortgages, could take any of the fund realized by the sale under the first mortgage until the second owner was reimbursed any sum paid by him on the first mortgage. Id.

52. Notwithstanding Code § 2976, providing that homestead can be sold only to satisfy any deficiency after exhausting other property pledged by the same contract. Guiher v. Huffman [Iowa] 109 N. W. 469.

53. Where corporation primarily liable became insolvent. Campbell v. Campbell Co., 117 La. 402, 41 So. 696.

54. See 6 C. L. 520.

NOTE: The rule giving the separate creditors a priority over the firm creditors in the distribution of the separate estate has not been universally adopted. Some courts * * * have held that firm creditors are entitled to share pari passu with the separate creditors in the separate estate. With one qualification, this rule is correct on principle. This qualification is that firm creditors should be compelled to first exhaust the joint estate, after which they should be admitted to share pari passu with the individual creditors in the whole of the separate estate. This rests upon the equitable doctrine of the marshaling of assets. Hultzer v. Phillips, 26 S. C. 136, 1 S. E. 502, 4 Am. St. Rep. 687; Blair v. Black, 31 S. C. 346, 9 S. E. 1033, 17 Am. St. Rep. 30, Mechem's Cases, 477; Bardwell v. Perry, 19 Vt. 292, 47 Am. Dec. 687; Adams v. Sturges, 55 Ill. 468.—From Shumaker on Partnership, p. 235.

55. See 6 C. L. 520.

56. Oliver v. Wright, 47 Or. 322, 83 P. 870.

MASTER AND SERVANT.

§ 1. The Relation; Statutory Regulations (840). Termination of the Relation (841). Actions for Wrongful Discharge (843). Remedies of Master for Breach by Servant (845). Labor Laws (845).
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§ 1. *The relation; statutory regulations.*[57]—The relation of master and servant rests upon contract, express or implied, and its existence is to be determined, in general, by reference to the principles applicable to other contracts,[58] and to the facts of each particular case.[59] The relation of master and servant exists where the employer has the right to select the employe, the power to discharge or remove him, and the right to direct and control him as to the work he shall do and the manner in which he shall do it.[60] The relation of employer and independent contractor,[61] or of bailor and bailee,[62] exists where the element of control is lacking.

A contract of hiring for a year, to begin in praesenti, is not within the operation of the statute of frauds.[63]

57. See 6 C. L. 521.

58. See Contracts, 7 C. L. 761; Implied Contracts, 8 C. L. 155.

59. Where plaintiff contracted to act as salesman of powder and as manager of magazine thereafter to be erected, his contract as manager did not become operative at once, but only after the expiration of a reasonable time for the construction of the magazine. Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997. Plaintiff having worked as salesman on commission for two months and having insisted on the erection of the magazine, and defendant having then refused to build such magazine, plaintiff's contract for salary became operative upon such repudiation by the defendant. Id. Where one agreed to give his entire time and attention to the business of another, a real estate broker, the compensation to be a percentage of commissions, the relation established was that of master and servant (Civ. Code, § 2009), and not principal and agent (Civ. Code, § 2295). Sumner v. Nevin [Cal. App.] 87 P. 1105.

60. McColligan v. Pennsylvania R. Co., 214 Pa. 229, 63 A. 792.

61. See Independent Contractors, 8 C. L. 176. See, also, post, § 4.

62. See Bailments, 7 C. L. 353. Railway company leased cabs to drivers at a stated sum per day and made certain requirements and conditions as to personal conduct and dress, length of drives, fares to be charged, etc., but otherwise exercised no control over drivers. Held, drivers were bailees, not servants of railroad company. McColligan v. Pennsylvania R. Co., 214 Pa. 229, 63 A. 792.

63. Hudgins v. State, 126 Ga. 639, 55 S. E. 492. See, also, Frauds, Statute of, 7 C. L. 1826.

Termination of the relation.[64]—The term for which a servant is employed must be determined by reference to the contract between the parties [65] and the construction which they themselves have placed upon it.[66] A general or indefinite hiring is prima facie a hiring at will [67] and may be terminated at any time by either party.[68] A personal contract of service which by its terms is terminable at any time by the employer is dissolved by his death.[69] A contract of employment, indefinite as to its duration but providing for a fixed monthly salary, is a hiring for one month.[70] After the expiration of the month it is terminable at will.[71] Where a person employed for a definite term continues in the employment by mutual acquiescence after expiration of the term, the presumption ordinarily is that the employment has been extended for another term,[72] but this presumption does not exist where the circumstances are inconsistent therewith.[73] If the servant is originally employed for an indefinite time, the parties may agree upon a definite term to commence at some preceding date,[74] and a continuation in the service with the master's consent after the expiration of the term so fixed constitutes a hiring for another similar term.[75]

A termination of the contract for causes specified by its terms is of course justifiable, if at the time [76] and upon the notice [77] fixed by the contract. Where a con-

64. See 6 C. L. 521.

65. Where telegram offered employment at $65 a month and stated the job would last a year, and the offer was accepted, there was a hiring for a year. King v. Seaboard Air Line R. Co., 140 N. C. 433, 53 S. E. 237. Evidence held to sustain finding that railway employe had been employed unconditionally for one year. Mobile, etc., R. Co. v. Hayden [Tenn.] 94 S. W. 940. Employment by the year may be implied from the nature of the business and a stipulation that the employe shall pay out of his commissions all expenses, including license taxes, for the ensuing year. Woods v. Shumard & Co., 114 La. 451, 38 So. 416. Where employe's contract expired on December 15th, and on the 23d he proposed a new contract for "this year," his proposal was for another year from the 15th. Whether this proposal was accepted by the employer, held a question for the jury. Embry v. Hargadine-McKittrick Dry Goods Co., 115 Mo. App. 130, 91 S. W. 170.

66. Where both parties treated a contract as a divisible one and this construction was consistent with its terms, an employe who left the service could recover for the time he actually worked. Powell v. Russell [Miss.] 41 So. 5.

67. A general or indefinte hiring is prima facie a hiring at will, and if the servant seek to make it a yearly hiring the burden is upon him to prove it. King v. Seaboard Air Line R. Co., 140 N. C. 433, 53 S. E. 237.

68. A hiring at so much per year, no time being specified, is a hiring at will and may be terminated at any time by either party. Summers v. Phenix Ins. Co., 50 Misc. 181, 98 N. Y. S. 226.

69. Where druggist was employed to run a drug store for a part of the profits, the administrator of the employer was under no duty to continue the relation. Campbell v. Faxon [Kan.] 86 P. 760.

70, 71. Odom v. Bush, 125 Ga. 184, 53 S. E. 1013.

72. Taber v. Trustees of State Hospital for Insane, 138 F. 865. Where there is a hiring for a year and the servant continues in the employment after the expiration of the year with the consent of the master, this effects a hiring for another year. Complaint for discharge held not demurrable for failure to allege consent of the employe as well as of the master for a continuation of services. Treffinger v. Groh's Sons, 112 App. Div. 250, 98 N. Y. S. 291. A firm employed an employe for a year at an annual salary He continued in service for several years, the firm having become a corporation, and the latter having passed into the hands of a receiver. The receiver discharged him. Held, a second corporation formed by the receiver was liable, the employe's contract having been renewed for a year. Baker v. Appleton & Co., 107 App. Div. 353, 95 N. Y. S. 125.

73. Hospital physician had been elected for several one year terms. At close of one of such terms the election was postponed, of which occupant had notice. After several postponements physician was notified of election of her successor. Held there was no presumption that she had been retained for another year, and she could not recover for services after notice to quit. Taber v. Trustees of State Hospital for Insane, 138 F. 865. Where plaintiff was originally employed for an indefinite time at so much a year, and subsequent increases were made, at the first of the year, there was no hiring for a definite term, and consequently no presumption of a continuation of a contract for any term. Summers v. Phenix Ins. Co., 50 Misc. 181, 98 N. Y. S. 226.

74. Contract was made in April, 1897, for hiring from January 1, 1897, to December 31, 1897, at a certain yearly salary, servant having previously worked for defendant. This constituted a hiring for a year from January 1st to December 31st. Treffinger v. Groh's Sons, 112 App. Div. 250, 98 N. Y. S. 291.

75. Treffinger v. Groh's Sons, 112 App. Div. 250, 98 N. Y. S. 291.

76. Contract held to provide for dismissal at the end of any month in case of dissatisfaction by the employer, though a certain monthly salary was agreed upon for six months. Watkins v. Napier [Tex. Civ. App.] 17 Tex. Ct. Rep. 523, 98 S. W. 904.

77. Contract of employment provided that

tract provides for dismissal by the employer whenever he is dissatisfied with the services of the employe, it is generally held that the master is the sole judge of the question whether the services are satisfactory,[78] though there is a conflict of authority upon the point.[79] It has been held that if the dissatisfaction of the employer is bona fide, this is sufficient;[80] elsewhere it is held that the employer's dissatisfaction must be reasonable.[81] Disobedience of orders,[82] failure or refusal to observe any material condition of his employment,[83] or a breach of the implied agreement on the part of the servant to serve the master diligently and faithfully and with the degree of skill required for the performance of the duties which he undertakes to perform,[84] justifies the discharge of the servant by the master. Where there is no express contract between an employer and an employe imposing upon the latter a higher degree of skill, care, diligence, and attention in the discharge of his duties, only the ordinary and reasonable skill, care, and attention implied by law can be required of him.[85] But if an employe contracts for more than the law implies, he cannot excuse a failure to perform in the manner agreed by showing

if employer was dissatisfied at the end of six months he could cancel the contract by giving thirty days' notice. Held employer could give notice thirty days before the expiration of the six months' period and terminate the contract at that time. Starkweather v. Emerson Mfg. Co. [Iowa] 109 N. W. 719. Where contract gave salesman exclusive territory and provided that either party could dissolve it on notice. The master withdrew a part of the salesman's territory. This was held notice to the salesman of a dissolution of the entire contract. White Sewing Mach. Co. v. Shadock [Ark.] 95 S. W. 143. Acceptance of the notice by the salesman created a new contract. Id. Evidence regarding term of employment considered and held an instruction to the effect that the contract was terminable by either party upon thirty days' notice was error. McDonald v. Ideal Mfg. Co., 143 Mich. 17, 12 Det. Leg. N. 896, 106 N. W. 279.

78. Watkins v. Napier [Tex. Civ. App.] 17 Tex. Ct. Rep. 523, 98 S. W. 904. Where a contract provides that the employer may cancel it when he considers that its "interests are neglected or jeopardized," the employer is the sole judge of whether its interests are neglected or jeopardized, and may discharge an employe on that ground. International Harvester Co. v. Boatman, 122 Ill. App. 474.

79. NOTE. Right to discharge: Where the contract provides that the master may dismiss the servant if he is dissatisfied with his services, the authorities are not agreed as to the power of the master to determine whether the work of the servant is satisfactory. "That he has such power is supported by the following authorities: Allen v. Mutual Compress Co., 101 Ala. 574, 14 So. 362; Bush v. Koll, 2 Colo. App. 48, 29 P. 919; Rossiter v. Cooper, 23 Vt. 522; Campbell Co. v. Thorp, 36 F. 414, 1 L. R. A. 645; Singerly v. Thayer, 108 Pa. 291, 2 A. 230, 56 Am. Rep. 207; Koehler v. Buhl, 94 Mich. 496, 54 N. W. 157; McCarren v. McNulty, 7 Gray [Mass.] 139; Blaine v. Knapp & Co., 140 Mo. 241, 41 S. W. 787; Tyler v. Ames, 6 Lans. [N. Y.] 280; Gibson v. Cranage, 39 Mich. 49, 33 Am. Rep. 351; Zaleske v. Clark, 44 Conn. 218, 26 Am. Rep. 446; Brown v. Poster, 113 Mass. 136, 18 Am. Rep. 463; Machine Co. v. Smith, 50 Mich. 565, 15 N. W. 906, 45 Am. Rep. 57. In support of the proposition that he has not such power, see Manufacturing Co. v. Chico, 24 F. 893; Jones v. Transportation Co., 51 Mich. 195, 16 N. W. 393; Daggett v. Johnson, 49 Vt. 345; Manufacturing Co. v. Brush, 43 Vt. 528; Moore v. Robinson, 92 Ill. 491; Wettermulgh v. Knickerbocker Bldg. Ass'n, 2 Bosw. [N. Y.] 381. The proposition does not seem to have been decided in this state, but the principle decided in Tennant v. Fawcett, 94 Tex. 111, is quite similar to the question under consideration. * * * We think it clear that the weight of authority is that the master may terminate the contract if dissatisfied, and that he is the sole judge of whether he is dissatisfied."—From opinion in Watkins v. Napier [Tex. Civ. App.] 98 S. W. 904.

80. Contract gave an employer the right to terminate the contract after a certain period if services proved "unsatisfactory." Held, if employer was dissatisfied in good faith, this was sufficient; it was not necessary that his dissatisfaction should be shown to be reasonable. Starkweather v. Emerson Mfg. Co. [Iowa] 109 N. W. 719.

81. Dissatisfaction with services under a contract of employment as long as the services are satisfactory, such as to justify a discharge, must be a reasonable dissatisfaction and not an arbitrary one. The good faith of the employer in claiming such services to be unsatisfactory will not alone justify the discharge if the services rendered were, in fact, such as ought to have been satisfactory to a reasonable employer. Lake Shore & Western R. Co. v. Tierney, 8 Ohio C. C. (N. S.) 521.

82. Standidge v. Lynde, 120 Ill. App. 418.

83. Hitchens v. School Dist. No. 180 [Del.] 62 A. 897. Where an employe agrees to work exclusively for one employer, a violation of that agreement by doing work for another justifies his discharge. Glaser v. National Alumni, 97 N. Y. S. 984.

84. Ivey v. Bessemer City Cotton Mills [N. C.] 55 S. E. 613. Where mill superintendent proved to be incompetent and made serious and costly mistakes, his discharge was justified. Id.

85. Hatton v. Mountford, 105 Va. 96, 52 S. E. 847.

performance in the ordinary manner implied by law.[86] Failure to perform as agreed is sufficient cause for a discharge.[87]

No precise words are necessary to constitute a discharge; any language by which an employe is notified that his services are no longer required is sufficient to operate as such.[88] Nor is an absolute refusal by the master to perform required in order that the servant may treat the contract as rescinded; any acts or language showing an intention not to perform is sufficient.[89]

Actions for wrongful discharge.[90]—A servant wrongfully discharged may either treat the contract as continuing, though broken by the master, and recover damages for the breach,[91] or he may rescind the contract and sue on a quantum meruit and recover for services actually rendered,[92] or may sue at once for breach of the contract and recover damages to the time of suit,[93] or may treat the contract as subsisting and sue at the end of each period for salary then due,[94] or may wait until the entire term has expired and recover as damages his salary for the portion of the term remaining after his discharge less what he has earned or reasonably could have earned by other employment.[95] In an action for breach of the contract, the dam-

86. Where music teacher in a ladies' school agreed to be loyal to the management, to use his best efforts to promote the school's interests in his department, and to assist in maintaining discipline, he contracted for a higher degree of care, skill, and attention than the law implied. Hatton v. Mountford, 105 Va. 96, 52 S. E. 847.

87. Teacher was negligent and offensive and caused pupils to threaten to leave. Discharge was justifiable. Hatton v. Mountford, 105 Va. 96, 52 S. E. 847.

88. Where employer told employe and his attorney to "get out of here" while they were discussing difficulties between them, whether employe was discharged was for jury. Sigmon v. Goldstone, 101 N. Y. S. 984. Where representative of defendant told plaintiff that defendant association was to consolidate with another the next day and go out of existence, and offered to settle with plaintiff for his unexpired term of service, this constituted a discharge, and an action therefor commenced thereafter but before a formal letter ending plaintiff's connection with defendant was given him next day was not premature. Shugg v. American Shoe & Leather Ass'n [Mass.] 77 N. E. 1029. Plaintiff was employed to manage defendant's business for five years. Two years later defendant leased its plant for a term longer than the balance of plaintiff's term of employment, and transferred all its rights to his services to the lessee and gave plaintiff notice thereof. Held the relation of master and servant was terminated without cause. White v. Lumiere North American Co. [Vt.] 64 A. 1121. An employe signed a contract as a boilermaker conditioned on his being found competent. He was examined and found incompetent and was told he could have other work if he desired, and performed other duties without objections. Held his contract as boilermaker had been terminated. Messerrio v. Atchison, etc., R. Co., 50 Misc. 317, 98 N. Y. S. 647.

89. Spencer Medicine Co. v. Hall [Ark.] 93 S. W. 985. Where an employe was hired as a general manager of cigar stores in a certain city and the employer attempted to change not only his headquarters but the character of his work under the contract, the employe was justified in refusing to consent to the change, though the salary was to remain the same. Kramer v. Wolf Cigar Stores Co. [Tex.] 15 Tex. Ct. Rep. 305, 91 S. W. 775.

90. See 6 C. L. 522.

91. Milage v. Woodward [N. Y.] 78 N. E. 873; Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788. Complaint alleging contract of employment and wrongful discharge that a certain amount became due as salary for unexpired term and that plaintiff was damaged in a certain sum, construed as a complaint for damages for breach of the contract and not for salary. Murray v. O'Donohue, 109 App. Div. 696, 96 N. Y. S. 335.

92. Milage v. Woodward [N. Y.] 78 N. E. 873; Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788. Where an employer fails to fulfill his obligations under the contract of service, the employe may acquiesce in the abandonment of the contract and recover for services performed under the common counts. Anglo-Wyoming Oil Fields v. Miller, 117 Ill. App. 552.

93. Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788. Only such damages as have accrued up to the time of the trial can be recovered. Pacific Exp. Co. v. Walters [Tex. Civ. App.] 15 Tex. Ct. Rep. 549, 93 S. W. 496.

94. Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788.

95. Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788; Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997. A wrongfully discharged employe may sue at once, or after the expiration of the contract term. Pacific Exp. Co. v. Walters [Tex. Civ. App.] 15 Tex. Ct. Rep. 549, 93 S. W. 496. A discharged employe may treat the contract as absolutely and finally broken and sue for what he would have received during the balance of the term less any sum he might have earned. Semet-Solway Co. v. Wilcox [C. C. A.] 143 F. 839. The amount which a discharged employe could have earned in other employment with reasonable diligence is to be deducted from his damages. Kramer v. Wolf Cigar Stores Co. [Tex.] 15 Tex. Ct. Rep. 305, 91 S. W. 776. Where a discharged employe engaged in business for himself, the amount to be deducted

ages are prima facie the amount stipulated to be paid during the term of employment.[96] Though the discharged employe is under the duty of using reasonable diligence to procure other employment of a similar kind to reduce the damages,[97] the burden is upon the defendant to show that the discharged employe obtained, or with reasonable effort might have obtained, such other employment.[98] That the servant has obtained, or could have obtained, other employment does not bar his action for damages but only goes to the reduction of the damages recoverable.[99] An employe who is prevented by his employer from performing services called for by his contract may recover an amount retained by the employer as a guaranty of faithful performance by the employe.[1] In an action by the employe for breach of the contract by the employer, the burden is upon plaintiff to show a wrongful discharge.[2] Proof of facts from which an intent to discharge may be inferred is sufficient.[3] The burden rests in the first instance on defendant to show a legal ex-

from his damages consisted not only in the amount of his cash profits but also the increased value of his business arising from his services. Kramer v. Wolf Cigar Stores Co. [Tex.] 15 Tex. Ct. Rep. 305, 91 S. W. 775. Where an employe sues the employer for damages for his wrongful discharge, he must account to his employer for salary and profits received in other employment during the time in question. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

96. Milage v. Woodward [N. Y.] 78 N. E. 873. One employed for a certain term, at a certain compensation, who is discharged without cause, may recover what he would have received under contract if he had been allowed to fully perform. Hitchens v. School Dist. No. 180 [Del.] 62 A. 897. A person who was employed as manager of a dairy at a salary and for a term fixed, and who was discharged without legal cause, was held entitled to recover the full amount of the agreed salary to the end of the contract term. Thurmond v. Skannal [La.] 42 So. 577. Where plaintiff was employed for a year as city manager of an insurance agency, and having been discharged without cause, he was entitled to recover earnings for the balance of the year, the amount recoverable being fixed on the basis of the sum guaranteed to be paid. Woods v. Shumard & Co., 114 La. 451, 38 So. 416. Wrongfully discharged employe may recover as damages agreed salary for balance of term in the absence of evidence showing he could have obtained other employment. American China Development Co. v. Boyd, 148 F. 258. Where contract of discharged salesman provided for a salary and a commission on sales up to $10,000, he could recover lost profits and salary in one action for breach of the contract. Spencer Medicine Co. v. Hall [Ark.] 93 S. W. 985. Where discharged salesman carried other lines besides those of defendant, no deduction could be made from the damages recoverable by him for saving of his time unless plaintiff obtained another line to take the place of defendants. Id.

97. Milage v. Woodward [N. Y.] 78 N. E. 873. Discharged employe is bound to use reasonable diligence to find other employment and reduce his damages. Kramer v. Wolf Cigar Stores Co. [Tex.] 15 Tex. Ct. Rep. 305, 91 S. W. 775.

98. Where plaintiff, with his canal boat, horses, and driver, were employed for four weeks and discharged after eight days, and thereafter kept his boat moored at a public place in the city ready for other employment, where those seeking such labor would be apt to seek him, but obtained no other work, he was entitled to recover the contract compensation in the absence of any further showing by defendant. Milage v. Woodward [N. Y.] 78 N. E. 873. That damages might have been reduced by plaintiff's obtaining other employment is matter of defense. Jefferson, etc., R. Co. v. Dreeson [Tex. Civ. App.] 96 S. W. 63. The burden is on defendant to plead and prove the amount that plaintiff could have earned by reasonable diligence after his discharge. Pacific Exp. Co. v. Walters [Tex. Civ. App.] 15 Tex. Ct. Rep. 549, 93 S. W. 496. Plaintiff need not show affirmatively a fruitless search for other employment during the term. Monroe v. Proctor, 100 N. Y. S. 1021.

Contra: Burden is on servant, who sues for damages for his discharge, to prove that he failed after reasonable effort, to obtain other employment, or that he did not receive as much as he would have received had he been allowed to perform his contract. Shepherd v. Gambill, 29 Ky. L. R. 1163, 96 S. W. 1104.

99. Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788.

1. One employed as designer and cutter was compelled to stay in a dark room, without work, for a large part of the time. Sigmon v. Goldstone, 101 N. Y. S. 984.

2. Evidence insufficient to prove employment for any period other than from week to week. Zahler v. Arkin, 112 App. Div. 327, 98 N. Y. S. 544. Evidence insufficient, in action for wrongful discharge, to show that plaintiff had been discharged by any one having authority to discharge him. Mozzi v. Administration Restaurant Co., 120 Mo. App. 587, 97 S. W. 947.

3. In an action for wrongful discharge, plaintiff, in order to make a case for the jury, need not prove an express and formal discharge; proof of facts from which an intent to discharge him may reasonably be inferred is sufficient. Semet-Solway Co. v. Wilcox [C. C. A.] 143 F. 839. Evidence held to show wrongful discharge of actress employed for three weeks after one week's service. Monroe v. Proctor, 100 N. Y. S. 1021. Plaintiff held to have made prima facie proof in action for damages for discharge; error to nonsuit. Freeman v. Goldstein, 99

cuse for the discharge.[4] An assent by the employe to the termination of the contract will bar an action for damages.[5] Where a servant resigns and assigns certain grounds for his resignation he cannot, in an action for breach of his contract, rely upon other grounds as the cause of his action.[6]

Remedies of master for breach by servant.[7]—For a breach by the servant the master may recover damages in an action at law.[8]

Equity will not undertake to decree specific performance of contracts for personal service.[9] The only remedy is an action at law for damages for breach of the contract where the servant refuses to perform.[10] In the absence of an express covenant on the part of the employe not to perform services for others, equity will not aid the enforcement of the contract by enjoining the performance of services for others.[11] Even where there is an express negative covenant, an injunction will not be granted save in exceptional cases where, by reason of the peculiar or extraordinary character of the promised service, a violation of the agreement will cause injury to the other party for which an action at law will afford no adequate remedy.[12]

Labor laws.[13]—An employer and employe may make such contracts relating to labor as they may agree upon, subject only to the proper exercise of the police power.[14] Hence, a statute which in effect makes it a misdemeanor for an employer to hire an employe on condition that such employe shall not become a member of a labor organization is unconstitutional.[15] The provision of the New York labor law of 1905, prohibiting any female from being employed or permitted to work in any factory after nine o'clock in the evening, is held invalid.[16] The Oregon statute

N. Y. S. 395. Petition in action for breach of contract alleged employment of plaintiff for a year beginning at a certain date, that plaintiff held himself ready to perform at all times, but that defendant refused to allow him to enter upon his duties, sufficiently show acceptance of the employment by plaintiff as against a general demurrer. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Where complaint charged that reason for discharge was to permit employment of old employes, evidence to sustain the charge was admissible. Pacific Exp. Co. v. Walters [Tex. Civ. App.] 15 Tex. Ct. Rep. 549, 93 S. W. 496.

4. Ivey v. Bessemer City Cotton Mills [N. C.] 55 S. E. 613. Where defendant claimed that plaintiff had been employed on condition that he should prove competent, and that he had been discharged because of incompetency, the burden was on defendant to prove plaintiff's incompetency. Mobile, etc., R. Co. v. Hayden [Tenn.] 94 S. W. 940.

5. Correspondence and other evidence considered, and held that plaintiff had not assented to a lease of a plant and a transfer of the right to his services so as to bar an action by him for his discharge. White v. Lumiere North American Co. [Vt.] 64 A. 1121.

6. Kansas Union Life Ins. Co. v. Burman [C. C. A.] 141 F. 835.

7. See 6 C. L. 524; 4 C. L. 536.

8. Public accountants were employed to check cash accounts and negligently failed to do so, whereby a cashier was enabled to embezzle certain sums of money. The accountants were held liable for the sums embezzled as damages flowing from their breach of contract. Smith v. London Assur. Corp., 109 App. Div. 882, 96 N. Y. S. 820.

9. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. The general rule is that contracts for personal services will not be specifically enforced in equity, since the court cannot enforce its decree. Rabinovich v. Reith, 120 Ill. App. 409.

10. Gossard Co. v. Crosby [Iowa] 109 N. W. 483.

11. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. There must be in the contract a negative provision excluding service by defendant for persons other than the complainant, to warrant relief by injunction. Rabinovich v. Reith, 120 Ill. App. 409.

12. A petition alleged that a lecturer, demonstrator, and saleslady, employed by plaintiff to advertise and sell corsets of a special make, had certain qualities desirable in such an employe in an exceptional degree, and that she refused to continue her services and instead had entered into competition with plaintiff and was lecturing upon and selling corsets upon her own account, using experience and skill acquired in the service of the plaintiff. An injunction was prayed for. Held no cause of action was stated for such extraordinary relief. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. The negative enforcement of a contract by injunctive process will not be undertaken unless the services contracted for are purely intellectual, peculiar, or individual in their character. Contract of a hat trimmer is not of such a character. Rabinovich v. Reith, 120 Ill. App. 409.

13. See 6 C. L. 524.

14. People v. Marcus, 185 N. Y. 257, 77 N. E. 1073.

15. Pen. Code, § 171a, makes an employer who shall "coerce or compel" an employe to agree not to join a labor organization guilty of a misdemeanor. This is an invalid restriction of the right to contract. People v. Marcus, 185 N. Y. 257, 77 N. E. 1073, afg., 110 App. Div. 255, 97 N. Y. S. 322.

16. Labor Laws 1903, p. 439, c. 184, § 77,

making it a misdemeanor to require any female to work in any factory, laundry, or mechanical establishment more than ten hours a day is held valid.[17] It is held that the Colorado statute making it a criminal offense for any officer or agent of the state or any municipality therein to require workmen on public works to labor more than eight hours a day, while invalid as an exercise of the police power,[18] is valid as an exercise by the state of its right to prescribe such conditions and rules as it sees fit for the prosecution of work of a public character to be performed for it.[19] The Montana act making eight hours a day's work in certain employments is upheld.[20] The act applies to both employers and employes,[21] but does not contemplate the punishment of persons who fail to work eight hours a day.[22] Coal miners and laborers are not subject to punishment under the Wyoming eight hour law, since the penal section applies only to owners or their lessees or agents.[23] The Pennsylvania statute requiring less educational qualification to obtain an employment certificate of minors who can furnish certain documentary evidence as to their age than of those who cannot do so is unconstitutional.[24]

§ 2. *The right of the master in services of the employe, and right of employe to compensation; assignments of wages; trade secrets; statutory regulations.*[25]—The right to compensation for services must rest upon contract, express[26] or implied.[27] Where there is an express contract, the amount of compensation recovera-

is an unwarranted infringement of the constitutional right to contract. People v. Williams, 101 N. Y. S. 552, afg. the decision of the court of special sessions, in 51 Misc. 333, 100 N. Y. S. 337.

17. Laws 1903, p. 148, does not violate the 14th amendment of the Federal constitution, nor Const. Or. art. 1, §§ 1, 20, that all men have equal rights and that no law shall grant any privileges not belonging equally to all citizens. State v. Muller [Or.] 85 P. 855.

18. Keefe v. People [Colo.] 87 P. 791.

19. Construing 3 Mills' Ann. St. Rev. Supp. § 2801 a, b, c. Keefe v. People [Colo.] 87 P. 791.

20. Laws 1905, p. 105, c. 50, §§ 1, 2, making eight hours a day's work on municipal work, and in ore mills, smelters, and mines, and providing for the punishment of those who violate the act, is a valid exercise of the police power, does not infringe freedom to contract, nor deny the equal protection of the laws. State v. Livingston Concrete Bldg. & Mfg. Co. [Mont.] 87 P. 980. The act is not objectionable as failing to except cases of emergency, where life or property is in danger, since courts will not review the policy of legislation. Id.

21, 22. State v. Livingston Concrete Bldg. & Mfg. Co. [Mont.] 87 P. 980.

23. Common miner is not subject to punishment for working more than eight hours. Construing Rev. St. 1899, §§ 2586, 2587, 2589. State v. Thompson [Wyo.] 87 P. 433.

24. Act May 2, 1905. Collett v. Scott, 30 Pa. Super. Ct. 430.

25. See 6 C. L. 524.

26. Domestic services held to have been rendered by plaintiff to defendant's ancestor under promise and expectation of payment; hence recovery by plaintiff. Eirley v. Eirley, 102 Md. 452, 62 A. 962. Where a teacher was hired by an independent contractor to whom a department of the school had been let, the teacher had no claim against the school for pay. Coltrane v. Peacock [Tex. Civ. App.] 14 Tex. Ct. Rep. 865, 91 S. W. 841. Where contract with corporation provided that it might be terminated by the corporation in case of its dissolution, the employe cannot prove a claim for salary after the corporation has become a voluntary bankrupt. In re Sweetser, Pembroke & Co. [C. C. A.] 142 F. 131. Bank clerk who had been employed for twenty-four years was given vacation, with pay, and was paid for part of the time that he was gone. He asked for an extension of his vacation and was discharged. Held that he was entitled to pay to the time of his discharge. Birch v. Glasgow Sav. Bank, 114 Mo. App. 711, 90 S. W. 746. Whether railroad company ratified act of station agent in engaging plaintiff's services as physician for injured employe so as to bind the company for compensation, held for jury. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278. Salesman's contract provided for repayment of commissions when accounts were lost or goods returned. A release of the salesman from this agreement was a sufficient consideration for a new substituted contract. Whether such new contract was in fact made held a question for the jury. Morrison Mfg. Co. v. Bryson, 129 Iowa, 645, 103 N. W. 1016, 105 N. W. 153.

27. Evidence sufficient to show that architect had been employed by decedent, and to show an implied promise to pay for services. Buckler v. Kneezell [Tex. Civ. App.] 14 Tex. Ct. Rep. 800, 91 S. W. 367. An implied contract to pay for work done on leased premises does not arise from mere fact that landlord has seen men at work there. Goode v. Illinois Trust & Sav. Bank, 121 Ill. App. 161. After death of employer, employe continued to feed and exercise horses which had been in his care. Held his services were not shown to be necessary and he was a mere volunteer, and could not recover under an implied promise to pay. Mathie v. Hancock, 78 Vt. 414, 63 A. 143. Evidence sufficient to show a contract for

ble depends upon its terms;[28] if the contract is implied, the reasonable value of services rendered may be recovered.[29] Where service, commenced under a written contract, continues after expiration of the term, it is presumptively upon the same terms as those expressed in the written contract.[30] The presumption is that services performed by an employe are within the contract and extra compensation beyond that stipulated cannot be recovered.[31] The amount recoverable by the servant may be reduced by valid claims in favor of the master.[32] That the servant has by his conduct forfeited his right to compensation is an affirmative defense which must be pleaded and proved.[33] That the servant actually performed no services is not a defense to an action on a valid contract, where performance was rendered

compensation to defendant's cousin living as a member of his family, only after certain date. Brunner v. Mosner, 101 N. Y. S. 538. Woman was induced to believe that she was married to a man and lived with him as his wife. She later discovered that they had not in fact been married. A claim for services rendered by her to him could not be defeated on the theory that she lived as his voluntary mistress, and performed the services on that account. Mixer v. Mixer, 2 Cal. App. 227, 83 P. 273.

28. Compensation to be received by plaintiff held a question for the jury where the testimony in regard to the contract was conflicting. McCowan v. Northeastern Siberian Co., 41 Wash. 675, 84 P. 614. Contract construed and held that under it plaintiff had right to determine profits of the business and the compensation to which defendants should be entitled. Jones v. Roberts, 113 App. Div. 285, 98 N. Y. S. 873. Employe was to be paid a salary and part of profits from goods sold in his department. Thereafter part of the goods in his department were moved to another, but he refused to sign a supplemental contract. Held he was entitled to profits on goods covered by his original contract. Hearn v. Stevens & Bro., 111 App. Div. 101, 97 N. Y. S. 566. Where contract with salesman provided for salary and commissions on sales above a certain amount, whether by usage in the trade, such agreement for commissions included the solicitation of sales, communicated to the employer, which afterwards developed into sales, was a question for the jury. Schultz v. Ford Bros. [Iowa] 109 N. W. 614. Where a servant employed to run a drug store was to receive a salary and one-third the profits, he was entitled only to profits of the business, and not to profits made from a sale of the employer's lease. Actual profits only were recoverable. Boisnot v. Wilson, 109 App. Div. 569, 96 N. Y. S. 581. Where services are not rendered under any contract specifying the amount or time of payment, wages cannot be held to have accrued monthly so that each instalment would bear interest. Mixer v. Mixer, 2 Cal. App. 227, 83 P. 273.

29. Where quantum meruit is brought, the measure of recovery is the reasonable value of the services rendered. Cozad v. Elam, 115 Mo. App. 136, 91 S. W. 434.

30. Houston Ice & Brew. Co. v. Nicolini [Tex Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84.

31. Nurse received regular weekly compensation. No promise to pay reasonable value of services in excess of regular rate could be implied. Lucas v. Boss, 110 App. Div. 220, 97 N. Y. S. 112. Whether pay over and above commissions was expected to be paid by parties for certain extra services, held a question for the jury. Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997.

32. Contract of insurance order with soliciting agent construed, and held that note given by agent for amount overdrawn by him over his contract compensation was enforceable against him. Whitestone v. American Ins. Union [C. C. A.] 143 F. 862. A contract whereby an employe of one corporation agrees that the amount of his monthly purchases from another corporation shall be deducted from his monthly wages is valid and enforceable. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104. Employer was to withhold part of a salesman's salary as a guaranty of faithful performance, and, on discharging the salesman, he retained the guaranty, which the salesman, in action to recover compensation, claimed. Whether plaintiff could recover was for jury. Schultz v. Ford Bros. [Iowa] 109 N. W. 614. An employe executed a written order on his employer to pay certain sums monthly to another until a certain total sum had been paid. In an action by the employe to recover wages in full, the order was not available as a set-off, when it was not shown that the employer accepted it, nor that the sums had in fact been paid. Usher v. Seaboard Air-Line R. Co., 125 Ga. 809, 54 S. E. 704. A contract requiring a minor employed for three years to make up at the end of that period all time lost during it under penalty of forfeiture of certain wages withheld includes time lost by sickness. Behney v. Stoever Foundry Co., 30 Pa. Super. Ct. 625.

33. In an action to recover wages and expenses, the defense that the right to compensation has been forfeited by dishonesty and other misconduct must be specially pleaded. Forfeiture not warranted where answer only disputed length of service and alleged payment. Spaulding v. Pepper [Mont.] 85 P. 754. In action by farm laborer for services, evidence sufficient to warrant finding for plaintiff, and did not support defense of violation of contract by plaintiff. McDonald v. Dunbar, 99 N. Y. S. 768. A mere prediction or promise by a salesman as to amount of goods he could sell held not to amount to fraud or misrepresentation so that employer could deduct a certain amount from the agreed compensation, where they could have discharged the salesman if dissatisfied. Steinbach v. La Roche, 50 Misc. 649, 98 N. Y. S. 672.

impossible by the accidental destruction of the master's plant.[34] Where services are rendered under a contract unenforceable because of the statute of frauds, and the adverse party refuses or is unable to perform, the party performing services can sue on a quantum meruit.[35] Holdings on the admissibility of evidence,[36] and on pleadings,[37] in actions for compensation, are given in the notes.

A judgment for wages will bar a subsequent action for wages due at the time the action in which the recovery was had was commenced,[38] but not an action for wages subsequently falling due.[39]

Trade secrets and inventions.[40]—An employe has a right, on leaving the service of the employer, to use the experience and skill acquired in such service for his own benefit, and such use will not be enjoined.[41] But this rule does not of course extend to trade secrets.[42] Where a person is employed in a business where a secret process is used and knows that the employer desires to keep the process secret, a confidential relation exists which raises an implied agreement by the employe not to disclose the trade secret.[43] When a trade secret has been fraudulently obtained, its use by persons so obtaining it may in a proper case be enjoined.[44] But such an injunction will not issue on the petition of a complainant who has himself been guilty of fraud and corruption in obtaining such secret from another.[45] A contract by an employe, hired for a term of years, to assign to his employer a half interest in all inventions made by him during the term of employment is not contrary to public policy.[46]

Medical treatment.[47]—Where the master collects a monthly sum from each employe for the maintenance of a hospital for the free use of employes, but does not expressly contract to furnish medical or surgical aid, the master's only duty is to use ordinary care in the expenditure of the money, and in the employment of phy-

34. Where a master agrees absolutely to pay a stipulated weekly salary for a certain period, the fact that the servant performs no services during a portion of the time, owing to the destruction of the master's plant, does not relieve the master from liability for the entire sum agreed to be paid, in the absence of a contrary stipulation providing for such an accident, and where the servant is at all times ready to perform. Magida v. Wiesen, 100 N. Y. S. 268.

35. As where consideration for services was agreement to convey land. Cozad v. Elam, 115 Mo. App. 136, 91 S. W. 434.

36. Evidence of value of services in procuring powder magazine site should have been introduced, their value not being a matter of common knowledge. Bradner v. Rockdale Powder Co., 115 Mo. App. 102, 91 S. W. 997. On issue whether a watchman was re-engaged by a mine owner after being discharged, evidence of the execution of a lease of the mine and the entry of the lessee on the day of the discharge was admissible to show that the watchman's services were no longer required. Rebecca Gold Min. Co. v. Baker [Colo.] 87 P. 1072.

37. Where action is for completed service under a contract, the complaint need not allege the details of the time of performance in anticipation of a possible defense that the services were performed out of season. Fleck v. Friedman, 49 Misc. 220, 97 N. Y. S. 231.

38. In action for wages for second month of term, a judgment barred a subsequent recovery for the third month, when wages for that month were due when first action was commenced. Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788.

39. Smith v. Cashie & Chowan R. & Lumber Co., 142 N. C. 26, 54 S. E. 788.

40. See 6 C. L. 526.

41. Gossard Co. v. Crosby [Iowa] 109 N. W. 483. Plaintiff corporation employed an engineer to design an automobile, but no patentable machine or device was produced. The engineer resigned and later designed a model for another which was sold to another corporation. It did not appear that the engineer took any tangible property of the first corporation; he simply used his skill and knowledge in producing the model. Held last corporation could not be enjoined from using and selling model so produced. New York Automobile Co. v. Franklin, 49 Misc. 8, 97 N. Y. S. 781.

42. Gossard Co. v. Crosby [Iowa] 109 N. W. 483.

43. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

44. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881. Equity will protect by injunction a trade secret obtained by an employe in connection with his duties and by him communicated to others who seek to employ it to the injury of the owner. Mahler v. Sanche, 121 Ill. App. 247.

45. Vulcan Detinning Co. v. American Can Co. [N. J. Eq.] 62 A. 881.

46. Contract construed. Wright v. Vocalion Organ Co. [C. C. A.] 148 F. 209.

47. See 6 C. L. 526.

sicians and surgeons in charge of the hospital.[48] He is not liable for a fee of a physician employed by an injured servant during the absence of the regular physician in charge.[49]

Assignments of wages.[50]—The assignee of wages cannot recover the amount thereof from the alleged employer without showing that the assignor was the employ of such employer and that the wages were due and unpaid.[51] The assignee of wages earned and to be earned has the right to maintain for its use an action against the debtor in the name of the creditor.[52] Injunction will not lie to restrain such assignee from suing the employer in the name of the employe from time to time as the wages accrue.[53]

Statutory regulations.[54]—A California statute gives the master the right to an accounting by the servant under certain circumstances.[55] The Indiana statute requiring mining and manufacturing corporations to pay their employes, in lawful money of the United States,[56] at least once every two weeks if demanded,[57] and providing penalties for its violation,[58] has been construed and held valid.[59] The Arkansas act prohibiting the owners or operators of coal mines, where ten or more men are employed, from screening coal before it is weighed and credited to the employes is also held valid.[60]

Statutory and other liens for services are elsewhere discussed.[61]

§ 3. *Master's liability for injuries to servants. A. Nature and extent in general.*[62]—The master is not an insurer of the safety of his servants; the law imposes only the duty of ordinary or reasonable care for their safety,[63] that is, that degree of care customarily used by ordinarily prudent men under similar circum-

48, 49. Miller v. Beaver Hill Coal Co. [Or.] 85 P. 502.

50. See 6 C. L. 525.

51. Wabash R. Co. v. Papin, 119 Ill. App. 99.

52, 53. Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595.

54. See 6 C. L. 526.

55. Where a servant of a real estate broker made sales and received commissions during the term of his employment, and the master demanded an accounting, and the contract was thereafter terminated, the master had a right to an accounting under Civ. Code, § 1986. Sumner v. Nevin [Cal. App.] 87 P. 1105.

56. A restriction on the right to contract, to the extent of requiring payment in lawful money of the United States, is constitutional. Seeleyville Coal & Min. Co. v. McGlosson [Ind.] 77 N. E. 1044.

57. Acts 1887, p. 13, § 1 (Burns' Ann. St. 1901, § 7065), leaves it optional with the employe to demand payment every two weeks. Seeleyville Coal & Min. Co. v. McGlosson [Ind.] 77 N. E. 1044.

58. If payment is not made within 10 days after demand, there is a penalty of $1 a day for each succeeding day of default, not to exceed twice the amount of wages due, and, if action is brought, a reasonable attorney's fee may be collected. Seeleyville Coal & Min. Co. v. McGlosson [Ind.] 77 N. E. 1044.

59. The act is not class legislation; it does not restrict the right of contract, except as to medium of payment, and the penalty exacted is not unreasonable. Seeleyville Coal & Min. Co. v. McGlosson [Ind.] 77 N. E. 1044.

60. Laws 1905, p. 558, is within the police power, as it tends to prevent the defrauding of employes. McLean v. State [Ark.] 98 S. W. 729. The act does not deny the equal protection of laws. Id.

61. See Mechanics' Liens, 6 C. L. 611; Agriculture (Crop liens), 7 C. L. 94.

62. See 6 C. L. 526.

63. McDonnell v. Oceanic Steam Nav. Co. [C. C. A.] 143 F. 480; Chrismer v. Bell Tel. Co., 194 Mo. 189, 92 S. W. 378; International, etc., R. Co. v. Trump [Tex.] 16 Tex. Ct. Rep. 1003, 97 S. W. 464; Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514. The master is not an insurer of the servant's safety and is not bound to take better care of the servant than he does of himself. Darrow v. The Fair, 118 Ill. App. 665. Failure to light premises held not actionable negligence where injury resulted from a cause no ordinary human foresight could have anticipated and provided against. Id.

Only such telegraph stations need be established along a railroad as are necessary for operation of trains with reasonable safety to employes. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. It is the master's duty to exercise ordinary care to provide and maintain a reasonably safe place and reasonably safe instrumentalities; it is not his absolute duty to provide and maintain a reasonably safe place and reasonably safe instrumentalities. Armour & Co. v. Russell [C. C. A.] 144 F. 614. Employer is not an insurer of employe's safety but is bound only to use ordinary care; hence, evidence that a bolt of a machine broke and allowed a knife to fly off a revolving shaft is not alone evidence of negligence, such an accident never before having occurred, though the machine had been used a long time. Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. S. 7.

stances.[64] Thus, a master is not responsible for injuries which could not reasonably have been foreseen and guarded against.[65] The degree of care required of the master in a particular instance depends upon the nature and character of the business or employment,[66] the character of the agencies employed by the master, with and about which the employes are required to work, [67] and upon all the exigencies and cir-

64. A master is only called upon to exercise reasonable care in supplying appliances, machinery, and a place to work, the test being the ordinary usage of the business. Low v. Central Dist. Printing & Tel. Co., 140 F. 558. If standard rule of American Association of Railways permitted the running of a light engine with only an engineer and fireman on a trip like the one on which engineer was killed in collision, running the engine with such crew would not be negligence. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877.

65. An employer is not bound to guard against dangers of a character he cannot foresee in the exercise of ordinary care. No liability where breaking of iron derrick hook could not have been foreseen by the exercise of ordinary care. New Castle Bridge Co. v. Steele [Ind. App.] 78 N. E. 208. Where the master has no reason to anticipate a particular danger, he is under no duty to guard against it; and the fact that accident did occur makes no exception to the rule. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158. Where gate to freight elevator was solidly built and had always proved adequate to keep employes out of the shaft, the fact that it could be opened from the outside when the elevator was not there did not constitute negligence in its construction. Id. The master is not negligent to fail to guard against an accident which no one could have foreseen and no prudence could have anticipated as one necessary to guard against. No negligence to have collar on revolving shaft 16 feet above floor, and no liability when employe was caught on it when working upon building. Martin v. Niles-Bement-Pond Co., 214 Pa. 616, 64 A. 370. No breach of master's duty to warn where employe, walking beside track, suddenly stepped in front of cars sent down a siding by flying switch where there was no reason to anticipate that deceased would step on the tracks as he did. Lord v. Boston & M. R. Co. [N. H.] 65 A. 111. In absence of evidence that belt lace is liable to pull out, or that lace used in belt was unsuitable, or that it was put in unskillfully, it could not be found that master was negligent in failing to anticipate that a lace would pull out and cause an injury. St. Pierre v. Foster [N. H.] 64 A. 723. That an injury was caused by an accident will not relieve the master unless the accident was one which could not have been prevented by the use of ordinary care. Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943. The duty of the master to furnish a safe place includes the duty to exercise reasonable care to guard against such dangers as may reasonably be foreseen and guarded against. Johnson v. Terry & Tench Co., 113 App. Div. 762, 99 N. Y. S. 375. Where employe wheeled a barrow of cement on a scaffold, a plank of which sagged, causing the barrow to tip, thereby throwing plaintiff, held, no negligence in furnishing the scaffold or barrow being shown, the accident was not one the master ought reasonably to have foreseen and guarded against. Cunningham v. Peirce, 112 App. Div. 65, 98 N. Y. S. 60. Circular saw had worn a hole in the saw table and operator complained and superintendent promised to repair it "pretty soon." A nonsuit on the ground that no injury was to be apprehended was error. Tannhauser v. Uptegrove & Bro., 100 N. Y. S. 245. A lever on a printing press flew back and startled the operator who then involuntarily thrust his hand into the machinery of the press and was injured. The accident was the first of its kind in the nine years' use of the press. It was held one which the master could not reasonably have foreseen. Creswell v. United Shirt & Collar Co., 100 N. Y. S. 497. Master not liable where employe was injured by a belt in an unprecedented manner, which could not reasonably have been foreseen. Guilmartin v. Solvay Process Co., 101 N. Y. S. 118. In action for injuries caused by explosion of dust in mill, evidence insufficient to take to jury question of negligence in not providing a certain device to prevent such an accident and in allowing dust to accumulate. Sticht v. Buffalo Cereal Co., 101 N. Y. S. 905. That a derailment was caused by a washout due to an unprecedented flood would not relieve a railroad company from liability for injuries to an engineer where the company had notice of the washout in time to prevent the accident. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355.

66. A higher degree of care is required of the master where the employes, miners, work underground and are exposed to unseen dangers, and have no ready means of escape, than where the employes are situated so that they can readily see and escape from danger. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Where engineer knew that fireman was at work under an attached engine, ordinary care required the use of every precaution to prevent the engine from moving. Atchison, etc., R. Co. v. Seeger [Tex. Civ. App.] 14 Tex. Ct. Rep. 492, 98 S. W. 892. Care required of master in regard to freight elevator, which employes were allowed to ride upon in going to and from work, held not the same degree of care that is required in the case of passenger elevators. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158.

67. Electricity must be handled with care proportionate to its dangerous character. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Employers dealing with electricity must use the degree of care usually exercised by ordinarily prudent persons engaged in that business. Zentner v. Oskosh Gaslight Co., 126 Wis. 196, 105 N. W. 911. Reasonable care for the protection of employes who work with electricity and electrical appliances requires a high degree of care and prudence commensurate with the greatness and subtlety of the danger to be guarded against. Martin v. Des Moines Edi-

cumstances of the particular case.[68] It follows that the question whether due care has been exercised by the master, or by those who stand in his place, in a particular instance, is usually a question of fact to be solved by the jury.[69]

son Light Co. [Iowa] 106 N. W. 359. Dangerous character of dynamite, when used for blasting or other like purposes, imposes on the person so using it the duty to provide reasonably safe and suitable methods for its use. Pinney v. King [Minn.] 107 N. W. 1127.

68. Where, in moving anchor of ship under way at full speed, her oval deck, where work was being done, was covered with ice and snow, and two of the five seamen were incompetent, extraordinary precautions should have been taken and only safe instrumentalities used. The Luckenbach, 144 F. 980.

Employment of minors: Fact of minority of employe does not impose any greater degree of care on the master than in case of adult servants. Decatur Car Wheel & Mfg. Co. v. Terry [Ala.] 41 So. 839. It is actionable negligence for an employer to engage and place at a dangerous employment a minor, who, although instructed, lacks sufficient age and capacity to comprehend and avoid the dangers of the employment, if the employer has or should have notice of the minor's age and lack of capacity. Employer of boy under thirteen as doorkeeper in mine entry. Bare v. Crane Creek Coal & Coke Co. [W. Va.] 55 S. E. 907. The employer of a minor, without other notice, is charged with notice of such lack of capacity as is usual among miners of the same age, so far as the minor's age is or should be known to the employer. Id.

69. Held for jury: Whether it was negligence to order employe to oil moving machinery. Southern Cotton Oil Co. v. Spatts, 77 Ark. 458, 92 S. W. 249. Servant injured while washing insecurely fastened window pane. Davis v. Diamond Carriage & Livery Co., 146 Cal. 59, 79 P. 596. Fireman was killed by derailment of train at a curve, while running at a high rate, with engine going backwards. There was evidence that roadbed was rough and uneven, also that flange of wheel on tender broke at the curve, also that it was customary with other roads to run trains as this one was run. Question of negligence was for jury. Rickerd v. Chicago, etc., R. Co. [C. C. A.] 141 F. 905. Brakeman fell under cars when he dropped off an engine to open a switch at night. Reardon v. Toledo, etc., R. Co. [C. C. A.] 147 F 187. Whether to require a boy of sixteen to carry a heavy load of tools, etc., down certain icy steps, upon which he fell, was negligence. Bainum v. American Bridge Co., 141 F. 179. Boy of thirteen was injured in dangerous machine, and complaint alleged failure to warn and instruct. Defense was that boy was doing an act not required of him when injured. Issue held for jury. Valley Knitting Mills v. Anderson, 121 Ga. 909, 53 S. E. 686. Employe sent out to flag a train and turn a switch for the train, was sighting along the rails, when he was seized with a cramp or paralytic stroke, fell on the track, and was struck by the train. Talley v. Atlantic & B. R. Co., 126 Ga. 56, 54 S. E. 817. Employe injured by bottle of acid tipping owing to alleged defect in crate on which it was placed. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409. Whether cage was negligently lowered into mine and at an excessive and prohibitive rate, Joseph Taylor Coal Co. v. Dawes, 220 Ill. 145, 77 N. E. 131. Negligence of engineer in moving train without signal from brakeman, injury to brakeman resulting. Illinois Cent R. Co. v. Cane's Adm'x, 28 Ky. L. R. 1018. 90 S. W. 1061. Whether manner in which superintendent in charge of unloading cargo lashed ladder for use of crew was negligence. Hourigan v. Boston Elevated R. Co. [Mass.] 79 N. E. 738. Cogwheel in elevator shaft broke and a piece of it struck plaintiff. Seeger v. St. Louis Silver Co., 193 Mo. 400, 91 S. W. 1030. Where plaintiff, holding a bar used to tighten nuts on an angle iron, was injured by reason of the bar slipping, and section boss having his weight on it, whether the boss was negligent. Browning v. Chicago, etc., R. Co., 118 Mo. App. 449, 94 S. W. 315. Where section hand was struck by a piece of coal thrown from the tender of a train when it passed over a rough place in the track, the coal having been piled 8 or 12 inches above the rim of the tender, the accident was not, as a matter of law, one which no prudent man could reasonably have foreseen; whether there was negligence was for the jury. Dean v. Kansas City, etc., R. Co. [Mo.] 97 S. W. 910. Plaintiff, girl under sixteen, was injured by plunger of tin stamping machine while removing a cup with her hands. She testified that the machine was defective in that it started of its own accord, that she had complained, and that foreman had promised to fix it, and had told her to use her hands as she did. Regling v. Lehmaier, 50 Misc. 331, 98 N. Y. S. 642. Evidence showed that elevator boy was accustomed to leave the elevator and go upon errands about the store, and that a door to the shaft was defective and was left open, and an employe walked through it and fell. Wendell v. Leo, 101 N. Y. S. 51. Boy under sixteen was employed in factory but had no certificate as required by Labor Law, §§ 70-72. He was permitted to use a circular saw and was injured while so doing. Held, whether defendant was negligent was for jury. Rahn v. Standard Optical Co., 110 App. Div. 501, 96 N. Y. S. 1080. Where cars were left without being scotched and ran down a grade into cars on which plaintiff was standing, the question of negligence of the crew which left the cars so that they would start was held for the jury. Bird v. U. S. Leather Co. [N. C.] 55 S. E. 727. Death caused by explosion of gas in tunnel. Gawne Co. v. Fry, 7 Ohio C. C. (N. S.) 317. Employe of natural gas company was injured while repairing pipe. Evidence held to warrant inference of negligence of company in failure to have gas shut off, and case should have gone to jury. McCoy v. Ohio Valley Gas Co., 213 Pa. 367, 62 A. 858. Negligence of coemployes who let weight of hand car fall on plaintiff as they were replacing it on the track. Texas, etc., R. Co. v. McCraw [Tex. Civ. App.] 16 Tex. Ct. Rep. 368, 95 S. W. 82. Employe moving truck on defendant's premises was injured by reason of defects in the truck and a hole in the track

into which a wheel went, causing the tongue to swing around and strike him. Pacific Exp. Co. v. Shivers [Tex. Civ. App.] 14 Tex. Ct. Rep. 807, 92 S. W. 96. Engineer injured in collision with train ahead of him. International, etc., R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660. Where it appeared that high currents were usually turned off while repairs on electric line were being made, but that the current was on when deceased was making repairs, he being killed by it, the negligence of defendant was for the jury. Zentner v. Oshkosh Gaslight Co., 126 Wis. 196, 105 N. W. 911. Negligence of electric company in allowing wires to be grounded, lineman having been injured. Smith v. Milwaukee Elec. R. & Light Co., 127 Wis. 253, 106 N. W. 829. To remove hub from shaft of propeller, hub was heated, and superintendent struck it with a sledge hammer, whereupon hot oil spurted out and burned an employe trying to remove it. Whether failure to ascertain the presence of the oil, and striking the hub without warning of the danger from the oil, was negligence, held a question for the jury. Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592.

Master held not negligent: Where engineer took signals from brakeman, standing beside the track, and backed cars down to be coupled in the usual manner, and the brakeman went in between the cars, and the engineer used every means to stop the engine but could not do so in time, the brakeman could not recover. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Order of superintendent to put disabled car "next to cabin car" held not negligent where one coupler was broken, since conductor should have put disabled car behind cabin car, not in front, which would have avoided injury to car inspector on front platform of cabin car. Shuster v. Philadelphia, etc. R. Co. [Del.] 62 A. 689. Switchman killed trying to board a switch engine from the rear at night. Pollard's Adm'x v. Kentucky, etc., R. Co. [Ky.] 97 S. W. 735. Negligence of master not established in action for injuries to servant engaged in unloading grain from cars to elevator. Casey v. Daugherty, 118 Ill. App. 134. Employe engaged in loading ship got on hatchway unnecessarily and fell through opening. Bamford v. Hammond, 191 Mass. 479, 78 N. E. 115. Where employe in freight house took a skid leaning against a pile of cotton bales, which then fell upon him, injuring him, held there was no evidence to show negligence on the part of the foreman whose duty it was to superintend the storing of freight. Cahill v. Boston, etc., R. Co., 190 Mass. 423, 76 N. E. 911. Held not negligence to allow a break in plaster in elevator shaft, only 5 or 6 inches wide, 2 1-2 inches high, and 1 to 1 1-2 inches deep, which injury to foot of operator who allowed it to project and get caught. McDonald v. Dutton, 190 Mass. 391, 76 N. E. 1055. Iron worker, nineteen years old, with some experience, was employed to construct an iron pipe railing around a gas tank, and fell while screwing a coupling in place. There was no evidence that the coupling was defective. Evidence insufficient to show negligence of the master. Sheon v. Kerr-Murray Mfg. Co. [Mich.] 13 Det. Leg. N. 699, 109 N. W. 40. Evidence insufficient to show negligence of train dispatcher as cause of a collision. Moon v. Pere Marquette R. Co., 143 Mich. 125, 12 Det. Leg. N. 932, 106 N. W. 715. Where employe was drowned while being rowed from a barge on which he had been working, owing to the fact that an oar struck a submerged cable which rested on the barge and from there sank into the stream, held no negligence shown as to place or plan of work. Chrismer v. Bell Tel. Co., 194 Mo. 189, 92 S. W. 378. Fact that oars were not loose was not negligence, the boat being otherwise safe. Id. Employe in cement mill, who had worked there two months, could not recover for injuries resulting from getting into an open conveyor, when he knew as much about the place and the danger as his employer. Riddle v. Alpha Portland Cement Co. [N. J. Err. & App.] 64 A. 1065. Where deceased, killed by falling into vat, was familiar with premises, intelligent, and knew as much about danger as employer, there was no recovery for his death. Gaudette v. Boston, etc., R. Co. [N. H.] 64 A. 667. Where brakeman was drowned owing to bridge giving way, company could not be found negligent when it appeared that work of construction of bridge had been entrusted to skilled and competent engineers, and bridge was weakened by unusual flood. McGuire v. Lehigh Valley R. Co. [Pa.] 64 A. 825. Train dispatcher held not negligent in holding regular train, when operator failed to report time of leaving of an extra train from his station. Mahoney's Adm'r v. Rutland R. Co., 78 Vt. 244, 62 A. 722. Held not negligence to leave a board at the entry to a mine, where a person of ordinary prudence could not have foreseen that the board would get on the track and derail a car in the manner in which it did, thereby causing an injury. Virginia Iron, Coal & Coke Co. v. Kiser, 105 Va. 695, 54 S. E. 889.

Master held negligent: Ordering an inexperienced brakeman to do dangerous work would constitute negligence, notwithstanding his willingness to undertake it. King v. Woodstock Iron Co., 143 Ala. 632, 42 So. 27. Conductor ordered brakeman on a car to apply hand brakes at proper time, and then gave signal to stop engine before he cut the car loose, thereby causing brakeman to fall. Held conductor was negligent. Pittsburgh, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522. In action for injury resulting, complaint was not demurrable for failure to allege that conductor knew of brakeman's position on the car. Id. Finding that collision in which brakeman was injured was caused by negligence of engineers and conductors of the two trains held supported by evidence. Southern Indiana R. Co. v. Baker [Ind. App.] 77 N. E. 64. Section foreman struck by locomotive engine while walking on track. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Where engineer ran his engine over a bridge where he knew bridge carpenters were at work without warning, and struck and killed a carpenter, the master was liable in the absence of contributory negligence Cason's Adm'r v. Covington & C. Elevated R. & Transfer & Bridge Co., 29 Ky. L. R. 352, 93 S. W. 19. Brakeman injured while coupling air hose owing to failure of head brakeman to give proper signal to prevent cars coming together. Hartman v. Minneapolis, etc., R. Co. [Minn.] 110 N. W. 102. Where superintendent moved carriage which

The common-law duties of the master to use ordinary care to provide a reasonably safe place of work,[70] reasonably safe tools and appliances,[71] and a sufficient number of reasonably competent servants to do the required work,[72] to provide suitable methods of work, and to make and promulgate reasonable rules and regulations,[73] and to warn and instruct servants,[74] are more fully discussed and illustrated in succeeding paragraphs. These duties are personal to the master and cannot be delegated so as to relieve him from liability for their nonperformance.[75]

The right to recover for injuries to a servant alleged to have been caused by negligence of the master is governed by the law of the state where the contract of employment is made and is to be performed.[76]

Statutory liability.[77]—Employers' liability acts do not usually take from servants their common-law rights, but impose additional duties on the master and provide additional remedies for the injured servant.[78] If the servant's action is at common law, statutory requirements need not be complied with.[79] But where such statutes are in derogation of the common law, they are to be strictly construed.[80]

plaintiff was cleaning without finding out where plaintiff was, there was actionable negligence. Baggneski v. Mills [Mass.] 78 N. E. 852. Failure of mine owner to keep air compressor in proper repair, as result of which gas and hot air was forced into a mine, held negligence. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Where it appeared to be duty of train crew to place a man on each end of a train to guard against breaks, a failure to do so constituted actionable negligence, the train having parted. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 376, 90 S. W. 926.

70, 71. See post, § 3 B.

72. See post, § 3 E.

73. See post, § 3 C.

74. See post, § 3 D.

75. One to whom such duties are delegated is a vice-principal. See post, § 3 E. Master's duties cannot be delegated so as to relieve him from liability. Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A. 935. Duty to furnish safe track for railroad employes is nondelegable. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. Duty of ordinary care to furnish reasonably safe machinery rests on master and cannot be delegated. Cooper's Adm'r v. Oscar Daniels Co., 29 Ky. L. R. 1172, 96 S. W. 1130. Duty to warn servant of latent or extraordinary dangers known to master but not to servant is nondelegable. Bone v. Ophir Silver Min. Co. [Cal.] 86 P. 685. Railroad company owes continuing duty to employes which it cannot be relieved of by allowing negligent habits of work. Pittsburgh, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522. Master put up his own steam plant by his own agents, purchasing only a few castings from other manufacturers. He had the plant examined and tested by competent engineers. Held he was liable for injuries caused by defects, notwithstanding such inspection. Erickson v. American Steel Wire Co. [Mass.] 78 N. E. 761.

76. Contract made and to be performed in Indiana. Liability of employer determined by law of that state. Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. The relative rights of the parties are fixed by the law of the state wherein the contract of service is made, in the absence of any showing that it was to be elsewhere performed. Miller v. Southern R. Co., 141 N. C. 45, 53 S. E. 726. Railway employe hired out as brakeman in one state and was promoted to be yard conductor while at work in another state, in which state the contract under which he was working when injured was made was held a question for the jury. Caldwell v. Seaboard Air Line R. Co., 73 S. C. 443, 53 S. E. 746. Where contract of employment, made in Indian Territory, required notice of injury within thirty days as a condition precedent to an action for injuries, such provision was to be construed with reference to the laws of Indian Territory. Chicago, etc., R. Co. v. Thompson [Tex.] 16 Tex. Ct. Rep. 979, 97 S. W. 459, rvg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 229, 93 S. W. 702. Rev. St. Tex. 1895, art. 3379, providing that no requirement as to notice shall be valid if less than ninety days are allowed, does not apply. Id.

77. See 6 C. L. 530.

78. Compliance with statutes requiring fire escapes of a certain kind and capacity will not relieve the master from his common-law duty to use ordinary care to provide means of escape in case of fire. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. Civ. Code, §§ 2660, 2661, 2662, providing that master must indemnify servant for loss or expense incurred in discharge of duties, or caused by master's want of ordinary care, except for such as are ordinary risks, apply to actions for personal injuries suffered by servants. Hardesty v. Largey Lumber Co. [Mont.] 86 P. 29.

79. Laws Colo. 1893, p. 129, c. 77 (Employers' Liability Act), does not take away an employe's right of action at common law, and hence, in an action not brought under the statute but at common law, the provision requiring notice of injury within sixty days does not apply. Denver, etc., R. Co. v. Norgate [C. C. A.] 141 F. 247. Sess. Laws 1905, p. 164, c. 84, does not apply where an injury complained of occurred prior to the time the act took effect, and the notice required by § 9 is not a condition precedent to the bringing of an action after the act took effect. Miller v. Union Mill Co. [Wash.] 88 P. 130.

80. O'Neil v. Karr, 110 App. Div. 571, 97 N. Y. S. 148.

Thus, the giving of a notice of a claim for injuries is a condition precedent to the right to maintain an action under a statute where such notice is required by the statute.[81] A violation of a positive statutory duty imposed upon the master for the benefit of the servant is negligence per se.[82] A violation of an ordinance or statute designed for the protection of the general public, while it may not constitute, per se, a breach of duty owed the servant,[83] may be considered with other evidence on the issue of negligence of the master.[84] Employment of a minor, in violation of a statute, is actionable negligence, rendering the master liable for injuries to the minor,[85] or is at least evidence of negligence,[86] if not conclusive.[87]

The relation of master and servant must exist.[88]—To warrant a recovery for injuries caused by an alleged breach of a master's duties, it must appear that the person injured was at the time the defendant's servant,[89] and was engaged in per-

81. Failure to give the employer notice of the time, place, and cause of injury bars right of action under Rev. Laws, c. 106, § 75. Cahill v. New England Tel. & T. Co. [Mass.] 79 N. E. 821. To secure the benefit of the provisions of the New York act, it is held that the employe must give the notice of his claim as required by the statute. If no notice is given an employe is not entitled to the benefit of the provision that the question of assumption of risk must be presented to the jury; he will be held to have assumed obvious risks as a matter of law. O'Neil v. Karr, 110 App. Div. 571, 97 N. Y. S. 148.

82. A violation of city ordinances regulating operation of railroads within city limits is negligence per se for which another employe may recover for injuries proximately caused thereby. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. City ordinance requiring bell of locomotive to be rung within city limits is for benefit of employes as well as general public. Illinois C. R. R. Co. v. Whiteaker, 122 Ill. App. 333.

83. Trackmen are not within protection of city ordinance limiting speed of trains within city limits. Norfolk & W. R. Co. v. Gesswine [C. C. A.] 144 F. 56. The statute requiring train crews to take certain precautions to prevent accidents to persons on the track is for the benefit of the general public only, and, where an employe is injured, liability of the master must be determined solely by reference to the common law. Cincinnati, etc., R. Co. v. Holland [Tenn.] 96 S. W. 758. Custom of railroad company of giving signals for crossings, as required by Rev. St. Ohio 1892, §§ 3336, 3337, being for benefit of persons using the crossings, a failure to give such signals is not a breach of duty owed to a trackman. Norfolk & W. R. Co. v. Gesswine [C. C. A.] 144 F. 56.

84. Servant of contractor on building was struck by wheelbarrow which fell through unguarded opening in floor. Contractor's negligence held for jury. Conroy v. Acken, 110 App. Div. 48, 96 N. Y. S. 530. Failure to enclose or fence elevator opening in buildings in course of construction, as required by statute, held not negligence as a matter of law. The question is for the jury. Kiernan v. Eidlitz, 109 App. Div. 726, 96 N. Y. S. 387.

85. Employment of a child under sixteen on a machine operated by steam power is a violation of Act May 16, 1903, § 11. Swift & Co. v. Rennard, 119 Ill. App. 173. That a child has concealed his true age does not relieve the employer from liability under this statute. Id. Mine owner who employes a child in the mine contrary to § 22 of the mining act is liable for injury to the child occuring in the mine. Marquette Third Vein Coal Co. v. Dielie, 113 Ill. App. 684. Where a minor was put to work on a steam candy roller, thereby violating Rev. St. 1899, § 6434, prohibiting employment of minors between the fixed or traversing parts of any machine moved by mechanical power, the act of the master constituted negligence. Nairn v. National Biscuit Co., 120 Mo. App. 144, 96 S. W. 679. Employment of boy under sixteen on a machine containing dangerous rollers is actionable negligence, since Pub. Acts 1901, p. 157, Act No. 113, § 3, prohibits the same. Sterling v. Union Carbide Co., 142 Mich. 284, 12 Det. Leg. N. 712, 105 N. W. 755. Whether rollers of corrugating machine upon which boy under sixteen was put to work were dangerous to life or limb, within Pub. Acts 1901, p. 157, Act No. 113, § 3, prohibiting employment of children under sixteen in work dangerous to life or limb, held for the jury. Sterling v. Union Carbide Co., 142 Mich. 284, 12 Det. Leg. N. 712, 105 N. W. 755.

86. Proof of employment of child under twelve in a factory, in violation of Acts 1903, p. 819, c. 473, § 1, is evidence of negligence, the child being injured while cleaning a machine. Rolin v. Reynolds Tobacco Co., 141 N. C. 300, 53 S. E. 891. Employment of child between fourteen and sixteen without a certificate is evidence of negligence. Dragotto v. Plunkett, 113 App. Div. 648, 99 N. Y. S. 361. Employment of girl under sixteen in violation of Laws 1899, p. 353, c. 192, § 81, held evidence of negligence in action for injuries in operating a dangerous machine. Regling v. Lehmaier, 50 Misc. 331, 98 N. Y. S. 642.

87. The violation of the New York statute prohibiting the employment of minors under the age of fourteen in factories is not conclusive evidence of negligence of the master (Lee v. Sterling Silk Mfg. Co., 101 N. Y. S. 78), nor of the absence of contributory negligence of the plaintiff [Labor Laws 1897, p. 477, c. 415, § 70] (Id.).

88. See 6 C. L. 531.

89. Relation of master and servant existed between plaintiff, a bridge laborer, and defendant, after plaintiff arrived on the premises and became subject to the orders

forming, in a reasonable and proper manner,[90] duties within the scope of his employment.[91] The relation of master and servant is held to continue while employes are using elevators on the master's premises, with the master's consent, while leav-

and control of the defendant's superintendent. Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603, 42 So. 73. Whether defendant corporation was engaged in building bridge as principal or as mere agent for a town, held for jury, question being its liability for injury to plaintiff. James Ramage Paper Co. v. Bulduzzi [C. C. A.] 147 F. 151. Employe was hired by one who had authority to employ men for defendants, contractors, and put to work for them. He became their servant, and the relation between them could not be affected by any undisclosed intention to consider him the employe of the owner of the building on which work was being done. State v. Trimble [Md.] 64 A. 1026. Proper to show who paid wages, on issue as to whose employe deceased was at time of injury. Id. Railroad properties and shops changed hands and new owner issued notice to employes to continue in the employment unless otherwise notified. It was not shown whether a servant who was killed had received notice. Held, if defendant was in fact operating the plant, it would be liable as undisclosed principal. McClure v. Detroit Southern R. Co. [Mich.] 13 Det. Leg. N. 846, 109 N. W. 847. Evidence insufficient to show plaintiff was servant of defendant, and not of another, an independent contractor, at the time of his injury. Davis v. Martin, 111 App. Div. 411, 97 N. Y. S. 835. Where conductor told plaintiff that he could ride on the train, and was to help load and unload freight, but the conductor had no authority to so employ plaintiff, plaintiff was neither a passenger nor an employe. Vassor v. Atlantic Coast Line R. Co., 142 N. C. 68, 54 S. E. 849. During a fire at a railway station, a bystander was called by the station agent to assist in moving cars to a place of safety. The person so called became an employe, and could recover for injuries caused by negligence of a superior agent or officer under Const. Art. 9, § 15. Jackson v. Southern R., Carolina Division, 73 S. C. 557, 54 S. E. 231. A judgment for injuries of a servant against a corporation whose general manager caused the injury is not enforceable against a corporation which has purchased the business, without assuming the seller's debts or obligations. Abilene Cotton Oil Co. v. Anderson [Tex. Civ. App.] 15 Tex. Ct. Rep. 91, 91 S. W. 607. Where train crew of construction train was paid by construction company, hired by railway company but worked subject to orders of the railway company's superintendent, an injury resulting from the negligence of the train crew rendered the railway company liable. Choctaw, etc., R. Co. v. McLaughlin [Tex. Civ. App.] 16 Tex. Ct. Rep. 839, 96 S. W. 1091.

Apprentices and student employes: Apprentice nurse in charitable hospital is a servant of the corporation. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. Telephone employe who was groundman, but learning duties of lineman, was sent with lineman to make repairs, and ordered by the lineman to climb a pole. He was injured by a shock from a broken wire. Held, he was performing duties as an employe and entitled to recover. Cumberland Tel. & T. Co. v. Adams, 28 Ky. L. R. 1265, 91 S. W. 739. Where fireman was also learning to be an engineer and sometimes ran the engine under the engineer's direction, the company owed him the duty to furnish him a reasonably safe place while so engaged. Norfolk & W. R. Co. v. Bell, 104 Va. 836, 52 S. E. 700. A student brakeman who in consideration of being permitted to ride on a railway company's freight train to observe and learn the duties of a railway brakeman, agrees to perform service on its engines, trains and cars, while learning such duties, is an employe of the company. Atchison, etc., R. Co. v. Fronk [Kan.] 87 P. 698. Railroad employe, working without pay until he should have learned the duties of a brakeman, was a servant and not a licensee. Alabama Great Southern R. Co. v. Burks [Ala.] 41 So. 638. Hence, where he sued as a licensee, and proof showed he was a servant, he could not recover. Id.

90. Evidence held to show that employe was properly on footboard of engine in discharge of duties when injured. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. In an action for death of brakeman due to defect in brake, instruction held erroneous because conveying idea that brakeman was not entitled to use brake unless such use was necessary. Sanders v. Houston, etc., R. Co. [Tex. Civ. App.] 93 S. W. 139.

91. Where an employe voluntarily leaves the work for which he was engaged and engages in other work, and is injured, he cannot hold the master liable. Employe injured while operating mincemeat machine in the absence of other employes and without the consent or knowledge of the foreman could not recover, she being hired for other work. Duvall v. Armour Packing Co., 119 Mo. App. 150, 95 S. W. 978. No recovery where boy, over thirteen, tried to remove obstruction from machine at a time when he was engaged in something which it was not his duty to do. Michalofski v. Pittsburg Screw & Bolt Co., 213 Pa. 563, 62 A. 1112. Whether door boy in mine was acting outside his duty in assisting driver held for jury. Esher v. Mineral R. & Min. Co., 28 Pa. Super. Ct. 387. Where servant employed to paint parts of a vessel as directed was injured while doing work which he had not been told to do, he could not recover therefor. Daug v. North German Lloyd S. S. Co. [N. J. Err. & App.] 65 A. 199. Plaintiff rented four rooms for $10 a month and was allowed $3 a month for taking care of the halls and lamps. Where she was injured in one of her own rooms, while attending to the lamps, by the falling of the ceiling, the landlord was not liable as an employer for having failed to supply a safe place in which to work. Walker v. Gleason, 109 App. Div. 791, 96 N. Y. S. 843. Where section foreman was injured while assisting in unloading timbers from cars, under superintendent's orders, he was at work in a department for which he was not employed, and the relation of master and servant did not then exist. Bryan v. International, etc.,

ing the place of work.[92] It is usually held that the relation of master and servant exists between a railway company and an employe who is being carried to or from his place of work by the company.[93] But it is held in Missouri that a laborer employed to work on railroad tracks is a passenger when riding on a train with an employe's pass, to a place where he has been ordered to work,[94] and hence does not assume the risk of negligence of the crew of the train.[95]

A general employer does not owe the duties of a master to servants of an independant contractor,[96] but is liable for injuries caused by his own negligence.[97]

R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693. Where newspaper carrier worked under orders of foreman of distribution, who had nothing to do with machinery, and was told by such foreman to take papers from a folding machine, and was injured in so doing, the boy was a volunteer and could not recover. Hatfield v. Adams, 29 Ky. L. R. 880, 96 S. W. 583. Employe in electric light plant, whose duty was to oil machinery, was killed by a shock while assisting others to put out or prevent a fire. Whether there was such an emergency as called for his presence at the place he was killed was for the jury. Mehan v. Lowell Elec. Light Corp. [Mass.] 78 N. E. 385. Where evidence showed that boy sent to get acid from a crock, and who was injured by some which splashed in his face, had been an errand boy for two weeks, a finding that he was acting within the scope of his employment was warranted. Hodde v. Attleboro Mfg. Co. [Mass.] 79 N. E. 252. Where a member of a switch crew, acting as foreman, used a brake, in the course of work being done by him for the master, he was entitled to the same protection as any other brakeman or switchman. Sanders v. Houston, etc., R. Co. [Tex. Civ. App.] 93 S. W. 139. Operator of planer in a sawmill was acting within the scope of his employment when he stepped around to one side of his machine, to remove an obstruction from it, and stepped into a hole in the floor while so doing. Baker v. Duwamish Mill Co. [Wash.] 86 P. 167. Where an employe at a sawmill was told to "get in and do anything that he saw to be done," he was acting within the scope of his duty in coupling cars in the yard. Stark v. Port Blakely Mill Co. [Wash.] 87 P. 339. Employe was told to go to work at machine at twelve o'clock noon, and continued after one o'clock when he was injured, though he testified that he usually worked only until another employe had returned. Held, whether injured employe was at the time acting within the scope of his duties was for the jury. Byrne v. Learnard, 191 Mass. 269, 77 N. E. 316. Employe was hired to plane axletrees, but a rule of the factory required employes to do small odd jobs when requested by other workman. Held, plaintiff was not working outside the scope of his employment when planing a narrow stick of timber at the request of a fellow workman. Millsap v. Beggs [Mo. App.] 97 S. W. 956. Where section foreman at work in yards passed over a side track to answer a call of nature and was struck by cars, he was not a trespasser, no closet convenient to the place having been provided; and other employes owed him the duty of ordinary care for his safety. Houston, etc., R. Co. v. Turner [Tex.] 15 Tex. Ct. Rep. 55, 91 S. W. 562. Where an employe started for a closet, but stopped between cars, he could not recover for injuries received by reason of the moving of the cars on the theory that the master had located the closet across the track and had therefore licensed him to cross. Hocker v. Louisville & N. R. Co., 29 Ky. L. R. 842, 96 S. W. 526.

92. Where employes in shoe factory were allowed to use freight elevator in going to and from work, stairways being also provided, which some used, the employes who used the elevator did not become passengers in so doing, but remained servants; and master owed them only ordinary care to keep the elevator and shaft reasonably safe. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158. Relation of master and servant exists between saleswoman and employer while former is going up in elevator to get her street clothes on the top floor, after working hours. McDonald v. Simpson-Crawford Co., 100 N. Y. S. 269.

93. Master who furnished transportation to and from work was bound to supply reasonably safe cars. Tanner v. Hitch Lumber Co., 140 N. C. 475, 53 S. E. 287. Employe riding to and from work, free of charge, by arrangement with master, is a servant while so riding. Chicago Terminal Transfer R. Co. v. O'Donnell, 114 Ill. App. 345. Railroad employe after cleaning switch boarded car, gave conductor an employe's ticket, and started to another switch to do work of the same kind. Held he was an employe of the company, not a passenger, notwithstanding a statute making unlawful any unnecessary work on Sunday. Shannon v. Union R. Co., 27 R. I. 475, 63 A. 488. Hence, was fellow-servant of negligent employe. Id. Employes traveling home from work on a hand car furnished for that purpose by the master were in the master's employ while going home. Arkadelphia Lumber Co. v. Smith [Ark.] 95 S. W. 800.

94. Authorities pro and con cited, in many jurisdictions. Haas v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 1155.

95. Haas v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 1155.

96. Where work is let to an independent contractor who works according to his own methods, and not under the direction of the master, those who work under the independent contractor are his servants and not the servants of the master. Dallas Mfg. Co. v. Townes [Ala.] 41 So. 988. This principle applies to one who is the general servant of the master but for the particular work becomes the servant of the contractor. Servant employed by defendant but put to work under independent contractor could not recover from defendant for injuries caused by defect in place of work. Id. Bridge builder, injured by reason of a defective tool, held

Where an owner contracts with an independent contractor to have work done with the owner's apparatus, the owner owes to servants of the independent contractor with respect to such apparatus the same duty as to an employe of his own.[98] This is the rule at common law and also by statute, in some states.[99] Where a servant is loaned by one person to another for praticular service, he becomes the servant of the latter as to the particular employment, though he remains the general servant of the former.[1] In South Carolina, a railroad company which leases its road is liable to an employe for injuries while the road is being operated by the lessee.[2]

The master's negligence must have been the proximate cause[3] *of the servant's injuries.*[4]—What was the proximate cause of an injury is ordinarily a question of fact to be determined by the jury, except in those few cases where the facts are undispued and are such that only one reasonable conclusion can be drawn therefrom.[5] Negli-

the servant of an independent contractor employed by defendant. Hence, defendant not liable. Hargadine v. Omaha Bridge & Terminal R. Co. [Neb.] 107 N. W. 864. Whether the person operating a sawmill was an independent contractor or the manager for defendant, so as to render him liable, held a question for the jury. Erickson v. McNeeley & Co., 41 Wash. 509, 84 P. 3. A stevedore, paid so much per ton to unload coal, and who hires, discharges, and pays off the men employed, is an independent contractor, and a man hired by him is his servant, and not the servant of the ons by whom the contractor is employed. Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048.

97. Evidence sufficient to support finding that plaintiff's injuries, sustained by falling of scaffold, were caused by negligence of defendant, and not by an independent contractor. Northrup v. Hayward [Minn.] 109 N. W. 241. Subcontractor held not liable for injuries to his employe caused by scaffold on a floor under the control of ths general contractor, with which subcontractor had nothing to do. Loehing v. Westlake Const. Co., 118 Mo. App. 163, 94 S. W. 747.

98. The contractor's servants are invited to use the owner's machinery. Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048.

99. Rev. Laws, c. 106, § 76, affirms the common-law rule but does not enlarge it. Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048.

1. Employe of logging company loaned to defendant as brakeman for a trip of a logging train became defendant's servant during such employment. Weist v. Coal Creek R. Co., 42 Wash. 176, 84 P. 725.

2. Acts 1902, p. 1152. Reed v. Southern R., Carolina Division [S. C.] 55 S. E. 218.

3. For discussion of doctrine of proximate cause, see Negligence, 6 C. L. 748. The proximate cause of an injury is that which, in a natural and continuous sequence, unbroken by any new, independent cause, produces the injury, and without which it would not have occurred. Lawrence v. Heidbreder Ice Co., 119 Mo. App. 316, 93 S. W. 897. A proximate cause need not be the last or sole cause but must be a concurring cause such as might have been contemplated under the circumstances. Houston, etc., R. Co. v. Oram [Tex. Civ. App.] 15 Tex. Ct. Rep. 624, 92 S. W. 1029. Where concurrent causes are the immediate and efficient cause of an injury, it is not competent to take one of them away from the other and say that it and not the other was the proximate cause of the accident. Ziehr v. Maumee Paper Co., 7 Ohio C. C. (N. S.) 144.

4. See 6 C. L. 534. To warrant recovery for death of trackman by collision, a breach of duty owed the trackman must be shown to be the proximate cause of the death. Norfolk & W. R. Co. v. Gesswine [C. C. A.] 144 F. 56. Negligence is not actionable unless it is the proximate causs of injury. Darrow v. The Fair, 118 Ill. App. 665. Failure to have train equipped with automatic air brakes could not warrant recovery for injury not proximately caused thereby. Lyon v. Charleston, etc., R. Co. [S. C.] 56 S. E. 18. Proof that piles of cinders were left on the track where they would be in the way of brakeman held not to warrant recovery for injuries to brakeman while coupling cars, where such negligence was not shown to have been the cause of injury. Marshall v. St. Louis, etc., R. Co. [Ark.] 94 S. W. 56. Instruction on proximate cause criticized. Galveston, etc., R. Co. v. Paschall [Tex. Civ. App.] 14 Tex. Ct. Rep. 709, 92 S. W. 446. Error to instruct that it was master's duty to make and promulgate rules of work when it did not appear that want of rules caused injury. Griffin Wheel Co. v. Stanton, 70 Kan. 762, 79 P. 651. Instruction that defendant would not be liable if injury occurred as the direct result of an accident and not as the direct and natural result of defendant's negligence held not objectionable as warranting a finding for defendant notwithstanding defendant's negligence. De Witt's Adm'r v. Louisville & N. R. Co., 29 Ky. L. R. 1161, 96 S. W. 1122.

5. **Proximate cause held a question for jury:** Where fireman was killed by derailment of train at curve, there being evidence of rough roadbed, high speed, and breaking of flange of wheel on tender. Rickerd v. Chicago, etc., R. Co. [C. C. A.] 141 F. 905. Whether violation of Mine & Miners Act. § 18, par. a, requiring inspection of mine for gas, was proximate cause of death of miner by an explosion held for jury. Athens Min. Co. v. Carnduff, 221 Ill. 354, 77 N. E. 571. Railway employe was removing woodwork from a bridge under foreman's orders when his footing was removed by the act of the foreman in prying loose a timber. Whether foreman's negligence caused employe's injury by falling was for the jury. Toledo, etc., R. Co. v. Pavey [Ind. App.] 79 N. E. 529.

gence of the master will be held the proximate cause of an injury if the master, in the exercise of ordinary care, ought reasonably to have foreseen that injury might result therefrom;[6] it is not necessary that the particular injury which occurred ought to have been foreseen,[7] provided it was the natural and probable consequence

Where "small pieces of iron or steel or material" were thrown into plaintiff's eyes as he was operating an emery wheel, the court could not say as a matter of law that the failure to provide exhaust fans for the wheel, as required by statute, was not the cause of injury. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. Whether collision of trains was caused by plaintiff's (engineer's) negligence in running his train ahead of time or negligence of operatives of other train in failing to put out emergency stop signals. Louisville, etc., R. Co. v. Hall, 29 Ky. L. R. 584, 94 S. W. 26. Whether defective condition of derrick caused boom to fall and injure plaintiff. Butler v. New England Structural Co., 191 Mass. 397, 77 N. E. 764. Whether injury was caused by castors on truck getting into a hole in the floor causing the truck to stop and the load to tip off on plaintiff. Longree v. Jackes-Evans Mfg. Co., 120 Mo. App. 478, 97 S. W. 272. Where engine was derailed at frog, whether a weak guard rail was a contributing cause was for the jury, it appearing that other derailments had occurred at the same place. Dunphy v. St. Joseph Stock Yards Co., 118 Mo. App. 506, 95 S. W. 301. Whether fire was communicated to trestle through pile of combustible material negligently left near trestle by the company. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. Where boy under twelve was engaged in cleaning a machine, and another boy threw a plug of tobacco into it, and, as cleaner tried to take it out, started the machine which tore off the cleaner's hand, whether the coemploye's act or the negligence of the employer in hiring the boy under twelve was the proximate cause of the injury was for the jury. Rolin v. Reynolds Tobacco Co., 141 N. C. 300, 53 S. E. 891. Section hand was riding on platform of passenger coach to which flat car was attached. As conductor came out of car, section hand started to step on flat car when cars were uncoupled and he fell between them and was killed. Held, conductor was not negligent in failing to anticipate and take steps to prevent the act of the section hand. Jones v. East Carolina R. Co., 142 N. C. 207, 55 S. E. 147. Where an employe in stumbling over a block of wood falls into an unguarded machine and is injured by having his arm drawn into the machine, it is not competent to separate the occurrence into two parts and say that the block of wood was the proximate cause and the machine merely the physical agency which caused the accident, but the case should be submitted to the jury as a whole to determine whether or not under all the circumstances the defendant might have anticipated an accident of that character resulting from leaving the machine exposed. Bresewski v. Royal Brush & Broom Co., 8 Ohio C. C. (N. S.) 457. Coupler between tender and cars would not work and brakeman went between cars, as was customary in such cases, to make a coupling. He stumbled on a clinker and fell under the tender. He had no notice of the presence of the cinders and clinkers on the track but defendant had. Held, negligence of defendant was proximate cause of injury. St. Louis, etc., R. Co. v. Ames [Tex. Civ. App.] 16 Tex. Ct. Rep. 298, 94 S. W. 1112. Whether injury was caused by improper structure of dolly-bar or its insecure position while in use by a servant constructing a smokestack. Ham v. Hayward Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 763, 96 S. W. 938. Whether negligence in furnishing unsafe laundry machine was proximate cause of injury to operator of machine. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. Whether engineer's death was proximately caused by failure of employes to set a switch and failure of company to provide a switch light. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1. Whether master's negligence was cause of quarryman's death by fall of loosened rock. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. Evidence held sufficient to take to jury the issue whether plaintiff was struck by a swinging hoisting hook, and to warrant a finding that the hook was swinging violently and was being raised with negligent speed. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. Whether defect in monkey wrench which employe was using to fix a machine was proximate cause of his injury by getting his hand in the gearing. Stork v. Stalker Cooperage Co., 127 Wis. 318, 106 N. W. 841.

6. Winchel v. Goodyear, 126 Wis. 271, 105 N. W. 824.

7. Winchel v. Goodyear, 126 Wis. 271, 105 N. W. 824. Where employe in sawmill was injured by coming in contact with a saw which had negligently been left unguarded, the accident having occurred by reason of the employe having slipped, and a table bed designed as a cover for the saw having tipped from it, the accident was held one which resulted proximately from the defendant's negligence, since without it the accident would not have occurred. Id. That the particular injury could not have been anticipated will not relieve the master if it ought reasonably to have been anticipated that some injury might result as a consequence of his negligence. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. Master is liable if injury ought reasonably to have been anticipated from defects in track, though the particular injury which resulted was not foreseen. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Proof that negligence of railway company caused the rear part of a train to stop suddenly, whereby a conductor was thrown to the floor of the caboose and injured, warranted a recovery, though the accident was shown to be an unusual one. Galveston, etc., R. Co. v. King [Tex. Civ. App.] 15 Tex. Ct. Rep. 75, 91 S. W. 622. Superintendent of blast furnace operations negligently permitted lumps of ore, which were too large, to be placed in furnace, whereby a "scaffold" was formed, which fell and caused a part of the furnace to give way, thereby allowing molten

of the master's negligence.[8] If an injury would not have resulted but for negligence of the master, he is not relieved from responsibility by the fact that an independent cause for which he was not responsible concurred in producing the injury.[9] These principles are further illustrated by holdings grouped in the note.[10]

ore to escape and kill an employe. Held, master liable though superintendent did not know, and ought not to have known, that such result would follow his act. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306.

8. Negligence is the proximate cause of an injury when it appears that "the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of attending circumstances." Schwarzschild & Sulzberger Co. v. Weeks, 72 Kan. 190, 83 P. 406.

9. Concurring negligence of a fellow-servant is no defense. See post, § 3 E. Where there are two contributing causes concurring for only one of which the master is responsible, he is liable. Godfrey v. Illinois Cent. R. Co., 117 La. 1094, 42 So. 571. Instruction making defendant liable if its negligence contributed to cause injury, though other causes also contributed, held proper. Wiest v. Coal Creek R. Co., 42 Wash. 176, 84 P. 725. If negligence of mine operator in failing to provide proper ventilation for a mine was a proximate cause of a miner's death, the fact that the miner's weak physical condition contributed would not relieve the operator from liability. Faley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273. If an injury to or the death of an employe is caused by concurrent negligence of the master and another, either or both are liable. Where one company furnished an unseaworthy barge, and another loaded it negligently, and an employe lost his life by the capsizing of the barge as a consequence of the negligence of both, both were liable. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

10. Negligence of master, or one representing him, held proximate cause of injury: Evidence sufficient to show that miner's injury was caused by the fall of a rock from the unlined part of a shaft in the mine. Monarch Min. & Development Co. v. De Voe [Colo.] 85 P. 633. Failure of mine inspector to make inspection and to mark a place of danger and to report it as required by Laws 1899, pp. 315, 317, §§ 16, 18, held proximate cause of injury to a miner by falling of a clod of earth. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902. Negligent piling of angle irons which fell on plaintiff who had been called to a shop to help in shearing a steel plate held the proximate cause of his injury. New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485. Defendant's negligence in improperly grounding a switchboard held cause of employe's death by electric shock. Mehan v. Lowell Elec. Light Corp. [Mass.] 78 N. E. 385. Employment of boy under sixteen on a machine with dangerous rollers held proximate cause of his injury by getting his hand caught in the rollers. Sterling v. Union Carbide Co., 142 Mich. 284, 12 Det. Leg. N. 712, 105 N. W. 755. Evidence held sufficient to show that switchman's death was caused by negligent backing of engine down upon him. Rogers v. Minneapolis, etc., R. Co. [Minn.] 108 N. W. 868. Whether dangerous construction of spur track or negligence of fellow-servant in sending cars on it unaccompanied by an engine was proximate cause of accident, held for jury. Gila Valley, etc., R. Co. v. Lyon, 27 S. Ct. 145. Evidence sufficient to sustain finding that cause of employe's injury was a piece of creasote which got into his eye from timbers he was unloading. Illinois Cent. R. Co. v. Gill [Miss.] 40 So. 865. Where boy in elevator moved his foot because another employe stepped on it, and it was caught between the floor of the elevator and the floor of the building, the negligent construction of the elevator, and not the act of the fellow-servant, was the proximate cause of injury. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Employe furnished a machine known to be unsafe because of a loose bar and the servant was injured in an attempt to continue the operation of the machine after the defect had hindered him. The defect was the proximate cause of his injury. Lawrence v. Heidbreder Ice Co., 119 Mo. App. 316, 93 S. W. 897. In action for injuries caused by derailment of engine, plaintiff proved that a guard rail was loose and weak, that other rails were too light, and that there were not enough ties, and that some ties were rotten. Held, this was sufficient to show a proximate cause for which defendant would be liable. Dunphy v. St. Joseph Stock Yards Co., 118 Mo. App. 506, 95 S. W. 301. Employe hauling a truck backwards fell into a hole in the floor. The proximate cause of his injury was the hole and not his failure to use a rope in hauling the truck. Burke v. Manhattan R. Co., 109 App. Div. 722, 96 N. Y. S. 516. Where coupler on flat car was defective and caused cars to come so close together that plaintiff was crushed when going between them to couple them under superintendent's orders, the defective coupler, and the superintendent's order, constituted continuing negligence which was the proximate cause of plaintiff's injury. Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795. Injuries to conductor caused by escape of train down a steep grade held to have been caused by defective brake. Louisville & N. R. Co. v. Bohan [Tenn.] 94 S. W. 84. Failure to properly warn operator of planing machine held proximate cause of his injury resulting from his trying to remove slivers when machine was in motion. Rice v. Dewberry [Tex. Civ. App.] 95 S. W. 1090. Evidence sufficient to sustain finding that defects in truck and platform caused injury to employe where express parcels fell off the truck upon him. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441. Evidence held to warrant finding that failure to have a switch light at a certain switch was negligence, and that such negligence was the proximate cause of engineer's death caused by running into the switch when improperly set. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1.

Proximate cause of injury held not to be master's negligence: Negligence of engineer

in backing cars at excessive rate would not warrant recovery by brakeman who negligently went between the cars. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Negligence in furnishing a balky mule to haul an ore car held not the proximate cause of injury, where driver got off the car when the mule balked and was injured trying to get on again later, at a time when the mule did not balk. Richards v. Sloss-Sheffield Steel & Iron Co. [Ala.] 41 So. 288. Cause of breaking of rope sling used in hoisting lumber held to be not the unsound condition of the rope but the catching of a heavy load on the hatch combing, for which vessel was not liable. The Fulton, 143 F. 591. Evidence sufficient to show negligence of conductor cause of brakeman's death by backing train down upon him. Chicago, etc., R. Co. v. Williams [Ind.] 79 N. E. 442. Miner was paid according to amount of coal delivered at mouth of mine and was himself required to push the cars out. A car was derailed, and a pit boss assisted the miner in getting it back on the track, and in so doing the miner's fingers were pinched, which became a serious injury. Held, defect in track and derailment of car were not proximate cause of the injury. Cavanaugh v. Centerville Block Coal Co. [Iowa] 109 N. W. 303. Lack of cup to pour powder into hole in blasting operations held not proxlmate cause of injury to employe's face by explosion, when employe could have supplied the lack with other means than the can he used, and it was not necessary to hold his face over the hole. Hilman Land & Iron Co. v. Littlejohn, 28 Ky. L. R. 983, 90 S. W. 1053. An inexperienced employe while at work as a sorter in a sawmill was directed to pile lumber in an isle, there being a shortage of help. The pile fell injuring plaintiff. Held, the insufficient number of employes was not the proximate cause of the injury. Hagglund v. St. Hilaire Lumber Co., 97 Minn. 94, 106 N. W. 91. Foreman's order to plaintiff to assist a mechanic in repairing engine was not proximate cause of injury where it resulted immediately from the mechanic's act in moving another part of the machinery, causing it to strike plaintiff. Schneider v. Missouri Pac. R. Co., 117 Mo. App. 129, 94 S. W. 730. Where employes crowded about an elevator entrance and some of them stooped under a railing and opened the elevator gate and were pushed into the shaft by those behind, the employe's negligence, and not the failure of the master to have a gate which could not be opened from the outside, was the proximate cause of the falling of employes down the shaft. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158. Proximate cause of injury to operator of planer, who put his hands into rollers trying to remove a board, held to be his own negligence and not the absence of a guard which would prevent boards getting caught. Smith v. Forrester-Nace Box Co., 193 Mo. 715, 92 S. W. 394. Foreman of crew of bridge repairers assisted crew in getting material for a fire needed by them. He placed a tie on the track and a train knocked it against plaintiff. Held, foreman's negligence in placing tie on the track, and not failure to give warning of the approach of the train, was the proximate cause of the injury. Bannon v. New York Cent., etc., R. Co., 112 App. Div. 552, 98 N. Y. S. 770. Employe of contractor at work on a scaffold was knocked off by another employe who fell from above him The scaffold did not fall. Held, master could not be held liable on theory that he had failed to furnish a safe scaffold. Madin v. Norcross Bros. Co., 50 Misc. 173, 98 N. Y. S. 223. Conductor, guiding trolley pole of car which was being taken into the repair shops, was dragged into a pit by the sudden starting of the car by the motorman, the conductor having the trolley rope twisted about his arm. Held, the pit being a proper and necessary part of the repair works, it was the motorman's negligent act which proximately caused the injury. Dulfer v. Brooklyn Heights R. Co., 101 N. Y. S. 207. If shield for saw was a reasonable, usual, and proper protection for operator of saw, doing a certain kind of work, and a shield would have prevented a particular injury, failure to provide it would be negligence and the proximate cause of injury. Jones v. Reynolds Tobacco Co., 141 N. C. 202, 53 S. E. 849. Where loose lacing of belt caused injury, but there was no evidence from which it could be inferred that defendants ought to have anticipated that the lace would pull out, or that they could have done anything to prevent its pulling out as it did, their failure to inspect could not be found the legal cause of the accident. St. Pierre v. Foster [N. H.] 64 A. 723. Where yardmaster knew that a car inspector was at work, and nevertheless caused cars to be kicked down the track against cars at which the inspector was at work, causing his injury, negligence of the yardmaster was the proximate cause of the injury, notwithstanding a rule requiring inspectors to display blue flags, such rule not being enforced or observed. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. Defect in engine held not proximate cause of injury to fireman at work under an attached engine, caused by the engines moving, where the engineer could have prevented the injury by the exercise of ordinary care. Atchison, etc., R. Co. v. Seeger [Tex. Civ. App.] 17 Tex. Ct. Rep. 492, 98 S. W. 892. Defect in engine held not proximate cause of brakeman's death by falling from a train into a river while passing over a bridge. English v. International, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 913. Where rules required trains to run ten minutes apart, and required crews to send back a flagman at stops only when ten minutes late, a collision caused by one train running into a preceding train in less than ten minutes after its leaving time was not due to violation of rules by the crew of the first train. International, etc., R. Co. v. Brice [Tex.] 16 Tex. Ct. Rep. 1036, 97 S. W. 461. Engineer of extra train left a station when he should have waited, and telegraph operator failed to report the time when the extra left to the dispatcher, and a collision resulted. Held, operator's negligence was a proximate cause of the collision and he was a fellow-servant. Mahoney's Adm'r v. Rutland R. Co., 78 Vt. 244, 62 A. 722. Where hook attached to rail of track, as part of tackle used to unload rails from a car, very suddenly flew up and killed an employe, such fact did not show negligence of the master as the proximate cause of the death, conceding that engine was defective, foreman incompetent, and an insufficient force of men employed. Norfolk & W. R. Co. v.

Contractual exemption from liability.[11]—The validity of a contract releasing a master from liability for negligence resulting in injuries to a servant is to be determined by the law of the place where it is made.[12] It is usually held that a contract exempting in advance a master from liability for negligence is contrary to public policy and void.[13] But it is held in some states that a contract whereby a servant agrees to accept certain benefits, in case of injury, and to waive other claims for the injury,[14] or a contract whereby it is optional with an injured employe to accept benefits from a relief department, or to bring an action for damages,[15] is valid, and an employe who has accepted benefits thereunder cannot later attack the validity of the contract and maintain an action for damages.[16] Such a contract is to be construed in connection with the by-laws of the relief department, which are made a part of it.[17] If the company violates the terms of such contract by refusing to continue benefits to an injured employe until he is cured, the employe may sue for damages, and the contract will not bar his action, though the company will be entitled to credit for the relief already given.[18] Contracts waiving liability of the

McDonald's Adm'x [Va.] 55 S. E. 554. Where employe was struck by drift pin under vertical steam hammer, evidence held insufficient to sustain finding that defectiveness of machinery controlling hammer caused accident, in that it struck two blows instead of one without any manipulation of machinery for second blow. Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833. Owing to worn condition of power drill with which operator was drilling holes in certain chain belt links, the employer having refused to fix the drill, the employe made a wire hook to keep the links in place. The wire was caught and wound round the drill shaft and the operator's fingers were cut off. Held, the use of the wire hook, and not the defective condition of the machine, was the proximate cause of the injury. Stefanowski v. Chain Belt Co. [Wis.] 109 N. W. 532.

11. See 6 C. L. 536.

12. Cannaday v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 836.

13. Cannaday v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 836. A contract whereby an employe agrees to relieve his employer from all liability for injury by reason of the negligence of the employer or any of his agents or employes, is void, as against public policy. Johnston v. Fargo, 184 N. Y. 379, 77 N. E. 388. A contract whereby a student brakeman exempts the company from all liability for damages which he may sustain in consequence of the negligence of the company, its agents, servants, or employes, is against public policy and void. Atchison, etc., R. Co. v. Fronk [Kan.] 87 P. 698. An implied agreement by an engineer to relieve the company from liability for negligence of a conductor in charge of the train would be null and void, as Const. 1895, art. 9, § 15, makes railroad corporations liable for negligence of a superior. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968. Under the statute providing that no contract limiting liability of an employer in case of the injury or death of an employe shall be valid, a contract that the surgeon of a railroad company shall be allowed to examine an employe if injured, and that a refusal to allow such examination shall bar an action for the injury, is void. Galveston, etc., R. Co. v. Hughes [Tex. Civ. App.] 14 Tex. Ct. Rep. 537, 91 S. W. 643.

NOTE. Validity of contracts of exemption from liability: "The question of the validity of such a contract between an employer and a person in his employment as affected by public policy, it must be conceded, is a debatable one. In support of the right to make the agreement we have respectable authority in decisions of the courts of England and of the courts of Georgia. Griffiths v. Earl of Dudley, 9 Q. B. Div. 357; Western, etc., R. Co. v. Bishop, 50 Ga. 465; Same v. Strong, 52 Ga. 461. The great weight of authority in decisions of the courts of the various states, however, sustains the view that such agreements are contrary to public policy. Railway Co. v. Spangler, 44 Ohio St. 471, 8 N. E. 467, 58 Am. Rep. 833; Railway Co. v. Peavey, 29 Kan. 169, 44 Am. Rep. 630; Railway Co. v. Jones, 2 Head [Tenn.] 517; Willis v. Railway Co., 62 Me. 488; Railway Co. v. Eubanks, 48 Ark. 466, 3 S. W. 808, 3 Am. St. Rep. 245; Railway Co. v. Jones, 92 Ala. 218, 9 So. 276; Maney v. Railway Co., 49 Ill. App. 105; N. N., etc., Co. v. Eifert, 15 Ky. L. R. 575; Blanton v. Dold, 109 Mo. 64, 18 S. W. 1149; Johnson's Adm'x v. Railway Co., 86 Va. 975, 11 S. E. 829."—From opinion in Johnston v. Fargo [N. Y.] 77 N. E. 388.

14. This is the South Carolina rule, and a contract of that kind, made in South Carolina, will be enforced in North Carolina. Cannaday v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 836. Contract of employment provided that acceptance of benefits from relief department would operate as release of other claims. Id.

15. Harrison v. Alabama Midland R. Co., 144 Ala. 246, 40 So. 394. A contract whereby a railroad employe agrees to accept the benefits of the relief department and to waive and release all claims for injuries or death is valid. Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248.

16. Harrison v. Alabama Midland R. Co, 144 Ala. 246, 40 So. 394. Where a servant has accepted benefits, he cannot thereafter maintain an action for damages. South Carolina rule enforced. Cannaday v. Atlantic Coast Line R. Co. [N. C.] 55 S. E. 836.

17. Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248.

18. Servant was treated after an injury, but was discharged, and when his wound reopened, after he went to work, the company

master for injuries, under certain circumstances, will be most strongly construed against the master.[19]

(§ 3) *B. Tools, machinery, appliances, and places for work.*[20]—It is the duty of the master to use ordinary care,[21] to furnish machinery, tools, and appliances which are reasonably safe and suitable [22] for the purpose for which they are intended to be used,[23] or for a use to which they are customarily put by employes, with the knowledge or acquiescence of the master.[24] Instrumentalities of the kind ordinarily used by those engaged in the same business are reasonably safe within the meaning of this rule,[25] which does not require the latest, safest, or best obtainable

refused to continue relief to him. Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248. Membership in relief organization, and acceptance of some benefits, held not to bar action for injuries. Pennsylvania Co. v. Chapman, 118 Ill. App. 201.

19. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203.

20. See 6 C. L. 537.

21. Master is only bound to use ordinary care to see that appliances are reasonably safe. Dunn v. Nicholson, 117 Mo. App. 374, 93 S. W. 869. Master is not absolutely bound to furnish reasonably safe appliances. Bryan v. International, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693. Master must use ordinary care and diligence to provide safe and suitable tools and appliances. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409. Master under duty of reasonable care to supply safe derrick to workmen. Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417.

22. Only reasonably safe appliances required. The Chico, 140 F. 568. Absolute safety of appliances is not required; only reasonable safety. McKee v. Crucible Steel Co., 213 Pa. 333, 62 A. 921; Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A. 935; Davis v. Northwestern R. Co. [S. C.] 55 S. E. 526. A master is bound to use ordinary care in furnishing machinery reasonably safe for all employes who operate it with ordinary care and skill. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. The duty owed by a railroad company to its employes with reference to its tracks and appliances is that of ordinary care to keep them in reasonably safe condition. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Master not liable where servant was injured by a piece of steel flying from a practically new, high grade steel instrument with which he was cutting rock, though a wedge was generally used. Langhorn v. Wiley, 28 Ky. L. R. 1186, 91 S. W. 255. No negligence of master shown in providing use of extension ladder for stringing wire on poles, the ladder being placed against an arm extending from the pole. Hart v. Clinton, 100 N. Y. S. 1092. Where miner was injured by a prop having been placed too close to a track, instructions as to master's duty of ordinary care to see that the place and cars were reasonably safe held proper. Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943. Complaint held to state a cause of action for furnishing an unsafe engine to an engineer, by reason of which defect the engineer sustained injury. Moore v. Southern R. Co., 141 N. C. 111, 53 S. E. 745.

23. It is not master's duty to furnish a scaffold reasonably safe for all purposes; he is only under the duty of providing one reasonably safe for the intended and required purposes. Chicago Union Traction Co. v. Theorell, 120 Ill. App. 490. Appliances must be reasonably safe and suitable considering the work to be done and the conditions under which it is to be performed. Costello v. Frankman, 97 Minn. 522, 107 N. W. 739. A master, in the exercise of reasonable care is not required to furnish the newest, safest, and best appliances, but only such as are reasonably suited to the use the servant is required to make of them. Post v. Chicago, etc., R. Co. [Mo. App.] 97 S. W. 233. Held error to refuse charge that no particular kind of mail crane need be furnished if one supplied was reasonably safe for intended purpose. Denver, etc., R. Co. v. Burchard [Colo.] 86 P. 749. Where train was derailed and went through a bridge, the bridge not having caused the derailment, the company could be found negligent with reference to the bridge only if it was found to be defective for the ordinary purposes of railway bridges. St. Louis, etc., R. Co. v. Hill [Ark.] 94 S. W. 914. An instruction that an appliance, pile driver, was itself reasonably safe is not an instruction that the driver as stayed was reasonably safe to work with. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789.

24. Switchman uses cross piece, put on stanchions of flat car to hold lumber, in supporting himself while adjusting a coupler, and the piece gave way, causing him to fall under the train. Evidence tending to show a customary use of such cross pieces for such purpose was held admissible on the issue of negligence of the company. Wallace v. Seaboard Air Line R. Co., 141 N. C. 646, 54 S. E. 399.

25. The master is required to provide only such facilities and conveniences for the use and operation of machinery by his employes as are in common and general use. Central Granaries Co. v. Ault [Neb.] 106 N. W. 418. Street railway companies are not bound to supply every possible appliance to insure safety of carmen, but need only adopt those which the standard of good railroading show to be reasonably safe. Mayer v. Detroit, etc., R. Co., 142 Mich. 459, 12 Det. Leg. N. 843, 105 N. W. 883. Master not liable for chipping of hand hammer, a machine made one, when it appeared that was the kind generally used, though a hand made hammer would not have chipped. Paul v. Westinghouse, Church & Kerr Co., 113 App. Div. 515, 99 N. Y. S. 356. Railroad company not liable for bursting of water gauge of locomotive engine when the gauge guard was of the

to be provided.[26] Failure to conform with general usage is not negligence as a matter of law; it is merely evidence to be considered by the jury.[27] Whether due care in this respect has been exercised in a given case is ordinarily a question of fact.[28]

kind generally used, even though experts considered another kind safer. Healy v. Buffalo, etc., R. Co., 111 App. Div. 618, 97 N. Y. S. 801. Failure to provide a guard or covering for a saw, when such guard or cover is a reasonable protection in general use, is negligence. Jones v. Reynolds Tobacco Co., 141 N. C. 202, 53 S. E. 849. To show that a shield for a certain kind of saw is in general use, plaintiff may prove a general custom or show that a large number of factories and mills used such a shield in similar work, from which the jury could infer a general custom. Id. Employes of labor on railways or in plants where complicated machinery is used, especially where such machinery is driven by mechanical power, are bound to use ordinary care to supply a reasonably safe place to work and reasonably safe and suitable machines and appliances, such as are approved and in general use in places of like kind and character. Fearington v. Blackwell Durham Tobacco Co., 141 N. C. 80, 53 S. E. 662. Finding of negligence of railroad company warranted where proof showed that a brakeman was required to use a link and pin between an engine and car more dangerous than the link and pin ordinarily used. Choctaw, etc., R. Co. v. Craig [Ark.] 95 S. W. 168.

26. The Fulton, 143 F. 591; Law v. Central Dist. Printing & Tel. Co., 140 F. 558; Monsen v. Crane [Minn.] 108 N. W. 933; Blust v. Pacific States Tel. Co. [Or.] 84 P. 847; Norfolk & W. R. Co. v. Bell, 104 Va. 836, 52 S. E. 700. Evidence insufficient to show ladder furnished plaintiff was unsafe or unsuitable. McDonnell v. New York, etc., R. Co. [Mass.] 78 N. E. 548. Master who furnishes a ripsaw to be used in his work is bound to maintain it in a reasonably safe condition, but is not bound to use the latest improvements or only such as have been tested and found efficient in reducing danger. Dow Wire Works Co. v. Morgan, 29 Ky. L. R. 854, 96 S. W. 530. No particular make or type of machinery need be used. Imhoof v. Northwestern Lumber Co. [Wash.] 86 P. 650. Whether an appliance furnished by the master is reasonably safe is to be determined by its actual condition and not conclusively by comparing it with other appliances used by others for the same work. Monsen v. Crane [Minn.] 108 N. W. 933. What appliances are generally used, and the comparative safety of different appliances, may be shown, but it cannot be shown that appliances used by a particular employe are better and safer than those used by defendant. Norfolk & W. R. Co. v. Bell, 104 Va. 836, 52 S. E. 700.

27. Monsen v. Crane [Minn.] 108 N. W. 933. Held error to instruct jury that if a certain described condition existed in a machine the defendant was negligent as a matter of law if such condition could have been remedied by the adoption of devices or apparatus or improvements which were recognized as proper improvements on such machine. Id.

28. Question of negligence held one for jury: Existence of defect in stationary engine for jury where evidence showed hanging up of governor, and consequent action of engine, and a promise of a master mechanic to make repairs on being informed of a defect. Sloss-Sheffield Steel & Iron Co. v. Hutchinson, 144 Ala. 221, 40 So. 114. Whether locomotive engine was defective in that it would start of itself. St. Louis, etc., R. Co. v. Fisher [Ark.] 97 S. W. 279. Whether furnishing a hand car without a brake with which to haul ties was negligence. Choctaw, etc., R. Co. v. Stroble [Ark.] 96 S. W. 116. Whether failure to box revolving wheel was negligence as to employe sitting in window who was caught in wheel. Michigan Headlining & Hoop Co. v. Wheeler [C. C. A.] 141 F. 61. Whether semaphore wires running along and across tracks were properly constructed for safety of employes. Chicago, etc., R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169. Whether sheet metal cutting machine was out of order and whether employes knew of the defect. United States Wind Engine & Pump Co. v. Butcher, 223 Ill. 638, 79 N. E. 304. Whether master knew or should have known of defect in basket of washing machine which caused it to break. McGuinness v. Lehan [Mass.] 79 N. E. 265. Whether platform made of loose sleepers, and provided for workmen by defendant's superintendent, was reasonably safe. White v. Perry Co., 190 Mass. 99, 76 N. E. 512. Where treadle of machine broke, whether it was due to defect which defendant should have discovered was for jury. Hannan v. American Steel & Wire Co. [Mass.] 78 N. E. 749. Whether failure to guard wire cutting machine which scattered pieces of wire was negligence. Thein v. Brecht Butchers' Supply Co., 116 Mo. App. 1, 91 S. W. 953. Whether truck furnished to haul sheet iron over a rough floor was reasonably safe. Longree v. Jackes-Evans Mfg. Co., 120 Mo. App. 478, 97 S. W. 272. Negligent construction of elevator for jury, where employe had foot caught between floor of elevator and strips nailed to beams of floor. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. It is not necessarily negligence to fail to wholly enclose an elevator. Id. The mere fact that a chain on which plaintiff and other workmen were pulling broke while being used for its intended purpose, and that it had previously broken and been repaired, was not alone sufficient to show conclusively that it was not reasonably safe and suitable. Standard Distilling & Distributing Co. v. Harris [Neb.] 106 N. W. 582. Whether failure to furnish employe who removed snow from elevated road a wooden instead of an iron shovel, or some other appliance which would protect him against a shock from the third rail, held for jury. Smith v. Manhattan R. Co., 112 App. Div. 202, 98 N. Y. S. 1. Whether wood-cutting machine, with knives revolving toward instead of from the operator, who was struck by a piece of wood thrown from the knives, was reasonably safe. Swarts v.

Wilson Mfg. Co., 100 N. Y. S. 1054. Whether failure to install a certain block system was negligence. Stewart v. Raleigh, etc., R. Co., 141 N. C. 253, 53 S. E. 877. Defendant not entitled to nonsuit where plaintiff claimed the guard of his machine was defective and there was evidence tending to show that the machine was of standard make without defects. Hicks v. Naomi Falls Mfg. Co. [N. C.] 55 S. E. 411. Plaintiff was injured by falling from top of repair car, the grab iron having pulled out. There was evidence that the iron was fastened with screws that were too small and in rotten wood. McIsaac v. South Jersey Gas, Elec. & Traction Co. [N. J. Law] 64 A. 976. Instruction held to properly submit to jury the question of defendant's negligence as to a handhold on a box car which gave way when plaintiff took hold of it in descending from a car. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. Employe injured while operating defective laundry machine. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. Where gallows frame used to move heavy bridge girders, which fell and injured plaintiff, was reasonably safe in its construction. Farney v. Oregon Short Line R. Co. [Utah] 87 P. 440. Whether defendant was negligent in supplying a defective engine to engineer. Virginia Iron, Coal & Coke Co. v. Cash's Adm'r, 105 Va. 570, 54 S. E. 472. Where a wedge in a girder, which was being hoisted to its place, fell through and struck plaintiff who was holding a stay rope, and it appeared that the wedge was too small and that it had been selected by the foreman, the case was for the jury. Sullivan v. Wood & Co. [Wash.] 86 P. 629. Proof of certain defects in machine held sufficient to take question of negligence to jury where machine acted abnormally and caused an injury. Montanye v. Northern Elec. Mfg. Co., 127 Wis. 22, 105 N. W. 1043.

Master held not negligent: Where derrick hook broke after two years' use, and there was no evidence of negligence in inspection and such hooks ordinarily lasted twelve or fifteen years, the master was not liable for the resulting injury. New Castle Bridge Co. v. Steele [Ind. App.] 78 N. E. 208. Evidence insufficient to show that torch used to light fuses was defective, where injury was caused by premature explosion of blast in a mine. Breckenridge v. American Eagle Consol. Min. Co., 42 Wash. 279, 84 P. 858. Absence of cover over revolving cylinder with knives held not negligence (where employe was injured by a knife flying off), the purpose of the cover when used being to keep sawdust and shavings off the machine and not to protect employes. Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. S. 7. Uee of perpendicular instead of horizontal handhold on car held not negligence. Worceeter v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S. W. 339. Evidence insufficient to show coal board of engine defective Missouri, etc., R. Co. v. Hanson [Tex. Civ. App.] 14 Tex. Ct. Rep. 415, 90 S. W. 1122. Evidence insufficient to show negligence in not providing a guard for a brass rolling machine. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077.

Master held negligent: Evidence held sufficient to show that company failed to supply proper reverse lever on street car and that such failure caused plaintiff's injury. Chicago Union Traction Co. v. Sawusch, 119 Ill. App. 349. Fastenings by which machinery was secured to joists of ceiling held insufficient and unsafe. Stagg Co. v. Brightwell, 28 Ky. L. R. 1220, 92 S. W. 8. Master liable where chain which held tail board of wagon broke allowing tail board to fall and injure driver. Gomez v. Tracey, 115 La. 824, 40 So. 234. Where exposed shaft could have been boxed with little expense or trouble and thereby made safe, failure to box it was negligence as to a servant caught and injured by it. Foreman v. Eagle Rice Mill Co., 117 La. 227, 41 So. 555. Printing press started of its own accord injuring operator, and there was evidence that belt had been improperly repaired. Byrne v. Boston Woven Hose & Rubber Co., 191 Mass. 40, 77 N. E. 696. Evidence held to warrant finding that unguarded planer was unsafe and improper for use of inexperienced employe. Silva v. Davis, 191 Mass. 47, 77 N. E. 525. Where telephone exchange operator was injured by electric shock, evidence held to warrant finding that injury was caused by negligence of company. Cahill v. New England Tel. & T. Co. [Mass.] 79 N. E. 821. Where chain used to lift trusses had not been annealed for six months, and a link in it became crystallized and broke, dropping a truss on plaintiff, such evidence warranted a finding of negligence on part of defendant. Ford v. Eastern Bridge & Structural Co. [Mass.] 78 N. E. 771. Evidence held to show that jointing machine was not properly adjusted nor in good condition when employe was put to work. Frazier v. Lloyd Mfg. Co. [Minn.] 108 N. W. 819. Evidence sufficient to warrant finding that ironing mangle was defective in not having guard over rollers to protect employes while putting covers on them. Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340. Stone quarry employe was caught up by hoisting apparatus while attaching hooks to load of stone owing to fact that a cable became wound round the drum when it should not have been. Milton v. Biesanz Stone Co. [Minn.] 109 N. W. 999. Where hooks and hinge gate in pulley block were liable to become unfastened and loose in the course of the work in which it was used, it was not a reasonably safe appliance, even though it could have been made safe by tying or mousing. Costello v. Frankman, 97 Minn. 522, 107 N. W. 739. Evidence held sufficient to justify finding that death of brakeman was caused by his being struck by an improperly constructed overhead bridge. Louisville & N. R. Co. v. Thomas, 87 Miss. 600. 40 So. 257. Steam shovel apparatus held defective and master liable for consequent injury. Southern R. Co. v. Wiley [Miss.] 41 So. 511. Negligence of employer in failing to keep blast furnace in proper repair held cause of injuries to servant from gas escaping from such furnace. Stenger v. Buffalo Union Furnace Co. [N. Y.] 78 N. E. 1068. Where a chain by which a heavy piece of iron was being raised suddenly broke, and it appeared defendant had failed to have the chain properly annealed at proper times so as to preserve its fibre and toughness, defendant was negligent as a matter of law. Isley v. Virginia Bridge & Iron Co., 141 N. C. 220, 53 S. E. 841. Failure of a manufacturing company which owned and operated a railroad twelve to fourteen miles long to

The master, having provided reasonably safe and suitable machines or appliances, is not liable for injuries resulting from their negligent use by an employe,[29] or from failure to use them,[30] or from their use for a purpose for which they were not intended,[31] or from the selection by an employe of such as are defective, others, reasonably safe, having been provided.[32]

equip its cars with automatic couplers held negligence. Hairston v. U. S. Leather Co. [N. C.] 55 S. E. 847. Evidence sufficient to sustain finding that boiler had not been made reasonably safe before test was applied which caused it to burst, injuring plaintiff. Green v. Washington Oil Co. [Pa.] 64 A. 877. Maintenance of exposed cogwheels near place of work of employes, when such cogs can be guarded readily at slight expense, constitutes negligence. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323. Evidence sufficient to show that crane which fell and injured plaintiff was negligently secured. Sorenson v. Case Threshing Mach. Co. [Wis.] 109 N. W. 84. Where death of servant was caused by explosion of paper pulp digester, evidence held to support finding that explosion was caused by defective and leaky condition of digester, that superintendent had knowledge of the defect, and had failed to have it repaired. Horr v. Howard Co., 126 Wis. 160, 105 N. W. 668.

29. Ft. Wayne Iron & Steel Co. v. Parsell [Ind.] 79 N. E. 439. It is the masters' duty to use ordinary care to provide reasonably safe instrumentalities and a reasonably safe place to work. Having performed this duty, it becomes the duty of the servant to so use the instrumentalities and place that they will not become dangerous by reason of the use to which they are put. American Bridge Co. v. Seeds [C. C. A.] 144 F. 605. The master may assume that servants will perform this duty which rests upon them. Id. Winch which injured plaintiff held reasonably safe within the rule that an appliance is reasonably safe if it can be used by the servant in the course of his employment without danger to himself by exercising ordinary care. The Chico, 140 F. 568. Where hooks and marline furnished to support cable while it was being put up were safe and suitable, the employer was not liable for an injury caused by failure to put supports close enough together. Blust v. Pacific States Tel. Co. [Or.] 84 P. 847. Where master had provided proper means to support a feed pipe in an ore reduction plant, but during the work the lower part of it was pushed or dropped on plaintiff by a fellow-servant, the master was not liable. Colorado-Philadelphia Reduction Co. v. Fretz, 34 Colo. 472, 83 P. 631. Where block light system was shown to be reasonably safe when properly used, and an accident was caused by failure of a motorman to turn on the light, there could be no recovery on the ground of negligence of the company. Berg v. Seattle, etc., R. Co. [Wash.] 87 P. 34. If master furnishes a safe derrick he is not liable for injuries resulting from negligence of servants in moving or setting it up, this being a part of their ordinary duties. Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417. Where it appeared that injury to employe while unloading timbers was caused by unsafe method employed, it was not error to refuse to submit question of master's negligence.

Bryan v. International, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693. But the mere fact that an employe was injured because he was operating a defective machine in a manner different from that intended by the master will not alone, regardless of the employe's knowledge or diligence, defeat a recovery. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110.

30. If shield for saw was provided and operator refused to use it and was injured, he could not recover. Jones v. Reynolds Tobacco Co., 141 N. C. 202, 53 S. E. 849. Where master lighted plant with electric lights and also furnished torches to be used when necessary, a failure of the employes to use the lights furnished did not render the master liable. Livingstone v. Saginaw Plate Glass Co. [Mich.] 13 Det. Leg. N. 873, 109 N. W. 431. Where master provided sheathing for servant digging trench to use to prevent cave-ins or slides, and servant failed to use it, master was not liable for resulting injury. Rocco v. Gillespie Co. [N. J. Err. & App.] 64 A. 117. Where employes in repair shop had been accustomed to use "scrap" to block wheels on a track and a workman had been sent for something to use for this purpose, but others did not wait and wheels started and caused an injury, the superintendent was not negligent in failing to provide blocks. Duffy v. New York, etc., R. Co. [Mass.] 77 N. E. 1031.

31. Employes must use their own judgment in the use of tools and appliances, and, if they use them for purposes for which they were not intended or subject them to a strain too great, the master is not liable for resulting injury. Standard Distilling & Distributing Co. v. Harris [Neb.] 106 N. W. 582. Master not liable where servant put too great a load on appliances connected with mail chutes used to load mail. Salisbury v. Press Pub. Co. [Neb.] 108 N. W. 136. Railing along viaduct was intended merely to indicate the edges of the platform, but employe sat on it, and it gave way. Master not liable. Kelley v. Lawrence, 195 Mo. 75, 92 S. W. 1158. Where injury was caused by sliver from hammer being used by another servant, the complaint alleging that the master had supplied an unsafe hammer, was defective in failing to state that it was being used by a servant acting in the line of his duty. Louisville & N. R. Co. v. Gillen [Ind.] 76 N. E. 1058. Street car employe changing sign on car fell because of a band giving way. The band was not intended to support a man so engaged. Company not liable. Carroll v. Union R. Co., 101 N. Y. S. 745.

32. Where servant selected a defective plank to be used in a gangway for his truck in unloading a car, and was injured by reason of such defect, the master was not liable. Fewell v. Southern R. Co., 105 Va. 1, 52 S. E. 689. If duty of selecting appliances furnished is delegated to servants, master is not liable for a negligent selection; he is liable

The master is not generally liable for injuries to a servant who is using appliances which the master neither owns nor controls.[33] But ownership or control of appliances is not always the test. The master owes the duty of ordinary care with respect to all appliances used in his business under his direction or authority, though such appliances are owned by others.[34] Thus, appliances owned by another but used by a master in his business may be such, in their character and use, as to impose the duty of inspection.[35] If the master is not in a position to inspect such appliances, he must refrain from ordering his servants to use them whereby their safety will be imperilled.[36] It is held that the only duty owed by railroad companies to employes with reference to foreign cars is the duty of reasonable inspection.[37] For injuries caused by defects in such cars not known to the company, and not discoverable by a reasonable inspection, the company will not be held liable.[38]

Temporary appliances; scaffolds.[39]—In regard to temporary structures, such as scaffolds, built and used by the employes in the course of their ordinary duties, the master fully performs his duty by supplying a sufficient quantity of suitable material,[40] and he is not liable for injuries caused by negligent construction or failure to use the suitable material supplied.[41] But if the master undertakes to furnish a completed structure, he owes the servant the same degree of care as in respect to other appliances.[42]

if he makes the selection himself. Whether master selected rope or delegated its selection held a question for the jury. Geldard v. Marshall, 47 Or. 271, 83 P. 867, 84 P. 803.

33. De Maries v. Jameson [Minn.] 108 N. W. 830.

34. De Maries v. Jameson [Minn.] 108 N. W. 830. The fact that a tool which caused an injury was not owned by defendant would not relieve it from liability if it knew that it was being used by employes and that it was defective. Mergenthaler-Horton Basket Co. v. Taylor, 28 Ky. L. R. 923, 90 S. W. 968. Duty of railroad company to have cross piece used to secure lumber on flat cars securely fastened was not affected by fact that it was put on by shipper of lumber. Wallace v. Seaboard Air Line R. Co., 141 N. C. 646, 54 S. E. 399. That a car was furnished by a railroad company held not to relieve master who used it of ordinary care to see that it was reasonably safe. New Ohio Washed Coal Co. v. Hindman, 119 Ill. App. 287. Where lumber company used a logging road owned by a railroad company and furnished its employes a hand car to use in getting home, the lumber company owed such employes the duty of ordinary care to have the road reasonably safe for such purpose. Arkadelphia Lumber Co. v. Smith [Ark.] 95 S. W. 800. Where defendant employed a servant to work on top of oil tanks, it owed him the duty of ordinary care to see that the tanks were reasonably safe for the performance of his work, though they were furnished by another company. Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 16 Tex. Ct. Rep. 750, 97 S. W. 332.

35. De Maries v. Jameson [Minn.] 108 N. W. 830.

36. Principles applied where servant was sent to deliver baled hay and was told to use a hoisting appliance owned by the customer, a rope of which broke, injuring the servant. De Maries v. Jameson [Minn.] 108 N. W. 830.

37. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. That a car which had a defective coupler was owned by another company did not relieve defendant where the car was taken on a train at a place where defendant had a car inspector and repairer. Chicago, etc., R. Co. v. Snedaker, 122 Ill. App. 262.

38. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682.

39. See 6 C. L. 540.

40. If a servant be directed to build a scaffold, it is the master's duty to supply materials which are reasonably safe and suitable, and servant is not chargeable with contributory negligence unless he uses materials which he knows are unsafe. Madden v. Hughes, 185 N. Y. 466, 78 N. E. 167.

41. Where master furnished suitable lumber for a scaffold, he was not liable for the negligent selection of poor material by an employe. Forbes v. Dunnavant, 198 Mo. 193, 95 S. W. 934. Rev. St. 1899, § 6447, requiring scaffolds to be well and safely supported, and of sufficient width, and so secured as to insure safety of persons working on or about them, does not make the master liable for selection of poor material by a servant when proper material has been supplied. Id Where master furnished plenty of good rope to use in hanging skid from side of vessel and foreman selected a defective piece, which broke, master was not liable. Agresta v. Stevenson, 112 App. Div. 367, 98 N. Y. S. 594.

42. Where scaffold was built for workmen building an oil tank, and it fell, owing to its negligent and faulty construction, master was liable. National Refining Co. v. Willis [C. C. A.] 143 F. 107. Where telephone company furnished swinging platforms for use of employes in splicing cables, it was its duty to furnish ropes which were reasonably safe. Cumberland Tel. & T. Co. v. Metzger's Adm'r, 29 Ky. L. R. 1024, 97 S. W. 35. Evidence, in action for injuries to painter caused by breaking of extension ladder used by three painters as staging, that they had used the ladder before in the same way, was not enough to warrant a finding that the

In New York a statute requires a person who procures work to be done to provide a scaffold, or similar contrivance needed for such work, which is safe.[43]

Places for work.[44]—It is the duty of the master to use ordinary care to provide a place of work which is reasonably safe [45] considering the nature of the business and the character of the work [46] and the intended uses and purposes of the places provided.[47] Whether due care has been exercised by the master in this respect is

same men had used the same ladder in this way, to defendant's knowledge. Jacobson v. Favor [Mass.] 78 N. E. 763.

43. Construction of New York statute: New York Labor Law, Laws 1897, p. 467, c. 415, § 18, provides that a person employing another to perform labor in the erection of a house shall not furnish or erect scaffolding which is unsafe and not so constructed as to give proper protection to the employe. Scaffolding built for erection of temporary partition in a store to protect goods from dust held not within the act. Sutherland v. Ammann, 112 App. Div. 332, 98 N. Y. S. 574. Scaffold act does not apply to platform of loose planks placed on horses and used by janitor to wash walls. Stokes v. New York Life Ins. Co., 112 App. Div. 77, 98 N. Y. S. 135. Freight elevator used by men to stand on while cutting a hole in a wall held a scaffold within the meaning of the act. Croce v. Buckley, 100 N. Y. S. 898. The fact that the elevator could be moved by anyone from any one of four floors rendered it defective. Id. An agreement between the owner of the building and a contractor that the elevator should be used by the workmen exclusively was not a sufficient discharge of the master's duty. Id. Where scaffold was built by employes under direction of one who was a superintendent (Laws 1902, p. 1748, c. 600, § 1, subd. 2), it was "furnished" by the master within the meaning of Laws 1897, p. 467, c. 415, § 18. Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. S. 421. Duty of master to furnish a safe scaffold is a continuing one. Hence, where a scaffold was originally safe, but was weakened by the removal of part of a building which helped support it, this being done under direction of a superintendent, the master was liable for a resulting injury. Id. Owner of premises not liable where servant of an independent contractor made a scaffold with materials supplied by the owner, and used the scaffold after the owner had warned him that it was unsafe. Antes v. Watkins, 112 App. Div. 860, 98 N. Y. S. 519. Scaffold held "safe," though a plank sagged on engine when a wheel barrow load of cement was placed on it. Cunningham v. Peirce, 112 App. Div. 65, 98 N. Y. S. 60. The mere fact that one end of a scaffold descended was no evidence of its defectiveness where it was a swinging scaffold and it was part of the employe's duties to adjust by the ropes which sustained it. Andrews v. Reiners, 112 App. Div. 378, 98 N. Y. S. 658. Instruction on duty to provide safe scaffold held not misleading or erroneous. Madden v. Hughes, 185 N. Y. 466, 78 N. E. 167.

44. See 6 C. L. 541.

45. Bates-Rogers Const. Co. v. Dunn, 29 Ky. L. R. 428, 93 S. W. 1032; Low Moor Iron Co. v. La Bianca's Adm'r [Va.] 55 S. E. 532. It is not the rule that master must furnish "a safe place." Bionski v. American Enameled Brick & Tile Co. [N. J. Law] 63 A. 909. Master is not an insurer of the safety of the place of work, but need only make and keep it reasonably safe. Herren v. Tuscaloosa Waterworks Co. [Ala.] 40 So. 55; Cudahy Packing Co. v. Wesolowski [Neb.] 106 N. W. 1007. The law requires the master to furnish the servant a reasonably safe place to work, that is, a place where he can, with the exercise of ordinary care, perform his work with safety, subject only to such risks as are necessary and incidental to the employment. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. The duty of the master to provide a safe place has reference to latent as well as patent dangers and to dangers which threaten from outside sources as well as those originating within the place. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Where a mine owner was told that an adjoining mine was flooded, it was his duty to exercise reasonable care to prevent the water breaking through into his mine, and to investigate the walls intervening between drifts of the two mines. Id. An instruction that it is a master's duty to furnish a reasonably safe place to work, and to use the reasonable care and diligence which an ordinarily careful and prudent person would use under the circumstances, was not erroneous as warranting the inference that the master insures the absolute safety of the place. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359.

46. The test generally is, not whether this or that kind of means have been adopted, but whether, with the method of construction, kind of device, or appliance, employed, the place, under all the circumstances of the case, is reasonably safe for a performance of the duties of the employment. Grand Trunk Western R. Co. v. Melrose [Ind.] 78 N. E. 190. Railroad company could not be held negligent for failing to keep in repair a safety device to keep cars on a side track, if other suitable means were employed for that purpose. Id. Place of work need only be "safe" according to the usage, custom, and risk of the business. Welch v. Carlucci Stone Co. [Pa.] 64 A. 392. Where servant in brick factory was struck by car, which transported brick around the factory, held, that the master had a right to build the track with a grade such as was necessary or convenient for the work, and that he did so did not constitute negligence. Bionski v. American Enameled Brick & Tile Co. [N. J. Law] 63 A. 909. Where servant was employed to cut weeds on slanting right of way, an instruction warranting recovery for negligence as to the place of work was error. Post v. Chicago, etc., R. Co. [Mo. App.] 97 S. W. 233. Master was not relieved from the duty of ordinary care to maintain a safe place though employes in electric power plant were engaged in making alterations in a switchboard. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359.

47. If a passing track at a station is reasonably safe for the intended purpose,

usually a question of fact.[48] The "place of work," within the meaning of the rule being discussed, means not only the place where servants are directed or expected

proof that it is not safe for trains passing over it at a high rate of speed does not alone show negligence. St. Louis, etc., R. Co. v. Bishard [C. C. A.] 147 F. 496. Where trestle was used only for logging trains, evidence as to its safety for use of passenger trains was irrelevant. Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. Master bound only to use ordinary care to make and keep floor over which trucks of sheet iron were hauled reasonably safe for that purpose. Longree v. Jackes-Evans Mfg. Co., 120 Mo. App. 478, 97 S. W. 272. Instruction as to duty of employer with respect to trestle used for logging trains held proper. Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. Whether maintenance of an insecure balustrade, intended only to warn persons of an opening, was negligence would depend on whether it suggested that its intended purpose was to support persons. Bennett v. Himmelberger, 117 Mo. App. 58, 93 S. W. 823.

Application of rule to roadbed, right of way, and premises of railroad companies: Railroad company owes employes duty of ordinary care to give reasonably safe track and run trains with some care. Choctaw, etc., R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Declaration held to state a cause of action for injury to railroad employe by reason of defective construction of switch. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. The mere fact that a fire was liable to be communicated to trestle through a pile of combustible material, that such result was within the range of possibility, would not be proof of negligence in allowing the material to accumulate. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. Railroad company must see that track on which employes are required to work is reasonably safe and maintained in that condition, but the duty to repair does not extend to tracks which it has ceased to use. McAuley v. New York Cent., etc., R. Co., 111 App. Div. 117, 97 N. Y. S. 631. Railroad company is bound to provide suitable and safe place of work for employes, and a bridge is a place within the meaning of this rule, and a fireman injured by the giving way of a bridge which was defective may recover. McCabe & Steen Const. Co. v. Wilson [Okl.] 87 P. 320. Where a defect in a roadbed arises from the character of the material used, the company must show that it used ordinary care in the construction and that the defect which arose could not have been discovered and avoided by the use of ordinary care. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 S. W. 375. Railroad company owes employes duty of ordinary care in the original construction of the track and roadbed to make them reasonably safe, and where a defect in construction is charged, that it was not discoverable by ordinary care is no defense. Id. Where rule required cars on sidings to be coupled, the duty to see that it was complied with, so as to make the tops of the cars a safe place of work for brakemen, was that of the master, and was nondelegable. St. Louis Southwestern R. Co. v. Pape [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534. Instructions as to master's duty to use ordinary care to keep tracks and roadbed in reasonably safe condition approved. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 376, 90 S. W. 926.

48. Whether master was negligent as to providing place of work held for jury: Whether the master is guilty of negligence in providing a safe place to work is usually a question of fact for the jury. Central Granaries Co. v. Ault [Neb.] 106 N. W. 418. Omission to place whipping straps on a low bridge under which defendant's trains passed. Central of Georgia R. Co. v. Alexander, 144 Ala. 257, 40 So. 424. Track employe killed by train. St. Louis, etc., R. Co. v. Jackson [Ark.] 93 S. W. 746. Whether trestle through which logging train went was reasonably safe in the manner of construction. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. Where locomotive fireman was killed by being struck by a mail crane located nearer the track than was necessary, whether the company was negligent in placing the crane where it was. Denver, etc., R. Co. v. Burchard [Colo.] 86 P. 749. Where water from an adjoining flooded mine broke through into defendant's mine and killed an employe, the defendant having been informed of the flooded condition of the nearby mine. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Whether master was negligent in furnishing a place of work, for the jury, where a piece of lumber fell through a hole in a platform upon plaintiff, a lumber inspector, working below. Ingram v. Hilton & Doge Lumber Co., 125 Ga. 658, 54 S. E. 648. Whether place was unsafe by reason of stacks of lumber which fell, and whether master knew it. McCormick Harvesting Mach. Co. v. Zakzewski, 220 Ill. 522, 77 N. E. 147. Miner injured by fall of part of roof. Cook v. Smith-Lome Co. [Iowa] 109 N. W. 798. Employe at work in a well was injured by fall of timber placed at top to support machinery. Martin v. South Covington & C. R. Co., 29 Ky. L. R. 148, 92 S. W. 571. Whether failure to build a platform over coal shovelers wide enough to protect them from falling coal and parts of machinery was negligence. Buffalo Creek Coal Min. Co. v. Hodges [Ky.] 98 S. W. 274. Employe engaged in grading and digging injured by caving of bank of earth. Chiappini v. Fitzgerald, 191 Mass. 598, 77 N. E. 1030. Whether defendant was negligent in not guarding a trench in which plaintiff was at work and where he was injured by a horse falling into it. Johnson v. St. Paul Gas Light Co. [Minn.] 108 N. W. 816. Brakeman killed by reason of unblocked switches. McManus v. Oregon Short Line R. Co., 118 Mo. App. 152, 94 S. W. 743. Injury to switchman caused by unblocked switch. Lee v. Missouri Pac. R. Co., 195 Mo. 490, 92 S. W. 614. Whether railroad company was negligent in allowing combustible material to accumulate near a trestle, through which a fire was communicated to the trestle. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. Building, being torn down under supervision of a superior, fell on plaintiff. Bloomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304. Employe at work in sewer trench injured by fall of

to perform their labors[49] but also such portions of the master's premises as are used by the employes for necessary purposes of their own, with the consent or

bulkhead. Kielty v. Buehler-Cooney Const. Co. [Mo. App.] 97 S. W. 998. Whether maintenance of a water crane, to supply water to passenger trains, so near the track as to be eighteen and one-half to twenty-three and one-half inches from the sides of freight cars, held a question for jury in action for death of brakeman, struck by the crane. Charlton v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 529. City employe fell down unguarded shaft in police station. Wilcox v. Rochester, 99 N. Y. S. 1020. Employe while going to dark place to oil machinery was caught on set screw of revolving shaft, it appearing that another employe had been injured there. Walker v. Newton Falls Paper Co., 111 App. Div. 19, 97 N. Y. S. 521. Negligence in furnishing unsafe place for jury where superintendent directed employes to attach a valve on a six-inch gas main while gas was turned on without providing a rubber bag as usual to prevent the escape of gas. Cadigan v. Glens Falls Gas & Elec. Light Co., 112 App. Div. 751, 98 N. Y. S. 954. Where employe was drawn into the leg of a grain elevator by grain which moved from a pile near it, whether the master was negligent in failing to provide means to prevent such an accident, was for the jury. Lynch v. American Linseed Co., 113 App. Div. 502, 99 N. Y. S. 260. Whether railroad company was negligent in maintaining switch rod too close to track. Kinney v. Rutland R. Co., 99 N. Y. S. 800. Plaintiff was moving ice on runway and slipped, falling on a rail which broke, allowing him to fall to the ground. The question of negligence depended upon what the rail was for, and this question was for the jury. Smith v. Mountain Ice Co. [N. J. Law] 64 A. 956. Negligence of railroad company for jury where brakeman was struck by telegraph pole while alighting from freight car to turn a switch, pole being only fifteen inches from track. Kaylor v. Cornwall R. Co. [Pa.] 65 A. 65. Whether defendant ought to have known of dangerous condition of rock in quarry. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. Hole in floor of sawmill near planer was concealed by shavings and sawdust and employe was set to work at planer without any warning as to the existence of the hole, and was injured by stepping into the hole. Held master was not free from negligence as a matter of law. Baker v. Duwamish Mill Co. [Wash.] 86 P. 167.

Master held negligent: Negligence in failing to provide handguards for mangle held for jury on conflicting evidence as to whether such guards were customary. Greenan v. Eggeling, 30 Pa. Super. Ct. 253. Heavy door detached from its fastenings left unsecured by direction of foreman three days before accident. Delaney v. Penn Steel Casting & Mach. Co., 30 Pa. Super. Ct. 387. Evidence held for jury as to whether spur track was improperly constructed because so overhung by tramway that brakes could not be set until train was dangerously near end of spur. Gila Valley, etc., R. Co. v. Lyon, 27 S. Ct. 145. If a train dispatcher, having knowledge that his orders which would have averted collision have been disobeyed, fails to issue other possible orders to avert the same, there is a failure to furnish safe places and appliances. Santa Fe Pac. R. Co. v. Holmes, 202 U. S. 438, 50 Law Ed. 1094. Where dispatcher knew that train had passed a certain station ahead of time and failed to issue orders to hold it at the next station, the company is liable for a collision caused by the train being ahead of time. Id. Negligence held for jury where machinery was started during noon hour while plaintiff was repairing belt. Wessel v. Jones & Laughlin Steel Co., 28 Pa. Super. Ct. 332. Defects in track held cause of derailment resulting in switchman's death. Wallis v. St. Louis, etc., R. Co., 77 Ark. 556, 95 S. W. 446. Evidence sufficient in action for death of employe caused by excessive current in electric light wire to show that defendant had notice of the dangerous condition a sufficient length of time before the accident to have prevented such excessive current on its wires inside the building. Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805. Employe, injured by coming in contact with obstruction in street, while exercising due care, has cause of action against company for placing obstruction where it was. South Side El. R. Co. & Cosmopolitan Elec. Co. v. Nesvig, 114 Ill. App. 355. Master liable where plank in platform on which plaintiff was at work broke. Godfrey v. Illinois Cent. R. Co., 117 La. 1094, 42 So. 571. Defendant held negligent in not keeping power turned off third rail at night when employes were engaged in repairing tracks. Keeley v. Boston El. R. Co. [Mass.] 78 N. E. 490. Where employe was killed by electric shock from an iron post in an electric light plant, evidence held sufficient to show negligence in method used to ground wires. Mehan v. Lowell Elec. Light Corp. [Mass.] 78 N. E. 385. Plaintiff was struck by a falling pile of timber and knocked to a lower floor of the building in which he worked. Robertson v. Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130. Evidence sufficient to show negligence of defendant in not having runways between joists where plaintiff fell between joists. Robertson v. Hammond Packing Co., 115 Mo. App. 520, 91 S. W. 161. Negligence to leave hole in floor over which employes passed in course of their work. Burke v. Manhattan R. Co., 109 App. Div. 722, 96 N. Y. S. 516. Domestic servant was injured by falling into depression in pathway leading to house, having entered at night through an unfastened gate. Master held negligent in not fastening gate or giving warning. Battle v. Robinson, 27 R. I. 588, 65 A. 273.

Master held not negligent: Workman struck by iron which fell from balcony above him. Barsalou v. Pierce, 109 App. Div. 506, 96 N. Y. S. 538. Failure to gravel switchyard held not negligence as to switchman injured when attempting to board a moving train. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S. W. 339. "Testing room" of firearm manufacturer, which was low, had a bulkhead at one end to fire into, and was some distance from other buildings, held reasonably safe. Servant who was injured while looking in at window could not recover. Church v. Winchester Repeating Arms Co., 73 Conn. 720, 53 A. 510.

49. If servant was called through a pass-

acquiescence of the master.[50] An employer is not liable for injuries to an employe caused by a defect in a place of work owned and controlled by a third person,[51] but if the place of work is owned by or under the control of the master, the duty to use ordinary care to keep it reasonably safe is personal and nondelegable.[52]

The rule that it is the master's duty to use ordinary care to provide a reasonably safe place does not apply where the very nature of the work itself renders it dangerous,[53] as where a dangerous place is being made safe,[54] nor where the danger is transitory or temporary, and arises during the progress of the work,[55] nor where

ageway in the course of his duties, or if he used it as a result of failure of the master to instruct him, it was the master's duty to make it a reasonably safe place, or to warn the servant of the dangers. Barrett v. Banner Shingle Co. [Wash.] 87 P. 919. A platform built on piling at the edge of a lake, upon which workmen are directed to carry on the work of unloading logging cars, is an appliance or place within the rule requiring a master to furnish a reasonably safe place for his employes to carry on their work. Bailey v. Swallow [Minn.] 107 N. W. 727. Defendant railway company allowed another company to build a bridge over its tracks, and continued to run trains under the bridge. A defect in the bridge would be a defect in defendant's "ways." Central of Georgia R. Co. v. Alexander, 144 Ala. 257, 40 So. 424.

50. Servant had right to use a bridge over a trench on defendant's premises when going for a drink of water regardless of who furnished the water, and it was master's duty to keep bridge reasonably safe. Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96. Employes of boiler room customarily went into a yard adjoining to wash and eat their lunches, and the custom was of long standing and known to the master. There was a tub of water and a tank of boiling water. The tank burst and an employe was killed while washing out his clothes in the tub. Held, the duty of the master extended to the place where the accident occurred, and the employe was entitled to protection at the time. Muller v. Oakes Mfg. Co., 99 N. Y. S. 923.

51. Deceased was required to go to premises of trolley company to repair cars, defendant having no control over such premises. Long v. Stephenson Co. [N. J. Law] 63 A. 910. City not liable for injury to an employe on premises not under its control. Dalton v. Towanda Borough [Pa.] 64 A. 547. Duty to provide safe place held not to extend to stairway leading to bridge across which tool boy must go in course of his errands. Hence, no liability for injury to boy by slipping on stairs on premises owned by third party. American Bridge Co. v. Bainum [C. C. A.] 146 F. 367. Conductor of logging train, employed by lumber company, was injured by reason of a defective bridge giving way. The roadway and bridge belonged to a railway company, which allowed the lumber company to use it, and the latter had no control or supervision over the track or bridge or knowledge of its condition. The lumber company was held not liable. Hamilton v. Louisiana, etc., R. Co., 117 La. 243, 41 So. 560.

52. McCormick Harvesting Mach. Co. v. Zakzemski, 121 Ill. App. 26. Duty of mine operator to provide reasonably safe place of work cannot be delegated. Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S. W. 62. Where defendant knew of a defect in its premises which caused an injury, the fact that by a contract with another the latter was under the duty of keeping the place in repair would not relieve defendant from liability. Pacific Exp. Co. v. Shivers [Tex. Civ. App.] 14 Tex. Ct. Rep. 807, 92 S. W. 46.

53. As where linemen are employed to move wires from old to new poles and must climb the old poles to do so. Western Union Tel. Co. v. Holtby, 29 Ky. L. R. 523, 93 S. W. 652. Where employe was engaged in excavating under a rock, which fell and injured him, master could not be held liable on theory that he failed to provide a safe place to work. Welch v. Carlucci Stone Co. [Pa.] 64 A. 392.

54. Where mine employes were sent into a room to make it safe, the rule requiring the employer to furnish a reasonably safe place to work did not apply. Kellyville Coal Co. v. Bruzas, 223 Ill. 595, 79 N. E. 309. Where evidence was conflicting as to whether a servant when killed was engaged in making a dangerous place in a mine safe, and plaintiff's evidence tended to show that the dangers of the place were not obvious, it was proper to charge that the doctrine of the master's duty as to the place of work applied to the case made by plaintiff. Cripple Creek Min. Co. v. Brabant [Colo.] 87 P. 794.

55. Bloomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304. Rule requiring master to use ordinary care to provide a safe place does not apply where the work produces constant changes and gives rise to temporary dangers, and work could not be done without making the place somewhat dangerous. Utica Hydraulic Cement Co. v. Whalen, Adm'x, 117 Ill. App. 23. Rule as to providing a safe place held not to apply where employe was injured by the fall of a pile of lumber while engaged in constructing a building, and carrying lumber to it. Hardesty v. Largey Lumber Co. [Mont.] 86 P. 29. Where concrete mixer was injured by stepping on a nail in a board thrown down by other employes in course of clearing up rubbish, the danger was held a transitory one, not arising from the master's plan or method, and master was not liable. Armour & Co. v. Dumas [Tex. Civ. App.] 16 Tex. Ct. Rep. 47, 95 S. W. 710. The safe place rule does not apply where the danger is temporary and arises from the progress of the work and is known to the servant. But this exception was held not applicable where a pile of lumber became dangerous and fell upon an employe who was ordered to get a piece of lumber from it. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460.

the injured servant was engaged at the time of his injury in making a place of work,[56] nor where the conditions are constantly changing and the safety of the servant depends upon the exercise of due care by himself.[57] In these cases the dangers are incidental to the work and are assumed risks.[58] But even in such cases if the master has a representative present directing the work, and taking precautions for the servant's safety, the law requires the exercise of ordinary care to take such precautions as will make the place reasonably safe, considering the conditions and nature of the work.[59] There can be no recovery for failure of the master to maintain the place of work in a reasonably safe condition when that duty devolved on the injured employe,[60] or when the place was made unsafe by the negligence of a fellow-servant.[61]

Inspection, repairs, knowledge of defects.[62]—The master's duty is not fully performed by providing reasonably safe tools and appliances and a reasonably safe place of work; he must use ordinary care to maintain them in such condition,[63] and the duty of maintenance necessarily includes that of reasonable inspection[64] and

56. Rule as to furnishing safe place not to apply where miner was injured while assisting in making a chamber in a mine. Friel v. Kimberly-Montana Gold Min. Co. [Mont.] 85 P. 734. Where servant is making his own place of work which constantly changes, as where he is digging a trench, the master performs his whole duty by providing means which servant may use to keep the place safe, as by keeping sheathing on hand to be used to prevent slides or cave-ins. Rocco v. Gillespie Co. [N. J. Err. & App.] 64 A. 117. A gallery was being built on a vertical cylindrical boiler for the use of firemen and engineers, and a servant was on it constructing a hand rail. Held, the gallery was not a place of work furnished by the master but was part of the structure then being built, and for an injury caused by defective work of another employe the master was not responsible. McDonough v. Clonbrock Steam Boiler Co., 113 App. Div. 432, 99 N. Y. S. 263.

57. Bloomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304. Rule as to safe place inapplicable to a sandpile from which plaintiff was taking and wheeling sand, since the conditions constantly changed. Livingstone v. Saginaw Plate Glass Co. [Mich.] 13 Det. Leg. N. 873, 109 N. W. 431. Rule as to supplying a safe place has a very limited application where a building is being torn down. Walaszewski v. Schoknecht, 127 Wis. 376, 106 N. W. 1070. Whether conditions in mine were constantly changing, and were being made safe by employes, so that rule as to master's duty with reference to the place of work did not apply, held for the jury. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 256.

58. Bloomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304.

59. Rule applied where building was being torn down, and foreman caused certain joists to be left to support the building, and the building fell. Bloomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304. Foreman arranged place of work so that it became dangerous and directed servant to work there without warning him. Held, master liable. Brown v. Baltimore & O. R. Co., 142 F. 911. The rule that the master is under no duty to provide a safe place, when the very nature of the work renders it unsafe, does not relieve the master from liability for a false assurance of safety, by a mine superintendent in regard to a blast which had not been discharged. Allen v. Bell, 32 Mont. 69, 79 P. 582.

60. Where the character of the place of work changes with the progress of the work, it is the duty of the employe to see that it is kept reasonably safe. American Bridge Co. v. Leeds [C. C. A.] 144 F. 605. Where the work consists in making a reasonably safe place dangerous, or an obviously dangerous place safe, the duty to care for the safety of the place is the servant's, not the master's. Id. Where miner stood in main slope of a mine while working a room off from it, the part of the slope where he stood was his place of work, and he was required to keep it free from loose rock and debris, and master was not liable for injuries resulting from his failure to do so. Rolla v. McAlester Coal Min. Co. [Ind. T.] 98 S. W. 141.

61. Where place was safe but was made unsafe by the negligent act of a fellow-servant, the master was not liable. Brust v. Perkins Co., 113 App. Div. 633, 99 N. Y. S. 212.

62. See 6 C. L. 544.

63. Mergenthaler-Horton Basket Co. v. Taylor, 28 Ky. L. R. 923, 90 S. W. 968. When a reasonably safe place has been furnished by the master, it becomes his duty to use ordinary care to maintain it in such condition. Howard v. Peldenville Lumber Co. [Wis.] 108 N. W. 48. It is not only the duty of the master to exercise ordinary care and diligence to provide a reasonably safe place in which the servant is to work, but to use ordinary care and diligence to keep it safe. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Duty to furnish safe scaffold is continuing one; finding of negligence supported where evidence showed that scaffold originally safe, was weakened by an act of a vice-president. Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. S. 421. Instructions construed and held to state properly the railroad company's duty to use ordinary care to furnish a reasonably safe place of work for its employes and to maintain it in such condition by reasonable inspection. Denver, etc., R. Co. v. Warring [Colo.] 86 P. 305.

64. Duty to furnish reasonably safe appliances includes duty of reasonable inspection, and this duty cannot be delegated.

repair.[65] Whether due care in this respect has been used in a given instance is ordinarily a question of fact [66] to be determined by reference to the nature of the work, the character of the place and appliances, and the use to which they are put.[67] A system of inspection such as is customarily used in prudently managed businesses of the same kind is sufficient.[68] The duty of inspection is personal and nondelegable.[69]

Chicago Union Traction Co. v. Sawusch, 119 Ill. App. 349. A rule requiring trainmen to inspect cars and appliances does not relieve a company from liability for failure to discover by proper inspection a defect which an inspection by an employe, with the means at his command, would not have disclosed. Martin v. Wabash R. Co. [C. C. A.] 142 F. 650. Grab iron on box car was mashed flat against the car at the time the car was placed in a train and a slight inspection would have disclosed its condition. There was no evidence that an inspection had been made. Held jury was warranted in inferring that no inspection had been made. St. Louis, etc., R. Co. v. Johnson [Kan.] 86 P. 156. Where declaration alleges failure to maintain quarry in a reasonably safe condition, plaintiff may show failure to make proper inspection prior to accident. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. Machine became dangerous from pin gradually working out. Weller v. Aberfoyle Mfg. Co., 28 Pa. Super. Ct. 102.

65. Montanye v. Northern Elec. Mfg. Co., 127 Wis. 22, 105 N. W. 1043. Master must use reasonable care to discover and repair defects. St. Louis, etc., R. Co. v. Andrews [Ark.] 96 S. W. 183. The employer is under legal obligation to furnish safe appliances to his workmen, and by proper inspection and repair to keep them in safe condition. Gomez v. Tracey, 115 La. 824, 40 So. 234. Telephone company is under duty of ordinary care not only to furnish reasonably safe apparatus but also to keep it in a state of repair so that it can be used with safety. Cahill v. New England Tel. & T. Co. [Mass.] 79 N. E. 821.

66. Whether weak condition of bridge over trench should have been discovered and remedied by master. Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96. Brakeman killed while coupling cars, having stepped down on bumper of one of them. Whether company owed him duty of inspecting bumper to see that it was reaeonably safe for such purpose held a question for jury. Lyle v. Alabama, etc., R. Co. [C. C. A.] 145 F. 611. Where lineman received a shock from two service wire ends left sticking out, uninsulated, whether it was the duty of the master to insulate such wires, or the duty of the lineman to make an inspection for himself and guard against the danger, held for jury. New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 106 N. W. 213. Conductor was injured by tripping over semaphore wires while going between cars to uncouple them, one having a defective coupler. This car had been placed in the train at night at a station where the company had a car inspector. Question of negligence in inspection was for jury. Chicago, etc., R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169. Fireman was injured in a wreck caused by a washout and it appeared that another train had passed the place before without the washout being discovered. The question of negligence in the matter of inspection was held, nevertheless, for the jury. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932. Where employe was killed by reason of his train striking a stone that had rolled on the track, the company's negligence was for the jury where the last inspection had been at 5:30 p. m. and the accident was at 11:30 p. m. the same day. Denver, etc., R. Co. v. Warring [Colo.] 86 P. 305. Whether railroad company was negligent in failing to discover by inspection that a cross piece nailed on stanchions of a flat car to secure a load of lumber was reasonably secure for use of brakemen to support them while adjusting couplers, such use being customary. Wallace v. Seaboard Air Line R. Co., 141 N. C. 646, 54 S. E. 399.

67. Evidence held sufficient to ehow negligence in inspection of handhold on box cars, where wood appeared to be rotten, allowing screws to pull out. Missouri, etc., R. Co. v. Box [Tex. Civ. App.] 14 Tex. Ct. Rep. 998, 93 S. W. 134. Where defect in floor had existed sometime before it caused the injury complained of, whether the master was negligent in failing to discover and repair it, held for jury. Kremer v. Eagle Mfg. Co., 120 Mo. App. 247, 96 S. W. 726. Where it appeared that an inspection of a trestle had been made two weeks before it gave way under a logging train, evidence was admissible to ehow that the method of inspection used, sounding, was not proper, and that timbers should have been bored into. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010.

68. Where bursting of pulley was very unusual, held an inspection every three months by the master was sufficient to relieve him from liability. Clark v. Goldie [Mich.] 13 Det. Leg. N. 759, 109 N. W. 1044. Inspection and tests of air hose such as are customarily used by other prudently managed railway companies are sufficient; it is not necessary to apply tests not ordinarily used. Instructions as to inspection approved. Shandrew v. Chicago, etc., R. Co. [C. C. A.] 142 F. 320. An inspection of railroad cars such as is ordinarily made by well regulated and prudently conducted railroads, and which is the only kind that can be made without interfering with the operation of the road, is sufficient. Shankweiler v. Baltimore, etc., R. Co. [C. C. A.] 148 F. 195. Where brake rod was out of sight, so that a visual inspection would not disclose a defect in it, the mere fact that it was not disclosed was not proof of negligence in inspecting. Id.

69. Where railway company had regular inspectors who inspected a track, a failure by them to do their duty properly and to discover a defective rail would make the master liable, even though the defect was

A master is not liable for injuries resulting from defects of which he had no notice,[70] and which ordinary care and a reasonable inspection would not have disclosed,[71] but the master is chargeable with notice of defects which ordinary care on his part would have disclosed,[72] and in such case the absence of actual notice

not observable by other employes in the course of their duty exercising ordinary care. Missouri, etc., R. Co. v. Hagan [Tex. Civ. App.] 15 Tex. Ct. Rep. 325, 93 S. W. 1014. That a mine operator has employed a licensed mine examiner does not relieve the operator from liability if the examiner fails to make a proper examination and mark dangerous places as required by the statute. Kellyville Coal Co. v. Strine, 117 Ill. App. 115.

70. Master held not to have had actual notice of defect in pulley which caused it to break. Clark v. Goldie [Mich.] 13 Det. Leg. N. 759, 109 N. W. 1044.

71. If defect in hand car was not discoverable by use of ordinary care by section master, the master would not be liable for an injury caused by it to the section master. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24. In action for injuries to operator of machine, instructions held not to have omitted element that defendant would be liable if it knew or ought to have known of the defect alleged. Cotton v. Highland Park Mfg. Co., 142 N. C. 528, 55 S. E. 358. No negligence of defendant shown where railroad employe was injured by breaking of rotten round in wooden ladder on water tank, the defect not being visible, and the customary inspection of it having been made six months before. Nichols v. Pere Marquette R. Co. [Mich.] 13 Det. Leg. N. 623, 108 N. W. 1016. Where a reasonable inspection would have disclosed no defect in an emery wheel which broke, the master was not liable for the resulting injury. Saxe v. Walworth Mfg. Co., 191 Mass. 338, 77 N. E. 883. The master is not liable where he neither created the danger nor in the exercise of ordinary care has had knowledge or means of knowledge of the danger. Brennan v. Elec. Installation Co., 120 Ill. App. 461. Where master has used utmost diligence to procure reasonably save machinery, and it contains a latent defect not discoverable by the use of ordinary care, he is relieved from liability. Osner v. Zadek, 120 Ill. App. 444. Where a cable splicer was sent to repair cable, and upon climbing a pole took hold of a guy wire which was charged by a light wire which sagged against it, and was injured in a fall caused thereby, held the defect was not one discoverable by ordinary inspection, and, the construction being of the usual type, defendant was not negligent. Law v. Central Dist. Printing & Tel. Co., 140 F. 558. Where hand bar of hand car broke in the iron socket, thereby causing an employe upon the car to fall and sustain injury, it was held not negligence in the company to fail to discover the hidden defect in the bar by inspection. Alves v. New York, etc., R. Co., 27 R. I. 581, 65 A. 261. Evidence of the abnormal action of a machine is not alone sufficient to support an inference of negligence causing an injury, where there is not also proof of defects discoverable by the master by the use of ordinary care. Montanye v. Northern Elec. Mfg. Co., 127 Wis. 22, 105 N. W. 1043. Company liable for death of engineer caused by rotten tie only if the rotten tie could have been discovered by the use of ordinary care. Hach v. St. Louis, etc., R Co., 117 Mo. App. 11, 93 S. W. 825. Where fireman was injured in a wreck caused by a washout, an instruction relieving the master from liability if the washout was caused by an unprecedented rainfall and could not reasonably have been anticipated, or if the master had not been negligent in failing to discover and remedy the defect, was not erroneous. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932. Defendant used ordinary care in selecting spurs furnished to lumbermen to climb trees, and its blacksmith used care and skill in reconstructing them. Defendant held not liable for a defect in them not discoverable by the use of ordinary care. Bennett v. Himmelberger-Harrison Lumber Co., 116 Mo. App. 699, 94 S. W. 808. Where third round of ladder broke, injuring plaintiff, evidence held insufficient to show that master knew or ought to have known of defect, though it appeared that two bottom rounds were badly worn. St. Louis, etc., R. Co. v. Andrews [Ark.] 96 S. W. 183. The master's duty is a continuous one, and he is required to use ordinary care to seek out latent and hidden defects, though he is not liable for latent defects not discoverable by the use of such care. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460.

72. Fall of engineer held to have been proximately caused by a defect in a step which a reasonable inspection by the master would have disclosed. Galveston, etc., R. Co. v. Stevens [Tex. Civ. App.] 15 Tex. Ct. Rep. 977, 94 S. W. 395. Where defective nut and bolt used to fasten hand-hold were originally defective, the fact that the defects were concealed by paint would constitute no defense to the master. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S W. 184. Master is liable for injuries caused by defects in appliances or place of work if he knew or in the exercise of ordinary care ought to have known of the existence of such defects. Cumberland Tel. & T. Co. v. Adams, 28 Ky. L. R. 1265, 91 S. W. 739. Railroad company not chargeable with knowledge of defect in water gauge on locomotive when neither engineer nor engine inspector reported any defect. Healy v. Buffalo, etc., R. Co., 111 App. Div. 618, 97 N. Y. S. 801. Master is chargeable with knowledge that place of work is unsafe if the conditions are such that the exercise of ordinary care would have disclosed the danger. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. Where a defective rail was used in constructing a logging railroad, a lumber company which used it was chargeable with notice of the defect and was liable for injuries caused by a derailment of a hand car resulting from such defect. Arkadelphia Lumber Co. v. Smith [Ark.] 95 S. W. 800. Instruction holding master liable for injury caused by defective step on engine if it "could have known of its exist-

will not relieve him from liability.[73] But neither actual nor implied notice will render the master liable unless he has had a reasonable time thereafter to warn the servant or make repairs.[74] In the case of simple and common tools, no liability rests on the master for the ordinary perils resulting from their use, nor for those latent and usual defects or weaknesses which by reason of the common, usual character of the appliance are presumed to be known to all men alike.[75] This exemption from liability is based upon the condition that the defect and peril are such that no superiority of knowledge in the master over the employe exists or can be

ence by the exercise of ordinary care," approved. Galveston, etc., R. Co. v. Stevens [Tex. Civ. App.] 15 Tex. Ct. Rep. 977, 94 S. W. 395. Evidence held sufficient to warrant finding that automatic couplers were defective and would not couple and that master could have discovered defect by simple inspection. St. Louis Southwestern R. Co. v. Pape [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534. Where defendant was informed of a defect that demanded an inspection, it was chargeable with knowledge of all defects which a proper inspection would have disclosed. Libby v. Cook, 222 Ill. 206, 78 N. E. 599. The duty of the master with reference to providing a safe place extends not only to known dangers and defects but also to such as he ought to know of in the exercise of ordinary care. City of Waukegan v. Sturm, 118 Ill. App. 479. Where engine was derailed, and it appeared that rails and ties were defective and that derailments had previously taken place at the same spot, the question of defendant's knowledge of the defective condition was for the jury. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301. Whether defects in floor, over which trucks loaded with sheet iron had to be hauled, had existed so long that master was charged with notice and was negligent in failing to make repairs. Longree v. Jackes-Evans Mfg. Co., 120 Mo. App. 478, 97 S. W. 272. Where engineer was injured by a fall caused by a defective step, his testimony describing the step, showing that it could have fallen only by working loose, that a reasonably careful inspection would have disclosed the defect, and that the company had engine inspectors, made a prima facie case. Galveston, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 505, 98 S. W. 898. Knowledge of a defect in an appliance by a foreman of a department of a packing house is knowledge of the corporation; hence, an admission of notice by such fireman may be shown. Cudahy Packing Co. v. Hays [Kan.] 85 P. 811.

73. Where servant is injured by being caught in an unguarded belt or pulley, he need not prove that the master or some representative had actual notice of the defect, even if the servant had notice and did not report it. Knowledge of such a defect is presumed. Johnson v. Onondaga Paper Co., 112 App. Div. 667, 98 N. Y. S. 602. Where injury to fireman was claimed to have been caused by an original defect in a handhold, knowledge of the master of the defect at any time before the injury would be sufficient to make it liable regardless of knowledge at the time of the last inspection. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184.

74. Railroad company held not negligent in failing to repair track where it gave timely notice to employes of the defect so that they could avoid danger. St. Louis, etc., R. Co. v. Mize [Ark.] 95 S. W. 488. Where break in shaft could have been discovered by timely inspection so as to prevent injury, a finding for plaintiff was warranted. Reinhardt v. Central Lard Co. [N. J. Law] 64 A. 990. Where employe was injured by loose lace in belt, through which he put his hand to oil a machine, evidence held insufficient to prove that master could have discovered defect in time to prevent injury. St. Pierre v. Foster [N. H.] 64 A. 723. If the place becomes unsafe during the course of the employment and a servant receives an injury thereby before the master has knowledge of the existence of the danger or has reasonable opportunity to obtain such knowledge and remedy the defect, the master is not liable. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

75. Such as monkey wrench. Stork v. Stolper Cooperage Co., 127 Wis. 318, 106 N. W. 841. No duty rests upon an employer to inspect simple and common tools to discover defects which arise from the ordinary use of such instruments. Rule applied to common sledge hammer in good condition when furnished to employes. Koschman v. Ash [Minn.] 108 N. W. 514.

NOTE. Inspection of common tools: "The master is under no duty to inspect simple or common tools, or to discover or remedy defects arising necessarily from the ordinary use of such instruments. Miller v. Erie R. Co., 21 App. Div. 45, 47 N. Y. S. 285 (a pushpole by which an engine on one track was able to move a car on an adjacent track); Marsh v. Chickering, 101 N. Y. 396, 5 N. E. 56 (ladder); Cahill v. Hilton, 106 N. Y. 512, 518, 13 N. E. 339 (ladder); Webster Mfg. Co. v. Nisbett, 205 Ill. 273, 68 N. E. 936 (hammer); Meador v. R. Co., 138 Ind. 290, 37 N. E. 721, 46 Am. St. Rep. 384 (ladder); Wachsmuth v. Elec. Crane Co., 118 Mich. 275, 76 N. W. 497 (snap-hammer); Dompier v. Lewis, 131 Mich. 144, 91 N. W. 152 (hammer); O'Brien v. Missouri, etc., R. Co., 36 Tex. Civ. App. 528, 82 S. W. 319 (wrench); Gulf, etc., R. Co. v. Larkin [Tex.] 82 S. W. 1026 (defective globe on a lantern); Lynn v. Sugar Ref. Co., 128 Iowa, 501, 104 N. W. 577 (hammer of soft steel with which to break lumps of coal); Garragan v. Iron Works, 158 Mass. 596, 33 N. E. 652; Martin v. Highland Co., 128 N. C. 264, 38 S. E. 876, 83 Am. St. Rep. 671; R. Co. v. Brooks, 84 Ala. 138, 4 So. 289; Georgia R. Co. v. Nelms, 83 Ga. 70, 9 S. E. 1049, 20 Am. St. Rep. 308; Power Co. v. Murphy, 115 Ind. 566, 18 N. E. 30; Labatt, Master & Servant, § 154."—From opinion in Koschman v. Ash [Minn.] 108 N. W. 514.

presumed.[78] But this exemption from liability has no application to a defect of which the master is actually cognizant, and which is of a character such that injury from the use of the appliance ought reasonably to be apprehended, where the employe has no actual notice of the defect and is not charged with notice from having used it.[77]

Ordinarily, the servant is under no duty to make an inspection of the place or appliances,[78] but may rely on the assumption that the master has performed his duty with respect thereto.[79] But this is not the rule with respect to simple and common tools used by the servant in the ordinary discharge of his duties,[80] nor does the rule apply where the duty of inspection rests upon the servant.[81] The

76. Stork v. Stolper Cooperage Co., 127 Wis. 318, 106 N. W. 841.

77. Since master is liable if he knowingly exposes an employe to a danger unknown to the employe. Stork v. Stolper Cooperage Co., 127 Wis. 318, 106 N. W. 841.

78. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409; Mergenthaler-Horton Basket Co. v. Taylor, 28 Ky. L. R. 923, 90 S. W. 968. Employe who does not know of danger in the place of work may rely on master's care, unless danger is patent and obvious, and is not obliged to make an inspection. Wallace v. Bach [Ky.] 97 S. W. 418. Defendant liable for injury caused by defective appliance to remove steel plates from anvil, the defect being one which employe could have discovered only by special investigation. McKee v. Crucible Steel Co., 213 Pa. 333, 62 A. 921.

79. Employe held to have had a right to rely on superintendent's care in making platform, and was under no duty to inspect it to see if sleepers were fastened. White v. Perry Co., 190 Mass. 99, 76 N. E. 512. Express company's servant was not bound to inspect truck or platform to assume that they were reasonably safe. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441. The servant may rely fully on the assumption that the master has performed his several duties, and need not inspect to ascertain if these duties have been in fact performed. Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. Telephone cable splicer held to be under no duty to test and inspect ropes and swinging platform supplied by company, since he had a right to assume that the company had performed its duty with respect to such appliances. Cumberland Tel. & T. Co. v. Metzger's Adm'r, 29 Ky. L. R. 1024, 97 S. W. 35. Const., § 193, provides that knowledge of railroad employes of defects in appliances shall constitute no defense to an action for injuries, except in the case of conductors or engineers in charge of dangerous cars or engines voluntarily operated by them. A section foreman in charge of a hand car is not a conductor within the meaning of this provision. Yazoo, etc., R. Co. v. Parker [Miss.] 40 So. 746. If such foreman was guilty of reckless negligence, he could not recover; but such question is always one for the jury. Id.

80. Stork v. Stolper Cooperage Co., 127 Wis. 318, 106 N. W. 841; Koschman v. Ash [Minn.] 108 N. W. 514. In the case of simple tools and appliances, the master is under no duty to inspect in order to ascertain defects developing in the course of their use, since the servant has the same or a better opportunity to observe them as the master. As in case of monkey wrench. Stork v. Stolper Cooperage Co., 127 Wis. 318, 106 N. W. 841. Ladder used by employe was broken and a piece of plank nailed on during his absence. On his return he inspected it before using it and did not report any defect in it. Master held not liable for an injury caused by breaking off of plank nailed on it. Graham v. Chicago, etc., R. Co. [Tex.] 15 Tex. Ct. Rep. 211, 91 S. W. 1081. Employe was struck by piece of steel while engaged in cutting steel rail with coldchisel. The accident was one occurring in ordinary use of simple tool and was not one which the master ought reasonably to have apprehended. Hence, no liability. Fasini v. New York Cent., etc., R. Co., 109 App. Div. 404, 96 N. Y. S. 415. Where an ordinary ladder is sound and in good condition when supplied to the servant, no duty rests upon the master thereafter to inspect it for defects arising from ordinary use, at least as to a servant thoroughly familiar with such appliance. Dessecker v. Phoenix Mills Co. [Minn.] 108 N. W. 516. Where rope sling was used every day, it was duty of employes to inspect it and make needed repairs, the master having supplied plenty of sound material for the purpose. Hence, the act of an employe in using an unsafe sling would not render the master liable for a resulting injury to another employe. The Fulton, 143 F. 591. Wooden ladder on railroad watertank, used only occasionally by employes, held not a simple or common tool which employes were bound to inspect in their ordinary use. Nichols v. Pere Marquette R. Co. [Mich.] 13 Det. Leg. N. 623, 108 N. W. 1016.

81. Mergenthaler-Horton Basket Co. v. Taylor, 28 Ky. L. R. 923, 90 S. W. 968. The duty to inspect machinery to see that it is safe cannot be delegated, but the duty to inspect to see if it is in good working order can be delegated. Clark v. Goldie [Mich.] 13 Det. Leg. N. 759, 109 N. W. 1044. Railway employes who put in switch reported to station agent and it was then his duty to inspect the work. He could not, therefore, recover for injuries caused by falling into an excavation which he would have discovered had he made such inspection. Wood v. New York Cent., etc., R. Co., 184 N. Y. 290, 77 N. E. 27.

Duty of inspection held not to rest on servant: Evidence sufficient to sustain finding that employes themselves were not delegated to make repairs on a platform on which they worked. Bailey v. Swallow [Minn.] 107 N. W. 727. Where hooks and hinge gate in pulley block were loosened, the moving of them was not a duty resting

servant cannot recover for an injury caused by a defect or condition discoverable by him by the use of ordinary care in the performance of his usual duties,[82] or which was actually known to him and which he failed to report[83] to a proper person.[84]

Statutes.[85]—Decisions under the Federal automatic coupler act and under various state laws relating to appliances and places of work are collected in the note.[86]

on an unskilled workman who had no knowledge of the facts. Costello v. Frankman, 97 Minn. 522, 107 N. W. 739. Where a pole was hollow and defective when put in, the company could not escape liability for an injury caused by its breaking owing to such original defect on the ground that linemen, fellow-servants of injured employe, were under duty of inspecting the pole, where it was not shown that linemen had such duties at the time the pole was set. Livingway v. Houghton County St. R. Co. [Mich.] 13 Det. Leg. N. 534, 108 N. W. 662.

82. Servant's duty extends only to the observation of defects which are open, visible, and apparent. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409. Where defect in derrick hook was discoverable by a reasonable inspection, master was not liable for injury caused thereby. New Castle Bridge Co. v. Steele [Ind. App.] 78 N. E. 208. The servant is not bound to inspect his appliances or place of work upon entering upon his employment, but cannot close his eyes to obvious dangers or dangers which would be apparent to a man of ordinary care. Price v. Consumers' Cotton Oil Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 151, 90 S. W. 717. Where telephone lineman, employed to dismantle old poles and move wires, was not assured that appliances he would use were safe or would be inspected, and he himself had better opportunities of knowing dangers connected with his work than the company, he could not recover for an injury caused by defective insulation on the ground of the company's failure to inspect. Evansville Gas & Elec. Light Co. v. Raley [Ind. App.] 76 N. E. 549. A section master in temporary charge of a hand car, is under the duty of noting such defects in it as are discoverable by the use of ordinary care, and of refusing to use it if it is obviously unsafe. If he fails in this duty and is injured by reason of a discoverable defect, he cannot recover. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24. Servant held not to have actual or implied knowledge of defect in wrench. Mergenthaler-Horton Basket Co. v. Taylor, 28 Ky. L. R. 923, 90 S. W. 968.

83. The Alabama statute makes it the duty of a miner to report defects to the master or employer or to some person superior to himself engaged in the service or employment of the master, and not to some person entrusted with the duty of seeing that ways, works, etc., are safe. Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943. Rev. Laws, c. 106, § 77, barring an action based on a defect of which a servant had notice and which he failed to report does not apply to a defect of which the servant had no knowledge. Thus, failure to report the dangerous condition of a walk from ice and snow was held not to bar an action for an injury thereby caused. Urquhart v. Smith & Anthony Co. [Mass.] 78 N. E. 410.

84. Fireman on engine was under no duty to report defect in coupler of helping engine to any other person than the engineers and conductor of the train. Doyle v. Great Northern R. Co. [Wash.] 86 P. 861. Where conductor and engineers in charge of a train had notice of defects in a coupler of a helping engine, which caused it to break away and delay a train in a tunnel, it would be presumed that they reported to the company in the absence of contrary evidence. Id.

85. See 6 C. L. 547.

86. **Federal automatic coupler act** requires couplers which will couple automatically by impact without the necessity of men going between the cars. Chicago & Alton R. Co. v. Walters, 120 Ill. App. 152. The automatic coupler act requires couplers which can be coupled as well as uncoupled without requiring employes to go between the cars. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459. Cars loaded with rails had been kept at a point several days, in readiness to be sent where needed. An employe was getting them ready to move and was injured. Held, cars were not then engaged in interstate traffic, and automatic coupler act, cutting off defense of assumption of risk, did not apply. Coley v. Kansas City Southern R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 738, 95 S. W. 96.

Arkansas: 26 Stat. U. S. 1104, requiring ventilation of mines, is sufficiently complied with where the portions used are properly ventilated, and danger signals put up to warn miners away from portions not so ventilated and not intended to be used. Central Coal & Coke Co. v. Gregory [Ark.] 93 S. W. 56.

California: St. 1893, p. 82, c. 74, §§ 1-5, regulating operation of mines, construed, and held not to impose a personal obligation on mine operators to lash long poles to cable of skip when they cannot be carried inside. Manning v. App Consol. Gold Min. Co. [Cal.] 84 P. 657.

Illinois: Evidence held sufficient to show proper examination of mines as required by Miners' Act. New Virginia Coal Co. v. Gower 119 Ill. App. 1. Evidence sufficient to show willful violation of mine's law by failing to supply props and make required inspection of mines. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902. Hurd's Rev. St. 1903, c. 93, p. 1260, providing that no one shall be allowed to enter a mine except under direction of the inspector, does not require an inspector to personally accompany men sent into a room to make it safe. Kellyville Coal Co. v. Bruzas, 223 Ill. 595, 79 N. E. 309. A conscious failure to comply with Mine & Miners' Act, § 18, par. "a," requiring an inspection for gas before miners are allowed to enter a mine, is a willful violation of the act though there is no evil intent. Athens Min. Co. v. Carnduff, 221 Ill. 354, 77 N. E. 571. Mine owner is not relieved from liability for injury resulting from violation of laws 1899, pp. 315, 317, §§ 16, 18, by reason of having to employ a

manager and examiner who must have certificates issued by the state. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902.

Indiana: A shop maintained by a street railway company for the making of repairs on cars and appliances is a "workshop" within the meaning of Acts 1899, p. 234, c. 142, relating to the safety of employes in certain kinds of establishments where men are employed for hire. Hoffmeyer v. State [Ind. App.] 77 N. E. 372. Burns' Ann. St. 1901, § 7087, requiring "vats, pans, saws, planers, cogs, gearing, belting, set screws, and machinery of every description therein" to be guarded, does not apply to a machine consisting of rollers and knives revolving at great speed, set just below an opening in the floor, and used to mix sawdust, damp clay, and dirt thrown in from above. National Fire Proofing Co. v. Roper [Ind. App.] 77 N. E. 370. Failure of employer to provide exhaust fans to carry off dust from emery wheels, as required by statute, is a breach of duty to employes. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. Burns' Ann. St. 1901, § 7478, providing that doors used in assisting or directing ventilation in mines when coal is being hauled through shall be opened and closed by persons designated for that duty, is designed solely to secure proper ventilation and not to protect drivers; hence, a driver who strikes his head going through a door which he tries to keep open has no right of action thereunder, though § 7473 gives a right of action for any injury caused by a violation of the act. Indiana & Chicago Coal Co. v. Neal [Ind.] 77 N. E. 850.

Massachusetts: Plank walk leading from factory to privy held a part of the "ways, works," etc., under Employers' Liability Act, § 77. Evidence that several days before plaintiff's injury snow and ice had become packed into a rough, uneven surface thereon, was evidence of negligence. Urquhart v. Smith & Anthony Co. [Mass.] 78 N. E. 410. That a hatchway in a vessel that was being loaded was left uncovered did not constitute a defect in "ways, works or machinery." Bamford v. Hammond Co., 191 Mass. 479, 78 N. E. 115. Piles of cotton in warehouse alleged to have been negligently arranged held not a part of the "ways, works, and machinery." Cahill v. Boston, etc., R. Co., 190 Mass. 423, 76 N. E. 911. Rev. Laws, c. 104, § 27, requiring elevators to be equipped with a certain safety device, held not to apply to an elevator temporarily used as a part of the ways, works, and machinery, used in construction of a building. Rippucci v. Com. Const. Co., 190 Mass. 518, 77 N. E. 478.

Michigan: Pub. Acts 1901, No. 113, § 5, requires the owner or lessee of any manufacturing plant where hoisting shafts or well holes are used to guard them. This imposes a duty on employers to protect employes from falling into elevator shafts inside the building. Murphy v. Grand Rapids Veneer Works, 142 Mich. 677, 12 Det. Leg. N. 868, 106 N. W. 211.

Mississippi: No liability of railroad company for negligence in furnishing ways, works, or machinery, where cause of conductor's death was his own negligence in hitching a caboose to an engine with a chain, leaving several feet of slack. Illinois Cent. R. Co. v. Emerson [Miss.] 40 So. 818.

Missouri: Rev. St. 1899, § 6433, requiring belting, shafting, gearing and drums in factories to be guarded when possible, applies to a vertical belt and horizontal shaft rotating near the floor of a factory, exposed to limbs and clothing of employes. Morgan v. Hager & Sons Hinge Mfg. Co., 120 Mo. App. 590, 97 S. W. 638. Rev. St. 1899, § 6433, requiring belting, shafting, gearing, and drums, when situated where dangerous to employes, to be guarded held not to require a planer to be hooded. Smith v. Forrester-Nace Box Co., 193 Mo. 715, 92 S. W. 394. Whether vertical belt and horizontal shaft could have been guarded without making use of it impossible, held a question for jury. Morgan v. Hager & Sons Hinge Mfg. Co., 120 Mo. App. 590, 97 S. W. 638. Rev. St. 1899, § 6433, requiring dangerous shafting to be guarded when possible, and a notice to be posted when guarding is not possible, makes failure to guard negligence, if guarding is possible, even though a notice is posted, and if guarding is not possible, failure to post a notice is negligence. Millsap v. Beggs [Mo. App.] 97 S. W. 956. Violation of the statute is negligence per se. Id. To an action based on a violation of the statute it is no defense that the unguarded machine is reasonably safe. Id. Rev. St. 1899, § 6433, requiring shafting to be guarded, applies to a horizontal metal shaft with steel knives fastened on it, and operated as a planer. Millsap v. Beggs [Mo. App.] 97 S. W. 956. Rev. St. 1899, c. 91, art. 17, § 6435, requires guards to be placed before elevator openings in certain buildings, which are to be closed, except when in actual use. This statute is not designed for the protection of elevator operators. Lataple-Vignaux v. Askew Saddlery Co., 193 Mo. 1, 91 S. W. 496. An elevator operator who falls into the shaft while attempting to operate the elevator cannot recover for his injuries, since such a case would come within the exception of the statute. Id. Rev. St. 1899, § 8822, providing that mine operators shall have on hand a sufficient supply of props, etc., requires such props to be kept and to be furnished to miners upon their request without unnecessary delay. McKinnon v. Western Coal & Min. Co., 120 Mo. App. 148, 96 S. W. 485. The statute applies to miners working at a fixed price per bushel mined, as well as those who work for wages. Id. Statute requiring inspection of coal mines to determine presence of gas does not apply to mines where no gas is generated. Id.

New York: Whether it was practicable to guard a particular belt and pulley as required by Labor Law 1892, p. 1375, c. 673, § 8, held a question for jury. Johnson v. Onondaga Paper Co., 112 App. Div. 667, 98 N. Y. S. 602.

Ohio: Manufacturing corporation which maintains tracks and a switch engine in its yards to shift freight cars is not "a railroad corporation operating a railroad or a part of a railroad" within 93 Ohio Laws, p. 342, requiring such corporations to block frogs. Taggart v. Republic Iron & Steel Co. [C. C. A.] 141 F. 910.

Pennsylvania: Failure to provide guard rail for dangerous platform as required by Act June 2, 1891. Gulla v. Lehigh Valley Coal Co., 28 Pa. Super. Ct. 11.

Washington: Whether revolving knives of a log chipper in a sawmill could have been guarded advantageously held a question for the jury, the evidence being conflicting. Rec-

(§ 3) *C. Methods of work, rules and regulations.*[87]—If the master provides or adopts a mode of work which is not reasonably safe,[88] and an injury results therefrom,[89] he is liable. Whether a method adopted or provided is reasonably safe depends upon the nature of the work and the danger to be apprehended,[90] and this question is usually one for the jury to decide.[91]

When the business in which the master is engaged is complicated or dangerous,[92] or where the employes work in different departments or at different sorts of works, and the safety of one depends upon the performance of the duties of another at stated times or in a particular manner,[93] it is the duty of the master to provide and enforce suitable rules and regulations governing their conduct and that of the business.[94] But when the duties to be performed by the servant are simple and the appliances easily understood rules are not required.[95] A failure to promulgate particular rules will not constitute actionable negligence, unless it is made

tor v. Bryant Lumber & Shingle Mill Co., 41 Wash. 556, 84 P. 7. Whether circular saw could have been advantageously guarded held for jury. Erickson v. McNeeley & Co., 41 Wash. 509, 84 P. 3.

87. See 6 C. L. 548.

88. Directing or ordering the servant to do work in a certain manner may constitute negligence and when it does the servant obeying such order or direction, and injured as a proximate result thereof, may recover from the master. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. While a heavy machine was being moved from a car, defendant's general manager arrived and took charge of the work. Held, any defect or danger in the method already chosen of doing the work, discoverable by a man of ordinary prudence, became negligence chargeable to the master. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. When young employe was told by foreman to get instructions from a machinist as to how to grind tools and machinist told him to grind them on the side of the wheel, and the employe was injured while doing as he was told, he could recover though the method was wrong. Gulf, etc., R. Co. v. Archambault [Tex. Civ. App.] 16 Tex. Ct. Rep. 293, 94 S. W. 1108.

89. Where a derrick tipped because the boom was directed to be swung round before it was fastened at the base, the master was liable for a resulting injury, a negligent mode of operation having been adopted. Ball v. Megrath [Wash.] 86 P. 382. Failure to maintain a lookout on the flat car of a construction train, consisting of an engine and two cars, held not negligence as to a member of the crew who was injured by the train running into him without warning. Burrman v. Grand Trunk Western R. Co., 143 Mich. 689, 13 Det. Leg. N. 111, 107 N. W. 709. Where there was evidence that a foreman told employe to use her hands to unclog the machine, the fact that a stick had been supplied for that purpose would not absolve the master from the charge of negligence. Regling v. Lehmaier, 50 Misc. 331, 98 N. Y. S. 642. That a superintendent allowed men to unload rock in a certain manner did not make the master liable where the injury complained of was caused by failure to follow his instructions as to warnings. Martin v. Mason-Hage Co., 28 Ky. L. R. 1333, 91 S. W. 1146.

90. Master is under duty of controlling appliances so as not to subject employes to unnecessary dangers. Leighton & Howard Steel Co. v. Snell, 119 Ill. App. 199. For mine owner to permit heavily loaded cars to be sent down the incline in a mine without light or attendant, or brake or signal, and with nothing to retard speed except sprags in the wheels, is gross negligence. Spring Valley Coal Co. v. Chiaventone, 115 Ill. App. 558. In action for injuries caused by falling of a wheel upon plaintiff while he and another were attempting to move it from one shop to another, evidence held insufficient to prove negligence of the master in failing to provide a reasonably safe method or sufficient number of men. Beardsley v. Murray Iron Works Co., 129 Iowa, 675, 106 N. W. 180. Manner of removing snow and ice from tracks by flangers, plows, and shovels, according to condition of tracks, held not negligent. Neagle v. Syracuse R. Co., 185 N. Y. 270, 77 N. E. 1064.

91. Whether method employed by defendant's manager to move machine from car was negligent. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. Plaintiff was injured while unloading casks from a car. Held, whether he was ordered to do the work in a dangerous manner, or was allowed insufficient help, were questions for the jury. Kirk & Co. v. Jajko, 224 Ill. 338, 79 N. E. 577.

92. It is duty of railroad company to make and enforce definite and reasonable rules and regulations for the government and protection of its employes. Seaboard Air Line R. Co. v. Shanklin [C. C. A.] 148 F. 342. Complaint held to state a cause of action in that defendant failed to provide a system of rules and signals governing the works of sending logs down a chute, without which such work was extremely dangerous, and owing to the lack of which plaintiff was injured. Lindsay v. Grande Ronde Lumber Co. [Or.] 87 P. 145. In action for death of brakeman while coupling cars in railroad yards, evidence held sufficient to show that a rule regulating work in the yards should have been adopted, it appearing that such a rule would have been practicable, that a similar one was in use in other yards, and that the necessity of it was obvious. Freemont v. Boston, etc., R. Co., 111 App. Div. 831, 98 N. Y. S. 179.

93, 94. Blust v. Pacific States Tel. Co. [Or.] 84 P. 847.

95. No rules required to govern work of putting up telephone cables, the appliances

to appear that such rules would be practicable,[96] and would, if adopted, have prevented the injury complained of,[97] or that the necessity for such rules ought reasonably to have been foreseen.[98] The necessity for rules is ordinarily a question of fact.[99] The reasonableness or sufficiency of rules promulgated depends upon the nature of the work,[1] and this question also is usually one of fact,[2] but may become a question of law.[3] The construction of rules is for the court, if they are ambiguous and open to construction [4] but the application of a rule to a particular situation may be a question of fact.[5]

It is the duty of the master not only to formulate and promulgate rules, where the nature of the work requires them, but also to use ordinary care to see that they are enforced,[6] but he is not an insurer of their observance.[7] Where a rule is customarily or habitually violated by servants, to the knowledge of the master, or a vice-principal,[8] or for so long a time and so frequently and openly that the master

being simple and understood by the employes. Blust v. Pacific States Tel. Co. [Or.] 84 P. 847.

96. Failure to provide rules as to position in train of disabled cars, and prohibiting car inspectors from riding on trains held not negligent, because such rules would be impracticable. Shuster v. Philadelphia, etc., R. Co. [Del.] 62 A. 689.

97. Decedent was killed by electric shock while repairing wires owing to a mistake in the transmission of order to turn off the power "after ten minutes," the order transmitted being understood as one to turn off power "for ten minutes." A rule would not have prevented such a mistake. Van Alstine v. Standard Light, Heat & Power Co., 101 N. Y. S. 696. Employe picking up coal in yards was struck by coal car kicked onto a siding. Evidence did not show probable efficiency of a rule requiring cars to be under control in yards, so as to prevent such accidents, nor that such a rule was customary. Held, negligence was not shown. Kascsak v. Central R. Co., 101 N. Y. S. 211.

98. Failure to make rules regarding flying switches held not a breach of duty as to an employe who stepped on track in front of cars, his act being one which could not reasonably have been foreseen. Lord v. Boston & M. R. Co. [N. H.] 65 A. 111. When necessity for rule whereby railroad employes could be warned of presence of cinders on the track ought reasonably to have been foreseen by defendant in the exercise of ordinary care, failure to promulgate such rule was negligence. St. Louis, etc., R. Co. v. Ames [Tex. Civ. App.] 16 Tex. Ct. Rep. 298, 94 S. W. 1112.

99. Held not necessary to make and promulgate rules for running cars on private railroad. Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A. 935. Railroad company is not bound absolutely to promulgate rules for instruction of student brakemen. Louisville & N. R. Co. v. Vincent [Tenn.] 95 S. W. 179. Slabs were hauled by tram cars out of mill basement, up a grade and blocked and when two cars were up they were hauled away. Two such cars broke away and ran back into the mill killing an employe. Whether promulgation of rules for the operation of the cars was necessary was for the jury. Johnson v. Smith Lumber Co. [Minn.] 109 N. W. 810. Whether railroad company was negligent in not promulgating a written rule governing the giving of signals by men under engines, engaged in cleaning them out, so that hostlers would not move engines until the cleaners had reached a place of safety. McCoy v. New York Cent., etc., R. Co., 185 N. Y. 276, 77 N. E. 1174.

1. Railroad rule prohibiting employes from going between moving cars to couple or uncouple them held reasonable. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Rules of railroad company held insufficient to inform employes of freight train that another train was running in sections. Ryan v. Delaware & Hudson Co., 99 N. Y. S. 794. Defendant's rules required care in coupling and shifting cars to avoid injury to train men, limited speed to six miles an hour when crossing switches, and made engineers conductors when running engines alone. Held, these rules were sufficient as to a switch inspector struck by an engine crossing a switch at an excessive rate, and master was not liable. Keating v. Manhattan R. Co., 110 App. Div. 108, 97 N. Y. S. 137.

2. Whether code of signals used in operation of construction train was sufficient. Choctaw, etc., R. Co. v. McLaughlin [Tex. Civ. App.] 16 Tex. Ct. Rep. 839, 96 S. W. 1091.

3. Whether a given rule or regulation is reasonable and sufficient is a question of law. Rule requiring signals in blasting. Kenefick-Hammond Co. v. Rohr, 77 Ark. 290, 91 S. W. 179.

4. A railroad rule requiring conductors to see that brakes are set on cars left on sidings, and that when a siding is on grade, cars left thereon shall be coupled, was held free from ambiguity and not open to construction. St. Louis Southwestern R. Co. v. Pape [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534.

5. Whether a siding was "on grade" within the meaning of a rule requiring cars on such sidings to be coupled together held a question for the jury. St. Louis Southwestern R. Co. v. Pape [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534.

6, 7. Lane Bros. Co. v. Seakford [Va.] 55 S. E. 556.

8. Knowledge by conductors of habitual violation of a rule of the company held knowledge of the company. St. Louis, etc., R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749.

is charged with knowledge of its violation,[9] it is deemed abrogated.[10] A rule may also be abrogated by other rules of the master inconsistent therewith.[11] Nonobservance by a servant of a rule which has been abrogated does not constitute contributory negligence.[12]

A master cannot by the promulgation or rules relieve himself of a duty imposed by law [13] nor delegate personal duties to a servant, so as to absolve him from liability.[14]

(§ 3) *D. Warning and instructing servant.*[15]—It is the duty of the master to properly warn and instruct young and inexperienced employes [16] in regard to dan-

9. Knowledge of the master may be implied from the notoriety of the custom of the employes in disregarding the rule. St. Louis, etc., R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749. Customary violation of a rule prohibiting employes from going between cars would be binding on the company only if such violation was known to the company and acquiesced in, or if it had prevailed for so long that it was charged with notice. Huggins v. Southern R. Co. [Ala.] 41 So. 856.

10. Biles v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 512. Rule of railroad company prohibiting employes from jumping on or off trains in motion held to have no effect where evidence showed that it had been habitually violated by employes in the manner in which plaintiff violated it. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S W. 339. Rule requiring firemen to clean engines at end of each trip held abrogated by general custom, acquiesced in by company, of cleaning engines sometimes in the daytime, and when the engine was in motion. Kane v. Erie R. Co. [C. C. A.] 142 F. 682. Evidence held sufficient to warrant a finding that a rule governing the positions of trainmen on trains at certain times had been abrogated by a customary violation of it by employes. St. Louis, etc., R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749. Whether rules requiring trains to stop at switches under certain conditions had been abrogated by habitual violation of it and by making of schedules rendering observance of it impossible, held a question for the jury. Haynes v. North Carolina R. Co. [N. C.] 55 S. E. 516.

11. Certain evidence admissible to show that rule requiring trains to stop at switch under certain conditions had been abrogated by the promulgation of a schedule making its observance impossible. Haynes v. North Carolina R. Co. [N. C.] 55 S. E. 516.

12. Biles v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 512. Where a rule has been abrogated by its open violation for a time so long that the master must be charged with knowledge of the facts, nonobservance of it by a servant does not constitute contributary negligence. Haynes v. North Carolina R. Co. [N. C.] 55 S. E. 516.

13. Railway company cannot by the promulgation of rules for the government of its employes relieve itself from liability for failure to comply with automatic coupler act. Chicago & Alton R. Co. v. Walters, 120 Ill. App. 152.

14. Master cannot by rules for the regulation of his employes delegate personal duties to a servant. Chicago Union Traction Co. v. Sawusch, 119 Ill. App. 349.

15. See 6 C. L. 550.

16. Failure to warn and instruct inexperienced employe sent out on scow to lighter a stranded steamer, whereby he was injured by a traveling crane on the scow, held negligence. The Buffalo, 147 F. 304. Complaint held to state a cause of action for putting a boy of thirteen to work on a dangerous machine without warning or instructing him. Ft. Valley Knitting Mills v. Anderson, 124 Ga. 909, 53 S. E. 686. Master's duty to warn inexperienced employes as to dangers of the employment, unless such dangers are obvious. Chicago, etc., R. Co. v. Daugaard, 118 Ill. App. 67. Where inexperienced employe is put to work at a dangerous machine, it is master's duty to see that he is fully warned and instructed. Cohankus Mfg. Co. v. Rogers' Guardian, 29 Ky. L. R. 747, 96 S. W. 437. Boy of nineteen was sent to dip acid out of a crock without warning or instruction as to character of liquid of which he was ignorant. The dipper slipped and acid splashed into his eyes. Held, evidence warranted a finding of negligence on part of master. Hodde v. Attleboro Mfg. Co. [Mass.] 79 N. E. 252. Person using dynamite for blasting and like purposes is under duty of warning and instructing inexperienced employes of its character and the proper method of handling it with safety. Pinney v. King [Minn.] 107 N. W. 1127. Employer could be found negligent in directing inexperienced employe to assist in putting covers on rollers of ironing mangle, without instructing or warning her. Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340. Master held negligent in failing to instruct young and inexperienced operator of brick pressing machine. Hagerty v. St. Paul Brick Co. [Minn.] 108 N. W. 278. Evidence sufficient to warrant finding of negligence of master where young employe had not been instructed as to danger from tram cars, used to haul slabs out of mill, running back into the mill. Johnson v. Smith Lumber Co. [Minn.] 109 N. W. 810. Injury to operator of mangle in laundry held result of failure of master to properly instruct her in the operation of the machine. Ludwig v. Spicer [Minn.] 109 N. W. 832. Evidence sufficient to sustain charge of negligence on the part of the master in not warning an inexperienced employe of the danger, or instructing him with reference to the adjustment of the table gauge, condition of revolving knives, and use of guard for the knives of a jointing machine. Frazier v. Lloyd Mfg. Co. [Minn.] 108 N. W. 819. Hospital corporation owes inexperienced nurse duty to inform her when she is assigned to care of contagious case. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. Instruction on duty to warn

gers of their employment of which they have no knowledge or appreciation.[17] It is also his duty to warn or instruct his employes as to special or unusual risks arising during the course of the employment,[18] and as to hidden or latent dangers, known, or which ought to be known, to the master [19] and unknown to the servant.[20]

operator as to difference between old and new machine, at which he was put to work, approved. Hicks v. Naomi Falls Mfg. Co. [N. C.] 55 S. E. 411. Foreman of planing mill held negligent in failing to warn inexperienced employe of dangers of removing sliver from near knives when the machine was in motion. Rice v. Dewberry [Tex. Civ. App.] 95 S. W. 1090. An inexperienced adult, such as an inexperienced electric lineman, may be entitled to instruction as well as a child. Sias v. Consolidated Lighting Co. [Vt.] 64 A. 1104. Boy of seventeen was told to do anything he saw to be done, and was injured while coupling cars, no instructions having been given him. Master held negligent. Stark v. Port Blakely Mill Co. [Wash.] 87 P. 339. If one method of doing the work at which a servant is set is dangerous, an inexperienced servant should be warned. Operation of laundry mangle. Greenan v. Eggeling, 30 Pa. Super. Ct. 253.

17. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. It is the duty of the master to warn and instruct a young or inexperienced employe concerning dangers not obvious to ordinary inspection to which the nature of the work to be done will expose him. Vohs v. Shorthill & Co., 130 Iowa, 538, 107 N. W. 417.

18. Master liable where section hand was killed by train when removing hand car from track under foreman's orders, no warning having been given. St. Louis, etc., R. Co. v. Mathis, 76 Ark. 184, 91 S. W. 763. Evidence sufficient to show that it was duty of foreman of gang employed in loading cars with cinders, in track construction, to warn employes of the approach of cars, and also to show that he failed to give a warning as a result of which an employe was injured. Chicago, etc., R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936. Telephone company foreman held negligent in failing to inform lineman that current was turned on certain wires at four o'clock instead of five, as had been the previous custom. East Tennessee Tel. Co. v. Carmine, 29 Ky. L. R. 479, 93 S. W. 933. Evidence sufficient to show negligence of conductor in sending cars down a track where a car checker was at work without any warning, such as it was customary to give. Meadowcroft v. New York, etc., R. Co. [Mass.] 79 N. E. 266. Superintendent of track gang negligent in failing to give employes warning of approach of train. Dunphy v. Boston El. R. Co. [Mass.] 78 N. E. 479. Evidence sufficient to warrant finding that master was negligent in failing to provide means to warn employes of opening in floor, or to provide for barriers to place before it when opening was used. Falardeau v. Hoar [Mass.] 78 N. E. 456. Plaintiff at work on coal dock could recover for injury caused by engineer backing train against him, if engineer failed to give reasonable warning. Lanning v. Chicago Great Western R. Co., 196 Mo. 647, 94 S. W. 491. Duty of foreman, before starting machinery, to see that employes were not in danger, and to give warning. Carlson v. United Engineering Co., 113 App. Div. 371, 98 N. Y. S. 1036. If the place of work became dangerous by reason of perils not arising from the particular work, it is the duty of the master to give such warning as will enable the servant in the exercise of reasonable care to avoid or guard against such additional dngers. Johnson v. Terry & Tench Co., 113 App. Div. 762, 99 N. Y. S. 375. Workman was thrown from hanging scaffold attached to elevated road by a collision between a truck and the scaffold, and it appeared that no watchman had been provided to give warning of vehicles. Held, master liable. Sheridan v. Interborough Rapid Transit Co., 100 N. Y. S. 821. Where a servant in the prosecution of the work of his employer is obliged to take a position which is not necessarily dangerous, but may be rendered dangerous by the employer putting in motion a force or machine, it is the duty of the employer to notify the servant of his intention in time for him to avoid the consequences, and this must be done each and every time such machine or force against which the servant cannot protect himself is put in motion. Haun v. Cleveland, etc., R. Co., 7 Ohio C. C. (N. S.) 379. Failure to give statutory signals at a railroad crossing is negligence as to a watchman employed at the crossing. Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140. If a railroad watchman was seen at a crossing by an engineer, failure of the engineer to see whether or not the watchman would get out of the way or to give any warning would constitute negligence. Id. Evidence sufficient to warrant finding that foreman failed to warn a railroad employe of cars which struck cars on which he was at work. Galveston, etc., R. Co. v. Burns [Tex. Civ. App.] 15 Tex. Ct. Rep. 72, 91 S. W. 618.

19. The law imputes a knowledge of dangers the existence of which ordinary care would disclose. Vohs v. Shorthill & Co., 130 Iowa, 538, 107 N. W. 417. If there are latent defects in machinery or dangers incident to the employment unknown to the servant, of which the master knows or ought to know, he must give the servant warning in respect thereto. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Failure to warn switchman of danger from switch, located so close to track that handle would strike steps of passing cars, held negligence. Chicago, etc., R. Co. v. Riley [C. C. A.] 145 F. 137.

20. Jackson Knife & Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242. It is the master's duty to inform the servant of latent or extraordinary dangers or risks which are known to the master but unknown to the servant. Applied where miner was injured by explosion of charge of powder of which he had no knowledge. Bone v. Ophir Silver Min. Co. [Cal.] 86 P. 685. Where employe working on waste in an ore chute did not know, and could not with ordinary care ascertain that the waste was liable to go down, and the master knew or ought to

Proper instruction should be given an employe who is sent to perform services outside the regular scope of the duties for which he was employed.[21]

No instruction or warning is necessary as to incidental risks, assumed by the contract of employment,[22] nor as to obvious dangers,[23] fully known to the employe[24] or as well known to him as to his employer,[25] or which ought to have been known to him by reason of his experience and capacity,[26] or by the exercise of ordi-

have known, it was his duty to warn the employe. Low Moor Iron Co. v. La Bianca's Adm'r [Va.] 55 S. E. 532.

21. Finding of negligence warranted where employe was called from his regular work to assist in unloading timbers without being warned as to danger from creosote getting into his eyes. Illinois Cent. R. Co. v. Gill [Miss.] 40 So. 865. Servant was killed while assisting in repair of a car in railroad yards, and evidence showed that he was a repair man and also was sent out at times with a wrecking crew. Held, jury were improperly allowed to find that he had been ordered to do work outside the scope of his employment without instructions or warning. McClure v. Detroit Southern R. Co. [Mich.] 13 Det. Leg. N. 846, 109 N. W. 847.

22. There would be a duty to warn railroad employes of the presence of a mail crane only if it was unnecessarily close to the track. Denver, etc., R. Co. v. Burchard [Colo.] 86 P. 749.

23. Special warning to brakeman eighteen years old not required when he attempted to stop cars on a side track, to prevent a collision with other cars, the danger being obvious. King v. Woodstock Iron Co., 143 Ala. 632, 42 So. 27. The duty to warn employe directed to assist in chipping steel rolls of danger from flying bits of steel, that danger being obvious. Cripple Creek Sampling & Ore Co. v. Souza [Colo.] 86 P. 1005. No duty to warn employe in repair shop of railway of danger of allowing heavy wheels to start on a track and to catch him between them and a wall of the shop, when the danger was obvious and an injury caused in such manner was not reasonably to be anticipated. Duffy v. New York, etc., R. Co. [Mass.] 77 N. E. 1031. No duty to warn girl of sixteen as to danger from open, moving, visible cogwheels near which she worked. Stevens v. Gair, 109 App. Div. 621, 96 N. Y. S. 303. Dangers of which it is duty of master to give warning to employe are not those that are subjects of common knowledge or apparent to ordinary observation. Eisenberg v. Fraim [Pa.] 64 A. 793. While it is not the master's duty to warn concerning obvious dangers, the servant may assume that appliances are reasonably safe. McCarley v. Glenn-Lowry Mfg. Co. [S. C.] 56 S. E. 1.

24. No duty to warn employe engaged in loading vessel when he already knew all that anyone could tell him about dangers to be avoided. Bamford v. Hammond & Co., 191 Mass. 479, 78 N. E. 115. Where rules required miners to leave their places of work before twelve o'clock noon, and provided that blasts would be discharged after twelve o'clock and this was known to an employe, there was no duty to warn him. El Paso Gold Min. Co. v. Ewing [Colo.] 86 P. 119.

25. No warning required concerning a chisel the defects of which were as well known to plaintiff as to defendant. Banks v. Schofield's Sons Co., 126 Ga. 667, 55 S. E. 939. Where operator of mangle showed that she knew as much about the danger of operating it in a certain way as the master could have told her, failure to instruct her in regard thereto was not negligence. Lynch v. Shanley Co., 112 App. Div. 305, 98 N. Y. S. 406. Servant was told to put a new belt on a machine, and in doing so a rivet in the belt broke, and the end of the belt struck him in the eye. Held, no duty to warn, as the danger was as well known to employe as to master. Radley v. Shopiro, 99 N. Y. S. 1077.

26. Minor employe who says he understands the duties of his position, and who has reached years of discretion, need not be given instructions. King v. Woodstock Iron Co., 143 Ala. 632, 42 So. 27. No duty to warn experienced machinist's helper of danger from flying steel chips when steel is being cut with a chisel. Atchison, etc., R. Co. v. Weikal [Kan.] 84 P. 720. No duty to warn boy of seventeen who had worked on a cleaning machine several months of danger of cleaning an endless bicycle chain, the machine being a simple one. Lennon v. Goodrich [Mass.] 78 N. E. 421. Employer of painters held not negligent in failing to warn them not to use an extension ladder as staging, where one who was injured had had twenty years experience, and three of them used it at once. Jacobson v. Favor [Mass.] 78 N. E. 763. Intelligent boy of seventeen had worked on slitting machine three weeks. Machine was simple and easily understood. The belt frequently came off, and when replaced had to be covered by a box. Boy was injured by getting his hand in rollers when replacing box. Held, no breach of duty by failure to instruct. Hess v. Escanaba Woodenware Co. [Mich.] 13 Det. Leg. N. 857, 109 N. W. 1058. A master is not required to give warning of danger apparent and readily comprehensible to a servant of ordinary intelligence and years of discretion. No warning necessary that frozen crust of sand pile was liable to fall when undermined. Livingstone v. Saginaw Plate Glass Co. [Mich.] 13 Det. Leg. N. 873, 109 N. W. 431. Danger of putting one's hands into back rollers of a planer held so obvious to a man of plaintiff's age and experience that failure to warn him was not negligence. Smith v. Forrester-Nace Box Co., 193 Mo. 715, 92 S. W. 394. A servant who from the length or character of previous service or experience may be presumed to know the ordinary hazards attending the proper conduct of a certain business is not entitled, as an absolute right, to the same or similar notice of dangers incident to the employment as if he was ignorant or inexperienced, and this rule applies to infants as well as adults. Central Granaries Co. v. Ault [Neb.] 106 N. W. 418.

nary care.[27] It is not negligence to fail to give warning of a danger not reasonably to be apprehended.[28]

Whether warnings or instruction should have been given in a particular instance,[29] and whether warnings or instructions given were sufficient,[30] are usually

27. No duty to instruct nineteen-year-old driver of ore car how to get on the car without slipping on account of the mud. Richards v. Sloss-Sheffield Steel & Iron Co. [Ala.] 41 So. 288. Railway employe in freight yards who has had ample opportunity to observe location of culvert under track cannot allege negligence of the master in failing to warn him of the culvert. Price v. Central of Georgia R. Co., 124 Ga. 899, 53 S. E. 455. Foreman's failure to warn common laborer in sawmill of danger of putting his hand through a slit in a table in which a saw was operating held not a ground of recovery. Mathis v. Magnolia Mfg. Co., 140 N. C. 530, 53 S. E. 349.

28. Sommers v. Standard Min. Co. [Mich.] 13 Det. Leg. N. 697, 109 N. W. 30. No duty to warn employs that a knife might fly off the revolving shaft of a machine, when such an accident had not occurred during a long use of the machine. Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. S. 7. No duty to warn servant who went to work on beams sixteen feet above floor that he might be caught on collar of revolving shaft. Martin v. Niles-Bement-Pond Co., 214 Pa. 616, 64 A. 370. Employe of a city went into a culvert with lighted torch to look for leaks and was injured by explosion of certain sand which had been poured into it from a factory without knowledge of city authorities. City not liable. Dalton v. Towanda Borough [Pa.] 64 A. 547. Where employe was injured by an explosion of varnish, which was eight feet from a stove, held the liability of such accident was not such that the master should have anticipated and warned against it. Siegel v. United Elec. Heating Co., 143 Mich. 484, 13 Det. Leg. N. 45, 106 N. W. 1127.

29. Whether master was negligent held a question for jury: Whether brakeman's superior was negligent in failing to signal engineer to stop when he saw brakeman between cars. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Whether duties of boy of sixteen in rolling mill were such as to require warning and instruction held for jury. Decatur Car Wheel & Mfg. Co. v. Terry [Ala.] 41 So. 839. Where there was proof that a polishing wheel was defective and that the operator had not been warned of the danger. Sheehan v. Hammond, 2 Cal. App. 371, 84 P. 340. Unskilled and unexperienced workman was told to assist in unlacing belt which was off the pulleys but hung on revolving shaft. Belt caught on set screw, wound up, and injured him. Held, whether failure to warn and instruct him was negligence was for jury; also question whether projecting screw was defect Remington & Sherman Co. v. Blazosseck [C. C. A.] 146 F. 363. Whether master was negligent in failing to warn against dangers from pieces of flying steel when hard steel is to be cut was properly submitted to jury. Vohs v. Shorthill & Co., 130 Iowa, 538, 107 N. W. 417. Whether failure to warn and instruct employe properly as to manner of feeding suet into chopping machine was negligence. Byrne v. Learnard, 191 Mass. 269, 77 N. E. 316. Whether boy of fourteen should have been warned of danger of putting his hands between rolls of sanding machine. Kolodziejski v. Seestadt, 143 Mich. 38, 12 Det. Leg. N. 918, 106 N. W. 557. Where negligence charged was premature discharge of blast, without warning plaintiff, who was injured by the explosion. Hjelm v. Western Granite Contracting Co. [Minn.] 108 N. W. 803. Whether electric company was negligent in failing to warn lineman of current of electricity in light wires over which he was to string other wires. Snyer v. New York & N. J. Tel. Co. [N. J. Err. & App.] 64 A. 122. Whether nurse should have been warned when she was assigned to take care of contagious case by hospital authorities. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. Where plaintiff was struck by a train while at work changing tracks, whether master was negligent in failing to provide a watchman to give warning was for jury. Johnson v. Terry & Tench Co., 113 App. Div. 762, 99 N. Y. S. 375. Whether master was negligent in failing to warn boy of danger from rollers of paper making machine. Makin v. Pettibone Cataract Paper Co., 111 App. Div. 726, 97 N. Y. S. 894. Whether failure to warn employe engaged in removing snow from elevated road of danger from shock from third rail was negligence. Smith v. Manhattan R. Co., 112 App. Div. 202, 98 N. Y. S. 1. Whether failure to warn employe working on elevated, of danger from wire on which insulation was broken was negligence. Carey v. Manhattan R. Co., 101 N. Y. S. 631. Whether instructions should have been given a boy of seventeen employed on machine three weeks. Jackson Knife & Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242. Whether master was negligent in putting inexperienced employe at once on machine having unguarded cogs without warning. Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220. Where servant was put to work on exhaust pipe, and engineer was not notified, and servant was scalded by steam forced through, the engineer having started the engine. Smith v. Buffalo Oil Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 682, 91 S. W. 383. A blast was fired in a room, where an inexperienced miner was employed, during his absence. Whether it was foreman's duty to warn the servant of the changed conditions and the danger from loosened coal, after his return, was held a question for the jury. Pocahontas Collieries Co. v. Williams, 105 Va. 708, 54 S. E. 868. Where employs was injured by sudden starting of logging engine, whether the master had made sufficient provision for warning employes. Conins v. Olympia Logging Co., 42 Wash. 53, 84 P. 407. Employe feeding brass sheets into a roiling machine was injured by getting glove caught on a sliver of a sheet of brass. Whether the master was negligent in failing to warn employe was for jury. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077.

30. Evidence held to show operator of

questions of fact to be determined by reference to the character of the risk or danger in issue, and the age, capacity and experience of the employe concerned.[31]

(§ 3) *E. Fellow-servants.*[32]—The master is charged with the duty of exercising ordinary care to employ and retain in his service only such servants as are reasonably competent to perform their intended duties.[33] He is accordingly liable for injuries to a servant resulting approximately from the incompetency of a fellow-servant,[34] if he had actual or implied knowledge of such incompetency[35] and failed to warn the injured employe.[36] Notice to a foremen who has power to discharge for incompetency is notice to the master.[37] If the master has provided reasonably competent servants to perform certain duties, he is not liable for the selection of an incompetent servant by one not a vice-principal.[38]

saw was properly warned. Davis v. Queen City Furniture Mfg. Co., 116 La. 1070, 41 So. 318.

31. Whether it is incumbent on a master to warn his servant of the hazards attending the business in which he is engaged must be determined from the facts and circumstances shown to exist. Central Granaries Co. v. Ault [Neb.] 106 N. W. 418. Warning to beware of knives and slitters in slitting machine was not sufficient to warn girl of fifteen of danger from set screws which could not be seen when machine was moving. Van de Bogart v. Marinette & Menominee Paper Co., 127 Wis. 104, 106 N. W. 805. Instruction given operator of elevator held sufficient performance of master's duty. Equitable Life Assur. Soc. of the U. S. v. Tolbert [C. C. A.] 145 F. 338.

32. See 6 C. L. 553.

33. Master owes same degree of care as to original selection and as to retention of employes. Staunton Coal Co. v. Bub, 119 Ill. App. 278.

Incompetency means want of ability suitable to the task, either as regards natural qualities or experience, or deficiency of disposition to use one's abilities and experience properly. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. Foreman, in service two years, had had general experience with machinery and with moving it, but had never before moved a machine like the one in question. No accidents had previously occurred while work was being done under his direction. Held, evidence did not show him to be incompetent. Id. Evidence held sufficient to prove incompetency and habitual carelessness of an employe engaged in raising hoisting hooks. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. Whether engineer and brakemen, who caused conductor's death, were incompetent, held a question for jury. Louisville & N. R. Co. v. Wyatt's Adm'r, 29 Ky. L. R. 437, 93 S. W. 601. Where fellow-servants pushed a car against a ladder on which plaintiff was standing notwithstanding warning cries, which, being in English, they could not understand, the master was held not negligent, since an accident from their inability to understand English was not reasonably to have been foreseen. Date v. New York Glucose Co., 100 N. Y. S. 171. An allegation of **negligence in employing an incompetent servant** is not sustained by proof of the one negligent act of the servant which resulted in the injury complained of. The Elton [C. C. A.] 142 F. 367. Whether master used ordinary care in selecting servant to haul lumber on a truck, held a question for the jury, where a piece of lumber was dropped down upon plaintiff. Ingram v. Hilton & Dodge Lumber Co., 125 Ga. 658, 54 S. E. 648. Whether company was negligent in putting inexperienced man in charge of train as engineer, held a question for jury. Russ v. Central Vermont R. Co., 78 Vt. 424, 63 A. 134.

34. If person in charge of blasting, who directed plaintiff to clean out a hole in which there remained an unexploded charge, was incompetent and unfit for such work, and master was negligent in employing him, plaintiff could recover. Ramage Paper Co. v. Bulduzzi [C. C. A.] 147 F. 151. Evidence insufficient to show that lack of strength of a fellow-servant of plaintiff, who helped him move a wheel, contributed to produce an injury caused by the falling of the wheel. Beardsley v. Murray Iron Works Co., 129 Iowa, 675, 106 N. W. 180. Officers and agents of ship company were intoxicated and operated loaded apparatus recklessly and without regard to employes in the hold. Company was liable for an injury caused by lowering freight at too great a speed, whereby employe's leg was crushed, he having no warning and being engaged in performing his duties. Melse v. Alaska Commercial Co., 42 Wash. 356, 84 P. 1127.

35. Evidence insufficient to charge master with actual or implied knowledge of alleged incompetency of a fellow-servant, who struck plaintiff. Andrews v. Reiners, 111 App. Div. 435, 97 N. Y. S. 674. Railroad company's rules made it the duty of the yardmaster to call out crews for trains and to see that only competent brakemen were put on. A complaint by a conductor to the yardmaster of the incompetency of brakemen was notice to the company, and a promise by the yardmaster to call out competent men for the next trip, relied on by the conductor, relieved him from the assumption of the risk. Louisville & N. R. Co. v. Wyatt's Adm'r, 29 Ky. L. R. 437, 93 S. W. 601.

36. Where employers were chargeable with knowledge that blacksmith's helper had been drinking to excess and that when in that condition was likely to be unsafe as a helper, it was their duty to so inform the blacksmith. Curtis v. Laconia Car Co. Works, 73 N. H. 516, 63 A. 400.

37. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048.

38. Master not liable where, in foreman's absence, an incompetent oarsman was substituted to row plaintiff from his place of

When employes, as a condition of accepting employment, insist upon the employer's yielding to them and to the labor unions to which they belong the right to select workmen for a particular piece of work and to superintend the performance thereof, the employer is not liable for injuries resulting from the incompetency or negligent acts of workmen so employed.[39]

The master is not liable for an injury inflicted upon one of his employes by the tortious act of another outside the course of his employment,[40] and this it true though the co-employes are not fellow-servants.[41] It is held in Kentucky that an employe can recover for injuries caused by the act of a superior only upon proof that such superior was guilty of gross negligence.[42] It is held in Washington that when a foreman or superintendent, without the knowledge of other workmen, negligently sets in motion an agency fraught with danger, he renders the master responsible for the results of such negligence.[43] A Tennessee statute compels mine owners to employ certificated mine foremen and penalizes a failure to do so, but the control of the mine foreman in respect to the duties set out in the act is taken from the mine owner and the foreman's faithful discharge of his duties under the act secured by the imposition of penalties. It is held that a mine owner is not liable for the negligence of such a mine foreman in the discharge of duties required by the act to be performed.[44]

A master who has used due care in the selection and retention of employes is not, at common law,[45] liable to servants for injuries resulting from the negligence of fellow-servants,[46] such negligence being an assumed risk.[47]

work, a competent man having been furnished by the master. Chrismer v. Bell Tel. Co., 194 Mo. 189, 92 S. W. 378.

39. Farmer v. Kearney, 115 La. 722, 39 So. 967.

40. Master not liable where one employe threw oil on a kiln fire burning another who was on the side of the kiln. Younkin v. Rocheford [Neb.] 107 N. W. 853. An employe was injured, but foreman refused to allow him to quit, and promised to give him lighter work. The employe continued, and was given heavier work and was injured further. Held the master was not liable for the additional injury, since the foreman had acted beyond the scope of his authority. Hasty v. Cincinnati, etc., R. Co. [Ky.] 97 S. W. 433.

41. Younkin v. Rocheford [Neb.] 107 N. W. 853.

42. Mere fact that train stopped with a jerk, injuring a brakeman in the caboose, held not proof of gross negligence. Groves v. Louisville & N. R. Co., 29 Ky. L. R. 725, 96 S. W. 439.

43. To loosen a hub from the shaft of a propeller it was heated, and the superintendent then struck it with a sledge and hot oil spurted out and burned an employe assisting in the work. The act of the superintendent was held one for which the master was responsible. Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592.

44. Construing Acts 1903, c. 237. Sale Creek Coal & Coke Co. v. Priddy [Tenn.] 96 S. W. 610.

45. For modification of common-law doctrine. See post, Fellow-servant statutes.

46. Shuster v. Philadelphia, etc., R. Co. [Del.] 62 A. 689; Gawne Co. v. Fry, 7 Ohio C. C. (N. S.) 317; Groves v. Louisville & N. R. Co., 29 Ky. L. R. 1291, 97 S. W. 340. If master has exercised ordinary care in the selection of employes, he is not liable to an employe for injuries caused by negligence of fellow-servant. Louisville & N. R. Co. v. Wyatt's Adm'r, 29 Ky. L. R. 437, 93 S. W. 601. Fall of elevator held to have been caused solely by negligent act of fellow-servant. Latting v. Owasso Mfg. Co. [C. C. A.] 148 F. 369. Longshoreman was killed by falling of hatch cover which had been improperly placed by fellow employes. No recovery. McDonnell v. Oceanic Steam Nav. Co. [C. C. A.] 143 F. 480. No liability for acts of fellow-servant in the absence of negligence in employing one who is incompetent. Smith v. Lehigh Valley R. Co., 141 F. 192. Master not liable where grating in floor was removed by fellow-servant of one who fell through. Horrigan v. Boston El. R. Co., 190 Mass. 577, 77 N. E. 634. No recovery for injury caused by falling of angle iron during building construction through negligence of fellow-servants. Marshall v. Norcross, 191 Mass. 568, 77 N. E. 1151. Servant employed to take lumber from rollers in rear of gang saw in a saw mill was struck by a board on the rollers which was pushed against him solely by reason of the gang sawyer's failure to stop the cart. Held no recovery, the negligence which caused the injury being that of fellow-servant. Vik v. Red Cliff Lumber Co. [Minn.] 108 N. W. 469. Where employe was engaged in clearing away broken ice under an ice chute used to load ice on cars, and was injured by block of ice pushed down upon him by a fellow-servant, there was no liability of the master at common law. Beleal v. Northern Pac. R. Co. [N. D.] 108 N. W. 33. Master not liable for death caused by falling of iron negligently piled by fellow-servant of decedent. Barsa-

Negligence of a fellow-servant will not, however, defeat a recovery, unless it was the sole cause of the injury.[48] If negligence of the master concurred with negligence of a fellow-servant in producing the injury, so that the injury would not have resulted had the master exercised due care, he is liable.[49]

lou v. Pierce, 109 App. Div. 506, 96 N. Y. S. 538. Where death of engineer in collision was caused by violation of company's rules by fellow-servants of the engineer, the company was not liable. Spangler v. Baltimore & O. R. Co., 213 Pa. 320, 62 A. 919. When working portion of mine was properly ventilated, in accordance with the Federal statute, and danger signals put up to keep employes out of parts not ventilated, an explosion caused by a fellow-servant going beyond the "dead line" with a lamp would not make the mine operator liable. Central Coal & Coke Co. v. Gregory [Ark.] 93 S. W. 56. The civil law doctrine that a master, without fault, is liable for negligence of a fellow-servant is not recognized by the Civil Code or jurisprudence of Louisiana. By Rev. Civ. Code, art. 2320, masters are only responsible when they might have prevented the act and have not done it. Weaver v. Goulden Logging Co., 116 La. 468, 40 So. 798. In departing from the letter of this restriction as not applicable to corporations, the supreme court has adopted the common-law fellow-servant doctrine in a modified form. Id.

47. The occasional negligence of a fellow-servant is one of the ordinary risks assumed by the contract of employment. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. The servant assumes the risk of the negligence of his superior fellow-servant in the direction of the men and of the work to the same extent that he assumes the risk of negligence of the fellow laborer performing work at his side. American Bridge Co. v. Seeds [C. C. A.] 144 F. 605.

48. The Hamilton [C. C. A.] 146 F. 724. In order that a master may claim exemption from liability for injuries to a servant on the ground that the negligent act was that of a fellow-servant the master must have exercised reasonable care to prevent injury. Schwarzschild & Sulzberger Co. v. Weeks, 72 Kan. 190, 83 P. 406.

49. Choctaw, etc., R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; The Luckenbach, 144 F. 980; Kraft v. Neunkirchen, 119 Ill. App. 369; Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460; Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621; Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48. Master liable where negligence of vice-principal concurred with that of fellow-servants to produce injury. Archer Foster Const. Co. v. Vaughn [Ark.] 94 S. W. 717; New Ohio Washed Coal Co. v. Hindman, 119 Ill. App. 287; Chicago, etc., R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936. Where negligence of the master is made to appear, he is not relieved from liability by reason of the fact that negligence of a fellow-servant cooperated to produce the injury complained of. Gordon v. Chicago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177. Negligence of fellow-servants in failing to observe a rule to keep floors free from loose articles will not excuse the master for an injury caused by an article falling through an opening in the floor negligently left unguarded by the master. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Nor would fact that fellow-servants negligently loosened such article and caused it to fall excuse the master. Id. Where master negligently failed to take measures to protect, by proper rules, workmen employed in killing pens, the fact that negligence of a fellow-servant was the immediate cause of an injury did not relieve the master. Schwarzschild & Sulzberger Co. v. Weeks, 72 Kan. 190, 83 P. 406. If injury is produced by combined negligence of a fellow-servant and of the master in failing to provide a reasonably safe place or appliances, the master is liable. Johnson v. Christie, 117 La. 911, 42 So. 421. In case of fellow-servants, the master is liable when his own negligence contributed to the injury, as where an employe in a sawmill carelessly pitched a shovel, which, rebounding, struck and released an unsafe wooden latch holding the lever which controlled the operation of a carriage. Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475. Where evidence warranted a finding that defective derrick was proximate cause of injury, whether negligence of fellow-servant contributed to produce injury was immaterial. Butler v. New England Structural Co., 191 Mass. 397, 77 N. E. 764. Where derailment was caused by defective rail, the fact that motorman, conductor's fellow-servant, ran the car at an excessive speed, conductor not being responsible for this, would not relieve the company from liability for conductor's injuries. Moore v. St. Louis Transit Co., 193 Mo. 411, 91 S. W. 1060. Where railroad company was negligent in not promulgating certain rules for the government of crews of trains passing each other, negligence of servants in not heeding certain signals did not relieve the master. Ryan v. Delaware & Hudson Co., 99 N. Y. S. 794. If master supplied unsafe place, negligence of fellow-servant concurring to produce injury was no defense. Cadigan v. Glens Falls Gas & Elec. Light Co., 112 App. Div. 751, 98 N. Y. S. 954. Where foreman negligently failed to inform an inexperienced miner that a blast had been fired during his absence, rendering the room dangerous, the master was liable for an injury caused by falling coal, though the act of a fellow-servant was the immediate cause of the fall of the coal. Pocabontas Collieries Co. v. Williams, 105 Va. 708, 54 S. E. 868. Where negligence of the master in failing to make the place of work secure by providing a system of signals to announce the starting of a logging engine contributed to produce an employe's injury, concurring negligence of a fellow-servant was no defense. Conine v. Olympia Logging Co., 42 Wash. 50, 84 P. 407. Where master negligently maintained exposed cog wheels, negligence of a fellow-servant in suddenly starting the machine, concurring with the master's negligence to produce injury, did not relieve the master from liability. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323. The task

Determination of relation. Common-law rules.[50]—What facts are essential to the existence of the fellow-servant relation between two or more employes is a question of law; the existence of such facts in a particular case is a question of fact.[51]

It is essential to the existence of the fellow-servant relation that the employes have a common master.[52] It is commonly held that employes of a common master, working together in a common enterprise,[53] or performing duties tending to the

of moving a heavy iron wheel is not of such peculiar danger that the master, having directed three experienced employes to perform it, is required to supervise the work and guard against the negligence of one of them. Whitley v. Evans, 30 Pa. Super. Ct. 41.

50. See 6 C. L. 555.

51. While in certain cases it may be a question of law and entirely for the court to determine as to whether the negligent employe was the superior of the injured one, the rule is still in force in Ohio that the question whether one servant is the superior of another should be determined by the evidence presented in each case. Lake Shore, etc., R. Co. v. Burtscher, 8 Ohio C. C. (N. S.) 137. Whether employe at work in trench was fellow-servant of foreman who directed him to tamp back the earth in the trench. Johnson v. St. Paul Gas Light Co. [Minn.] 108 N. W. 816. In Illinois the existence of the fellow-servant relation is a question of fact, except where the facts are conceded and show beyond question that the relation does or does not exist. Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190. Jury should be instructed to find if relation existed; they should not be told to find whether two employes so co-operated or associated that they exercised an influence over each other promotive of caution. Id.

52. Servants of an independent contractor are not fellow-servants of the general employer's servants, though all are engaged in common employment. Lookout Mountain Iron Co. v. Lea, 144 Ala. 169, 39 So. 1017. Subordinate officers and crew of vessel held not fellow-servants of master who represented owner of vessel. The Hamilton [C. C. A.] 146 F. 724. Owner of hod elevator furnished it, in charge of his own engineer, to a building contractor for an agreed price. The engineer was not a fellow-servant of a servant of the contractor in charge of the building. McDonough v. Pelham Hod Elevating Co., 111 App. Div. 585, 98 N. Y. S. 90. A switchman of a company owning yards was killed by the negligence of servants of another company, engaged in switching. The deceased and the negligent men were not fellow-servants, since they were employed by different companies, even though the yardmaster directed the place where cars were to be placed. Pittsburgh, etc., R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128. Plaintiff, employed by owner of building, and another, employed by a contractor engaged in doing different work on same building, were not fellow-servants. Fisher v. Minegaux [N. J. Law] 63 A. 902. Employe hired by station agent to work about the depot was not the fellow-servant of a porter of a passenger train hired by others. Texas & P. R. Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 742, 92 S. W. 411. The employment of a physician by a railroad company to care for injured employes and passengers does not make the physician and operatives of a train fellow-servants when the physician was going to attend a patient of his own. Tingley v. Long Island R. Co., 109 App. Div. 793, 96 N. Y. S. 865. An **apprentice** is a fellow-servant of employes with whom he is engaged in a common employment, though he receives no pecuniary compensation for his services. "Student brakeman" held fellow-servant of other employes operating freight train. Weisser v. Southern Pac. R. Co., 148 Cal. 426, 83 P. 439.

53. Locomotive wiper and mechanic were fellow-servants while assisting each other in making repairs on an engine. Schneider v. Missouri Pac. R. Co., 117 Mo. App. 129, 94 S. W. 730. Employes who were fellow-servants in their ordinary work continued to be such when going to and from their work together. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158. Foreman and member of repair crew in railroad shops held fellow-servants where foreman ordered car raised without placing more supports under it and ordered employe to do work under the car, which fell upon him. McClure v. Detroit Southern R. Co. [Mich.] 13 Det. Leg. N. 846, 109 N. W. 847. Gang sawyer and man engaged in taking lumber from rollers back of the saw in a saw mill held fellow-servants. Vik v. Red Cliff Lumber Co. [Minn.] 108 N. W. 469. Servant engaged in excavating trench and foreman directing work and actively engaging therein were fellow-servants engaged in common employment. Rocco v. Gillespie Co. [N. J. Err. & App.] 64 A. 117. Lineman, foreman, and driver of repair wagon, were upon wagon while repairs were being made on wires. Foreman told driver to turn wagon, and driver turned too short, overturning wagon and injuring lineman. Held all three were fellow-servants. Hayes v. Jersey City, etc., R. Co. [N. J. Err. & App.] 64 A. 119. Concrete mixer held fellow-servant of carpenters and employes engaged in sweeping rubbish into basement, all being engaged in common work of construction of building. Armour & Co. v. Dumas [Tex. Civ. App.] 16 Tex. Ct. Rep. 47, 95 S. W. 710. Plaintiff, with others, was trying to move a rock with crow bars when the rock, or a bar, slipped, and plaintiff's bar was pushed against his leg, injuring him. Held master not liable, since injury resulted from act of fellow-servant. Pitts v. Centers [Ky.] 98 S. W. 300. Servant engaged in hauling and unloading rock allowed one to roll down the hill and strike plaintiff who was engaged in taking rock so rolled down and placing them in position. The two were fellow-servants. Martin v. Mason-Hoge Co., 28 Ky. L. R. 1333, 91 S. W. 1146. Where bystander was called in by station agent to assist in moving cars during a fire in the station, the person so called became a fellow- servant of a section hand engaged in the same work, and for the latter's negli-

accomplishment of the same general end or purpose,[54] are fellow-servants, though not at the time in question engaged in the same operation or on the same particular piece of work.[55]

The rule most frequently applied is that it is not the rank of an employe, nor the authority he exercises over the employes, but the nature of the duty or service he performs, which determines whether he is a vice-principal or a fellow-servant.[56]

gence, the former could not recover from the company. Jackson v. Southern R. Co., 73 S. C. 557, 54 S. E. 231. Servant discharging blasts held fellow-servant of one who hauled away debris; former's negligence did not render employer liable to latter. McMahon v. Bangs [Del.] 62 A. 1098. Where unloading of vessel was under control and direction of a master stevedore employed by the consignee of the cargo, and winchmen of the vessel worked with employes of the stevedore, winchmen and stevedores were fellow-servants, being engaged in common employment under same direction and control. The Elton [C. C. A.] 142 F. 367. Z. was one of a gang of laborers employed by the railroad company to remove in wheelbarrows a large pile of iron ore. The men were paid by the ton, and the pay of the boss was taken out of the proceeds of the work and pro rated among the men. The boss, after endeavoring for some time to loosen a mass of frozen ore, abandoned the effort, and a short time thereafter the mass fell and Z. was injured. Held that no liability on account of the accident attached to the company for which the work was being done. Zarembski v. Cincinnati, etc., R. Co., 7 Ohio C. C. (N. S.) 185.

54. Where employes are in the service and subject to the general control and direction of a common master, and the labor of such conduces to the accomplishment of the same general purpose for which they were employed, they are fellow-servants. Ingram v. Hilton & Dodge Lumber Co., 125 Ga. 685, 54 S. E. 648. Employe on construction cars, shovelling dirt between cars, which is pushed there by a plow attached by cable to an engine, held a fellow-servant of the engineer. No recovery for injury caused by sudden starting of engine when such shoveler was assisting in adjusting the plow. Bradford Const. Co. v. Heflin [Miss.] 42 So. 174.

55. Mate and floatman belonging to same crew, having same employer, and engaged in common object, though of different rank, and working on different lines to accomplish the undertaking are fellow-servants, and floatman cannot recover for injuries caused by mate's negligence. Smith v. Lehigh Valley R. Co., 141 F. 192. Employe in brick factory, struck by car which another employe had failed to block, held fellow-servant of latter. Blonski v. American Enameled Brick Co. [N. J. Law] 63 A. 909. Errand boy held fellow-servant of man employed to test firearms. Church v. Winchester Repeating Arms Co., 78 Conn. 720, 63 A. 510. Engineer in charge of engine and derrick used to hoist girders, and employe whose duty it is to place girders on pillars, held fellow-servants. Cooper's Adm'r v. Daniels Co., 29 Ky. L. R. 1172, 96 S. W. 1100. Member of railroad construction gang was injured by construction train running into him without warning. Foreman, who gave the order to move the cars, did not control the machinery by which cars were moved, nor did it appear that he knew of plaintiff's dangerous position. Held, failure to give warning was negligence of the engine man, who was plaintiff's fellow-servant. Burrman v. Grand Trunk Western R. Co., 143 Mich. 689, 13 Det. Leg. N. 111, 107 N. W. 709. Boatman employed to row employes to and from a barge used in connection with work of repairing a cable was not a vice-principal and his act of allowing an incompetent oarsman to row would not make master liable. Chrismer v. Bell Tel. Co., 194 Mo. 189, 92 S. W. 378. Servant was injured while riding on a car from one switch to another, being engaged in cleaning switches, and having given an employe's ticket to the conductor. Held he was a fellow-servant of negligent operator of car and could not recover for injuries received while on it. Shannon v. Union R. Co., 27 R. I. 475, 63 A. 488. Fact that work was done on Sunday, contrary to statute, did not charge master for negligent servant's act. Id. Motormen of two freight electric cars, used to haul beer, the two cars being operated on no fixed schedule but according to arrangements made between the motormen, were fellow-servants. Grimm v. Olympia Light & Power Co., 42 Wash. 119, 84 P. 635. Motorman and conductor of one street car are fellow-servants of motorman and conductor of another car on the same line where both cars are run on a regular schedule and pass each other by the use of the block light system; hence, failure of one motorman to turn on a light, and of his conductor to fail to see that it was on, is negligence of a fellow-servant for which a motorman on the other car cannot recover. Berg v. Seattle, etc., R. Co. [Wash.] 87 P. 34. Servant engaged in pouring vitriol from carboy held fellow-servant of superintendent of bleaching department. Bryan v. Gaffney Mfg. Co. [S. C.] 56 S. E. 9.

56. The true test is the character of the act from which injury results. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. The character of the duty entrusted to the negligent servant, and not whether he is a superior of the injured employe, or is in charge of a separate department, determines whether he is a vice-principal or fellow-servant. Ricker v. Central R. Co. [N. J. Err. & App.] 64 A. 1068. The question does not depend upon the rank or grade of the negligent servant but upon the nature or character of the act in the performance of which the injury was caused. Gereg v. Milwaukee Gas Light Co., 128 Wis. 35, 107 N. W. 289. A foreman under whom workmen are employed is a fellow-servant with the workmen when engaged in accomplishing with them the common task or object, but when discharging or assuming to discharge the duties toward the workmen which the law imposes on the

The duty of the master to use ordinary care for the safety of his employes being personal and nondelegable,[57] any person charged with, or engaged in the performance of, any part of that duty is a vice-principal for whose negligence in the performance of such duty the master is liable.[58] Thus, persons charged with, or engaged in the performance of, the duty of the master to provide a reasonably safe place of work,[59] or reasonably safe appliances,[60] or to direct the mode of work,[61] or to warn[62] or to properly instruct[63] employes, or to inspect[64] and keep in repair[65]

master, is a vice-principal. Christ v. Wichita Gas, Elec. Light & Power Co., 72 Kan. 135, 83 P. 199.

Contra: The rule that a servant is a vice-principal of his master only when executing the absolute and nonassignable duties of the master has not been established in Georgia. Moore v. King Mfg. Co., 124 Ga. 576, 53 S. E. 107.

57. Duty to provide a reasonably safe place is personal to the master and cannot be delegated. Gereg v. Milwaukee Gas Light Co., 128 Wis. 35, 107 N. W. 289; Johnson v. Terry & Tench Co., 113 App. Div. 762, 99 N. Y. S. 375. Duty to warn and instruct, where it exists, cannot be delegated. Vohs v. Shorthill & Co., 130 Iowa, 538, 107 N. W. 417. Acts 1881, p. 238, c. 170, § 8, requiring mine operators to hire competent mine bosses to look after safety of men does not relieve the master from liability for negligence of a boss. Smith v. Dayton Coal & Iron Co., 115 Tenn. 543, 92 S. W. 62.

58. Haun v. Cleveland, etc., R. Co., 7 Ohio C. C. (N. S.) 379. If the negligent servant is at the time discharging one of the personal duties of the master, he is a vice-principal. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Mine manager and examiner charged with certain duties for the protection of miners by Laws 1899, pp. 315, 317, §§ 16, 18, are vice-principals, and owner is liable for injuries caused by their failure to perform such duties. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902. Electric lineman went out with foreman to make repairs and foreman telephoned to have current turned off and told lineman " all right go ahead." Lineman received a shock and was killed. Held the foreman was a vice-principal, discharging a duty of the master as to the employe's place of work. Christ v. Wichita Gas, Elec. Light & Power Co., 72 Kan. 135, 83 P. 199.

59. Quarry foreman whose duty it was to see that quarry was reasonably safe was vice-principal. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. The furnishing of a place to work is a part of the master's duty, and in the discharge of that duty he is responsible for the negligence of any of his employes. Neagle v. Syracuse, etc., R. Co., 185 N. Y. 270, 77 N. E. 1064. An employe whose duty it is to keep a passageway cleared and safe represents the master. Beardsley v. Murray Iron Works Co., 129 Iowa, 675, 106 N. W. 180.

60. Where negligence complained of concerns master's duty to provide reasonably safe appliances, the fellow-servant doctrine does not apply. Chicago Union Traction Co. v. Sawusch, 119 Ill. App. 349. Duty to properly load cars on which servant was furnished transportation to and from work was part of master's duty to servant; hence, master liable for negligence of a servant in performance of it. Tanner v. Hitch Lumber Co., 140 N. C. 475, 53 S. E. 287. A superintendent who is directed to put up a pile driver for use of employes the next day is a vice-principal, and for his negligence in staying the appliance the master is responsible. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789.

61. Where foreman directed a derrick boom to be swung round before the derrick was fastened, so that it tipped over, the negligence was that of a vice-principal directing the mode of the work, and his act in making the place of work unsafe made the master responsible. Ball v. Megrath [Wash.] 86 P. 382. Master liable where mill foreman caused machinery to run at excessive speed, causing a wheel to burst, injuring plaintiff. Stecher Cooperage Works v. Steadman [Ark.] 94 S. W. 41.

62. Foreman whose duty it was to warn employe of latent dangers in work of blasting with dynamite was a vice-principal. Archer Foster Const. Co. v. Vaughn [Ark.] 94 S. W. 717. Foreman of section crew, whose duty it was to warn crew of approach of train, was a vice-principal. St. Louis, etc., R. Co. v. Mathis, 76 Ark. 184, 91 S. W. 763. Servant to whom duty to warn when steel blowing operation reached dangerous stage was delegated held vice-principal. Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190. Negligence of night watchman in failing to discover and give warning of fire held imputable to the master. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. Duty of engineer in a sawmill to give a signal before starting machinery is a duty of the master, and his failure to give it, whereby a saw filer was injured, was the act of a vice-principal. Comrade v. Atlas Lumber & Shingle Co. [Wash.] 87 P. 517. Where duty to warn employe that place where he was working was unsafe devolved on his foreman, he being the highest in authority on the ground, the foreman, as to such duty, was a vice-principal, not the fellow-servant of the employe. Low Moor Iron Co. v. La Bianca's Adm'r [Va.] 55 S. E. 532.

63. See 6 C. L. 558, n. 98.

64. Negligence of foreman in failing to inspect a hand car held negligence of the master. Missouri, etc., R. Co. v. Wilhoit [Ind. T.] 98 S. W. 341. Negligence of chief engineer in failing to discover the presence of water in a motor, which exploded injuring plaintiff, who had been called by the chief to assist in a test, was negligence of a representative of the master, not of a fellow-servant. American Car & Foundry Co. v. Brinkman [C. C. A.] 146 F. 712.

65. Where repairs on elevator required special skill and knowledge, and were not made as a part of the duty of the man using it but was duty of the master, the man who

the place and appliances supplied, or to promulgate and enforce reasonable rules and regulations,[66] have been held vice-principals for whose failure to perform the duties entrusted to them, or for whose negligence in the performance thereof, the master has been held responsible. On the other hand, when a master has performed his duties, he may properly entrust the details of his work to employes,[67] and if the act or omission complained of does not pertain to any duty of the master, but is a mere detail of the work which it is the duty of employes to perform, it is the act or omission of a fellow-servant,[68] regardless of the rank or authority of the employe charged therewith.[69]

made repairs represented the master in so doing. Hatch v. Pike Mfg. Co., 73 N. H. 521, 63 A. 306.

66. See 6 C. L. 558, n. 2.

67. Where the place itself is reasonably safe but is liable to be rendered unsafe by the sudden approach of cars, the duty to foresee and provide against danger from cars is one which may be delegated. Gereg v. Milwaukee Gas Light Co., 128 Wis. 35, 107 N. W. 289. Foreman of gang of laborers engaged in digging a trench for gas mains held fellow-servant of laborers, and master was not liable for an injury caused by his failure to give warning of approach of a car. Id. In the conduct of the work, except as modified by the employer's liability act, the master is responsible only for his own negligence and that of his alter ego, and not for negligence of a co-servant. Neagle v. Syracuse, etc., R. Co., 185 N. Y. 270, 77 N. E. 1064.

68. Duty to keep in place a plate used between car and platform in unloading cars was duty of gang boss, and not a personal duty of the master. Hence, an injury resulting from failure to replace it was due to negligence of a fellow-servant. Baltimore & O. R. Co. v. Brown [C. C. A.] 146 F. 24. If master provided barriers to be used when trap door was open, and servants failed to make use of them, whereby an employe fell through, the master would not be liable, the negligence being that of fellow-servants in a detail of the work. Falardeau v. Hoar [Mass.] 78 N. E. 456. A wreck on one track did not obstruct the parallel track. A flagman sent to warn trains coming on the parallel track of the presence of a wrecker on the other track neglected to warn a train when a crane from the wrecker extended over the other track. The flagman was not performing a duty of the master relating to the place of work, but was a fellow-servant of the trainmen. McAuley v. New York Cent., etc., R. Co., 111 App. Div. 117, 97 N. Y. S. 631. Master is not liable for the manner in which employes remove snow and ice from the track, this having relation to the conduct of the work. The removal of ice from the track before running a snow plow over it is a mere detail of such work. Neagle v. Syracuse, etc., R. Co., 185 N. Y. 270, 77 N. E. 1064. Hence, negligence of a track walker whose duty it was to notify the crew of the presence of ice on the track, would be negligence of a fellow-servant for which master would not be responsible to a fireman on the engine behind the plow. Id. Where master owed no duty to instruct an operator of a mangle, since she was fully apprised of the danger of negligent direction of a foreman as to the manner of doing certain work was negligence in a mere detail of the work for which the master was not liable, in an action at common law. Lynch v. Shanley Co., 112 App. Div. 305, 98 N. Y. S. 406.

69. Servant who had powers of foreman was a fellow-servant of employes with whom he was engaged in the common employment of filling and tamping dynamite into holes for blasting. Archer Foster Const. Co. v. Vaughn [Ark.] 94 S. W. 717. A mere foreman or gang boss is a fellow-servant of men working under and with him. Baltimore & O. R. Co. v. Brown [C. C. A.] 146 F. 24. Where brick kiln was defective in construction and fell upon plaintiff who was at work upon it, it was held that the act of a "boss," who worked with plaintiff and others on the kiln, which rendered it unsafe, was the act of a fellow-servant, and plaintiff could not recover. Chenall v. Palmer Brick Co., 125 Ga. 671, 54 S. E. 663. The mere fact that one of several servants engaged in common employment has power to control and direct the work of the others does not make him a vice-principal as to all his acts. If an act of his which causes injury relates to his duties as a colaborer, the common master is not liable. Anderson v. Higgins, 122 Ill. App. 454. Pit boss in a mine was not a vice-principal of a miner while assisting him to get his car back on the track after a derailment. Cavanaugh v. Centerville Block Coal Co. [Iowa] 109 N. W. 303. Foreman not a vice-principal when sent to haul logs out of river with other men. Godfrey v. Illinois Cent. R. Co., 117 La. 1094, 42 So. 571. The mere fact that one of several employes working together in the same employment for a common master has authority to direct the movements of the others does not, of itself, constitute such employe a vice-principal. Where pressman and helper were running a press, they were fellow-servants, though the pressman directed the helper and was also foreman of all the employes in the pressroom. Doerr v. Daily News Pub. Co. [Minn.] 106 N. W. 1044. If employe is acting as a mere laborer and engaging in the common employment with other servants, he is a fellow-servant. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Assistant superintendent of retail store is fellow-servant of a saleswoman. McDonald v. Simpson-Crawford Co., 100 N. Y. S. 269. Where foreman was assisting plaintiff to untangle a belt and in so doing severed it, whereby plaintiff was injured, the foreman's act was that of a fellow-servant and not of a superintendent. Guilmartin v. Solvay Process Co., 101 N. Y. S. 118. Person who held a ladder upon which plaintiff was at work, and did so negligently, allowing it to fall, was

But the authority conferred upon and exercised by employes is often applied as a test by which to determine whether they are vice-principals.[70] Thus, employes who are placed in the absolute control or management of an entire business, or of a distinct department of the business,[71] or who have charge of a particular piece of work with authority to control and direct the men engaged thereon,[72] are held to represent the master. One who is thus made a representative of the master does not lose his representative character by engaging occasionally in work as a common or ordinary employe.[73]

plaintiff's fellow-servant, though he might ordinarily have acted as a superintendent. Korber v. Ottman Lithographing Co., 49 Misc. 462, 97 N. Y. S. 1044. Foreman engaged with a crew in moving a machine from a car, and in planning the method of doing the work and warning the employes of the dangers, is a fellow-servant engaged with the others in details of a common employment. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081.

70. Where a foreman selected and adjusted a wedge for a girder and the wedge fell through, being too small, and injured plaintiff, the act of the foreman was one for which the master was responsible, even though the act might have been done by a fellow-servant. Sullivan v. Wood & Co. [Wash.] 86 P. 629.

71. Division superintendent held vice-principal as to car inspector. Shuster v. Philadelphia, etc., R. Co. [Del.] 62 A. 689. One employed as general manager of a business is a vice-principal. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. General manager and foreman in charge of local camp and logging operations held vice-principals. Bailey v. Swallow [Minn.] 107 N. W. 727. General superintendent of mine held a vice-principal, and his act in telling a miner that a blast, which injured him, had been discharged, made the master liable. Allen v. Bell, 32 Mont. 69, 79 P. 582. One who had general supervision of men in repair shops, and complete control therein, the shops being a separate and distinct part of defendant's business, was a vice-principal as to a man employed therein. Green v. Washington Oil Co. [Pa.] 64 A. 877. General manager of corporation, with general authority over conduct of business and direction of servants, is a vice-principal as to employes who do the actual labor of the business, though he has no power to employ or discharge. Abilene Cotton Oil Co. v. Anderson [Tex. Civ. App.] 15 Tex. Ct. Rep. 91, 91 S. W. 607.

72. Molders held vice-principals as to helpers who were under the molders' orders. Leighton & Howard Steel Co. v. Snell, 119 Ill. App. 199. One who was placed in full control of blasting operations carried on with dynamite, and of the method of preparing and handling the dynamite, and of the employes, was a vice-principal. Pinney v. King [Minn.] 107 N. W. 1127. Declaration charged that plaintiff was standing on a bridge where his chief told him to stand and was struck by pieces projecting from a passing car which had been improperly loaded under direction of the same chief. Held, negligence of a superintendent, and not of a fellow-servant, was charged. Morris v. Brookhaven, etc., R. Co. [Miss.] 41 So. 267. Steel blower, whose duties were to superintend and direct other employes in making of steel, and to give warning by a whistle when a blast was to be blown, was not the fellow-servant of one whose duties were only to look after stoppers of receptacles of molten metal. Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190. One who was in complete charge of the work of timbering in a mine, and of the timbermen, was not the fellow-servant of one working under him. Cripple Creek Min. Co. v. Brabant [Colo.] 87 P. 794. Foreman of railroad construction crew engaged in preparing road bed and unloading cinders from cars had power to hire and discharge laborers and to direct movements of train crew engaged in moving cars and placing them. Held such foreman was a vice-principal and not a fellow-servant of a member of the gang. Chicago, etc., R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936. Evidence that employe of street railway company asked for more help in certain work at the barns, and was told to go ahead and help would be furnished, warrants an instruction that one who is empowered to direct workmen and take charge of them is a vice-principal. North Chicago St. R. Co. v. Aufmann, 221 Ill. 614, 77 N. E. 1120. Where defendant's general manager came and took charge of moving of a heavy machine from a car, and failed to order any change in the method adapted, or to warn the employes, the defendant could not escape liability on the theory that a resulting injury was caused by negligence of a fellow-servant. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081.

73. A foreman who has authority to employ, direct, and discharge employes, renders the master liable if he fails in a duty owed to an employe, though he occasionally engages in work as an ordinary employe. Hollweg v. Bell Tel. Co., 195 Mo. 149, 93 S. W. 262. A foreman operated a saw a short time and left a block of wood lying near it. The regular operator was injured by reason of the block being thrown by the saw. Held foreman was a vice-principal, and, if negligent, the master was liable. Id. A shop foreman, who employed plaintiff and who superintended the employes and work in the shop, was a vice-principal, and he did not become a fellow-servant by occasionally working for a short time on a machine. Moore v. King Mfg. Co., 124 Ga. 576, 53 S. E. 107. Where a foreman, while acting as a mere colaborer, pulled out a plank and made a pile of lumber dangerous and then, as vice-principal, ordered an employe to go to the pile for other lumber, and the pile of lumber fell and injured the employe, the negligent order was the proximate cause of

In some jurisdictions the test applied is the extent to which employes associate in the performance of their usual duties.[74] Thus, it is held that employes engaged in different departments of a business are not fellow-servants.[75] In Illinois the rule is that the relation of fellow-servant must be mutual[76] and that it exists only where the servants are brought into such personal relation either by co-operating in the same work at the time of the injury, or by their usual duties, that they may exercise upon each other an influence promotive of caution.[77]

Railway employes.[78]—Holdings as to the relation existing between railroad employes are collected in the note.[79]

injury and the master was liable. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460.

74. Employes in sawmill, not coassociated in the same work, are not fellow-servants. Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475. Persons employed by the same master to accomplish one common object and so related in their labors as ordinarily to be exposed to injuries, caused by each other's negligence are fellow-servants. Kenefick-Hammond Co. v. Rohr, 77 Ark. 290, 91 S. W. 179. The coassociation rule has not been adopted in Ohio, and the separate department principle only to a limited extent and in such a manner that it is interwoven with the superior servant doctrine. Lake Shore, etc., R. Co. v. Burtscher, 8 Ohio C. C. (N. S.) 137.

75. The departmental rule obtains in Missouri. Track laborer held not the fellow-servant of crew of train on which he was riding to work on an employe's pass. Haas v. St. Louis & S. R. Co. [Mo. App.] 90 S. W. 1155. See opinion for many authorities in Missouri and elsewhere.—Ed.

Railway company employe working at a coal dock, under orders of a foreman, held not fellow-servant of locomotive engineer working under yardmaster who hauled coal cars back and forth. Lanning v. Chicago Great Western R. Co., 196 Mo. 647, 94 S. W. 491.

76. National Enameling & Stamping Co. v. McCorkle, 219 Ill. 557, 76 N. E. 843. Mere fact that servant injured by crank running on a track knew of the presence of the craneman, and the manner in which he did his work, did not make the two fellow-servants, where it did not appear that the craneman knew of the position and manner of work of the injured man. Id.

77. National Enameling & Stamping Co. v. McCorkle, 219 Ill. 557, 76 N. E. 843; Chicago, etc., R. Co. v. White, 209 Ill. 124, 70 N. E. 588; Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190; Chicago, etc., R. Co. v. Mikesell, 113 Ill. App. 146; Pittsburgh, etc., R. Co. v. Bovard, 121 Ill. App. 49. Operating crews of two trains on the same road under the same general management may be fellow-servants. Illinois C. R. Co. v. Ring, 119 Ill. App. 294. Skilled workman, at work in a separate room, held not fellow-servant of a common laborer in another room, where they were not so associated as to exercise on each other an influence promotive of caution. Schneider & Co. v. Carlin, 120 Ill. App. 538. Porter and conductor of sleeping car are fellow-servants so far as their duties to watch the car at night are concerned, each serving as watchman a portion of the night. The Pullman Co. v. Woodfolk, 121 Ill. App. 321. One engaged in shoveling snow, under direction of engineer, is not as a matter of law the fellow-servant of a section foreman or his helper, engaged in throwing ties off a train. Chicago, etc., R. Co. v. Mikesell, 113 Ill. App. 146.

78. See 6 C. L. 562.

79. Yardmaster, brakeman, and conductor held fellow-servants of car inspector who was riding on train which was carrying a car to the repair tracks. Shuster v. Philadelphia, etc., R. Co. [Del.] 62 A. 689. Head and rear brakemen of train held fellow-servants while engaged in switching. Higgins v. Atchison, etc., R. Co., 70 Kan. 814, 79 P. 679. Hostler, in charge of an engine in the yards, held superior of brakeman, assisting in moving a car so that engine could pass. Howard v. Chesapeake & O. R. Co., 28 Ky. L. R. 891, 90 S. W. 950. Railroad yard foreman, who gave orders to brakeman and directed him in his work, was not a fellow-servant of the brakeman. Howard v. Chesapeake & O. R. Co., 28 Ky. L. R. 891, 90 S. W. 950. Train dispatcher of railroad company who issues orders for movement of trains on a single track road, in the name of the superintendent, and must see to their proper transmission, is not a fellow-servant of a fireman on a locomotive. Ricker v. Central R. Co. [N. J. Err. & App.] 64 A. 1068. Engineer and fireman are fellow-servants and latter cannot recover for injury caused by former's failure to inspect water gauge. Healy v. Buffalo, etc., R. Co., 111 App. Div. 618, 97 N. Y. S. 801. Engineer, running engine from one track to another at an excessive rate, held fellow-servant of switch inspector struck by engine. Keating v. Manhattan R. Co., 110 App. Div. 108, 97 N. Y. S. 137. Within a limited area the duties of a towerman are analogous to those of a train dispatcher, and under the current of authority he stands in the position of superior of an engineer, and where the negligence charged by an injured engineer was in the signals given by the towerman, a verdict supporting that contention will not be disturbed on the ground that they were fellow-servants. Lake Shore, etc., R. Co. v. Burtscher, 8 Ohio C. C. (N. S.) 137. In Tennessee, an engineer and brakeman on the same train are fellow-servants. Hence, where engineer was not in charge of the train, the brakeman could not recover for an injury in that state caused by the engineers' negligence. Carman's Adm'r v. Illinois Cent. R. Co., 29 Ky. L. R. 280, 92 S. W. 954. Brakeman who signalled to move cars held fellow-servant of another brakeman who was between two cars attaching the air hose. Louisville & N. R. Co. v. Vincent [Tenn.] 95 S. W. 179. Fireman being brakeman's fellow-servant, latter could not re-

Statutory modification of common-law fellow-servant doctrine.[80]—The operation of the common-law rule that there can be no recovery for negligence of a fellow-servant has been limited by statute in many states, the limitation being frequently confined to employes of railroad corporations. Such statutes are generally held valid.[81] Other statutes supply tests by which it may be determined whether an employe charged with negligence is the fellow-servant or vice-principal of the injured employe. Decisions under such statutes are grouped in the note.[82] To

cover if former's negligence caused injury. Johnson v. Boston, etc., R. Co., 78 Vt. 344, 62 A. 1021.

80. See 6 C. L. 562.

81. As to validity of statutes making railroad companies liable for injuries caused by negligence of fellow-servants, see Beleal v. Northern Pac. R. Co. [N. D.] 108 N. W. 33. Burns' Ann. St. 1901, § 7083, making employes in the service of railroad companies, and having charge of any signal, telegraph office, switchyard, shop, roundhouse, locomotive engine, or train upon a railway, vice-principals, is held valid. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. The Colorado fellow-servant statute (Sess. Laws 1901, p. 161) which in effect renders the employer liable for damages resulting from injuries to or death of an employe caused by negligence of a coemploye in the same manner and to the same extent as if the negligence causing the accident was that of the employer is held valid. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. By depriving employers of the defense that the injury was caused by negligence of a fellow-servant, the act does not violate the fourteenth amendment, prohibiting deprivation of property without due process. Id. Const. 1890, § 193, partially abrogating fellow-servant rule in the case of railroad corporations, when construed as excluding railroads operated as adjuncts to the main business of a corporation, rather than as common carriers, does not violate the fourteenth amendment. Bradford Const. Co. v. Heflin [Miss.] 42 So. 174. Laws 1898, p. 85, c. 66, § 1, which partially abrogates the fellow-servant rule as to the employe of "any corporation," is unconstitutional because it applies to all corporations without regard to the nature of the business and the hazards connected therewith, and does not apply to natural persons. Id.

82. Alabama: Code 1896, § 1749, subd. 2, makes a master liable for a personal injury to a servant caused by negligence of any person in the master's service who has any superintendence intrusted to him, while in the exercise of such superintendence. Sloss-Sheffield Steel & Iron Co. v. Holloway, 144 Ala. 280, 40 So. 211. Master liable where superintendent intrusted with superintendence of construction of scaffold failed to personally supervise and inspect it, and the scaffold fell by reason of negligence in its construction by other servants, though competent men were selected, and proper materials supplied, and proper instruction given. Sloss-Sheffield Steel & Iron Co. v. Holloway, 144 Ala. 280, 40 So. 211. To create a liability under Code 1896, § 1749, subd. 2, it must appear that the negligent act relied upon was done while the person entrusted with superintendence was exercising superintendence. Where a foreman was taking the place of a common laborer, and while so engaged caused an injury, the master was held not liable. Smith v. Pioneer Min. & Mfg. Co. [Ala.] 41 So. 475. Where engineer took signals from a brakeman and not from a superintendent, whom he did not see, and the brakeman was caught between the cars, there could be no recovery on the theory that the superintendent was negligent as to signals. Huggins v. Southern R. Co. [Ala.] 41 So. 856. One exercising general superintendence at night over all employes operating a blast furnace, held a superintendent. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306. One in charge of gang of men engaged in breaking iron ore into lumps of a size suitable to go into a blast furnace held a superintendent. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306.

Arkansas: Train dispatcher and conductor held not fellow-servants of fireman on freight train. Sand. & H. Dig. § 6248. Choctaw, etc., R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768.

Colorado: Laws 1901, p. 161, is valid. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313.

Florida: Contributory negligence is a defense under the Florida act. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24.

Georgia: Railway employe has right to rely on exercise of ordinary care by coemployes and failure to exercise such care gives right of action. Collins v. Southern R. Co., 124 Ga. 853, 53 S. E. 388.

Indiana: Burns' Ann. St. 1901, § 7083, makes railroad corporations liable for injuries to employes of such corporations, exercising due care if the injuries are caused by negligence of any person in the service of such corporations having charge of any signal telegraph office, switchyard, shop, roundhouse, locomotive engine, or train upon a railway, etc. The class of vice-principals previously existing is enlarged by this statute. The act is constitutional. It does not impair the obligation of contracts, though applied in the case of an injury to a servant who was employed before the act went into effect. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1036. The act applies to all corporations, companies, partnerships, or persons, engaged in operating railroads, and hence does not deny the equal protection of law. Id. It is not objectionable as a deprivation of property without due process of law, nor as abridging privileges or immunities of citizens of the United States. Id. The defense of assumed risk is not available in an action under the statute. Id. An engineer who was standing between tracks of the defendant waiting for the engine of his train to back down to him, and who was struck by another engine and car, was engaged in defendant's service, and entitled to recover under the statute, if in the exercise of due care. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Foreman

ordered railway employe to go upon a bridge pier and remove woodwork, directing the employe specifically how to do it. The foreman then pried a timber loose, to assist in the work, without warning the employe, and caused the employe to fall. Held, the employe was acting under an order, within Burns' Ann. St. 1901, § 7083, subd. 2. Toledo, etc., R. Co. v. Pavey [Ind. App.] 79 N. E. 529. Where action was under Employers' Liability Act 1893 to recover for negligence of an engineer in charge of the locomotive on which plaintiff worked as fireman, it was proper to refuse to instruct that the engineer and fireman were fellow-servants. Southern Indiana R. Co. v. Osborn [Ind. App.] 78 N. E. 248. Brakeman may recover for injuries caused by collision owing to negligence of engineers and conductors if himself without fault. Southern Indiana R. Co. v. Baker [Ind. App.] 77 N. E. 64. Where conductor of train ordered brakeman to go on a car and set a hand-brake at the proper time after car was cut loose, and then negligently failed to cut the car loose, but stopped the engine suddenly, causing the brakeman to fall, the latter was acting under orders of a superior to which he was subject and bound to conform. Pittsburgh, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522.

Iowa: The ordinary work of a section gang, employed on the track, not connected with any control of a train, is not within the protection of Code, § 2071, making railroad companies liable for negligence of employes in the "use and operation" of the road. Dunn v. Chicago, etc., R. Co., 130 Iowa, 580, 107 N. W. 616. Section hand was struck by a crow bar knocked against him by a passing train, the bar having been negligently left too near the track by another section hand. Id.

Massachusetts: St. 1887, c. 270. The act of a person in charge of unloading of schooner in selecting a piece of rope with which to lash a ladder was an act of superintendence. Hourigan v. Boston El. R. Co. [Mass.] 79 N. E. 738. Employe who was paid more than other men, directed them when to begin and when to stop, and did manual work only when he pleased, was properly found to be a superintendent, no other person being shown to have been in charge of work unloading a cargo. Id. Where engineer placed a ladder against a boiler and told a helper to go up and turn off the steam, the engineer's act was a mere act of assistance and not an act of superintendence, and helper could not rely on engineer's act without investigating ladder to see if it was properly placed. McDonnell v. New York, etc., R. Co. [Mass.] 78 N. E. 548. One who was directed to get in a load of lumber, and who selected servants for this work and directed them therein, was while so engaged a superintendent. Sampson v. Holbrook [Mass.] 78 N. E. 127. Employe's injury due to improper instruction on manner of feeding chopping machine, given by one who was a superintendent, and failure of such person to warn the employe of danger from the knives, rendered the master liable at common law and under Rev. St. c. 106, § 71. Byrne v. Learnard, 191 Mass. 269, 77 N. E. 316.

Mississippi: Const. 1890, § 193, which partially abrogates the fellow-servant rules as to employes of "any railroad corporation," does not apply to a construction company, authorized to own, but not to operate, a railroad. Bradford Const. Co. v. Heflin [Miss.] 42 So. 174. That the constitutional provision authorizes the legislature to extend the provision to other classes of employes does not extend the application of the constitutional provision itself. Id. Section 193 applies only when the danger is one of the hazards connected with the operation of railroad trains. Id. Const. 1890, § 193, is held not to violate the fourteenth amendment. But Laws 1898, p. 85, c. 66, § 1, if applied to roads used as adjuncts of another business, and not simply to common carriers, would be unconstitutional. Id.

Missouri: Rev. St. 1899, § 2873, makes railroad corporations liable for injuries to employes engaged in operating a railroad caused by negligence of other employes. An employe injured while trucking freight from warehouse to a freight car is entitled to the protection of the act. Orendorff v. Terminal R. Ass'n, 116 Mo. App. 348, 92 S. W. 148. Negligence of switch tender in lining switches caused cornering of cars, whereby brakeman was injured. Master liable under Rev. St. 1899, § 2873. Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410.

Montana: Mont. Laws 1903, p. 156, c. 83, makes railroad corporations liable for injuries caused by negligence of dispatchers, telegraph operators, superintendents, engineers, or any employe having superintendence of any stationary or hand signal. Reinke v. Northern Pac. R. Co., 145 F. 988. This statute does not permit recovery for injury to an employe caused by negligence of the engineer of a stationary engine used to haul a plow over cars of gravel, to unload them. The "engineers" referred to by the act are engineers of locomotives only. Id.

North Carolina: Revisal 1905, § 2646, applies to logging railroads. Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795. Priv. Laws 1897, p. 83, c. 56, applies to a manufacturing corporation which owns and operates a railroad in connection with its manufacturing. Bird v. U. S. Leather Co. [N. C.] 55 S. E. 727; Hairston v. U. S. Leather Co. [N. C.] 55 S. E. 847. Priv. Act 1897, p. 83, c. 56, makes all coemployes of railroad companies agents and vice-principals of the company, for whose negligence the company is responsible, whether such employes are in superior, equal, or subordinate positions. Company held liable to employe injured by negligence of helpers shoveling coal from car into tender. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391. Laws 1903, c. 131, p. 178, making railroad companies liable to an employe for injuries caused by negligence of a coemploye, applies only to those employes engaged in operating railroads, and so exposed to the peculiar dangers attending that business. Beleal v. Northern Pac. R. Co. [N. C.] 108 N. W. 33. Statute held not to apply where servants were engaged in gathering and loading on cars ice for the company; plaintiff, working under ice chute, being injured by a block of ice pushed down upon him by a coemploye. Id.

New York: No recovery under N. Y. Laws 1902, p. 1784, c. 600, for death of longshoreman caused by falling of hatchcover improperly placed by other employes, where it was not shown that negligent servant was a "superintendent," nor that effect was due to negligence of master himself. Mc-

Donnell v. Oceanic Steam Nav. Co. [C. C. A.] 143 F. 480. Foreman in charge of work being done held a superintendent, though there was also a general superintendent; and foreman's act of ordering an engine started without warning plaintiff, who was in a dangerous position, was an act of superintendence. Carlson v. United Engineering Co., 113 App. Div. 371, 98 N. Y. S. 1036. Foreman of crew of bridge repairers assisted them in getting material for a fire to thaw out material to repair a culvert. He put a tie on the track which was struck by a train and thrown against plaintiff. The act of the foreman was that of a fellow-servant, not of a superintendent. Bannon v. New York Cent., etc., R. Co., 112 App. Div. 552, 98 N. Y. S. 770. "Pusher" in charge of gang of five or six structural ironworkers, whose work was the same as theirs except that he saw that they all worked to advantage, was not a superintendent. Abrahamson v. General Supply & Const. Co., 112 App. Div. 318, 98 N. Y. S. 596. Where action was based on alleged negligence of a superintendent, under the employers' liability act, an instruction allowing a recovery for negligence of defendant was not objectionable as permitting a recovery for negligence of a fellow-servant. Harris v. Baltimore Mach. & El. Co., 112 App. Div. 389, 98 N. Y. S. 440. Where one exercising superintendence directed removal of pier which weakened scaffold, fellow-servant defense was not available. Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. S. 421.

Ohio: 87 Ohio Laws, p. 150, § 3, provides that every person in the employ of a railroad company, actually having power or authority to direct any other employe of such company, is not a fellow-servant but a superior of such other employe. Also, that every person in the employ of such a company, having charge or control of employes in any separate branch or department, shall be held to be the superior and not the fellow-servant of employes in any other branch or department who have no power to direct or control in the branch or department in which they are employed. Separate trains are held separate branches or departments within the meaning of this statute. Kane v. Erie R. Co. [C. C. A.] 142 F. 682. Hence, where fireman of one train is killed by reason of negligence of engineer of another train, who has control of his own fireman, but is himself under control of the conductor of the train, the company is liable, such engineer being a "superior" as to the fireman who was killed. Id.

Pennsylvania: Act April 4, 1868, § 1 (P. L. 58), provides that when any person shall sustain injury while lawfully engaged or employed on or about the roads, works, depots and premises of a railroad company, or in or about any train or car therein or thereon, of which such person is not an employe, the right of action and recovery in all such cases against the company shall be such only as would exist if such person were an employe. Provided, that the act does not apply to one who is a passenger. Under this act, a news agent and fruit vendor on trains, by contract between company and news company, is employed thereon, and is not a passenger, and the company is not liable for his death caused by negligence of its employes. Smallwood v. Baltimore, etc., R. Co. [Pa.] 64 A. 732. Where cars were being operated on siding built for sole use of coal company, and employe of coal company was injured while repairing a car belonging to the railroad company, held deceased was fellow-servant of trainmen, under Act April 4, 1868 (P. L. 58). Miller v. Northern Cent. R. Co. [Pa.] 64 A. 924.

South Carolina: Const. art. 9, § 15, provides that "every employe of any railroad corporation shall have the same rights and remedies for any injury suffered by him from the acts or omissions of said corporations or its employes as are allowed by law to other persons not employes, when the injury results from the negligence of a superior agent or officer, or of a person having a right to control or direct the services of a party injured, and also when the injury results from the negligence of a fellow-servant, engaged in another department of labor from that of the party injured, or of a fellow-servant of another train of cars, or one engaged about another piece of work. A watchman at a railroad crossing is engaged in another department from employes running trains. Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140. Where railroad employe was killed as result of conductor's negligence his personal representative had the same remedies as others, not employes, would have. Reed v. Southern R. Co. [S. C.] 55 S. E. 218. Flagman was told to obey instructions of conductor and engineer, the conductor being in charge of the train. Engineer and flagman were fellow-servants, and flagman could not recover for negligence of the engineer. Lyon v. Charleston, etc., R. Co. [S. C.] 56 S. E. 18. Where a conductor was placed in charge of a train as a special pilot, the company was liable to its engineer for negligence of the conductor. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968.

Texas: Sayles' Ann. Civ. St. 1897, art. 4560f, allows a recovery by an employe engaged in operating railroad cars for injuries caused by negligence of a fellow-employe. A servant of a lumber company, which operated a private railroad, injured while working on a train load of telephone poles, unloading poles at proper places, was entitled to the protection of the statute. Mounce v. Lodwick Lumber Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 944, 91 S. W. 240. Sayles' Ann. Civ. St. 1897, art. 4560h, provides that persons engaged in the common service of a corporation controlling or operating a railroad and employed in the same grade of employment and doing the same character of work or service and working together at the same time and place and at the same piece of work and to a common purpose are fellow-servants. Employes not within these provisions are not. Clerk and warehouseman, working under orders of station agent, and brakeman, working under orders of the conductor of a train, were not fellow-servants, and for the negligence of the brakeman the clerk could recover. Galveston, etc., R. Co. v. Mohrmann [Tex. Civ App.] 15 Tex. Ct. Rep. 649, 93 S. W. 1090. A helper was sent by his foreman to assist the operator of a machine, and placed under the orders of such operator, and in obeying his orders was injured. Held, the operator was a vice-principal of the helper, under Rev. St. 1895, arts. 4560f, 4560g. Sherman v. Texas, etc., R. Co. [Tex.] 15 Tex. Ct. Rep. 127, 91 S. W. 561. Where brakeman was injured in collision

maintain an action under such a statute notice of the claim for injuries must be given, when the statute so requires.[83] Whether a particular case is within the operation of a fellow-servant statute is a question of law for the court where the facts are undisputed.[84] In Massachusetts there is a statute providing that where an employe of a railroad corporation is killed under such circumstances as would have entitled him to maintain an action for damages if death had not resulted, the corporation shall be liable in the same manner and to the same extent as it would have been if the deceased had not been an employe.[85] Another statute makes a master liable for negligence of one entrusted with and exercising superintendence.[86] It is held that in a case brought under the former, the provisions of the latter cannot be invoked to bar the defense that the death was caused by negligence of a fellow-servant.[87]

(§ 3) *F. Risks assumed by servant. Nature of defense.*[88]—Assumption of risk is a matter of contract; contributory negligence is a question of conduct.[89]

between engine and water car and rest of train, and evidence showed that he gave proper signals, which were not obeyed or observed by the engineer or fireman a recovery by him was warranted. Houston, etc., R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344. Brakeman, lighting lamps in caboose, which was being switched to his train, was engaged in "operating the railroad," within the Missouri statute. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 14 Tex. Ct. Rep. 376, 90 S. W. 926. Gang of railroad employes who use hand car in going to and from work, are engaged in operating a car within the meaning of the statute, while they are putting it on the track, preparatory to going home. Texas, etc., R. Co. v. McCraw [Tex. Civ. App.] 16 Tex. Ct. Rep. 368, 95 S. W. 82.

Wisconsin: Where fireman alleged that he was injured just after assisting the engineer to take water on the engine, having stepped from the engine to the track, when the engine was backed down upon him, and that he was working under the engineer's orders, it sufficiently appeared that he was engaged in "operating, running, riding upon, or switching, engines or cars" within Rev. St. 1898, § 1816, entitling him to recover for negligence of the engineer. Gaffney v. Chicago, etc., R. Co., 127 Wis. 113, 106 N. W. 810. Finding of jury held to show that he was "riding" on the engine at the time of injury, so as to be entitled to recover. Id.

83. Where a fellow-servant statute of a sister state requires the service of a notice of the claim for injuries on the master, the statute cannot be made the ground of recovery in Illinois unless the required notice has been given. The Pullman Co. v. Woodfolk, 121 Ill. App. 321. Notice of injuries by reason of negligence of coemployes required to be served on railroad companies by Laws 1903, p. 599, c. 393, may be served on the company's ticket agent. St. Louis, etc., R. Co. v. Burgess, 72 Kan. 454, 83 P. 991. Laws 1902, p. 1749, c. 600, § 2, requires notice within one hundred and twenty days. Chisholm v. Manhattan R. Co. 101 N. Y. S. 622. The service of a complaint stating only a cause of action at common law is not sufficient as a notice to entitle plaintiff to maintain an action under the statute for alleged negligence of a superintendent. Id.

84. As where section hand was struck by a crow bar which was knocked against him by a passing train, the bar having been negligently left near the rail by another section hand, the statute was held not to apply. Dunn v. Chicago, etc., R. Co., 130 Iowa, 580, 107 N. W. 616.

85. Rev. Laws, c. 111, § 267. Vecchioni v. New York Cent., etc., R. Co., 191 Mass. 9, 77 N. E. 306.

86. Rev. Laws, c. 106, § 71, cl. 2. Vecchioni v. New York Cent., etc., R. Co., 191 Mass. 9, 77 N. E. 306.

87. Vecchioni v. New York Cent., etc., R. Co., 191 Mass. 9, 77 N. E. 306.

88. See 6 C. L. 565.

89. Montgomery v. Seaboard Air Line R. Co., 73 S. C. 503, 53 S. E. 987. Distinctions between contributory negligence and assumption of risk, as defenses, discussed. Missouri, etc., R. Co. v. Wilhoit [Ind. T.] 98 S. W. 341. Assumption of risk rests upon contract; contributory negligence arises out of negligence of the servant. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. The defense of assumed risk rests upon contract, generally implied from the circumstances of the case. It comes within the principle "volenti non fit injuria." Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244. The owner of a building in course of construction requested an independent contractor to hire a man to do certain work, the man being paid by defendant. Held, the relation existing between defendant and the servant so employed was such that defendant was entitled to assert the defense of assumption of risk. Rooney v. Brogan Const. Co., 113 App. Div. 813, 99 N. Y. S. 939. The defense of contributory negligence rests on some fault or omission on the part of the plaintiff and is maintainable when, though defendant has been guilty of negligence, yet, the direct or proximate cause of the injury is the negligence of plaintiff, but for which the injury would not have happened. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244. An instruction that a miner assumes risk of injury by falling of stone from mine roof if he continues to work after learning of the presence of the stone without reporting it as provided by statute is properly refused, since these facts would bear on question of contributory negligence rather than assumption of risk. Diamond Block Coal Co. v.

While the two defenses are separate and distinct, they are not necessarily incompatible,[90] both are frequently available in the same case and under the same state of facts,[91] as where the danger is not only known or obvious, but injury therefrom is so imminent that no person of ordinary prudence would assume the risk.[92] It is said that the defense of assumed risk does not admit negligence of the defendant, as the plea of contributory negligence does, because no right of action can arise where the injury is the result of an assumed risk.[93] But courts do not agree on the question of the real nature of the defense of assumed risk.[94] Thus, it is held in some states that assumption of risk is a form of contributory negligence.[95]

It is usually held that the defense of the assumption of risk is not available where the negligence charged is a violation of a positive statutory duty,[96] and some statutes expressly exclude the defense.[97] Under some statutes, however, the de-

Cuthbertson [Ind.] 76 N. E. 1060. Employe did not assume risk of negligent construction of elevator by continuing in the employment with knowledge of the defect, though he might have been guilty of contributory negligence if the danger was such that an ordinarily prudent person would not have remained and encountered it. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673.

90. While assumption of risk and contributory negligence rest upon different grounds and are separate and distinct defenses, they are not necessarily incompatible, but may and sometimes do arise out of the same facts. Chicago Great Western R. Co. v. Crotty [C. C. A.] 141 F. 913.

91. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244.

92. Chicago Great Western R. Co. v. Crotty [C. C. A.] 141 F. 913.

93. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244.

94. See notes in 6 C. L. 565, and 4 C. L. 568.

95. Wisconsin rule. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. A general question submitted to the jury covering contributory negligence logically includes also assumption of risk, in the absence of a special question covering that phase of contributory negligence. Id. Instruction on assumed risk, without explaining that this was a form of contributory negligence, held erroneous. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077. A general finding of an absence of contributory negligence is inconsistent with a special finding that the employe knew and understood the danger, where there was no instruction limiting the special interrogatory to contributory negligence. Id.

96. Defense of assumed risk not available where willful violation of mining law was charged. Joseph Taylor Coal Co. v. Dawes, 122 Ill. App. 389. Where a servant under sixteen is employed at extra hazardous work, in violation of the statute, the defense of assumed risk is not available. Helmbacher Forge & Rolling Mills Co. v. Garrett, 119 Ill. App. 166. The doctrine of assumed risk does not apply to relieve a person from the consequence of a breach of a specific statutory duty. Switchman did not assume risk of injury caused by violation of ordinance requiring switch engines to carry lights. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. The defense of assumed risk is not available in an action under Burns' Ann. St. 1901, § 7083, making certain railroad employes vice-principals. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Risk of operating emery wheel not provided with exhaust fan to carry off dust as provided by statute not assumed as matter of law. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. Risk of injury arising from employer's violation of mining law is not assumed. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060. A servant does not assume the risk of a violation of a statutory duty of the master. Violation of statute requiring elevator shafts to be guarded not an assumed risk. Murphy v. Grand Rapids Veneer Works, 142 Mich. 677, 12 Det. Leg. N. 868, 106 N. W. 211. Boy under sixteen employed to run a dangerous machine contrary to Pub. Acts 1901, p. 156, act No. 113, § 3, does not assume the risk of injury from the machine. Sterling v. Union Carbide Co., 142 Mich. 284, 12 Det. Leg. N. 712, 105 N. W. 755. Where a master violated Rev. St. 1899, § 6434, by putting a minor to work on a steam candy roller, the master assumed all risk of injury to the minor while so employed. Nairn v. National Biscuit Co., 120 Mo. App. 144, 96 S. W. 679. It is held in Washington that a failure or refusal to comply with the provisions of the factory act deprives the master of the defense of assumption of risk. Johnston v. Northern Lumber Co., 42 Wash. 230, 84 P. 627. Where master fails to guard a saw, when practicable, as required by Laws 1903, p. 40, c. 37, he cannot assert the assumption of the risk as a defense. Thomson v. Issaquash Shingle Co. [Wash.] 86 P. 588; Miller v. Union Mill Co. [Wash.] 88 P. 130. Sess. Laws 1903, p. 40, c. 37, being in force at the time of an injury governs the right to a recovery, hence, its repeal before trial does not restore the master's right to plead assumption of the risk. Miller v. Union Mill Co. [Wash.] 88 P. 130. Servant held not to have assumed risk from large unguarded circular saw, failure to guard it being a violation of Laws 1903, p. 40, c. 37. Erickson v. McNeeley & Co., 41 Wash. 509, 84 P. 3. If master failed to guard knives of a log chipper, which could be advantageously guarded as required by Laws 1903, p. 40, c. 37, the defense of assumed risk was not open to him. Rector v. Bryant Lumber & Shingle Mill Co., 41 Wash. 556, 84 P. 7.

97. Defense of assumed risk not available where violation of automatic coupler act is charged. Chicago & Alton R. Co. v. Walters, 120 Ill. App. 152. Employe on railroad does

fense is available.[98] It may be interposed in cases where the statute does not make the master an insurer of the servant's safety, and where he has made a bona fide effort to comply with its provisions, and has taken adequate precautions against all dangers which an ordinarily prudent person would anticipate.[99]

Dangers incidental to business.[1]—The servant assumes the risk ordinarily incident to the employment in which he engages,[2] and this is so though the employment is necessarily dangerous.[3] Ordinary risks are such as arise from the per-

not assume the risk of working with cars not equipped with automatic couplers unless his conduct amounts to recklessness. Hairston v. U. S. Leather Co. [N. C.] 55 S. E. 847. Brakeman was thrown from pilot of engine because of lack of bar to hold on to, not knowing of the defect when he got on the pilot, and not having had previous opportunity to discover it. He could not be charged with assumption of risk, since Priv. Laws 1897, p. 83, c. 56, §§ 1, 2, giving a right of action, provide that no agreement waiving the benefits of the act shall be valid. Biles v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 512. Revisal 1905, § 2646, which deprives railroad companies operating in the state of the defense of assumption of risk of any defect in the machinery, ways or appliances, applies to logging railroads. Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420. Instruction held to charge in substance Const. art. 9, § 16, that knowledge by an employe injured of the defective or unsafe condition of machinery shall be no defense. Davis v. Northwestern R. Co. [S. C.] 55 S. E. 526. By the constitution and statutes of Virginia it is provided that knowledge by a railroad employe of the defective or unsafe character of the ways, shall not of itself bar an action for injuries. Const. 1902, § 162, and Va. Code 1904, § 1294k. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1. In that state the defense of assumption is to that extent abolished. Knowledge by engineer of fact that no switch light was used would not bar recovery for injuries caused by such defect. Id.

98. Danger from unguarded cog, which was obvious, assumed, notwithstanding failure of master to guard the cogs as required by statute. Stevens v. Gair, 109 App. Div. 621, 96 N. Y. S. 303. Laws Colo. 1897, p. 258, c. 69, requiring railroad companies to block frogs and switch rails, does not take away the defense of assumption of risk. Denver, etc., R. Co. v. Norgate [C. C. A.] 141 F. 247. Under Code Iowa 1897, § 2071, the fellow-servant defense is not available in injuries arising in the use and operation of railways. But where a brakeman undertakes an act, "staking" a car, known to him to be dangerous, the defense of assumption of the risk is available, even though there was prior negligence of a fellow-servant in selecting the mode of switching. Chicago Great Western R. Co. v. Crotty [C. C. A.] 141 F. 913. Under Laws 1902, p. 1750, c. 600, § 3, the question of assumption of risk must be submitted to the jury, even where the negligence alleged is violation of a statutory duty. Failure to guard elevator shaft. Kiernan v. Eidlitz, 100 N. Y. S. 731. Defense of assumption of risk is not precluded by Civ. Code, § 2662, making an employer liable for losses of an employe caused by the former's want of ordinary care. Coulter v. Union Laundry Co. [Mont.] 87 P. 973.

99. Laws 1903, p. 40, c. 37, relating to the guarding of machinery, does not make the master an insurer. Johnston v. Northern Lumber Co., 42 Wash. 230, 84 P. 627. Master held not liable when a machine had been safely operated with guard furnished for three years, and injury was unusual and one which could not reasonably have been foreseen. Id.

1. See 6 C. L. 567.

2. McMahon v. Bangs [Del.] 62 A. 1098. A servant assumes the ordinary risks of his employment and is bound to use his own skill and diligence to protect himself. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Minor assumes incidental risks the same as an adult. Decatur Car Wheel & Mfg. Co. v. Terry [Ala.] 41 So. 839. Employes who used freight elevator in going to and from work, instead of stairways, assumed the incidental risks. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 1158. Trackman assumes risks incident to his work and the operation of trains in the usual way. Norfolk & W. R. Co. v. Gesswine [C. C. A.] 144 F. 56. The jolting of cars which are being uncoupled is a risk assumed by brakemen, though caused by defective coupler. Clark v. New York, etc., R. Co., 101 N. Y. S. 96. Servant struck by switch engine while at work on track assumed the risk. Rich v. Pennsylvania R. Co., 112 App. Div. 818, 98 N. Y. S. 678. Concrete mixer engaged on building in course of construction stepped on a nail in board which had been thrown down by other employe. He assumed the risk. Armour & Co. v. Dumas [Tex. Civ. App.] 16 Tex. Ct. Rep. 47, 95 S. W. 710. Instruction that brakeman assumed all ordinary risks of his employment approved. De Witt's Adm'r v. Louisville & N. R. Co., 29 Ky. L. R. 1161, 96 S. W. 1122. Error to refuse to instruct the jury that plaintiff assumed the risk of such injuries from accident as are incident to the nature of the work in which he was engaged, and against which the defendant could not by the exercise of ordinary care have protected him. Gawne Co. v. Fry, 7 Ohio C. C. (N. S.) 317. Instruction that "obvious and ordinary" risks are assumed proper, where trial was on theory that risk was an ordinary one. Thomas v. Boston & Montana Consol. Copper & Silver Min. Co. [Mont.] 87 P. 972. Boiler maker's helper went inside boiler and another employe, on the outside, struck at a plug they were trying to remove, and a sliver from the plug flew into the helper's eye. The risk was incident to the nature of the work and assumed. Illinois Cent. R. Co v. Young [Ky.] 97 S. W. 1115. Whether a particular risk is usual and ordinary is ordinarily a question of fact. Wabash R. Co. v. Thomas, 117 Ill. App. 110.

3. Ordinary, incidental, risks assumed by entering employment, even if dangerous.

manent, open, visible conditions of the master's business,[4] and which are presumed

Graboski v. New Castle Leather Co. [Del.] 64 A. 74. A servant may enter upon employment which is hazardous, and if he does he assumes the necessary known risks. Western Union Tel. Co. v. Holtby, 29 Ky. L. R. 523, 93 S. W. 652. An employe who voluntarily undertakes a dangerous employment with which he is familiar assumes the risks naturally incident thereto. Boy of eighteen assumed risk of operating machine with knives, when he could see the knives and had worked on similar machines. Danisch v. Amer, 214 Pa. 105, 63 A. 416. Employes sent to make a dangerous room in a mine safe assume the risk of injury while so engaged. Kellyville Coal Co. v. Bruzas, 223 Ill. 595, 79 N. E. 309. Miner held to have assumed risk attendant upon making a chamber in a mine. Friel v. Kimberly-Montana Gold Min. Co. [Mont.] 85 P. 734. A servant engaged in a hazardous occupation assumes the risk of injury to himself from all its obvious dangers. Anderson v. Union Stock Yard Co. [Neb.] 109 N. W. 171. Railway switchman assumed risk of injury from obvious defects in roadbed and track. Id. Expert miner assumed risk of working voluntarily in a mine without an air shaft where safety of drill holes could not be tested by squib shots during working hours. Knorpp v. Wagner, 195 Mo. 637, 93 S. W. 961. "Trouble finder" for telephone company was killed by fall caused by shock received from guy wire which he touched as he climbed a cable pole to ascertain what was wrong with a telephone. Held he assumed the risk. Bell Tel. Co. v. Detharding [C. C. A.] 148 F. 371.

4. If a servant, knowing the hazards of the employment and the manner in which the business is conducted, is injured while employed in such business, he cannot maintain an action against the master on account of such injury merely because he may be able to show that there was a safer mode in which the business could have been conducted, and that if it had been conducted in that manner he would not have been injured. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Boy of sixteen, sent to carry tools, fell on icy stairway leading to bridge and was injured. Danger was held an assumed risk incident to his employment. American Bridge Co. v. Bainum [C. C. A.] 146 F. 367. Where company used system of ditches in tracks to drain the yards, and switch tender had worked in yards four or five years and knew of these ditches, he could not recover for an injury caused by stepping in a ditch and falling on a rail, having assumed the risk. Haggerty v. Chicago, etc., R. Co. [C. C. A.] 141 F. 966. Recovery cannot be had for injury resulting from peril with which servant was familiar and which he was bound to incur in his employment. Eckhart & Swan Mill. Co. v. Schaefer, 118 Ill. App. 21. Master having used ordinary care, servant assumes obvious and apparent dangers still remaining in performance of his work. Velzandt v. Friedman Mfg. Co., 118 Ill. App. 339. A railroad employe by entering the employment assumes the risk of all obvious dangers existing at the time he becomes an employe. McLeod v. New York, etc., R. Co., 191 Mass. 389, 77 N. E. 715. Thus he assumes the risk of permanent structures near the track (Id.), even if such structures are unusually near the track (Id.). Danger from building two feet and seven or eight inches from the rail assumed, when deceased had passed it six times prior to his injury and on the same day. Id. Elevator operator assumed risk of elevator shaft being plastered instead of boarded up. McDonald v. Dutton, 190 Mass. 391, 76 N. E. 1055. Servant employed by contractor to unload coal with apparatus of owner assumes risk of using machinery as he finds it; owner is not bound to supply machinery of a better or safer type. Sullivan v. New Bedford Gas & Edison Light Co., 190 Mass. 288, 76 N. E. 1048. Where repairs to cable necessitated use of barge to and from which the employes were conveyed by boat, an employe engaged in such work, and who knew the plan and helped arrange the barge, etc., assumed the risks incident to being rowed from his work on the barge. Chrismer v. Bell Tel. Co., 194 Mo. 189, 92 S. W. 378. Usual, incidental dangers, remaining after the master has exercised due care, are assumed by the servant. Charlton v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 529. Employe of one engaged in blasting operations assumes the obvious risks as they exist at the time or with which he becomes familiar by continuing in the service. Master is not bound to use most approved methods. O'Neil v. Karr, 110 App. Div. 671, 97 N. Y. S. 148. All risks, whether plain or obscure and uncertain, which are incident to the work and cannot be avoided by the exercise of reasonable care by the master, are assumed by the servant, in the absence of an express assumption of them by the master. Lynch v. American Linseed Co., 113 App. Div. 502, 99 N. Y. S. 260. Experienced repairman sent to do work in cab of engine held to have assumed risks. Politowski v. Burnham, 214 Pa. 165, 63 A. 459. Where there was no evidence that railroad employes habitually sent cars down a siding at excessive speed, a section foreman at work in the yards could not be held to have assumed the risk of injury from cars, running at an excessive rate, which struck him. Houston, etc., R. Co. v. Turner [Tex.] 15 Tex. Ct. Rep. 55, 91 S. W. 562; Id. [Tex. Civ. App.] 15 Tex. Ct. Rep. 817, 92 S. W. 1074. A servant who is employed to load and unload freight and who assists in devising means to be used in such work, assumes the risk attendant upon such work. Grandin v. Southern Pac. Co. [Utah] 85 P. 357. Section men who work upon the tracks of railroads assume the risk of the running of all trains, regular, special and "wild," including the running of a train at a particular place at an unusually high rate of speed and at a rate violating a city ordinance. Ives v. Wisconsin Cent. R. Co., 128 Wis. 357, 107 N. W. 462. Flagman sent out to give warning to train of a crew at work on the track assumed risk of train running into him, without other warning than the usual noise made by a train and the customary signals. Vaundry v. Chicago, etc., R. Co. [Wis.] 109 N. W. 926. Plaintiff was digging and wheeling sand from a pile which had a frozen crust, and the top, being undermined, fell. He assumed the risk. Livingston v. Saginaw Plate Glass Co. [Mich.] 13 Det. Leg. N. 873, 109 N. W. 431.

NOTE. Assumption of risk of landslides or cave-ins: "In Indiana it has been held that

to be known and undertaken by the servant when he enters into the employment.[5] The occasional negligence of fellow-servants is an assumed risk within the meaning of this rule,[6] negligence of the master,[7] or of a vice-principal,[8] or of a co-employe for whose acts or negligence the master is made responsible by statute,[9] are not un-

a laborer working in a gravel pit assumes the risk arising from the liability of sand and gravel falling during the process of excavation. Swanson v. Lafayette, 134 Ind. 625, 33 N. E. 1033. Also that a servant who was injured while undermining a bank of gravel and clay below a stratum of earth which fell upon him cannot recover. Railsback v. Wayne County Turnpike Co., 10 Ind. App. 622, 38 N. E. 221; Griffin v. O. & M. R. Co., 124 Ind. 326, 24 N. E. 888. In Missouri, that a laborer engaged in excavating a bank of iron ore assumes the risk incident thereto. Albridge's Adm'r v. Midland Blast Furnace Co., 78 Mo. 559. In Texas, that an employe assumes the risk in going above an overhanging gravel ledge and digging a ditch for the purpose of dislodging the ledge. Missouri, etc., R. Co. v. Spellman [Tex. Civ. App.] 34 S. W. 298. In Minnesota, that an employer is not liable in a case where the employe was put to work on a hill from which the employer was removing gravel, and while loosening the material while performing his work received injuries. Swanson v. Great Northern R. Co., 68 Minn. 184, 70 N. W. 978. To the same effect. Kletschka v. Minneapolis, etc., R. Co., 80 Minn. 238, 83 N. W. 133; Pederson v. Rushford City, 41 Minn. 289, 42 N. W. 1063. In Utah, that a laborer cannot recover for injuries caused by fall of bank caused by undermining the same for the purpose of removing it. Allen v. Logan City, 10 Utah, 279, 37 P. 496. In Wisconsin, that a workman of ordinary intelligence, whether experienced or not, is presumed to know that when a bank of earth is undermined by removing its foundation, it is liable to fall. Naylor v. Chicago, etc., R. Co., 53 Wis. 661, 11 N. W. 24. In Tennessee, that an ignorant and illiterate negro laborer must be taken to understand that the sides of a ditch dug in soil which is composed of cinders is liable to fall. Brown v. Chattanooga Elec. R. Co., 101 Tenn. 252, 47 S. W. 415, 70 Am. St. Rep. 666." —From opinion in Welch v. Carlucci Stone Co. [Pa.] 64 A. 392, 394.

5. The servant upon entering the service of the master, impliedly assumes by his contract of hire, for the same compensation, the hazards which result from such risks as are ordinarily incident to the employment. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. The servant is presumed to know the ordinary risks. It is his duty to inform himself of them, and if he negligently fails to do so he will still be held to have assumed them. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244. Open, apparent, obvious dangers, and dangers which the servant knows, or ought to know, are necessarily incident to his employment, are assumed. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323; Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592.

6. See, also, ante, § 3 E. Employe was injured by explosion of concealed dynamite cartridge, knowing the danger from cartridges so concealed, which was incident to the work of blasting, and was created by the act of a fellow-servant. He assumed the risk. Dawkins v. Keystone Granite Co., 74 S. C. 419, 54 S. E. 604.

7. See post, Reliance on Care of Master. Negligence on the part of the master is not an assumed risk. Jensen v. Kyer, 101 Me. 106, 63 A. 389; Schwarzschild & Sulzberger Co. v. Weeks, 72 Kan. 190, 83 P. 406. Risk of master's falure to supply reasonably safe place and appliances is not assumed. Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A 935. Railroad employe assumes ordinary risks, but not risks arising from negligence of the company with reference to the track, unless he knew of the defect. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Where gallow's frame was built by railroad company and carried from place to place as needed in bridge work and plaintiff assisted only in setting it up, he did not assume the risks of defects in its construction and plan. Farney v. Oregon Short Line R. Co. [Utah] 87 P. 440.

8. Negligence of vice-principal not assumed. Abilene Cotton Oil Co. v. Anderson [Tex. Civ. App.] 15 Tex. Ct. Rep. 91, 91 S. W. 607. Servant held not to have assumed risk of failure of another to give the usual warning when a heat was to be blown through molten metal in process of steel making. Illinois Steel Co. v. Ziemkowski, 220 Ill. 324, 77 N. E. 190. The servant did not assume the risk of the place being suddenly made dangerous by the foreman directing a derrick to be operated in a negligent and unsafe manner. Ball v. Megrath [Wash.] 86 P. 382. Several servants were holding a heavy wheel they had rolled on a flat car and foreman told them to let go. An employe could not get out of the way and was injured. The risk was not incident to his employment. Louisville & N. R. Co. v. Metcalf, 29 Ky. L. R. 870, 96 S. W. 525.

9. Negligence of switchtender not assumed by brakeman, under fellow-servant act, Rev. St. 1899, § 2873. Phippin v. Missouri Pac. R. Co., 196 Mo. 321, 93 S. W. 410. Miner was killed by a fellow-servant's raising certain guard rails of a shaft before a cage in which he was riding had reached a level, this being contrary to the custom. Held deceased assumed the risk of the manner in which the guard rails were built, but not the risk of their neglient operation (decided under fellow-servant statute). Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. Negligence of a "superintendent" is not an assumed risk. Baggneski v. Mills [Mass.] 78 N. E. 852. Where section foreman was not connected with work of switching cars, he did not assume the risk of injury by reason of negligence of employes engaged in switching. Houston, etc., R. Co. v. Turner [Tex.] 15 Tex. Ct. Rep. 55, 91 S. W. 562; Houston, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 817, 92 S. W. 1074. While a switchman assumes ordinary risks incident to the boarding of trains in motion, he does not assume the risk of a sudden jerk of the

usual or extraordinary risks[10] which the exercise of ordinary care on the part of the master would have obviated,[11] or which are encountered outside the service which the employe was hired to perform,[12] and which ordinary care in the performance of his duties would not disclose,[13] are not assumed. Risks arising from latent defects, not discoverable by the use of ordinary care on the part of the master, and unknown to him, are assumed, though no knowledge of the defect or appreciation of the danger by the servant is shown, such risks being classed as incidental.[14]

Known or obvious dangers.[15]—Risks which are actually known to the servant,[16]

train, as he is about to board it, caused by negligence of the crew of the train. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S. W. 339. Stone mason, at work on railroad culvert, did not assume risk of negligence of a member of a pile driver crew which was at work on a nearby trestle. International, etc., R. Co. v. Muschamp [Tex. Civ. App.] 90 S. W. 706.

10. Electric linemen assume ordinary risks but not unusual or extraordinary dangers. Zentner v. Oshkosh Gaslight Co., 126 Wis. 196, 105 N. W. 911. Telephone exchange operator assumed ordinary risks of nervous annoyance and irritation that might be reasonably connected with the performance of her duties, but not the risk of dangerous shocks arising from a want of proper repair. Cahill v. New England Tel. & T. Co. [Mass.] 79 N. E. 821. Section hand does not assume risk of being struck by a piece of coal thrown from the tender of a passenger train owing to the tender passing over bad rails. Dean v. Kansas City, etc., R. Co. [Mo.] 97 S. W. 910. Where wires become crossed outside the building where deceased was at work, thereby causing a powerful electric current to be diverted and brought into the building on wires not intended to carry such a current, the danger therefrom was not an assumed risk. Belvidere Gas & Elec. Co. v. Boyer, 122 Ill. App. 117. Risk of pile of lumber falling is not an ordinary and incidental risk assumed by an employe in a lumber yard. McCormick Harvesting Mach. Co. v. Zakzewski, 121 Ill. App. 26. Employe feeding brass sheets into a rolling machine did not as matter of law assume risk of getting hand caught on sliver of a sheet of brass. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077.

11. Risks assumed are only those incidental and necessary risks which remain after master has exercised due care for the servant's safety. Hinchcliff v. Robinson, 118 Ill. App. 450; Chicago & A R. Co. v. Seevers, 122 Ill. App. 558. Railroad employes assume ordinary risks, but not those arising from master's failure to use ordinary care to inspect and keep safe the place of work. Denver, etc., R. Co. v. Warring [Colo.] 86 P. 305. Risks which can be avoided by the exercise of reasonable care by the master are not assumed by the servant unless they are so plain and certain that it can be said, as a matter of law, that the servant assumed them by working in the face of them. Lynch v. American Linseed Co., 113 App. Div. 502, 99 N. Y. S. 260.

An unusual risk which ordinary care on the part of the master would not have prevented is assumed. Where loaded coal cars were supposed to be started and driven only by drivers, a miner who was struck by a car coming out of a gallery, having been started by an intermeddler, assumed the risk, such an accident having never before occurred. Sommers v. Standard Min. Co. [Mich.] 13 Det. Leg. N. 697, 109 N. W. 30.

12. The servant does not assume risks which he could not reasonably expect to encounter because outside the scope of his duties. Lyon v. Charleston, etc., R. Co. [S. C.] 56 S. E. 18. But to render this rule applicable, it must be shown that the servant was transferred to essentially new duties and that the order under which he acted was negligent. Id. Plaintiff was employed to pile iron and load and unload cars in the yard of a bridge factory, but was called to the shop to help shear a steel plate and was there injured by the falling of a pile of angle irons. He did not assume the risk having been called to do work outside the scope of that which he was employed to do. New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485. Risks encountered by conductor of train while performing duties outside those for which he is employed, such duties devolving on him on account of a brakeman's illness, are not assumed by the conductor. Chicago, etc., R. Co. v. Snedaker, 122 Ill. App. 262.

13. See 6 C. L. 568, n. 56.

14. Incidental dangers are assumed even though not open to observation. Houston, etc., R. Co. v. Helm [Tex. Civ. App.] 14 Tex. Ct. Rep. 460, 93 S. W. 697. Servant assumes risks not discoverable by master by the use of ordinary care. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Planing mill employe assumed risk of knife flying off revolving cylinder of machine. Moran v. Mulligan, 110 App. Div. 208, 97 N. Y. S. 7.

15. See 6 C. L. 568.

16. City Water Works v. Lane, 122 Ill. App. 427. Servant assumes not only risks ordinarily incident to his employment, but also such unusual and extraordinary risks as he knows and comprehends. Johnson v. Boston, etc., R. Co., 78 Vt. 344, 62 A. 1021. Servant assumes ordinary risks and those of which he knows or as to which he has been instructed. Dow Wire Works Co. v. Morgan, 29 Ky. L. R. 854, 96 S. W. 530. Experienced employe assumed risk of known defect in handle bar. Mobile & O. R. Co. v. Beasley, 119 Ill. App. 18. Employe who went to work on steam power punching machine, knowing that cogs were unguarded and that the floor near it was greasy and slippery, assumed the risk of such defects. Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. Servant injured by breaking of bottle from which he was pouring vitriol, knowing the danger of using an uncased bottle, assumed the risk though he did not know the thickness of the glass in the

or which are so obvious [17] tha ta person of the same age, capacity, and experience,

bottle. Bryant v. Gaffney Mfg. Co. [S. C.] 56 S. E. 9. Sawmill employe assumed risk of being struck by a cart which he saw coming to a machine, and which he knew was too short to be handled by the machine where he failed to get out of the way of it. Imhoof v. Northwestern Lumber Co. [Wash.] 86 P. 650. Brakeman knew of low bridge and of condition of engine causing leakage of steam. Hence he assumed risks and could not recover for injury caused by raising his head while enveloped in cloud of steam and smoke while passing under bridge. Johnson v. Boston, etc. R. Co., 78 Vt. 344, 62 A. 1021. Where brakeman was coupling a car which he knew was defective and which was to be hauled to a repair shop, he assumed the risk of injury from its defective condition. Marshall v. St. Louis, etc., R. Co. [Ark.] 94 S. W. 56. Does not assume risk arising from defective condition of machinery unless he knows of the defect. Vicious mule. Esher v. Mineral R. & Min. Co., 28 Pa. Super Ct. 387. Complaint of an employe because a machine did not do good work does not show such knowledge of danger as to indicate assumption of risk. Greenan v. Eggeling, 30 Pa. Super. Ct. 253.

17. Risks held obvious and assumed: Bates-Rogers Const. Co. v. Dunn, 29 Ky. L. R. 428, 93 S. W. 1032; Utica Hydraulic Cement Co. v. Whalen, 117 Ill. App. 23. Narrowness of steps and low railing in building, being obvious dangers, were assumed risks. Herren v. Tuscaloosa Waterworks Co. [Ala.] 40 So. 55. Where plaintiff had worked in mill four years and knew about an unguarded drum used to operate a cable, which was an open and obvious danger, and recognized generally as dangerous, he assumed the risk. American Linseed Co. v. Heins [C. C. A.] 141 F. 45. Where workman, ordered to work on an iron beam, was told to climb up to a scaffold in a certain way, and in doing so was injured by a traveling crane, he assumed the risk of injury, which was obvious. American Tin Plate Co. v. Smith [C. C. A.] 143 F. 281. Machinist, employed to keep machinery in repair, held to have assumed risk of injury while repairing a tight pulley. Wade v. Thomson Press Co., 144 F. 305. Section foreman in charge of hand car and crew assumed risk of obvious defects in the car which caused it to leave the track, thereby injuring him. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24. Plaintiff assumed risk where he had worked in the place a number of months and was thoroughly familiar with it. International Packing Co. v. Kretowicz, 119 Ill. App. 488. Boy of eighteen held to have assumed risk of coming in contact with circular saw which he knew was in motion. Creamery Package Co. v. Daniels, 72 Kan. 418, 83 P. 986. Plaintiff, a carpenter of six years' experience, hired himself for constructive mill work and was injured while operating a "dolly" on a narrow runway. Held, he assumed all the obvious risks of his employment and could recover only on affirmative proof that planks furnished were defective in quality or dimensions. Harris v. Tremont Lumber Co., 115 La. 973, 40 So. 374. Experienced carpenter and handler of timber assumed risk of a timber falling while being handled with derrick. Sampson v. Holbrook [Mass.] 78 N. E. 127. Boy of seventeen, who had worked machine several months, assumed risk of cleaning endless bicycle chain on the cleaner. Lennon v. Goodrich [Mass.] 78 N. E. 421. Servant assumed risk of allowing heavy car wheels in repair shop to start moving and to catch him between them and a wall, conditions being open and visible and danger obvious. Duffy v. New York, etc., R. Co. [Mass.] 77 N. E. 1031. Employe digging in trench under frozen ground, without shoring, assumed obvious risk of cave-in. Hodgson v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 890, 109 N. W. 1125. Plaintiff was required to exercise care to prevent falling from the place where he was at work; he assumed the risk. Shoen v. Kerr-Murray Mfg. Co. [Mich.] 13 Det. Leg. N. 699, 109 N. W. 40. Where employe wanted lacing to repair a belt but was told to use rivets, as they were out of lacings, and employe did so, and the belt so fixed separated and injured him, he assumed the risk as a matter of law. Eligh v. Goldie, 143 Mich. 596, 13 Det. Leg. N. 96, 107 N. W. 316. If motorman who had had usual training, and who knew the uses of sand in going down hill, had sand on his car and failed to use it, he assumed the risk, notwithstanding a statement of the superintendent that automatic sand boxes were not necessary and that he could take a car down the hill in question without the use of sand. Mayer v. Detroit, etc., R. Co., 142 Mich. 459, 12 Det. Leg. N. 843, 105 N. W. 888. Experienced dredge engineer, who assisted in making repairs, placed a casting in such a position that it slid down a skid upon him. He assumed the risk. Schneider v. Wolverine Portland Cement Co. [Mich.] 13 Det. Leg. N. 694, 108 N. W. 1113. Brakeman was crushed between a cattle chute and a car while directing the movement of cars. He was familiar with the location of the chute and could see the conditions and was free to choose his position. He assumed the risk, whether or not he knew the ordinary distance between a car and such chute. Wilson v. Lake Shore, etc., R. Co. [Mich.] 13 Det. Leg. N. 571, 108 N. W. 1021. Where employe was directed to pile lumber in an aisle in a sawmill, and the pile he made fell and injured him, he assumed the risk, which was obvious and one he himself voluntarily took. Hagglund v. St. Hilaire Lumber Co., 97 Minn. 94, 106 N. W. 91. Operator of mangle assumed risk of patent defects. Coulter v. Union Laundry Co. [Mont.] 87 P. 973. Telephone employe assumed risk of method and appliances used to support a cable which was being raised. Blust v. Pac. States Tel. Co. [Or.] 84 P. 847. Crane near which employe worked had been defective for three months, its condition being apparent. No recovery for injury resulting therefrom. Lindberg v. National Tube Co., 213 Pa. 545, 62 A. 985. Experienced log truck driver, who had driven truck in question three or four times, assumed risk incident to its use, which was apparent to him. Zeilmann v. McCullough, 214 Pa. 27, 63 A. 368. Employe excavating under a rock assumed obvious risk of its falling when undermined. Welch v. Carlucci Stone Co. [Pa.] 64 A. 392. Fireman held to have assumed risk of absence of wheel or nut from brake staff when he had

exercising ordinary care, would have known of them, [18] are also assumed by a servant who continues in the employment with such actual or implied knowledge of the danger.[19] But mere knowledge of a defective condition will not alone charge a servant with the assumption of a risk; it must also appear that he knew and appre-

worked with it several hours. Missouri, etc., R. Co. v. Hanson [Tex. Civ. App.] 14 Tex. Ct. Rep. 415, 90 S. W. 1122. Section foreman held to have assumed risk of unloading timber from cars with gang of Mexican laborers. Bryan v. International, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693. One employed to load and unload freight assisted in fixing up a platform and incline to be used in unloading battery houses from cars and had assisted in unloading five before he was injured. He assumed the risk arising from the insufficiency of the means employed. Grandin v. Southern Pac. Co. [Utah] 85 P. 357. Where operator of mangle in laundry got her hand caught by putting it over the guard to smooth out wrinkles in a sheet, she assumed the risk, though not warned not to do so, the danger being apparent. Kranich v. Knapp [Wash.] 86 P. 207. Servant employed to wheel away brick from a brick and wooden building which was being torn down assumed the risk of being struck by a falling board. Walaszewski v. Schoknecht, 127 Wis. 376, 106 N. W. 1070.

18. Risks discoverable by ordinary care are assumed. Western Union Tel. Co. v. Haltby, 29 Ky. L. R. 523, 93 S. W. 652. An employe assumes risks discoverable by the use of ordinary care on his part. Evansville Gas & Elec. Light Co. v. Raley [Ind. App.] 76 N. E. 548. Telephone lineman employed to move wires from old poles assumed risk of slipping on an old pole and of catching hold of a poorly insulated wire in an endeavor to save himself. The defects were such as he would have discovered by the use of ordinary care in performance of his duty. Id. Servant is charged with full consequences of what he ought to have known in the exercise of ordinary care and prudence. Jensen v. Kyer, 101 Me. 106, 63 A. 389. A minor assumes the risks of all such apparent dangers as he is capable of comprehending and avoiding. Bare v. Crane Creek Coal & Coke Co. [W. Va.] 55 S. E. 907. A minor employe assumes such risks of the business as a person of his apparent age, experience, and capacity would discover and appreciate. Moss v. Mosley [Ala.] 41 So. 1012. Employe eighteen years old presumptively assumes same risks as an adult would assume, and burden is on plaintiff to show his inexperience and need of instruction. King v. Woodstock Iron Co., 143 Ala. 632, 42 So. 27. Employe who was as familiar with peril as any employe whom master could have selected to remove or guard against it, he assumed the risk. Crown Coal & Tow Co. v. Koenig, 119 Ill. App. 192. Where defect is so plain and obvious that an employe ought to have knowledge of it by exercising ordinary care, he assumes the risk, in the absence of any promise to repair. Chicago Union Traction Co. v. Theorell, 120 Ill. App. 490. Where the defect is obvious and the danger would have been known and appreciated by an ordinarily prudent person of the same age and experience, a servant cannot be heard to say that he did not appreciate the danger. Blust v. Pac. States Tel. Co. [Or.] 84 P. 847. An open and obvious defect is one which is manifest to the sense of observation, open and readily discernable, whether it arises from the nature of the business, the particular manner in which it is conducted, or the use of defective and unsafe appliances. New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 106 N. W. 213. Where scaffold fell, owing to defective joist, injuring plaintiff, he could not recover if he knew, or, in the exercise of ordinary care, ought to have known, of the defect. Covington & Co. Bridge Co. v. Hull, 28 Ky. L. R. 1038, 90 S. W. 1065. An unskilled workman will be charged with the assumption of a risk only when the peril is so obvious that an ordinarily prudent and intelligent person would have appreciated it. Bailey v. Mukilteo Lumber Co. [Wash.] 87 P. 819. Instruction in effect that servant did not assume risk unless it was one which would have been apparent to a person of ordinary prudence with the same experience and knowledge under similar conditions, approved. Sullivan v. Wood & Co. [Wash.] 86 P. 629.

19. An employe may assume risks by continuing in the employment with knowledge of danger. Rooney v. Brogan Const. Co., 113 App. Div. 813, 99 N. Y. S. 939. Employe assumed risk of danger from flying bits of steel, where he voluntarily continued in the work of chipping with knowledge of the danger. Cripple Creek Sampling & Ore Co. v. Souza [Colo.] 86 P. 1005. Where teamster complained of loose tire on wagon and foreman said they would have to have it fixed, and teamster kept on using the wagon, he assumed the risk. Thorne v. Minneapolis General Elec. Co., 97 Minn. 329, 106 N. W. 253. If servant continues in employment having means of knowing risks, such risks are assumed. Evidence insufficient to show that employe did not know that stacks of lumber were liable to fall, which made his place of work unsafe. McCormick Harvesting Mach. Co. v. Zakzewski, 220 Ill. 522, 77 N. E. 147. Where operator of steel shearing machine complained of a defect, and the foreman put in a new screw but the defect was not remedied, as the operator well knew, the risk of using the machine in this condition was assumed. Goga v. American Car & Foundry Co., 142 Mich. 340, 12 Det. Leg. N. 761, 105 N. W. 859. Servant assumes risks arising and becoming known in course of employment such as machine getting out of repair while he is using it. Andrecsik v. New Jersey Tube Co. [N. J. Err. & App.] 63 A. 719. Risk of running emery wheel without a guard assumed when wheel was unguarded when plaintiff began work. Master was under no duty of changing it. Saxe v. Walworth Mfg. Co., 191 Mass. 338, 77 N. E. 883. Plaintiff was both fireman and brakeman. He got off the engine and in attempting to board the train to perform duties as brakeman he fell, as the train was moving too fast and passengers

ciated the danger arising from the defect.[20] Knowledge of the danger will, however, be implied from knowledge of the defect, if the danger would be apparent to a person of ordinary intelligence.[21] Dangers which are as well known to the servant as to the master, or which the servant has an equal opportunity with the master to observe, are assumed.[22] Risks which are unknown to the servant, and which due care on his part would not have disclosed, and which are not among those risks which are classed as incidental are not assumed.[23] Whether a particular risk was

on the steps of the car prevented his boarding it. He had done this each day. Held he assumed the risk. Griffith v. Lexington Terminal R. Co., 124 Ga. 553, 53 S. E. 97. Workman on building in course of construction who knew of absence of flooring between two stories (such flooring being required by St. 1901, p. 105, c. 166), assumed the risk. Marshall v. Norcross, 191 Mass. 568, 77 N. E. 1151.

20. To assume the risk of a defect the servant must both know of the defect and appreciate the danger. Chicago, etc., R. Co. v. Daugaard, 118 Ill. App. 67. To assume a risk a servant must know and appreciate the danger, or be charged with such knowledge, as well as the condition of the instrumentality supplied him. Hendrickson v. Ash [Minn.] 109 N. W. 830. Employe did not assume risk of working in building which had insufficient means of escape in case of fire unless she knew and appreciated the danger. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. Fireman did not assume risk of injury from defective condition of the apron between the cab and tender when he did not discover it until he had removed coal from it during the trip and did not then appreciate the danger. Missouri, etc., R. Co. v. Dumas [Tex. Civ. App.] 15 Tex. Ct. Rep. 538, 93 S. W. 493. Though operator of laundry machine knew it did not run right, she did not as a matter of law assume the risk of injury unless she appreciated the danger. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. Employe operating machine had noticed an external defect in machine and reported it. The defect was not remedied. The employe did not know of or appreciate the danger of continuing to run the machine. Held he did not assume the risk. Libbey v. Cook, 222 Ill. 206, 78 N. E. 599.

21. Servant is charged with knowledge of a danger obvious to a person of ordinary intelligence. International Packing Co. v. Kretowicz, 119 Ill. App. 488. Actual knowledge need not be shown, if the defect and danger would be apparent to an ordinarily prudent person under the same circumstances. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. To assume the risk of a defect a servant must know and appreciate the danger arising therefrom, but if the danger is so obvious as to be apparent to a person of ordinary prudence, the servant is chargeable with a knowledge thereof. Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. An employe who worked near a dynamite magazine, knowing it was a dangerous place, assumed the risk of an accidental explosion, though he did not fully appreciate all the danger or anticipate just the accident which occurred. He assumed the result of what might reasonably have been expected to occur. Davis v. Somers-Cambridge Co. [Ohio] 79 N. E. 233.

22. Dangers as obvious to employes as to master are assumed. Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 866, 92 S. W. 426. Where telephone lineman inspected old pole before climbing it and did not rely on an inspection by the master, he assumed the risk of the pole falling with him. Adams v. Central Indiana R. Co. [Ind. App.] 78 N. E. 687. Experienced employe assumed risk of injury from sliver from steel punch which had become worn and battered, the tool being a simple one, and his knowledge of the danger equal to the master's. Cincinnati, etc., R. Co. v. Phinney [Ind. App.] 77 N. E. 296. Duty of inspecting drill holes was delegated to an expert drillman, and he was to see that no accidental explosions occurred. Held he could not complain of the method of inspection used, having adopted and used it. Knorpp v. Wagner, 195 Mo. 637, 93 S. W. 961.

23. Risks held not assumed: Danger from defects in hand car not assumed unless known. St. Louis S. W. R. Co. v. Plumlee [Ark.] 95 S. W. 442. Servant does not assume risks unknown to him and known to the master, or which the master ought to know in the exercise of ordinary care. Archer Foster Const. Co. v. Vaughn [Ark.] 94 S. W. 717; Minor, inexperienced employe, unacquainted with ordinary risks of his employment, does not assume the same, in the absence of any warning or instruction by the master. Arkadelphia Lumber Co. v. Whitted [Ark.] 98 S. W. 697. Switchman held not to have assumed risk of locating switch too near track whereby his hand was crushed by the switch handle striking the step of a car. Chicago, etc., R. Co. v. Riley [C. C. A.] 145 F. 137. Employe did not assume risk of injury from cars "kicked" down siding when he did not know of the existence of the custom of handling cars in this manner. Pennsylvania Co. v. Chapman, 118 Ill. App. 201. Defects in traveling crane consisting of certain irregularities in the track from which it was suspended and of insufficient bracing, by reason of which it fell, held not so obvious to an ordinary servant employed in the shop that he assumed the risk as a matter of law. Hamner v. Janowitz [Iowa] 108 N. W. 109. Where uninstructed and inexperienced employe was sent to roll a heavy wheel from one shop to another with the assistance of fellow-servant, he did not assume the risk of the wheel falling upon him owing to the improper way in which he went about it. Beardsley v. Murray Iron Works Co., 129 Iowa, 675, 106 N. W. 180. Servant was required to pass between revolving fly wheels in the dark being unfamiliar with the premises, and was caught by nuts and bolts on shafting which he did not see. He did not assume the risk. Bates-Rogers Const. Co. v. Dunn, 29 Ky. L. R. 428, 93 S. W. 1032. Inexperienced employe nine-

known or ought to have been known to the servant, within the meaning of these rules is ordinarily a question of fact [24] to be determined by reference to the age,

teen years old held not to have assumed risk of operating a rip saw which was not as carefully guarded as it might have been, no instructions or warning having been given him. Dow Wire Works Co. v. Morgan, 29 Ky. L. R. 854, 96 S. W. 530. A servant assumes only such risks as he is informed of or that he ought to have discovered in the exercise of ordinary care. Johnson v. Christie, 117 La. 911, 42 So. 421. Printing press started of its own accord while plaintiff was running it for the first time, so that he had no knowledge of any defect, and no defect was apparent. He did not assume the risk. Byrne v. Boston Woven Hose & Rubber Co., 191 Mass. 40, 77 N. E. 696. Boy sent to dip out acid, without knowledge of character of liquid, and unwarned, did not assume risk of splashing acid in his eyes. Hadde v. Attleboro Mfg. Co. [Mass.] 79 N. E. 262. Where employe who had never run a "buzz planer" was put to work on it without instruction, he did not assume the risk of a board slipping because of lack of a guard, causing his hands to go into the knives, though he knew the machine was dangerous. Silva v. Davis, 191 Mass. 47, 77 N. E. 525. Employe who did not know that heavy sleepers in platform were not spiked did not assume the risk of danger arising therefrom. White v. St. Perry Co., 190 Mass. 99, 76 N. E. 512. Servant was sent to deliver baled hay and told to use hoisting appliance owned by customer, a rope of which broke, injuring him. Held the appliance was not so simple or the defect so obvious that he was charged with the assumption of the risk as a matter of law. De Maries v. Jameson [Minn.] 108 N. W. 830. Evidence sufficient to warrant finding that uninstructed, inexperienced employe did not assume risk of putting covers on unguarded rollers of mangle. Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340. Inexperienced employe eighteen years old held not to have assumed risk of method used to heat dynamite, as a matter of law, though there was evidence that he was afraid. Pinney v. King [Minn.] 107 N. W 1127. Defect in steam shovel apparatus, not obvious and arising from neglect of the master, held not assumed. Southern R. Co. v. Wiley [Miss.] 41 So. 511. Freight brakeman had worked only a few days and had passed over a certain trestle six times. He did not assume the risk of a fire from combustible material near the trestle of the presence of which he had no actual knowledge. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. Carpenter, at work in power house, was not required to assume that electric current would be turned on trolley wire when there was no necessity for it. Cessna v. Metropolitan St. R. Co., 118 Mo. App. 659, 95 S. W. 277. Where the danger from a falling pile of lumber was created by defendant's superintendent, and the injured employe had no knowledge of it until it fell, he did not assume the risk. Robertson v. Fuller Const. Co., 116 Mo. App. 456, 92 S. W. 130. Servant did not assume risk of being caught on set screw of revolving shaft of which he had no knowledge, the shaft being in a dark place. Walker v. Newton Falls Paper Co., 111 App. Div. 19, 97 N. Y. S. 521. Risk of falling into hole in floor not assumed by employe who was hauling a truck and walking backwards, when he did not know of the hole. Burke v. Manhattan R. Co., 109 App. Div. 722, 96 N. Y. S. 516. Danger of electric shock to employe engaged in removing snow from elevated road, using an iron shovel, which came in contact with third rail, held not obvious to such employe who was not an expert and not instructed. Smith v. Manhattan R. Co., 112 App. Div. 202, 98 N. Y. S. 1. Evidence insufficient to show that engineer assumed risk of derailment caused by defect in track owing to washout. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Evidence held to sustain finding that fireman did not know, and was not chargeable with knowledge, that iron apron between engine and tender was smooth and curved, and therefore defective and dangerous to walk on as fireman was obliged to do. Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. Servant held not to have assumed risk of defect in a runway of which he had no knowledge and which was not obvious. Lone Star Salt Co. v. Allen [Tex. Civ. App.] 97 S. W. 131. Defects in track in lumber yard held not so obvious that employe riding on footboard of engine in course of his duties assumed the risk. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607. Where employe in quarry was killed by falling rock, and defendant's inspector testified that the seam in the rock, indicating danger that it might fall, could not be seen from where deceased had worked, and that he, the inspector, had not seen it and had not supposed the rock was dangerous, deceased was held not to have assumed the risk. Black' Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. In going down the shaft of a mine in a skip, the clothing of a miner was caught on a projection in the shaft and he was thrown against plaintiff, who was performing his duties on the upper deck of the skip. Held plaintiff did not assume the risk of injury in this manner. Pearson v. Federal Min. & Smelting Co., 42 Wash. 90, 84 P. 632. Servant does not assume risks that are not open and obvious, and which he does not know and has no reason to know are incident to his employment. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323. Risk of hoisting hook being raised with unusual speed, causing it to swing violently, not assumed, as matter of law, where employe has no knowledge that it is to be raised in that manner. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 106 N. W. 1048. Girl of fifteen employed on slitting machine of paper company, who did not know that set screws were used to fasten slitters on the shaft and could not see them when the machine was going, did not as a matter of law assume the risk of getting her hair caught on a screw. Van De Bogart v. Marinette & Menominee Paper Co., 127 Wis. 104, 106 N. W. 805.

24. The question of assumption of the risk of a defect in machinery and appreciation of the danger is ordinarily one of fact and is not to be decided arbitrarily by rules of

capacity, experience, and intelligence of the employe,[25] and the facts and circumstances of the case.[26]

law, but by proper submission to the jury. Atlas v. National Biscuit Co. [Minn.] 110 N. W. 250. Charge erroneous as taking issue of assumption of risk from jury where employe's hand was run over by a crane. Wynkoop v. Ludlow Valve Mfg. Co., 112 App. Div. 729, 98 N. Y. S. 1076.

25. A servant's age and experience may properly be considered on the issue of his knowledge of danger and assumption of a risk. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789.

26. Whether risk was assumed held for jury: Whether brakeman assumed risk of using certain link and pin to couple car and engine. Choctaw O. & G. R. Co. v. Craig [Ark.] 95 S. W. 168. Whether miner knew of and assumed risk of water breaking through from an adjoining drift of another mine. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Fireman's head struck by mail crane located beside track. Denver & R. G. R. Co. v. Burchard [Colo.] 86 P. 749. Whether employe, who was caught in wheel while sitting in open window, assumed the risk. Michigan Headlining & Hoop Co. v. Wheeler [C. C. A.] 141 F. 61. Where railroad fireman was killed by derailment of train on regular run, whether he assumed risk was for jury, where it appeared engine was being run backwards and train was going round a curve at an unusually high rate of speed, and flange of the tender broke at the curve. Rickerd v. Chicago, etc., R. Co. [C. C. A.] 141 F. 905. Employe injured by traveling crane while working on partition in factory. National Enameling & Stamping Co. v. McCorkle, 219 Ill. 557, 76 N. E. 843. Whether conductor, from his familiarity with the condition of a track and semaphore wires assumed the risk of tripping over wires while going between cars to uncouple them. Chicago & E. I. R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169. Whether risk of working with insecurely fastened pile driver was assumed. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789. Servant digging ditch injured by cave-in. St. Louis & S. F. R. Co. v. Burgess, 72 Kan. 454, 83 P. 991. Inexperienced employe put to work on meat chopping machine without warning or instruction did not assume risk of getting hands in knives, as matter of law. Byrne v. Learnard, 191 Mass. 269, 77 N. E. 316. Where telephone exchange operator had noticed something wrong and had reported previous slight shocks, whether she appreciated the danger of continuing in the work, so that she assumed the risk of a shock which produced a serious injury, was for the jury. Cahill v. New England Tel. & T. Co. [Mass.] 79 N. E. 821. Car repair man held not to have assumed risk of working under a car which had been negligently jacked up by a foreman, as a matter of law. McClure v. Detroit Southern R. Co. [Mich.] 13 Det. Leg. N. 846, 109 N. W. 847. Whether employe on chain carrier in sawmill assumed risk. Hendrickson v. Ash [Minn.] 109 N. W. 830. Whether employe at work in a trench, and injured by a horse falling in, assumed the risk of a lack of guards and warning signals. Johnson v. St. Paul Gas Light Co. [Minn.] 108 N. W. 816. Evidence held not to show conclusively that operator of jointing machine was experienced and understood machine so that he assumed the risk of running it. Frazier v. Lloyd Mfg. Co. [Minn.] 108 N. W. 819. A minor employe, with limited experience, operated an unguarded machine for three months. He used a piece of burlap to grease pans coveyed to and carried from him by the machine. The cloth caught in a sprocket wheel and his hand was drawn in and a finger crushed. Atlas v. National Biscuit Co. [Minn.] 110 N. W. 250. Whether stationary engineer assumed risk of defect in apparatus used to move cars, a hook becoming loosened and striking him. O'Neal v. Refuge Cotton Oil Co. [Miss.] 41 So. 67. Whether switchman knew and assumed the risk of absence of blocks from switches in railroad yards so that he assumed the risk. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614. Whether carpenter in power house assumed the risk of coming in contact with an overhead trolley wire, when there was no necessity for having a current on the wire. Cessna v. Metropolitan St. R. Co., 118 Mo. App. 659, 95 S. W. 277. Whether brakeman assumed risk of being struck by water crane maintained by railroad company near the track. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. Whether employe in factory assumed, by continuing in the employment, the risk of a pile of lumber falling upon him. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Boy of thirteen injured by piece of wire which flew off an unguarded wire cutting machine. Thein v. Brecht Butchers' Supply Co., 116 Mo. App. 1, 91 S. W. 953. Whether coal miner assumed risk of slate falling on him from roof. Dodge v. Manufacturers' Coal & Coke Co., 115 Mo. App. 501, 91 S. W. 1007. Whether employe had such knowledge of the manner in which lumber was piled, and the danger of its falling, that he assumed the risk of injury when working near it, under orders. Hardesty v. Largey Lumber Co. [Mont.] 86 P. 29. Where brakeman, struck by a low bridge when on a car on a spur track, testified that he had never been on this track before and did not know of the bridge, whether he assumed the risk was for the jury. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Whether lineman assumed risk of injury from uninsulated wires. New Omaha Thomson-Houston Elec. Light Co. v. Rombold [Neb.] 106 N. W. 213. Whether lineman assumed risk of contract with charged wires when he had a few days before found them harmless and employer had not informed him that other company had commenced to use wires in day time. Snyer v. New York & N. J. Tel. Co. [N. J. Err. & App.] 64 A. 122. Whether servant who was told to put a valve on a six-inch gas main, while gas was turned on, an explosion resulting, ought to have known the danger, and whether he assumed the risk, held for jury in view of Laws 1902, p. 1748, c. 600. Cadigan v. Glens Falls Gas & Elec. Light Co., 112 App. Div. 751, 98 N. Y. S. 954. Where servant fell into an unguarded shaft, having tripped over sleepers, the floor being in an unfinished and rough condition, the issue of assumed risk was for the jury, though he knew of the un-

Reliance on care of master.[27]—In the absence of knowledge to the contrary, the servant has a right to rely on the assumption that the master has properly performed the various duties imposed on him by law [28] and need not make an indepen-

guarded shaft, since the jury should have passed on question whether he appreciated the danger arising from the condition of the floor. Rooney v. Brogan Const. Co., 113 App. Div. 813, 99 N. Y. S. 939. Whether employe assumed risk of being drawn by grain into the leg of a grain elevator. Lynch v. American Linseed Co., 113 App. Div. 502, 99 N. Y. S. 260. Where brakeman was injured by being struck by switchrod as he passed a switch, the question of assumption of risk was for the jury, plaintiff having given the notice required by Laws 1902, p. 1748, c. 600. Kinney v. Rutland R. Co., 99 N. Y. S. 800. Boy under sixteen injured while using circular saw. Rahn v. Standard Optical Co., 110 App. Div. 501, 96 N. Y. S. 1080. Employe removing snow from elevated road with iron shovel received shock from third rail. Smith v. Manhattan R. Co., 112 App. Div. 202, 98 N. Y. S. 1. Assumption of risk by brakeman killed in yards while coupling cars held for jury in action under employer's liability act. Freemont v. Boston & M. R. Co., 111 App. Div. 831, 98 N. Y. S. 179. Boy's hand drawn into roller of machine used to make paper. Makin v. Pettibone Cataract Paper Co., 111 App. Div. 726, 97 N. Y. S. 894. Whether fireman assumed risk of running engine on bridge after being assured by foreman of construction crew, after repairs were made, that it was safe. McCabe & Steen Const. Co. v. Wilson [Okl.] 87 P. 320. Whether servant assumed risk of injury by defective machine when oiling it. McCarley v. Glenn-Lowry Mfg. Co. [S. C.] 56 S. E. 1. Whether engineer knew or ought to have known of defects in lubricator, the explosion of which caused his injury, held for jury. Wysong v. Seaboard Air Line R. Co., 74 S. C. 1, 54 S. E. 214. Employe in mill injured while using ladder after stairway had been put in, and employes ordered not to use the ladder. Evidence showed continued use of ladder with knowledge of foreman, and tended to show want of notice or orders by plaintiff. Pipkin v. Hayward Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 157, 94 S. W. 1068. Whether minor, inexperienced employe, assumed risk of grinding a tool on the side of an emery wheel as instructed. Gulf, etc., R. Co. v. Archambault [Tex. Civ. App.] 16 Tex. Ct. Rep. 293, 94 S. W. 1108. Employe hauling clay was struck by girder in clay shed above him. Titterington v. Harry [Tex. Civ. App.] 97 S. W. 840. Laundry employe was injured while operating machine according to directions of foreman, and it appeared she knew it did not work as it should. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. Fireman on engine was overcome by gas while train was stalled in a tunnel, by reason of the helping engine having broken away, owing to a defective coupler. He knew that something was the matter with the coupler, also that a poorer grade of coal than usual was being used. Held he did not assume the risk as a matter of law. Doyle v. Great Northern R. Co. [Wash.] 86 P. 861. Whether servant assumed risk when he put his hands into unguarded cogs, of whose presence he knew but had forgotten when the machine was suddenly started by a fellow-servant. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323. Operator of planer in sawmill did not as a matter of law assume the risk of stepping into a hole in the floor, which was concealed by shavings and sawdust, and of which he had no notice. Baker v. Duwamish Mill Co. [Wash.] 86 P. 167. Whether minor, sixteen years old, assumed risk of injury from a saw the danger from which was open and obvious. Kirby v. Wheeler-Osgood Co., 42 Wash. 610, 85 P. 62. Where hub was heated to get it off the shaft of a propeller, and the superintendent struck it with a sledge hammer and oil spurted out and burned an employe assisting in removing it, whether employe should have known of the presence of oil and the danger therefrom held for jury. Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592. Where electric lineman making repairs had a right to suppose that current would be turned off as usual, he did not as a matter of law assume the risk of being killed by a shock. Zentner v. Oshkosh Gaslight Co., 126 Wis. 196, 105 N. W. 911. Whether danger of moving machine from car by method adopted was obvious. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081.

27. See 6 C. L. 572.

28. Servant may rely on presumption that master has performed his duty of providing a reasonably safe place. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 256. Employe in lumber yard may assume that his place of work is reasonably safe. McCormick Harvesting Mach. Co. v. Zaksewski, 121 Ill. App. 26. Coal miner may assume in absence of knowledge to the contrary that place to which he is sent to work is reasonably safe. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060. Servant may assume that machinery and appliances are reasonably safe. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184. A servant has a right to assume that the master has supplied reasonably safe tools and appliances. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409. Servants cannot assume that appliances are safe, only that ordinary care has been used to make them reasonably safe. International & G. N. R. Co. v. Von Hoesen [Tex. Civ. App.] 14 Tex. Ct. Rep. 463, 91 S. W. 604. A servant has the right to assume that the master has performed his duty by the exercise of that reasonable care for the servant's safety which the law requires, until he is warned or notified of danger, or until the danger becomes so obvious that a reasonably prudent servant, under the circumstances, would observe it. Dunne v. Jersey City Galvanizing Co. [N. J. Err. & App.] 64 A. 1076. Where a foreman selected a wedge to be used in a girder which was being raised, and it was too small and fell through and struck plaintiff, plaintiff did not assume the risk as a matter of law, since he had a right to rely on the exercise of ordinary care by the master. Sullivan v. Wood & Co. [Wash.] 86 P. 629. Skilled employe had right to as-

dent inspection or examination of his appliances or place of work.[29] In other words, negligence of the master, or of his representatives, is not one of the ordinary risks which a servant assumes,[30] ordinary or incidental risks being only those which due care on the part of the master would not have obviated.[31] But this rule is usually limited in its application to breaches of the master's duty unknown to the servant.[32] If a neglect of duty by the master is known to the servant,[33] or is discoverable by the use of ordinary care in the performance of his own duties,[34] and

sume that master would perform his duty of instructing an inexperienced employe so that latter would not cause injury by reason of his ignorance. Schneider & Co. v. Carlin, 120 Ill. App. 538.

29. Servant may assume that master has provided reasonably safe place and need not make independent investigation. Wiest v. Coal Creek R. Co., 42 Wash. 176, 84 P. 725. Employe who was ordered to excavate in a bank of earth and stone had a right to assume he could work with reasonable safety and was not under duty to make careful inspection. Chiappini v. Fitzgerald, 191 Mass. 598, 77 N. E. 1030.

30. As a general rule, the employe does not assume the risk of dangers growing out of the employe's negligence or the negligence of those for whom the master is responsible, however habitual it may be. Houston & T. C. R. Co. v. Turner [Tex.] 15 Tex. Ct. Rep. 55, 91 S. W. 562. Railroad employe does not assume risk arising from defective condition of coupling apparatus and failure of brakeman to use ordinary care in coupling cars. Missouri, etc., R. Co. v. Barnes [Tex. Civ. App.] 15 Tex. Ct. Rep. 524, 95 S. W. 714. Employe engaged in railroad construction work did not assume risk of negligence of conductor in charge of construction train in failing to adjust switches on moving the train from a side track to the main track. St. Louis, etc., R. Co. v. Boyles [Ark.] 95 S. W. 783. Negligence of master in furnishing a truck unsafe to be be run over a rough floor is not an assumed risk. Longree v. Jackes-Evans Mfg. Co., 120 Mo. App. 478, 97 S. W. 272. Risk of going between cars was not assumed by brakeman if he went there in course of duty owed to his employer. McManus v. Oregon Short Line R. Co., 118 Mo. App. 152, 94 S. W. 743. Superintendent in a gypum mine ordered miners into a "company room" just before a shot was discharged, and the wall of this room was blown in, causing death of an employe, the wall being thinner than the superintendent supposed. Held, there being a violation of the duty of the master, the risk was not assumed. Electric Plaster Co. v. Reedy [Kan.] 85 P. 824. An employe was ordered to work on a scaffold, which fell by reason of its faulty construction. The risk was not assumed, though the servant was engaged in taking the scaffold down. Liedke v. Moran Bros. Co. [Wash.] 86 P. 646. Stationary engineer was called by chief engineer to assist in test of electric motor, and during the test the motor exploded owing to presence of water, and stationary engineer, plaintiff, was injured. Held he did not assume the risk since he had a right to assume that the motor had been inspected and was reasonably safe. American Car & Foundry Co. v. Brinkman [C. C. A.] 146 F. 712. Where servant knew of existence of safety device on side track, he did not assume risk of its getting out of repair and remaining in such condition without actual or implied notice to him. Grand Trunk Western R. Co. v. Melrose [Ind.] 78 N. E. 190. Though brakemen knew that certain cars were uncoupled, he did not assume the risk of walking on them where the separation of them and his fall between them was caused by a sudden stopping of the train, by reason of the engineer's negligence. St. Louis S. W. R. Co. v. Pape [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534. If telephone lineman failed to inspect pole which he climbed because he relied on the foreman's inspection and on his order to climb it, he did not assume the risk. Western Union Tel. Co. v. Holtby, 29 Ky. L. R. 523, 93 S. W. 652.

31. Risks arising from the master's negligence, in addition to the incidental risks are not assumed. Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 16 Tex. Ct. Rep. 750, 97 S. W. 332.

32. St. Louis S. W. R. Co. v. Pape [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534. Master's negligence in failing to provide a reasonably safe place or reasonably safe appliances is not assumed risk unless known. Smith v. Buffalo Oil Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 682, 91 S. W. 383. Plaintiff, injured by falling of parcels from a truck, held not to have assumed risk of the injury, which arose from a defect in the truck and in the platform over which he was hauling it. Wells, Fargo & Co. Exp. v. Boyle [Tex. Civ. App.] 17 Tex. Ct. Rep. 350, 98 S. W. 441. The servant assumes no risk arising from negligence of the master unless he knew and appreciated the danger, or, in the discharge of his duties, while in the exercise of ordinary care, he must necessarily have acquired such knowledge. Galveston, etc., R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. It is sometimes said that negligence of the master is never an assumed risk, but a servant assumes the risk of defects of which he knows and the danger of which he appreciates. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Risks which are not incidental, but which arise by reason of the master's negligence after the service has commenced, are not assumed unless the servant knew of the defect and appreciated the danger. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244. Risks arising from negligence of the master are not assumed unless discoverable by the use of ordinary care, or made known to the servant. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359. Servant, furnished transportation to work, did not assume risk arising from defect in car unless it was obvious. Tanner v. Hitch Lumber Co., 140 N. C. 475, 53 S. E. 287. Inexperienced employe put to work at a pump of a barge did not assume the risk of the barge overturning owing to her unsafe con-

he continues in the employment without complaint,[35] he assumes the risk of so doing, notwithstanding the want of due care by the master [36] unless he was justified in believing that he could continue with safety, by exercising due care,[37] the danger not being so obvious and imminent that an ordinarily prudent person would not have encountered it.[38]

The servant may also assume that work will be done in the customary manner and that rules will not be violated.[39]

Reliance on orders or assurances of safety.[40]—A servant may rely to a reasonable extent upon the superior knowledge of the master or a superior,[41] and may assume that he will not be subjected to unusual or unnecessary danger.[42] Hence, he does not assume the risk of executing an order of a superior [43] or of continuing

dition and the negligent manner of unloading, where he had no knowledge or appreciation of the defects or danger. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

33. Where work was customarily done in negligent manner which caused injury, to servant's knowledge, he assumed the risk. Gulf, etc., R. Co. v. Huyett [Tex.] 15 Tex. Ct. Rep. 502, 92 S. W. 454. Servant assumes risk of master's negligence if he knows of it and voluntarily faces the danger. Wisenger, Adm'x v. Donk Bros. Coal & Coke Co., 119 Ill. App. 298.

34. Servant may assume that master has performed his duty, but must exercise ordinary care for his own safety, and if, in the performance of his duties, he discovers, or in the exercise of ordinary care should have discovered, a defective condition and the attendant danger, he assumes the risk of injury proximately resulting therefrom. Price v. Consumers' Cotton Oil Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 151, 90 S. W. 717. An employe may assume that the master has properly performed his duty and does not assume the risk of a violation of it, unless the defect is so apparent that he ought to have observed it and appreciated the danger, in the exercise of ordinary care. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500.

35. Besides the risks incidental to the employment, a servant assumes risks arising from defects in his place of work or appliances, if he continues in the service without complaint, after he has knowledge of such defects, provided he appreciates the dangers arising therefrom. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460.

36. A servant entering or continuing in the employment of a master with knowledge of the defective appliances used by him or of the imperfect methods of work used, without objection or complaint, assumes the risk arising therefrom. Blust v. Pacific States Tel. Co. [Or.] 84 P. 847.

37. Mere knowledge of a defect will not charge an employe with the assumption of the risk if he was justified in believing that he could continue without injury by exercising ordinary care. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

38. Robertson v. Hammond Packing Co., 115 Mo. App. 520, 91 S. W. 161. It is only when it becomes apparent to any reasonable man that the master has failed in his duty and that the safety of the servant is imminently endangered that the law requires him to refuse to work in the dangerous place, if he would be held blameless. Dodge v. Manufacturers' Coal & Coke Co., 115 Mo. App. 501, 91 S. W. 1007. Use of a machine known to be defective will not bar a recovery unless the danger was so obvious and imminent that a person of ordinary prudence would not have used it. Lawrence v. Heidbreder Ice Co., 119 Mo. App. 316, 93 S. W. 897. An employe does not assume the risk of a known defect if under the circumstances an ordinarily prudent person would have continued in the employment. Cooper's Adm'r v. Daniels Co., 29 Ky. L. R. 1172, 96 S. W. 1100.

39. Car checker had a right to rely on custom of giving warning when cars were kicked down side track, and did not as a matter of law assume the risk of being struck by a car while engaged in his work. Meadowcroft v. New York, etc., R. Co. [Mass.] 79 N. E. 266.

40. See 6 C. L. 576.

41. Hunley v. Patterson & Co., 116 La. 736, 41 So. 54.

42. Where employe was ordered to get a piece of lumber from a pile, he had a right to assume that the foreman would not order him into a place of danger, and he did not assume the risk of the pile falling on him. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Brakeman does not assume risk of being subjected to sudden and unexpected danger while executing an order of the conductor; risk of sudden stopping of engine without cutting off car which brakeman was put on to control by hand brake. Pittsburgh, etc., R. Co. v. Nicholas, 165 Ind. 679, 76 N. E. 522.

43. Where a servant is injured while complying with a command of a superior, the master cannot relieve himself on the theory that the defect was one in respect to a simple and ordinary appliance as to which the servant had full knowledge. Kraft v. Neunkirchen, 119 Ill. App. 369. Where the master or his representative orders or requests the servant to engage in an employment outside the scope of the duties which the servant has contracted to perform, which employment is attended with dangers unknown to the servant and not open to his observation, and which are not discoverable by him by means of such an inspection as he has time and opportunity to make, and gives him no instructions with respect to such dangers, and he is injured in consequence of so entering upon the new service, he is not deemed to have accepted the risk

his work after an assurance of safety by a superior,[44] unless the danger is known and appreciated by the servant,[45] or is obvious and imminent and such that an ordinarily prudent person would not have encountered it under the circumstances.[46] The question is ordinarily one of fact.[47]

of such dangers, and the master is liable in damages for the injury. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516.

44. Employe did not assume risk of shock from third rail while engaged in repairs on track at night, having been told the power was off. Keeley v. Boston El. R. Co. [Mass.] 78 N. E. 490.

45. Southern Cotton Oil Co. v. Spotts, 77 Ark. 458, 92 S. W. 249. Where work is being done under orders of a superior, the risk of injury is assumed only when the danger is known and appreciated. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244. Even though an employer performs work under orders, and unwillingly, no physical compulsion being used, he may assume the risk if he knows and appreciates the danger. Id. After an expert drillman had inspected a hole and found it unsafe, he had no right to rely on an assurance of safety by a superintendent who knew less about it than he did, and he assumed the risk though he went to work under a command of the superintendent. Knorpp v. Wagner, 195 Mo. 637, 93 S. W. 961. Though employe was injured while oiling a machine under orders of a superintendent, and requested that the machine be stopped, which was refused, yet if he knew and appreciated the danger of oiling it when in motion he would have assumed the risk. Southern Cotton Oil Co. v. Spotts, 77 Ark. 458, 92 S. W. 249. Where servant knew that mangle was unsafe, even though it had a guard, and was afraid of it, but nevertheless consented to operate it, she assumed the risk of getting caught in the rollers, notwithstanding foreman's assurances of safety, since she was not misled thereby. Burke v. Davis, 191 Mass. 20, 76 N. E. 1039. Section foreman who went on a railroad velocipede by direct order of a superior nevertheless assumed the risk, since his knowledge of the danger from trains was equal to that of his superior. Ives v. Wisconsin Cent. R. Co., 128 Wis. 357, 107 N. W. 452.

46. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500; American Brake Shoe & Foundry Co. v. Jankus, 121 Ill. App. 267. Where master furnished unsafe scaffold and ordered servant to use it, he could not set up defense of assumed risk, unless danger was so apparent that a man of ordinary prudence would not have incurred it. Hinchliff v. Robinson, 118 Ill. App. 450. Where a servant is injured while complying with a command of a superior coupled with a threat of dismissal in case of disobedience, he does not assume the risk unless an ordinarily prudent person would not have incurred the danger under the same circumstances. Kraft v. Neunkirchen, 119 Ill. App. 369. Where miner requested mine manager to inspect and ascertain if a room was going in the right direction, and was assured by the manager that it was all right, he did not assume the risk of injury by a blast through a wall which was thinner than specifications required, unless the danger was so plain that none but a reckless person would have encountered it. Consolidated Coal Co. v. Shepherd, 220 Ill. 123, 77 N. E. 133. The servant has the right to rely on the superior knowledge of the master, and when acting under his orders will not be held to have assumed a risk, unless it was so evident that no prudent person in his place would have obeyed the order. Hunley v. Patterson & Co., 116 La. 736, 41 So. 54. Where servant acts under express orders and is exposed to unusual danger and is injured, the master is liable unless the servant realized the danger, or unless it was so obvious and imminent that a man of ordinary prudence would not have undertaken it. Ross-Paris Co. v. Brown, 28 Ky. L. R. 813, 90 S. W. 568. Evidence held to show that employe in laundry did not appreciate the risk of operating a laundry mangle. Id.

Risk held to have been assumed: Section hand assumed risk of using obviously defective hand car, even though he was acting under direct orders of his superior. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24. Employe who drove his team, hitched to a scraper, down a steep bank, assumed the risk, though defendant's agent told him to do so, assuring him it was safe. Lindsay v. Hollerback & May Contract Co., 29 Ky. L. R. 68, 92 S. W. 294. Where a peril which can be easily apprehended attaches to the operation of a machine that is in good order, and it appears that the operator understood the danger, the fact that his foreman on a previous occasion, when the machine may have been running at a different rate of speed and at work on different material, expressed ths opinion that the work was safe, does not render the master liable for an injury to the operator from the apprehended danger, and the taking of a case from the jury under such circumstances does not constitute error (Van Dusen Gas Co. v. Schelies, 61 Ohio St. 298, distinguished). Marshka v. Republic Iron & Steel Co., 7 Ohio C. C. (N. S.) 137. The fact that a servant undertakes an act under the direction of a superior does not relieve him from the assumption of the risk if the danger is obvious and known and appreciated by him. Brakeman assumed risk of being crushed between cars which crew were "staking," though conductor directed him to act as he did. Chicago Great Western R. Co. v. Crotty [C. C. A.] 141 F. 913.

47. Risk of explosion not assumed as matter of law by quarryman who was ordered to clean out a blast hole which he was told had been discharged. McKane v. Marr [Vt.] 63 A. 944. Whether driver of sprinkling cart assumed risk of driving into barn while seated on it (being struck by door), when employer told him to do so, and that it was all right. Jensen v. Kyer, 101 Me. 106, 63 A. 389. There is no absolute rule applicable to all cases by which to determine the question of the master's liability where the servant is injured in the performance of a duty which he was ordered or requested by the master or his representative to perform. The question depends on

Reliance on promise to repair, after complaint.[48]—Where the servant has complained of a defective condition, and the master or his representative has promised to make it safe by proper repairs, the servant may continue in the employment, without assuming the risk,[49] for such length of time as is reasonably necessary for the making of the required repairs,[50] unless the appreciated danger is so imminent that a man of ordinary prudence would refuse to encounter it.[51] To bring a case

the circumstances of each case. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Specific orders of the master and his assurances of safety are to be considered as part of circumtances in determining whether a risk was assumed. Jensen v. Kyer, 101 Me. 106, 63 A. 389. Where a young, inexperienced helper, under the orders of an operator of a machine, was injured by lifting a heavy piece of iron, under the operator's order, and would have been discharged had he not obeyed, he did not assume the risk as a matter of law. Sherman v. Texas & N. O. R. Co. [Tex.] 15 Tex. Ct. Rep. 127, 91 S. W. 561. Where employe objected to going down a stack on a swing board, and foreman told him to go ahead that it would be all right with weight on it, and the board caught on a rivet and tipped throwing plaintiff to the bottom of the stack, he did not assume the risk as a matter of law. Springfield Boiler & Mfg. Co. v. Parks, 222 Ill. 355, 78 N. E. 809.

48. See 6 C. L. 577.

49. Citrone v. O'Rourke Engineering Co., 113 App. Div. 518, 99 N. Y. S. 241; Chicago Tel. Co. v. Schulz, 121 Ill. App. 573. A promise to repair after complaint relieves the servant of the assumption of the risk. Bates-Rogers Const. Co. v. Dunn, 29 Ky. L. R. 428, 93 S. W. 1032. The master by promising to amend a defect complained of by the servant as an inducement to the servant to continue, forthwith takes from the servant the risk, and thereafter, and during the period for repair, assumes it. Andrecsik v. New Jersey Tube Co. [N. J. Err. & App.] 63 A. 719. Plaintiff, working near coal chute, complained that overhead platform was not wide enough to protect employes from falling coal and parts of machinery, and foreman promised to have it extended, but before he did so plaintiff was injured by a falling weight. He did not assume the risk. Buffalo Creek Coal Min. Co. v. Hodges [Ky.] 98 S. W. 274. Miner noticed that shaft was dangerous, being untimbered, and complained to superintendent two days before he was injured by the fall of a rock down the shaft. The superintendent promised to have the shaft timbered right away. The miner did not assume the risk. Monarch Min. & Development Co. v. De Voe [Colo.] 85 P. 633. Plaintiff complained that trench in which he was to work was unsafe, and foreman told him to go to work and after dinner he would fix it. Plaintiff was injured during the forenoon. Held risk was assumed by master. Citrone v. O'Rourke Engineering Co., 113 App. Div. 518, 99 N. Y. S. 241.

50. Servant complained of machine on Monday and master promised to repair the following Saturday. Servant did not assume risk of injury on Thursday. Swarts v. Wilson Mfg. Co., 100 N. Y. S. 1054. Servant assumes risks known to him when he goes to work, unless master promises to make repairs, in which case he may continue a reasonable time after the promise without assuming the risk. Louisville Belt & Iron Co. v. Hart, 29 Ky. L. R. 310, 92 S. W. 951. Where employe operating a machine complained that it was in a dangerous condition and received promise that it would be fixed, he had a right to continue working for a reasonable time without assuming the risk, the danger not being so imminent that a person of ordinary prudence would not have incurred it. Antletz v. Smith, 97 Minn. 217, 106 N. W. 517. If a promise to repair is not fulfilled in such time as would ordinarily and reasonably be required to fulfill it, the servant, remaining after such time, assumes the risk. Parker v. Drakesboro Coke & Coal Min. Co., 29 Ky. L. R. 825, 96 S. W. 575. Servant employed around the mouth of a mining shaft threatened to leave unless barriers were built, but remained seven days thereafter and was then injured, though no barrier had been built. Such safeguard could have been made in half a day by an unskilled workman. Held, risk assumed. Heathcock v. Milwaukee-Platteville Lead Zinc Min. Co. [Wis.] 107 N. W. 463

Question of fact: For how long a time the servant may continue to work after a promise to remove a danger has been made is ordinarily a question of fact to be solved in view of all the facts and circumstances. Victor Coal Co. v. Dunbar, 120 Ill. App. 288. Where miner continued to work after superintendent promised to timber a dangerous shaft right away, and was injured two days later, whether he was negligent in continuing to work was for the jury. Monarch Min. & Development Co. v. De Voe [Colo.] 85 P. 633. Where, on complaint, master promised to repair a circular saw machine "pretty soon," whether it was negligent to continue work two days in reliance on the promise was for the jury. Tannhauser v. Uptegrove & Bro., 100 N. Y. S. 245. Employe was told on November 5th that openings in floors would be rendered safe. November 9th he saw lumber to be used for the purpose. On November 14th he was struck by a piece of gas pipe which fell through. Whether he reassumed the risk of injury from the defect complained of was for the jury. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Where operator of circular saw complained of lack of guard, and foreman promised several times to have it fixed, and some days later the employe was injured, whether he assumed the risk was for the jury. Eligh v. Goldie, 143 Mich. 596, 13 Det. Leg. N. 96, 107 N. W. 316.

51. Where employe complained of lack of runways between joists on which he had to work, and foreman said they would have them made, the employe did not assume the risk of falling through unless the danger was glaring and obvious and such that he would be in danger, notwithstanding the exercise of ordinary care by himself. Robertson v. Hammond Packing Co., 115 Mo. App. 520, 91 S. W. 161. Where employe asked

within the operation of this rule, it must appear that the servant who made the complaint apprehended danger to himself and desired the repairs to be made for his own protection.[52] A complaint as to dangerous premises which plainly conveys the idea that a defect exists and that the employe desires it to be removed is sufficient.[53] The complaint need not be made to the master personally; it is sufficient if it be made to a representative of the master having authority in the premises,[54] or to one whose duty it is to communicate such complaints to the master.[55] The promise to repair must be made by the master or some one standing in his place.[56] The promise of a mere fellow-servant is without effect, unless it appears that he made it by authority from the master.[57] It must further appear that the servant relied upon the promise.[58] A foreman may be justified in relying upon a promise to repair, made upon a complaint by him, as well as an ordinary servant,[59] where it sufficiently appears that his complaint was made, in part at least, because of apprehension of personal danger to himself.[60] The promise to repair need not be express but may be implied from what was said at the time complaint was made.[61] Where the promise is general and indefinite, the master's undertaking runs for a reasonable time.[62] Where the promise is to repair at a fixed time, it runs only until the termination of the time fixed.[63] The rule under discussion does not apply

for assistance in moving cars and was promised help, he did not assume the risk of proceeding in the work without such help, unless the danger was so imminent that no man of ordinary prudence would continue. North Chicago St. R. Co. v. Aufmann, 221 Ill. 614, 77 N. E. 1120. Where master promised to repair appliance being used by plaintiff as soon as the job on which he was engaged was finished, and plaintiff continued and was injured before completing the job, whether the danger was so imminent that he assumed the risk was for the jury. Leeson v. Sawmill Phoenix, 41 Wash. 423, 83 P. 891.

52. Complaints as to openings in floors of works through which objects might fall on those below held to indicate sufficiently that plaintiff desired the defect remedied for his own protection while going about the plant. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Where a depot employe requested the removal of snow from the platform, and the station agent promised to have it done, but the complaint was not based on any apprehension of danger but on a desire to make himself and passengers more comfortable, he was not relieved from the assumption of the risk. Texas & P. R. Co. v. Nichols [Tex. Civ. App.] 14 Tex. Ct. Rep. 742, 92 S. W. 411.

53. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475.

54. Complaint of opening in floors of works through which objects might fall, made to a night superintendent in charge at the time, who had under him foremen controlling three hundred and fifty to four hundred men, was made to a proper person so as to bind the master. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Whether employe to whom plaintiff complained of defects had authority to make repairs held a question for the jury, in view of evidence. Burch v. Southern Pac. Co., 145 F. 443.

55. Odin Coal Co. v. Tadlock, 119 Ill. App. 310.

56. Spencer v. Haines [N. J. Law] 64 A. 970. General manager and foreman in charge of a local camp and logging operations were vice-principals, and a promise by them to repair was binding on the master. Bailey v. Swallow [Minn.] 107 N. W. 727.

57. Where engineer who had care of machinery in hotel told operator of mangle in laundry that he would repair it, the promise did not relieve the employe of the assumption of risk, there being nothing to show actual or implied authority of the engineer to bind the master. Spencer v. Haines [N. J. Law] 64 A. 970.

58. Evidence held not to show conclusively that injured employe and his fellow-servants did not rely on a foreman's promise to repair a platform on which they work or that they themselves had undertaken to make such repairs. Bailey v. Swallow [Minn.] 107 N. W. 727.

59. Viou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891.

60. Foreman complained that tram cars kept running off a bridge over a ravine because a curve was too short. He occasionally rode across on cars himself. The superintendent promised to have the defect fixed. Held the foreman did not assume the risk of injury from a tram car falling upon him while at work in the ravine getting out cars which had previously gone over. Viou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891.

61. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Promise of superintendent that "he would see to it and have it fixed" held sufficient. Id.

62. Andrecsik v. New Jersey Tube Co. [N. J. Err. & App.] 63 A. 719. What is a reasonable time may be for the jury, but if the servant continues longer than such a time without any repairs being made, he assumes the risk thereafter. Id.

63. There is in such case no question for the jury as to when servant reassumes the risk. Andrecsik v. New Jersey Tube Co. [N. J. Err. & App.] 63 A. 719. Workman complained of machine at 10 o'clock in forenoon and superintendent told him to go ahead, that work must be rushed and that

where the complaint and promise to repair have reference to a simple tool or appliance.[64]

Risks created by servant.[65]—A servant who unnecessarily adopts a dangerous method of doing work, when another method less dangerous is open to him, assumes the risk.[66]

(§ 3) *G. Contributory negligence. Nature of defense.*[67]—Contributory negligence is a want of ordinary care on the part of the servant injured, which, concurring and combining with negligence of the master, produced the injury as a proximate cause [68] without which the injury would not have occurred.[69] When found to

he would have it fixed at the "noon hour." The promise to repair was held specific, and the machine not having been repaired, and the workman having been injured at 3 o'clock in the afternoon, it was held he could not recover. Id.

64. The rule that a servant is relieved from the assumption of a risk by a promise to replace a defective with a safe tool does not apply where the tool is a simple one. Bowen v. Chicago & N. W. R. Co., 117 Ill. App. 9. Where the defective appliance is simple, such as a box used to stand on, the servant cannot relieve himself of the assumption of the risk by setting up an alleged promise to repair. International Packing Co. v. Kretowicz, 119 Ill. App. 488.

65. See 6 C. L. 578.

66. Conductor assumed risk of hitching caboose to tender with a chain, leaving several feet of slack. Illinois Cent. R. Co. v. Emerson [Miss.] 40 So. 818. Where manner of work was chosen by servant himself, without orders, the defense of assumed risk was available. Reeves v. Galveston, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 498, 98 S. W. 929. Servant who walked on elevated road on a place which was obviously dangerous on account of trains, there being another safer walk, assumed the risk of being struck. McLaughlin v. Manhattan R. Co., 111 App. Div. 254, 97 N. Y. S. 719. Where a servant abandons the usual and safe mode of doing his work and tries a new way, which is liable to become dangerous at any time, he assumes the risk. Baltimore, etc., R. Co. v. Arnold, 122 Ill. App. 278. Employe who had worked with sheet metal cutting machine, and who used his hands to remove the metal because the construction of the machine made another method less convenient, assumed the risk. United States Wind Engine & Pump Co. v. Butcher, 223 Ill. 638, 79 N. E. 304. Switchman assumed risk of going between cars to uncouple them when he could have done the work without going between them. Suttle v. Choctaw, etc., R. Co. [C. C. A.] 144 F. 668. Where servant knew that clutch of machine was defective and that machine could be stopped only by shutting off the power, he assumed the risk of trying to get rubber out of the rollers without stopping. Roche v. India Rubber & Gutta Percha Insulating Co., 100 N. Y. S. 1009. Coal miner assumed risk of falling coal when he knew of the danger and neglected to take certain precautions to protect himself. Cranes Nest Coal & Coke Co. v. Mace, 105 Va. 624, 54 S. E. 479.

67. See 6 C. L. 579.

68. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968. Proximate connection between plaintiff's want of ordinary care and the injury must be made to appear. Sorensen v. Case Threshing Mach. Co. [Wis.] 109 N. W. 84. Negligence of servant in oiling machinery from an inconvenient place would not bar recovery for an injury unless it proximately contributed to produce the injury. McCarley v. Glenn-Lowry Mfg. Co. [S. C.] 56 S. E. 1.

69. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968. Negligence of servant must contribute directly to produce the injury. Browning v. Chicago, etc., R. Co., 118 Mo. App. 449, 94 S. W. 315; Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140. That a servant was in a particular position of danger, as to which he had been warned, would not prevent a recovery where the cause of injury was the act of a superintendent. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. Where schedule time of street car required a speed in excess of that allowed by ordinance, the company could not claim that a violation of the ordinance constituted contributory negligence where car was derailed owing to a defective rail. Moore v. St. Louis Transit Co., 193 Mo. 411, 91 S. W. 1060. Where switchman turned the wrong switch, thereby causing a collision and his own death, and an inspection of the rails which he was required to make, would have disclosed his mistake and given him a chance to avoid the accident, his own negligence, and not the lack of switch lights, was held the proximate cause of his death. Louisville & N. R. Co. v. Mounce's Adm'r, 28 Ky. L. R. 933, 90 S. W. 956. If servant fell asleep while riding on a logging train, and was thrown off by a sudden jerk caused by lack of brakes on the cars, and the servant's negligence concurred with the master's to produce the injury, the servant could not recover. Sledge v. Weldon Lumber Co., 140 N. C. 459, 53 S. E. 295. Where viaduct was reasonably safe for intended purpose, travel between two buildings, servant's negligence in sitting on a railing not intended for such purpose was the proximate cause of his injury by reason of the railing giving way. Kelley v. Lawrence, 195 Mo. 75, 92 S. W. 1158. Where trackman assumed, without reason, that no torpedoes had been set out, though he saw a standing train and knew that a rule required torpedoes to be set out and a man left with them, he could not recover for injuries caused by the explosion of a torpedo left by a conductor who did not remain with it. Murphy v. Galveston, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 606, 96 S. W. 940. Where a person learning the duties of a brakeman had been warned and instructed not to go between cars, the conductor and engineer were not negligent in failing to as-

exist, it bars a recovery in most jurisdictions,[70] though in some it goes only to a reduction of the damages recoverable.[71] The defense of contributory negligence is usually held available, though the action is based upon the violation of a statutory duty of the master,[72] unless expressly excluded by the statute,—but there are authorities to the contrary.[73] Contributory negligence is held not a defense to an action based on a willful violation of a statute,[74] or where gross negligence [75] or wanton or reckless conduct [76] on the part of the defendant is alleged and proved.

The distinctions between the defenses of assumed risk and contributory negligence have already been referred to.[77]

Degree of care required of servant.[78]—Only ordinary care is required,[79] that is,

certain his presence there before starting a part of the train. Louisville & N. R. Co. v. Vincent [Tenn.] 95 S. W. 179.

70. Graboski v. New Castle Leather Co. [Del.] 64 A. 74. Negligence of plaintiff, which in any degree contributes to produce injury, bars recovery. International & G. N. R. Co. v. Wray [Tex. Civ. App.] 16 Tex. Ct. Rep. 676, 96 S. W. 74. Boy of fifteen, fully instructed as to use of machine, who was injured by failure to use care and operate as directed, could not recover. Essenberg v. Fralm [Pa.] 64 A. 793. Where sheeting in an excavation was put in under agreement with city by decedent and under his direction, there was no cause of action against the city for decedent's death caused by the sheeting giving way. Salwedel v. Adrian [Mich.] 13 Det. Leg. N. 418, 108 N. W. 701. If brakeman knew that cars were being backed down a track where he went between cars to couple them and failed to exercise reasonable care in so doing, and his failure contributed proximately to cause his injury, he could not recover. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459. Though railroad conductor was transferred from repair to wrecking department of railroad, his contributory negligence in hitching a caboose to the tender with a chain, leaving several feet of slack, barred a recovery for injuries caused by a collision. Illinois Cent. R. Co. v. Emerson [Miss.] 40 So. 818.

71. See 6 C. L. 679, n. 13.

72. Contributory negligence is a defense to an action under Laws 1887, p. 117, c. 3744, and Laws 1891, p. 113, c. 4071, authorizing recovery by one railroad employe for negligence of another in running locomotives, cars, or machinery. Atlantic Coast Line R. Co. v. Byland, 60 Fla. 190, 40 So. 24. Contributory negligence is a defense to an action based on a violation of Rev. St. 1899, § 6433, requiring shafting to be guarded when possible. Millsap v. Beggs [Mo. App.] 97 S. W. 956. Defense of contributory negligence is available in action under Laws 1902, p. 1748, c. 600. Chisholm v. Manhattan R. Co., 101 N. Y. S. 622. Defense of contributory negligence is available in an action based on employment of boy under fourteen to run a dangerous machine in violation of Laws 1897, p. 477, c. 415, § 17. Lee v. Sterling Silk Mfg. Co., 101 N. Y. S. 78. The provision of 94 O. L. 42, making it negligence for a master to permit the use of certain machinery without guards over it for the protection of operatives, does not make it possible for an operative to recover for an injury received in such machinery, notwithstanding his own negligence at the time of the accident. Ziehr v. Maumee Paper Co., 7 Ohio C. C. (N. S.) 144. If contributory negligence of the servant was the proximate cause of his injury, he cannot recover though he proves a violation of a statute requiring machinery to be guarded. Hunter v. Washington Pipe & Foundry Co. [Wash.] 86 P. 171. Where it was the duty of a servant to keep the floor clean around a machine, and as he was engaged in cleaning up some oil on the floor he slipped and threw his hand into the machine and was injured, and it appeared that if the machine had been guarded he would have had to remove the guard to do his work, and that he could have stopped the machine, it was held his own negligence and not the failure to guard the machine was the cause of injury. Id.

73. Where servant under sixteen is employed on extra hazardous work, in violation of the statute, the defense of contributory negligence is not available. Helmbacher Forge & Rolling Mills Co. v. Garrett, 119 Ill. App. 166. Railroad employe is not negligent in working on cars not equipped with automatic couplers unless his conduct was reckless. Halrston v. U. S. Leather Co. [N. C.] 55 S. E. 847.

74. Contributory negligence is no defense to an alleged willful violation of the Miners' Act. Kellyville Coal Co. v. Strine, 117 Ill. App. 115. In an action under Laws 1899, pp. 316, 317, §§ 16, 18, for a willful violation thereof by a failure to inspect and to provide props for a miner, whereby he was injured, contributory negligence is not a defense. Henrietta Coal Co. v. Martin, 221 Ill. 460, 77 N. E. 902.

75. Gross negligence being shown, mere contributory negligence on the part of the injured servant is no defense. Where brakeman was guilty of gross negligence in leaving a switch open, contributory negligence on part of engineer, in jumping, to avoid injury in a collision was no defense. Yazoo & M. V. R. Co. v. Block, 86 Miss. 426, 38 So. 372.

76. Whether engineer of train purposely and wantonly increased speed of train after seeing switchman go between cars. Louisville & N. R. Co. v. Preston [Ala.] 40 So. 337. Violation of rules by a switchman who went between cars would not prevent a recovery for injuries if engineer purposely and wantonly increased the speed of the train after he saw the switchman go between the cars. Id.

77. See ante, § 3 F.

78. See 6 C. L. 580.

79. St. Louis & S. F. R. Co. v. Ames [Tex. Civ. App.] 16 Tex. Ct. Rep. 298, 94 S. W. 1112.

such care as ordinarily prudent persons would exercise under the same circumstances.[80] Whether that degree of care was exercised in a particular instance is

Only reasonable care can be required of a servant in selecting a path through works where he was employed on a necessary errand. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Switchman's failure to use ordinary care as a consequence of having used intoxicants held to bar a recovery by him irrespective of a rule prohibiting use of liquor while on duty. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S. W. 339. Instruction to effect that servant must use his ordinary senses in places of danger proper where servant was injured going down an unattached ladder in the dark. Thomas v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 87 P. 972.

80. Morgan v. Hager & Sons Hinge Mfg. Co., 120 Mo. App. 690, 97 S. W. 638. Degree of care depends on danger to which person is knowingly exposed. City Water Works v. Lane, 122 Ill. App. 427. The care required of a conductor going down unlighted steps of depot platform was held such care as an ordinarily prudent person would exercise under like circumstances, not such care as he thought was necessary to protect himself. Beard v. Southern R. Co. [N. C.] 56 S. E. 505. Engineer was injured while waiting for his engine, standing between two main tracks, being struck by a mail car. An instruction that he was required to exercise such care as persons of ordinary care and prudence would exercise under the same circumstances was proper. Pittsburgh, etc., R. Co. v. Lighthelser [Ind.] 78 N. E. 1033. Electric linemen, liable to come in contact with electric currents, must use such care as is reasonably commensurate with the usual and ordinary dangers to be expected under such circumstances, that is, such care as ordinarily careful and prudent persons usually exercise under the same circumstances. Zentner v. Oshkosh Gaslight Co., 126 Wis. 196, 105 N. W. 911. Where employe was killed by molten iron from a blast furnace, a part of which gave way as a result of a superintendent having put lumps of ore of improper size into it, instructions held to have properly presented issue of contributory negligence. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306.

Servant held not guilty of contributory negligence: Where fireman was found dead at his post after a collision, and there was no proof of his failure to keep a lookout, he was not shown to have been guilty of contributory negligence. Choctaw, etc., R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Miner, killed by gas explosion, gas having accumulated because a door was left open, held not negligent in going in through the open door, nor did it appear that he himself left the door open. Western Coal & Min. Co. v. Douglass [Ark.] 96 S. W. 994. Workman employed to sew bags carried strings tied round his waist, and strings caught in exposed shaft and he was injured. He had been at work only a few hours and had not been warned. Foreman v. Eagle Rice Mill Co., 117 La. 227, 41 So. 555. Employe of railroad company held not negligent in putting his head over a gate to ascertain cause of noise and see if anything was wrong, since it was his duty to exercise great care for safety of passengers. South Side El. R. Co. & Cosmopolitan Elec. Co. v. Nesvig, 114 Ill. App. 355. Servant held not negligent as matter of law in using scaffold. Hinchliff v. Robinson, 118 Ill. App. 450. Where plaintiff was injured by particles of matter being thrown into his eyes as he was operating an emery wheel, and the evidence supported a finding that he could not work it from one side, he could not be held negligent for having stood in front of it. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. Employe injured by wheel which servants dropped, under order of foreman, held not negligent as a matter of law. Louisville & N. R. Co. v. Metcalf, 29 Ky. L. R. 870, 96 S. W. 525. Plaintiff, working on a platform while handling logs in river, fell by reason of a plank breaking. Godfrey v. Illinois Cent. R. Co., 117 La. 1094, 42 So. 571. Boy sent to dip out acid without knowledge of its dangerous character, and unwarned, was not negligent in getting some of the acid in his eyes. Hodde v. Attleboro Mfg. Co. [Mass.] 79 N. E. 252. Plaintiff injured by sudden starting of printing press which had been properly stopped by him, and which he was running for the first time. Byrne v. Boston Woven Hose & Rubber Co., 191 Mass. 40, 77 N. E. 696. Evidence sufficient to warrant finding that employe was not negligent in walking into opening in the floor (trap door was left open), when he had always found it safe before. Falardeau v. Hoar [Mass.] 78 N. E. 456. Where foreman, at work in a ravine getting out cars which had gone over a bridge, was injured by another car going over, the evidence was held to warrant a finding that he was not negligent. Viou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891. Evidence sufficient to support finding that inexperienced employe was not negligent in putting covers on rollers of mangle. Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340. Minor operating a steam candy roller put starch on rollers to remove candy which was stuck on them and got his fingers caught in the rollers. Rev. St. 1899, § 6434, was violated in putting him to work on the machine. He was not guilty of contributory negligence. Nairn v. National Biscuit Co., 120 Mo. App. 144, 96 S. W. 679. Held not negligence for brakeman to mount a train while in motion to resume his duties. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. Employe not negligent in continuing to work on defective steam shovel apparatus where he had no knowledge, or means of knowledge, of the defect. Southern R. Co. v. Wiley [Miss.] 41 So. 511. Where plaintiff was at work on cars and was injured by other cars running into them, the evidence was held to sustain a finding that he was not guilty of contributory negligence. Bird v. U. S. Leather Co. [N. C.] 56 S. E. 727. Mine employes, discovering gas and foul air, signaled for hoist and were taken to the 18 foot level where the bucket stopped. They waited 20 minutes and then started to climb, and plaintiff was overcome and fell back. Held he was not guilty of contributory negligence. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Where brakeman

failed to place lights on the end of a train, but gave proper and timely signals to engineer and fireman to prevent the engine and water car from colliding with the rest of the train, a finding that he was not guilty of contributory negligence was justified. Houston & T. C. R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344. Employe holding guide rope on girder which was being hoisted was struck by a wedge which fell through the girder. He was not negligent as a matter of law for not watching all the time he was holding the rope. Sullivan v. Wood & Co. [Wash.] 86 P. 629.

Servant held guilty of contributory negligence: Where plaintiff dumped a car before he received orders to do so and while the car was still moving, thereby violating his instructions, and caused a derailment of the car. Redus v. Milner Coal & R. Co. [Ala.] 41 So. 634. Declaration alleged negligence of a superintendent in allowing or causing plaintiff's hand to be caught in cog wheels, and also defects in machinery. Proof that he negligently stood on a stool to start the machine, and took hold of the cogs to support himself, did not warrant a recovery, but showed that his own negligence caused his injury. King v. Southern R. Co. [Ala.] 41 So. 639. Employe engaged in striking chisel to chip steel allowed a fellow-servant to strike for him to show him how and took a position behind him, where he was struck by a sliver of steel. He was held negligent. Cripple Creek Sampling & Ore Co. v. Souza [Colo.] 86 P. 1005. Where employe left the place where he was at work to a roadway where several persons were gathered near a live wire which had rendered two others unconscious, and took hold of wire, notwithstanding warning cries, he was negligent and there could be no recovery for his resulting death. Kennedy v. Scovill Mfg. Co. [Conn.] 65 A. 131. Cable repairer who climbed pole and took hold of guy wire without noticing that an electric light wire rested against it was negligent. Law v. Central Dist. Printing & Tel. Co., 140 F. 558. Servant is guilty of contributory negligence where conditions producing his injury were created solely by himself. Darrow v. The Fair, 118 Ill. App. 665. Section hand, warned of approach of a train, stepped on another track without looking to see if a train was coming, though he knew about twenty-five trains a day passed on that track in a certain direction. St. Louis & S. F. R. Co. v. McMinn, 72 Kan. 681, 84 P. 134. Experienced wool worker held guilty of negligence where wood being bent by him sprung back and struck him, when a bolt broke. Cotton v. Owensboro Wheel Co. [Ky.] 97 S. W. 763. Conductor held negligent in connecting power of street car before motorman had placed the controller in position, causing the car to start suddenly and run into him. Nassauer v. New Orleans & C. R. Light & Power Co., 116 La. 475, 40 So. 842. Evidence held to show that operator of saw was injured by reason of his own act and not on account of any defect in the machine he was operating. Davis v. Queen City Furniture Mfg. Co., 116 La. 1070, 41 So. 318. Electric light company employe knew the kind of steps used on poles and that they frequently became loosened, and it was his duty to report the fact when he discovered that a step became loosened. Held he was negligent in placing his weight on a step without first inspecting it. Little v. Hyde Park Elec. Light Co., 191 Mass. 386, 77 N. E. 716. Deceased, engaged in work on a railroad track, knew the foreman had left and knew the dangers to be guarded against. Hence, he had no right to assume that warning of a train would be given, but it was his duty to keep a lookout. No recovery for death caused by regular train. Vecchioni v. New York Cent. & H. R. Co., 191 Mass. 9, 77 N. E. 306. Employe injured by fall of curbstones was guilty of contributory negligence when he had been piling such stones two years and had the same opportunity to observe dangers in the piles or in the dunnage between them as anyone else. Regan v. Lombard [Mass.] 78 N. E. 476. Engineer's helper injured by slipping of ladder placed against boiler for him should have examined it to see if it was properly placed and safe. McDonnell v. New York, etc., R. Co. [Mass.] 78 N. E. 548. Brakeman was caught between a moving car and a pile of rattan piled in railroad yards. Rattan was commonly stored there, plaintiff could see the pile which injured him, could have stepped off the car in time to avoid injury, and had been warned that the car was extra wide. He was held guilty of contributory negligence. Flansberg v. Heywood Bros. & Wakefield Co., 190 Mass. 125, 76 N. E. 599; Wilson v. Lake Shore & M. S. R. Co. [Mich.] 108 N. W. 1021. Where girl of sixteen stood with one foot protruding into elevator shaft and was caught by elevator as it came down, she was guilty of contributory negligence as a matter of law. Roberts v. Sanitas Nut Food Co., 142 Mich. 589, 12 Det. Leg. N. 788, 106 N. W. 68. Conductor held guilty of negligence in hitching a caboose to an engine tender with a chain leaving several feet of slack, as a result of which, when the engine was stopped suddenly, the caboose collided with the tender and he was killed. Illinois Cent. R. Co. v. Emerson [Miss.] 40 So. 818. Boy fourteen years old was employed in guiding pans on an endless chain running on sprockets. Some of the pans had holes in the bottom and he had been warned not to put his fingers through into the chain. He did so, through lack of attention, and was injured. Held he was guilty of negligence. Coonce v National Biscuit Co., 115 Mo. App. 629, 92 S. W. 352. Failure of servant to test balustrade before leaning on it held negligence. Bennett v. Himmelberger, 117 Mo. App. 58, 93 S. W. 823. Where track repairer failed to heed warnings of other employes, he was guilty of negligence as matter of law. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872. Experienced railroad employe, switch inspector, struck by engine, held negligent, where situated where he could have seen and avoided danger. Keating v. Manhattan R. Co., 110 App. Div. 103, 97 N. Y. S. 137. Servant at work on track struck by switch engine which he ought to have seen and avoided. Rich v. Pennsylvania R. Co., 112 App. Div. 818, 98 N. Y. S. 678. Injury to station agent by falling into excavation held to have been caused by his own failure to inspect. Wood v. New York, etc., R. Co., 184 N. Y. 290, 77 N. E. 27. Servant in factory stopped freight elevator at a certain floor and got out, but the elevator continued to go up owing to some defect. The employe returned and walked into the open shaft which was plainly visible. Fink v. Hartog & Beinhauer Candy Co., 112 App.

ordinarily a question of fact for the jury,[81] to be determined with reference to all

Div. 387, 98 N. Y. S. 393. Employe, walking beside a track which had been in use, to his knowledge, stepped on it in front of cars and was killed. No recovery. Lord v. Boston & M. R. Co. [N. H.] 65 A. 111. Failure of engineer to heed signals to stop, when he saw or ought to have seen the signals, held to constitute contributory negligence. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. Engineer negligent in running into station without keeping a lookout for a train on the track. International & G. N. R. Co. v. Brice [Tex.] 16 Tex. Ct. Rep. 1005, 97 S. W. 461. Brakeman held negligent in not watching for switch engine while crossing tracks in railroad yards. Anson v. Northern Pac. R. Co. [Wash.] 87 P. 1058. Plaintiff guilty of contributory negligence in attempting to drive between curb and a van being backed up to the curb. Roe v. Standard Furniture Co., 41 Wash. 546, 83 P. 1109. Wagon was dumped by shafting and a chain and a wrench flew off the shafting and struck plaintiff. He was negligent in standing where he did and in leaving the wrench on the shaft. Trudeau v. American Mill Co., 41 Wash. 465, 83 P. 725. Experienced saw operator held negligent in trying to remove obstruction from a chute, the obstruction giving way suddenly and throwing his arm against the saw, this danger being obvious and imminent. Laidley v. Musser Lumber & Mfg. Co. [Wash.] 88 P. 124. Where employe could have avoided injury by the use of appliances at hand, he could not recover. Bailey v. Mukilteo Lumber Co. [Wash.] 87 P. 819. Section hand sent out on velocipede to flag a train was struck by it at a place where he could see ahead 600 or 800 feet. Vaundry v. Chicago & N. W. R. Co. [Wis.] 109 N. W. 926.

81. Contributory negligence held a question for the jury: Where driver of horse car tried to stop the car to avert a collision and was injured. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. Plaintiff was injured by reason of tripping over a scantling lying on steps in the building. He testified that he relied on a promise of another employe that the scantling would be removed that day. Herren v. Tuscaloosa Waterworks Co. [Ala.] 40 So. 55. It is not negligence per se for a brakeman to climb down the side of a box car. St. Louis, etc., R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749. Common laborer injured in mine by fall of earth and rock, timbering being in charge of underground manager, and the place where the accident occurred being untimbered. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 256. Miner fell down a shaft, guard rails having been negligently raised by a fellow-servant. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. Brakeman killed while coupling cars, having stepped down upon bumper of one of them. Lyle v. Alabama Great Southern R. Co. [C. C. A.] 145 F. 611. Whether employe was negligent in sitting in window of factory near unboxed revolving wheel in which she was caught. Michigan Headlining & Hoop Co. v. Wheeler [C. C. A.] 141 F. 61. Where brakeman was injured in making a coupling with a link and pin, used by the company in violation of the automatic coupler act of Congress, the mere fact of injury was not presumptive evidence of contributory negligence. Denver & R. G. R. Co. v. Arrighi [C. C. A.] 141 F. 67. Where switchman in yards of defendant stepped between cars to uncouple them, the automatic coupler having failed to work, and got his foot caught in a frog, whether he was negligent was for jury, there being evidence that he had worked twelve days, that many couplers did not work, and that it was customary to uncouple cars as he had tried to do it. Taggart v. Republic Iron & Steel Co. [C. C. A.] 141 F. 910. Where plaintiff was directed to clean out hole containing unexploded charge. James Ramage Paper Co. v. Bulduzzi [C. C. A.] 147 F. 151. Where brakeman fell under cars as he dropped off an engine to open a switch at night. Reardon v. Toledo, etc., R. Co. [C. C. A.] 147 F. 187. Fireman was killed in wreck caused by train going over a passing track at a station at a high rate of speed, main track being blocked. Evidence conflicting as to lights which it was fireman's duty to watch for. St. Louis, etc., R. Co. v. Bishard [C. C. A.] 147 F. 496. Where railroad employe was at work on the repair track and was struck and injured by an engine. Collins v. Southern R. Co., 124 Ga. 853, 53 S. E. 388. Order clerk, sent on errand across tracks, struck by switch engine. Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391. Employe sent to flag a train and turn a switch for it sighted along the rails, while waiting, and when so engaged was seized with a cramp or paralytic stroke and fell on the track and was struck by the train. He knew he was subject to such attacks when overheated. Talley v. Atlantic & B. R. Co., 126 Ga. 56, 54 S. E. 817. Operator of sheet metal cutting machine got hand caught. United States Wind Engine & Pump Co. v. Butcher, 223 Ill. 638, 79 N. E. 304. Servant working on partition in factory injured by traveling crane. National Enameling & Stamping Co. v. McCorkle, 219 Ill. 557, 76 N. E. 843. Where employe went down a stack on a swing board, after an assurance of safety by his foreman, facing the center of the stack instead of the walls, and the board caught on a rivet and threw him off. Springfield Boiler & Mfg. Co. v. Parks, 222 Ill. 355, 78 N. E. 809. Engineer waiting for engine, and standing between two main tracks, was struck by a mail car. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Employe attempted to adjust unguarded machine while in motion. Stephens v. American Car & Foundry Co. [Ind. App.] 78 N. E. 335. Engineer knew that side track had safety device to keep cars off the main track and had no notice that the device was out of repair. Held he was not negligent as a matter of law in failing to watch for cars from the side track, during a storm, in which he passed the place. Grand Trunk Western R. Co. v. Melrose [Ind.] 78 N. E. 190. Employe injured by tipping of bottle of acid owing to alleged defect in crate on which it was placed. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409. Stone fell from mine roof injuring a miner. It appeared another stone near had been removed a short time before, but evidence was conflicting as to whether this caused the second to fall or whether the miner knew of the danger from the sec-

ond. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060. Miner injured by fall of part of roof. Cook v. Smith-Lowe Co. [Iowa] 109 N. W. 798. Servant digging ditch injured by a cave-in. St. Louis & S. F. R. Co. v. Burgess, 72 Kan. 454, 83 P. 991. Brakeman killed in course of switching operations. Illinois Cent. R. Co. v. Cane's Adm'x, 28 Ky. L. R. 1018, 90 S. W. 1061. Bridge carpenter, in going to work on bridge, had to watch carefully in order not to step between the ties. Whether he was negligent in failing to discover the approach of an engine held for the jury. Cason's Adm'r v. Covington & C. El. R. & Transfer & Bridge Co., 29 Ky. L. R. 352, 93 S. W. 19. Employe engaged in grading and digging injured by caving of bank of earth. Chiappini v. Fitzgerald, 191 Mass. 598, 77 N. E. 1030. Whether employe was negligent in using an icy walk to a privy when there was another way. Urquhart v. Smith & Anthony Co. [Mass.] 78 N. E. 410. Treadle of machine broke while operator was jumping on it with both feet to stop the machine and save it from injury. Hannan v. American Steel & Wire Co. [Mass.] 78 N. E. 749. Boy of sixteen injured by moving of carriage which he was engaged in cleaning. Baggneski v. Mills [Mass.] 78 N. E. 852. Rim of basket on washing machine broke, injuring operator of machine. McGuinness v. Lehan [Mass.] 79 N. E. 265. Whether defect in ladder on water tank should have been discovered by employe using it, defect being a rotten round not visible. Nichols v. Pere Marquette R. Co. [Mich.] 13 Det. Leg. N. 623, 108 N. W. 1016. Whether lineman was negligent in the manner of stringing a feed wire, or in putting too great a strain upon a pole. Livingway v. Houghton County St. R. Co. [Mich.] 13 Det. Leg. N. 534, 108 N. W. 662. Employe fell into shaft while loading a truck on the elevator. Murphy v. Grand Rapids Veneer Works, 142 Mich. 677, 12 Det. Leg. N. 868, 106 N. W. 211. Whether boy under sixteen who was injured in rollers of corrugating machine was negligent. Sterling v. Union Carbide Co., 142 Mich. 284, 12 Det. Leg. N. 712, 105 N. W. 755. Boy of sixteen was caught by hoisting apparatus while attaching hooks to load of stone, and dropped after being carried up thirty feet. Milton v. Biesanz Stone Co. [Minn.] 109 N. W. 999. Saw mill employe at work on chain carrier injured. Hendrickson v. Ash [Minn.] 109 N. W. 830. Whether employe at work in a trench and injured by a horse falling in was negligent in continuing to work without guards or warning signals. Johnson v. St. Paul Gas Light Co. [Minn.] 108 N. W. 816. Whether brakeman, struck by overhead bridge, was negligent in unnecessarily exposing himself to danger held a question for jury. Louisville & N. R. Co. v. Thomas, 87 Miss. 600, 40 So. 257. Switchman injured by reason of unblocked switch. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614. Building being torn down, under direction of foreman, fell on plaintiff. Broomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304. Whether brakeman went between cars to uncouple them or to detach air hose. McManus v. Oregon Short Line R. Co., 118 Mo. App. 152, 94 S. W. 743. Carpenter in power house came in contact with charged trolley wire. Cessna v. Metropolitan St. R. Co., 118 Mo. App. 659, 95 S. W. 277. Plaintiff injured by derailment while riding on switch engine held not negligent as a matter of law by reason of having taken a position on the front of the engine with one foot on the draw bar instead of standing on foot board. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301. Employe at work in sewer trench injured by fall of bulkhead. Kielty v. Buehler-Cooney Const. Co. [Mo. App.] 97 S. W. 998. Brakeman killed while climbing side of car being struck by water crane maintained beside the track. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. Whether boy of fourteen was negligent held for jury, where he moved his foot, which another boy had stepped on, in an elevator, and placed it where it was caught between floor of elevator and floor of building. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Lineman injured by contact with uninsulated service wires. New Omaha Thomson-Houston Elec. Light Co. v. Romhold [Neb.] 106 N. W. 213. Employe hauling a truck out under direction of foreman and walking backwards fell over a hole in the floor of which he had no knowledge. Burke v. Manhattan R. Co., 109 App. Div. 722, 96 N. Y. S. 516. Employe fell into elevator opening in building in course of construction, the opening being unguarded. Kiernan v. Eidlitz, 109 App. Div. 726, 96 N. Y. S. 387. Where employe was injured by the fall of a scaffold which had been weakened by the removal of a pier of a building which had helped to support it, evidence of his knowledge of that act being conflicting, the issue of contributory negligence was for the jury. Laws 1902, p. 1750, c. 600, § 3. Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. S. 421. Employe removing snow from elevated road with iron shovel received shock from third rail. Smith v. Manhattan R. Co., 112 App. Div. 202, 98 N. Y. S. 1. Plaintiff was injured when building scaffold by fall of bricks from a wall on which he stepped, these bricks having been laid the day before. Meehan v. Hogan, 100 N. Y. S. 1008. Employe, after going up an elevator, stepped out after some card board, and returning stepped into shaft and fell, the elevator having gone on up. There were no lights and the accident occurred after dark. Graham v. Williams, 101 N. Y. S. 77. Where plaintiff was operating a moveable steam derrick, and seeing that it began to tip and that an emergency had arisen, left his place of work to ascertain what the trouble was, he was not guilty of contributory negligence as a matter of law. Redhead v. Dunbar & Sullivan Dredging Co., 101 N. Y. S. 301. Servant working on elevated with iron tool accidentally broke insulation on wire and received a shock. He had not been warned and had no knowledge of danger. Carey v. Manhattan R. Co., 101 N. Y. S. 631. Where a contractor building a depot, was required to be on or to cross the track often, and he looked both ways and listened for a train, and then stepped upon a track and was struck without warning, he was not negligent as a matter of law. The issue was for the jury. Sherrill v. Southern R. Co., 140 N. C. 252, 52 S. E. 940. Whether boy under twelve was guilty of contributory negligence, where injured by starting of machine he was cleaning, held for jury, considering the boy's age, experience, and intelligence. Rolin v. Reynolds Tobacco Co., 141 N. C. 300, 53 S. E. 891. Brakeman, standing on pilot of engine,

the facts and circumstances of the case,[82] including the age, experience, and capacity

according to instruction and custom, and thrown off because he had no bar to hold on to, was not negligent as a matter of law. Biles v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 512. Switchman, in adjusting coupler on car, took hold of a cross piece nailed to stanchions of car to secure lumber, and piece gave way throwing him under the train. Wallace v. Seaboard Air Line R. Co., 141 N. C. 646, 54 S. E. 399. Contributory negligence was not shown as a matter of law where plaintiff was injured while cleaning a machine by hand, where he alleged and testified that he had no knowledge of the defect which caused the injury. Hicks v. Naomi Falls Mfg. Co. [N. C.] 55 S. E. 411. Conductor fell down steps of depot platform at night while going to his train. Beard v. Southern R. Co. [N. C.] 55 S. E. 505. Where engineer ran his engine on a bridge and, seeing that it was giving way, ran it off again, whereupon repairs were made by a construction crew, the superintendent of which assured him that the bridge was then safe, and relying thereon the engineer and fireman ran on the bridge and went through, the question of contributory negligence was for the jury. McCabe & Steen Const. Co. v. Wilson [Okl.] 87 P. 320. Inexperienced employe caught in unguarded cogs of picker machine. Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220. Whether conductor was negligent, his train having escaped down a grade owing to defect in brakes. Louisville & N. R. Co. v. Bohan [Tenn.] 94 S. W. 84. Whether engineer was negligent in failing to discover that a step on the locomotive was defective. Galveston, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 505, 98 S. W. 898. Employe claimed he had not heard of orders not to use ladder after stairway had been built, and employes customarily used the ladder with foreman's knowledge. Plaintiff, injured while on ladder, was not negligent in using it as a matter of law. Pipkin v. Hayward Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 157, 94 S. W. 1068. Man hauling clay was struck by girder above him as he drove into clay shed. Titterington v. Harry [Tex. Civ. App.] 97 S. W. 840. Whether employe at work on track had a right to assume engine crew would look out for him, and whether he was negligent. Texas & P. R. Co. v. Cotts [Tex. Civ. App.] 95 S. W. 602. Whether coupling pin was defective held properly submitted to jury on issue whether brakeman was negligent in remaining between moving cars. Texas & N. O. R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. Engineer injured in collision with train which preceded his. International & G. N. R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660. Laundry employe was injured while running a laundry machine under foreman's directions, and it appeared she knew there was something the matter with it. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. Engineer, who knew of lack of switch light, was killed by running into switch improperly set. Southern R. Co. v. Blonford's Adm'x, 105 Va. 373, 54 S. E. 1. Engineer injured by reason of failure of reverse bar to work, a collision resulting. Virginia Iron, Coal & Coke Co. v. Cash's Adm'r, 105 Va. 570, 54 S. E. 472. Quarryman killed by falling rock, loosened by seam of water. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. Lineman was not negligent as matter of law in failing to test and inspect pole before climbing it, where it appeared that he was inexperienced and was relying on instructions of experienced man with whom he was working. Sias v. Consolidated Lighting Co. [Vt.] 64 A. 1104. Employe in sawmill fell on unguarded circular saw. Erickson v. McNeeley & Co., 41 Wash. 509, 84 P. 3. Employe assisting in removing hub from shaft of propeller was burned by oil spurting out as superintendent struck it with a sledge to loosen it. Creamer v. Moran Bros. Co., 41 Wash. 636, 84 P. 592. Operator of planer in sawmill stepped into a hole in floor as he went to remove an obstruction from the machine. He knew of other holes but not of this one, which was concealed by shavings and sawdust. He was not guilty of contributory negligence as a matter of law. Baker v. Duwamish Mill Co. [Wash.] 86 P. 167. Knot sawyer injured by unguarded saw. Thomson v. Issaquoh Shingle Co. [Utah] 86 P. 588. Where saw broke, a piece striking plaintiff and there appeared to have been a mistake in the signals given to control operation of the machinery, the question of contributory negligence was for the jury. Smith v. Michigan Lumber Co. [Wash.] 86 P. 652. Whether saw filer was negligent in the position he took to file a saw, or in failing to loosen the belt, for jury, he being injured by reason of the sudden starting of the machinery of the mill. Comrade v. Atlas Lumber & Shingle Co. [Wash.] 87 P. 517. Boy of sixteen, thinking he had been called to another place in a shingle mill, started to go there and fell on a saw in trying to avoid certain beams in a passageway which he used. Whether, in view of his age and inexperience, he had reason to suppose he was expected to use the passageway was for the jury. Barrett v. Banner Shingle Co. [Wash.] 87 P. 919. Whether lineman ought to have known that electricity was turned on while he was making repairs so that he should have guarded against contact with wires. Zentner v. Oshkosh Gaslight Co., 126 Wis. 196, 105 N. W. 911. Whether employe was negligent in not watching for a hoisting hook as it was being raised, and in not steadying it so as to prevent its swinging and striking him. Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. Whether girl of fifteen should have discovered set screws on shaft of slitting machine and avoided getting her hair caught. Van de Bogart v. Marinette & Menominee Paper Co., 127 Wis. 104, 106 N. W. 805.

82. In passing upon the issue of contributory negligence, all the facts and circumstances of the case should be considered. Instruction predicating negligence on only a part of the facts held erroneous. Southern R. Co. v. Blonford's Adm'x, 105 Va. 373, 54 S. E. 1. Though master has promised to repair a defect, after complaint, the servant must use care commensurate with the danger. Trudeau v. American Mill Co., 41 Wash. 465, 83 P. 725.

of the servant,[83] and the respective duties of the master and the servant.[84] Mere knowledge of a defective condition does not charge a servant with negligence as a matter of law,[85] unless the danger was obvious and imminent.[86] Momentary forgetfulness of a known danger does not of itself, as a matter of law, constitute contributory negligence.[87]

There can be no recovery for the injury or death of an employe who was engaged at the time in an unlawful act.[88]

Choice of methods.[89]—Needless exposure to a known danger is negligence;[90] hence, a voluntary choice of an obviously dangerous way of doing work, when a rea-

83. The degree of care to be required of a minor depends upon his age, maturity of judgment, experience, and emotional control, and the question is one for the jury. Longree v. Jacks-Evans Mfg. Co., 120 Mo. App. 478, 97 S. W. 272. Boy under sixteen injured using circular saw. Rahn v. Standard Optical Co., 110 App. Div. 601, 96 N. Y. S. 1080. Boy of thirteen injured by pieces of wire flying from unguarded wire cutting machine. Thein v. Brecht Butchers' Supply Co., 116 Mo. App. 1, 91 S. W. 953. Where boy of sixteen was injured while feeding sheets of brass into rolling machine, an instruction that it was his duty to exercise such care as boys of the same age, intelligence, and experience usually exercise under similar circumstances was proper. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077.

84. Where it was plaintiff's duty to keep a passageway clean, he could not complain of the presence of shavings and iron scraps therein which contributed to produce an injury by the falling of a wheel upon him which he and another were rolling from one shop to another. Beardsley v. Murray Iron Works Co., 129 Iowa, 675, 106 N. W. 180. Rev. St. 1905, § 6871, requires a miner to securely prop the roof of a mining place or room under his control. Failure of a miner to do so, whereby he is injured by the roof falling, is not excused by the impracticability of propping the roof while working with machines, since there is no exception to that effect in the statute. Morris Coal Co. v. Donley, 73 Ohio St. 298, 76 N. E. 945. Miner was not negligent in sitting down under a mass of rock to allow a car to pass unless he was negligent in working at all in the place. Dodge v. Manufacturers' Coal & Coke Co., 115 Mo. App. 601, 91 S. W. 1007. The "look and listen" rule applied to person about to cross railroad tracks does not apply to employes obliged to be on or near the tracks. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Where it is employe's duty to work on the track where trains are being run in the work of repair, he is not negligent as a matter of law in not keeping a constant lookout. St. Louis, etc., R. Co. v. Jackson [Ark.] 93 S. W. 746. The rule that a railroad employe, whose duty requires him to be at or near the track, need not keep a strict lookout for trains does not apply to one who merely crosses the track in order to get to points where his work requires him to be. Dyerson v. Union Pac. R. Co. [Kan.] 87 P. 680. Such an employe is under the duty of looking in both directions for trains before crossing the tracks. Id. The fact that the company has previously run trains only in one direction on a certain track, and has changed the custom without notice to him, does not relieve him from this duty. Id.

85. Mere knowledge that a pile of lumber was dangerous would not alone charge a servant ordered to get a piece of lumber from it with contributory negligence where the pile fell and injured him. All the surrounding facts and circumstances are to be considered. Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. A servant is not necessarily guilty of contributory negligence as a matter of law simply because he had previous knowledge of the defect which caused his injury. Where servant forgetting that revolving knives of a log chipper were just over his head, put his fingers into them when giving a signal, the question of contributory negligence was for the jury. Rector v. Bryant Lumber & Shingle Mill Co., 41 Wash. 556, 84 P. 7. Fireman, overcome by coal gas when his train was stalled in a tunnel, was not negligent as a matter of law in staying on the engine, though he knew that poor coal was being used and that something was the matter with the coupler of the helping engine which caused the delay. Dayle v. Great Northern R. Co. [Wash.] 86 P. 861.

86. Brakeman is not negligent as a matter of law in going between cars on unblocked switches, the danger from the absence of blocking not being obvious. McManus v. Oregon Short Line R. Co., 118 Mo. App. 152, 94 S. W. 743. Where it did not appear that switchman knew or ought to have known of defects in a track causing a derailment, it could not be held that he was negligent. Wallis v. St. Louis, etc. R. Co., 77 Ark. 556, 95 S. W. 446. Where locomotive fireman did not discover that the apron extending from the cab to the tender was defective until he had moved coal which covered it, having started on his trip, he was not guilty of negligence in not at once abandoning the engine, the danger not appearing to be imminent. Missouri, etc. R. Co. v. Dumas [Tex. Civ. App.] 15 Tex. Ct. Rep. 538, 93 S. W. 493.

87. Applied where employe got caught in cog wheels suddenly started. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323.

88. No recovery for death of elevator operator who was running elevator at a speed greater than that allowed by statute. Malloy v. American Hide & Leather Co., 148 F. 482.

89. See 6 C. L. 583.

90. Servant who rode on dangerous place on engine, after being warned, was negligent. Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A. 936. Plea of contributory negligence showing a brakeman attempted to stop a car after entering a switch held not

sonably safe way is available, is negligence,[91] notwithstanding the customary use of

demurrable. King v. Woodstock Iron Co., 143 Ala. 632, 42 So. 27. Where man engaged in structural work unnecessarily put his fingers over a rail above him to steady himself, and had them cut off by a car, he could not recover. McNeil v. Clairton Steel Co., 213 Pa. 331, 62 A. 923. Railroad employe walked on inside narrow walk of elevated road instead of taking the outer, safer path, and failed to look out for trains and was struck and killed. He was held negligent. McLaughlin v. Manhattan R. Co., 111 App. Div. 254, 97 N. Y. S. 719. Employe, struck by car while walking on elevated road in course of his duties in installing telephone line, held negligent in walking too close to the track, there being no necessity therefor. Chisholm v. Manhattan R. Co., 101 N. Y. S. 622. Where, notwithstanding warning notice not to use tram cars, deceased got on the front of one to ride up to his place of work, and stood outside with one foot on the bumper and the other on the cable, and fell to the track and was run over, he was negligent, and there could be no recovery for his death. Union Coal & Coke Co. v. Sundberg [Colo.] 85 P. 319. Approaching and entering elevator shaft in the dark held contributory negligence. Darrow v. The Fair, 118 Ill. App. 665. If switchman, who knew frogs were unlocked, went between moving cars at a frog and got his foot caught, knowing the cars would continue to move, he would be guilty of negligence. Houston & T. C. R. Co. v. Oram [Tex. Civ. App.] 15 Tex. Ct. Rep. 624, 92 S. W. 1029. Where manner of work was chosen by servant himself without orders, the defense of contributory negligence was available. Reeves v. Galveston, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 498, 98 S. W. 929. A servant who unnecessarily exposes himself to a known danger cannot excuse his negligent act by the claim that unknown negligence of the master made the danger greater than he supposed it. Employe jumped over a drum instead of using a platform built over it. His act was not excusable by reason of the fact that loose strands of the cable, which he did not know about caught him. American Linseed Co. v. Heins [C. C. A.] 141 F. 45. Where blasting foreman, shortly after a missed shot which he observed, cleaned out the hole and poured powder into it, holding his face over the hole while doing so, and an explosion resulted, burning his face, was guilty of contributory negligence. Hilman Land & Iron Co. v. Littlejohn, 28 Ky. L. R. 983, 90 S. W. 1053.

91. Where servant has two ways to do work and selects an obviously dangerous one, the other being safe, cannot recover for resulting injuries. Johnson v. Malette [Mont.] 87 P. 447. Brakeman negligent in going between cars to uncouple them when he could have used a lever and avoided going between them. McManus v. Oregon Short Line R. Co., 118 Mo. App. 152, 94 S. W. 743. If brakeman could have coupled cars without going between them, it was negligence to go between them. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Where brakeman atempted to uncouple cars in a dangerous manner instead of using the device in as safe a manner as was possible, he could not recover for resulting injury. Lyon v. Charleston & W. C. R. [S. C.] 56 S. E. 18. An employe who has the choice of two methods of doing a given piece of work, the one safe and the other dangerous, is under a duty to his employer to select the former, and if, instead of so doing, he voluntarily selects the latter, when he knows or ought in the exercise of due care to know of the danger, he cannot recover of the employer for injuries thus sustained. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Servant who jumped over a drum and was caught by the cable, his leg being crushed, when he might have gone safely over a platform built over it, could not recover. American Linseed Co. v. Heins [C. C. A.] 141 F. 45. No recovery by employe who rode on a car loaded with logs and was injured by its derailment when he might have ridden on a flat car with other employes, none of whom were injured. Tower Lumber Co. v. Brandvold [C. C. A.] 141 F. 919. Plaintiff, ordered to cross a track on which cars were standing, crawled under the cars instead of climbing over, and was injured by starting of train. No recovery. Slota v. Albert Lewis Lumber & Mfg. Co. [Pa.] 64 A. 632. If electric light company employe could have lifted and lowered lamps by using steps provided so as not to touch an iron awning, and so that he would have been insulated, he would be guilty of negligence in failing to use them whereby he received a shock. Horne v. Consol. R., Light & Power Co., 141 N. C. 50, 53 S. E. 658. Where operator of shingle machine was injured because he tried to remove a block while the machine was in motion instead of waiting until he had stopped it, as he might have done, he could not recover. Cawood v. Chattahoochee Lumber Co., 126 Ga. 159, 54 S. E. 944. Evidence is admissible to show that employe had a safe way to do his work, and that he would have escaped injury, had he used this safe way. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. Attempting to remove an obstruction from a moving machine, which operator could easily have stopped, held negligence. Smith v. Forrester-Nace Box Co., 193 Mo. 715, 92 S. W. 394. Evidence of death of servant from electric shock in coupling electric wires which were insulated except at the ends held insufficient because as consistent with the theory that he needlessly took hold of the uninsulated wire as with the theory that the insulation was defective. Looney v. Metropolitan R. Co., 200 U. S. 480, 50 Law Ed. 564. Servant who had to cross tracks, obstructed by a train, attempted to climb through between them, and was injured by the starting of the train. Southern R. Co. v. Thomas, 29 Ky. L. R. 79, 92 S. W. 578. An inexperienced servant is not necessarily guilty of contributory negligence in adopting an improper method of work when he has not been instructed otherwise. Wessel v. Jones & Laughlin Steel Co., 28 Pa. Super. Ct. 332. Where a servant for whom proper appliances have been provided voluntarily uses an improper appliance and in an unusual manner, he cannot recover. Meyers v. Moorehead Bros. & Co., 28 Pa. Super. Ct. 503.

such method by other employes,[92] though the existence of such a custom may be considered on the issue.[93] Failure to use the least dangerous method is not necessarily negligence,[94] and whether choice of a particular method constitutes negligence depends upon the knowledge of the servant, actual or implied, of the danger,[95] and the conditions attending the doing of the work at the time of the injury.[96]

Reliance on master's care.[97]—A servant is not negligent in relying, to a reasonable extent, on the assumption that the master has performed his duties with respect to his employes,[98] unless he has actual or implied knowledge to the contrary.[99] He may also rely on an assurance of safety by a superior,[1] and may as-

92. That other employes are accustomed to do work in a dangerous manner is no excuse for an employe who is injured while doing work in such manner. Cawood v. Chattahoochee Lumber Co., 126 Ga. 159, 54 S. E. 944. That an act is customarily done by other employes does not relieve it of its negligent character, nor relieve a negligent employe of the consequences of his act. American Linseed Co. v. Heins [C. C. A.] 141 F. 45. That it was customary for planer operators to remove obstructions with their hands would not relieve plaintiff from the charge of contributory negligence. Smith v. Forrester-Nace Box Co., 193 Mo. 715, 92 S. W. 394.

93. Where fireman was on pilot of engine cleaning it, while it was moving, and was killed in collision, whether he was negligent was for jury, there being evidence of a general custom among firemen of doing as he did. Kane v. Erie R. Co. [C. C. A.] 142 F. 682.

94. A servant is not necessarily negligent by failing to use the least dangerous method of doing his work. Moss v. Mosley [Ala.] 41 So. 1012.

95. Where an employe had no knowledge of a defect in a passageway, he was not negligent in using it, though another was available. Kremer v. Eagle Mfg. Co., 120 Mo. App. 247, 96 S. W. 726. Where servant fell into a depression in a pathway leading from a gate to the house, she was not guilty of negligence, the way chosen being shorter and more convenient, and she having no knowledge that it was not as safe. Battle v. Robinson, 27 R. I. 588, 65 A. 273. Whether servant knew he was doing work on machine in a manner more dangerous than other ways of which he knew held for jury. Lawrence v. Heidbreder Ice Co., 119 Mo. App. 316, 93 S. W. 897. Servant was directed to do certain work about an elevator and went on the elevator to do it, this not being necessary, and was injured in consequence. Whether he ought to have known and avoided the danger was held for the jury. Johnson v. Maiette [Mont.] 87 P. 447. Whether the position chosen by an employe before a bed plate of a cloth press at which he was directing a battering ram was so obviously dangerous that no ordinarily prudent person would have chosen it, held a question for the jury. Shaw v. Highland Park Mfg. Co. [N. C.] 55 S. E. 433.

96. Brakeman, struck by water crane maintained beside the track, cannot be held negligent in having mounted on the wrong side of the car, while the train was moving. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. Where seaman, ordered to paint funnel, tried an iron pulley to rig up an appliance from which to work, and found it too rusty and then tried a wooden pulley and a rope which appeared sound, and the rope broke and he was injured, he was not negligent as a matter of law. The Lowlands, 142 F. 888.

97. See 6 C. L. 584.

98. Servant may rely on master's care to a reasonable extent. Foreman v. Eagle Rice Mill Co., 117 La. 227, 41 So. 555. Servant may assume that master will maintain scaffold in safe condition. Berthelson v. Gabler, 111 App. Div. 142, 97 N. Y. S. 421. Employe, injured by tripping on elevation of floor in passageway, had the right to rely on the assumption that the master had exercised reasonable care in inspecting the place of work and in repairing defects therein. Kremer v. Eagle Mfg. Co., 120 Mo. App. 247, 96 S. W. 726. Where servant was directed to use a block and tackle device to hoist bales of hay, he was not guilty of negligence as a matter of law in using the guide rope without first inspecting it. De Maries v. Jameson [Minn.] 108 N. W. 830. Employe engaged in relaying track at night was not negligent in placing chisel on the third rail, receiving a shock when he understood power was off. Keeley v. Boston El. R. Co. [Mass.] 78 N. E. 490. Where servant was called through a certain passageway in a mill, he had a right to assume it was reasonably safe without making an examination of it. Barrett v. Banner Shingle Co. [Wash.] 87 P. 919. Code 1896, § 2914, requiring operators of mines to provide ample means of ventilation, imposes a positive duty upon operators which a miner may assume has been performed. Foley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273. Instruction that servant has a right to rely on the assumption that the master has exercised reasonable care for his safety approved where injury was alleged to have been caused by falling of scaffold placed on a car, by reason of the moving of the car. Louisiana & Texas Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140.

99. Failure of railway company to have steps of depot platform well lighted at night would not relieve conductor, going to his train, of the duty of exercising ordinary care for his own safety. Beards v. Southern R. Co. [N. C.] 55 S. E. 505.

1. Miner had a right to rely on assurance of mine superintendent that a blast had been discharged, and was not negligent in going to work on the assumption that it had been exploded. Allen v. Bell, 32 Mont. 69, 79. P. 582. The fact that work of the servand is being done in the presence and under the immediate direction of representative of the master is equivalent to an assurance of

sume that execution of an order given by a superior will not expose him to any unusual danger,[2] unless he has knowledge of the danger involved, and such known danger is one which an ordinarily prudent person would not have encountered under the same circumstances.[3] Similarly, the servant may rely to a reasonable ex-

safety. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968. Quarryman not negligent as matter of law in using hammer to clean out blast hole which foreman had told him had been exploded. McKane v. Marr [Vt.] 63 A. 944. Superintendent of gang working on track saw plaintiff looking up and said "all right." Held plaintiff was justified in assuming that superintendent was looking out for trains. Dunphy v. Boston El. R. Co. [Mass.] 78 N. E. 479. Orders and assurances of safety are immaterial unless they are the operating influence which induces the servant to do the act that is the immediate cause of his injury. Jensen v. Kyer, 101 Me. 106, 63 A. 389.

2. Employe has a right to rely, within reasonable limits, on his master's superior knowledge, skill, and ability and is not bound to set his judgment against that of his superior. Hence, specific orders and assurances of safety by the master are to be considered as part of the attendant circumstances in determining question of employe's negligence. Jensen v. Kyer, 101 Me. 106, 63 A. 389. That foreman told a young employe to use her hands to unclog a machine instead of a stick could be considered on the issue of her contributory negligence. Regling v. Lehmaier, 50 Misc. 331, 98 N. Y. S. 642. A servant obeying the instructions of a representative of the master on the spot is not guilty of negligence. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968. That foreman ordered employe to do certain work may be shown on issue of contributory negligence. Fearington v. Blackwell Durham Tobacco Co., 141 N. C. 80, 53 S. E. 662. That an employe had been generally instructed not to go between cars to couple them would not necessarily relieve him from the duty of obeying an express order of superintendent to make a coupling in that manner. Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795. Section hand, engaged in moving hand car from track, was not negligent when acting under foreman's orders and relying on his vigilance to avoid danger. St. Louis & N. A. R. Co. v. Mathis, 76 Ark. 184, 91 S. W. 763. Brakeman held not negligent in using link and pin coupler where he was directed to use it and had used it successfully on the same trip. Choctaw, etc., R. Co. v. Craig [Ark.] 95 S. W. 168. Where employe was injured while trying to remove choke from a machine, and not while trying to clean it, and was following directions at the time, whether or not there was a sign forbidding the cleaning of machines while in motion was immaterial. Creachen v. Bromley Bros. Carpet Co., 214 Pa. 15, 63 A. 195. Where boy of thirteen was directed by superintendent of cotton mill to remove cotton from a cog wheel, and attempted to do so and was injured, he could recover, notwithstanding placards prohibiting cleaning of machinery when in danger. Dougherty v. Dobson, 214 Pa. 252, 63 A. 748. Obedience to a direct order of a superior is not negligence unless the danger is so obvious and imminent that no prudent man would have done the act commanded. International & G. N. R. Co. v. Wray [Tex. Civ. App.] 16 Tex. Ct. Rep. 676, 96 S. W. 74. Engineer of switch engine, ordered to run his engine backward on the main track, held not negligent as a matter of law in doing so, relying upon switchman on front of engine for signals, where he ran into a train and was injured. Id.

To constitute an order it is not necessary that the language used should be of a formally imperative character. Jury could find that employer's direction to plaintiff to stay on sprinkler cart while driving into barn was an order on which he had a right to act. Jensen v. Kyer, 101 Me. 106, 63 A. 389. Where rules prohibited brakemen going between cars, an order to couple cars was not an order to go between cars. Huggins v. Southern R. Co. [Ala.] 41 So. 856.

3. If danger is so patent and serious that no prudent man would incur it, the servant cannot plead an order of assurance of safety of the master as justification for placing himself in danger. Jensen v. Kyer, 101 Me. 106, 63 A. 389. Actual knowledge of a defect need not be shown if it is such that the danger would be apparent to an ordinary careful man under the circumstances. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Though the servant was acting pursuant to an order or direction, he may still be found negligent if the danger involved was apparent and such that no reasonably prudent man would have encountered it under the same circumstances. Tuckett v. American Steam & Hand Laundry [Utah] 84 P. 500. Though a servant has some knowledge of danger involved in obeying a command of a superior, he is not negligent if he acts as an ordinarily prudent person would act under the same circumstances. City of Waukegan v. Sturm, 118 Ill. App. 479. Whether plaintiff was negligent in going between cars to couple them, under orders of superintendent, held to depend on whether a reasonably prudent man would have done as he did under the circumstances. Liles v. Fosburg Lumber Co., 142 N. C. 39, 54 S. E. 795. A servant is guilty of contributory negligence in undertaking an act the danger of which he knows and appreciates and which is so imminent that no prudent person would incur it, even though a superior directs him to undertake the act in question. Brakeman held negligent in holding post between cars where one was being "staked" on sidetrack by an engine and car on another track, and the danger of his position must have been fully known to him, even though he worked under the direction of the conductor of the train. Chicago Great Western R. Co. v. Crotty [C. C. A.] 141 F. 913. Motorman, who had right of way over a single track, left a place of safety and took the track, under direction of his conductor and according to rules of the company, though he saw a car coming on the single track from the other direction and took no steps to avoid a collision until the other car, which was being run in violation of the rules, was too close. Held he

tent on the assumption that work will be done in the customary manner,[4] and in accordance with the rules of the master,[5] and that other employes, for whose conduct the master is responsible, will perform their duties in an ordinarily careful manner.[6]

Disobedience of orders and violation of rules.[7]—It is the duty of the employe to obey and observe the reasonable rules and regulations of his employer with reference to the conduct of the business,[8] and a failure to do so will ordinarily be held negligence,[9] which will bar recovery for injuries proximately caused thereby.[10]

was guilty of contributory negligence. Mason v. Post, 105 Va. 494, 54 S. E. 311.

Contributory negligence held a question for jury: Where driver of sprinkling cart drove into barn seated on the cart and was struck by the door, employer having told him to do so and that it was all right. Jensen v. Kyer, 101 Me. 106, 63 A. 389. Whether employe was negligent in obeying order of superintendent to oil moving machinery. Southern Cotton Oil Co. v. Spotts, 77 Ark. 458, 92 S. W. 249. Whether employe assisting in taking a wooden structure down under orders of a superior was negligent in continuing at work, a dangerous method of work being adopted, held a question for the jury. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244. Whether employe engaged in building construction was negligent in walking over girders and joists connected in places by boards but having wide spaces between them. Butz v. Murch Bros. Const. Co. [Mo.] 97 S. W. 895. Miner held not negligent as a matter of law in working without props in the mine, though he knew props had not been supplied where the danger was not obvious and imminent. McKinnon v. Western Coal & Min. Co., 120 Mo. App. 148, 96 S. W. 485. Where a servant is injured while endeavoring to execute an order involving obvious danger to himself, the question whether or not he was justified in obeying the instructions given him by the master is one which should be left to the jury. Crockett v. Michael, 9 Ohio C. C. (N. S.) 15.

4. Car checker, struck by cars kicked down a track where he was engaged in his work, no warning being given, was not negligent as a matter of law, since he had a right to assume that the customary warning would be given. Meadowcroft v. New York, etc., R. Co. [Mass.] 79 N. E. 266. Section foreman walking on track had right to rely on the operation of trains in the usual and proper manner, and was not negligent as matter of law where struck by a locomotive without warning. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Employe whose duties frequently called him to place where fellow-servants were shoveling coal from cars to a bin was under no duty to give them warning of his presence, since they had reason to apprehend that he might be there at any time, and there was a custom of giving a warning cry whenever they threw large lumps of coal into the bin. Ranford v. Southern R. Co., 126 Ga. 452, 55 S. E. 183. Brakeman not negligent where he was injured while coupling air hose by reason of failure of head brakeman to give proper signal to prevent cars coming together. Hartman v. Minneapolis, etc., R. Co. [Minn.] 110 N. W. 102.

5. Brakeman may assume that company will conform to its rules and exercise reasonable care for his safety. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459. Brakeman had a right to assume, when walking on cars on a siding, that they would be coupled in accordance with rules of the company. St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534. Where engineer was sent out under a special pilot, the conductor, and the latter disregarded rules, the former was not responsible. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968.

6. Where the master's representative is present directing the work of tearing down a building, an employe may rely on the assumption that ordinary care will be exercised to make the place reasonably safe. Broomfield v. Worster Const. Co., 118 Mo. App. 254, 94 S. W. 304. Brakeman had right to rely on faithful discharge by engineer of his duty not to move a train without a signal from the brakeman. Illinois Cent. R. Co. v. Cane's Adm'x, 28 Ky. L. R. 1018, 90 S. W. 1061. Where fireman was fixing headlight of engine, and engineer knew it, the latter was bound to use ordinary care not to cause injury to the former, and the fireman was under no duty to anticipate negligence on the part of the engineer. Galveston, etc., R. Co. v. Cade [Tex. Civ. App.] 15 Tex. Ct. Rep. 66, 93 S. W. 124. If telephone lineman relied on inspection of his foreman who ordered him to climb a pole, he was not negligent in climbing it without making an independent inspection. Western Union Tel. Co. v. Holtby, 29 Ky. L. R. 523, 93 S. W. 652. Where a servant is at work in a proper place and in the customary manner, he need not anticipate a negligent act on the part of his coemployes. Bird v. U. S. Leather Co. [N. C.] 55 S. E. 727.

7. See 6 C. L. 586.

8. Seaboard Air Line R. Co. v. Shanklin [C. C. A.] 148 F. 342; Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053. A rule prohibited trainmen from attempting to work with apparatus which they have discovered to be defective so as to render their work dangerous, and required them to report the defect at once to the conductor or superior servant in charge. A reasonable construction of such rule was held to be that after reporting a defect the servant was to act under orders of the superior. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203.

9. In action for injuries to brakeman, the plea set up contributory negligence by reason of plaintiff's going between cars to couple them, in violation of his contract not to do so. The plea was held good. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Where rules required miners to leave their places ten minutes before noon, and that blasts would be discharged after twelve noon, a

But the fact that the servant injured violated a rule will not be available as a defense if it appears that the rule in question had been in effect abrogated by failure of the master to enforce it,[11] or by the promulgation of other rules or orders inconsistent therewith.[12] A violation of a rule is not negligence per se; the question must be determined with reference to other circumstances of the case as well.[13]

Emergencies.[14]—A servant suddenly confronted with an emergency,[15] or with

servant who did not leave his place until after twelve and was injured by an explosion was guilty of contributory negligence. El Paso Gold Min. Co. v. Ewing [Colo.] 86 P. 119. Failure of section master in charge of a crew on a hand car to cause them to run it in a safe manner is contributory negligence which will bar a recovery for injuries to him resulting from operation of the car in a negligent manner. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24. Where railroad rule required employes to provide themselves with lanterns when necessary in their work, failure of a brakeman to get a light, when he could have done so, the company having provided them, was a violation of the rule, and an injury caused by want of light did not warrant recovery. Howard v. Chesapeake & O. R. Co., 28 Ky. L. R. 891, 90 S. W. 950. If employe required to work on top of oil tanks had been forbidden to go there alone and warned of the danger, there could be no recovery for his death, if it resulted from his disobedience of such warnings. Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 16 Tex. Ct. Rep. 750, 97 S. W. 332. Engineer held negligent when a rule required trains to be at least ten minutes apart, and he, knowing of the time of departure of a preceding train and his own, ran into it in less than ten minutes after its leaving time. International & G. N. R. Co. v. Brice [Tex.] 16 Tex. Ct. Rep. 1005, 97 S. W. 461. Car repairer who failed to observe the rules by neglecting to set out a signal while working between cars, this being the only way to protect himself, as he knew, could not recover for injuries caused by the cars being moved by a locomotive while he was between them. Losnes v. Le Roy [Wash.] 87 P. 502. Sawmill employe who failed to observe rules and directions and got in the way of a cart unnecessarily was guilty of negligence. Imhoof v. Northwestern Lumber Co. [Wash.] 86 P. 650.

The rule that violation of a rule promulgated for the protection of the servant is negligence per se does not apply to a rule made for the benefit of the master. Whether violation of a rule of the latter kind is negligence per se not decided. St. Louis, etc., R. Co. v. Caraway, 77 Ark. 405, 91 S. W. 749.

10. That an engineer is off his engine, in violation of a rule of the company, when injured, will not preclude a recovery by him unless it proximately caused his injury. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Rules of company required brakeman, when his train went on a siding, to lock the switch and remain within ten feet of it. Instead, he went into the caboose and failed to lock the switch. Held he was guilty of negligence which was the proximate cause of his death by another train colliding with the caboose. Holland v. Seaboard Air Line R. Co. [N. C.] 55 S. E. 835. No recovery where engineer was killed in a collision in yards caused by his failure to have his engine under control as required by the rules. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053.

11. Car inspector was not negligent in failing to observe a rule requiring him to display a blue flag while at work when such rule had not been enforced. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. Where car provided by defendant to take servants to and from work left the track, killing a servant, the fact that a rule of the company prohibited employes from riding on the car was not available as a defense. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

12. If compliance by the servant with a general rule is rendered impossible by other and inconsistent orders and duties imposed by the master, negligence cannot be imputed to the servant for not following the general rule. Maehren v. Great Northern R. Co. [Minn.] 107 N. W. 951. Engineer was injured by jumping before rear end collision occurred. A general rule required him to have his train under control at the place in question, but he had orders to make up time and was not given the schedule of a train ahead. The test of his conduct was whether he used ordinary care to have his train under control at the time, and this question was held one for the jury. Id.

13. Disobedience of railroad rules by employe is not negligence per se. Texas & P. R. Co. v. Cotts [Tex. Civ. App.] 95 S. W. 602; Missouri, etc., R. Co. v. Parrott [Tex. Civ. App.] 16 Tex. Ct. Rep. 879, 96 S. W. 950. Breach of a rule is not negligent per se unless the act is one which no prudent person would have done. Galveston, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 505, 98 S. W. 898. Where a rule prohibiting brakemen from going between cars was habitually violated, a violation of it by a brakeman was only a circumstance to be considered on the issue of contributory negligence. Chicago, etc., R. Co. v. Thompson [Tex. Civ. App.] 15 Tex. Ct. Rep. 229, 93 S. W. 702. It is the duty of employes to observe the master's rules. But where they are oral, proof of them is difficult, and the question of contributory negligence for nonobservance of them should go to the jury. Seaboard Air Line R. Co. v. Shanklin [C. C. A.] 148 F. 342. As where foreman was injured while riding on front of hand car seated on a box. Id.

14. See 6 C. L. 586.

15. Where an emergency occurs in the master's business, the serious nature of which calls a servant from his regular employment, and he is injured in an effort to relieve the situation, in consequence of some defect or danger imputable to the negligence of the master, the servant is not as a matter of law to be charged with contributory negligence, though but for the existence of

an unexpected danger,[16] is not required to act with the same deliberation and foresight that might properly be expected of him under ordinary circumstances.[17]

Discovery of servant's peril; intervening negligence.[18]—Though a servant has been negligent in placing himself in a position of peril, the master will be liable for a want of ordinary care to avoid injuring him,[19] after discovery of his peril.[20] But this rule, the last clear chance doctrine, does not apply where both parties are negligent at the very time of the injury.[21]

(§ 3). *H. Actions.* 1. *In general.*[22]—Only questions of procedure peculiar to actions to recover for personal injuries to servants are here treated. The general principles which control procedure in all actions of this nature are elsewhere discussed.[23]

the emergency he would be barred from recovering on the ground of being a volunteer and of having accepted the risk. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Where brakeman was trying to release a brake at the time he was struck by a low bridge, the existence of the emergency, the train having started suddenly before the brake was released, and the fact that the brakeman was engrossed in his labors, would excuse his forgetfulness of the danger. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Boy of thirteen, suddenly ordered to remove cotton from cog wheel, is not negligent as matter of law, though placards prohibited cleaning of machines while in motion, and though the act he was told to do was not a proper part of his duties. Dougherty v. Dobson, 214 Pa. 252, 63 A. 748.

16. Brakeman riding on engine, and seeing a burning trestle so close at hand that engine could not be stopped before running into it, was not negligent in jumping just before it was reached. Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621. Where one is placed in danger by negligence of another, his attempt to escape, even by doing an act which is also dangerous and from which injury results, is not contributory negligence, if the attempt was one such as a person acting with ordinary prudence might make under the circumstances. Cudahy Packing Co. v. Wesolowski [Neb.] 106 N. W. 1007. Foreman of switching crew, on switch engine, jumped in order to avoid injury in a collision with a passenger engine. Whether he was negligent was for the jury. Missouri, etc., R. Co. v. Houlihan [Tex. Civ. App.] 15 Tex. Ct. Rep. 559, 93 S. W. 495. Planer was suddenly started, and employe, startled, put his hand into cog wheels, having momentarily forgotten about them. Whether he was negligent was for the jury. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323. A sudden cry of warning given by a superintendent when he saw telephone poles about to fall from a train while not an act of negligence, could be considered on the issue of contributory negligence of an employe who jumped from the train and was injured. Mounce v. Lodwick Lumber Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 944, 91 S. W. 240.

17. American Brake Shoe & Foundry Co. v. Jankus, 121 Ill. App. 267.

18. See 6 C. L. 587.

19. After discovery of the perilous position of an employe, the master is bound to use ordinary care to avoid injury, regardless of whether the servant assumed the risk or was guilty of negligence in getting into danger. Raasch v. Elite Laundry Co. [Minn.] 108 N. W. 477. Train crew saw section hand on the track and rang the locomotive bell, but it was apparent that he did not hear it. It was held negligence to fail to sound the whistle. Mills v. Missouri Pac. R. Co. [Mo.] 94 S. W. 973. If injury to minor servant was caused by negligent failure to avoid injuring him after discovering him in a position of peril, the parent's consent to his employment in dangerous work would constitute no defense. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187. Complaint alleging that foreman of section crew ordered crew to take hand car off the track seeing a train coming, that employes started to do so, but that the train was run down upon them at a reckless rate of speed, though there was time to have stopped it, held to state a cause of action. Allen v. Yazoo & M. V. R. Co. [Miss.] 40 So. 1009. Operator of mangle got her fingers caught in rollers and a representative of the master, called to the place, started the machine, and the employe's hand was drawn in. Whether the vice-principal was negligent was for the jury. If he was, the employe was entitled to recover. Raasch v. Elite Laundry Co. [Minn.] 108 N. W. 477. Where brakeman fell between cars but was not injured until he had crawled or been carried forty feet, he could recover notwithstanding his previous contributory negligence in getting into a place of danger, provided the employes in charge could with ordinary care have prevented his injury after discovering his position. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096.

20. Where an employe was injured while standing between cars, the mere fact that one of the train crew saw him near the cars did not charge them with notice that he was in a place of danger. Hacker v. Louisville & N. R. Co., 29 Ky. L. R. 842, 96 S. W. 526.

21. A plaintiff who has received an injury occasioned by negligence of defendant but who could have avoided it by the exercise of ordinary care on his own part cannot recover damages therefor, though the defendant ought to have discovered plaintiff's peril in time to avoid injury, but did not in fact do so, plaintiff's negligence having continued to the very time of injury. Dyerson v. Union Pac. R. Co. [Kan.] 87 P. 680.

22. See 6 C. L. 587.

23. See Damages, 7 C. L. 1029; Evidence, 7 C. L. 1511; Parties, 6 C. L. 888; Pleading, 6 C. L. 1008; Instructions, 8 C. L. 333; Trial,

(§ 3 *H*) 2. *Parties.*[24]—The law as to parties to the action is the same as in other actions for death or injuries, and not to be here discussed.[25]

(§ 3 *H*) 3. *Pleading and issues. The complaint or petition.*[26]—Must show the existence of the relation of master and servant[27] and the existence and breach of some duty owed by the master to the servant at the time of the injury.[28] A mere allegation of duty is insufficient; facts showing a duty to exist must be alleged.[29] Allegations of negligence must be sufficiently certain and specific to inform the defendant of the nature of plaintiff's claim,[30] but a general allegation

6 C. L. 1731; Verdicts and Findings, 6 C. L. 1814; Venue and Place of Trial, 6 C. L. 1806, etc.

24. See 6 C. L. 587.

25. See Parties, 6 C. L. 888; Death by Wrongful Act. 7 C. L. 1083.

26. See 6 C. L. 587.

27. Complaint alleging negligence in the use of certain machinery in the mill in which plaintiff was employed held to show that the relation of master and servant existed between plaintiff and defendant. Hay v. Bash [Ind. App.] 76 N. E. 644. Error to strike paragraph of complaint containing only allegation that negligent man was in defendant's employ. Schneider v. Missouri Pac. R. Co., 117 Mo. App. 129, 94 S. W. 730.

28. Complaint held to show sufficiently that when servant was injured on a trestle he was in the discharge of duties as servant. Virginia B. & I. Co. v. Jordan, 143 Ala. 603, 42 So. 73. Where complaint in action for death of minor alleged that the relation of master and servant existed and that the minor was acting under orders when injured, it was not defective for failing to allege that he was in the discharge of his duties when killed. Moss v. Mosley [Ala.] 41 So. 1012. Complaint alleging failure to warn employe engaged in loading car of approach of another car, and an injury to the employe as a result of such negligence, held to state a cause of action. Chicago & E. I. R. Co. v. Kimmel, 221 Ill. 547, 77 N. E. 936. In action for injuries to brakeman on logging train, a complaint alleging failure to warn and instruct plaintiff, who was without experience, negligence in track construction and in furnishing a defective engine, and in overloading the train, whereby the train got beyond control of the crew on a steep grade and was wrecked, and that plaintiff jumped and was injured, stated a cause of action. Wiest v. Coal Creek R. Co., 42 Wash. 176, 84 P. 725. A complaint alleging the injury in plain and concise language, that it resulted from the carelessness and negligence of defendant in the construction and operation of its sawmill and appliances thereto, and that plaintiff was in no way guilty of contributory negligence, and used ordinary care in the performance of his duties in the performance of which he was injured, is not demurrable. Crawford v. Boners Ferry Lumber Co. [Idaho] 87 P. 998. Complaint alleging that plaintiff was an employe of defendant, engaged in operating a hoisting engine, stating master's duty to use ordinary care to furnish a safe place, and alleging that unskilled servants placed dynamite near the place where plaintiff was working, which caught fire and exploded and injured him, held to state a cause of action. Lane Bros. Co. v. Seakford [Va.] 55 S. E. 556. Complaint alleging that while plaintiff was standing on a car defendant suddenly, violently, and negligently moved it with a jerk, without notice or warning, alleges negligence in the manner of moving the car and also in failing to give notice. Houston v. Chicago, etc., R. Co., 118 Mo. App. 464, 94 S. W. 560. Complaint alleging defects in machines and building whereby a machine was out of alignment with a pulley, causing the belt to shift and start the machine while plaintiff was cleaning it, thus injuring him, held not demurrable. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650. Petition in action for injuries to employe in lumber yard received while riding on footboard of engine alleged that it was customary and necessary for him to ride on the footboard in the performance of his duties. Petition held to show that plaintiff was properly on the footboard. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

29. Where a complaint is based on the theory that the master has failed to supply a reasonably safe place and alleges facts to show how it could be made safe a further allegation that a certain duty rested upon the master with reference to such place was a mere conclusion of law. Long v. John Stephenson Co. [N. J. Law] 63 A. 910.

30. The facts must be stated with sufficient certainty to be understood by the defendant, the jury, and the court. Lane Bros. Co. v. Seakford [Va.] 55 S. E. 556. Complaint alleging that a bridge over a trench gave way by reason of a defect, held not defective for failure to describe the defect specifically. Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96. A complaint alleging that an engine was defective sufficiently particularized the part of the ways, works, machinery, or plant was defective without stating the particular part of the engine claimed to be defective. Sloss-Sheffield S. & I. Co. v. Hutchinson, 144 Ala. 221, 40 So. 114. Complaint for injuries caused by falling of a pole which was being lowered into a mine shaft held to show that the pole which fell was one which was being lowered without having been lashed, negligence in the manner of lowering poles having been alleged. Manning v. App Consol. Gold Min. Co. [Cal.] 84 P. 657. The specific act or omission relied upon as constituting the breach of duty must be stated in the declaration. In action against a corporation and its foreman, declaration alleging that plaintiff was required to do certain work in which an insufficient number of men were employed was demurrable as against the foreman. Klawiter v. Jones, 219 Ill. 626, 76 N. E. 673. Complaint alleged that a miner went to work in a certain part of the mine under direction of his mine boss and while working there in the line of his duty the roof fell, injuring him.

of negligence is usually held sufficient as against a demurrer,[31] if the facts alleged disclose a legal duty and a violation thereof.[32] Knowledge by the master, actual or constructive, of the defective or dangerous condition, alleged to have caused the injury, must be made to appear.[33] A complaint is demurrable if it shows on its face, conclusively and as a matter of law, that the servant assumed the risk[34] or

Motion to make more specific and show particular kind of work plaintiff was doing was properly denied. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060. Complaint held defective for failure to allege expressly that the fly wheel which broke, causing the injury, was defective. Hay v. Bash [Ind. App.] 76 N. E. 644. Where complaint alleged negligence whereby a young, inexperienced employe had his hand caught and injured in cotton cards, a motion to make more definite by giving number of employes present, their names, etc., was properly denied. Shaver v. Grendel Mills, 74 S. C. 430, 54 S. E. 610. If a petition in an action for injuries caused by defective appliances points out the appliance or apparatus claimed to be defective, this is sufficient without specifying defects. Missouri, K. & T. R. Co. v. Barnes [Tex. Civ. App.] 15 Tex. Ct. Rep. 524, 95 S. W. 714. Complaint alleging that plaintiff was at work on a scaffold on a car, and that it was thrown down by the car moving, held to allege sufficiently that the scaffold was unsafe. Louisiana & Texas Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140.

31. Complaint alleging death of a servant proximately caused by negligence of defendant in failing to provide safe machinery and to keep it in that condition states a cause of action. If greater detail is desired the remedy is by motion to make more specific. Burton v. Anderson Phosphate & Oil Co. [S. C.] 55 S. E. 217.

32. That the place of work is constantly changing in character, so that it is not the master's duty to keep it safe, is a matter of defense, and a complaint charging negligence in providing a place of work need not allege the character of the work being done at the time. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 266.

33. Complaint alleging negligence in failing to warn operator of machine of dangerous character of gas generated by the machine held not demurrable for failure to show that master knew or ought to have known of the danger. Blount Carriage & Buggy Co. v. Ware, 125 Ga. 571, 54 S. E. 637. Where a complaint alleges negligence in maintaining a side track in an unsafe condition, an allegation that defendant knew of all the matters and things alleged in the premises is sufficient without a specific averment of knowledge as to each matter charged. Grand Trunk Western R. Co. v. Melrose [Ind.] 78 N. E. 190. In an action for injuries caused by defective brake rod, a complaint alleging that the defect was known to defendant, or could have been known by the exercise of ordinary care, was sufficient without alleging that defendant knew of the defect a sufficient length of time before the accident to have made repairs. Kentucky & I. Bridge & R. Co. v. Moran [Ind. App.] 79 N. E. 213. Allegations of negligence held to state by inference that the defect complained of, loose slate in coal mine, and defendant's knowledge of it, had both existed for a time sufficient for the master to have remedied it in the exercise of ordinary care, and hence a direct averment to that effect was unnecessary. Dodge v. Manufacturers' Coal & Coke Co., 115 Mo. App. 501, 91 S. W. 1007. Where evidence showed knowledge by engineer of position of coal dock employe, plaintiff could recover for injuries caused by want of warning, though knowledge of engineer was not specifically alleged. Lanning v. Chicago Great Western R. Co., 196 Mo. 647, 94 S. W. 491. Where complaint showed that defect in machine which caused injury was patent, it was not objectionable for failing to allege that the master had knowledge of it. Coulter v. Union Laundry Co. [Mont.] 87 P. 973. Where the facts alleged to constitute negligence are explicitly stated the complaint need not allege in terms that defendant knew or in the exercise of ordinary care ought to have known of the defective condition which caused the injury. Galveston, H. & S. A. R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330.

34. Complaint alleging that mine was unsafe by reason of the roof being soft and loose and because the master furnished no props held not objectionable as showing that dangers were patent to plaintiff. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 266. Where a declaration shows on its face that the defects in a hand car, alleged to have caused the injury complained of, would have been discoverable by use of ordinary care by plaintiff, who was in charge of the car, it is demurrable, though it alleges that the defects were unknown to plaintiff. Atlantic Coast Line R. Co. v. Byland, 50 Fla. 190, 40 So. 24. Complaint alleging negligence in failing to warn operator of machine of dangerous character of gas generated by it held not demurrable as disclosing that the operator knew or ought to have known of the danger, it being alleged that the operator was inexperienced and the danger unusual. Blount Carriage & Buggy Co. v. Ware, 125 Ga. 571, 54 S. E. 637. Complaint in action for injuries to brakeman caused by his attempting to board a moving train held demurrable because it disclosed that he voluntarily assumed the risk. Griffith v. Lexington Terminal R. Co., 124 Ga. 553, 53 S. E. 97. Where complaint alleging injuries caused by defective appliance disclosed that plaintiff had at least equal opportunities with defendant of discovering the defect complained of, it was demurrable. Lee v. Atlantic Coast Line R. Co., 125 Ga. 655, 54 S. E. 678. Complaint for injury caused by piece of steel flying from chisel being used by plaintiff held demurrable because it showed that plaintiff had same knowledge, or means of knowledge, of the defect as the master. Banks v. Schofield's Sons Co., 126 Ga. 667, 55 S. E. 939. Where a complaint does not show that defects complained of were open and obvious, it is not objectionable as showing an assumed risk. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.]

was guilty of contributory negligence,[35] or that the act of a fellow-servant caused the injury.[36] There is a conflict as to the necessity of positive averments of want of contributory negligence[37] and non-assumption of risk. Thus, in some states, an allegation by plaintiff of want of knowledge of a defect causing an injury is unnecessary;[38] in others, such an allegation is essential.[39] A general allegation of lack of knowledge by plaintiff negatives constructive as well as actual notice.[40] It appear from the pleading that the negligence alleged was the proximate cause of the injury.[41]

77 N. E. 363. A complaint in an action for injuries by a miner alleged that the employer knew the dangerous condition which caused the injury and that the plaintiff did not. The complaint was not objectionable as showing an assumed risk, though it did not allege that plaintiff had no means or opportunity of learning of such dangerous condition. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060. Complaint in action for death of brakeman, which alleged that he was required to work with cars on a high trestle without guard rails, did not show an assumption of the risk. Brown's Adm'r v. Cincinnati, etc., R. Co., 29 Ky. L. R. 146, 92 S. W. 583. Where petition alleged a promise to repair a defect, but failed to allege that a reasonable time for the making of such repairs had not expired at the time of the injury, it was demurrable. Parker v. Drakesboro Coke & Coal Min. Co., 29 Ky. L. R. 825, 96 S. W. 575.

35. Complaint in action for death of switchman caught between engine and car alleged that decedent did not know of the near approach of the engine to the car. Held freedom from contributory negligence was sufficiently alleged. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363.

36. The complaint should show that the negligence charged was not that of a fellow-servant. Allegations insufficient because they failed to state what agents or agent of corporation defendant ran engine against cars upon which plaintiff was at work. Brown v. Pennsylvania R. Co., 142 F. 909. Complaint in action by porter held not to state a cause of action where injury was alleged to have been caused by conductor, and no breach of duty by company was alleged, and it was not alleged that conductor and porter were not fellow-servants. The Pullman Co. v. Woodfolk, 121 Ill. App. 321. A complaint which alleged negligence of a foreman in switching a car on a track on which plaintiff was working, without warning plaintiff, did not state a cause of action at common law, since it alleged negligence of a fellow-servant. Chicago & E. R. Co. v. Lain [Ind. App.] 79 N. E. 547. Where a complaint alleged an injury to an employe while engaged in cleaning out a boiler, but it appeared the injury was caused by a negligent use of appliances by a fellow-servant, the complaint was insufficient to state a cause of action at common law. Ft. Wayne Iron & Steel Co. v. Parsell [Ind.] 79 N. E. 439. Where declaration charged only negligence of the engineer in running the engine at a reckless rate of speed over a rough piece of track as the cause of the fireman's death, it failed to state a cause of action against defendant. Hyatt v. Southern R. Co. [Miss.] 41 So. 3. A petition which merely alleges that one servant was injured by the negligent act of another servant, while both were engaged in the same work under a common employment, does not state a cause of action against the master. If the negligence was in fact that of a superior or vice-principal, the petition should so state. Weaver v. Goulden Logging Co., 116 La. 468, 40 So. 798. A complaint alleging that a collision of trains was caused by "negligence and carelessness of the agents and servants of said defendant company" held sufficient, as against a demurrer, to show that the collision was caused by servants for whose negligence the company would be responsible. Choctaw, O. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. The proper remedy, if greater certainty be desired as to the acts complained of, and the servants charged to have been negligent, would be by motion to make move definite and certain. Id.

37. See, also, post, The Answer. Complaint alleging that plaintiff was injured by reason of negligence of defendants and their servants held demurrable for not showing that plaintiff himself was not the negligent servant responsible for the injury. Schreiner v. Grant Bros. [Cal. App.] 86 P. 912.

38. See 6 C. L. 689, n. 67.

39. Complaint in action for injuries caused by unguarded circular saw held insufficient at common law because failing to allege that unsafe condition of saw was unknown to the employe. Kintz v. Johnson [Ind. App.] 79 N. E. 533.

40. Notice on the part of the master of defects in machinery or appliances and want of notice on the part of the servant may be alleged in general terms, and such allegation will include both actual and constructive knowledge. Allegation that servant did not know of defects is sufficient to rebut constructive or implied knowledge. Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409. Where complaint alleged that plaintiff had no knowledge of the defects or dangers which caused his injury, it need not allege want of means or opportunity to discover such defects or dangers. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 77 N. E. 363. Complaint alleging that dangerous condition of mangle was known to the master but not to the servant held sufficient without negativing implied knowledge by the servant. Ross-Paris Co. v. Brown, 28 Ky. L. R. 813, 90 S. W. 568.

41. Declaration demurrable because not showing negligence alleged to have been proximate cause of injury. Wright v. Illinois C. R. Co., 119 Ill. App. 132. Where complaint alleged defects in a track and then alleged that an engine jumped the track as it "approached" the defective place in the track, it did not appear that the defect in the track caused the engine to leave the

If a complaint contains a sufficiently definite statement of the negligence of defendant relied upon, it is not demurrable for stating two causes of action in a single count.[42] Counts of a declaration charging wantonness or willfulness, and also setting out facts showing only simple negligence, are demurrable.[43] Where a complaint makes reference to the rules and regulations of a railroad company, it is sufficient to allege their legal effect without setting them out in full.[44]

Pleading statutory causes of action.[45]—A party who relies on a statutory cause of action must show by the facts alleged that the action falls within the particular statutory provision relied upon,[46] though particular reference to the statute is unnecessary.[47] Decisions as to pleadings in actions based upon statutes are given in the note.[48]

track; hence no cause of action was stated. Southern R. Co. v. Sittasen [Ind.] 76 N. E. 973. Petition held to show sufficiently that defective condition of brake staff was proximate cause of fireman's injury. Missouri, K. & T. R. Co. v. Hanson [Tex. Civ. App.] 14 Tex. Ct. Rep. 415, 90 S. W. 1122. Where petition alleged that, by reason of negligence in the construction of the roadbed and in furnishing couplings for cars, two sections of a train became uncoupled and then collided, injuring plaintiff, the causal connection between the injury and the negligence alleged was sufficiently made to appear. Gordon v. Chicago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177.

42. Complaint alleging that switch was left open and that defendant failed to furnish a safe track in that no switch light was used held not demurrable. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1.

43. Herren v. Tuscaloosa Waterworks Co. [Ala.] 40 So. 55.

44. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

45, 46. See 6 C. L. 590.

47. A complaint in an action for injuries caused by the fall of a scaffold which alleged that the scaffold was built of unsafe materials and unsafely constructed is sufficient without pleading the statute which forbids the furnishing of an unsafe scaffold. Riley v. McNulty, 100 N. Y. S. 985. Where a complaint alleged the giving of a notice of the time, place, and cause of plaintiff's injuries, signed by plaintiff, and alleged failure to properly guard tools and machinery. Held complaint stated a cause of action under the statute, though it did not specifically refer thereto. Severson v. Hill-Warner-Fitch Co., 101 N. Y. S. 808.

48. Alabama: To state a cause of action under Code 1896, § 1749, subd. 3, making a master liable for negligence of a fellow-servant, the name of the alleged negligent servant should be stated, or it should be alleged that the name of such servant is unknown. Alabama Steel & Wire Co. v. Clements [Ala.] 40 So. 971. Where a count alleges injury as a result of an order of a superior it should allege that the order was negligently given. Id. Where count alleges that orders of a superintendent were negligently given, it is not necessary to state in what particular the order was negligent. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. Complaint alleging in substance that a person exercising superintendence ordered a chain to be slackened, thereby causing a block to fall on a servant, held to state a cause of action under Code 1896, § 1749, subd. 2. Id. Where complaint alleged that inexperienced minor employe was killed while performing orders of superior, to which he was bound to conform, it was not defective for failure to allege lack of warning or instruction, or that dangers were not obvious. Moss v. Mosley [Ala.] 41 So. 1014. Where negligence of a superintendent was relied on, an allegation that such superior knew that an employe was an inexperienced boy was a material allegation which plaintiff was bound to prove. Id. Where complaint alleged relation of master and servant and that minor inexperienced employe was put to work by superior at the dangerous work of cleaning near dangerous machinery, it was held not defective for failing to allege that minor was in discharge of duties when killed nor defective as too indefinite in its allegations of negligence. Id. Complaint alleging that a superintendent caused a chain attached to a block under which deceased stood to be loosened, whereby the block fell and caused death of deceased, held to contain sufficient allegation of negligence. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. That name of person whose act caused the accident, and who, it was alleged, acted under orders of one exercising superintendence, was not stated, did not render the complaint objectionable. Id. Where reply to plea, setting up a violation of a rule and contract as the cause of injury, failed to show that person who gave order pursuant to which the rule was violated had authority to give such an order, the reply was demurrable. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Where complaint alleged that bridge over a trench on defendant's premises gave way, owing to its defective condition, and by reason of a defect in the "ways, works, etc.," held not demurrable for failure to show that bridge was a part of the "ways, works, etc." Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96.

Indiana: In an action for injuries to operator of circular saw, a complaint alleging that defendant failed to place any guard or protection over or about the saw sufficiently stated a violation of Burns' Ann. St. 1901, § 7087i. Kintz v. Johnson [Ind. App.] 79 N. E. 533. A complaint under this statute must show that the saw could have been properly guarded without destroying its usefulness; allegations held insufficient for this purpose. Id. A complaint based on a failure to guard machinery as required by statute must allege the practicability of guarding

The answer.[49]—The fellow-servant defense,[50] and the defenses of assumed risk[51] and contributory negligence,[52] must be specially pleaded, to be available to defendant, unless they are affirmatively disclosed by plaintiff's pleadings or proof.[53] Some courts hold that it is only the assumption of risks arising from neg-

the machine in question without interfering with its usefulness. Complaint under Burns' Ann. St. 1901, § 7087l. National Fire Proofing Co. v. Roper [Ind. App.] 77 N. E. 370. Complaint alleged that master failed to provide exhaust fan for emery wheel to carry off dust from the wheel and to properly guard the wheel, and that the wheel was dangerous and that it could have been guarded by exhaust fans. Held it stated a cause of action under the statute requiring exhaust fans to be provided for emery wheels. Muncie Pulp Co. v. Hacker [Ind. App.] 76 N. E. 770. Burns' Ann. St. 1901, § 7083, subd. 2, makes the employer liable where injury results from the negligence of a person in the master's employ to whose order or direction the servant injured was bound to conform. A complaint under the statute must allege the negligence of such person; merely alleging that the injured servant was at the time obeying an order of a person authorized to give it is not enough. Ft. Wayne Iron & Steel Co. v. Parsell [Ind.] 79 N. E. 439. A complaint under subd. 4 of § 7083 is insufficient if it does not allege that the negligence charged was that of a person at the time acting in the place and performing the duty of the master. Id. Where complaint alleged negligence of a foreman who switched cars down a track upon which plaintiff was at work, without warning, but failed to allege that the foreman knew of plaintiff's dangerous position, did not show negligence of one whose orders plaintiff was bound to obey, etc. Chicago & E. R. Co. v. Lain [Ind. App.] 79 N. E. 547. Complaint alleging that death of brakeman, engaged at the time in the line of his duty as an employe of a railroad corporation, was caused by negligence of the conductor in the service of the corporation and at the time in charge of a train, held sufficient. Chicago, I. & L. R. Co. v. Williams [Ind.] 79 N. E. 442. Complaint alleging negligence of an engineer in charge of locomotive on which plaintiff was working held to allege with sufficient directness that the engineer was in charge of the train. Southern Indiana R. Co. v. Osborn [Ind. App.] 78 N. E. 248. Complaint in action for injuries to brakeman sustained in collision alleged that the trains were in charge of engineers and conductors, employes of defendants. These allegations were sufficient to show that trains were in charge of engineers and conductors at the time of the collision. Southern Indiana R. Co. v. Baker [Ind. App.] 77 N. E. 64. Complaint held sufficient to state a cause of action based on a violation of an ordinance requiring lights to be carried on the ends of trains engaged in switching, alleged to have caused injuries to a switchman. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363.

New York: An allegation that the acts were all and each without any fault or negligence on the part of the plaintiff is a sufficient allegation of plaintiff's freedom from negligence under the employer's liability act. Redhead v. Dunbar & Sullivan Dredging Co., 101 N. Y. S. 301. Complaint alleging that plaintiff was directed to use an elevator which was defective by reason of the negligent manner in which the cable was fastened to the car held to state cause of action for negligence of a superintendent, though it did not allege specially that superintendent directed plaintiff to use the elevator. Harris v. Baltimore Mach. & El. Co., 112 App. Div. 389, 98 N. Y. S. 440.

49. See 6 C. L. 590.

50. Complaint alleged that injury was caused by explosion of charge left in a mine, of which the employe had no knowledge, but which was known to the master. Answer did not deny knowledge by the master but alleged the servant knew of it. Held, whether the servant's foreman was his fellow-servant was not in issue. Bone v. Ophir Silver Min. Co. [Cal.] 86 P. 685.

51. Defense of assumed risk must be pleaded. Missouri, K. & T. R. Co. v. Wilhoit [Ind. T.] 98 S. W. 341; Price v. Consumers' Cotton Oil Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 151, 90 S. W. 717; Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. Assumption of risk is an affirmative defense which must be specially pleaded. Montgomery v. Seaboard Air Line R. Co., 73 S. C. 503, 53 S. E. 987. Answer referred to various allegations of negligence in complaint and alleged that if plaintiff's injuries were caused by negligence alleged, the facts were known to plaintiff and each of such risks assumed. The answer was held sufficiently clear and certain. Bryan v. International & G. N. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 455, 90 S. W. 693.

52. Defense of contributory negligence must be pleaded. Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140; Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. Contributory negligence is an affirmative defense. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. Plea demurrable because not alleging that plaintiff's conduct was negligent. Foley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273. Where complaint alleged injuries as a result of plaintiff's trying to stop a car so as to avert a collision with another car standing on the track, a plea that "plaintiff negligently failed to properly drive or operate the car of which he had charge as driver, and as a proximate consequence whereof he was injured," was demurrable because too general. Sloss-Sheffield S. & I. Co. v. Smith [Ala.] 40 So. 91. Answer, construed with petition, held to allege with sufficient definiteness that deceased was negligent in use of rope and plank used to move a pump, defects being obvious. Ramm v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 866, 92 S. W. 426. In action for death of miner by noxious gases, a plea alleging contributory negligence in that plaintiff failed to turn on a fan was held demurrable because not showing that any duty rested on plaintiff to see that the fan was operated. Foley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273.

53. Where plaintiff's evidence shows contributory negligence without controversy,

ligence of the master, after the employment has commenced, that must be specially pleaded,[54] and that the assumption of ordinary incidental risks may be proved under a general denial [55] without being specially pleaded.[56]

Issues, proof, variance.[57]—Negligence must be proved as alleged.[58] There can be no recovery for negligence other than that alleged,[59] and proof of negligence not alleged is inadmissable.[60] If several acts of negligence are alleged, plaintiff is entitled to recover upon proof of any one or more of the acts alleged as the proximate cause of the injury complained of.[61] Where there is a general allegation of negligence followed by a specific allegation, plaintiff will be confined to proof of the latter.[62] Where the action is based upon a statute, there cannot be a recovery under the common law.[63]

(§ 3 *H*) 4. *Evidence, burden of proof and presumptions.*[64]—The burden is upon plaintiff to prove negligence of the master, as alleged,[65] and that such neg-

the court may direct a verdict though the defense is not specially pleaded. Kappes v. Brown Shoe Co., 116 Mo. App. 154, 90 S. W. 158.

54. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359; Vohs v. Shorthill & Co., 130 Iowa, 538, 107 N. W. 417. The master may show, without pleading the facts as a defense, that an injury occurred as the direct and proximate result of an ordinary risk, as such risks are presumed to have been in contemplation of the parties when they entered into the contract, and testimony to that effect tends directly to refute the allegation of negligence. Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140. But if defendant relies on facts occurring after the parties had entered into the agreement to show that plaintiff had, by his conduct, assumed the risk which caused the injury, such facts must be set forth as defense, as they are in the nature of a plea of confession and avoidance. Id. This distinction was made by Gary, A. J., who wrote the opinion; Jones and Woods, J. J., concurred, saying only that "assumption of risk by an employe is not available unless pleaded as a defense." Id.

55. Master may prove under a general denial that injury resulted from a risk incidental to the business. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944.

56. Vohs v. Shorthill & Co., 130 Iowa, 538, 107 N. W. 417; Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140. Such as servant is presumed to have considered upon entering the employment and to have assumed by his contract. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359.

57. See 6 C. L. 591.

58. Allegations that slate, rock, stones, and other debris had been allowed to accumulate on a track in a mine, causing car to run off the track, and injure plaintiff, held to have been sustained by the proof. Western Coal & Min. Co. v. Honaker [Ark.] 96 S. W. 361. An allegation that plaintiff was ordered to do certain work is proved by evidence that plaintiff and another were told to do it without specifying which one did it. Cessna v. Metropolitan St. R. Co., 118 Mo. App. 659, 95 S. W. 277.

59. Instruction erroneous because permitting recovery on grounds not alleged. Texas & N. O. R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. Instruction construed and held to limit recovery to negligence charged. Martin v. Des Moines Edison Light Co. [Iowa] 106 N. W. 359. Where complaint alleged negligence of an engineer and of the master, in that the place of work was dark, and evidence showed that negligence of a yard master in failing to give signals was the proximate cause of injury, there could be no recovery. Howard v. Chesapeake & O. R. Co., 28 Ky. L. R. 891, 90 S. W. 950.

60. Where declaration charged negligence in failing to equip cars with automatic sand boxes and sand, whether or not a car which ran away had a pail of sand and a shovel was immaterial. Mayer v. Detroit, etc., R. Co., 142 Mich. 459, 12 Det. Leg. N. 843, 105 N. W. 888.

61. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Where more than one act of negligence is charged, proof of one warrants recovery. Ingram v. Hilton & Dodge Lumber Co., 125 Ga. 658, 54 S. E. 648. Where injury to engineer caused by derailment was charged to be due to a washout on a dark night, and to fact that headlight was defective, he could recover if he proved negligence in connection with the condition of the track, even though he could not recover on account of the defective headlight because he had knowledge of it. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355.

62. Rule applied where there was a general allegation of negligence in running cars, followed by specific allegation of negligence and incompetency of engineer. Grissamore v. Chicago, etc., R. Co., 118 Mo. App. 387, 94 S. W. 306. Evidence of negligence of car inspector held inadmissible. Id. Specific acts of negligence being alleged, recovery can be had only upon proof thereof. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872.

63. Where plaintiff's petition and instructions use the terms of Rev. St. 1899, c. 91, art. 17, § 6435, requiring elevator openings in manufacturing, mechanical, or mercantile buildings, the action is based on its violation and plaintiff must recover, if at all, by proving negligence thereunder, and cannot recover at common law. Latapie-Vignaux v. Askew Saddlery Co., 193 Mo. 1, 91 S. W. 496.

64. See 6 C. L. 592.

65. Graboski v. New Castle Leather Co.

[Del.] 64 A. 74; Adams v. Central Indiana R. Co. [Ind. App.] 78 N. E. 687; Norfolk & W. R. Co. v. McDonald's Adm'x [Va.] 55 S. E. 554. Burden on plaintiff to prove negligence alleged. Harris v. Tremont Lumber Co., 115 La. 973, 40 So. 374. Negligence is not presumed; plaintiff must prove it. Jemnienski v. Lobdell Car Wheel Co. [Del.] 63 A. 935. Burden of plaintiff to show defect in "ways, works, etc.," due to negligence for which master would be responsible. Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96. In action for death of brakeman struck by an overhead bridge, plaintiff must prove that death was caused by brakeman's being struck by an improperly constructed bridge. Louisville & N. R. Co. v. Thomas, 87 Miss. 600, 40 So. 257.

Burden does not shift: The burden of proving the negligence alleged by a preponderance of the evidence rests at all times throughout the progress of the case on the plaintiff. Klunk v. Hocking Valley R. Co., 74 Ohio St. 125, 77 N. E. 752. Proof of facts which, by statute, create a prima facie case does not shift the burden to defendant, so as to require him to prove by a preponderance of the evidence that he was not negligent. Id. In action against railroad, where proof of facts sufficient to make a prima facie case under the statute is made, it is error to instruct that the defendant must prove by a preponderance of evidence that he was not guilty of negligence; defendant is only required to meet the prima facie case so made. Id. 87 Ohio Laws, p. 149, provides that in an action against a railroad company proof of a defect in a car, locomotive, or machinery shall be prima facie proof of negligence. This statute does not shift the burden of proof, the burden is still on plaintiff to prove negligence by a preponderance of all the evidence. Shankweiler v. Baltimore & O. R. Co. [C. C. A.] 148 F. 195.

Contra: Where a trainman is trying to fasten parts of a train with chains, the drawhead of a car having pulled out, and the front part of the train is moved down upon him, he is engaged in "running a train" within the meaning of Civ. Code 1895, § 2321; hence, on proof thereon, burden of proof shifted to defendant. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203.

Knowledge of defect by master must be shown: In action for injuries caused by fall of trestle, plaintiff must show that company knew of defective condition of trestle or that a reasonable inspection would have disclosed it. Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. Burden on plaintiff to prove that master ought to have discovered and repaired a defect in the floor which caused his injury. Kremer v. Eagle Mfg. Co., 120 Mo. App. 247, 96 S. W. 726. Where injury was alleged to have been caused by a defective stirrup on a car, the burden was on plaintiff to show that the railway company had knowledge of the defect, or that it was such that ordinary care would have disclosed it. Galveston, etc., R. Co. v. Parish [Tex. Civ. App.] 15 Tex. Ct. Rep. 334, 93 S. W. 682. In action for injuries caused by a want of care by the master it must be made to appear that the master knew or ought to have known of the defect complained of. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Before railroad employe can recover from company for injuries resulting from defective appliance on a locomotive, he must show that the company had notice of the defect long enough before the injury to have made repairs. Missouri Pac. R. Co. v. Dorr [Kan.] 85 P. 533. To recover on the ground that place of work was unsafe, plaintiff must show that the place where he was directed to work was unsafe, that the master would have known of its condition in the exercise of ordinary care, and that plaintiff did not know of the danger and did not have equal means with the master of finding it out. McCormick Harvesting Mach. Co. v. Zakzewski, 220 Ill. 522, 77 N. E. 147.

Sufficiency of evidence: Evidence insufficient to show that cogs of machine were broken as alleged. Barbieri v. Gandolfo-Ghio Ohio Mfg. Co., 118 Mo. App. 218, 94 S. W. 828. Where electric lamp trimmer was killed, evidence held insufficient to establish any defect in appliances. Gardner v. Schenectady R. Co., 113 App. Div. 133, 98 N. Y. S. 1034. Peremptory instruction proper where there was no evidence tending to establish charges of negligence made in declaration. Baltimore, etc., R. Co. v. Friend, 119 Ill. App. 306. Where servant was killed while making repairs on a track at night, evidence held insufficient to prove that warning signals were not given. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872. Where certain defects in a machine did not reasonably explain its abnormal action, the court should have given a requested instruction that proof thereof did not warrant a finding of negligence on the part of the master. Montanye v. Northern Elec. Mfg. Co., 127 Wis. 22, 105 N. W. 1043. That a hose which burst was spliced is not alone proof that it was defective where there was evidence that spliced air hose is not weakened. Shandrew v. Chicago, etc., R. Co. [C. C. A.] 142 F. 320. Where injury was caused by fall of elevator, but evidence failed entirely to show the cause of its fall, the master could not be held liable. Casterton v. American Blower Co., 142 Mich. 407, 12 Det. Leg. N. 751, 106 N. W. 61. Where injury was caused by bursting of steam main in factory, plaintiff was not under duty of proving the exact defect which caused the injury; it was enough to show facts from which jury could infer negligence in some particular which caused the accident. Erickson v. American S. & W. Co. [Mass.] 78 N. E. 761. Where telephone exchange operator was injured by electric shock while working at exchange, she was only required to prove that injury must have been the result of some defect in the apparatus of which company had actual or implied knowledge without showing the exact defect which produced the shock. Cahill v. New England Tel. & T. Co. [Mass.] 79 N. E. 821. Where defendant has submitted the question of negligence to the jury, as one of fact, he is estopped to claim there was no proof of negligence. Chicago Terminal Transfer R. Co. v. Schiavone, 116 Ill. App. 335. Where the evidence produced is equally consistent with the existence or nonexistence of negligence of the master, recovery cannot be had; negligence must be made to appear by a **preponderance of evidence.** Virginia Iron, Coal & Coke Co. v. Kiser, 105 Va. 695, 54 S. E. 889. Instruction requiring negligence to be a reasonable, logical, and necessary conclusion from facts and circumstances shown held erroneous, a preponderance of evidence is sufficient. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944.

ligence was the proximate cause of the injury or damage suffered,[66] and that the relation of master and servant existed at the time.[67] It is held by most courts that mere proof of the occurrence of an accident does not alone raise a presumption of negligence on the part of the master,[68] and that the doctrine res ipsa loquitur is inapplicable in an action by a servant against the master to recover for personal injuries.[69] Proof of the fact of injury may, however, be sufficient to take the issue of negligence to the jury,[70] though it does not relieve plaintiff of the burden of proof or raise any presumption in his favor. Negligence may, as in other cases, be inferred from the fact of injury taken in connection with other surrounding facts and circumstances,[71] but where the facts are such as to warrant a reasonable infer-

66. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301. Breach of duty owed servant by master must be shown, also that such breach caused injury. Loehring v. Westlake Const. Co., 118 Mo. App. 163, 94 S. W. 747. Plaintiff must show by fair preponderance of evidence that master was negligent and that his negligence, and no other cause, produced the injury. Saxe v. Walworth Mfg. Co., 191 Mass. 338, 77 N. E. 883. Plaintiff must not only show defects but must prove a causal connection between such defects and his injury. While he may do this by direct or circumstantial evidence, he must show it by a preponderance of evidence; it is not enough to show that such connection is consistent with plaintiff's theory. O'Connor v. Chicago, etc., R. Co., 129 Iowa, 636, 106 N. W. 161. Evidence held insufficient to show defects in freight car as cause of plaintiff's injury so as to require submission of the case to the jury. Id. Chains in elevator used to hoist beer kegs suddenly slackened and caused a keg to fall on plaintiff. No defect which could have caused the accident was shown. Master not liable. Muhlmeyer v. Koehler & Co., 99 N. Y. S. 814. Where plaintiff claimed that a handhold gave way because a nut was too large for a bolt used to hold it, and defendant claimed there might have been a latent defect in the nut which caused it to come off; the burden was on the plaintiff to show that cause alleged in fact produced the injury. Galveston, etc., R. Co. v. Smith [Tex.] 98 S. W. 240. Evidence held sufficient. Id. Evidence insufficient to show that use of unsafe appliance for tamping powder caused an explosion. Caudle v. Kirkbridge, 117 Mo. App. 412, 93 S. W. 868. Where operator of saw was injured, the burden was on him to prove the absence of a proper brace or guard and that want of it caused the accident. Davis v. Queen City Furniture Mfg. Co., 116 La. 1070, 41 So. 318.

67. See 6 C. L. 592.

Contra: Where it appeared defendant was operating a factory and that he hired and discharged the men, it was incumbent upon him to prove an allegation that he operated it for others and that he was not responsible for a defect therein causing an injury. Sheehan v. Hammond, 2 Cal. App. 371, 84 P. 340.

68. Mere fact that a wreck has occurred and an employe has been injured does not raise a presumption of negligence on part of railroad company. St. Louis & S. F. R. Co. v. Hill [Ark.] 94 S. W. 914. Burden is on plaintiff to show negligence, which cannot be inferred from mere fact that accident happened. St. Louis, etc., R. Co. v. Andrews [Ark.] 96 S. W. 183. Mere fact that elevator fell injuring plaintiff did not give rise to presumption of negligence on part of master. Latting v. Owasso Mfg. Co. [C. C. A.] 148 F. 369. Mere happening of accident (where longshoreman fell through hatch which had been improperly placed by other servants), held not evidence of master's negligence. McDonnell v. Oceanic Steam Nav. Co. [C. C. A.] 143 F. 480. Mere fact of collision and resulting injury to brakeman held not to raise presumption of negligence. Southern Indiana R. Co. v. Baker [Ind. App.] 77 N. E. 64. Proof that derrick fell is not alone presumptive evidence of master's negligence. Fallon v. Mertz, 110 App. Div. 755, 97 N. Y. S. 417. Mere proof of accident and injury to plaintiff from poorly insulated electric wire held not sufficient proof of defendant's negligence. Carey v. Manhattan R. Co., 50 Misc. 335, 98 N. Y. S. 668. Where injury was caused by the slipping and falling of a gang plank, and the evidence showed the gangway was properly constructed and in good condition just before the accident, the mere fact of the accident raised no presumption of negligence. Shaw v. Highland Park Mfg. Co. [N. C.] 55 S. E. 433. Mere fact that battle-pole which plaintiff was assisting in raising fell, held not to raise a presumption of negligence in the absence of proof that it was negligently secured. Green v. Catawba Power Co. [S. C.] 56 S. E. 125.

69. The maxim res ipsa loquitur has no application as between master and servant. Mere fact that air brake hose burst was not proof of negligence of railway company. Shandrew v. Chicago, etc., R. Co. [C. C. A.] 142 F. 320. Res ipsa loquitur doctrine has no application as between master and servant. Chicago Tel. Co. v. Schulz, 121 Ill. App. 573.

70. No presumption of negligence arises from the simple fact that an accident has occurred, but the fact of the accident may properly go to the jury as evidence bearing on the issue. Isley v. Virginia B. & I. Co., 141 N. C. 220, 53 S. E. 841. Where employe was injured by truck being knocked against him while carrying freight on a freight elevator, the circumstances were held such as to take the issue of negligence to the jury. Fearington v. Blackwell Durham Tobacco Co., 141 N. C. 80, 53 S. E. 662.

71. Where the circumstances surrounding a collision were such that it could have been caused only by negligence of a conductor or train dispatcher, proof of such circumstances and the facts of the collision and injury raised a presumption of negligence of the company. Choctaw, O. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Presumption of negligence held to arise in favor of

ence that the injury was produced by a cause other than defendant's negligence, the maxim res ipsa loquitur does not apply.[72] Where an injury may have resulted from any one of several causes, the burden is upon plaintiff to show that it in fact resulted from a cause for which the master would be responsible,[73] and this must be shown with reasonable certainty;[74] if the real cause of an injury is left a matter of conjecture, there can be no recovery.[75]

servant where pile of lumber fell without being touched by anyone. McCormick H. M. Co. v. Zakzewski, 121 Ill. App. 26. Maxim res ipsa loquitur held applicable where a piece of gas pipe fell and struck plaintiff, and it appeared that it must have come through an opening in a floor above and could not have been thrown by an unseen assailant. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Where treadle broke down while operator was attempting to stop the machine, this fact was some evidence of a defect and of negligence of the defendant. Hannan v. American S. & W. Co. [Mass.] 78 N. E. 749. In action for injuries to a pressman caused by sudden starting of machine, the fact that the machine started of itself, unexplained, held some evidence of a defect in the machine and so negligence of the master. Byrne v. Boston Woven Hose & Rubber Co., 191 Mass. 40, 77 N. E. 696. Where a vice-principal directed lumber to be piled and the manner of doing it, and ordered an injured employe to work near it and it fell and injured him, such facts warranted an inference of negligence on the part of the master. Hardesty v. Largey Lumber Co. [Mont.] 86 P. 29. Where employe was injured by sudden starting of freight elevator used as a scaffold, proof of the sudden starting was sufficient to show the defectiveness of the scaffold and to warrant a recovery, though the cause of its starting was not made to appear. Croce v. Buckley, 100 N. Y. S. 898. Where floor of elevator caught on the sides of the shaft and was torn out, negligence of the master could be inferred by the jury, though there was some evidence that a truck on the elevator projected and was caught. Samuels v. McKesson, 113 App. Div. 497, 90 N. Y. S. 294. Proof of collision of freight train and light engine in the daytime is presumptive evidence of negligence. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. Railroad employe was at work between a coal car and a tender and helpers were shoveling coal from the car into the tender and knew of the presence of the plaintiff. A piece of coal fell and injured plaintiff. Held the maxim res ipsa loquitur applied and warranted jury in finding a want of due care by the coal shovelers. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391. Presumption of negligence on part of railroad company arises where a brakeman is injured by reason of a derailment. Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420. Where miner was killed by the bucket being dropped back into the shaft, and this was caused by the cable running off the drum because the pulley and cable were out of alignment, such facts warranted an inference of negligence. Texas & P. Coal Co. v. Daves [Tex. Civ. App.] 14 Tex. Ct. Rep. 745, 92 S. W. 275.

72. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872. Fact of injury by derailment of car was not evidence of negligence where plaintiff disobeyed instructions and dumped the car too soon, and this act caused the derailment and his injury. Redus v. Milner Coal & R. Co. [Ala.] 41 So. 634.

73. Where an injury may have resulted from any one of several causes for only one of which the master would be liable, plaintiff must show that this particular cause produced the injury. Caudle v. Kirkbridge, 117 Mo. App. 412, 93 S. W. 868. Where it was employe's duty to remove rails from an intersection of tracks, and a passing train knocked a rail against him, it was for him to show the proximate cause of this injury, since the jury could have believed it was caused by his own negligence in failing to remove the rail. Gardner v. Porter [Wash.] 88 P. 121.

74. An employe in a sawmill testified that as he went to remove an obstruction from a planer which he was operating he stepped into a hole at the left of the machine with his left foot and threw out his left hand and got it caught in the machine. His testimony was not so improbable as to require its withdrawal from the jury. Baker v. Dunwamish Mill Co. [Wash.] 86 P. 167. Where plaintiff proved that he called attention of superintendent to wheel which was throwing off sparks and making a screeching sound, and that superintendent told him to go ahead and work, that there was no danger and that he would have it fixed, and that the wheel broke, injuring plaintiff, he was entitled to recover though he did not prove exactly how the accident occurred. Hughes v. Fayette Mfg. Co., 214 Pa. 282, 63 A. 692. Where it sufficiently appears that an injury resulted from a defect in machinery existing by reason of the master's negligence, the servant may recover therefor without showing the precise defect which caused the injury. Tuckett v. American S. & H. Laundry [Utah] 84 P. 500.

75. Plaintiff suing for death of employe while engaged in moving a machine in the way adopted by manager of defendant, must show with reasonable distinctness how and why the accident occurred. A verdict cannot rest upon conjecture. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. Where it appeared that a pit into which plaintiff put his foot (pit contained hot oil and water) was visible, and there was no proof of how the accident occurred, nor of any defect in the place, plaintiff could not recover. Sheridan v. Gray's Ferry Abattoir Co., 214 Pa. 115, 63 A. 418. Plaintiff, ordinary laborer in molding room, was injured, but failed to prove cause of injury so that jury would have to guess at cause. Held no recovery could be had. Sandt v. North Wales Foundry Co., 214 Pa. 215, 63 A. 596. Where there are concurrent causes which may have operated, in combination or singly, to produce an accident, the fact that the machine at which the plaintiff

It is usually held that contributory negligence is an affirmative defense which must be alleged and proved by defendant,[76] though some courts hold that plaintiff must show that the person injured or killed was in the exercise of due care.[77] The presumption arising from the instinct of self-preservation is sufficient in the absence of any other evidence to sustain the burden of proof in the first instance that an employe was not guilty of contributory negligence.[78] By some courts it is held that the burden is upon the defendant to prove that the employe knew or ought to have known of the danger,[79] and that assumption of risk is an affirmative defense.[80] By others, it is held that plaintiff must show a want of actual or implied knowledge of the defect which caused the injury.[81] That the injury was caused by the act of a fellow-servant must be proved by defendant.[82] The burden of proving that a minor employe had greater than the usual capacity of minors of the same age rests upon the employer; the burden of proving that he had less than such usual capacity rests upon the minor or one seeking to recover damages for his death.[83]

was working was out of repair does not furnish a sufficient basis upon which to ground a verdict in his favor, where the injury occurred in such a manner as to render it mere guess work to say the accident would not have occurred had the machine been in order. Ziehr v. Maumee Paper Co., 7 Ohio C. C. (N. S.) 144. Instruction to find for defendant if it was doubtful whether cause of brakeman's death was negligence alleged, or some other cause, held proper. Louisville & N. R. Co. v. Thomas, 87 Miss. 600, 40 So. 257.

76. Choctaw, O. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; Wallis v. St. Louis, etc., R. Co., 77 Ark. 556, 95 S. W. 446; Nord v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 1116; Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. Burden of proving contributory negligence is on defendant under Burns' Ann. St. 1901, § 359a. Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060. Burden is on defendant to prove by a fair preponderance of all the evidence that plaintiff was guilty of contributory negligence. New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485. Proof of the absence of contributory negligence on the part of deceased is not essential to the right to recover for wrongful death. Contributory negligence in such a case is an affirmative defense and the burden of proving it rests on the defendant. Jackson Knife & Shear Co. v. Hathaway, 7 Ohio C. C. (N. S.) 242. Where engineer was killed in collision, burden was on defendant to overcome presumption that engineer used due care and to prove that he was guilty of contributory negligence. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. When the complaint sufficiently alleges the injury and negligence of defendant and that plaintiff was in the exercise of due care, and a demurrer to the complaint has been overruled and defendant has answered, setting up its defense, the burden of proving contributory negligence is on defendant. Crawford v. Bonners Ferry Lumber Co. [Idaho] 87 P. 998.

77. In New York, plaintiff must show affirmatively that he was free from contributory negligence. Evidence insufficient to show want of contributory negligence where employe fell off a platform alleged to have been insufficiently lighted. Bauer v. Empire State Dairy Co., 100 N. Y. S. 553. Where an engineer was found dead in the engine room with his skull cut off and there was absolutely no evidence to show he was in the exercise of due care at the time of the accident, there could be no recovery for his death. McCarthy v. Clinton Gaslight Co. [Mass.] 78 N. E. 739.

78. Section foreman struck by engine while walking on the track. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077.

79. Applied where miner was drowned by water breaking through from an adjoining mine. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 37. Burden of proving risk obvious on defendant in action for death of brakeman while coupling cars. Freemont v. Boston & M. R. Co., 111 App. Div. 831, 98 N. Y. S. 179. The burden of proving that a servant knew of a defect and failed to report it is upon defendant, since such proof constituted a defense under Rev. Laws, c. 106, § 77. Urquhart v. Smith & Anthony Co. [Mass.] 78 N. E. 410.

80. Nord v. Boston & M. Consol. C. & S. Min. Co. [Mont.] 84 P. 1116.

81. Servant must prove that he had neither actual nor imputed knowledge of alleged defective condition which caused the accident. Instructions on contributory negligence held misleading. Grand Trunk Western R. Co. v. Melrose [Ind.] 78 N. E. 190. Employe, plaintiff, has burden of proving risk which caused injury was not assumed. Evansville Gas & Elec. Light Co. v. Raley [Ind. App.] 76 N. E. 548. Plaintiff must show that the servant injured did not know, and had not equal means of knowing, of such defect, and could not have known of it by the exercise of ordinary care, Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Under Georgia Code, a servant must affirmatively show that he could not have known of the defects complained of by the exercise of ordinary care. Wysong v. Seaboard Air Line R. Co., 74 S. C. 1, 54 S. E. 214.

82. Burden is on defendant to show fellow-servant relation as a defense. Chicago, P. & St. L. R. Co. v. Mikesell, 113 Ill. App. 146.

83. Bare v. Crane Creek Coal & Coke Co. [W. Va.] 55 S. E. 907.

Admissibility in general.[84]—Holdings as to the relevancy of evidence on the issues of negligence of the master,[85] contributory negligence of the employe,[86] and

84. See 6 C. L. 596.

85. **Held admissible:** Where petition charged that it was the duty of employe to observe the company's rules, such rules were admissible in evidence. Houston & T. C. R. Co. v. Fanning [Tex. Civ. App.] 91 S. W. 344. Evidence that rip saw which injured operator could have been made reasonably safe by guards held admissible. Dow Wire Works Co. v. Morgan, 29 Ky. L. R. 854, 96 S. W. 530. Where oil tanks were alleged to be defective in that it was necessary to go on top of them in order to gauge the oil, evidence that there was no float or gauge with which to do the work was admissible. Yellow Pine Oil Co. v. Noble [Tex. Civ. App.] 16 Tex. Ct. Rep. 750, 97 S. W. 332. In action for death of brakeman caused by being struck by a water crane beside the track, testimony of a former brakeman that the crane had brushed his arm when he had passed it on the side of a car was held admissible as tending to show whether the crane was a proper distance from the track. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. In action for death of brakeman caused by being struck by water crane located close to track, evidence that another crane was maintained at another station, where freight trains usually took water, and that latter crane was farther from the track was admissible. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. In action for injuries caused by railroad wreck, rules of company were admissible though not pleaded. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932. Where complaint alleged negligence in providing fastenings for handhold on locomotive, in that they were allowed to become loose and insecure, evidence of the original defectiveness of a nut and bolt used to secure the handhold was admissible. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184. Where theory of case in action for injuries caused by fall of trestle, was that trestle was improperly constructed or had been allowed to fall into disrepair, evidence of the proper construction of trestles as a whole was admissible. Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. On issue of negligence of master in failing to repair defective trestle, evidence that an expert trestle builder had called the managers' attention to the defects prior to the accident was admissible. Id. Where death of engineer was caused by collision, train sheets for day and time tables were admissible to show movement of trains. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. Negligence charged being failure to maintain a switch light at the misplaced switch where an engineer was killed, evidence that defendant used such lights at other points on its road and that other roads also used them was admissible, though not to fix the legal standard of care. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1. Where it was alleged that a machine was out of alignment with a pulley owing to unevenness of the floor, evidence tending to show that other machines were also out of alignment was admissible. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650. When complaint alleged that cars were equipped with defective brakes and that only one brake could be used on each car, questions concerning the respects in which the brakes were defective were proper. Wiest v. Coal Creek R. Co., 42 Wash. 176, 84 P. 725. In action for death of miner caused by water breaking through from adjoining mine, evidence of a lack of ladders and bulkheads was admissible, there being some evidence that the presence of water in the adjoining mine was known to the owner of the mine where deceased worked. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Declaration by master mechanic of repair shops to defendant, at the time defendant became the owner of the works, as to the incompetency of a foreman in the shop, held competent to show notice of such incompetency, but not as substantive evidence of incompetency. McClure v. Detroit Southern R. Co. [Mich.] 13 Det. Leg. N. 846, 109 N. W. 847. Where evidence failed to disclose the immediate cause of the fall of an elevator which produced the injury complained of, evidence to show that the elevator had previously worked irregularly and spasmodically should have been admitted. Casterton v. American Blower Co., 142 Mich. 407, 12 Det. Leg. N. 751, 106 N. W. 61. Evidence that blacksmith's helper talked faster than usual on day of accident, that he acted this way when he had been drinking, and that he had used liquor to excess for many years, admissible to show knowledge by employers of his condition. Curtis v. Laconia Car. Co. Works, 73 N. H. 516, 63 A. 400. Where quarryman was injured by an explosion from a blast hole which he had been told had been exploded, when ordered to clean it out, evidence was admissible to show that foreman under whose orders he worked had knowledge as to the situation superior to his. McKane v. Marr [Vt.] 63 A. 944. In action for injuries to painter working in elevator shaft, evidence as to what was said to painter by employe at the time he was sent to work, and what precautions were taken to prevent injury by stopping the elevator above him, was admissible. State v. Thimble [M. D.] 64 A. 1026.

Held inadmissible: Where action was based on negligence in furnishing an unsafe handhold on a locomotive, which gave way while a fireman was hanging on to it and leaning out of the cab, evidence that the fireman was in a dangerous position was irrelevant. Galveston, etc., R. Co. v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 150, 93 S. W. 184. Evidence of negligence in allowing repairs to be made on a side track instead of on the repair track inadmissible when such negligence was not pleaded. Chicago, etc., R. Co. v. Breeding [Tex. Civ. App.] 14 Tex. Ct. Rep. 659, 91 S. W. 877. Complaint alleged injuries were caused by unevenness of a platform, but did not allege negligent construction, and it appeared that the unevenness was caused by permanent skids fastened to the floor. It did not appear from the complaint that these skids were unnecessary or unusual. Held evidence of negligent construction was inadmissible. Imhoof v. Northwestern Lumber Co. [Wash.] 86 P. 650. Where servant was injured while passing through a passageway

assumption of risk,[87] are given in the notes. On the issue of negligence of the master, proof of previous similar accidents may be admissible to show notice.[88] The fact that no previous injury had resulted from the alleged defective condition

in a mill, evidence of custom in the mill to exclude men from the passage was inadmissible when it appeared the servant was sent into it by a vice-principal, and knowledge of the custom by the servant was not shown. Barrett v. Banner Shingle Co. [Wash.] 87 P. 919. Evidence of manner in which shifting rods were used in well regulated mills inadmissible where negligence charged was failure to have countershaft aligned with main shaft. Fitzgerald v. Langley Mfg. Co., 74 S. S. 232, 54 S. E. 373. Where a rope broke, injuring plaintiff, at a time when the employer was present personally directing the work, evidence of a custom whereby the selection of the rope for use was left to servants was inadmissible. Geldard v. Marshall, 47 Or. 271, 83 P. 867, 84 P. 803. Laws 1905, p. 164, c. 84, requires the labor commissioner to issue a certificate where the factory act has been complied with, and provides that the certificate shall be prima facie evidence of compliance with the statute, in an action thereunder, but that the certificate shall be inadmissible in an action at common law. Held, where the statute took effect between the time of injury and the time of trial, the certificate was inadmissible. Tergeson v. Robinson Mfg. Co. [Wash.] 86 P. 578. Error to admit testimony regarding the use of rubber gloves as a means of avoiding danger while stringing wires, where there was no specific allegation that the defendent was negligent in failing to provide the intestate with rubber gloves, and there was no general allegation opening the door to such evidence. City & Suburban Tel. Ass'n v. Kelly, 8 Ohio C. C. (N. S.) 342. Whether rules should have been adopted to prevent leaving wheels near vat into which servant fell, immaterial when presence of wheels was not shown to have contributed to produce the injury. Gaudette v. Boston & M. R. R. [N. H.] 64 A. 667. Whether defendant contractors carried casualty insurance on work being done was immaterial in action for injuries to employe. State v. Trimble [Md.] 64 A. 1026.

86. Testimony by plaintiff as to why he put his hands into a machine to remove a sliver held inadmissible. Rice v. Dewberry [Tex. Civ. App.] 15 Tex. Ct. Rep. 193, 93 S. W. 715. Testimony of person who was in the cab of an engine with the fireman when he fell on the iron apron between the cab and the tender, that he did not notice the worn and defective condition of the apron, held admissible on issue whether fireman knew of its condition. Galveston, etc. R. Co. v. Udalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 668, 91 S. W. 330. Where switchman was injured trying to board a train, evidence, including a rule of the company, tending to show that it was his duty to see that his signal to slow up had been seen and obeyed before attempting to board it, was admissible. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S. W. 339. Proper to allow superintendent to testify that he told brakeman not to go between cars and called his attention to a rule forbidding it, where brakeman went between cars and was there injured. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Evidence as to age, experience, size, and appearance, and length of service of boy, and character of regular duties, admissible in action for his death where it was claimed he was inexperienced and was assigned to dangerous work by a superior. Moss v. Mosley [Ala.] 41 So. 1012. Evidence to show why operator of machine to cut sheet metal used his hand to remove the metal instead of another method, admissible where his hand was caught. United States Wind Engine & Pump Co. v. Butcher, 223 Ill. 638, 79 N. E. 304. Conversation between lineman and superintendent of electric company, showing that latter told former current would be turned off while employe was at work was admissible on issue of contributory negligence. Smith v. Milwaukee Elec. R. & Light Co., 127 Wis. 253, 106 N. W. 829. Employe was killed by explosion in brewery caused by tampering of some unknown person with steam appliances. Held error to admit evidence that deceased had tampered with such appliances without connecting his act with the accident which caused his death. Veit v. Class & Nachod Brew. Co. [Pa.] 64 A. 871.

Habits of care of deceased may be shown where there were no eye witnesses to accident. Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333; Chicago & A. R. Co. v. Seevers, 122 Ill. App. 558; Wisenger v. Donk Brothers Coal & Coke Co., 119 Ill. App. 298. On issue whether violation of a rule by a railroad employe constituted negligence, evidence that he had habitually violated rules, and that such violation had previously resulted in accidents, was inadmissible. Missouri, K. & T. R. Co. v. Parrott [Tex. Civ. App.] 16 Tex. Ct. Rep. 879, 96 S. W. 950.

87. Plaintiff may testify that he relied on a promise to repair a defect. To rebut a contention of assumed risk. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. On issue of assumed risk, evidence was admissible to show that plaintiff, molder's helper, was subject to molder's orders; evidence regarding their relations was also admissible. Leighton & Howard Steel Co. v. Snell, 119 Ill. App. 199.

88. Where set screw caused injury, evidence of a prior accident similarly caused was admissible. Walker v. Newton Falls Paper Co., 111 App. Div. 19, 97 N. Y. S. 521. Where servant was killed by falling from a material car, evidence that other employes had been present on other occasions when the car had left the track and had discussed means of preventing such accidents was admissible to show notice of defendant. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352. In action for injuries to motorman caused by car running away down a hill; evidence of other similar accidents from similar causes, lack of sand in proper appliance, would be competent to show notice on the part of the master. Mayer v. Detroit, etc., R. Co., 142 Mich. 459, 12 Det. Leg. N. 843, 105 N. W. 888. But an offer to show whether witness knew of other similar accidents, without showing that they occurred in the same manner or from the same cause, was properly excluded.

cannot be shown.[89] Proof of the condition of the machine or appliance or place alleged to have caused the injury must be confined closely to the time of the injury,[90] unless there is other evidence showing that there has been no change.[91] What is customarily done by others in the same business as defendant may be shown on the issue of negligence,[92] but the practice or usage of particular persons or employers cannot be proved.[93] Proof of repairs or precautions taken to prevent other accidents, subsequent to an injury, is usually excluded.[94] But where the

Id. Evidence that engineer in charge of cage in mine had lowered it at an excessive rate on occasions prior to the time in issue was admissible to prove knowledge by the engineer, which was chargeable to the company. Joseph Taylor Coal Co. v. Dawes, 220 Ill. 145, 77 N. E. 131. In action for death of employe by excessive current of electricity in light wire in building, evidence that another employe received a slight shock in the morning, and evidence as to the condition of the wire after the accident, was inadmissible, since it did not tend to show any excuse for the dangerous condition or defendant's failure to give warning. Goddard v. Enzler, 222 Ill. 462, 78 N. E. 805.

89. In action for injuries to operator of polishing wheel, evidence that defendant had never had any trouble of the kind and that no similar injury had ever occurred was inadmissible. Sheehan v. Hammond, 2 Cal. App. 371, 84 P. 340.

90. Evidence concerning conditions at place of injury a few days before and after it held admissible. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Where it was alleged that injured employe had been sent to oil machinery at the time he was injured, evidence of the condition of the machinery one and one-half hours after the accident, as to oil, and that the oil can could not be found, was admissible. McCarley v. Glenn-Lowry Mfg. Co. [S. C.] 56 S. E. 1. Evidence of presence of gas in a mine thirteen hours after death of a miner held admissible where it appeared that the presence of such gas was caused by a blast which occurred before the accident. Foley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273. Testimony as to condition of certain car couplings admissible, cars being identified as those between which brakeman was injured. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Where brakeman was injured by catching his foot between a spike and bolt in a track, it was proper to allow a witness to testify to measurements of a spike long after the accident without showing the condition of the track to be the same as at the time of the accident. Culver v. South Haven & E. R. Co., 144 Mich. 254, 13 Det. Leg. N. 719, 109 N. W. 256, rvg. on rehearing Id., 144 Mich. 254, 13 Det. Leg. N. 185, 107 N. W. 908. Where bursting of wheel, which caused injury, was alleged to have been caused by running machinery at excessive and unusual speed, evidence that the machine could be heard at a much greater distance than such machines could usually be heard was inadmissible when not shown to be confined to the time of the injury or near it. Stecher Cooperage Works v. Steadman [Ark.] 94 S. W. 41.

91. Evidence of conditions after accident inadmissible without a showing that there had been no change. Hodde v. Attleboro Mfg. Co. [Mass.] 79 N. E. 252. Derailment occurred in September, 1903, and witness examined track in March, 1905. Held he could not testify to conditions which he then found without proof that they were the same as at the time of the derailment. Redus v. Milner C. & R. Co. [Ala.] 41 So. 634. Witness who does not know conditions existing at time of injury cannot testify to conditions existing prior thereto. Swift & Co. v. Rennard, 119 Ill. App. 173. Where section man was struck by piece of coal thrown from tender of passenger train, evidence of condition of track six months before the injury was not too remote where there was also proof that condition remained unchanged. Dean v. Kansas City, etc., R. Co. [Mo.] 97 S. W. 910.

92. Where lumber stack fell owing to unsafe foundation, evidence of the kind of foundations in customary use by experienced millmen was admissible, though master was only bound to use ordinary care to make and keep such foundations reasonably safe. Kirby Lumber Co. v. Dickerson [Tex. Civ. App.] 15 Tex. Ct. Rep. 611, 94 S. W. 153. Evidence of an experienced foundryman as to a universal custom in regard to certain work held admissible. Louisville Belt & Iron Co. v. Hart, 29 Ky. L. R. 310, 92 S. W. 951. Where defect charged was negligent fastening of a pile driver, evidence of the usual and customary method of fastening such pile drivers was admissible. Wilder v. Great Western Cereal Co. [Iowa] 109 N. W. 789. Where failure to guard a saw as required by law is alleged, proof of customs in other mills whereby such saws are guarded is admissible, though not specially pleaded. Thomson v. Issaquah Shingle Co. [Wash.] 86 P. 588. Evidence of the customary location of mail cranes is admissible where negligence charged is that a crane was placed too close to the track. Denver & R. G. R. Co. v. Burchard [Colo.] 86 P. 749.

93. Where injury was caused by unblocked switch, evidence of a general custom of well regulated railroads to have switches blocked was admissible but evidence as to the practice of two particular companies was inadmissible. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

94. That guard was put on a planer the day after an accident and thereafter used inadmissible. Silva v. Davis, 191 Mass. 47, 77 N. E. 525., Where fireman was injured in a collision owing to the failure to stop a train at a station, evidence of the method adopted to stop a train at that station after such collision was inadmissible. Moon v. Pere Marquette R. Co., 143 Mich. 125, 12 Det. Leg. N. 932, 106 N. W. 715. In action for injuries to employe while unloading telephone poles, evidence that after the accident the method of unloading was changed was inadmissible. Fitter v. Iowa Tel. Co., 129 Iowa, 610, 106 N. W. 7. The general rule is that

negligence charged is failure to properly guard a machine, evidence that other similar machines were guarded,[95] or that the machine in question was guarded after the injury,[96] may be admitted not as an admission of negligence but to show the practicability of guarding the machine.

Expert and opinion evidence.[97]—If witnesses are shown to be properly qualified,[98] they may testify as experts in regard to matters requiring special skill and knowledge.[99] But expert and opinion evidence is inadmissible upon ultimate issues where the facts can be ascertained and made intelligible to the jury.[1]

Questions of law and fact.[2]—Unless the evidence is conclusive or the facts undisputed and such that only one reasonable conclusion can be drawn therefrom, the issues of negligence of the master,[3] contributory negligence of the servant,[4] as-

the taking of precautions against the future is not to be construed as an admission of responsibility in the past, and, hence, evidence of what has been done since the occurrence of an accident is inadmissible. Erickson v. McNeeley & Co., 41 Wash. 509, 84 P. 3. Admission of evidence that repairs were made on a hand car after an accident and that witness supposed they were made because the car was not considered safe held prejudicial error. St. Louis S. W. R. Co. v. Plumlee [Ark.] 95 S. W. 442.

95. Applied where death of employe in sawmill was caused by his falling on an unguarded saw. Erickson v. McNeeley & Co., 41 Wash. 509, 84 P. 3.

96. Changes made in a saw which had been unguarded, immediately after an injury, could be shown on the issue of the practicability of guarding the saw. Thomson v. Issaquah Shingle Co. [Wash.] 86 P. 588.

97. See 6 C. L. 599.

98. Foreman brakeman was competent to prove duties of brakemen as to keeping trespassers off trains by telling what brakemen usually did. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. Held proper to exclude customary mode of testing steam plants where inquiry was not plainly relevant and witness was not fully shown to be qualified. Erickson v. American Steel & Wire Co. [Mass.] 78 N. E. 761. Testimony of experienced railroad yard employe as to reasonableness and practicability of rule regulating work in the yards held competent. Freemont v. Boston & M. R. Co., 111 App. Div. 831, 98 N. Y. S. 179.

99. Expert opinion admissible on question whether machine with revolving knives would have been safer if the knives revolved in the opposite direction. Swarts v. Wilson Mfg. Co., 100 N. Y. S. 1054. Expert may testify as to usual manner of attaching counterpoise to movable steam derrick. Redhead v. Dunbar & Sullivan Dredging Co., 101 N. Y. S. 301. Properly qualified witness may testify as to necessity of timbering mine to make it safe. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 256. Evidence of expert as to proper method of trestle construction admissible in action for death caused by logging train going through a trestle. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. Expert opinion competent on trestle construction. Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. What constitutes train crew generally and what is proper crew for light engine is proper subject of expert testimony. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. Railroad man may give opinion as to what cars may be coupled without going between them. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Expert opinion held competent on question whether use of cast iron in certain parts of steam plant was dangerous, and whether such use caused an explosion. Erickson v. American Steel & Wire Co. [Mass.] 78 N. E. 761. Expert testimony held competent to show proper way to put coverings on rollers of ironing mangle, and whether such rollers could have been guarded. Carlin v. Kennedy, 97 Minn. 141, 106 N. W. 340. Where servant was injured by falling of track of traveling crane, held proper to allow expert to describe construction of track and tell what he considered a safe and proper method of construction. Hamner v. Janowitz [Iowa] 108 N. W. 109.

1. Testimony of employe that it would be a "good idea" to establish a certain rule held incompetent. McLaughlin v. Manhattan R. Co., 111 App. Div. 254, 97 N. Y. S. 719. Opinion evidence is incompetent on question whether the method employed to move a heavy machine from a car was proper. Hamann v. Milwaukee Bridge Co., 127 Wis. 550, 106 N. W. 1081. Whether a brass rolling machine was a dangerous machine to put boys to work at is not a subject of expert testimony. Anderson v. Chicago Brass Co., 127 Wis. 273, 106 N. W. 1077. Whether vertical belt and horizontal shaft were adequately guarded was held not a proper subject for expert evidence. Morgan v. Hager & Sons Hinge Mfg. Co., 120 Mo. App. 590, 97 S. W. 638. Expert opinion inadmissible to explain railroad rules which were in ordinary language and easily understood. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877.

2. See 6 C. L. 600; also, ante, §§ 3a-3g.

3. Where the facts are undisputed and only one inference can be drawn therefrom, the issue of negligence is for the court. Isley v. Virginia Bridge & Iron Co., 141 N. C. 220, 53 S. E. 841. Negligence becomes a question of law only when the act causing damage to another is in violation of statute or when the undisputed evidence admits of the inference only that the commission of the act was negligence. International & G. N. R. Co. v. Wray [Tex. Civ. App.] 16 Tex. Ct. Rep. 676, 96 S. W. 74. The question whether the master has exercised ordinary care under the circumstances is for the jury, except where the facts are undisputed and such that only one reasonable conclusion can be drawn therefrom. Williams v. Sleepy Hol-

sumption of risk,[5] and proximate cause,[6] are for the jury. What facts are essential to the existence of the fellow-servant relation is a question of law; the existence of such facts is for the jury.[7] This question may, therefore, be said to be a mixed question of law and fact.[8]

(§ 3 *H*) 5. *Instructions.* —Only a few illustrative holdings are here given, the general principles governing the giving of instructions being elsewhere fully treated.[10]

The instructions should be confined to the issues raised by the pleadings[11] and the evidence.[12] All the acts of negligence relied on by plaintiff and supported by evidence should be submitted,[13] and all the defenses relied on by defendant

low Min. Co. [Colo.] 86 P. 337. In action for injuries to carriage rider in sawmill caused by breaking of rod which controlled the carriage, evidence held sufficient to take the issue of defendant's negligence to the jury. Gomulak v. Smith Lumber Co. [Minn.] 107 N. W. 542. Where several witnesses, unimpeached, testified positively that a warning was given, testimony of others that they did not hear it was insufficient to make an issue for the jury. Baltimore & O. R. Co. v. Baldwin [C. C. A.] 144 F. 53. Location of switch stand in yards between two tracks, so close to one that the handle of a switch would strike the step of a passing car, was a part of the engineering scheme in the construction of the road, and, in the absence of defects patent to an ordinary observer, did not present a question of negligence to be passed on by the jury. Chicago, M. & St. P. R. Co. v. Riley [C. C. A.] 145 F. 137. The reasonable safety of a railroad and of couplings on cars is a question for the jury, even though engineering problems are involved. Gordon v. Chicago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177.

4. Williams v. Ballard Lumber Co., 41 Wash. 338, 83 P. 323; Belvidere Gas & Elec. Co. v. Boyer, 122 Ill. App. 116. Contributory negligence is for the jury when the facts are such that more than one reasonable conclusion can be drawn therefrom. Christ v. Wichita Gas, Elec. Light & Power Co., 72 Kan. 135, 83 P. 199. Where brakeman jumped to avoid a train coming from the rear, and testified that he gave proper signals, the issue whether such signals were given was for the jury, though other witnesses testified that none were given. Kentucky & I. B. & R. Co. v. Nuttall, 29 Ky. L. R. 1167, 96 S. W. 1131.

5. Assumption of risk for jury where reasonable minds may differ. Pearson v. Federal M. & S. Co., 42 Wash. 90, 84 P. 632.

6. See ante, § 3a, for illustrative cases.

7. Hinchliff v. Robinson, 118 Ill. App. 450; Wabash R. Co. v. Thomas, 117 Ill. App. 110; Chicago, P. & St. L. R. Co. v. Mikesell, 113 Ill. App. 146. Where all the facts regarding relation of servants are made known without dispute or controversy, and are so conclusive that only one reasonable conclusion can be drawn therefrom, the question is one of law. Illinois Cent. R. Co. v. Ring, 119 Ill. App. 294.

8. Relation of fellow-servants is a mixed question of law and fact and an instruction making it a pure question of law is error. Chicago Union Traction Co. v. Sawusch, 119 Ill. App. 349. Where evidence was conflicting as to whether contract of employment was made in South Carolina or another state, it was proper for the court to charge on the fellow-servant law of both states and leave to the jury the question whether a brakeman, engineer, and yard conductor were fellow-servants. Caldwell v. Seaboard Air Line R. Co., 73 S. C. 443, 53 S. E. 746.

9. See 6 C. L. 600.

10. See Instructions, 8 C. L. 333.

11. Instructions should submit all the issues raised by the pleadings and evidence, but should be confined to issues so raised. Moss v. Mosley [Ala.] 41 So. 1012. Willful violation of the coal mine law being necessary to sustain a recovery, an instruction on negligence is error in an action based on the statute. Consolidated Coal Co. v. Stein, 122 Ill. App. 310. Instruction authorizing recovery on ground of negligence not pleaded held erroneous. Chicago, R. I. & G. R. Co. v. Breeding [Tex. Civ. App.] 14 Tex. Ct. Rep. 659, 91 S. W. 877. Error to instruct on duty of master to use ordinary care to employ and retain only competent servants, that not being an issue in the case. Ft. Valley Knitting Mills v. Anderson, 124 Ga. 909, 53 S. E. 686. Charge on ordinary care in selection and retention of servants error when there was no such issue in the case. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Where the only issue submitted is whether the injury to plaintiff could have been prevented by the exercise of ordinary care after discovery of his dangerous position, failure to instruct on contributory negligence or assumed risk is not error. Dale v. Colfax Consol. Coal Co. [Iowa] 107 N. W. 1096.

12. Not error to refuse instruction as to non-applicability of factory act where jury had not been advised of the existence of such act. Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514. Where it appeared that fireman was called to assist in adjusting a belt, and was injured while so engaged, an instruction as to the master's duty when a servant is called away from his regular duties was not prejudicial error. Id.

13. Instruction erroneous because ignoring two counts of complaint and not confined to third. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. Where complaint charged negligence in construction of brake, and instruction charged only on duty to inspect, it was erroneous. Sanders v. Houston & T. C. R. Co. [Tex. Civ. App.] 93 S. W. 139. Instruction on defendant's alleged negligence erroneous because making no reference to conduct of superintendent who was charged with negligence. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. Where evidence raised the question

should also be submitted when sustained by proof.[14] Thus, the defendant is entitled to proper instructions on the issues of contributory negligence,[15] assumption of risk,[16] and the existence and effect of the fellow-servant relation,[17] when these defenses are relied on and supported by proof.[18] The instructions given must be warranted by the evidence.[19] They should not assume as proved facts in

of the sufficiency of inspection of a telephone pole, by the fall of which an employe was injured, a requested instruction confining the question of negligence to the guying of the pole was properly refused. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909.

14. Defendant held entitled to a charge that if chain which broke had not crystallized as alleged, owing to lack of annealing, the jury should find for defendant on the issue of negligence. Isley v. Virginia Bridge & Iron Co. [N. C.] 55 S. E. 416.

15. Instruction erroneous because ignoring defense of contributory negligence. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187. Requested particular instruction on contributory negligence was warranted by evidence and should have been given. Chicago Folding Box Co. v. Schallawitz, 118 Ill. App. 9. Duty of miner to use ordinary care to look out for his own safety held sufficiently covered by instructions. Cook v. Smith-Lowe Co. [Iowa] 109 N. W. 798. Engineer was injured by a collision between his engine and a train on a spur track, and the evidence showed contributory negligence in not observing that the switch was properly set, and afterwards. Failure to charge on contributory negligence after his engine was placed on the spur track held reversible error. Missouri, K. & T. R. Co. v. Parrott [Tex. Civ. App.] 14 Tex. Ct. Rep. 157, 91 S. W. 601.

16. Refusal of charge on assumed risk not error in view of charge given. James Ramage Paper Co. v. Bulduzzi [C. C. A.] 147 F. 151. Instruction ignoring defense of assumed risk held erroneous. Edmunds Mfg. Co. v. McFarland, 118 Ill. App. 256. Where a count on which a case was submitted stated facts which, if true, showed plaintiff did not assume the risk of injury, an instruction that plaintiff could recover if he proved his case as alleged was not objectionable as ignoring the defense of assumed risk. Springfield Boiler & Mfg. Co. v. Parks, 222 Ill. 355, 78 N. E. 809. Where the allegations of each count of a declaration clearly negatived the assumption of the risk, instructions to find for plaintiff if he proved his case as alleged in any count, was not erroneous as ignoring the defense of assumed risk. James S. Kirk & Co. v. Jajko, 224 Ill. 338, 79 N. E. 577. No special instruction on assumption of ordinary risks necessary when defendant relied on assumption of risk of a defect charged, and such instruction was not requested. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475.

17. Where, in action for injuries to lineman, it appeared plaintiff was working with an experienced man and under his direction, and defendant claimed plaintiff had experience and that he was the fellow-servant of the employe he was with, the fellow-servant defense should have been presented to the jury. Sias v. Consolidated Lighting Co. [Vt.] 64 A. 1104. The court should instruct who are fellow-servants. Instruction held too vague and indefinite. Kenefick-Hammond Co. v. Rohr, 77 Ark. 290, 91 S. W. 179.

18. Instruction on assumed risk properly refused when the defense was not interposed at the trial. Springfield Elec. Light & P. Co. v. Mott, 120 Ill. App. 39. Evidence held not to warrant instruction that plaintiff assumed risk of breaking of a rope if he knew of its defective condition. Geldard v. Marshall, 47 Or. 271, 83 P. 867, 84 P. 803. No error to refuse instructions on fellow-servant doctrine where injury was not proximately caused by the act of another employe. Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514. Charge on fellow-servants properly refused, no such issue having been raised. Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. E. 650. Instruction that if foreman did an act which it was ordinarily the duty of a fellow-servant to perform, he was a fellow-servant of plaintiff while doing it held improper, where evidence did not tend to show that foreman did such an act. Moore v. King Mfg. Co., 124 Ga. 576, 53 S. E. 107. Where there was no evidence that a shop foreman was assisting plaintiff in repairing and adjusting a gang saw, it was error to instruct that he was plaintiff's fellow-servant if so engaged at the time of injury. Id. Instruction that where a dangerous and a safe method are open, servant is under duty of using safe method, and cannot recover for injuries caused by use of dangerous method held justified by evidence where servant was injured while getting a saw ready to cut certain lumber. Id.

19. Where a miner was injured by reason of a prop having been placed too close to a track, certain requested instructions held properly refused on issue of contributory negligence because not applicable to the evidence, and instructions given held proper. Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943. Instruction predicated on a finding either way on the issue whether an engineer stopped his train held erroneous when there was no evidence that he did stop it. Southern R. Co. v. Scanlon's Adm'r, 29 Ky. L. R. 268, 92 S. W. 927. Instruction on duty to prescribe method of work erroneous where method used was not shown, except that it appeared that work was being done in the usual manner. Browning v. Chicago, R. I. & P. R. Co., 118 Mo. App. 449, 94 S. W. 315. Instruction erroneous because not applicable to evidence and allowing a finding of negligence on an erroneous theory. Hall v. Cayuga Lake Cement Co., 111 App. Div. 801, 97 N. Y. S. 955. Instruction practically following § 18 of Miner's Act held not erroneous as applied to facts of case. Henrietta Coal Co. v. Martin, 122 Ill. App. 354. Evidence sufficient to warrant submission to jury of question whether there was a safer block system in general use on railroads of like character than that used by defendant company. Stewart v. Raleigh & A. Air Line R. Co., 141 N. C. 253, 53 S. E. 877. Where evidence showed that injured motorman had

issue.[20] Decisions as to particular instructions on various issues are cited in the note.[21] Generally, the court should not charge that certain specified facts would constitute negligence,[22] except where, under the operation of a statute or ordinance, certain acts constitute negligence per se.[23] In Georgia, where the evidence warrants such an instruction, it is better practice to instruct that contributory negligence will not defeat a recovery but may be considered in reduction of damages,[24] but a failure to so instruct is not reversible error where plaintiff claims full damages, and alleges that he was without fault, and no request for such an instruction is made.[25]

had the usual training and experience before being placed in charge of a car, an instruction in substance that he was the only motorman without any training other than in the stopping and starting of cars was erroneous. Mayer v. Detroit, etc., R. Co., 142 Mich. 459, 12 Det. Leg. N. 843, 105 N. W. 888.

20. Instruction on plaintiff's conduct erroneous because assuming that it proximately contributed to his injury. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. Where negligence charged was the existence of a low place in the track, and that fact was in issue, an instruction assuming the charge to be true was error. Atlantic & B. R. Co. v. Hattaway, 126 Ga. 333, 55 S. E. 21. It being disputed as to whether a foreman was acting within the scope of his employment, the question as to whether the duty was an implied one should have been submitted to the jury. Gawne Co. v. Fry, 7 Ohio C. C. (N. S.) 317.

21. Instructions on master's duties approved: Shandrew v. Chicago, St. P., M. & O. R. Co. [C. C. A.] 142 F. 320. Instructions as to degree of care criticized. International & G. N. R. Co. v. Trump [Tex. Civ. App.] 94 S. W. 903. Instructions construed as a whole held not to require more than ordinary care of employes to avoid injuring a brakeman. International & G. N. R. Co. v. Hays [Tex. Civ. App.] 17 Tex. Ct. Rep. 605, 98 S. W. 911. Instruction held proper as requiring only reasonable care of master in discharge of his various duties. Lane Bros. Co. v. Seakford [Va.] 55 S. E. 556. An instruction authorizing a recovery for injuries caused by latent defects in machinery condemned because it made the master an insurer of the servant's safety. Harris Lumber Co. v. Morris [Ark.] 96 S. W. 1067. Instruction construed and held proper as requiring only ordinary care to furnish a reasonably safe place. Kielty v. Buehler-Cooney Const. Co. [Mo. App.] 97 S. W. 998. Where employe was injured while piling lumber owing to the foundation of the stack giving, an instruction which in effect placed on the master the absolute duty of providing a safe foundation for lumber stacks was erroneous. Kirby Lumber Co. v. Dickerson [Tex. Civ. App.] 15 Tex. Ct. Rep. 611, 94 S. W. 153. Error to instruct jury that railroad company owed to employe riding on a train in the course of his employment a "high degree to care" in the construction and maintenance of its roadbed and tracks. Van Blarcom v. Central R. Co. [N. J. Err. & App.] 64 A. 111. An instruction that ordinary care is such care as the great mass of mankind would have exercised "under the same circumstances" is sufficiently accurate without adding "engaged in a similar employment." Johnson v. St. Paul & W. Coal Co., 126 Wis. 492, 105 N. W. 1048. When an issue of "ordinary care" or "reasonable care" is submitted to the jury, the court when requested should define those terms. Denver & R. G. R. Co. v. Norgate [C. C. A.] 141 F. 247. Instruction permitting recovery if negligence of defendant was found to be "the" **proximate cause** of injury held not objectionable as ignoring defense of contributory negligence. Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603, 42 So. 73. Instruction that plaintiff could recover if defendant's violation of statute "proximately contributed," instead of "proximately caused," the death of a miner, held not error. Athens Min. Co. v. Carnduff, 221 Ill. 354, 77 N. E. 571. Instruction erroneous because omitting element of proximate cause. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Instruction that plaintiff could recover unless he was guilty of **contributory negligence** "and" assumed the risk held reversible error. International & G. N. R. Co. v. Von Hoesen [Tex. Civ. App.] 14 Tex. Ct. Rep. 463, 91 S. W. 604. Instruction on contributory negligence held to furnish a standard for the jury. Huggard v. Glucose Sugar Refining Co. [Iowa] 109 N. W. 475. Requested instruction on contributory negligence properly refused where hypothesized conduct of plaintiff would not necessarily be proximate cause of the injury. Sloss-Sheffield Steel & Iron Co. v. Hutchinson, 144 Ala. 221, 40 So. 114. Instruction on contributory negligence held not erroneous as failing to state that acts of servants relied on must have proximately caused his injury. Worcester v. Galveston, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 548, 91 S. W. 339. An instruction that plaintiff could not recover if he failed to exercise ordinary care "at the very time of the injury" was held correct but possibly too narrowly limited. Beardsley v. Murray Iron Works Co., 129 Iowa, 675, 106 N. W. 180. Instruction on plaintiff's conduct erroneous because failing to hypothesize it as negligent. Sloss-Sheffield Steel & Iron Co. v. Smith [Ala.] 40 So. 91. Instruction requiring **"due care"** of plaintiff held not erroneous for not also requiring "diligence." Southern Ind. R. Co. v. Osborn [Ind. App.] 78 N. E. 248.

22. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110. Instruction should not undertake to state to jury what acts constitute negligence. Illinois Central R. Co v. Hicks, 122 Ill. App. 349. Instruction that a certain omission would be negligence condemned. Manning v. App Consol. Gold Min. Co. [Cal.] 84 P. 657. Error to instruct jury that it was defendant's duty to promulgate rules and regulations for the operation of factory and machinery, without instructing as to what particular rule should have been, especially where the evidence did not disclose what, if any, rule would have been

(§ 3 *H*) 6. *Verdicts and findings.*[26]—A general verdict will be disregarded if inconsistent with special findings.[27].

§ 4. *Liability for injury to third persons. A. In general.*[28]—The master is liable for the acts of his servant within the general scope of his employment, while about his master's business,[29] though the act be negligent, wanton, willful, or malicious,[30] and though the servant exceeds his actual authority or violates express

efficient and practicable. Severson v. Hill-Warner-Fitch Co., 101 N. Y. S. 808.

23, 24, 25. Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 54 S. E. 110.

26. See 6 C. L. 602.

27. In action for death of switchman, special verdict held not to show contributory negligence so as to make it inconsistent with general verdict for plaintiff. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. In action for injuries to girl who got her hair caught on set screws, special finding held sufficient to show that negligence of defendant was proximate cause of injury. Van de Bogart v. Marinette & Menominee Paper Co., 127 Wis. 104, 106 N. W. 805.

28. See 6 C. L. 602.

29. The expression "in the course of his employment" means, in contemplation of law, "while engaged in the service of the master," it is not synonymous with "during the period of his employment." Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133. The law makes the master liable to third persons for negligence of his servants while acting within the scope of their employment, regardless of whether or not the servant in a particular case would be liable to the master. Star Brew. Co. v. Houck, 222 Ill. 348, 78 N. E. 827. Negligence of servant held negligence of his employer, defendant corporation. Lookout Mountain Iron Co. v. Lea, 144 Ala. 169, 39 So. 1017. Street railway company is liable for negligence of motorman in charge of car. Garrett v. People's R. Co. [Del.] 64 A. 254. Owner of building not liable for negligent act of his elevator operator in moving elevator at request of person repairing the same. Sherwood v. Warner, 27 App. D. C. 64. Negligence by driver of vehicle employed by owner is negligence of such owner. Robinson v. Huber [Del.] 63 A. 873. Acts of chauffeur when running automobile within scope of his employment, are acts of servant for which employer is liable. Hannigan v. Wright [Del.] 63 A. 234. Proprietor of hotel held liable for assault on a guest by the manager of the hotel in the cause of the discharge of his duties. Morris Hotel Co. v. Henley [Ala.] 40 So. 52. To render the master liable for negligent acts of a servant, such acts must be within the scope of the servant's employment and must be done in the conduct of the master's business. St. Louis Southwestern R. Co. v. Harvey [C. C. A.] 144 F. 806. Telephone employe went on defendant's premises to do certain work in an elevator shaft. Held, the operator of the elevator was acting within the scope of his employment in promising not to operate the elevator while the telephone employe was at work. Rink v. Lowry [Ind. App.] 77 N. E. 967. A watchman, empowered to eject from fishing club grounds persons who were on them without authority, had an altercation with plaintiff whom he found on the ground and who claimed to have been granted a privilege, and then assaulted him. The assault was held to have been committed by the servant while in the discharge of his duties. New Ellerslie Fishing Club v. Stewart, 29 Ky. L. R. 414, 93 S. W. 598. Where plaintiff claimed that he had a privilege evidence that the servant had formerly allowed him to fish on the ground without objection was admissible. Id. Master, except in case of fellow-servants, is answerable for damage occasioned by servants and overseers in the exercise of functions in which they are employed. Payne v. Georgetown Lumber Co., 117 La. 983, 42 So. 475. Telegraph company is liable for damages caused a third person by the forging of a telegram by its agent. Usher v. Western Union Tel. Co. [Mo. App.] 98 S. W. 84. Defendant maintained a telegraph office at a railway station, and agent, employed and paid by railroad company, took messages for transmission and turned the charges over to the telegraph company. Held, he was an employe of the telegraph company so that the forging of a telegram not connected with railroad business by him made defendant liable. Id. Where bridge tender in employ of state was not performing his regular duties when he did a negligent act which caused injury to another, the state was not liable for his act. Spencer v. State, 110 App. Div. 585, 97 N. Y. S. 154. Where servant driving master's private sleigh struck a boy, who had jumped on the runner, with the butt of his whip, stunning him and giving him a severe cut, it was held a finding that the servant was acting within the scope of his employment and used unnecessary means, and that master was liable, was justified. Dealy v. Coble, 112 App. Div. 296, 98 N. Y. S. 452. Act of servants, laying tracks in streets, of striking a third person with a tie, held to make master liable. Cincinnati, H. & D. R. Co. v. Klute, 8 Ohio C. C. (N. S.) 409. Servant of restaurant keeper became abusive to patron, and patron started to leave, whereupon the servant assaulted him. Held, where jury found that the assault was committed in the course of the servant's employment, to compel the patron to pay what the servant thought he ought to, the master was liable. Goodwin v. Greenwood, 16 Okl. 489, 85 P. 1115. Defendant liable for water taken by its servant, if latter acted within scope of employment and was entrusted with determination of amount of water to be taken. Tyler Ice Co. v. Tyler Water Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 114, 95 S. W. 649. Servant was holding a compressed air hose to be used in case a fire should break out in oil which was leaking, and turned the hose on a bystander, killing him. Master was held liable. Galveston, H. & S. A. R. Co. v. Currie [Tex. Civ. App.] 15 Tex. Ct. Rep. 18, 91 S. W. 1100.

30. It is within the scope of employment of the conductor of a trolley car to control and manage the car and to eject a passenger when necessary to preserve peace and order

orders or instructions.[31] The master is not liable for unauthorized acts, outside the scope of the servant's employment.[32] Thus, for an act of the servant in the prosecution of some private purpose of his own, unconnected with the business of the

in the car, and, where in so doing a malicious assault is committed, the company is liable therefor. Scioto Valley Traction Co. v. Graybill, 8 Ohio C. C. (N. S.) 469. Where servant is employed to keep trespassers off land, and in doing so commits an assault, the master is liable even if the assault was wanton or vindictive; but if the assault was committed for a private purpose of the servant, the master would not be liable. Schmidt v. Vanderveer, 110 App. Div. 758, 97 N. Y. S. 441.

31. A master is liable for the tort of his servant committed in direct disobedience of his orders if the tort occurs about something in the scope of the servant's duty. Houck v. Chicago & A. R. Co., 116 Mo. App. 559, 92 S. W. 738. Where engineer in charge of engine room, whose duty it was to keep people, especially children out, invited a boy in to help him start the machinery and the boy was injured by negligence of the engineer, the master could not defend on the ground that the engineer had no authority to invite the boy into the room. Id. Where servant was employed to retake a machine which had not been paid for, his employer was liable for an assault committed by the servant while retaking the machine, though the employer had instructed him not to use force. Grant v. Singer Mfg. Co., 190 Mass. 489, 77 N. E. 480. If a servant, while acting within the general scope of his employment, disregards his master's orders, or exceeds his powers, the master is nevertheless responsible for his conduct. Sharp v. Erie R. Co., 184 N. Y. 100, 76 N. E. 923. Defendant's servants negligently set out a fire in order to protect defendant's property from accidental fire, and the fire spread, got beyond their control, and destroyed property of plaintiff. Defendant held liable though servant's act was unauthorized and unlawful. Paraffine Oil Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 93 S. W. 1089.

32. In an action for the statutory penalty (Code 1896, § 4137) for willfully and knowingly cutting the trees of another, where the cutting was done by defendant's employe without defendant's knowledge, or consent, or authorization, defendant was not liable. Alabama Mineral Land Co. v. Lathrop-Hatton Lumber Co. [Ala.] 41 So. 952. Act of bartender in setting fire to the foot of a patron asleep in the saloon was outside the scope of his employment. Peter Anderson & Co. v. Diaz, 77 Ark. 606, 92 S. W. 861. Duties of servant employed by steamship company were confined to engineering department, with supervision of motive power. Held he did not represent the company while on a steamship which was being changed from coal to oil burner, merely to see that company got what it paid for. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788. Railroad company is not liable for act of brakeman, acting without authority, in ejecting a trespasser from a train. Chicago, R. I. & P. R. Co. v. Moran, 117 Ill. App. 42. Stenographer and chief clerk in railway office had a dispute over railroad business, and clerk thereafter procured stenographer's discharge. Three days later the clerk met the stenographer on the depot platform and struck him. The railroad company was not liable for the assault. Alabama & V. R. Co. v. Harz [Miss.] 42 So. 201. Acts of telegraph operator in procuring money on forged check and telegrams held outside scope of employment and company not liable. Usher v. Western Union Tel. Co. [Mo. App.] 98 S. W. 84. Employe of newspaper company, delivering papers to venders, became engaged in an altercation with a vender, and aimed a blow at him, which was dodged, and the blow fell upon plaintiff. Master held not liable. Froomkin v. Brooklyn Daily Eagle Co., 113 App. Div. 443, 99 N. Y. S. 300. Where owner of hod elevator rented it, in charge of his own engineer, to a contractor, the fact that the engineer allowed servants of the contractor to ride in it did not preclude the owner from showing that the engineer was acting outside the scope of his authority and employment in so doing. McDonough v. Pelham Hod El. Co., 111 App. Div. 585, 98 N. Y. S. 90. Yardmaster and employe of railroad quarreled about an alleged mistake made by the employe in performing his duties, and a little later the yardmaster assaulted the other employe. Whether defendant was liable depended upon whether the act was within the scope of the yardmaster's employment, in the course of the master's business, and not whether the yardmaster was on duty at the time. Roberts v. Southern R. Co. [N. C.] 55 S. E. 509. It appearing that the assault occurred after the yardmaster had corrected the employe, and that incident was closed, and that the assault grew out of the quarrel between the two, a verdict for defendant was proper. Id. Railway company held not liable where employe in roundhouse, who was using a compressed air hose while discharging his duties, turned it in sport on a subordinate and caused his death. Galveston, etc., R. Co. v. Currie [Tex.] 16 Tex. Ct. Rep. 870, 96 S. W. 1073. Foreman of construction crew held not to have had authority over train crew so that his negligence would not render defendant liable for death of boy killed by the train Forge v. Houston & T. C. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 386, 90 S. W. 1118. Where a driver of a wagon invited children to ride, and one was killed when getting off, and the driver had never been expressly nor impliedly authorized to invite children to ride and his act was not within the scope of his employment, hauling stone, the employer was not liable. Foster-Herbert Cut Stone Co. v. Pugh, 115 Tenn. 688, 91 S. W. 199. Driver of ice wagon gave boy permission to take a piece of ice and then when boy climbed upon wagon to take it seized him and threw him off, injuring him. Act of servant was held beyond the scope of his authority and master was held not liable. Kiernan v. New Jersey Ice Co. [N. J. Law] 63 A. 998.

Note: In the following cases, also, the servant was held not to be acting within the scope of his authority, in extending invitations, and the master was held not liable for injuries to the invited person; servant extending unauthorized invitation to person to

master, the latter is not liable,[33] although the servant may be using the instrumentalities furnished by the master.[34]

The doctrine of respondeat superior is of course inapplicable unless the relation of master and servant existed at the time between the defendant and the person charged with the wrongful act or omission.[35] Thus, an employer is not liable

ride on a dump-cart. Driscoll v. Scanlon, 165 Mass. 348, 43 N. E. 100, 52 Am. St. Rep. 523; Morris v. Brown, 111 N. Y. 318, 18 N. E. 722, 7 Am. St. Rep. 751. To ride on a hand car. Haar v. Maine Cent. R. Co., 70 Me. 65, 35 Am. St. Rep. 299. To child to ride on trolley car. Finley v. Hudson Elec. R. Co., 64 Hun [N. Y.] 373, 19 N. Y. S. 621. To ride on gravel train or freight car. Flower v. Penna. R. Co., 69 Pa. 210, 8 Am. Rep. 251; Keating v. Mich. Cent. R. Co., 97 Mich. 154, 56 N. W. 346, 37 Am. St. Rep. 328; Smith v. Louisville R. Co., 124 Ind. 394, 24 N. E. 753.—From Kiernan v. New Jersey Ice Co. [N. J. Law] 63 A. 998.

33. The master is not liable for injuries occasioned to a third person by the negligence of his servant while the latter is engaged in some act beyond the scope of his employment, for his own, or the purposes of another. Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133. If a servant acts maliciously or for some purpose of his own, the master is not responsible. Sharp v. Erie R. Co., 184 N. Y. 100, 76 N. E. 923. If a servant step aside from the business of his master for ever so short a time to do an act that is not a part of that business, the relation of master and servant is for the time suspended, and the acts of the servant during this interval are not the master's but his own. St. Louis Southwestern R. Co. v. Harvey [C. C. A.] 144 F. 806. Workmen took a hand car and operated it after working hours and contrary to rules of company, without a light, and the car collided with another car on which a gang was taking sick workmen to town. Held, the acts of the first gang were outside the scope of their employment, and the master was not liable. Id. A groom and stableman, not employed as a driver took out his master's horse and buggy contrary to orders, and in the master's absence, and wholly for his own pleasure, and ran into and killed a boy while driving recklessly. Master held not liable. Brenner v. Ford, 116 La. 550, 40 So. 894.

34. Two general state agents for defendant took an automobile furnished by defendant for the use of one of such agents in its business, and drove to a neighboring city for a purpose purely personal to themselves, and wholly unconnected with business of defendant. Held, defendant was not liable for their negligence in operating the machine whereby a team was frightened and damage caused. Slater v. Advance Thresher Co., 97 Minn. 305, 107 N. W. 133. Master is not answerable for acts of his servant committed outside the line of his duty, and not connected with his master's business, but done in pursuit of some independent purpose of his own, although the particular injury could not have occurred without facilities afforded by the relation of master and servant. Louisville & N. R. Co. v. Gillen [Ind.] 76 N. E. 1058.

35. Relation of master and servant held to exist: Evidence sufficient to show that man charged with assault had been employed by an authorized agent of defendant. Grant v. Singer Mfg. Co., 190 Mass. 489, 77 N. E. 480. Master and servant relation exists between board of education and persons employed by it to inspect school buildings. Wahrman v. City of New York, 111 App. Div. 345, 97 N. Y. S. 1066. Evidence sufficient to go to the jury on the question of whether the driver of an express wagon that ran over plaintiff was defendant's agent. Banks v. Southern Express Co., 73 S. C. 211, 53 S. E. 166. Where foreman in employe of state acquiesced in the act of a bridge tender who removed a plank for purposes of his own, whereby a third person was injured, the state was liable. Spencer v. State, 110 App. Div. 585, 97 N. Y. S. 154. Where in trespass action for injuries to building it was proved that work which caused injury was done under direction of an engineer employed by defendant, such proof made a prima facie case against defendant. American Horse Exch. Co. v. Naughton Co., 97 N. Y. S. 384. A contract gave plaintiff right to use defendant's tracks in a certain city, provided that certain employes, including flagmen, should be hired and controlled by defendant, though paid in part by plaintiff, and that each party should be responsible for acts of employes acting in its behalf. Held, that a crossing flagman acted for both, and that for damages caused by his negligence, plaintiff could not recover from defendant. Louisville, etc., R. Co. v. Illinois Cent. R. Co., 29 Ky. L. R. 265, 93 S. W. 4.

Relation of master and servant held not to exist: Evidence held to show that chauffeur, whose act caused injury, was servant of a third person and not of defendant. Titus v. Tangeman, 101 N. Y. S. 1000. Evidence insufficient to show that one who caused a sign to fall was defendant's servant, or was acting as such at the time. Bowden v. Mott Iron Works, 113 App. Div. 738, 99 N. Y. S. 209. Where elevator operator was not appointed by nor responsible to defendant county or city, such defendants were not liable for injuries to a third person caused by the operator's negligence. Moest v. City of Buffalo & County of Erie, 101 N. Y. S. 996. Consignee unloaded vessel, under his contract, employing a master stevedore for that purpose. Vessel's winchmen were used, according to contract, who worked under stevedore's control and direction. Held, if master was free from negligence in employing winchmen who were competent, vessel was not liable for injuries caused by winchman's negligent act to a workman of the master stevedore. The Elton [C. C. A.] 142 F. 367. Where the owner of a building sold it to another, the latter and his agents were not the servants of the vendor in moving the house so as to render the vendor liable for their acts. Wilmot v. McPadden [Conn.] 65 A. 157. A. bought threshing engine from B., defendant, and B. agreed to supply a new one, the first proving unsatisfactory. B. furnished A. with men to move the new engine, A. agreeing to pay them. The men caused a

for the acts of an independent contractor,[36] nor for the acts of one not subject to his control or direction at the time though in his general employ.[37] Where an employe in the general employ of one person is hired to another for certain special service, there is a conflict of authority as to whether the general or special employer is liable for the negligence of the employe, while engaged in the special service.[38]

Public charitable institutions are exempt from the operation of the doctrine of respondeat superior.[39]

Damages.[40]—In an action against a master for a tort of his servant, punitive damages cannot be recovered for the malice of the servant.[41]

Liability of servant; joint liability of master and servant.[42]—There are two classes of cases falling under the doctrine of respondeat superior: First, where the master is held liable for the nonfeasance or negligent failure of the servant to perform a duty; second, where the master is held liable for the misfeasance or negligent performance of a duty by the servant.[43] In the first class of cases the servant is not liable to third parties, though the master is, under the rule of respondeat superior;[44] in the second class, both are liable to third parties.[45] In either case the

fire when moving the engine, sparks being thrown out, and plaintiff's property was destroyed. Held B. was not liable, the men operating the engine being A.'s employes. McComb v. Baskerville [S. D.] 106 N. W. 300. Defendants requested the appointment of a special officer for their store, under New York City Charter, Laws 1897, p. 109, c. 378, § 308, and paid for his services, but he was subject to orders from the chief of police, and had all the powers and duties of a regular policeman. Defendants were not liable for an arrest made by him in which they did not personally participate. Samuel v. Wanamaker, 107 App. Div. 443, 95 N. Y. S. 270. Contract between drivers of cabs, owned by railroad company, and company, construed, and held driver was bailee and not servant of company and latter was not liable for an injury caused by driver's negligence. McColligan v. Pennsylvania R. Co., 214 Pa. 229, 63 A. 792.

36. Railroad company not liable for trespass committed by independent contractor during construction of road. St. Louis, I. M. & S. R. Co. v. Gillihan, 77 Ark. 551, 92 S. W. 793. An independent contractor is one who prosecutes work according to his own methods, being responsible to his employer only as to the result. Id. Where complaint charged negligence of defendant's agent and proof showed negligent person to be independent contractor employed to do the work, it was proper to direct a verdict for defendant. Huntt v. McNamee [C. C. A.] 141 F. 293.

37. Evidence insufficient to prove defendant's responsibility for negligent act of a servant of a truck company employed by defendant as an independent contractor. Cohen v. Western Elec. Co., 50 Misc. 660, 99 N. Y. S. 525. Defendant's locomotive, and a crew employed by defendant, were permanently engaged in switching in the yards of a third person and under the direction and control of the third person's foreman. Held, defendant was not liable for an injury caused by the negligence of the crew while so engaged. Sexton v. New York Cent. & H. R. R. Co., 99 N. Y. S. 1111.

38. Houseman v. Philadelphia Transp. & L. Co., 141 F. 385. Where A. employed, paid and had right to discharge a servant, and hired him to B. to unload poles, negligence of the servant while unloading poles under B.'s direction and control was held not chargeable to A. Id.

39. Parks v. Northwestern University, 121 Ill. App. 512. The trustees of a charitable institution, the advantages of which are free, and the trustees of which serve without any compensation, having exercised ordinary care in the selection of servants and agents are not liable for their negligence. No liability for injuries to servant caused by negligence of another servant. Farrigan v. Pevear [Mass.] 78 N. E. 855.

40. See 6 C. L. 605.

41. Action for illegal arrest. East v. Brooklyn Heights R. Co., 101 N. Y. S. 364.

42. See 6 C. L. 605.

43. McGinnis v. Chicago, etc., R. Co. [Mo.] 98 S. W. 590.

44. McGinnis v. Chicago, etc., R. Co. [Mo.] 98 S. W. 590. If a servant neglects a duty owed by the master to third persons, the remedy is against the master alone (Scheller v. Silbermintz, 50 Misc. 175, 98 N. Y. S. 230), unless the servant is guilty of actual misfeasance or tort he cannot be held liable with the master. Applied where husband was agent or manager for his wife. Husband held not liable where roof over sidewalk fell injuring plaintiff. Scheller v. Silbermintz, 50 Misc. 175, 98 N. Y. S. 230.

45. The servant because he actually does the wrongful act; the master under the doctrine of respondeat superior. McGinnis v. Chicago, etc. R. Co. [Mo.] 98 S. W. 590. Failure of the servant to exercise ordinary care in the performance of his duties renders him liable to a third person for injuries proximately caused thereby. Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039. For a tort of the servant committed within the scope of his employment, a joint action may be maintained against master and servant. New Ellerslie Fishing Club v. Stewart, 29 Ky. L. R. 414, 93 S. W. 598. Master and servant are jointly liable for the willful tort of the servant committed in the scope of his employment while in the master's service. Able v. Southern R. Co., 73 S. C. 173, 52 S. E.

master has recourse upon the servant as for a breach of duty to the master.[46] In a joint action against master and servant, where the master is sought to be held liable solely under the doctrine of respondeat superior, the negligence alleged being that of the servant alone, a finding that the servant was free from negligence relieves the master also from liability.[47]

(§ 4) *B. Procedure.*[48]—The complaint must show that the person charged with negligence or wrongdoing was defendant's servant,[49] and that he was acting within the scope of his employment at the time,[50] and the burden rests upon plaintiff to prove these facts,[51] as well as the negligence or wrongful act alleged.[52] The questions of negligence,[53] whether the relation of master and servant existed be-

962. Where, in an office occupied by a railroad company, a telegraph company and an express compahy, their joint agent is provided by them with a revolver for the protection of the property entrusted to his care, and while thus armed and acting in the line of duty shoots at and wounds one entering the building on lawful business, his mistake of judgment must be charged against his employers, and an action for damages on account of the injury suffered will lie against the companies and agent jointly. Blakely v. Greer, 7 Ohio C. C. (N. S.) 169. For an injury caused by negligence of an employe acting within the scope of his employment, the employer and employe may be sued jointly, or each may be sued separately. Whalen v. Pennsylvania R. Co. [N. J. Law] 63 A. 993. Where a complaint against a carrier and its employe alleged that "defendants" failed to use reasonable care, etc., and so negligently operated a boat that it collided with a pier, injuring plaintiff, states a cause of action against defendants jointly, though it also alleges that the boat was under the control of the employe. Id.

Contra: In Washington a master and servant may be sued jointly for injuries alleged to have been caused by their negligence whether the negligence of the servant is alleged to be nonfeasance or misfeasance. Thomas v. Great Northern R. Co. [C. C. A.] 147 F. 83. The wrongful death of a servant, due to the misfeasance of the superintendent under whom he was employed, does not afford ground for a joint action against the superintendent and the master, but may be made the basis of an action against the superintendent for his negligent act or against the master under the doctrine of respondeat superior, and, where the action has been brought against both jointly, the plaintiff may be required to elect against which one the cause shall proceed. French v. Central Const. Co., 8 Ohio C. C. (N. S.) 425.

46. McGinnis v. Chicago, etc., R. Co. [Mo.] 98 S. W. 590.

47. Verdict against master is inconsistent with finding for servant. McGinnis v. Chicago, etc., R. Co. [Mo.] 98 S. W. 590. Judgment releasing agents from liability for negligence held to bar subsequent suit against principal on the ground of respondeat superior. Hayes v. Chicago Tel. Co., 218 Ill. 414, 75 N. E. 1003.

48. See 6 C. L. 606.

49. Complaint which charged that a certain person employed by defendants to break up machinery, wrongfully and carelessly used dynamite, and that defendants knew, and connived in this method and directed the work, did not show that the person employed was an independent contractor. Falender v. Blackwell [Ind. App.] 79 N. E. 393.

50. Count for injury to third person held insufficient for not alleging that defendant's servants were acting within the scope of their employment. Daniels v. Carney [Ala.] 42 So. 452.

51. Plaintiff alleged an assault by a servant who was a watchman of fishing club grounds, while acting in the line of his employment, and that he (plaintiff) was on the premises under a privilege granted by the owner. The owner denied the granting of the privilege and also that watchman committed the assault while acting within the scope of his duties. The burden of proof was on plaintiff. New Ellerslie Fishing Club v. Stewart, 29 Ky. L. R. 414, 93 S. W. 598. Plaintiff was injured by some object dropping down upon him from upper floors of a building in course of construction, but failed to sustain the burden which was upon him of showing that the object was dropped by defendant's servants. Halsch v. J. B. & J. M. Cornell Co., 49 Misc. 525, 97 N. Y. S. 983.

Contra: Where injuries to lands were caused in course of construction of railroad, the burden was on the company to show that wrongful acts were done by an independent contractor. St. Louis, I. M. & S. R. Co. v. Davenport [Ark.] 96 S. W. 994.

52. Where defendant's engineer, in charge of steam roller, caused the engine to whistle and puff after noticing that plaintiff's horse was frightened and failed to take measures to prevent a runaway, he was guilty of negligence. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440. Plaintiff and defendant's driver were engaged in unloading a truck, and the load fell on plaintiff as the driver unfastened a rope which held it. No negligence on the part of the driver was shown. Rogers v. Jones, 100 N. Y. S. 1013. Intoxication of servant driving a beer wagon may be considered on the issue of his negligence in driving and loading the wagon. Cooke Brew. Co. v. Ryan, 223 Ill. 382, 79 N. E. 132. Competent mechanic, sent to install machinery sold, by an error of judgment, caused the machine to break, thereby causing damage. No negligence being proved, the seller was not liable. Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555.

53. In action for injuries caused by being struck by runaway team, driven by defendant's servant, issues of negligence and proximate cause held to have been properly submitted to the jury. Warren v. Porter, 144 Mich. 699, 13 Det. Leg. N. 406, 108 N. W. 435. Where plaintiff was injured by a beer keg

tween defendant and the person charged with wrongdoing,[54] and whether the latter, if a servant of defendant, was acting within the scope of his employment,[55] are questions of fact to be submitted to the jury, unless the evidence admits of but one reasonable conclusion.

§ 5. *Civil liability for interference with relation by third person.*[56]—It is the right of every man to engage in such lawful business or occupation as he may choose free from hindrance or obstruction by his fellow men save such as may result from the exercise of equal or superior rights on their part.[57] Hence, whoever intentionally and without legal justification or excuse procures an employer to discharge his employe, to the damage of the latter, is liable to an action for damages at the suit of the employe,[58] and this, although there was no binding contract of employment.[59] Thus, one who deprives a workman of his employment by threatening and intimidating his employer is liable to the workman in damages in a civil action.[60] Where a conspiracy to deprive the workman of his employment is alleged, the gist of the action is not the conspiracy, but the wrongful act, in procuring the plaintiff's discharge and the injury thereby caused.[61] In such action a verdict against joint defendants is sustained by evidence that defendants were joint tort feasors in procuring plaintiff's discharge.[62] Proof that one of defendants procured plaintiff's discharge warrants a verdict against that one alone where the act is made unlawful by statute.[63] Malice may be implied by law from the unlawful act.[64] Punitive damages are recoverable in such action in a proper case.[65]

One who maliciously entices a servant in actual service of a master to desert and quit his service is liable to an action for damages.[66] Such action lies though

which fell from a wagon driven by defendant's servant, whether the servant was driving in a negligent manner, and had loaded the wagon improperly, was for the jury. Cooke Brew. Co. v. Ryan, 223 Ill. 382, 79 N. E. 132.

54. Instruction held proper as submitting to jury question whether person accused of wrongful act was defendant's servant at the time. Foote v. Kelley, 126 Ga. 799, 55 S. E. 1045. Whether person employed to break up old machinery, who used dynamite and caused death of a person, was a servant of defendants or an independent contractor. Falender v. Blackwell [Ind. App.] 79 N. E. 393.

55. Whether brakeman who kicked a piece of ice from a platform of a caboose on a crossing, injuring a boy standing there, was acting within the scope of his employment. Willis v. Maysville & B. S. R. Co., 29 Ky. L. R. 178, 92 S. W. 604. Whether one who had a police commission from the state and was also employed by railway company as special officer was acting in the scope of his employment by the company when he shot plaintiff, who was stealing a ride on a train, held for jury. Baltimore & O. R. Co. v. Deck, 102 Md. 669, 62 A. 958. Whether employer was liable for act of watchman in shooting a trespasser on defendant employer's land held to depend on whether watchman was at the time acting within the scope of his employment, and this question was for the jury. Magar v. Hammond, 183 N. Y. 387, 76 N. E. 474. Where it appeared that plaintiff was assaulted by a servant of defendant who was on the master's premises after working hours, when plaintiff was trying to take a key to a closet from the defendant, whether the latter was acting within the scope of his authority to protect his master's property was for the jury. Collins v. Wise, 190 Mass. 206, 76 N. E. 657. Detective employed by railroad company was also public officer. He pursued a boy whom he saw jumping off a train out of the yards and there shot him. Whether he was acting in the scope of his employment by the company, or as public officer, held for jury. Sharp v. Erie R. Co., 184 N. Y. 100, 76 N. E. 923.

56. See 6 C. L. 606.

57. Brennan v. United Hatters of North America [N. J. Err. & App.] 65 A. 165.

58. Action sustainable where union fined a member without justification and forced his employer to discharge him for not paying the fine. Brennan v. United Hatters of North America [N. J. Err. & App.] 65 A. 165.

59. Brennan v. United Hatters of North America [N. J. Err. & App.] 65 A. 165.

60, 61. Wyeman v. Deady [Conn.] 65 A. 129.

62. Held that labor union and its walking delegate were both liable where delegate's acts were known to and authorized by the union. Wyeman v. Deady [Conn.] 65 A. 129.

63. Gen. St. 1902, § 760. Wyeman v. Deady [Conn.] 65 A. 129.

64. There need be no other proof, even if malice is alleged. Wyeman v. Deady [Conn.] 65 A. 129.

65. Such damages recoverable against walking delegate and labor union where latter authorized or ratified former's unlawful acts. Wyeman v. Deady [Conn.] 65 A. 129.

66. Thacker Coal & Coke Co. v. Burke, 59 W. A. 253, 53 S. E. 161.

the contract is terminable at will by either party, if the relation of master and servant actually exists at the time.[67] That the act of interference was to advance the interests of the third party, is no defense.[68] A complaint alleging such a wrongful act should specify the servant who was enticed away.[69] A statute prohibiting any person or combination of persons from preventing others from working by force, or threats, or intimidation, but allowing the use of moral suasion or lawful argument to induce persons not to work does not render legal the malicious act of a person inducing an employe to break an existing contract of employment.[70]

Employes may organize for their own protection, may strike, and may persuade and induce others to join them by lawful means.[71] But they have no right to interfere with the relation existing between an employer and his lawful employes by unlawful means, such as bribery, intimidation, or coercion, of such employes,[72] and a molestation of the business of an employer by such unlawful means will be enjoined.[73]

§ 6. *Crimes and penalties.*[74]—Holdings under the Georgia [75] and Louisiana [76] acts making it illegal to procure an advancement on a contract for services, with in-

67. That no definite term of service has been fixed is immaterial. Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S. E. 161.

68, 69. Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S. E. 161.

70. Code 1899, p. 1053, § 14, construed. Thacker Coal & Coke Co. v. Burke, 59 W. Va. 253, 53 S. E. 161.

71, 72. Everett Waddey Co. v. Richmond Typographical Union No. 90, 105 Va. 188, 53 S. E. 273.

73. Evidence insufficient to prove charges of bribery or intimidation whereby employes were induced to join union and quit plaintiff's service. Everett Waddey Co. v. Richmond Typographical Union No. 90, 105 Va. 188, 53 S. E. 273.

74. See 6 C. L. 607.

75. Elements of offense denounced by Georgia Laws 1903, p. 90. To sustain a conviction under the statute it must appear that accused contracted to perform the labor or service himself, not merely to furnish and pay for the labor and that he has, without good or sufficient cause, failed and refused to carry out his contract. Johnson v. State, 125 Ga. 243, 54 S. E. 184. Loss by or damage to the person contracted with, and from whom money or other things of value are procured, is a necessary element in the offense. Millinder v. State, 124 Ga. 452, 52 S. E. 760. The gravamen of the offense is the fraudulent intent which exists at the time of the advance, not to perform the services contracted for. Sterling v. State, 126 Ga. 92, 54 S. E. 921. The presumption of a fraudulent intent arising from a failure to perform may be overcome by proof of another cause for the employe's nonperformance. As where evidence showed a disagreement as to the work to be done, threats of violence by the hirer, and a quitting by the employe in consequence thereof. Id. Where proof showed that accused was a minor and that he was forced to leave the employment because his father demanded it in order to have him perform services under a contract made by the father, the presumption of a fraudulent intent was rebutted, and a conviction was illegal. Howard v. State, 126 Ga. 538, 55 S. E. 239. Proof that a minor left the service of his employer in obedience to parental authority will suffice to rebut all presumption of fraudulent intent. Anthony v. State, 126 Ga. 632, 55 S. E. 479. But the bare fact that the minor told his employer that he had yielded to the command of a stranger to go to work for him can afford the minor no excuse, in the absence of a satisfactory showing that he did so under fear of duress, rather than voluntarily and with the purpose of defrauding his employer in accordance with a previously formed intent. Id. The statute has reference only to contracts creating the relation of hirer and person hired. Young v. State, 124 Ga. 788, 53 S. E. 101. It does not apply where persons occupy the relation of landlord and tenant, and a tenant is not subject to prosecution, though as part of a contract of rental he agrees to clear up certain land. Id. The statute relates to transactions where money or other things of value are procured with fraudulent intent, either contemporaneously or subsequently to the contract of service. Bridges v. State, 126 Ga. 91, 54 S. E. 916. Where an employe agrees to pay an existing debt due his employer by rendering to him further service, and fails to perform the service contracted for and omits to pay the debt, his failure does not constitute the offense defined by the act. Id.

The accusation: An accusation in a city court charging one with the offense of violating the provisions of Acts 1903, p. 90, which fails to set forth in substance a contract definite and certain as to its terms and duration, is subject to demurrer on the ground that "there are no facts showing any valid contract between prosecutor and defendant nor consideration nor duration of said contract." Pressley v. State, 124 Ga. 446, 52 S. E. 750. Contract alleged held too indefinite and uncertain to support a conviction. Taylor v. State, 124 Ga. 798, 53 S. E. 320. An accusation showing on its face that the hirer has sustained no loss or damage is demurrable. Braughner v. State, 125 Ga. 629, 54 S. E. 653. Accusation held fatally defective for failure to allege when

tent to defraud, under the Mississippi [77] and Georgia [78] statutes making it a crime to entice away the servant of another, and under the Washington [79] act making violation of the eight-hour law a misdemeanor, are treated in the notes.

MASTERS AND COMMISSIONERS.[80]

§ 1. Office, Eligibility, Appointment, and Compensation (951).
§ 2. Powers and Duties in General, and Subjects of Reference (952).
§ 3. Proceedings on Reference and Hearing by Master (952).
§ 4. Report of Master, Exceptions and Objections (953).
§ 5. Powers of Court and Proceedings on Review (953).
§ 6. Re-reference (954).

§ 1. *Office, eligibility, appointment, and compensation.*[81]—When a cause is on the calendar subject to call at intervals during the trial of other causes and one opposing counsel is in court, an order of reference may be made on motion in open court without further notice.[82]

It is proper for the court to allow a master a reasonable fee for his services.[83] When it is claimed that the master retains a greater sum than is allowable under the reference, an application for an order requiring him to pay over the balance is properly continued until the costs are adjusted.[84] In New York a referee who

services were to commence, or for what time they were to continue, or that the prosecutor contracted and agreed to pay any amount whatever to defendant for services to be rendered. Watson v. State, 124 Ga. 454, 52 S. E. 751. It is unnecessary to allege that the term of service had expired before the indictment was preferred. Millinder v. State, 124 Ga. 452, 52 S. E. 760.

Evidence and proof: The burden is upon the state to show that loss or damage was actually sustained by the hirer. Where it appears that advances were made, and that accused performed some services, and the value of the services does not appear, the burden of proof is not sustained. Abrams v. State, 126 Ga. 591, 55 S. E. 497. Proof held not to show contract alleged in accusation; variance fatal. Taylor v. State, 124 Ga. 798, 53 S. E. 320. Proof of a failure to perform services contracted for, and failure to return the money or other things of value advanced, even during the term of service contracted for, is sufficient to establish prima facie the intent to defraud. Millinder v. State, 124 Ga. 452, 52 S. E. 760. An allegation that defendant obtained from prosecutor an advance of a sum of money is not sustained by proof that prosecutor paid to a third person the amount of defendant's debt to such third person, secured by mortgage, took a transfer of the mortgage, and subsequently, as transferee, foreclosed the same. Abrams v. State, 126 Ga. 591, 55 S. E. 497.

70. A Louisiana statute makes violation of a contract of labor, upon the faith of which money or goods have been advanced a criminal offense, punishable by fine or imprisonment. One who obtains an advance on representing that he will stay and work and immediately leaves, violates act No. 50, p. 71, of 1892. State v. Murray, 116 La. 655, 40 So. 930. The statute is held not to contravene the Federal act abolishing peonage. [Rev. St. U. S. §§ 1990, 5526], (State v. Murray, 116 La. 655, 40 So. 930), nor the constitutional provisions against involuntary servitude, or the deprivation of life, liberty, or property, or the denying of equal protection of laws. Id.

77. Evidence held sufficient to show that defendant had knowingly enticed away a laborer under contract, contrary to Laws 1900, p. 140, c. 102. Gregory v. State [Miss.] 42 So. 168.

78. Pen. Code 1895, § 122, makes it a crime to entice away a servant of another, with knowledge of his contract with such other. An accusation alleging that the enticing was after the employe "had actually entered the service of his employer" was held sufficient, as against a motion in arrest of judgment, and the objection that it did not show a contract of hiring, nor whether it was verbal or written. Hudgins v. State, 126 Ga. 639, 55 S. E. 492.

79. Complaint before a justice held sufficient to charge a violation of Sess. Laws 1899, p. 163, c. 101, making it a misdemeanor for a contractor employed by the state or any subdivision thereof to compel employes to work more than eight hours a day. State v. Davis [Wash.] 86 P. 201.

80. This article includes all matters relating to masters in chancery and court commissioners. Analogous matter may be found in the titles Reference, 6 C. L. 1272; Restoring Instruments and Records (examiners of title under burnt record acts), 6 C. L. 1310; Notice and Record of Title (referees under Torrens Act), 6 C. L. 814; and Partition, 6 C. L. 897. See, also, Arbitration and Award, 7 C. L. 254; and Depositions, 7 C. L. 1129.

For a full discussion of the law and practice on this subject, see Fletcher, Eq. Pl. & Pr. §§ 582-614.

81. See 6 C. L. 607.

82. Where cause was on calendar No. 2 subject to call during trial of causes on Calendar No. 1. Brookshire v. Farmers' Alliance Exch., 71 S. C. 451, 51 S. E. 442.

83. $75 properly allowed under R. S. c. 53, § 20, authorizing such compensation as court may deem just. Touhy v. McCagg, 121 Ill. App. 93.

makes a sale in partition is entitled to a fee to be computed on the price the property brings.[85]

In order that one may be held liable as court commissioner, he must have qualified and acted as such.[86] Special masters, commissioners and receivers are not "officers" subject to prosecution for embezzlement in Ohio.[87]

§ 2. *Powers and duties in general, and subjects of reference.*[88]—In cases of a complicated character involving matters of accounts,[89] justice cannot well be done without a reference and the chancellor ought to refer the subject to a master.[90] This should be done in other cases also where such procedure would be most conducive to justice.[91] The making of an order of reference is ordinarily discretionary with the court, however,[92] and hence is not appealable unless it is assailed on jurisdictional grounds or operates to deny a mode of trial to which a litigant is entitled by law.[93] An action at law in the United States circuit court falls under the last exception, the trial judge having no power even by consent of the parties to order a trial before a special master authorized to hear and determine the issues of fact and report his findings to the court.[94] The state practice will not be followed in such cases under the conformity act.[95] In suits against infants the proper practice is to refer the cause to a master even though the guardian ad litem admits the allegations of the bill.[96]

§ 3. *Proceedings on reference and hearing by master.*[97]—All parties in interest must have notice of proceedings before the master.[98] Testimony taken before a former master is not admissible against persons not parties in the former proceedings.[99] If a commissioner is clothed with full authority to determine all objections to testimony sought to be introduced before him, the court of reference will not interfere in such matters prior to the coming in of his report.[1] Ordinarily, a witness whose testimony is being taken orally before an examiner in a Federal

84. Where master was ordered to sell land and pay proceeds less expenses to an executrix. Lockwood v. Lockwood, 73 S. C. 18, 52 S. E. 735.

85. Code Civ. Proc. §§ 3297, 3307. Duffy v. Muller, 102 N. Y. S. 296.

86. Where two persons were appointed commissioners to sell land but only one gave bond and acted, the fact that the other received a part of the proceeds did not render him liable as commissioner. Pope v. Prince's Adm'r, 105 Va. 209, 52 S. E. 1009.

87. State v. Fabin, 4 Ohio N. P. (N. S.) 288.

88. See 6 C. L. 609.

89. After a decree for complainants in a suit to establish a trust in lands in favor of several persons, the cause should be referred to a master to take an account of rents and profits pursuant to the averments and prayer of the bill. Stahl v. Stahl, 220 Ill. 188, 77 N. E. 67.

90. **Fletcher, Eq. Pl. & Pr. § 583.**

91. Motion to set aside service in a Federal court on ground that defendant is an inhabitant of another district will not be determined alone on defendant's affidavit where intention is involved, nor on plea or answer where defendant is under arrest; but will be referred to a master who will take testimony subject to the right of cross-examination. Canadian Pac. R. Co. v. Wenham, 146 F. 206.

92. Brookshire v. Farmers' Alliance Exch., 71 S. C. 451, 51 S. E. 442. Allowance or disallowance of motion, after a second hearing for appointment of a commissioner to report the evidence taken at such hearing held discretionary with trial judge. Manning v. Mulrey [Mass.] 78 N. E. 551.

93. Order of reference calling in creditors to prove claims against a corporation held not of this character. Brookshire v. Farmers' Alliance Exch., 71 S. C. 451, 51 S. E. 442. An order of reference in an equity case, though made without special notice on call of the calendar, is within the discretion of the judge and not appealable. Lockwood v. Lockwood, 73 S. C. 198, 53 S. E. 87.

94. Issues of fact must be tried by jury or the court, except in equity, admiralty or bankruptcy. Swift & Co. v. Jones [C. C. A.] 145 F. 489. Rev. St. §§ 648, 700 (U. S. Comp. St. 1901, pp. 525, 570).

95. Swift & Co. v. Jones [C. C. A.] 145 F. 489.

96. Mote v. Morton [Fla.] 41 So. 607.

97. See 6 C. L. 609.

98. Infant defendants represented by guardian ad litem should have had notice in suit to foreclose mortgages. Mote v. Morton [Fla.] 41 So. 607.

99. Not admissable against minors who were newly made parties before second master. Mote v. Morton [Fla.] 41 So. 607.

1. Will not be determined on application to commissioner, especially where he acts within his authority. Original proceeding in supreme court. State v. Standard Oil Co., 194 Mo., 124, 91 S. W. 1062.

court cannot refuse to answer on the ground that the evidence called for is immaterial or irrelevant.[2] The master is not bound to re-open a cause for evidence which is merely cumulative and not conclusive.[3]

§ 4. *Report of master, exceptions and objections.*[4]—While it is better practice for the master to report all the facts upon which his ultimate findings are based, it is not legal error for him to omit to do so even though the findings be conclusions resulting from mixed questions of law and fact.[5] A report of the evidence has been held not necessary if not called for by the rule submitting the cause,[6] but the contrary has also been held.[7] Unless requested to do so a master is not bound to state his decisions in admitting or rejecting evidence but may treat the objection as waived.[8] No proper objections or exceptions being made to the report, it is conclusive as to all matters of fact.[9] Exceptions to the reports of masters in chancery are in the nature of special demurrers and errors must be specifically pointed out,[10] and where an objection is based upon particular evidence, it should refer to the place in the record where such evidence may be found.[11] Formal exceptions may, however, be dispensed with if the court makes an order directing that objections filed with the master shall stand as exceptions before the court.[12] A report of a master is not subject to exceptions where it simply follows the decree directing the reference and is based on findings contained in that decree.[13] The sufficiency of a notice by the master of the time and place for filing and hearing objections to the report is not affected by the fact that a party has no attorney and does not know that the filing of objections is necessary.[14]

§ 5. *Powers of court and proceedings on review.*[15]—The master's findings, while prima facie correct, are only advisory to the chancellor and should be disregarded by him when found to be erroneous.[16] Where a master is required to report merely the proofs without his conclusions, either party may offer further evidence

2. Examination under equity rule 67. New England Phonograph Co. v. National Phonograph Co., 148 F. 324. It is not the duty of an auxiliary court or judge who takes testimony in a suit pending in the court of another district to determine the competency, materiality or relevancy of the evidence which one of the parties seeks to elicit. Dowaglac Mfg. Co. v. Lochren [C. C. A.] 143 F. 211. The court or judge should compel the production of the evidence although it deems it incompetent, irrelevant, or immaterial, unless the witness or the evidence is privileged, or it clearly and affirmatively appears that the evidence cannot be competent, material, or relevant, and that it would be an abuse of process to compel its production. Id. This rule prevails in the taking of testimony before a commissioner or examiner under rules 67, 68, in equity, before a master empowered to determine the admissibility of evidence under rules 74, 77, 78, 79 and 82 in equity, and in the taking of evidence in actions at law under §§ 863, 868 and 869. Rev. St. (1 U. S. Comp. St. 1901, pp. 661, 664, 665 Id.).

3. Matthews v. Whitethorn, 220 Ill. 36, 77 N. E. 89.

4. See 6 C. L. 609.

5. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110.

6. Gurley v. Reed, 190 Mass. 509, 77 N. E. 642.

7. The report should show the basis of the master's findings of fact (Mote v. Morton [Fla.] 41 So. 607), and the evidence adduced at the hearing should be taken down and filed with the report (Id.).

8. U. S. 939. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110. Where objections were properly considered as waived, they could not be considered on appeal. Id.

9. General Fire Extinguisher v. Lamar [C. C. A.] 141 F. 353; Fordyce v. Omaha, etc., R. Co., 145 F. 544; Lies v. Klaner, 121 Ill. App. 332; Matthews v. Whitethorn, 220 Ill. 36, 77 N. E. 89. Rule that improper decree will be reversed, though no exceptions to the master's report is filed, applies only to cases where findings though true do not sustain the decree. Matthews v. Whitethorn, 220 Ill. 36, 77 N. E. 89.

10. Otherwise parts not excepted to will be taken as admitted. General Fire Extinguisher Co. v. Lamar [C. C. A.] 141 F. 353; First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158; Fordyce v. Omaha, etc., R. Co., 145 F. 544.

11. Fordyce v. Omaha, etc., R. Co., 145 F. 544.

12. Appeal could be considered. Ryan v. Desmond, 118 Ill. App. 186.

13. Error if any is in original decree. Young v. Rose [Ark.] 98 S. W. 370.

14. Matthews v. Whitethorn, 220 Ill. 36, 77 N. E. 89.

15. See 6 C. L. 610.

16. Master's findings held sustained by greater weight of evidence and should not have been disturbed by the court. Thomas v. Ellis, 121 Ill. App. 612.

before the chancellor,[17] but this should be done in apt time or some reason should be given for any delay.[18] Where there is evidence to sustain them, a master's findings of fact will not be reviewed on appeal unless fraud or corruption is shown,[19] and a decree based on a master's report will not be reviewed where no exceptions appear to have been filed to the report, though the decree recites that exceptions were filed,[20] but where the decree recites that the case was heard upon exceptions to the report, the cause will be treated as if exceptions had been filed, although such filing does not distinctly appear from the record.[21]

§ 6. *Re-reference.*[22]—The recommittal of a master's report is within the discretion of the chancellor [23] and will not be reviewed unless abuse of discretion appears.[24] A motion for a re-reference on the ground of newly-discovered evidence must set out the character of such evidence.[25]

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§ 1. *Nature of lien and right to it in general.*[26]—The right to a mechanic's lien is only statutory and exists only in the instances prescribed by the statute,[27] and cannot be acquired unless statutory requirements are complied with.[28] But

17,.18. Griswold v. Griswold, 111 Ill. App. 269.

19. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110.

20. Beck v. Stoddard, 118 Ill. App. 370.

21. Croissant v. Beers, 118 Ill. App. 502.

22. See 6 C. L. 611.

23. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110.

24. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110. A motion to recommit a master's report is addressed to the discretion of the court, whose action will not be disturbed in the absence of abuse. Gurley v. Reed, 190 Mass. 509, 77 N. E. 642.

25. Matthews v. Whitethorn, 220 Ill. 36, 17 N. E. 89.

26. See 6 C. L. 611.

27. Under a statute providing that liens shall exist in favor of any person who shall furnish material, upon the building and land upon which it stands, it exists only upon such property in favor of one who furnishes material. Manatee Light & Traction Co. v. Tampa Plumbing & Supply Co. [Fla.] 42 So. 703. A decree finding that only a portion of the material was used in the building, but fixing a lien for the whole amount, is erroneous. Id. A bank to which a municipal contract assigns an amount due him from the city may not file a lien on such fund under laws N. Y. 1897, p. 514, c. 418, providing for a lien on such fund to laborers and material-men. In re Cramond, 145 F. 966. Const. art. 16, § 37, and Sayle's Rev. Clv. St., art. 3294, providing for mechanic's liens, does not give a lien on a railroad for material used in its construction or repair. Waters-Pierce Oil Co. v. Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212. Under Kirby's Dig. § 4970, providing for a lien where a material-man complies with the provisions of the act, such compliance establishes a prima facie right to the lien, and the owner has the burden to show the contrary. Long v. Abeles & Co., 77 Ark. 156, 93 S. W. 67. Under Code 1897, § 3102, providing that subcontractors shall have a claim against any public corporation constructing the building which shall have priority in the order in which they are filed, a subcontractor acquires no lien on the money due on the building, though to the extent he may acquire priority in the distribution of his claim is in the nature of a lien. Thompson v. Stephens [Iowa] 107 N. W. 1095.

28. Eccles Lumber Co. v. Martin [Utah] 87 P. 713. Evidence insufficient to show a right to a lien upon a particular building,

where the statute requires certain things to be done to acquire the lien, it must be substantially complied with.[29] But where it requires certain things to be done in case certain conditions exist, then before the statute is operative it must appear that the conditions are in fact present.[30] Statutes allowing mechanics' liens are in derogation of the common law and are to be strictly construed,[31] and should not be extended to cases not falling within the language of the statute though within its reason.[32] The entire act relative to mechanics' liens must be construed in connection with any section of it.[33] A lien law repealing all former inconsistent ones but saving "unaffected" rights under existing laws leaves the former law in force as to liens having their inception in work already begun.[34] Mechanics' lien laws are generally held constitutional.[35] The absence of intention at the time material is furnished to assert a lien, does not preclude enforcement of a lien afterwards.[36] The lien is to be distinguished from the lien of one in possession of personal property for work and labor expended upon it[37] or other liens existing by virtue of equitable[38] or common-law rights.[39] In some states the fund due a public contractor is subject to a lien for labor and materials furnished him.[40]

§ 2. *Services, materials and claims for which liens may be had.*[41]—As a general rule a lien may be had for services and materials furnished[42] or delivered on

Central Planing Mill & Lumber Co. v. Betz, 29 Ky. L. R. 252, 92 S. W. 591. Where a contract provides that the first payment shall be made beyond a year from completion of the work, the contractors are not entitled to a lien under Hurd's Rev. St. 1891, c. 82. Provost v. Shirk, 223 Ill. 468, 79 N. E. 178.

29. Eccles Lumber Co. v. Martin [Utah] 87 P. 713. It is essential that all statutory requirements be substantially complied with. United States Blowpipe Co. v. Spencer [W. Va.] 56 S. E. 345.

30. Eccles Lumber Co. v. Martin [Utah] 87 P. 713.

31. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22. Lien Laws, Laws 1897, p. 526, c. 418, § 30, providing for a lien for materials furnished or for work done in building or equipping a vessel, is in derogation of the common law and is to be strictly construed. In re Froment, 110 App. Div. 72, 96 N. Y. S. 1061.

32. Provost v. Shirk, 223 Ill. 468, 79 N. E. 178.

33. Eccles Lumber Co. v. Martin [Utah] 87 P. 713. Rev. St. 1898, tit. 39, c. 1, creating mechanic's liens and providing the method by which they may be secured and enforced, must be construed on the theory that some of the provisions are for the benefit of the owners and some for the claimants. Id.

34. Act June 4, 1901, P. L. 431; Orr v. Rogers, 29 Pa. Super. Ct. 175.

35. The Mechanic's Lien Law of Georgia is constitutional and does not violate the due process clause or the provision which guarantees impartial and complete protection of property. Prince v. Neal-Millard Co., 124 Ga. 884, 53 S. E. 761.

36. Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43. In such case he must clearly show what materials were used in the building and the amount due therefor. Id.

37. Civ. Code, §§ 3051, 3052, providing for a lien to one who repairs personal property, gives the lien to one who has possession as a bailee, and not to one who has possession as a servant. Michaelson v. Fish, 1 Cal. App. 116, 81 P. 661.

38. Where a parent places his child in possession of land under promise to deed it to her and she improves it, but the deed is not forthcoming, the child is entitled to a lien for the value of the improvements. Burk's Adm'r v. Lane Lumber Co., 28 Ky. L. R. 545, 89 S. W. 686.

39. Where a municipal contractor who subsequently became bankrupt assigned amounts due him under his contract to material-men, held that though they filed their lien as authorized by Laws N. Y. 1897, p. 517, c. 418, § 5, they were entitled to liens on the fund by virtue of their assignment. In re Cramond, 145 F. 966.

40. A county which lets a contract for the construction of a court house is a "municipality" within 2 Gen. St. p. 2078, providing for a lien to a person who furnishes labor or material for any public improvement under contract with a city, town, or other "municipality," on the moneys due under the contract. Herman v. Board of Chosen Freeholders [N. J. Eq.] 64 A. 742.

See, also, Public Works and Improvements, 6 C. L. 1143.

41. See 6 C. L. 612.

42. Where material required for the erection of a building is specially prepared for it at the shop of the contractor with the consent of the owner the material deemed to have been furnished on the premises. Berger v. Turnblad [Minn.] 107 N. W. 543. Evidence sufficient to show that materials were furnished and actually used in the construction of a building so as to give a lien thereon under Ball. Ann. Code and St. § 5900. Seattle Lumber Co. v. Sweeney [Wash.] 85 P. 677. Under Pierce's Code, § 6210, a materialman's lien cannot be established where it does not appear that the materials were used in the building or delivered on the premises on which the lien is claimed. Fuller & Co. v. Ryan [Wash.] 87 P. 485.

the premises[43] under contract with the owner or his authorized agent,[44] or with his consent,[45] and actually used in the particular building.[46] In Pennsylvania, any material for the construction of some integral and essential part of a "mill" will support a lien.[47] The labor done or material furnished must be within the contemplation of the statute under which the lien is asserted.[48] Where materials furnished were not all used on the building but a partial payment has been made, the

43. Evidence insufficient to show actual delivery of the materials for use in the building. Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43.

44. See post, § 4. Held a question for the jury as to whether certain screens were furnished under the original contract or under an independent contract. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795.

45. Though it is stipulated that a claimant did no work personally within the statutory period, it is competent to show that he had furnished labor, with the consent of the owner, within such period. Wera v. Bowerman, 191 Mass. 458, 78 N. E. 102. Where a contract between an owner and a contractor impliedly authorizes the contractor to employ sub-contractors, work performed by such sub-contractor is with the consent of the owner within the mechanic's lien statute. McCormack v. Butland, 191 Mass. 424, 77 N. E. 761. Under Pub. St. c. 191, § 1, providing for a lien where labor is performed or furnished with the consent of the owner, it is not necessary that work should have been performed personally by the claimant, it is sufficient if it is performed by his employes. Wera v. Bowerman, 191 Mass. 458, 78 N. E. 102.

46. Evidence insufficient to show what amount if any should be charged against the building. Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43. Under Laws 1897, p. 526, c. 418, § 30, which gives a lien for work done or materials furnished in connection with building vessels, one who furnishes material is not entitled to a lien unless the material actually went into the vessel. In re Froment, 110 App. Div. 72, 96 N. Y. S. 1061. A lien cannot be enforced for materials not used in the building. North v. Globe Fence Co., 144 Mich. 557, 13 Det. Leg. N. 305, 108 N. W. 285. A lien allowable only for materials "actually used" will not cover such as, though furnished, were not used in the building. Bricks sold for building and resold without notice to seller. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658.

47. Bricks for a boiler setting in an ice factory. Supplementary act of April 21, 1856 (P. L. 496). Kountz Bros. Co. v. Consolidated Ice Co., 28 Pa. Super. Ct. 266.

48. Mechanics' liens under the West Virginia Statute considered and adjudicated. In re Hobbs & Co., 145 F. 211.

Held entitled to a lien: Hose and racks held to constitute fixtures for which a lien might be had. Crane Co. v. Epworth Hotel Construction & Real Estate Co. [Mo. App.] 98 Ill. 795. A lien may include an **item for a drain pipe from the house to the sewer in the street.** It is a part of the house. O'Neil v. Taylor, 59 W. Va. 370, 53 S. E. 471. The price of a **coal house and sample room** constructed as appurtenant to the building may be included. Id. Walks and fences may be included. Id. Under Revisal 1905, § 2016, one who erects **gutters, spouts, and outlets** under an indivisible contract for labor and materials is entitled to a lien for the whole amount due. Isler v. Dixon, 140 N. C. 529, 53 S. E. 348. The **drilling and casing of a well** is an improvement for which a lien may be had within Code Civ. Proc. § 696. Rolewitch v. Harrington [S. D.] 107 N. W. 207. Under Rev. St. 1898, § 3314, giving a lien for materials or labor furnished in the repair or construction of a building or appurtenance, **window and door screens made for and fitted into a building,** are an appurtenance and subject of a lien, though detachable without injury. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795. A lien may be had for **materials for a heating** plant furnished as part of the building. Siegmund v. Kellogg-Mackey-Cameron Co. [Ind. App.] 77 N. E. 1096. Act June 15, 1897 (P. L. 155), extending the mechanic's lien privilege to cover a debt for **gas fixtures,** is not retroactive and does not give lien for fixtures contracted for but not delivered until after the law took effect. Horn & Brannen Mfg. Co. v. Steelman [Pa.] 64 A. 409, rvg. 29 Pa. Super. Ct. 544. Subcontractors who furnish an **apparatus for opening and closing windows** and make a lump charge for the apparatus installed are entitled to a lien by stop notice under Mechanics' Lien Law (P. L. 1898, p. 538). McNab & Harlin Mfg. Co. v. Paterson Bldg. Co. [N. J. Eq.] 63 A. 709.

Held not entitled to a lien: The simple **preparation of plans and specifications** for a building gives no lien under the laws of New York. Thompson-Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358, 98 N. Y. S. 128. An architect is not entitled to a lien for services in preparing plans and specifications for a contemplated building upon the building actually constructed on a different plan after abandonment of the plans drawn. Buckingham v. Flummerfelt [N. D.] 106 N. W. 403. Services rendered in **surveying and marking the site for a building,** and drawing a contract for the construction of the building are not labor for which a lien may be claimed. Id. Where a statute gives no lien to an architect for preparing plans and specifications, he has no lien under an entire contract including such work and the **supervising** of the work of **construction.** Libbey v. Tidden [Mass.] 78 N. E. 313. An independent contractor engaged to fix a cellar **is not a laborer** within Mechanics' Lien Law, § 3 (P. L. 1898, p. 538), giving laborers a lien. McNab & Harlin Mfg. Co. v. Peterson Bldg. Co. [N. J. Eq.] 63 A. 709. A mill superintendent is not a **laborer** within the North Carolina statute. Moore v. American Industrial Co., 138 N. C. 304, 50 S. E. 687, citing many cases defining the word "laborer."

Coal, oil, and tools are not materials within Sayles' Rev. Civ. St. art. 3294, giving a

material-man may, in the absence of direction how to apply it, apply it to such items as will not support a lien, and equity will do the same for him.[49]

§ 3. *Properties and estates therein which may be subjected to the lien.*[50]—As a general rule the lien attaches to the improvement and the parcel of land on which it stands [51] against all who made or authorized or assented to the making of the contract,[52] but under some circumstances it attaches only to the improvement.[53] It is generally provided that only the land necessary to the beneficial use of the improvement is subject to the lien,[54] but the owner may be precluded from objecting that more land than was necessary was subjected.[55] Where an improvement is made by a lessee, the estate of the lessor is not subject to the lien,[56] and this is so though the lease contains an option to purchase,[57] but the estate of a lessor may be subjected to the lien if the improvement becomes a part of the realty,[58] especially in a long term lease,[59] and this rule is not affected by an agreement between lessor and lessee that the improvement might be removed.[60] The right to a lien may be pre-

lien for materials furnished for the construction of a railroad. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212. One who furnishes **iron and solder** to a manufacturer which is made into guttering and spouting and delivered to the contractor is not a materialman. Berger Mfg. Co. v. Lloyd [Mo. App.] 91 S. W. 468. One who fails to remove **ladders and other appliances** may not enforce a lien for them where permission to remove them is refused. Gates v. O'Gara [Ala.] 39 So. 729. The **tearing down of a building** gives no lien. Thompson-Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358, 98 N. Y. S. 128.

49. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658.

50. See 6 C. L. 612.

51. Under Rev. St. 1895, arts. 3294, 3299, 3300, where three buildings are erected under one contract on three lots, one of which is separated from the others, a lien for all does not extend to each lot. Guaranty Sav. Loan & Inv. Co. v. Cash [Tex.] 15 Tex. Ct. Rep. 53, 91 S. W. 781. The lien of a materialman does not extend to the homestead as a whole but is restricted to the building constructed or repaired and the lot on which the structure stands. People's Independent Rice Mill Co. v. Benoit, 117 La. 999, 42 So. 480.

52. Hughes v. McCasland, 122 Ill. App. 365.

53. Under Const. art. 20, § 15, and Code Civ. Proc. tit. 4, and § 1185, providing for a lien on the building and also upon the land upon which it is constructed if it belongs to the person who caused the building to be constructed, where one furnishes material to one who falsely represents himself to be the owner of the land, he is entitled to a lien on the building. Linck v. Meikeljohn, 2 Cal. App. 506, 84 P. 309. Under the statutes of Michigan when one who had no title to land contracted for the erection of a building thereon, and his wife did not sign the contract, he was entitled to a lien on the building though the premises constituted a homestead. Holliday v. Mathewson [Mich.] 13 Det. Leg. N. 816, 109 N. W. 669.

54. Where buildings on which a materialman's lien was claimed were constructed wholly on one of two contiguous lots and the lot on which no buildings were constructed was not necessary for the use of the buildings, it was not subject to the lien. Fulton v. Parlett [Md.] 64 A. 58.

55. Where in foreclosure proceedings the owner made no objection to entry of a decree directing sale of the premises, until boundaries of land necessary for the use of the building had been established, he could not thereafter object that a sale of more land than was necessary was decreed. Fulton v. Parlett [Md.] 64 A. 58.

56. Where a lessee erects a building under contract whereby he retains the title to it, and has a right to remove it, the land of the lessor may not be subjected to the lien. Central of Georgia R. Co. v. Shiver, 125 Ga. 218, 53 S. E. 610. No lien can be enforced against the estate of a lessor where work and labor was furnished to one in possession of mining property as a mere lessee. Williams v. Eldora-Enterprise Gold Min. Co. [Colo.] 83 P. 780.

57. Where a mining lease contained an option to purchase but did not require the lessee to do any work, a lien for labor furnished him could not be enforced against the lessor, on the ground that he was in possession under a contract of sale. Williams v. Eldora-Enterprise Gold Min. Co. [Colo.] 83 P. 780.

58. In an action to enforce a lien for work done for a tenant, whether materials were so affixed to the building as to become a part thereof was a question of fact. Stevenson v. Woodward [Cal. App.] 86 P. 990. Where a tenant constructs an ice wareroom, it is permissible to show that a door was cut through the side of the building as showing the nature of the improvement, though no lien was claimed for the work. Id.

59. A provision in a 99 years' lease that the lessor's interest and lien on the lessee's interest and lien on the lessee's estate for the payment of rent should not be affected by a mechanic's lien does not prevent the lessor's interest from being subjected to a lien. Provost v. Shirk, 223 Ill. 468, 79 N. E. 178.

60. Where an improvement is made under contract with a tenant in such manner as to become a fixture, and the laborer has no information that it will be regarded

cluded by facts of which a claimant is charged with notice.[61] Land of a married woman may be subjected to a lien for improvements made under contract with her husband of which she has notice,[62] and a homestead is subject to a lien where so provided.[63] The interest of a vendor may be subjected to the lien if he fails to comply with the statutory requirements.[64] A tract is not divided by the mere unaccepted laying out of a street so as to prevent an apportionment of a lien among numerous lots covered by one contract.[65]

§ 4. *The contract supporting the lien and the privity of the land-owner thereto. A. In general.*[66]—In most states it is essential that the lien rest on contract made with the owner [67] or his authorized agent,[68] or that the labor or material be furnished with the consent of the owner,[69] and one who furnishes material to a sub-

otherwise than as a fixture, the right of lien attaching to the land cannot be defeated by an agreement between tenant and owner that the improvement might be removed. Stevenson v. Woodward [Cal. App.] 86 P. 990.

61. Where land is held in trust for life under a recorded will providing that the trustee may make improvements only out of the income, no lien on the real estate can be acquired by one who furnishes material for an improvement. Hall v. Bullock's Trustee, 29 Ky. L. R. 1254, 97 S. W. 351. But he has a lien on the material and may require payment of the trustee in instalments out of the income. Id.

62. Where improvements are made on land of a married woman under contract with her husband and with her knowledge, there is a lien therefor under the express provisions of the statute. McGeever v. Harris & Sons [Ala.] 41 So. 930. Where a wife is the exclusive owner of the premises and the husband contracts for material to be used in the erection of a building thereon, the materialman has a lien on the premises. Limerick v. Ketcham [Okl.] 87 P. 605.

63. A bill of particulars furnished in filing a lien as so many feet of gutters at a certain price does not show that the lien is only for materials so as to entitle the owner to set up his homestead exemption which does not exempt work done. Isler v. Dixon, 140 N. C. 529, 53 S. E. 348.

64. One cotenant who authorizes a vendee to enter for the purpose of making improvements, without posting notice as required by Laws 1899, p. 267, c. 118, § 5, cannot avoid liability for the value of improvements. Seely v. Neill [Colo.] 86 P. 334.

65. Where the apportionment was decreed before the street was accepted, it was good. Fleck v. Collins, 28 Pa. Super. Ct.

66. See 6 C. L. 613.

67. Under Rev. St. 1898, tit. 39, c. 1, a mechanic's lien attaches to land, and unless the person for whom the improvement is made has an estate, no lien attaches. Eccles Lumber Co. v. Martin [Utah] 87 P. 713. The contract must have been made with the owner or his authorized agent. Id. A material man in order to be entitled to a lien must contract with the owner or his authorized agent. Meade Plumbing, Heating & Lighting Co. v. Irwin [Neb.] 109 N. W. 391. Evidence sufficient to show an oral contract under which labor and materials were to be furnished, to be superceded by a "uniform contract" which was executed about four months later. Libbey v. Tidden [Mass.] 78 N. E. 313. Evidence sufficient to show that the subsequent oral contract was a continuation of the written one and not a substitute for it, though it contained terms not provided in the former. Id.

68. Where an owner contracts with a builder to furnish labor and material, he constitutes such contractor his agent and his property is subject to liens for labor and material contracted for by such contractor. Mineah v. Scotts, 130 Iowa, 530, 107 N. W. 425. Where a husband as agent for his wife contracted for materials, her property is subject to the lien regardless of whether she consented to the repairs or not. Saunders v. Tuscumbia Roofing & Plumbing Co. [Ala.] 41 So. 982. Where there was no direct proof that the husband acted as agent for the wife, evidence tending to show such agency is admissible. Id. Where materials were furnished to a contractor on orders given by the architect before the contract was let and extras were furnished while the contractor was still in charge, and also after he had absconded and the owner was in charge, held to have been furnished to the owner's agents authorized to purchase. Seattle Lumber Co. v. Sweeney [Wash.] 85 P. 677. Evidence sufficient to show that the wife was estopped to deny the agency of her husband when mechanic's lien notes against the homestead were sought to be enforced. Roane v. Murphy [Tex. Civ. App.] 16 Tex. Ct. Rep. 24, 96 S. W. 782. Under B. & C. Comp. § 5640, declaring a contractor or subcontractor in charge of construction the agent of the owner for the purpose of binding the property with a lien, he is not the agent for the purpose of determining the value of labor or material furnished, and an arbitration of the value between contractor and subcontractor is not binding upon him. Quackenbush v. Artesian Land Co., 47 Or. 303, 83 P. 787.

69. A lessor in a lease binding the lessee to keep machinery in repairs "at his own cost" "consents" to work done by a third person under contract with the lessee within Laws 1897, p. 516, c. 418, § 3. Tinsley v. Smith, 101 N. Y. S. 382. Where an owner sells under an agreement by which the vendee is to construct a building on the premises, and after the foundation was completed the vendee defaulted, held that the work on such foundation was with the consent of the owner. Barnard v. Lantry, 101 N. Y. S. 502. Where a lumber dealer required from a tenant, desiring to purchase lumber on credit, an order from the owner, and the owner wrote him "it is O. K. with

contractor who has no contractual relation with the owner does not acquire a lien on the property improved,[70] though some states give him a "direct" lien,[71] but the fact that all materials are not furnished under the same contract is not ground for denying the lien as to materials for which a lien may be had.[72] The contract must be for labor or materials for which a lien may be had.[73] It must be definite and certain as to time of completion in Illinois,[74] and at any rate must be susceptible of identification and ascertainment,[75] and, where the material is furnished for improving the homestead, the contract must be signed by both husband and wife.[76] As a general rule, extras are regarded as furnished under the contract,[77] unless otherwise expressly provided by its terms.[78] There is no right to a lien until the contract has been substantially performed,[79] and a contractor who abandons his contract without excuse is not entitled to a lien.[80]

me as for Mr. O. having the lumber," held not to entitle the seller to a lien on the premises. Oregon Lumber Co. v. Beckleen, 130 Iowa, 42, 106 N. W. 260. Laws 1897, p. 516, c. 418, § 3, giving a lien to one who furnishes labor or material with the consent or at the request of the owner, where an owner sold under a contract providing that he should complete a building in process of construction, the buyer impliedly consented that the contractors proceed with the work and hence the contractors were entitled to a lien. Pope v. Heckscher, 109 App. Div. 495, 96 N. Y. S. 533.

70. General Supply Co. v. Hunn, 126 Ga. 615, 55 S. E. 957. A complaint showing such fact is demurrable. Id.

71. See post, § 4 C.

72. Crane Co. v. Epworth Hotel Const. & Real Estate Co. [Mo. App.] 98 S. W. 795.

73. An entire contract for preparing plans for which a lien cannot be had, and for supervising construction, completion of which was prevented by the owner, is not within Rev. Laws, c. 197, § 16, giving a lien in such case for reasonable compensation, as such section applies only where a lien would exist if the contract had been completed. Libbey v. Tidden [Mass.] 78 N. E. 313. A contract for preparing plans and for supervising the construction of a building is not within Rev. Laws, c. 197, § 2, providing that under an entire contract for labor and materials a lien for the labor can be enforced if its value can be shown. Id. In a suit to enforce a lien an owner is not estopped by the final certificate of the architect to show that there was no basis for the lien for extra work done. Barbee v. Morris, 221 Ill. 382, 77 N. E. 589.

74. A contract for construction of a building providing for its completion on a certain date and final payment to be made within thirty days thereafter is definite as to the time of payment, though payment is to be made on the certificate of the architect who was authorized to make alterations and find the balance due. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22. A contract to do work in "about" twenty-four days fixes a time for completion within one year. Ryan v. Desmond, 118 Ill. App. 186.

75. Where the lien declared or stated that the contract was to furnish all materials to be used in the building to be paid for at market rates, and it appeared that after the list of materials required had been furnished it was figured up at current market rates, held that the fact that the aggregate market value was so ascertained did not show a contract other than the one relied on. San Pedro Lumber Co. v. West [Cal. App.] 86 P. 993. Where in an action to enforce a lien the claimant testified that the contract called for brown stone, and the only evidence that any other kind of stone was required consisted of testimony as to some talk of blue stone, a finding that the contract called for blue stone was unwarranted. Miller v. Isear, 99 N. Y. S. 869.

76. It is necessary for one furnishing material for improvement of a homestead to contract therefor in writing with both husband and wife, if they are both living, not divorced, in order to obtain a lien. Rowley v. Varnum, 15 Okl. 612, 84 P. 487. If no such contract is entered into no lien attaches by reason of the filing of a lien thereon. Id.

77. A claim for extras may properly be included in the claim for the amount due under the contract. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

A lien may be had for extras supplied under the contract, though the original contract price independent of the extras has been paid. Zollars v. Snyder [Tex. Civ. App.] 16 Tex. Ct. Rep. 203, 94 S. W. 1096.

78. Under a contract providing that alterations should be made by direction of the architect only by written agreement with the principal contractor, a subcontractor may not recover for extras in the absence of such agreement. Ponti v. Eckels [Wis.] 108 N. W. 62.

79. He must comply with specifications as to methods of construction, materials and workmanship, and may not substitute materials or methods of workmanship which in his opinion are just as good. Easthampton Lumber & Coal Co. v. Worthington [N. Y.] 79 N. E. 323. Principal contractor who undertakes to complete the work on default of a subcontractor does not make himself personally liable for materials furnished the subcontractor, but his action only preserves the right of the material man to a lien on any surplus due the subcontractor after deducting the cost of completing the work. Martin v. Flahive, 112 App. Div. 347, 98 N. Y. S. 577. When a subcontractor defaulted and the principal contractor with the consent of the owner and materialman who had furnished the material to the subcontractor completed the work, the lien of the materialman on the sum coming due under the contract to the principal contractor continued as if the subcontractor had completed the work. Id. Nor was it affected by the fact

Payments and offsets.—An owner who in good faith pays the contractor the full contract price is not liable to a sub-contractor whom he permitted to continue the work,[81] When a contractor defaults in the performance of his contract, the owner is entitled to credit for the amount he expends in completing it,[82] and also for payments made for material which the contractor was bound to furnish,[83] and offsets connected with the contract.[84] Where the statute provides against the allowance of credit for advance payments or payments made for the purpose of avoiding the provisions of the statute,[85] an owner who makes payments has the burden to show that they were made pursuant to statutory requirements.[86]

that where the principal contractor failed to complete the work, the owner did so himself. Id.

Substantially performed: Where contractors notified the owner of their abandonment of the contract, but he refused to consent thereto and arranged to pay them day wages until completion, evidence held to show substantial compliance with the contract and that the owner could not object to the validity of mechanic's lien notes. Roane v. Murphy [Tex. Civ. App.] 16 Tex. Ct. Rep. 24, 96 S. W. 782. Where the contractor agreed to install a patented heating system and furnish a license to use it, but failed to furnish the license and was under order of court to do so, there was substantial performance. Hankee v. Arundel Realty Co. [Minn.] 108 N. W. 842. Where a contract to furnish all materials necessary for the construction of a building was relied upon, and the notice showed delivery of certain articles, evidence that the contractor purchased some articles elsewhere does not show that the contract was not carried out. San Pedro Lumber Co. v. West [Cal. App.] 86 P. 993. Under Code Civ. Proc. § 1101, providing that trivial imperfection in the work will not preclude a lien, failure to place windows in alignment is a trivial imperfection. Schindler v. Green [Cal.] 87 P. 626.

Not performed: In a suit to enforce a lien, evidence held to show that the claimant had done his work in such an unskillful manner as to damage the owner and was not entitled to lien. McLaughlin v. Sayle, 190 Mass. 583, 77 N. E. 639. Evidence insufficient to show substantial performance of the contract entitling a contractor to a lien. Easthampton Lumber & Coal Co. v. Worthington [N. Y.] 79 N. E. 323.

80. Rochford v. Rochford [Mass.] 78 N. E. 454. But where the answer in an action to enforce the lien is inconsistent with abandonment, a decree may be rendered for him. Id.

81. Drall v. Gordon, 101 N. Y. S. 171. Evidence insufficient to show that payment was not made in good faith. Id. Evidence sufficient to show that when an owner made payments to a contractor she had no notice that one seeking to establish a lien was furnishing materials. Chicago Lumber & Coal Co. v. Garmer [Iowa] 109 N. W. 780.

82. Where a contract provided for payment when the work was completed and on abandonment by contractor the owner completed it, lien claimants for materials furnished the contractor could share in the amount in the hands of the owner after deducting from the contract price the cost of completion and the sums paid for materials before abandonment or notice of lien. Fall v. Nichols [Tex. Civ. App.] 16 Tex. Ct. Rep. 748, 97 S. W. 145. Notwithstanding Code Civ. Proc. § 1183, providing that mechanics' and materialmens' liens shall extend to the entire contract price, an owner may deduct from a completion payment damages for the contractor's failure to complete the work within the prescribed time, and also an amount paid by him for materials which the contractor agreed to but did not furnish. Hampton v. Christensen, 148 Cal. 729, 84 P. 200. But he may not deduct an excess from the final payment. Id.

83. Under Code Civ. Proc. § 1184, providing that no payment by owner to contractor prior to maturity thereof shall be valid against lienors does not invalidate a payment for material which the owner guaranteed when the contractor was unable to secure credit, and made after completion of the building when no lien had been filed or notice thereof served. Hampton v. Christensen, 148 Cal. 729, 84 P. 200.

84. Code Civ. Proc. § 1184, providing that as to liens, except that of the contractor, the contract price shall not be diminished by any offset in favor of the owner against the contractor, refers to offsets not arising under the contract of which laborers and materialmen could have no notice. Hampton v. Christensen, 148 Cal. 729, 84 P. 200.

85. Laws 1897, p. 517, c. 418, § 7, providing that a payment made by the owner to the contractor before due for the purpose of avoiding the provisions of the lien statute shall be of no effect against a lien, applies only where made for the purpose of avoiding the provisions of the statute. Behrer v. City & Suburban Homes Co., 114 App. Div. 450, 100 N. Y. S. 35; Tommasi v. Bolger, 100 N. Y. S. 367. Where an owner makes advance payments to a contractor prior to the filing of liens by the subcontractor, in order that the work may advance, failure to notify such subsequent lienors of such fact does not show a purpose to avoid the provisions of the act. Tommasi v. Bolger, 100 N. Y. S. 367. Laws 1897, p. 1405, c. 635, § 15, requiring orders drawn by a contractor or subcontractor on an owner for money payable on the contract to be filed, does not apply to payments made by the owner on account of labor or material, and failure of the contractor to file orders given by the owner for the cancellation of their lien does not show an intent to deceive subsequent lienors. Id. Evidence insufficient to show that advance payments were made for the purpose of avoiding the provisions of Laws 1897, p. 517, c. 418, § 7. Id.

86. An owner who sets up payments to the contractor to defeat the lien of one who

(§ 4) *B. Contracts by vendors, purchasers, lessors, and lessees.*[87]—The rights of persons in privity with claimant depend on the nature of their interests in the land and their relation to the owner.[88]

(§ 4) *C. Subcontractors and materialmen.*[89]—The right of a sub-contractor to a lien rests in the terms of the statute.[90] A sub-contract need not necessarily, require completion when the principal one does.[91] In Iowa, a sub-contractor must enforce his lien in subordination to the original contract and his right is dependent on the existence of an indebtedness on the part of the owner to the original contractor.[92] In North Dakota, sub-contractors have a direct lien [93] not dependent on subrogation to the rights of the principal contractor [94] and hence not dependent on the existence of a sum remaining due him.[95] In Pennsylvania the materials for an essential part of a building need not be furnished to a contractor for the whole building.[96] The price stipulated in the original contract on which liens are based may not be diminished by secret understanding.[97] The lien of a sub-contractor is limited to the amount due him from the contractor.[98]

§ 5. *Acts and proceedings necessary to acquire lien. A. Notice and demand, statement to acquire lien.*[99]—Notice of the kind appropriate to the lien claimed must be given.[1] In Pennsylvania not only notice but a sworn statement must be served.[2] As a general rule the notice or statement or claim of lien must be verified.[3] It must be in substantial compliance with the statute.[4] It must set forth the name

furnished materials to him, must show that such payments have been made pursuant to statutory requirements. Prince v. Neal-Millard Co., 124 Ga. 884, 53 S. E. 761. Where an owner before making payment to the principal contractor did not require him to furnish a sworn statement required by Comp. Laws 1897, § 10,713, as to amounts due subcontractors and the payments were not distributed pro rata among subcontractors, materialmen, etc., the owner was not entitled to credit for such payment as against subcontractors, materialmen, etc. Greilick Co. v. Rogers, 144 Mich. 313, 13 Det. Leg. N. 16, 107 N. W. 885.

87. See 6 C. L. 614.

88. See ante, § 3, also see Vendor and Purchaser, 6 ch. 1781; Landlord and Tenant, 8 C. L. 656, and like titles.

89. See 6 C. L. 615.

90. Under Mechanics' Lien Law (P. L. 1898, p. 538), the remedy by stop notice is open to a party who, under employment by or contract with the contractor, has installed fixtures and other materials in his building, and his claim may include the work of installation as a part of the cost of materials in situ. Beckhard v. Rudolph, 68 N. J. Eq. 740, 63 A. 705. A subcontractor is not deprived of his lien expressly conferred by 2 Gen. St. p. 2078, § 1, by § 14 of the same act. Herman v. Board of Chosen Freeholders [N. J. Eq.] 64 A. 742.

91. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

92. Where a contract discontinued for inability to complete the work, provided that in such case the contractor should be liable if it cost more to finish the work than the contract price, of which fact the certificate of the architect should be conclusive, a subcontractor has the burden to show the architect's certificate. Chicago Lumber & Coal Co. v. Garmer [Iowa] 109 N. W. 780.

93, 94, 95. Rev. Codes 1899, § 4788. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

96. Brick to contractor for boiler foundation. Kountz Bros. Co. v. Consol. Ice Co., 28 Pa. Super. Ct. 266.

97. Under Laws 1897, p. 521, c. 418, § 4, limiting liability of the owner to a sum not greater than the contract price unpaid at the time the liens were filed, and providing that a copy of the contract shall be furnished by the owner on demand, it is no defense in an action to enforce a lien that by secret understanding between the owner and contractor, the contract price was to be less than therein stated. Hitchings v. Teague, 113 App. Div. 670, 99 N. Y. S. 967.

98. For materials furnished a subcontractor a lien can be enforced only for the amount due him from the contractor. Wright v. Schoharie Valley R. Co., 101 N. Y. S. 801.

99. See 6 C. L. 615.

1. The notice required to fix a lien for new work will not suffice for work of repair or restoration. Rebuilding exterior walls of a building on same lines with slight changes held repairs. Porter v. Weightman, 29 Pa. Super. Ct. 488.

2. Wolf Co. v. Pennsylvania R. Co., 29 Pa. Super. Ct. 439.

3. Under the rule that the statement must be verified by claimant or one having knowledge of the facts a verification by one partner of a firm which claimed a lien is sufficient, though it did not aver that he had knowledge of the facts. McGeever v. Harris & Sons [Ala.] 41 So. 930. Sess. Laws 1899, p. 270, c. 118, § 8, requiring statements to be sworn to by claimant or some one in his behalf "to the best knowledge, information, and belief of affiant" held complied with. Gutshall v. Kornaley [Colo.] 88 P. 158.

4. Statutory requirements as to notice or other like requirements must be substantially complied with. A subcontractor who

of the owner if known,[5] the amount of the lien,[6] and generally, if a lien is asserted against more than one building, it must specify the amount claimed against each,[7] unless all the improvements were made under a single contract.[8] It must describe the property against which the lien is asserted,[9] but inaccuracy in the description will not invalidate it.[10] The terms of the statute control the necessity that the

does not give the notice to the owner or furnish a statement of account and obtain a settlement thereof with the owner, as required by Mansf. Dig. art. §§ 4402, 4421, does not secure a lien by furnishing and filing a statement of his own account. Cameron & Co. v. Campbell, 141 F. 32. A memorandum signed by the claimant, alleging that a lien was asserted the amount claimed, the person to whom it is due specifying the building into which the materials went, and the owner of it, is sufficient. Baldwin v. Spear Bros. [Vt.] 64 A. 235. In Pennsylvania a lien showing on its face that the claimant contracted with one other than the owner must state **when and how notice** of intention to file **was given** to such owner, also the statement served with the notice must **set forth the contract** under which he claims. Collins v. Pennsylvania R. Co., 29 Pa. Super. Ct. 547.

5. Ky. St. 1903, § 2468, requires claimant's statement to contain the name of the owner only in case it is known and one does not lose his right to a lien because the name is incorrectly stated. Mivelaz v. Johnson [Ky.] 98 S. W. 1020. Under Rev. St. 1899, § 4207, requiring a contractor to file a verified account with the name of the owner, if known, an affidavit on information and belief as to who is the owner is sufficient. Crane Co. v. Epworth Hotel Const. & Real Estate Co. [Mo. App.] 98 S. W. 795. Under B. & C. Comp. § 5644, requiring a claim of lien to state the name of the person to whom material or labor is furnished, a claim is insufficient which does not show to whom the labor or material was furnished, or that labor or material was furnished in connection with the building sought to be impressed. Barton v. Rose [Or.] 85 P. 1009. The word "owner" in Rev. St. 1899, § 2893, requiring the statement to state the name of the owner considered in connection with §§ 2889, 2894, means the owner at the time the statement is filed. Davis v. Big Horn Lumber Co., 14 Wyo. 517, 85 P. 980. The name of the owner of the property against which a mechanic's lien is filed must be given if known but substantial compliance with the statute in this respect is all that is required. United States Blowpipe Co. v. Spencer [W. Va.] 56 S. E. 345.

6. A notice of lien for over $5,000 is insufficient, though the amount is not willfully exaggerated where the value is in fact only about one-half such amount. Finn v. Smith [N. Y.] 79 N. E. 714. Evidence sufficient to show that the amount claimed in the notice was willfully and intentionally exaggerated, rendering the notice void. Hecla Iron Works v. Hall, 100 N. Y. S. 696. Under a statute requiring the statement to contain a just and true account of the demands, one containing an excessive demand is insufficient. Where material was furnished to a contractor who was building four houses for different owners, and as statement as to one was excessive and such excess was not explained. Greilick Co. v. Taylor, 143 Mich. 704, 13 Det. Leg. N. 92, 107 N. W. 712. Where the lien is claimed for labor and material in a lump sum, the statement is not fatally defective for failure to specify the amount claimed for each. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

7. Under Gen. Laws 1896, c. 206, providing that any building together with the land shall stand pledged for materials of buildings constructed, where disconnected buildings are constructed under one contract, the contractor must, in order to obtain a lien, present a separate account for materials furnished for each building. McElroy v. Kelly, 27 R. I. 474, 63 A. 238.

8. Under Code Civ. Proc. § 1188, providing that where a claim is filed against two or more buildings at the same time, the claimant must designate the amount due him on each, where materials were furnished on a single contract for three houses, with nothing to show how much went into each, the claim need not state how much is due on each of the buildings. Southern California Lumber Co. v. Peters [Cal. App.] 86 P. 816. Under Comp. Laws 1888, § 3812, requiring a claim against two or more buildings to state the amount due on each, otherwise the lien is postponed. Rev. St. 1898, § 1387, provides that a lien against two or more buildings may be included in one claim if it designates the amount due on each. Held that under the former law the court was required to enforce the penalty where the statement was omitted whether equities required it or not, and under the latter the court was at liberty to enforce it as the equities required. Eccles Lumber Co. v. Martin [Utah] 87 P. 713. Under Rev. St. 1898, § 1386, provides for a statement of demand after deducting credits and offsets, § 1387, provides that, where a lien is claimed against two or more buildings, the statement shall designate the amount claimed on each. Held that the former statute is to acquire a lien and the latter to protect claimants among themselves, and a statement under the first section on two buildings on one lot is sufficient, though it does not set forth the amount due on each building. Id. Under Rev. St. 1898, § 1387, requiring a statement against two or more buildings to designate the amount due on each when a contract required the construction of two buildings on one parcel of land, and the construction is treated as an entirety, a statement is sufficient, though it does not designate the amount due on each. Id.

9. Where a statement covered but one lot, an amendment to the complaint to include a portion of another lot was ineffective to amend the statement, and the lien covered only the lot described in the original statement. Perkins v. Boyd [Colo.] 86 P. 1045.

10. Inaccuracy in the description in a statement does not invalidate the lien, under Ky. St. 1903, § 2468, requiring such statement to contain a description sufficiently accurate to identify the property. Mivelaz v. Johnson [Ky.] 98 S. W. 1020.

notice and statement served recite that claimants intended to assert a lien,[11] or the date of completion of the contract or when the amount became true,[12] or the particulars of the contract,[13] or that materials were furnished in accordance with the terms of the contract.[14] It is said that the certainty of such notice and statement

11. Under Code 1904, art. 63, § 10, providing that where building is erected on land of a married woman by her husband, no lien shall attach unless sixty days notice thereof be given to the married woman, the notice need not recite that claimants "intended" to claim a lien. Fulton v. Parlett [Md.] 64 A. 58. Under Code 1904, art. 63, § 11, requiring a materialman to give notice within sixty days of his intention to claim a lien a notice that claimants claimed and should forthwith file their claim of a lien in the office of the clerk of court is not fatally defective for failure to recite that they "intended" to claim such lien. Id. Unless the statute requires it, an averment is not necessary that the notice was given of intention to file a lien. Acts June 16, 1836 (P. L. 695); May 1, 1861 (P. L. 550); May 18, 1887 (P. L. 118), do not require such averment. Winton v. Benore, 28 Pa. Super. Ct. 27.

12. Unless so required by statute, a statement is not fatally defective for failure to allege the date the work was completed or when the amount became due. Baldwin v. Spear Bros. [Vt.] 64 A. 235. Need not state "when material was to be delivered," or that there was any fixed time for delivery or when payments were to be made. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

13. St. c. 109, requiring the claimant to file a written memorandum, does not require that the statement contain the particulars of the contract or items of the account. Baldwin v. Spear Bros. [Vt.] 64 A. 235. A statement need not specify that the contract under which the labor was performed or materials furnished was written. Id.

14. A notice and statement of lien provided for by the Act of June 4, 1901 (P. L. 431), set forth in a contract and specifications as to materials furnished avering the kind of materials, the amount due, date when last material was furnished is sufficient without alleging that they were furnished in accordance with the contract. American Car & Foundry Co. v. Alexandria Water Co. [Pa.] 64 A. 683.

Notice held sufficient: A stop notice, which declares that certain materials were furnished to the contractor for and in the "erection" of a building, sufficiently shows that the materials were actually used in the building. Beckhard v. Rudoplh, 68 N. J. Eq. 740, 63 A. 705. Mechanics' Lien Law (P. L. 1898, p. 538), giving materialmen a lien by stop notice on funds in the hands of the owner, and requiring the stop notice to state the amount due, that demand has been made and payment refused, a notice stating that material was sold to the contractor, but not stating that it was actually used in the building is sufficient. McNab & Harlin Mfg. Co. v. Peterson Bldg. Co. [N. J. Eq.] 63 A. 709. An assignment by the contractor to the materialman of a certain sum of the amount due from the owner to the contractor taken together with the notice, held sufficient as to the lienable portion of the debt, though the notice incorrectly stated that the materials were used by the owner instead of by the contractor, but the assignment correctly stating the matter. Id. Mechanics' Lien Law (P. L. 1898, p. 538), giving the materialmen a lien by stop notice of funds in the hands of the owner, where the lien on the building has been cut off by the filing of the contract, should be liberally construed as to liability of the debt and sufficiency of the notice. Id. A stop notice, which sets forth that a certain sum of money is due from the contractor for materials used in a building, and that the contractor has refused to pay the money so due, need not more explicitly state that payment has been demanded of the contractor. "Refusal" imports prior demand or request. Beckhard v. Rudolph, 68 N. J. Eq. 740, 63 A. 705. Where a husband employed contractors to construct a building on land of his wife, a notice of materialmen of their intent to claim a lien is not defective for failing to recite that the contractors who claimed the lien are the contractors employed by the husband. Fulton v. Parlett [Md.] 64 A. 58. A notice given to and lien recorded in the name of "Home Brewing Co." instead of "Home Brewing Company of Grafton" as alleged, is an immaterial variance. Grafton Grocery Co. v. Home Brew. Co. [W. Va.] 54 S. E. 349. Where repairs and improvements are male under contract with the owner, dates when the several items of work or material were furnished are not material except that it must appear that the last item was furnished within the statutory period. O'Neil v. Taylor, 59 W. Va. 370, 53 S. E. 471. The West Virginia statute does not require of a contractor who contracts with the owner an itemized statement of work done and material furnished, but requires only that the account show the amount due, describe the property and give the name of the owner. Id. A general statement showing the nature of the claim, the amount due after deducting credits, is sufficient. Id. A finding that a notice claimed a lien on a frame house and the land upon which it stood implies a finding that the house and land are properly identified in the notice. Big Horn Lumber Co. v. Davis, 14 Wyo. 455, 84 P. 900, 85 P. 1048. A notice of lien by a materialman in terms under the subcontractor's contract and against him as subcontractor not alleging that the subcontractor defaulted, that the principal contractor undertook to complete the work or that on his default the owner completed it, is sufficient. Martin v. Flahive, 112 App. Div. 347, 98 N. Y. S. 577. A signature to a notice of claim of a lien signed in the name of claimant by his attorney is sufficient. Siegmund v. Kellogg-Mackay-Cameron Co. [Ind. App.] 77 N. E. 1096. A notice of claim for materials furnished for a heating plant, "for work and labor done and materials furnished in the erection and construction of said house," is sufficient. Id.

Held insufficient: A statement of claim indorsed by the architect "this bill is O. K. except the last item" does not comply with a

are not tested as by the rule of variance,[15] but the words, "A verbal contract," are not a setting forth of the contract,[16] nor does "on or about" a day certain set out "the date when" the last work was done or material furnished.[17] In a printed blank the filling in of which shows a lien for materials only, failure to strike out the word labor is not a defect.[18]

Service of notice.[19]—The notice must be served on the owner or his agent having authority to accept notice,[20] unless in the cases provided by statute a substitute for service may be had.[21]

(§ 5) *B. Filing and recording claim and statement thereof.*[22]—It is generally required that the statement be filed in the public records within a certain period after the last item was furnished,[23] and when so filed it binds the property.[24] Where liens are filed only against the owner of the premises, no claim can be as-

provision in the contract requiring an architect's certificate. Provost v. Shirk, 223 Ill. 468, 79 N. E. 178. Where a contract provided that the work should be done under supervision of the architect whose decision should be final, a contractor who seeks to enforce a lien should procure such certificate. Id. Statement held insufficient to charge the estate of a lessor with a lien. Id.

15. The doctrine of variance in pleadings does not apply to notice in mechanics' liens. All that is required in such notice is that it be true, and it is immaterial that the notice states that material of the value of $132 was furnished, none of which was paid when in fact $212 was furnished and $80 paid. Star Mill & Lumber Co. v. Porter [Cal. App.] 88 P. 497.

16. Collins v. Pennsylvania R. Co., 29 Pa. Super. Ct. 547.

17. Wolf Co. v. Pennsylvania R. Co., 29 Pa. Super. Ct. 439.

18. Buess v. Pugh & Co., 46 Misc. 414, 92 N. Y. S. 359.

19. See 6 C. L. 616.

20. Under Comp. Laws 1897, § 10715, authorizing service on an agent having charge of the premises, a service of a statement on an owner's wife in his absence is sufficient, though the premises are in charge of an agent who testified that the wife's orders concerning the premises were obeyed. Greilick Co. v. Rogers, 144 Mich. 313, 13 Det. Leg. N. 161, 107 N. W. 885.

21. Rev. St. 1898, § 3315, requires notice to be given to the owner or his agent if he can be found in the county, if not it may be filed with the clerk of court. Ponti v. Eckels [Wis.] 108 N. W. 62. Evidence sufficient to show that the agent of the owner was in the county and a subcontractor was not excused from serving him with the notice. Id.

22. See 6 C. L. 617.

23. Laws 1895, p. 1405, c. 635, requiring notices of lien to be filed in the city clerk's office as well as in the office of the county clerk, violate the constitutional provision against a private or local bill embracing more than one subject. Tommasi v. Bolger, 100 N. Y. S. 367. Laws 1895, p. 1405, c. 635, tit. 12, § 3, requiring the filing of lien notices in the office of the city clerk, does not repeal the general lien which provides for a filing in the office of the county clerk but requires an additional filing. Id. Time within which the lien may be filed runs from the date the last material was furnished on the premises, and when material furnished to a contractor was never taken to the premises, the period does not run from such date. North v. Globe Fence Co., 144 Mich. 557, 13 Det. Leg. N. 305, 108 N. W. 285. Under Laws 1893, p. 318, c. 117, § 3, requiring materialmen's liens to be filed within thirty days after completion of the contract, and that cessation of work for thirty days shall be equivalent to completion, a statement filed within thirty days after cessation of work is in time. Perkins v. Boyd [Colo.] 86 P. 1045. Where a contractor undertakes to make repairs, additions, and improvements without a contract price as to the whole work, but in the course of the work it is agreed that a certain item shall be done for a certain price, such item is part of the general account, though furnished more than sixty days before filing the lien. O'Neil v. Taylor, 59 W. Va. 370, 53 S. E. 471. Rev. St. 1899, § 2893, providing that a statement of lien must be filed within ninety days after the indebtedness accrues, the indebtedness is deemed to have accrued at the date of furnishing the last item in the original count and not at the date of the last item which remains unpaid. Big Horn Lumber Co. v. Davis, 14 Wyo. 466, 84 P. 900, 85 P. 1048. Under §§ 10713, 10714, providing that the original contractor shall furnish the owner with a statement of claims due subcontractors, and also providing that a lien claimant shall file a statement in the office of the register of deeds, a claim of lien is not invalid because filed before statement is served. Holliday v. Mathewson [Mich.] 13 Det. Leg. N. 816, 109 N. W. 669. In an action to enforce a lien, an objection that the notice of lien was not filed within the statutory period after the materials were furnished is untenable where it appeared that goods furnished within the period, though not within the contract, yet were a portion of one entire improvement. Siegmund v. Kellogg-Mackay-Cameron Co. [Ind. App.] 77 N. E. 1096. A subcontractor's lien must be filed within ninety days to hold against bona fide subsequent purchasers and incumbrances. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

24. Under ch. 5143, p. 78, acts 1903, when a contractor assigns the balance due him on an uncompleted contract and the owner accepts the assignment on condition that the assignee will complete the house, and before completion a lien is filed for materials furnished the original contractor, the lien binds the property for an amount not greater

serted against a mortgagee.[25] By statute a lien filed after time may be good as to the owner save in so far as he has made payments after the regular time to file and before actual filing.[26]

§ 6. *Amount of lien and priority thereof.*[27]—As a general rule the amount of the lien is governed by the price specified in the contract,[28] and, where the contract is abandoned, excess in cost of completion above such price may be deducted.[29] An owner who seeks to defeat a lien on the ground that the contract was abandoned, and that it cost more than the contract price to complete the building, must show that the advanced cost was necessary to complete the building.[30]

As a general rule a mechanics' lien is made superior to any other lien attaching subsequent to commencement of work on the improvement,[31] or to the time

than the amount unpaid at the time of service of the notice. Carter v. Brady [Fla.] 41 So. 539.

25. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299.

26. So in North Dakota. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

27. See 6 C. L. 618.

28. Under Code W. Va. 1899, c. 75, § 5, requiring an owner in order to limit his liability of lien holders to the contract price to record his contract, such contract need not be acknowledged to be entitled to record. In re Hobbs & Co., 145 F. 211. Where a contractor abandoned the contract and the owner completed the work at an advanced cost in determining whether one had a lien for material furnished under the contract, no credit should be given the owner for payments made after the abandonment which were used in paying claims which accrued under the contract. Long v. Abeles & Co., 77 Ark. 156, 93 S. W. 67. Where one is employed to get out logs and employs others to assist him and pays them for their services and delivers the logs to a mill which saws them and sells the lumber to one who has notice of the claim of the person who cut the logs, he has a lien for his own labor. Valley Pine Lumber Co. v. Hodgens [Ark.] 97 S. W. 682.

29. Under Rev. St. 1895, art. 3310, where a contractor abandoned his contract, lien holders may recover from the owner only the amount remaining due after deducting the excess in cost of completing the building. Slade v. Amarillo Lumber Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 437, 93 S. W. 475. Under Laws 1897, p. 516, c. 418, § 4, providing that the lien for labor or materials furnished a contractor shall not be for more than the amount due at the time notice is filed, and any sum thereafter earned where a contractor had abandoned his contract and his workman had filed liens if there was any surplus after completion of the work, the liens will attach. Murphy v. City of Watertown, 112 App. Div. 670, 99 N. Y. S. 6. Where an owner as authorized by the contract performed work which the contractor failed to perform, the contractor could enforce a lien for the contract price less the cost of such work. Sweatt v. Hunt, 42 Wash. 96, 84 P. 1.

30. Long v. Abeles & Co., 77 Ark. 156, 93 S. W. 67.

31. Where mortgage liens are involved in the foreclosure of mechanic's and materialmen's liens, the date when the building was commenced or the labor begun is to be taken into consideration in determining the priority of the liens over the mortgage. Pacific States Sav., Loan & Bldg. Co. v. Dubois, 11 Idaho, 319, 83 P. 513. A mechanic's or materialmen's lien, duly and timely filed, takes priority over a mortgage subsequently executed by the owner. Hahn v. Bonacum [Neb.] 107 N. W. 1001. Under Rev. St. 1898, § 1384, a mechanic's lien timely filed is prior to equities intervening after date work is commenced or materials furnished. Sanford v. Kunkel, 30 Utah, 379, 85 P. 363. Under acts 1895, p. 217, No. 146, the lien of a laborer who assists in raising a crop is superior to a mortgage given before the crop is produced. Sheeks-Stephens Store Co. v. Richardson, 76 Ark. 282, 88 S. W. 983. Under Laws N. Y. 1897, p. 517, c. 418, § 5, providing for a lien for labor and materials furnished a public contractor on the amount due him from the municipality, one who performed labor for a contractor who subsequently became bankrupt, but filed no notice of lien, has none, but is entitled to priority over general creditors under the National Bankruptcy Act. In re Cramond, 145 F. 966. Where one not an owner entered into a contract for the construction of a building on a lot which he afterwards purchased and gave back a mortgage but the deed and mortgage were not delivered at the same time, in order to render the seisin instantaneous and prevent liens from attaching before the mortgage, deed and mortgage must have been part of the same transaction. Libbey v. Tidden [Mass.] 78 N. E. 313. Evidence sufficient to show that deed and mortgage were not part of the same transaction. Id. The contractors were entitled to a mechanic's lien which was superior to the mortgage. Id. Where an owner in a contract to erect a building impliedly authorized the contractor to employ subcontractors, and subsequently conveyed the premises and took a mortgage back at a time when he knew that a third person was performing work on the building, the laborer's lien was superior to his mortgage. McCormack v. Butland, 191 Mass. 424, 77 N. E. 761. Where one cotenant sells and takes a deed of trust for a portion of the purchase price for the benefit of all the cotenants, his interest in the deed is superior to mechanic's liens acquired in the construction of improvements by the purchaser. Seely v. Neill [Colo.] 86 P. 334. The interests of cotenants not shown to have had notice that improvements were being made are superior to such liens. Id. The validity of a lien may not be questioned by a mortgagee who has recognized it and did not attack it until he excepted to ratifica-

the contract was made,[32] but is inferior to a mortgage executed before work was commenced.[33] In some states lienors stand on an equal footing as between themselves,[34] and in other states they are classified as to priority.[35] Where sale of property subject to the lien is ordered in receivership proceedings, the court should protect the claimant's lien on the fund entitling him to priority over general creditors.[36] After a service by a sub-contractor or material-man the owner must reserve from the contract price a sufficient sum to satisfy the claim,[37] but no greater sum.[38] The lienor may be estopped to assert priority.[39] By analogy to the rule of marshalling assets, a prior mortgage released as to land not subject to the mechanics' lien and which was ample security becomes junior as to the doubly incumbered land.[40]

§ 7. *Assignment or transfer of lien.*[41]

§ 8. *Waiver, loss, or forfeiture of lien, or right to acquire it.*[42]—A builder may waive his right to a lien by a provision to such effect in the contract,[43] and by

tion of the auditor's account for distribution of the fund derived from the sale. Title Guaranty & Trust Co. v. Burdette [Md.] 65 A. 341. A building loan agreement filed under Laws 1897, p. 525, c. 418, § 21, did not contain a provision that a mortgage executed simultaneously should be a first lien. Held that, by using part of the money to pay off a first mortgage, it subjected its interest in the property to the lien of a materialman who relied on the agreement that the entire building loan should be devoted to the building under construction. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299. Where a mortgagee of chattels permits the mortgagor to have possession and use them, authority is impliedly conferred on him to have necessary repairs made, and the lien of the artificer for repairs is prior to the lien of the mortgage, though duly recorded. Ruppert v. Zang [N. J. Law] 62 A. 998.

32. Hughes v. McCasland, 122 Ill. App. 365.

33. The lien for materials furnished for the construction of a railroad given by Sayles Rev. Civ. St. acts 3294-3301, is inferior to a mortgage which existed when the materials were furnished, unless such material was used for the betterment of the road and increased the security of the mortgage. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212. Under Code Civ. Proc. § 1186, providing that the lien shall have priority over any lien attaching after the building is commenced, it is not prior to a mortgage executed prior to the commencement of work to secure advances with which to do it, though no advances were made before work was commenced. Valley Lumber Co. v. Wright, 2 Cal. App. 288, 84 P. 58. Where a materialman elects to seize and sell a homestead embracing twenty acres of land, the sale will be void if the price of adjudication is less than the amount of a special mortgage covering the entire property. People's Independent Rice Mill Co. v. Benoit, 117 La. 999, 42 So. 480.

34. Under the Lien Laws of Arkansas, all liens stand on an equal footing and if they exceed the contract price must be discharged pro rata. Long v. Abeles & Co., 77 Ark. 156, 93 S. W. 67.

35. In adjusting the rights of lien holders under Sess. Laws 1899, p. 148, where the owner employed different men to do the different kinds of work and the entire contract was not let to one party, the court must declare the class of the liens in accordance with the provisions of the statute, and where a mortgage attached prior to the commencement of any class of work it constitutes a prior lien. Pacific States Sav., Loan & Bldg. Co. v. Dubois, 11 Idaho, 319, 83 P. 513.

36. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

37. After service of notice of lien as provided by Code Civ. Proc. § 1184, the owner is bound to withhold from the contract price enough to pay the claim and $100 attorney's fees, and may not charge subsequent payments against such sum. Hampton v. Christensen, 148 Cal. 729, 84 P. 200. Where payments were due on the certificate of the certificate of the architect, a stop notice served on the owner on the day after the last certificate was given was insufficient to give priority over other persons holding orders of the contractor on the owner. Edge v. McClay [N. J. Eq.] 64 A. 969. Code Civ. Proc. § 1184, providing that one who furnishes material to a contractor may give notice to the owner who is required to withhold from the contract price sufficient money to pay the claims authorizes the interception of money due the contractor from the owner but not that due a material man from the contractor. Kruse v. Wilson [Cal. App.] 84 P. 442.

38. One who furnishes material does not, by virtue of notice to the owner to withhold money due the contractor, become entitled to a personal judgment against the owner for a sum due him in excess of the amount due the contractor. Hughes Bros. v. Hoover [Cal. App.] 84 P. 681.

39. By representing to subsequent incumbrancer that there was no lien. Hughes v. McCasland, 122 Ill. App. 365.

40. McCarthy v. Miller, 122 Ill. App. 299.

41, 42. See 6 C. L. 618.

43. A provision in a subcontract by which the subcontractor was to keep the premises free from mechanics' liens is a waiver of the right to a lien, both as to the subcontractor and his assign. Security Nat. Bank v. St. Croix Power Co., 126 Wis. 370, 105 N. W. 914. The waiver inured to the benefit of the original contractor and the owner. Id. A waiver of all right, title, and interest in any privilege of lien for labor, materials, and stock furnished, held a waiver as to all claims arising between date of

statute the filing of a contract stipulating against liens may put persons on notice and prevent such liens attaching on behalf of sub-contractors or material-men.[44] A lien is not lost by removal of the building from the land on which it was constructed.[45] A lien claimant is not deprived of his right by an assignment by the contractor of the balance due under his contract.[46] Where materials were furnished for three buildings on land belonging to the same owner, and it was impossible to know what materials were intended for each building, failure to distribute the materials among the several buildings does not invalidate the lien.[47] A manufacturer entitled to a lien on articles in his possession does not lose it by delivering part of such articles.[48]

§ 9. *Discharge and satisfaction.*[49]—The lien is not discharged by the taking of a promissory note,[50] nor by an unexecuted agreement to accept a mortgage.[51] Where one employed to get out logs hires laborers to do it and pays them, such payment operates as an extinguishment of their lien and not as an assignment of it.[52] The lien is discharged by foreclosure and sale to the lien claimant,[53] and while his

waiver and execution of a mortgage. Weinberg v. Valente [Conn.] 64 A. 337. Though a contract contain no provision for the release of liens, it having been modified by indorsement and acceptance of orders by the owner, the release of such liens become a condition precedent to the right of the contractor to recover any balance due on completion of the contract. Grimwood Co. v. Capitol Hill Bldg. & Const. Co. [R. I.] 65 A. 304.

44. If a modified contract stipulating against liens is made and filed and before furnishing or contracting to furnish materials the claimant had actual notice, he is not entitled in Pennsylvania to a lien. Lee v. Williams, 30 Pa. Super. Ct. 349. A party furnishing materials after the filing of a contract containing a stipulation against liens is bound thereby, although a prior contract without such stipulation had been filed which was canceled by the filing of the second contract. Act of June 26, 1895, P. L. 369. Lee v. Williams, 26 Pa. Super. Ct. 405. In Pennsylvania a field contract providing that the contractor will not permit anyone to file a lien against the premises nor file any lien himself, deprives a subcontractor of power to file a lien. Under Act June 4, 1901 (P. L. 431), as amended by Act April 24, 1903 (P. L. 297), providing that if the legal effect of the contract is that no claim shall be filed by any one such provision shall be binding. Glassport Lumber Co. v. Wolf, 213 Pa. 407, 62 A. 1074.

45. Under Rev. St. 1898, § 1372, providing for a lien on which labor is performed or material furnished, and § 1379, providing for a lien on the land on which a building is constructed, a building removed from land on which it is built without the consent of the owner or lienors is not released from the lien for a deficiency on sale of the land. Sanford v. Kunkel, 30 Utah, 379, 85 P. 863. Such building may be sold on foreclosure of the lien, and, if great injury would thereby result to the land to which it is removed, such land may be sold. Id. Sanford v. Kunkel, 30 Utah, 379, 85 P. 1012.

46. Under Ch. 5143, p. 78, Acts 1903, an assignment by a contractor of the balance to become due under his contract will not defeat a materialman's lien served before completion of the house, and before the owner has paid the balance to the assignee, the balance due being in excess of the lien. Carter v. Brady [Fla.] 41 So. 539.

47. Its only effect is to postpone the claim to liens of other creditors as provided by Code 1904, art. 63, § 31. Fulton v. Parlett [Md.] 64 A. 58.

48. The lien given by Laws 1897, p. 532, c. 418, § 70, to one who repairs, etc. personal property while it remains in his possession, is not lost by the delivery of a portion of articles manufactured under one entire contract. Solomon v. Bok, 49 Misc. 493, 98 N. Y. S. 838. Where a lien for the entire price is sought to be enforced against the articles remaining, the artisan has the burden to prove that the contract was entire. Id. Evidence insufficient to show that the contract was entire. Id.

49. See 6 C. L. 619.

50. That a subcontractor accepts a note from the principal contractor does not preclude his right to a lien. Mivelaz v. Johnson [Ky.] 98 S. W. 1020. The taking of a promisory note for the amount due will not in the absence of agreement extinguish the lien when the note is paid. Belmont Farm v. Dobbs Hardware Co., 124 Ga. 827, 53 S. E. 312.

51. An unexecuted agreement to accept a mortgage as security for payment for work done is not a taking of security within Code Civ. Proc. § 695, precluding the right to a lien where collateral security is taken. Rolewitch v. Harrington [S. D.] 107 N. W. 207.

52. Valley Pine Lumber Co. v. Hodgens [Ark.] 97 S. W. 682.

53. Where property is sold to a lien claimant on foreclosure of the lien and is not redeemed, the property is freed from the lien and the claimant's rights are those of a purchaser only. Van Buskirk v. Summitville Min. Co. [Ind. App.] 78 N. E. 208. A materialman who files notice of a lien under Laws 1897, p. 525, c. 418, § 21, against the holder of a building loan mortgage, a second mortgagee and the owner after filing of lis pendens in an action to foreclose the second mortgage, though not a party to the foreclosure proceeding, is bound by the judgment to the extent of all proceedings taken after the lis pendens was filed, as provided by Code Civ. Proc. § 7671, and the judgment bars him from foreclosing his lien against the prop-

title relates back to the date the lien became effective he is precluded by the doctrine of caveat emptor from recovering damages for injuries to the property by the owner between date of filing the lien and date of sale.[54]

The purpose of a statute providing that one having an interest in property upon which a lien is claimed may have the same dissolved by giving bond, is to allow one who has an interest to free his title from such an incumbrance.[55] In the execution of such bond, statutory requirements must be complied with,[56] and if not complied with the lien claimant is not estopped to assert the invalidity as against a purchaser of the interest who does not show that the lien claimant prior to the purchase informed him that the lien did not attach,[57] nor is he estopped by the fact that the bond was recorded and received by his attorney where it does not appear that the purchaser took, believing the property free from the interest and where he is not shown to have been misled.[58]

§ 10. *Remedies and procedure to enforce lien. A. Remedies.*[59]—The jurisdiction of a justice of the peace of proceedings to enforce a mechanics' lien is wholly statutory.[60] In Illinois the remedy assimilates to one in chancery.[61] The statutes should be so construed as to admit of the application of the remedy.[62] The suit to foreclose may be the proper subject of a reference.[63] To avoid circuity of action a material-man may sue directly on a contractor's bond conditioned to pay for all material used, though he has a right to enforce a lien.[64] Where property subject to the lien is in the hands of a receiver, granting permission in a suit to foreclose to join the receiver does not authorize sale of the property in such proceedings.[65] In Georgia there can be no foreclosure of lien for materials furnished to a contractor, against the land on which the materials were used in the absence of a valid judgment in his favor against the contractor.[66] The fact that a deed of trust is superior to the lien on the interests of certain co-tenants does not deprive the lien claimants of the right to have the premises sold subject to such trust deed.[67]

Time of bringing action.[68]—As a general rule it is required that action be brought within a specified time after the lien is filed [69] or payment under the con-

erty. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299.

54. Van Buskirk v. Summitville Min. Co. [Ind. App.] 78 N. E. 208.

55. Rev. Laws, c. 197, § 28. Rockwell v. Kelly, 190 Mass. 439, 77 N. E. 490. Laws 1897, p. 523, c. 418, § 18, provides that a lien shall be discharged if action is not brought within one year from filing of notice, also that it may be discharged by giving bond. Code Civ. Proc. § 3417, provides that it shall be discharged if the lienor does not commence action to enforce it within a specified time after notice given. Held, where it is once discharged by bond, it cannot within one year be again discharged and liability on the bond terminated by notice to sue. Uris v. Brackett Realty Co., 114 App. Div. 29, 99 N. Y. S. 642.

56. Rev. Laws, c. 197, § 28, requires the bond to be approved by a justice or judge, and where the magistrate who approves the bond does not pass on the value of the interest, the bond is void. Rockwell v. Kelly, 190 Mass. 439, 77 N. E. 490.

57, 58. Rockwell v. Kelly, 190 Mass. 439, 77 N. E. 490.

59. See 6 C. L. 619.

60. Under Code 1896, § 2733, a justice has no jurisdiction if the amount exceeds $50. Tolbert v. Falkenberry [Ala.] 40 So. 120. Failure of a petition before a justice to allege that plaintiff had filed notice showing before what justice he would institute the suit, as required by Rev. St. 1899, § 3893, is cured by a recital in the judgment that such notice had been filed. Wissman v. Meagher, 115 Mo. App. 82, 91 S. W. 448.

61, 62. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

63. A suit to enforce a mechanic's lien may be the proper subject of a reference under § 155 of the Practice Act (P. L. 1903, p. 579). New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444.

64. Where a complaint on such bond states a direct and primary cause of action, further allegations attempting to set up a cause by assignment of the bond may be ignored if insufficient. Ochs v. Carnahan Co. [Ind. App.] 76 N. E. 788.

65. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

66. Mauck v. Rosser, 126 Ga. 268, 55 S. E. 32.

67. Seely v. Neill [Colo.] 86 P. 334.

68. See 6 C. L. 619.

69. Code Civ. Proc. § 1190, providing that a mechanic's lien shall not be binding for more than ninety days, does not apply only to liens based directly on contract with the owner but to all liens on the property.

tract becomes due.[70] Where an original bill to enforce a lien is filed in time, an amendment filed after expiration of the limitation stating the same cause of action relates back.[71] The statutes allowing the lien which is in force on the date the contract for construction is made, governs as to the right to the lien, and the time for bringing action to enforce it.[72]

(§ 10) *B. Parties.*[73]—Contractors as well as the owners are proper parties [74] and a guarantor of the proper performance of the contract may be joined,[75] but a sub-contractor who is guarantor of the surety on the contractor's bond conditioned to protect his own liens cannot enforce a lien in a suit which the surety defends.[76]

(§ 10) *C. Pleading, practice and evidence. Pleading.*[77]—The complaint must conform to statutory requirements [78] and state facts constituting a cause of action under the statute.[79] A complaint need not allege in detail the facts recited

Hughes Bros. v. Hoover [Cal. App.] 84 P. 681. Under Ball. Ann. Codes & St. § 5908, providing that a lien shall not be binding for longer than eight months after the claim is filed, unless action be commenced, an action is not commenced until complaint is filed, under § 4807, though summons is served within such period. Service v. McMahon, 42 Wash. 452, 85 P. 33. Where a contractor defaulted and the owner completed the work as he was authorized to do by the contract, the ninety days' limitation within which to commence action to enforce the lien runs from thirty-five days after completion of the work as provided by the contract and not from the date of abandonment by the contractor. Hughes Bros. v. Hoover [Cal. App.] 84 P. 681. Under Code Civ. Proc. § 1190, providing that actions to enforce liens must be commenced within ninety days after completion of the work, where a materialman was to be paid in instalments, the last instalment to fall due thirty-five days after completion of the work, an action commenced within ninety days after maturity of the last payment is in time. Id.

70. Under Laws 1895, p. 225, it is essential that suit be brought or claim filed within four months from the date final payment becomes due under the contract. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22. Under a contract providing that work should be complete by July 1, that payments should be made on certificates of the architect, final payment to be made within thirty days after completion of the work, authorizing the architect to make alterations and find balance due, where the certificate of the architect was given October 5, a bill to enforce a lien could be filed within four months thereafter. Id.

71. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22. If an amended petition seeks the same lien on the same premises and on the same contract, it is not barred as on a new cause of action. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

72. Eisendrath Co. v. Gebhardt, 222 Ill. 113, 78 N. E. 22.

73. See 6 C. L. 620.

74. Slade v. Amarillo Lumber Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 437, 93 S. W. 475. Under the statutes of South Dakota relative to parties to actions to enforce lines, a nonresident principal contractor is not a necessary party to the enforcement of a subcontractor's lien. Burgi v. Rudgers [S. D.] 108 N. W. 253.

75. In an action to enforce a lien under Code Civ. Proc. §§ 484 and 3399, one liable on the debt as a guarantor of the performance of the contract may be joined. Whisten v. Kellogg, 50 Misc. 409, 100 N. Y. S. 526.

76. Todd v. Franzvog [Wash.] 87 P. 831.

77. See 6 C. L. 620.

78. Complaint held sufficient independent of § 5 of Sess. Laws 1899, p. 261, c. 118, and the constitutionality of such section was not involved. Gutshall v. Kornaley [Colo.] 88 P. 158. A lien under Act June 4, 1901 (P. L. 431), is not defective on the ground that the bill of particulars does not set forth the kind of materials furnished where such fact is shown by other papers in the cause. American Car & Foundry Co. v. Alexandria Water Co. [Pa.] 64 A. 683. An unaccepted order on the owner given by the principal contractor to the materialman is not an assignment of the contract between the owner and contractor and does not need to be filed with the pleadings in an action to enforce a lien. Siegmund v. Kellogg-Mackay-Cameron Co. [Ind. App.] 77 N. E. 1096.

79. A statement in a notice of lien filed with and made part of the complaint that a certain amount is due under the contract is insufficient as an allegation of nonpayment. It refers to the time of filing the lien and not to the time of commencing action. McPherson v. Hattich [Ariz.] 85 P. 731. A materialman who attempts to intercept money due the contractor from the owner, as provided by Code Civ. Proc. § 1184, must allege that he gave the owner notice of his claim. Kruse v. Wilson [Cal. App.] 84 P. 442. In an action on a materialman's lien for materials furnished the subcontractor, who defaulted, an allegation that the principal contractor completed the work is sufficient without alleging that the principal contractor also defaulted and that the owner completed the work, the essential fact being the completion of the work. Martin v. Flahive, 112 App. Div. 347, 98 N. Y. S. 577. Where a complaint to foreclose a lien was in two counts and one contained correct allegations as to the ownership of the property, a demurrer to the entire pleading was properly overruled. Burgi v. Rudgers [S. D.] 108 N. W. 253. In a suit to enforce a lien by a subcontractor's assignee, he pleaded a claim for extras as an amount due from the contractor and not from the owner. Held he was not entitled to recover from the owner on the theory that the work was done and materials furnished at request of the owner engineer. Security Nat. Bank v. St. Croix Power Co., 126 Wis. 370, 105 N. W. 914. A lien ex-

in the statement filed,[80] nor set it out by copy,[81] but must allege facts showing for what the lien is claimed [82] and the validity of the contract upon which it is based.[83] A bill of particulars annexed to the lien statement and filed with it is a part of it.[84] Where the sub-contractor's lien is direct and not worked out by subrogation, he need not allege a balance due to the contractor.[85] Notice by the owner that materials were furnished by a sub-contractor should be pleaded as a fact.[86] Payment is a matter of defense to be made by answer.[87]

Evidence and burden of proof.[88]—The evidence introduced must conform to the pleadings [89] and be competent to establish the issues thereby made.[90] It is competent for the owner to introduce facts showing that the claimant was not entitled to a lien.[91] Notwithstanding a statutory rule that lien laws are to be liberally construed, a lienor has the burden to show that there is a sum to which his lien may attach and that he substantially performed his contract.[92] The owner has the burden of proving damages off-set against the lien.[93]

pressly alleging that materials set forth in a bill of particulars were furnished under a contract is not open to the objection that it does not allege that the material was shipped in accordance with the specifications. American Car & Foundry Co. v. Alexandria Water Co. [Pa.] 64 A. 683. A complaint in an action to enforce a lien which alleges that material was furnished in the construction of buildings on the land need not allege that the land sought to be subjected to the lien was necessary for the convenient use of the buildings. Seely v. Neill [Colo.] 86 P. 334.

80. McGeever v. Harris & Sons [Ala.] 41 So. 930.

81. Under Act June 4, 1901 (P. L. 431), an averment of the date when and the manner in which a notice to the owner is served is sufficient without setting out a copy of the notice in the claim itself. American Car & Foundry Co. v. Alexandria Water Co. [Pa.] 64 A. 683.

82. One seeking to enforce a contractor's lien who does not allege that he is entitled to a lien as materialman may not enforce a lien for materials used in constructing a scaffold. Gates v. O'Gara [Ala.] 39 So. 729. One seeking to enforce a lien may not recover on an allegation of full performance if any material part of it remains unfinished. Id.

83. A complaint alleging that materials were furnished in pursuance of a contract with defendant through and by her husband sufficiently alleges the agency of the husband. McGeever v. Harris & Sons [Ala.] 41 So. 930.

84. American Car & Foundry Co. v. Alexandria Water Co. [Pa.] 64 A. 683.

85. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

86. An allegation that a materialman had by registered letter notified the owner that "said materials" (they being elsewhere pleaded) had been furnished is not objectionable as a conclusion that the owner had notice. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

87. Robertson Lumber Co. v. State Bank [N. D.] 105 N. W. 719.

88. See 6 C. L. 621.

89. Under a complaint alleging due performance of the contract, an answer claiming damages for delay in performance, and a reply setting up that the delay was because of obstructions by the owner, it is not competent for the claimant to introduce evidence of excuses for delay. Hecla Iron Works v. Hall, 100 N. Y. S. 696. Under a complaint which does not allege that the principal contractor promised to pay the subcontractor's workman, nor facts on which such a promise could be based, it is not permissible to introduce evidence of such promise. Murphy v. City of Watertown, 112 App. Div. 670, 99 N. Y. S. 6. On a complaint to enforce a lien against one in possession as ostensible owner, it is not permissible to introduce a record of claim against his wife as owner. Jennings, Gresham & Co. v. Huggins, 125 Ga. 338, 54 S. E. 169. Nor can such action be converted into one against the wife by an amendment that her husband acted as her agent. Id.

90. In proceedings to enforce a materialman's lien under § 7101, Cobbey's Ann. St. 1903, a general denial of the lien puts the lien claimant on proof of the amount actually due. Lee v. Storz Brewing Co. [Neb.] 106 N. W. 220. An answer in an action to enforce a lien alleging that on demand by defendant for a statement of the amount due a partial statement was furnished, but not alleging that defendant was thereby misled to her injury, does not present an issue of estoppel to claim the full amount due. Big Horn Lumber Co. v. Davis, 14 Wyo. 455, 84 P. 900, 85 P. 1048.

91. Where a contractor was required to furnish materials, the owner may show that he had paid for materials furnished in order to save his property from liens. Gates v. O'Gara [Ala.] 39 So. 729. Where pay for material above what was embraced in the contract is claimed, it was not error to ask the claimant if he was not to furnish such material. Id.

92. Brandt v. Burke, 110 App. Div. 396, 97 N. Y. S. 280. A materialman who seeks to enforce a lien for materials furnished a subcontractor against the principal contractor, who undertook to complete the work, and the owner who completed on default by the principal contractor, has the burden to show the cost of completing the contract. Martin v. Flahive, 112 App. Div. 347, 98 N. Y. S. 577. Under a contract providing that if the contractor failed to perform the owner might finish the work and deduct the expense from the contract price, when the

Questions of law and fact.[94]—

(§ 10) *D. Judgments, costs and attorney's fees.*[95]—As a general rule the proceeding to enforce a lien is one in rem, but in some states it is provided that a personal judgment may be rendered,[96] but where there is no lien there can be no personal judgment,[97] and where a sub-contractor is seeking to enforce his lien against a contractor, a personal judgment against the owner is not proper.[98] The judgement must be predicated on a finding on all the material issues [99] and must be within the jurisdiction of the court by which it is rendered.[1] The decree need not join a contractor who is beyond the jurisdiction.[2] Relief will not be denied because of a trifling omission in the performance of the contract where it has been substantially performed.[3] A judgment may be had in some cases though the valid-

owner did so, the evidence was held to show that there was nothing due the contractor when his lien was filed. Condon v. Church of St. Augustine, 112 App. Div. 168, 98 N. Y. S. 253. Where defects in the work were the result of the owner's negligence, and on his refusal to stand the expense of repairing it the contractor abandoned his work and asserted a lien for what he had done and alleged that the abandonment was because of the owner's refusal to make payments when due, and not that it was because he had refused to stand such expense, the contractor could not recover where the owner successfully proved that the work had not been substantially performed. Brandt v. Burke, 110 App. Div. 396, 97 N. Y. S. 280. A materialman seeking to enforce a lien has the burden of proof and his account must be so kept that it can be clearly ascertained what is chargeable against the building. Knudson-Jacob Co. v. Brandt [Wash.] 87 P. 43. A laborer who claims a lien on a bale of cotton has the burden to show that such bale was not included in a trust deed sought to be foreclosed. McCarty v. Key, 87 Miss. 248, 39 So. 780. In a suit to enforce a lien, findings that the contractor did not fully perform his contract and making deduction therefor, that the labor and materials furnished were worth a certain amount, are not inconsistent with findings that the contractor attempted in good faith to perform and had done so substantially. Bergfors v. Caron, 190 Mass. 168, 76 N. E. 655. In a suit for an accounting and to enforce a lien for railroad construction work, the complainant was held entitled to a discovery of books in defendant's possession necessary to establish his cause of action. Utah Const. Co. v. Montana R. Co., 145 F. 981.

93. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

94. Whether numerous buildings were built under two distinct contracts or under an original and a modified contract held a question of fact. Fleck v. Collins, 28 Pa. Super. Ct. 443. On undisputed facts it is a law question what work is new and what repairing. Porter v. Weightman, 29 Pa. Super. Ct. 488.

95. See 6 C. L. 621.

96. Under Comp. Laws, § 10723, authorizing a personal decree only when a portion of the lien remains unpaid, a defendant in a suit to enforce a lien may maintain a cross-bill for damages for failure to perform the contract according to its terms. Koch v. Sumner [Mich.] 3 Det. Leg. N. 487, 108 N. W. 725. Code 1896, § 2739, expressly provides that where the evidence shows a personal liability a judgment both in personam and in rem is to be rendered. McGeever v. Harris & Sons [Ala.] 41 So. 930.

97. Under a contract requiring an architect's certificate as a condition precedent to the contractor's right to payment, the contractor cannot recover a personal judgment in an action to enforce a lien without proof that he had obtained the certificate. Thompson-Starrett Co. v. Brooklyn Heights Realty Co., 111 App. Div. 358, 98 N. Y. S. 128. Under Code Civ. Proc. § 3412, providing that if a lienor fails to prove his lien he may have judgment for an amount found due him, a personal judgment is not authorized where the claimant never could have had a lien. Id. Code Civ. Proc. § 3412, expressly provides that a personal judgment may be had against the contractor only where a valid lien is not established. Murphy v. City of Watertown, 112 App. Div. 670, 99 N. Y. S. 6.

98. Ponti v. Eckels [Wis.] 108 N. W. 62.

99. Where in a suit to foreclose a lien the answer put in issue the material allegations, and a cross complaint for damages for failure to complete the contract was filed, and the jury brought in a general verdict for the plaintiff which the court set aside and entered, judgment without making further findings, held that as the jury did not find on all material issues the judgment must be set aside. Sandstrom v. Smith [Idaho] 86 P. 416. Decree held to have found the amount due the contractor. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

1. Municipal Court Act, Laws 1902, p. 1488, c. 580, § 1, gives such court no power to adjudge priority of liens nor to permit another lienor to be made a party and establish his lien. Drall v. Gordon, 101 N. Y. S. 171. Under Laws 1902, p. 1488, c. 580, § 1, a municipal court may render judgment for the amount due and declare it a valid lien, but may not render judgment for foreclosure and sale. Id.

2. Statute construed. Miller v. Calumet Lumber & Mfg. Co., 121 Ill. App. 56.

3. Hahn v. Bonacum [Neb.] 107 N. W. 1001. Evidence sufficient to show substantial performance. Id. In a suit to enforce a lien, evidence held sufficient to sustain a finding in favor of the claimant for an amount greater than found by the trial court. Id. Where a contractor intended in good faith to fulfill his contract but by inadvertence failed to furnish articles and work which could be remedied for a small amount, he is entitled to recover the contract price less such amount. Burgi v. Rud-

ity of the lien is not established.[4] In a suit to sell land to satisfy mechanics' and judgment liens, and also a subsequent trust lien which covers a part only of the land, it is error to decree a sale of the property as a whole,[5] and in an action against the owner and the contractor of property subject to mechanics' liens, it is error to decree to one who had no lien a charge on the "residue" of proceeds of the property after paying liens.[6] An order striking off a lien is a final disposition of a scire facias on the lien.[7]

Where the amount of the claim depends on reasonable value and cannot be ascertained by mere mathematical calculation, it is unliquidated and does not bear interest.[8]

Costs and attorney's fees.[9]—The fees of an attorney of one who institutes foreclosure proceedings may not be allowed out of the fund where claims of other lien holders are antagonistic and are represented by other attorneys.[10] Excessive attorney's fees should not be awarded.[11] An additional allowance for attorney's fees will not be made by the supreme court on appeal in an action to foreclose a lien.[12] In awarding costs the discretion of the court should be exercised fairly.[13]

§ 11. *Indemnification against liens.*[14]—A surety for the performance of the conditions of a contract is liable where the contractor defaults and the county for which the work was being done pays liens of laborers and material-men.[15]

MEDICINE AND SURGERY

§ 1. Public Regulation of the Business of Treating Disease (972). Revocation of License or Professional Status (974). Expulsion from Society (975). Prosecutions for Violations of Regulative Acts (975).
§ 2. Malpractice (977). Negligence by Nurses (977). Damages (978). Malpractice by Nonmedical Practitioners (978). Remedies and Procedure (978).
§ 3. Recovery of Compensation (979).
§ 4. Negligent Homicide by Physician (980).
§ 5. Regulation of the Keeping and Sale of Drugs and Medicines (980).
§ 6. Tort Liability of Druggists (980).

§ 1. *Public regulation of the business of treating disease*[15a] by legislation properly enacted[16] and consonant with the organic plan of the state[17] and its in-

gers [S. D.] 108 N. W. 253. Where a claim arose from construction of improvements on one lot and a portion of an adjoining one, but the statement only claimed a lien on one lot, the lienor was entitled to have his entire claim paid out of such lot. Perkins v. Boyd [Colo.] 86 P. 1045.

4. Rev. St. 1898, § 3324, expressly provides that where plaintiff in an action to establish a lien fails to do so but establishes a right to recover, he may have judgment against the party liable. Ponti v. Eckels [Wis.] 108 N. W. 62. Where the owner tenders a sum less than is claimed, he admits the validity of the lien to that extent, and enforcement should be so decreed though it is adjudged that the lien is invalid. Cameron & Co. v. Campbell [C. C. A.] 141 F. 32.

5. O'Neil v. Taylor, 59 W. Va. 370, 63 S. E. 471.

6. Where a materialman filed no lien, he has no claim against the owner and a judgment to be satisfied out of the "residue" after sale of the property is erroneous. Hampton v. Christensen, 148 Cal. 729, 84 P. 200.

7. Orr v. Rogers, 29 Pa. Super. Ct. 175.

8. Fox v. Davidson, 111 App. Div. 174, 97 N. Y. S. 603.

9. See 6 C. L. 621.

10. Title Guaranty & Trust Co. v. Burdette [Md.] 66 A. 341.

11. It is error to decree as part of plaintiff's costs $300 attorney's fees. O'Neil v. Taylor, 59 W. Va. 370, 53 S. E. 471.

12. Sweatt v. Hunt, 42 Wash. 96, 84 P. 1.

13. Though it is within the discretion of the court to award costs to the prevailing party, it is an abuse of discretion to tax the entire costs against subcontractors who were merely standing on their legal rights, where the main controversy was between the owner and principal contractor. Condon v. Church of St. Augustine, 112 App. Div. 168, 98 N. Y. S. 253.

14. See 6 C. L. 621.

15. Allen County v. U. S. Fidelity & Guaranty Co., 29 Ky. L. R. 356, 93 S. W. 44.

15a. See 6 C. L. 622.

16. Statute regulating the practice of medicine and surgery is sufficient to uphold the provision making violations punishable as misdemeanors. Act May 18, 1893, P. L. 94. Commonwealth v. Clymer, 30 Pa. Super. Ct. 61. Sess. Acts 1897, p. 166, construed. State v. Doerring, 194 Mo. 398, 92 S. W. 489.

17. Does not confer judicial power on administrative body. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. The Dentistry Act is not an infringement on the judiciary. State v. Doerring, 194 Mo. 398, 92 S. W. 489.

ternal policy as laid down in the constitution [18] is within the recognized police power,[19] and, as such, the revocation of a license may be "due process" though not accomplished judicially,[20] and though there is no provision for judicial appeal.[21] The matters committed to a state board must be couched in terms of such definiteness and certainty as constitute an ordained limit to their discretion.[22] Their power is to execute the legislative will as defined, and the making of rules thereto is not legislation.[23] Such regulative power extends only to such matters as concern public welfare; it does not reach internal management of professional schools.[24] Hence, it cannot control rates of tuition or forbid rebates of same or forbid matriculants from making up any deficiencies in their entrance qualifications,[25] and the practice of allowing matriculants to make up deficiencies during their early schooling being a common one and not being forbidden in a statute fixing qualifications is impliedly approved.[26] A law forbidding physicians to solicit patients through paid agents, is valid.[27]

The state board in Alabama has full authority to prescribe rules and regulations governing the issuance of certificates to practitioners,[28] and countersignature by a particular officer of the state board required by their rule is a condition precedent to the validity of a certificate or license to practice.[29] The Kentucky Dentistry act of 1904 does not require a dentist who prior to its passage had received his certificate and had it registered in the county of his residence, to again have it registered in the county or counties in which he practices,[30] A "reputable" college is one worthy of good repute and not merely esteemed so,[31] and reputability is distinct from and in addition to the requisites, of such a college and of its instruction.[32] The right to practice medicine is, like the right to practice any other profession, a valuable property right in which one is entitled to be protected and secured.[33] One having practiced in a state before removing therefrom does not thereby secure a vested right to practice therein whenever he may see proper [34] but is bound to conform to the laws in force at the time he undertakes to engage in the practice.[35] The mere fact that the remedies prescribed by a person in the state are sent from another

18. Comp. St. 1903, c. 65, art. 1, § 14, not void in that fees payable thereby are not required to be turned into state treasury. Munk v. Frink [Neb.] 106 N. W. 425.

19. Statutes prescribing the qualifications of practitioners and otherwise regulating the practice. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. Code, §§ 2579, 2580. State v. Wilhite [Iowa] 109 N. W. 730; Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773; State v. Kendig [Iowa] 110 N. W. 463. Act of May 18, 1893 (P. L. 94), is constitutional. Commonwealth v. Densten, 30 Pa. Super. Ct. 631. The practice of **dental surgery** is a profession or calling requiring special skill within the rule. Kettles v. People, 221 Ill. 221, 77 N. E. 472. The Dentistry Act is not invalid as a deprivation of property without due process of law. State v. Doerring, 194 Mo. 398, 92 S. W. 489. Dentistry Law does not grant special privileges or immunities. Act July 1, 1905 (Laws 1905, p. 321), §§ 3, 5, construed. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

20. Pub. Acts 1899, p. 372, No. 237, § 3, subd. 6. Kennedy v. State Board, etc., in Medicine [Mich.] 13 Det. Leg. N. 431, 108 N. W. 730. Burns' Ann. St. 1901, § 7322. Spurgeon v. Rhodes [Ind.] 78 N. E. 229, citing 2 C. L. 887, 888. It does not become judicial merely because an appeal is given. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

21. All that is necessary is that remedy in court be given for the infraction of a guaranteed right, but the statute need not give this. It exists even when the statute is silent. Kennedy v. State Board, etc., in Medicine [Mich.] 13 Det. Leg. N. 431, 108 N. W. 730.

22. Hewitt v. State Board of Medical Exam'rs, 148 Cal. 590, 84 P. 39.

23, 24, 25, 26. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

27. Acts 1903, p. 342, held valid. Thompson v. Van Lear, 77 Ark. 506, 92 S. W. 773.

28. Code 1896, §§ 3262, 5333, construed. Brooks v. State [Ala.] 41 So. 156.

29. Rule of State Medical Board held valid under Code 1896, §§ 3262, 5333. Brooks v. State [Ala.] 41 So. 156.

30. Registration in the county of practice is required of all subsequent thereto. Commonwealth v. Nevill, 29 Ky. L. R. 108, 92 S. W. 550. The law on the subject of practicing dentistry in Kentucky is to be determined from four different acts, namely, Act April 8, 1878 (1 Acts 1877-1878, p. 97, c. 847), May 10, 1886 (2 Acts 1885-1886, p. 523, c. 1017), May 1, 1893 (Ky. St. 1903, § 2636), and March 17, 1904 (Acts 1904, p. 92, c. 32). Id.

31, 32. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

33. Hewitt v. State Board of Medical Exam'rs, 148 Cal. 590, 84 P. 39.

34, 35. State v. Davis, 194 Mo. 485, 92 S. W. 484.

state does not negative the idea that the person prescribing was practicing or attempting to practice in the state.[36]

Revocation of license or professional status.[37]—To warrant revocation of license misconduct must be in some respect inimicial to the health, safety, or morals, of the public.[38] Felonious or grossly immoral conduct [39] and advertising of fraudulent, improbable, or misleading kind,[40] are among the grounds. The Wisconsin statute is retroactive on licenses antedating the law but procured by fraud,[41] and being not in respect to crime, is not objectionable as ex post facto,[42] but as to causes arising subsequently there must be a preordained ground of some certainty of meaning.[43] Where the unprofessional conduct must have been of a character likely to deceive and defraud the public, the proof must show that it had such likelihood.[44] Statutes of limitation of actions for penalties and forfeitures have no application to proceedings for revocation of licenses to practice when the ground of revocation is fraud in procurement thereof,[45] and in Wisconsin there is no bar to such action.[46] Revocation proceedings, though grounded on misconduct amounting to crime, are not criminal, and the guaranties pertinent to prosecutions for crime are inapplicable.[47] If the revocation is effected by action in the name of the state, the state board is not a proper party.[48] On its own motion or on petition of a college of which it has jurisdiction, the state dental board of Wisconsin may determine reputability of a college,[49] and, when so determined, the status of the college as a "reputable" one presumptively continues.[50] When action is taken destructive of an accredited standing, notice should first be given though the statute is silent in that regard.[51] The complaint should apprise the licensee of the nature of the charge and of the particular misdoing on which it is founded.[52] Thus, a complaint charging a licensee in words denominating a crime and particularizing the acts done by him as such crime is sufficient. Ordinarily injunction does not lie to prevent action of the state board toward revoking a license pursuant to the power conferred.[53] An injunction if proper in such case will not issue unless the imminence, illegality, and irreparability, of a threatened revocation are clearly shown by the evidence,[54] and the fact that the

36. Under Sess. Acts 1901, pp. 207-208, §§ 1, 4, 5. State v. Davis, 194 Mo. 485, 92 S. W. 484.

37. See 6 C. L. 625.

38. Hewitt v. State Board of Medical Exam'rs, 148 Cal. 590, 84 P. 39.

39. Statutes providing for revocation when the holder has been guilty of felony or gross immorality are valid. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

40. Under Pub. Acts 1899, p. 372, No. 237, § 3, subd. 6. Kennedy v. State Board, etc., in Medicine [Mich.] 13 Det. Leg. N. 431, 108 N. W. 730. A statutory provision declaring all advertising of medical business in which grossly improbable statements are made to constitute unprofessional conduct, without defining "grossly improbable statements," is void for uncertainty. Hewitt v. State Board of Medical Exam'rs, 148 Cal. 590, 84 P. 39.

41. Laws 1905, p. 726, c. 422, held to authorize a revocation of license issued prior to its passage for fraud in its procurement. State v. Schaeffer [Wis.] 109 N. W. 522.

42. State v. Schaeffer [Wis.] 109 N. W. 522.

43. The power to revoke a license when conferred on a board must be declared with such certainty and definiteness as to the grounds that the practitioner may know before hand what they are. Provision of St. 1901, p. 56, c. 51, held void in part for uncertainty in making the publication of "grossly improbable statements" a ground. Hewitt v. State Board of Medical Exam'rs, 148 Cal. 590, 84 P. 39.

44. Evidence held insufficient to show that advertisements of "Electric cure" were fraudulent and false. Macomber v. State Board of Health [R. I.] 65 A. 263.

45, 46. State v. Schaeffer [Wis.] 109 N. W. 522.

47. Jury trial compulsory process for witnesses and indictment not essential. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

48. State v. Schaeffer [Wis.] 109 N. W. 522.

49, 50. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

51. Ruling that college is no longer reputable. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

52. Charge was of procuring an "abortion," the particulars whereof were then given. Munk v. Frink [Neb.] 106 N. W. 425.

53. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

54. Verified bill on "information and belief" not enough even though hearing was on notice to defendants, they presenting affidavits that they were unprejudical. Spurgeon v. Rhodes [Ind.] 78 N. E. 228. Statements made by attorney of board as to what the board would do on trial of charges is not competent against them. Id.

evidence was procured by one secretly in the service of the state board,[55] which person has absented himself and will be absent at the hearing,[56] will not invoke such relief. While medical boards which proceed on accusation and hearing to revoke licenses may belong to the executive branch, their action has a "judicial" character making it reviewable as such[57] and the same is true of their other decisions of fact,[58] but prohibition will not issue to such a board.[59] A dental college though not a record party to a proceeding to license one of its graduates is directly aggrieved and may bring certiorari to a decision denying such college further recognition as reputable.[60] Such certiorari will reach neither the merits of a ruling within the jurisdiction nor a ruling which is wholly a usurpation.[61] The decision of the state dental board of Wisconsin acting fairly and reasonably and on evidence is conclusive on the merits of the matters committed to it.[62] On a certiorari an applicant who has been refused a license for failure to make the required grade cannot have his papers reexamined and regraded.[63] The reviewing courts cannot on a silent record take judicial notice of the falsity of extravagant claims for inventions or discoveries.[64]

Expulsion from society.—A society of professional persons may legally expel members thereof for unprofessional conduct,[65] and such expulsion is irremediable in the courts when the authority of the society is not transcended and no fraud or bad faith is shown,[66] the question of what constitutes unprofessional conduct being one for the society to determine;[67] nor is it essential that the evidence on which charges are based shall be submitted to the whole society.[68]

Prosecutions for violations of regulative acts.[69]—The criminal "practice of medicine" without license means the practice of it as commonly understood,[70] and a corporate charter to teach a system of healing but limiting acts thereunder to be done in accordance with law is no shield for an individual practicing medicine without a license, even though the charter purports to authorize such practice as pertains to his school.[71] A statute providing a penalty for any person practicing unless previously registered or licensed to practice in the state applies to the case of one unlawfully practicing prior to and at the time of its taking effect who thereafter practices in violation thereof.[72] A license must have every legal requisite to constitute a defense[73] and one asserting previous registration within an excepting clause must show registration at the time to which the exception applies.[74] Wrongful

55, 56. Spurgeon v. Rhodes [Ind.] 78 N. E. 228.

57. Code Civ. Proc. § 580, allows error to district court. Munk v. Frink [Neb.] 106 N. W. 425. Hence, a provision for certiorari [writ of review] as the exclusive remedy for an adverse decision by the board is warranted. Act March 3, 1899 (Sess. Laws 1899, p. 345), construed. Raaf v. State Board of Medical Exam'rs, 11 Idaho, 707, 84 P. 33. The authority of the Wisconsin Dentistry board under Laws 1903, p. 664, c. 411, to pass on the reputability of colleges, is neither legislative nor judicial, but quasi-judicial. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

58. Annulment of standing of dental college. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

59. It is not a judicial body or tribunal. State v. Goodier [Mo.] 93 S. W. 928.

60, 61, 62. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

63. Raaf v. State Board of Medical Exam'rs, 11 Idaho, 707, 84 P. 33.

64. Hence, when a charge of gross unprofessional conduct or conduct likely to defraud the public is based on such claims, evidence must be adduced to show their falsity or deceptive character. Macomber v. State Board of Health [R. I.] 65 A. 263.

65, 66. Bryant v. District of Columbia Dental Soc., 26 App. D. C. 461.

67. Charges based on falsely writing about and making charges of unprofessional conduct against his fellow members. Bryant v. District of Columbia Dental Soc., 26 App. D. C. 461.

68. Bryant v. District of Columbia Dental Soc., 26 App. D. C. 461.

69. See 6 C. L. 625.

70. State v. Heffernan [R. I.] 65 A. 284. Evidence held to show practice by one unlearned in medicine who gave treatments free but charged for a "nerve food" and for "massage." Id.

71. State v. Heffernan [R. I.] 65 A. 284.

72. Act July 1, 1905 (Laws 1905, p. 320), § 3, construed. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

73. Lacked countersignature. Brooks v. State [Ala.] 41 So. 156.

74. Registration under the Pennsylvania Act of June 8, 1891, was by the act expressly required to be made prior to March 1, 1894.

refusal of the board of examiners to issue a license to practice is no defense to a prosecution for practicing without a license,[75] nor is the fact that others are equally guilty.[76] One who has had no certificate or license to practice cannot attack the validity of a law on the ground that it confers an unlimited right of discretion to a particular body in granting and revoking licenses.[77]

A regulation penalizing the failure of physicians in charge of contagious disease cases to report the same to the board of health within a limited time does not apply when the physician merely diagnoses and refuses to treat.[78]

The indictment must be particular and certain enough to give accused notice of what will be produced against him at the trial.[79] If the statute defines the offense, its words may be used.[80] The indictment need not set forth the names of the accused's patients [81] nor aver that accused was not within a class excepted from the operation of the statute,[82] nor need a practicing on or prescribing for human beings be averred as contradistinguished from furnishing medicine for domestic animals.[83] The rule against charging several distinct and separate offenses in a single count does not prevent charging contemporaneous acts which together constitute the offense.[84] The burden is on accused to show in defense that he had a license.[85] As to medical matters of judicial knowledge, the court may use standard books as an aid to memory.[86] What amounts to practicing is not the subject of expert testimony.[87] On the issue of no license it is irrelevant that accused had a diploma,[88] or that he had practiced for a long time,[89] or that others practiced without license fully authenticated.[90] When defendant takes the stand he may be required to state the ingredients of a lotion administered by him,[91] and this is true even though the lotion is a secret compound and accused's own private property.[92] The evidence must show a "practicing." [93]

Instructions must not assume as true disputed facts as to whether the substance sold or administered was a drug.[94] The general law for commitment for nonpayment of fines applies in Illinois to fines for practicing dentistry without license.[95]

Registration in 1897 held unavailing. Commonwealth v. Densten, 30 Pa. Super. Ct. 631.

75. State v. Doerring, 194 Mo. 398, 92 S. W. 489.

76. State v. Wilhite [Iowa] 109 N. W. 730; Brooks v. State [Ala.] 41 So. 156.

77. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

78. Charitable dispensary physician held not in charge of a contagious disease case brought to him for diagnosis and treatment at the dispensary, within Act Cong. Dec. 20, 1890 (26 Stat. at L. 691, c. 25). Johnson v. District of Columbia, 27 App. D. C. 259.

79. State v. Wilson [Vt.] 65 A. 88.

80. Indictment for practicing medicine without a license in violation of Code, §§ 2579, 2580, held sufficiently certain. State v. Wilhite [Iowa] 109 N. W. 730; State v. Kendig [Iowa] 110 N. W. 463. Charge that accused "did hold himself out to the public as a practicing physician in this state," held to state no crime under the Vermont statutes. State v. Wilson [Vt.] 65 A. 88.

81. State v. Doerring, 194 Mo. 398, 92 S. W. 489.

82. State v. Doerring, 194 Mo. 398, 92 S. W. 489; State v. Kendig [Iowa] 110 N. W. 463.

83. Under Code, §§ 2579, 2580. State v. Kendig [Iowa] 110 N. W. 463.

84. Indictment for practicing medicine without a license held sufficient. State v. Wilhite [Iowa] 109 N. W. 730.

85. Kettles v. People, 221 Ill. 221, 77 N. E. 472. Hence, error cannot be predicated on the admission of parol evidence to prove the state of the registration record. Commonwealth v. Clymer, 30 Pa. Super. Ct. 61.

86. A standard medical dictionary is proper for this purpose on a prosecution for practicing medicine without a license, as an aid to the memory and understanding of the court. State v. Wilhite [Iowa] 109 N. W. 730.

87. State v. Heffernan [R. I.] 65 A. 284.

88, 89. Brooks v. State [Ala.] 41 So. 156.

90. Could not show that other physicians were practicing in violation of the rule requiring certificates to be countersigned by a member of the board. Brooks v. State [Ala.] 41 So. 156.

91, 92. State v. Heffernan [R. I.] 65 A. 284.

93. Held sufficient. State v. Kendig [Iowa] 110 N. W. 463. Evidence held to show a practicing of medicine within Code, § 2580, forbidding practice without a license. State v. Wilhite [Iowa] 109 N. W. 730. To show that accused had engaged in the practice of medicine within Gen. Laws 1896, c. 165, as amended by c. 926, p. 336, Public Laws 1900-1901. State v. Heffernan [R. I.] 65 A. 284.

94. Charge that a person who uses neither drugs, medicine, or surgery, cannot be said to engage in the practice of medicine, was properly refused as assuming that a certain lotion was not a medicine. State v. Heffernan [R. I.] 65 A. 284.

95. Cr. Code, § 14, div. 14. Kettles v. People, 221 Ill. 221, 77 N. E. 472.

§ 2. *Malpractice.*[96]—In the absence of special contract, a practitioner is only required to exercise such reasonable and ordinary skill and diligence as are ordinarily exercised by the average of the members of the profession in good standing, in similar localities, and in the same general line of practice, regard being had to the state of medical science at the time.[97, 98] He is not required to use the highest degree of skill and diligence possible,[99] and is never considered as warranting a cure in the absence of a special contract for that purpose,[1] and is not liable for an error of judgment [2] unless it is so gross as to be inconsistent with that degree of skill which it is the duty of a practitioner to possess.[3] Ordinarily, consent of a patient or some one authorized to act in his behalf must be obtained as a prerequisite to the legal right of a practitioner to perform an operation [4] but exceptions to the rule have been suggested,[5] and the absence of the father's consent to an operation on an infant, killed by the anaesthetic, has been held not to give a cause of action for death in favor of the infant's estate.[6] Persons who, pretending to be a corporation not eligible to license, engage in dentistry are personally liable for malpractice by a servant.[7]

Negligence by nurses.—The lessor of a sanitarium who had relinquished his interest prior to a negligent act of a nurse therein cannot be held for the damage caused thereby, though the patient injured had been admitted prior to the execution of the lease,[8] but the lessee in charge at the time of the negligent act is responsible.[9] The management of a sanitarium is responsible for the negligence of a nurse furnished for attention to a patient admitted for treatment by an outside physician.[10] A physician is not liable for the negligence of a nurse employed by a patient resulting in injury to the patient unless with knowledge of the negligent act he fails to protect the patient.[11]

A medical witness who through negligence injures the cause of his employer is liable for the damage caused thereby.[12]

96. See 6 C. L. 626.

97, 98. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147. The standard of skill and learning required is limited to that ordinarily possessed by those practicing in similar localities. Ferrell v. Ellis, 129 Iowa, 614, 105 N. W. 993. Instruction in action against surgeon for malpractice in setting dislocated arm omitting limitation as to locality, held prejudicial from fact that surgeons from towns and cities ranging in population from 690 to 5,000 testified while the town wherein defendant practiced was too small to find place in the same census enumeration. Id.

99. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147.

1. Champion v. Kieth [Okl.] 87 P. 845. In action for malpractice the success of the operation is not the criterion of defendant's liability, but the real standard is the exercise of proper care. Awde v. Cole [Minn.] 109 N. W. 812. Failure to effect a cure does not alone raise a presumption of want of skill or negligence on the part of the practitioner. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147. The exercise of a reasonable degree of skill and care exonerates the practitioner, irrespective of results. Peterson v. Wells, 41 Wash. 693, 84 P. 608. A physician in setting a broken limb does not undertake to effect a cure or restore the limb to its normal condition. Id.

2. Where a practitioner exercises ordinary skill and diligence, keeping within recognized and approved methods, he is not liable for the result of a mere mistake of judgment. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147.

3. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147.

4. Evidence held insufficient to raise an implication of consent to the removal of plaintiff's uterus. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, afg. 118 Ill. App. 161.

5. As where the patient desires or consents that an operation be performed and unexpected conditions develop or are discovered in the course of the operation (Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, afg. 118 Ill. App. 161), or in cases of emergencies, when action must be taken immediately for the preservation of life or health and it is impracticable to obtain consent (Id.).

6. Where a surgical operation is undertaken to be performed on an infant without the express consent of the father and the infant dies as the result of the preliminary administration of an anaesthetic, no cause of action necessarily arises in favor of the deceased's administrator for the death so caused under the Michigan Death Act, there being no want of skill disclosed. Bakker v. Welsh, 144 Mich. 632, 13 Det. Leg. N. 372, 108 N. W. 94.

7. Mandeville v. Courtright [C. C. A.] 142 F. 97.

8, 9, 10. Stanley v. Shumpert, 117 La. 255, 41 So. 565.

11. As where a nurse placed a hot stone under the patient's legs and burnt them. Awde v. Cole [Minn.] 109 N. W. 812.

12. Hence, such negligence is defensive

Damages.[13]—A physician's liability for malpractice in the treatment of an injury caused by the negligence of a third person is not necessarily less than that of the first tort feasor.[14] In suing for permanent injury from the negligent setting of a bone, matters relating to a resection to give plaintiff better results are not within the issues.[15] Since the law infers pain and suffering from personal injury, direct proof of pain and suffering is not required to warrant assessment of actual damages in an action for removal of an important organ of the body without consent of the patient.[16] Pain is ordinarily an element of damages, but it must be within the issues.[17] Exemplary damages are recoverable for a proved trespass to the person, as by performing an operation and removing an important bodily organ without the patient's consent,[18] or when a reckless disregard of consequences is shown to have existed.[19] As in other cases the amount of damages is largely for the jury.[20] A patient at a sanitarium who through the mistake of a nurse in charge is caused intense suffering is entitled to nominal damages therefor, though the suffering was only momentary and resulted in no other injury.[21] For an operation performed without consent of the patient, it is immaterial in Illinois that the form of action adopted is trespass on the case rather than trespass.[22]

Malpractice by nonmedical practitioners.[23] *Remedies and procedure.*—The general rule as to the sufficiency of an allegation of negligence obtains in actions for malpractice.[24] The burden is on plaintiff to prove negligence [25] by sufficient [26] evidence, and on defendant to show binding consent to an operation.[27] A court cannot say as a matter of common knowledge that a dentist's negligence in allowing an

matter in an action for compensation. Coyne v. Baker, 2 Cal. App. 640, 84 P. 269.

13. See generally, Damages, 7 C. L. 1029.

14. Froman v. Ayars, 42 Wash. 385, 85 P. 14.

15. Evidence as to cost of resection held inadmissible. Albertson v. Lewis [Iowa] 109 N. W. 705. Instruction permitting recovery for expense of resection operation held erroneous. Id.

16. As to removal of the uterus and ovaries. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, afg. 118 Ill. App. 161.

17. In an action for malpractice in setting a bone, where the only matter appearing on which a charge of negligence could be sustained was the imperfect opposition and no evidence that any pain suffered or to be suffered might be due to that, the matter of a possible future operation not being in the case, no recovery could be had for pain and suffering. Albertson v. Lewis [Iowa] 109 N. W. 705.

18. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, afg. 118 Ill. App. 161.

19. Where an unlicensed dentist extracted from plaintiff's jaw what he supposed to be a root or process, but what was, in fact, a portion of the jaw bone, a verdict for $4,000 including $1,500 exemplary damages was warranted. Mandeville v. Courtright [C. C. A.] 142 F. 97.

20. Five thousand dollars held not excessive damages for amputation of left leg of one classifiable as a common laborer whose life expectancy was twenty-six years. Froman v. Ayars, 42 Wash. 385, 85 P. 14.

21. As by the use of pure alcohol for dropping in the eye, when the prescription called for a weak solution. Stanley v. Schumpert, 117 La. 255, 41 So. 565.

22. Under statutes abolishing the distinction between trespass on the case and trespass. Pratt v. Davis, 118 Ill. App. 161, afd. 224 Ill. 300, 79 N. E. 562.

23. See 6 C. L. 627.

24. Complaint for dentist's negligently permitting an extracted tooth to get into plaintiff's lung held sufficient. McGehee v. Schiffman [Cal. App.] 87 P. 290.

25. The burden is on plaintiff to prove negligence or want of skill in action for malpractice. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147.

26. **Held sufficient** to sustain a finding of negligence on the part of a dentist in allowing a tooth to drop into his patient's lung. McGehee v. Schiffman [Cal. App.] 87 P. 290. Whether negligence was shown in the treatment of a broken limb held a question for the jury. Peterson v. Wells, 41 Wash. 693, 84 P. 608; Froman v. Ayars, 42 Wash. 385, 85 P. 14.

Held insufficient to show gross error of judgment in the treatment of an ankle for dislocation instead of fracture. Dye v. Corbin, 59 W. Va. 266, 53 S. E. 147. Treatment of a patient's hip for dislocation instead of fracture of the surgical neck of the femur. Champion v. Kieth [Okl.] 87 P. 845.

27. In an action for removing without plaintiff's consent an important organ of her body in an operation performed by defendant, when defendant relies on the consent of another as a defense, the burden is on him to show mental incapacity of the plaintiff or consent of such other person (Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, afg. 118 Ill. App. 161), and failure to prove the first alternative renders proof of the second futile, even though it be the patient's husband (Id.).

Evidence held to have no tendency to show husband's consent to operation on his wife for removal of uterus. Pratt v. Davis, 224 Ill. 300, 79 N. E. 562, afg. 118 Ill. App. 161.

extracted tooth to drop into the patient's lung was impossible without some other agency acting upon it.[28]

§ 3. *Recovery of compensation.*[29]—The request of the patient for treatment and a promise of reasonable compensation therefor may be implied from the circumstances of the case.[30] When one is hurt through the negligence of a common carrier and requires prompt medical attendance, and no surgeon of the company is obtainable, the representative of the company in authority at the time and place of accident has a right to employ a physician, and thus, for the time being at least, to bind the company to pay for his reasonable services.[31] The superintendent of such a corporation has power to bind the company.[32] Authority of an agent to employ a physician may be supplied by ratification.[33] Slight acts of ratification of employment by a subordinate employe are sufficient to bind the corporation.[34] But where the surgeon so called is required to notify superior officers and fails to do so it does not deprive him of his right to compensation for such reasonable length of time as would have been required for notice and further instructions,[35] though in the absence of a waiver of the rule [36] no further compensation can be recovered in such cases.[37] An express contract for compensation is not defeated by the falsity of a mere opinion by the physician as to the probable duration of treatment.[38] Where the price for services is not agreed on at the time of employment, the physician may, in an action for compensation, show that he was busily engaged in the pratice of his profession,[39] especially where the nature of the services performed makes the possession of certain qualifications constitute an important element in the value of the services.[40] Fees for medical attention rendered in cases of infectious and dangerous communicable diseases,[41] or to paupers or persons without means,[42] are often required to be paid by the municipality in which the services are rendered, and a

28. McGehee v. Schiffman [Cal. App.] 87 P. 290.

29. See 6 C. L. 627.

30. Evidence that plaintiff's testator had performed an operation for pay on a patient shortly prior to the operation for which compensation was sought, that the last operation was absolutely necessary "on the chance" to save the patient's life, and that the patient was operated on, warrants an inference of a request on the part of the patient to have the operation performed with an understanding that a reasonable compensation would be paid. Pryor v. Milburn, 101 N. Y. S. 34.

31, 32. Chicago Consol. Traction Co. v. Mathews, 117 Ill. App. 174.

33. Ratification held a question for the jury. Hall v. New York, etc., R. Co., 27 R. I. 525, 65 A. 278. When a street railway company injures a stranger and then requests a physician to care for him, or with knowledge of the facts ratifies the act of its conductor in employing him, or with knowledge fails and neglects to countermand such employment, the company is liable to such physician in a reasonable sum for his services. Chicago Consol. Traction Co. v. Mathews, 117 Ill. App. 174.

34. Where superintendent in answer to question as to continuation of services made no other reply than that he would send out one of the surgeons of the company, ratification could be inferred. Chicago Consol. Traction Co. v. Mathews, 117 Ill. App. 174.

35. Hays v. Wabash R. Co., 119 Mo. App. 439, 95 S. W. 299.

36. Waiver held not established by proof of statement of claim agent having no authority in personal injury cases. Hays v. Wabash R. Co., 119 Mo. App. 439, 95 S. W. 299.

37. Hays v. Wabash R. Co., 119 Mo. App. 439, 95 S. W. 299.

38. The statement by a physician that treatment in a given case might continue six, seven, or eight, weeks was not a representation that the case would take any definite time, but merely the expression of opinion. Denenholz v. Kelly, 97 N. Y. S. 389.

39. Sills v. Cochems [Colo.] 85 P. 1007.

40. As where the plaintiff was called because of peculiar skill as a diagnostician. Sills v. Cochems [Colo.] 85 P. 1007.

41. Act No. 7, p. 6 (Pub. Acts 1903). Dawe v. Board of Health of Monroe [Mich.] 12 Det. Leg. N. 741, 109 N. W. 433. Under Act No. 7, p. 6 (Pub. Acts 1903), the local board of health is required to keep an itemized and separate statement of expenses and render the same to the board of supervisors by filing the same with the county clerk (Id.), whereupon the entire responsibility rests on the board of supervisors to pass on the necessity for such expenses (Id.), the services performed (Id.), the justice and reasonableness thereof (Id.), and to allow such parts thereof as the board shall deem just (Id.), nor is the action of the board of health affected by a change in the personnel of its members (Id.); and when the employment is denied, an issue of fact is presented for the determination of the board of supervisors (Id.), and it is the duty of the latter to determine whether the board of health made a contract for the claimant's services (Id.).

42. Rev. St. 1903, p. 1369, § 4. Dieffenbacher v. County of Mason, 117 Ill. App. 103.

statute of this kind cannot be nullified by a rule of the municipality unreasonably limiting the amount collectible.[43] The question of the reasonableness of a rule of a municipality, limiting the amount collectible from it as fees for medical attention to persons whose duty it is to furnish same, is one of law for the court.[44]

Negligence of a medical witness in giving testimony injurious to his employer's cause is a defense to an action for compensation.[45]

§ 4. *Negligent homicide by physician.*[46]

§ 5. *Regulation of the keeping and sale of drugs and medicines.*[47]—The regulation of the drug trade is a proper police function within constitutional limitations.[48] The distribution by an agent of separate packages of drugs shipped from another state on orders taken by a different agent is interstate traffic not subject to regulation.[49] A law has been held valid and based on proper classification which required dispensation by "registered pharmacists" in larger towns but permitted "assistant registered pharmacists" in the smaller towns.[50] On a prosecution for violating such act, it is immaterial whether druggists think the classification wise.[51] Whether it interferes with the "practice" of a physician prosecuted for leaving an unqualified person in charge of his drug store is irrelevant to a defense that an exception allowed a physician to dispense "his own medicines or supply his patients."[52] In Texas the statute makes criminal the prescribing of certain drugs to habitual users unless to treat and cure the habit,[53] and the indictment must negative every part of such exception.[54] Licensed druggists are subject to prosecution under the Missouri dramshop act for unlawful sales of intoxicating liquor.[55] An instruction as to the criminal sale of drugs must be restricted to the time since when a sale like that charged was unlawful.[56]

Individual members of a board which illegally refuses to issue a license are not civilly liable therefor, having acted in good faith and without malice.[57]

§ 6. *Tort liability of druggists.*[58]—The care required of druggists in compounding prescriptions is to be measured by the danger that is manifest,[59] but druggists in compounding prescriptions are not absolute insurers[60] and are bound only

43. Rule limiting fee to $1 per visit held void for unreasonableness. Dieffenbacher v. County of Mason, 117 Ill. App. 103. To hold a municipality liable for fees for medical attention rendered under the Pauper Act (Rev. St. 1903, p. 1369, § 24) on an implied contract, it is essential to show that the overseer had notice of the necessity therefor (Id.), and that he refused or neglected to act in the premises (Id.), or, when the question of notice is out of the case, that either the overseer or the board, with full knowledge of the facts, subsequently recognized the liability of the municipality therefor (Id.).

44. Submission of question to jury as one of fact held error. Dieffenbacher v. County of Mason, 117 Ill. App. 103.

45. Coyne v. Baker, 2 Cal. App. 640, 84 P. 269.

46. See 4 C. L. 639.

47. See 6 C. L. 628.

48. State v. Kumpfert, 115 La. 950, 40 So. 365. Does not prohibit the freedom of contract, nor deny equal protection of the laws, or transgress due process of law. Id.

Title of the Louisiana Pharmacy Law is sufficient to sustain its validity. Act No. 66, p. 74, § 1888, construed. State v. Kumpfert, 115 La. 950, 40 So. 365.

49. Revisal 1905, §§ 5150, 5151, construed. State v. Trotman, 142 N. C. 662, 55 S. E. 599.

50. Rev. St. 1898, § 1409g. State v. Evans [Wis.] 110 N. W. 241. The fact that it provides no method of ascertaining or proving the prescribed population of the towns and cities where it applies does not affect its validity. Id. Said law is not ex post facto. Id. An amendment, if void because it allowed persons unregistered but of a prescribed experience to dispense, held not to carry with it said act. Id.

51. Opinions of druggists are inadmissible to show absence of reason for making the discrimination. State v. Evans [Wis.] 110 N. W. 241.

52. State v. Evans [Wis.] 110 N. W. 241.

53, 54. "Did not prescribe for the use of" said user is bad as a negation of a prescription, etc., to treat or cure the habit. Blair v. State [Tex. Civ. App.] 16 Tex. Ct. Rep. 702, 96 S. W. 23; Blair v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 171, 97 S. W. 89.

55. State v. Heibel, 116 Mo. App. 43, 90 S. W. 758.

56. Sale of cocaine without prescription. Brendecke v. People, 118 Ill. App. 42.

57. Monnier v. Godbold, 116 La. 165, 40 So. 604.

58. See 6 C. L. 628.

59, 60. Faulkner v. Birch, 120 Ill. App. 281.

to the exercise of ordinary care.[61] Defendant is entitled to show the care exercised by him in compounding a prescription when sued for alleged negligence in the compounding.[62] Mere ignorance of a druggist of the explosiveness of an article sold is insufficient as a predicate for negligence but it must be shown that the ignorance arose from the absence of due care.[63] The proof should show that the plaintiff was the one to whom defendant undertook the duty,[64] but a variance in this respect was waived by general objection when the one dealing with the druggist acted for plaintiff.[65] It is a fact question whether the erroneous substitution of a similar but dangerous drug is negligence,[66] and it is not as matter of law due care to rely on the warranty of genuineness by him who sold the drug to defendant,[67] but it is not proper practice to single out facts showing such mistake in charging the jury.[68]

MERCANTILE AGENCIES.[69]

MERGER IN JUDGMENT; MERGER OF CONTRACTS; MERGER OF ESTATES, see latest topical index.

MILITARY AND NAVAL LAW.

§ 1. Military and Naval Organization, Maintenance and Enlistment (981).
A. Regular Army and Navy and Marine Corps (981). Pay and Subsistence (982). Traveling Expenses and Mileage (983). Compensation for Lost Equipment (983). Relief from Liability for Lost Property (983). Commutation for Quarters (983).
B. Militia (983).
§ 2. Regulations and Discipline; Promotion and Discharge (983).
§ 3. Military and Naval Tribunals (984).
§ 4. Civil Status, Rights and Liabilities of the Military and Navy and of Military and Naval Reservations (984).
§ 5. Martial Law (985).
§ 6. Soldiers' Homes and Indigent Soldiers (985).

1. *Military and naval organization, maintenance, and enlistment. A. Regular army and navy and marine corps.*[70]—Enlistment of a minor under eighteen years of age in the navy without parental consent is voidable,[71] while in the marine corps, which is held to be in this respect governed by army rather than navy regulations, such consent is needful as to all minors.[72] Habeas corpus will lie at the instance of

61. Ordinary care in making the distinction between codiene and atropine requires a very great degree of care. Faulkner v. Birch, 120 Ill. App. 281.

62. Where atropine was used instead of codiene, defendant's testimony was admissible to describe the appearance of the drug which he used (Faulkner v. Birch, 120 Ill. App. 281), to show whether there was a general similarity in appearance to the naked eye between them (Id.), whether by the naked eye he could distinguish atropine from codeine (Id.), and whether he had ever handled any codeine that had same appearance to the naked eye as the drug he had used (Id.), and he was entitled to show by other druggists in what forms atropine and codeine were received by druggists (Id.), their color, shape, process of manufacture, similarity, how distinguished and the like (Id.).

63. Evidence held insufficient to establish negligence in the sale of sparklet bottle and carbonic acid capsules for use therein in aerating liquids. Bruckel v. Milhau's Son, 102 N. Y. S. 395. Instruction held erroneous as eliminating the element of due care. Id.

64. Where the complaint alleged a hiring of defendant by plaintiff to fill a prescription, and the proof showed that the prescription was filled for another person, there was a variance. Faulkner v. Birch, 120 Ill. App. 281.

65. Failure to make more than a general objection to evidence held a waiver of variance. Faulkner v. Birch, 120 Ill. App. 281.

66. Use of atropine in a prescription calling for codeine. Faulkner v. Birch, 120 Ill. App. 281.

67. Faulkner v. Birch, 120 Ill. App. 281.

68. Where plaintiff sued for injury by use of wrong drug in prescription, a charge that proof that the defendant did not use the drug specified in the prescription in compounding the same and was mistaken as to the real nature of the drug he did use is not evidence of negligence on his part was properly refused. Faulkner v. Birch, 120 Ill. App. 281.

69. No cases have been found for this subject since the last article. See 2 C. L. 890.

70. See 6 C. L. 638.

71. Rev. St. §§ 1418, 1419 (Comp. St. 1901, p. 1007) construed. Ex parte Lisk, 145 F. 860.

72. It is now held, contrary to previous decisions, by a different process of reasoning, that the naval regulations do not of their own operation cover enlistments in the marine corps (McCalla v. Facer [C. C. A.] 144 F. 61. See 6 C. L. 638, n. 58), but that as the secretary of the navy has and exercises the authority to prescribe regulations for enlistment therein (McCalla v.

the father of such infant,[73] and it is no answer to the writ that the naval authorities held the minor for trial for fraudulent enlistment;[74] but arrest for a military offense, committed before the enlistment was rescinded by the parent, authorizes detention.[75]

Pay and subsistence.[76]—Though charged therefor on their clothing account, soldiers in the regular army receive but a qualified interest in clothing issued to them,[77] and such clothing is within a statute making it a criminal offense to purchase or receive in pledge any public property from a person not having the right to sell or pledge the same.[78] Officers of volunteer regiments are by statute entitled on muster out to two months extra pay [79] at the rate to which they were entitled when mustered out,[80] and the act provides for officers resigning after muster out of their regiments is ordered.[81] The navy personnel act provides for pay at a higher rate for sea duty than for shore duty,[82] but allows extra pay for shore service in foreign lands; [83] but service in remote places being incidental to the Revenue Cutter service, the officers thereof are not entitled to the extra pay for service beyond the limits of the United States.[84] The rate of pay to which one is entitled while sick is governed by the duty on which he was engaged at the time he was ordered on sick leave.[85] An officer detained for special service on the grant of a furlough to his regiment before mustering it out, and who is promoted during such furlough, is entitled to extra pay only of the rank he held when detained.[86] An officer ordered to a command beyond his rank in forces operating against the enemy [87] is entitled to additional compensation, though such command would have devolved on him by seniority without an order.[88] The right of one appointed to the navy from civil life to five years' constructive service [89] does not apply to one appointed for temporary service.[90] Under a statute providing that if militia regiments enlist as a body their officers shall continue officers of the

Facer [C. C. A.] 144 F. 61), and having prescribed that the regulations for the recruiting service of the army be applied to the recruiting service of the marine corps (Id.), a minor can not be lawfully enlisted in the marine corps under the army regulations promulgated September 15, 1904 (Id.).

73. Ex parte Lisk, 145 F. 860.

74. Rev. St. § 1624, art. 22 (U. S. Comp. St. 1901, p. 1112), and act March 3, 1893, c. 212, 27 Stat. 716 (U. S. Comp. St. 1901, p. 1006) construed. Ex parte Lisk, 145 F. 860.

75. The court in deciding submits with apparent reluctance to the higher authority of the circuit court of appeals in United States v. Reaves [C. C. A.] 126 F. 127. In re Carver, 142 F. 623.

76. See 6 C. L. 638.

77. Such as caps, gloves, shoes, and coats. United States v. Hart, 146 F. 202.

78. Rev. St. § 5438 (U. S. Comp. St. 1901, p. 3674) construed. United States v. Hart, 146 F. 202.

79. The act of May 26, 1900, relating to extra pay on muster out of officers of volunteer regiments is not limited to the Spanish War. Repetti v. U. S., 40 Ct. Cl. 240. Withdrawing dicta in Daggett v. U. S., 39 Ct. Cl. 209. Heirs of regular officer killed in battle while serving by permission in volunteer regiment are entitled to two months' extra pay. Wallace v. U. S., 41 Ct. Cl. 352.

80. One detached and ordered to his home and immediately afterwards discharged i on being allowed two months' extra pay entitled to sea pay, not waiting orders pay. Hite v. U. S., 41 Ct. Cl. 256.

81. An officer who resigns after a general order for the muster out of volunteer regiments in the Phillipines, but before special order for the muster out of his regiment is within a statute making certain allowances to officers resigning after the muster out of their organization is ordered. Bishop v. U. S., 41 Ct. Cl. 151.

82. An officer having also shore duty and living on shore is not entitled to sea pay because assigned to command of a training ship in addition to his shore duty. Mahan v. U. S., 40 Ct. Cl. 36.

83. The provision of the navy personnel act relating to extra pay on shore service in foreign lands applies to all navy officers, though added as a proviso to an act relative only to officers of the line, etc. Prindle v. U. S., 41 Ct. Cl. 8.

84. Wiley v. U. S., 40 Ct. Cl. 406.

85. Whether officer in hospital for treatment is entitled to sea pay depends on whether he was on sea duty when ordered to hospital. Ackley v. U. S., 40 Ct. Cl. 216. The status of a sick soldier during the time his regiment is on furlough depends on whether he was unfit for duty when the furlough was granted. Legg v. U. S., 40 Ct. Cl. 115.

86. Terrell v. U. S., 40 Ct. Cl. 78.

87. A regiment at instruction camp in the interior of the United States during the Spanish War is operating against the enemy. Mitchell v. U. S., 41 Ct. Cl. 36.

88. Mitchell v. U. S., 41 Ct. Cl. 36.

89. Assistant civil engineer in navy appointed from civil life is entitled to the five years' constructive longevity provided by act Mar. 3rd, 1899. Thurber v. U. S., 40 Ct. Cl. 489.

90. Nelson v. U. S., 41 Ct. Cl. 157.

same grade in the regiment, when received into the Federal service,[91] an assistant surgeon of militia holding the grade of captain continues in such grade, though in the regular army assistant surgeons rank only as lieutenants.[92] And mistake in assignment of rank does not deprive a volunteer officer of pay to which he was entitled.[93] A naval officer assigned to duty as flag lieutenant on the personal staff of an admiral is an "aid" and entitled to $200 a year extra.[94] Right of soldiers enlisted during Spanish war to compensation runs from enrollment and not from mustering in.[95] Many of the volunteers having been paid by their states for the period between enrollment and muster in, and the states having been reimbursed by the Federal government, it was at first held that soldiers so paid could not recover from the United States pay for such period,[96] but, it appearing that many claims for such compensation had been allowed by the comptroller, it was later decided in the interest of uniformity that all should be allowed.[97] In a later case, it appearing that the policy of the comptroller had changed, the court of claims reverted to its original holding.[98] The appointment of a retired naval officer, who has been restored to the active list in time of war as meteorologist at a navy yard with his salary as meteorologist payable from such fund, entitles such officer to draw salary both as retired naval officer and meteorologist, but not to pay at the rate for such officers on the active list.[99]

Traveling expenses and mileage.[1]—An officer traveling under orders without troops held entitled to mileage less cost of transportation furnished him.[2] Approval by the secretary of war of an oral order directing travel entitles to mileage.[3] One seeking to recover travel pay and allowances based on discharge in 1865 must rebut presumption that he was furnished transportation in kind.[4]

Compensation for lost equipment.[5]—The accounting officers had authority to reduce the valuation approved by the secretary of war on property claimed for under the act to reimburse officers and crew for property destroyed in the loss of the Charleston.[6]

Relief from liability for lost property.—A disbursing officer, who allows a messenger carrying a large sum of money out of his sight and does not examine the package supposed to contain such money for several hours after it is returned, is guilty of negligence precluding relief.[7]

Commutation for quarters.[8]—The rights to rent quarters and obtain commutation of quarters when those assigned are inadequate can only be exercised with the approval of the secretary of war.[9] A paymaster ordered to his home to settle his accounts and await orders is entitled to commutation for quarters during the time allowed for settling his accounts.[10] An officer detailed at his own request to act as professor of military science at a college is not entitled to commutation for quarters.[11]

(§ 1) *B. Militia.*[12]

§ 2. *Regulations and discipline; promotion and discharge.*[13]—A cadet in the naval academy is not an officer within Rev. St. § 1624, providing that no officer

91. Act April 22, 1898.
92. Hawkins v. U. S., 40 Ct. Cl. 110.
93. Nutt v. U. S., 41 Ct. Cl. 368.
94. Miller v. U. S., 41 Ct. Cl. 400.
95, 96. Burnham v. U. S., 40 Ct. Cl. 166.
97. New Jersey v. U. S., 40 Ct. Cl. 493; Hovey v. U. S., 40 Ct. Cl. 39.
98. Boyd v. U. S., 41 Ct. Cl. 438.
99. Hayden v. U. S., 38 Ct. Cl. 39.
1. See 6 C. L. 641.
2. Sutherland v. U. S., 41 Ct. Cl. 209.
3. Mueller v. U. S., 41 Ct. Cl. 240.
4. Sanderson v. U. S., 41 Ct. Cl. 230.
5. See 6 C. L. 641. Act of Mar. 3, 1885, does not impair right of officers to reimbursement for horses killed in service. Cox v. U. S., 41 Ct. Cl. 86.
6. Little v. U. S., 41 Ct. Cl. 408.
7. Stevens v. U. S., 41 Ct. Cl. 344.
8. See 6 C. L. 641.
9. Moses v. U. S., 41 Ct. Cl. 27.
10. Colhoun v. U. S., 41 Ct. Cl. 31.
11. Spencer v. U. S., 41 Ct. Cl. 430.
12, 13. See 6 C. L. 642.

shall be dismissed except on sentence of court martial;[14] but midshipmen at the naval academy who were called into active service in the Civil War are "officers who served in the Civil War" and are entitled to be retired with the rank of the next higher grade.[15]

§ 3. *Military and naval tribunals.*[16]—An officer of the regular army though temporarily attached to a volunteer command, is not eligible as a member of a court martial to try a volunteer officer.[17] In the absence of provision for review the decisions of military tribunals created by congress are not reviewable.[18] Where the decisions of a military tribunal are subject to the approval or disapproval of the president, they are, in effect his acts,[19] and it will not be presumed that congress intended that the decisions of the president, when called on to exercise judgment and discretion in the performance of official duties should be reviewable.[20] A statute making punishable as a misdemeanor the willful refusal of a civilian witness to appear, produce documents or testify at a court martial of the army, does not apply to a refusal based on self-incrimination,[21] nor does the failure of a witness to there produce documents on a subpoena duces tecum render him punishable under the act when it is made to appear that the witness had destroyed the document before the service of the subpoena,[22] nor does a statute authorizing a court martial to punish in its decretion any person who, in the presence of the court, uses menacing words, signs, or gestures, or who disturbs its proceedings by any riot or disorder, apply to a witness' mere refusal to testify.[23] Though the acts of congress touching army and navy courts martial in the United States are constitutional,[24] and, though the decisions of a military court martial cannot as a general rule be set aside or reviewed by the civil courts,[25] yet the decision of such court that questions propounded were answerable without subjecting an objecting civilian witness to incrimination is not conclusive as to an order of the court adjudging the witness guilty of contempt for refusing to answer.[26]

§ 4. *Civil status, rights and liabilities of the military and navy and of military and naval reservations.*[27]—In some states sureties in a recognizance are entitled to discharge when surrender of their principal is prevented by the act of the state or Federal government,[28] but a voluntary enlistment of the principal in the navy without the knowledge of the sureties and departure beyond their reach is not ground for discharging the sureties.[29] The use of land as a reservation does not of itself transmute that character to the land so occupied when the proper legal steps have not been taken to establish the same by law.[30] A person arrested by the military officers of a state as an insurrectionist, and detained with a view to a speedier termination of an existing insurrection and to turning him over to the civil au-

14. Weller v. U. S., 41 Ct. Cl. 324.

15. Navy Personnel Act (30 St. L. 1007). Jasper v. U. S., 40 Ct. Cl. 76.

16. See 6 C. L. 642.

17. Brown v. U. S., 41 Ct. Cl. 275.

18. The decisions of the board of examiners appointed by the president under the act of congress of October 1, 1890 (26 Stat. at L. § 562, c. 1241 [U. S. Comp. St. p. 849]) relating to promotion and indirectly to retirement of officers of the navy are not reviewable on certiorari after approval by the president. Reaves v. Ainsworth, 28 App. D. C. 157.

19, 20. Reaves v. Ainsworth, 28 App. D. C. 157.

21. Act Cong. March 2, 1901, c. 809, 31 Stat. 950, 951 (U. S. Comp. St. 1901, p. 965) construed. United States v. Praeger, 149 F. 474.

22. United States v. Praeger, 149 F. 474.

23. Rev. St. § 1342, 86th Article of War (U. S. Comp. St. 1901, p. 964) construed. United States v. Praeger, 149 F. 474.

24, 25, 26. United States v. Praeger, 149 F. 474.

27. See 6 C. L. 643.

28. Pub. St. 1901, c. 252, § 30. Lamphire v. State, 73 N. H. 463, 62 A. 786.

29. Pub. St. 1901, c. 252, § 30, construed. Lamphire v. State, 73 N. H. 463, 62 A. 786.

30. Federal courts held to have no jurisdiction to try person for homicide committed on the E. 1-2 of section 36 adjoining the Ft. Missoula Military Reservation. United States v. Tully, 140 F. 899.

thorities at the conclusion of hostilities to be tried for any crime he may have committed, is not illegally restrained of his liberty.[31]

§ 5. *Martial law.*[32]—The existence of insurrection warranting the use of the militia in suppressing the same, when declared by proclamation of the governor of a state, is not issuable,[33] and when insurrection exists the military officers may legally arrest and detain any one, whom they have reasonable ground to believe was engaged therein,[34] nor are such officers liable civilly for an unintentional error.[35]

§ 6. *Soldiers' homes and indigent soldiers.*[36]

MILITIA, see latest topical index.

MILLS.[37]

MINES AND MINERALS.

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§ 1. *General common-law principles. A. Public ownership* [38] seldom arises as a live question in respect of lands in the public domain.[38]

(§ 1) *B. Private ownership; rights of freehold tenants of less than fee.*[40]—Minerals in place in the earth are realty,[41] but when severed therefrom by artificial causes become personalty.[42] Oil and natural gas are minerals within this rule and

31. Hence he is not entitled to release on habeas corpus before the end of the insurrection. In re Moyer [Colo.] 85 P. 190.

32. See 6 C. L. 643.

33. Moyer v. Peabody, 148 F. 870; In re Moyer [Colo.] 85 P. 190.

34, 35. Moyer v. Peabody, 148 F. 870.

36. See 6 C. L. 643.

37. No cases have been found for this subject since the last article. See 6 C. L. 643.

38. See 6 C. L. 644.

39. See Barringer & Adams on Mines, p. 178 et seq.

40. See 6 C. L. 644.

41. Coal. Brand v. Consolidated Coal Co., 219 Ill. 543, 76 N. E. 849. Coal in its natural state, and foreclosure and execution sales thereof are subject to redemption. Traer v. Fowler [C. C. A.] 144 F. 810. Bill lies to quiet title to coal and other minerals under and upon land, they being "lands" within meaning of Code 1896, § 809. Gulf Coal & Coke Co. v. Alabama Coal & Coke Co. [Ala.] 40 So. 397. Reservation of mineral, marble, and granite, and right to mine same, to grantor of land, held an interest in real estate and also an easement within meaning of Rev. St. 1899, § 4262, authorizing action to recover interest in real estate to be brought within ten years after cause of action accrues. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72.

42. Iron ore mined under lease and removed to wharf for shipment held personalty and the absolute property of lessee, though credit was extended to lessee therefor and though lease was subsequently forfeited. Russell v. Howe, 30 Pa. Super. Ct. 591. Ore having been stored on wharf on lessor's land under some arrangement with him, held that his grantee acquired no title thereto. Id. Neither did grantee have right of stoppage in transitu, he having no interest in ore and grantee of lessee owing him nothing therefor. Id.

become personalty only when reduced to possession.[43] Owing to their fugitive character, however, they are not subject to ownership in their natural state in the strict sense of the term.[44] A perpetual tunnel right is an easement in lands.[45]

The products derived from the ordinary and reasonable operation of opened mines, quarries, oil wells, and the like, constitute the rents and profits thereof and not the body of the property, and hence belong to the owners of the former rather than the owners of the latter.[46]

§ 2. *Acquisition of mining rights in public lands. A. What lands may be located.*[47]—Only unappropriated government land is subject to location under the federal mining laws.[48] Land once located may become unappropriated by forfeiture or abandonment,[49] and land attempted to be located is unappropriated if the attempted location is invalid.[50]

43. Gas and oil in its natural state is realty, and hence one having vested right thereto under so-called lease has interest in land which cannot, under statute of frauds, be surrendered by parol. Ramage v. Wilson [Ind. App.] 77 N. E. 368. Release by agent is conveyance of realty within statute requiring written power of attorney, etc. Id. Oil brought to the surface through a well becomes personalty. Nonamaker v. Amos, 73 Ohio St. 163, 76 N. E. 949. Parol modification of oil lease in regard to amount of oil which was to go to lessor as rent or royalty held contract relating to personalty, and not one relating to realty or an interest therein or concerning same, and hence not within statute of frauds. Id.

44. Are not subject to sale and conveyance until diverted from natural paths into artificial receptacles. New American Oil & Min. Co. v. Troyer [Ind.] 77 N. E. 739.

45. Perpetual right in one tenant in common to use common tunnel to convey ore from an outside claim and an oral agreement giving him such right is within statute of frauds, and in order to take it out of operation of statute it must be supported by clear, definite, and conclusive proof. Laesch v. Morton [Colo.] 87 P. 1081. Evidence held insufficient to show agreement. Id.

46. Rule does not apply to mines and deposits which have never been opened or operated. Traer v. Fowler [C. C. A.] 144 F. 810. Rule is equally applicable in cases in which rights of judgment debtors, mortgagors, and purchasers during period of redemption are concerned. Id. Hence judgment creditor redeeming from foreclosure sale of mortgaged coal in an open mine, under Statutes of Illinois, is not entitled to recover damages from receiver in foreclosure suit for his extraction of coal from mine by ordinary and reasonable mining operations during period of redemption. Id.

47. See 6 C. L. 645.

48. Discovery on unoccupied and unappropriated mineral land of U. S. is prerequisite to valid location. Lockhart v. Farrell [Utah] 86 P. 1077. Attempted location on land previously located in conformity to law and on which required work had been done held to confer no rights. Anderson v. Caughey [Cal. App.] 84 P. 223. A location based upon a discovery within the limits of an existing and valid location is void. Sierra Blanca Min. & R. Co. v. Winchell [Colo.] 83 P. 628. Is void, not only as against prior locator but as against all the world, relocation not being permissible until original location has been forfeited or abandoned. Lockhart v. Farrell [Utah] 86 P. 1077. In suit in support of adverse claim, showing by defendant that plaintiff's location was made upon ground embraced within prior, valid, subsisting location is bar to plaintiff's recovery. Hoban v. Boyer [Colo.] 85 P. 837. Valid subsisting location prevents subsequent one until abandoned so as to render premises a part of unappropriated public domain. Sharkey v. Candiani [Or.] 85 P. 219. In action to recover possession of unsurveyed mining property, judgment giving plaintiffs possession of so much of the property as they had been in actual possession of held not objectionable as depriving defendants of right to contest plaintiff's right of entry before land department when question should there arise, and to be as favorable to them as facts warranted. Davis v. Dennis [Wash.] 85 P. 1079.

49. See § 3 C. post.

50. If defendant's location was invalid because of absence of discovery cut and expiration of legal time for making it, at time of plaintiff's peaceable entry, held that territory within boundaries of defendant's claim was then open to location, and plaintiff could lawfully initiate his location within such boundaries and was not a trespasser, irrespective of his belief as to whether such territory was unoccupied and unappropriated, and though he knew that defendant's claim had been surveyed for patent, the situs of such claim, that boundaries had been marked on ground, and that defendant had posted patent plats and notices. Instruction held prejudicially erroneous. Walsh v. Henry [Colo.] 88 P. 449.

51. Act Cong. March 3, 1875, c. 152, 18 St. 482, providing for railroad rights of way through public lands, and U. S. Rev. St. § 2322, 5 Fed. St. Ann. 13, giving locators exclusive right to possession of surface included within lines of their location, construed, and held that former statute only conferred right of way over such lands as were not disposed of when railroads were located, and hence lands covered by right of way map were open to mineral location until such map of definite location was filed with and approved by secretary of interior as required by § 4 of the act. Southern California R. Co. v. O'Donnell [Cal. App.] 85 P. 932. In action to determine adverse interests in mining property, finding that defendant ever since 1883 was and has been owner and in possession of certain portion of premises held an implied finding that loca-

The Federal statute granting rights of way to railroads across public lands does not operate to withdraw any such land from mineral location until the location map of a railroad company seeking to take advantage of its provisions has been filed and approved.[51]

(§ 2) *B. Who may locate.*[52]—Claims may be located by citizens of the United States or those who have declared their intention of becoming such.[53] A location by an alien is voidable only and cannot be attacked by anyone except the government.[54]

§ 3. *Mode of locating and acquiring patent. A. Making and perfecting location.*[55]—A discovery of mineral within the boundaries of a claim is essential to its location,[56] but the fact that it follows instead of precedes the other steps required to make a valid location does not invalidate the title of the locator, in the absence of intervening rights.[57] The discovery must be such as would justify a man of ordinary prudence in the further expenditure of his labor and means in the development of the property with reasonable prospects of success,[58] the rule respecting its suf-

tion was made in 1883 as alleged, that land was mineral, that claim was properly monumented, that annual work was done and that claim was not abandoned. Id.

52. See 6 C. L. 646.

53. In view of U. S. Rev. St. § 2321, 5 Fed. St. Ann. 13, providing that proof of citizenship may, in the case of a corporation, be made by filing copy of charter or certificate of incorporation, and practice in Federal land department, held that where in an action on an adverse claim it was alleged in complaint and admitted by answer that plaintiff was a corporation duly organized and existing under laws of the state, it was unnecessary to allege or prove citizenship of its members. Jackson v. White Cloud Gold Min. & Mill Co. [Colo.] 85 P. 639.

54. In action for sole purpose of recovering possession of mineral lands not yet subject to entry, complaint need not allege that complainants are over age of twenty-one, that question being immaterial. Davis v. Dennis [Wash.] 85 P. 1079. Rule not changed by fact that defendants were in possession and plaintiffs seeking to oust them, plaintiffs having been in possession for several years and defendants having taken possession during their temporary absence. Id. Objection that locators through whom applicant claims were aliens may properly be made in action based on adverse, it being in right and on behalf of the government. Matlock v. Stone, 77 Ark. 195, 91 S. W. 553.

55. See 6 C. L. 646.

56. U. S. Rev. St. § 2320, 5 Fed. St. Ann. 8. Ambergris Min. Co. v. Day [Idaho] 85 P. 109. Location without discovery confers no rights. Healey v. Rupp [Colo.] 86 P. 1015; Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563. Evidence held to show discovery. Daggett v. Yreka Min. & Mill Co. [Cal.] 86 P. 968. Discovery as essential to location of placer claim as to location of lode claim. Steele v. Tanana Mines R. Co. [C. C. A.] 148 F. 678. Where validity of location had remained unchallenged for five years and up to time of commencement of action of ejectment to recover property, held that certificate of location created presumption of discovery of mineral and valid location, particularly on application for injunction pendente lite, and where subsequent locator attacks title of prior one. Vogel v. Warsing [C. C. A.] 146 F. 949.

57. Discovery made after staking and record will inure to benefit of locator as of date of such discovery, provided others have not previously acquired rights to premises on which it is made. Healey v. Rupp [Colo.] 86 P. 1015. Fact that it follows posting of notice and marking of boundaries does not invalidate title of locator, provided discovery is made before another locates the claim. Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563. Stipulation that plaintiff's lode claims were "located in compliance with law" at dates anterior to location of defendant's tunnel site, etc., held to use word "located" in restricted sense of marking boundaries, posting notices, etc., excluding discovery, so that it did not estop defendant from litigating issue relative to discovery of mineral rock in place in plaintiff's claims prior to location of tunnel site. Id. Word "location" may mean all acts, including discovery, requisite to perfect right of possession, or the placing of the claims, the posting of notice, and the marking of boundaries, excluding the discovery. Id. Discovery after posting of notices required by state statutes validates prior location which was insufficient for absence of discovery, provided no adverse rights have been acquired in meantime. Sharkey v. Candiani [Or.] 85 P. 219. B. & C. Comp. §§ 3975, 3984, require locator to post notice stating, among other things, number of linear feet claimed along vein or lode with width on each side thereof, and general course or strike of vein or lode as near as may be, and to mark boundaries upon surface so that they may be readily traced, and declare void attempted locations not complying therewith. Id. Statute held to be designed only as guide to determine rights of conflicting claimants and to permit proper marking of location at any time before adverse rights attach. Id.

58. Steele v. Tanana Mines R. Co. [C. C. A.] 148 F. 678. Is essential to the validity of placer location that discovery of mineral thereon be such that an ordinarily prudent man, not necessarily a miner, would be justified in expending his time and labor

ficiency being more strictly applied in the case of a controversy between a mineral claimant and one seeking to make an entry under the agricultural or other land laws than in case of a controversy between two mineral claimants.[59]

The location must be distinctly marked on the ground so that its boundaries may be readily traced,[60] Where the location is crosswise of the vein, the side lines will be regarded as the end lines.[61] The Federal statutes do not require a notice of location to be posted or recorded,[62] but provide that all records of mining claims must contain the name or names of the locators,[63] the date of the location,[64] and such a description of the claim or claims located by reference to some natural object or permanent monuments as will identify the claim.[65] Statutes in some states re-

thereon in the development of the property. Cascaden v. Bartolis [C. C. A.] 146 F. 739. Instruction that it was necessary to show with reasonable clearness that for labor and capital expended in working ground it would yield reasonable profit held erroneous and in conflict with correct rule previously given in instructions. Id. Not necessary that gold should have been found in paying quantities, but must be such a discovery as gives reasonable evidence of fact that ground is valuable for placer mining. Lange v. Robinson [C. C. A.] 148 F. 799. Question of discovery is one of fact to be decided not only with reference to gold actually found within limits of claim located but also in view of its situation with reference to other lands known to contain valuable deposits, character and formation of soil and rock, and fact that object of requiring discovery is to prevent fraud. Id. Discovery of gold held sufficient. Id. Evidence held to show that there was no vein or deposit of ore sufficient to justify location. Mutchmor v. McCarty [Cal.] 87 P. 85. Locator of lode claim has made discovery when he finds rock in place containing mineral in sufficient quantities to justify him in expending time and money in prospecting and developing claim whether rock or earth assays high or low, provided that definition of vein or lode must always have special reference to formation and characteristics of district where it is found. Fox v. Myers [Nev.] 86 P. 793. Evidence of discovery held sufficient to justify denial of nonsuit. Id.

59. Steele v. Tanana Mines R. Co. [C. C. A.] 148 F. 678. Where land is sought to be taken out of catagory of agricultural lands, evidence of its mineral character should be reasonably clear. Id. Evidence that colors of gold had been found which were fairly good prospects held insufficient as against prior entry under homestead law and right of railway to appropriate it as right of way. Id. Rule more liberal in controversy between mineral claimants. Lange v. Robinson [C. C. A.] 148 F. 799; Fox v. Myers [Nev.] 86 P. 793. As between prior and subsequent locators of same ground as lode claim, courts will view evidence tending to establish senior locator's discovery in most favorable light such evidence will reasonably justify. Ambergris Min. Co. v. Day [Idaho] 85 P. 109.

60. U. S. Rev. St. § 2324, 5 Fed. St. Ann. 19. Whether claim was properly marked presents pure question of fact. Finding held sustained by the evidence. Smith v. Cascaden [C. C. A.] 148 F. 792. Evidence held insufficient to show that boundaries were so marked. Mutchmor v. McCarty [Cal.] 87 P. 85. Locators must not only mark location at time it is made, but use reasonable diligence in preserving and restoring boundary monuments as occasion may require. Daggett v. Yreka Min. & Mill Co. [Cal.] 86 P. 968.

61. Location is valid, but rights of locator will be restricted to area within side lines 300 feet on each side of vein or lode. Southern Cal. R. Co. v. O'Donnell [Cal. App.] 85 P. 932.

62. Those steps are not necessary unless local custom and rules of the miners of the district require them. Anderson v. Caughey [Cal. App.] 84 P. 223. In absence of proof as to custom of miners it will be presumed that Federal law governed when location was made. Id. There being no statute in force in 1884 requiring posting or recording and no evidence of any local law requiring it held that notices posted and recorded at that time did not constitute in themselves a location or any part of a legal location, and were of no value except as acts in pais, to be considered in connection with well known customs and practices of prospectors as item of evidence upon question of compliance with law, especially as to marking of boundaries. Daggett v. Yreka Min. & Mill Co. [Cal.] 86 P. 968.

63. Rev. St. § 2324, 5 Fed. St. Ann. 19.

64. Rev. St. § 2324, 5 Fed. St. Ann. 19. Rights of locator are defined by fact of location of which date given in notice is at most evidence, and hence error in notice in that regard must give way to proved fact. Webb v. Carlon, 148 Cal. 555, 83 P. 998. Location by defendant's grantor having been in fact made before plaintiff's entry on the land, and notice being there visible and boundaries marked, held that defendant's rights were not affected by fact that recorded notice, by mistake, showed location at later date than that made by plaintiffs. Id.

65. R. S. § 2324, 5 Fed. St. Ann. 19. Notice containing no such description held invalid. Mutchmor v. McCarty [Cal.] 87 P. 85. Any reference furnishing means by which claim may be identified is sufficient. Londonderry Min. Co. v. United Gold Mines Co. [Colo.] 88 P. 455. Certificate is sufficient in this regard if, by a reasonable construction, language descriptive of situs of claim, aided or unaided by testimony aliunde, will give notice to subsequent locators. Id. Whether or not there is such a reference to a natural object or permanent monument as will satisfy the law is a question of fact, unless there is no reference at all, or the reference is so indefinite that it can be told from an inspection of the certificate that

quire the posting of the location notice at the point of discovery,[66] and the recording within a specified time [67] of a notice or certificate of location, or the like, describing the claim, and giving the dimensions and location of the discovery shaft or cut,[69] and the length of the vein each way from the center of the discovery shaft.[70] The notice is sometimes required to state that the claim is located as forfeited or abandoned property when such is the fact.[71] Recitals in notices are not prima facie evidence of

the claim cannot be identified thereby. Id. The reference in the certificate is not conclusive that the law has been complied with, but it may be such as to require testimony aliunde to determine whether or not there has been a prima facie compliance. Id. Reference to another patented or unpatented claim is prima facie sufficient, there being a presumption that it is a well known natural object or permanent monument until contrary appears. Id. Statement that corner number one of claim joined corner number four of another named claimed held prima facie a sufficient reference to permanent monument, so that exclusion of certificate was error. Id. Error held not cured by subsequent exclusion of evidence offered to show that reference was not such as would serve to identify claim. Id. Held that, under instructions and evidence, jury might have found that plaintiff's location was good as against defendant's because former had discovered mineral prior to date of filing of valid certificate by latter, and hence exclusion of certificate could not be regarded as harmless on theory that in finding verdict for plaintiff jury must have found that no valid discovery was made on defendant's claim prior to the discovery on plaintiff's claim. Id. On issue as to sufficiency of recorded notice, question is whether, in view of customary mode of describing claims in district, a person with information given thereby could find location of particular claim on the ground with reasonable certainty by going to natural and permanent objects referred to. Smith v. Cascaden [C. C. A.] 148 F. 792. In absence of evidence that claim referred to in recorded notice was not a well known and clearly defined mining claim, held that it would be presumed that it was, and therefore a natural object or permanent monument. Id. Description in recorded notice of location held sufficient. Id. Location notice held to sufficiently refer to natural object, at least to prevent preliminary injunction on ground that it did not. Vogel v. Warsing [C. C. A.] 146 F. 949.

66. Under Comp. Laws, § 208, requiring notice of location to be posted "at the point of discovery," proof of the posting of a notice at a certain point establishes that at that point the locator claims a discovery. Fox v. Myers [Nev.] 86 P. 793. Where conflicting claimants had both posted notice at same point, held that such showing that both claimed discovery at same point would warrant presumption, in absence of showing to contrary, that both based claim of discovery on same natural conditions, and, on motion for nonsuit, that such discovery existed. Id.

67. Failure to record certificate of location within sixty days from date of location as required by statute does not vitiate it but merely prevents it from affecting intervening rights. Slothower v. Hunter [Wyo.] 88 P. 36.

68. Under Gen. St. 1883, § 2400, Mills' Ann. St. § 3151, must contain such a description as shall identify the claim with reasonable certainty. Londonderry Min. Co. v. United Gold Mines Co. [Colo.] 88 P. 455. Rev. St. 1899, § 2546, requires location certificate to contain description of claim by such designation of natural or fixed objects, or if upon ground surveyed by U. S. system of land survey by reference to section or quarter section corners, as shall identify the claim beyond question. Slothower v. Hunter [Wyo.] 88 P. 36. Survey referred to means completed survey by the proper authority, and not to one not yet approved. Id. Existence of natural or fixed object within meaning of statute, and sufficiency of description of location with reference thereto, are questions of fact. Id. Mining claim is a permanent monument and when mentioned in certificate will be so considered unless contrary appears. Id. Description held prima facie sufficient. Id.

69. Declaratory statement required to be filed by Pol. Code, § 3612, must show dimensions and location of discovery shaft or equivalent cut or tunnel required by § 3611. Dolan v. Passmore [Mont.] 85 P. 1034. Statement held insufficient in that it did not show that vein or lode was cut by tunnel ten feet below surface, and hence location was invalid. Id. Statement of dimensions must be such as to leave at least an inference that excavation cut vein at depth or for length required by § 3611. Helena Gold & Iron Co. v. Baggaley [Mont.] 87 P. 455. Statement held insufficient under said sections as amended by Sess. Laws 1901, p. 140, in that it only gave one dimension, viz, the depth, instead of all. Id. Provision as to contents of statement is mandatory and must be complied with. Dolan v. Passmore [Mont.] 85 P. 1034; Helena Gold & Iron Co. v. Baggaley [Mont.] 87 P. 455.

70. Failure of certificate to give length of claim as required by Rev. St. 1899, § 2546, or to mention discovery shaft at all, renders certificate void under Id. § 2547. Slothower v. Hunter [Wyo.] 88 P. 36.

71. Notice held void. Matko v. Daley [Ariz.] 85 P. 721. Where locators remained on claim until after twelve o'clock midnight of Dec. 31, and posted notice, and on next day set stakes at northeast and southwest corners of claim, and immediately left claim and never did anything further in connection therewith, held that they never proceeded far enough to acquire any rights which could be lost by abandonment, and hence claim was not an abandoned one within meaning of Act 1899, p. 71, c. 45, § 8, requiring in case of relocation, that certificate shall state whether whole or any part of new location is located on abandoned property. Paragon Min. & Development Co.

the facts stated where the statute does not require such statement,[72] but copies of recorded notice are sometimes received as evidence on the question of the location of boundaries though posting and recording is not required.[73] The filing of an amended certificate of location cannot affect intervening rights of third parties.[74] Since a location must be good when made,[75] one making a location on lands already covered by a valid subsisting location acquires no rights by reason of the forfeiture or abandonment of such prior location,[76] but this rule does not apply to the area in conflict between two adjoining locations.[77]

(§ 3) *B. Maintaining location; forfeiture, loss or abandonment.*[78]—Under the Federal statutes in order to hold his claim, the locator is required to perform one hundred dollars worth of labor or make one hundred dollars worth of improvements thereon each year until a patent is issued.[79] The period within which the work is to be done commences on the first day of January next succeeding the date of the

v. Stevens County Exploration Co. [Wash.] 87 P. 1068.

72. Since statute does not require notice to declare that discovery has been made, recital of discovery therein held not prima facie evidence of that fact. Fox v. Myers [Nev.] 86 P. 793. Copy of record of notice recorded pursuant to St. 1875-76, p. 853, c. 562, held to prove nothing except the bare fact that notice had been recorded, neither that notice was posted, nor that location was properly marked on ground, nor that boundaries included apex of a lode or any valuable deposit, nor that assessment work had been done. Mutchmor v. McCarty [Cal.] 87 P. 85.

73. Copies of recorded notices, though notices not required to be posted or recorded, held to be considered as evidence in case on question of location of boundaries when received without objection. Daggett v. Yreka Min. & Mill Co. [Cal.] 86 P. 968. Notice claiming 1,500 feet of this vein or lode held to show that notice as posted on ground was placed on croppings of lode or in close proximity thereto. Id.

74. Does not cure defect arising from fact that land was not part of public domain at time of original location, where rights of third parties have intervened. Brown v. Gurney, 26 S. Ct. 509.

75. Location must be good when made, and each claimant must stand on his own location and can only take what it will give him under the law. Lockhart v. Farrell [Utah] 86 P. 1077.

76. Since a location based on discovery within limits of existing valid location is void as to all the world, one who locates claim within boundaries of valid subsisting location does not succeed to rights of prior locators on forfeiture or abandonment of prior location, and subsequent locator in suit on adverse may show and rely on fact that applicant's location was invalid when made because within subsisting location belonging to third person. Lockhart v. Farrell [Utah] 86 P. 1077. Since a location notice properly made and posted upon a valid location of mineral is an appropriation of the territory therein specified for the sixty-day period allowed for doing statutory discovery work, during such period no one can initiate title thereto which would be rendered valid by mere failure of first appropriator to perform the necessary discovery work within the time prescribed by law. Sierra Blanca Min. & R. Co. v. Winchell [Colo.] 83 P. 628.

77. Forfeiture of location or forfeiture or abandonment of right acquired by posting notice required by Pol. Code, § 3610, through failure of declaratory statement to comply with § 3612, held not to cause area covered by it, in so far as in conflict with junior right, to revert absolutely to public domain but to inure to benefit of junior locator. Helena Gold & Iron Co. v. Baggaley [Mont.] 87 P. 455.

78. See 6 C. L. 648.

79. Rev. St. § 2324, 5 Fed. St. Ann. 19. If work was actually done in good faith for purpose of developing mine, a strict compliance with requisites of the statute is established, and a court will not be permitted to substitute its own judgment as to the wisdom and expediency of the method employed for developing the mine in place of that of the owner. Gear v. Ford [Cal. App.] 88 P. 600. Whether work was done for the purpose of working the claim in controversy, or was adapted to that purpose, are questions of fact. Id. Money expended for watchman held not a compliance with statute under the circumstances, the suspension of actual work not being temporary or with the intention of renewing it within a reasonable time, etc. Id. Evidence held to sustain finding that required work was not done during certain year and that defendant did not resume work, or make any improvements during next year and prior to plaintiff's location. Id. Question is not what it cost to do work but whether it was worth $100, and hence it is immaterial whether whole or any part of it was done gratuitously by one having no interest. Anderson v. Coughey [Cal. App.] 84 P. 223. Evidence held to sustain finding that required work for certain year was done. Id. Evidence insufficient to show doing of work. Mutchmor v. McCarty [Cal.] 87 P. 85. Evidence held to support finding that work for certain year was performed. Smith v. Mountain Gulch Min. & Mill. Co. [Idaho] 85 P. 918. Where in ejectment defendant claimed forfeiture for failure of plaintiff, a co-owner, to pay for her share of assessment work, held that requested instruction that, in determining amount of work done for purpose of representation, test was reasonable value of work, and not what was paid for it or contract price, was properly refused, it appearing that defendant himself did work. McKay v. Neussler [C. C. A.] 148 F. 86.

location of the claim.[80] If a co-owner fails or refuses to contribute his proportion of the cost of the required work after a personal notice or notice by publication to do so, his interest becomes the property of his co-owners who have made the required expenditures.[81] Statutes in some states require the locator to sink a discovery shaft or to do other equivalent work within a specified time.[82]

After a valid location has been made the locator need not keep actual possession of the claim but his right of possession continues until he has in fact abandoned it, or has forfeited it by failure to do the requisite amount of work within the prescribed time.[83]

A forfeiture [84] can only be established by clear and convincing evidence.[85] One who prevents the doing of the required assessment work cannot take advantage of its nonperformance.[86] Whether a prior location was forfeited as against another adverse location is a question of fact.[87]

An abandonment [88] takes place where the locator of a claim leaves it without any intention of returning and having no regard for what may become of it or who may appropriate it.[89]

80. One locating claim in 1900 held to have whole of 1901 in which to do work. Anderson v. Caughey [Cal. App.] 84 P. 223.

81. U. S. Rev. St. § 2324, 5 Fed. St. Ann. 20. Ballard v. Golob, 34 Colo. 417, 83 P. 376. Published notice held insufficient to divest interest of co-owner whose name did not appear therein. Id. Notice cannot be given by manager of corporation co-owner in his own name. Dye v. Crary [N. M.] 85 P. 1038. Burden of proving that party giving notice was actual owner is on party asserting forfeiture. Id. One buying an interest in unpatented mining claim at a void judicial sale and paying the amount due from the judgment debtor, as co-tenant, for assessment work before the time to redeem has fully expired, taking a receipt therefor only, held not subrogated to rights of judgment creditor who was seeking forfeiture for failure to contribute to assessment work, but his payment and its acceptance prevented forfeiture as against judgment debtor. Id. Where defendant claimed forfeiture of plaintiff's interest for failure to pay for her share of alleged work, bona fides of defendant's attempt to comply with law held to have no part in questions to be considered by jury in aid of proof that he did required work or otherwise. McKay v. Neussler [C. C. A.] 148 F. 86. Evidence held insufficient to show that defendants had done assessment work required by Rev. St. 1878, § 2324, on claims located prior to 1872, so that verdict was properly directed in favor of plaintiffs claiming under subsequent location. First Nat. Gold Min. Co. v. Alvater [C. C. A.] 149 F. 393.

82. Under Pol. Code, § 3611, locators must within ninety days after discovery sink shaft on lode or claim at least ten feet or as much deeper as may be necessary to show well-defined crevice or valuable deposit, or in lieu thereof a cut or tunnel cutting lode at depth of ten feet below surface, or open cut for at least ten feet along lode from point of discovery. Dolan v. Passmore [Mont.] 85 P. 1034. Under § 3611, as amended by Sess. Laws 1901, p. 140, must do work within sixty days after posting required notice. Helena Gold & Iron Co. v. Baggaley [Mont.] 87 P. 455. Evidence held to show compliance with Acts 1899, p. 71, c. 45, § 2, providing that before filing location notice for record discoverer shall locate claim by sinking discovery shaft upon lode to depth of ten feet. Paragon Min. & Development Co. v. Stevens County Exploration Co. [Wash.] 87 P. 1068.

83. Gear v. Ford [Cal. App.] 88 P. 600. Actual presence on the property is not necessary to constitute possession as against a stranger entering without right. Davis v. Dennis [Wash.] 85 P. 1079.

84. See 6 C. L. 649.

85. Upon clear and convincing proof of the failure of the former owner to have performed the labor to the amount required by law. Gear v. Ford [Cal. App.] 88 P. 600.

86. Garvey v. Elder [S. D.] 109 N. W. 508. Where plaintiff prevented defendant's servant from doing required work by threats to have him arrested, held that claim was not subject to relocation by him on ground that work had not been done. Id.

87. Gear v. Ford [Cal. App.] 88 P. 600.

88. See 6 C. L. 649.

89. Leaving with intent to return is not abandonment. Davis v. Dennis [Wash.] 85 P. 1079. Evidence held to show that there was not an abandonment. Id. Though an abandonment results from a mere exercise of the will and, so far as it relates to a vested estate in realty, is ineffectual to transfer title, the possible fluctuations in value of mining claims demands a different rule, and necessitates an immediate assertion of inchoate rights therein, when, by the exercise of reasonable diligence, the locators could have discovered that their rights were being invaded. Scharkey v. Candiani [Or.] 85 P. 219. Experienced miners familiar with method generally adopted in marking boundaries of which defendants were ignorant, held, by their failure to object, and by acts and conduct, to have abandoned right to premises in conflict, and to be estopped from asserting it, the means of information to the respective parties not being equal. Id. Co-tenant, as superintendent and managing partner, held to have possessed sufficient authority to bind all his cotenants by his negligence in permitting defendants to take, hold possession of, and improve their property for so long a time. Id. Where owners

(§ 3) *C. Relocation.*[90]—On forfeiture or abandonment,[91] a claim is open to relocation in the same manner as though never located.[92] A relocation impliedly admits a valid prior location,[93] and one whose application for a patent is based on a relocation cannot rely on rights acquired by the original location.[94]

(§ 3) *D. Proceedings to obtain patent; adverse claims.*[95]—A transfer of title by an applicant for a patent during the pendency of the application makes him a trustee, and, as such, he holds the title only for the purposes of such application, and, when patent is issued, the title immediately vests in his grantee.[96] A patent is conclusive of all facts necessary to establish the validity of the patentee's title as against a party claiming adverse rights.[97] It raises a conclusive presumption that there is the apex of a vien within the patented ground, but not that it is the apex of any particular vein.[98] When the claim to a tunnel site has been located before the entry of conflicting lode claims which have subsequently passed to patents, the question whether discoveries of mineral were made within the lode claims before the location of the claim to the tunnel site is open to determination by evidence de hors the patents.[99] Rulings of the land department as to the ground covered by a lode location are not subject to collateral attack where final entry has been made, though patent has not been issued.[1]

of three-fourths of claim abandoned same by permitting defendant to enter and locate another claim thereon, held that act of owner of other fourth in subsequently ratifying abandonment and consenting thereto was equivalent to an abandonment at time when other owner abandoned, and subsequent locator could not complain that entire interest was not abandoned at time defendant made his location and that he was mere trespasser. Oberto v. Smith [Colo.] 86 P. 86. Land department refused to issue patent for entire claim on ground that it was divided into two parts by patented placer claim, but gave applicant privilege to apply for patent on either of the segregated tracts and directed that, in default of election or appeal within sixty days, south tract should be deemed abandoned. Claimant did not appeal, but instituted proceedings in land department to secure title to vein which it was alleged passed through placer claim which conflicted with his location, but was unsuccessful. Thereafter, and after expiration of sixty days, claimant filed written election to retain and patent north tract. Held that south tract did not revert to and become part of public domain subject to relocation until filing of election to take north tract, original order being suspended pending contest. Brown v. Gurney, 201 U. S. 184, 50 Law. Ed. 717. Election filed in land office took effect eo instanti as voluntary abandonment of south tract, though entry as to it was not canceled until subsequently. Id.

90. See 6 C. L. 650.

91. As to what constitutes a forfeiture or abandonment, see § 3 B, ante.

92. On forfeiture provided original locators or their heirs, assigns, or legal representatives, have not resumed work in meantime. Lockhart v. Farrell [Utah] 86 P. 1077.

93. Recital in certificate that location was relocation of abandoned claim. Slothower v. Hunter [Wyo.] 88 P. 36.

94. S. located G. D. claim, and subsequently with one R. made and recorded an amended certificate of location. Thereafter N. relocated claim as the B. D., recording certificate which recited that it was a relocation of such claim which had been abandoned, using and appropriating the stakes and survey thereof. S. thereafter purchased N.'s rights, and applied for patent for B. D. claim. Held that S. thereby adopted N.'s certificate as basis and inception of his title, and while location certificates of the G. D. were admissible in adverse suit as showing boundaries of B. D. by reference, they could not operate to establish title antedating location of the latter. Slothower v. Hunter [Wyo.] 88 P. 36. Recital in certificate that location was relocation of G. D. claim abandoned was admission that latter once had legal existence, and possessory title conveyed by N. to S. was antagonistic to and destructive of any former title held by latter. Id.

95. See 6 C. L. 650.

96. Slothower v. Hunter [Wyo.] 88 P. 36, is not such a parting of title as to deprive him of right to defend suit on adverse claim. Id. Admission of deed transferring his interest held error, but harmless in view of the decree. Id.

97. Sharkey v. Candiani [Or.] 85 P. 219.

98. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. Where defendant claimed ore under plaintiff's adjoining claim by virtue of alleged extralateral rights, held that presumption was equally applicable to claims of both parties, and did not shift burden of proof as to apex and continuity of vein and ore in controversy from defendant to plaintiff. Id.

99. Entries and patents of lode claims, in proceedings to which claimant of tunnel site located across them prior to the entries was not, and was not required to be, a party, will not estop him from establishing by testimony of witnesses who know and by other customary evidence the fact that no discoveries of mineral in rock in place had been made in lode claims before claim for tunnel site was located across them. Uinta Tunnel Min. & Transp. Co. v. Ajax Gold Min. Co. [C. C. A.] 141 F. 563.

1. Brown v. Gurney, 201 U. S. 184, 50 Law. Ed. 717.

Suits to determine adverse claims.[2]—Under the Federal statute adverse claims must be filed in the land office within the sixty day period within which the notice of the application for a patent is required to be published,[3] and the person filing such a claim must, within thirty days thereafter, commence proceedings in a court of competent jurisdiction to determine his right to possession of the land in controversy.[4] The statute applies only to adverse claims arising out of independent conflicting locations of the same ground, and not to controversies between persons claiming under the same location,[5] but under the rules and practice of the land department an owner of an interest in a claim who has been excluded by his co-owner from an application for a patent may adverse or protest such application and maintain an action in support thereof.[6]

No particular form of action is provided for, the matter being entirely regulated by state statutes relating to the recovery of possession of, or the quieting of title to, realty.[7] The purpose of the action is to determine for the information of the land department which, if either, of the parties is entitled to be vesetd with the fee of the premises in dispute by purchase from the government.[8] Each party is practically a plaintiff and must show his title.[9] While in a contest between them the court may indulge the presumption that the location prior in time has, prima facie, the better right, the parties are not concluded by the mere fact of priority,[10] such presumption operating merely to cast on the junior locator the burden of rebutting it and to show the invalidity of the apparently prior location, or other facts giving him the better right to the ground in dispute.[11] The notices required to be given of the application are, in effect, a summons to all adverse claimants to appear and assert their rights by filing an adverse within the time prescribed[12] and hence the rights of an adverse claimant must be limited to those existing at the time of filing his adverse.[13] If title is not established by either party, judgment must be rendered accordingly.[14] The usual rules of practice[15] and pleading[16] apply in the absence of special statutory provisions on the subject.[17]

2. See 6 C. L. 652.

3. Sixty-day period during which notice must be published as required by U. S. Rev. St. § 2325, 5 Fed. St. Ann. 31, commences to run from date of first publication. Helbert v. Tatem [Mont.] 85 P. 733. Complaint held to sufficiently show that adverse claim was filed before expiration of sixty-day period, it not appearing that first publication was made on day that application was filed. Id.

4. U. S. Rev. St. § 2325, 5 Fed. St. Ann. 31.

5. Davidson v. Fraser [Colo.] 84 P. 695.

6. In view of practice of land office to await result of such action before issuing patent, and Code Civ. Proc. § 275, permitting action for possession of interest in realty to be brought by a tenant in common against his cotenant, where latter has actually ousted him or done some act amounting to denial of his right as cotenant. Davidson v. Fraser [Colo.] 84 P. 695.

7. Action pursuant to adverse to determine title to ground in conflict held suit in equity. Kirby v. Higgins, 33 Mont. 518, 85 P. 275.

8. Healey v. Rupp [Colo.] 86 P. 1015.

9. Brown v. Gurney, 201 U. S. 184, 50 Law. Ed. 717; Lockhart v. Farrell [Utah] 86 P. 1077. Each party must show affirmatively his title, both the right of possession as between the parties and also the sufficiency of the showing by the party adversed to entitles him to a patent being in issue. Slothower v. Hunter [Wyo.] 88 P. 36. Failure of court to find upon issue of possession and right to patent of balance of claim, after determining that one party was entitled to possession of part of it, held error. Id. Trial de novo on such issue held not necessary where there was no conflict in evidence, and possession and right to patent was supported by evidence. Id. Objection that the locators, through whom the applicant claims, were aliens may properly be made in an action based on an adverse, it being in right and on behalf of the government. Matlock v. Stone, 77 Ark. 195, 91 S. W. 553.

10. Lockhart v. Farrell [Utah] 86 P. 1077.

11. Lockhart v. Farrell [Utah] 86 P. 1077. May show that location was invalid because on land covered by valid subsisting location by third person, though latter has forfeited his rights and fails to adverse. Id.

12. Within sixty-day period of publication prescribed by U. S. Rev. St. § 2325, 5 Fed. St. Ann. 31. Healey v. Rupp [Colo.] 86 P. 1015.

13. Cannot base rights on subsequent discovery. Healey v. Rupp [Colo.] 86 P. 1015. In suit in support of an adverse, defendants held not precluded from objecting to judgment in favor of plaintiff on ground that it was based on discovery made after he filed his adverse because jury found that there had been no discovery on their claim. Id.

14. Act March 3, 1881, 21 St. L. 505, c. 140. Applicant must prove claim of title before

§ 4. *Ownership or estate obtained by claim, location, and patent; apex and extralateral rights.*[18]—Mere occupancy of the public land and the making of improvements thereon creates no vested right therein as against the United States or any purchaser from it.[19] One making a valid location of mineral land without obtaining a patent acquires the possessory title thereto as against all the world, and against the government so long as he performs the required annual assessment work thereon.[20] Such title passes to his grantee [21] or by descent to his heirs on his death.[22]

Under the Federal statutes where a vein or lode is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim which does not include an application for the vein or lode claim is to be construed as a conclusive declaration that the applicant has no right of possession of the vein or lode claim,[23] but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim conveys all the valuable mineral and other deposits within its boundaries.[24]

he is entitled to patent. Brown v. Gurney, 201 U. S. 184, 50 Law. Ed. 717. Federal government is quasi party to suit on adverse, and, in proper case, it is incumbent on court to render judgment that neither party is entitled to patent. Helena Gold & Iron Co. v. Baggaley [Mont.] 87 P. 455.

15. Stipulation in adverse suit waiving all other issues and submitting case on sole issue as to whether plaintiffs had resumed work after forfeiture before making of location under which defendant claimed title, held valid and binding, and to have rendered proof of any other matter unnecessary, whether Federal land officers would accept judgment based on issue so limited being question for them to decide. Gibberson v. Wilson [Ark.] 96 S. W. 137.

16. In action of ejectment brought by plaintiff against cotenant in support of adverse on application of latter for patent in his own name, amended complaint held not to set up different cause of action from original, the cause alleged in both being plaintiff's interest and his exclusion therefrom by defendant, though facts pleaded to show interest were somewhat different. Davidson v. Fraser [Colo.] 84 P. 695. Amended complaint, though inartificial, held not open to objection that, while original complaint only embraced parts of claim not in conflict with another, it limited ground in controversy to conflict between the two claims. Id.

17. Complaint in action on adverse held sufficient under Mills' Ann. Code, § 267, providing that if plaintiff claims legal right to occupy and possess premises under local mining laws or rules, or those of U. S. or the state, or otherwise, complaint shall contain brief statement of such possessory claim, and whether right claimed is by pre-emption or purchase, or by right of actual prior possession on public domain. Jackson v. McFall [Colo.] 85 P. 638.

18. See 6 C. L. 654.

19. Helstrom v. Rodes, 30 Utah, 122, 83 P. 730. One making improvements upon public land, knowing that it is open to exploration and sale for its minerals, who makes no effort to secure title thereto or the right of possession, has no valid claim of possession or for compensation for his improvements as an adverse holder in good faith as against one obtaining a patent from the government. Id.

20. Reed v. Munn [C. C. A.] 148 F. 737. Location notice properly made and posted upon a valid location of mineral is an appropriation of the territory therein specified for the period of sixty days allowed locator to do discovery work required by statute. Sierra Blanca Min. & R. Co. v. Winchell [Colo.] 83 P. 628. Failure to give requested instruction held error in view of evidence. Id. Locator of claim who has complied with all requirements of law with reference to location has freehold estate within statute relating to appeals to supreme court, though he has not obtained patent. White Star Min. Co. v. Hultberg [Ill.] 77 N. E. 327.

21. Grantee, as the apparent owner, holds it against the unrecorded equitable claim of another of which he has no notice. Claimant under trust agreement. Reed v. Munn [C. C. A.] 148 F. 737. Between such a grantee without notice and the claimant of a prior equitable interest, the former has the prior equity. Id.

22. Possessory rights of locator who has not applied for patent or paid purchase price therefor, and has done nothing to perfect his title except to do annual assessment work required by law, is property which on his death passes to his heirs by descent, and not as designated donees or beneficiaries of the United States, and hence it may be administered upon and sold by his administrator as other property. R. S. § 2322. O'Connell v. Pinnacle Gold Mines Co. [C. C. A.] 140 F. 854, afg. 131 F. 106.

23. R. S. § 2333, 5 Fed. St. Ann. 45. Vein known to exist and not included in application may be located by adverse claimant after issuance of patent. Mutchmor v. McCarty [Cal.] 87 P. 85. Vein is known to exist when it is known to placer claimant, when its existence is generally known, or when any examination of ground sufficient to enable placer claimant to make oath that it is subject to location as such would necessarily disclose its existence. Id. Evidence held to show that existence of veins was known. Id. Quartz vein containing so small a percentage of mineral as to be of no value for mining purposes is not known vein within meaning of statute. Id. Evidence held to show that veins were valueless. Id.

24. R. S. § 2333, 5 Fed. St. Ann. 45. Mutchmor v. McCarty [Cal.] 87 P. 85.

A locator is entitled to protection in the possession of his claim, and cannot be deprived of his rights by the tortious acts of others; nor can an intruder or trespasser initiate any rights which will defeat those of the prior locator.[25] A lessee of a claim who has contracted to do an amount of work thereon which would be a sufficient compliance with the legal requirements in respect of development, and also to notify the lessor of any intention to surrender or abandon the lease, cannot, upon failing to perform his obligations, secretly relocate the claim and so secure and hold for himself the title,[26] and a patent obtained under such circumstances will be decreed to be held in trust for the lessor.[27] So too, one co-tenant will not be permitted to act in hostility to the others in reference to the joint estate, and a distinct title acquired by one will inure to the benefit of all.[28] One tenant in common of a claim has no right to use a common tunnel driven thereon to convey ore from an outside claim.[29]

Apex and extralateral rights.[30]—The owner of a mining claim has a right to follow, between vertical planes drawn downward through the end lines of the location, a vein having its apex within the limits of such claim on its dip to the deep, though such vein may so far depart from a perpendicular on its course downward as to extend outside of the vertical side lines of the surface location.[31] The definition of a vein or lode must always have special reference to the formation and peculiar characteristics of the particular district in which it is found.[32] The essen-

25. Garvey v. Elder [S. D.] 109 N. W. 505.

26. Stewart v. Westlake [C. C. A.] 148 F. 349. Evidence held to show that no notice of intention to surrender or abandon tenancy was ever given to lessor. Id. Fact that lessor had, before executing lease in his own name, conveyed claim to a corporation of which he was lessor and manager, and of which he owned all the stock, with authority to make contracts in its name, held not to enable lessees to avoid consequences of their own fraud, the circumstances being such as to estop corporation from repudiating lease. Id.

27. Stewart v. Westlake [C. C. A.] 148 F. 349.

28. Where published notice to contribute to expense of assessment work was insufficient to deprive plaintiff of his interest as cotenant, held that he was not deprived of his interest by act of Federal officials in issuing patent to cotenants, but patentees took title subject to his rights and became trustees to extent of his interest. Ballard v. Golob, 34 Colo. 417, 83 P. 376. Payment of taxes by patentees held to be regarded as payment for plaintiff to the extent of his interest, and hence not to be basis for claim of adverse possession. Id. Obtaining patent was not purchase of outstanding adverse title as to plaintiff, and hence could not be made basis of claim of adverse possession as to him. Id. Mills' Ann. St. §§ 2923, 2924, providing that persons in possession of property under color and claim of title made in good faith who have paid taxes thereon for five years, or persons who under color and claim of title made in good faith have paid taxes on unoccupied land for five years, shall be adjudged owners thereof, held repealed by Laws 1893, p. 327, c. 118. Id. Even if applicable, held that complaint was not demurrable, since it did not appear therefrom that taxes had been paid for five years by persons having or claiming property under color of title. Id. Mills' Ann. St. § 2911, requiring actions for relief on ground of fraud to be brought within three years after discovery of fraud, held not to apply to frauds perpetrated by one in fiduciary capacity, and hence not to an action to recover interest in mining claim of which plaintiff was deprived by fraud of co-owners. Id. Trust created by taking of patent by one co-owner in his own name is an express and continuing one, and hence cause of action does not accrue until trust is repudiated and notice of repudiation brought home to cestui que trust. Id. Complaint held not to show that five-year limitation prescribed by Mills' Ann. St. § 2912, was applicable. Id. Where cross-complaint alleged that at time patent was issued patentees well knew the interest of the cross-complainants in the claim as cotenants, and that grantees of patentees also had notice and knowledge of the facts, and that patentees held the interest of cross-complainants as trustees, held that cross-complaint was improperly dismissed on demurrer, any attempted forfeiture proceedings as to cross-complainants being ineffectual. Stephens v. Golob, 34 Colo. 429, 83 P. 381.

29. Laesch v. Morton [Colo.] 87 P. 1081.

30. See 6 C. L. 655.

31. U. S. Rev. St. § 2322, 5 Fed. St. Ann. 13. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. Evidence held to sustain finding as to direction of vein on its strike and as to place where it left defendant's claim. Id. Evidence held to sustain finding that no dip of vein had been shown which could extend from apex in defendant's claim north of plaintiff's south end line extended and intercept ore bodies in dispute. Id. Evidence held to sustain finding that ore bodies in dispute were on strike of vein and not on its dip, and hence belonged to plaintiff who was surface owner. Id.

32. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648; Fox v. Myers [Nev.] 86 P. 793.

tial elements of a vein are mineral or mineral bearing rock and boundaries.[33] When one of these elements exist, very slight evidence may be accepted as to the existence of the other.[34] One claiming extralateral rights because of a vein existing and apexing in his ground, but which has no well-defined boundaries, must, in order to exercise them when disputed, show a ledge or body of mineral or mineral bearing rock of such value as will distinguish it from the country rock, or from the general mass of the mountain.[35] There is no fixed standard as to the value which the mineral or mineral bearing rock must have, but it necessarily depends upon the characteristics of the surrounding country, and upon the character, as to boundaries, of the vein itself.[36] What may constitute a sufficient discovery to warrant a location may be wholly inadequate to show an apex justifying the locator in claiming extralateral rights, the law being more rigidly construed in the latter case than the former.[37]

Under the Federal statutes now in force, in order to entitle a locator to extralateral rights, the end lines of his surface location must be parallel,[38] but this rule does not apply to locations made under former statutes.[39]

Boundary lines and monuments.[40]—Where the monuments are found upon the ground or their position or location can be determined with certainty, they govern rather than the location certificate,[41] but where the course and distances are not with certainty defined by monuments or stakes, the calls in the location notice must govern and control.[42] Surveys made and monuments erected after location cannot operate to change the rights of the locator, or the position, location, or boundaries of the claim except in so far as they may show an abandonment of parts of the the claim not included therein, there being no new location.[43] A map purporting to show the lines of a location is of no probative value unless supported by the evi-

33. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. Evidence held insufficient to show existence of vein satisfying demands of law within a certain part of defendant's claim. Id.

34. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648.

35. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. Material must in texture and value be such as to show existence of vein, and mere proof of fact that rock is broken, shattered and fissured and mixed with calcareous substance, though it may show a conglomerate mass, is insufficient for that purpose. Id. When, however, the walls or boundaries are well defined, the vein differentiated from the surrounding country, and the kind of material mentioned constitutes the filling, evidence of slight value in mineral is sufficient. Id. An occassional vugg or fragment of ore disconnected from any ore body, and so intermingled with and surrounded by country rock that it cannot be regarded as continuous, is insufficient to mark the line of a vein or lode. Id. Evidence as to mineralization held insufficient. Id.

36. Values of filling of vein must be considered with special reference to the district where vein or lode is found. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. If surrounding country is barren, slight values are sufficient, but if rock generally carries values and boundaries are not well defined, values should be in excess of those of country rock. Id.

37. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. Mere fact that miner sees gangue and vein matter which he can follow with a reasonable expectation of finding ore is insufficient. Id.

38. Rev. St. § 2320, 5 Fed. St. Ann. 8. Daggett v. Yreka Min. & Mill. Co. [Cal.] 86 P. 968. Evidence held insufficient to show that end lines of claim as marked on ground were parallel. Id.

39. This requirement of Act of May 10, 1872, c. 152 (R. S. § 2320) does not apply to case where locations were made and patent applied for before passage of act, though patent was not issued until after it went into effect, in view of provisions in § 3 (R. S. § 2322), and §§ 9, 12, 16, against impairment of existing rights. East Cent. Eureka Min. Co. v. Central Eureka Min. Co., 27 S. Ct. 258, afg. 146 Cal. 147, 79 P. 834. Fact that patent granted rights that would have been acquired by location under act of 1872 as well as those acquired under act of 1866, held not to import election on part of grantee to abandon latter. Id.

40. See 6 C. L. 657.

41, 42. Treadwell v. Marrs [Ariz.] 83 P. 350.

43. On adverse to application for patent, held that, in order to make survey by plaintiffs and evidence of their surveyor as to conflict between their claim and that of defendant admissible, it was incumbent on them to prove that their claim as originally located was in accord with such survey to extent of conflict claimed. Treadwell v. Marrs [Ariz.] 83 P. 350. Evidence held insufficient to show that alleged conflict was based upon a survey or plat of claim having course or distances or area of plaintiff's claim, and hence evidence of survey was inadmissible. Id.

dence of some one knowing the position of the monuments supporting such lines.[44] Cases fixing the monuments and boundaries of particular claims will be found in the note.[45]

§ 5. *Right to mine on private land thrown open to the public.*[46]—By statute in Missouri the owner or lessee of mining land, platting it into lots and permitting others than his agents or employes to mine thereon, may post rules and regulations to govern their mining operations, and specify the time during which the right to mine shall continue.[47] In case no time is specified in the rules so posted, the right is limited to a period of three years from the date of the permit.[48]

§ 6. *Private conveyances or grants of mineral rights in land.*[49]—A grant of a mere easement in the surface carries no right to the underlying minerals,[50] The effect of a statutory dedication of a street in this regard depends on the terms of the statute under which it is made.[51] The usual rules as to the acquisition of title by adverse possession apply.[52]

A reservation is something reserved or created out of the thing granted that was not in existence before, while an exception must be a part of the thing granted.[53] Whether the languge of a deed creates a reservation or an exception from the grant depends upon the intention of the parties as evinced by a construction of the whole instrument in the light of the circumstances of each case.[54] Deeds which are silent as to mining rights severed by the original grantor will be construed as

44. Daggett v. Yreka Min. & Mill. Co. [Cal.] 86 P. 968.

45. Evidence held insufficient to support findings as to location of boundaries and monuments. Meyer-Clarke-Rowe Mines Co. v. Steinfeld [Ariz.] 85 P. 1067. Evidence held to establish that end lines as marked on ground did not give plaintiff extralateral rights in ore mined by defendant. Daggett v. Yreka Min. & Mill. Co. [Cal.] 86 P. 968. Evidence held insufficient to identify ground claimed by plaintiff, and hence insufficient, to support verdict in his favor. Kirby v. Higgins, 33 Mont. 518, 85 P. 275. Certain monument held northwest corner of claim instead of northwest center end. Sharkey v. Candiani [Or.] 85 P. 219. In suit on adverse evidence held to support finding as to boundaries of certain claims. Slothower v. Hunter [Wyo.] 88 P. 36.

46. See 6 C. L. 657.

47. Rev. St. 1899, § 8766. Arbuthnot v. Eclipse Land & Min. Co., 115 Mo. App. 600, 92 S. W. 170.

48. Rev. St. 1899, § 8767. Arbuthnot v. Eclipse Land & Min. Co., 115 Mo. App. 600, 92 S. W. 170. Rights acquired under oral contract with lessee and assigned to plaintiffs, though contract provided right should continue until lease expired. Id.

49. See 6 C. L. 657.

50. Contract granting right of way to railroad held to give it merely an easement, so that it had no right to grant right to take oil and gas to another. South Penn. Oil Co. v. Calf Creek O. & G. Co., 140 F. 507. Grantor held estopped by conduct from denying right of lessee of railroad. Id. Dedication of street held insufficient as a statutory dedication so that city did not acquire fee, but only an easement, and was not entitled to enjoin mining under street which did not interfere with such easement. City of Leadville v. Coronado Min. Co. [Colo.] 86 P. 1034.

51. Under Gen. Laws 1877, c. 100, § 6, statutory dedication held to give city entire title to streets as such for public use, but not for profit or emolument of city, and hence it was entitled to only so much of property as was reasonably necessary for that purpose, such being plainly the intention of the dedicator, and not to underlying ores, mining of which did not interfere with use of street. City of Leadville v. Bohn Min. Co. [Colo.] 86 P. 1038.

52. Hostile acts relied upon to initiate adverse possession must be such as to carry with them a presumption that they would be observed by the owner, were he to visit the premises. Castello v. Muheim [Ariz.] 84 P. 906. Actual, visible and continuous possession of mine may not be held to have been initiated and maintained by one sinking shaft of unstated depth six or ten feet deeper, who thereafter does no other act upon property for seven years, in absence of proof that such act would naturally attract attention of owner, should he visit premises. Id. Action to recover possession of unpatented mining property from one who had been in adverse, open, and notorious possession thereof, claiming right to possession under a deed purporting to convey the title to it, for more than five years, held barred by Rev. St. 1887, § 4036. Bradley v. Johnson, 11 Idaho, 689, 83 P. 927. Statute applies to unpatented mining claims. Id.

53. Moore v. Griffin, 72 Kan. 164, 83 P. 395. Provision in deed reserving to grantors all rights, etc., under certain oil and gas lease and all oil and gas privileges in and to the premises, held to constitute an exception, and not a reservation. Id.

54. Use of words "reserve," or "reserving," or of other words of similar import does not necessarily create a technical reservation. Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433. Language and circumstances held to show an intention to except from grant of lands an absolute and inheritable estate in the one-half of the plaster beneath the surface. Id.

conveying only such rights as his grantees had.[55] Purchasers take with constructive notice of reservations in recorded deeds.[56] There can be no conditional delivery, or delivery in escrow, by the grantor to the grantee in a deed.[57]

It is the duty of the court to construe contracts for the sale of mineral land as they are made by the parties thereto, and to give full force and effect to the language used, when it is clear, plain, and unambiguous.[58] Customs and usages in the light of which such contracts are made enter into and form a part of them as fully as though incorporated therein.[59] Where the contract is ambiguous, the construction placed upon it by the parties will be considered in determining their intention.[60] Whether an assignment is absolute or conditional is a question of intention.[61] Courts of equity enforce specific performance of contracts for the sale of realty according to the true intent and meaning of parties as disclosed by the contract considered as a whole, and do not hold themselves bound by all technical rules applicable to deeds passing title.[62] While in a naked option for the purchase of mining property, time is ordinarily of the essence of the contract, and failure of the holder to comply with the times fixed, without legal excuse, ordinarily results in a loss of his rights, yet where there has been a part performance and a reasonable excuse for a failure to fully perform, equity will not decree a forfeiture, but will compel specific performance, where it is within the power of the defaulting party, at the time of the trial, to make the other party whole.[63] The Federal supreme court will follow the highest state court in a holding as to the construction and effect of a conveyance of mineral land between private parties.[64] Cases construing particular instruments as to the property included [65] or reserved,[66] and provisions as to the

55. Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433.

56. Deed excepted all oil and gas privileges in premises. Grantee conveyed by general warranty deed to another, without any reservation or exception. Held that, all the deeds being of record, subsequent purchaser took with constructive notice and had no interest in oil or gas. Moore v. Griffin, 72 Kan. 164, 83 P. 395.

57. Larsh v. Boyle [Colo.] 86 P. 1000. Evidence held to show delivery of deed of assignment of interest in mine, parties having treated it as perfected and delivered instrument. Id.

58. Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24. It is only where language is ambiguous, uncertain, and susceptible of more than one construction that court may, under well established rules of construction, interfere to reach a proper construction, and make certain that which in itself is uncertain. Id.

59. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232. Parties, by arranging for exploration of land without critically defining how it was to be done, held to have adopted the usual and customary explorations of the region. Id.

60. Whether evidenced by contemporaneous acts or circumstances, or subsequent acts or circumstances, or formal expression. Powers v. World's Fair Min. Co. [Ariz.] 86 P. 15. Instructions to bank with which deeds were placed in escrow, though executed several months after contract. Id. Cross-complaint with copy of instructions held inadmissible, no foundation for introduction of secondary evidence having been laid. Id.

61. Evidence held to support finding that assignment of option on mining claims was absolute and obligated defendant to pay purchase price immediately on its execution. Hunner v. Mulcahy [Wash.] 88 P. 521.

62. Armstrong v. Ross [W. Va.] 55 S. E. 895. Rule that grantor cannot by subsequent clause in deed destroy or nullify grant made in prior clause does not apply to executory contracts. Id.

63. Certain defendants holding option on mine assigned to plaintiff and another a part interest in consideration of their paying part of purchase price as it became due, and parties then formed mining partnership. Fund for second payment was, by agreement, raised by giving of joint notes of all the parties. Held that failure of plaintiff to pay his share of notes did not entitle defendants to forfeit his interest, but he was entitled to recover his interest and to an accounting in suit in which he offered to fully perform. Larsh v. Boyle [Colo.] 86 P. 1000.

64. That quitclaim deed of adjoining land did not purport to convey part of underlying vein apexing in grantor's claim. East Cent. Eureka Min. Co. v. Central Eureka Min. Co., 27 S. Ct. 258.

65. Mortgage described land covered thereby as "the mineral lands" described in a specified deed. Deed did not designate lands conveyed or any portion of them as "mineral" lands. Held that mortgage was not void for indefinite description, but would be regarded as covering lands described in deed which were in fact mineral, and could be aided in that respect by evidence aliunde. Smith v. Vary [Ala.] 41 So. 941. Bill to foreclose held not demurrable for failure to show what part of lands were mineral and what part were not, that being a matter of evidence not required to be pleaded. Id. One having deed of S. mine and deed of J. mine,

right of access,[67] the right to sink ventilating shafts,[67] and payment,[69] will be found in the notes.

In order to acquire any interest under an assignment of an option to purchase, the assignee must perform all the conditions imposed on him thereby.[70] Contract rights may be lost by their abandonment or surrender.[71] One who voluntarily puts it out of his power to perform thereby commits a breach and is liable generally therefor.[72] To work a release, a refusal to perform must be distinct, unequivocal and absolute, and must be acted upon as such by the other party.[73]

the boundaries of which coincided, executed mortgage on the "J. mining claim, being the property located by W." on a certain date and described in certain deed from B. to mortgagor. Location of J. claim by W. was void and deed by B. conveyed nothing. Held that mortgage covered mortgagor's interest in S. mine, it not being intended that it should embrace only such interests as mortgagor acquired through B.'s deed or W.'s location. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280. Contract of sale, when read in connection with deeds and other writings referred to therein, held to show on its face that subject of sale was portion of certain vein of coal lying under certain tract of land, the existence and location of which was known to parties, and not to include other veins in said land not so known to them. Armstrong v. Ross [W. Va.] 55 S. E. 895. Pursuant to compromise of adverse suit, locator of one of two conflicting claims executed bond whereby he agreed to obtain patent for his claim including land in controversy and then to convey a certain described part thereof to locator of other claim "together with all the mineral therein contained." Pursuant to decree of specific performance, plaintiff, which had acquired rights of first mentioned locator, executed deed to defendant, which had acquired rights of second, conveying tract described in bond "together with all the mineral therein contained," together with "all the dips, spurs, and angles," etc. Held that deed passed all minerals below surface of tract, including part of undiscovered vein apexing on remaining part of plaintiff's claim. Montana Min. Co. v. St. Louis Min. & Mill. Co., 27 S. Ct. 254; Id. [C. C. A.] 147 F. 897.

66. Where deed contained exception of all rights under certain oil and gas lease and all oil and gas privileges in and to the premises, held that subsequent cancellation of lease referred to did not affect rights of grantor in oil and gas, nor vest same in grantee. Moore v. Griffin, 72 Kan. 164, 83 P. 395. Reservation of "mineral" in deed held not to include natural gas. Silver v. Bush, 213 Pa. 195, 62 A. 832. Deed held to convey entire fee for all purposes except only right to mine or take reserved minerals or interfering with grantor's reserved right to do so. Id. Deed conveyed a part of grantee's interest in oil in certain land "except the well that is now producing on said land." Subsequently well referred to ceased to produce, and was deepened by a lessee thereof to a different sand rock, and produced oil from it. Held that oil so produced was excepted from operation of deed. Ammons v. Toothman, 59 W. Va. 165, 53 S. E. 13.

67. Deed conveying mineral rights providing that grantee should have "free access to said land from any direction by roads and other passways or means of exit and entrance," held to give grantee right to construct such roads, etc., as might be necessary to get out the mineral, having due regard to interests of grantor as owner of soil, and not inflicting upon him any unnecessary damage. Duncan v. American Standard Asphalt Co. [Ky.] 97 S. W. 392. Construction of necessary tramway held not to entitle grantor to damages. Id. Deed granting underlying coal with right of way for purpose of mining and removing same, held not to give grantee right to construct and maintain railroad thereon for purpose of transporting coal from shaft on adjoining land to main line of railroad. Farrar v. Pittsburg, etc., Coal Co., 28 Pa. Super. Ct. 280.

68. Deed of coal underlying certain tract giving right "to exercise the usual and ordinary privileges of ventilation," etc., "and to transport other coal through underground entries made or to be made in the coal so granted," held to give grantee right to sink shaft for purpose of ventilating workings, both in that and adjoining tracts. Cubbage v. Pittsburg Coal Co., 29 Pa. Super. Ct. 341.

69. In contract for sale of mine providing for development by vendee and application of proceeds, less certain deductions, to payment of purchase price, provision for certain deduction held ambiguous and, unaided by extrinsic evidence, not to authorize defendant to withhold $12 per ton for ore shipped to smelter, and not milled, concentrated, or leached on the grounds. Powers v. World's Fair Min. Co. [Ariz.] 86 P. 15.

70. Where persons holding naked option to purchase mine assigned part interest to plaintiff, subject to certain conditions, held that, if he failed to perform covenants under deed of assignment, he acquired no interest, and hence it could not be contended that his conduct was parol abandonment insufficient to deprive him of his interest under statute of frauds. Larsh v. Boyle [Colo.] 86 P. 1000. Evidence held to show that assignees of part interest in mine on which certain of the defendants held an option made payments to owner in such a way as to comply with obligations resting upon them under conditions of deed of assignment. Id.

71. Finding that defendant did not surrender option to purchase mining claims, and that plaintiff did not accept surrender by going into possession, held contrary to the evidence. K. P. Min. Co. v. Jacobson, 30 Utah, 115, 83 P. 728. Evidence held insufficient to show that plaintiff abandoned or surrendered his rights under assignment of part interest in mine. Larsh v. Boyle [Colo.] 86 P. 1000.

72. Cannot escape liability by putting it out of his power to perform in way contem-

Sales of mineral land may be set aside or rescinded for fraud [74] on restoration of the status quo.[75] In the absence of fraud or deceit, the assignee of an option to purchase will be held to have contracted with reference to facts apparent on the face of the instrument and cannot subsequently rely on them to avoid his contract for failure of consideration.[76]

The owner of land containing minerals may separate it into two or more estates and convey the surface to one person and the minerals to another, or may reserve either to himself and convey the other.[77] After a severance the owners of the respective estates hold them as separate and distinct estates in land, each being subject to the ordinary incidents of other like estates.[78] Title to the underlying minerals may in such case be acquired by adverse possession,[79] but possession and occupancy

plated by contract. Teachenor v. Tibbals [Utah] 86 P. 483. Contract for sale of mine providing for payment of part of purchase price out of first net profits derived from sale of ores extracted therefrom, said sum not to be paid otherwise, held to contemplate sale of ores as extracted without unreasonable delay, so that one who bought interest from purchaser subject to contract could not escape liability by stacking ore extracted and selling it and mine for lump sum. Id. Evidence held to show that sufficient ore had been extracted to pay balance of purchase price of mine had it been sold and proceeds used for that purpose as contemplated by contract of sale. Id.

73. Armstrong v. Ross [W. Va.] 55 S. E. 895. Refusal of vendee of certain coal in place to perform contract according to true interpretation thereof, accompanied by offer to perform in accordance with his own erroneous interpretation, held not to entitle vendor to rescind. Id.

74. Mather v. Barnes, 146 F. 1000. Sale of coal lands rescinded because of fraud and false representations of vendor's agent. Id. Representations as to underlying coal, accompanied by statement of vendors that had never been over property or examined it, held mere commendatory or trade talk not amounting to fraud. Id.

75. Substantial restoration is all that is required, it being sufficient that one party gets back what he parted with and other gives up what he got. Mather v. Barnes, 146 F. 1000. Fact that defendants would be compelled to take back land instead of options which they originally held, and to pay back entire purchase price, a part of which had gone to original owners, held not to prevent rescission of sale of coal lands. Id. On rescission of sale of coal lands for fraud vendees, upon reconveyance, held entitled to have restored to them the purchase money with interest, and amount paid for legal services in examining titles and drawing deeds, and recording fees, taxes, etc., but not amounts paid for preliminary examination by experts, nor expenses of organizing corporation, nor of taking steps looking to construction of coke plant and branch railroad, etc., which did not directly benefit property. Id.

76. Assignee of option to purchase mine held not entitled to defeat recovery of purchase price on ground that option contract was a nullity because it did not sufficiently describe the property and had expired by its own limitation at the time of the assignment, those facts being apparent on the face of the instrument at the time of the purchase, and there being no showing of fraud or deceit. Hunner v. Mulcahy [Wash.] 88 P. 521.

77. Coal in place may be severed from the surface, and the title thereto may be in one person while the title to the surface is in another. Brand v. Consol. Coal Co., 219 Ill. 643, 76 N. E. 849. Surface and underlying minerals may belong to different owners, and severance may be accomplished by conveyance of minerals or by reservation or exception thereof from grant. Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433. Ownership of coal or other underlying minerals may be separated from surface by a deed of record, and thereafter there will be two estates in same land. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593. Severed coal may run in its own different line of title without reference to that of surface. Gallagher v. Hicks [Pa.] 65 A. 623.

78. Each may be conveyed by deed or devised by will, or may pass to heir under statutes of descent. Brand v. Consol. Coal Co., 219 Ill. 643, 76 N. E. 849. Owner of surface and owner of minerals are not joint tenants or tenants in common, but are owners of distinct subjects of entirely different natures. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593. Owner may convey surface estate in fee, and reserve to himself an estate in fee in minerals or any particular species of them, in which case vendor holds a distinct and separate estate in minerals, which is subject to law of descent, devise and conveyance. Moore v. Griffin, 72 Kan. 164, 83 P. 395. Exception in deed by which grantor carved out and retained right to oil and gas held to carve out separate estate in oil and gas from estate in surface, so that title and ownership thereof remained in grantor. Id.

79. Can take place only when possession is actual, continuous, open, notorious and hostile, and cannot be accomplished by secret trespass on owner's rights. Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433. Constructive possession under color of recorded deeds conveying land, but which are silent as to excepted minerals, held not to amount to adverse possession or notice of adverse claim. Id. As in other cases, tenant in common cannot assert title by adverse possession against his cotenant unless he shows a definite and continuous assertion of adverse right by overt acts of unequivocal character clearly indicating an assertion of ownership of premises to exclusion of cotenant. Id. Actual possession of the surface and constructive possession of minerals

of the surface in such case is insufficient.[80] The owner of the minerals does not lose his rights by mere non user.[81]

Rights as between surface and subterranean owners.[82]—The underlying or mineral estate owes a servitude of sufficient support to the upper or superincumbent strata,[83] unless the same is waived.[84] There is a conflict of authority as to whether a grant of all the underlying mineral with the right to remove the same constitutes such a waiver.[85] Aside from such servitude, the operator has the right to mine and remove the underlying minerals in a proper manner according to the approved methods of mining without liability for such injuries as incidentally result to the superincumbent strata.[86]

§ 7. *Leases.*[87]—Statutes in some states provide for the leasing of mineral lands belonging to the state.[88]

Essentials and validity.—As in the case of other contracts, mutuality,[89] a valuable consideration,[90] and definiteness and certainty of terms,[91] are essential to the

under color of deeds is insufficient, but there must be an actual interference with plaintiff's seisin with denial of his title. Id.

80. Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433.

81. Title can be defeated only by acts which actually take the mineral out of his possession. Gill v. Fletcher, 74 Ohio St. 295, 78 N. E. 433.

82. See 6 C. L. 661.

83. Weaver v. Berwind-White Coal Co. [Pa.] 65 A. 545.

84. Surface owner may waive or part with his right to support. Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24. Preliminary injunction to prevent removal of surface support refused, where lease provided that lessee should not be liable for damages due to subsidence of surface. Miles v. Pennsylvania Coal Co., 214 Pa. 544, 63 A. 1032.

85. **Pennsylvania:** Grant of all merchantable coal underlying the premises, together with necessary mining rights to mine and remove same, does not amount to waiver by implication. Weaver v. Berwind-White Coal Co. [Pa.] 65 A. 545. Reservation of specified number of acres underlying buildings and spring held not to show intention to waive surface support to balance. Id.

West Virginia: Where a deed conveys the coal under a tract of land with the right to enter upon, and under said land, and to mine excavate, and remove all of it, there is no implied reservation that the grantee must leave enough coal to support the surface in its original position, and he may remove all of it without liability for damages resulting from the consequent subsidence of the surface. Griffin v. Fairmont Coal Co., 59 W. Va. 480, 53 S. E. 24. Deeds conveying coal with rights of removal should be construed in the same way as other written instruments, and the intention of the parties as manifest by the language used in the deed itself should govern. Id.

86. Can be no recovery for destruction of springs where there has been no disturbance of superincumbent strata and no subsidence of surface, or where it appears that they were not destroyed by failure to provide surface support. Weaver v. Berwind-White Coal Co. [Pa.] 65 A. 545. Whether destruction was due to failure to provide sufficient support held for jury on conflicting evidence. Id.

87. See 6 C. L. 662.

88. Laws 1889, p. 68, c. 22, and amendments thereto, providing for issuance of mineral leases and contracts does not authorize sale of any school or swamp lands of state within meaning of Const. art. 8, § 2, prohibiting sale of such lands except at public sale, and is not unconstitutional. State v. Evans [Minn.] 108 N. W. 958.

89. Though option to purchase contained in lease was originally nudum pactum because not signed by lessee, held that it became enforceable contract of sale on payment of whole or part of purchase price. Williams v. Eldora-Enterprise Gold Min. Co. [Colo.] 83 P. 780. Gas lease held not lacking in mutuality. Ringle v. Quigg [Kan.] 87 P. 724. Lease imposing on lessees unconditional obligation to sink one or more wells within eighteen months, and to commence work on first one within six months, and giving lessor option to forfeit lease in case of failure to commence work within time specified, held not to be unilateral but to be supported by sufficient consideration and enforceable, since, unless lessor exercised option to cancel, lessees could be held at all events to compliance with obligation to do specified work. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57. Further provision that lessees might prevent cancellation and continue lease in force for another year by paying certain sum per acre per annum as rental held not to change rule, such right becoming effective only in event lessor exercised right to cancel, and hence in no way affecting right of latter to demand compliance at all events. Id. Immaterial that lessee could not be compelled specifically to do work, or that remedy by way of action for damages would be inadequate because damages could not be measured. Id. Lease upon consideration of one dollar paid at the time is not wanting in mutuality, merely because it reserves to one party option to terminate it which it withholds from other. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

90. Consideration of one dollar recited in oil and gas leases as paid, and in fact paid, held merely nominal and insufficient to support the contracts. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57. Release of all of lessee's rights under second lease held sufficient consideration for contract of lessor to convey

validity of mining and oil and gas leases. The lessor is estopped to deny the receipt of a consideration which the lease recites has been received as against an assignee for value without notice that it has not in fact been paid.[92] An option to do something in the future is not void merely because the person making the agreement is unable to perform at once.[93] In Louisiana a potestative condition in a lease renders it void.[94]

Estate or interest created.[95]—In Pennsylvania an instrument, which in terms is a demise of all the coal in, under and upon certain land, with the unqualified right to mine and remove the same, is a sale of the mineral in place, whether the purchase money is a lump sum or depends on the amount mined, and though a term is created within which the coal is required to be taken out.[96] So called oil and gas leases are generally held not to be leases in the ordinary sense of the term.[97] There is a conflict of authority as to the interest acquired by the lessee thereunder.[98]

Interpretation and effect in general.[99]—As in the case of other contracts, leases

certain part of land to lessee in fee, and to pay certain sum in cash out of proceeds of first fifty acres of balance sold to others. Id. Release of part of land covered by lease before accrual of right of lessor to cancel lease for failure to do prescribed development work held sufficient consideration to support lease imposing no express obligation on lessee to do any work. Id. Mere inadequacy of consideration, or other inequality in terms of lease, does not alone constitute ground for avoiding it in equity. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. The civil law requires that the consideration for a contract be serious, and not out of all proportion with the value of the contract. Murray v. Barnhart, 117 La. 1023, 42 So. 489. In contract of more than $100 in value, consideration of one dollar is insufficient, and same is true of two dollars for privilege of retiring therefrom at any time. Id. Hence in oil and gas lease obligation of lessee to complete one well within one year will be held to be purely potestative, and as such to entail nullity of contract, where he retains right to retire from contract at any time on payment of two dollars, though consideration of contract is stated to be one dollar cash in hand paid, receipt whereof is acknowledged. Id.

91. Lease is not void for ambiguity when intention of parties can be clearly and certainly ascertained therefrom. Ringle v. Quigg [Kan.] 87 P. 724. Oil and gas lease held void for uncertainty in description of premises. South Penn. Oil Co. v. Calf Creek Oil & Gas Co., 140 F. 507.

92. Receipt of recited consideration of one dollar. Dill v. Fraze [Ind.] 79 N. E. 971, rvg. 77 N. E. 1147.

93. Gas lease held not to be void merely because lessee stipulates therein that at end of five years he shall have option to keep lease in force by laying pipes to lessor's premises and furnishing him gas, which he has no right to do at the time the lease is executed. Ringle v. Quigg [Kan.] 87 P. 724.

94. Provision in oil and gas lease authorizing rescission by lessee at any time on payment of two dollars held a potestative one rendering lease void, consideration not being a serious one. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

95. See 6 C. L. 662.

96. Wilmore Coal Co. v. Brown, 147 F. 931.

97. Owing to fugitive character of oil and gas and speculative and uncertain character of business of mining them, so called oil and gas leases are not ordinary leases nor within purview of statute concerning relation of landlord and tenant. New American Oil & Min. Co. v. Troyer [Ind.] 77 N. E. 739. Contract held not a lease. Dill v. Fraze [Ind.] 79 N. E. 971. Provision that lessee may at any time reconvey grant whereupon lease shall become null and void held not to render contract voidable at will of lessor. New American Oil & Min. Co. v. Troyer [Ind.] 77 N. E. 739.

98. Indiana: Fugitive character precludes ownership of oil and gas in natural state, and are not subject to sale and conveyance until diverted from natural paths into artificial receptacles. New American Oil & Min. Co. v. Troyer [Ind.] 77 N. E. 739. So called lease granting oil and gas under specified tract held to import a sale thereof to lessee, and to give him vested interest in realty. Ramage v. Wilson [Ind. App.] 77 N. E. 368.

Pennsylvania: The grant of the exclusive right to mine for and produce oil is not a sale of the oil that may afterwards be discovered, but merely gives the grantee the right to produce and sever it from the soil. Kelly v. Keys, 213 Pa. 295, 62 A. 911. So much as is thus severed belongs to parties entitled under terms of grant as a chattel, only so much as is produced and severed passing under grant, and there being no change of property as to oil not produced. Id. Grant of exclusive right to go on land and prospect for and produce oil and gas, grantor to receive part of product, does not vest in grantee any estate in land or oil and gas, but is merely a license or grant of an incorporeal hereditament and hence he cannot maintain ejectment against subsequent grantee, even though latter is in possession and producing oil in paying quantities. Id.

West Virginia: Oil and gas lease giving lessee for term of years right to mine and operate for oil and gas is not sale of oil and gas in place, but a lease and lessee has no vested estate therein until it is discovered, but, when found, right to produce becomes vested right, and, when extracted, title vests in lessee, and consideration or royalty paid for privilege of search and production is rent for leased premises. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

99. See 6 C. L. 663.

and contracts in relation thereto are to be interpreted so as to give effect to the intention of the parties[1] to be derived from the entire instrument.[2] The contract should, if possible, be so construed as to give it effect rather than to defeat it,[3] and each of its provisions so as to give effect to all of them.[4] Where the written contract is unequivocal, its meaning cannot be sought for beyond the instrument itself.[5] When ambiguous the language employed must be construed in the light of the subject-matter and circumstances surrounding the parties when the contract was made.[6] In case of doubt, the practical construction given to the contract by the parties, while engaged in its performance and before any controversy arises, will be adopted.[7] Contracts whereby the owner of land surrenders a part of his rights with respect to the oil and gas therein, generally called leases, require and are given treatment peculiar to themselves.[8] Language of doubtful import will be construed more favorably to the lessor, or at least the court will incline away from a construction which would compel him, on condition of receiving some small periodical payment, to remain inactive while his oil is drained away through wells sunk on neighboring lands.[9] When practicable an interpretation which would make against the development of the resources of the property involved will be avoided.[10] A lease for a definite and permissible term, but which reserves to the lessee an option to terminate it sooner, does not create a mere tenancy at will.[11] Before a custom or usage can govern the rights of the parties to an oil and gas lease, it must be so certain, uniform, and notorious, as probably to be known to and understood by the parties thereto.[12] Whatever is necessary to the accomplishment of that which is ex-

1. Assignment of lease. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232.

2. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232.

3. Compromise agreement amendatory of lease of coal mine. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884.

4. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232.

5. Compromise agreement amendatory of coal lease. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884.

6. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232; Ramage v. Wilson [Ind. App.] 77 N. E. 368.

7. As to exploration of property which was covered by leases to be assigned. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232. Provision that lessee might cancel and annul contract at any time held ambiguous. Ramage v. Wilson [Ind. App.] 77 N. E. 368. Lease provided that lessee should drill three wells within specified time or pay one dollar per day for each day's delay over that time, and also that it might cancel lease at any time. Only two wells were drilled. In action to recover penalty for delay in drilling third well, held that answer alleging that parties agreed when lease was executed, and construed it to mean that lessee should be relieved from drilling more than one well by cancelling contract for six and two-thirds acres for each well not drilled, and that notice of cancellation as to six and two-thirds acres was duly given, was insufficient to overcome provisions of lease, it not being alleged from what part of the tract the six and two-thirds acres were to be taken, or that parties ever agreed upon any division of premises for such purpose, etc. Id. Lease requiring completion of well within specified time or payment of quarterly rental until completion held ambiguous as to what should constitute a completed well, so that conduct of parties in treating completion of unproductive well as sufficient to give lessee right to make further explorations, without additional payment, was conclusive upon them under principal of practical construction. Smith v. South Penn. Oil Co., 59 W. Va. 204, 53 S. E. 152. Hence where, after drilling one unproductive well, and paying commutation money until its completion, lessee was permitted to drill another without making further payments, and without notice that any compensation would be demanded for further use and occupation of premises, none could be recovered. Id.

8, 9. Federal Betterment Co. v. Blaes [Kan.] 88 P. 555.

10. Federal Betterment Co. v. Blaes [Kan.] 88 P. 555. Contracts relating to oil and gas to be construed with reference to known characteristics of the business. Dill v. Fraze [Ind.] 79 N. E. 971, rvg. 77 N. E 1147. Object of contract granting right to operate for oil and gas held to be exploration for oil and gas, and development of it if circumstances warranted, so that it was to be construed in light of that fact. Id.

11. Not within rule that estate at will of one party is equally at will of other. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

12. Requested charge as to custom permitting lessee to erect building to be occupied by employes held defective in failing to specify territory referred to, and time when custom began, and to whom and where it was known, and as referring to custom in existence at time of trial instead of when contract was made. Prigg v. Pres-

pressly contracted to be done is part and parcel of the contract though not expressed.[13] Implied provisions are as effectual as those expressed.[14] Written provisions control printed ones.[15] Conditions subsequent are not favored, and unexpressed terms will not be imported into them on which to claim a breach.[16] Where the obligation of one party to a lease is indivisible, the corresponding obligation of the other party is necessarily so likewise.[7]

Rights, duties, and liabilities of the parties.[18]—What property is covered by the lease,[19] its duration,[20] the purposes for which the leased premises may be used,[21] the right to move machinery and buildings from place to place thereon,[22] and the right to transport minerals from adjoining mines across the land,[23] and to make underground connections with such mines for that purpose,[24] depend of course on the terms of the contract. The lessee is frequently required to keep entries in the mine [25] and escape ways open and unobstructed,[26] to keep all buildings on the prem-

ton, 28 Pa. Super. Ct. 272. Evidence on part of lessor that he and other farmers in vicinity never heard of alleged custom held properly admitted. Id. Instructions as to custom approved. Id.

13. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

14. Covenant arising by necessary implication. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Implication is merely another word for intention, and if it arises from language of lease when considered in its entirety, and is not gathered from mere expectations of parties, it is controlling. Id.

15. Clauses of lease as to compensation for gas, particularly in view of contemporaneous construction by parties, etc. McArthur v. Tionesta Gas Co., 28 Pa. Super. Ct. 568.

16. Condition in coal lease held not to require railroad to be built by grantee nor along any particular line, and to have been sufficiently complied with. Wilmore Coal Co. v. Brown, 147 F. 931. Provision that so-called lease should be null and void unless railroad was built within specified time held condition subsequent. Id.

17. Obligation of lessee to drill well within year being indivisible, corresponding obligation of lessor to deliver land is also indivisible. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

18. See 6 C. L. 663, 666.

19. Demised premises held to include all veins outcropping or having apexes within surface lines of certain part of claim. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. Lease held not to authorize lessee to mine coal from other than demised premises, so that mining in adjacent property was violation of its items. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

20. Oil and gas lease held to have terminated by its express terms when gas ceased to be used generally for manufacturing purposes. Diamond Plate Glass Co. v. Knote [Ind. App.] 77 N. E. 954. Lease gave lessee certain rights for term of twelve years and so long thereafter as oil or gas could be produced in paying quantities, "or" the annual payments thereinafter provided for in case of delay in commencing operations were made. Held that word "or" should be construed to mean "and," so that lease expired at end of twelve years, unless oil or gas was produced in paying quantities in the meantime. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

21. Oil and gas lease held to contain implied reservation of right to use, and possession of land for other than oil and gas operations, and to restrict rights of lessee to such use as might be reasonably necessary for such operations. Instruction approved. Prigg v. Preston, 28 Pa. Super. Ct. 272. Evidence held insufficient to show agreement between lessor and lessee permitting latter to erect house and barn on leased premises. Id.

22. Lessee held to have authority to remove machinery, etc., from old hoisting shaft, which was defective by reason of age, etc., to new one, and not to be required at end of term to return it to original location, particularly where it did not appear that reinstatement was necessary to effect purpose of lease, or that lessor suffered any damage by failure, and there was no substantial evidence on which to predicate damages if any. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

23. Compromise agreement amendatory of lease of coal mine held to give lessor present use of three haulways, to be designated by him to transport coal from his adjoining mine, which were to be used jointly with lessee. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884. Provision that use of haulways was not to injuriously interfere with the operations of the lessee held to have been intended to protect lessee against abuse of lessor's rights, but not to deprive lessor of fair exercise and enjoyment thereof. Id.

24. Lease prohibited excavations within sixty feet of dividing line between leased premises and adjoining land of lessor, without latter's consent. Supplemental agreement gave lessor right to use three haulways to transport coal from adjoining premises. Held that driving cross entries over dividing line by lessor was not a violation of the lease. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884.

25. Lease held not to require lessee to keep open and unobstructed entries in mine which had been worked out at time of execution of lease or which were opened and worked out by it during its tenancy except such as afforded access to coal not mined, and hence lessor was not entitled to damages for failure to do so, particularly where there was insufficient evidence on which to base an award. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

26. Lessor held only entitled to cost of

ises in good condition,[27] and to return the premises at the end of the term in good condition as an entire mining property.[28] The lessor is sometimes required to reimburse him for necessary permanent improvements.[29] The lessor is not entitled to damages for a breach consisting in mining on adjoining property belonging to him, where he accepts royalty on mineral so mined with knowledge of its source.[30] The ordinary oil and gas lease, giving the lessee merely an estate for years with a reversion to the lessor, contains an implied covenant for good title and quiet enjoyment during the term.[31]

Leases in which the compensation of the lessor is made to depend on the output are generally held to contain an implied covenant to operate with reasonable diligence.[32] This is particularly true in the case of oil and gas leases,[33] and where the lessee agrees to drill a well within a specified time, or to thereafter pay a periodical rental until a well is drilled, it is generally held that the law will imply a provision requiring the drilling of a well within a reasonable time at the option of the landowner.[34] The acceptance by the lessor of the stipulated rental is, however, a waiver of performance in developing the property during the time it is paid and

opening up escape way obstructed by lessee's negligence, and not to cost of purchasing right of way for escape way over adjoining land. Junction Min. Co. v. Springfield Junction Coal Co., 200 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

27. Stipulation requiring lessee to return buildings, etc., in as good condition as when received, ordinary wear and tear excepted, held not to require it to replace worthless buildings burned without its negligence. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

28. Stipulation held not to require replacing of burned buildings, it not appearing that they were necessary to constitute the premises such a property (Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574), or surrender of shaft sunk by it on adjoining property not belonging to lessor (Id.). Lessor held not entitled to both an escapement shaft and escape way connected with adjoining mine in order to constitute premises an entire mining property in view of statute regulating matter. Id.

29. Lease of coal mining property held to contemplate that some of the personalty and fixtures on premises would be worn out during term by use and decay, and that lessee would be required to replace them and provide additional ones and made permanent improvements necessary for proper operation of mine, for all of which lessor was required to pay at end of term. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

30. Lessor held not entitled to damages for such breach, where owner of adjacent property was one of its stockholders and officers, and it accepted royalty on coal mined thereon with knowledge of its source. Junction Min. Co. v. Springfield Junction Coal Co., 222 Ill. 600, 78 N. E. 902, afg. 122 Ill. App. 574.

31. Lease for years containing word "grant," "demise," or "lease." Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

32. Conveyance of coal with right to mine providing for payment of royalty on output, though fixing no minimum quantity. Wilmore Coal Co. v. Brown, 147 F. 931. Lease mentioning no specific term but providing for payment of a percentage of net proceeds, that payments should not exceed six in number, should be semi-annual, and should begin on or before six months from its date, held to contain implied covenant that lessee would proceed with mining operations with reasonable diligence, and delay of year and a half to operate under lease, and failure to make semi-annual payments during that time, warranted plaintiff in rescinding and entitled him to a cancellation. McIntosh v. Robb [Cal. App.] 88 P. 517.

33. Promise of royalties on oil and gas produced held to have been controlling inducement to grant so that lease would be construed as containing an implied covenant, that, if oil or gas was found in paying quantities during five years allowed for development and exploration, lessor would thereafter continue work of development and production with reasonable diligence, that is along lines reasonably calculated to make production of mutual advantage. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Where object of lease is to obtain benefit or profit to both lessor and lessee, neither is, in absence of stipulation to that effect, the arbiter of extent to which, or diligence with which operation shall proceed but both are bound by what, in the circumstances, would be reasonably expected of operators of ordinary prudence, having regard to interests of both. Id. Prolonged failure of lessee to continue work of development and production held, under circumstances, a plain and substantial breach of implied covenant and condition in respect of exercise of reasonable diligence which entitled lessor to terminate lease, though due to mistaken view of obligations imposed. Id. Provision that failure to comply with "any of the above conditions" should render lease void held to apply to implied covenant to continue with reasonable diligence the work of development and production after expiration of five year period if oil or gas was found during that time, and that implied covenant was a condition, breach of which would entitle lessor to avoid lease. Id.

34. Indiana Rolling Mill Co. v. Gas Supply Min. Co. [Ind. App.] 76 N. E. 640. Fluctuating and uncertain character and value of oil and gas renders it necessary for

accepted,[35] and if, after accepting such payments, the lessor desires to insist on the drilling of a well, he must notify the lessee to that effect, and cannot forfeit the lease until the latter has had a reasonable time in which to perform.[36] What is a reasonable time is ordinarily a question of fact depending on the circumstances of the particular case.[37] Where, however, the lease expressly defines the measure of diligence which the lessee is bound to exercise in the exploration and development of the premises, the lessor cannot avoid it for his failure to do more.[38]

protection of lessor that leased property be developed as speedily as possible, and lessee will not be permitted to hold land for an unreasonable length of time for a mere nominal rent, when a royalty on the product is the chief object for execution of lease. Monarch Oil, Gas & Coal Co. v. Richardson [Ky.] 99 S. W. 668. Where oil and gas lease provides that lessee shall complete well within a year, "or pay at the rate of four dollars quarterly in advance for each additional three months, such completion is delayed;" and that the contract is made "for the sole and exclusive purpose of mining and operating for oil and gas," and it otherwise appears from whole contract that it was intention that lessee should be bound to complete well within a year, obligation to make quarterly payments will be held to be mere penal clause and not an alternative obligation, and making of payments not a fulfillment of principal contract, but merely payment of liquidated damages. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

35. Indiana Rolling Mill Co. v. Gas Supply Min. Co. [Ind. App.] 76 N. E. 640. Lease held not to lay upon lessees absolute duty of drilling well within fixed period, but to give them option either to do so or to pay a rental of free gas for domestic purposes until well was drilled, and so long as they continued to furnish gas and lessor accepted it, latter could not arbitrarily say that lease had expired or that it had been forfeited. Id. Voluntary severance by lessor of service pipes, through which gas was furnished them from lessees mains, held not to have affected the latter's rights under the contract. Id. Where lease was terminable at the end of twelve years, unless oil or gas was found in paying quantities, acceptance of rentals and giving of a receipt reciting that payment continued lease for another term, did not extend it for a term of twelve years, but did operate as waiver of right to claim forfeiture at end of twelve year period, and was effective to require notice to lessee and reasonable time thereafter to comply with lease before forfeiture. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

36. Where lessee waived right to declare forfeiture at end of twelve year term, during which lease was to run unless oil or gas was discovered in paying quantities in mean time, held that he could not declare forfeiture until he had given lessee reasonable time in which to develop lands after notice of such intention. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006. Evidence held not to show notice of intention to terminate prior to execution of new leases to others by lessor. Id. Second lessee held not to have been bona fide lessee for value without notice of rights of prior lessee, and hence to occupy no better position that its lessor. Id. Contract recited consideration of one dollar and provided that it should continue for five years and as long as oil and gas were found in paying quantities, or rental was paid, that it should be void if well was not completed in sixty days, unless second party should pay forty dollars for each year commencement was delayed, and that second party could cancel it at any time on payment of one dollar. Held that while, on payment of first year's compensation for delay operator would be entitled to postpone beginning of operations, owner could, by appropriate action, prevent him from holding right granted in land, without exploration or development for contract period. Dill v. Fraze [Ind.] 79 N. E. 971, rvg. [Ind. App.] 77 N. E. 1147. Lease provided that it was to run for twenty years, or so long as oil, gas, or other minerals were to be found in paying quantities, for payment to lessor of certain part of oil or minerals produced, and certain rental for each producing well, and that lessee should commence well within a year or pay annual rental of sixteen dollars. Held that object of lease was development of premises, and hence lessor had right at end of any rental period to refuse to accept rent for next year and notify lessee to proceed with development of property, and in case of latter's failure to do so within a year, lessor could, at expiration of that time, have lease forfeited. Monarch Oil, Gas & Coal Co. v. Richardson [Ky.] 99 S. W. 668. Unconditional acceptance of rent, however, satisfied demands of contract to date, and lessor could not have lease canceled until expiration of year from giving notice to lessee to proceed with development. Id.

37. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006. Delay by lessee in beginning or prosecution of work after execution of new lease to other parties by lessor held not to affect lessee's rights. Id.

38. Lease on three tracts giving lessee two years within which to drill well on premises and providing for extension of time by payment of annual rental until well was drilled, and that lease should be void if no well was drilled within five years, held to expressly define measure of diligence which lessee was bound to exercise in exploration and development during first five years, and well having been drilled on one tract during fifth year and rental paid from end of second year until that time, lease could not be avoided because other wells were not drilled during five year period. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Gas lease held not void or subject to cancellation merely because lessor expected lessee to perform at once where lease permitted him to delay performance for five years. Ringle v. Quigg [Kan.] 87 P. 724. Though obtaining royalty may be of essence of lease, time when operations shall com-

Leases often contain express covenants for diligence in development of the land and in marketing of the product,[39] the lessee to do a specified amount of work per month,[40] what constitutes reasonable diligence in such a case being a question of fact for the jury.[41]

Failure to drill additional wells is not ground for terminating a lease, where it has been satisfactorily shown that the territory is light and the production would not warrant the sinking of more wells.[42] As to wells already in existence, on land under lease so long as oil or gas shall be found in paying quantities, it is for the lessee to say whether the production will warrant their further operation, and the fact that, for some reasons which seem to be sufficient, he has failed to pump the wells for some time, is not ground for the cancellation of the lease, if in his judgment he can still make some profit from the operation of the wells.[43] What constitutes a well, within the meaning of a provision that if a specified period shall elapse after the drilling of a well without the lessor having received any revenue therefrom and without any further drilling being done by the lessee, the lease shall be deemed abandoned, depends upon the intention of the parties as expressed in the lease.[44] The receipt of a quarterly payment of rental within such period does not commit the lessor to the position that a well has not been drilled where such payments are required to be made until a well is completed, which has not been done.[45] A provision that on failure of the lessee to drill any one of a specified number of wells within the time specified he shall surrender the right to drill on all of the premises except ten acres for each well drilled is not so indefinite as to render the whole contract void, but does not entitle the lessor to quiet title to the whole or any

mence is proper subject of agreement between parties, and, in absence of imposition, fraud, or mistake, provisions of contract in that regard should be upheld. Id. Demurrer to petition for cancellation of lease held properly sustained, where no facts indicating fraud, imposition, or mistake, or that interests of lessor were being or would be injuriously affected by any of provisions of lease, were alleged. Id.

39. Where an oil and gas lease covering lands located in a field, which is being actively developed, is given for a term of two years, and contains a provision that, in case oil or gas is found on the premises, the lease may be continued in force by the lessee so long as he diligently develops the land and markets the product, the failure of the lessee to use reasonable diligence in the respects named will cause the lease to lapse. Buffalo Valley Oil & Gas Co. v. Jones [Kan.] 88 P. 537.

40. Lease of mine requiring lessee to conduct work in miner-like manner and so as to take out greatest amount of ore possible, and to mine steadily and continuously, with provision that failure to do certain amount of work per month would be violation of covenant, and providing for payment monthly of graded royalty based on amount of ore extracted, held not to render it optional with lessee whether he would comply with requirements as to working and developing property or to limit remedy of lessor in case of a failure to do so to a forfeiture of the lease, but lessee's failure rendered him liable for such damages as he could show that he had suffered by reason thereof. Macon v. Trowbridge [Colo.] 87 P. 1147. Measure of damages in such case would depend upon amount of ore which could have been mined if reasonable diligence had been exercised, and its value, question being whether premises could have been operated at such profit, after deducting royalties, as would be regarded as fair and reasonable. Id. In action on promissory note against lessor, averments of answer and cross complaint setting up lease and breach thereof, and damages, held sufficient to warrant proof of amount of ore which could have been extracted and its value. Id.

41. Buffalo Valley Oil & Gas Co. v. Jones [Kan.] 88 P. 537. Evidence held to support finding of lack of reasonable diligence. Id.

42, 43. Zeller v. Book, 7 Ohio C. C. (N. S.) 429.

44. Oil lease provided that if well was not completed within six months it could be kept in force by quarterly payment of ten dollars until one was completed, and that if, at any time after well was drilled, six months should elapse without any revenue being received therefrom or any further drilling being done, lease should be deemed abandoned. Attempt was made to drill well, but casing was pulled out, and hole plugged. No further drilling was done, and more than six months thereafter lessor sued for cancellation of lease on ground of abandonment. Held that there being evidence from which it might be inferred that drilling showed oil in sufficient quantity to warrant shooting, which was not attempted, court was justified in finding that operations amounted to drilling of a well, and that cessation of operations thereafter was an abandonment of lease. Federal Betterment Co. v. Blaes [Kan.] 88 P. 555.

45. Federal Betterment Co. v. Blaes [Kan.] 88 P. 555.

part of the tract on failure of the lessee to drill the required number of wells.[46] Provision is sometimes made for the arbitration of disputes and for the determination of specified questions by a board of engineers selected for that purpose.[47] The lessor cannot recover damages for breach of a provision requiring the lessee to explore for oil and gas by drilling wells, in the absence of an allegation that there was oil and gas in the leased premises.[48]

The lessor has no right to destroy or convert to his own use property of the lessee remaining on the leased premises after the termination of the lease, and is liable in damages for so doing.[49] The lessor cannot in such case set up as a counterclaim damages for failure of the lessee to bore for oil as required by the lease.[50]

Rents and royalties.[51]—Coal leases often provide for the payment of a certain royalty per ton for all coal mined and accepted by the lessee as merchantable,[52] and for the payment of royalty on a minimum number of tons whether mined or not,[53] unless mining is prevented by unforeseen faults in the strata.[54] Faults in the strata in land covered by one lease will not excuse payment of the minimum royalty provided for in another lease covering a different tract.[55] The lessee is sometimes required to pay a certain fixed sum at specified times regardless of all other con-

46. Contract contemplated drilling of eight wells and provided that on failure to drill any of them within time specified lessee should surrender right to drill on all of the grant excepting ten acres for each well drilled. Grantee had power of selection. Jones v. Mount [Ind.] 77 N. E. 1089, afg. 74 N. E. 1032. Hence, where only one well was drilled, grantor could not have title quieted to whole tract or to all of it except specific ten acres in square form surrounding the well drilled, provision being so far uncertain that it could not be said that failure to drill other seven wells entitled him to all or any particular portion of the realty. Id.

47. Provision for arbitration in case of disagreement held inapplicable to further provision for determination by three engineers of question whether all coal capable of being mined had been paid for. Henry v. Lehigh Valley Coal Co. [Pa.] 64 A. 635. Agreement for arbitration of disputes held revocable by either party. Id.

48. Duff v. Bailey [Ky.] 29 Ky. L. R. 919, 96 S. W. 577.

49. Oil and gas lease provided that lessee should begin work within three months and diligently prosecute same, and that he might abandon lease at any time, and when contract was terminated might remove all buildings and machinery from leased premises. Lessee placed buildings and machinery on premises, but did nothing further. After more than a year, lessor made buildings into stove wood and sold machinery. Held that he was liable to lessee for its value. Duff v. Bailey [Ky.] 29 Ky. L. R. 919, 96 S. W. 577.

50. Does not grow out of, and is not connected with, plaintiff's cause of action. Duff v. Bailey [Ky.] 29 Ky. L. R. 919, 96 S. W. 577.

51. See 6 C. L. 665.

52. Where lease so provided, and also that any culm not so accepted should be the property of the lessor, held that lessee by mingling culm with that from other mines, taking unqualified possession thereof, and exercising full and exclusive dominion over it, and removing it beyond power of lessor to assert his ownership of culm mined on her lands, exercised its option in favor of taking all the material mined as merchantable coal under the contract, and lessor was entitled to royalty therefor. Genet v. President, etc., of Delaware & H. Canal Co. [N. Y.] 79 N. E. 437.

53. Where lease provided for payment of minimum royalty, held that further provision "that in the end no more coal shall be paid for than is actually mined" did not become operative in the absence of proof that lessee had paid royalty for all coal that could be mined, and overpayment for coal actually mined did not relieve it from payment of minimum royalty so long as it remained in possession. Pennsylvania Coal & Coke Co. v. Witherow [Pa.] 64 A. 535.

54. Coal lease provided for payment of royalty on minimum number of tons whether mined or not, unless prevented by unforeseen faults in strata. Lessee attempted to reach coal from adjoining mine, but was prevented by faults. Made no effort during first year to mine on leased premises, but it appeared that thereafter coal was without difficulty reached by opening thereon. Held, that lease contemplated effort on leased premises to reach coal and faults contemplated were such as might there be encountered, and lessor was entitled to recover minimum royalty for first year. Troxell v. Anderson Coal Min. Co., 213 Pa. 475, 62 A. 1083.

55. Two coal leases between same parties, made at different times and covering different adjoining tracts, each contained provision for payment of minimum royalty unless mining was prevented by faults in strata, etc. Second lease provided for sinking a second shaft, but this was not done on land covered thereby. Second shaft was, however, sunk on land covered by first lease and faults discovered in coal. Held, that each lease was dependent alone on condition of coal in land covered thereby, and faults in strata in land covered by first lease did not excuse payment of minimum royalty provided for by second. Dorris v. Morrisdale Coal Co. [Pa.] 64 A. 855. Evidence held not so clear, precise, and indubitable as to warrant submission of question of reformation of

ditions.[56] Where the lessor has a continuing interest in the land, his right to royalties passes under a conveyance, pursuant to an execution sale, of all his right, title, and interest in the property.[57]

Provisions in oil and gas leases to the effect that they shall be forfeited on failure to complete a well or wells within a specified time, unless the lessee shall make certain specified periodical payments, do not ordinarily impose any absolute obligation on him to make such payments, but merely provide a means for postponing a forfeiture.[58] Where, however, the lease requires the drilling of additional wells after the completion of the first, and provides that upon failure to do so the lessee shall pay a specified sum for each well not drilled, he cannot, by abandoning his lease after completing one well, escape liability.[59] The sum so required to be paid is not a penalty, but liquidated damages.[60] The lessee is sometimes made absolutely liable for a specified rental, the amount of which is reduced on the completion of each of a specified number of wells.[61] Whether such payments must be made in advance depends on the terms of the contract.[62] Deposit of the rental in a specified bank to the lessor's credit is sometimes provided for.[63] One executing a division order whereby he agrees to accept a certain part of the oil produced as his share of the royalty is estopped to contend, as against other parties thereto and those claiming under them, that he is entitled to a larger share under the lease.[64]

Assignments.[65]—The consideration to be paid for the assignment of leases is frequently made to depend on the amount of ore in the premises, to be estimated from the result of certain exploration work.[66]

contract on ground of fraud, accident, or mistake, to the jury. Id.

56. Supplemental agreement. Pennsylvania Coal & Coke Co. v. Witherow [Pa.] 64 A. 535.

57. Lessor held to have continuing interest. Gallagher v. Hicks [Pa.] 65 A. 623.

58. Held to merely give it privilege of extending lease by periodical payments of amount specified. Smith v. South Penn. Oil Co., 59 W. Va. 204, 53 S. E. 152. Where lease provided that it should terminate if a well was not completed within three months unless lessee should thereafter pay $500 per month for each month's delay, each payment to extend time for completion for one month, held that provision for monthly payment was not a covenant to pay rental at specified rate until well was completed or lease surrendered and canceled, but payment was only condition precedent necessary to maintaining vitality of lease after three months and a means whereby right to forfeit could be postponed. Hays v. Forest Oil Co., 213 Pa. 556, 62 A. 1072. Where lessor treated well as completed and accepted royalties for more than two years, held that he could not thereafter contend that it was not completed in accordance with the terms of the lease. Id.

59. Crown Oil Co. v. Probert, 8 Ohio C. C. (N. S.) 489.

60. Provision that after completion of first well lessee should drill two additional wells at intervals of ninety days, and upon failure to drill said wells or any one of them should forfeit and pay to lessor $100 for each well not drilled. Crown Oil Co. v. Probert, 8 Ohio C. C. (N. S.) 489.

61. Oil and gas lease providing for quarterly payments of rental to be reduced one-third on completion of first and second wells respectively, and to cease on payment of third, construed and held that on completion of two wells lessees acquired right to hold two-thirds of entire tract without possibility of forfeiture, in consideration of which they were bound to pay rental which lease required to be paid after completion of second well. Jackson v. American Natural Gas Co., 31 Pa. Super. Ct. 408.

62. Contract providing for forfeiture if well was not completed in sixty days unless certain sum was thereafter paid for each year completion was delayed, and authorizing grantee to cancel it at any time on payment of one dollar, held to require payment in advance. Dill v. Fraze [Ind.] 79 N. E. 971, rvg. [Ind. App.] 77 N. E. 1147. Hence, owner was entitled to declare forfeiture at end of sixty days where well had not been drilled and payment was not then made. Id.

63. Where lease provided that deposit should constitute payment, bank's acceptance of deposit without notice from lessor not to do so constituted payment to lessor. American Window Glass Co. v. Indiana Natural Gas & Oil Co. [Ind. App.] 76 N. E. 1006.

64. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

65. See 6 C. L. 665.

66. Contract for assignment of mining leases held to require plaintiff to pay defendant within specified time certain price per ton of iron ore of certain quality, found as result of exploration work of usual and customary kind, conducted with reasonable diligence during that period, and not to require ascertainment of actual quantity and quality of ore in premises. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232. Provision requiring plaintiff to furnish defendant a true report, showing the "substance encountered" in drilling, held not to mean absolutely true showing, but only a showing as disclosed by the kind of

Eviction.[67]—Any act of the lessor whereby his tenant is deprived of the enjoyment of the whole or a material part of the demised premises, or which shows an intent upon the part of the lessor permanently to deprive or seriously to obstruct or interfere with the tenant's quiet and peaceable enjoyment thereof, amounts to an eviction [68] for which the lessee has an action for damages.[69] A mere trespass does not amount to an eviction, though accompanied by such acts and committed in such circumstances as to be equivalent thereto.[70] A provision whereby the lessee waives all claims for damages against the lessees of adjoining land for trespass has no application to a claim against the lessor for breach of covenant for quiet enjoyment because of an eviction resulting from the acts of such adjoining lessees with the connivance of the lessor.[71]

Forfeiture, rescission, cancellation, and abandonment.[72]—As in other cases, a lease or an assignment thereof may be rescinded for fraud or material misrepresentations.[73] On breach of the contract by the lessee, the lessor may either claim rescission or damages.[74] Only in the latter event is it necessary to put the obligor in default before bringing suit.[76] An offer of performance after notice of rescission is too late.[78] In a suit to rescind the obligor may, under proper circumstances, be granted further time in which to perform.[77] The party having the right to rescind must do so within a reasonable time after the discovery of the facts giving him such right.[78] A decree of rescission should put the parties in statu quo, by requiring

exploration and development adopted by the parties to test it. Id. Where explorations were conducted by usual and customary methods, there being no other methods provided for, and payment made based on results thereof, held that if, notwithstanding accurate calculations and computations, it turned out that customary assumptions as to character and quantity of ore in area surrounding drill holes, or any other assumption connected with exploration, was false, overpayment made in consequence thereof could not be recovered on theory of mistake of fact. Id.

67. See Landlord & Tenant, 8 C. L. 656.

68. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. Evidence held to show possession by lessees and their eviction by lessor. Id.

69. Action by evicted lessee against lessor for damages held one for breach of implied covenant for quiet enjoyment, and not one for trespass. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. As to right, in action for damages by lessee for wrongful eviction, to recover, in addition to net value of ore which lessee would have extracted had it not been for lessor's wrong, a sum equal to legal interest thereon, see Id.

70, 71. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

72. See 6 C. L. 667.

73. Owing to the peculiar nature of oil and gas, both the quantity and location of land covered by an oil and gas lease are elements going to the substance and essence of a contract of sale of such lease, obligating the vendee to develop the property by drilling a well thereon and to deliver to the vendor a part of the product thereof, free of cost or expense, and a gross misrepresentation as to either, even if innocently made, relied on by the vendee under the belief that it is true, is ground for rescission of the contract. Bruner & McCoach v. Miller, 59 W. Va. 36, 52 S. E. 995. Assignment canceled where it was made to call for a specific quantity of land and to include land not covered by lease under a misapprehension as to meaning of latter instrument. Id. Where lease gave lessee at least six months in which to drill well, held that lessor could not have it set aside for fraud because entered into in reliance on false statement of agent of lessee that it had drill loaded on cars for the purpose of bringing it to the field, such misrepresentation not being material in view of fact that oral negotiations were merged in written lease (Ruggles v. Spindle Bottom Oil & Gas Co., 72 Kan. 662, 83 P. 399), nor because agent falsely represented that drill would be in operation within thirty days, since failure to do a thing at time promised in future does not relate back and make promise fraudulent, particularly when subsequent written contract provides later time for performance (Id.).

74. Petition alleging that defendant contracted to complete well within a year, and that at time of commencing suit, four years after date of contract, he had not even made preparations for commencing well, and praying that contract be avoided, held to set forth action for rescission. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

75. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

76. Putting up derrick held insignificant. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

77. Further time in which to fulfill provision of oil and gas lease requiring drilling of well within a year refused because in such a contract time is always more or less of essence, and lessee failed to offer any excuse for delay. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

78. Delay after knowledge, and receipt of royalties not offered to be returned, held to preclude avoidance of lease by lessor for fraud. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

each to restore to the other what he obtained by virtue of the contract.[79] Money paid as rental to the landowner for delay in drilling a well under a lease held by assignment, in accordance with obligations imposed by the lease and assumed by the assignee, may be recovered back on rescission, where the contract of sale does not bind the vendee to drill, but extends to him the right to pay such rental in lieu of drilling.[80] Payments made by way of liquidated damages for delay in performance need not be returned in a suit for rescission for nonperformance.[81]

A condition subsequent is reserved for the benefit of the grantor and his privies in blood, who, in the absence of a provision to the contrary, can alone take advantage of its breach.[82] The usual means of taking advantage of a breach is by entry for condition broken, but it may be by any equally significant act.[83]

Except in cases of fraud, accident, or mistake, equity will not relieve against a forfeiture where the damages occasioned by a breach cannot be ascertained with reasonable precision,[84] or where the forfeiture is of the essence of the contract, and equity will be promoted thereby.[85] Though equity will not ordinarily enforce a forfeiture, this rule is not inflexible, and it may do so where such a course is more consonant with principles of right, justice, and morality, than to withhold equitable relief.[86] If the obligations of the lessee depend on the performance of conditions precedent by the lessor, the latter must show compliance on his part before he will be entitled to a forfeiture.[87] As a general rule a forfeiture cannot arise from an honest mistake.[88] A failure to pay the full amount of royalty will not ordinarily result in a forfeiture where the lessee acts in good faith, relying on his construction of the contract, and the lessor has a remedy by pecuniary reimbursement which he is seeking to enforce.[89] A lessor who sells part of the leased land cannot enforce a forfeiture as to the land sold for a subsequent breach of condition.[90]

A grant of mineral and mining rights may be lost by abandonment, even though

79. Contract assigning oil and gas lease. Bruner v. Miller, 59 W. Va. 36, 52 S. E. 995.

80. Bruner v. Miller, 59 W. Va. 36, 52 S. E. 995.

81. Quarterly payments on delay in drilling well under oil and gas lease. Murray v. Barnhart, 117 La. 1023, 42 So. 489.

82. That lease shall be null and void unless railroad is built within specified time (Wilmore Coal Co. v. Brown, 147 F. 931), cannot be taken advantage of by executors or subsequent grantees (Id.).

83. Wilmore Coal Co. v. Brown, 147 F. 931. Execution and recording of second deed to same mineral, grantee taking possession and mining thereunder, is effectual to do so. Id. Rule does not, however, apply where subsequent conveyance is expressly declared to be subject to prior lease. Id. Fact that, subsequent to or contemporaneously with reconveyance purporting to convey fee, grantor assigned to grantee all his rights under former lease held not to change rule. Id.

84. Breach of implied covenant for reasonable diligence in development, etc., held not one compensable in damages, and hence equity would not relieve against forfeiture therefor. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

85. Held that equity would not relieve against forfeiture contemplated by contract for failure to drill well within stipulated time or pay rental in advance. Dill v. Fraze [Ind.] 79 N. E. 971, rvg. 77 N. E. 1147.

86. Suit to establish forfeiture of lease as matter of record and to cancel lease held one to aid in enforcement of forfeiture. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Bill held to state case calling for measure of relief not attainable at law and which entitled lessor to decree giving effect to forfeiture of oil and gas lease by its establishment as a matter of record and by cancellation of lease as cloud on title. Id.

87. Failure to furnish gas for domestic use held not ground for forfeiture, where it was not alleged that lessor laid and maintained requisite pipes as required by lease. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

88. Where lease required defendant to mine and remove sufficient coal to keep face of mine on leased premises even with face of coal on his adjoining land and to make surveys, etc., held that it was no defense to action of ejectment to enforce forfeiture for breach of conditions of lease that defendant did not know that he was mining on leased premises, particularly where mistake was not an honest one based on fair survey. Brooks v. Gaffin, 192 Mo. 228, 90 S. W. 808.

89. Royalty reserved in deed of oil and gas by guardian. Headley v. Hoopengarner [W. Va.] 55 S. E. 744.

90. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

it vests the grantee with a legal estate.[91] Where an oil and gas lease gives the lessee a vested interest in the realty, his rights cannot ordinarily be released by parol.[92]

Reinstatement.[93]—A lessee who has forfeited his rights by failure to complete a well within the time stipulated or pay rent cannot renew them by subsequently completing a well without the consent of the lessor.[94]

§ 8. *Working contracts.*[95]—A trust results in favor of one for whose joint benefit another has agreed to locate a claim, where the latter subsequently makes such location in his own name alone.[96] So too one, who acquires mining property pursuant to an agreement whereby he is to furnish the funds and another his skill and services as an expert, and both are to share in the profits, will be held to be a trustee as to the latter's share and compelled to account to him therefor.[97]

As in other cases a contract to mine in order to be enforceable must be free from fraud,[98] and must be supported by a valuable consideration.[99] Whether a new

91. Wilmore Coal Co. v. Brown, 147 F. 931. Rights under coal leases held lost by abandonment. Id.

92. Oil and gas lease held to import sale of oil and gas under specified tract to lessee, and to give him vested interest in realty so that parol release thereof was void. Ramage v. Wilson [Ind. App.] 77 N. E. 368.

93. See 6 C. L. 670.

94. Lease provided that if well was not completed within thirty days it should become void unless lessee should pay certain rental. Time for completing well was postponed by a payment and within period of extension lessee sunk a well which it abandoned as worthless. After expiration of extension and death of lessor, and without making any further payments, lessee sunk another well which produced oil in paying quantities. Held, that lessee's rights had terminated before he sunk second well, and executors of lessor were entitled to decree quieting title in them. Zeigler v. Dailey [Ind. App.] 76 N. E. 819. Lessee's rights having terminated by abandonment of dry well and failure to pay rental, held that subsequent acts and statements of lessor's executors could not operate to revive lease or waive default thereunder. Id.

95. See 6 C. L. 670.

96. Where one who has himself discovered a mine, but has not located it, discloses it to another in consideration of and reliance upon an agreement or understanding that mine when located shall be joint property of both, and pursuant thereto, the further agreement is then made that latter will locate mine in their joint names or for benefit of both, and latter subsequently locates it in his own name alone, without consent of former. Stewart v. Douglass, 148 Cal. 511, 83 P. 699. Complaint held to state cause of action to enforce resulting trust and for accounting of proceeds of property embraced therein. Id. Plaintiff's husband and another located claim and afterwards sold a part of it to defendant's grantor. Prior to conveyance to defendant, assessment work not having been done, plaintiff relocated claim and obtained patent therefor. Held that, in absence of evidence that plaintiff located claim for benefit of anyone but herself, or under agreement to convey any part thereof to defendant or his grantor, or of any evidence of fraud, finding that plaintiff held any portion of claim in trust for defendant was erroneous. Helstrom v Rodes, 30 Utah, 122, 83 P. 730.

97. In action to have defendant declared trustee of plaintiff as to one-third of certain mining stock held by him and for an accounting, evidence held to sustain finding that defendant acquired stock pursuant to an agreement whereby plaintiff and defendant were to purchase mining properties, plaintiff to furnish his skill and service as an expert, and defendant the necessary capital, and plaintiff to have a third of the profits after defendant was reimbursed for his expenditures. Rutan v. Huck, 30 Utah, 217, 83 P. 833. Terms of contract as alleged in complaint held sufficiently broad to include oral contract, though made previously to date alleged, conceding that written contract of that date related to different subject matter. Id. Evidence held to support finding that plaintiff was faithful to best interests of defendant in the transactions leading up to the purchase of property for which stock was subsequently issued by corporation organized for purpose of taking it over (Id.), and that he did not receive commissions from vendor of property for obtaining purchaser for certain other property belonging to him (Id.). In any event receipt of such commissions would not have operated as fraud on defendant since he never purchased any interest in such other property and never intended to, and did not affect terms of purchase which he did make. Id. Receipt and retention by plaintiff of letter and check sent him by defendant and others held not to show settlement between them, particularly as no settlement was pleaded (Id.), nor to be conclusive admission by plaintiff that purchase was not made pursuant to contract relied on (Id.). Defendant held not entitled to object that assignment by plaintiff to his co-plaintiff of an interest in the contract relied on was without consideration. Id. Where defendant, being unable to meet assessment on stock, sold part of it to his wife, held that he should not, on accounting, be charged with more than the amount received therefor, in absence of evidence that it was less than its then market value, or that he acted in bad faith. Id.

98. Evidence held insufficient to show that contract for mining coal, superseding one sued on, was procured through fraud or misrepresentation. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603.

99. Second contract for mining coal, which superseded former one, held supported by sufficient consideration, both parties

contract has been substituted for a former one is a question of intention.[1] Persons who are to receive a certain price per ton for ore mined are not deprived of their right to compensation by reason of the fact that it becomes impossible to hoist the ore mined to the surface.[2] Where the owner recognizes persons as working under such a contract, he is liable to them for compensation at the contract rate.[3] Where the owner of mining property knowingly accepts the services of another in caring for the same, the law implies a promise on his part to pay the reasonable value thereof.[4]

§ 9. *Mining partnerships and corporations.*[5]—The receiver of a mining corporation has only such powers as are conferred upon him by the order appointing him,[6] and persons dealing with him are presumed to know whether he possesses the powers he assumes to exercise.[7] One who improperly secures the appointment of a receiver is liable for the legitimate expenses of the receivership.[8] As a general rule allowances to a receiver for the expenses of the receivership should be made to the receiver himself, and not to those who furnish supplies to, or perform labor for, him, the award being in the nature of costs in his favor with a proper direction for distribution.[9] Expenses incurred in doing unauthorized acts cannot be taxed as costs of the receivership,[10] nor can the liability of the plaintiff, or of any other party to the suit therefor, be litigated in the original action in which the receiver is appointed.[11]

A corporation quarrying slate from an open quarry is engaged in mining within the meaning of the bankruptcy act.[12]

§ 10. *Public mining regulations.*[13]—Matters relating to the liability of mine owners for injuries to their employes, including statutory provisions as to appli-

having derived benefit therefrom. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603. Plaintiff, having signed second contract and operated under it for nearly a year, held that he could not thereafter contend that it did not take place of first. Id.

1. Evidence held to show second contract for mining coal was intended to supersede former one between same parties. Proctor Coal Co. v. Strunk, 29 Ky. L. R. 995, 96 S. W. 603.

2. Where plaintiffs were to receive certain price per ton for ore mined and deposited in chutes ready for hoisting, held that further provision that payment was to be made on 10th of month for ore hoisted the preceding month, the quantity to be ascertained from number of tons hoisted, did not show that plaintiffs were to receive no pay unless ore was hoisted, nor precluded them from showing by other means the amount mined where hoisting was prevented by water in mine. Ward v. Eastwood [Cal. App.] 86 P. 742. Where it appeared that plaintiffs did not assume risk of defendant's ability to hoist ore, or agree that they should only be paid for amount of ore hoisted, they were not deprived of right to compensation, regardless of whether high water was due to unavoidable causes or not. Id. Evidence held to support finding as to amount of ore mined. Id.

3. Evidence held to support finding that defendant recognized all of the plaintiffs as working under contract alleged. Ward v. Eastwood [Cal. App.] 86 P. 742.

4. Plaintiff held entitled to recover reasonable value of services in paying taxes, keeping off trespassers, etc., rendered while acting as defendant's agent, without alleging or proving special contract. Morrison v. New Haven & Wilkerson Min. Co. [N. C.] 55 S. E. 611.

5. See 6 C. L. 671.

6. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. Order appointing receiver of mining corporation "with all the powers usual in receivership cases" held not to purport to give him power to work mines. Id. Mills' Ann. St. § 497, held not to authorize court appointing receiver for mining corporation to empower him to work mines owned by it. Id.

7, 8. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113.

9. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. Creditors of receiver may not intervene in original action in which he was appointed and litigate against plaintiff therein the question of his liability for expenses of receivership, where receiver is still in office and plaintiff objects. Id.

10. Expenses for supplies and labor furnished in working mines, where receiver was not authorized to work them. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113.

11. Cannot in such action try question of plaintiff's liability on ground that it approved illegal acts of receiver and that receiver was appointed as result of fraudulent conspiracy to which it was a party, particularly where sole right of recovery alleged in pleadings was that plaintiff wrongfully had receiver appointed. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113.

12. Word "mining" as used in Bankruptcy Act, § 4 B, as amended. In re Mathews Consol. Slate Co., 144 F. 724, afd. Burdick v. Dillon [C. C. A.] 144 F. 737.

13. See 6 C. L. 671.

ances and the like, are treated elsewhere.[14] In some states anthracite coal miners are required to obtain a certificate of qualification from an examining board and to be registered.[15] In others operators of coal mines who elect to pay miners according to the coal produced are prohibited from screening the coal or otherwise taking any part from the value thereof until the same shall have been weighed and credited to the employe producing it.[16] It is sometimes provided that at least two available openings to the surface must be maintained from each seam or stratum of coal worked when required by the chief mining inspector.[17] Statutes in some states forbid excavations in any mine or shaft within five feet of the dividing line of other property without the written consent of the owner of the latter.[18] Abandoned oil wells are sometimes required to be plugged in a specified manner.[19]

The condemnation of rights of way for aerial bucket lines for the transportation of ore from mines is authorized in some states.[20]

§ 11. *Statutory liens and charges.*[21]—Statutes in many states give liens to persons furnishing labor or material used in the development of mining claims.[22] As against an innocent purchaser, an agent is not entitled to a lien for services in paying taxes on mining property, listing it, keeping off trespassers, and the like.[23]

As a general rule a lien will not attach to the interest of the owner for work done or material furnished to a lessee, unless it appears that it was done or furnished pursuant to some authority emanating from him.[24] Statutes in some states

14. See Master and Servant, 8 C. L. 840.

15. Act July 15, 1897 (P. L. 287), making it a misdemeanor for anyone to engage as a miner in any anthracite coal mine, unless he first obtains certificate, etc., construed and held to require two years' experience in anthracite coal mines of the state as qualification for examination and registration, and hence not to be in conflict with Federal constitution as abridging privileges and immunities of citizens. Commonwealth v. Shaleen [Pa.] 64 A. 797, afg. Id., 30 Pa. Super. Ct. 1.

16. Acts 1895, p. 558, applying to mines employing ten or more men underground, where miners are employed at quantity-rates, is within police power, its object being to protect miners from fraud. McLean v. State [Ark.] 98 S. W. 729. Is valid exercise of power to compel conformity to uniform system of weights and measures. Id. Does not contravene Const. §§ 2, 3, 8, or U. S. Const. Amend. 14, securing to all persons liberty and equality of rights under the law, because applying only to mines where ten or more men are employed. Id. May be upheld as to foreign corporation under state's power to prescribe conditions on which such corporations may do business in state. Id.

17. One ground opening divided up by plank partition into two compartments, the mouths of which are separated only by thin wooden partition, held not a compliance with Code 1896, § 2921. Howells Min. Co. v. Gray [Ala.] 42 So. 448.

18. Va. Code 1904, § 2570. Cranes Nest Coal & Coke Co. v. Virginia Iron, Coal & Coke Co., 105 Va. 785, 54 S. E. 884. Where agreement amendatory to lease of coal mine gave lessor right to use three haulways for purpose of transporting coal from adjoining lands through leased premises, held that the driving of cross entries over the dividing line was not a violation of the statute, the right to do so being an essential incident of the right to use the haulways, and hence a necessary inference from the contract. Id.

19. Act June 10, 1881, P. L. 110, requiring plugging, being a penal statute, is to be reasonably construed, and cannot be extended by implication to cases not included within the clear and obvious import of its language. Dawson v. Shaw, 28 Pa. Super. Ct. 563. Statute held not to require plugging of well unless there was a third sand or oil bearing rock, whether there was or not being a question for the jury. Id. Nor will penalty be imposed where it is physical impossibility, under all reasonable and known means, to pull casing and place two seasoned plugs as required by act, whether it was impossible in particular case being also for the jury. Id. Evidence held to show that defendant was owner or operator of wells within meaning of act. Id.

20. Utah Rev. St. 1898, § 3588, which, as construed by supreme court of that state, authorizes condemnation of right of way for aerial bucket line for transporting ore from mines, is not in violation of fourteenth amendment to U. S. Const. as a taking for private use, particularly where line is dedicated to carrying for whatever portion of public may desire to use it. Strickley v. Highland Boy Gold Min. Co., 200 U. S. 527, 50 Law. Ed. 581, afg. 28 Utah, 215, 78 P. 296.

21. See 6 C. L. 671.

22. Eighty acre tract in process of development as an oil mine held a mining claim within meaning of Code Civ. Proc. §§ 1183-1187, and hence persons furnishing labor and material to lessee in development thereof were entitled to lien on whole of his interest. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47, rvg. [Cal. App.] 84 P. 45.

23. Morrison v. New Haven & Wilkerson Min. Co. [N. C.] 55 S. E. 611.

24. A lien will not attach to the interests of an owner of a mine for work done or material furnished in working, or developing the same at the instance of, or under contract with, one whose only interest is that

make anyone having charge of any mining on the land the agent of the owner for this purpose.[25] Where a vendee is in possession under a contract of sale requiring him to make certain improvements as a part of the consideration therefor, both the title of the vendor and that of the vendee is subject to a lien for labor performed and materials furnished in the erection of such improvements by the vendee.[20] But the contrary has been held as to a purchaser in possession under a contract requiring him to work the property and apply a certain part of the proceeds on the purchase price.[27]

In some states persons furnishing labor or materials to a contractor have a lien on the property for the value thereof unless the contract between the owner and the contractor, if in excess of a certain amount, is in writing and recorded, in which case the lien extends to the contract price only.[28] Where the contract is void because oral, payment by the owner to the contractor is no defense to a claim of a laborer's lien.[29] The land should not be charged with a lien for a larger amount than the demand stated in the summons.[30] The right to a personal judgment ordinarily depends on privity of contract.[31]

of a lessee. Lessee held to occupy no other relation to mine, with respect to working of it, than that of lessee, though lease contained agreement to purchase enforceable against vendor. Williams v. Eldora-Enterprise Gold Min. Co. [Colo.] 83 P. 780. Complaint in action to foreclose lien against owner for work done for lessee held insufficient in absence of allegation that lessee had authority to develop the mine, or that the lessor knew that the work was being done. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47, afg. 84 P. 45. In action to foreclose mechanic's lien for labor in drilling oil well on leased land held that in order to sustain judgment foreclosing fee title it was necessary for plaintiff to show not only the ownership of the premises, the drilling of the well, and the performance of the labor, but also that well was drilled pursuant to some authority emanating from owner of land or his agent. Littler v. Robinson [Ind. App.] 77 N. E. 1145. Evidence held not to show that plaintiff's employer had such authority. Id. Where it did not appear that defendant H., who was alleged to have let contract for drilling well to plaintiff's employers, had succeeded to any of the interests or rights of one to whom owner of premises had given lease, or that he had any interest in such premises, or that he employed or in any manner authorized plaintiff's employers to construct well about which plaintiff was employed, or had notice or knowledge that it was being constructed at time plaintiff was being employed thereon, held that judgment of foreclosure against him was unauthorized. Littler v. Friend [Ind.] 78 N. E. 238. Even if it appeared that H. was lessee of owner and had authorized construction of well, held that lien would only extend to and affect his leasehold interest, and hence judgment of foreclosure against owner was improper, no contract on his part being shown. Id. Code, § 3105, giving lien to coal miners and laborers in certain cases, held not to provide for lien on mining property of an owner in favor of employes of an operating lessee. Caster v. McClellan [Iowa] 109 N. W. 1020.

25. Lessee under lease requiring it to forthwith begin and continually prosecute work of exploring, developing and mining upon premises, and to pay lessor certain part of net profits, held the person in charge of mining within Code Civ. Proc. § 1183, and hence to be deemed agent of owner, so that one performing labor for lessee was entitled to lien as against owner. Higgins v. Carlotta Gold Min. Co., 148 Cal. 700, 84 P. 758. Under said section prior to its amendment by St. 1903, p. 84, c. 76, interest of owner held liable for liens whether for work done exclusively in extraction of ores, or in development of mine, or both. Id.

26. Rule held not to apply where one was in possession under lease at a stipulated rent in nature of a royalty and for sole purpose of working and developing the mine, though lease also contained an option to purchase, converted into an enforceable contract of sale by payments thereunder, there being no requirement in latter contract that vendee should make any improvements, and possession not having been given thereunder. Williams v. Eldora-Enterprise Gold Min. Co. [Colo.] 83 P. 780.

27. Owner contracted to sell mine, purchase price to be paid in installments, and deed to remain in escrow until full amount was paid, purchaser being required to work property and to apply certain part of the proceeds on purchase price. Purchaser assigned contract, and assignee went into possession. Held that assignee was not agent of owner, and hence person performing work for assignee was not entitled to lien as against interest of owner, though latter knew that work was being done and acquiesced therein, but only against interest of assignee. Bogan v. Roy & Titcomb [Ariz.] 86 P. 13.

28. Overruling special demurrer directed to fact that complaint failed to allege that unrecorded contract between lessee and contractor, under which work was done, was in writing, or that it was for more than $1,000, held harmless where those facts were clearly proved and were found by the court. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47.

29. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47.

30. Berentz v. Belmont Oil Min. Co., 148 Cal. 577, 84 P. 47, afg. 84 P. 45.

31. Complaint in action to recover for

In many states a reasonable attorney's fee is allowed on foreclosure.[32]

§ 12. *Mining torts.*[33]—One leasing land for oil and gas purposes has a right of action against the lessee for damages for injury to the land caused by the escape of gas from a well drilled thereon and abandoned by the latter.[34] The one mining the property has the burden of having a survey to determine the lines underground.[35] A lessor is not ordinarily liable for the trespass of his lessee unless he participates therein or shares in the profits.[36]

By statute in some states any owner or person operating a mine who, without permission takes coal from adjoining lands, is made liable in double damages therefor, and for all expenses caused thereby.[37]

The measure of damages for permanent and irremedial injuries to land by failure to give surface support is the depreciation in the value thereof.[38] Only damages for subsidences which have taken place when the action is brought may be recovered.[39]

§ 13. *Remedies and procedure peculiar to mining rights.*[40]—Rescission of contracts affecting any estate or interest in land on the ground of fraud or mistake belongs to the exclusive jurisdiction of courts of equity.[41] Equity has jurisdiction of a bill to remove a cloud on the title to realty, though the legal title is involved and has not been previously established by an action at law, where there is no adequate legal remedy.[42]

Minerals are land within the meaning of statutes providing for suits to quiet

labor in drilling well and to foreclose lien on land proceeding upon theory that L. owned land, that H., operating under lease from L., contracted with C. to drill well upon said land, and that C. employed plaintiff to do certain work upon said well, held not to authorize personal judgment against L. or H. Littler v. Robinson [Ind. App.] 77 N. E. 1145.

32. Amount prayed for as reasonable attorney's fee, taxable as costs under B. & C. Comp. Or. § 5672, in suits to enforce miners' liens, cannot be added to amount of lien in ascertaining amount in controversy for purpose of determining jurisdiction of Federal court. Swofford v. Cornucopia Mines of Oregon, 140 F. 957.

33. See 6 C. L. 673.

34. Complaint held to state cause of action at common law, even if not under statute requiring plugging of wells, whether lessee was tenant for years or mere licensee. Talbott v. Southern Oil Co. [W. Va.] 55 S. E. 1009.

35. Lessee. Orphan Belle Min. & Mill. Co. v. Pinto Min. Co. [Colo.] 85 P. 323.

36. Lessor held not to have participated in trespass of its lessee or shared in profits thereof, where, at time it received royalty on ores taken from adjoining claim, it had no knowledge that trespass had been committed. Orphan Bell Min. & Mill. Co. v. Pinto Min. Co. [Colo.] 85 P. 323. Language of lessor's manager held not an instigation or a request by lessor corporation to lessee to commit trespass complained of. Id. Is not within scope of general authority of manager of mining corporation to instigate or request commission of trespass by its lessee so as to make such trespass the act of the corporation, and thereby make it liable as a willful trespasser. Id. In absence of proof to contrary, will not be presumed that he had such authority. Id.

37. Code, § 2485, is not unconstitutional as depriving owner of his property without due process of law (Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621), nor as being class legislation (Id.). Damages contemplated are all those resulting from taking of coal, including those caused to surface (Id.). In action to recover double damages for removal of coal from under plaintiff's land, question whether coal had been taken held, under the evidence, for the jury. Id.

38. Difference in market value before and after injury. Weaver v. Berwind-White Coal Co. [Pa.] 65 A. 545. Value of springs destroyed cannot be shown as separate and independent item not connected with general value of land, but their value may be considered as element in estimating value of land, and destruction of them in determining depreciation. Id. Preliminary questions for purpose of determining competency of witness to express opinion as to depreciation held proper. Id.

39. Catlin Coal Co. v. Lloyd, 124 Ill. App. 394.

40. See 6 C. L. 673.

41. Bruner v. Miller, 59 W. Va. 36, 52 S. E. 995. Courts of law have jurisdiction and power to afford relief in such cases by judgment for money or property, under some circumstances, when a right to rescind exists and has been properly claimed; but remedy at law is incomplete and inadequate because of lack of power to affect rescission by a direct adjudication thereof. Id.

42. Complainant in possession held entitled to maintain bill in Federal court to remove cloud consisting of invalid coal leases, outstanding and actively asserted by several actions at law. Wilmore Coal Co. v. Brown, 147 F. 931. Actions in state court to which complainant was not party, and which involved only a part of the leases, held not to deprive court of jurisdiction. Id.

title.[43] Possession is generally necessary to enable one to sue to determine adverse claims to realty.[44] Ejectment will lie to recover leased land where the lease provides for a forfeiture for breach of its essential conditions and a breach is shown.[45] The remedy for breach of an implied covenant to mine with reasonable diligence is not a bill to forfeit or avoid but an action at law for damages, or, possibly, an action of ejectment, based on a right of entry, for nonperformance.[46] Tenants in common of mineral beneath the soil which has been severed from the surface are entitled to a partition, but they must be tenants in common to have that right.[47] The granting or withholding of a preliminary injunction in an action to recover mineral lands rests in the sound discretion of the court.[48]

Persons in joint possession of property may be sued jointly in an action to recover possession.[49]

Suits to recover an interest in mining property must be brought promptly.[50] In case payment is made to depend on the happening of a contingency, an action will not lie until it has happened.[51]

Waiver or release of damages for wrongful eviction of a lessee must be specially

43. Bill lies to quiet title to coal and other minerals under and upon land, they being "lands" within meaning of Code 1896, § 809. Gulf Coal & Coke Co. v. Alabama Coal & Coke Co. [Ala.] 40 So. 397.

44. Locator of mining claims living in tent on one of them who had begun to sink shaft thereon held to have sufficient possession to entitle him to sue under Act June 6, 1900, § 475 (31 St. 410, c. 786), relating to government of Alaska, and providing that any person in possession may sue to determine adverse claims to realty, slight acts of dominion being sufficient in case of one claiming under valid location of mining claims. Lange v. Robinson [C. C. A.] 148 F. 799.

45. Coal lease providing for forfeiture and giving right of re-entry. Brooks v. Gaffin, 196 Mo. 351, 95 S. W. 418. Where coal lease provided that lessee's rights should be forfeited and lessor should have right to re-enter on breach of any of its provisions, and lessee failed to remove coal from leased premises, or to mine and remove sufficient coal to keep face of mine on leased premises even with face of coal on his own adjoining premises, or to weigh or keep account of coal mined, or to pay or offer to pay royalty, as required by lease, held that lessor was entitled to declare lease forfeited and recover possession. Brooks v. Gaffin, 192 Mo. 228, 90 S. W. 808.

46. In absence of express stipulation or reservation of right of re-entry. Wilmore Coal Co. v. Brown, 147 F. 931.

47. Coal. Brand v. Consol. Coal Co., 219 Ill. 543, 76 N. E. 849. Bill alleging that complainant was owner in fee of certain lands, and conveyed to defendant's grantors right to mine and remove three-fourths of the underlying coal, and that defendant had mined and removed a portion of the underlying coal, the amount of which and area from which it had been taken being unknown to complainant, and that for purposes of partition she elected to sever her fourth from the surface, held insufficient to entitle complainant to partition, it not appearing that any of the three-fourths belonging to defendant remained in place, and hence that anything remained to be partitioned. Id.

48. Refusal held not abuse of discretion. Vogel v. Warsing [C. C. A.] 146 F. 949.

49. Evidence held to show joint possession by defendants so that suit to recover possession was properly brought against them jointly. Davis v. Dennis [Wash.] 85 P. 1079.

50. Action to recover interest in claim to which plaintiff's co-owners obtained patent in own name. Ballard v. Golob, 34 Colo. 417, 83 P. 376. Plaintiff in suit to quiet title held not guilty of laches as against defendant, who had been in possession for less than three years, by reason of his failure to pay taxes or list property for taxation for eleven years, and fact that defendant, holding under void tax deed, had paid taxes for that time and had expended certain sum in improvements within three years. Costello v. Muheim [Ariz.] 84 P. 906. Defendant executed mining deed of unpatented mining property to secure indebtedness to plaintiff, and it and the note for the debt were placed in escrow to be delivered to defendant if he paid note when due, but if he did not, the deed to be delivered to plaintiff. Defendant notified plaintiff, before note became due, that he could not pay it, and did not demand deed or offer to pay note for twelve years after it became due, during which time plaintiff and one to whom he had conveyed a part interest had done assessment work and a large amount of development work. Held that defendant's rights were barred by laches. Bradley v. Johnson, 11 Idaho, 689, 83 P. 927. Mining property being speculative in character, claims therefor must be pressed at earliest possible time. Hudson v. Cahoon, 193 Mo. 547, 91 S. W. 72. Complaint in action to interest in land secretly purchased from plaintiff by his agent held not to show laches barring recovery, it not appearing that delay had injured defendant. Id.

51. Where in consideration of release of lessees' rights under oil and gas lease, lessor agreed to pay lessee certain sum out of proceeds of sale of first fifty acres of land covered thereby, held that lessee could not recover such sum until land had been sold as provided. Great Western Oil Co. v. Carpenter [Tex. Civ. App.] 15 Tex. Ct. Rep. 970, 95 S. W. 57.

pleaded if relied on.[52] The defense of laches must be raised by answer.[53] A description of the surface of a claim and an allegation of entry and trespass on said premises have been held to authorize proof of trespass on plaintiff's extralateral rights.[54]

The burden of proving a forfeiture for failure to do the required assessment work is on the party asserting it.[55] Since the owner of the surface is presumed to own all the underlying ore,[56] the burden is on one claiming any part thereof by virtue of extralateral rights to show by a preponderance of the evidence the existence of all facts necessary to give him such rights.[57] So, too, the burden is upon him who is interested to prove that there has been a severance by a deed of record, or by proof of such facts and circumstances brought home to the party charged as will affect his conscience with notice of adverse rights, or will serve to put him upon inquiry which will lead to such knowledge.[58] In an action for damages for the wrongful eviction of a lessee and the subsequent extraction of ore from the demised premises by the lessor, the burden is on the latter to show the amount and value of the ores so removed during the term of the lease.[59] One suing for a breach of an alleged oral contract to develop mines has the burden of proving the existence of the contract and its breach.[60]

The usual rules of evidence apply in actions affecting mining rights.[61] Parol evidence is inadmissible to vary or contradict the terms of a written contract, but

52. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

53. Cannot be raised by demurrer. Ballard v. Golob, 34 Colo. 417, 83 P. 376.

54. In action for trespass on extralateral dip of vein having apex in plaintiff's claim, it is not necessary for plaintiff to allege the existence of vein having apex within his surface boundaries, but departing from his side lines on its dip, and that his end lines are parallel, though it is better pleading to do so. Daggett v. Yreka Min. & Mill. Co. [Cal.] 86 P. 968.

55. Gear v. Ford [Cal. App.] 88 P. 600.

56. The owner of a claim is presumed to own all the ore within planes drawn vertically downward to the deep through the boundary lines of such claim, as well as the surface, until some one else shows by a preponderance of testimony that such deposits belong to another lode having its top and apex elsewhere. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648.

57. Has burden of showing by satisfactory evidence the continuity of the vein between its apex within his lines and the point at which it is claimed such rights have been interfered with, but an actual tracing is not necessary to show trespass. Daggett v. Yreka Min. & Mill. Co. [Cal.] 86 P. 968. Evidence of lode identity held sufficient. Id. Has burden of showing by preponderance of evidence not only that apex and strike of vein were in his claim, but also that between planes drawn vertically downward through end line and certain parallel line, the vein from its apex on its dip was continuous, that its continuity extended to and through plaintiff's ground, and that ore bodies in question formed a part of the vein. Grand Cent. Min. Co. v. Mammoth Min. Co., 29 Utah, 490, 83 P. 648. One defending action of trespass for taking ore underlying surface of another's claim, on ground that he was properly following on its dip a vein apexing wholly within surface of his claims, held to have burden of proving location of the vein and its apex in his claim on its strike at such a point that on its dip it would include ore taken. Red Wing Gold Min. Co. v. Clays, 30 Utah, 242, 83 P. 841. Finding as to course of vein held supported by evidence. Id.

58. Interstate Coal & Iron Co. v. Clintwood Coal & Timber Co., 105 Va. 574, 54 S. E. 593. Compromise agreement, which was never executed and to which defendant's grantor was not a party and with knowledge of which he was not chargeable, held not admissible to show severance. Id. Where at date of suit defendant and his grantor had acquired title to land including mineral by adverse possession, instruction that fact that person from whom grantor acquired title did not claim half underlying coal for sometime before sale held proper. Id. Where defendant and its grantor had acquired title by adverse possession since certain dates, questions relative to title prior to that time were immaterial. Id.

59. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349. Verdict for plaintiff held sustained by evidence as to amount of damages. Id.

60. Where defendant in action to recover on alleged oral contract for development of mining property relied wholly on alleged written contract and release of liability thereunder, held that instruction placing on plaintiff burden of proving oral contract and its breach, and that it was independent of written one, and did not refer to same property, and on defendant burden of showing that written contract was only one between parties, and that release was a release of all claims thereunder, held proper in view of other instruction. Lindblom v. Fallet [C. C. A.] 145 F. 805.

61. Payrolls of mining company introduced for purpose of showing that certain persons alleged to have done assessment work for plaintiff were employed by it at the

is admissible to explain ambiguities therein.[62] Failure of a party to produce evidence under his control warrants the presumption that it would be unfavorable to him.[63] Oral evidence which is admissible, except as against the objection that it is not the best evidence, goes into the case for all purposes when such objection is not made.[64] Evidence of indications successfully followed in the same district and on contiguous ground is admissible on the issue of a valid discovery by one attempting to locate a lode claim on similar indications;[65] but a litigant may not introduce for comparison evidence of indications found on a particular property leading to an ore body over which he has absolute control, unless he permits his adversary to inspect such property.[66] In an action for damages for removal of coal underlying the lands of another, evidence of the discovery of coal on adjoining land, and as to the existence of cracks in such land similar to those on plaintiff's land alleged to have been caused by such removal, is admissible.[67] Evidence as to the thickness of coal on other lands is inadmissible in the absence of a showing that the conditions are similar.[68] Inquiry as to the price of coal lands in the vicinity must be limited to similar lands similarly situated.[69] Evidence of similar trespasses on other lands is inadmissible.[70] In an action to recover royalties on coal actually mined under a lease, evidence comparing the output of another mine is inadmissible unless similarity of all the material conditions and methods is shown.[71]

The premises may be viewed by the jury only for the purpose of better applying the evidence introduced in the course of the trial.[72]

MINISTERS OF STATE; MINUTES; MISJOINDER, see latest topical index.

time, and hence could not have done it, held inadmissible for reason that signatures of such persons thereto were not sufficiently identified (Matko v. Daley [Ariz.] 85 P. 721), and also as being hearsay (Id.). In action to recover royalties on coal mined under lease, statements claimed to have been given witness by agent of railroad company, together with evidence as to what certain agents told him, held inadmissible. Missouri & Ill. Coal Co. v. Reichert, 119 Ill. App. 148.

62. Contract held one for sale of particular veln of coal, and not to be ambiguous on its face, nor was latent ambiguity disclosed by discovery, in application thereof to subject-matter, that there were other veins in land. Armstrong v. Ross [W. Va.] 55 S. E. 895. Fact, as disclosed by terms of contract, that area and location of coal covered thereby was known, held a part of written description thereof, to be observed in applying contract to subject-matter, and, for incorporation thereof into contract, as an element within intent of parties, parol evidence was not necessary. Id. Contract whereby plaintiff was employed to develop certain mining property held ambiguous as to whether it included four claims owned by defendants or only two, so that parol evidence was admissible to show that only two specified ones were referred to, and that there was subsequent oral contract as to others. Lindblom v. Fallet [C. C. A.] 145 F. 805.

63. On issue as to description of leased property, failure of lessor to produce office map referred to in lease held to warrant presumption that intention of parties coincided with lessee's contention. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

64. In suit on adverse, decree adjudged title to be in the three original locators and a fourth person who was a stranger to record title. Oral evidence to effect that there was a mining partnership existing between such four persons and that claims in controversy were owned by it, was admitted without objection. Held that oral evidence being admissible, except as against objection that it was not best evidence, and no such objection having been made, it went into case for all purposes, and was sufficient to support the decree. Slothower v. Hunter [Wyo.] 88 P. 36.

65. Ambergris Min. Co. v. Day [Idaho] 85 P. 109.

66. So as to enable him to introduce rebuttal evidence, and new trial will be granted where such evidence is admitted and examination is denied. Ambergris Min. Co. v. Day [Idaho] 85 P. 109.

67. As tending to show that plaintiff's land contained coal, and as bearing on question whether coal had been removed therefrom. Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621.

68. Evidence as to thickness of coal in mine one and one-half miles distant. Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621.

69, 70. Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621.

71. Missouri & Ill. Coal Co. v. Reichert, 119 Ill. App. 148.

72. Motion for view in action for damages for removing coal under plaintiff's land held properly denied, where mine was in such condition that it could not be entered and examination of land was unnecessary to apply evidence, and could only have aided jury in determining whether there were cracks in land and their extent which would have been improper, evidence being conflicting in that regard. Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. . 621.

MISTAKE AND ACCIDENT.

§ 1. Definition; Elements (1020).
§ 2. Effect of Mistake and Relief Against It (1021).
§ 3. Procedure to Obtain Relief or Make Defense (1021).

§ 1. *Definition; elements.*[74]—Mistake must be mutual,[75] or else conjoined with fraud, misrepresentation or other inequitable conduct on the part of the adverse party,[76] and to be remediable, the injury must flow from the mistake; hence, where consequences in regard to which relief is sought were brought about by the gross negligence of complainant, they are not caused by mistake.[77] Ignorance of the terms of an instrument is not therefore mistake as to one who passed by an opportunity to know by reading.[78] Especially is this true where a person signing an instrument knows the nature of the instrument which he signs,[79] but one may escape this rule whose capacity or situation warranted him in relying on the other [80] or where the other practiced fraud in this regard.[81] Neither an unfounded belief,[82] nor an unrealized expectation,[83] amounts to mistake in the legal sense. An exception to the rule that the mistake must be mutual is where the mistake of one party is caused by the fraud of the other.[84] Misrepresentations which come short of fraud because unintentional may mislead the other party into mistake.[85] A mistake of a private legal right rather than a general law is a mistake of fact and not a mistake of law.[86] Thus a mistake between the grantees by which they took a tenancy by the entirety, the grantor being indifferent, is not one of law in the irremediable sense.[87] Mistake may go to the parties,[88] to the subject-matter,[89] or the consideration.[90]

73. Cross references: Money paid by mistake, see Implied Contracts, 8 C. L. 155; Correction of Judgments, see Judgments, 8 C. L. 543.

74. See 6 C. L. 678.

75. The mere fact that one party believed that contract contained certain provisions does not authorize relief, unless it is shown that the other party to the contract shared in the mistake. East Jellico Coal Co. v. Carter [Ky.] 97 S. W. 768. Public contract omitted provision contained in notice inviting proposals, but there was no evidence that it was not as intended by public authorities. United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980.

76. See post this section.

77. Forfeiture of lease for failure of tenant to pay taxes, which under lease he agreed to pay. Kann v. King, 27 S. Ct. 213.

78. One becoming party to a contract is bound by its terms, though unread by him. Restrictions upon carrier's liability contained in bill of lading. Atlantic Coast Line R. Co. v. Dexter, 50 Fla. 180, 39 So. 634. Person signing a written instrument without reading it is bound thereby where he had an opportunity to do so and his signature was not procured by fraud or other trick or device. Pratt & Co. v. Metzger [Ark.] 95 S. W. 451; Curry v. Greffet, 115 Mo. App. 364, 90 S. W. 1166.

79. Release. Schenfeld v. Hochman, 100 N. Y. S. 1020.

80. An assurance that the only changes from a previous contract were those indicated by a certain letter does not warrant an assumption that everything in such letter was included. United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980. Evidence that one illiterate in English signed a contract of suretyship without having it read to him, but which had been drawn up after he gave directions to limit his liability to one only of several debts, held to show mistake. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

81. See 6 C. L. 679.

82. A mere belief on a purchaser's part that a description of land included certain property outside of it is not mistake. Kinyon v. Cunningham [Mich.] 13 Det. Leg. N. 806, 109 N. W. 765.

83. A discrepancy between estimate and eventual facts is not mistake where due solely to the uncertainty and fallible character of the data from which the estimates were computed, the fallibility being mutually known but having been greater than hoped. Computations of royalties for mining based on exploration by drilling the soil at intervals. Cleveland-Cliffs Iron Co. v. East Itasca Min. Co. [C. C. A.] 146 F. 232.

84. Agent of carrier in checking cases received for shipment made an error of six cases in his count. Upon applying to the consignor as to the number of cases, he was informed that his count was correct and thereupon issued a bill of lading for six cases more than were received. Cohen Bros. v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

85. Showing a prospective buyer the wrong property which was better than that really offered. Silverman v. Minsky, 109 App. Div. 1, 95 N. Y. S. 661.

86. Where husband and wife procured a deed to be issued to them in such form that it conveyed an estate by entirety, when each supposed and desired that the property should be held by them in common, the deed was reformed on the ground of mistake of fact. Marshall v. Lane, 27 App. D. C. 276.

87. Marshall v. Lane, 27 App. D. C. 276.

88. Contract with one doing business under a name importing incorporation, and in

§ 2. *Effect of mistake and relief against it.*[91]—Where on account of mistake there is no meeting of minds as to all of the essential elements of a contract, there is no binding obligation,[92] but unless artifice or fraud is practiced to induce a party to sign a contract, he cannot avoid same by denying that he knew its contents or that it expressed the real agreement of the parties.[93] In a conveyance not only it but also the warranties are vitiated as to a mistakenly included tract.[94] In the case of a bill of lading parol evidence of mistake will vary it so far as it constitutes a receipt.[95] As a general rule a mistake of law is not ground for relief, but in some states by statute a mistake of law entering into the consent avoids a contract,[96] but the mistake must be mutual or known to one of the parties and not rectified by him.[97] Under a like statute, relief is given where gross injustice to one and unconscionable advantage to the other is wrought.[98] No relief will be given in equity for mistake which vigilance would have avoided,[99] or against an innocent person who will unjustly be put to hazard.[1] Equity may decree a rescission on the ground of a unilateral mistake, but not as against a party who is innocent and who will obtain no unconscionable advantage thereby.[2] As a general rule where there has been no fraud or imposition, equity will not grant relief for mistake as to the legal effect of language used in a contract, but an exception is where the mistake exclusively concerns private rights.[3] Reformation is proper to correct a mistake in description.[4]

§ 3. *Procedure to obtain relief or make defense.*[5]—Law courts which have no equity powers may entertain a defensive plea of mistake.[6] The remedy is at

the supposition that in fact he was agent for an existing corporation, held rescindable for mistake. Fifer v. Clearfield & C. Coal & Coke Co., 103 Md. 1, 62 A. 1122.

89. Evidence held to show that a purchaser, who knew of an alley did not intend that it should be included in the description of the lot conveyed to him and that the scrivener by mistake included it. Fitch v. Vatter, 143 Mich. 568, 13 Det. Leg. N. 68, 107 N. W. 106. Inclusion in description more than the parcel of land mutually intended to be conveyed. Cullison v. Connor, 222 Ill. 135, 78 N. E. 14.

90. Bidding by items which aggregated $800 and tendering offer by letter for $700 as "per estimates." Adkins & Co. v. Campbell [Del.] 64 A. 628.

91. See 6 C. L. 678.

92. Mistake as to terms of sale. Curry v. Greffett, 115 Mo. App. 364, 90 S. W. 1166. See, also, ante, § 1. Special plea setting up mistake in description in bill of lading held good. Cohen Bros. v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

93. Order for goods. Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748.

94. Laufer v. Moppins [Tex. Civ. App.] 99 S. W. 109.

95. Cohen Bros. v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

96. Rev. Codes N. D. 1905, § 5299. Silander v. Gronna [N. D.] 108 N. W. 544. Rev. Civ. Codes S. D. §§ 1283, 1285. Griffing v. Gislason [S. D.] 109 N. W. 646.

97. Widow was induced to sign an agreement to share with distributees under a void will equally under a mistake as to her legal rights in the estate of her deceased husband, such distributees knowing that she was entitled to a one-third interest, but making no effort to rectify her misapprehension of the law, it was held that, having exercised due diligence upon discovering the mistake, she was entitled to a rescission. Griffing v. Gislason [S. D.] 109 N. W. 646.

98. Relief granted where renewal note was given on false representations by seller's agent, the circumstances having technically defeated the plea of failure of consideration, and a paper which had been given to protect the maker being legally insufficient to do so. Dolvin v. American Harrow Co., 125 Ga. 699, 54 S. E. 706.

99. Failure to examine title records before making deed containing warranty. Bidder v. Carville, 101 Me. 59, 63 A. 303. Denied to a tenant who suffered taxes to become delinquent and who was forfeited in consequence. Kann v. King, 27 S. Ct. 213. See, also, ante, § 1.

1. Where tenant under lease agreed to pay all taxes, relief was refused against a forfeiture for failure to pay same on the ground that such failure was occasioned by accident and mistake, where relief sought could not be afforded without subjecting the lessor to the peril of contesting the validity of an outstanding prima facie irredeemable tax title. Kann v. King, 27 S. Ct. 213.

2. Rescission was refused where grantor conveyed land which he did not own under the mistaken impression that he was the owner of same, notwithstanding fact that he offered to return consideration paid, and such further sum as equity in justice might require, there being no fraud or misrepresentation on the part of the grantee. Bidder v. Carville, 101 Me. 59, 63 A. 303.

3. Marshall v. Lane, 27 App. D. C. 276.

4. Laufer v. Moppins [Tex. Civ. App.] 99 S. W. 109.

5. See 6 C. L. 681.

6. City Court in Georgia. Burnett v. Davis & Co., 124 Ga. 541, 52 S. E. 927.

law and not by bill where plaintiff through ignorance gave a false answer to a warranty in a fire policy, but the same did not constitute a defense.[7] Where contract by mistake fails to express the real intent of the parties, the mistake may be set up in an action at law, unless the contract must be reformed before relief can be had.[8] The court of claims has jurisdiction to reform a contract with the United States and to allow damages thereon.[9] If cancellation is prayed in the bill, but the facts warrant reformation, defendant must pray the same by cross bill or answer.[10] Where specific performance is prayed to include a strip mistakenly omitted, respecting which the vendor has brought ejectment, it suffices to reform and permanently restrain the ejectment suit.[11] The statutes requiring the filing or exhibition of a written instrument sued on do not apply to a cross complaint setting up mistake and praying reformation of one filed with the complaint.[12] A plea of mistake in amount of a note when contradictory in amount must be attacked by special, not general, demurrer.[13] Mistake may sometimes be shown under a general denial of the contract, though fraud also is pleaded.[14] Mistake must be proved by clear and satisfactory evidence.[15] Unless the seller knew that the land was purchased for a particular purpose, it is immaterial that property supposed to be included and essential to such purpose, was excluded by the description.[16] Parol evidence is admissible to show that by mistake the terms in a contract are not as they were in fact agreed to.[17] As pertinent to a defense of mistake on one side, fraud should be submitted to the jury if there is any evidence.[18]

MISTRIAL; MONEY COUNTS; MONEY LENT; MONEY PAID; MONEY RECEIVED; MONOPOLIES; MORTALITY TABLES, see latest topical index.

MORTGAGES.

§ 1. Nature and Elements of Mortgages (1023).
§ 2. General Requisites and Validity (1023).
§ 3. Absolute Deed as Mortgage (1026).
§ 4. Equitable Mortgages (1029).
§ 5. Nature and Incidents of Trust Deeds as Mortgages (1029).
§ 6. Construction and Effect of Mortgages in General (1030).
§ 7. Title and Rights of the Parties (1032).
§ 8. Lien and Priorities (1035).
§ 9. Assignments of Mortgages (1036).
§ 10. Transfer of Title of Mortgagor and Assumption of the Debt (1037).
§ 11. Transfer of Premises to Mortgagee and Merger (1038).
§ 12. Payment, Release or Satisfaction (1039).
§ 13. Redemption (1041).
§ 14. Subrogation (1042).

Scope of topic.—This article is devoted to the mortgage as an instrument and the substantive rights growing from it. The procedure by which mortgages are

7. Rupert v. Patron's Mut. Life Ins. Co. [Mich.] 13 Det. Leg. N. 568, 108 N. W. 968.

8. Cincinnati, etc., R. Co. v. Pendleton, 29 Ky. L. R. 721, 96 S. W. 434.

9. United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980.

10. Cullison v. Connor, 222 Ill. 135, 78 N. E. 14.

11. Rundle v. Bohrer, 222 Ill. 475, 78 N. E. 831.

12. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

13. Burnett v. Davis & Co., 124 Ga. 541, 52 S. E. 927.

14. Action against a carrier for nondelivery of six cases of shoes. The bill of lading showed that fifty-five cases had been delivered to the carrier for shipment, but it was claimed that, by mistake in checking, six cases had been counted twice and that only forty-nine cases had been received. Held mistake could be shown under general denial. Cohen Bros. v. Missouri, K. & T. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 121, 98 S. W. 437.

15. Mistake in drafting deed. Kinyon v. Cunningham [Mich.] 13 Det. Leg. N. 806, 109 N. W. 675.

Evidence considered: Description of land in contract to convey held to have been two rods short in depth, either because of mutual mistake as to whether boundary was on or in the street, or because of such mistake on one side and fraud on the other. Rundle v. Bohrer, 222 Ill. 475, 78 N. E. 831. Declarations to scrivener by grantor in absence of grantees held insufficient to show mistake in reciting the wrong consideration. Graham v. Strawsburg, 28 Ky. L. R. 1204, 91 S. W. 737. Evidence held to show that description by mistake included certain land which parties knew and did not intend to convey. Laufer v. Moppins [Tex. Civ. App.] 99 S. W. 109. Held insufficient to show making of

foreclosed [19] has been fully treated in an earlier topic. The doctrine of notice and record of title,[20] the application of the statute of frauds,[21] the effect of a mortgage as an incumbrance,[22] and the purchase of land subject to a mortgage,[23] are elsewhere treated. Mortgage within this topic means only those of land or interests therein.[24]

§ 1. *Nature and elements of mortgages.*[25]—Mortgage is a conveyance by way of pledge [26] to secure the payment of a debt or the performance of an obligation.[27] It is a mere incident of the debt.[28] In most states it creates a mere lien and does not pass an estate.[29] It creates no lien unless the note secured evidences a debt.[30] Mortgages are taxable.[31]

§ 2. *General requisites and validity.*[32]—The general requisites of contracts[33] and of deeds of conveyance [34] are necessary also in mortgages. A mortgage is a conveyance by way of pledge and must be evidenced by writing,[35] though it has been held that an equitable mortgage may result from a parol agreement to give one.[36] No particular form is necessary.[37] There must be a debt.[38] There must be con-

mistake as to amount due at time of settlement. Crabtree v. Sisk [Ky.] 99 S. W. 268. Held to show mistake if not fraud in that more was due the grantor than grantee represented. Allen v. Bryant [Cal. App.] 88 P. 294. To show that contract was intended to create partnership and did not. Stein v. Phillips, 47 Or. 545, 84 P. 793. Held insufficient to show mutual mistake as to terms of a contract. United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980.

16. Kinyon v. Cunningham [Mich.] 13 Det. Leg. N. 806, 109 N. W. 765.

17. Nichols & Shepard Co. v. Berning [Ind. App.] 76 N. E. 776.

18. Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748.

19. See Foreclosure of Mortgages on Land, 7 C. L. 1678.

20. See Notice and Record of Title, 6 C. L. 814.

21. See Frauds, Statute of, 7 C. L. 1826.

22. See Covenants for Title, 7 C. L. 1004; Vendors and Purchasers, 6 C. L. 1781.

23. See Vendors and Purchasers, 6 C. L. 1781. See, also, post, § 10.

24. See Chattel Mortgages, 7 C. L. 634; railroad mortgages, see Railroads, 6 C. L. 1194; Street Railways, 6 C. L. 1556.

25. See 6 C. L. 682.

26. It is the conveyance of an estate by way of pledge and must be in writing. Poarch v. Duncan [Tex. Civ. App.] 14 Tex. Ct. Rep. 644, 91 S. W. 1110.

27. A mortgage is not a conveyance within the meaning of a statute providing that, when a conveyance is made to one upon consideration paid by another, no use or trust shall result in favor of the latter, but the title shall vest in the former. Hanrion v. Hanrion [Kan.] 84 P. 381.

28. Where a mortgage is unenforceable as security for the note sued on, the creditor need not attempt to enforce the security before suing on the debt. Mantle v. Dabney [Wash.] 87 P. 122.

29. A mortgage only creates a lien. Neither the legal nor equitable title passes until foreclosure. Gillett v. Romig [Okl.] 87 P. 325. A provision in an insurance policy that the premises should not be transferred, etc., is violated where the owner conveys and takes a mortgage back. Jump v. North British & Mercantile Ins. Co. [Wash.] 87 P. 928. It is mere security; the beneficial title is regarded as in the mortgagor. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092. Under the rule that mortgagor is the legal owner except as against the mortgagee after condition broken, the grantor in a deed of trust is the legal owner as against the world including the beneficiary prior to condition broken. Smith v. Forbes [Miss.] 42 So. 382. A mortgagee's interest in the land is personal estate and upon his death passes into his estate as personal property. Wilson v. Rehm, 117 Ill. App. 473.

30. McCourt v. Peppard, 126 Wis. 326, 105 N. W. 809.

31. Laws 1905, p. 2059, c. 729, providing for taxation of mortgages does not deny equal protection of the laws because applicable only to mortgages recorded after a certain future date. People v. Ronner, 185 N. Y. 285, 77 N. E. 1061. Nor does it deny due process, the tax being fixed on the amount stated in the mortgage or as to the amount actually found secured. Id. A statute prescribing a tax on all mortgages recorded after a certain date does not deny equal protection of the laws. People v. Ronner, 110 App. Div. 816, 97 N. Y. S. 550. The Mortgage Tax Law of New York is not unconstitutional. Id.

32. See 6 C. L. 683. The sale of an equity in mortgaged premises belonging to an intestate, under the license of the probate court, does not establish the validity of the mortgage. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

33. See 7 C. L. 761.

34. See 7 C. L. 1103.

35. In Texas a parol agreement to give a mortgage cannot be foreclosed as a mortgage. Poarch v. Duncan [Tex. Civ. App.] 91 S. W. 1110.

See, also, Frauds, Statute of, 7 C. L. 1826.

36. See 6 C. L. 688, n. 69.

37. An instrument by which one conveys land to a trustee to secure a note to a third person containing a provision for foreclosure, and reconveyance at the expense of the grantor on payment of the debt, is a mortgage. McVay v. Tousley [S. D.] 105 N. W. 932. Agreement and supplemental agreement by the owner of heavily incumbered premises, whereby another loan was secured, held to constitute a junior mortgage on the premises. Marquam v. Ross, 47 Or. 374, 78 P. 698, 83 P. 852, 86 P. 1. An instru-

tracting parties.[39] It must be executed by one who has some interest [40] or apparent interest in the property,[41] or who subsequently acquires an interest,[42] or has authority to mortgage.[43] A mortgagor may be estopped to assert the invalidity of a mortgage.[44] A mortgage is not void as being testamentary which runs to the lender and is payable to his heirs after the lender's death.[45]

Description.[46]—The mortgage must contain a description sufficient to identify the premises.[47] Parol evidence is not admissible in aid of a description as part of a certain section in a certain county where range or township is not given.[48]

The consideration.[49]—Like other contracts a mortgage must be based on a consideration,[50] and such consideration must be legal.[51] The consideration need not

ment in form a deed but containing a clause that, should the grantor pay the grantee a certain sum by a given date, it should be void, is a mortgage. Scott v. Hughes, 124 Ga. 1000, 53 S. E. 453. A conveyance of property to be held by the grantee until it could be sold when the proceeds were to be applied on the payment of debts and the balance returned to the grantor is a mortgage. Robinson v. Gassoway [Ala.] 39 So. 1023. When a settler on unsurveyed public lands purchased fruit trees and bound himself, heirs, assigns, and grantees to pay therefor, and subsequently became owner of certain land not that described, the contract was held **not a mortgage.** Stark Bros. v. Royce [Wash.] 87 P. 340.

38. Kerting v. Hatcher, 117 Ill. App. 647.

39. Brumby v. Jones [C. C. A.] 141 F. 318.

40. A mortgage by one who holds under a void deed is of no effect. Williams v. Ketcham [Ind. App.] 77 N. E. 285. Where a mortgagee has notice before the loan was made that the mortgagor's deed was a forged one, a prior statement by the owner that he had conveyed to the mortgagor could not have been relied upon and the owner was not estopped to deny the validity of the mortgage. Id. Where a will operated to convert real estate devised to an heir into personalty as of the date of the death of the testator, a mortgage subsequently executed by an heir on her interest in such realty created no lien thereon. Stake v. Mobley, 102 Md. 408, 62 A. 963.

41. A fraudulent grantee may give a valid mortgage to an innocent mortgagee. Gilcreast v. Bartlett [N. H.] 64 A. 767.

42. Where after a decree adjudging that a will conveyed an estate to one for life remainder to others in fee, the guardian of infant remaindermen under order of court executed a mortgage on their interest, held it created a valid lien. Ure v. Ure, 223 Ill. 454, 79 N. E. 153. Where a mortgagor had no title when he executed the mortgage, one subsequently acquired inured to the benefit of the mortgagee. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57.

43. Evidence held to show that the owner of property authorized others to mortgage it. Pellerin v. Sanders, 116 La. 616, 40 So. 917. One who takes a mortgage from a guardian on property of his ward, and such guardian had no power to execute such mortgage, has not an equitable lien. Capen v. Garrison, 193 Mo. 335, 92 S. W. 368.

44. A mortgagor who has received and retained the benefits of the mortgage cannot assert its invalidity on the ground that the mortgagee is a foreign corporation which has failed to comply with statutory requirements. Prudential Ins. Co. v. Cushman, 130 Iowa, 378, 106 N. W. 934.

45. Hellig v. Hellig, 28 Pa. Super. Ct. 396.

46. See 6 C. L. 684. See, also, Deeds of Conveyance, 7 C. L. 1103.

47. Description in the mortgage of a mine held sufficient to cover a certain interest. Wemple v. Yosemite Gold Min. Co. [Cal. App.] 87 P. 280. A description "the mineral lands described" in a certain deed construed to mean lands described in such deed as were in fact mineral. Smith v. Vary [Ala.] 41 So. 941. Description as part of a certain section in a certain county without designating the township or range is too indefinite. Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

48. Martin v. Kitchen, 195 Mo. 477, 93 S. W. 780.

49. See 6 C. L. 684.

50. See, also, Contracts, 7 C. L. 761.

Held a sufficient consideration: The **subsisting liability of a surety** is a sufficient consideration for the mortgage to him by the principal. Griffis v. First Nat. Bank [Ind. App.] 79 N. E. 230.

A mortgage to a trustee to pay certain debts is supported by a sufficient consideration where the mortgagee executes a deed of trust declaring the purpose for which the mortgage was given. American Mortg. Co. v. Merrick Const. Co., 50 Misc. 464, 100 N. Y. S. 561. An **agreement to extend time on an indebtedness,** though not in the form of an enforceable contract for a definite period, is a sufficient consideration. Muir v. Greene, 100 N. Y. S. 722. Where a mortgage is given in consideration of **extension of time and future advances,** refusal of the mortgagee to make future advancements does not invalidate it. Id. A mortgage signed by both husband and wife to secure a note upon sufficient **consideration running to the husband alone** is valid against the wife without any consideration moving to her separately. Bastin v. Schafer, 15 Okl. 607, 85 P. 349. Where a corporation transferred stock in consideration of a mortgage by the buyer to a third person to whom the corporation was indebted for a mine, the fact that the mine was worthless did not render the mortgage without consideration, as the consideration for it was its acceptance by the corporation in payment for its stock. Smith v. Krueger [N. J. Eq.] 63 A. 850. Evidence insufficient to show that a mortgage lacked consideration. Lefmann v. Brill [C. C. A.] 142 F. 44.

Partial failure of consideration may be set up in an action to enforce the mortgage. Otis v. McCaskill [Fla.] 41 So. 458. Evi-

move from the payee of the mortgage debt to the mortgagor.[52] It is presumed that the consideration recited in a mortgage is the amount of the debt.[53] But when the mortgagee admits that it is not, but that it was given to secure an unascertained indebtedness, he has the burden to show what the amount was.[54]

Execution.[55]—A mortgage must be executed by persons competent to contract.[56] The transaction must be free from fraud,[57] though fraud as to collateral matters will not avoid it.[58] It must be signed by the mortgagor[59] or under his authority.[60] If the mortgagor is a married man, his wife must join in order that her dower rights may be shut off,[61] and, if the mortgagor is a married woman, the husband must join.[62] The fact that a mortgage runs to a third person will not preclude the real creditor from asserting his rights under it.[63] A seal is not necessary,[64] nor is attestation.[65] It must be delivered,[66] but actual manual delivery is not essential.[67] A mortgage for a sum payable to "heirs" of named persons is de-

dence sufficient to show partial failure of consideration. Id. Where a purchaser from a corporation which has not power to execute a deed gives back a purchase money mortgage and goes into possession, he may without eviction defend an action to foreclose the mortgage on the ground of **lack of consideration.** Lafferty v. Evans [Okl.] 87 P. 304. To cancel a deed of trust on the ground that it was given for a contemplated loan which was never made, oral proof that the loan was never made must be clear and convincing. Brown v. Click, 59 W. Va. 172, 53 S. E. 16.

51. A mortgage based on an illegal consideration is unenforceable (Dierkes v. Wideman, 143 Mich. 181, 12 Det. Leg. N. 921, 106 N. W. 735), and not subject to ratification (Henry v. State Bank of Laurens [Iowa] 107 N. W. 1034).

52. Sufficient where parents lent money and took mortgage payable to their "heirs." Heilig v. Heilig, 28 Pa. Super. Ct. 396.

53. Cady v. Burgess, 144 Mich. 523, 13 Det. Leg. N. 324, 108 N. W. 414.

54. Cady v. Burgess, 144 Mich. 523, 13 Det. Leg. N. 324, 108 N. W. 414. Where in a suit to have a deed declared a mortgage it appeared that at the time the instrument was executed the amount of the debt was not ascertained, and that the mortgagor was old and infirm and under the influence of the mortgagee, who sustained a confidential relation toward her, he has the burden to show the amount and that transactions were fair and honest. Id.

55. See 6 C. L. 684.

56. A mortgage given by a lunatic for debt previously created is void. Smith's Committee v. Forsythe, 28 Ky. L. R. 1034, 90 S. W. 1075. Where a lunatic executed a mortgage at the instigation of his business manager who received the lion's share of the proceeds, the mortgage is void. Id.

57. Evidence held to show that execution of a mortgage was procured by duress. Long v. Branham [Ky.] 99 S. W. 271. A mortgagor cannot assert invalidity of the mortgage on the ground that he did not know of certain provisions contained in the mortgage when he signed it in the absence of fraud or mistake. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003. Such ignorance is no defense unless it appears that the mortgagee had notice of it. Id. Evidence insufficient to show fraud in the giving of a mortgage. Emerson-Newton Imp. Co. v. Cupps [N. D.] 108 N. W. 796.

58. That a note and mortgage was made to run to a nonresident for the purpose of evading taxation thereon does not affect its validity. Waterbury v. McKinnon [C. C. A.] 146 F. 737.

59. Where the mortgage is not signed with the signature of the alleged maker nor attested, but purports to be signed by his mark, the production of such mortgage is not available against the plea of non est factum. Clark v. Clark, 28 Ky. L. R. 1069, 91 S. W. 284. It may be shown by parol that a wife signed a mortgage as surety for her husband. Gibson v. Wallace [Ala.] 41 So. 960. Evidence held to show that a wife was the principal debtor and not merely surety for her husband. Id.

60. A husband may sign his wife's name to a mortgage where it is done in her presence and at her express request and direction. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

61. A mortgage is enforceable except as against a dower right though the wife does not join. Lowe v. Walker, 77 Ark. 103, 91 S. W. 22.

62. Burn's Ann. St. 1901, § 6962, expressly prohibits a married woman from mortgaging her separate estate unless her husband joins in the mortgage. Starkey v. Starkey [Ind.] 76 N. E. 876.

63. Where one lends his own money upon the notes of borrowers secured by mortgages, which notes and mortgages he retains possession of, the fact that they are made payable to a third person does not prevent them from being treated as assets of his estate. Hanrion v. Hanrion [Kan.] 84 P. 381.

64, 65. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

66. Brumby v. Jones [C. C. A.] 141 F. 318.

67. Fryer v. Fryer [Neb.] 109 N. W. 175. It is sufficient if the mortgagor with intention to give it effect place it on record pursuant to agreement between the parties. Acknowledgement of a bond and recitation thereof in a mortgage duly acknowledged and recorded is evidence that the instruments were executed and delivered. Ward v. Ward, 144 F. 308.

livered in law to the mortgagees when delivered to the named ancestors.[68] It must be accepted.[69]

Recordation[70] is not necessary as between the parties.[71] An unrecorded mortgage is an incumbrance within the provision of an insurance policy declaring it to be void in case the premises were incumbered.[72] An absolute deed intended as a mortgage must be recorded in the mortgage book.[73]

§ 3. *Absolute deed as mortgage.*[74]—An absolute deed intended by both parties as security for a debt is a mortgage.[75] It must have been intended as a mortgage at its inception,[76] and the relation of debtor and creditor must exist.[77] There must be a reciprocal right to redeem and to foreclose.[78] In some states it is provided

68. The named persons are in effect holding trustees. Heilig v. Heilig, 28 Pa. Super. Ct. 396.

69. A delivery to the husband of the mortgagee is presumed accepted by the wife who is mortgagee. Rhea v. Planters' Mut. Ins. Ass'n, 77 Ark. 57, 90 S. W. 850.

70. See 6 C. L. 685. See, also, Notice and Record of Title, 6 C. L. 814. Where a deed to secure a debt was never recorded and innocent third person acquired interests in the property, the mortgage may not after a long period of years assert and enforce his lien. Sturdivant v. Cook [Ark.] 98 S. W. 964.

71. Rhea v. Planters' Mut. Ins. Ass'n, 77 Ark. 57, 90 S. W. 850. Recordation is not essential as between the parties. Rogers v. Page [C. C. A.] 140 F. 596; Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

72. Rhea v. Planters' Mut. Ins. Ass'n, 77 Ark. 57, 90 S. W. 850.

73. Under the statutes of Michigan requiring deeds and mortgages to be recorded in separate books, an absolute deed intended as a mortgage which is recorded in the deed book and not in the mortgage book is void as against a bona fide purchaser. Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 13 Det. Leg. N. 10, 107 N. W. 76.

74. See 6 C. L. 685.

75. An absolute deed intended as a mortgage merely creates a lien on the premises. Flynn v. Holmes [Mich.] 13 Det. Leg. N. 448, 108 N. W. 685; Wilson v. Rehm, 117 Ill. App. 473. If so intended a deed absolute will be treated as a mortgage. Hill's Guardian v. Hill, 29 Ky. L. R. 201, 92 S. W. 924. Pleading held not to allege that a deed was intended as a mortgage. Jacoby v. Funkhouser [Ala.] 40 So. 291. A deed intended as a mortgage always remains such. Ferguson v. Boyd [Ind. App.] 79 N. E. 549.

Held a mortgage: A deed absolute accompanied by a contract for reconveyance separately executed, will be held to constitute a mortgage, if such appears from the surrounding circumstances to have been the intention of the parties. Keeline v. Clark [Iowa] 106 N. W. 257. Evidence sufficient to show that such a transaction was intended as a mortgage. Id. Where one as agent is authorized to foreclose a mortgage and instead takes a conveyance in the name of his principal under an agreement to apply the rents and profits on the debt and to recovery when the debt is paid. De Bartlett v. De Wilson [Fla.] 42 So. 189. Where one procured another to pay a debt for him and executed a deed to him as security for repayment under an agreement that he should have a right to redeem. Shreve v. McGowin, 143 Ala. 665, 42 So. 94. Where one gave a deed to secure a debt and while the grantor was in possession the grantee conveyed to his wife. Prefumo v. Russell, 148 Cal. 451, 83 P. 810. Where a wife had made extensive advances to her husband and, just prior to the maturity of an obligation against him, took a conveyance of all his real estate, held not fraudulent as to his creditors, but enforceable as a mortgage having priority of a judgment on the obligation. Knickerbocker Trust Co. v. Carhart [N. J. Eq.] 64 A. 756. An instrument purporting to be a deed but given as security and not accompanied by a bond for reconveyance as required by Ga. Civ. Code 1895, § 2771, nor a transfer of possession, and which contains a power of sale, constitutes a common-law mortgage and will be enforced in the Federal courts as a lien only. In re Moore, 146 F. 187. The grantee from one who has received the property on like terms, who sells the land and is paid his debt, becomes trustee as to the surplus for the grantors as their interests may appear. Wilson v. Rehm, 117 Ill. App. 473.

76. The intention of the parties at the time the instrument was executed in controlling. Fridley v. Somerville [W. Va.] 54 S. E. 502. Where land has been conveyed by deed absolute in payment of mortgage liens existing thereon, a subsequent parol promise to reconvey to the grantor without consideration will not sustain a proceeding to have such deed declared a mortgage. Samuelson v. Mickey [Neb.] 106 N. W. 461. Where a contract, other instruments and a deed executed contemporaneously, show that the deed was intended as a mortgage, it will be so considered. Ferguson v. Boyd [Ind. App.] 79 N. E. 549.

77. Fridley v. Somerville [W. Va.] 54 S. E. 502. Deed and option to repurchase held not a mortgage. Jones v. Hubbard, 193 Mo. 147, 90 S. W. 1137. Where it did not appear that there was an existing debt or contract for future advance, evidence held insufficient to show that a deed was intended as a mortgage. Jacoby v. Funkhouser [Ala.] 40 So. 291. It must appear that a debt existed at the time of the transaction. Jones v. Jones [S. D.] 108 N. W. 23. Under a statute providing that a deed given as security is a mortgage, a deed given to secure a debt which the grantor was to pay whenever he is able to is not as there is no right to foreclose. Caraway v. Sly, 222 Ill. 203, 78 N. E. 588.

78. Where the grantor is to pay the debt whenever he is able, there is no right to foreclose. Caraway v. Sly, 222 Ill. 203, 78 N. E. 588.

by statute that an absolute deed intended as a mortgage must be accompanied by a written defeasance,[78] and such defeasance be recorded,[80] but, though statutory requirements are not complied with, a forfeiture will not be decreed.[81] Such statutes are not merely recording acts but prescribe the mode of evidencing a defeasance which is otherwise invalid.[82] A statute requiring deeds of trust to be executed like deeds of conveyance has no application to a purchase at execution sale on agreement to hold as security for the land owner.[83]

Mortgage or conditional sale.[84]—A deed absolute and contract to reconvey on payment of a specified sum is prima facie a deed.[85] A transfer to enable the grantee to recover judgment quieting title in him is a deed.[86]

The proceeding to establish a mortgage is equitable,[87] but when reformation of the instrument is not necessary, the fact may be shown in an action at law.[88] The proceeding is usually a suit to establish the mortgage and to redeem and in that phase is hereafter discussed.[89] Actions for all relief to which a party is entitled may be joined,[90] and several instruments may be declared to be mortgages in a single suit.[91] One who has no real interest in the outcome of the proceeding is not a necessary party.[92] Tender of the amount of the debt may not be essential.[93]

79. Under the rule that a deed absolute cannot be decreed a mortgage, unless a written defeasance is executed and recorded, where statutory requirements are not complied with, the grantee cannot be declared a trustee ex maleficio in the absence of fraud. O'Donnell v. Vandersaal, 213 Pa. 551, 63 A. 60.

80. General creditors are not within the provisions of a statute requiring written defeasance of an absolute deed to be recorded. Valley v. First Nat. Bank [N. D.] 106 N. W. 127. Where it is required by statute that a written defeasance be recorded, an instrument will be held to be what it purports to be if such statute is not complied with, as to one taking a mortgage from the grantee. Patnode v. Deschenes [N. D.] 106 N. W. 573.

81. Where an absolute deed is given to secure a debt and time fixed for repayment is not of the essence of the transaction, and the tender can be compensated at any time by payment of the loan, a forfeiture will not be permitted. In re King's Estate [Pa.] 64 A. 324.

82. Rockhill's Estate, 29 Pa. Super. Ct. 28.

83. Code, § 2918, so providing does not preclude a showing that a purchaser at execution sale had agreed to purchase and hold the land as security. McElroy v. Allfree [Iowa] 108 N. W. 116.

84. See 6 C. L. 685.

85. Johnson v. Scrimshire [Tex. Civ. App.] 15 Tex. Ct. Rep. 949, 93 S. W. 712. Deed and contract to reconvey on payment of the consideration and interest within a specified time held a conditional sale and not a mortgage. Goodbar & Co. v. Bloom [Tex. Civ. App.] 16 Tex. Ct. Rep. 765, 96 S. W. 657. Where one sold land to be paid for in instalments represented by notes, title to be conveyed on payment of the notes, and subsequently assigned such notes a collateral and executed a deed of the land to the assignee, held that, so long as the vendee's contract is in force, such deed cannot be considered as a mortgage, but the legal title passed in trust. First Nat. Bank v. State Bank [N. D.] 109 N. W. 61.

86. Renton v. Gibson, 148 Cal. 650, 84 P. 186.

87. See 6 C. L. 686.

88. Barchent v. Snyder, 128 Wis. 423, 107 N. W. 329.

89. See post, § 13.

90. An action to have a deed declared a mortgage, to have a judgment for possession of the premises in favor of the mortgagee canceled, and to have a mortgage executed by him on the premises adjudged fraudulent, may be joined. Gustin v. Crockett [Wash.] 87 P. 839. Where one as owner and as agent executed separate deeds as security for a single indebtedness, and the grantee was not required to accept partial payment or partial surrender of securities, a single suit could be maintained to have all the deeds declared mortgages, and to redeem. Wadleigh v. Phelps [Cal.] 87 P. 93.

91. Where one acting for himself and as agent for another conveys property held by them in severalty as security, both agent and principal were entitled to join in an action to have the deeds declared mortgages, though it is provided by statute that, if there is more than one mortgage or person claiming under him, any of whom are not entitled to redeem, any one who is entitled may redeem a divided or undivided part. Wadleigh v. Phelps [Cal.] 87 P. 93. Where a complaint to have deeds declared mortgages alleged that they were given to secure a certain sum, an amendment that one of such deeds was also given to secure another sum does not detract from the effect of the original complaint. Id.

92. An agent to whom a deed runs is not the real party in interest and is not a necessary party to an action to have it declared a mortgage. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155.

93. Where one gave an absolute deed which was intended as a mortgage under the understanding that he was not to be disturbed in his possession, and the grantee fraudulently procured a judgment for possession, tender of the debt is not essential to an action to have the deed declared a mortgage, where it did not show that the grantees were in possession as mortgagees. Gustin v. Crockett [Wash.] 87 P. 839.

Evidence.[94]—The burden of proving an absolute deed to be in fact a mortgage is on the party who asserts it.[95] As a general rule and excepting those states which prescribe a written formal defeasance,[96] such fact may be established by parol evidence[97] including letters or memoranda[98] in an appropriate proceeding.[99] The rule is for the purpose of preventing fraud[1] and does not violate the statute of frauds,[2] but it does not authorize contradiction of the terms of the instrument.[3] In Kentucky, however, it is held that such evidence is not admissible in the absence of fraud or mistake,[4] but is admissible when it appears that the written instrument does not contain the entire contract.[5] The fact is to be determined from all the circumstances surrounding the transaction.[6] The evidence must be clear and convincing.[7] The presence of what are termed "indicia of a mortgage," arising from

94. See 6 C. L. 687.

95. The burden of proving the fact is on the party alleging it. Fridley v. Somerville [W. Va.] 54 S. E. 502.

96. See ante this section.

97. Alexander v. Grover, 190 Mass. 462, 77 N. E. 487; Alexander v. Cleland [N. M.] 86 P. 425; Reynolds v. Blanks [Ark.] 94 S. W. 694. It may be shown by parol that one loaned money to another with which to purchase land and took title in his own name as security. Krebs v. Lauser [Iowa] 110 N. W. 443. Parol evidence is admissible to show that a debt existed when the instrument was executed and that it was intended as a mortgage. Shreve v. McGowin, 143 Ala. 665, 42 So. 94.

98. Letters exchanged between grantor and grantee concerning the transaction were admissible. Wadleigh v. Phelps [Cal.] 87 P. 93. Memorandum found wrapped around quitclaim deed from grantee to grantor, after former's death, but not shown to have been seen or assented to by grantor, held not admissible to show terms on which deed was made so as to exclude parol evidence to show that deed was really a mortgage. Id.

99. Where one conveyed by deed absolute his interest as devisee, to his brother in payment of a debt, parol evidence is not admissible in an action for accounting to show that a mortgage was intended. Nevius v. Nevius, 101 N. Y. S. 1091.

1. This rule is for the purpose of preventing fraud and imposition. De Bartlett v. De Wilson [Fla.] 42 So. 189.

2. It is not a contract for the sale of any interest in land. De Bartlett v. De Wilson [Fla.] 42 So. 189. The statute of frauds does not apply to such case. Shreve v. McGowin, 143 Ala. 665, 42 So. 94.

3. A statutory provision that a transfer as security is deemed to be a mortgage does not authorize parol evidence of the intent of the parties in executing an absolute deed without qualification or limitation, as to the interest intended to be conveyed. Bernardy v. Colonial & U. S. Mortg. Co. [S. D.] 105 N. W. 737.

4, 5. Crockett's Guardian v. Waller, 29 Ky. L. R. 1155, 96 S. W. 860.

6. It is for the court to determine the intention of the parties from all the evidence introduced. Fridley v. Somerville [W. Va.] 54 S. E. 502. The relations existing between the parties at the time of the transaction may be considered in determining the intention. De Bartlett v. De Wilson [Fla.] 42 So. 189. Where a deed is treated by the parties as a mortgage, they are bound by their construction. Ferguson v. Boyd [Ind. App.] 79 N. E. 549.

7. Proof must be clear and satisfactory. Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 S. W. 405; Krebs v. Lauser [Iowa] 110 N. W. 443; Goodbar & Co. v. Bloom [Tex. Civ. App.] 16 Tex. Ct. Rep. 765, 96 S. W. 657; Reynolds v. Blanks [Ark.] 94 S. W. 694. Evidence sufficient. Reynolds v. Blanks [Ark.] 94 S. W. 694; Reynolds v. Reynolds, 42 Wash. 107, 84 P. 579; Renton v. Gibson, 148 Cal. 650, 84 P. 186; Jones v. Jones [S. D.] 108 N. W. 23. The fact that a deed is referred to as collateral security will not conclusively stamp the transaction as a mortgage. Wisner v. Field [N. D.] 106 N. W. 38. It is presumed to be what it purports to be until shown otherwise by reasonably clear and satisfactory proof Betts v. Betts [Iowa] 106 N. W. 928.

Evidence insufficient to show that a deed and ground rent were intended as a mortgage in an action brought 40 years after the instruments were executed. Rosenstock v. Keyser [Md.] 65 A. 37. Where a purchaser at foreclosure sale subsequently took a quitclaim deed from the mortgagor, evidence held insufficient to show that such quitclaim deed was intended as a mortgage. Pankau v. Morrissey, 224 Ill. 177, 79 N. E. 643. Evidence insufficient to show that a deed was intended as a mortgage. Betts v. Betts [Iowa] 106 N. W. 928. Evidence sufficient to show that a deed was what it purported to be and not a mortgage. Jones v. Jones [S. D.] 108 N. W. 23. Evidence insufficient. Renton v. Gibson, 148 Cal. 650, 84 P. 186; Krebs v. Lauser [Iowa] 110 N. W. 443. Where a son never held legal title to property but the deed from the vendor ran directly to his father who agreed to sell it to the son and gave a bond for a deed, and the son gave his note for the price, evidence held insufficient to show that the deed to the father was a mortgage, and that the son had in fact paid most of the purchase price. Reynolds v. Reynolds, 42 Wash. 107, 84 P. 579. Evidence insufficient to show that a deed was intended as a mortgage. Hamilton v. Holmes [Or.] 87 P. 154.

Evidence sufficient to show that an absolute deed was intended as a mortgage. Patnode v. Deschenes [N. D.] 106 N. W. 573; McElroy v. Allfree [Iowa] 108 N. W. 116; Cady v. Burgess, 144 Mich. 523, 13 Det. Leg. N. 324, 108 N. W. 414; Meeker v. Shuster [Cal. App.] 87 P. 1102. Finding that absolute deed was intended as mortgage sustained. Wadleigh v. Phelps [Cal.] 87 P. 93. Evidence sufficient where it appeared that

circumstances attending the transaction, does not prevent consideration of other evidence on the question of intent.[8] Such evidence may be so potent and convincing as to overcome the weight to be given indicia of a mortgage.[9] The rule that clear and convincing proof is required does not require that the record on appeal contain evidence clear and convincing to the reviewing court.[10]

§ 4. *Equitable mortgages.*[11]—An equitable mortgage is a transaction to which equity attaches the character of a mortgage.[12] The transfer, however, must have been intended as security.[13] It may result from an agreement to give a mortgage, a defectively executed mortgage, an imperfect attempt to create a mortgage or appropriate specific property to the payment of a particular debt.[14] Improvements made pending ejectment suits do not put plaintiffs on inquiry of the source of the money to make them; hence, no equitable lien for their value arises in favor of the mortgagee to the unsuccessful defendants and especially when they had at least some knowledge of a dispute of their mortgagors' title.[15]

§ 5. *Nature and incidents of trust deeds as mortgages.*[16]—A deed of trust for the purposes of the trust vests legal title in the trustee until the debt is paid.[17] He is entitled to reimbursement for necessary expenditures in connection with his trust.[18] His duties and obligations are to be determined from the provisions of the deed.[19] He is bound at his peril to know that the debt is paid before he executes a release.[20] The power granted to the beneficiary of appointing a substitute trustee is a power coupled with an interest.[21] Authority to appoint a substitute trustee cannot be delegated.[22] It must be executed in the manner prescribed,[23] but is subject

a debt existed, that a deed was executed to prevent foreclosure, and no other consideration was shown. De Bartlett v. De Wilson [Fla.] 42 So. 189.

8, 9. Fridley v. Somerville [W. Va.] 54 S. E. 502.

10. Wadleigh v. Phelps [Cal.] 87 P. 93.

11. See 6 C. L. 687.

12. An instrument executed to secure a loan will be regarded in equity as a mortgage, whatever its form. Marquam v. Ross, 47 Or. 374, 78 P. 698, 83 P. 852, 86 P. 1.

13. To create an equitable mortgage for the payment of a debt, an intention must be manifest as distinguished from an intention to apply to the payment of the debt the proceeds of a sale of the property. Smith v. Rainey [Ariz.] 83 P. 463.

14. Smith v. Rainey [Ariz.] 83 P. 463. Defectively executed, not attested or acknowledged. Markham v. Wallace [Ala.] 41 So. 304. Where a bankrupt executed a deed to his wife one month prior to making a voluntary assignment, the deed is valid only as an equitable mortgage to secure actual indebtedness to the wife at the date of execution. Treseder v. Burgor [Wis.] 109 N. W. 957. Where one borrowed money to pay a usurious debt and procured an assignment of the mortgage securing the same to the person advancing the money and agreed to execute a new mortgage but failed to do so, the assigned mortgage would be regarded as the new one, notwithstanding it was void for usury. Lowe v. Walker, 77 Ark. 103, 91 S. W. 22. An agreement to give a mortgage to one who paid a debt for another on faith of his promise to do so may be specifically enforced. Id.

15. Armstrong v. Ashley, 27 S. Ct. 270.

16. See 6 C. L. 689.

17. Weber v. McCleverty [Cal.] 86 P. 706. Under the statutes of California a deed of trust of a homestead given to secure a debt is not a lien or incumbrance, and the holder of the debt secured need not present it for allowance against the estate of the grantor as a condition of the right to foreclose. Id. Where one was vested with the title to premises at the time she executed a trust deed thereon, a deed by the trustee pursuant to the terms of the trust vested title in the purchaser. Stockton Sav. & Loan Soc. v. Saddlemire [Cal. App.] 86 P. 723.

18. Under a statute providing that a trustee is entitled to repayment of all expenses actually incurred, he is entitled to attorney's fees in a necessary action, though no provision was made therefor in the deed. Mitau v. Roddan [Cal.] 84 P. 145.

19. A mortgagor, at the time the mortgage was made, deeded the property under under an agreement that the latter should take possession and collect rents and profits and apply them to interest, taxes, expenses, etc. The deed obligated the trustee to make specific advances, interest on the mortgage not being specifically mentioned, and recited that it might become necessary for the trustee to make other advances, in which case it should be entitled to a lien on the property therefor. Held trustee was not bound to make advances to pay interest on the mortgage to prevent foreclosure. Marquam v. Ross, 47 Or. 374, 78 P. 698, 83 P. 852, 86 P. 1. Evidence held insufficient to show that foreclosure of mortgage was caused by trustee's failure to apply net income to interest. Id.

20. If he unwarrantably executes a release, he is liable for resulting damages. Lennartz v. Estate of Peter Popp, 118 Ill. App. 31.

21. Frank v. Colonial & U. S. Mortg. Co., 86 Miss. 103, 38 So. 340.

22. A power given in a deed of trust to appoint a substituted trustee is personal and cannot be delegated to an attorney in fact. Watson v. Perkins [Miss.] 40 So. 643.

23. Where a trust deed required the ap-

to the rules governing the execution of other instruments.[24] An order appointing a substituted trustee should not contain recitals which could be construed as an adjudication of a disputed question.[25] A trustee appointed pursuant to a stipulation in the deed, to make the sale, is not a substituted trustee.[26]

Sale of premises[27] by a trustee is a foreclosure in legal consequence and is fully treated as such in another topic.[28] The power of sale vested in the trustee is a power coupled with an interest[29] and is not revoked by the death of the grantor,[30] except pending administration of his estate.[31] There is a conflict of authority as to whether a sale by a trustee acting under a void appointment is absolutely void.[32] A trustee will not be permitted to purchase the mortgaged property for his own benefit, at foreclosure sale,[33] unless his trusteeship has been terminated.[34]

§ 6. *Construction and effect of mortgages in general.*[35]—A mortgage is to be construed as other written instruments are.[36] A mortgage and other instruments executed at the same time and relative to the same subject-matter are to be construed together.[37] In a mortgage to the "heirs" of husband and wife, the word heirs is not a word of limitation.[38] Recitals as to the property mortgaged are not conclusive.[39] A stipulation conferring a power of sale in case of default gives a remedy which must be exercised agreeably to the statutes relating thereto, in force

pointment of a substituted trustee to be made "under his name and seal" an appointment not under seal is void. Watson v. Perkins [Miss.] 40 So. 643.

24. The appointment of a substituted trustee need not be signed by the owner of the deed if he is very feeble; it is sufficient if it is signed by his express direction in his presence. Watkins v. McDonald [Miss.] 41 So. 376. The appointment of a substituted trustee may be made on a separate paper where the deed is full. Id. Deed of trust construed and held to show that it was intended to appoint the "acting sheriff" of a certain county as substituted trustee in case of death or disqualification of the trustee appointed. Killgore v. Cranmer [Colo.] 84 P. 70.

25. Should not recite that the applicant for the order was the owner of the bonds secured where his ownership was disputed. In re Radam Microbe Killer Co., 114 App. Div. 199, 99 N. Y. S. 925.

26. His sale is not vitiated because of failure to comply with statutory requirements relative to recording his appointment. Searles v. Kelley, Simmons & Co. [Miss.] 40 So. 484.

27. See 6 C. L. 690.

28. See Foreclosure of Mortgages on Land, 7 C. L. 1678.

29, 30. Frank v. Colonial & U. S. Mortg. Co., 86 Miss. 103, 38 So. 340.

31. A power of sale in a trust deed is revoked by the death of the owner of the equity pending administration of his estate. Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925.

32. A sale by a substituted trustee under a void appointment is void. Watson v. Perkins [Miss.] 40 So. 643. A sale by a substituted trustee whose appointment is void, is voidable only. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

33. Marquam v. Ross, 47 Or. 374, 78 P. 698, 83 P. 852, 86 P. 1.

34. A trustee managing the property under an agreement which is terminated at foreclosure may purchase at the sale to protect its subsequent lien for advances. Marquam v. Ross, 47 Or. 374, 78 P. 698, 83 P. 852, 86 P. 1.

35. See 6 C. L. 690.

36. Mortgage construed and held not to give a holder of a certain class of claims less than a majority of such class the right to direct foreclosure, unless holders of a majority of such claims joined in the demand. Allen v. Pierson, 113 App. Div. 586, 100 N. Y. S. 451. Where a mortgage was made to secure loans at five and one per cent and two notes were made, one for the amount of the loan at five per cent and the other for one per cent of the amount at eight per cent, the words "five and one per cent" were construed to mean six per cent. Citizens' State Bank v. Chambers, 129 Iowa, 414, 105 N. W. 692. Where a mortgage was executed to secure certain money advanced to a corporation and another, it was held to constitute a primary security for the repayment of such money and of the value of certain stock transferred on faith of it and not a mere surety obligation. Clambey v. Corliss, 41 Wash. 327, 83 P. 422.

See particularly Deeds, etc., 7 C. L. 1103.

37. Security Trust & Life Ins. Co. v. Ellsworth [Wis.] 109 N. W. 125. A note, deed, and defeasance executed at the same time and relative to the same subject-matter, should be construed together as one instrument. Bartels v. Davis [Mont.] 85 P. 1027. The note and mortgage are to be construed together to determine the intent and purpose of the parties. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. Note and mortgage should be construed together. Spesard v. Spesard [Kan.] 88 P. 576. A mortgage given to secure the payment of a note, though executed long after the date of the note, will, if so intended, become a part of the contract from date of delivery, the same as if both instruments had been executed at the same time. Id.

38. Heilig v. Heilig, 28 Pa. Super. Ct. 396.

39. A recital that the land mortgaged did not include a homestead is not conclusive. McGaughey v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 350, 92 S. W. 1003.

when the remedy is invoked.[40] A provision that the mortgagor could sell from time to time certain of the mortgaged lots, and the mortgagor would release as to such lots on receipt of a certain sum "during the life of this agreement" applies only prior to default in payment of the mortgage debt at maturity.[41] A stipulation, that for failure of the mortgagors to pay taxes when due, the entire debt should become due, is valid.[42] A provision that it is optional with the mortgagee to declare the entire debt due on default in payment of an instalment gives him the right to execute a power of sale,[43] or foreclose on default;[44] but a stipulation that a receiver may be appointed in case of default does not require the appointment of a receiver if it would be inequitable.[45] Under a stipulation that failure to pay taxes when due shall mature the debt, limitations commence to run against the holder of the mortgage on breach of the condition.[46] A provision that the deed shall not be foreclosed until the last note secured is due does not prevent action to have matured notes declared a lien.[47] A condition that the maker and her administrator shall support the obligee for life is not breached by the death of the maker, since the duty then devolved on her administrator.[48] All provisions in the instrument should be definite and certain.[49] The date of maturity may be extended by parol agreement.[50] A provision that the mortgagor might extend it for a year from the expiration of the term includes the notes secured.[51]

Property and interests conveyed.[52]—A mortgage, describing the property by metes and bounds only, covers all fixtures on the property.[53] A mortgage covering certain described land and all other lands owned by the grantor in the county covers only lands owned by him at the time the mortgage was executed,[54] but if it was so intended, a mortgage will cover after-acquired property.[55] A mortgagee who has notice that his mortgagor has only an estate on condition subsequent takes a lien only on the mortgagor's estate, though he has no notice of the breach of the con-

40. Orvik v. Casselman [N. D.] 105 N. W. 1105. Under B. & C. Comp. § 423, providing that liens other than judgment shall be foreclosed by suit, a power of sale in a trust deed does not authorize sale other than under decree. Marquam v. Ross, 47 Or. 374, 78 P. 698, 83 P. 852, 86 P. 1.

41. Bartels v. Davis [Mont.] 85 P. 1027.

42. Spesard v. Spesard [Kan.] 88 P. 576.

43. Moody v. Atkins [Ala.] 40 So. 305.

44. A provision that interest not paid when due should become part of the principal, but, if default was made in the payment of interest for thirty days, the whole sum should become due at the option of the holder, held that the mortgage might be foreclosed for the entire amount due thirty days after default. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. The filing of a complaint seeking to recover the entire amount is notice of an election to claim the entire amount due. Id.

45. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092.

46. Spesard v. Spesard [Kan.] 88 P. 576. And where the land is sold for taxes, the fact that the mortgagor redeems does not toll the statute. Id.

47. Arnold v. McBride [Ark.] 93 S. W. 989.

48. Pattee v. Boynton, 73 N. H. 525, 63 A. 787.

49. A provision that for every certain sum paid one acre should be released is void for indefiniteness of description (McCormick v. Parsons, 195 Mo. 91, 92 S. W. 1162), and cannot be aided by the demand of the parties that a certain portion of the tract be released (Id.).

50. Moody v. Atkins [Ala.] 40 So. 305. Evidence held sufficient to show an agreement extending the time of payment of the secured debt, precluding the right to foreclose according to the terms of the mortgage and note. Arnot v. Union Salt Co. [N. Y.] 79 N. E. 719. The holder of notes secured by a mortgage containing the pact de non alienando does not lose his mortgage by consenting with the mortgagor and maker of the notes without consulting with the grantee of the property to an extension of time. Blanchard v. Naquin, 116 La. 806, 41 So. 99.

51. Corson v. McDonald [Cal. App.] 85 P. 861. It is not necessary that the mortgagor's decision to extend it be expressed in writing. Id.

52. See 6 C. L. 692.

53. Factory and machinery therein. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694. A sawmill and machinery intended to be used permanently on the premises and not adopted to any other use are fixtures. Humes v. Higman [Ala.] 40 So. 128.

54. Ross v. Lafferty [Tex. Civ. App.] 16 Tex. Ct. Rep. 161, 95 S. W. 18.

55. A mortgage covering buildings and improvements to be put on during the term of the mortgagor's lease and all tools and machinery covers after-acquired machinery which become a fixture. McClung v. Quincy Carriage & Wagon Co. [Tenn.] 96 S. W. 960.

dition.[56] A clause pledging the rents and profits during pendency of foreclosure proceedings and period of redemption is valid.[57]

Debts secured.[58]—A mortgage secures all debts it was intended to secure[59] but no others,[60] unless by way of estoppel.[61] Parol evidence is admissible to show the real consideration.[62] In interpreting a clause describing the indebtedness, the note actually secured should be construed with it and, if true, control the description thereof in the mortgage.[63] A mortgagee may pay taxes on the premises if the mortgagor fails to do so and add it to the amount of his debt.[64]

§ 7. *Title and rights of the parties.*[65]—The equity of redemption remaining is an estate in the land itself,[66] and, though by express stipulation, the legal title may be conveyed to the mortgagee, yet the mortgagor's equity may not be cut off except by judicial foreclosure.[67] In consequence of the title remaining in the mortgagor, he is the proper party to all actions pertaining to ownership or possession and the mortgagee is not,[68] excepting such cases as those where his security is impaired.[69] He may maintain action for damages against one who intentionally im-

56. Gall v. Gall, 126 Wis. 390, 105 N. W. 953.

57. Schaeppi v. Bartholomae, 118 Ill. App. 316.

58. See 6 C. L. 692.

59. When the notes secured were reduced by payments and **new notes** executed for the balance due, such new notes did not evidence a new debt, but were evidence of the original obligation, and were secured. Pollard v. Pittman [Ind. App.] 77 N. E. 293. Where a principal executes an indemnity mortgage to his surety, containing a provision, "the mortgagors hereby agree to pay all sums above secured," etc., such mortgage is available to the creditor. Griffis v. First Nat. Bank [Ind. App.] 79 N. E. 230. A provision in the note for **attorney's fees** is part of the debt secured and on foreclosure is properly made a lien on the premises. Corson v. McDonald [Cal. App.] 85 P. 861. In Georgia a provision for attorney's fees must be read in the light of Civ. Code 1895, § 3667, which provides that they shall not be allowed unless the defendant files a plea and fails to sustain it. Booth v. Rosier, 124 Ga. 154, 52 S. E. 327. Where a deed was made to an agent to secure a debt to his principal and the agent made a mortgage on the premises to pay off other liens, the grantor was not entitled to have the mortgage cancelled after the principal's claims for advances to pay off prior liens had become barred. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155. Deed construed and held to secure certain items of indebtedness. Miles v. Coleman Nat. Bank [Tex. Civ. App.] 84 S. W. 284.

60. Where mining claims mortgaged were in possession of the mortgagee under an agreement that he might operate them and apply net profits on the debt, and he contracted with one to manage and look to the mines for money expended and salary, the amount due such manager was no part of the debt secured. Wadleigh v. Phelps [Cal.] 87 P. 93. Where a mortgage is given by husband and wife to secure a certain note signed by the husband and such note is paid in full, the husband may not without the consent of the wife agree that the mortgage shall stand security for another debt. Mantle v. Dabney [Wash.] 87 P. 122. Under Gen. Acts 1900-1901, p. 164, amending Code 1896, § 2630, if a debt draws a usurious rate of interest, no interest need be paid. Barclift v. Fields [Ala.] 41 So. 84.

61. Where a mortgagor procures a mortgagee to make certain payment, knowing that the mortgage is relied on as security therefor, he is estopped to assert that it is not. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801.

62. That a mortgage, reciting that it was given to secure a certain note, was also to indemnify the mortgagee against loss on other obligations and future advances. Ladd v. Lookout Distilling Co. [Ala.] 40 So. 610.

63. Bastin v. Schafer, 15 Okl. 607, 85 P. 349. Where a note signed by husband and wife purported to be the one secured, but evidence showed that the note in contemplation of the parties when the mortgage was executed and the one really secured was signed by the husband alone, it was proper to decree reformation and foreclosure. Id.

64. Lidster v. Poole, 122 Ill. App. 227.

65. See 6 C. L. 693.

66. An equity of redemption is an equitable estate in the property capable of being enlarged into completed legal title by discharging the liens and not a mere right to the difference between value and incumbrance, and in such case the interest of the owner, subject to a mechanic's lien under section 3 of chapter 75 of the Code of 1899, is such equitable estate. Grant v. Cumberland Valley Cement Co., 58 W. Va. 162, 52 S. E. 36.

67. Kirkendall v. Weatherley [Neb.] 109 N. W. 757.

68. A mortgagee has but a lien and not being in possession cannot maintain action against a third person for trespass. Jackson v. Brandon Realty Co., 100 N. Y. S. 1005. The holder of the debt has no such interest as entitles him to notice of condemnation proceedings. So even though he is senior to the proceeding. Martin v. District of Columbia, 26 App. D. C. 146.

69. Where a receiver of a mortgagor commits waste, the mortgagee may recover damages measured by the diminution in value of the property, determined by the value before and after the waste was committed. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694. A second mortgagee may maintain an action for waste which impairs his security, though his mortgage has not matured. Re-

pairs his security by removing part of the realty.[70] A mortgagor may recover damages for premature foreclosure.[71] A mortgagor may recover from the mortgagee, by a suit in equity, rents collected by him.[72] A mortgagee is not a necessary party to an action against the fee owner to foreclose a tax lien.[73] Under a statute providing that where an action to foreclose is pending, no action shall be commenced to recover any part of the debt without leave of court, leave will not be denied merely because the obligor claims to have a defense to the action.[74] A mortgagee who has negotiated for a purchase of the equity has not such a possessory title as will enable him to maintain a petition for assessment of damages in condemnation proceedings,[75] and, if he is entitled to do so as mortgagee, he must not attempt to do so as owner.[76]

The obligation of the mortgagor is not to pay the amount of the note absolutely but only the balance after security is exhausted.[77] Consequently, if the mortgagee releases the mortgage, he cannot hold the mortgagor personally liable.[78] Where mortgaged premises insured for the benefit of the mortgagee are injured prior to the maturity of the debt and the amount of the loss paid to the mortgagee, he is not entitled to apply it to the payment of his debt but must hold it and apply it when the debt matures.[79]

The fact that the debt is barred by the statute of limitations does not affect rights under the mortgage.[80] A mortgagee's claim for advances made to protect his security may be barred, though the principal debt is continued by renewal.[81] A mortgagor does not hold adversely to the mortgagee until he renounces his rights and he has notice thereof,[82] but one who acquires an interest in the premises under a tax deed may invoke the statute of limitations against the mortgagee, though it is

moval of timber from the land. Jenks v. Hart Cedar & Lumber Co., 143 Mich. 449, 13 Det. Leg. N. 44, 106 N. W. 1119. A mortgagee is not liable in damages for permitting a stranger to remove timber from the premises. Tucker v. Benedict, 116 La. 968, 41 So. 226.

70. Jackson v. Brandon Realty Co., 100 N. Y. S. 1005. One, who knowingly impairs mortgage security by removing part of the realty, is chargeable with an intent to effect such object, though his leading motive may be his own gain. Id.

71. In such case the measure of damages is the difference between the value of the property and the amount of the debt. Missouri Real Estate Syndicate v. Sims [Mo. App.] 98 S. W. 783.

72. Where a mortgagee collects rents and the mortgagor pays the full amount of the debt, he can recover the rents from the mortgagee by suit in equity. No adequate remedy at law. Thomas v. Livingston [Ala.] 40 So. 504.

73. Hall v. Moore [Neb.] 106 N. W. 785.

74. Whether such defense is valid should be litigated in the action. La Grave v. Hellinger, 109 App. Div. 515, 96 N. Y. S. 564.

75. A mortgagee, who has not taken possession but who has taken stone from the premises under license from the mortgagor and has negotiated for a purchase of the equity of redemption, has not such a possessory title as entitles him to maintain a petition for assessment of damages when the property is taken in condemnation proceedings. Taber v. Boston, 190 Mass. 101, 76 N. E. 727.

76. Under the Massachusetts statutes, relative to the taking of mortgaged property for public use, a mortgagee cannot recover damages where he alleges that he is owner of an unincumbered fee of the premises. Taber v. Boston, 190 Mass. 101, 76 N. E. 727.

77. Where three persons sign a note and mortgage and, unbeknown to one, the mortgagee releases enough of the property to pay the debt, an action may not be maintained on the note against the party who had no notice of such release. Cooper v. Burch [Cal. App.] 86 P. 719.

78. A mortgagee who releases to the mortgagor's grantee without the consent of the mortgagor cannot hold him personally liable. Crisman v. Lanterman [Cal.] 87 P. 89. Where a mortgagee releases a portion of the premises from the lien of the mortgage without the knowledge of the mortgagor, the mortgagor is not liable for a deficiency on foreclosure. This is so where prior to such release the mortgagor had sold the premises with covenant against incumbrances. Meigs v. Tunnicliffe, 214 Pa. 495, 63 A. 1019.

79. Thorp v. Croto [Vt.] 65 A. 562.

80. See in this connection, Foreclosure of Mortgages on Land, 7 C. L. 1678; also Limitation of Actions, 8 C. L. 788. That the debt is barred by limitations does not affect the power of the trustee to sell. Williams v. Armistead [Tex. Civ. App.] 14 Tex. Ct. Rep. 381, 90 S. W. 925. Where a claim against an estate secured by mortgage was barred, it was not a debt payable by the executor but an incumbrance, subject to which the land mortgaged should be sold to pay debts. Robinson v. Cogswell [Mass.] 78 N. E. 389.

81. Such advances not having been included in the renewal notes. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155.

82. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57. Where a mortgagor conveys and records his deed, the recorda-

not available to the mortgagor.[83] Payments by one joint mortgagor do not toll the statute of limitations as to the other.[84]

Right of possession.[85]—As a general rule a mortgagee has no right to possession,[86] unless the equities of the parties demand it.[87] In Mississippi a mortgagee may maintain ejectment to recover the mortgaged premises as a means of enforcing his security.[88]

Accounting.[89]—A mortgagee who has agreed to account may be required to do so if he refuses.[90] Only parties interested in the accounting need be joined.[91] A mortgagor is entitled to have rents and profits accrued during the possession of the mortgagee applied on the mortgage debt.[92] A mortgagee who pays taxes on the premises may recover only the legal rate of interest thereon against the mortgagor,[93] or such rate as is specially prescribed by law.[94]

Assumption of possession by the mortgagee.[95]—A mortgagee in possession [96] may exercise all rights of ownership.[97] He must account for rents and profits [98] actually received,[99] and is entitled to reimbursement for expenditures necessarily made in the care of property,[1] but not to compensation for personal services in con-

tion is not notice of adverse holding by the mortgagor as the record is not notice to prior incumbrancers. Id.

83. Graves v. Seifried [Utah] 87 P. 674. The fact that the tax deed under which one claims an interest in mortgaged premises is so defective as to be inoperative does not prevent him from pleading limitations against the mortgagee. Id.

84. Keese v. Dewey, 111 App. Div. 16, 97 N. Y. S. 519.

85. See 6 C. L. 693.

86. Under a statutory provision that a mortgage is not to be deemed a conveyance so as to enable the mortgagee to recover possession prior to foreclosure and sale, a mortgagee has no right to possession before or after condition broken until after foreclosure and sale. Moncrieff v. Hare [Colo.] 87 P. 1082.

87. This rule, however, does not preclude the appointment of a receiver after filing suit to foreclose to collect rents and profits pledged as part of the security, and which were inadequate, where the mortgagor is insolvent. Moncrieff v. Hare [Colo.] 87 P. 1082.

88. Haggart v. Wilczinski [C. C. A.] 143 F. 22.

89. See 6 C. L. 694.

90. One who takes title as security under an agreement to account for rents and profits and reconvey when the debt is paid may be required to account on his refusal to do so. Holliday v. Perry [Ind. App.] 78 N. E. 877.

91. Where after the discharge of the mortgage the mortgagor sues the mortgagee for an accounting, his wife and mother, owner of a life estate in part of the premises, are not necessary parties. Their interests are not in litigation. Bullis v. Farmers' State Bank, 143 Mich. 632, 13 Det. Leg. N. 85, 107 N. W. 700.

92. Gillett v. Romig [Okl.] 87 P. 325. Where land was conveyed to a wife to be held by her until it could be sold by her husband who was to sell it and pay a debt to himself out of the proceeds, it is presumed that rent was not to be paid, where the property was in the joint occupancy of the parties. Robinson v. Gassoway [Ala.] 39 So. 1023. Where a mortgagee agreed to apply the proceeds of the mortgage to the payment of a debt of a third person which was secured by a chattel mortgage and failed to do so, and the chattel mortgage was foreclosed, the mortgagee must account for the amount of indebtedness. Bullis v. Farmers' State Bank, 143 Mich. 632, 13 Det. Leg. N. 85, 107 N. W. 700.

93. Not the statutory rate on delinquent taxes. Fuhrman v. Power [Wash.] 86 P. 940.

94. In an accounting between mortgagor and mortgagee in an action to redeem from a void foreclosure, the mortgagee is entitled to interest on taxes paid by him while in possession under such foreclosure at twelve per cent. as prescribed by Gen. St. 1895, § 8423. Nelso v. Norton [Kan.] 87 P. 184.

95. See 6 C. L. 694.

96. A purchaser under a void foreclosure sale is a mortgagee in possession. Haggart v. Wilczinski [C. C. A.] 143 F. 22. And in Mississippi is entitled to retain possession until the debt is paid. Id. A mortgagee who does not take actual possession on void foreclosure is not a mortgagee in possession with rights as such though he pays the taxes. Fuhrman v. Power [Wash.] 86 P. 940. A grantee from a purchaser at a void foreclosure sale who takes possession, being an equitable assignee of the mortgage, is deemed a mortgagee in possession. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

97. A mortgagor in possession as the owner of the estate may exercise all rights of ownership and even commit waste, provided he does not diminish the security or render it insufficient. Fidelity Trust Co. v. Hoboken & M. R. Co. [N. J. Eq.] 63 A. 273.

98. This is true of one who stands in his shoes. Gillett v. Romig [Okl.] 87 P. 325. A mortgagee in possession under an agreement making it optional with him to work the premises or not or to lease portions of them is bound to pay running expenses and apply the net profits on the debt. Wadleigh v. Phelps [Cal.] 87 P. 93.

99. A mortgagee in possession because of default of the mortgagor is liable to account only for the rents and profits actually received. Wateon v. Perkins [Miss.] 40 So. 643.

1. A mortgagee in possession should be allowed cost of necessary and reasonable improvements and repairs, and for permanent improvements made with the consent of the

nection with the property [2] in the absence of a contract therefor.[3] A mortgagee who has taken possession peaceably cannot be evicted until the debt is paid.[4] The only remedy by a mortgagor against a mortgagee in possession while the relation continues is a suit in equity.[5] A mortgagee in possession may hold adversely to the mortgagor,[6] but not so long as he holds with the consent of the mortgagor and under an agreement to apply profits on the debt [7] or the relation of mortgagee and mortgagor exists.[8]

§ 8. *Lien and priorities.*[9]—The liens of mortgages take priority according to the date of recordation [10] order on the register,[11] or lis pendens,[12] or in case of actual notice according to date of execution,[13] unless otherwise agreed upon.[14] A

mortgagor. Gillett v. Romig [Okl.] 87 P. 325. A second mortgagee in possession is entitled to recover the amount advanced by him, together with taxes paid, repairs, and interest on other incumbrances, less rents and profits. Keeline v. Clark [Iowa] 106 N. W. 257. Where pursuant to agreement a mortgagee took possession and management of the mortgagor's business and applied the proceeds to the payment of his debt, he was entitled to interest paid by him and interest on his debt. Pomeroy v. Noud [Mich.] 13 Det. Leg. N. 401, 108 N. W. 498. Also on sums advanced by him in the conduct of the business. Id.

2. Wadleigh v. Phelps [Cal.] 87 P. 93. A mortgagee in possession, collecting the rents and profits and applying them on the debt, is not entitled to compensation in the absence of contract. Gilluly v. Shumway, 144 Mich. 661, 13 Det. Leg. N. 316, 108 N. W. 88.

3. Where a mortgagee took possession and assumed management of the mortgagor's business and applied the proceeds to the payment of the debt, the fact that he furnished statements showing that he was charging for his services, and after the death of the mortgagor such statements were allowed by the administratrix, does not show an agreement to pay for such services. Pomeroy v. Noud [Mich.] 13 Det. Leg. N. 401, 108 N. W. 498. Held also that the mortgagee was not entitled to compensation after the death of the debtor. Id.

4. A mortgagee who enters peaceably under foreclosure proceeding cannot be dispossessed so long as the mortgage remains unsatisfied. Gillett v. Romig [Okl.] 87 P. 325. One who purchases from the purchaser at the sale stands in his shoes. Id. One in possession under a security deed cannot be evicted until the debt is paid. Hamilton v. Rogers [Ga.] 54 S. E. 926. A quiet and peaceable entry into possession of unoccupied land and the continued possession thereof by the mortgagee after condition broken is defense to ejectment by the mortgagor until the mortgage has been satisfied. Walters v. Chance [Kan.] 85 P. 779.

5. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

6. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. Where one, who in good faith claims title under a void foreclosure sale, takes possession of the mortgaged premises under such claim with the consent of the mortgagor, although he is deemed a mortgagee in possession, his possession is adverse to the mortgagor. Id. Such adverse possession starts limitations against the remedies of the mortgagor. Id.

7. Wadleigh v. Phelps [Cal.] 87 P. 93.

8. Gillett v. Romig [Okl.] 87 P. 325.

9. See 6 C. L. 695.

10. The legal fiction that there are no portions of a day does not preclude a determination of priority of mortgages executed and filed the same day. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57.

11. Where two mortgages on the same land executed to different mortgagees are filed for record at the same time by the same person, priority is determined by order of number by the register. Edmonston v. Wilbur [Minn.] 110 N. W. 3, following Wolf v. Edmonston, 109 N. W. 233. The fact that one mortgage is dated several days before the other and is for a greater amount, and the other covers an additional tract of land, does not show that it was intended to make it prior to the other. Edmonston v. Wilbur [Minn.] 110 N. W. 3.

12. A lis pendens filed at the beginning of the suit makes a judgment in such suit prior to a mortgage subsequently executed. Barbour v. Patterson [Mich.] 108 N. W. 973.

13. Mortgage by heirs of a decedent held subject to his debts, whether they constituted valid judgment liens or not, especially where the mortgagee had notice of their existence. Lyons Nat. Bank v. Shuler, 101 N. Y. S. 62. One who takes a mortgage with notice that a prior one has not been regularly satisfied takes subsequent to such prior mortgage. Bank v. Doherty, 42 Wash. 317, 84 P. 872. Where a first mortgage does not constitute a lien on the homestead, but a second one does, it takes priority as to the homestead, though it recites that it is subject to the first mortgage. Home Bldg. & Loan Ass'n v. McKay, 118 Ill. App. 586.

14. A trust deed executed by a cotenant to secure money to pay off vendor's liens on the land which had existed prior to the creation of the estate in common, and which provided that such liens were continued for further security, the lien so continued was superior to the lien of the grantor's cotenant on the grantor's share of the rents and profits which such cotenant had converted. Flach v. Zanderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 540, 91 S. W. 348. Where the owner of two tracts incumbered by a mortgage executed a second mortgage on one of such tracts and covenanted in effect to discharge the first mortgage, held, as between the parties, the mortgagee acquired the equitable right to have the burden of the first mortgage cast on the other tract. Jamaica Sav. Bank v. Butler [Vt.] 65 A. 92. After a decree adjudging that a will devised land to two persons in fee, the devisees partitioned and one conveyed to the other. The decree was subsequently reversed and the devisee

mortgage takes precedence over the claims of general creditors whether created prior or subsequent to the execution of the mortgage.[15] One who furnishes money to redeem land from execution sale, and takes a mortgage on the premises under an agreement that he is to have a first lien, has a lien superior to that of the mortgagee inuring to him by reason of redemption.[16] The lien is extinguished by foreclosure sale and is not revived by redemption.[17] A mechanic's lien duly filed takes precedence over a mortgage subsequently executed by the owner.[18] Otherwise, if statutory requirements are not complied with,[19] the lien becomes subject to a mechanic's lien where the lien of the mortgage covers other property which is released after the mechanic's liens attach, though the released property is insufficient to satisfy the mortgage.[20]

§ 9. *Assignments of mortgages.*[21]—A mortgage may be assigned by mere delivery,[22] and an equitable assignment may result from a void foreclosure[23] or other transaction from which an intent to assign may be inferred.[24] An intention to

who sold was adjudged to have only a life estate. Held that the lien of the grantee for the purchase price paid was subsequent to a mortgage executed by the grantor on his interest. Ure v. Ure, 223 Ill. 454, 79 N. E. 153. The holders of notes secured by a trust deed may by agreement and without consent of the maker postpone the lien thereof to an otherwise subsequent lien. Jackson v. Grosser, 121 Ill. App. 363.

15. Seaboard Air Line R. Co. v. Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138.

16. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57. But one who acquires rights under him must apply rents and profits to the payment of his debt. Id.

17. Barry v. Harnesberger [C. C. A.] 148 F. 346.

18. Hahn v. Bonacum [Neb.] 107 N. W. 1001. Where one contracted for the erection of a building on a lot which he did not own but afterwards purchased, and a deed to him and mortgage back were delivered simultaneously in order to prevent a mechanic's lien from attaching, his seisin must have been instantaneous and the deed and mortgage must have been part of the same transaction. Libbey v. Tidden [Mass.] 78 N. E. 313. Evidence sufficient to show that they were not parts of the same transaction. Id. Where one contracted for the erection of a building on land which he did not own, but which he subsequently purchased, and gave a mortgage back, and his seisin was not instantaneous in law, the lien of mechanics for the erection of the building was prior to the mortgage, though the contract for the erection of the building was not ratified by the purchaser. Id. Where an owner contracted for the erection of a building on his premises and subsequently sold them, taking a mortgage back, and at the time of the sale he knew that work was being done under the contract by subcontractors, the lien of the mortgage was held subject to mechanics' liens. McCormack v. Butland, 191 Mass. 424, 77 N. E. 761. Where a building loan agreement did not provide that a mortgage executed at the same time should constitute a first lien, when part of the loan was used to pay off a first mortgage, the interest of the mortgagee was liable for the lien of materialmen who relied on the agreement that the entire loan should be used in the completion of the building under construction. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299. Contract for the sale of building in process of construction, whereby the purchaser was required to advance funds to complete the building, held not a building loan agreement within Laws 1897, p. 525, c. 418, § 21, which it is necessary to file in order to give it priority over mechanic's lien notice. Id.

19. Where one cotenant sold the land and took a mortgage to secure part of the purchase price for the benefit of all cotenants, and failed to post the statutory notice prior to the erection of building by the vendee, his interest in the mortgage was subject to the lien of mechanics acquired in the construction of such buildings. Seely v. Neill [Colo.] 86 P. 334. The lien of other cotenants who had no notice of the construction of such buildings was not. Id.

20. McCarthy v. Miller, 122 Ill. App. 299.

21. See 6 C. L. 695.

22. Laws 1899, p. 340, c. 168, relative to recording assignments of mortgages, does not prevent transfer and assignment by delivery. Anthony v. Brennan [Kan.] 87 P. 1136.

23. A sale under a void foreclosure, where the premises have been bid in for the full amount of the debt, operates as an equitable assignment of the mortgage. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792.

24. Where one advanced money to a debtor to take up a trust deed and took no security from such debtor but made the advancement for the purpose of taking an assignment of the security, held to vest him with an equitable title to the security, though the note and mortgage were by mistake marked "paid" by the original owner. Sprague v. Lovett [S. D.] 106 N. W. 134. The execution of a satisfaction piece and delivery of the mortgage is sufficient to transfer title, and the rights of an assignee who has notice of such facts and of a prior agreement to deliver are subject to the rights of him to whom the satisfaction piece is delivered. Urbansky v. Shirmer, 111 App. Div. 50, 97 N. Y. S. 577. Where heirs of an intestate paid a mortgage on the family residence of their ancestor and had the note and mortgage assigned to their sister, they became equitable assignees of the note and mortgage. In re Heeney's Estate [Cal. App.] 86 P. 842.

transfer it is essential.[25] A deed by a purchaser at a void foreclosure sale and subsequent deeds by his grantee operates as an assignment of the mortgage,[26] but a conveyance of the mortgaged premises by the mortgagee to a third person does not operate as an assignment as against third persons.[27] The assignment must be made by one with power to assign.[28] An assignment of the mortgage must be recorded to protect the assignee.[29] A mortgage is not a negotiable instrument and an assignee takes subject to equitable defenses available to the maker,[30] especially when the assignee has notice of such defenses.[31] A mortgagee may by agreement fix the rights of his assignees of the notes secured to the mortgage security, and such agreement may be inferred from circumstances surrounding the transfer.[32] The assignment of a void mortgage to an innocent purchaser does not give it validity,[33] but a mortgage which constitutes a mere scroll may be enforceable by an assignee.[34] Where an assignee of the mortgage takes it as collateral and forecloses it, he holds the mortgagor's title for his own benefit and not as trustee for the mortgagee.[35] The pledgee of a mortgage note has the same rights of enforcement that the pledgor had.[36]

§ 10. *Transfer of title of mortgagor and assumption of the debt.*[37]—As a general rule a subsequent purchaser or lessee of mortgaged property takes subject to the mortgage,[38] yet, if the mortgage authorizes the mortgagor to make such sale or lease for the benefit of the mortgagee, such sale or lease is binding on the mortgagee and those claiming under him.[39]

Assumption of the mortgage.[40]—A purchaser who does not assume the mortgage does not become personally liable for the debt.[41] Where one purchases land incumbered with three mortgages and two record judgments and agrees to pay such

25. Where after sale under a trust deed and cancellation of the note secured one purchased the note, he acquired no title to the deed of trust entitling him to participate in the proceeds of a second sale after the first was set aside. Polliham v. Reveley [Mo. App.] 93 S. W. 829.

26. Nash v. Northwest Land Co. [N. D.] 108 N. W. 792. One who purchases a mortgage after maturity from the original mortgagee after a void foreclosure sale acquires no rights as against one in possession of the premises who by virtue of purchase from a purchaser at the foreclosure sale is an equitable assignee of the mortgage. Id.

27. This is the rule in jurisdictions where a mortgage creates only a lien. Noble v. Watkins [Or.] 87 P. 771.

28. A transfer of a mortgage loan by a building and loan association to another association is ultra vires. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93.

29. Where before an assignment was recorded the premises were sold and the mortgagee gave a release and defaulted, the assignee was without remedy against the purchaser, though the release was not recorded before the assignment was. Marling v. Nommensen, 127 Wis. 363, 106 N. W. 844. An assignee who fails to record his assignment may not recover from a purchaser of the premises who pays the debt to his assignor. Barry v. Stover [S. D.] 107 N. W. 672.

30. Gen. St. p. 2108, § 31, expressly provides that the assignee of a bond and mortgage takes subject to the equities of the mortgagor. Black v. Thurston [N. J. Eq.] 63 A. 999. The assignee of a non-negotiable note cannot enforce it if the mortgage by which it is secured is based on an illegal consideration. Henry v. State Bank of Laurens [Iowa] 107 N. W. 1034. The assignee takes subject to equitable defenses available against his assignor prior to notice of the assignment. This is the rule prescribed by Rev. Code Civ. Proc. § 81. Barry v. Stover [S. D.] 107 N. W. 672.

31. An assignee of a mortgage who takes with notice that it has been satisfied acquires no rights. Black v. Thurston [N. J. Eq.] 63 A. 999.

32. Preston v. Morsman [Neb.] 106 N. W. 320.

33. Lowe v. Walker, 77 Ark. 103, 91 S. W. 22.

34. A mortgage delivered to one for the purpose of raising money for the mortgagor becomes valid in the hands of the assignee of the person to whom it is given, although the money received for it is not turned over to the mortgagor. Bogert v. Stevens [N. J. Err. & App.] 63 A. 246.

35. Anderson v. Messinger [C. C. A.] 146 F. 929.

36. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357. See, also, Pledges, 6 C. L. 1065.

37. See 6 C. L. 697.

38, 39. Sammons v. Kearney Power & Irr. Co. [Neb.] 110 N. W. 308.

40. See 6 C. L. 697.

41. Rabb v. Texas Loan & Inv. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 618, 96 S. W. 77. Where a contract for the sale of the mortgaged premises recited the amount of the mortgage and that the grantee agreed to pay it as part of the purchase price, where he elected to pay the entire purchase price in cash as between himself and the vendor, he never became liable for the mortgage. Marling v. Nommensen, 127 Wis. 363, 106 N. W. 844.

incumbrances as part of the purchase price, and does pay off one mortgage, he is not entitled to enjoin a sheriff's sale under the judgments to be made subject to the two unpaid mortgages only,[42] nor is he entitled to have the paid mortgage which has been satisfied of record revived for his protection, nor is he entitled to be subrogated to the rights of the mortgagee thereunder.[43] A purchaser who assumes the mortgage is bound by all facts concerning it of which he is charged with notice.[44]

Status of the mortgagor as surety.[45]—A purchaser who assumes the mortgage becomes principal debtor, the mortgagor a surety.[46]

§ 11. *Transfer of premises to mortgagee and merger.*[47]—A contract by which the mortgagor agrees to sell his equity to the mortgagee must be definite and certain[48] and be based on a sufficient consideration.[49] Such agreements are viewed with distrust[50] and will not be effective if the consideration is grossly inadequate, or it appears that advantage was taken of the mortgagor.[51] Where by express stipulation the legal title is conveyed to the trustee in a trust mortgage, the trustee may, with the consent of the mortgagor, convey such title to the mortgagee in satisfaction of the debt.[52] A provision in an insurance policy on mortgaged premises, that the mortgagee shall notify the insurance company of any change of ownership, does not contemplate a quit claim deed to the mortgagee.[53]

Where the holder of a mortgage acquires title to the mortgaged premises, a merger results.[54] The question of merger is one of intention,[55] and will take place

42. Kuhn v. Nat. Bank of Holton [Kan.] 87 P. 551.

43. Kuhn v. Nat. Bank of Holton [Kan.] 87 P. 551. This is so whether or not he had actual knowledge of the existence of the judgments at the time he purchased or paid the mortgage, as he is charged with notice by the records. Id.

44. Where the record showed the rate of interest the secured notes ordinarily drew, a purchaser of the mortgaged premises who assumed the mortgage was liable on a provision for increased interest after maturity and for interest on overdue interest payments, though such provision was not recorded. Hinricks v. Brady [S. D.] 108 N. W. 332.

45. See 6 C. L. 698.

46. Wonderly v. Giessler, 118 Mo. App. 708, 93 S. W. 1130.

47. See 6 C. L. 698.

48. Evidence of an agreement between mortgagor and mortgagee for a deed to the mortgage on his expressing a desire to take stone from the premises and of other acts held insufficient to show an oral agreement for the purchase of the mortgagor's equity prior to the time a bond for a deed was executed. Taber v. City of Boston, 190 Mass. 101, 76 N. E. 727. Evidence of conversations between mortgagors and mortgagee, relative to a transfer of the property to the mortgagee, held insufficient to show a completed contract cutting of the right to redeem. Ferguson v. Boyd [Ind. App.] 79 N. E. 549. A consent decree that one has an equity to redeem, and in case of failure to do so within a specified time he should stand disbarred, is not a contract for the purchase of the equity of redemption. Bunn v. Braswell, 142 N. C. 113, 55 S. E. 85.

49. Where it appeared that a mortgagor was entitled to credits nearly sufficient to discharge the mortgage debt, an agreement to surrender his right to redeem for a release of the mortgage was without consideration. Ferguson v. Boyd [Ind. App.] 79 N. E. 549.

50. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012.

51. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012. A mortgagor surrendered his equity of redemption valued at $27,000 for a debt of $3,000. Id.

52. Kirkendall v. Weatherley [Neb.] 109 N. W. 757.

53. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co. [Kan.] 86 P. 142.

54. Wonderly v. Giessler, 118 Mo. App. 708, 93 S. W. 1130. Where the mortgagee becomes owner of the mortgaged premises, a merger results unless a contrary intention is apparent. Evidence held to show a merger. Townsend v. Provident Realty Co., 110 App. Div. 226, 96 N. Y. S. 1091. A statement by a mortgagee after he acquired title that a second mortgage was the only one on the premises is admissible. Id. Where the holder of two mortgages forecloses the senior one and purchases the property at the sale and does nothing to protect his rights under the junior one, the lien of such mortgagor is extinguished. Henry v. Maack [Iowa] 110 N. W. 469. And where the mortgagor quitclaims to one who redeems from such sale, such grantee may rely on his quitclaim deed to protect him against the lien of such second mortgage, though he has orally agreed with the mortgagor to pay it. Id.

55. Whether a merger results where a deed of trust is executed to the mortgagee securing the mortgage debt and other indebtedness, depends on the intention of the parties. Crisman v. Lanterman [Cal.] 87 P. 89. The conveyance by a mortgagor to the mortgagee does not operate as a merger unless so intended. Moffet v. Farwell, 222 Ill 543, 78 N. E. 925. There can be no merger where the intention to keep the two estates separate can be inferred or has been expressed. Topliff v. Richardson [Neb.] 107 N. W. 114.

as the mortgagee may desire or his interests require.[56] It is presumed that a merger was not intended when the mortgage is essential to the security of the mortgagee as against intervening liens.[57]

§ 12. *Payment, release or satisfaction.*[58]—Payment of the debt extinguishes the mortgage without surrender thereof.[59] An unconditional tender on the day the debt falls due discharges the lien of the mortgage.[60] What will constitute payment sometimes rests in the terms of the mortgage.[61] Whether or not the debt has been paid may be a question of fact.[62] One may be estopped to deny payment.[63] Payment may be made to the agent of the holder of the mortgage,[64] but the debtor

56. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co., Ltd. [Kan.] 86 P. 142. An intention that no merger shall take place may be inferred from the fact that it would be to the interest of the mortgagee that it should not. Townsend v. Provident Realty Co., 110 App. Div. 226, 96 N. Y. S. 1091. Where a mortgagee is secured in part by an insurance policy issued to the mortgagor, and the mortgagee acquires title and holds it as security, the mortgage is not merged in the fee so as to relieve the insurance company from liability. Fort Scott Bldg. & Loan Ass'n v. Palatine Ins. Co., Ltd. [Kan.] 86 P. 142. Where a grantee of mortgaged premises executed a deed of trust to the mortgagor to secure the mortgage debt and other indebtedness, which provided that in case a sale of such premises did not bring enough to pay the debts the creditor might enforce his rights as if the deed had not been executed and the mortgagor consented to the giving of such deed, the mortgage was not merged in the deed. Crisman v. Lanterman [Cal.] 87 P. 89. A deed under which one does not claim title will not merge a security deed held by him. Hamilton v. Rogers [Ga.] 54 S. E. 926.

57. Such presumption is not overcome by the fact that the mortgagee surrenders and cancels the note and mortgage. Moffet v. Farwell, 222 Ill. 543, 78 N. E. 925. There is no merger where the property subject to a subsequent attachment lien is transferred to the mortgagee through a third person. Katz v. Obenchain [Or.] 85 P. 617.

58. See 6 C. L. 699.

59. Where a conveyance given to secure a loan provided for reconveyance by the trustee on payment of such loan, a satisfaction of such debt duly recorded by the trustee discharges the lien, though the mortgage was not surrendered, and an assignee is estopped to assert a lien. McVay v. Tousley [S. D.] 105 N. W. 932.

60. Dickerson v. Simmone, 141 N. C. 325, 53 S. E. 850.

61. Where one taking an insurance agency executed a mortgage to secure advances from the company, such advances to be repaid out of commissions, and not to constitute a personal liability, the agent made a reasonable effort to conduct the business. The agency contract did not state when it was to terminate. The agent resigned leaving the mortgage unpaid. Held the obligation to pay not being absolute and the discretion to resign having been reasonably exercised, the resignation discharged the mortgage. Security Trust & Life Ins. Co. v. Ellsworth [Wis.] 109 N. W. 125. Where a mortgage to husband and wife provided for payment to the mortgagees, their heirs or assigns, and also for payment within five years after the death of the mortgagees, payment to be made to the heirs equally on the death of the wife, the husband satisfied the mortgage, held valid as against the heirs. Heilig v. Heilig [Pa.] 64 A. 442. Where a mortgage is past due at a time suit is brought to compel satisfaction thereof on payment of an alleged balance, which was found as claimed, it was improper to give judgment requiring satisfaction on payment of such amount into court without fixing the time of payment. Frutig v. Trafton, 2 Cal. App. 47, 83 P. 70.

62. Evidence sufficient to show that the debt had not been paid, though many years overdue and no interest had ever been paid and no steps ever taken to foreclose it. Edmonston v. Wilbur [Minn.] 110 N. W. 3. Evidence held to show that a mortgage debt had not been entirely paid and that there was a balance due. Ladd v. Lookout Distilling Co. [Ala.] 40 So. 610. Evidence insufficient to show that a mortgage debt had been paid. Becker v. Bluemel [Wis.] 109 N. W. 534. Evidence insufficient to show that a mortgage debt had been paid. Lefmann v. Brill. 142 F. 44. In a suit for accounting between a mortgagee as to transactions with the deceased mortgagor, evidence held insufficient to show that a mortgage debt had been paid by a subsequent mortgage (Morris v. Anderson, 142 Mich. 279, 12 Det. Leg. N. 709, 105 N. W. 773), or to show that certain alleged payments were made by the mortgagor (Id.). The fact that the instrument is in the possession of the maker after the death of the payee raises no presumption of payment where it appears that he is the prospective administrator of the payee and took possession of his papers immediately after his death. Ward v. Ward, 144 F. 308.

63. An owner who represents that a mortgage has been paid for the purpose of misleading another is estopped to assert that it is not paid. Deering v. Schreyer, 110 App. Div. 200, 97 N. Y. S. 14. A mortgagee who subsequently took a trust deed on the same property to secure the mortgage debt and other indebtedness and who sold the property for sufficient to pay all the debts, and released the mortgage, is estopped to deny the validity of the release where he applied part of the proceeds to the payment of other debts. Crisman v. Lanterman [Cal.] 87 P. 89

64. A payment to one authorized by power of attorney to receive money that may become due to him as trustee and guardian is sufficient, though the power of attorney gives other powers that cannot be delegated and the mortgagor was not required to see that the amount was properly applied. Forbes v. Reynard, 49 Misc. 154, 98 N. Y. S. 708. Payment to mortgagee after he had assigned the mortgage and recorded the assignment held sufficient under the circumstances of this

should satisfy himself that he has authority to receive payment.[65] Payments made in good faith and not disaffirmed may be binding, though not made to an agent empowered to receive them,[66] and especially so when by taking a judgment the principal estops himself.[67] In the case of a mortgage to the "heirs" of husband and wife, the children alone can release the debt; the surviving husband has no such power.[68] A tender by a stranger does not affect the lien or priority of the mortgage,[69] nor is it satisfied by a mere promise.[70] A morgtage is not discharged by the adjudication and discharge in bankruptcy of the mortgagor.[71] The application of payments may be made as the debtor directs.[72]

A release is to be construed as other written instruments are.[73] A release procured by misrepresentation may be annulled.[74] Under some circumstances the discharge of a mortgage may be ineffectual.[75] It is presumed after a considerable lapse of time that marginal entries of the satisfaction of mortgages were made in compliance with law.[76] A third encumbrancee who redeems from the first mortgage need not take any assignment thereof in order to protect his rights against one with notice.[77] A mortgage lien may be released by the bar of limitations.[78]

Penalties for failure to release.[79]—To entitle a mortgagor to recover the statutory penalty for failure to discharge the mortgage of record, he must show that it has been fully paid.[80]

case. Bettle v. Fiedgen [Neb.] 110 N. W. 548.

65. Payment to one who had previously been the mortgagor's agent, but who at the time did not have the securities, held not to constitute payment. Hughes v. Clifton [Ala.] 41 So. 998.

66, 67. In judicially canceling an assignment by mortgagee's agent for his private use, the interest paid to the agent should be accounted and the mortgagor joined, else on foreclosure such interest cannot be recovered. Union Trust Co. v. Cain, 29 Pa. Super. Ct. 189; Union Trust Co. v. Cain, 29 Pa. Super. Ct. 197.

68. Heilig v. Heilig, 28 Pa. Super. Ct. 396.

69. Where a court authorized a lunatic's money to be invested in a first mortgage, but the committee invested in a second mortgage, a tender by the sureties of the committee of the amount of the first mortgage does not extinguish the lien or affect its priority. Graffiin v. State, 103 Md. 171, 63 A. 373.

70. A mere promise by a creditor to a husband who is sole debtor and holder of title to a mortgaged homestead that the former will forbear for a term of years to enforce past due obligations if the latter promptly pays semi-annual instalments of interest at a greater rate than that reserved does not operate to discharge the lien of the mortgage. McKinley-Lanning Loan & Trust Co. v. Johnson [Neb.] 105 N. W. 899.

71. Security Sav. Bank v. Scott [Cal. App.] 86 P. 903. Where a mortgagor's wife signs a mortgage containing an express agreement on her part to pay the debt, she is not discharged by his adjudication and discharge as a bankrupt. Id.

72. Where a mortgagor assigned a claim to a mortgage under an agreement that it was to be applied on the mortgage, which agreement was later modified so that it should be applied on a general indebtedness, the mortgagee was not estopped as against a subsequent mortgagee from applying the proceeds according to the modified agreement on the grounds that the representation was not made to the subsequent mortgagee and was merely a promissory statement. Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162. Where the money was applied on the general indebtedness without notice to the mortgagor of other mortgages, a second mortgagee was not entitled to have it otherwise applied. Id.

73. Where a mortgage covered two lots and the mortgagor sold one with an appurtenant right of way over the other, a release by the mortgagee of the mortgage on the lot conveyed, together with "appurtenances" thereto belonging, does not extend the easement over his legal estate in the other lot. Hazeldine v. McVey, 67 N. J. Eq. 275, 63 A. 165.

74. Where some of several mortgagors paid the debt and over their objection the mortgage was released on the claim that it would have no effect, such parties may have the release annulled. Where cotenants gave a mortgage. Parsons v. Urie [Md.] 64 A. 927.

75. Where payment is accepted by an agent in a manner in which he had no authority to accept, and subsequent mortgagees have notice that in fact the first mortgage is not paid. Becker v. Bluemel [Wis.] 109 N. W. 534. Mortgage held not satisfied by payment of the debt. Pellerin v. Sanders, 116 La. 616, 40 So. 917.

76. Metz v. Wright, 116 Mo. App. 631, 92 S. W. 1125.

77. Malmberg v. Peterson [S. D.] 108 N. W. 339.

78. Where a judgment lienor's lien is barred and suits to revive it were void, he has no interest in the property and need not be joined in an action to set aside a release of the mortgage. Lawrence County Bank v. Lambert, 116 Mo. App. 620, 92 S. W. 755.

79. See 6 C. L. 701.

80. That there is a balance due, however small, is a defense. Smith v. Bank of En-

§ 13. *Redemption*[81] from the mortgage should not be confused with redemption from the sale on foreclosure.[82] The right is incident to a mortgage[83] and exists till it is foreclosed,[84] and it extends beyond the mortgagor to all who claim under or through him.[85] A cotenant in the equity of redemption has the same right to redeem that his grantor has.[86] Creditors of a fraudulent grantor may redeem from an innocent mortgagee of the fraudulent grantee.[87] As to the mortgagor, the right to redeem is the right to pay the mortgage debt as soon as it is due and thus to relieve his land from the lien of the mortgage.[88] The mortgagor's wife, when made a party to foreclosure during her husband's life time, may redeem pendente lite.[89] A dowress may redeem before assignment of dower.[90] So far as concerns the strict right of redemption, the interests of heirs not made parties by a dowress seeking redemption need not be considered,[91] but a dowress cannot be subjected to mortgages or debts which did not bind her interest.[92] Laches[93] will bar the right, and the right to redeem and the right to foreclose being reciprocal, when the latter is barred by limitations, the former is also barred;[94] but when a mortgagor is not made a party to a foreclosure proceeding, his right to redeem is not limited to the statutory period,[95] nor is it so limited where the foreclosure was void.[96] Where the mortgagee is in possession with the consent of the mortgagor, the statute does not begin to run in favor of the mortgagee until he has asserted an adverse claim.[97] Redemption from a deed absolute is not a suit specially limited as one to "enforce a contract to convey."[98] If the property has appreciated after a foreclosure which omitted one entitled to redeem, the redemptor may be subjected to such conditions as make equity;[99] but a deficiency resulting from foreclosure of other lands cannot be charged against him.[1]

Procedure to redeem.[2]—The only function of an action to redeem is to adjust the equities of the parties.[3] Where it appears that the deed was intended as a mortgage, equity will decree a reconveyance on accounting and settlement.[4] A judgment

terprise [Ala.] 42 So. 551. Nonpayment of the recording fee which he had agreed to pay is a defense. Id.

81. See 6 C. L. 701.

82. See Foreclosure of Mortgages on Land, 7 C. L. 1678.

83. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.

84. In suit to redeem, evidence held not to sustain defense that mortgage had been foreclosed by sale under power of sale. Zimmerman Mfg. Co. v. Pugh [Ala.] 39 So. 989.

85. To wife of owner. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.

86. Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850.

87. Gilcreast v. Bartlett [N. H.] 64 A. 767.

88, 89. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.

90, 91. Hays v. Cretin, 102 Md. 695, 62 A. 1028.

92. Second mortgages in which she did not join and simple contract debts due the paramount mortgagee. Hays v. Cretin, 102 Md. 695, 62 A. 1028.

93. Suit to redeem from mortgage by deed absolute held not barred by laches. Wadleigh v. Phelps [Cal.] 87 P. 93.

94. Rule applied to suit to declare a deed absolute a mortgage and to redeem, the right to foreclose being barred under Hurd's Stat. c. 83, § 11, on account of the fact that the debt was barred. Caraway v. Sly, 122 Ill. App. 648.

95. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

96. Ann. Code 1892, § 2732, providing that an action to recover from a mortgagee in possession after default must be brought within ten years, does not apply to one in possession under a void foreclosure sale. Woods v. Campbell, 87 Miss. 782, 40 So. 874.

97. Wadleigh v. Phelps [Cal.] 87 P. 93; Hunter v. Coffman [Kan.] 86 P. 451. Under Code Civ. Proc. § 346, suit against mortgagee in possession may be brought at any time unless mortgagee has had five years' adverse possession. Wadleigh v. Phelps [Cal.] 87 P. 93.

98. Suit to redeem from mortgage by deed absolute after death of grantee not barred by Code Civ. Proc. § 1597, relating to contracts to convey where there was no written contract to reconvey. Wadleigh v. Phelps [Cal.] 87 P. 93.

99. Dowress was allowed to choose between taking her dower and taking the value thereof with the right to full redemption if the foreclosure purchaser refused to do either. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.

1. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.

2. See 6 C. L. 701.

3. The holder of a judgment lien on the premises is not a necessary party. Kelso v. Norton [Kan.] 87 P. 184.

4. De Bartlett v. De Wilson [Fla.] 42 So. 189. Where a deed is declared a mortgage in a suit in which the mortgagee denied that it was so intended, the mortgagee was entitled to interest on the amount found due

decreeing a deed to be a mortgage and directing reconveyance on payment of the debt is not defective for failing to fix the time of payment.[5] In an action to redeem from a void foreclosure, the equities of the parties will be adjusted as if no foreclosure had ever taken place.[6] Where the mortgagor's wife is not made a party, she may enforce her right to redeem, after foreclosure and sale, by a suit in equity.[7] The suit must be for total redemption,[8] but the owner of only a portion of the redeemable premises may sue to redeem.[9] Where, therefore, separate properties owned by separate parties are mortgaged to secure the same debt, all of such parties may join in a suit to reedeem.[10] The suit is not one on a "claim" making the mortgagor an incompetent witness against the mortgagee's personal representative.[11] A decree in a suit to redeem that there has been no sale, and that complainant is entitled to redeem, is final so as to be appealable, though a reference is ordered to ascertain the amount due.[12] A tender into court on an offer to redeem is not necessary unless so required by statute.[13] But the debtor must be able and willing to pay,[14] and he is required to pay interest to the day of tender on the amount decreed to be due,[15] but not personal expenses of a mortgagee in possession,[16] or compensation of the mortgagee's agent.[17] The tender under a security deed absolute may be conditioned upon a reconveyance.[18] On redeeming from such a mortgage, a grantee who sells the premises is not chargeable with a sum in excess of what he received on the ground of dereliction of duty.[19]

§ 14. *Subrogation*[20] exists only where the payer has an equity to reimbursement from the land.[21] If the mortgagor fails to redeem, anyone claiming under him may redeem and thus be subrogated to his rights,[22] the subrogation in such case being treated as an assignment to the extent that may be necessary for the ade-

less costs awarded to plaintiff from date of judgment to date of tender or foreclosure. Wadleigh v. Phelps [Cal.] 87 P. 93.

5. The court still has control of the case and can protect the rights of the parties. Crockett's Guardian v. Waller [Ky.] 29 Ky. L. R. 1155, 96 S. W. 860.

6. Kelso v. Norton [Kan.] 87 P. 184. In a suit by a mortgagor to redeem from the mortgagee where he had not been made a party to foreclosure proceedings, he is entitled to have determined between himself, the mortgagee, and purchaser at the sale, an issue as to taxes, rents, and improvements. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

7. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721, afg. 90 N. Y. S. 493.

8, 9. Wadleigh v. Phelps [Cal.] 87 P. 93.

10. Redemption from mortgage by deed absolute. Wadleigh v. Phelps [Cal.] 87 P. 93. This rule was not changed by Code Civ. Proc. § 347, relating to the case where there was more than one mortgagor or more than one claiming under a mortgagor "some of whom are not entitled," etc. Id.

11. Code Civ. Proc. § 1880, rendering plaintiff, in an action upon certain "claims" against the estate of a decedent, incompetent to testify as to transactions occurring during decedent's life, does not apply to a suit to redeem from a mortgage by deed absolute. Wadleigh v. Phelps [Cal.] 87 P. 93.

12. Zimmerman Mfg. Co. v. Pugh [Ala.] 39 So. 989.

13. Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850.

14. Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850. Whether a tender of the mortgage debt was made and kept good on an offer to redeem held a question for the jury. Id.

15. Upon redemption being allowed, defendant is entitled to interest on the amount adjudged to be due, less costs allowed plaintiff from date of judgment to payment or tender thereor. Wadleigh v. Phelps [Cal.] 87 P. 93.

16. Wadleigh v. Phelps [Cal.] 87 P. 93.

17. Where the mortgagee in possession makes, with authority of mortgagor, an agreement with a third party to manage the property, compensation for such management to be chargeable solely to the property, the amount of such compensation need not be included in a tender, but the property may be redeemed subject to the claim for such compensation. Wadleigh v. Phelps [Cal.] 87 P. 93.

18. Wadleigh v. Phelps [Cal.] 87 P. 93.

19. Sengel v. Patrick [Ark.] 97 S. W. 448.

20. See 6 C. L. 702. See, also, Subrogation, 6 C. L. 1581.

21. Where the purchase price has been used in the payment of pre-existing mortgages, which were extinguished and canceled on the record, such payment gives no right of subrogation to the purchaser or his assigns, since the price thus used was the money of the vendor. Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 So. 453.

22. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721. Any person having the right to redeem and who actually does redeem is subrogated to the lien of the mortgage and may hold the land until he is reimbursed to the extent of the amount paid in redemption. Hays v. Cretin, 102 Md. 695, 62 A. 1028.

quate protection of the redemptioner's rights and interests,[23] hence, a junior encumbrancer who redeems from the senior mortgage is subrogated to all the rights of the prior lien holder.[24] One who pays off and has discharged an incumbrance is not entitled to subrogation,[25] and one who insists on the execution of a void mortgage in satisfaction of an existing one is not subrogated to rights under the latter.[26] A purchaser at a void foreclosure sale who pays the amount of the debt becomes subrogated to the rights of the mortgagee.[27] One who in good faith assumes a mortgage on land to which he has no title, but in good faith believes that he has, becomes equitable owner of the mortgage and the same constitutes a lien on the land.[28] Where cotenants give a mortgage and it is satisfied by one, he is entitled to be subrogated to the rights of the mortgagee.[29] Where a receiver was appointed to collect rents and profits and apply them to the payment of mortgage debts, one who had paid interest to prevent foreclosure was entitled to be subrogated to the rights of the mortgagee and receive interest.[30]

MOTIONS AND ORDERS.

Making, submitting and filing motion.[32]—It is essential that a motion proper be made; the entry of an order cannot be considered as the making of a motion.[33]

Notice [34] is generally required,[35] especially where the applicant is a stranger to the action.[36] An order to show cause may be granted for the purpose of bringing a motion before the courts more speedily than it could be done by ordinary notice,[37] and the propriety of dispensing with the usual notice is a discretionary matter [38] and must be determined on the applicant's ex parte showing.[39] When a motion is brought before the court by an order to show cause, and the opposing party appears, and opposes the motion on the merits without making any claim that he has not had sufficient time to prepare for the hearing, it is improper to deny the motion on the ground that the order to show cause was improvidently issued.[40] The manner of giving notice is largely statutory.[41]

Hearing and rehearing and relief.[42]—The conduct of hearing on motions is largely within the judicial discretion.[43] The court may require a motion involving

23. MacKenna v. Fidelity Trust Co., 184 N. Y. 411, 77 N. E. 721.
24. Rev. Civ. Code, § 2035. Malmberg v. Peterson [S. D.] 108 N. W. 339.
25. Ramoneda Bros. v. Loggins [Miss.] 42 So. 669.
26. Where an unauthorized mortgage was executed by a guardian to secure money to pay off a prior incumbrance, the mortgagee who insisted on a new mortgage was not entitled to subrogation to the rights of the prior mortgagee. Chapin v. Garrison, 193 Mo. 92, 92 S. W. 368.
27. Hamilton v. Rogers [Ga.] 54 S. E. 926. One who purchases on foreclosure of a deed of trust is subrogated to the rights of the grantee in such deed as against other incumbrances. Ramoneda Bros. v. Loggins [Miss.] 39 So. 1007.
28. Taylor v. Roniger [Mich.] 13 Det. Leg. N. 994, 110 N. W. 503.
29. Parsons v. Urie [Md.] 64 A. 927.
30. Sampers v. Conolly, 100 N. Y. S. 806.
31. This topic does not treat of particular motions, but only of matters common to all. See New Trial and Arrest of Judgment, 6 C. L. 796; Pleadings, 6 C. L. 1008; Process, 6 C. L. 1078, etc.
32. See 6 C. L. 702.
33. So held that where a party's attorney, supposing that a motion or a new trial had been made, caused an order denying such motion to be entered. Koeppel v. Koeppel, 49 Misc. 218, 97 N. Y. S. 401.
34. See 6 C. L. 702.
35. After defendants have appeared and filed and served their answers, no order allowing an amendment of a complaint can be granted, except upon notice to the defendants. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335.
36. A stranger to an action cannot procure an ex parte order. Order to obtain is void. Kerns v. Morgan, 11 Idaho, 572, 83 P. 954.
37, 38, 39, 40. Gilbreath v. Teufel [N. D.] 107 N. W. 49.
41. Code Civ. Proc. § 797, providing for service of notice or other papers through the post office, directed to the person to be served at his place of residence according to the best information to be obtained concerning the same, has no application to service on a nonresident of the state. Gottlieb v. Kurlander, 101 N. Y. S. 751.
42. See 6 C. L. 703.
43. Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22.

an issue of fact to be heard upon affidavits only, and its ruling will not be set aside unless it is clear that in the particular case it abused its discretion.[44] It may require the moving party to present his whole case at once and decline to receive affidavits or other proof in rebuttal of counter affidavits.[45] It may cause persons who have made ex parte affidavits in support of a motion to be brought before it and examined orally with respect to statements made in their affidavits and how they came to give them, for the purpose of testing their knowledge or credibility,[46] though it would seem that the practice, commonly recognized and frequently fixed by rule of court of only receiving affidavits, should not be departed from unless it be in exceptional cases and to avoid a miscarriage of justice.[47] It is not within the trial court's power to require persons who have made ex parte affidavits, either in support or in opposition to a motion, to give additional affidavits.[48] Counter affidavits on the merits cannot be received on a motion to open a default.[49] The postponement of the hearing on the motion is largely discretionary with the court.[50] Discontinuance of a motion is waived by proceeding to a hearing on the merits.[51]

Renewals.[52]—A motion, once made on notice and denied by the court, may not be renewed without leave of the court, either upon the same papers, or upon additional facts existing at the time the prior motion was made, or upon substantially the same facts.[53] A motion, however, based upon facts subsequently arising, or upon the ground that the former order was obtained by fraud or collusion, may be made as a matter of right without leave of court.[54] Leave to renew on the ground of surprise is properly denied, no objection or claim of surprise having been made on the first hearing.[55]

The order.[56]—An "order" has been defined to be any direction of the court or judge made or entered in writing and not included in a judgment.[57] An order at chambers as distinguished from one by the court should be signed by the judge by name and not initial.[58] Orders should be filed as soon as rendered and made a part of the files of the case,[59] and in the absence of evidence to the contrary, it will be presumed that an order was made on the date it was filed.[60] An order allowing the amendment of a summons and complaint should have annexed to it a copy of the amended pleading.[61] While generally an order does not become effective until signed, attested, and filed,[62] still in some states an order appearing on the clerk's minutes is valid without a formal order signed by the judge.[63] Where an order is duly made and a copy filed with the clerk for entry, failure to enter it does not affect the validity of acts done thereunder.[64]

44, 45. See Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22, and cases cited.

46, 47. Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22.

48. See Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22, and cases cited.

49. American Mail Order Co. v. Marsh, 118 Ill. App. 248.

50. De Wandelaer v. Sawdey, 78 Conn. 654, 63 A. 446. Refusal to postpone hearing of a motion of an attorney to restore a cause to the docket on the ground that it had been settled and dismissed for the purpose of defrauding applicant of his fees and disbursements, in order to allow applicant to introduce evidence supporting averment of motion held properly refused. Id.

51. Birmingham Ry., L. & P. Co. v. Hinton [Ala.] 40 So. 988.

52. See 6 C. L. 703.

53. Haskell v. Moran, 102 N. Y. S. 388.

54. Application to amend so as to bring in new party defendant. Haskell v. Moran, 102 N. Y. S. 388.

55. Cannon v. McKenzie [Cal. App.] 85 P. 130.

56. See 6 C. L. 703.

57. Rev. St. 1887, § 4880. Dahlstrom v. Portland Min. Co. [Idaho] 85 P. 916.

58. Order by "W. B. S." held bad. Conery v. His Creditors, 116 La. 535, 40 So. 173.

59, 60. Sandstrom v. Smith, 11 Idaho, 779, 84 P. 1060.

61. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335.

62. So held under Rev. Code Civ. Proc. §§ 316, 317. Stephens v. Faus [S. D.] 106 N. W. 56.

63. Order granting extra allowance of cost. Harris v. Baltimore Mach. & El. Co., 112 App. Div. 389, 98 N. Y. S. 440.

64. Commissioner's court; Texas. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

The record should merely show the filing of the motion and the ruling of the court upon it.[65]

Operation and effect of orders.[66]—Orders in particular proceedings may have the force and effect of judgments especially as regards collateral attack.[67] A void order is not made valid by lapse of time but ever remains without effect as completely as if never entered.[68] The file mark of the clerk of court will not countervail a recital by the court itself as to the filing of the paper upon which the order containing the recital is based.[69]

Nunc pro tunc orders.[70]—Except where broadened by statute, nunc pro tunc orders supply only the record and not the order.[71] An irregular order cannot be confirmed nunc pro tunc.[72] The court has no power to direct that an order made at one term be entered nunc pro tunc as of a previous term.[73] Satisfactory parol evidence of an order omitted from the record is sufficient to authorize a nunc pro tunc [74] order. The right to entry nunc pro tunc may be barred by limitations.[75]

An order operates as conclusive only according to the fair import of its terms.[76]—A decision on a motion is not res judicata to the same extent as a judgment.[77] The denial of motion is conclusive though erroneous.[78]

Amendment and vacation.[79]—A void order may be vacated at any time,[80] but one merely erroneous cannot be vacated after the term.[81] An interlocutory order or ruling may be reversed and vacated at a subsequent term by the same court and by the successor of the judge rendering the order,[82] without compliance with statutory provisions relating to the vacation and modification of judgments and final orders at a term subsequent to that in which rendered,[83] and, in the absence of abuse of discretion, an appellate court will not interfere.[84] A final order may be vacated after term providing the proceedings are still in fieri.[85] The motion to vacate should be made in court of rendition.[86] The nature of the order assailed governs the sufficiency of the motion to annul and the proceedings thereunder.[87] Where the order

65. Held not necessary or proper to copy motion, notice, and affidavit of service into the record. Daggs v. Smith, 183 Mo. 494, 91 S. W. 1043.

66. See 6 C. L. 703.

67. So held as to order confirming settlement of guardian of insane person. Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773.

68. Kelner v. Cowden [W. Va.] 55 S. E. 649.

69. Stokes v. Hardy [N. J. Law] 62 A. 1002. Order directing discharge of debtor. Id.

70. See 6 C. L. 703.

71. Under Code Civ. Proc. §§ 721-724, held proper to enter an order of reference nunc pro tunc, the first order having been acted under and being void by reason of the disqualification of the judge making it. Owasco Lake Cemetery v. Teller, 110 App. Div. 450, 96 N. Y. S. 985.

72. Ex parte order allowing amendment of complaint and summons. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335. An order authorizing service of an "amended and supplemental complaint" is irregular, because no such pleading as an "amended and supplemental complaint" is known to the Code. Id.

73. Mertz v. Mehlhop, 117 Ill. App. 77.

74. Liddell v. Bodenheimer, Landau & Co. [Ark.] 95 S. W. 475.

75. An application for a nunc pro tunc entry of an order made eight years before held not barred by limitation. Liddell v. Bodenheimer, Landau & Co. [Ark.] 95 S. W. 475.

76. See 4 C. L. 705. Denial of a motion for an order requiring plaintiff to separately state and number his two causes of action, on the ground that there was but one cause of action, held not to conclude defendants from demurring to the complaint for misjoinder of causes. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082.

77. Haskell v. Moran, 102 N. Y. S. 388.

78. Barber v. Barnum, 101 N. Y. S. 1065.

79. See 6 C. L. 704.

80. Void order can be vacated more than six months after adjournment of term. Rev. St. 1887, § 4229, does not apply. Kerns v. Morgan, 11 Idaho, 572, 83 P. 954.

81. Krieger v. Krieger, 121 Ill. App. 11.

82. An order granting leave to answer after the expiration of the statutory period is administrative and not final, and not involving the merits. A succeeding judge may modify it by allowing an answer after a second failure to answer. Kaylor v. Hiller, 72 S. C. 433, 52 S. E. 120.

83, 84. Godfrey v. Cunningham [Neb.] 109 N. W. 765.

85. So held that where application was made during term of rendition and continued to the next term. Hews v. Hews [Mich.] 13 Det. Leg. N. 482, 108 N. W. 694.

86. People v. Anglo-American Sav. & L. Ass'n, 101 N. Y. S. 270.

87. Godfrey v. Cunningham [Neb.] 109 N. W. 765.

assailed was not based upon evidence, but was the natural sequence of the court proceedings, the motion assailing needs to set forth only such irregularities as would prima facie show a meritorious reason why the order should be set aside.[88] Where the order requires evidence on the merits to sustain it, the motion or petition assailing it must allege, and the evidence in support thereof must prove not only the irregularities complained of but facts relative to the merits which show a prima facie cause of action or defense.[89] The trial court may of its own motion correct errors in the order.[90] Cases dealing with the propriety of amendments are shown in the notes.[91]

Review.—An order must be reviewed by an appeal, not by a co-ordinate court.[92]

MULTIFARIOUSNESS; MULTIPLICITY; MUNICIPAL AIDS AND RELIEFS, see latest topical index.

MUNICIPAL BONDS.

§ 1. Power to Issue (1046).
§ 2. Conditions Precedent; Submission to Vote; Provision for Payment (1049).
§ 3. Execution (1051).
§ 4. Form and Requisites (1051).
§ 5. Issue and Sale (1052).
§ 6. Rights and Liabilities Arising Out of Illegal Issue (1052).
§ 7. Transfer (1053).
§ 8. Payment (1054).
§ 9. Scaling Overissue (1056).
§ 10. Enforcement of Improvement Bonds Against Abutters (1056).

"Municipal bonds" includes all public bonds, but not warrants for the payment of public money.[94]

§ 1. *Power to issue.*[95]—Municipalities derive their power to issue bonds either from the constitution or from valid statutes.[96] Such statutes must conform to the

88. So held as to order confirming judicial sale. Godfrey v. Cunningham [Neb.] 109 N. W. 765.

89. Godfrey v. Cunningham [Neb.] 109 N. W. 765.

90. So held where order signed did not correspond to order orally indicated. State v. Krahmer [Minn.] 108 N. W. 1119.

91. Held proper to amend order erroneously stating that motion was made by defendant's attorney. Raymond v. Tiffany, 100 N. Y. S. 807. Affidavit of attorney held to warrant amendment of order so as to show that it was not entered on default. Wollowitz v. New York City R. Co., 101 N. Y. S. 830.

92. One special term has no power to review an order made by another special term. In re Cullinan, 109 App. Div. 816, 96 N. Y. S. 751. See Appeal and Review, 7. C. L. 128.

93. See **Abbott Mun. Corp. §§ 169-225.**

94. See Municipal Corporations, 6 C. L. 714; Counties, 7 C. L. 976, etc.

95. See 6 C. L. 704.

96. A municipality can incur no indebtedness for objects not within the powers granted by its charter. White River Sav. Bank v. Superior [C. C. A.] 148 F. 1. The act of May 11, 1905, authorizing park commissioners to issue bonds for the maintenance of parks, applied only to boards which had a bonded indebtedness at the time of its passage. Bonds were issued by a town and delivered to its park commissioners to be sold. They bore the signature of the officers of the board and the money was used by it for park purposes. Held, the indebtedness was that of the park commissioners, and they were therefore authorized to issue further bonds. Kucera v. West Chicago Park Com'rs, 221 Ill. 488, 77 N. E. 912. Under Const. art. 20, the city of Denver has power to provide by charter for the erection of an auditorium and to issue bonds to discharge the cost thereof. City & County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066. Under 2 Mill's Ann. St. § 4403, subds. 6, 70, 72, 73, and Mill's Ann. St. Rev. Supp. §§ 4430a-4430c, a town or city is authorized to issue bonds for the purchase of water rights to secure water for its inhabitants. City of Cripple Creek v. Adams [Colo.] 85 P. 184. Where a city voted bonds for erecting an electric light plant and improving its gas works, and subsequently the legislature authorized the city to own and operate electric light plants and gas works for the purpose of supplying the city and its inhabitants with light, the city could issue the bonds voted and use the proceeds thereof not only for the purpose of lighting its streets and public places but also for the purpose of supplying its inhabitants with light in their homes and places of business. Baker v. Cartersville [Ga.] 56 S. E. 249. The city of Stockton has no power to establish an electric light plant for the purpose of supplying light to the inhabitants, and bonds issued for that purpose are unauthorized. Hyatt v. Williams, 148 Cal. 585, 84 P. 41. The bond act (St. 1901, p. 27, c. 32) merely gives power to issue bonds for the construction or maintenance of public utilities, where by other laws the power to build and operate such enterprises may be conferred. Id. The city charter of Oneida (Laws 1904, p. 563, c. 273, § 59, subd. 25) providing that whenever the common council shall resolve that an extraordinary expenditure ought to be made "for the benefit of the city," it may provide

constitution as regards title [97] and special legislation,[98] and will also be strictly construed.[99] Hence, mere authority to incur an indebtedness does not confer power to issue negotiable bonds,[1] though power to issue bonds for the construction or purchase of needful buildings for a city includes power to raise funds with which to procure a site for any such building.[2] A city may be authorized by statute to issue bonds for the creation of a general fund for contemplated future improvements from which the city may draw without special legislation for each improvement.[3] Where a county complies with a statute requiring it to issue bonds, it cannot afterwards defeat the bonds on the ground that they were issued under a mandatory statute, irrespective of the will of the county.[4] A special school district is not a "municipality" within the meaning of a constitutional provision prohibiting any municipality from issuing any interest bearing evidence of indebtedness.[5]

Refunding bonds.[6]—If the municipality had power to create the original indebtedness, the fact that the particular evidences of it were unauthorized does not render invalid the refunding bonds,[7] neither does the legality of such bonds depend upon the regularity or sufficiency of the notice calling in the outstanding ones.[8]

for the issue of bonds, does not authorize an issue of bonds to pay valid assessments previously made on property holders for the construction of a sewer. City of Oneida v. King, 101 N. Y. S. 239. Charter of town of Salem held legally passed so as to authorize issue of bonds thereunder. Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 442. Act 1898, c. 123, was designed to continue in effect previous acts authorizing a $5,000,000 bond issue by the city of Baltimore and did not authorize an additional issue in that sum beyond that previously sanctioned. City of Baltimore v. Bond [Md.] 65 A. 318.

97. The title of act March 7, 1867, authorizes townships to issue bonds only for the purpose of "building bridges," though the body of the act confers power to issue bonds generally when authorized by two-thirds of the voters. Bonds issued for the purpose of "constructing and improving roads and bridges" are not authorized. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824. Gen. St. 1878, being a mere private compilation, the act of 1867 is referred to for the purpose of ascertaining the authority of the township to issue the bonds. Id. Bonds not within curative act of 1903, p. 387, c. 267. Id.

98. Laws 1905, pp. 334, 340, authorizing every board of park commissioners in the state, after submission of the question to the municipality, to issue bonds to establish, improve, or maintain parks, do not violate Const. art. 4, § 22, prohibiting special laws regulating county and township affairs. Kucera v. West Chicago Park Com'rs, 221 Ill. 488, 77 N. E. 912. Do not authorize taking of property without due process. Id. Sess. Laws 1905, c. 101, p. 137, entitled "An act authorizing certain cities to issue bonds for natural gas, water, light and heating purposes" is a general law of uniform operation throughout the state, valid as to title and constitutional. City of Belleville [Kan.] 88 P. 47.

99. Authority to issue bonds beyond a certain per cent for the purpose of "purchasing or constructing" waterworks or electric light plants does not include power to issue bonds for the purpose of "erecting, constructing, maintaining and operating" a plant. State v. Wilder [Mo.] 98 S. W. 465.

1. Under acts 19 Gen. Assem. p. 123, c. 133, authorizing cities to procure land and donate it to a railroad company for depot grounds, etc., but not authorizing the levy of any tax or creation of any fund to pay therefor, the city could pay for the site only with warrants upon its general or incidental funds. Swanson v. Ottumwa [Iowa] 106 N. W. 9. The bonds being unauthorized, the fact that a municipality could have refunded the debt under the statute or could have issued warrants in payment does not operate to validate them (Id.), neither can recovery be had on them as non-negotiable papers (Id.).

2. Power conferred by § 195 of Omaha charter, where construction of the building was provided for as part of the same proposition. Linn v. Omaha [Neb.] 107 N. W. 983.

3. It was not the legislative intent that there should be separate legislation by the city providing for an issue of bonds to pay the city's share of each of contemplated future improvements made. A fund raised for such a purpose is a general fund from which the city may draw from time to time as occasion arises to pay its share of such improvements, wherever they may be located within the boundaries of the city, and in providing for this fund, it is not necessary to wait until legislation with respect to a particular improvement has gone forward to the point where an assessment has actually been levied. Heffner v. Toledo, 9 Ohio C. C. (N. S.) 1.

4. Territory v. Vail [Ariz.] 85 P. 652.

5. Schmutz v. Special School Dist. of Little Rock [Ark.] 95 S. W. 438.

6. See 6 C. L. 705.

7. Village of Bradford v. Cameron [C. C. A.] 145 F. 21. Ohio village held to have had authority to improve its corporation building and electric light plant. Id. If any irregularity existed in creating the original indebtedness, the village was estopped as against a bona fide purchaser to show it under the circumstances and recitals in the bonds. Id.

8. Under Rev. St. 1899, §§ 1719-1724, authorizing the issuance of refunding bonds by an incorporated city or town and requir-

A constitutional requirement, that at the time of issuing bonds a municipality shall provide for a tax for their discharge within a certain period, does not necessarily prohibit a refunding of such bonds pursuant to statute, though the effect is to defer payment beyond such period.[9] New bonds issued for the purpose of extending the time for the payment of old ones are, like the originals, only evidences of the indebtedness, and the rights of a holder of the new bonds must be determined as of the date of the creation of the debt.[10]

Railroad aid bonds.[11]—Statutes authorizing municipalities to extend aid to public utilities must be legally passed,[12] and the rule of strict construction is particularly applicable.[13] A statutory provision authorizing semi-annual interest may be waived by the railroad company.[14] A delivery of aid bonds before the doing of any work by the railroad company in violation of the statute under which they are issued does not necessarily render them void.[15] A county may be estopped by judgment from contesting the validity of railroad aid bonds in proceedings to compel the levy of a tax to pay them.[16]

Where a township has expended money in payment of railroad aid bonds, the legislature may direct that the county taxes derived from the railroad property in the township shall be expended therein until the township shall have been fully reimbursed;[17] but a statute requiring the county commissioners to maintain a sinking fund for the payment of the bonds at maturity cannot be enforced by the taxpayers after the bonds have been paid.[18]

Limitation of indebtedness.[19]—The amount of indebtedness, which a municipality may legally incur, is often limited to a certain percentage of its taxable property,[20] and constitutional limitations in this regard render invalid legislation in con-

ing notice of the redemption of outstanding bonds to be given as provided by law or ordinance. Diefenderfer v. State, 14 Wyo. 302, 83 P. 591.

9. Where by inadvertance no tax was levied issuance of refunding bonds by a school district under Rev. St. 1899, § 5157, held not unconstitutional. State v. Walker, 193 Mo. 693, 92 S. W. 69.

10. Graham v. Tuscumbia [Ala.] 42 So. 400.

11. See 6 C. L. 705.

12. Where House Journal showed that Laws N. C. 1885, p. 439, c. 233, incorporating a railroad and authorizing the issuance of county aid bonds, was passed by "Ayes 94, nays —; total —," it was presumed that there was no negative vote cast and the record was a sufficient compliance with Const. N. C., art. 2, § 14, requiring the ayes and nays to be entered on the journal. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

13. Chapter 67, p. 96, Laws 1886 (Gen. St. 1901, §§ 5907-5912) does not authorize a city of the first or second class to vote aid and issue bonds to purchase lands for a right of way depot grounds, etc., for a railroad company whose line is confined within the corporate limits of the city. Water, Light & Gas Co. v. Hutchinson Interurban R. Co. [Kan.] 87 P. 883.

14. That bonds provided for annual interest payments did not render them invalid. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

15. That bonds were delivered contrary to 1 Acts Ky. 1887-88, pp. 913-919, c. 449. Estill County, Ky. v. Embry [C. C. A.] 144 F. 913.

16. Where a county contested the legality of proceedings for the issuance of railroad aid bonds first in the state court in a suit to compel their issue and again in the Federal court in a suit to recover on the coupons and the bonds were declared valid. Estill County, Ky. v. Embry [C. C. A.] 144 F. 913.

17. Laws 1893, p. 430, c. 448, § 1, and Laws 1895, p. 182, c. 131, not unconstitutional as interfering with uniformity and equality of taxation. Jones v. Com'rs of Stokes County [N. C.] 55 S. E. 427. Taxpayers could maintain mandamus to compel compliance with the act. Id. Duty of county commissioners being continuing and prospective, action was not barred by limitations. Id.

18. Taxpayers could not compel performance of Laws 1895, p. 182, c. 131, § 2, requiring commissioners to invest the county taxes derived from the railroad property in a certain township, as a sinking fund for payment of aid bonds issued by the township. Jones v. Com'rs of Stokes County [N. C.] 55 S. E. 427.

19. See 6 C. L. 706.

20. The limitations of section 100 of the Municipal Code and Longworth Bond Act, which is in effect a part of that section, are controlling upon city and village councils in the issue of bonds to pay the corporation's share of street and sewer improvements and intersections, provided for in section 53 of the municipal code. Unless authorized by the electorate, therefore, such issues must be restricted for any one fiscal year to one per cent of the amount of taxable property within the corporation and on the tax duplicate. Smith v. Village of Rockford, 4 Ohio N. P. (N. S.) 513; Smith v. Village of Rockford, 4 Ohio N. P. (N. S.) 477.

flict therewith.[21] The issuance of bonds is an increase of indebtedness, though they can be paid only out of a special tax and the income from the improvement contemplated.[22] Money in the sinking fund of a city and applicable only to the payment of its bonded indebtedness should be deducted in determining the amount of its debt.[23] It will be presumed in support of the validity of an act authorizing a bond issue that a city's debt limit had not been reached.[24]

Curative acts.[25]—A curative act is inapplicable to bonds excepted from its provisions.[26]

§ 2. *Conditions precedent; submission to vote; provision for payment.*[27]—A statute requiring the treasurer of a county to file an additional bond within a specified time after it has been determined to issue county bonds is merely directory as to time and need not be literally complied with.[28] Meetings for the purpose of taking action in regard to issuing bonds must be legally called.[29] Statutes usually designate the vote required for the passage of ordinances.[30] Where a board is authorized to execute bonds, no formal resolution is always necessary.[31]

A school district may not issue bonds to pay outstanding warrants where the bonds in addition to the indebtedness of the district at the time of their issuance raise the indebtedness above the constitutional limit. State v. Ross [Wash.] 86 P. 675. Where the constitution provided that a city could not become indebted in an amount exceeding five per cent of its taxable property, except that it might become indebted in an amount not exceeding an additional five per cent for waterworks and light plants, and the debt of a city including the cost of waterworks and light plants already exceeded five per cent of the value of its property, such cost could not be deducted so as to authorize the city to issue further bonds for sewers. State v. Wilder, 197 Mo. 1, 94 S. W. 495. The amount of bonds which cities may issue under c. 101, p. 137, Sess. Laws 1905, for gas, water, heat, and lighting purposes is not controlled by any limitations of previous acts, said act repealing all previous acts inconsistent therewith. City of Belleville v. Wells [Kan.] 88 P. 47. Rev. St. 1898, §§ 926-11, conferring generally upon cities having special charters the power to issue bonds for the construction of school buildings without limit as to amount, repealed Priv. & Loc. Laws 1861, p. 301, c. 295, in so far as it limited the power of the city of Madison to issue bonds therefor to the sum of $10,000. Hall v. Madison, 128 Wis. 132, 107 N. W. 31. Cities of the second class and villages, in Nebraska, have the option to vote bonds to the amount of five per cent of the assessed valuation of their taxable property to establish a heating or lighting system under §§ 8504-8508 Cobbey's Ann. St. 1903, or limit the amount to two and one-half per cent by proceeding under c. 33, p. 264, Laws 1905. State v. Searle [Neb.] 107 N. W. 588. Electric light bonds, to the amount of five per cent of assessed valuation which record fairly showed were voted and issued under the act of 1903, held valid and entitled to registration. Id.

21. Const. art. 9, § 12, prohibiting a municipality from becoming indebted for any purpose in an amount exceeding five per cent of the value of its taxable property, is a limitation of the power of the legislature to authorize indebtedness and renders invalid legislation in conflict therewith regardless of its purpose. Village of East Moline v. Pope, 224 Ill. 386, 79 N. E. 587.

22. Where city had already reached debt limit, an ordinance providing for issuance of waterworks bonds to be paid out of an annual tax and the income from the waterworks constituted an increase in the city's debt and was void. Village of East Moline v. Pope, 224 Ill. 386, 79 N. E. 587.

23. Williamson v. Aldrich [S. D.] 108 N. W. 1063.

24. Where bonds could not be issued without providing for a sinking fund unless city had not reached debt limit. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357.

25. See 6 C. L. 706.

26. Laws 1903, p. 387, c. 267, excepting bonds involved in any pending suit or which have been questioned in any court, does not include bonds involved in a pending suit by a taxpayer to restrain a township from paying them. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824.

27. See 6 C. L. 707.

28. Laws 1903, p. 731, c. 444, requiring the county treasurer to execute an additional bond within thirty days after it has been determined to issue bonds for county improvements, is merely directory as to time and filing the treasurer's bond before his duties began constituted a substantial compliance with the statute. Bingham v. Milwaukee County Sup'rs, 127 Wis. 344, 106 N. W. 1071.

29. Testimony of clerk of school board that all directors were present except a certain one and that he had been "notified by mail three days previous" held sufficient to show that all directors were notified. Schmutz v. Special School Dist. of Little Rock [Ark.] 95 S. W. 438.

30. Where seven commissioners were elected as prescribed by the charter but one had resigned, the passage of an ordinance for the issuance of bonds by a vote of five members of the board was a sufficient compliance with the charter (Acts 1891, p. 746, c. 40, § 70), requiring the passage of such ordinances by a three-fourths vote of the "entire board." Board of Com'rs of Town of Salem v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 442.

31. Where records of county commissioners did not show a formal resolution direct-

Assent of voters or taxpayers.[32]—The issuance of bonds is frequently prohibited except by consent of a certain majority of the voters or "electors" of the municipality,[33] the manner of calling and conducting elections being usually provided by statute.[34] They must be lawfully conducted,[35] and the proposition must be properly presented to the voters,[36] care being taken that it is not dual in character or stated in the alternative.[37] Whether a majority of all the voters is required or only a majority of those voting on the particular proposition depends upon the statute under which the question is submitted.[38] An election having been held in compliance with the law, the return thereof, showing the proposition to have prevailed by a lawful majority, cannot be collaterally attacked for errors or fraud in registration or in the conduct of the election.[39] The bonds issued must be responsive to the question submitted.[40] In Wisconsin women may vote on the question of issuing bonds for the construction of a school building.[41] A constitutional provision intended to prevent the creation of a new debt without the assent of the voters does

ing the execution of certain railroad aid bonds, but it was shown that the bonds were executed at a meeting convened for that purpose, and a majority of the members were present during the intire session, the bonds were properly executed by the board. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

32. See 6 C. L. 707.

33. The word "elector" in Code 1892, § 3016, providing that municipal bonds shall not be issued unless authorized by a majority of the electors means voters who have registered so as to be entitled to vote at any election, held under the constitution and laws of the state. Greene v. Rienzi, 87 Miss. 463, 40 So. 17.

34. Under its charter, the city council of Omaha may provide by ordinance a manner not inconsistent with statutory provisions, for calling and conducting a special election for the purpose of voting upon a proposition to issue such bonds of the city as are authorized by law. Linn v. Omaha [Neb.] 107 N. W. 983.

35. That city council delegated to persons not members thereof the ministerial duty of assisting the clerk in tabulating the election returns did not invalidate the election in the absence of fraud or mistake. Linn v. Omaha [Neb.] 107 N. W. 983.

36. Inscription on ballot label of voting machine, "Shall the city issue $60,000 fire engine house bonds to run twenty years at four per cent?" held a sufficient statement of proposition to issue bonds for constructing two engine houses and procuring a site. Linn v. Omaha [Neb.] 107 N. W. 983.

37. Ordinance providing for election to vote bonds for the purpose of erecting "a waterworks and electric light plant" held to provide for but a single plant and the proposition was not dual. State v. Wilder [Mo.] 98 S. W. 465. Question whether bonds for the construction of engine houses should be issued held to contain only one proposition, though it included two engine houses and the purchase of a site. Linn v. Omaha [Neb.] 107 N. W. 983.

38. The constitution required the consent of three-fifths of the voters voting at an election to be held for the purpose of deciding upon the issue of bonds in excess of a certain per cent of the taxable property of a city. The charter required the consent of three-fifths of the voters voting at a general or special election. Held the consent of three-fifths of the voters voting on the proposition at a general election was sufficient, and it did not require three-fifths of all the votes cast at the election. Fox v. Seattle [Wash.] 86 P. 379. Under Acts 1899, c. 624, p. 1371, § 11, requiring a plan for additional water supply for the city to be approved "by a majority of the voters of the corporation tax district" as a condition precedent to the expenditure of money therefor, the adoption of the ordinance by a majority of the electors voting thereon as distinguished from a majority of qualified voters was sufficient. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357. Where the constitution requires the incurrence of a debt to be concurred in by a majority of the electors of the municipality, a favorable vote of less than such majority, though constituting a majority of those voting, is insufficient. Under Const. art. 13, § 4, prohibiting the incurrence of a debt by a city unless authorized by "a vote in favor thereof by a majority of the electors of the city." Williamson v. Aldrich [S. D.] 108 N. W. 1063.

39. Suit to restrain issue. Phoenix Water Co. v. City Council of Phoenix [Ariz.] 84 P. 1095.

40. Where the question of the issuance of bonds was "Shall the city issue bonds bearing four per cent and maturing in not less than fifteen years nor more than thirty years, the principal to be payable in equal annual instalments?" the bonds proposed by an ordinance providing for bonds "payable at the option of the city and county fifteen years after date and absolutely due and payable twenty-five years after date," were not responsive to the question submitted. City & County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066. Bonds maturing in fifteen years after date providing for the payment of one-fifteenth of the principal in annual instalments, or bonds maturing each year through the period of fifteen years so that one-fifteenth of the entire debt would be extinguished each year, would be responsive. Id.

41. Rev. St. 1898, § 428a, and § 943, as amended by laws 1903, p. 486, c. 312. Hall v. Madison, 128 Wis. 132, 107 N. W. 31.

not prevent the renewal of bonds to refund an existing indebtedness without submission to vote.[42]

Notice of election.[43]—Under an ordinance requiring the publication of a "previous notice," the publication need not continue up to and including election day.[44]

Providing for payment of bonds.[45]—Municipalities are often required at the time of issuing bonds to make provision for the payment of principal and interest.[46]

§ 3. *Execution.*[47]—The bonds must be legally signed[48] and delivered by the proper officers.[49] A statute requiring the bonds to be issued by certain officers does not require that they be executed by such officers.[50] Parol evidence is admissible to show facts concerning the execution of county bonds.[51]

§ 4. *Form and requisites.*[52]—The nonobservance of a mere directory provision as to denominations will not invalidate the issue.[53] Bonds issued under the

42. Issuance of bonds to refund indebtedness of water company which city was authorized to control by virtue of act March 6, 1906, held not within Const. § 157. Gaulbert v. Louisville [Ky.] 97 S. W. 342.

43. See 6 C. L. 708.

44. Where an ordinance providing for an election to determine the advisability of issuing bonds required that at least fifteen days "previous notice" should be given in a specified daily newspaper, a publication for seventeen consecutive issues, continuing until and including January 25, was sufficient, though it did not continue up to the day of election which occurred January 29. State v. Wilder [Mo.] 98 S. W. 465.

45. See 6 C. L. 708.

46. Under Const. art. 11, § 3, providing that municipalities at the time of incurring an indebtedness shall provide for an annual tax for the payment of the principal and interest, a resolution of the board of supervisors of a county levying on all taxable property in the county in each of twenty years a certain tax for the payment of the principal of bonds for the construction of a viaduct and a specified amount for interest, was not objectionable on the ground that the board could not levy taxes beyond the current year. Bingham v. Milwaukee County Sup'rs, 127 Wis. 344, 106 N. W. 1071. The levies so provided being sufficient to meet all instalments of principal and interest, it was immaterial that some of the taxes might not be paid until after sale, and therefore that the entire amount might not be on hand at the time of the maturity of the annual instalments. Id. Under Const. art. 11, § 8, providing that no city shall contract any debt except by ordinance providing for tax sufficient to pay the annual interest and extinguish the principal within fifteen but not less than ten years from the creation thereof, a city may issue bonds maturing in fifteen years after date and providing for payment in fifteen annual instalments or bonds maturing each year through the period of fifteen years so that one-fifteenth of the entire debt will be extinguished each year. City & County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066. Bonds for water rights for the purpose of supplying water to the inhabitants of a municipality are not within 2 Mill's Ann. St. §§4447, 4449, providing that no expense shall be incurred unless an appropriation shall have been previously made. Passage of appropriation ordinance before issuance of bonds held not necessary. City of Cripple Creek v. Adams [Colo.] 85 P. 184. The provision of the New York constitution, requiring an act authorizing a municipal corporation to issue bonds to provide for a sinking fund, does not apply where a city has not reached its constitutional debt limit. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357.

47. See 6 C. L. 708.

48. The lithographic signatures of the secretary of an irrigation district adopted by him and appearing on the interest coupons of bonds issued by the district are sufficient evidence of his signature to such bonds. Hewel v. Hogin [Cal. App.] 84 P. 1002. Prior to Laws 1905, p. 145, c. 94, requiring the city or town clerk to sign the certificate of legality required by the constitution to be endorsed on bonds issued by a county, township, etc., a city or town issuing bonds under Rev. St. 1899, §§ 1719-1724, had power to provide by ordinance what officer should sign the certificate. Diefenderfer v. State, 14 Wyo. 302, 83 P. 591. A municipal ordinance providing what officer shall sign the certificate of legality to be endorsed on municipal bonds issued under Rev. St. 1899, §§ 1719-1724, is a "provision of law" within a constitutional requirement that such certificate shall be signed by the county auditor or other officer "authorized by law." Id.

49. Requirement of act N. C. 1885, p. 439, c. 233, § 14, that certain county railroad aid bonds be delivered by a board of trustees held directory merely and delivery by county commissioners held not to invalidate the bonds. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

50. Act N. C. 1885, p. 445, c. 233, § 14, providing for the "issuance" of county railroad aid bonds by a board of trustees did not require the bonds to be "executed" by the trustees. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753. The statute being silent on the subject of execution, the bonds were properly executed by the board of commissioners. Id.

51. To show that railroad aid bonds were properly executed by board of county commissioners. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

52. See 6 C. L. 709.

53. Laws 1903, p. 731, c. 444, providing that bonds for county improvements shall be in denominations $1,000, $500, and $100 each, the number of each denomination to be fixed by the county board, is directory only, and the validity of the issue was not

direction of a city, but payable solely out of a special fund created by it and for the payment of which its general credit is not bound, are not municipal bonds within a constitutional provision authorizing the investment of the state school fund in municipal bonds.[54]

Validation of proceedings.[55]—A judgment validating an issue of bonds by a municipality is conclusive that the city had the legal right to incur the debt,[56] and judgment on a bond concludes the question of its validity in the absence of fraud.[57]

§ 5. *Issue and sale.*[58]—The acts of de facto officers in proceeding to issue bonds are valid and binding.[59] Taxpayers may restrain by injunction the issue of bonds for an unlawful purpose,[60] or the misappropriation of the proceeds of bonds.[61] While a municipality may sell its bonds at whatever premium it can, it has no power to antedate them and thus exceed the debt limit by selling interest as well as principal.[62] A statute prohibiting a sale of bonds at less than par does not require a sale at par net to the municipality.[63]

§ 6. *Rights and liabilities arising out of illegal issue.*[64]—Where a municipal corporation acts within its powers in borrowing and using money for an authorized purpose, the fact that without authority it issues negotiable bonds therefor will not preclude a recovery by the lender in an action for money had and received,[65] and limitations will not run in such case so long as the municipality recognizes its express obligation by paying interest on the bonds.[66] A railroad company, whose agent expressly warrants the validity of railroad aid bonds as an inducement to their sale, is liable for the consideration paid if the bonds prove unauthorized.[67] Defendant not having been benefited, there can be no recovery on a quantum

affected because no $100 bonds were issued. Bingham v. Board of Sup'rs of Milwaukee County, 127 Wis. 344, 106 N. W. 1071.

54. State v. Clausen, 40 Wash. 95, 82 P. 187.

55. See 6 C. L. 709.

56. Conclusive of right to incur debt of amount and for purposes indicated in notice of election, that the assent of the voters had been obtained and upon all other questions required to be determined. Baker v. Cartersville [Ga.] 56 S. E. 249.

57. Graham v. Tuscumbia [Ala.] 42 So. 400.

58. See 6 C. L. 709.

59. Greene v. Rienzi, 87 Miss. 463, 40 So. 17.

60. Though preliminary proceedings are regular on their face and show a lawful purpose, if it is the intent to issue bonds in pursuance of a conspiracy to use the money to pay bonuses to industries, a taxpayer may restrain such action. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005. Bill alleging that city officials had openly avowed their purpose to issue bonds under regular proceedings, but to use the money for paying bonuses to industries, held to charge facts raising a fair inference of fraud. Id. Objection that motives of council could not be inquired into held untenable. Id. Bill held not premature. Id. Evidence tending to show the purpose of the municipal agents held admissible, though it was inconsistent with their records. Id. Allegation that "the bonds will be immediately disposed of to innocent persons as your orators are informed and believe" held not a mere allegation of information and belief but an allegation of fact based on information and belief, and hence admitted by demurrer. Id. Under c. 334, p. 550, Laws 1905, a taxpayer may enjoin any board or body from entering into any contract or doing any act not authorized by law which might result in the creation of a public burden. Water, Light & Gas Co. v. Hutchinson Interurban R. Co. [Kan.] 87 P. 883.

61. Where a private waterworks company in a city was a taxpayer, it could sue to restrain misappropriation of funds raised by taxation for the purpose of erecting a waterworks system regardless of its real purpose to prevent the erection thereof. Owensboro Waterworks Co. v. Owensboro [Ky.] 29 Ky. L. R. 1118, 96 S. W. 867.

62. Owensboro Waterworks Co. v. Owensboro [Ky.] 29 Ky. L. R. 1118, 96 S. W. 867. Where a city on the sale of water bonds received a sum of money in excess of the face of the bonds for interest coupons which were left attached, such sum should be set apart from the water bond fund to the payment of the coupons. Id. Mandatory injunction held proper remedy to compel application. Id.

63. Where refunding bonds of a town were sold at face value the trustees could pay the broker a commission under Mill's Ann. St. § 4548b. Town of Manitou v. First Nat. Bank [Colo.] 86 P. 75.

64. See 6 C. L. 710.

65, 66. Incorporated Town of Gilman v. Fernald [C. C. A.] 141 F. 941.

67. Statements of an officer held an express warranty that bonds had a valid legal existence. Union Bank of Richmond v. Oxford & C. L. R. Co. [C. C. A.] 143 P. 193.

meruit.[68] Equity may afford relief to the holders of void bonds on a showing that the proceeds can be directly traced to specific benefits.[69]

§ 7. *Transfer.*[70]—A bona fide purchaser of a negotiable municipal bond is entitled to transfer all his rights therein to another and such right is one of contract which cannot be destroyed or impaired by subsequent state legislation.[71] Municipal bonds issued under authority of law have the attributes of commercial paper and are not subject to equities in the hands of bona fide holders;[72] but purchasers are charged with notice of the power of the municipality to issue them as conferred by the statute under which the bonds were issued.[73]

Recitals.[74]—Where a statement of legislative authority to issue a bond appears upon its face, a holder may rest, at least primarily, upon the presumptions arising from the recitals,[75] and, where want of authority may be shown, the burden is on the defendant.[76]

Estoppel.[77]—Where a municipality is vested with authority to issue certain bonds, it is generally held estopped by recitals therein concerning their validity as against bona fide holders.[78] The estoppel of a county to assert the invalidity of bonds issued to take up warrants for the payment of which the people of a city in such county are not responsible extends to the people of the whole county;[79] and an innocent holder of the bonds cannot be deprived of his right to receive taxes levied and in the process of collection for their payment at the suit of the people of the city to which he is not a party,[80] but the taxes are properly levied upon all the property in the county, including the city property.[81]

68. Where a city donated negotiable bonds void for want of power to issue them to a railroad company to reimburse it for money paid out for depot grounds, subsequent holders could not recover against the city on quantum meruit. Swanson v. Ottumwa [Iowa] 106 N. W. 9.

69. Where school bonds were issued without the required vote and proceeds were used exclusively in procuring a school house, lot, and furniture. Board of Trustees v. Postell, 28 Ky. L. R. 37, 88 S. W. 1065.

70. See 6 C. L. 710.

71. Gamble v. Rural Independent School Dist. [C. C. A.] 146 F. 113. Transferer of bona fide holder of school bonds held not affected by statute, providing that, if negotiable paper had been procured by fraud, the holder should recover only the sum paid therefor, though such transferer purchased for less than face value and with knowledge of the fraud, and hence he was entitled to recover the full face value. Id.

72. Failure of consideration by reason of failure of title to water rights for which bonds were issued held not to affect purchaser for value without notice before maturity. City of Cripple Creek v. Adams [Colo.] 85 P. 184. Bona fide holders of municipal bonds relying on the face of the record will be protected against informalities or irregularities in the proceedings authorizing the issuance of the bonds, or from mistakes or lack of wisdom on the part of the authorities. This rule cannot apply, however, where it is sought to restrain their issuance. Greene v. Rienze, 87 Miss. 463, 40 So. 17.

73. Swanson v. Ottumwa [Iowa] 106 N. W. 9. A purchaser of the bonds of a city is chargeable with notice of its charter powers, when the purpose for which the bonds were issued is fully disclosed in their recitals. White River Sav. Bank v. Superior [C. C. A.] 148 F. 1.

74. See 6 C. L. 711. See Bronson on Recitals in Municipal Bonds, 4 C. L. 717.

75, 76. Northwestern Sav. Bank v. Centreville Station [C. C. A.] 143 F. 81.

77. See 6 C. L. 711.

78. Where bonds to procure water works were authorized by law and recited a valuable consideration and the performance of all acts required by law, failure of consideration was not available as against an innocent holder. City of Cripple Creek v. Adams [Colo.] 85 P. 184. Where a town is vested with legislative authority to issue bonds for the purpose recited therein, it is bound by such recital as against a bona fide purchaser (Northwestern Sav. Bank v. Centreville Station [C. C. A.] 143 F. 81), and it is no defense as to him that the money was expended for a purpose not strictly within the meaning of the legislative act (Id.). Though purchaser is chargeable with notice of terms of act under which bonds were issued, he is not bound to ascertain the regularity of municipal action thereunder despite recitals conclusively purporting that action was properly taken. Id. Where a city was authorized to insert in sewerage bonds "such other provisions as the council may think proper," it was estopped by a recital that the law had been duly complied with in the issuance of the bonds and by a pledge of its faith and credit for their payment to defend on the ground that it had not provided funds for their payment as required by law. Superior v. Marble Sav. Bank [C. C. A.] 148 F. 7.

79. Slutts v. Dana [Iowa] 109 N. W. 794.

80. Injunction should not be granted where it would jeopardize the rights of the

§ 8. *Payment.*[82]—A municipality may be compelled by mandamus to levy a tax for the payment of its bonds.[83] Funds collected for the payment of bonds are impressed with a trust for that purpose,[84] and resort may be had to equity to compel their application where the remedy is inadequate at law.[85] A writ of mandate will lie to compel the treasurer of an irrigation district to pay interest coupons on bonds issued by the district.[86] The fact that a municipality has been enjoined at the suit of a taxpayer from paying certain bonds issued by it is not in itself a defense to an action on the bonds by a holder who was not a party to such suit.[87] In an action in a Federal court, decisions of state courts rendered subsequent to the sale of the bond cannot govern the rights of a bona fide holder who was not a party in the state courts.[88] Upon the subdivision of the territory of a municipality into new and distinct corporations, a suit by a bondholder of the old corporation to enforce payment by the new ones is within the equity jurisdiction of a Federal court.[89] A new school district may agree to assume and pay the bonded indebtedness of an old one out of which it was carved, in consideration of its receiving an undue proportion of the school property.[90] The fact that money raised by taxation for the purpose of paying the interest and principal of municipal bonds is misappropriated for general expenses does not authorize the setting apart of an equal amount from the proceeds of the bonds for the purpose of paying the principal and interest, the bonds being issued for a particular purpose,[91] neither can money taken from the general fund of a city to pay the brokers be deducted from the proceeds.[92] Under a

bondholder. Slutts v. Dana [Iowa] 109 N. W. 794. That bondholder if made a party might have consented to a decree restraining collection did not authorize such decree. Id.

81. Slutts v. Dana [Iowa.] 109 N. W. 794.

82. See 6 C. L. 712.

83. Under 1 Acts Ky. 1887-1888, pp. 913-319, c. 449, directing Estill county to levy a tax to pay certain railroad aid bonds and requiring the company to commence operations and do a certain amount of work each year, the county's liability to levy a tax did not depend on whether the conditions had been complied with by the company but whether the bonds had been issued so as to bind the county. Estill County v. Embry [C. C. A.] 144 F. 913. Where an order, awarding a peremptory mandamus against a county to compel the levy of a tax to pay railroad aid bonds, specifically declared that it was for the amount specified in the judgment on the bonds which was referred to, failure to specify the amount to be collected was not fatal. Id. Where a judgment was obtained against a city on a debt which arose prior to the constitution of 1875, pursuant to a statute authorizing the city to levy taxes to pay the debt, on refusal of the city to make such levy, the judgment creditor is entitled to mandamus. Graham v. Tuscumbia [Ala.] 42 So. 400.

84. Where taxes were levied and collected to pay coupons on county railroad aid bonds, the fund was impressed with a trust in the hands of the county treasurer for the benefit of the owner of the coupon. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

85. Where county had instituted proceedings to restrain its treasurer from paying railroad aid bonds on ground that they were void. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

86. Under Code Civ. Proc. § 1085. Hewel v. Hogin [Cal. App.] 84 P. 1002. Evidence held to show that defendant had in his hands available funds. Id. Where the bonds and interest coupons had not been refunded, the directors could not defeat plaintiff's claim immediately after his demand by transferring the money to the fund applicable to the payment of refunded bonds. Id. Plaintiff was not entitled to interest on his overdue coupons where no provision was made therefor by the district. Id. The personal liability, if any, of the treasurer of the district resulting from his failure to pay the coupons when presented, could not be enforced by writ of mandate. Id.

87. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824.

88. Where state decisions held bonds invalid. Northwestern Sav. Bank v. Centerville Station [C. C. A.] 143 F. 81; Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753. A purchaser is entitled to the same rights though he bought after rendition of the decisions. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

89. Under Code Iowa 1873, § 1715, providing for the division of the liabilities of an old school district between new ones created therefrom. Gamble v. Rural Independent School Dist. [C. C. A.] 146 F. 113.

90. Act April 11, 1862 (P. L. 471) not repealed or suspended by Act June 24, 1895 (P. L. 259). Everson Borough, 31 Pa. Super. Ct. 170. Upon such agreement being submitted to the court, a decree may be entered in accordance therewith without the necessity of hearing any testimony. Id.

91, 92. Owensboro Waterworks Co. v. Owensboro [Ky.] 29 Ky. L. R. 1118, 96 S. W. 867.

statute allowing interest on any instrument in writing, unpaid coupons on municipal bonds draw interest after maturity.[93]

The power of the legislature to alter or destroy subordinate municipalities cannot be so exercised as to impair the obligation of valid bonds previously issued,[94] but the legislature has power to provide for the payment of such debts by another issue of bonds when the corporate existence of a municipality is thus destroyed.[95] The legislature has power to readjust the burden of taxation to meet outstanding bonds by substituting a more equitable plan if such plan could have been adopted in the first instance.[96] The fact that a state has contracted to accept state bonds in payment for lands does not deprive it of the right to provide for payment of such bonds in money.[97] A statute, requiring the holders of past due outstanding state bonds to present them for payment within a specified time on penalty of having them declared invalid, is not unconstitutional if the time and conditions are reasonable.[98]

Payment from special fund or tax.[99]—Where municipal improvement bonds are payable only out of a fund created by special assessment, the municipality has no power to appropriate money for the payment of interest or the purchase of such bonds in case the assessments prove insufficient.[1] Where the duty of levying and collecting taxes for the payment of street improvement bonds is purely a statutory one, imposed upon certain officers of a municipality, and the municipality itself is given no control of the improvement proceedings, it cannot be charged as a voluntary trustee with respect to the levy and collection of such taxes so as to prevent the running of limitations against a suit for an accounting and to compel a levy;[2] but laches may defeat the right to compel a levy, even in cases where the municipality is considered a trustee.[3] The legislature cannot reduce or destroy a fund pledged for the payment of bonds as required by statute.[4] Where an act in effect

93. Mills' Ann. St. § 2252. City of Cripple Creek v. Adams [Colo.] 85 P. 184.

94. Const. 1895, art. 7, § 11, as amended by Act Feb. 23, 1903 (24 St. at L. p. 3) is inoperative as against previous valid bonds. Smith v. Walker, 74 S. C. 519, 54 S. E. 779.

95. Act Feb. 21, 1906 (25 St. at L. p. 309), authorizing the board of county commissioners to provide for the payment of the bonded debt of certain townships whose corporate existence was destroyed by Act Feb. 23, 1903, is constitutional. Smith v. alker, 74 S. C. 519, 54 S. E. 779.

96. Under Act 1890 (Acts 1889-1890, p. 674, c. 1491), providing that one-half of the cost of the construction of certain turnpikes should be paid by abutting owners and one-half by general taxation, one not an abutter acquired no vested rights which were violated by the act of March 14, 1906, providing for payment for the turnpikes by general county taxation. Durrett v. Davidson, 29 Ky. L. R. 401, 93 S. W. 25. Act of 1906 not void though retrospective in operation. Id.

97. Kirby's Dig. § 4866, providing that state bonds shall be received in payment for real estate bank lands having been enacted in 1879, did not become a part of bonds issued in 1870. Tipton v. Smythe [Ark.] 94 S. W. 678. But conceding that it did, the act of May 3, 1901, providing for the payment of past due bonds in money within a specified time, did not impair the obligation of contract, there being no higher method of discharging a debt than by payment in money. Id. Act of 1901 impliedly repealed Kirby's Dig. § 4866. Id.

98. Act May 3, 1901, fixing six months is not unreasonable and does not deprive holders of property without due process. Tipton v. Smythe [Ark.] 94 S. W. 678. The notice to holders provided for by the statute, and to be filed with certain stock exchanges held not inadequate, though a holder resided outside the United States. Id. The fact that ths treasurer is required to pay only valid bonds did not render the law invalid since his adverse decision as to validity is not conclusive, but holder may appeal to courts. Id. Does not impair obligation of contract, though when bonds were issued, thers was no authority for calling them in. Id.

99. See 6 C. L. 712.

1. City of Chicago v. Brede, 121 Ill. App. 662.

2. City held not a voluntary trustee. Eddy v. City & County of San Francisco, 148 F. 272.

3. Suit for equitable relief barred by laches whers bondholder waited over twenty years from first breach and eight years after maturity of bonds. Eddy v. City & County of San Francisco, 148 F. 272.

4. Where bonds for the construction of a subway pledged the tolls for the payment of principal and interest as required by St. 1897, p. 498, c. 500, a statute reducing the tolls was unconstitutional as impairing the obligation of contracts. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038. Though the bonds, as required by statute, provided that

authorizes a municipality to pledge a certain fund for the payment of its bonds, recitals in the bonds pledging the revenues of the municipality are not repugnant to the statute.[5]

§ 9. *Scaling overissue.*[6]

§ 10. *Enforcement of improvement bonds against abutters.*[7]—Street improvement bonds containing recitals showing that they are chargeable against the abutting property cannot be enforced against the municipality as a general liability,[8] in the absence of provisions showing such intent.[9]

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E. Control of Streets and Public Places (1070).
F. Definition of Offenses and Regulation of Criminal Procedure (1072).
§ 11. Property and Public Places (1073).
§ 12. Contracts (1074).
§ 13. Fiscal Affairs and Management (1076). Funds and Appropriations (1076). Warrants (1077). Limitation of Indebtedness (1077).
§ 14. Torts and Crimes (1078).
§ 15. Claims and Demands (1080).
§ 16. Actions by and Against (1081).

Scope of article.—This article is designed to treat, as strictly as may be proper, the law of municipalities as distinguished from that of streets and other public ways,[10] parks and public grounds,[11] bridges,[12] public utilities, works and improvements,[13] health and sanitation,[14] buildings and injuries therein and building regu-

the whole amount of the tolls should be pledged, the intent of the statute was accomplished on the city retaining as security the whole amount less a reasonable allowance to the railway company for collection, since the law contemplated such collection and suggested compensation therefor. Id.

5. Act 1905, p. 154, providing that the evidences of indebtedness of the special school district of Little Rock shall be paid out of the building fund in the order therein provided, in effect pledges such fund, and recitals in the bonds pledging the revenues of the district were not repugnant thereto. Schmutz v. Special School Dist. of Little Rock [Ark.] 95 S. W. 438. But even if the directors exceeded their power in thus pledging the revenues, it would not be ground for enjoining the issuance of the bonds at the suit of a taxpayer for it would not estop the district or bind the successors in office of the directors who issued the bonds. Id.

6, 7. See 6 C. L. 713.

8. Such enforcement not authorized by charter of city of Superior, Wis. (Laws 1889, pp. 407-413, c. 152, subchap. 16, §§ 139-167). White River Sav. Bank v. Superior [C. C. A.] 148 F. 1.

9. Sewerage bonds of city of Superior, Wis., held general obligations, where, though charter provided that they should specify that they were chargeable only to particular lots, it also authorized the council to insert such other provisions as it deemed proper, and to pay the bonds and reimburse the city by a tax on the lots. Superior v. Marble Sav. Bank [C. C. A.] 148 F. 7.

10. See Highways and Streets, 8 C. L. 40.

11. See Parks and Public Grounds, 6 C. L. 885.

12. See Bridges, 7 C. L. 460.

13. See Public Works and Improvements, 6 C. L. 1143.

14. See Health, 8 C. L. 36.

lations,[15] the local taxing power,[16] local and special assessments,[17] licenses and licensing,[18] the granting of franchises,[19] and the law of public officers generally.[20] The particular applications of the general law of municipalities to these several enumerated subjects should be sought in the titles cited. The body of laws relating to each of these largely involves powers and duties of counties, towns, and of the public generally, as well as powers of municipalities. All this has been brought together into titles relating to the subject-matter of such powers and duties.

§ 1. *Nature, attributes and elements.*[21]—The term municipal corporation as ordinarily applied includes all corporations created for the local exercise of delegated governmental functions.[22] They are the auxiliaries, or the convenient instrumentalities, of the general government of the state for the purpose of municipal rule.[23] The powers of a municipal corporation are wholly delegated,[24] but in the exercise of its powers so conferred, it is subject only to constitutional limitations.[25] Its functions are of two classes, governmental and private, the distinction being chiefly important in determining liability for tort.[26]

§ 2. *Creation and corporate existence. A. Creation and organization.*[27]—The creation of municipal corporations by special act being prohibited by the constitutions of most states,[28] the usual method of incorporation is for inhabitants of the locality desiring to incorporate to avail themselves of the provisions of a general law, which laws ordinarily provide conditions precedent of population, area, or physical characteristics.[29] Acceptance thereof is usually signified by an election[30] ordered by the proper officials. The official, or board to whom the petition is presented, on determining that it is sufficient in point of contents and signatures,[31] which determination is usually held to be final,[32] orders the election, prescribing the time and place of holding the same. In some states, incorporation may be by an order of court in a special proceeding designed for the purpose.[33] Judicial notice will be taken of a municipality regularly created.[34]

15. See Buildings and Building Restrictions, 7 C. L. 507.
16. See Taxes, 6 C. L. 1502.
17. See Public Works and Improvements, 6 C. L. 1143.
18. See Licenses, 6 C. L. 436.
19. See Franchises, 7 C. L. 1771.
20. See Officers and Public Employes, 6 C. L. 841.
21. See 6 C. L. 714. See, also, **Abbott, Mun. Corp. §§ 1-8.**
22. The word "town" is generic and includes cities. City of Smithville v. Dispensary Com'rs of Lee County, 125 Ga. 559, 54 S. E. 539. A "township" held to be a municipality for certain statutory purposes. Hanson v. Cresco [Iowa] 109 N. W. 1109. The water commissioners of Erie, Pa., as a board are wholly independent of the city. Saltsman v. Olds [Pa.] 64 A. 652.

Note: The term "municipality" has sometimes been limited by definition to include only municipal corporations in the proper and strict sense. Briegel v. Philadelphia, 135 Pa. 451, 19 A. 1038, 20 Am. St. Rep. 885; In re Werner, 129 Cal. 567, 62 P. 97; Memphis Trust Co. v. Board of Directors, 69 Ark. 284, 62 S. W. 902. But the term is also used by good authority in a broader sense to include public and political corporations which are not strictly municipal. Spalding Lumber Co. v. Brown, 171 Ill. 487, 49 N. E. 725; State v. Elliott, 158 Ind. 168, 63 N. E. 222; Brown v. Board of Education, 108 Ky. 783, 57 S. W. 612; Commissioners v. Fell, 52 N. J. Eq. 689, 29 A. 816; Miller v. Town of Jacobs, 70 Wis. 122, 35 N. W. 324, and see cases collected in 5 Words and Phrases Judicially Defined, 4630.
23. MacMullen v. Middleton [N. Y.] 79 N. E. 863.
24. See post, § 7.
25. See post, §§ 7, 9, 10.
26. See post, § 14.
27. See 6 C. L. 715. And see **Abbott, Mun. Corp. §§ 9-20.**
28. See post, § 3.
29. Insufficient number of actual residents. State v. Clark [Neb.] 106 N. W. 971. The prospective expansion of a town may be taken into consideration in determining the intention of electors as to what area is to be incorporated. Merritt v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 925, 94 S. W. 372.
30. In Illinois a proposition to incorporate must receive two-thirds of all the votes cast at the election. People v. Weber, 222 Ill. 180, 78 N. E. 55.
31. Under the Wash. statute, Oct., 1903, c. 186, the determination of sufficiency vests in the first instance with the city council. Hindman v. Boyd, 42 Wash. 17, 84 P. 609.
32. Annexation of territory. People v. Ontario, 148 Cal. 625, 84 P. 205.
33. See 4 C. L. 721, n. 71. A final order incorporating a village in a special proceeding for the incorporation thereof is appealable. In re Salter, 127 Wis. 677, 106 N. W. 684.
34. City of Brownsville v. Arbuckle [Ky.] 99 S. W. 239. See, also, 6 C. L. 717, n. 43.

(§ 2) *B. Consolidation, succession and dissolution.*[35]—Consolidation of municipal corporations is permissible only by legislative authority, and special laws authorizing consolidation are as a rule prohibited by the several state constitutions.[36] It is usually effected by a special election initiated and held in a manner similar to those for incorporation.[37] The power to divide or dissolve municipalities is likewise a legislative power,[38] to which is incident the power to prescribe the rule for the division of property,[39] the apportionment of debts,[40] and the devolution of office.[41] Alteration or dissolution of a municipal corporation does not impair existing municipal contracts.[42] The order of a board vacating streets, lots, and alleys disannexed from a city being a judicial act, an appeal lies,[43] and where a municipality had allowed its government to lapse and seventy-five electors had petitioned the governor under the statute to appoint election commissioners, his refusal was open to review in mandamus proceedings.[44]

(§ 2) *C. Classes and classification.*[45]—Municipalities may be classified for purposes of legislation,[46] provided such classification is reasonable[47] and based on real and substantial differences of population or situation.[48]

(§ 2) *D. Attack on corporate existence; quo warranto.*[49]—The validity of the organization and existence of a municipal corporation cannot be questioned except in a direct proceeding,[50] and at the instance of the state.[51] Quo warranto is the proper remedy.[52]

35. See 6 C. L. 716. **See, also, Abbott, Mun. Corp. §§ 33, 34.**

36. See 6 C. L. 716, n. 12.

37. See 6 C. L. 716, n. 13.

38. The Ohio Act of 1902 (Rev. St. 1905, §§ 1536-1560), providing for detaching farm lands from cities and villages, held constitutional. Incorporated Village of Fairview v. Giffee, 73 Ohio St. 183, 76 N. E. 865. Suspension of municipal functions and failure to elect officers does not work a dissolution. Hill v. Anderson, 28 Ky. L. R. 1032, 90 S. W. 1071. A municipal corporation does not lose its existence by nonuser of its franchise. Elliott v. Pardee [Cal.] 86 P. 1087.

39. The doctrine upon which the division of property is founded is an equitable one, resting upon the relative rights of the municipalities, the character of the property to be divided, and legislative regulation upon the subject. Washburn Waterworks Co. v. Washburn [Wis.] 108 N. W. 194.

40. Galloway v. Memphis [Tenn.] 94 S. W. 75. A special indebtedness for a street improvement created by an illegally organized corporation cannot after its legal creation be ratified so as to convert the liability from a special to a general one. State v. Moss [Wash.] 86 P. 1129.

41. The consolidation of two boroughs under Pennsylvania Act of 1893, P. L. 335, created no vacancy in the office of councilman. Lilly v. Krause, 30 Pa. Super. Ct. 412. The provisions of Denver charter, adopted March 29, 1904, increasing the number of county officers and changing the time of their election, held unconstitutional. County judge. People v. Johnson, 34 Colo. 143, 86 P. 233. County assessor. People v. Alexander, 34 Colo. 193, 86 P. 249. Coroner. People v. Horan, 34 Colo. 304, 86 P. 252. City and county attorney. People v. Lindsley [Colo.] 86 P. 352.

42. Washburn Waterworks Co. v. Washburn [Wis.] 108 N. W. 194; Graham v. Folsom, 200 U. S. 248, 50 Law. Ed. 464, 15 Yale L. R. 363.

43. MacGinnitie v. Silvers [Ind.] 78 N. E. 1013.

44. Elliott v. Pardee [Cal.] 86 P. 1087.

45. See 6 C. L. 716. See, also, **Abbott, Mun. Corp. § 94.**

46. Classification for purpose of building restrictions. Welch v. Swasey [Mass.] 79 N. E. 745. Rules for classification stated. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974.

47. In incorporating a certain class of cities it is competent to enact that the treasurer of the county in which the only city of that class is situated shall be ex officio treasurer of the city. Cathers v. Hennings [Neb.] 107 N. W. 586. Sec. 124, chap. 62, N. Dak. Laws 1905, is invalid to the extent that it requires county treasurer to pay to cities the interest and penalties on city and city school taxes. State v. Mayo [N. D.] 108 N. W. 36.

48. Classification according to population sustained. Smith v. Burlington [Wis.] 109 N. W. 79.

49. See 6 C. L. 716. **See, also, Abbott, Mun. Corp. §§ 32, 34.**

50. People v. Pederson, 220 Ill. 554, 77 N. E. 251; Atchison, T. & S. F. R. Co. v. Lyon County Com'rs, 72 Kan. 13, 82 P. 519, 84 P. 1031.

51. The existence and authority of a municipal corporation acting under color of law cannot be questioned collaterally by private suitors. Ward v. Gradin [N. D.] 109 N. W. 57.

52. The only mode by which the legality of a de facto municipal corporation can be inquired into is by information in the nature of quo warranto. People v. Pederson, 220 Ill. 554, 77 N. E. 251. A municipality is a "person," subject to quo warranto for usurping a franchise. City of Uniontown v. State [Ala.] 39 So. 814.

§ 3. *The charter; adoption, amendment, repeal and abrogation.*[53]—Municipal charters, like all other legislative acts, are subject to constitutional limitations,[54] such as the prohibition placed upon the delegation of legislative functions,[55] the requirement of uniformity in taxation,[56] and those relating to the subjects of titles and acts.[57] Special charters are now quite generally prohibited by the constitutions of the several states.[58] Where cities are governed by general act, amendments must be within the constitutional limitation as to special acts.[59] A revision or amendment of a general law becomes operative upon all cities previously organized under the general law without any action by such cities,[60] but the provisions of the general incorporation act have no application to a city chartered under a special act.[61] Statutory provisions with respect to the amendment of charters, such as the petition therefor of a percentage of qualified voters,[62] the publication of the proposed amendment,[63] must be complied with. Since all powers of a municipality are derived from its charter, no ordinance or by-law can enlarge, diminish, or vary its powers.[64] San Francisco freeholders charter, when approved by statute, became the organic law of the city by express terms of the constitution, and superseded the existing charter.[65]

§ 4. *The territory.*[66]—The creation of a municipal corporation involves the fixing of its boundaries, the determination of which rests with the legislature in the absence of constitutional restrictions.[67] Where a line has been treated for more

53. See 6 C. L. 716. See, also, **Abbott, Mun. Corp. §§ 22-31.**

54. Salem incorporation act held constitutional. Murphy v. Salem [Or.] 87 P. 532. Avondale city charter (Acts 1894-5, p. 139) does not violate Alabama constitution 1901, § 223. Harton v. Avondale [Ala.] 41 So. 934.

55. The provision in an enactment of the state legislature that the final operation thereof may be made to depend upon some contingency as the vote of the electors of a given territory within which the law is to operate is not the delegation of legislative functions to electors or to corporate officials of the municipality. Act relating to "criminal court of Cook County" sustained. Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46.

56. The fact that a license tax imposed by a city upon dealers in intoxicating liquors is higher than the tax upon dealers in other commodities does not render the tax invalid because discriminative. Lachman v. Walker [Fla.] 42 So. 461.

57. Title of act to amend city charter held to express the subject. City of Ensley v. Cohn [Ala.] 42 So. 827.

58. Wash. Const. art. 2, § 28, prohibiting the legislature from enacting special laws granting corporate powers, applies equally to municipal and private corporations. Terry v. King County [Wash.] 86 P. 210. Kentucky Act of 1906, empowering cities of the first class to construct a system of sewerage and providing for a sewerage commission, is not special legislation within the constitution of that state. Miller v. Louisville [Ky.] 99 S. W. 284. New Jersey Act (P. L. 1894), conferring powers upon cities located on or near the ocean to lay out parks, is not special legislation regulating internal affairs of cities, and is constitutional. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081. In Alabama, city boundaries may be altered by special act. Const. 1903, § 104, sub. 18. City of Ensley v. Cohn [Ala.] 42 So. 827. Notice of intention to apply for special act altering city boundaries held to express the substance thereof. Id. See 6 C. L. 716, n. 28.

59. Art. 48 of the Louisiana constitution of 1898, in prohibiting the amendment by special laws of the charters of municipalities, with the exception of those having a population of not less than 2,500, did not abridge the power of the general assembly to enact general laws affecting the charters of the class of municipalities excepted. City of Lake Charles v. Roy, 115 La. 939, 40 So. 362. Alabama L. A. 1903, p. 512, repealing Act of March 4, 1901, does not amend the charter of Troy within the constitutional provision that the legislature shall not pass a special, private, or local law amending the charter of a municipal corporation. State v. Hubbard [Ala.] 41 So. 903. See 6 C. L. 717, n. 34.

60. State v. Mayo [N. D.] 108 N. W. 36.

61. City of Ensley v. Cohn [Ala.] 42 So. 827.

62. Under Washington Act 1903, p. 393, it lies with the city council in the first instance to pass on the qualification of signers of a petition for amendment of a city charter. Hindman v. Boyd, 42 Wash. 17, 84 P. 609. Registration held not to be a necessary element in the qualification of a voter. Id.

63. Publication in daily newspaper held sufficient. Wolfe v. Moorhead [Minn.] 107 N. W. 728.

64. Annex Improvement Commission of Baltimore. City of Baltimore v. Flack [Md.] 64 A. 702.

65. Burke v. Board of Trustees [Cal. App.] 87 P. 421.

66. See 6 C. L. 717. See, also, **Abbott, Mun. Corp. §§ 35-51, 55-65.**

67. The lands under the navigable waters of the Bay of San Francisco below the line of low tide, in front of the Oakland water front, belong to the state and are not with-

than fifty years as the correct line between towns, such line must be regarded as the true one although it may differ from the calls of the charter.[68] The boundaries of a city established by public statute will be judicially noticed.[69]

Annexations[70] must be authorized by the legislature either directly[71] or by conferring the power upon electors themselves.[72] The extent and manner of such annexation is a question of legislative discretion;[73] a chancery court cannot pass upon the right of a municipality to acquire lands outside of its territorial limits.[74]

Severances.[75]—The corporate limits of a city having been prescribed by the act of incorporation they may not be contracted by mere acquiescence of the municipal officers, even for a period of thirty years.[76] Tacitly submitting to the inclusion of unplatted lands in the incorporated limits of a town does not estop the owner from proceeding under the statute to have it disconnected therefrom.[77] A judgment of a court detaching territory will not be impeached upon appeal in the absence of a showing that the trial judge committed an important mistake of fact or made an erroneous inference of fact or of law.[78]

Plats.[79]—The entire subject of platting being fully covered by general statute, a municipality may not impose additional requirements.[80] A street bounded on one side by a river extends to the center of the river, notwithstanding a plat gives the width thereof.[81] Mandamus lies to compel approval of plat of a subdivision where the withholding of approval is arbitrary and unlawful.[82]

§ 5. *Officers and employes.*[83]—This subject is fully treated in another topic.[84] But speaking generally, the state having power to create municipal corporations, it may designate the various municipal offices,[85] prescribe the tenure of office,[86] define

in the boundaries of the town of Oakland. Southern Pac. Co. v. Western Pac. R. Co., 144 F. 160.

68. Town of Bath v. Haverhill, 73 N. H. 511, 63 A. 307.

69. But the court cannot take judicial notice that an alley between two designated streets is within the territorial boundaries of the city. City of Topeka v. Cook, 72 Kan. 595, 84 P. 376.

70. See 6 C. L. 717.

71. Local Act No. 627, Mich. 1905, providing for annexation of certain territory to city of Detroit (Attorney-General v. Springwells Tp., 143 Mich. 523, 13 Det. Leg. N. 80, 107 N. W. 87), and Virginia Act 1904, providing for the extension of corporate limits of cities, held constitutional (Henrico County v. Richmond [Va.] 55 S. E. 683). The statutes of Kansas empower a city lying in one county to extend its boundaries into another. Portsmouth Sav. Bank v. Smith [Kan.] 86 P. 462.

72. People v. Ontario, 148 Cal. 625, 84 P. 205. Under California St. 1889, p. 358, providing that trustees of a town on receiving the petition provided for shall submit the question of annexation to popular vote, record of the determination of the board as to the sufficiency of the petition need not be made. Id. Even if it were necessary for the record to show that the board passed on the sufficiency of the petition, a recital in the order calling the election that the petition was signed by requisite number of voters would be sufficient. Id. New Jersey P. L. 1905, p. 131, requires that the application to the mayor for a resubdivision shall proceed from fifty per cent. or more of the governing body of the city acting in their official capacity and not as individuals. Rutten v. Paterson [N. J. Law] 64 A. 573.

73. Elliott v. Louisville, 28 Ky. L. R. 967, 90 S. W. 990. Ordinance extending boundaries sustained. New Orleans & N. W. R. Co. v. Vidalia, 117 La. 561, 42 So. 139. Kansas Gen. Stat. 1901, § 1172, authorizing county commissioners to make an order enlarging the boundaries of a city, is to be interpreted as intended to confer upon the commissioners the legislative power to determine whether such change shall be made. Nash v. Glen Elder [Kan.] 88 P. 62.

74. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897.

75. See 6 C. L. 718.

76. Martin v. Gainesville, 126 Ga. 577, 55 S. E. 499.

77. Barber v. Franklin [Neb.] 108 N. W. 146.

78. Gregory v. Franklin [Neb.] 108 N. W. 147, following and approving Michaelson v. Tilden [Neb.] 101 N. W. 1026. See 4 C. L. 724, n. 18.

79. See 6 C. L. 719.

80. Burroughs v. Cherokee [Iowa] 109 N. W. 876.

81. Chicago, R. I. & P. R. Co. v. People, 222 Ill. 427, 78 N. E. 790.

82. People v. Board of Trustees, 122 Ill. App. 449.

83. See 6 C. L. 719. See, also, **Abbott, Mun. Corp. §§ 596-716.**

84. See Officers and Public Employes, 6 C. L. 841.

85. Act authorizing the constitution of a sewerage commission in cities of the first class in Kentucky sustained. Miller v. Louisville [Ky.] 99 S. W. 284. The inhibition against the holding of other public office or employment, found in section 120 of the municipal code (Rev. St. §§ 1536-1613) relating to the qualifications of councilmen, is not limited to other office or employment by the

the powers and duties,[87] and fix the compensation [88] of the incumbents. The office may be filled by election [89] or appointment,[90] and in proper cases the duties may be performed by a deputy.[91] In the absence of prohibitive charter provisions, a municipality may reimburse its officers for expenses and attorney's fees.[92] The acts of officers of a de facto municipal corporation are binding when such acts would be within the power of such officers if the corporation were one de jure.[93] Failure to exact a bond of the contractors, as required by statute, renders the councilmen individually liable to material men.[94] Unauthorized acts of officials will not estop a municipal corporation,[95] but it has been held that a city is estopped to deny au-

municipality, but extends to all public office and employment. State v. Gard, 8 Ohio C. C. (N. S.) 599. Treasurer of county may be ex officio treasurer of a city. Cathers v. Hennings [Neb.] 107 N. W. 586.

86. Pennsylvania Act June 1, 1883 (P. L. 54), relating to term of office of councilmen, held to apply to boroughs divided into wards. Hayes v. Sturges [Pa.] 64 A. 828. Under the charter of Taunton, Mass., the council had authority to pass ordinance prescribing one year as the term of office of members of police department. Lahar v. Eldridge, 190 Mass. 504, 77 N. E. 635.

87. Commissioner of public works held to have authority to agree to pay for overtime of employe without approval of common council. Gadd v. Detroit, 142 Mich. 683, 12 Det. Leg. N. 900, 106 N. W. 210. By the statutes of Rhode Island a warden is vested with the powers and duties of a justice of the peace. Rose v. McKie [C. C. A.] 145 F. 584. Under Massachusetts Rev. Laws, c. 50. § 11, street commissioners have no authority to bind city by contract giving up betterments assessable on laying out street. Whitcomb v. Boston [Mass.] 78 N. E. 407. A superintendent of a municipal electric light plant has, in the absence of authority to deal with public on behalf of the municipality, no implied power to accept for it a shipment of electric apparatus not consigned to him or the municipality. Southern Exp. Co. v. B. R. Elec. Co., 126 Ga. 472, 55 S. E. 254. The armory board of the city of New York has no authority to bind the city for architect's fees until the board is authorized by resolution to incur the indebtedness. Horgan v. New York, 100 N. Y. S. 68. The discretionary powers of a comptroller in cities of the first and second class in Pennsylvania do not extend to the revision of lawful contracts made by other departments within their proper sphere (Commonwealth v. Larkin [Pa.] 64 A. 908), nor to the confession of judgment (Valentine Clark Co. v. Allegheny City, 143 F. 644).

88. Sutherland v. Rochester, 112 App. Div. 712, 98 N. Y. S. 970; In re Babcock, 101 N. Y. S. 90. The mayor in Ohio cities is not entitled to fees in prosecutions for violations of penal ordinances. Smallwood v. Cambridge [Ohio] 79 N. E. 755. Corporation counsel of Detroit held not entitled to extra compensation for prosecuting proceedings on behalf of board of education. Tarsney v. Board of Education [Mich.] 13 Det. Leg. N. 1021, 110 N. W. 1093. Until regularly removed an officer is entitled to the salary affixed to the office. People v. Sipple, 109 App. Div. 788, 96 N. Y. S. 897. Under a provision that claim for services of a public official must be presented to board of estimates, nonsuit must be granted in absence of a showing of such presentation. Lyons v. Syracuse, 101 N. Y. S. 247. Whether a municipal officer may bind the city by assigning his salary prior to the issue of a warrant therefor, **quaere.** Gordon v. Omaha [Neb.] 110 N. W. 313.

89. Erroneous description of length of term in order of council calling for an election to fill vacancy is a mere irregularity. Koster v. Coyne, 184 N. Y. 494, 77 N. E. 983. Aldermen in cities of the second class in Colorado are to be elected by wards and not by such cities at large. Dunton v. People [Colo.] 87 P. 540. Where one is elected to council who is already serving in the office of school examiner and is further employed as superintendent of a public school, the election is a nullity by reason of his ineligibility, and council has the right to so determine without notice to the one so affected or the taking of any proceedings against him, and may proceed to fill the vacancy forthwith. State v. Gard, 8 Ohio C. C. (N. S.) 599.

90. A charter provision granting council authority to appoint policemen and prescribe their duties and compensation is self-executing and requires no resolution or ordinance to make it effective. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925. Power in aldermen to appoint necessary officers authorizes appointment of policeman. Early v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 78, 97 S. W. 82.

91. In Louisiana, record evidence must be kept that because of absence of the officer in chief the deputy acted. State v. Briede, 117 La. 183, 41 So. 487.

92. Greater New York Charter, Laws 1901, c. 466, § 231, authorizing allowance by city of expenses of city officers in contesting removal from office proceedings, held valid. Kane v. McClellan, 110 App. Div. 44, 96 N. Y. S. 806. But a municipality is not bound to reimburse an officer for a judgment procured against him in a suit for unauthorized acts. Gormly v. Mt. Vernon [Iowa] 108 N. W. 465. In Newton v. Hamden [Conn.] 64 A. 229, the rule is stated to be that an officer or agent of a municipal corporation may be indemnified when he has in good faith acted in the discharge of a duty imposed or authorized by law in a matter in which the municipality has an interest. See 4 C. L. 730, n. 14; p. 737, n. 16, 17.

93. People v. Pederson, 220 Ill. 554, 77 N. E. 251.

94. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547.

95. The levy and collection of taxes will not estop city from asserting title to the property for the benefit of the public. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

thority of city attorney to stipulate discontinuance of a suit.[96] An officer judicially ousted for misconduct cannot be reinstated in the office by re-election,[97] and failure to pay debts is in California a sufficient reason for dismissal.[98] Mandamus will not issue to compel approval of druggist's bond, where, pending action by the council, three of the four sureties thereon withdraw from their obligation,[99] nor does it lie to compel members of council committee to repay money illegally received by them.[1]

§ 6. *Municipal records and their custody and examination.*[2]

§ 7. *Authority and power of municipality.*[3]—Municipalities being creatures of the state, with powers defined by the legislature of the state,[4] they possess and can exercise only such powers as are expressly granted,[5] those necessarily or fairly implied in or incident to the powers expressly granted,[6] and those essential to the declared objects and purposes of the municipality, not simply convenient but indispensable.[7] Any fair or reasonable doubt concerning the existence of the power is resolved by the courts against the municipality.[8] The power to contract,[9] to legislate

96. State v. Spokane [Wash.] 87 P. 944.

97. State v. Rose [Kan.] 86 P. 296.

98. Cleu v. Police Com'rs [Cal. App.] 84 P. 672.

99. Young v. Van Buren Circuit Judge [Mich.] 13 Det. Leg. N. 416, 108 N. W. 506.

1. State v. Hale [Ind.] 77 N. E. 802.

2. See 6 C. L. 720. See, also **Abbott, Mun. Corp. §§ 591-595.**

3. See 6 C. L. 720. See, also, **Abbott, Mun. Corp. §§ 108-114.**

4. That the city of Denver was created by constitutional amendment adopted by direct vote of the people with power to frame its own charter did not change its relation to the state nor exempt it from state control. Keefe v. People [Colo.] 87 P. 791. It is competent for the legislature to provide that liability for breach of duty to remove snow and ice from the sidewalk be conditioned upon notice in writing being given to the city. MacMullen v. Middleton [N. Y.] 79 N. E. 863. The legislature may authorize or require cities or towns to construct armories for militia companies stationed therein. Hodgdon v. Haverhill [Mass.] 79 N. E. 830.

5. There is an entire absence of express power either in the municipal code or previous statutory provisions whereby a municipality may grant to a lighting company the right to jointly use municipal poles, nor can such power be implied from authority to sell either real or personal property, and to treat such pole rights as a mere license might easily result in confiscation to a degree which would exclude the city from larger use demanded by future growth. City of Columbus v. Columbus Public Service Co., 4 Ohio N. P. (N. S.) 329.

6. To contract for waterworks system is within the incidental powers of a city. City of Gadsden v. Mitchell [Ala.] 40 So. 557. A legislative grant of power to the city of Baltimore to lay out additions and alterations to be made to the public wharves and docks held to include power to enlarge the facilities of that part by making entirely new ones. Dyer v. Baltimore, 140 F. 880. Authority to contract a debt carries power to tax for its payment. Rose v. McKie [C. C. A.] 145 F. 584. Power to borrow money does not belong to a municipal corporation as an incident of its creation. White River Sav. Bank v. Superior [C. C. A.] 148 F. 1. Power in a charter provision to require abutting owners to construct sidewalks carries power to require the repair or reconstruction thereof. Walker v. Detroit, 143 Mich. 427, 106 N. W. 1123. Charter power to define privileges of pawnbrokers does not confer power to allow pawnbrokers to charge usury. Lockwood v. Muhlberg, 124 Ga. 660, 53 S. E. 92. Municipality held to have no implied authority to supply water to another municipality. Farwell v. Seattle [Wash.] 86 P. 217. The exclusive control of streets conferred by sec. 77, D. C. Rev. Stat., does not imply power to narrow their width. Walter v. Macfarland, 27 App. D. C. 182.

7. It has been held that no authority exists in a town to conduct an amusement park (Bloomsburg Land Imp. Co. v. Bloomsburg [Pa.] 64 A. 602), but it is within the power of the city and county of Denver to provide by charter for the erection of an auditorium and to purchase a site therefor (City and County of Denver v. Hallett, 34 Colo. 393, 83 P. 1066). City of Greenville, Ala., had no authority to pledge general revenues for payment of furniture to fit up one of its schools. Cleveland School Furniture Co. v. Greenville [Ala.] 41 So. 862. A charter provision conferring power to regulate the erection of lights in the streets does not warrant the establishment of an electric light plant to supply light to the inhabitants. Hyatt v. Williams, 148 Cal. 585, 84 P. 41.

8. While a strict construction should be applied to the grant of powers to municipalities, and especially those which result in public burdens, yet the construction must nevertheless be sensible and based upon the entire context. Lachman v. Walker [Fla.] 42 So. 461. A city has no power to create and appropriate for what is styled a bond improvement fund. City of Chicago v. Brede, 121 Ill. App. 562. Imposition by municipality of requirement, in addition to provisions of general statutes relative to conditions precedent to recording of plats, held unauthorized. Burroughs v. Cherokee [Iowa] 109 N. W. 876. Ordinance prohibiting any city official to serve as a member of a standing committee of any political party declared invalid. City of Richmond v. Lynch [Va.] 56 S. E. 139. Borough, under Pennsylvania Act 1851 (P. L. 320), cannot require railroad company at its own expense to maintain safety gates. In re Pennsylvania R. Co., 213 Pa. 373, 62 A. 986. Power in a board to provide against danger from falling building does

with reference to streets and sidewalks,[10] and subjects within the police power,[11] are hereinafter referred to. In addition to the foregoing, municipalities are almost universally invested with power to supply their inhabitants with water,[12] and with gas [13] and electric lighting,[14] either through the medium of a system owned and maintained by the municipality,[15] or by contract with third parties.[16] It has been held, however, that a city may not engage in a commercial enterprise, thereby entering into competition with private individuals.[17] The powers of a municipal corporation are restricted in operation to the municipal limits,[18] and power once exercised is exhausted and may not be invoked again.[19] But where an abutting owner was permitted to pave street in front of his premises, this was not an original paving so as to preclude city from causing it to be done again at expense of adjoining owner.[20]

Judicial control over exercise of powers.[21]—The acts of municipal officers in the exercise of administrative or legislative discretion [22] are not subject to judicial review;[23] but if the authority which a municipality assumes to exercise is granted in general terms, it seems to be universally conceded that the grant is subject to

not confer power to contract for storage of wreckage. People v. Metz, 100 N. Y. S. 913.

9. See post, § 12.

10. See post, § 10 E.

11. See post, § 10.

12. City of Gadsden v. Mitchell [Ala.] 40 So. 557. A city exercises its business or proprietary power when it purchases waterworks or contracts for their construction or operation. Omaha Water Co. v. Omaha, 147 F. 1. Kirby's Dig. of Arkansas, §§ 5442-5448, grants express authority to cities to contract for water plant. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622.

13. Statutory power to construct and establish gas works is broad enough to include natural gas, though when authority was granted natural gas was unknown as an available product. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

14. Potsdam Electric L. & P. Co. v. Potsdam, 49 Misc. 18, 97 N. Y. S. 190; Baker v. Cartersville [Ga.] 56 S. E. 249.

15. Hyatt v. Williams, 148 Cal. 585, 84 P. 41. Purchase of private water plant by city. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. S. C. Civ. Code 1902, § 2021, providing for the enlargement, extension and establishment of waterworks, includes purchase of waterworks. Dick v. Scarborough, 73 S. C. 150, 53 S. E. 86. Purchase by a city of waterworks system under contract giving city the right so to do. Galena Water Co. v. Galena [Kan.] 87 P. 735. The existence of a contract between a city and a water company does not preclude the city from constructing a water system on its own account in the absence of a contract stipulation to that effect. City of Meridian v. Farmers' L. & T. Co. [C. C. A.] 143 F. 67. To the same effect is the case of Knoxville Water Co. v. Knoxville, 200 U. S. 22, 50 Law. Ed. 353. See 19 Harv. L. R. 380; 4 Mich. L. R. 561.

16. A city may provide for public safety against fires by contracting for water supply (Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25), but a contract for exclusive service of water, gas, and electricity, held void for want of legislative authority (Water, Light & Gas Co. v. Hutchinson, 144 F. 256). An ordinance under which a corporation is to supply water to a city held to constitute a contract. Lackey v. Fayettville Water Co. [Ark.] 96 S. W. 622.

17. Buying and selling coal. Baker v. Grand Rapids, 142 Mich. 687, 12 Det. Leg. N. 879, 106 N. W. 208.

18. Exercise of right of eminent domain beyond corporate limits denied. City of Puyallup v. Lacey [Wash.] 86 P. 215. Municipality held to have no authority to supply water to another municipality (Farwell v. Seattle (Wash.) 86 P. 217), nor to individuals beyond corporate limits (Stauffer v. East Stroudsburg Borough [Pa.] 64 A. 411). While a city may not extend its water system to an adjoining city, it may sell the excess of its product to nonresidents. Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25. City of Jersey City held to have no authority to supply water to borough of East Newark because of noncontiguity, the charter permission applying only to contiguous territory. Rehill v. East Newark [N. J. Law] 63 A. 81. Municipal police officers have no jurisdiction to arrest offenders outside of city limits. State v. Stobie, 194 Mo. 14, 92 S. W. 191. See 6 C. L. 720, n. 89.

19. Contract for paving street by railway company. City of Chicago v. Newberry Library, 224 Ill. 330, 79 N. E. 666.

20. City of Louisville v. Gast, 28 Ky. L. R. 1256, 91 S. W. 251. And a vote of a town meeting rejecting proposition to buy water plant does not exhaust the town's right to vote upon the proposition again. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

21. See 6 C. L. 721.

22. Enders v. Friday [Neb.] 111 N. W. 140. Yet if, after an ordinance becomes an accomplished fact, attempt is made to apply it to injury of a citizen, he may complain. In re Twenty-first Street [Mo.] 96 S. W. 201. Exercise of a legislative power clearly delegated can only be reviewed for collusion or fraud. Vacation of streets. Mottman v. Olympia [Wash.] 88 P. 579.

23. Municipal governments are clothed with a very broad discretion over questions of policy, such as purchasing public utilities, which under all ordinary circumstances will better promote the legal welfare than opinions of courts formed under the serious limitations upon their means of ascertaining

judicial construction,[24] and matters purely ministerial,[25] or wherein there has been an abuse of power,[26] affecting some particular person or case,[27] or in case of collusion or fraud,[28] may be judicially controlled. A municipal corporation may be adjudged guilty of contempt of court.[29]

§ 8. *Legislative functions of municipalities and their exercise. A. Nature and extent of legislative power.*[30]—Inasmuch as a municipal corporation is purely a creature of the state,[31] it has only such legislative power as has been granted to it. The extent to which the people of a municipality shall be allowed to directly participate in the governmental function of legislating therefor in local or municipal affairs is purely a question of state policy, in the determination of which the state is not restricted by any provision of the Federal constitution.[32] In practice the legislative power is confined chiefly to the enactment of police regulations,[33] the functions of the legislative department in the initiation of public contracts and improvements,[34] and in the fiscal management of the municipality,[35] being largely of an administrative character. Since the legislative powers exercised by a municipal corporation are derived from the state, it is a general rule that it cannot delegate them to any person or body;[36] neither may a municipality by contract, ordinance, or by-law cede away, limit, or control its legislative or governmental powers, nor disable itself from performing its public duties.[37] Ministerial powers, however, may be delegated.[38]

(§ 8) *B. Meetings, votes, rules, and procedure.*[39]—A municipal council is a continuous body though its members and officers may change from time to time.[40] It has power by ordinance to establish and adopt suitable rules for its government in matters of procedure,[41] and such rules when adopted will not be set aside unless directly or by necessary implication in conflict with some charter or statutory pro-

and appreciating all the elements involved. Connor v. Marshfield, 128 Wis. 280, 107 N. W. 639.

24. New Orleans & N. W. R. Co. v. Vidalia, 117 La. 561, 42 So. 139.

25. Mandamus lies against a common council where the duty imposed by law is purely ministerial. Mandamus to compel council to appoint an examining board of plumbers. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774.

26. Ordinance for paving. Gardner v. Chicago, 224 Ill. 254, 79 N. E. 624. Employment of city engineer. City of Decatur v. McKean [Ind.] 78 N. E. 982.

27. Collins Hotel Co. v. Collins [Cal. App.] 88 P. 292. The action of a municipal council clearly in the interest of the taxpayers will not be set aside upon a doubtful point of procedure at the suit of a prosecutor who has suffered no special injuries of which he can be heard to complain. Atlantic Gas & Water Co. v. Atlantic City [N. J.] 63 A. 997.

28. Issue of bonds restrained at suit of taxpayer on showing of conspiracy of officers to use proceeds for unlawful purpose. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1085.

29. Marson v. Rochester, 185 N. Y. 602, 78 N. E. 1106, afg. 112 App. Div. 51, 97 N. Y. S. 881.

30. See 6 C. L. 721. See, also, **Abbott, Mun. Corp. §§ 109, 110;** Id. §§ 496-567.

31. Water, Light & Gas Co. v. Hutchinson, 144 F. 256.

32. "Initiative and referendum" provision of Los Angeles charter sustained. In re Pfahler [Cal.] 88 P. 270.

33. See post, § 10.

34. See post, § 12; also Public Contracts, 6 C. L. 1109, and Public Works and Improvements, 6 C. L. 1143.

35. See post, § 13.

36. Determination of material to be used in street paving. City of Baltimore v. Gahan [Md.] 64 A. 716. City council may not delegate to city attorney authority to employ assistants at his discretion. City of Bowling Green v. Gaines, 29 Ky. L. R. 1013, 96 S. W. 852.

37. Contract by city with railroad company for maintenance of viaduct by city set aside. Vandalia R. Co. v. State [Ind.] 76 N. E. 980.

38. The preparation by the board of public service of plans, estimates, specifications, and profiles for a new municipal waterworks system, in accordance with a determining ordinance by council, is not an exercise of legislative power, and authority so to do is conferred upon such board and may be exercised by it, notwithstanding section 127 of the Municipal Code which provides that all power unless otherwise provided is to be exercised by council. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1.

39. See 6 C. L. 722. See, also, **Abbott, Mun. Corp. §§ 496-567.**

40. Proceedings begun before one council may be continued before succeeding councils. Taintor v. Thurston [Mass.] 78 N. E. 545.

41, 42. State v. Dunn [Neb.] 107 N. W. 236.

vision.[42] Meetings of the council must be held at the time [43] and place [44] fixed, due notice being given of special meetings.[45] A quorum must be present.[46]

(§ 8) *C. Records and journals.*[47]—Since a council can only speak by its records, these, when properly read and signed, are the only evidence of its action.[48] Failure of clerk to copy ordinance into record book correctly does not invalidate the ordinance.[49] Amendments showing action actually taken may be made nunc pro tunc.[50]

(§ 8) *D. Titles and ordaining clauses.*[51]—While the constitutional provisions relating to the titles of statutes have no application to ordinances, similar provisions are usually contained in the charter, and are given the same interpretation, viz., that all parts of an ordinance must be germane to the subject-matter,[52] that there must be but one subject [53] which must be expressed with reasonable certainty in the title.[54] It has been held, however, that a title is not essential to the validity of an ordinance.[55]

(§ 8) *E. Passage, adoption, amendment, and repeal of ordinances and resolutions.*[56]—Ordinances must be uniform [57] and definite.[58] Statutory or charter directions as to the procedure to be observed in the enactment of ordinances and resolutions must be followed.[59] It is not fatal to an ordinance that it was taken up and

43, 44. Shugars v. Hamilton, 29 Ky. L. R. 127, 92 S. W. 564.

45. In the absence of a showing to the contrary, a presumption exists that a special meeting was regularly called and held. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357.

46. State v. Briede, 117 La. 183, 41 So. 487. The mayor though entitled to vote in case of a tie is not to be counted in making up a quorum. McLean v. East St. Louis, 222 Ill. 510, 78 N. E. 815. Otherwise of a member of the council chosen mayor pro tem. Shugars v. Hamilton, 29 Ky. L. R. 127, 92 S. W. 564. Three members of the board of police commissioners of Newark city held to constitute a quorum of the board. McManus v. Police Com'rs of Newark [N. J. Law] 62 A. 997.

47. See 6 C. L. 723. See, also, **Abbott, Mun. Corp. §§ 496-567.**

48. Town of Mt. Pleasant v. Eversole, 29 Ky. L. R. 830, 96 S. W. 478. Authentication by acting mayor and acting recorder held sufficient. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622.

49. Kenaston v. Riker [Mich.] 13 Det. Leg. N. 709, 109 N. W. 278.

50. Fleener v. Johnson [Ind. App.] 77 N. E. 366.

51. See 6 C. L. 723.

52. City of Paducah v. Ragsdale, 28 Ky. L. R. 1057, 92 S. W. 13.

53. An ordinance providing that all offenses made misdemeanors under the state laws shall be violations of the municipal laws contains only one subject. Winfield v. Jackson [Miss.] 42 So. 183. An ordinance providing for an issue of seventy-five bonds of $1,000 each to meet the city's part of thirty-two sewer and street improvements, which are not more particularly named, is not violative of the requirement of section 1694, Revised Statutes, because containing more than one subject not clearly expressed in the title; on the contrary, such an ordinance contains but one subject, and that is the subject embraced in section 1536-213. Heffner v. Toledo, 9 Ohio C. C. (N. S.) 1.

54. Title of saloon ordinance held sufficient. State v. Calloway, 11 Idaho, 719, 84 P. 27.

55. Scanlon v. Denver [Colo.] 88 P. 156.

56. See 6 C. L. 723.

57. Ordinance prohibiting owners of waterworks systems from permitting pipes to remain in leaky condition for more than two days at a time sustained. Crumpler v. Vicksburg [Miss.] 42 So. 673.

58. An ordinance for a street pavement must give such description of the improvement that an intelligent and correct estimate of its cost can be made, and in order to do this the ordinance must either upon its face or by reference to some other ordinance, plat for specifications, indicate the grade of the street. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675. Ordinance for pavement sustained. Uhlich's Estate v. Chicago, 224 Ill. 402, 79 N. E. 598. Ordinance providing for the construction of sidewalks held sufficiently definite with respect to grade. Gage v. Chicago, 223 Ill. 602, 79 N. E. 294. An insufficient description of boundaries in an ordinance extending fire limits cannot be aided by extrinsic evidence that a street commonly bears a name other than that given in a plat. Lamm v. Danville, 221 Ill. 119, 77 N. E. 422. Ordinance requiring railroad to light street grade crossings with such lights as the city maintains on streets held uncertain as to character of light to be furnished. Chicago I. & L. R. Co. v. Salem [Ind.] 76 N. E. 631.

59. Under Atlantic City charter, ten days' notice only is required of the introduction of an ordinance. Bye v. Atlantic City [N. J. Law] 64 A. 1056. But in Kentucky previous notice is not necessary. City of Paducah v. Ragsdale, 28 Ky. L. R. 1057, 92 S. W. 13. Resolution delivered to mayor's clerk on July 3 but not brought to attention of the mayor until July 6 held to have been "presented" on the 6th and therefore returned within prescribed time. Farwell v. Boston [Mass.] 78 N. E. 303. Requirement that ordinance granting a franchise shall not be passed on day of its introduction held not to apply to ordinance imposing an occupation tax. Shugars v. Hamilton, 29 Ky. L. R. 127, 92 S. W.

considered before being printed as required by charter.[60] An ordinance when put on its final passage should be the same in substance as that introduced at a previous meeting.[61] A majority vote of those present at a council meeting is usually made sufficient,[62] the yeas and nays being taken when required.[63] Where more ballots are cast than there are persons voting in a city council, the fact that one is a blank ballot does not repel the inference of fraud or mistake.[64] The veto power of a mayor should not be anticipated by mandamus proceedings,[65] but a veto containing no statement of objections is of no effect.[66] An ordinance cannot be amended, repealed, or suspended by resolution,[67] but may be corrected by the adoption of a subsequent ordinance.[68] An ordinance may be given immediate effect.[69] Resolutions may be rescinded.[70] In South Dakota a city council has no power to submit resolution for lighting contract to vote of people, since the power resides in the city auditor.[71]

Publication.[72]—In the absence of charter provision, an authorized ordinance is effective from its enactment, neither publication nor promulgation being necessary to its validity.[73] Where a statute of the state provided for publication by two insertions in two newspapers and the city charter provided for publishing an ordinance for two weeks, compliance with the statute was sufficient.[74]

(§ 8) *F. Construction and operation of ordinances.*[75]—An ordinance may be valid though it does not include the entire corporate limits of a city,[76] and though void in part may be valid as to the remainder.[77] If to enforce the valid provisions of an ordinance, invalid in part, will not carry out the general scheme of the ordinance, the whole ordinance will be declared inoperative.[78] An ordinance is presumptively valid,[79] but the mere fact that an ordinance is reasonable does not determine its validity.[80] The motives of a municipal legislative body are not the sub-

564. Indorsement of recommendation by board of public works held not essential to ordinance for improvement of boulevard. Jaicks v. Merrill [Mo.] 98 S. W. 753.

60. Hallock v. Lebanon [Pa.] 64 A. 362.

61. South Jersey Tel. Co. v. Woodbury [N. J. Law] 63 A. 4.

62. Majority held to mean majority of whole council irrespective of vacancies caused by death. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141. Contra, Board of Com'rs of Salem v. Wachovia L. & T. Co. [N. C.] 55 S. E. 442. In Michigan, ordinance requiring saloonists to pay license does not provide for a tax the imposition of which requires a two-thirds vote. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423; Kenaston v. Riker [Mich.] 13 Det. Leg. N. 709, 109 N. W. 278. A proviso that city council may by a two-thirds vote put an ordinance upon its final passage at the same meeting at which it was introduced, or materially amended, is not complied with by the mere passage of such ordinance by a two-thirds vote. South Jersey Tel. Co. v. Woodbury [N. J. Law] 63 A. 4.

63. Hurd's Rev. St. 1905, of Illinois, c. 24, § 41, requires that the yeas and nays be taken on the passage of all ordinances. McLean v. East St. Louis, 222 Ill. 510, 78 N. E. 815.

64. Appointment of city surveyor. State v. Starr, 78 Conn. 636, 63 A. 512.

65. Smith v. Buffalo, 99 N. Y. S. 986.

66. Mayor of Lowell v. Dadman, 191 Mass. 370, 77 N. E. 717.

67. Hearst's Chicago American v. Spiss, 117 Ill. App. 436. Resolution of council suspending ordinance regulating speed of automobiles in order to permit speed contest held invalid. Johnson v. New York [N. Y.] 78 N. E. 715.

68. Ordinance directing issuance of tax bills. City of Fayette v. Rich [Mo. App.] 99 S. W. 8.

69. City of Paducah v. Ragsdale, 28 Ky. L. R. 1057, 92 S. W. 13.

70. Resolution held not to create contract relations so as to prevent its being rescinded at a subsequent meeting. Harrison v. New Brighton, 110 App. Div. 267, 97 N. Y. S. 246.

71. Rev. Pol. Code, §§ 1214-1228. Sioux Falls Elec. L. & P. Co. v. Sioux Falls [S. D.] 108 N. W. 488.

72. See 6 C. L. 723.

73. Greer v. Jackson [Ga.] 56 S. E. 73.

74. Croker v. Excise Com'rs of Camden [N. J. Law] 63 A. 901.

75. See 6 C. L. 724.

76. Ex parte Glass [Tex. Cr. App.] 14 Tex. Ct. Rep. 877, 90 S. W. 1108.

77. City of Gadsden v. Mitchell [Ala.] 40 So. 557; Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. Where a portion of an ordinance is valid, the addition of matter invalid because punishable only by state laws will not prevent the conviction of one violating the valid portion. Fichtenberg v. Atlanta, 126 Ga. 62, 54 S. E. 933. See 6 C. L. 726, n. 89.

78. Town of Blackshear v. Strickland, 126 Ga. 492, 54 S. E. 966.

79. Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654.

80. City of Chicago v. Reinschreiber, 121 Ill. App. 114.

ject of judicial inquiry,[81] the rule, however, being sometimes relaxed, particularly if fraud can be established.[82] An ordinance which contains terms that can only be made effective by infringing on private rights will be set aside.[83]

(§ 8) *G. Pleading and proving ordinances and proceedings.*[84]—A printed compilation of ordinances purporting by its title page to have been issued by authority of the council is admissible.[85] State courts cannot take judicial notice of municipal ordinances and regulations; these must be proved as other facts.[86] In actions for injuries growing out of a violation of ordinance provisions, such ordinance and its violation are admissible not as substantive and sufficient proof of a defendant's negligence but as evidence of municipal expression of opinion in regard to an apparent or positive danger.[87]

(§ 8) *H. The remedy against invalid legislation.*[88]—While the courts are without power to review the exercise of legislative discretion,[89] invalidity resulting from violation of constitutional or charter limitations,[90] or when there is question of fraud,[91] will warrant judicial interposition. Only total want of power in the legislative body will be ground for quo warranto [92] or prohibition,[93] while certiorari will lie for total invalidity,[94] and only in case of irreparable injury, or to avoid multiplicity of proceedings,[95] is injunction available.[96] A taxpayer may maintain suit to restrain a municipal corporation from transcending its legislative powers,[97] and an alderman may in his individual capacity join with other taxpayers for this purpose.[98] So a private water company may join with other taxpayers to restrain the construction of a waterworks system, even though its real purpose be the advantage that may accrue to itself.[99] The officers of a municipal corporation are proper parties defendant and the municipality a necessary party, in a suit to restrain the perpetration of ultra vires acts.[1]

§ 9. *Administrative functions, their scope and exercise.*[2]—In their adminis-

81. Wiesenthal v. Atlantic City [N. J. Law] 63 A. 759; City of Burlinghame v. Thompson [Kan.] 86 P. 449; People v. Gardner, 143 Mich. 104, 12 Det. Leg. N. 936, 106 N. W. 541.

82. In re Twenty-first St. [Mo.] 96 S. W. 201.

83. Ocean City Land Co. v. Ocean City [N. J. Law] 63 A. 1112.

84. See 6 C. L. 724.

85. Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333; Hinchliff v. Robinson, 118 Ill. App. 450. See 6 C. L. 724, n. 59.

86. Town of Canton v. Madden, 120 Mo. App. 404, 96 S. W. 699; Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. See 6 C. L. 724, n. 55.

87. Shaffer v. Roesch [Pa.] 64 A. 511.

88. See 6 C. L. 724. See, also, **Abbott, Mun. Corp. § 560.**

89. See ante, § 7. Judicial Control Over Exercise of Powers.

90. Anderson v. Fuller [Fla.] 41 So. 684; Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25.

91. In re Twenty-first Street [Mo.] 96 S. W. 201; Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622.

92. See 6 C. L. 725, n. 65.

93. See 6 C. L. 725, n. 66.

94. Rehill v. East Newark [N. J. Law] 63 A. 81. New Jersey P. L. 1899, § 71, providing that no certiorari shall be allowed to set aside any ordinance for any improvement after the contract therefor shall have been awarded, does not apply to an ordinance to build a fire house. Lockwood v. East Orange [N. J. Law] 64 A. 144. A municipal ordinance which is not entirely void cannot be questioned on certiorari by a person not shown to be affected by any of its provisions. Morwitz v. Atlantic City [N. J. Law] 62 A. 996. See 6 C. L. 725, nn. 69, 70.

95. For the purpose of preventing a multiplicity of suits, an injunction lies to restrain the enforcement of an ordinance not previously declared invalid. Kappes v. Chicago, 119 Ill. App. 436.

96. Smith v. Burlington [Wis.] 109 N. W. 79; Potsdam Elec. L. & P. Co. v. Potsdam, 49 Misc. 18, 97 N. Y. S. 190. The right of a taxpayer to bring an action to enjoin a threatened abuse of corporate power was not created by the municipal code, nor is it restricted to property owners in cities, but, when occasion arises, is equally available to one owning property in a village. Smith v. Rockford, 4 Ohio N. P. (N. S.) 513. Bond issue enjoined for fraud. Bates v. Hastings [Mich.] 13 Det. Leg. N. 626, 108 N. W. 1005.

97. Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25; Potsdam Elec. L. & P. Co. v. Potsdam, 49 Misc. 18, 97 N. Y. S. 190. But only on showing that he has exhausted all means to bring about action by the city. Merrimon v. Southern Pav. & Const. Co., 142 N. C. 539, 55 S. E. 366.

98. Gillespie v. Gibbs [Ala.] 41 So. 868.

99. Owensboro Waterworks Co. v. Owensboro, 29 Ky. L. R. 1118, 96 S. W. 867. Cf. 6 C. L. 721, n. 1.

1. Gillespie v. Gibbs [Ala.] 41 So. 868.

2. See 6 C. L. 725. See, also, **Abbott, Mun. Corp. §§ 568-581.**

trative functions municipal officers, so long as they act within the charter and in good faith, exercise a discretion [3] which is not subject to judicial control,[4] nor do their acts in the administration of public duties give rise to liability in tort on the part of the municipality.[5] A municipal council may determine to pave a highway with a patented material when the price at which any one may obtain the material is definitely fixed and obtainable by all at such price before the bids are asked for.[6] In designating an official newspaper a city council must act in the manner and upon the evidence required by the city's charter.[7] The obligation assumed by an owner who connects his premises with the city system for the purpose of acquiring light or water is to maintain and pay for the same in accordance with the prescribed rules and regulations of the city upon the theory of implied contract.[8] A city may order the laying of a sidewalk by an abutting owner and in default lay the walk and collect the cost thereof.[9]

§ 10. *Police power and public regulations.*[10]—This section deals only with matters peculiar to municipal police power, general rules as to the extent and exercise of police power being treated in topics descriptive of the subjects thereof.[11]

(§ 10) *A. In general.*[12]—Power to make needful police regulations is a proper legislative delegation, but authority to regulate does not give power to suppress.[13] A municipality cannot by affirmative action, or by inaction, permanently divest itself of the authority and right to exercise its police power.[14] In the enactment of ordinances under this power, municipalities are accorded a large discretion, and such ordinances will not be declared void unless unjustly discriminative, oppressive, or unreasonable.[15, 16]. And the restriction as to reasonableness has no applica-

3. A board of public service, where required by a street improvement ordinance to choose one of three materials after bids were received, performs only a ministerial act, and, as the agent of the city council, executes its legislative command. Scott v. Hamilton, 7 Ohio C. C. (N. S.) 493.

4. See ante, § 7. Surveillance of liquor store. McGorie v. McAdoo, 113 App. Div. 271, 99 N. Y. S. 1107. And see 6 C. L. 725, n. 74. The discretion of the board of public service is not to be interfered with in the matter of awarding the contract to another than the lowest bidder except for fraud or its legal equivalent. Scott v. Hamilton, 4 Ohio N. P. (N. S.) 1.

5. See post, § 14. See, also, 6 C. L. 725, n. 75.

6. Bye v. Atlantic City [N. J. Law] 64 A. 1056. Cf. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280, and see 5 Mich. Law Rev. 485.

7. People v. Common Council of Troy, 114 App. Div. 354, 99 N. Y. S. 1045.

8. He may be compelled to pay for water and light furnished to his tenant. City of East Grand Forks v. Luck, 97 Minn. 373, 107 N. W. 393.

9. Angle v. Stroudsburg Boro., 29 Pa. Super. Ct. 601.

10. See 6 C. L. 726. See, also, **Abbott, Mun. Corp. §§ 115-139.**

11. See Buildings and Building Restrictions, 7 C. L. 507; Exhibitions and Shows, 7 C. L. 1636; Health, 8 C. L. 36; Intoxicating Liquors, 8 C. L. 486; Licenses, 8 C. L. 734, and like topics.

12. See 6 C. L. 726.

13. Billiard and pool room. State v. McMonies [Neb.] 106 N. W. 454; In re McMonies [Neb.] 106 N. W. 456.

14. State v. Northern Pac. R. Co. [Minn.] 108 N. W. 269; State v. St. Paul, M. & M. R. Co. [Minn.] 108 N. W. 261.

15, 16. Reasonable regulation: Ordinance prohibiting infants or females from remaining in saloons over five minutes. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32. Prohibiting any person other than proprietor and his family from entering saloon during closed hours. State v. Calloway, 11 Idaho, 719, 84 P. 27. Forbidding the operation of a merry-go-round within one thousand feet of any public park in the city. Scranton City v. Straff, 28 Pa. Super. Ct. 258. Limiting speed of automobile to six miles per hour between crossings, and four miles at crossings. Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325. Regulating trading on streets. State v. Barbelais, 101 Me. 512, 64 A. 881. Ordinance making it unlawful to leave horse unhitched in street. Rowe v. Reneer [Ky.] 99 S. W. 250. An ordinance providing for the separation of races upon street cars, sustained, the design of such ordinance being to safeguard the peace and good order of society within the city. Patterson v. Taylor [Fla.] 40 So. 493. The exception of nurses in charge of children and invalids from operation of such an ordinance does not render it invalid. Crooms v. Schad [Fla.] 40 So. 497. Prohibiting excavation in highway without permit. Edgewood Boro. v. Scott, 29 Pa. Super. Ct. 156.

Oppressive regulation: Ordinance prohibiting the burial of bodies within the limits of an entire county. Hume v. Laurel Hill Cemetery, 142 F. 552. Prohibiting the keeping of dogs, whose barking disturbs persons in ill health. Heylman v. District of Columbia, 27 App. D. C. 563. Ordinance relative to trading stamps held unreasonable. City & County

tion to an ordinance passed pursuant to a specific power.[17] The reasonableness of an ordinance is a question of law for the court,[18] and, in determining this question, the legislative expressions of public policy upon the subject sought to be regulated may be considered in connection with the ordinance.[19]

(§ 10) *B. For public protection.*[20]—If power to legislate upon the subject has been granted, a municipality may regulate or prohibit gaming, and the keeping of gaming places or implements,[21] sale of intoxicants,[22] the conduct of billiard and pool rooms,[23] use of fire arms,[24] regulate the height of buildings,[25] provide against their becoming a menace to life,[26] and forbid structures or practices causing danger of fire [27] or explosion,[28] provided the regulation goes no further than is required by the reasonable necessities of the occasion.[29]

(§ 10) *C. Health and sanitation.*[30]—Anything which from its nature or surrounding is, or is liable to become, a menace to the public health is a proper subject of police regulation. Thus quarantine regulations may be imposed,[31] the location of

of Denver v. Frueauff [Colo.] 88 P. 389. An ordinance requiring saloonkeepers to pay a license fee of $500 held oppressive as to saloonkeepers not engagsd in selling intoxicating liquors (Kenaston v. Riker [Mich.] 13 Det. Leg. N. 709, 109 N. W. 278), and an ordinance prohibiting the possession of carcasses to be manufactured into fertilizer, but not otherwise, held invalid for unjust discrimination (Town of Fulton v. Norteman [W. Va.] 65 S. E. 668). An ordinance requiring that sign and billboards shall be constructed not less than ten feet from street line is a regulation not reasonably necessary for the public safety. City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N. J. Law, 285, 62 A. 267.

17. Ligonier Valley R. Co. v. Latrobe Borough [Pa.] 65 A. 548.

18. Flynn v. Springfield, 120 Ill. App. 266; Hume v. Laurel Hill Cemetery, 142 F. 552. The legislative body of a city being the sole judge of the necessities of a regulation, the same being reasonable on its face, will be so presumed by the courts. In re Newell, 2 Cal. App. 767, 84 P. 226.

19. City of Chicago v. Slack, 121 Ill. App. 131.

20. See 6 C. L. 726.

21. City of Lake Charles v. Roy, 115 La. 939, 40 So. 362; Flynn v. Springfield, 120 Ill. App. 266; White v. Commonwealth, 28 Ky. L. R. 1312, 92 S. W. 285. An ordinance fixing a penalty for being an inmate of a gambling house is valid as an exercise of police power. Lane v. Springfield, 120 Ill. App. 5. See 6 C. L. 726, n. 93.

22. City of Liberty v. Moran [Mo. App.] 97 S. W. 948. Entering saloon during closed hours. State v. Calloway, 11 Idaho, 719, 84 P. 27. Allowing females and infants in saloons. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32. Requirement that applicant for license procure written assent of majority of property owners in immediate vicinity sustained. City of Baton Rouge v. Butler [La.] 42 So. 650. Ordinance relative to sale of liquors held to apply to restaurant keepers. Scanlon v. Denver [Colo.] 88 P. 156. A physician is within the terms of an ordinance prohibiting the sale of intoxicating liquors by a pharmacist not having a permit to do so. Braisted v. People [Colo.] 88 P. 150. Ordinance held to be a police regulation and not a revenue measure. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423. See 6 C. L. 726, n. 94.

23. In re McMonies [Neb.] 106 N. W. 466; City of Burlingame v. Thompson [Kan.] 86 P. 449.

24. Police regulation prohibiting discharge of firearms. District of Columbia v. Lewis, 26 App. D. C. 133.

25. Williams v. Boston, 190 Mass. 541, 77 N. E. 509; Welch v. Swasey [Mass.] 79 N. E. 745.

26. Greater New York charter, conferring upon the department of buildings power to render a building temporarily safe, does not authorize contract for storage of materials taken from collapsed building. People v. Metz, 100 N. Y. S. 913. And a contractor employed by the commissioner of buildings to remove an unsafe building, acting under a precept, cannot recover until the precept has been returned by the commissioner and an adjustment made. Parker Co. v. New York, 97 N. Y. S. 200.

27. Ordinance forbidding repair of wooden building damaged to the extent of twenty-five per cent. of its value sustained. Ironside v. Vinita [Ind. T.] 98 S. W. 167. Ordinance prohibiting construction of house nearer than seventy feet to another building, though wholly outside fire limits, exceeded charter powers. Town of Blackshear v. Strickland, 126 Ga. 492, 54 S. E. 966. A municipality having authority to fix fire limits and direct manner of constructing buildings may, by ordinance, declare building not so constructed a nuisance and authorize its abatement. Micks v. Mason [Mich.] 13 Det. Leg. N. 472, 108 N. W. 707. It may make it unlawful to erect or maintain tents or movable structures in fire limits. In re Newell, 2 Cal. App. 767, 84 P. 226. See 6 C. L. 727, n. 96.

28. See 6 C. L. 727, n. 96.

29. While a city may destroy buildings maintained within fire limits in violation of an ordinance, it is liable for needless damage. Wheeler v. Aberdeen [Wash.] 87 P. 1061. See 6 C. L. 727, n. 97.

30. See 6 C. L. 727.

31. Liability of borough for food supplied to inmates of quarantined house considered. Borger v. Alliance Boro., 28 Pa. Super. Ct. 407.

morgues determined,[32] and burial permits issued.[33] The keeping of hogs may be prohibited,[34] the operation of slaughter houses supervised,[35] and the disposition of garbage provided for.[36] The emission of dense smoke may be prohibited.[37]

(§ 10) *D. Regulation and inspection of business.*[38]—Regulations restrictive of the conduct of business are justified only by considerations of public comfort, health, or safety.[39] A power usually conferred on municipalities is that of licensing occupations for the purpose of regulation;[40] but license fees must be reasonable,[41] and not unjustly discriminating.[42] Various cases dealing with the subject of licenses are given in the notes.[43]

(§ 10) *E. Control of streets and public places.*[44]—Paramount authority over municipal streets resides in the state, which may delegate such powers as it sees fit.[45] Under a delegated power to regulate the use of streets, a municipality may regulate the operation of automobiles therein,[46] regulate railroad street crossings,[47] and limit

32. Koebler v. Pennewell [Ohio] 79 N. E. 471.

33. Meyers v. Duddenhauser, 29 Ky. L. R. 393, 93 S. W. 43.

34. But ordinance providing that hogs may not be kept in the city, irrespective of whether such keeping constitutes a nuisance, is invalid. Comfort v. Kosciusko [Miss.] 41 So. 268. Ordinance forbidding keeping hogs within one mile of court house sustained. Ex parte Glass [Tex. Cr. App.] 14 Tex. Ct. Rep. 877, 90 S. W. 1108.

35. City of Portland v. Cook [Or.] 87 P. 772.

36. Contract for removal of garbage sustained as properly authorized. Detroit Reduction Co. v. Blades, 143 Mich. 591, 13 Det. Leg. N. 73, 107 N. W. 286. An ordinance which limits the use of the public streets for the collection of garbage to a duly authorized contractor is valid as an exercise of police power, if passed in good faith to safeguard the public health. Atlantic City v. Abbott [N. J. Law] 62 A. 999.

37. Palmer v. District of Columbia, 26 App. D. C. 31. See, also, 4 C. L. 739, n. 55.

38. See 6 C. L. 727.

39. Ringing of locomotive bells within city limits. Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333. Requiring street railway to furnish sufficient cars to prevent overcrowding. City of Chicago v. Chicago City R. Co., 222 Ill. 560, 78 N. E. 890. Penny arcade prohibited from doing business on Sunday. Fichtnberg v. Atlanta, 126 Ga. 62, 54 S. E. 933.

40. A municipal corporation has no inherent power to grant licenses or to exact license fees. Wells v. Torrey, 144 Mich. 689, 13 Det. Leg. N. 378, 108 N. W. 423. In regulating public markets city cannot prevent lessee of stall from employing telephonic service. Swayze v. Monroe, 116 La. 643, 40 So. 926.

41. Grocer selling liquors in quantities less than one gallon may be required to take out license notwithstanding no bar is kept. City of Chicago v. Slack, 121 Ill. App. 131. Mandamus lies to compel common council to revoke liquor license in a case where, upon complaint, the facts requiring the revocation are established beyond dispute. State v. Curtis [Wis.] 110 N. W. 189. License of saloonist may be revoked upon hearing and determination by village council of violation of ordinance. Langan v. Wood River [Neb.] 109 N. W. 748. Subjection of express company to license fee sustained. City of Topeka v. Jones [Kan.] 86 P. 162.

42. An ordinance which imposes a license fee of $300 on temporary stores and transient dealers is invalid, because prohibitive as to some classes, unreasonable as to others, and in restraint of trade. Uhrlaub v. Cincinnati, 4 Ohio N. P. (N. S.) 505. Ordinance relative to bill posting held class legislation. City of Watertown v. Rodenbaugh, 112 App. Div. 723, 98 N. Y. S. 885. Ordinance prohibiting delivery of intoxicants by common carriers without obtaining license of $1,000 held invalid. Southern Express Co. v. Rose Co., 124 Ga. 581, 53 S. E. 185.

43. Public vehicles: Ordinance forbidding any person to hire, or offer for hire, rolling chairs on the Board Walk in Atlantic City held valid. Harris v. Atlantic City [N. J. Law] 62 A. 995. Prohibiting hacks and other public vehicles from being kept on streets at places other than public stands. Barnes v. District of Columbia, 27 App. D. C. 101.

Trading stamps: Ordinance held unreasonable. City and County of Denver v. Frueaut [Colo.] 88 P. 389.

Pawn brokers: Power to regulate pawn broking does not authorize permission to charge usurious rates. Lockwood v. Muhlberg, 124 Ga. 660, 53 S. E. 92.

Junk shops: City of Chicago v. Reinschreiber, 121 Ill. App. 114.

Hawkers and peddlers: City of New Orleans v. Fargot, 116 La. 369, 40 So. 735; City of Buffalo v. Linsman, 113 App. Div. 584, 98 N. Y. S. 737; City of Shreveport v. Dantes [La.] 42 So. 716.

44. See 6 C. L. 729.

45. Under the New York constitution (art. 3, § 18), the legislature may not grant a franchise to lay railroad tracks in the streets of a municipality without first obtaining the consent of the local authorities. Wilcox v. McClellan, 186 N. Y. 9, 77 N. E. 986, afg. Id., 110 App. Div. 378, 97 N. Y. S. 311. The control of the streets of the city of Washington for the purpose of protecting them from unlawful encroachment is vested in the commissioners of the district. Bill to enjoin maintenance of show window projecting over building line of street. Guerin v. Macfarland, 27 App. D. C. 478.

46. Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325; Brazier v. Philadelphia [Pa.] 64 A. 508; City of Bellingham v. Cissna [Wash.] 87 P. 481; Gassenheimer v. District of Columbia, 26 App. D. C. 557. See 6 C. L. 729, n. 30.

47. Borough, under Pennsylvania Act 1851 (P. L. 320), cannot require railroad company at its own expense to maintain safety

the speed of railway trains,[46] require precaution in the operation of street cars,[49] limit the speed of teams,[50] require overhead electric wires to be guarded,[51] and prevent the running at large of horned cattle.[52] No use of streets or public places inconsistent with the public easement therein can be authorized.[53] Though a council has power to enact regulations for the moving of buildings through the public streets, that power should not be set in motion in each individual case by resolution,[54] and, where an ordinance prohibits the suspension of a sign across a street, a permit so to do furnishes no justification.[55] A power to regulate the movement of teams in the streets does not authorize exclusion of teams from certain streets.[56] A municipality has the right, and it is its duty, in the exercise of its police power, to supervise and control the introduction and maintenance upon and under the surface of the streets, of the various appliances which subserve the several urban uses to which the highways of a municipality may lawfully be subjected.[57] Among such uses may be enumerated the placing of telegraph and telephone lines,[58, 59, 60] water, gas, and heating mains,[61] lighting wires,[62] and the operation of street [63] and steam

gates. In re Pennsylvania R. Co., 213 Pa. 373, 62 A. 986. The power given to cities by the Illinois City and Village Act, to authorize the crossing of a railroad track over a s eet by a street railroad, is not affected by the act creating the state railroad and warehouse commission. East St. Louis R. Co. v. Louisville & N. R. Co. [C. C. A.] 149 F. 159. See 6 C. L. 729, n. 31.

48. State v. Atlantic & N. C. R. Co., 141 N. C. 736, 53 S. E. 290; Houston & T. C. R. Co. v. Dillard [Tex. Civ. App.] 94 S. W. 426; Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. City can only regulate; it cannot defeat the right of eminent domain by refusing consent. Memphis & S. L. R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019.

49. Ashley v. Kanawha Valley Traction Co. [W. Va.] 55 S. E. 1016. Ordinances forbidding street cars to cross railroad track until conductor goes ahead and signals is valid. Indianapolis Traction & Terminal Co. v. Romans [Ind. App.] 79 N. E. 1068.

50. Ordinance limiting driving of teams to six miles an hour admissible in action for injury to a child. Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827.

51. See 6 C. L. 729, n. 32.

52. City of Paducah v. Ragsdale, 28 Ky. L. R. 1057, 92 S. W. 13; Thomason v. Brownwood [Tex. Civ. App.] 17 Tex. Ct. Rep. 418, 98 S. W. 938. See 6 C. L. 729, n. 35.

53. See post, § 11. Commercial trading in the public streets may be prohibited. State v. Barbelais, 101 Me. 512, 64 A. 881. Granting use of street for "carnival" purposes is not an inconsistent use (State v. Stoner [Ind. App.] 79 N. E. 399), nor is the construction of a "watch-box" by a railway company leaving ample room for pedestrians (Pickup v. Philadelphia & R. R. Co., 29 Pa. Super. Ct. 631). See, also, post, § 11.

54. Hinman v. Clark, 51 Misc. 252, 100 N. Y. S. 1068.

55. Hearst's Chicago American v. Spiss, 117 Ill. App. 436.

56. Peace v. McAdoo, 110 App. Div. 13, 96 N. Y. S. 1039.

57. Quo warranto is a proper remedy to declare a forfeiture of the franchise of a corporation, and of its right to exercise such franchise in the streets of a city under an ordinance. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

58, 59, 60. Keystone State Tel. & T. Co. v. Ridley Park Boro., 28 Pa. Super. Ct. 635; People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245; Village of Carthage v. Central New York Tel. & T. Co., 185 N. Y. 448, 78 N. E. 165; Western Union Tel. Co. v. Visalia [Cal.] 87 P. 1023; City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S. W. 314. But a company cannot be compelled to place its wires underground in the same streets in which a like company enjoys open air construction. Village of Carthage v. Central New York Tel. & T. Co., 48 Misc. 423, 96 N. Y. S. 917. Where a telephone company has a right to use any of the streets of a city for its lines, mandamus will not be to compel city to designate the streets to be so used, but only to designate where poles shall be placed. State v. Red Lodge, 33 Mont. 345, 83 P. 642.

61. Anderson v. Fuller [Fla.] 41 So. 684; Scranton Gas & Water Co. v. Scranton [Pa.] 64 A. 84. Water pipes may not be laid in street for private use only. Van Duyne v. Knox Hat Mfg. Co. [N. J. Eq.] 64 A. 149. A water pipe under the road bed of a public street cannot be said to be an appendage to or part of the lands abutting on the street in such sense that a police regulation may require the abutting owner to lay the pipe. Doughten v. Camden, 72 N. J. Law, 451, 63 A. 170.

62. United Electric Co. v. Bayonne [N. J. Law] 63 A. 996. Permission to erect poles in streets carries no exclusive right to maintain the same in the original positions. Merced Falls Gas & Elec. Co. v. Turner, 2 Cal. App. 720, 84 P. 239. The right by a public lighting company to maintain its wires on municipal poles cannot be acquired by estoppel, where the company claiming such right has been charged from the beginning with full knowledge that whatever rights it might acquire to the use of such poles must be through strict legal contract with the municipality. City of Columbus v. Columbus Public Service Co., 4 Ohio N. P. (N. S.) 329.

63. Dulaney v. United Rys. & Elec. Co. [Md.] 65 A. 45; Kuhn v. Knight, 101 N. Y. S. 1. Permission to construct subways held to have elapsed. People v. Ellison, 101 N. Y. S. 55. The question of the reasonableness of restrictions in an ordinance granting a location of street railway tracks is one of fact, with the burden on him who asserts

railways.[64] The power to regulate carries with it the power to impose a money charge or other obligation as a condition to the enjoyment of the right.[65] While a municipality may, by ordinance, grant to individuals and corporations the privilege of occupying the streets and public ways for the uses specified,[66] such rights are at all times held in subordination to the superior rights of the public.[67] A city may not, however, take away vested rights without notice and an opportunity to be heard.[68] Quo warranto is a proper remedy to declare a forfeiture of privileges exercised in the streets of a city.[69]

(§ 10) *F. Definition of offenses and regulation of criminal procedure.*[70]—Incident to the power to make police regulations is the power to punish their breach,[71] and, in the exercise of such power, acts made penal by the state law may be punished,[72] but such ordinances are justifiable only by express legislative authority.[73] In defining offenses,[74] or prescribing procedure,[75] a municipality cannot

the unreasonableness. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84. Paving a portion of the street, as between the tracks, may be imposed as a condition to the use of the street. Inhabitants of Trenton v. Trenton St. R. Co., 72 N. J. Law, 317, 63 A. 1; Uhlich's Estate v. Chicago, 224 Ill. 402, 79 N. E. 598. Mandamus is the proper remedy for enforcing performance by a traction company of its duty to pave a street pursuant to the terms of the ordinance granting to its predecessor the right to locate tracks in such street. Borough of Rutherford v. Hudson River Traction Co. [N. J. Law] 63 A. 84. Where a contractor for street improvements sues a street railway and a city, on certificates of a city engineer that such railway owed certain amounts for paving, and no ordinance is shown authorizing the transfer of such certificates to the contractor, his alternative demand against the city will be dismissed as in case of nonsuit. Louisiana Imp. Co. v. Baton Rouge Elec. & Gas Co., 114 La. 534, 38 So. 444.

64. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798. Ordinance granting use of streets and alleys to railway company held not to vacate such streets or alleys so as to allow land to revert to abutting owners. Tonkawa Milling Co. v. Tonkawa, 15 Okl. 672, 83 P. 915. A municipal council is without power, under existing laws, to authorize a railroad company to occupy a street or public landing with an overhead structure, resting upon fixed permanent supports of the character shown in this case and necessarily involving the exclusive use of the grounds so occupied, and an ordinance granting the right to erect such a structure is void. Louisville & Nashville R. Co. v. Cincinnati, 4 Ohio N. P. (N. S.) 497.

65. City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S. W. 314. The smallness of a money charge is ineffectual to invalidate an ordinance in the absence of a showing of bad faith. Dulaney v. United Rys. & Elec. Co. [Md.] 66 A. 45. For failure to perform the condition precedent, the city may treat poles and wires in the streets as a nuisance and cause them to be removed. Keystone State T. & T. Co. v. Ridley Park Boro., 28 Pa. Super. Ct. 635. Upon condition broken, a company is without further right and its occupancy constitutes a nuisance which may be enjoined. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798.

66. Anderson v. Fuller [Fla.] 41 So. 684.

67. Thus a water company placing its pipes in the streets under a franchise contract does so subject to the right of the city to construct sewers wherever the public demands (Anderson v. Fuller [Fla.] 41 So. 684), and a gas and water company is not entitled to recover for damages through removal of pipes on account of change in street grade (Scranton Gas & Water Co. v. Scranton, 214 Pa. 586, 64 A. 84).

68. United Elec. Co. v. Bayonne [N. J. Law] 63 A. 996; Evans v. Boston, 190 Mass. 525, 76 N. E. 905.

69. People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

70. See 6 C. L. 729. Procedure on summary trials, see Indictment and Prosecution, 8 C. L. 189.

71. See 6 C. L. 729, n. 40.

72. Brazier v. Philadelphia [Pa.] 64 A. 508. Ordinance proscribing assaults, affrays, and the use of blasphemous language, sustained, though same penalties were provided in state statutes defining same offenses. Town of Neola v. Reichart [Iowa] 109 N. W. 5. See 6 C. L. 729, n. 40.

73. Ordinance punishing gambling. Blodgett v. McVey [Iowa] 108 N. W. 239.

74. See 6 C. L. 729, n. 42.

75. A conviction for violation of a borough ordinance had before a justice of the peace, who is described as acting recorder of the borough, is void for want of jurisdiction. Borough of Vineland v. Kelk [N. J. Law] 63 A. 5. Defect in summons charging violation of ordinance may be amended. Commonwealth v. Price, 29 Ky. L. R. 593, 94 S. W. 32. In Missouri no information is required to be filed in an action arising in a municipal court for violation of ordinance. City of Kirksville v. Munyon, 114 Mo. App. 567, 91 S. W. 57. Under the Mississippi Const. § 26, providing that an accused shall have the right to demand the nature and cause of the accusation, an affidavit, alleging that accused violated an ordinance designated by section and number, is insufficient. Telheard v. Bay St. Louis, 87 Miss. 580, 40 So. 326. A city council cannot by an order necessarily obtain the dismissal of a penal action (Flynn v. Springfield, 120 Ill. App. 266), nor can it by ordinance regulate appeals (City of Paducah v. Ragsdale, 28 Ky. L. R. 1057, 92 S. W. 13). Sentence in the alternative is authorized by Georgia Pol. Code 1895, § 712. Leonard v. Eatonton, 126 Ga. 63, 54 S. E. 263; Shuler v. Willis, 126 Ga. 73, 54 S. E. 965. See 6 C. L. 729, n. 43.

depart from the established meaning of words and the settled rules of procedure. In a trial before a municipal court, the recorder may take judicial notice of the ordinance of the city defining offenses.[76] The Georgia constitution does not guarantee trial by jury to one charged with violation of municipal ordinance.[77] Equity will not interfere to enjoin the prosecution of a violation of a city ordinance,[78] but the validity of an ordinance may be drawn in question by motion to quash the summons.[79] It is not fatal to a judgment upon conviction that it did not recite that respondent be put at labor upon public streets, the ordinance under which conviction was had providing therefor.[80] Where a prosecution results in acquittal, it is improper to render judgment for costs against the city.[81]

§ 11. *Property and public places.*[82]—The law upon this subject is fully treated elsewhere,[83] only a few cases based on the peculiar status of municipalities being here treated. It is competent for the state when creating municipal governments to retain to itself some control over the state's property situated within the territory of the municipality.[84] It may exercise this control directly or through the medium of other selected and more suitable instrumentalities.[85] Unless otherwise provided a city may acquire and hold land or other property [86] and may devote the public property to any use consistent with its position as trustee for the benefit of its inhabitants,[87] but it cannot sanction a use inconsistent with the public use [88] or amounting to a public nuisance.[89] Streets being held and controlled by a municipality for the

76. Hill v. Atlanta, 125 Ga. 697, 54 S. E. 354.

77. Pearson v. Wimbish, 124 Ga. 701, 52 S. E. 751.

78. City Council of Montgomery v. West [Ala.] 40 So. 215.

79. City of Richmond v. Lynch & Duke [Va.] 56 S. E. 139.

80. Bartlett v. Paducah, 28 Ky. L. R. 1174, 91 S. W. 264.

81. City of Chicago v. Reinschreiber, 121 Ill. App. 114.

82. See 6 C. L. 730. See, also, **Abbott, Mun. Corp. §§ 717-834.**

83. See Parks and Public Grounds, 6 C. L. 885. See, also, Highways and Streets, 8 C. L. 40.

84. Control of buildings for school of the blind in Kentucky. Kentucky Inst. for Education of Blind v. Louisville [Ky.] 97 S. W. 402.

85. Police juries of Louisiana have plenary powers with respect to establishment of public ferries, bridges, and roads. Police Jury of Lafourche v. Robichaux, 116 La. 286, 40 So. 705. Under the "Court House Acts" of Kentucky, the duty of maintaining the court house buildings at Newport devolves upon the commissioners of the district. Commissioners for Court v. Newport, 29 Ky. L. R. 649, 94 S. W. 629.

86. Authority of city over tide water lands. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307. All real estate owned by the city of New Orleans in 1880 and 1884 and not at that time dedicated to public use passed to the board of liquidation. Board of Liquidation of the City Debt v. New Orleans, 116 La. 417, 40 So. 781. Batture property is under the control and administration of the municipality. City of Shreveport v. St. Louis Southwestern R. Co., 115 La. 885, 40 So. 298. A power in a city to acquire land to protect the view oceanward from a sidewalk is power to acquire land under water. Power given the city of Long Branch by Pub. Laws 1903, p. 318, § 53, amended by Pub. Laws 1904, p. 347, §§ 4, 8. Murphy v. Long Branch [N. J. Law] 61 A. 593. Certificate of corporation counsel not necessary to enforcement of agreement for purchase of land. Lighton v. Syracuse, 112 App. Div. 589, 98 N. Y. 792.

87. Polling booths may be placed in traveled portion of street. Haberlil v. Boston, 190 Mass. 358, 76 N. E. 907. See 6 C. L. 730, n. 49.

88. Enclosed structure on wheels but unmoved for long periods held an obstruction to proper use of street. Spencer v. Mahon [S. C.] 55 S. E. 321. In Ohio there is an entire absence of power in council, under the statutes as they exist today, to authorize the erection of any structure, abutment, or support in a public way which will necessarily prevent a joint use by the public of the part so occupied. City of Cincinnati v. Louisville & N. R. Co., 4 Ohio N. P. (N. S.) 217. New York Building Code, § 144, has no application to ordinary commercial signs fastened flat against the outside of a building wall. People v. Schmidt, 51 Misc. 258, 100 N. Y. S. 1094.

89. Outside stairway held a nuisance. McCormick v. Weaver, 144 Mich. 6, 107 N. E. 314. Building used by municipality as hospital for treatment of contagious diseases is not per se a nuisance. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897. Whether an awning over sidewalk constituted a menace to public safety was question of law for the courts; city had no authority to declare same a nuisance and abate the same summarily. Brown v. Carrollton [Mo. App.] 99 S. W. 37. A bill board standing upon private ground, but used by public, and which is blown down, injuring a passer-by, does not constitute a nuisance rendering the city liable. Temby v. Ishpeming [Mich.] 13 Det. Leg. N. 667, 108 N. W. 1114.

use of the general public, it may not grant an exclusive use of them for private purposes.[90] The general power over streets, their grades and maintenance, and over bridges and the manner in which they shall be constructed, which is usually possessed by cities, must be considered with reference to, and is limited by, the purposes and uses of public ways.[91] Permits may be authorized by ordinance,[92] and are revocable.[93] The statute of limitations as to adverse possession does not run against a municipal corporation in respect to public property.[94] The doctrine of equitable estoppel, however, is applicable to municipalities in respect to such rights.[95] Equity has jurisdiction to enjoin a municipality from opening and using as a public street, without owners' consent, land which has not been condemned nor dedicated to public,[96] and a court of equity may restrain the illegal use of a street where such use if permitted would constitute a purpresture or public nuisance.[97] A municipality may maintain a suit in equity to prevent encroachment upon and obstruction of highways by land or water under its care and charge.[98]

§ 12. *Contracts.*[99]—Contracts by public governmental bodies are fully treated in a separate article.[1] Practically the only questions arising upon such contracts which are peculiar to municipalities and proper to be here treated are those relating to unauthorized contracts and the implications and estoppels resulting therefrom. It results necessarily from the limited and delegated character of municipal authority that a municipality can contract only to the extent and in the manner expressly authorized,[2] and contracts for an unauthorized purpose [3] or not executed in

90. City of Chicago v. Verdon, 119 Ill. App. 494; Kansas City v. Hyde, 196 Mo. 498, 96 S. W. 201. Use of street by railway for frog on switch-plate. Morie v. St. Louis Transit Co., 116 Mo. App. 12, 91 S. W. 962. Ordinance granting railroad use of street for yards, switch tracks, and depot grounds, held void. Chicago, R. I. & P. R. Co. v. People, 120 Ill. App. 306, afd. in 222 Ill. 427, 78 N. E. 790.

91. Construction of approaches to bridge. Ranson v. Sault Ste. Marie, 143 Mich. 661, 13 Det. Leg. N. 113, 107 N. W. 439; Morris v. Sault Ste. Marie, 143 Mich. 672, 107 N. W. 443.

92. An ordinance authorizing inspector of buildings to permit erection of awning covered with wood, iron, tin, or brass, does not cover an awning with iron frame and covered with iron and luxfer prisms. Preston v. Likes, Berwanger & Co., 103 Md. 191, 62 A. 1024. Prior to the adoption of New York City charter of 1897 the board of aldermen and not the board of electrical control was the body competent to grant consent to the laying of electric wires in a subway. People v. Consolidated Tel. & Elec. Subway Co. [N. Y.] 79 N. E. 892.

93. Permits, under N. Y. Gen. Ordinance 1303, § 1, for projection of bay windows, are revocable. Williams v. Silverman Realty & Const. Co., 111 App. Div. 679, 97 N. Y. S. 745. License to construct stone steps and railed areaway extending into sidewalk may be revoked. City of New York v. U. S. Trust Co., 101 N. Y. S. 574.

94. City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N. E. 296. Victoria County, Texas, held to have occupied the square upon which its court house is situated adversely to the city of Victoria. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873. 94 S. W. 368.

95. City of El Paso v. Hoagland, 224 Ill. 263, 79 N. E. 658. A municipality may be estopped by its own acts; it cannot deny the existence of facts which, by the action of its duly authorized officers, have theretofore been declared to exist when such facts are necessary to authorize the doing of some other thing which has misled another to his prejudice. Raynolds v. Cleveland, 8 Ohio C. C. (N. S.) 278.

96. McGourin v. De Funiak Springs [Fla.] 41 So. 541. See, also, Eminent Domain, 7 C. L. 1276; Injunction, 8 C. L. 279.

97. Use of street by railway. Chicago, R. I. & P. R. Co. v. People, 120 Ill. App. 306. Section 3337-1 is a statute penal in its nature, and the maxim expressio unius est exclusio alterius cannot be invoked in order to derive therefrom power vesting in the municipal corporation the right to grant to railroads the exclusive use of the public streets. But even if the power were lodged by the statutes in council to grant some use of the city streets to railroads for placing piers, posts, or supports therein, the power could not be abused by council, and if it is abused in such a way as to interfere with the ordinary rights of the public in and to the ordinary use of such streets, a court of equity will interpose by injunction. City of Cincinnati v. Louisville & N. R. Co., 4 Ohio N. P. (N. S.) 217. Injunction to prevent city from maintaining public dump. Shreck v. Coeur d' Alene [Idaho] 87 P. 1001.

98. City of Milwaukee v. Gimbel Bros. [Wis.] 110 N. W. 7.

99. See 6 C. L. 731. See, also, **Abbott, Mun. Corp. §§ 246-299.**

1. See Public Contracts, 6 C. L. 1109.

2. Under the Detroit charter a contract for the destruction of garbage to be collected by the city may be made by the council without previously submitting it to the commissioner of public works and obtaining an estimate from him. Detroit Reduction Co. v. Blades, 143 Mich. 591, 13 Det. Leg. N. 73, 107 N. W. 286.

3. Contract with water company for ex-

the prescribed manner [4] are invalid.[5] But a contract irregularly made or made without authority may be ratified so as to impose liability upon the municipality.[6] Where benefits have been received under an invalid contract, it has been held, on principles of implied contract or estoppel,[7] the municipality is liable, but on the other hand it has been held that neither implied contract [8] nor estoppel will arise.[9] Persons dealing with a municipal corporation are presumed to know the extent of its powers.[10] In the exercise of legislative powers a city council may make no grant or contract which will bind the municipality beyond its term of office, since they may not lawfully circumscribe the powers of their successors,[11] but in the exercise of business powers so called the municipality and its officers are controlled by no such rule, and they may lawfully exercise these powers in the same way, and in their exercise the city will be governed by the same rules which control an individual or a private corporation under like circumstances.[12] A municipality acting through its

clusive franchise held ultra vires and void. Water, Light & Gas Co. v. Hutchinson, 144 F. 256. So of a contract for purchase of gas property at appraised value. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640. The fact that public policy and good business judgment favor an advantageous contract by a city for the joint use of city poles by an electric lighting company furnishes no warrant to a court to assist in a continuance of such use, where the entering into such a contract is manifestly ultra vires on the part of the municipality. City of Columbus v. Columbus Public Service Co., 4 Ohio N. P. (N. S.) 329. A thirty year contract between a city and a water company, the city having no authority to contract beyond twenty years, is valid at least for the lesser period, the contract being separable by years. McGonigale v. Defiance, 140 F. 621. Contracts by which the police power is attempted to be forever abdicated are ultra vires and void. State v. St. Paul, M. & M. R. Co. [Minn.] 108 N. W. 261; State v. Northern Pac. R. Co. [Minn.] 108 N. W. 269.

4. Contract to lowest bidder. Anderson v. Fuller [Fla.] 41 So. 684. But contracts within ordinary corporate powers of the city, though not in writing nor evidenced by resolution or ordinance, are binding in the absence of statutory mode of procedure. City of Decatur v. McKean [Ind.] 78 N. E. 982. A charter provision requiring a public work to be submitted to lowest bidder does not apply to contract for supervision of its construction. City of Houston v. Potter [Tex. Civ. App.] 14 Tex. Ct. Rep. 691, 91 S. W. 389. It is competent for a municipality to award a contract for a public work as an entirety rather than to parcel it out, where it is evident that the entire work can be done with greater expedition and better results than under a single contract. Bye v. Atlantic City [N. J. Law] 64 A. 1056. The provision of section 143 of the Ohio Municipal Code that the board of public service shall make a contract with the lowest and best bidder, or may reject any and all bids, does not limit the board to a mathematical computation as to who is the lowest responsible bidder, but permits the board to go beyond the price bid and the character of the bidder and to accept the best proposition offered, considering quality, feasibility and efficiency of the thing to be furnished, the qualifications and responsibility of the bidder, and the price proposed in view of all the other considerations. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1.

5. A contract to donate a specified sum in consideration of the establishment of a factory being invalid, a city can not recover on a bond given to secure the performance of the contract on the part of the company. Collier Shovel & Stamping Co. v. Washington [Ind. App.] 76 N. E. 122. See 4 Mich. L. R. 405. See 6 C. L. 731, n. 58.

6. A contract entered into in violation of a mandatory charter provision can only be ratified by an observance of the conditions essential to a valid agreement in the first instance. City of Plattsmouth v. Murphy [Neb.] 105 N. W. 293.

7. A contract to which a municipality is a party, executed and acted upon for thirty years, is entitled to the presumption of regularity. Marklove v. Utica, C. & B. R. Co., 48 Misc. 258, 96 N. Y. S. 795. One who has performed work for a municipality in accordance with his contract and has not been paid therefor, has a right to a judgment at law for the contract price, and he cannot resort to mandamus to compel the levying of an assessment of tax to pay his judgment until it appears that it cannot be enforced by execution. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317. See 6 C. L. 731, n. 59.

8. See 6 C. L. 731, n. 60.

9. Sale by member of council to town. Bay v. Davidson [Iowa] 111 N. W. 25. Municipality not estopped to deny validity of contract. People v. Voorhies, 114 App. Div. 351, 99 N. Y. S. 918. Performance of unauthorized contract does not entitle one to audit of claim. Niland v. Bouron, 113 App. Div. 661, 99 N. Y. S. 914. See 6 C. L. 731, n. 61.

10. Bloomsburg Land Imp. Co. v. Bloomsburg [Pa.] 64 A. 602. Dock master under Greater New York charter has no power to bind the city to pay for work done by his direction. Sheridan v. New York, 145 F. 835. Compensation for extra time by city employe. May v. Chicago, 222 Ill. 595, 78 N. E. 912.

11. Board of aldermen cannot make contract for legal services for an unlimited period and irrevocable by their successors. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

12. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. Suspension of power by contract to regulate water and gas

legislative body has no power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority.[13] It, however, may be the depository as trustee for its citizens of a contract obligating a railroad to locate and maintain general offices and shops within the city.[14]

§ 13. *Fiscal affairs and management.*[15]—Municipal bonds are treated in a separate topic,[16] and such questions as the consent of electors to an indebtedness, which arise usually with special reference to bonded indebtedness, will be found more fully treated there. The power to issue bonds is only given for particular purposes and the municipality has no power to use the proceeds for other purposes.[17] As a safeguard against official improvidence, it is frequently provided by charter that no indebtedness shall be incurred unless provision for its payment be then made[18] or until an appropriation has been made for unpaid liabilities,[19] or to an amount exceeding the current revenues,[20] and to the same end is a common provision that no extraordinary expense[21] shall be incurred unless authorized by popular vote[22] at an election duly held. Proceedings for an examination into fiscal affairs are sometimes provided.[23]

Funds and appropriations.[24]—Public funds can be devoted only to public purposes,[25] and money appropriated for a specific purpose will be regarded as still in the treasury applicable to such purpose, notwithstanding the fact that it has been diverted to other purposes.[26] Contracts divisible into annual periods and therefore within annual appropriations and limitations upon indebtedness are not invalid, although the aggregate amount may exceed the limit.[27] That the estimated cost of

rates. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

13. State v. Minneapolis Park Com'rs [Minn.] 110 N. W. 1121.

14. City of Tyler v. St. Louis Southwestern R. Co. [Tex.] 14 Tex. Ct. Rep. 839, 91 S. W. 1.

15. See 6 C. L. 732. See, also, **Abbott, Mun. Corp. §§ 410-495.**

16. See Municipal Bonds, 8 C. L. 1046.

17. Owensboro Waterworks Co. v. Owensboro, 29 Ky. L. R. 1118, 96 S. W. 867. See 6 C. L. 732, n. 74.

18. A resolution to maintain a free public library and to provide a suitable site for the same sustained, such resolution not involving the expenditure of money within the inhibition of a statutory provision requiring that there shall be filed a certificate of the clerk that the money required is in the treasury to the credit of the fund. Smith v. Evans, 74 Ohio St. 17, 77 N. E. 280. The New Jersey Garbage act of 1902 (P. L. p. 200), making provision for raising the necessary funds during the continuance of a contract made in pursuance of the act, an ordinance directing the mayor and clerk to execute such contract without a previous appropriation to meet the expense, is valid. Townsend v. Atlantic City, 72 N. J. Law 474, 65 A. 509.

19. Where a municipal board is independent of and has entire control of funds in its hands, it can enter into contract relations without an appropriation. Saltsman v. Olds [Pa.] 64 A. 552. An appropriation for "salaries and labor of police department" held to cover a deficiency in an appropriation specially intended for the clerk of the board. Smith v. Lowell, 190 Mass. 332, 76 N. E. 956. See 6 C. L. 733, n. 80.

20. City of Providence v. Providence Elec. Light Co., 28 Ky. L. R. 1015, 91 S. W. 664. See 6 C. L. 733, n. 81.

21. See 6 C. L. 733, n. 82.

22. McNutt v. Lemhi County [Idaho] 84 P. 1054. Under a constitutional provision prohibiting incurrence of debt except by a majority vote of the electors of the city, a majority only of the electors voting is not sufficient. Williamson v. Aldrich [S. D.] 108 N. W. 1063.

23. The New Jersey act (P. L. 1879, as amended, P. L. 1898), providing for a summary investigation of county and municipal expenditures held constitutional. City of Hoboken v. O'Neill [N. J. Law] 64 A. 981. See 6 C. L. 733, n. 86.

24. See 6 C. L. 733.

25. Buying and selling coal, even under the exigency of a coal famine, is not a public purpose. Baker v. Grand Rapids, 142 Mich. 687, 12 Det. Leg. N. 879, 106 N. W. 208. A contract for the donation of a sum of money as an inducement to the establishment of a manufactory being void, an action on the bond given by the company for faithful performance cannot be maintained by the city for breach of contract. Collier Shovel & Stamping Co. v. Washington [Ind. App.] 76 N. E. 122. Illinois Laws 1893, p. 136, authorizing city treasurer to retain certain portion of the interest on funds under his control, not violative of the constitutional provision against donating public money to an individual for private use. City of Chicago v. Wolf, 221 Ill. 130, 77 N. E. 414.

26. So held where the amount of a draft held by a village was included in a tax levy and the money raised for the payment of the draft came into the hands of the village treasurer. People v. Owens, 110 App. Div. 30, 96 N. Y. S. 1054.

27. Toomey v. Bridgeport [Conn.] 64 A. 215.

an improvement was not made a part of the first resolution, the final resolution containing all the elements required by statute, is not material.[28] Under New Orleans charter judgments are payable in the order in which they are filed and registered, and out of money appropriated for that purpose.[29] Equity will interfere at the suit of a taxpayer to restrain the misapplication of funds.[30]

Warrants.[31]—General warrants issued on judgments awarded against city by collusion with its officers, [32] or county warrants in payment of indebtedness unlawfully incurred, or void.[33] An ordinance providing for city improvements being invalid, as were subsequent reassessment ordinances, the holder of warrants given in payment for the improvement is entitled to have a proper reassessment ordinance passed,[34] and mandamus will lie to compel such reassessment;[35] but mandamus will not lie to compel payment of an order or warrant based on an illegal contract.[36] In a proceeding against a county treasurer to pay warrant, he may retain an amount equal to relator's taxes.[37] Though a warrant is not negotiable unless made so by statute,[38] it may be such evidence of indebtedness as will support an action by the payee.[39] In the absence of prohibitory restrictions, a municipality may provide for the payment of interest on its warrants.[40] Town warrants held not to have been canceled and reissued at time of their deposit in a bank.[41]

Limitation of indebtedness.[42]—Almost without exception, municipalities are prohibited from incurring indebtedness above a certain sum usually fixed at a percentage of the assessed valuation.[43] Such a limitation, unless otherwise stated, has only a prospective operation, and indebtedness created or assumed prior to the passage of an act may not be considered in ascertaining whether the prescribed limit has been reached.[44] In determining whether a city's limit of indebtedness has been reached, money in sinking fund and applicable only to payment of bonded indebtedness not yet matured is to be deducted from its debt.[45] Further cases illustrative of the restriction in question are given in the notes.[46]

28. Heiple v. Washington, 219 Ill. 604, 76 N. E. 854.

29. State v. City Council, 116 La. 851, 41 So. 115.

30. Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099. But equity will not enjoin a municipality from breaking a contract it has entered into, since, if it does, it may be sued at law for damages. Cox v. Jones, 73 N. H. 504, 63 A. 178.

31. See 6 C. L. 734.

32. State v. Tanner [Wash.] 88 P. 321.

33. McNutt v. Lemhi County [Idaho] 84 P. 1054.

34, 35. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106.

36. People v. Grout, 111 App. Div. 924, 98 N. Y. S. 185.

37. Funk v. State [Ind.] 77 N. E. 854.

38. See 6 C. L. 734, n. 8.

39. Coleman v. New Kensington, 140 F. 684.

40. State v. Stout [Wash.] 86 P. 848.

41. Town of Manitou v. First Nat. Bank [Colo.] 86 P. 75.

42. See 6 C. L. 735.

43. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329.

44. City of Tiffin v. Griffith, 74 Ohio St. 219, 77 N. E. 1075.

45. Williamson v. Aldrich [S. D.] 108 N. W. 1063.

46. Street improvements, a portion of the cost of which is to be defrayed by special assessment on abutting property, will not create an indebtedness within the meaning of such limitation. Corey v. Ft. Dodge [Iowa] 111 N. W. 6. An ordinance for the levy of a one per cent tax for fifteen years for the payment of water bonds to be issued, and providing for the issuance of such bonds for the payment of which the tax so levied and the income of water works was pledged, offends the constitutional limitation in question. Village of East Moline v. Pope, 224 Ill. 386, 79 N. E. 587. New York Const. (Art. 8, § 10), requiring an act authorizing the issuance of bonds to provide for a sinking fund, has no application to a case where the ten per cent limit of indebtedness fixed by the constitution has not been reached. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 547, 100 N. Y. S. 357. Bonds may not be antedated and thereby made to realize more than they were worth on the day of sale which would operate as a sale not only of the bonds but of the accrued interest, thereby increasing the city's debt limit. Owensboro Waterworks Co. v. Owensboro, 29 Ky. L. R. 1118, 96 S. W. 867. In Pennsylvania the bonded indebtedness of a borough, made by vote of the electors, is to be deducted in computing the indebtedness which may be incurred. Coleman v. New Kensington, 140 F. 684. Missouri constitutional amendment (Art. 10, § 12a), permitting a further indebtedness not exceeding an additional five percentum for the purpose of purchasing or constructing waterworks or light plants, does not

§ 14. *Torts and crimes.*[47]—A municipal corporation exercises functions of two classes, private and governmental.[48] In respect to matters of the former class, it is liable for the negligent acts of its officers and employes in the due course of duty to the same extent as a private corporation.[49] In the exercise of its governmental functions, the municipality possesses the attributes of sovereignty and is not liable in tort in the absence of statute imposing such liability.[50] Under this rule a municipality is not liable for negligence connected with the operation of its fire,[51] health,[52] and police departments,[53] or the maintenance of its school system,[54] nor the erection and maintenance of its public buildings,[55] unless the same are so maintained as to constitute a nuisance.[56] Nor is liability incurred by a city for failure to pass or enforce ordinances,[57] or for failure to furnish protection against mob violence.[58] Neither is a city liable for destruction of property by fire through failure to furnish adequate water supply.[59] With respect to facilities designed for the use and benefit of the public, the municipality is not liable for any matter growing out of the plan of the work,[60] but is liable for failure to keep such facilities in repair,[61] or for negligence in the actual execution or construction of its public works.[62]

admit of a proposed bond issue for sewers (State v. Wilder, 197 Mo. 1, 94 S. W. 495), and, while under this amendment a city may bond to erect or construct a waterworks or lighting system, it may not do so to maintain and operate the same. State v. Wilder [Mo.] 98 S. W. 465.

47. See 6 C. L. 735. See also, **Abbott, Mun. Corp. §§ 950-1066.**

48. MacMullen v. Middletown, 112 App. Div. 81, 98 N. Y. S. 145.

49. A municipality operating an electric light plant is not exercising governmental functions and hence is liable for negligence of employes. Davoust v. Alameda [Cal.] 84 P. 760.

50. A city engaged in repairing its streets by means of a steam road roller held not liable for fire originated by sparks emitted from the engine. Alberts v. Muskegon [Mich.] 13 Det. Leg. N. 735, 109 N. W. 262. City not liable for negligence of public servant in removal of ashes from dwelling house. Haley v. Boston, 191 Mass. 291, 77 N. E. 888.

51. Flushing hydrant frightening horse. Brink v. Grand Rapids, 144 Mich. 472, 13 Det. Leg. N. 306, 108 N. W. 430. Trespass by fire department horse. Cunningham v. Seattle, 42 Wash. 134, 84 P. 641, 82 P. 143. See 6 C. L. 735, n. 22.

52. Beeks v. Dickinson County [Iowa] 108 N. W. 311.

53. Municipality not liable for injuries occasioned by unsanitary condition of prison to one incarcerated therein. Shaw v. Charleston, 57 W. Va. 433, 50 S. E. 527. Failure to keep jail properly warmed. Jones v. Corbin [Ky.] 98 S. W. 1002.

54. No liability for injuries to child by falling of plaster from the ceiling of schoolroom. Rosenblit v. Philadelphia, 28 Pa. Super. Ct. 587. **Contra.** Wahrman v. New York, 111 App. Div. 345, 97 N. Y. S. 1066.

55. Liability denied where injury resulted from careless elevator service in county building (Moest v. City of Buffalo & County of Erie, 101 N. Y. S. 996); but the operation of elevator in a police station is not the exercise of a governmental function and does not relieve from liability (Wilcox v. Rochester, 114 App. Div. 734, 99 N. Y. S. 1020). See 5 Mich. L. R. 136.

56. A municipality, even in the performance of its governmental functions, may not perpetuate a nuisance. Violation of smoke ordinance. Palmer v. District of Columbia, 26 App. D. C. 31. City held liable for fire arising from negligent deposit of refuse on public dumping ground (City of Denver v. Davis [Colo.] 86 P. 1027), likewise for death caused by horse frightening at pile of rubbish in street (Board of Councilmen v. Fain [Ky.] 99 S. W. 275).

57. Riding of bicycles on sidewalks. Millett v. Princeton [Ind.] 79 N. E. 909; Hull v. Roxboro, 142 N. C. 453, 55 S. E. 351.

58. Long v. Neenah, 128 Wis. 40, 107 N. W. 10. See 6 C. L. 735, n. 21.

59. Nor is a company under contract to furnish water to the city liable. Peck v. Sterling Water Co., 118 Ill. App. 533. **Contra.** Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57, 50 Law. Ed. 367; Mugge v. Tampa Waterworks Co. [Fla.] 42 So. 81. These cases were actions ex delicto and liability was placed upon the ground of negligence in performing a duty owed the public. See, also, 5 Mich. Law Rev. 362. Guardian Trust & Deposit Co. v. Fisher, 200 U. S. 57, 50 Law. Ed. 367. See 4 Mich. L. R. 540. The principle of the Peck case was applied to a case where a company under contract with city failed to properly light streets and injury resulted. City Council of Montgomery v. Halse [Ala.] 40 So. 665. See 6 C. L. 736, n. 33.

60. Fall from viaduct stairway. Watters v. Omaha [Neb.] 107 N. W. 1007. Sewer backing up. Davis v. Bangor, 101 Me. 311, 64 A. 617. Not liable for injury to property by deficiency of sewer due to defects in original plan of construction (Robinson v. Everett, 191 Mass. 587, 77 N. E. 1151), and it is immaterial that the sewer was constructed before the city was incorporated (Id.).

61. Escape of water from reservoir. Wiltse v. Red Wing [Minn.] 109 N. W. 114. Flooding by defective water main. Kirk & Co. v. Cunningham & Kearns Contracting Co., 99 N. Y. S. 879.

62. Construction of sewer. City of Louisville v. Hess' Adm'x [Ky.] 99 S. W. 265. Defective water main. Morgan v. Duquesne

With respect to street lighting,[63] and the construction and operation of sewer systems,[64, 65] and the casting of water in altering street grades,[66] the cases are not in unison. A municipality in maintaining and repairing a highway, acts as agent of the state, and is not responsible for injury to persons [67] or property,[68] in the absence of a statute creating liability. But municipal immunity from liability does not extend beyond the governmental duty imposed by the state.[69] It has been held that an abutting owner claiming to be injured must resort to an action at law,[70] but that a proposed change of grade of a street, seriously injuring abutting property and uncompensated, may be enjoined.[71] A municipality is liable for the consequences of an unlawful use of its streets sanctioned by its permit,[72] and dangerous places in grounds or ways for public use must be guarded with reasonable prudence.[73] To charge a municipality

Boro., 29 Pa. Super. Ct. 100. Death from broken electric wire. Aiken v. Columbus [Ind.] 78 N. E. 657.

63. Liability imposed for injuries from wires. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 542; City of Richmond v. Lincoln [Ind.] 79 N. E. 445; Eaton v. Weiser [Idaho] 86 P. 541. But city not liable for failure of company, under contract with city to light streets, to properly light the streets. City Council of Montgomery v. Halse [Ala.] 40 So. 665.

64, 65. Liability imposed: Construction of sewer causing walls of building to settle. Johnson v. St. Louis, 137 F. 439. Insufficient drainage of surface water flooding cellar. City of McCook v. McAdams [Neb.] 106 N. W. 988. Filling up of drain pipe throwing surface water onto abutting land. Town of Central Covington v. Beiser, 29 Ky. L. R. 261, 92 S. W. 973. Deposit of filth from sewer causing sickness. City of Madisonville v. Hardman, 29 Ky. L. R. 253, 92 S. W. 930. Nonaction by city, where private sewer connects with gutters depositing offal in such wise as to cause injury, renders city liable. City of Vicksburg v. Richardson [Miss.] 42 So. 234.

Liability denied: Backing of water into cellar during unusual rainstorm. Ebberts v. New York, 111 App. Div. 364, 97 N. Y. S. 833. Flooding cellar. Watson v. New York, 99 N. Y. S. 860. Unprecedented rainfall. Holzhausen v. New York, 102 N. Y. S. 145.

66. A municipality has no right to collect surface water in an artificial channel and cast it upon an abutting owner. City of Valparaiso v. Spaeth [Ind.] 76 N. E. 514; City of Valparaiso v. Spaeth [Ind.] 74 N. E. 518; Cromer v. Logansport [Ind. App.] 78 N. E. 1045; City of Houston v. Richardson [Tex. Civ. App.] 15 Tex. Ct. Rep. 107, 94 S. W. 454. Injunctive relief denied. Penfield v. New York, 101 N. Y. S. 422.

67. City liable for faulty operation of drawbridge. Naumburg v. Milwaukee [C. C. A.] 146 F. 641. See note in 5 Mich. L. R. 218.

68. Defective condition of street delaying fire department in responding to call does not renler city liable for the loss of property. Hazel v. Owensboro [Ky.] 99 S. W. 315. Injury to abutting owners through grading of street, reasonable care and skill being exercised, is damnum absque injuria. Davis v. Silverton, 47 Or. 171, 82 P. 16. Though in opening streets the change of rural lands to urban property results in some injury to abutting owners, the municipality incurs no liability. Strauss v. Allentown [Pa.] 63 A. 1073. Erection and maintenance of approaches to bridge to injury of abutting owners. Sadlier v. New York, 185 N. Y. 408, 78 N. E. 272. No liability for injuries to abutting owner by original establishment of street grade, the grade being reasonable and the work properly done. Fletcher v. Seattle [Wash.] 86 P. 1046.

69. Town held liable for injuries from surface water. Rudnyai v. Harwinton [Conn.] 63 A. 948. Measure of damages stated for lowering grade of alley. McMillen v. Columbia [Mo. App.] 97 S. W. 953.

70. De Lucca v. North Little Rock, 142 F. 597.

71. Hart v. Seattle, 42 Wash. 113, 84 P. 640.

72. City held liable for permitting "slide for life" wire to be stretched across street whereby pedestrian was injured through fall of performer. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057. A municipality is liable for damages to one injured from contact with a telephone or telegraph pole, which has been so placed in a public street as to become a nuisance or dangerous, and the municipality has knowledge thereof or in the exercise of ordinary care and prudence should know of its existence. City of Norwalk v. Jacobs, 7 Ohio C. C. (N. S.) 229. Whether or not such a pole is dangerous to the public or a nuisance is a question for the jury, to be determined under proper instructions from the court and all the circumstances of the case. Id.

Contra: Discharge of fireworks. De Agramonte v. Mt. Vernon, 112 App. Div. 291, 98 N. Y. S. 454. And where the city allowed the construction of a "Ferris Wheel" in a street whereby horse became frightened, liability was denied because the driver deliberately chose the street in question when a safer street was at hand. Bechtel v. Mahanoy City, 30 Pa. Super. Ct. 135. Under the New York Code defendant, in an action for personal injuries on public street, cannot raise question of muincipal permission under general denial. Blake v. Meyer, 110 App. Div. 734, 97 N. Y. S. 424.

73. Municipality liable for permitting pool of water impregnated with acids to continue along edge of street and without intervening fence or barrier, and child of tender years strays in and is killed (Welda v. Hanover Tp., 30 Pa. Super. Ct. 424), and for escape of water from reservoir constructed and separated by it (Wiltse v. Red Wing

pality with liability for the defective condition of any of its public places or facilities, it must have had actual or constructive notice thereof,[74] the question of constructive notice being for the jury.[75] A municipal corporation is liable for the acts of its officers, servants, or agents, done within the scope of their authority.[76] A city is not liable for the acts of an independent contractor engaged in the construction of a public work,[77] unless the matter involved is one of positive duty to an individual, in its nature non-delegable,[78] or unless the work is intrinsically dangerous or liable to create a nuisance.[79] The liability of city for tort, where it embarks in the management of any utility for profit, is to be determined by the same tests that apply to individuals or private corporations.[80] A contractor or third person, even in the absence of express contract, may be answerable to a municipal corporation for negligence in executing a public work or keeping a street in repair;[81] but, where a bond has been given to indemnify the city, the respective rights and liabilities of the parties is determined by such bond.[82]

§ 15. *Claims and demands.*[83]—Statutes usually require that notice be given to municipalities within a limited time of demands for injuries received by reason of defective streets, sidewalks, or otherwise.[84] The provisions of these statutes or-

[Minn.] 109 N. W. 114). Also for allowing manhole to project above surface of street. (City Council of Montgomery v. Reese [Ala.] 40 So. 760), but not to one fording a creek and falling into hole formed at the mouth of a sewer emptying into the creek (Zehe's Adm'r v. Louisville, 29 Ky. L. R. 1107, 96 S. W. 918), nor for death caused by the falling of a water pipe attached to the side of a building unless city had notice (Mitchell's Adm'r v. Brady [Ky.] 99 S. W. 266), nor for injury to passerby by falling of a bill board in wind storm (Temby v. Ishpeming [Mich.] 13 Det. Leg. N. 667, 108 N. W. 1114).

74. Mitchell's Adm'r v. Brady [Ky.] 99 S. W. 266. Actual notice not necessary. Dinsmore v. St. Louis, 192 Mo. 255, 91 S. W. 95. A city permitting the obstruction of a street by stretching of a "slide for life" wire across it held chargeable with notice from moment of its erection. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057. Presence of mortar boxes in street for three or four weeks held constructive notice. Munley v. Sugar Notch Borough [Pa.] 64 A. 377. Where the dangerous character of an obstruction on the sidewalk is the graveman of a petition for damages on account of injuries sustained in walking thereon, the testimony must establish that the city had notice actual or constructive of the dangerous condition of the walk in time to remedy it, and that the obstruction was one it was the city's duty to remove, and, having received such notice, it failed to remove it. An allegation of notice does not under strict rules of pleading support proof of constructive notice, and constructive notice cannot be based upon temporary conditions of recent operation. Schneider v. Cincinnati, 4 Ohio N. P. (N. S.) 57. Performance of a condition with respect to actual notice to a city of snow and ice on walks must be both alleged and proved. MacMullen v. Middletown [N. Y.] 79 N. E. 863.

75. Goff v. Philadelphia, 214 Pa. 172, 63 A. 481. Where the testimony goes to show that a plaintiff was injured by a fall in the nighttime upon a sidewalk on which ice had accumulated, and that the condition was peculiar to this place in the sidewalk and not general throughout the city, and that the city, through its officers, had knowledge of the condition of the walk while he was ignorant of its condition, a case is presented for the jury. Barry v. Akron, 7 Ohio C. C. (N. S.) 575.

76. Barree v. Cape of Girardeau, 197 Mo. 382, 95 S. W. 330. Falling of sand tub because of improper fastening by city employe. McMullen v. New York, 110 App. Div. 117, 97 N. Y. S. 109. Improperly guarded trench across sidewalk. Bennett v. Everett, 191 Mass. 364, 77 N. E. 886. While a municipality is liable for the negligent failure of its council or engineer with reference to the repair and keeping of a street or sidewalk open and safe, no liability attaches on account of errors of judgment on the part of these officers in the performance of these duties in good faith. Schneider v. Cincinnati, 4 Ohio N. P. (N. S.) 57. Board of health of Yonkers not an agent of the city so as to impose liability for negligence on the part of the board. Prime v. Yonkers, 102 N. Y. S. 118.

77. Street grading. Calvert v. St. Joseph, 118 Mo. App. 503, 95 S. W. 308.

78. See 6 C. L. 737, n. 41.

79. Depression in street by sinking of earth in trench recently dug and filled up. Goff v. Philadelphia, 214 Pa. 172, 63 A. 431.

80. Yazoo City v. Birchett [Miss.] 42 So. 569.

81. City of Pawtucket v. Pawtucket Elec. Co., 27 R. I. 130, 61 A. 48.

82. City of Pawtucket v. Pawtucket Elec. Co., 27 R. I. 130, 61 A. 48. See 15 Yale L. J. 149; 19 Harv. L. R. 138.

83. See 6 C. L. 737. See, also, **Abbott, Mun. Corp. §§ 484-495.**

84. See Highways and Streets, 8 C. L. 40, for rulings under statutes relating wholly to streets. In Kentucky cities of third class have no power to enact ordinance requiring presentation of claims before commencement of suit. City of Bowling Green v. Duncan, 28 Ky. L. R. 1177, 91 S. W. 268. Under Wisconsin mob violence act, notice by employer does not inure to benefit of employe. Long v. Neenah, 128 Wis. 40, 107 N. W. 10.

dinarily do not extend to claims for injuries to realty,[85] but do apply to claims arising under contract.[86] These notices must be sufficient in point of contents,[87] and presented to the proper officials [88] within the prescribed time.[89] Recovery cannot be had in excess of the amount named in the notice,[90] and notice by the wife does not support an action by the husband.[91] In the absence of prohibitive enactments, claims against municipalities are the proper subject of assignment.[92] Claim of a physician for care of a person quarantined held to have been properly before the board of supervisors for action by it.[93] A city cannot avoid the payment of interest upon a completed bridge contract through the refusal of its engineer to furnish the required certificate to the contractor.[94]

§ 16. *Actions by and against.*[95]—In the absence of statutory limitation municipal corporations in exercising their general corporate power may sue and be sued,[96] and the power conferred to sue and be sued carries with it power to compromise and settle suits.[97] The corporate name should be used.[98] A statutory provision that no action for negligence is maintainable against a city unless begun within one year after the accrual of the right of action does not bar the right of action of a minor.[99] A city may be sued for trespass to real estate in a court other than its own.[1] A light company which has furnished light to a city in consideration of a void agreement of the city to exempt the company from taxation may recover on the quantum meruit,[2] and a claimant is not bound to obtain a warrant in order to entitle him to maintain suit against the city on his claim.[3] One whose

85. Chap. 248, Laws 1897, of Minnesota, has no application to realty damaged by defective water pipes. Megins v. Duluth, 97 Minn. 23, 106 N. W. 89.

86. Minnesota Gen. St. 1894, § 687, has no application to a claim for damages occasioned by the city's failure to perform a statutory duty. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329.

87. Defect in sidewalk sufficiently described and located. Mulligan v. Seattle, 42 Wash. 264, 84 P. 721. Notice held sufficient with respect to description of place of injury. Town of Waterford v. Elson [C. C. A.] 149 F. 91; Blount v. Troy, 110 App. Div. 609, 97 N. Y. S. 182. Notice sufficient as to statement of city's default. Davis v. Adrian [Mich.] 13 Det. Leg. N. 1023, 110 N. W. 1084.

88. City auditor held to be a proper officer under North Dakota statutes. Pyke v. Jamestown [N. D.] 107 N. W. 359.

89. Blount v. Troy, 110 App. Div. 609, 97 N. Y. S. 182. Notice of claim served within specified time after removal of mental incapacity held sufficient. Forsyth v. Oswego, 114 App. Div. 616, 99 N. Y. S. 1022. Notice by filing claim "thirty days before commencement of suit." Foley v. Cedar Rapids [Iowa] 110 N. W. 158.

90. Van Camp v. Keokuk, 130 Iowa, 716, 107 N. W. 933.

91. Nothdurft v. Lincoln [Neb.] 105 N. W. 1084.

92. Kansas City Ordinance No. 11,125 does not forbid assignment of claims against city for wages. Kansas City Loan Guarantee Co. v. Kansas City [Mo.] 98 S. W. 459. Claim of contractor for money due. Dickson v. St. Paul [Minn.] 106 N. W. 1053.

93. Dawe v. Board of Health of Monroe [Mich.] 13 Det. Leg. N. 741, 109 N. W. 433.

94. Roebling's Sons Co. v. New York, 97 N. Y. S. 278.

95. See 6 C. L. 738. See, also, **Abbott, Mun. Corp. §§ 1107-1168.**

96. Town of Beloit v. Heineman, 128 Wis. 398, 107 N. W. 334. A municipality ousted from possession of land owned by it may maintain trespass and ejectment to establish title and recover possession. City of Providence v. Comstock, 27 R. I. 637, 65 A. 307. But a city, in the absence of express statutory authority, cannot maintain an action to collect a tax due it. City of Rochester v. Bloss, 185 N. Y. 42, 77 N. E. 794. Gen. St. Conn. 1902, § 2020, conferring a right of action against municipalities for injuries by reason of defective highways, is not a penal statute in such sense as to prevent the survival of the action in case of death. Elson v. Waterford, 140 F. 800. A municipality has not such legal interest in the relations of a water company and the individual consumer as warrants a suit to test the reasonableness of the rates imposed. City of Mount Vernon v. New York Interurban Water Co., 101 N. Y. S. 232.

97. A city council may, when acting in good faith, accept a less sum in settlement of a litigated case than is claimed to be due. Farnham v. Lincoln [Neb.] 106 N. W. 666.

98. Town of Mt. Pleasant v. Eversole, 29 Ky. L. R. 830, 96 S. W. 478. Ownership of fire department property having been reinvested in the city, the Fulton Fire Department had no legal capacity to sue with respect to the property. Fulton Fire Department v. Fulton, 61 Misc. 242, 100 N. Y. S. 816.

99. McKnight v. New York [N. Y.] 78 N. E. 676.

1. City of Baltimore v. Meredith's Ford, etc., Turnpike Co. [Md.] 65 A. 35.

2. Board of Councilmen v. Capitol Gas & Elec. Light Co., 29 Ky. L. R. 1114, 96 S. W. 870.

3. Kansas City Loan Guarantee Co. v. Kansas City [Mo.] 98 S. W. 459.

land has been taken by a city in an action brought by it cannot recover the land after its sale to a third party.[4] Contents of the journal of a charter convention cannot, in the absence of express provision, be received in evidence.[5] In the absence of statutory inhibition an execution may issue against a city, and while on the ground of public policy it cannot be levied on any of the general revenues of the city, either before or after their collection,[6] or upon any property real or personal reasonably necessary for government purposes,[7] still, if the city is possessed of any property held for pecuniary benefit, such property may be taken.[8] Mandamus lies to compel levy of taxes to satisfy judgment.[9]

MUNICIPAL COURTS; MURDER; MUTUAL ACCOUNTS; MUTUAL INSURANCE, see latest topical index.

NAMES, SIGNATURES AND SEALS.

§ 1. Names (1082). Idem Sonans (1082). Business and Corporate Names (1083).
§ 2. Signatures (1083).
§ 3. Seals (1083).

§ 1. *Names.*[10]—The middle name or initial is deemed no part of the name,[11] and likewise the word junior, or words of similar import, are mere matter of description,[12] but a transposition of initials may work prejudice from the nature of the transaction.[13] One may acquire by assumption and use a name other than his true name,[14] and if one be as well known by one name as another either may be used.[15]

Idem sonans.[16]—Absolute accuracy is not essential in the spelling of names in legal documents or proceedings either civil [17] or criminal.[18]

4. Metz v. Dayton, 28 Ky. L. R. 1053, 91 S. W. 745.

5. People v. Lindsley [Colo.] 86 P. 352.

6. Upon dissolution of a school district, held that its indebtedness could only be liquidated by taxation. In re Abolishing of School Districts, 27 R. I. 598, 65 A. 302.

7. Beadles v. Smyser [Okl.] 87 P. 292; City of Gibson v. Murray, 120 Ill. App. 296.

8. Beadles v. Smyser [Okl.] 87 P. 292.

9. Graham v. Tuscumbia [Ala.] 42 So. 400.

10. See 6 C. L. 739.

11. Letters of administration held not vitiated by insertion of middle initial in name of decedent whereas he had no middle name. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034. Patentee's claim of title held not affected by use of middle initial in name of his grantor sometimes and its omission at others. Taulbee v. Buckner's Adm'r, 28 Ky. L. R. 1246, 91 S. W. 734. Mistake in middle initial of purchaser in school land certificate held immaterial. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 S. W. 614. Variance in an indictment for disorderly conduct in a house alleged to be owned by Sam McReynolds and proof that it was owned by S. C. McReynolds held immaterial. Jones v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 687, 96 S. W. 29.

12. Indictment for assault held sufficient as against motion to quash for failure to add "junior" to name of person alleged to have been assaulted. Teague v. State, 144 Ala. 42, 40 So. 312.

13. A writ of sequestration against J. M. Peters is void as against M. J. Peters (Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428), as is also a judgment on citation issued against M. J. Peters (Id.).

14. May be indicted by assumed name. Stallworth v. State [Ala.] 41 So. 184. Assumption cannot be proved by hearsay. Id. Description of woman by her maiden name good though she had been secretly married. Palmer v. Baum, 123 Ill. App. 584.

15. In an action to foreclose, a mortgage executed by one "Henry Bethan" held admissible though there was evidence that the mortgagor was as well known by the name of "Henry Bethel" as by the name of "Henry Bethan." Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100. A release from liability as to transactions carried on under an assumed name when executed and delivered by the releasor in his own proper person and as and for contracts made by himself personally with the releasee and so taken by it is operative also as to transactions carried on by releasor in his own name. Klopot v. Metropolitan Stock Exch., 188 Mass. 335, 74 N. E. 596. See 19 Harv. L. R. 66. One who has sued in an assumed or trade name is estopped to deny in his own name the validity of an adverse judgment. Clark Bros. v. Wyche, 126 Ga. 24, 54 S. E. 909.

16. See 6 C. L. 740.

17. Notice of redemption from tax sale in name of James Karney, while the affidavit as to publication was in the name of James Carney, held immaterial variance. McCash v. Penrod [Iowa] 109 N. W. 180.

18. Roland commonly pronounced Rolin idems sonans with Rawlin. Roland v. State [Ga.] 56 S. E. 412. Rigley and Rigby. State v. Pointdexter, 117 La. 380, 41 So. 688. Vister and Vester. Gaither v. Commonwealth, 28 Ky. L. R. 1345, 91 S. W. 1124. Morris and Maurice. Thompson v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 175, 97 S. W. 316. An indictment for robbery is not vitiated because the name of the prosecutor is variously spelled

Business and corporate names.[19]

§ 2. *Signatures.*[20]—Signature may be with lead pencil,[21] and a signature mechanically affixed may be adopted.[22] Illiterate persons are generally permitted to sign by making their marks near their names written by others, the marks being witnessed by persons who write their own names as witnesses.[23] Authority to sign one's name in one's presence may be conferred by parol.[24] One bound personally by the condition of an instrument is not relieved of personal responsibility by signing in a representative capacity.[25]

§ 3. *Seals.*[26]—A statute abolishing the distinctions between sealed and unsealed instruments does not militate against the effectiveness of another statute limiting to different periods the time in which actions may be brought thereon.[27] It is held in Georgia that a seal is not necessary to the validity of a mortgage.[28] A writing actually sealed and delivered is held in some jurisdictions to be a specialty though no mention of the seal is made in the body of the writing,[29] but the contrary is held in Georgia.[30] The absence of a seal from a contract not required, otherwise than by a recital in the attestation clause, to be sealed is immaterial on the question of its validity.[31] In some states it is statutory that a scrawl or scroll, printed or written, affixed as a seal to any written instrument shall be as effectual as a seal.[32] Where there is no dispute as to the character or device used in the execution of a written instrument, it is for the court to determine whether the device as used constitutes a seal,[33] but whether a device was adopted by the maker as a seal is for the jury.[34]

NATIONAL BANKS; NATURAL GAS; NATURALIZATION, see latest topical index.

NAVIGABLE WATERS.

§ 1. What are Navigable (1084).
§ 2. Relative, Public and Private Rights (1084). Right of Access (1085). Rights of Wharfage and Reclamation (1086).
§ 3. Regulation and Control (1086).
§ 4. Remedies for Injuries Relating to (1088).

The rights of riparian owners,[35] the ownership of subaqueous lands,[36] consuming uses of water,[37] and matters relating to navigation[38] are treated elsewhere.

therein as Dorgan and Durgan. O'Donnell v. People, 224 Ill. 218, 79 N. E. 639.

19. See 6 C. L. 740. See, also, Corporations, 7 C. L. 866, as to corporate names; Partnership, 6 C. L. 911, as to firm names; Trade Marks and Trade Names, 6 C. L. 1713, as to imitation of names as unfair competition and as to statutes relating to misleading trade names.

20. See 6 C. L. 741.

21. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179.

22. Signature by stencil must be accompanied by proof of adoption. Bell Bros. v. Western & A. R. Co., 125 Ga. 510, 54 S. E. 532. Lithographed signatures may be adopted by the persons whose names they purport to be. Hewel v. Hogan [Cal. App.] 84 P. 1002.

23. The question as to whether an illiterate made a mark on a contract purporting to be signed by his mark, as provided in Cutt. Comp. Laws Nev. § 2734, held one of evidence merely. Kessel v. Austin Min. Co., 144 F. 859.

24. Husband held to have authority to sign wife's name to mortgage. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

25. Appeal bond signed by surety as cashier. Northup v. Bathrick [Neb.] 110 N. W. 685. Addition of matter descriptio personis to signature, see Agency, 7 C. L. 61; Corporations, 7 C. L. 862; Negotiable Instruments, 6 C. L. 777.

26. See 6 C. L. 741.

27. Rev. Civ. Code, § 1243, and Rev. Code Civ. Proc. § 58, construed. Gibson v. Allen [S. D.] 104 N. W. 275. Evidence held to show an instrument to have been a "sealed" instrument. Id.

28. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

29. Wenchell v. Stevens, 30 Pa. Super. Ct. 527. When the statute declaring what shall be a sufficient seal is silent as to reference in the instrument to the fact of its being a sealed instrument, no such reference is required. Langley v. Owens [Fla.] 42 So. 457.

30. A promissory note is not rendered a sealed instrument by the addition after the signature of a device usually purporting a seal. Burkhalter v. Perry [Ga.] 56 S. E. 631.

31. Sale contract held valid without seal. Noel Const. Co. v. Atlas Portland Cement Co., 103 Md. 209, 63 A. 384.

32. Under Acts 1893, p. 72, c. 4148, "L. S." in parenthesis held a sufficient seal. Langley v. Owens [Fla.] 42 So. 457.

33. Langley v. Owens [Fla.] 42 So. 457.

34. Wenchell v. Stevens, 30 Pa. Super. Ct. 527.

35, 36. See Riparian Owners, 6 C. L. 1313.

37. See Waters and Water Supply, 6 C. L. 1840.

38. See Shipping and Water Traffic, 6 C. L. 1464.

§ 1. *What are navigable.*[39]—In England only waters in which the tide ebbs and flows are navigable, but this test has been rejected by most of the American states and that of navigability in fact substituted.[40] A stream is navigable in fact when capable of some substantial use as a highway of commerce[41] in its natural state.[42] It is not necessary that it be capable of continuous use throughout the entire year, provided it be capable of such use periodically and with such regularity as to serve some beneficial purpose.[43] Navigable waters of the United States are those which form in their ordinary condition or by uniting with other waters a highway over which commerce between the several states or with foreign countries may be carried on in the ordinary modes in which such commerce is conducted.[44] Though a stream cannot be made navigable by legislative action,[45] the fact that it was meandered by the government surveyor is evidence of its navigability.[46]

§ 2. *Relative, public and private rights.*[47]—Navigable waters are held in trust for the public,[48] and every citizen has a natural right to use the same as highways of commerce.[49] This public right of navigation includes the right to operate ferry-boats,[50] to float logs, timber, etc.,[51] and, as incident to the latter, the right

39. See 6 C. L. 742.

40. The words "navigable stream" as used in Laws 1899, c. 284, p. 492, relating to bridges and their maintenance, means a stream navigable in fact, one of sufficient capacity to float saw logs during the spring or permit the passage of small boats. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974.

41. Harrison v. Fite [C. C. A.] 148 F. 781. A theoretical or potential navigability, or one which is temporary, precarious, or unprofitable, is not sufficient. Id.

Non-navigable: Depth of water sufficient for pleasure boating and to enable hunters and fishermen to float skiffs is insufficient. Harrison v. Fite [C. C. A.] 148 F. 781. Small by-waters and mere rivulets held not navigable. Burns v. Crescent Gun & Rod Club, 116 La. 1038, 41 So. 249. A lagoon having no fixed channel, the bed of which is covered with grass, and which will permit of boating only with difficulty, held not navigable. Id. A meandered slough, dry during the greater portion of the year, except during high tide at which time it would float small boats and logs for a short distance from its mouth is not navigable to such an extent as to require the consent of the Federal government for the construction of a dam at its mouth. State v. Superior Court for Skagit County, 42 Wash. 491, 85 P. 264. Evidence held to show that Big Lake, and Little river passing through it, are not navigable. Harrison v. Fite [C. C. A.] 148 F. 781.

Held navigable: A lake having an average depth of sixteen feet and floating a small steam pleasure boat and numerous rowboats is navigable. Kalez v. Spokane Valley Land & Water Co., 42 Wash. 43, 84 P. 395. Irish Bayou, two hundred feet wide and at least fifteen feet deep, which is capable of receiving large boats, held navigable. Burns v. Crescent Gun & Rod Club, 116 La. 1038, 41 So. 249. The Allegheny river is a navigable stream, having been declared such by the legislatures of Pennsylvania and New York, over which the Federal government has assumed jurisdiction, having included it in plans for the improvement of interstate water ways. United States v. Union Bridge Co., 143 F. 377.

42. Harrison v. Fite [C. C. A.] 148 F. 781.

43. Harrison v. Fite [C. C. A.] 148 F. 781. The mere fact that a bayou may be used during high water by fisherman does not make it navigable. Burns v. Crescent Gun & Rod Club, 116 La. 1038, 41 So. 249. A stream is a floatable one if by the rise due to the periodical melting of snow it will be capable of substantial commercial use, such periods occuring with reasonable certainty and regularity. Hot Springs Lumber & Mfg. Co. v. Revercomb [Va.] 55 S. E. 580.

44. People v. Board of Sup'rs, 122 Ill. App. 40.

45. Act of the territorial legislature approved Feb. 14, 1879, declaring the Palouse river navigable, held not to make it so in fact. Potlatch Lumber Co. v. Peterson [Idaho] 88 P. 426.

46. Not conclusive. Harrison v. Fite [C. C. A.] 148 F. 781.

47. See 6 C. L. 742.

48. A state holds navigable waters within its boundaries as a quasi-trustee for the public benefit and to support the rights of navigation and fishery, to which state grants of privileges or interests in such waters are subject. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353. Although the state has dominion over and power to regulate the use of the waters of navigable streams, it has no property right in them, within Const. art. 3, § 20, prohibiting the appropriation of public property to private use without the assent of two-thirds of the members of the legislature. Niagara County Irr. & Water Supply Co. v. College Heights Land Co., 111 App. Div. 770, 98 N. Y. S. 4. The power and control of the state over lands under tide water is limited to acts which will not impair the public interest therein, and subject to the right of congress to control navigation where necessary for regulation of commerce among the states or with foreign nations. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307.

49. Warner v. Ford Lumber & Mfg. Co., 29 Ky. L. R. 527, 93 S. W. 650; Powell v. Springston Lumber Co. [Idaho] 88 P. 97.

50. The owner of a ferry franchise has the same right to use a navigable stream as every other person has, and the right can-

to employ reasonable means of intercepting the same;[52] but, while the right of navigation extends to the full width of the stream,[53] it does not authorize the use of the banks.[54] The right of navigation being common to all, one exercising it must have due regard for the equal right of others,[55] but, so long as one is using it for a legitimate purpose, no liability exists for resulting injuries in the absence of negligence.[56]

Since navigable waters are public highways, one must not so occupy them as to obstruct free navigation,[57] or render them unsafe for travel.[58]

The rights of an assignee of an oyster bed in Virginia being by statute subject to previously acquired rights of others, no recovery can be had for injury resulting from dredging by a dock and ship-building company as authorized by a charter granted prior to the assignment.[59]

Right of access.[60]—The public generally,[61] and riparian owners in particular,[62] are entitled to access to navigable streams for proper purposes, and it is not within the power of a municipality in Louisiana to so dispose of a batture as to destroy public access.[63] Riparian rights[64] do not attach to lands which do not extend to the water.[65] A public landing being for the use of the public in reaching the water,

not be made subservient to the right of a riparian owner to maintain booms. Warner v. Ford Lumber & Mfg. Co., 29 Ky. L. R. 527, 93 S. W. 650.

51. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405. Hence, a riparian owner whose land has been injured by careless log driving is not entitled to an injunction totally restraining the use of the river. Id.

52. Powell v. Springston Lumber Co. [Idaho] 88 P. 97. The use of a navigable stream by a riparian owner for maintaining booms cannot be exclusive or inconsistent with the public use. Warner v. Ford Lumber & Mfg. Co., 29 Ky. L. R. 527, 93 S. W. 650. Under the express provisions of Rev. St. 1887, § 835, it is unlawful to construct a dam or boom without connecting therewith a sluiceway, lock, or fixture, sufficient to permit logs to pass without unreasonable delay. Powell v. Springston Lumber Co. [Idaho] 88 P. 97; Potlatch Lumber Co. v. Peterson [Idaho] 88 P. 426. Laws 1889-1890, p. 470, § 1, giving boom companies the right to acquire property for carrying on their business by purchase or condemnation, does not give them the right to interfere with navigation or the use of abutting lands by the owners, especially in view of Laws 1895, p. 130, c. 72, § 4, providing that nothing shall be constructed that will interfere with navigation. Burrows v. Grays Harbor Boom Co. [Wash.] 87 P. 937.

53. Warner v. Ford Lumber & Mfg. Co., 29 Ky. L. R. 527, 93 S. W. 650.

54. Where the license granted by a riparian owner to a mill company to use the banks along his premises in floating shingle bolts is revoked, injunction will lie to restrain further threatened use. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.

55. Riparian owner maintaining a boom. Powell v. Springston Lumber Co. [Idaho] 88 P. 97.

56. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405. Evidence held to show negligence in permitting shingle bolts cast upon plaintiff's land to lie there an undue length of time and in failing to break jams, etc. Id. One floating logs is not liable for injuries to riparian owners from the piling up of logs on their lands, causing an overflow in the absence of negligence. Hot Springs Lumber & Mfg. Co. v. Revercomb [Va.] 55 S. E. 580. The defense that the injury is the natural result of a legitimate use of the stream is not applicable where there has been an actual invasion of plaintiff's rights, as where defendant's boom caused the water to back up, overflowing plaintiff's lands and casting logs thereon. Burrows v. Grays Harbor Boom Co. [Wash.] 87 P. 937.

57. The rights of a street railway company in a tunnel under a navigable river, arising from its ownership of the fee in the bed, are subject to the paramount right of navigation. West Chicago St. R. Co. v. People of State of Illinois, 201 U. S. 506, 50 Law. Ed. 845.

58. A railroad company maintaining a bridge across a canal under authority from the state is liable for injuries due to concealed cribs extending beyond the piers. The Nonpariel, 149 F. 521.

59. Code 1904, § 2137. Newport News Shipbuilding & Dry Dock Co. v. Jones, 105 Va. 503, 54 S. E. 314.

60. See 6 C. L. 744.

61. The right of access does not prevent the board of park commissioners from exercising jurisdiction for park purposes over the bed between high and low water mark as provided by Acts 28th Gen. Assem. c. 179 (Acts 1900, p. 131). Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

62. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

63. City of Shreveport v. St. Louis Southwestern R. Co., 115 La. 885, 40 So. 298. City of Shreveport held not to have surrendered right of access by cross streets to the river in granting the right to defendant railroad company to lay tracks on what was formerly a batture. Id.

64. The rights of riparian owners in tide lands within the town of Providence is regulated and controlled by the town government and not by the general custom of the state, and the owners have no right of occupation by virtue of their ownership. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307.

65. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307. Nor do they necessarily

a city cannot authorize any occupation thereof inconsistent with its primary purpose.[66] A prescriptive right to obstruct a landing with a building may be acquired in Massachusetts by forty years of adverse user.[67]

Rights of wharfage and reclamation.[68]—The right of reclamation incident to the ownership of littoral land will be determined by the natural shore line, unless the artificial conditions are definite, substantial, and permanent.[69] The right of wharfage is controlled by statute in many states.[70] The right of a riparian owner to wharf out to the deep water line must be exercised within side lines at right angle to a straight shore, or, if the shore is concave, within converging lines which proportionately divide the tide water shore among the riparian owners.[71] A grant of a right of wharfage carries as an appurtenance a right of way over lands under water of the grantor necessarily crossed in reaching the same.[72] Where a street was condemned and opened as a highway and public wharf, the city acquired the wharfage and riparian rights of the former owners of the land abutting on the harbor,[73] and, where such street is widened on the harbor side, the city has the same wharfage and riparian rights in front of the widened streets as it had in front of the old street.[74]

§ 3. *Regulation and control.*[75]—Congress has power to determine what shall be deemed obstructions of interstate navigable water,[76] and, having enacted that certain obstructions shall be removed, it may leave it to one of the administrative departments to determine whether such obstruction exists, and if so to abate it.[77] A state may authorize the building of structures in the navigable waters within its borders, subject to the power of the United States to remove or alter them if they obstruct United States waters.[78] The Federal government may abate an obstruction without compensating the owner,[79] unless it was constructed under an act of

attach to a state grant of lands lying below tidal highwater mark. Id.

66. Chicago, R. I. & P. R. Co. v. People, 222 Ill. 427, 78 N. E. 790. An ordinance granting a railroad company the right to occupy a public landing place with tracks and sheds is void. Id.

67. A prescriptive right to maintain a building on a public landing may be acquired by occupation for forty years under Rev. St. 1836, c. 24, § 61 (substantially embodied in Gen. St. 1860, c. 46, § 1; Pub. St. c. 54, § 1; Rev. Laws, c. 53, § 1). Gifford v. Westport, 190 Mass. 323, 76 N. E. 1042. No right acquired where the building was permitted to fall into decay for eight or nine years of the required time. Id.

68. See 6 C. L. 744.

69. Moran v. Denison [Conn.] 65 A. 291.

70. Owners of shore land on the San Francisco Bay in the city of Oakland are expressly granted right of access for wharves, etc., over the state land below the line of low tide, subject, however, to the declared policy of the state, as set out in § 2, art. 15, Const. 1879, that they shall not exclude a right of way to the waters when wanted for a public purpose nor obstruct free navigation, and subject also to the right of the state to make improvements to promote commerce. Southern Pac. Co. v. Western Pac. R. Co., 144 F. 160. Hence, a railroad, otherwise entitled to reach the water, may condemn a right of way thereto. Id. Where the owners of land abutting on a street adjoining a harbor fill out beyond the street, as authorized by Acts 1796, c. 45, Acts 1801, c. 92, and Acts 1805, c. 94, they acquire the right to construct wharves and to moor vessels in the waters in front of the wharves. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353. The right conferred upon the riparian owners upon Light Street, Baltimore, to extend their lots beyond the street out into the harbor by Acts 1796, c. 45, Acts 1801, c. 92, and Acts 1805, c. 94, did not give exclusive rights in the water as against those who had previously filled in from Pratt Street, a cross street. Id.

71. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.

72. In re Water Front of New York, 113 App. Div. 84, 98 N. Y. S. 1063.

73. Opened as authorized by Acts 1817, c. 71, and damages awarded. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.

74. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.

75. See 6 C. L. 745.

76. United States v. Union Bridge Co., 143 F. 377.

77. Secretary of war. United States v. Union Bridge Co., 143 F. 377.

78. Especially in the absence of congressional legislation. United States v. Union Bridge Co., 143 F. 377. A state has complete power over navigable water courses within its boundaries, and may authorize the construction of bridges, subject to the power of the Federal government, to remove unreasonable obstruction to navigation. The Nonpariel, 149 F. 521.

79. Especially a bridge built under a state charter containing no specifications as to its character, but expressly providing that it shall be so constructed as not to interfere with free navigation. United States v. Union Bridge Co., 143 F. 377. Act March 3, 1899,

Congress containing no provision for alteration or abatement in case it becomes a nuisance.[80] Likewise, a city may require a street railway company to lower its tunnel under a navigable river which has become an obstruction, where the ordiannce under which it was built contained no stipulation to the contrary,[81] and at its own expense.[82] Where, however, a bridge is constructed according to the authorizing statute, the courts cannot abate it as an obstruction and a nuisance.[83] The replacement of the superstructure of a railroad bridge is not the building of a bridge so as to require a permit from the Secretary of War.[84] The Federal and state government have power to control the management of a draw bridge by requiring it to be kept open at all proper times, etc.[85] The Federal statutes regulating harbors used in interstate commerce are merely restrictive of certain acts and do not prevent the states from policing to prevent the obstructing of the same,[86] nor is the decision of the Secretary of War, permitting the construction of a bridge, conclusive upon the state that it will not interfere with navigation.[87] In Louisiana special legislative authority is prerequisite to the right to construct a pontoon bridge across a navigable stream.[88] The statute, granting the city of Yonkers the title to the lands under the waters of the Hudson river opposite the mouth of the Nepperham, and providing that the same shall be kept free from obstructions, does not obligate her to remove obstructions not placed therein by her.[89] The right to construct piers under a city permit is limited by restrictions contained therein and limitations imposed of law upon the city's power to grant permits or inherent in the nature of its title in the water.[90] The fact that the government permits an obstruction interfering with navigation to remain does not prevent it from objecting to the placing of a greater obstruction in the same place.[91] The drainage commissioners of Wisconsin have no power to destroy a navigable meandered lake.[92] It is competent for the the state, acting through the counties, to protect a harbor therein, if it does not interfere with the control of the Federal government.[93]

c. 425, § 18 (30 Stat. 1153 [U. S. Comp. St. 1901, p. 3545]), providing that upon determining that a bridge is unreasonably interfering with the free navigation of the waters of the United States, the secretary of war may require the same to be altered, etc., is not unconstitutional as failing to award compensation. Id.

80. United States v. Parkersburg Branch R. Co. [C. C. A.] 143 F. 224.

81. Does not impair the obligation of a contract. West Chicago St. R. Co. v. People of State of Illinois, 201 U. S. 506, 50 Law. Ed. 845.

82. Is not a taking of property without just compensation. West Chicago St. R. Co. v. People of State of Illinois, 201 U. S. 506, 50 Law. Ed. 845, afg. Id., 214 Ill. 9, 73 N. E. 393.

83. United States v. Parkersburg Branch R. Co. [C. C. A.] 143 F. 224.

84. As required by Act March 3, 1899 (30 Stat. 1151 [U. S. Comp. St. 1901, p. 3540]). United States v. Parkersburg Branch R. Co. [C. C. A.] 143 F. 224.

85. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877.

86. City of Milwaukee v. Gimbel Bros. [Wis.] 110 N. W. 7.

87. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877.

88. Blanchard v. Abraham, 115 La. 989, 40 So. 379 The power to permit such obstruction has not been vested in the police juries as to navigable streams. Id.

89. Laws 1899, c. 562, p. 1153; Ben Franklin Transp. Co. v. Yonkers, 102 N. Y. S. 1060.

90. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.

91. Proposed to extend a building to the outer line of an encroaching dock. City of Milwaukee v. Gimbel Bros. [Wis.] 110 N. W. 7.

92. The power conferred upon the drainage commissioners, under Rev. St. 1898, §§ 1379-11 to 1379-31, does authorize the establishment of a drainage system to the destruction of a navigable river and a navigable meandered lake. In re Dancy Drainage Dist. [Wis.] 108 N. W. 202.

93. Policed the harbor to prevent deposits from being made therein. Board of Com'rs of Escambia County v. Port of Pensacola Pilot Com'rs [Fla.] 42 So. 697. Rev. St. 1892, § 950 (Gen. St. 1906, § 1302), which requires the board of pilot commissioners of each port to take steps to detect violations of the laws for the protection of harbors, etc., and charging the expense to the counties, is valid. Id. The legislature may provide for the exercise of police protection by the counties through officials other than the commissioners. Id. The duty of determining the necessity of protecting the harbor, under Rev. St. 1892, § 950 (Gen. St. 1906, § 1302), is vested in the board of pilot commissioners and not in the county commissioners. Id. Where a harbor lies in two counties, the state may provide for the protection of the portion in one county and to charge the same thereto. Id.

Improvements.[94]—The "burnt district commissioners" of Baltimore have power to construct new wharves.[95] The city of Chicago has authority to require the lowering of a tunnel under the Chicago river preparatory to deepening the same.[96] The constitutional right of congress to improve harbors of the United States carries the right to deposit removed materials in any part of the harbor she chooses.[97] The right to take water from a navigable stream for irrigation purposes is inferior to the right of improvement,[98] and hence a state may improve the same [99] without liability for the resulting injury,[1] which immunity she may grant to a private corporation.[2] Where land of a riparian owner is taken in improving a navigable stream, compensation must be made.[3]

§ 4. *Remedies for injuries relating to.*[4]—The fact that the Federal government made no objection to the construction of a bridge pursuant to a state charter does not preclude it from requiring its alteration without compensation to permit of free navigation.[5] Under Federal statute a vessel used [6] in depositing refuse in any navigable water of the United States is liable for the prescribed penalty irrespective of the owner's knowledge of such use.[7] The power conferred by the Michigan statute upon county supervisors to remove obstructions arising from the erection of booms, or the collection of logs, does not authorize them to contract for the removal of ancient obstructions arising from other causes.[8] One [9] negligently exercising the right of navigation, or maintaining an obstruction in a navigable stream, must use due

The fact that a greater part of a harbor is within a municipality and under its police protection does not relieve the county of its duty to protect the same. Id. A harbor is a public highway and of such value to the people of the county in which it is situated, that money spent in protecting it from being filled is for a county purpose for which county funds may be expended under the constitution, though such harbor is used for foreign commerce. Id.

94. See 6 C. L. 746.

95. The power conferred upon the burnt district commissioners by Act of March 11, 1904 (Laws 1904, p. 141, c. 87), "to lay out additions and extensions to be made to the public wharves and docks," etc., is not limited to building additions to existing wharves, but includes power to make new ones. Dyer v. Baltimore, 140 F. 880.

96. Under Hurd's Rev. St. 1903, p. 292, c. 24, giving the city of Chicago authority to deepen or change the channel of water courses. West Chicago Street R. Co. v. People, 214 Ill. 9, 73 N. E. 393. The city of Chicago was empowered without the approval of the secretary of war to require the lowering of a street railway tunnel under the Chicago river so as to give a clearance of twenty-one feet, by Act of March 3, 1899 (30 Stat. at L. 1156, c. 425), declaring that all work of removing tunnels necessary to permit a navigable channel with the prescribed "project" of twenty-one feet in the Chicago river should be done by the city. West Chicago Street R. Co. v. People of State of Illinois, 201 U. S. 506, 50 Law. Ed. 845, afg. Id., 214 Ill. 9, 73 N. E. 393.

97. Southern Pac. Co. v. Western Pac. R. Co., 144 F. 160.

98. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 440, 91 S. W. 848. The taking of water from a navigable stream for irregation is not a natural use giving the riparian owner an absolute right to so use. Id.

99. A canal forming a deep water connection between a navigable stream and the sea is a practical improvement of the stream. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 440, 91 S. W. 848.

1. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 440, 91 S. W. 848. A company constructing a canal in the improvement of the navigability of a stream will not be required to put in locks to keep back salty water so as not to destroy irrigation rights, where it would interfere with free navigation and increase the cost of maintenance. Id.

2. Under Rev. St. 1895, arts. 722, 723, subd. 6, the Port Arthur Canal & Dock Company has all the rights and immunities in carrying on its improvements of navigation that the state possesses. Bigham Bros. v. Port Arthur Canal & Dock Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 440, 91 S. W. 848.

3. A person whose land has been flooded by the construction of a levee is entitled to damages irrespective of negligence. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068.

4. See 6 C. L. 746.

5. United States v. Unfon Bridge Co., 143 F. 377.

6. Where a person is placed in charge of a scow to unload, the dumping of the refuse within the harbor is within the scope of his employment so as to render the vessel "used" within Act March 3, 1899, c. 425, §§ 13, 16 (30 Stat. 1152, 1153 [U. S. Comp. St. 1901, pp. 3542, 3544]), though done contrary to orders. Scow No. 36 [C. C. A.] 144 F. 932.

7. Boat held liable under Act March 3, 1899, c. 425, §§ 13, 16 (30 Stat. 1152, 1153 [U. S. Comp. St. 1901, pp. 3542, 3544]), though used contrary to orders. Scow No. 36 [C. C. A.] 144 F. 932.

8. Comp. Laws, § 2494. Gainer v. Nelson [Mich.] 13 Det. Leg. N. 983, 110 N. W. 511.

9. Where the stock of a boom company was owned by a mill company and its employes were paid by the latter, and, in an

care [10] and give proper warning,[11] and is liable for damages proximately resulting from his negligence.[12] The usual rules of pleading [13] and evidence [14] apply to actions for damages.

Injunction will issue to restrain an unauthorized obstruction of a navigable stream [15] at the instance of a municipality if the stream is under its charge,[16] but, such impairment of navigation being a public nuisance, a private party cannot enjoin the same unless specially injured.[17] But injunction will only lie in the absence of other remedy.[18] The Idaho statute giving a boom owner thirty days after notice, within which to construct sluiceways before abating the obstruction, is only applicable to booms constructed prior to its passage.[19]

While the courts will take judicial notice that the more important rivers of the country are navigable,[20] such action is exercised with caution and denied in doubtful cases,[21] thus leaving navigability a question of fact for the jury.[22] Where

action against the mill company for damages due to careless floating of shingle bolts, the answer alleged an agreement with plaintiff justifying the use of the banks, etc., held that the boom company was the agent of the mill company for whose acts it is liable. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.

10. Evidence held to show that the damage to the scow was due to the negligent operation of the tug and not to the negligent opening of the draw bridge. Dunbar-Sullivan Dredging Co. v. Troy & West Troy Bridge Co., 145 F. 428. Evidence held to show that injury to the canal boat was due to the projecting submerged cribs of the railroad bridge pier and not to the negligent operation of the boat. The Nonpariel, 149 F. 521.

11. The positive testimony that warning lights were placed on a sunken dredge and were burning a few minutes before the accident held to warrant a reversal of a finding that there were no lights, notwithstanding the negative testimony of four witnesses that they did not see any lights. The Fin Mac Coal [C. C. A.] 147 F. 123.

12. Proximate cause held to have been the suction of a passing vessel which forced libellant's boat onto the projecting timbers and not the absence of warning signals, the existence of the timbers being known to the master. Kelley Island Line & Transp. Co. v. Cleveland, 144 F. 207.

13. A complaint alleging that defendant carelessly and negligently permitted logs to pile up in jams on plaintiff's premises, thereby causing an overflow, held insufficient for failing to allege the facts of negligence. Hot Springs Lumber & Mfg. Co. v. Revercomb [Va.] 55 S. E. 580. A complaint alleging that defendant has constructed a boom "across" the stream so as to effectually "prevent" the floating of logs past, etc., makes a prima facie case for an injunction, though it does not allege that there are no sluices, etc., as required by statute. Powell v. Springston Lumber Co. [Idaho] 88 P. 97.

14. Where, in an action for damages for injury by careless floating of shingle bolts, the evidence shows the amount of land cut away and the value thereof, it is sufficiently definite to authorize damages. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.

15. An injunction restraining a boom company from obstructing the river navigation in front of complainant's property, and from sorting, holding, or rafting logs at such place, or from operating any boom so as to interfere with navigation, from operating artificial means of increasing the flow of water past plaintiff's premises, or occupying or damaging his premises, is proper. Burrows v. Grays Harbor Boom Co. [Wash.] 87 P. 937. An obstruction to constitute a nuisance must materially interrupt general navigation. A drawbridge held not necessarily a nuisance. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877. Evidence held insufficient to show that a proposed drawbridge would so interrupt and interfere with navigation as to justify an injunction restraining its construction. Id.

16. City of Milwaukee v. Gimbel Bros. [Wis.] 110 N. W. 7.

17. **Insufficient interest:** Owners and operators of sailboats on a river to restrain the construction of a bridge. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877. Citizens of a town adjoining a river to restrain the construction of a bridge. Id.

Sufficient interest: An owner of a sawmill located on a river above a proposed bridge, who procures from above and below the bridge site, and who ships his lumber in barges which must pass such place, has a sufficient special interest as to maintain an injunction. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877.

18. Under Laws 1901, p. 98, c. 62, an order of the state land commissioners, canceling a lease of harbor area, is appealable, hence, injunction will not issue to enjoin its enforcement. Seattle Wharf Co. v. Callvert, 42 Wash. 390, 85 P. 16. An immemorial-custom entitling littoral proprietors to wharf out to the navigable channel may be interposed as a defense to ejectment by a city to recover possession of the shore, as may also, the fact that the rights of the city in the shore have been vested in a commission. Murray v. Barnes [Ala.] 40 So. 348.

19. Rev. St. 1887, § 3836. Powell v. Springston Lumber Co. [Idaho] 88 P. 97.

20. Harrison v. Fite [C. C. A.] 148 F. 781. Kentucky river. Warner v. Ford Lumber & Mfg. Co., 29 Ky. L. R. 527, 93 S. W. 650. Tennessee river. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310.

21. People v. Board of Sup'rs, 122 Ill. App. 40.

22. Whether a stream is navigable is a

the court does not take judicial notice, the burden of proving navigability rests upon the party alleging the same.[23]

NE EXEAT.

The common-law scope of the writ has not been enlarged in Wisconsin,[24] and it will issue only against a debtor.[25] Does not lie in favor of a defendant against the complainant.[26] In Illinois the demand must be reduced to judgment unless the facts shown raise a clear presumption of fraud.[27] Ne exeat, being an extraordinary writ, should not issue when legal process can afford as ample and efficacious relief.[28]

NEGLIGENCE.

§ 1. **Definitions (1090).**
§ 2. **Acts or Omissions Constituting Negligence (1092).**
A. Personal Conduct in General (1092).
B. Use of Property in General (1093). Dangerous Machinery and Substances (1094). Liability of Manufacturers (1095).
C. Use of Lands, Buildings and Other Structures (1095). Liability to Trespassers and Licensees (1096). Liability for Injuries to Children (1098).
§ 3. **Proximate Cause (1099).**
§ 4. **Contributory Negligence (1101).** Children (1104). Comparative Negligence (1104). Last Clear Chance Doctrine (1105). Imputed Negligence (1105).
§ 5. **Actions (1108).**

Scope of title.—This topic treats generally of the subject of negligence, and includes only such specific applications of the general principles as are not covered by other topics[29] or such as it has been deemed advisable to retain for the purpose of illustration. The subject of damages recoverable for negligent injuries is also excluded.[30]

§ 1. *Definitions.*[31]—Negligence is the failure to exercise such care as an ordinarily prudent person would exercise under the same circumstances,[32] or, in other

question of fact to be determined by the jury from the evidence. People v. Board of Sup'rs, 122 Ill. App. 40.

23. Harrison v. Fite [C. C. A.] 148 F. 781.

24. Rev. St. 1898, §§ 2784-2786, merely regulate the practice of the issuance of the writ and do not enlarge its scope. Davidor v. Rosenberg [Wis.] 109 N. W. 925.

25. Rev. St. 1898, § 2784, authorizing the writ to prevent "any person" from leaving the state, etc., held not to justify its issuance against one to whom the debtor had transferred property, since § 2785 limits it to its common-law scope. Davidor v. Rosenberg [Wis.] 109 N. W. 925.

26. A defendant in an accounting who merely alleges that complainant is indebted to him without setting up a counterclaim is not entitled to the writ under Rev. St. 1898, § 2785. Davidor v. Rosenberg [Wis.] 109 N. W. 925.

27. Allegations of mere conclusions of fraud are insufficient. Brophy v. Sheppard, 124 Ill. App. 512. The mere fact that defendant is about to leave the state with all his property, exempt and nonexempt, does not raise such a presumption of fraud as will authorize the writ. Id.

28. Capias ad respondendum held adequate. Brophy v. Sheppard, 124 Ill. App. 512.

29. See agency, 7 C. L. 61; Animals, 7 C. L. 120; Bridges, 7 C. L. 460; Banking and Finance, 7 C. L. 358; Building and Construction Contracts, 7 C. L. 480; Buildings and Building Restrictions, 7 C. L. 507; Carriers, 7 C. L. 522; Corporations, 7 C. L. 862; Counties, 7 C. L. 976; Death by Wrongful Act, 7 C. L. 1083; Electricity, 7 C. L. 1258; Explosives and Inflammables, 7 C. L. 1637; Fires, 7 C. L. 1657; Highways and Streets, 8 C. L. 40; Independent Contractors, 8 C. L. 176; Inns, Restaurants and Lodging Houses, 8 C. L. 317; Intoxicating Liquors, 8 C. L. 486; Landlord and Tenant, 8 C. L. 656; Master and Servant, 6 C. L. 521; Medicine and Surgery, 6 C. L. 622; Mines and Minerals, 6 C. L. 644; Municipal Corporations, 6 C. L. 714; Negotiable Instruments, 6 C. L. 777; Nuisance, 6 C. L. 827; Parks and Public Grounds, 6 C. L. 885; Party Walls, 6 C. L. 950; Pipe Lines and Subways, 6 C. L. 1007; Poisons, 4 C. L. 1060; Railroads, 6 C. L. 1194; Sewers and Drains, 6 C. L. 1448; Shipping, 6 C. L. 1876; Wharves, 6 C. L. 1879. See, also, Torts, 6 C. L. 1700.

30. See Damages, 7 C. L. 1029, and Water Traffic, 6 C. L. 1464; Street Railways, 6 C. L. 1556; Telegraphs and Telephones, 6 C. L. 1665; Warehousing and Deposits, 6 C. L. 1834; Waters and Water Supply, 6 C. L. 1840; Weapons, 6 C. L. 1876.

31. See 6 C. L. 748.

32. Heidelbaugh v. People's R. Co. [Del.] 65 A. 587; Garrett v. People's R. Co. [Del.] 64 A. 254; Robinson v. Huber [Del.] 63 A. 873; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308. See post, § 4, Contributary Negligence. "Negligence is the failure to observe * * * that degree of care which the circumstances justly demand." Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342.

words, it is a failure to use ordinary care,[33] or, as it is sometimes called, due care.[34] Degrees of negligence are sometimes recognized by the courts,[35] and where they are recognized or created by statute [36] they cannot be ignored by the courts.[37]

To be actionable, negligence must constitute a violation of a legal duty [38] and must proximately [39] result in injury.[40]

Willful or wanton negligence.[41]—While wantonness usually implies willfulness,[42] it is not necessarily inconsistent with negligence,[43] and one may be guilty of wanton or willful misconduct without any actual intent to do wrong,[44] and though the word "wanton" is not an apt adjective in describing negligence, when so used the expression imports both wantonness and negligence.[45] The distinction between

33. Ordinary care is the care which an ordinarily prudent person would exercise under the same circumstances. McMahen v. White, 30 Pa. Super. Ct. 169; Lovell v. Kansas City Southern R. Co. [Mo. App.] 97 S. W. 193; Louisville R. Co. v. Esselman, 29 Ky. L. R. 333, 93 S. W. 50. Ordinary care is not the care of a "prudent" man but that of an "ordinarily prudent" man. City of Paris v. Tucker [Tex. Civ. App.] 15 Tex. Ct. Rep. 240, 93 S. W. 233.

34. Due care is such care as a reasonably prudent and careful man would use under similar circumstances. Robinson v. Huber [Del.] 63 A. 873.

35. Use of term "slightest negligence" in instruction in action by passenger, approved. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139. Term "slight negligence" used in ascertaining that one may recover though not entirely free from fault, if he was in the exercise of ordinary care. Malott v. Schlosser, 119 Ill. App. 259. See post, § 4. Contributory Negligence.

36. Rev. Laws, c. 171, § 2, providing for recovery for death caused by gross negligence. Manning v. Conway [Mass.] 78 N. E. 401. Gross negligence is highest degree of neglect recognized by Texas statutes. Pendley v. Illinois Cent. R. Co., 28 Ky. L. R. 1324, 92 S. W. 1.

37. Ordinary and gross negligence. Pearlstein v. New York, etc., R. Co. [Mass.] 77 N. E. 1024. One who commenced to jump and dance and jerk rope atached to heavy machine being loaded on car, but who desisted when warned, held not guilty of gross negligence though he did not thereafter pull as effectively as he might have done. Id.

38. Chroust v. Acme Bldg. & Loan Ass'n, 214 Pa. 179, 63 A. 595; Prosser v. West Jersey & S. R. Co., 72 N. J. Law, 342, 62 A. 494; Lake Erie & W. R. Co. v. Hennessey [Ind. App.] 78 N. E. 670; Indianapolis Traction & Terminal Co. v. Pressell [Ind. App.] 77 N. E. 357; Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165; Walker's Adm'r v. Potomac, F. & P. R. Co., 105 Va. 266, 53 S. E. 113; Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231. See post, § 2. Acts Constituting Negligence. Violation of legal duty is essence of actionable negligence. Wilmot v. McPadden [Conn.] 65 A. 157. Even a recklessly negligent act is not actionable unless it constitutes a violation of duty. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603. Shipper owes carrier and its servants no duty to tie bales or bundles with cords strong enough to move them by. Cronin v. American Linen Co., 147 F. 755. Duty may arise out of contract. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. Duty arising out of contract to excavate lot and place underpinning under house. Olson v. Goerig [Wash.] 88 P. 1017. Servant of railroad company, working under superintendent, whose duty was to keep watering tanks in repair, held not liable for injury due to negligent placing of tank too near track. Dudley v. Illinois Cent. R. Co., 29 Ky. L. R. 1029, 96 S. W. 835.

39. See post, § 3. Proximate Cause.

40. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273; Sineone v. Lindsay [Del.] 65 A. 778; Brewster v. Elizabeth City, 142 N. C. 9, 54 S. E. 784; Indianapolis Traction & Terminal Co. v. Pressell [Ind. App.] 77 N. E. 357; Deschner v. St. Louis & M. R. R. Co. [Mo.] 98 S. W. 737; Fanizzi v. New York & I. C. R. Co., 113 App. Div. 440, 99 N. Y. S. 281; Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Libby, McNeill & Libby v. Kearney, 124 Ill. App. 339. Evidence insufficient to show that negligence of the state in failing to maintain discipline in reformatory caused fire which resulted in loss of contractor's property. Mills Co. v. State, 97 N. Y. S. 676. Fact that defendant took possession of plaintiff's lumber did not render him liable for its depreciation by rotting where it did not appear that the rotting occurred while lumber was in defendant's possession. Deitz v. Lensinger, 77 Ark. 274, 91 S. W. 755. Violation of municipal ordinance relating to care is not actionable unless it was proximate cause of injury. International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90 S. W. 918.

41. See 6 C. L. 749.

42. "Wantonness is a conscious failure to observe due care, a conscious invasion of the rights of another, an intentional doing of an unlawful act, knowing such act to have been unlawful." Bussey v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 163.

43. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 903.

44. Birmingham R., Light & Power Co. v. Ryan [Ala.] 41 So. 618; Ambroz v. Cedar Rapids Elec. Light & Power Co. [Iowa] 108 N. W. 540. Gross negligence may amount to wantonness or willfulness. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 903. Recklessness may be the equivalent of willfulness or intentional wrong. Bussey v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 163.

45. Campbell v. Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571.

negligence and willfulness or wantonness, however, is not without importance,[45] especially as regards the amount of damages recoverable.[47]

§ 2. *Acts or omissions constituting negligence. A. Personal conduct in general.*[48]—The standard of personal conduct is ordinary care,[49] which is such care as an ordinarily prudent person would exercise under the same circumstances.[50] Due or ordinary care, however, is not an absolute term and varies with the circumstances.[51] It is correlative with the duty owed [52] and proportionate to the probability of injury,[53] and involves some knowledge or notice of circumstances or conditions from which injury might have been anticipated.[54] It is not necessary, however, that the exact consequences of an act should or could have been anticipated.[55] The probability of injury is sometimes treated as an element of probable cause.[56] Failure to take precautions which would not have prevented the accident is not negligence.[57]

As a general rule specific acts do not of themselves and considered without their

46. Error to instruct on negligence in action for wilful violation of statute. Consolidated Coal Co. v. Stein, 122 Ill. App. 310.

47. See Damages, 7 C. L. 1029.

48. See 6 C. L. 750.

49. Baird v. Chambers [N. D.] 109 N. W. 61.

50. McMahen v. White, 30 Pa. Super. Ct. 160; Lovell v. Kansas City Southern R. Co. [Mo. App.] 97 S. W. 193; Louisville R. Co. v. Esselman, 29 Ky. L. R. 333, 93 S. W. 50; City of Paris v. Tucker [Tex. Civ. App.] 15 Tex. Ct. Rep. 240, 93 S. W. 233. Duty to exercise care which ordinarily prudent and intelligent men exercise in their own affairs does not call for "extraordinary" or "very high" degree of care. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273.

51. Southern R. Co. v. Stutts [C. C. A.] 144 F. 948; Robinson v. Huber [Del.] 63 A. 873; McMahen v. White, 30 Pa. Super. Ct. 169; Weldon v. People's R. Co. [Del.] 65 A. 589. Care of bank as to safety deposit boxes and vaults. Masonic Temple Safety Deposit Co. v. Langfelt, 117 Ill. App. 652. Ordinary care in crossing steam railroads and street railroads. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738. Acts constituting due care to workmen above ground do not necessarily constitute due care as to workmen under ground. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337.

52. See Carriers, 7 C. L. 522; Inns, Restaurants, and Lodging Houses, 6 C. L. 31; Landlord and Tenant, 6 C. L. 345; Master and Servant, 6 C. L. 521; Railroads, 6 C. L. 1194; Street Railroads, 6 C. L. 1556; Warehousing and Deposits, 6 C. L. 1834; Wharves, 6 C. L. 1879. See, also, post, this section, subsection C. Use of Lands, Buildings, and Other Structures. Rule as to care required of one crossing railroad not applicable to one acting as a carrier. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652.

In dealing with children greater care may be required than in dealing with adults. Indianapolis Water Co. v. Harold [Ind. App.] 79 N. E. 542. In determining what is ordinary care in reference to children their apparent age, size, and inability to protect themselves should be considered. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692. The youth of plaintiff, however, will not supply defendant's lack of negligence. Belt R. Co. v. Charters, 123 Ill. App. 322.

53. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569. See Electricity, 7 C. L. 1258; Explosives and Inflammables, 7 C. L. 1637; Fires, 7 C. L. 1657; Highways and Streets, 8 C. L. 40; Medicine and Surgery, 6 C. L. 622; Parks and Public Grounds, 6 C. L. 885; Poisons, 4 C. L. 1060; Weapons, 6 C. L. 1876. See, also, this section, subsection B. subd. Dangerous Machinery and Substances, and subsection C. Use of Lands, Buildings, and Other Structures. An act is negligent only with relation to its reasonable and probable consequences which might have been anticipated by a person of ordinary prudence. Snyder v. Arnold, 28 Ky. L. R. 1250, 92 S. W. 289; Mailliefert v. Interborough Rapid Transit Co., 50 Misc. 160, 98 N. Y. S. 207. That which has never happened before and which is not of such a character that prudent men ought naturally to guard against it cannot, when it does happen, be the basis of a charge of negligence. Martin v. Niles-Bement-Pond Co., 214 Pa. 616, 64 A. 370. Act of owner in putting oil in fuel tank under course of construction by an independent contractor without notifying workmen, and with knowledge that holes had to be drilled and bolts inserted, held negligence. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788.

54. One opening enclosure not liable for escape of and injury to stock where there was nothing whatever to charge him with notice that stock were within such enclosure. Mobile & O. R. Co. v. Christian Moerlein Brew. Co. [Ala.] 41 So. 17. One is charged with having seen what he could have seen by exercise of reasonable care. Indianapolis Traction & Terminal Co. v. Presseli [Ind. App.] 77 N. E. 357.

55. Kimberly v. Howland [N. C.] 55 S. E. 778. Injury from wire stretched by a stranger from guy wire post, electric current being communicated to such way from defectively insulated electric wire. Wilbert v. Zurheide Brick Co. [Wis.] 106 N. W. 1058. Reasonable care requires one to anticipate what might naturally result from his conduct, as that horse left untied in ferry area-way might run away and injure someone. Koontz v. New York Mail Co., 72 N. J. Law, 530, 63 A. 341.

56. See post, § 3, Probable Cause.

57. Failure to have guard at entrance to temporary bridge onto which plaintiff knowingly went and from which he fell. Bell v. New York, 114 App. Div. 22, 99 N. Y. S. 684.

attending circumstances constitute negligence,[58] though certain acts or omissions are sometimes declared to be negligence per se,[59] or the circumstances may be such as to raise a prima facie presumption of negligence.[60] The foregoing general principle and the two exceptions stated usually involve merely the question as to when negligence is for the jury and when for the court.[61] A more distinctive doctrine, though also probably a mere phase of the same question, is that the violation of a statutory duty [62] or a duty created or declared by a municipal ordinance [63] is negligence per se. Otherwise expressed, it is declared that the violation of such a duty raises a rebuttable presumption of negligence.[64]

Act of God and unavoidable accident.[65]—One must provide against such acts of God as may be reasonably anticipated,[66] and one may be liable for the results of his negligence notwithstanding an act of God concurred in producing them,[67] though he may not be liable for the total resultant damages.[68] An inevitable or, as it is sometimes called, a pure accident is not actionable.[69]

Joint and several liability.[70]—As in the case of other joint torts,[71] joint negligence gives rise to a point and several liability.[72] Some sort of community in the wrong is essential to joint liability,[73] but the negligent acts need not be concerted.[74]

(§ 2) *B. Use of property in general.*[75]—One furnishing property for the use of others is bound, irrespective of any privity of contract, to use reasonable care to see that it is in a safe condition for the use for which it was intended.[76] Such duty is not confined to the construction or manufacture of the property,[77] but one

58. Rate of speed in driving at night, or pulling horse suddenly to other side of road. McMahen v. White, 30 Pa. Super. Ct. 169.

59. Failure to use any spark arrester on a stavemill engine held negligence per se, there being buildings near by. Dodd & Co. v. Read [Ark.] 98 S. W. 703.

60. See doctrine of res ipsa loquitur, post, § 5, subd. Presumptions and Burden of Proof.

61. See post, § 5, subd. Questions of Law and Fact.

62. Schutt v. Adair [Minn.] 108 N. W. 811.

63. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Ordinance relating to insulation of electric wires. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. Speed ordinances. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509; Campbell v. St. Louis Transit Co. [Mo. App.] 99 S. W. 58.

64. Failure of owner of apartment house to furnish operator for electric elevator. Shellaberger v. Fisher [C. C. A.] 143 F. 937.

65. See 6 C. L. 751.

66. Building must be constructed so as to withstand ordinary storms. Uggia v. Brokaw, 102 N. Y. S. 857.

67. See post, § 3, Proximate Cause.

68. One whose negligence, concurring with act of God, caused flood, held not liable for such damages as would have accrued irrespective of his negligence. Carhart v. State, 100 N. Y. S. 499.

69. Simeone v. Lindsay [Del.] 65 A. 778. Purely accidental discharge of gun. Siefker v. Paysee, 115 La. 953, 40 So. 366. Where each party is using due care and an accident occurs, it will be held to be an enevitable accident. White v. Wilmington City R. Co. [Del.] 63 F. 931.

70. See 6 C. L. 751.

71. See Torts, 6 C. L. 1702.

72. Joint negligence of owner of building and of janitor in charge of elevator. Ferguson v. Truax [Wis.] 110 N. W. 395. Joint negligence of owner of coal barge and owner of steamer being coaled. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230. Joint negligence of driver of bus and those in charge of street car. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652. Recovery against one defendant guilty of negligence jointly with another defendant not dependent on recovery against latter. Ferguson v. Truax [Wis.] 110 N. W. 395. See Code Civ. Proc. § 578. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178. Defendant in such case cannot complain of striking out name of codefendant. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. Verdict against one not affected by new trial as to other. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178. Plaintiff may dismiss as to one and proceed against other. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178; Cincinnati Traction Co. v. Baron, 3 Ohio N. P. (N. S.) 633. One defendant jointly liable with another defendant for negligence is not entitled to reversal for error in favor of latter, though it tends unduly to prejudice former. Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599.

73. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

74. Negligence of barge owner in furnishing unseaworthy barge and of steamship owner in loading and unloading barge. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

75. See 6 C. L. 752.

76. City furnishing appliances for use of employes of independent contractor. McMullen v. New York, 110 App. Div. 117, 97 N. Y. S. 109. Refrigerator car company liable to brakeman injured through a defect in a car furnished to the railroad. Leas v. Continental Fruit Exp. [Tex. Civ. App.] 99 S. W. 859.

77. Refrigerator car company furnishing cars to railroads liable for defects therein at time it is furnished, though arising after original construction. Leas v. Continental Fruit Exp. [Tex. Civ. App.] 99 S. W. 859.

is not liable for defects arising while the property is in the exclusive custody and control of another.[78] Where the seller of an article not inherently dangerous is not the manufacturer thereof, he is not liable for injuries caused thereby in the absence of knowledge of the danger attending its use, or negligence in failing to discover such danger.[79]

Dangerous machinery and substances.[80]—In the use of intrinsically dangerous articles the care required is proportionate to the nature of the article and the circumstances under which it is used,[81] so also one must use due diligence to ascertain the competency of an agent intrusted with dangerous substances.[82] One using a manufactured article purchased in open market will not be charged with negligence on account of its inadequacy unless he knew or ought to have known of its inadequacy.[83] The seller of a dangerous article must give notice of its nature and qualities,[84] and if he fails to give such notice he will be liable to persons injured irrespective of any privity of contract.[85] A shipper of a dangerous substance is not an

Complaint construed as charging negligence in permitting car to remain in defective condition as well as negligently constructing it in the first instance. Id.

78. Railroad employe injured while working on oil tank car owned by oil company but in control of railroad company. Finan v. Valvoline Oil Co., 51 Misc. 292, 100 N. Y. S. 1087.

79. Bottles and carbonic acid gas to be used in aerating liquids. Bruckel v. Milhau's Sons, 102 N. Y. S. 395. Mere ignorance of the seller will not render him liable unless his ignorance is due to negligence. Id.

80. See 6 C. L. 752.

81. See Electricity, 7 C. L. 1258; Explosives and Inflammables, 7 C. L. 1637; Fires, 7 C. L. 1657; Weapons, 6 C. L. 1876. Electricity. Wood v. Wilmington City R. Co. [Del.] 64 A. 246; Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342; Wilbert v. Zurheide Brick Co. [Wis.] 106 N. W. 1058; Morhard v. Richmond Light & R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Goddard v. Enzler, 123 Ill. App. 108; Byron Tel. Co. v. Sheets, 122 Ill. App. 6. Blasting with powerful explosives. Page v. Dempsey, 184 N. Y. 245, 77 N. E. 9. Blasting with dynamite in populous neighborhood. Kimberly v. Howland [N. C.] 55 S. E. 778. Landlord who furnishes automatic electric elevator for use of tenant and family owes higher duty to tenant's children as regards protecting them from injury than railroad company does to protect trespassing boy from injury from turntable. Shellaberger v. Fisher [C. C. A.] 143 F. 937. Engineer of crane running on track upon which persons are licensed to walk and work must keep constant lookout for persons on track. Allis-Chalmers Co. v. Reilley [C. C. A.] 143 F. 298. Negligence to leave in only passage way from house to street a portable charcoal furnace with fire in it and molten lead on top. Rosenberg v. Zeitchik, 101 N. Y. S. 591. Testing room of firearm factory held reasonably safe as regards injury from bullets to person passing by on outside. Church v. Winchester Repeating Arms Co., 78 Conn. 720, 63 A. 510. Bale of merchandise tied with rope sufficient to secure it but not to move it by cannot be classed as an inherently dangerous thing. Cronin v. American Linen Co., 147 F. 755.

Liability to trespassers is treated elsewhere. See post, this section, subsection C. Use of Lands, Buildings and Other Structures.

82. Agent of shipowner intrusted with filling tank with crude oil. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788.

83. Adequacy of insulation of electric light wire. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

84. Illuminating oil containing gasoline. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829; Ellis v. Republic Oil Co. [Iowa] 110 N. W. 20; Nelson v. Republic Oil Co. [Iowa] 110 N. W. 24.

85. Seller of kerosene containing gasoline liable for injuries from explosion. Ellis v. Republic Oil Co. [Iowa] 110 N. W. 20; Nelson v. Republic Oil Co., 110 N. W. 24. Seller of kerosene containing gasoline held liable for death of purchaser's child caused by explosion. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829.

Note: Seller of intrinsically dangerous articles, such as gun powder, nitro-glycerin, naptha, poisonous drugs, etc., who delivers them without notice of their character to persons ignorant thereof, are liable for injuries caused thereby without regard to any privity of contract. Davidson v. Nichols, 11 Allen [Mass.] 514; Carter v. Towne, 98 Mass. 567, 96 Am. Dec. 682; Wellington v. Downer Kerosene Oil Co., 104 Mass. 64; Norton v. Sewall, 106 Mass. 143, 8 Am. Rep. 298; Boston & Albany R. Co. v. Shanley, 107 Mass. 568; Turner v. Page, 186 Mass. 600, 72 N. E. 329; Ouilghan v. Butler, 189 Mass. 287, 75 N. E. 726; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Thomas v. Winchester, 6 N. Y. 397, 57 Am. Dec. 455. A similar liability attaches where a caterer furnishes impure or unwholesome foods, or where a manufacturer sells for general use defective mechanical implements or other articles with knowledge of such defects. Bishop v. Weber, 139 Mass. 411, 1 N. E. 154, 52 Am. Rep. 715; McDonald v. Snelling, 14 Allen [Mass.] 290, 92 Am. Dec. 768; Flynn v. Butler, 189 Mass. 377, 75 N. E. 730; Lewis v. Terry, 111 Cal. 39, 43 P. 398, 31 L. R. A. 220, 52 Am. St. Rep. 146; Huset v. Case Threshing Machine Co. [C. C. A.] 120 F. 865, 61 L. R. A. 303; Clarke v. Army & Navy Co-operative Soc. [1903] 1 K. B. 155, 167. See Lebourdais v. Vitrified Wheel Co. [Mass.] 80 N. E. 482.

insurer of the safety of persons who may handle it, and his duty is performed if he employs well known and reasonably safe methods.[86]

Liability of manufacturers.[87]—As a general rule the manufacturer of an article not imminently dangerous is not liable to strangers for injuries caused by defects therein of which he did not know and could not have known by the exercise of ordinary care.[88] There seems to be some conflict as to whether failure to exercise ordinary care to discover the defects will render him liable to strangers.[89]

(§ 2) *C. Use of lands, buildings and other structures. In general.*[90]—Negligence cannot be predicated upon one's lawful and ordinary use of his own premises,[91] and, as in the case of negligence in general,[92] negligence in the use of such premises must be predicated upon the violation of a legal duty [93] and the probability of injury therefrom.[94] On the other hand one must use his property so as not to injure adjoining property or persons thereon.[95] And so also one in control of premises must give proper warning of hidden dangers to persons rightfully thereon.[96] In determining whether a certain act or omission constituted negligence, the purpose for which the premises were used and the business of the occupant will be considered.[97] Ownership of the premises or property is not essential to liability,[98] nor is responsibility for the erection of a structure essential to liability for injuries caused thereby,[99] but the owner of premises occupied by another is not liable for

86. Method of shipping sulphuric acid. Reddick v. General Chemical Co., 124 Ill. App. 31.

87. See 6 C. L. 752.

88. Heindirk v. Louisville El. Co., 29 Ky. L. R. 193, 92 S. W. 608. Maker of support for sign not liable to purchaser for whom it was made for injuries caused by falling of sign, by reason of defective fastening, though he voluntarily assisted in fastening the sign to the support under direction of plaintiff's clerk. Hyman v. Waas [Conn.] 64 A. 354.

Note: Manufacturer not usually liable in absence of privity of contract. Davidson v. Nichols, 11 Allen [Mass.] 514; Clifford v. Atlantic Cotton Mills, 146 Mass. 47, 15 N. E. 84, 4 Am. St. Rep. 279; Glynn v. Central Railroad Co., 175 Mass. 507. See Lebourdais v. Vetrified Wheel Co. [Mass.] 80 N. E. 482.

89. Manufacturer of defective emery wheel held not liable to employe of purchaser though defendant could have discovered the defects by exercise of reasonable care. Lebourdais v. Vetrified Wheel Co. [Mass.] 80 N. E. 482. Manufacturer of separator cylinder cap so defective as to charge him with notice of the defects held liable for injuries to employe of vendee caused by breaking of cap. Holmvick v. Parsons Band Cutter & Self-Feeder Co. [Minn.] 108 N. W. 810.

90. See 6 C. L. 753.

91. Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231.

92. See ante, § 1, Definitions.

93. Lot owner owes no duty to public to place railing on top of retaining wall lawfully constructed by him along side of highway. Schimberg v. Cutler [C. C. A.] 142 F. 701. Owner of unfinished building not liable to one injured by its collapse while taking shelter therein from unusually severe storm. Glennon v. Everson [Mass.] 80 N. E. 476.

94. Proprietor of baths held not liable to patron who cut his hand on bar glass left on shelf in bathroom, where it was custom to serve drinks in such room, and it did not appear how long glass had been left there. Jones v. Levy, 50 Misc. 624, 98 N. Y. S. 206. Contractor not liable to pedestrian who fell from temporary bridge, not intended for his use, while attempting to recover a coin which he had dropped and which rolled onto the bridge. Bell v. New York, 114 App. Div. 22, 99 N. Y. S. 684. Proprietor liable for injury from hole in carpet in aisle of theatre. Nephler v. Woodward [Mo.] 98 S. W. 488.

95. Common way used jointly by abutting owners held adjoining property within this rule. Cavanagh v. Block [Mass.] 77 N. E. 1027. One backing water up against a roadway so as to make travel thereon dangerous must do whatever is reasonably necessary to protect the public (Strange v. Bodcaw Lumber Co. [Ark.] 96 S. W. 152), notwithstanding he was given permission by the county judge so to do (Id.), and if guard rails are reasonably necessary, it is no excuse for failure to erect them that he had no authority to do so, at least where he has never asked for such leave (Id.). Property owner liable for injury from ice falling from roof. Cavanagh v. Block [Mass.] 77 N. E. 1027.

96. Party repairing public bridge charged with duty of protecting public from danger of loose planks. Burns v. Lehigh Valley R. Co. [N. J.] 65 A. 186.

97. Contractor not liable for failure to put barrier across entrance to temporary bridge where such barrier would have interfered with work. Bell v. New York, 114 App. Div. 22, 99 N. Y. S. 684.

98. Lessee of sign board with full control thereover held liable for injury caused by its fall. San Filippo v. American Bill Posting Co., 112 App. Div. 395, 98 N. Y. S. 661. See Landlord and Tenant, 6 C. L. 345.

99. Owner may be liable for injuries from a dangerous structure though neither he nor his servants constructed it, where he knew of its existence and allowed it to remain. Indianapolis Water Co. v. Harold [Ind. App.] 79 N. E. 542.

defects of which he has no notice.[1] Duration of a defective or dangerous condition may charge the owner with notice of its existence.[2] The owner of premises is not ordinarily liable for injuries from the acts of trespassers,[3] or mere volunteers.[4]

Liability to trespassers and licensees.[5]—It is often declared broadly that one owes no act, duty of care to trespassers [6] or bare licensees,[7] liability to such persons being confined entirely to cases of wantonness or recklessness,[8] and it is certain that the owner is not ordinarily liable to either trespassers [9] or bare licensees.[10] There is another element, however, which should be considered, and that is the probability of injury,[11] a duty to exercise due care arising in many cases from the knowledge of the presence of the trespasser or licensee [12] or from circumstances rendering their presence probable,[13] and exemption from liability being based upon absence of such

1. Chroust v. Acme Bldg. & Loan Ass'n, 214 Pa. 179, 63 A. 595. See Landlord and Tenant, 6 C. L. 345.

2. Supervisors charged with notice of defective condition of street. Milliren v. Sandy Township, 29 Pa. Super. Ct. 580. Gas plug in street. Perry v. People's Gas Light & Coke Co., 119 Ill. App. 389.

3. Owner of house not liable for injury from brick caused to fall from roof by trespassers who did not gain access to roof through his premises and of whose presence he was ignorant. Strasburger v. Vogel, 103 Md. 85, 63 A. 202.

4. Park owner held not liable for injury from fireworks in charge of independent contractor which was caused solely by negligence of volunteer assisting contractor. Noggle v. Carlisle & Mt. H. R. Co. [Pa.] 64 A. 547.

5. See 6 C. L. 755.

6. McLain v. Chicago & N. W. R. Co., 121 Ill. App. 614; Wilmot v. McPadden [Conn.] 65 A. 157; Krause v. Lewis, 144 Mich. 549, 13 Det. Leg. N. 385, 108 N. W. 417. Owner of vacant lot not liable to trespasser who deliberately left street and went into lot and fell into open vat four feet from street. Johnson v. Paducah Laundry Co., 29 Ky. L. R. 59, 81, 92 S. W. 330. Fact that persons frequently crossed track for their own convenience near place where boy was playing on track did not make him any less a trespasser. Elliott v. Louisville & N. R. Co. [Ky.] 99 S. W. 233.

7. Wilmot v. McPadden [Conn.] 65 A. 157; Brown v. Thomas Blackwell Coal & Min. Co. [Ky.] 99 S. W. 299; Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165; Norfolk & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19; McLain v. Chicago & N. W. R. Co., 121 Ill. App. 614. One going through premises to premises of another. Rosenthal v. United Dressed Beef Co., 101 N. Y. S. 532. Employer not bound to warn one visiting employes of obvious danger. Jenkins v. Central of Georgia R. Co., 124 Ga. 986, 53 S. E. 379.

8. Trespasser or licensee on elevator injured by negligent operation by defendant's servants cannot recover where injury was not wantonly or recklessly inflicted. McManus v. Thing [Mass.] 80 N. E. 487. Owner will be held liable for a wanton disregard of the safety of trespassers whom he has reason to believe to be on his premises and likely to be injured by his acts. Ambroz v. Cedar Rapids Elec. L. & P. Co. [Iowa] 108 N. W. 540.

9. Horse being driven through railroad stock yards frightened by collision between trains. Johnson v. Louisville, etc., R. Co., 29 Ky. L. R. 36, 91 S. W. 707. Lot owner not liable to trespasser who fell over retaining wall lawfully built by such owner at side of highway. Schimberg v. Cutler [C. C. A.] 142 F. 701.

10. Owner not liable to one who fell from platform in alley in rear of store. Krause v. Lewis, 144 Mich. 549, 13 Det. Leg. N. 385, 108 N. W. 417. Longshoreman injured by falling of warehouse door on dock where he was waiting for work. Oats v. New York Dock Co., 109 App. Div. 841, 96 N. Y. S. 813. Owner not liable for affirmative acts of negligence of persons not in his employ or even of employes unless act is within scope of employment. Illinois Steel Co. v. Zolnowski, 118 Ill. App. 209.

11. The rule that the owner is ordinarily not liable to trespassers is based on the general rule that one is liable for only such acts as are likely to produce injury, and the owner, in the absence of notice of the presence of trespassers or the probability of their presence, is not charged with any duty to them. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12. Owner is liable to bare licensee injured by his unnecessary affirmative acts creating dangers proximately resulting in licensee's injury, such as leaving dynamite on ground in lumber camp when presence of licensee was known. Hobbs v. Blanchard & Son Co. [N. H.] 65 A. 382.

12. Trespasser. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569. Persons using railroad track with knowledge or acquiescence of railroad company. Louisville & N. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691. Where the owner knows of the licensee's presence and his ignorance of danger. Hobbs v. Blanchard & Son Co. [N. H.] 65 A. 382. The duty to exercise care as to trespassers usually arises only after their presence is known. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692.

13. Trespasser. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692. Duty to keep lookout in operating trains in populous neighborhood. Johnson v. Louisville & N. R. Co., 29 Ky. L. R. 36, 91 S. W. 707. Children playing with building material in street not trespassers so as to bar recovery for injury caused by negligent use of highway by owner of material in operating pile drivers. Compty v. Starke Dredge & Dock Co. [Wis.] 109 N. W. 650. Railroad company held liable to licensee at depot who was scalded by steam and water from engine. Gulf, C. & S. F. R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317. Where private property is habitually used by public as a pass-way with acquiescence of owner, one

knowledge or circumstances.[14] One is not, however, generally required to anticipate the presence of such persons.[15] Absence of benefit to the owner or occupant from one's presence does not necessarily render such person a bare licensee,[16] but mere acquiescence or permission does not necessarily amount to invitation or inducement such as to give rise to any duty of care,[17] although it may do so in some cases.[18] One whose presence is required and authorized by contract is not a volunteer or bare licensee.[19] An owner or occupant, therefore, owes a duty of due care to an independent contractor, licensed to use the premises for the purpose of his work,[20] and to the employes of such contractor,[21] and the owner's liability in such case may arise from the negligence of his servants as well as his own.[22] As between a contractor and the employes of a subcontractor, the contractor stands in the place of an owner or occupant,[23] and his liability is not identified with that of the subcontractor.[24] In any case the owner or occupant is required to exercise only ordinary care.[25] A bare licensee is one who goes upon the premises of another without invitation, enticement, allurement or inducement from the owner or occupant.[26] Licen-

so using is not a trespasser so as to lessen care due him. Texarkana & Ft. S. R. Co. v. Trugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

14. Boy entered defendant's engine room after being warned to keep out. Houck v. Chicago & A. R. Co., 116 Mo. App. 559, 92 S. W. 738. Owner not liable where presence of trespasser could not have reasonably been anticipated, as where traveler left road on account of snow block and drove into unprotected well over three hundred yards from highway. Flint v. Bowman [Tex. Civ. App.] 16 Tex. Ct. Rep. 464, 93 S. W. 479. Railroad company owes no duty to keep lookout for trespassers, but is only required to use reasonable diligence to prevent injury after discovering his danger. Elliott v. Louisville & N. R. Co. [Ky.] 99 S. W. 233.

15. Trespasser. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569; Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692. Railroad company not chargeable with probability of trespassers entering inclosed lot and climbing onto fence causing it to fall on plaintiff who was on street below. Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231. Licensees. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569.

16. Baltimore & O. S. W. R. Co. v. Slaughter [Ind.] 79 N. E. 186.

17. Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165; Wilmot v. McPadden [Conn.] 65 A. 167; Rosenthal v. United Dressed Beef Co., 101 N. Y. S. 532.

18. Railroad crossing. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Permission long continued. Baltimore & O. R. Co. v. Campbell, 8 Ohio C. C. (N. S.) 569. Injury to licensee by engine backing without light or warning signal. Id.

19. Party superintending work being done by independent contractor. Pickwick v. McCauliff [Mass.] 78 N. E. 730.

20. Allis-Chalmers Co. v. Reilley [C. C. A.] 143 F. 298.

21. Rink v. Lowry [Ind. App.] 77 N. E. 967. Injury by reason of unsafe place to work. Power v. Beattie [Mass.] 80 N. E. 606. Injury from engine running without lights or warning signals. Caffi v. New York Cent., etc., R. Co., 49 Misc. 620, 96 N. Y. S. 835. City held liable for injury caused by defective appliances furnished by it to be used by plaintiff. McMullen v. New York, 110 App. Div. 117, 97 N. Y. S. 109. Injury from defective insulation of electric wire. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865.

22. Liable to contractor. Allis-Chalmers Co. v. Reilley [C. C. A.] 143 F. 298. Liable to contractor's employes. Rink v. Lowry [Ind. App.] 77 N. E. 967.

23. Ryan v. Irons, 114 App. Div. 165, 99 N. Y. S. 590. Employe of subcontractor injured by reason of defective flooring in building wherein he was working, such flooring not having been constructed by the subcontractor. Steele v. Grahl-Peterson Co. [Iowa] 109 N. W. 882. Contractor held liable for injury from defective contrivance convenient and commonly used for purpose for which plaintiff was using it, though not built for that purpose or for plaintiff's use. Loehring v. Westlake Const. Co., 118 Mo. App. 163, 94 S. W. 747.

24. Steele v. Grahl-Peterson Co. [Iowa] 109 N. W. 882.

25. Duhme v. Hamburgh-American Packet Co., 184 N. Y. 404, 77 N. E. 386; Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47.

26. Baltimore & O. S. W. R. Co. v. Slaughter [Ind.] 79 N. E. 186.

Note: Where one has a license to go upon another's premises, he takes the premises as he finds them, but when the owner or occupant by enticement, allurement, or inducement, whether express or implied, causes another to come upon his lands, he assumes the obligation of providing for the safety and protection of such person, and is charged with the duty to exercise due care not to injure him or allow him to be injured. Indiana, etc., R. Co. v. Barnhart, 115 Ind. 399, 16 N. E. 121; Railroad Co. v. Griffin, 100 Ind. 221, 50 Am. Rep. 783; Sweeny v. Railroad Co., 10 Allen [Mass.] 368, 87 Am. Dec. 644; Smith v. Docks Co., L. R. 3 C. P. 326; Carleton v. Steel Co., 99 Mass. 216; Railroad Co. v. Grush, 67 Ill. 262, 16 Am. Rep. 618; Doss v. Railway, 59 Mo. 27, 21 Am. Rep. 371; Elliott v. Pray, 10 Allen [Mass.] 378, 87 Am. Dec. 653; Strocton v. Staples, 59 Me. 95; Railroad Co. v. Hanning, 15 Wall. (U. S.) 649, 21 Law. Ed. 220; Bennett v. Railroad Co., 102 U. S. 577, 26 Law. Ed. 235; Hayes v. Railroad Co., 18 Rep. 193. See, also, Leary v. Railway, 78 Ind. 323, 41 Am. Rep. 572; Railroad v. Bingham, 29 Ohio St. 364, 23 Am.

sees by invitation are not bare licensees, and from the invitation arises a duty to exercise due care to have and keep the premises reasonably safe for the use for which the invitation is extended,[27] and also a duty to give warning of any peculiar danger,[28] but the owner or occupant is not an insurer of the safety of such licensees,[29] and his duty of care extends only to the ways, places and contrivances which the licensee is invited to use.[30]

Persons other than the owner may be liable to licensees,[31] and a trespasser who injures another through negligence cannot raise the question as to what duty the owner of the land owes to trespassers.[32] The question of ownership, however, does not affect the probability of the presence of trespassers as bearing upon the negligence of one not the owner.[33]

The question of liability to trespassing children is treated elsewhere.[34]

Liability for injuries to children.[35]—The fact that a trespasser is a child will not necessarily render the owner or occupant of premises liable for injury to him,[36] but under the doctrine known as the "turntable doctrine" the owner or occupant must exercise due care to protect children from the consequences of their inexperience and their youthful inclination to play with dangerous and attractive appliances

Rep. 751; Railway v. Goldsmith, 47 Ind. 43; Hargreaves v. Deacon, 25 Mich. 1; Nicholson v. Railroad Co., 41 N. Y. 525; Durham v. Musselman, 2 Blackf. [Ind.] 96, 18 Am. Dec. 133; Haunsell v. Smyth, 97 E. C. L. 731; Gilles v. Railway Co., 59 Pa. 129, 98 Am. Dec. 317; Southcote v. Stanley, 1 Hurl. & N. 247; Bolch v. Smith, 7 Hurl. & N. 736; Legge v. Newbold, 24 Eng. Law & Eq. 507; Burdick v. Cheadle, 26 Ohio St. 392, 20 Am. Rep. 267; Hardcastle v. Railroad Co., 4 Hurl. & N. 67.—See Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186.

27. Alabama Steel & Wire Co. v. Clements [Ala.] 40 So. 971. Persons in store for purpose of trade. Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165. Owner of store held liable to customer injured by negligent opening of swinging door by owner's servant. Paine v. Armour & Co. [Mass.] 80 N. E. 500. Where engineer invited boy into engine room. Houck v. Chicago & A. R. Co., 116 Mo. App. 559, 92 S. W. 738. Smelter company owed duty of care to servants of railroad company taking cars off of smelter company's siding by latter's invitation. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Where railroad track is constructed through premises of smelting company for its benefit, it must exercise ordinary care to avoid injurying employes of railroad company rightfully thereon. Consolidated Kansas City Smelting & Ref. Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181. Person delivering goods to defendant's tenant. Hamilton v. Taylor [Mass.] 80 N. E. 592. Owner held liable to prospective tenant who fell through trap door while examining premises. Boyd v. U. S. Mortg. & Trust Co. [N. Y.] 79 N. E. 999. Prospective tenant fell into elevator shaft. Wills v. Taylor [Mass.] 78 N. E. 774. Construction of railroad crossing is invitation to cross. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186.

28. Open elevator shaft. Wills v. Taylor [Mass.] 78 N. E. 774.

29. Bell v. Central Nat. Bank, 28 App. D. C. 580.

30. Customer injured while going beyond limits of storeroom. Shaw v. Goldman, 116 Mo. App. 332, 92 S. W. 165. Owner not liable for injuries sustained by plumber who went out of gateway which he was not authorized to use, climbed a ladder, and fell into well of ash elevator. Gilfillan v. German Hospital & Dispensary, 100 N. Y. S. 601. Injury caused by defective stairway which licensee was allowed but not invited to use. Ryan v. Irons, 114 App. Div. 165, 99 N. Y. S. 590. Defective ladder which licensee was allowed to use. Hotchkin v. Erdrich, 214 Pa. 460, 63 A. 1035. Contractor not liable to employe of subcontractor for injury caused by breaking of stairway which employe was allowed but not invited to use. Ryan v. Irons, 114 App. Div. 165, 99 N. Y. S. 590. In Hotchkin v. Erdrich, 214 Pa. 460, 63 A. 1035, the owner was held not liable for injury to employe of independent contractor caused by a defective ladder which such employe was allowed but not invited to use. The decision was based upon the doctrine of assumption of risk. Justices Elkin and Mestezolt dissented.

31. Defendant, the owner of electric plant, liable for injury to licensee on vacant lot, not owned by defendant, from live wire. Davoust v. Alameda [Cal.] 84 P. 760. One coming to see property owner on business by invitation stands in place of owner as regards injury from negligent management of adjoining premises. Cavanagh v. Block [Mass.] 77 N. E. 1027.

32. Plaintiff injured by live electric wire owned by defendant on vacant lot not owned by defendant. Davoust v. Alameda [Cal.] 84 P. 760.

33. Trespassing boy injured by electric wires strung on bridge pier. Graves v. Washington Water Power Co. [Wash.] 87 P. 956.

34. See next succeeding subdivision of this subsection.

35. See 6 C. L. 756, n. 34 et seq.

36. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12; Wilmot v. McPadden [Conn.] 65 A. 157. Owner not bound to anticipate presence of trespassing children. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692.

and structures,[37] regardless of whether the children are trespassers [38] and of the legality of the contrivance or structure.[39] The "turntable doctrine" is an exceptional one and does not apply to all cases of injury to children by machinery.[40] It does not apply where the machinery is in an enclosed building,[41] or where the machinery is not left unguarded.[42] On the other hand it is not confined to injuries from any particular kind of machinery,[43] and its application in any case depends upon the circumstances.[44] It does not apply where the defendant is not responsible for the lure or attraction,[45] or where the attractive thing is not the proximate cause of the injury.[46] In some states the doctrine is absolutely repudiated.[47]

Reasonable means may be employed to get rid of trespassing children without incurring liability for injuries sustained by a child in attempting to escape.[48]

§ 3. *Proximate cause.*[49]—A proximate cause is that from which the injury complained of results in natural and continuous sequence [50] unbroken by the intervention of any independent cause.[51] The intervening cause need not be wrongful

37. Kreiner v. Straubmiller, 30 Pa. Super. Ct. 609; Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813; McAllister v. Seattle Brew. & Malting Co. [Wash.] 87 P. 68.

38. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813. Child who plays with attractive appliance being used in a street is not such a trespasser as will preclude a recovery if he is injured. O'Leary v. Michigan State Tel. Co. [Mich.] 13 Det. Leg. N. 752, 109 N. W. 434.

39. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813.

40. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12.

41. Though no special guardman is provided. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12.

42. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12. Negligence held for jury where plaintiff, a child of seven, was injured while playing with snatch block being used by defendant in stringing telephone cable, defendant's servants being present and having notice of what plaintiff was doing. O'Leary v. Michigan State Tel. Co. [Mich.] 13 Det. Leg. N. 752, 109 N. W. 434.

43. McAllister v. Seattle Brew. & M. Co. [Wash.] 87 P. 68. Where defendant stacked iron beams in street. Louisville R. Co. v. Esselman, 29 Ky. L. R. 333, 93 S. W. 50. Pile of barrels on sidewalk. Kreiner v. Straubmuller, 30 Pa. Super. Ct. 609. Street cars left standing in street. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813. Foot log across defendant's bank near highway and used generally by public. Indianapolis Water Co. v. Harold [Ind. App.] 79 N. E. 542.

44. Age and capacity of child, nature of structure, and proximity to public places. Belt R. Co. v. Charters, 123 Ill. App. 322. Pumping machine in enclosed room remote from any residence and attended by competent engineer not within doctrine. Houck v. Chicago & A. R. Co., 116 Mo. App. 559, 92 S. W. 738. Not applicable where boy seven and one half years old entered defendant's premises on a Sunday, without authority, and pulled supports from under chimney of house being demolished by defendants thereby causing chimney to fall. Wilmot v. McPadden [Conn.] 65 A. 157. Proprietor of body of water so situated as to present no circumstances specially enticing or hazardous to children, whereby they are led by their infantile instincts to incur danger of drowning, is under no higher duty to infant trespassers or licensees than to adults. Akron Waterworks Co. v. Swartz, 8 Ohio C. C. (N. S.) 509. No duty upon landowner to protect trespassing children from obvious danger of a pond or body of water. Sullivan v. Hidekoper, 27 App. D. C. 154.

45. Boy injured by defendant's electric wire while climbing bridge pier to get at pidgeon nests. Graves v. Washington Water Power Co. [Wash.] 87 P. 956.

46. Doctrine applies only where the injury results from some part of the alluring thing or structure, or where the attractive device is so located that in yielding to its attraction the child, without the intervention of any other cause, is brought directly in contact with some extrinsic danger. Seymour v. Union Stock Yards & Transit Co., 224 Ill. 579, 79 N. E. 950. Doctrine not applicable where child playing on clay bank, alleged to be the attractive thing or device, left his play and ran alongside cars until he fell under, question of sloping sides of bank being eliminated from case by concession of counsel that plaintiff did not contend that it was defendant's duty to make yard where clay bank was situated a safe play ground. Id.

47. In case involving turntable. Walker's Adm'r v. Potomac, etc., R. Co., 105 Va. 266, 53 S. E. 113.

48. No liability where boy fell from wall on being warned off and threatened by watchman, in absence of any evidence that boy was unduly driven or harassed. Weatherbee v. Philadelphia, etc., R. Co., 214 Pa. 12, 63 A. 367.

49. See 6 C. L. 757.

50. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788.

51. An act of negligence which would not have produced the injury, but for the intervention of an independent cause which could not have been reasonably anticipated, but which turned aside the natural sequences of events and produced the result complained of, is not the proximate cause of such result, the intervening cause being the proximate cause. American Bridge Co. v. Seeds [C. C. A.] 144 F. 605. Defendant not liable for injury caused by fall of his fence overhanging street which was caused by crowd of trespassers climbing upon it. Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231. Negligence of shipper as to manner of pre-

or neglectful,[52] and it may be the acts of the plaintiff himself, in which case it is usually called contributory negligence,[53] though the distinction is sometimes recognized.[54] On the other hand, the proximate cause need not be the last in point of time,[55] nor the sole cause,[56] and may consist of several elements.[57] Existing conditions contributing to the negligent act and making it more dangerous do not constitute proximate cause.[58] It has been held that what one may reasonably anticipate is not decisive in determining the question of proximate cause,[59] the question in

paring sulphuric acid for shipment superseded by negligence of consignee in ordering plaintiff, an inexperienced hand, to unload it. Reddick v. General Chemical Co., 124 Ill. App. 31. Where plaintiff's driver would have driven him against defendant's car regardless of its negligent management. Kane v. Boston El. R. Co. [Mass.] 78 N. E. 485. Negligently turning stock loose not proximate cause of their injury by railroad train some distance from place of their escape. Mobile & O. R. Co. v. Christian Moerlein Brewing Co. [Ala.] 41 So. 17. Defendant not liable for fire started by licensee in building in which defendant kept inflammable materials. Beckham v. Seaboard Air Line R. Co. [Ga.] 56 S. E. 638. Where persons for whose actions defendant was not responsible caused brick to fall from defendant's chimney. Strasburger v. Vogel, 103 Md. 85, 63 A. 202.

52. Cavanagh v. Centerville Block Coal Co. [Iowa] 109 N. W. 303.

53. See post, § 4, Contributory Negligence.

54. White v. Wilmington City R. Co. [Del. Super.] 63 A. 931; Garrett v. People's R. Co. [Del. Super.] 64 A. 254. Contributory negligence involves fault or neglect, whereas one may be debarred from recovery on account of his own act, which though not neglectful, constitutes an independent, intervening cause which was not such as ought to have been foreseen by defendant. Cavanaugh v. Centerville Block Coal Co. [Iowa] 109 N. W. 303.

55. Houston & T. C. R. Co. v. Oram [Tex. Civ. App.] 15 Tex. Ct. Rep. 624, 92 S. W. 1029. Where disease results in unbroken connection from an injury, the cause of the injury is the proximate cause of the disease. Sallie v. New York City R. Co., 110 App. Div. 665, 97 N. Y. S. 491. Fact that the disease is a germ disease and that the germs do not enter the system by reason of the accident does not break the causal connection where they would not have developed except for the weakened condition of the system caused by the injury. Id.

56. Neal v. Rendall, 100 Me. 574, 62 A. 706; Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 99 S. W. 200; Gulf, C. & S. F. R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688; Baltimore & O. S. W. R. Co. v. Kleespies [Ind. App.] 76 N. E. 1015. Where injury would not have occurred but for defendant's negligent failure to construct guard-rails along highway, fact that it would also not have occurred but for fact that horse became frightened at some goats, does not relieve defendant. Strange v. Bodcaw Lumber Co. [Ark.] 96 S. W. 152. Where defendant electric company turned current into circuit knowing of a "ground" but not of another "ground" created by a stranger, the two "grounds" making a short circuit which caused the injury. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951. Negligence of third party in driving wagon against lumber pile negligently constructed by defendant. Snydor v. Arnold, 28 Ky. L. R. 1250, 92 S. W. 289. Concurrent negligence of defendant's motorman and flagman of train. Chicago City R. Co. v. Shaw, 220 Ill. 532, 77 N. E. 139. Defendant's negligence in constructing bar across railroad track, and railroad's negligence in failing to erect warning signals, concurred. Consolidated Kansas City Smelting & Ref. Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181. Proximate cause for jury where employe stumbled over block of wood and fell into unguarded machine. Bresewski v. Royal Brush & Broom Co., 8 Ohio C. C. (N. S.) 457. Where stranger opened unguarded switch and car running at excessive speed and negligently operated was wrecked, injuring passenger. Elgin, Aurora & S. Traction Co. v. Wilson, 120 Ill. App. 371. Where ship owner knew that workmen were using candles and electric lights in their work on an oil tank, but nevertheless put oil in tank without notifying workmen, and an explosion was caused by gas escaping through drill holes and being ignited by candles. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788. Where two acts of negligence are alleged and these unite in causing an injury, it is not a question of proximate or remote cause, but of a concurrence of two causes, for both of which the defendant may be responsible, and the one injured may allege and prove both if he can. Home Ins. Co. v. Pittsburgh, etc., R. Co., 4 Ohio N. P. (N. S.) 373. Common carrier's negligence mingling with act of God. Fentiman v. Atchison, etc., R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 500, 98 S. W. 939. Lightning concurring with defective electric lighting appliances. Quincy Gas & Elec. Co. v. Schmitt, 123 Ill. App. 647. Fire caused by lightning communicated by defendant's telephone wire. Byron Tel. Co. v. Sheets, 122 Ill. App. 6.

57. Where several acts are alleged to have contributed to the injury, a particular act is not to be ignored because it is not the sole cause. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504. Where several defects proved were so related as to lead to the conclusion that they interacted and cooperated together to produce a dangerous condition, it was held that the resultant condition was the proximate cause, and there was no uncertainty for failure to prove which of the defects caused the accident. Dunphy v. St. Joseph Stock Yards Co., 118 Mo. App. 506, 95 S. W. 301.

58. Frosty and slippery condition of ground which prevented plaintiff from holding hand car negligently precipitated against him. Hardt v. Chicago, etc., R. Co. [Wis.] 110 N. W. 427. Fact that weak physical condition contributed in measure to extent of injury is no defense. Foley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273.

59. Hudson v. Atlantic Coast Line R. Co.,

such case being merely whether the injury resulted from the defendant's negligence through a continuous and unbroken sequence without reference to whether the defendant could or should have anticipated the ultimate result,[60] but the weight of authority seems to be the other way.[61] It is not necessary, however, that the precise injury should have been foreseen.[62] The cause sine qua non is not necessarily the proximate cause.[63]

§ 4. *Contributory negligence.*[64]—Contributory negligence is the negligence of the plaintiff or person injured directly contributing to the injury as a concurring proximate cause thereof.[65] In most states it is a complete defense,[66] but in some

142 N. C. 198, 55 S. E. 103. Defining proximate cause with reference to what one should anticipate as the results of his action confounds negligence with proximate cause. Id.

60. Hudson v. Atlantic Coast Line R. Co., 142 N. C. 198, 55 S. E. 103.

61. Toledo Rys. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334; Bresewski v. Royal Brush & Broom Co., 8 Ohio C. C. (N. S.) 457; McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788; American Bridge Co. v. Seeds [C. C. A.] 144 F. 605; Marsh v. Great Northern Paper Co., 101 Me. 489, 64 A. 844; Johnston v. New Omaha Thomson-Houston Elec. Light Co. [Neb.] 110 N. W. 711; Bryant v. Beebe & Runyan Furniture Co. [Neb.] 110 N. W. 600; Houston & T. C. R. Co. v. Oram [Tex. Civ. App.] 15 Tex. Ct. Rep. 624, 92 S. W. 1029; Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231; Mailiefert v. Interborough Rapid Transit Co., 50 Misc. 160, 98 N. Y. S. 207; Byron Tel. Co. v. Sheets, 122 Ill. App. 6. Probable cause is "the efficient cause; that which acts first and produces the injury as a natural and probable result, under circumstances that he who is responsible for such cause as a person of ordinary intelligence and prudence ought reasonably to foresee that personal injury to another may probably follow from such person's conduct." Quoted in Feldschneider v. Chicago, etc., R. Co., 122 Wis. 423, 99 N. W. 1034, from Deisenrieter v. Kraus-Merkel Co., 97 Wis. 279, 72 N. W. 735, and approved in Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325. Proximate cause is that which naturally leads to, or produces, or contributes, directly to, producing a result such as might be expected by any reasonable and prudent man as likely to directly and naturally follow from the performance or nonperformance of any act. Moore v. Lanier [Fla.] 42 So. 462. If, in the exercise of ordinary foresight, and the light of the circumstances, the negligent escape of a powerful current of electricity from the wires of a power company to those of a telegraph company should have been anticipated by the former as likely to occur, such negligence will be deemed the proximate cause of the death or injury of an employe of the telegraph company occasioned by his contact, while in the performance of his duties, with his employer's wires so charged. Toledo R. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334.

Held proximate cause: Where workman in fitting iron pipe touched defectively insulated electric wire with wrench or pipe and was killed, the defective insulation was the proximate cause. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865. Defendant should have anticipated that explosion might occur where oil was put in unfinished tank, in which holes had to be drilled, without notifying workmen who were using candles and electric lights in connection with their work. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788.

Held not proximate cause: Allowing passenger to smoke in seat in which smoking was forbidden held not proximate cause of injury in rush caused by fire set to another passenger's dress by match negligently discarded by smoker. Fanizzi v. New York & Q. C. R. Co., 113 App. Div. 440, 99 N. Y. S. 281. Failure of bank teller to keep count of money in reserve chest not proximate cause of loss by theft by other employes when they did not know of such failure and it did not appear that earlier discovery of theft would have led to recovery of money. United States Fidelity & Guaranty Co. v. Des Moines Nat. Bank [C. C. A.] 145 F. 273. Failure of shipper to tie up bale of merchandise with cords strong enough to handle it with held not proximate cause of fall of teamster caused by cord breaking while he was pulling on it in attempt to move bale. Cronin v. American Linen Co., 147 F. 755.

62. Marsh v. Great Northern Paper Co., 101 Me. 489, 64 A. 844. If in the light of the circumstances results of the general character should have been anticipated by ordinary foresight as likely to occur, that would, so far as that question is concerned, be sufficient. Toledo R. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334. Fact that the particular act of concurrent negligence could not have been anticipated is immaterial. Harrison v. Kansas City Elec. Light Co., 195 Mo. 606, 93 S. W. 951.

63. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195. Obstruction across railroad track held proximate cause of injury to switchman struck thereby while on top of car, though accident might not have occurred if warning signals had been constructed. Consolidated Kansas City Smelting & Ref. Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181.

64. See 6 C. L. 760.

65. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968; Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220; Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 76 N. E. 1015; Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317; Birmingham R., L. & P. Co. v. Ryan [Ala.] 41 So. 616; Illinois Cent. R. Co. v. Bethea [Miss.] 40 So. 813. Negligence in boarding a moving car will not defeat recovery where it was safely accomplished and plaintiff was thereafter injured. Missouri, K. & T. R. Co. v. Barnes [Tex. Civ. App.] 15 Tex. Ct. Rep. 524, 95 S. W. 714. The fact that the plaintiff was violating an ordinance when injured will not prevent a recovery unless such vio-

jurisdictions it is never an absolute defense in any case,[67] and in certain cases it is no defense at all.[68] It is a defense in an action for injuries caused by violation of statutory duties, unless the statute plainly excludes such defense.[69] Contributory negligence is not the same as assumed risk,[70] nor is it the same as where the injury is caused solely by the negligence of the plaintiff or the person injured.[71] These distinctions, however, being usually unimportant so far as the effect is concerned, are often disregarded, and the negligence of the plaintiff or the person injured is usually classed and treated as contributory negligence, regardless of whether it was the sole or only a contributing cause. In some cases, however, the latter distinction is of prime importance.[72] A licensee must exercise due care for his own safety.[73]

Due care by a plaintiff[74] or person injured is measured by the general standard of due care,[75] and the care which one must exercise for his own safety is correlative to the duty which others owe to him, and he may to a certain extent presume that such duties will be performed.[76] Lack of due care, or contributory neg-

lation proximately contributed to or caused accident. Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827. Intoxication at time of injury will not preclude recovery unless it was direct or contributory cause of injury. Black v. New York, etc., Co. [Mass.] 79 N. E. 797.

66. Simeone v. Lindsay [Del.] 65 A. 778; Weldon v. People's R. Co. [Del.] 65 A. 589; Garrett v. People's R. Co. [Del.] 64 A. 254; Graboski v. New Castle Leather Co. [Del.] 64 A. 74; White v. Wilmington City R. Co. [Del.] 63 A. 931; Robinson v. Huber [Del.] 63 A. 873; Hoffman v. Philadelphia Rapid Transit Co., 214 Pa. 87, 63 A. 409; Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220; Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 76 N. E. 1015; Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909; Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47. Where the injury is caused by the concurrent negligence of plaintiff and defendant, the plaintiff cannot recover, as the law will not weigh and balance the degree of negligence attributable to each party. Robinson v. Huber [Del.] 63 A. 873. Violation of a street car speed ordinance affords no cause of action where plaintiff was himself guilty of contributory negligence. Campbell v. St. Louis Transit Co. [Mo. App.] 99 S. W. 58. Party fixing and adjusting planks himself by which he loaded wagon from grain elevator could not hold proprietor of elevator responsible for their slipping. Elvey v. Powers, 191 Mass. 588, 77 N. E. 1152.

67. See 4 C. L. 775.

68. See post this section, subdivision Comparative Negligence.

69. Schutt v. Adair [Minn.] 108 N. W. 811.

70. Contributory negligence is based on lack of care while the doctrine of assumed risk is based on or at least arises out of contract and is but an application of the maxim volenti non fit injuria. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244.

71. See ante, § 3, Proximate Cause.

72. In determining whether capacity and intelligence of child is involved. Brown v. Rockwell Canning Co. [Iowa] 110 N. W. 12. See post this section, Children.

73. Rich v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79; Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47; Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569; Brown v. Thomas Blackwell Coal & Mining Co. [Ky.] 99 S. W. 299; Rosenthal v. United Dressed Beef Co., 101 N. Y. S. 532.

74. See 6 C. L. 761.

75. See ante, § 1, Definitions; § 2 A, Personal Conduct in General. One handling dangerous instrumentalities or agencies will be held to the degree of care imposed on all who intentionally deal with dangerous things, as when telephone lineman is handling electric light wire on same pole. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

76. Party driving on street car track. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945. Workman repairing elevator was promised by operator that elevator would not be moved. Rink v. Lowry [Ind. App.] 77 N. E. 967. Person may, in absence of notice to contrary, assume that street is reasonably safe to travel on. City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132. Person ordinarily entitled to presume that sidewalk is safe. Pyke v. Jamestown [N. D.] 107 N. W. 359. That driver of livery vehicle will exercise due care and is competent. Cotton v. Willmar & S. F. R. Co. [Minn.] 109 N. W. 835. See post this section, Imputed Negligence. One may presume compliance with municipal ordinance in matter of insulation and voltage of electric wires. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. Employe of one contractor had right to assume that bridge upon which he was directed to drive by another contractor who had control thereof was safe. Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345. Employe of independent contractor working in room light enough to work in, but not to inspect insulation of electric wires, had right to assume that wires were properly insulated. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865. Employe of subcontractor may, in absence of obvious dangers, presume that contractor has provided safe place to work. Steele v. Grahl-Peterson Co. [Iowa] 109 N. W. 882. Person going on premises by invitation may presume that they are reasonably safe. Wills v. Taylor [Mass.] 78 N. E. 774. Plaintiff had right to assume that defendant had not been guilty of negligence in constructing windmill pursuant to contract with plaintiff. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. Employe of independent contractor held entitled to drive according to signal from

ligence, may consist of failure to use one's senses to avoid danger,[77] failure to take proper precautions,[78] or unnecessary exposure to obvious danger.[79] It involves some knowledge of the conditions and circumstances,[80] and some conception of the danger likely to result from the non-observance of due care;[81] but mere knowledge of the danger and opportunity to observe and avoid it are not conclusive of the question, but only circumstances to be considered by the jury.[82] Ignorance of danger, in order to prevent the application of the doctrine of contributory negligence, must be not only actual but excusable.[86] Intoxication does not necessarily constitute lack of due care but is a fact to be considered.[84] The same care is not required in cases of sudden emergencies as where there is time to deliberate,[85] the test being whether he acted as an ordinarily prudent man would have acted under the same circumstances,[86] and mere error of judgment in attempting to escape sudden peril does not necessarily constitute contributory negligence.[87] Even acting wildly under such

one accustomed to give directions to workman on premises. Power v. Beattie [Mass.] 80 N. E. 606. Where plaintiff and fellow-servants were rolling a heavy wheel onto a car under the direction of a foreman, plaintiff was not guilty of contributory negligence as a matter of law in taking hold in such manner as to be unable to get away when it was dropped, since the foreman may have been negligent in giving the order before he had time to get out of the way. Louisville & N. R. Co. v. Metcalf, 29 Ky. L. R. 870, 96 S. W. 525. A patron of a theater may assume in the absence of warning that it is safe to follow the usher and is not guilty of negligence in failing to look for holes in the carpet. Nephler v. Woodward [Mo.] 98 S. W. 488.

77. Failure to see uncovered keg of blasting powder near blacksmith's forge. Brown v. Thomas Blackwell Coal & Mining Co. [Ky.] 99 S. W. 299. In crossing car track. Blackwell v. Old Colony St. R. Co. [Mass.] 79 N. E. 335. Failure to look before crossing railroad track. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909. See Railroads, 6 C. L. 1194; Street Railways, 6 C. L. 1556.

78. Running street car over road crossing at excessive speed causing collision with a steam roller known to be working in vicinity of crossing. Hanson v. Whalen, 110 App. Div. 793, 97 N. Y. S. 237. Mechanic in leaving premises in dark knowingly attempted to walk across top of ash elevator well without ascertaining whether well was open. Gilfillan v. German Hospital & Dispensary, 100 N. Y. S. 601.

79. Walking under iron bed plate suspended from shears made of poles. Wiethoff v. Shedden Cartage Co., 142 Mich. 264, 12 Det. Leg. N. 732, 105 N. W. 748. Standing on railroad track. Coy v. Missouri Pac. R. Co. [Kan.] 86 P. 468. Stopping on street car track. Ft. Smith L. & T. Co. v. Flint [Ark.] 99 S. W. 79.

80. Hobbs v. Blanchard & Son Co. [N. H.] 65 A. 382; Wallis v. St. Louis, etc., R. Co., 77 Ark. 556, 95 S. W. 446; St. Louis Southwestern R. Co. v. Plumlee [Ark.] 95 S. W. 442; Abby v. Wood [Wash.] 86 P. 558. Where one is negligent by reason of exposing himself to one danger, it does not follow that he is negligent as to another danger arising from the intervention of some act of which he had no notice. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280.

81. Knowledge of explosive character of dynamite. Hobbs v. Blanchard & Son Co. [N. H.] 65 A. 382. Workman drilling hole in oil tank by candle light held not charged with knowledge that crude oil in tank gave off gas which might come through drill hole and be ignited by candle. McGill v. Michigan S. S. Co., 144 F. 788. Mere knowledge of facts not contributory negligence without realization of the danger to which one exposes himself. Choctaw, etc., R. Co. v. Jones, 77 Ark. 367, 92 S. W. 244.

82. Cutting v. Shelburne [Mass.] 78 N. E. 752. Forgetfulness not necessarily contributory negligence. Pyke v. Jamestown [N. D.] 107 N. W. 359. Brakeman forgot low bridge while absorbed in responding to sudden call of duty. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Fact that workman knew he was working in a dangerous place. Ryan v. St. Louis Tr. Co., 190 Mo. 621, 89 S. W. 865. Workman injured by tram car falling on him while he was removing a tram car from ravine under bridge from which it had fallen not charged with contributory negligence in working under bridge without taking precautions to prevent other cars from crossing bridge while he was at work in ravine. Viou v. Brooks-Scanlon Lumber Co. [Minn.] 108 N. W. 891. Knowledge of danger from blow-off steam pipe on edge of lake did not necessarily charge boy fishing in lake with knowledge of danger from steam. Ambros v. Cedar Rapids Elec. L. & P. Co. [Iowa] 108 N. W. 540.

83. Williams v. Choctaw, etc., R. Co. [C. C. A.] 149 F. 104.

84. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

85. Louisville & W. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 1113, 91 S. W. 685; Southern R. Co. v. Stutts [C. C. A.] 144 F. 948.

86. Hess v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 220; Louisville & W. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 1113, 91 S. W. 685.

87. Acker, Merrall & Condit v. Stern, 49 Misc. 650, 97 N. Y. S. 1041; Cudahy Packing Co. v. Wesolowski [Neb.] 106 N. W. 1007; Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Turning horse onto street railroad track upon suddenly discovering red lights in road in front. Palmer v. Larchmont Horse R. Co., 112 App. Div. 341, 98 N. Y. S. 567. One will not be held guilty of contributory negligence if in his effort to avoid

circumstances is not necessarily fatal to a recovery;[88] but unreasonable fright on account of unreal danger will not excuse negligence in exposing one's self to a real danger.[89] One may adopt a perilous alternative in a sudden emergency to prevent injury to another and yet not be guilty of negligence.[90]

Children.[91]—A child so young as not to be able to appreciate a danger is not chargeable with contributory negligence in not avoiding it.[92] Children of certain ages are sometimes declared absolutely incapable of exercising care and hence not chargeable with the consequences of a failure to exercise it,[93] and a similar prima facie presumption is indulged in favor of children between certain ages,[94] but the general rule is that no presumption applicable to all cases will be indulged,[95] age being material only as bearing upon the question of capacity.[96] Under this rule the duty of the child is commensurate with its maturity and capacity in connection with the circumstances of his injury,[97] and is measured by the care which a child of the same age, capacity, intelligence and experience, would exercise under the same circumstances.[98] Mere capacity to know danger is not necessarily sufficient to make a child guilty of contributory negligence in doing a thing which would be negligence in one of mature age.[99] Where the acts of a child are the sole proximate cause of his injury and not merely a contributing cause, the question of his capacity is not involved.[1] The contributory negligence of children is usually a question for the jury.[2]

Comparative negligence.[3]—The doctrine of comparative negligence has generally been repudiated,[4] but it is held that contributory negligence is no defense in

immediate danger, in the exigency of the moment, suddenly and without time to consider, puts himself in the way of other perils. Simeone v. Lindsay [Del.] 65 A. 778. Where one riding along a public highway is put in position of danger by top of vehicle coming in contact with low telephone wire, question whether she jumped or was thrown from the buggy is immaterial. Jacks v. Reeves [Ark.] 95 S. W. 781.

88. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317.

89. Stepping in front of moving car because gong was sounded on motionless car. Blackwell v. Old Colony St. R. Co. [Mass.] 79 N. E. 335.

90. McCallion v. Missouri Pac. R. Co. [Kan.] 88 P. 50.

91. See 6 C. L. 764.

92. Shellaberger v. Fisher [C. C. A.] 143 F. 937.

93. Four years old. Rosenberg v. Zeitchik, 101 N. Y. S. 591. Two years old. Richardson v. Nelson, 123 Ill. App. 550. Under seven. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583.

94. Between seven and fourteen. Birmingham R., L. & P. Co. v. Jones [Ala.] 41 So. 146.

95. Child five years old not relieved, as matter of law, from duty to exercise care while playing in street. Wabnich v. Dry Dock, etc., R. Co., 112 App. Div. 4, 98 N. Y. S. 38. No presumption that a child over seven years old is incapable of contributory negligence. Wabash R. R. Co. v. Jones, 121 Ill. App. 390.

96. Negligence of child over seven years old not determined from age alone. Wabash R. R. Co. v. Jones, 121 Ill. App. 390. Evidence held to show that boy twelve years old was guilty of contributory negligence in standing on railroad track and not using such care as he was capable of to avoid injury. Coy v. Missouri Pac. R. Co. [Kan.] 86 P. 468.

97. Belt R. Co. v. Charters, 123 Ill. App. 322. Question of child's negligence depends upon age, capacity, experience and intelligence and the circumstances of the injury. Wabash R. R. Co. v. Jones, 121 Ill. App. 390; Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827; United Breweries Co. v. Bass, 121 Ill. App. 299. Five year old child held not capable of appreciating danger of operating automatic electric elevator. Shellaberger v. Fisher [C. C. A.] 143 F. 937.

98. Illinois Cent. R. Co. v. Johnson, 221 Ill. 42, 77 N. E. 592; United Breweries Co. v. O'Donnell, 124 Ill. App. 24; Illinois Cent. R. Co. v. Johnson, 123 Ill. App. 300; Wabash R. R. Co. v. Jones, 121 Ill. App. 390; St. Louis, etc., R. Co. v. Sparks [Ark.] 99 S. W. 73; Wise v. St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Louisville R. Co. v. Esselman, 29 Ky. L. R. 333, 93 S. W. 50; Buscher v. New York Transp. Co., 114 App. Div. 85, 99 N. Y. S. 673. Child eight years old held guilty of contributory negligence in boarding elevator while in motion. Rothschild & Co. v. Levy, 118 Ill. App. 78.

Contra: Standard is not the care of the average child of the same ages, but it is the care which the particular child, considering his age, capacity, experience, etc., is capable of exercising. See Civ. Code 1895, § 2901. Herrington v. Macon, 125 Ga. 58, 54 S. E. 71.

99. Birmingham R., L. & P. Co. v. Jones [Ala.] 41 So. 146.

1. Johnston v. New Omaha Thomson-Houston Elec. Light Co. [Neb.] 110 N. W. 711; Brown v. Rockwell Canning Co. [Iowa] 110 N. W. 12.

2. See post, § 5, Actions, subd. Questions of Law and Fact.

3. See 6 C. L. 764.

4. While doctrine of comparative negligence no longer prevails in Illinois, it does

an action for willful injury,[5] or where negligence is so wanton or reckless as to amount to willfulness.[6]

Last clear chance doctrine.[7]—The doctrine of the last clear chance is merely a phase of the doctrine of proximate cause,[8] and applies where the negligence of the defendant intervenes between that of the plaintiff and the accident, thus constituting an independent and efficient cause to the exclusion of the plaintiff's negligence,[9] or where the negligence of the plaintiff intervenes in a similar way between the accident and the negligence of the defendant.[10] It does not apply so as to exclude the defense of contributory negligence where the plaintiff's peril was not discovered by the defendant in time to avoid the accident,[11] and, a fortiori, it does not apply where the defendant neither knew nor could have known of such peril by the exercise of due care.[12] It does not apply where the negligence of both parties is contemporaneous and concurring.[13] Contributory negligence occurring after the defendant's last act of negligence will bar a recovery,[14] but in such case the plaintiff's subsequent negligence must have been with knowledge of his peril.[15]

Imputed negligence.[16]—Except under the doctrine of respondeat superior, the negligence of one person will not be imputed to another.[17] Where, therefore, this

not follow that plaintiff cannot recover though guilty of "slight" negligence, where he was exercising due care under the circumstances. Malott v. Schlosser, 119 Ill. App. 259.

5. La Fitte v. Southern R. Co., 73 S. C. 467, 53 S. E. 755; Shinn v. Smith [Ark.] 97 S. W. 52.

6. Garth v. North Alabama Traction Co. [Ala.] 42 So. 627; Birmingham R., L. & P. Co. v. Ryan [Ala.] 41 So. 616; Birmingham R., L. & P. Co. v. Jones [Ala.] 41 So. 146.

7. See 6 C. L. 765.

8. Black v. New York, etc., R. Co. [Mass.] 79 N. E. 797.

9. Simeone v. Lindsay [Del.] 65 A. 778; Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 628, 91 S. W. 365; Birmingham R., L. & P. Co. v. Ryan [Ala.] 41 So. 616; Johnson v. Center [Cal. App.] 88 P. 727; Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738; Pendleton v. Chicago City R. Co., 120 Ill. App. 405. Person killed by railroad train. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144. Where plaintiff was intoxicated. Black v. New York, etc., R. Co. [Mass.] 79 N. E. 797. Rowboat run down by tug. Philadelphia & R. R. Co. v. Klutt [C. C. A.] 148 F. 818. Boy run over by wagon. Star Brewery Co. v. Houck, 222 Ill. 348, 78 N. E. 827. Plaintiff negligently fell down and was struck by truck propelled by defendant's servant. Gray v. Weir, 113 App. Div. 479, 99 N. Y. S. 252. Boy injured while getting off engine after having been warned by engineer to get off Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469. Failure to cease blowing whistle and to stop steam roller after discovering that plaintiff's horse was frightened and unmanageable. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440. Railroad company liable for injury caused by derailment which was caused by washout during unprecedented flood, where company knew of the washout and could have prevented the derailment by exercise of due care. Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355.

10. Where owner of boat knew of defendant's negligence in tying boat to stump, but could by exercise of due care have prevented it from being sunk. Shinn v. Smith [Ark.] 97 S. W. 52. See ante, § 3, Proximate Cause.

11. Daniels v. Carney [Ala.] 42 So. 452. Defendant's duty arises only upon discovery of plaintiff's peril. International & G. N. R. Co. v. Ploeger [Tex. Civ. App.] 96 S. W. 56. Defendant must have had actual knowledge of plaintiff's dangerous situation. Sauer v. Eagle Brewing Co. [Cal. App.] 84 P. 425. A railway company is not liable for the injury of one who was guilty of contributory negligence, but whose peril might, by the exercise of due care, have been seen by the engineer or motorman in time to have prevented the accident. Northern Ohio Traction Co. v. Drown, 7 Ohio C. C. (N. S.) 549. Not applicable where engineer used every possible effort to avert accident after discovering that man on track was apparently unconscious of approach of train. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 N. W. 446. Where there was nothing to apprise motorman that one standing upon tracks was deaf and did not hear signals until he was within six or eight feet of him, when he redoubled his efforts to warn him, he was not negligent in failing to sooner discover plaintiff's peril or in his efforts to avoid injury thereafter. Bennett v. Metropolitan St. R. Co. [Mo. App.] 99 S. W. 480.

12. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569.

13. Sims v. St. Louis, etc., R. Co., 116 Mo. App. 572, 92 S. W. 909. Doctrine has no application where the plaintiff voluntarily places himself in a place of danger from which he has present means of escape, but nevertheless continues there without exercising such precautions as an ordinarily prudent man would exercise Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47.

14. Averment that negligence counted on arose after discovery of plaintiff's peril will not preclude defense of plaintiff's subsequent contributory negligence. Johnson v. Birmingham R., L. & P. Co. [Ala.] 43 So. 33.

15. Johnson v. Birmingham R., L. & P. Co. [Ala.] 43 So. 33.

16. See 6 C. L. 765.

17. C., P. & S. L. R. Co. v. Condon, 121 Ill. App. 440. Where a tug is responsible for

doctrine cannot be invoked, the negligence of the driver of a vehicle will not be imputed to his companion,[18] although both parties were engaged in a common enter-

the navigation of a tow, as where the latter is lashed to the side of the former, the negligence of the tug is not imputable to the tow. Rockland Lake Trap Rock Co. v. Lehigh Valley R. Co., 101 N. Y. S. 222.

18. Negligence of driver of private vehicle not imputable to guest or companion. Shultz v. Old Colony St. R. Co. [Mass.] 79 N. E. 873; Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553; Loso v. Lancaster [Neb.] 109 N. W. 752; Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860; Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421; Bresee v. Los Angeles Traction Co. [Cal.] 85 P. 152; C., P. & St. L. R. Co. v. Condon, 121 Ill. App. 440; Chicago Union Traction Co. v. Leach, 117 Ill. App. 169. Compare Kane v. Boston El. R. Co. [Mass.] 78 N. E. 485. Negligence of driver of livery team not imputed to passenger. Cotton v. Willmar & S. F. R. Co. [Minn.] 109 N. W. 835; Louisville & W. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 1113, 91 S. W. 685. Negligence of driver of hose wagon not imputed to fireman riding on wagon. McBride v. Des Moines R. Co. [Iowa] 109 N. W. 618. Common enterprise doctrine has no application in such case. Id. Negligence of driver of tallyho in crossing car tracks not imputable to passenger on seat seven feet from ground and four seats back of driver, passenger being unaware of danger until too late to give effective warning. Denver City Tramway Co v. Norton [C. C. A.] 141 F. 599. One not in a position to give orders is not bound by the requests of his copassengers and hosts that a high rate of speed be maintained by the chauffeur in the absence of acquiescence therein. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749.

Note: The doctrine of imputed negligence, first applied in Thorogood v. Bryan, 8 C. B. 115, has been the subject of considerable dispute and conflict at various times and in different jurisdictions. This case, decided in 1849, was overruled in England in The Bernina, 12 P. D. 58; Mills v. Armstrong, L. R. 13 App. Cas. 1. It was cited as authority in Allyn v. Boston & H. R. Co., 105 Mass. 77, but distinctly repudiated in Randolph v. O'Riordan, 155 Mass. 331, 29 S. E. 582. It was followed in Wisconsin at an early date and is still followed there, no distinction being made between a passenger of a common carrier and one riding gratuitously as guest of the driver. Hoofe v. Fulton, 29 Wis. 296, 9 Am. Rep. 568; Prideaux v. Mineral Point, 43 Wis. 513, 28 Am. Rep. 558; Otis v. Janesville, 47 Wis. 422, 2 N. W. 783; Olson v. Winnipeg, 123 Wis. 479, 102 N. W. 30. So, also, in Michigan the rule is that, where one of years of discretion enters a private conveyance of another, he is chargeable with the contributory negligence of such other. Lake Shore, etc., R. Co. v. Miller, 26 Mich. 274; Schindler v. Railway Co., 87 Mich. 410, 49 N. W. 670; Cowan v. Railway Co., 84 Mich. 583, 48 N. W. 166. In Mullens v. Owosso, 100 Mich. 103, 58 N. W. 663, 23 L. R. A. 693, 43 Am. St. Rep. 436, however, there was a vigorous dissenting opinion. This rule is also limited so as to apply only to adults, the distinction being based upon the fiction that in such case the relation of principal and agent exists, and hence an infant too young to appoint an agent does not come within the rule, and where there is no evidence that either party supposed the relation to exist as a matter of fact, the doctrine does not apply. Humpel v. Detroit, etc., R. Co., 138 Mich. 1, 100 N. W. 1002, 110 Am. St. Rep. 275. And the rule has further been limited so as not to apply where one himself in the exercise of due care riding upon a fire engine was injured by the concurring negligence of the driver and a motorman (Murray v. Boston Ice Co., 180 Mass. 165, 61 N. E. 1001; McKernan v. Detroit Citizens' St. R. Co., 138 Mich. 519, 101 N. W. 812, 68 L. R. A. 347), nor does it apply to a passenger injured by concurring negligence of his carrier and another carrier (Cuddy v. Horn, 46 Mich. 596, 602, 10 S. W. 32, 41 Am. Rep. 178). The authority of the Wisconsin and Michigan cases prevailed upon the Montana courts to adopt the same rule. Whittaker v. Helena, 14 Mont. 124, 43 Am. St. Rep. 621. In Vermont the contributory negligence of the driver is imputable to his guest. Carlisle v. Sheldon, 38 Vt. 440. The early cases in Pennsylvania follow Thorogood v. Bryan, 8 C. B. 115. See Lockhart v. Licthenthaler, 46 Pa. 151; Phila., etc., R. Co. v. Boyer, 97 Pa. 91. But these cases have been overruled. Dean v. Pennsylvania R. Co., 129 Pa. 514, 18 A. 718, 6 L. R. A. 143, 15 Am. St. Rep. 733; Bunting v. Hogsett, 139 Pa. 363, 21 A. 31, 12 L. R. A. 268, 23 Am. St. Rep. 192; Little v. Cent. Dist. & P. Tel. Co., 213 Pa. 229, 62 A. 848. The rule has never been applied in Pennsylvania to a case where a guest is in the exercise of due care on his own part and in such case the plaintiff is allowed to go to the jury. Carlisle v. Brisbane, 113 Pa. 544, 6 A. 372, 57 Am. Rep. 483; Carr v. Easton, 142 Pa. 139, 21 A. 822. In Allyn v. Boston & Al. R. Co., 105 Mass. 77, it was held that where one riding in a vehicle with another used no care for his own safety, he was bound to show due care on the part of his companion to whom he had intrusted himself. In Randolph v. O'Riordan, 155 Mass. 331, 29 S. E. 582, it was held that a hack driver's negligence would not be imputed to a passenger injured in a collision with another carriage, and the doctrine of Thorogood v. Bryan, 8 C. B. 115, was repudiated. Little v. Hackett, 116 U. S. 366, 375, 29 Law. Ed. 652, was approved, and Allyn v. Boston & A. R. Co., 105 Mass. 77, was distinguished. In Murray v. Boston Ice Co., 180 Mass. 165, 61 N. E. 1001, it was held that where one trusts the sole management of a vehicle in which he is riding with another to such other person, he must show due care on the part of the latter; but the court declared that it did not mean to give the Allyn case any further sanction than it then had. In Yarnold v. Bowers, 186 Mass. 396, 71 N. E. 799, the doctrine of the Allyn case was applied to a case where two were riding in same rowboat which collided with steamer. In Knox v. Boston El. R., 185 Mass. 602, 606, 71 N. E. 90; Evensen v. Lexington & B. St. R. Co., 187 Mass 77, 72 N. E. 355, and Halloran v. Worcester Consol. St. R. Co., 192 Mass. 104, 78 N. E. 381, the plaintiff based his own case upon due care on part of driver,

thus adopting the latter's acts as his own. In Creavin v. Newton St. R., 176 Mass. 529, 57 N. E. 994; and La Blanc v. Lowell, etc., St. R., 170 Mass. 564, 49 N. E. 927, the question of indentity did not arise, as there was evidence in each case that plaintiff exercised due care. The unbroken line of authority in all the other states is opposed to the doctrine of imputed negligence, the general rule being that where the injured person and the driver do not stand in the relation of master and servant, passenger and carrier, or parent and child, and where the plaintiff is himself in the exercise of due care, the concurring negligence of the driver is not imputable to the plaintiff so as to preclude a recovery from a third person. Elyton Land Co. v. Mingen, 89 Ala. 521, 7 So. 666; Birmingham R. & Elec. Co. v. Baker, 132 Ala. 507, 31 So. 618; Dormus v. R. Co., 97 Ala. 327, 12 So. 111; Colorado & S. R. Co. v. Thomas, 33 Colo. 517, 81 P. 801, 70 L. R. A. 681; Hot Springs St. R. Co. v. Hildseth, 72 Ark. 572, 82 S. W. 245; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 492, 25 N. E. 799, 10 L. R. A. 696, 23 Am. St. Rep. 688; W., St. L. & P. R. Co. v. Shacklett, 105 Ill. 364, 44 Am. Rep. 791; West Chicago St. R. Co. v. Dougherty, 209 Ill. 241, 70 N. E. 586; Christy v. Elliott, 216 Ill. 31, 74 N. E. 1035, 1 L. R. A. (N. S.) 215, 108 Am. St. Rep. 196; Knightstown v. Musgrove, 116 Ind. 121, 18 N. E. 452, 9 Am. St. Rep. 827; Michigan City v. Boeckling, 122 Ind. 39, 23 N. E. 518; Louisville R. W. Co. v. Creek, 130 Ind. 139, 29 N. E. 481, 14 L. R. A. 733; Chicago, etc., R. Co. v. Spilker, 134 Ind. 380, 33 N. E. 280, 34 N. E. 218; Lake Shore, etc., R. v. McIntosh, 140 Ind. 461, 38 N. E. 467; Indianapolis St. R. Co. v. Johnson, 163 Ind. 518, 72 N. E. 571; Nesbit v. Garner, 75 Iowa, 314, 39 N. W. 516, 1 L. R. A. 152, 9 Am. St. Rep. 486; Leavenworth v. Hatch, 57 Kan. 57, 45 P. 65, 57 Am. St. Rep. 309; Cahill v. Cincinnati, etc., R. Co., 92 Ky. 355, 18 S. W. 2; Louisville R. Co. v. Anderson, 25 Ky. L. R. 666, 76 S. W. 153; State v. Boston & M. R. Co., 80 Me. 430, 15 A. 36; Neal v. Rendall, 98 Me. 69, 56 A. 209, 63 L. R. A. 668. But in Maine the general rule that the negligence of the driver is not imputable to the guest is subject to an exception based on statute where the action is for injuries caused by defective highways. Barnes v. Rumford, 96 Me. 315, 52 A. 844. In Minnesota the rule is that in the absence of the relation of master and servant, parent and child, or guardian and ward, the negligence of one party will not be imputed to another where the latter neither authorized the conduct of the former nor participated therein, nor had the right or power to control it; but where several unite in the joint prosecution of a common purpose under such circumstances that each has authority, express or implied, to act for all with regards to the means or agency employed to effect such purpose, the negligence of one in the management of such means or agency will be imputed to the others. Koplitz v. St. Paul, 86 Minn. 373, 90 N. W. 794, 58 L. R. A. 74; Teal v. St. Paul City R. Co., 96 Minn. 379, 104 N. W. 945. The general rule against imputation of negligence of driver to one riding with him prevails in Missouri, Maryland, New Hampshire and California. Dickson v. Mo. P. R. Co., 104 Mo. 491, 16 S. W. 381; Holden v. Mo. R. Co., 177 Mo. 456, 76 S. W. 973; Johnson v. St. Joseph, 96 Mo. App. 663, 71 S. W. 106, 9 Am. St. Rep. 375; Baltimore, etc., R. Co. v. State, 79 Md. 335, 29 A. 518, 47 Am. St. Rep. 415; Consolidated Gas Co. v. Getty, 96 Md. 683, 54 A. 660, 94 Am. St. Rep. 603; United Rys. & Elec. Co. v. Beidler, 98 Md. 564, 56 A. 813; Noyes v. Boscawen, 64 N. H. 361, 10 A. 690, 10 Am. St. Rep. 410; Bresee v. Los Angeles Traction Co. [Cal.] 85 P. 152. The same doctrine is also supported in a long line of decisions in New York, beginning with Robinson v. N. Y. Cent., etc., R. Co., 66 N. Y. 11, 23 Am. Rep. 1. In Brickell v. New York, etc., R. Co., 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648, the rule is held to apply only where the relation of master and servant does not exist, and where the passenger is so situated as not to be in a position to discern the danger and warn the driver. But generally in New York the guest has not been debarred from recovery as a matter of law. See Robinson v. Metropolitan St. R. Co., 91 App. Div. 158, 86 N. Y. S. 442, afd. in 179 N. Y. 593, 72 N. E. 1150; Van Vranken v. Clifton Springs, 86 Hun, 67, 33 N. Y. S. 329; Morris v. Metropolitan St. R. Co., 63 App. Div. 78, 71 N. Y. S. 321; Dyer v. Erie R. Co., 71 N. Y. 228; Masterson v. New York, etc., R. Co., 84 N. Y. 247, 38 Am Rep. 510; Phillips v. New York, etc., R. Co., 127 N. Y. 657, 27 N. E. 978; Strauss v. Newburgh Elec. R. Co., 6 App. Div. 264, 39 N. Y S. 998; Bailey v. Jourdan, 18 App. Div. 387, 46 N. Y. S. 399; Mack v. Shawangunk, 90 N. Y. S. 760. The same general rule applies in Mississippi. Mississippi R. Co. v. Davis, 69 Miss. 444, 13 So. 693. See Illinois C. R. Co. v. McLeod, 78 Miss. 334, 29 So. 76, 52 L. R. A. 954, 84 Am. St. Rep. 630. Negligence of driver not imputed to voluntary passenger in New Jersey. Consolidated Traction Co. v. Hoemack, 60 N. J. Law, 456, 38 A. 684; Noonan v. Consolidated Traction Co., 64 N. J. Law, 579, 46 A. 770; Thorogood v. Bryan is discredited in New Jersey. New York, etc., R. Co. v. New Jersey Elec. R. Co., 60 N. J. Law, 338, 38 A. 828; New York, etc., R. Co. v. Steinbrenner, 47 N. J. Law, 161, 54 Am. Rep. 126. Doctrine of imputed negligence has also been repudiated in North Carolina and Ohio. Duval v. Railway Co., 134 N. C. 331, 46 S. E. 750, 65 L. R. A. 722, 101 Am. St. Rep. 830; Crampton v. Ivie, 126 N. C. 894, 36 S. E. 351; Transfer Co. v. Kelly, 36 Ohio St. 86, 38 Am. Rep. 558; Cincinnati St. R. Co. v. Wright, 54 Ohio St. 181, 43 N. E. 688, 32 L. R. A. 340. In Georgia, North Dakota, Virginia, Tennesee, Texas, Delaware, Washington, and Nebraska, the negligence of the driver is not imputed to a guest or companion himself in the exercise of due care. Metropolitan St. R. Co. v. Powell, 89 Ga. 601, 16 S. E. 118; Ouverson v. Grofton, 5 N. D. 281, 65 N. W. 676; Hyde Ferry Turnpike Co. v. Gates [Tenn.] 67 S. W. 69; Farley v. Wilmington & W. C. Elec. R. Co., 3 Penn. [Del.] 581, 52 A. 543; M. K. & T. R. Co. v. Rogers, 91 Tex. 52, 40 S. W. 956; G., H. & S. A. R. Co. v. Katac, 72 Tex. 643, 11 S. W. 127; Central Tex. & N. W. R. Co. v. Gibons [Tex. Civ. App.] 83 S. W. 863; Atlantic & D. R. Co. v. Ironmonger, 95 Va. 625, 29 S. E. 319; Shearer v. Buckley, 31 Wash. 320, 72 P. 76; Hajsek v. Chicago, etc., R. Co., 68 Neb. 539, 94 S. W. 609. But it has been held in Nebraska that in a case of joint enterprise the negligence of the driver was imputable to the plaintiff. Omaha & R. Co v. Talbot, 48 Neb. 627, 67 N. W. 599. The question of imputed negligence was before the supreme court of the United States in Little v. Hackett, 116 U. S. 366, 29 Law Ed. 652, and Thorogood v. Bryan was

prise;[19] but the fact that some one else is driving, does not relieve one of the duty to exercise due care for his own safety.[20] The doctrine of respondeat superior is sometimes invoked as between the driver and his guest.[21]

The negligence of a parent or child is not imputable to the child so as to preclude a recovery in its behalf,[22] but the contributory negligence of a beneficiary will bar a recovery for the death of the child.[23]

§ 5. *Actions. Pleading.*[24]—*The complaint or petition* must allege the duty of the defendant to the plaintiff,[25] the negligence of the defendant,[26] and that such negligence was the proximate cause of the plaintiff's injury.[27] In some jurisdictions contributory negligence must be negatived,[28] but in most jurisdictions this is not necessary.[29] The law of the forum controls as to the necessity of negativing contributory negligence.[30] Where the complaint shows contributory negligence, no recovery can be had.[31]

discredited, as resting "upon indefensible ground," and following this case, the Federal courts generally have held that the negligence of the driver is not imputable to a gratuitous passenger in a private conveyance. Pyle v. Clark, 75 F. 644; Id. [C. C. A.] 79 F. 748; Griffith v. Baltimore & O. R. Co., 44 F. 574; Union Pacific R. Co. v. Lopsley, [C. C. A.] 51 F. 174, 16 L. R. A. 800; Sheffield v. Central Union Tel. Co., 30 F. 164; Evans v Lake Erie & W. R. Co., 78 F. 783; Hiney v. Chicago, etc., R. Co., 59 F. 427. See Delaware, L. & W. R. Co. v. Devore [C. C. A.] 114 F. 155; Denver City Tramway Co. v. Norton [C. C. A.] 141 F. 599. Text-book writers generally have expressed the same view. 7 Am. & Eng. Enc. Law [2nd Ed.] 447; 1 Thompson on Negligence, § 502; 1 Shearman & Redfield on Negligence, 366; Black on Contributory Negligence, § 115. See Shultz v. Old Colony St. R. [Mass.] 79 N. E. 873.

19. Where plaintiff and driver were engaged in common employment but plaintiff exercised no control over the wagon or the driver. Scheib v. New York R. Co., 100 N. Y. S. 986, distinguishing Donnelly v. Brooklyn City R. Co., 109 N. Y. 16, 15 N. E. 733.

20. Cotton v. Willmar & S. F. R. Co. [Minn.] 109 N. W. 835; Bresee v. Los Angeles Traction Co. [Cal.] 85 P. 152. Where the circumstances are such that the plaintiff ought not to have surrendered himself to the driver's care and control or ought to have exerted himself to warn the driver, the doctrine of contributory negligence becomes applicable to the exclusion of any question of imputed negligence. Schultz v. Old Colony St. R. [Mass.] 79 N. E. 873; Cotton v. Willmar & S. F. R. Co. [Minn.] 109 N. W. 835. Consenting to being driven across track in front of train held contributory negligence. Louisville & N. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 1113, 91 S. W. 685. Occupant of wagon held guilty of contributory negligence in allowing his son, who was driving, to attempt to cross track in front of moving train. Sanguinette v. Mississippi, etc., R. Co., 196 Mo. 466, 95 S. W. 386. Negligence of driver of hose cart in crossing railroad track without stopping, looking, and listening, imputed to fireman who knew when he got on cart that track would be crossed without such precautions. Thompson v. Pennsylvania R. Co. [Pa.] 64 A. 323. Taking no precautions, though aware of danger, before submitting to act of driver in driving on street car track. Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421.

21. Negligence of friend riding with plaintiff imputed to latter under doctrine of respondeat superior. McMahen v. White, 30 Pa. Super. Ct. 169.

22. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583. Civ. Code 1895, § 2902. Herrington v. Macon, 125 Ga. 58, 54 S. E. 71.

23. Mills' Adm'r v. Cavanaugh, 29 Ky. L. R. 685, 94 S. W. 651; Buscher v. New York Transp. Co., 114 App. Div. 185, 99 N. Y. S. 673. Negligence of grandmother carrying child nineteen months old in arms imputed to child so as to prevent recovery by child's administrator. Paige v. New York Cent., etc., R. Co., 111 App. Div. 828, 98 N. Y. S. 183.

24. See 6 C. L. 767.

25. Norfolk & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19; McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603; Lake Erie & W. R. Co. v. Hennessey [Ind. App.] 78 N. E. 670.

26. Allegations of defendant's negligence held sufficient on demurrer. Seaboard Air Line R. Co. v. Hood [Ga.] 56 S. E. 303.

27. Allegation that defendant extracted plaintiff's tooth and allowed it to drop into her lung held sufficient on demurrer, though it was possible that muscular action of plaintiff's throat was necessary to pass the tooth into the lung. McGehee v. Schiffman [Cal. App.] 87 P. 290. Allegation that engine jumped the track as it "approached" defective place does not show that accident was caused by such defect. Southern R. Co. v. Sittasen [Ind.] 76 N. E. 973.

28. Wilmot v. McPadden, 78 Conn. 276, 61 A. 1069; Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. Allegations of diligence on part of plaintiff held sufficient on demurrer. Seaboard Air Line R. Co. v. Hood [Ga.] 58 S. E. 3030; Burns' Ann. St. 1901, § 359a, providing that in suits for personal injuries caused by negligence the complaint need not negative contributory negligence, does not apply to negligent injuries to personal property. Cincinnati, etc., R. Co. v. Klump [Ind. App.] 77 N. E. 869.

29. Moore v. Lanier [Fla.] 42 So. 462. See post, this section, subd. The Answer.

30. Cincinnati, etc., R. Co. v. Klump [Ind. App.] 77 N. E. 869.

31. Notwithstanding Burns' Ann. St. 1901, § 359a, providing that plaintiff need not allege lack of contributory negligence. In-

The alleged duty of the defendant and the acts of negligence relied on must be stated with sufficient particularity to enable the defendant to understand the nature of the charge against him.[32] A general allegation of duty is insufficient,[33] and the same is true as to the allegation of proximate cause,[34] but negligence may be alleged in general terms provided the particular act alleged to have been done negligently is specified,[35] that is, only the ultimate act of negligence need be alleged.[36] A general averment of wantonness or willfulness is sufficient to let in proof.[37] Such an allegation is not inconsistent with allegations of negligence.[38] Several acts of negligence of the same nature and all of which may be true and either or all of which may have caused the accident may be pleaded in one count.[38] Sufficiency of the complaint on demurrer must be tested by its specific and not its general allegations of negligence.[40] It is not necessary as against a demurrer to allege that the effect of the act or omission would ordinarily produce the effect which actually did follow.[41] Allegations of conclusions are not admitted by a demurrer.[42] In alleging freedom from contributory negligence it is not necessary to use the phrase "free from fault," but the averments should be such that this condition of affairs is apparent from the language used,[43] and freedom from contributory negligence should be shown as to each act of negligence alleged against the defendant.[44] A general allegation of freedom from contributory negligence is an allegation of a mere inference which must be sustained by the facts alleged.[45] An allegation that the defendant knew or could have known of certain defects will be construed, on demurrer, merely as an allegation that he could have known.[46] The pleading of facts is not open to objec-

dianapolis Traction & Terminal Co. v. Pressell [Ind. App.] 77 N. E. 357.

32. Blending allegations of duty, only one of which imposes any obligation upon defendant, and attributing the accident to the cumulative effect of all as the proximate cause, is insufficient. Norfolk & W. R. Co. v. Stegall's Adm'r, 105 Va. 538, 54 S. E. 19.

33. That defendant was bound to give warning before shoving cars against car on siding. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 6030. That defendant had no right to put any more cars on siding. Lake Erie & W. R. Co. v. Hennessey [Ind. App.] 78 N. E. 670.

34. Moore v. Lanier [Fla.] 42 So. 462.

35. The particular omission or act which rendered the ultimate act or omission negligent need not be alleged. McGehee v. Schiffman [Cal. App.] 87 P. 290. Where defendant's duty is sufficiently charged, it is permissible to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that such duty was violated. If pleading is not sufficiently specific in such case, remedy is by motion and not by demurrer. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186.

36. Nashville, etc., R. Co. v. Reynolds [Ala.] 41 So. 1001; Jacksonville Elec. Co. v. Schmetzer [Fla.] 43 So. 85. Not necessary to allege manner in which gas which exploded was ignited, the defendant's negligence as alleged being that he allowed the gas to escape into the room. Moore v. Lanier [Fla.] 42 So. 462. Allegation that defendant's servant so negligently conducted himself as to cause the accident, held sufficient. Birmingham R., L. & P. Co. v. Ryan [Ala.] 41 So. 616. Allegation that defendant's servants negligently committed a certain act which caused the injury, held sufficient. Nashville, etc. R. Co. v. Reynolds [Ala.] 41 So. 1001. Allegations that orders were negligently given to servant, resulting in his injury, sufficient without specifying what the orders were. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280.

37. Bradley v. Louisville & N. R. Co. [Ala.] 42 So. 818.

38. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 903. Allegation that defendant "recklessly and wantonly or intentionally" committed the act complained of held not subject to demurrer on ground that it was uncertain whether simple or wanton negligence was charged, or that it joined disjunctively simple and wanton negligence. Garth v. North Alabama Traction Co. [Ala.] 42 So. 627.

39. Charge that the train which injured plaintiff was negligently run at a high rate of speed and in violation of an ordinance. Haley v. Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120.

40. Baltimore, etc., R. Co. v. Kleespies [Ind. App. 76 N. E. 1015. Where a complaint was negligence in general terms and then avers the particular acts constituting such negligence, it is demurrable unless such acts amount to negligence per se. Johnson v. Birmingham R., L. & P. Co. [Ala.] 43 So. 33.

41. Sufficient to present trial question if it was to be reasonably apprehended that such an effect might follow. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186.

42. Allegations of "negligently," "unsafe," "imperfectly lighted," "without sufficient light." Bell v. Central Nat. Bank, 28 App. D. C. 580.

43, 44. Central of Georgia R. Co. v. Ruff [Ga.] 56 S. E. 290.

45. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

46. Heindirk v. Louisville El. Co., 29 Ky. L. R. 193, 92 S. W. 608.

tion where the pleader is thereby relieved from the necessity of pleading conclusions as to negligence on the part of the defendant or contributory negligence on the part of the defendant.[47] In order to invoke the doctrine of last clear chance, knowledge of the plaintiff's peril must be alleged.[48] In a suit for injuries to a licensee it must appear that the injuries were received on the defendant's premises [49] and that the plaintiff was a licensee.[50]

Amendments are allowed as in other actions.[51]

The answer.[52]—Objection to allegation of acts of contributory negligence in the alternative must be taken by demurrer.[53] The general issue admits the defendant's connection with the accident when the case is tried on this assumption and no rebutting evidence introduced.[54] Contributory negligence is an affirmative defense and, unless developed by the plaintiff's case must be specially pleaded,[55] and the specific facts constituting such negligence must be alleged.[56]

Issues and proof.[57]—The plaintiff can recover only upon proof of the negligence alleged,[58] and where particular acts of negligence are specified the proof will be confined to such acts,[59] but it is not necessary to prove them all, proof of any one or more being sufficient.[60] Allegation of a specific act of negligence will not preclude proof of other acts under a more general allegation of the ultimate act of negligence,[61] and having alleged the ultimate facts upon which a recovery is predicated,

47. Home Ins. Co. v. Pittsburgh, etc., R. Co., 4 Ohio N. P. (N. S.) 373.

48. That small boat was plainly visible to or that it was seen by those in control of steamboat in time to avoid overturning small boat by waves from steamboat held insufficient as stating a conclusion on the one hand and for failure to state that the danger to the boat was or should have been seen. Daniels v. Carney [Fla.] 42 So. 452.

49. Allegation that defendant was tenant in possession of "second floor of the premises," and that plaintiff "while in said premises in the act of delivering goods to," said defendant fell into an elevator shaft "in said premises," held not to show that the accident occurred on part of premises occupied by defendant. Detviller v. Rolled Plate Metal Co., 110 App. Div. 773, 97 N. Y. S. 419.

50. Word "delivery" as used in declaration for injury to plaintiff who was in the employ of one under contract to make "delivery" to defendant of stone, etc., held to import delivery through agency of others, including plaintiff, thus showing his right on the premises. Power v. Beattie [Mass.] 80 N. E. 606. An allegation that plaintiff had been "invited" to use defendant's blacksmith shop is a conclusion only, and from the whole complaint the word "invitation" construed as a license. Brown v. Thomas Blackwell Coal & Min. Co. [Ky.] 99 S. W. 299.

51. Amendment alleging knowledge of landowner of presence of trespasser who was injured did not add a new cause of action. Rome Furnace Co. v. Patterson, 122 Ga. 776, 50 S. E. 928. In action against owner of barge and owner of steamship for injuries sustained while coaling the steamship from the barge, an amendment alleging employment of plaintiff by barge owner was allowable for purpose of showing that plaintiff was rightfully on the barge and was entitled to a safe place to work and that the steamship owner owed him the duty of not increasing by its negligence the hazard of his employment. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

52. See 6 C. L. 768.

53. Johnson v. Birmingham R. Co., L. & P. Co. [Ala.] 43 So. 33.

54. Chicago Union Traction Co. v. Lundahl, 117 Ill. App. 220.

55. Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718; Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140; St. Louis Southwestern R. Co. v. Gammage [Tex. Civ. App.] 16 Tex. Ct. Rep. 805, 96 S. W. 645; Wise v. St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898; Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421; Goodloe v. Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482; Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505; Foley v. Pioneer Min. & Mfg. Co., 144 Ala. 178, 40 So. 273.

56. Watson v. Farmer, 141 N. C. 452, 54 S. E. 419; Nephler v. Woodward [Mo.] 98 S. W. 488; Forbes & Carloss v. Davidson [Ala.] 41 So. 312. Defendant may be required to set out act of negligence charged against plaintiff. Vanatta v. Baltimore & O. R. Co., 4 Ohio N. P. (N. S.) 542.

57. See 6 C. L. 769.

58. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692; Barker v. Collins [Del.] 63 A. 686.

59. Jemming v. Great Northern R. Co., 96 Minn. 302, 104 N. W. 1079; McCoy v. Carolina Cent. R. Co., 142 N. C. 383, 55 S. E. 270; Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326.

60. Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326; Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033; Warren v. Porter, 144 Mich. 699, 13 Det. Leg. N. 406, 108 N. W. 435. Even though the several acts are alleged conjunctively. Houston & T. C. R. Co. v. Easton [Tex. Civ. App.] 97 S. W. 833.

In Alabama several acts of negligence alleged in the conjunctive form must all be proved. Western R. of Alabama v. McPherson [Ala.] 40 So. 934.

61. Allegation that machine was defective not controlled or rendered nugatory by al-

the plaintiff may prove the logical and reasonable results arising from such facts.[62] Allegations of wantonness or willfulness will not preclude proof of ordinary negligence,[63] and under an allegation of wanton negligence, a recovery may be had for wantonness.[64]

An allegation of injury to the body is sustained by proof of injury to the members thereof.[65] Allegations of place need not be proved strictly as laid where they are not descriptive of the identity of the subject of the action,[66] but it is otherwise where the character of the negligence is affected by the place of the accident.[67] Proof of an instrumentality of the same general nature as the one alleged is sufficient.[68] A custom need not be pleaded in order to be proved as evidence of what would have been due care under the circumstances.[69] That a child was non sui juris cannot be proved unless it is pleaded.[70]

The defendant's proof must conform to his pleadings.[71] That the injury was caused by the negligence of some one for whose acts the defendant was not responsible is available under the general issue.[72]

Evidence. Admissibility.[73]—The general rules of evidence apply in actions for negligent injuries, including the rules as to relevancy and materiality,[74] admissions,[75] res gestae,[76] opinions and conclusions of witnesses,[77] experiments,[78] observa-

legation of specific defect. Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809.

62. Having alleged sudden and violent escape of steam from pipe three feet behind him, plaintiff was entitled to prove that he was frightened. Cudahy Packing Co. v. Wesolowski [Neb.] 106 N. W. 1007.

63. Allegation of gross, reckless, and wilful negligence. Pendley v. Illinois Cent. R. Co., 28 Ky. L. R. 1324, 92 S. W. 1. Allegation of negligence and wantonness. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 903. Allegation of negligence and willfulness. Southwest Missouri Elec. R. Co. v. Fry, 71 Kan. 736, 81 P. 462.

64. Campbell v. Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571. See ante, § 1, Definitions.

65. Arms and legs. Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371.

66. Western R. Co. v. McPherson [Ala.] 40 So. 934.

67. Allegation of injury at railroad crossing will not authorize a recovery on proof of injury in a switch yard. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692.

68. Allegation of injury from piece of metal projected by boiler explosion sustained by proof that injury was caused by piece of wood projected in same manner. Stanley v. West Virginia Cent., etc., R. Co., 59 W. Va. 419, 53 S. E. 625.

69. Brunke v. Missouri & K. Tel. Co., 115 Mo. App. 36, 90 S. W. 753.

70. Roberts v. Terre Haute Elec. Co. [Ind. App.] 76 N. E. 895.

71. Where defendant's pleadings admitted his possession and occupation of building from which ladder fell and injured plaintiff, evidence that part of such building was occupied by tenant who was using such ladder in connection with repair work was inadmissible. Christopher v. William T. Keough Amusement Co., 99 N. Y. S. 840.

72. That injury caused by negligence of independent contractor. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12.

73. See 6 C. L. 770.

74. On issue as to negligence in allowing ice to accumulate on gutter and to fall on plaintiff, whether ice would have accumulated again if it had been removed held immaterial. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 683. Where plaintiff was not in position to direct speed of automobile and had given no orders, it is improper to ask chauffeur whether he was running machine under orders of defendant, his master, or of occupant. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749. Plaintiff's **knowledge and belief** as to conditions is material on issue of contributory negligence, as, for example, the knowledge and belief one has as to the competency of driver with whom he is riding. Bresee v. Los Angeles Traction Co. [Cal.] 85 P. 152. Plaintiff's belief as to age and use of electric wires by which he was injured. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. Evidence that premises upon which fire started was under defendant's control, that his servant who set the fire had been in the habit of burning rubbish and had previously burned plaintiff's fence, that plaintiff had notified servant that he would burn him out, held admissible as establishing knowledge. Hayes v. Brandt [Ark.] 98 S. W. 368. Evidence as to **necessity of act,** as that electric wire carried unnecessarily high voltage, admissible on issue of negligence. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482. Acts of **ownership of property** causing the accident admissible, as evidence as to what defendant did with pile of lumber from which beam fell. Snitten v. Brown, 102 N. Y. S. 677.

75. Declarations of plaintiff prior to accident as to why horse was driven close to defendant's tracks. Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553. Error to exclude on cross-examination of plaintiff's physician, who had testified that she had a broken rib, question whether plaintiff had declared that she had fallen from horse, such question being relevant on issue of whether plaintiff was injured while alighting from defendant's train. Southern R. Co. v. Cothran [Ala.] 42 So. 100.

76. Statement of person injured at same time with plaintiff's intestate three minutes

tions of the conditions under which the accident occurred,[79] settlement,[80] expert testimony,[81] and circumstantial evidence.[82] Evidence of other acts of negligence [83] and other injuries [84] is generally inadmissible, but evidence of other effects of the same cause is admissible to show the nature and extent of the causal agency.[85] Although custom cannot be considered as changing the standard of care established by substantive law, it is admissible upon the issue whether such standard has been complied with,[88] but evidence of a custom contrary to a municipal ordinance is in-

after accident. Louisville & N. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 113, 91 S. W. 685. Declarations of the injured person immediately on returning to consciousness are admissible as to how the injury occurred, though made in response to questions by a physician, such questions not being leading or suggestive. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077. Statement of man on engine that woman claimed to have been scalded held so near in point of time as to be part of the res gestae. Gulf, etc., R. Co. v. Tullis [Tex. Civ. App.] 14 Tex. Ct. Rep. 478, 91 S. W. 317. Evidence as to how packages of flooring were tied and hoisted previous to falling of a package upon plaintiff. Smith v. Dow [Wash.] 86 P. 555.

77. Statement of witness that crossing was dangerous, inadmissible. Louisville & N. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 1113, 91 S. W. 685. Witness cannot testify generally as to whether plaintiff was himself negligent but must state the facts. Forbes & Carlose v. Davidson [Ala.] 41 So. 312. Testimony that person was negligent in doing certain act is inadmissible, but witness may testify as to the proper manner of doing the act. Id. Witness should not be allowed to give his opinion as to whether the business in which defendant was engaged was dangerous or not. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. Opinion of witness as to whether plaintiff was guilty of contributory negligence is inadmissible, no question of science or peculiar knowledge being involved. Whether plaintiff should have known that it was unsafe to drive on bridge. Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345. Opinion as to whether the person injured had time to escape danger admissible. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280.

78. Experiments are permissible where the conditions have not been changed, but not otherwise. Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371.

79. Observations made immediately after accident, or so soon as to preclude possibility of a change of conditions, are admissible. Elgin, A. & S. Traction Co. v. Wilson, 120 Ill. App. 371. Evidence of observations after change of conditions not admissible. Goddard v. Endler, 123 Ill. App. 108. Evidence of the working or action of the instrumentality which caused the injury admissible. Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809.

80. A settlement by defendant with another injured by the same alleged negligent act is not admissible as a confession of negligence. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749.

81. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. Expert testimony based on observations made after the accident is admissible when the conditions have not been changed. Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809. That steam shovel was calculated to frighten ordinarily gentle horses proved by expert horsemen. Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102. Admissible as to safety of method of tying up lumber to be hoisted. Smith v. Dow [Wash.] 86 P. 555. In action for injury from explosion of boiler, expert testimony as to construction and nature of such boilers and as to condition of one that exploded. Hanley v. West Virginia Cent., etc., R. Co., 59 W. Va. 419, 53 S. E. 625. Expert testimony admissible to prove how the accident occurred when it is necessary to the understanding of the jury. Goddard v. Enzler, 123 Ill. App. 108. Where it appeared that the injured person did not appreciate his danger until injured, expert testimony as to his ability to save himself is inadmissible. Illinois Cent. R. Co. v. Whiteaker, 122 Ill. App. 333.

82. Causal connection may be proved by circumstantial evidence. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Exercise of due care may be proved by circumstantial evidence. Elgin, J. & E. R. Co. v. Hoadley, 220 Ill. 462, 77 N. E. 151.

83. Damren v. Trask [Me.] 65 A. 513. Evidence that defendant was negligent in a previous isolated instance is inadmissible Pullman Co. v. Schaffner, 126 Ga. 609, 55 S. E. 933. That elevator door made to open and shut had been previously left open causing other accidents. Hope v. Longley, 27 R. I. 579, 65 A. 300.

84. Evidence of another injury is admissible only where it appears that the instrumentality causing the injuries was in same condition when both accidents occurred. City of Aurora v. Plummer, 122 Ill. App. 143. Other injury to plaintiff by defendant inadmissible. Id. Evidence that planks used to load and unload wagons at grain elevator had previously slipped, and that on the day prior to plaintiff's injury from such slipping defendant's door-sill on which planks rested was covered with dust and corn held properly rejected within discretion of court. Elvey v. Powers, 191 Mass. 588, 77 N. E. 1152.

85. That ice which fell from gutter through window, injuring plaintiff, broke other windows and also planks on walk held admissible to show force with which ice fell. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583. That other horses had been frightened by steam shovel on same afternoon admissible to show that shovel was calculated to frighten animals, but not to prove that plaintiff's horse was frightened. Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102.

86. In action for injury from tool attempted to be thrown by workman to an-

admissible.[87] There is some conflict as to the extent to which a municipal ordinance is admissible in an action based on common-law negligence.[88] Evidence of subsequent repairs and changes is not admissible to prove negligence,[89] though it may be admissible for other purposes[90] such as the practicability of such repairs or changes.[91] In the absence of other evidence the habits of the person injured may be proved as bearing upon the question of due care on his part.[92]

Presumptions and burden of proof.[93]—The burden is on the plaintiff to prove the negligence of the defendant,[94] and this burden does not shift during the trial,[95] even where the doctrine of res ipsa loquitur is involved.[96] This burden cannot be sustained by mere conjecture or speculation,[97] but the plaintiff need not exclude the possibility that the accident may have happened in some way other than that alleged.[98] The mere fact of the accident raises no presumption of negligence,[99] even

other on telephone pole, evidence of custom of sending up tools by lines instead of throwing them was admissible. Brunke v. Missouri & K. Tel. Co., 115 Mo. App. 36, 90 S. W. 753.

87. Use of uninsulated electric wires. Clements v. Potomac Elec. Power Co., 26 App. D. C. 482.

88. Held admissible though not pleaded. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. Held inadmissible. Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421. Where horses hitched to a sixty-six pound weight ran away and caused injury sued for, an ordinance requiring a weight of only twenty-five pounds was admissible on issue of due care. Coughlin v. Campbell-Sell Baking Co. [Colo.] 89 P. 53.

89. Davidson S. S. Co. v. United States [C. C. A.] 142 F. 315; Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809; Wilkes v. Gallagher, 99 N. Y. S. 866; City of Aurora v. Plummer, 122 Ill. App. 143. Change in location of electric wires which caused injury. Ziehn v. United Elec. L. & P. Co. [Md.] 64 A. 61. Enlarging elevated station platform after plaintiff had been crowded off and injured. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Repairs to handcar that jumped track. St. Louis Southwestern R. Co. v. Plumlee [Ark.] 95 S. W. 442. Construction of culvert after injury alleged to have been caused by insufficient waterways under road. Ft. Smith L. & T. Co. v. Soard [Ark.] 96 S. W. 121.

90. Where defendant denied the existence of a hole as set out in the complaint but did not deny the existence of some kind of hole, the case was not one for admission of evidence of repairs. Wilkes v. Gallagher, 99 N. Y. S. 866. In an action for injury to one of two horses hired by plaintiff to defendant under an alleged agreement that they should be worked together and not singly, evidence of subsequent repairs to road held admissible to show that other horse remained and was worked alone under a new contract and not under the original contract. McKenzie v. Boutwell [Vt.] 65 A. 99.

91. Thompson v. Issaquah Shingle Co. [Wash.] 86 P. 588. Enlargement of defendant's elevated station platform after plaintiff had been crowded off. Beverly v. Boston El. R. Co. [Mass.] 80 N. E. 507.

92. In action for death. Chicago & A. R. Co. v. Wilson [Ill.] 80 N. E. 56; Chicago & Alton R. Co. v. Seevers, 122 Ill. App. 558. See Death by Wrongful Act, 7 C. L. 1083. See, also, post, this section, subd. Presumptions and Burden of Proof.

93. See 6 C. L. 771.

94. Weldon v. People's R. Co. [Del.] 65 A. 589; Garrett v. People's R. Co. [Del.] 64 A. 254; Graboski v. New Castle Leather Co. [Del.] 64 A. 74; White v. Wilmington City R. Co. [Del.] 63 A. 931; Robinson v. Huber [Del.] 63 A. 873; Hannigan v. Wright [Del.] 63 A. 234; Hanley v. West Virginia Cent. & P. R. Co., 59 W. Va. 419, 53 S. E. 625; Waters-Pierce Oil Co. v. Knisel [Ark.] 96 S. W. 342; Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 628, 91 S. W. 365; Harris v. Tremont Lumber Co., 115 La. 973, 40 So. 374; Ulseth v. Crookston Lumber Co., 97 Minn. 178, 106 N. W. 307; Washington, A. & Mt. V. R. Co. v. Chapman, 26 App. D. C. 472; Jones v. Brooklyn Heights R. Co., 99 N. Y. S. 812, Morhard v. Richmond L. & R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Leonard v. Miami Min. Co. [C. C. A.] 148 F. 827. In action under Rev. Laws, c. 171, § 2, for death caused by gross negligence, plaintiff has burden of proving gross negligence. Manning v. Conway [Mass.] 78 N. E. 401. See Death by Wrongful Act, 7 C. L. 1083.

95. Lincoln Traction Co. v. Shepherd [Neb.] 107 N. W. 764.

96. See post, this section and subdivision.

97. Leonard v. Miami Min. Co. [C. C. A.] 148 F. 827; Ulseth v. Crookston Lumber Co., 97 Minn. 178, 106 N. W. 307; Powers v. Pere Marquette R. Co., 143 Mich. 379, 12 Det. Leg. N. 1027, 106 N. W. 1117; Morhard v. Richmond L. & R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Hamilton v. Lake Shore & M. S. R. Co., 4 Ohio N. P. (N. S.) 249.

98. Woodall v. Boston El. R. Co. [Mass.] 78 N. E. 446.

99. Leonard v. Miami Min. Co. [C. C. A.] 148 F. 827; Garrett v. People's R. Co. [Del.] 64 A. 254; Martin v. Niles-Bement-Pond Co., 214 Pa. 616, 64 A. 370; Shaw v. Highland Park Mfg. Co. [N. C.] 55 S. E. 433; Isley v. Virginia Bridge & Iron Co., 141 N. C. 220, 53 S. E. 841; Renders v. Grand Trunk R. Co., 144 Mich. 387, 13 Det. Leg. N. 314, 108 N. W. 368; Powers v. Pere Marquette R. Co., 143 Mich. 379, 12 Det. Leg. N. 1027, 106 N. W. 1117; Jones v. Brooklyn Heights R. Co., 99 N. Y. S. 812. Explosion of locomotive boiler in lawful use on defendant's tracks. Hanley v. West Virginia, etc., R. Co., 59 W. Va. 419, 53 S. E. 625.

though it appears that it was avoidable,[1] but under the doctrine of res ipsa loquitur a prima facie presumption of negligence arises where the accident is such that in the ordinary course of affairs it would not have happened except for the negligence of the defendant.[2] This doctrine is invoked most often as between passenger and carrier,[3] but it may apply between master and servant,[4] or in any other case where the accident, in the terms of the maxim, speaks for itself.[5] This doctrine is not confined to cases where a contractual relation exists between the plaintiff and defendant,[6] and the mere fact that the person injured was a licensee will not prevent its application,[7] but it is held to be inapplicable in the case of a bare licensee or trespasser.[8] It may apply without the specific cause of the accident being pointed out.[9] Except as applied to carriers,[10] the doctrine is applicable only where the injury arises from some condition or event in its very nature so obviously destructive of the safety of persons or property and so tortious in its quality as to permit no inference, in the first instance, at least, except one of negligence on the part of the person in control of the injurious agency,[11] and the inference of negligence cannot rest upon only a part of the attendant circumstances shown by the evidence.[12] The doc-

1. Illinois Steel Co. v. Zolnowski, 118 Ill. App. 209.

2. Mumma v. Eastern & A. R. Co. [N. J. Err. & App.] 65 A. 208; Wood v. Wilmington City R. Co. [Del.] 64 A. 246; Goddard v. Enzler, 123 Ill. App. 108; Field v. Winheim, 123 Ill. App. 227; Illinois Cent. R. Co. v. McCollum, 122 Ill. App. 531.

3. Mere happening of an accident to a passenger raises a prima facie presumption of negligence on the part of the carrier and shifts the burden of proof. Washington, A. & Mt. V. R. Co. v. Chapman, 26 App. D. C. 472. Where passenger was injured by collision between two street cars. Goodloe v. Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482. See Carriers, 7 C. L. 522.

4. See Master and Servant, 6 C. L. 521.

5. Falling of house being constructed by defendant as contractor. Scharff v. Southern Ill. Const. Co., 115 Mo. App. 157, 92 S. W. 126. Collision of trains under exclusive control of defendant under circumstances raising presumption of negligence. Choctaw, O. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Collision or derailment of railroad trains. Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420. Where plaintiff was injured by coal falling from car or tender while defendant's servants were shovelling coal from car into tender. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391. Breaking of hawser being used to dock vessel. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178. Falling of lumber pile. Hardesty v. Largey Lumber Co. [Mont.] 86 P. 29. Injury to person on highway by falling telephone wire. Jacks v. Reeves [Ark.] 95 S. W. 781. Railroad wreck caused by defective track. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932. Patient burned by hot water bags while under influence of anaesthetic. Adams v. University Hospital [Mo. App.] 99 S. W. 453. Where skylight blew off defendant's building and fell on plaintiff. Uggla v. Brokaw, 102 N. Y. S. 857. Where piece of stone cracked off window sill and fell to sidewalk. Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. S. 399. Fire set by spark from locomotive. Shipman v. Chicago, etc., R. Co. [Neb.] 110 N. W. 535. See Fires, 7 C. L. 1657. Failure of safety appliance on elevator to work. National Biscuit Co. v. Wilson [Ind. App.] 78 N. E. 251. Falling of elevator. Field v. Winhein, 123 Ill. App. 227. Person injured in turning on electric lamp. Quincy Gas & Elec. Co. v. Schmitt, 123 Ill. App. 647. Where stone slab to which sign was affixed pulled off allowing sign to fall on paintiff. Hearst's Chicago American v. Spiss, 117 Ill. App. 436. Where traveler on street is injured by brick falling from chimney. Decola v. Cowan, 102 Md. 551, 62 A. 1026. See, also, Strasburger v. Vogel, 103 Md. 85, 63 A. 202. In absence of issue of nuisance the liability of owner for injury to traveler caused by falling of awning over highway, determinable under doctrine of res ipsa loquitur and not under doctrine of insurance. Waller v. Ross [Minn.] 110 N. W. 252.

6. Illinois Cent. R. Co. v. McCollum, 122 Ill. App. 531. Absence of contractual relations affects doctrine in so far as it affects the duty of care owed by defendant to plaintiff, and facts upon which the doctrine might be predicated where a contractual relation existed do not necessarily make a case for the application of the doctrine in the absence of such relation, as in case of a permissive licensee. Duhme v. Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386.

7. Breaking of shackle to which steel hawser was fastened causing hawser to hit plaintiff, a licensee on the dock, in the face. Duhme v. Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386.

8. Duhme v. Hamburg-American Packet Co., 184 N. Y. 404, 77 N. E. 386; McLain v. Chicago, etc., R. Co., 121 Ill. App. 614.

9. Injury from live electric wire. Goddard v. Enzler, 123 Ill. App. 108.

10. See Carriers, 7 C. L. 522.

11. Strasburger v. Vogel, 103 Md. 85, 63 A. 202. A door is not such a dangerous piece of machinery that its being left open will give occasion for the application of the doctrine of res ipsa loquitur, and the doctrine did not apply. Where plaintiff went into building at 5 A. M. to see janitor and fell into elevator shaft through door accidentally left open. Hope v. Longley, 27 R. I. 579, 65 A. 300.

12. Doctrine inapplicable where plaintiff's own evidence shows intervention of independent cause, as where it appeared that

trine does not apply unless the co-operation of the plaintiff or others than defendant in the cause is negatived by the facts.[13] Nor does it apply unless every reasonable inference in favor of other causes is excluded,[14] nor where both parties were exercising equal rights and each is chargeable with the same degree of care,[15] nor when the details of the accident are seen by eye witnesses,[16] nor where the causal agency was not within the exclusive control of the defendant [17] or the person against whom the doctrine is invoked.[18] The doctrine of res ipsa loquitur neither shifts the burden of proof [19] nor enlarges the measure of care,[20] but merely raises a rebuttable presumption [21] sufficient to take the case to the jury,[22] and it is not necessary to show exactly how the accident occurred in order to rebut such presumption.[23] Even where the doctrine of res ipsa loquitur applies, if the plaintiff alleges specific acts of negligence he must prove them.[24]

The burden is also upon the plaintiff to prove that the defendant's negligence was the proximate cause of the injury,[25] and he must exclude all other causes,[26] but this last rule does not apply when the proximate cause is a condition resulting from several related and co-operating acts of negligence.[27] In an action for negligent injury to property the burden is on the plaintiff to prove his ownership of the property.[28] Where a danger has been proved to have once existed, the burden is upon

several persons for whose actions defendant was not responsible were leaning against defendant's chimney when brick fell and injured plaintiff. Strasburger v. Vogel, 103 Md. 85, 63 A. 202.

13. Where plaintiff was struck by falling of timber brace to defendant's awning while plaintiff and others were taking down a scaffold near the awning and handling heavy timbers within a few inches of awning. Meaney v. Hurwitz, 100 N. Y. S. 975.

14. When inferences equal whether accident caused by negligence of deceased or of defendant. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872. Gas turned on in furnace room under circumstances indicating that it was done intentionally by a volunteer. Illinois Steel Co. v. Zolnowski, 118 Ill. App. 209.

15. Collision between teams on highway. Sauer v. Eagle Brew. Co. [Cal. App.] 84 P. 425.

16. Brown v. Rockwell City Canning Co. [Iowa] 110 N. W. 12.

17. Frederickson v. Central Wharf Towboat Co., 101 Me. 406, 64 A. 666. Where injury caused by act of defendant's servant in letting fall his end of piece of lumber which he and plaintiff were placing in wagon. Ulseth v. Crookston Lumber Co., 97 Minn. 178, 106 N. W. 307. Collision between street car and fire engine. Wolf v. Chicago Union Traction Co., 119 Ill. App. 481.

18. Does not apply so as to charge plaintiff with contributory negligence where accident was caused by defective safety appliance which he was not bound to inspect, though he was using the machine to which such appliance was attached. National Biscuit Co. v. Wilson [Ind. App.] 78 N. E. 251.

19. Dean v. Tarrytown, etc., R. Co., 113 App. Div. 437, 99 N. Y. S. 250; Shipman v. Chicago, etc., R. Co. [Neb.] 110 N. W. 535.

20. Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. S. 399.

21. Proof that elevator had been inspected weekly and was working properly the day before the accident held sufficient. McGuirk v. Manhattan Life Ins. Co., 50 Misc. 590, 99 N. Y. S. 536. That lumber pile which fell was properly piled and in safe condition just before it fell held to rebut presumption of negligence. Nigro v. Willson, 50 Misc. 656, 99 N. Y. S. 344. Testimony by owner of private telephone across public highway that teamsters were passing highway nearly every day and were instructed to give notice of line being out of repair, and that his foreman had orders to repair same, did not overcome prima facie case established by proof of an accident due to fallen wire. Jacks v. Reeves [Ark.] 95 S. W. 781.

22. Doctrine held to create no presumption at all, but merely to take case to jury. Fitzgerald v. Southern R. Co., 141 N. C. 530, 54 S. E. 391.

23. Presumption from fact of stone cracking off of window sill and falling to sidewalk rebutted by evidence that defective condition of stone was not discoverable by exercise of ordinary care. Papazian v. Baumgartner, 49 Misc. 244, 97 N. Y. S. 399.

24. McGrath v. St. Louis Transit Co., 197 Mo. 97, 94 S. W. 872.

25. Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 628, 91 S. W. 395; Hannigan v. Wright [Del.] 63 A. 234; Murphy v. Crocicchia, 102 N. Y. S. 523.

26. Candle v. Kirkbride, 117 Mo. App. 412, 93 S. W. 868. Where the probabilities are equally balanced as to which of two acts or omissions caused the injury and the defendant is responsible for only one, the plaintiff cannot recover. Morhard v. Richmond L. & R. Co., 111 App. Div. 353, 98 N. Y. S. 124. Where the evidence establishes two independent causes, the burden is on the plaintiff to show that the cause chargeable to the defendant caused the injury. Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231. Burden not sustained where plaintiff proved that brick fell from defendant's chimney but several persons for whose actions defendant was not responsible were leaning against chimney at the time. Strasburger v. Vogel, 103 Md. 85, 63 A. 202.

27. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301.

28. Jones v. Brooklyn Heights R. Co., 99 N. Y. S. 812.

the party alleging its removal to prove it.[29] Knowledge of dangerous conditions may be presumed from lapse of time.[30]

In some few jurisdictions the plaintiff must prove freedom from contributory negligence,[31] but in most jurisdictions contributory negligence is an affirmative defense and the burden of proving is on the defendant,[32] but the defendant is not bound to assume the burden thus placed upon him until the plaintiff has made out a prima facie case,[33] and he is entitled to the benefit of the plaintiff's evidence as well as his own.[34] In some states the burden of proving contributory negligence is placed upon the defendant by statute,[35] but such a statute does not create any presumption of due care on the part of the plaintiff where no such presumption existed prior to the enactment of the statute.[36] In the states where the burden as to contributory negligence is on the defendant it is sometimes declared that the plaintiff is presumed to have exercised due care,[37] especially where there is no other evidence on this subject,[38] and even in the states where the contrary doctrine obtains as to the burden of proof the same presumption is indulged in the absence of all other evidence,[39] but this presumption may be rebutted by the circumstances.[40] Where the plaintiff invokes the doctrine of last clear chance, the burden is on him to establish it by proof.[41]

Questions of law and fact.[42]—The court must always decide the preliminary question whether there is sufficient evidence to go to the jury,[43] but where there is

29. Logue v. Grand Trunk R. Co. [Me.] 65 A. 522.

30. Condition of railroad track. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301.

31. Jones v. Brooklyn Heights R. Co., 99 N. Y. S. 812; Bell v. New York, 114 App. Div. 22, 99 N. Y. S. 684; Morhard v. Richmond L. & R. Co., 111 App. Div. 353, 98 N. Y. S. 124; Hewes v. Chicago, etc., R. Co., 119 Ill. App. 393; Baltimore & O. S. W. R. Co. v. Ayers, 119 Ill. App. 108; Wright v. Boston & M. R. [N. H.] 65 A. 687.

32. Southern R. Co. v. Stutts [C. C. A.] 144 F. 948; Armour & Co. v. Carlas [C. C. A.] 142 F. 721; Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420; Stephens v. American Car & Foundry Co. [Ind. App.] 78 N. E. 335; City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132; Cincinnati, H. & D. R. Co. v. Levy, 8 Ohio C. C. (N. S.) 353; Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 99 S. W. 897; Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070; Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308; Wallis v. St. Louis, etc., R. Co., 77 Ark. 556, 95 S. W. 446; Choctaw, O. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401; Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 628, 91 S. W. 365; Nord v. Boston, etc., Min. Co., 33 Mont. 464, 84 P. 1116, 89 P. 647.

33. Beaty v. El Paso Elec. R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 628, 91 S. W. 365.

34. City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132; Cincinnati, H. & D. R. Co. v. Levy, 8 Ohio C. C. (N. S.) 353; Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070; Choctaw, O. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768; Nord v. Boston, etc., Min. Co., 33 Mont. 464, 84 P. 1116, 89 P. 647.

35. Acts 1899, p. 58, c. 41, Burns' Ann. St. 1901, § 359a. Town of Sellersburg v. Ford [Ind. App.] 79 N. E. 220; Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060.

36. Acts 1899, p. 58, c. 41, casting burden on defendant to prove contributory negligence, creates no presumption of freedom from such negligence. City of Indianapolis v. Keeley [Ind.] 79 N. E. 499.

37. Ryan v. St. Louis Transit Co., 190 Mo. 621, 89 S. W. 865.

38. Where plaintiff's injuries left her without knowledge of the accident. Stotler v. Chicago, etc., R. Co. [Mo.] 98 S. W. 509.

39. In action for death. Chicago & A. R. Co. v. Wilson [Ill.] 80 N. E. 56; Ellis v. Republic Oil Co. [Iowa] 110 N. W. 20; Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077.

In New Hampshire the burden on the plaintiff to prove freedom from contributory negligence cannot be sustained by any presumption of due care or any presumption arising from the instinct of self preservation. Wright v. Boston & M. R. [N. H.] 65 A. 687.

40. Rich v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79. Burden of proving freedom from contributory negligence cannot be sustained by presumption of due care from instinct of self-preservation where there are facts indicating contributory negligence, as where party attempted to board moving elevator. Rothschild & Co. v. Levy, 118 Ill. App. 78. Unless evidence conclusively shows contributory negligence, instinct of self-preservation must be considered. Christopherson v. Chicago, etc., R. Co. [Iowa] 109 N. W. 1077.

41. International, etc., R. Co. v. Ploeger [Tex. Civ. App.] 96 S. W. 56.

42. See 6 C. L. 774.

43. If there is no evidence of negligence or it does not fairly sustain plaintiff's case according to any fair inference, the court should give a peremptory instruction for the defendant. Bannom v. Pennsylvania R. Co. 29 Pa. Super. Ct. 231. Negligence for court where evidence raises only conjecture of negligence. Powers v. Pere Marquette R. Co.,

any evidence, the jury must ordinarily pass upon the questions of negligence,[44] contributory negligence,[45] and proximate cause.[46] Where, however, the facts are undis-

143 Mich. 379, 12 Det. Leg. N. 1027, 106 N. W. 1117. No question for jury where there is no evidence tending to show negligence. Hoffman v. Philadelphia Rapid Transit Co., 214 Pa. 87, 63 A. 409. Nonsuit proper where watchman in warning boy to get off wall shook stick at him and made motion as if to throw stone, whereupon boy fell, it not appearing that boy was unduly driven or harrassed and that there was a reasonably safe way for him to get down. Weatherbee v. Philadelphia, etc., R. Co., 214 Pa. 12, 63 A. 367.

44. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190; Talbert v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 138; Ruffin v. Atlantic & N. C. R. Co., 142 N. C. 120, 55 S. E. 86; Southern Cotton Oil Co. v. Skipper, 125 Ga. 368, 64 S. E. 110; Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652; Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945; Columbian Enameling & Stamping Co. v. O'Burke [Ind. App.] 77 N. E. 409; Chicago City R. Co. v. Shaw, 220 Ill. 632, 77 N. E. 139; Laurel Mercantile Co. v. Mobile & O. R. Co., 87 Miss. 575, 40 So. 269; Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102; Pyke v. Jamestown [N. D.] 107 N. W. 369; Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738; Robbins v. New York City R. Co., 50 Misc. 625, 98 N. Y. S. 198; Washington, etc., R. Co. v. Chapman, 26 App. D. C. 472; Alton R., Gas & Elec. Co. v. Webb, 119 Ill. App. 75; Milliren v. Sandy Tp., 29 Pa. Super. Ct. 580. Boy run over by vehicle. Levin v. Dunn, 101 N. Y. S. 26. Employe injured by stepping into open door in elevator shaft while elevator was not there. Wendell v. Leo, 101 N. Y. S. 51. Evidence held sufficient to sustain finding of negligence on part of contractor resulting in injury to employe of subcontractor. Steele v. Grahl-Peterson Co. [Iowa] 109 N. W. 882. As to size of sky rockets which may be used in lawful exhibition of fireworks in park. Crowley v. Rochester Fireworks Co., 183 N. Y. 353, 76 N. E. 470. In erection and operation of derrick. Pickwick v. McCauliff [Mass.] 78 N. E. 730. Manner of piling lumber in street. Addis v. Hess, 29 Pa. Super. Ct. 505.

Where the evidence is conflicting, negligence is for the jury. International, etc., R. Co. v. Edwards [Tex. Civ. App.] 14 Tex. Ct. Rep. 92, 91 S. W. 640; Union Pac. R. Co. v. Brown [Kan.] 84 P. 1026; Oklahoma Gas & Elec. Co. v. Lukert, 16 Okl. 397, 84 P. 1076; Choctaw, etc., R. Co. v. Wilker, 16 Okl. 384, 84 P. 1086; Chicago Union Traction Co. v. Lundahl, 117 Ill. App. 220. Negligence in manner of hoisting lumber. Smith v. Dow [Wash.] 86 P. 555. Testimony of one witness that danger shown to have once existed had been removed held not binding on jury when negatived by circumstances. Logue v. Grand Trunk R. Co. [Me.] 65 A. 522.

Where the inferences are disputable though the facts are not in dispute, negligence is for the jury. Mumma v. Easton & A. R. Co. [N. J. Err. & App.] 65 A. 208; Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368; Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308; Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337; McMahen v. White, 30 Pa. Super. Ct. 169. Employe injured in scrotum while sitting partly on drawhead of engine instead of resting entirely on footboard when engine was derailed. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301. Using lighted matches in basement near combustible material close to elevator shaft. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Where defendant stored dynamite within one thousand feet of plaintiff's house, with no intervening hills, and employed man addicted to drink to care for stove in the storage house, and an explosion occurred which injured plaintiff in his own house. Caldwell v. Kerbaugh, 144 F. 443. Where driver took off horse's bridle and attempted to feed him in ferry area way and horse ran away. Koonz v. New York Mail Co., 72 N. J. Law, 630, 63 A. 341. Where defendant hung and left for two days on a pole in public place a live electric wire defectively insulated. Fisher v. New Bern, 140 N. C. 506, 53 S. E. 342. Finding of negligence sustained by evidence of driving pile after it had obviously been broken. Compty v. Starke Dredge & Dock Co. [Wis.] 109 N. W. 650. Firing revolver on highway and frightening plaintiff's horses. Baxter v. Krainik, 126 Wis. 421, 106 N. W. 803. Ice fell from gutter against window of adjoining house. Richardson v. Nelson, 221 Ill. 254, 77 N. E. 583. Where evidence showed light rails, guard rail and frog, loose guard rail, insufficient number of ties, rotten ties in track immediately adjoining that occupied by frog and guard rail. Dunphy v. St. Joseph Stockyards Co., 118 Mo. App. 506, 95 S. W. 301.

45. Southern R. Co. v. Stutts [C. C. A.] 144 F. 948; Armour & Co. v. Carlas [C. C. A.] 142 F. 721; Diamond Block Coal Co. v. Cuthbertson [Ind.] 76 N. E. 1060; Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718; Heinmiller v. Winston Bros. [Iowa] 107 N. W. 1102; Pyke v. Jamestown [N. D.] 107 N. W. 359; Keile v. Kahn, 30 Pa. Super. Ct. 416; Pittsburgh, etc., R. Co. v. O'Donnell, 118 Ill. App. 335; Perry v. People's Gas Light & Coke Co., 119 Ill. App. 389; Alton R., Gas & Elec. Co. v. Webb, 119 Ill. App. 75; Robbins v. New York City R. Co., 50 Misc. 626, 98 N. Y. S. 198; Gerber v. Boorstein, 113 App. Div. 808, 99 N. Y. S. 1091. Plaintiff while delivering goods to defendant's tenant fell into elevator well. Hamilton v. Taylor [Mass.] 80 N. E. 592. Degree of care and skill with which horse was being driven. Cutting v. Shelburne [Mass.] 78 N. E. 752. Whether bridge carpenter who had delivered only one load upon a bridge ought to have known that bridge was unsafe when directed to drive upon same to deliver second load. Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345.

Where evidence is conflicting, contributory negligence is for the jury. Hemphill v. Buck Creek Lumber Co., 141 N. C. 487, 54 S. E. 420; Brown v. Durham, 141 N. C. 249, 53 S. E. 513; Ft. Smith Light & Traction Co. v. Flint [Ark.] 99 S. W. 79; Chicago Union Traction Co. v. Lundahl, 117 Ill. App. 220.

Where inferences are disputable though facts are undisputed, contributory negligence is for jury. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337; Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738; Thomson v. Issaquah Shingle Co. [Wash.] 86 P. 588.

puted and only one reasonable inference can be drawn, such questions are questions of law for the court,[47] but this rule applies only when there is no reasonable ground for difference of opinion as to either the facts or the inferences therefrom,[48] in other words, such questions are for the jury except where neither the facts nor inferences are subject to reasonable dispute.[49] These rules are, of course, applicable to the

Where the nature and attributes of an act relied upon to show contributory negligence can be determined only by considering the attendant circumstances. Baltimore & O. R. Co. v. State [Md.] 64 A. 304; Turner v. Hall [N. J. Law] 64 A. 1060. Whether plaintiff carelessly created danger from which he was attempting to escape when injured. Boman v. Mashek Chemical & Iron Co. [Mich.] 13 Det. Leg. N. 996, 110 N. W. 518. Sitting on boom of derrick in course of erection. Pickwick v. McCauliff [Mass.] 78 N. E. 730. Allowing fourteen year old girl accompanied by adult companion to drive gentle horse. Jacks v. Reeves [Ark.] 95 S. W. 781. Driving over side of bridge known to be unrailed. Cutting v. Shelburne [Mass.] 78 N. E. 752. Where woman jumped from window to escape fire instead of running through flames. Omaha Water Co. v. Schamel [C. C. A.] 147 F. 502. Evidence held to warrant inference that boy killed by dynamite carelessly left on ground by defendant either did not know of presence of dynamite or was ignorant of its explosive character. Hobbs v. Blanchard & Son Co. [N. H.] 65 A. 382. Lineman injured by contact with defectively insulated wire. Ziehn v. United Elec. Light & Power Co. [Md.] 64 A. 61. Contributory negligence of woman thrown from high spring seat of wagon when wheel dropped into rut. Milliren v. Sandy Tp., 29 Pa. Super. Ct. 580. Pedestrian fell into excavation in street at night. Guild v. Pringle [C. C. A.] 145 F. 312. Miner injured while working in room insufficiently propped. McKinnon v. Western Coal & Min. Co., 120 Mo. App. 148, 96 S. W. 485. Independent contractor working in basement within five feet of elevator shaft through which lumber being handled by another contractor fell and injured the former. Smith v. Dow [Wash.] 86 P. 555. Where plaintiff merely steadied herself against bannister in dark hall instead of grasping it. Greenfield v. Doepfner, 49 Misc. 651, 97 N. Y. S. 1043. Use of kerosene oil to kindle fire. Ellis v. Republic Oil Co. [Iowa] 110 N. W. 20; Nelson v. Republic Oil Co. [Iowa] 110 N. W. 24. Whether certain act constitutes negligence, or how work should be done in order to be safe. Stephens v. American Car & Foundry Co. [Ind. App.] 78 N. E. 335. Attempting to turn balky horse in street thirty-eight feet wide with gully on one side partly protected by trees. Dethrage v. Rome, 125 Ga. 802, 54 S. E. 654. Independent contractor licensed to walk on and use track of crane in defendant's shop held not guilty of contributory negligence in failing to keep constant look out for crane while sitting on track and performing his work. Allis-Chalmers Co. v. Reilly [C. C. A.] 143 F. 298.

46. Elgin, Aurora & So. Traction Co. v. Wilson, 120 Ill. App. 371; Wendell v. Leo, 101 N. Y. S. 51. Whether pile of barrels on sidewalk was of such character that defendant should have anticipated that children would play thereon and be injured. Kreiner v. Straubmuller, 30 Pa. Super. Ct. 609.

47. **Negligence:** Hayes v. Southern R. Co., 141 N. C. 195, 53 S. E. 847; Brown v. Durham, 141 N. C. 249, 53 S. E. 513; Pyke v. Jamestown [N. D.] 107 N. W. 359; Union Pac. R. Co. v. Brown [Kan.] 84 P. 1026; Hamilton v. Lake Shore & M. S. R. Co., 4 Ohio N. P. (N. S.) 249. When the conclusion follows as a matter of law that the plaintiff has failed to make out his case, it is the court's duty to take the case from the jury. Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231. No question for jury where plaintiff's own evidence shows that injury was caused by someone other than defendant or fails to connect defendant therewith. Strasburger v. Vogel, 103 Md. 85, 63 A. 202. Where plaintiff's evidence is evenly balanced as to whether injury was caused by defendant's negligence or by independent intervening cause, jury cannot arbitrarily adopt inculpating and reject exculpating evidence. Id. Failure of train crew to keep a lookout for men known to be making repairs on the track in the yards at night. Texas & P. R. Co. v. Cotts [Tex. Civ. App.] 95 S. W. 602. Defendant's driver held not guilty of gross negligence causing death so as to render defendant liable under Rev. Laws, c. 171, § 2. Manning v. Conway [Mass.] 78 N. E. 401.

Contributory negligence: Crookston Lumber Co. v. Boutin [C. C. A.] 149 F. 680; Bradley v. Louisville & N. R. Co. [Ala.] 42 So. 818; Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053; Hewes v. Chicago, etc., R. Co., 119 Ill. App. 393; Keile v. Kahn, 30 Pa. Super. Ct. 416. Verdict should be directed for defendant where it is plain that plaintiff was guilty of contributory negligence. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909. Where plaintiff fell through trap door in her own house left open by defendant's employe. Louisville Gas Co. v. Fuller, 29 Ky. L. R. 130, 92 S. W. 566. Driving on track in front of train. Sanguinette v. Mississippi River & B. T. R. Co., 196 Mo. 466, 95 S. W. 386. Where plaintiff's own actions raise presumption of contributory negligence. Lofsten v. Brooklyn Heights R. Co., 184 N. Y. 148, 76 N. E. 1035. Where one familiar with premises fell down stairs. Chicago, etc., R. Co. v. Doyle, 119 Ill. App. 303.

Proximate cause: Fanizzi v. New York & Q. R. Co., 113 App. Div. 440, 99 N. Y. S. 281. Where child playing on clay bank ran along side moving cars and fell under them, clay bank held not proximate cause of accident. Seymour v. Union Stock Yards & Transit Co., 224 Ill. 579, 79 N. E. 950.

48. **Negligence:** Brower v. Public Service Corp. [N. J. Law] 64 A. 1052; International, etc., R. Co. v. Wray [Tex. Civ. App.] 16 Tex. Ct. Rep. 676, 96 S. W. 74; Choctaw, etc, R. Co. v. Wilker, 16 Okl. 384, 84 P. 1086; Oklahoma Gas & Elec. Co. v. Lukert, 16 Okl. 397, 84 P. 1076; Bannon v. Pennsylvania R. Co., 29 Pa. Super. Ct. 231; Hanlon v. Traction Co., 28 Pa. Super. Ct. 223.

49. **Negligence:** Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 99 S. W. 200; International, etc., R. Co. v. Brice [Tex. Civ. App.] 15 Tex. Ct. Rep. 408, 95 S. W. 660; Texarkana

particular doctrines and phases of negligence, contributory negligence and proximate cause, such as the turntable doctrine,[50] last clear chance,[51] whether the presumption under doctrine of res ipsa loquitur has been rebutted,[52] whether the injury was caused by act of God,[53] contributory negligence in attempting to escape sudden peril,[54] and contributory negligence of children[55] or of their parents or guardians.[56] Where negligence is a mixed question of law and fact, the law is for the court and the fact for the jury.[57]

Instructions.[58]—The usual rules apply. Thus, the instructions should cover

& Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

Contributory negligence: Guild v. Pringle [C. C. A.] 145 F. 312; Armour & Co. v. Carlas [C. C. A.] 142 F. 721; Mortimer v. Beaver Valley Traction Co [Pa.] 65 A. 758; Turner v. Hall [N. J. Law] 64 A. 1060; International & G. N. R. Co. v. Brice [Tex. Civ. App.] 95 S. W. 660. An act relied on to show contributory negligence as a matter of law must be distinct, prominent, and decisive. Baltimore & O. R. Co. v. State [Md.] 64 A. 304.

50. Question for jury: Negligence in maintaining nuisance attractive to children. Belt R. Co. v. Charters, 123 Ill. App. 322. Jury must determine the dangerous character of the machine, device, or substance, its attractiveness, its location, and the care proper to be exercised in guarding it. McAllister v. Seattle Brew. & Malting Co. [Wash.] 87 P. 68.

Question for court: Where machine by which child was hurt was in enclosed room remote from any dwelling and attended by a competent engineer, and it appeared that the child was not attracted into the room by the machine, the court held as a matter of law that the turn table doctrine did not apply. Houck v. Chicago & A. R. Co., 116 Mo. App. 559, 92 S. W. 738.

51. Whether defendant had last clear chance to avoid the injury, held for jury. Plemmons v. Southern R. Co., 140 N. C. 286, 52 S. E. 953. Where plaintiff negligently fell while alighting from train and was struck by express truck propelled by defendant's servant, question held one of fact for jury. Gray v. Weir, 113 App. Div. 479, 99 N. Y. S. 252.

52. Held for jury. Field v. Winheim, 123 Ill. App. 227.

53. Whether injury was caused by act of God, held for jury. City of McCook v. McAdams [Neb.] 106 N. W. 988. Whether storm was of such unusual violence that defendant in constructing building was not obliged to foresee its consequences, held for jury. Uggla v. Brokaw, 102 N. Y. S. 857.

54. Whether one used due care in attempting to escape from dangerous position caused by negligence of another, held for jury. Hess v. Baltimore & O. R. Co., 28 Pa. Super. Ct. 220.

55. For jury: Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737; Buscher v. New York Transp. Co., 114 App. Div. 85, 99 N. Y. S. 673. Question for jury whether child under twelve is sui juris. Gerber v. Boorstein, 113 App. Div. 808, 99 N. Y. S. 1091. Whether child seven years old was capable of contributory negligence in playing with snatch block used in stringing telephone cable. O'Leary v. Michigan State Tel. Co. [Mich.] 13 Det. Leg. N. 752, 109 N. W. 434. Eight year old boy walking on railroad track. Wabash R. Co. v. Jones, 121 Ill. App. 390. Boy thirteen years old playing on street car left standing in street. Denver City Tramway Co. v. Nicholas [Colo.] 84 P. 813. Boy eleven years old run over while crossing street. Levin v. Dunn, 101 N. Y. S. 25. Child nine years old drowned while attempting to cross foot log. Indianapolis Water Co. v. Harold [Ind. App.] 79 N. E. 542. Boy eight years old tried to climb between wheels into wagon about to start. United Breweries Co. v. O'Donnell, 124 Ill. App. 24. Negligence in playing on turn table. Belt R. Co. v. Charters, 123 Ill. App. 322.

For court: Contributory negligence for boy ten years old and of average intelligence to jump from tail piece of one wagon and run into pole of wagon six feet in rear going only four miles an hour. United Breweries Co. v. Bass, 121 Ill. App. 299.

56. Question of fact: Mother not guilty of contributory negligence as matter of law in allowing child to escape from house and go into dangerous place while she was engaged in household duties. Weida v. Hanover Tp., 30 Pa. Super. Ct. 424; Compty v. Starke Dredge & Dock Co. [Wis.] 109 N. W. 650. Not negligence for parents to allow child four years old to go unattended through barber shop constituting only entrance to house from street, child being burned by portable furnace left in shop by plumber. Rosenberg v. Zeitchik, 101 N. Y. S. 591. Bright child five years old in street unattended, held not to show contributory negligence of parent as matter of law. Wabnich v. Dry Dock, etc., R. Co., 112 App. Div. 4, 98 N. Y. S. 38. Grandmother temporarily lost sight of child while engaged in domestic duties. Norris v. Anthony [Mass.] 79 N. E. 258. Father not negligent as matter of law in allowing daughter to kindle fire with kerosene oil. Nelson v. Republic Oil Co. [Iowa] 110 N. W. 24. Whether father, a working man away from home from 6 A. M. to 5 P. M., was guilty of negligence contributing to death of child four years old, killed by falling of lumber pile near curb while child was playing on sidewalk near curb with eight year old sister, held for jury. Addis v. Hess, 29 Pa. Super. Ct. 505.

Question of law: Prima facie evidence of negligence on part of parent when child of tender years is on street unattended. Norris v. Anthony [Mass.] 79 N. E. 258; Buscher v. New York Transp. Co., 114 App. Div. 85, 99 N. Y. S. 673.

57. Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 78 N. E. 252. See post, this section, Instructions.

58. See 6 C. L. 776.

all issues raised by the pleadings and sustained by the evidence [59] and no others,[60] but failure to submit an issue is not fatal where the party is given full benefit thereof;[61] they must not give undue prominence to any particular phase of the case;[62] they must be considered as a whole;[63] and instructions on matters fully covered by other instructions need not be given.[64] When the evidence is conflicting, the instructions must not assume the negligence of the defendant,[65] or the contributory negligence of the plaintiff,[66] or that the plaintiff was injured [67] in the manner

59. When properly requested so to do, the court should submit to the jury the particular physical facts directly put in issue by the pleadings. Rev. St. 1898, § 2858. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. Submission as follows held sufficient. Were the alleged injuries the immediate, natural, and necessary consequences of the alleged act of negligence, were such injuries such as might naturally and probably occur from the alleged negligence, and were they such as should have been in contemplation of the defendant with reasonable certainty; was the alleged physical injury the natural and proximate result of the defendant's negligence. Kimberly v. Howland [N. C.] 55 S. E. 778.

Contributory negligence: Ruffin v. Atlantic, etc., R. Co., 142 N. C. 120, 55 S. E. 86. Where voluntary drunkenness is pleaded as an issue of contributory negligence, it is error to refuse to charge upon the same. International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90 S. W. 918. Where servant testified that he could not stand in trench and do work, which was safer way than that employed, but physical facts testified to by him justified contrary finding, evidence justified instruction upon contributory negligence. Reeves v. Galveston, etc. R. Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 498, 98 S. W. 929. There being evidence in action by brakeman that he voluntarily placed his foot under car, a requested instruction, that if he did so no recovery could be had, should have been given. Missouri, K. & T. R. Co. v. Mason [Tex. Civ. App.] 99 S. W. 186.

Proximate cause: Instruction that falling of brick from defendant's chimney made prima facie case of negligence erroneous when evidence showed also that several persons for whose actions defendant was not responsible were leaning against chimney when brick fell. Strasburger v. Vogel, 103 Md. 85, 63 A. 202.

60. Where there is no evidence of mere accident or misadventure but an issue of negligence is clearly tendered, instructions in respect thereto are properly refused. Wise v. St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898. Charge that there was no presumption of negligence from mere fact of accident properly refused where no such issue was raised by the evidence. Galveston, etc., R. Co v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Use of word "unusual" in refering to puffing and whistling of engine, improper where there was no evidence that such acts were unusual. Phelan v. Granite Bituminous Pav. Co., 115 Mo. App. 423, 91 S. W. 440. Error to instruct upon the theory that the action is for injuries caused by a nuisance when the action is for negligence only. Loth v. Columbia Theater Co., 197 Mo. 328, 94 S. W. 847. Error to instruct on doctrine of last clear chance where evidence showed that defendant could not have prevented the accident after having discovered plaintiff's peril. Louisville & N. R. Co. v. Molloy's Adm'x, 28 Ky. L. R. 1113, 91 S. W. 685. It is misleading and error to instruct on the doctrine of the last clear chance where there is no evidence to sustain the instruction, defendant being thus deprived of full benefit of defense of contributory negligence. Newport News & O. P. R. & Elec. Co. v. McCormick [Va.] 56 S. E. 281.

61. Under Revisal 1905, § 483, requiring contributory negligence to be specially pleaded and placing the burden of proof on defendant, such issue should be submitted where raised by the pleadings, but failure to submit it is not error where defendant is given full benefit thereof in the instructions given. Ruffin v. Atlantic & N. C. R. Co., 142 N. C. 120, 55 S. E. 86.

62. In a case turning on the doctrine of res ipsa loquitur, it is error to give undue prominence to law of ordinary negligence. Waller v. Ross [Minn.] 110 N. W. 252.

63. The rule that an instruction must be taken in connection with the other instructions given has peculiar force with reference to a definition of negligence, it being almost impossible to give a definition of negligence in one sentence which would apply to all cases. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280.

64. Where the court charged that plaintiff could not recover if he failed to exercise ordinary care for his own safety, it is not error to refuse an instruction that no recovery can be had if plaintiff voluntarily exposed himself to the danger. Wellmeyer v. St. Louis Transit Co., 198 Mo. 527, 95 S. W. 925. Where the jury answered an issue as to contributory negligence in the negative and did not answer an issue as to last clear chance at all, an instruction as to the latter issue did not render harmless as to defendant, failure to instruct as to proximate cause and last clear chance having reference to the special facts of the case. Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553.

65. Brewster v. Elizabeth City, 142 N. C. 9, 54 S. E. 784; Garth v. North Alabama Traction Co. [Ala.] 42 So. 627. Instruction that "where the negligence of two unite," etc., instead of "where two united in negligently causing," etc., held not misleading as assuming fact of negligence. Frank Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652. Instruction commencing "where the negligence of two unite in causing an accident," instead of "if the negligence of two," etc., held not misleading as assuming that the negligence of two did unite, etc. Id.

66. Instruction that plaintiff could not recover if accident would have been averted by his doing certain things, held to assume that things were not done. Baltimore & O. R. Co. v. State [Md.] 64 A. 304.

67. Brewster v. Elizabeth City, 142 N. C. 9, 54 S. E. 784.

alleged,[68] or that the defendant's negligence was the proximate cause of the injury;[69] but it is not error to assume facts not in conflict.[70] Definitions should be given when properly requested,[71] but failure to give a definition is not necessarily fatal.[72] Definitions of negligence and ordinary care,[73] and contributory negligence,[74]

68. Garth v. North Alabama Traction Co. [Ala.] 42 So. 627.

69. Brewster v. Elizabeth City, 142 N. C. 9, 54 S. E. 784.

70. That hole in theatre aisle carpet which had existed two weeks had existed long enough for defendant to discover it. Nephler v. Woodward [Mo.] 98 S. W. 488.

71. Ordinary and reasonable care. Denver & R. G. R. Co. v. Norgate [C. C. A.] 141 F. 247.

72. Not reversible error to fail to define proximate cause where jury were told that the defendant's negligence must have been the "direct" cause of the injury. Houston & T. C. R. Co. v. Oram [Tex. Civ. App.] 15 Tex. Ct. Rep. 624, 92 S. W. 1029. Leaving it for the jury to determine the proximate cause of the accident is not error where all the facts necessary to render the defendant liable are defined by the court. Harrison v. Kansas City Elec. L. Co., 195 Mo. 606, 93 S. W. 951. An instruction using the term "ordinary care" need not define the same when it is fully defined in another instruction. Nephler v. Woodward [Mo.] 98 S. W. 488.

73. Negligence: Definition of negligence as failure to do something which " a reasonable person guided by those considerations which ordinarily regulate the conduct of human affairs, under the circumstances would do or doing something which such person under such circumstances would not do, held a sufficient preservation of the idea that the standard of care is the conduct of a reasonably careful and prudent man. Martin v. Des Moines Edison L. Co. [Iowa] 106 N. W. 359. Instruction that "negligence is the failure to observe, for the protection of the interest of another person, that degree of care, precaution, and vigilance which the circumstances justly demand, whereby such other person suffers injury," held proper. Fisher v. Newbern, 140 N. C. 506, 53 S. E. 342. Instruction that negligence is failure to do that which person of "ordinary" prudence would do, etc., or doing that which person of "like" prudence would not have done, etc., not erroneous or misleading in use of word "like" for "ordinary." St. Louis Southwestern R. Co. v. Dixon [Tex. Civ. App.] 14 Tex. Ct. Rep. 782, 91 S. W. 626. Use of words "due diligence," where from whole instruction it appeare to be used as synonymous with "reasonable care" which has been correctly defined, held not error. Bond v. Chicago, B. & Q. R. Co. [Mo. App.] 99 S. W. 30.

Ordinary or due care: Inaccuracies of expression in defining due care are not fatal where the care required of the defendant by the instruction as a whole is that degree of care which would be ordinary care under the circumstances. Savannah Elec. Co. v. Bell, 124 Ga. 663, 53 S. E. 109. Use of expression "such care as a person of ordinary care and prudence would have exercised," etc., held **not erroneous** in use of word "would." Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88. Using expression "care which the great majority of men would have used," instead of "care which the great majority of men would have ordinarily exercised," held not misleading. Olweil v. Skobis, 126 Wis. 308, 105 N. W. 777. Phrase "by the exercise of reasonable exertion," as used in instruction on doctrine of last clear chance, held equivalent to "by the exercise of reasonable care." Phelan v. Granite Bituminous Pay. Co., 115 Mo. App. 423, 91 S. W. 440. Definition of ordinary care as the care which a "prudent" man instead of an "ordinarily prudent" person would exercise, held **erroneous.** City of Paris v. Tucker [Tex. Civ. App.] 15 Tex. Ct. Rep. 240, 93 S. W. 233. Instruction that defendant was liable unless its servants exercised due care "in all respects" in the performance of the acts causing the accident was erroneous as not confining the duty of care to the acts alleged and proved as constituting negligence. International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90 S. W. 918. Instruction that "ordinary care" is such care as an ordinary person would usually observe under the same or similar circumstances as those under "investigation" held erroneous, on ground that it is the care which an ordinarily prudent person would exercise under the "circumstances proven." Henderson City R. Co. v. Lockett [Ky.] 98 S. W. 303. Instruction that defendant was liable if he "could" have known of the defect causing the injury, held erroneous as eliminating the element of due care. Bruckel v. J. Milhau's Son, 102 N. Y. S. 395. Use of terms "while" and at the "time" with reference to due care criticised as not being broad enough to cover antecedent time so well as mere instinct of injury. Illinois C. R. Co. v. Whiteaker, 122 Ill. App. 333.

74. Where definition is broad and true, it is better to adhere to it rather than to follow suggestions overly refined. Wilson v. Southern R. Co., 73 S. C. 481, 53 S. E. 968. Instruction that burden was on defendant to prove that plaintiff failed to exercise ordinary care to avoid injury, and that such failure was the cause of the injury without which it would not have occurred, held a proper exposition of law of contributory negligence. Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401. Charge that jury must consider "whether plaintiff was in the exercise of due care; that is, whether his failure to exercise due care, if you find that he did fail, contributed to the accident," held sufficient. Cleveland v. Washington [Vt.] 65 A. 584. Instruction "if you believe from the evidence that the plaintiff was guilty of any negligence which caused or contributed to his injury, if any, then he cannot recover," held sufficient in view of correct definitions of negligence and ordinary care elsewhere given. Galveston, etc., R. Co. v. Burns [Tex. Civ. App.] 15 Tex. Ct. Rep. 72, 91 S. W. 618. Charging plaintiff with duty of exercising such care as one of same age, etc., "would ordinarily use under like circumstances," held equivalent to charging him with duty of exercising care "that person of ordinary prudence of his age," etc.,

must be predicated upon the particular acts of negligence alleged,[75] or shown by the evidence.[76] Instructions on negligence[77] and contributory negligence[78] must

would exercise, etc. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 15 Tex. Ct. Rep. 167, 91 S. W. 598. Instruction that if plaintiff contributed to his injury by his own negligence as the proximate cause held sufficient in absence of request for definition. Cole v. Blue Ridge R. Co. [S. C.] 55 S. E. 126. Instruction that in order to constitute contributory negligence "it must appear that there was such a relation between plaintiff's fault, and the injury that it was the natural result thereof," held not erroneous in use of word "fault" for "want of ordinary care." Sorensen v. J. I. Case Threshing Mach. Co. [Wis.] 109 N. W. 84.

75. Contributory negligence. International & G. N. R. Co. v. Wray [Tex. Civ. App.] 16 Tex. Ct. Rep. 676, 96 S. W. 74.

76. Though the petition contains only general allegations. Muiderig v. St. Louis, K. C. R. Co., 116 Mo. App. 655, 94 S. W. 801.

77. Ordinariiy it is not necessary or proper to charge that any specific act is or is not negligence. McMahen v. White, 30 Pa. Super. Ct. 169. See ante, this section, Questions of Law and Fact. Instruction that there is no negligence if the jury find certain facts must include all the material elements of the case, otherwise it would preclude the jury from drawing such reasonable inferences as the testimony justifies. Ruffin v. Atlantic & N. C. R. Co., 142 N. C. 120, 55 S. E. 86. Instruction that facts showed negligence properly refused where question was for jury. Alton R. G. & E. Co. v. Webb, 119 Ill. App. 75. Instruction that failure to exercise ordinary care in doing the acts which caused the injury was negligence was not an invasion of the province of the jury. International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90 S. W. 918. Where negligence is a mixed question of law and fact it is not improper to tell the jury that, if the facts are established, they constitute negligence. Baltimore & O. S. W. R. Co. v. Kleespies [Ind. App.] 78 N. E. 252. Instruction that upon certain showing, certain presumption of negligence arises, is misleading unless it states that such presumption is rebuttable. Chicago & E. I. R. Co. v. Crose, 113 Ill. App. 547. Instruction that **burden of proof** was on plaintiff to establish by preponderance of evidence that alleged injury, if any, was caused by defendant's negligence, and that, if it had been done, the burden shifted to defendant to show that accident was caused by the contributory negligence of plaintiff's son, held not erroneous as requiring defendant to disprove negligence. El Paso Elec. R. Co. v. Kitt [Tex. Civ. App.] 99 S. W. 587. It is error to refuse to instruct that the party alieging facts giving rise to a presumption of negligence has the burden of proving such negligence. Lincoln Traction Co. v. Shepherd [Neb.] 107 N. W. 764.

Ininstructing on statutory negligence, it is sufficient to follow the language of the statute, though the jury are not specifically told that the injury must have been caused by defendant's negligence. Ward v. Meredith, 122 Ill. App. 159.

78. The phrase "considering his surroundings, at the time, did he exercise such reasonable care for his own safety as would be expected of an ordinarily prudent man," is equivalent to hypothesizing the instruction on "one similarly situated." Reiter-Conley Mfg. Co. v. Hamiin, 144 Ala. 192, 40 So. 280. Must be hypothesized upon plaintiff's knowledge or notice of the danger. Id. In action by brakeman for an injury alleged to have been caused by hand hold giving away thereby throwing him so that his foot was crushed, instruction that, if "plaintiff purposely loosened the hand hold, and then voluntarily placed his foot under the train," the verdict should be for the defendant, is not objectionable as requiring them to find both facts before such verdict could be given. Missouri K. & T. R. Co. v. Mason [Tex. Civ. App.] 99 S. W. 186. Not error to refuse to instruct that, in determining question of contributory negligence the instinct of self preservation should not be considered, when the attention of the jury was not called to such matter. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Instruction on **contributory negligence of child** properly refused when it included no explanation of what due care is in the case of a child. Coney Island Co. v. Dennan, 149 F. 687. Error to charge as to contributory negligence of child in same terms applicable to adults, without adverting to child's age, capacity and intelligence. Ill. Cent. R. Co. v. Johnson, 123 Ill. App. 300. Where jury is instructed to consider age of person injured, it should also be instructed that if he would have escaped injury by the exercise of such care as he was capable of there could be no recovery. Buscher v. New York Transp. Co., 114 App. Div. 85, 99 N. Y. S. 673. Instruction that child not required to exercise same care as aduit, erroneous, since his intelligence and capacity may charge him with duty to exercise such care. Wabash R. Co. v. Jones, 121 Ill. App. 390. Charge as to what the evidence showed as to the capacity and intelligence of a child properly refused as stating no proposition of law. Moss v. Mosley [Ala.] 41 So. 1012.

Burden of proof: Intimation in charge that presumption exists and remains throughout case, that plaintiff was not guilty of contributory negligence, but exercised ordinary care, was not prejudicial as requiring anything more than that negligence of plaintiff need be shown by a preponderance of the evidence only. Toledo R. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334. An instruction that the burden of proof was on defendant to prove by a preponderance of evidence that plaintiff was negligent, unless plaintiff's evidence showed such fact, in which case the verdict should be for defendant, is not objectionable as submitting to the jury the question as to where the burden rests. Texas & N. O. R. Co. v. Conway [Tex. Civ. App.] 16 Tex. Ct. Rep. 898, 98 S. W. 1070. Instruction that burden of proof as to negligence is on plaintiff, and that he is entitled to recover upon proof of negligence charged and that same was proximate cause of his injury, unless he was guilty of contributory negligence, is not erroneous as placing burden on plaintiff to prove freedom from contributory negligence. International & G. N. R. Co. v. Jackson [Tex. Civ. App.] 14 Tex. Ct. Rep. 170, 90

be predicated upon a causal connection between the negligence and the injury,[79] to the exclusion of causal agencies for which defendant was not responsible.[80] An instruction on proximate cause [81] should follow the technical definition of proximate cause,[82] but it is not fatal error to express the idea in other terms.[83] A particular doctrine or theory [84] must be invoked by a request for an instruction thereon.[85]

Verdicts and findings.[86]—The usual rules apply,[87] including those applicable to the submission of special interrogatories.[88]

S. W. 918. Instruction to find for defendant if jury was unable to determine whether the injury was caused by defendant's negligence or plaintiff's contributory negligence held misleading in that jury might infer that burden as to contributory negligence was on plaintiff. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. In Indiana defendant must be given benefit of plaintiff's evidence as well as his own in connection with burden of proving contributory negligence (City of Indianapolis v. Keeley [Ind.] 79 N. E. 499; Evansville & T. H. R. Co. v. Mills [Ind. App.] 77 N. E. 608; City of Indianapolis v. Mullally [Ind. App.] 77 N. E. 1132), but such is not the case in Arkansas (Little Rock R. & Elec. Co. v. Doyle [Ark.] 96 S. W. 353). Instruction that burden was on defendant to prove contributory negligence not erroneous as susceptible of inference that such negligence must be shown solely by defendant's evidence where there was also an instruction to find for defendant if the "evidence" showed contributory negligence. International & G. N. R. Co. v. Edwards [Tex. Civ. App.] 14 Tex. Ct. Rep. 92, 91 S. W. 640.

79. Negligence: Johnson v. Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866. Charge that defendant was liable notwithstanding plaintiff's contributory negligence if defendant after discovering plaintiff's danger failed to exercise due care to avoid the accident, without charging that such failure must be the proximate cause of the accident, held erroneous. Birmingham R. L. & P. Co. v. Jones [Ala.] 41 So. 146. Instruction that proximate cause is "the efficient cause without which the injury complained of would not have occurred," held insufficient in suit for contracting consumption in cold waiting room. Gulf, etc., R. Co. v. Turner [Tex. Civ. App.] 15 Tex. Ct. Rep. 224, 93 S. W. 195.

Contributory negligence: Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280; Betchman v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 140. Instruction that if complainant's negligence "in any way contributed" to the injury, there could be no recovery properly refused. Coney Island Co. v. Dennan, 149 F. 687.

Where the causal connection is admitted, no instruction on proximate cause is necessary in connection with instruction on contributory negligence. Texas & P. R. Co. v. Cotts [Tex. Civ. App.] 95 S. W. 602.

80. Where plaintiff hired team and driver to defendant and driver's negligence contributed to injury of team. Johnson v. Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866.

81. Definition of probable cause as "the efficient cause from which the injury follows, in unbroken sequence without any intervening cause to break the continuity," held erroneous. Eichman v. Buchheit, 128 Wis. 385, 107 N. W. 325. Citing Deisenrieter v. Kraus-Merkel Co., 97 Wis. 279, 72 N. W. 735, and Feldschneider v. Chicago, etc. R. Co., 122 Wis. 423, 99 N. W. 1034, for correct definition.

82. Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777.

83. Speaking of "natural result" instead of "natural and probable result." Olwell v. Skobis, 126 Wis. 308, 105 N. W. 777. As "the efficient cause which produces the injury," etc., not erroneous because of absence of phrase "that which acts first," after word cause. Roedier v. Chicago, M. & St. P. R. Co. [Wis.] 109 N. W. 88. Instruction that "by proximate cause as used in this charge is meant a cause without which the thing complained of would not have occurred," held not strictly correct in that it was not sufficiently comprehensive, but that, nevertheless, it was sufficient in action for death to present the question in issue. Galveston, etc., R. Co. v. Heard [Tex. Civ. App.] 14 Tex. Ct. Rep. 617, 91 S. W. 371. Instruction on necessary connection between negligent act and injury using words "by reason of," instead of "as the direct and proximate result of," is not error. Houston & T. C. R. Co. v. Anglin [Tex. Civ. App.] 99 S. W. 897.

84. Instruction that burden of proof shifted to defendant on defense of act of God held to mean that burden rested on defendant and, as thus construed, not erroneous. City of McCook v. McAdams [Neb.] 106 N. W. 988. Instruction on theory that injury was caused by act of God held sufficient. Id.

85. Res ipsa loquitur: Isley v. Virginia Bridge & Iron Co., 141 N. C. 220, 53 S. E. 841. In North Carolina the doctrine of res ipsa loquitur seems to be that the fact of the accident may sometimes be considered by the jury as evidence of such weight as they may choose to attach to it. Id. Inevitable accident. Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911.

86. See 6 C. L. 777.

87. See Verdicts and Findings, 6 C. L. 1814.

88. Question whether injury "to plaintiff" should have been foreseen erroneous. Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809. Question whether defendant "knew or ought to have known," is double. Id. Question whether injury was caused by "incompetence or want of skill," is improper in form, since, if incompetence and want of skill are synonymous, the latter term is surplusage, and, if not synonymous, the question is double. Id.

NEGOTIABLE INSTRUMENTS.

§ 1. Elements and Indicia (1124).
§ 2. Form, Interpretation, and Effect (1125).
§ 3. Anomalous Signatures and Indorsements (1129).
§ 4. Liability and Discharge of Primary Parties (1130). Defenses Between Original Parties (1130).
§ 5. Liabilities and Discharge of Sureties, Guarantors and Other Anomalous Parties (1132).
§ 6. Negotiation and Transfer Generally (1134).
§ 7. Acceptance (1134).
§ 8. Indorsement (1135).
§ 9. Presentment and Demand (1137).
§ 10. Protest and Notice Thereof (1138).
§ 11. New Promise After Discharge and Waiver of Presentment and Demand (1139).
§ 12. Accommodation Paper (1140).
§ 13. The Doctrine of Bona Fides (1141).
§ 14. Remedies and Procedure (1146).

§ 1. *Elements and indicia.*[89]—A negotiable instrument is an unconditional written promise or order to pay a certain person or his order or to bearer a certain sum of money at a certain time.[90] The promise is not unconditional if the direction is to pay out of a particular fund.[91]

89. See 6 C. L. 777.

90. Under Negotiable Instrument Law, Laws 1897, p. 722, c. 612, § 20, an instrument not payable to order or bearer is not negotiable. Fulton v. Varney, 102 N. Y. S. 608. Promissory note which in addition to all other essential elements contains the word "negotiable" is a negotiable instrument within Negotiable Instruments Law. Alexander & Co. v. Hagelrigg, 29 Ky. L. R. 1212, 97 S. W. 353. Checks are negotiable instruments. Boswell v. Citizens' Sav. Bk., 29 Ky. L. R. 988, 96 S. W. 797. Negotiability of interest coupons attached to bonds is governed by the negotiability of the bonds. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353.

91. The fact that a draft otherwise regular recites "400 c/A. R. L. No. 3362—via. A. R. L. B. L. direct" which charged the payee with notice that a certain number of cases had been shipped and that the bill of lading went direct to the payee, does not show that the instrument was to be paid only out of a particular fund, so as to render it nonnegotiable. Waddell v. Hanover Nat. Bank, 48 Misc. 578, 97 N. Y. S. 305. Under Negotiable Instruments Law, Laws 1897, p. 722, c. 612, § 20, requiring the promise to pay to be unconditional, and § 22, providing that a promise to pay out of a particular fund is conditional, an instrument promising to pay out of the profits of a certain contract, is not negotiable. Fulton v. Varney, 102 N. Y. S. 608. Under Negotiable Instruments Law, bonds issued by a joint stock company are negotiable though by express stipulation the stockholders are exonerated from individual liability, liability being confined to the security and assets of the association, such limitation not restricting liability to a particular fund. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353. "Hutchinson, Kansas, Aug. 10, 1903. G. W. Lightner, Offerle, Kansas—Dear Sir: Pay to the order of First National Bank of Hutchinson, Kansas, on account of contract between you and the Snyder Planing Mill Co., $1,500" is negotiable "on account of" etc., is not a direction to charge to a particular fund. First Nat. Bank v. Lightner [Kan.] 88 P. 59. A municipal bond providing that it shall be payable only out of a particular fund when collected, and that the holder shall not have any claim or lien against the city except such fund, and that the city shall not be liable in case of failure to collect, is not negotiable. Northern Trust Co. v. Wilmette, 220 Ill. 417, 77 N. E. 169.

Note: The law is well settled that a bill or note is not negotiable if made payable out of a particular fund. 1. Daniel, Neg. Inst. 50; White v. Cushing, 88 Me. 339, 51 Am. St. Rep. 402, 32 L. R. A. 590. But a distinction is recognized where the instrument is simply chargeable to a particular fund. In such case it is beyond question negotiable; payment is not made to depend upon the sufficiency of the fund mentioned, and it is mentioned only for the purpose of informing the drawee as to his means of reimbursement. 1 Daniel, Neg. Inst. § 51; Tiedeman, Bills and Notes, § 20. In Ridgely Bank v. Patton, 109 Ill. 479, 54 L. R. A. 827, it is said: "A bill or note, without affecting its character as such, may state the transaction out of which it arose, or the consideration for which it was given." "So, also, the insertion into the bill or note of a memorandum, explaining the nature of the business or debt, for which the instrument was given, will not make it nonnegotiable, for such memoradum does not make the payment conditional." Tiedeman, Com. Paper, § 26. The test in every case is said to be: "Does the instrument carry the general personal credit of the maker, or only the credit of a particular fund?" 4. Am. & Eng. Enc. of Law, 89. A promise to pay a certain sum "out of my next quarter's mail pay, which becomes due January 1, 1883," was held in Nichols v. Ruggles, 76 Me. 25, to be an absolute promise to pay a certain sum of money. And in Pierson v. Dunlop, 2 Cowp. 571, an order which was to be charged "to freight" was held negotiable. A note expressed to be in payment of certain tracts of land was held negotiable. Bank v. Micheal, 96 N. C. 53. Likewise a note which stated that it was given in consideration of certain personal property, the title of which was not to pass unless the note was paid. Chicago R. Co. v. Merchant's Bank, 136 U. S. 268, 34 L. Ed. 349. The following authorities are also in point: Matthews v. Crosby, 56 N. H. 21; Shepard v. Abbott, 137 Mass. 224; Schmittler v. Simon, 101 N. Y. 554, 54 Am. Rep. 737; Hillstrom v. Anderson, 46 Minn. 382. See First Nat. Bank v. Lightner [Kan.] 88 P. 59.

The time of payment[92] is not rendered uncertain by a provision that sureties consent to an extension of time of payment without notice,[93] nor by a provision reserving the right to waive default in the payment of interest,[94] nor by the fact that a maker may pay before maturity.[95]

The amount[96] is uncertain where the instrument is payable in current funds.[97] There is a conflict of authority as to whether a provision for attorney's fees renders the amount uncertain.[98]

Words of negotiability[99] are essential.[1]

§ 2. *Form, interpretation, and effect.*[2]—Except as affected by the doctrine of bona fides,[3] a negotiable instrument is a contract, and all the elements essential to the validity of a contract must exist.[4] Hence, it must be executed by one with authority to execute it.[5] It must be based on a sufficient[6] and legal consideration,[7]

92. See 6 C. L. 777.

93. Farmer v. Bank of Graettinger, 130 Iowa, 469, 107 N. W. 170.

94. Under Negotiable Instruments Law, negotiability is not affected by a provision in a deed of trust securing bonds reserving to the bondholders the right to waive default in payment of interest coupons attached to the bonds. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 363.

95. National Salt Co. v. Ingraham [C. C. A.] 143 F. 805.

96. See 6 C. L. 777.

97. Cashier's checks payable in current funds. Dille v. White [Iowa] 109 N. W. 909.

98. Instrument providing for attorney's fees, and waiving protection of exemption laws, held negotiable. Dumas v. People's Bank [Ala.] 40 So. 964. Rendered non-negotiable by a provision for attorney's fees and for taxes which the maker may not pay when due. Pace v. Gilbert School, 118 Mo. App. 369, 93 S. W. 1124.

99. See 6 C. L. 778.

1. Shelley v. Baker, 125 Ga. 663, 54 S. E. 663.

2. See 6 C. L. 778.

3. See post, § 13.

4. See Contracts, 7 C. L. 761. It is presumed that a maker read a note before he signed it. Fay v. Hunt, 190 Mass. 378, 77 N. E. 602. Where one executed a note under an agreement that it was not to be effective unless signed by another, the payee could not recover where it was not signed by such other without showing that he was willing to sign and was deterred by the wrongful act of the other. Key v. Usher [Ky.] 99 S. W. 324. Where in an action on a note it was alleged that it was agreed that such note was to be turned in on the payment of goods to be furnished the payee and the maker failed to furnish the goods, held such agreement did not affect the inforceability of the note. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166. Evidence held to show that a note was duly executed and had not been paid and was due. Johnston v. Baca [N. M.] 85 P. 237. The consideration is open to inquiry. Holmes v. Horn, 120 Ill. App. 359.

5. A commercial traveler has no authority to draw drafts on his principal for traveling expenses. Seattle Shoe Co. v. Packard [Wash.] 86 P. 845. Proof that he had been in the habit of doing so and that they had been paid does not show authority. Id. Evidence sufficient to show that notes were executed by authority of one sued as maker. Myrick Bros. Co. v. Jackson [Tex. Civ. App.] 99 S. W. 143. Evidence held to show that notes were executed by the select men of a town and purchased by one suing thereon from the treasurer. Bass v. Wellesley [Mass.] 78 N. E. 543.

6. Consideration held sufficient: Though a married woman may not execute a note as surety for her husband, yet where she does, the moral consideration is sufficient to sustain a renewal note given by her after her husband's death. Rathfon v. Locher [Pa.] 64 A. 790. Notes executed to take up a sight draft held valid, though draft had not been accepted, where drafts were renewals of others which the payee had accepted and the claimants, payee in the notes, had acted in accordance with a custom, and, on execution of the notes, surrendered to the bankrupt valuable collateral which later passed to the trustee. In re New York Car Wheel Works, 139 F. 421. A note is based on a sufficient consideration where given for a specified sum which the maker received from the payee. Taylor v. Industrial Mut. Deposit Co.'s Receiver, 29 Ky. L. R. 767, 96 S. W. 462. Where the proceeds of a note were received by an agent of the maker and used for his benefit, there was a sufficient consideration, though the money was furnished the payee by a third person. Hale v. Harris, 28 Ky. L. R. 1172, 91 S. W. 660. An antecedent debt is a sufficient consideration. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. Extension of time of payment is a good consideration. In re Kemp's Estate, 49 Misc. 396, 100 N. Y. S. 221. A check given on the purchase price of land under a contract to execute a contract of sale the next day, the fact that the seller refused to execute such contract does not affect the consideration for the check as it was given in consideration for the first contract, which is still in force. Caren v. Liebovitz 113, App. Div. 674, 99 N. Y. S. 952. An agreement to forbear immediate action to collect a draft is sufficient consideration for a note. Emerson v. Sheffer, 113 App. Div. 19, 98 N. Y. S. 1057. Where the payee of a note signed by three persons accepted in payment a note signed by one, it was based on a sufficient consideration. Brink v. Stratton, 112 App. Div. 299, 98 N. Y. S. 421. A valid patent or the right to sell a patented article is a sufficient consideration for a note though its value is greatly over estimated. Twentieth Century Co. v. Quilling [Wis.] 110 N. W. 174. Where an employe of a bank was either a debtor thereof or a defaulter, notes executed by him and his

though such instruments prima facia import a consideration.[8] Delivery is essential.[9] An instrument which is void on the ground of public policy cannot be ratified.[10]

In construing such instruments, effect will be given the intention of the parties [11] according to the terms of the instrument.[12] The nature of the liability

sister for the amount are based on a sufficient consideration. Henry v. State Bank [Iowa] 107 N. W. 1034. A check given in payment of a mortgage debt to prevent foreclosure, where the mortgagor claimed that the debt had been paid, is based on a sufficient consideration. National Bank of Newberry v. Sayer, 73 N. H. 595, 64 A. 189. Consideration held sufficient. Greene v. Osceola Gold Mines Co. [Cal. App.] 86 P. 733. Evidence held to show consideration. Page v. Geiser Mfg. Co. [Okl.] 87 P. 851. The note sued on is prima facia the consideration. Gates v. Morton Hardware Co. [Ala.] 40 So. 509. An agreement to pay interest is a sufficient consideration for an extension. Agnew v. Agnew [Ind. App.] 77 N. E. 952.

Held insufficient: A renewal note executed for a void note is void. Gilbert v. Brown, 29 Ky. L. R. 1248, 97 S. W. 40. Renewal notes are without consideration where the original is. Cochran v. Perkins [Ala.] 40 So. 351. Voluntary services are not a sufficient consideration. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492. Where a widow who received no property from her husband's estate executed a note in renewal of one void as to her which was executed by herself and husband, the satisfaction of the husband's obligation was not a good consideration for the renewal notes. Gilbert v. Brown, 29 Ky. L. R. 1248, 97 S. W. 40.

7. When a note did not have written on its face "Peddler's note" as required by statute, and was given for the right to sell a patented article in a certain territory to a vendor of such rights, and part of the consideration was a patented machine which did not require that the note be stamped "peddler's note," it is void. Bugg v. Holt, 29 Ky. L. R. 1208, 97 S. W. 29. The fact that the proceeds were used for an illegal purpose is no defense when the payee did not know it was to be used for such purpose. Hale v. Harris, 28 Ky. L. R. 1172, 91 S. W. 660. A note is not invalidated by the fact that the statement of the consideration shows an illegal item. Zeller v. Leiter, 114 App. Div. 148, 99 N. Y. S. 624.

8. A note in the form of a due bill implies a consideration under Ky. St. 1903, § 470. Doty v. Dickey [Ky.] 29 Ky. L. R. 900, 96 S. W. 544. Where the estate of a decedent is sued on a note, the giving of evidence by claimant upon the question of consideration does not destroy the presumption of consideration. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492. A consideration is imported. Ellison v. Simmons [Del.] 65 A. 591. A writing stating that a certain sum is due a person is within Rev. St. 1899, § 894, providing that all instruments made and signed by which a promise to pay money is made shall import a consideration. Locher v. Kuechenmiester, 120 Mo. App. 701, 98 S. W. 92. In action on note by the administrator of a deceased payee where there is no evidence as to the transaction which resulted in giving it except the note, the evidence of the maker being incompetent, held that judgment must be rendered for plaintiff. Union Trust Co. v. Morgans, 140 Mich. 134, 12 Det. Leg. N. 111, 103 N. W. 568. Where the estate of a decedent is sued on a note testimony of claimant that there was not a consideration sufficient to support it destroys the presumption of consideration. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492.

9. See 6 C. L. 778, n. 97 et seq. Delivery is essential as between the parties. Viets v. Silver [N. D.] 106 N. W. 35. Where a maker dies after giving a note to an agent to deliver, the authority of the agent to deliver is revoked, and a delivery by him is unavoiding. Jones v. Jones, 101 Me. 447, 64 A. 815. Where it was alleged that the note in suit was by mistake made payable to the wrong person, and the payee named endorsed it to him without recourse, and the indorsee endorsed to plaintiff, held that evidence of genuineness of the maker's signature together with possession of the paper for three years, and the denial of the payee named that the paper was ever executed to it, did not show a delivery. Digan v. Mandel [Ind.] 79 N. E. 899.

A delivery in escrow is a complete delivery as to the maker. Jones v. Jones, 101 Me. 447, 64 A. 815. When a check was deposited with a third person to be delivered upon the performance of a condition, evidence held to show that delivery was authorized. Parker v. Young [N. J. Err. & App.] 65 A. 194.

10. A note which is void on the ground of public policy because executed in consideration a promise not to prosecute for a crime is not validated by a subsequent delivery not influenced by duress. Henry v. State Bank [Iowa] 107 N. W. 1034.

11. A note reciting that it is given as security with an assignment or scrip made and executed this day, and that on payment thereof, according to these terms the order and assignment are to be cancelled, is not a mere security for the assignment of the script but as security for the payment of the force of the note. Carey v. Hays, 41 Wash. 580, 84 P. 581. Under an agreement to extend a note for two months for a certain sum per month such sum can be collected for only two months though the note was not paid for several months. Rowland v. Watson [Cal. App.] 88 P. 495. Where the maker of the note is discharged for justifiable cause, the payee is released from his obligation to receive payment in services or to grant an extension of the note, and a suit on the note is not prematurely brought when begun within six months after maturity. Minzey v. Marcy Mfg. Co., 6 Ohio C. C. [N. S.] 593. Where the only difference between a note sued upon and the one admitted to have been made was that the latter had written across its face "in renewal of $5,000 note," a defense, on this ground is insufficient. Yardley Nat. Bank v. Vansant, 214 Pa. 250, 63 A. 544. Where the holder of valid notes executed by a town surrenders them for renewal notes

assumed may be determined from the terms of the instrument.[13] It is presumed that an instrument is for the benefit of the payee,[14] and this presumption is not overcome by the fact that it is indorsed by him.[15] One who signs in a representative capacity is not personally liable [16] unless such capacity is not known to the other party thereto.[17] The nature of his contract may be shown by parol.[18] An instrument payable to one in a representative capacity is the property of his principal.[19]

A provision for attorney's fees is additional to the obligation of the note.[20] Where the amount is not stated a reasonable amount will be allowed.[21] The provision will be enforced according to its terms,[22] and, though it destroys the negotiability of the instrument, it will not preclude the right to grace.[23]

which the officers of the town had no authority to execute, such surrender did not extinguish the notes. Bass v. Wellesley [Mass.] 78 N. E. 543. By construction the word "dollars" was supplied as the omitted word in a note promising to pay "one thousand with interest," especially in view of the fact that stamps thereon were appropriate to such amount. Eldridge v. Kay, 124 Ill. App. 136.

12. Where a maker of a note agrees to pay its face six months after date, "interest at eight per cent. per annum," interest runs from date of default and not from the date of the note. Dunlap v. Kelley, 115 Mo. App. 610, 92 S. W. 140. Notes construed and held that the payee was entitled to interest from maturity as provided, though an extension of time of payment is procured. Dashiell v. Moody & Co. [Tex. Civ. App.] 97 S. W. 843. A provision in a mortgage securing the note that the note might be declared due at any time the payee deemed himself insecure authorizes action on the note whenever he has reasonable grounds for feeling unsafe. Warren v. Osborne [Tex. Civ. App.] 97 S. W. 851. On an issue as to an extension agreement, evidence of the payee's requirement of the payment of interest in advance is admissible on the question to show improbability of such an agreement. Ellis v. Littlefield [Tex. Civ. App.] 14 Tex. Ct. Rep. 514, 93 S. W. 171.

13. Where a note signed by several recites that each maker is liable for a proportional part, a joint action on the note cannot be maintained by an indorsee. National Bank of Phoenixville v. Buckwater, 214 Pa. 289, 63 A. 689.

14. In the absence of any thing indicating to the contrary, it is presumed that a note is for the personal benefit of the payee named. McGuffin v. Coyle, 16 Okl. 648, 85 P. 954, 86 P. 962. Checks payable to a certain person prima facie belong to him. Salen v. Bank of State of N. Y., 110 App. Div. 636, 97 N. Y. S. 361. The fact that the prima facie owner of notes had some arrangement with his assignor for reimbursement in case of failure of the maker to pay does not affect his title. Bennett v. First Nat. Bank, 117 Ill. App. 382.

15. Possession of a note though indorsed by the holder is prima facie evidence of title. Gumaer v. Jackson [Colo.] 86 P. 885. Possession is prima facie evidence of ownership though the paper is indorsed by the holder. Van Vlissingen v. Roth, 121 Ill. App. 600.

16. Under the Negotiable Instruments Act providing that one signing in a representative capacity is not personally liable, and that a signer is deemed an indorser unless another capacity appears to have been intended, where a note is signed by a corporation by "A.," "Treas.," and "B.," in an action against B. it was shown that he was secretary of the corporation. Held, he was not personally liable. Germania Nat. Bank v. Mariner [Wis.] 109 N. W. 574. Where a note is signed by the president and purported secretary of a corporation, it is immaterial that the person signing as secretary was not in fact secretary, as his signature was not essential to the validity of the note. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166. Where officers of a corporation sign a note on its behalf, their intention as to their personal liability controls. It is immaterial what the payee understood. Western Grocer Co. v. Lackman [Kan.] 88 P. 527. Where officers execute notes on behalf of a corporation, they need not, in order to escape personal liability, show that the corporation had power to issue such notes. Id.

17. If an agent sign a note with his name alone and there is nothing on the face of the note to show his agency, he is personally liable thereon (Burkhalter v. Perry [Ga.] 56 S. E. 631), and the addition of the word "agent" after his name, being merely descriptio personae, will not relieve him from liability (Id.).

18. Where a note is signed by a company by persons as officers, parol evidence is admissible to show that it was not their individual note. Western Grocer Co. v. Lackman [Kan.] 88 P. 527.

19. Under Negotiable Instruments Law providing that where an instrument is drawn payable to a person as fiscal officer of a bank, it is deemed payable to the bank, where a bank was collector of a debt, a draft from the debtor to the president of the bank, his name being followed by "pt.," held the presumption that the draft was payable to the bank was not overcome. Griffin v. Erskine [Iowa] 109 N. W. 13.

20. Boyett v. Standard Chemical & Oil Co. [Ala.] 41 So. 756. Where the action is on several notes all attorney's fees claimed may be set up in one count. Id.

21. A provision for attorney's fees not stating the amount means a reasonable amount. Gates v. Morton Hardware Co. [Ala.] 40 So. 509.

22. The fact that the law relative to attorney's fees is changed after the execution of a note providing therefor does not affect liability therefor according to the terms of the note. American Mortgage Co. v. Rawlings [Ga.] 56 S. E. 110 Where statutory notice is given of intention to sue on a note

In some states patent right notes are declared void by statute unless the nature of the consideration appears from the face of the instrument.[24] Such statutes are upheld in some states and pronounced unconstitutional in others.[25]

An instrument is governed as to interpretation and validity by the law of the place where made [26] unless otherwise provided by statute,[27] and by the law of the forum in regard to matters affecting remedial rights.[28] It is governed by the interest laws of the state where payable.[29] The liability of the indorser is governed by the law of the place where the indorsement is made.[30]

Negotiability is not destroyed by a qualified indorsement,[31] nor by the mere fact that the instrument is secured.[32] Bills of lading [33] and warehouse receipts [34] possess attributes of negotiability. In Kentucky bonds payable to bearer are not negotiable.[35]

While the drawing of a check operates as an assignment pro tanto of the drawer's deposit,[36] the drawing of a draft does not constitute an equitable assignment of the drawer's funds in the hands of the drawee.[37] A note procured by fraud as evi-

containing a provision for attorney's fees, such fees may be recovered though prior to the first day of the term the face of the note had been paid. Everett & Son v. Ferst's Sons & Co., 126 Ga. 662, 55 S. E. 916. Where an interest bearing note provides for a ten per cent. attorney's fee for collection, the amount of the fee is ten per cent. of the principal and accrued interest. Hamilton v. Rogers [Ga.] 54 S. E. 926. A provision for attorney's fees does not apply where prior to maturity of the note the maker dies and expenses are incurred in presenting it as a claim against the estate. St. Joseph County Sav. Bank v. Randall [Ind. App.] 76 N. E. 1012. Cross bill held to constitute a "suit on the notes" entitling the plaintiff to recover attorney's fees provided for. Houston Ice & Brewing Co. v. Nicolini [Tex. Civ. App.] 16 Tex. Ct. Rep. 663, 96 S. W. 84.

23. A provision for attorney's fees which destroys negotiability does not preclude the right to days of grace. Sullins v. Farmers' Exch. Bank [Okl.] 87 P. 857.

24. In an action on a note not having "Peddler's note" written on its face as required by statute, it is competent to show that the payee was a peddler vending patent rights, that the note was given for the right to sell a patented article in a certain district, and that the payee traveled in other states selling rights to the same patent. Bugg v. Holt, 29 Ky. L. R. 1208, 97 S. W. 29.

25. See 6 C. L. 779, n. 23. See, also, Patents, 6 C. L. 952. A statute providing that notes given for a patent right shall state the consideration and shall be nonnegotiable is unconstitutional. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. Sand. & H. Dig. Art. §§ 493-496, making negotiable instruments taken for a patented machine void unless showing on its face for what it was given, and prescribing a penalty for noncompliance, is void. Ozan Lumber Co. v. Union County Nat. Bank [C. C. A.] 145 F. 344.

26. Where a note is made and is payable in a state where if it was procured by fraud a bona fide holder can recover only what he paid for it, where such note is sued in another state, such rule applies. Creston Nat. Bank v. Salmon, 117 Mo. App. 506, 93 S. W. 288.

27. Under the rule that a contract is to be interpreted according to the law of the place of performance if indicated, otherwise according to the law of the place where made, the negotiability of a note payable at a certain place is to be determined by the law of such place. Barry v. Stover [S. D.] 107 N. W. 672.

28. The rules of pleading and evidence of the state where the action is brought apply in an action on a note executed and to be performed in another state. Kaufman v. Barbour [Minn.] 107 N. W. 1128. Where a note is made in one state payable on demand in another, it is presumed in the absence of proof that the law of the place where the note was made is similar to the law of the forum. Farmers' Nat. Bank v. Venner [Mass.] 78 N. E. 540.

29. Kraus v. Torry [Ala.] 40 So. 956. The laws of such state must be proved in order to recover interest. Id.

30. As to notice and protest. Columbia Finance & Trust Co. v. Purcell, 142 F. 984.

31. Under the Negotiable Instrument Act a qualified indorsement does not destroy negotiability. Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

32. A mortgage given to secure a note does not impair its negotiability. Dumas v. People's Bank [Ala.] 40 So. 964.

33. Bill of lading is negotiable. Hardie & Co. v. Vicksburg, etc., R. Co. [La.] 42 So. 793. A railroad company is not bound by a bill of lading given by an agent for goods never received though such instrument is in the hands of bona fide holder. Henderson v. Louisville & N. R. Co., 116 La. 1047, 41 So. 252. This rule is not affected by Act No. 150, p. 193, of 1898, making it criminal for any person to sign a bill of lading for goods not received. Id. Act No. 150, p. 193, of 1868, makes negotiable only bills of lading issued in accordance with its provisions for goods actually received. Id.

34. Warehouseman's receipt is negotiable. Hardie & Co. v. Vicksburg, etc., R. Co. [La.] 42 So. 793.

35. Mutual Life Ins. Co. v. Chosen Friend Lodge, 29 Ky. L. R. 394, 93 S. W. 1044.

36. The drawee may maintain action against the bank. Loan & Sav. Bank v. Farmers' & Merchants' Bank, 74 S. C. 210, 54 S. E. 364.

37. McArdle v. German Alliance Ins. Co., 183 N. Y. 368, 76 N. E. 337.

dence of an existing debt does not affect the right of the creditor to sue on the debt,[38] and, while acceptance of a check does not ordinarily extinguish a preexisting debt, it will do so if accepted with that intent.[39] In order to render an instrument drawn to the order of a fictitious person bearer paper, it must appear that the drawer so intended.[40] Authority of the holder to fill in blanks does not authorize him to materially alter the instrument.[41] A negotiable draft not payable out of a specific fund cannot be regarded as an equitable assignment.[42] An instrument is not rendered void by the fact that it is antedated.[43] The instrument can be made a specialty only when sealed in the manner prescribed.[44]

§ 3. *Anomalous signatures and indorsements.*[45]—As a general rule one who signs an instrument prior to delivery is liable as a maker,[46] though it is otherwise held in some states.[47] As between the parties it may be shown that a different liability was agreed upon or intended,[48] but not as against a bona fide holder.[49] Where

38. Allen v. Caldwell, Ward & Co. [Ala.] 42 So. 855.

39. Cochran v. Slomkowski, 29 Pa. Super. Ct. 385.

40. A draft drawn to the order of an existing firm which did not know of its being drawn is not drawn to the order of a nonexisting or fictitious person unless the drawer had no notice of the existence of such payee and his intent was to make it payable to bearer. Seaboard Nat. Bank v. Bank of America, 51 Misc. 103, 100 N. Y. S. 740. Intent to make such draft payable to bearer may be inferred where it is drawn at the instance of an unauthorized agent in exchange for a forged check. Id.

41. The provision of Negotiable Instruments Law authorizing a holder to fill in blanks where an instrument is wanting in any material particular does not authorize him to alter a note payable to several payees jointly so as to make it payable to himself. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445.

42. Borough of Rosselle Park v. Montgomery [N. J. Eq.] 60 A. 954.

43. Rathfon v. Locher [Pa.] 64 A. 790.

44. In order to render a promissory note a sealed instrument, it must be so recited in the body of the note. The mere addition of the seal after the signature is insufficient. Jackson v. Augusta S. R. Co., 125 Ga. 801, 54 S. E. 697. The letters "L. S." after the signature indicates that the instrument is a sealed one. Langley v. Owens [Fla.] 42 So. 457.

45. See 6 C. L. 780.

46. Prior to the enactment of the Negotiable Instruments Law (c. 4524, p. 25, Acts 1897), one other than the maker or payee who indorsed a promissory note in blank before delivery to accommodate the maker thereof was liable as a maker. Baumeister v. Kuntz [Fla.] 42 So. 886. Persons who indorse at the time of execution and for the same consideration are joint makers. Jones v. Bank of Pine Bluff [Ark.] 96 S. W. 1060. Where one who is neither payee nor indorser writes his name on the back of a note, he is presumed to be a comaker. Oexner v. Loehr, 117 Mo. App. 698, 93 S. W. 333. The payee may at his election treat persons who sign before delivery as joint makers, guarantors, or indorsers. Golding Sons Co. v. Cameron Pottery Co. [W. Va.] 55 S. E. 396. Under the rule that one who indorses prior to delivery is liable to the payee and all subsequent holders, it is immaterial that he signed for the purpose of giving the maker credit with the payee. Far Rockaway Bank v. Norton [N. Y.] 79 N. E. 709. One who places his name on the back of a promissory note before delivery is a maker or surety and is not entitled to notice of presentment and nonpayment. The act of April 17, 1902, known as "The Negotiable Instrument Act," does not change the liability of such party as established by the supreme court of the state for many years. Rockfield v. First Nat. Bank, 8 Ohio C. C. (N. S.) 290. One who indorses before indorsement by the payee for the purpose of giving the maker credit is a joint maker or guarantor. Columbia Finance & Trust Co. v. Purcell, 146 F. 85. One who indorses a note before the name of the payee has been written therein is prima facie a joint maker. Keyser v. Warfield, 103 Md. 161, 63 A. 217.

47. Under the Negotiable Instrument Law (Acts 1897, c. 4524, p. 25), one not otherwise a party to a negotiable note who places his name thereon in blank before delivery is an indorser. Baumeister v. Kuntz [Fla.] 42 So. 886. Under a statute providing that a person's signature on an instrument otherwise than as maker shall be presumed to be an indorsement unless it clearly appears to have been otherwise intended, one placing his name on the back of an instrument before delivery is an indorser. Toole v. Crafts [Mass.] 78 N. E. 775. Where a firm made a note and one of the members indorsed it and also procured his wife to indorse it before delivery, she was an accommodation indorser and liable as such under Rev. Laws, c. 73, §§ 82, 83. Middleborough Nat. Bank v. Cole, 191 Mass. 168, 77 N. E. 781.

48. As between the parties it may be shown by parol that the makers, though they appear to be principal debtors, bear the relation of principal and surety. Kaufman v. Barbour [Minn.] 107 N. W. 1128. On conflicting evidence as to whether a married woman executed a note as joint maker or as surety for her husband, the question is for the jury. Fries v. Mather, 214 Pa. 304, 63 A. 695. Where all the signers of a note except one claimed to be sureties, it was proper to admit a contract signed by one and guarantied by the others whereby the signer agreed to consign to the payee cotton to the value of the face of the note. Kempner v. Patrick [Tex. Civ. App.] 95 S.

the statute fixes the status of a party to a negotiable instrument, parol evidence is not admissible to vary the same.[50] The use of the words "indorse" and "indorsement" at the time of the transaction is not conclusive if something said or done at the time indicate otherwise.[51] A stranger who signs on the back of a note after execution is a guarantor.[52]

§ 4. *Liability and discharge of primary parties.*[53]—Parties primarily liable[54] are not discharged by dismissal of a suit against parties secondarily liable.[55] That delay in forwarding and presenting a check may discharge the drawer, he must show that he was prejudiced by such delay.[56] Defect of title is no defense to an action on an instrument given for the assignment of a lease.[57] One who agrees to pay a note is liable for attorney's fees therein provided for.[58]

A material alteration[59] after delivery discharges persons primarily liable.[60]

Defenses between the original parties.[61]—As between the parties the instrument is only a contract and is subject to all equitable or legal defenses,[62] as that it

W. 51. Where one agreed to take a note providing a certain person's indorsement was secured, and the maker took the note to him and had him sign it on an agreement that he was an indorser, the question as to whether he was an indorser or maker was for the jury. Oexner v. Loehr, 117 Mo. App. 698, 93 S. W. 333. Evidence insufficient to show that the payee of a note agreed to treat one who signed before delivery as an indorser. Id. On an issue as to the character of one who indorsed before delivery, an instruction that the jury must find that it was "expressly" agreed that he was to be treated as an indorser was held misleading. Id. It may be shown that in a note signed by husband and wife the wife signed as surety. Gibson v. Wallace [Ala.] 41 So. 960. In such case the wife has the burden of proof. Id. A note signed A, principal, B, surety, and C written directly below, without more, does not show that C was a surety. Scott v. Bales [Ky.] 29 Ky. L. R. 776, 96 S. W. 528.

49. Where one subscribes his name in the proper place at the bottom of a note, his liability as against a holder for value is determined by the position it occupies. Diffenbacher's Estate, 31 Pa. Super. Ct. 35. Where one so affixes his name to a note as to become a maker, knowledge of a subsequent holder for value that he is an accommodation maker does not reduce his liability to surety. Id.

50. Status of an accommodation party signing in blank before delivery fixed as an indorser. Baumeister v. Kuntz [Fla.] 42 So. 886.

51. Instruction that something must have been "said and done" is misleading, as either is sufficient. Oexner v. Loehr, 117 Mo. App. 698, 93 S. W. 333. Where parties indorsed before delivery under an agreement and understanding that they would pay if the maker did not, it was held that they were liable as makers though the terms "guaranty" and "indorse" were used. Keyser v. Warfield, 103 Md. 161, 63 A. 217.

52. Thompson v. Brown [Mo. App.] 97 S. W. 242.

53. See 6 C. L. 781.

54. A maker of notes and acceptor of drafts are primarily liable. Campbell v. Campbell Co., 117 La. 402, 41 So. 696.

55. A principal is not discharged where an action against himself, surety, and indorser is dismissed as to the latter two. Glenn v. Augusta Drug Co. [Ga.] 55 S. E. 103.

56. Cox v. Citizens State Bank [Kan.] 85 P. 762. The drawer of a check which is not collected because of lack of diligence in presenting it may recover the amount of a second check given on dishonor of the first. Noble v. Doughten, 72 Kan. 336, 83 P. 1048.

57. Norton v. Stroud State Bank [Okl.] 87 P. 848.

58. Trabue v. Wade & Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

59. See 6 C. L. 782. See, also, Alteration of Instruments, 7 C. L. 115.

60. A note may be vitiated by an unauthorized alteration inserting a lower rate of interest. New York Life Ins. Co. v. Martindale [Kan.] 88 P. 559. Where an alteration is in favor of the holder and made while in his possession, the question whether it was made by him is for the jury though he testifies without contradiction that it was made by his bookkeeper without authority. McDonald v. Nalle [Tex. Civ. App.] 14 Tex. Ct. Rep. 718, 91 S. W. 632. When the body of a note is written with a different pencil from that used in writing "value received with interest," the holder has the burden to show that the words were written before delivery. In re Pinkerton's Estate, 49 Misc. 363, 99 N. Y. S. 492.

61. See 6 C. L. 782.

62. As between the original parties the defense may be made that the check was to be paid out of partnership profits which have not been realized. Creery v. Thompson, 26 Pa. Super. Ct. 511. Where a promissory note was given as a guaranty for a loan by the promisee to another, with the understanding that the maker should be called upon only if the borrower was unable to pay, it is a good defense to a suit thereon that the payee owes the borrower a sum in excess thereof. Marquis v. McKay [Pa.] 65 A. 678. Where a purchase price note is too large because of miscalculation in the basis adopted to ascertain the sale price, such excessive amount may be shown in a suit on the note where plaintiff has not changed his position in respect thereto. Green v. Smith, 102 N. Y. S. 629. An instrument delivered under a verbal

was procured by fraud [68] in which case negligence of the maker is immaterial.[64] The consideration may always be inquired into,[65] and illegality,[66] lack,[67] or total,[68] or partial failure thereof,[69] is a defense. Payment is a defense [70] if made to one authorized to receive payment,[71] and where the maker finds the note at the place where it is payable, he may assume that the person in possession has authority to

agreement that it shall not be binding until certain conditions have been performed is not valid as between the parties until the conditions have been satisfied. Hodge v. Smith [Wis.] 110 N. W. 192. Parol evidence is admissible to show such parol agreement. Id. Where the maker of a note tainted with usury induces another to take it up after maturity, promising to pay it thereafter, he is estopped to set up the defense. Walker v. Hillyer, 124 Ga. 857, 53 S. E. 313. Whether one ratified a note executed by him when he was under the impression that he was signing something else held a question of fact. Palo Alto Stock Farm v. Brooker [Iowa] 108 N. W. 307. By paying a note the maker recognizes its validity and cannot afterwards assert that it was signed and delivered in blank. Staunton v. Smith [Del.] 65 A. 593. Where one signs a note before the name of the payee is filled in, under an agreement that it is to run to a certain person against whom the signer has a demand, and the name of a different payee is filled in, the maker has a defense. Hess v. Gerstlauer, 214 Pa. 10, 63 A. 366. Such defense must be properly pleaded. Id.

63. A note procured by fraud by an agent is not collectible by the principal. Wickham v. Evans [Iowa] 110 N. W. 1046.

64. A party procuring a note by fraud or one not a bona fide holder cannot take advantage of the maker's negligence in executing the same. Wickham v. Evans [Iowa] 110 N. W. 1046. An ignorant man unfamiliar with technical legal language held not negligent in not reading all the terms of a mortgage note signed by him under representations that it was a mortgage only. Id.

65. Where notes were given by an employer for goods furnished his employe, the amount of which was deducted from his earnings, the statement of such facts is a defense to the employe in an action on the notes. Bovaird & Seyfang Mfg. Co. v. Ferguson [Pa.] 64 A. 513. As between the parties the consideration is open to inquiry. Ellison v. Simmons [Del.] 65 A. 591.

66. Illegality of consideration is a defense. Stewart v. Hutchinson, 120 Mo. App. 32, 96 S. W. 253. Where it is set up that the notes were given as part of a colorable transaction to protect the maker from threatened proceedings against him by his wife, it was competent to show unfriendly relations between the maker and his wife. Stone v. Stone, 191 Mass. 371, 77 N. E. 845. That the consideration was illegal is a defense. Yowell & Williams v. Walker [La.] 42 So. 635. Illegality of consideration is a defense between the parties. Hynes v. Plastino [Wash.] 87 P. 1127.

67. Where a check is delivered to one as a gift and the bank refuses to pay it, the payer has no cause of action against the drawer. Roney v. Dunleary [Ind. App.] 79 N. E. 398. Evidence held to show that there was no consideration and that the notes were made as a memorandum of an amount to be due in case the maker sold certain bonds belonging to the payee. Hill v. Hall, 191 Mass. 253, 77 N. E. 831. Note held without consideration. Gillespie v. Salmon. 2 Cal. App. 501, 84 P. 310. An answer alleging that the note sued on was a renewal note and was given in consideration of a note which had been paid, and was therefore without consideration, is good. Eule v. Dorn [Tex. Civ. App.] 14 Tex. Ct. Rep. 833, 92 S. W. 828. Want of a consideration is a defense. Sullivan v. Sullivan. 29 Ky. L. R. 239. 92 S. W. 966. Evidence held to show that the note was executed to indemnify against liability on another note. Lovell & Co. v. Sneed [Ark.] 95 S. W. 157.

68. Total or partial failure of consideration is a defense without alleging fraud. Rouse, Hempstone & Co. v. Sarratt, 74 S. C. 575, 54 S. E. 757. Failure of consideration is a defense. Alley v. Jesse French Piano & Organ Co. [Ala.] 42 So. 623.

69. Where there are two or more independent considerations and some of them fail, it is a defense pro tanto as between the parties. Tuttle v. Tuttle Co., 101 Me. 287, 64 A. 496. Evidence held to show partial failure of consideration. Id. Failure of consideration is a defense to a note under seal. Slaton v. Fowler, 124 Ga. 955, 53 S. E. 567. Where the consideration of a note from mother to son was services rendered and to be rendered, and he failed to render the services he contracted to, his recovery is limited to the value of services rendered. Sullivan v. Sullivan, 29 Ky. L. R. 239, 92 S. W. 966. Answer in an action on a note given by one partner to another, though charging fraud, held broad enough to admit evidence of failure of consideration. Davis v. Ferguson, 29 Ky. L. R. 214, 92 S. W. 968.

70. Payment is a defense. Barnes v. Barnes' Adm'r [Ga.] 56 S. E. 172. Plea of payment held good as against general demurrer. Eule v. Dorn [Tex. Civ. App.] 14 Tex. Ct. Rep. 833, 92 S. W. 828. Payment is a defense. Royal Bank v. Goldschmidt, 101 N. Y. S. 101. Question of payment held for the jury. Id. Under Negotiable Instruments Law providing that an instrument is discharged by payment by or on behalf of the principal debtor, where a resident of New York gave in a foreign country a draft on himself which was negotiated to a local broker, and dishonored by the drawee, the payee who reimbursed the broker could not recover re-exchange from the maker. Pavenstedt v. New York Life Ins. Co., 113 App. Div. 866, 99 N. Y. S. 614. Nor could he recover loss sustained by reason of fluctuation of the local currency. Id.

71. Where an agent indorses a note of his principals to a bank as collateral for his private debt and upon receiving the money turns it over to the bank, the principal and not the maker must lose the money. Wickham v. Evans [Iowa] 110 N. W. 1046.

receive payment,[72] which person is the agent of the holder.[73] Fraud is a defense.[74] As a general rule when any of the above specified defenses are set up, the maker has the burden of proof.[75]

§ 5. *Liabilities and discharge of sureties, guarantors and other anomalous parties.*[76]—An extension of the time of payment granted those primarily liable releases parties secondarily liable.[77] But such extension must be granted without the knowledge or consent of the latter,[78] be for a definite period,[79] be based on a sufficient consideration,[80] and must be mutual as between maker and payee.[81] Pay-

72. Where the maker finds the note at the place designated as the place of payment, he has a right to assume that the person in possession has authority to receive payment. Fifth Congregational Ch. v. Bright, 28 App. D. C. 229.

73. Hence, if he absconds with the money after releasing the note, the payee and not the maker must lose. Fifth Congregational Ch. v. Bright, 28 App. D. C. 229. Since the maker has a right to pay such party in cash, the fact that he pays in a check payable to such party instead of to the payee, does not render him liable for the money converted by the agent. Id.

74. Fraud is a defense. Crosby v. Emerson [C. C. A.] 142 F. 713. As between parties the maker cannot wholly defeat recovery because of deceit whereby improper items were included in the amount but the sum actually due may be recovered. Note given to settle an account for work done under contract but which account was incorrect. Daniel v. Learned, 188 Mass. 294, 74 N. E. 322. Where some persons sign unconditionally and other signatures are procured without a disclosure of the fact, the latter may defend on the ground of fraud. Hodge v. Smith [Wis.] 110 N. W. 192. Fraud is a defense. Douglass v. Richards, 101 N. Y. S. 299. Fraud is a defense to a note under seal. House v. Martin, 125 Ga. 642, 54 S. E. 735. Where at the time one signed a note the printed matter was obscured so that he did not know he was signing a note such fact was not defense unless the concealment was intentional. Palo Alto Stock Farm v. Brooker [Iowa] 108 N. W. 307. The instrument was not a forgery unless the concealment was intentional. Id. Where a note was given by a married woman for worthless corporate stock which fact the payee knew and the transaction was carried through by her husband, the payee was charged with notice that false representations must have been made to the maker. Ditto v. Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2. Answer held not to state facts showing fraud. Leedy v. Wood [Or.] 88 P. 585.

75. A maker has the burden to prove want of consideration. Crabtree v. Sisk [Ky.] 99 S. W. 268. Evidence insufficient to show partial failure of consideration in an action on a note given for government concessions. McGue v. Rommel, 148 Cal. 539, 83 P. 1000. Evidence insufficient to show fraud or want of consideration. Rogers v. Mercantile Adjuster Pub. Co., 118 Mo. App. 1, 93 S. W. 328. Evidence insufficient to show total failure of consideration for a note. Steven v. Henderson [Neb.] 110 N. W. 646. Defendant has the burden to prove payment. Walston v. Davis [Ala.] 40 So. 1017. Such fact need not be established beyond a reasonable doubt. Id. Where payment is relied on, the defendant has the burden to prove it. Dodrill's Ex'rs v. Gregory Adm'r [W. Va.] 53 S. E. 922. Evidence insufficient to show payment where one claiming to be a surety induced the payee to sue the holder alone and made a deposit in escrow to purchase a judgment against him if the maker did not pay. Capital Nat. Bank v. Robinson, 41 Wash. 454, 85 P. 1021. Evidence of accountings between the parties held admissible on the question of payment where the maker had died. Stone v. Stone, 191 Mass. 371, 77 N. E. 845. Evidence insufficient to show that a note had been paid. Stumm v. Goetz [Conn.] 64 A. 810. Where payments indorsed on a note exceed interest, it must be proven that they were made to so apply. Dunlap v. Kelly, 115 Mo. App. 610, 92 S. W. 140. Where payment was set up as a defense, it was competent to show that the maker had no notice that subsequent to the time of the alleged payment the holder had pledged the note as corroborating his testimony that he had forgotten that he had given the note. Foss v. Smith [Vt.] 65 A. 553.

76. See 6 C. L. 782.

77. A surety is released by an extension of the time of payment. Carter-Battle Grocer Co. v. Clarke [Tex. Civ. App.] 14 Tex. Ct. Rep. 609, 91 S. W. 880.

78. Without the consent of the surety. Weaver v. Prebster [Ind. App.] 77 N. E. 674. An indorser is released by an extension of time of payment made without his knowledge or consent. Browere v. Carpenter, 50 Misc. 525, 99 N. Y. S. 531.

79. To release a surety by reason of an extension of time, the extension should be for a definite period. Weaver v. Prebster [Ind. App.] 77 N. E. 674.

80. Prepayment of interest before maturity may be a good consideration for an extension agreement. Welch v. Kukuk, 128 Wis. 419, 107 N. W. 301. Payment of a portion of a note before maturity is a sufficient consideration for an extension of time on the balance. Browere v. Carpenter, 50 Misc. 525, 99 N. Y. S. 531. Extension agreement is based on a sufficient consideration where given for the hypothecation of land and additional interest to accrue by reason of the extension. Carter-Battle Grocer Co. v. Clarke [Tex. Civ. App.] 14 Tex. Ct. Rep. 609, 91 S. W. 880. Where a post-office inspector without authority extended the time of payment to sureties on a postmaster's bond, where the postmaster had defaulted, and took their note for the amount. United States v. Kauhoe [C. C. A.] 147 F. 185. Where a maker voluntarily prepaid interest before maturity of the note and the payee voluntarily consented to an extension without regard to the time inter-

ment of interest without alteration of the terms,[82] or renewal of a note, does not release collateral security.[83] One secondarily liable is discharged by a valid tender made by a prior party,[84] or by the intentional cancellation of his signature,[85] but not by a payment which is subsequently recovered because constituting an unlawful preference.[86] An indorser is not discharged by delay of the holder in suing the maker for a period short of that fixed by limitations where his liability has been fixed by demand, protest, and notice, though the maker becomes insolvent in the meantime,[87] nor is he released where he and the maker under an agreement give the notes to another in settlement of a debt of the maker, and providing that in case of default in payment of the notes, the entire debt should mature.[88] A surety is released where impairment of the security is permitted,[89] but not by failure to pursue the principal debtor at his request,[90] nor by a mere promise that he will not have to pay.[91] Failure to recover judgment against the maker in an action to which the guarantor is not a party will not preclude judgment against the guarantor.[92] Payments by a guarantor do not toll the statute of limitations as to the maker.[93] An anomolous indorser cannot be held on a contract written above his indorsement reciting an agreement to pay the note according to the terms of another note which added other terms.[94] An indorser may release himself by contract.[95] One who has agreed to become a cosurety cannot refuse so to do, pay the note, take

est was paid, the surety was not discharged. Welch v. Kukuk, 128 Wis. 419, 107 N. W. 301. Payment of interest for a year on a note due one year from date a few days before maturity is not sufficient consideration. Weaver v. Prebster [Ind. App.] 77 N. E. 674.

81. Where the maker paid interest for a year a few days before maturity, and it was understood that the note was to run for another year, there was no valid agreement. Weaver v. Prebster [Ind. App.] 77 N. E. 674.

82. Payment of interest on a promissory note does not release the surety, it not appearing that the note was in any manner altered or changed in respect thereto. Bltler's Estate, 30 Pa. Super. Ct. 84.

83. First Nat. Bank v. Gunbus [Iowa] 110 N. W. 611.

84. Under Negotiable Instruments Law. State Bank v. Kahn, 49 Misc. 500, 98 N. Y. S. 858.

85. Under the provision of Negotiable Instruments Law that one secondarily liable is discharged by the intentional cancellation of his signature by the holder, where the holder consents to the cancellation of the signature of an indorser, he is discharged, though there is no consideration for the cancellation. McCormick v. Shea, 50 Misc. 592, 99 N. Y. S. 467. The fact that the cancellation was made by the holder's representative in his presence is to be considered on the question whether the cancellation was intentional. Id. Under Negotiable Instruments Acts providing that the intentional cancellation of the signature of one secondarily liable releases him, one who alleges that the cancellation was not intentional, or was made by mistake or without authority, has the burden of proof. Id.

86. Payment by the maker within four months prior to being adjudged a bankrupt, which payment was recovered by the trustee as a preference, does not discharge sureties or indorsers. Hooker v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 993, 97 S. W. 1083. Where a maker paid the note and within a few days thereafter went into bankruptcy and the payment was recovered as a preference, such payment was insufficient to discharge the indorser. Second Nat. Bank v. Prewett [Tenn.] 96 S. W. 334. Where holders of a note failed to file it as a claim in bankruptcy against the maker, parties secondarily liable were discharged as to so much as would have been paid had it been so presented. Id.

87. His remedy is to pay and recover from the maker. Rogers v. Detroit Sav. Bank [Mich.] 13 Det. Leg. N. 889, 110 N. W. 74. The holder is under no obligation to the indorser to take steps to enforce payment as soon as the instrument becomes due. Id.

88. Crilly v. Gallice, 148 F. 835.

89. A surety is discharged where the payee permits impairment of the security. Kempner v. Patrick [Tex. Civ. App.] 95 S. W. 51.

90. Failure to pursue the principal debtor at the request of the surety does not release the surety. White v. Savage [Or.] 87 P. 1040. A surety is primarily liable under Revisal 1905, § 2342. Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430.

91. The mere fact that a husband who is principal debtor promises his wife who is surety that she will never have to pay the note does not release her from liability. Hover v. Magley, 101 N. Y. S. 245.

92, 93. Thompson v. Brown [Mo. App.] 97 S. W. 242.

94. Columbia Finance & Trust Co. v. Purcell, 146 F. 85.

95. Where, in a suit upon a deed of trust note against an indorser for a deficit, it appears that an agreement was made between the defendant and the trustees that, if the former would find a purchaser for the property at a price sufficient to pay principal, interest, and costs, the note would be surrendered, which purchaser was procured, it is error to direct a verdict for plaintiffs. Ubhoff v. Brandenburg, 26 App. D. C. 3.

an assignment, and hold the sureties who have signed.[96] Where notes secured by a trust deed provide a fixed sum as compensation for the trustee, the sureties are bound thereby.[97]

§ 6. *Negotiation and transfer generally.*[98]—Indorsement by all payees is necessary to pass title.[99] A transfer of a secured instrument carries with it the collateral.[1] The assignee of an instrument takes it subject to all equities against it.[2] The assignor is liable for fraud inducing the transfer.[3] A note may be pledged without special indorsement.[4] The nature of the transfer, whether absolute or as security, may be a question of fact.[5] The character of the transaction is to be determined from the contract.[6] A check on a bank in a distant city indorsed and deposited in the home bank of the payee becomes the property of such bank.[7] Delivery is essential to pass title to notes secured by a trust deed.[8]

§ 7. *Acceptance.*[9]—A drawer of a bill is not liable thereon until acceptance,[10] but after acceptance he is a guarantor.[11] An accepted bill is an assignment to the payee to the extent of its face of any debt due from the debtor to the drawer.[12] As a general rule an acceptance in writing is necessary,[13] but an oral one [14] or a promise

96. Where one liable upon a note as surety agrees with the maker, payee, and a new surety to sign a renewal note, he cannot after the others have signed refuse to sign, pay the note, take an assignment thereof, and hold the new surety, especially where he signed upon the express condition that the note should not be delivered until the old surety signed. Smith v. Bales [Ky.] 99 S. W. 672. Where in an action against a surety by the assignee of a note, the defense is that plaintiff had agreed to become a cosurety thereon, an instruction that the finding should be for plaintiff unless plaintiff had agreed to sign as surety, and defendant had signed upon the express condition that he should sign, fairly presents the issue. Id.

97. Cannot contend that the trustee was entitled only to a reasonable sum. Bolton v. G. C. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210.

98. See 6 C. L. 783.

99. Negotiable Instruments Law expressly provides that endorsement of all the payees is necessary to pass good title. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445.

1. Clark v. Whitaker, 117 La. 298, 41 So. 580.

2. An assignee of a note in the hands of a pledgee who holds it as security for two claims takes it burdened with such claims and cannot assert that he is an innocent purchaser. Ladd v. Myers [Cal. App.] 87 P. 1110. Where one gave a check in payment of a mortgage note and received the note and mortgage bearing a memorandum that both had been discharged, and it was not intended to vest any title to the note in him, he could not repudiate the check on the ground that the note had not been regularly indorsed to the holder. National Bank v. Sayer, 73 N. H. 595, 64 A. 189.

3. The transferor of a note is primarily liable on his false representations that a note and lien securing it had not been paid. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866.

4. Clark v. Whitaker, 117 La. 298, 41 So. 580.

5. Whether a note was transferred absolutely or as security held question for the jury. Elledge v. Gray [Miss.] 41 So. 2. Transaction construed and held not a sale of certificates of deposit. Schultz v. Becker [Wis.] 110 N. W. 214. Evidence sufficient to show that a note had been deposited with a bank as collateral and not sold to it. First Nat. Bank v. Gunhus [Iowa] 110 N. W. 611.

6. Where one gives his note in exchange for the note of a third person held by the party to whom his note is given, the transaction is a purchase of the note received and not a sale of the note of the purchaser, so that the rule that, if the seller of his own note is insolvent and conceals such fact, the note may be avoided, does not apply. German Nat. Bank v. Princeton State Bank, 128 Wis. 60, 107 N. W. 454.

7. Where the payee of a check on a bank in a distant city indorses and deposits it in his home bank in the usual and ordinary manner, it becomes the property of the indorsee. Noble v. Doughten, 72 Kan. 336, 83 P. 1048. The fact that the indorsee has the right to charge it against the depositor's account in case of dishonor does not alter the character of the transaction. Id. Where a bank holding title to a check deposited by a depositor forwards it to a bank in the city where the drawee bank is located with a guaranty of the previous indorsement and forwards with it a deposit slip and it is accepted by such bank on the terms proposed by the indorsement, the title vests in the second indorsee. Id.

8. Bennett v. First Nat. Bank, 117 Ill. App. 382.

9. See 6 C. L. 783.

10. Under Negotiable Instruments Law. Seattle Shoe Co. v. Packard [Wash.] 86 P. 845.

11. The drawee of a check by accepting it makes himself a guarantor. Farmers' & Merchants' Bank v. Bank of Rutherford [Tenn.] 88 S. W. 939. See 4 Mich. L. R. 147.

12. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415.

13. Negotiable Instruments Law expressly provides that acceptance must be in writing. Seattle Shoe Co. v. Packard [Wash.] 86 P. 845.

14. Where one orally accepted certain orders, he was held liable thereon though he

to accept may be sufficient.[15] Under the rule that a written acceptance is essential, failure of the drawee to return the bill does not constitute an acceptance.[16] An acceptance external from the instrument must unequivocally import an absolute promise to pay.[17] A qualified or conditional acceptance is binding upon performance of the conditions.[18] But such acceptance is ineffective when its conditions never have been and probably never will be fulfilled.[19] In some states one who refuses to accept a bill drawn on him is subject to a penalty.[20]

Certification of a check made at the instance of an indorsee discharges the drawee though at the time he had no funds on deposit.[21] Where an indorsee of a check procured the bank to certify it, the bank could not thereafter revoke its certification so as to render an indorser liable.[22] Certification at the instance of the drawee before delivery does not make the bank absolutely liable.[23] The drawee of a forged check is negligent where he passes it without examination in reliance on prior indorsements.[24]

§ 8. *Indorsement.*[25]—A contract of indorsement is one in writing and cannot be contradicted by parol.[26] The contract is entered into by writing one's name on

had advanced other sums up to the amount due the drawer while the orders were outstanding. Eighth Ward Bank v. McLoughlin, 113 App. Div. 750, 99 N. Y. S. 362.

15. A promise to accept a bill not drawn, but subsequently drawn in favor of the promisee who takes it for a pre-existing debt, is a good acceptance. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415. A drawee who has promised to accept and has funds of the drawer in his hands must do so though there is a condition attached to his agreement to accept which has not been performed. McPhee v. Fowler [Colo.] 85 P. 421. One who refuses to honor a draft for a certain amount "with exchange" but says that he will honor one for a certain amount is liable on a draft for such amount with exchange, it not appearing that he refused to honor the first because exchange was included. State Bank v. American Hardwood Lumber Co. [Mo. App.] 98 S. W. 786.

16. St. Louis & S. W. R. Co. v. James [Ark.] 95 S. W. 804. Under a statute providing if a drawee destroy a bill, or fail to return it to the holder within twenty-four hours, or refuse for that period to accept, he shall be deemed to have accepted, mere neglect or failure to return does not constitute acceptance. Id. Where a railroad company contracted to pay board orders of its employes, and it was its custom on receiving them to retain them if they were indebted to the drawers, or if the drawers were still in their employ, the fact that they failed to return certain orders within reasonable time does not prove acceptance. Id.

17. The drawee of a check cannot be held upon a claimed contract of acceptance external from the check unless the language unequivocally imports an absolute promise to pay. First Nat. Bank v. Commercial Sav. Bank [Kan.] 87 P. 746. Such promise is not made by returning to a telegraphic inquiry "Is A's check on you good for $350" the telegraphic response "A's check is good for the sum named." Id.

18, 19. Barnsdall v. Waltmeyer [C. C. A.] 142 F. 415.

20. Under Rev. St. 1899, § 449, providing for a penalty in case of refusal to accept a draft drawn out of the state on a person within the state where protested, where a draft drawn in Iowa upon a corporation in Missouri, which had previously agreed to accept it, is protested, the corporation is liable for the statutory penalty. State Bank v. American Hardwood Lumber Co. [Mo. App.] 98 S. W. 786.

21. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. Certification of a chcek by the bank procured by an indorsee discharges the drawer and indorsers. Id. Where an indorsee procured the certification of a check, the subsequent insolvency of the drawer did not render an indorser liable. Id.

22. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. Where an indorsee procured the drawer of a check to certify it and purchased goods on faith of it, as between them, an enforceable contract was created. Id.

23. Under the provisions of the Negotiable Instruments Law, where the drawer of a check procured it to be certified before delivering it, and before presentation the bank failed, the bank was not liable on the check to the drawer who received from the payee after the failure. Schlesinger v. Kurzrok, 47 Misc. 634, 94 N. Y. S. 442. See 19 Harv. L. R. 212.

24. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939. A drawee bank which pays a forged check which had been previously honored and indorsed by other banks, and holds it for more than thirty days, thereby admits it to be correct and is estopped to recover from indorsing banks. Id. To entitle the holder of a forged draft to retain the money obtained thereon from the drawee it must appear that the entire responsibility of determining the genuineness of the signature of the drawer devolved on the drawee, and that his negligence was not lessened by any disregard of duty on the part of the holder. Ford & Co. v. People's Bank, 74 S. C. 180, 54 S. E. 204.

25. See 6 C. L. 785.

26. A blank indorsement cannot be varied by parol. Torbert v. Montague [Colo.] 87 P. 1145. A contract of indorsement is one in writing and can not be contradicted by a contemporaneous written contract un-

the back of a negotiable instrument,[27] and is not altered by recitals which constitute mere surplusage.[28] Like any other contract it must be executed by one with power to execute,[29] and if made by an agent he must have been specifically authorized.[30] An indorsement for a special purpose is to be construed as any other contract.[31] An indorsement in blank may be amended at any time before trial.[32]

Indorser's liability.[33]—An indorser guaranties the genuineness of all prior indorsements[34] and warrants the title,[35] but does not warrant to the drawee the genuineness of the drawee's signature,[36] nor is it a warranty of an instrument which

less the terms of the latter plainly indicate that the parties so intended. Crilly v. Gallice [C. C. A.] 148 F. 835.

27. Where a note was indorsed by a bank, presumably for collection, and after the collector recovered judgment, which the payee was unable to satisfy, he indorsed it back without recourse, and the bank reissued it without striking off its prior indorsement, it was liable thereon. Moore v. First Nat. Bank [Colo.] 88 P. 385.

28. "For value received the within note, together with collaterals securing the payment of the same is transferred to A" is an indorsement and does not destroy negotiability. Rowe v. Gohlman [Tex. Civ. App.] 17 Tex. Ct. Rep. 40, 539, 98 S. W. 1077. Under the rule that an instrument payable to a person, his order, or assigns, is negotiable, a written assignment indorsed on a note by the payee is the equivalent of a blank indorsement. Leahy v. Haworth [C. C. A.] 141 F. 850. Where a payee in indorsing writes above his name: "I hereby acknowledge myself as principal," etc., such words were mere surplusage and could be stricken, and the contract was one of indorsement only. Kistner v. Peters, 223 Ill. 607, 79 N. E. 311. An indorsement followed by "transferred to" renders the indorser liable as such. Mayes Mercantile Co. v. Handley [Ind. T.] 98 S. W. 125. An indorsement without recourse will not be read from such term. Id. Under the Negotiable Instrument Act a written guaranty constitutes an indorsement with an enlarged liability, and transfers the paper free from equities existing between maker and payer. Leahy v. Haworth [C. C. A.] 141 F. 850.

29. A trading corporation has power to purchase and indorse bills and notes. Jamieson v. Heim [Wash.] 86 P. 165.

30. A corporation is not liable on notes indorsed by its resident manager who had no authority to indorse. Manhattan Liquor Co. v. Magnus & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 785, 94 S. W. 1117. A corporation is liable on notes given by its agent and indorsed by him with the corporate name for the purchase of goods he was authorized to purchase. Id. Where notes were given by a managing agent of a corporation and indorsed by him with the corporate name, evidence held insufficient to show that the goods for which they were given were purchased for the corporation. Id. Stamping a name on the back of an instrument by a person authorized to do so constitutes an indorsement if it was so intended. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447. One whose name does not appear on an instrument cannot be charged as an indorser by parol evidence that the nominal payee in indorsing acted as his agent where the note does not suggest such agency. New York Life Ins. Co. v. Martindale [Kan.] 88 P. 569. Under Negotiable Instruments Law providing that a forged indorsement is inoperative, where an agent with authority to indorse checks payable to his principal and deposit them in a bank for collection indorses them to a broker for margins on a stock transaction, the indorsement is not a forgery, and a bank which takes them from the broker is not liable in conversion. Salen v. Bank of State of N. Y., 110 App. Div. 636, 97 N. Y. S. 361. The secretary of a corporation is not presumed to have authority to bind the corporation as accommodation indorser of his own notes. Wheeling Ice & Storage Co. v. Conner [W. Va.] 55 S. E. 982. An agent selling goods and authorized to collect therefor has no implied authority to indorse a check received for goods payable to his principal. Hamilton Nat. Bank v. Nye [Ind. App.] 77 N. E. 295.

31. A payee of a note who assigns it with a guaranty of payment is not made agent for collection by an attached slip providing that payment by the payee, being made as guarntor only, it is desired that any bank through whose hands the instrument passes do not mark it "paid." Pace v. Gilbert School, 118 Mo. App. 369, 93 S. W. 1124. An indorsement on an over due note "extended on or before Oct. 1, 1902, at six per cent interest from Mch. 27, '02" makes six per cent the rate from that date until paid, and not merely until October 1, 1902. Moffatt v. Blake [C. C. A.] 145 F. 40.

32. An indorser in blank may, at any time before trial in an action on the note is terminated, amend the indorsement by writing over it "for value received I hereby assign the within note to." Kistner v. Peters, 223 Ill. 607, 79 N. E. 311.

33. See 6 C. L. 786.

34. An indorser warrants the genuineness of all prior indorsements. Seaboard Nat. Bank v. Bank of America, 57 Misc. 103, 100 N. Y. S. 740. An unrestricted indorsement guarantees the genuineness of the signature of the maker. Ford & Co. v. People's Bank, 74 S. C. 180, 54 S. E. 204. Where a prior indorsement was a forgery, the indorser is liable. Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. S. 561. Evidence sufficient to show that a prior indorsement was a forgery. Id.

35. Where a draft is drawn in exchange for a forged check, the fact that the bank might by the exercise of ordinary diligence have discovered the forgery does not affect the liability of an indorser of the draft on his warranty of title. Seaboard Nat. Bank v. Bank of America, 51 Misc. 103, 100 N. Y. S. 740.

36. Farmers' & Merchants' Bank v. Bank of Rutherford, 115 Tenn. 64, 88 S. W. 939.

is materially altered subsequent to the indorsement.[37] His liability is contingent upon failure of the maker to pay at maturity,[38] due presentment and demand,[39] protest and notice.[40] The right to have due presentment made and notice of dishonor given is not changed by the fact that failure to do so did not damage him.[41] A holder when seeking to charge an indorser has the burden to prove timely presentment.[42] Indorsers are liable in the inverse order of their indorsement.[43]

§ 9. *Presentment and demand.*[44]—Demand paper must be presented within a reasonable time.[45] A note payable at a particular bank does not necessitate demand for payment there.[46] Where a note is payble on demand at a certain place, no demand is necessary as a condition to the holder's right to sue,[47] and a refusal to pay on a demand made at a place other than that specified constitutes a default in payment.[48] A person receiving a check must exercise reasonable diligence in making presentment thereof for payment if he wishes to avoid risk of loss by insolvency of the drawee.[49] The fact that there are no funds in the account against

37. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445.

38. An indorser of a check is liable thereon if it is not paid when seasonably presented and he is notified of the nonpayment. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. Where a note is payable to a bank, it is immaterial in an action against an indorser that the bank failed to appropriate funds on deposit by the maker to its payment, since it was optional with the bank to so apply it. Far Rockaway Bank v. Norton [N. Y.] 79 N. E. 709.

39. Presentment before maturity is insufficient to charge an indorser. Demelman v. Brazier [Mass.] 79 N. E. 812. To hold an indorser, presentment, demand and notice of dishonor to him is necessary. Galbraith v. Shepard [Wash.] 86 P. 1113. Delay of five days in presenting a check discharges an indorser. Travers v. Sinclair & Co., 122 Ill. App. 203.

40. Under Negotiable Instruments Law a holder who exercises the option to declare an instrument due for nonpayment of interest must, in order to hold an indorser, make presentment and give notice of dishonor. Galbraith v. Shepard [Wash.] 86 P. 1113.

41. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. An indorser is discharged from liability for failure to present a check within a reasonable time though he suffered no damage. Travers v. Sinclair & Co., 122 Ill. App. 203.

42. Hence, the indorser may avail himself of the defense of want of presentment though he does not plead it. Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020.

43. An indorsee may disregard all indorsements carrying the instrument forward from the payee. Cox v. Citizens' State Bank [Kan.] 85 P. 762. An accommodation indorser who is last indorser on the note and is not a judgment debtor in a judgment against other parties, which is satisfied by a surety on an appeal bond, is discharged. State Bank v. Kahn, 49 Misc. 500, 98 N. Y. S. 858. Indorsers are prima facie liable in the order in which they indorse. Under Negotiable Instruments Law. Id. Where one holding an instrument on which an intermediate indorsement had been filed was paid the face of it by the drawee, who on discovering the forgery sued to recover, the last holder could compromise the suit and recover from an indorser. Oriental Bank v. Gallo, 112 App. Div. 360, 98 N. Y. S. 561.

44. See 6 C. L. 786.

45. Under Negotiable Instrument Act relative to presentment of demand paper and providing that it must be presented within a reasonable time under the circumstances and usages where a check is forwarded to various banks for collection in accordance with the custom of bankers, sufficient diligence is shown though demand might have been made more promptly if extraordinary means had been resorted to. Plover Sav. Bank v. Moodie [Iowa] 110 N. W. 29. Evidence of the usage and customs of banks relative to presentation of checks is admissible. Id. Under Negotiable Instrument Act providing for presentment of demand paper within a reasonable time under the circumstances, three and one half years held unreasonable in this case though complaint had been made of nonpayment in the meantime. Commercial Nat. Bank v. Zimmerman, 185 N. Y. 210, 77 N. E. 1020.

46. Hibernia Bank & Trust Co. v. Smith [Miss.] 42 So. 345.

47, 48. Farmers' Nat. Bank v. Venner [Mass.] 78 N. E. 540.

49. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017. Under Rev. Laws, c. 73, § 209, providing that in determining what shall constitute a reasonable time within which to present a bill regard must be had to the nature of the instrument, the usage of trade or business, and the facts of each case, held that a check drawn in Boston, on a Boston Bank, and delivered to the payee who lived at Chelsea, on Saturday which was not presented until Thursday was untimely though it had been transferred three times. Gordon v. Levine [Mass.] 80 N. E. 505. An indorsee of a check undertakes that he will present it within the day after its receipt and give notice if it is not paid. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. An indorser who pays and sues the holder for damages for delay in presenting and demanding payment waives insufficiency of the presentment and demand. Rogers v. Detroit Sav. Bank [Mich.] 13 Det. Leg. N. 889, 110 N. W. 74. Failure to present a check within five days is sufficient to discharge the drawer where he has not waived presentation within a reasonable time. Burns v. Yocum [Ark.] 98 S. W. 956.

which it is drawn does not relieve the indorsee of the duty of presenting it.[50] Presentation the day after it is given is timely.[51] If the payee of a check and the drawee reside or have their places of business in the same city, presentment must be made within the business hours of the next day after it is received.[52] If in different cities it must be forwarded for presentment on the next day after receipt if reasonably and conveniently practicable.[53] If not so practicable, then by the next mail or similar means of conveyance.[54] It need not be forwarded by the only or last mail of the day after its receipt if such mail closes or departs so early as to render it inconvenient for the holder to avail himself of it.[55] What is an unreasonably early hour depends on the circumstances of the transaction and situation of the parties.[56] In the absence of agreement to the contrary or circumstances making it imprudent to do so, it may be indorsed to a bank for collection.[57] But this does not extend the time within which it must be forwarded for presentment.[58] Failure to present a check does not bar recovery from the drawer if the time intervening between delivery thereof and failure of the bank is not sufficient for presentment by the exercise of such diligence as the law requires.[59] Where the payee of a check accepts a deposit slip instead of demanding cash, he must stand the loss if the bank is thereafter unable to pay.[60] One secondarily liable may waive presentment, expressly or by implication,[61] and waiver of presentment dispenses with notice of dishonor.[62]

§ 10. *Protest and notice thereof.*[63]—The law merchant does not require formal protest.[64] It is generally required that foreign bills and notes be protested.[65]

50. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499.

51. Cox v. Citizens' State Bank [Kan.] 85 P. 762.

52. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017.

53. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017. If the drawer bank of a check is in a distant city, it is sufficient if the check is put in the course of collection the day after it is received. Cox v. Citizens' State Bank [Kan.] 85 P. 762.

54, 55. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017.

56. On undisputed facts this is a question for the court. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017.

57. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017. The parties to a check sent to a distant place to be forwarded for collection are deemed to have acted with knowledge of the usual diligent method of making such presentment through a bank at the place to which it is sent and to have agreed to suffer any reasonable delay incident to such mode of presentment. Id. In such case the drawer by allowing his funds to remain in the drawee bank and the drawee by accepting the check evinces belief in the solvency of th bank and the former takes the risk of solvency during the reasonable period necessary for presentment in the usual manner. Id. The drawer, by delivering a check to the agent of the payee, having no authority to indorse it, impliedly agrees to allow such additional time for presentment as may be necessary for transmission of the check to the principal. Id.

58. The bank is not required to forward it the next day after its receipt if there be no convenient means of doing so within banking hours of that day. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017.

59. Lewis, Hubbard & Co. v. Montgomery Supply Co., 59 W. Va. 75, 52 S. E. 1017. Where a check is not paid because the maker had stopped payment before demand, an indorser could not escape liability because of negligence of the holder in sending the check to the drawee bank for payment instead of selecting an independent agent to make demand. Plover Sav. Bank v. Moodie [Iowa] 110 N. W. 29.

60. This is so though employes of the bank did not place the deposit slip to his credit. Burns v. Yocum [Ark.] 98 S. W. 956.

61. Under the Negotiable Instrument Law (Acts 1897, c. 4524, p. 25), presentment may be expressly or impliedly waived by an indorser. Waiver may be implied from conduct. Baumeister v. Kuntz [Fla.] 42 So. 886. In an action against one indorsing in blank and before delivery notes payable one day after date, as an accommodation indorser, evidence of contemporary facts and circumstances is admissible to show waiver of presentment. Id. The fact that an accommodation indorser was a stockholder in and treasurer of the corporation maker of a note payable one day from date, together with other facts, held sufficient to show a waiver of presentment. Id.

62. Baumeister v. Kuntz [Fla.] 42 So. 886.

63. See 6 C. L. 787.

64. The law merchant does not require formal protest, and an indorser is liable after due demand and notice. Waples-Painter Co. v. Bank of Commerce [Ind. T.] 97 S. W. 1025.

65. Ky. St. 1903, § 483, placing notes payable at banks organized under state or Fed-

Necessity of protest is regulated by statute in some states.[66] The indirect pecuniary interest of a notary in a note does not render him incompetent to protest it.[67] Damages may be recovered for wrongful and malicious protest of a check.[68]

Notice of nonpayment is not necessary in order to charge parties primarily liable,[69] but is necessary in order to charge an indorser [70] or drawer of a bill [71] unless waived.[72] Notice to the indorser must come from the holder of the note or some one who was a party to it,[73] and the fact that a note is payable at a bank of which an indorser is president does not dispense with the necessity of notice of protest to him.[74] Where an indorser denies that he has received notice of protest, the burden of proving that he has is on the holder.[75]

The certificate of protest[76] is prima facie evidence of the facts therein recited.[77]

§ 11. *New promise after discharge and waiver of presentment and demand.*[78] —Notice of presentment, dishonor and protest may be waived.[79] Such waiver may be made either before or after maturity of the paper.[80] Waiver may be made by

eral laws on the same footing with foreign bills, violates no rights secured to national banks by acts of congress. Merchants' Nat. Bank v. Ford [Ky.] 99 S. W. 260.

66. In a suit against an indorser on a note discounted by W. J. West & Co., evidence that such company "were in the money lending business, discounting notes," etc., but did not receive deposits, that they had out a sign "W. J. West & Co., Bankers," but had no charter, that the company was composed of W. J. West alone, does not show that the company was a bank within Civ. Code 1895, § 3688, so as to render protest necessary. Davis v. West & Co. [Ga.] 56 S. E. 403.

67. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664.

68. Compensatory damages may be recovered without allegation and proof of special damages. Peabody v. Citizens' State Bank [Minn.] 108 N. W. 272.

69. Protest and notice is not necessary to charge the maker. Preston v. Morsman [Neb.] 106 N. W. 320. A surety is not entitled to notice of dishonor under Revisal 1905, § 2239. Rouse v. Wooten, 140 N. C. 557, 53 S. E. 430. He is not an indorser within Revisal 1905, § 2213. Id. Want of demand, notice, and protest cannot be raised for the first time on appeal. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

70. Where a note is payable at a chartered bank, not only indorsers for value but all others whose indorsement is essential to due transmission of title are entitled to notice of nonpayment and protest. Ennis v. Reynolds [Ga.] 56 S. E. 104.

71. Failure to give notice of dishonor of a draft releases the maker and indorser from liability. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641. A holder of a bill of exchange must give the drawer notice of nonpayment. Morehouse & Wells Co. v. Schwaber, 118 Ill. App. 44.

72. The fact that an indorser who was not served with notice of protest gave another note on the day the first became due for an amount equal to the unpaid balance is not evidence of waiver of notice of protest, in the absence of evidence that she knew it was a renewal note. Jenkinson Co. v. Eggers, 28 Pa. Super. Ct. 151.

73. Mere knowledge of nonpayment on his part is not sufficient. Marshall v. Sonneman [Pa.] 64 A. 874. A notice of protest addressed to a third person and by him delivered to an indorser is insufficient to charge the indorser, though signed by a notary and personally delivered by him to the indorser. Id.

74. Ennis v. Reynolds [Ga.] 56 S. E. 104.

75. Fuller Buggy Co. v. Waldron, 112 App. Div. 814, 99 N. Y. S. 561. Evidence that the notaries who presented two notes protested the same and so certified, and charged for mailing notices thereof, together with evidence of the plaintiff that defendant admitted receiving notice, held to require the reversal of a finding that defendant received no notice though he so testified. Kupferberg v. Horowitz, 102 N. Y. S. 502. Evidence held to show that an indorser had received notice of protest. Fuller Buggy Co. v. Waldron, 112 App. Div. 814, 99 N. Y. S. 561. A notice addressed to an indorser at a place where he did not live and which was not his last known address is insufficient where the indorser did not receive the notice until three months after the protest. Albany Trust Co. v. Forthingham, 50 Misc. 593, 99 N. Y. S. 343. Testimony of a notary that she enclosed notice of protest in an envelope addressed to the indorser and put it in the regular place for outgoing mail, and that a certain person attended to the mailing each day, is insufficient to show that the notice was mailed. Goucher v. Carthage Novelty Co. [Mo. App.] 91 S. W. 447.

76. See 6 C. L. 788.

77. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664.

78. See 6 C. L. 788.

79. A new promise to pay when able is not void for indefiniteness. Kraus v. Torry [Ala.] 40 So. 956.

80. An indorser who indorses on the note a waiver of notice of protest eighteen months after maturity with knowledge that no demand for payment has been made or notice of dishonor given becomes liable on the note. Burgettstown Nat. Bank v. Nill, 213 Pa. 456, 63 A. 186.

Note: The indorser may waive protest after the date of maturity of the note with like effect as if done prior to that date. Barclay v. Weaver, 19 Pa. 396, 57 Am. Dec. 661; Hoadley v. Bliss, 9 Ga. 303; Sheldon v. Horton, 43 N. Y. 93, 3 Am. Rep. 669; Rindge v. Kimball, 124 Mass. 209; Ross v. Hurd, 71 N. Y. 14, 27 Am. Rep. 1; 1 Parsons, Bills and Notes, 594; 2 Randolph, Commercial Paper, 1456. In Barclay v. Weaver, 19 Pa. 396, 57

acts and declarations calculated to mislead the holder or induce him to forbear taking steps necessary to charge the indorser,[81] but cannot be implied from an equivocal act not communicated to the holder.[82] An indorser who knowing the facts which releases him signs a waiver of demand and protest is not relieved of the consequences of the waiver though ignorant of its legal effect,[83] and, if he asserts that the waiver was procured by fraud, he must allege [84] and prove it.[85]

§ 12. *Accommodation paper.*[86]—An accommodation party is one who signs an instrument without consideration.[87] As a general rule a corporation has not power to issue accommodation paper.[88] An accommodation party is liable to a holder according to the terms of the instrument though such holder has notice of his status.[89] An accommodation indorser who is required to pay may recover from the parties for whose accommodation he indorsed.[90] An indorser who is sued may

Am. Dec. 661, the court says: "It seems, therefore, that the duty of demand and notice, in order to hold an indorser, is not a part of the contract, but a step in the legal remedy, that may be waived at any time. In some jurisdictions it is held that the waiver, when made after the maturity of the note, must be with full knowledge of the indorser's laches and that it requires a new consideration. But it is settled by numerous American authorities that a waiver of protest need not be supported by a new consideration. Neal v. Wood, 23 Ind. 523; Hughes v. Bowen, 15 Iowa, 446; Creshire v. Taylor, 29 Iowa, 492; Tebbetts v. Dowd, 23 Wend. [N. Y.] 379; Lane v. Steward, 20 Me. 98.—See Burgettstown Nat. Bank v. Nill, 213 Pa. 456, 63 A. 186.

81. Torbert v. Montague [Colo.] 87 P. 1145. An indorser's promise to pay a note after maturity with knowledge of the maker's default and that no notice of dishonor had been given, is waiver of such notice. Brittain v. Murphy, 118 Mo. App. 235, 94 S. W. 303.

82. Where an accommodation indorser indorsed another note for renewal and mailed it to the maker of the first note before maturity, held such indorsement did not amount to a waiver of notice of dishonor of the first note. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445

83. Toole v. Crafts [Mass.] 78 N. E. 775.

84. An indorser who sets up that he was induced to waive notice and protest by fraudulent representations must allege that he was induced to walve by such fraud. Burgettstown Nat. Bank v. Nill, 213 Pa. 456, 63 A. 186.

85. Where an indorser executes a waiver of demand and protest at the instance of the payee's attorney after time for demand had expired, testimony that he did not know that he had been relieved from liability at the time he signed is admissible on the question of fraud in inducing him to execute it. Toole v. Crafts [Mass.] 78 N. E. 775.

86. See 6 C. L. 738.

87. Where a corporation drew drafts upon a firm of which its president was the principal member payable to itself or order and indorsed the same to the firm or to its president to enable the indorsee to raise money by discounting them, held that the drafts were accommodation paper. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641. An indorser who signs renewal notes in consideration of the cancellation of the original ones is not an accommodation indorser. Bank of Spartanburg v. Mahon [S. C.] 55 S. E. 529. Negotiable Instruments Law expressly provides that a person signing as maker, without receiving value therefor, for the purpose of giving credit to the payee is an accommodation party. National Bank v. Snyder Mfg. Co., 102 N. Y. S. 478. Where the cashier of a bank acting as agent for another loaned the principal's money and took a note payable to the bank, which the bank indorsed to the principal, such indorsement was accommodation and the principal could not recover from the bank thereon. First Nat. Bank v. Anderson [C. C. A.] 141 F. 926. That the maker of the note deposited the proceeds thereof in the bank did not constitute a consideration for the indorsement. Id. Where an indorsing corporation at the time of the indorsement owned all the stock of the corporation for which it indorsed, such indorsement is not accommodation, and ultra vires, but is a guaranty based on a valuable consideration. In re New York Car Wheel Works, 141 F. 430. In an action on an accommodation note, evidence held insufficient to show that it was specifically secured by a certain mortgage. Eighth Ward Bank v. Ehrlich, 112 App. Div. 883, 97 N. Y. S. 766.

88. A manufacturing corporation held to have no power to issue accommodation paper. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641. The fact that accommodation paper is issued by a corporation with the approval of the holders of a majority of the stock does not render it valid against the corporation. Id. A manufacturing corporation cannot bind itself as accommodation party. National Bank v. Snyder Mfg. Co., 102 N. Y. S. 478.

89. He may recover from an accommodation indorser whether or not he knew the nature of this contract. Charleston Sav. Inst. v. Farmers' & Merchants' Bank, 73 S. C. 545, 54 S. E. 216. B. & C. Comp. § 4431 expressly provides that a holder may recover from an accommodation party though he knows the nature of his contract. White v. Savage [Or.] 87 P. 1040.

90. Foster v. Balch & Platt [Conn.] 65 A. 574. Where an indorser for the accommodation of both maker and payee sues the payee after paying the note, the payee may not set off an indebtedness due from plaintiff to the maker. Id.

not prove that the maker paid interest on a renewal in order to show that the holder regarded the maker as the real debtor.[91]

§ 13. *The doctrine of bona fides. Who may be a holder.*[92]—A bona fide holder is one who takes the paper when it is complete and regular upon its face,[93] before maturity,[94] in the usual course of business,[95] and without notice of any defense thereto between the original parties,[96] and for value.[97] All of these requirements must exist.[98] A receiver [99] or personal representative [1] are not bona fide holders unless the holder himself had such character.

Once bona fide holdership always bona fide holdership,[2] hence a bona fide holder may gratuitously [3] transfer all his rights to one with notice.[4] The right to do so is a vested one.[5]

Notice and knowledge.[6]—Notice in order to destroy one's character as a bona fide holder must be of facts sufficient to impute bad faith.[7] Mere surmise or sus-

91. Charleston Sav. Inst. v. Farmers' & Merchants' Bank, 73 S. C. 545, 54 S. E. 216.

92. See 6 C. L. 789.

93. Hodge v. Smith [Wis.] 110 N. W. 192. The title of a person who negotiates an instrument is defective when he shall have obtained it, or any signature thereto, by fraud or negotiated it in breach of faith and fraudulently. Id.

94. Hodge v. Smith [Wis.] 110 N. W. 192. Evidence sufficient to show that paper was not taken before maturity. Hynes v. Plastino [Wash.] 87 P. 1127.

95. Hodge v. Smith [Wis.] 110 N. W. 192.

96. Hodge v. Smith [Wis.] 110 N. W. 192. One who takes with notice that the maker has refused payment is not. Old Nat. Bank v. Marcy [Ark.] 95 S. W. 145. One who takes from an agent of the owner and under his indorsement with knowledge that the agent has no authority to indorse and transfer is not a bona fide holder. Salen v. Bank of State of N. Y., 110 App. Div. 636, 97 N. Y. S 361. One who takes with knowledge that the instrument is void for usury is not a bona fide holder. Schlesinger v. Lehmaier, 50 Misc. 610, 99 N. Y. S. 389. Evidence held to show good faith. Ward v. City Trust Co., 102 N. Y. S. 50. Evidence insufficient to show that a holder was a bona fide one. Old Nat. Bank v. Marcy [Ark.] 95 S. W. 145.

97. Hodge v. Smith [Wis.] 110 N. W. 192. Evidence held to show that the instrument was taken by the indorsee in absolute payment of a debt and that value was paid. Wood v. Rairden, 111 App. Div. 303, 97 N. Y. S. 735. Held a bona fide holder. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

98. The mere fact that value was paid is not sufficient. Tischler v. Shurman, 49 Misc. 257, 97 N. Y. S. 360.

99. Defenses avilable against the holder of a note are available against a receiver appointed to collect the same. Hutchins v. Langley, 27 App. D. C. 234.

1. Where the intestate purchased the notes after maturity, the defense of failure of consideration is available against his administratrix. Kampmann v. McCormick [Tex. Civ. App.] 99 S. W. 1147.

2. See 6 C. L. 789. Under Negotiable Instruments Law where one negotiated through brokers a sale of a bond, paying the party presenting the bond the proceeds of the sale, and when the bond was returned because payment of interest was refused on the ground that the bond had been stolen, transmitted to the purchaser another bond of like tenor and of the same issue, they were holders in due course. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353.

3. Where a note has passed into the hands of a bona fide holder, it is immaterial that his indorsee and plaintiff paid no consideration therefor. Ludlow v. Woodward, 102 N. Y. S. 647.

4. Gamble v. Rural Independent School Dist. [C. C. A.] 146 F. 113.

5. The right of a bona fide holder of negotiable municipal bonds to transfer his title with all the rights with which he is vested is one of contract and cannot be impaired by legislation. Gamble v. Rural Independent School Dist. [C. C. A.] 146 F. 113.

6. See 6 C. L. 789.

7. Mere suspicious circumstances are not sufficient to charge a purchaser with notice of defects, but they must be such as impute bad faith. Hutchins v. Langley, 27 App. D. C. 234. Suspicions growing out of the unpopular business or even the ill reputation of the assignor are not sufficient. Id. It is proper to charge that if a holder had notice when he took the notes of facts which made his taking an act of bad faith he could not recover, held proper. Old Nat. Bank v. Marcy [Ark.] 95 S. W. 145. Bad faith is essential. Ward v. City Trust Co., 102 N. Y. S. 50. Evidence insufficient to show bad faith. Id. Bad faith or dishonesty in refraining from making inquiry must be shown. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353. He must have taken it under circumstances showing bad faith. Norwood v. Bank of Commerce [Neb.] 109 N. W. 152. Evidence insufficient to show bad faith or want of honesty. Id. It must be knowledge of such facts that his failure to make further inquiry is presumptive evidence of bad faith. First Nat. Bank v. Moore, 148 F. 953.

Not taken in bad faith: That the purchaser of negotiable certificates of a corporation has notice that they were given in payment of stock of another corporation does not charge him with notice that they were given in violation of an anti-trust law and such fact is not defense in the absence of proof of bad faith. National Salt Co. v Ingraham, 143 F. 805. Under Negotiable Instruments Law providing that it must be actual knowledge of the infirmity or defect, or knowledge of

picion [8] as a general rule,[9] or negligence, is not sufficient.[10] It must be knowledge of such facts as would impeach title between the antecedent parties.[11] Knowledge of such facts as ought to put an ordinarily prudent man on inquiry is insufficient.[12] An indorsee must take notice of facts appearing on the face of the instrument,[13]

such facts that the taking amounts to bad faith, where a stockholder and director of a corporation transferred his stock to another knowing that such transfer gave him control of the company, and payment was made by check signed as treasurer of the corporation, he was not charged with notice that the treasurer was misappropriating corporate funds. Fillebrown v. Hayward, 190 Mass. 472, 77 N. E. 45. That the payee of a note executed by a corporation is a director of such corporation does not put an indorsee on inquiry as to whether its execution was authorized. Orr v. South Amboy Terra Cotta Co., 113 App. Div. 103, 98 N. Y. S. 1026. Where a blank form was signed by a stamp bearing a corporation's name, the fact that such stamped name was erased does not charge a taker with notice of such erasure. Nassau Trust Co. v. Matherson, 113 App. Div. 693, 100 N. Y. S. 55. In an action by the holder of certified checks, evidence of his knowledge of the business and affairs of the certifying bank held admissible on the question of his bona fides. Detroit Nat. Bank v. Union Trust Co. [Mich.] 13 Det. Leg. N. 593, 108 N. W. 1092. A purchaser is not charged with notice that the note has been renewed and paid because the renewal and payment passed through the bank which purchased it. Spencer Nat. Bank v. Inman Mills, 74 S. C. 76, 53 S. E. 951. Evidence insufficient to show that an indorsee ought to have had notice of infirmities in an instrument. Jamieson v. Heim [Wash.] 86 P. 165.

Evidence insufficient to show bad faith. Clark v. Whitaker, 117 La. 298, 41 So. 580.

Bad faith shown: Evidence held to show that an indorsee was a confederate of one who obtained the note by fraud and not a bona fide holder. Tamiyn v. Peterson [N. D.] 107 N. W. 1081. The agent of a foreign corporation, which has not complied with the laws and is not entitled to do business in the state, who takes from a sub-agent a note received in such business is not a bona fide holder. Katz v. Herrick [Idaho] 86 P. 873.

8. Hibbs v. Brown, 112 App. Div. 214, 98 N. Y. S. 353. Actual notice is essential. Mere suspicion is not enough. First Nat. Bank v. Leeper [Mo. App.] 97 S. W. 636. It is not sufficient that he has knowledge of circumstances creating a suspicion of a defect in the title of his indorser and is guilty of gross negligence in failing to discover such defects. Bradwell v. Pryor, 221 Ill. 602, 77 N. E. 1115.

9. One about to receive a negotiable instrument must make inquiries concerning it, if he is aware of any suspicious circumstances. Bradwell v. Pryor, 124 Ill. App. 84. The fact that an indorsee of a large draft knew the indorsor to be financially embarrassed held to put him on inquiry. Id.

10. Actual knowledge is necessary. Creston Nat. Bank v. Salmon, 117 Mo. App. 506, 93 S. W. 288.

11. First Nat. Bank v. Moore [C. C. A.] 148 F. 953.

12. First Nat. Bank v. Moore [C. C. A.] 148 F. 953. Knowledge of facts that would cause a man of ordinary prudence to suspect that the person from whom he acquired the paper had no interest in it is not sufficient. Union Nat. Bank v. Neill, 149 F. 711. It is not sufficient that he took it under circumstances which might excite suspicion in the mind of a prudent man. Norwood v. Bank of Commerce [Neb.] 109 N. W. 152.

13. One who takes an instrument marked so as to indicate that it had been paid is not a bona fide holder. Silverman v. National Butchers' & Drovers' Bank, 50 Misc. 169, 98 N. Y. S. 209. Under Negotiable Instruments Law one who takes an instrument which mere inspection shows has been altered is not a bona fide holder. Elias v. Whitney, 50 Misc. 326, 98 N. Y. S. 667. Held a question of fact whether a note bore on its face such evidence of alteration as to charge an indorsee with notice. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445. Where the note of a secretary of a corporation contains the accommodation indorsement of the corporation put on by himself, the paper carries notice to the purchaser of his possible want of power to so indorse. Wheeling Ice & Storage Co. v. Conner [W. Va.] 55 S. E. 982. Check held to bear notice of irregularity on its face. State v. Jahraus, 117 La. 286, 41 So. 575. Where the maker of a note procures its discount for his own benefit, the discountee has notice that an indorsement is not in the usual course of business but is for the accommodation of the maker. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445. The purchaser of a note executed by a married woman must take notice of the fact of coverture and the existence of facts which would authorize her to execute it. Haas v. American Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 985, 94 S. W. 439. Where a joint note is so framed as to impart notice that it was not a transaction in the usual course of business of borrowing money for partnership purposes, a bona fide holder must show that the money was used by the partnership or that a protesting partner ratified it. In re Hardie & Co., 143 F. 553. Promissory notes signed first by a corporation and by a partnership as joint maker. Id. When notes were signed by three persons, the second signer being a firm which subsequently became bankrupt, the notes did not show on their face that the firm's contract as principal to pay the face of the notes was to the extent of two-thirds of the amount as surety. Union Nat. Bank v. Neill, 149 F. 711. When notes were signed by three persons, the second being a firm which subsequently became bankrupt, the firm's contract as principal to pay the entire debt is not changed by the fact that other signers made the same promise. Id. Where a note was signed on its face by three persons, the fact that the name of a trading partnership appeared as second signer does not charge a taker with notice that it signed as surety which it was without power to do. Id.

and the fact that a draft is being discounted by the party primarily liable thereon is notice that it is accommodation paper,[14] and notice to the agent is notice to the principal.[15, 16]

Taking in due course of business.[17]—One must acquire the paper in due course of business,[18] and the instrument must be regularly indorsed[19] and the indorsement proven.[20] One holding under a qualified indorsement may be a bona fide holder.[21]

Taking before maturity.[22]—To be a bona fide holder one must take before maturity.[23] One who purchases a note one day after date which is payable one day after date takes before maturity,[24] and one who takes a check five days after it is issued does not take demand paper an unreasonable time after issue under Negotiable Instruments Law providing that one who does so is not a bona fide holder;[25] but where a note provides that delinquency in payment of interest shall mature the entire note, one who takes it after such delinquency is not a bona fide holder.[26]

Parting with value.[27]—The instrument must be taken for value,[28] but full value need not be paid.[29] One who takes as collateral security for an antecedent debt[30]

14. Cook v. American Tubing & Webbing Co. [R. I.] 65 A. 641. Where a draft drawn by a corporation upon a firm of which its president and principal stockholder was the main member payable to its own order, and indorsed to the president, who discounted the same, knowledge of the general relation between the various parties to the draft and special notice that it was being discounted for the benefit of the acceptor held to give notice that the paper was accommodation paper. Id.

15, 16. Condon v. Barnum [Iowa] 106 N. W. 514. When an agent selling threshing outfits obtained an order from a buyer who was required to give farmers notes as collateral, and the agent assured the farmer that the note would be returned unless the buyer did his threshing, which he failed to do, held the principal was not a bona fide holder. New Birdsall Co. v. Stordalen [S. D.] 109 N. W. 516. Where an agent without authority indorses and receives the proceeds of a check payable to his principal, the bank, being bound to know whether the check was properly indorsed, was not a bona fide holder and could not transfer title to another. Hamilton Nat. Bank v. Nye [Ind. App.] 77 N. E. 295.

17. See 6 C. L. 791.

18. An agent who indorses a note of his principal held as agent to himself as an individual held not to acquire it in the usual course of business, especially where he thereafter regards it as the principal's. Wickham v. Evans [Iowa] 110 N. W. 1046.

19. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447. One who holds paper not regularly indorsed is not a bona fide holder and such paper is subject to all defenses available against the payee. Keel v. East Carolina Stone & Const. Co. [N. C.] 55 S. E. 826. One who takes an assignment by a separate instrument is not a bona fide holder. Condon v. Barnum [Iowa] 106 N. W. 514. Under Negotiable Instruments Act providing that a note payable to the maker is not complete until indorsed by him, a complaint on such note must allege such indorsement. Simon v. Mintz, 101 N. Y. S. 86.

20. An indorsement does not prove itself but must be established by proper testimony. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447. Under the provisions of Negotiable Instruments Act, the holder of a draft is not a bona fide holder in the absence of proof of the payee's indorsement. Id.

21. An indorsement without recourse does not deprive an indorsee of his character as bona fide holder. Neely v. Black [Ark.] 96 S. W. 984. One who holds under an indorsement, reciting that the indorser transfers his rights to the indorsee, is a holder in due course. Evans v. Freeman, 142 N. C. 61, 54 S. E. 847.

22. See 6 C. L. 791.

23. Where one's bona fide holdership is denied, it is permissible to show that the instrument was seen unindorsed after maturity. Mayers v. McRimmon, 140 N. C. 640, 53 S. E. 447. Where notes were taken after maturity, they are subject to the defense on behalf of the payee and first indorser that they were indorsed for collection and that the second indorsee had no authority to indorse them to the holder. Mayfield Grocer Co. v. Andrew Price & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 650, 95 S. W. 31.

24. Wilkins v. Usher, 29 Ky. L. R. 1232, 97 S. W. 37.

25. Singer Mfg. Co. v. Summers [N. C.] 55 S. E. 522.

26. Hodge v. Wallace [Wis.] 108 N. W. 212.

27. See 6 C. L. 791.

28. Affidavit of defense stating that plaintiff is not a bona fide holder, but that the note was transferred to him solely for the purpose of having action brought in his name, and that the note was procured by fraud, states a defense. First Nat. Bank v. Gebbie & Co., 145 F. 448.

An indorsee for collection is not a bona fide holder. Bank of America v. Waydell [N. Y.] 79 N. E. 857.

29. One who purchases a $1500 note for $1000 is a bona fide holder. Lassas v. McCarty, 47 Or. 474, 84 P. 76.

30. Wilkins v. Usher, 29 Ky. L. R. 1232, 97 S. W. 37. Where an indorsee takes paper for security, and also holds other paper, the question whether there is a consideration for the indorsement is for the jury.

or in discharge of a pre-existing debt takes for value,[31] but such debt must be discharged.[32] A trustee in a deed of trust of all the property of a person holding negotiable paper is a bona fide holder under Negotiable Instruments Law.[33] A bank discounting paper for a depositor is not a bona fide holder so long as the deposit is not withdrawn,[34] but is thereafter, or if the depositor is indebted to the bank in an amount equal to the face of the note at the time it is discounted.[35]

Rights of a bona fide holder.[36]—A bona fide holder takes free from defenses available to the original parties,[37] but he cannot get a contract where none was made.[38] As to him, failure[39] or invalidity of consideration,[40] payment,[41] usury,[42]

Mercantile Guaranty Co. v. Hilton, 191 Mass. 141, 77 N. E. 312.

A pledgee is a bona fide holder so far as the instrument is essential to carry out the terms of the pledge. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

31. Rowe v. Gohlman [Tex. Civ. App.] 17 Tex. Ct. Rep. 40, 539, 98 S. W. 1077. Negotiable Instruments Law expressly provides that an antecedent debt constitutes value. Singer Mfg. Co. v. Summers [N. C.] 55 S. E. 522. One who takes a note in payment of a debt is a holder for value. Ward v. City Trust Co., 102 N. Y. S. 50.

32. Under the rule that an antecedent debt constitutes value where one took an instrument and gave his indorser credit therefor which credit was conditional on its being paid, he was not a taker for value. Commercial Nat. Bank v. Citizens' State Bank [Iowa] 109 N. W. 198.

33. Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14.

34. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942. It is not taken for value when the amount of the consideration was placed to the credit of the indorser subject to his order. Hodge v. Smith [Wis.] 110 N. W. 192. A bank taking a check on deposit is not necessarily a bona fide holder since, if the check is dishonored, it may recover from the depositor. Fayette Nat. Bank v. Summers, 105 Va. 689, 54 S. E. 862.

35. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942. Where a note is taken and the consideration placed to the credit of the indorser on the books of the indorsee subject to his order, the indorsee has the burden to show that such constituted payment. Hodge v. Smith [Wis.] 110 N. W. 192.

36. See 6 C. L. 791.

37. The transferee of commercial paper of a corporation acquires its title and right to transfer. Ward v. City Trust Co., 102 N. Y. S. 50. An agreement in writing made at the time of execution of the note that it should not draw interest is no defense against a bona fide holder. Hunter v. Johnson, 119 Mo. App. 487, 94 S. W. 311. That they were executed on Sunday is no defense. Myers v. Kessler [C. C. A.] 142 F. 730. A maker cannot avoid payment on the ground that the note was made on Sunday. Hale v. Harris, 28 Ky. L. R. 1172, 91 S. W. 660. That the indorsee of a note secured by a mortgage procured the purchaser of the mortgaged premises to buy the note for him is no defense to an action against the maker. The only defense in such case is payment by the maker or the purchase of the premises. Neely v. Black [Ark.] 96 S. W. 984. The title of the bona fide holder of coupon mortgage bonds issued by a corporation and payable to bearer, which are taken before maturity, is like title to commercial paper, good as against all secret equities claimed by the corporation or third parties. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Err. & App.] 64 A. 126. One claimed that there was an agreement between her and a corporation that she should have seven bonds of a proposed issue of mortgage bonds. The bonds were never delivered or set apart for her but the entire issue came into the hands of bona fide holders. Held the title of the holders was complete. Id. That an acceptance was without consideration is no defense. Breyfogle v. Addison, 120 Ill. App. 520.

38. Max Simons & Co. v. McDowell, 125 Ga. 203, 53 S. E. 1031. As where the instrument is materially altered after execution. Where an instrument in the form of a promissory note is altered so as to make it a bill of exchange. Id. Under Negotiable Instruments Law an alteration by adding "Payable with interest" in a blank space does not show on its face that the instrument was altered, the extra phrase being in the same handwriting as the original instrument. It is complete and regular. Trustees of American Bank v. McComb, 105 Va. 473, 54 S. E. 14. Where an instrument is executed in blank and shows on its face that such blanks must be filled in, the filling in by the payee of such blank is not such an alteration as will invalidate it in the hands of a bona fide holder. Place of payment filled in Bowen v. Laird [Ind.] 77 N. E. 852.

39. Where a drawee pays the face of the draft to a holder in due course, he cannot recover when it appears that the goods for which the draft was drawn were never sent. Waddell v. Hanover Nat. Bank, 48 Misc. 578, 97 N. Y. S. 305. Failure of consideration is no defense. Empire Trust Co. v Magee, 102 N. Y. S. 9. Want of consideration is no defense. Johnson County Sav. Bank v. Roberts, 125 Ga. 41, 53 S. E. 808 Want or failure of consideration is no defense. Summerford v. Davenport, 126 Ga. 153, 54 S. E. 1025

40. That the consideration is a gambling debt is a defense under Negotiable Instruments Law, such notes having been declared void. Alexander & Co. v. Hazelrigg, 29 Ky. L. R. 1212, 97 S. W. 353. That the consideration was a gambling debt is no defense. Myers v. Kessler [C. C. A.] 142 F. 730. That the consideration is illegal and immoral is no defense in the absence of statute declaring such instruments to be void. Henry v. State Bank of Laurens [Iowa] 107 N. W. 1034.

41. Payment of note to original payee after assignment is no defense to an action by the assignee who received the note be-

that the instrument was executed without power,[43] obtained by theft,[44] or fraud,[45] is no defense; but that one was induced to sign a negotiable instrument when he intended to sign something else,[46] or that the instrument is absolutely void,[47] or is a forgery,[48, 49] is a defense. Where one is not a bona fide holder, all equitable defenses may be set up.[50]

Burden of proof.[51]—The holding of one in possession of paper regularly indorsed is presumed to be bona fide,[52] and one who asserts that he is not has the burden of proof;[53] but where it is shown that the instrument is accommodation

fore maturity. Gemkow v. Link [Ill.] 80 N. E. 47 While payment of a note secured by trust deed in good faith to the original payee and mortgagee after assignment generally releases the lien, it does not do so where the mortgagor expressly recognizes it thereafter by entering into extension agreements. Id. It is no defense against a bona fide holder that payments have been made on the note. Hunter v. Johnson, 119 Mo. App. 487, 94 S. W. 511. Payment by the maker to the payee after he had transferred the instrument is no defense. Staff v First Nat. Bank [Tex. Civ. App.] 97 S. W. 1089.

42. The defense of usury is not available. Wood v. Babbitt, 149 F. 818 That it is usurious is no defense. Ferguson v. Bien, 101 N. Y. S. 100.

43. One who is a joint maker with a corporation which has not power to execute a note is liable to a bona fide holder though the corporation is not. Scott v. Bankers' Union [Kan.] 85 P. 604. A member of a trading partnership has no implied power to bind the firm by an accommodation indorsement, but the firm is liable on such indorsement in the hands of a bona fide holder. Union Nat. Bank v. Neill [C. C. A.]149 F. 711.

44. A bona fide holder of a note may recover thereon though it was obtained by theft from the maker. Arons v. Ziegfeld, 102 N. Y. S. 898.

45. A bona fide holder of a note procured from the maker by fraud may recover the face of the instrument and is not limited to what he paid for it. Lassas v. McCarty, 47 Or. 474, 84 P. 76. Though the payee of a draft induced its issue by impersonating another and forging such other's name to a draft given for it, a bona fide taker may recover. Jamieson & McFarland v. Heim [Wash.] 86 P. 165. Fraud is no defense Johnson County Sav. Bank v. Roberts, 125 Ga. 41, 53 S. E. 808. The drawer of a check cannot countermand it for fraud after it has passed into the hands of a bona fide holder. Loan & Sav. Bank v Farmers' & Merchants' Bank, 74 S. C. 210, 54 S. E. 364.

46. Where one is induced to sign a negotiable instrument under the belief that he is signing something else, and is not negligent, such defense is avoidable against a bona fide holder. Hulett v. Marine Sav. Bank, 143 Mich. 219, 12 Det. Leg. N. 958, 106 N. W. 879.

47. Notes given for fertilizer not tagged as required by law are void even in the hands of a bona fide holder. Alabama Nat. Bank v. Parker & Co. [Ala.] 40 So. 987. Burden of proving that the bags were not tagged is on the defendant. Id. Where several notes are given for independent deliveries of fertilizer, a showing that one sack was not tagged would not defeat recovery on all the notes. Id. That the instrument was executed by a corporation which had no power to execute it is a defense. Scott v. Bankers' Union [Kan.] 85 P. 604.

48, 49. The drawee of a forged check who has paid the same may recover the amount from the party who received it, though he was a bona fide holder, if he was not misled by the drawee's failure to detect the forgery. First Nat. Bank v. Bank of Wyndmere [N. D.] 108 N W. 546.

50. That the note was given as the purchase price of a horse with a guaranty the breach of which was a defense. Carey v. Nissle [Mich.] 13 Det. Leg. N. 490, 108 N. W. 733. Plea alleging that a holder held it as security, that a bank which had agreed to collect was negligent in making presentment and setting up an equitable defense, is not demurrable. Hibernia Bank & Trust Co. v. Smith [Miss.] 42 So. 345.

51. See 6 C. L. 593.

52. An indorsee is presumed to be a bona fide holder Hodge v. Smith [Wis.] 110 N. W. 192. The holder of an instrument regularly indorsed is presumed a bona fide holder. Johnson County Sav. Bank v. Roberts, 125 Ga. 41, 53 S. E. 808. One who asserts that he is not has the burden of proving it. Evans v Freeman, 142 N. C. 61, 54 S. E. 847. The holder of a note payable to bearer and properly indorsed is prima facie entitled to recover and may introduce the note without proof of ownership. Hibernia Bank & Trust Co. v. Smith [Miss.] 42 So. 345. This is the rule under Negotiable Instruments Law where one takes as security for an antecedent debt a note wherein the maker was deceived as to the purpose for which it was given. Wilkins v. Usher, 29 Ky L. R. 1232, 97 S. W. 37. One holding a note indorsed in blank is presumed the owner. Myrick Bros. Co. v. Jackson [Tex. Civ. App.] 99 S. W. 143. Possession of paper regularly indorsed is prima facie evidence of title. Adams v. Connelly, 118 Ill App. 441.

53. One attacking bona fide holdership has the burden of showing knowledge of facts concerning defects in the paper as to impute bad faith. Hutchins v. Langley, 27 App. D. C. 234. A statute imposing on defendant, in an action by a transferee where the defendant pleads that such transferee is not a bona fide holder, the burden of proving fraud, and notice of it is not unconstitutional. Johnson County Sav Bank v. Walker [Conn.] 65 A. 132. The maker has the burden to show that an indorsee had actual knowledge of the defense set up, or such knowledge that his taking amounted to bad faith. Old Nat. Bank v. Marcy [Ark.] 95 S. W. 145. Where a bank which discounted a note for a depositor sues thereon and the defense of fraud interposed by the maker is not submitted, the maker has the burden to

paper which the accommodating party had not power to execute,[54] or that the instrument was procured by fraud,[55] is based upon an illegal consideration,[56] or it appears that the title of any one who negotiated the paper was defective,[57] or it is shown that the paper was taken as security,[58] the indorsee must prove the bona fides of his holding.[59]

§ 14. *Remedies and procedure.*[60]—Equity will enjoin the transfer of a negotiable instrument where the complainant maker has a good defense against the defendant payee which would not be available against a bona fide holder.[61] When notes were endorsed to one in settlement of an account, it was proper to bring an action against the transferror on his indorsement instead of upon the account.[62] An action may be maintained on the original obligation instead of on the instrument.[63] A payee may sue any time after maturity in the absence of an extension agreement,[64] but the action must be commenced within the limitation period.[65] A cause of action on a note against an administrator in his representative capacity cannot be joined with a suit in equity to enforce a claim against him individually on the theory of trust or estoppel.[66] Indorsement of payment of interest upon a

show that the bank is not a bona fide holder. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942. The defendant has the burden to prove that an indorsee in due course is not a bona fide holder. First Nat. Bank v. Moore [C. C. A.] 148 F 953.

54. National Bank v. Snyder Mfg. Co., 102 N. Y. S. 478

55. Stouffer v. Fletcher [Mich.] 13 Det. Leg. N. 790, 109 N. W 684. Under Negotiable Instruments Law (Laws 1898-1899, p. 234, c. 674), § 67, the prima facie validity of the holder's title to negotiable paper ceases when the fraudulent character is shown, and the burden is upon the holder to exonerate himself from complicity in the fraud. Cook v. American Tubing & Webbing Co. [R. I.] 65 A 641. The purchaser of a fraudulently certified check has the burden to show that he is a bona fide holder in an action against the receiver of a bank. Detroit Nat. Bank v. Union Trust Co. [Mich.] 13 Det. Leg. N. 593, 108 N. W. 1092. In an action by an indorsee against the maker where fraud is set up as a defense, the plaintiff has the burden to show that he is a bona fide holder. Lahrman v. Bauman [Neb.] 107 N. W. 1008. Where fraud in the inception of an instrument is alleged and proved, the holder has the burden of proving the bona fides of his holding. Tamlyn v. Peterson [N. D.] 107 N W. 1081.

56. In an action upon a negotiable note, proof of an illegal consideration makes a prima facie case of notice to the holder, and the burden of proving bona fide holdership is on him. Union Collection Co. v. Buckman [Cal.] 88 P. 708.

57. Negotiable Instruments Law expressly provides that where it appears that title to any one who has negotiated the paper is defective, the holder has the burden to show that he is a bona fide holder. Singer Mfg. Co. v Summers [N. C.] 55 S. E. 522. If it appears that the title of any person who negotiated the instrument was defective, the holder has the burden of showing the bona fides of his holding. Hodge v. Smith [Wis.] 110 N. W. 192. Where it is shown that the title of an intermediate holder was defective, proof that full consideration was paid prima facie establishes that it was taken in due course. Id.

58. An indorsee for security has the burden to show that he is a holder for value. Mercantile Guaranty Co. v. Hilton, 191 Mass. 141, 77 N. E. 312.

59. Evidence insufficient to show that an indorsee in due course was not a bona fide holder. First Nat. Bank v. Moore [C. C. A.] 148 F. 953 Evidence sufficient to show one a bona fide holder. Bradwell v. Pryor, 221 Ill. 602, 77, N. E. 1115. In an action by a bona fide holder where the defense of fraud is set up, evidence of similar fraud by the agent of the payee about the same time is inadmissible. Hunt v. Van Burg [Neb.] 106 N. W. 329 Where it is shown that the instrument is without consideration, a holder must show the circumstance under which it came into his possession, and that he is a bona fide holder. Tischler v. Shurman, 49 Misc. 257, 97 N. Y. S. 360. Evidence insufficient to show one to be a bona fide holder. Id. Whether one was a bona fide holder held a question for the jury Detroit Nat. Bank v. Union Trust Co. [Mich.] 13 Det. Leg. N. 593, 108 N. W. 1092.

60. See 6 C. L. 793

61. Atkinson v. Cain [W. Va.] 56 S. E. 519.

62. Le Tulle Mercantile Co. v Rugeley [Tex. Civ. App.] 17 Tex. Ct. Rep. 276, 98 S. W. 438.

63. Where a creditor took a renewal note which was not signed by the maker of the original, in an action on such note on the common counts, the creditor can recover on the original debt Councilman v. Towson Nat. Bank, 103 Md. 469, 64 A. 358.

64. Caskey v. Douglas [Tex. Civ. App.] 95 S. W 562. Evidence insufficient to show an agreement for an extension for any definite period. Id.

65. Failure of the holder of a bank draft to present it to the drawee within five years bars an action by him against the drawer, Wrigley v. Farmers' & Merchants' State Bank [Neb.] 108 N. W. 132. The obligation of one who overdraws by check is one based upon an instrument in writing within the statute of limitations. Du Brutz v. Bank of Visalia [Cal App.] 87 P. 467.

66. Tyler v. Stitt, 127 Wis. 379, 106 N. W. 114.

promissory note by one having an interest therein,[67] if proved to have been made before the bar of limitations has attached,[68] is sufficient evidence of payment to toll the statute.[69]

Parties.[70]—As a general rule an action on an instrument may be brought by the real party in interest,[71] but a holder who has no beneficial interest may sue,[72] and a pledgee may sue in his own name and as owner.[73] Where sureties are independently liable for a specified portion all are proper but not necessary parties to a suit against one.[74] Under a statute providing that, where an instrument is not assigned in writing, the assignor shall be made a party to answer as to the assignment where a note was by mistake made payable to the wrong person who indorsed it without recourse, he was not an assignor within such statute.[75] A transferror who made false representations at the time of the transfer is properly made a party.[76]

Pleading. The complaint.[77]—The instrument may be pleaded according to its legal effect,[78] or by copy.[79] If pleaded according to its legal effect, execution must

67. Husband of a deceased payee held to have sufficient interest although not the administrator of the intestate. Peters v. Rothermel, 30 Pa. Super. Ct. 281.

68. Being admitted as a declaration against interest, it must be shown to have been made before the bar attached, though so dated. Peters v. Rothermel, 30 Pa. Super. Ct. 281.

69. Peters v. Rothermel, 30 Pa. Super. Ct. 281.

70. See 6 C. L. 793.

71. Under the rule that an action may be maintained by the real party in interest, where by mistake a note is made payable to an officer of a bank, the bank may sue, though it is also provided that one in whose name a contract is made for the benefit of another may sue without joining the beneficial party. Best v. Rocky Mountain Nat. Bank [Colo.] 85 P 1124. Where executors by written assignment transferred a note, the transferee could maintain action as the real party in interest, though the estate was still interested in the note. Huck v. Kraus, 50 Misc. 528, 99 N. Y. S. 490. An executor who takes a note payable to himself in his representative capacity may maintain action thereon in his individual capacity after he has settled with the distributees and devisees. Layne v. Power, 29 Ky. L. R 494, 92 S. W. 945. A transferee who has taken a note in the usual course of trade for value may sue the maker without proof of indorsement. First Nat. Bank v. Sprout [Neb.] 110 N. W 713. Where a draft was described in a complaint thereon as payable to a bank but showed on its face to be payable to "P. Cashier," the bank on showing that "P." was its cashier could sue thereon in its own name. State Bank v. American Hardwood Lumber Co. [Mo. App.] 98 S. W. 786

72. Fay v. Hunt, 190 Mass. 378, 77 N. E. 502. The payee and holder of the legal title to a promissory note may sue thereon even though a third person may be entitled to the proceeds. Therefore evidence tending to show that a bank had an interest therein was properly excluded from the jury Stanley v. Penny [Kan.] 88 P. 875. A holder of a note who has no beneficial interest therein may sue thereon with the assent of the real owner to whom he is accountable for the proceeds. Jump v. Leon [Mass.] 78 N. E. 532.

73. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357. Under Code Civ. Proc. 367, and Civ. Code 3006, a pledgor may maintain action, but the pledgee is a necessary party. Graham v. Light [Cal. App.] 88 P. 373. But not if he has retransferred the note before action brought. Id.

74. Where members of a corporation become sureties on a corporation note in the proportion that their individual stock bore to the whole, the undertaking of each was independent of the other, and in a suit against one, the others are proper but not necessary parties. Bolton v. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210.

75. Digan v. Mandel [Ind.] 79 N. E. 899.

76. One who transfers a note and falsely represents that it has not been paid is properly made a party in an action thereon. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866. The purchaser may sue the maker and one guilty of fraud in transferring it in the same action. Id.

77. See 6 C. L. 793.

78. Santa Rosa Bank v. Paxton [Cal.] 86 P. 193. A complaint alleging that the note was executed on a certain date and fell due on a certain date, a copy of which was attached and read "On September 20, we promise to pay," is good against demurrer though the year of maturity was left out. Helm & Son v. Briley [Okl.] 87 P 595. A complaint against Nancy S. as principal and Joseph S. as surety, not showing that the parties were married, is good when assailed for the first time on appeal on the ground that they are husband and wife, and that it did not appear that a married woman had power to make such contract. Scott v. Collier [Ind.] 78 N. E. 184.

79. Santa Rosa Bank v. Paxton [Cal.] 86 P. 193. Complaint setting out the instruments sued on held sufficient. Didato v. Coniglio, 50 Misc. 280, 100 N. Y. S. 466. Under Code Pub. Loc Laws. art. 3, § 18f, providing for judgment by default in an action on a note where the same is filed by plaintiff, filing a copy is not sufficient. Councilman v. Towson Nat. Bank, 103 Md. 469, 64 A. 358. Under Code Pub. Loc Laws art. 3, providing for a default judgment in an action on note where plaintiff files the note and defendant fails to file a sufficient plea, etc., when the note is filed, and also the declaration contains the common counts, and defendant appears, plaintiff may recover on any evidence admissible under the plead-

be alleged,[80] and if executed by an agent, his authority must appear.[81] It need not be alleged that plaintiff was the owner at the commencement of the action.[82] The consideration need not be alleged,[83] but waiver of presentment, demand and notice must be,[84] though the pleadings may be amended to conform to proof in respect thereto.[85] Statutory requirements must be complied with.[86] A complaint against the drawee of a check must allege that he had funds of the drawee on deposit.[87] If attorney's fees are claimed, facts warranting the recovery thereof should be alleged.[88]

The answer.[89]—The grounds of defense should be plainly stated.[90] The defense that plaintiff is not a bona fide holder must be alleged[91] by pleading facts,[92] but need not be verified.[93] A general denial puts in issue only the allegations of

ings and is not limited to recovery on the note. Id

80. Execution is sufficiently alleged by an allegation that defendants by their note promised to pay plaintiff. Scott v. Bales, 29 Ky. L. R. 776, 96 S. W. 528. A complaint alleging that one made, signed, and delivered a note, states a cause of action and authorizes evidence that he did so through an attorney in fact. Santa Rosa Bank v. Paxton [Cal.] 86 P. 193. An allegation that a note was "by indorsement transferred and assigned" imports delivery. Hibernia Bank & Trust Co. v. Smith [Miss.] 42 So. 345.

81. Complaint on a note executed by an attorney in fact setting out the power held sufficient. Santa Rosa Bank v. Paxton [Cal.] 86 P. 193.

82 That plaintiff was owner and holder of the note at the commencement of the action need not be alleged. Graham v. Light [Cal. App.] 88 P. 373.

83. A complaint on a note given in consideration of goods purchased need not allege the contract of sale and compliance with its conditions. McGue v. Rommel, 148 Cal. 539, 83 P. 1000.

84. Galbraith v. Shepard [Wash.] 86 P. 113.

85. A complaint in an action against the drawer of a check which fails to allege notice of dishonor may be amended to correspond to prove that the drawer stopped payment thereby excusing notice under Negotiable Instrument Law (Laws 1897, pp. 739, 742, c. 612, §§ 160, 185). Scanion v. Wallach, 102 N. Y. S 1090.

86. Under the rule that action must be brought on a note payable at bank in the name of the holder of the legal title, a complaint alleging that the note and the property of plaintiff is insufficient where it does not show that he has legal title to it. Young v Woodliff-Dunlap Furniture Co. [Ala.] 40 So. 656.

87. Hall v. First Nat. Bank, 120 Ill. App. 441.

88. Where in an action upon a note providing for ten per cent. attorney's fees, if the note is placed in the hands of an attorney for collection, the complaint must allege that the plaintiff has paid or contracted to pay such sum or that it is a reasonable sum for attorney's fees. Bolton v. Gifford & Co. [Tex Civ. App.] 100 S. W. 210. Where a note provides for attorney's fees in case it is placed in the hands of an attorney for collection, an allegation that it was so placed is essential to a recovery of such fees. Le Tulle Mercantile Co. v. Rugeley [Tex. Civ. App.] 17 Tex. Ct. Rep. 276, 98 S. W. 438.

89. See 6 C. L. 794.

90. Under Code Civ. Proc. § 500, requiring an answer to state any new matter of defense in ordinary and concise language, and allegation that after maturity and payment, the note was delivered to plaintiff by his indorser for no value, is too vague as to payment. Ludlow v. Woodward, 102 N. Y. S. 647. Pleas setting up want of and failure of consideration, fraud, and set-off, held demurrable. Noble v. Anniston Nat. Bank [Ala.] 41 So. 136. Where owners of stock deposited by a corporation as security for a note paid the note and sued on it, an answer setting up that the payee had demanded additional security and that plaintiff had converted the stock does not state a defense where it does not appear that defendant had been damaged or that the stock had any value. Wills v. James Rowland & Co., 102 N. Y. S. 386. Affidavit of defense in an action on a note that part of the consideration was a claim against a third person which was to be assigned on request, but that it had not been assigned, and that the note was not to become due until it was assigned is insufficient. It should set out the value of the claim, and request for assignment. Bordentown Banking Co. v. Restein, 214 Pa. 331, 63 A. 751. Where it is sought to recover money paid to one on a check to which the name of the payee had been forged, delay in notifying defendant of the forgery is a matter of defense. United States v. National Bank of Republic, 141 F. 208.

91. One sued on a note must in order to avail himself of the defense that plaintiff is not a bona fide holder plead such fact. Koppel v. Hatch, 50 Misc. 626, 98 N. Y S. 619. The bringing of an action by an indorsee does not charge the maker with notice that the plaintiff is a bona fide holder so as to render demurrable an answer denying for lack of information allegations that he is. Alexander & Co. v. Hazelrigg, 29 Ky. L. R. 1212, 97 S. W. 353.

92. Under Code Civ. Proc § 500, requiring an answer to contain a statement of any new matter constituting a defense in ordinary and concise language, allegations that "plaintiff was not a bona fide holder" of the note and was "maintaining the action for the benefit of the original payee." are mere conclusive and insufficient. Ludlow v. Woodward, 102 N. Y. S. 647. An allegation that at the "time of receiving the bonds," the pledgees "had knowledge of facts from which they knew or should have known" that the pledgor was not the rightful owner held insufficient as being mere conclusions. Lawyers' Title Ins. & Trust Co. v. Jones, 113 App. Div. 105, 98 N. Y. S. 871.

93. A maker who claims that an in-

the complaint.[94] If execution is denied, the fact should be clearly alleged.[95] The plea of non est factum must be verified.[96] If a counterclaim or setoff is asserted,[97] facts warranting recovery thereof should be alleged.[98, 99]

Evidence. Presumptions and burden of proof.[1]—In an action on a negotiable instrument, the parol evidence rule applies.[2] The evidence introduced should not be at variance with the pleadings.[3] A note in the hands of the payee is presumptively a subsisting obligation,[4] but such presumption is not conclusive.[5] One who proves himself the owner and holder of notes proves due execution and delivery, and nonpayment establishes a prima facie case.[6] Where one sues on a note payable

dorsee took the paper under such circumstances as charged him with equities in the endorser's behalf need not plead such matter under oath. Mayfield Grocer Co. v. Price & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 650, 95 S. W. 31.

94. Where it is not alleged that plaintiff was owner of the note at the commencement of the action, a general denial only puts in issue the allegation of non-payment. Graham v. Light [Cal. App.] 88 P. 373. Want or failure of consideration may be shown under a general denial. Clark v. Holway, 101 Me. 391, 64 A. 642.

95. An answer denying execution and non-payment for want of information and belief and setting up want of consideration is insufficient to raise the issue of execution and non-payment as an entirety. Greene v. Osceola Gold Mines Co. [Cal. App.] 86 P. 733.

96. In an action by an indorsee of a check against the drawer, an answer alleging that the holder held under an indorsement of an agent of the payer who had no authority to indorse, and that the amount of the check had been paid, is not a plea of non est factum and need not be verified. Hamilton Nat. Bank v. Nye [Ind. App.] 77 N. E. 295.

97 Under a statute authorizing a defendant to set up as many defenses or counter-claims as he may have, he may set up a counterclaim for damages for fraud in which he was induced to execute the note. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. An answer alleging that defendant at the special instance of plaintiff, and for his exclusive use made himself liable for an attorney's fee, for plaintiff, sets up a counterclaim. Ruzeoski v. Wilrodt [Tex. Civ App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142.

98, 99. Where defendant pleads a setoff but did not allege that the plaintiff agreed to allow the amount as a credit, the plaintiff was entitled to recover the face of the note with attorney's fees provided for. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W 142.

1. See 6 C. L. 794.

2. A joint and several note cannot be varied by parol evidence to show that it created a several liability only. City Deposit Bank v. Green, 130 Iowa, 384, 106 N. W. 942. The binding obligation of a note cannot be varied by parol evidence of an agreement that it need not be paid. Payne v. Mutual Life Ins. Co. [C. C. A.] 141 F 339. Where there is no verified plea impeaching the consideration, evidence that the note was given for a greater amount than was owed was inadmissible as proving failure of consideration. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906. While, as a general rule, parol evidence is inadmissible to charge an undisclosed principal of a negotiable note signed by the agent personally, though the word "agent" is added to the signature (Burkhalter v. Perry [Ga.] 56 S. E. 631), it is admissible as between the immediate parties to show that it was intended to bind the principal (Id.). In an action by the payee upon a note signed by an agent personally with the word "agent" after his signature, a complaint alleging that he had authority to bind defendant, his principal, that the consideration was goods sold to defendant and that it was intended to bind defendant, states a cause of action against defendant. Burkhalter v. Perry & Brown [Ga.] 56 S. E 631.

3. Where the only defense to a suit on a promissory note is an unlawful alteration thereof, evidence relating to the sufficiency of consideration is inadmissible. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619. Under a statute authorizing a plea of special matter to be annexed to the general issue an allegation of fraud as special matter does not authorize the court to consider representations not amounting to fraud as warranties. Crosby v. Emerson, 142 F 713. Specific title alleged must be proved as laid. Digan v. Mandel [Ind.] 79 N. E. 899. It is error to receive a note in evidence which varies materially with the note described in the complaint, execution of which is admitted by the answer. Viets v. Silver [N. D.] 106 N W. 35. Where it is alleged that a note was given for a certain consideration and the instrument recites such fact, no other can be proven. Ditto v. Slaughter, 28 Ky. L. R. 1164, 92 S. W. 2. It may be shown under an oral plea of nil debit in a justice court that the defendant did not owe the debt. Dawson v Owen [Ark.] 93 S. W. 567. Or that it had been paid by deeding land to plaintiff. Id.

4. Bush v. Brandecker [Mo. App.] 100 S. W 48. The introduction of a promissory note is prima facie evidence that the payor is indebted to the payee for the amount specified therein. Eldridge v. Kay, 124 Ill. App. 136. The introduction of a promissory note makes a prima facie case. Harter v. Morris, 124 Ill. App. 377.

5. Maker may show payment. Bush v. Brandecker [Mo. App.] 100 S. W. 48.

6. Exchange Bank v. Veirs [Cal. App.] 84 P. 455. Where testimony showed that a lost note named plaintiff as payee, that it was delivered and remained in her possession until it was lost, and there was no evidence that she ever parted with it, it was proper to authorize the jury to find that it was her property at the time it was lost. Jenkins v. Emmons, 117 Mo. App. 1, 94 S. W. 812. It is proper to authorize the jury to find that a lost note bore the rate of interest

to a third person, it is incumbent on him to allege and show his title or right to sue.[7] If want of consideration is alleged, the payee has the burden to prove it.[8] It is presumed that an instrument was delivered before maturity,[9] and that conditions precedent to liability have been performed.[10] There is no presumption that the laws of a sister state are similar to a statute of the state of the forum abolishing grace.[11] Negotiable Instruments Law expressly provides that, where an instrument or any signature thereto has been cancelled, the party alleging that the cancellation was unintentional or made by mistake or without authority has the burden to prove it.[12] On an issue as to how much interest had been paid, convincing evidence is essential to establish that a greater rate than was called for was paid.[13] Where execution is denied, it must be proved before the instrument can be introduced,[14] and, if admitted, constitutes no proof of the fact.[15] Otherwise, if it is not denied,[16] and where a negotiable instrument "clearly shows upon its face" that it has been altered in a material part, it is not admissible to establish the obligation in the absence of explanatory evidence,[17] but, where the matter of alteration is a matter of doubt, it may be admitted in evidence so that the jury may pass up such preliminary question.[18]

which a witness who had read the note testified that it bore. Id. Where, in an action on a note given by husband and wife, the husband testified that his wife signed it and she testified that she did not, it was proper to show the circumstances under which the note was executed. Councilman v. Towson Nat Bank, 103 Md. 469, 64 A. 358. The introduction of the instrument establishes a prima facie case. Holmes v. Horn, 120 Ill. App. 359.

7. Digan v. Mandel [Ind.] 79 N. E. 899. Where a note is executed for services rendered, there can be no recovery for such services without production of the note or accounting for its non-production Dawdy v. Dawdy's Estate, 118 Mo. App. 336, 94 S. W. 767.

8. Where in an action by the payee it is disputed whether or not the instrument is accommodation paper, the payee has the burden of proving consideration. Best v. Rocky Mountain Nat. Bank [Colo.] 85 P. 1124 In an action on a note, where defendant sets up the defense that his signature was without consideration, being merely for the accommodation of plaintiff, the burden is on plaintiff to prove consideration. Lombard v. Bryne [Mass.] 80 N. E. 489.

9. It is presumed that a note signed by the maker was delivered before maturity. Exchange Bank v. Veirs [Cal. App.] 84 P. 455.

10. Under the rule that presentment for payment is not necessary to charge one primarily liable, but if payable at a specified place and the maker is able and willing to pay, such is equivalent to a tender, failure to present for payment at such place is a matter of defense and the plaintiff need not prove presentment before action brought. Florence Oil & Refining Co. v. First Nat. Bank [Colo.] 88 P. 182

11. The presumption is that the common law prevails. Demelman v. Brazier [Mass.] 79 N. E. 812. In an action against an indorser on a note made in another state, the laws of which are provable by parol under the Negotiable Instrument Act, and the plaintiff testified without objection that the note was presentable, and payable on the date of protest, whether presentment on such date was sufficient to bind the indorser was for the jury. Id.

12. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445.

13. Henderson v. Lightner, 29 Ky. L. R. 301, 92 S. W. 945.

14. Where a corporation pleaded non est factum to a suit on a note signed by its vice president, the note was not admissible in evidence without proof of the officer's authority to sign it. Dreeben v. First Nat. Bank [Tex.] 99 S. W. 850. Where execution of a note has been denied by the plea of non est factum, the note is not admissible until some extrinsic evidence of its execution has been submitted. Patton v. Bank of LaFayette, 124 Ga 965, 53 S. E. 664. Where an issue of negotiability and ownership was raised and the plea of non est factum interposed, the instrument is not admissible until execution and title is proven. Peevey v. Tapley [Ala.] 42 So. 561. A note not signed by the signature of the maker and not attested but which merely purports to be signed by his mark does not prove itself as against the plea of non est factum. Clark v. Clark, 28 Ky. L. R. 1069, 91 S. W 284. Where one sued the estate of a decedent on a note claimed to have been destroyed, evidence held insufficient to show that the note was ever executed. Haines v. Goodiander [Kan.] 84 P. 986. It was admissible in such action to show that the alleged payer was financially embarrassed at the time the alleged note was made, and that he could not have made the loan. Id.

15. Dreeben v. First Nat. Bank [Tex.] 99 S. W. 850.

16. The execution and acceptance of drafts is established under the statute of Texas when they are introduced in evidence, in the absence of a denial under oath. Ellis v. Marshall Car Wheel & Foundry Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 719, 95 S. W. 689. Under Code 1896, § 1801, the instrument is admissible unless execution is denied by verified plea. Gates v. Morton Hardware Co [Ala.] 40 So. 509.

17. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619.

18. Colonial Trust Co. v. Getz, 28 Pa. Super. Ct. 619. Jury should be instructed

Instructions should not submit issues not raised,[19] and should not assume controverted facts [20] nor be misleading.[21]

The judgment should conform to the prayer for relief,[22] but all relief demanded may be granted.[23] A judgment against one of several joint makers is not binding against others not made parties.[24] A judgment for interest against one of several joint and several makers is not a bar to an action on the note against all the makers.[25] The rule of Negotiable Instruments Law permitting the joinder of persons severally liable does not change the rule that a verdict erroneous as to one defendant is erroneous at to all.[26]

Indemnifying maker of lost instrument.[27]—Where the instrument sued upon is not produced, the court in rendering judgment thereon should protect the judgment debtor,[28] unless it appears that it was destroyed.[29]

NEUTRALITY; NEW PROMISE, see latest topical index.

NEWSPAPERS.

This topic treats only of the designation and compensation of official newspapers; the necessity and sufficiency of publication of process [30] and other legal notices [31] being excluded, as are advertising contracts [32] and liability for improper publication.[33]

The designation of an official newspaper is largely regulated by statute, and hence must be made by the proper person or board [34] in the prescribed manner,[35]

that if they find that there was such an alteration, the instrument is void as against an indorser unless they further find that the alteration was made prior to the indorsement or with the indorser's consent if made thereafter. Id.

19. The question of the execution of the instrument should not be submitted where there is no plea of non est factum. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906.

20. An instruction that, if the drawer of a check promised to pay if the bank failed to do so on presentation, he was liable where the bank was unable to pay the entire amount, assumes that he waived failure to present within a reasonable time. Burns v. Yocum [Ark.] 98 S. W. 956. Where, on presentation of a check, the payer accepted a deposit slip instead of demanding cash, it was error to assume that the check was not paid because the deposit slip was not placed to the credit of the payee Id.

21. In an action on a note alleged to be due and unpaid, it is not error to charge that if the defendant does not overcome the allegations of the petition, plaintiff would be entitled to recover instead of that plaintiff would be entitled to recover unless defendant proved his plea of payment. Scott v. Brown [Ga.] 56 S. E. 130.

22. In a suit on a note purporting to be secured by a mortgage where it is alleged that plaintiff reserves his mortgage rights but does not pray that they be reserved, a decree that they be reserved is not authorized by a prayer for general relief. Lichtenstein v. Lyons, 115 La. 1051, 40 So. 454. In an action against three persons as makers where a joint answer alleged that the instrument was a forgery, and it was found that the name of one of the three had been forged, a judgment could not be rendered against the other two though it was not specially alleged that the note was void as to each of the defendants. Beem v. Farrell [Iowa] 108 N. W. 1044.

23. Where a note provides for a collection fee in case resort to law is necessary, the full fee provided for may be recovered where action is brought and is not reduced by subsequent payments. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906.

24, 25. Davis v. Schmidt, 126 Wis. 461, 106 N. W. 119.

26. Morehouse & Wells Co. v. Schwaber, 118 Ill. App. 44.

27. See 6 C. L. 795.

28. Where a transferee of a note, who recovers judgment against the transferor, admits that he has parted with the note and guaranteed payment thereof, the court must make the necessary orders to protect the transferor upon paying his judgment. Grubbs v. Fisk [Ky.] 99 S. W. 928.

29. Where it appears affirmatively that an instrument has been destroyed, an indemnity bond is not necessary. Councilman v. Towson Nat. Bank, 103 Md. 469, 64 A. 358.

30. See Process, 6 C. L. 1078

31. See such topics as Statutes, 6 C. L. 1520; Municipal Corporations (publication of ordinances), 8 C. L. 1056; Public Contracts, 6 C. L. 1109.

32. See Contracts, 7 C. L. 761.

33. See Contempt, 7 C. L. 746; Libel and Slander, 8 C. L. 713.

34. Under Wilson's Rev. and Ann. St. 1903, c. 75, § 101, providing that "All delinquent taxes shall, by the county treasurer, be advertised in some newspaper published in the county," the treasurer is authorized to make the selection. Logan Co. Comr's v. State Capital Co., 16 Okl. 625, 86 P. 518. The duty of designating the newspaper for the pub-

and designate a legally qualified paper.[36] Where the body charged with the duty of making the designation fails to act,[37] the official specially interested in the premises is usually authorized to make the selection,[38] or the last designation is continued in force.[39] In New York a supervisor may withdraw his signature to a designation any time before it is filed with the county clerk,[40] or, if it has been filed, he may revoke the same by written notice unless the clerk has acted thereon.[41] Certiorari lies to review the designation of official newspapers contrary to statute.[42] Where the designating board acts in good faith in determining whether a newspaper has the qualifications required of law, a court will not interfere by injunction with the designation.[43]

The compensation of official newspapers for printing public matter is usually prescribed by statute.[44] The fact that the supervisors intended to discriminate

lication of the election day notice, fixing the day and designating the offices to be filled, sent by the secretary of state to the county clerks within the City of New York, rests upon the board of alderman and not upon the board of elections of New York City. Standard Pub. Co. v. New York, 111, App. Div 260, 97 N. Y. S. 740. The city council of Troy and not the supervisors of Rensselaer County are authorized to designate the newspaper for the publication of notice of tax sales and redemptions therefrom of lands within the city, as Laws 1860, p. 390, c. 236, and Laws 1885, p. 801, c. 461, as amended by Laws 1892, p. 1041, c. 512, were repealed by implication by Laws 1898. p. 376, c. 182, § 29, as amended by Laws 1899, c. 581 p. 1268, and Laws 1896, c. 908, p. 796 In re Troy Press Co. [N. Y.] 79 N. E. 1006, afg. Id., 100 N. Y. S. 516. Under the charter of the city of Rensselaer, Laws 1897, pp. 360, 402, 403, c. 359, §§ 62, 202, 204, authorizing the council to designate official newspapers for the publication of tax sale notices, notices of tax sales of land within the city must be published therein (In re Troy Press Co., 100 N. Y. S. 516), but not notices of tax sales of lands without the city (Id).

35. The common council of the city of Troy in determining the two papers of the opposite political faith having the largest circulation must require the oaths of the publishers and the business records of the papers for the three last preceding months in confirmation of the circulation, as Laws 1903, p. 435, c. 182, § 1, subsec. 29, amending Laws 1898, p. 371, c. 182, providing for the government of cities of the second class, is not inconsistent with and does not repeal Laws 1893, p 1310, c. 575, § 3, subsec. 9 (charter of the city of Troy), requiring such confirmation. People v. Common Council of Troy, 144 App. Div. 354, 99 N. Y. S. 1045. The designation of the two newspapers by the board of aldermen of New York City for the publication of the notice of the day of election and the officers to be voted for, shall be by the members representing the two great political parties, each designating one. Standard Pub. Co. v. New York, 111 App. Div. 260, 97 N. Y. S. 740.

36. Where there is no paper having the mechanical work of printing done in the city, but there is one having a general circulation therein which is devoted to local news and which has been designated as the official city newspaper, a notice of election published therein is sufficient though the statute requires it to be published in a paper "printed" and published in the city. Amos Brown's Estate v West Seattle [Wash.] 85 P. 854. An independent, nonpartisan newspaper is not qualified under a statute requiring the designated papers to be of opposite political faith. People v. Common Council of Troy, 114 App. Div. 354, 99 N. Y. S. 1045. Where the petition for certiorari to review the designation specifically alleges that one of the papers is independent, and the return does not reply thereto except by a general allegation upon information and belief that the two papers designated are of opposite faith, the independent character is admitted. Id.

37. Where two designations of a newspaper to publish the Session Laws were filed under County Law, Laws 1892, p. 1749, c. 686, § 19, each containing eight names, but of the names on one, one had been cancelled and another revoked, thus leaving one with a majority, there was no failure to designate. People v. Roberts, 102 N. Y. S. 1110.

38. In Nebraska the county treasurer may designate the newspaper for the publication of the notice of the pendency of a tax foreclosure suit where the commissioners have failed to act. Comp. St. 1905, c. 77, art. 9, § 7. Bee Pub. Co. v. Douglas County [Neb.] 110 N. W. 624. Where the commissioners have failed to act at the time of filing of the petition, the treasurer may make the designation without further delay. Id.

39. The last prior designation stands by operation of law, and the county clerk is not authorized to redesignate the paper. People v. Roberts, 102 N. Y. S. 1110.

40. Designation under County Law, Laws 1892, p. 1749, c. 686, § 19, of a newspaper for the publication of the Session Laws. People v. Roberts, 102 N. Y. S. 1110.

41. People v. Roberts, 102 N. Y. S. 1110.

42. Under Code Civ. Proc. § 2140. People v. Common Council of Troy, 114 App. Div. 354, 99 N. Y. S. 1045.

43. Evidence held to show that the board acted in good faith upon conflicting evidence. Getzschmann v. Douglas County Com'rs [Neb.] 107 N. W. 987.

44. Under Comp. St. 1905, c. 28, § 17, the compensation for publishing a notice of the pendency of a tax foreclosure suit is $1 for each square of ten lines for the first insertion and fifty cents per square for each subsequent insertion, which includes the description. Bee Pub. Co. v. Douglas County [Neb.] 110 N. W. 264. A publication of a

against a publisher in fixing a lower rate for publishing the delinquent tax list than for other public printing [45] does not vitiate the order fixing the rate.[46]

NEW TRIAL AND ARREST OF JUDGMENT.

§ 1. Nature of the Remedy by New Trial and Right to It in General (1153).
§ 2. Grounds (1155).
A. In General (1155).
B. Misconduct of Parties, Counsel, or Witnesses (1156).
C. Rulings and Instructions at the Trial (1156).
D. Misconduct of or Affecting Jury (1157).
E. Irregularities or Defects in Verdict or Findings (1157).
F. Verdict or Findings Contrary to Law or Evidence (1158).
G. Surprise, Accident, or Mistake (1160).
H. Newly-Discovered Evidence (1162).
I. As a Matter of Right in Ejectment (1162).
§ 3. Proceedings to Procure New Trial (1162).
§ 4. Proceedings at New Trial (1166).
§ 5. Arrest of Judgment (1166).
A. Nature and Grounds (1166).
B. Motions and Proceedings Thereon (1167).
C. Effect (1167).

This topic is designed to treat only the grounds for which new trial will be granted or judgment arrested in the trial court. The grant of new trials by reviewing courts,[47] the modification and vacation of judgments without resort to a new trial,[48] the erroneous [49] or prejudicial [50] character of particular rulings, the necessity of objections and exceptions to save rulings for motion for new trial, and the necessity of motion for a new trial to save questions for the reviewing court,[51] are elsewhere treated.

§ 1. *Nature of the remedy by new trial and right to it in general.*[52]—The remedy by new trial is granted for the purpose of re-examining issues of fact.[53] It is not the appropriate remedy to raise objections to pleadings,[54] or to question the correctness of a dismissal,[55] or to correct an erroneous judgment,[56] and should not

commissioner's report in columns and with leaders and two or more justifications is tabular work within the meaning of Rev. St. § 4366, and in the absence of a special contract the publisher is entitled to the price and a half rate therein prescribed. Knorr v. Darke County, 4 Ohio N. P. (N. S.) 35.

45. Evidence in an action to recover for county printing held to show that the action of the supervisor in fixing a lower rate for printing the delinquent tax list than for other public printing was not arbitrary but based upon good grounds. Dodge v. Kings County [Cal.] 88 P. 266.

46. Dodge v. Kings County [Cal.] 88 P. 266.

47. See Appeal and Review, 7 C. L. 128.

48. See Judgments, 6 C. L. 214.

49. See such topics as Argument and Conduct of Counsel, 7 C. L. 257; Evidence, 7 C. L. 1511; Examination of Witnesses, 7 C. L. 1598; Instructions, 6 C. L. 43; Trial, 6 C. L. 1731.

50. See Harmless and Prejudicial Error, 8 C. L. 1.

51. See Saving Questions for Review, 6 C. L. 1385.

52. See 6 C. L. 796.

53. On setting aside a verdict because of insufficiency of evidence to support it, a new trial should be granted and the case should not be dismissed. Drake v. Baker, 96 N. Y. S. 1057. Where the decision of the court as embodied in its findings is contrary to law and not sustained by sufficient evidence, the remedy of the aggrieved party is by application for new trial to the trial court. Migatz v. Stieglitz [Ind.] 77 N. E. 400. When a judgment is reversed on appeal, a cause should not be dismissed but a new trial should be directed where it appears that from evidence not considered a different conclusion might be reached. In re Fromment, 184 N. Y. 568, 77 N. E. 9. Where defendant asserts that the court erred in making a particular finding of fact, he may properly disregard the probative facts found and correct the error through motion for a new trial and statement of the case in which the evidence relevant to the issue is set out. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415.

54. Not available for the purpose of calling in question the pleadings of the plaintiff or amendments thereto. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672. An objection that a memorandum pleaded is insufficient to satisfy the statute of frauds cannot be raised for the first time on motion for new trial. Ewart v. Young, 119 Mo. App. 483, 96 S. W. 420. Refusal of the court to dismiss on the ground that the petition was defective cannot be assigned as ground for new trial. Taylor v. Globe Refining Co. [Ga.] 56 S. E. 292. The overruling of a demurrer to the complaint cannot properly be made ground. Lang v. Yearwood [Ga.] 56 S. E. 305.

55. It is not the appropriate remedy where in a will contest the case is dismissed because the contestant failed to appear and no trial of the issue was had. In re Dean's Estate [Cal.] 87 P. 13.

56. It is not the proper remedy to correct an erroneous judgment. Such error should be corrected by motion to modify it. Migatz v. Stieglitz [Ind.] 77 N. E. 400.

be granted if it will afford no relief.[57] The granting or denial of a new trial rests largely in the discretion of the trial court and his exercise of discretion will not be interfered with [58] unless it has been abused,[59] but the court has no discretion where it is demanded as a matter of right for errors of law prejudicial to the moving party.[60] A rule that no more than two trials shall be granted the same party on the same grounds does not apply to cases wherein material errors of law have intervened.[61] Provision for new trial is in many states made by law,[62] and, when a party is entitled to the remedy as a matter of right, it should be granted without terms or conditions.[63] If by affirmative act a party lulls the court into a lack of

57. Under the rule authorizing a default judgment against a garnishee on his failure to answer the granting of a garnishee's motion for a new trial, after default has been entered, would be ineffective unless the default is set aside as the new trial would result in the assessment of damages the same as before. Travelers' Ins. Co. v. Kent Circ. Judge, 114 Mich. 687, 13 Det. Leg. N. 279, 108 N. W. 363.

58. Order will not be reversed on appeal unless abuse of discretion appears. Jones v. Campbell, 11 Idaho, 752, 84 P. 510. Discretion exercised relative to a motion based on the ground of newly-discovered evidence or insufficiency of the evidence to sustain the verdict will not be disturbed unless abused. Case v. Kramer [Mont.] 85 P. 878. The granting of a new trial on the ground of newly-discovered evidence is addressed to the sound legal discretion of the court and will not be interfered with unless abused. Martin v. Corscadden [Mont.] 86 P. 33. The finding of the trial court that misconduct of defendant had prevented plaintiff from having a fair trial is conclusive on appeal. Piercy v. Piercy [Cal.] 86 P. 507. The decision of the trial court based on conflicting evidence on a motion for new trial is conclusive on appeal. Id. Discretion of trial court in granting a new trial for insufficiency of evidence to sustain the verdict will not be interfered with unless it has been manifestly abused. Crocker v. Garland [Cal. App.] 87 P. 209. Where granted in a case where there is a substantial conflict in the evidence, the order will not be disturbed. Buckle v. McConaghy [Idaho] 88 P. 100. Ruling of the trial court on the motion will not be disturbed in the absence of abuse of discretion. Harden v. Card [Wyo.] 88 P. 217. The action of the trial court when the verdict is based on conflicting evidence is conclusive. Caverly v. Heaton, 124 Ga. 862, 53 S. E. 103; Murphey v. Moreland, 124 Ga. 853, 53 S. E. 103; Mott v. Douglas Hardware Co., 125 Ga. 382, 53 S. E. 959. It is not error of law to refuse a new trial if the verdict is supported by evidence. Newell v. Taylor, 74 S. C. 8, 54 S. E. 212. Whether a case will be reinstated after non-suit upon a motion made during the same term rests in the discretion of the trial court. City of Atlanta v. Miller, 125 Ga. 495, 54 S. E. 538. Setting aside a verdict is largely discretionary. Slocumb v. Philadelphia Const. Co., 142 N. C. 348, 55 S. E. 196. Discretion will not be interfered with unless it is apparent that it has been abused. Jarrett v. High Point Trunk & Bag Co., 142 N. C. 466, 55 S. E. 338. Discretion in overruling a motion on the ground of insufficiency of evidence will not be interfered with unless there is a palpable failure of evidence. Williamson Iron Co. v. McQueen, 144 Ala. 265, 40 So. 306. Discretion exercised on a motion on the ground of newly-discovered evidence is conclusive unless it appears not to have been exercised according to established rules of law. Missouri, etc., R. Co. v. Kahn [Tex. Civ. App.] 14 Tex. Ct. Rep. 608, 91 S. W. 816. The trial judge may, in the exercise of a sound discretion, affirm or set aside a verdict. Especially where the evidence is against the verdict. Morris v. Kansas City, 117 Mo. App. 298, 92 S. W. 908. A motion on the ground of abuse of discretion in proceeding with the trial in the absence of a party and his counsel as addressed to the discretion of the court. Simeral v. Rosewater [Neb.] 110 N. W. 546. Where evidence is conflicting, the action of the trial court on a motion will not be disturbed in the absence of an abuse of discretion. Walsh v. Conrad [Mont.] 88 P. 655. Abuse must be clear and unmistakable. Ettien v. Drum [Mont.] 88 P. 659. Remarks of a judge in his decree denying the motion to the effect that while a judge has power to set aside a verdict he should never do so unless it clearly appears that it is the result of prejudice or abuse does not show an erroneous conception of his power. Ruddell v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 528.

59. A second new trial should not be granted where concurrent verdicts are rendered on the same state of facts, and the verdict is not manifestly wrong. Dethrage v. Rome, 125 Ga. 802, 54 S. E. 654.

60. Case v. Kramer [Mont.] 85 P. 878. Where the appellate court reverses the judgment on a question of law alone, a new trial should be directed and the cause should not be dismissed. Lembeck & Betz Eagle Brewing Co. v. Sexton, 184 N. Y. 185, 77 N. E. 38.

61. Osner v. Zadek, 120 Ill. App. 444.

62. The right under Burns' Ann. St. 1901, § 572, to move for new trial for causes discovered after the term obtains in a cause appealed. Louisville & N. R. Co. v. Vinyard [Ind. App.] 79 N. E. 384.

63. Costs need not be imposed where granted for error in instructions, in excluding or admitting testimony, and because the verdict is perverse. Cooper v. Granger [Wis.] 108 N. W. 193. The payment of costs and disbursements cannot be imposed as a condition to granting a new trial where the court concludes that there has been a mistrial. Terriberry v. Mathot, 110 App. Div. 370, 97 N. Y. S. 20. When a justice of the supreme court has been designated, and actually begun, to sit in the appellate division, before he has settled and signed a decision, but after he has handed down his opinion, and directing judgment and refuses to settle and sign such decision,

vigilance which results in error necessitating a new trial, he may not complain if reasonable terms are imposed as a condition.[64] When the granting order is largely discretionary, costs should be imposed as a condition.[65] A trial court may require a remittitur of damages deemed excessive as a condition to overruling a motion,[66] but it may not fix the amount when no verdict has been returned,[67] nor reduce a verdict to a nominal sum.[68] An application for a rehearing in equity is governed by the principles applicable to motions for a new trial at law.[69]

§ 2. *Grounds. A. In general.*[70]—The grounds upon which a new trial may be had are in many states prescribed by statute.[71] The remedy will not be granted for any cause which the moving party might have avoided by the exercise of ordinary diligence,[72] or to determine a question which might have been raised at the trial,[73] or where it appears that a new trial will not change the result,[74] or for non-

for lack of power, the aggrieved party has an absolute right to a new trial, without terms or conditions. Williamson v. Randolph, 185 N. Y. 603, 78 N. E. 545.

64. Where a party was at fault in not amending his complaint and dismissing as to defendants against whom no cause of action was proved, and judgment was rendered on a verdict against all in an action against a firm alleged to consist of five members but in fact consisting of only two. Donnelly v. Gray Bros. [Cal. App.] 84 P. 451.

65. Hart v. Kaplan, 101 N. Y. S. 763. Where there is nothing tending to show that the verdict is perverse, a new trial on the ground that the verdict is contrary to the evidence should be granted only upon terms. Godfrey v. Godfrey, 127 Wis. 47, 106 N. W. 814.

66. St. Louis S. W. R. Co. v. Price [Tex. Civ. App.] 99 S. W. 120.

67. Though it is discretionary with the court to grant a new trial in actions for personal injuries, because the verdict is contrary to the weight of evidence, it may not condition the validity of the order on the defendant's consenting to the entry of judgment for a certain amount. Shanahan v. Boston, etc., R. Co. [Mass.] 79 N. E. 751. On a motion on the ground of inadequacy of damages the court has no authority to condition the refusal of the motion, on the defendant's election to pay an increased sum fixed by the court. Lorf v. Detroit [Mich.] 13 Det. Leg. N. 502, 108 N. W. 661.

68. Under Code Civ. Proc. § 999, providing that the court may in its discretion award a new trial because the verdict is excessive, it may not reduce the verdict to nominal damages and direct judgment. Howard v. Bank of the Metropolis, 100 N. Y. S. 1003.

69. Feinberg v. Feinberg [N. J. Eq.] 62 A. 562. The rule that the refusal or allowance of a new trial is discretionary does not apply where there is a clear abuse of discretion. May be interfered with on writ of error in case of abuse of discretion. James v. Evans [C. C. A.] 149 F. 136.

70. See 6 C. L. 797.

71. A motion on the ground that certain findings are not sustained and that certain findings are contrary to law is insufficient, not enumerated. Burns' Ann. St. 1901, § 568, subd. 6. Scott v. Collier [Ind. App.] 77 N. E. 666. Under the rule that a new trial may be granted for fraud in obtaining the judgment, mere false swearing or perjury is not sufficient unless accompanied by fraud which justifies a conclusion that in the absence of it the result would have been different. Graves v. Graves [Iowa] 109 N. W. 707. An objection that the judgment is contrary to law is not a proper ground. Migatz v. Stieglitz [Ind.] 77 N. E. 400. Under the rule that it shall not be granted until it is adjudged that there is a valid defense or cause of action, the fact that after an assignee of corporate stock obtained judgment for its conversion he voted it could not have been shown at the first trial and is not ground. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864. A new trial will not be granted in an action for alienation of affections because after the trial the husband did not procure a divorce on the ground of adultery. Lewis v. Roby [Vt.] 65 A. 524. A new trial will be granted in equity only on the ground of newly discovered evidence, surprise, fraud, or where a party was deprived of his means of defense by circumstances beyond his control. Bankers' Union v. Landis [Neb.] 106 N. W. 973.

72. Failure to use ordinary diligence in making a defense precludes asking a new trial. Bankers' Union v. Landis [Neb.] 106 N. W. 973. Will not be granted at the instance of a garnishee because the return and disclosure was $50 too much where such fact resulted from negligence of the garnishee. People's Loan & Trust Co. v. McMurray, 27 R. I. 516, 63 A. 803. Where attorneys know some days in advance that they will be absent from the court on the day cases are set for trial, it is not ground for new trial that his case was set for a day prior to his return. Roberts v. Fitzgerald [Tex. Civ. App.] 16 Tex. Ct. Rep. 114, 93 S. W. 704. Failure of the court to appoint a reporter to take down the evidence is not ground where no request was made that the court appoint a reporter. Burns' Ann. St. 1901, § 1470, requires the official reporter to take the evidence in shorthand only when so directed by the judge. Rudisell v. Jennings [Ind. App.] 77 N. E. 959.

73. Newspaper article denouncing defendant a felon, and guilty of subornation of perjury, published during the trial but not shown to have been read by the jurors nor called to the court's attention until the close of the trial, did not entitle defendant to a new trial. Sheehan v. Hammond, 2 Cal. App. 371, 84 P. 340. Where a motion to exclude certain evidence stated no grounds and the fact it tended to prove was assumed, nonproof of such fact cannot be asserted as ground for new trial. Vicksburg

prejudicial error.[75] Nor will it be granted where a mere trifling sum is involved [76] nor for perjury or false swearing.[77] But a new trial may be granted for an unwarranted dismissal,[78] or where the jury misconceived the issues submitted and their impartiality has been disturbed between their separation and reassembling.[79]

(§ 2) *B. Misconduct of parties, counsel, or witnesses.*[80]—The granting of a new trial for misconduct of counsel or party rests largely in the discretion of the trial court,[81] and improper remarks,[82] conduct,[83] or argument, are ground [84] only when prejudicial to the unsuccessful party,[85] and when steps have been taken to counteract it.[86]

(§ 2) *C. Rulings and instructions at the trial.*[87]—Error in rulings on the admissibility of evidence,[88] or in giving instructions,[89] or other error occurring at

R. & L. Co. v. Cameron [Miss.] 40 So. 822. The court having sustained an objection to evidence on the specific ground that no foundation had been laid for impeachment, the party offering it may not assert on an application for new trial that it was admissible as part of the res gestae. Korby v. Chesser [Minn.] 108 N. W. 520. Where evidence as to loss of profits was introduced by both parties, argued and submitted without objection, the question of the right to recover such profits as damages cannot be raised on the motion. Adams Top-Cutting Mach. Co. v. Wildman Mfg. Co., 145 F. 576.

74. Where an attorney for a defendant was absent and another attorney fraudulently filed an answer for his client, it is not ground for new trial where it does not appear that the result would have been different had such answer not been filed. Roberts v. Fitzgerald [Tex. Civ. App.] 16 Tex. Ct. Rep. 114, 93 S. W. 704.

75. An order of the court entered after the jury had retired that the evidence given by a witness was false, and that he had been suborned by defendant, and committed defendant for subornation of perjury, but such order was not known to the jury until after verdict rendered, does not entitle defendant to a new trial. Sheehan v. Hammond, 2 Cal. App. 371, 84 P. 340.

76. Chany v. Hotchkiss [Conn.] 63 A. 947.

77. Dooley v. Gladiator Consol. Gold Mines & Milling Co. [Iowa] 109 N. W. 864. Newly-discovered evidence held not to show false swearing warranting a new trial. Id.

78. An appellate court will order a new trial where the action is prematurely dismissed on motion of the defendant before he has rested and upon grounds not in issue under the pleadings. Viet's v. Silver [N. D.] 106 N. W. 35.

79. Winslow v. Smith [N. H.] 65 A. 108.

80. See 6 C. L. 798.

81. Before a new trial should be granted for pleading allegations intending to prejudice the jury with no intention of proving them, the abuse should be flagrant and plainly prejudicial. Johnstone v. Seattle, etc., R. Co. [Wash.] 87 P. 1125.

82. Statements made by a party in the presence of the jury not shown to have been made for an improper purpose or to have influenced the verdict are not ground. Third Nat. Bank v. Fults, 115 Mo. App. 42, 90 S. W. 755.

83. Not on the ground of misconduct of counsel unless circumstances show that such misconduct influenced the verdict. Easterly v. Gater [Okl.] 87 P. 853.

84. Misconduct of counsel in argument held not ground. Carey v. Switchmen's Union [Minn.] 107 N. W. 129. Improper remarks of counsel which were withdrawn and the jury instructed not to consider them are not. San Antonio Traction Co. v. Parks [Tex. Civ. App.] 97 S. W. 510.

85. Held ground for new trial: That counsel during argument stated that "he had mighty little respect for experts because they were employed by their clients" and "mighty well paid for it" is ground. Winslow v. Smith [N. H.] 65 A. 108. Under the rule that a new trial may be granted for irregularity in proceedings of the court, jury, or adverse party, whereby a fair trial is prevented, a new trial is properly granted in a suit to set aside a deed as procured by fraud where because of false representation of the defendant a full hearing was not had. Material evidence was not presented. Piercy v. Piercy [Cal.] 86 P. 507. Misconduct of counsel in a close case in suggesting in the presence of the jury that the case was being conducted by an accident insurance company is ground. Beaumont Traction Co. v. Dilworth [Tex. Civ. App.] 16 Tex. Ct. Rep. 257, 94 S. W. 352.

86. Misconduct of counsel in the presence of the court is not ground unless objected to and a motion made to have the court take such action as will counteract it. Hasper v. Wietcamp [Ind.] 79 N. E. 191.

87. See 6 C. L. 798.

88. Error in admitting evidence over objection that it is secondary and no foundation laid is ground. Boynton v. Ashabraner [Ark.] 88 S. W. 1011. May be granted for erroneous exclusion of material testimony. Owen v. McDermott [Ala.] 41 So. 730. Where a claim for damages for tort was submitted on incompetent evidence and a verdict returned for less than the amount claimed, the only remedy is by new trial. Jayne v. Loder [C. C. A.] 149 F. 21. The rule that the admission of incompetent evidence is not ground for a new trial where the fact it tends to prove is established by other competent evidence applies only when the other evidence fairly construed conclusively establishes the fact. Bergenthal Co. v. Security State Bank [Minn.] 108 N. W. 301. Wrongful admission of evidence is. National City Bank v. Pacific Co., 101 N. Y. S. 1098.

89. Failure in instructing to give a party the benefit of a theory of defense sustained by the evidence. Susong v. McKenna, 126 Ga. 433, 55 S. E. 236. Failure of the court upon request to reduce instructions to writing as required by statute is ground. Sawyer v. Roanoke R. & Lumber Co., 142 N.

the trial,[90] is ground for a new trial if prejudice results to the unsuccessful party, but not if the error is harmless.[91]

(§ 2) *D. Misconduct of or affecting jury.*[92]—A new trial may be granted for misconduct of the jury if such misconduct results in prejudice to the defeated party.[93] Misconduct must be such as to raise a presumption of prejudice.[94] Nonprejudicial misconduct[95] or misconduct known of before verdict is rendered is not ground for a new trial,[96] and a party moving on this ground must allege and affirmatively show that both he and his counsel were ignorant of such misconduct until after the trial.[97]

(§ 2) *E. Irregularities or defects in verdict or findings.*[98]—A new trial may be granted where a verdict is reached in an irregular manner,[99] or where it fails to

C. 162, 55 S. E. 84. Error in instructions is ground though no exception was taken when the instructions were given. Nagle v. Laxton, 191 Mass. 402, 77 N. E. 719.

90. Omission of the court to find on all issues and that it erred in refusing to sign special findings tendered by the defeated party is not ground. Walters v. Walters [Ind.] 79 N. E. 1037. Where the court dismissed the action where there was evidence of negligence for the jury, a new trial will be awarded. Graham v. Williams, 101 N. Y. S. 77. Should not be granted solely because of admission of evidence of contradictory statements of a witness for the purpose of impeachment, without notice to the witness of the time, place, and person, where there was opportunity for the witness to explain the contradiction. Newell v. Taylor, 74 S. C. 8, 54 S. E. 212.

91. Improper admission of evidence is not ground where it was not prejudicial. Burch v. Americus Grocery Co., 125 Ga. 163, 53 S. E. 1008. Where a witness had testified that he knew of certain rules, the admission, over objection as not the best evidence, that the rules were printed in the rule book was not prejudicial and not ground. Rappaport v. New York City R. Co., 50 Misc. 658, 99 N. Y. S. 539. Omission to charge a particular rule is not ground where no specific request for such instruction was made. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203. Where the substance of an instruction is proper, the fact that it was not technically a correct statement of the allegations of the pleadings, which error could not have misled the jury, is not ground. Armstrong v. Musser Lumber & Mfg. Co. [Wash.] 86 P. 944. Error in giving an instruction inapplicable where such error is cured by other instructions. Southern R. Co. v. Holbrook, 124 Ga. 679, 53 S. E. 203. Erroneous instructions which do not result in an unjust verdict is not ground. Lomax v. Southwest M. Elec. R. Co., 119 Mo. App. 192, 95 S. W. 945. Mere lack of verbal precision which could not have misled the jury is not ground. Savannah Elec. Co. v. Mullikin, 126 Ga. 722, 55 S. E. 945. Instructions considered as a whole held not prejudicial though portions standing alone were erroneous. Indiana Fruit Co. v. Sandlin, 125 Ga. 222, 54 S. E. 65.

92. See 6 C. L. 799.

93. It is ground for new trial where the foreman of the jury accepted entertainment from the claim agent of a party one night during the trial and after the trial several of the jurors were treated and thanked by the claim agent. McGill Bros. v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 216. It is proper to grant a new trial where the jury disregard an instruction that plaintiff could recover only nominal damagee, though such instruction is erroneous. Fleming v. Louisville & N. R. Co. [Ala.] 41 So. 683.

94. Proof of mere indiscretion in the conduct of a juror is not sufficient. Wessel v. Bishop [Neb.] 107 N. W. 220. An affidavit of a party to the effect that he heard the jurors discussing the case in the jury room and that they referred to a witness as having gone into bankruptcy, etc., without showing that his evidence was rejected, fails to show misconduct. Austin v. Smith [Iowa] 109 N. W. 289. That the jury embraced in their verdict a finding for interest when no instruction on such subject had been given is not such a showing of prejudice as requires the granting of a new trial. Macon, D. & S. R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197. In a suit involving adverse possession it is not ground for new trial that a juror expressed his disapproval of one holding land by limitations. Webb v. Lyerla [Tex. Civ. App.] 16 Tex. Ct. Rep. 199, 94 S. W. 1095. A statute providing that a new trial may be granted if a party during the term of court give any of the jurors who try the case any treat or gratuity is merely an affirmance of the common-law powers of the court and permissive only. Shepard v. Lewiston, etc., R. [Me.] 65 A. 20. Such rule does not apply to acts, innocent in themselves, which occurred months prior to the trial. Id.

95. Not on the ground of misconduct of jurors unless circumstances show that such misconduct probably influenced the verdict. Easterly v. Gates [Okl.] 87 P. 853. The statement of a juror in the jury room of a fact of his personal knowledge but not in dispute and not material to the issues is not misconduct requiring new trial. Douglas v. Smith [Neb.] 106 N. W. 173. The mere fact that the foreman of the jury had a pass on the defendant's railroad is not fatal to the verdict without proof allunde that the plaintiff was prejudiced. Shepard v. Lewiston, etc., R. Co. [Me.] 65 A. 20.

96. It is not error to refuse a new trial for misconduct of the jury known to the attorney of the defeated party prior to submission of the case and not raised until after verdict. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469.

97. Grantz v. Deadwood [S. D.] 107 N. W. 832.

98. See 6 C. L. 800.

99. Quotient verdict. Ward v. Marshalltown, etc., R. Co. [Iowa] 108 N. W. 323. Evi-

fully determine the issues submitted,[1] or shows on its face that it may be unjust,[2] but not for the mere fact that it is for an amount greater than is demanded.[3]

(§ 2) *F. Verdict or findings contrary to law or evidence.*[4]—That the verdict is contrary to the law and to the evidence [5] and is not sustained by the evidence [6] are grounds for a new trial. It is discretionary with the court to grant a new trial on these grounds.[7] If a verdict is based on conflicting evidence,[8] or if there is evidence to sustain it [9] or in support of it,[10] a new trial may be denied, and the mere fact that the court if sitting as a jury would have found differently will not justify him in granting a new trial,[11] but if the verdict is clearly contrary to the weight of the

dence held insufficient to show that a verdict was reached by casting lots as to the amount of the return. Louisiana R. & Nav. Co. v. Kohn, 116 La. 159, 40 So. 602.

1. A new trial must be granted where a verdict is returned against one joint defendant and no verdict for or against the other. McMahon v. Hetch Hetchy, etc., R. Co., 2 Cal. App. 400, 84 P. 350.

2. A new trial will be granted where a complaint states two causes of action and there is no evidence to support one and a general verdict is rendered for the plaintiff. Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170.

3. Where a verdict in conversion is returned for a greater amount than is demanded, the court properly reduced the amount instead of granting a new trial. Mossteller v. Holborn [S. D.] 108 N. W. 13.

4. See 6 C. L. 800.

5. A new trial is properly granted in an action on a street assessment where the court found that the reduction of intention to make the improvement had been duly passed, but the evidence in the statement on the motion showed that the board of supervisors had no authority to order the improvement and that the resolution was not duly passed. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415.

6. Is properly granted where the findings are either in direct conflict with the allegations or testimony and there is evidence opposed to the general finding. Crocker v. Garland [Cal. App.] 87 P. 209.

7. It is discretionary with the court to grant a new trial on the ground that the verdict is not sustained. Godfrey v. Godfrey, 127 Wis. 47, 106 N. W. 814. It is discretionary with the trial court to set aside a verdict on the ground of inadequacy. Ward v. Marshalltown L., P. & R. Co. [Iowa] 108 N. W. 323. Order granting a new trial will not be disturbed. Where the verdict is based on conflicting evidence, unless the evidence is palpably in favor of the verdict. Owen v. McDermott [Ala.] 41 So. 730. The court may not decide on motion for new trial on which side is the greater weight of evidence. Rice v. Lockhart Mills [S. C.] 55 S. E. 160.

8. A verdict based on conflicting evidence will not be disturbed unless the jury were governed by passion or prejudice and disregarded evidence and instructions. Peltomaa v. Katahdin Pulp & Paper Co., 149 F. 282. Where there is direct and positive conflict in the evidence, the court is not required on the motion to consider the number and credibility of the witnesses. Burch v. Southern Pac. Co., 145 F. 443.

9. May be refused where there is evidence sufficient to sustain the verdict. Collier v. Whatley [Ga.] 56 S. E. 128. May be denied where there is evidence to authorize the verdict. Epps v. Miller [Ga.] 56 S. E. 123. Discretion is not abused in refusing a new trial where there is evidence authorizing the verdict. Lovelady v. Roberts [Ga.] 55 S. E. 915. Not unless plainly against the weight of evidence. Black's Adm'r v. Virginia Portland Cement Co. [Va.] 55 S. E. 587. Upon a motion on the ground that the decision was not justified, and for errors of law occurring at the trial, it is error to grant the motion when neither the order nor memorandum of the court indicates that it is granted on such grounds and the evidence reasonably tends to sustain the verdict. Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311; Hasseltine v. Southern R. Co. [S. C.] 55 S. E. 142. Where evidence is susceptible of two inferences, it is not ground for new trial that the jury disregarded an instruction relative to one of such inferences. Will not be granted where the point urged is the finding of the jury as to whether a certain act is negligence. Klutt v. Philadelphia & R. R. Co., 145 F. 965.

10. Where there is some evidence to authorize a verdict a new trial may be refused. Conflicting evidence. Southern R. Co. v. Puryear [Ga.] 56 S. E. 73. Verdict held supported and new trial properly refused. Macon, etc., R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197. Evidence held not to preponderate so heavily against the verdict as to warrant a new trial. Reich v. Cochran, 114 App. Div. 141, 99 N. Y. S. 755. Not where the verdict is supported by evidence of a substantial nature. Libby v. Barry [N. D.] 107 N. W. 972.

11. Not where evidence is conflicting though the court would have found differently. Wertheim Coal & Coke Co. v. Harding, 145 F. 660. Not where the evidence is conflicting on material points though the court would have reached a different conclusion on the same testimony. Salzinger v. Interurban St. R. Co., 101 N. Y. S. 804. Verdict based on uncorroborated but clear and explicit testimony of plaintiff will not be set aside. Vogel v. Werner, 101 N. Y. S. 21. It is not sufficient that the verdict is merely against the preponderance of the evidence or that the court sitting as a jury might have reached a different conclusion. Lewis v. Roby [Vt.] 65 A. 524. If a verdict is not so manifestly erroneous that justice requires it to be set aside, a new trial will not be granted though the court, if sitting as a jury, might have drawn a different inference or reached a different conclusion. Garland v. Hewes, 101 Me. 549, 64 A. 914.

evidence,[12] or is actuated by passion or prejudice,[13] or the court is satisfied that justice has not been done,[14] it is his duty to grant a new trial, though the evidence upon which the verdict is based was conflicting.[15] An excessive [16] or inadequate verdict is ground for a new trial [17] unless the court is satisfied that justice has been done.[18]

(§ 2) *G. Surprise, accident, or mistake.*[19]—Surprise, accident,[20] or excusable neglect [21] may be ground for a new trial, but to bring a case within this rule it must

12. Where in an action for tort the clear weight of the evidence is against the verdict upon any theory of the case, a new trial should be granted. Griffin v. Jersey City, etc., R. Co. [N. J. Law] 63 A. 863. A new trial is the proper remedy where facts found by the court in a special finding are not sustained or are contrary to the evidence. Walters v. Walters [Ind.] 79 N. E. 1037. A verdict palpably against the weight of evidence is ground for new trial. Louisville & N. R. Co. v. Daniel, 28 Ky. L. R. 1146, 91 S. W. 691. In an action on a contract where the evidence authorized a finding that such contract had never been made where the verdict was for plaintiff, a new trial should be granted on the ground that the verdict was contrary to the evidence. Taylor v. Globe Refinery Co. [Ga.] 56 S. E. 292. The appellate division has authority to order a new trial on the ground that the verdict is contrary to the evidence, where the trial court fails to do so. Fish v. Utica Steam, etc., Cotton Mills, 109 App. Div. 326, 95 N. Y. S. 673. A new trial is properly granted where the trial judge determines that the findings of the jury are conflicting, that the verdict is against the weight of evidence, and the damages allowed are inadequate. Jarrett v. High Point Trunk & Bag Co., 142 N. C. 466, 55 S. E. 338. It is the duty of the trial court to grant a new trial where the verdict is manifestly against the weight of evidence. Rankin v. Cardillo [Colo.] 88 P. 170. Discretion not abused in awarding a new trial because the verdict was contrary to the evidence in an action for broker's commission. Pinney v. Wilson [Cal. App.] 87 P. 1111. Will be granted where the verdict is contrary to the evidence. Rossenbach v. Supreme Court, I. O. F., 101 N. Y. S. 890. Not abused in granting the motion on the ground that the verdict was contrary to the evidence. Nelson v. Mississippi & Rum River Boom Co. [Minn.] 109 N. W. 1118.

13. Rev. Civ. Code Proc. § 301 expressly provides that a new trial should be granted if the verdict is so excessive as to indicate passion or prejudice. Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Where in an action against principal and agent for a joint tort a verdict is returned against the principal alone on evidence much stronger against the agent, prejudice warranting a new trial is not shown. Ruddell v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 528.

14. Where a verdict is the result of a comparison of signatures, which was the only evidence introduced, and the court is of the opinion that the verdict is contrary to the weight of evidence, a new trial should be granted. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244. May be granted where the verdict is not justified by the evidence. Dart v. Russell [Minn.] 109 N. W. 702.

15. A new trial should be granted where the verdict is contrary to the weight of conflicting evidence. County of Montmorency v. Putnam, 144 Mich. 135, 13 Det. Leg. N. 229, 107 N. W. 895. If a trial judge concludes that the verdict is contrary to evidence which is conflicting, he should grant a new trial. Jones v. Campbell, 11 Idaho, 752, 84 P. 510. The rule that a verdict based on conflicting evidence will not be disturbed on appeal does not apply on application for a new trial. Id.

16. Must be granted where verdict is excessive. Von Au v. Magenheimer, 100 N. Y. S. 659. Discretion not abused in granting the motion on the ground of excessive damages. Nelson v. Mississippi & R. R. Boom Co. [Minn.] 109 N. W. 1118. Where a verdict is excessive and there is no definite basis for remitting part of it, a new trial must be granted. Hanson v. Henderson [S. D.] 107 N. W. 670. Excessive verdict in a case involving unliquidated damages. Id. Not on the ground of excessive damages unless so excessive as to indicate prejudice, partiality, or corruption. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

17. Inadequate damages is ground. Ford v. Minneapolis St. R. Co. [Minn.] 107 N. W. 817. It is not prejudicial to base the refusal of a new trial on the defendant's payment of a certain amount of damages. Id. Verdict held inadequate. Buttner v. New York, 110 App. Div. 549, 97 N. Y. S. 303.

18. Inadequacy of verdict is not ground where the court is of the opinion that the verdict should have been for defendant. Blazosseck v. Remington & Sherman Co., 141 F. 1022. Where it did not appear that the verdict was a quotient one, but it was less than the evidence appeared to authorize, it was error to grant a new trial to the defeated party. Martin v. McLeod [Ala.] 42 So. 622. Not unless so excessive as to indicate passion or prejudice. Burch v. Southern Pac. Co., 145 F. 443.

19. See 6 C. L. 802.

20. Evidence held to show surprise warranting new trial. Coolidge v. Taylor [Vt.] 65 A. 582. Where one was surprised at the testimony of witnesses who claimed to have seen an accident, and on a motion for a new trial it was shown by several witnesses that the witnesses were not present at the scene of the accident, the new evidence was more than impeaching, and warranted a new trial. Louisville Belt & Iron Co. v. Hart, 29 Ky. L. R. 310, 92 S. W. 951. Where a complaint on a note showed on its face that the cause of action was barred by limitations in the absence of partial payments tolling the statute, and the court refused to require the complaint to be made more definite and certain as to payments, and at the trial defendant could not disprove certain alleged payments but could thereafter, a new trial should be granted. O'Neil v. Lindsey, 41 Wash. 649, 84 P. 603.

21. Discretion not abused in granting a new trial where the applicant was pre-

appear that the moving party used due diligence to prepare and present his case and was prevented from doing so by circumstances over which he had no control.[22] A party who fails to ask for a continuance is not entitled to a new trial.[23] Surprise is not ground unless a different result is probable.[24]

(§ 2) *H. Newly-discovered evidence.*[25]—Newly discovered evidence which is material and important [26] and is likely to change the result [27] is ground for a new trial. It must have been discovered since the trial [28] and be of such nature that it could not have been produced at first trial by the exercise of ordinary diligence,[29]

vented from being present at the first trial by the fact that he lived a long distance from the place of trial, that his attorney had promised to keep him informed but did not. Trainor v. Maturen [Minn.] 110 N. W. 370.

22. Discretion not abused in denying a new trial on the ground of plaintiff's surprise at the testimony of a witness called by the defendant. Village of Pillager v. Hewitt [Minn.] 107 N. W. 815. Surprise at certain testimony held not ground. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987. Where in an action for wrongful death plaintiff was granted leave to substitute the name of decedent's mother for that of his widow, and after postponement for some days defendant made no showing except his own statement that he had not time to meet the new issue, he was entitled to a new trial on the ground of surprise. St. Louis, etc., R. Co. v. Block [Ark.] 95 S. W. 155. Where a party has full notice of all issues tendered by the pleadings, he may not assert surprise at evidence introduced in support of them, and assert right to a new trial on such ground. Harden v. Card [Wyo.] 88 P. 217.

23. A party who is surprised at the exclusion of testimony offered by him should apply for a continuance and if he fails to do so is not entitled to a new trial on the ground of surprise. Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864. Where a party is surprised by evidence introduced and does not ask for a continuance or take a nonsuit, he cannot as a general rule have a new trial on such ground. Todd v. Banning, 118 Ill. App. 676.

24. In an action for enticing one's minor son from home the complaint alleged that after leaving home the son stayed at the home of a certain person, but the evidence showed that he stayed at another place, held such fact did not warrant a new trial on the ground of surprise. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907.

25. See 6 C. L. 803.

26. Newly-discovered evidence held material and it was error to refuse a new trial. Douglas v. Walker [Tex. Civ. App.] 15 Tex. Ct. Rep. 115, 92 S. W. 1026. In an action against a physician for malpractice in removing sutures from wounds newly-discovered evidence that defendant never removed any sutures held material. Binns v. Emery [Wash.] 88 P. 133. That new and material facts have been discovered since the trial which could not by reasonable diligence have been produced at the trial. Grigsby v. Wolven [S. D.] 108 N. W. 250. In an action for burning of a building by sparks from a locomotive, newly-discovered evidence that it was burning when the train was approaching half a mile distant is material. Louisville & N. R. Co. v. Vinyard [Ind. App.] 79 N. E. 384.

27. New evidence directly in conflict with the testimony of the successful party and so material and conclusive that it will probably lead to a different result is ground. Village of Lerna v. Wood, 122 Ill. App. 542. Newly-discovered evidence which creates a strong probability of a different result on another trial authorizes a new trial. Evidence of payment of a note sued upon held to warrant a new trial. Foss v. Smith [Vt.] 65 A. 553. Where in an action on a note defendant claimed that he had paid it, a receipt signed by him showing nonpayment held not cumulative evidence. Id. Evidence cannot be regarded as merely cumulative because it tends to prove the same point controverted. Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10.

28. On an issue as to whether an absolute deed was a mortgage, where the grantor testified that a certain person was present during the negotiations, the party desiring his testimony should take steps to procure his attendance and cannot assert that it is newly-discovered. Johnson v. Scrimshire [Tex. Civ. App.] 15 Tex. Ct. Rep. 949, 93 S. W. 712.

29. Not where it does not appear that due diligence was unavailing prior to the trial. Smith v. Birmingham R., L. & P. Co. [Ala.] 41 So. 307; San Antonio Traction Co. v. Parks [Tex. Civ. App.] 97 S. W. 510. A motion for leave to make motion for new trial on the ground of newly-discovered evidence will be denied unless it appears that the new evidence would change the result and that movent has used due diligence. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658. It is the duty of a party to meet an issue tendered, and, where he fails to produce a witness whom he knows has knowledge relative to such issue, a new trial may be denied him. Harden v. Card [Wyo.] 88 P. 217. Evidence consisting merely of an additional certified copy of a document, a certified copy of which was introduced, is not ground for new trial where it is not shown that due diligence was not used in obtaining it at the first trial. In re McClellan's Estate [S. D.] 107 N. W. 681.

Diligence was not used in producing a witness at the trial where such witness lived only sixteen miles distant. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417. Sufficient diligence in producing the witness who would testify to a material fact is not shown where he lived in the immediate vicinity, though it is stated that inquiry was made of several persons living in the vicinity as to the fact. Louisville & N. R. Co. v. Vinyard [Ind. App.] 79 N. E. 384. Where a party fails to elicit testimony from a witness who is on the

and it must appear that due diligence was exercised.[30] It must also appear that the new evidence will be produced at the new trial.[31] The granting of a new trial on this ground is discretionary with the trial court,[32] and it will not be granted for evidence which is immaterial,[33] merely cumulative [34] or corroborative,[35] contradictory or impeaching,[36] or inadmissible,[37] and which would probably not produce a

stand, he is guilty of lack of diligence precluding him from seeking a new trial on the ground of newly-discovered evidence. McDonald v. People, 222 Ill. 325, 78 N. E. 609. Where it appeared that the attorney for the applicant had knowledge of the evidence before the first trial, lack of diligence is apparent. Grigsby v. Wolven [S. D.] 108 N. W. 250. Where a defect in a tax deed is pointed out by objection at the trail and the party offering it neglected to offer other evidence of his alleged right as a tax sale purchaser, he may not have a new trial to supply such proof. State Finance Co. v. Beck [N. D.] 109 N. W. 357. Where in an action to annul a marriage on the ground that it had been induced by false representations, and the jury found that they were false, defendant was not entitled to a new trial on the ground of newly-discovered evidence that they were not relied upon. Di Lorenzo v. Di Lorenzo, 111 App. Div. 920, 97 N. Y. S. 644. Where the defense to an action for the price of steel bars was that they were not of the size ordered, and no surprise was expressed at such defense, newly-discovered evidence that they were of the size ordered held not ground because of lack of diligence. Iroment v. Mugler, 99 N. Y. S. 877. Not for the testimony of a witness whom applicant knew had knowledge of the transaction and who might have been called at the first trial. Bosler v. Coble, 14 Wyo. 423, 84 P. 895. The motion is properly denied in an action for malicious prosecution where the new evidence consisted of testimony of plaintiff's bad reputation in a populous community, and the affidavit stated that before the trial the movent had made inquiries of eight persons and that they were reluctant to testify, but that after the trial he was able to procure several witnesses. Martin v. Corscadden [Mont.] 86 P. 33. Not where it appears that the party knew of a witness who would give the testimony a month prior to the trial but made no effort to produce him, and no application for continuance was made. O'Neill v. State Sav. Bank [Mont.] 87 P. 970. Not where the alleged evidence is to be given by witnesses who live in the community and who were known of at the time of the trial and no reason is shown why they were not produced. Crigler v. Newman, 29 Ky. L. R. 27, 91 S. W. 706. Where newly-discovered evidence consists of testimony of people who live in the neighborhood and who might have been produced at the trial by the exercise of ordinary diligence, a new trial will be denied. Gay v. Steele's Adm'rs, 29 Ky. L. R. 248, 92 S. W. 590.

Due diligence used: Discretion not abused in granting a new trial on the ground of newly-discovered evidence because diligence had not been shown where though the party had talked to the witnesses it did not appear that they had disclosed the facts constituting the new evidence. Woerdehoff v. Muekel [Iowa] 108 N. W. 533. Applicant held not negligent in failing to produce evidence at the trial. Douglas v. Walker [Tex. Civ. App.] 15 Tex. Ct. Rep. 115, 92 S. W. 1026. Where newly-discovered evidence consisted of a written instrument diligent search for which had been made prior to the trial, and it was found among the public records after the trial, diligence was shown. Foss v. Smith [Vt.] 65 A. 553. In an action against a physician for malpractice, affidavits held to show no lack of diligence in discovering new evidence. Binns v. Emery [Wash.] 88 P. 133.

30. An application for a new trial on the ground of newly-discovered evidence must show that the applicant has been vigilant in the preparation of his case for trial. Grigsby v. Wolven [S. D.] 108 N. W. 250. There must be a clear showing that by the exercise of reasonable diligence it could not have been produced at the former trial. Cudahy Packing Co. v. Hays [Kan.] 85 P. 811.

31. Not where it does not appear that the movant knows where the witness who is to give the newly discovered evidence may be found or will likely appear. O'Neill v. State Sav. Bank [Mont.] 87 P. 970.

32. A motion on the ground of newly-discovered evidence is addressed to the discretion of the court upon a full consideration of all the evidence introduced and the legitimate effect which the new evidence taken in connection therewith ought, upon legal principles, to have toward producing a different result. Bunker v. United Order of Forestera, 97 Minn. 361, 107 N. W. 392.

33. San Antonio Traction Co. v. Parks [Tex. Civ. App.] 97 S. W. 510; Kidder v. Maynard [Neb.] 106 N. W. 172. Newly-discovered evidence of fraud relative to a counterclaim set up in an action on a note held not material. Bosler v. Coble, 14 Wyo. 423, 84 P. 895. Where the defense to an action for the price of steel bars was that they were not of the size ordered, newly-discovered evidence that they were sold commercially as the size ordered was immaterial. Froment v. Mugler, 99 N. Y. S. 877.

34. Pratt v. Davis, 118 Ill. App. 161; Cain v. Corley [Tex. Civ. App.] 99 S. W. 168; Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987; San Antonio Traction Co. v. Parks [Tex. Civ. App.] 97 S. W. 510; Smith v. Birmingham R., L. & P. Co. [Ala.] 41 So. 307; City of Emporia v. White [Kan.] 86 P. 295; In re McClellan's Estate [S. D.] 107 N. W. 681; Hanousek v. Marshalltown, 130 Iowa, 550, 107 N. W. 603. Cumulative evidence is not ground, especially where it appears that there was lack of diligence in producing it at the trial. Hall v. Roberts, 29 Ky. L. R. 851, 96 S. W. 555.

35. Corroborative not. Cain v. Corley [Tex. Civ. App.] 99 S. W. 168.

36. Phoenix Ins. Co. v. Wintersmith [Ky.] 98 S. W. 987; Miller v. Thigpen, 125 Ga. 113, 54 S. E. 194; Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417; Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864; Lang v. Yearwood

different result;[38] but this rule is not to be applied if substantial justice will be thereby defeated.[39]

(§ 2) *I. As a matter of right in ejectment.*[40]—In many states it is provided by law that a new trial may be had as a matter of right where title or right to possession of real property is involved.[41] Such statutes do not apply to an action for partition between tenants in common,[42] nor to statutory proceedings to settle boundary disputes,[43] nor where two causes of action are joined in one of which a new trial is allowable as a matter of right and the other not.[44] Where a new trial as a matter of right is granted, it is the duty of the court to vacate the judgment of record.[45]

§ 3. *Proceedings to procure new trial.*[46]—The proceeding to obtain a new trial is analogous to a proceeding on writ of error and is in effect a new action brought to reverse the judgment, and if the proceeding abates the judgment, it remains in full force.[47] The proceeding is a subject of statutory regulation.[48] If a motion is necessary it must be made.[49] A motion for new trial will not be read

[Ga.] 56 S. E. 305; Seattle Lumber Co. v. Sweeney [Wash.] 85 P. 677; Northrup v. Hayward [Minn.] 109 N. W. 241; Libby v. Barry [N. D.] 107 N. W. 972. Not for impeaching evidence where ordinary diligence was not exercised to produce it at the trial. McBurnie v. Stelsly, 29 Ky. L. R. 1191, 97 S. W. 42. Will not be granted where the new evidence consists of testimony of defendant contradicting his deposition given at the original trial. Tillar v. Liebke [Ark.] 95 S. W. 769. Will not be granted to enable the applicant to impeach the credit of witnesses. Feinberg v. Feinberg [N. J. Eq.] 62 A. 562.

37. Newly-discovered evidence in a will contest that after a witness had testified she was offered $1,000 if she would reverse her testimony is not ground where it does not appear that the offer came from the adverse party. Mueller v. Pew, 127 Wis. 288, 106 N. W. 840.

38. Pierson v. Peirce, 42 Wash. 164, 84 P. 731. Newly-discovered evidence must be such that had it been heard at the first trial it would probably have changed the result. Feinberg v. Feinberg [N. J. Eq.] 62 A. 562. Newly-discovered evidence held insufficient in an action for alienation of affections. Lewis v. Roby [Vt.] 65 A. 524. Newly-discovered evidence relative to an issue which was not raised but should have been raised at the trial is not ground. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417. Must be of a decisive and controlling character. Crigler v. Newman, 29 Ky. L. R. 27, 91 S. W. 706. In a proceeding under Ball. Ann. Codes and St. §§ 5667, 5669, to establish a lost boundary, on a motion on the ground of newly-discovered evidence that a government corner could be established other than where located by the commissioners, such evidence must be clear and convincing. Strunz v. Hood [Wash.] 87 P. 45. It is not enough that the new evidence be material. The court must consider its importance and determine whether in connection with evidence already introduced it is liable to affect the verdict on another trial. Bunker v. United Order of Foresters, 97 Minn. 361, 107 N. W. 392. Newly-discovered evidence in a will contest that after testator's death a witness saw proponent tear up a paper and heard her say to her daughter: "This is the last one. Now let them look if they want to," is not ground, there being nothing to show that such paper was a later will. Mueller v. Pew, 127 Wis. 288, 106 N. W. 840. Not for evidence on a point established in favor of movent. Kidder v. Maynard [Neb.] 106 N. W. 172. Not where newly-discovered evidence is of doubtful value and could have been obtained at the trial by due diligence. United States v. Twenty Thousand Five-hundred and Fifty Pounds of Unwashed Wool, 149 F. 795.

39. Cumulative evidence is ground if it is probable that it would have changed the result. St. Paul Harvester Co. v. Faulhaber [Neb.] 109 N. W. 762.

40. See 6 C. L. 805.

41. Under Burns' Ann. St. 1901, § 1076, the fact that title to real estate is in controversy does not authorize a new trial as of right unless it comes in dispute in an action for possession or to quiet title. Bonham v. Doyle [Ind. App.] 77 N. E. 858.

42. Bonham v. Doyle [Ind. App.] 77 N. E. 858.

43. Ball. Ann. Codes & St. § 5518, providing for a new trial as of right in actions for the recovery of real estate, does not apply to the statutory proceeding to settle a boundary dispute. Strunz v. Hood [Wash.] 87 P. 45. Rev. Laws 1905, § 4430, providing for a new trial as of right in actions for the recovery of land, does not apply to the statutory action to settle a boundary dispute. Tierney v. Gondereau [Minn.] 109 N. W. 821.

44. Bonham v. Doyle [Ind. App.] 77 N. E. 858.

45. Richardson v. Stephenson [Ind. App.] 78 N. E. 256.

46. See 6 C. L. 805.

47. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178.

48. The change made by Laws 1905, p. 657, c. 174, in the procedure to obtain review of a judgment, does not change the rule relative to a motion for new trial. Carmack v. Erdenberger [Neb.] 110 N. W. 315.

The legislature has power to prescribe that orders granting a new trial shall specify of record the grounds upon which it is granted. Stoner v. Royar [Mo.] 98 S. W. 601.

49. The filing of a written motion coupled with the fact that the court noticed and took it under advisement is a sufficient presentation of the motion to preserve the points urged for review. Cleveland, etc., R. Co. v.

from an order denying a motion never made.[50] A written motion specifying the points relied on need not be filed unless required by the court or action of the opposing party.[51] Grounds of the motion must be well assigned as a whole [52] and must be definite and specific,[53] and, if based on statutory grounds, a ground within the statute must be asserted.[54] The grounds should be stated in such terms as will clearly indicate the error relied on.[55] Grounds not specified in a motion, specifying grounds are waived,[56] but where a written motion is not required, no points are waived by failure to file it.[57] The motion need not ask that the verdict be set aside.[58] Where the motion is made on a statement and bill of exceptions, it is immaterial that the paper is misnamed,[59] and that the statement does not conform to rules of court is not fatal where such rules are not invoked.[60] The statement must conform to statutory requirements,[61] and be filed within the prescribed period.[62] The motion

Sparks, 122 Ill. App. 400. One who procures the overruling of his own motion for new trial may not predicate error thereon. Brecher v. Chicago Junction R. Co., 119 Ill. App. 554.

50. Where a party's present attorneys, supposing a motion for new trial had been made, caused entry of an order denying such motion, such entry could not be considered as the making of a motion. Koeppel v. Koeppel, 49 Misc. 218, 97 N. Y. S. 401.

51. Merritt v. Le Clair, 118 Ill. App. 328.

52. A ground assigned "in admitting in evidence exhibits one to nine inclusive, over the objection of defendants" is joint and must be good as to all, or it fails. Hendricks County Com'rs v. Eaton [Ind. App.] 77 N. E. 958. A ground assigning error in giving several instructions is joint, and bad if all are not erroneous. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448. Where two defendants made separate answers and different defenses and a verdict was found in favor of one and against the other, a joint motion filed by plaintiff was properly overruled where the verdict was good as to one defendant. Fredrickson v. Schmittroth [Neb.] 110 N. W. 653.

53. Errors of law in the record, remarks of the court in the presence of the jury and error in giving and refusing instructions, is too general. William Cameron & Co. v. Peck [Ind. T.] 97 S. W. 1015. Assignments that the verdict is contrary to the preponderance of the evidence contrary to the charge are too general; should point out wherein it is so defective. Texas & P. R. Co. v. Norman [Tex. Civ. App.] 91 S. W. 594.

54. A motion questioning the sufficiency of the evidence to support the decision is sufficient though it uses the word "findings" instead of "decision" as provided by Burns' Ann. St. 1901, § 568. Ellison v. Ganiard [Ind.] 79 N. E. 450. That certain enumerated findings are not sustained by sufficient evidence is not a proper assignment. Scott v. Collier [Ind.] 78 N. E. 184. A ground of motion that the verdict is contrary to a specified instruction is equivalent to a complaint that it is contrary to law. Seaboard Air Line R. Co. v. Bradley, 125 Ga. 193, 54 S. E. 69.

55. Even if the ruling of the court rejecting an amendment to the pleadings may be reviewed on motion for new trial, a copy of the rejected amendment must appear in the motion. Cornwell v. Leverette [Ga.] 56 S. E. 300. A ground asserted that the judgment is contrary to the verdict and not supported by the same does not bring before the court the fact that in copying the judgment an answer of the jury to a question was copied "No" when it was answered "Yes." Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116. Under Code Civ. Proc. §§ 1152, 1173, amended by Sess. Laws 1905, p. 185, notice of motion for new trial designating as grounds insufficiency of evidence to support the verdict need not state wherein it is insufficient. Ettien v. Drum [Mont.] 88 P. 659. A ground of motion based on admission of evidence should state what objection was made at the time it was offered and show that the objection was then urged. McFarland v. Darien & W. R. Co. [Ga.] 56 S. E. 74. The rule that error in refusing a change of venue must be stated as ground for new trial does not apply where a motion for new trial for cause has been ruled upon before motion for change of venue which is made pending motion for new trial as of right. Bonham v. Doyle [Ind. App.] 79 N. E. 458. Where application is made for a rule to show cause why a new trial should not be granted by a party holding bills of exception, the mere granting of the rule operates as a waiver of all exceptions, except such as are expressly reserved in the rule to show cause Haden v. Bamford Bros. Silk Mfg. Co. [N. J. Law] 63 A. 7.

56. Landt v. McCullough, 121 Ill. App. 328

57. All points which might be specified can be relied upon. Merritt v. Le Clair, 118 Ill. App. 328.

58. Vanhoosier v. Dunlap, 117 Mo. App. 529, 93 S. W. 350.

59. Statement denominated by movent as "statement of case and bill of exceptions." Friel v. Kimberly-Montana Gold Min. Co. [Mont.] 85 P. 734.

60. A statement is not objectionable because the lines are not numbered as required by rule of court, where such rule was not invoked by court or counsel. Friel v. Kimberly-Montana Gold Min. Co. [Mont.] 85 P. 734. Where a rule of court requires that statement on motion shall be reduced to narative form, unless otherwise ordered, overruling of objections to a statement not in such form is equivalent to an order. Id.

61. The only difference between a bill of exceptions and statement of case under Code Civ. Proc. § 659, requiring one moving for new trial to serve notice of his intention designating the ground, and whether it will be made on affidavits, bill of exception, or statement, is that in a statement, in addition to setting forth in the body of

must be filed within the time prescribed,[63] usually within a certain number of days,[64] or during the term at which the judgment was rendered,[65] unless delay in filing is excused,[66] in which case it must be made in the manner prescribed.[67] A motion filed out of time is of no avail.[68] Where notice of intention to file a motion is required, the statutes must be complied with.[69] It must be filed before a court entitled to hear it,[70] and must be prosecuted with due diligence.[71] An application to dismiss

the document the exceptions taken, the particular ones relied upon must be specified. If insufficiency of evidence is relied upon, the particulars in which it is insufficient must be specified in either document. Pease v. Fink [Cal. App.] 85 P. 657.

62. In granting or refusing extensions of time within which to settle statements of the case under Rev. Codes 1899, § 5477, the trial court is vested with wide discretionary powers. Peterson v. Hansen [N. D.] 107 N. W. 528.

63. Under a rule that a new trial may be granted by an appellate court for newly-discovered evidence, within one year, the fact that a party prosecuted a motion in the superior court on other grounds does not preclude relief being granted by the appellate court. Hughes v. Rhode Island Co., 27 R. I. 591, 65 A. 275. Under the rule that a new trial may be granted within one year where the judgment was obtained by fraud, where the fraud is not discovered within one year, equity has jurisdiction to grant a new trial thereafter. Graves v. Graves [Iowa] 109 N. W. 707.

64. Where a decree was not entered until November but recited that it was rendered prior to such date, the entry does not give it effect as of such prior date, and a motion filed within three days after the entry is in time. Eldridge & Higgins Co. v. Barrere, 74 Ohio St. 389, 78 N. E. 516. A holiday counts as one of the three days allowed for filing a motion for a new trial, unless the holiday is the last of the three days. Oberer v. State of Ohio, 8 Ohio C. C. (N. S.) 93. Where a case is tried to the court, and findings of fact and conclusions of law are filed, which include a determination of the general issue, a party aggrieved by rulings during the trial must file motion for new trial within three days from the time such findings and conclusions are made, irrespective of the time judgment is rendered. Brubaker v. Brubaker [Kan.] 86 P. 455. Motion must be made during the term at which verdict was rendered and within five days after it is rendered. Henry v. Lincoln Lucky & Lee Min. Co. [N. M.] 85 P. 1043.

65. The Nebraska statute requiring the motion to be filed at the same term at which judgment is rendered except for newly-discovered evidence is mandatory. Carmack v. Erdenberger [Neb.] 110 N. W. 315. Under a rule authorizing the motion to be filed during the term or on the first day of the succeeding term, if verdict is rendered on the last day of the term, where a judgment was rendered prior to the last day, a motion filed in vacation is too late. Richardson v. Stephenson [Ind. App.] 78 N. E. 256. An order granting a new trial at the same term is in time. James v. Evans, 149 F. 136.

66. Civ. Code Prac. § 342, providing that motion must be made at the term at which decision is rendered, may be waived. Huffman v. Charles [Ky.] 97 S. W. 775. It is within the discretion of the court to grant or deny a motion not timely filed. Cato v. Scott [Tex. Civ. App.] 16 Tex. Ct. Rep. 807, 96 S. W. 667. Properly denied for lack of diligence in not making it in time. Id. The time for filing the motion may be extended by the trial court, notwithstanding the statute requiring judgment to be entered immediately on return of the verdict. McAllister v. Seattle Brewing & Malting Co. [Wash.] 87 P. 68. Where the court reporter who took the testimony left the state before preparing a transcript thereof, a party desiring to move for a new trial was entitled to necessary extensions of time to enable them to secure a transcript. Twaddle v. Winters [Nev.] 85 P. 280. Order in chambers granting such extension held within the jurisdiction of the judge of another district who was attending to the duties of the trial judge who was absent. Id.

67. Where the motion is not made at the time before the trial justice as required by Code Civ. Proc. § 999, it must be made on a case and exceptions as required by § 997. Wilcox v. Fox, 112 App. Div. 560, 98 N. Y. S. 769.

68. For the purpose of review. Carmack v. Erdenberger [Neb.] 110 N. W. 315.

69. Under a statute providing that a party intending to move for new trial must within five days after verdict file and serve notice of intention, and a statute providing that the court may grant relief subsequent to such time if satisfactory reason is shown, it is essential that an application showing reason why the motion was not made under the former state be made before the notice under the latter section may be served. Felt v. Cook [Utah] 87 P. 1092. Under Comp. Laws, § 3292, requiring notice of intention to be given within five days after verdict or ten days after receiving notice of decision by a judge and file his statement within five days after giving such notice, when a suit for injunction is tried before a jury, a party has ten days from notice by the judge and may file his statement within five days after giving notice. State v. Murphy [Nev.] 88 P. 335. Such period is not curtailed by the fact that he applies at the time of rendition of verdict, without knowing that it had been approved, for an order allowing thirty days after receipt of the transcript in which to file his statement. Id. Under Code Civ. Proc. § 473, relief from default in service of notice of intention to move for a new trial must be made within six months from default. Steen v. Santa Clara Valley Mill & Lumber Co. [Cal. App.] 88 P. 499.

70. Where a judge is called away after verdict rendered and is unable to return during the term, the motion may be heard and determined by a special judge subsequently selected. Texas & P. R. Co. v. Voliva [Tex. Civ. App.] 14 Tex. Ct. Rep. 501, 91 S. W. 354. A justice of the supreme court may grant a rule to show cause why a verdict rendered in an issue out of this court tried

a motion for lack of diligence in prosecuting it is addressed to the discretion of the court.[72] The hearing on the motion is governed by the rules applicable to other judicial proceedings,[73] and irregularities may be waived.[74] A movant may not shift to a different theory from that upon which his case was tried and insist thereon as a basis for his right to recover.[75] A court may not rule on a motion before it is presented,[76] and under the rule that it shall not be granted except on motion stating the grounds, it may not be granted on grounds not asserted.[77]

Affidavits[78] in support of the motion must be filed when required,[79] and must show facts warranting a new trial.[80]

Evidence in support of motion.[81]—The practice commonly recognized or fixed by rule of court of only receiving affidavits on the motion should not be departed from unless in exceptional cases and to avoid miscarriage of justice.[82] A party has

at the circuit court should not be set aside, after the six days allowed by rule of the court, upon an allegation of misconduct of jurors or other cause not within the purpose of that rule. Rooney v. King [N. J. Law] 64 A. 955. A motion cannot be heard and determined by a justice of the city court sitting as a trial justice in the case but must be made at special term. Koeppel v. Koeppel, 49 Misc. 218, 97 N. Y. S. 401. Under Rev. St. § 953, amended by act June 7, 1900, c. 717, (31 Stat. 270), providing that where a judge becomes disabled to pass upon motion and allow and sign a bill of exceptions, his successor may do so, if stenographic notes have been taken or he is satisfied that he can pass on such motion, otherwise he may grant a new trial where a judge died and there was no record of the case, the only authority his successor has is to grant a new trial. Penn Mut. Life Ins. Co. v. Ashe [C. C. A.] 145 F. 593.

Note: Where a judge who hears a case is called away and is unable to return during the term to hear the motion, a judge setting for him has authority to hear and determine the motion. Coles v. Thompson [Tex. Civ. App.] 29 S. W. 958; Malone v. Eastin, 2 Port. [Ala.] 182; Wilson v. R. Co. [Cal.] 29 P. 861, 17 L. R. A. 865; Jones v. Sanders [Cal.] 37 P. 649; Chicago & S. W. R. Co. v. Marseilles, 107 Ill. 313; People v. McConnell [Ill.] 40 N. E. 608; American Cent. Ins. Co. v. Neff [Kan.] 23 P. 606; State v. Gaslin [Neb.] 49 N. W. 353; Ott v. McHenry, 2 W. Va. 73. There are decisions holding a contrary doctrine but the weight of authority is as stated.—See Texas & P. R. Co. v. Voliva [Tex. Civ. App.] 14 Tex. Ct. Rep. 501, 91 S. W. 354.

71. District court rule requiring motions to be heard two entire days before adjournment is not mandatory and where hearing was postponed at the suggestion of counsel of the successful party until the day before the last day of the term, it was an abuse of discretion for the court to dismiss it. Houston Saengerbund v. Dunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 699, 92 S. W. 429.

72. His action thereon is conclusive unless discretion is abused. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415. Mere lapse of time, four months, is insufficient to show an abuse of discretion where it is not shown that the motion could have been presented or heard at some time during the expired period. Id.

73. Where the hearing of the motion has been set for a future day in term time by an order requiring the movent to file a brief of the evidence on or before a specified date the court could not by ex parte order before the hearing and at a time when the court was not in session extend the time for filing the brief. But the court might refuse to dismiss because the brief was not filed within the time specified on the day set for hearing if the movent was not chargeable with laches. Broadway Nat. Bank v. Kendrick, 124 Ga. 1053, 53 S. E. 576. Where attorneys for the parties have signed a stipulation waiving notice of the time and place of hearing and passing on a motion for a new trial, the notice may be heard and passed upon without notice to the adverse party. Buckle v McConaghy [Idaho] 88 P. 100.

74. Where a motion was heard and determined on the merits without objection that the court was without authority to entertain it, the discontinuance of the motion resulting from failure of the record to show a continuance was waived. Birmingham R. L. & P. Co. v. Hinton [Ala.] 40 So. 988.

75. Fisk v. Chicago Water Chute Co., 119 Ill. App. 536.

76. A court has no authority to rule on a motion for a new trial which has not been filed and is not before it, in anticipation that such motion may be filed. Carmack v. Erdenberger [Neb.] 110 N. W. 315.

77. Under the rule that a new trial shall not be granted except on motion in writing, "stating the reasons relied upon in its support," the court in refusing a motion may not grant it on grounds not stated herein. Peirson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769.

78. See 6 C. L. 809.

79. Code Civ. Proc. § 343, expressly provides that affidavits must be filed in support of a motion on the ground of newly-discovered evidence. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907.

80. On an application for new trial on the ground of newly-discovered evidence, the affidavits should explicitly state the new facts. Grigsby v. Wolven [S. D.] 108 N. W. 250. An affidavit on the ground of newly-discovered evidence must show that such evidence could not have been discovered at the former trial by the exercise of ordinary diligence. Wheeling Corrugating Co. v. Armstrong, 97 N. Y. S. 960.

81. See 6 C. L. 808.

82. Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22.

no legal right to bring before the court for examination persons who have given affidavits in opposition to his motion.[83] A new trial will not be granted on affidavits of jurors impeaching their verdict,[84] nor will their affidavits be received to show that they misconceived one of the issues submitted.[85] Where it is claimed that the jury misconceived the issues, the court may call them together and inquire how they construed the question.[86]

Order granting or refusing new trial.[87]—An order granting a new trial operates to vacate the verdict and judgment.[88] Where a new trial is granted for error in sustaining a plea to the counterclaim which arose out of the same contract upon which the action was based, a new trial may be granted as to the entire action.[89] The order need not state the ground upon which the motion is granted.[90] An order, which does not designate on which of several grounds mentioned it was based, will not be disturbed if justified on any.[91] In overruling the motion, the court may state the effect of the testimony on his own mind.[92]

§ 4. *Proceedings at new trial*[93] are de nova.[94]

§ 5. *Arrest of judgment. A. Nature and grounds.*[95]—A motion in arrest lies only for errors apparent on the face of the record.[96] It will reach a jurisdictional error apparent from the pleadings,[97] or error which cannot be cured by amendment,[98] or where objection cannot be raised thereto by demurrer,[99] or a de-

83. The hearing on the motion is within the discretion of the judge. Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22. The trial judge may in his discretion receive affidavits or other evidence to refresh his recollection of what occurred at the trial, but a party has no absolute right to file such affidavits, and they may be stricken out. Hasper v. Wietcamp [Ind.] 79 N. E. 191.

84. Jurors may not impeach their verdict. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 16 Tex. Ct. Rep. 860, 98 S. W. 226. A juror may not directly or indirectly impeach the verdict. Cable Co. v. Walker [Ga.] 56 S. E. 108. Cannot be impeached by affidavits of misconduct by the jurors. Galveston, etc., R. Co. v. Roberts [Tex. Civ. App.] 14 Tex. Ct. Rep. 671, 91 S. W. 375. This rule is changed by the act of April 24, 1905. Id. Affidavits of jurors will not be received to impeach their verdict. Flynt v. Taylor [Tex. Civ. App.] 14 Tex. Ct. Rep. 648, 91 S. W. 864.

85. Winslow v. Smith [N. H.] 65 A. 108.

86. Winslow v. Smith [N. H.] 65 A. 108. On a motion based on the ground of misconduct of jurors whose affidavits in opposition to the motion were admitted without objection, it is discretionary with the court to allow the jurors to be examined relative to the statements made in their affidavits, and it is error to rule as a matter of law that a party has not such right. Goodwin v. Blanchard, 73 N. H. 550, 64 A. 22.

87. See 6 C. L. 810.

88. In an action against two for conspiracy where a verdict was returned in favor of one and against the other. James v. Evans [C. C. A.] 149 F. 136. Where a verdict is returned against one defendant and in favor of another, the granting of a new trial before judgment entered as to one operated to restore the status of the case as it existed prior to trial. Barfield v. Coker & Co., 73 S. C. 181, 53 S. E. 170. Where judgment is entered against joint tort feasors which by Rev. St. 1895, art. 1337 is but one judgment, the grant of a new trial as to one is necessarily the grant of a new trial as to the other (St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 99 S. W. 171); but under the rule that a judgment in an action against tort feasors may be given against one and in favor of another, where a judgment is rendered against two or more, the granting of a new trial as to one does not vacate the judgment as to the other (Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178).

89. Schmidt v. Posner, 130 Iowa, 347, 106 N. W. 760.

90. Rev. St. 1899, § 801, requiring the court to state the grounds upon which a new trial is granted is not mandatory. Pierce v. Lee, 197 Mo. 480, 95 S. W. 426.

91. Case v. Kramer [Mont.] 85 P. 878.

92. Caldwell v. Seaboard Air Line R., 73 S. C. 443, 53 S. E. 746.

93. See 6 C. L. 811.

94. Where a retrial is necessary because of disqualification of the trial judge before signing the judgment, it must be an entire new trial and not on the evidence submitted at the former trial. Williamson v. Randolph, 111 App. Div. 539, 97 N. Y. S. 949. A mistrial does not result where a judge becomes disqualified to act on a motion for a new trial. Stern v. Wabash R. Co., 101 N. Y. S. 181.

95. See 6 C. L. 811.

96. A motion in arrest is based upon the record proper. Danley v. Hibbard, 222 Ill. 88, 78 N. E. 39.

97. The question of want of jurisdiction in a divorce case because of failure of the petition to allege that plaintiff had resided in the state for the statutory period may be raised for the first time by motion in arrest. Stansbury v. Stansbury, 118 Mo. App. 427, 94 S. W. 566.

98. A motion in arrest goes only to such substantial defects in the pleadings as cannot be reached by demurrer. Enright v. Gibson, 119 Ill. App. 411. That the action is prematurely brought cannot be reached. Id. A judgment cannot be arrested for any defect in the pleadings or record which is

fective verdict;[1] but where the complaint states a cause of action and the evidence tends to sustain it, a motion in arrest is properly denied.[2] A motion will not lie where an action is erroneously entitled case when it should have been entitled trespass, where the technical difference between the two forms of action has been abolished.[3] Under the rule that a party in default may appear at the time of assessment of damages and cross-examine witnesses against him, but for no other purpose, a party in default may not file a motion in arrest without firts having the default set aside.[4]

(§ 5) *B. Motions and proceedings thereon.*[5]—The motion must be filed within the period prescribed,[6] but may be amended at a subsequent term.[7] In considering the motion, the court does not look into the evidence.[8] On a motion based on insufficiency of the pleadings, every intendment is indulged in favor of the declaration.[9]

(§ 5) *C. Effect.*[10]

NEXT FRIENDS; NEXT OF KIN, see latest topical index.

NON-NEGOTIABLE PAPER.

Non-negotiable paper.[11]—The term "non-negotiable paper" comprehends those contracts for the payment of money which possess the form and other essentials of bills and notes but lack the characteristic of negotiability.[12] Such instruments import a consideration [13] and may be entitled to grace.[14] A non-negotiable instrument

aided by the verdict or amendable as matter of form. Reid v. Hearn [Ga.] 56 S. E. 129. Under a statute providing that where a complaint does not state facts sufficient to entitle plaintiff to relief, it may be taken advantage of by motion in arrest, the insufficiency of a complaint in failing to allege that a claim for damages was presented within sixty days after accrual of the cause, as required by statute, may be raised. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143.

99. A judgment obtained after appearance in a short note case is in personam and nothing that could have been urged as ground for quashing the attachment can be availed of to arrest entry of judgment. Philbin v. Thurn, 103 Md. 342, 63 A. 571. Defects in pleadings which are of an amendable nature, and matters which might have been pleaded in abatement, cannot be urged in arrest of judgment authorized by the pleadings. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

1. Under a statute providing that, where an amount is found due a defendant on a counterclaim, the jury must state such amount in their verdict, failure to find either for or against defendant on a counterclaim is ground for motion in arrest. Winkelman v. Maddox, 119 Mo. App. 658, 95 S. W. 308. Failure to find affirmatively either for or against a certain defendant on a counterclaim is ground for motion in arrest by other defendants Id.

2. Olson v. Brison, 129 Iowa, 604, 106 N. W. 14.

3. Pratt v. Davis, 118 Ill. App. 161.

4. Free v. Western Union Tel. Co. [Iowa] 110 N. W. 143.

5. See 6 C. L. 812.

6. Motion must be filed at the term at which judgment is rendered. Diamond Match Co. v. Wabash R. Co. [Mo. App.] 97 S. W. 993. Rev. St. 1899, § 803, expressly provides that a motion in arrest must be made before the end of the term at which trial is held. Wright v. Fetters [Mo. App.] 97 S. W. 627.

7. While a motion in arrest must be made at the term at which judgment is rendered, it may be amended at a subsequent term by adding new and distinct grounds of attack. To so amend is not to introduce a new cause of action but simply to amplify the pleadings by assigning additional reasons why the judgment should be arrested because not supported by the record. A. Leffler & Sons v. Union Compress Co. [Ga.] 55 S. E. 927.

8. Danley v. Hibbard, 222 Ill. 88, 78 N. E. 39.

9. If it contains terms sufficiently general to comprehend any matter necessary to be proved, the want of an express averment may be cured by verdict. Danley v. Hibbard, 222 Ill. 88, 78 N. E. 39.

10, 11. See 6 C. L. 812.

12. See, also, Contracts, 7 C. L. 761. In Kentucky, bonds payable to bearer are not negotiable. Mutual Life Ins. Co. v. Chosen Friend Lodge, 29 Ky. L. R. 394, 93 S. W. 1044. Instrument payable in current funds is not. Dille v. White [Iowa] 109 N. W. 909. Under the rule that bills of lading are negotiable unless providing in express terms to the contrary, they are not negotiable if "not negotiable" is written on their face Merchants' Nat. Bank v. Baltimore, 102 Md. 573, 63 A. 108.

13. Under a statute providing that all instruments by which one promises to pay another money shall import a consideration, a non-negotiable instrument does. Locher v. Kuechenmiester, 120 Mo. App. 701, 98 S. W.

may be transferred by indorsement,[15] but the assignee takes it subject to all equitable defenses available between the parties.[16] Where execution of an instrument is denied, it is not admissible in evidence until such fact is established.[17] The fact that a note given in payment of a stock subscription is non-negotiable does not relieve the maker from liability as to creditors induced thereby to give credit to the corporation.[18] Where negotiable city bonds are void for want of power to execute them, recovery cannot be had thereon as non-negotiable instruments.[19]

NONRESIDENCE, see latest topical index.

NOTARIES AND COMMISSIONERS OF DEEDS.[20]

A county attorney in Texas is not disqualified from holding at the same time the office of notary public.[21] It will be presumed that a notary has a seal[22] and courts take judicial notice of the seals of notaries.[23]

The official acts of notaries are presumed to have been regular,[24] and the acts of a notary de facto are entitled to the recognition accorded those of a notary de jure.[25] The failure of a notary to certify when his term of office will expire, as required by statute, does not invalidate his certificate.[26] Interest may disqualify in certain cases,[27] but a notary's indirect pecuniary interest in a note does not disqualify him to protest it for nonpayment,[28] and the acknowledgment of a grantor may be taken by a notary in the employ of the grantee where he has no interest in the property.[29] The jurisdiction of a notary is confined to the limits designated in the commission of the governor.[30]

While a notary is not a guarantor of the absolute correctness of his certificate

92. A general averment of consideration in a complaint on an unsealed non-negotiable instrument is insufficient. Fulton v. Varney, 102 N. Y. S. 608.

14. The fact that an instrument contains a provision which renders it non-negotiable does not defeat the right to grace. Sullins v. Farmers' Exchange Bank [Okl.] 87 P. 857.

15. Indorsee may sue in his own name. Shelley v. Baker, 125 Ga. 663, 54 S. E. 653.

16. Merchants Nat. Bank v. Baltimore, 102 Md. 573, 63 A. 108. The assignee of a non-negotiable note cannot enforce a deed securing it which is void for illegality of consideration. Henry v. State Bank [Iowa] 107 N. W. 1034. A non-negotiable instrument though in the hands of a bona fide holder is subject to all defenses which might be interposed against it in the hands of the original payee. Payment is a defense. Dickerson v. Higgins, 15 Okl. 588, 82 P. 649. All defenses available against assignee. Gambling consideration. Union Collection Co. v. Buckman [Cal.] 88 P. 708.

17. Peevey v. Tapley [Ala.] 42 So. 561.

18. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415.

19. Swanson v. Ottumwa [Iowa] 106 N. W. 9.

20. See 6 C. L. 813.

21. Not prohibited by constitution, art. 16, § 40. Figures v. State [Tex. Civ. App.] 99 S. W. 412.

22. Deposition not attested by notary's seal held not sufficiently authenticated under a statute requiring a seal where notary has one. Gharst v. St. Louis Transit Co., 115 Mo. App. 403, 91 S. W. 453.

23. Affidavit for appeal held good though made before notary of another state. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

24. Pardee v. Schanzlin [Cal. App.] 86 P. 812.

25. One who has been commissioned, has taken the oath, and has been acting as a notary for many years, and has had the reputation of being one, but who has failed to file his oath with the secretary of state and the clerk of court, and to renew his bond, is a notary de facto and acts passed before him have the same validity as those passed before notary de jure. Davenport v. Davenport, 116 La. 1009, 41 So. 240.

26. Affidavit for appeal. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

27. Where a firm of brokers was employed to negotiate certain notes secured by a mechanic's lien and one of the firm testified that the fee was fixed and earned when the notes were negotiated, whether a loan was made to the makers or not, he was not disqualified by the interest of his firm to take the acknowledgment to the mechanic's lien contract. Roane v. Murphy [Tex. Civ. App.] 16 Tex. Ct. Rep. 24, 96 S. W. 782.

28. That he was stockholder of bank which held the note. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664.

29. Smith v. Ayden Lumber Co. [N. C.] 56 S. E. 555.

30. Indictment in perjury case held to sufficiently allege that defendant was sworn before a notary, at a certain time and place before testifying. Commonwealth v. Schwieters, 29 Ky. L. R. 417, 93 S. W. 592.

of acknowledgment,[31] and does not undertake to certify that a person who acknowledges a grant has any interest in the land described therein,[32] he does certify that the person appearing before him is known to him to be the person described in and who executed the instrument.[33] A notary and his sureties are liable not only to those who employ the notary but also to those who may sustain loss by reason of his failure to discharge his duties properly, or by reason of wrongful acts done by means, or under color of his office.[34] To establish a liability, however, the wrongful act of the notary must be the proximate cause of the injury.[35] It is no part of the duties of a notary to receive money for investment, and his sureties cannot be held liable for money so received.[36]

NOTES OF ISSUE; NOTICE, see latest topical index.

NOTICE AND RECORD OF TITLE.

§ 1. **Bona Fide Purchaser and the Doctrine of Notice (1169).** Requisites of a Bona Fide Purchaser (1170). Valuable Consideration (1170). Good Faith (1171). Notice or Knowledge (1171).
§ 2. **Statutory Records or Filings as Constructive Notice (1174).**
A. In General (1174).
B. Deed and Mortgage Records (1174). Necessity, Operation and Effect of Recording (1174). Sufficiency, Operation and Effect of Record (1175). Recording Officers and Administration of the Act (1176).
C. Wills and Their Probate and Administrative Proceedings (1177).
D. Chattel Mortgages, Conditional Sales and Other Liens (1177).
§ 3. **Registration and Certification of Land Titles Under the Torrens System (1178).**

§ 1. *Bona fide purchasers and the doctrine of notice.*[37]—The doctrine of bona fide purchase without notice is that no title or lien is ever allowed to prevail against one who takes an incumbrance upon property, or an interest therein, or a conveyance thereof, in good faith without notice of the title or lien, and for a valuable consideration parted with before such notice.[38] This doctrine applies only in favor of

31, 32. Barnard v. Schuler [Minn.] 110 N. W. 966.

33. Barnard v. Schuler [Minn.] 110 N. W. 966. A notary who certifies to the acknowledgment of an instrument without personal knowledge as to the indentity of the party appearing before him and without a careful investigation as to such identity is guilty of negligence (Id.), and he and his sureties are liable for all damages proximately resulting therefrom (Id.). Evidence sufficient to sustain finding of negligence. Id.

Petition alleging that a certificate of acknowledgment was false, that defendant, a notary, made it, and that plaintiff parted with money on the faith of it, states a prima facie case of negligence (Blaes v. Commonwealth, 29 Ky. L. R. 308, 96 S. W. 802), to avoid which defendant must show that he acted in good faith and with due care in ascertaining the identity of the appearing party and that he was nevertheless deceived (Id.).

34. Nolan v. Labatut, 117 La. 431, 41 So. 713.

35. False certification to execution of assignment of homestead right held not to render notary and sureties liable where evidence was insufficient to show that purported assignor had any such right. Coffin v. Bruten [Ark.] 95 S. W. 462.

36. Where notary took the money and later executed forged notes purporting to be secured by mortgages. Nolan v. Labatut, 117 La. 431, 41 So. 713.

37. See 6 C. L. 814.

38. Weinberg v. Schrank, 100 N. Y. S. 800; Swanstrom v. Washington Trust Co., 41 Wash. 561, 82 P. 1112. A mortgagee without notice of his mortgagor's fraudulent title is an innocent purchaser for value and his title is superior to that of creditors. Gilcreast v. Bartlett [N. H.] 64 A. 767. Interests or estates in lands descended to heirs from whom such interests or estates are acquired by innocent purchasers for value and before the commencement of a suit to charge them with the payment of claims against the ancestors, cannot be lawfully or equitably subject to such charges. Scoggin v. Hudgins [Ark.] 94 S. W. 684. Where a deed of trust included land which had been conveyed to another, and the deed was not accepted by the grantee until a reconveyance was made to the grantor, and the grantee had no notice actual or constructive of any reservation of right to the land in question in the person from whom the reconveyance had been compelled, the grantee in the deed of trust is an innocent holder for value against such person and the fact that the grantor had previously committed fraud with the third person from whom the reconveyance had been obtained was not enough to put the grantee on inquiry as to whether the reconveyance represented the true status of title. Smith v. Wofford [Tex. Civ. App.] 16 Tex. Ct. Rep. 815, 97 S. W. 143. A secret equity cannot be asserted to defeat the title of an innocent purchaser at a judicial sale. Scarborough v. Holder [Ga.] 56 S. E. 293; Harrison Mach. Works v.

the purchaser of a legal title and not of a bare equity,[39] and in any event one who takes with notice of rights of third persons in the property takes subject to such rights.[40] One suing on an admitted legal title to quiet title against an equity is not within the rule that the doctrine of bona fide purchase can be used to protect but not to establish title.[41] A trustee in bankruptcy, while a purchaser, is in no sense an innocent purchaser, but takes only such title as the bankrupt had.[42] Judgment creditor who buys at execution sale may be a bona fide purchaser.[43]

Requisites of a bona fide purchaser.[44]—A person claiming exemption from prior claims or liens has the burden of showing that he was a bona fide purchaser for value.[45]

Valuable consideration.[46]—While the consideration need not be commensurate with the actual value of the property, it must be valuable,[47] it must be actually paid,[48] although not necessarily in money,[49] or the purchaser must be irrevocably bound for its payment.[50] There is a conflict of decisions as to whether an ante-

Bowers [Mo.] 98 S. W. 770; Williams v. Jones, 74 S. C. 258, 54 S. E. 558. Boundaries stated in recorded deed cannot be extended as against bona fide purchaser to make good acreage. Young v. Duggin [Ky.] 99 S. W. 655.

39. See 5 C. L. 814. The purchaser of an equitable title takes it subject to all the countervailing equities to which it was subject in the hands of the person from whom he purchased it. Henry v. Black, 213 Pa. 620, 63 A. 250.

40. See post, subd. Notice or Knowledge.

41. Pheby v. Lake Superior & Arizona Mine Co. [Ariz.] 85 P. 952.

42. Crosby v. Rideout, 27 App. D. C. 491; Ellison v. Ganaird [Ind.] 79 N. E. 450.

43. Mansfield v. Johnson [Fla.] 40 So. 196.

44. See 5 C. L. 814.

45. In an action to quiet title a party claiming protection as a bona fide purchaser must deny notice of the fraud, although notice thereof is not charged in the plaintiff's bill, and a failure of the complaint to allege notice does not make the complaint bad. Rozell v. Chicago Mill & Lumber Co., 76 Ark. 525, 89 S. W. 469. To entitle one to protection as a bona fide purchaser of lands previously conveyed by his grantor, he must allege and prove not only want of notice but actual payment of the consideration independently of recitals in the deed as to such payment. Johnson v. Georgia Loan & Trust Co. [C. C. A.] 141 F. 593. A claimant under a conveyance who has notice that the grantee in the conveyance was in a fiduciary relation toward the grantor is charged with showing that the contract of conveyance was fair. Jackson v. Grisson, 196 Mo. 624, 94 S. W. 263. A claimant under a junior title who is attempting to defeat the title of the holder of a prior unrecorded deed from the same grantor for the same land has the burden of showing by evidence outside the recitals in his conveyance that he purchased for valuable consideration and without notice of the previous conveyance. Kimball v. Houston Oil Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 41, 94 S. W. 423. If a party relies upon record to establish his title to realty and to relieve him of knowledge of secret liens known to his grantor, the record itself must show a chain of conveyances which discloses a perfect title in the grantor. Weatherington v. Smith [Neb.] 109 N. W. 381. Positive evidence of a grantee of land who bought after the levy of an attachment thereon, notice of which was not filed in the clerk's office, that she knew nothing of the attachment, and the evidence of a disinterested witness that he had investigated the title of the land in question and had found no liens recorded against it and had advised grantee to purchase outweighed the evidence of a witness who testified with some uncertainty that he had talked with grantee and she had asked him why he had attaced the land and he had replied, that he had not done it but the sureties on the note sued upon had done so. Boltz v. Boain, 28 Ky. L. R. 842, 90 S. W. 593.

46. See 6. C. L. 815.

47. Reed v. Munn [C. C. A.] 148 F. 737. Where the price paid was four-fifths the value asserted by complainants in their bill, it was not so inadequate as to put defendant purchaser on notice of an defect in the title. Goerz v. Barstow [C. C. A.] 148 F. 552.

48. The burden is on one claiming as a bona fide holder to prove such payment independently of the recitals in the deed as to such payment. Johnson v. Georgia Loan & Trust Co. [C. C. A.] 141 F. 593. Revisal 1905, vol. 1, § 980, for lack of timely registration, postpones or subordinates only a deed which is older in date to creditors and purchasers for value. As against volunteers or donees, the older deed, though not registered, will as a rule prevail. Tyner v. Barnes, 142 N. C. 110, 54 S. E. 1008.

The attaching of property by a creditor does not put him in a position of a bona fide purchaser as against another who has a prior claim of which the attaching creditor knew nothing before the attachment was made. Tishomingo Sav. Inst. v. Johnson, Nesbitt & Co. [Ala.] 40 So. 503. Grantee in conveyance made from gratitude for past support not bona fide purchaser. Sunter v. Sunter, 190 Mass. 449, 77 N. E. 497. Assumption of incumbrance not payment. Wasserman v. Metzger, 105 Va. 744, 54 S. E. 893.

49. Definitely extending the time of payment of an existing debt extended in consideration of the debtor's giving a note and chattel mortgage makes the payee and mortgagee, where he has no notice of a prior lien, a bona fide purchaser and his title will be protected as against the claim of the prior lienor. Snellgrove v. Evans [Ala.] 40 So. 557.

50. See 6 C. L. 815.

cedent indebtedness is a valuable consideration.[51] A judgment creditor who purchases land under his own execution without paying money, but crediting the amount of the bid on his judgment, is not a purchaser for value.[52]

Good faith.[53]

Notice or knowledge.[54]—In order that one may, as a bona fide purchaser, claim priority over the equities of third persons, he must not, at the time of the purchase,[55] have had either actual or constructive notice of such equities.[56] However, a purchaser with notice from a bona fide purchaser takes free from equities.[57] Registration or record,[58] or notice or knowledge of facts which would have put an ordinarily

51. A bill of sale received in payment of an antecedent debt protects the vendee to the same extent as had there been a new consideration, if taken in good faith, and without an intention to defraud the other creditors of the vendor, the question of good faith being for the jury. Starr v. Dow [Neb.] 108 N. W. 1065. And one is a bona fide purchaser who, in addition to the discharge of an antecedent debt, releases the security of a trust agreement. Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 13 Det. Leg. N. 10, 107 N. W. 76.

52. Sturdivant v. Cook [Ark.] 98 S. W. 964.

53, 54. See 6 C. L. 815.

55. The rights of a bona fide purchaser are not affected by subsequent notice (Adams v. Brownell-Drews Lumber Co., 115 La. 179, 38 So. 957), even a record being notice only to subsequent purchasers or incumbrancers (New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57). Where notice of a trust agreement is not received until after judgment rendered, a sale under the execution and payment of the purchase money, the purchaser takes a good title although the sheriff's deed is not executed until after notice, the deed relating back to the time of the judgment. Reed v. Munn [C. C. A.] 148 F. 737. A judgment creditor who has no notice of outstanding equities at the time the lien attaches is not as a purchaser at the execution sale charged with notice acquired before the sale. Mansfield v. Johnson [Fla.] 40 So. 196.

56. Rozell v. Chicago Mill & Lumber Co., 76 Ark. 525, 89 S. W. 469: Comstock v. Robertson, 72 Kan. 465, 83 P. 1104; Rittenhouse v. Swango [Ky.] 97 S. W. 743; Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227; Johnson v. Georgia Loan & Trust Co. [C. C. A.] 141 F. 593. An occupant of land who has knowledge of an adverse claim is not entitled to the right to set off improvements made thereon after acquiring such knowledge against the adverse claimant in whom the title is subsequently adjudged to be. Murray v. Barnes [Ala.] 40 So. 348. Where two cotenants divided the property and each took possession of the share allotted to him, a purchaser who buys from one of the cotenants the share which belonged to the other, with notice of such other's claim acquires no rights against the latter. Seawell v. Young, 77 Ark. 309, 91 S. W. 544. A vendee with actual notice of an unrecorded deed acquires no title. Hunt v. Nance, 28 Ky. L. R. 1188, 92 S. W. 6. And a deed by a trustee in bankruptcy of one holding a deed, which in fact is but a mortgage, to one who has notice of the character of such holding passes no title superior to a mortgage previously executed by the bankrupt's grantor. Vallely v. First Nat. Bank [N. D.] 106 N. 127. The bona fide purchaser by unrecorded deed will be protected against the execution creditor who purchases at the execution sale, if the latter has notice of the older equity before the sale. Moore v. Faris, 29 Ky. L. R. 294, 92 S. W. 592. Purchasers from the grantee of an incompetent person cannot take the position of innocent purchasers for value when they had known for many years of the insanity of the incompetent and of the consequent defect in his grantee's title. Rush v. Handley [Ky.] 97 S. W. 726. A mortgagee of crops with actual notice of the existence of a farm contract by which the owner of the land was to receive one-third the crop is not a bona fide purchaser. Agne v. Skewis-Moen Co. [Minn.] 107 N. W. 415. A vendee who buys with knowledge of a prior valid agreement to sell to another may be compelled by such other to specifically perform. Smith v. Umstead [N. J. Eq.] 65 A. 442. Any person who receives property knowing that it is subject to a trust, and that it has been transferred in violation of the duty or power of the trustee, takes it subject to the right, not only of the cestui que trust but also of the trustee, to reclaim possession of the property. Mansfield v. Wardlow [Tex. Civ. App.] 14 Tex. Ct. Rep. 928, 91 S. W. 859. The equity of the beneficiary in property to which the legal title is in another is superior to the title of a grantee of such other who takes with actual notice of such equity. Latham v. Scribner [Wash.] 88 P. 203. A vendee who takes with notice that another has a valid equitable title under his vendor is held in equity as holding the legal title in trust for the benefit of the first purchaser and equity will require him to convey the legal title to the first purchaser. Reel v. Reel, 59 W. Va. 106, 52 S. E. 1023. Where a trustee holding under an express trust uses the trust property in the purchase and conveyance of land to another, in violation of the trust and with notice of it, it creates a constructive, not an express, trust in that third person, and laches will apply in favor of such person as a defense against the enforcement of such trust. Newman v. Newman [W. Va.] 55 S. E. 377. Statement to prospective purchaser that one would have had an interest in the land had a certain person done as he promised not sufficient to put on inquiry as to alleged equity. Pheby v. Lake Superior & Arizona Min. Co. [Ariz.] 85 P. 952.

57. Reed v. Munn [C. C. A.] 148 F. 737.

58. See post, § 2.

prudent man on inquiry,[59] or such as upon reasonable investigation would have revealed the claims of the other party,[60] is equivalent to actual knowledge. But while a purchaser must exercise due diligence to ascertain the status of his grantor,[61] notice will not be imputed unless the circumstances warrant the court in saying that knowledge ought to have been acquired but for the purchaser's gross negligence.[62] Visible user,[63] or possession,[64] unless such possession is consistent with the record

59. Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68. The law does not permit a man to close his eyes to facts which he cannot otherwise fail to see, for the purpose of remaining in ignorance of them and thus acquiring an unjust advantage. Comstock v. Robertson, 72 Kan. 465, 83 P. 1104; Eversole v. Virginia Iron, etc., Co., 29 Ky. L. R. 151, 92 S. W. 593. A purchaser is bound to take notice of the terms of the deed under which his vendor holds, although the deed is not recorded, and is in consequence charged with notice that his vendor holds under a deed reserving a vendor's lien for the unpaid purchase price. Gilbough v. Runge [Tex.] 14 Tex. Ct. Rep. 993, 91 S. W. 566.

60. Comstock v. Robertson, 72 Kan. 465, 83 P. 1104; Niles v. Cooper [Minn.] 107 N. W. 744; Sicher v. Rambousek, 193 Mo. 113, 91 S. W. 68. Where warehouse receipts gave defendants in an action for the conversion of mortgaged cotton notice that one J. had connection with the cotton and the registration of plaintiffs' mortgage gave notice of their claim on all cotton raised by J. or his tenants, defendants were charged with notice that the cotton in question was raised by J. D. P. Haynes & Bro. v. Gray & Co. [Ala.] 41 So. 615. Where M. J. J. joined with M. J. in a deed, this fact was sufficient to put the grantee on inquiry as to M. J. J. and such inquiry would have disclosed a recorded mortgage from M. J. J. to F., and notice of this would have led, on investigation, to discovering an unrecorded deed from M. J. to M. J. J., with knowledge of all which facts defendant was charged in an action in the nature of ejectment. Creel v. Keith [Ala.] 41 So. 780. Actual notice imports all the notice which the record could afford. Hence, where a mortgage was given on sheep to secure the payment of two notes and one of the mortgagees on discounting one of the notes informed the cashier of the bank that the payees had a mortgage on maker's sheep, this was sufficient notice of the second note although no mention was made of it. Williams v. First Nat. Bank [Or.] 87 P. 890. So one having notice of the existence of a mortgage is chargeable with notice that the rate of interest thereon or on the note which it is given to secure is liable to an increase upon the happening of certain contingencies. Feltenstein v. Ernst, 49 Misc. 262, 97 N. Y. S. 376; Hinricks v. Brady [S. D.] 108 N. W. 332.

61. Attebery v. O'Neil, 42 Wash. 487, 85 P. 270.

62. Reed v. Munn [C. C. A.] 148 F. 737. A covenant in a deed against loss from lawsuits and taxes, which was part of a printed form of deed commonly used in the locus in quo, was of no significance to an unprofessional woman. Goerz v. Barstow [C. C. A.] 148 F. 562. When the record showed title in a wife, and the state when it took title took the precaution to obtain affidavits from the wife and the husband that the wife owned the land in question, which was conveyed along with a large quantity of other land, the facts that the deed to the state was executed by both the husband and the wife, that the certificate of the state's agents to the controller reciting the purchase repeatedly referred to both the husband and the wife as the vendors of the property in question and requested payment out of the purchase price of certain lien which were debts of the husband and directed payment of the residue of the purchaseprice to both the husband and the wife, are not sufficient to show that the state had notice of any interest of the husband in the property in question, if it is not shown that the husband had no interest in the other property conveyed and if it appears that the husband had been the owner of the property in question and had conveyed it to a stranger several years before there had been any conveyance of the same to himself or to his wife, and it is not shown that the judgments against him were recovered subsequent to his said conveyance to the stranger. Trombly v. Turner, 101 N. Y. S. 27.

63. One who has actual and constructive notice of an easement in his grant stands in exactly the same position with reference to the easement as his grantor had stood previously to the grant. Rittenhouse v. Swango [Ky.] 97 S. W. 743. Where the grantee of land bought with knowledge that a railroad operated a line thereon connected by switch with its main line, this was such notice as would ordinarily suggest inquiry as to its rights and claims in the matter. Valentine v. Long Island R. Co. [N. Y.] 79 N. E. 849. A grantee who takes with knowledge of a covenant of his grantor to open a street through the lands conveyed and knowing the position of defendant's pipes as laid through the premises acquires no greater rights than his grantor had to object to defendant's acts. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227.

64. Banton v. Herrick, 101 Me. 134, 63 A. 671; Fall v. Fall [Neb.] 106 N. W. 412. See, also, Seawell v. Young, 77 Ark. 309, 91 S. W. 544. Expressly so provided by Civ. Code 1895, § 3931. Bridger v. Exchange Bank, 126 Ga. 821, 56 S. E. 97. And it is immaterial that such holding is under an unrecorded instrument. Denton v. Cumberland Tel. & T. Co., 29 Ky. L. R. 1218, 96 S. W. 1112. Where a grantor of land continued in possession after she was induced to convey without understanding the nature and character of her act and without consideration, the continuance of her occupancy constituted notice to purchasers from her grantee of her equitable rights in the property. Shiff & Son v. Andress [Ala.] 40 So. 824. Possession by a third person under a lien at the time of the execution of a chattel mortgage is such notice to the mortgagee as to subordinate his lien to that of the person in possession.

title,[65] is notice to all the world of the title and rights of the person in possession and of all facts connecting therewith which reasonable inquiry would disclose.[66] There is a conflict as to whether one claiming under a quitclaim deed is a bona fide purchaser;[67] but the significance of such a deed as a circumstance to show bad faith is lost when the purchaser acts in good faith and without notice.[68] Notice may also be imputed to one from certain representative relations in which he may stand.[69]

Wood v. West Pratt Coal Co. [Ala.] 40 So. 959. Where the mortgagee of the grantee of an incompetent knew that the property was in possession of a third party, who claimed to hold it for the incompetent, such possession, which was the possession of the incompetent, was notice to the mortgagee of all rights the incompetent had in the premises and he was not a bona fide purchaser. Peck v. Bartelme, 220 Ill. 199, 77 N. E. 216. Where the grantee when he purchased land saw a partition fence and knew that a third person was in possession of the land or one side thereof, and that such person and his grantor cultivated the land up to the fence on their respective sides, these facts were sufficient notice to put him upon inquiry as to such third person's claim or right in the land on his side of the fence. Adams v. Betz [Ind.] 78 N. E. 649. A vendee of land in the possession of a tenant takes the title subject to the unexpired term. Stone v. Snell [Neb.] 109 N. W. 750. Possession of one of several tracts covered by an unrecorded deed is notice only as to the tract occupied. Brooks v. Hibbard, Spencer, Bartlett & Co. [Tex. Civ. App.] 99 S. W. 718.

65. Where the grantee had the records examined and found a warranty deed, absolute in form, from the third party in possession to his grantor, and the party in possession explained that he was there as agent for such grantor, his possession was not notice to the grantee that the recorded deed was intended only as a mortgage. Causey v. Handley [Tex. Civ. App.] 17 Tex. Ct. Rep. 578, 98 S. W. 431. So the occupation of land by minor children with their parents is entirely consistent with the full, legal, and equitable title in the parents, and is not of itself any notice of a claim on the part of the children. Attebery v. O'Neil, 42 Wash. 487, 85 P. 270. And where the record title is in a father, his son's occupancy with him is not notice to a vendee of the father of any claim of title or right in the son, the presumption being that the son was living with the father under the father's possession and not that the father was living with the son under the son's possession distinct from that of the father. Nagelspach v. Shaw [Mich.] 13 Det. Leg. N. 839, 109 N. W. 843. Possession by widow of mortgagor being consistent with mortgage is not notice of a claim of homestead. Weber v. McCleverty [Cal.] 86 P. 706.

66. Niles v. Cooper [Minn.] 107 N. W. 744.

67. Under Burns' Ann. St. 1901, § 3346, a quit claim deed "is of itself notice to the purchaser that he is accepting a doubtful title, and is sufficient to put him upon inquiry regarding it." Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245. A claimant under a quitclaim deed, which follows a trust deed which was foreclosed, is no such innocent purchaser for value as would entitle him to avoid the effect of outstanding equities, but is charged with the notice of the contents of the trust deed foreclosed, of the constitution and by-laws of the building and loan association which was the beneficiary set forth in the trust deed, and with all that is disclosed by his chain of title, as well as by statutes of the state read into the transaction. Cobe v. Lovan, 193 Mo. 235, 92 S. W. 93. One who purchases from a grantee in a quitclaim deed is not a bona fide purchaser, but is presumed to have knowledge of all outstanding equities as against his grantor. Schmidt v. Musson [S. D.] 107 N. W. 367. One claiming under either a quitclaim deed or a deed with covenant of special warranty may make the defense of bona fide purchaser. Dunfee v. Childs, 59 W. Va. 225, 53 S. E. 209. A memorandum in a private book of the existence of a quitclaim deed would not be admissible against the grantee of a fee owner unless it could be shown that he had seen the memorandum prior to his purchase even if it could be admissible under any circumstances. Grigsby v. Wolven [S. D.] 108 N. W. 250.

68. When a purchaser of real estate accepts a quitclaim deed from a vendee in possession under a recorded warranty deed, after examining the records, which did not indicate any equity in the grantor of his vendor, and after inquiring of the notary who took the acknowledgment of the deed and the witness to the signatures, both of whom informed him that the transaction, so far as they knew or could discover, was in good faith, and he has no information that would lead him to suppose that there is any equity remaining in such grantor, he takes the title free from any equity in the grantor of his vendor based on the claim that the title and possession of the property were obtained by fraud. Fountain v. Kenney, 71 Kan. 642, 81 P. 179.

69. One may be bound by the notice or knowledge of his attorney (Turner v. Kuehnle [N. J. Eq.] 64 A. 478; Weinberg v. Schrank, 100 N. Y. S. 800), but is not chargeable with notice of frauds attempted or committed by the attorney before his employment as such (Goerz v. Barstow [C. C. A.] 148 F. 562). Notice to an agent is notice to his principal (In re Nassau, 140 F. 912), but such notice must be predicated on notice to the agent while engaged in the business of his agency (Reed v. Munn [C. C. A.] 148 F. 737). Hence a corporation is not chargeable with notice of facts coming to the knowledge of a stockholder or director prior to the organization of the corporation. Id. Knowledge acquired by officer of corporation in investigation of title but omitted from his report is imputed to the corporation. Armstrong v. Ashley, 27 S. Ct. 270, 51 Law. Ed. ——.

§ 2. *Statutory records or filings as constructive notice. A. In general.*[70]—An agreement giving the right of occupation to erect poles and wires need not be recorded to make the occupation rightful.[71]

(§ 2) *B. Deed and mortgage records. Eligibility to record.*[72]—Statutes relating to recording have reference to the legal registry of acknowledged or proven papers,[73] and the record of a paper without such acknowledgment or proof is a nullity.[74] The recording of a deed procured by fraud will be enjoined.[75]

Necessity, operation and effect of recording.[76]—While recording a deed is not essential to delivery,[77] it may take the place of actual manual delivery and formal acceptance.[78] Registration of a deed is not, however, conclusive evidence of its delivery.[79] The purpose of the recording laws is that the true state of the title may be represented,[80] and that purchasers may be protected from being undone by prior secret conveyances or encumbrances.[81] Hence, failure to record has the effect, in the absence of notice, of subordinating an unrecorded instrument to a recorded one,[82] although one with actual knowledge or constructive notice that others are acting to their detriment in reliance upon their conveyances is in no position to attack them.[83] There is, however, some conflict as to whether this is true as to the liens of creditors.[84] Of two recorded titles the older is the better.[85]

70. See 6 C. L. 819.

71. Denton v. Cumberland Tel. & T. Co., 29 Ky. L. R. 1218, 96 S. W. 1112.

72. See 6 C. L. 819.

73. Under Rev. St. 1895, art. 4624, to entitle a deed to record the proof of a subscribing witness must show that the witness signed at the request of the grantor, but under the statute of 1846 this was not required. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106. Where a mortgage, executed and delivered to A, was acknowledged by the parties executing the same before B, a notary public, and there was nothing upon the face of the instrument which disclosed any interest therein in any third person, it was entitled to record notwithstanding the fact that both A and B were officers of a bank having an undisclosed interest therein. Kee v. Ewing [Okl.] 87 P. 297. Where a statute provides that persons holding unregistered deeds executed prior to a certain date could have the same registered by making affidavit that the grantor and witnesses were dead or could not be found and that such person could not make proof of their hand-writing, "provided that it shall also be made to appear by affidavit that affiant believes such deed to be a bona fide deed and executed by the grantor therein named," an affidavit by a person offering one of this class of deeds which affidavit says that "he claims title under a deed from," etc., does not conform to the provision in the statute and such deed is not entitled to registration. Allen v. Burch, 142 N. C. 524, 55 S. E. 354.

The act relating to the recording of assignments of mortgages (Laws 1899, p. 340, c. 168), does not restrict the methods by which a negotiable note and mortgage securing it may be transferred, nor prevent a transfer of the ownership of such paper by mere delivery. The statute was intended as a protection to mortgagors and the only penalty for not recording the assignment is that all payments made by the mortgagor to the mortgagee or to any one who appears to be the owner shall be credited to the mortgagor although never received by the assignee. Anthony v. Brennan [Kan.] 87 P. 1136.

In **Louisiana** the registration of an act of sale signed by the vendor alone will effect a registry of the sale. Lepine v. Marrero, 116 La. 941, 41 So. 216, overruling Hutchinson v. Rice, 109 La. 29, 33 So. 57.

74. Where the acknowledgment of a deed is fatally defective in omitting the word "delivered", the record of the deed conveys no constructive notice. Ligon v. Barton [Miss.] 40 So. 555.

75. Lucas v. County Recorder [Neb.] 106 N. W. 217.

76, 77. See 6 C. L. 820.

78. Fryer v. Fryer [Neb.] 109 N. W. 175.

79. Napier v. Elliott [Ala.] 40 So. 752.

80. Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 13 Det. Leg. N. 10, 107 N. W. 76.

81. Swanstrom v. Washington Trust Co., 41 Wash. 561, 83 P. 1112.

82. Swanstrom v. Washington Trust Co., 41 Wash. 561, 83 P. 1112. If a purchaser in good faith acquires from the patentee or his heirs lands against which no adverse title is recorded, he cannot be affected by equities between his vendor and other persons of which the public records afford no information. Adams v. Brownell-Drews Lumber Co., 115 La. 179, 38 So. 957. The assignee of a mortgage who neglects to record the assignment cannot enforce the mortgage against one who buys the property and satisfies the mortgage by paying the amount thereof to the record mortgagee, who absconds, although the assignment is recorded ahead of the absconding record mortgagee's deed, or satisfaction. Marling v. Nommensen, 127 Wis. 363, 106 N. W. 844. Under Ky. St. 1903, § 496, a mortgagee who fails to record his mortgage is not entitled to priority over creditors of a bankrupt who have become such during the period of withholding. In re Doran, 148 F. 327.

83. Kessler & Co. v. Ensley Co., 141 F. 130.

84. Code, § 499, providing that a deed shall take effect against creditors without

Sufficiency, operation and effect of record.[86]—While recording does not operate to cure jurisdictional defects in tax proceedings,[87] the lapse of time after recording may have practically that effect.[88] Where the statute provides that an instrument operates as a record from the date of delivery to the recording officer, a mistake in transcribing,[89] or the delay or neglect of the officer in actually recording said instrument, if it was promptly and properly indexed in the book required by law to be kept for that purpose,[90] does not affect the rights of the party interested in favor of a subsequent purchaser. Nor will he be prejudiced when, after recording, the records are destroyed by fire.[91] But where the statute places upon the person offering an instrument for record the burden of seeing that it is properly recorded, a record in a wrong book is not effective against a subsequent bona fide purchase.[92] The record is contructive notice to all subsequent purchasers,[93] of those matters which are stated in the record,[94] which may fairly and reasonably be implied there-

notice only from the time of recording, a judgment creditor who files a bill to reach an equitable interest of his debtor has priority over an earlier grantee of such equitable interest who fails to record his deed until after bill filed and process served. Ohio Nat. Bank v. Berlin, 26 App. D. C. 218. An attachment made in good faith and without notice will take precedence over a prior unrecorded deed of the same property. Haines v. Connell [Or.] 87 P. 265. But Civ. Code 1895, § 2727, providing that an unrecorded mortgage is "postponed to all other liens created or obtained prior to the actual record of the mortgage," refers only to liens created or obtained during the lifetime of the mortgagor and a mere general judgment against the estate of a decedent can neither take precedence over, nor stand upon an equal footing with, an unrecorded mortgage executed by him. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62.

85. Banton v. Herrick, 101 Me. 134, 63 A. 671. Kee v. Ewing [Okl.] 87 P. 297. Where two mortgages are executed and filed the same day, actual priority may be determined, the legal fiction of no fractions of a day being inapplicable. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57. When two mortgages on the same land, executed by a mortgagor to two different mortgagees, are filed for record at the same time by the common agent of the mortgagees, and no instructions are given, the priority of the liens is determined presumptively by the order in which the instruments are numbered by the register. Wolf v. Edmonston [Minn.] 109 N. W. 233.

86, 87. See 6 C. L. 821.

88. Under Mills' Ann. St. 3904, which provides that no action for recovery of land sold for taxes shall lie unless the same be brought within five years after the execution and delivery of a deed therefor by the treasurer, the fact that a tax deed regular on its face was actually void for irregularites does not prevent the operation of the statute against an owner who did not begin action for recovery of the land for more than five years after the tax deed was recorded; for the tax deed constituted color of title. Williams v. Conroy [Colo.] 83 P. 959.

89. Chapman & Co. v. Johnson, 142 Ala. 632, 38 So. 797.

90. Sawyer v. Vermont Loan & Trust Co., 41 Wash. 524, 84 P. 8. Where a mortgage is indexed according to the requirements of the statute, the index is sufficient notice to send a purchaser of the property on which the mortgage is a lien to the record of the mortgage for information. Mohr v. Scherer, 30 Pa. Super. Ct. 509. The requirements of the act of April 22, 1856 (P. L. 532), are not complied with by indexing the name of judgment defendant as he is commonly known, "but its requirements are met when the first or Christian name of a defendant is so indexed that a prospective purchaser examining the index ought to know from it of the existence of a lien against the property which he is about to purchase." Burns v. Ross [Pa.] 64 A. 526, holding that a purchaser from the heirs of Francis Ross is bound to look for judgment liens indexed against Frank Ross during the lifetime of Francis. The presumption is, after a lapse of time and nothing to the contrary appearing, that marginal entries of the satisfaction of trust deeds and releases of mortgages were made in compliance with the law. Metz v. Wright, 116 Mo. App. 131, 92 S. W. 1125.

91. Manwarring v. Missouri Lumber & Min. Co. [Mo.] 98 S. W. 762.

92. The Michigan statute being construed so to place the burden and providing (Comp. Laws, § 8980) that deeds absolute in form and not intended as mortgages or securities shall be recorded in one book and mortgages and deeds intended as securities shall be recorded in another, a deed absolute in form, but intended as a mortgage which is recorded in the first book, is not effective. Grand Rapids Nat. Bank v. Ford, 143 Mich. 402, 13 Det. Leg. N. 10, 107 N. W. 76.

93. A purchaser of land without actual notice of a prior mortgage, who purchased after the execution of the mortgage, but before it was recorded, at an execution sale for a debt incurred before the execution of the mortgage, is not affected by subsequent recording of the mortgage. Williams v. Jones, 74 S. C. 268, 54 S. E. 558.

94. Mansfield v. Wardlow [Tex. Civ. App.] 14 Tex. Ct. Rep. 928, 91 S. W. 859; Jamaica Sav. Bank v. Butler [Vt.] 65 A. 92. If the record of a deed shows the retention of a lien upon the land to secure a part of the purchase money, this alone is notice to anyone that the title was still in grantor in the deed, or it was at least sufficient to put anyone on inquiry to ascertain whether or not the purchase money had been paid. Staley v. Stone [Tex. Civ. App.] 14 Tex. Ct. Rep. 827, 92 S. W. 1017.

from,[95] or which might have been discovered upon a reasonable investigation of the facts so disclosed or implied;[96] but the record of instruments not in their chain of title is no notice to purchasers,[97] and a party is not charged with constructive notice of anything that the record does not show.[98]

Recording officers and administration of the act.[99]

95. Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 P. 280. A recorded plat of land and recorded deeds of portions of land in said plat, showing that a portion of the land platted was intended to be dedicated to the public use, is sufficient notice of the dedication to a subsequent vendee of the land in question. Street v. Leete [Conn.] 65 A. 373. The record of an instrument creating a trust is constructive notice to a purchaser of the trust property and to all those who claim under him, not only of the existence of the instrument, "but of its contents, and of all estates, rights, titles, and interests, legal and equitable, created or conferred by it or arising from its provisions." Mansfield v. Wardlow [Tex. Civ. App.] 14 Tex. Ct. Rep. 928, 91 S. W. 859. The record of a mortgage executed by a father and daughter is at most notice that the father was a widower at the time. It is no notice of any claim on the part of his children. Attebery v. O'Neil, 42 Wash. 487, 85 P. 270. The fact that a first mortgage remained unsatisfied of record challenged inquiry beyond the mere fact that it was paid to the mortgagee. Hence, one who bought under a junior mortgage was subject to the senior mortgage which had been redeemed by a junior encumbrancer. Malmberg v. Peterson [S. D.] 108 N. W. 339.

96. Feltenstein v. Ernst, 49 Misc. 262, 97 N. Y. S. 376; Hinricks v. Brady [S. D.] 108 N. W. 332. Where the grantee claimed through M. J. and M. J. J., the fact that M. J. J. joined in the deed to P. was sufficient to put the grantee upon inquiry as to M. J. J. and to furnish constructive notice of a duly recorded mortgage from M. J. J. to F., which in turn would have disclosed a recorded deed from M. J. to M. J. J. Creel v. Keith [Ala.] 41 So. 780. Where the recorded deed describes the property as in a certain lot and block according to a map recorded in a specified book and page, which map did not contain any such lot and block, the description gave constructive notice to a subsequent purchaser holding under the grantor in such deed, it appearing that there was such a lot and block on another page of the book described which was the only map of the town mentioned in the first deed. Rogers v. Mecartney [Cal. App.] 84 P. 215; Gray v. Maier & Zobelein Brewery, 2 Cal. App. 653, 84 P. 280. Where a lease made by one as "party of the first part" to another as "party of the second part" contained a provision that the party of the first part should have the privilege of leasing for another year, this is not an obvious error as to put a purchaser on inquiry as to the tenant's right to renew and to ascertain his rights and equities. Where three mortgages executed by the same mortgagor to the same mortgagee contained the same description by metes and bounds and mentioned the same streets, but described the property as located in three different towns, a subsequent purchaser was charged with notice of the facts which could have been learned by slight inquiry. Kellogg v. Randolph [N. J. Eq.] 63 A. 753. The record of a mortgage is sufficient notice to a subsequent judgment creditor of the mortgagor, who buys in the property at a sale to enforce his lien, when the mortgage correctly describes the property, except in reciting it as situate in a township of which it was once a part, when prior to recording the mortgage that part of the township in which the property was situated had been erected into a new township. Mohr v. Scherer, 30 Pa. Super. Ct. 509. Where a person is well known in a community by the initials R. C. and by the initials W. A. before his cognomen, the record of the mortgage given by such person wherein his name is preceded by the initials R. C. is constructive notice to a subsequent mortgagee from the same person on the same property under the same cognomen preceded by initials W. A. Brayton v. Beall, 73 S. C. 308, 53 S. E. 641. But where the mortgage recorded recites that it is given to secure the payment of a bond in the sum of $800, conditioned for the payment of $400, but refers to the bond for fuller particulars and the bond is not recorded, the record is notice of nothing beyond an ordinary debt of $400. But where the land was conveyed to a grantee who continued making payments in exact accordance with the conditions of the bond, it is a fair inference that the grantee took with knowledge of the character of the debt represented by the bond. Equitable Bldg. & Loan Ass'n v. Corley, 72 S. C. 404, 52 S. E. 48. Recorded release of lien cannot be relied on where facts on record put one on inquiry as to its fraudulent character. Abraham Lincoln B. & H. Ass'n v. Zuelk, 124 Ill. App. 109.

97. The record of a deed from F to R of land owned by the state, the equitable title to which F afterward acquired so that it vested in R, was no notice to grantees of C who held by patent. Rozell v. Chicago Mill & Lumber Co., 76 Ark. 525, 89 S. W. 469. Recording a deed of trust is not constructive notice that the grantor, then a stranger to the title, was grantee of the land from another under a prior unrecorded title. Crosby v. Ridout, 27 App. D. C. 481. Constructive notice, by recordation of deeds and other instruments, is operative only among parties claiming rights under the same title. Between claimants under distinct and hostile titles, notice is ordinarily immaterial and inoperative. Webb v. Ritter [W. Va.] 54 S. E. 484. But a purchaser of land from vendor in possession without legal, but with the equitable, title is bound to take notice of the record of the vendor's prior deed of the mineral rights to the land. He cannot escape the responsibility for his failure to find it by sheltering himself under the technical rule that it was outside the regular chain of title that he was investigating. Eversole v. Virginia Iron, etc., Co., 29 Ky. L. R. 151, 92 S. W. 593. Recitals in recorded deeds not part of chain of title are not notice. Mansfield v. Johnson [Fla.] 40 So. 196.

98. Attebery v. O'Neil, 42 Wash. 487, 85 P. 270.

(§ 2) *C. Wills and their probate and administrative proceedings.*[1]—The record of a will and its probate makes it constructive notice.[2]

(§ 2) *D. Chattel mortgages, conditional sales and other liens.*[3]—In most states chattel mortgages,[4] conditional sales,[5] and other liens, are void as against subsequent creditors in good faith,[6] unless filed, or recorded, or accompanied, by a visible and continuing change of possession.[7] Where the property is in more than one county, the instrument must be recorded in each,[8] and where it is removed from one county to another, the instrument must be recorded within a specified time in the county to which it is removed.[9] Neither the assignment of a chattel mortgage,[10] nor the note to secure the payment of which it is given,[11] need be recorded. Statutory provisions as to filing or recording must be strictly complied with by the mortgagee.[12] Registration of a chattel mortgage is constructive notice to subsequent purchasers.[13]

99, 1. See 6 C. L. 824.

2. Prior to Civ. Code 1895, § 2778, a recorded deed from an heir or devisee was inferior in dignity to an unrecorded deed of the ancestor, but since the passage of that act an unrecorded deed made by a testatrix is ordinarily to be regarded as inferior in dignity to a deed duly recorded subsequently made by her devisee to an innocent purchaser for value without notice of the prior conveyance. But this statute has no application to a case where the testatrix recognized in her will the title of her donee, and the purchaser from her devisee was thus put upon notice that the property conveyed to him formed no part of the estate of the testatrix, and could not be regarded as passing to the devisee under the residuary clause of the will. Equitable Loan & Security Co. v. Lewman, 124 Ga. 190, 52 S. E. 599. Persons dealing with the executor are bound by the will which gives the executor his powers and they cannot take the position of an innocent purchaser where such position contravenes the notice with which they are charged by the will. Mitchell v. Carrollton Nat. Bank, 29 Ky. L. R. 1228, 97 S. W. 45.

Duty of vendee to see to investment of funds: Where lands are devised to a woman under a will making the same her separate estate and providing that if they be sold "the purchaser must see to the reinvestment of the proceeds" in other real estate to be taken for her separate use, a grantee who failed to see to such reinvestment acquired no title to the property even against his grantors, such woman, and her husband. Bell v. Bair, 28 Ky. L. R. 614, 89 S. W. 732. See 4 Mich. L. R. 292.

3. See 6 C. L. 824.

4. A chattel mortgage is void as against creditors who have become such while the mortgage has been withheld from record. Rike v. Ryan [Ala.] 41 So. 959; American Book Co. v. Chapman, 119 Mo. App. 275, 95 S. W. 957. Under Laws 1897, c. 418, § 90, a failure for five years to record a chattel mortgage renders the same void even as against simple contract creditors whose claims accrued prior to filing, although they would not be entitled to attack the mortgage for fraud until their claims had been reduced to judgment. Skilton v. Codington, 185 N. Y. 80, 77 N. E. 790; Brockhurst v. Cox [N. J. Eq.] 64 A. 182.

5. A contract for the sale and delivery of personal property upon condition that the title is to remain in the vendor until the purchase price is paid is invalid as against purchasers in good faith, judgment, and attaching creditors of the vendee, without notice, unless a copy of the contract is verified and filed in the manner pointed out in Comp. St. 1887, c. 32, § 26. Starr v. Dow [Neb.] 108 N. W. 1065.

6. Under B. & C. Comp. St. § 5630, the recording of an unacknowledged chattel mortgage imports no notice of its existence, but under § 5633 where a subsequent mortgage has actual notice of the existence of such a mortgage, the latter is valid. This rule is not changed by the recording of both mortgages, under § 5632, in a county to which the property is removed. Williams v. First Nat. Bank [Or.] 87 P. 890.

7. Neither an unrecorded mortgage with no attempt to take possession nor an unrecorded mortgage where there was an attempted delivery by going to a tannery, "locating the different piles of bark, having them scaled and attaching to each pile a wooden block about six inches square," each marked with a letter of the alphabet, and all being delivered to the tannery as custodian of the mortgagee, is valid as against the tannery's trustee in bankruptcy. In re Shaw, 146 F. 273.

8. Sess. Laws 1899, p. 157, c. 98. Merritt v. Russell & Co. [Wash.] 87 P. 70.

9. Ballinger's Ann. Codes & St. § 4559. Merritt v. Russell & Co. [Wash.] 87 P. 70. This statute is not repealed by Sess. Laws 1899, p. 157, c. 98. Id.

10. To make it necessary that the assignment of a chattel mortgage be recorded, there must be a law providing for it, either in express terms or by necessary implication from the words used. No such implication arises from Kan. Gen. St. 1901, § 4251, par. 36, requiring satisfactions of chattel mortgages to be recorded or from the nonexistence of a statute prohibiting their recordation. National Live Stock Bank v. First Nat. Bank, 27 S. Ct. 79, 51 Law. Ed. —.

11. Where a bill of sale absolute in form is given and recorded to secure the payment of a note, it is not necessary to record the note. Greeson v. German Nat. Bank [Ark.] 95 S. W. 439.

12. Under B. & C. Comp. St. § 5630, the recording of an unacknowledged chattel mortgage imports no notice of its existence. Williams v. First Nat. Bank [Or.] 87 P. 890. Where the statute requires "immediate" recording, this means "as soon as may be by reasonable dispatch under the circumstances of the case." Brockhurst v. Cox [N. J. Eq.]

§ 3. *Registration and certification of land titles under the Torrens system.*[14]—Any person owning land, whether his title be of record or not, may maintain proceedings to register his title.[15] The proceeding is one in rem which operates directly to vest and establish title to the land [16] which is indefeasible, after the expiration of the statutory period, unless the registration was obtained by fraud.[17] Evidence establishing title good as against the world is, therefore, essential to warrant a decree awarding initial registration of a title; [18] but the court may grant relief as to such portion of a tract of land, less than the whole, as the evidence shows the applicant is entitled to in fee.[19] Where the applicant establishes a claim of title, one claiming under a tax deed has the burden of establishing the validity of such deed.[20] Unless otherwise provided or clearly inappropriate, all rules and principles of law applicable in equitable actions, and rules of practice with respect to the trial, evidence, findings and order of judgment, should be followed.[21] The matter of appeals is governed by statute.[22]

NOTICE OF CLAIM OR DEMAND; NOTICES, see latest topical index.

64 A. 182. Civ. Code 1902, § 950, provides that it shall be a sufficient record of any chattel mortgage, where the amount secured is not more than one hundred dollars, to enter upon an index book the names of mortgagor and mortgagee, the amount and character of the debt secured, a brief description of chattels pledged, the date of said mortgage and maturity of said debt and the date of presentation of said mortgage for record. Under this statute in the recording of a mortgage of less than $100, the entry in the index book under the heading "amount" $25 and the entry under the heading character of debt "L & M" are sufficient entries under those headings for a chattel mortgage in the amount of $25, although a clause in the mortgage set forth that the mortgage was for the purpose of securing also other indebtedness which might become due at a certain date. Bryant v. Thigpen, 73 S. C. 223, 51 S. E. 535, 53 S. E. 368.

13. Haynes & Bro. v. Gray & Co. [Ala.] 41 So. 615; Hirsh & Co. v. Beverly, 125 Ga. 657, 54 S. E. 678. A fortiori this is true where the purchaser assumes the payment of the mortgage debt as part of the consideration. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

14. See 6 C. L. 826.

15. The act provides that the "owner" may have his title registered. National Bond & Security Co. v. Andersen [Minn.] 108 N. W. 861.

16. First Nat. Bank v. Woburn [Mass.] 78 N. E. 307.

Boundaries of highways: Rev. Laws, c. 128, contains special provisions for determining the boundaries of highways and, when the application contains a request for such determination, the court has jurisdiction to determine. First Nat. Bank v. Woburn [Mass.] 78 N. E. 307.

Intent of testator: The court has jurisdiction to determine whether a testator's failure to provide for his children was intentional. Woodvine v. Dean [Mass.] 79 N. E. 882.

17. Baart v. Martin [Minn.] 108 N. W. 945. As long as the title remains registered in the name of the person guilty of the fraud, the decree and certificate of registration may be set aside in an action brought by the defrauded party within a reasonable time after notice of the fraud; and the mere fact that the statute does not in express words except fraud does not deprive a court of equity of the general jurisdiction to protect parties from the consequences of fraud. Id. Where the applicant knows the name of a claimant, such name should be stated in the application, for, as he is not an "unknown party," the concealment of his name is a fraud on the court, and a decree and certificate of registration issued thereunder may be vacated and set aside, unless an innocent purchaser for value has obtained rights on the faith of the record. Id.

18. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80. Where the applicant in support of his title offered a deed describing the land as Lot 19 in a certain subdivision and no plat of any subdivision was offered and there was no evidence that any plat or subdivision was ever made, the deed alone furnished no means of locating the lot and the proof in this respect was insufficient. Glos v. Ehrhardt, 224 Ill. 532, 79 N. E. 605. Where the applicant in support of his title offered a deed to C, a mortgage from C to himself, and a decree for sale of the land and a master's deed to himself, but there was nothing connecting this deed with the deed of trust the evidence was sufficient as title was in C and vested in the applicant under the master's deed. Id.

19. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80.

20. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80; Glos v. Hoban, 212 Ill. 222, 72 N. E. 1.

21. The examiner of titles occupies to the court, in which an application is pending which has been referred to him for examination, a position similar to that of a master in chancery. Glos v. Holberg, 220 Ill. 167, 77 N. E. 80. Evidence relied on to establish title should be introduced upon notice to defendant and, in such form, that objection can be interposed, and the rights of defendant preserved for review in case of an adverse decision. Id. It is not the province of the examiner to make ex parte examinations of abstracts of titles not introduced in evidence before him and such abstracts are not admissible until a proper

NOVATION.

Definition and Elements (1170).
Novation Between the Same Parties (1179).
Novation by the Substitution of New Parties (1179).
Essentials (1180).
Pleading and Proof (1180).
Legal Effect of Novation (1180).

Definition and elements.[23]—Novation is the substitution of one debtor by mutual agreement for another, whereby the old debt is extinguished.[24] It is distinguishable from the obligation arising from the assumption of a mortgage debt as a part of the purchase price,[25] which is enforceable without an application of the doctrine of novation.[26]

Novation between the same parties [27] does not result from the acceptance of a note for a debt standing on open account,[28] nor is the debt of a commercial firm necessarily novated by the acceptance of the joint note of the partners "to represent the purchase price" of goods sold on a credit to the firm.[29]

Novation by the substitution of new parties.[30]—Novation may be by substitution of a new party.[31] A form of novation known to the civil law is called "delegatio" wherein the debtor remains the same as at the first but a new creditor is substituted for the old.[32] In this form of obligation the concurrence of all three parties is requisite, the original creditor, on being otherwise satisfied, discharging the debtor, the new, or indicated, creditor, accepting the debtor as his own, and the debtor, on being discharged from the original contract, entering into the new obligation.[33]

foundation is laid for the introduction of secondary evidence. Id. Where an examiner's report as to title rests upon secondary evidence, he should report enough of the evidence introduced before him to show that a proper foundation was laid for the introduction of such secondary evidence. Id. The appellate court cannot consider an objection that the examiner erred in admitting certain secondary evidence under an exception to his report in that he erred in finding that plaintiff was seized in fee to the land in question. The exception should have been made specifically to the report and reserved in the trial court. Glos v. Hoban, 212 Ill. 222, 72 N. E. 1; Woodvine v. Dean [Mass.] 79 N. E. 882. Stat. 1905, p. 208, c. 288, providing that on appeal to the superior court the judge of the land court shall file a report of his decision and of the facts which shall be prima facie evidence as to matters contained therein, applies to a trial after the statute went into effect but commenced prior thereto. Id. Such a report finding that a testator's failure to provide for his children was intentional is sufficient although it does not set out the provisions of the will, the number of children left by testator, or the fact that respondent was one of them. The statute does not require that evidence shall be set out. Id. Where the applicant seeks to have the boundaries of a highway determined, the city has the right to appeal. First Nat. Bank v. Woburn [Mass.] 78 N. E. 307.

22. Originally there was no provision for the revision by the supreme court of questions of law arising in the land court, but questions of law arising upon trial in the superior court on appeal might be brought to the supreme court. Under Rev. Laws, c. 128, § 13, they may now be taken up direct. First Nat. Bank v. Woburn [Mass.] 78 N. E. 307.

23. See 6 C. L. 826.

24. Chenoweth v. National Bldg. Ass'n, 59 W. Va. 653, 53 S. E. 559. Entering into new agreement with assignee after bar of note by statute of limitations whereby debtor agreed to pay balance due in installments held not such novation as would extinguish original debt and create new one. American Mortgage Co. v. Rawlings [Ga.] 56 S. E. 110.

25, 26. Butler v. Bruce & Co. [Neb.] 106 N. W. 445.

27. See 6 C. L. 826.

28, 29. Fox v. Barksdale [La.] 42 So. 957.

30. See 6 C. L. 826.

31. Globe Ins. Co. v. Wayne [Ohio] 80 N. E. 13. An accepted order assigning on account of a pre-existing indebtedness whatever moneys might become due to the assignor as commissions or profits from a transaction managed by the acceptor has all the earmarks of a novation. Bank of Yolo v. Bank of Woodland [Cal. App.] 86 P. 820. Evidence held sufficient to show a substitution of a new party in place of one of the originals to an undertaking. Simmons v. Lima Oil Co. [N. J. Eq.] 63 A. 258. Where a creditor surrenders the note of his debtor and accepts in lieu thereof the note of third persons in pursuance of a contract between the debtor and such third persons, the transaction operates as a payment and discharge of the note. Gannon v. Cooke, 122 Ill. App. 615.

32, 33. Loper v. Somers, 71 N. J. Law, 657, 61 A. 85

Essentials.[34]—To constitute a novation there must be assent of parties express on implied [35] on consideration,[36] and an extinguishment of the original obligation.[37]

Pleading and proof.[38]—Novation must be specially pleaded.[39] The proof of a novation must be definite.[40] When it is sought to show an intent to substitute one debtor or one security for another, the intent that novation shall occur should be the only reasonable inference from the facts relied on.[41] The creditor cannot create a novation by his subsequent statements that he looked to the new debtor and not to the original.[42] A novation is never presumed but must be established by the full discharge of the original debt by the express terms of the agreement or the acts of the parties, whose intention must be clear.[43]

Legal effect of novation.[44]—In every novation the old debtor is released or the original debt extinguished.[45]

NUISANCE.

§ 1. Distinction Between Private and Public Nuisance (1180).
§ 2. What constitutes a Nuisance (1180).
§ 3. Right to Maintain; Defenses (1183).
§ 4. Remedies Against Nuisances (1184).
A. Abatement and Injunction (1184).
B. Criminal Prosecution (1187).
C. Action for Damages (1187).
D. Rights of Private Persons in Respect to Public Nuisances (1189).

§ 1. *Distinction between private and public nuisance.*[46]

§ 2. *What constitutes a nuisance.*[47]—Anything physically discomforting to persons of ordinary sensibility is a nuisance though it does not jeopardize health,[48]

34. See 6 C. L. 827.

35. Where liquor licenses were to be paid with funds furnished the applicants by a brewery, and the law required a return of the amount paid in case of refusal to issue a license, the brewery could not, as by novation, hold the county treasurer on his promise to return the fund to it, in the absence of a showing that applicants assented to the agreement. Hemrich Bros. Brewing Co. v. Kitsap County [Wash.] 88 P. 838. Where a purchaser of a building knew at the time of the purchase of a contract between his grantor and an adjoining landowner for the maintenance of an elevator at their joint expense, and after the purchase, with the knowledge and consent of the adjoining land-owner, proceeded to perform his part of the agreement, he thereupon became a party to the contract by novation. Globe Ins. Co. v. Wayne [Ohio] 80 N. E. 13.

36. Where a landlord on a sale of his tenants' stock inquired about his rent and the tenant replied that they had made arrangements for that and one of the purchasers stepped up and said "That is all provided for, I will see that you get your rent," and the landlord said: "All right, all I want is my rent," there was no discharge of the tenant or acceptance of the purchasers as the debtors in lieu of the tenant. Davis v. Dunn [Mo. App.] 97 S. W. 226.

37. Merely becoming responsible for the debt of another by consent of the debtor and creditor does not establish novation. (Chenoweth v. National Bldg. Ass'n, 59 W. Va. 653, 53 S. E. 559), but the debtor must be released (Id.). Evidence held insufficient to show release of original debtor. Draggo v. West Bay City Sugar Co., 144 Mich. 195, 13 Det. Leg. N. 245, 107 N. W. 911; Fitzgerald v. Thompson Towing & Wrecking Ass'n 143 Mich. 171, 12 Det. Leg. N. 961, 106 N. W. 853; Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 12 Det. Leg. N. 833, 106 N. W. 75. Agreement between brewing company, the architect of its building, the contractor therefor, and the purchaser of its stock and bonds, held a novation of the brewing company's obligation to the architect. Wyss-Thalman v. Beaver Valley Brewing Co. [Pa.] 65 A. 811. Opening an account with substituted debtors after the substitution held insufficient to establish novation. Chenoweth v. National Building Ass'n, 59 W. Va. 653, 53 S. E. 559.

38. See 6 C. L. 827.

39. Fox v. Barksdale [La.] 42 So. 957.

40. A mere statement that a debtor understood that notes given were payment pro tanto on the debt is insufficient to overcome a finding treating them as collateral. Grimnett v. Owsley [Ark.] 94 S. W. 694. The mere taking of a note, without some evidence that it was taken in satisfaction of the debt, does not constitute a novation. Gimbell & Sons v. King [Tex. Civ. App.] 95 S. W. 7.

41. Evidence held insufficient to establish an intent to substitute one obligation for another. Long v. Gump [C. C. A.] 144 F. 824.

42. Testimony of creditors that they looked to the new debtor and not to the original is incompetent on the issue of the existence of a novation. Wierman v. Bay City-Michigan Sugar Co., 142 Mich. 422, 12 Det. Leg. N. 833, 106 N. W. 75.

43. Chenoweth v. National Bldg. Ass'n, 59 W. Va. 653, 53 S. E. 559.

44. See 6 C. L. 824.

45. Where a debtor's attorneys gave his creditor a check against their individual account which was good for the amount of the check but at a time when they had not sufficient of the debtor's funds in their possession to meet the check, the debt was paid

and though persons may, in time, become so accustomed thereto as not to be affected [49] and others similarly situated were not disturbed.[50] A nuisance cannot be predicated of the result of the operation of natural causes, in the absence of an intervention of human agency.[51] The time when the annoying conditions are manifested,[52] the frequency of their recurrence,[53] and the character of the neighborhood,[54] are to be considered. The discharge of heated or impure air or air charged with offensive smells,[55] noxious gases, smoke, and fumes,[56] vitriol and other deleterious material from electric batteries,[57] collection of explosive or inflammable substances,[58] noise [59] and vibration,[60] keeping a gaming house,[61] sale of intoxicating liquors,[62]

at the time of giving the check and a note evidencing the debt surrendered. Upson v. Mt. Morris Bank, 103 App. Div. 367, 92 N. Y. S. 1101.

46. See 6 C. L. 827.

47. See 6 C. L. 828.

48. United States v. Luce, 141 F. 385.

49. Odors from fish fertilizer factories. United States v. Luce, 141 F. 385.

50. Seligman v. Victor Talking Mach. Co. [N. J. Eq.] 63 A. 1093.

51. Hence it is not the legal duty of railway company to ditch its right of way and make openings in its roadbed for the purpose of draining or removing from its right of way such water as accumulates and stands thereon because of the natural lay of the land. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 952, 92 S. W. 989.

52. Persons kept from sleeping at night by noise and vibrations of factory held entitled to enjoin the operation thereof from a reasonable hour at night till a reasonable hour in the morning. Seligman v. Victor Talking Machine Co. [N. J. Eq.] 63 A. 1093.

53. Frequency of recurrence of noisome smells from fish fertilizer factories during portion of year held to constitute a nuisance. United States v. Luce, 141 F. 385.

54. Hospital for contagious diseases. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897. Keeping and use of gasoline in and about frame garage adjacent to frame residences held a nuisance. O'Hara v. Nelson [N. J. Eq.] 63 A. 836. The existence of two factories in a neighborhood does not bring it within the rule that those in an industrial or manufacturing neighborhood have no redress for annoying conditions necessarily incident to the operation of the industries or factories. United States v. Luce, 141 F. 385. While the character of the neighborhood may be considered in determining the kind and degree of annoyance which will be regarded as a nuisance, it will not relieve from liability the person who caused the annoyance when the existence of a nuisance is proved.

Location of cyanide of sodium factory in factory neighborhood held no answer in suit by private individual for maintaining a nuisance. Roessler & H. Chemical Co. v. Doyle [N. J. Law] 64 A. 156.

55. Vaughan v. Bridgham [Mass.] 79 N. E. 739. The occupation of a building in a city as a **slaughterhouse** is prima facie a nuisance as to persons residing near it. City of Portland v. Cook [Or.] 87 P. 772.

City sewer. Cty of Madisonville v. Hardman, 29 Ky. L. R. 253, 92 S. W. 930; Murray v. Butte [Mont.] 88 P. 789.

Privy. Town of Vernon v. Edgeworth [Ala.] 42 So. 749.

Manufacture of Cyanide of Sodium. Roessler & Hasslacher Chem. Co. v. Doyle [N. J. Law] 64 A. 156.

Held not nuisances per se: In a city where there is no sewerage a cesspool is not a nuisance per se. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

Nuisances in fact: Evidence held to show that **odors** emanating from a **garage** were such as to entitle complainants to injunctive relief against the establishment as a nuisance. O'Hara v. Nelson [N. J. Eq.] 63 A. 836. That inmates of United States quarantine stations were materially annoyed and discomforted by offensive, noisome, and nauseating odors originating at or in the immediate vicinity of certain fish fertilizer factories and caused by their operation. United States v. Luce, 141 F. 385. Evidence held to sustain finding that slaughter house was not a nuisance per se under Wilson's Rev. & Ann. St. 1903, c. 56. Weaver v. Kuchler [Okl.] 87 P. 600. It is held in Washington that whether a slaughter house can be so conducted as not to amount to a nuisance is a question of fact. State v. Schaefer [Wash.] 87 P. 949. In Oklahoma that the maintenance of a slaughter house is not a nuisance per se as to persons not owning platted lands or lands in town site additions unless independent of the manner in which it is being used and conducted, its location, proximity and relation to the public make it so under Wilson's Rev. & Ann. St. 1903, c. 56. Weaver v. Kuchler [Okl.] 87 P. 600.

56. Asphalt factory. Sultan v. Parker-Washington Co., 117 Mo. App. 636, 93 S. W. 289. Electric power house. King v. Vicksburg R. & Light Co. [Miss.] 42 So. 204.

The emission of dense smoke. Atlantic City v. France [N. J. Law] 65 A. 894. See, also, Palmer v. District of Columbia, 26 App. D. C. 31.

57. Stokes v. Pennsylvania R. Co., 214 Pa. 415, 63 A. 1028.

58. Garage proprietors restrained from filling automobiles with gasoline in the building or storing automobiles containing gasoline. O'Hara v. Nelson [N. J. Eq.] 63 A. 836. Whether the business of storing dynamite was a nuisance per se by reason of inappropriate location has been held to be a question of fact. Remsberg v. Iola Portland Cement Co. [Kan.] 84 P. 548.

59. **Noise and vibration** of factory. Seligman v. Victor Talking Machine Co. [N. J. Eq.] 63 A. 1093. **Barking of dogs.** Herring v. Wilton [Va.] 55 S. E. 546. Malicious **beating on tin pans, fences,** and **iron** to an-

blasting,[63] obstructing or rendering unsafe a highway,[64] sidewalk,[65] street,[66] easements,[67] or navigable stream,[68] have been held to be nuisances; but an unsightly

noyance of adjoining landowner. Shellabarger v. Morris, 115 Mo. App. 566, 91 S. W. 1005.

Held not nuisances: Playing the game of baseball held not a nuisance per se as to persons living in the vicinity of the game. Spiker v. Eikenberry [Iowa] 110 N. W. 457.

60. By operation of factory. Seligman v. Victor Talking Machine Co. [N. J. Eq.] 63 A. 1093; Ganster v. Metropolitan Elec. Co., 214 Pa. 628, 64 A. 91.

61. Conducting place where **pools on horse races** are sold. State v. Vaughan [Ark.] 98 S. W. 685.

62. Brewing company held guilty of maintaining public nuisance in the wholesaling of liquors in a local option mining town without police protection. Jung Brewing Co. v. Com., 29 Ky. L. R. 939, 96 S. W. 595. And see Intoxicating Liquors, 8 C. L. 486.

63. Blasting stone in city held a public nuisance for which city was criminally liable. City of Paris v. Com., 29 Ky. L. R. 483, 93 S. W. 907.

64. One erecting on land not owned or controlled by himself, on which he has no legal right to enter, immediately adjacent to a traveled highway, machinery or objects calculated to and which do frighten horses is guilty of maintaining a nuisance. Illinois Cent. R. Co. v. Com., 29 Ky. L. R. 754, 96 S. W. 467 [first case]. Deprivation of a highway of lateral or subjacent support. Board of Chosen Freeholders v. Woodcliffe Land Imp. Co. [N. J. Law] 65 A. 844. Collection of water in an artificial channel and discharging it on a highway. Hynes v. Brewer [Mass.] 80 N. E. 503. Grant by city of exclusive right to particular persons to exclusive use of highway for automobile racing held violative of Pen. Code § 385, subsec. 3. Johnson v. New York [N. Y.] 78 N. E. 715. An obstruction of a highway not authorized by competent authority. Bischof v. Merchant's Nat. Bank [Neb.] 106 N. W. 996. Obstructing the easement of view of abutting owner on street. Id.

Excavation in road. Dunn & L. Bros. v. Gunn [Ala.] 42 So. 686. Whether **automobile race** conducted in highway was a nuisance held a question of fact. Johnson v. New York [N. Y.] 78 N. E. 715.

Held not nuisances: The use of a steam engine for purposes of traction on an ordinary roadway is not at common law a nuisance per se. McCarter v. Ludlum Steel & Spring Co. [N. J. Eq.] 63 A. 761.

65. Stone steps and stoop and railed areaway. City of New York v. U. S. Trust Co. 101 N. Y. S. 574.

Stairway. McCormick v. Weaver, 144 Mich. 6, 107 N. W. 314. Wire stretched from top of court house to post across adjoining street for use in acrobatic performance held a nuisance notwithstanding consenting attitude of municipality to its erection and maintenance. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057.

Held not nuisances: Steam pennnt roaster operated by gasoline as a fuel and occupying space between curb and sidewalk held not a nuisance per se. Frank v. Warsaw, 101 N. Y. S. 938. A **cellarway** in rented premises opening into a sidewalk in conformity to ordinance is not a nuisance so far as the landlord is concerned. Opper v. Hellinger, 101 N. Y. S. 616.

Electric sign suspended in front of theater building fourteen feet above sidewalk, extending six feet from the building line on to the sidewalk and weighing 200 to 350 pounds, according to the number of letters placed thereon held not a nuisance per se. Loth v. Columbia Theater Co., 197 Mo. 328, 94 S. W. 847.

Awnings constructed of wood, with metal roofs, fifteen feet above the street attached to substantial brick buildings, extending over the sidewalk for the distance of about ten feet and supported on the outer edge by posts resting on the sidewalk or curbing held not nuisances per se. Brown v. Carrollton [Mo. App.] 99 S. W. 37, criticising the Missouri doctrine in this respect.

Engine used in the construction of a public building and placed twenty-five feet inside the curb held not a nuisance entitling plaintiff to recover for injuries sustained by contact with a horse frightened by noise therefrom. Munro v. Wells Bros. Co., 101 N. Y. S. 900. Structure dangerous only under extraordinary conditions is not a nuisance.

Open stairway to basement, located in private alley and four feet from sidewalk. Sheehan v. Bailey Bldg. Co., 42 Wash. 535, 85 P. 44.

66. Robbins v. White [Fla.] 42 So. 841. Any obstruction of a public street in a town or city is a public nuisance. Robins v. McGehee [Ga.] 56 S. E. 461. Formation and maintenance of embankments in excavating for a sewer in a street so as to cause injury to abutting property by surface waters held a private nuisance. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351. Permitting an **accumulation of ice** to obstruct street for three days held a public nuisance for which a railroad company was criminally liable. Illinois Cent. R. Co. v. Com., 29 Ky. L. R. 756, 96 S. W. 467 [second case].

Purpresture and structures erected thereon maintained in public street by private individuals. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009. Whether **steam peanut roaster** operated with gasoline as fuel and occupying space between sidewalk and curb was a public nuisance is a question of fact. Frank v. Warsaw, 101 N. Y. S. 938. Whether the **obstruction** of a street by building material placed in front of plaintiff's place of business was **continued an unreasonable length of time** is a question of fact. Culbertson v. Alexander [Okl.] 87 P. 863. Whether **reasonable care** was exercised to prevent interference with the property or business of plaintiff by the obstruction of a street with building material held question of fact. Id.

Held not a nuisance: The **operation of a railroad** on a street is not, as to abutting owners, a nuisance per se. Brown v. Rea [Cal.] 88 P. 713. The **discharge of fireworks** in a city park is not a nuisance per se. De Agramonte v. Mount Vernon, 112 App. Div. 291, 98 N. Y. S. 454.

67. Unlicensed wharf obstructing the

structure is not a nuisance, though its existence impairs the value of adjacent property.[69] Neither a hospital for contagious diseases [70] nor a cemetery [71] is a nuisance per se. A municipality with power merely to prevent and remove nuisances has not authority to declare that a nuisance which is not a nuisance per se.[72]

§ 3. *Right to maintain; defenses.*[73]—That the acts complained of necessarily result from the exercise of a franchise is generally held a defense,[74] but if the franchise be exercised negligently [75] or in a manner not contemplated in its issue,[76] or after condition broken,[77] it is no protection; and the better rule seems to be that the franchise only prevents injunctive relief and does not bar liability in damages.[78] Governmental authorization,[79] as by a valid license, relieves from liability [80] for acts authorized thereby [81] until it is revoked; [82] but license laws will not ordinarily be

right of access and departure by water, of owner or tenant of land bordering on tidewater, is to the extent of such obstruction a nuisance abatable at the suit of the owner or tenant. Whitmore v. Brown [Me.] 65 A. 516. See post, § 4 C. Trial, as to existence of nuisance being a question for the jury.

68. Unnecessary obstruction of steam by railroad embankment nuisance under statute. Graham v. Chicago, etc., R. Co. [Ind. App.] 77 N. E. 57, 1055.

Held not nuisances: In Virginia it is held that a **mill dam** lawfully established is not prima facie a nuisance. Va. Code 1904, expressly excepts dams used to work a mill as an obstruction of a watercourse constituting a nuisance. Jeremy Imp. Co. v. Com. [Va.] 56 S. E. 224. A **drawbridge** over a navigable stream is not a nuisance per se. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877.

69. Wharf. Whitmore v. Brown [Me.] 65 A. 516.

70. State v. Inhabitants of Trenton [N. J. Eq.] 63 A. 897. Evidence sufficient to sustain charge of maintaining **pest house** so as to become a nuisance by permitting the spread of contagious diseases. Id.

71. Payne v. Wayland [Iowa] 109 N. W. 293.

72. Brown v. Carrollton [Mo. App.] 99 S. W. 37. An ordinance requiring billboards to be constructed not less than ten feet from the street line cannot be sustained as a valid exercise of the police power. City of Passaic v. Paterson Bill Posting, Advertising & Sign Painting Co., 72 N. J. Law, 285, 62 A. 267. Where a local board is authorized to make orders for the suppression of nuisances and to sue to enjoin their violation, such an order is not, in a suit thereon, even prima facie that the alleged nuisance is such. Complaint must allege facts. Village of White Plains v. Tarrytown, etc., R. Co., 102 N. Y. S. 1046.

73. See 6 C. L. 831.

74. St. Louis, etc., R. Co. v. Shaw [Tex.] 15 Tex. Ct. Rep. 129, 92 S. W. 30, rvg. [Tex.] Civ. App.] 13 Tex. Ct. Rep. 45, 88 S. W. 817. Use of spur track adjacent to plaintiff's residence premises in reasonable manner held not actionable. Thomason v. Seaboard Air Line R. Co., 142 N. C. 318, 55 S. E. 205.

75. Use of spur track adjacent to plaintiff's residence premises held actionable. Thomason v. Seaboard Air Line R. Co., 142 N. C. 318, 55 S. E. 205.

76. Use of street by railroad for yard when right of way only was granted. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

77. Use of steam whistle or signal and bituminous coal as fuel by railroad in violation of ordinance granting use of street on condition that such signal and fuel should not be used held to entitle private citizen to injunction under act June 19, 1871, P. L. 1360. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798. Telephone line not completed in time. Keystone State Tel. & T. Co. v. Redley Park Borough, 28 Pa. Super. Ct. 635.

78. The right of an adjoining owner to damages is not impaired by the fact that the injury necessarily results from the exercise of a franchise on land acquired by eminent domain. Smoke, cinders, etc., from electric power house. King v. Vicksburg R. & Light Co. [Miss.] 42 So. 204.

79. Where a **bridge** over a navigable stream is **built in conformity to an act of congress** reserving no right to amend, modify, or repeal the same, it cannot be abated by the courts as a nuisance in the absence of appropriate legislation and just compensation. United States v. Parkersburg Branch R. Co. [C. C. A.] 143 F. 224.

80. Operation of properly equipped bowling alley under license. Levin v. Goodwin, 191 Mass. 341, 77 N. E. 718. Nor can the court change the hours named in the license as to the time of operating the business (Id.), or interfere with respect to the nature of the place of operation of a licensed business (Id.).

81. License to use street for private business even if valid is no defense to injury to property by manner of conducting it. Kuhl v. St. Bernard Rendering & Fertilizing Co., 117 La. 86, 41 So. 361. Suspension of electric sign over sidewalk in front of theater building held not authorized by ordinance. Loth v. Columbia Theatre Co., 197 Mo. 328, 94 S. W. 847. Contracts of a city for the construction of asphalt pavements and ordinances requiring the use of asphalt in such work are not implied or constructive licenses to the contractors to operate an asphalt factory at any particular place. Sultan v. Parker-Washington Co., 117 Mo. App. 636, 93 S. W. 289.

82. The grant of a license to operate a business that may constitute a nuisance is not a contract. City of Portland v. Cook [Or.] 87 P. 772. Hence a cancellation is not an impairment of the obligation of a contract. Id.

construed as allowing the licensing of a nuisance, and municipalities have no power to permit by license or otherwise a private use of public ways in derogation of the public easement.[83] A statute giving municipalities power to establish cemeteries does not give an absolute discretion as to location or authorize the creation of a nuisance.[84] The possession of the power of eminent domain does not relieve one guilty of the maintenance of a nuisance from liability for injury caused thereby to real property of others prior to an exercise of the right.[85] In Massachusetts it is held that the right to maintain a public nuisance cannot be gained by prescription.[86] and in California the rule is statutory.[87] Where statutes in pari materia provide that limitations shall not apply to lands belonging to the public and that the state shall be barred the same as private individuals, a prescriptive right thereunder to obstruct a street cannot be claimed to defeat a suit by the state to abate the obstruction as a public nuisance.[88] Want of intent to injure or do a wrongful act is no defense for maintaining a nuisance.[89] One is not precluded from complaint of a nuisance affecting his property by the fact that he acquired the property with knowledge of its existence,[90] but contributory negligence bars an action to recover damages,[91] and one who impliedly licenses a structure cannot complain of the results of its proper use.[92]

§ 4. *Remedies against nuisances. A. Abatement and injunction.*[93]—A mu-

83. The board of estimate and appraisement of New York City has been held to have no power to grant the right to private persons of using highway for the construction of a private railway for the use of a single individual. Hatfield v. Strauss, 102 N. Y. S. 934. Saginaw City held powerless to grant permit to erect stairway on sidewalk in view of its charter, tit. 17 p. 116, § 8, forbidding grant of exclusive privileges to use of streets or public grounds. McCormick v. Weaver, 144 Mich. 6, 107 N. W. 314. Cities of the fourth class in Missouri, though given control over their streets by the legislature, cannot lawfully license private individuals to take up any considerable portion of a street with an obstruction. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009. Police jury has no power to license private use of street to exclusion of public. Kuhl v. St. Bernard Rendering & Fertilizing Co., 117 La. 86, 41 So. 361.

84. Payne v. Wayland [Iowa] 109 N. W. 203.

85. Ganster v. Metropolitan Elec. Co., 214 Pa. 628, 64 A. 91.

86. Maintenance of structures without change for fifty years held to give no prescriptive right to maintain public nuisance thereby created. Hynes v. Brewer [Mass.] 80 N. E. 503.

87. Civ. Code, § 3440. McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082, afd. [Cal.] 83 P. 1085.

88. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

89. Shreck v. Coeur d'Alene [Idaho] 87 P. 1001.

90. Where persons purchase property adjacent to a cemetery constituting a nuisance to their knowledge, they are not estopped to object to an enlarged danger by the establishment of an addition to the grounds. Payne v. Wayland [Iowa] 109 N. W. 203. One maintaining a nuisance injuriously affecting another's improvements cannot justify the nuisance on the ground that it existed when complainant's improvements were erected. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177. The mere fact that one voluntarily "comes to" a nuisance will not preclude the granting of relief to him against the nuisance. United States v. Luce, 141 F. 385.

91. Where plaintiff who was an adjoining land owner on a railroad right of way was injured by stagnant water accumulated by insufficient drainage through the railroad's artificial embankment he could recover as for the maintenance of a nuisance without showing the railroad to be negligent. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 952, 92 S. W. 989. Whether plaintiff in an action to recover for injuries sustained because of the maintenance of a nuisance in a city street was guilty of **contributory negligence** held a question for the jury. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057. Spectator at illegal automobile race injured by machine swerving from its course held not entitled to recover damages therefor in absence of proof of negligence and want of contributory negligence. Johnson v. New York [N. Y.] 78 N. E. 715. A city is not liable for an injury caused by a negligent obstruction of its streets by a street carnival where the obstruction could slightly less conveniently have been avoided by driving through an unobstructed street. Bechtel v. Mahoney City Borough, 30 Pa. Super. Ct. 135.

92. One who initiated industry complained of and sold the same to defendants with more land for enlargement held not entitled to equitable relief from increased annoyance even though complainant did not know that the increased capacity would increase the annoyance from soot, cinders and ashes. Woodard v. West Side Mill Co. [Wash.] 86 P. 579.

93. See 6 C. L. 832.

nicipality may, in the exercise of its police power,[94] abate a public nuisance,[95] and one injured by a private nuisance may lawfully abate the same when the person guilty of maintaining it refuses to abate it.[96] A town with power merely to prevent and remove nuisances has not authority to summarily abate as a nuisance that which it has declared to be such, but which is not a nuisance per se.[97] It is said the authority of a city to abate nuisances erected within its bounds by the county in which it is situate is undoubted.[98] In Missouri the equity practice permitting a county prosecuting attorney to proceed in equity for the abatement of a public nuisance is reinforced by statute.[99] A suit to abate a nuisance declared by a village board of health to exist is properly brought in the name of the village in New York.[1] The commissioners of the District of Columbia may maintain a bill in their own names and behalf to enjoin the obstruction of the streets of the District,[2] and the ownership of the fee of the streets is immaterial on the question.[3]

Injunction.[4]—The remedy by injunction rests in discretion,[5] and as in other cases, is granted only when there is no adequate remedy at law,[6] and where the right threatened thereby is clear and the fact is clearly established that the proposed structure will infringe such right.[7] It is only in extreme cases that equity will exercise its powers to compel the removal of existing structures on land though they may be a nuisance, but will leave the plaintiff to his remedy at law.[8] It must be promptly sought.[9] When civil property rights are not affected by the maintenance

94. The abatement of a public nuisance for the public safety on a conviction for maintaining the same comes under the police power of the state (Jeremy Imp. Co. v. Com. [Va.] 56 S. E. 224), and is not a taking of private property for a public use within the constitutional requirement that compensation must be allowed (Id.)

95. Municipality may, after notice, remove poles of telephone company which has not complied with condition as to time of completion of line. Keystone State Tel. & T. Co. v. Ridley Park Borough, 28 Pa. Super. Ct. 635. The power of a municipality to summarily abate an obstruction of a street extends only to streets opened and in public use. Street never laid out and land in private use. Robins v. McGehee [Ga.] 56 S. E. 461.

96. Under Civ. Code, § 4591. Murray v. Butte [Mont.] 88 P. 789.

97. Brown v. Carrollton [Mo. App.] 99 S. W. 37.

98. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

99. State v. Vandalia, 119 Mo. App. 406, 94 S. W. 1009.

1. Under Public Health Law (Laws 1893, c. 661, p. 1502). Village of White Plains v. Tarrytown, etc., R. Co., 102 N. Y. S. 1046. It is not enough to allege and prove on the trial that the board of health has declared a nuisance and ordered it abated. Id.

2. Projection of show window over building line as obstruction. Guerin v. Macfarland, 27 App. D. C. 478.

3. Guerin v. Macfarland, 27 App. D. C. 478.

4. See 6 C. L. 832.

5. Mountain Copper Co. v. U. S. [C. C. A.] 142 F. 625. In a suit to enjoin a nuisance where the plaintiff has shown a condition which the defendant admits constitutes a nuisance the discretion of the court should be liberally exercised in favor of plaintiff. Plaintiff held entitled to injunction pendente lite against maintenance of village dump so as to constitute a nuisance. Shreck v. Coeur d'Alene [Idaho] 87 P. 1001.

6. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177. Injury resulting from noisome or foul odors producing personal discomfort and annoyance is not susceptible of compensation in damages according to any approximately correct measure and from its recurrence would lead to a multiplicity of suits. United States v. Luce, 141 F. 385. Equity is not deprived of jurisdiction to grant injunctive relief merely because relief may be had by proceeding under a statute or ordinance. Herring v. Wilton [Va.] 55 S. E. 546. A permanent nuisance is one of such character, and which exists under such circumstances that it will be presumed to continue indefinitely. Bischof v. Merchants' Nat. Bank [Neb.] 106 N. W. 996. Projection into street of structure not an essential part of building held not permanent. Remedy is not adequate for a continuing nuisance which may be temporary or permanent, the injury from which is incapable of precise measurement. Obstruction of street. Sloss-Sheffield Steel & Iron Co. v. Johnson [Ala.] 41 So. 907.

7. Whitmore v. Brown [Me.] 65 A. 516. Injunction will be denied when a threatened injury may or may not become a nuisance, according to circumstances, or when the injury apprehended is doubtful, contingent, or eventual, merely. Winsor v. Hanson, 40 Wash. 423, 82 P. 710.

8. Whitmore v. Brown [Me.] 65 A. 516.

9. United States held not guilty of laches in seeking injunctive relief against a nuisance affecting a quarantine station. United States v. Luce, 141 F. 385. Mere lapse of time short of the prescriptive period cannot operate as a bar to equitable relief against a nuisance. Id. When complain-

of a common nuisance, equity has no jurisdiction to grant injunctive relief,[10] nor does injunction lie to restrain the carrying on of a public nuisance indictable and punishable under the criminal law.[11] The acts of several persons may together constitute a nuisance which the courts will restrain, though the damage occasioned by the acts of any one, taken alone, would be inappreciable,[12] but acts which are but a remote cause of the injury will not be enjoined in a suit where the parties proximately causing it are not joined.[13] The relative effect upon the parties of granting or refusing injunctive relief from a nuisance is a consideration affecting the exercise of the court's discretion.[14] When the facts are clear, it is the duty of the court, on application for injunction, to determine the question whether a given state of facts constitutes a nuisance.[15] The government cannot be forced to acquire by purchase or condemnation all the territory within the sphere of operation of a nuisance objectionable to it.[16] A suit to enjoin the removal of a boom in a stream passing through plaintiff's land which is by cross complaint made a suit also to enjoin the obstructions of the stream is not terminated by the boom being carried out by high water before the trial.[17] The bill must set forth the facts rather than legal conclusions.[18] The decree should go no further than the necessities of the

ants have been guilty of laches in seeking equitable relief, the court may decree damages payable in lieu thereof, subject to the enforcement of injunctive relief on failure to pay the damages found to be due. McCleery v. Highland Boy Gold Min. Co., 140 F. 951. The absence of a property owner from the state is no excuse for failure to seek his equitable remedy for the maintenance of a nuisance injuriously affecting the property. Id. The larger financial interest to be affected by the granting of injunctive relief against the maintenance of a nuisance injurious to the real property of another is no impediment to the granting of relief in favor of persons of small means. Id. The right to equitable relief against a nuisance may be lost by laches. Ten years' delay in proceeding held fatal laches. Whitmore v. Brown [Me.] 65 A. 516. The lack of promptness and effectiveness of the civil and criminal remedies gives equity jurisdiction to abate the maintenance of a nuisance. Obstruction of highway. Letherman v. Hauser [Neb.] 110 N. W. 745. Where the building of a garage alleged to be a nuisance was commenced some time in the middle of October, the filing of a bill for injunctive relief against it on November 5th, did not show laches preventing injunctive relief (O'Hara v. Nelson [N. J. Eq.] 63 A. 836), but to effect such result there must also be shown a change in the situation of the parties whereby the one has been put in a worse condition by the delay of the other (Bischof v. Merchants' Nat. Bank [Neb.] 106 N. W. 996). Delay of ten days after lodging protest held not to constitute laches forbidding maintenance of injunction proceedings. Id.

10. State v. Vaughan [Ark.] 98 S. W. 685.

11. As the carrying on of a pool room for selling pools on horse races. State v. Vaughan [Ark.] 98 S. W. 685.

12. United States v. Luce, 141 F. 385.

13. Equity will not enjoin the owner of vacant lots from permitting persons who use the same without permission or compensation in the playing of games thereon which are not nuisances per se. The fact that batted balls by baseball players occasionally passed onto plaintiff's adjoining premises and the players committed trespasses in retrieving the balls held not conclusive of equity jurisdiction. Spiker v. Eikenberry [Iowa] 110 N. W. 457.

14. Mountain Copper Co. v. United States [C. C. A.] 142 F. 625. The fact that defendants have invested a considerable amount of money cannot clothe them with immunity for creating or contributing to and maintaining a nuisance. United States v. Luce, 141 F. 385. Where complainant's loss would be but a mere trifle in comparison to the loss inflicted on defendant and those dependent on and benefited by it, injunction will be refused. Mountain Copper Co. v. U. S. [C. C. A.] 142 F. 625.

15. O'Hara v. Nelson [N. J. Eq.] 63 A. 836.

16. United States held not required to purchase fish fertilizer factory sites to abate nuisance caused thereby affecting its quarantine station. United States v. Luce, 141 F. 385.

17. Winsor v. Hanson, 40 Wash. 423, 82 P. 710.

18. Neither the averment that defendant made "a deep and wide trench therein, which greatly obstructs and impedes traffic in said street" (Brown v. Rea [Cal.] 88 P. 713), nor that the defendants are constructing and intend to operate a four-track railroad on the street in front of complainant's premises is sufficient (Id.). Petition held sufficient as against exception as to public character of street obstructed. City of New Orleans v. New Orleans Jockey Club, 115 La. 911, 40 So. 331. Allegations tending to show that business of storing dynamite was being located in unnecessarily close proximity to the public highway frequently traveled by plaintiffs and their families, and to the residence and other buildings of plaintiffs held proper in a petition to enjoin the same as a nuisance. Reinsberg v. Iola Portland Cement Co. [Kan.] 84 P. 548.

case require,[19] but may prohibit acts which the defendant disclaims any intention of committing.[20]

(§ 4) *B. Criminal prosecution.*[21]—The maintenance of a public nuisance was a crime at common law[22] and many specific nuisances are declared by statute or ordinance.[23] When a prosecution is had under an ordinance defining and punishing an act as constituting a nuisance, but before judgment of guilty is pronounced the ordinance is repealed by an ordinance containing no saving clause respecting violations of the prior law, but providing a new punishment for the same offense, the conviction is valid.[24] It is no defense that the nuisance complained of is contributed to by the acts of others over whom the defendant has no control, when there would be a nuisance without such contribution.[25] To sustain a conviction for the maintenance of a nuisance it is essential that the thing or act which is the ground of the prosecution be shown to be the direct and proximate cause of the nuisance.[26] An indictment for obstructing a highway should aver that the obstruction has been permitted to exist an unreasonable or unnecessary period of time.[27] The complaint[28] and judgment[29] are sufficient if they substantially state the elements of the offense. Conditions produced in adjacent premises may be shown.[30]

(§ 4) *C. Action for damages.*[31]—While one is liable only for damages proximately resulting from his acts,[32] the maintenance of structures which but par-

19. Injunction against extension of railroad freight facilities in center of town modified by compelling railroad to erect and maintain gates and gatemen to protect from danger. City of Hickory v. Southern R. Co. [N. C.] 55 S. E. 840, modifying on rehearing 53 S. E. 955. Injunction will go only to the wrongful use of premises when they may be used lawfully without constituting a nuisance. Decree enjoining slaughter house as nuisance held properly modified to permit its conduct lawfully. Weaver v. Kuchler [Okl.] 87 P. 600. The mere fact that a business not a nuisance per se operated to contribute to the creation of a nuisance will not justify the abolition of the franchise of the owner to conduct the business. Abolition of franchise for slaughtering animals in Havana, Cuba, by Major General of United States Army during American occupation, held wrongful. O'Reilly de Camara v. Brooke, 142 F. 858. An order absolutely prohibiting continuation of a business which is not a nuisance per se is too broad. State v. Schaefer [Wash.] 87 P. 949.

20. Injunction against maintenance of nuisance by railroad in using street for switching held warranted notwithstanding the building of a depot which in the future by the time the decree was to take effect would enable the defendant to avoid the continuation of the nuisance. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

21. See 6 C. L. 835.

22. Railroad guilty of obstructing highway by placing cars therein for unreasonable length of time held indictable at common law. Commonwealth v. Illinois Cent. R. Co., 29 Ky. L. R. 102, 92 S. W. 944.

23. Pool selling at race track public nuisance punishable under B. & C. Comp. § 1930. State v. Ayers [Or.] 88 P. 653. See also, such topics as Betting and Gaming, 7 C. L. 434; Intoxicating Liquors, 8 C. L. 486.

24. Conviction for maintaining slaughter house in city held valid. City of Portland v. Cook [Or.] 87 P. 772.

25. Jeremy Imp. Co. v. Com. [Va.] 56 S. E. 224.

26. Evidence held insufficient to show dam to be direct and proximate cause of conditions alleged to arise therefrom. Jeremy Imp. Co. v. Com. [Va.] 56 S. E. 224.

27. General averment in indictment for permitting it to obstruct highway held sufficient. Illinois Cent. R. Co. v. Com., 29 Ky. L. R. 756, 96 S. W. 467 [second case].

28. Complaint under ordinance relating to emission of smoke in such quantity as to cause deposit of "soot or other substance" need not describe the deposit. Atlantic City v. France [N. J. Law.] 65 A. 894.

29. Disturbance of any person by emission of smoke not being an element of the Atlantic City ordinance, the judgment need not find it. Atlantic City v. France [N. J. Law] 65 A. 894.

30. On a prosecution for maintaining a slaughter house at a certain place so as to constitute a nuisance, evidence tending to show that blood and water and putrid matter were permitted to flow from the premises described, into and beyond the public highway adjoining was admissible. State v. Schaefer [Wash.] 87 P. 949.

31. See 6 C. L. 836.

32. Salt company held erroneously mulcted for damages contributed to by railroad. Southern Salt Co. v. Roberson [Tex. Civ. App.] 16 Tex. Ct. Rep. 887, 97 S. W. 107. Where conditions amounting to a nuisance arise from properties of different persons, each is liable for no more than the proportion contributed by the conditions existing on his own property. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 952, 92 S. W. 989. Whether the tort of a city in permitting the erection of an obstruction in a street was the proximate cause of plaintiff's injuries held for jury. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057.

tially contribute to the creation of a public nuisance is sufficient to render the owner liable for injury caused thereby.[33] The rule that a purchaser of land is not liable for a nuisance created thereon by his grantor until after notice to abate it does not apply where the nuisance consists in violation of statute,[34] and the purchaser is liable without notice if he uses the structure.[35] A lessor is liable for a nuisance created by his lessee if such nuisance was the natural result of the execution of the purpose of the demise,[36] or if he fails to exercise a reserve power to terminate the lease if such purpose is so exercised as to create a nuisance.[37] Where a landowner leases his premises and surrenders his possession with a nuisance thereon which he has created or of which he has either actual or constructive notice he is liable therefor.[38] Injuries resulting from a permanent nuisance must be sued for in one action,[39] and every injury to person and property that plaintiff has sustained by reason of a nuisance may be recovered in one action.[40] Recovery in an action for a continuing nuisance is no bar to an action for damages caused thereby, subsequently accruing to the same property.[41] A city is liable in damages for maintaining a nuisance,[42] and a statute requiring a city to keep its streets free from nuisances renders it liable for injury from its officers allowing the maintenance of a nuisance therein even though they had no power to consent to the maintenance of the nuisance.[43] Limitations when available begin to run from the time the nuisance was established irrespective of the time when plaintiff ascertained the character of the injury.[44] The leasing of premises by defendant during the period covered by the existence of a nuisance maintained thereon raises a presumption of his ownership thereof.[45] Municipal permission to maintain the structure complained of must be specially pleaded.[46] If the proof of nuisance fails, the action cannot be sustained as one for negligence,[47] but an action for nuisance does not fail because a needless averment of negligence was not proved.[48] On proof of the existence of

33. Hynes v. Brewer [Mass.] 80 N. E. 503.

34. Unnecessary obstruction of stream by railroad. Burns' Ann. St. 1901, § 5153. Graham v. Chicago, etc., R. Co. [Ind. App.] 77 N. E. 57, 1055.

35. Central Consumers' Co. v. Pinkert, 29 Ky. L. R. 273, 92 S. W. 957. Railroad using bridge built by predecessor to impinge on highway. State v. Lehigh & H. R. Co. [N. J. Law] 63 A. 857. The liability for maintaining structures which bring about a public nuisance is not changed by the fact that the owner received the property while they were standing on it. Hynes v. Brewer [Mass.] 80 N. E. 503.

36. Blasting. Board of Chosen Freeholders v. Woodcliffe Land Imp. Co. [N. J. Law] 65 A. 844.

37. Board of Chosen Freeholders v. Woodcliffe Land Imp. Co. [N. J. Law] 65 A. 844.

38. Uggla v. Brokaw. 102 N. Y. S. 857. In an action against a landlord for injuries received by the blowing down of a skylight from his leased premises, the burden is on plaintiff to show that the skylight was not originally securely attached to the building. Id.

39. Virginia Hot Springs Co. v. McCray [Va.] 56 S. E. 216.

40. Sickness, disease, annoyance, discomfort, and injuries to property. City of Madisonville v. Hardman, 29 Ky. L. R. 253, 92 S. W. 930. City sewer held a permanent nuisance. Id.

41. Ganster v. Metropolitan Elec. Co., 24 Pa. 628, 64 A. 91.

42. Murray v. Butte [Mont.] 88 P. 789. After notice and refusal to abate, a city is liable in damage for the maintenance of a nuisance caused by allowing private persons to connect their sewers with its surface water gutters and emptying the filth on a vacant lot adjacent to plaintiff's residence. City of Vicksburg v. Richardson [Miss.] 42 So. 234. The liability of a city as for the maintenance of a private nuisance in the disposition of dirt in excavating for a sewer by a contractor is sustainable on the ground that its control over the public streets and the right of supervision charges it with the duty not to erect a private nuisance or permit the continuance of one by its contractor. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351.

43. City held liable to person injured by fall of acrobatic performer on wire stretched over sidewalk on which injured person was standing. Wheeler v. Ft. Dodge [Iowa] 108 N. W. 1057.

44. Virginia Hot Springs Co. v. McCray [Va.] 56 S. E. 216.

45, 46. Blake v. Meyer, 110 App. Div. 734, 97 N. Y. S. 424.

47. When proof of the existence of a nuisance fails in an action for injuries alleged to have resulted therefrom, recovery cannot be sustained on the ground that the injuries were the result of negligence. Opper v. Davega, 101 N. Y. S. 621.

48. Stokes v. Pennsylvania R. Co., 214 Pa. 415, 63 A. 1028.

a nuisance for which damages are claimed, nominal damages at least are recoverable.[49]

Damages.[50]—One suing for permanent injury to property by the maintenance of a nuisance elects to recover all damages sustained or thereafter to accrue because of the nuisance.[51] The measure of damages for the maintenance of a nuisance is the amount which will compensate the injured party for all detriment proximately caused thereby,[52] hence is entitled to recover for the diminution in its fair market value,[53] and the amount, as in other cases, rests largely in the discretion of the jury.[54] Under the rule obtaining in Mississippi where damage by physical invasion of deleterious agents produced by different persons or corporations is shown, in an action to recover therefor, it should be left to the jury to say from which and to what extent,[55] but with a continuing cause of damage, whereby the restoration of value, depreciated during the previous proprietorship, by such annoying conditions has been prevented, the fact of former damage is immaterial on the question of the liability of the successor in interest.[56] In the absence of a continuing cause of damage, after the acquisition of property, the successor in interest is not liable for damage accruing during a preceding proprietorship from annoying conditions.[57] Punitive or exemplary damages are recoverable in a second suit for a continuance of a private nuisance.[58] When specially pleaded and proved, special damages are recoverable in an action for maintenance of a nuisance.[59] Evidence of physical discomfort on the part of plaintiff and his family,[60] depreciation in the value of his property,[61] and nauseating sights [62] incident to the maintenance of the nuisance sued for, is admissible.

(§ 4) *D. Rights of private persons in respect to public nuisances.*[63]—In order that a private person may maintain an action for relief against a public nuisance, he must sustain a special injury therefrom different in kind from and in addition to that sustained by the general public [64] but this rule does not apply to nuisances

49. Hence it is error to direct a nonsuit. Stokes v. Pennsylvania R. Co., 214 Pa. 415, 63 A. 1028.

50. See 6 C. L. 839.

51. Central Consumers' Co. v. Pinkert, 29 Ky. L. R. 273, 92 S. W. 957.

52. Under Civ. Code, § 4330, Murray v. Butte [Mont.] 88 P. 789. The basic principle to be followed in the measurement of damages in nuisance cases is that applying to other cases arising in tort. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351. When a person injured by a private nuisance abates the same, the necessary expense so incurred is a part of the detriment proximately caused by the maintenance of the nuisance and recoverable as an element of his damages. Murray v. Butte [Mont.] 88 P. 789.

53. Central Consumers' Co. v. Pinkert, 29 Ky. L. R. 273, 92 S. W. 957. The injured party is entitled to adequate compensation for the damages actually sustained up to the commencement of the suit as the direct result of the nuisance. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351; City of Madisonville v. Hardman, 29 Ky. L. R. 253, 92 S. W. 930. Where damages are sought to be recovered for the maintenance of a nuisance alleged to have rendered plaintiff's property unfit for any purpose, the depreciation in the value of plaintiff's property is the measure of his damage. City of Huntington v. Stemeh [Ind. App.] 77 N. E. 407. Evidence held to show **a depreciation in the value of plaintiff's property by** the maintenance of a nuisance. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

54. $4,000 held not excessive damages to keeper of boarding house on leased premises exposed to injuries from nuisance. Bly v. Edison Elec. Illuminating Co., 111 App. Div. 170, 97 N. Y. S. 592. $4,000 held not excessive damages for injuries to plaintiff's residential property from the generation and escape of poisonous gases produced by reducing common salt to its elements, viz: caustic soda and chlorine gas. Rock v. Acker Process Co., 112 App. Div. 695, 98 N. Y. S. 977. $500 held not excessive damages for maintenance of sewer by city so as to constitute a nuisance. City of Madisonville v. Hardman, 29 Ky. L. R. 253, 92 S. W. 930.

55, 56, 57. King v. Vicksburg R. & Light Co. [Miss.] 42 So. 204.

58. Ganster v. Metropolitan Elec. Co., 214 Pa. 628, 64 A. 91.

59. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351. Where special damage from the maintenance of a nuisance was claimed for injuries to plaintiff's property from surface waters, plaintiff's testimony alone that she removed mud deposited in her cellar entitled her to recover therefor without opinion evidence as to the value of such services. Id.

60, 61, 62. Town of Vernon v. Edgeworth [Ala.] 42 So. 749.

63. See 6 C. L. 840.

64. Held specially damaged: Private citizen whose property valuation was injur-

causing injury to property, health, or comfort, though a great number of persons are equally affected.[65] That a structure was erected without obtaining a license required by law gives no right of abatement at private suit in the absence of special damage.[66] In Pennsylvania private citizens are authorized by statute to challenge the authority of a corporation to the possession of a right or franchise to do an act from which injury to their property is imminent.[67] A statute defining a nuisance and providing a remedy available to certain persons is not applicable when the remedy is sought to be enforced by persons not within the class designated.[68] A declaration by a private person must state the facts authorizing him to sue.[69]

iously affected by the encroachment of defendant's building on the sidewalk though his property was 26 feet distant from the encroachment. Close v. Witbeck, 102 N. Y. S. 904. Abutting owner of sawmill getting logs by river above and below proposed bridge alleged to contemplate obstruction of navigation. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877. Owner of property abutting on alley held entitled to injunctive relief against its obstruction by closing at both ends. Harniss v. Bulpitt, 1 Cal. App. 140, 81 P. 1022. See 6 Columbia L. R. 203. The owner of vacant lots adjoining the property of another let for the maintenance of a house of prostitution is entitled to injunctive relief against the continuance of the nuisance before the erection of any building on his property. Dempsie v. Darling, 39 Wash. 125, 81 P. 152. See 6 Columbia L. R. 56. Private citizen whose property would be damaged and who would be rendered in a position of danger thereby held entitled to injunctive relief against proposed construction in highway of underground electric railway for private use of defendants. Hatfield v. Strauss, 102 N. Y. S. 934. Wooden building within fire limits in violation of ordinance enjoined at suit of enjoining owner. Bangs v. Dwork [Neb.] 106 N. W. 780. A property owner having property abutting on a public street and whose right of ingress to and egress from such property is obstructed in such street, sustains a special injury different from that sustained by the public. Nichols v. Sadorus, 120 Ill. App. 70. Right of access to and departure by water from land bordering on tide-water held a private right peculiar to the owner or tenant distinct from right of navigation. Whitmore v. Brown [Me.] 65 A. 516. A sign board across the top of a building from which paint, dirt and ice fall on the property of the tenant of the ground floor causing him special damages. Buskirk v. Gude Co., 100 N. Y. S. 777. Outside stairway held to cause special damage to adjacent property. McCormick v. Weaver, 144 Mich. 6, 107 N. W. 314. Projection of building into street partly cutting off view to adjoining building used for mercantile building held to cause special damage. Bischof v. Merchant's Nat. Bank [Neb.] 106 N. W. 996. Owner of lot abutting on street held entitled to maintain injunction to abate structures erected therein opposite his lot under Civ. Code, § 3493. McLean v. Llewellyn Iron Works, 2 Cal. App. 346, 83 P. 1082. afd. 83 P. 1085. An elector residing within five miles of a public highway which had been closed to travel and which was his best and most available route to market held to have an interest sufficient to entitle him to maintain injunction. Letherman v. Hauser [Neb.] 110 N. W. 745. A citizen forced out of a direct public street or road by an obstruction thereof into a circuitous route in his commerce and intercourse with the outside world suffers peculiar or special injury within the rule. Sloss-Sheffield Steel & Iron Co. v. Johnson [Ala.] 41 So. 907.

Held not specially damaged: Private citizen held not entitled to enjoin obstruction of alley by barn which did not interfere with free use of the alley and from which he suffered no damage. Johnson v. Andengaard [Minn.] 110 N. W. 369. Abutting owner held not entitled to enjoin obstruction of street. Robbins v. White [Fla.] 42 So. 841. A private individual whose rights of navigation have not been interfered with by an obstruction in a navigable stream cannot justify his removal of the obstruction. Winsor v. Hanson, 40 Wash. 423, 82 P. 710. Private citizens held not shown to have been specially damaged by increased train service consisting of more trains and greater speed by elevated railroad adjacent to his premises. Wolf v. Manhattan R. Co., 101 N. Y. S. 493. The mere fact that railroad cars are to be operated on a street adjoining plaintiff's property does not show any such peculiar injury to him as will justify an injunction restraining the construction and operation thereof. Brown v. Rea [Cal.] 88 P. 713. Owners of sailboats passing from docks above proposed bridge to point below held not entitled to sue to enjoin building of bridge as obstruction to navigation. Pedrick v. Raleigh & P. S. R. Co. [N. C.] 55 S. E. 877.

65. Roessler-Hasslacher Chemical Co. v. Doyle [N. J. Law] 64 A. 156.

66. Wharf. Whitmore v. Brown [Me.] 65 A. 516.

67. Private citizen held entitled under Act June 19, 1871, P. L. 1360, to enjoin use by railroad of steam whistle as signal and bituminous coal as fuel in violation of ordinance granting it right to use of streets. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798.

68. One not owner of adjacent real estate not entitled to sue under Wilson's Rev. St. 1903, § 134 et. seq., to enjoin slaughter house. Weaver v. Kuchler [Okl.] 87 P. 600.

69. A declaration in an action for damages, for maintaining a nuisance which does not allege the nuisance to be a public one but avers direct and particular damage to the plaintiff is sufficient, assuming the nuisance to be a public one. Roessler-Hasslacher Chemical Co. v. Doyle [C. C. A.] 142 F. 118.

OATHS.[70]

A deputy of an officer authorized to administer oaths has such power implied from power to do what requires an oath to be taken.[71]

OBSCENITY, see latest topical index.

OBSTRUCTING JUSTICE.

"Due administration of justice" which it is a crime to obstruct means a full judicial investigation of all material facts with unhampered opportunity to the litigants to have it.[73] It is a crime if the act may obstruct justice whether or not it must have that effect.[74]

Suppressing evidence[75] will be criminal though the litigant may, when his trial is had, decide not to introduce such evidence.[76] It is no defense that the evidence suppressed is false in fact.[77] Such suppression of evidence in a civil case in the Federal courts is an "offense against the United States" on which criminal conspiracy may be predicated.[78] Knowledge that the person sought to be corrupted was or might be a witness is essential to an attempt to corrupt him,[79] and the indictment must charge it or facts from which it is conclusively presumed.[80] In a prosecution for corrupting it is error to receive evidence showing the suborning of the witness.[81] A witness in this sense means one who has knowledge enabling him to testify of a material fact or who is called for that purpose.[82]

The statutory crime of taking property from an officer who holds it under process is distinct from that of secreting it to prevent a levy,[83] and in New York the grand jury may indict for the former though the special sessions has in the first instance exclusive jurisdiction of the latter crime.[84] The owner may be guilty of thus taking his own property[85] and a levy and custody thereunder is a predicate for the offense.[86] Incompetent evidence before the grand jury as to what accused did with the goods does not vitiate the indictment.[87]

To charge resisting an officer[88] it is not necessary that the offense for which the arrest was made be described by technically pleading its elements or by stating its technical name,[89] and such offense need not be legally defined to the jury unless a proper request is made.[90] The indictment is not double merely because the acts done might tend to prove a rescue.[91]

OCCUPATION TAXES; OFFER AND ACCEPTANCE; OFFER OF JUDGMENT, see latest topical index.

OFFICERS AND PUBLIC EMPLOYES.

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70. See 6 C. L. 840. See also, affidavits, 7 C. L. 58; Witnesses, 6 C. L. 1975; Jury, 8 C. L. 617; Perjury, 6 C. L. 1000.

71. Deputy bond recorder under Ky. St. § 2947. Henderson v. Com., 28 Ky. L. R. 1212, 91 S. W. 1141. Deputy Clerk taking justification of surety on bond. Civ. Code Prac. § 547. Stamper v. Com. [Ky.] 100 S. W. 286.

72. See 6 C. L. 841.

73, 74. Wilder v. U. S. [C. C. A.] 143 F. 433.

75. See 6 C. L. 41.

76, 77, 78. Wilder v. U. S. [C. C. A.] 143 F. 433.

79, 80, 81, 82. Gandy v. State [Neb.] 110 N. W. 862.

83, 84. Pen. Code § 83 and Code Cr. Proc. § 56, subd. 25, construed. People v. Booth, 102 N. Y. S. 62.

85, 86, 87. People v. Booth, 102 N. Y. S. 62.

88. See 6 C. L. 841.

89. Allegation that arrest was "under the charge of having a concealed weapon about his person and for a disturbance of the peace, held good. Johnson v. State [Fla.] 40 So. 678.

90. Johnson v. State [Fla.] 40 So. 678.

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§ 1. *Definitions and classification.*[92]—A public office has in it no element of property, but it is rather a personal public trust, created for the benefit of the state, and not for the benefit of the individual citizens thereof.[93]

"Officer" and "employe" distinguished.[94]—One who is invested with a portion of sovereign powers and whose employment does not arise from contract is an officer and not an employe.[95] The employe of an officer is not himself an officer.[96]

Kinds of officers.[97]—In the United States with reference to the public body for which their services are performed, officers may be classified as Federal,[98] state,[99] county,[1] or municipal.[2] A school trustee is not always a "city" officer.[3] With reference to their duties, officers are executive, legislative, judicial, or ministerial.[4] Members of boards having power to assess property and equalize values for purpose

92. See 6 C. L. 841.

93. Sumpter v. State [Ark.] 98 S. W. 719; Shaw v. City Council of Marshalltown [Iowa] 104 N. W. 1121.

94. See 6 C. L. 842.

95. ILLUSTRATIONS. Positions held offices: Superintendent of public roads. Cheney v. Unroe [Ind.] 77 N. E. 1041. A superintendent of streets. Stephens v. City of Oldtown [Me.] 65 A. 115. Coroner's clerk in a borough of New York city. People v. Cahill, 102 N. Y. S. 325. Assistant registrars of voters. Dunn v. Folly, 78 Conn. 670, 63 A. 122. A school district trustee. State v. Kitchens [Ala.] 41 So. 871. Receiver of a United States land office. United States v. Booth, 148 F. 112. Whether a deputy clerk is an officer, quaere. State v. Hanlin [Iowa] 110 N. W. 162.

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96. The constitutional provision extending the terms of all such officials as expired in January, 1904, for a year does not make those who were then in the employment of county commissioners or attorneys, county officials or extend their terms. People v. Lindsley [Colo.] 86 P. 352.

97. See 6 C. L. 843.

98. United States senators are chosen by state legislatures and cannot properly be said to hold their places under the government of the United States. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. 1057. And see United States, 6 C. L. 1770.

99. A county dispenser is an officer of the state, and all books, documents, and letters, in dispensary prima facie, relate to the public business and are open to examination by any committee of the general assembly. State v. Farnum, 73 S. C. 165, 53 S. E. 83. Under Mo. Rev. St. 1899, § 6232, a police officer in the city of St. Louis is a state officer. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543. Prosecuting attorneys are not local but are state officers. State v. Lucas County Com'rs, 7 Ohio C. C. (N. S.) 512.

1. See Counties, 7 C. L. 976.

2. See Municipal Corporations, 6 C. L. 704.

3. Under the statutes of Indiana, the officers of the various school corporations are statutory trustees and are not officers and employes of the government of a city. Agar v. Pagin [Ind. App.] 79 N. E. 379.

4. See 23 Am. & Eng. Enc. of Law [2d Ed.] 325. See, also, topics Certiorari, 7 C. L. 606; Prohibition, Writ of, 6 C. L. 1102; Appeal and Review, 7 C. L. 128, where the reviewableness of an order depends on its judicial character.

of taxation are not judicial officers.[5] Under the statute of New York providing that the term "judge" shall be construed to mean every judicial officer authorized alone or with others to hold or preside over a court of record, a police magistrate of the city of New York is not a judge.[6] With reference to their title to office, officers are either de jure officers, de facto officers, or usurpers.[7] Where one has qualified and entered upon the discharge of his duties and is recognized under the appointment made by the authorities, and his salary paid for a considerable time without objection, and without any question being raised concerning the legality of his appointment, he becomes officer de jure and entitled to hold the office to which he has been appointed for the designated term unless lawfully ousted.[8] A de facto officer is one whose acts, though not those of a lawful officer, the law upon principles of policy and justice will hold valid so far as they involve the interest of the public and third persons where the duties of the office were exercised without a known appointment or election, but under such circumstances of reputation or acquiesence as were calculated to induce people without inquiry to submit to or invoke his action, supposing him to be the officer he assumed to be.[9] An officer elected under an unconstitutional statute is a de facto officer,[10] but there can be no de facto when there could be no de jure officer.[11] A deputy of one who, his term having expired, has been re-elected and has duly qualified, is a deputy de facto, if he is recognized as such by his principal and if he continues to perform his duties, though he has not been appointed in writing as required by law and has not given the required bond.[12] The failure of a tax assessor to take the statutory oath before he makes the assessment does not make the assessment void. Though he was not sworn his acts have all the force and effect of a de facto officer.[13] Where a complaint on a detinue bond alleges that the writ was issued by a certain named person a notary public, and ex officio justice of the peace, proof that he was a de facto justice is permissible.[14] A mere intruder or usurper is not ordinarily, but may become, an officer de facto; but when without color of authority he simply assumes to act, to exercise authority as an officer, and the public know, or reasonably ought to know that he is an usurper, his acts are absolutely void for all purposes.[15] To usurp an office is to seize it by force, actual or constructive, without any color of right or title. Usurpation is entirely different from holding an office originally rightfully possessed but to which the incumbent becomes ineligible by the happening of some extraneous fact or circumstance.[16]

5. It is the common practice in many of the states to vest such powers in executive officers. Such officers when acting as a board do not exercise judicial powers, but only exercise such quasi judicial functions as do any public officers invested with discretionary power. Missouri, etc., R. Co. v. Shannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527.

6. Tully v. Lewitz, 50 Misc. 350, 98 N. Y. S. 829.

7. See 23 Am. & Eng. Enc. of Law [2d Ed.] 327.

8. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925. See, also, Nalle v. Austin [Tex. Civ. App.] 93 S. W. 141.

9. State v. Cartright [Mo.] 99 S. W. 48. See, also, Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141. The long possession of the books and papers of an office and performance of the duties thereof with the acquiescence of the public constitute one an officer de facto, that is, if such an office is in existence. The long holding of one's self out as entitled to an office and performing its duties and the general acquiescence of the public is sufficient to constitute the person so acting an officer de facto and make his acts as such officer valid. Heard v. Elliott [Tenn.] 92 S. W. 764.

10. Thompson v. Couch, 144 Mich. 671, 13 Det. Leg. N. 313, 108 N. W. 363.

11. Persons cannot be de facto officers when professedly acting under a repealed statute. People v. Welsh, 225 Ill. 364, 80 N. E. 313.

12. Murphy v. Lentz [Iowa] 108 N. W. 530.

13. Blades v. Falmouth [Ky.] 98 S. W. 1017.

14. Williams v. Finch [Ala.] 41 So. 834.

15. Heard v. Elliott [Tenn.] 92 S. W. 764.

16. One who while holding the office of notary public is appointed and qualified as post master, but continues after accepting he latter office to exercise the functions of the office of notary public, is not guilty of

Deputies.—A mere assistant for a single occasion is not a deputy.[17]

§ 2. *Creation and change of offices. Number of employes.*[18]—Except as such matters are constitutionally fixed,[19] the legislature may abolish an appointive office and impose its duties on another officer.[20] An office created but without means of filling it remains in suspense.[21] The existence of an office created by ordinance must be proved [22] and will not be inferred from an appropriation to pay the officer.[23] There can be no employment to do that which the regular official duty includes.[24]

§ 3. *Eligibility and qualifications. A. In General.*[25]—The right to hold office not being a natural or personal right but a right conferred by the sovereign power, a state may by statute provide that persons of a certain class or who have performed certain services shall be preferred for public employment.[26] It is not within the power of a legislature to add to the qualifications fixed by a state constitution or to impose additional restrictions.[27] A disqualification to be "elected" for more than two consecutive terms ignores time served as a vacancy appointee prior to the first of such terms.[28] A special qualification as to residence is commonly prescribed,[29] but a loss of residence does not necessarily create a vacancy.[30] The arrest and confinement upon a charge of felony does not of itself operate as a disqualification and does not have the effect to create a vacancy in an office until the officer is

the usurpation of office under Ky. St. 1903, § 1364, nor is he guilty of knowingly holding and pretending to exercise an office after the election or appointment thereto has been declared illegal by a court of competent jurisdiction, nor is he guilty of holding over after his term has constitutionally or legally expired. Palmer v. Com., 29 Ky. L. R. 219, 92 S. W. 588.

17. Persons summoned by a sheriff under his authority to summon the power of the county are not deputies. Power v. Douglas County [Neb.] 106 N. W. 782.

18. See 6 C. L. 843.

19. See post, §§ 4, 7, also, 6 C. L. 843, n. 87.

20. Noble v. Bragaw [Idaho] 85 P. 903.

21. A constitutional provision that there "shall be elected . . . a county attorney, who shall be elected or appointed as shall be provided by law," seemingly creates the office but leaves it in suspense till the legislature enacts a mode of choosing the officer. People v. Lindsley [Colo.] 86 P. 352.

22, 23. Office of policeman not provable thus. Gay v. Chicago, 124 Ill. App. 586.

24. Contract with board of education to sue and recover taxes for school funds held within regular duties of city law department, hence void. Tarsney v. Board of Education of Detroit [Mich.] 13 Det. Leg. N. 1021, 110 N. W. 1093.

25. See 6 C. L. 844.

26. Shaw v. City Council [Iowa] 104 N. W. 1121. Mass. Rev. Laws, c. 19, § 23, construed. Sims v. O'Meara [Mass.] 79 N. E. 824.

Construction of statutes: The preference of honorably discharged veteran, provided for by statute in Iowa is conferred only on such veterans as possess qualifications equal to those possessed by other candidates. McBride v. City Council [Iowa] 110 N. W. 157. In New York honorably discharged veterans are entitled to preference, without regard to their standing on the eligible list, in appointments to all competitive and non-competitive positions provided their qualifications and fitness shall have been ascertained. People v. Adam, 101 N. Y. S. 925. In Massachusetts a veteran has the right to continuous employment in preference to those laborers who are not veterans, so long as there is work to be done of the kind for which he was employed and as he is competent. Ransom v. Boston [Mass.] 78 N. E. 481. The New York constitutional provision for preference to veterans relates entirely to the matter of appointment to the public service and does not deal with the subject of suspension or removal. It does not provide or guarantee the continued retention of veterans in that service. Seeley v. Franchot, 102 N. Y. S. 220.

27. A requirement that candidates shall come from particular counties or districts held invalid. People v. Chicago Election Com'rs, 221 Ill. 9, 77 N. E. 321. Membership of a standing committee of a political party cannot by municipal ordinance be made a disqualification for office. City of Richmond v. Lynch [Va.] 56 S. E. 139. Imposing a fee on all those who file as candidates under a **primary election law** does not create a **property test** for office. State v. Scott, 99 Minn. 145, 108 N. W. 828.

28. Dodson v. Bowlby [Neb.] 110 N. W. 698.

29. The Illinois Cities and Villages Act, as amended June 26, 1895, prescribing a residence qualification relates to eligibility to "offices" and **does not apply to mere employment.** Powell v. People, 121 Ill. App. 474. Where from the undisputed evidence it appears that a municipal officer resided in the city at the time of his election and that he had his domicile there, a writ of quo warranto questioning his right to office on the ground of non-residence is properly refused. Milligan v. Fortson, 126 Ga. 15, 54 S. E. 915.

30. The removal of a county commissioner from one commissioner district to another a few months before the expiration of his term does not operate to render the office vacant. Gray v. Beadle County Com'rs [S. D.] 100 N. W. 36.

convicted upon such charge.[31] The ineligibility of a person to office because of a defalcation in the past does not cease upon the amount of defalcation being made good by his sureties in satisfaction of their own obligation.[32] One holding an incompatible office is disqualified from holding another office.[33] An officer removed for misconduct is disqualified for re-election to the vacancy thus created.[34]

(§ 3) *B. Civil Service.*[35]—In many states civil service laws have been enacted under which appointments and promotions are made dependent upon the results of competitive examinations[36] resulting in a list of eligible candidates from which appointees must be chosen.[37] The legislature often empowers some officer or commission to include certain offices within the competitive class.[38] A civil service commission has power to establish rules and regulations not inconsistent with the constitutional and statutory provisions creating it.[39] Thus, it can regulate admission to examination for promotion,[40] but of its own power, it can not make violation of its rules a crime.[41] Whether or not the provisions of the civil service act are violative of any constitutional provisions is a question which cannot be raised by one who is not subject to the provisions of such act.[42]

31. Bergerow v. Parker [Cal. App.] 87 P. 248.

32. A receipt to the sureties for payment made by them under their bond is not a discharge obtained by the officer within the meaning of Const. art. 182. State v. Reid [La.] 42 So. 662.

33. **Offices held incompatible:** It seems that the position of city clerk and tax assessor are incompatible. Blades v. Falmouth [Ky.] 98 S. W. 1017. In New York the offices of district leader and police commissioner or deputy police commissioner. McAvoy v. Press Pub. Co., 114 App. Div. 540, 99 N. Y. S. 1041. The inhibition against the holding of other public office or employment, found in Municipal Code § 120 (Rev. St. §§ 1536-613), relating to the qualifications of councilmen, is not limited to other office or employment by the municipality, but extends to all public office and employment. State v. Gard, 8 Ohio C. C. (N. S.) 599. The offices of deputy constable and policeman are inconsistent. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925.

Held compatible: In Texas the constitution does not prohibit a county attorney from holding at the same time the office of notary public. Figures v. State [Tex. Civ. App.] 99 S. W. 412.

34. State v. Rose [Kan.] 86 P. 296.

35. See 6 C. L. 846.

36. Restoration to rank denied because it was temporary only and attainable as permanent position only on examination. People v. Bingham, 49 Misc. 607, 99 N. Y. S. 1111.

37. Under the New York civil service law it is the duty of the civil service commissioners to determine the question of fitness and eligibility of applicants and their report is controlling upon the appointing power. In re Lazenby, 101 N. Y. S. 5. Whether or not an applicant has passed the examination which the law requires, where he has conformed to the requirements of the civil service commission and has been actually accepted and placed upon the list, it seems that this list is binding upon the commission. Id.

38. **Judicial control of classification:** The act of classification by the civil service commission is a legislative or executive and not a judicial act and it cannot be reviewed by the courts, and the only control the courts can exercise over such an act is a limited and qualified one to be exercised only by mandamus in cases where the act sought to be controlled is so palpably violative of the law as to present no fair nor reasonable ground for difference of opinion among able and conscientious officials. People v. McWilliams, 185 N. Y. 92, 77 N. E. 785; People v. McAdoo, 113 App. Div. 770, 99 N. Y. S. 324. The classification of the position of battalion chief in a city fire department, as competitive will not be interfered with. People v. McWilliams, 185 N. Y. 92, 77 N. E. 785; In re Dill, 185 N. Y. 106, 77 N. E. 789.

Deputy superintendent of streets in charge of city ferries of Boston held **not exempt from examination** as head of a department. Attorney General v. Douglass [Mass.] 80 N. E. 581. A veteran whose office was not put in the civil service list till after he was discharged is **not** one "holding office" **within civil service rules.** Sims v. O'Meara [Mass.] 79 N. E. 824. As to power of removal, see post, § 8 C.

39. Morris v. Baker, 49 Misc. 440, 99 N. Y. S. 957. The court has power to review a rule established by the civil service commission to declare it invalid if it offends the spirit and purpose of the civil service law. Id.

40. A regulation of a civil service commission that examinations shall be open to all persons who shall have served with fidelity for not less than six months in positions of the same group or general character in the grade next lower in the same department, office, or institution, is reasonable and proper. In re Ricketts, 111 App. Div. 669, 98 N. Y. S. 502.

41. Johnson v. U. S., 26 App. D. C. 128. A wilfully false answer under oath made by an applicant for examination by a civil service commission, is not a violation of one of the civil service regulations but is perjury, and the person making such false answer is indictable therefor. Id.

42. State v. Sparling [Wis.] 107 N. W. 1040.

In certifying persons to a list of eligibles, no more extensive inquiry or examination need be made than the reasonable construction of the law requires,[43] and the sufficiency of that made is presumed.[44] A statutory maximum and minimum of time within which the term of eligibility must be fixed does not require the commissioners to fix a precise time.[45] They may abrogate a list of eligibles which has continued for the minimum time and supersede it with a new list [46] on making a rule to that effect.[47] A territorial classification of eligibles will not operate retroactively to take away one's preference.[48] Promotive transfers from one competitive class to another are illegal if competitive examination is thereby evaded.[49] A law counting previous service in certain positions as part of a candidate's rating for promotion excludes service in positions not mentioned.[50] An advance in salary may be a promotion without any change in work,[51] and, where such promotion is allowable without examination because of something not ascertainable in that way, those facts should be shown.[52] Where there is a failure of the persons certified by a civil service commission to accept certain positions, and a subsequent failure of the list itself, persons not on the civil service list may be employed from day to day so as to permit their instant discharge in case men are obtained from eligible lists.[53] The appointing officer will not be compelled to appoint where the necessity of the office is in his discretion,[54] and the removal of police officers from attendance on courts will not be compelled in order to force other appointments, if they have any proper duties in that connection.[55] In New York a right of action is given for failure to appoint a veteran on the eligible list, and the officer intrusted with the appointive power is bound to accept the list as certified.[56]

§ 4. *Choice or employment. A. How chosen or employed.*[57]—The prescribing of laws for the election or appointment to an office is a legislative function, but that does not include the power of making the appointment itself, much less the nullification of an election held and prescribed by law.[58] Where the mode of selection is committed to a local charter convention, it may prescribe either election or

43. Civil service commissioners in Schenectady are not required to make personal examination as to the qualification or habits of sobriety or industry of each applicant for public employment as "laborer," but may take the endorsement of two citizens and the street commissioner. Burke v. Holtzmann, 110 App. Div. 564, 97 N. Y. S. 218.

44. Burke v. Holtzmann, 110 App. Div. 564, 97 N. Y. S. 218.

45, 46, 47. Civil Service Law, § 13, construed, which fixes not less than one or more than four years. Golland v. Baker, 102 N. Y. S. 721.

48. Eligibles in New York were classified to Manhattan and Brooklyn after a promotion was attempted. In re Dryer, 102 N. Y. S. 922.

49. Transfer among those in a competitive class without regard to grade, class of work, or compensation, providing only that the persons so transferred are upon the eligible list, violate the constitutional provision that all appointments and promotions shall be made according to merit and fitness to be ascertained by competitive examinations. A transfer of a bath attendant, seventh on the eligible list, to be assistant superintendent of baths and then superintendent, at a greatly increased salary, is such a transfer. Hale v. Worstell 185 N. Y. 247, 77 N. E. 1177.

50. Record of applicant: The New York municipal civil service commission is justified in excluding from the rating of a policeman any credit for service rendered upon his detail as a roundsman prior to the date when the greater New York Charter took effect, January 1, 1898. Moran v. Baker, 49 Misc. 327, 99 N. Y. S. 197. Civil service commissioners should not consider the probationary record of a police officer included by the police commissioner in the police record of such officer submitted to the civil service commission. People v. Baker, 49 Misc. 143, 97 N. Y. S. 453.

51, 52. In re Dryer, 102 N. Y. S. 922.

53. Gallagher v. New York, 101 N. Y. S. 229.

54. Power to appoint such court attendants "as may be necessary" is not controllable. People v. McClellan, 102 N. Y. S. 946.

55. City magistrate's courts in New York. People v. McClellan, 102 N. Y. S. 946

56. Preferred veteran held entitled to damages for failure to employ him. Burke v. Holtzmann, 110 App. Div. 564, 97 N. Y. S. 218.

57. See 6 C. L. 846.

58. State v. Bunnell [Wis.] 110 N. W. 177.

appointment within its defined authority.[59] The body of a city charter so adopted, specifying the mode, controls a recital of the mode in a prefatory synopsis of the charter.[60]

Elections.[61]—The election of public officers by popular vote is treated elsewhere.[62] All other "elections" are regarded as elective appointments and are treated under appointment.[63] An election may be held for an office at the same time that a constitutional amendment creating such office is submitted to the voters.[64]

Appointment[65] of an office once made cannot be revoked by the appointing power unless permissible under the power of removal.[66] Unless it is otherwise provided by the constitution, the legislature may provide for the appointment of statutory officers.[67] An agreement made by one having the power of appointment to appoint a certain person to office will not be enforced.[68]

Right to appointment and enforcement of right.[69]

By whom appointed.[70]—The appointment of subordinate officers by superior officers or by public commissions or boards is frequently authorized.[71] Local officers can not be appointed by state authority where violative of the principle of home rule contained in the constitution.[72]

Manner of appointment.[73]—In the absence of constitutional limitations, the legislature may change the mode of appointment to a statutory office at pleasure,[74] but it must not thereby invade the appointive or elective power.[75] When the right

59. Const. art. 20, § 3, by making the district attorney ex officio city and county attorney of Denver during the transitional government from separate to consolidated organization and until his successor is "elected" did not disable the charter convention acting under the legislature from making the successor appointive. People v. Lindsley [Colo.] 86 P. 352.

60. Synopsis referred to city and county attorney as elective, but body of charter after providing for election of mentioned officers (attorney not included) made "heads of departments" appointive. People v. Lindsley [Colo.] 86 P. 352.

61. See 6 C. L. 846.

62. See Elections, 5 C. L. 1065

63. See infra this section.

64. State v. Winnett [Neb.] 110 N. W. 1113.

65. See 6 C. L. 846.

66. When a legislative body expresses its will by ballot, its act is not complete before the result is ascertained and made known. When this is done, the will of the body is finally expressed and the appointment is complete. State v. Starr, 78 Conn. 636, 63 A. 512.

See post, § 8 C.

67. In re Terrett [Mont.] 86 P. 266. The legislature may authorize the governor to appoint members of a police force. Ex parte Tracey [Tex. Civ. App.] 15 Tex. Ct. Rep. 900, 93 S. W. 538. Members of the board for the assessment and revision of taxes, created by Act of Mar. 24, 1905, are not county officers who must be elected under Const. art. 14, § 2. Commonwealth v. Collier, 213 Pa. 138, 62 A. 567.

68. It is the duty of an officer, having the power of appointment, to make the best appointments in his power at the time the appointment is made, and it is against public policy that he should be deprived of the exercise of his best judgment by a contract previously made or an obligation previously assumed. Whatever may be the practice, appointments are in theory made for the public good. Schneider v. Local Union No. 60, 116 La. 270, 40 So. 700.

69. See 6 C. L. 847. See, also, ante, § 3 Eligibility and Qualification.

70. See 6 C. L. 847.

71. Appointment of assessor under a local improvement act by president of the board of local improvements. Harrigan v. Jacksonville, 220 Ill. 134, 77 N. E. 85. Appointment of city attorney by mayor. People v. Lindsley [Colo.] 86 P. 352. Appointment of policemen by board of aldermen. Early v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 78, 97 S. W. 82. Appointment of watchmen and policemen by city council. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925. Appointment of tax assessors by circuit court judges. Whitlock v. Hawkins, 105 Va. 242, 53 S. E. 401. Where the dispensary comsioners of a town elected a secretary and treasurer, and subsequently by an amendment to the act creating the dispensary the legislature named a secretary and treasurer therefor, this took effect as against the person who had been named by the commission, although the time for which they named him had not expired. Waters v. McDowell, 126 Ga. 807, 56 S. E. 95.

72. The principle of home rule as embodied in New York Const. art. 10, §§ 1 and 2 is not violated by the enactment of a statute which provides for the creation of a metropolitan election district for the election of state officers, and confers upon the governor the power to appoint the superintendent of such election district, instead of requiring his appointment by some local authority. Morgan v. Furey, 186 N. Y. 202, 78 N. E. 869.

73. See 6 C. L. 848.

74, 75. The mere fact that the legislature in order to make a change in the mode of filling an office thereby incidentally con-

to appoint it is delegated to a board, it should be exercised at a regular or special meeting thereof.[76] A meeting by an appointing board to fill an office is valid though not called in the regular way, if fairly conducted and after an attempt in good faith to regularly call it.[77] When an appointment is vested in a legislative body with directions to make its choice by ballot, the appointment can be made only by ballot,[78] and, if the vote taken shows more votes than members, the body may poll its members or vote anew, or where the excess is in blank ballots may assume them to have been inadvertent.[79]

(§ 4) *B. Filling vacancies and promotions.*[80]—The power to fill a vacancy is purely statutory,[81] and a "vacancy" of the kind contemplated must exist.[82] In New York where a vacancy exists in the office of supervisor, the filling of the same is vested in the town board and such a vacancy exists where the candidate for such office who received the greatest number of votes at election is ineligible. The predecessor of such a supervisor holding over has no vote on the question of the appointment of his successor.[83]

Promotions in the civil service are sometimes made dependent upon the results of competitive examinations.[84] A writ of mandamus sought for the purpose of obtaining official promotion will be denied when the relator has been guilty of laches.[85]

Contracts of public employment.[86]—The general principles relating to public contracts are treated elsewhere.[87] Public officers and boards are frequently empowered to employ persons to perform services for the public benefit.[88] Where a new office is created but left in suspense, the governing body of a city or county may employ one to do necessary service appropriate to it.[89] A contract of employment may be invalid for lack of the prerequisite appropriation and certification of funds

tinues an incumbent in office for a reasonable time cannot be urged as a reason against the exercise of this power. Wayt v. Glasgow [Va.] 55 S. E. 536. See, also, State v. Plasters [Neb.] 104 N. W. 1150, 105 N. W. 1092.

76. State v. Cartwright [Mo. App.] 99 S. W. 48.

77. Mayor refused to call joint session intending thereby to thwart election and continue incumbent in office. Davis v. Claus [Ky.] 100 S. W. 263.

78. In the manner of taking the ballot and in all other matters relating to the completion of the choice, the body proceeds as a legislative body having the discretion and powers belonging to such body. State v. Starr, 78 Conn. 636, 63 A. 512.

79. New vote upheld. State v. Starr, 78 Conn. 636, 63 A, 512. Where more ballots, including one blank one, are cast than there were persons voting, the body may exercise its discretion whether to make an investigation then and there, which might require each member to declare how he voted, or to assume that the evident irregularity was harmless, or to exclude all suspicion of fraud by allowing each member to again cast his ballot. Id.

80. See 6 C. L. 848.

81. Appointment of county assessor by the governor for the remainder of the term when the vacancy occurs within six months of a general election. Bowett v. Bowling [Ark.] 94 S. W. 682.

82. State v. Ives [Ind. App.] 78 N. E. 225. A failure to elect by reason of a tie vote does not create a vacancy and a special election should be called. Id. Vacancy in a county office, caused by refusal of person elected to qualify, filled by court of common pleas under art. 14, § 7. Commonwealth v. Muse [Pa.] 65 A. 535.

83. In re Smith, 49 Misc. 567, 100 N. Y. S. 179.

84. Hale v. Worstell, 185 N. Y. 247, 77 N. E 1177. See, also, supra, § 3B. Civil Service.

85. People v. Bingham, 49 Misc, 607, 99 N. Y. S. 1111.

86. See 6 C. L. 848.

87. See Public Contracts, 6 C. L. 1109.

88. Employment of a night watchman by a commissioner of public works. Gadd v. Detroit, 142 Mich. 683, 12 Det. Leg. N. 900 106 N. W. 210. Employment of a consulting engineer by a commissioner of street improvements. Hildreth v. New York, 111 App. Div. 63, 97 N. Y. S. 582. Employment of counsel by a board of county commissioners. People v. Lindsley [Colo.] 86 P. 352. Ordinarily the employment of a city engineer is a matter which under the law rests in the sound discretion of the common counsel of the city, and an abuse of such discretion would be subject to judiciary review. City of Decatur v. McKean [Ind.] 78 N. E. 982. Statutes regulating the employment of laborers by cities and the rules of the civil service commissioners enter into a contract made with a laborer by a city and constitute a part of the terms of his employment. Ransom v. Boston [Mass.] 78 N. E. 481.

89. County attorney created by Const. art. 14, § 8. Power of commissioners to employ counsel continues till legislature provides how such officer shall be chosen. People v. Lindsley [Colo.] 86 P. 352.

on hand.[90] A contract authorized and drawn between the city and its employe but requiring approval by the council is not yet binding.[91] A public school teacher cannot be legally employed by individual school directors. The employment must be made by the directors as a board at a regular or special meeting.[92] The board of aldermen of a city cannot make a contract for the employment of counsel binding for an unlimited time and irrevocable by their successors.[93]

§ 5. *Right to office and remedies to enforce same. A. Indicia and evidence of right.*[94]—A commission issued by one having the power of appointment to an office is prima facie title thereto.[95] Record matters cannot be proved by parol.[96] It is not necessary, however, in order to prove one to be a public officer, that his commission should be produced.[97] Proof that he acted as such, in connection with other circumstances may be sufficient.[98] When appointment and assumption of duties is proved, the burden of showing failure to take the oath is on the disputant.[99] Appointment of a deputy may be proved by a letter press copy upon proof of loss of the original.[1] It is competent for an officer himself to testify that he is such officer.[2] The mere fact that a policeman's name was carried upon the payrolls and that the civil service commissioners certified the payrolls upon which his name appeared is not evidence of the legal existence of his office as police patrolman.[3] An estoppel if any existed against relator to claim the office would not prevent an inquiry into respondent's right.[4]

(§ 5) *B. What remedy.*[5] The duty imposed upon the governor of a state of giving certificates of election to state officials is ministerial and not political or executive, and, therefore, mandamus will lie to compel him to perform such duty.[6] equity has no jurisdiction to determine title to public office.[7] While title will not be tried by injunction, a stipulation may warrant the treatment of such a bill as on hearing of quo warranto.[8] Quo warranto[9] and not certiorari,[10] mandamus,[11]

90. Pittinger v. Wellsville [Ohio] 80 N. E. 182.

91. VanCamp v. Huntington [Ind. App.] 78 N. E. 1057.

92. Such a contract though appearing regular on its face is not conclusive of its legality and binding force. Pugh v. School Dist. No. 5, 114 Mo. App. 688, 91 S. W. 471.

93. Where the employment of an attorney to collect back taxes was under a contract at will and revocable, the action of the city in demanding its tax books from the attorney was a revocation and termination of the contract, and all collections made by the attorney thereafter were tortious and gratuitous. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

94. See 6 C. L. 849. Right to appointment, see ante, § 4. See, also, specific topics, such as Mandamus, 8 C. L. 810, and Quo Warranto, 6 C. L. 1190. Election contests and ouster proceedings depending upon the validity of elections, see Elections, 7 C. L. 1230.

95. Where the appointee fills a vacancy, such commission is prima facie evidence of such vacancy. Hubbell v. Armijo [N. M.] 85 P. 1046. The commission of the governor of New Mexico in a case where he has the power to appoint must be recognized until resort is had to a trial of title to the office in question in a proceeding by quo warranto, and the peremptory writ of prohibition will be refused. Boca v. Parker [N. M.] 87 P. 465.

96. The election of an entry taker by the county court cannot be proved by oral evidence. The minutes of that court are the only evidence of the acts done by that body. Heard v. Elliott [Tenn.] 92 S. W. 764.

97. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

98. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099. Circumstances sufficient to prove appointment. Seifen v. Racine [Wis.] 109 N. W. 72.

99. 1. People v. Ellenbogen, 114 App. Div. 182, 99 N. Y. S. 897.

2. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

3. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155.

4. Dunton v. People [Colo.] 87 P. 540.

5. See 6 C. L. 849. See, also, topics Certiorari, 7 C. L. 606; Mandamus, 8 C. L. 810; Quo Warranto, 6 C. L. 1190; Prohibition, Writ of, 6 C. L. 1102.

6. State v. Brooks, 14 Wyo. 393, 84 P. 488.

7. Hubbell v. Armijo [N. M.] 85 P. 1046. The title to public offices and the right to exercise the functions thereof by persons claiming title thereto by election cannot be determined in an action for injunction. School Dist. No. 77 v. Cowgill [Neb.] 107 N. W. 584.

8. Hayes v. Sturges [Pa.] 64 A. 828. Where the parties have agreed upon the record to waive the question of jurisdiction and the court has considered the case as though it had been brought before it upon a writ of quo warranto, a decree awarding an injunction will be regarded as equivalent to a judgment of ouster in a quo warranto proceedings. Id.

or prohibition,[12] is the proper remedy to try title to public office. Injunction is proper to restrain intrusion though complainant is but a de facto officer.[13] One who by force takes an office room and some of the books and who has a certificate is not a de facto officer as against an incumbent also certified and claiming the office by re-election. The right of an incumbent to an office should not be determined in a mandamus proceeding when there is any dispute or doubt of his right.[15] By instituting proceedings in the nature of quo warranto, the claimant of an office conclusively admits that such office is in the possession of the party proceeded against.[16] One in partial possession claiming by re-election and who was certified as elected is a de facto incumbent as against a rival claimant also certified and who enters by force.[17] A bona fide claimant of an office is not justified in attempting to take possession thereof by violence when there is a de facto officer in possession.[18] Contempt will not try title to office but this does not apply to one who disobeys a judgment by ouster by resuming a forfeited office to which he has been unlawfully chosen at a vacancy election.[19] In some jurisdictions special statutory proceedings to obtain possession of an office wrongfully withheld,[20] or the records of a public office [21] are provided.

(§ 5) *C. Procedure and practice in particular remedies.*[22]—The procedure and practice in particular remedies is largely treated in the specific topics dealing

9. Hubbell v. Armijo [N. M.] 85 P. 1046. Tests to determine whether a position is a public office so as to subject the incumbent to a quo warranto proceeding. State v. Kitchens [Ala.] 41 So. 871. One seeking to obtain office by a quo warranto proceeding must show that he has complied with the law by filing the statutory oath. Carlson v. People, 118 Ill. App. 592. Quo warranto will be only when the party proceeded against is a de jure or a de facto officer in possession of the office and the facts are in dispute. In re Smith, 101 N. Y. S. 992. The misconduct of the petitioner in regard to the election for the office sought is a ground for refusing a writ of quo warranto. Pomeroy v. Kelton, 78 Vt. 230, 62 A. 56. See Quo Warranto, 6 C. L. 1190.

10. Bumsted v. Blair [N. J. Law] 64 A. 691. If it appears that the newly elected official has been inducted into office, a writ of certiorari should be dismissed, but when it does not appear whether this is so, and so it does not appear whether quo warranto would lie against him, the cause should be held to enable the prosecutor to bring in the newly-elected official, whose interests would be affected by such a judgment as the prosecutor of the writ of certiorari sought. Magner v. Bayonne [N. J. Law] 64 A. 993. See Certiorari, 7. C. L. 606.

11. Goodwin v. Sherer [Ala.] 40 So. 279; People v. Cahill, 102 N. Y. S. 325; State v. Hyland [Neb.] 107 N. W. 113; Commonwealth v. James, 214 Pa. 319, 63 A. 743. Quo warranto and not mandamus is the remedy of one claiming an office where another person is actually in the office and is recognized as an officer. Caffrey v. Caffrey, 28 Pa. Super. Ct. 22. See Mandamus, 8 C. L. 810.

12. Thompson v. Couch, 144 Mich. 671, 13 Det. Leg. N. 313, 108 N. W. 363; Baca v. Parker [N. M.] 87 P. 465. Where it is claimed that the statute purporting to create a tribunal, board or office is in all respects unconstitutional and persons are acting pursuant to its provisions, an action in the nature of quo warranto is the appropriate remedy. Prohibition, which is the counterpart of mandamus, impliedly admits the existence of the board to which the writ is directed. Davenport v. Elrod [S. D.] 107 N. W. 833. See Prohibition, Writ of, 6 C. L. 1102.

13, 14. Blain v. Chippewa Circuit Judge, 145 Mich. 39, 13 Det. Leg. N. 394, 108 N. W. 440.

15. Mandamus to compel vacation of injunction against withholding office denied. Blain v. Chippewa Circuit Judge, 145 Mich., 59, 13 Det. Leg. N. 394, 108 N. W. 440. It being the object of a proceeding to require a board of county commissioners to recognize the plaintiff as a commissioner, and to restore the office from which he is alleged to have been wrongfully excluded, mandamus is a proper remedy, whether or not the plaintiff might have appealed from the decision of the board declaring his office vacant. Gray v. Beadle County Com'rs [S. D.] 110 N. W. 36.

16. Territory v. Dame [N. M.] 85 P. 473.

17, 18. Blain v. Chippewa Circuit Judge, 145 Mich. 59, 13 Det. Leg. N. 394, 108 N. W. 440.

19. State v. Rose [Kan. 86 P. 296.

20. The remedy for usurpation of the office of road overseer is by an action in the circuit court, brought either by the state or the person entitled to the office. State v. Sams [Ark.] 98 S. W. 955. Ky. St. 1903, § 1596a, repealing former law, does not admit of trial of title in an election contest proceedings. Wilson v. Tye, 29 Ky. L. R. 71, 92 S. W. 295.

21. In New York in a proceeding brought under Code Civ. Proc. § 2471-A, to enforce the delivery of books and papers pertaining to an office, the title to such office cannot be regularly tried or decided; but where the facts are undisputed, the rights of the parties can properly be determined. In re Smith, 49 Misc. 567, 100 N. Y. S. 179.

22. See 6 C. L. 850.

therewith.[23] One suing under a special statutory remedy must plead his capacity so to sue.[24] When the state requires one who claims a public office to show by what right and authority he holds and exercises the functions of said office, the duty and burden of showing a lawful right to the office is put upon the defendant.[25] In Alabama it is unimportant that a suit brought to try the right to hold a public office is brought on the relation of a private person.[26] In such a suit an averment in the information as to the functions, powers, etc., exercised, is not required and it is sufficient to aver in general terms, designating the particular office, the usurpation, intrusion into, and unlawful holding of the same, nor is it necessary that the information be sworn to.[27] Statutory authority to join several claimants of the "same" office warrants a joint suit against claimants of the several incumbencies of a board which is a collective one.[28] The present incumbent of a position, appointed to fill the position from which another has been removed, is not a necessary party to a proceeding by mandamus to reinstate the latter.[29] Quo warranto cannot be used to contest an election by tendering issue who had the most votes and that the returns were false.[30] For disobedience of quo warranto contempt will lie [31] and advice of counsel is no excuse.[32] A judgment in a quo warranto proceeding is self executing, and a person refusing to obey an order of court ousting him from office is guilty of contempt under the Iowa statute.[33] In Colorado quo warranto to try right to office is reviewable by error since it does not involve a franchise or the controversial amount which warrants appeal.[34]

§ 6. *Induction into office.*[35]—It is generally required by statute that an officer before entering upon the duties of his office shall take an oath [36] and furnish security or bond [37] and give a bond.[38] Statutes which do not expressly declare a vacancy in case of a refusal or neglect to deposit or file an official oath are generally construed to be directory merely, and not mandatory.[38]

§ 7. *Nature of tenure and duration of term; vacancies.*—The official per-

23. See Injunction, 8 C. L. 279. Mandamus, 8 C. L. 810; Prohibition, Writ of, 6 C. L. 1102; Quo Warranto, 6 C. L. 1190.

24. Contestant of election must allege that he is an "elector" within the statute. Dodson v. Bowlby [Neb.] 110 N. W. 698.

25. Jackson v. State, 143 Ala. 145, 42 So. 61. In quo warranto the respondent by the usual practice has the burden of proof of his right to office. Dunton v. People [Colo.] 87 P. 540. Permitting relator to open and close held harmless. Id.

26, 27. Jackson v. State, 143 Ala. 145, 42 So. 61.

28. The board of county commissioners is a single official entity though composed of three officers. People v. Stoddard, 34 Colo. 200, 86 P. 251.

29. While it may be that the present incumbent can be made a party as interested in the result of the proceeding, his presence is not at all essential to a complete determination of the question at issue between the incumbent and the appointing officer. People v. Ahearn, 111 App. Div. 741, 98 N. Y. S. 492; People v. Ahearn, 100 N. Y. S. 716.

30. People v. Horan, 34 Colo. 304, 86 P. 252.

31, 32. So by statute in Iowa Code § 3954. State v. Canill [Iowa] 108 N. W. 453.

33. And this is true although he acted on advice of counsel. State v. Cahill [Iowa] 108 N. W. 453.

34. People v. Horan, 34 Colo. 304, 86 P. 252.

35. See 6 C. L. 850.

36. In New Jersey under Act Feb. 19, 1906, a municipal officer who takes and files his oath of office before the time fixed for the beginning of his term has a valid title to his office. Attorney General v. Petty [N. J. Law] 63 A. 911. In Wisconsin an office to which one has been elected does not become vacant by reason of his oath being filed in the office of county clerk instead of the office of the clerk of the circuit court. State v. Bunnell [Wis.] 110 N. W. 177.

37. The act of Mar. 16, 1860, § 2, providing that, if any officer shall fail to give the security required by the act within one month after his election, his office shall be vacant is not mandatory in the sense of barring the court from the use of judicial discretion in determining whether the command of the statute has really been disobeyed. In re Supervisor of Nether Providence Tp. [Pa.] 64 A. 443. What the statutes really intends to provide against is not a temporary omission, irrespective of all circumstances, to enter the prescribed security, but a default on the part of the officer, an omission not legally excused. Id.

38. State v. Bunnell [Wis.] 110 N. W. 117. Where there is no such requirement, a bond need not be given. Waters v. McDowell, 126 Ga. 807, 56 S. E. 95.

39. State v. Bunnell [Wis.] 110 N. W. 117.

40. See 6 C. L. 850.

son's relation to the office is that of an occupant and a change of incumbency does not abate action against the officer.[41] The term of a public officer is generally fiexd by constitutional or statutory provisions.[42] Where the provisions contained in different sections of a statute regulating the terms of officers are irreconcilably conflicting, that provision will be declared operative which more nearly conforms to the obvious policy and intent of the legislature.[43] It is generally provided that an officer shall continue in office until his successor is elected or appointed and qualifies.[44] By such a provision a term of office is not prolonged beyond a reasonable time to enable the newly elected officer to qualify.[45] An officer does not hold over after his term expires where the legislative intent to the contrary is clearly manifested.[46] When there is no legislative provision fixing the time when an officer is to be elected, he holds his office from the time of his election, for the term prescribed by statute.[47] A state officer elected at a general election to fill a vacancy, such election being held at a time before his predecessors term would have expired.[39] holds only for the remainder of the unexpired term [48] and a vacancy appointee like wise.[49] In computing a probationary term of an appointee, all lawful suspensions are excluded.[50] A change in the constitutional term does not affect officers chosen at the same election when the constitution was amended.[51] Offices are frequently held at the pleasure of some superior officer or official board.[52] The general rule is that, in the absence of some statutory provision to the contrary, the commission or appointment of a deputy officer runs or continues only during the term of the officer making the appointment.[53] In changing the term of an office, an incidental continuance in office must not be unreasonable.[54] A constitutional provision prohibiting the extension of the term of office of a public officer after his election does not refer to a constitutional amendment for that purpose, but only to statutes passed by the legislature.[55] The legislature cannot extend the terms of incumbents

41. People v. Best [N. Y.] 79 N. E. 890. Trover by levying sheriff continued by successor. Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. S. 432.

42. Term of board of aqueduct commissioners of New York city. Walter v. McClellon, 113 App. Div. 295, 99 N. Y. S. 78.

43. 98 Ohio L. p. 271, construed. State v. Mulhern, 74 Ohio St. 363, 78 N. E. 507.

44. State v. Ives [Ind.] 78 N. E. 225; Wayt v. Glasgow [Va.] 55 S. E. 536; State v. Bunnell [Wis.] 110 N. W. 177. A hold over officer who has failed to qualify by applying for his commission and filing his oath within the time prescribed by statute is entitled to hold his office until his successor is legally elected and qualified. Boyett v. Cowling [Ark.] 94 S. W. 682. Under laws 1892, c. 681, p. 1657, a town supervisor holds over until his successor is chosen and qualifies but has no right to participate in the choice of his successor by the board of supervisors. In re Smith, 101 N. Y. S. 992. The constitutional provision contained in art. 14, § 2, providing that county officers shall hold their offices for three years and until their successors shall be duly qualified is inapplicable where one of several officers elected under Const. Art. 14, § 7, refuses to qualify as there is no way known to determine which one of the former officers he succeeds. Commonwealth v. Wise [Pa.] 65 A. 535.

45. Powell v. State, 142 Ala. 80, 39 So. 164; State v. Thompson, 142 Ala. 98, 38 So. 679.

46. A policeman does not hold over until his successor is elected or appointed where his term is expressly limited to three years. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155.

47. The words, used in Pub. Laws 1905, p. 14, "officers chosen by the governing body of any town, township, borough or other municipality" do not apply to solicitors of boards of chosen freeholders. Wright v. Campbell [N. J. Law] 64 A. 171.

48. Wyoming Const. arts. 4 and 6 construed. State v. Brooks, 14 Wyo. 393, 84 P. 488.

49. Vacancy in office of clerk of superior court of Suffolk county filled by justice of the superior court. Attorney General v. Campbell, 191 Mass. 497, 78 N. E. 133. The appointee holds until the next annual election for which precepts can be seasonably issued, though there is no express provision as to the term for which he is appointed. Id.

50. Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252.

51. State v. Pattison, 73 Ohio St. 305, 76 N. E. 946.

52. Police officers of the city of Taunton. Lahar v. Eldridge, 190 Mass. 504, 77 N. E. 635.

53. Hord v. State [Ind.] 79 N. E. 916.

54. Wayt v. Glasgow [Va.] 55 S. E. 536.

55. State v. Silver Bow County Com'rs [Mont.] 87 P. 450. See, also, People v. Lindsley [Colo.] 86 P. 352.

of offices even though the office be not a constitutional one when such would be tantamount to an invasion of the appointive or elective power.[50] Legislative power to extend existing terms of office to effectuate a constitutional change in the term extends only to such as will not co-terminate without extension.[57] The Denver charter convention of the city and county had no power to alter the terms of officers whose functions were pertinent solely to the county.[58] A constitutional provision that the election of officers of certain cities shall be held in an odd numbered year and shall expire in an odd numbered year is mandatory.[59]

Vacancies have already been discussed with reference to the power of filling them.[60] The effect of a resignation or removal is treated hereafter.[61] Omission of a merely directory preliminary to taking office does not create a vacancy,[62] neither does a loss of residence [63] or a mere charge of felony.[64]

§ 8. *Resignation, abandonment, removal and reinstatement. A. Resignation.*[65]—Where the resignation of a public officer is absolute and unconditional and contains a request for immediate acceptance and has been accepted by one with authority to do so, he cannot afterwards withdraw his resignation though he attempt to do so at a time before the date fixed therein for the vacation of the office.[66] Resignation on the eve of ouster for misconduct does not thwart the proceeding [67] or avoid its disqualifying effect.[68]

(§ 8) *B. Abandonment.*—The acceptance of a second incompatible office by a public officer constitutes an abandonment of his first office.[70] The surrender of property furnished an officer for use in the performance of his duties, in the belief that he was properly discharged, does not show abandonment, when upon being advised that he was wrongfully discharged he brings proceedings for reinstatement.[71]

(§ 8) *C. Removal. Who has the power.*[72]—The power of removing or discharging employes and subordinate officials is commonly conferred by statute upon superior officers or official boards.[73] Where the charter of a city vests the authority in such a board to select, control, and discipline the police force of the city and no provision is made for disqualifying a member where he may be biased or prejudiced against the policeman on trial, an objection cannot be properly made to a member

56. State v. Plasters [Neb.] 104 N. W. 1150, 105 N. W. 1092; State v. Offill [Neb.] 104 N. W. 1150, 105 N. W. 1098; Id. [Neb.] 104 N. W. 1151, 105 N. W. 1099.

57. State v. Pattison, 73 Ohio St. 305, 76 N. E. 946.

58. County clerk and recorder. Byrne v. People, 34 Colo. 196, 86 P. 250. County treasurer. People v. Elder, 34 Colo. 197, 86 P. 250. County Constable. People v. Berger, 34 Colo. 199, 86 P. 250. Sheriff. People v. Armstrong, 34 Colo. 204, 86 P. 251. Justice of the peace. People v. Rice, 34 Colo. 198, 86 P. 251. Coroner. People v. Horan, 34 Colo. 304, 86 P. 252. County judges. People v. Johnson, 34 Colo. 143, 86 P. 233.

Held county officers: Coroner. People v. Horan, 34 Colo. 304, 86 P. 252. Assessors. People v. Alexander, 34 Colo. 193, 86 P. 249.

59. The term of an alderman of the city of Yonkers elected in 1904 for a term to expire in 1906, expired in 1905, under such a provision. Koster v. Coyne, 184 N. Y. 494, 77 N. E. 983.

60. See ante, § 4 B.

61. See post, § 8.

62. An office is not vacant by reason of filing the oath in the wrong office. State v. Bunnell [Wis.] 110 N. W. 177.

63. County Commissioner moved to new district. Gray v. Beadle County Com'rs [S. D.] 110 N. W. 36.

64. Bergerow v. Parker [Cal. App.] 87 P. 248.

65. See 6 C. L. 852.

66. Murray v. State, 115 Tenn. 303, 89 S. W. 101.

67, 68. State v. Rose [Kan.] 86 P. 296.

69. See 6 C. L. 853.

70. A policeman who accepts an appoint as deputy constable abandons the office of policeman. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925. Under Ky. statutes, § 3744, providing that the acceptance by an officer of an incompatible office vacates his first office, it seems that a city clerk who accepts the office of tax assessor is deprived of his clerkship. Blader v. Falmouth [Ky.] 98 S. W. 1017.

71. Seifen v. Racine [Wis.] 109 N. W. 72.

72. See 6 C. L. 853.

73. Discharge of fireman by authorities of fire department. Reidy v. New York, 185 N. Y. 141, 77 N. E. 1011. Discharge of policeman by police commissioner (People v. Lewis, 112 App. Div. 889, 97 N. Y. S. 1057) or by an inspector of police (State v. Whittaker, 116 La. 947, 41 So. 218). Discharge of member of street cleaning department by commissioner. People v. Woodbury, 114 App.

of the board participating in the trial on this ground.[74] A Massachusetts town can not remove its officers except when so empowered by statute.[75] Removals by abolishing the incumbent's office are valid if in good faith and not in evasion of his rights.[76] An employment to survey and sell public lands being paid out of sales has been held not one irrevocable because coupled with an interest.[77]

What constitutes a removal.[78]—If approval of a council or like body is required, an order of discharge by a mayor is inoperative till such approval.[79] The report of a civil service commission, which is empowered to investigate the conduct of certain officials, may reflect on the official whose conduct has been investigated, but can have no effect on his tenure of office.[80]

Grounds.[81]—A cause is something inimical to the discipline and efficiency of the service.[82] It means some dereliction or general neglect of duty, or some delinquency affecting the general character of the one sought to be removed, and his fitness for the office.[83] The cause must be one which specifically relates to and affects the administration of the office and must be restricted to something of a substantial nature directly affecting the rights and interest of the public.[84] Where an office or employe is to be removed only upon written charges, such charges must state as a cause for removal some substantial shortcoming which renders his continuance in office or employment in some way detrimental to the discipline or efficiency of the service.[85] A preference in appointing does not necessarily restrict the power of removal.[86] Charging or collecting illegal fees is a common ground for removal,[87] and one charged with official misconduct in this respect cannot show good faith on his part,[88] and the fact that one does not know that the charges he makes for his services are illegal is no excuse.[89] Under a statute providing for removals for charging illegal fees or refusing or neglecting to perform official duties, a failure to properly itemize a claim against a county or the allowance of

Div. 188, 99 N. Y. S. 573. Discharge of teacher by board of education. People v. Board of Education, 114 App. Div. 1, 99 N. Y. S. 737.

74. Tibbs v. Atlanta, 125 Ga. 18, 53 S. E. 811.

75. Attorney General v. Stratton [Mass.] 79 N. E. 1073.

76. Ordinance abolishing an office in police force held in good faith and valid. McBride v. Bayonne [N. J. Law] 65 A. 895.

77. Contract at most entitled the person employed to a reasonable opportunity to sell the lands, and thus obtain compensation for the labor and expense of surveying and subdividing the same. Hollingsworth v. Young County [Tex. Civ. App.] 14 Tex. Ct. Ct. Rep. 737, 91 S. W. 1094.

78. See 6 C. L. 854.

79. City of San Antonio v. Serna [Tex. Civ. App.] 99 S. W. 875.

80. N. Y. Laws 1899, c. 370, construed. People v. Milliken, 110 App. Div. 579, 112 App. Div. 907, 97 N. Y. S. 223.

81. See 6 C. L. 854.

82. City of Chicago v. Gillen, 124 Ill. App. 210.

83. An unintentional neglect of one of the many duties of an office is not a ground for removal (In re Adam, 113 App. Div. 534, 99 N. Y. S. 273), but an entire omission and neglect to perform official duties is a ground (Folsom v. Conklin [Cal. App.] 86 P. 724).

84. In the absence of a statutory specification the sufficiency of the cause should be determined with reference to the character of the office and the qualifications necessary to fill it. State v. Sheppard, 192 Mo. 497, 91 S. W. 477. An information against an officer for a homicide wholly disconnected with his office is not a cause for removal. Id.

85. Joyce v. Chicago, 120 Ill. App. 398. Negligence and incompetency in regard to some particular work which it is an officer's duty to do or supervise are cause for removal. Heaney v. Chicago, 117 Ill. App. 405.

86. In removals preference of veterans does not apply. Seeley v. Franchot, 102 N. Y. S. 220.

87. Corker v. Pence [Idaho] 85 P. 388. Under Utah Rev. St. § 4580, a salaried officer who collects illegal fees may be proceeded against, as well as an officer who is only paid by fees for specific services, or a salaried officer who is required to collect fees for specific services. Skeen v. Craig [Utah] 86 P. 487. Making a claim for an expense account in excess of an amount really expended is cause for removal. Joyce v. Chicago, 120 Ill. App. 398. A member of the police force in the city of New York cannot be discharged for receiving money in violation of the rules of the police department, where there is no evidence that he accepted money but it is claimed that it was placed in his hand by a man who had pretended to be his friend, and who ran away without making any explanation. People v. Bingham, 102 N. Y. S. 347.

88. Skeen v. Craig [Utah] 86 P. 487.

89. State v. Richardson [N. D.] 109 N. W. 1026.

such a claim without a proper voucher is not a cause for removal.[90] In the case of a policeman, inattention or want of diligence or active breach of discipline or misconduct is ground,[91] but long service and a good record should be considered as against ill proved charges of breach of discipline.[92] Failure on the part of a municipal employe to pay his debts may be made a ground for his discharge.[93] Under a statute providing that employes shall be citizens of the United States, one who obtained employment by means of a fraudulent certificate of naturalization is properly dismissed.[94] An officer or employe may be removed or discharged for acts done prior to his appointment [95] or for acts committed in a previous term of the same office or employment.[96] The legislature has the power, unless it is otherwise provided by the constitution, to provide that an officer indicted for misfeasance, malfeasance, or nonfeasance in office shall be suspended, and not allowed to discharge the duties of office during the pendency of the indictment.[97] And such malfeasance as conspiracy to defeat collection of taxes is good cause for removal.[98] Where the statute is silent as to what constitutes a ground for discharge by a civil service commission, the right to determine those questions is left to such commission.[99] Under a statute providing for the compulsory retirement of police officers because of unfitness for duty, fitness for duty means the ability to discharge with average efficiency the duties of the grade to which the officer belongs. It does not mean ability to perform full duty or every conceivable duty.[1] A contract made by an officer, which provides for his discharge at any time, without notice and with or without cause is void.[2]

90. Idaho Rev. St. 1887, § 7459, construed. Corker v. Pence [Idaho] 85 P. 388.

91. Failure by a policeman to report to the station house while on his beat and drunkenness constitute cause for his removal. People v. Lewis, 111 App. Div. 375, 97 N. Y. S. 1057. A few minutes absence from post while reporting an offense from the nearest telephone held not a violation of duty or breach of discipline. People v. McAdoo, 102 N. Y. S. 656. Mere failure to state when he was telephoning to an inspector that he was a patrolman held not a concealment of that fact by one who made disclosure to the police operator when calling the inspector. Id. Delay of a half hour or less to get food, after an entire day's service without any, held reasonable promptness in obeying an order to report at a distant place forthwith. Id. Failure to report absence from post "at the expiration of patrol duty" is excused by an order to report "forthwith" to a superior at an other place. Id. That his brother had an altercation with the same man does not tend to prove that a patrolman threatened the man. Id.

92. People v. McAdoo, 102 N. Y. S. 656.

93. A board of police commissioners having power under a city charter to appoint, promote, or dismiss, any member of the department and to prescribe rules and regulations for the government, discipline, etc., of the same, may make a rule that any member of the police department in neglecting to pay any debt owing by him shall, on complaint by one of his creditors, be punished by reprimand from the police department. Cleu v. Police Com'rs [Cal. App.] 84 P. 672.

94. People v. Woodbury, 114 App. Div. 188, 99 N. Y. S. 573.

95. Tibbs v. Atlanta, 125 Ga. 18, 53 S. E. 811.

96. Tibbs v. Atlanta, 125 Ga. 18, 53 S. E. 811; State v. Whitaker, 116 La. 947, 41 So. 218.

97. Sumpter v. State [Ark.] 98 S. W. 719.

98. Petition for removal of county judge for official misconduct in conspiring to defeat the collection of taxes held sufficient against general demurrer and also sufficiently definite within Sayles' Rev. Civ. St. art. 3543, providing that the grounds of removal shall be set forth in plain and intelligible words. Perry v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 180, 98 S. W. 411. Evidence of defendant's connection with the same conspiracy prior to his election was relevant. Id. No defense that lands were afterwards duly assessed and placed on tax list. Id. As explanatory of the fact defendant and the members of the commissioners' court subsequently approved the tax rolls, as required by law, it was competent to show that prior thereto suits had been instituted to enforce such action. Id. Competent to show that before defendant's election he was present and acted with commissioners alleged to have been in the conspiracy in passing a resolution that they would not place the school lands on the tax rolls. Id. Not error to admit evidence that commissioners' court over which defendant presided approved the tax rolls with taxes charged against lands in the name of unknown owners when the court and he knew to whom the lands belonged. Id.

99. Every ground for discharge need not be specified in the written rules of such commission. Kammann v. Chicago, 222 Ill. 63, 78 N. E. 16.

1. The certificate of disability required by Laws 1901, ch. 466, § 357, must be signed by at least a majority of the police surgeons making the examination. People v. McAdoo, 184 N. Y. 263, 77 N. E 17.

2. Such a contract is against public pol-

Mode of proceeding.[3]—Statutory proceedings are freequently provided,[4] and persons holding civil service positions are subject to removal by the civil service commission after due notice and upon sufficient charges.[5] Provisions for charges and a hearing do not apply to incumbents discharged before the office came into the civil service list.[6] Quo warranto lies wherever the statute declares a forfeiture [7] and is not excluded by the fact that the misconduct is a crime for which forfeiture is part of the punishment assessable on conviction.[8]

Nature of proceeding and procedure.[9]—The proceeding to oust an officer is civil and not criminal.[10] A public office, not being the property of the incumbent, is not within the meaning of constitutional provisions against depriving one of his property without due process of law or except by the law of the land.[11] Employes, who are not within the protection of the civil service laws, may generally be summarily removed.[12] A limitation in a statute as to the time within which a proceeding for removal shall be heard, being obviously intended to guarantee to the accused a speedy hearing, may be waived by competent parties.[13] In North Dakota an accusation for removal from office for malfeasance must be presented by a grand jury.[14] Where written charges are required,[15] they must state as a removal some substantial shortcoming which renders the continuance of the officer or employe in his office or employment in some way detrimental to the discipline or efficiency of the service.[16] Such charges need not be stated with the accuracy of an indictment,[17]

icy. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925.

3. See 6 C. L. 856.

4. Corker v. Pence [Idaho] 85 P. 388; State v. Richardson [N. D.] 109 N. W. 1026; Skeen v. Craig [Utah] 86 P. 487.

5. City of Chicago v. Gillen, 222 Ill. 112, 78 N. E. 13; Kammann v. Chicago, 222 Ill. 63, 78 N. E. 16; Heaney v. Chicago, 117 Ill. App. 405; Joyce v. Chicago, 120 Ill. App. 398. And see infra, this section, Nature of Proceeding and Procedure.

6. Sims v. O'Meara [Mass.] 79 N. E. 824.

7, 8. State v. Rose [Kan.] 86 P. 296.

9. See 6 C. L. 856.

10. Skeen v. Craig [Utah] 86 P. 487.

11. Sumpter v. State [Ark.] 98 S. W. 719.

12. An employee who is engaged to fill a temporary position is not within the civil service provisions of the city charter, and he may be discharged without the filing of written charges and an opportunity to be heard. Rodrigue v. Rogers [Cal. App.] 87 P. 563. One appointed to a position without competitive examination is not within the provisions of the municipal civil service act as to removal. People v. McAdoo, 113 App. Div. 770, 99 N. Y. S. 324. Under the greater New York charter, the board of education may dispense with the services of a teacher or any of its clerical force if they are unnecessary without preferring charges against the person filling such position, or without passing a resolution formally abolishing the position. People v. Board of Education, 114 App. Div. 1, 99 N. Y. S. 737. An inspector of masonry in the department of parks of New York city does not hold an office to which a salary is attached as an incident, but is an employee who can be rightfully dismissed, whenever for lack of work his services become unnecessary. Dunne v. New York, 101 N. Y. S. 678. Under N. Y. Const., art. 5, § 3, an employee in the canal department may be discharged without a hearing on charges, even though he is an honorable veteran of the Civil War. Seeley v. Franchot, 102 N. Y. S. 220.

13. Where the defendant appeared on the day set for trial, and proceeded to trial without objection on account of delay, he will not be heard upon appeal to raise for the first time an objection to the jurisdiction of the court for that reason. Folsom v. Conklin [Cal. App.] 86 P. 724.

14. In a proceeding under N. Dak. Rev. Code 1905, § 9646, or Rev. Code 1899, § 7838, for the removal of public officials, it is proper to object to the accusation on any ground one might assign, by way of demurrer to a complaint. If objections to the accusation are overruled, an answer must be filed, and trial had in a summary manner. State v. Richardson [N. D.] 109 N. W. 1026. It is not necessary that an accusation under such statute should contain all the facts and circumstances surrounding the alleged charge and collection of illegal fees by a public official. Id.

15. Under 22 U. S. St. at L. 406 (U. S. Comp. St. 1901, p. 1222), and the execution order made in pursuance thereof, extending the departmental service classified under this act so as to include all executive officers and employes outside of the District of Columbia, whether compensated by a fixed salary or otherwise, who are serving in a clerical capacity and who perform duties wholly or partly clerical, an employe in the office of the United States surveyor general of the state of Idaho cannot be removed except upon written charges with an opportunity for defense. United States v. Wickersham, 201 U. S. 390, 50 Law. Ed. 798.

16. Joyce v. Chicago, 120 Ill. App. 398. The particular acts or omissions which constitute the alleged negligence or incompetency need not be specified. Heaney v. Chicago, 117 Ill. App. 405.

17. The object of such charges is simply to apprise the officer or employe accused,

but it must not leave a substantial part of the cause to inference.[18] It is no objection that a charge averring two causes for removal deficiently sets out one of them.[19] Notice is requisite to a hearing on charges in Illinois,[20] but want of notice is cured by appearance.[21] The allegations of an information against an officer should be made positively when the facts are of record and are accessible or are within the personal knowledge of the informant, otherwise they may be made on information and belief.[22] Where notice of charges against an officer or employe is required, if the record fails to show such notice or waiver thereof, the trial body is without jurisdiction to determine such charges.[23] In Illinois the officer has no right to be present when the civil service commission considers the report and findings of the triers.[24] Under the Greater New York City Charter, which provides that persons holding certain municipal positions shall not be removed until they have been informed of the cause and allowed an opportunity to make an explanation,[25] such persons are not entitled to be sworn, or to introduce witnesses in their own behalf, nor are they entitled to a trial or judicial hearing of any kind.[26] In matters of evidence, the rules of criminal practice are sometimes applied,[27] but in New York the common-law rules of evidence do not apply in their strictness to police trials.[28] Hence, the inadvertent omission to administer the oath to a witness who testifies against a policeman in proceedings to remove him does not invalidate such proceedings.[29] A police commissioner has a right to examine the whole record of a member of the police force to determine what punishment to impose on him, and whether he does so during the trial or after retiring from the bench, or has it all in mind from personal experience or previous examination, does not matter.[30] Where charges against a city employe are admitted, there is no necessity for any further evidence, the only question being whether the excuse offered by him for his alleged omission of duty was sufficient to exonerate him.[31]

with reasonable certainty, of the charges against him, that he may have a fair opportunity to defend himself. Joyce v. Chicago, 120 Ill. App. 398. Charges are stated with sufficient precision when the person proceeded against does not appear to have been surprised and appears to have been sufficiently informed to defend himself. State v. Whitaker, 116 La. 947, 41 So. 218.

18. "Violation of rule 69" specification "Neglect to pay within a reasonable time a just debt" held bad for failing to show any culpability or dishonesty. City of Chicago v. Condell, 124 Ill. App. 64; City of Chicago v. Gillen, 124 Ill. App. 210.

19. Conduct unbecoming an officer, and "violation of Rule 54," sustained on the former. City of Chicago v. Bullis, 124 Ill. App. 7.

20. City of Chicago v. Gillen, 124 Ill. App. 210.

21. Clifford v. Chicago, 124 Ill. App. 123.

22. Under Idaho Rev. St. 1887, § 7459, an information is sufficient if it charges a public officer with knowingly, wilfully, and intentionally, charging and collecting illegal fees, specifying them, or knowingly, wilfully, or intentionally refusing to perform, or neglecting to perform an official duty pertaining to his office, specifying such duty. Cerker v. Pence [Idaho] 85 P. 388.

23. Powell v. Bullis, 221 Ill. 379, 77 N. E. 575, afg. 124 Ill. App. 7; City of Chicago v. Gillen, 222 Ill. 112, 78 N. E. 13.

24. Clifford v. Chicago, 124 Ill. App. 123.

25. To entitle one claiming to be the head of a bureau to relief, he must allege that the bureau of which he claims to be a member was one established by such charter, or by an officer authorized by such charter to create bureaus. People v. Ahearn, 111 App. Div. 741, 98 N. Y. S. 492. An assistant librarian in a public city library in Greater New York is within the protection of this statute. Craigie v. New York, 100 N. Y. S. 197.

26. All that they are entitled to is to be notified of the charge and afforded an opportunity to make an explanation. People v. Weedbury, 114 App. Div. 188, 99 N. Y. S. 573.

27. But in such a proceeding, the same rules governing the introduction of evidence must be followed as in criminal prosecution, and the guilt of the defendant must be established by the same degree of positive proof as is required in such prosecution. Skeen v. Craig [Utah] 86 P. 487. In New York where the charge is a felony, the same presumptions as on a criminal prosecution are indulged, and the evidence must be very clear. People v. Sturgis, 110 App. Div. 1, 96 N. Y. S. 1046. Evidence held insufficient to show perjury or the suppression of testimony. Id.

28. People v. McAdoo, 113 App. Div. 909, 99 N. Y. S. 949.

29. People v. McAdoo, 184 N. Y. 304, 77 N. E. 260.

30. People v. Lewis, 111 App. Div. 375, 97 N. Y. S. 1057.

31. Ryan v. Handley [Wash.] 86 P. 398.

Order of removal.[32]—A judgment of removal need not state the grounds upon which it is based.[33] The result of a trial before a board as expressed in its findings like a verdict in an ordinary case is to have a reasonable intendment and a reasonable construction, and is not to be set aside, except for necessity.[34] A general finding guilty as charged will be sustained if any of several causes charged was proven.[35] Where no finding in writing was made by deputy police commissioner upon dismissing a member of the police force, no such finding can be returned as a part of the record.[36] The judgment of a civil service tribunal, discharging a civil service employe, will prevent the recovery of a salary by such employe after his discharge, though errors occurred in the trial.[37]

Appeal and review.[38]—Where removal proceedings are judicial in their character they may be reviewed by certiorari,[39] but when an officer or a departmental board in making a removal exercises a power incident to executive discretion rather than one of a judicial or quasi-judicial nature, no review can be had.[40] The courts may, however, as incidental to their power to determine and enforce an officer's right to his office, inquire whether or not the officer or board making the removal exceeded its lawful authority.[41] In New Jersey it has been held that a statute directing a justice of the supreme court to rehear in a summary manner the charges against a policeman, suspended or dismissed by a police board, is void.[42] In Louisiana when a police officer is removed by an inspector of police, he may appeal de novo to the board of police commissioners.[43] In Massachusetts under the statute providing for the removal of license commissioners by the mayor of a city, for cause, there can be no appeal from the decision of the superior court affirming the order of the mayor removing such a commissioner.[44] A review must be reasonably pur-

32. See 6 C. L. 858.

33. State v. Richardson [N. D.] 109 N. W. 1026.

34. Tibbs v. Atlanta, 125 Ga. 18, 53 S. E. 811.

35. City of Chicago v. Bullis, 124 Ill. App. 7.

36. People v. McAdoo, 112 App. Div. 32, 98 N. Y. S. 40.

37. The utmost effect of such errors would be to render such judgment voidable and, being voidable, it cannot be attacked in a collateral proceeding. City of Chicago v. Campbell, 118 Ill. App. 129.

38. See 6 C. L. 858.

39. A judgment of a board of police commissioners, discharging a policeman in the manner prescribed by law creating the board, is subject to review on certiorari. Tibbs v. Atlanta, 125 Ga. 18, 53 S. E. 811. Certiorari lies where removal is on charges and a hearing of witnesses. Not necessary that property rights be involved. City of Chicago v. Bullis, 124 Ill. App. 7; City of Chicago v. Condell, 124 Ill. App 64; City of Chicago v. Gillen, 124 Ill. App. 210; Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252, rvg. 124 Ill. App. 282 (decided earlier); Powell v. Bullis, 221 Ill. 379, 77 N. E. 575; Kammann v. Chicago, 222 Ill. 63, 78 N. E. 16. **Contra.** Joyce v. Chicago, 120 Ill. App. 398; Kusel v. Chicago, 121 Ill. App. 469. The civil service board when hearing charges is a judicial body. City of Chicago v. Condell, 124 Ill. App. 64; City of Chicago v. Bullis, 124 Ill. App. 7.

40. When a police commissioner who has the power of removal, upon giving his reasons and notifying the person removed, exercises this power, his action will not be set aside unless an essential formality has been omitted or unless, perhaps, he has so acted as to defeat the real purpose of the law. Appeal of Pierce, 78 Conn. 666, 63 A. 161. In Massachusetts the action of the mayor of a city in making removal or abolishing an office is final and not subject to review. Hill v. Fitzgerald [Mass.] 79 N. E. 825. Certiorari will not lie to review an order made by the street commissioner dismissing a member of the uniformed force from the street cleaning department of the city of New York. Such a proceeding is in no sense judicial and cannot be reviewed by certiorari. People v. Woodbury, 112 App. Div. 79, 98 N. Y. S. 142. Where a municipal charter provides that charges against firemen should be established to the satisfaction of the board of fire commissioners with the further provision that such board shall be responsible for the efficient working of the department, when charges have been regularly preferred, opportunity given to defend against such charges, and the board has exercised its discretion in passing upon such charges, their judgment in that respect is not subject to review. Ryan v. Handley [Wash.] 86 P. 398.

41. Riggins v. Waco [Tex.] 15 Tex. Ct. Rep. 758, 93 S. W. 426.

42. This is an attempt to confer upon a statutory tribunal the prerogative right of the supreme court to review by certiorari the proceedings of municipal boards. City of New Brunswick v. McCann [N. J. Law] 64 A. 159.

43. State v. Whitaker, 116 La. 947, 41 So. 218.

44. Dow v. Casey [Mass.] 79 N. E. 810.

sued or it is lost.[45] Notice of application for certiorari is especially proper when the civil service commission is the respondent.[46] If the return is incomplete, the civil service commission may be compelled to supply it.[47] On a return laches will not be inferred against the removing power unless the time when it first knew the facts appears.[48] Whether the cause charged was legal ground may be reviewed.[49]

(§ 8) *D. Reinstatement.*[50]—Unless the office held by a public official has been lawfully abolished, or he has been guilty of unreasonable delay,[51] he is entitled to relief by mandamus, if illegally removed.[52] The writ should issue to those officers on whom is the legal duty to make reinstatement,[53] and it does not abate by resignation of the respondent,[54] but should be continued against his successor.[55] An officer may waive or abandon his right to reinstatement,[56] or this right may be barred by limitations[57] or lost by laches,[58] but one is not guilty of laches where the time allowed to elapse has been consumed in making attempts to procure redress from the proper authorities.[59] Where a policeman, who has been dismissed for absence from duty, seeks to be reinstated, the burden is on him to prove in a proper proceeding that his absence was not voluntary or intentional, and, therefore, could not be treated as a resignation.[60]

§ 9. *Powers and duties*[61] of officers and employes are generally prescribed by statute, or constitution, and where an office is constitutional, but its duties are statutory, the legislature may, within reasonable limits, change the duties of the office if the public welfare requires it to be done.[62] Unless restrained by the constitution, the legislature may impose upon public officers new and additional duties theretofore performed by other officers.[63] Persons elected to office take the office

45. Nineteen months' delay unexplained to apply for certiorari held fatal. Blake v. Lindblom, 225 Ill. 555, 80 N. E. 252.

46. City of Chicago v. Gillen, 124 Ill. App. 210.

47, 48, 49. City of Chicago v. Condell, 124 Ill. App. 64.

50. 6 C. L. 860.

51. Hill v. Fitzgerald [Mass.] 79 N. E. 825.

52. Hill v. Fitzgerald [Mass.] 79 N. E. 825; Bean v. Clausen, 113 App. Div. 129, 99 N. Y. S. 44. This rule is applicable in favor of a veteran, employed by a municipality, who has been wrongfully discharged. Ransom v. Boston [Mass.] 79 N. E. 823; Sims v O'Meara [Mass.] 79 N. E. 824. The right to this remedy is not lost by reason of the fact that suit was previously brought by him for the wages which he had lost for the time during which he was excluded from his employment. Ransom v. Boston [Mass.] 79 N. E. 823.

53. A writ of mandamus to compel the reinstatement of a janitor of a police station, removed in violation of a statute providing against the removal of a veteran without a hearing, should be brought against the police board to whom by statute control of police stations is given. Sims v. Boston. 191 Mass. 382, 77 N. E. 714. Where by a city charter the exclusive power to detail patrolmen for detective duty and to revoke such details is vested in the superintendent of police, mandamus will not lie against the board of police to compel such board to reinstate certain persons to detective duty. In re Pritchard, 101 N. Y. S. 711.

54, 55. People v. Best [N. Y.] 79 N. E. 890.

56. Heaney v. Chicago, 117 Ill. App. 405; Seifen v. Racine [Wis.] 109 N. W. 72.

57. The limitation of four months contained in New York City Charter, c. 466, § 302, does not apply to a proceeding to restore to active duty a member of the police force who has been retired on account of alleged physical incapacity. People v. Bingham, 186 N. Y. 538, 78 N. E. 1098.

58. Hill v. Fitzgerald [Mass.] 79 N. E. 825. Mandamus refused though petitioner had a clear legal right to reinstatement, where there was a delay of five years. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 155. A delay of nearly sixteen months in the absence of any explanation constitutes laches. People v. Board of Education of New York, 114 App. Div. 1, 99 N. Y. S. 737. A delay of one and one-half years caused by the fact that the officer was wrongly advised as to his legal rights is not justified. City of Chicago v. Condell, 224 Ill. 595, 79 N. E. 954.

59. People v. Baker, 49 Misc. 143, 97 N. Y. S. 453.

60. There is no provision of the charter of the city of New York giving a police commissioner power to reverse an action of his predecessor and restore an officer to the force after he has been dismissed. People v. McAdoo, 114 App. Div. 100, 99 N. Y. S. 600.

61. See 6 C. L. 860. See special article Contracts Interferring with Public Service, 3 C. L. 861. Powers and duties of **policemen**, see Arrest and Binding Over, 7 C. L. 265; Municipal Corporations, 8 C L. 1056; Sheriffs and Constables, 6 C. L. 1459.

62. State v. Stedman [N. C.] 54 S. E. 269.

63. The legislature may designate the particular board or body that shall have control of city streets and change such designation from time to time as the public interest may require. Wilcox v. McClellan, 185 N. Y. 9, 77 N. E. 986.

subject to such regulations, impositions, and restrictions as the legislature may impose, which are not forbidden by the constitution directly or by necessary implication.[64] A public officer has only such powers as are conferred upon him expressly or by necessary implication,[65] and all acts done in excess of such powers [66] or beyond his bailiwick,[67] or after his term has expired,[68] are invalid.

An office peculiarly of statutory origin carries such powers only as the statute gives.[69] A pro tempore officer has usually all the powers which pertain to the regular incumbent.[70] All persons who deal with public officials are charged with notice of the scope of the power of such officials.[71] Officers charged with ministerial duties like private persons, act at their peril on determining what their duties are under particular circumstances.[72] In the absence of evidence to the contrary, the presumption is that public officials have properly discharged their duties.[73]

The unauthorized act of a state official may be confirmed and ratified by the legislature,[74] and of a city official by the electors [75] or governing body [76] of the city.

Effect of personal interest.[77]—An officer may be temporarily disqualified to perform the duties of his office because of interest.[78] Where municipal authorities

64. The legislature may provide that certain public officers may be required to apply for a commission and pay a fee therefor within a prescribed time. Boyett v. Cowling [Ark.] 94 S. W. 682.

65, 66. Illustrations: The superintendent of a city electric lighting plant cannot accept for the city a shipment of electric apparatus not consigned to him or the city. Southern Exp. Co. v. B. R. Elec. Co., 126 Ga. 472, 55 S. E. 254. Revenue agents are officers created by, and their duties and powers prescribed by, statute, and they cannot exercise any authority not conferred on them by statute. Commonwealth v. Central Consumers' Co., 28 Ky. L. R. 1363, 91 S. W. 711. Municipal officers may enjoin encroachments upon the streets and parks of the municipality. A bill in equity is maintainable in the names of the district commissioners in their official character to enjoin the maintenance and use by the defendant of a show window projecting over the building line of a street and encroaching upon public parking. Guerin v. Macfarland, 27 App. D. C. 478. Where by mistake a sheriff pays to the trustee of the jury fund a part of the state revenue the state treasurer and the state auditor are without authority to credit him with the amount in the settlement of his accounts as collector or to repay him but he is entitled to be reimbursed by the trustee. Giboney v. Com., 28 Ky. L. R. 1230, 91 S. W. 732. The allowance of illegal claims by a board of county commissioners to a county officer does not justify the officer in retaining the amount thus allowed as such a board cannot make a donation of public revenues to an officer. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

See, also, the topics treating of particular officers, as Sheriffs and Constables, 6 C. L. 1459, or of particular matters of which a duty is predicated as Taxes, 6 C. L. 1602.

67. Under the statutes of Missouri creating the police sysytem for the city of St. Louis, the members of the police force of that city have no jurisdiction to arrest offenders outside of the city limits for offences committed in St. Louis county. State v. Stobie, 194 Mo. 14, 92 S. W. 191.

68. The speaker of the assembly for 1903 could not, in June, 1904, make any substitution, alteration, or addition to his original certificate attached to original bill passed by the assembly that would give the bill vitality. In re Stickney's Estate, 110 App. Div. 294, 97 N. Y. S. 336.

69. Revenue agents charged to prosecute the collection of delinquent taxes or omitted license fees. Commonwealth v. Central Consumers Co., 28 Ky. L. R. 1363, 91 S. W. 711.

70. A mayor pro tem. appointed under N. C. Revisal, § 2933, is authorized to exercise the duties of the mayor during his absence as fully as he could do if present. The power conferred upon the mayor pro tem. to exercise the duties of mayor during his absence includes that of issuing a warrant in criminal actions. State v. Thomas, 141 N. C. 791, 53 S. E. 522.

71. Hord v. State [Ind.] 79 N. E. 916; Sheridan v. New York, 145 F. 835. Township trustee. Indiana Trust Co. v. Jefferson Tp. [Ind. App.] 77 N. E. 63. Building commission. Davenport v. Elrod [S. D.] 107 N. W. 833.

72. An assessor in restoring omitted lands to the land books under authority vested in him by W. Va. Code 1899, c. 29, § 10, performs a purely ministerial function. Webb v. Ritter [W. Va.] 54 S. E. 484.

73. Craigie v. New York, 100 N. Y. S. 197.

74. Hord v. State [Ind.] 79 N. E. 916.

75. The electors of a town having statutory power to direct the institution of actions and to employ necessary attorneys for their prosecution may ratify the action of counsel in bringing to judgment a claim of the town, although such counsel were in the first instance directed to bring the action by a town board without authority of law. Town of Partridge v. Ring, 99 Minn. 286, 109 N. W. 248.

76. The **bringing of suit** by a city on a contract within its powers **ratifies** the unauthorized acts of its officers in making it. City of Worcester v. Worcester & H. Consol. St. R. Co. [Mass.] 80 N. E. 232.

77. See more fully in Public Contracts, 6 C. L. 1109.

78. Where a clerk of a court is charged with murder, the judge may appoint a clerk pro tem. for the purpose of performing the

are personally interested in the allowance of a claim against the municipality, they are legally disqualified from voting to allow it.[78] A public official cannot contract with himself, on behalf of the public, as such a contract would be against public policy,[80] and even an assignment of a contract to his corporation is held invalid in Arkansas[81] though made in good faith.[82] So a contract with regard to public affairs in which a public officer is interested is void, although such contract is without fraud and without prejudice to the interests of taxpayers.[83]

Acts of a de facto officer[84] are valid as to the public and third persons,[85] but the acts of a mere usurper are absolutely void for all purposes.[86] The acts of the officers of a de facto municipal corporation are valid when they would be within the power of such officers if the corporation were one de jure.[87]

Employment of deputies and assistants.[88]—A defined power to employ assistants at public charge is exclusive of any greater authority.[89]

Hours of work.[90]—The number of hours per day which public employes shall work is sometimes fixed by statute.[91]

Office records, paraphernalia, and rooms.—A duly appointed and qualified officer is entitled to the official records of his office.[92] County officials having the custody thereof have the right to direct what rooms in the court house shall be occupied by certain officers,[93] and the right to change these assignments from time to time as the public interest requires;[94] but without statutory authority to do

duties of the clerk with relation to the prosecution against the clerk. State v. Sheppard, 192 Mo. 497, 91 S. W. 477. Under Tex. Const. art. 5, § 11, and Tex. Rev. St. 1895, art. 1068, a district judge is disqualified to try a case in which he may be interested, but such a judge is not so interested as to be disqualified to try a case in which it is sought to restrain the collection of city taxes, though he is a taxpayer of that city. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141.

79. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547.

80. A road superintendent cannot accept employment from contractors for building a public road. Cheney v. Unroe [Ind.] 77 N. E. 1041. Under Shannon's Tenn. Code, §§ 1133, 1134, making it unlawful for public officials to have an interest in public contracts, a member of a county board cannot sell supplies to a county workhouse, although such supplies were necessary, and were worth the price charged for them. Madison County v. Alexander [Tenn.] 94 S. W. 604.

81. If an officer cannot as an individual be interested in a contract against the public, an assignment to a bank of which he was an officer and stockholder is invalid. Contractor assigned unearned price of city work to bank. People's Sav. Bank v. Big Rock Stone & Const. Co. [Ark.] 99 S. W. 836.

82. Kirby's Dig. 5644-5647 "forbids" him to be interested. People's Sav. Bank v. Big Rock Stone & Const. Co. [Ark.] 99 S. W. 836.

83. Cheney v. Unroe [Ind.] 77 N. E. 1041. And see Public Contracts, 6 C. L. 1117.

84. See 6 C. L. 862.

85. Blades v. Falmouth [Ky.] 98 S. W. 1017; Heard v. Elliott [Tenn.] 92 S. W. 764; Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141. An enumeration of children of school age made by one who for a number of years has been recognized and acted as the clerk of a school district, though not regularly appointed, is valid. State v. Cartwright [Mo. App.] 99 S. W. 48.

86. Heard v. Elliott [Tenn.] 92 S. W. 764.

87. People v. Pederson, 220 Ill. 554, 77 N. E. 251.

88. See 6 C. L. 862, n. 52.

89. Attorney general has no authority to employ an attorney to prosecute claims due the state or to contract for service beyond his term except as defined in Acts 1889, p. 124, c. 71 (Burns' Ann. St. 1901, § 7683). Hord v. State [Ind.] 79 N. E. 916. Under N. Y. Laws 1896, ch. 57, § 1, amended by N. Y. Laws 1897, ch. 679, the commissioner of street improvements is not authorized to employ an engineer to make plans and specifications for an approach to the entrance of a boulevard which it was his duty to lay out and establish. Hildreth v. New York, 111 App. Div. 63, 97 N. Y. S. 582.

90. Working hours on public works, see Public Works and Improvements, 6 C. L. 1143.

91. The provision of the Municipal Code of Chicago, § 1688, that eight hours of labor shall constitute a legal day's work for all employes performing manual labor for the city of Chicago, does not apply to a clerk in the city collector's office. May v. Chicago, 222 Ill. 595, 78 N. E. 912.

92. Code Civ. Proc. § 2471-a, construed. In re Smith, 101 N. Y. S. 992.

93. Watson v. Scarbrough [Ala.] 40 So. 672. In Alabama the county board of revenue has this power and so long as it acts within the limits of its authority and in good faith, its action cannot be assailed, and no other tribunal can intervene to revise or control its action. White v. Hewlett, 143 Ala. 374, 42 So. 78.

94. White v. Hewlett, 143 Ala. 374, 42 So. 78. A county officer whose property has been removed from room occupied by him as an office during his absence and who is refused permission to re-enter by and

otherwise they must proceed according to the forms of law to test the right of an officer, who is in possession, to hold the room occupied by him.[95]

Mode of official action.—Where a board is empowered to perform certain public duties, a quorum must be present or its acts will not be valid and binding.[96] Generally when a common council, or legislature, or congress is referred to especially in statutes, a single official body is meant, and when acts are required to be performed, they must be performed by the body and not by the separate volition of the different members composing such body.[97] A direction to do an official act under the official seal, there being none, may be upheld by regarding the direction to use the seal as surplusage.[98] A deputy authorized to issue writs should do so in his own name as deputy, not in his principal's name according to the rule in Georgia.[99]

Judicial control or review.[1]—Generally speaking, administrative or executive and legislative acts are not subject to judicial visitation unless in gross abuse or usurpation of right.[2] Thus, the action of a city council in disciplining a member is not reviewable.[3] Mandamus will lie to enforce the performance of ministerial duties,[4] where the relator establishes a clear legal right to their performance. But this writ will not issue to disturb or overrule the determination of questions of fact committed to the discretion of an officer or official body.[6] Officers may be enjoined from the commission of lawful acts,[7] but an injunction will not be granted at

under order of the county commissioners, cannot maintain an action of forcible entry and detainer to recover possession of the room where he does not show an actual, exclusive, and peaceable possession. Watson v. Scarbrough [Ala.] 40 So. 672.

95. In Alabama the commissioners' court has the right to punish for contempt of court, but an officer claiming what he considers his legal right to hold possession of a room is not guilty of contempt of court, and if he were, putting him and the property of his office out of the room is not one of the punishments mentioned in the statute. Watson v. Scarbrough [Ala.] 40 So. 672.

96. Hobbs v. Uppington, 28 Ky. L. R. 131, 89 S. W. 128; State v. Briede, 117 La. 183, 41 So. 487.

97. Where appointments of municipal officers by a mayor are subject to be nullified by the filing of objections in writing by a majority of the common council, it is not necessary that the common council should meet as a body, and a majority thereof agree upon the objections, but each member of the council may file his objections separately. State v. Bandel [Mo. App.] 97 S. W. 222.

98. Spokane Terminal Co. v. Stanford [Wash.] 87 P. 37.

99. A clerk of the court may appoint a deputy and authorize him to issue execution but he cannot by oral authority confer general power upon the deputy to sign such clerk's name to executions issued in his absence and not under his immediate direction and control. Biggers v. Winkles, 124 Ga. 990, 53 S. E. 397.

1. See 6 C. L. 863.

2. Nathan v. O'Brien, 102 N. Y. S. 947; Goytino v. McAleer [Cal. App.] 88 P. 991; Murphy v. Police Jury, St. Mary Parish [La.] 42 So. 979. Administrative action is not reviewable or controllable unless so abused as to be in plain excess of the power possessed. Inclusion of rural lands in city held excess of power. Commonwealth Real Estate Co. v. South Omaha [Neb.] 110 N. W. 1007. A board of public service, where required by a street improvement ordinance to choose one of three materials after bids were received, performs only a ministerial act, and as the agent of the city council executes its legislative command. The discretion of such board is not to be interfered with in the matter of awarding the contract to another than the lowest bidder, except for fraud or its legal equivalent. Scott v. Hamilton, 4 Ohio N. P. (N. S.) 1.

3. Butler v. Harrison, 124 Ill. App. 367.

4. Mandamus to compel the placing of the name of a duly nominated candidate on the official ballot. Robinson v. McCandless, 29 Ky. L. R. 1088, 96 S. W. 877. Mandamuus to compel a board of health to furnish and certify a property itemized statement of claims of persons employed by it. Sawyer v. Village of Manton, 145 Mich. 272, 13 Det. Leg. N. 470, 108 N. W. 644. Mandamus to compel board of health to issue permit to sell milk. People v. Department of Health of New York, 51 Misc. 190, 100 N. Y. S. 788. Mandamus will lie to compel a municipal superintendent of buildings to approve plans for a house which one desires to erect on a lot owned by him, though the owner knows the city intends to acquire the lot in the near future and he will thus be entitled to compensation for the value of such house. People v. Reville, 50 Misc. 474, 100 N. Y. S. 584. Mandamus does not issue as of course to a town officer, whenever an execution against the town remains unsatisfied. It issues only to compel such officer to do those acts which the law requires of him toward the payment of the judgment. Rose v. McKie [C. C. A.] 145 F. 584.

5. People v. Department of Health of New York, 51 Misc. 190, 100 N. Y. S. 788.

6. Mandamus will not issue to interfere with the discretion of an official body, having control of the police force of a municipality, in the management of that force. Gleistman v. West New York [N. J. Law] 64 A. 1084.

7. Trespassing upon the lands of a pri-

the instance of a taxpayer where the injury suffered by him does not differ in kind from that which is suffered by the public generally.[8] Acts threatened under color of laws averred to be invalid will not be enjoined when not an interference with complainant's rights.[9] Police officers will not be enjoined from the performance of their duty of suppressing crime and arresting criminals.[10] The federal courts are without jurisdiction to entertain a suit in equity to restrain public officers from initiating judicial proceedings in the state courts to enforce a statute which is alleged to be unconstitutional.[11] The officers of a municipal corporation engaged in the perpetration of ultra vires acts in behalf of the corporation are proper parties defendant to a suit to enjoin such acts or to correct them.[12] Certiorari will not lie to review the summary determination of an official board made without judicial proceedings, through its action may involve the exercise of judgment and discretion.[13]

§ 10. *Liabilities of public officers. A. Civil liability.*[14]—In doing what the lawful discharge of his duties requires, an officer does no wrong and is not liable;[15] but if he is negligent therein or if he exceeds his duty and performs an active wrong,[16] or invades property rights without due course of law,[17] he is personally liable, as he is if h enegligently omits a duty imposed for the protection of one injured.[18] Personal liability for an unauthorized act may be extinguished by sub-

vate person under a claim that it is a public highway. Lawrence v. Kirby, 145 Mich. 432, 13 Det. Leg. N. 497, 108 N. W. 770.

8. Injunction against the establishment of a central depository for school books. Duncan v. State Board of Education, 74 S. C. 560, 54 S. E. 760.

9. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138.

10. An injunction will not be granted restraining the police from taking stations in front of or in the doorway leading to an alleged pool room and from warning persons not to enter therein. The owner if injured may invoke the criminal law or have an action for his damages. Stevens v. McAdoo, 112 App. Div. 458, 98 N. Y. S. 553.

11. Action to prevent officers from enforcing a statute prohibiting the use of trading stamps. Hutchinson v. Smith, 140 F. 982.

12. The fact that after a suit has been instituted complaining of ultra vires acts about to be done, the corporation and its officers discover their error and revoke the order under which the acts were directed to be done and abandon the illegal scheme, does not afford any cause for the dismissal of a suit properly instituted to prevent the acts complained of. Gillespis v. Gibbs [Ala.] 41 So. 868.

13. Refusal of board of health to allow one to sell milk in a city. People v. Department of Health of New York, 51 Misc. 190, 100 N. Y. S 788.

See, also, ante, § 8 C, as to whether removal of officers on charges is a judicial act.

14. See 6 C. L. 864.

15. **Health officers** are not liable for injuries occasioned by establishing a **quarantine,** however erroneous or mistaken their action may be, provided there be no malice or wrong motive present (Beeks v. Dickinson County [Iowa] 108 N. W. 311), nor are they liable for a mistake made or negligence in locating a smallpox hospital (Id.). If health officers are personally negligent in the maintenance of such hospital and in consequence of such negligence the hospital becomes a nuisance, they are liable, provided their negligence is a misfeasance as distinguished from a nonfeasance. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099.

16. Where one complains of indignities heaped upon him by officials who had him in charge while working upon the streets of a city as punishment for violating a city ordinance, he should bring his action against such officials and not the city. Bartlett v. Paducah, 28 Ky. L. R. 1174, 91 S. W. 264.

17. Health officers are liable for taking land for use in connection with a contagious hospital without the owner's consent or without proceeding according to law. Barry v. Smith, 191 Mass. 78, 77 N. E. 1099. In the prosecution of public works by or under authority of the state under the right of eminent domain or common-law necessity there is immunity from liability for entry upon private lands only to the extent that the entry or occupation is temporary or the infliction of damage is incidental and incipient or preliminary. A state engineer and his assistant, who make a slash through a forest preserve three and a half miles long and from five to twenty-five feet wide which it will take eighty years of timber growth to repair, are guilty of an unauthorized trespass and are personally liable. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

18. Officers who let a contract for a public building without taking the bond required by statute for the protection of materialmen and laborers are individually liable for damages suffered by such persons. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547. Where it is provided that the laborer or person furnishing materials shall file an itemized statement of the amount owed within thirty days after the contract is completed, such notice is not a condition precedent to the liability of public officers to laborers or furnishers of material where such officers entered into a contract for public work without taking the required bond. Hardison v. Yeaman, 115 Tenn. 639, 91 S. W. 1111.

sequent legislation, ratifying the act as if originally authorized.[19] A public officer who is a member of a corporate body upon which a duty rests cannot be held liable for the neglect of duty of that body.[20] Under a statute providing that sheriffs shall be responsible for the official acts of their deputies, a sheriff is liable where his deputy shoots a person in order to effect his arrest.[21] Under the New York statute subjecting an officer to an action for damages for refusing to give preference to an honorably discharged veteran,[22] or for removing such a veteran for political purposes,[23] or for reducing the salary of such veteran with intent to bring about his resignation,[24] and also giving such veteran a remedy by mandamus for righting his wrong, he must first establish his right by mandamus[25] unless under the special circumstances of the case this cannot be done.[26] An action against an officer for omission of a duty is in Iowa not barred as one for mistake but as one for neglect of official duty.[27]

In contracts where the officers of a public or municipal corporation act officially and under an innocent mistake of law in which the other contracting party participated with equal opportunities for knowledge, neither party at the time looking to personal liability, the officers in such a case are not personally liable, nor is the corporation liable.[28] An officer is not personally liable for the compensation of subordinates appointed by him, unless he pledges his own credit in plain words.[29]

In Nebraska an officer who exacts illegal fees is liable to a statutory action for a penalty.[30]

Liability to the public on the bond is hereafter treated. The statute of limitations applicable to suits upon official bonds does not apply to an action to recover from an officer personally sums collected and illegally detained.[31] The rule that a public officer is not liable for the loss of public funds deposited by him in a bank of undoubted standing and reputation for solvency, which subsequently fails, is followed in Tennessee.[32] In Nebraska a citizen not specially interested cannot sue officers on behalf of a city for misappropriation of funds,[33] but in New York a taxpayer may bring an action against an official who has caused the loss of any public

19. Slaughtering franchise illegally abolished in suppressing a nuisance in Havana, Cuba, by military governor and confirmed by Platt Amendment to Cuba's treaty. O'Reilly de Camara v. Brooke, 142 F. 858.

20. If there be a refusal to exercise the power of such body, it is the refusal of the body and not the individuals composing it. Official action of its different members is merged into the official action of the board itself as an entity. Monnier v. Godbold, 116 La. 165, 40 So. 604.

21. The character of the act, whether official or not, does not depend upon its lawfulness but upon the fact that the person who performs it is in fact an officer, and purports to act in his official capacity. King v. Brown [Tex.] 16 Tex. Ct. Rep. 189, 94 S. W. 328.

22. Such action survives and may be prosecuted by his personal representative. Burke v. Holtzmann, 102 N. Y. S. 162.

23. Bean v. Clausen, 113 App. Div. 129, 99 N. Y. S. 44.

24, 25. Hilton v. Cram, 112 App. Div. 35, 97 N. Y. S. 1123.

26. The superintendent of the New York city aquarium was not debarred from bringing suit when on being discharged he promptly resorted to mandamus but before obtaining a final determination jurisdiction over the aquarium passed out of the city and into the hands of another corporation. Bean v. Clausen, 113 App. Div. 129, 99 N. Y. S. 44.

27. Code § 3447, applies. Lougee v. Reed [Iowa] 110 N. W. 165.

28. Dispensary commissioners are not liable for liquors bought for a dispensary established by an act which was subsequently declared unconstitutional. Schloss v. McIntyre [Ala.] 41 So. 11.

29. A registrar of voters is not liable for the compensation of assistant registrars. Dunn v. Foley, 78 Conn. 670, 63 A. 122.

30. Cobbey's Ann. St. (1903) § 9060, construed. Sheibley v. Hurley [Neb.] 103 N. W. 1082.

31. Zuelly v. Casper [Ind. App.] 76 N. E. 646.

32. "A public officer holds the funds that come into his hands in the discharge of the duty of his office as a trustee to be disposed of as provided by law; he is not an insurer of the safety of such funds, but is bound only for the exercise of good faith, the proper diligence, caution and prudence in their management and safe keeping." State v. Reed [Tenn.] 95 S. W. 809.

33. Omaha Charter, § 40, imposes such duty on the city attorney or in certain cases on a special attorney. Cathers v. Moores [Neb.] 110 N. W. 689

property, funds or assets or the waste or injury of the public funds.[34] The sureties of a bonded depository bank are not liable for a shortage of the depositing officer by reason of the depository's having discounted his note and credited the proceeds to the deposit fund.[35] If officers act in bad faith in making public contracts they are liable in damages where it is proved that pecuniary loss resulted from such conduct, or for the costs of any litigation occasioned by their corrupt action.[36]

Accounting.—Such disbursements should be credited as were made conformably to law for the public.[37] The official audit of an officer's accounts is conclusive of all matters audited [38] and re-audit is not permissible.[39] The form of an audit finding the state of the account is not material.[40] A compromise and release respecting funds misappropriated held not to cover claims held by the officer at the time which he had purchased below face value and of which the county had no knowledge.[41] Where a city agrees to repay an official, charged with a shortage, the amount of any overpayment made by him, and upon an investigation the evidence shows an overpayment, a decree for such repayment should be made as incidental to foreclosure of a lien securing the shortage.[42]

(§ 10) *B. Criminal liability.*[43]—Aside from crimes in which the official character of the crimiual does not inhere, public officers are criminally liable for malfeasance, misfeasance or nonfeasance in office,[44] thus public officers who wilfully neglect to make arrests when voters are assaulted and obstructed are indictable.[45] Public officers are also made criminally liable for the commission of special statutory offenses, such as failing or refusing to deliver the records of the office to their successors,[46] falsifying the official records and accounts [47] or purchasing or receiving in payment evidence of the indebtedness of a city or a county or a demand against it for less than its face value, with accrued interest.[48] Previous demand is essential to make out a crime of failing to pay over moneys after demand.[49] Under an act of congress making it a criminal offense for a member of congress [50] or an officer

34. Where a town supervisor makes payment of claims against the town without first presenting them to the board for audit, he is liable to a taxpayer's suit. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951.

35. Henry County v. Salmon [Mo.] 100 S. W. 20.

36. Municipal officers, who conspire with the manager of a water company to sell his plant to the town for a price greatly in excess of its real value, are liable in damages. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

37. On accounting a disbursing officer should not be allowed credit for the amount of a warrant covering numerous claims which he had paid in advance of audit, the warrant being made for the aggregate in order to facilitate bookkeeping. York County v. Thompson [Pa.] 64 A. 781.

38, 39, 40. Commonwealth v. Keenan, 31 Pa. Super. Ct. 586.

41. Harrison County v. Ogden [Iowa] 108 N. W. 451.

42. First State Sav. Bank v. McMurtrie, 145 Mich. 700, 13 Det. Leg. N. 587, 108 N. W. 1097.

43. See 6 C. L. 866.

44. Liable for malfeasance. State v. Griffith, 74 Ohio St. 80, 77 N. E. 686. Liable for willful, corrupt, or fraudulent violation or neglect of official duty. State v. Boyd, 196 Mo. 52, 94 S. W. 536.

45. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543. Under a statute making a policeman a state officer, it is the duty of such policeman to arrest persons who interfere with the orderly conduct of an election. Id.

46. Under Wis. Rev. St. 1898, §§ 978, 979, 980, an officer may be committed to jail until he shall deliver such record. State v. Morgan [Wis.] 110 N. W. 245. The circuit court may issue a certiorari that it may determine whether the judge ordering such commitment has transgressed the jurisdictional limits imposed upon him. Id. Such a recalcitrant cannot be imprisoned until he pays a sum of money in addition to turning over the records. Id.

47. Iowa Code, § 4910, applies to a deputy clerk as well as to his principal. State v. Hanlin [Iowa] 110 N. W. 162.

48. Trine v. People [Cal.] 86 P. 100. Under Iowa Code, § 596, the purchase at a discount of any claim or demand against a county by one of its officers, whether evidenced by writing or not, is prohibited. Harrison County v. Ogden [Iowa] 108 N. W. 451.

49. Under Pa. Act Mar. 31, 1860, making it embezzlement for a public officer to fail to pay over public money on a proper demand, a conviction cannot be had until an actual and not a constructive demand has been made. Commonwealth v. Sholner, 30 Pa. Super. Ct. 321. The statute of limitations runs from demand only. Id. And see Embezzlement, 7 C. L. 1267.

50. U. S. Comp. Stat. (1901) § 1782, is constitutional. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. 1057. The authority of the

or agent of the United States government[51] to receive or agree to receive any compensation for services rendered, or to be rendered in relation to any proceeding in which the United States is directly or indirectly interested, before any department or officer[52] a fraud order inquiry pending before the postoffice department[53] and the disposition of the public lands[54] are matters in which the United States is interested. Officers in the city of Washington are subject to the municipal regulations which all other citizens are required to obey.[55] In Iowa it is made unlawful by statute for a school director to act as agent for any school text books or school supplies during his term of office.[56] In Pennsylvania it is unlawful for the contracting officer to be interested in any contract for public supplies whether as an individual, firm member, member of corporation, or any agent or officer of one,[57] and a corrupt intent is not essential in such crime.[58] In New York it is made a misdemeanor for an official to reduce the compensation of an honorably discharged veteran with intent to bring about his resignation.[59]

An indictment against a city official for unlawfully buying city warrants must contain the name of the state and county as well as the city.[60] An indictment charging an officer with misconduct in violation of a statute must allege that the misconduct was wilful, corrupt, or fraudulent.[61] Indictments for official misconduct in the performance of executive and ministerial duties do not usually, however, contain an averment that the misfeasance was corrupt.[62] An indictment against a police officer for nonfeasance in several instances charges but one crime.[63] An indictment for being interested in a contract for supplies made by accused for the public need not particularize the supplies furnished unless the statute does so.[64] Averment of different supplies to several places under one contract is not double,[65] and under the Iowa statute it may charge accused with acting as agent and dealer.[66] On the issue of fraud in public contracts it is irrevelant what other work cost not

United States senate over its members is not interfered with, nor is a senator interfered with in the discharge of his legitimate duties by this statute. Id.

51. A receiver of the land office is an officer of the United States. United States v. Booth, 148 F. 112.

52. It was competent for Congress to make the agreement to receive and the receiving of the forbidden compensation separate offenses. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. 1057.

53. The United States may be interested in a proceeding pending before an executive department though it has no direct pecuniary interest in the result. Burton v. U. S., 202 U. S. 344, 50 Law. Ed. 1057.

54. Giving to certain persons advance information as to the entry of public lands is rendering a service. United States v. Booth, 148 F. 112.

55. The public printer is liable for a violation of the law against the smoke nuisance. Palmer v. District of Columbia, 26 App. D. C. 31.

56. Iowa Code, § 2834, applies where the board has not undertaken to contract for or buy books and supplies for sale to pupils at cost. State v. Wick, 130 Iowa, 31, 106 N. W. 268.

57, 58. Commonwealth v. Miller, 31 Pa. Super. Ct. 309.

59. Hilton v. Cram, 112 App. Div. 35, 97 N. Y. S. 1123.

60. An indictment charging that the treasurer of the city of Pueblo did unlawfully buy certain city warrants of the said city of Pueblo will be quashed, since the court cannot take judicial notice that the city of Pueblo referred to in the indictment is the city of Pueblo, in the county of Pueblo, and state of Colorado. Trine v. People [Colo.] 86 P. 100.

61. State v. Boyd, 196 Mo. 52, 94 S. W. 536.

62. An indictment against a police officer for willful neglect in not making arrests need not allege that he acted corruptly. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543.

63. It was averred that he failed to arrest several named persons. State v. Boyd, 196 Mo. 52, 94 S. W. 536. An indictment is not duplicitous which charges that certain named citizens were unlawfully obstructed while waiting to vote, and details the manner in which the voters were molested by being pushed out of line and assaulted. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543. And see Indictment and Prosecution, 8 C. L. 189.

64. Averment in words of statute held sufficient. Commonwealth v. Miller, 31 Pa. Super. Ct. 309.

65. Commonwealth v. Miller, 31 Pa. Super. Ct. 309.

66. An indictment is not bad for duplicity in that it charges the defendant with acting as agent and dealer in school text books and school supplies, whereas the statute prohibits any director from acting as agent, or dealer in school text books or school supplies. State v. Wick, 130 Iowa, 31, 106 N. W. 268.

shown to have been similar,[67] and the officers contracting for such other work are not competent experts.[68] The bids which other contractors would make are also irrelevant to the issue of fraud in the one made.[69] On a prosecution for misappropriating moneys and falsifying books, conviction may be had of the latter while acquitting of the former.[70]

A writ of prohibition will not be issued to restrain the prosecution of public officers because the sole object of such prosecution is to hinder and obstruct them in the performance of their duty.[71]

§ 11. *Liabilities of the public and of private persons for acts of public officers.*[72]—The general rule is that in order to make a governmental body liable for the acts or contracts of its officers they must be done or made within the scope of official authority.[73] Official contracts must follow official authority[74] and conform in the making and subject-matter to regular lawful official procedure and be for a lawful public end.[75] To render municipal warrants valid and binding upon a municipality they must be signed by the officers prescribed by statute.[76] Where it is provided by statute that a town can not buy without the consent of a majority of its selectmen, to constitute such assent affirmative action by them as a board of public officers is required.[77] Where a proceeding is against an officer of a municipality for the enforcement of a right of a relator against the municipality, the proceeding does not abate by the resignation, removal, or expiration of the term of the officer[78] and where persons are sued in their official capacity the effect of any service and of any notice made upon them as such officials applies to and is binding upon their successors in office to the same extent as if they had continued in office.[79] While one may be liable for acts of a public officer performed at his instance,[80] one at whose store a special policeman has been posted by request is not liable for an arrest made by him unless it is shown that he was authorized by such person to make an arrest, or that in making an arrest he was acting under the authority of the storekeeper express or implied, or was acting otherwise than in the exercise of the powers conferred upon him by his appointment as a special policeman.[81] The liability of particular public bodies is discussed under appropriate titles.[82]

67, 68, 69. Commonwealth v. Sunderlin, 31 Pa. Super. Ct. 349.

70. Verdict not repugnant in so finding. Commonwealth v. Sharpless, 31 Pa. Super. Ct. 96.

71. This writ was denied where the object of a prosecution against police officers was to prevent them from arresting persons engaged in horse racing in violation of the statute. State v. Stobie, 194 Mo. 14, 92 S. W. 191.

72. See 6 C. L. 867.

73. Indiana Trust Co. v. Jefferson Tp. [Ind. App.] 77 N. E. 63; Davenport v. Elrod [S. D.] 107 N. W. 833. The determination of an overseer of the poor that certain persons are entitled to relief is an official act which is binding upon the county in favor of those who in good faith furnish medical attendance or supplies. Rock Island County v. Rankin, 118 Ill. App. 499. A public officer cannot bind or estop a city by his utterance of a legal opinion, when it is not within his official power to declare what the law is upon a given state of facts. City of Chicago v. Malken, 119 Ill. App. 542. Under Iowa Code, §§ 1530, 1531, a county board of supervisors is not authorized to purchase road machines and an indebtedness incurred for this purpose cannot be recovered from the county. Harrison County v. Ogden [Iowa] 110 N. W. 32. A dock master has no authority to bind the city of New York for work done by persons employed by him. Sheridan v. New York, 145 F. 835.

74. See Public Contracts, 6 C. L. 1109; Municipal Corporations, 8 C. L. 1056.

75. See Public Contracts, 6 C. L. 1109; Public Works and Improvements, 6 C. L. 1143.

76. City of Decatur v. McKean [Ind.] 78 N. E. 982.

77. Such action is not to be implied from the recitals found in the clause of a contract that they were authorized to execute it in behalf of the town. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

78. People v. Best [N. Y.] 79 N. E. 890. See, also, ante, § 7.

79. Waldron v. Snohomish, 41 Wash. 566, 83 P. 1106.

80. See Malicious Prosecution, etc., 8 C. L. 797; Executions, 7 C. L. 1614, and like titles.

81. Such special policemen are not agents or representatives of the person upon whose application they are appointed. By their appointment they become public officers upon whom the law imposes special duties. Such policemen are not bound to obey the orders or direction of the person at whose request

§ 12. *Official bonds and liabilities thereon.*[83]—A bond must be signed by the principal unless the sureties signed and delivered the bond intending to be bound without it.[84]

A bond given for the faithful discharge of the duties of one legally entrusted with state and county funds is an official bond, and the statutory provisions relative thereto enter into, and become a part of, the contract.[85] The recital in a bond that the principal is a deputy officer in the service of a certain officer will estop the sureties on the bond to deny that he was in fact such deputy officer and that the bond was an official bond.[86] A condition in a bond limiting the liability of a surety company to such wrongs of a deputy officer as shall be discovered during the continuance of the bond or within six months thereafter cannot be enforced.[87] The sureties on an officer's bond are answerable only for the unfaithful performance of official duties and not derelictions outside of he limits thereof.[88] An officer and his bondsmen have no concern with acts done after his successor has taken charge of the office and evidence thereof is inadmissible.[89] Penal liabilities of the officer for misconduct are not enforceable against his sureties.[90] In the case of a special bond, the general bond is secondarily liable.[91] What constitutes a breach of particular bonds is decided in the cases in the note below.[92] A resolution of a city council to furnish the bond of a city officer, required by such council, amounts only

they are appointed, and when such a one acts upon his own authority and in the performance of what he considers to be his duty and makes an arrest, he acts under the authority conferred upon him by law. Samuel v. Wanamaker, 107 App. Div. 433, 95 N. Y. S. 270.

82. See Counties, 7 C. L. 976; Municipal Corporations, 8 C. L. 1056; States, 6 C. L. 1515; Towns; Townships, 6 C. L. 1709; United States, 6 C. L. 1770.

83. See 6 C. L. 868.

84. School Dist. No. 80 v. Lapping [Minn.] 110 N. W. 849. Evidence held not to show that intent. Id.

85, 86, 87. United States Fidelity & Guaranty Co. v. McLaughlin [Neb.] 107 N. W. 577, 109 N W. 390.

88. State v. Cottle, 8 Ohio C. C. (N. S.) 120; Id., 4 Ohio N. P. (N. S.) 145. The sureties on the bond of the clerk of a board of education are not liable for his failure to help and account for tuition funds belonging to such board which it is not his duty to receive and of which such board is not authorized by statute to make him the custodian. State v. Griffith, 74 Ohio St. 80, 77 N. E. 686. The sureties on the official bond of a constable are liable where such constable acting in his official capacity and while executing a valid search warrant causes a person to be imprisoned. Gomez v. Scanlan, 2 Cal. App. 579, 84 P. 50. Where an officer performs an act in strict accordance with the directions of a valid writ and in the line of his official duty, neither he nor his sureties are responsible. If he willfully performs such act without any valid process and outside his official duty, he alone is responsible in damages. If he has in his possession a valid writ or order, and claiming and even believing he is acting within the scope of such writ or order, performs an illegal or unauthorized act as to the party against whom the writ or order runs, or as to a third party, then he is liable and also his sureties, to the extent of their bond. Id.

89. Nagle v. U. S. [C. C. A.] 145 F. 302.

90. The Act of Congress which provides that if a voucher presented to secure credit with the United States in any matter pertaining to the Indian service contains any material misrepresentation, no credit shall be allowed for any part of such voucher is in the nature of a penalty. United States v. Pierson [C. C. A.] 145 F. 814. A surety on an official bond is not liable for a penalty imposed by Neb. Comp. Stat. c. 28, § 34, for exacting excessive fees. Eccles v. Walker [Neb.] 106 N. W. 977.

91. Where a sheriff who has been appointed public administrator gives the additional bond required by statute, such bond is a special fund set apart to protect those interested in any particular estate, and the sureties thereon are primarily liable for any losses resulting from a failure to comply with its conditions. The remedies on the sheriff's bond as administrator, must be exhausted before recourse can be had to his official bond as sheriff. Briggs v. Manning [Ark.] 97 S. W. 289.

92. A bond to the state for state moneys does not cover city moneys received by the same officer. Liquor license moneys paid to county treasurer. Commonwealth v. Scranton, 214 Pa. 595, 64 A. 321; Commonwealth v. Schadt, 241 Pa. 592, 64 A. 320. A public officer who disburses public funds otherwise than in accordance with law, renders himself and his sureties liable upon his official bond. United States v. Day, 27 App. D. C. 458; Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951. There is no breach of a county treasurer's bond conditioned that he "shall well and truly and faithfully discharge all the duties enjoined upon him by law in behalf of the commonwealth of Pennsylvania, and shall make payment according to law of all moneys received by him for the use of said commonwealth" by reason of a failure to pay over license moneys to a municipality. Commonwealth v. Schadt, 214 Pa. 592, 64 A. 320. A postmaster and his sureties are not liable to the government on his bond for money paid out to a laborer for work

to a vote of such council to pay the premium and does not affect the liability of the surety thereon.[93] Under a statute authorizing any person injured by the breach of an official bond to sue thereon to obtain a recovery, the relator must show an injury growing out of the act of the officer.[94] Under a statute making a county officer liable on his official bond to the party injured by his collection of illegal fees for five times the amount of such fees, neither the officer or his sureties are liable to the county for collecting illegal fees.[95] Where an official undertaking is in form joint and several, it is proper to bring an action against the sureties thereon without joining the public officer as a party.[96] In Kansas in case of the breach of the bond of a school district treasurer, if the school directors neglect or refuse to bring an action, any householder in the district may do so.[97] Error in suing in the name of the state on a bond which should have run to the state but ran to the county should be raised on the trial and may be cured by amendment after judgment.[98] A taxpayer who may sue only by leave of court must plead the giving of leave thereto.[99] Ordinarily in an action on an official bond for failure to account for public moneys the burden is on the plaintiff to show not only the amount of money received by the officer but also to show his disbursements, but under circumstances their burden shifts.[1] By act of Congress in an action on the bond of a United States public officer, a duly certified and authenticated copy of the records of the proper department is admissible in behalf of the government [2] and makes a prima facie case for the government.[3] Such a transcript is not conclusive of the claims of the government but items rejected by the accounting officers may be allowed by the court.[4] As a general rule an auditor's settlement of a tax collector's account is admissible in evidence both as against him and against his sureties for the year in question.[5]

§ 13. *Compensation.*[6]—The rule that the salary annexed to a public office is incident to the title of the office and does not depend upon its occupation and exercise [7] may be changed by the legislative power of the state which may provide that when no duty is actually performed no salary shall be allowed.[8] A public officer

which he procured to be done by a person for whose services such laborer paid. Nagle v. U. S. [C. C. A.] 145 F. 302.

93. An indemnity company is not relieved of liability because of false representations made by such officer in his application. Aetna Indemnity Co. v. Haverhill [C. C. A.] 142 F. 124.

94. Burn's Ann. Stat. 1901, § 7543, construed. State v. Williams [Ind. App.] 77 N. E. 1137.

95. State v. Williams [Ind. App.] 77 N. E. 1137.

96. Town of Hadley v. Garner, 101 N. Y. S. 777.

97. Kans. Gen. Stat. 1901, § 6174, construed. School Dist. No. 9 v. Brand, 71 Kan. 728, 81 P. 473.

98. Commonwealth v. Singer, 31 Pa. Super. Ct. 597.

99. Allen v. Humphrey [N. J. Law] 65 A. 881.

1. Where the plaintiff has proceeded in giving evidence of disbursements to the point of showing and admitting all that a ledger kept by the officer was evidence of and all that vouchers and papers in the clerk's office were evidence of and no evidence of any disbursements were lost or destroyed by the act or omission of the plaintiff, it is the officer who is bound either to meet or submit to the presumption that other evidence of disbursments, if any exists, is within his knowledge and control. Board of Sup'rs v. Lovejoy, 143 Mich. 555, 13 Det. Leg. N. 51, 107 N. W. 276.

2. It is contemplated by U. S. Rev. St. § 886, U. S. Comp. St 1901, p. 670, that only the plain bookkeeper's statement of accounts may be thus certified in place of proof. Nagle v. U. S. [C. C. A.] 145 F. 302. To be admissible the transcript should not be a mere statement of resultant balances but both sides of the account both debit and credit should be given. United States v. Pierson [C. C. A.] 145 F. 814. Such a transcript is not proper evidence of the receipt of money by the officer not coming into his hands through the ordinary channels of the department. Id.

3, 4. United States v. Pierson [C. C. A.] 145 F. 814.

5. Commonwealth v. Carson, 28 Pa. Super. Ct. 477.

6. See 6 C. L. 870.

7. Taut v. Blair [Cal. App.] 84 P. 671; Tanner v. Edwards [Utah] 86 P. 765. **Contra.** Grant v. New York, 111 App. Div. 160, 97 N. Y. S. 685; Samuels v. Harrington [Wash.] 86 P. 1071.

8. Under Cal. Pol. Code, § 936, as amended by Act of 1891, the occupant of a public office to whom a certificate of election has been issued, and who performs the duties

cannot recover any compensation for his services unless a compensation therefor has been fixed by law.[9] And the payment of a claim made by an official for a specific sum as his official salary does not establish a salary for the office nor oblige the payment of a similar claim afterwards made but only disposes of that particular claim.[10] However, salaries of officers is a current expense and not a "debt" which must be preceded by provision of a fund for its payment.[11] It is said that persons summoned as posse comitatus are not entitled to any compensation.[12]

A public officer is entitled for the performance of his official duties to such compensation only as is fixed by law for that office,[13] and even though additional duties are imposed upon him after his appointment he cannot claim extra compensation [14] unless it is provided for in the law imposing such additional duties.[15] He can recover, however, for other services which he may render outside of and in addition to his ordinary official duties which can be as well performed by any other person as by him.[16] Even where an eight-hour law applies to public service, com-

thereof, is entitled to the salary of such office until a contest against him is finally determined, and if the contestant is successful he is not entitled to any salary up to the time of such determination. Merkley v. Williams [Cal. App.] 84 P. 1015; and see Taut v. Blair [Cal. App.] 84 P. 671. This statute was not repealed by the provisions of the county government act, which contains no provision relating to the payment for services in cases where an action to determine the right to an office is pending. Sweeney v. Doyle [Cal. App.] 86 P. 819.

9. An officer cannot recover upon a quantum meruit. Stephens v. Oldtown [Me.] 65 A. 115. A superintendent of streets is not an employe or agent entitled to damages for breach of contract. Id. A tax assessor who makes an assessment of persons who have moved into his district since the last regular assessment or who were omitted therefrom is entitled to compensation therefor though there is no express statutory provision authorizing it. Hoak v. Lancaster County, 29 Pa. Super. Ct. 585.

10. Stephens v. Oldtown [Me.] 65 A. 115.

11. City of San Antonio v. Serna [Tex. Civ. App.] 99 S. W. 875.

12. Power v. Douglas County [Neb.] 106 N. W. 661, 782.

13. Rouse v. Pima County [Ariz.] 85 P. 1075; Stephens v. Oldtown [Me.] 65 A. 115; State v. Vasaly, 98 Minn. 46, 107 N. W. 818. Under the statutes of Indiana the fees for the admission and discharge of prisoners do not belong to the sheriff but the county. Stan v. Delaware County Com'rs [Ind. App.] 79 N. E. 390, reversing on rehearing [Ind. App.] 76 N. E. 1025. In Ohio, the mayor of a city is not entitled to fees in prosecutions for the violence of penal ordinances. Smallwood v. Cambridge, 75 Ohio St. 339, 79 N. E. 755. Receiving, filing and computing the amount of poor orders by a town clerk entitles him to no extra compensation. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951. A railway postal clerk is not entitled to his hotel bills and necessary traveling expenses in addition to his salary. Parshall v. U. S. [C. C. A.] 147 F. 433. A statute providing that the compensation fixed shall be in full for all services excludes the idea that the legislature intended to allow extra compensation for traveling and like expenses. Placer County v. Freeman [Cal.] 87 P. 628. 97 Ohio Laws p. 296, § 719 provides for all the compensation to which a sheriff is entitled for conveying persons to the asylum at Athens, Ohio, upon the warrant of a probate judge. Ketter v. Scioto County Com'rs, 8 Ohio C. C. (N. S.) 73. The right of a corporation counsel of cities of second class to costs and allowances collected from the adverse party in suits by the city discussed. Sutherland v. Rochester, 112 App. Div. 712, 98 N. Y. S. 970. Though under Idaho Const. art. 18, § 7, a probate judge must account and turn into the county treasury all fees received by him for services rendered by virtue of his office over and above his actual and necessary expenses, and the salary paid to such officer under the law is in full compensation for all services rendered by him, yet any gratuity received by such probate judge over and above the statutory fee of five dollars for solemnizing a marriage may, under Idaho Rev. Stat. 1887, § 438, be retained by him for his individual use and benefit. Rhea v. County Com'rs [Idaho] 88 P. 89.

14. May v. Chicago, 222 Ill. 595, 78 N. E. 912. The salary of the register of deeds fixed by the board of county commissioners, according to the population of the county, cannot be increased by them because unorganized territory, not within the boundaries of the county is added to the county for judicial purposes, and thereby labor and services of the said register of deeds, is increased. Broaddus v. Pawnee County Com'rs [Okl.] 88 P. 250. Not allowable for reporting proceedings of county board. Board of Com'rs of Garfield County v. Daneley [Okl.] 88 P. 1053.

15. The legislature may allow an officer charged with an additional duty with respect to a public fund part of the interest received on such fund, as extra compensation. City of Chicago v. Wolf, 221 Ill. 130, 77 N. E. 414. Ill. Laws 1893, p. 136, which contains this provision is not in violation of Const. art. 4, § 20, as a donation of public money to an individual for merely private uses. Id.

16. State v. Vasaly, 98 Minn. 46, 107 N. W. 818. A clerk of a court who searches the records of his office to ascertain what liens exist against certain lands is entitled to a reasonable compensation therefor. Scheibley v. Hurley [Neb.] 103 N. W. 1082.

pensation above that fixed cannot be given or agreed,[17] and one on the regular staff working overtime is not an "extra clerk" during such overtime.[18]

It is frequently provided that an officer shall receive a salary, the exact amount of which is fixed by law,[19] while in other instances it is provided that he shall receive certain fees,[20] or commissions.[21] Where it is expressly provided that an official shall receive no other compensation than the salary fixed by the statute, he is not entitled to fees,[22] and where the law fixes fees as the only source of compensation, an officer must look to this source alone.[23] Also a provision that certain traveling and personal expenses be paid negatives the right to others,[24] especially when a sum is allowed as full compensation "for all services." Fees paid a public officer voluntarily without legal duress or compulsion and without notice of reservation of rights cannot be recovered back though they were collected under an erroneous construction of a statute.[25] In New Jersey municipal officers are to be compensated in accordance with the services rendered by them.[26]

An officer may lose his right to compensation by absence from duty;[27] but so long as an officer is not removed, he is entitled to the salary attached to his office

17, 18. May v. Chicago, 124 Ill. App. 527.

19. Under Cobbey's Ann. Stat. 1903, § 9069, in counties of more than twenty-five thousand inhabitants the salary of the county clerk is fixed at twenty-five hundred dollars per annum, and he is also entitled to one deputy whose salary shall be $1,000 per annum. State v. Drexel [Neb.] 106 N. W. 791. Ohio Rev. Stat. § 1297, providing for the compensation of prosecuting attorneys, which specifies the maximum amount thereof in certain counties and fixes the salary in others on a basis of population is unconstitutional as being a law of a general nature lacking uniform operation throughout the state. State v. Lucas County Com'rs, 7 Ohio C. C. (N. S.) 512.

20. Laws 1903, c. 333, amended by Laws 1905, c. 171, fixing and regulating the collection and disposition of the fees of clerks of district courts in the counties having, or which hereafter may have a population of over two hundred thousand inhabitants is constitional. State v. Rogers, 97 Minn. 322, 106 N. W. 345. The Act 1891, c. 35, creating a state board of health is not rendered void by the fact that it provides for compensation of its secretaries by fees which are not required to be accounted for to, or paid into the state treasury. Munk v. Frink [Neb.] 106 N. W. 425. The provisions of Rev. St. §§ 1536-633, Municipal Code § 126, requiring "that all fees pertaining to any office shall be paid into the city treasury" has reference to municipal fees solely, or such fees as may be fixed by municipal authority. Said section does not authorize cities to interfere with the fees of mayors or chiefs of police in state criminal cases. City of Portsmouth v. Milstead, 8 Ohio C. C. (N. S.) 114. Fees for making service and return on writ in conveying sentenced prisoners to Cincinnati workhouse, under Rev. St. § 1230. Ketter v. Scioto County Com'rs, 8 Ohio C. C. (N. S.) 73. Fees for committing persons to jail and discharging them therefrom, under Rev. St. §§ 1230, 1231. Id.

21. Register of wills entitled to commissions on inheritance tax. Allegheny County v. Stengel, 213 Pa. 493, 63 A. 58. A forfeiture of the commissions of the tax collector under Act 170, of 1898, § 79, p. 380, may be waived by the police jury, and will be considered as waived when belated monthly settlements have been accepted without protest or objection for a series of years. Such an acceptance is equivalent to a voluntary payment of commissions. Young v. Parish of East Baton Rouge, 116 La. 379, 40 So. 768. Moneys merely received into custody are not "collected" moneys on which commissions are to be paid and especially where another officer is by statute charged with their "collection". Treasurer cannot have commissions on liquor and gaming licenses collected by sheriff between Laws 1901, c. 19, p. 46 and Laws 1905, c. 60, § 11. Hubbell v. Bernalillo County Com'rs [N. M.] 86 P. 430.

22. Campbell County v. Overby [S. D.] 108 N. W. 247.

23. Power v. Douglass County [Neb.] 106 N. W. 782. Since Sess. Laws 1901, c. 108, p. 205, county assessors receive only the fee allowed and not a commission on liquor and gaming licenses. Sandoval v. Bernalillo County Com'rs [N. M.] 86 P. 427.

24. Expenses not allowable to supervisors as ex-officio road commissioners. Placer County v. Freeman [Cal. App.] 87 P. 628.

25. Alton Light & Traction Co. v. Rose, 117 Ill. App. 83.

26. Tice v. New Brunswick [N. J. Err. & App.] 64 A. 108.

27. An officer is entitled to his salary where no appointment is made during his absence and he upon return from his absence resumes the office and enters upon his functions without objection, there being no voluntary cessation on his part in the discharge of his duties, but it being shown that he was prevented from their discharge by being confined under a criminal charge. Bergerow v. Parker [Cal. App.] 87 P. 248. In determining whether a public officer has lost the right to claim his compensation because of absence from his post of duty, what constitutes such absence must in great measure be determined by the character of the office, the nature of the duties, and the circumstances and conditions under which they are to be performed. United States v. Day, 27 App. D. C. 458. And see infra this section, Vocation.

although he has not fully discharged his duties;[28] though one lawfully suspended pending trial of charges for removal for which he might have been immediately removed cannot recover compensation for the interval between them and final removal.[29]

Payment to a de facto public officer of the salary of the office made while he is in possession is a good defense to an action brought by the de jure officer to recover the same salary after he has acquired or regained possession;[30] but the latter may sue the former for the salary and fees received by him.[31] One who is not an officer de jure because his term of office has expired, nor an officer de facto because the duties of the office have been performed by another who has been appointed and duly qualified, is not entitled to the salary attached to such office.[32] A city should be allowed when sued by a de jure officer the amount paid out by it in good faith to deputies and assistants recognized by him as his own in the earning of fees.[33]

An employe who receives his pay, at a fixed rate, for a considerable time, without objection or dissent is estopped to claim additional compensation,[34] and the public is not bound by protest made to its mere disbursing agent;[35] but an employe who by ordinance is entitled to a certain salary is not estopped to claim that amount by receiving and receipting for a less amount where he demands the greater amount and has made no claim for less.[36] One who is a mere probationary policeman and as such a mere employe is bound by a receipt in full.[37] An ordinance fixing the salaries of municipal employes is not a contract between them and the municipality.[38]

Power to fix the compensation of subordinate officers and employes is frequently conferred upon certain officers and official boards.[39]

28. People v. Sipple, 109 App. Div. 788, 96 N. Y. S 897. And where he is allowed only a part thereof by the town board of audit, certiorari will lie to review the allowance notwithstanding the claim has been passed on to the supervisors. Id. The right to his salary by a policeman not shown to have been legally discharged is not affected by the existence of cause for his discharge. Evidence to that issue is irrelevant. City of San Antonio v. Serna [Tex. Civ. App.] 99 S. W. 875.

29. People v. Cook, 102 N. Y. S. 1087, distinguishing cases denying the doctrine whers power to remove instanter did not exist.

30. Samuels v. Harrington [Wash.] 86 P. 1071. This principle was applied in a case where an inspector of police was removed from office, although the city could not show which person was appointed to fill the vacancy caused by his removal. Grant v. New York, 111 App. Div. 160, 97 N. Y. S. 685. Contra, Tanner v. Edwards [Utah] 86 P. 765.

31. Grant v. New York, 111 App. Div. 160, 97 N. Y. S. 685. If the compensation fixed by law is the salary the de jure officer is entitled to recover the whole thereof, but where the officer's remuneration consists of fees earned for services rendered the public or individuals, the measure of damages is the amount of fees less the necessary expense in earning them where the de facto officer has held the office under a color of right. Hobbs v. Uppington, 28 Ky. L. R. 131, 89 S. W. 128; and see Henderson v. Koenig, 192 Mo. 690, 91 S. W. 88.

32. Town of Hampton v. Jones, 105 Va. 306, 64 S. E. 16.

33. Henderson v. Koenig, 192 Mo. 690, 91 S. W. 88.

34. Wagoner v. Philadelphia [Pa.] 64 A. 557.

35. Riordan v. Chicago, 124 Ill. App. 183. An unlawful deduction may be waived by accepting the lesser sum without objection or protest to an officer competent to receive notice on behalf of the public. Protest to clerk of pay wagon unavailing. Gay v. Chicago, 124 Ill. App. 586.

36. Chicago v. McNally, 117 Ill App. 434.

37. Cannot recover the legal salary of an officer. Riordan v. Chicago, 124 Ill. App. 183.

38. The municipality or any of its departments may discontinue the payment of a full day's wages for a half day's work. Wagoner v. Philadelphia [Pa.] 64 A. 557.

39. Under Kentucky Acts 1904, c. 36, p. 136, the fiscal court in fixing the salary of a health officer should fix it at a reasonable amount, that is, an amount commensurate with the services estimated from past experience and present conditions which he would be required to perform during the year. Butler County v. Gardner, 29 Ky. L. R. 922, 96 S. W. 582. While the Greater New York Charter does not require any particular or special method or manner of fixing salaries of the employes of the department of public works, the action of the commissioner in fixing such salaries, must be called to the attention of the common council for its action and concurrence. In re Babcock, 101 N. Y. S. 90. Under the Greater New York Charter the compensation of an architectural draughtsman is to be fixed by the board of aldermen and board of estimate and apportionment. Middleton v. New York, 50 Misc. 587, 99 N. Y. S 440. Salary of county treasurer fixed by board of county commissioners and controllers under act April 15, 1834, § 41. Scranton v. Lackawanna County, 214 Pa. 509, 63 A. 968. Upon their failure to do so the exclusive remedy is by appeal to the court of common pleas under act April

A constitutional inhibition against the increase or diminution of the salary of an officer during his existing term of office [40] operates to prevent the repeal of an ordinance, passed prior to a municipal officer's entering upon the discharge of his duties, authorizing him to take a certain per cent of the interest on city deposits for his salary and expenses.[41] Even though an office be a constitutional one if its duties are statutory, the legislature may within reasonable limits change the duties and diminish the emoluments thereof, if the public welfare requires it.[42]

An officer or employe who has been wrongfully removed or suspended is upon restoration to office or employment entitled to the emoluments accruing during the period of his removal or suspension [43] if there was no other person who performed the duties of the office or position during such period,[44] and if he is found to have been able and willing to perform them.[45] If an official whose salary is payable monthly is wrongfully discharged, he may sue to recover the salary due at the expiration of each month or he may wait until the end of his term and sue for the whole amount due.[46] The rule that an officer suing for his salary must establish his right to the office to which the salary attaches [47] has no application in the case of a municipal laborer.[48] Ordinarily a prima facie case is made out by proof of appointment and qualification, of the amount of salary fixed, the term of office, and nonpayment.[49] An unpaid allowance for uniform cannot be recovered without proof of its value where the uniform and not money is allowable.[50]

Compensation of subordinates.[51]—Officers are not generally liable for the compensation of their subordinates.[52] In New York an honorably discharged veteran whose salary is reduced in order to cause his resignation may bring an action for damages against the officer making such reduction.[53]

Assignments and other contracts.[54]—Not only in the common-law states but also under the civil law as in Louisiana, an assignment of unearned salary by an officer is void.[55] If it be true that a municipal officer can bind the municipality by an assignment of his salary before a warrant therefor is issued,[56] unless notice is given to the municipality in the manner prescribed by statute, the assignment will not bind it.[57] A penal statute against selling or assigning "unearned" salary, wages

16, 1875. Id. A street board though authorized "to make all contracts for labor" on streets is not authorized to fix the compensation of the superintendent of streets. Stephens v. Oldtown [Me.] 65 A. 115.

40. It is beyond the power of the fiscal court to change the remuneration of the County Judge during the term for which he was elected, McNew v. Com., 29 Ky. L. R. 540, 93 S. W. 1047. Act of March 30, 1869, P. L. 581, act of May 7, 1889, P. L. 109, and act of May 5, 1897, P. L. 42, as to salaries of county commissioners of Berks County, construed. Berks County v. Linderman, 30 Pa. Super. Ct. 119.

41. City of Chicago v. Wolf, 221 Ill. 130, 77 N. E. 414.

42. State v. Stedman [N. C.] 54 S. E. 269.

43. An employe in the classified civil service of the United States is entitled to pay for a time when he was wrongfully suspended. United States v. Wickersham, 201 U. S. 390, 50 Law. Ed. 798.

44. Seifen v. Racine [Wis.] 109 N. W. 72.

45. Hill v. Fitzgerald [Mass.] 79 N. E. 825.

46. If he waits until the end of his term he may recover so much of the salary due him as is not barred by the statute of limitations. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925.

47. Ransom v. Boston [Mass.] 78 N. E. 481; Bean v. Clausen, 113 App. Div. 129, 99 N. Y. S. 44.

48. Ransom v. Boston [Mass.] 78 N. E. 48.

49. City of San Antonio v. Serna [Tex. Civ. App.] 99 S. W. 875.

50. What claimant "understood" was the amount allowable is not relevant. City of San Antonio v. Serna [Tex. Civ. App.] 99 S. W. 875.

51. See 6 C. L. 870. See, also, Ante, § 10a.

52. Dunn v. Foley, 78 Conn. 670, 63 A. 122.

53. Hilton v. Cram, 112 App. Div. 35, 97 N. Y. S. 1123.

54. See 6 C. L. 874.

55. McGowan v. New Orleans [La.] 43 So. 40.

56. This question is not decided. Gordon v. Omaha [Neb.] 110 N. W. 313.

57. Under Cobbey's Ann. Stat. 1907, § 7453, a notice affecting a city must be served on the mayor or acting mayor or in the absence of both on the city clerk. Gordon v. Omaha [Neb.] 110 N. W. 313. The assignee of a pending matured claim cannot charge the public with notice by filing it with the officers having charge only of future earnings. Hellen v. Boston [Mass.] 80 N. E. 603.

or earnings does not invalidate assignments of earned sums.[56] A contract made by an officer in consideration of his appointment that he may be discharged without notice and without cause and that, if discharged, he will give up his salary and all claim thereto is void.[59]

Garnishment.—A statute making the compensation of certain officers and employes liable to attachment and garnishment and exempting that of others is void as class legislation.[60]

Vacations.[61]—The right of a public officer or employe to compensation while on leave of absence generally depends upon statutory provisions.[62] A member of the street cleaning department of New York City is estopped by his application for leave from recovering pay for the period of his absence.[63]

Pensions, reliefs, and benefits.[64]—According to the public or private nature of these funds they must be regarded as pensions [65] or fraternal mutual benefit insurance [66] and are consequently treated elsewhere.

Officers of Corporations; Official Bonds; Opening and Closing; Opening Judgments; Opinions of Court; Options; Order of Proof; Orders for Payment; Orders of Court; Ordinances; Oysters and Clams, see latest topical index.

PARDONS AND PAROLES.

A board of pardons is a branch of the executive department and has no power to inflict punishment,[68] or right to question, examine into, or determine, the justice of a conviction or sentence.[69] Unless otherwise provided, it may impose any condition or restriction not immoral or illegal,[70] and upon acceptance of the pardon, it becomes binding upon the convict.[71] Where the power to pardon is vested in the governor "by and with the advice" of the council, such advice is required only for affirmative action.[72] The state authorities have power to parole a Federal prisoner.[72a] A violation of a conditional pardon renders the same null and void [73] and the convict liable to arrest and reimprisonment as provided by statute or the terms

58. Kansas City Loan Guarantee Co. v. Kansas City [Mo.] 98 S. W. 459.

59. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925.

60. Compensation of the officers and employes of counties, cities, villages and school districts, made liable and that of all other municipal offices and employes exempted. Badenboch v. Chicago, 222 Ill. 71, 78 N. E. 31.

61. See 6 C. L. 875.

62. Under Mich. Laws 1905, p. 360, a patrolman is entitled to pay. Carney v. Whelan [Mich.] 13 Det. Leg. N. 955, 110 N. W. 128. Absence from his post, in the sense used in U. S. Comp. Stat. 1901, p. 1192, providing that no diplomatic or consular officer shall receive salary for the time during which he may be absent from his post by leave or otherwise beyond the term of sixty days in any one year does not mean mere temporary absence from the consular office itself, when at the same time the officer is within his district, but either a willful or inexcusable abstension from the performance of his ordinary duties or such continuous illness beyond the period of a regular leave of absence as may wholly disable him from such performance. United States v. Day, 27 App. D. C. 458.

63. Tepidino v. New York, 50 Misc. 324, 98 N. Y. S. 693.

64. See 6 C. L. 876.

65. See 6 C. L. 1000.

66. See Fraternal Mutual Benefit Associations, 7 C. L. 1777.

67. See 6 C. L. 876.

68. Power to grant clemency only. Ex parte Prout [Idaho] 86 P. 275.

69. Michigan board of pardons. People v. Cook [Mich.] 13 Det. Leg. N. 971, 110 N. W. 514.

70. Ex parte Prout [Idaho] 86 P. 275. Pardoning board of Florida held to have such power. State v. Harne [Fla.] 42 So. 388. A condition which provides for reimprisonment for the original sentence after the expiration of the particular time fixed by the court for execution thereof is not immoral or illegal. Id. **Contra.** Ex parte Prout [Idaho] 86 P. 275.

71. State v. Horne [Fla.] 42 So. 388.

72. Under Const. c. 2, art. 8, § 1, the governor may reject a petition for pardon without submitting it to the council. In re Opinion of the Justice, 190 Mass. 616, 78 N. E. 311.

72a. Rev. St. §§ 5539, 5544, subjects Federal prisoners to the same "discipline and treatment" as state prisoners in same prison. In re Naples, 142 F. 781.

73. State v. Horne [Fla.] 42 So. 388.

of the pardon[74] for the unserved portion of his term,[75] but it does not forfeit earned credits for good behavior.[76] However, unless otherwise provided,[77] he is entitled to a hearing before a court of general criminal jurisdiction,[78] but not to a jury trial except upon the issue of identity.[79] Where the sentence is referred to in a conditional pardon, it is to be taken in its legal and proper meaning.[80] Ordinarily a full pardon restores one to civil rights,[81] but is no defense to disbarment proceedings against an attorney.[82] The power of the warden to grant conditional freedom under the indeterminate sentence law of Michigan is not an unconstitutional interference with the judicial power of the courts.[83] The refusal of a state court to recognize a pardon is not a ground for removal into the Federal court.[84]

PARENT AND CHILD.

§ 1. Custody and Control of Child (1225).
§ 2. Support and Necessaries (1229).
§ 3. Services, Earnings and Injuries to Child (1231).
§ 4. Property Rights and Dealings Between Parent and Child (1233).
§ 5. Liability for Child's Torts (1233).

§ 1. *Custody and control of child.*[86]—The parents as natural guardians of their minor children are ordinarily entitled to their custody and control,[87] and the father has the paramount right providing he is a fit and proper person,[88] though this common law rule may be modified by the particular facts and circumstances of a given case,[89] especially where the child's interest would be promoted thereby.[90] A father is presumed to be competent to care for his child and can be deprived of his right only by an affirmative showing of incompetency.[91] He is not shown to be incompetent by proof that he has some faults or that he is not an ideal parent;[92]

74. A convict cannot be re-arrested and committed upon the order of the governor unless such order is authorized by statute or by the pardon. State v. Horne [Fla.] 42 So. 388.

75. State v. Horne [Fla.] 42 So. 388. The time during which a prisoner is at large is not time served upon the sentence where remanded for breach of a conditional pardon. Ex parte McKenna [Vt.] 64 A. 77.

Contra: Especially where his liberty is greatly restricted. Ex parte Prout [Idaho] 86 P. 275.

76. Ex parte McKenna [Vt.] 64 A. 77.

77. A conditional pardon may expressly provide for a summary arrest and recommitment upon violation of its conditions. State v. Horne [Fla.] 42 So. 388.

78. As to breach of the condition and identity. State v. Horne [Fla.] 42 So. 388.

79. As a matter of right. State v. Horne [Fla.] 42 So. 388.

80. State v. Horne [Fla.] 42 So. 388. Where a conditional pardon contains a provision that, upon breach of a condition therein "it shall be the duty of the sheriff of any county of this state to arrest him (prisoner) and return him to the penitentiary to serve out the remainder of his term," the reference is to the length of the term fixed by the sentence and not to the period mentioned for execution. Id.

81. One who has been convicted of an infamous crime and pardoned is not disqualified by Code Civ. Proc. § 2612 to act as an executor. In re Raynor, 48 Misc. 325, 96 N. Y. S. 895.

82. People v. Burton [Colo.] 88 P. 1063.

83. People v. Cook [Mich.] 13 Det. Leg. N. 971, 110 N. W. 514.

84. It is not a denial of a right secured by a law providing for equal civil rights of citizens of the United States or of all persons within its jurisdiction as contemplated by U. S. Rev. St. § 641. Commonwealth v. Powers, 201 U. S. 1, 50 Law. Ed. 633.

85. **The scope of topic** is confined to the relationship of parent and child and their rights and liabilities inter se, excluding the law of Adoption of Children (7 C. L. 35); Bastards (7 C. L. 430); Alimony (7 C. L. 104) and Divorce (7 C. L. 1175); Infants (8 C. L. 267) and Descent and Distribution (7 C. L. 1137).

86. See 6 C. L. 877.

87. A father is entitled to the custody of his child as against its grandparents where both are proper persons, and the father has in no way abandoned the child. Newsome v. Bunch [N. C.] 56 S. E. 509. Where on separation of a husband and wife without procuring a divorce the husband forcibly took their child and placed it with its grandmother after whose death it remained with an aunt, the mother, leaving aside the child's welfare, was entitled to the child as against the aunt. People v. Rubin, 98 N. Y. S. 787.

88. The father of a child under fourteen years, if a proper and competent person, is absolutely entitled to the guardianship of such child. Code Civ. Proc. § 175. In re Galleher, 2 Cal. App. 364, 84 P. 352.

89. Where with father's consent the grandmother had cared for the child for three years and a strong affection had sprung up between the child and the grandmother. Ex parte Maris [Del.] 63 A. 197.

90. While not alone conclusive, the interest of the child is an important factor in the determination of the question of control. Ex parte Maris [Del.] 63 A. 197.

91, 92. In re Galleher 2 Cal. App. 314, 84 P. 352.

it must appear that he will probably fail in a substantial degree to discharge his duty towards his child.[93] It is held in Illinois that a father who provides a good home for his child is deprived of his custody without due process of law by the action of the juvenile court in committing him to a home for boys during minority for committing a criminal assault.[94]

In controversies over the possession of a child, three matters are to be considered: The rights of the parents; the rights and interests of the present custodian; and the welfare of the child.[95] The rights of the parents may be forfeited by misconduct or voluntary relinquishment.[96] The agreement to relinquish is, however,

93. Evidence insufficient to show that father had abondoned child or that he was profligate, indolent, intemperate and an improper custodian. In re Galleher, 2 Cal. App. 364, 84 P. 352. To establish a parent's bad moral character and low financial condition such as will make him unfit for the custody of his children, it must be shown that provision for ordinary comfort and contentment and the intellectual and moral development of the children is not to be expected at his hands. Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490. Where a father by intemperate habits had brought reproach upon himself and his children and had permitted others to provide for them, but had reformed and placed himself in a financial and moral condition suitable for the care of the children, he was entitled to their custody. Id. The mere fact that a father is a man of small means is not a sufficient ground for denying him the custody of his child. Cormack v. Marshall, 122 Ill. App. 208. Evidence that, at the time a child six months old was placed in the care of its aunt, it did not have shoes or a bonnet, held insufficient to warrant finding that father had failed to properly care for it. In re Galleher, 2 Cal. App. 364, 84 P. 352. Where the return of a petition for habeas corpus for the removal of a daughter from the custody of her father, based on the ground of his adultery with his housekeeper, denied the allegation of the petition, and the affidavit of the daughter averred that she was eighteen years of age, was properly cared for and was receiving a good education, and that she wanted to stay with her father, the proceedings should have been dismissed on the return and papers annexed thereto. People v. Bishop, 102 N. Y. S. 592.

94. Note: The validity of the present decision may be doubted on the simple ground that the fact that the child has committed a criminal assault shows that the father is not able to care for it properly. While the father might be able to control an ordinary boy, his failure to develop this boy into a law-abiding citizen is at least evidence of his incompetence. It is therefore questionable if the action of the juvenile court is so unreasonable as to authorize the court to declare it unconstitutional. But there is another objection to the case which seems to be conclusive. The reasoning of the court is premised upon the proposition that the father has a vested property right to the custody of his children. It is believed, however, that this parental right is merely a privilege granted to the parent by the state, which may consequently be withheld by the state if it sees fit. See Tiedeman, Limitations of Police Power, §§ 166 et seq. It has seen fit to allow the father the privilege of caring for his children, because the natural affection that exists between them ordinarily renders the father the best person to exercise this control. But if the state desired, it could transfer the custody of the children to whomsoever it chose. The decisions amply sustain this position. Thus, a statute enacting that the custody of children under seven years of age should belong to the mother in case the parents separated has been held constitutional (Bennet v. Bennet, 13 N. J. Eq. 114), and furthermore, in determining who shall care for a minor, courts of chancery or probate courts whenever a controversy arises, exercises a sound discretion, and frequently deprive the father of his custody if it seems wise, although he may be entirely competent to care for him (Jones v. Darnall, 103 Ind. 569, 53 Am. Rep. 545). For a careful review of the decisions see Hurd, Habeas Corpus, 461 et seq.

It was further argued by counsel that, as the child had been deprived of his liberty without a jury trial, the constitutional provisions guaranteeing jury trial had been violated. The proceeding is certainly not an infringement of the provisions, for this is not in any aspect a criminal proceeding. The judgment is that the child is delinquent and as such needs the care of the state. The whole purpose of the commitment is the reformation of the child and not his punishment. Furthermore, the child is not even being deprived of his "liberty", as that word is used in the constitutions. The state is exercising parental restraint, a restraint which is perhaps more severe than that usually exercised by a father, because of the peculiar viciousness of the child. The imposition of such restraint has always been legitimate. Were there any doubt of the validity of this reasoning, it is resolved by an examination of the cases, which fully support it. Ex parte Nichols, 110 Cal. 651; Prescott v. State of Ohio, 19 Ohio St. 184; contra, People v. Turner 55, Ill. 280, 8 Am. Rep. 645. See, however, Petition of Ferrier, 103 Ill. 367, 42 Am. Rep. 10. See 19 Harv. L. R. 374.

95. Robertson v. Bass [Fla.] 42 So. 243.

96. Robertson v. Bass [Fla.] 42 So. 243. Where for seven years respondent had supported and cared for children awarded her by a divorce decree, and relator had contributed nothing to their support, relator was not entitled to the custody of one of the children who was in Europe. People v. Duryee, 109 App. Div. 533, 96 N. Y. S. 371. Mother held to have forfeited right to custody of child where, without making any claim, she allowed it to remain with its grandmother

not absolute and irrevocable,[97] especially if resting only in parol;[98] but when a contention arises, much will depend upon the character of the parties, the length of time elapsed, and the circumstances of the particular case,[99] all, however, subordinate to the interests of the child.[1] Though the wishes of the child are not controlling, they should be consulted for the purpose of better preparing the court to wisely exercise its discretion.[2] Though a parol contract giving the custody of a child to another is not binding, it may estop a parent from afterwards claiming custody where a strong attachment is thus allowed to spring up between the child and its custodian.[3] Those who receive children under such circumstances are required, however, to prove a certain and definite agreement and estoppel by conduct or by evidence strong and convincing.[4] In Texas, the adoption of a child does not give the persons adopting it the right to its custody.[5] In North Carolina a surviving parent of an orphan child, who by its abandonment has forfeited all rights to its custody and services,

and aunt for eight years. People v. Rubin, 98 N. Y. S. 787. Where in a suit by an alleged father, under Act. 79, p. 91, of 1894, for the custody of a child, he is confronted by his own previous allegation that the child was a bastard, and his allegations that the physical and moral welfare of the child is endangered by the neglect and immoral habits of the mother, are not sustained by the evidence, the action was properly dismissed. State v. Thompson, 117 La. 102, 41 So. 367. Mother held estopped to deny effect of deed of relinquishment of custody of minor children after four years. Robertson v. Bass [Fla.] 42 So. 243. Evidence insufficient to show agreement by father that grandfather of a child should retain permanent custody. Cormack v. Marshall, 122 Ill. App. 208.

97. Roberston v. Bass [Fla.] 42 So. 243.

98. An oral agreement by which a father gives his minor child to another to raise is revocable at the father's election. In re Galleher, 2 Cal. App. 364, 84 Pa. 352. Cannot defeat parent's right to custody of child. Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490. Is not binding. Cormack v. Marshall, 122 Ill. App. 208.

99. Robertson v. Bass [Fla.] 42 So. 243. The lower court having left with the foster parents two small children who when feeble and helpless were voluntarily relinquished to them by the mother, now a stranger to them, after a lapse of four years the status will not be disturbed by the appellate court because the mother has bettered her condition by a recent marriage, it not appearing that the interests of the children demand the change. Id. A father of good character earning $16 a week and having a good home is entitled to the custody of his child as against her grandparents with whom she has resided since the death of her mother, where they are poor and infirm. Titus v. McCloskey, 67 N. J. Eq. 709, 63 A 244. Where the father had shown indifference towards his child and permitted him to remain with its grandparents until he was ten years old contributing nothing to his support, held the best interests of the child required that he remain with his grandparents. Coulter v. Sypert [Ark.] 95 S. W. 457. Parents had practically abandoned a child to her grandparents for nearly twelve years and when she was fourteen sought to get possession of her. She expressed under oath her desire to remain with her grandparents who were not shown to be unfit and there was no special fitness of the parents to care for her. Held she should be allowed to remain with her grandparents. Workman v. Watts, 74 S. C. 546, 54 S. E. 775. Adoption proceedings examined and held to justify finding of trial court that the natural mother and her present husband were the proper persons to have the custody and control of a child. State v. Bryant, 99 Minn. 49, 108 N. W. 880.

1. Robertson v. Bass [Fla.] 42 So. 243. The best interests of the child is of primary importance. White v. Richeson [Tex. Civ. App.] 94 S. W. 202; State v. Poindexter [Wash.] 87 P. 1069; People v. Rubin, 98 N. Y. S. 787. In habeas corpus by a mother, evidence held to show that the welfare of the child would be best promoted by allowing an aunt to retain custody. People v. Rubin, 98 N. Y. S. 787. Where in habeas corpus a mother recovered the custody of her minor children from their adopted parents, the giving of a supersedas bond by such parents did not give them the right to the custody of the children pending appeal. State v. Poindexter [Wash.] 87 P. 1069. In proceedings by the father of a boy between two and three years old to secure his possession, he being in the custody of his maternal grandmother to whom custody was awarded by the will of the mother, the polestar of the inquiry is the interests of the child. Glidewell v. Morris [Miss.] 42 So. 537.

2. Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490. On petition for removal of a daughter from the custody of her father on the ground of improper relations between the latter and his housekeeper, evidence held not to warrant relief especially in view of the desire of the daughter to stay with her father and the fact that she had married prior to the rendition of the order. People v. Bishop, 102 N. Y. S. 592.

3. Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490.

4. Evidence insufficient to prove clear and definite parol agreement by father for unconditional surrender of his children or to prove estoppel by conduct. Ex parte Reynolds, 73 S. C. 296, 53 S. E. 490.

5. White v. Richeson [Tex. Civ. App.] 94 S. W. 202.

may be restored to such privileges when the child's welfare will not be materially prejudiced.[8]

There is no civil action by a child for corporal punishment inflicted upon it by one standing in loco parentis.[7]

Where the parents are unfit to care for a child, or have abandoned it,[8] the state may provide for its custody and care,[9] but such proceedings must be had in a court of competent jurisdiction after due notice to the parents.[10] Where a child is in the exclusive custody of a benevolent institution, the question of whether the parents should be allowed to visit it must necessarily be left to the sound discretion of the governing authorities of the institution.[11] Statutes often make provision for the return of the child to its parents after such a change of circumstances as will render them proper custodians.[12]

Where a child is in the custody of the father, the relative rights of the father and mother to his custody should be determined by the courts of the domicile of the father.[13] Habeas corpus is generally resorted to when it is sought to recover the

6. Revisal 1905, §§ 180, 181, are applicable in a habeas corpus proceeding by a father to recover the custody of his child alleged to have been abandoned by him and hence it was the duty of the court to find as to the controverted fact of abandonment and as to whether the welfare of the child would be materially prejudiced by its restoration to petitioner. Newsome v. Bunch, 142 N. C. 19, 54 S. E. 785.

7. Where a mother left her child with a person who was to support, educate, care for, and treat it as his own child, such person stood in loco parentis and hence could not be sued by the child for a whipping inflicted on it. Fortinberry v. Holmes [Miss.] 42 So. 799. It was immaterial that when the mother gave the child she stated that it was not to be whipped. Id.

8. That father living apart from his wife left his minor daughter with his mother who was caring for her while he went away to seek employment and remained away for five or six months did not constitute an abandonment. State v. Wheeler [Wash.] 86 P. 394.

9. If a child is abandoned or neglected, or if its home becomes unfit for it, the state may, and it is its duty to, take the child from its parents and provide for its proper care and custody. Right of parent primarily to bring up child is not exclusive or final. In re Vera Brown, 117 Ill. App. 332. The Federal constitution providing that no state shall deprive any person of life, liberty or property without due process of law, and the state constitution art. 1, § 1, declaring that all men forming a social compact are entitled to equal rights, does not limit the power of the state to interfere with the parental control of minors. State v. Shorey [Or.] 86 P. 881. State could forbid employment of a child under sixteen years for more than ten hours a day. Id. See Infants, 8 C. L. 267. The father has no absolute vested right in his child's custody, but the state may step in when the child's interest requires it. Coulter v. Sypert [Ark.] 95 S. W. 457. Act. 1894, p. 80 (Civ. Code 1895, § 2372), providing for the placing of children in benevolent institutions of the character indicated thereby, is not unconstitutional as to title nor objectionable as special legislation. Kennedy v. Meara [Ga.] 56 S. E. 243. Does not authorize slavery because it permits the institution to bind out children to service. Id. Does not deprive parents of any rights without due process of law. Id. A judgment of commitment to an institution under this act is a judgment of a court of competent jurisdiction and binding upon the parties until reversed and it was not error to reject impeaching evidence. Id.

10. Proceedings for placing a child with a charitable institution held void under act 1903, p. 60, c. 49, § 2, where on the mother's complaint charging the father with abandonment, but making no allegations whatever against herself, the court summarily ordered the child's commitment without any notice to the father. State v. Wheeler [Wash.] 86 P. 394. The mother's attempted surrender of the child to the institution as authorized by Laws 1903, p. 59, c. 49, § 1, being based upon the void adjudication that the father had abandoned it, was ineffective. Id. Since the custody of the institution was not legal, it could not give assent to adoption proceedings. Id.

11. Not error for court to refuse parent to visit child once a week. Kennedy v. Meara [Ga.] 56 S. E. 243.

12. When a child has been committed to a benevolent institution under the act of 1894 (Acts 1894, p. 80, Civ. Code 1895, § 2372), the parent may have its custody restored to him on habeas corpus by showing that the conditions have changed since the commitment and that the parent has become a fit person to have the custody of the child. The provision allowing the parent to apply to the institution for a return of the child is merely cumulative and does not oust the court's jurisdiction. Kennedy v. Meara [Ga.] 56 S. E. 243. Held error not to admit evidence tending to show a change of conditions and that the parent was a fit person to have the custody of the child. Id. Evidence that the grandmother was of good character and able to support and maintain the child held irrelevant. Id.

13. Where a child was in the lawful custody of his father who was domiciled in Louisiana, the relative rights of the father and mother to his custody should be determined by the Louisiana courts. Lanning v. Gregory [Tex.] 99 S. W. 542. Where a child was in the lawful custody of his father who

custody of a child.[14] In such proceeding the burden of establishing that the interests of the child will be best conserved by awarding custody to petitioners is upon them.[15] A decree of divorce awarding the custody of a child to one of the parties is conclusive as between the parents,[16] but a divorce judgment alleged but not offered in evidence cannot be considered in determining the issue.[17] The court may receive evidence as to the laws of a sister state relative to the capacity of a married woman to contract concerning her child, though such laws may not have been strictly complied with by the party offering the evidence.[18] A decree granting to the mother for a number of years the custody of a child already in the custody of the father changes the domestic status of the child for the time being.[19] The discretion of a trial court in awarding the custody of a child will not be interfered with on appeal in the absence of abuse.[20]

§ 2. *Support and necessaries.*[21]—A parent is bound to maintain and care for his minor child,[22] and where public policy or the interest of the child demand that it be cared for in a hospital, the parent may be required to stand the expense.[23] A father's obligation to support his children is not impaired by a decree of divorce,[24] which, on account of his misconduct, deprives him of their care and custody;[25] and a judgment for alimony awarding the wife allowances not to exceed in the aggregate a certain sum for the custody and care of the children is not res adjudicata as to the husband's liability for the children's support.[26] To constitute abandonment of a child, it must be not only deserted but left in a destitute condition.[27] A

was domiciled in Louisiana, the courts of Texas did not acquire jurisdiction of the child by reason of his temporary presence in that state so as to authorize them to adjudicate a change of the relation between the father and the child. Id.

14. Under Domestic Relations Law (Laws 1896, p. 222, c. 272, § 40), providing that a husband or wife living in a state of separation without being divorced, who have a minor child, may have the custody of the child determined on habeas corpus, such proceedings may be maintained by an Indian woman, a ward of the United States government living on an Indian reservation. People v. Rubin, 98 N. Y. S. 787.

15. Under the evidence considered in this case, held, child's best interests would be conserved by denying custody to petitioners. White v. Richeson [Tex. Civ. App.] 94 S. W. 202.

16. State v. Wheeler [Wash.] 86 P. 394.

17. State v. Thompson, 117 La. 102, 41 So. 367.

18. Trial on habeas corpus being to the court. Robertson v. Bass [Fla.] 42 So. 243. Where a mother articled her children to a stranger in another state who maintained them properly, on a contest over their possession in this state, the court will not inquire whether the foreign statute governing apprenticeships has been strictly complied with, the maternal right only being involved. Id.

19. Where, upon the separation of the parents, a child was taken by the father on his agreement to return him to the mother at her request, and thereafter, on habeas corpus, a decree was entered granting the mother the custody of the child until he was twelve years old, after which time custody was given to the father, held the decree operated to take the child from the father and place him in the family and custody of the mother, and thereby changed his domestic status for the time being. Lanning v. Gregory [Tex.] 99 S. W. 542.

20. Willingham v. Mattox, 125 Ga. 106, 53 S. E. 607. No abuse of discretion in awarding three minor children to a wife as against the husband. Cooper v. Cooper [Ga.] 56 S. E. 116.

21. See 6 C. L. 880.

22. Guthrie County v. Conrad [Iowa] 110 N. W. 454.

23. Parent held liable for support of son in insane hospital under Code, § 2297, providing that public support of insane persons shall not release relatives. Guthrie County v. Conrad [Iowa] 110 N. W. 454.

24. A decree of divorce in another state, after a separation which continued for many years, does not bar recovery by the wife from him of money expended in the support of their children prior to the granting of the decree, nor can aggression on her part be inferred as a matter affecting the rights of children, where the decree assigns no cause for the divorce and makes no provision for alimony or for the children. Clark v. Clark, 4 Ohio N. P. (N. S.) 142.

25. Graham v. Graham [Colo.] 88 P. 852.

26. So as to bar suit by wife for continued allowances after such sum has been expended, since children's rights could not be precluded by the judgment, they not having been parties. Graham v. Graham [Colo.] 88 P. 852. The court in determining the amount to be allowed each child should take in consideration the amount of his earnings and allow only the amount required for his maintenance over his actual earnings. Id.

27. Under Pen. Code 1895, § 114, desertion is not sufficient if the wants of the child are provided for by others. Williams v. State, 126 Ga. 637, 55 S. E. 480. Since the evidence established desertion but not destitution, a new trial should have been granted. Id.

prosecution for nonsupport must be instituted in the county in which the offense is committed.[28] The pendency of bastardy proceedings against the father of an illegitimate child is not a bar to a criminal prosecution against him for nonsupport.[29]

To authorize a recovery against a parent for goods sold a minor child, it must be shown either that they were necessaries,[30] or that the child had authority to pledge the parent's credit;[31] and a parent is not liable even for necessaries furnished his child unless he has refused to furnish them himself.[32]

Except in special cases,[33] a parent cannot recover for the past support of his child,[34] or the child for the support of the parent[35] in the absence of express contract.[36] Such contract may be binding though the amount to be paid is not agreed to.[37] Though a father may be relieved from all legal obligation to support a child, subsequent assistance rendered the child by him is presumed to have been prompted by his moral obligation.[38] A mother who is already being supported by some of her children cannot maintain an action for support against another child.[39]

Under Pen. Code, § 287, punishing by imprisonment a parent or other person who deserts a child under fourteen years old at any place with intent to abandon it, the words "in any place" are important, and a father's leaving his children with their mother is not a crime thereunder. People v. Joyce, 112 App. Div. 717, 98 N. Y. S. 863.

28. Prosecution under § 7017-3, Rev. St. 1906, for nonsupport of parent must be instituted in the county in which defendant resides at the time he fails to furnish support. State v. Dangler, 74 Ohio St. 49, 77 N. E. 271. Verdict for defendant properly directed where prosecution was commenced in wrong county. Id.

29 Not a bar to, nor ground for the abatement of, a criminal prosecution against him by the state under § 3140-2, Rev. St. 1906, for nonsupport of the child. State v. Veres, 75 Ohio St. 138, 78 N. E. 1005.

30. Complaint against father for price of footwear sold his infant daughter, not alleging that they were necessaries or that daughter stood in need of them, held insufficient to authorize recovery on theory that they were necessaries. Cousins v. Boyer, 100 N. Y. S. 290.

31. Evidence held insufficient to show that daughter had authority to pledge credit of father for goods. Cousins v. Boyer, 100 N. Y. S. 290. See special article, Agency from Relation, 3 C. L. 101.

32. One who employs a child against the objection of his parent who has not refused to furnish the child with necessaries cannot, on being sued by the parent for the value of the services, deduct what he paid the child and which the child used for necessaries. Smith v. Gilbert [Ark.] 98 S. W. 115.

33. A special case warranting an exception to this rule is presented, where a mother who has furnished such support had little or no estate or an estate trifling in comparison with that of the minor, and the support was furnished to the minor for the benefit of the minor under conditions which were coercive upon the mother and compelled her to assume a burden which was not naturally and legally hers alone. Spink v. Spink, 7 Ohio C. C. (N. S.) 89.

34. It is the general rule of law that no allowance should be made to either father or mother out of the estate of a deceased minor child for past maintenance and support, except in special cases. Spink v. Spink, 7 Ohio C. C. (N S.) 89. A guardian, the mother of her ward, may not charge for the board of the latter whose services are worth as much as her support, there being no circumstances showing why it would be inequitable for the mother to furnish her child board without charge. Leake v. Goode, 29 Ky. L. R. 793, 96 S. W. 565.

35. Where a father furnished a house and dressmaking rooms for his daughter and the latter furnished him with board and nursing, the daughter could not recover on a quantum meruit for board furnished in the absence of any express agreement. Conway v. Cooney, 111 App. Div. 864, 98 N. Y. S. 171.

36. The presumption that services, boarding, and the like, are furnished gratuitously as between parent and child, may be overcome by evidence showing an express contract. Evidence sufficient to establish contract of father to pay son for boarding himself and a grandson. Shadle's Estate, 30 Pa. Super. Ct. 151. Where a father and daughter lived together for several years, he furnishing the house and she furnishing board, etc., an express contract on his part to pay for the board must be proved by clear and convincing evidence. Conway v. Cooney, 111 App. Div. 864, 98 N. Y. S. 171. Evidence held insufficient to show an express contract by a father to pay his daughter for board. Id.

37. If amount to be paid is not agreed to, it will be implied to be the reasonable value. Shadle's Estate, 30 Pa. Super. Ct. 151. Agreement between two sons that one of them will take their father into his family and the other will stand "his share" of the expense held a valid contract, though there were other children who might have been compelled to contribute to the father's support and though the amount to be paid was not fixed at any definite sum. Compton's Estate, 30 Pa. Super. Ct. 605.

38. Where a divorce decree gave the child to the mother and the father afterwards, as executor, received a legacy for the child and then made payments to relieve the child's necessities, he could not have credit therefor on the legacy in a court of equity. Exchange Banking & Trust Co. v. Finley, 73 S. C. 423, 53 S. E. 649.

39. There being no threat of withdrawal of support, she could not maintain action under Civ. Code, § 206, making it the duty of

§ 3. *Services, earnings, and injuries to child.*[40]—Services rendered by parent to child or vice versa are presumed to be gratuitous [41] and contracts to pay for them must be clearly established.[42]

A parent may recover for loss of services resulting from the wrongful injury of his child by others,[43] in either enticing the child away,[44] or causing his death.[45] Unless a mother has the same right to the custody and services of a child as the father has,[46] the right of action is in the father, if he is then alive,[47] and accrues immediately upon the happening of the injury,[48] and if he dies before bringing action, the cause does not survive to the mother.[49] A parent who consents to the employment of a minor child to do certain work cannot recover against the employer for injuries to the child proximately resulting from its minority and lack of experience,[50] but consent of a parent to the employment of a son in a hazardous work is not a defense where injury results from defendant's negligence.[51] Contributory negligence on the part of the parent [52] or child [53] is fatal to recovery, the question of due care being ordinarily for the jury.[54] One who has not adopted a child and is not his guardian cannot recover for loss of his services, though he has kept him ever since he was very small.[55]

children to maintain their poor parents who are unable to maintain themselves by work. Duffy v. Yordi [Cal.] 84 P. 838.

40. See 6 C. L. 881.

41. Fennimore v. Wagner [N. J. Eq.] 64 A. 698 Where a member of the family after becoming of age continues to live with the family and render services, the law will not imply a promise to pay for the services. In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. S. 480. In Louisiana children are not entitled to compensation for services rendered their mother who is also their natural tutrix. Gaspard v. Coco, 116 La. 1096, 41 So. 326. The services of **illegitimate children** living with and working for their father under the belief that they are legitimate are presumed gratuitous. Williams v. Halford, 73 S. C. 119, 53 S. E. 88.

42. Evidence insufficient to establish claim of son for having worked on father's farm. In re Milligan's Estate, 112 App. Div. 373. 98 N. Y. S. 480. Held sufficient to establish a claim of a daughter. Id.

43. A father may recover for loss of services of an adult daughter, who, though married, is a member of his family and lives apart from her husband. Where loss of service was result of illegal carnal assault. Palmer v. Baum, 123 Ill. App. 584.

44. In an action against several for acting in consert in enticing plaintiff's son from home, instructions considered and held not erroneous on theory that jury could not find against one or more of defendants without finding against all. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907. The fact that the proof showed that the son stayed at the home of a person other than the one named in the petition held not ground for new trial for surprise. Id. Evidence considered and held to sustain verdict for defendants. Id.

45. In an action by a father for the death of his minor son who had left home against his parents' wishes, on the question of whether he intended to contribute his services or earnings to his parents, his letters and conversations expressing such intention were competent, and not objectionable as self-serving declarations. Dean v. Oregon R. & Nav. Co. [Wash.] 87 P. 824. In action to recover a statutory forfeiture for the wrongful death of a son, it was no defense that decedent fraudulently represented himself to be of age in order to obtain employment. Matlock v. Williamsville, etc., R. Co., 198 Mo. 495, 95 S. W. 849.

46. A mother who has the same right to the custody and services of a child as the father has may sue in her own name for loss of services of the child through the negligence of another. Married woman deserted by husband and supporting child could sue under Act June 26, 1895 (P. L. 316), giving a mother who contributes to the support and education of her minor child the same right to its custody and services as is possessed by the father. O'Brien v. Philadelphia [Pa.] 64 A. 551.

47, 48. King v. Southern R. Co., 126 Ga. 794, 55 S. E. 965.

49. Where father died about an hour later. King v. Southern R. Co., 126 Ga. 794, 55 S. E. 965.

50. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187

51. Where employer failed to avoid injury after discovering the peril. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct Rep. 203, 93 S. W. 187.

52. Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517. The parent or guardian is required to exercise the care of a reasonably prudent and cautious person under the circumstances. Id In determining whether proper care was exercised, the jury may consider the place of the accident, the character of the community, the intelligence of the people, etc. Id

53. Instruction erroneous as ignoring a son's contributory negligence in action against an employer. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187.

54. Held question for the jury under the circumstances. Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517.

55. Kelly v. Illinois Cent. R. Co. [Ky.] 100 S. W. 239.

Future earnings of minor children are not assets of the father's estate reachable by creditors so as to prevent their relinquishment by the father, to the children, though the father is insolvent.[56]

Where an action is only for injury to the child, it must be brought in the name of the child.[57] A father individually cannot recover damages for a libel against the good name of his minor daughter,[58] nor can a parent recover damages for mental shock and distress caused by injury to minor children.[59]

Emancipation.[60]—Until a child is emancipated his earnings belong to his father,[61] and the creditors of the latter have a right to subject them and the property in which they are invested to the satisfaction of their claims.[62] Emancipation, either partial or complete,[63] may be effected either by the conduct of the parent,[64] such as allowing a son to hire out and retain his own wages,[65] or compelling him to leave home,[66] or by agreement.[67] The incarceration of a minor child in a state hospital for the insane without his father's consent is not an emancipation so as to relieve the father from liability for its care, he being otherwise liable.[68] Upon the complete emancipation of a child, he, and not his parents, is entitled to sue for injuries to himself;[69] but emancipation is no defense in an action by a father to recover a statutory forfeiture for the wrongful death of his son.[70] A complaint for labor done au-

56. Merrill v. Hussey, 101 Me. 439, 64 A. 819.

57. Code, §§ 4503, 4504. Father alone could not recover in his own name. Tennessee Cent. R. Co. v. Doak, 115 Tenn. 720, 92 S. W. 853.

58. Pattison v. Gulf Bag Co., 116 La. 963, 41 So. 224.

59. In suit by father for unlawful arrest of his children, father could not recover for death of mother alleged to have resulted from mental distress. Sperier v. Ott, 116 La. 1087, 41 So. 323. See Damages, 7 C. L. 1029.

60. See 6 C. L. 883.

61. Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508. Where in an action by an infant, by his father as next friend, for injuries, there was no proof that plaintiff had been emancipated, nor that the father had waived his rights to plaintiff's services until after verdict, it was error to permit a recovery for loss of plaintiff's services during minority. Farrar v. Wheeler [C. C. A.] 145 F. 482.

62. Harper v. Utsey [Tex. Civ. App.] 17 Tex. Ct. Rep. 17, 97 S. W. 508. Where a son claimed a horse as against his father's creditors and the horse had been purchased with work done by the son for the seller, evidence held to require the giving of an instruction that the horse would be subject to execution as the property of the father unless prior to the purchase the son had been emancipated. Id.

63. Where a minor son left his parents without their consent and enlisted in the army, if there was any manumission, it was effective only during the time of service. When he was discharged from the army, he became in law subservient to the authority of his parents who were entitled to his earnings. Dean v. Oregon R. & Nav. Co. [Wash.] 87 P. 824.

64. That a father prosecuted an action for injuries for his son as next friend, and testified that he told defendant that he had no objection to his son's working for defendant, was insufficient to show emancipation or waiver of father's right to son's services during minority. Farrar v. Wheeler [C. C. A.] 145 F. 482. Where a lessee of hopyards surrendered his lease and thereafter his wife and minor son operated the yards under a new lease, and there was no question as to the son's emancipation, the minority of the son did not render the labor he performed, or the crops he helped to produce, liable to the claims of the creditors of the first lessee. Livesley v. Heise [Or.] 85 P. 509.

65. If a father permits his son to make his own contracts of hiring and to receive his own wages with the understanding that the son is to retain them as his own, the wages earned under such contract become the property of the son and not of the father. Merrill v. Hussey, 101 Me. 439, 64 A. 819.

66. Where a parent has compelled his child to leave home and seek employment elsewhere, it operates as an act of manumission and cannot be revoked by the parent so as to abrogate a contract for service fairly entered into between the child and his employer. Smith v. Gilbert [Ark.] 98 S. W. 115.

67. A separation agreement by which a father promises to return a child to the mother at her request does not emancipate the child from the father's control, nor change his domicile from that of the father. Lanning v. Gregory [Tex.] 99 S. W. 542. The offer of a parent to give his child a share of all his earnings while working for the parent is not an emancipation. Offer that he could have a share of the crop he might raise on his father's farm. Smith v. Gilbert [Ark.] 98 S. W. 115.

68. Guthrie County v. Conrad [Iowa] 110 N. W. 454.

69. Pecos & N. T. R. Co. v. Blasengame [Tex. Civ. App.] 15 Tex. Ct. Rep. 203, 93 S. W. 187.

70. Under Rev. St. 1899, § 2864, providing that wrongdoer "shall forfeit" $5,000. Matlock v. Williamsville, etc., R. Co., 198 Mo. 495, 95 S. W. 849.

thorizes a recovery for the labor of plaintiff's son.[71] In an action for loss of services due to injuries to a minor son, the defense of emancipation must be pleaded and proved by defendant.[72]

§ 4. *Property rights and dealings between parent and child.*[73]—Alleged agreements between parent and child for the transfer of property must be clearly established and shown to be supported by a sufficient consideration.[74] Mutual love and affection is sufficient to sustain a conveyance from a father to his child.[75] Where a father makes an advancement by deed to his children in consideration of love and affection,[76] the cestue que trustent are not required to show that the father knew that he reserved no rights or power of revocation, in the absence of suspicious circumstances.[77] In the absence of fraud or undue influence, a voluntary payment by a parent to his children will be presumed to be a gift,[78] and a voluntary conveyance for a recited consideration of love and affection is presumed to be an advancement and title passes to the child.[79] Parents may lawfully receive security from their son who is indebted to them, though they know that the result will be to delay or defeat his other creditors, no fraud being shown.[80] The power conferred upon the father by the Louisiana statute to administer, during marriage, the estate of his minor children is wholly distinct from tutorship and not controlled by provisions relating thereto.[81]

§ 5. *Liability for child's torts.*[82]—One is not liable for the tort of an infant upon the sole ground that he is his father.[83] To render a parent liable for such tort, it must appear that he might reasonably have anticipated injury as a consequence of permitting the infant to act as he did.[84] To establish the liability of a parent for the acts of his children while working for him, it must appear that the act complained of was within the scope of the employment.[85]

PARKS AND PUBLIC GROUNDS.

Acquisition and creation.[86]—The New Jersey acts, authorizing cities near a beach to lay out parks thereon,[87] and directing the reparian commissioners to con-

71. Under Civ. Code, § 197, providing that a father is entitled to the services and earnings of his minor son. Cannon v. McKenzie [Cal. App.] 85 P. 130.

72. Singer v. St. Louis, etc., R. Co., 119 Mo. App. 112, 95 S. W. 944.

73. See 6 C. L. 884.

74. Evidence insufficient to show agreement on part of aged mother to transfer $8,000 worth of bonds and mortgages in consideration that daughter should take care of her, or to show any other consideration for the transfer. Fennimore v. Wagner [N. J. Eq.] 64 A. 698.

75. Where father made an advancement by having his share as tenant in common conveyed to him as trustee for children. Taylor v. Draper [N. J. Eq.] 63 A. 844.

76. Father held to have made advancement by accepting as trustee for children, a deed of his share, as tenant in common, of certain land. Taylor v. Draper [N. J. Eq.] 63 A. 844.

77. Taylor v. Draper [N. J. Eq.] 63 A. 844. Even if such burden was cast upon them, it was made out by proofs produced by complainant. Id. Complainant held to have no title by subsequent deed from trustee. Id.

78. Jenning v. Rohde, 99 Minn. 335, 109 N. W. 597. No error in instructing jury on burden of proof, presumption, and intention of donor. Id.

79. Conveyance not a mere trust in father's favor. Seed v. Jennings, 47 Or. 464, 83 P. 872.

80. First Nat. Bank v. Brubaker, 128 Iowa, 587, 105 N. W. 116.

81. Not controlled by La. Code, art. 3350, providing that an inventory must be made and recorded before fathers and mothers who by law are entitled to the usufruct of property belonging to their minor children shall be allowed to take possession and enjoy the fruits and revenues thereof. Darlington v. Turner, 202 U. S. 195, 50 Law. Ed. 992. Trustee could transfer property of minors to their father without being held accountable further, since art. 3350 applies only to the usufruct in such case. Id.

82. See 6 C. L. 885.

83. Palm v. Ivorson, 117 Ill. App. 535.

84. Not liable for permitting son to use fire-arms, where son was twelve years old, experienced in their use, and had habitually been careful. Palm v. Ivorson, 117 Ill. App. 535.

85. Petition that "while they were engaged in his (the father's) business and for his benefit and working for him," they carelessly set out a fire, held insufficient. Mirick v. Suchy [Kan.] 87 P. 1141.

86. See 6 C. L. 885.

87. The Act of 1894 (P. L. 1894, p. 146), conferring power upon cities located on or

vey to them tide lands so used,[89] are constitutional. Property may be condemned for park purposes upon due compensation being made as provided by statute.[92] Where a lot is sold with reference to a map and upon representation that a park shown thereon would be kept open, such representation is binding, though the map had never been so adopted by the grantor as to dedicate the park to the public.[90] A borough has no power in Pennsylvania to lease a public amusement park for the purpose of revenue by charging admission thereto.[91] Where a Spanish grant of land titles to colonists provided that a block should be set aside "for public buildings for the municipality," such reservation was in favor of the subdivision corresponding to the county and not the city in which it might be located.[92]

The public title.[93]—Whether a fee or an easement is acquired in land condemned for park purposes is determined by the statute under which it is taken.[94]

Rights of individuals in or to parks.[95]—An artificial drainage course existing at the time land is condemned cannot be closed to the injury of the remaining property unless it is inconsistent with park purposes,[96] and, if it becomes obstructed, the owner of adjoining lands may enter thereon and remove the obstruction.[97]

Adverse possession, abandonment, and diversion; actions.[98]—Title to a block reserved for public buildings of a city may be lost by estoppel [99] or adverse possession.[1] The vacation of parks and highways is a legislative power [2] which cannot be contracted away,[3] and a determination by the proper legislative body that a parkway should be vacated is conclusive upon the courts in the absence of fraud, except

near the ocean to lay out parks on the beach, is not unconstitutional as special in that it does not include cities not on or near the ocean. Seaside Realty & Imp Co. v. Atlantic City [N. J. Law] 64 A. 1081.

88. Act 1903 (P. L. 1903, p. 387), providing that the state's land, within the limits of a park laid out under Act 1904, p. 146, may be granted by the riparian commissioners to the city, is not unconstitutional as to title (Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081), as special legislation regulating the internal affairs of cities (Id.), nor as depriving the free schools of lands appropriated to their use (Id.).

89. Under St. 1894, p. 286, c. 288, § 5, a person whose land is damaged by the taking of other land by the metropolitan park commissioners under St. 1894, p. 283, c. 288, and St. 1895, p. 504, c. 450, may recover such damages though no part of his land is taken. Whitney v. Com., 190 Mass. 531, 77 N. E. 516. Where at the time land of others was taken for park purposes, the only land of petitioners which might suffer special damages was a mill pond adjacent to the park, the court properly instructed in proceedings to assess damages, that in case the pond should be filled and divided into building lots in separate ownership between a certain boulevard and other parts of the pond, the owners would have a right of access to the boulevard. Whitney v. Com., 190 Mass. 531, 77 N. E. 516.

90. Marshall v. Columbia & E. C. Elec. St. R. Co., 73 S. C. 241, 53 S. E. 417.

91. A borough has no power under Act April 3, 1851 (P. L. 320), § 1, cl. 4, authorizing it to hold and convey such real estate as the purposes of the borough require, and § 2, cl. 4, empowering it to regulate, etc., common grounds, and § 2, cl. 17, empowering to make such regulations as may be necessary for the health or cleanliness of the borough, to lease an inclosed pleasure park for the purpose of revenue. Bloomsburg Land Imp. Co. v. Bloomsburg [Pa.] 64 A. 602.

92. Reservation under 1 Grammel's Laws. pp 56-58. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

93. See 6 C. L. 885.

94. Reed v. Winona Park Com'rs [Minn.] 110 N. W. 1119. Unless the intention to authorize the taking of a fee is clear, the statute will be construed to allow the taking of an easement only (Reed v. Winona Park Com'rs [Minn.] 110 N. W. 1119), unless a fee is required by the necessities of the purposed use (Id.). Gen. Laws 1903, c. 293. p. 513, held to authorize the taking of an easement only. Id.

95. See 6 C. L. 886.

96, 97. Reed v. Winona Park Com'rs [Minn.] 110 N. W. 1119.

98. See 6 C. L. 886.

99. Where a city, without objection, permitted the county to take possession and erect costly buildings on a square within its limits, under a claim of ownership, it is estopped to assert title as against the county. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

1. In an action by a city against a county to recover certain blocks, evidence held to sustain a finding that the county had so used the square for public building purposes as to acquire title by adverse possession. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

2. To be exercised by the legislature or by a municipal board to which it is delegated. State v. Minneapolis Park Com'rs [Minn.] 110 N. W. 1121.

3. Neither the legislature nor a municipality has any power to enter into a contract curtailing its right to vacate a park if the public interest requires. State v. Minneapolis Park Com'rs [Minn.] 110 N. W. 1121.

when reviewed as provided by statute.[4] Where unrestricted power is conferred upon a park board to vacate parks, it is applicable to existing parks as well as to those thereafter created.[5] The New Jersey statute providing for the vacation of parks with the consent of the fee owners is constitutional,[6] and, in proceedings thereunder, the consent need not be expressed in any particular form,[7] and the council may impose such lawful[8] terms as they see fit. Lands dedicated to park purposes cannot be diverted to any use inconsistent therewith.[9]

Park bonds.[10]

Government, control, and officers of parks.[11]—Park officials have no powers except such as are expressly conferred by statute or by the constitution, or fairly inferred therefrom, or is essential to the performance of the duties of the office;[12] and by statute in New York, a tax payer may restrain the park commissioners from doing any illegal act in respect to the park.[13] The power conferred upon city councils in New Jersey to improve[14] public parks extends to newly-acquired parks as well as to existing ones.[15] Park officials may prescribe reasonable rules and regulations for the use of parks.[16] A municipal corporation has authority to abate a nuisance erected by the county on lands occupied by county buildings within the city limits.[17] Under the Kansas City charter, the park commissioners are authorized to recommend the improvement of boulevards within park districts,[18] and if

Contract between property owners conveying land for Hennepin parkway and the city that it should be perpetually maintained held ultra vires. Id.

4. State v. Minneapolis Park Com'rs [Minn.] 110 N. W. 1121. Will be presumed to be based upon public interest. Id.

5. The power conferred under Sp. Laws 1885, c. 304, p. 546. State v. Minneapolis Park Com'rs [Minn.] 110 N. W. 1121.

6. Act March 30, 1904 (P. L. 1904, p. 366), providing for the vacation of lands dedicated to public use, is not unconstitutional as being especial in that it applies only to such fee owners as consent to the vacation. Ocean City Land Co. v. Ocean City [N. J. Law] 63 A. 1112.

7. Where the fee owner presented the proposition to the council in the first instance, agreed to the modification of the proposed terms of vacation, and accepted the vacating ordinance, sufficient consent is given. Ocean City Land Co. v. Ocean City [N. J. Law] 63 A. 1112.

8. Terms infringing upon private rights are unauthorized, as where it provides for uses of the vacated lands different than that indicated when surrounding lot owners purchased their lots. Ocean City Land Co. v. Ocean City [N. J. Law] 63 A. 1112.

9. The erection of a public library on grounds dedicated by the city as a public park is not inconsistent with its enjoyment as a park (Spires v. Los Angeles [Cal.] 87 P. 1026), but the building must be used strictly for library purposes, and while rooms may be provided for the library board because of their connection with the library, they cannot be provided for the board of education (Id.).

10, 11. See 6 C. L. 886.

12. Tompkins v. Pollas, 47 Misc. 309, 95 N. Y. S. 875. For ornamental purposes and beneficial uses, does not authorize the granting of the right to use a fence for advertising purposes. Id. Greater New York Charter (Laws 1897, p. 213, c. 378, § 612, as amended by Laws 1901, p. 257, c. 466), imposing on the park commissioners the duty to maintain the beauty and utility of all parks and to execute measures necessary. And the fact that the fence is only temporary, or that the city receives a pecuniary consideration, is immaterial. Id.

13. Restrained from leasing a park fence for advertising purposes, and it is not necessary to show a waste of public moneys or injury to the property. Tompkins v. Pallas, 47 Misc. 309, 95 N. Y. S. 875.

14. Where a purposed building is capable of public uses, the courts will not assume that it is to be used for other purposes. Erection of a "casino" held a public improvement. Ross v. Long Branch [N. J. Law] 63 A. 609.

15. The power conferred upon city councils by the act of 1903 (P. L. 1903, p. 292), as amended by Act of 1904 (P. L. 1904, p. 346), to improve public parks, includes the power to erect in a newly-acquired park a building for public purposes. Ross v. Long Branch [N. J. Law] 63 A. 609.

16. Reasonableness is determined by conditions as they exist at the time of attack. Whitney v. Com., 190 Mass. 531, 77 N. E. 516. Whether rules established by a park commission are reasonable as applied to known facts is a question of law for the court, but where the facts are uncertain or in dispute, such question must be submitted to the jury under proper instructions. Id.

17. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368.

18. Kansas City Charter, art. 10, § 31, providing that, if the park commissioners recommend that boulevards, etc., in park districts be improved, the council shall order such work, gives the board power of recommendation and not legislation, and if the city adopts such recommendation, the section will not be construed as infringing Const. art. 9, §§ 16, 17, requiring certain city charters to provide for two houses. Jalcks v. Merrill [Mo.] 98 S. W. 753.

the city council adopt the recommendation, they need not obtain the approval of the board of public works.[19]

Injuries in parks.[20]—A municipality must keep its parkways in a reasonable safe condition for travel,[21] but it is not liable for injuries resulting from a display of fireworks in a park with its permission unless the same constituted a nuisance,[22] or the city either authorized it to be done in a dangerous manner [23] or acquiesced therein after notice. [24]

Privately owned parks open to public.[25]

PARLIAMENTARY LAW.[26]

PAROL EVIDENCE, see latest topical index.

PARTIES.

§ 1. Definition and Classes (1236).
§ 2. Who May or Must Sue (1236).
§ 3. Who May or Must Be Sued (1239).
§ 4. Designating and Describing Parties (1242).
§ 5. Additional and Substituted Parties (1242). Intervention (1243). Substitution (1244).
§ 6. Objections to Capacity and Defects of Parties (1245).

Scope of title.—Only general principles are treated here. As to parties in particular actions, or as controlled by relationship, see appropriate titles.[27]

§ 1. *Definition and classes.*[28]

§ 2. *Who may or must sue.*[29]—In general an action ex contractu may be brought by the covenantee,[30] though it be for the benefit of another,[31] and a misnomer therein [32] or the use of a fictitious name [33] does not prevent the real party from suing thereon. While not general, the common-law rule that a covenant for

19. Kansas City Charter, art. 10, § 31, authorizing the improvement of boulevards in park districts upon the recommendation of the park commissioners, is an exception to art. 9, § 2, authorizing the pavement of streets, etc., upon recommendation of the board of public works, and such recommendation need not be indorsed thereon. Jaicks v. Merrill [Mo.] 98 S. W. 753.

20. See 6 C. L. 887.

21. A binding instruction for defendant was properly refused where plaintiff was injured by a mooring cable stretched across a pathway of a river-front parkway of which the city had notice. Weber v. Harrisburg [Pa.] 64 A. 905.

22. Not a nuisance per se. De Agramonte v. Mt. Vernon, 112 App. Div. 291, 98 N. Y. S. 454.

23. No evidence introduced by plaintiff as to the terms of the permit. De Agramonte v. Mt. Vernon, 112 App. Div. 291, 98 N. Y. S. 454.

24. Held to have had no notice of the defective condition of the iron tube in which the fireworks were exploded. De Agramonte v. Mt. Vernon, 112 App. Div. 291, 98 N. Y. S. 454.

25. See 6 C. L. 887.

26. No cases have been found for this subject since the last article. See 6 C. L. 887.

27. Appeal and Review, 7 C. L. 128; Assignments, 7 C. L. 277; Bankruptcy, 7 C. L. 387; Corporations, 7 C. L. 862; Death by Wrongful Act, 7 C. L. 1083; Estates of Decedents, 7 C. L. 1386; Guardians, ad Litem and Next Friends, 7 C. L. 1896; Guardianship, 7 C. L. 1899; Husband and Wife, 8 C. L. 122; Wills, 6 C. L. 1880; Equity, 7 C. L. 1323; Ejectment and Writ of Entry, 7 C. L. 1212; Mandamus, 8 C. L. 810; Quo Warranto, 6 C. L. 1190; Replevin, 6 C. L. 1301; Specific Performance, 6 C. L. 1498; Quieting Title, 6 C. L. 1183, and similar topics.

28, 29. See 6 C. L. 888.

30. Where an agent is the only ostensible party to a contract he is in law the real contracting party and may sue on the contract. Hewitt v. Torson, 124 Ill. App. 375. Where a contract, assignable only with the consent of the parties thereto, is so assigned to a particular person he alone can sue thereon, and hence where he brings the action for the benefit of himself and another there is a defect of party plaintiff, since under Code 1896, § 29, the beneficiaries must be deemed the sole parties plaintiff. Fletcher v. Prestwood [Ala.] 43 So. 231.

31. Kirby's Dig. § 6002. And the fact that he so states is immaterial. Beekman Lumber Co. v. Kittrell [Ark.] 96 S. W. 988.

32. Where the contract upon which suit was brought described plaintiff as "Farmers' Co-operative Shipping Association of Alma, Neb.," its true name being "Farmers' Co-operative Shipping Association," if a misnomer is immaterial where there was no mistake as to the parties. Kannow v. Farmers' Co-op. Shipping Ass'n [Neb.] 107 N. W. 563.

33. Hartwell & Spotswell, operating a tug under the name of the "Tow Boat Company" contracted for a boiler under such name. Held that in an action for balance due, they could maintain a cross-libel for breach of warranty as individuals. The Nimrod, 141 F. 215.

the benefit of a stranger to the consideration will not support an action by him still prevails in some states.[34] One having a special interest in property may maintain an action for the destruction thereof.[35]

Where a suit is prosecuted for the benefit of another, the usee's interest should be made to appear,[36] though, if the action is based upon a legal right of plaintiff, the defendant cannot contest the right of the usee therein.[37] With the consent of the holder of the legal title,[38] or without it upon indemnifying him against costs,[39] a beneficiary may institute suit in his name and prosecute the same free from interference.[40] The nominal plaintiff, however, has a right to be heard upon the fact of beneficial ownership.[41] In some states the beneficial owner may sue in his own right for injury to property held in trust.[42] Unless prohibited by statute, a suit may be prosecuted in the name of an assignor for the benefit of the assignee, especially if the assignment is made pendente lite;[43] but in Maine the name and residence of the latter, if known, must be indorsed on the process upon request of defendant.[44]

In the Code states, actions are usually[45] required to be prosecuted by the real party in interest,[46] though a trustee of an express trust is frequently authorized to sue in respect thereto,[47] if no dispute among the beneficiaries is involved.[48]

34. A creditor cannot sue upon a covenant by a third party made with the debtor notwithstanding Code 1904, § 2840, providing that certain actions cannot be maintained unless the contract is in writing and signed by the party to be charged thereby (McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473), or Code 1904, § 2415, authorizing one to sue upon a covenant in a contract to which he is not a party made for his sole benefit, since such covenant is primarily for the benefit of the debtor (Id.), or Code 1904, § 2860, authorizing the assignee of a bond or other chose in action to sue in his own name and to maintain any action which his assignor might have brought (Id.). A suit at law upon three instruments containing covenants of indemnity and relief of the grantor in the first instrument, which were only available to the parties and their privies, of whom plaintiff was not one, is not saved by Code 1904, § 3528a, providing that a suit brought in the proper forum where there has been a misjoinder of parties the court may order the action to abate as to the misjoined parties and proceed. Id.

35. A bailee of property, having an interest therein under express contract, may maintain an action for the negligent destruction thereof. Union Pac. R. Co. v. Meyer [Neb.] 107 N. W. 793.

36. Where a suit commenced by a lessor for rent was prosecuted for the use of another, an equity record showing that the usee had become a guarantor for the payment of the rent and had paid the same is admissible. Philbin v. Thurn, 103 Md. 342, 63 A. 571. As is also oral testimony of the usee to the same point. Id.

37. Where one directs the payment of claims due him to another, and upon default brings an action for the use of such third person, defendant cannot defend on the ground that the order was insufficient to entitle the usee to the money. Sentinel Printing Co. v. Long, 28 Pa. Super. Ct. 608.

38. Where a party was informed of a transfer of a claim to him and acquisced in the bringing of a suit in his name, his acceptance of the trust will be presumed. Ex parte Randall [Ala.] 42 So. 870.

39. Ex parte Randall [Ala.] 42 So. 870.

40. Nominal plaintiff cannot dismiss where he has been indemnified against costs. Ex parte Randall [Ala.] 42 So. 870. Held error to refuse to strike a cause from the short cause calendar upon motion of the usee, it having been placed there by the nominal plaintiff without his consent. Weckler Brick Co. v. McLean, 124 Ill. App. 309.

41. Ex parte Randall [Ala.] 42 So. 870.

42. Yates v. Big Sandy R. Co., 28 Ky. L. R. 206, 89 S. W. 108.

43. Where a claim is assigned after suit brought thereon the assignee is a lis pendens purchaser, and the suit may be continued in the name of the assignor. Wallace v. Shapard [Tex. Civ. App.] 15 Tex. Ct. Rep. 735, 94 S. W. 151. Under Code of Civ. Proc. St. 1893, p. 768, § 40 (Wilson's Rev. & Ann. St. 1903, § 4238) a party transferring real estate pending litigation in respect thereto, may continue the action in his name. Gillett v. Romig [Okl.] 87 P. 325.

44. Rev. St. c. 84, § 144, held mandatory. Liberty v. Haines, 101 Me. 402, 64 A. 665.

45. One to whom payment can legally be made and who can discharge the debtor may bring an action notwithstanding Code 1896, § 28, requiring it to be prosecuted by the real party in interest though he is bound to pay it to another when collected. Ex parte Randall [Ala.] 42 So. 870.

46. Under Code Civ. Proc. § 367, the pledgor of a note may sue thereon, though the Civ. Code, § 3006, authorizes the pledgee to sue. Graham v. Light [Cal. App.] 88 P. 373. Where a vendor delivered a deed to a bank with direction to deliver it to the vendee upon payment of the purchase price, which the bank was to receive and apply to the vendor's debt to it, there was a sufficient assignment to make the bank the real party in interest within Rev. St. 1899, § 540. Farmers' Exch. Bank v. Crump, 116 Mo. App. 371, 92 S. W. 724. Where the parties in interest are the heirs at law of decedent, a petition alleging that petitioner is the "sole

Except as authorized by statute, a suit cannot be prosecuted in the name of,[49] or for the benefit [50] of an unincorporated association. Restrictions upon the capacity of foreign corporations to sue are frequently imposed.[51] One suing under the authority of a judgment when jurisdictionally challenged must prove the same and all jurisdictional facts leading up to it.[52]

Joinder of parties plaintiff.[53]—Joint obligees [54] and persons seeking the same relief from a common injury upon similar grounds may join as co-plaintiffs,[55] though one having no right of action cannot join with one having such right.[56] A

heir" of decedent states a mere conclusion, and hence is demurrable under Civ. Code Proc. § 18. Dailey v. O'Brien, 29 Ky. L. R. 811, 96 S. W. 521. Under Code Civ. Proc. § 3, providing that actions "shall" be prosecuted by the real party in interest except as otherwise provided, a bank may sue on a note made payable to its president by mistake, notwithstanding § 5, providing that one in whose name a contract is made for the benefit of another "may" sue without joining the one beneficially interested. Best v. Rocky Mountain Nat. Bank [Colo.] 85 P. 1124. Where goods sold are wrongfully levied upon before delivery, the vendor may sue therefor as the real party in interest. Hall v. Frith, 101 N. Y. S. 31. Citizens of a county may sue to enjoin the commissioner appointed by the governor to have surveys made for a new county from acting. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540. Under Code, § 3459, providing that every action must be prosecuted in the name of the real party in interest, except as to contracts made for the benefit of another, an action cannot be maintained for the members of an unincorporated association not consenting to a breach of a contract with the association to enforce the same. Westbrook v. Griffin [Iowa] 109 N. W. 608. An agreement to give one-half of the amount recovered to the attorney as compensation does not give him such an interest as makes him a necessary party. El Paso Elec. R. Co. v. Telles [Tex. Civ. App.] 99 S. W. 444; Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909. Where an action must be brought in the name of the real party in interest, defendant may introduce evidence to show that certain of the plaintiffs have assigned all their interest. Wilson v. Kent [Colo.] 88 P. 461.

47. Under Civ. Code Proc. § 21, one holding land as an agent may sue in respect thereto. Goff v. Boland, 29 Ky. L. R. 172, 92 S. W. 575. Where a foreign executor, pursuant to a written agreement with his coexecutor and the beneficiaries of the estate, takes title in his own name for the benefit of the state, he is a trustee of an express trust within Ballinger's Ann. Codes & St. § 4825, and hence has capacity to sue. Doe v. Tenino Coal & Iron Co. [Wash.] 86 P. 938. Under Rev. St. 1899, § 541, where a trustee of an express trust who contracts in respect to the land sues thereon, it is no objection that he is not the real owner. Johnston v. O'Shea, 118 Mo. App. 287, 94 S. W. 783. Where a contract is made directly with a syndicate, the fact that only one member was designated by name, the others being referred to by the pronoun, does not make him a trustee of an express trust within Revisal 1905, § 404. Winders v. Hill, 141 N. C. 694, 54 S. E. 440.

48. Code Civ. Proc. § 369, does not apply where the beneficiaries are disputing among themselves as to their rights, and they are necessary parties. Mitau v. Roddan [Cal.] 84 P. 145.

49. Under Code Civ. Proc. § 24, authorizing any company or association of persons formed for the purpose of carrying on any trade or business, etc., to sue in its usual name, a petition must allege that plaintiff is a company or association formed for the purpose of carrying on a trade, etc. Meyer v. Omaha Furniture & Carpet Co. [Neb.] 107 N. W. 767.

50. An action by members of an unincorporated association brought for a large number of unnamed persons alleged to constitute the association, upon a contract made with the association is, in effect, an action for the association. Westbrook v. Griffin [Iowa] 109 N. W. 608.

51. Where a complaint shows that plaintiff is a foreign corporation but does not show that it is a stock company or is doing business in the state and the evidence does not show it to be a stock company, it cannot be nonsuited for failure to comply with Laws 1901, p. 1364, c. 558, § 15, providing that foreign stock companies doing business in the state shall not maintain any action until it has procured a certificate from the Secretary of State authorizing it to do business. Wright v. Faulkner, 101 N. Y. S. 807. See Foreign Corporations, 7 C. L. 1728.

52. Suit by a receiver. Swing v. St. Louis Refrigerator & Wooden Gutter Co. [Ark.] 93 S. W. 978.

53. See 6 C. L. 890.

54. Where several persons associated together for the purchase of a stallion which was warranted by the vendors, the warranty is a joint obligation to all the purchasers and they may jointly sue thereon, though as among themselves each took a specific interest. Daugherty v. Robert Burgess & Son, 118 Mo. App. 557, 94 S. W. 594.

55. Parties owning different lots in severalty joined as complainants to enjoin a municipality from taking up certain existing sidewalks. Nichols v. Sadorus, 120 Ill. App. 70.

56. Alexander v. Gloversville, 110 App. Div. 791, 97 N. Y. S. 198. One who has assigned her entire cause of action cannot join with her assignee. Id. Where the wife and the father of one killed join as plaintiffs in an action for death by wrongful act, and interpose an alternative prayer that if it be found that decedent's injuries were not the proximate cause of his death, judgment should be awarded to the wife for the injuries sustained, there was a misjoinder of parties as to the alternative prayer. Gal-

statute providing that all persons having an interest in the subject-matter [57] "may" be joined does not require that all be made parties.[58] While a beneficiary is not a necessary party to an action by the holder of the legal title, he is a proper party thereto.[59] A plaintiff cannot appear in a double representative capacity in a suit affecting one only.[60] Where the parties seeking to enforce a common right are numerous and it is impracticable to bring all before the court, one or more interested parties [61] are authorized in many states to prosecute for the many.[62]

In Alabama the striking out of some of the parties jointly interested in the subject-matter does not entitle defendant to a verdict against the others.[63]

§ 3. *Who may or must be sued.*[64]—Generally speaking, all persons having an interest in the subject-matter are necessary parties,[65] thus, if title to specific property is involved, the real owner must be joined.[66] Likewise, where a charge is to be made against his estate,[67] but if his title or right can in no way be affected,[68]

veston, etc., R. Co. v. Heard [Tex. Civ. App.] 14 Tex. Ct. Rep. 617, 91 S. W. 371.

57. Under Code Civ. Proc. § 446, providing that all persons having an interest in the subject-matter and in obtaining the judgment demanded, may be joined as plaintiffs, one joined must not only have an interest but must have a right to enforce an obligation or to recover property (Conley v. Walton, 49 Misc. 1, 96 N. Y. S. 400), hence heirs may not join with the administratrix of a legatee of a testator for the embezzlement of funds (Id.), nor does the fact that the funds after embezzlement have been invested in real estate alter the case (Id.).

58. Code Civ. Proc. 1902, § 138. Lamar v. Croft, 73 S. C. 407, 53 S. E. 540.

59. A trustee of lands may join the beneficiary as party plaintiff to a suit to set aside a contract for the sale of such lands, under Code Civ. Proc. §§ 446, 449. Cassidy v. Sauer, 114 App. Div. 673, 99 N. Y. S. 1026. Beneficiaries filed a bill for an accounting by their trustees and a receiver was appointed. Held, in a suit by the receiver, who held legal title under order of the court, against a holder of tax deeds to set such deeds aside, the beneficiaries and trustees were proper parties complainant. Glos v. Ambler, 218 Ill. 269, 75 N. E. 764. The testimony of one suing on a contract made in his name that his wife was interested therein not being contradicted, she is a proper though not a necessary party. Beekman Lumber Co. v. Kittrell [Ark.] 96 S. W. 988.

60. A trustee in bankruptcy for two bankrupts individually and as co-partners, appointed in the same proceeding has but one office and hence in prosecuting an action as "trustee in bankruptcy of Michael Sampter and Arnold Sampter, individually and as co-partners" to set aside a fraudulent conveyance by one of the individuals there is no misjoinder of parties plaintiff. Wright v. Simon, 102 N. Y. S. 1108.

61. Under Civ. Code Proc. § 25, the one suing must have an interest. Overton v. Overton, 29 Ky. L. R. 736, 96 S. W. 469.

62. A few members of an association maintaining a bill to compel a bank to pay over money belonging to all. Dornan v. Buckley, 119 Ill. App. 523. Hill's Ann. Code, § 12, requiring the court to make an order is directory and not jurisdictional, and the denial of a motion to strike the complaint on the ground that no order was made permitting a few to prosecute is equivalent to granting of the permit. Adams v. Clark [Colo.] 85 P. 642.

New York: Code Civ. Proc. § 448, providing for the bringing of an action by one for the benefit of all, where the question is of common or general interest, is not applicable to actions in the municipal court, § 3347, subds. 3, 4. Reed v. Wiley, Harker & Camp Co., 101 N. Y. S. 39.

63. Code 1896, §333. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129.

64. See 6 C. L. 890.

65. In an action by a pledgor to recover upon a pledged note, the pledgee is a necessary party (Graham v. Light [Cal. App.] 88 P. 373), unless he has reassigned it (Id.).

66. Specific performance of a contract for the sale of real estate. Action against his agent does not bind him. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46. Where a decree of mortgage foreclosure is vacated and a subsequent purchaser is given the right to appear and defend his grantees are necessary parties. Gillett v. Romig [Okl.] 87 P. 325. In an action to quiet title, where the bill alleges that the deed under which defendant claims is void because made when plaintiff was in the adverse possession of the land, the defendant's grantor is a necessary party, for, if the defendant's deed is void, he has title. Davis v. Denham [Ala.] 40 So. 277. Where a corporation created by consolidation of others agreed to and did issue stock to the president of a constituent corporation for distribution among its stockholders in payment of its assets, the constituent corporation is a necessary party to an action by a stockholder against the president for an accounting (Knickerbocker v. Conger, 110 App. Div. 125, 97 N. Y. S. 127), as are the other stockholders (Id.). A decree foreclosing a mortgage is not void for failing to make a subsequent purchaser of the land a party thereto. Livingston v. New England Mortg. Sec. Co., 77 Ark. 379, 91 S. W. 752. Where a trustee brings a suit to set aside a contract for the sale of the trust property it is necessary that he personally be so connected with the suit as to be concluded by the judgment. Cassidy v. Sauer, 114 App. Div. 673, 99 N. Y. S. 1026.

67. In a proceeding by a curator and tutor ad hoc of a minor to have his fees in defending a suit allowed as costs, the minor is a necessary party since the costs are to

or he is legally fully represented by other paries,[69] or if the proposed party no longer has any relation to the subject-matter,[70] he is not necessary. Parties claiming or having an interest in the subject-matter,[71] unless too remote,[72] are usually proper parties if not necessary ones. Parties necessary only to the granting of superfluously demanded relief need not be joined.[73] Only natural or artificial entities recognized in law can be sued,[74] and where one is made a party in a particular capacity, his rights in another cannot be litigated.[75]

Joinder of parties defendant.[76]—Joinder of parties as affecting the jurisdiction of Federal courts is elsewhere trated.[77] Unless otherwise provided by staute,[78]

be paid from his estate. Driscoll v. Pierce, 117 La. 264, 41 So. 568. Where, in an action against an administrator of the maker of certain notes, plaintiff alleges that debt was a community debt and seeks to reach community property, the widow was properly joined. Dashiell v. Moody [Tex. Civ. App.] 97 S. W. 843.

68. Where, in an action to recover shares of stocks deposited by plaintiff with defendant to secure a debt owned by plaintiff to a third party, there is no dispute as to the payment of the debt but defendant asserts an interest in the shares, the creditor is not a necessary party. Leigh v. Laughlin, 222 Il. 265, 78 N. E. 563. An application by the attorney general for an order directing the election commissioners to exclude the returns from certain precincts in making up the final abstract on the ground of fraud does not involve the rights of the candidates for offices and they are not proper or necessary parties. People v. Tool [Colo.] 86 P. 229. An agent to whom a deed absolute in form was executed as security for a debt to the principal, is not a necessary party to an action to have the deed declared a mortgage and foreclosed, under Code Civ. Proc. § 367, providing that actions must be prosecuted in the name of the real party in interest. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155. Where one of three attorneys collected the entire fee, in an action by one for his portion thereof the third is not a necessary party, under Rev. St. 1899, § 543, requiring all who are necessary parties to a complete determination to be joined. State v. Bradley, 193 Mo. 33, 91 S. W. 483.

69. In a suit by a receiver in proceedings supplementary to execution to recover from a city an award made for the taking of the debtor's property, the debtor is not a necessary party. Fawcett v. New York, 112 App. Div. 155, 98 N. Y. S. 286. In a suit to have a devise to a trustee to sell for the benefit of a church, declared void, the church is not a necessary party, equity rule 49 authorizing suit against the trustee. Miller v. Ahrens, 150 F. 644.

70. Where a testamentary trustee has fully discharged his trust by selling the land he is not a necessary party to a suit to construe the will by declaring a certain devise void and complainant the owner of the devised land. Miller v. Ahrens, 150 F. 644.

71. A person entitled by contract with a member of a partnership to divide the profits is a proper party to a suit for the wrongful sequestration of partnership property. St. Geme v. Boimare, 117 La. 232, 41 So. 557. In an action by creditors to enforce unpaid subscriptions to the capital stock of a dissolved Missouri corporation, on the refusal of the directors to sue, the directors, stockholders, and administrator of a deceased stockholder are properly joined as defendants. Lewisohn v. Stoddard, 78 Conn. 575, 63 A. 621. Under the Code, a plaintiff in partition proceedings may make defendants all persons claiming any interest in the lands sought to be partitioned. Lawrence v. Norton, 102 N. Y. S. 481. Where the subject-matter of a suit is the value of timber taken, it is proper to make any one claiming an interest therein a party defendant. Alford Bros. & Whiteside v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636. In a proceeding to compel county commissioners to establish a ditch fund and make a special assessment to pay warrants issued in payment of work done in the construction of a ditch, the county is not a necessary but is a proper party, because of its indirect interest in the property and its possible direct interest in the costs. Espy Estate Co. v. Pacific County Com'rs, 40 Wash. 67, 82 P. 129.

72. Where a will provided for the sale of certain real estate for the payment of specified legacies, the trustees and legatees are not proper parties to an action by a purchaser of the executrix to determine the validity of the sale and for relief according to the determination of the question. Clark v. Carter [Mo.] 98 S. W. 594.

73. Where relief is asked against persons not parties to the action and whose presence is not necessary to a determination, the prayer may be deemed surplusage and the failure to join is not ground for demurrer. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082. A judgment defendant in condemnation was fraudulently induced to quit claim the lot to a third person through another and to execute an order directing the comptroller to pay the judgment to him. Held that in a suit to recover the judgment sum it was not necessary to cancel the deed or order and, hence, praying for such cancellation did not make the intermediary or comptroller necessary parties. Heath v. Schroer, 119 Mo. App. 93, 96 S. W. 313.

74. An unincorporated society cannot be made a party. Pickett v. Walsh [Mass.] 78 N. E. 753.

75. Where one is made a party to a partition suit as a co-owner, her rights as a judgment creditor of another co-owner cannot be passed upon. McCormick v. McCormick [Md.] 65 A. 54.

76. See 6 C. L. 892.

77. See Removal of Causes, 6 C. L. 1292.

78. Rev. Laws, c. 173, § 3, providing for joinder of persons severally liable on the contract sued on applies only to actions

parties cannot be made codefendants unless they are jointly liable,[79] hence, parties liable on different causes of actions can not be joined, though the liability grows out of the same transaction.[80] In Texas, however, a vendee has been permitted to join two corporations of a similar name and controlled by the same persons where he was ignorant as to which received the goods.[81] Joint tort feasors may be sued jointly,[82] or severally,[83] and hence plaintiff may amend by striking one not served without affecting his right to proceed against the others.[84] Persons whose independent acts jointly produce a nuisance may be joined in abatement proceedings.[85] In Minnesota joint obligors may be severally sued [86] and in Massachusetts persons severally liable on a contract may be sued jointly.[87] By statute in many states, an action against numerous parties having a common interest where it is impracticable to bring all before the court may be prosecuted against one interested [88] who may defend for all.[89] A voluntary association with extensive membership may be proceeded against through its officers.[90] Where several causes of actions are joined, persons interested therein are properly made co-defendants.[91] One proceeding against defendants "as individuals or as partners" need not elect in a tort action between the capacities.[92]

on written contracts. Foote v. Cotting [Mass.] 80 N. E. 600.

79. Where national associations of manufacturers of proprietary medicines, wholesale druggists, and retail druggists entered into a tripartite agreement to maintain prices in violation of the anti-trust law, and thereafter in furtherance of the same object the retail druggists adopted more drastic measures which were not adopted by the other associations but accepted by some of their members, held that a party to the first who had not become a party to the second could not be joined in an action for damages under the statute. Jayne v. Loder [C. C. A.] 149 F. 21.

80. Where two parties, acting independently, appropriate separate portions of plaintiff's pasture, they cannot be sued jointly. Millard v. Miller [Colo.] 88 P. 845. Mills' Ann. Code, § 13, providing that parties jointly or severally liable upon the same obligation may be included in the same action, is not applicable. Id. Parties liable on different causes of action cannot be joined as defendants though their liability grows out of the same transaction. An embezzling employe liable only in tort or on implied contract cannot be joined as defendant in a suit against an indemnifying insurance company under Code Iowa 1897, §§ 3462, 3545. Iowa Lilloo-Gold Min. Co. v. Bliss, 144 F. 446.

81. Alleging that one had ordered the goods and in the alternative that the other had. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617.

82. Common carrier and its negligent agent made a joint defendant in an action for injuries. Knuth v. Butte Elec. R. Co., 148 F. 73.

83. Need not join all whose concurrent negligence caused the injury. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. In an action against a municipality for injuries from defective streets, it is not error to refuse to join as party defendant, the person who caused the defect and is liable to the city on contract. McGowan v. Watertown [Wis.] 110 N. W. 402.

84. Seaboard Air Line R. Co. v. Randolph, 126 Ga. 238, 55 S. E. 47. Though an unsuccessful motion to dismiss the action has been interposed.

85. Independently depositing refuse in a stream, polluting the water. Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579.

86. Laws 1897, p. 563, c. 303. Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

87. Under Rev. Laws. c. 173, § 3, providing that all persons severally liable on contracts in writing may be joined in one action, the signers of a guaranty are properly joined in an action thereon, though their liability was several and equal and not joint. Tulane University v. O'Connor [Mass.] 78 N. E. 494.

88. A motion that certain parties defend for the heirs of a certain decedent will be denied where it is not shown that such parties are heirs of the decedent. Morris v. Martin, 29 Ky. L. R. 913, 96 S. W. 555.

89. Code Civ. Proc. 1902, § 140, authorizes the interests of remote legatees when the class consists of many persons some of whom are without the jurisdiction of the court to be adjudicated in an action against one as representative of the class. Faber v. Faber [S. C.] 56 S. E. 677. While every member of an unincorporated association must be made a party (Pickett v. Walsh [Mass.] 78 N. E. 753), if they are numerous, this may be done by making a number of them parties as representing all (Id.).

90. Spaulding v. Evenson, 149 F. 913. Affirmed under equity rule 48, providing that where the parties are very numerous the court may dispense with making them all parties, and proceed, having sufficient to represent all diverse interest. Evenson v. Spaulding [C. C. A.] 150 F. 517.

91. Where all the parties defendant were concerned in the different causes of action, directly or remotely, they were properly joined, although final judgment as to one cause of action might go against some or all of them severally and in another against some of them jointly. Lewishon v. Stoddard, 78 Conn. 575, 63 A. 62.

92. Lewis v. Crane, 78 Vt. 216, 62 A. 60.

§ 4. *Designating and describing parties.*[93]—The allegations of the petition and the relief sought rather than the title determines the capacity in which the suit is prosecuted.[94] One suing under an assumed or business name is bound by a judgment rendered therein.[95] While the action must be against the proper party,[96] the omission of words from a corporate name,[97] or a misnomer,[98] is not fatal but may be corrected upon payment of costs,[99] and upon due notice to the true party if he is not before the court.[1] A misnomer is not a ground for quashing service where there could be no mistake as to identity.[2]

§ 5. *Additional and substituted parties.*[3]—Where a necessary party is omitted or a new one becomes proper under subsequent pleadings, he may be brought in[4] by supplemental summons and complaint,[5] if the call is timely made.[6] The Codes of the various states usually provide that the court shall bring in parties

93. See 6 C. L. 892.

94. Where a trustee brings an action to rescind a contract for sale, in which he alleges that he is a trustee merely and prays for such a finding, he is personally a party to the action notwithstanding he is described as trustee in the title. Cassidy v. Sauer, 114 App. Div. 673, 99 N. Y. S. 1026.

95. Estopped to deny the validity of the judgment. Clark Bros. v. Wyche, 126 Ga. 24, 54 S. E. 909. Where, one suing under a business name, becomes a judgment debtor under a recoupment, she cannot in garnishment proceedings to recover thereon, allege the invalidity of the judgment for want of proper party plaintiff. Id.

96. Levick v. Niagara Falls Home Tel. Co., 102 N. Y. S. 150. Naming a non-existing partnership instead of an individual trading as such is not a misnomer but is a failure to name the true plaintiff, and is fatal although not raised by a plea in abatement. Voigh Brewery Co. v. Pacifico, 139 Mich. 284, 102 N. W. 739. Where an action is commenced under the name of "Voigh Brewing Company, Limited," there being no such company, an individual trading as such cannot be substituted as a party. Id.

97. The designation of the "Home Brewing Company of Grafton" as the "Home Brewing Company" is not a fatal variance. Grafton Grocery Co. v. Home Brew. Co. [W. Va.] 54 S. E. 349.

98. Davis v. Jennings [Neb.] 111 N. W. 128. Where a New York corporation having the same name as a New Jersey corporation and being represented by the same local officers, is sued for an accident to one of its employes and appears to defend, the pleadings may be amended so as to make it the party defendant instead of the New Jersey corporation which had been mistakenly named. Bainum v. American Bridge Co. 141 F. 179. One intending to sue the "C. Mining Co. of Maine," designated it as the "C. Mining & Milling Co. of Maine," but levied upon its mine and mailed a copy of the summons to its residence. There was a "C. Mining & Milling Co. of New Jersey" doing business in the county. Held that the action was against the C. Milling Co., and that the misnomer could be corrected under Civ. Code § 357, and Civ. Code Proc. § 473. Nisbet v. Clio Min. Co., 2 Cal. App. 436, 83 P. 1077. Where one intending to sue "T. &. T. Company" designated it as the "T. & T. Construction Company" which no longer existed, but serves an officer of the former and the complaint clearly shows that the action was against it, the error in title and the fact that the officer served had been an officer of the latter company did not make it an action against it but merely a misnomer which may be corrected under Code Civ. Proc. § 723. Ward v. Terry & Tench Const. Co., 102 N. Y. S. 1066.

99. Where defendant did not mislead plaintiff in suing in the name of another corporation, plaintiff should be permitted to correct the misnomer only upon payment of the costs of the motion and the statutory costs of the action to date. Ward v. Terry & Tench Const. Co., 102 N. Y. S. 1066.

1. Where a plaintiff intending to sue the "Niagara County Home Telephone Company" named the "Niagara Falls Home Telephone Company" as defendant, and the attorney appeared solely for the latter the pleadings cannot be corrected without notice to the former. Levick v. Niagara Falls Home Tel. Co., 102 N. Y. S. 150,

2. Described as "Christ Jennings" by which name he was commonly known instead of "Christian Jennings." Davis v. Jennings [Neb.] 111 N. W. 128. In an action against Christ Jennings and wife a designation of the latter as "Mrs. Christ Jennings," is a misnomer only, and not a ground for quashing the writ. Id.

3. See 6 C. L. 893.

4. Where a defendant in replevin of lumber did not defend upon his equitable ownership of the land from which it was cut but asked for a specific performance of a contract to convey, he must bring in the parties necessary to such relief. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46. Where in a suit against a maker of a note payment is pleaded in the answer, it is proper for plaintiff to bring in by supplemental pleading his transferror who had warranted the note. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866.

5. Farley v. Manhattan R. Co., 102 N. Y. S. 330.

6. Where service upon the heirs of a decedent has been made within a year from the commencement of the action as required by Code Civ. Proc. § 581, a subsequently appointed administrator may be brought in as a party after the expiration of the year, the time having not expired in which action might have been brought against him. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155.

necessary [7] to a complete determination of the controversy,[8] which provisions are mandatory, and failure to do so is not waived by non-action of the parties.[9] Such statutes do not authorize the bringing in of one not subject to a suit in the first instance in such forum.[10] Where one co-plaintiff seeks to bring in a party over the objection of another, he must indemnify the latter against costs.[11] While one primarily liable may usually be called in by the one secondarily liable so as to render the determination conclusive upon him,[12] it cannot be done over plaintiff's objection where a notice to defend is equally as effective.[13] The right to call in parties must usually be exercised during trial,[14] but in North Dakota the right continues after judgment.[15] Plaintiff's excuse for nonjoinder must be verified as required by statute.[16] A denied motion for leave to bring in cannot be renewed on the same papers or on additional facts existing at the time of the first motion without leave of court.[17]

Intervention.[18]—A person having a direct and immediate interest in the subject-matter of a litigation [19] is usually permitted to intervene upon timely application,[20] and although he possesses the rights of an original party,[21] he takes the case

7. Where copartners are severally liable in tort and suit is commenced against one only, the plaintiff cannot thereafter join the other, since Code Civ. Proc. § 723, authorizing the court to add the name of a party in certain case applies only where such person is a necessary party or is interested. Hinds v. Bonner, 102 N. Y. S. 484.

8. Under Code of Civ. Proc. §§ 452, 723, in an action for injunction to restrain a street railway from operating in front of complainant's property until damages have been paid for interference with her easements of light, air, and access, a lessee under contract made pending litigation should be brought in as defendant. Farley v. Manhattan R. Co., 102 N. Y. S. 330. Where the pledgee has not been made a party to an action by the pledgor to recover upon the pledged note, the court should order him brought in under Code of Civ. Proc. § 389. Graham v. Light [Cal. App.] 88 P. 373. Code Civ. Proc. § 452, relates primarily to equitable actions and does not authorize the court to bring in additional parties in actions for money only. Horan v. Bruning, 101 N. Y. S. 986. Code Civ. Proc. § 723, authorizing the court to amend any pleading, process, or other proceeding, by adding or striking out the name of a person as a party, etc., held not to permit the court to allow plaintiff to bring in a joint tort feasor. Id.

9. Code Civ. Proc. § 389, is mandatory and the failure to bring in necessary parties is not waived by failure to raise the point by demurrer or answer notwithstanding § 434. Mitau v. Roddan [Cal.] 84 P. 145. Under Kirby's Dig. § 6011, the court must order parties without whom it is powerless to act in the premises brought in. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46.

10. Rev. St. 1895, art. 1208, providing that before a case is called additional or necessary parties may be brought in upon such terms as the court may prescribe, does not authorize the court to compel parties to litigate in counties in which they are not residents. Mugg v. Texas & P. R. Co. [Tex. Civ. App.] 91 S. W. 876.

11. Weed v. First Nat. Bank, 101 N. Y. S. 1045.

12. In an action upon the official bond of a town treasurer for illegal expenditures, the sureties are entitled to an order under Rev. St. 1898, §§ 2675, 2656a and 2610 bringing in the parties who received the money. Town of Washburn v. Lee, 128 Wis. 312, 107 N. W. 649. One who has assumed the payment of a note cannot object to being brought in by his promisee upon being sued. Key v. Fouts [Tex. Civ. App.] 99 S. W. 448.

13. Booth v. Manchester St. R. Co., 73 N. H. 527, 63 A. 577.

14. The right of a joint obligor to bring in his co-obligor must be exercised during trial, and the court cannot allow an amendment after decision and grant a new trial. Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311.

15. Right exists by statute and also as an inherent power of the court to control their own judgments (Dedrick v. Charrier [N. D.] 108 N. W. 38), for which purpose the judgment may be set aside upon motion of the successful party (Id.).

16. Verified by attorney without a showing that the affidavit of the plaintiff could not be obtained. Haskell v. Moran, 102 N. Y. S. 388.

17. Haskell v. Moran, 102 N. Y. S. 388. The fact that defendant had waived the defect of parties defendant by answering at the time of the former motion, but has since demurred to the amended complaint is not such new additional facts as entitle plaintiff to move without leave of court. Id.

18. See 6 C. L. 894.

19. Where a general writ of possession is awarded to the assignee of the purchasers at a judicial sale against the tenants of the property, a tenant claiming to have received a lease from the purchasers before the assignment may intervene. Aull v. Bowling Green Opera House Co. [Ky.] 92 S. W. 943.

20. Where an assignee of a cause of action contended through many years of litigation for certain damages, the assignor cannot intervene upon a holding that the cause is unassignable for the purpose of recovering enhanced damages for the benefit of plaintiff especially where a receiver has been appointed for defendant and the

as he finds it,[22] and cannot withdraw therefrom,[23] especially if the opposing party has made his intervening petition the basis of his action.[24] One consenting to an intervention cannot thereafter object thereto.[25] Parties to an action must take notice of an intervenor's petition.[26] A motion to intervene on a particular motion should be denied with such motion.[27]

Substitution.[28]—While substitution of parties lies largely within the court's discretion,[29] it is usually permitted if it does not affect the cause of action [30] and denied if it will change the same.[31] By statute in many states an assignee may be substituted for his assignor,[32] but if the suit may be continued by the latter, the defendant cannot force a substitution.[33] Where the capacity of a party to continue suit ceases, the proper party in interest may be substituted.[34] The application must be timely,[35] and both the summons and complaint must be amended to

rights of other creditors would be unjustly interfered with. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463.

21. Seeking to call in an additional party as defendant. Weed v. First Nat. Bank, 101 N. Y. S. 1045.

22. Where a decree confirming a mortgage foreclosure provides for a bond to be given by the purchaser conditioned upon payment of claims which may be properly payable out of the proceeds, one intervening on a motion to cancel the bond and praying for its continuance cannot attack the validity of the mortgage. Seaboard Air Line R. Co. v. Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138.

23. Where in condemnation proceedings a person claims to be the owner of certain lands and intervenes, he is not entitled to a dismissal upon a finding that he is not the owner. Fulton v. Methon Trading Co. [Wash.] 88 P. 117.

24. Where an action is commenced by attachment without making the present owners of the property defendants but who intervene by a petition, admitting the agency in caring for the property, which admission plaintiff takes advantage of by replication, as a basis for the action, the interveners cannot thereafter withdraw. Morrison v. New Haven & Wilkerson Min. Co. [N. C.] 55 S. E. 611.

25. Consented in open court. Lee v. Hickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 91, 91 S. W. 636.

26. Where defendant answers, he is bound to take notice of an intervenor's petition, and intervenor need not cite him to answer it. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387. Where in an action between a builder and a contractor, a subcontractor intervenes, establishes his claim, and prays for a judgment for its debt and the foreclosure of its lien, judgment may be rendered against the contractor, all parties being before the court. Id.

27. Muller v. Philadelphia, 49 Misc. 322, 99 N. Y. S. 194.

28. See 6 C. L. 895.

29. A court may, in its discretion, permit heirs suing an administrator to so amend as to make the action by the plaintiffs on the relation of the state. Mann v. Baker, 142 N. C. 235, 55 S. E. 102. Held an abuse of discretion to refuse to allow a corporation to be substituted as plaintiff in a suit upon a cause in its favor erroneously instituted in the name of the stockholders where the application was timely made upon due notice and the action will be barred by limitation if abated. Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247.

30. Court has power to amend the proceedings so as to turn an action against defendants as trustees to one against them individually. Southack v. Gleason, 49 Misc. 445, 98 N. Y. S. 859. Where the beneficiary in a deed of trust institutes such in his own name, it is error to deny a motion to substitute the trustee as plaintiff. McCue v. Massey [Miss.] 43 So. 2.

31. In an action by a husband for the death of his wife it is not permissible to amend so as to allow him to sue as administrator. Walker v. Lansing & S. Traction Co., 144 Mich. 685, 13 Det. Leg. N. 317, 108 N. W. 90. The substitution of a corporation as plaintiff in an action on a cause in its favor which was erroneously commenced in the names of owners of the corporate stock is not objectionable as changing the cause of action, within Rev. St. 1899, § 657. Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247.

32. Civ. Code Proc. § 20. Western Bank v. Coldeway's Ex'r, 29 Ky. L. R. 651, 94 S. W. 1.

33. Oberndorfer v. Moyer, 30 Utah, 325, 84 P. 1102.

34. Substitution of wards upon coming of age and the discharge of the guardian. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093. Where, in an action to cancel a title bond defendant sought specific performance, it developed that one of the parties thereto had died and his interest in the land had descended to his heirs, it was error to refuse to bring in the heirs. East Jellico Coal Co. v. Carter [Ky.] 97 S. W. 768. Where a party dies pending suit and it is ordered that the suit be revived in the name of his administrator, such administrator became plaintiff in his representative capacity and not as an individual. Southern R. Co. v. Morris, 143 Ala. 628, 42 So. 17.

35. Where a suit was brought in the county court in the name of the payee for the use of the assignee thereof, and the assignee appeals in his own name to the superior court a motion to amend so as to leave the case to stand in the assignee's name made after a motion to dismiss, is timely (Swilley v. Hooker, 126 Ga. 353, 55 S. E. 31), and the fact that the court had orally announced that it would sustain the motion to dismiss, does not render it too

effect a valid substitution.[36] Where, on motion of wards to be substituted for their discharged guardian, the title to the cause of action is summarily tried without objection, the guardian cannot thereafter complain of the summary procedure.[37]

§ 6. *Objections to capacity and defects of parties.*[38] *Incapacity to sue,* if apparent on the face of the complaint,[39] may be raised by special [40] demurrer,[41] and if not so raised, the objection is waived.[43] Disability to sue in Maryland must be raised by a plea in abatement.[44] Objection must be timely interposed.[45]

Nonjoinder.[46]—Except in Illinois [47] the objection, if apparent on the face of the complaint, must be raised by demurrer,[48] otherwise by special answer,[49] and if not so raised is waived,[50] if the court has power to act without such parties.[51] Hence, the objection cannot be raised after a plea in bar,[52] or a general denial.[53] Likewise, answering after overruling of a demurrer, waives the objection.[54] The demurrer must point out the necessary omitted party.[55]

late, no judgment of dismissal having been signed (Id.).

36. Southack v. Gleason, 49 Misc. 445, 98 N. Y. S. 859.

37. Shattuck v. Wolf, 72 Kan. 366, 83 P. 1093.

38. See 6 C. L. 895.

39. Where an action was brought by one by his next friend to set aside a conveyance on the ground of the grantor's mental weakness, the next friend is a party and his incapacity to sue, if it exists, is apparent on the face of the pleadings. Owings v. Turner [Or.] 87 P. 160.

40. Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856.

41. The **lack of legal capacity** must **affirmatively appear** on the face of the pleadings before it can be reached by demurrer. Independent Trembowler Young Men's Benev. Ass'n v. Somach, 102 N. Y. S. 495. Where the petition of one attempting to sue in a company name fails to allege facts sufficient to bring the case within Code Civ. Proc. § 24, the objection must be raised by demurrer. Meyer v. Omaha Furniture & Carpet Co. [Neb.] 107 N. W. 767. In an action by a foreign corporation, the objection that it has no capacity to sue, having failed to procure a receipt for license fee as required by § 181 of the tax law (Laws 1896, p. 856, c. 908, as amended by Laws 1901, p. 1364, c. 558) must be raised by demurrer if the defect appear on the face of the complaint, otherwise by answer, motion for nonsuit being insufficient. Wright & Co. v. Faulkner, 101 N. Y. S. 807.

42. Under Rev. St. 1899, §§ 598, 599, 602, a general denial is insufficient. Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856. Under Rev. St. 1898, § 4200, requiring a specific denial, a general denial is insufficient. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526.

43. Under B. & C. Comp. § 72, failure to demur to the capacity of a next friend suing for one alleged to be mentally incompetent waives the objection. Owings v. Turner [Or.] 87 P. 160. Under Rev. St. 1898, §§ 2653, 2654, failure to deny an allegation in a suit by a guardian ad litem of due appointment waives the objection. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526. Plaintiff need not prove his legal capacity to sue unless it is put in issue. Independent Trembowler Young Men's Benev. Ass'n v. Somach, 102 N. Y. S. 495.

44. Cannot be reached by a motion to quash. Albert v. Freas, 103 Md. 583, 64 A. 282.

45. Where an action has been pending for years without objection that it was brought by the heirs instead of by them on the relation of the state, the objection is waived. Mann v. Baker, 142 N. C. 235, 55 S. E. 102.

46. See 6 C. L. 895.

47. An objection to nonjoinder of plaintiff may be interposed under the general issue (Lasher v. Colton, 225 Ill. 234, 80 N. E. 122), but a defect of parties plaintiff in actions ex delicto can only be availed of under the general issue in so far as it affects the amount of recovery. Masonic Temple Safety Deposit Co. v. Langfelt, 117 Ill. App. 652.

48. Fawcett v. New York, 112 App. Div. 155, 98 N. Y. S. 286. Code Civ. Proc. §§ 498, 499. Wills v. Pennell, 101 N. Y. S. 1017. Nonjoinder of cotenant in common in an ejectment suit must be objected to by demurrer under Code § 3561, where the defect is apparent on the face of the complaint Anderson v. Acheson [Iowa] 110 N. W. 335.

49. Code Civ. Proc. §§ 498, 499. Wills v. Pennell, 101 N. Y. S. 1017. Under Code Civ. Proc. §§ 498, 499, 552, the objection must be taken by answer, and cannot be raised by a motion to require plaintiff to make the omitted persons defendants. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 111 App. Div. 812, 97 N. Y. S. 673.

50. Anderson v. Acheson [Iowa] 110 N. W. 335. Civ. Proc. §§ 488, 498. Fawcett v. New York, 112 App. Div. 155, 98 N. Y. S. 286. Code Civ. Proc. § 488. Wills v. Pennell, 101 N. Y. S. 1017.

51. The fact that no objection was made by demurrer to the non-joinder of parties does not waive the defect where the court is powerless to act without them. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46.

52. Seymour v. Du Bois, 145 F. 1003; Swannell v. Byers, 123 Ill. App. 545.

53. Cherry v. Lake Drummond Canal & Water Co., 140 N. C. 422, 53 S. E. 138.

54. Adams v. Clark [Colo.] 85 P. 642.

55. Federal Betterment Co. v. Blaes [Kan.] 88 P. 555.

Misjoinder.[56]—The manner of raising the objection is largely controlled by statute, but generally, if the misjoinder is apparent upon the face of the pleadings, it may be reached by demurrer[57] or special exception,[58] but not where it is dependent upon facts,[59] and failure to properly raise the objection,[60] or answering and proceeding to trial after an adverse ruling,[61] waives the objection. Where a misjoined party is reinstated after dismissal without objection, the misjoinder is waived.[62] In equity a defendant cannot object that a co-defendant is improperly joined.[63]

An objection for a defect of parties must be timely interposed.[64]

Amendments[65] striking the names of unnecessary parties[66] or usees[67] are freely allowed. A defect of parties is cured by striking out the name of a party misjoined.[68]

PARTITION.

§ 1. Nature, Right, and Propriety (1246).
§ 2. Jurisdiction and Venue (1248).
§ 3. Procedure to Obtain Partition (1249).
§ 4. Scope of Relief in Partition (1251).
§ 5. Commissioners or Referees and Their Proceedings (1254).
§ 6. Mode of Partition and Distribution of Property or Proceeds (1255).
§ 7. Sale and Subsequent Proceedings (1257).
§ 8. Appeal and Review; Vacation of Sale (1259).
§ 9. Voluntary Partition (1260).

§ 1. *Nature, right, and propriety.*[69]—A suit for partition implies a prayer that real estate be either divided in kind or sold for division of the proceeds.[70] The right of one or more co-owners of land to demand partition is an equitable one, proceedings to enforce which are generally regulated by statute.[71] A statute giving the right of partition to any owner in common is not inflexible in such sense that the court may not grant a reasonable temporary delay for good and sufficient grounds.[72] The Alaska Code provides for partition suits of an equitable nature as between tenants in common.[73]

56. See 6 C. L. 896.

57. Under Mansf. Dig. § 5028, an objection of misjoinder of parties is raised by demurrer and not a motion to dismiss. Tishomingo Elec. Light & Power Co. v. Burton [Ind. T.] 98 S. W. 154.

58. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 99 S. W. 577.

59. Improper joinder as defendant cannot be raised by demurrer, especially where its liability depends upon the facts. Miller v. Ahrens, 150 F. 644.

60. Burckharth v. Stephens, 117 Mo. App. 425, 94 S. W. 720. Code Civ. Proc. § 434. Conde v. Dreisam Gold Min. & Mill. Co. [Cal. App.] 86 P. 825. Rev. St. 1899, § 598. Dougherty v. Burgess, 118 Mo. App. 557, 94 S. W. 594.

61. Where, after the overruling of certain motions to strike intervening petitions, defendants answer and go to trial, they thereby waive the objection. Kansas City v. Schroeder, 196 Mo. 281, 93 S. W. 405.

62. Dalton v. Moore [C. C. A.] 141 F. 311.

63. Such objection can be made only by the defendants improperly made defendants. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742.

64. Plea of non-joinder cannot be interposed on the second trial. Lasher v. Colton, 225 Ill. 234, 80 N. E. 122. Where three terms intervene between the filing of the first answer and the amended answer in which for the first time the defendant raised the objection of misjoinder, it came too late. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617.

65. See 6 C. L. 896.

66. Where, in an action against a principal and agent upon a contract, the evidence shows no individual liability of the agent, plaintiff may amend by striking his name as a party defendant. Eagle Iron Co. v. Baugh [Ala.] 41 So. 663.

67. Under Code Civ. Proc. 1902, § 194, a pleading may be amended by striking out the names of certain parties for whose benefit the action was instituted. McDaniel v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 543.

68. Seaboard Air Line R. Co. v. Randolph, 126 Ga. 238, 55 S. E. 47.

69. See 6 C. L. 897.

70. Suit held one for specific performance and not for partition where plaintiff demanded enforcement of a contract by which defendant had agreed to sell her interest to him. Noecker v. Wallingford [Iowa] 111 N. W. 37.

71. Noecker v. Wallingford [Iowa] 111 N. W. 37.

72. Court should have heard evidence in propriety of partition before harvesting of crop, despite Civ. Code art. 1289. Succession of Becnel, 117 La. 744, 42 So. 256.

73. Where defendant admitted plaintiff's original ownership of an undivided one half of a mining claim, and only sought to defeat

The right, and parties entitled.[74]—Parties seeking partition must have an interest in the property in suit,[75] ordinarily as joint tenants or tenants in common,[76] and must have either actual or constructive possession.[77] While there can be no partition or sale for partition among contingent remaindermen,[78] this fact does not prevent the life tenants from having a partition or a sale;[79] and since, as a general rule, every adult owner of undivided fee simple estate in real property is entitled to partition as a matter of right,[80] the fact that a cotenant holds an estate for life only will not defeat the action.[81] Under the doctrine of equitable reconversion, remaindermen capable of election may bring partition of real estate after the termination of a life estate, though the land was directed to be then sold and the proceeds divided among them.[82] The action may be maintained by a child born after the execution of the parent's will and entitled under the statute to a share of the estate,[83] notwithstanding there is also a summary remedy for contribution.[84] Under a statute giving an unrestricted right to compel partition, one may not be denied such right merely because it would not be for the best interest of a minor.[85] In Louisiana a partition suit may be brought against minors without the prior sanction of a family meeting authorizing them to stand in judgment[86] provided the minors are properly represented.[87] While a common possession is presumed from a common title,[88] where one tenant is ousted by another, there is no longer a common possession, and the latter's remedy is not partition but ejectment.[89] The right of a tenant in common to partition cannot be defeated by a conveyance by his cotenant of a particular part of the estate by metes and bounds,[90] nor can one tenant in

it by alleging a forfeiture for plaintiff's failure to contribute to the performance of assessment work, the suit was properly triable in equity under Code Civ. Proc. Alaska, c. 43, § 397, authorizing suits of an equitable nature for partition as between tenants in common. Forderer v. Schmidt [C. C. A.] 146 F. 480. Held error to remit plaintiff to ejectment. Id.

74. See 6 C. L. 897.

75. Evidence held to show sale by heirs of their interest in the land to their mother in consideration of her paying the debts so as to defeat partition suit by the heirs against defendants who claimed under the mother. O'Brien v. Knotts, 165 Ind. 308, 75 N. E. 594. Until the extinction of the numerous classes of heirs of the blood of a father is shown, the court will not decree partition among alleged maternal cousins. Smith v. Cosey, 26 App. D. C. 569.

76. Where husband and wife were tenants by entireties, they became tenants in common by divorce. Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918.

77. Partition would not lie where one defendant claimed adversely to all the other parties and was in possession. Chamberlain v. Waples, 193 Mo. 96, 91 S. W. 934. Children of former owner who had sold the land, obligated himself to convey a legal title, received the purchase money, and allowed purchaser to retain possession until his and his wife's death, held not entitled to possession authorizing partition even on the theory that they were the owners of a share as enforced heirs. Fry v. Hare [Ind.] 77 N. E. 803.

Quaere, whether a tenant not in possession may maintain a bill in equity for partition against his cotenant in adverse possession. Smith v. Cosey, 26 App. D. C. 569.

78, 79. Rutherford v. Rutherford [Tenn.] 92 S. W. 1112.

80. Kinkead v. Maxwell [Kan.] 88 P. 523.

81. Kinkead v. Maxwell [Kan.] 88 P. 523. An owner in fee of an undivided one-half interest in real estate may maintain partition as against cotenants who have only a life estate in the other undivided half. Johnson v. Brown [Kan.] 86 P. 503.

82. Where trustees and life tenants were dead and all interested were before the court. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

83. Legal title to which stood in name of one claiming under parent's legatee. Obecny v. Goetz, 102 N. Y. S. 232.

84. Pretermitted grandchild could assert the right to a share given her by Rev. St. 1899, § 4611, by an action of partition notwithstanding remedy provided by § 4649. Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828.

85. Rev. St. 1895, art. 3606. Morris v. Morris [Tex. Civ. App.] 99 S. W. 872. And a court may not refuse partition in a suit by an infant by guardian or next friend merely because the best interest of the minor may not be subserved thereby. Not where suit was brought by next friend and statute provided that next friend should have same rights as guardian. Id.

86. Succession of Becnel, 117 La. 744, 42 So. 256.

87. Co-owner interested as plaintiff not proper representative of minor defendants. Succession of Becnel, 117 La. 744, 42 So. 256.

88, 89. Carlson v. Sullivan [C. C. A.] 146 F. 476.

90. Where a tenant in common conveyed a parcel of land by metes and bounds, his cotenants were bound thereby only as heirs of the grantor and not as tenants in common,

common question the validity of the common title as against his cotenant who sues for partition.[91] A former partition having been made under mutual mistake as to the existence of a material portion of the land, equity may allow a second partition as to the land omitted.[92]

Statutory sale for partition.[93]—Under the Kentucky statute, an owner of an interest in indivisible property may be entitled to a sale though he is not in actual possession and the title is in dispute;[94] and one having a life estate in a portion of the property may have a sale as against the owners of the remaining interests.[95] A sale may also be had though the interest of a pretermitted heir has passed to her issue subject to her husband's curtesy.[96] One who by answer disclaims any interest in the land is thereafter estopped from setting up any claim as against the purchaser.[97]

What may be partitioned.[98]—The California act for the encouragement of oyster planting in the public waters of the state does not confer any estate of inheritance subject to partition under the partition statute.[99]

Partition of estates of decedents.[1]—A suit for the partition of a decedent's real estate may be maintained in many jurisdictions although the estate has not been settled,[2] and in Pennsylvania a petition is not premature, though filed in the orphan's court within one year from the death of the decedent.[3] In Louisiana, however, the succession must be closed [4] and the executor may oppose the partition and retain the property until his final account has been homologated.[5] As to real estate not subject to debts, the question of whether the debts of the estate have been paid is immaterial.[6]

§ 2. *Jurisdiction and venue.*[7]—Though in Alabama the statutory jurisdiction

and hence entitled to partition though their interests had been decreased by the deed. Finch v. Green, 225 Ill. 304, 80 N. E. 318.

91. Defendant could not defeat suit because plaintiffs failed to exhibit title from commonwealth. Heard v. Cherry, 29 Ky. L. R. 106, 92 S. W. 551.

92. Where commissioners in former suit reported that the tract contained only two hundred acres, believing that fifty acres had been permanently submerged or washed away. Fowler v. Wood [Kan.] 85 P. 763.

93. See 6 C. L. 898.

94. Where he was owner of undivided half subject to a dower right. Civ. Code Proc. § 490. Talbott v. Owen, 29 Ky. L. R. 550, 93 S. W. 658.

95. Under Civ. Code, § 490, authorizing sale of estate in possession incapable of division without impairing value. Craddock v. Smythe [Ky.] 99 S. W. 216.

96. Testator devised his estate to his wife for life remainder to their children of whom there were then two. Four more children were afterwards born, one of whom died leaving a husband and an infant child. Held, though the child so dying was pretermitted and therefore under the statute, inherited direct from her father, and on her death her share passed to her infant child subject to her husband's curtesy, the joint property was subject to partition sale under Civ. Code, § 490, as being in possession and incapable of division without impairing its value. Stine v. Goodman, 29 Ky. L. R. 221, 92 S. W. 612.

97. Husband of heir who was entitled to curtesy in heir's estate. Stine v. Goodman, 27 Ky. L. R. 221, 92 S. W. 612.

98. See 6 C. L. 898.

99. Act March 30, 1874 (St. 1873-74, p. 940, c. 671, § 1), confers a mere personal privilege and not an "estate of inheritance or for life or for years" within Code Civ. Proc. § 752. Darbee & Immel Oyster & Land Co. v. Pacific Oyster Co. [Cal.] 88 P. 1090.

1. See 6 C. L. 898.

2. Heirs suing for partition of real estate to which they have acquired title by descent need not show as a condition precedent to relief that the estate has been settled or that the land is not subject to appropriation for the payment of decedent's debts. O'Keefe v. Behrens [Kan.] 85 P. 555. In a suit by a widow and administratrix, the mere fact that the estate has not been fully settled is not a defense. Where decree was not entered until nearly three years after death of husband and there was no pretence that delay was necessary for purpose of settling estate. Smith v. Smith [Iowa] 109 N. W. 194.

3. That the law allows a year for settlement of estate is immaterial. In re Reifsnyder's Estate, 214 Pa. 637, 63 A. 1075.

4. A judgment recognizing heirs and decreeing that they have a right to receive the estate from the executrix does not close the succession so as to authorize the heirs to maintain partition. Succession of Landry, 117 La. 193, 41 So. 490.

5. Code Prac. arts. 1003, 1007. Succession of Landry, 117 La. 193, 41 So. 490. Agreement by counsel for executrix not ratified by her held not binding on her. Id.

6. Homestead. Hild v. Hild, 129 Iowa, 649, 106 N. W. 159.

7. See 6 C. L. 899.

of the probate and chancery courts to partition property is concurrent,[8] the court first acquiring jurisdiction will exercise it exclusive of the other,[9] and where partition is sought in the probate court either in kind or by sale, the final decree is conclusive until reversed on appeal so as to exclude the jurisdiction of the chancery court in the absence of special ground for equitable interposition.[10] The probate court has jurisdiction to partition personal as well as real property.[11]

Service of process.[12]—The statute generally provides for service upon infants or nonresidents.[13] Proper service upon an infant defendant is a condition precedent to the valid appointment of a guardian ad litem.[14] In the case of an incompetent, his guardian must be served.[15] The papers and docket having been destroyed personal service of citation on resident heirs will be presumed on collateral attack.[16]

Venue.[17]

§ 3. *Procedure to obtain partition. Limitations.*[18]—While in Iowa the statute limiting the time within which an application for the admeasurement of dower may be made does not apply to an action in equity or for partition of a distributive share,[19] the general statute limiting the time for the recovery of real property does apply in such actions.[20] Where the bill shows that suit is commenced after the statutory period the fact that the suit is brought by next friend does not raise an inference of disability so as to render the bill good as against a demurrer.[21] In Louisiana where a partition is only provisional because of a minor having been interested and the forms of law not having been complied with, the action of the minor for a definitive partition is prescribed by either five or ten years from emancipation or majority.[22] A question of limitations will not be heard for the first time on appeal.[23]

Parties.[24]—In Alabama an executor or administrator alone may file a bill for partition in his own name in the chancery court as well as in the probate court.[25] Under the New York statute all persons having or claiming any interest in the land may be made parties.[26] A plaintiff's wife is properly made a party where she has an

8, 9, 10. Finch v. Smith [Ala.] 41 So. 819.

11. Code 1896, § 3161. Logs. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

12. See 6 C. L. 900.

13. 2 Rev. St. pt. 3, c. 5, tit. 3, § 12, provided that service of the "petition and notice" could be made personally upon nonresidents. Code Proc. § 448, provided that the Revised Statutes relating to partition should apply to actions for partition brought under the Code so far as they could be so applied to the subject-matter without regard to form. Held service of the "summons" upon an infant and also upon the person with whom she resided out of the state was regular, especially where the mother asked to be appointed guardian ad litem and answered after appointment. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621.

14. Where an infant defendant was not properly served with process, the court was under the statute then in force without authority to appoint a guardian ad litem, the act of the guardian appointed did not bind the infant and as to him the judgment was void. McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902.

15. Where two incompetents for whom a guardian had been appointed were in an asylum in another state and the guardian or any one for them was not served, the service was insufficient to confer jurisdiction. Sonn v. Kennedy, 51 Misc. 234, 100 N. Y. S. 885.

16. Where application of administrator for partition was sworn to January 15, but not acted on until February 4th. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

17, 18. See 6 C. L. 900.

19. Code, § 3369, does not apply. Britt v. Gordon [Iowa] 108 N. W. 319.

20. And an action by a widow against a stranger claiming adversely and in possession under a deed from the husband must be brought within ten years from the death of the husband, the time when the cause of action accrued. Britt v. Gordon [Iowa] 108 N. W. 319.

21. Thames v. Mangum [Miss.] 40 So. 327.

22. Rhodes v. Cooper [La.] 42 So. 943.

23. Where no question was raised either in the evidence, the master's report, the exceptions thereto, or the opinion of the court below, as to whether certain parties were barred by the act of April 22, 1856. Lehman v. Lehman, 29 Pa. Super. Ct. 60.

24. See 6 C. L. 900.

25. Code 1896, §§ 3185, 3187. Schuessler v. Goodhue [Ala.] 41 So. 958.

26. Complaint that defendants claim some interest, the extent of which was unknown to plaintiff, etc., held to state a good cause of action against such parties. Lawrence v. Norton, 102 N. Y. S. 481.

inchoate dower right.[27] A trustee by will holding title to the land with power of sale is a necessary party.[28] Mere lien holders,[29] reversioners or remaindermen,[30] or life tenants and remaindermen whose interests are represented by trustees,[31] are not necessary parties. Though the statute may provide that incumbrancers may be made parties in a suit for the sale of land, the rights of one as judgment creditor cannot be determined in the suit where he is made a party only as co-owner.[32] Where a father conveys an entire tract of land owned by him and his children, the immediate and subsequent grantees are properly made parties to a suit by the children to set aside the deed as to them and for partition and sale of the premises.[33] A posthumous child who by statute inherits on the death of the father cannot be deprived of his rights by partition proceedings to which he in no way is made a party.[34]

Pleading and evidence.[35]—The complaint must disclose the right or title of the parties interested in quality and quantity.[36] A petition setting forth the conveyances from which the interests of the several parties appear is not demurrable for failing to allege in terms their respective interests.[37] A complaint alleges but one cause of action though it seeks a determination of other matters incidental to the relief demanded.[38] If incidental equitable relief is sought, facts must be set out on which equitable jurisdiction can be based.[39] Partition will be refused if it is not asked for in the bill and no cross bill is filed.[40] A cross complaint is sufficient if it shows defendant's right of possession at the time of its filing, though it does not

27. Dunn v. Dunn, 51 Misc. 302, 100 N. Y. S. 1061.

28. Plea held to show nonjoinder. Mackey v. Mackey [N. J. Eq.] 63 A. 984.

29. The words "those having an interest" and "all persons interested" in Civ. Code Prac. § 499, subsec. 1, refer to persons owning an interest in the land under the same title, and not to the holder of a lien on the undivided interest of one of the owners. Barry v. Baker, 29 Ky. L. R. 573, 93 S. W. 1061.

30. Reversioners and remaindermen should not be made parties since their rights cannot be affected. Rev. Code 1892, § 3097. Lawson v. Bonner [Miss.] 40 So. 488.

31. Where trustees under a will were unable to carry out its provisions without selling the property, there was an equitable conversion and trustees only were necessary or proper parties in partition. Sonn v. Kennedy, 51 Misc. 234, 100 N. Y. S. 885.

32. Court had no power to restrain execution of judgment. Case not within Acts 1904, p. 920, c. 535. McCormick v. McCormick [Md.] 65 A. 54.

33. Especially in view of Rev. Code 1892, § 3101, authorizing the court in partition to adjust equities and determine all claims of the several cotenants. Thamas v. Mangum, 87 Miss. 575, 40 So. 327.

34. Where partition of father's estate occurred before child's birth, she could recover her interest from a remote vendee of purchaser at partition sale. Deal v. Sexton [N. C.] 56 S. E. 691.

35. See 6 C. L. 901.

36. Cross complaint held sufficient in its statement of the right or title of the parties as to quality and quantity. Shetterly v. Axt [Ind. App.] 77 N. E. 865. Petition stating merely that plaintiffs' father died intestate twenty-three years before bringing suit, the owner of a half interest in the land, and that plaintiffs are his heirs at law, held not to show any interest in plaintiffs and to not state a cause of action. Chaney v. Bevins, 29 Ky. L. R. 1219, 96 S. W. 1129.

37. Johnson v. Brown [Kan.] 86 P. 503.

38. All contentions between the parties in respect to their rights in the property, no matter on what ground based or from what source they arise, may be determined in the one action. Lawrence v. Norton, 102 N. Y. S. 481. Where all the relief demanded outside of partition is merely incidental and necessary to be determined before the court can adjudicate the respective rights of the parties in the land, there is no misjoinder of independent causes though all the parties are not affected to the same extent or in the same manner. Id. That as to some defendants relief is sought which will not be granted, in such an action does not sustain contention that a separate cause of action is thereby alleged. Id. The fact that the complaint seeks to avoid an alleged fraudulent transfer of a mortgage does not constitute an improper joinder of causes where such relief is necessary to a full determination of the rights of the parties. Dunn v. Dunn, 51 Misc. 302, 100 N. Y. S. 1061. Causes of action sufficiently stated. Id.

39. General allegation that plaintiff was entitled to five-eighths did not justify reformation of a deed. Buchanan v. Harrington, 141 N. C. 39, 53 S. E. 478. Such equitable matter might have been alleged by amendment in superior court after transfer of case though not originally cognizable by clerk before whom action was commenced. Id.

40. In suit by cotenant to remove mortgage as cloud on title. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502.

See note Necessity for a cross bill, Equity, 5 C. L. 1166.

show such right at the time of commencement of suit.[41] General averments in a cross complaint control specific ones not the foundation of the pleading.[42] An answer that a codefendant had received rents and profits without accounting for them and praying for an accounting is a sufficient foundation on which to base such relief.[43]

Jurisdictional averments must be proven.[44] The burden is upon complainants to prove an interest in themselves.[45] Thus, one who sues in partition, notwithstanding an apparent devise of the land, has the burden of establishing the invalidity of the devise.[45] Where land is conveyed to several persons, some of whom afterwards bring partition, defendants will be held to strict proof if they seek to show that the land in suit was not included in the common grant.[47] As in other cases, the proof must be directed to the issues,[48] but under an averment of ownership, proof may be made of either legal or equitable title.[49] Ex parte affidavits cannot be considered on the merits against objection in the absence of previous consent or waiver.[50]

Mode and time of trial.[51]

§ 4. *Scope of relief in partition.*[52]—Partition cannot be made a substitute for ejectment,[53] and so where an alleged legal title is set up by way of defense, the court will await a decision at law,[54] but relief may be had which is merely incidental to the main action and necessary to a complete adjudication of the rights of the parties;[55] for example, title may be decreed and quieted in one of the parties,

41. Shetterly v. Axt [Ind. App.] 77 N. E. 865.

42. General averment as to ownership as tenants in common held to control specific averments relating to the will of a decedent made an exhibit, and not the foundation of cross complaint. Shetterly v. Axt [Ind. App.] 77 N. E. 865.

43. Evidence insufficient to sustain judgment requiring accounting. Burnett v. Piercy [Cal.] 86 P. 603.

44. Averment in petition in probate court for partition by sale, that the property could not be equitably divided in kind. Code 1896, § 3178. Finch v. Smith [Ala.] 41 So. 819.

45. Where complainants claimed as grantees of a child of the deceased owner of the land, which was decedent's homestead, the burden was on them to show either that the estate was insolvent or that the homestead was all the land decedent owned at death. Carroll v. Fulton [Ala.] 41 So. 741. Evidence insufficient. Id.

46. Under express provision of Code Civ. Proc. § 1537. Fischer v. Langlotz, 100 N. Y. S. 578.

47. Where deed of land to two persons provided that it was not to "conflict with the title" to any part of the premises previously deeded away by the grantor, and one of the grantees subsequently sued in partition certain evidence introduced in a prior suit by one of the grantees to recover possession of a part of the premises, held insufficient to establish defendant's claim that the land in question was not included in the original conveyance of the tract. Roll v. Everett [N. J. Eq.] 65 A. 732.

48. In an action by heirs for partition, the widow had executed a deed to part of the community land and defendants answered that she had paid community debts out of her separate means to the value of the land conveyed which plaintiffs denied. Held, plaintiffs could not show that at the death of the husband it was agreed that she should have the community property during life in consideration of paying the debts. Jennings v. Borton [Tex. Civ. App.] 17 Tex. Ct. Rep. 53, 98 S. W. 445.

49. Shetterly v. Axt [Ind. App.] 77 N. E. 865.

50. Affidavit in support of motion to enter a consent decree and stating that a sale was necessary as in such decree recited. Herold v. Craig, 59 W. Va. 353, 53 S. E. 466.

51, 52. See 6 C. L. 902.

53. Where one defendant was in possession of a portion of the land claiming adversely to all the other parties. Chamberlain v. Waples, 193 Mo. 96, 91 S. W. 934. Pleading headed "petition for partition" and alleging that certain defendants were in possession and claimed some interest unknown to plaintiffs, held to state a cause of action in partition and not one under Rev. St. 1899, § 650, to determine adverse claims, though it prayed that the court determine the rights and title of the several parties, and hence the interest of one in possession claiming adversely could not be affected. Id.

54. Court would not determine validity of tax title asserted by defendant but would hold case to await decision of law court as to its validity. Roll v. Everett [N. J. Eq.] 65 A. 732.

55. Complaint not demurrable for joinder of independent causes, though showing that complainants understood that there was a boundary dispute and that defendant had attempted to occupy a portion of the premises, torn down fences, etc. Lawrence v. Norton, 102 N. Y. S. 481. That complaint sought to avoid a fraudulent transfer of a mortgage held not to constitute an improper joinder. Dunn v. Dunn, 51 Misc. 302, 100 N. Y. S. 1061. Equity having acquired jurisdiction will retain it for a settlement

the court having first found that the other has no interest.[56] The bare denial of complainant's title on information and belief, defendants not claiming adverse title in themselves, does not put title in issue so as to require a stay until title has been established at law.[57] In partition of the separate estate of a deceased father, claims of the heirs against the mother or against each other individually are foreign to the issue.[58] In a suit by a widow and administratrix for partition, where the heirs demand an accounting of rents and profits, it is proper to relegate the accounting to the settlement of plaintiff's account as administratrix.[59] The heirs of a lessor in a suit to partition his land cannot by rule bring the lessee into court for the purpose of litigating the right to possession or construing the lease under which he holds.[60] If pending partition a defendant threatens destruction or removal of the property, the court may grant an injunction or appoint a receiver.[61] Upon settlement of the suit and motion for discontinuance a receiver therein having also been appointed receiver in a previous action, the court can only vacate the order appointing the receiver in the second action and leave the parties to an application in the other action for an accounting for rents and profits.[62]

Costs and attorney's fees.[63]—Defendants should not be compelled to pay complainant's solicitor's fees where a substantial and successful defense is interposed,[64] or the services were rendered exclusively for plaintiffs,[65] and defendants rightfully employ their own attorney.[66] Such fees are properly allowed where contested issues are found against a defendant.[67] Under the Missouri statute, either a written or verbal prior agreement between plaintiff and his attorney that the court might allow a reasonable attorney's fee is a sufficient basis for the courts action in allowing such fee and ordering the same to be taxed as costs, though the amount thereof is not stipulated in the agreement.[68] Attorney's fees are not taxed in Iowa where there is a dispute as to the ownership of the subject of the suit and both parties are represented by counsel;[69] and in South Carolina there is no warrant for the allowance

of all disputed questions in one and same suit. Where father conveyed his and his children's interest in land, children could maintain suit to set aside deed as to them and for partition and make the several grantees parties. Thames v. Mangum, 87 Miss. 675, 40 So. 327.

56. Where answer was in nature of cross-bill and asked affirmative relief, the court having found that plaintiff had already received his share. Goodnough v. Webber [Kan.] 88 P. 879.

57. But rule did not apply where complaint showed that defendants denied their right of possession and had virtually ousted them from the land and defendant denied that plaintiff had any interest. Carlson v. Sullivan [C. C. A.] 146 F. 476.

58. Accounts to be settled are those between the heirs and father's succession. Faure v. Faure, 117 La. 204, 41 So. 494.

59. Code, § 3333, giving administrator authority to receive rents and profits. Smith v. Smith [Iowa] 109 N. W. 194.

60. Where one heir claimed that tenant was in possession of a portion not embraced in lease. Mounts v. Mounts [W. Va.] 56 S. E. 358.

61. Tenant in common could not recover exclusive possession of logs because cotenant took them from his possession by force, partition being the only remedy. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782.

62. Horn v. Horn, 100 N. Y. S. 790.

63. See 6 C. L. 903.

64. And the allegations of the bill were not all sustained by proof. Berger v. Neville, 117 Ill. App. 72.

65. Under Rev. St. 1899, § 4422, authorizing the court to allow plaintiff's attorney a reasonable fee, the attorney should not be allowed for services performed exclusively for plaintiff on contested issues. Liles v. Liles, 116 Mo. App. 413, 91 S. W. 983.

66. Defendants who rightfully employ their own attorney cannot be compelled to pay for the services of plaintiff's attorney not beneficial to them. Where judgment which plaintiffs had procured was erroneous and defendants procured one free from error. Hemingray v. Hemingray, 29 Ky. L. R. 879, 96 S. W. 574.

67. Where defendant set up equitable title to the land and court found against him, held proper to allow complainant a counsel fee out of defendant's share of proceeds of sale. Buttlar v. Buttlar [N. J. Err. & App.] 64 A. 110. Revised Chancery Act 1902, § 91 (P. L. p. 540), authorizing allowance of counsel fees to complainants in equity cases held not unconstitutional. Id. Where one defendant raised issues requiring investigation, the costs thereof should be deducted from her share. Williams v. Jones, 74 S. C. 258, 54 S. E. 568.

68. Rev. St. 1899, § 4422. Liles v. Liles, 116 Mo. App. 413, 91 S. W. 983.

69. Properly allowed plaintiff, however, where there was no dispute as to the land she sought to have partitioned, but defend-

of a fee to the attorneys for plaintiff out of the common fund arising from a sale of the land.[70] Costs should not be taxed to the interests of those improperly made parties.[71] In a suit for the partition and distribution of the estate of a decedent, it is the usual practice in Virginia to have the costs of the entire proceedings paid out of the assets of the estate;[72] and where a reference of the cause is made with only the usual and necessary inquiries, it is error to require complainants to pay the costs of the reference.[73] Where a lis pendens is filed, and as authorized by statute, the court upon confirmation of the partition decrees that defendants pay complainant a portion of the costs, the lien of the judgment takes priority over a mortgage by defendants on their share executed pending suit to secure the fees of their solicitor;[74] and the fact that the costs are awarded on appeal is immaterial.[75] Under a statute giving an attorney a lien upon the client's cause of action, the court may not impose a lien upon the interests of the other parties.[76] A commission due real esate agents should not be allowed out of the funds.[77] In New York the referee is entitled to a sale fee computed on the amount bid and to commission on the amount in his hands for distribution.[78]

Operation and effect of decree.[79]—A deed of partition either voluntary or pursuant to decree merely destroys the unity of possession and does not confer any new title or additional estate in the land.[80] Rights in reversion or remainder cannot be affected.[81] The construction of a particular decree necessarily depends upon its terms.[82] A person taking a lien on an undivided interest in land takes with knowledge that his lien will follow and remain on the particular interest wherever placed when the land is partitioned.[83] A judgment rendered when all the parties who at the time had any interest in the property were before the court is sufficient to give a purchaser a good title, though afterborn children might have an interest in a part of the estate held as executor and trustee by a party to the suit.[84] A provisional partition gives to the parties the right to the fruits of their respective allotments.[85] A recital in a decree of sale that all parties interested were made parties

ants demanded accounting and partition as to another tract. Smith v. Smith [Iowa] 109 N. W. 194.

70. Partition in kind impossible. Butler v. Butler, 73 S. C. 402, 53 S. E. 646.

71. Held error to tax interests in remainder. Lawson v. Bonner [Miss.] 40 So. 488.

72, 73. McCoy v. McCoy, 105 Va. 829, 54 S. E. 995.

74. Comp. Laws 1897, § 11,080. Barbour v. Patterson, 145 Mich. 459, 13 Det. Leg. N. 605, 108 N. W. 973.

75. Barbour v. Patterson, 145 Mich. 459, 13 Det. Leg. N. 605, 108 N. W. 973.

76. Code Civ. Proc. § 66. Where defendant's attorney had served no answer and his client had only a dower right which had terminated by her death, court could not impose lien on entire property involved in action. Horn v. Horn, 100 N. Y. S. 790. Attorney was, however, entitled to the taxable costs. Id.

77. Rutherford v. Rutherford [Tenn.] 92 S. W. 1112.

78. Code Civ. Proc. §§ 3297, 3307. Duffy v. Muller, 102 N. Y. S. 296.

79. See 6 C. L. 904.

80. Partition after husband had conveyed to wife gave husband no land reachable by creditors. Foster v. Hobson [Iowa] 107 N. W. 1101.

81. Rev. Code 1892, § 3097. Lawson v. Bonner [Mass.] 40 So. 488.

82. Where the wife and child of an heir were not made parties, a decree that a place then occupied by such heir "and family shall stand and remain the sole and separate property of his wife and their children," should not be construed as a judgment inter partes settling rights asserted by the wife and child but should be considered in the nature of a voluntary conveyance by the heir to them of property which would otherwise have belonged to him under a division of his father's estate. Dix v. Bigham, 124 Ga. 1067, 53 S. E. 571. As so construed, it vested a fee in the wife and child with no interest in after-born children. Id.

83. Barry v. Baker, 29 Ky. L. R. 573, 93 S. W. 1061. An owner mortgaged his two-fifths interest and later purchased two-fifths subject to a vendor's lien. In partition a tract was set apart to the owner of the remaining one-fifth. Held, the mortgagee had a lien on one-half of the land allotted to the owner of the four-fifths interest, the vendors of the two-fifths had a lien on the other half, and the remaining fifth was free from liens. Id. Foreclosure proceedings held prejudical to interests of holders of vendor's liens. Id.

84. Under Code Civ. Proc. §§ 1557, 1577. Dwight v. Lawrence, 111 App. Div. 616, 98 N. Y. S. 76.

85. Demand for rents and revenues eliminated. Rhodes v. Cooper [La.] 42 So. 943.

by proper process duly served is conclusive of the jurisdiction of the court.[86] Where the court has jurisdiction of the parties and the subject-matter, the fact that the court decrees to one party more than his share does not render the decree void and subject to collateral attack;[87] and on collateral attack, the fact that a decree of sale is rendered a considerable time after return day is not fatal.[88] The Texas statute relating to proceedings for the partition of the estates of decedents confers upon the probate court general jurisdiction over such subject,[89] and an order within the scope of such jurisdiction is not void because the procedure may not be strictly followed as to matters which the heirs may waive.[90] Where by reason of lack of proper service upon an infant defendant the court is without authority to appoint a guardian ad litem, such guardian cannot bind the infant and, as to the latter, the judgment is void;[91] and where a compromise between plaintiffs and the guardian of an infant defendant is void,[92] a decree entered in accordance therewith and directing the land to be sold is also void for want of jurisdiction.[93] A decree directing partition is interlocutory and may be modified or reversed by the court at any time before final decision of the cause;[94] and where a decree is taken against a party without a trial on the merits of a particular proposition in the case, the chancellor may in his discretion open the decree and permit a defense as to such question.[95] But a standing, final decree is conclusive as to all parties who had due notice,[96] and infants who appeared by guardians ad litem are barred from subsequently maintaining ejectment to recover the shares sold.[97]

§ 5. *Commissioners or referees and their proceedings.*[98]—To authorize commissioners to act, there must be a valid and timely appointment.[99] It is for the commissioners to determine upon the manner of division.[1] The time for filing exceptions is usually regulated by statute.[2] No exceptions being filed during the

86. Sweatman v. Dean, 86 Miss. 641, 38 So. 231.

87. Court was not without jurisdiction because it decreed to a widow one-third of all the land partitioned when she was entitled only to a dower interest. Staats v. Wilson [Neb.] 109 N. W. 379.

88. That a decree of sale was rendered much later than return day and during the fourth week of the term is at most an irregularity which may be amended or, if not amended, may be deemed error on direct appeal, but does not affect its validity on collateral attack. Sweatman v. Dean, 86 Miss. 641, 38 So. 231.

89. Sayles' Ann. Civ. St. 1897, arts. 2155, 2156. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

90. Not because personalty and advancements were not brought into hotchpot. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

91. McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902.

92. Compromise without order of court and depriving infant of larger share of property of which he was sole heir. Rankin v. Schofield [Ark.] 98 S. W. 674.

93. Where court entered decree in accordance with compromise and ordered sale without finding whether the land could be divided. Rankin v. Schofield [Ark.] 98 S. W. 674.

94. Sweatman v. Dean, 86 Miss. 641, 38 So. 231.

95. Evidence held to require finding that a lost deed by a son to his mother was not for petitioners' benefit and so they were not entitled to open an enrolled decree for the purpose of claiming title to a portion of the property under such deed. White v. Smith [N. J. Eq.] 65 A. 1017.

96. Held abuse of court's discretion to refuse to order a sheriff's successor to execute a deed to a purchaser after confirmation of sale where sheriff's predecessor had failed to do so where objections were interposed which should have been raised in the partition proceedings. Gallitzin Bldg. & Loan Ass'n v. Steigers, 28 Pa. Super. Ct. 336.

97. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621. The statute prohibiting the sale of the realty of infants in contravention of a will or deed under which their estate is created has no application where there are adult tenants in common who have an immediate right to the possession of their shares. Id.

98. See 6 C. L. 904.

99. In proceedings to partition a decedent's estate, order of court, minutes, and report of commissioners, held to show appointment of commissioners at proper time. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

1. Held error for court to direct commissioners to divide the land so as to give one of the parties a certain portion. Lawson v. Bonner [Miss.] 40 So. 488.

2. Where judgment in partition appointing commissioners is entered by consent of the parties and afterwards the commissioners' report is filed with the clerk and no exception is taken within twenty days, the re-

term, a party may be entitled to confirmation of the report as a matter of law.[3] Though parties who are dissatisfied with the valuation of commissioners in partition may bring the property to sale by securing a bid in material advance in price over such valuation, the return of the comissioners cannot be vacated by the unsecured bid of a stranger to the record.[4] The court will not set aside the valuation of the commissioners unless it is so grossly incorrect and unequal as to warrant an inference of unfair or improper motives.[5] Though the action of the probate court in approving and acting on the report of commissioners advising a sale may be erroneous, it is not subject to collateral attack.[6]

§ 6. *Mode of partition and distribution of property or proceeds.*[7]—A sale is generally not authorized unless the land cannot be equitably divided in kind,[8] or a sale will better promote the interests of the owners,[9] or is necessary to prevent serious loss to them.[10] In Alabama the power of the probate court to order partition by sale depends upon the impossibility of equitable division in kind either by the probate or the chancery court.[11] If the land can be equitably divided but the remedy in the probate court is insufficient, complainants should proceed in chancery;[12] but if it cannot be so divided, a proceeding may be maintained either in the probate or chancery court for a sale.[13] An allegation in a petition in the probate court for partition by sale that the property cannot be equitably divided in kind is jurisdictional and must be proven before the court can order a sale.[14] Where an actual division cannot be made without prejudice to persons interested, a sale may be made though the share of a tenant is for a less estate than a fee[15] and a sale may be proper in some cases notwithstanding the existence of a contingent estate in remainder.[16] Testamentary power to make partition of land includes power to sell

port stands confirmed without formal decree. Code 1883, § 1896. Roberts v. Roberts [N. C.] 55 S. E. 721.

3. Commissioners were appointed to partition land under a consent decree in 1887 and filed their report that year with the clerk. No exceptions were ever filed or objections made, and in 1906 without notice to defendant plaintiff procured an order confirming the report. Held, if the proceeding be regarded as pending in the superior court under Acts 1887, p. 518, c. 276, defendant was bound to take notice of orders made in term time (Roberts v. Roberts [N. C.] 55 S. E. 721), and no exceptions being filed during the term following the filing of the report, plaintiff was entitled to confirmation as a matter of law (Id.). The order made in 1906 should be considered as entered nunc pro tunc (Id.).

4, 5. Aldrich v. Aldrich [S. C.] 55 S. E. 887.

6. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

7. See 6 C. L. 905.

8. Court held without authority to order a sale in absence of any finding that the lands were not susceptible of division, where complaint alleged that they could be divided and prayed that the proper shares be laid off. Rankin v. Schofield [Ark.] 98 S. W. 674. Where the property consisted of two city lots and another tract of land and one of the parties had a half interest and five others were entitled to one-tenth each, decree for sale on ground of impossibility of equal division was proper. Joerger v. Joerger, 193 Mo. 133, 91 S. W. 918. Actual partition could not be made and sale was properly directed. Dwight v. Lawrence, 111 App. Div. 616, 98 N. Y. S. 76.

9. A sale cannot be decreed unless it affirmatively appears in the record that partition cannot be conveniently made and that the interests of the parties will be promoted by a sale. Herold v. Craig, 59 W. Va. 353, 53 S. E. 466. Under Gen. St. 1902, § 1037, providing that the court may order a sale when in its opinion a sale will better promote the interests of the owners, held, in an action by a tenant in common, it is not necessary for the complaint to allege or the court to find that an actual division of the land is impossible or impracticable, the division being legally impracticable if the severance of joint ownership can only be accomplished consistently with the interests of the owners by a sale and division of the proceeds. Contaldi v. Errichetti [Conn.] 64 A. 219.

10. A sale should not be ordered unless it is necessary to protect the parties from serious pecuniary injury. In partition of timber lands, evidence held to show that it could not be partitioned without serious loss. Idema v. Comstock [Wis.] 110 N. W. 786.

11. Probate court may not order sale merely because it is powerless to make an equitable division under § 3169, Code 1896. Finch v. Smith [Ala.] 41 So. 819.

12, 13. Finch v. Smith [Ala.] 41 So. 819.

14. Code 1896, § 3178. Finch v. Smith [Ala.] 41 So. 819.

15. Under express provision of Laws 1898, pp. 644, 653, 660, §§ 26, 45, 46. Campbell v. Cole [N. J. Eq.] 64 A. 461.

16. Where land was so situated that it

where the real estate is so situated that actual partition cannot be had,[17] and powers given executors in this regard devolve upon the court, if for any reason the executors are disqualified, unable, or refuse to act.[18] A statutory method of partition may supplement a testamentary one which is defective,[19] or be substituted for it where on account of delay circumstances and the value of the land have changed.[20]

Distribution.[21]—In Louisiana the drawing of lots is an essential formality in a judicial partition in which a minor is interested,[22] failure to observe which renders the partition merely provisional.[23]

Where there are life estates with a contingent remainder and a sale, the life estates may be valued, the value paid over to the life tenants,[24] and the remainder of the fund invested to await the contingency.[25] Life tenants who are compelled to expend money in order to obtain the surrender of outstanding leases should be allowed reimbursement out of the aggregate fund if the sale was advantageous and could not have been made if the leases had not been surrendered.[26] Reimbursement should be made also to parties who in good faith have expended money for valuable improvements or for other charges against the property,[27] but one who entered the premises under a lease from a prior life tenant, knowing of the latter's want to authority to demise, is not entitled to compensation for improvements made in a subsequent suit for partition brought by the remaindermen;[28] and the fact that the receiver in the partition suit accepts rent from the tenant in such case is not an assumption of the agreement made by the life tenant.[29] Where a widow sells improvements made with community funds and also her interest in the land, the vendee is entitled to remove the improvements and have partition of the land only as against the children of the vendor.[30] Claims for improvements made by the heirs and enhancing the value of the land should be appraised separately either before or immediately after the partition sale.[31]

A statute empowering the court to transfer a lien from land sold to the proceeds in all cases where a sale is ordered free from incumbrances does not deprive the court of power to order the proceeds of a sale in partition to be paid into court, though it was not directed that the land be sold free from incumbrances.[32] An

would be advantageous that it be sold for factory purposes. Shannon's Code, §§ 5010, 5020, 5040, 5070. Rutherford v. Rutherford [Tenn.] 92 S. W. 1112. The sections of the Code on the subject of partition in kind and sale for partition are in pari materia and should be construed together. Id.

17, 18. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621.

19. Where a mode of partition provided by a will failed to indicate how the appraisers should be appointed or who they should be, Act April 17, 1869 (P. L. 72), authorizing partition, was applicable. In re King's Estate [Pa.] 65 A. 942.

20. Delay of eight years. In re King's Estate [Pa.] 65 A. 942.

21. See 6 C. L. 905.

22, 23. Rhodes v. Cooper [La.] 42 So. 493.

24. Shannon's Code, § 5056. Rutherford v. Rutherford [Tenn.] 92 S. W. 1112.

25. Shannon's Code, § 5070. Rutherford v. Rutherford [Tenn.] 92 S. W. 1112.

26. Sale where there were life estates and contingent remainders. Rutherford v. Rutherford [Tenn.] 92 S. W. 1112.

27. Where a defendant in good faith made valuable improvements believing he had title and it was probable that plaintiff entertained the same belief during the time the improvements were made, the court on decreeing that defendant had no title should give him the value of the improvements. Lyons Nat. Bank v. Shuler, 101 N. Y. S. 62. Where grantee of a sole devisee paid off mortgages, taxes, and assessments, and made improvements in ignorance of the rights of a child born after the execution of the will, the judgment should be without prejudice to a lien for those expenses. Obecny v. Goetz, 102 N. Y. S. 232.

28, 29. Train v. Davis, 49 Misc. 162, 98 N. Y. S. 816.

30. Since widow had the right to sell the improvements. Olschewske v. Summerville [Tex. Civ. App.] 95 S. W. 1. In such case the children were entitled to one-half of the land or its proceeds, the vendee to the other half or its proceeds and the improvements, and there were no equities to be adjusted between them and the vendee (Id.), except that the vendee should recover from the children their pro rata share of the taxes paid by him (Id.). The children should not be held personally liable for rents pending the suit, nor can such rents be made a lien on the land. Id.

31. Faure v. Faure, 117 La. 204, 41 So. 494.

32. P. L. 1898, p. 659, § 43. Morgan v. Morgan [N. J. Eq.] 64 A. 155.

omission in a decree of partition to require the proceeds of the sale to be paid into court for the adjustment of claims may be corrected by supplemental order, or by amendment of the decree if all the parties are before the court.[33] A defendant need not make payment in court for an interest which he claims in the premises, where he avers that he does not know what he owes but is ready and willing to pay it.[34]

Where a husband's land is sold in partition, his judgment creditors cannot hold the entire proceeds as against his wife who did not join in the conveyance and who was not a party to the proceedings.[35] Upon a partition sale of the interest of an heir, a junior judgment creditor who causes a levy to be made is entitled to priority of payment out of the proceeds as against a senior judgment creditor of his ancestor who failed to make a levy.[36] Laches may defeat the right of a tenant to enforce an equitable lien against the interest of his cotenant for rents appropriated by the latter, as against the holder of an outstanding mortgage.[37]

Owelty.[38]

§ 7. *Sale and subsequent proceedings.*[39]—A sale in partition made under process of the court by its appointed officer and subject to confirmation is a judicial sale.[40]

Notice [41] of sale must be given as required by the decree.[42] The Texas statute does not require notice to the heirs of a proceeding to sell an estate because it is not capable of division.[43]

Terms of sale of minors' interests.[44]—In Louisiana, if the representative of minor defendants fails to have the terms of sale fixed as to them by a family meeting, the court may order the sale of the property, so far as their interest is concerned, to be made for cash.[45]

Conduct of sale.[46]—In Louisiana the individual interest of an interdict can be alienated at private sale only where the purpose is to effect a partition by a sale of the whole property.[47] The fact that a purchaser bids an amount materially less than the appraisal of the commissioners does not avoid the sale.[48] If bids are not

33. Omission to order money into court as required by Partition Act, § 52 (Gen. St. p. 2432), did not discharge incumbrances. Morgan v. Morgan [N. J. Eq.] 64 A. 155.

34. Peirce v. Halsell [Miss.] 43 So. 83.

35. Burn's Ann. St. 1901, §§ 2652, 2669. Staser v. Gaar, Scott & Co. [Ind. App.] 78 N. E. 987, recommending overruling of Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384; Staser v. Gaar, Scott & Co. [Ind.] 79 N. E. 404, distinguishing Haggerty v. Wagner, 148 Ind. 625, 48 N. E. 366, 39 L. R. A. 384.

36. Gen. St. p. 2984, § 9. Lippincott v. Smith [N. J. Err. & App.] 64 A. 141. See Judgments, 8 C. L. 530.

37. Where for many years defendant permitted his cotenant to retain all the rents knowing of the existence of an outstanding mortgage on the cotenant's interest given for money to take up vendor's lien notes which had existed from a date prior to the tenancy, defendant was barred thereafter from asserting an equitable lien on his cotenant's share to the prejudice of the holder of the mortgage. Flach v. Zanderson [Tex. Civ. App.] 14 Tex. Ct. Rep. 540, 91 S. W. 348. Evidence held to show that defendant had knowledge that the mortgage was for money loaned to take up the lien notes and continued such liens for the benefit of the lender. Id.

38, 39. See 6 C. L. 906.

40. Under statute relating to judicial sales, a wife could hold her dower interest. Staser v. Gaar, Scott & Co. [Ind. App.] 78 N. E. 987.

41. See 6 C. L. 906.

42. Evidence held to show that master complied with decree requiring him to post notices of sale at five of the most public places in the vicinity. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106.

43. Judgment approving commissioner's report, recommending sale if rendered before service of citation on the heirs in the partition proceedings, though premature, is not void. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

44. See 6 C. L. 906.

45. Succession of Becnel, 117 La. 744, 42 So. 256.

46. See 6 C. L. 906.

47. Otherwise must be sold at public auction. Gallagher v. Lurges, 116 La. 755, 41 So. 60. Proceeding by which only the interest of a non compos in property held in common was sold at private sale to one of the other co-owners held void. Id.

48. Limitation as to price under Sayles' Ann. Civ. St. 1897, art. 2178, does not apply to a purchaser at a sale but only to heirs. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

made good, the master may continue to offer the premises for sale.[49] Where as authorized by the decree purchasers and parties consent to a sale in parcels of a certain size, they cannot afterwards avoid the sale because the land is thus sold.[50] A tenant has no right to complain because half a crop is sold when the other half might rightfully have been sold also.[51] A partner may avoid a sale of partnership property to his copartner.[52] A party who receives a part of the purchase money at a sale confirmed by the court and moves in the cause to collect the remainder is bound by the terms of the sale as recited in the decree of confirmation.[53]

A misdescription.[54]

The omission of property.[55]

Confirmation of sale.[56]—The sale must be confirmed by the court before a purchaser can acquire title,[57] and confirmation must be shown by the record.[58] In a special case a telegram from a nonresident, giving the title of the case and objecting to the sale on specified grounds, may authorize the filing of subsequent formal exceptions.[59] In the exercise of its discretion, the court may refuse to confirm a sale where equitable circumstances exist and the price is inadequate.[60]

Rights and liabilities of purchasers or bidders.[61]—A rule to show cause may issue if the sheriff and adjudicatees neglect to consummate the sale;[62] and where a sale has been duly confirmed by the court and an order made directing the sheriff to execute a deed to the purchaser, but the sheriff fails to do so until his office expires, the purchaser is entitled to an order of court requiring the sheriff's successor to execute the deed.[63] The court cannot refuse to grant such order because objections are interposed which should have been raised in the partition proceedings.[64]

49. Where by reason of defendant's failure to make good her bid, a second sale was necessitated, the terms this time being $1,000 cash and defendant again bid for the property but failed to deposit the cash, she could not complain because the master again offered the premises for sale. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106.

50. Where the judgment ordered the land to be divided into forty-acre lots "or less, if deemed proper by interested parties," and the attorneys of plaintiffs and defendants agreed that the lots should be less than forty acres, and sale was accordingly made, no one objecting, purchasers and parties could not thereafter successfully contend that the sale was void because some lots were less than forty acres in area. Decuir v. Decuir, 117 La. 249, 41 So. 563.

51. A tenant in common who planted crops after a decree of sale and a few days before sale could not complain because one-half of the crops were sold when the other half which could also have been sold was reserved for her. Vaughn v. Newman, 221 Ill. 576, 77 N. E. 1106.

52. Rule that trustee may not purchase trust property held applicable. Cresse v. Loper [N. J. Eq.] 65 A. 1001.

53. Where confirmation decree recited that the value of certain personal property should be deducted from the purchase price of the land in a certain contingency. Ex parte Pittinger, 142 N. C. 85, 54 S. E. 845.

54, 55, 56. See 6 C. L. 907.

57. Sheriff's deed given before report and confirmation held to confer no title, Gen. St. 1865, c. 152, being in force at the time. Clark v. Sires, 193 Mo. 502, 92 S. W. 224. Where in proceedings for partition of a decedent's estate the administrator sold the land by order of court and, on his reporting the sale, the court ordered that he distribute the proceeds, held the sale was confirmed giving purchaser title under the administrator's deed. Rye v. Guffey Petroleum Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 739, 95 S. W. 622.

58. Record showing that sheriff filed report and that cause was settled did not show confirmation. Clark v. Sires, 193 Mo. 502, 92 S. W. 224.

59. Where immediately upon learning of the sale defendants, who were nonresidents and who had not been represented by resident counsel, sent a telegram to the clerk of court signed by counsel, giving the title of the case and objecting to the sale on the ground of inadequacy of price. Compton v. McCaffree, 220 Ill. 137, 77 N. E. 129.

60. Where it was shown that the land sold would bring $2,225 more than it was sold for, and defendants who were nonresidents were misled by not learning of the terms and date of the sale, and the purchasers did not deposit the bid on the day of the sale, and two of complainants were minors, it was no abuse of discretion to refuse to confirm the sale and set it aside and order a resale. Compton v. McCaffree, 220 Ill. 137, 77 N. E. 129.

61. See 6 C. L. 909.

62. Failure to deliver deed and pay price. Decuir v. Decuir, 117 La. 249, 41 So. 563. Where one plaintiff in partition proceeded by rule and the adjudicatee of one of the lots joined in the prayer, but in the other partition plaintiffs and adjudicatees contested the rule, an issue was joined and the case could not be considered as though plaintiff in rule and the acquiescing adjudicatee were the only parties. Id.

63. Gallitzin Bldg. & Loan Ass'n v. Steigers, 28 Pa. Super. Ct. 336.

64. Could not refuse order until deter-

A bill for partition, decree, report of sale, decree of confirmation, and process issued in the cause, show a title in the purchaser at such sale which cannot be collaterally attacked.[65] A purchaser may be relieved of his bid if the title is unmarketable,[66] but the burden is upon him to show that fact.[67] A sale may be made with the understanding that upon the happening of a certain contingency the purchase price shall be reduced.[68] A purchaser cannot be required to pay rent pending confirmation of the sale, he not being entitled to possession.[69] On partition between heirs, he does not acquire the right to water rents accrued prior to the death of the ancestor.[70] A cause of action for a continuing injury to the property passes to him.[71]

Land sold at a void sale.[72]—Minor heirs who by guardian join in procuring a sale of a homestead in partition will be estopped to deny the equitable title of the purchaser while retaining the benefits of the sale, though the court may have been without jurisdiction.[73]

§ 8. *Appeal and review; vacation of sale.*[74]—An appeal from a partition decree must be taken to a court having jurisdiction when a freehold is involved,[75] unless the errors assigned do not involve the freehold.[76] It is immaterial on appeal whether or not the interests of certain parties are properly defined in the decree where they do not appeal and where appellant is in no way affected by their interests.[77] After a sale has been set aside and a resale of the premises decreed and an appeal allowed, an offer on the part of appellant to pay to certain minors the difference between the rejected bid and the offer of the objectors in order to eliminate the question of the minor's interest in a resale comes too late if ever such offer could be of any force.[78] A decree in partition is entire in its nature and cannot

mination of title in pending ejectment. Gallitzin Bldg. & Loan Ass'n v. Steigers, 28 Pa. Super. Ct. 336.

65. Subsequent partition not warranted. Sweatman v. Dean, 86 Miss. 641, 38 So. 231.

66. Purchaser not relieved because it did not appear from the records that all the heirs of a deceased owner were included in title deeds forty years ago, there being no evidence that there are any persons in being who might assert title. Wanser v. De Nyse, 102 N. Y. S. 36. After a mortgage debt on land has been due for over twenty years, the presumption of payment is conclusive in the absence of proof of payment within the period, and such presumption may be invoked in a motion by a purchaser at partition sale to be relieved from her purchase because the title is not marketable. Ouvrier v. Mahon, 102 N. Y. S. 981. Title held unmarketable by reason of defective service as to two incompetents so as to relieve purchaser of bid. Sonn v. Kennedy, 51 Misc. 234, 100 N. Y. S. 885.

67. Evidence held not to show existence of any heirs who could make claim of any interest in land sold. Sonn v. Kennedy, 51 Misc. 234, 100 N. Y. S. 885.

68. In partition between H. and P., the land was sold to H. with the understanding that, if certain personalty thereon should be sold by a third person to pay his debts, its price should be deducted from the purchase price. H. was indorser on the third person's notes and the personalty was sold. Held, since H. on paying the notes was entitled to be subrogated to the rights of the creditors of the third person, H. was not required to pay the notes before she could have the value of the personalty credited on the purchase price of the land. Ex parte Pettinger, 142 N. C. 85, 54 S. E. 845. P. was responsible for only one-half of the actual cash value of the personalty at the date it was sold. Id.

69. A purchaser at a sale in partition is not entitled, under Rev. St. § 6600, to possession until the sale has been confirmed, and where the purchase is of a part of the title only, and confirmation is delayed, the purchaser cannot be compelled to pay rent to the holders of the remainder of the title during the intervening period. Schwartz v. Williamson, 8 Ohio C. C. (N. S.) 532.

70. Legal representatives only could maintain suit against tenant. Lyons v. Dorf, 49 Misc. 652, 98 N. Y. S. 843.

71. Where remaindermen could have enjoined the maintenance of an elevated railroad in front of land afterward sold in partition, the purchaser acquired all their rights. Muller v. Manhattan R. Co., 102 N. Y. S. 454.

72. See 6 C. L. 909.

73. Murphy v. Sisters of the Incarnate Nord [Tex. Civ. App.] 16 Tex. Ct. Rep. 821, 97 S. W. 135.

74. See 6 C. L. 909.

75. Partition proceedings necessarily involves freehold. Steele v. Steele, 123 Ill. App. 176.

76. Appeal dismissed. Steele v. Steele, 123 Ill. App. 176.

77. Dwight v. Lawrence, 111 App. Div. 616, 98 N. Y. S. 76.

78. Compton v. McCaffree, 220 Ill. 137, 77 N. E. 129.

be reversed as to only some of the defendants.[79] The judgment will be affirmed when the evidence is too vague and uncertain to enable the court to render an intelligent judgment on the respective demands of the parties.[80]

Laches.[81]

Vacation of sale.[82]—On motion to set aside the confirmation, it is sufficient to allege the existence of irregularities which would have been sufficient to avoid the sale had they been considered at the time of confirmation.[83] The motion is not waived by later filing a motion to set aside interlocutory orders, but both motions may be considered at the same time.[84]

§ 9. *Voluntary partition.*[85]—Joint owners may make a voluntary division of land,[86] and such division may be established by any competent evidence.[87] A court of equity will not interfere with a testamentary power of executors to make partition of an estate in the absence of abuse or unreasonable delay on the part of the executors,[88] and the mere fear that designing persons might seek to establish false claims against the property will not authorize such interference.[89] Where land is divided for the support of a widow and children, the proceeds of a sale thereof to be divided among the children upon the death of the widow, the children may partition the land among themselves with the widow's consent,[90] and a child who thereafter conveys the portion so assigned her will be estopped to assert any further interest in the land.[91] Where cotenants orally divide the land among themselves, each taking possession of his allotted share, they are bound in equity by the division so made without the execution of deeds.[92] Since in Texas a parol partition of a community homestead by a husband fairly made with the consent of his wife is binding on the wife,[93] a partition deed of such property signed by her is effective

79. Where court erroneously dealt with reversions and remainders. Lawson v. Bonner [Miss.] 40 So. 488.

80. In partition among heirs where court ordered a sale and subsequently nonsuited the demands of the heirs against each other and ordered distribution of proceeds. Faure v. Faure, 117 La. 204, 41 So. 494.

81. See 6 C. L. 911.

82. See 6 C. L. 910.

83. Not necessary in motion under Cobbey's St. 1903, § 1612, to allege and prove that movant was prejudiced by irregular proceeding. Godfrey v. Cunningham [Neb.] 109 N. W. 765. After the filing of a stipulation by the attorney's agreeing that an order of sale in partition and all proceedings thereunder be vacated, a confirmation of such sale without consideration of the stipulation is an irregularity within Cobbey's Ann. St. 1903, § 1612. Id.

84. Not by filing motion to set aside orders confirming referee's report and modifying same. Staats v. Wilson [Neb.] 109 N. W. 379.

85. See 6 C. L. 911.

86. In suit to recover land, evidence held to show an amicable division of certain lands by which the entire interest in the land in suit passed to defendant's grantor, and knowledge thereof by plaintiff's grantor. Blackburn v. Hall [Ky.] 97 S. W. 399. Defendant held to have a good paper title. Id. Certain partition deeds held to include the fee to a roadbed which had reverted to the ancestor by reason of a discontinuance of the highway by act of legislature. Van Winkle v. Van Winkle, 184 N. Y. 193, 77 N. E. 33.

87. Seawell v. Young, 77 Ark. 309, 91 S. W. 544.

88. Would not decree partition only four and one-half months after decedent's death, where no request had been made upon the executors and there was no abuse of trust. Fischer v. Butz, 224 Ill. 379, 79 N. E. 659. Would not decree partition on ground that it could not be known when bill was filed, whether the personalty could pay debts and legacies, and because it could not be known whether the lands were free from liabilities if partition was made by executors, there being no emergency requiring equity to determine in advance of filing claims in probate whether there were debts outstanding. Id.

89. Pretense of woman that she was decedent's widow when there was abundent evidence that she was not. Fischer v. Butz, 224 Ill. 379, 79 N. E. 659.

90. No question of minority being involved. Gibson v. Fuller, 74 S. C. 535, 54 S. E. 778.

91. Where she conveyed her interest to plaintiff and plaintiff also took a conveyance of another portion of the land from the widow, defendant could not resist plaintiff's right to possession. Gibson v. Fuller, 74 S. C. 535, 54 S. E. 778.

92. Especially where one gave a deed. Seawell v. Young, 77 Ark. 309, 91 S. W. 544. One who purchased from the one who took a deed the share of the other with notice of the later's rights acquired no rights as against him. Id. If the grantor ever had title to the land conveyed it was annulled by the partition agreement. Id.

93, 94. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. 23.

for the purpose intended, though her name as grantor does not appear in the body of the deed.[94] Upon a voluntary partition in kind, of real estate, between heirs, each will take subject to any obvious, subsisting, and reasonably necessary easements, in the absence of a contrary intent shown,[95] and the one to whom a servient part is thus conveyed has no right to materially and permanently interfere with, or destroy, an easement, by an unwarranted change of the physical condition of his allotment.[96] Where an amicable division of a decedent's land is made between the widow and children, and thereupon each heir holds possession of the portion allotted to him, they owe no accounting to each other for fruits and revenues or for taxes and repairs.[97] A party to a contract of partition who for a long period of time recognizes the rights of all the parties thereunder may be estopped from thereafter claiming title to the portion set apart to eiher of the others.[98]

PARTNERSHIP.

§ 1. What Constitutes (1261). Partnerships as to Third Persons (1267).
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E. Accounting (1280).
F. Contribution and Indemnity (1284).
§ 8. Limited Partnerships (1284).

§ 1. *What constitutes. Definition and kinds.*[99]—A partnership may be defined as the relation existing between two or more persons who have agreed to carry on a business together and to share the profits thereof as joint owners of the business.[1] Unincorporated joint stock associations are in some respects deemed partnerships.[2]

95. Johnson v. Gould [W. Va.] 53 S. E. 798.

96. Supply of water could not be cut off or impaired. Johnson v. Gould [W. Va.] 53 S. E. 798.

97. Faure v. Faure, 117 La. 204, 41 So. 494.

98. Where parties took possession and defendant acquiesced for over thirty years, he could not claim title under a prior deed. Stover v. Stover [W. Va.] 54 S. E. 350.

99. See 6 C. L. 912.

1. Herman Kahn Co. v. Bowden & Co. [Ark.] 96 S. W. 126. Where two or more parties are engaged in a joint business enterprise, in which they contribute either capital, skill, or labor, upon an understanding, tacit or otherwise, that they will share in common the profits accruing therefrom, they are partners in fact and in law. Gaddie v. Mann, 147 F. 960. To constitute a partnership as to the partners themselves it is only necessary that each of them contribute either capital, labor, credit, or skill and care or two or more of these, and that all the contributions are put together into a common stock or common enterprise to be used for the purpose of carrying on business for the common benefit. Swonnell v. Byers, 123 Ill. App. 545. An agreement for the transaction of a lawful business, according to the terms of which there was to be a community of profit and loss between the contracting parties, each sharing in these mutually as associates in the undertaking is an agreement for the formation of a partnership. Dorough v. Harrington & Son [Ala.] 42 So. 557.

2. In the absence of statute, they possess no powers or privileges of corporations not possessed by individuals or corporations. Spotswood v. Morris [Idaho] 85 P. 1094. They cannot, however, from the very nature of their organization, be entirely controlled by the legal rules and principles that control ordinary partnerships. Id. Death of a member does not dissolve the association. Id. And one of the partners has not plenary power to sell or otherwise dispose of the association property or create indebtedness beyond that provided for in the articles of association. Id. But this limitation of the agency of the members is an incident resulting from the lack of the right of delectus personae, and not an incident of

Essential elements.[3]—The essential elements of every true partnership [4] are an agreement between the parties [5] to establish and carry on some lawful commerce or business,[6] in which they are to have a community of interest,[7] and the profits [8] and losses [9] of which they are to share, the obligation to share losses being implied in the absence of express agreement and of evidence to the contrary.[10] But while

the corporation not possessed by a partnership. Id.

3. See 6 C. L. 912.

4. **Partnerships as to third person by estoppel,** see infra, this section.

5. The parties must assume the partnership relation. Norton v. Brink [Neb.] 110 N. W. 669 overruling [Neb.] 106 N. W. 668. There must be a voluntary contract (Bond v. May [Ind. App.] 78 N. E. 260; Coons v. Coons [Va.] 56 S. E. 576), to which the consent of all parties thereto is necessary (Beasley v. Berry, 33 Mont. 477, 84 P. 791). Hence, where, by the terms of a deceased partner's will, his representative was to continue the business for a definite time, but with the consent of all the beneficiaries continued it for a year longer, the beneficiaries by such assent did not become partners. Manhattan Oil Co. v. Gill, 103 N. Y. S. 364.

6. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890. Ordinarily the profits are expected to arise from the purchase and sale of some form of property, but they may be produced by the skill and industry of the partners as in the case of professional firms or those for the organization or promotion of various enterprises. Morgart v. Smouse, 103 Md. 463, 63 A. 1070.

7. Ramsay v. Meade [Colo.] 86 P. 1018; Morgart v. Smouse, 103 Md. 463, 63 A. 1070; Estabrook v. Woods [Mass.] 78 N. E. 538; Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890; Jackson v. Haynie's Adm'r [Va.] 56 S. E. 148. To constitute persons partners, in adition to the mere sharing of profits, if any, they must have associated themselves for the purpose of carrying on the business together; that is, the business must have been partnership business, the funds for investment partnership funds, the property purchased partnership property, and the profits, if any, partnership profits. Beasley v. Berry, 33 Mont. 477, 84 P. 791. An agreement merely "that said land should be purchased in partnership" does not constitute the purchasers partners, where the land was bought by one person with his own money and the other person did nothing, contributed nothing, risked nothing and there was no consideration for the contract. Norton v. Brink [Neb.] 110 N. W. 669, overruling [Neb.] 106 N. W. 668. Lease of line by one railroad to another held not to make them partners. Moorshead v. United R. Co. [Mo.] 100 S. W. 611.

The property employed in the business may be the separate property of the partners. Brooke v. Tucker [Ala.] 43 So. 141. An instruction that one could not "be a partner without having money in the business" was clearly incorrect, for one may engage in a business as a partner and furnish his services against the money furnished by his partner or he might furnish the use of the building in which the business was carried on against the capital of his partner. If he was wealthy, the other members of the firm might agree to give him a share of the profits to induce him to enter the firm and lend the credit of his name to the firm, without requiring him to put any money in the business. Herman Kahn Co. v. Bowden & Co. [Ark.] 96 S. W. 126. Of course, one partner may contribute funds and another labor; but, when the funds are set apart for the purpose, they become partnership funds. Beasley v. Berry, 33 Mont. 477, 84 P. 791.

8. Ramsay v. Meade [Colo.] 86 P. 1018; Bond v. May [Ind. App.] 78 N. E. 260; Morgart v. Smouse, 103 Md. 463, 63 A. 1070; Norton v. Brink [Neb.] 110 N. W. 669, overruling [Neb.] 106 N. W. 668; Jackson v. Haynie's Adm'r [Va.] 56 S. E. 148. An agreement by two or more persons to buy a piece of property together does not amount to an agreement to form a partnership, where there is no agreement for a joint sale of ths property and a sharing of the profits. Harris v. Umsted [Ark.] 96 S. W. 146.

Community of profits means partnership in them as distinguished from the personal claim upon the other associate. In other words, a property right in them from the start. Breinig v. Sparrow [Ind. App.] 80 N. E. 37. For one to share in the profits as profits, within the true meaning of the cases is to stand in such relations to the business that the profits, or a share of them, are in his ownership as they accrue. He must have a proprietary interest in each dollar of profits as it is earned, so that he then has a right of possession or control of it for the purpose of retaining his share. Estabrook v. Woods [Mass.] 78 N. E. 538.

9. Norton v. Brink [Neb.] 110 N. W. 669, overruling [Neb.] 106 N. W. 668; Jackson v. Haynie's Adm'r [Va.] 56 S. E. 148.

10. Baremore v. Selover, Bates & Co. [Minn.] 110 N. W. 66. Though there is no clause in the contract saying that either party was to bear the losses, in the absence of evidence to the contrary, the law presumes that losses were to be borne by them in the same proportion in which they shared the profits. Ramsey v. Meade [Colo.] 86 P. 1018. The announcement by a participant in a joint adventure, after the business was ended, of his purpose of paying all outstanding accounts, when not accompanied by an admission of liability, did not enlarge his obligation, so as to require him to be treated as a partner. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890.

Illustrations: Where the owner of a newspaper contracted with another that the former should remain in control of the paper until the formation of a corporation and the latter advanced a sum of money to be applied on certain debts, both agreeing to work for the good of the paper and to divide the profits after devoting a certain portion to the liquidation of debts, a partnership was created. Brooke v. Tucker

the sharing of profits is some evidence that a partnership exists,[11] and while the prevailing opinion now is said to be that any contract by which the parties are entitled to share in the profits or business as owners thereof is a copartnership,

[Ala.] 43 So. 141. Where a physician contracted with the owner of a drug store to prescribe gratis for all patients who would have the prescriptions filled at the drug store, each party to take a certain monthly sum from the business, and they subsequently agreed to take out a certain monthly sum if the business justified, "all over" going to the payment of the stock, that a specific balance was due the druggist, and that in case of a rupture in the business each should receive a certain percentage of the stock, no partnership was created. Nobbs v. Stotts [Ark.] 94 S. W. 918. When M took an interest in a dry-goods stock owned by R to the extent of $5000 which was to be turned over to M as manager, the firm to be known as R & M, and M was to receive a monthly salary and in addition a proportion of the profits a partnership was created. Ramsay v. Meade [Colo.] 86 P. 1018. A contract, which provided for the buying and selling of tobacco on joint account, stipulated that the profits and losses should be equally divided, and termed the business a partnership, binding one of the parties to pay for the tobacco purchased by the other, constituted the parties partners. Bloom v. Farmers' Bank [Ky.] 97 S. W. 756. Where the firm A & B, was succeeded by the firm, A & C, and A & C gave their individual notes to a creditor of the firm of A & B, this was not a partnership transaction, although the firm of A & C, may have used a portion of the assets of the firm of A & B. Theus v. Armistead, 116 La. 795, 41 So. 95. A contract by which defendants agreed to convey by bill of sale a one-third interest in certain specified property in consideration of complainant's personal services in the conduct of a business whenever the business shall yield a fixed sum, reserving the right to defendant to sever the relation and in lieu of such conveyance pay complainant a fixed monthly salary is inconsistent with the idea of a partnership. Collier v. Dasher [Fla.] 41 So. 269. An agreement to purchase, develop and sell lands for joint acount and to share equally the profits and losses constitutes the parties co-partners quoad the undertaking covered by such agreement. Morgart v. Smouse, 103 Md. 463, 63 A. 1070. Where two partners enter into an arrangement with a third person for participation in the business with the understanding that the latter's liability is to be limited by his advances, and that the two former shall have no authority to make contracts which will bind the later, there is no partnership relation between them. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890. Where one person had an option on certain land and entered into an agreement with another that such other should purchase the land and both parties should then use their efforts to sell the same and share the profits equally, the agreement was in the nature of a partnership to purchase the lands covered by the option for the purpose of reselling them and sharing the profits. Baremore v. Selover, Bates & Co. [Minn.] 110 N. W. 66. Where one railroad company leased another for a term of years at a specific rent and the performance of certain duties in the nature of rent, the contract did not constitute the two companies partners. Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261. An agreement to join in the purchase and sale of a carload of hogs, the profits or losses of the transaction to be shared equally, is an agreement for a partnership. McNealy v. Bartlett [Mo. App.] 99 S. W. 767. Where three persons entered into an arrangement for opening an art gallery under which each was to receive $2000 per annum, to be charged as an expense, and they were to divide the profits by paying two-thirds to one and one-sixth to each of the others, they formed a partnership. Lefevre v. Silo, 112 App. Div. 464, 98 N. Y. S. 321. Where two persons contribute sums to put up a margin to buy cotton, the buying and selling on the market being in charge of the husband of one, with the agreement to share profits, the parties to the agreement are partners. Jones v. Walker, 101 N. Y. S. 22. Where, under the express language of the contract, and as a consideration of it, the plaintiff agreed to contribute to the common business, as an asset, connections in Europe which were valuable in the exporting of cotton for profit, which was the commercial enterprise undertaken; and he was to share in the net profits, the parties were partners. Price v. Middleton [S. C.] 55 S. E. 156. Where a company made no contracts for shipments, but furnished refrigerator cars to a railroad on order, sending a man to superintend the loading when the cars were delivered to the shipper, there being no joint management or joint agents, there was no partnership between the companies. American Refrigerator Transit Co. v. Chandler [Tex. Civ. App.] 15 Tex. Ct. Rep. 243, 93 S. W. 243. Where a firm was unable to procure funds for financing a contract which it had and on which it estimated $53,000 profit and procured them from a third person under an arrangement by which it was agreed that the members of the firm should give their skill and time to the work, and that when all debts were settled, and certain interest had been paid to defendant for the money furnished, the net profits, if any, should be divided according to a scale varying with their amount, the parties were partners. Kelley Island Lime & Transport Co. v. Masterson [Tex.] 15 Tex. Ct. Rep. 820, 93 S. W. 427. Receiving profits from the co-partnership, knowing the character of the company as a co-partnership, knowing that she had signed as guardian the co-partnership articles, with the express purpose of thereby, as guardian, becoming a co-partner, is quite enough to fix the liability as a partner, in the absence of a contract by which she was to have a share of the profits upon some other consideration, such as services, property, etc. In re Neasmith [C. C. A.] 147 F. 160.

11. Beasley v. Berry, 33 Mont. 477, 84 P. 791. Participation in the profits of a co-partnership is strong evidence of a part-

rather than an employment,[12] a division of the profits of a business is not alone sufficient to constiute a partnership.[13] As between the parties,[14] the essential test is whether the parties asserted to be in partnership intended to establish that relation,[15] which is determined by ascertaining whether each has a share or interest in the profits as profits, or whether the interest of one is merely as a measure of his compensation for something that he does or furnishes.[16] A person who receives a share of the net profits of a business or compensation for services[17] or in lieu of rent for the use of property, real or personal,[18] is not thereby made a partner. Another characteristic feature of a partnership is that the parties are usually principals of and agents for each other,[19] but a valid contract of partnership may be made stipulating that one of the partners shall have the management of the business to the exclusion of all the others.[20] In the case of mining partnerships, the principle of delectus personæ does not apply.[21]

Intent as test.[22]—As between the parties,[23] partnership is a matter of intention to be proved by their express agreement or inferred from their acts and conduct.[24] The intention which controls, however, is the legal intention,[25] and if the parties intend to and do enter into such a contract as in the eye of the law consti-

nership, and that it is sufficient, as to third persons, unless explained by circumstances showing a different relation, is well settled. In re Neasmith [C. C. A.] 147 F. 160.

12. Lefevre v. Silo, 112 App. Div. 464, 98 N. Y. S. 321.

13. Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261; Beasley v. Berry, 33 Mont. 477, 84 P. 791; Price v. Middleton [S. C.] 55 S. E. 156; Jackson v. Haynie's Adm'r [Va.] 56 S. E. 148.

14. Partnership as to third persons, see infra, this section.

15. Intent as test, see infra, this section.

16. Estabrook v. Woods [Mass.] 78 N. E. 538.

17. Bond v. May [Ind. App.] 78 N. E. 260; Beasley v. Berry, 33 Mont. 477, 84 P. 791; Price v. Middleton [S. C.] 55 S. E. 156. A contract providing that a person should receive for his services a percentage of the net profits from which should be deducted at the end of the year a monthly advance of $40 and that the traveling expenses should be paid does not create a partnership. Van Duzer v. Zimmerman Lumber Co. [Miss.] 43 So. 177. An arrangement by which B employed M to buy and handle sheep, to rent ranches to winter them, to buy feed for them, and generally to have charge of the business under B's directions for a fixed monthly compensation and a share of the profits, if any, does not constitute them partners. Beasley v. Berry, 33 Mont. 477, 84 P. 791. A miller employed by the owner to take charge of a mill for a third of the profits is not a partner of the owner. Jackson v. Haynie's Adm'r [Va.] 56 S. E. 148. One is not a partner who is employed by a corporation as manager at $4 per day and half the net profits. Belch v. Big Store Co. [Wash.] 89 P. 174.

18. Bond v. May [Ind. App.] 78 N. E. 260. Where a person loaned money to a partnership to enable it to purchase certain coal lands on which it had an option under an agreement that the purchase-money should be repaid with a share of the profits if the lands were sold within a year and that if not so sold he should have title to the land, the transaction was a loan and not a partnership. Duncan Coal Co. v. Duncan & Co., 29 Ky. L. R. 1249, 97 S. W. 43. Where W was to furnish B capital to establish and carry on a risky investment and was to receive as compensation, not only a fixed percentage, but also, for a certain period, half of the net profits after allowing so much per week for B's time, and for a certain longer period one-quarter of the profits, and was also to have security by mortgage for his entire investment, the parties were not partners. Estabrook v. Woods [Mass.] 78 N. E. 538. An arrangement by which one person advanced money and indorsed paper to enable another to purchase lumber, the latter, in adition to repaying the money and satisfying the notes, agreeing to pay the former one-third of the net profits, did not constitute the two partners, the former taking no part in the management of the business. Wisotzkey v. Niagara Fire Ins. Co., 112 App. Div. 599, 98 N. Y. S. 760.

19. Mattern v. Canavan [Cal. App.] 86 P. 618; Eastbrook v. Woods [Mass.] 78 N. E. 538; Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890; Norton v. Brink [Neb.] 110 N. W. 669, overruling [Neb.] 106 N. W. 668; Price v. Middleton [S. C.] 55 S. E. 156.

20. Brotherton v. Gilchrist, 144 Mich. 13 Det. Leg. N. 150, 107 N. W. 890; Price v. Middleton [S. C.] 55 S. E. 156.

21. Neither the death nor bankruptcy of a partner, nor the sale of his interest, dissolves it. Spotswood v. Morris [Idaho] 85 P. 1094.

22. See 6 C. L. 914.

23. Partnership as to third persons, see infra, this section.

24. Brooke v. Tucker [Ala.] 43 So. 141; Breinig v. Sparrow [Ind. App.] 80 N. E. 37; Morgart v. Smouse, 103 Md. 463, 63 A. 1070; Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890; Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261; Bimberg v. Wagenhals, 102 N. Y. S. 925; Price v. Middleton [S. C.] 55 S. E. 156.

25. Breinig v. Sparrow [Ind. App.] 80 N. E. 37.

tutes a partnership they thereby become partners, whether they are designated as such or not,[26] and even though their purpose was to avoid the creation of such relation and they have carried their purpose to the extent of expressly stipulating that they are not to be partners.[27]

Who may become partners.[28]—A corporation has no power to enter into a contract of partnership unless the power is expressly conferred,[29] but this rule does not prevent the law from imposing upon the corporation the liability of a partner to third persons by reason of a contract made by it in furtherance of the object of its creation.[30]

Formalities of contract of partnership.[31]—The statute of frauds does not require partnership agreements to be in writing where they are to be performed within one year[32] or where they run for an indefinite time,[33] and even where an oral agreement for a partnership is not to be performed within the year, the statute will not apply after part performance by the parties.[34] Although there are divisions to the contrary,[35] the weight of authority is to the effect that the provision of the statute requiring contracts for an interest in real property to be in writing does not apply to contracts to form a partnership to deal in real estate.[36] But whatever may be the rule, where a partnership is found to deal in lands and lands are bought with partnership funds in pursuance of such agreement, a parol agreement by a buyer to admit another into partnership with him is void under the statute of frauds.[37]

Stockholders in illegal or defective corporations.[38]—Although there is some conflict of authority,[39] it is generally held that parties who assume a corporate name and pretend to be a corporation which has no de facto or de jure existence[40] are

26. Morgart v. Smouse, 103 Md. 463, 63 A. 1070; Price v. Middleton [S. C.] 55 S. E. 156. A fortiori, where the instrument, which is complete in every respect, in express terms creates a partnership and no fraud or mistake is charged in the procurement of the contract, the only mistake being as to the legal effect of the instrument, the court is bound to declare the legal effect of the writing. Monson v. Ray [Mo. App.] 99 S. W. 475.

27. Breinig v. Sparrow [Ind. App.] 80 N. E. 37. If two persons connected in business have such rights and interests as to make them in fact partners, no contract modifying or limiting the liability of either partner, or increasing the liability of the other as between themselves, would have any effect upon the rights of third persons to hold both upon proper contracts made by either in the partnership business. Estabrook v. Woods [Mass.] 78 N. E. 538.

28. See 6 C. L. 915.

29. Breinig v. Sparrow [Ind. App.] 80 N. E. 37. Without considering the question whether or not a corporation can enter into a co-partnership with individuals for the operation of a business other than that named in its charter, a partnership could not be constituted by an act of the president without authority and without the knowledge of the board of directors. Dixie Cotton Oil Co. v. Morris [Ark.] 94 S. W. 933.

30. Breinig v. Sparrow [Ind. App.] 80 N. E. 37.

31. See 6 C. L. 915.

32. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824, citing 3 C. L. 1527; McNealy v. Bartlett [Mo. App.] 99 S. W. 767.

33. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824, citing 3 C. L. 1527.

34. McNealy v. Bartlett [Mo. App.] 99 S. W. 767. Where parties have orally agreed to become partners and share equally in the profits and in pursuance of such agreement have conducted their business in a firm name it is immaterial that the agreement was not in writing and that no term was fixed. Fruin v. Chotzianoff [Conn.] 63 A. 782, distinguishing Morris v. Peckham, 51 Conn. 128.

35. See 6 C. L. 915.

36. Morgart v. Smouse, 103 Md. 463, 63 A. 1070. A partnership may be formed by parol to deal in real estate and to improve and sell for joint profit a particular piece of land. Stitt v. Rat Portage Lumber Co., 98 Minn 52, 107 N. W. 824.

37. Norton v. Brink [Neb.] 110 N. W. 669, overruling [Neb.] 106 N. W. 668.

38. See 6 C. L. 916.

39. That certain persons allowed their names to appear on the letter heads used by another as officers of a corporation which did not exist and that the name of the pseudo corporation appeared upon the door of the office occupied by said persons and upon motors stored in a warehouse used by all and that one of the persons had guaranteed in writing certain contracts made by the person using the letter heads does not raise an estoppel to deny the existence of a partnership as against creditors. The letter head implied not a co-partnership, but an incorporated company and the other matters fall far short of raising any presumption of the existence of partnership relations. Churchill v. Thompson Elec. Co., 119 Ill. App. 430.

40. Rev. St. 1899, § 1314, provides that when the secretary of state issues his certificate no one can question the corporate

liable as partners.[41] The same is true of officers and stockholders of a foreign corporation, who knowingly and actively participate in the business, conducted in violation of, or without first complying with, the law of the forum.[42]

Evidence.[43]—It is the universal rule that where the question of partnership arises in a contest between partners and the interest of no third persons are involved, much stronger proof is required to establish it than when the question arises between the alleged partners and third persons.[44] The articles of copartnership are, of course, admissible on the issue of partnership,[45] which may, however, be proved by circumstantial as well as direct testimony.[46] Declarations or admissions of a partner are admissible to prove partnership against him[47] but are incompetent to prove that others were partners.[48] The authorities are in conflict on the question whether general reputation is admissible.[49] It is permissible to show an alteration of the firm name by parol evidence.[50]

character except the state in a direct proceeding. Hence, where such certificate has been issued the incorporators are not rendered liable as partners by reason of the failure of some of them to acknowledge the articles, as required by § 1313, or to pay for the amount of stock named in the articles, even though the certificate of the secretary of state has been procured by fraud. First Nat. Bank v. Rockefeller, 195 Mo. 16, 93 S. W. 761. And the same is true where the articles of incorporation falsely state the amount subscribed and paid when there was an agreement that certain stockholders should not be required to pay and the secretary of state issues his certificate without knowledge of the falsity of the statements. Webb v. Rockefeller, 195 Mo. 67, 93 S. W. 772. But where the thing omitted was the filing of the papers with the secretary of state, who alone could issue a certificate constituting the persons a de facto corporation, they were held liable as partners. Sexton v. Snyder, 119 Mo. App. 668, 94 S. W. 562.

41. In re Hudson Clothing Co., 148 F. 305.

42. Where defendants were stockholders in a foriegn corporation, which by its charter had in authority to practice dentistry and to which the pratice of dentistry was positively forbidden by Pennsylvania law, and were actively and knowingly engaged in such practice, they were liable to plaintiff as partners for injuries received at their hands, plaintiff supposing that she was in the hands of licensed dentists. Mandeville v. Courtright [C. C. A.] 142 F. 97. Where officers and members of a mercantile corporation, created by the law of another state with a capacity to exist and do business only in certain named counties in that state, attempt to establish the corporation under another name in the state of Louisiana, the effect, so far at least as third persons are concerned, is the establishment of a mercantile partnership, composed of the parties to such attempt, and where it appears that such partnership, in its own name, has acquired property and contracted debts, such property will be devoted to the payment, by preference, to the debts so contracted. Campbell v. Campbell Co., 117 La. 402, 41 So. 696. But the directors and stockholders of a foreign corporation doing business in Pennsylvania without first complying with the provisions of the statute relative to granting permission to foreign corporations to do business within the state are not liable as co-partners for debts contracted within the state, in the absence of any showing that the said directors or stockholders were actually copartners or by their conduct held themselves out to be copartners doing business within the state. Bond v. Stoughton, 26 Pa. Super. Ct. 483.

43. See 6 C. L. 916.

44. Norton v. Brink [Neb.] 106 N. W. 668, overruled on another point in [Neb.] 110 N. W. 669.

45. Dorough v. Harrington & Son [Ala.] 42 So. 557.

46. In re Hudson Clothing Co., 148 F. 305. Where the issue was whether a partnership had existed between defendant and another in December of a certain year, plaintiff having the affirmative of the issue, drafts drawn on the firm during the year, the latest one being dated November 15th of such year, and which drafts were paid, were properly admitted on behalf of plaintiff. Lellman v. Mills [Wyo.] 87 P. 985. On trial against a partnership for goods sold and delivered upon the order of one of the firm, the letters of one of the firm received in the ordinary course of business as well as letters from the firm are admissible to show such partner's connection with the business, that he had charge of its financial concerns, and to prove agency. Barth v. Paul, 50 Misc. 600, 99 N. Y. S. 425.

47. Herman Kahn Co. v. Bowden [Ark.] 96 S. W. 126; Franklin v. Hoadley, 101 N. Y. S. 374. But a reference by a participant in a joint adventure to himself as a silent partner is not conclusive as to the existence of a partnership relation. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890.

48. Franklin v. Hoadley, 101 N. Y. S. 374.

49. The trial court erred in admitting evidence of "general reputation" or "common report" of the existence of a partnership between the defendants. Bell v. Daugherty [Ky.] 99 S. W. 922. On the issue whether one is an ostensible member of a partnership, testimony that by general repute he was a member is admissible. Grey v. Callan [Iowa] 110 N. W. 909.

50. Dorough v. Harrington [Ala.] 42 So. 557. As confirming the fact of such alteration, and of the employment in the transaction of the business of the name alleged in the complaint, certain checks of the firm, drawn in the altered name, were of-

Questions of fact.[51]—Whether a partnership existed or not is a question of fact to be determined on all the proof.[52]

Partnerships as to third persons.[53]—As between the parties and third persons, a partnership may exist without an agreement to that effect between the partners [54] if they have so held themselves out and dealt with the public as to estop the members to deny its existence.[55] This estoppel exists not only as to those whom the

fered and admitted in evidence. They were admissible for the purpose indicated, and no error was committed in overruling the objection thereto. Id.

51. See 6 C. L. 917.

52. Headley v. Rice, 29 Ky. L. R. 1102, 96 S. W. 903. Whether or not an alleged partner was a member of the firm against which an involuntary petition has been filed is not of itself a proper question to be submitted to a jury under § 19a of the Bankrupt act of 1898, although it may properly be submitted as part of the larger question whether or not such person was insolvent, where the answer depends upon the question of membership and formal application for a jury has been made. In re Neasmith [C. C. A.] 147 F. 160.

Evidence held sufficient to show relation: Evidence that W in the presence of H had ordered lumber, which was paid for; that W and H subsequently were refused credit for other lumber, and that thereupon H and F appeared and H introduced F "as the moneyed man of the concern" is sufficient to fix a partnership liability on H and F. Fay v. Walsh, 190 Mass. 374, 77 N. E. 44. Where in an action for negligence it appeared that the team which caused the injury was marked "Anthony, Swift & Co." as were bills rendered by the driver's employer, the premises occupied by them, and horse blankets on other teams, this was sufficient, coupled with the fact that defendants were of the name A & S, to sustain a finding that they were partners against evidence that this was a corporation, no charter or books or providings for the incorporation being produced. Norris v. Anthony [Mass.] 79 N. E. 258. Evidence that after defendant bought a tract of land he talked over the subject of a partnership with complainant who subsequently moved on the land and began improving it at joint expense and that a lease was subsequently made in their joint names and that they filed a bill in which they alleged that they were partners sufficiently shows the existence of a partnership. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

Evidence held insufficient to show a partnership in a case where real property had stood in the name of an alleged partner for many years and subsequently for about ten years in the name of his wife without any claim being asserted by plaintiff. Budlong v. Budlong [Wash.] 86 P. 559. Where the firm of Burgess & Son advertised that it had opened a branch establishment with C. H. Dixon as manager and a delivery bond executed upon releasing a stallion from attachment recited that it was given by Robert Burgess and C. H. Dixon doing business as Burgess & Dixon, this evidence was insufficient to show a partnership consisting of Burgess & Son and Dixon. Daugherty v. Burgess, 118 Mo. App. 557, 94 S. W. 594. Evidence that holders of a second mortgage stationed representatives on the premises, advised with the builder and his architect, repeatedly complained of defects in the building, insisted that it be built according to specifications, and, after the builder's disappearance paid certain labor claims is insufficient to establish a partnership between the mortgagees and builder. Pennsylvania Steel Co. v. Title Guaranty & Trust Co., 50 Misc. 51, 100 N. Y. S. 299. The mere fact that judgment obtained against two persons jointly was a deficiency judgment on the foreclosure of premises formerly owned by a firm composed of such persons is not enough to show that the obligation was a partnership one. New York Institution v. Crockett, 102 N. Y. S. 412. The facts showing this an individual and not a partnership obligation were these. Defendant, Harding, and Burke and two other parties were partners engaged in developing mines. As between the partners one-fourth of the expense so incurred was to be borne by Harding and Burke, and one-fourth by Doyle. To pay the one-fourth against Harding and Burke, Doyle had borrowed money by giving his note, and with the money so obtained had paid off such indebtedness against Harding and Burke. Hansen loaned Doyle, Burke, and Harding the amount named in the contract sued on to repay Doyle the amount so paid out by him, giving a check payable to Doyle for the amount named in the contract, of which check Doyle availed himself. In consideration of the giving of this check the contract sued on was made. Doyle v. Nesting [Colo.] 88 P. 862.

53. See 6 C. L. 918.

54. Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890; Coons v. Coons [Va.] 56 S. E. 576. See, also, Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261.

55. Price v. Middleton [S. C.] 55 S. E. 156; Coons v. Coons [Va.] 56 S. E. 576. The doctrine of estoppel operates against one who knowingly suffers himself to be represented as a partner in a particular firm, and renders him liable to one who is thereby induced to give credit to the firm. Breinig v. Sparrow [Ind. App.] 80 N. E. 37. Defendant did not render himself liable as a partner under the following circumstances. He was an undertaker, who at all times had some carriages in the hands of T & H, carriage repairers, whose shop he visited daily giving instructions as to the work on his own property. He loaned T & H money and reimbursed himself by collecting some of their accounts and was consulted as to extending credit to purchasers of certain tires for which he had loaned money. T & H having been closed by seizure, hs opened a shop taking his own work and subsequently completing the work which T & H had had on hand and some of T & H's property having been removed to his new shop without his knowledge. Buford Bros. v. Sontheimer, 116

representation was directly made,[56] but as to all others[57] who with knowledge[58] of such holding out and in reliance thereon[59] extended credit, provided they exercised due diligence in ascertaining the facts.[60]

§ 2. *Firm name, trade mark, and good will.*[61]—The firm name need not contain the full names of the parties.[62] It may be sold with the good will of a business and its use by a subsequent partnership enjoined at the suit of the purchaser.[63] So too the articles of partnership or of dissolution may provide that the firm name may be employed by one partner to the exclusion of the other,[64] but the right of a man to use his own name in connection with his own business is so fundamental that an intention to entirely divest himself of such right and transfer it to another will not readily be presumed, but must be clearly shown.[65] In the same way when the partnership business and good will are sold, the sellers may agree not to re-engage in the same business in the same city,[66] and the articles of partnrship or agreement for dissolution may provide that a retiring partner shall

La. 500, 40 So. 851. Mere belief by the creditor not based on any acts of holding out within the knowledge of the person to be charged is not sufficient. Manlove v. Metzger, 124 Ill. App. 383.

56. Herman Kahn Co. v. Bowden [Ark.] 96 S. W. 126.

57. Herman Kahn & Co. v. Bowden [Ark.] 96 S. W. 126; Brotherton v. Gilchrist, 144 Mich. 274, 13 Det. Leg. N. 150, 107 N. W. 890.

58. The mere fact that a person held himself out as a partner would not estop him from showing that he was not in fact a partner, except as to those who knew of such holding out. Herman Kahn Co. v. Bowden [Ark.] 96 S. W. 126.

59. There can be no basis for the estoppel where the party seeking to raise it knew the truth from the beginning, and therefore, although the creditor knew that a certain person was represented as partner of the concern, no estoppel arises if the creditor knew that the person was not in fact a partner. Breinig v. Sparrow [Ind. App.] 80 N. E. 37. But knowledge by the creditor that the real partners have agreed to indemnify the party lending his name to be held out as a member of the partnership does not prevent an estoppel against him; for by thus holding himself out as a partner he becomes primarily liable to the creditor and must seek his indemnity from those who promise it. Breinig v. Sparrow [Ind. App.] 80 N. E. 37.

When one is actually a partner, he is liable as such to creditors without respect to whether the credit was extended on the faith of his liability. Price v. Middleton [S. C.] 55 S. E. 156.

60. Herman Kahn Co. v. Bowden [Ark.] 96 S. W. 126.

61. See 6 C. L. 919.

62. **A firm name, showing the surnames only of the parties** is not "a fictitious name," or "a designation not showing the names of the parties," within Rev. Codes 1899, §§ 4410, 4412, requiring every firm doing business under such name or designation to file and publish a certificate showing the full names and residences of the members. Walker v. Stimmel [N. D.] 107 N. W. 1081.

Use of corporate name: A lease in which one of the parties is described as "Jay, Morris & Co., incorporated," but which is signed by each of the persons forming the copartnership of "Jay, Morris & Co.," no one being misled by the addition of the word "Incorporated," is valid. Julicher v. Connelly, 102 N. Y. S. 620.

63. Acker, Merrall & Condit Co. v. McGaw, 144 F. 864. But selling the firm name "George K. McGaw & Co." does not prevent the vendor from having his name appear as a member of the firm "Hopper, McGaw & Co." Id.

64. Where plaintiff based his rights to an injunction on the dissolution agreement, a separate defense alleging that the agreement was signed by defendant's attorney in fact, contrary to defendant's instructions, and was subsequently repudiated by defendant, was not demurrable; but a defense allegeing that the attorney in fact was induced by plaintiff to sign the agreement by means of a sum of money paid to him by plaintiff was immaterial and demurrable. Bastable v. Carroll, 101 N. Y. S. 637. Nor can defendant successfully defend or counterclaim on the ground that plaintiff directed the postmaster to deliver all mail directed to the firm to himself, and that plaintiff had thereby obtained large quantities of mail belonging to defendant. Id.

65. Blanchard Co. v. Simon, 104 Va. 209, 51 S. E. 222. Where the articles of partnership and subsequent dissolution agreement contained no reference to the good will of the business, such reference having been stricken from the articles on defendant's request, and one partner, H. K., after taking a new partner, continued business under the old name H. K. & Co., while the other continued under his own name as successor to H. K. & Co., the latter had no standing to enjoin the use of such firm name by the former, who was clearly entitled to use it. Lepow v. Kottler, 100 N. Y. S. 779. The sale by Simon of his interest in the business carried on as the Simon Auction Company to his partner did not entitle the latter to an injunction restraining Simon from again entering into business under the same name. Blanchard Co. v. Simon, 104 Va. 209, 51 S. E. 222.

66. Such a contract is assignable. Bradford v. Montgomery Furniture Co., 115 Tenn. 610, 92 S. W. 1104. Upon breach of such a contract the buyer's measure of damages is the actual damages which they are able to show naturally and proximately resulted

not compete with the continuing partner,[67] but the mere transfer by one member of a copartnership to his copartners of his interest in the good will of the business does not preclude him from entering into a similar business in the same town and prosecuting it in competition with the old firm of which he had been a member.[68]

§ 3. *Firm capital and property. In general.*[69]—Ordinarily property contributed to the partnership[70] or acquired with partnership funds or assets[71] is partnership property even though title is taken in the name of one partner alone,[72] but property employed in the partnership operations is not necessarily partnership property;[73] and property acquired with partnership assets may or may not become partnership property according to the intention of the parties.[74] A partnership may lawfully transfer all its property free from all liability for the partnership debt.[75]

How title is held.[76]—All effects of a partnership are held in trust,[77] and all assets acquired by the firm, whether real[78] or personal[79] are acquired subject to existing incumbrances. Where land is conveyed to a firm, the partners are tenants in common.[80]

therefrom, and on failure to furnish data from which the jury can properly estimate these they will be limited to nominal damages. Id.

67. Where the partnership agreement contained a possession that upon the retirement of any partner he should not carry on the same kind of business in such a way "as to interfere with, draw any customers from," etc., the business already established, the same so indefinite that it would be enforced only by enjoining the retiring partner from soliciting new or old customers from the successors to the established business. Sanford Dairy Co. v. Sanford, 100 N. Y. S. 270.

68. White v. Trowbridge [Pa.] 64 A. 862.

69, 70. See 6 C. L. 919.

71. Payne v. Martin [Colo.] 89 P. 46.

Fees for professional services: In the absence of an express agreement to the contrary, any professional services rendered by a member of a firm of lawyers should be presumed to be for the benefit of the firm. This includes services in matters pending when the firm is organized. MacFarland v. Altschuler [Neb.] 108 N. W. 151.

72 Payne v. Martin [Colo.] 89 P. 46. When real estate is acquired in a partnership business so formed, and for partnership purposes, notwithstanding the provisions of the statute of frauds, it is partnership assets although the legal title be taken in the name of one of the partners. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

73. Wilson v. Wilson, 74 S. C. 30, 54 S. E. 227. The fact that a life insurance policy payable to the estate of the insured was pledged by the partnership of which he was a member does not afford a scintilla of legal evidence that the title to the policy or the proceeds thereof was in the partnership. The legal presumption is that title is in the insured. In re Mertens [C. C. A.] 144 F. 818.

74. The intention is manifested by all the surrounding circumstances, and the use to be made of it, whether for partnership or individual purposes. Jenkins v. Jenkins [Ark.] 98 S. W. 685. While it is undisputed that the property was paid out of partnership funds, appellee testifies that he immediately caused the amount to be charged to himself on the books of the firm, and that appellant recognized it as a purchase for individual use by his agreement to pay rent. Under the circumstances, the amount of the purchase price being charged to appellee on the books of the firm at the time of the purchase, a presumption even does not arise that the purchase was for partnership uses. Id.

75. Sale to a corporation. Culberson v. Alabama Const. Co. [Ga.] 56 S. E. 765. One who loans a partnership money which is invested in property which the partnership afterwards sells and transfers to others, cannot pursue the property for such debt, unless he has retained some lien thereon recognized by the laws of the state. Bank of Commerce v. Ada County Abstract Co., 11 Idaho, 756, 85 P. 919.

76. See 6 C. L. 921.

77. Where the legal title is in one partner he holds it in trust for the uses of the firm, its creditors, and his copartner. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

78. When prior to the formation of a partnership for improving a tract of land, which was then owned by one of the parties, such party had acquired a residence in the state, his wife had an inchoate right of dower as against the husband's partner. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

79. Personal property encumbered with a mortgage, which becomes a part of the assets of a partnership formed after the execution and record of the mortgage, remains subject to seizure and sale as the property of the mortgagor, notwithstanding the formation of the partnership, unless the mortgagee induced its acquisition by a statement that it is unencumbered. Booker v. Bass [Ga.] 56 S. E. 283.

80. Anderson v. Goodwin, 125 Ga. 563, 54 S. E. 679; Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

Each partner has freehold interest: While it is true that for certain purposes partnership realty is treated, by a doctrine of equitable conversion, as personalty in the settlement of the affairs of the partnership,

Partner's interest.[81]—A partner's interest in firm property is only his proportion in the surplus after the payment of partnership debts, and the settlement of the partnership accounts, and until that occurs, it is impossible to determine the extent of his interest.[82] This interest, however, may be seized under execution or attachment,[83] may be reached by injunction at the suit of a creditor,[84] or may be mortgaged by the partner.[85]

§ 4. *Rights and liabilities as to third persons. A. Power of partner to bind firm. In general; contracts.*[86]—As a general rule[87] each member of a firm is its general agent in relation to all the business of the firm[88] and can bind the firm by what he does in transacting such business[89] or in any transaction within its apparent scope.[90] Thus it has been held that a partner may bind his firm by borrowing money,[91] that his acts and declarations may be admitted in evidence where there is prima facie proof of partnership,[92] and that, in the absence of statute he has full power to sell, pledge or otherwise dispose of all personal property belonging to the partnership.[93] There are, however, statutes which require a chattel mortgage to be executed and acknowledged by each and every member of the partnership in order that it may bind the copartnership property.[94] Such a statute is not confined to chattel mortgages executed in favor of one who has actual notice or is chargeable with notice of the ownership of the property,[95] and does not permit one partner to authorize a partnership chattel mortgage to be executed in the firm name, without the signature of all the partners, nor to ratify a mortgage so exe-

yet except so far as it is impressed with a trust in favor of the other partners that it shall be first applied so far as necessary to the adjustment of partnership obligations it retains, in the absence of agreement, express or implicit, its character as realty and each member of the partnership is possessed of a freehold interest therein. Tattersal v. Nevels [Neb.] 110 N. W. 708.

81. See 6 C. L. 921.

82. Gay v. Ray [Mass.] 80 N. E. 693; Lellman v. Mills [Wyo.] 87 P. 985.

83. The right existing in the other partners and in partnership creditors would not be affected, but may be protected, if it should become necessary, by appropriate proceedings. Fleisher v Hinde [Mo. App.] 93 S. W. 1126. The conveyance by a partnership of the partnership property, in such manner that it is a conveyance to the partnership's own use, is such an act of the individual partner as will sustain an attachment against him for his individual debt. Id.

84. Under Rev. Laws, c. 159, § 3. Gay v. Ray [Mass.] 80 N. E. 693.

85. But a mortgage by one partner of his interest does not create any actual lien upon the partnership property itself, but is only a lien upon the interest of the partner as finally ascertained. Lellman v. Mills [Wyo.] 87 P. 985.

86. See 6 C. L. 921.

87. As to contract for limited agency, see supra, § 1, Essential Elements.

88. Franklin v. Hoadley, 101 N. Y. S. 374; Harris v. Zier [Wash.] 86 P. 928; Lellman v. Mills [Wyo.] 87 P. 985; Acker, Merrall & Condit Co. v. McGaw, 144 F. 864.

89. McNealy v. Bartlett [Mo. App.] 99 S. W. 767; Franklin v. Hoadley, 101 N. Y. S. 374; Union Nat. Bank v. Neill [C. C. A.] 149 F. 711. One member of a firm which is engaged in building brick buildings can bind the firm by a contract made in the firm name for the purchase of brick although they were bought for another firm. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174. But the mere fact that a member of three firms dealing with appellant gave orders indiscriminately which appellant believed were to go upon the accounts of one of the three firms does not entitle him to recover for such items against such firm if in fact the items were not bought by them or for them by one authorized to represent them in the matter, nor got or used by them. Hyslop v. Johnson [Ky.] 98 S. W. 993.

90. See 6 C. L. 921.

91. Union Nat. Bank v. Neill [C. C. A.] 149 F. 711; Lemke v. Faustman, 124 Ill. App. 624. But when the interest of one partner is bought with borrowed money, neither the firm nor the remaining copartners are liable therefor and it is immaterial that the loan has been carried on the books of the lender charged against the firm when this was done with the knowledge of the borrowing member alone. But advances made to the firm to enable it to buy property are chargeable against both the firm and its members. Dixie Cotton Oil Co. v. Morris [Ark.] 94 S. W. 933.

92. Franklin v. Hoadley, 101 N. Y. S. 374. Where plaintiff sued in ejectment for the recovery of a ditch, which defendants claimed by succession from their father, and a partnership between the father and another had been shown, in the business of which the ditch was used, evidence was admissible that the grantor of plaintiff, who was claimed by the latter to have built and maintained the ditch, had given defendant's father permission to use the same. Dondero v. O'Hara [Cal. App.] 86 P. 985.

93. Lellman v. Mills [Wyo.] 87 P. 985.

94. Rev. St. 1899, § 2808, so provides. Lellman v. Mills [Wyo.] 87 P. 985.

95. Lellman v. Mills [Wyo.] 87 P. 985.

cuted as to make it a valid lien upon firm property.[96] Even as against the other partners, an act of a partner for his own exclusive benefit may be binding on the firm, where there was nothing which ought to have put a reasonable person on his guard as to the true nature of the transaction.[97] The act of a partner, even if not within the scope of the partnership business, may be so ratified by the copartners as to bind the firm.[98]

Partnership bills and notes.[99]—Where the transaction is within the scope of the firm's business, a partner may bind his firm by making and endorsing bills of exchange and promissory notes in the name of the firm,[1] even when the partner exercising such power uses his trust for his own pecuniary advantage and to the injury of his firm, unless the other party to the contract is chargeable with notice of the facts.[2] In the case of a trading partnership, either partner has power and authority to execute notes even for the purpose of borrowing money,[3] and even in the case of a nontrading partnership it has been held that either partner would have the right to execute a note for supplies necessary for furtherance of the partnership objects.[4] Ratification is equivalent to previous authorization.[5] On a note signed by the firm name and by both partners individually each partner is individually liable as well as the firm.[6]

Notice to one as notice to all.[7]—Notice in partnership matters to one partner is notice to all.[8]

96. Thomas v. Schmitz [Wyo.] 87 P. 996.

97. Union Nat. Bank v. Neill [C. C. A.] 149 F. 711. Where a partner receives money and wrongfully withholds it from the owner, the firm is not liable therefor unless it received the money or had the right to receive it, or unless the individual member received it while acting for or as a member of the firm. Fox v. Clemmons [Ky.] 99 S. W. 641. One partner cannot, without the assent of his copartner, bind the firm by an arrangement with a firm debtor, who has purchased the partner's individual notes, that the debt due the firm shall be applied on such notes. Deunnett v. Gibson, 78 Vt. 439, 63 A. 141.

98. Lee v. Kirby [Ark.] 97 S. W. 298. Ratification of contract of purchase by failure to repudiate contract before delivery. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174.

99. See 6 C. L. 923.

1. Union Nat. Bank v. Neill [C. C. A.] 149 F. 711; Lemke v. Faustmann, 124 Ill. App. 624. Where the statement of an employee's claim was made before the death of one of the copartners and the note of the firm for the amount of the claim was executed by one of the partners his act was binding on the copartner unless the relation between the employee and the partner making the note would tend to discredit the good faith of the transaction. Webber v. Webber [Mich.] 13 Det. Leg. N. 703, 109 N. W. 50. Notes issued by a firm to reimburse bondsmen who had been obliged to repay the United States government money which one of the partners, a postmaster, had embezzled and used to pay partnership debts are supported by a valuable consideration and constitute valid obligations of the firm. In re Speer Bros., 144 F. 910.

Presumptions and burden of proof: Where the note sued on was executed by one of the partners, who signed the name of the firm and admitted in his evidence that it was his intention to bind the firm as payors of the note, prima facie he was authorized so to do, and the burden of showing to the contrary was upon the defendant Talbert. Mitchell v. Whaley, 29 Ky. L. R. 125, 92 S. W. 556.

2. Union Nat. Bank v. Neill [C. C. A.] 149 F. 711. The power is not implied to sign the firm name as an accommodation endorser, but where such unauthorized contract is made, if the paper is of such a character as to be subject to the law merchant, an innocent endorsee acquiring it in the usual course of trade before maturity can maintain an action against the partnership. Id.

3. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174; Union Nat. Bank v. Neill [C. C. A.] 149 F. 711.

4. Hatchett v. Sunset Brick & Tile Co. [Tex. Civ. App.] 99 S. W. 174.

5. Where a note, payable to one of the best customers of a copartnership, was actually executed in the firm name and the partner executing it called the attention of his copartner thereto, there is sufficient evidence to sustain a finding that the copartner ratified its execution. Moran Bros. Co. v. Watson [Wash.] 87 P. 508.

6. In re McCoy [C. C. A.] 150 F. 106. The fact that the name of a partnership appears as second signer raises no presumption that the first signer of the note is principal and that the partnership which follows is surety and as against a bona fide holder of the note the defense that the firm name has been signed as surety by one of the partners without authority cannot be raised. On the contrary all those who sign a note joint or joint and several on its face are held to be joint or joint and several makers, unless the note expresses the contrary. Union Nat. Bank v. Neill [C. C. A.] 149 F. 711.

7. See 4 C. L. 916.

8. Atterbury v. Hopkins [Mo. App.] 99 S. W. 11.

Nature of partnership liability.[9]—The obligation of a partnership is joint and is the same as any other joint obligation in the eyes of the law,[10] so long as no question of insolvency intervenes.[11]

Liability for torts and crimes.[12]—Partners are jointly [13] and severally [14] liable for torts committed by any of their number in the conduct and within the business of the firm.[15]

(§ 4) *B. Commencement and termination of liability. Incoming partner or firm.*[16]—Unless expressly assumed, an incoming partner is not liable for the debts of the old firm.[17]

Notice of dissolution and rights of third parties dealing with firm after apparent dissolution.[18]—Except where dissolution is caused by operation of law,[19] notice of dissolution or retirement is necessary in order to terminate the liability of a retiring partner for future acts of his remaining copartners,[20] but where a person, with notice of the dissolution, deals with the firm, he cannot hold the retiring partner.[21] The dissolution must be made known to creditors and to the world.[22] As to former dealers, actual notice [23] or knowledge of facts sufficient to put him on inquiry [24] is necessary, and as to others published notice be given.[25] Whether a plaintiff has been notified, is a question for the jury.[26]

Novation.[27]

9. See 6 C. L. 924.

10. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

11. When the firm or one of its members is insolvent a distinction arises between a partnership debt and other kinds of joint obligation, in that in the former case equity intervenes and applies partnership property to the payment of partnership debts, and individual property to the payment of individual debts. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

12. See 6 C. L. 925.

13. A fraud committed by one partner in the course of the partnership business renders the firm pecuniarily liable to the aggrieved party for the wrongful act of the offending member. In re Hardie, 143 F. 607.

14. Where a firm of attorneys prosecuted a note to judgment and subsequently dissolved, one partner is liable for the amount collected thereon after dissolution by his copartner and converted by the latter to his own use. Powell v. Roberts, 116 Mo. App. 629, 92 S. W. 752.

15. A firm is not liable for false representations as to the financial standing of one of its customers alleged to have been made by one of the partners unless made in the business. Bartles v. Courtney [Ind. T.] 98 S. W. 133.

16. See 6 C. L. 926.

17. Bank of Commerce v. Ada County Abstract Co., 11 Idaho, 756, 85 P. 919.

18. See 6 C. L. 926.

19. See 4 C. L. 916.

20. Sprague v. Keltie Stone Co., 123 Ill. App. 616; Curtis v. Sexton [Mo.] 100 S. W. 17; Daniel v. Lance, 29 Pa. Super. Ct. 454.

21. For money advanced to a firm from which one partner had retired and the name of which had been changed. Dixie Cotton Oil Co. v. Morris [Ark.] 94 S. W. 933. If a customer has knowledge of the dissolution of a partnership or the legal equivalent of such knowledge, he is in no position to complain that he did not receive formal notice. Miller v. Pfeiffer [Ind.] 80 N. E. 409.

22. Bush v. McCarty [Ga.] 56 S. E. 430. The word "creditors" employed in Civ. Code 1895, § 2634, is not limited to persons who were creditors at the time of the dissolution, but includes persons who had previously sold goods and given credit to the firm during its continuance was within its meaning. Bush v. McCarty Co. [Ga.] 56 S. E. 430.

23. Bush v. McCarty Co. [Ga.] 56 S. E. 430; Sprague v. Keltie Stone Co., 123 Ill. App. 616.

24. Where one member of a firm told a general agent of a customer that there was no longer a partnership, the notice to the agent in the course of his employment was equivalent to actual notice to his employers. Miller v. Pfeiffer [Ind.] 80 N. E. 409. Where there was no evidence of a partnership and plaintiff attempted to raise an estoppel against defendant on the ground that he was a partner and where for several years defendant had not been held out as partner, plaintiff should have applied to defendant to ascertain whether a partnership existed. Id.

25. Sprague v. Keltie Stone Co., 123 Ill. App. 616. Fair and reasonable publication in a public gazette circulated in the locality in which the business of the partnership has been conducted is generally sufficient, and any means of fairly publishing the fact of such dissolution as widely as possible, in order to put the public on its guard, are proper to be considered on the question of such notice. Bush v. McCarty Co. [Ga.] 56 S. E. 430. General reputation of the dissolution in a community where a person sought to be charged with notice resides, or in the business community to which the parties belong, is admissible as tending to show notice. Such general reputation or notoriety is not itself notice, but is admissible for the consideration of the jury in determining whether there was notice. Id.

26. Daniel v. Lance, 29 Pa. Super. Ct. 454.

27. See 6 C. L. 927.

(§ 4) *C. Application of assets to liabilities. Firm debts and assets.*[28]—There is no equity between partners giving them the right to compel the application of firm assets to the payment of its debts,[29] but this may be terminated by agreement, or by good faith sale and transfer of the partnership property.[30] Proceeds arising from the sale of partnership real property constitute partnership assets and must be distributed in like manner as other partnership assets.[31]

§ 5. *Rights of partners inter se. Duty to observe good faith.*[32]—From the very nature of the partnership relation, each partner owes to the other in their transactions the utmost faith and openness of dealing.[33] Neither has the right to secure, without consent of the other, any private advantage out of such transactions.[34] Doing so, he will be treated in equity as a trustee for the others.[35] It is, therefore, well settled that where one partner having possession and control of partnership property uses the same to acquire property in his own name, the property so acquired inures to the benefit of his copartner, and his copartner may demand an interest in the property obtained corresponding in extent to his interest in the original partnership property.[36] But where a partner, with the assent of his

28. See 6 C. L. 928.

29. Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940.

A dormant or secret partner is not entitled to a preference over the general creditors of the estate of the deceased partner; for the money the dormant partner has loaned to his firm he stands in the same position with respect to the estate of his deceased partner as the general creditors of the estate. Funk v. Kempton, 123 Ill. App. 100.

30. But the rights of creditors cannot be defeated by a sale made for the purpose of defrauding creditors. Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 108 N. W. 940. Partnership creditors, however, have no lien upon the partnership property. Id. A clerk of a township having deposited public money to the credit of the firm of which he was a partner, all of which was subsequently paid out in proper claims against the township, the township had no claim against the assets of the partnership as against creditors. Van Zuuk v. Pothoven [Iowa] 109 N. W. 288.

31. Wilson v. Wilson, 74 S. C. 30, 54 S. E. 227. Land owned by copartners, as part of their firm assets, where each has a legal title, is held in common subject to a liability to have it applied to partnership obligations and accounting, each having a lien on the interest of his copartner for any balance due him, and that when the firm is dissolved, or can no longer continue business, real estate constituting part of its assets, may be divided by compulsory partition if it be shown that it will not be required to satisfy liabilities of the firm. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

32. See 6 C. L. 930.

33. Wiggins v. Markham [Iowa] 108 N. W. 113; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

34. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824. Each party is forbidden to make a profit for himself at the expense of the other by deception as to the purchase price. Mattern v. Canavan [Cal. App.] 86 P. 618. Where a firm was engaged inselling land and one member, selling on commission sold land in the firm's hands, but subsequently abandoned the sale by agreement between himself and the purchaser and sold land which he owned in lieu thereof, such partner was liable to the other to the extent that he would have profited by the original contract. Wiggins v. Markham [Iowa] 108 N. W. 113. When, on the insanity of one partner, his copartner institutes proceedings which result in a sale of the property at which he purchases the property, such sale is voidable at the instance of the insane partner whose trustee the purchaser is. Cresse v. Loper [N. J. Eq.] 65 A. 1001. A partner of a wholesale firm which has a retail department who acquires a partnership interest in retail firm in the same line in the same city and who, as representing the former firm, sold to himself as representing the latter firm the principal part of the merchandise sold by the latter, has, in an action to dissolve the wholesale firm, the burden of proving that the wholesale firm was not injured by his relations and its relations with the retail firm. Van Deusen v. Crispell, 99 N. Y. S. 874. When a partnership is formed for the purpose of selling land and in the courss of the operations options are taken which are renewed as they expire by one partner in his own name, he will be deemed a trustee for his copartners. Gaddie v. Mann, 147 F. 960.

35. Mattern v. Canavan [Cal. App.] 86 P. 618; Deaner v. O'Hara [Colo.] 85 P. 1123; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824. The interest so acquired that inures to the benefit of the copartner is a resulting trust, and in order to enforce such a trust, the contract or transaction out of which it arises must be established by clear, certain, and convincing evidence. Deaner v. O'Hara [Colo.] 85 P. 1123.

36. Deaner v. O'Hara [Colo.] 85 P. 1123. So where one member of a firm fraudulently abstracts some of its assets a representative of that firm may share pari passu with the individual creditors of the delinqusnt member. McElroy v. Allfree [Iowa] 108 N. W. 119.

Mala fide transfer to third person: The thin device, on the part of the partner sought to be charged, of transferring title

copartners, withdraws assets in payment of a firm obligation to him and purchases real estate therewith, his copartners can claim no interest in such real estate.[37]

Power of majority.[38]

Firm accounts.[39]—A partner is under obligation to keep an accurate account of the firm moneys which pass through his hands.[40]

§ 6. *Actions. A. By firm or partner.*[41]—Where a partnership sues on a contract alleged to have been assigned to it, an individual partner cannot recover on a contract assigned to him as an individual.[42] Nor can one partner, in the absence of statutory authority to the contrary, maintain an action on a firm claim.[43] In the absence of statute, action by firm must be in the names of the individuals as partners.[44]

(§ 6) *B. Against firm or partner. Pleading and proof of partnership.*[45]—At common law, in order to render a judgment against the firm, all the partners must be served;[46] but by statute in many states, a judgment may be rendered against a partnership, where process is served on one of the partners, which will bind both the partnership property and the separate property of the partner served.[47] These statutes also authorize an action against the unserved partner to charge his property with the amount unpaid on the judgment.[48] But while it is only necessary for one member of a firm to be served with citation to bring the firm into court, the suit must be against all of the members.[49] Statutes also exist which authorize a suit against the partnership by the partnership name.[50]

to a third person, not a bona fide purchaser, would not change the equitable relations and duties of the parties. Equity would hold the transfer to be a fraud upon his associates and would hold such third person to be a trustee of all for both partners as to the property conveyed to him. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

37. Higgins v. Higgins [Pa.] 65 A. 804.

38, 39. See 6 C. L. 931.

40. Wiggins v. Markham [Iowa] 108 N. W. 113. It will not lie in the mouth of one of the members to complain, after length of use, that the books kept by another member are incomplete, and fail to show all that they should have shown. No presumption will be indulged against the bookkeeping member on account of the state of the books under such circumstances. Shoemaker v. Shoemaker, 29 Ky. L. R. 134, 92 S. W. 546.

41. See 6 C. L. 931.

42. Vanhoosier v. Dunlap, 117 Mo. App. 529, 93 S. W. 350. In such an action defendant's failure to deny the partnership under oath, while it admits the partnership, does not admit that the contract was assigned to the firm and not to one of its members as an individual. Id.

43. See 6 C. L. 931. A charge authorizing a recovery by one partner for the value of all the firm property and interest levied upon, when the petition did not allege facts which authorized such recovery. Haight & Co. v. Turner & Pierce [Tex. Civ. App.] 99 S. W. 196.

44. It is not an abuse of discretion to refuse to allow an amendment to the answer setting up that plaintiffs had no right to sue by the firm name alone because no certificate of the individual names had been filed. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531.

45. See 6 C. L. 932.

46. See 6 C. L. 932. Nevertheless, in equity complainant was entitled to amend a bill against partnership composed of several where service was on one by converting the suit into one against the partners individually and striking out the names of those not served. Levystein v. Gerson, Seligman & Co. [Ala.] 41 So. 774.

Effect of statute authorizing service on corporation or association officer: In view of the fact that Ballinger's Ann. Codes & St. § 4881, provides that, when summons is served on one of several defendants jointly liable, judgment may be entered against all defendants so far as it may be enforced against joint property and also against defendant served individually, it must be held that § 4875 authorizing service on a nonresident corporation, company, or association by serving its secretary, cashier, or managing agent, does not authorize such service in case of nonresident partnership. If it did it would make service upon a managing agent more potential than if made upon a member of the firm. Coughlin v. Pinkerton, 41 Wash. 500, 84 P. 14.

Effect of statute requiring registration: Where a partnership has not registered in accordance with the provisions of section 13 of the Act of April 14, 1851 (P. L. 612), it cannot complain in a suit against it that the name of one of the members was omitted or that the names of persons not members were included as parties defendant. Daniel v. Lance, 29 Pa. Super. Ct. 454.

47. See 6 C. L. 932.

48. Such action accrues upon recovery of the former judgment and is barred by the ten-year statute. Hofferberth v. Nash, 102 N. Y. S. 317, rvg. 50 Misc. 328, 98 N. Y. S. 684. In such an action a failure to allege that defendant was not served is not fatal after proof thereof without objection. An amendment to conform to the proof should be allowed. Hofferberth v. Nash, 102 N. Y. S. 317.

49. Where plaintiff dismisses the suit against one partner, he thereby abandons

No action can be maintained against a firm upon a several and individual contract of the partners.[51]

The complaint in an action against a partnership should show with reasonable certainty that the defendants are sued as partners;[52] but where a person is sought to be held as a partner by estoppel, a considerable latitude must be allowed in the setting forth of the facts and circumstances going to serve as a basis for the estoppel.[53] Under some statutes the fact of partnership must be put in issue by affidavit.[54]

Abatement.[55]—Where the statute authorizes suit against a partnership, where only one partner is sued, the death of such partner before trial does not abate the action.[56] Where it is not patent upon the record, as by plaintiff's declaration, that there is a nonjoinder of a party defendant as partner, it should be pleaded in abatement.[57]

Judgment and subsequent proceedings.[58]—Judgment against a partnership in the firm name is irregular but not void.[59]

(§ 6) *C. Between partners.*[60]—Until there has been a settlement or an accounting, one partner cannot sue another at law upon any claim arising out of their relation as partners.[61] A partner can, however, sue his copartner at law upon a

his cause of action against the firm. King v. Monitor Drill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046.

50. Code 1896, § 40. Levystein v. Gerson, Seligman & Co. [Ala.] 41 So. 774. An affidavit for attachment that C. E. Woolf and J. H. Wallace, doing business under the name of Woolf & Wallace were indebted is a charge against the firm and the individuals composing it; but a charge that Woolf & Wallace, a firm composed of C. E. Woolf and J. H. Wallace, are justly indebted, etc., constitutes a proceeding against the firm and not against the individuals. Haas v. Cook [Ala.] 41 So. 731.

51. A complaint against a firm for a sum of money collected by one partner and not paid over to plaintiff, when the exhibits showed that the transaction was an individual and not a partnership one, is bad on demurrer. Fox v. Clemmons [Ky.] 99 S. W. 641.

52. See 6 C. L. 933. Where plaintiff alleges that one H. S. was a member of defendants' firm and defendants do not specifically traverse this averment but under a general denial prove that he was not, the variance is not fatal and the complaint will be treated as though duly amended to conform to the proofs. Schiffer v. Anderson [C. C. A.] 146 F. 457. Averment that defendants are partners is not negatived by allegations of attempt to incorporate. Louisiana Nat. Bank v. Henderson, 116 La. 413, 40 So. 779.

53. Buford Bros. v. Sontheimer, 116 La. 500, 40 So. 851.

54. Under Rev. St. 1899, § 746 the fact of partnership is not put in issue unless defendants put it in issue by affidavits filed with the pleadings. Nephler v. Woodward [Mo.] 98 S. W. 488. Where defendants, sued as partners in assumpsit, pleaded nonassumpsit and filed separate affidavits denying their individual liability, but no affidavit denying partnership, such affidavits not being responsive to the allegations of plaintiffs, defendant's pleas should be rejected. Ruffner Bros. v. Montgomery & Co. [W. V.] 56 S. E. 388.

55. See 6 C. L. 934.

56. By force of Code Civ. Proc. § 755, since the cause of action survives against the surviving partner and the personal representatives of the deceased partner need not be substituted where there is no claim that the survivor is insolvent or unable to pay the debt. Latz v. Blumenthal, 50 Misc. 407, 100 N. Y. S. 527.

57. The question cannot be raised for the first time on appeal. Mueller & Co. v. Kinkead, 113 Ill. App. 132.

58. See 6 C. L. 934.

59. Justice v. Meeker, 30 Pa. Super. Ct. 207.

60. See 6 C. L. 935.

61. Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674; Bond v. May [Ind. App.] 78 N. E. 260; Burley v. Brown [Kan.] 85 P. 527. A partner cannot recover in an action at law against his copartner for a share of profits of their joint adventure until there has been a settlement or account stated between them. Morgart v. Smouse, 103 Md. 463, 63 A. 1070; Jones v. Walker, 101 N. Y. S. 22.

Pleading: In an action by one partner against another, a petition alleging that they had dissolved partnership and settled their business is good as against an objection that it does not allege a settlement of partnership affairs. Burley v. Brown [Kan.] 85 P. 527.

Counterclaim: In an action by one partner upon the individual promissory note given by another partner, an unascertained balance alleged to be due from the plaintiff to the defendant upon the unsettled partnership account cannot be set up in an affidavit of defense as a set-off. The reason for this is that the damages which can be set off as an independent counterclaim must be such as a jury can find and liquidate in the ordinary way just as if the defendant were a plaintiff in debt, assumpsit or covenant; but where the right of the defendant is only to call the plaintiff to an account

claim not arising out of a partnership transaction.[62] And while no action will lie against a partner for terminating a partnership at will,[63] an action will lie for the breach of an executory contract to form a copartnership,[64] or for the violation of the terms of an existing one,[65] the measure of damages being the same in both cases,[66] and the cause of action accruing as soon as a breach occurs.[67] Where, one, by false representations, induces another to become his partner,, the partnership agreement will be rescinded at the instance of the latter.[68] A bill seeking to restrain alleged partners from ousting complainant from participation in the alleged partnership business must disclose that a partnership existed.[69] Where a partnership settlement has been procured by the fraud of one of the partners, his copartner, upon discovery of the fraud, may, without rescinding the contract of settlement, sue him for any damages occasioned by the deceit.[70]

§ 7. *Dissolution, settlement, and accounting. A. Dissolution by operation of law.*[71]—While the partners may stipulate that death shall not dissolve the partnership,[72] in the absence of such provision or of a direction to the contrary in the deceased partner's will,[73] a partnership is terminated ipso facto by the death of one

and this demand is such as must be settled in an action of account rendered, or bill in equity for accounting, it is not a proper setoff. Appleby v. Barrett, 28 Pa. Super. Ct. 349.

Where but one matter growing out of the partnership business remains unadjusted, it is well settled that one partner may sue another in an action at law. McNealy v. Bartlett [Mo. App.] 99 S. W. 767.

62. To recover the amount of a personal loan. Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674.

63. McGuire v. Gerstley, 26 App. D. C. 193.

64. Ramsay v. Meade [Colo.] 86 P. 1018; Hobbs v. Ray, 29 Ky. L. R. 999, 96 S. W. 589. And, after defendant has refused to carry out the contract, it is not necessary for plaintiff to make formal tender as a condition precedent to maintaining the action. Hobbs v. Ray, 29 Ky. L. R. 999, 96 S. W. 589.

65. Ramsay v. Meade [Colo.] 86 P. 1018. Compare Price v. Middleton [S. C.] 55 S. E. 156, where the court said: "There are cases where a court of law may entertain an action brought by one partner against another for damages for breach of his contract to maintain the partnership where the items going to indicate profits which are to constitute the measure of damages are few and simple. But we have been able to find no case in which a court of law has undertaken to adjust partnership affairs, arising either before or after dissolution, where it was necessary for the jury to take a strict accounting covering a long period and many transactions."

66. Ramsay v. Meade [Colo.] 86 P. 1018.

One element, if not the sole measure, of which is the probable profits which plaintiff would have earned had not the defendant wrongfully prevented its performance. Ramsay v. Meade [Colo.] 86 P. 1018. Evidence as to past profits in the same business is competent upon this issue. So also, is evidence concerning the prosperity and growth of the community during the term of the partnership, and the ability and skill of the plaintiff. Id. In an action brought by one partner to recover damages for the other partner's withdrawal from the business, plaintiff's witness testified that since the withdrawal the profits had increased but explained that the increase was due to the natural increase in the business but that if the partner had not withdrawn they would have been greatly increased. This estimate was purely speculative and there could be no recovery, the measure of damages in such cases being loss of profits. Burdall v. Johnson [Mo. App.] 99 S. W. 2.

67. Ramsay v. Meade [Colo.] 86 P. 1018.

68. And where by like representations he was induced to put his stock into the business at less than its value, he is not bound by such value. Caplen v. Cox [Tex. Civ. App.] 15 Tex. Ct. Rep. 266, 92 S. W. 1048.

Measure of recovery: He may recover the value of what he put into the business, with interest, and the value of his services in attending to the business, deducting what he has drawn out of his business, with interest, from the time of the dissolution of the partnership to the judgment, on the amount he has drawn out in excess of what he was entitled to for his services. Caplen v. Cox [Tex. Civ. App.] 15 Tex. Ct. Rep. 266, 92 S. W. 1048.

69. A bill in such case is demurrable where it fails to state any facts from which a court can adjudge whether this is true or not, and where a contract between the parties exhibited as part of such bill is in its terms inconsistent with the existence of a real partnership. Collier v. Dasher [Fla.] 41 So. 269.

70. Crockett v. Burleson [W. Va.] 54 S. E. 341.

71. See 6 C. L. 936.

72. Spotswood v. Morris [Idaho] 85 P. 1094. But where the articles of partnership provided that upon the death of a partner his share of the capital should remain in the business for two years thereafter, the surviving partners paying a specified interest thereon, the death of a partner dissolves the partnership and the executor of the deceased partner is not authorized to continue the business. The interest of the deceased partner is merely of a loan to the firm. Williams v. Brookline [Mass.] 79 N. E. 779.

73. See 6 C. L. 936.

of the partners.[74] Insanity of one of the partners, however, does not, per se work a dissolution of the partnership.[75] Partnership also ends by the extinction of the thing, or the consummation of the business,[76] and by the expulsion of one member.[77]

(§ 7) *B. Dissolution by act of partners.*[78]—A partnership may be dissolved by mutual consent,[79] and where no definite time is fixed for the continuance of a partneship, it is one at will and either party may dissolve it at pleasure.[80] Indeed to effect a dissolution of a partnership at will, there must have been a mutual agreement to dissolve, or there must have been an election to dissolve.[81] As a general rule, where one partner transfers his entire interest in the firm to his copartner, a dissolution results ipso facto.[82] Abandonment may be a ground upon which one's copartners may elect to consider the partnership as dissolved.[83]

(§ 7) *C. Dissolution by order of court.*[84]—The basis of a bill for dissolution is the necessity for the due winding up of a partnership, and this equity alone, independently of any other consideration, will entitle a suitor to demand relief.[85] Insanity of one of the partners,[86] or failure to furnish his share of the expenses of the partnership having declared his inability so to do,[87] are good grounds for demanding a dissolution. A petition for dissolution is sufficient, although it does not distinctly pray for a full and final settlement, where, taking it as a whole, the purpose appears.[88] A suit for dissolution may, in a proper case, be brought in the Federal court.[89]

74. Norton v. Brink [Neb.] 110 N. W. 669, overruling [Neb.] 106 N. W. 668; Loewenstein v. Loewenstein, 99 N. Y. S. 730.

75. Cresse v. Loper [N. J. Eq.] 65 A. 1001.

76. So provided by Civ. Code art. 2876. Borah v. O'Niell, 116 La. 672, 41 So. 29. A partnership for the cultivation of a plantation is dissolved by the seizure of an undivided interest in the plantation, whereby the partnership is deprived of the control of the plantation, although it may be conceded that a partnership is not, ipso facto, dissolved by the seizure of the interest of one of the members. Id.

77. Because it is impossible to force the parties to continue in a relation implying so much confidence. Price v. Middleton [S. C.] 55 S. E. 156.

78. See 6 C. L. 936.

79. Crouse v. McCandless, 121 Ill. App. 237.

80. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824.

81. Brady v. Powers, 112 App. Div. 845, 98 N. Y. S. 237. The partner electing to dissolve must give his copartners notice of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party which signify the will of the former that the partnership be dissolved. Id. The bringing of an action by one partner against his copartners for an accounting does not necessarily constitute an election on his part to dissolve the partnership. It does not, for example, where the complaint treats the partnership as existing. Id. But an answer that there is "no partnership now existing * * * and that all business relations * * * have terminated and cease to exist" between the parties amounts to an election on the part of defendants to dissolve the partnership. Id.

82. See 6 C. L. 936. Where one partner proposed to sell his interest to his copartners and they accepted the proposition and thereafter he acted as clerk, he ceased to be a partner and was not entitled under the bankruptcy law to any personal property exemption in the firm's assets even though no formal agreement was entered into and the whole purchase price was never paid. In re Fowler & Co., 145 F. 270. Sale by one partner of his entire interest in the firm is an adjustment of all accounts between the partners, and the presumption is that all accounts between the partners were taken into consideration, including a salary item which was provided by the partnership articles, should "not be considered net profit but come out of the general expense account." Milloy v. Hoyt 123 Ill. App. 568.

83. See 6 C. L. 936. When one partner, who advanced all the capital, notifies the other partner, who was employed as manager, that he is discharged and the person so notified leaves the city and speaks of his intending to have no further connection with the business, a finding that the partnership was dissolved by this "stepping out" is supported by the evidence. Adrian Knitting Co. v. Wabash R. Co., 145 Mich. 323, 13 Det. Leg. N. 550, 108 N. W. 706.

84. See 6 C. L. 936.

85. Gaddie v. Mann, 147 F. 960, quoting Bispham Eq. [6th ed.] 635.

86. Cresse v. Loper [N. J. Eq.] 65 A. 1001.

87. Under Civ. Code, art. 2888. Borah v. O'Niell, 116 La. 672, 41 So. 29.

88. Borah v. O'Niell, 116 La. 672, 41 So. 29. An allegation in such a petition referring to certain debts as having accrued after the dissolution of the partnership, and reserving the right to recover these debts in another proceeding, does not change the nature of the petition as one in settlement of partnership. Id.

89. The fact that one of the parties defendant, whose interests are in part identical with complainant's, is a citizen of the

(§7) *D. Effect of dissolution.* 1. *In General.*[90]—Except as to such acts as are necessary or proper for the winding up of the partnership affairs,[91] the dissolution of a partnership terminates the power of the respective partners to bind each other, provided notice has been given,[92] especially by a fraud practiced by one of the former members for his own benefit, where the others knew nothing of the fraud.[93] A member of a dissolved commercial firm, who has paid one of its obligations, has no right of action against his partner for reimbursement, save by suit for a settlement of the partnership.[94]

(§ 7D) 2. *As to surviving partner and estate of deceased partner.*[95]—A surviving partner takes the title to the partnership property,[96] only for the purpose, however, of winding up the business and settling the partnership affairs,[97] and has the exclusive control and management of such affairs and of partnership litigation.[98] It is the duty of the surviving partner to settle the affairs of the copartnership as speedily as the best interests of the business of the copartnership will permit,[99] but he may continue the business by and with the consent of the executor or administrator of the estate of the deceased and the approval of the probate court.[1] And while, as a general rule, he is not entitled to a salary or compensation for managing and settling up the partnership business,[2] he may be entitled to compensation when the business has been carried on for some time with beneficial results.[3] He is also entitled to reimbursement for necessary expenses incurred.[4] In settling the

same state as the partners in fault does not defeat the jurisdiction where complainant is a citizen of another state. Gaddie v. Mann, 147 F. 960.

90, 91. See 6 C. L. 937.

92. Harris v. Zier [Wash.] 86 P. 928. After the dissolution of a firm, without special action as to the accounts receivable, the late partners remain tenants in common of the joint effects and all must join in any action to recover debts due the late firm. Joint action is required to settle all matters left unsettled at the time of the dissolution. The right of either joint tenant to proceed depends upon the consent of the others. In re Hendrick, 143 F. 647.

93. But if the transaction could be held to be a settlement of the partnership debts by the fraud of one of the partners and either had benefited thereby, the partner who had unwittingly benefited by the transaction would no doubt be bound. Harris v. Zier [Wash.] 86 P. 928.

94. Theus v. Armistead, 116 La. 795, 41 So. 95.

95. See 6 C. L. 938. Young v. Winkley, 191 Mass. 570, 78 N. E. 377.

96. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62; In re Thieriot, 102 N. Y. S. 952. Therefore deceased partner's executrix who has bought a chattel mortgage of the fixtures of the firm cannot be enjoined from enforcing it, on the theory that the purchase of the mortgage was a payment, for the executrix is not a partner in the concern. Loewenstein v. Loewenstein, 99 N. Y. S. 730.

97. Loewenstein v. Loewenstein, 99 N. Y. S. 730. The surviving partner of a commercial partnership liquidating its affairs without authority to pay debts alleged to be due by the deceased individually out of the partnership funds, he is without authority to admit their correctness and pay them. The widow of the deceased partner and his succession cannot be called on to litigate such claims in the liquidation proceedings. In re Curlee & Co. [La.] 43 So. 165.

98. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62; Barnes v. Stone, 198 Mo. 471, 95 S. W. 915; In re Thieriot, 102 N. Y. S. 952. An averment that the firm was composed of the estate of John Silvey, deceased, simply described the capacity in which the other parties sued, as the estate of a deceased member could not sue. Evans v. Silvey & Co., 144 Ala. 398, 42 So. 62.

Waiver of right: Whatever may be the rights of a surviving partner, it is clear that when, as in this case, he waives his right to administer on the partnership estate, and another administrator is in charge when the lands of the copartnership are sold to satisfy a lien created when all the partners are alive, the surplus over and above the secured debt is assets of the copartnership estate, and the administrator thereof is entitled to administer the same and apply it to the liquidation of the unpaid debts of the partnership. Barnes v. Stone, 198 Mo. 471, 95 S. W. 915.

Real estate is not ordinarily partnership assets of a law firm, so that the survivors, as such, have power to dispose of it. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679.

99, 1. McElroy v. Whitney [Idaho] 88 P. 349.

2. McElroy v. Whitney [Idaho] 88 P. 349; Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49. The surviving partner of a commercial partnership liquidating its affairs is without right, under the express terms of the law, to receive commission for his services as such. In re Curlee & Co. [La.] 43 So. 165.

3. McElroy v. Whitney [Idaho] 88 P. 349; Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49.

4. When an outlay of money for electric lights is shown to have resulted in benefit to the partnership, the surviving widow, who accepts the benefit of the expenditure,

partnership affairs, the surviving partner may act, within the limits of good faith, in any manner he deems best for the interests concerned.[5] and the only right of the deceased partner's personal representative is to call the surviving partner to account.[6] The burden is on the latter however, to show by satisfactory evidence that any transaction he has with the partnership estate is in all respects fair and free from any fraud or deception.[7]

Where a partnership is dissolved, its debts paid and its affairs wound up, partnership property remaining belongs to the individual members of the firm as joint tenants or tenants in common.[8] Whether real estate is to be treated as personalty for all purposes depends on the intent of the parties as disclosed by the terms of the partnership and the construction placed upon them by the partners.

(§ 7D) 3. *As to continuing or liquidating partner. Retiring partner.*[10]—An agreement upon the dissolution of a partnership, by which the retiring partner transfers his interest in the partnership property to the remaining partner, and the latter agrees to pay the partnership debts, creates as between them the relation of surety and principal.[11] By some authorities a creditor who knows of such agreement is bound thereby and by any act which would release an ordinary surety will release the retiring partner.[12] By other authorities it is held that a creditor, even with notice of such an agreement, is not bound thereby unless he has assented to it and that as to him their joint obligation as joint debtors continues.[13] The retiring member of a firm is entitled to interest on his share of the property of the old partnership all of which was taken over by the remaining members who formed a new firm.[14] Where the continuing partner has purchased the assets of the partnership, giving his note therefor, he is entitled to have deducted from such note one-half the amount of assets withdrawn by the retiring partner, but not appearing on the books, and one-half the amount of certain liabilities not included in the settlement and paid by him.[15]

cannot properly complain of the outlay which produced the benefit. And, in general, complaints as to expenses incurred should be made at the time and not postponed until the liquidation is closed. In re Curlee & Co. [La.] 43 So. 165.

The preparation of the accounts of the surviving partner of a commercial firm liquidating its affairs is part of the duty of the attorney employed in the case. The liquidator is not authorized to employ a bookkeeper to make out the account, and have him paid out of the funds of the partnership as one of the expenses he is entitled to incur under Civ. Code, art. 1142, par. 2. In re Curlee & Co. [La.] 43 So. 165.

5, 6. In re Thieriot, 102 N. Y. S. 952.

7. See 6 C. L. 938. When a surviving partner took over part of the real estate paying a full price to his deceased partner's executors as part of the settlement of the firm's affairs, and assumed to pay and actually paid a mortgage upon the property and all the other outstanding obligations of the partnership, and the money paid to the executors was accounted for by them in the orphan's court with the express approval of the distributees, who brought suit and obtained judgment in ejectment, the execution will be enjoined, for they have nothing but a naked legal right which they seek to enforce against the plain undisputed equity and fairness of the transaction. Schlichter & Jute Cordage Co. v. Mulqueen, 142 F. 583.

8. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

9. Evidence held to show that, as between a deceased partner's widow and personal representatives and heirs, the real estate was to be treated as personalty. Buckley v. Doig, 100 N. Y. S. 869. Where a partnership was engaged in building operations and at the time of its dissolution by the death of one partner its assets consisted of real estate, the share of the deceased partner when ascertained should be treated as personalty and his widow and heirs are entitled to share in it as such. Patrick v. Patrick [N. J. Eq.] 63 A. 848.

10. See 6 C. L. 940.

11. Dean & Co. v. Collins [N. D.] 108 N. W. 242; Moon Bros. Carriage Co. v. Devenish, 42 Wash. 415, 85 P. 17; Fish v. First Nat. Bank [C. C. A.] 150 F. 524.

12. Moon Bros. Carriage Co. v. Devenish, 42 Wash. 415, 85 P. 17. But where, at the request of a continuing partner who had agreed to pay the firm debts, a creditor, without consideration, extended the time of payment, the extension did not discharge the retiring partner. Barlow v. Stearns & Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 43, 98 S. W. 455.

13. Dean & Co. v. Collins [N. D.] 108 N. W. 242.

14. Blun v. Mayer, 113 App. Div. 247, 99 N. Y. S. 25.

15. Davis v. Ferguson, 29 Ky. L. R. 214, 92 S. W. 968.

(§ 7) *E. Accounting. Right to.*[16]—A partner's right to an accounting and settlement accrues upon the dissolution of the firm,[17] in connection with which each partner is entitled to an account of all the firm's transactions,[18] unless it be an exceptional case in which the findings of the court granting relief operate as an accounting or the parties have agreed upon a settlement.[19] Where, however, a settlement has been effected by the false representation of one partner to another, equity will grant the latter relief, especially where the perpetrator of the fraud has charge of the books of the firm, and by reason of his position has more intimate knowledge of the partnership affairs.[20] Such an action being really to surcharge a voluntary settlement made by the copartners, the burden of showing the errors or fraud is on the plaintiff.[21] Where the partnership is one at will and has no assets, one partner has no right to demand an accounting of profits earned by his copartners who continue the business after notifying him of their election to dissolve.[22] But, where, after one partner's death the surviving partner continues the business, children of the deceased partner are entitled to an accounting as of the date of his death and to demand the payment of the assets to which he would have been entitled at that time plus interest or in lieu of interest to an accounting of the profits.[23] It is no reason for refusing redress that, under the particular circumstances, it may be difficult to make a true accounting,[24] but laches will bar the right.[25]

16. See 6 C. L. 941.

17. Eddy v. Fogg [Mass.] 78 N. E. 549. The articles of a banking partnership provided for the continuance of the partnership for a time certain and that if any member of the firm should die within the stated period his share should remain in the business until the end of said period, and the representative of deceased should be paid interest on said share and participate in the earnings to some extent as the deceased partner, had he lived, would have participated; that business was to continue under surviving partner or partners. By a subsequent agreement a trust company was formed and the partnership assets were transferred to the corporation for stock therein, any of the parties in interest to be entitled, upon the issue and delivery of the stock, to require a distribution of it and a settlement of the affairs of the copartners for which purpose suits at law or in equity, if necessary to compel a settlement and distribution, could be maintained. Under these facts, a suit by representative of plaintiff's intestate deceased eight years, whose estate had never received anything in the way of profits, is not premature because certain assets of the copartnership which had been excepted from the operation of the agreement had not been realized upon, for the court has power to protect all interests in a final decree. Brew v. Cochran, 141 F. 459.

18. Reis v. Reis, 99 Minn. 446, 109 N. W. 997.

19. Reis v. Reis, 99 Minn. 446, 109 N. W. 997. Where, on dissolution and submission, an award was made covering all matters between the partners growing out of a certain line of business, as distinguished from loans, advances, and payments which one partner had made to and on behalf of his copartner, the right of the latter, if any, to recover from the former on account of losses sustained in such business, was conclusively disposed of. Eddy v. Fogg [Mass.] 78 N. E. 549. But when the business of a partnership was the cultivation of rice, and one of the partners died before the maturity of the crop, and after the crop was harvested, on demand of the executors of the deceased partner there was an equal division of the rice, but no undertaking to construe the contract or make a final settlement, such transaction did not amount to an accord and satisfaction which would estop the executors from denying that the survivor was entitled to one-half of the crop. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

20. Oliver v. House, 125 Ga. 637, 54 S. E. 732.

A rescission of such a contract of dissolution, and the return of the property received thereunder, is not a condition precedent to an action for further accounting brought by the injured party; nor will the retention of the assets turned over to such injured party, and the application of them by him to the indebtedness of the firm, which he assumed under the agreement of dissolution, be treated as a ratification by him of the terms of dissolution, when the other partner has been in no way injured thereby.

Pleading: An allegation in a petition to the effect that an item in a statement of a firm's indebtedness which the partner, who had charge of the firm's books and who drew the statement to be used as a basis of a settlement of dissolution, represented to be te amount due by the firm in addition to the liabilities more specifically set forth therein, will, as against a demurrer, be treated, not as a mere expression of opinion by such partner, but as a statement of fact. Oliver v. House, 125 Ga. 637, 54 S. E. 732.

21. Shoemaker v. Shoemaker, 29 Ky. L. R. 134, 92 S. W. 546.

22. Brady v. Powers, 112 App. Div. 845, 98 N. Y. S. 237.

23. Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49.

24. Reis v. Reis, 99 Minn. 446, 109 N. W. 997.

25. See 6 C. L. 942. Where one of the parties to an agreement of dissolution of

Jurisdiction.[26]—Equity has jurisdiction in cases of accounting and settlement between partners,[27] but the court ordinarily will not entertain matters relating to partnership accounts between partners, until by its judgment or decree a final adjustment of the partnership business can be effected.[28]

Parties.[29]

Procedure, pleading and proof.[30]—The bill must show that the plaintiff has such an interest in the partnership as entitles him to an accounting,[31] but where the action is plainly for the settlement of a partnership, and for a division of profits, a prayer for general relief will authorize a decree for any balance that may be found due the plaintiff on a settlement of accounts.[32] An allegation in a petition that, under the facts pleaded, the plaintiff is entitled to recover a certain amount is not an estoppel in judicio which precludes an amendment that under the same facts the plaintiff is entitled to a larger recovery.[33] Under certain circumstances, creditors may come in by petition in intervention.[34] General rules as to evidence [35] and instructions [36] apply.

partnership discovers, within a few weeks after the settlement is effected, that he has been defrauded by the other, and immediately calls upon such partner to rectify the wrong he has perpetrated, which the latter declined to do, the former is not guilty of such laches as will preclude a recovery by waiting seven months before filing his petition for further accounting. Oliver v. House, 125 Ga. 637, 54 S. E. 732.

26. See 6 C. L. 942.

27. This jurisdiction is not lost because discovery from the defendant is waived by plaintiff. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

28. Bond v. May [Ind. App.] 78 N. E. 260.

29. See 6 C. L. 942.

30. See 6 C. L. 943.

31. It must do more than assert that there was a partnership agreement. It must contain allegations with respect to the contributions of the parties to the partnership assets, and the proportions in which they were to sustain losses or share profits so that the court may determine whether it was an agreement of partnership on which an accounting may be decreed. Patterson v. Sadler [N. J.] 63 A. 1115. But where a partner failed to pay in the amount agreed upon for his admission to the partnership, and at the next accounting the full sum was deducted from his share of the profits, the partners will be deemed to have waived any defense to an action for dissolution and an accounting which they might have had by reason of his failure to pay. Brady v. Powers, 112 App. Div. 845, 98 N. Y. S. 237.

32 Stark v. Howcott [La.] 43 So. 61. Moreover, a partner has the right in equity to have the firm assets applied to the payment of the firm debts, and, although the bill does not in so many words pray for such application, the general frame of the bill is to that end and the prayer for general relief is sufficient therefor. Veneman v. Leo Ruckle, 120 Ill. App. 251.

33. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64. The petition may be amended to include partnership debts paid by petitioner since the commencement of the proceedings. Id.

34. Where a receiver was appointed who was ordered to sell the firm property and pay creditors but no sale was made and, by stipulation of the partners, a new basis of settlement was agreed on with the approval of the court and a new receiver substituted, a creditor whose claim has been duly listed with the first receiver, but no part thereof paid, may file a petition in intervention praying an order directing the payment of his claim. Johnson v. Johnson [Iowa] 107 N. W. 802.

35. Testimony that one partner, previously to signing written articles of partnership had made the same offer of partnership to a relative, who had declined it, is not relevant in construing the partnership agreement. A letter from one of the partners to his factor, authorizing his copartner to draw on his private account for funds in conducting the partnership enterprise, was properly excluded on the ground of irrelevancy. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64. Where one partner testified that another and different agreement from that contained in the partnership agreement had been entered into between him and his copartner in relation to certain transactions, which was denied by the latter, proof of custom and usage was permissible to give the jury a basis upon which to act in the event they found there was no definite agreement in relation to the commission to which the latter was entitled in such transactions. Morgan v. Barber [Tex. Civ. App.] 99 S. W. 730.

Variance: Whether the statement, which was the basis of the settlement or calculation made when the $2,303 was paid, was on a separate paper, as the allegations of the original bill would seem to indicate it was, or was in one of the books of the partnership, as the amended and supplemental bill alleged, was not very material. The inquiry was whether or not the complainant had been induced to accept the $2,303 in full of his interest in the partnership profits or assets by reason of representations made by the defendant, Burrill, that the statement or account upon which they based their settlement or calculations was correct, when he knew it was not. Laskey v. Burrill, 105 Va. 480, 54 S E. 23.

36. Where, in a suit by a partner for an accounting, it was shown that the partnership agreement guaranteed that the plaintiff should receive a specified sum per month for

Receivers.[37]—After an accounting, a receiver may be appointed, if necessary, to carry the judgment into effect.[38] The remedy, however, is a stringent measure, not to be resorted to except remedially,[39] although when a bill seeking dissolution is filed and it satisfactorily appears that the complainant will be entitled to a decree, a receiver will be appointed of course.[40] Where complainant has paid money into the firm and defendant has converted the profits to his own use, it is no obstacle to the appointment of a receiver that defendant has the legal title to the partnership property.[41] Nor, where one of the defendant partners is charged with fraud, will he be allowed to retain possession of the partnership property upon giving bond to secure the complainant in any recovery he may obtain.[42] Objection that the appointment of a receiver was premature because made before answer filed is waived by the filing before the chancellor of defendant's answer to the bill as part of the proofs against the application of a receiver.[43]

Credits and charges.[44]—Upon an accounting each partner is held accountable according to the articles of partnership.[45] Unless pleaded, only partnership transactions can be considered,[46] but all the partnership debts must be taken into account,

twelve months, that the firm continued after the twelve months and that plaintiff made no claim for such sum after the expiration of the year, and the court charged the jury as to the guaranty for the twelve months without charging as to the guaranty for any time thereafter, an instruction, that the evidence showed that the partners continued under the partnership agreement for a specified time after the twelve months was not erroneous. Morgan v. Barber [Tex. Civ. App.] 99 S. W. 730.

37. See 6 C. L. 944.

38. Bond v. May [Ind. App.] 78 N. E. 260.

39. See 6 C. L. 944. A receiver will not be appointed at the suit of one partner where no dissolution is sought, no disagreement among the partners is alleged, no fraud or wrong doing on the part of any of them is alleged, and it is not averred that the firm or any of its members are insolvent, and the only complaint is the alleged incompetency of a manager whose removal may be affected by discharge at any time. Campbell v. Rich Oil Co., 29 Ky. L. R. 716, 96 S. W. 442. Where the existence of the partnership is in doubt and there are no allegations of fraud, mismanagement, or dissipation of assets, a receiver will not be appointed before judgment. Bimberg v. Wagenhals, 102 N. Y. S. 925. A receiver pendente lite will not be appointed in an action between partners for an accounting where no claim is made that defendant is unable to respond to a judgment and no dissolution is asked. Greenwald v. Gotham-Attucks Music Co., 103 N. Y. S. 123. Partnership held so far solvent and prosperous that receiver should be denied. Meyer v. Meyer, 116 La. 456, 40 So. 794.

40. Brooke v. Tucker [Ala.] 43 So. 141; Gaddie v. Mann. 147 F. 960, quoting 5 Pomeroy's Eq. 145.

41. Brooke v. Tucker [Ala.] 43 So. 141.

42. Gaddie v. Mann, 147 F. 960.

43. Brooke v. Tucker [Ala.] 43 So. 141.

44. See 6 C. L. 945.

45. Under the articles of partnership in this case, where the partnership venture resulted in loss, the proceeds of the partnership business should be first deducted from the expense account, and two-thirds of the actual loss charged to plaintiffs' testator, and one-third to the defendant. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64. Where defendant, who was to furnish a building for the transaction of the business, transferred the sum to his wife after the date to which the partnership was extended, and she with full knowledge allowed the business to be continued, it was held that the business was conducted on the same terms after, as before, the expiration of the partnership agreement, and that plaintiff was not chargeable with rent. Pardue v. McCollum, 116 Mo. App. 603, 92 S. W. 757. J. & Co. and S. & Co. used to issue notes to one another for mutual accommodation. X., a member of J. & Co., issued one of these notes to S. & Co. against the protest of another member of J. & Co. There was no understanding or agreement that the note should be charged to X., although other members afterward claimed that it should be so charged. When the new firm was formed at the expiration of the old, the amount to the credit of X. was contributed by him as his capital to the new firm and that amount was fixed without charging X. with said note. All parties having thus acquiesced in his being credited in the new to the amount of his credit in the old firm, without deducting the note, he cannot be charged with the amount of this note upon the liquidation of the affairs of the second firm. Blun v. Mayer, 113 App. Div. 247, 99 N. Y. S. 25. Where one partner was to receive half the net profits, the other partner financing the business, and the latter paid out certain sums and held certain bonds, the former was not entitled to half the bonds upon payment of half the expenses. Under the partnership agreement all expenses were payable from the proceeds of the bonds before he was entitled to anything. Hebblethwaite v. Flint, 101 N. Y. S. 43.

If nothing was said about expenses, the law would infer an agreement that each was to bear one-half thereof. Wiggins v. Markham [Iowa] 108 N. W. 113; Stark v. Howcott [La.] 43 So. 61.

46. Payne v. Martin [Colo.] 89 P. 46. A discharge of the receiver does not preclude the surviving partner from asserting his claim against the widow, for the claim of the surviving partner against the widow

and it is wholly indifferent to whom the debt is owing, if the obligation be just.[47] Each partner is entitled to credit for all sums advanced for the use of the firm,[48] and should be charged with all money drawn out on individual account;[49] but a partner is not entitled to deduct any expenditure made by him which he deemed necessary and proper, unless it can be shown that it related to the common undertaking and was in some way beneficial to the partnership.[50] Ordinarily a partner should not be charged with the depreciation of the partnership plant,[51] but he may be charged with losses resulting from his actual negligence or bad faith.[52]

Interest.[53]—In the discretion of the court, interest may be allowed from the time of filing the bill.[54]

was not before the court at the time of the adjudication. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

47. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64. After dissolution each member of the firm is liable for his share of legal expenses for suits begun against the firm before its dissolution. Blun v. Mayer, 113 App. Div. 247, 99 N. Y. S. 25.

48. Wilson v. Wilson, 74 S. C. 30, 54 S. E. 227.

49. Wilson v. Wilson, 74 S. C. 30, 54 S. E. 227. Where upon the establishment of a partnership a seat in the stock exchange was purchased in the name of one partner and, in accordance with a rule of the exchange, the other partner executed a release for the benefit of other members and subsequently the member was charged with the price of his seat on the books of the firm, paid interest thereon and received credits as payments were made the debt was due the firm and was properly charged against the sitting member on an accounting after the death of the other partner, nor did such release affect such liability. Sterling v. Chapin, 185 N. Y. 395, 78 N. E. 158. Checks not shown to have been used in the partnership business are properly charged to a survivor's account, for while the propriety of a disbursement if made in the business could not be questioned, the burden is on the accounting partner to show that disbursements were made in the business. Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49. Where the master finds that a certain retainer received by one of the parties was not mentioned in the partnership agreement that it was subsequently treated by the partner as partnership property, and that it should be charged to the partner receiving it, this is a finding of fact and not a conclusion of law, nor are the findings inconsistent. Where a partner holds bonds which are not of par value, he should be charged only with their actual value. Hebblethwaite v. Flint, 101 N. Y. S. 43.

50. Van Tine v. Hilands, 142 F. 613.

51. But under the contract involved in this case and the circumstances disclosed by the evidence, the plaintiffs were entitled to an accounting for one-half of the net profits as of the date fixed in the contract for them to retire and receive such profits. McConnell v. Stubbs, 124 Ga. 1038, 53 S. E. 698.

52. One partner may, by way of recoupment, have a deduction made from the amount of the claim of the other in the profits, on account of neglect or refusal to discharge certain duties, whereby the interest of the firm suffered damage and extra expenses were incurred; but the deduction cannot go beyond the amount of damage proved. McConnell v. Stubbs, 124 Ga. 1038, 53 S. E. 698. But where there was no evidence that defendant said anything to plaintiff about his not having earned the salary stipulated for in the partnership agreement, although he pleaded that plaintiff had neglected the business and his testimony tended to support the plea, plaintiff was entitled to recover the salary called for in the partnership agreement. Morgan v. Barber [Tex. Civ. App.] 99 S. W. 730. Where defendant claims a sum of money forfeited in a business not originally contemplated by the partners, it is for defendant to show that plaintiff either authorized or ratified this transaction before he can be held liable for any part of the loss. Wiggins v. Markham [Iowa] 108 N. W. 113. Where a note given to a firm was allowed by the survivor of a partnership to become barred by the statute of limitations under circumstances not creditable to the surviving partner or his representative, the amount of the note was a proper charge against the estate of the surviving person. Webber v. Webber [Mich.] 13 Det. Leg. N. 703, 109 N. W. 50. A partner of a wholesale firm which had a retail department, who acquired a one-half interest in a retail firm in the same line in the same city, is chargeable, upon an action for a dissolution of the wholesale firm and for an accounting, with the profits and interest thereon made in the retail firm, where it was shown that the wholesale firm did business at an actual loss with the retail concern. He should be credited each year with the interest on his capital in the retail concern, the total interest on capital deducted from amount charged against him as profits, and interest should be reckoned against him on that balance. Van Deusen v. Crispell, 99 N. Y. S. 874.

53. See 6 C. L. 947.

54. Young v. Winkley, 191 Mass. 570, 78 N. E. 377. Where a partner made a statement of a claim of an employee by executing a firm note in the amount due and paid interest on the note, but did not exact interest on the employee's overdraft on the partnership, which was in the bank's business, the partner was chargeable with interest on the overdraft. Webber v. Webber [Mich.] 13 Det. Leg. N. 703, 109 N. W. 50. In the ordinary case of a copartnership accounting, partners are not liable for interest upon moneys withdrawn, because until there is an accounting it cannot be said whether the partner owes the firm. So where the money withdrawn earned no profits, as pro-

Reference.[55]—The powers and duties of the referee are measured by the order of reference.[56]

Decree.[57]—The account should be determined and a finding made as to whether or not a balance exists in favor of one partner or the other.[58] After the relative credits and charges to which the parties are respectively entitled and liable have been adjusted, the assets will be distributed according to equitable principles.[59]

Apportionment of costs.[60]—In an equitable action for an accounting, the apportionment of costs rests in the sound discretion of the trial court.[61]

Opening or correcting settlement.[62]—Assumpsit cannot be used as a means of reviewing and revising a partnership settlement.[63]

(§ 7) *F. Contribution and indemnity.*[64]—Where, after dissolution, one partner pays a firm obligation, he can enforce contribution by his copartner or a deceased copartner's representatives.[65] And where, under statute, one partner alone is served in an action on a firm obligation and judgment is entered against him, he has a right, after payment of the judgment, to maintain an action to compel contribution by his copartner.[66]

§ 8. *Limited partnerships.*[67]—Failure to comply in any substantial particular with the statute relating to the formation of limited partnerships makes the partners generally liable.[68] A declaration against the members as general partners need not allege the reasons why they are generally liable.[69]

PARTY WALLS.[70]

Co-owners of a party wall in Iowa are owners in severalty, and hence neither can use the same beyond its center line.[71] The obligation of one to contribute to the cost of a wall erected by the other is measured by the agreement between them, if there is one,[72] but in the absence thereof, be becomes liable upon using the same.[73] Covenants respecting party walls are charges in the nature of an equitable lien upon

fits by way of interest or otherwise are chargeable. Clausen v. Puvogel, 114 App. Div. 455, 100 N. Y. S. 49.

55. See 6 C. L. 947.

56. McElroy v. Whitney [Idaho] 88 P. 349. Where the court appoints a referee and authorizes and directs him to take an accounting of the business and transactions of the partnership, the parties are entitled to a statement from the referee of all the items of account between them and to have the same reported to the court, showing the items allowed and rejected in favor of and against each party. Id.

57. See 6 C. L. 947.

58. Payne v. Martin [Colo.] 89 P. 46.

59. Where the partnership assets amounted to the sum of $4,932.66, of which sum plaintiff contributed $4,232.66, and defendant contributed $700, the amount of money in the hands of the receiver and the amount to be collected by him must be paid to the parties in this proportion, after the payment of the costs and expenses of the action, the commissions of the receiver and the taxes which may be due. Wilson v. Wilson, 74 S. C. 30, 54 S. E. 227. Where a married partner held the legal title to land forming firm assets, which was subject to purchase-money and other mortgages, the right of his wife was in the equity of redemption only, and on a sale of the land, the proceeds must first be applied to the payment of the mortgages, then to the dower interest as ascertained, then to the payment of the debts of the firm, and then to a division of the balance between the members of the firm. Chase v. Angell [Mich.] 13 Det. Leg. N. 616, 108 N. W. 1105.

60. See 6 C. L. 948.

61. See 6 C. L. 948. Where on the dissolution of a partnership by the death of one partner, the surviving partner brings a friendly suit against the deceased partner's widow and heirs to wind up the partnership affairs, the defendants are entitled to their costs out of the estate and each party to the suit is entitled to a reasonable counsel fee to be paid out of the estate in addition to his taxable costs. Patrick v. Patrick [N. J. Eq.] 63 A. 848.

62. See 6 C. L. 948.

63. Pfeiffer v. Bauer, 122 Ill. App. 625.

64. See 6 C. L. 949.

65. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

66. Moran Bros. Co. v. Watson [Wash.] 87 P. 508.

67. See 6 C. L. 949.

68. Failure to record statement. Chatham Nat. Bk. v. Gardner, 31 Pa. Super. Ct. 135.

69. Merchants & Traders' Bk. v. Gardner, 31 Pa. Super. Ct. 143.

70. See 6 C. L. 950.

71. Owners in severalty under Code tit. 14, c. 10. Leaderer v. Colonial Inv. Co., 130 Iowa, 157, 106 N. W. 357.

72. Where the contract provided for payment upon "building on the lot," he is liable irrespective of whether he uses the wall. Jabele & Colias Confectionery Co. v. Brown [Ala.] 41 So. 6266.

73. Where defendant constructed a party wall and plaintiff thereafter nailed the

the land [74] and run therewith, binding the successive owners,[75] especially if the agreement so provides.[76] Where, as a part of the purchase price, a vendee agrees to construct a party wall adjoining the vendor's remaining lot, a lien exists in Kentucky for the enforcement of the same,[77] and where he fails to erect the wall within the contract period, he is liable for resulting damages;[78] and, in an action to compel performance, the court may direct performance within a specified time and decree an alternative judgment for the cost of the same,[79] if the action is not barred by limitation.[80] In Iowa the statute does not commence to run against an action for contribution until the user denies his liability.[81] A co-owner cannot interfere with a legitimate use of a party wall by the other,[82] nor so use it himself as to injure the same [83] or his co-proprietor.[84] The unsuitableness of a party wall for a proposed new building is no ground for condemnation under the act of congress relating to unsafe walls.[85]

PASSENGERS, see latest topical index.

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§ 1. *Necessity and kinds.*[88]—Revised statutes, § 4886, is not unconstitutional because it provides that inventions or discoveries may be either arts, machines,

rafters of his porch into it and so constructed a frame house as to use the wall as one side of two rooms, he was obligated to pay defendant one-half of the value of the wall as a wall in common at the time of the commencement of the use. Pier v. Salot [Iowa] 107 N. W. 420.

74. Equity has jurisdiction for the enforcement of the same. Rugg v. Lemly [Ark.] 93 S. W. 570.

75. Grantee of the builder held entitled to recover upon use of the wall by the adjoining owner, as per contract with his grantor. Rugg v. Lemly [Ark.] 93 S. W. 570.

76. Jabeles & Colias Confectionery Co. v. Brown [Ala.] 41 So. 626.

77. St. 1903, § 2358. Hagins v. Sewell [Ky.] 99 S. W. 673.

78. Cannot recover damages where there is no allegation that a sale was lost or that he desired to use the wall. Hagins v. Sewell [Ky.] 99 S. W. 673.

79. Hagins v. Sewell [Ky.] 99 S. W. 673.

80. Where an agreement to build a party wall is contained in a deed as a part of the consideration for the conveyance, the Kentucky fifteen year statute of limitations applies. Hagins v. Sewell [Ky.] 99 S. W. 673.

81. Does not commence to run so long as he denies that he has made such use as obligates him to pay. See Code, §§ 2995, 3000. Pier v. Salot [Iowa] 107 N. W. 420.

82. Where the builder of a party wall constructs chimneys therein for the benefit of the co-owner and at his expense, he is guilty of trespass in thereafter stopping up the same and may be enjoined. Pier v. Salot [Iowa] 107 N. W. 420.

83. Code, § 2998, does not give a co-proprietor of a party wall an absolute right to place soil pipes therein to the injury of the same. Lederer v. Colonial Inv. Co., 130 Iowa, 157, 106 N. W. 357.

84. Where, in an action for an accounting, it appears that plaintiff has so constructed his roof that snow is likely to accumulate in the gutters and so dampen the wall as to loosen the defendant's wall paper, the decree should provide for the removal of the snow. Pier v. Salot [Iowa] 107 N. W. 420.

85. Act of Congress of March 1, 1899 (30 Stat. at L. 923, c. 323), District of Columbia v. Mattingly, 28 App. D. C. 176.

86. See 6 C. L. 952.

manufactures, or compositions of matter, and that presumptively no two of these subjects are one invention. Inventions have been thus distinguished continuously since 1793, and the supreme court of the United States has frequently recognized the validity of this division.[87]

§ 2. *Patentability. Subjects of an invention.*[88]—The end or purpose sought to be acomplished by a device is not the subject of a patent;[89] a new and useful means for obtaining such end, or accomplishing such purpose, is.[90] While the patentability of a design does not depend on its aesthetic value,[91] still an article to be a proper subject for a design must be one which by artistic treatment in form and configuration may be given value from an aesthetic point of view.[92] In order to decide that a design is unpatentable, it is not necessary to find that it infringes an earlier one, for, to entitle an applicant to the benefit of the design, there must be an exercise of the inventive faculty.[93] Where the peculiarities of an applicant's design do not rise to the dignity of invention, the design is not patentable, although the peculiarities are such as to prevent the design from being regarded as a substitute for a design patented.[94] An improvement in a process and an improvement in a machine are entirely different things, and each may present subject-matter which is patentable.[95] If a process is old and well known, the product of such process must likewise be considered as old in the patentable sense, and is not patentable as a separate and distinct invention.[96]

In all patents invention as distinguishable from mechanical skill is essential.[97]

87. In re Frasch 27 App. D. C. 25.

88. See 6 C. L. 952.

89. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. An abstract idea is not patentable. Bradford v. Expanded Metal Co. [C. C. A.] 146 F. 984.

90. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. An abstract idea is not patentable but only the means by which it may be put into practice. Bradford v. Expanded Metal Co. [C. C. A.] 146 F. 984.

91. In re Schraubstadter, 26 App. D. C. 331.

92. Williams Calk Co. v. Kemmerer [C. C. A.] 145 F. 928. Design patent No. 29,793, horseshoe calk, is void because the subject of it is not one patentable as a design. Id. Design patent No. 31,675, typewriter ribbon spool, is void, the device not being a proper subject for a design patent. Wagner Typewriter Co. v. Webster Co., 144 F. 405.

93. In re Schraubstadter, 26 App. D. C. 331. In a font of type the addition of an old waived outline to common forms of letters does not amount to invention. Id.

94. In re Schraubstadter, 26 App. D. C. 331.

95. Tropenas v. Bryson [Pa.] 64 A. 385. Process for making steel held not infringed and plaintiff held entitled to an accounting under a royalty contract. Id.

96. Victor Talking Mach. Co. v. American Graphophone Co., 145 F. 189.

97. General Elec. Co. v. Bullock Elec. Mfg. Co., 146 F. 551; Gates Iron Works v. Overland Gold Min. Co. [C. C. A.] 147 F. 700; Mills v. Scranton Cold Storage Co., 147 F. 525; Daylight Glass Mfg. Co. v. American Prismatic Light Co. [C. C. A.] 142 F. 454; Krans v. Adolph Hollander Co., 145 F. 956; Western Elec. Co. v. Rochester Tel. Co., 142 F. 766; In re Garrett, 27 App. D. C. 19. No. 587,633, fastener for stair carpets. Sloane v. Dobson, 145 F. 352.

Substituting rubber for stone in making titles held not to constitute invention. New York Belting & Packing Co. v. Sierer, 149 F. 756. Substitution of celluloid for metal, rubber, or glass, held not to constitute invention. No. 752,903, salt and pepper dredge, lacks invention. Hogan v. Westmoreland Specialty Co., 145 F. 199. Granulated coffee is not patentable as an article of manufacture merely because the process used may produce granules which are more uniform and attractive in appearance than those otherwise produced. Balser v. Duncombe Mfg. Co. [C. C. A.] 146 F. 744. A new arrangement or grouping of parts or elements which is the mere result of mechanical judgment and the natural outgrowth of mechanical skill is not invention. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. The use of a ball and socket joint to accomplish the same purpose for which it had previously been used in the same art, in a different but old combination, does not constitute invention. Bradley v. Eccles [C. C. A.] 143 F. 521.

ILLUSTRATIONS. Patents held to disclose invention: Reissue No. 11,992 (original No. 664,890), convertible cars. O'Leary v. Utica & Mohawk Valley R. Co. [C. C. A.] 144 F. 399. Reissue No. 12,037 (original No. 589,168), kinetographic camera, claims 1, 2 and 3. Edison v. American Mutoscope & Biograph Co., 144 F. 121. Design patent No. 33,633, casing for disinfectant. West Disenfecting Co. v. Frank [C. C. A.] 149 F. 423, afg. 146 F. 388. Design patent No. 35,755, reflector. Mygatt v. McArthur, 143 F. 348. No. 330,061, telephone switchboard. Western Elec. Co. v. Rochester Tel. Co., 142 F.

766. No. 339,998, manhole for boilers, Munroe v. Riter, 143 F. 986. No. 365,723, wire-barbing machine. Columbia Wire Co. v. Kokomo Steel Wine Co. [C. C. A.] 143 F. 116. No. 392,735, printers' drying racks. Koerner v. Deuther, 143 F. 544. No. 397,-860, machine for molding tubes. Keasbey & Mattison Co. v. Johns-Manville Co., 145 F. 202. No. 417,451, pulp screening machine. Van Epps v. United Box Board & Paper Co. [C. C. A.] 143 F. 869. No. 418,678, electric switch. Cutler-Hammer Mfg. Co. v. Union Elec. Mfg. Co., 147 F. 266. No. 422,746, electrical transformer. Kuhlman Elec. Co. v. General Elec. Co. [C. C. A.] 147 F. 709. No. 430,868, electric current regulator. Electric Storage Battery Co. v. Gould Storage Battery Co., 148 F. 695. No. 465,255, computing machine, claims 7 and 8. Comptograph Co. v. Mechanical Accountant Co. [C. C. A.] 145 F. 331, rvg. 140 F. 136. No. 473,019, corrugating machine claim. Plecker v. Poorman, 147 F. 528. No. 474,158 air brush. Wold v. Thayer [C. C. A.] 148 F. 227, afg. 142 F. 776. No. 474,536, spring supports. Staples & Hanford Co. v. Lord [C. C. A.] 148 F. 16. No. 478,344, electrical distribution. Bullock Elec. Mfg. Co. v. Crocker Wheeler Co., 141 F. 101. No. 480,026, conveying apparatus. Lidgerwood Mfg. Co. v. Lambert Hoisting Engine Co., 150 F. 364. No. 493,736, car starter. Railway Appliances Co. v. Munroe [C. C. A.] 147 F. 241, afg. 145 F. 464. No. 506,268, process for delinting cotton seed and bulb. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73. No. 508,-637, armature core. General Elec. Co. v. National Elec. Co., 145 F. 193. No. 523,833, machine for making hat packing rings. Ferry-Hallock Co. v. Hallock, 142 F. 172. No. 528,223, workman's time recorder. International Time Recording Co. v. Dey [C. C. A.] 142 F. 736. No. 534,543, gramophone, Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 143 F. 350, afg. 140 F. 860. No. 564,675, rubber tired wheel. Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co., 147 F. 739. No. 555,669, air brush. Wold v. Thayer [C. C. A.] 148 F. 227, afg. 142 F. 776. No. 558,969, claims 1, 2 and 7, paper bag machine Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479. No. 569,903, nail clipper. Cooke Co. v. Little River Mfg. Co. [C. C. A.] 145 F. 348. No. 571,604, belt conveyer claims 5 and 6. Robins Conveying Belt Co. v. American Road Mach. Co. [C. C. A.] 145 F. 923, afg. 142 F. 221. No. 275,614, fireproof blind, claim 3. Kinnear Mfg. Co. v. Wilson [C. C. A.] 142 F. 970. No. 580,000 separable button. United States Fastener Co. v. Bradley [C. C. A.] 149 F. 222, afg. 143 F. 523. No. 680,001, separable button, claims 1 and 2. United States Fastener Co. v. Meyers, 145 F. 536. No. 583,227, card records, claims 1, 2 and 3. Dunn v. Bridgeport Brass Co., 148 F. 239. No. 622,889, steam packing. Forsyth v. Garlock [C. C. A.] 142 F. 461. No. 623,933, bowling alley. Brunswick-Balke-Collender Co. v. Beyer, 145 F. 353. No. 624,-597, card records, claims 1 and 2. Library Bureau v. Macey Co. [C. C. A.] 148 F. 380. No. 626,667, electric sign. Chase Elec. Const. Co. v. Columbia Co., 144 F. 431. No. 626,997, gas burning stove. Nathan v. Howard [C. C. A.] 143 F. 889. No. 645,026, lubricator for locomotive engines. Nathan Mfg. Co. v. Delaware R. Co., 146 F. 252. No. 650,771, plow, claims 7 and 8. Avery & Sons v. Case Plow Works [C. C. A.] 148 F. 214, rvg. 139 F. 878. No. 655,253, woven wire fabric. Locklin v. Buck, 148 F. 715. Nos. 661,025; 661,024, process and apparatus; plate prism glass. Pressed Prism Plate Glass Co. v. Continuous Glass Press Co., 150 F. 355. No. 695,121, doll. Steiner v. Schwarz, 148 F. 868. No. 714,290, incandescent lamps. Fielding v. Crouse-Hinds Elec. Co., 148 F. 230. No. 714,-880, paint remover. Chadeloid Chemical Co. v. De Ronde Co., 146 F. 988. No. 717,348, vamp stay for shoes. Charmbury v. Walden, 141 F. 373. No. 721,276, numbering machine, claims 13, 14 and 15. Bates Mach. Co. v. Force & Co., 146 F. 526. Nos. 721,774 and 721,777, cluster lights. Benjamin Elec. Mfg. Co. v. Dale Co., 141 F. 989. No. 725,278, bolt anchor. Palmer v. Wilcox Mfg. Co., 141 F. 378. No. 729,500, eye shade. Mahony v. Malcom [C. C. A.] 143 F. 124. No. 736,032, bath-seat. Silver & Co. v. Eustis Mfg. Co., 142 F. 525.

Patents held void for lack of invention: Reissue No. 11,639, transom lifter. Connors v. Ormsby [C. C. A.] 148 F. 13. Reissue No. 11,992 (original No. 664,890) convertible cars, claims 1, 2, 6, 7, 8 and 9. O'Leary v. Utica & Mohawk Valley R. Co. [C. C. A.] 144 F. 399. Reissue No. 12,300, refrigerator building. Wills v. Scranton Cold Storage Co., 147 F. 525. Design Patent No. 36,806, building stone. Clark v. Palmer Hollow Concrete Bldg. Block Co. [C. C. A.] 149 F. 1001. No. 368,807, electric resistance coil. Cutler-Hammer Mfg. Co. v. Union Elec. Mfg. Co. 147 F. 266. No. 413,293, system of electrical distribution. Salem Elec. Co. v. Thomson-Houston Elec. Co. [C. C. A.] 144 F. 974, rvg. 140 F. 445. No. 422,305, wheel for door hanger Lane Bros. Co. v. Wilcox Mfg. Co., 141 F. 1000. No. 423,996, brake shoe. American Brake Shoe & Foundry Co. v. Railway Materials Co., 143 F. 540. No. 426,390, door hanger. Lane Bros. Co. v. Wilcox Mfg. Co., 141 F. 1000. No. 427,621, telephone switchboard. Western Elec. Co. v. Rochester Tel. Co. 142 F. 766. No. 440,020, glove fastener. United States Fastener Co. v. Wertheimer, 147 F. 736. No. 447,757, incandescent burner. Pennsylvania Globe Gaslight Co. v. Cleveland Vapor Light Co., 150 F. 583. No. 463,704, electric motor. General Elec. Co. v. Bullock Elec. Mfg. Co., 146 F. 552. No. 473,019, corrugating machine, claim 8. Plecker v. Poorman, 147 F. 528. No. 489,682, electric lamp socket, claim 6. Edison General Elec. Co. v. Crouse-Hinds Elec. Co., 146 F. 539. No. 493,216, track hanger, hay carrier. Louden Mach. Co. v. Janesville Hay Tool Co. [C. C. A.] 148 F. 686, afg. 141 F. 975. No. 493,434, insulator pin. Locke Insulator Mfg. Co. v. Ley [C. C. A.] 143 F. 985, afg. 143 F. 911. No. 500,149, claim 3, air lock for caissons. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. No. 500,371, music boxes. Regina Co. v. New Century Music Box Co. [C. C. A.] 148 F. 1021. No. 504,985, printers' drying racks. Koerner v. Deuther, 143 F. 544. No. 506,268, machine for delinting cotton seeds and bulbs. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73. No. 508,637, armature cores. Bullock Elec. Mfg. Co. v. General Elec. Co. [C. C. A.] 149 F. 409, rvg. 146 F. 549 No. 512,504, chimney Alphons Custodis Chimney Const. Co. v. Heinicke, 142 F. 759. No. 514 843, claims 1, 3, 4, 6 and 8, air lock for caissons. O'Rourke Engineering

While the mere adjustability of parts does not constitute invention,[98] still the conversion of an abandoned machine, which was a failure, into one which is operative and successful, by the introduction of new and ingenious features, however simple, does constitute invention.[99] An increase in the size of an existing device to more completely fulfill its purpose does not constitute patentable invention.[1] It is not patentable invention merely to carry forward an invention shown in a prior machine by a change only in form, proportions, or degree, or the substitution of equivalents, doing substantially the same thing in the same way by substantially the same means, but with better results.[2] The mere adoption of well known methods of one act to another does not, as a general rule, involve invention;[3] nor is the discovery

Const. Co. v. McMullen, 150 F. 338. No. 525,419, stone crusher. Gates Iron Works v. Overland Gold Min. Co. [C. C. A.] 147 F. 700. No. 526,839, track hanger, hay carrier. Louden Mach. Co. v. Janesville Hay Tool Co. [C. C. A.] 148 F. 686, afg. 141 F. 975. No. 527,242, process for expanding sheet metal. Bradford v. Expanded Metal Co. [C. C. A.] 146 F. 984. No. 527,961, rubber tile floors. New York Belting & Packing Co. v. Sierer, 149 F. 756. No. 539,366, lock seam rip strip cans. American Can Co. v. Morris [C. C. A.] 142 F. 166. No. 539,713, photographic film. Eastman Kodak Co. v. Anthony & Scovil Co. [C. C. A.] 145 F. 833. No. 543,347, lock-seam rip-strip cans. American Can Co. v. Morris [C. C. A.] 142 F. 166. No. 548,973, cable-hoist. Lidgerwood Mfg. Co. v. Lambert Hoisting Engine Co., 150 F. 364. No. 559,411, telephone switchboards. Western Elec. Co. v. Rochester Tel. Co. [C. C. A.] 145 F. 41. No. 573,107, armature. General Elec. Co. v. Bullock Elec. Mfg. Co., 146 F. 551. No. 578,633, fastener for stair carpets. Sloane v. Dobson, 145 F. 352. No. 593,954, chest and neck protector. Way v. Hygienic Fleeced Underwear Co., 150 F. 374. No. 600,186, fireproof windows. Voightmann v. Weis & Ridge Cornice Co. [C. C. A.] 148 F. 848. No. 615,500, coat pad. Schweichler v. Levinson [C. C. A.] 147 F. 704. No. 616,659, stone crusher. Gates Iron Works v. Overland Gold Min. Co. [C. C. A.] 147 F. 700. No. 617,942, acetylene gas burner. American Acetylene Burner Co. v. Kirchberger [C. C. A.] 147 F. 253, afg. 142 F. 745. No. 623,857, card records. Library Bureau v Macey Co. [C. C. A] 148 F. 380. No. 624,597, card records, claims 3 and 4. Library Bureau v. Macey Co. [C. C. A.] 148 F. 380. No. 629,391, stocking supporter. Parramore v. Siegel-Cooper Co. [C. C. A.] 143 F. 516. No. 634,295, reflector. Mygatt v. McArthur, 143 F. 348. No. 634,838, acetylene gas burners. American Acetylene Burner Co. v. Kirchberger [C. C. A.] 147 F. 253, afg. 142 F. 745. No. 654,550, machine for delinting cotton seeds and bulbs. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73. Nos. 654,843, 654,844 and 654,845, saw sharpening machines. Covel Mfg. v. Rich [C. C. A.] 142 F. 468. No. 668,268, foot rest for chairs. Streit v. Kaiper [C C. A.] 143 F. 981. No. 669,251, saw sharpening machines. Covel Mfg. v. Rich C. C. A.] 142 F. 468. No. 669,621, pleasure wheel. Conderman v. Clements [C. C. A.] 147 F. 915. No. 695,282, machine for making prismatic glass. Daylight Glass Mfg. Co. v. American Prismatic Light Co. [C. C. A.] 142 F. 454. Nos. 695,283 and 695,284, and 710,434, process making prismatic glass. Id. No. 719,814, neckwear supporter. Krans v. Adolph Hollander Co., 145 F. 956. No. 725,858, savings bank. Burns Co. v. Mills [C. C. A.] 143 F. 325. Nos. 726,812 and 736,346, each for a process of treating coffee and the product of such process. Baker v. Duncombe Mfg. Co. [C. C. A.] 146 F. 744. No. 729,084. swift bracket for winding machines. Sipp Elec. & Mach. Co. v. Atwood-Morrison Co. [C. C. A.] 142 F. 149. No. 752,903, salt and pepper dredge. Hogan v. Westmoreland Specialty Co., 145 F. 199. No. 761,635, wire paper clip. Cushman & Denison Mfg. Co. v. Denny, 147 F. 734. Improvement in a stem-setting timepiece, of gears connecting the pinion of the minute hand with the second hand. In re Volkmann, 28 App. D. C. 441. The insertion of an additional gear and pinion wheel in a train of such wheels arranged to transmit motion. Id. Adaptation of device for heating water into a device for cooling it. In re Welch, 28 App. D. C. 362. Substitution, in the Bourdon tube spring of a steam gage, of tapered threads for a soldered joint. Millett v. Allen, 27 App. D. C. 70. The inclosing of an electro magnet for submarine work in a waterproof, nonmagnetic covering. In re Hayes, 27 App. D. C. 393. Method for treating shells in the manufacture of pearl buttons, consisting of reducing portions of the shells to a suitable thickness and then cutting blanks therefrom. In re Weber, 26 App. D. C. 29. Using neck of funnel as part of a plug valve to be opened by turning the funnel. In re Baker, 26 App. D. C. 363. Adding, in a stem-setting timepiece, a setting mechanism such as is shown in one patent, to a clock mechanism as shown in another patent. In re Volkmann, 28 App. D. C. 441.

98. Smyth Mfg. Co. v. Sheridan [C. C. A.] 149 F. 208, rvg 144 F. 423.

99. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736.

1. Streit v. Kaiper [C. C. A.] 143 F. 981.

2. Van Epps v. United Box Board & Paper Co. [C. C. A.] 143 F. 869; In re Hodges, 28 App. D. C. 525.

3. The application of an old process or machine to a similar or analogous subject, with no change in the manner of applying it, and no result substantially distinct in its nature, will not sustain a patent, even if the new form of result has not before been contemplated. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. Applying an old process to a new use is not invention. Baker v. Duncombe Mfg. Co. [C. C. A.] 146 F. 744. A patent for a material for making steam packing may involve invention, although a similar material had previously been used for other and wholly different purposes. Forsyth v. Garlock [C. C. A.] 142 F. 461. The

of a new and analogous function for an old machine patentable.[4] A patent will not fail because the principal advantages of the invention prove to be different from the one chiefly in the patentee's mind, if there be in the concept an actual advantage and the structure embodying it discloses patentable invention.[5] Where a patent discloses means by which a novel and successful result is secured, it is immaterial whether the patentee understands or correctly states the theory or philosophical principles of the mechanism which produces the new result.[6]

To constitute a combination, it is essential that there should be some joint operation performed by the elements, producing a result due to their joint and co-operating action, while in an aggregation there is a mere adding together of separate contributions, each operating independently of the other.[7] Unless the combination of well known elements accomplishes some new result, the mere multiplicity of elements does not make it patentable. So long as each element performs some old and well known function, the result is not patentable invention, but an aggregation of elements.[8] While a combination of old elements producing a new and useful result will be patentable, yet, where the combination is merely the assembling of old elements producing no new and useful result, invention is not shown.[9] Where the elements of a combination sought to be patented are well known, and, if not known in the combination described, are known in analogous combinations, the court is at liberty to determine whether there is any invention in using them in the exact combination claimed.[10] The substitution for an old element in a combination of an element performing a similar function, but constructed in a different way, does not render the combination itself patentable where there is no resultant change in the operation.[11] In such a case, although the substituted elements may be superior, the invention lies in the element and not in the combination.[12] A change in prior devices, in order to be patentable, must be made by transferring an old device to use in an entirely different and related act.[13] There being no change in the manner of applying it, and no result substantially distinct in its nature, the application of an old device or process to a similar or analogous subject is not patentable, even if the new form of result has not before been contemplated.[14]

strengthening of iron castings by the insertion of wrought iron bars or rods in the process of making belongs in the casting or foundry art and not in the art in which the particular casting may be used, and the employment of the device in casting brake shoes, after its use for the same purpose in casting sleigh runners, annealing boxes, etc., is not an adoption of the process to a new art. American Brake Shoe & Foundry Co. v. Railway Materials Co., 143 F. 540.

4. In re McNeil, 28 App. D. C. 461.

5. Kuhlman Elec. Co. v. General Elec. Co. [C. C. A.] 147 F. 709.

6. Van Epps v. United Box Board & Paper Co. [C. C. A.] 143 F. 869.

7. American Chocolate Mach. Co. v. Helmstetter [C. C. A.] 142 F. 978.

8. In re Hill, 26 App. D. C. 318.

9. Computing Scale Co. v. Automatic Scale Co., 27 S. Ct. 307. It is not invention to merely extend the use of an old combination of elements, where no new result is produced and no new method of producing the old result. Voightmann v. Weis & Ridge Cornice Co. [C. C. A.] 148 F. 848. No. 479,607, feeders for cotton gin, while elements are old, discloses new and patentable combination which produces new and decidedly useful result. Murray Co. v. Continental Gin Co. [C. C. A.] 149 F. 989. No. 587,368, fire pots and grates for stoves void as not disclosing a true combination. Germer Stove Co. v. Art Stove Co. [C. C. A.] 150 F. 141. No. 532,554, candy cutter, held patentable combination though elements are old. American Caramel Co. v Mills & Bro. [C. C. A.] 149 F. 743. No. 645,871, folding machine, old elements but new combination, United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736.

10. In re Hill, 26 App. D. C. 318.

11. In re Hawley, 26 App. D. C. 324. It does not involve invention, so far as the combination is concerned, to use in a time-recording mechanism a record sheet having a removable service in combination with a stylus which removes a portion of said surface, although the record sheet itself may be novel. Id. Where in a rock crusher the combination of a crusher shaft, a core portion removably secured thereto, and a mantle portion removably secured to the core portion, is concededly unpatentable, the attachment of a pin and slot-fastening device of a former patent to retain the mantle on the case, is mere double use, and also an obvious substitution of substantial equivalents. In re Thurston, 26 App. D. C. 315.

12. In re Hawley, 26 App. D. C. 324.

13. In re Thurston, 26 App. D. C. 315.

14. Millett v. Allen, 27 App. D. C. 70.

The form of contracts or proposals for contracts, devised or adopted as a method of transacting a particular class of insurance, is not patentable as an act.[15]

While utility [16] or commercial success [17] is not necessarily proof of invention, still, the question being otherwise doubtful,[18] it may help to determine the matter, increased efficiency being accepted as an important factor;[19] and it also is regarded as significant that there has been a recognized need of such an article as that of the patent, and that the facts of others to meet it have been without success which the patentee has attained only after continued experiment.[20] Invention may exist in substituting a new and different operating part in a machine, notwithstanding it does not constitute such an advance in the art as to lead the owner of the patent to discard old machines and use those of the patent. It may be enough that the substitution addresses itself to any considerable portion of the community and creates an opportunity for electing between different methods.[21]

Double patenting is not allowable.[22] The granting of a void patent for an improvement upon valid basic patents then pending on application cannot be held to impair the inventor's rights under the basic patents when granted.[23] Where an application for a basic patent is pending, the granting to the same inventor of a limited combination patent, of which the subject-matter of the basic patent is an essential element, is not an abandonment of the latter to the public.[24]

Novelty [25] is essential to all patents.[26] The novelty of a design is to be deter-

15. A form of proposed contract to be entered into with individuals desiring the benefit of burial insurance or guaranty, with blanks attached and readily separable therefrom, which, in addition to the ordinary draft for payment, show the several certificates required in order to provide, as far as practicable, against the perpetration of frauds upon the insurer or guarantor, is not of a patentable nature. Millett v. Allen, 27 App. D. C. 70. Semble, that a form of proposed contract to be entered into with individuals desiring the benefit of burial insurance or guaranty, with blanks attached and readily separable therefrom, which, in addition to the ordinary draft for payment, show the several certificates required in order to provide, as far as practicable, against the perpetration of frauds upon the insurer or guarantor, is unpatentable for want of novelty. Id.

16. American Caramel Co. v. Mills & Bro. [C. C. A.] 149 F. 743. Wills v. Scranton Cold Storage Co., 147 F. 525.

17. In re Thomson, 26 App. D. C. 419. No. 695,282, machine for making prismatic glass, lacks invention. Daylight Glass Mfg. Co. v. American Prismatic Light Co. [C. C. A.] 142 F. 454. The fact that a machine has met with instant favor and large sales may be sufficient to determine patentability in case of doubt thereof, but it cannot confer patentability on an unpatentable device. In re Thurston, 26 App. D. C. 315.

18. The utility, public acceptance, or magnitude of sales of a patented article can only be considered on the question of invention when such question is otherwise doubtful. Voightmann v. Weis & Ridge Cornice Co. [C. C. A.] 148 F. 848. Although the fact that a device has supplanted prior devices in the trade may turn the scale in favor of the existence of invention, where that question is in doubt, yet such fact has no weight where the want of patentable novelty is already reasonably clear. In re Garrett, 27 App. D. C. 19. The fact that a new device or construction may have displaced others by reason of its manifest superiority is material only when the question of patentable novelty is otherwise a matter of doubt. Millett v. Allen, 27 App. D. C. 70.

19, 20. American Caramel Co. v. Mills & Bro. [C. C. A.] 149 F. 743.

21. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

22. Nos. 511,559 and 511,560, electric motors, and No. 401,520, do not constitute a case of double patenting. Westinghouse Elec. & Mfg. Co. v. Elec. Appliance Co., 142 F. 545.

23, 24. Westinghouse Elec. & Mfg. Co. v. Elec. Appliance Co., 142 F. 545.

25. See 6 C. L. 958.

26. Patents possessing novelty: No. 617,813, curtain-stretching frame, contains but a single novel feature of proportioning the metal base of the movable pins and the slot in which they move. Mayr v. Holmquist [C. C. A.] 145 F. 179. No. 623,933, bowling alley, discloses novelty. Brunswick-Balke Collender Co. v. Beyer, 145 F. 353. No. 633,772, automatic electric circuit breaker. Westinghouse Elec. & Mfg. Co. v. Cutter Elec. & Mfg. Co. [C. C. A.] 143 F. 966. No. 667,813, railroad torpedo. American Fog Signal Co. v. Columbia Firecracker Co., 143 F. 907.

Patents void for lack of novelty: No. 435,613, book-sewing machine, claims 3 and 15. Smythe Mfg. Co. v. Sheridan [C. C. A.] 149 F. 208, rvg. 144 F. 423. No. 485,896, thilling coupling. Bradley v. Eccles [C. C. A.] 143 F. 521. No. 565,276, button or snap fastner. United States Fastener Co. v. Stahel, 149 F. 225. No. 570,148, car truss. Thomas v. St. Louis, etc., R. Co. [C. C. A.] 149 F. 753. No. 575,154, stone planing machine, claims 1, 2 and 3. Lincoln Iron Works v. McWhirter Co. [C. C. A.] 142 F. 967. No. 622,403, cell case machine, claim 1. Swift v. Portland Brush & Broom Co. [C. C. A.] 149 F. 216. No. 651,938, sprayer. Look v. Smith [C. C. A.] 148 F. 12. No. 688,674, meat tree. Fitzgerald

mined by the comparative appearance of the designs to the eyes of average observers, and not to the eyes of experts.[27] Novelty is not negatived by a prior accidental production of the same thing, when the operator does not recognize the means by which the accidental result is accomplished, and no knowledge of them or the method of its employment is derived from it by any one.[28]

Anticipation[29] in a prior invention is fatal to the validity of the patent.[30] Whatever the fact may be, an inventor is chargeable with a knowledge of all pre-

Meat Tree Co. v. Morris [C. C. A.] 148 F. 854, afg. 142 F. 763. No. 705,715, process for lustering silk. Stuart v. Auger & Simon Silk Dyeing Co. [C. C. A.] 149 F. 748. No. 705,716, machine for lustering silk. Id. No. 715,512, cigar band. Regensburg v. Portuondo Cigar Mfg. Co. [C. C. A.] 142 F. 160. No. 718,499, tenting cloth. West Boylston Mfg. Co. v. Wallace [C. C. A.] 144 F. 979, afg. 137 F. 922.

27. In re Schraubstadter, 26 App. D. C. 331.

28. American Salesbook Co. v. Carter-Crume Co. [C. C. A.] 150 F. 333, rvg. 145 F. 939.

29. See 6 C. L. 958.

30. Where an applicant's claims do not differ essentially from a patent referred to as anticipating his invention, he cannot assert the question is not whether certain limitations shall be put into his claims, but solely whether the patent referred to discloses a structure capable of securing the same function as his. In re McNeil, 28 App. D. C. 461.

Patents anticipated: Design Patent No. 36,806, building stone. Clark v. Palmer Hollow Concrete Bldg. Block Co. [C. C. A.] 149 F. 1001. No. 415,048, lemon juice extractor, claim 3. The Fair v. Manny Lemon Juice Extractor Co. [C. C. A.] 145 F. 175. No. 426,390, door hanger. Lane Bros. Co. v. Wilcox Mfg Co., 141 F. 1000. No. 433,791, coil clasp for belts. Birdsboro Steel Foundry & Mach. Co. v. Kelley Bros. & Spielman [C. C. A.] 147 F. 713, afg. Kelley Bros v. Diamond Drill & Mach. Co., 142 F. 868. No. 447,757, incandescent burner. Pennsylvania Globe Gaslight Co. v. Cleveland Vapor Light Co., 150 F. 583. No. 447,932, titling bin. Miller v. Walker Patent Pivoted Bin Co. [C. C. A.] 145 F. 832. No. 612,504, chimney. Alphons Custodis Chimney Const. Co. v. Heinicke, 142 F. 759. No. 513,603, flexible ventilated eyeguard. Tilleston v. Vaughan [C. C. A.] 149 F. 999. No. 523,833, machine for making hot packing rings, claim 5. Ferry-Hallock Co. v. Hallock, 142 F. 172. No. 524,178, packing for steam pistons. Daniel v. Restein [C. C. A.] 146 F. 74. No. 555,825, locking device for elevators, claims 1 and 2. Standard El. Interlock Co. v. Ramsey [C. C. A.] 143 F. 972. No. 573,532, separable buttons, claims 3 and 4. United States Fastener Co. v. Dutcher, 146 F. 136. Claim 1, No. 594,036, vacuum tubes. Queen v. Friedlander, 149 F. 771. Nos. 600,826 and 600,827, for processes for mercerizing fabrics. American Mercerizing Co. v. Hampton Co., 147 F. 725. No. 605,138, barrel-washing machine. Schock v. Olsen & Tilgner Mfg. Co [C. C. A.] 147 F. 229, afg. 145 F. 633. No. 620,826, machine for dimensioning chain links. Columbus Chain Co. v. Standard Chain Co. [C. C. A.] 148 F. 622. No. 628,176, computing machine, claims 1, 2 and 4. Universal Adding Mach. Co. v. Comptograph Co. [C. C. A.] 146 F. 981, rvg. 142 F. 539. No. 631,518, motor frames. New England Motor Co. v. Sturtevant Co. [C. C. A.] 150 F. 131, rvg. 140 F. 866. No. 644,532, cotton elevators and gin feeders Murray Co. v. Continental Gin Co. [C. C. A.] 149 F. 989. No. 647,934, manifolding salesbook. American Sales Book Co. v. Carter-Crume Co. [C. C. A.] 150 F. 333, rvg. 145 F. 939. No. 650,771, plow, claims 2 to 6 Avery & Sons v. Case Plow Works [C. C. A.] 148 F. 214, rvg. 139 F. 873. No. 661,023, plate prism glass. Pressed Prism Plate Glass Co. v. Continuous Glass Press Co., 150 F. 355. No. 669,574, motor frames. New England Motor Co. v. Sturtevant Co. [C. C. A.] 150 F. 131, rvg. 140 F. 866. No. 672,056, clutch. United Shoe Mach. Co. v. Greenman, 145 F. 538. No. 688,739, method of producing sound records. American Graphophone Co. v. American Record Co., 146 F. 643; American Graphophone Co. v. Universal Talking Mach. Mfg. Co., 145 F. 636. No. 705,715, process for lustering silk. Stuart v. Auger & Simon Silk Dyeing Co. [C. C. A.] 149 F. 748. No. 705,716, machine for lustering silk. Id. No. 729,084, swift bracket for winding machines. Sipp Elec. & Mach. Co. v. Atwood-Morrison Co. [C. C. A.] 142 F. 149. Combination bed couch anticipated by a patent wherein the same structure is found except that the projections to the end of the seat extend from the upper instead of the lower side thereof, and project just beyond the back, instead of to a point just within the box. In re Hoey, 28 App. D. C. 416. Box couch combination, providing for small stops on either end of and within the box, so placed that, when the seat is opened sufficiently to balance the back, the projecting arms strike thereon or come in contact therewith, is anticipated by a construction in which the back of the box itself performs the same function. Id. A fluid color for the water jacket of a gas engine held anticipated by a patent for a similar device in which the tubes are fastened together by a wire so as to permit the passage of the warm water between. In re Welch, 28 App. D. C. 362. Claims for an interheater for a compound compressed air engine, using atmospheric air to impart heat to the compressed air within the interheater, are not anticipated by a patent for such an interheater using a liquid substance for the same purpose, but are anticipated by a patent which shows that one body of air may impart heat to another body flowing in a coil, and by thus imparting heat may increase the expansive power of the inclosed body of air. In re Hodges, 28 App. D. C. 525.

Patents not anticipated: Patent for air brush for making pictures held not anticipated by oil burners having concentric oil and steam nozzles. Wold v. Thayer & Chandler [C. C. A.] 148 F. 227, afg. 142 F. 776. Reissue No. 11,992 (original No. 664,-

existing patents and devices.[31] While the date of the application is presumptively the date of the invention,[32] still declarations of a patentee relating to the invention, accompanied by descriptions thereof, and made before his application for a patent was filed, are competent evidence to carry the date of his invention back to the time when they were made.[33] A public knowledge and use of a device by others prior to the application for a patent therefor being shown, the burden is cast upon the patentee to furnish convincing proof that the anticipation shown was anticipated by him in making the invention.[34] In order to overcome a showing of anticipation, oral proof must be clear, satisfactory, and beyond a reasonable doubt.[35] A patent

890), convertible cars. O'Leary v. Utica & Mohawk Valley R. Co. [C. C. A.] 144 F. 399. Reissue No. 12,037 (original No. 589,168), kinetographic camera, claims 1, 2 and 3. Edison v. American Mutoscope & Biograph Co., 144 F. 121. Design patent, No. 35,765, reflector. Mygatt v. McArthur, 143 F. 348. No. 330,061, telephone switchboard. Western Elec. Co. v. Rochester Tel. Co., 142 F. 766. No. 339,998, manhole for boilers. Munroe v. Erie City Iron Works, 143 F. 989; Munroe v. Riter, 143 F. 986. No. 392,735, printers' drying racks. Koernor v. Deuther, 143 F. 544. No. 397,860, machine for molding pipe coverings. Keasbey & Mattison Co. v. American Magnesia & Covering Co. [C. C. A.] 143 F. 490. No. 417,451, pulp screening machine. Van Epps v. United Box Board & Paper Co. [C. C. A.] 143 F. 869. No. 418,678, electric switch. Cutler v. Hammer Mfg. Co. v. Union Elec. Mfg. Co., 147 F. 266. No. 422,746, electrical transformer, not anticipated. Kuhlman Elec. Co. v. General Elec Co. [C. C. A.] 147 F. 709. No. 430,868, electric current regulator. Electric Storage Battery Co. v. Gould Storage Battery Co., 148 F. 695. No. 472,607, feeders for cotton gin. Murray Co. v. Continental Gin Co. [C. C. A.] 149 F. 989. No. 474,158, air brush. Wold v. Thayer [C. C. A.] 148 F. 227, afg. 142 F. 776. No. 474,536, spring supports Staples & Hanford Co. v. Lord [C. C. A.] 148 F. 16. No. 478,344, electrical distribution. Bullock Elec. Mfg. Co. v. Crocker-Wheeler Co., 141 F. 101. No. 479,864, staiway. Seeberger v. Reno Inclined Elev. Co., 145 F. 532. No. 480,029, conveying apparatus. Lidgerwood Mfg. Co. v. Lambert Hoisting Engine Co., 150 F. 364. No. 493,736, car starter Railway Appliances Co. v. Munroe [C. C. A.] 147 F. 241, afg. 145 F. 646. No. 504,065, typewriter keys. Imperial Mfg. Co. v. Munson Supply Co. [C. C. A.] 145 F. 514. No. 506,268, process for delinting coton seed and bulbs. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73. No. 508,637, armature core. General Elec Co. v. National Elec. Co., 145 F. 193. No. 523,833, machine for making hot packing rings. Ferry-Hallock Co. v. Hallock, 142 F. 172. No. 528,223, workman's time recorder. International Time Recording Co. v. Dey [C. C. A.] 142 F. 736. No. 534,543, gramophone. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 145 F. 350, afg. 140 F. 860. No. 535,465, washing machine. Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co., 144 F. 429. No. 542,732, heat regulator. Weld Mfg. Co. v. Johnson Service Co. [C. C. A.] 147 F. 234. No 555, 669, air brush. Wold v. Thayer [C. C. A.] 148 F 227, afg. 142 F. 776. No. 558,969, claims 1, 2 and 7, paper bag machine. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479. No. 569,903, nail clipper. Cooke Co. v. Litle River Mfg. Co. [C. C. A.] 145 F. 348. No. 572,014, fireproof blind, claim 3. Kinnear Mfg. Co. v. Wilson [C. C. A.] 142 F. 970. No. 580,000, separable button. United States Fastener Co. v. Bradley [C. C. A]. 149 F. 222, afg. 143 F. 523. No. 583,227, card records, claims 1, 2 and 3. Gunn v. Bridgeport Brass Co, 148 F. 239. Nos. 587,441 and 587,442, electric controllers. General Elec. Co. v. Garrett Coal Co. [C. C. A.] 146 F. 66, rvg. 141 F. 994. No. 594,036, vacuum tubes, claims 2 and 3. Green & Co. v. Friedlander, 149 F. 771. No. 622,889, steam packing. Forsythe v. Garlock [C. C. A.] 142 F. 461. No. 626,667, electric sign. Chase Elec. Const. Co. v. Columbia Co., 141 F. 431. No. 626,997, gas burning stove Nathan v. Howard [C. C. A.] 143 F. 889. No. 633,772, automatic electric circuit breaker. Westinghouse Elec. & Mfg. Co. v. Cutter Elec. & Mfg. Co. [C. C. A.] 143 F. 966. No. 638,540, combined abdominal pad and hose supporter. Foster Hose Supporter Co. v. Cohen, 148 F. 92. No. 645,026, lubricator for locomotive engines. Nathan Mfg. Co. v. Delaware, etc., R. Co., 146 F. 252. No. 645,871, folding machine. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736. Nos. 661,024, 661,025, process and apparatus. plate prism glass. Pressed Prism Plate Glass Co. v. Continuous Glass Press Co., 150 F. 355. No. 667,813, railroad torpedo. American Fog Signal Co. v. Columbia Firecracker Co., 143 F. 907. No. 695,121, doll. Steiner v. Schwarz, 148 F. 868. No. 714,880, paint remover. Chadeloid Chemical Co. v. De Ronde Co, 146 F. 988. No. 717,348, vamp stay for shoes. Charmbury v. Walden, 141 F. 373. No. 721,276, numbering machine, claims 13 14 and 15. Bates Mach. Co. v. Force Co, 145 F. 526. No. 729,500, eye shade. Mahony v. Malcom [C. C. A.] 143 F. 124. No. 736,032, bathseat. Silver & Co. v. Enstis Mfg. Co., 142 F. 525.

31. Voightmann v. Weis & Ridge Cornice Co. [C. C. A.] 148 F. 848; Daylight Glass Mfg. Co. v. American Prismatic Light Co. [C. C. A.] 142 F. 454; Millett v. Allen, 27 App. D. C. 70.

32. Stuart v. Auger & Simon Silk Dying Co. [C. C. A.] 149 F. 748.

33. Bullock Elec. Mfg. Co. v. Crocker-Wheeler Co., 141 F. 101.

34. New England Motor Co. v. Sturtevant Co. [C. C. A.] 150 F. 131, rvg. 140 F. 866; Stuart v. Auger & Simon Silk Dyeing Co. [C. C. A.] 149 F. 748.

35. Columbus Chain Co. v. Standard Chain Co. [C. C. A.] 148 F. 622. A patent will not be held void for anticipation by an unpatented machine on the oral testimony of witnesses, the accuracy of which depends upon their unaided recollection of events which

for a successful machine is not void for anticipation, because a prior machine intended for a different purpose may possibly be capable of use as an inefficient substitute for the later machine.[36] A machine fully embodying a device subsequently patented by another does not lose its effects as an anticipation because its use was abandoned solely for the reason that the product in making which it was employed was not successful, where it is shown that the machine worked successfully and the maker did not abandon the invention embodied therein.[37] The fact that the alleged anticipating machines were not capable of successful practical working, because of objections as to minor matters of detail in construction, does not destroy their effect as anticipated.[38] A prior foreign patent will not invalidate a domestic patent if the invention is shown to have been made by the American patentee before the date of the foreign patent.[39] In determining the question of anticipation, an instrument known under the German law as a "Gebrauchsmuster," is not one, the filing of which charges any one with notice of its contents or which has the effect of a foreign [40] patent.

Prior public use [41] for two years before the filing of the application will defeat the right to the patent;[42] hence an inventor who has reduced his invention to practice is entitled to a period of two years in which to put the same in public use and on sale, without a forfeiture of his right to receive a patent.[43] It is not enough to defeat the patent that some one other than the patentee had conceived the invention before he did, or had not perfected it, so long as it had not been in public use, or described in some patent or publication, if the patentee was an original and independent inventor.[44] If the inventor uses his invention for profit, and not by way of experiment, it is a public use.[45] A patent is not invalidated because a machine like that of the patent was made and used by the patentee more than two years before the application was filed, where such use was for the purpose of experiment

occurred twenty-five year previously, unless it is exceptionally clear and convincing. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F 736.

36. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736. A patent is not anticipated by prior patents for devices which might by slight modifications have been made to perform the functions of that of the later patent, where it does not appear that the patentees had in mind their use or adoption to accomplish such result. Gunn v. Bridgeport Brass Co., 148 F. 239.

37. United Shoe Mach. Co. v. Greenman, 145 F. 538.

38. Van Epps v. United Box Board & Paper Co. [C. C A.] 143 F. 869.

39. Columbus Chain Co. v. Standard Chain Co [C. C. A.] 148 F. 622.

40. Steiner v. Schwarz, 148 F. 868.

41. NOTE: A "Gebrauchsmuster" is somewhat similar to a United States design patent, but it is not a patent. It protects a new construction without relation to its technical effect. In distinction from a United States design patent, a German Gebrauchsmuster protects not only the outer shape or appearance or artistic design of the model, but also the construction of the inner parts thereof. In examining a Gebrauchsmuster in the German Patent Office as to whether the same is to be registered or not, the title of the Gebrauchsmuster only is considered, since the latter only is made officially public by printing in the proper German publication.—From Steiner v. Schwartz, 148 F. 868.

41. See 6 C. L 960.

42. Patents Construed With Reference to Prior Public Use. Valid: No. 534,543, gramophone. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 145 F. 350, afg. 140 F. 860. No. 736,032, bathseat. Silver & Co. v. Eustis Mfg. Co., 142 F. 525.

Void: Reissue No. 6,831 (original No. 165,438) gong attachment for engine houses. Bragg Mfg. Co. v. New York, 141 F. 118. Reissue No. 11,260 (original No. 456,117) thill coupling. Bradley v. Eccles [C. C. A.] 144 F. 90. Nos. 543,347. 539,366, lock-seam rip-strip cans. American Can Co. v. Morris [C. C. A.] 142 F. 166. No. 559,827, featherbone. American Featherbone Co. v. Warren Featherbone Co. [C. C. A.] 141 F. 655. No. 713,209, process of duplicating phonograms. National Phonograph Co v. Lambert [C. C. A.] 142 F. 164. No. 729.084, swift bracket for winding machines. Sipp Elec. & Mach. Co. v. Atwood-Morrison Co. [C. C. A.] 142 F. 149.

43. Rolfe v. Hoffman, 26 App. D. C. 336.

44. Lincoln Iron Works v. McWhirter Co. [C. C. A.] 142 F. 967.

45. Ferry-Hallock Co. v. Hallock, 142 F. 172. Manufacture and use for commercial purposes of some eight thousand of the articles during the ten years preceding the filing of the application held a public use. National Phonograph Co. v. Lambert Co. [C. C. A.] 142 F. 164.

only,[46] nor is such a public use which will defeat the patent because the product of the machine during the time was sold.[47] To defeat a patent, evidence of public use must be clear and convincing.[48]

Abandonment.[49]—Delay by an inventor in applying for a patent after he has reduced his invention to practice for the purpose of perfecting it, or testing its practical value, will not constitute an abandonment or laches which will defeat his right to a patent where, from some unknown cause, it was not successful in operation, although it subsequently develops that the trouble was due to external causes not affecting the utility or successful working of the invention;[50] but an inventor, having grasped an idea and put it in mechanical form, may not wait to secure a monopoly upon the broad thought until everything in the nature of a mere accessory improvement that makes it commercially better has been run out and perfected.[51] The mere omission of claims from an application will not operate as an abandonment.[52]

§ 3. *Who may acquire patents.*[53]—The patentee must be the true inventor.[54] Where two inventors are working contemporaneously, but independently, on the same invention, the one who first reduces his ideas to a definite form by means of a written description, model, or drawing, and obtains a patent therefor, is entitled to priority.[55] A patent for a machine is not invalid because of the fact that the pat-

46. American Caramel Co. v. Mills & Bro. [C. C. A.] 149 F. 743.

47. American Caramel Co. v. Mills & Bro. [C. C. A.] 149 F. 743. No. 532,554, candy cutter, held valid as against claim of prior public use. Id.

48. American Featherbone Co. v. Warren Featherbone Co. [C. C. A.] 141 F. 655. There is no hard and fast rule as to the measure or kind of proof required to establish prior use of a patented device, further than that it must be clear and satisfactory to the judicial mind in each case. Sipp Elec. & Mach. Co. v. Atwood-Morrison Co. [C. C. A.] 142 F. 149.

49. See 6 C. L. 961.

Facts constituting and evidence of abandonment: Eight years' delay works an abandonment. Claims 1, 2 and 4 of No. 628,176, computing machine, construed. Universal Adding Mach. Co. v. Comptograph Co. [C. C. A.] 146 F. 981, rvg. 142 F. 539. Attempt to obtain patent held evidence that invention was not an abandoned experiment. United Shoe Mach. Co. v. Greenman, 145 F. 538. Where after notice of rejection of claim the applicant filed an application for another patent, incorporated the rejected claim therein by amendment, and after allowance cancelled the rejected claim of the former application, held no abandonment. Kinnear Mfg. Co. v. Wilson [C. C. A.] 142 F. 970.

Patents construed with reference to abandonment: No. 534,543, gramophone, not abandoned. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 145 F. 350, afg. 140 F. 860. No. 572,014, fireproof blind claim 3, not abandoned. Kinnear Mfg. Co. v. Wilson [C. C. A.] 142 F. 970.

50. Appert v. Brownsville Plate Glass Co., 144 F. 115.

51. Universal Adding Mach. Co. v. Comptograph Co. [C. C. A.] 146 F. 981, rvg. 142 F. 539.

52. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 145 F. 350, afg. 140 F. 860. The fact that an invention is described, but not claimed in a patent, does not operate as a disclaimer or abandonment of the same, where it is the subject-matter of a pending application by the inventor for another patent. Kinnear Mfg. Co. v. Wilson [C. C. A.] 142 F. 970.

53. See 6 C. L. 96.

54. One of the parties to an interference not being the original inventor, the question of the diligence of the other party is immaterial. Henry v. Doble, 27 App. D. C. 33. While the courts deal liberally with inventors, they will not permit the real inventor to be deprived of the fruits of his genius and labor by a mere copyist. In re Hoey, 28 App. D. C. 416. Evidence held to establish the reduction to practice by Edmund C. Schmertz of the process of making wire glass covered by the Appert patent No. 608,906, prior to the issuance of the French patent, for the invention to Appert. Appert v. Brownsville Plate Glass Co., 144 F. 145. Evidence held insufficient to overcome the presumption of priority of invention in favor of No. 558,969, paper bag machne, over No. 598,497, for which application was made after the issuance of the former patent. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479. Patentee held inventor. No. 397,860, machine for molding tubes. Keasbey & Mattison Co. v. Johns-Manville Co., 145 F. 202. No. 667,813, railroad torpedo, held valid as against the defense of prior invention by a defendant. American Fog Signal Co. v. Columbia Firecracker Co., 143 F. 907. Complainant held not entitled to patent for a wooden center for a hub. Gillette v. Sendelbach [C. C. A.] 146 F. 758. Where it appears that plans and specifications for a power plant, submitted by an electric company to a construction company with which one applicant was connected, disclosed the invention, and that such applicant prepared a proposal to meet their requirements, he cannot be held to be an original inventor. Henry v. Doble, 27 App. D. C. 33.

55. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

entee obtained the general conception of the machine from another, but without disclosure of any means for carrying the same into effect, which means the patentee himself devised and which constituted the only invention described and claimed in the patent;[56] and the fact that another than the patentee contributed to the mechanism necessary to make the invention operative does not affect the validity of any claims of the patent which do not cover the mechanism so supplied, either as a whole or in combination.[57] The right of one who conceives an invention to patent the same as the sole inventor is not lost because he lacks the mechanical skill to embody his invention in a machine, and employs another to construct such machine.[58]

§ 4. *Mode of obtaining and claiming patents.*[59]—If there is a serious doubt as to patentability, that doubt should be resolved in favor of the applicant, for, if his claim be denied, he has nothing with which he can go into court and attempt to enforce a lawful monopoly.[60] A process and an apparatus, when so dependent as to constitute a unitary invention, may be claimed in one and the same application, but otherwise when they constitute independent inventions.[61] Such inventions are presumptively independent inventions and the burden of proof is upon the applicant to prove that two statutory inventions constitute one unitary invention.[62]

Specification and description.[63]—The description must be so clear and exact as to enable one skilled in the art to which the alleged invention relates to make and use it without experiments of his own,[64] and if it be so vague and uncertain that no one can tell, except by independent experiments, how to construct the patented device, the patent is void.[65] Where the novelty consists in particular dimensions or material, the particular dimensions or material must be specified.[66] While a claim for a design patent, reciting, "substantially as shown," or "as shown and described," and accompanied by a drawing, is in a large class of cases sufficient, and is, in most cases, better in form than a detailed description, yet there are cases where such detailed description is not only permissible but necessary.[67] The claims must be for the invention described,[68] and where there are many devices on the market which closely resemble each other in appearance and structure, an applicant for a patent for a similar device must carefully limit and differentiate his claims in his application.[69] Although where two structures are not specifically the same, and the art does not warrant a generic claim, the language of the claims can be made precise and fittingly descriptive of each structure without the use of identical language, yet general terms may be used which apply equally to two structures which are not the same, as may be shown when those terms are read and construed

56. Lincoln Iron Works v. McWhirter Co. [C. C. A.] 142 F. 967.

57. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

58. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736.

59. See 6 C. L. 961.

60. In re Schraubstadter, 26 App. D. C. 331.

61. They are presumptively independent inventions. In re Frasch, 27 App. D. C. 25.

62. In re Frasch, 27 App. D. C. 25.

63. See 6 C. L. 961.

64. Universal Brush Co. v. Sonn, 146 F. 517; Nathan Mfg. Co. v. Delaware, etc., R. Co., 146 F. 252.

65. Germer Stove Co. v. Art Stove Co. [C. C. A.] 150 F. 141. No. 587,368, fire pots and grates for stoves, claim 2, void for indefiniteness of description as to the third element. Id.

66. Bullock Elec. Mfg. Co. v. General Elec. Co. [C. C. A.] 149 F. 409, rvg. 146 F. 549. No. 508,637, armature cores, is void for insufficiency of description of the separators in respect to their thickness, form, and composition, to differentiate them from those of the prior art, being described in the specification merely as "thin" and of "metal." Id.

67. In re Mygatt, 26 App. D. C. 366.

68. An apparatus that molds tubes or cylinders in sections of half tubes or cylinders, capable of being fitted together and so designed, is an apparatus for molding tubes or cylinders, as much as if the completed tube came from the mold. Keasbey & Mattison Co. v. American Magnesia & Covering Co. [C. C. A.] 143 F. 490.

69. In re Hoey, 28 App. D. C. 416.

70, 71. Podlesak v. McInnerney, 26 App. D. C. 399.

in the light of the specifications behind them.[70] While the same language may be applied to two structures that are not the same, the employment of such identical language in two claims does not necessarily prove that there is an interference in fact.[71] In order to warrant the amendment of applications in respect of claims that there must be a basis for the amendment in the description and specifications of the original application,[72] and enlargements of an original specification are not permitted, which will interfere with other inventors who have entered the field in the meantime.[73] A new claim, within the invention described in the specification, may be inserted in an application by the applicant's attorney without the addition of a new oath,[74] or, where the specification of a pending application is broad enough to warrant the making of certain claims which are not made, the applicant instead of making such claims by amendment may at his election make them the subject of a new application, which in such case may fairly be considered a continuation of the first.[75]

The drawings are addressed to those skilled in the art, and must also be considered in connection with the claims and specifications and with each other; and a patent is not invalidated by a clerical mistake in a drawing, which, when so considered, would not mislead one skilled in the art to which it relates.[76] In an application for a design patent for a font of type, it is sufficient to furnish the conventional drawing accepted for years by the patent office, and it is not necessary, under the patent office rules relating to designs, to show or describe the type themselves.[77]

The cancellation of a claim while the application is pending does not affect the validity of a retained claim which is substantially the same,[78] although, if susceptible of two constructions, it will not be so construed as to cover the canceled claim.[79]

Abandonment of application.[80]—The statutory provision that the application shall be regarded as abandoned upon failure of the applicant to prosecute the same within two years after any action thereon does not apply, where two years have not elapsed after final action by the patent office on an original application, before the filing of a divisional application.[81]

Renewal of application.[82]

Interference.[83]—In interference proceedings the only question presented is which party was the first to invent or discover, conceding that there is a patentable invention.[84] This question is of course based upon the assumption that the invention claimed by each is similar.[85] The issues of an interference are to be construed in the light of the application of the party making the claims,[86] and an interference in fact depends chiefly upon the subject-matter disclosed.[87]

72. In re Duncan, 28 App. D. C. 457. If the specifications and drawings of an application as originally filed suggest the claims made by amendment and finally allowed, such claims are valid. In re Briede, 27 App. D. C. 298.

73. In re Hoey, 28 App. D. C. 416.

74. Cutler-Hammer Mfg. Co. v. Union Elec. Mfg. Co., 147 F. 266.

75. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 145 F. 350, afg. 140 F. 860.

76. Cutler-Hammer Mfg. Co. v. Union Elec. Mfg. Co., 147 F. 266.

77. In re Schraubstadter, 26 App. D. C. 331.

78, 79. Bullock Elec. Mfg. Co. v. Crocker-Wheeler Co, 141 F. 101.

80. See 6 C. L. 962.

81. U. S. Rev. St. § 4894, (U. S. Comp. Stat. 1901, p. 3384). Duryea v. Rice, 28 App. D. C. 423.

82, 83. See 6 C. L. 962.

84. Court of appeals will not decide whether either party shall receive a patent. Sobey v. Holsclaw, 28 App. D. C. 65.

85. Where, in interference proceedings, the machine of one of the parties embodying the invention, and which reduced it to practice, shows a specifically different arrangement of the device from that of his adversary's drawing, but both are within the generic invention of the issue, the point of difference is of no practical importance. Cleveland v. Wilkin, 27 App. D. C 311.

86. It is improper for the commissioner to read into them, for any purpose limitations not disclosed in such party's application. Sobey v. Holsclaw, 28 App. D. C. 65.

87. Not merely upon the language of the respective claims. Blackford v. Wilder, 28 App. D. C. 535.

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PATENTS—Cont'd.

The meaning given to the counts of an interference must be that intended by the party to the interference first making the claim.[88] The sworn preliminary statement required when an interference has been declared constitute the pleadings of the parties, and the parties should be held strictly to the dates given therein,[89] except in a few cases wherein the interest of the parties and the public will be best subserved by permitting dates earlier than those set forth in the preliminary statements to be proved, but in all cases this should be done under the supervision and with the approval of the patent office;[90] and it has been held to be a suspicious circumstance for a party, after seeing that his adversary's dates, set out in his preliminary statement, overcome his, to seek to prove earlier dates than those set out in his own preliminary statement.[91] The burden is upon the party questioning the correctness of the date given as the date of the oath to an application for a patent.[92] One is not entitled to inspect affidavits filed in connection with his rival's application where it appears that they do not relate to the claims in issue.[93] A motion to strike an application from the files for want of proper verification can only be sustained when supported by the clearest proof.[94] In an ex parte case, the decision of a primary examiner that a party has a right to make a claim is final, unless the commissioner, for good cause shown, under his supervisory powers, takes jurisdiction to review the question.[95] It is generally left to courts in a suit brought, after the issue of the patent, for infringement of a claim thus allowed, to determine whether the patentee ever had a right to make the claim.[96] If, however, an interference involving such claim be instituted, the rules of the patent office provide for an examination by the primary examiner of the question of the right of either party to make the claim.[97] If his decision be in the affirmative, the rules do not provide for an appeal to the

88. Podlesack v. McInnerney, 26 App. D. C. 399. Where the claims of the patent of the senior party to an interference are bodily incorporated into the junior party's application after the issue of the patent, for the purpose of provoking the interference, the counts of the issue thus formed are to be construed in the light of the specifications of the senior party's patent. Bourn v. Hill, 27 App. D. C. 291.

89. Parkes v. Lewis, 28 App. D. C. 1; Fowler v. Boyce, 27 App. D. C. 55. Proof by one of the parties of conception at an earlier date than that alleged in his preliminary statement will not be considered. Neth v. Ohmer, 27 App. D. C. 319. If the rule were otherwise, the rules which require the filing of statements before the records are opened for the inspection of the parties interested may as well be abrogated. Fowler v. Boyce, 27 App. D. C. 48. Where the patent office has refused to allow a party to an interference to file an amended preliminary statement, any attempt of such party to prove dates earlier than those set out in his preliminary statement is contrary to the rules of the patent office and to the general rules applicable to pleading in courts of law, and such testimony will be disregarded. Fowler v. McBerty, 27 App. D. C. 41. Where in his preliminary statement one of the parties to an interference claimed no earlier date than a date two months after the other party's constructive reduction to practice, and a motion to amend his preliminary statement by setting up dates of disclosure and actual reduction to practice earlier than those claimed by his adversary was denied, he is limited by his preliminary statement to a disclosure and reduction to practice at a date subsequent to his rival's record date, and failing to show that the latter is not entitled to that date, he is not entitled to an award of priority. Fowler v. Boyce, 27 App. D. C. 48.

90. Fowler v. Boyce, 27 App. D. C. 55. Rule as to dates will not be ignored in a given case, even with the consent of counsel, unless expressly approved by the commissioner of patents or his representatives, especially where it appear that leave was asked to file an amended preliminary statement and was refused. Id.

91. Fowler v. McBerty, 27 App. D. C. 41.

92. O'Connell v. Schmidt, 27 App. D. C. 77.

93. So held where the only theory on which such affidavits could have any relevancy was that there might be some statement therein inconsistent with statements made on the witness stand in the interference proceedings. Davis v. Garrett, 28 App. D. C. 9.

94. Motion denied where it appears that the date of the oath on file is February 18, that changes were alleged to have been made in the papers after that date, but at the direction of the applicant, that the applicant claims to have made oath as to inventorship after the making of the changes, that the application passed through the patent office, and that it has been acted upon for nearly ten years. A purely technical objection of this character should not be sustained, except upon the clearest proof. Davis v. Garrett, 28 App. D. C. 9.

95, 96, 97, 98, 99, 1. Podlesak v. McInnerney, 26 App. D. C. 399.

examiners-in-chief.[98] The decision of a primary examiner that a party to an interference has the right to make a claim which is the same as a count of the issue of an interference will be reviewed by the court of appeals as an ancillary question to be considered in awarding priority of invention.[99] But where the examiners-in-chief and the commissioner have concurred in this decision, the court will not disturb their finding unless manifest error has been committed.[1] The first to conceive and make disclosure of an invention, being diligent in reducing it to practice, is entitled to priority over one who makes a prior reduction to practice.[2] Of course an inventor who is the first to conceive and disclose is under no obligation of diligence until just prior to the date when his rival enters the field.[3] There is no general rule as to what constitutes due diligence in reducing to practice, that being a question to be determined by all the facts and surrounding circumstances in the particular case.[4] The rules of law as to what constitutes a prior use, and what con-

2. A junior applicant in interference proceedings must, in order to overcome a decision against him, prove prior conception coupled with diligence, or prior conception and prior reduction to practice. Ball v. Flora, 26 App. D. C. 394; Bourn v. Hill, 27 App. D. C. 291. Where one of the parties to an interference stands on his record date, which antedates the date of the application of the other party, it is necessary, in order for the latter to prevail, to show an earlier conception, disclosure, and actual reduction to practice, or an earlier conception and disclosure, followed by diligence in the actual reduction to practice prior to his rival's record date. Fowler v. Boyce, 27 App. D. C. 48. The inventor who first reduces to practice is prior in right, unless the inventor who is the first to conceive was using reasonable diligence at the time of the second conception and the first reduction to practice. Parkes v. Lewis, 28 App. D. C. 1. The inventor who is first to conceive and disclose is entitled to priority, provided he has used reasonable diligence in adapting and perfecting his invention, even though his adversary is the first to reduce to practice actually or constructively. O'Connell v. Schmidt, 27 App. D. C. 77. An inventor, who, although the first to conceive, is the last to reduce to practice, and who is not exercising diligence when his opponents enter the field, is not entitled to priority. Laas v. Scott, 26 App. D. C. 354. The diligence required of an inventor is diligence rather in the reduction of his invention to practice, than in application to the patent office, or in manufacturing his device for public use. Rolfe v. Hoffman, 26 App. D. C. 336.

3. O'Connell v. Schmidt, 27 App. D. C. 77.

4. O'Connell v. Schmidt, 27 App. D. C. 77. By due diligence in reduction to practice is meant reasonable diligence and where a party to an interference has taken eleven months to accomplish a reduction to practice, he cannot be heard to say that his adversary who has taken only eight months is guilty of laches. Fowler v. McBerty, 27 App. D. C. 41. Where an inventor has conceived the idea and has embodied it in models, which, if tested, would amount to a reduction to practice, and has disclosed the invention to experts in the art, and, at the time his rival enters the field, is urging the acceptance of the invention in the trade, and where he files his application only six months later than his rival, he is exercising due diligence and is entitled to priority. O'Connell v. Schmidt, 27 App. D. C. 77. The fact that an inventor, who is the first to conceive, has made models which, if tested, would constitute a reduction to practice, and has shown these models to those skilled in the art, thus fully disclosing the invention and its practicability, should have considerable weight in determining the question of diligence. Id. Unexplained delay of a year held fatal. Anderson v. Wells, 27 App. D. C. 115. Unexplained delays of three years held fatal Parkes v. Lewis, 28 App. D. C. 1. An inventor of a complicated device, who attempts to construct a completed machine with his own hands during a period of over a year, and finally abandons the effort from lack of time and money, and immediately makes a model and drawings, is exercising due diligence. Davis v. Garrett, 28 App. D. C. 9. Where, in an interference case involving an improvement in buckles, it appeared that the junior party when testifying was unable to describe the invention in issue, that it was not clear from the testimony of the party to whom he claimed to have made disclosure and who made a buckle for him that the buckle so made embodied the invention or that it was anything more than an experimental model in the nature of an abandoned experiment, and that the only excuse of the junior party for a delay of three years between his alleged conception and the filing of his application was that another buckle for which he obtained patents at home and abroad was a better buckle, and he lacked the money to make an earlier application, it was held, affirming a decision of the commissioner, that the senior party was entitled to an award of priority. Gibbons v. Peller, 28 App. D. C. 530. The rule requiring diligence in reduction to practice is not satisfied by mere diligence in attempting to secure capital to manufacture and exploit the device invented. Laas v. Scott, 26 App. D. C. 354. If the expense of an experimental device is so great as to prevent an actual reduction to practice, it is the duty of the inventor to secure his right by a constructive reduction to practice by filing an application for a patent. Id. Where the testimony in an interference case shows that, during more than three years of inaction, one of the parties applied for six patents for other inventions, and that, while poor, he had available means to make an application for a patent for the invention in controversy, and it does not appear that he was working upon some closely related device, under conditions that

stitutes a reduction to practice, are the same.[5] The same act or acts may or may not constitute a reduction to practice, modified, as they may be, by the special circumstances of the particular case.[6] To constitute a reduction to practice, the device constructed must be fashioned out of a material capable of actual use for the intended purpose;[7] but the size of the device does not affect the determination of the question of reduction to practice.[8] In the case of simple devices, it is not essential that actual tests of the invention be made in order to constitute a reduction to practice;[9] but except in the cases of simple inventions, the mere construction of a model does not constitute a reduction to practice, even if it is clearly sufficient to disclose the invention, and to enable those skilled in the art to understand it thoroughly.[10] Long delay in making use of an invention claimed to have been reduced to practice, or in applying for a patent, is a patent circumstance tending to show that the alleged reduction to practice was nothing more than an unsatisfactory or abandoned experiment; and this is especially the case where, in the meantime, the inventor has been engaged in the prosecution of similar inventions.[11] While the dismantling of an experimental machine after its trial does not necessarily prevent its construction and operation from having the effect of a reduction to practice, yet such a proceeding is sometimes an important and cogent circumstance in the determining of the fact whether the trial showed a successful reduction to practice, or amounted to nothing more than abandoned experiment,[12] and the same may be

excused delay while it does appear that the real ground of delay as shown by his own evidence was that it was to his interest to hold his application until he could make an advantageous arrangement with some capitalist for the exploitation of the invention, he will be held to have lost the benefit of an earlier conception than that of his adversary, by his failure to exercise diligence in perfecting his invention at the time his rival entered the field. Turnhill v. Curtis, 27 App. D. C. 567.

5. Gilman v. Hinson, 26 App. D. C. 409.

6. Rolfe v. Hoffman, 26 App. D. C. 336; Andrews v. Nilson, 27 App. D. C. 451 In an interference case, where there were tests of the device embodying the invention by men of experience in the particular art to which the invention related, at a place equipped with everything necessary to enable continued and complete tests to be made, it was held that there had been a reduction to practice, in that the test showed the work of the invention to be complete, though the first device so made was not a commercial article. Id. A reduction to practice is not sufficiently shown by proof of various experiments in search of a particular process, and an approximation to that process. Bourn v. Hill, 27 App. D. C. 291. In order to reduce to practice a device for protecting low-tension telephone circuits from the injurious effects of unduly strong currents, it is sufficient to operate the device with currents such as would prevail in telephone circuits if the latter became crossed with wires carrying more current than is safe, and it is not necessary to actually operate it in a telephone circuit. Rolfe v. Hoffman, 26 App. D. C. 336.

7. Gilman v. Hinson, 26 App. D. C. 409.

8. If an experimental machine completely embodies the invention, and is capable of testing its efficiency to the full extent of its power, the mere fact that later manufactures to fill orders may be on a larger scale cannot impair its effect as constituting reduction to practice. Robinson v. Thresher, 28 App. D. C. 22. Where inventor and two expert witnesses testify fully as to construction and operation of device and that they had used it successfully several times, a reduction to practice is sufficiently proved and it is unnecessary that the facts upon which they base their conclusion as to the success of the device be of record. Seeberger v. Russell, 26 App. D. C. 344.

9. Rolfe v. Hoffman, 26 App. D. C. 336. A device for protecting low-tension electric circuits from injurious effects of unduly strong currents, is a simple device within the above rule. Id.

10. O'Connell v. Schmidt, 27 App. D. C. 77.

11. Gilman v. Hinson, 26 App. D. C. 409. A delay of two years and a half in filing an application for a patent is not sufficient to destroy the weight of proof of an actual reduction to practice, especially where it appears that drawings showing substantially the same construction as the original device were sent to the applicant's attorney more than a year before the filing of the application and before anyone else had entered the field. Seeberger v. Russell, 26 App. D. C. 344.

12. Robinson v. Thresher, 28 App. D. C. 22. The dismantling of an experimental machine by a large and prosperous company has more weight as showing the lack of success of the trial than it would if done by a poor inventor whose necessities compel him to utilize the parts for other purposes. Id. Although the fact that after an alleged successful operation of a device, the device was taken apart and one element never used again, is sufficient to warrant an inference that the test was not successful yet, when a reasonable and satisfactory explanation of such fact is given such an inference is unwarranted. Seeberger v. Russell, 26 App. D. C. 344.

said of certain failures to produce evidence.[13] A failure immediately to manufacture and put on the market a newly invented device does not afford any reasonable foundation for denying the date claimed at its inception, where the inventor is already engaged in disposing of a large stock of devices manufactured under former patents relating to the same subject-matter of which the new invention is an improvement.[14] The filing of an allowable application for a patent is equivalent to a reduction to practice,[15] and, for this purpose, a divisional application filed while the original application is pending in the patent office will be held to be continuation of the latter.[16]

The junior party to an interference has the burden of proving conception and disclosure of the invention in controversy earlier than his adversary's filing date, and either a reduction to practice prior to that date or due diligence in respect thereto at the date of the constructive reduction to practice by his adversary;[17] and this burden is substantially increased where a patent has been issued to his adversary,[18] prior to the filing of his application,[19] or where there are successive adverse decisions against him in the patent office.[20] It follows that no award of priority of invention can be made to a junior applicant in interference, unless he overcomes his rival's record date.[21] Where each of two parties to an interference claims a disclosure to the other, the presumption is in favor of the one who has a practical

13. In a case where the units of a machine are proved to be old and practical, severally considered, and where the only novelty is the relative mechanical construction of the heal of the casing of one machine and the usual parts of the other machine whereby the one shall be put inside of the other, it would be obvious from the mechanical construction shown in a drawing that each unit would, in that new arrangement, practically perform its usual functions; but, where a test of an experimental machine has been carefully made by a large manufacturing company, the failure to call as a witness the enigineer who had charge of such test has great weight as tending to show that the test was unsuccessful. Robinson v. Thresher, 28 App. D. C. 22.

14. Laas v. Scott, 26 App. D. C. 354.

15. Davis v. Garrett, 28 App. D. C. 9.

16. Duryea v. Rice, 28 App. D. C. 423.

17. Fowler v. Dyson, 27 App. D. C. 52. If a junior applicant in interference would prevail upon the ground that he disclosed the invention to his rival, who has received a patent, he must prove such disclosure beyond a reasonable doubt. Anderson v. Wells, 27 App. D. C. 115. Priority of invention. Orcutt v. McDonald, 27 App. D. C. 288; Rolfe v. Hoffman, 26 App. D. C. 336; Shuman v. Beall, 27 App. D. C. 324. The junior applicant where the question is one of originalty, and not priority, must sustain the burden of proof. Cleveland v. Wilkin, 27 App. D. C. 311. Reduction to practice prior to the filing date of his adversary, or a prior conception followed by due diligence in reducing to practice. Gibbons v. Peller, 28 App. D. C. 530. Where, in an interference case involving the invention of a display can with two openings, with removable plates, the real parties to which are a biscuit company, the assignee of the senior party, and a can company, the assignee of the junior party, it appears that the senior party, who was the advertising manager of the biscuit company, had drawings made, some of which showed such a can, which was a modification of a can then in use; which drawings were turned over to the can company, and the latter thereupon caused cans to be made for the biscuit company by its employe, the junior party, such cans having certain means of fastening not disclosed by the drawings; and that thereafter, the can company having failed to procure a long-term contract with the biscuit company for the manufacture of the new cans, the junior party applied for a patent, a heavy burden is on the junior party to show that what he did was his independent invention, and if the testimony fails to so show, the senior party is entitled to an award of priority. Larkin v. Richardson, 28 App. D. C. 471.

18. A junior applicant in interference proceedings, who has filed his application with knowledge of the issue of a patent to the senior party, has a heavy burden to sustain in order to prove his case. Bourn v. Hill, 27 App. D. C. 291. An applicant in interference who files his application after the granting of the patent has the burden of proving his prior right beyond a reasonable doubt. French v. Halcomb, 26 App. D. C. 307. Burden is not discharged by merely raising a doubt as to which party had the first conception of the invention. Id.

19. The burden of proof imposed upon a junior applicant in interference proceedings is not increased by the granting of a patent to his opponent while his application is pending. Laas v. Scott, 26 App. D. C. 354. The junior party to an interference is not required to prove his case beyond a reasonable doubt, but need prove it only by a preponderance of the evidence, where his application was pending when a patent was granted to his adversary. Andrews v. Nilson, 27 App. D. C. 451.

20. Turnbull v. Curtis, 27 App. D. C. 567; Orcutt v. McDonald, 27 App. D. C. Bauer v. Cone, 26 App. D. C. 352.

21. Sobey v. Holsclaw, 28 App. D. C. 65.

knowledge of the art, and against the one who has not such knowledge.[22] A disclosure, in order to be effectual, must be shown to have been full and clear as to all the essential elements of the invention, and such as was sufficient in itself to enable the party to whom the disclosure was made to give the invention practical form and effect without the exercise of invention on his part.[23] In a contested case in the patent office, the court has no power to issue a subpoena duces tecum.[24] On the taking of depositions for use in a contested case before the patent office, only material, relevant testimony will be admitted.[25] There is no reasonable difference between a statement by a witness fixing a date by reference to an original paper in the possession of a person within the jurisdiction, or to a regular business entry in such person's books, and a statement fixing a date by something calculated to fix it in mind, claimed to have happened to the witness, or in the community, about the same time.[26] The proper method of proving the state of the weather at a given place at a given time is to produce official records of the variations of the thermometer near such place.[27] Uncorroborated testimony of the parties is insufficient.[28] The rule that the failure of a party to an interference to rebut the sworn statement of his adversary, that he had fully disclosed the invention to him furnishes strong evidence that the latter is not the prior inventor, does not apply where there is no evidence of a complete disclosure, and merely unsatisfactory evidence of a partial disclosure.[29] General rules as to admissions apply.[30] Cases dealing with the sufficiency of the evidence are shown in the notes.[31]

22. Alexander v. Blackman, 26 App. D. C. 541.

23. Anderson v. Wells, 27 App. D. C. 115.

24. U. S. Rev. St. §§ 4906, 716 construed. In re Outcalt, 149 F. 228.

25. Equity rule of Federal courts not in use. Lacroix v. Tyberg, 149 F. 782.

26. Laas v. Scott, 26 App. D. C. 354. Where a witness testifies postively to a date and states that he is able to fix such date by the daily work record of a corporation, it is not necessary to offer the work record in evidence, for such document would not be admissible at all, but could only serve to refresh the memory of the witness. Id.

27. Ball v. Flora, 26 App. D C. 394.

28. The depositions of parties to an interference, unless corroborated by independent circumstances established by the evidence, are clearly insufficient to prove conception of the invention. Podlesak v. McInnerney, 26 App. D. C. 399. The practically uncorroborated evidence of the inventor himself cannot be accepted on an interference proceeding as proof of conception. French v. Halcomb, 26 App D. C. 307. The testimony of joint applicants who are parties to an interference is insufficient to support their case if uncorroborated. Taylor v. Lowrie, 27 App. D. C. 527. Where the testimony of a party to an interference as to the date of his conception is clearly corroborated by a witness whose intelligence and capacity to understand and explain a disclosure which was made to him are apparent, and who, although he is deeply interested in the result, is unimpeached, and where the surrounding circumstances tend to support the claim of such party to the date of conception alleged, and none are inconsistent with it, there is sufficient evidence to support his claim. Turnbull v. Curtis, 27 App. D. C. 567.

29. Podlesak v. McInnerney, 26 App. D. C. 399.

30. If there is any doubt that an invention involved in interference was disclosed by certain specifications to the perception of one of the applicants, who prepared a proposal to meet their requirements, such doubt is removed by the applicant's admission on the witness stand that they suggest the subject matter of the interference. Henry v. Doble, 27 App. D. C. 33. The fact that the senior party to an interference, who had assigned his rights to another for royalties, and who had sworn to the application in interference, but who refused to testify in the proceeding when requested by his assignee, had after his assignment and at a time when he was seeking higher royalties from his assignee intimated to the assignee that he was not the real inventor of the issue, will not, of itself, prevent an award of priority to the senior party. Gibbons v. Peller, 28 App. D. C. 530.

31. Where the junior party in interference proves that he was the first to conceive the invention, that he disclosed it to others, who fully understood it and could have reduced it to practice from his explanation, that he made accurate drawings, that his knowledge was imparted to the senior party's brother in-law, who got possession of the drawings, and that his delay in applying for a patent was caused by the fraud of the senior party, the latter's brother-in-law, and others, such junior party is entitled to priority. Shuman v. Beall, 27 App. D. C. 324. A memorandum in a notebook produced by an applicant in an interference proceeding and alleged to prove prior conception is insufficient that the entry was seen by no one, and there is no corroborative evidence on the point except the statement of a witness that he saw the applicant produce such a book. French v.

The doctrine of res judicata, or estoppel by former judgment, applies to adjudication made in the patent office, and this is especially true of interference cases.[32]

Appeal and review.[33]—Only the parties appealing can have a hearing in the appellate court.[34] One is entitled to all the time allowed by the rules for taking and perfecting his appeal regardless of consequences.[35] Rules of practice in interference cases are necessary and should not be disregarded; and the court of appeals does not sit to review the rulings of the commissioner of patents in discretionary matters,[36] or decisions of the examiner of interferences not lawfully appealed from.[37] It is only from the rejection of a claim that an appeal will lie.[38] An appeal from a decision of the primary examiner upon a motion to dissolve an interference, holding that the party had the right to make the interfering claims, may be prohibited by the rules of the patent office without infringing the right of appeal in interferences given by the Federal statutes, since the appeal therein provided for must be deemed limited to final decisions upon the question of priority of invention.[39] Although it is the better practice usually, in cases where the examiners-in-chief have erred in refusing to entertain an appeal, to require the commissioner of patents to direct them to entertain the appeal, yet, in cases of general public interest, and

Halcomb, 26 App. D. C. 307. Obtaining a more attractive exterior, or securing a more salable article, does note prove originality of conception. In re Hoey, 28 App. D. C. 416. Where an issue in an interference case is specific, and has only been held patentable after such hesitation in the patent office, any oral testimony by one of the parties to show the invention to have been his must correspond in every detail with the requirements of the issue. Gibbons v. Peller, 28 App. D. C. 530. Quaere, whether the execution of the oath accompanying an application is, in the absence of any proof other than the paper itself, sufficient evidence to prove the fact of conception by an inventor at that date. Fowler v. Boyce, 27 App. D. C. 48.

32. Blackford v. Wilder, 28 App. D. C. 535.

33. See 6 C. L. 966.

34. Where one of three parties to an interference fails to appeal from a decision of the examiners-in-chief of the patent office adverse to him, so that under rule 132 of the patent office his claims which were involved in the interference stand finally rejected, he can have no standing in this court on an appeal by one of the other parties from the commissioner's decision. Fowler v. Boyce, 27 App. D. C. 48.

35. An appeal will not be dismissed because the appellant has availed himself of all the time allowed by the rules for taking and perfecting his appeal, although by so doing he necessarily prevents the hearing of the appeal until after the summer recess of the court. Jones v. Starr, 26 App. D. C. 64.

36. Jones v. Starr, 26 App. D. C. 64. The granting or refusal by the commissioner of patents, of a motion by one of the parties to an interference for leave to retake testimony which had been suppressed for irregularities in taking it is within the discretion of the commissioner, and cannot be reviewed on appeal by the court of appeals. Id. As an interlocutory proceeding the court of appeals cannot review it and it is not one which should be reviewed as necessary or proper in connection with the final decision of priority. Id. Whether leave shall be given to amend a preliminary statement is not reviewable in this court, save possibly, in a case of palpable abuse of that discretion. Neth v. Ohmer, 27 App. D. C. 319. This court cannot control the action of the commissioner of patents as to the extent of oral argument to be permitted at a hearing of an interference. Sobey v. Holsclaw, 28 App. D. C. 65. The exercise of the discretion of the commissioner of patents should not be disturbed save where that discretion has palpably been abused. Davis v. Garrett, 28 App. D. C. 9.

37. Jones v. Starr, 26 App. D. C. 64.

38. There is no statute providing for an appeal to this court from the ruling of the commissioner of patents, or of any of the subordinate tribunals affirming the patentability of a claimed invention. It is only from the decision adverse to the patentability of a claim that an appeal will lie. Sobey v. Holsclaw, 28 App. D. C. 65. Neither the rules of the patent office, nor any section of the Revised Statutes, provide for or permit an appeal from a decision of a primary examiner holding that the claims which are the issue of an interference are patentable, and that the senior party had the right to make the claims, when such decision is rendered after the hearing of a motion to dissolve the interference. Id. Semble, that the decision of a primary examiner as to the patentability of an invention should not be reversed by the commissioner, unless the error is so gross that it would be a wrong to the public to permit the patent to issue. A mere difference of opinion is not enough. Id. A ruling by an examiner that an applicant for a design patent cannot have a certain claim, but must offer a claim suggested by the examiner, is, in effect, a rejection of the claim, and, if repeated, entitles the applicant to an appeal to the examiners-in-chief. In re Mygatt, 26 App. D. C. 366.

39. U. S. Rev. St. §§ 482, 483, 4904, 4909, construed. United States v. Allen, 27 S. Ct. 141, afg. 26 App. D. C. 8.

where the case if sent back would undoubtedly come up again, the court of appeals will entertain an appeal from a decision of the commissioners upholding the action of the examiners-in-chief.[40] Only matters necessarily involved in the decision appealed from,[41] and properly saved for review,[42] will be considered by the appellate court. In interference proceedings the questions of identity of invention,[43] operativeness of the device [44] and of patentability,[45] will not ordinarily be considered by the court of appeals. Though in extreme cases, where palpable error has been committed, a decision of the patent office holding identity of invention between the devices of the parties to an interference may be reversed.[46] But the court, although

40. In re Mygatt, 26 App. D. C. 366.

41. The propriety of an interlocutory decision in the patent office, relating to practice therein, held not to be necessarily involved in the consideration of an appeal from the final decision on the merits. Davis v. Garrett, 28 App. D. C. 9. Where the patent office decides that an invention is patentable, and issues a patent therefor, uch decision is binding on this court, n an appeal by one of the parties to an interference subsequently declared from a decision of the commissioner awarding priority of invention to his adversary. Kreag v. Green, 28 App. D. C. 437. Where a party to an interference case is admittedly not entitled to an award of priority of invention, for the reason that in his preliminary statement he fails to allege conception prior to the filing date of his adversary, he will not be heard on an appeal from an adverse decision of the commissioner, to question the patentability of the invention of the issue. Potter v. McIntosh, 28 App. D. C. 510. Where, on appeal to the commissioner of patents from a decision of the examiners-in-chief rejecting an application for a patent, a new and additional claim is suggested by the applicant, but not acted upon by the commissioner, this court, on an appeal from his decision, is not at liberty to pass upon such claim. In re Garrett, 27 App. D. C. 19. Where, on appeal to the commissioner of patents from a decision of the examiners-in-chief rejecting an application for a patent, a new and additional claim is suggested; Semble, that the proper procedure is for the applicant to request that his application be remanded to the examiner with leave to amend by inserting such claim as an additional one, or as a substitute for others. Id. Where the junior party to an interference is limited by his preliminary statement to dates of disclosure and actual reduction to practice subsequent to the senior party's record date, and he fails to show any reason why the senior party is not entitled to his record date, testimony not admissible under the junior party's preliminary statement will not be reviewed on appeal. Fowler v. Boyce, 27 App. D. C. 55.

42. An assignment of errors on an appeal from a decision of the commissioner of patents, that the commissioner "erred in many material respects," will not be considered. In re Frasch, 27 App. D. C. 25. Where an appellant in an interference case, in his assignment of errors, does not challenge the decision of the commissioner of patents on the question of priority of invention, he will, to that extent, be presumed to have acquiesced in the decision against him. Bechman v. Southgate, 28 App. D. C. 405.

43. The question of identity of invention is in general one which should be settled by the experts of the patent office, and not by this court, and the rules of the patent office, established under legislative authority, provide how this is to be done. The proceeding for a dissolution of an interference for want of identity in the several devices of the parties is collateral to the interference itself, and independent thereof, and does not enter into the consideration of the question of priority of invention, when the latter question is brought to this court. Parkes v. Lewis, 28 App. D. C. 1. The decision of the expert tribunals of the patent office in respect of identity of invention will ordinarily be accepted as conclusive, where the question is whether the application of one of the parties in interference is broad enough, in the terms of its specifications and claims, to embrace the invention of the other, and especially where the invention is one of elaborate and complicated mechanism. Bechman v. Southgate, 28 App. D. C. 405.

44. Duryea v. Rice, 28 App. D. C. 423.

45. The question of patentability is not ordinarily regarded as open on appeal to this court in an interference case, but is to be regarded as conclusively established by the commissioner of patents. Orcutt v. McDonald, 27 App. D. C. 228. Although this court will, on an appeal from a decision of the commissioner awarding priority, refuse to affirm the decision if there clearly appears to be a lack of patentable invention, yet, where the primary examiner has held claims to be patentable, and the examiner of interferences and the examiners-in-chief have omitted or declined to call the attention of the commissioner of patents to the unpatentability of the issue of an interference, or where the commissioner has declined to review the decision of the primary examiner, after his attention has been called to the alleged unpatentability of the issues, the court will hold the question of patentability to be settled. Sobey v. Holsclaw, 28 App. D. C. 65. In an interference proceeding, wherein one of the parties, who was unsuccessful in a former interference, upon the case going back to the patent office made amended and broader claims and was successful there in another interference then declared, the patentability of the new claims cannot be considered by this court, even though they seem rather inconsistent with the views apparently controlling the earlier proceedings in the patent office and the position then assumed by such party. Blackford v. Wilder, 28 App. D. C. 535.

46. Podlesak v. McInnerney, 26 App. D. C. 399. Such a case is not presented where it appears that the assignee and employer

of the opinion that error has been committed, may refuse to hold that there is no interference in fact, and may send the case back to the patent office for further consideration.[47] The question whether a description in a design case is a proper one is not reviewable in the court of appeals, except in an extraordinary case.[48] Where, on appeal from a decision of the commissioner awarding priority of invention, it is assigned as error that he made his decision without first deciding as to the question of patentability, it is sufficient to show that, in making his decision, he adopted the views of the subordinate tribunals of the patent office after the question of patentability had been repeatedly raised.[49] On an appeal from the decision of the commissioner rejecting a claim which has been added by amendment, the burden is on the applicant to show that the claim is within the description of his original application.[50] Unanimity in the patent office tribunals imposes upon the appellant here the burden of showing very clearly that the commissioner erred in the final decision appealed from.[51] A case must be a very clear one to justify an appellate court in affirming a decision on motion and in advance of the hearing upon the printed record.[52] The hearing on a motion on appeal to dismiss or affirm will not be postponed, unless the applicant's good faith and excuse for any delay be shown.[53] Records to appeal should not be encumbered with unnecessary recitals, and when it is made plain that such is the case, they will be stricken out.[54] On an appeal from a decision of the commissioner of patents awarding priority of invention in an interference case, decisions of the patent office upon motion for dissolution of the interference in favor of the appellant, who contested the motions, are improperly included in the transcript of the record in this court, as are, also, copies of patents unnecessary for the determination of the issues presented here, and copies of briefs filed by the parties in the patent office.[55] General expressions of opinion in affidavits in support of a motion for a rehearing before the commissioner of patents, after a rejection by him of an application for a patent, in respect to the patentability of the device for which a patent is sought, are entitled to no weight.[56] An appeal to the court of appeals in an interference case is not a proceeding in equity, and the statutory provisions providing for relief by a bill in equity where the patent has been finally refused do not apply. It is a proceeding at law, and hence a decision of the supreme court of the United States as to the statute referred to does not apply.[57] After an appeal from the decision of the examiners-in-chief, a motion to transmit an interference to the primary examiner will only be enter-

of the junior and unsuccessful party, after the latter saw his rival's application and drawings, filed the junior party's application with specifications reading very much like those of the senior party. Bechman v. Southgate, 28 App. D. C. 405.

47. Podlesak v. McInnerney, 26 App. D. C. 399.

48. In re Mygatt, 26 App. D. C. 366.

49. Sobey v. Holsclaw, 28 App. D. C. 65.

50. In re Duncan, 28 App. D. C. 457.

51. Parkes v. Lewis, 28 App. D. C. 1, In re Clunies, 28 App. D. C. 18; Bourn v. Hill, 27 App. D. C. 291; Ball v. Flora, 26 App. D. C. 394; In re Schraubstadter, 26 App. D. C. 331; Fowler v. McBerty, 27 App. D. C. 41; Gillette v. Sendelbach [C. C. A.] 146 F. 758; O'Connell v. Schmidt, 27 App. D. C. 77; Orcutt v. McDonald, 27 App. D. C. 228; Parkes v. Lewis, 28 App. D. C. 1. Semble, that where the board of examiners-in-chief affirms the decision of the preliminary examiner, or of the examiner of interference, the commissioner of patents will not reverse the board on any mere question of fact, unless the decision be clearly aginst the weight of evidence. Id.

52. Jones v. Starr, 26 App. D. C. 64. Decision affirmed on motion where it appeared that appellee was entitled to an award of priority upon the record dates of the parties as disclosed by the record, that the record contained no testimony, but showed that the appellant's testimony was suppressed for irregularities in taking it, and that the appellate court, from no possible viewpoint, would be justified in considering such testimony were it before the court. Id.

53. So held where motion to postpone was made upon the ground that it was necessary to make a certain stipulation and certain testimony a part of the record already filed. Jones v. Starr, 26 App. D. C. 64.

54, 55. Howell v. Hess, 28 App. D. C. 167.

56. In re Garrett, 27 App. D. C. 19.

57. Rev. St. § 4915, considered. Sobey v. Holsclaw, 28 App. D. C. 65.

tained by the commissioner of patents, when it appears that a clear and unmistakable error has been committed in the prior decision.[58] One is entitled to pursue all the statutory remedies afforded.[59]

Suit in equity to secure patent.[60]—The statute creating the court of appeals for the District of Columbia does not, by implication, repeal the law giving a rejected applicant a right to obtain a patent by a bill in equity.[61] A suit by an unsuccessful applicant to compel the issuance of a patent to him is not an appeal from the proceedings in the patent office or the decision of the court of appeals of the District of Columbia, but is one of original equity jurisdiction.[62] The decision of the court of appeals of the District of Columbia or an appeal from the commissioner of patents does not constitute an adjudication which precludes the maintenance of a suit in equity by one of the parties against the other to obtain a patent.[63]

§ 5. *Letters patent.*[64]—A patentee is not obliged to state all the objects of his invention, but he is protected in all the beneficial uses thereof within its scope.[65] Where a patent for a material to be used for a stated purpose involved invention, it is not necessarily rendered invalid by the fact that the patentee also suggests its use for a different purpose, for which alone it would not be patentable.[66] No general rule can be laid down by which to determine when a given invention or improvement shall be embraced in one, two, or more patents. The commissioner of patents is vested with a discretion in determining whether or not to require a division of claims for a process and an apparatus,[67] the inclination being to resolve all doubts as to whether more than one invention is embraced in one patent in favor of the patentee;[68] and, unless abused, the exercise of this discretion will not be reversed by the court of appeals.[69]

Construction and limitation of claims.[70]—Nothing is patented except what is specifically covered by the claims required by statute,[71] though it is possible this rule might be modified where by reason of matters not claimed the device has attained commercial success.[72] The presumption is that an inventor intends to protect his invention broadly, and consequently the scope of a claim should not be restricted beyond the ordinary meaning of the words, save for the purpose of saving it.[73] The claims must be read in the light of the specifications and drawings [74]

58. Parkes v. Lewis, 28 App. D. C. 1.

59. Where in an interference case the court of appeals refused to consider the testimony of the appellant which had been suppressed in the patent office and affirmed a decision of the commissioner awarding priority to the appellee on the record dates of the parties, it was held that the appellant still had a remedy in § 4915, U. S. Rev. St. and, if there successful, could invoke relief under § 4918, of U. S. Rev. St. Jones v. Starr, 26 App. D. C. 64.

60. See 6 C. L. 967.

61. 27 Stat. 436, and Rev. St. § 4915, construed. Dover v. Greenwood, 143 F. 136.

62. Appert v. Brownsville Plate Glass Co., 144 F. 115.

63. Dover v. Greenwood, 143 F. 136.

64. See 6 C. L. 967.

65. Scott v. Fisher Knitting Mach. Co. [C. C. A.] 145 F. 915. Where a party obtains a patent on an apparatus, he is entitled to all the analogous uses of which his apparatus is capable. In re McNeil, 28 App. D. C. 461.

66. Forsyth v. Garlock [C. C. A.] 142 F. 161.

67. In re Frasch, 27 App. D. C. 25.

68. In re Briede, 27 App. D. C. 298.

69. In re Frasch, 27 App. D. C. 25.

70. See 6 C. L. 967.

71. Harder v. U. S. Steel Piling Co., 149 F. 434. A patent for a mere improvement on prior devices must be limited to the precise devices and combinations shown and claimed. Cumming v. Baker [C. C. A.] 144 F. 395.

72. Harder v. U. S. Steel Piling Co., 149 F. 434.

73. Andrews v. Nilson, 27 App. D. C. 451. Where a patent has been granted as filed, no prior art being cited, and the element in controversy in the interference is narrowly claimed in some of the claims and broadly in others, and where the application upon which the patent was issued was pending with the application with which it becomes involved in interference, and where no motion is made to avoid the interference by calling the attention of the patent office to the claimed fact that element of the claim is limited to such element when made of a material having certain characteristics; and where the invention may be carried out by the use of the element with or without the limiting qualification, the issue should be construed as it reads, and free from nar-

and the other claims,[75] but being unambiguous, the court has no power to either change or enlarge them by reference to the specification.[76] The claims should be construed, where they reasonably may be, to cover the entire invention of the patentee; and, where a patent contains several claims, some of which are limited to details, the others are prima facie, not to be restricted by insisting that they contain as necessary elements the particulars which are specifically covered elsewhere.[77] Where a patent includes claims for a process and also for the product of such process, the latter are to be construed in connection with and are limited by the scope of the former.[78] Where the claims of a patent for a machine refer generally to "means" for accomplishing a specified result or movement, without claiming such means, they are not limited by a description of particular means in the specification given for the purpose of explaining the mode in which the patentee contemplates applying the principle of his invention.[79] The words "substantially as specified," at the end of a claim for a combination, refer to the whole claim, and import nothing into it not already there, either to narrow it so as to escape anticipation, or to broaden it so as to establish infringement.[80] The claims of a patent as allowed must be construed with reference to the action of the patent office thereon and the prior art;[81] they are not affected by a mere change in the wording at the instance of the patent office which leaves the substance unchanged, but, if narrowed in scope, and so accepted by the applicant, he is bound thereby.[82] Various constructions placed upon patents are stated in the notes.[83]

Pioneer invention.[84]—A primary invention is "one which performs a function never performed by any earlier invention."[85] A secondary invention is one

row encumbrances and the senior party who has a patent may not be heard to ask that his claim be rewritten so that it may prevail in the interference. Id. In machine construction, the expression "mounted on" seems to have an ordinary meaning. The thing mounted upon another must be borne or supported by it. Mere riding in or over another in a slot for the purpose, although operating in connection therewith, is not equivalent to being mounted thereon. In re Duncan, 28 App. D. C. 457.

74. Queen & Co. v. R. Friedlander & Co., 149 F. 771. Where the meaning of language used in the claims is susceptible of two different constructions, the specifications and drawings may properly be referred to for the purpose of ascertaining the true construction of the claims. Robins Conveying Belt Co. v. American Road Mach. Co. [C. C. A.] 145 F. afg. 142 F. 221. Claim 7, of No. 672,984, for a safety razor, held limited to a razor having a hinged casing. Kampfe v. Torrey Razor Co., 149 F. 778. No. 490,738, stop device, hay carriers held limited to a device having extended wings as shown in the specification and drawings. Louden Mach. Co. v. Janesville Hay Tool Co. [C. C. A.] 148 F. 686, afg. 141 F. 975.

75. Andrews v. Nilson, 27 App. D. C. 451.

76. Cincinnati Ry. Supply Co. v. American Hoist & Derrick Co. [C. C. A.] 143 F. 322.

77. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880.

78. Downes v. Teter-Heany Development Co. [C. C. A.] 150 F. 122, afg. 144 F. 106.

79. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

80. American Can Co. v. Hickmott Asparagus Canning Co. [C. C. A.] 142 F. 141.

81. Welsbach Light Co. v. Cremo Incandescent Light Co., 145 F. 521. The claims of a patent finally allowed and accepted by the patentee must be read in connection with the claims set forth in the original application and with the prior art. Victor Talking Mach. Co. v. American Graphophone Co., 145 F. 189.

82. Welsbach Light Co. v. Cremo Incandescent Light Co, 143 F. 521. Cannot be construed to cover what was rejected or disclosed by prior devices. Victor Talking Mach. Co. v. American Graphophone Co., 145 F. 189. Where an inventor, seeking a broad claim which is rejected, in which rejection he acquiesces, substitutes therefor a narrower claim, he cannot be heard to insist that the construction of the claim allowed shall cover that which has been previously rejected. Computing Scale Co. v. Automatic Scale Co., 27 S. Ct. 307.

83. No. 676,824, hook and eye package is of narrow scope. DeLong Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 150 F. 597. No. 388,840, wire rope clamp, construed and limited. Cincinnati Ry. Supply Co. v. American Hoist & Derrick Co. [C. C. A.] 143 F. 322. Reissue No. 12,037 (original No. 589,168), kinetographic camera, claim 4, is void as too broad. Edison v. American Mutoscope & Biograph Co., 144 F. 121. No. 700,919, computing scale, given narrow construction. Computing Scale Co. v. Automatic Scale Co., 87 S. Ct. 307.

84. See 6 C. L. 970.

85. Western Elec. Co. v. Roberston [C. C. A.] 142 F. 471. No. 358,545, stove linings is only entitled to a very narrow construction in view of prior art. Germer Stove Co. v. Art Stove Co. [C. C. A.] 150 F. 141. No. 525,941, duplicate whist trays, not a pioneer invention. United States Playing Card Co. v. Spalding [C. C. A.] 148 F. 620. No. 542,733 heat regulator, is a primary invention in its

which performs a function previously performed, but in a substantially different way.[86] A pioneer invention is entitled to a generic claim, and may also include specific claims in the same patent, and in such case the broad claims are not prima facie to be restricted by reading into them the specific devices claimed in the narrower ones.[87] A patentee is entitled to the protection of the doctrine of equivalency in proportion to the nature of the advance which his invention indicates.[88] One who selects and combines elements from the inventions of others into a new structure, adapted to accomplish the old result, is entitled to a patent only for his own particular form of adaptation, and hence is not entitled to the doctrine of equivalents.[89] The word "equivalent" as applied to a chemical action, may mean a fluid which is "equally good" with that specified in the patent.[90]

§ 6. *Duration of patent right. Surrender and reissues.*[91]—By statute, there being substantial identity of the invention as covered by the claims,[92] an American patent expires with a previous foreign patent to the same invention.[93] A prior patent in a foreign country for a minor part of a broad or basic invention is not for the same invention as a subsequent United States patent covering both the minor parts and the broad main invention, and such foreign patenting of a part does not so affect the whole that the expiration of the foreign patent terminates the whole of the American patent.[94] The statutory provision, that a United States patent shall expire at the same time as a prior foreign patent for the same invention, has reference to the legal term of the foreign patent as appears on its face at the time of the issuance of the United States patent, and the latter is not further limited by the subsequent lapse or forfeiture of any portion of such legal term of the foreign patent by the failure to comply with a condition subsequent, such as the payment of additional fees at stated intervals.[95] The 1897 amendment to this statute did not affect patents previously issued either to their validity or length of term,[96]

specific field. Weld Mfg. Co. v. Johnson Service Co. [C. C. A.] 147 F. 234. No. 552,796, mechanical musical instrument, pioneer invention. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880. No. 561,559, knitting machine, primary invention. Scott v. Fisher Knitting Mach. Co. [C. C. A.] 145 F. 915. No. 628,886, lock rod for cards, narrowly construed. Yawman & Erbe Mfg. Co. v. Library Bureau [C. C. A.] 147 F. 246. No. 642,869, controller for spark generator, is not a pioneer invention and must be limited to the substantial construction shown. Motsigner Device Mfg. Co. v. Hendrichs Novelty Co. [C. C. A.] 149 F. 995. No. 688,690, cylinder printing presses, not a pioneer invention. Hoe v. Miehle Printing Press & Mfg. Co. [C. C. A.] 149 F. 213, afg. 141 F. 112. No. 709,001, electrical conductors, limited construction in view of prior art. Downes v. Teter-Heany Development Co. [C. C. A.] 150 F. 122, afg. 144 F. 106. No. 714,290, incandescent lamps, narrowly construed. Fielding v. Crouse-Hinds Elec. Co., 148 F. 230.

86. Western Elec. Co. v. Robertson [C. C. A.] 142 F. 471.

87. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880.

88. American Can Co. v. Hickmott Asparagus Canning Co. [C. C. A.] 142 F. 141. The patentee of an improvement of undoubted utility and which constitutes a marked advance in the art is entitled to the benefit of the doctrine of equivalent commensurate with the invention disclosed. Columbia Wire Co. v. Kokomo Steel & Wire Co. [C. C. A.] 143 F. 116.

89. Bates Mach. Co. v. Force & Co., 143 F. 526.

90. Chadeloid Chemical Co. v. De Ronde Co., 146 F. 988.

91. See 6 C. L. 971.

92. Formal identity of claims is not essential. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 148 F. 31. Nos. 511,559 and 511,560, electric motors, held not affected by expiration of British patent corresponding to United States No. 401,520. Westinghouse Elec. & Mfg. Co. v. Elec. Appliance Co. 142 F. 545. No. 363,425, spindle spool, expired with similar British patent in 1897. Sawyer Spindle Co. v. Carpenter [C. C. A.] 143 F. 976.

93. Rev. St. § 4887. United Shoe Mach. Co. v. Duplessis Shoe Mach. Co., 148 F. 31. Article 4, his, inserted in the international convention for the protection of industrial property of March 20, 1883, by the additional act proclaimed by the president, August 25, 1902 (32 Stat. 1936, 1939), did not change the rule. Id. No. 412,704, sole sewing machine, expired with British patent No. 13,366. Id.

94. Victor Talking Mach. Co. v. Talk-o-phone Co., 146 F. 534.

95. Victor Talking Mach. Co. v. Talkophone Co., 146 F. 534. No. 434,543, talking machines, claims 5 and 35, held not to expire with certain foreign patents. Id.

96. Act March 3, 1897, c. 391 (29 Stat. 692), amending Rev. St. § 4887, construed. Sawyer Spindle Co. v. Carpenter [C. C. A.] 143 F. 976.

nor did the amendment of 1903 affect the term of patents for inventions previously patented in a foreign country, but only their validity, and did not opreate to revive such a patent which had previously expired under the law as it originally stood before amendment.[97] On the expiration of a patent for a combination, the use of such combination becomes free to the public, notwithstanding the fact that it contains as one of its elements a device covered by another patent to the same patentees which has not expired.[98]

Where a reissue is sought upon the ground of defects in the original patent, the right must be exercised promptly upon discovering the error.[99] A reissue must be one in fact, and not an additional patent on something neither shown nor described in the original application;[1] and on an application for a reissue on the ground that, by mistake, the claim of such patent does not fully cover the actual invention, where it appears that the same invention is set forth in the specifications and claims of the original patent, that the applicant has exercised due diligence in discovering his mistake and returning to the patent office, that there are not intervening rights, and that there is no fraud, a reissue with a broader claim is permissible.[2] The consideration of a claim in an application for the reissue of a patent should be governed by the same rules as would be involved if the claim was presented by an amendment to the application as originally filed.[3] That the reissue was unauthorized or that some of the claims incorporated therein are invalid does not affect the invalidity of claims identical with those of the original.[4] The oath of an applicant, filed with this application for a reissue, should count for something, and cannot be entirely ignored but must be traversed by the patent office.[5]

§ 7. *Disclaimer and abandonment.*[6]—During the two year period, neither forfeiture nor abandonment can be presumed but must be proved.[7]

§ 8. *Titles in patent rights and license, conveyance, or transfer thereof. In general.*[8]—The constitution in the interests of invention grants to the patentee the absolute right to exclude or debar the world from making, using and selling his device, and congress cannot interfere with this right.[9] Having the absolute power of complete exclusion, the proprietor may exclude, conditionally or in part, by imposing limits as to time, place, price, or person.[10] He may deal arbitrarily, may sell or withhold for sale, vend to one at one price and to another at a different price, permit use in one state and not in another, give reasons or not, or deal fairly or

97. Act March 3, 1903, c. 1019 (32 Stat. 1225), amending Rev. St. § 4887, as amended, construed. Sawyer Spindle Co. v. Carpenter [C. C. A.] 143 F. 976.

98. Thomson-Houston Elec. Co. v. Illinois Tel. Const. Co., 143 F. 534.

99. Milloy Elec. Co. v. Thomson-Houston Elec. Co. [C. C. A.] 148 F. 843. Where after patent was adjudged invalid patentee still continued to sue upon it for years, held right to a reissue was lost. Reissue No. 11,875 (original No. 495,443), for traveling contract for electric railways, considered. Id. Reissue No. 11,872 (original No. 495,443), for a traveling contract for electric railways, is void because of the delay in making application therefor, which was not until seven years after the issuance of the original, and more than three years after it had been declared invalid by a circuit court of appeals, during which time the owner was prosecuting suits for infringement in other circuits, which also terminated adversely before the application was made. Thomson-Houston Elec. Co. v. Sterling-Meaker Co., 150 F. 589. Seven years and six months delay pending litigation held not to constitute laches. Thomson-Houston Elec. Co. v. International Trolley Controller Co., 141 F. 128. The lapse of seven months between the issue of an ordinary patent and an application for a reissue does not constitute undue delay or laches on the part of the inventor, where both he and his attorney reside abroad and are unfamiliar with the English language and with the requirements of our patent laws. In re Briede, 27 App. D. C. 298.

1. In re Hoey, 28 App. D. C. 416.
2. In re Briede, 27 App. D. C. 298. A claim in an application for the reissue of a patent is sustainable if it would have been sustainable if put into the original patent. Id.
3. In re Briede, 27 App. D. C. 298.
4. Rawson & Morrison Mfg. Co. v. Hunt Co. [C. C. A.] 147 F. 239.
5. In re Briede, 27 App. D. C. 298.
6. See 6 C. L. 971.
7. Rolfe v. Hoffman, 26 App. D. C. 336.
8. See 6 C. L. 972.
9, 10, 11, 12. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 142 F. 531.

unfairly, and in doing all or any of these, he is within his right, until the patent expires or is avoided, or the articles pass beyond the limits of his monopoly.[11] He may even bring nonpatented articles within his monopoly by providing that the patented article shall only be sold in connection therewith;[12] but he cannot be permitted by means of his royalties to create a fund for crushing lawful opposition, destroying legitimate and proper competition, and restraining trade and commerce, not only in the patented articles themselves but all others competing with them,[13] and this is especially true in districts where the patent has been declared to be invalid.[14]

Patent rights as between employer and employe.[15]—When one conceives the principle or plan of an invention, and employs another to perfect the details and realize his conception, although the latter may make valuable improvements therein, such improved results belong to the employer.[16] An express contract by an employe to assign to his employer, in consideration of the employment, all or part of any inventions discovered by him during the term of the contract, is not contrary to public policy,[17] and is valid,[18] and specifically enforceable in equity[19] if definite in its terms.[20] An agreement by an employe to give his employer "the full benefit and enjoyment" of any and all inventions which he might make pertaining to the employer's business imports an agreement for a shop right or license to use such inventions merely.[21]

Royalties.[22]—In order to render one liable for an accounting under a royalty contract, there must exist a contract relation between the parties;[23] hence a license being rescinded by mutual agreement, the licensee is relieved from further liability to acount for and pay royalties.[24] In the absence of some trust or fiduciary relation, mere failing to pay royalties under a contract does not give one the right to an accounting in equity.[25] A royalty contract is not in restraint of trade by which the licensee agrees that in the event of his terminating his obligation to pay royalties

13. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 142 F. 531. Where contracts of all licensees provided for a board to supervise the operations of the licensees to which one-half the royalties should be paid and which should have power, with the consent of a majority of the licensees, to purchase tires from any of them and resell at such prices as it deemed for the interest of all, held illegal and void. Id.

14. Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co., 142 F. 531.

15. See 5 C. L. 972.

16. Kreag v. Geen, 28 App. D. C. 437; Larkin v. Richardson, 28 App. D. C. 471. Where a person has discovered an improved principle in a machine, manufacture, or composition of matter, and employs other persons to assist him in carrying out that principle, and they in the course of experiments arising from that employment make valuable discoveries ancillary to the plan and preconceived design of the employer, such suggested improvements are in general to be regarded as the property of the person who discovered the original improved principle, and may be embodied in his patent as a part of his invention. Orcutt v. McDonald, 27 App. D. C. 228.

17. Wright v. Vocation Organ Co. [C. C. A.] 148 F. 209.

18. Mississippi Glass Co. v. Franzen [C. C. A.] 143 F. 501. A suit for infringement of a patent cannot be maintained against a defendant who employed and paid the patentee to build the machines embodying the invention, for which the patent was afterward applied for and obtained, under an agreement that defendant was to pay all costs and expenses, and was to own any patent that should be issued, and where the machines so built were used by defendant, not only without objection on the part of the patentee but under his direction. Pardy v. Hooker Co. [C. C. A.] 148 F. 631.

19. Mississippi Glass Co. v. Franzen [C. C. A.] 143 F. 501.

20. Hildreth v. Duff, 143 F. 139.

21. Hildreth v. Duff, 143 F. 139.

Evidence held to show that inventions were made during term of contract of employment. Mississippi Glass Co. v. Franzen [C. C. A.] 143 F. 501.

22. See 6 C. L. 972.

23. Allegation that party to a royalty contract "gave the benefit of the contract" to a certain corporation held not to render latter liable to patentee under the contract. Moore v. Coyne & Delaney Mfg. Co., 113 App. Div. 52, 98 N. Y. S. 892.

24. American St. Car Adv. Co. v. Jones [C. C. A.] 142 F. 974.

25. Adequate remedy at law. Moore v. Coyne & Delaney Mfg. Co., 113 App. Div. 52, 98 N. Y. S. 892.

as therein provided, he will not, for the life of the patents covering the machine, which he is licensed to use, employ in his business any like machine.[26]

Transfer.[27]—The general rules of contract law apply to contracts transferring interests in patents.[28] An agreement to assign future inventions is enforceable against the inventor and an assignee who takes with knowledge of the assignment.[29] One who takes a promise of an assignment in a patent on conditions to be performed by him, and he fails to wholly perform such conditions and abandons the contract, he is estopped to claim an interest in the patent finally obtained,[30] though he may recover money paid under such conditions.[31] Within the meaning of assignments, a subsequent patent not infringing a former one, it is regarded as a new patent.[32] That the owners of a patent organize a corporation to which they assign all their interests does not terminate the liability of one of the owners under the contract by which he acquired an interest in the patent.[33] Under the statute an assignment of a patent is void as against any subsequent purchaser or mortgagee without notice, unless it is recorded within three months from its date.[34] The acknowledgement of an assignment relates to the date of the assignment.[35] Breach of concurrent collateral undertaking does not bar termination of contract under the conditions thereof.[36] The constructions placed on various assignments are shown in the notes.[37]

Until congress legislates upon the subject, the states may make such reasonable regulations concerning the transfer of patent rights as is deemed necessary to protect its citizens from fraud.[38]

26. Warth v. Loewenstein, 121 Ill. App. 71.

27. See 6 C. L. 973.

28. Plaintiff contracted in writing with defendant and another, in consideration of $1,000 paid on the execution of the contract and $4,000 thereafter to be paid and a certain portion of the stock of a corporation to be formed, to transfer to such corporation certain letters patent for the manufacture and production of steel. Held that the contract was not void for want of materiality. Wills v. Pennell, 101 N. Y. S. 1017.

29. Davis & Roesch Temperature Controlling Co. v. Tagliabue, 148 F. 705.

30, 31. Stitzer v. Withers, 28 Ky. L. R. 1076, 91 S. W. 277.

32. Stitzer v. Withers, 28 Ky. L. R. 1076, 91 S. W. 277. Certain patent on portable horse stall held not a mere improvement. Id.

33. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995.

34. Arnold Monophase Elec. Co. v. Wagner Elec. Mfg. Co., 148 F. 234.

35. Murray v. Continental Gin Co. [C. C. A.] 149 F. 989.

36. Condition not to use similar machine. Warth v. Loewenstein, 121 Ill. App. 71.

37. An assignment upon condition that machine prove satisfactory requires the fulfillment of such condition before payment of the purchase price can be demanded. Comer v. Byars [Tex. Civ. App.] 13 Tex. Ct. Rep. 784, 89 S. W. 80. Assignment construed in light of correspondence between the parties and held conditional, and the conditions not having been performed, the assignee could not maintain a suit for infringement. Arnold Monophase Elec. Co. v. Wagner Elec. Mfg. Co., 148 F. 234. An assignment of pending applications "and any and all inventions of like nature or similar thereto which I have already completed, or which may hereafter be completed by me," held not to charge a third person with notice that it was intended to cover inventions, which, though similar in character, were not then in existence or even conceived, so as to deprive him of protection as a bona fide purchaser of a patent for an invention made by the assignor afterwards, and while in the employ of such third person. Davis & Roesch Temperature Controlling Co. v. Tagliabue, 150 F. 372.

38. Kan. Laws 1889, chap. 182, compelling any one selling a patent right in any county in the state to file with the clerk of such county an authenticated copy of the letters patent, together with an affidavit of the genuiness of the letters patent and as to other matters, and providing that any written obligation given for the purchase price of a patent right shall contain the words "given for a patent right," held valid. Allen v. Riley, 27 S. Ct. 95. Kirby's Ark Dig. § 513, requiring notes given for patents to show such fact on their face, held valid. Woods v. Carl, 27 S. Ct. 99.

Contra: State statutes requiring that notes given for patents a patent right shall bear a statement of such fact upon their face are unconstitutional. Laws 1901, p. 364, c. 268, as amended by Laws 1903, p. 723, c. 438, held unconstitutional. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231.

NOTE. State regulation of sale of patent rights: In many states, the validity of statutes similar to the one of Kansas involved have been upheld. Brechbill v. Randall, 102 Ind. 528, 1 N. E. 362, 52 Am. Rep. 695; New v. Walker, 108 Ind. 365, 9 N. E. 386, 58 Am. Rep. 40; Tod v. Wick Bros., 36 Ohio St. 370; Haskell v. Jones, 86 Pa. 173; Herdic v. Roessher, 109 N. Y. 127, 16 N. E. 198; Wyatt v. Wallace, 67 Ark. 575, 55 S. W. 1105; State

The jurisdiction of equity does not extend to a suit for false representations as to the validity of a patent owned by the plaintiff, nor as to his title thereto, which involves no breach of trust or contract.[39] An action cannot be maintained against an individual to restrain violation of a contract of assignment of patent rights, entered into between plaintiff and a corporation, though defendant is in control of the corporation.[40] The general rules of practice apply to actions on notes given for patent rights.[41]

Licenses.[42]—A license may be created by parol and be established by clear implication from proven facts and circumstances.[43] The seller of a machine intended to be used in connection with a device covered by a patent owned by him, and which is inoperative without such device, impliedly grants the right to the purchaser to use it and is estopped to maintain a suit to enjoin such use as an infringement of the patent.[44] The manufacture and sale by a corporation for use of an article in which there was a device covered by a patent owned by its president carries an implied license under such patent.[45] A license to use a patented invention that does not contain words importing assignability is a grant of a mere personal right to the licensee, which does not pass to the licensee's heirs or representatives, and which cannot be transferred to another without the express consent of the licensor.[46] A continuing assignable quality, however, may be given to a licensee to use a patented invention originally unassignable, by facts and circumstances and the conduct of the parties during the continuance of the license.[47] An exclusive license to

v. Cook, 107 Tenn. 499, 64 S. W. 720, 62 L. R. A. 174. The courts of some other states, having like questions before them, have held their statutes void. Hollida v. Hunt, 70 Ill. 109, 22 Am. Rep. 63; Crauson v. Smith, 37 Mich. 309, 26 Am. Rep. 514; Wilch v. Phelps, 14 Neb. 134, 15 N. W. 361; State v. Lockwood, 43 Wis. 405.

The circuit court of appeals of the eighth circuit, in Ozan Lumber Co. v. Union County Nat. Bank, 145 F. 344, has held a statute of Arkansas upon this same subject void because of its discrimination between articles of property of the same class or character, based only on the fact that the property discriminated against was protected by a patent granted by the United States. In the opinion in the case, authorities upon the subject are cited and commented upon. Among the cases cited are Patterson v. Kentucky, 97 U. S. 501, 24 Law. Ed. 1115, and Webber v. Virginia, 103 U. S. 344, 26 Law. Ed. 565. These cases are not in conflict with Allen v. Riley, 27 S. Ct. 95, nor do they cover the question before the court in the latter case. The cases of Patterson v. Kentucky, 97 U. S. 501, 24 Law. Ed. 1115, and Webber v. Virginia, 103 U. S. 344, 26 Law. Ed. 565, refer to tangible property which has been manufactured and came into existence under a patent and the case of Allen v. Riley, 27 S. Ct. 95, relates to provisions which are to accompany an assignment of intangible rights, growing out of a patent.

To uphold the kind of a statute considered in Allen v. Riley, 27 S. Ct. 95, is by no means to authorize any state to impose terms which, possibly, in the language of Mr. Justice Davies, in Ex parte Robinson, 2 Biss. 309, Fed. Cas. No. 11,932, "would result in a prohibition of the sale of this species of property within its borders, and in this way nullify the laws of congress which regulate its transfer, and destroy the power conferred upon congress by the constitution." Such a statute would not be a reasonable exercise of the powers of the state.—From Allen v. Riley, 27 S. Ct. 95, 97, 98.

39. Aberthow Const. Co. v. Ransome [Mass.] 78 N. E. 485.

40. Aberthow Const. Co. v. Ransome [Mass.] 78 N. E. 485.

41. Instructions: In an action on notes given for a patent right for a fuel-saving device in which defendant pleaded false representations and denied that the device was of any practical utility, the court, on request, should instruct that, unless it was established that the device was of no practical value with any kind of coal, they should find for plaintiff on the issue of utility. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. Where in an action on a note given for a patent right, the question of the utility of the patented device was in issue, an instruction that the jury must confine their inquiry as to utility to the purposes named in the patent and those only, without stating such purpose was misleading, although the jury were allowed to take the patent to their room and construe it for themselves. Id.

Witnesses: In an action on notes given for a patent right held no abuse of discretion to limit the parties to fifteen witnesses each upon the issue of utility. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231.

42. See 6 C. L. 974.

43. Bowers v. Lake Superior Cont. & Dredging Co. [C. C. A.] 149 F. 983. Facts held to render transferee a licensee. Id.

44. Thomson-Houston Elec. Co. v. Illinois Tel. Const. Co., 143 F. 534.

45. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338.

46, 47. Bowers v. Lake Superior Cont. & Dredging Co. [C. C. A.] 149 F. 983.

sell a patented article, granted by the owner of the patent who is also the manufacturer of the article, does not vest the licensee with the right to impose a valid restriction upon the future selling price of the article under penalty of liability for infringement of the patent.[48] The constructions placed upon various licenses are shown in the notes.[49]

§ 9. *Interference suits.*[50]

§ 10. *Infringement. A. What is.*[51]—It is the exclusive privilege of a patentee to be protected to the full extent of his invention and grant, equally against an improver and the general public.[52] A patent may be infringed in either of three ways: By the unlawful making, by the unlawful selling, or by the unlawful using, of a patented invention.[53] The giving away of infringing articles as premiums

48. Ingersoll v. Snellenberg, 147 F. 522.

49. License held not to cover invention in suit. Bullock Elec. Mfg. Co. v. Crocker-Wheeler Co., 141 F. 101. Exclusive licensee of limited territory held entitled to damages for breach of license by parties obtaining title to the patents with knowledge of such license. New York Phonograph Co. v. National Phonograph Co. [C. C. A.] 144 F. 404. A license held not modified so that transferee of the license was only liable for royalties under the original contract. Bowers v. Lake Superior Cont. & Dredging Co. [C. C. A.] 149 F. 983. A contract by which a patentee licensed defendant to use anyone or more of the devises "described and claimed" in a patent, and requiring defendant to pay a royalty therefor, must be construed as requiring payment only for the use of such devices as defendant would not otherwise have the right to use because covered by the patent, and does not subject him to payment of royalty because of his use or one element only of a combination patented as a whole. Western Elec. Co. v. Robertson [C. C. A.] 142 F. 471. No. 346,563 held not to embrace the structure used by defendant so as to render it liable for royalties. Id.

50, 51. See 6 C. L. 975.

52. Columbia Wire Co. v. Kokom Steel & Wire Co. [C. C. A.] 143 F. 116.

53. One who knowingly buys and sells patented articles in violation of restrictions placed on their sale by the owner of the patent is guilty of infringement. Condition fixing minimum price at which article should be sold. New Jersey Patent Co. v. Schaefer, 144 F. 437.

ILLUSTRATIONS. Patents held infringed: Design patent No. 33,633, casing for disinfectant. West Disenfecting Co. v. Frank [C. C. A.] 149 F. 423. Design patent No. 35,755, reflector. Mygatt v. McArthur, 143 F. 348. Reissue No. 11,992 (original No. 664,890) convertible cars, claims 4, 10, 13 and 14. O'Leary v. Utica & Mohawk Valley R. Co. [C. C. A.] 144 F. 399. Reissue No. 12,115 (original No. 727,331), claims 11, 23 and 25. National Elec. Signaling Co. v. De Forest Wireless Tel. Co., 145 F. 354. No. 330,061, telephone switchboard, claims 2, 4 and 6. Western Elec. Co. v. Rochester Tel. Co., 142 F. 766. No. 339,998, manhole for boilers. Munroe v. Erie City Iron Works, 143 F. 989; Munroe v. Riter, 143 F. 986. No. 365,723, wire-barbing machine. Columbia Wire Co. v. Kokomo Steel & Wire Co. [C. C. A.] 143 F. 116. No. 383,258, machine for removing hairs from furs. Cimiotti Unhairing Co. v. Bowsky [C. C. A.] 143 F. 508. No. 392,735, printers' drying racks. Koerner v. Deuther, 143 F. 544. No. 397,860, machine for molding tubes. Keasbey & Mattison Co. v. Johns-Manville Co., 145 F. 202; Keasbey & Mattison Co. v. American Magnesia & Covering Co. [C. C. A.] 143 F. 490. No. 418,678, electric switch, claims 1 and 4. Cutler-Hammer Mfg. Co. v. Union Elec. Mfg. Co., 147 F. 266. No. 422,746, electrical transformer. Kuhlman Elec. Co. v. General Elec. Co. [C. C. A.] 147 F. 709. No. 436,792, can body making machine American Can Co. v. Hickmott Asparagus Canning Co. [C. C. A.] 142 F. 141. No. 465,255, computing machine, claims 7 and 8. Comptograph Co. v. Mechanical Accountant Co. [C. C. A.] 145 F. 331, 140 F. 136. No. 472,607, feeders for cotton gin, claims 1, 2, 9 and 12. Murray Co. v. Continental Gin Co. [C. C. A.] 149 F. 989. No. 473,019, corrugating machine, claim 1. Plecker v. Poorman, 147 F. 528. No. 474,158, air brush. Wold v. Thayer [C. C. A.] 148 F. 227, afg. 142 F. 776. No. 474,536, spring supports, claims 1 and 3. Staples & Hanford Co. v. Lord [C. C. A.] 148 F. 16. No. 475,929, nonmetallic bearing. Mellor v. Carroll, 141 F. 992. No. 478,344, electrical distribution, claims 1, 2, 4, 8 and 9. Bullock Elec. Mfg. Co. v. Crocker-Wheeler Co., 141 F. 101. No. 479,864, stairway, claims 6 and 10. Seeberger v. Reno Inclined Elec. Co., 145 F. 532. No. 480,029, conveying apparatus. Lidgewood Mfg. Co. v. Lambert Hoisting Engine Co., 150 F. 364. No. 489,682, electric lamp socket, claims 5 and 7. Edison General Elec. Co. v. Crouse-Hinds Elec. Co., 146 F. 539. No. 493,736, car starter. Railway Appliance Co. v. Munroe [C. C. A.] 147 F. 241, afg. 145 F. 646. No. 504,065, typewriter keys. Imperial Mfg. Co. v. Munson Supply Co. [C. C. A.] 145 F. 514. No. 506,268, process for delinting cotton seed and bulbs. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73. No. 508,637, armature core, claims 2, 4 and 6. General Elec. Co. v. National Elec. Co, 145 F. 193. No. 523,833, machine for making hot packing rings, claims 1, 2, 4 and 6. Ferry-Hallock Co. v. Hallock, 142 F. 172. No. 526,968, chocolate dipper. American Chocolate Mach. Co. v. Helmstetter [C. C. A.] 142 F. 978. No. 528,223, workman's time recorder. International Time Recording Co. v. Dey [C. C. A.] 142 F. 736. No. 532,554, candy cutter. American Caramel Co. v. Mills & Bros. [C. C. A.] 149 F. 743. No. 534,543, gramophone, claims 5 and 35. Victor Talking Mach. Co. v. American Graphophone Co. [C. C. A.] 145 F. 350, afg. 140 F. 860. No. 535,465, washing machine. Benbow-Brammer Mfg. Co. v. Hef-

fron-Tanner Co., 144 F. 429. No. 539,171, bag-filling machine, claims 14, 53, 54, 30, 24, 53, 61, 41, 11, 12, 16, 17, 19, 23, 34, 35 and 20. Brown Bag-Filling Mach. Co. v. Drohen [C. C. A.] 148 F. 985. No. 542,565, press for forming screw insulators. Brookfield v. Elmer Glass Works, 144 F. 418. No. 542,733, heat regulator. Weld Mfg. Co. v. Johnson Service Co. [C. C. A.] 147 F. 234. No. 552,796, mechanical musical instrument. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880. No. 554,676, rubber tired wheel. Consolidated Rubber Tire Co. v. Firestone Tire & Rubber Co., 147 F. 739. No. 553,669, air brush. Wold v. Thayer [C. C. A.] 148 F. 227, afg. 142 F. 776. No. 558,969, claims 1, 2 and 7, paper bag machine. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479. No. 561,559, knitting machine. Scott v. Fisher Knitting Mach. Co. [C. C. A.] 143 F. 915. No. 569,903, nail clipper, claim 1. Cook Co. v. Little River Mfg. Co. [C. C. A.] 145 F. 348. No. 571,604, belt conveyor, claims 5 and 6. Robbins Conveying Belt Co. v. American Road Mach. Co. [C. C. A.] 145 F. 923, afg. 142 F. 221. No. 572,014, fireproof blind, claim 3. Kinnear Mfg. Co. v. Wilson [C. C. A.] 142 F. 970. No. 580,000, separable button. United States Fastener Co. v. Bradley [C. C. A.] 149 F. 222, afg. 143 F. 523. No. 580,001, separable button, claims 1 and 2. United States Fastener Co. v. Meyers, 145 F. 536. No. 583,227, card records, claims 1, 2 and 3. Gunn v. Bridgeport Brass Co., 148 F. 239. No. 584,177, magazine gun. Marlin Firearms Co. v. Sparks, 140 F. 879. Nos. 587,441 and 587,442, electric controllers. General Elec. Co. v. Garrett Coal Co. [C. C. A.] 146 F. 66, rvg. 141 F. 994. No. 594,036, claims 2 and 3, vacuum tube. Queen & Co. v. Friedlander & Co., 149 F. 771. No. 622,834, golf ball. Haskell Golf Ball Co. v. Perfect Golf Ball Co., 143 F. 128. No. 622,889, steam packing. Forsyth v. Garlock [C. C. A.] 142 F. 461. No. 623,686, machine for molding building blocks, claims 6 and 7. Palmer Hollow Concrete Bldg. Block Co. v. Palmer, 148 F. 702. No. 623,933, bowling alley. Brunswick-Balké-Collender Co. v. Beyer, 145 F. 353. No. 626,667, electric sign. Chase Elec. Const. Co. v. Columbia Const. Co., 144 F. 431. No. 626,997, gas burning stove. Nathan v. Howard [C. C. A.] 143 F. 889. No 631,033, mirror. Conroy v. Penn Elec. & Mfg. Co. [C. C. A.] 146 F. 749, modifying, 140 F. 872. No. 633,772, automatic electric circuit breaker, claims 2 and 5. Westinghouse Elec. & Mfg. Co. v. Cutter Elec. & Mfg. Co. [C. C. A.] 143 F. 966. No. 638,540, combined abdominal pad and hose supporter. Foster Hose Supporter Co. v. Cohen, 148 F. 92. No. 645,026, lubricator for locomotive engines. Nathan Mfg. Co. v. Delaware, etc., R. Co., 146 F. 252. No. 645,871, folding machine. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736. No. 650,771, plow, claims 7 and 8. Avery & Sons v. Case Plow Works [C. C. A.] 148 F. 214, rvg. 139 F. 878. Nos. 661,024, 661,025, process and apparatus, plate prism glass. Pressed Prism & Plate Glass Co. v. Continuous Glass Press Co., 150 F. 355. No. 667,813, railroad torpedo. American Fog Signal Co. v. Columbia Firecracker Co., 143 F. 907. No. 695,121, doll. Steiner v. Schwarz, 148 F. 868. No. 714,880, paint remover. Chadeloid Chemical Co. v. De Ronde Co., 146 F. 988. No. 717,014, claim 1, method of making brushes. Universal Brush Co. v. Sonn, 146 F. 517. No. 717,348, vamp stay for shoes. Charmbury v. Walden, 141 F. 373. No. 725,278, bolt anchor. Palmer v. Wilcox Mfg. Co., 141 F. 378. No. 729,500, eye shade. Mahony v. Malcom [C. C. A.6 143 F. 124. No. 736,032, bath-seat. Silver & Co. v. Eustis Mfg. Co., 142 F. 525.

Patents held not infringed: Reissue No. 11,918 (original No. 428,169), electric motor regulator. Thomson-Houston Elec. Co. v. Garrett Coal Co., 144 F. 434. Reissue No. 12,037 (original No. 589,168), kinetographic camera, claims 1, 2 and 3. Edison v. American Mutoscope & Biograph Co., 144 F. 121. No. 271,426, sewing machine treadle. Cramer v. Singer Mfg. Co. [C. C. A.] 147 F. 917. No. 341,380, stamp-canceling machine. International Postal Supply Co. v. American Postal Mach. Co., 141 F. 969. No. 358,545, stove linings. Germer Stove Co. v. Art Stove Co. [C. C. A.] 150 F. 141. No. 375,102, automatic scale, claim 11. National Automatic Weighing Mach. Co. v. New York Scale Co., 145 F. 951. No. 375,377, machine for molding building blocks. Palmer Hollow Concrete Bldg. Block Co. v. Palmer, 148 F. 702. No. 386,771, portable forge. Cumming v. Baker [C. C. A.] 144 F. 395. No. 388,366, stamp-canceling machine. International Postal Supply Co. v. American Postal Mach. Co., 141 F. 969. No. 389,817, claim 1, portable boat. Winans v. Perring [C. C. A.] 146 F. 133. No. 398,625, cash indicator and register. National Cash Register Co. v. Union Computing Mach. Co., 143 F. 342. No. 400,346, barrel-washing machine. Schock v. Olsen & Tilgner Mfg. Co. [C. C. A.] 147 F. 229, afg. 145 F. 6[illegible]. No. 402,140, machine for shaping sheet metal pipes. Plecker v. Poorman, 147 F. 530. No. 411,131, furnace for reheating glassware. National Glass Co. v. U. S. Glass Co. [C. C. A.] 149 F. 1003, afg. 147 F. 254. No. 415,048, lemon juice extractor, claim 4. The Fair v. Manny Lemon Juice Extractor Co. [C. C. A.] 145 F. 175. No. 417,451, pulp screening machine. Van Epps v. United Box Board & Paper Co. [C. C. A.] 143 F. 869. No. 423,317, lamp appliance. Welsbach Light Co. v. Cremo Incandescent Light Co., 145 F. 521. No. 424,291, time-recording machine. Wilson v. Calculagraph Co. [C. C. A.] 144 F. 91. No. 430,368, electric current regulator. Electric Storage Battery Co. v. Gould Storage Battery Co., 148 F. 695. No. 434,062, breach-loading gun, claim 27. Marlin Fire-Arms Co. v. Kellogg [C. C. A.] 145 F. 631. No. 441,962, saw set. Morrill v. Hardware Jobbers Purchasing Co. [C. C. A.] 142 F. 756. No. 442,855, furnace for reheating glassware. National Glass Co. v. U. S. Glass Co. [C. C. A.] 149 F. 1003, afg. 147 F. 254. No. 446,151, manhole cover. Munroe v. Erie City Iron Works, 143 F. 989. Nos. 449,959, 449,968, ball bearings. Ball Bearing Co. v. Star Ball Retainer Co. [C. C. A.] 149 F. 219, afg. 147 F. 721. No. 451,847, artificial brush. Societe Fabriques de Produits Chimiques de thann et de Mulhouse v. Lueders [C. C. A.] 142 F. 753. No. 454,638, water-wheel bucket. Pelton Water-heel Co. v. Abner Doble Co., 142 F. 520. No. 461,734, water-closets, claim 1. Mott Iron Works v. Webb Mfg. Co. [C. C. A.] 144 F. 103. No. 472,607, gin-feeder, claims 1, 2, 9 and 12. Murray Co. v. Continental Gin Co., 141 F. 126. No. 474,536, spring supports, claims 1 and 3. Staples & Hanford Co. v. Lord [C. C. A.] 148 F. 16. No. 479,864, stairway, claims 7, 11 and 12. Seeberger v. Reno Inclined Elev. Co., 145 F. 532. No. 483,033, hermetically sealed jars. Phoenix Cap

with other goods sold is in effect a sale and constitutes infringement.[54] The article actually made as distinguished from that claimed in the patent under which the alleged infringer claims to operate would seem to be controlling.[55] The owner of

Co. v. Reiss, 146 F. 387. No. 488,179, trolley stand. General Elec. Co. v. Garret Coal Co., 141 F. 124. No. 492,205, chocolate dipping machine. American Chocolate Mach. Co. v. Helmstetter [C. C. A.] 142 F. 978. No. 498,196, railroad switch stands. Pennsylvania Steel Co. v. Pettibone, Mulliken & Co. [C. C. A.] 141 F. 95. No. 499,402, mop stick. Stover Mfg. Co. v. Arcade Mfg. Co. [C. C. A.] 143 F. 126. No. 500,149, air lock for caissons, claim 2. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. No. 501,367, magazine gun, claims 4, 8 and 29. Russell v. Winchester Repeating Arms Co., 148 F. 388. No. 503,870, endless chain conveyor, claims 2 and 4. McCaslin v. Link Belt Engineering Co. [C. C. A.] 147 F. 243. No. 507,439, claim 2, portable boat. Winons v. Perring [C. C. A.] 146 F. 133. No. 523,563, car replacer. Alexander Car Replacer Mfg. Co. v. Heitzmann Tool & Supply Co., 147 F. 921. No. 525,941, duplicate whist trays. United States Playing Card Co. v. Spalding & Bros. [C. C. A.] 148 F. 620. No. 532,175, saw set. Morrill v. Hardware Jobbers Purchasing Co. [C. C. A.] 142 F. 756. No. 533,974, chocolate dipping machine. American Chocolate Mach. Co. v. Helmstetter [C. C. A.] 142 F. 978. No. 534,785, electrical conductors. Downes v. Teter-Heany Development Co. [C. C. A.] 150 F. 122, afg. 144 F. 106. No. 535,465, claim 1, means for operating washing machines. Benbow-Brammer Mfg. Co. v. Richmond Cedar Works, 149 F. 430. No. 539,171, bag-filling machine, claims 1, 2, 6, 13, 8, 9, 18, 29 and 75. Brown Bag-Filling Mach. Co. v. Drohen [C. C. A.] 148 F. 985. No. 542,565, press for forming screw insulators. Brookfield v. Elmer Glass Works, 144 F. 418. No. 548,623, sound records. Victor Talking Mach. Co. v. American Graphophone Co., 145 F. 189. No. 553,055, foundry ladle. Central Foundry Co. v. Coughlin [C. C. A.] 141 F. 91. No. 553,740, starter's gate for race tracks. Ryan v. Metropolitan Jockey Club [C. C. A.] 144 F. 697. No. 555,825, locking device for elevators, claims 1 and 2, conceding their validity. Standard Elev. Interlock Co. v. Ramsay [C. C. A.] 143 F. 972. No. 556,943, aromatic ketone. Haarmann de Laire-Schaefer Co. v. Lueders, 145 F. 357. No. 559,446, shade holder. Curtain Supply Co. v. North Jersey St. R. Co. [C. C. A.] 142 F. 750. No. 559,522, sewage apparatus. American Sewage Disposal Co. v. Pawtucket [C. C. A.] 146 F. 753. No. 561,386, shoe sewing machine. United Shoe Mach. Co. v. Greenman [C. C. A.] 146 F. 759. No. 569,903, nail clipper, claim 2. Cook Co. v. Little River Mfg. Co. [C. C. A.] 145 F. 348. No. 573,205, gas heater. Columbus v. Ferno Co., 144 F. 701. No. 583,320, time-recording machine. Wilson v. Calculagraph Co. [C. C. A.] 144 F. 91. No. 584,177, "take-down" gun. Marlin Fire Arms Co. v. Dinnan [C. C. A.] 146 F. 628. No. 584,340, hoist. Hunt, Helm, Ferris & Co. v. Milwaukee Hay Tool Co. [C. C. A.] 148 F. 220. No. 598,567, can-body machine. American Can Co. v. Hickmott Asparagus Canning Co. [C. C. A.] 142 F. 141. No. 599,438, knitted fabric. Bell v. MacKinnon [C. C. A.] 149 F. 205. No. 601,405, brush. Shepherd v. Deitsch [C. C. A.] 146 F. 756, rvg. 138 F. 83. No. 607,433, milk can. Ironclad Mfg. Co. v. Dairyman's Mfg. Co. [C. C. A.] 143 F. 512. No. 617,813, curtain-stretching frame. Mayr v. Holmquist [C. C. A.] 145 F. 179. No. 622,403, cell case machine, claim 19. Swift v. Portland Brush & Broom Co. [C. C. A.] 149 F. 216. No. 623,686, machine for molding building blocks, claims 8 and 14. Palmer Hollow Concrete Bldg. Block Co. v. Palmer, 148 F. 702. No. 628,886, lock rod for cards. Yawman & Erbe Mfg. Co. v. Library Bureau [C. C. A.] 147 F. 246. No. 632,527, stamp-canceling machine. International Postal Supply Co. v. American Postal Mach. Co., 141 F. 969. No. 633,962, water-wheel casing. Pelton Water Wheel Co. v. Abner Doble Co., 141 F. 661. No. 642,869, controller for spark generator. Motsinger Device Mfg. Co. v. Hendricks Novelty Co. [C. C. A.] 149 F. 995. No. 644,532, gin-feeder, claim 8. Murray Co. v. Continental Gin Co., 141 F. 126. No. 652,730, lamp chimney. Cortis v. American Street Lamp & Supply Co., 145 F. 516. No. 655,253, woven wire fabric. Locklin v. Buck, 148 F. 715. No. 659,315, shade holder. Curtain Supply Co. v. North Jersey St. R. Co. [C. C. A.] 142 F. 760. No. 613,648, lamp. Cortis v. American Street Lamp & Supply Co., 145 F. 516. No. 663,325, machine for turning cranked axles. Blamire v. Sheldon Axle Works, 149 F. 780. No. 666,583, horseshoe calk. Williams Calk Co. v. Kemmerer [C. C. A.] 145 F. 928. No. 669,708, telephone switchboards. Western Elec. Co. v. Galesburg Union Tel. Co. [C. C. A.] 144 F. 684, afg. 148 F. 857. No. 676,084, numbering machine. Bates Mach. Co. v. Force & Co. [C. C. A.] 149 F. 220, rvg. 145 F. 529. No. 676,824, hook and eye package. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co., 150 F. 597. No. 688,690, cylinder printing presses. Hoe v. Miehle Printing Press & Mfg. Co. [C. C. A.] 149 F. 213, afg. 141 F. 112. No. 699,151, casing for horse collars. Couch Bros. v. Allen Mfg. Co., 140 F. 856. No. 700,919, computing scale. Computing Scale Co. v. Automatic Scale Co., 27 S. Ct. 307. No. 703,440, saw set. Morrill v. Hardware Jobbers Purchasing Co. [C. C. A.] 142 F. 756. No. 709,001, electrical conductors. Downes v. Teter-Heany Development Co. [C. C. A.] 150 F. 122, afg. 144 F. 106. No. 714,290, incandescent lamps. Fielding v. Crouse-Hinds Elec. Co., 148 F. 230. No. 717,122, pressure governor. Davis & Roesch Temperature Controlling Co. v. Roesch, 148 F. 713. No. 721,276, numbering machine, claims 13, 14 and 15. Bates Mach. Co. v. Force & Co., 145 F. 526. Nos. 721,774 and 721,777, cluster lights. Benjamin Elec. Mfg. Co. v. Dale Co., 141 F. 989. No. 727,888, stop mechanism for winding machine. Bibb Mfg. Co v. Bowers [C. C. A.] 142 F. 137. No. 736,032, bath seat. Silver & Co. v. Eustis Mfg. Co., 142 F. 526. Nos. 756,177 and 756,178, cartridge belts. Mills v. Russell Mfg. Co. [C. C. A.] 144 F. 700. No. 771,426, sheet piling. Harder v. U. S. Steel Piling Co., 149 F. 434.

54. Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co., 144 F. 429.

55. The offer by defendant of a copy of an application for a patent which shows a device infringing a prior patent with a

the majority of the stock of a corporation, who controls its affairs and who transfers to it certain patents in violation of a trust under which they had been conveyed to him by the owners, is equally liable with the corporation for its infringement of the patents by the use of the patented devices.[56] The issuance of a patent raises a presumption of dissimilarity between it and prior patented devices.[57] Where the whole substance of the invention may be copied in a different form, it is the duty of the courts and juries to look through the form for the substance of the invention, for that which entitled the inventor to a patent, and which the patent was designed to secure and where there is identity in such particulars, there is infringement;[58] hence if two machines be substantially the same and operate in the same manner, though they may differ in form, proportion, and utility, they are the same in principle.[59] The use of mechanical equivalents will not avoid infringement.[60] Neither the joinder of two elements into an integral part accomplishing the purpose of both and no more, nor the separation of one integral part into two, together doing precisely or substantially what was done by the single element, will evade a charge of infringement.[61] Where in the alleged infringing machine the parts have merely been rearranged by transferring their different functions, while the principle of operation remains the same as in the patented machine, the recombination as a whole is the equivalent of the patent,[62] it follows that interchangability of parts in two machines is not a conclusive test of infringement.[63] Where a patent includes claims for a process and also for the product of such process, the latter are not infringed unless the process claims are also infringed.[64] Identity of detail in a machine combination is not necessary in order to constitute infringement, which cannot be avoided by changing the form and shape of the elements entering into the combination, so long as the essential features are appropriated and accomplish the same result in substantially the same way.[65] In all combinations of a mechanical patent, every element claimed is conclusively presumed material,[66] and a claim for a combination is not infringed if any one of the described or specified elements is omitted without the substitution of any equivalent therefor;[67] but the impairment of the function of a part of a patented structure by omitting a portion will not avoid infringement when the

statement that defendant is manufacturing thereunder is insufficient to prove infringement of the prior patent where such device is absent from the article actually made by defendant. Morrill v. Hardware Jobbers Purchasing Co. [C. C. A.] 142 F. 756.

56. Harrington v. Atlantic & Pacific Tel. Co., 143 F. 329.

57. United States Fastener Co. v. Meyers, 145 F. 536.

58. Ferry-Hallock Co. v. Hallock, 142 F. 172.

59. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880; Nathan v. Howard [C. C. A.] 143 F. 889. A patentee is entitled to protection against evasions of the wording of a claim in former nonessential details, where the substance of the invention, which is unmistakably disclosed in the claims and specification, has been appropriated. Columbia Wire Co. v. Kokomo Steel & Wire Co. [C. C. A.] 143 F. 116.

60. Where single wheel cast with two peripheral contacts was substituted for two wheels or pulleys connected together so as to revolve as one. Lidgerwood Mfg. Co. v. Lambert Hoisting Engine Co., 150 F. 364. A pulley revolving on a central shaft, and one having trunnions revolving in bearings at the ends, are mechanical equivalents. Robins Conveying Belt Co. v. American Road Mach. Co. [C. C. A.] 145 F. 923, afg. 142 F. 221.

61. Nathan v Howard [C C. A.] 143 F. 889. One may not escape infringement by the mere joinder of two elements into one integral part. So held where single wheel cast with two peripheral contacts is substituted for two wheels or pulleys connected together so as to revolve as one. Lidgerwood Mfg. Co. v. Lambert Hoisting Engine Co., 150 F. 364.

62. Columbia Wire Co. v. Kokomo Steel & Wire Co. [C. C. A.] 143 F. 116. Infringement is caused by a structure which differs from the patented article only in the location of one of the parts, the change being immaterial to the result. Avery & Sons v. Case Plow Works [C. C. A.] 148 F. 214, rvg. 139 F. 878.

63. Columbia Wire Co. v. Kokomo Steel & Wire Co. [C. C. A.] 143 F. 116.

64. Downes v. Teter-Heany Development Co. [C. C. A.] 150 F. 122, afg. 144 F. 106.

65. International Time Recording Co. v. Dey [C. C. A.] 142 F. 736.

66. Universal Brush Co. v. Sonn, 146 F. 517.

67. Winans v. Perring [C. C. A.] 146 F. 133; Central Foundry Co. v. Coughlin [C. C. A.] 141 F. 91.

principle of operation is preserved and appropriated.[68] A patent for a combination of elements in a machine is not infringed by a machine in which the elements of the combination are merely aggregated operating successively and independtly of each other.[69] Where all the parts of a patented combination were old and the only invention is in their new arrangement, one who makes and sells the old parts is not chargeable with infringement, provided it was done with no purpose to contribute to plans of another intending an infringement by combining such parts in accordance with the patent.[70] A combination patent is not infringed by a device which is not only structurally different but does not perform by reason of its combination various functions which are inherent necessities of the patented combination and have been specifically pointed out in the specification.[71] Where a patent is for an improvement on a known machine by a mere change of form or a new combination of parts, the patentee cannot invoke the doctrine of equivalents to establish infringements by another, who has also improved the original machine by the use of a different form or combination performing the same functions.[72] Upon the question of infringement, the structure itself is to be looked to and not the results obtained, except as they may go to the question of identity [73] and infringement is not avoided because the patented device is not utilized to the full extent possible, nor because a feature is retained which might be dispensed with to advantage, and which it was one of the purposes of the patented device to render unnecessary.[74] A substantial equivalent of a patented device or means which performs the same function does not avoid infringement because it may perform an additional function.[75] The tests of lawful repairing is that the "identity of the machine" must be retained,[76] providing that in executing such repairs a separately patented part be not replaced by one not made under the authority of the patentee,[77] and the repair cannot extend to reconstruction.[78]

Contributory infringement.[79]—One who knowingly and directly aids, abets, and procures, a violation of a license restriction is guilty of contributory infringement,[80] and it is no defense that the patentee afforded the opportunity for the infringement.[81] One who manufacturers and sells certain elements of a patented combination with intent that they shall be used as a part of the full combination,

68. Nathan v. Howard [C. C. A.] 143 F. 889.

69. American Chocolate Mach. Co. v. Helmstetter [C. C. A.] 142 F. 978.

70. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73.

71. Russell v. Winchester Repeating Arms Co., 148 F. 388.

72. Central Foundry Co. v. Coughlin [C. C. A.] 141 F. 91.

73, 74. Wills v. Scranton Cold Storage Co., 147 F. 525.

75. Universal Brush Co. v. Sonn, 146 F. 517; Comptograph Co. v. Mechanical Accountant Co. [C. C. A.] 145 F. 331, 140 F. 136.

76. National Cash Register Co. v. Grobet, 148 F. 385. Defendants held not chargeable with infringement of a patent for a cash register by removing a part of a machine made thereunder and attaching it to another machine made under a different patent but which was the same except for such part, both machines having been sold by complainant without restriction and having come lawfully into defendant's ownership. Id. The replacing by a purchaser and user of a patented article of a part which is peculiarly subject to wear or destruction and which does not constitute a chief element of the patented invention is within his rights as a repair, and cannot be considered a reconstruction to subject him to liability as an infringer. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338. Replacing ribbon spool in a ribbon mechanism for a typewriter held in the nature of a repair. Wagner Typewriter Co. v. Webster Co., 144 F. 405. The purchaser of a patented machine is entitled to make necessary repairs and to replace worn out parts not separately patented so long as the identity of the licensed machine is not destroyed and such repairs may be made by him or by any one employed by him. Morrin v. White Engineering Works [C. C. A.] 143 F. 519. Replacing all generating tubes in No. 463,307, steam generator, reconstruction; not so as to replacing one tube. Id.

77, 78. National Cash Register Co. v. Grobet, 148 F. 385.

79. See 6 C. L. 980.

80. Selling supplies for use in rotary mimeograph. Dick v. Henry, 149 F. 424.

81. Requested purchase of machine to give defendant opportunity to sell ink for use thereon in violation of license restriction. Dick v. Henry, 149 F. 424.

as well as in other combinations, is chargeable with contributory infringements in so far as its sales are for use in the patented combination;[82] but a defendant cannot be charged with contributory infringement of a patent merely because of the sale to an infringing manufacturer of an article which constitutes an element in the patented product, but which is also a common article of commerce, used for other purposes without convincing proof that the article sold was used in the manufacture of the infringing product, and that the defendants sold it knowing, or having reasonable cause to know, that it was to be so used.[83] Advice of counsel is no defense to a suit for contributory infringement,[84] although, where it has been honestly relied upon, a heavy penalty will not usually be imposed, but only a sum sufficient to reimburse the moving party and act as a deterrent from future infringing actions.[85]

(§ 10) *B. Defenses.*[86]—Where a patented device is obviously operative and useful, the fact that it has never been manufactured by the owner of the patent does not affect his right to maintain a suit for infringement.[87] Using a patented article under either an actual or an implied license will protect the user against a charge of infringement.[88] Defenses which impugn the legality of a patent, issued with apparent regularity, must be supported at least by proofs which are satisfactory to the court and cannot be established by a mere preponderance of the evidence, and this to the extent of requiring the proof to be clear, unequivocal, and convincing, where fraud and criminal acts in the procurement of the patent are charged.[89] Alleged anticipating patents introduced by a defendant in a suit for infringement are entitled to little consideration unless there is an expert or other evidence to show their relation to the patent in suit.[90] Even though the point is not made in the proofs or pleadings, that the device does not disclose patentable invention, it is not to be disregarded when it is plain.[91] It is not open to an alleged infringer to collaterally attack a patent on the ground of fraud in its procurement.[92] Where a bill alleges infringement of patents by the violation of the conditions of a license contract thereunder, and seeks in effect the specific enforcement of the contract, its legality is involved directly and not collaterally, and must be established before equity

82. Cutler-Hammer Mfg. Co. v. Union Elec. Mfg. Co., 147 F. 266. The sale by a defendant which has been enjoined from infringing a patent for a sound producing apparatus of a talking machine, of records which are capable of use with the other elements of the patented apparatus and which are intended to be and are so used by purchaser of such apparatus from complainant, constitutes a contributory infringement and a violation of the injunction. Victor Talking Mach. Co. v. Leeds & Catlin Co., 150 F. 147.

83. Rumford Chem. Works v. Hygienic Chem. Co., 148 F. 862. The doctrine of contributory infringement should be limited to cases where the articles sold are either parts of a patented combination or device, or one produced for the sole purpose of being so used as to constitute infringement, and should not be extended to apply to ordinary and staple articles of commerce, used in connection with a patented machine, because the patentee sells or licenses such machine upon the condition that he alone shall furnish such articles. Cortelyou v. Johnson & Co. [C. C. A.] 145 F. 933.

84, 85. Victor Talking Mach. Co. v. Leeds & Catlin Co., 150 F. 147.

86. See 6 C. L. 980.

87. United States Fastener Co. v. Bradley [C. C. A.] 149 F. 222, afg. 143 F. 523.

88. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338.

89. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

90. Charmbury v. Walden, 141 F. 373. The defense of anticipation will not be considered in a suit for infringement of a patent where it is supported by the introduction of a number of prior patents for complicated machinery without any explanatory testimony. Bell v. MacKinnon [C. C. A.] 149 F. 205. In determining a defense of anticipation, it would seem that the court may disregard prior patents placed before it without evidence explaining them or their operation. Benbow-Brammer Mfg. Co. v. Heffron-Tanner Co., 144 F. 429.

91. Wills v. Scranton Cold Storage Co., 147 F. 525. It is the duty of the court to dismiss a suit brought to restrain infringement of a patent where the structure is not patentable, even though the defense be not set up in the answer. Conderman v. Clements [C. C. A.] 147 F. 915.

92. So held where it was alleged that patentee's solicitor contributed a substantial part of the invention and embodied it in the application after the patentee had made oath

will grant relief.[93] An assignment of a patent by the patentee estops himself,[94] and all claiming or acquiring their knowledge of the patented article or process from him [95] to deny the validity of the patent, and in some [96] but not all [97] courts from involving the prior art as a limitation of its claims as made and allowed, and where he is deemed so estopped, in a suit against him for infringement by the assignee, extraneous evidence is inadmissable, if there is no ambiguity or uncertainty in the language of the description and claims; and if there is uncertainty, outside evidence is admissible only to make clear what the applicant meant to claim and the government to allow, and not for the purpose of showing even in the slightest degree, that the applicant had no right to claim, and that the government was improvident in allowing what was in fact claimed and allowed.[98]

(§ 10) *C. Damages, profits and penalties.*[99]—A complainant failing to show the amount of his loss is only entitled to recover nominal damages.[1] Where the devices covered by a patent are mere improvements in the line of simplicity of construction and consequent saving in cost of manufacture, and there is no satisfactory evidence that they rendered the machine as a whole more saleable, an infringer is only liable for profits realized from the use of the patented parts which were new and wrongfully appropriated by him,[2] and the complainant must furnish evidence from which the profits may be thus apportioned.[3] Where a patent for certain improvements in machines is found to be infringed by machines made and used but not sold, and it appears that the product of such infringing machines has no superiority which gives it an enhanced price over that of noninfringing machines, the only profits recoverable are the saving in the cost of construction and maintenance of the machines, or in the cost of the product due to the use of the infringing devices.[4]

(§ 10) *D. Remedies and procedure.*[5]—Laches will bar equitable relief.[6] The owner of a patent, who has obtained an interlocutory decree adjudging its validity and infringement, is not required to wait until it has become final before bringing suit against the defendant for infringement by the same device in another district;[7]

to the same. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

93. Indiana Mfg. Co. v. Case Threshing Mach. Co., 148 F. 21.

94. Siemens-Halske Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 142 F. 157; Wold v. Thayer [C. C. A.] 148 F. 227, afg. 142 F. 776.

95. If an estopped assignor enters into business with others, who derive from him their knowledge of the patented process or machine, and, availing themselves of his knowledge and assistance, enter with him upon a manufacture infringing the patent which he has assigned, they are bound by his estoppel. Mellor v. Carroll, 141 F. 992. When individuals thus estopped establish a corporation to carry on a business which they would be restrained from carrying on as individuals, then the corporation, also, is deemed in privity of estoppel with them, even though it contain some stockholders more or less ignorant of the history of the patent and of the transactions leading up to the incorporation. Id. A corporation organized by a patentee, who had assigned his patents, and others having full knowledge of the facts, who are largely the owners of its stock, is estopped to deny the validity of the patents, or to limit their claims by the prior act, to the same extent as the patentee. Siemens-Halske Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 142 F. 157.

96. Siemens-Halske Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 142 F. 157.

97. Even if the assignor of a patent be estopped as against the assignee to deny its validity, it is open to him in a suit for infringement to show the prior state of the act as bearing on the construction and scope of the patent, and to show that the acts alleged are not violations. Aberthaw Const. Co. v. Ransome [Mass.] 78 N. E. 485.

98. Siemens-Halske Elec. Co. v. Duncan Elec. Mfg. Co. [C. C. A.] 142 F. 157.

99. See 6 C. L. 981.

Finding as to profits sustained. Cimiotti Unhairing Co. v. Bowsky [C. C. A.] 143 F. 508.

1, 2, 3. Force v. Sawyer-Boss Mfg. Co. [C. C. A.] 143 F. 894.

4. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 517.

5. See 6 C. L. 981.

6. Six years' delay held not to bar suit. Plecker v. Poorman, 147 F. 528. Eleven or twelve years' delay held to constitute laches. National Cash Register Co. v. Union Computing Mach. Co., 143 F. 342. Where bill to restrain was brought at so late a date that it could not be heard before the expiration of the patent, held, its sole practical purpose being to collect damages, it would be dismissed for laches. Beid-Archer Co. v. North American Chemical & Engineering Co., 147 F. 746.

7, 8. Bredin v. National Metal Weatherstrip Co., 147 F. 741.

nor is he precluded, by the fact that evidence has been taken in the second suit, from pleading therein the final decree when obtained in the first suit as an adjudication.[8] That the patented device was publicly used and exhibited in actual use for two years is sufficient to sustain a suit for infringement without a showing that it has been in constant use since that time.[9]

Jurisdiction.[10]—The Federal courts have exclusive jurisdiction of a suit for infringement of patent, whether brought against the original patentee or any other party.[11] In determining the jurisdiction of particular Federal courts, the place of infringement is important.[12] Where a suit involves the question of infringement of patents, it is one arising under the patent laws, although it also involves the question of ownership of the patents or other contract rights.[13] The jurisdiction of a court of equity cannot be invoked if one has an adequate remedy at law;[14] hence, a bill in equity cannot be maintained for the mere recovery of profits, damages, or royalties,[15] even though the bill prays for the cancellation of patents not otherwise involved.[16] An action at law cannot be maintained for the sole purpose of recovering the profits which an infringer of a patent has made,[17] the proper remedy being to sue in equity while the infringement is in progress for an injunction and an accounting.[18]

Parties.[19]—Only one having a title to, or interest in, the patent can maintain a suit for its infringement.[20] The owner of a patent who has granted an exclusive license thereunder for certain territory cannot, suing alone, recover profits made by an infringer which, but for the infringement, would have inured to the sole benefit of the licensee.[21] In a suit to restrain infringement, a party who is alleged to be encouraging the manufacture and sale by the other defendants of the infringing device and who is closely connected with the transactions complained of is a proper party to the bill.[22] A corporation and an individual may be joined as defendants in a suit for infringement where it is alleged that the individual defendant owns practically all the stock of the corporation and personally directs its affairs and that they conspired together to commit the acts of infringement.[23] Where a bill for infringement alleges that a licensee has an interest in the patented inventions which is capable of being impaired by the asserted infringement of defendant, he may properly be joined as a complainant.[24]

Questions of law and fact.[25]—In an action at law for damages for infringement, the question of invention is ordinarily for the jury, subject to the direction of the

9. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880.

10. See 6 C. L. 981.

11. Aberthaw Const. Co. v. Ransome [Mass.] 78 N. E. 485.

12. Infringement within the southern district of New York held not made out by proof that an infringing article sold in another state bore a label with the name of defendant and the words "New York" thereon, in the absence of evidence that defendant made, used, or sold the article, or attached the label, or was engaged in the manufacture of similar articles in New York. Rumford Chemical Works v. Egg Baking Powder Co., 145 F. 953.

13. Within jurisdiction of circuit court. Rev. St. § 629, cl. 9, construed. Harrington v. Atlantic & Pacific Tel. Co., 143 F. 329.

14. Allegations in a bill for infringement that complainant derives his benefit from his patent, through limited granting of licenses, does not deprive equity of jurisdiction by showing that he has an adequate remedy at law where it does not appear that there is a fixed license fee for all users. Peters v. Chicago Biscuit Co., 142 F. 779.

15, 16. Allen v. Consolidated Fruit Jar Co., 145 F. 948.

17, 18. Brown v. Lanyon [C. C. A.] 148 F. 838.

19. See 6 C. L. 981.

20. Arnold Monophase Elec. Co. v. Wagner Elec. Mfg. Co., 148 F. 234.

21. Bredin v. Solmson, 145 F. 944.

22. Simplex Elec. Heating Co. v. Leonard, 147 F. 744.

23. Whiting Safety Catch Co. v. Western Wheeled Scraper Co., 148 F. 396. Owner of company and company itself held proper parties to suit to restrain infringing acts of company. Simplex Elec. Heating Co. v. Leonard, 147 F. 744.

24. Daimler Mfg. Co. v. Conklin, 145 F. 955.

25. See 6 C. L. 981.

court concerning the construction to be put on the letters patent.[26] If, however, the patent in suit appears to the court to be plainly invalid for want of invention, a verdict for the defendants should be ordered.[27] The presumption of validity which arises from the patent itself does not necessarily require the submission of the question of invention to the jury.[28] Where the question of infringement depends enirely upon the construction of a patent, either upon its face, or in connection with facts not to be reasonably disputed, the question is one of law for the court.[29]

Injunctions.[30]—A bill for infringement which charges past infringement only and contains no allegation of present or threatened infringement does not state a case within the jurisdiction of equity.[31] A single infringement by making and selling a single infringing machine will not justify the interposition of a court of equity for the purpose of restraining further infringement by the making and sale of other infringing machines, if it clearly appears that there is no reason to apprehend any further infringement.[32] The assertion of a right to make the devices complained of as an infringement in the absence of a very express denial of a purpose to exercise the right claimed, justifies the presumption that further infringement it to be apprehended, if the device shall prove to be an infringement.[33] It seems that an injunction may be obtained although the owner of the patent has never constructed a machine thereunder for practical use, and apparently does not intend to do so, but merely to hold the patent to prevent the use of the invention by competitors in business.[34] Where the complainant has made a prima facie case for injunction against infringement, the right is not to be denied on the ground that the injunction would be inconvenient to defendant or seriously interfere with the success of his business.[35] Equity will enjoin contributory infringement though no damages have resulted.[36] Infringement being doubtful, a preliminary injunction will be refused.[37] In determining the granting of a preliminary injunction, public acquiescence or a prior adjudication are of great weight[38] as

26, 27, 28. Connors v. Ormsby [C. C. A.] 148 F. 13.

29. Western Elec. Co. v. Robertson [C. C. A.] 142 F. 471.

30. See 6 C. L. 982.

31. Especially when taken in connection with a plea denying any infringement since more than a year prior to the filing of the bill, and with the fact that the patent expired before the hearing. Weston Elec. Instrument Co. v. Vallee Bros. Elec. Co., 145 F. 534. Where it was shown that defendant had only used one of plaintiff's machines, that plaintiff had consented thereto and a royalty agreed upon, and there was no evidence of defendant's insolvency, or of any profits to be accounted for, or tending to show any threat or intention to use the patented article without the patentee's consent, held bill for an injunction would be dismissed. Plotts v. Central Oil Co. [C. C. A.] 143 F. 901.

32. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73.

33. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73. Assertion of right, in answer, coupled with general averment that defendant does not intend to employ the patented device or to interfere with the rights of complainant, is insufficient. Id.

34. Eastern Paper Bag Co. v. Continental Paper Bag Co., 142 F. 479.

35. Thomson-Houston Elec. Co. v. Jeffrey Mfg. Co., 144 F. 130.

36. Dick v. Henry, 149 F. 424.

37. Westinghouse Elec. & Mfg. Co. v. Cutter Elec. & Mfg. Co., 149 F. 437. Denial of infringement having been sustained by a circuit court of appeals of another circuit, preliminary injunction will be refused. Calculagraph Co. v. Automatic Time Stamp Co., 149 F. 436. Infringement of No. 520,429, electric battery, held too doubtful to warrant preliminary injunction. American Elec. Novelty & Mfg. Co. v. Stanley [C. C. A.] 142 F. 754. Preliminary injunction against alleged infringement of No. 647,298, apparatus for racking beer, denied. Automatic Racking Mach. Co. v. White Racker Co., 145 F. 643. Preliminary injunction granted restraining infringement of reissue No. 11,872 (original No. 495,443), traveling contact for electric railway. Thomson-Houston Elec. Co. v. International Trolley Controller Co., 141 F. 128. Preliminary injunction against infringement of No. 424,695, conductor switch for electric railways, denied. Thomson-Houston Elec. Co. v. Illinois Tel. Const. Co., 143 F. 534.

38. Where a patent has been sustained on a motion for a preliminary injunction, and the order affirmed on appeal, it comes before another court on a similar application as a sustained patent, and the ruling may properly be followed, in the absence of any contrary decision, unless there is some new question raised, and so far sustained as to make a prima facie defense against valid-

is also the lack thereof,[39] though the fact that a patent is unadjudicated will not defeat the right to a preliminary injunction against its infringement, unless it also appears from common knowledge, or from the prior art shown, that there is reasonable ground for doubt as to its validity.[40] In the absence of such a showing the presumption arising from the issuance of the patent is sufficient to warrant injunctive relief against the infringer.[41] A preliminary injunction will not issue where the alleged infringement has ceased and the court is assured it will not be resumed.[42] An injunction against infringement of a patent should not be made so broad as to prevent the infringer from making and selling a device which it had added to that of the patent and designed to be used with it.[43] One violating an injunction against infringing may be fined for contempt.[44] That the violation was unintentional and due to carelessness is no defense to contempt proceedings therefor, but may be considered on the question of punishment;[45] and, such a proceeding being remedial, the penalty in such case may properly be measured by the damage resulting to complainants from the violation and the costs and legal expenses incurred in the proceeding.[46] On a motion for an attachment for contempt on account of the violation of an injunction issued to restrain the infringement of a patent, it must appear clearly and indisputably that the infringement continues.[47]

Pleading.[48]—A bill for infringement must allege the facts which are essential to the validity of the patent and negative the existence of those which would defeat it.[49] It must charge the infringement of a material part of the invention,[50] and the patent containing a number of claims must specifically enumerate the claims to be relied on, and where it does not the objection may be properly raised by demurrer on the ground that it is inequitable and unconscionable.[51] While a bill for infringe-

ity. Thomson-Houston Elec. Co. v. Jeffrey Mfg. Co., 144 F. 130. Where a patent has been sustained by a circuit court of appeals, the only question open on an application for a preliminary injunction in a subsequent suit in the same circuit is that of infringement, unless new evidence of invalidity of a conclusive character is produced. Cohen v. Stephenson & Co. [C. C. A.] 142 F. 467. Validity of patent having been decided, preliminary injunction will generally issue. Elite Pottery Co. v. Dececo [C. C. A.] 150 E. 581. Generally a preliminary injunction will issue in favor of one who has been sustained in a contested interference (Laas v. Scott, 145 F. 195), especially where the decision in the patent office has been affirmed on appeal by the supreme court of the District of Columbia (Id.).

39. Preliminary injunction denied to restrain alleged infringement of a paper patent issued more than sixteen years before the suit, the validity of the patent not having been established by adjudication or public acquiescence. Standard Roller Bearing Co. v. Hess-Bright Mfg. Co., 145 F. 356. The validity of an unadjudicated patent being in doubt, a preliminary injunction should be refused, defendant being financially responsible. Bristol Oil & Gas Co. v. Beacon, 143 F. 550.

40, 41. Palmer v. Wilcox Mfg. Co., 141 F. 378.

42. General Elec. Co. v. Pittsburg-Buffalo Co. [C. C. A.] 144 F. 439.

43. Thomson-Houston Elec. Co. v. Holland, 143 F. 903.

44. Frank v. Bernard, 146 F. 137.

45, 46. Robinson v. Lederer Co., 146 F. 993.

47. General Elec. Co. v. McLaren, 140 F. 876. Affidavits considered and held insufficient to warrant attachment for contempt for violating injunction in the case of patent No. 726,293, process in exhausting lamps. Id.

48. See 6 C. L. 983.

49. Moss v. McConway & Torley Co., 144 F. 128. A bill held demurrable where it failed to allege that the invention was not patented or described in any printed publication in this or any foreign country more than two years prior to the application for the patent, or whether or not it was patented in any foreign country, and if so, that the application was made within seven months thereafter for the United States patent. Id. A bill for infringement of a patent must specifically allege all the facts necessary to show the validity of the patent under the statutes, and a failure to allege that it was issued in the name of the United States, or under the seal of the patent office, or that it was signed by the commissioner of patents, renders it demurrable. Eastwood v. Cutler-Hammer Mfg. Co., 148 F. 718. A bill to recover damages and profits which merely alleges that the patent alleged to be infringed was issued in due form of law an application "to the proper department of the government," and while alleging title in the complainant by assignment does not show the date of such assignment, nor that it carried the right to past damages, is insufficient. Vant Woud Rubber Co. v. Sternau, 145 F. 197.

50. Moss v. McConway & Torley Co., 144 F. 128.

51. Eastwood v. Cutler-Hammer Mfg. Co., 148 F. 718.

ment of two separate patents must show that the inventions are capable of conjoint use, it is sufficiently shown where one patent shows on its face that it is for an improvement of the invention of the other.[52] The bill in a suit to enjoin infringement should set forth the judgments, public acquiesence, or equivalent rights, upon which the presumption of the complainant's right is based.[53] The bill must not be multifarious.[54] The question of the validity of a patent on its face may be raised by demurrer in an action at law for its infringement.[55] By profert of a patent in a suit for its infringement, it is carried into the bill, and, if it is plainly devoid of invention on its face, the bill is demurrable.[56] A demurrer for want of invention will be overruled except in a clear case.[57] The issues depending to some extent upon the construction and scope of the claims in view of the prior act, the question will not be determined on demurrer.[58] If a plea is to be allowed in a suit for the infringement of a patent in any case, and such practice is of doubtful propriety, it should reduce the issue to a single point, so that, conceding the fact to be as settled by the bill of complaint and plea, a full and final determination may be had.[59] The defense of noninfringement cannot bemade by plea, except under extraordinary or very special circumstances,[60] and while it may be within the discretion of the court to permit the defense of prior invention to be raised by plea, to justify such practice it should appear with reasonable certainty that the determination of the plea will end the case.[61] In an infringement suit use of the statutory provision denying the right to a patent in case of foreign patenting more than seven months prior to the application is a matter of defense to be pleaded by answer.[62] Laches is a defense which need not be pleaded, but may be raised upon the argument, or, when found to exist, the court itself may be passive and deny relief.[63] The general rules as to judgments on the pleadings apply.[64]

Evidence.[65]—A patent is prima facie evidence of the patentability, usefulness, and novelty, of the device covered by it.[66] On the question of invention the court

52. Moss v. McConway & Torley Co., 144 F. 128.

53. Peters v. Chicago Biscuit Co., 142 F. 779. Allegations setting out proceedings in other courts with reference to the patent, the granting of foreign patents thereon, and acquiescence therein in this and other counties, are proper, as going to the question of acquiescence, and are material, as tending to establish a presumptive right or an application for a preliminary injunction. Id.

54. Allegations in a bill for infringement of a number of patents that the inventions, each and all of them, are applied to a machine, and that defendant is using a machine in which is embodied each and all of the inventions, improvements, or discoveries of said letters patent," and is infringing all of said patents, held not multifarious. Daimler Mfg. Co. v. Conklin, 145 F. 955.

55. Thomas v. St. Louis, etc., R. Co. [C. C. A.] 149 F. 753.

56. Hogan v. Westmoreland Specialty Co., 145 F. 199.

57. Peters v. Chicago Biscuit Co., 142 F. 779. No. 593,954, claim 3, chest and neck protector, not so clearly void as to be declared void on demurrer. Way v. Hygienic Fleeced Underwear Co., 142 F. 552.

58. Star Ball Retainer Co. v. Klahn, 145 F. 834.

59. Schnauffer v. Aste, 148 F. 867.

60. Thresher v. General Elec. Co., 143 F. 337. In a suit in equity for infringement, a plea which sets up the single defense of noninfringement is not a good plea, such defense being one which should be taken by answer, and the plea will either be stricken out or ordered to stand as an answer, as in the judgment of the court will best subserve the ends of justice. Glucose Sugar Refining Co. v. Douglass & Co., 145 F. 949.

61. Thresher v. General Elec. Co., 143 F. 337. A plea alleging that, prior to the alleged invention by complainant of the device covered by the patent, another invented and disclosed the device made and used by defendant which is claimed to infringe and with reasonable diligence made an application for a patent therefor which is still pending, held bad. Id.

62. Rev. St. § 4887. Bill not alleging that invention was not within the statute held not demurrable. American Cereal Co. v. Oriental Food Co., 145 F. 649.

63. National Cash Register Co. v. Union Computing Mach. Co., 143 F. 342.

64. Where declaration alleged granting of patent and defendant filed a plea alleging that the acts complained of were merely continuances of acts involved in a former adjudication and adjudged not to constitute a cause of action, which facts were denied in the replication, held improper to award defendant judgment on the pleadings. Robinson v. American Car & Foundry Co. [C. C. A.] 150 F. 331.

65. See 6 C. L. 984.

66. Robinson v. American Car & Foundry Co. [C. C. A.] 150 F. 331; Couch Bros. v.

will take judicial cognizance of facts of general knowledge or devices in common use which may be similar to or identical in principle with that of the patent.[67] Certified copies of the patent office records of assignments are not prima facie proof of the execution or genuineness of such assignments,[68] nor are they made evidence by any United States statute, and, if competent at all, must conform to the rules relating to primary and secondary evidence.[69] Upon an issue of prior invention, witnesses testifying as to the use of such invention by others may properly refresh their memories as to the time of such use by reference to contemporaneous newspaper articles describing the invention and which they read at the time.[70] The burden of proving lack of invention is on party setting it up,[71] and every reasonable doubt should be resolved against him.[72] The burden is on defendant to prove a defense of discontinuance of infringement.[73] Burden of showing infringement is on complainant,[74] and in the case involving contributory infringement, he has the burden of showing knowledge on part of defendant.[75] In a suit against a nonresident, the burden of proof is upon the complainant to show an act of infringement within the district.[76] In a suit against a user, the defense being a license, the burden is on plaintiff to show that the article used was not covered by the patent.[77]

Prior decisions sustaining a patent are to be given effects under the rule of comity only as to matters which were before the court. With respect to defenses or evidence not before the court, the action of the court in a subsequent case is purely original.[78] The decision of a circuit court of appeals sustaining the validity of a patent, especially where such court has had the same or related patents before it in a number of cases, should be followed by a circuit court in another circuit where there are no conflicting decisions.[79]

A variance being immaterial it will be disregarded.[80]

Stay.—The pendency of a suit for infringement of a patent is not ground for staying a second suit in another circuit against a different defendant for infringement by a different machine.[81]

Accounting.[82]—In directing an accounting no more is decided, aside from the validity of the patent, than that infringement has been made out. The extent of it is in an after consideration;[83] consequently, except as concluded by the decree, the question of infringement is always open for consideration before the master.[84] Where on a reference for an accounting the master by his rulings limits the scope

Allen Mfg. Co., 140 F. 856. Due consideration must always be given by the court or jury, as the case may be, to the presumption of validity arising from the grant of a patent and the real question in all cases is whether or not the evidence in the case is sufficient to overcome such presumption. Los Angeles Art Organ Co. v. Aeolian Co. [C. C. A.] 143 F. 880. Evidence held insufficient to overcome presumption that patentee was inventor. No. 397,860, machine for molding pipe coverings, considered. Keasbey Mattison Co. v. American Magnesia & Covering Co. [C. C. A.] 143 F. 490.

See 6 C. L. 957, N. 29.

67. Baker v. Duncombe Mfg. Co. [C. C. A.] 146 F. 744.

68, 69. American Graphophone Co. v. Leeds & Catlin Co., 140 F. 981.

70. Bragg Mfg. Co. v. New York, 141 F. 118.

71. Couch Bros. v. Allen Mfg. Co. 140 F. 856; Charmbury v. Walden, 141 F. 373.

72. Charmbury v. Walden, 141 F. 373.

73. Silver & Co. v. Eustis Mfg. Co., 142 F. 525.

74. Societe Fabrigues de Produits Chimigues de thann et de Mulhouse v. Lueders [C. C. A.] 142 F. 753.

75. Cortelyou v. Johnson & Co. [C. C. A.] 145 F. 933. Evidence held insufficient to sustain burden. Id.

76. Gray v. Grinberg, 147 F. 782. Burden held not sustained. Id.

77. O'Rourke Engineering Const. Co. v. McMullen, 150 F. 338.

78. Bragg Mfg. Co. v. New York, 141 F. 118.

79. Thomson-Houstom Elec. Co. v. Holland, 143 F. 903.

80. A decree for infringment will not be reversed on appeal, because the proof shows that the infringing machine was sold by a concern doing business under a different name and style from that of the partnership of defendants as alleged in the bill, where it also fairly shows the defendants were the proprietors of such concern and the fact that they made the sale was not contested in the trial court. United Shirt & Collar Co. v. Beattie [C. C. A.] 149 F. 736.

81. Electric Vehicle Co. v. Barney, 143 F. 551.

82. See 6 C. L. 984.

83, 84, 85. Walker Patent Pivoted Bin Co. v. Miller, 146 F. 249.

of the inquiry, the matter may properly be presented to the court for decision by a motion for instructions to the master.[85] On a reference for an accounting by defendant under a decree finding infringement of a patent, the defendant is the only "party accounting" within the meaning of equity rule 79.[86]

Saving questions for review.—Failure to formally mark exhibits is frequently deemed immaterial.[87]

Costs.[88]—The statutory provision that a complainant recovering judgment for infringement of a part of a patent shall not recover costs, where the claims of the patent were too broad and no disclaimer was entered before suit, does not apply to the costs in an appellate court, where the decree below dismissing the suit is found erroneous, and the complainant was compelled to appeal to obtain the relief to which he was entitled.[89] There is a conflict as to whether a disclaimer will be required where part of the claims are held valid and part invalid.[90]

Judgments or decrees.[91]—One taking an alleged infringing patent, by assignment or transfer, pending infringement litigation is bound by the judgment of the court,[92] and may be brought in by supplemental bill and subjected to the injunction granted thereby, and to liability for damages under the decree as to acts of infringement committed by him subsequent to his purchase.[93] The defeated party to an interference proceeding in the patent office, which involved only the issue of priority of invention, is not estopped by the decision to contest the validity of the patent granted to the successful party, when sued for its infringement, on the ground of lack of patentable novelty or invention.[94] A decree in a prior suit for the infringement of a patent is none the less conclusive between the parties on the issues of validity and infringement because it was merely interlocutory, when the second suit was commenced, where it is set up therein as an adjudication by a supplemental bill, after having ripened into a final decree.[95] The settlement by a licensee under a patent of a suit brought against it for infringement of another patent does not estop its licensor, who was not a party and did not participate in the settlement from subsequently contesting the validity of the patent sued on.[96]

PAUPERS.[97]

Definition and Status (1324).
Settlement and Removal of Paupers (1325).
Liability of Municipalities for Support and Aid (1325).
Liability of Relatives (1327).
Repayment by Indigent or Relatives (1327).
Administration of Poor Laws; Officers and Districts (1327).

Definition and status.[98]—One without means and unable on account of some bodily or mental infirmity, or other unavoidable cause, to earn a livelihood, and

86. Complainant cannot be required to bring in an account. Goss Printing Press Co. v. Scott, 148 F. 393.

87. Patents set up in the answer in a suit for infringement as a party of the prior art, printed and indexed in the record on appeal, and referred to in the briefs, and in relation to which witnesses were examined, all without objection, will not be excluded from consideration by the appellate court because they were not formally marked as exhibits by the examiner. Smyth Mfg. Co. v. Sheridan [C. C. A.] 149 F. 208, rvg. 144 F. 423.

88. See 6 C. L. 982.

89. Johnson v. Foos Mfg. Co. [C. C. A.] 141 F. 73.

90. Statute applies to a suit in which certain claims of a patent are held valid and infringed, while other independent claims, infringement of which is alleged, are held invalid, and in such case, the complainant is not entitled to recover costs. Rev. St. §§ 973, 4922, construed. General Elec. Co. v. Crouse-Hinds Elec. Co., 147 F. 718. Where in a suit for infringement one claim involved is held valid and infringed and another void, a disclaimer will not be required as a condition precedent to the recovery of profits or damages for infringement of the valid claim. Blecker v. Poorman, 147 F. 528.

91. See 6 C. L. 984.

92, 93. Western Tel. Mfg. Co. v. American Elec. Co., 141 F. 998.

94. Automatic Racking Mach. Co. v. White Racker Co., 145 F. 643.

95. Bredin v. National Metal Weatherstrip Co., 147 F. 741.

96. Automatic Racking Mach. Co. v. White Racker Co., 145 F. 643.

97. See 6 C. L. 985.

98. See 4 C. L. 954.

having no kindred in the state liable for his support, or whose kindred within the state are of insufficient ability or fail or refuse to maintain him, is a person chargeable as a pauper under the Nebraska statute.[99]

Settlement and removal of paupers.[1]—In Pennsylvania prior to the act of 1901, the settlement of an illegitimate did not follow the mother when she changed her settlement.[2] Legal settlement in a town is extinguished by a year's residence elsewhere unless during such time the person to some degree supported as a pauper by the town.[3] A pauper sent by the poor officers beyond the limits of a municipality in which he is domiciled at the time of becoming a public charge, under a contract for subsistence, does not lose his domicile as affecting the liability of the municipality for his maintenance.[4] The facts necessary to support an order of removal under the pauper statutes must be proved according to the ordinary course of the common law,[5] as must the issue of one's pauper settlement.[6] Place of settlement when based on conflicting evidence as to residence is a question of fact.[7] When the purpose of the parties is merely to bring a question of law to final and conclusive adjudication without unnecessary delay and expense, the consent by an attorney representing a poor district for the removal of a pauper to his district does not preclude an appeal from the order by the district he represents.[8]

Liability of municipalities for support and aid[9] is wholly statutory.[10] A statute for the relief of blind paupers is not invalid as an unjust discrimination among classes,[11] nor is its validity affected because it makes some discrimination among the

99. Otoe County v. Lancaster County [Neb.] 111 N. W. 132.

1. See 6 C. L. 985.

2. Schuylkill County Directors v. Jackson Tp. Overseers, 29 Pa. Super. Ct. 567.

3. One, though living in the family and eating at the table of a pauper aided by a town, cannot be said to receive aid as a pauper merely because his landlady may have used moneys furnished her by the town to purchase the food supplied to the household (Sheboygan County v. Sheboygan Falls [Wis.] 109 N. W. 1030), nor can it make any difference that such board be paid for in services instead of money, especially if the services are such as to enable some other member of the family to devote his time or labor to earning money for its support, thus rendering sufficient a less contribution from the public (Id.).

4. Randolph v. Greenwood, 122 Ill. App. 23.

5. Bernards Tp. v. Bedminster Tp. [N. J. Law] 64 A. 960. Where a case of pedigree arises in the proof of facts in support of such an order, resort may be had to proof of declaration of persons then deceased who were at the time related by blood or marriage to the person whose pedigree is in question (Id.); but the affidavit of a stranger, based on information and belief, is inadmissible for such a purpose (Id.).

6. On the issues of one's pauper settlement his declarations, connected with a transaction in which he arranged for board, evincing a purpose to change his residence, are admissible. Town of Jericho v. Huntington [Vt.] 65 A. 87. In an action to recover for support of a pauper to which he was not a party and on the trial of which he was not a witness, his declaration that he left a certain employment which the defendant claimed he had taken permanently, thereby changing his settlement, because of a misunderstanding with the employer, was not admissible as part of the res gestae (Town of Jericho v. Huntington [Vt.] 65 A. 87), nor was it receivable under the rule relating to the admissions of parties (Id.), nor as impeaching evidence, assuming the alleged pauper to have been a witness, in the absence of proper foundation having been laid therefor (Id.); and an offer to show that a day or two before the alleged pauper took the employment in question witness called his attention to the fact that the employer in question "wanted a man to go onto his place to stay for a year to cut lumber or wood at the halves and draw it away and live with the old man and take care of him," was properly refused in the absence of evidence tending to show what the arrangement between them actually was (Id.). So, also, an offer to show by a witness what he saw the alleged pauper doing there, the plaintiff not disputing the fact that he was there working for about a week was properly refused (Id.).

7. The time of removal of a pauper from one house to another. Inhabitants of Case v. Linington [Me.] 65 A. 523.

8. Schuylkill County Directors v. Jackson Tp. Overseers, 29 Pa. Super. Ct. 567.

9. See 6 C. L. 985.

10. There is no common-law liability of counties to care for the poor. Martin v. Fond du Lac County, 127 Wis. 586, 106 N. W. 1095. The liability of one county to another for relief furnished to a pauper is purely statutory. Otoe County v. Lancaster County [Neb.] 111 N. W. 132.

11. Davies v. State, 6 Ohio C. C. (N. S.) 417. It is within the legislative power of

blind,[12] nor is it a use of public funds for a private purpose within the purview of any provisions of the Federal constitution.[13] The county court in Tennessee has no power to levy a special tax for the support of the poor.[14] The notice required by the Pennsylvania statute to render a county liable for aid rendered by a poor district to a pauper having no settlement in the state must be given before the expense is incurred,[15] and in that state the division of a poor district does not render the new district liable to contribution to the support of paupers having their settlement in the old district at the time of its division and continuing to have their settlement there during the time for which the contribution is claimed.[16] The rendition of quarterly bills for support of a pauper is a sufficient notice to a municipality of a claim against it therefor in the absence of objection by it to the furnishing of such support.[17] In Illinois it is held that the determination by the overseer of the poor that certain persons are entitled to relief is an official act which is binding on the county in favor of those who in good faith furnish medical attendance or supplies in reliance on his order,[18] and it is not necessary that the supervisor wait for the relatives of an indigent person to furnish the aid required,[19] nor is it material as to which township in a county the person requiring aid is in so long as the supervisor where he resides directs the furnishing of aid.[20] It is essential to show, in establishing the liability of a county for relief furnished to a pauper that the relief was furnished to a person chargeable as a pauper.[21] A contract of a municipal poor officer for furnishing subsistence to a pauper chargeable to it, beyond the limits of the municipality, is enforceable against the municipality,[22] and on refusal to recognize its liability to continue the aid, on the grounds of nonresidence of the pauper, its liability may be enforced on a quantum meruit for aid furnished the pauper by others.[23] The reasonableness of a rule of officers of the poor limiting the amount of fee for medical attendance on persons requiring county aid within their jurisdiction is a question for the court,[24] and such rule, limiting the fee for attendance when made within the limits of any incorporated city or village to $1 per visit, and medicine, is void for unreasonableness.[25] One claiming the right to recover from the county on a claim for medical attendance on sick persons without money or property, under the Illinois statute must show that the overseer had notice of the necessity for the attendance and that he refused or neglected to act,[26] or recognition of liability by the overseer or the board of supervisors, with full knowledge of the facts.[27] Authority from the supervisors to bury a pauper is essential to a claim against the county for expenses of such burial, under the Mississippi stat-

the state to make provision for the aid of any legitimate class, recognized as such either by the constitution of the state, or by a sense of justice and the common reason of the people of the state. Id.

12. As that it witholds benefits from the vicious (Davies v. State, 6 Ohio C. C. (N. S.) 417), or those found to be unworthy (Id), or who have not had the required residence in the state or county (Id.), or who are not adults (Id.).

13. Davies v. State, 6 Ohio C. C. (N. S.) 417.

14. Southern R. Co v Hamblen County [Tenn.] 97 S. W. 455.

15. Notice April 18, 1905, as to expense incurred March 17, 1905, held too late under act of March 6, 1903 (P. L. 18). Cowanshannock Poor District v. Armstrong County, 31 Pa. Super. Ct. 386.

16. Wayne Tp. Poor Overseers v. Ellwood City Borough Poor Overseers, 29 Pa. Super. Ct. 181.

17. Failure to object held a waiver of formal notice, assuming notice to be required. Bradford v. Cambridge [Mass.] 80 N. E. 610.

18. County held liable for medical attendance and supplies. Rock Island County v. Rankin, 118 Ill. App. 499; Rock Island County v. Arp, 118 Ill. App. 521.

19, 20. Rock Island County v. Arp, 118 Ill. App. 521.

21. Facts held insufficient. Otoe County v. Lancaster County [Neb.] 111 N. W. 132.

22, 23. Randolph v. Greenwood, 122 Ill. App. 23.

24, 25. Dieffenbacher v. Mason County, 117 Ill. App. 103.

26. Whether overseer had notice held a question for the jury on conflicting evidence (Dieffenbacher v. Mason County, 117 Ill. App. 103), which was concluded against him by an adverse finding (Id.).

27. Rev. St. 1903, p. 1369, § 24. Dieffenbacher v. Mason County, 117 Ill. App. 103.

ute.[28] In Massachusetts the city in which an insane criminal pauper has his settlement at the time of commitment to the state asylum for insane criminals at Bridgewater is liable for his support other than during the term of his sentence.[29] In Maine expenses incurred by a town to protect its inhabitants or the public from danger of being hurt by paupers are not recoverable under the pauper statute,[30] nor is the Maine statute authorizing recovery of expense of preventing the spread of contagious diseases by paupers applicable to a case of insanity.[31] In Wisconsin the remedy, if any, for injury suffered from a nonresident becoming afflicted with smallpox in one's house, and required to be kept therein, is a claim against the particular municipality wherein the necessity arises.[32]

Liability of relatives.[33]—Under a statute penalizing the neglect or refusal of a child to support his parent, it is the act of the child in failing to furnish support, under the conditions named in the statute, that constitutes the offense;[34] hence, the other elements being present, the offense is committed in the county in which the child charged with the duty resides at the time of his neglect or refusal to furnish the same.[35]

Repayment by indigent or relatives.[36]

Administration of poor laws; officers and districts.[37]—The directors of the poor and of the house of employment of the county of Lancaster, Pennsylvania, are not county officers.[38]

PAWNBROKERS AND SECONDHAND DEALERS.[39]

A pawnbroker is one who carries the business of receiving goods in pledge for loans at interest.[40] Regulation of the business is within the police power [41] for the protection of the public as well as for the protection of the needy and improvident,[42] and a violation of provisions of this character is fatal to the validity of the contract between a pawnbroker and his customer,[43] and invalidates the pawnbroker's lien.[44]

28. County not responsible for expense of burial of unknown nonresident killed in the county and buried without authority of the board of supervisors. Marshall County v. Rivers [Miss.] 40 So. 1007.

29. Bradford v. Cambridge [Mass.] 80 N. E. 610. The state asylum for insane criminals at Bridgewater, is a part of the system adopted by the commonwealth for taking care of its insane rather than part of its system for taking care of its criminals (Id.); hence, the general provision in regard to the payment of the charges for the support of insane persons having known settlements in the commonwealth apply to those supported there (Id.). The provision that the expense of supporting a state prison convict who is committed to a state insane hospital shall be paid by the commonwealth refers to support furnished during the term of his sentence (Id.), and the provision that the expense of supporting a prisoner who is removed from a jail or house of correction to the state farm shall be paid by the county from which he is removed has no application to transfers to the state asylum for the criminal insane at Bridgewater (Id.); hence, neither is a defense to a claim by the commonwealth against a city for support at such asylum of a criminal pauper, having his legal settlement in the city at the time of commitment to that asylum when the claim does not include any part of the term of the pauper's sentence (Id.).

30. Charges for employment of watcher over insane son of pauper held not recoverable except as the extra care for the patient. Inhabitants of Casco v. Linington [Me.] 65 A. 523.

31. Inhabitants of Casco v. Linington [Me.] 65 A. 523.

32. Under Rev. St. 1898, § 1416. Martin v. Fond du Lac County, 127 Wis. 586, 106 N. W. 1095.

33. See 6 C. L. 986.

34, 35. State v. Dangler, 74 Ohio, St. 49, 77 N. E. 271.

36. See 6 C. L. 986.

37. See 4 C. L. 955.

38. Hence, are not affected by a statute touching the salaries of county officer. Nissley v. Lancaster County [Pa.] 64 A. 794.

39. See 4 C. L. 955.

40. Levison v. Boas [Cal.] 88 P. 825. Neither the fact that at the same time and place he conducts another business or branches of his business which are not of that character (Id.), nor that one limits his business, which is otherwise that of pawnbroker, to a particular class of goods (Id.), nor that he requires the execution of a promissory note or chattel mortgage in connection with the transaction, when it is simply a pledge, and reliance is placed thereon irrespective of the financial ability of the pledgor (Id.), militates against the conclusion that he is in fact a pawnbroker (Id.).

41. In re Home Discount Co., 147 F. 538; Levison v. Boas [Cal.] 88 P. 825.

42, 43. Levison v. Boas [Cal.] 88 P. 825.

44. Receiver of pawnor held entitled to pawn as against the claim of the pawn-

In some states the contract is expressly declared void by statute for violation of provisions regulating the business.[45] A regulatory statute is not void for inequality because made not to apply to the business of banking and loans when the amount exceeds $75.[46] The right granted to a city to define by ordinance the powers and privileges and to exercise such general superintendence of pawnbrokers as will insure fair dealing between pawnbrokers and their customers does not authorize the city to change the state's usury laws in favor of pawnbrokers.[47] Ordinances requiring a detailed report of pawnbroker's business and prohibiting redemption of pledges within twenty-four hours after the report is delivered to the police department are not an unreasonable exercise of the powers of a city authorized to license, tax, regulate, suppress, and prohibit, pawnbrokers.[48] The New York statute penalizing the reception or purchase by junk dealers of goods, wares, or merchandise, from children under sixteen years of age, applies irrespective of whether the property is stolen,[49] nor does this construction render it unconstitutional;[50] and since there is no presumption that a child selling goods to a junk dealer does so as the agent of the lawful owner,[51] the state on a prosecution under the statute need not prove the negative.[52] One who, in good faith, at the request of a husband with apparent authority, redeems from pawn the property of his wife, without paying more than the wife was legally bound to pay, is entitled to be subrogated to the lien of the pawnbroker from whom redemption is had.[53] The unilaterality of the contract and indefiniteness thereof as to the time of redemption are not obstacles to a redemption when tender is made within a reasonable time.[54] A written receipt given to a pawnor is sufficient to take the contract between himself and the pawnbroker, not to be performed within a year, out of the statute of frauds.[55] Redemption of a pawn cannot be enforced in the courts in the absence of a tender of the amount due thereon having been made and kept good.[56] Deliberate violation of a regulatory municipal ordinance by a pawnbroker affords the mayor ground for the exercise of his discretionary power to revoke a pawnbroker's license and refusal to relicense him.[57] When a mayor has exercised a discretion vested in him to revoke a pawnbroker's license for conviction of violation of city ordinances, an appeal from the judgment of conviction does not suspend the judgment of conviction so as to entitle the pawnbroker to mandamus to compel the issuance to him of a new license,[58] especially in view of an ordinance expressly obviating such effect of an appeal,[59] nor does the good character of the applicant, under such circumstances, aid him.[60] Under an ordinance making it a penal offense for a pawnbroker to fail to report a transaction to the police department of the city, there can be no conviction of a mere clerk in a pawnbroker's office,[61] and this is true even though accused was present and participated in the transaction whereby the article not reported as required was taken possession of by the pawnbroker,[62] and though it was customary for accused as clerk to make such reports for his employer.[63]

broker of a lien for money advanced thereon. Levison v. Boas [Cal.] 88 P. 825.

45, 46. In re Home Discount Co., 147 F. 538.

47. Lockwood v. Muhlberg, 124 Ga. 660, 53 S. E. 92.

48. Harrison v. People, 121 Ill. App. 189.

49, 50, 51, 52. People v. McGuire, 113 App. Div. 631, 99 N. Y. S. 91.

53. Lesser v. Steindler, 110 App. Div. 262, 97 N. Y. S. 255. The principle of agency is applicable to arrangements between husband and wife for the redemption of her property from pawn. Id. Husband held to have apparent authority to induce another to redeem his wife's property and hold it to secure the advancement. Id.

54, 55, 56. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 9.7.

57, 58, 59, 60. Harrison v. People, 121 Ill. App. 189.

61, 62 63. Schane v. Atlanta [Ga. 56 S. E. 91.

PAYMENT AND TENDER.

§ 1. Mode and Sufficiency of Payment or Tender (1329). To and By Whom (1329). Place of Payment or Tender (1330). Sufficiency of Tender (1330). Medium; Checks, Notes, and Drafts (1330).
§ 2. Application of Payment (1331).
§ 3. Effect of Payment or Tender (1333).
§ 4. Payment or Tender as an Issue (1333).
A. Pleading (1333).
B. Evidence (1334).
C. Limitations (1336).
D. Questions of Law and Fact (1336).

Scope of article.—This does not include discharge by novation,[64] release,[65] or accord and satisfaction,[66] nor does it include payment into court,[67] nor matters peculiar to negotiable paper,[68] nor the recovery back of involuntary and mistaken payments.[69] Tender of payment only is included, tender of other performance being elsewhere treated.[70]

§ 1. *Mode and sufficiency of payment or tender.*[71] *To and by whom.*[72]—Payment [73] or tender [74] to an unauthorized person is ineffectual. Payment of an obligation to the drawer under and through the indorsement of the payee is equivalent to a payment to the payee himself.[75] Payment of taxes to the duly elected and qualified collector before they are due and before the tax rolls are delivered to him is no payment to the state.[76] A partner cannot bind his copartner to a liquidation of a personal obligation of a third person to the firm without the copartner's assent.[77] The power to receive the principal of an overdue mortgage is delegable by a guardian or trustee.[78] A tender by a stranger is not good.[79] Payment by a third person without the debtor's knowledge is effective as a discharge if an obligation given in ignorance of the payment,[80] but when an obligation is paid by a third person who is subrogated to the rights of the obligee, the obligation is not discharged.[81] A wife has the legal right to pay the debt of her husband.[82]

64. See Novation, 8 C. L. 1179.
65. See Releases, 6 C. L 1286.
66. See Accord and Satisfaction, 7 C. L. 10.
67. See Payment Into Court, 8 C. L. 1337.
68. See Negotiable Instruments, 8 C. L. 1124.
69. See Implied Contracts, 8 C. L. 155.
70. See Contracts, 7 C. L. 761, and title dealing with particular contracts.
71. See 6 C. L. 987. See, also, **Hammon, Cont. §§ 429, 433.**
72. See 6 C. L. 987.
73. Hughes v. Clifton [Ala.] 41 So. 998; Hayne v. Van Epps, 99 N. Y. S. 772. A mere collecting agent has no authority to accept a partial payment, especially when expressly instructed to the contrary. Curkeet v. Steinhoff [Wis.] 109 N. W. 975. Payment to bank by drawee of draft of amount less than face of draft held not a payment to the drawer. Id. An agent restricted to the receipt of cash in payment has no authority to accept payment in any other way. Evidence held insufficient to show payment to agents of more than $50 on an $850 mortgage debt. Becker v. Bluemel [Wis.] 109 N. W. 534. A payment to an agent not specially authorized to receive it is not valid. Mynick v. Bickings, 30 Pa. Super. Ct. 401. Agent held not authorized to receive money in payment of mortgage debt for his principal. Id. One paying money to an agent is bound at his peril to ascertain the authority of the agent to receive it. Id. A course of dealing may suffice to show the authority of a local agent to accept payment. International Harvester Co. v. Smith [Fla.] 40 So. 840. Since checks, drafts, and other bills of exchange, are the usual and customary means of transferring money in nearly all commercial transactions, the reception by an agent for collection of a check or draft, negotiable and payable on demand, which he has good reason to believe will be honored on presentation, is within his authority as a conditional satisfaction of the debt. Griffin v. Erskine [Iowa] 109 N. W. 13.
74. McGuire v. Bradley, 118 Ill. App. 59.
75. In re Curlee & Co. [La.] 43 So. 165.
76. Texas, etc., R. Co. v. State [Tex. Civ. App.] 97 S. W. 142.
77. Dunnett v. Gibson, 78 Vt. 439, 63 A. 141.
78. Forbes v. Reynard, 49 Misc. 154, 98 N. Y. S. 708. Authority to receive all moneys due or to become due to one as guardian, including all principal and interest of any mortgages, empowers the agent to receive the principal of an overdue mortgage. Id.
79. Tender by guaranty company as surety on bond of lunatic's committee held insufficient as tender by principal. Graffiin v. State, 103 Md. 171, 63 A. 373.
80. Where one gives an obligation evidencing a debt which had been paid theretofore by a third person for him, without the knowledge of the obligor, the obligation thereby becomes unenforceable. Penrose v. Caldwell, 29 Pa. Super. Ct. 550.
81. Mansur v. Dupree [C. C. A.] 150 F. 329. See Subrogation, 6 C. L. 1581.
82. Pelletier v. State Nat. Bank, 117 La. 335, 41 So. 640.

Place of payment or tender.—Tender must be made at the place where an obligation is payable,[83] unless waived by the holder.[84]

Sufficiency of tender.[85]—There must be a definite offer to pay on the one hand and refusal to accept on the other.[86] Ordinarily a tender to be effectual must be unconditional,[87] but a conditional tender is effective to stop the running of interest in California when the debtor is entitled to the performance of a condition precedent to or concurrent with performances on his part.[88] A tender is ineffective to preserve one's rights unless kept good by being paid into court for the use of the party to whom the tender was made,[89] but a tender may be kept good without a payment of the same into court in the absence of a statute requiring it,[90] though, in such case, the debtor must be ready, able, and willing at all times, to pay the debt,[91] and though the identical money need not be kept on hand,[92] yet, if by making use of the money, the debtor is not able to pay the debt in current money at any time when requested, the effect of the tender is destroyed.[93] One sued for partition of realty whose full rights are not recognized by the plaintiff need not bring into court a tender made by him in order to protect the rights claimed by him in the land.[94] In California a tender does not operate as an extinguishment of the debt unless followed by a deposit in bank as prescribed by statute.[95] A tender to save contractual rights must be made within the currency of the contract.[96] After notice from a creditor that a note will not be accepted by the creditor, tender of a note by a creditor adds nothing to his rights.[97] A tender by sureties after the suretyship obligation has matured must in addition to principal and interest, include any further sums provided in the instrument by way of penalty for failure to pay when due.[98]

Medium; checks, notes, and drafts.[99]—When one has an option to pay a debt in money or by the conveyance of property, and voluntarily deprives himself of the power to make conveyance, his obligation to pay cash becomes absolute,[1] and on refusal of a debtor to discharge a debt payable otherwise than in money, he becomes bound to discharge it by the payment of money.[2] Ordinarily a check or draft is not payment unless the parties intend otherwise,[3] but the acceptance of a check or draft, offered under such circumstances as amount to a condition that it is to be received in full payment of a demand, will satisfy the demand,[4] notwithstanding any protest

83. Redman v. Murrell, 117 La. 516, 42 So. 49.

84. Evidence held insufficient to show waiver of place of tendering payment. Redman v. Murrel, 117 La. 516, 42 So. 49.

85. See 6 C. L. 987.

86. Crane v. Renville State Bank [Kan.] 85 P. 285. Transaction between guarantor of note and a transferee's representative held not to amount to a tender. Id. Payment of a tender to the trial justice does not obviate a tender to the party. Wiener v. Auerbach, 98 N. Y. S. 686.

87. Rankin v. Rankin, 117 Ill. App. 636. Evidence held insufficient to show a tender on condition. Id.

88. Wadleigh v. Phelps [Cal.] 87 P. 93.

89. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947. Failure to keep a tender good makes it ineffectual to bar the accrual of interest on the sum tendered (Rankin v. Rankin, 117 Ill. App. 636), especially when the party making the tender has not lost any use of the money thereby (Id.). To make a tender good after suit brought, defendant must bring into court not only the sum admittedly due, but also the plaintiff's costs up to the time of the tender. Rogers Grain Co. v. Jansen, 117 Ill. App. 137.

90, 91, 92, 93. Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850.

94. Peirce v. Halsell [Miss.] 43 So. 83.

95. Redpath v. Evening Exp. Co. [Cal. App.] 88 P. 287.

96. Tender of purchase money under contract to convey held within the currency of the contract. Balkwill v. Spencer [Wash.] 88 P. 1029.

97. Austin v. Smith [Iowa] 109 N. W. 289.

98. Tender by surety not including attorney's fees held insufficient. Bolton v. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210.

99. See 6 C. L. 988.

1. Irving v. Bond [Neb.] 107 N. W. 585.

2. Harris v. Sheffel, 117 Mo. App. 514, 94 S. W. 738.

3. Kinard v. First Nat. Bank, 125 Ga. 228, 53 S. E. 1018.

4. Snow v. Grieshelmer, 220 Ill. 106, 77 N. E. 110. Where one accepts the checks of his debtor in payment of an account, he

the creditor may make to the contrary;[5] and if a debtor purchases a draft with his own money and forwards it to his creditor who cashes it and appropriates the proceeds to his own use, there is a payment to the amount of the draft.[6] Whether one obligation given in lieu of another is a payment of the original is, ordinarily, a question of fact, depending on the intention or conduct of the parties.[7] Payment of a forged note is ineffectual as a discharge of the debt.[8] When honored by the drawee, a check or draft is equivalent to a cash payment relating to the time of delivery thereof,[9] and this is true when delivery is to an agent in the absence of an express limitation on the agent's authority to receive anything else than cash.[10] The indorsement of a draft is not a payment, but only a mode of obtaining payment.[11] The negotiation of notes and the execution of renewals thereof for such balances as remain due does not constitute a taking of the originals as payment where the payee was at all times liable as indorser.[12] Credit extended to a taxpayer by an officer authorized only to accept cash does not amount to payment of taxes to the state.[13] An offer of payment is a prerequisite to the validity of a deposit in bank as a payment under the California statute.[14] When a creditor is induced by false representations to accept notes as payment, he may by rescission restore the original debt,[15] but to make out a case, there must be proof of having actually been misled by deceit in addition to proof of intent to defraud.[16]

§ 2. *Application of payment.*[17]—As a rule a creditor may make application of a general payment at any time before judgment or verdict,[18] irrespective of the adverse effect it may have on the rights of third persons;[19] but the rule does not apply when money is received by the debtor from a third person whose property would be liable for the debt in case the money was not applied on the third person's liability when paid to the creditor,[20] nor can a creditor apply a general payment to satisfy an illegal demand without the debtor's consent,[21] nor, when a creditor in procuring a settlement of a claim wrongfully obtains money of the debtor, can he

must look to the checks for satisfaction of his claim. Cochran v. Slomkowski, 29 Pa. Super. Ct. 385.

5. Snow v. Griesheimer, 220 Ill. 106, 77 N. E. 110.

6. Boothe v. Scriber [Or.] 87 P. 887.

7. Draft given in lieu of note, retained more than a year held to justify finding that note was paid thereby. Conde v. Dreisam Gold Min. & Mill. Co. [Cal. App.] 86 P. 825. The giving of a renewal note. First Nat. Bank v. Gridley, 112 App. Div. 398, 98 N. Y. S. 445. A novation entered into by which obligations are taken up and others substituted in their place, with different obligors, operates as payment of the surrendered obligations. Gannon v. Cooke, 122 Ill. App. 615. See Novation, 8 C. L. 1179. Whether the delivery and acceptance of a note, check, or draft, drawn by the debtor or by a third person, are to be treated as payment in themselves, or as payment conditional on the honoring of the paper by the drawee, depends on the intention of the parties. Dille v. White [Iowa] 109 N. W. 909. The acceptance of a buyer's note for the price of goods does not affect the right of the seller to sue on the original claim after maturity, and nonpayment of the note, when the note is produced and offered to show a liquidation of the account. St. Albans Beef Co. v. Aldridge, 112 App. Div. 803, 99 N. Y. S. 398. See, also, post, § 4.

8. Bass v. Wellesley [Mass.] 78 N. E. 543.

9, 10. Griffin v. Erskine [Iowa] 109 N. W. 13.

11. Hence, an indorsement has no influence on the question for whom the indorsee holds the money after getting it. Rawson v. Bethesda Baptist Church, 221 Ill. 216, 77 N. E. 560.

12. Moore v. Jacobs, 190 Mass. 424, 76 N. E. 1041.

13. Figures v. State [Tex. Civ. App.] 99 S. W. 412.

14. Owen v. Herzlhoff, 2 Cal. App. 622, 84 P. 274.

15, 16. American Malting Co. v. Southern Brewing Co. [Mass.] 80 N. E. 526.

17. See 6 C. L. 990.

18. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658.

19. Landlord held not required to apply payment by tenant to account for which he held a lien instead of a subsequent claim against the tenant for supplies, as against one asserting a right to levy on and sell the property represented by the secured account. Cadenhead v. Rogers & Bro. [Tex. Civ. App.] 16 Tex. Ct. Rep. 837, 96 S. W. 952.

20. Lee v. Storz Brewing Co. [Neb.] 106 N. W. 220.

21. Foreign corporation unauthorized to do business in state held not entitled to apply payment to account for business done in state. Armour Pack. Co. v. Vinegar Bend Lumber Co. [Ala.] 42 So. 866.

of his own volition apply it in extinguishment of a prior claim,[22] nor, when he permits the debtor to incur a further indebtedness with notice that the rights of third persons will be adversely affected, should he be permitted to make application of a general payment to such debt.[23] A debtor may, however, conclusively direct the application of remittance by him to the payment of any particular indebtedness so long as the superior rights of the creditor are not invaded.[24] The doctrine of election is applicable to the creditor's privilege of applying payments in the absence of direction by the payor,[25] and forbids a change when the election has once been made.[26] The doctrine is applicable also to the payor who gives directions as to the debt to which a payment is to be applied.[27] One may bind himself by contract to apply money to a particular purpose,[28] but an agreement to apply money to be received in the future to the payment of a particular debt is revocable by the parties;[29] and a different application made in good faith by the mutual agreement of the parties is binding on a third person whose reliance on the agreement is not brought to the knowledge of the creditor before the application has been made.[30] After a contractual right of imputation of payment has been exhausted, the conferee of the power cannot thereafter change the imputations already made to the detriment of the conferor.[31] One may also be bound by an acquiescence in the application of payments different from his express direction.[32] The Massachusetts rule requiring a partial payment on a note to be first applied to the payment of interest due is recognized in New Mexico rather than the Connecticut rule requiring it to be applied directly to a discharge of the principal.[33] In applying partial payments on an interest-bearing obligation, at the full legal rate, the sum originally loaned, it is held in Kentucky, should be taken as the principal and interest calculated thereon till the first renewal or payment,[34] then such payment should be applied to the discharge of interest accrued and any excess applied on the principal,[35] and when the obligation is renewed, accumulated interest unpaid is then to be added to the remaining principal, which sum constitutes a new principal on which interest is to be calculated and payments applied as before indicated,[36] nor is this rule objectionable as requiring a greater interest charge than that contemplated in the original contract.[37] A general payment on an account will be applied, in the absence of application by the parties, in payment of the oldest item.[38] A statute requiring the application of payments, in the absence of direction, on the obligation earliest in date

22. Meyer v. Johnson, 122 Ill. App. 87.

23. A mortgagee under a mortgage to secure a note and future advances, but not obligated to make future advances, is bound to apply payments from its debtor on the note as against a record mortgagee whose mortgage is given to secure advances of which the first mortgage had notice prior to making advances. Davis v. Carlisle [C. C. A.] 142 F. 106.

24. Letter of shipper to factor held application of proceeds of commodities to payment of note (Kempner v. Patrick [Tex. Civ. App.] 95 S. W. 51), which was conclusive except for factor's right to protect account for which he had a factor's lien (Id.).

25. United States Rubber Co. v. Peterman, 119 Ill. App. 610.

26. United States Rubber Co. v. Peterman, 119 Ill. App. 610. Payment once applied cannot be changed without consent of surety adversely affected by a change. Mitchell v. Wheeler [Iowa] 108 N. W. 1030.

27. Where one directs a particular application to be made of a payment and it is so applied, he cannot thereafter direct a different application. Flynn v. Seale, 2 Cal. App. 665, 84 P. 263.

28. Mortgagee held liable to account to mortgagor for amount to be applied by mortgagee in payment of debt of third person on failure to make application as agreed. Bullis v. Farmers' State Bank, 143 Mich. 632, 13 Det. Leg. N. 85, 107 N. W. 70.

29, 30. Weidemann v. Springfield Breweries Co., 78 Conn. 660, 63 A. 162.

31. The imputation as made and its ratification, are equivalent to an agreement which satisfies and takes the place of the original agreement. Lichtenstein v. Lyons, 115 La. 1051, 40 So. 454.

32. Instruction held proper. Bird v. Benton [Ga.] 56 S. E. 450.

33. Jones, Downs & Co. v. Chandler [N. M.] 85 P. 392.

34, 35, 36, 37. Bramblett v. Deposit Bank, 28 Ky. L. R. 1128, 92 S. W. 283.

38. Jamison v. Alvarado Compress & Warehouse Co. [Tex. Civ. App.] 99 S. W. 1053; Hammer v. Crawford [Mo. App.] 93 S. W. 348; Houeye v. Henkel, 115 La. 1066, 40 So. 460.

of maturity, requires a ratable application of a payment on several obligations maturing at the same time, irrespective of the date incurred.[39] When neither the debtor nor creditor has made application of a payment, the court may do so,[40] and the court will credit a general payment according to its own view of the intrinsic justice and equity of the case so as to give the creditor the best security for the debt remaining unpaid.[41] Payment in property will be so applied in equity as to protect and preserve a homestead.[42] Where distinct sets of partners become sureties for a contractor and on his default agree to complete the work themselves as an independent partnership, payments made by the latter are applicable to discharge its debts to the constituent partners rather than to the discharge of the debts of the contractor to them for supplies not furnished at the request of all the members of the independent partnership.[43] When the principal of a mortgage debt has been paid to a person authorized to receive it for a guardian, the mortgagor is not bound to see to the application made by the guardian of the sum paid.[44] When a debtor remits a portion of his debt and incloses an assignment of the balance to himself for execution by the creditor which he requests to be signed and returned as a "receipt," the creditor is justified, notwithstanding the demand for assignment, in applying the remittance or the debt.[45] Mere irregularity of a transaction by a debtor with his creditor will not justify the creditor in refusing to make proper application of credits.[46]

§ 3. *Effect of payment or tender.*[47]—A valid tender does not, because not accepted, extinguish the debt.[48] An admission of liability for a less sum than one is sued for and tender of that amount into court entitles the plaintiff to recover at least to the extent of the admission.[49] A tender made before trial but not relied on in the pleadings of the party making it and not kept good by bringing the same into court is an admission of liability, but not conclusive.[50]

§ 4. *Payment or tender as an issue. A. Pleading.*[51]—An averment of tender must state the facts constituting a tender to be effective,[52] and show that the tender

39. Star Mill & Lumber Co. v. Porter [Cal. App.] 88 P 497.

40. In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. S. 480. When no application has been made of a partial payment on a note by either the maker or the holder, it becomes the duty of the court, in a suit to enforce the obligation, to direct its application. Jones, Downs & Co. v. Chandler [N. M.] 85 P. 392.

41. General payment on building contract and account for extra work applied by court on account for extra work which was unsecured by mechanics' lien while the balance of the debt was so secured. Barbee v. Morris, 221 Ill. 382, 77 N. E. 589. Where a debtor without the knowledge of his creditor so disposes of property for which the debt was incurred as to leave the creditor unsecured as to part when he believed he was secured as to all, equity will require general payments by the debtor to be applied to the unsecured portion. Wardlaw v. Troy Oil Mill, 74 S. C. 368, 54 S. E. 658. A court in making application of a payment will do so in the interest of the creditor, to that portion of a debt which is least secured. Sipe v. Taylor [Va.] 55 S. E. 542. In determining the priorities between creditors, the court will treat the application of payments as having been made in the manner prescribed by law. Davis v. Carlisle [C. C. A.] 142 F. 106.

42. Shaffer Bros. v. Chernyk, 130 Iowa, 686, 107 N. W. 801.

43. Sexton v. McInnis [Or.] 86 P. 778.

44. Forbes v. Reynard, 49 Misc. 154, 98 N. Y. S. 708.

45. Johnson v. Smothers [Ark.] 96 S. W. 386.

46. Where the treasurer of a building and loan association checks out to the secretary a portion of its funds to be used by the latter in transacting the association's business in the absence of the treasurer and no account of the transaction is made on the books of the association, but it nevertheless receives full benefit for the amount so transferred and has full knowledge of the transaction through its board of directors, it is bound to apply the same as a credit on a loan subsequently made by it to the treasurer notwithstanding any irregularity in the transaction. Indiana Trust Co. v. International Bldg. & Loan Ass'n No. 2, 165 Ind. 597, 76 N. E. 304.

47. See 6 C. L. 991.

48. Independent Credit Co. v. South Chicago City R. Co., 121 Ill. App. 595.

49. Ellison v. Simmons [Del.] 65 A. 591.

50. Mackey v. Herwin, 222 Ill. 371, 78 N. E. 817.

51. See 6 C. L. 992.

52. Harding, Whitman & Co. v. York Knitting Mills, 142 F. 228.

has been kept good.[53] Payment as a defense must be pleaded,[54] and the facts must be set forth.[55] A claim asserted defensively as a payment but not so pleaded is allowable only as a set-off or counterclaim.[56]

(§ 4) *B. Evidence.*[57] *Presumptions.*[58]—There is a presumption that a note in the possession of the payee is a subsisting obligation,[59] but the presumption is not conclusive.[60] A judgment is presumed to be paid after the lapse of twenty years from the time the debt became due,[61] but from a lapse of time of less than twenty years, no such presumption arises.[62] In Massachusetts the rule of evidence is that where a debtor delivers to his creditor a negotiable note for the whole or a portion of the debt, the presumption arises that it was given and received in satisfaction of the debt,[63] such presumption being controllable, however, by evidence that by the acceptance, the creditor did not intend to extinguish the debt.[64] Nevertheless the rule is not applicable to a note accepted in a jurisdiction wherein it is not the law unless the contract is to be performed where the rule is recognized;[65] but the fact that notes become completed contracts only on their acceptance in another state is not conclusive as to the place of performance, when acceptance is according to their tenor, as against a place selected by the parties for performance, so as to take the case out of the rule.[66] In authorizing an agent to make collections, the the presumption, in the absence of instructions to the contrary, is that the authority is to be exercised in the manner usual and customary in the commercial world.[67] Payment is presumable from an extraordinary lapse of time in the assertion of a right by the persons entitled thereto.[68] The presumption of payment arising from lapse of time is rebuttable.[69] Such presumption being by statute made repellable for particular causes is not repelled by other causes.[70] In Pennsylvania a presumption of payment of a charge on realty arises where no payment or demand has been made for twenty-one years,[71] and the execution of a mortgage by the grantee of land subject to a charge within the twenty-one years is not rebuttive of the presumption.[72] The presumption of payment of a mortgage debt is conclusive after twenty years in the absence of proof of payment within that period,[73] and this presumption is available to show the marketability of title of land sold on a partition sale on a motion of the purchaser to be relieved of the purchase.[74] Possession by an obligor of an obligation sued on raises a presumption of payment,[75] as does the fact that the obligation was found among the obligor's papers after his death.[76] There is no presumption that the value of land acquired by foreclosure is sufficient to pay notes evidencing the debt not due at the time of foreclosure.[77] A receipt for all moneys

53. Averment of tender of ground rent held insufficient to relieve from payment thereof. Maulsby v. Page [Md.] 65 A. 818.

54. Schackter v. Kukowsky, 102 N. Y. S. 1028; Florence Oil & Refining Co. v. First Nat. Bank [Colo.] 88 P. 182.

55. Plea of partial payment on notes held demurrable. Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77.

56. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142.

57. See 6 C. L. 992.

58. See 6 C. L. 993.

59, 60. Bush v. Brandecker [Mo. App.] 100 S. W. 48.

61, 62. Janvier v. Culbreth [Del.] 68 A. 309.

63, 64, 65, 66. American Malting Co. v. Souther Brewing Co. [Mass.] 80 N. E. 526.

67. Griffin v. Erskine [Iowa] 109 N. W. 13.

68. Purchase price of land, after lapse of 70 years, will be presumed to have been paid, in absence of effort to enforce payment. Doty v. Jameson, 29 Ky. L. R. 507, 93 S. W. 638.

69. And is rebutted, of course, by a stipulation admitting nonpayment. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

70. Absence of debtor from state held not repellable of presumption of payment of judgment under Gen. Laws 1865, p. 749, c. 181, § 31. Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299.

71, 72. In re De Haven Estate [Pa.] 64 A. 779.

73, 74. Ouvrier v. Mahon, 102 N. Y. S. 981.

75. Engle v. Betz, 214 Pa. 185, 63 A. 457.

76. Dodrill's Ex'rs v. Gregory's Adm'r [W. Va.] 53 S. E. 922.

77. McKeen v. Corh, 73 N. H. 410, 62 A. 729.

owing by the debtor up to date is prima facie evidence of payment of a note indebtedness due by him to the receiptor at the time.[78]

Burden of proof.[79]—The burden of proving payment is on the party pleading it,[80] while the burden of impeaching payments is on the litigant contesting their validity.[81] The burden is on defendant to show that payments not specifically alleged in the pleadings, but admitted in the testimony of the plaintiff as having been made, were made in part payment of the claim sued on, instead of on other items of indebtedness.[82] Where there has been a lapse of twenty years from the time a debt represented in a judgment became due, the burden is on one asserting the right to enforce it to show by a preponderance of the evidence that it is not paid,[83] but when twenty years have not elapsed, the burden is on one asserting payment to show by a like preponderance that it has been paid.[84] Where defendant pleads payment of an account sued on by paying to a third person on plaintiff's authority to so pay any sum found to be due, he assumes the burden of showing that plaintiff was indebted to the third person.[85]

Admissibility.[86]—The fact that a note sued on is found among the papers of the maker after his death is admissible to show payment.[87] A plea of payment and claim of ability to pay render admissible evidence as to the amount of incumbrance outstanding on the property of the litigant responsible for such plea and contention.[88] A check is competent evidence as tending to show payment.[89] When a plea of payment is interposed in an action by an administrator on notes given to one since deceased, a note given by the defendants to decedent while the notes in suit were still under the control of deceased and uncanceled is admissible in rebuttal of the plaintiff's case, as tending to show that the notes sued on had not been paid,[90] especially when the note was given within a short time after a check for an equal amount from defendants to decedent was given and which defendants had introduced in support of their plea of payment,[91] nor did the fact that the note offered in evidence by the administrator had been paid deprive it of its evidential character.[92] On an issue of payment, the admissibility of evidence of the financial standing and ability of the party, to make payment as bearing on the credibility of the claimant, is within the discretion of the trial court.[93] On such issue, the assessment records are admissible to show that the alleged debtor had property during a long period of time when the alleged demand was enforceable from which it could have been made,[94] but evidence as to his promptitude in paying his debts is inadmissible,[95] as is evidence as to his having owed other debts,[96] and evidence as to

78. Connelly v. Sullivan, 119 Ill. App. 469.

79. See 6 C. L. 992.

80. Lasswell v. Gahan, 122 Ill. App. 513. The burden is on defendant who pleads payment to sustain it by a preponderance of the evidence. International Harvester Co. v. Smith [Fla.] 40 So. 840. When payment is relied on as a defense in an action on a note, the burden is on defendant to prove the same by a preponderance of the evidence (Dodrill's Ex'rs v. Gregory's Adm'r [W. Va.] 53 S. E. 922), and this burden is not changed by the fact that the note sued on is found among the papers of the maker after his death (Id.). Where one sued on an obligation claims payment subsequent to its becoming due, the burden is on him to prove such payment by a preponderance of the probabilities. McKeen v. Cook, 73 N. H. 410, 62 A. 729.

81. In re Milligan's Estate, 112 App. Div. 373, 98 N. Y. S. 480.

82. Wessel v. Bishop [Neb.] 107 N. W. 220.

83, 84. Janvier v. Culbreth [Del.] 63 A. 309.

85. Putman v. Grant, 101 Me. 240, 63 A. 816.

86. See 6 C. L. 994.

87. Dodrill's Ex'rs v. Gregory's Adm'r [W. Va.] 53 S. E. 922.

88. Hasper v. Wietcamp [Ind.] 79 N. E. 191.

89, 90, 91, 92. Bailey v. Robison, 123 Ill. App. 611.

93. Discretion held not abused by declining to receive such evidence. Coulter v. Goulding, 98 Minn. 68, 107 N. W. 823.

94, 95, 96, 97, 98, 99, 1, 2. Janvier v. Culbreth [Del.] 63 A. 309.

his reputation for honesty and fair dealing.[97] Declarations during the period in which the alleged debt might have been enforced as to his financial condition are admissible,[98] as are his declarations as to what the debt was for,[99] and evidence as to whether he was a close collector of indebtedness due to him, where there has been a a long lapse of time and it is relied on to show payment.[1] On an issue of payment of a debt merged into a judgment, evidence as to knowledge, by a transferee, of the transfer of a portion of the judgment on the records in evidence before made is inadmissible.[2] On an issue of payment of notes given to a bank marked "paid" by the bank as between an officer of the bank and the drawer, the notes are admissible when produced by the officer in connection with his testimony that he paid them at the request of the drawer,[3] and a check given in payment of notes which is part of a like transaction is admissible on such issue.[4] But deposit slips claimed by defendant to have been made out by himself for funds deposited by him in the bank for plaintiff's benefit, were inadmissible,[5] even in connection with defendant's testimony that he took the slips from the bank files, in the absence of some showing that the plaintiff had received credit therefor on the bank books or in some other way become bound to pay the same,[6] nor was defendant's testimony admissible to show that a draft drawn on the bank by plaintiff was paid out of defendant's personal funds in the absence of the records of the bank as evidence.[7]

Sufficiency.[8]—A check without other evidence will not sustain a plea of payment.[9] Ordinarily, a receipt is not conclusive evidence of payment,[10] but a receipt in full is conclusive as payment in the absence of fraud, accident, or mistake.[11] The marking of a note as "paid" by the payee on receipt of a draft therefor is not conclusive of the question whether the draft was payment.[12] The general rules for testing the sufficiency of evidence apply.[13]

(§ 4) *C. Limitations.*[14]

(§ 4) *D. Questions of law and fact.*[15]—The question as to the value and of the amount of payment effected by a foreclosure of a mortgage on a part of a series of notes, before other of the series are due, is one of fact,[16] and ordinarily is the question whether payment has been made.[17] Whether false representations as inducement to procure acceptance of note as payment were made with a purpose

3, 4, 5, 6, 7. Boothe v. Scriber [Or.] 87 P. 887.

8. See 4 C. L. 961.

9. Bailey v. Robison, 123 Ill. App. 611.

10. Reikes v. Sullivan, 99 N. Y. S. 318.

11. Receipt for $1,500 mortgage as in full for legacy of $2,000 held binding on legatee as payment of legacy. Naglee v. Naglee, 30 Pa. Super. Ct. 75. A receipt in full, deliberately given, is conclusive in the absence of fraud, accident, or mistake. McGahren v. Insurance Co., 28 Pa. Super. Ct. 47.

12. Kinard v. First Nat. Bank, 125 Ga. 228, 53 S. E. 1018.

13. Evidence held sufficient: To show payment. Kinsey v. Carr [W. Va.] 55 S. E. 1004; Barnes v. Barnes' Adm'r [Va.] 56 S. E. 172. To warant finding that plaintiff was not indebted to third person to whom defendant averred payment as a defense. Putnam v. Grant, 101 Me. 240, 63 A. 816. To sustain a finding that there had been no payment to plaintiff of accounts, the amount of which was taken by a robber after having been counted out for plaintiff, but before it was passed to him. Ah Gett v. Carr [Cal. App.] 84 P. 458. To show waiver of tender. Austin v. St. Louis Transit Co., 115 Mo. App. 146, 91 S. W. 450; Witt v. Dersham [Mich.] 13 Det. Leg. N. 660, 109 N. W. 25.

Evidence held insufficient: To show payment. Hopeye v. Henkel, 115 La. 1066, 40 So. 460; Lovell & Co. v. Sneed [Ark.] 95 S. W. 157. To show a legal tender. Redman v. Murrel, 117 La. 516, 42 So. 49. To rebut the presumption of discharge of an obligation from its possession by the obligor when he is sued thereon. Engle v. Betz, 214 Pa. 185, 63 A. 457. To show waiver of place of tender. Redman v. Murrel, 117 La. 516, 42 So. 49. To show tender on condition. Rankin v. Rankin, 117 Ill. App. 636.

14. See 6 C. L. 994.

15. See 6 C. L. 994.

16. McKeen v. Cook, 73 N. H. 410, 62 A. 729.

17. Question for jury. Snyder v. Patton & Gibson Co., 143 Mich. 350, 12 Det. Leg. N. 1041, 106 N. W. 1106; Gastonia Cotton Mfg. Co. v. Wells Co. [C. C. A.] 148 F. 1018. Whether the amount recited in a receipt had been paid held a question for the jury. Reikes v. Sullivan, 99 N. Y. S. 318.

to mislead,[18] and whether they actually did influence the acceptor's conduct in the transaction, are also questions of fact.[19]

PAYMENT INTO COURT.[20]

The custody of deposits in court is a matter within the control of the legislature.[21] Deposit in court is a means of keeping a tender good,[22] though in the absence of statute, it is held that a tender may be kept good without payment of the same into court,[23] but when alleged as having followed tender, it must be proved as well as the tender.[24] When money is paid into court as a tender, the depositor thereupon parts with his property rights therein,[25] nor does a change of issues by amendment authorize a withdrawal of the fund by the party who has made the deposit,[26] even where the change is an entire denial of liability and an assertion of a demand on a counterclaim against the litigant for whose benefit the sum was deposited,[27] and even though a judgment is rendered against him for a less sum, he cannot withdraw a proportionate part of the deposit,[28] but a deposit made as a tender by an intervener unsuccessfully claiming a right against the litigants remains the property of the intervener.[29] When a tender has been excused by an act of the party to whom it is due, a deposit of the tender may be withdrawn without prejudice to the rights of the depositor,[30] and a refusal of one to accept a tender after it has been paid into court and an adverse judgment rendered warrants a withdrawal of the fund by the depositor.[31] When a deposit placed in the custody of an officer of the court has drawn interest, the person entitled to the find is also entitled to the accrued interest.[32] Waiver of proof of tender does not waive proof of a deposit of the tender in court.[33] When a tender is refused, it is proper procedure to pay it into the registry of the court.[34] A litigant, liable at all events for the full sum required to be paid into court, is not prejudiced by an order requiring payment into court before the persons to whom it belongs have been ascertained.[35] One sued for partition of realty whose full rights are not recognized by the plaintiff need not bring into court a tender made by him in order to protect the rights claimed by him in the land.[36] After a tender and payment into court thereof by defendant, the only question to be litigated is whether the plaintiff establishes a cause in action for more than the amount of the tender.[37]

18, 19. Question for jury. American Malting Co. v. Souther Brewing Co. [Mass.] 80 N. E. 526.

20. See 6 C. L. 994.

21. A statute requiring deposits in the custody of local court officers to be paid into the state treasury after they have been on hand twenty years, to be thereafter paid out on the warrant of the state comptroller, is not invalid as depriving the beneficiaries of their property without due process of law (People v. Keenan, 110 App. Div. 537, 97 N. Y. S. 77), nor as vacating, nullifying, or interfering, with orders of the court (Id.), nor as attempting to divest the court of its general jurisdiction (Id.).

22. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947. To make a tender good after suit brought, defendant must bring into court not only the sum admittedly due, but also the plaintiff's costs up to the time of tender. Rogers Grain Co. v. Jansen, 117 Ill. App. 137.

23. Dickerson v. Simmons, 141 N. C. 325, 53 S. E. 850.

24. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947.

25. Mann v. Sprout, 185 N. Y. 109, 77 N. E. 1018; Lackner v. American Clothing Co., 112 App. Div. 438, 98 N. Y. S. 376. The withdrawal of a deposit by the litigant for whose benefit the deposit is made before the end of the litigation does not prejudice his right to proceed to final judgment on the merits of the controversy. Traynor v. White [Wash.] 87 P. 823.

26, 27. Mann v. Sprout, 185 N. Y. 109, 77 N. E. 1018.

28. Lackner v. American Clothing Co., 12 App. Div. 438, 98 N. Y. S. 376.

29. Lazier v. Cady [Wash.] 87 P. 344.

30. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883.

31. Coltrane v. Peacock [Tex. Civ. App.] 14 Tex. Ct. Rep. 865, 91 S. W. 841.

32. Rhea v. Brewster, 130 Iowa, 729, 107 N. W. 940.

33. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947.

34. Samaha v. Mason, 27 App. D C. 470.

35. Miller v. Russell, 224 Ill. 68, 79 N. E. 434.

36. Peirce v. Halsell [Miss.] 43 So. 83.

37. Lackner v. American Clothing Co., 112 App Div. 438, 98 N. Y. S. 376.

PEDDLING.

§ 1. Definition (1338).
§ 2. Statutory or Municipal Regulation (1338).
§ 3. Who May Become Licensees (1339).
§ 4. Offenses and Prosecution (1339).

§ 1. *Definition.*[38]—One who acts for another in taking orders for goods or delivering for him goods, orders for which have been previously taken either by himself or by another, is not a peddler or hawker within the general meaning of these terms,[39] or within the meaning of a statute including in the term peddler all "transient merchants and itinerant vendors" selling by sample or by taking orders either for immediate or future delivery.[40] The carrying and selling of frames for portraits in connection with the business of delivering the portraits previously ordered is peddling.[41] The sale of coal oil from a wagon to a retail dealer is not a violation of the Kentucky statute requiring peddlers to take out licenses though some of the oil purchased is used for manufacturing purposes.[42]

§ 2. *Statutory or municipal regulation.*[43]—Municipalities may be given power to regulate the business of hawkers and peddlers and may provide that such terms shall include persons who go about soliciting by sample.[44] Statutes or ordinances of this character must be reasonable,[45] and like other laws are subject to constitutional restrictions,[46] including those relative to title,[47] interstate commerce,[48] and class legislation.[49]

38. See 6 C. L. 995.

39. **Not peddlers or hawkers:** An agent of a nonresident corporation who delivers and collects for goods which another agent of such corporation has previously contracted to furnish. Agent who delivered portraits made by photographic enlargement. Chicago Portrait Co. v. Macon, 147 F. 967. This was so though as incidental to delivery he also sold the customer a frame. Id. One who merely solicits orders and takes notes for goods to be shipped from another state and delivered by another person. Medicines. Act Feb. 26, 1902 (Laws 1902, pp. 1102, 1102). State v. Ivey, 73 S. C. 282, 53 S. E. 428.

40. One who takes orders for goods by sample for a corporation and delivers the goods for the company after its approval of the orders. Not within Act 30th Gen. Assem. p. 41, c. 48, assuming it to be constitutional. State v. Bristow [Iowa] 109 N. W. 199.

41. One who delivers portraits to fill orders previously taken under an agreement whereby it was made optional with the purchasers to take frames to be furnished with the portraits and, upon delivery of the portraits, also sells the frames, is a peddler within Rev. St. 1899, §§ 8861, 8862, 8868, defining a peddler as one who sells goods by going from place to place. State v. Looney [Mo.] 97 S. W. 934. Compare Chicago Portrait Co. v. Macon, 147 F. 967.

42. Ky. St. 1903, § 4215. Commonwealth v. Standard Oil Co., 29 Ky. L. R. 433, 93 S. W. 613.

43. See 6 C. L. 995.

44. Ordinance held not violative of state law. Defendant who solicited orders for a corporation from door to door held properly convicted. City of Alma v. Clow [Mich.] 13 Det. Leg. N. 836, 109 N. W. 853. Case governed by City of Muskegon v. Zeeryp, 134 Mich. 181, 96 N. W. 502. City of New Orleans may regulate peddling on the streets and compel peddlers and hawkers to keep within bounds and refrain from boisterous or other conduct which will render their occupation a nuisance. City of New Orleans v. Fargot, 116 La. 369, 40 So. 735.

45. Ordinance prohibiting peddlers and hawkers from crying out for sale fruit, fish, etc., held reasonable, and not contrary to state law or in restraint of trade. City of New Orleans v. Fargot, 116 La. 369, 40 So. 735. Hucksters and peddlers may be required to move on and not to make unnecessary stops or loiter about in the streets. Ordinance not oppressive or unconstitutional. City of Shreveport v. Dantes [La.] 42 So. 716. An ordinance prohibiting the carrying on of any trade or business in any part of a public street without a permit is not inconsistent with law or oppressive when reasonably construed. State v. Barbelais, 101 Me. 512, 64 A. 881. Should be construed only to prohibit a person from offering articles for sale in a public manner either from a stand or from a cart which he drives or pushes along the street. Id.

46. A city ordinance merely imposing a license tax upon "peddlers of goods, wares, and merchandise", is not repugnant to the interstate law or to any feature of the state or Federal constitution. City of Selma v. Till [Ala.] 42 So. 405.

47. Act 30th, Gen. Assem, p. 41, c. 48, repealing and enacting a substitute for § 1347a of the supplement of the Code, and providing that the word "peddlers" shall include transient merchants and itinerant vendors selling by sample or by taking orders whether for immediate or future delivery, is unconstitutional because the subject is not expressed in the title, the original act imposing a tax on peddlers only. State v. Bristow [Iowa] 109 N. W. 199.

48. A corporation of one state there engaged in the manufacture of portraits and frames may send agents into another state to solicit orders and other agents to deliver and collect for the goods, and neither the state nor a municipality can impose license taxes on either class of such agents. Chicago Portrait Co. v. Macon, 147 F. 967. Delivery of portraits previously ordered held

§ 3. *Who may become licensees.*[50]

§ 4. *Offenses and prosecution.*[51]—Where one takes orders and delivers goods for a corporation which for all the purposes of the case is a domestic corporation and also sells goods from stock on hand, the mere fact that the goods are shipped him from out of the state does not render his business interstate commerce.[52] The phrase "domestic machinery" as used in the statute of New Mexico excepting such machinery from the class of articles which may not be sold by itinerant vendors without a license does not include a buggy or wagon for use at the purchaser's home.[53] Where different penalties may be inflicted upon different classes of peddlers, the indictment must show the class to which the accused belongs.[54] A constitutional provision that no municipal ordinance shall fix a penalty for its violation, less than that imposed by statute for the same offense, does not apply to an ordinance providing a penalty for peddling without a license.[55] The remedy of one who is convicted, though he is not a peddler, or is within the protection of the interstate law, is by appeal and not habeas corpus.[56]

PEDIGREE, see latest topical index.

PENALTIES AND FORFEITURES.

§ 1. Definitions and Elements (1339).
§ 2. Rights and Liabilities to Penalties and Forfeitures, and the Policy of the Law (1340).
§ 3. Remedies and Procedure (1342).

§ 1. *Definitions and elements.*[57]—The question of whether a sum contracted to be paid for the breach of a covenant is liquidated damages or a penalty depends largely upon the terms of the particular contract,[58] except that unless the amount is unconscionable,[59] it will generally be held not to be a penalty, if the resultant damages are so uncertain as to be practically incapable of calculation.[60] A con-

interstate commerce. State v. Looney [Mo.] 97 S. W. 934. Sale of frames not previously contracted for held not interstate commerce. Id. "Domestic machinery" as used in Sess. Laws 1903, c. 16, p. 27, imposing a license tax on itinerant vendors of certain articles and excepting domestic machinery, does not refer only to machinery made in New Mexico and the statute is not void for that reason. Territory v. Russell [N. M.] 86 P. 55.

49. Ordinance requiring hucksters and peddlers of small articles to move on and not to make unnecessary stops in the streets held not discriminative. City of Shreveport v. Dantes [La.] 42 So. 716. Sess. Laws 1903, c. 16, p. 27, imposing a license tax on itinerant vendors of certain articles is not violative of the Federal constitution as class legislation because it forbids sales to those who are not dealers. Territory v. Russell [N. M.] 86 P. 551. An ordinance requiring peddlers to pay a license fee but excepting persons selling vegetables, fish, meat, or farm produce, and bakers, is not invalid because of the exception. People v. Smith [Mich.] 13 Det. Leg. 1068, 110 N. W. 1102.

50, 51. See 6 C. L. 996.

52. Could not escape liability under ordinance requiring peddlers to pay license fee. People v. Smith [Mich.] 13 Det. Leg. N. 1068, 110 N. W. 1102.

53. Sess. Laws 1903, c. 16, p. 27. Territory v. Russell [N. M.] 86 P. 551.

54. Where penalty was three times the license and there were various classes of licenses required to pay different sums for their licenses. Williams v. State [Ala.] 43 So. 182; Keller v. State, 123 Ala. 94, 26 So 323, overruled so far as it conflicts.

55. Such offense is not classed with crimes and misdemeanors involving moral turpitude. Commonwealth v. Merz [Ky.] 100 S. W. 333.

56. City of Selma v. Till [Ala.] 42 So. 405.

57. See 6 C. L. 996.

58. A provision that after the completion of a first well "the second party shall drill two additional wells at intervals of ninety days, and upon failure to drill said wells or any one of them shall forfeit and pay to said first party the sum of one hundred dollars for each well not drilled" does not provide a penalty, but is a provision for stipulated damages. Crown Oil Co. v. Probert, 8 Ohio C. C. (N. S.) 489. A provision, that upon breach of a contract a certain sum shall be paid and if suit shall become necessary it may be for double such amount, stipulates for a penalty in so far as it refers to double damages. Carruthers v. Gay [Tex. Civ. App.] 15 Tex. Ct. Rep. 169, 91 S. W. 593. See, also, Damages, 7 C. L. 1029.

59. Where there was nothing in the record by which it could be determined what plaintiff's actual damages were or would be on account of defendant's violation of his agreement not to engage in a competing butchering business, the court could not say that $2,000 was unconscionable. Canady v. Knox [Wash.] 86 P. 930.

60. Agreement not to engage in competing butcher business. Canady v. Knox [Wash.] 86 P. 930. Where actual damages from delay in completing a store building were in-

tract for labor by which a certain portion of the price is held back by the employer to guaranty completion of the work" stipulates for a penalty and not for liquidated damages.[61]

§ 2. *Rights and liabilities to penalties and forfeitures, and the policy of the law.*[62]—Provisions for forfeitures are viewed with disfavor by the law and hence are strictly construed.[63] The terms of a contract will therefore not be extended by construction so as to include grounds for forfeiture not specified in it.[64] If a forfeiture is dependent upon the giving of a written notice, it must appear that such notice was given in compliance with the contract both as to time and contents.[65] A forfeiture may be waived by conduct inconsistent with an intention to enforce it.[66]

Statutory penalties.[67]—The rule of strict construction is particularly applicable to penal statutes;[68] hence, these apply only in cases falling squarely within their terms.[69] No one can have any vested right in an unenforced statutory penalty,[70] and hence, the legislature may repeal laws providing therefor so as to affect pending suits,[71] or may limit the amount of recovery in such actions.[72] The repeal of a Federal penal statute extinguishes no penalties or forfeitures previously incurred

capable or extremely difficult of calculation, a provision for a certain sum for each day's delay was one for liquidated damages and not for a penalty. Neblett v. McGraw [Tex. Civ. App.] 14 Tex. Ct. Rep. 496, 91 S. W. 309. Where a contract for the exchange of merchandise for land provided that either party should forfeit $500 as liquidated damages if he failed to carry out the agreement, such provision was not to be construed as a penalty. Howard v. Adkins [Ind.] 78 N. E. 665.

61. Railroad contract. Henderson-Boyd Lumber Co. v. Cook [Ala.] 42 So. 838.

62. See 6 C. L. 997.

63. Provision in a deed by executors and trustees that grantee should not erect certain buildings "under penalty of the forfeiture of the said lot to the parties of the first part or their assigns" while equivalent to a provision for re-entry (Richter v. Distelhurst, 101 N. Y. S. 634), could not be construed to authorize re-entry by heirs of the trustee and hence was unenforceable (Id.).

64. Where fraud and deceit was not named as one of the grounds in contract for purchase of land. Bennett v. Glaspell [N. D.] 107 N. W. 45.

65. Where it did not appear that certain land owners gave a written notice which would authorize them to take charge of a railroad upon default of the company for thirty days thereafter. Georgia R. & Banking Co. v. Haas [Ga.] 56 S. E. 313.

66. Where pending trial of a traverse of an inquisition in forcible detainer proceedings, the landlord accepted rent both in arrear and in advance and the traverse was dismissed, a forfeiture for the tenant's failure to pay rent was thereby waived. Marshall v. Davis, 28 Ky. L. R. 1327, 91 S. W. 714.

67. See 6 C. L. 998.

68. Rev. St. 1899, § 2864, providing a forfeiture of $5,000 for wrongful death is penal and must be strictly construed. Carey v St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419. City ordinance imposing a penalty for hindering or delaying cars by using other vehicles on a switch track should be construed to relate only to an unreasonable hindrance or delay and not to a reasonable use of the street by adjacent owners. Dulaney v. United R. & Elec. Co. [Md.] 65 A. 45. A. 45.

69. The Texas statute (Sayles Rev. Civ. St. §§ 4497-4499), penalizing carriers for failure to furnish cars on demand does not apply to applications for cars for through interstate shipments in part on other lines. Texas & P. R. Co. v. Loving [Tex. Civ. App.] 17 Tex. Ct. Rep. 150, 98 S. W. 451. Where it appeared that the order only required the carrier to furnish the cars "as soon as possible" plaintiff could recover neither the penalty nor damages based only on failure to furnish the cars on such order within the time specified by statute. Texas & P. R. Co. v. Shipman [Tex. Civ. App.] 17 Tex. Ct. Rep. 152, 98 S. W. 449. 24 St. at L. p. 1, imposing a penalty on a carrier for damage to freight does not require the claimant to demand interest; and where he sues for the actual amount of damage without interest, and recovers the amount claimed, he is entitled to the penalty. Abrahams v. Columbia, etc., R. Co., 73 S. C. 542, 53 S. E. 819. Statute constitutional. Id.

70. Penalty for failure of administrator to file inventory within twelve months before suit brought. Atwood v. Buckingham, 78 Conn. 423, 62 A. 616.

71. Atwood v. Buckingham, 78 Conn. 423, 62 A. 616. Gen. St. 1902, § 1, provides that the repeal of an act shall not affect pending suits for penalties or forfeitures incurred under the act repealed. Held, the repeal of § 324, providing a penalty for the unexcused failure of an administrator to file an inventory within twelve months before suit brought to recover the penalty, did not affect an action pending at the time to recover the penalty under such section (Id.), but it did prevent the institution of any new actions, for any such delinquencies, past or future. Id.

72. Act July 6, 1905 (Pub. Acts 1905, p. 413, c. 217), providing the amount recoverable in actions pending to recover a penalty against an administrator for failure to file an inventory as provided by Gen. St. 1902, § 324, was not unconstitutional because retroactive, such legislation not being prohibited by the constitution. Atwood v. Buckingham, 78 Conn. 423, 62 A. 616. Did not impair vested rights (Id.), or the obli-

thereunder unless there is an express extinguishing clause in the repealing act.[73] A statute imposing a penalty for a wrongful act, to be enforced by an action in the name of the state, does not deprive the injured party of his civil action for damages.[74]

Relief from forfeitures.[75]—A court of equity will relieve from a forfeiture resulting from fraud,[76] accident, or misake,[77] if the applicant is free from negligence,[78] and no injustice results to other parties;[79] but in the absence of any such equities, relief will not be granted from a forfeiture based on contract if the measure of compensation is uncertain.[80] The doctrine in regard to the power of equity to relieve from the forfeiture of a leasehold in certain cases regardless of fraud, accident, or mistake, presupposes justice to the lessor, and will not be so applied as to subject him to loss.[81] One who comes into equity for relief, from a default in not paying money must be willing to pay what he owes and cannot simply plead the statute of limitations.[82]

It is provided by statute in North Dakota that one who has incurred a forfeiture under a contract may be relieved therefrom by making compensation unless the breach is grossly negligent, willful, or fraudulent.[83]

Cumulative penalties [84] are not allowed unless clearly provided for by the statute.[85] An ordinance may lawfully provide that a continuance of a breach thereof

gation of contract (Id.), nor encroach upon the judiciary (Id.), or deny plaintiffs in pending suits the equal protection of the laws. Id. The act applied to pending actions. Id.

73. Rev. St. § 13 (U. S. Comp. St. 1901, p. 61), providing that the repeal of any statute shall not extinguish any penalty, forfeiture or liability incurred thereunder, unless the repealing act shall expressly so provide, was not an attempt to curtail the power of succeeding congresses, but merely a new rule of construction of statutes thereafter enacted to be followed only until abrogated by some later congress. United States v. Standard Oil Co., 148 F. 719. Section 10 of the rate law of June 29, 1906 (34 St. 595, c. 3591), repealing all laws in conflict therewith, but providing that it shall not affect "causes now pending," did not relieve offenders under the old law from subsequent prosecution while leaving those previously indicted subject to punishment, but merely prescribed the rule of procedure in pending causes. Id.

74. Code 1902, § 2166, penalizing a carrier for refusing to check baggage does not prevent a passenger from suing for damages suffered, especially since § 2208 provides that the chapter shall not be construed to affect such suits. Sullivan v. Southern R. Co., 74 S. C. 377, 54 S. E. 586.

75. See 6 C. L. 998.

76. Purchase of a tax title with view of procuring a lease held not such fraud on tenant in possession as would entitle him to relief from forfeiture for failure to pay taxes. Kann v. King, 27 S. Ct. 213. The act of a landlord in accepting as a new tenant the purchaser of an irredeemable tax title to the property is not such a fraud on the tenant in possession as entitles him to relief from a forfeiture of the lease for his failure to pay the taxes, especially where the tenant refused an offer of the landlord to condone the forfeiture if the tenant would commence proceedings to have the tax title declared invalid and would secure the landlord from loss. Id.

77. Lessee who had expended a large sum for improvements and established a valuable good will held entitled to injunction restraining lessor from taking possession for failure to serve notice of renewal where such failure was due to lessee's being delayed in a foreign country, and there was a delay of only nineteen days from which lessor suffered no injury. Doepfner v. Bowers, 102 N. Y. S. 920.

78. No relief from forfeiture of lease for failure to pay taxes where lessee was guilty of gross negligence. Kann v. King, 27 S. Ct. 213.

79. No relief from forfeiture of lease for tenant's failure to pay taxes where it would require landlord to engage in a contest as to validity of a tax deed. Kann v. King, 27 S. Ct. 213.

"Equitable relief against forfeiture of estate," see note to Maginnis v. Knickerbocker Ice Co. [Wis.] 69 L. R. A. 833.

80. Breach of condition in respect of leasehold. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

81. The general power of equity to relieve from a forfeiture of a lease upon payment of full compensation by the defaulting party, even if conceded to apply to collateral covenants, cannot be so exercised as to compel an owner to risk the loss of his property by engaging in a contest involving the validity of an irredeemable tax title brought into existence by the tenant's failure to pay taxes. Kann v. King, 27 S. Ct. 213.

82. Water lease. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

83. Under Rev. Codes 1899, § 4970, plaintiff held entitled to relief from forfeiture in suit for specific performance. Bennett v. Glaspell [N. D.] 107 N. W. 45.

84. See 6 C. L. 999.

85. Code Civ. Proc. § 4814, authorizing a joinder of causes of action for penalties incurred "under the fisheries, game, and for-

for each day following notice shall constitute a distinct offense,[86] and cumulative penalties for the breach of such ordinance may be recovered in one action.[87] Where an offense is continuous, it is improper to cumulate a penalty imposed by statute on account thereof.[88]

§ 3. *Remedies and procedure.*[89]—Laches may defeat the right of a party to enforce a forfeiture.[90] An action in a Federal court against a common carrier for damages for discrimination in violation of the Federal interstate commerce act is governed by the Federal statute of limitations controlling suits or prosecutions for penalties or forfeitures accruing under the laws of the United States.[91] When a person is entitled to a part of any penalty or forfeiture when recovered, he may join with the state in an action to recover it.[92] An action may not be brought in the name of a city without its consent.[93]

Forfeitures being usually harsh and oppressive and ordinarily capable of being enforced at law, courts of equity generally refuse to aid in their enforcement;[94] but there is no insuperable objection to their enforcement in equity in cases otherwise cognizable there when that is more consonant with justice and morality than to withhold equitable relief,[95] and there is no adequate remedy at law.[96] The equity presented by such a suit must be strong enough to overcome the general indisposition of chancery courts toward granting such relief.[97] Equity will not enforce

ests law," does not permit the joinder of causes for penalties for adulteration of milk in violation of the Agricultural Law (Laws 1893, c. 338). People v. Koster, 50 Misc. 46, 97 N. Y. S. 829. Under Laws 1902, p. 1135, c. 482, § 1, amending Laws 1896, p. 329, c. 376, § 29, prohibiting one from having in his possession milk cans belonging to a dealer without his consent, and imposing a penalty of $50 "for every such violation," one having in his possession more than one can is liable for only one penalty in view of the strict construction required to be given a penalty statute, notwithstanding previous legislation on the subject imposing a penalty for each can. United States Condensed Milk Co. v. Smith, 101 N. Y. S. 129. Under Acts 29th Leg. p. 324, c. 133, imposing a penalty of $100 for each week a railroad fails to erect waterclosets at stations, a railroad is liable for a penalty of $100 for each week it fails to comply with the statute at any station in the county, but not for each station at which it so fails. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 25, 97 S. W. 724.

86. Ordinance establishing street grade. Village of Hampton v. Chicago, etc., R. Co., 118 Ill. App. 621.

87. Village of Hampton v. Chicago, etc., R. Co., 118 Ill. App. 621. Even if recovery could be had for only one offense, a general demurrer should have been overruled. Id.

88. Where gambling house was set up and continuously maintained. Lane v. Springfield, 120 Ill. App. 5.

89. See 6 C. L. 999.

90. Failure of state for fifty-four years to enforce forfeiture of lease for nonpayment of rent. People v. Freeman, 110 App. Div. 605, 97 N. Y. S. 343.

91. Five-year limitation prescribed by Rev. St. § 1047 (U. S. Comp. St. 1901, p. 727), applies and not the one-year period mentioned in Ann. Code, Miss. 1892, § 2741. Prosecution under Act Feb. 4, 1887. Carter v. New Orleans, etc., R. Co. [C. C. A.] 143 F. 99.

92. Rev. St. 1898, § 3297 State v. Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295.

93. Act April 13, 1859. Could not be brought to recover penalty provided by Act June 7, 1901 (P. L. 493), for conducting plumbing business without a license. Clauchs v. Pittsburg, 31 Pa. Super. Ct. 331.

94. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Equity will never enforce a forfeiture. Spies v. Arvondale & C. R. Co. [W. Va.] 55 S. E. 464, citing authorities. Would not restrain railway companies from using right of way claimed to have been forfeited. Id. Equity cannot be invoked merely to enforce a forfeiture, or to divest an estate for breach of a subsequent condition against a vendee in possession. Thornton v. Natchez [Miss.] 41 So. 498. Where a deed contained a provision holding the grantee to an implied covenant to use the land always for burial purposes, the remedy of grantor was at law. Id.

95. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801; Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630.

96. Remedy at law not adequate in suit to establish forfeiture of mining lease. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801.

97. Suit, the primary and only purpose of which is to establish a forfeiture as a matter of record and cancel a lease, is a suit in aid of a forfeiture. Brewster v. Lanyon Zinc Co. [C. C. A.] 140 F. 801. Bill to establish forfeiture of and cancel a mining lease for lack of diligence on part of lessee, held to call for relief not obtainable at law and to entitle lessor to the relief sought. Id. Where a corporation tenant failed to erect an expensive building on the premises and after notice of forfeiture in accordance with the lease, was adjudged a bankrupt, held, on petition of the lessor the bankruptcy court properly decreed the enforcement of the forfeiture and directed a surrender of the property as the only effective protection for the

against a vendee a technical forfeiture of an executory contract for the sale of land if defendant offers to do equity in consideration of being restored to her contractual rights.[98]

One seeking to recover under a penal statute must allege and prove facts bringing the case strictly within its terms,[99] and where a penalty is entirely unknown to the common law, the precise amount fixed by the statute must be demanded in the complaint.[1] A mere reference to a statute is not sufficient where it contains several provisions each reciting different facts upon which a penalty may be predicated.[2] A statute imposing a penalty to be recovered in the name of the state "in addition" to damages to any person injured does not require proof of any private injury as a condition to recovery of the penalty.[3] Ordinarily a judgment for a penalty does not bear interest.[4]

PENSIONS.[5]

Questions as to whether the statutory grounds for a pension exist,[6] who is entitled to the benefit of the pension,[7] and the amount thereof,[8] all depend upon the construction of the various statutes. It is competent for the legislature in providing for a pension fund from the revenues of the state to make the decision of the board of trustees placed in charge thereof final as to who is entitled to the benefit thereof.[9] Where the granting board acts in a quasi judicial capacity, its decision cannot, after the lapse of many years and in the absence of the petitioner, be set aside by another board as unsupported by the evidence.[10] Where the amount depends upon certain conditions and circumstances, it will be presumed prima facie that the officer charged with administering the fund considered such conditions and

lessor. Lindeke v. Associates Realty Co. [C. C. A.] 146 F. 630.

98. Yeiser v. Portsmouth Sav. Bank [Neb.] 106 N. W. 784.

99. Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419. The complaint must state every fact necessary to constitute a cause of action under the statute. Complaint for penalty for violation of Agricultural Law (Laws 1893, p. 660, c. 338, § 20), held bad. People v. Koster, 50 Misc. 46, 97 N. Y. S. 829.

1. Petition for death by wrongful act claiming less than $5,000 states no cause of action under Rev. St. 1899, § 2864. Casey v. St. Louis Transit Co., 116 Mo. App. 235, 91 S. W. 419. Question considered at length and case distinguished from common-law recoveries made cumulative by statute. Id.

2. Not sufficient merely to refer to §§ 20, 22, of Agricultural Law (Laws 1893, p. 660), in prosecution for selling adulterated milk. People v. Koster, 50 Misc. 46, 97 N. Y. S. 829. Code Civ. Proc. § 530, providing that in pleading a private statute it shall be sufficient to refer to it by year, title and chapter, did not apply. Id.

3. Rev. St. 1898, § 1809, imposing penalty upon railroads for exceeding speed limits. State v. Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295.

4. Error to allow interest from date of trial in lower court on judgment against railroad for penalties for failure to erect waterclosets. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 25, 97 S. W. 724.

5. See 6 C. L. 100.

6. A policeman committing suicide while insane does not die "in the line of duty," within Laws 1903, p. 102, c. 41, unless it appears that his insanity resulted from the performance of duty. Hutchens v. Covert [Ind. App.] 78 N. E. 1061.

7. The right of a policeman's widow to pension allowed her husband under city charter of San Francisco, art. 8, c. 10, § 11, subd. 9, depends upon the provisions of the first portion of section 6, and the concluding portion does not confer any rights but on the contrary creates a limitation upon rights which might otherwise exist. Burke v. San Francisco Police Relief & Pension Fund Trustees [Cal. App.] 87 P. 421. The amendment to the Illinois police pension act, providing for the continuance of the pension to the pensioner's widow, applies to the widow of one receiving a pension at the time the act was passed. Eddy v. People, 118 Ill. App. 138. Under a statute providing that where a position under the civil service is abolished the incumbent shall be entitled to re-employment if there is need for his services within a year, one dying within a year after the abolition of his position is considered as suspended and is entitled to pension. N. Y. Charter, §§ 792, 1542. Reidy v. New York, 185 N. Y. 141, 77 N. E. 1011.

8. San Francisco City Charter art. 8, c. 10, § 11, subd. 9, creating relief fund for benefit of policemen and their families held to be prospective only and to entitle widow of policeman to only such sum as was retained from her husband's salary after charter went into effect. Burke v. San Francisco Police Relief & Pension Fund Trustees [Cal. App.] 87 P. 421.

9. Act No. 43, p. 51, of 1902, creating board of trustees of firemen's pension fund, makes decision of such board final as to who is entitled to pensions. State Fireman's Pension & Relief Fund Trustees [La.] 42 So. 506.

10. Eddy v. People, 120 Ill. App. 626.

circumstances and that the amount allowed by him is covered.[11] An exemption of pension funds from seizure in legal proceedings exempts such funds from claims for support and maintenance in the past;[12] but where the support of an incompetent is a charge against his estate, pension funds should be applied to his present support.[13] The assignment of a cause of action for the conversion of a pension check and the proceeds thereof is not prohibited by the Federal statute relating to exemptions of pension funds from legal seizure.[14] Upon the death of a Federal pensioner's widow, an accrued pension goes to her children free from any claim for her debts.[15]

The remedy of one claiming error in fixing the amount of his pension is by mandamus,[16] but the writ will not issue against a respondent who has parted with the funds pursuant to law.[17] An averment that there is in the official custody of the defendant "more than sufficient money applicable to" the petitioner's claim is merely an amount of a legal conclusion and is limited by the facts upon which the claim is based,[18] and the law applicable thereto and an averment of contribution to a pension fund is not sustained by proof that the money was retained pursuant to statute act of a salary.[19] On demurrer to a petition for mandamus to compel the reinstatement of a pension, it will be presumed that the board that granted the pension kept a record as required by law,[20] and that such record shows a finding and adjudication in the petitioner's favor as alleged,[21] and averments entitling the petitioner to relief are not overcome by an informal notice, recited in the petition, of suspension of the pensioner for lack of evidence.[22] Mandamus is properly denied where it appears that a claim greater than the amount actually due has been audited and allowed and it does not appear that the petitioner has ever demanded the money on such claim so allowed and no reason is shown why he has not received it.[23]

PEONAGE; PERFORMANCE, see latest topical index.

PERJURY.

§ 1. Elements of the Offense (1344). Subornation of Perjury (1345).
§ 2. Prosecution and Punishment (1345). Indictment (1345). Admissibility of Evidence (1347). Sufficiency of Evidence (1347). Instructions (1348).

§ 1. *Elements of the offense.*[24]—Perjury and false swearing were at common

11. Where the statute provides for a retiring pension of one-half pay at time of retirement "or such less sum as the condition of the fund will warrant," one pensioned at less than half his pay has the burden of proving that more could have been allowed. Ramsay v. Hayes [N. Y.] 80 N. E. 193, rvg. 112 App. Div. 442, 98 N. Y. S. 394.

12. Under Code Civ. Proc. § 1393, claim for past support of incompetent not allowable against pension funds. In re Strohm, 101 N. Y. S. 688.

13. See Code Civ. Proc. § 2321, and section 66, of the insanity law. In re Strohm, 101 N. Y. S. 688.

14. See Rev. St. U. S. § 4747 (U. S. Comp. St. 1901, p. 3279). Alexander v. Gloversville, 110 App. Div. 791, 97 N. Y. S. 198.

15. Pinson v. Sanders, 29 Ky. L. R. 715, 96 S. W. 444.

16. Ramsay v. Hayes [N. Y.] 80 N. E. 193.

17. Act March 4, 1889 (St. 1899, p. 57), not available to charge Board of Trustees of Police Relief and Pension Fund of City and County of San Francisco with duty to pay widow of policeman benefits provided for by charter of such city and county, art. 8, c. 10, § 11, subd. 9, out of funds paid into the general fund pursuant to section 14 of the charter, since the general law was superseded by the special. Burke v. San Francisco Police & Pension Fund Trustees [Cal. App.] 87 P. 421.

18. Burke v. San Francisco Police Relief and Pension Fund Trustees [Cal. App.] 87 P. 421.

19. Money retained out of policeman's salary pursuant to San Francisco City Charter, art. 8, c. 10, § 11, subd. 9 (St. 1899, p. 334, c. 2), held not a contribution by the officer but the money of the state retained for the creation of the pension fund. Burke v. San Francisco Police Relief and Pension Fund Trustees [Cal. App.] 87 P. 421.

20. See Hurd's Rev. St. 1903 p. 362, relating to police and firemen's relief fund. Eddy v. People, 120 Ill. App. 626.

21. Eddy v. People, 120 Ill. App. 626.

22. Notice signed only by clerk of board of trustees, and setting out no resolution of the board or copy of any record and not stating wherein evidence was insufficient. Eddy v. People, 120 Ill. App. 626. The statute relating to police and firemen's relief fund does not require the evidence on which a pension is granted to be preserved. Id.

23. Burke v. San Francisco Police Relief and Pension Fund Trustees [Cal. App.] 87 P. 421.

24. See 6 C. L. 1000.

law distinct offenses, it not being essential to the latter offense that the oath be in a judicial proceeding,[25] and this separation is preserved in some states.[26]

Perjury is willful,[27] false,[28] swearing in respect of a material matter [29] of fact,[30] before an officer or tribunal having jurisdiction,[31] and upon an oath duly administered by a competent officer.[32] Perjury cannot be predicated on testimony given under a statute providing that such testimony cannot be used against the witness in any criminal proceeding.[33]

Subornation of perjury.[34]—Though the offense is designated "subornation of perjury," it may, if the terms of the statute clearly so import, include subornation to false swearing.[35]

§ 2. *Prosecution and punishment.*[36]—In Pennsylvania it is held that an indictment for perjury should not be brought to trial until the termination of the proceeding in which it is alleged to have been committed.[37]

Indictment.[38]—The indictment must charge offense substantially in words of

25. False swearing was at common law an offense distinct from perjury and a statute defining the former offense, though variant from the common law, does not repeal one relating to perjury. State v. Coleman, 117 La. 973, 42 So. 471.

26. It is not essential to the offense of false swearing that it be in a judicial proceeding. Stamper v. Com. [Ky.] 100 S. W. 286.

Materiality is not essential to the offense of false swearing under the Texas statute. Wilson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 939, 93 S. W. 547.

27. Must be known to be false or be made under such circumstances that knowledge of falsity will be imputed. State v. Smith, 47 Or. 485, 83 P. 865. Verification in good faith of claim against municipality not perjury, though municipality was not in law liable. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 800, 106 N. W. 547.

28. An oath by an applicant under the timber and stone land act that he has made no contract by which the title shall inure to another is falsified by an oral contract to sell. Boren v. U. S. [C. C. A.] 144 F. 801.

29. Statement before election officers as to residence of electors held material. People v. Ellenbogen, 99 N. Y. S. 897. Evidence before coroner as to acts having no relation to death held immaterial. Commonwealth v. Nailor, 29 Pa. Super. Ct. 275. Question before grand jury as to whether accused had guarded the door of a place where liquor was sold held material, though it was not unlawful so to do. Lewis v. State [Ark.] 94 S. W. 613. Materiality of the alleged perjured testimony **is a question of fact.** People v. Chadwick [Cal. App.] 87 P. 384. Testimony as to one element of an offense is material though the proof falls as to others. Denial on trial for assault with weapon that one had such weapon. Scott v. State, 77 Ark. 455, 92 S. W. 241.

30. Testimony that accused "never made any trade" with a certain person held a conclusion. Commonwealth v. Bray, 29 Ky. L. R. 757, 96 S. W. 522.

31. That there was a misjoinder of offenses in the indictment does not affect jurisdiction. Gardner v. State [Ark.] 97 S. W. 48. Jurisdiction not affected by the fact that accused was improperly arrested without a warrant. Id.

32. Referee in bankruptcy may examine witnesses under oath in proof or disproof of claims filed. United States v. Simon, 146 F. 89. Register of land office may require oath at the time of final proof that application under timber land act is in good faith for the sole benefit of the applicant. United States v. Brace, 149 F. 869. That the officer applied to his signature two official designations, by virtue of either of which he was entitled to administer the oath, is no defect. "Justice of the peace and ex officio notary public." Wilson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 939, 93 S. W. 547. Authority of county attorney to take affidavits as to commission of offense does not authorize examination on oath of persons captured in raid of gambling house. Williams v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 531, 96 S. W. 47. Deputy bond recorder has in the absence of the recorder authority to administer oath to sureties on bonds to be recorded. Henderson v. Com., 28 Ky. L. R. 1212, 91 S. W. 1141.

33. Testimony of bankrupt before referee. Bankr. Act 1898, c. 541, § 7. United States v. Simon, 146 F. 89.

34. See 6 C. L. 1001.

35. Ky. St. 1903, §§ 1174-1177. Henderson v. Com., 28 Ky. L. R. 1212, 91 S. W. 1141.

36. See 6 C. L. 1001.

37. Trial for perjury at coroner's inquest need not be delayed till termination of prosecution for homicide based on the transaction which the coroner was investigating. Commonwealth v. Nailor, 29 Pa. Super. Ct. 275.

38. See 6 C. L. 1001.

Essentials of indictment stated. Higgins v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 354, 97 S. W. 1054; State v. Gordon, 196 Mo. 185, 95 S. W. 420; State v. Walker, 194 Mo. 367, 91 S. W. 899; State v. Jewett [Or.] 85 P. 994.

Indictment for subornation sustained. Boren v. U. S. [C. C. A.] 144 F. 801. Indictment for subornation of applicant for public lands to falsely swear that no other person had an interest in the application sustained. United States v. Brace, 149 F. 869. And see, also, State v. Jewett [Or.] 85 P. 994

statute.[39] It must allege the oath,[40] the occasion on which it was taken,[41] the authority of the officer administering it, unless such authority is judicially known from his office,[42] though it need not name him,[43] the substance of the alleged false testimony,[44] its willful [45] falsity,[46] and the facts from which its materiality will appear.[47] Where the alleged perjury was on trial of a criminal prosecution, the alleged crime must be so stated as to show that it was such,[48] but it is immaterial that defects in the indictment on which such trial was had are shown.[49] A number of false statements relating to the same matter may be alleged,[50] and proof upon one justifies conviction,[51] but each should be separately alleged and traversed.[52] Indictment for false denial that defendant did not see a certain crime committed need not state the county in which such crime was committed.[53]

Variance as in other cases is not fatal unless as to a material matter.[54]

39. Must conclude that accused, in manner aforesaid, "wilfully and corruptly did commit wilful and corrupt perjury." Commonwealth v. Nailor, 29 Pa. Super. Ct. 275.

40. The oath administered need not be set out where it appears that it was administered in open court. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509. Averment that one was "undue manner sworn" sufficient in Oregon. State v. Jewett [Or.] 85 P. 994.

41. Averments held sufficient to show that alleged perjured testimony was given on the trial of a case. State v. McLain [Wash.] 86 P. 388. Averment that oath was taken in election contest proceedings then being conducted "under and in accordance with the law" sufficiently shows that the notice prerequisite to the taking of depositions in such a contest had been given Commonwealth v. Coakley, 29 Ky. L. R. 948, 96 S. W. 876. Alleged false affidavit set out held sufficiently connected with averments as to its making. State v. Jewett [Or.] 85 P. 994. Oregon state land board being a constitutional board its authority to act in a particular matter need not be alleged. Id.

42. The indictment need not allege the authority of the clerk of a court of record to administer the oath to witnesses therein. State v. Harter [Iowa] 108 N. W. 232.

43. An averment that the oath was administered by "the duly authorized clerk" of a certain court of record is sufficient. State v. Harter [Iowa] 108 N. W. 232.

44. In stating alleged false testimony the questions to which it was in answer need not be set out. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509. The false testimony on which perjury is assigned should be set out as nearly as possible in the words of the witness, and no testimony not deemed false and material should be set out. Higgins v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 354, 97 S. W. 1054.

45. Must allege scienter. Adams v. Com., 29 Ky. L. R. 683, 94 S. W. 664. Averments of knowledge of falsity held sufficient. State v. Jewett [Or.] 85 P. 994.

46. "Whereas it was true as accused well knew that" stating the negative of the testimony alleged, is sufficient. Commonwealth v. Schwieters, 29 Ky. L. R. 417, 93 S. W. 592. Alleged testimony that accused did not see a certain game is falsified by an averment that he did see it. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509. Averments held sufficient to negative alleged false affidavit by applicant for public land that application was for his own benefit. Not necessary to set out terms of contract by applicant to sell. State v. Jewett [Or.] 85 P. 994.

47. Averment that it was material whether a third person knew certain facts and that accused falsely testified that he heard such person state that he did not know them is insufficient. Rosebud v. State [Tex. Cr. App.] 98 S. W. 868. Averment that on prosecution against accused it became material whether he was at a certain place at a certain time is sufficient. State v. McLain [Wash.] 86 P. 388. Information charging perjury on inquiry whether accused "had seen" certain persons gambling is insufficient. Barton v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 568, 95 S. W. 110; Gallegos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 630, 95 S. W. 123. The substance of the issue must be alleged so that the materiality of the alleged false testimony is apparent. Averment merely that a certain fact was material held insufficient. State v. Argo [Tenn.] 100 S. W. 106.

48. Information for perjury on trial for gambling held insufficient for failure to sufficiently show that the alleged gambling was not at a private residence. Barton v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 568, 95 S. W. 110. Information for perjury on trial for gaming held insufficient because not alleging any wager on card game. Gallegos v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 630, 95 S. W. 123.

49. Indictment is not vitiated by averment that perjured testimony was given on trial for two offenses which could not be properly joined. Gardner v. State [Ark.] 97 S. W. 48.

50, 51. State v. Gordon, 196 Mo. 185, 95 S. W. 420; State v. Taylor [Mo.] 100 S. W. 41.

52. Higgins v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 354, 97 S. W. 1054.

53. Sweat v. Com., 29 Ky. L. R. 1067, 96 S. W. 843.

54. Mistake as to given name of person suborned held not fatal. Henderson v. Com., 28 Ky. L. R. 1212, 91 S. W. 1141. Variance between indictment for perjury on trial for two offenses and proof that the trial was for one of them not fatal under statute that only objections to indictment affecting substantial rights shall avail. Gardner v. State [Ark.] 97 S. W. 48. Evidence held to substantially sustain averment of indictment as to alleged perjured testimony relating to commission of larceny by third persons.

Admissibility of evidence.[55]—The alleged false testimony may be proved by any person who heard it given.[56] Appointment of officer administering oath may be shown by secondary evidence if order of appointment is lost.[57] The rules applicable to other crimes apply in respect to evidence to prove the falsity of the testimony,[58] and defendant's knowledge thereof.[59] False testimony on another occasion actuated by the same motive cannot be shown,[60] nor can facts tending to show knowledge of facts distinct from those of which defendant is accused of falsely denying knowledge.[61] The indictment on trial of which the alleged perjury was committed is admissible,[62] and on trial for perjury before grand jury, the indictment found in the case then under consideration.[63] The mental and physical condition of accused as bearing on his powers of memory at the time of the alleged perjured testimony may be shown.[64]

Sufficiency of evidence.[65]—The prosecution must prove the taking of the oath [66] before the officer named,[67] and his authority,[68] and where perjury is alleged on trial for offense against an ordinance, the ordinance must be proved.[69] On indictment for false swearing, the proceedings in which the false oath was made need not be shown.[70] Sufficiency of the information on trial of which the alleged perjured testimony was given, ruled at such trial, cannot be again raised on the trial for perjury.[71] The evidence of the falsity of the testimony counted on must be direct,[72] and consist of proof by two witnesses or one witness with corroborating circumstances;[73] but the

Martinatis v. People, 223 Ill. 117, 79 N. E. 55. Indictment for perjury in proceeding in court under naturalization law held fatally variant from proof of affidavit before notary in naturalization proceeding. Moore v. U. S. [C. C. A.] 144 F. 962. Proof of alleged perjured testimony held not substantially variant from indictment. Stanley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 590, 95 S. W. 1076.

55. See 6 C. L. 1002.

56. On prosecution for false answers on voir dire. Leaptrot v. State [Fla.] 40 So. 616.

57. People v. Ellenbogen, 99 N. Y. S. 897.

58. On an issue as to the falsity of an affidavit that the stock of a corporation organized by defendant was paid in evidence of defendant's poverty is admissible. Komp v. State [Wis.] 108 N. W. 46. To disprove testimony that a deed was recorded oral testimony of the custodian of the record is admissible. Stamper v. Com. [Ky.] 100 S. W. 286.

59. On charge of perjury in support of claim of third person against city for personal injury, evidence that at about same time accused and such person made claims against other cities for same injury is admissible. State v. Smith, 47 Or. 485, 83 P. 865.

60. That accused had denied on oath having seen certain other card games. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509. As is evidence as to the positive character of the proof that he did see such other games. Weems v. State [Tex. Cr. App.] 95 S. W. 513.

61. On trial for falsely denying that accused had seen certain gambling evidence that he had been previously warned against allowing gambling on his premises is not admissible. Lamar v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 392, 95 S. W. 509.

62. Stanley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 590, 95 S. W. 1076.

63. Nance v. State, 126 Ga. 95, 54 S. E. 932.

64. Leaptrot v. State [Fla.] 40 So. 616.

65. See 6 C. L. 1002.

66. Proof of authenticity of the signatures of officer and affiant makes a prima facie case of execution of an affidavit. Komp v. State [Wis.] 108 N. W. 46. Evidence held insufficient to rebut. Id.

67. The burden is on the state to prove that the oath was taken before the person named as notary and that he was a notary whose jurisdiction included the place where the oath was administered. Commonwealth v. Schwieters, 29 Ky. L. R. 417, 93 S. W. 592.

68. Proof of appointment of officer and assumption by him of duties is prima facie sufficient. Burden is on accused to show that oath of office was not taken. People v. Ellenbogen, 99 N. Y. S. 897.

69. Gardner v. State [Ark.] 97 S. W. 48.

70. Only bond in justification of which perjury is assigned need be introduced. Stamper v. Com. [Ky.] 100 S. W. 286.

71. People v. Chadwick [Cal. App.] 87 P. 384.

72. On an issue as to the falsity of testimony by accused that he wrote certain telegrams at a certain time, evidence that they were in his possession before such time is direct. People v. Chadwick [Cal. App.] 87 P. 384.

73. Sweat v. Com., 29 Ky. L. R. 1067, 96 S. W. 843. Corroboration must be strong. Cook v. U. S., 26 App. D. C. 427. Testimony as to falsity held not sufficiently direct in its contradiction. Id.

Evidence insufficient: Impeached witness and conflicting statements by accused insufficient. Cleveland v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 521. Evidence as to willful falsity of testimony on voir dire held insufficient in view of proof of defendant's impaired mentality. Leaptrot v. State [Fla.] 40 So. 616. Evidence that an occurrence took place but uncertain as to

corroboration need not be equivalent to the direct testimony of another witness,[74] or sufficient of itself to sustain a conviction.[75] The rule requiring two witnesses does not apply to a prosecution for subornation.[76] As in other cases, corroboration of an accomplice is generally required.[77]

Instructions[78] as in other cases must confine the jury to the accusation[79] and submit all defenses of which there is evidence,[80] and must not assume matters in issue.[81] An instruction as to the necessity of two witnesses or their equivalent need not be given unless requested.[82]

PERPETUATION OF TESTIMONY, see latest topical index.

PERPETUITIES AND ACCUMULATIONS.

§ 1. The Rule Against Perpetuities and Accumulations; Its Nature and Applications (1348).
§ 2. Computation of the Period and Remoteness of Particular Limitations (1350). Charitable Gifts (1352). Accumulations of Income (1352).
§ 3. Operation and Effect, Complete and Partial Invalidity (1352).

§ 1. *The rule against perpetuities and accumulations; its nature and applications.*[83]—Whenever a contract raises an equitable right in property which the obligee can enforce in chancery by a decree for specific performance, such right is subject to the rule against perpetuities.[84]

The suspension prohibited is such as arises from the terms of the instrument by which the estate is created, and not such as exists outside of it,[85] and the prohibition is directed toward the suspension of the power when exercised by those who hold or control the estate or some interest therein, and not to provisions limiting a naked power to sell given to one without any interest whatever, as an executor.[86]

defendant's presence held insufficient in connection with conflicting statements by defendant to show falsity of denial that he saw it. Billingsley v. State [Tex. Cr. App.] 95 S. W. 520.

74. Stamper v. Com. [Ky.] 100 S. W. 286. Testimony of custodian of record and return of officer on execution held sufficient to disprove testimony as to recording of deed. Id.

75. The corroborating evidence need not be sufficient of itself to sustain a conviction but must tend to connect accused with the offense. Nance v. State, 126 Ga. 95, 54 S. E. 932.

76. Boren v. U. S. [C. C. A.] 144 F. 801.

77. The officer is not an accomplice because he knew of the falsity of the affidavit. Wilson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 939, 93 S. W. 547. Evidence of falsity of testimony to support an alibi of a third person held insufficient to corroborate accomplice. People v. Smith [Cal. App.] 84 P. 452.

78. See 6 C. L. 1003.

79. Instruction held to sufficiently confine the issue to the testimony charged as false. People v. Chadwick [Cal. App.] 87 P. 384.

80. Where there is evidence that **defendant's memory was impaired** at the time of giving the testimony, he is entitled to an instruction thereon. Leaptrot v. State [Fla.] 40 So. 616. Effect of **belief in truth** of statement held sufficiently charged. People v. Ellenbogen, 99 N. Y. S. 897.

81. Charge as to belief in truth held not to assume falsity. Wilson v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 939, 93 S. W. 547.

82. Scott v. State, 77 Ark. 455, 92 S. W. 241.

83. See 6 C. L. 1003.

84. Starcher Bros. v. Duty [W. Va.] 56 S. E. 524. Option contract for purchase of land good for one year and providing for extending it for another year on payment of stipulated sum, and that optionee "may have this option and agreement so extended from year to year upon the payment of said sum annually as aforesaid," and extending its provisions to heirs, assigns, executors, and administrators of both parties, held void since it could be extended to period beyond that allowed. Id. Contract being illegal from its inception, held that it was given no vitality by payments made and received for annually extending it. Id. Similar contract providing that optionees "may have this option and agreement extended upon the payment of said sum annually as aforesaid," the words "from year to year" being omitted, held void. Starcher Bros. v. Duty [W. Va.] 56 S. E. 527.

85. Fact that some of interested parties were minors, incapable of executing valid conveyances except by intervention of court, held not to bring case within prohibition.

86. In re Campbell's Estate [Cal.] 87 P. 573. Provision giving executor mere naked power of sale with a direction to hold property for a specified price until testator's daughter reached age of twenty-one, or, if she died sooner, until she would have reached that age if she had lived, held not a violation of Code, §§ 715, 716, it not affecting the general power of alienation by executor under order of court, or by persons to whom property was given. Id.

The validity of any future estate depends upon the certainty of its vesting within the prescribed period,[87] which certainty must exist at the time of its creation.[88] An interest is not obnoxious to the rule if it begins within the prescribed period, although it may extend beyond that limit.[89] The mere fact that a contingent interest may be released by a person in being and that a good title may thus be made is not enough to take the case out of the rule.[90] Where the interests vest immediately, the rule is not violated by reason of the fact that enjoyment is postponed to a time beyond the period prescribed.[91] A trust to pay annuities does not operate as a suspension of the power of alienation,[92] except where such annuities are not assignable.[93] The fact that a will creating a trust for two lives also provides for the payment of a fixed annuity to a third person does not render it void, it not preventing the vesting of the estate.[94]

A suspension of the power of alienation as to realty and of absolute ownership as to personalty occurs only when there are no persons in being by whom an absolute estate in possession can be conveyed.[95]

Power held a mere naked one not coupled with any interest. Id.

87. Brown v. Columbia Finance & Trust Co. [Ky.] 97 S. W. 421. Is not sufficient that limitation be capable of taking effect within prescribed period, but must be so framed as to take effect ex necessitate within that period, if at all. Gray v. Whittemore [Mass.] 78 N. E. 422. Will gave property in trust to pay income to wife for life, and then to daughter for life, and upon death of latter to divide same between her issue, and provided that on her death without issue, or in case all such issue should die under age of twenty-one, property should go to others. Held that trust was void, there being a probability that it would be measured by more than two lives. In re Bruchaeser's Estate, 49 Misc. 194, 98 N. Y. S. 937. If contingency on which estate is to vest must certainly happen within period, it does not offend rule. Keeler v. Lauer [Kan.] 85 P. 541. Provision creating trust which was to terminate when youngest child arrived at age of twenty-one, when property was to pass to children, held valid under common-law rule in force in absence of statute, since contingency must happen within twenty-one years. Id.

88. Estate will be void when this certainty does not exist at time of its creation, though subsequent events so happen that it could vest after that period. Brown v. Columbia Finance & Trust Co. [Ky.] 97 S. W. 421. Testator devised realty in trust to use of daughter for life with remainder to such of her children as she might appoint, or in default of appointment to her heirs. Daughter appointed property to her six children for life with remainder over. Held that attempted limitation of their estate to life estate with remainder over was void under St. 1903, § 2360, regardless of fact that all of such children were living at time of original testator's death, since mother might have had children born after that time who would have survived her. Id. Where, by terms of an instrument creating an estate, there may be an unlawful suspension, limitation is void though it turns out by subsequent events that no actual suspension beyond the prescribed period would have taken place. People's Trust Co. v. Flynn, 113 App. Div. 683, 99 N. Y. S. 979. Fact that widow elected to take dower held not to authorize elimination of provision in will for her benefit in determining question of suspension of power of alienation by trust in which such provision was contained. Id.

89. Gray v. Whittemore [Mass.] 78 N. E. 422.

90. Starcher Bros. v. Duty [W. Va.] 56 S. E. 524.

91. Remainders so limited as to necessarily vest in interest within period limited. Gray v. Whittemore [Mass.] 78 N. E. 422. Will held not to create trust in personalty but merely to postpone time of payment. In re Robert's Will, 112 App. Div. 732, 98 N. Y. S. 809.

92. Trust to pay out of income of personalty annuities to seven annuitants during their respective lives held valid at common law. Robb v. Washington & Jefferson College, 185 N. Y. 485, 75 N. E. 359.

93. Trust to pay out of income of personalty annuities to seven annuitants during their respective lives held invalid under Laws 1897, p. 507, c. 417, § 2, as suspending absolute ownership for more than two lives in being, such an annuity being inalienable. Robb v. Washington and Jefferson College, 185 N. Y. 485, 78 N. E. 359. Fact that ultimate remainder was to charity held not to change rule. Id.

94. Cole v. Lee, 143 Mich. 267, 12 Det. Leg. N. 975, 106 N. W. 855.

95. Real property law, § 32. In re Bray, 102 N. Y. S. 989. Gift to brother of use of property until last of testator's children should become of age, the property then to be sold and proceeds divided equally between children, held not to suspend power of alienation, remainder in children being vested and there being persons in being who could pass indefeasible title at any time with immediate possession. Id. Test of alienability is whether or not there are persons in being who can give perfect title, and rule has no application where there are living persons who have unitedly the entire power of disposition free and untrameled. Graham v. Graham, 49 Misc. 4, 97 N. Y. S. 779. Not where remaindermen and life tenants can together give good title if they desire to do so. Id. Gift of residue of personal estate in trust to pay certain specified annuities to three persons for their

An estate which cannot be created by direct devise without violating the rule cannot be created through the intervention of a power of appointment.[96]

The New York statute permits the creation of only two life estates in the same property.[97] Each undivided share of a tenant in common must, in such case, be treated as a separate entity, and under the statute is entitled to is own separate tenant for two lives.[98]

The validity of a trust is to be determined by the laws of the state where the trustee resides, the property is to be held, and the trust administered.[99] A trust in favor of a foreign corporation, valid under the laws of the state where the corporation is domiciled and of the state where the testator resided and the property is situated, will be upheld by the courts of the latter state under the doctrine of comity.[1]

§ 2. *Computation of the period and remoteness of particular limitations.*[2]—Limitations or conditions in wills suspending the power of alienation are deemed created at the death of the testator.[3] The period during which the absolute right of alienation may be suspended by an instrument in execution of a power must be computed not from the date of such instrument, but from the creation of the power.[4] Though the statute prohibits suspension for more than two lives, an entire

lives, the trustee having power to use principal for that purpose if necessary, held not a trust to receive income and apply it to any person, and hence interests of annuitants were assignable under Laws 1897, p. 508, c. 417, § 3, and absolute ownership was not suspended. Wells v. Squires, 102 N. Y. S. 597. Where it distinctly appeared by terms of will itself that deed executed by life tenants and remaindermen would convey an absolute title in fee, held that there was no restraint upon alienation or violation of rule against perpetuities. Thieler v. Rayner, 100 N. Y. S. 993. Power of alienation is not suspended when there are persons in being by whom an absolute interest in possession can be conveyed. Civ. Code, § 716. In re Campbell's Estate [Cal.] 87 P. 573. Where no trust is created and legal effect is to vest present title to entire fee in persons ascertained and in being, though different interests or rights are given to each, interest of each can be conveyed immediately and collective transfers of all of them will convey absolute fee and there is no suspension. Id.

96. Effect of execution of power is to make such act in effect that of the original testator. Brown v. Columbia Finance & Trust Co. [Ky.] 97 S. W. 421.

97. Laws 1896, p. 565, c. 547, § 33. Graham v. Graham, 49 Misc. 4, 97 N. Y. S. 779. Where three sisters were given use and occupancy of premises during term "that they each or the survivors and survivor of them" remained unmarried, held that on death of one of them survivors took life estate in common in her share, which would continue until one of them died or married, when limit of statute as to that share would be reached, and fee would be released from life estate as to it. Id. Statute not violated by gift to husband for life, then in trust for benefit of two sons for life, with ultimate remainder to grandchildren, legal estate in trustees not being two life estates. In re Hurlbut's Estate, 51 Misc. 263, 100 N. Y. S. 1098.

98. Graham v. Graham, 49 Misc. 4, 97 N. Y. S. 779.

99. Rule against perpetuities in force in Pennsylvania held to govern. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

1. Testamentary trust in favor of a New York cemetery association for perpetual maintenance of cemetery lot, permitted by laws of that state, will be upheld by courts of District of Columbia, where testatrix was domiciled at time of her death and where property from which trust fund was created was situated, trusts for that purpose in favor of domestic corporations being authorized by Code D. C. § 669. Iglehart v. Iglehart, 27 S. Ct. 329, afg. 26 App. D. C. 209.

2. See 6 C. L. 1004.

3. Trust to continue during life of son and of all of his children living at time of testator's death, which could, under certain circumstances, end sooner but could not exist longer held not to violate Civ. Code, § 715, prohibiting suspension by any condition or limitation whatever for a longer period than continuation of lives in being at the creation of the limitation or condition. In re Lux's Estate [Cal.] 85 P. 147. Fact that by reason of provision requiring that, on termination of trust, property be divided between son's children then living, children born after testator's death and before termination of trust would be entitled to share, held immaterial. Id.

4. Laws 1896, p. 583, c. 547, § 158. Where will suspended power of alienation of realty during lives of testator's two daughters attempted exercise of power of appointment by survivor whereby she directed that property be held in trust for life of certain person with remainder to persons who could not be determined until death of latter, held invalid as suspending power of alienation for three lives. Farmers' Loan & Trust Co. v. Kip, 102 N. Y. S. 137. Statute is made applicable to suspension of absolute ownership of personalty by Laws 1897, p. 507, c. 417, § 2. In re Pillsbury's Will, 113 App. Div. 893, 99 N. Y. S. 62. Provisions of will attempting to execute power of appointment created by will must be tested by reading them into

estate may be held in trust for one beneficiary for life, and on his death may then be divided into shares, each of which may be held in trust for a second separate life.[5] The construction of deeds[6] and wills[7] for the purpose of determining whether the language used therein attempts to create estates void under the rule is treated elsewhere. Applications of the rule to particular estates will be found in the note.[8]

will creating power, and hence attempt to postpone absolute ownership of personalty by lives not in being at death of maker of will creating power is void. Id.

5. Not necessary that whole corpus be released at end of any two lives. In re Mount's Will, 185 N. Y. 162, 77 N. E. 999. Testatrix gave residue in trust to pay income to sister for life, and directed that on latter's death share should be set apart for each of the living children of nephew and for issue of each who had died leaving issue, income to be paid to each child for life with remainder to his issue, and principal of shares set apart for issue of deceased children to be paid to them on reaching age of twenty-five. Held that as to share of children living at death of testatrix, suspension was only for two lives, and validity of trust as to them would not be affected by invalidity of trust for benefit of afterborn children. Id. Will held to create valid separable trust estates for life of each of testator's children, with remainder over to their children, in absence of exercise of powers of appointment. Fischer v. Langlotz, 100 N. Y. S. 578. Will giving residue in trust to pay income to testator's three sons until youngest attained age of twenty-five, or would have attained it if living, with discretionary power in trustees to then pay over corpus, and in case of death of son without issue before receiving his share of corpus, his share to go to testator's brother, but in case he left issue, then to them, held valid, interests of sons being separable, and distinct, and will to be construed as though it had in terms created separate trusts for each son and his issue. Cushman v. Cushman, 102 N. Y. S. 258.

6. See Deeds of conveyance, 7 C. L. 1103.

7. See Wills, 6 C. L. 1880.

8. **Provisions held valid:** Testatrix devised land to S. for life, remainder to "my heirs in Switzerland," but only after payment by them to heirs of S. for any improvements made by him. Held that heirs referred to were heirs of testatrix living at her death, and, since payment was to be made by them in their lifetime, rule was not violated. Hill v. Gianelli, 221 Ill. 286, 77 N. E. 458. Since, under treaty with Switzerland, residents of that country acquiring land in U. S. by devise have only three years in which to dispose of it, held that gift could not create perpetuity. Id. Neglect of heirs to pay for improvements would not create perpetuity, but merely defeat their title. Id. Will provided that part of estate should be held by trustees after daughter's death during lives of her children, and that income should be paid to latter, and that at their death capital should be paid to their children as they respectively attained age of twenty-one, said grandchildren to take by right of representation and to receive income of their shares until reaching that age. Held that grandchildren were not to be treated as members of one class and considered together, so that whole provision would be invalid, but that share of each child of daughter was to be considered separately, so that remainders to children of children of daughter born during testator's lifetime, were valid though those to children of afterborn children were void. Minot v. Doggett, 190 Mass. 345, 77 N. E. 629. Where testator gave residue in trust to pay income to such of his children as should survive him, held that limitation over directly to issue of such of them as should die without leaving surviving husband or wife was valid. Gray v. Whittemore [Mass.] 78 N. E. 422. Contract whereby plaintiff was to dispose of property of defendant's testator, using his best judgment in the matter which was to be binding on testator, and providing that it should bind and be carried out by testator's executors, held not to violate rule, plaintiff not being entitled to delegate his authority or to make illegal contracts. Mills v. Smith [Mass.] 78 N. E. 765. Will held to create valid trust to continue until death of named beneficiary and his wife. Cole v. Lee, 143 Mich. 267, 12 Det. Leg. N. 975, 106 N. W. 855. Provision that upon death of testator's two children trust property should descend to their heirs held to control previous provision that it should be held in trust during lives of children and testator's wife, so that trust did not violate Comp. Laws 1897, §§ 797, limiting suspension to period of two lives in being. Foster v. Stevens [Mich.] 13 Det. Leg. N. 742, 109 N. W. 265. Testator gave residue in trust for certain beneficiaries for their respective lives, and, on death of any beneficiary, in trust for his children and issue of any deceased child living at time of his death, "his, her, or their executors, administrators, and assigns." Held that, on death of life tenant, corpus of his share vested absolutely in his issue, trust designated in will in favor of latter being mere dry or passive one, and hence gift was not void. Denison v. Denison, 185 N. Y. 438, 78 N. E. 162. Valid trust in favor of children with remainder in fee to their issue held not rendered invalid by provision of codicil directing executors not to turn over property to trustees until five years after testator's death, and making them trustees in meantime with all powers given trustees anywhere in will. Clark v. Goodridge, 51 Misc. 140, 100 N. Y. S. 824. Devise in trust to apply proceed to benefit of children until youngest reached age of twenty-five held valid, trust being measured by life, or less time of testator's youngest child, and would be terminated by death of such child before reaching such age. Burke v. O'Brien, 100 N. Y. S. 1048. Will giving husband legal life estate, and creating trust in remainder for benefit of two sons for their lives, with ultimate remainder to grandchildren of testatrix living at death of both sons, held

Charitable gifts.[9]—The rule does not ordinarily apply to charitable gifts.[10] Statutes in some states authorize trusts for the perpetual maintenance of cemetery lots, monuments, and the like.[11] In New York in the case of bequests to charitable uses, ownership and the power of alienation may be suspended during a period necessary to form a corporation, not exceeding two lives in being at the death of the testator, to take the bequest which in such circumstances is valid as an executory devise or bequest.[12]

Accumulations of income.[13]—By statute in New York the accumluation of income is limited to the period of minority,[14] but where there is a valid bequest to a charitable corporation to be formed after testator's death and no direction as to income accruing prior to its formation, it will take the same as an increment of the principal.[15]

§ 3. *Operation and effect, complete and partial invalidity.*[16]—A contract in violation of the rule is void from its inception, and everything done by either of the parties thereto designed to carry it into effect which is auxiliary thereto must be considered as unauthorized and inoperative.[17] Invalid provisions in a will may be rejected without in any manner affecting valid ones, where they are in fact inde-

not to unlawfully suspend power of alienation, since at death of sons all parts of absolute fee would vest somewhere whether husband survived them or not. In re Hurlbut's Estate, 51 Misc. 263, 100 N. Y. S. 1098. Provision in deed that grantee should not have power to alienate land until youngest child begotten of her by her then husband should reach age of twenty-one, if a son, or should marry, if a daughter, held valid, restraint being necessarily limited to life of grantee. Berry v. Spivey [Tex. Civ. App.] 17 Tex. Ct. Rep. 11, 97 S. W. 511.

Provisions held void: Provision in will giving land to heirs of first taker that it "is never to be sold" held void under St. 1903, § 2360, though similar restriction on power of alienation by first taker was valid. Robison v. Gray, 29 Ky. L. R. 1296, 97 S. W. 347. Instrument whereby grantee of realty agreed to hold same in trust for use and benefit of the estate of G., and also for use and benefit of herself and two other persons, and for their respective heirs, executors, and administrators, held void under Laws 1896, c. 547, p. 565, § 32, if regarded as an active trust, it being intended to continue indefinitely. Gueutal v. Gueutal, 113 App. Div. 310, 98 N. Y. S. 1002. Will gave property in trust with directions to pay income to children for life, and, after the death of the last of them, and the lapse of ten years from the date when testatrix's youngest grandchild should come of age, to divide principal among grandchildren. Held that interest of grandchildren was contingent, and gift to them void. In re Kountz's Estate, 213 Pa. 390, 62 A. 1103.

9. See 6 C. L. 1006.

10. Bequest in trust to manage estate until certain sum was accumulated, and then to use part of principal to erect school for boys, and income of balance for its maintenance, held not to offend rule because of perpetuity in first taker, or to be void for remoteness. Tincher v. Arnold [C. C. A.] 147 F. 665.

11. District of Columbia Code, § 669, is not nullified by § 1023, relating to perpetuites by reason of fact that latter section does not expressly exempt from its operation trusts authorized by former. Iglehart v. Iglehart, 27 S. Ct. 329, afg. 26 App. D. C. 209.

12. Gift held valid without regard to whether Laws 1893, p. 1748, c. 701, relating to gifts for charitable uses, was valid or not. St. John v. Andrewa Institute, 102 N. Y. S. 808.

13. See 6 C. L. 1006.

14. Under § 51 of real property law (Laws 1896, p. 568, c. 547) and § 4 of personal property law (Laws 1897, p. 508, c. 417). St. John v. Andrews Institute, 102 N. Y. S. 808. Rev. St. [1st Ed.] p. 726, pt. 2, c. 1, tit. 2, §§ 37, 38. In re Hoyt, 101 N. Y. S. 557. Gift to remaindermen of surplus income which trustees might determine was not necessary for use of daughter held invalid Id. Provisions in will directing application of surplus income to payment of mortgages on testator's realty, and investment of surplus income in bond and mortgage until termination of two lives on which trust depended, held invalid. Kirk v. McCann, 101 N. Y. S. 1093. Decrees of surrogate on accounting, approving application of surplus income in accordance with provisions of will, held conclusive as to income previously so applied and included in accounts as against parties having notice of the proceedings, though provisions of will were invalid as directing unlawful accumulation, but not as to application of subsequent accumulations in regard to which they contained no directions. Id. Provision directing accumulation held void. Fischer v. Langlotz, 100 N. Y. S. 578. Provision in will held not a provision for accumulation of income of personalty, but merely testator's advice or suggestion as to management of fund previously given absolutely. Morgan v. Durand, 101 N. Y. S. 1002.

15. Is not to be regarded as income within meaning of statute. St. John v. Andrews Institute, 102 N. Y. S. 808.

16. See 6 C. L. 1006.

17. Void option contract for purchase of realty not validated by payments for annual extensions. Starcher Bros. v. Duty [W. Va.] 56 S. E. 524.

pendent and are not for the carrying out of a common or general purpose,[18] but where they are so connected together as to constitute a general scheme, the rule is ordinarily otherwise.[19]

By statute in New York where there is a suspension of the power of alienation of realty or of the absolute ownership of personalty in consequence of a valid limitation of an expectant estate during the continuation of which the rents or income are undisposed of, and no valid direction for their accumulation is given, they go to the persons presumptively entitled to the next eventual estate.[20] Where, however, a direction for an accumulation is void and there is some other and legal disposition of the rents and profits, the direction for accumulation should be eliminated from the will, the statute not applying to such a case.[21]

PERSONAL INJURIES; PERSONAL PROPERTY; PERSONS; PETITIONS, see latest topical index.

PETITORY ACTIONS.[22]

A petitory action is for the recovery of possession,[23] in which plaintiff must recover upon the strength of his own title,[24] though neither party can attack the title of a common author under whom they claim.[25] Only the possessory right to the property described can be litigated.[26] While plaintiff in a petitory action need not cumulate therewith a suit to annul a judicial proceeding which apparently divests his title, he cannot attack the same if it proves voidable only.[27] A general denial of defendant is not limited or controlled by a special answer of his warrantor.[28] Defendant may prove by parol [29] that the title pleaded to oust him is simulated.[30] While defendant may call in his warrantor and recover over,[31] such

18. Invalidity of trust in favor of afterborn children held not to affect trust in favor of children living at testatrix's death. In re Mount's Will, 185 N. Y. 162, 77 N. E. 999. Where remainder is limited to take effect upon the happening of either of two separate and distinct contingencies, either one of which, if it occurs, will exclude the existence of the other, the fact that remainder limited on one is void does not affect the validity of the other. Gray v. Whittemore [Mass.] 78 N. E. 422.

19. Remainders being void, held that antecedent particular estate failed also, and heirs at law of testatrix were entitled to immediate possession. In re Kountz's Estate, 213 Pa. 390, 62 A. 1103.

20. Laws 1896, c. 547, § 53; Laws 1897, c. 417, § 2. St. John v. Andrews Institute, 102 N. Y. S. 808. Charitable corporation to be formed after testator's death held entitled to income, though not in existence when it was earned. Id.

21. In re Hoyt, 101 N. Y. S. 557. Where will gave trustees power to apply entire income to use of daughter and also discretionary power to accumulate a part of it, and provided that, if they did accumulate any part of it, it should go to remaindermen, held that the provision for accumulation being void, income accumulated thereunder should go to daughter. Id.

22. See 6 C. L. 1007.

23. On proof that defendant is not in possession of the property described in the petition, the action must be dismissed. Ledoux v. Kornbacher [La.] 43 So. 266.

24. And not on the weakness of the defendant's. Walker v. Levy [La.] 42 So. 771. Proof of an outstanding title superior to plaintiff's is a good defense. City of Shreveport v. Marks, 117 La. 143, 41 So. 444. As against a possessor in good faith, holding under a title legislative of property, plaintiff must establish a perfect title in himself. Glover v. Haley [La.] 43 So. 265. Evidence held insufficient to show that the land in question is embraced in plaintiff's paper title. Walker v. Levy [La.] 42 So. 771. Where plaintiff holds a regular patent from the government, it is not affected by a mistake in a former patent by which the land was omitted from a conveyance to defendant. Foster v. Meyers, 117 La. 216, 41 So. 551. A title placed in plaintiff's name by her father as her natural tutor, which character he did not possess, is insufficient. Lyons v. Lawrence [La.] 43 So. 51. And if it be regarded as a donation, it was revoked by sale before plaintiff reached her majority. Civ. Code, art. 1890. Id.

25. Pecot v. Prevost, 117 La. 765, 42 So. 263.

26. Under a petitory action describing a particular piece of land, plaintiff cannot litigate the right to possession of accretion to property dehors the described limit. Ledoux v. Kornbacher [La.] 43 So. 266.

27. Succession proceedings under which plaintiff's interest was sold held not void and not subject to attack. Bankston v. Owl Bayou Cypress Co., 117 La. 1053, 42 So. 500.

28. Admission of warrantor held not binding upon the defendant. Lisso & Bros. v. Giddens, 117 La. 507, 41 So. 1029.

29, 30. Lyons v. Lawrence [La.] 43 So. 51.

31. A defendant is entitled to a judgment over against his warrantor for the

warrantor cannot as against his warrantor show by parol the identity of the land where purchased and sold under different descriptions, without appropriate pleadings.[32] One not a party to the action cannot be compelled to make title by appropriate deed,[33] but as between the parties, the judgment may be given the effect of title.[34] A successful plaintiff can recover rents from a possessory defendant in good faith only from the time of judicial demand,[35] and, in turn, must pay the costs of the improvements placed thereon or the enhanced value of the soil,[36] and, if he elects to pay the latter, must establish such value by competent evidence.[37] Where a defendant has wrongfully ousted plaintiff, a reconvention may be allowed.[38]

PEWS; PHOTOGRAPHS; PHYSICAL EXAMINATION; PHYSICIANS AND SURGEONS; PILOTS, see latest topical index.

PIPE LINES AND SUBWAYS.[39]

Consent by municipality to the laying of electric cables and conduits in its streets is a grant of a franchise, and to be valid must be given by the proper municipal authorities.[40] It is within the police power of the state to modify the franchise of a subway company by requiring that plans of such subway be submitted to a municipal board within a limited time after the passage of the act,[41] and in the event of a failure to submit plans to authorize such board to devise a ground subway which all operators of underground electrical conductors should be bound to use.[42] Under a statute submitting the approval of subway routes to a court, it may make the approval conditional on construction of the line within a specified time so adjusted as to protect abutters,[43] but in a proceeding to approve the route only, conditions on the construction contract will not be imposed in the face of a provision for notice and public hearing before making such contract.[44] Injunction lies at suit of a township to restrain use of pipes laid in its highways without legislative authority,[45] but the owner of the fee whose property will be injured by the construction of a pipe line in the highway is not entitled to an injunction unless the injury is so great as to amount to the virtual taking of his property,[46] his remedy being an action at law for damages. Mandamus lies to compel subway company, which is required by its contract with the municipality to lease space to companies having "lawful power" to operate electrical conductors in the city, to grant a qualified applicant such space;[47] and a company operating under an assignment of a special franchise to operate electrical conductors, which assignment has been

same amount as the judgment against him. Pecot v. Prevost, 117 La. 765, 42 So. 263.

32. Pecot v. Prevost, 117 La. 765, 42 So. 263.

33, 34. Barfield v. Saunders, 116 La. 136, 40 So. 593.

35. Pecot v. Prevost, 117 La. 765, 42 So. 263.

36. May elect under Rev. Civ. Code art. 508. Foster v. Meyers, 117 La. 216, 41 So. 551.

37. Foster v. Meyers, 117 La. 216, 41 So. 551.

38. Ousted plaintiff and his family and compelled them to live out of doors for two days. Barfield v. Saunders, 116 La. 136, So. 593.

39. See 6 C. L. 1007.

40. Board of electrical control of the city of New York held to be without power to give such consent. People v. Consolidated Tel. & Elec. Subway Co. [N. Y.] 79 N. E. 892.

41. Held the right to construct a subway under a franchise lapsed where the plans therefor were not submitted to such board within the time limited and no action had been taken under the franchise. People v. Ellison, 101 N. Y. S. 444.

42. People v. Ellison, 101 N. Y. S. 444, afg. 101 N. Y. S. 55.

43. Limit of two years on each several section held proper where not more than one-seventh of the funds needed for the whole plan submitted could possibly be available. In re Board of Rapid Transit R. Com'rs, 114 App. Div. 379, 100 N. Y. S. 611.

44. In re Board of Rapid Transit R. Com'rs, 114 App. Div. 379, 100 N. Y. S. 611.

45. Landis Tp. v. Millville Gas Light Co. [N. J. Eq.] 65 A. 716.

46. Hardman v. Cabot [W. Va.] 55 S. E. 756.

47. Held that rules of department having supervision of subways did require an application to that department as a condition precedent to relief. In re Long Acre Light & Power Co., 102 N. Y. S. 242, afg. 101 N. Y. S. 460.

ratified by the acquiescence of the city, is a qualified applicant.[48] The construction of a pipe line in a public highway for the purpose of conveying natural gas does not impose an additional servitude upon the fee in the highway.[49] Subway companies while engaged in the work of construction in a public highway must use reasonable care to keep the highway safe for travel during the progress of the work,[50] and the fact that the work of construction is being carried on by an independent contractor does not relieve the company from liability for injuries caused by reason of its unsafe condition.[51] The conditions of a license to enter upon land for the purpose of constructing a pipe line must be complied with or such license will not constitute a defense to an action for trespass.[52] Under a law authorizing a city to collect a toll charge of one cent for each person passing through a subway, such charge may be collected from those who pass through only a part of such subway.[53] Tunnels located in public streets may be assessed and taxed, as real property.[54]

PIRACY; PLACE OF TRIAL; PLANK ROADS; PLATE GLASS INSURANCE, see latest topical index.

PLEADING.

§ 1. Principles Common to All Pleadings (1355). General Rules (1355). Interpretation and Construction in General (1364). Profert and Oyer (1367). Exhibits (1367). Bills of Particulars (1368).
§ 2. The Declaration, Count, Complaint, or Petition (1372). General Rules (1372). Consolidation of Suits (1374). Joinder of Causes of Action (1375). Election (1380). Splitting Causes of Action (1380). Prayer (1381).
§ 3. The Plea or Answer (1381). General Principles (1381). Denials and Traverses (1383). Confession and Avoidance (1384).
§ 4. Replication or Reply and Subsequent Pleadings (1384).
§ 5. Demurrer (1386). General Rules (1386). Form, Requisites, and Sufficiency (1387). Issues Raised (1388). Hearing and Decision on Demurrer (1390).
§ 6. Cross Complaints and Answers (1391).
§ 7. Amendments (1392).
§ 8. Supplemental Pleadings (1405).
§ 9. Motions Upon the Pleadings (1406).
§ 10. Right to Object, and Mode of Asserting Defenses and Objections; Whether by Demurrer, Motion, etc. (1407).
§ 11. Waiver of Objections and Cure of Defects (1413).
§ 12. Time and Order of Pleadings (1419).
§ 13. Filing, Service, and Withdrawal (1420).
§ 14. Issues Made, Proof, and Variance (1421). The General Issue and General Denials (1421). Special Issues and Special Denials (1422). Proof and Variance (1423). Admissions in Pleadings or by Failure to Plead (1428). Judgment on the Pleadings (1430).

Scope of title.—This topic treats only of the general rules applicable to common-law and code pleading. For the sufficiency of pleadings in particular actions reference should be had to the appropriate topics. Matters particularly applicable to equity pleading,[1] and to affidavits of merits of claim or defense,[2] the necessity of verified pleadings and the sufficiency of the verification,[3] and all questions in regard to set-off and counterclaim,[4] are treated in separate articles.

§ 1. *Principles common to all pleadings. General rules.*[5]—While the codes

48. An instrument held to be an absolute assignment of a franchise and not a grant of a right under it. In re Long Acre Light & Power Co., 102 N. Y. S. 242, afg. 101 N. Y. S. 460.

49. Hardman v. Cabot [W. Va.] 55 S. E. 756.

50. Evidence held insufficient to show that highway was not in a reasonably safe condition for travel. Monahan v. Empire City Subway Co., 102 N. Y. S. 774.

51. Monahan v. Empire City Subway Co., 102 N. Y. S. 774.

52. Under a license to construct a pipe line "of good substantial material and workmanship," the construction of a defective line likely to cause unnecessary injury may be enjoined and damages may be recovered for trespass. Graham v. Redlands Heights Water Co. [Cal. App.] 86 P. 989.

53. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038.

54. Companies owning such tunnels have rights and privileges in the soil in which the tunnels are constructed separate and apart from the fee of the streets and such interest is not of an intangible nature. People v. Upham, 221 Ill. 555, 77 N. E. 931.

1. See Equity, 7 C. L. 1323.

2. See Affidavits of Merits of Claim or Defense, 7 C. L. 59.

3. See Verification, 6 C. L. 1832.

4. See Set-off and Counterclaim, 6 C. L. 1442.

5. See 6 C. L. 1008.

have abolished forms of action,[6] yet, since their substance remains unchanged, good pleading demands that all averments material to equitable rights of action be present and appropriately well pleaded. Conversely, matters of equity should be omitted from the pleadings in a purely equitable action,[7] and, so far as rights or procedure depend thereon under the codes, the parties will be held to the kind of action or defense they have pleaded.[8]

In code states the only proper pleadings are those designated by the code.[9] The allegations of the pleading and not the name by which it is called determine its character.[10] Pleadings must give the title of the case,[11] but the caption is no part of the pleading proper.[12]

A party may state his case in his own way, provided he conforms to the statutes and rules of court.[13] Where the court is of limited or special jurisdiction, facts bringing the cause within its jurisdiction must be alleged.[14] In local actions venue should be alleged.[15] One is not ordinarily bound to negative defenses,[16] except such as are apparent on the face of his pleading.[17] A party seeking to avail himself of a statutory action must by proper averments bring himself clearly within its provisions.[18] Foreign statutes must be pleaded if relied on.[19] In some states a pri-

6. See Equity, 7 C. L. 1323; Forms of Action, 7 C. L. 1769. Under Rev. St. 1887, § 4168, complaint is only required to contain title of the court and the cause, statement of facts constituting cause of action in ordinary and concise language, and demand for relief, and district court may grant such relief, whether in law or equity, as parties are entitled to under their allegations and proof. Coleman v. Jaggers [Idaho] 86 P. 894. Under Rev. St. 1899, § 539, it is sufficient if such facts appear as authorize judgment one way or another. Ackerman v. Green, 195 Mo. 124, 93 S. W. 255.

7. Code generally allows equitable defenses in actions at law. See § 3, post.

8. See 6 C. L. 1008, n. 92.

9. So called bill of particulars filed with complaint in action on special account for breach of contract, which did not refer to complaint and was not referred to therein, and which could not be said to be a particular description of that of which complaint contained sufficient general description as provided by rules of court, held a paper unknown to system of pleading and which could not be considered determining sufficiency of complaint. Puritan Mfg. Co. v. Bouteiller & Co. [Conn.] 64 A. 227. Is no such pleading as an "amended supplemental complaint." Horowitz v. Goodman, 112 App. Div. 13, 98 N. Y. S. 53. Order authorizing service of "amended and supplemental complaint" held irregular. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335. Writing signed and acknowledged by one admitted to citizenship admitting that order admitting him and certificate of citizenship were obtained by fraud, and consenting to setting aside of order, filed in support of oral motion to that effect, held not a complaint within Code Civ. Proc. § 405, requiring civil actions to be commenced by filing a complaint and proceeding founded thereon could not be considered suit in equity. Tinn v. United States District Attorney, 148 Cal. 773, 84 P. 152.

10. Pleading called cross complaint treated as counterclaims. Reardon v. Higgins [Ind. App.] 79 N. E. 208.

11. Pleas having no title held properly rejected. Walls v. Zufall [W. Va.] 56 S. E. 179.

12. No part of count proper. West Chicago Park Com'rs v. Schillinger, 117 Ill. App. 525.

13. Ginty v. New Haven Iron & Steel Co., 143 F. 699.

14. In action in municipal court against foreign corporation, failure to allege that defendant had office in city, which fact is essential to jurisdiction under Laws 1902, p. 1489, c. 580, held to render complaint defective. Epstein v. Weisberger Co., 102 N. Y. S. 488. Averments as to citizenship of corporation in action in Federal court held sufficient. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

15. Petition held to sufficiently show that contract sued on was entered into in county where suit was brought, and hence to be good against demurrer raising question of venue. Macon & B. R. Co. v. Walton [Ga.] 56 S. E. 419.

16. Where plaintiff alleged that defendant was corporation and that contract was made by its duly authorized agent, held not necessary to allege character of business it was authorized to do so that it could be determined from pleadings whether contract was within its charter powers. San Antonio Machine & Supply Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 176, 91 S. W. 598. Plaintiff need not anticipate defense of discharge in bankruptcy by alleging new promise in original petition. Shumate v. Ryan [Ga.] 56 S. E. 103. Petition need not anticipate defense of limitations by alleging matter in avoidance of it, but may allege matter in avoidance thereof in reply if pleaded as a defense. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

17. When person more than twelve years after arriving at majority invokes equity jurisdiction for relief from acts occurring more than twenty-five yeas prior thereto, pleading should state some reasonable excuse for delay. Complaint held sufficient. Steinberg v. Saltzman [Wis.] 110 N. W. 198.

18. Employer's liability act. Sutherland v. Ammann, 112 App. Div. 332, 98 N. Y. S. 574. Complaint held insufficient to state

vate statute may be pleaded by designating it by year, chapter, and title.[20] A pleading is defective whenever evidence cannot be received in support of its allegations.[21]

Material facts should be shown by direct and issuable averment,[22] and not be left to inference or pleaded by way of recital.[23] Facts, not ignorance of facts, should be alleged,[24] and matters presumptively within a party's knowledge,[25] or in regard to which the truth is readily ascertainable, should not be alleged on information and belief.[26] Facts, not conclusions, must be pleaded.[27] Statutes in many

cause of action under employer's liability act. Ft. Wayne Iron & Steel Co. v. Parsell [Ind.] 79 N. E. 439. Evidence that employe was injured through negligence of fellow-employe for which employer would be liable under employers' liability act held inadmissibe under complaint merely charging negligence on the part of the defendant company. Kelly v. Northern Pac. R. Co. [Mont.] 88 P. 1009. One seeking to maintain an action for a statutory penalty must state every fact necessary to enable court to judge whether he has a cause of action under the statute, the pleadings being strictly construed in such case. People v. Koster, 50 Misc. 46. 97 N. Y. S. 829. A reference to the statute giving a penalty for its violation is sufficient only when there is a single substantive fact shown affirmatively, constituting a cause of action. Id. In action for penalties prescribed by Laws 1893, c. 338, for adulteration of milk, reference to §§ 20 and 22, of the act, with allegation that defendant was a dealer in milk, that on certain day he caused milk to be adulterated and sold same, held insufficient, there being many different provisions in said sections by which and for violation of which a penalty may be incurred. Id.

19. Law of another state. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

20. Code Civ. Proc. § 530, does not apply to action for penalties prescribed by Laws 1893, c. 338, for adulteration of milk. People v. Koster, 50 Misc. 46, 97 N. Y. S. 829.

21. Demurrer to counterclaim for failure to set forth in what manner or by what facts defendant had been damaged in amount claimed held properly sustained. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

22. Averment of consideration in actions on contract must be direct and explicit, and not by way of inducement or preamble only. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567. Designation of defendants as "common carriers for hire and reward" and allegations that as such at their own risk and solicitation they "received" certain junk "to be so carried," held not a sufficient allegation of consideration to support promise to carry, etc. Id. In order to found cause of action on alleged shortcomings of another, particulars of alleged resulting damages should be so far set forth that court may be able to see that such damages are neither obscure, vague, nor shadowy, but might and probably would naturally result from acts complained of. McQuire v. Gerstley, 27 S. Ct. 332, afg. 26 App. D. C. 193. Pleas of set-off held insufficient. Id. In action on bound given to secure sales of merchandise on credit, pleas setting up breach of agreement respecting prices held insufficient, there being no allegation that agreement was in writing, and bound itself not showing existence of agreement, and nothing to show that securties would be injured by breach. Id.; Clark v. Gerstley, 27 S. Ct. 337.

23. Allegations that agreement to "take and pay for" machinery was in consideration of warranty, and that it was not suitable for purpose "for which it purchased it," held not to amount to averment that defendant agreed to take and pay for machinery, or that it ever purchased it. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. Should not be left to be supplied or gathered by remote implication or conjecture. Puritan Mfg. Co. v. Bonteiller & Co. [Conn.] 64 A. 227. Answer alleging that defendant did not cut certain tree, and that, if it was cut, it was done because it was reasonably necessary to do so in the construction of defendant's telephone system, held bad. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207. Allegations of duty and its breach in negligence case held insufficient. Norfolk & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19.

24. Allegation that no one knew whether certain remaindemen had children, etc., held insufficient. Furr v. Burns, 124 Ga. 742, 53 S. E. 201.

25. Allegation in answer that certain statute was never law of certain state because not passed or signed in manner required by constitution held not a matter presumptively within plaintiff's knowledge so as to make denial in reply insufficient under Mills' Ann. Code, § 56. Adams v. Clark [Colo.] 85 P. 342.

26. See also, § 3, post. Matters relating to existence or nonexistence of public record. Steinberg v. Saltzman [Wis.] 110 N. W. 198.

27. Conclusion of law is not statement of fact upon which liability can be predicated, within Code Civ. Proc. § 481, requiring complaint to set up plain and concise statement of facts constituting each cause of action. Tate v. American Woolen Co., 114 App. Div. 106, 99 N. Y. S. 678; Ganesvoort Bank v. Empire State Surety Co., 112 App. Div. 500, 98 N. Y. S. 382. To avoid effect of res judicata on ground that judge making order removing administrator was personally disqualified, such disqualification must be shown by averments of facts, not by mere legal conclusions. Milton v. Hundley [Fla.] 42 So. 185. Answer states no defense when no facts are set forth as basis of conclusions pleaded. Answer held not to alleged facts on which failure of warranty of machine to do satisfactory work could be predicated. Houghton Imp. Co. v. Vavrousky [N. D.] 109 N. W. 1024.

Averments held to be conclusions: That defendant through its agent waived contract provision for notice of claim. Western Union Tel. Co. v. Heathcoat [Ala.] 43, So. 117. Facts sufficient to sustain conclusion

of waiver of provisions of written contract must be alleged, allegation that defendant had knowledge of and fully assented to manner of performance being insufficient. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341, 97 N. Y. S. 73. As to irreparable injury to complainant, etc, which would result from allowing defendant to string wires on certain pole. Montgomery L. & W. P. Co. v. Citizens' L. H. & P. Co. [Ala.] 40 So. 981. That damages cannot be measured in action at law, that plaintiff has no plain, adequate, or complete remedy at law, and that injunction is necessary to avoid multiplicity of suits. General Elec. Co. v. Westinghouse Elec. & Mfg. Co. 144 F. 458. As to fraud. Ingraham v. International Salt Co., 100 N. Y. S. 192. Mere general allegation of fraud in proceedings to set aside foreclosure of chattel mortgage. Kuhling v. Beidenhorn [Ky.] 99 S. W. 646. That plan of reorganization between two railway companies was fraudulently designed, without specifically charging that said companies participated therein, or specifying in what fraud consisted. Gella v. Brown [C. C. A.] 144 F. 742. Allegations of fraud in action against corporation and officers by stockholders. Schell v. Alston Mfg. Co., 149 F. 439. That fraud was practiced by successful party in obtaining judgment. Machen v. Bernheim, 29 Ky. L. R. 427, 93 S. W. 621. Where fraud is gist of action, facts themselves which constitute it must be alleged. Petition sufficient. Ennis v. Padgett [Mo. App.] 99 S. W. 782. Allegation that one falsely and fraudulently made certain representations is insufficient to charge actual fraud in absence of allegation that representations were untrue. Bonham v. Doyle [Ind. App.] 77 N. E. 859. That plaintiffs and other parties named are only heirs at law and next of kin. Moser v. Talmon, 100 N. Y. S. 231. That certain person is the sole heir at law of a decedent. Daley v. O'Brien, 29 Ky. L. R. 811, 96 S. W. 521. That certain sum was "due" plaintiff from defendant on appeal bond sued on. Moriarty v. Cochran [Neb.] 106 N. W. 1011. That "the money and cotton called for by the mortgage" was tendered by mortgagor. Wittmeier v. Tidwell [Ala.] 40 So. 963. That plaintiff's lot was damaged by the construction of a railroad embankment. Birmingham R. L. & P. Co. v. Oden [Ala.] 41 So. 129. That at the time of his qualification as trustee in bankruptcy of defendant, plaintiff succeeded to and became owner of interest in certain land previously owned by defendant, and has ever since been and now is owner thereof. Schoonover v. Birnbaum, 148 Cal. 548, 83 P. 999. That superintendent of streets did not make assessment in manner or form prescribed by law, in absence of setting forth particulars in which it was defective. Beckett v. Morse [Cal. App.] 87 P. 408. That an act has not been "duly" performed. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415. That there was in official custody and subject to official control of defendant more than sufficient money applicable to, and with which to pay, plaintiff's claim. Allegation limited by facts on which she based her claim and provisions of law applicable thereto. Burke v. San Francisco Police & Relief Pension Fund Trustees [Cal. App.] 87 P. 421. That stairway was "negligently" constructed, and in an "unsafe" condition, and was "imperfectly lighted", and without "any sufficient light", etc. Bell v. Central Nat. Bank, 28 App. D. C. 580. As to obligation and duty of defendants under a certain contract. Milligan v. Keyser [Fla.] 42 So. 367. As to defendant's knowledge of guardian's sale and his failure to object, and as to purchaser's good faith. Furr v. Burns, 124 Ga. 742, 53 S. E. 201. That at time of organization of corporation, it was tacitly understood that fair, reasonable, and adequate salaries for its officers would be fixed thereafter, to be paid out of its future earnings. Home Mixture Guano Co. v. Tillman, 125 Ga. 172, 53 S. E. 1019. That sums "paid" by plaintiff were part of purchase price of certain land, and that defendant received benefit of same in his purchase of land. Tye v. Gaissert, 124 Ga. 733, 52 S. E. 813. That city had authorized appointment of large number of policemen and that petitioner was duly appointed a policeman. Kenneally v. Chicago, 220 Ill. 485, 77 N. E. 165. That railroad company abandoned a route. Stannard v. Aurora, etc., R. Co., 220 Il. 469, 77 N. E. 254. That deed was never lawfully delivered. Blake v. Ogden, 223 Ill. 204, 79 N. E. 68. In suit to enforce vendor's lien, that vendee was responsible for certain rent as part of purchase money, and that certain other specified sums should also be considered as part of consideration money. Ross v. Clark, 225 Ill. 326, 80 N. E. 275. That under the demand, pressure, and compulsion on part of defendant plaintiff paid certain sum. Alton Light & T. Co. v. Rose, 117 Ill. App. 83. That filing fee was paid fraudulently. Stephens v. City Council of Marion [Iowa] 107 N. W. 614. That court of foreign state in which death occurred would, in such case, hold plaintiff entitled to recover, following allegations as to law of such state. St. Louis & S. F. R. Co. v. Johnson [Kan.] 86 P. 156. That proceedings in which judgment was obtained were against a person under disability. Machen v. Bernheim, 29 Ky. L. R. 427, 93 S. W. 621. That plaintiff was "invited" to use certain shop. Brown v. Thomas Blackwell Coal & Min. Co. [Ky.] 99 S. W. 299. That affairs of assigneeship under assignment annexed to bill had been so far completed that assignees had no just claim or right to retain certain books of account, etc. Lothrop Pub. Co. v. Williams, 191 Mass. 361, 77 N. E. 844. That one "had no proper and legal authority to make" a certain sale. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. That under his contract complainant was entitled at any time to receive transfer of stock. Simmons v. Lima Oil Co. [N. J. Eq.] 63 A. 258. That defendant was foreign corporation and had not complied with laws regulating such corporations. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048. "That all conditions were fulfilled." there being no statement as to what the conditions were, "and all things happened," no things being set forth," and all times elapsed necessary to entitle" plaintiff to maintain action on bond, no dates or periods of time being set forth. Ganesvoort Bank v. Empire State Surety Co., 112 App. Div. 500, 98 N. Y. S. 382. Allegation of indebtedness for money had and received, in absence of allegation of promise to repay or facts from which it can be inferred. Tate v. American Woolen Co., 114 App. Div. 106, 99 N. Y. S. 678. That instrument not under seal and

states allow matters to be alleged generally which it would otherwise be necessary to particularize,[28] but in such case the statutory form must be strictly followed.[29]

not negotiable was executed and delivered "for a valuable consideration." Fulton v. Varney, 102 N. Y. S. 608. That plaintiff "is maintaining this action for the benefit of said M. and is not the real party in interest." Ludlow v. Woodward, 102 N. Y. S. 647. That plaintiff "is not a bona fide owner and holder of said note." Id. That defendant has defense to claim. Conroy v. Equitable Acc. Co., 27 R. I. 467, 63 A. 356. That grant under which plaintiff claimed title to land was prior to that under which defendant claimed, that plantiff's title was superior, and that she was prepared to show such facts on a trial in trespass to try title. Gilbert v. Cooper [Tex. Civ. App.] 16 Tex. Ct. Rep. 376, 95 S. W. 753. That it was defendant's duty to exhibit certain vouchers to taxpayers under certain circumstances. Clement v. Graham, 78 Vt. 290, 63 A. 146. That sheriff "returned said execution fully satisfied." Cambers v. First Nat. Bank, 144 F. 717. That draft of contract and letters constituted a binding contract. Nester v. Diamond Match Co. [C. C. A.] 143 F. 72. That plaintiff had no insurable interest in the life insured by certain policy does not aid pleading. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. That fire insurance policy insured plaintiff as well as another. American Cereal Co. v. Western Assur. Co., 148 F. 77. Denial that proofs of death were furnished insurance company within thirty days as required by policy, language of policy not being set out. Continental Casualty Co. v. Waters [Ky.] 97 S. W. 1103. That interpleader is by her conduct estopped from claiming property. Rice-Stix Dry Goods Co. v. Sally, 198 Mo. 682, 96 S. W. 1030. Where estoppel is relied on, facts constituting it must be pleaded with particularity and precision, and must be alleged that party setting up estoppel relied on facts and will be prejudiced by allowing them to be disproved. Nothing can be supplied by inference or intendment. Haun v. Martin [Or.] 86 P. 371. That chattel mortgage did not give interpleader any right, title, or interest in, or to property, the same being null and void. Rice-Stix Dry Goods Co. v. Sally, 198 Mo. 682, 96 S. W. 1030. That decree confirming tax title was null and void and inoperative to cure defects, irregularities, and illegality in tax title. Flannigan v. Chapman & Dewey Land Co. [C. C. A.] 144 F. 371. That defendant, as justice of the peace, unlawfully or wrongfully issued warrant of arrest. Bufford v. Chambers [Ala.] 42 So. 597. That an act is unlawful. Schmidt v. Brennan, 4 Ohio N. P. (N. S.) 239. General allegations that defendant had no right to do what it did, and that it acted wrongfully, cannot avail plaintiff, where only acts alleged are those which upon other averments of bill seem to have been within its legal rights. Lothrop Pub. Co. v. Lothrop, etc., Co., 191 Mass. 353, 77 N. E. 841. Insufficient to allege that conduct is immoral, unless sets up that which constitutes the immorality. Molineux v. Hurlbut [Conn.] 64 A. 350. Words "even though he was conscious," held merely recital of a conclusion based on previous statements, and not the allegation of the fact. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. Averment by plaintiff in action for death of servant, that, upon facts stated in declaration, it was defendant's duty to furnish deceased with safe place to work, held simply pleader's averment of legal efficacy of facts stated, and of no importance in determining on demurrer whether declaration showed cause of action. Long v. John Stephenson Co. [N. J. Law] 63 A. 910. Where complaint alleged that it was duty of city and contractor in digging up streets to furnish support to gas pipes laid therein by plaintiff "under competent and legal authority," held that conclusion as to character and sufficiency of such authority, being based upon undisclosed facts, did not sustain allegation of resulting duty, for negligent performance of which defendants were sought to be held liable. Millville Gaslight Co. v. Sweeten [N. J. Law] 64 A. 959. Petition alleging in general terms that illegal interest, etc., was charged against property sold for taxes, that deed was void because separate school taxes were assessed against property, and that special city tax, being part of taxes, etc., for which property was sold, was illegally levied against it, held not to state facts sufficient to raise such questions. Jones v. Carnes [Okl.] 87 P. 652. Not sufficient in action for negligence to allege that it is duty of defendant to do certain things, but facts must be stated from which law will raise duty. Declaration held insufficient to state cause of action. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603, afg. 124 Ill. App. 166. Averment that defendant shoved cars negligently held not supply want of averment of facts showing duty owing to plaintiff not to move cars without notice to him. Id.

Averments held not to be conclusions: That motorman negligently ran car upon railroad crossing without first knowing that track was clear. Montgomery St. R. Co. v. Lewis [Ala.] 41 So. 736. That plaintiffs owned certain passway. Louisville & N. R. Co. v. Scomp [Ky.] 98 S. W. 1024. That plaintiffs were ousted and dispossessed of land in due course of law by certain bank. Hirshiser v. Ward [Nev.] 87 P. 171. As to loss by reason of defective abstract. Id. That at time of purchase of certain land by plaintiffs, a certain bank was owner in fee thereof. Id. As to duty of officer to keep streets in safe condition. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. As to fraud. Steinberg v. Saltzman [Wis.] 110 N. W. 198. In action against corporation for fraud as to agency and authority of person with whom transactions complained of occurred. Rogers v. Virginia-Carolina Chemical Co. [C. C. A.] 149 F. 1.

28. Under Code Civ. Proc. § 533, in pleading performance of condition precedent in a contract, party may state generally that he, or person whom he represents has duly performed all the conditions on his part, and, if such allegation is controverted, he must establish performance on the trial. Sager v. Gonnermann, 50 Misc. 500, 100 N. Y. S. 406. General allegation of performance of all conditions held sufficient in action on fire insurance policy. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35.

29. In action on bond given to secure note, allegation that before commencement

Collateral writings need only be averred according to their substance and effect,[30] but the writing itself controls averments as to its character.[31]

Allegations should be definite and certain,[32] and direct rather than argumenta-

of action "every condition was fulfilled and all things happened, and all times elapsed necessary to entitle" plaintiff to maintain the action, held not an allegation of performance under Code Civ. Proc. § 533. Gansevoort Bank v. Empire State Surety Co., 102 N. Y. S. 544.

30. Where declaration refers to rules, orders, and requirements of railroad company, it is not necessary to set them out in tolidem verbis. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

31. Where letter was not an option because lacking a consideration, loose reference to it in bill as an option held not to change its character. Comstock Bros. v. North [Miss.] 41 So. 374.

32. Pleading must contain statement of party's cause of action or defense with sufficient certainty to notify adverse party of the charge he is to meet. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34. Is sufficient if allegations are sufficiently definite to inform opposite party what is relied on for recovery. Spaulding v. Edina [Mo. App.] 97 S. W. 545. It is only when the allegation is so indefinite and uncertain that the precise meaning thereof is not apparent that court is authorized to require pleading to be made more definite and certain by amendment. Code Civ. Proc. § 546. Citizens' Central Nat. Bank v. Munn, 101 N. Y. S. 435, rvg. 49 Misc. 319, 99 N. Y. S. 191; Mullen v. Hall, 99 N. Y. S. 841. Declaration must state facts with sufficient certainty to be understood by defendant, jury, and court, and in actions for tort must state sufficient facts to enable court to say upon demurrer whether, if they were proved, plaintiff would be entitled to recover. Lane Bros. Co. v. Seakford [Va.] 55 S. E. 556. Allegations of bill in equity must be certain, clear, and positive. Simmons v. Lima Oil Co. [N. J. Eq.] 63 A. 258. Though plaintiff is required to charge his cause of action in direct and certain terms, he need not go into an elaboration of details beyond what is reasonably necessary to fully and distinctly inform the defendant of what he is called upon to meet. Pittsburg, etc., R. Co. v. Simons [Ind.] 79 N. E. 911. In action for deceit, motion to make complaint more definite and certain by setting out matters immaterial to cause of action properly denied. Kabat v. Moore [Or.] 85 P. 506. In action for injuries due to being thrown from car by its being started suddenly while plaintiff was about to alight, motion to make complaint more definite and certain by stating whether car had been stopped still or was slowly moving held properly denied, negligence compained of not depending upon fact to which motion was addressed. Louisville & S. I. Traction Co. v. Leaf [Ind. App.] 79 N. E. 1066. Where complaint alleged that defendant agreed that if plaintiff would pay to him what money she should earn, he would keep it for her as trustee and return it on demand, that she paid him certain sum, and that he refused to return it on demand, motion to make more definite and certain by stating into what employment plaintiff agreed to enter held properly denied, there being no allegation that she obligated herself to earn any money. Goupille v. Chaput [Wash.] 86 P. 1058.

Allegations held sufficiently definite: Plea of set-off. Belote v. Wilcox [Ala.] 41 So. 673. Answer in mandamus at least as against general demurrer. People v. Board of Trade, 224 Ill. 370, 79 N. E. 611. Complaint in action on contract. Grau v. Grau [Ind. App.] 77 N. E. 816. Counterclaim on alleged contract to give legal opinion as to saleability of mortgaged property. Pearce v. Weidemeyer, 102 N. Y. S. 505. As to negligence. Moss v. Mosley [Ala.] 41 So. 1012; Pittsburg, etc., R. Co. v. Simons [Ind.] 79 N. E. 917; Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1; Lane Bros. v. Seakford [Va.] 55 S. E. 556. As to injuries claimed to have been sustained by reason of defendant's negligence. City of Dallas v. McCullough [Tex. Civ. App.] 16 Tex. Ct. Rep. 348, 95 S. W. 1121. As to location of defect in walk. Spaulding v. Edina [Mo. App.] 97 S. W. 545. Allegations as to injuries to certain parts of body held sufficiently specific to admit proof of some injuries so that demurrers thereto were properly overruled. Southwesten Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909. Complaint in action for damages for personal injuries, as to acts and omissions for which plaintiff intended to hold defendants accountable. Mullen v. Hall, 99 N. Y. S. 841. In action against carrier for wrongfully ejecting plaintiff from train, motion to require her to make petition more specific by naming persons who offered to pay her fare held properly overruled. Louisville & N. R. Co. v. Fowler, 29 Ky. L. R. 905, 96 S. W. 568. In action to recover money borrowed by defendant through another, held error to require plaintiff to make complaint more definite and certain by alleging extent of defendant's interest in, or liability for, alleged loan, in what capacity it was claimed such other represented defendant, and whether note or other writing was given for loan, and if so a description of it, and manner or grounds on which it was sought to charge defendant thereon. Citizens' Central Nat. Bank v. Munn, 101 N. Y. S. 435, rvg. 49 Misc. 319, 99 N. Y. S. 191. General allegation that certain claims were barred by limitations held sufficient to admit proof that they did not come within exceptions of statute. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. In action to quiet title held not an abuse of discretion to deny motion to make complaint more definite and certain by setting forth nature and character of plaintiff's estate, character of their possession, abstract of their title, and nature and character of interest claimed by defendant, claims of both parties being based on written instruments and records and there being no pretense of surprise. Boyer v. Robinson [Wash.] 86 P. 385.

Allegations held not sufficiently definite: As to damages in action for libel. Wright v. Coules [Cal. App.] 87 P. 809. That named statute is unconstitutional and void. Parham v. Potts-Thompson Liquor Co. [Ga.] 56 S. E. 460. General allegation in petition that

tive.[33] At law only the basic ultimate facts, as distinguished from matters of evidence, should be stated,[34] but this rule is not applied with the same degree of strictness in equity.[35]

Negatives pregnant[36] and irrelevant,[37] inconsistent,[38] equivocal and ambigu-

statute is unconstitutional and void, without in any way specifying particular constitutional provisions with which it is claimed to conflict. Moore v. Houston County, 124 Ga. 898, 53 S. E. 506. As to wrongful acts relied on as basis of recovery in action for libel. Merker v. Belleville Distillery Co., 122 Ill. App. 326. Allegation that "upon ascertaining these facts" defendant offered to return machinery to defendant held defective in failing to state time when it ascertained facts and made offer. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. Complaint in action on contract and exhibit held too indefinite and uncertain to advise court and defendant with reasonable degree of certainty of charge sought to be imposed on defendant. Puritan Mfg. Co. v. Bouteiller & Co. [Conn.] 64 A. 227. Items of account running through several years, attached to petition in suit by tenant against landlord for labor, materials, and improvements upon leased premises, bearing no date and otherwise defectively stated, held open to attack by special demurrer calling for more specific information, and, not having been cured by amendment, demurrer was properly sustained and items stricken. Busby v. Marshall, 125 Ga. 645, 54 S. E. 646. Amendment to certain paragraph of petition held not to cure duplicity, what abbreviation, "etc.," used therein was intended to include being left to conjecture, and it not clearly appearing whether amendment was to precede paragraph as it originally stood or to stand in lieu of it. Macon & B. R. Co. v. Walton [Ga.] 56 S. E. 419. Petition in action for breach of contract to maintain ditch so as to prevent overflow of lands held insufficient for failure to allege what lands were owned by plaintiffs' assignors that were covered by contract or what lands so owned by them were acquired by plaintiffs. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34. Where defendant pleads contributory negligence in an action for damages for negligence, he may be required to make more definite and certain by setting out acts of negligence upon which he relies. Vanatta v. Baltimore & O. R. Co, 4 Ohio N. P. (N. S.) 542. In action against railroad company for personal injuries resulting from negligent use of engine, averments held too general in that they did not show that negligence was imputable to defendant, it not appearing what particular agents failed to perform duty owing to plaintiff and hence that negligence was not that of fellow-servants. Brown v. Pennsylvania R. Co., 142 F. 909.

33. Denials of making certain contract held argumentative. Borland v. Prindle, 144 F. 713. R. I. Court & Prac. Act. 1905, § 287, held not to authorize argumentative denial. Id.

34. Winders v. Hill, 141 N. C. 694, 54 S. E. 440. Allegations as to acts of plaintiff and defendant after assault sued for held properly stricken from petition. Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10. The pleading of facts is not open to objection in an action for negligence, where the pleader is thereby relieved from the necessity of pleading conclusions as to the concurrence of negligence or nonconcurrence of contributory negligence. Home Ins. Co. v. Pittsburgh, etc., R. Co., 4 Ohio N. P. (N. S.) 373.

35. See, also, Equity, 7 C. L. 1323.

36. Denials of averments of bill as to complainant's residence on and possession of land in controversy held insufficient, they being literal and evasive only, and not traversing such allegations. Shiff v. Andress [Ala.] 40 So. 824. In ejectment defendant's denial of plaintiffs' title and right to possession held an admission of ouster of plaintiffs by them. Dondero v. O'Hara [Cal. App.] 86 P. 985. Answer in ejectment denying that defendants "without right or title" entered into possession held an admission of ouster. Id. Denial of complaint in haec verba held negative pregnant. Shepard v. Wood, 102 N. Y. S. 306. Doctrine of negatives pregnant held abolished by code provisions abolishing forms of pleading previously existing and relating to construction of pleadings, so that denial of allegation of complaint that certain team of horses was wild and ungovernable and was known to be so by defendant could not be taken as admission of those facts. O'Brien v. Seattle Ice Co. [Wash.] 86 P. 399.

37. The test of irrelevancy in an answer is whether statements claimed to be irrelevant tend to make or constitute a defense. Hanson Co. v. Collier, 101 N. Y. S. 690. Motion to strike parts of answer in action for libel granted. Id. Allegations in complaint in action for damages growing out of collision with street car to effect that search light such as was carried by car was not permitted in cities owing to fact that it made highways unsafe held properly expunged as irrelevant, where accident occurred in sparsely settled portion of country town. Garfield v. Hartford & S. St. R. Co. [Conn.] 65 A. 598. Amendment seeking to recover for services which plaintiff was not required to perform under contract sued on held properly stricken. Long v. Furnas, 130 Iowa, 504, 107 N. W. 432. Special exceptions to allegations in supplemental petition in regard to extraneous matters having no connection whatever with issues in case held properly sustained. Simpson v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 352, 95 S. W. 94. In action against tenant for rents, supplies, and advances, in which defendant claimed off-sets and asked damages for negligent handling of his rice and failure to furnish water for irrigation purposes, allegations of answer that defendant was experienced and practical rice farmer, etc., held immaterial, irrelevant, and a pleading of evidence tending to qualify him as expert, and they should have been stricken. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335. Motion to strike irrelevant and redundant matter is addressed to discretion of court and should be granted only when no doubt as to the irrelevancy of the part of the pleading in question exists. Hanson Co. v. Collier, 101 N. Y. S. 690. Mo-

ous,[39] and scandalous allegations, should be avoided,[40] and frivolous pleadings should not be interposed.[41] Surplusage will be disregarded or stricken on motion.[42]

tions to strike parts of pleading as irrelevant and redundant are not favored, and will be denied where, under any possible circumstances, evidence of the facts therein pleaded has any bearing on the subject-matter of the litigation. Motion to strike parts of defenses in action for libel denied. Dalziel v. Press Pub. Co., 102 N. Y. S. 909. In action to recover money loaned one defendant through another, held that allegations as to purposes for which money was borrowed and manner in which it was applied would not be stricken as irrelevant, since they might possibly be relevant as tending to show the joint nature of the transaction. Citizens' Cent. Nat. Bank v. Munn, 49 Misc. 319, 99 N. Y. S. 191, rvd. on other grounds, 101 N. Y. S. 435. Where plaintiff only claimed to have single cause of action based on defendant's negligence, but specified several distinct propositions as to which defendant was alleged to have been negligent, some of which constituted actionable negligence at common law and some under employer's liability act, the defendant being equally liable in either event but only for single damages sustained, held that order striking allegations involved in common-law action, unless plaintiff served amended complaint separately stating his common-law action, and his action under the statute was not authorized by Code Civ. Proc. § 545, authorizing striking of irrelevant or redundant matter. Acardo v. New York C. & T. Co., 102 N. Y. S. 7. In action for rent claim of defendant under covenant for quiet enjoyment, while setting up matter of law, and so unnecessary, held, under principles of practice act, neither irrelevant nor immaterial. Molineux v. Hurlbut [Conn.] 64 A. 350. Allegations of petition in action for conversion of personalty as to usable value, etc., held not redundant or irrelevant. Berry v. Geiser Mfg. Co., 15 Okl. 364, 85 P. 699.

38. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Complaint in action for negligence alleging that defendant "carelessly and negligently and willfully and wantonly" did certain acts held not demurrable on ground that could not be all of them at same time. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 903. Further answer and counterclaim held not inconsistent with itself. Conrey v. Nichols [Colo.] 84 P. 470. In action against telegraph company for statutory penalty for failure to transmit message, complaint held not bad as proceeding on inconsistent theories because it pleaded willful wrong doing and negligence in same paragraph, it being immaterial whether violation of statutory duty was due to willfulness or negligence. Western Union Tel. Co. v. McClelland [Ind. App.] 78 N. E. 672. Inconsistency between allegations that train left track because of spreading rails due to rotten ties, and allegation that leaving track was due to breaking of wheel held not to make complaint bad. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606; Id., 78 N. E. 201. In action to collect franchise tax on deposits in savings bank, averments of plea setting up that defendant was not such a bank held not inconsistent, one being merely amplification of other. State v. German Sav. Bank, 103 Md. 196, 63 A. 481. In action against street railway company for killing pedestrian at crossing, allegations in same count that motorman failed to keep vigilant watch and failed to stop in shortest time and space held not objectionable as stating repugnant grounds of negligence. McQuade v. St. Louis & S. R. Co. [Mo.] 98 S. W. 552. Allegations of answer as to repayment of money held not contradictory. Devereux v. Peterson, 126 Wis. 558, 106 N. W. 249. In no contradiction between allegation of answer that consideration for release was $250 and recital in release made a part of answer that it was executed in consideration of $1 and other valuable considerations. Wallace v. Skinner [Wyo.] 88 P. 221. Plea in action on insurance contract attempting to set up nonpayment of premium note held contradictory and uncertain and bad on demurrer. Farmers & Threshers Mut. Ins. Co. v. Koons, 120 Ill. App. 303. Plea held bad in that it both denied argumentatively the making of an agreement and also set up that agreement was invalid. Borland v. Prindle, 144 F. 713.

39. In justice's court. Atlanta, etc., R. Co. v. Georgia R. & Elec. Co., 125 Ga. 798, 54 S. E. 753.

40. Fact that relevant allegations reflect on character is no ground for expunging them. Hall v. Strong, 102 N. Y. S. 161. In action to compel accounting by surviving trustee and executors of deceased trustee, allegations of executor's answer, in which as remaindermen they asked for removal of surviving trustee, as to such trustee's incompetency, held relevant and hence not subject to be stricken as irrelevant and scandalous. Id.

41. Where demurrer was not so plainly bad as to require no argument to show that fact, and bare inspection did not indicate that it was made in bad faith, held that it could not be disposed of as frivolous. Hildreth v. Mercantile Trust Co., 112 App. Div. 916, 98 N. Y. S. 582. Amended answer filed within time allowed for amendments as of course held not so clearly invalid as to justify court in striking it out under Code Civ. Proc. § 542, as served for purposes of delay only. Beyer v. Henry Huber Co., 100 N. Y. S. 1029.

42. Conclusion as to agent's duty to send check to payee instead of indorsing and cashing it held surplusage. Hamilton Nat. Bank v. Nye [Ind. App.] 77 N. E. 295. Allegation in complaint in supplementary proceedings. Hobbs v. Eaton [Ind. App.] 78 N. E. 333. In action to cancel conveyance, held that allegations of petition in regard to damages were properly stricken, the granting of relief prayed for not involving any allowance of damages and no facts being alleged entitling plaintiff to damages if successful in securing cancellation, or by way of alternative relief if he was not. Hall v. Kary [Iowa] 110 N. W. 930. In action by trustee for convict appointed pursuant to statute to recover property belonging to convict, held that allegations with reference to convict's right to join as plaintiff would be treated as surplusage on demurrer. New v. Smith. [Kan.] 84 P. 1030. Since in suit

Facts judicially noticed,[43] or which the law presumes,[44] or which are true as a matter of law,[45] legal conclusions,[46] and matters of evidence,[47] need not be alleged. That which already appears sufficiently in the pleading of either party without formal allegation need not be expressly averred.[48]

before justice formal pleadings are not required, redundancy and surplusage may be disregarded and complaint held good if there is enough in it to state cause of action and to bar second suit on same state of facts. McReynolds v. Quincy, etc., R. Co., 115 Mo. App. 676, 91 S. W. 446. Case not being bottomed on negligence, but on statutory duty of railroad to maintain fences in repair, held that allegation of negligence would be treated as surplusage. Id. There being a good plea of damages without certain allegations, held that they were not vital, so that striking them out was harmless. Roth Tool Co. v. Champ Spring Co. [Mo. App.] 99 S. W. 827. Demand for relief against certain persons not made parties held to be regarded as mere surplusage where their presence was in no way necessary to determination of controversy between plaintiff and defendants, and hence demurrer for nonjoinder was bad. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082. If the material and essential facts necessary to give council authority to proceed with street improvement are stated in a petition involving action with reference thereto, recitals which are mere conclusions of law may be treated as surplusage and petition allowed to stand. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317. Except as to allegations of essential description, it is only necessary to prove such allegations as are necessary to constitute a cause of action or a defense, whatever else is alleged being regarded as surplusage. Collins v. Chipman [Tex. Civ. App.] 15 Tex. Ct. Rep. 411, 95 S. W. 666. Allegations as to knowledge of falsity of representations in suit to rescind contract for fraud held surplusage. Id. Certain words stricken because presence could not affect cause of action, and only use would be that they might excite passion and prejudice of jury. Ginty v. New Haven Iron & Steel Co., 143 F. 699.

43. Objection that counts failed to allege in what county injury took place held met by amended complaint alleging that it took place in certain city, since court would take judicial notice that it was in certain county. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. Averment that injury was result of negligence in operating cars on streets of certain city held sufficient averment as to place, court taking judicial notice that streets of that city were all in county where suit was brought. Birmingham R., L. & P. Co. v. Moore [Ala.] 42 So. 1024.

44. Common-law rights and duties, such as duty of auditor to exhibit vouchers for bills to taxpayers and citizens. Clement v. Graham, 78 Vt. 290, 63 A. 146. Superfluous to claim damages which law implies from acts complained of. Malnati v. Thomas, 26 App. D. C. 277.

45. That certain vouchers were public records. Clement v. Graham, 78 Vt. 290, 63 A. 146.

46. That vouchers which law required auditor to keep were his in possession. Clement v. Graham, 78 Vt. 290, 63 A. 146. If facts alleged show fraud, either actual or constructive, no positive averments of fraud are necessary. Holliday v. Perry [Ind. App.] 78 N. E. 877. Answer alleging facts showing right of one redeeming pledged property to be subrogated to lien of pawnbroker held sufficient without alleging legal conclusion as to rights thus acquired. Lesser v. Steinder, 110 App. Div. 262, 97 N. Y. S. 255. Where law conferred right of action on widow for death of her husband, held that it was not necessary for her to allege survival of cause of action in her favor through his death. Davis v. Arkansas Southern R. Co., 117 La. 320, 41 So. 587.

47. General averment that certain orders were negligently given by defendant's representative held sufficient, it not being necessary to allege in what particulars order was negligent. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280. Complaint should allege the substantive or issuable facts, and it is unnecessary to set out evidence, or history of transactions leading up to such facts. Strange v. Bodcaw Lumber Co. [Ark.] 96 S. W. 152. In action for personal injuries resulting from collision of coach in funeral procession with street car, evidence of custom of cars to stop and allow funeral procession to pass without interruption held admissible though not pleaded. White v. Wilmington City R. Co. [Del.] 63 A. 931. In complaint on appeal from assessment of benefits and damages in proceedings to construct levee alleging that appellant's lands would be overflowed, held not necessary to allege how construction would cause overflow. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068. Where elemental fact is dependent for its existence upon other facts, averment of it alone is sufficient. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138. Allegation in plaintiff's denial of garnishee's answer that latter had in his possession and under his control a certain sum of money coming to and due the defendant held not a conclusion of law but a conclusion of fact, and proper. Id. Requiring complaint to be made more definite and certain by setting up evidentiary matters held error. Citizens' Central Nat. Bank v. Munn, 101 N. Y. S. 435, rvg. 49 Misc. 319, 99 N. Y. S. 191. Evidence of plaintiff's intoxication held admissible under allegation of contributory negligence, it being unnecessary to plead probative facts relied on to show such negligence. Sharpton v. Augusta & A. R. Co., 72 S. C. 162, 51 S. E. 553. In suit to have defendant declared to hold certain tidelands as trustee for plaintiff where complaint alleged that plaintiff was entitled to purchase such lands as owner of the upland, held not an abuse of discretion to require plaintiff to state what uplands he owned. Washington Dredging & Imp. Co v. Cannel Coal Co. [Wash.] 88 P. 836. Fraud and agency held alleged with sufficient particularity. Rogers v. Virginia-Carolina Chemical Co. [C. C. A.] 149 F. 1.

48. Complaint for mandamus need not allege that relator has no other adequate remedy where fact is apparent from other alle-

As a general rule it is not permissible to plead in the alternative,[49] though in some states a party may state all the facts out of which the controversy arises and pray in the alternative for relief.[50]

Pleadings may ordinarily be signed, filed, and presented by an attorney.[51] Pleadings signed by two attorneys are properly allowed to stand though one of them is disqualified.[52]

Interpretation and construction in general.[53]—A pleading should be construed as a whole,[54] and, where reasonably possible, so as to give effect to all of its material allegations.[55] Specific averments control general ones.[56] Mere clerical errors will be disregarded.[57] That which is implied is of equal effect as if it had

gations. Clement v. Graham, 78 Vt. 290, 63 A. 146.

49. Complaint in action for damages for personal injuries averring that act complained of was willfully or wantonly done held not demurrable, wantonness being legal equivalent of willfulness. Mobile, etc., R. Co. v. Smith [Ala.] 40 So. 763. Where complaint set up but a single cause of action in case predicated on simple negligence, held that it was not fatally defective because averments of negligence on part of defendant or its agent were in the disjunctive, same evidence and defenses being available in either case. Alabama Great Southern R. Co. v. Sanders [Ala.] 40 So. 402. Alleged alternative averments held not such as to vitiate the complaint on demurrer, where in each instance they referred to same ultimate fact, each of them being pertinent to the single cause of action. Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539. Allegation that defective condition of sidewalk was known to defendant or by the exercise of ordinary care might have been known to it, held not objectionable. Spaulding v. Edina [Mo. App.] 97 S. W. 545. Pleading under oath, pursuant to Sayles' Rev. Civ. St. art. 2323, that account sued on was "not just or true, in whole or in part," held not objectionable. Milam v. Harrell Lumber Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 429, 97 S. W. 825.

50. An action may be maintained on the theory of alternative relief only where, on the facts stated, plaintiff would be entitled to the relief demanded against the same defendant or defendants, and he cannot join two defendants upon claim that he has right to relief against one or the other of them Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co., 102 N. Y. S. 122. Where two corporations had same name, but were organized under laws of different states, and were controlled by same parties, and had same officers who ordered fixtures from plaintiff without informing him for which corporation they were intended, and they were distributed between two as officers desired, held that it was permissible for plaintiff to allege in complaint in suit for purchase price that one of them had ordered all the fixtures and was liable for all of them and in the alternative that the other had done so, and jury could return verdict against each for amount it owed. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617. Civ. Code Proc. § 113, subsec. 4, providing that party may allege alternatively the existence of one or another fact, if he states that one of them is true and that he does not know which of them is true, held not to limit number of facts which may be so stated to two, so that petition was not objectionable because alleging that death was caused by one or more of three negligent acts, and that plaintiff did not know which. Louisville & N. R. Co. v. Wyatt's Adm'r, 29 Ky. L. R. 437, 93 S. W. 601. Both of the alternative statements must present a cause of action or the pleading is bad. Hoffman v. Maysville, 29 Ky. L. R. 1245, 97 S. W. 360.

51. Answer in suit to set aside judgment for fraud. Lee v. Hickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 91, 91 S. W. 636.

52. Where pleadings were signed by two attorneys one of whom was judge of court where case was pending, held that they were properly allowed to stand, though Rev. St. 1895, art. 271, prohibits judges from appearing and pleading as attorneys, since they were signed by one attorney who was allowed to sign them. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

53. See 6 C. L. 1015.

54. Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539. Failure of complaint to show fact that plaintiff himself was not the servant whose negligence caused accident complained of held not supplied by other allegation. Schreiner v. Grant Bros. [Cal. App.] 86 P. 912. On demurrer to certain paragraphs of answer held that their sufficiency could only be determined by considering them in connection with others which were traversed, all being proper parts of single plea of justification. Molineux v. Hurlbut [Conn.] 64 A. 350. Where plaintiff in ejectment pleads title and source of title of each of the parties in addition to statutory requirements, all the facts pleaded will be considered in determining sufficiency of petition on demurrer, and demurrer will be sustained if other allegations negative truth of those required. Jones v. Carnes [Okl.] 87 P. 652.

55. Complaint in action for damages due to negligent construction of windmill held to state cause of action ex delicto and not ex contractu, particularly as case was tried on that theory below. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503.

56. Averments as to negligence. Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 76 N. E. 1015. In partition, general averments in cross complaint that ownership is that of tenants in common held to control specific averments in exhibit not properly apart thereof because not the foundation of the action. Shetterly v. Axt [Ind. App.] 77 N. E. 865.

57. Inappropriate use of word "plaintiff" instead of "defendant" held obviously a

been expressed.[58] An inference cannot be drawn from facts which themselves rest wholly or in part in inference, or which do not reasonably and fairly exclude every other hypothesis except the fact inferred,[59] though the contrary has been held in regard to an express trust.[60] An agreement alleged generally will ordinarily be presumed to be in writing if a writing is essential to its validity.[61]

It will be presumed that the pleader has stated is case as strongly in his favor as the facts warrant.[62] At common law on demurrer everything in a pleading was taken most strongly against the pleader, and this rule still prevails in some states.[63] Under the codes, however, pleadings are generally to be liberally construed with a view to substantial justice between the parties,[64] and every reasonable intendment

clerical error. Burstein v. Levy, 49 Misc. 469, 98 N. Y. S. 853. Allegation that wagon ran into "plaintiff" instead of into "plaintiff's intestate" held a mere clerical error which did not render complaint demurrable, but was mendable at any time, under Code Civ. Proc. § 723, upon mere suggestion to court. King v. Mail & Express Co., 113 App. Div. 90, 98 N. Y. S. 891.

58. On demurrer. Moore v. East Tenn. Tel. Co. [C. C. A.] 142 F. 965.

59. Facts must be clearly and unequivocally alleged. Krank v. Continental Ins. Co., 50 Misc. 144, 100 N. Y. S. 399. In action on fire insurance policy, complaint held not to allege specifically or by fair intendment that insured property was destroyed or damaged by fire. Id.

60. Where statute requires it to be in writing, complaint in action to enforce such a trust must allege that it was in writing. Boulliam v. Doyle [Ind. App.] 77 N. E. 859.

61. Petition is not demurrable because it fails to allege that contract declared upon was in writing, though contract is within statute of frauds. Mobley v. Lott [Ga.] 56 S. E. 637; Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81; International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Demurrer is not well taken unless complaint shows affirmatively that contract sued on is oral. Alexander v. Cleland [N. M.] 86 P. 425. Where petition did not state whether contract sued on was written or oral, held that it would be presumed to be in writing as against argument that it was barred by statute of limitations relating to oral contracts. Van Meter v. Poole, 119 Mo. App. 296, 95 S. W. 960. Where written contract is indispensable to valid agreement, pleading of agreement that does not affirmatively show that it was not in writing is pleading of a written agreement. Barnsdall v. Waltemeyer [C. C. A.] 142 F. 415.

62. Schaadt v. Mutual Life Ins. Co., 2 Cal. App. 715, 84 P. 249.

63. Johnson v. Birmingham R. L. & P. Co. [Ala.] 43 So. 33; Bunting v. Dobson, 125 Ga. 447, 54 S. E. 102; Ayer & Lord Tie Co. v. Keown, 29 Ky. L. R. 110, 400, 93 S. W. 588; Fox v. Clemmons [Ky.] 99 S. W. 641; Cambers v. First Nat. Bank 144 F. 717. Allegations which are ambiguous or in alternative form. Bagnett v. Edwards, 126 Ga. 463, 55 S. E. 250. Where petition in suit to enjoin sale of land under power contained in instrument executed by plaintiff's intestate for purpose of securing a debt described such instrument as "a mortgage or security deed", held that it would be considered as deed conveying title, and power as one coupled with an interest and not revoked by maker's death. Id. Declaration in action for personal injuries to servant held not to state cause of action. Wright v. Illinois Cent. R. Co., 119 Ill. App. 132. Claim of set-off in action on note held insufficient, it being presumed that plaintiff came into possession of note lawfully where it failed to state how she came into possession of it. Schnell v. Schnell [Ind. App.] 80 N. E. 432. Petition in action for personal injuries held to mean that plaintiff had defendant's permission or consent to use shop, what pleader called invitation being a license. Brown v. Thomas Blackwell Coal & Min. Co. [Ky.] 99 S. W. 299. Where complaint alleged that dangerous condition arising from close proximity of pole to track was unknown to plaintiff, held that on demurrer it would be presumed that he knew it was there but did not appreciate danger, allegation containing an implication to that effect. Moore v. East Tennessee Tel. Co. [C. C. A.] 142 F. 965.

64. Choctaw, etc., R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Rev. St. 1899, § 629. Ackerman v. Green, 195 Mo. 124, 93 S. W. 255. Code Civ. Proc. § 519. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86; Thompson v. Wittkop, 184 N. Y. 117, 76 N. E. 1081. On general demurrer every reasonable intendment from allegations taken as a whole will be indulged. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Petition in action for breach of contract of employment held sufficient Id. In absence of motion to make more definite and certain, petition should be liberally construed with view to promote justice, and demurrer overruled, if facts stated, when all are taken as true constitute cause of action, whether well pleaded or not. Bowersox v. Hall & Co. [Kan.] 84 P. 557; Upham v. Head [Kan.] 85 P. 1017. Under rule that pleadings should be liberally construed with view to substantial justice between parties, no pleading is to be condemned if allegations of fact claimed to have been stated can be read therefrom with reasonable certainty though its allegations be in form uncertain, incomplete, and defective. Modern Steel Structural Co. v. English Const. Co. [Wis.] 108 N. W. 70. Reply held to put in issue allegations of defendant's counterclaim for damages for breach of contract sued on. Id. Where facts are stated in complaint sufficient to constitute cause of action, whether legal or equitable, complaint is not demurrable for want of facts because both legal and equitable relief is demanded, when

and presumption will be indulged in their favor,[65] though in some states this rule does not apply when they are attacked by special demurrer.[66] As a general rule both at common law and under the codes, pleadings will be liberally construed when first attacked at the trial,[67] or after verdict and judgment,[68] though there seems to be some conflict of authority in this regard.[69]

plaintiff is entitled to but one. Doyle v. Delaney, 112 App. Div. 856, 98 N. Y. S. 468. Where complaint stated a legal cause of action, held that it was not demurrable because it demanded equitable relief where it also demanded a money judgment in the alternative. Id. Demand for money judgment in the alternative held the equivalent of a demand for a legal remedy, no set form of words being necessary if intent of pleader is made apparent. Id. Declaration in action on insurance policy held sufficient in view of Code 1887, § 3246, providing that no action shall abate for want of form where declaration sets forth sufficient matter of substance for court to proceed upon the merits, and § 3272, providing that on demurrer, defects and imperfections shall be disregarded unless there is omitted something so essential to action or defense that judgment according to law cannot be given. Cosmopolitan Life Ins. Co. v. Koegel, 104 Va. 619, 52 S. E. 166. Test of sufficiency of a declaration is whether it contains sufficient matter for plaintiff to state and prove his case under it, and to afford a defense to another suit for same cause of action. Id.

65. Pleader is entitled to benefit of all reasonable inferences which can be deduced from specific facts alleged. Bell v. Central Nat. Bank, 28 App. D. C. 580. Allegation of refusal to pay certain sum held to imply a demand, at least on general demurrer. Hirshiser v. Ward [Nev.] 87 P. 171. On demurrer for want of facts, all facts stated will be held to be true, and pleading will be held to state all facts that can be implied from its allegations by reasonable and fair intendment. Lesser v. Bradford Realty Co., 101 N. Y. S. 571; Town of Hadley v. Garner, 101 N. Y. S. 777. Demurrer cannot be sustained simply because facts are imperfectly or informally averred, or agumentatively stated, or lack definiteness and precision. Complaint in action by servant for breach of contract of employment held sufficient. Treffinger v. Groh's Sons' 112 App. Div. 250, 98 N. Y. S. 291. Complaint in action for fraud held sufficient. Motley v. Mercantile Trust Co., 51 Misc. 460, 100 N. Y. S. 281. In absence of special exception. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551. Where no objection is made to the form of allegations of a petition. Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212. Statement of grounds of contest of local option election held sufficient as against general demurrer, though allegations were redundant, etc. Id. Allegation the defendant promulgated a rule" held equivalent to allegation that rule was in force at time of accident, in absence of special exception. Missouri, etc., R. Co. v. Avis [Tex.] 15 Tex. Ct. Rep. 756, 93 S. W. 424. General demurrer. Allen v. Baxter, 42 Wash. 434, 85 P. 26. All facts presumed to exist which are reasonably inferable from those pleaded. Not laches. Steinberg v. Saltzman [Wis.] 110 N. W. 198. Where construction of pleading assailed by demurrer is doubtful after giving its language a reasonable intendment, doubt will be resolved against pleader. Stephens v. City Council [Iowa] 107 N. W. 614.

66. Where pleading is fairly susceptible of two intendments, on special demurrer, that will be adopted which is most unfavorable to the pleading. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551.

67. O'Brien v. Seattle Ice Co. [Wash.] 86 P. 399. More liberally construed than on demurrer. Carey v. Hays, 41 Wash. 580, 84 P. 581. Rule that pleading must be taken most strongly against the pleader, where the language used is ambiguous, has no application where the pleader confesses that the pleading is ambiguous and seeks to amend it. Atlanta, etc., R. Co. v. Georgia R. & Elec. Co., 125 Ga. 798, 54 S. E. 753. Allegation of complaint that trustee in bankruptcy claimed right to take possession of attached property though defective, held after answer, to be entitled to all intendments in favor of its sufficiency, and to be tantamount to allegation that, when suit was commenced, he had not taken possession of it. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049. On plaintiff's motion for judgment on pleadings made at trial, answer will be liberally construed. Answer held sufficient. Roebuck v. Wick [Minn.] 107 N. W. 1054.

An objection to introduction of any evidence. Simonds v. Richards [Kan.] 86 P. 452. Though averments are indefinite and informal, objection will be overruled if, upon any fair construction, it can be held to state a cause of action. Burnette v. Elliott, 72 Kan. 624, 84 P. 374. Complaint held sufficient. Id. Will be more liberally construed than if demurrer had been interposed before trial. Heether v. Huntsville [Mo. App.] 97 S. W. 239. Objection will be overruled if it is susceptible of a construction that will constitute a cause of action. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614. Where petition in action for wrongful death of citizen of another state relied on statute of latter, authorizing widow to recover such damages as deceased could have recovered if death had not ensued, but was defective in failing to allege that deceased could have maintained suit in that state had he survived, but did state facts which would have allowed him to do so under statutes of forum, held that, on objection to introduction of evidence, it would be presumed that laws of two states were same, defendant having by its answer joined issue on question of negligence. Id. Petition in action on bond held sufficient, notwithstanding difference in name of plaintiff and that of obligee, and lack of particularity of allegations of mistake in this regard. State v. Delaney [Mo. App.] 99 S. W. 1. Court will determine only whether or not it states cause of action in equity, and if facts pleaded are sufficient and in their nature

Profert and oyer.[70]—The purpose of making profert is to enable the other party to demand oyer,[71] and of oyer to enable the party craving it to hear the instrument so that he may enter it upon the pleadings and take advantage of any part thereof not already pleaded by his adversary.[72] Profert cannot be made nor oyer demanded unless the declaration avers a sealed instrument.[73] Defendant in an action of jactitation is not entitled to oyer of plaintiff's title.[74]

Exhibits.[75]—By statute in some states when any pleading is founded on a written instrument, the original or a copy thereof must be filed with the pleading.[76]

cognizable by court of equitable jurisdiction, objection will ordinarily be overruled. Haffner v. Dobrinski [Okl.] 88 P. 1042. Complaint in action on contract held to state sufficient facts to constitute cause of acion. Schriner v. Dickinson [S. D.] 107 N. W. 536. Allegations liberally construed for purpose of sustaining them on appeal. First Nat. Bank v. Cochran [Okl.] 87 P. 855.

68. Clem v. Quincy, etc., R. Co., 119 Mo. App. 245, 96 S. W. 226; Hopkins v. Chicago, etc., R. Co., 128 Wis. 403, 107 N. W. 330. On appeal. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849; Frontier Supply Co. v. Loveland [Wyo.] 88 P. 651. Where pleading is attacked and defect therein sought to be availed of for first time on error, or at any time after verdict, all intendments and reasonable inferences stand to advantage of pleader, and all parts of pleading must be taken most strongly in his favor. Alton L. & T. Co. v. Oller, 119 Ill. App. 181. Where sufficiency of complaint is tested for first time by assignment of error on appeal it will be held sufficient if it contains facts enough to bar another action for same cause. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068; Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524. Any uncertainty held cured by evidence and verdict Negligence. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347. Complaint in action for personal injuries sufficient. Indianapolis Traction & Terminal Co. v. Smith [Ind. App.] 77 N. E. 1140. Complaint in action for damages for personal injuries to passenger on train held sufficient in absence of motion to make more specific. Southern R. Co. v. Roach [Ind. App.] 77 N. E. 606, 78 N. E. 201. Complaint is good if upon facts stated plaintiff is entitled to any part of relief sought on theory of his case. Migatz v. Stieglitz [Ind.] 77 N. E. 400. Can be successfully so attacked only when total failure to allege some fact essential to recovery. Complaint in action for personal injuries held sufficient. Indianapolis Traction & Terminal Co. v. Smith [Ind. App.] 77 N. E. 1140. Uncertainty or inadequacy of averment will not render it bad. Id. In action for personal injuries due to negligence, if defendant fails to demur, appellate court will not reverse judgment on objection that complaint fails to state cause of action where it is shown by record that it does state that injury was direct result of negligent and careless construction and management of defendant's property, and calls attention to particular portion thereof that was badly constructed and managed and resulted in injury of plaintiff. Crowley v. Croesus Gold & Copper Min. Co. [Idaho] 86 P. 536. Where party fails to test sufficiency of petition by demurrer, but answers to merits and proceeds to trial on theory that it tenders certain issue, and such issue is litigated, pleadings will, on appeal, be construed to raise such issue if it is possible by any reasonable construction of language. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260. Objections to sufficiency of answer to support testimony and sustain judgment held too late. Nelson v. Modern Brotherhood of America [Neb.] 110 N. W. 1008. In passing on sufficiency of petition to support judgment on appeal, it is entitled to liberal construction, and any construction which will support judgment. Petition held sufficient. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. App. 578, 98 S. W. 943.

69 Answer construed most strongly against pleader. Fitzpatrick v. Vincent, 28 Ky. L. R. 121, 88 S. W. 1073. In an action on purchase money notes in which it is alleged that the vendor had made and the vendee had accepted a warranty deed, an answer denying, that the vendor had made a good title or that the vendee had accepted such deed or title merely denies that the vendor had made the vendee a good title and not that he had accepted a deed. Id.

70. See 6 C. L. 1017.

71. Sautter v. Metropolitan Life Ins. Co. [N. J. Law] 63 A. 994.

72. Sautter v. Metropolitan Life Ins. Co. [N. J. Law] 63 A. 994. Letters of administration having been made public records by statute, and defendant before plea being entitled to compel plaintiff to file any instrument upon which declaration is founded, fact that one suing as administrator failed to make profert of letters held not to require striking out of declaration, where issuance of letters and their date and officer by whom granted was alleged. Id. Where oyer of sealed instrument was in fact demanded and given, it became part of declaration and gave defendant right to plead thereon whether oyer was in fact demandable or not. Morrill's Adm'x v. Catholic Order of Foresters [Vt.] 65 A. 526.

73. Insufficency of notice of motion for judgment on note under Code 1899, c. 121, § 6, held not cured by reading of note on demand for oyer. Anderson v. Prince [W. Va.] 55 S. E. 656. Contract not under seal cannot be made a part of the declaration by oyer. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465. Such a contract cannot be considered in consideration a demurrer to the declaration. Id.

74. Slander of title. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153.

75. See 6 C. L. 1018.

76. Copies of notes and a written statement of balance due on open account filed with declaration in action on all of them held sufficient to appraise defendant of nature and extent of demand against him and

As a general rule exhibits cannot be looked to in aid of a pleading,[77] though they may be against it.[78] There seems to be a conflict of authority as to the effect in this regard of statutes requiring the filing of written instruments sued on.[79]

Bills of particulars.[80]—A bill of particulars may ordinarily be demanded in all actions where, by reason of the generality of the claim or charge, the adverse party is unable to know with reasonable certainty what he is required to meet.[81] Its purpose and effect is to amplify the pleading and to limit the issues.[82] It is not

hence a sufficient compliance with statute. Lord v. Dowling Co. [Fla.] 42 So. 585. Rights sought to be enforced by plaintiff held based on compromise agreement and not on will, so that it was not necessary to attach copy of will to petition or set out its substance therein. Bell v. Lazenby, 126 Ga. 767, 56 S. E. 81; Elwood Natural Gas & Oil Co. v. Glaspy [Ind. App.] 77 N. E. 956. Complaint seeking to restrain threatened breach of written contract to furnish gas held founded on contract, so that original or copy should have been filed or set out as required by Burns' Ann. St. 1901, § 565. Elwood Natural Gas & Oil Co. v. Kullman [Ind. App.] 78 N. E. 1056. Order given by contract to materialman on owner for balance due under contract held not an assignment of contract, and hence materialman was not bound to file contract in action to foreclose lien. Siegmund v. Kellogg-Mackay-Cameron Co. [Ind. App.] 77 N. E. 1096. Action by materialman to foreclose mechanic's lien held not founded on contract between owner and contractor. Id. In action to recover value of fence constructed along railroad right of way where it ran through plaintiff's land, itemized and verified statement of account required by statute to be furnished to company in such case is not foundation of action. Vandalia R. Co. v. Kanarr [Ind. App.] 77 N. E. 1135. Statement is not an account within meaning of statute, nor is action based on any contract. Vandalia R. Co. v. Stephens [Ind. App.] 78 N. E. 1055. In action to contest probate of will and to probate in its stead an alleged subsequent one, latter will held foundation of cause of action so that it was part of complaint when copy was attached as exhibit. Heaston v. Kreig [Ind.] 77 N. E. 805. Contract not foundation of action to recover premiums paid on alleged void policy of life insurance. American Mut. Life Ins. Co. v. Mead [Ind. App.] 79 N. E. 526. Action by remaindermen under will to restrain commission of waste by grantees of life tenant, etc., held not founded on will. Cross v. Hendry [Ind. App.] 79 N. E. 531. Will held basis of paragraph of answer claiming setoff to note sued on. Schnell v. Schnell [Ind. App.] 80 N. E. 432. Foundation of cause of action in certain paragraph of complaint held issue of suretyship of married woman and not deed given to secure sureties which it was sought to have declared a mortgage and canceled. Warner v. Jennings [Ind. App.] 76 N. E. 1013. Is not essential under Civ. Code Proc. § 120, that an exhibit like an open account be set out in the body of the pleading if it is made a part of it and filed with it as an exhibit, though rule is different as to writings that are evidences of indebtedness. Snowden v. Snowden, 29 Ky. L. R. 1112, 96 S. W. 922. Rev. St. 1899, § 643, held not to require filing of contrats executed by both parties. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34.

77. Cannot be referred to for purpose of supplying omission of a material allegation or curing a fatal defect. McPherson v. Hattich [Ariz.] 85 P. 731. Cannot plead by exhibits at common law and contract cannot be made part of declaration at law by filing it therewith and referring to it as a part thereof. Chicago Portrait Co. v. Chicago Crayon Co., 118 Ill. App. 98. Bond filed with petition in action thereon held not part of it so that face of petition alone could be looked to to determine whether if stated cause of action. State v. Delaney [Mo. App.] 99 S. W. 1. Exhibit not the foundation of a cross-complaint cannot be looked to to determine its sufficiency. Shetterly v. Axt [Ind. App.] 77 N. E. 865. Where copy of will was made exhibit pursuant to order of court on motion of defendants, but was not a proper exhibit under Code, questions as to effect of such instrument held not raised by demurrer to complaint. Heaston v. Kreig [Ind.] 77 N. E. 805.

78. Where petition alleged that money sought to be recovered from partnership was received by certain person as a member of the firm, and not turned over to plaintiff to whom it belonged, but exhibits showed that transaction was between plaintiff and such person was between them alone, demurrer was properly sustained. Fox v. Clemmons [Ky.] 99 S. W. 641.

79. Florida: Rev. St. 1892, and circuit court rule 14, requiring contract sued on or a copy thereof to be filed with declaration, do not make contract so filed a part of the pleading, and hence copy of contract annexed to declaration as an exhibit cannot, on demurrer, be used to supply an essential allegation of fact omitted therefrom. Milligan v. Keyser [Fla.] 42 So. 367.

Indiana: Where allegations of complaint in regard to instrument sued on vary from provisions of instrument as shown by exhibit controls on demurrer and allegations will be disregarded. Huber Mfg. Co. v. Wagner [Ind.] 78 N. E. 329.

Oklahoma: Copy of instrument which is basis of action, attached to petition and made a part thereof, should be considered as part of petition when construing allegations thereof as against general demurrer. Mortgage in replevin by mortagagee. Whitacre v. Nichols [Okl.] 87 P. 865.

80. See 6 C. L. 1019.

81. American Rolling Mill Corp. v. Ohio Iron & Metal Co., 120 Ill. App. 614.

82. To inform the opposite party of the precise nature and extent of the claim which the plaintiff intends to rely upon under each and every count of the narr., and to confine his evidence to the claim thus stated. Cairnes v. Pelton, 103 Md. 40, 63 A. 105. To amplify the pleading and indicate with more

a part of the pleading and cannot operate to change the cause of action therein alleged.[83]

Bills of particulars are generally obtained by motion and order of court.[84] The motion is sometimes required to be based on the affidavit of the party making it.[85] In some states a copy of an account sued on may be procured on mere notice or demand.[86]

Whether or not a party shall be ruled to furnish a bill in a particular case ordinarily rests in the sound legal discretion of the trial court, whose action will not be reviewed unless an abuse of discretion is clearly shown.[87] One whose pleading is bad is not entitled to compel the furnishing of a bill by his adversary.[88] A party should not be required to recite his evidence[89] or to disclose his witnesses,[90] or to set

particularity than is ordinarily required in a formal plea, the nature of the claim made in order that the issues may be be more intelligently met. Chisolm v. Straus, 110 App. Div. 552, 97 N. Y. S. 258. Object is not only to enable a party to properly prepare his pleading for trial but also to limit the scope of the inquiry at the trial, and whenever facts are presented from which court can find that either is the object of the motion, bill will be ordered to extent required for such purpose. Rhodes v. Rice, 113 App. Div. 304, 98 N. Y. S. 913. When required and furnished, its effect is to limit the plaintiff on the trial to proof of the particular cause or causes therein mentioned. American Rolling Mill Corp. v. Ohio Iron & Metal Co., 120 Ill. App. 614. In action on common counts, filing of bill held to have operated to strike out of the complaint all the counts or paragraphs not appropriately applicable thereto. Gen. St. 1902, § 627. Dunn v. Foley, 78 Conn. 670, 63 A. 122. Declaration in action of assumpsit to recover money paid for option contained common money counts and special count alleging false representations. Held that bill alleging that action was to recover amount paid defendants and interest thereon did not purport to and did not limit plaintiff to common counts, measure of damages being same under special count and under common counts. Gubbins v. Ashley [Mich.] 13 Det. Leg. N. 844, 109 N. W. 841.

83. Dixon v. Bunnell, 102 N. Y. S. 775. Office is to amplify a pleading and limit the proof and not to change cause of action stated in complaint, or to state one other than one there stated. St. Albans Beef Co. v. Aldridge, 112 App. Div. 803, 99 N. Y. S. 398.

84. Party is not bound to furnish bill provided for by Rev. Codes 1899, § 5282, on demand, but court or judge must order to be furnished before delivery can be compelled or penalties for failure to deliver inflicted. Hanson v. Lindstrom [N. D.] 108 N. W. 798. In action to recover money paid to defendant by plaintiff and alleged to be held by him as trustee pursuant to contract, motion to make complaint more definite and certain by stating dates and amount of payments, etc., held to amount in effect to demand for bill of particulars which was properly denied because irregularly made. Gouplile v. Chaput [Wash.] 86 P. 1058.

85. Affidavit of attorney alone is insufficient unless some well stated reason exists for a departure from this rule. St. Regis Paper Co. v. Santa Clara Lumber Co., 112 App. Div. 775, 98 N. Y. S. 572. Rule is not changed by fact that defendant applying for bill is a corporation. Id. Fact that no officer of defendant was within county at date of verification held not a sufficient reason for verification by attorney. Id. Affidavit of attorney held insufficient in that he did not make it appear that he had personal knowledge of the essential facts, and because it appeared that his statement as to lack of knowledge of officers of defendant as to certain matters was based on their unsworn statements to him. Id.

86. Copy of order for delivery of threshing machine outfit accepted by seller for fixed price, on which certain payments have been made, is not a copy of an account within meaning of Rev. Codes 1899, § 5282. Hanson v. Lindstrom [N. D.] 108 N. W. 798.

87. American Rolling Mill Corp. v. Ohio Iron & Metal Co., 120 Ill. App. 614. Refusal to require plaintiff to file bill in action for negligence held not an abuse of discretion in view of full and clear statement of plaintiff's case in the declaration. Blue Ridge L. & P. Co. v. Tutwiler [Va.] 55 S. E. 539.

88. Where defendant's denial was negative pregnant, held that his motion for bill was properly denied. Shepard v. Wood, 102 N. Y. S. 306.

89. In action by judgment creditor to set aside conveyance as fraudulent, where answer of grantee alleged that conveyance was made in part payment for services rendered judgment debtor, held that plaintiff was not entitled to bill giving copy of contract under which alleged services were made if in writing, or specifying when it was made if oral, and specifying what part of wages was agreed upon as consideration for conveyance. Allter v. Jerome, 110 App. Div. 813, 97 N. Y. S. 243. Complaint in action by stockholders of corporation against another corporation owning a majority of the stock held to sufficiently allege wrongful breach of trust by defendant, and to give all the particulars the latter was entitled to. Ingraham v. International Salt Co., 100 N. Y. S. 192.

90. Bill denied as to name and address of lawyer examining title. Markowitz v. Teichman, 102 N. Y. S. 469. Code Pub. Gen. Laws 1904, art 75, § 107, does not require disclosure. Cairnes v. Pelton, 103 Md. 40, 63 A. 105.

out immaterial matters,[91] or to give too many minute details of his claim.[92] An order for a further bill made after the service of a voluntary one should only be required to cover matters not sufficiently alleged in the former.[93] Cases dealing with the right to bills in particular cases[94] and the sufficiency of particular bills[95] will be found in the notes.

91. In action for wrongful discharge of employe, amount of defendants' losses alleged to be due to plaintiff's negligence held immaterial. Reichardt v. Plaut, 98 N. Y. S. 195.

92. Motion for bill in action for damages resulting from collision between team and defendant's automobile held an imposition on court so that refusal to grant any part of it was justifiable. Shepard v. Wood, 102 N. Y. S. 306.

93. Reichardt v. Plaut, 98 N. Y. S. 195.

94. Plaintiff held entitled to bill: As to whether a certain agreement was in writing, and, if not in writing, then a statement to that effect. Knickerbocker Trust Co. v. O'Rourke Engineering Const. Co., 97 N. Y. S. 116. Of facts constituting fraud and false swearing alleged as a defense in action on fire insurance policy. Douthitt v. Nassau Fire Ins. Co., 101 N. Y. S. 94. In action on quantum meruit for work and materials done and furnished in repairing building, of defendant's counterclaim for loss of profits and rents paid because of delay in completing work. Geo. W. Smith & Co. v. Welsh, 114 App. Div. 899, 99 N. Y. S. 873. In action for breach of contract of employment, where answer alleged that plaintiff was rightfully discharged because he had persisted in course of conduct antagonistic to defendant's superintendent and destructive of discipline, held that plaintiff was entitled to bill specifying items of such course of conduct and acts and omissions whereby he antagonized or failed to co-operate with superintendent and which were destructive of dicipline. Burhans v. Hudson River Wood Pulp Mfg. Co., 101 N. Y. S. 271. In action to recover balance alleged to have been expended for benefit of defendant's intestate, held that plaintiff was entitled to particulars of defendant's counterclaim alleging deception, imposition, and wrongdealing by plaintiff and his deceased copartner for period of four years, while acting as attorney for defendant's intestate, where in his moving affidavit he denied all knowledge of the same, and there were no opposing affidavits of inability to furnish particulars. Washburn v. Graves, 101 N. Y. S. 1043.

Plaintiff held not entitled to bill: In action for alleged wrongful discharge of plaintiff from defendant's employ, held unnecessary to require defendant to state wherein plaintiff was careless and inattentive, etc., those matters having been stated with sufficient particularity in the answer (Reichardt v. Plaut, 98 N. Y. S. 195), nor should defendants be required to give names and addresses of persons improvidently employed by plaintiff while acting for them (Id.), nor where answer merely alleged that plaintiff was not diligent in seeking other employment to specify names of persons from whom they claimed plaintiff could have obtained employment and nature thereof, etc. (Id.). Where defendants claimed that goods manufactured were returned because of plaintiff's negligence and defendants furnished voluntary bill, held that order for further bill requiring them to furnish names and addresses of such customers other than those specified in previous bill should be modified by inserting words "if any", so that they would not be precluded from proving items in such former bill (Id.).

Defendant held entitled to bill: In action to recover value of articles claimed to have been unlawfuly removed from premises belonging to her by defendants upon vacating as tenants, and resultant damages to her freehold from such removal, specifying quantity, character, and value of articles removed, and character and nature of injuries to freehold. Chisolm v. Straus, 110 App. Div. 552, 97 N. Y. S. 258. In action for specific performance of contract of damages claimed to have been sustained in consequence of failure to perform, for which complainant asked judgment in case specific performance could not be decreed. Gross v. Conner, 114 App. Div. 32, 99 N. Y. S. 569. In action on contract to build and convey certain houses to plaintiff, where alleged breach consisted in failure to build according to plans and sample houses, specifying in what respect the houses were not completed as required. Breslauer Realty Co. v. Cohen, 100 N. Y. S. 775. In action by vendees for specific performance for contract for sale of realty, where complaint alleged that title tendered by defendants was "subject to a number of violations on file" in various city departments, and also to other incumbrances and charges, held that plaintiffs would be required to specify particular violations which they complained were not complied with and constituted an incumbrance at the time title was tendered and rejected. Gross v. Connor, 114 App. Div. 32, 99 N. Y. S. 569. In action to recover money deposited to bind contract for sale of realty on ground that defendant could not furnish marketable title because of incumbrances other than those mentioned in contract and to recover counsel fees paid for examining title, motion for bill as to incumbrances and defects in title and as to date of payment of counsel fees granted. Markowitz v. Teichman, 102 N. Y. S. 469, here defendant denied making of written contract sued on or any knowledge thereof, held that he was entitled to copy of contract on motion for bill. United States Paper Co. v. De Haven, 100 N. Y. S. 796. In action for breach of contract to furnish twisted wire in cut lengths, where plaintiff alleged as special damages its inability to perform contracts with third persons and to fill orders, held that defendant was entitled to bill giving names and addresses of persons with whom plaintiff made contracts and statement of items of damages sustained by being unable to fill orders. Id. In action for services in bringing about sale of defendant's property, plaintiff required to specify whether contract under which services were rendered was oral or written, if former, to state when and where and persons with whom it was made, and substance

A party failing to file a bill as required by statute [96] or order of court [97] is generally precluded from giving evidence as to matters which should have been in-

thereof, and if written to furnish copy thereof, and also to specify what services were rendered. Rhodes v. Rice, 113 App. Div. 304, 98 N. Y. S. 913. In action on life insurance policy, where answer set up false representations and warranties and reply alleged that at time of making application insured duly informed defendant of true condition of her health, etc., held that order directing plaintiff to specify name of person to whom information was given and time and place of each transaction upon which waiver was claimed should further provide that, if plaintiff should declare under oath that he was unable to give such name, he might instead give description of such person, or such other facts as woud tend to establish his identity. Schmitt v. Mutual Reserve Life Ins. Co., 97 N. Y. S. 294. Plaintiff in action for slander held properly required to file bill of places where and persons to whom words were spoken, and names of persons who would have dealt with plaintiff but for such words. American Rolling Mill Corp. v. Ohio Iron & Metal Co., 120 Ill. App. 614. In action against railroad for conversion of trunks, showing as far as possible the contents of trunks. Texas & P. R. Co., v. Weatherby [Tex. Civ. App.] 14 Tex. Ct. Rep. 809, 92 S. W. 58. Error in failing to require plaintiff to furnish it held harmless where it appeared that defendant was in possession of trunks and knew their contents. Id. In action against street railway for assault by employe on passenger, plaintiff required to give place, time, direction car was going, number of car, line, badge number of motorman and conductor if he knew them, length of time plaintiff was confined to house and detained from work, amounts paid for doctor bills and medicines, and nature of his business and average earnings, or to state his lack of knowledge as to any such information he was unable to furnish, but not nature of injuries and effect of same, there being no allegation of permanent injuries. Ferris v. Brooklyn Heights R. Co., 102 N. Y. S. 463. Where complaint alleged permanent injuries in general, held that bill should have been ordered though defendant would not, as condition of granting motion, waive its right to physical examination of plaintiff, since particulars might in themselves furnish reason for such examination. Baker v. New York City R. Co., 102 N. Y. S. 276.

Defendant held not entitled to bill: In action to quiet title held not an abuse of discretion to refuse to require plaintiffs to furnish bill of their claim of title, abstract of title, particular statement of defendant's adverse claim, claims of both parties being evidenced by written instruments and records, and there being no pretense of surprise. Boyer v. Robison [Wash.] 86 P. 385. Refusal to grant motion for bill showing time of day when collision between plaintiff's team and defendant's automobile was alleged to have occurred held not an abuse of discretion. Shepard v. Wood, 102 N. Y. S. 305. In action for conversion of stock by defendants while in possession of it, where there was no allegation that plaintiff ever had possession of stock or that it was taken from her possession or control, held that plaintiff should not be required to furnish bill specifying dates when she parted with stock or when it was taken from her possession, and whether she delivered it or it was taken without her consent, where she filed affidavit that it was impossible for her to do so because stock was taken without her consent. Farwell v. Boody, 112 App. Div. 493, 98 N. Y. S. 385. In action for breach of contract defendants held not entitled to bill specifying damages which were alleged generally. Breshauer Realty Co. v. Cohen, 100 N. Y. S. 775. In action on a contract for services in securing contracts from government for purchase of boats where answer denied contract and rendition of services, held that defendant was not entitled to bill of particulars specifying particulars of services, whether contract was written or oral, etc., for purpose of preparing an amended answer, it not being necessary for that purpose. Sands v. Holland Torpedo Boat Co., 100 N. Y. S. 684. In actions for libel bill as to elements of damage should not be granted when no special damages are alleged. W. T. Hanson Co. v. Collier, 101 N. Y. S. 690. In action for injuries to business by publication in regard to certain medical compound, motion for bill specifying names and residences of customers induced to cease purchasing denied. Id. Where demand for damages was general and there was no plea of justification, or that compound was made up of ingredients mentioned in alleged libel, motion for bill specifying ingredients of compound at periods when transfers of ownership of compound and trademarks were made, prior to publication of libel, denied. Id.

95. On counterclaim to recover moneys alleged to have been disbursed for plaintiff, bill held sufficient in view of affidavit of defendant that no itemized account was ever kept and that under the circumstances he was unable to specify disbursements more particularly, and in view of fact that, if advances were made, plaintiff must have as much information in regard to them as defendant. Kindberg v. Chapman, 100 N. Y. S. 685.

96. Is no authority for precluding defendants in case of default from giving evidence of their defenses, provision of Code Civ. Proc. § 531, being that they may be precluded from giving evidence of part or parts of affirmative allegations of which the particulars have not been given. Reichardt v. Plaut, 98 N. Y. S. 195. Is within discretionary power of court, in order precluding giving of evidence for failure to furnish account on demand pursuant to Code Civ. Proc. § 531, to provide that order shall be effective unless copies are furnished within specified time. Smith v. Irvin, 101 N. Y. S. 904. Order requiring furnishing of copies within twenty days modified so as to preclude defendants from giving evidence of accounts unless copies were furnished within twenty days. Id. Where defendant failed to furnish bill after demand made in strict compliance with statute, held that he should not have been allowed to introduce any evidence. Code 1892, § 1652. W. C. Early & Co. v. Long [Miss.] 42 So. 348.

97. Where plaintiff's action was upon an account for labor performed and also for an

cluded therein, though this rule has been held not to apply to interest to which a party is entitled by statute.[98] It has also been held that permitting him to give such evidence is tantamount to the allowance of an amendment, and hence not erroneous.[99] Disobedience of such an order may justify a dismissal.[1] The fact that a bill does not specify matters equally known to both parties and as to which there is no dispute is immaterial.[2] In case the bill furnished is defective or insufficient, the remedy is by motion for a further bill, or by returning the defective bill and leaving the question of its sufficiency to be determined by a motion to compel its acceptance.[3] The fact that a party makes different claims in the form of bills of particulars may be considered by the jury, but is not conclusive against him.[4]

§ 2. *The declaration, count, complaint, or petition.*[5] *General rules.*—The declaration, petition, or complaint, must aver all the facts necessary to show a cause of action against defendant,[6] including the performance or happening of all conditions precedent to the right to sue, or an excuse for nonperformance.[7] It is sometimes required to be divided into orderly and distinct paragraphs consecutively numbered.[8] Under the code it is not necessary to brand a cause of action, but it is

accounting for moneys received by defendant to use of plaintiff, failure to deliver bill of items as to former held not to preclude him from giving evidence as to later. Flynn v. Seale, 2 Cal. App. 665, 84 P. 263.

98. May be recovered though not claimed in bill filed under rule of court. Meyer v. Johnson, 122 Ill. App. 87.

99. Permitting plaintiff to testify to loss and value of articles not set out. Hayes v. Brandt [Ark.] 98 S. W. 368.

1. American Rolling Mill Corp. v. Ohio Iron & Metal Co., 120 Ill. App. 614.

2. Failure to specify by whom time checks were issued where evidence showed that manner of issuing them was well understood between parties, only question being as to whose obligations they were. Yawger v. Backs, 119 Ill. App. 61.

3. Code Civ. Proc. § 531, does not authorize order precluding evidence where party attempts to comply with order, and bill furnished is never returned and no attempt is made to secure a further one. Reader v. Haggin, 114 App. Div. 112, 99 N. Y. S. 681.

4. In action for balance due on account for labor, subjects of quantity and price being for jury. Snyder v. Patton & Gibson Co., 143 Mich. 350, 12 Det. Leg. N. 1041, 106 N. W. 1106.

5. See 6 C. L. 1022.

6. Must set forth cause of action plainly, fully, and distinctly. Petition in action of trover held sufficient whether looked at without regard to common-law forms of action or not. Phelan v. Vestner, 125 Ga. 825, 54 S. E. 697. In complaints or declarations for negligence it is competent, after showing the existence of a duty by appropriate allegations, to predicate negligence, charged in general terms, upon any act or omission whereby it is claimed that that duty was violated. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186. Petition declaring on appeal bond, containing no allegations showing its breach, is demurrable. Moriarty v. Cochran [Neb.] 106 N. W. 1011. Mere statement of indebtedness is insufficient, but must be a statement of promise to pay, either express or implied. Haines v. Rogers [N. J. Law] 62 A. 272. Bill in equity must charge all facts essential to entitle him to relief. Simmons v. Lima Oil Co. [N. J. Eq.] 63 A. 258. Complaint must state facts from which legal conclusion follows that plaintiff is entitled to some relief. Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co., 102 N. Y. S. 122. In actions of tort founded on defendant's negligence, declaration must allege directly and positively, and not merely by way of recital, what duty was owing by defendant to plaintiff, the failure to discharge which caused injury complained of, and its breach, or make such averments of facts as will show existence of duty and its breach. Declaration held insufficient. Norfolk & W. R. Co. v. Stegall's Adm'r, 105 Va. 538, 54 S. E. 19. Must show existence of duty and its violation. Pullman Co. v. Woodfolk, 121 Ill. App. 321. Declaration held sufficient. Blue Ridge L. & P. Co. v. Tutwiler [Va.] 55 S. E. 539.

7. As to manner of alleging performance, see § 1, ante. In action on contract, should allege performance by plaintiff, or excuse for nonperformance. Milligan v. Keyser [Fla.] 42 So. 367. Declaration was that plaintiff, having been committed to jail as witness in criminal case, was not furnished by defendant, the sheriff, with separate accommodations as required by Laws 1898, p. 876, c. 237, § 30. Defendant pleaded that board had not provided for such accommodations. Held, upon demurrer to plea, that declaration was bad for failure to charge affirmative of allegation negatived by plea, that is in failing to state only condition under which, if at all, duty was cast on defendant. Watkins v. Kirby [N. J. Law] 64 A. 979. In action by foreign corporation to recover purchase price of goods sold in state, must allege compliance with statute regulating such corporations. Ward v. Ball, 100 N. Y. S. 119. Notice of claim for damages provided for in contract of affreightment held condition precedent, so that it was necessary to allege compliance therewith or waiver. St. Louis & S. F. R. Co. v. Phillips [Okl.] 87 P. 470. In action on fire insurance policy, must allege furnishing proofs of loss or their waiver. American Cereal Co. v. Western Assur. Co., 148 F. 77.

8. Whether it is so divided is a matter to be left largely to the discretion of the trial

sufficient if the facts stated constitute one, and two or more are not improperly joined.[9] Ordinarily it is not essential to the statement of a good cause of action that the complaint set out or disclose the proper legal measure of damages,[10] but the contrary is true where the law does not necessarily imply that plaintiff sustained damage from the act complained of.[11]

The theory of a complaint is to be determined from the facts stated therein, and not from the admissions of the parties.[12] Whether the action is in tort or on contract,[13] or on an express or implied contract,[14] or at law or in equity,[15] and whether the complaint states one or more causes of action,[16] are questions of construction.

judge. Upholding petition held not an abuse of discretion. Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622.

9. Motion to require plaintiff to elect whether she would rely on alleged breach of contract or on tort held properly denied where complaint alleged that plaintiff leased property from defendant who violated his duty to keep her in peaceable possession and before expiration of lease attempted to tear down building, in consequence of which plaintiff's tenants were driven away and her business broken up, and she was compelled to terminate her tenancy. Gray v. Linton [Colo.] 88 P. 749.

10. See, also, post, this section, Prayer. Statement of the facts essential to a good cause of action is sufficient. St. Louis S. W. R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106.

11. In such case resulting damage must be shown with particularity. Malnati v. Thomas, 26 App. D. C. 277. In order to render special damages recoverable, each item thereof must be specially and specifically pleaded. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903.

12. Where demurrer for want of facts was overruled on ground that complaint stated good cause of action at common law, subsequent statement of plaintiff that he elected to prosecute under employers' liability act held not to have made previous ruling erroneous, or complaint subject to attack on ground that more than one theory was attempted to be stated therein. Oolithic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441.

13. Complaint in action for damages due to negligent construction of windmill held to state cause of action ex delicto and not ex contractu, though it set out contract, particularly as case was tried on that theory. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. In suing in tort, plaintiff may set out his contract as constituting an underlying fact, instead of charging defendant's undertaking in general terms, without thereby necessarily committing himself to theory that action is for breach of contract. Id. Special count in action against carrier for delivery of goods without surrender of bills of lading held one in tort, it being insufficient as a count in assumpsit for failure to allege consideration. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567. Petition against carrier for delay in transporting fruit held to state cause of action ex contractu. Macon & B. R. Co. v. Walton [Ga.] 56 S. E. 419. Petition held to state cause of action for recovery of alleged indebtedness to plaintiff's intestate and not one for conversion of certain notes. Ackerman v. Green, 195 Mo. 124, 93 S. W. 255. Complaint in action for damages against carrier for assault by employe held to state cause of action for breach of contract to safely carry plaintiff, and action was not one of tort. Busch v. Interborough Rapid Transit Co. [N. Y.] 80 N. E. 197.

14. Petition held to state cause of action for money had and received and not for breach of express contract. Crigler v. Duncan [Mo. App.] 99 S. W. 61.

15. Action held not one in equity to enforce a trust, but one at law to recover moneys alleged to have come into defendant's hands and which he refused to turn over on demand. Austin v. Wilcoxson [Cal.] 84 P. 417. Action held one at law for damages for breach of contract, so that prayer for equitable relief was properly stricken. Todd v. Bettingen [Minn.] 107 N. W. 1049. Petition held intended to state cause of action for cancellation of deed and not cause of action in ejectment. Ames v. Ames [Neb.] 106 N. W. 584.

16. Test for determining whether two claims constitute single cause of action is whether recovery on one would bar recovery on other. Carlson v. Albert, 102 N. Y. S. 944.

Complaint held to state two causes of action: One for amount due plaintiff on contract of employment at time of its breach by his discharge, and other for damages caused by breach, two claims not being one cause of action. Carlson v. Albert, 102 N. Y. S. 944. One for negligence in letting contract to break horse to an unskillful person, and other for negligence of defendant's servant. Mullich v. Brocker, 119 Mo. App. 332, 97 S. W. 549. Petition in action against carrier, one for starting car while plaintiff was attempting to get aboard, and other for negligence in failing to stop car after discovery of her peril, and plaintiff was entitled to recover on proof of either. Foland v. Southwest Mo. Elec. R. Co., 119 Mo. App. 284, 95 S. W. 958. Complaint alleging assault and slander which together caused damage sought to be recovered, so that motion to separately state and number was properly granted. Paul v. Ford, 102 N Y. S. 359.

Complaint held to state one cause of action: Where property belonging to different persons is conveyed by deeds to secure single indebtedness, complaint by all of such owners setting up facts necessary to entitle them to have deeds declared mortgages and to entitle them to redeem. Wadleigh v. Phelps [Cal.] 87 P. 93. In action against carrier for ejecting plaintiff from train. Louisville & N. R. Co. v. Fowler, 29

In some states the court may during the trial permit plaintiff to file a special statement of any matter in confession and avoidance.[17] A notice of a motion for a judgment under the West Virginia statute must indicate with reasonable certainty that the demand or obligation which it is proposed to reduce to judgment is that of the defendant.[18]

Consolidation of suits.[19]—The court ordinarily has discretionary power to consolidate two or more pending actions brought by the same plaintiff against the same defendant for causes of action which could be joined.[20]

Ky. L. R. 905, 96 S. W. 568. To have plaintiff adjudged owner of universal right in certain land, though it was stated in different ways, and a diversity of relief was sought, so that it was not error to overrule motion to require election. Eversole v. Virginia I... etc., Co., 29 Ky. L. R. 151, 92 S. W. 593. Against several signers of an entire contract for damages provided for therein in case of a breach. Minneapolis, etc., R. Co. v. Brown [Minn.] 109 N. W. 817. Single cause of action for specific performance and not cause of action for fraud, deceit, or failure to perform contract. Hopkins v. Baremore [Minn.] 109 N. W. 831. To set aside alleged fraudulent satisfaction of deed of trust given to secure note, reinstate lien of deed, and obtain judgment on note. Ennis v. Padgett [Mo. App.] 99 S. W. 782. For setting aside of fraudulent conveyances. Zeiser v. Cohn, 113 App. Div. 9, 98 N. Y. S. 1078. Where plaintiff's cause of action against directors of insurance company was based solely on ground that she was a stockholder, though she also alleged that she was a policyholder. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446. Against two defendants jointly for wrongful publication of plaintiff's picture. Riddle v. MacFadden, 101 N. Y. S. 606. In action by husband against several defendants for alienation of wife's affections. De Ronde v. Bell, 101 N. Y. S. 497. In action to recover freight charges, since it simply stated facts relating to one transaction, and but one recovery could be had upon one or all of the grounds set forth. Union Transit Co. v. Erie R. Co., 102 N. Y. S. 149. In action by trustee in bankruptcy to set aside as fraudulent certain conveyances made to different children and grandchildren at different times but pursuant to one fraudulent scheme. Wright v. Simon, 102 N. Y. S. 1108. Complaint held to allege but one cause of action for partition of realty, the determination of other matters alleged being merely incidental to relief demanded, and all claims between parties relating to their respective rights in property being properly to be determined in such action. Lawrence v. Norton, 102 N. Y. S. 481. Since object of code provisions relating to partition is to give to each cotenant a clear title in severalty to portion of premises set apart to him, court must consider and adjudicate different claimed rights of parties limited to portion of premises as well as those extending to the whole. Id. In action against employer for death of employe, motion for order directing service of amended complaint in which allegations of common-law and statutory liability claimed to exist should be separately stated and numbered, or set forth in separate counts, denied. Hamnstrown v. New York Contracting Co., 102 N. Y. S. 835. Complaint held to state but single cause of action on contract and not cause of action for breach of contract under which wheat was delivered and another for conversion of the wheat. Savage v. Salem Mills Co. [Or.] 85 P. 69. In action for services performed in different capacities. Nelsen v. Henrichsen [Utah] 87 P. 267. Complaint held based on fact that defendants as mortgagees under deed absolute in form had wrongfully conveyed and attempted to incumber mortgagor's property, and had wrongfully obtained possession thereof, and in effect to state but one cause whereby plaintiffs sought to be restored to rights as mortgagors. Gustin v. Crockett [Wash.] 87 P. 839. Where two steers were struck while on same track, by same locomotive, and within few seconds of same time, held that plaintiff had but one cause of action. Chicago, I. & L. R. Co. v. Ramsey [Ind. App.] 78 N. E. 669. Complaint in action by lessee against railroad and construction companies for destruction of crops by building line without plaintiff's consent, held to charge defendants as joint tortfeasors for destruction of crops, and not to seek to recover damages against railroad company for taking right of way out of leasehold estate. Ft. Smith Suburban R. Co. v. Maledon [Ark.] 95 S. W. 472.

17. Statement authorized by Code 1899, c. 125, §§ 65, 66, is not a pleading, but in nature of notice of claim or defense, and permitting it to be filed does not give defendant a continuance as matter of right, but granting of continuance is discretionary with trial court. Levy v. Scottish Union & Nat. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

18. Motion under Code 1899, c. 121, § 6 Code 1900, § 3786. Anderson v. Prince [W. Va.] 55 S. E. 656. Notice which failed to connect defendant with note on which judgment was sought held insufficient, so that motion to quash it should have been sustained. Id. Where person giving notice of motion for judgment on note under Code 1899, c. 121, § 6, correctly described himself therein as payee thereof, held that word "assignee" added to his signature to notice would be ignored as mere description of the person, and did not vitiate the notice nor preclude judgment in his favor in capacity accorded him in body of notice. Id.

19. See 6 C. L. 1024.

20. Where plaintiff commenced action to recover two instalments on agreement to purchase corporate stock which had become due when complaint was verified, and thereafter commenced second action to recover remaining instalments which became due before defendant was served in first action, held that it was error to deny motion to consolidate where defense was same in both actions except that in second defendant set

Joinder of causes of action.[21]—Joinder being a matter relating purely to the remedy, acts relating to it may be made applicable to pending actions in which judgment has not yet been rendered.[22] The question of misjoinder is to be determined by the law of the forum.[23]

The codes generally specify certain classes of causes of actions which may be joined.[24] Among the most common of these are causes of action upon claims arising out of the same transaction [25] or transactions connected with the same subject of action,[26] causes of action on contract,[27] for the recovery of the possession of realty and the rents and profits thereof,[28] for injury to property,[29] for separate torts

up pendency of first. Wilson v. Locke, 101 N. Y. S. 831. Delay held not ground for denying motion made when cases were at issue but had not yet been reached for trial. Id.

21. See 6 C. L. 1024.

22. Act broadening right. Gibson v. Miller, 7 Ohio C. C. (N. S.) 96. Since appeal vacates judgment appealed from and cause stands in appellate court as a pending action without judgment, provision of Act April 25, 1904, § 3, relating to joinder in suits for sale of real estate for taxes, is applicable to suits pending at time of its enactment and brought up on appeal subsequently thereto. Id.

23. Is matter respecting remedy. Anglo-American Land Mortgage & Agency Co. v. Wood, 143 F. 683.

24. Rev. St. 1899, § 593, construed and held that no action coming within any of the other classes specified in such section can be joined with actions for recovery of specific personal property, they being specified alone in sixth class. Williams Cooperage Co. v. Bollinger [Mo. App.] 99 S. W. 812. Actions to set aside judgment and to recover specific personalty taken under execution and levy pursuant thereto held improperly joined. Id. Since in action to set aside judgment on equitable grounds execution and levy thereunder fall with judgment if plaintiff is successful, and order to that effect will be granted for mere asking, count setting up latter cause was unnecessary. Id. Causes of action for assault and slander occurring at same time cannot be joined, both not being included within any one subdivision of Code Civ. Proc. § 484. Paul v. Ford, 102 N. Y. S. 359. Id., subd. 10, providing for joinder of causes of action for penalties incurred under the fisheries, game, and forest law, excludes joinder of causes of action for penalties imposed by Laws 1893, c. 338, for adulteration of milk. People v. Koster, 50 Misc. 46, 97 N. Y. S. 829. Complaint containing causes of action to quiet title, to remove cloud on title, and to recover money judgment, based on invalidity of tax deeds, held demurrable. Knight v. Boring [Colo.] 87 P. 1078.

25. When several acts of negligence concur in giving rise to single cause of action, they may be joined in same complaint under Rev. Laws 1905, § 4154, though defendants named may be affected in different degrees of responsibility. Mayberry v. Northern Pac. R. Co. [Minn.] 110 N. W. 356. Causes of action against railroad and its servants for negligently causing death. Id. Causes of action for money held by defendant as trustee of resulting trust by virtue of guardianship de son tort, and as trustee of express trust by virtue of contract to hold and invest money of ward for her benefit after she became of age. Rev. St. 1899, § 593. Zeldeman v. Molasky, 118 Mo. App. 106, 94 S. W. 754. Where defendant, as part of one scheme to obtain property, wrongfully obtained a deed and a will from her father, either of which would give her the land in question, suits in equity brought after father's death to set aside both held properly joined and tried as one, and one action may be brought for that purpose. Irving v. Bruen, 110 App. Div. 558, 97 N. Y. S. 180. Causes of action for breach of warranty and for deceit may be joined when both arise out of same transaction. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234. Cause of action to recover on note and to enforce vendor's lien securing it, and cause of action against person who transferred note to plaintiff with representations that it was secured by such a lien to recover amount paid for note on faith of such representations in case no such lien was found to exist. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866. Where a widow accepted a draft which was to be in settlement of her claim if paid, she may sue thereon and in the alternative ask for recovery on the original cause of action. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

26. Causes of action to recover damages for false and fraudulent representations of agents of insurance company whereby plaintiff was at different times induced to take out fifteen policies of insurance on lives of herself and her children. Revisal 1905, § 469, subd. 1. McGowan v. Life Ins. Co., 141 N. C. 367, 54 S. E. 287.

27. Express or implied. Ball. Ann. Codes & St. § 4942. Ames v. Kinnear, 42 Wash. 80, 84 P. 629. Causes of action for failure to furnish sufficient lumber to keep planing mill running to its full capacity as required by written contract, and to recover for planing lumber after expiration of such contract. Beekman Lumber Co. v. Kittrell [Ark.] 96 S. W. 988. Since liability of stockholders of corporation to creditors is contractual in its nature, creditor of Kansas corporation suing in Federal court in Pennsylvania may join in statement of claim causes of action based on Kan. Gen. St. 1889, c. 23, § 32, giving creditor right to proceed against stockholders where corporation is bankrupt, and cause based on Id. § 44, giving similar remedy where it is dissolved. Anglo-American Land, M. & A. Co. v. Wood, 143 F. 683.

28. Code Civ. Proc. § 427. Beckman v. Waters [Cal. App.] 86 P. 997.

29. Rev. St. 1887, § 4169. Causes of action for damages arising out of same contract, and for injuries to real property. Frepons v. Grostein [Idaho] 87 P. 1004. Com-

by the same party,[30] and by or against a party in a fiduciary capacity arising by virtue of contract or operation of law.[31] In some states, with certain specified exceptions, any two causes of action of the same nature and on which the same judgment may be given may be united in the same suit.[32] In others any number of causes of action may be joined provided they all sound in contract or in tort.[33] In Louisiana the possessory and petitory actions cannot be joined.[34] In the absence of a statutory provision to the contrary, causes of action in tort and on contract cannot be joined,[35] nor can legal and equitable causes of action [36] except where authorized by the code.[37] Ordinarily only causes of action which are consistent [38]

plaint in action by lessee of hotel against lessor alleging that latter in erecting building on adjoining lot tore down and rebuilt part of hotel whereby it was rendered useless as hotel property, and plaintiff's furniture was damaged, and he was obliged to move, and also that plaintiff was further damaged in specified sum by erection of building, held not demurrable. Id. Permanent and special damages from overflow of land due to negligent construction of railroad embankment held recoverable in same suit when alleged in separate counts of petition. International, etc., R. Co. v. Walker [Tex. Civ. App.] 17 Tex. Ct. Rep. 268, 97 S. W. 1081. Under 2 Ball. Ann. Codes & St. § 4942, complaint alleging that, by same act, defendants injured certain property, and destroyed and converted to their own use certain other property, was not demurrable for improper joinder. McClure v. Campbell, 42 Wash. 252, 84 P. 825.

30. Causes of action for wrongfully flooding plaintiff's land, and for both actual and exemplary damages for his wrongful arrest by defendant. Cody v. Lowry [Tex. Civ. App.] 14 Tex. Ct. Rep. 788, 91 S. W. 1109.

31. Rev. St. 1899, § 593. Causes of action for money held by defendant as trustee of resulting trust as guardian de son tort, and as trustee of express trust under contract to hold and invest money of ward for her benefit after she became of age. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

32. In action of trespass quare clausum fregit allegations of acts which are a component part of the outrage complained of may be included though amounting to trespass vi et armis, and same damages recovered as though separate action had been brought. Haines' Ex'rs v. Haines [Md.] 64 A. 1044.

33. Where petition contained two counts, each setting forth a separate and distinct cause of action in tort, held there was no error in refusing to require election. Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37.

34. Where such a combination is attempted the possessory feature lapses and the petitory alone remains. Code Prac. art. 57 et seq. Lindner v. Yazoo & M. V. R. Co., 116 La. 262, 40 So. 697. Parts of petition setting up action in trespass held to be treated as surplusage. Id.

35. Rev. St. 1899, § 593, does not permit joinder. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971. Count in tort cannot be joined with counts in assumpsit. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567. Declaration joining count in contract against one defendant with counts in tort against other defendants held bad on demurrer. Gallagher v. Sisters of the Poor [N. J. Law] 65 A. 833. First count held to claim damages for deceit in sale of oats, and second to state cause of action ex contractu for breach of warranty in sale, so that it was error to overrule demurrer for misjoinder. Brooks v. Romano [Ala.] 42 So. 819.

36. Complaint seeking to quiet title and to recover damages for maintaining nuisance held demurrable under Burns' Ann. St. 1901, § 343. City of Huntington v. Stemeh [Ind. App.] 77 N. E. 407. Cause of action for damages for breach of contract under which conveyance was made and cause of action to compel reconveyance and accounting held improperly joined, so that order giving plaintiff option of filing declaration on law side of court or having legal cause of action stricken was proper. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201.

37. Under Gen. St. 1902, § 613, causes both legal and equitable may be united when presented as grounds of recovery upon claims, whether in contract or tort, or both, arising out of the same transaction or transactions connected with same subject of action. Lewisohn v. Stoddard, 78 Conn. 575, 63 A. 621. In action against stockholders of extinct foreign corporation to recover indebtedness due from corporation, held that subject of action was relation between defendants and corporation, and any transactions growing out of such relation tending or contributing to establish duty of defendants to plaintiffs with respect to payment of latter's claim against corporation were transactions connected with same subject of action, and plaintiffs had right to state in complaint any number of transactions of that nature, that is, of acts or agreements having some connection with each other whereby their legal relations to defendants were altered. Id. Where cause of action for restitution of price of land sold is disclosed, demand for correction of error in description of property may be united with it. Bonvillain v. Bodenheimer, 117 La. 793, 42 So. 273. Since under Code Civ. Proc. § 484, legal and equitable causes of action may be joined if both arise out of same transaction, held there was not misjoinder because plaintiff sought injunction against further use of her picture for advertising purposes, and damages for such use in past. Riddle v. MacFadden, 101 N. Y. S. 606. Cause of action for specific performance of a contract may be joined with one for damages for its breach. Winders v. Hill, 141 N. C. 694, 54 S. E. 440.

38. Code Civ. Proc. § 484, subd. 9. Cause of action in tort on theory that title to cer-

and which affect all the parties to the action [39] may be joined, the latter rule being subject to some statutory exceptions [40] and not being applicable in suits in equity.[41]

tain automobile was in plaintiff, and that defendants wrongfully deprived him of it by converting same to their own use, held improperly joined with one in contract on theory that title was in defendants under an agreement, and seeking to recover payment therefor, though growing out of same transaction, they being inconsistent. Drexel v. Hollander, 112 App. Div. 25, 98 N. Y. S. 104. Causes of action for damages for breach of contract, and for damages for fraud inducing plaintiff to make it, being inconsistent, cannot be united under said section, which is the only authority for uniting cause of action on contract with one in tort. Edison Elec. I. Co. v. Franklin H. Kalb-Fleisch Co., 102 N. Y. S. 1039. Inconsistent causes of action cannot be joined in equity. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201. Complaint alleging breach of contract to give plaintiff certain stock alleged to be of certain value for services rendered to defendant, and also the reasonable value of the services so as to enable him to recover on quantum meruit should evidence fail to establish express contract, held not demurrable as uniting inconsistent causes of action. Shaw v. Hotchkiss, 143 F. 680.

39. Demurrer to complaint in action against stockholders of extinct corporation to recover on indebtedness of corporation, and containing three causes of action, properly overruled. Gen. St. 1902, § 613. Lewisohn v. Stoddard, 78 Conn. 575, 63 A. 621. Two towns not being jointly liable for whole cost of bridging drainage ditch constructed on line between them, suit in debt against highway commissioners of both charging them with joint liability for whole amount cannot be maintained. Commissioners of Union Drainage Dist. No. 3 v. Com'rs of Highways of Virgil & Cortland, 220 Ill. 176, 77 N. E. 71. Where complaint against a corporation and an individual sought to recover on a quantum meruit for services rendered individual defendant in procuring an exclusive franchise for a corporation not shown to have then been in existence, and also for services rendered and money expended as manager of the corporation under contract of employment made by individual defendant who was its president, held that corporation should have been stricken as a party, and claims against it and claim against individual defendant for services rendered corporation should also have been stricken. Tishomingo Elec. L. & P. Co. v. Burton [Ind. T.] 98 S. W. 154. Causes of action to settle estate of decedent and to cancel deed given by him to one of the defendants held improperly joined where parties to former had no interest in latter. Civ. Code Prac. § 83. Danley v. O'Brien, 29 Ky. L. R. 811, 96 S. W. 521. Action against assignee for creditors of a decedent to surcharge his settlement with sums wrongfully paid out held improperly joined with one against same defendant as administrator of estate of assignor's mother, the latter involving the interests of parties not affected by former. Adamson v. Donaldson [Ky.] 98 S. W. 1009. Action for enticing plaintiff's minor son from home cannot be joined with one against different person for harboring him. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907. Demurrer held properly sustained in action by several plaintiffs against bank for accounting on certificates of deposit, where it appeared from petition that assignments of fractional parts of separate demands had been made by each plaintiff to his coplaintiffs, that interest of each in total sum was equal to amount of certificate originally held by him, and that purpose of assignment was to enable them to join in single action. Strawn v. First Nat. Bank [Neb.] 109 N. W. 384. Where different persons convey their property in trust to secure same debt, is not misjoinder to unite them all as parties in single action for purpose of enforcing the conditions of the trust. Michigan Trust Co. v. Frymark [Neb.] 107 N. W. 760. Code Civ. Proc. § 484. Complaint held to state four different causes of action based on four independent contracts for legal services, and that demurrer was properly sustained. Myers v. Lederer, 101 N. Y. S. 1088. Complaint by stockholder held to state two causes of action, one in favor of corporation for failure to restore stock to it on abrogation of contract under which it was held, and another against a different defendant based on different transaction, and demurrer for misjoinder should have been sustained though second cause was insufficiently stated. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082. Persons through whose concurrent negligence death occurred may be sued jointly. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. In an action for recovery of money lost in gambling, principal to whom money was lost, his assignee, and owner of property, may be properly joined. Pentz v. Burrows, 8 Ohio C. C. (N. S.) 349. One of the plaintiffs recovered judgment and pending appeal assigned same to other plaintiffs. Defendant gave cost bond and supersedeas bond, two being executed as one instrument. Held, that on affirmance of judgment, plaintiffs could not maintain joint action on bond to recover amount of judgment in lower court and judgment for costs in supreme court, contracts for payment of judgment and costs being separate contracts, and there being no joint interest of parties in two judgments. Jerome v. Rust [S. D.] 110 N. W. 780. Causes of action on account for goods sold by plaintiff to defendant, and on account for goods sold by another corporation, but of which plaintiff alleged it was now the owner, held improperly joined, open account not being assignable and vendor thereof being necessary party to action thereon. Jett v. Theo. Maxfield Co. [Ark.] 96 S. W. 143. Cause of action to recover value of timber cut from land by one defendant under contract held properly joined with one to recover possession of part of land from other defendant and to quiet title against her, her claim to timber, by reason of which other defendants refused to pay, growing out of her title to land, and plaintiffs therefore being compelled to show title as against her. Alford Bros. & Whiteside v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636. Actions by son for dam-

There is no misjoinder where one of two causes attempted to be stated is bad for want of facts,[42] nor does the statement of facts in separately numbered paragraphs, or alleging them by mistake as separate causes of action, vitiate the pleading if but a single cause of action is in fact pleaded.[43]

Several aspects of the same cause of action may ordinarily be pleaded in different counts.[44] Separate causes of action should not be stated in a single count

ages for personal injuries and by mother for loss of his earnings and expenses incurred in caring for him during his minority by reason of same injuries held distinct actions, and improperly joined. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 99 S. W. 577.

40. Rev. St. 1898, § 1199, relating to proceedings by holder of tax deeds to bar former owners of land, and providing that if plaintiff has more than one deed upon any parcel of land mentioned in complaint upon which he might bring such action he shall set forth copy of each such deed, but as separate cause of action, requires all deeds on tract of land to be included in same complaint and made separate causes of action, though several parcels of land owned by different defendants are included in one deed, and constitutes exception to § 2647. Corry v. Brown, 127 Wis. 140, 106 N. W. 393.

41. See also, Equity, 7 C. L. 1323. Action of partition being one in equity, held not necessary that alleged causes of action should affect all of the defendants to same extent and in same manner. Lawrence v. Norton, 102 N. Y. S. 481. Action by stockholder against directors of corporation to recover money lost through their misfeasance and nonfeasance being one in equity, fact that some of the defendants are charged with faults of commission and others with failure to perform duties held not to show misjoinder. Young v. Equitable Life Assur. Soc., 49 Misc. 347, 99 N. Y. S. 446.

42. Minneapolis, etc., Co. v. Brown [Minn.] 109 N. W. 817.

43. Schlieder v. Dexter, 114 App. Div. 417, 99 N. Y. S. 1000. In action on bond paragraph of the complaint setting out one of the items assigned as a breach, held not to be treated as the statement of a cause of action in itself though designated as a cause of action by the pleader, and hence it was to be taken in connection with the introductory averments of the complaint for the purpose of forming the isues to be tried. Paterson v. Watson [Colo.] 83 P. 958.

44. Though, as a general rule, pleading double statement of case so as to meet exigencies of the proof is not permitted under the Code, it is sometimes premissible to duplicate statements for same cause of action where there is reasonable cause to believe that plaintiff cannot safely go to trial upon a single statement, as where he cannot reasonably be expected to anticipate the evidence. Cripple Creek Min. Co. v. Brabant [Colo.] 87 P. 794. Complaint in action for damages for personal injuries resulting in death of plaintiff's husband held to come within exception, so that motion to require election was properly denied. Id. Though Code, § 94, requires complaint to contain a statement of the facts constituting the cause of action in ordinary and concise language without unnecessary repetition, plaintiff may state cause of action, growing out of same transaction, in more than one count when it appears that such pleading may be necessary to meet the possible proofs which will, for first time, fully appear at trial. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. Count alleging that injury was due to defendant's negligence in failing to furnish safe place to work, and count on coemploye act alleging that it was caused by negligence of fellow-servant, held not inconsistent in legal sense, so that motion to require election was properly overruled. Id. One suing for damages for personal injuries may embrace in his petition two or more separate counts setting forth different accounts of manner in which he was injured, so as to meet any anticipated variance in proof adduced at trial, and judgment striking out one of such counts on ground that it states no cause of action is not bar to prosecution of suit on another. Gainesville & Dahlonega Elec. R. Co. v. Austin [Ga.] 56 S. E. 254. Where amendment contained no new cause of action, but merely particularized general allegations of negligence in original statement, held proper to make it the subject of a separate count. Peery v. Quincy, etc., R. Co. [Mo. App.] 99 S. W. 14. Under Code Civ. Proc. § 672, court may in its discretion permit same cause of action to be stated in different counts in order to meet exigencies of case as presented by the evidence. Written agreement for services in selling land and quantum meruit. Blankenship v. Decker [Mont.] 85 P. 1035. When plaintiff has two or more grounds upon which he may have a single cause of action, and there is some uncertainty as to which he will be able to establish at the trial, he may set forth his claim in different counts so as to include each and every ground he may have for recovery Oberndorfer v. Moyer, 30 Utah, 325 84 P. 1102. Motion to require plaintiff to elect as to whether he would rely on count on account stated or one on open account held properly denied. Id. Where cause of action exists, and plaintiff may be doubtful as to what its character will be shown by the evidence to be, and hence in one count of his petition sets up cause of acton of character he conceives it to be and asks judgment upon it, and in another count declares upon cause of action of different character and asks judgment upon it in the alternative, there is neither a joinder or misjoinder of actions. Galveston, etc., R. Co. v. Heard [Tex. Civ. App.] 14 Tex. Ct. Rep. 617, 91 S. W. 371. Where, pending action for personal injuries, plaintiff died, and his father and wife made themselves parties plaintiff, and averred that injuries inflicted upon deceased by defendant were proximate cause of his death and prayed judgment for damages, and asked in separate prayer that if this was found not to be the case, judgment be rendered for wife for such damages as deceased would

or paragraph,[45] and when this is done plaintiff may ordinarily be required to separately state and number them.[46] Each count or paragraph must be complete in itself,[47] though reference in subsequent ones to matter of inducement in the first is often held to be sufficient.[48] A claim for damages need not be inserted at the

have been entitled to had he lived, held that there was no joinder or misjoinder. Id.

45. May not write in one count several torts constituting distinct and separate causes of action. Counts for overflow of land held demurrable. Iron City Min. Co. v. Hughes, 144 Ala. 608, 42 So. 39. Agreement in note to pay attorney's fee being one additional to the regular obligation of the note, held that there was no objection to embodying in one count a claim for all the attorney's fees claimed in suit on such note as it was all one subject and no confusion could arise therefrom. Boyett v. Standard Chemical Oil Co. [Ala.] 41 So. 756 Paragraph of petition in action against carrier for damages to fruit during transit held bad for duplicity. Macon & B. R. Co. v. Walton [Ga.] 56 S. E. 419. Paragraphs of complaint by sheriff to determine his right to fees counting both on right to retain fees to which he was entitled and also on claim to fees to which he had no legal right held good. Daviess County Com'rs v. Fitzgerald [Ind. App.] 79 N. E. 393. Count in which plaintiff sought to recover for failure to pay installments due under building contract, and also to recover damages for refusal of defendant to permit him to perform contract, held bad for duplicity. Milske v. Steiner Mantel Co., 103 Md. 235, 63 A. 471. Declaration in replevin cannot be combined in one count with one in assumpsit for balance due on promissory note. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073. Should be separately stated. Foland v. Southwest Missouri Electric R. Co., 119 Mo. App. 284, 95 S. W. 958. Rev. St. 1899, § 593. Cause of action for money for which defendant is liable under resulting trust with one for money held by him as trustee of express trust. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754. Where petition stated cause of action based on common-law negligence, ordinance negligence, and willfulness, recklessness, or wantonness, in same count, denial of motion to require election held error. Clancey v. St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509. Where petition stated causes of action based on common-law negligence, violation of two city ordinances, and wantonness, in same count, held that error in refusing to require election was not cured by striking allegation as to violation of one ordinance. Id. Action on contract and on quantum meruit may be put in one count where both are based on same transaction, since simply states two grounds of recovery but presents only single cause of action. Robinson v. American Linseed Co., 147 F. 885. In action for wrongful death, single count alleging failure to furnish safe platform on which to work, failure to properly construct same, and failure to employ competent foreman, held not bad for duplicity. Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643.

46. Where petition sets up cause of action in ejectment and another for rents and profits. Gen. St. 1901, § 4522. New v. Smith [Kan.] 84 P. 1030. Where complaint alleged two causes of action, one for conversion and one for goods sold, held that defendant had right under Code Civ. Proc. § 483, before answering to move to have them separated and numbered, and that such motion was properly granted where plaintiff neglected to avail himself at that time of opportunity to elect to waive tort and proceed on the one cause of action. Christenson v. Pincus, 102 N. Y. S. 1041. Each publication of defamatory matter held to give rise to a separate cause of action, so that in action for libel, where two publications were relied on, plaintiff should have been required to separately state and number. Fisher v. New Yorker Staats-Zeitung, 100 N. Y. S. 185. Where court having determined that complaint set up two causes of action, entered order directing plaintiff to serve an amended complaint "separately stating and numbering the causes of action attempted to be pleaded in said complaint", held that plaintiff was not thereby required to serve an amended complaint stating two causes of action, but defendant could by motion be compelled to accept one stating but a single cause of action. O'Reilly v. Skelly, 102 N. Y. S. 884.

47. Schlieder v. Dexter, 114 App. Div. 417, 99 N. Y. S. 1000. Code Civ. Proc. § 481, subd. 2. Second and each succeeding cause of action to recover penalties for adulteration of milk held insufficient, since did not repeat or make any reference to essential facts set forth in first one. People v. Koster, 50 Misc. 46, 97 N. Y. S. 829. Words in second paragraph "reiterating each and all the averments of the first paragraph of the petition" held properly stricken. Daley v. O'Brien, 29 Ky. L. R. 811, 96 S. W. 521. Each cause of action must be complete in itself, and must contain all the material and issuable facts which constitute the cause of action embraced in it, and its defects cannot be supplied by mere reference to another cause of action. Lack of material allegations in second cause of action held not supplied by reference in first paragraph thereof to certain paragraphs of first cause of action. Murray v. Butte [Mont.] 88 P. 789.

48. Chesapeake & N. R. v. Crews [Tenn.] 99 S. W. 368; Schlieder v. Dexter, 114 App. Div. 417, 99 N. Y. S. 1000. Allegations in other paragraphs of complaint held properly incorporated in second cause of action so that they would be construed in connection with allegations relating thereto. Marrietta v. Cleveland, etc., R. Co., 100 N. Y. S. 1027. Averments as to assignment of claim and cause of action incorporated in third cause of action held to refer to it alone, and not to other causes of action which were separately stated and numbered and referred to different maters. Id. Reference in second court to averments in regard to injuries in first count held permissible mode of pleading. Wolf v. Smith [Ala.] 42 So. 824. Manner of reference to other counts for facts held allowable. Anniston

end of each count or paragraph, but it is sufficient to state the amount demanded at the end of the complaint.[49]

Election.[50]—An election is required whenever a pleader relies on two different, inconsistent conditions of fact.[51]

Splitting causes of action.[52]—One may not split his cause of action, but all damages arising from a single wrong or cause of action must be recovered in one suit.[53]

Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. Fact that demurrers had been sustained to certain counts of complaint referred to in other counts held not to cause them to cease to be parts of the record to which reference could be had. Id. Second count held to have adopted by reference contract as set out in first count, but not averments as to its assignment, and hence to be demurrable. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008.

49. Clause of declaration immediately following last count in which was set out the several items of loss sustained and amount of damages claimed, and distinctly connecting them with negligence alleged in each count, held not a part of last count so that it was not affected by striking out such count. Baltimore & O. R. Co. v. Whitehill [Md.] 64 A. 1033.

50. See 6 C. L. 1029.

51. Election required: Between count claiming price of property on theory that plaintiff has parted with title to it by sale, and that defendant owns it and hence is entitled to its possession, and count asking damages as in trover for conversion of same property on theory that plaintiff owns it and is entitled to its possession, two being inconsistent. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559. Where action for death of servant due to misfeasance of superintendent was brought against superintendent and master jointly. French v. Central Const. Co., 8 Ohio C. C. (N. S.) 425. In action for breach of warranty and false representations in sale of stallion, held that plaintiff should have been required to elect whether he would seek to recover actual damages or double damages allowed by statute in such cases, he not being entitled to both. Galbraith v. Carmode [Wash.] 86 P. 624.

Election not required: Where declaration in asumpsit for services contained three counts based on express contract and one on quantum meruit, plaintiff being entitled to recover on quantum meruit if contract was not performed precisely in accordance with its terms, or if it had been abrogated. Utter v. Buck, 120 Ill. App. 120. Where declaration contained two special counts, one against defendant as an indorser of note and other on its guaranty, held that plaintiffs could rely on either or both, as evidence might warrant, and was entitled to recover if evidence supported either. G. E. Lloyd & Co. v. Matthews, 119 Ill. App. 546. Where plaintiff in first count sought to recover reasonable compensation for finding purchaser for defendant's property at his request, in second, to recover agreed compensation, defendant having refused to complete sale, and, in third, compensation for services in procuring purchaser who was willing and able to take property. Tuffree v. Binford, 130 Iowa, 532, 107 N. W. 425. Where complaint in action by vendee of land to recover advance payments, alleged previous rescission by him for fraud, and amendment alleged previous rescission by vendor and also sought recovery on that theory. Pedley v. Freeman [Iowa] 109 N. W. 890. Where complaint in action against railroad for killing stock contained counts based on statute and on common-law negligence, evidence in support of two counts held not so intermingled as to render overruling of motion to require election, made at close of evidence, erroneous, particularly where jury in effect found for defendant on first. Wright v. Quincy, etc., R. Co., 119 Mo. App. 469, 95 S. W. 293. Code Civ. Proc. 1902, § 186a, construed, and held that plaintiff would not be required before trial to elect whether he would rely on cause of action against carrier for negligence in failing to stop train at station to whch it had sold ticket, or cause of action for statutory penalty for failure to do so. Rountree v. Atlantic Coast Line R. Co., 73 S. C. 268, 53 S. E. 424. Complaint in action in claim and delivery to recover flax seed, alleging right to same both under a farm lease and a chattel mortgage, held not to set up inconsistent causes of action, so that motion was properly denied, particularly as under terms of lease mortgage was valid. Lyon v. Phillips [S. D.] 108 N. W. 554.

52. See 6 C. L. 1029.

53. Where plaintiff took a note for part of an account due him from defendant, and note was not paid at maturity, and residue of account was not discharged when due, held that he had two separate and distinct causes of action, so that a recovery upon note was no bar to judgment for residue of claim. Ebersole v. Daniel [Ala.] 40 So. 614. Fees for legal services rendered same person, but accruing under separate and distinct contracts of employment, give rise to separate causes of action, and may be sued for separately though all are due when first action is brought. Wheless v. Serrano [Mo. App.] 98 S. W. 108. Rule that all claims or causes of action arising out of same contract must be included in one suit, or all not so included will be deemed waived, does not apply to separate notes given for separate sales or contracts, but several notes are several distinct causes of action and suit will lie upon each, and satisfied judgment in suit upon one will not bar suit upon others. Paton v. Doyne [N. J. Law] 65 A. 843. Code 1899, c. 50, § 48, providing that where plaintiff has several demands on contract he must bring his action for all or be barred as to those not sued on, does not require him to include demands not due when suit is commenced. Adams v. International Supply Co. [W. Va.] 56 S. E. 607. The statement of each cause of action being practically a complaint in itself, and each being independent of the others, where

Prayer.[54]—Though the prayer may be considered in construing the complaint when the cause of action intended to be presented is doubtful,[55] it is no part of the cause of action,[56] and cannot refute a cause of action clearly stated,[57] nor control in determining whether more than one cause of action is alleged.[58] A demand not based upon a properly pleaded cause of action must be disregarded.[59]

§ 3. *The plea or answer.*[60]—Matters relating to set-off and counterclaim,[61] affidavits of defense,[62] and the necessity of pleading under oath,[63] are treated in separate articles.

General principles.[64]—The answer must be responsive to the allegations of the complaint.[65] A paragraph offered as a defense to an entire complaint is insufficient if it fails to meet all the material averments thereof.[66] If any one of several defendants, either in a joint or several answer, relies upon a defense going to the whole merits of the action, a judgment cannot be rendered in the action until such defense is disposed of, and if he succeeds in establishing the same, the action must be dismissed as to all the defendants.[67] In the absence of a statute to the contrary,[68] inconsistent defenses or pleas cannot be set up in the same answer.[69] There is a

plaintiff split his cause of action and attempted to state a part of it in each count or cause of action, and recovered on first one on part of it, held that he could not maintain second cause of action for balance, judgment recovered on first cause being complete bar to recovery on second. Murray v. Butte [Mont.] 88 P. 789.

54. See 6 C. L. 1029.

55. Where petition in district court states facts sufficient to entitle plaintiff to both legal and equitable relief, and prays relief only a part of which can be had at law, but all of which can be had in equity, it will be held to have thereby intended to invoke chancery and not common-law powers of court. Ames v. Ames [Neb.] 106 N. W. 584. May elect to proceed at law in such case, but must do so by some unequivocal act committing him to theory that he has abandoned claim to equitable relief. Id. Demand for jury to try issues of fact not sufficient to show election. Id.

56. Nature of action and nature and extent of relief is to be determined from facts alleged and not from prayer. Minneapolis, etc., R. Co. v. Brown [Minn.] 109 N. W. 817. Where relief prayed for is money judgment, mere failure to state amount for which plaintiff asks judgment does not render petition insufficient on demurrer for want of facts. Wilson St. § 4291, construed. Oklahoma Gas & Elec. Co. v. Lukert, 16 Okl. 397, 84 P. 1076.

57. Complaint in suit against employe and sureties on his bond alleging mistake therein, and misappropriation of funds, held to state cause of action in equity for an accounting, though prayer was for recovery of money only. North Side Loan & Bldg. Soc. v. Nakielski, 127 Wis. 539, 106 N. W. 1097. Action by a county against exposition company to recover land no longer used by it for giving fairs, and for rents and profits, held one for the recovery of real property under Rev. St. § 5781, notwithstanding allegations seeming to call for some form of equitable relief. Toledo Exposition Co. v. Kerr, 8 Ohio C. C. (N. S.) 369.

58. Fact that judgment demanded as to some of defendants in partition sought relief which would not be granted in such an action held not to sustain contention that separate cause of action was thereby alleged. Lawrence v. Norton, 102 N. Y. S. 481.

59. Erbes v. Smith [Mont.] 88 P. 568. Demand in answer, in action for waste, that defendant's title be quieted. Id. Where complaint set up action for damages for waste, and answer pleaded equitable title in defendant, held that decree quieting title in plaintiff was erroneous though demanded in reply, there being no pleading upon which to predicate prayer therefor. Id.

60. See 6 C. L. 1029.

61. See Set-off and Counterclaim, 6 C. L. 1442.

62. See Affidavits of Merits of Claim or Defense, 7 C. L. 59.

63. See Verification, 6 C. L. 1832.

64. See 6 C. L. 1029.

65. Defendant cannot avoid contract alleged in petition by answering that he made another and different contract with plaintiff. Tyler v. Coleman, 29 Ky. L. R. 1270, 97 S. W. 373. In action on promissory notes, matters set up in certain paragraphs of separate defense in answer held to have no relation to causes of action alleged in complaint and hence not to be available as a defense and to be demurrable, though they might have constituted a valid counterclaim if so pleaded. Prosser v. Maxon, 100 N. Y. S. 815.

66. Jonas v. Hirshburg [Ind. App.] 79 N. E. 1058.

67. In action for damages for trespass and injunction, where answer of intervening defendants denied that plaintiff was owner of land and alleged ownership in themselves, and that original defendant had done acts complained of by their license and prayed that their title be quieted, held that no judgment could be taken against original defendant, though he failed to file an answer, unless plaintiff made out his case. Le Moyne v. Anderson, 29 Ky. L. R. 1017, 96 S. W. 843.

68. Under Code 1899, c. 125, § 20, defendant may plead inconsistent defenses, except where he pleads non est factum, in which case he cannot do so without leave of court. Levy v. Scottish Union & Nat. Ins. Co., 58 W. Va. 546, 52 S. E. 449.

69. In action for false imprisonment, pleas denying arrest under authority of de-

conflict of authority as to whether such a course is permissible under a statute authorizing defendant to set up as many defenses as he may have,[70] and as to whether such a statute authorizes the pleading of matter in abatement and in bar in the same answer.[71]

Under the code the defendant is generally given the right to set up as many defenses as he may have, whether legal or equitable.[72] Statutes in some states require him to set up as many consistent defenses as he has,[73] or to state each fact relied on in avoidance of the action.[74] Separate grounds of defense are sometimes required to be stated in separate paragraphs and numbered.[75] Whether matter is set up by way of defense or as a counterclaim is a question of construction.[76]

Pleas must commence and close in proper form.[77] Each separate defense or

fendant and also seeking to justfy same held bad for inconsistency if intended as pleas of justification. Gambill v. Fuqua [Ala.] 42 So. 735. In action for cancellation of deed on ground that it was procured through fraudulent promise of defendant to hold land in trust and to reconvey same which he refused to do, answer denying such allegations and praying for dismissal and costs held not to set up inconsistent defenses because it also prayed for accounting and credit for sums paid by defendant for taxes, etc., in case court found that plaintiff had any interest in the premises. Bluett v. Wilce [Wash.] 86 P. 853.

70. Fact that further answer and counterclaim was inconsistent with original answer held not objectionable in vew of Mills' Ann. Code, § 59. Conrey v. NIchols [Colo.] 84 P. 470. Under Rev. St. 1898, § 2657, may set up defenses and counterclaims based on inconsistent theories unless so repugnant in fact that proof of one disproves the other. Clark Co. v. Rice, 127 Wis. 451, 106 N. W. 231. In action on notes may join defenses of fraud, failure of consideration, and that notes were contrary to public policy, with counterclaims for damages for fraud, and tendering back all rights under contract pursuant of which notes were given and seeking to rescind for such fraud. Id.

71. Florida: Cannot at same time plead to jurisdiction of court over person and to merits without waiving former. Little Rock Co., 50 Fla. 251, 39 So. 193.

Missouri: Under Rev. St. 1899, § 605, may unite in same pleading a plea to jurisdiction of person or subject-matter and plea to merits without waiving former. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944. Motion to set aside judgment held not to challenge merits of petition. Id.

72. Civ. Code Proc. § 113, held to do away with common-law rules of pleading confining actions to single issues and denying equitable defenses in actions at law. Davis v. Ferguson, 29 Ky. L. R. 214, 92 S. W. 968. Under Code Pub. Gen. Laws 1904, art. 75, §§ 86, 88, where a defense relied on is available at law, it cannot be set up as an equitale plea. Estoppel in pais. Albert v. Freas, 103 Md. 583, 64 A. 282. Rev. St. c. 84, § 17 construed and held that equitable matter which may be so pleaded must be matter of defense to plaintiff's claim, not matter of set-off, nor matter constituting ground for relief in equity apart from and independent of the action at law. Martin v. Smith [Me.] 65 A. 257. Does not authorize court in action at law based on mortgage to reform mortgage so as to correct mistakes of scrivener, and such mistakes cannot under such statute be held a legal or equitable defense to that action, remedy being exclusively by separate suit in equity. Id. Fraud in procuring a release may be set up as against a plea of accord and satisfaction in an action at law. Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855. St. 4 Anne, c. 16, § 4, making it lawful for defendant to plead as many several matters in several district pleas as he should think necessary for his defense, is in force in Vermont as part of common-law. Clement v. Graham, 78 Vt. 290, 63 A. 146. Under Rev. St. 1898, § 2657, may set out facts which would have formerly entitled him to injunction against further prosecution of the action at law. Town of Washburn v. Lee, 128 Wis. 312, 107 N. W. 649.

73. Under Civ. Code Proc. § 113, subsecs. 2, 4, loses such as he fails to set up. Suit to enjoin issuance of patents to land to which plaintiff sought to establish title. Asher v. Uhl, 29 Ky. L. R. 396, 93 S. W. 29. For former opinion see 27 Ky. L. R. 938, 87 S W. 307.

74. Under Rev. Laws, c. 173, § 27, defense that contract sued on was void at its inception as in violation of anti-trust law must be specially pleaded if relied on. New York Bank Note Co. v. Kidder Press Mfg. Co. [Mass.] 78 N. E. 463.

75. Burns' Ann. St. 1901, § 350, Unger v. Melinger [Ind. App.] 77 N. E. 814. Answer containing denial limited to allegations not admitted and sought to be avoided by affirmative facts held intended to set forth single defense and to be construed as single paragraph. Id. Answer may in single paragraph confess certain allegations of complaint and avoid same by affirmative facts, and deny all others, and will be treated as containing but one ground of defense. Id. Answer containing denial limited to such allegations as were not admitted and sought to be avoided by affirmative facts held not bad as both admitting and denying same facts. Id.

76. In action for damages for waste, answer pleading equitable title in defendant held merely to set up new matter by way of defense and not to constitute counterclaim through demanding that his title be quieted. Erbes v. Smith [Mont.] 88 P. 568.

77. Commencement and closing of plea to jurisdiction held proper. Goldberg v. Harney, 122 Ill. App. 106.

plea must be complete in itself,[78] though allegations in other parts of the answer may be incorporated therein by references.[79] Matters properly the subject of traverse cannot be raised by special plea.[80] Pleas in abatement, being dilatory, are required to be technically exact, so as to preclude all presumptions or arguments against the pleader.[81]

Denials and traverses.[82]—Though no particular form of denial is prescribed, it should be so clear and specific as to at once appraise the parties and the court of the matter controverted.[83] Argumentative denials are insufficient.[84] Denials on information and belief are unknown to the common law,[85] but are generally permissible under the code,[86] except as to matters presumptively within defendant's

78. Must, either by direct allegations therein, or by proper reference to other portions of the answer, set forth facts sufficient to show such defense. Barnard v. Sloan, 2 Cal. App. 737, 84 P. 232. Sufficiency of each separate defense and of counterclaim is to be determined without reference to matters elsewhere set forth in the answer unless connected therewith by direct reference. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. Plea alleging that contract was obtained through fraud though admitting contract for purpose of special defense could not be taken advantage of to disprove issue of authority of alleged agents to make contract raised by other pleas not referred to therein. Fifer v. Clearfield & C. Coal & Coke Co., 103 Md. 1, 62 A. 1122. Where neither separate defense was sufficient upon its face without reference to other parts of answer, held that demurrer to answer should have been sustained. Empire Trust Co. v. Magee, 102 N. Y. S. 9.

79. Reference to paragraphs in other portions of answer has same effect as if latter had been repeated in each defense and sufficiency of each defense is to be measured as if so repeated. Barnard v. Sloan, 2 Cal. App. 737, 84 P. 232.

80. In action on contract for payment of money where plaintiff specially pleaded part of contract and alleged that by its terms money was payable in B. county where action was brought, held that a plea of privilege by defendant to be sued in D. county was demurrable, it amounting merely to a challenge of plaintiff's construction of the contract as to place of payment. Parr v. McGown [Tex. Civ. App.] 98 S. W. 950.

81. Not to be aided by intendment or inference. New York, etc., R. Co. v. Illy [Conn.] 65 A. 965. In trustee process plea in abatement for want of jurisdiction because of nonresidence of trustees held bad where it alleged nonresidence in present tense only, but did not allege residence at time when action was brought or negative residence at that time in county where action was brought. Hibbard v. Newman, 101 Me. 410, 64 A. 720. Plea in abatement alleging that previous identical action had been instituted by plaintiff against defendant and dismissed without costs being paid held not demurrable for failure to annex copy of dismissed action, where plea itself set forth enough to enable court to determine that two actions were identical. Dougherty v. Dougherty, 126 Ga. 33, 54 S. E. 811. Defense of another action pending is one in abatement, which must be pleaded with particularity and is waived if not pleaded. Fish Co. v. Young, 127 Wis. 149, 106 N. W. 795. Both at common law and under Code plea in abatement of another action pending must show that prior action is pending between same parties and for same cause. Tyler v. Standard Wine Co., 102 N. Y. S. 65. Plea in abatement held not well taken, two causes of action not being same. Id. Plea held insufficient for failure to allege that action was pending at the time of the commencement of the one in which it was interposed. Porter v. Fuld & H. Knitting Co., 114 App. Div. 292, 99 N. Y. S. 815. If it does not expressly aver that suits are for same subject-matter, must state facts which clearly indicate that they are. Van Houten v. Stevenson [N. J. Eq.] 64 A. 1094.

82. See 6 C. L. 1031. See, also, § 14, post.

83. Thompson v. Wittkop, 184 N. Y. 117, 76 N. E. 1081. Denial of all the allegation contained in certain specified folios of complaint though not to be commended, held in view of other allegations not so indefinite and uncertain as to justify treating it as nuulity. Id. General denial which indicates with sufficient clearness the pleader's intention to put all the allegations of the complaint in issue is a compliance with Code Civ. Proc. § 500, though carelessly and inartificially drawn. Bodine v. White, 98 N. Y. S. 232. Allegation that plaintiff was wholly ignorant of defect held to negative constructive or actual knowledge and repel idea of assumed obvious risk. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 N. E. 1062.

84. Clement v. Graham 78 Vt. 290, 63 A. 146. Argumentative general denial cannot be construed as admitting facts denied. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524.

85 Does not prevent allegations of complaint from being taken as admitted for failure to deny. Clement v. Graham, 78 Vt. 290, 63 A. 146.

86. Puts plaintiff to proof. Clark v. Apex Gold Min. Co. [N. M.] 85 P. 968. Allegation that defendants "are not advised" that lands were granted to state as swamp lands, and that defendants have no information that lands were patented to state as swamp lands, held not a denial of allegation of complaint that lands were duly granted to state by Federal government as swamp lands. Wade v. Goza [Ark.] 96 S. W. 388. Denial "on information and belief" of any knowledge sufficient to form a belief as to plaintiff's residence held bad. Ubart v. Baltimore & O. R. Co., 102 N. Y. S. 1000.

knowledge,[87] or matters of public record to which he has access.[88] In some states a general denial cannot be qualified by unspecific exceptions.[89] In a special traverse the inducement should be in substance a sufficient answer to the declaration, though not a direct denial or confession and avoidance, and the traverse with which it concludes must go to a material point which will try the merits of the case.[90] By statute in some states a denial of plaintiff's representative capacity alleged in the complaint must state the facts relied on.[91]

Confession and avoidance.[92]—The codes generally require the answer to contain a statement of new matter constituting a defense or counterclaim in ordinary and concise language without repetition.[93] A defense cannot consist of facts provable under a denial.[94]

§ 4. *Replication or reply and subsequent pleadings.*[95]—The only way of answering a special traverse is by joining issue thereon.[96] In some states where a plea concludes to the country and the formal addition of the similiter is omitted, the parties may proceed to trial as though issue had been formally joined.[97] To constitute a good pleading, a replication must answer every material allegation of the plea.[98] In tort actions the replication de injuria is a sufficient traverse of allegations by way of confession and avoidance in special pleas.[99] The Illinois statute providing for a notice by defendant under a plea of the general issue in lieu of pleading special matters of fact does not apply to the reply, and such a notice cannot be made to take the place of a replication.[1] One good reply to a plea is sufficient.[2] Replications traversing material allegations of a plea properly conclude to the country.[3]

87. Such a denial as to whether coupons were ever signed by secretary of irrigation district issuing bonds held to raise no issue. Hewel v. Hogin [Cal. App.] 84 P. 1002. Such a denial as to demand and nonpayment of rent held insufficient, facts alleged importing personal knowledge thereof in defendant. Schwartz v. Ribaudo, 101 N. Y. S. 599.

88. Such a denial of allegation that by deed dated and recorded on certain day premises were conveyed to plaintiff by defendant's lessor, held insufficient since defendant was in position to obtain knowledge, and one cannot plead ignorance of public record to which he has access. Schwartz v. Ribaudo, 101 N. Y. S. 599.

89. "Defendants for their first amended answer to plaintiff's petition deny each and every allegation therein contained except so much thereof as is herein expressly admitted" held bad. Atterbury v. Hopkins [Mo. App.] 99 S. W. 11.

90. Rogers v. Barth, 117 Ill. App. 233.

91. Under Code §§ 3627, 3628, held that in proceeding under statute by citizen contesting validity of consent to issuing of liquor licenses, where defendant did not controvert plaintiff's allegation of citizenship except by a denial, no issue was raised thereon and no proof required. Dye v. Augur [Iowa] 110 N. W. 323.

92. See 6 C. L. 1032.

93. New matter constituting either a complete or partial defense must be pleaded. Eviction and accord and satisfaction in action for rent. Schwartz v. Ribaudo, 101 N. Y. S. 599. Mere affirmative allegations of conclusions of law does not meet requirement of Code Civ. Proc. § 500. Ludlow v. Woodward, 102 N. Y. S. 647. Vague and indefinite allegation that note was delivered to plaintiff by bank after maturity and payment for no value held not a compliance with requirement of ordinary and concise language. Id.

94. Must be new matter, that is facts outside the issues that are or may be raised by a denial, and can only be an affirmative. Code Civ. Proc. § 500. Frank v. Miller, 102 N. Y. S. 277. In action by landlord to remove tenant for nonpayment of rent, allegation that plaintiff's predecessor had leased premises to defendant for year held not a defense. Id.

95. See 6 C. L. 1032.

96. Rogers v. Barth, 117 Ill. App. 323.

97. Code 1899, c. 125, § 25, c. 134, § 3. Plea of nonassumpsit. Hi Williamson & Co. v. Nigh, 58 W. Va. 629, 53 S. E. 124.

98. Replications leaving material averments without denial and without confession and averment of matter in avoidance held demurrable. Owenshoro Wagon Co. v. Hall [Ala.] 43 So. 71. Replication attempting to confess and avoid plea held bad in that it failed to do either. Sefton v. Mitchell, 120 Ill. App. 256.

99. In action of trespass de bonis asportraits where defendant sought to justify by plea that goods were taken under writ of replevin issued by justice of the peace, held not necessary for plaintiff to reply specially in order to question jurisdiction of justice. Rice v. Travis, 117 Ill. App. 644.

1. Rev. St. c. 110, § 29. Snow v. Greisheimer, 120 Ill. App. 516.

2. Where second reply to plea was confessed, it being neither traversed or avoided, held immaterial whether demurrer to surrejoinder to rejoinder to third replication to such plea was sustained or not. Dawdy v. Wright, 120 Ill. App. 279.

3. Blue Island Brewing Co. v. Fraatz, 123 Ill. App. 26.

Where the answer contains a counterclaim or any new matter, the codes generally require plaintiff to file a reply denying the same,[4] or setting up new matter tending to avoid it.[5] In some states new matter set up in the answer and not pleaded as a counterclaim is deemed controverted and no reply is necessary.[6] In others the right to order a reply is discretionary with the court.[7] No reply is necessary where the allegations of new matter are insufficient,[8] or where the affirmative averments of the answer amount to a mere denial.[9] The refusal to strike from the reply allegations provable under the issues raised by the other pleadings is harmless.[10] The reply must not be inconsistent with the allegations of the complaint,[11] and its allegations may not in any case aid the latter.[12]

4. Denial of new matter, without specifying what new matter is referred to, is insufficient. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207. Denial of each and every allegation of answer except such facts as are set forth in the complaint admitted by the answer held equivalent to denial of each and every allegation of the answer except as in the complaint alleged, and not to be a nullity so as to entitle defendant to judgment on pleadings for failure to put in issue affirmative allegations of answer. Seffert v. Northern Pac. R. Co. [Or.] 88 P. 962.

5. Though reply is not necessary to plea of non est factum in action on note, it is proper, if not necessary, to set up by reply facts showing that defendant is estopped to make such plea against plaintiff. Bowen v. Laird [Ind.] 77 N. E. 852. In action by administrator to recover money alleged to belong to estate, reply held to be in nature of plea in confession and avoidance raising issue of good faith of one of defendants in making contract with deceased under which he claimed. Drefahl v. Security Sav. Bank [Iowa] 107 N. W. 179. In trespass quare clausum where defendant pleaded right of way and other easements by way of justification, held that replication by way of new assignment was proper method, under Code Pub. Gen. Laws, art. 75, § 24, subsecs. 78-80, for plaintiff to set up that acts complained of were in excess of rights set up by the plea Haines' Ex'rs v. Haines [Md.] 64 A. 1044. May plead new matter not inconsistent with petition and contradictory to or supplementary of facts pleaded as a defense in answer. Mellor v. McConnell [Neb.] 106 N. W. 1012. Partial defense to counterclaim held demurrable because not pleaded as such. Pope Mfg. Co. v. Rubber Goods Mfg. Co., 110 App. Div. 341, 97 N. Y. S. 73. Allegation of reply in effect a confession of defendant's counterclaim, a partial defense, and a plea in mitigation of damages, held demurrable because not pleaded as such. Id.

6. Code Civ. Proc. § 522. Allegation in answer of payment of judgment previously recovered against another joint tort-feasor, not pleaded as counterclaim, held new matter pleaded as a defense by way of avoidance to which no reply was necessary. Reno v. Thompson, 111 App. Div. 316, 97 N. Y. S. 744. For defendant to preclude plaintiff from contesting counterclaim because of failure to serve reply, counterclaim must be distinctly named as such in answer. American Guild of Richmond, Va. v. Damon [N. Y.] 78 N. E. 1081. Where answer in action on accident insurance policy alleged material mispresentations as a defense, held that, under Revisal, §§ 485, 503, no reply was necessary to raise issue as to whether defendant's agent when policy was issued knew truth in regard to matters alleged to have been misrepresented. Fishblate v. Fidelity & Casualty Co., 140 N. C. 589, 53 S. E. 354. Allegation in answer as to promulgation and existence of rule prohibiting passengers from riding on engines held in issue without denal, under Rev. St. 1895, art. 1193. Missouri, etc., R. Co. v. Avis [Tex.] 15 Tex. Ct. Rep. 756, 93 S. W. 424. Rev. St. 1898, § 2667. Matters in abatement, as failure to join necessary parties, deemed controverted without reply. Payne v. Payne [Wis.] 109 N. W. 105.

7. Though under Rev. Lews, c. 173, § 31, plaintiff may file replication stating any facts in reply to new matter in answer yet under same section new matter in answer in avoidance of action is to be considered denied without replication, unless court requires reply on defendant's motion. Moore v. Northwestern Mut. Life Ins. Co. [Mass.] 78 N. E. 488. In action against married woman for goods sold, where answer alleged that plaintiff had previously sued defendant's husband and had accepted from him certain sum in part payment therefor and confession of judgment for value of goods, held that court should have required reply. Seaton v. Garrison, 101 N. Y. S. 526.

8. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207. Where new matter does not constitute a defense. Hickey v. Anheuser-Busch Brewing Ass'n [Colo.] 85 P. 838. Bad reply is good enough for bad answer. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524. Where plea is bad there is no necessity for considering replication to it. Broadwood v. Southern Exp. Co. [Ala.] 41 So. 769. In action on an account held necessary to reply to defective pleas of payment and usury. Sanders v. Helfrich Lumber & Mfg. Co., 29 Ky. L. R. 466, 93 S. W. 54.

9. In action of trespass where plaintiff alleged that he was owner of land, and defendant in his answer denied this and alleged that he himself was owner thereof, held that no reply was necessary, allegation as to defendant's ownership being but an affirmative denial. Wheeler v. Davis, 29 Ky. L. R. 730, 96 S. W. 451. Averments held to constitute merely a denial of fraud charged in complaint, so that no reply was required under B. & C. Comp. § 77 as amended, and motion to make reply more definite and certain was property denied. Kabat v. Moore [Or.] 85 P. 506.

10. Allegations of new matter already embraced in issues raised by petition and

Additional pleadings.[13]—Where the replication ignores certain facts in a plea, taking issue only upon certain other facts therein, and defendant files a general rejoinder to the replication, the facts so ignored cease to be issues in the cause.[14]

Under the codes allegations of new matter in the reply are generally deemed denied without further pleading.[15]

§ 5. *Demurrer. General rules.*[16]—A demurrer is directed against the pleading itself,[17] and reaches only such defects as are apparent on its faces.[18] A demurrer cannot go to the fragmentary part of a pleading, but must go to the whole of the count, plea, or defense to which it is addressed.[19] A demurrer for want of facts will be overruled if the complaint warrants the granting of any relief[20]

evidence, and hence admissible in evidence without further pleading. Citizens' Bank v. Emley [Neb.] 107 N. W. 1014

11. Reply in action by receiver of corporation on stock note held not a departure, both it and complaint counting on right in creditors. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415. New matter in the reply which plaintiff is forced to plead in order to meet allegations of answer will not constitute departure if it does not contradict facts stated in petition, and is not adopted as a new basis for relief in place of cause of action presented in petition. Hunter Milling Co. v. Allen [Kan.] 88 P. 252. In action for conversion of wheat stored in elevator reply alleging that sale and settlement of accounts alleged in answer was induced by fraud held not a departure. Id. Where petition alleged cause of action for breach of contract for failure to deliver goods purchased on time, and answer set up counterclaim for balance due on purchase price held that counterclaim in reply for damages to goods in transit by reason of negligent packing was totally repugnant to petition and should have been stricken on motion under Civ. Code Proc. §§ 101, 113. Langan & T. Storage & Moving Co. v. Tennelly, 29 Ky. L. R. 367, 93 S. W. 1. Objection that new matter constituted amendment to original petition held not well taken where reply was directed to answer to amended petition. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83.

12. Cannot be looked to to supply essential allegation. Thornton v. Kaufman [Mont.] 88 P. 796.

13. See 6 C. L. 1034.

14. By joining issue generally upon replication admitted that issuable averments of facts therein were sufficient, if proved, to entitle plaintiff to recover notwithstanding issues tendered by plea. New York Life Ins. Co. v. Mills [Fla.] 41 So. 603.

15. Since under Code the only pleading of facts on defendant's part is an answer, and cross bills or complaints are not recognized, and every allegation of new matter in reply is deemed denied, held that contention that defendant's pleading was a cross complaint and plaintiff's pleading, putting in issue its allegations and setting up new matter, was an answer requiring a reply on part of defendant, was untenable. Gilchrist v. Hore [Mont.] 87 P. 443.

16. See 6 C. L. 1034.

17. Defects apparent on face of complaint can be reached by demurrer, but defenses which must be sustained or may be rebutted by evidence must be presented by plea. Williams v. Finch [Ala.] 41 So. 834.

18. As to what defects and defenses may be reached by demurrer, see § 10, post. In suit to quiet title and for an accounting for oil and gas taken from land in controversy, pipe line company to which part of oil had been delivered demurred to bill on ground that since it was common carrier required to receive and transport all oil delivered to it, it was not liable to be held responsible for oil so delivered to it, and hence was improperly made party. Held that demurrer would be overruled since liability of company was to be determined from evidence as to contracts under which oil was received, of which court could not take judicial notice. Miller v. Ahrens, 150 F. 644. If defense of staleness can be interposed by demurrer, it is only when objection appears on face of bill. Marsh v. Marsh, 78 Vt. 399, 63 A. 159.

19. Demurrer attacking part of count held properly overruled. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. Where petition contains but single paragraph, it must be held good or bad as an entirety though each ground of demurrer is directed to some particular allegation. Gordon v. Chicago, etc., R. Co., 129 Iowa, 741, 106 N. W. 177. Demurrer held objectionable in from where each ground thereof was directed to particular allegations. Id. Code Civ. Proc. §§ 681, 682. Cannot be directed to particular lines or paragraphs claimed to contain immaterial allegations. Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co. [Mont.] 88 P. 565.

20 Bresler v Bloom [Ala.] 41 So. 1010; Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539. Complaint held sufficient in absence of motion to make more specific Gilman v. Fultz [Ind. App.] 77 N. E. 746. In action on contract complaint alleging facts entitling plaintiff to nominal damages is good as against demurrer for want of facts. Grau v. Grau [Ind. App.] 77 N. E. 816. Exception of no cause of action cannot be sustained when judgment of some kind, however small, could be legally rendered by the allegations supported by evidence. Davis v. Arkansas So. R. Co., 117 La. 320, 41 So. 587. Complaint stating cause of action for damages for breach of contract not demurrable because specific performance asked for against one defendant cannot be had. Minneapolis, etc., R. Co. v. Brown [Minn.] 109 N. W. 817. Where defendant was sued both individually and as executor and court had jurisdiction of action against him in former capacity, held that complaint was good on demurrer though it had no jurisdiction against him in latter capacity. Burstein v. Levy, 49 Misc. 469, 98 N. Y. S.

or if it is good on any theory,[21] as will a demurrer addressed to a complaint,[22] answer,[23] or cross complaint [24] as a whole, if any of the counts or defenses set up therein are good. So too, a general demurrer to the whole of a count will be overruled though one of its averments is insufficient where it contains other good averments.[25, 26] The sustaining of a demurrer directed wholly to one cause of action dose not affect the others,[27] but entry of judgment for defendant is proper, notwithstanding a plea of the general issue remains undisposed of, where plaintiff stands upon his replication to a special plea constituting a complete defense after a demurrer to the replication has been sustained.[28] If there are two or more counts in a declaration, or a single count containing several breaches, some well and others ill assigned, or containing a demand of several matters, some of which are well and others ill claimed, a demurrer to the whole declaration and each count thereof, or to the several breaches assigned, must be sustained to the faulty counts or breaches and overruled as to the others.[29]

Form, requisites, and sufficiency.[30]—A frivolous demurrer is one which raises no serious question of law.[31] In some states a demurrer must be accompanied by a statement of counsel that it was not interposed for delay.[32] A speaking demurrer is bad.[33] Where the statute prescribes the grounds of demurrer, no others are available.[34] In some states the precise defect relied on must be pointed out,[35] and

853. Is error to sustain demurrer where langauge is sufficiently explicit to raise an issue of fact upon which the pleader would be entitled to recover in the case. Berry v. Geiser Mfg. Co., 15 Okl. 364, 85 P. 699.

21. If good on any theory. Holliday v. Perry [Ind. App.] 78 N. E. 877. In action for injuries to employe, demurrer held properly overruled if it was good under employers' liability act or under common law. Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441.

22. If any of several counts is good. Norfolk & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19; Brockmeyer v. Sanitary Dist. of Chicago, 118 Ill. App. 49. Demurrer should not be sustained because, in addition to necessary and proper averments, it alleges other matter which does not constitute a cause of action or defense. Gordon v. Chicago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177.

23. Joinder of three claims of set-off in one paragraph of answer is no ground for demurrer, and, if facts alleged are sufficient to constitute valid set-off as to any one of such claims, paragraph is sufficient on demurrer. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

24. If one count is good. Burgl v. Rudgers [S. D.] 108 N. W. 253.

25, 26. Latham v. Staten Island R. Co., 150 F. 235.

27. Is error to render judgment in bar of action upon sustaining demurrer to one count of declaration, other good counts remaining upon which issue has been joined. Merker v. Belleville Distillery Co., 122 Ill. App. 326. Demurrer directed solely to plaintiff's second cause of action held not to affect first cause of action, and fact that it was sustained would not authorize dismissal of entire complaint. Pratt, Hurst & Co. v. Tailer, 100 N. Y. S. 16.

28. Lowenstein v. Franklin Life Ins. Co., 122 Ill. App. 632.

29. Norfolf & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19.

30. See 6 C. L. 1036.

31. Demurrer to complaint in action to set aside deed for fraud held frivolous. Morgan v. Harris [N. C.] 54 S. E. 381.

32. Where mere glance at demurrer will satisfy court that it was filed in best of faith, will not be stricken because not accompanied by statement which would be superfluous under such circumstances. Ballantine v. Yung Wing, 146 F. 621.

33. Where demurrer relies on new facts set up therein, will be overruled unless statement thereof can be disregarded as surplusage. McDevitt v. Connell [N. J. Eq.] 63 A. 504. In suit to set aside conveyance by judgment debtor as fraudulent, on demurrer on ground that judgment is void, sufficiency of bill must be determined upon facts set up therein as to judgment, and statements of demurrer as to other facts alleged to be foundation of judgment cannot be considered. Id.

34. Civil code does not authorize demurrer to reply on ground that it does not state facts sufficient to constitute defense to answer, so that demurrer on that ground was properly overruled. Scott v. Collier [Ind.] 78 N. E. 184. On demurrer to answer styled "a separate and distinct defense" and "by way of set-off and counterclaim," on ground that it was insufficient in law upon its face, held that sufficiency of demurrer was to be tested by determining whether facts pleaded alleged any one of the three. Code Civ. Proc. §§ 494, 495, 501, providing when plaintiff may demur to answer, construed. Isbell-Porter Co. v. Heineman, 113 App. Div. 74, 98 N. Y. S. 1018.

35. Defect of parties cannot be raised under demurrer alleging simply a want of facts sufficient to state cause of action. Helm & Son v. Briley [Okl.] 87 P. 395. Demurrer to complaint for failure to state cause of action held general demurrer or objection which could not be considered under Code 1896, § 3303. Town of Vernon v. Edgeworth [Ala.] 42 So. 749. In trespass to try title, special demurrer to that part of

only the grounds so specified may be considered.[36] A joint demurrer cannot be sustained except on grounds that are good as to all of the parties interposing it.[37] The objection that there is a misjoinder of parties defendant cannot be raised by a joint demurrer of all the defendants.[38] When two or more parties desire to demur separately to the same pleading it is not necessary for each to file a separate paper, but all may act separately and yet unite in the same paper, provided it is clearly stated therein that they act severally and not jointly.[39]

Issues raised.[40]—A demurrer, whenever and by whomsoever interposed, reaches back through the whole record and condemns the first pleading defective in substance,[41] but will not be carried back to a pleading to which a demurrer has already been overruled.[42]

answer setting up claim for improvements "upon the ground that the same shows no facts constituting good faith" held sufficient, though not pointing out desired facts. Campbell v. McCaleb [Tex. Civ. App.] 99 S. W. 129. So called special exceptions held nothing more than different reasons assigned why general demurrer should be sustained and not special exceptions. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577. So called special exception to allegations of special damage in answer held in effect only a general exception. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551.

36. Broadwood v. Southern Exp. Co. [Ala.] 41 So. 769. Objection that acts of contributory negligence were averred in the alternative held not available. Johnson v. Birmingham R., Light & Power Co. [Ala.] 43 So. 33. Demurrer held only to raise objection that claim against decedent's estate was not presented in time, and not that nature and amount of claim were not sufficiently shown by presentation as alleged. Moss v. Mosley [Ala.] 41 So. 1012. Assignment of cause of demurrer that "defendant reinterposes all of the above demurrers to the fifth count of the complaint" held to refer only to seven causes previously appearing on same paper, and not to demurrers assigning three causes filed to original complaint several months before, so that latter were not reinterposed to fifth count added after they were filed. Fulenwider v. Ridgway [Ala.] 41 So. 846. In action for false imprisonment, demurrer to plea on ground that it did not deny or confess or avoid counts to which it was addressed held to sufficiently point out objection that it was inconsistent in attempting to justify arrest and at same time denying it. Gambill v. Fuqua [Ala.] 42 So. 735. Ground of demurrer that declaraton is too general in its nature, and fails to set forth specific acts of negligence relied on held so general as to only require court to determine whether or not there were such essential and vital defects as to show no cause of action against defendant. Jacksonville Elec. Co. v. Schmetzer [Fla.] 43 So. 85. A demurrer seeking to question constitutionality of statute on ground that it contains matter in body not referred to in title presents no question for determination, where it fails to point out wherein body contains matter not referred to. Pace v. Goodson [Ga.] 56 S. E. 363. Demurrer held not to set up statute of limitations, so that such defense could not be considered on appeal. Cox v. American Freehold & Land Mtg. Co. [Miss.] 40 So. 739. Demurrer on ground that several causes of action have been improperly united in same petition held not to raise objection that several causes of action which may be properly joined have been improperly united in same count. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754. Under P. L. 1903, p. 572, § 131, grounds not specified cannot of themselves alone be dealt with as reason for overthrowing pleading. People's Bank & Trust Co. v. Weidinger [N. J. Law] 64 A. 179. In action on contract absence of averments of performance or tender of performance on part of plaintiff or its assignor held to be considered in aid of grounds of demurrer assigned though not itself assigned as ground. Id. Under Code Civ. Proc. § 490, requiring demurrer to distinctly specify objections to complaint, and that objection that plaintiff has not legal capacity to sue must point out specifically the particular defect relied on, demurrer to complaint in action by town supervisor for want of capacity to sue in that statute requires action to be brought by county treasurer held not to raise objection that action should be brought by town. Palmer v. Roods, 101 N. Y. S. 186. In suit to set aside sale of decedent's realty exception to petiton to the effect that allegations that claims for payment of which sale was made were barred by limitations came too late, and that objection should have been made before order of sale, held merely to raise objection that petition was not filed in time and not that allegation that claims were barred was not sufficient. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679.

37. To bill. Phillips v. Jacobs [Mich.] 13 Det. Leg. N. 542, 108 N. W. 899.

38. People v. Stoddard, 34 Colo. 200, 86 P. 251.

39. Paper held to show that it was several demurrer of each of the defendants. Whitesell v. Strickler [Ind.] 78 N. E. 845.

40. See 6 C. L. 1037.

41. Demurrer to a replication to a plea, which replication confesses and undertakes to avoid the plea, reaches back to the declaration. State v. Louisville & N. R. Co. [Fla.] 40 So. 885. Upon argument of demurrer in absence of plea of general issue whole record is open. Hedrick v. People, 221 Ill. 374, 77 N. E. 441. Bad answer is good enough for bad complaint. Bonham v. Doyle [Ind. App.] 77 N. E. 859. Upon a demurrer to an answer, the sufficiency of the complaint as to matters of substance may be considered and judgment given against

A demurrer admits the truth of all material allegations of fact which are well pleaded [43] and all inferences which may be fairly drawn therefrom,[44] but does not admit conclusions of law,[45] nor facts which are contrary to law or legally impos-

party whose pleading was first defective. Hanson v. Byrnes, 96 Minn. 50, 104 N. W. 762. See 6 Columbia L. R. 204. Whether rule applies where by answer complaint has become subject of an issue of fact, and demurrer is to counterclaim alleging separate and independent cause of action, not decided. Id. Reaches only such prior pleadings as are defective in substance and not those only technically so. Id. Complaint will not be construed with same strictness as if defendant had demurred to complaint instead of answering it, but will be held sufficient if by fair intendment it states facts constituting cause of action. Id. Declaration did not allege a state of facts under which any duty on part of defendant arose, but pleas supplied or assumed missing allegation and traversed it by stating opposite to be truth. Held that on demurrer to pleas judgment must be for defendant, since, if pleas were bad because negativing allegation not in declaration, declaration was bad because not containing such allegation, and if declaration was good on theory that it did contain such allegation, pleas were also good. Watkins v. Kirby [N. J.] 64 A. 979. Complaint held to state cause of action ex delicto for deceit and fraudulent representations of attorney. Id. Where plaintiff demurs to answer, defendant may attack complaint for want of facts, any answer being good if complaint does not state cause of action. Parker Co. v. New York, 97 N. Y. S. 200; Ganesvoort Bank v. Empire State Surety Co., 112 App. Div. 500, 98 N. Y. S. 382. Demurrer to answer held properly overruled where it was practically a denial of all the averments of the complaint, and if it did not state a defense it was because complaint did not state cause of action. Schell v. Walla Walla [Wash.] 86 P. 1114.

42. Demurrer to answer not carried back to plea. Carlson v. People, 118 Ill. App. 592.

43. Williams v. Routt County Com'rs [Colo.] 84 P. 1109; Hiles v. Hiles & Co., 120 Ill. App. 617; Eisendrath Co. v. Gebhardt, 124 Ill. App. 325; Continental Casualty Co. v. Waters [Ky.] 97 S. W. 1103; National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92; Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539; Whaley v. Thomason [Tex. Civ. App.] 15 Tex. Ct. Rep. 207, 93 S. W. 212; Reams v. Taylor [Utah] 87 P. 1089; Houston & T. C. R. Co. v. Storey, 149 F. 499. Exception of no cause of action. Davis v. Arkansas Southern R. Co., 117 La. 320, 41 So. 587; Ramos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898. Admission by demurrer that defendant held possession of land as trustee for plaintiff, etc., held to dispose of plea of limitations. Beckman v. Waters [Cal. App.] 86 P. 997. Allegations of interpleading answer that defendant was not guilty of fraud. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577. That certain land was unappropriated public domain when settled on. Haney v. Atwood [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1093. Where plea in action on benefit certificate alleged that insured agreed to conform to by-laws thereafter adopted, and that by-law was subsequently adopted precluding recovery in case of suicide, held that demurrer thereto admitted that by-law was adopted regularly and in accordance with provisions of defendant's constitution. Plunkett v. Supreme Conclave, 105 Va. 643, 55 S. E. 9. Demurrer to plea that insured commited suicide and died from effects of pistol wound inflicted by himself with suicidal intent, held to admit that insured committed suicide while sane. Id. Where demurrers to answer are overruled and party interposing them elects to stand thereon, introduction of evidence to support allegations of answer is unnecessary. Commonwealth v. Hillis, 29 Ky. L. R. 1063, 96 S. W. 873. Where, instead of answering to rule to show cause, defendant demurred to bill, thereby admitting facts therein, and failed to ask leave to answer when demurrer was overruled, held that he could not on appeal object that demurrer was treated as answer to rule to show cause. Guerin v. Macfarland, 27 App. D. C. 478. Where plaintiff demurred to a separate defense, order sustaining demurrer was reversed on appeal and demurrer overruled and no leave to withdraw the demurrer was reserved to plaintiff by judgment and it did not appear that it was in fact withdrawn, held that defendant was entitled as matter of law to a final judgment dismissing the complaint. National Contracting Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92. Only admits material matters. Riverside County v. Yawman & Erbe Mfg. Co. [Cal. App.] 86 P. 900. Demurrer to complaint alleging that stockholders of foreign corporation is under laws of foreign state personally and individually liable to creditor in double amount of his stock held not to admit that he was liable in action at law by single stockholder, complaint not specifically or plainly alleging liability in that form of action. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77 N. E. 877.

44. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539.

45. As to what allegations are conclusions, see § 1, ante. Bell v. Central Nat. Bank, 28 App. D. C. 580; Stannard v. Aurora, etc., R. Co., 220 Ill. 469, 77 N. E. 254; Blake v. Ogden, 223 Ill. 204, 79 N. E. 68; Ross v. Clark, 225 Ill. 326, 80 N. E. 275; Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153; Moriarity v. Cochran [Neb.] 106 N. W. 1011; Millville Gaslight Co. v. Sweeten [N. J. Law] 64 A. 959; Blum v. Whitney, 185 N. Y. 232, 77 N. E. 1159; Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048; Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539; Schmidt v. Brennan, 4 Ohio N. P. (N. S.) 239; State v. Irvine, 14 Wyo. 318, 84 P. 90; General Elec. Co. v. Westinghouse Elec. & Mfg. Co., 144 F. 458. Legal conclusions drawn by reply in application of by-laws of fraternal benefit society to material facts not admitted, though stated, when particularly objected to as conclusions. Coughlin v. Knights of Columbus [Conn.] 64 A. 223. Not allegations of foreign law. Knickerbocker Trust Co. v. Iselin, 185 N. Y. 54, 77

sible.[46] Special and statutory demurrers raise only such questions as are strictly within their scope.[47]

Hearing and decision on demurrer.[48]—A refusal to act on a demurrer must be treated as if it had been overruled.[49] If the declaration is good, the ignoring of a demurrer thereto is not error.[50] Whether judgment may be rendered without notice to counsel depends on the statutes and rules of court of the various states.[51]

A pleading to which a demurrer has been sustained is out of the record.[52] A judgment for defendant upon the sustaining of a demurrer to a petition is a final determination of the action, and until set aside no further proceedings can be had therein looking to a trial of the issues between the parties.[53] If a portion of a plea or answer is stricken upon a ruling made that it is without merit, this is res adjudicata, if an amendment setting up substantially the same defense is tendered at a later date.[54] But the striking of a part of a plea or answer on special demurrer on the ground that it is not sufficiently specific does not prevent the tendering of an amendment at a later date setting up the defense with sufficient specification.[55] Leave to plead over after demurrer overruled,[56] or to amend after demurrer sustained,[57] generally rests in discretion. In some states where a demurrer to the pe-

N. E. 877. Not construction placed upon statute. State v. Irvine, 14 Wyo. 318, 84 P. 90.

46. That corporations are "not for pecuniary profit." Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

47. See, also, Form, Requisites and Sufficiency, ante, this section. Demurrer held to raise question whether contract provided for liquidated damages or penalty, fact that it pointed out failure to allege any particular items of damage being consistent with theory that it provided for penalty, and ruling thereon was ruling that it provided for penalty and not that specific items of damage must be shown to recover liquidated damages. Long v. Furnas, 130 Iowa, 504, 107 N. W. 432. Demurrer on ground that court has no jurisdiction of the person of the defendant raises only the question whether he is such a person as can be subjected to the process and jurisdiction of the court. Sanipoli v. Pleasant Valley Coal Co. [Utah] 86 P. 865. Does not raise question that defendant had right to have case tried in county where cause of action arose, but motion to transfer to proper county is proper remedy in such case. Id. Does not raise question that action should have been commenced in county where defendants reside and hence was wrongfully commenced in another county, that objection going to jurisdiction of subject-matter. Continental Life Ins. & Inv. Co. v. Jones [Utah] 88 P. 229.

48. See 6 C. L. 1038.

49, 50. Walls v. Zufall & Co. [W. Va.] 56 S. E. 179.

51. Where demurrer to answer was heard and decision reserved, court held not bound to notify plaintiff's counsel before rendering judgment. Morrison-Trammell Brick Co. v. McWilliams [Ga.] 56 S. E. 306. Trial judge before whom demurrer to petition has been argued at first term may render judgment upon the demurrer at that term in the absence, without leave of court, of plaintiff or his counsel, and without giving time to plaintiff to amend his petition. Lamar, Taylor & Riley Drug Co. v. First Nat. Bank [Ga.] 56 S. E. 486.

52. Held that defendant could not be required to look to replication for any purpose, and its allegations could not be looked to in aid of another replication. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Where no replication was filed to plea of limitations, court having sustained demurrer to plea and no leave being obtained to plead over, held there was no issue of fact involving limitations. Gillmore v. Chicago, 224 Ill. 490, 79 N. E. 596.

53. Martindale v. Battey [Kan.] 84 P. 527. Demurrer was filed to petition on several grounds including misjoinder and want of facts, and record was made showing that demurrer was sustained, but not on what ground. Judgment for defendant was rendered and sustained on error on ground of misjoinder of causes of action. At subsequent term of district court plaintiff asked that record be amended to show that demurrer was in fact sustained on sole ground of want of facts, and also that he be permitted to file separate petitions setting out his separate causes of action and to proceed without further service as authorized by Gen. St. 1901, § 4526, where demurrer is sustained upon ground of misjoinder. Held that, while he was entitled to have record amended, court could not permit filing of separate petitions. Id.

54, 55. Morrison-Trammell Brick Co. v. McWilliams [Ga.] 56 S. E. 306.

56. Where demurrer to petition is overruled, defendant should be given reasonable time in which to answer. Gerrein's Adm'r v. Berry [Ky.] 99 S. W. 944.

57. Held that demurrer should not have been sustained without leave to amend. Wright v. Coules [Cal. App.] 87 P. 809. Court may provide, in order sustaining special demurrer to petition, that plaintiff may have opportunity to amend so as to meet it, but is not bound to do so, particularly where no request has been made for time in which to amend. Lamar, T. & R. Drug Co. v. First Nat. Bank [Ga.] 56 S. E. 486. Where demurrer to complaint in action for libel was sustained on ground that publication was not libelous per se, innuendoes attempted to be alleged being insufficient, held

tition is overruled, the defendant is entitled to answer over as a matter of right, if it appears that it was interposed in good faith,[58] but when the demurrer is frivolous, the plaintiff is entitled to judgment unless the court, in the exercise of a sound discretion, permits the defendant to answer over.[59] A judgment sustaining a special demurrer to a paragraph of a petition with leave to amend within a specified time operates to eliminate such paragraph if no amendment is offered within that time.[60]

Error cannot be predicated on the sustaining of a demurrer to a plea or paragraph when the facts therein alleged may be proved under a general denial in the answer.[61] There can be no error in overruling a demurrer to an argumentative general denial.[62] A party who does not himself demur cannot complain of the overruling of a demurrer interposed by his coparty.[63]

§ 6. *Cross complaints and answers.*[64]—By statute in some states whenever a defendant seeks affirmative relief against any party affecting the property to which the action relates, he may, in addition to his answer, file a cross complaint at the same time, or, by permission of court, subsequently.[65] It must allege all facts necessary to show a cause of action against the person to whom it is addressed.[66] A cross complaint states a separate and independent cause of action, and, if it appears from its averments that the right sought to be enforced exists at the time of filing, it is sufficient.[67] The prayer is no part of the pleading, tenders no issue, and neither adds to nor takes from the evidence required from either party.[68] Matters involved in a cross bill cannot be submitted to the jury as against a defendant who has never appeared, answered, or paid any attention to it.[69] One setting up the same matters as a defense and set-off in one suit, and as ground of recovery in a cross action, is properly required to elect which remedy he will pursue.[70] Cross pleadings have been abolished in some states.[71]

that plaintiff should have been allowed to amend on payment of costs. Rees v. New York Herald Co., 112 App. Div. 456, 98 N. Y. S. 548.

58. Revisal 1905, § 506. Morgan v. Harris [N. C.] 54 S. E. 381. Municipal Court Act, §§ 142, 249 (Laws 1902, c. 580, §§ 1562, 1536), construed and held that motion to dismiss complaint for want of facts is equivalent to demurrer, and leave to serve amended complaint must be granted when it is sustained. Carpenter v. Pirner, 102 N. Y. S. 461. Plaintiff should be allowed to amend. Rogers v. Fine, 49 Misc. 633, 97 N. Y. S. 1004.

59. Morgan v. Harris [N. C.] 54 S. E. 381.

60. Blackwell v. Ramsey-Brisben Stone Co., 126 Ga. 812, 55 S. E. 968.

61. Gambill v. Fuqua [Ala.] 42 So. 735; Richardson v. Stephenson [Ind. App.] 78 N. E. 256.

62. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524.

63. Defendant who does not demur to a bill. Shiff v. Andress [Ala.] 40 So. 824.

64. See 6 C. L. 1039.

65. Under Code Civ. Proc. § 442, held that in action of ejectment defendant was entitled to file cross complaint setting up judgment in former action between plaintiff and defendant's grantor involving title and possession of same land, and alleging that action was contrary to equity and good conscience and intended to harass defendant by compelling him to relitigate questions determined in former action. Martin v. Molera [Cal. App.] 87 P. 1104. Cross complaint held to be regarded as on file by consent of court, though no formal permission to file it was granted, where plaintiff interposed no objection to its filing and court overruled demurrer thereto. Syvertson v. Butler [Cal. App.] 85 P. 164. In view of Code Civ. Proc. § 389, relating to bringing in of new parties, held not an abuse of discretion in action concerning realty to permit defendant to file cross complaint against persons not parties to original action, but claiming an interest in the property, plaintiff not objecting. Id.

66. Cross bill held to sufficiently describe crop in controversy by reference to description in petition. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

67. Cross complaint for partition is sufficient if it shows right to possession at time it is filed though not at commencement of suit. Shetterly v. Axt [Ind. App.] 77 N. E. 865.

68. Denial of motion to strike part of it cannot prejudice plaintiff. Jordan v. Jackson [Neb.] 100 N. W. 999.

69. Johnston v. Fraser [Tex. Civ. App.] 15 Tex. Ct. Rep. 80, 92 S. W. 49.

70. Hebert v. Dewey, 191 Mass. 403, 77 N. E. 822.

71. Under Code Civ. Proc. § 3453, 662, 460, 690, the only pleading of facts on part of defendant is an answer, regardless of whether action is at law or in equity, and hence answer cannot be regarded as a cross complaint, no matter what form it assumes. Gilchrist v. Hore [Mont.] 87 P. 443.

§ 7. *Amendments.*[72]—Amendments are as a rule freely granted in furtherance of justice,[73] the matter being largely committed to the discretion of the trial court,[74] who may take into consideration the probable utility of the amendment[75]

72. See 6 C. L. 1039.

73. Statute allows any amendment which does not make an entire change of parties or an entirely new cause of action. Montgomery Traction Co. v. Fitzpatrick [Ala.] 43 So. 136.

Amendment allowed: Amendment to answer so as to properly allege facts, if they were either defectively or erroneously stated, and it did not appear that defect or error was incurable. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P. 730. In action for negligent killing of plaintiff's husband, amendment of complaint at close of plaintiff's case by inserting allegations as to amount of wages deceased was receiving, and that defendant assured him that place where he received injuries was safe. Cripple Creek Min. Co. v. Brabant [Colo.] 87 P. 794. Where only negligence alleged in original petition was that machine was in dangerous and unsafe condition, held that plaintiff should have been allowed to amend at close of his testimony to conform to proof that negligence of plaintiff's superior in giving orders contributed to injury, amendment not substantially changing cause of action and being in furtherance of justice. Civ. Code Prac. § 134. Ford v. Providence Coal Co. [Ky.] 99 S. W. 609. To answer so as to ask for reformation of written contract sued on so as to show clearly the agreement contended, it being contended that plaintiffs sought to take advantage of phraseology adopted because of their representations to give different meaning than that intended. National Gum & Mica Co. v. Century Paint & Wall Paper Co., 102 N. Y. S. 327. Where plaintiffs were allowed to recover for coal delivered under contract made with firm of same name of which they were the successors, held error to refuse to allow defendant to amend so as to set up breach of such contract. Piper v. Seager, 111 App. Div. 113, 97 N. Y. S. 634. In action to recover money alleged to have been obtained through fraud, defendant allowed to amend for second time so as to amplify defense of waiver on payment of costs though guilty of laches, where case had not yet appeared upon calendar and it did not appear that plaintiff would be prejudiced. Herbert v. De Murias, 101 N. Y. S. 381. In action to recover damages suffered by reason of a temporary injunction subsequently dissolved, amendment to complaint, seeking to compel defendant to pay same amount of damages for wrongfully and improvidently obtaining injunction. Code Civ. Proc. 1902, § 194. Batson v. Paris Mountain Water Co., 73 S. C. 368, 53 S. E. 500.

Amendment disallowed: Of answer so as to set up statute of limitations, which amounted to no more than a tardy demurrer. Hewel v. Hogin [Cal. App.] 84 P. 1002. Of answer during trial so as to deny allegations that one of the plaintiffs had been adjudged insane, and that public administrator had been authorized to take charge of his estate. Levels v. St. Louis & H. R. Co., 196 Mo 606, 94 S. W. 275.

74. Chicago, etc., R. Co. v. Williams [Ind.] 79 N. E. 442; Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832. To demurrer. Phillips v. Jacobs [Mich.] 13 Det. Leg. N. 542, 108 N. W. 899. Amendment of alternative writ of mandamus under B. & C. Comp. § 612. State v. Richardson [Or.] 85 P. 225. Amendment after trial is begun. American Life Ins. Co. v. Melcher [Iowa] 109 N. W. 805. Amendment of answer made at time of motion for new trial. Roebuck v. Stephenson, 99 Minn. 521, 109 N. W. 1134.

Allowance held not abuse of discretion: Where real issue in action on note was whether it was given to prevent criminal prosecution of maker's sons, permitting defendant to amend answer at close of evidence by striking out denial of maturity of obligation so as to give her right to open and close. Beal-Doyle Dry Goods Co. v. Barton [Ark.] 97 S. W. 58. Allowing filing of amended reply immediately after striking out original as sham. Florence Oil & Ref. Co. v. Oil Well Supply Co. [Colo.] 87 P. 1077. Where plaintiff in original petition relied on a former contract no longer in force, amendment setting out real contract under which defendant was operating. Georgetown Water, Gas, Elec. & Power Co. v. Smith [Ky.] 97 S. W. 1119. Amendment to answer, which did not change substantially defense which could have been made under original. Robertson v. Lombard Liquidation Co. [Kan.] 85 P. 528. Allowance of amendment eliminating cause of action for damages for false representations, and adding other allegations of fact to cause of action to recover amount of notes given to defendant by plaintiff and sold by plaintiff to innocent purchasers in violation of agreement that they were to be paid out of profits of sale of machines under patent, in which plaintiff was induced to purchase interest by fraud, and which plaintiff was compelled to pay. Myrick v. Purcell [Minn.] 109 N. W. 995, even if nature and substance of action was changed thereby. In action to recover contract price for material furnished and services rendered, held proper to permit plaintiff to amend petition so as to seek to recover value of material furnished and work performed upon a quantum meruit, where he states of action. Limrick v. Lee [Okl.] 87 P. 859. Allowance of amendment to counterclaim after sustaining demurrer thereto, where it did not insert a new or different cause of action, but was designed to complete defectively stated cause of action. Leesville Mfg. Co. v. Morgan Wood & Iron Works [S. C.] 55 S. E. 768.

Refusal to allow held not abuse of discretion: Of complaint. Seager v. Armstrong [Minn.] 109 N. W. 1134. Of answer where defendant had already introduced without objection all the testimony bearing upon the issue sought to be raised thereby, and amendment was unnecessary, no possible prejudice resulting. White River R. Co. v. Batesville & Winerva Tel. Co. [Ark.]98 S. W. 721. In action by administrator of surety to recover from principal amount of debt paid by decedent, where answer alleged that decedent assumed indebtedness and became principal maker on note, and that defendant was surety as between himself and decedent,

and the diligence exercised in presenting it,[76] and impose such terms as seem just.[77]

amendment alleging that decedent gave defendant money received on note, it being repugnant to rest of answer and impossible if other allegations were true. Townsend v. Sullivan [Cal. App.] 84 P. 435. Amended counterclaim after sustaining demurrer to original, where two were identical in their legal effect, it not appearing that defendants were harmed, since, if pleadings were good, they could have secured their rights by excepting to ruling on demurrer and standing on such ruling. Siebe v. Heilman Mach. Works [Ind. App.] 77 N. E. 300. Amendment to answer during trial, after repeated delays. Spurrier v. Bullard [Iowa] 107 N. W. 1036. Where complaint in action on subscription to aid in building hotel alleged that plaintiff constructed hotel in reliance thereon, and answer alleged that subscription was obtained by fraud and was without consideration and that defendants had withdrawn before any expense had been incurred, denial of leave to amend complaint so as to allege that plaintiff had not been instrumental in securing subscription but had become party to it only after it had been made. American Life Ins. Co. v. Melcher [Iowa] 109 N. W. 805. In any event ruling was harmless in view of fact that paper was subject to same defenses in any case and in view of evidence and findings. Id. Amendment to answer during trial setting up a new and additional defense, where only reason given therefor was that court refused to admit certain evidence under general denial. Piper v. Choctaw Northern Townsite & Imp. Co., 16 Okl. 436, 85 P. 965.

75. Under Rev. Laws, c. 173, § 48, amendment of answer is matter entirely within discretion of trial court, and refusal of motion to amend was proper where court was satisfied that purpose of amendment was vexation and delay, and not the setting up of what was honestly thought to be a defense. Fay v. Hunt, 190 Mass. 378, 77 N. E. 502.

76. Court held to have properly permitted defendant to amend answer by setting up defense of which she had no knowledge when demurrer to original answer was sustained. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P. 730. In denying motion for leave to file counterclaim after evidence was all in, held that court was acting within its discretion, and error would not be imputed to such action unless clear abuse was shown. Sidney Novelty Co. v. Hanlon [Conn.] 63 A. 727. Court held not to have erred in refusing to allow amendment of answer at trial so as to set up new mater of defense, notice of which was not given in original answer where defendant failed to swear, in affadavit attached to proposed amendment that new matter was not omitted from original answer for purposes of delay, as required by Civ. Code 1895, § 5057, as amended. Beacham v. Wrightsville & T. R. Co., 125 Ga. 362, 54 S. E. 157. Statute does not apply to suit in justice's court. Glessner v. Longley, 125 Ga. 676, 54 S. E. 753. Fact that presiding judge had announced orally that he would sustain motion to dismiss on ground that it appeared on face of complaint that plaintiff had no title to note in suit and no right to sue thereon, held not to have rendered proper amendment to complaint thus tendered too late, or authorize its rejection on that ground where he had not yet signed any judgment of dismissal. Swilley v. Hooker, 126 Ga. 353, 55 S. E. 31. Refusal to set aside order of submission and to allow amended reply to be filed more than a year after filing of answer held not an abuse of discretion, where no good excuse was offered for delay. Blanton v. Arnett, 29 Ky. L. R. 491, 93 S. W. 1043. Application to amend answer after decree for complainants on ground of newly-discovered evidence held made too late, it appearing that failure to discover evidence at outset was due to defendant's negligence. Woods v. Campbell, 87 Miss. 782, 40 So. 874. That facts set out in amendment existed at time original answer was filed is no objection to allowance. Jordan v. Jackson [Neb.] 106 N. W. 999. Ordinarily a party will not be permitted to amend for purpose of setting up facts of which he had full knowledge when original pleading was filed, unless he shows satisfactorily excusing his failure or negligence in not setting up originally. Jacobs v. Mexican Sugar Refining Co., 101 N. Y. S. 320. Amendment to answer eighteen months after filing of original held improperly allowed, excuse being insufficient. Id. Court held justified in refusing to entertain motion to amend answer at trial, where action had been at issue for some time, and counsel failed to make application at special term to stay proceedings pending determination of motion. Riesgo v. Clark, 101 N. Y. S. 832. Will devised property in trust to corporation to be organized. Objection to its probate was withdrawn pursuant to compromise agreement as to disposition of testator's property, and corporation was organized. In subsequent action by executors for construction of will and agreement held that corporation would be allowed to amend its answer so as to attack validity of agreement before trial, notwithstanding lapse of time, where nothing had occurred in meantime changing position of any party to the action. Muller v. Evans Museum & Institute Soc., 99 N. Y. S. 93, rvg. 49 Misc. 322, 99 N. Y. S. 194. Motion to amend answers by setting up statute of limitations and want of jurisdiction because of plaintiff's nonresidence held properly denied on ground of laches where not made until five years after issue joined. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1. In action on bond secured by mortgage to recover deficiency after sale under judgment of foreclosure, application to amend answer at trial so as to charge plaintiff with actual value of land at time of the sale several years before instead of amount realized held properly denied, plaintiff being entirely unprepared for such issue. Randrup v. McBeth, 101 N. Y. S. 604. Rule to show cause why amendment to bill in equity should not be allowed not having been disposed of before hearing to adjourn, held that amendment was properly refused as offered too late when it was brought up for disposition at final hearing and after defendant had closed relying on his objections, which were well taken. Muehlhof v. Boltz [Pa.] 64 A. 427. Where defendant had ample opportunity to ascertain whether plaintiffs

Amendments may, on proper leave granted,[78] or in some states as a matter of right,[79]

had filed certificate of partnership as required by statute, but answered to merits and waited until cause was about to be reached for trial before asking leave to interpose amended answer for purpose of raising objection that it had not held that denial of application was not an abuse of discretion, the statute providing for filing of certificate at any time, and subject-matter of amendment being merely plea in abatement which had apparently been waived. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531. Under Rev. St. 1899, § 3588, party applying to amend during trial must show that amendatory facts were unknown to him prior to application, unless court in its discretion relieves him from so doing. Mau v. Stoner [Wyo.] 87 P. 434. Amendment to answer so as to plead misjoinder of parties defendant held properly allowed at close of plaintiff's evidence, there being sufficient proof that amendatory facts were previously unknown to defendent and such facts constituting defense to case as made by evidence. Id. Provision of Rev. St. 1895, art. 1188, that amendments must be filed before parties announce ready for trial and not thereafter, held directory only, so that court may in exercise of sound discretion permit amendment after such announcement. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400. Permitting amendment setting up waiver of provisions of contract sued on held not an abuse of discretion. Id.

77. Allowance of amendment and denial of continuance because of absence of witness held not ground for reversal where former was not an abuse of discretion, and opposite party admitted that witness would testify as claimed. Florence Oil & Refining Co. v. Oil Well Supply Co. [Colo.] 87 P. 1077. Where, in trial to court without jury, application to amend answers to conform to proof was taken under advisement and, on final determination of case, order was entered allowing amendment and reciting that it would be considered as denied by plaintiffs, held that effect of order, was to allow amendment only on condition that statements therein should be taken as denied without formal pleading to that effect being filed, and motion for judgment on pleadings for failure to file reply to amended answers was properly denied since defendants could not have any benefit from amendment without recognizing condition. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160. Question whether or not costs or terms shall be imposed as condition of amending complaint is necessarily involved in motion to amend, and second motion by defendant for costs is improper. Abrahams v. Finkelstein, 49 Misc. 448, 97 N. Y. S. 987. Held that court should have imposed proper and reasonable terms as a condition of granting leave to amend complaint, though plaintiff contended that amendment was unnecessary and moved to amend only because justice intimated his purpose to dismiss it otherwise. Id. Where answer set up that contract sued on was intended to relate to certain particular transactions and not all future transactions, held that, though case had appeared on day calendar, defendant would be allowed to serve amended answer setting up substantially the same matter as a counterclaim and demanding the reformation of the contract, on condition that he pay all taxable costs and disbursements after service of summons and complaint, and that action remain upon the day calendar, and amended answer be served within one day after entry of order. Sackett v. Milholland, 49 Misc. 439, 99 N. Y. S. 948. In action for negligence where at close of evidence, court allowed juror to be withdrawn, held that, as condition of allowing plaintiff to amend by setting up more particularly the defects complained of, he should be required to pay all taxable costs to date as well as costs of motion. Palazzo v. Degnon MacLean Contr. Co., 100 N. Y. S. 681; Mossein v. Empire State Surety Co., 102 N. Y. S. 1013. Provision by special term in allowing amendment to complaint that it should be without prejudice to position of case on general trial term calendar held within power of court. Where effect of granting application for leave to amend answer was to take case off the calendar and delay trial and to present new issue, held that it would only be granted upon payment of all costs to date. National Gum & Mica Co. v. Century Paint & Wall Paper Co., 102 N. Y. S. 327. On allowing amendment of complaint so as to rid it of parties held to have been improperly joined, held that plaintiffs would be required to pay costs of motion and all accrued taxable costs in the action which had been taxed against all the plaintiffs. Town of Palatine v. Canajoharie Water Supply Co., 101 N. Y. S. 810. Failure of order permitting amendment of complaint to provide that defendant might answer it held not error, where record did not show that defendant requested permission to answer. McDonald v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 543.

78. Where answer admitted making of contract for furnishing certain materials as alleged in complaint, but alleged that order for materials was countermanded before plaintiffs had incurred any expense, held that amended answer denying making of contract as alleged by alleging making of conditional contract under which materials were not to be shipped until ordered, and that they were not ordered, was properly allowed to be filed in view of Kirby's Dig. § 6098, authorizing defendant to set forth as many grounds of defense as he may have. Stainback, Crawford & Co. v. Henderson [Ark.] 95 S. W. 786. Denial of motion for leave to amend reply held error, new matter offered to be pleaded not being inconsistent with complaint, and tending to supplement and contradict defense pleaded in answer. Mellor v. McConnell [Neb.] 106 N. W. 1012. Order granting leave to amend complaint held irregular in that no copy of amended pleading was attached thereto. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335. Fact that there had been two previous trials in which verdicts had been set aside held not at all controlling in exercise of trial court's discretion to allow amendments, application being still one made before trial. Pickett v. Southern R. Co., 74 S. C. 236, 54 S. E. 375.

79. Delay in filing amended petition after demurrer to former one had been sustained

be made before trial, at the trial [80] under proper restrictions against surprise,[81] at

held not, under the circumstances, so unreasonable as to authorize court to strike it from files and dismiss action for want of prosecution, in view of Civ. Code Prac. §§ 94, 132. Quinn v. Cincinnati, etc., R. Co. [Ky.] 97 S. W. 379. Under Code Civ. Proc. § 542, providing that within twenty days after pleading has been served, or at any time before period for answering it expires, it may be once amended by the party as of course, held that where defendant served an amended answer to the orlginal complaint, and plaintiff thereafter filed an amended complaint which defendant answered, defendant could, within prescribed time, file an amended answer to amended complaint as of course. Brooks Bros. v. Tiffany, 102 N. Y. S. 626. Where plaintiff voluntarily and without order of court served amended complaint in order to overcome defendant's objections as set forth in a motion to require causes of action to be separately stated and numbered, held that he could not serve another as of course, particularly where first one was general amendment in form and effect so as to strengthen pleading against possible demurrer. Freyhan v. Wartheimer, 102 N. Y. S. 839. Under § 542 and § 798 which gives to party served with a pleading by mail double time in which to answer, reply, or demur to it, held that where defendant served answer by mail he could amend it as of course at any time within forty days. Schlesinger v. Borough Bank, 112 App. Div. 121, 98 N. Y. S. 136. Rev. St. 1895, art. 1188, held to confer right to file amended pleadings in vacation, and not to require pleading so filed without notice to opposite party to be treated as a nullity. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312.

80. Denial of leave to file additional plea at trial held not improper where character of plea was not indicated, there was no showing of reasonable excuse for failure to file it sooner, and it did not appear that counsel was then ready to file it. Byerly v. Wilson, 123 Ill. App. 662. Allowance after announcement of ready for trial is within discretion of court and its refusal will not be reversible error unless abuse of discretion is shown. Walker v. Hernandez [Tex. Civ. App.] 15 Tex. Ct. Rep. 456, 92 S. W. 1067. Refusal to allow amendment of answer so as to ask for affirmative relief held not an abuse. Id. Under Code Civ. Proc. §§ 723, 1018, referee on the trial has same power as court to amend pleadings to conform to proofs. Perkins v. Storrs, 114 App. Div. 322, 99 N. Y. S. 849. Party consenting that referee may pass upon application for amendment cannot afterwards contend that application could only have been granted at special term. Id.

Amendment held properly allowed: Of declaration. Bloomington & Normal R. Elec. & Heat. Co. v. Bloomington, 123 Ill. App. 639. Of complaint charging name of defendant's servant alleged to have been guilty of negligence complained of, in view of allegations as to duties being performed by such servant and time and place of accident, and defendant's probable knowledge as to who was performing such duties, etc. Smith v. Michigan Lumber Co. [Wash.] 86 P. 652. Of answer to meet new contention made material by amendment to complaint at trial. Devereux v. Peterson, 126 Wis. 558, 106 N. W. 249. Amendments to plea at trial term to meet objections thereto pointed out by special demurrer. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664. Where issue was made by pleadings and evidence and case was referred to auditor, allowance after filing of auditor's report of amendment which introduced no new issue, but simply adjusted prayer of petition more specifically to finding of auditor and evidence submitted to him is proper. McConnell v. Stubbs, 124 Ga. 1038, 53 S. E. 698. Unverified plea of non est factum filed at appearance term may be amended at trial term by allowing defendant to swear to its averments. Patton v. Bank of La Fayette, 124 Ga. 965, 53 S. E. 664. In replevin, where defectively drawn answer amounted to amplified general denial and had not been attacked by motion or demurrer, amendment setting up general denial coupled with specific allegations of fraud in alleged purchase of goods by plaintiff. Rusho v. Richardson [Neb.] 109 N. W. 394. Where contract was set out verbatim in declaration and recited that it was under seal, but in copying it into declaration nothing to represent seal was indicated, and when contract was introduced in evidence it was apparent that corporate seal had been affixed, held that amendment to make declaration conform to fact was authorized by Va. Code 1887, § 3384, and U. S. Rev. St. § 954. Mathieson Alkali Works v. Mathieson [C. C. A.] 150 F. 241.

81. In action against carrier for damages for loss of part of shipment of machinery where answer had been on file for over a year, held that denial of continuance on allowance of amendment thereto after evidence was closed and witnesses discharged, setting up for first time failure to comply with requirement of bill of lading as to notice of claim for damages, was reversible error. Hall & Brown Woodworking Mach. Co. v. Louisiana, etc., R. Co. [Ark.] 95 S. W. 799. In action for negligence allowing amendment during trial setting out in further detail result of injuries held not an abuse of dicretion in view of terms offered. Postal Tel. Cable Co. v. Likes, 124 Ill. App. 459, afd. 225 Ill. 249, 80 N. E. 136. Defendant held not prejudiced by trial amendment and denial of motion for continuance, where original declaration permitted recovery for every ailment proved at trial and amendment added nothing to it. Shoninger Co. v. Mann. 121 Ill. App. 275. Under Rev. St. 1899, § 688, amendment does not entitle opposite party to continuance as matter of right, but court must be satisfied that in consequence thereof he cannot be ready for trial at time previously appointed. Keeton v. St. Louis, etc., R. Co., 116 Mo. App. 281, 92 S. W. 512. Denial held not an abuse of discretion. Id. Under Code Civ. Proc. § 774, giving court discretionary power to allow amendments under such terms as it may deem just and proper, denial of continuance on ground of surprise held not ground for reversal in absence of affirmative showing of abuse of discretion. Dorais v. Doll, 33 Mont. 314, 83 P. 884. Refusal to allow continuance on filing amended

the conclusion of the trial to conform the pleadings to the proof,[82] and in some

answer held not abuse of discretion, original answer though defective being sufficient to inform plaintiff that defendant relied on general denial, under which facts alleged in amendment could have been proved. Rusho v. Richardson [Neb.] 109 N. W. 394. Amendment held not such a surprise as would authorize postponement or terms, where it was allowed after notice and nearly sixty days before trial. More v. Burger [N. D.] 107 N. W. 200. Where amendment is filed when case is called for trial in such a manner as not to operate as a surprise to opposite party and there is no objection to its filing, it is improper for court of its own motion to strike it from files merely because replication of opposite party operates as a surprise and a continuance of the case. Zollars v. Snyder [Tex. Civ. App.] 16 Tex. Ct. Rep. 203, 94 S. W. 1096. Where, when case was called for trial, it was discovered that answer to merits had not been attached to exceptions and general denial, but it appeared that copy had been previously furnished to plaintiffs' counsel who then agreed that it might be so attached, and by consent of plaintiffs same was then attached, held error for court to strike same. Id.

82. Is proper after verdict or judgment to permit complaint to be amended so as to present issue as both parties have presented it in the evidence without objection. Kirby's Dig. § 6145. McNutt v. McNutt [Ark.] 95 S. W. 778. Is not error to refuse amendment offered after evidence of plaintiff has closed which is supported by no testimony. Huggins v. Southern R. Co. [Ala.] 41 So. 856.

Amendments allowed: Amendment to complaint held supported by evidence and its denial was error. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Plaintiffs held properly allowed to amend pending motion in arrest of judgment, amended counts merely amplifying averments of original declaration, particularly where no question of variance was raised during trial. Wabash R. Co. v. Campbell, 117 Ill. App. 630. In action for damages for injuries to employe due to defect in shears, allowance of amendment of complaint so as to allege that nicks in lower blade of shears made rough places on lower surface of steel plate being sheared instead of on upper surface held not an abuse of discretion, particularly as, under findings, it could not have affected case one way or the other. New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485. Plaintiff's testimony held to have made case for jury so that court should have allowed amended petition to be filed. Hobbs v. Ray, 29 Ky. L. R. 999, 96 S. W. 589. Where in trespass quare clausum plaintiff did not prove the breaking and entering of the close, but an injury to his property after a lawful entry, held that he would be allowed after verdict to amend so as to set up cause of action in case, it appearing that merits of case had been fairly and fully tried without any surprise to defendant. Beers v. McGinnis, 191 Mass. 279, 77 N. E. 768. In action of torts in three counts, first and second being under statute and alleging negligence on part of defendant personally and on part of his agents and servants respectively, and third being at common law for conscious suffering after death, held that, where second and third counts were submitted to jury which assessed damages to plaintiff under each, it was within power of court under Rev. Laws c. 173, § 48, and court rules to allow plaintiff to amend after verdict by striking out third count, whether defendant was harmed by evidence as to third count being question for trial court. Manning v. Conway [Mass.] 78 N. E. 401. Where petition alleged that draft sued on was payable to plaintiff bank, but it showed on its face that it was payable to "P. cashier", and evidence showed that P. was plaintiff's cashier and that he was acting as its agent in taking draft, held that plaintiff was properly allowed to amend petition after cause was submitted. State Bank v. American Hardwood Lumber Co. [Mo. App.] 98 S. W. 786. Under Laws 1902, p. 1542, c. 580, § 166, municipal court held to have authority to allow amendment to complaint at close of plaintiff's case, changing cause of action from use and occupation to trespass to conform to proof where facts upon which plaintiff claimed right to recover were the same. Bunke v. New York Tel. Co., 110 App. Div. 241, 97 N. Y. S. 66. Trial court held to have authority to amend complaint at close of trial. Martin v. Flahive, 112 App. Div. 347, 98 N. Y. S. 577. Where complaint to recover on check against drawer thereof was defective in failing to allege giving of notice of dishonor required by negotiable instruments law, held that it could be amended to conform to proof that drawer had stopped payment, no notice of dishonor being required in such case. Scanlon v. Wallach, 102 N. Y. S. 1090. Allowance of amendment to petition held within court's discretion, where it could not have occasioned surprise. Northern Texas Traction Co. v. Mullins [Tex. Civ. App.] 99 S. W. 433. In assumpsit by officer to recover purchase price of attached property sold under agreement that proceeds should be paid to plaintiff, where case and thereby cause of action was referred by parties, held immaterial whether or not general assumpsit would lie, declaration being adaptable by amendment to facts found without changing nature of action. Lamb v. Zundell, 78 Vt. 232, 62 A. 33. In action for breach of promise of marriage held an abuse of discretion to refuse to allow amendment to conform complaint to proof that promise was made after plaintiff's divorce, where court construed complaint as based on promise made during plaintiff's former marriage. Leaman v. Thompson [Wash.] 86 P. 926. Where at close of testimony in action at law it appears that cause is really one in equity for an accounting by defendant as a trustee, court should treat complaint as amended in particulars necessary to conform to proof and take case from jury. Goupille v. Chaput [Wash.] 86 P. 1058. Where complaint alleged that injuries were caused by jerking train after it had stopped and proof showed that it was stopped with a jerk, held that complaint could be amended if necessary, it appearing that all material questions were fully tried by parties. Hopkins v. Chicago, etc., R. Co., 128 Wis. 403, 107 N. W. 330. Under Rev. St. 1899, § 3588, amendments to conform pleadings to proof should be liber-

cases in the appellate court,[83] or after remand therefrom.[84] If the averments are

ally allowed when justice will be thereby promoted. Lellman v. Mills [Wyo.] 87 P. 985. In action by trustee in bankrutcy to set aside chattel mortgage, amendment of complaint after judgment for plaintiff held properly allowed, it not being subject to objection that it set up new cause of action, or that complaint did not state cause of action without it. Id. Where statement of claim submitted to jury by plaintiff without objection was in accordance with evidence, held that defendant could not after verdict object that it contained items not claimed in declaration, but plaintiff would be allowed to amend declaration so that it would cover them. Johnson v. Crawford, 144 F. 905.

Amendments disallowed: After both parties had concluded introduction of evidence and argument had been entered upon, held not error to disallow amendment setting up defense of limitations, no evidence having been introduced which would have authorized binding for defendant upon such plea. Hinkle v. Smith & Son [Ga.] 56 S. E. 464. Refusal to allow amendment of answer at close of evidence held not an abuse of discretion, no reason being suggested why it was not made earlier, and there being no sufficient evidence to support it. Kettering v. Eastlack, 130 Iowa, 498, 107 N. W. 177. Defendant having known facts when he filed original answer, held that he would not be permitted after judgment for plaintiff to file amended answer setting up title by adverse possession. Asher v. Uhl, 29 Ky. L. R. 396, 93 S. W. 29; for former opinion see 27 Ky. L. R. 938, 87 S. W. 307. In action against carrier for injuries to shipment of hogs, refusal of court to allow amendment of answer to show delivery to connecting carrier held not an abuse of discretion, where evidence did not show any notice to connecting carrier that hogs had been placed on receiving track for it, or when it in fact took charge of them. Illinois Cent. R. Co. v. Stevens, 29 Ky. L. R. 1079, 96 S. W. 888. Where one party to joint lease, when sued separately, pleaded general denial, and failed to object, held that he was not after decision, entitled to amend answer and set up fact that was joint, and order allowing such amendment was abuse of discretion. Hoatson v. McDonald, 97 Minn. 201, 106 N. W. 311. Where defendant had during trial been allowed to amend answer twice and plaintiffs to amend reply three times, held no abuse of discretion to refuse on motion for new trial to allow amendment of answer involving complete change of theory of defense, based on falsity of verified admissions of answer, and inconsistent with much of the testimony, because stockholder of defendant corporation at time of transaction was ignorant of the proceedings. Wasser v. Western Land Securities Co., 99 Minn. 460, 107 N. W. 160. Where plaintiff is permitted, without amendment asked or allowed and against seasonable objection by defendant, to recover on a wholly different cause of action than that alleged, the pleadings cannot be conformed to the proof, even though defendant was probably not misled. Hill v. Weidinger, 110 App. Div. 683, 97 N. Y. S. 473. Permitting amendment of complaint after cause was submitted so as to enlarge its scope held error, where evidence as to facts set up by amendment was received over objection and exception. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357. In action before justice to recover on alleged contract to pay for milk average price paid by any three factories to be selected by plaintiff, held that amendment to conform pleading to proof, received over objection that he was to receive same price paid by plaintiff to others, was properly disallowed. Genger v. Westphal, 128 Wis. 426, 107 N. W. 330.

83. In action on due bill petition filed in district court on appeal held not a departure from that filed in county court. Rieck v. Griffen [Neb.] 103 N. W. 1061. In action on life insurance policy where defendant pleaded that insured had warranted that he had not in fifteen years been under care of any physician, and that warranty was false, and proof was of a warranty that last attendance by a physician was fifteen years before, held that plea was amendable and amendment could be made in appellate court if necessary, plaintiff not having been misled. Hanrahan v. Metropolitan Life Ins. Co., 72 N. J. Law, 504, 63 A. 280.

84. Amendments allowed: Opinion on appeal held not to have determined rights of either party, but merely that there should be new trial, so that, after mandate was entered in court below, defendants should have been allowed to file such additional pleading, if any, as might be necessary to properly present their case. Fugate v. Gill [Ky.] 99 S. W. 602. Where on appeal case was reversed and remanded for new trial, filing of amended pleading before mandate was filed in lower court as required by Civ. Code Prac. § 761, was premature and it was properly stricken. In suit to restrain trespass on oyster beds, where answer and cross bill alleged right to take oysters under certain contract between the parties, held that decision on appeal that contract conferred no such right did not preclude trial court from subsequently allowing defendants to amend so as to seek reformation of such contract on ground that it did not express true agreement. Barataria Can. Co. v. Ott [Miss.] 41 So. 378. Affidavit made by counsel stating facts and reciting that it is made by him rather than by plaintiff because facts are peculiarly within his knowledge held sufficient basis for allowance of amendment to complaint by trial court after remand so as to complete state of facts necessary to sustain judgment for plaintiff, when accompanied by verified amended complaint in which necessary allegations were made by plaintiff. Mossein v. Empire State Surety Co., 112 App. Div. 69, 98 N. Y. S. 144. Where judgment dismissing complaint was affirmed by court of appeals with leave to appellants to apply to supreme court for such relief as they might be advised, held that special term had power or authority to order amendment of summons and complaint so as to eliminate parties held to have been improperly joined, and to amend judgment so that complaint should not stand dismissed, but in force as amended. Town of Palatine v. Canajoharie Water Supply Co., 101 N. Y. S. 810. Where judgment in law action is reversed and cause remanded for new trial or further proceed-

sufficient to give jurisdiction,[85] amendments either of substance or form are allowable.[86] Parties may be eliminated or new parties added,[87] but amendments chang-

ings, court below has power to allow reasonable amendments to pleadings, and its action in this respect will not be disturbed except for an abuse of discretion. State v. Richardson [Or.] 85 P. 225. Remand on affirmance of judgment sustaining demurrer to alternative writ of mandamus held not to preclude allowance of amendment. Id. Allowance of amendment held not an abuse of discretion. Id. Where it appeared that special count was intended as count in assumpsit rather than tort, but it was insufficient as former, held that, on reversal of judgment overruling demurrer for misjoinder, case would be remanded with directions to sustain demurrer unless plaintiff should apply for leave to amend, in which case leave should be granted. Pennsylvania R. Co. v. Smith [Va.] 56 S. E. 567.

Amendments disallowed: Where it was determined on appeal that evidence to show estoppel was inadmissible without a plea, held that on a retrial leave to amend so as to set up estoppel was properly denied when application was not made until the close of the testimony. Craig v. Leschen & Sons Rope Co. [Colo.] 87 P. 1143. On appeal to district court from action of board of review, motion to dismiss on ground that it did not appear that it was based on any complaint before board was overruled and assessment was reduced. On appeal to supreme court, judgment was reversed on ground that transcript did not show any such complaint. Held that after redocketing in district court it was too late for defendant to amend so as to allege that on original trial in district court it was conceded that such complaint was made, question having been an issue in case from its inception. City Council v. National Loan & Inv. Co., 130 Iowa, 511, 107 N. W. 309. Where answer in suit to enjoin issuance of patents to land to defendant denied title of plaintiff and alleged that land was vacant and unoccupied, held that after judgment had been rendered for plaintiff defendant would not be permitted to file amended and supplemental answer and counterclaim alleging title under a prior patent, two pleas being inconsistent. Asher v. Uhl, 29 Ky. L. R. 396, 93 S. W. 29, for former opinion see 27 Ky. L. R. 938, 87 S. W. 307. Motion after remand to permit defendant to file amended and supplemental answer and counterclaim held properly denied, that not being proper method by which to obtain new trial. Id. Where judgment is reversed and case remanded with directions to render judgment for a party in accordance with the opinion, trial court has no authority to reframe pleadings as to any issue and retry it. Allowance of amendment held error. Halsey v. Waukesha Springs Sanitarium, 128 Wis. 438, 107 N. W. 1.

85. Refusal to allow amendment held not error, where there was not enough in the petition to amend by, and it would not have stated a cause of action had amendment been allowed. Tye v. Goissert, 124 Ga. 733, 57 S. E. 813. Petition, after eliminating paragraph held bad on demurrer, held to contain sufficient allegation of negligence on part of defendant to authorize amendment amplifying such allegation, there being no objection on ground that allegations were not orderly and distinct. Blackwell v. Ramsey-Brisben Stone Co., 126 Ga. 812, 55 S. E. 968. Petition in action against carrier for damages for failure to deliver car load of corn within a reasonable time held sufficient to amend by. Southern R. Co. v. Gardner [Ga.] 56 S. E. 454. Original petition in action against carrier for injuries to passenger held to have sufficiently alleged a cause of action to be amended by inserting an allegation that alleged culpable acts of defendant were negligently done. Keeton v. St. Louis, etc., R. Co., 116 Mo. App. 281, 92 S. W. 512.

86. Petition not addressed to any court held amendable in that regard in view of prayer for process. Parish v. Davis, 126 Ga. 840, 55 S. E. 1032. Petition which is duplicitous in that plaintiffs, though asserting that they sue as heirs at law, seek to set up rights as legatees, is amendable, and may be rendered unobjectionable in this respect by introduction of allegations to effect that they pray for the relief sought solely in their capacity as legatees and devisees. Hodges v. Wheeler, 126 Ga. 848, 56 S. E. 76. Where second paragraph of petition erroneously described petitioner as administrator of P. instead of D., held that it was amendable in that regard. Parish v. Davis, 126 Ga. 840, 55 S. E. 1032. Failure of petition in eminent domain proceedings to allege fact necessary to maintenance of proceeding may be cured by amendment under express provisions of eminent domain act. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86. Failure of complaint in action for slander to allege innuendo held curable by amendment. Russell v. Barron, 111 App. Div. 382, 97 N. Y. S. 1061. Under Code Civ. Proc. 1902, § 194, court has power to allow amendment striking out allegations other than name of a party. Pickett v. Southern R. Co., 74 S. C. 236, 54 S. E. 375.

87. Evidence having discolsed no liability against one of the defendants on contract sued on, held not error to permit plaintiff to amend by striking out his name. Eagle Iron Co. v. Baugh [Ala.] 41 So. 663. Instruction to find verdict for defendant if jury believed that all plaintiffs, who originally filed suit for damages to lot resulting from construction of railroad embankment in street, owned joint interest in property, and that since filing of suit some of plaintiffs had been stricken from complaint, held erroneous in view of Code 1896, § 3331. Birmingham R., Light & Power Co. v. Oden [Ala.] 41 So. 129. Plaintiff held properly permitted to amend so as to make action one against the "C. Mining Company" instead of against the "C. Mining and Milling Company," the former company evidently not having been misled and having conferred jurisdiction by appearance. Nisbet v. Clio Min. Co., 2 Cal. App. 436, 83 P. 1077. In action for labor performed and goods sold, brought against defendants as copartners, held that allowance of amendment before trial striking allegation as to copartnership and making

ing the cause of action or introducing new issues are ordinarily not allowable.[88]

action one against defendants individually was not error. Haviland v. Mayfield [Colo.] 88 P. 148. In action on note by indorsee in name of payee and for use of indorsee, held error on appeal to superior court to refuse to allow amendment of declaration by striking out name of payee and words "for the use of," so as to leave case to stand in indorsee's own name as plaintiff. Swilley v. Hooker, 126 Ga. 353, 55 S. E. 31. Petition in action in tort brought against two defendants may be amended by striking therefrom one of them against whom service is not perfected, in which case, if language is not otherwise altered, allegations will be read and understood as if there had been only one defendant originally. Seaboard Air Line R. Co. v. Randolph, 126 Ga. 238, 55 S. E. 47. Where plaintiff is by mistake described as a company in title of action and alleged in body of petition to be a corporation, petition may, under Code, § 139, be amended by striking out such descriptive words. American Bonding Co. v. Dickey [Kan.] 88 P. 66. Denial of motion to amend petition by substituting corporation as plaintiff in place of all its stockholders held an abuse of discretion under the circumstances. Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247. Under Code Civ. Proc. § 723, may permit amendment of summons and complaint so as to charge defendant individually instead of in his capacity as trustee. Boyd v. United States Mortgage & Trust Co. [N. Y.] 79 N. E. 999. In action under statute for killing plaintiff's minor son, error in failing to join deceased's mother and in failure of statement to give names of parties entitled to damages recovered held cured by instruction at defendant's request to find full compensation and damages so far as affected both parents, and to so state in verdict, and verdict finding for both parents, on which judgment was entered and amendment made after verdict making mother party, was unnecessary and harmless error. Waltz v. Pennsylvania R. Co. [Pa.] 65 A. 401. Under Code, § 194, court has power to allow amendment of complaint by striking out names of two of the parties for whose benefit action was instituted. McDaniel v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 543.

88. Only limitation upon right of plaintiff in action at law to amend at any time before cause is submitted to jury is that form of action must not be changed. Must not be an entire change of parties, nor can there be the substitution or introduction of an entirely new cause of action. Huggins v. Southern R. Co. [Ala.] 41 So. 856. Test is whether recovery had under original would bar one under amended, or if same evidence would support both, or if same measure of damages is applicable. Knight v. Boring [Colo.] 87 P. 1078. Test to determine whether amendment is permissible is whether cause of action set up by amendment would be bar to suit on other. More v. Burger [N. D.] 107 N. W. 200. Under Rev. Codes 1899, § 5297, in regard to amendments, amendment to complaint after cause is set for trial is not objectionable merely because it introduces new or different cause of action in technical sense of that term, where it does not substantially change plaintiff's claim, test being whether it should be allowed in furtherance of justice. Kerr v. Grand Forks [N. D.] 107 N. W. 197. In action for injuries received by falling on sidewalk, allowance of amendment held not error even if it changed cause of action from one for failure of city to enforce ordinance in regard to construction of sidewalks to one for negligence in permitting walk to remain in dangerous and defective condition, which it did not, same injury being alleged in both. Id. Amendment which does not substantially state different facts is permissible, though prayer of original complaint is one applicable to claim and delivery proceedings, and that of amended complaint pertains solely to demand for damages for conversion of property. More v. Burger [N. D.] 107 N. W. 200. Under Code Civ. Proc. § 723, court held to have power to direct amendment of complaint, though it changes cause of action and substitutes another of a different class, where result sought to be reached is same, and amendment does not change substantial purpose of the action. Rubin v. Maine S. S. Co., 101 N. Y. S. 30. In action for loss of goods on contract of carriage, amendment held properly allowed. Id. Amendment of complaint changing cause of action from one for breach of contract to one for moneys had and received held within power of municipal court. Devery v. Winton Motor Carriage Co., 49 Misc. 626, 97 N. Y. S. 392. A cause of action is the fact, or combination of facts, which gives rise to a right of action. Davidson v. Fraser [Colo.] 84 P. 695. Right of plaintiff to amend on appeal to district court is governed by substantially same rule as that relating to amendments in actions originally brought in that court, test being in both cases whether identity of cause of action is preserved. Myers v. Moore [Neb.] 110 N. W. 989. "Cause of action" means, not formal statement of facts set forth in petition, but subject-matter upon which plaintiff grounds his right of recovery. Id. Under Laws 1871-72, p. 342, § 23, identity of causes of action is to be determined by court as question of law by inspection and consideration of both declarations, without aid of extrinsic evidence. Heffron v. Rochester German Ins. Co. [Ill.] 77 N. E. 262, afg. 119 Ill. App. 566. Amended complaint contradicting allegations of original should not be permitted unless good cause therefor is shown. Hadevis v. Nutting [Wash.] 86 P. 197. Allowance of amendment held not an abuse of discretion. Id. Penalty of improperly attempting to ingraft separate and disconnected suit upon pending suit by supplemental petition is not the dismissal of the pending suit, but simply the rejection of the suit sought to be ingrafted. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153. In action ex delicto the wrongful act of which complaint is made is cause of action, and amendment should not be allowed which substitutes wrongful act different from that alleged in original petition, or injects it into case as an additional cause. Peery v. Quincy, etc., R. Co. [Mo. App.] 99 S. W. 14. Inherent differences between law and equlty cannot be ignored in allowing amendments of complaints, in view of limitation imposed by Rev. St. 1898, § 2830, that such amendments shall not substantially change the claim. North Side

Loan & Bldg. Soc. v. Nakielski, 127 Wis. 539, 106 N. W. 1097.

Amendment held to set up new or different cause of action: Where complaint stated cause of action for personal injuries, held that after plaintiff's death and revival of action in name of his administrator, latter could not set up additional cause of action to recover damages for his death for benefit of his widow and children. Choctaw, etc., R. Co. v. Hickey [Ark.] 99 S. W. 839. In action for injuries due to defective sidewalk, amendment stating that injury occurred at different place than that named in original declaration. Gilmore v. Chicago, 224 Ill. 490, 79 N. E. 596. Counts of amended declaration pleading specially contract of fire insurance, from count upon account stated in original declaration. Heffron v. Rochester German Ins. Co. [Ill.] 77 N. E. 262, afg. 119 Ill. App. 566. In action for personal injuries, additional counts setting up different duties and their breach by defendant. Libby, McNeill & Libby v. Kearney, 124 Ill. App. 339. Substitution of administrator for widow as plaintiff in action for death of a miner, right of action given administrator by Rev. St. c. 70, to recover damages for death due to negligence being in no manner related to or connected with right and cause of action given widow under Miner's Act, Rev. St. c. 93. Staunton Coal Co. v. Fischer, 119 Ill. App. 284. Suit in jactitation involving property held in severalty by one of the plaintiffs cannot be ingrafted by supplemental petition upon one involving property held in indivision by the several plaintiffs, though title to two properties has same origin. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153. In suit to redeem land sold under trust deed, amendment setting up that sale was invalid because person making it was not authorized in writing by trustee as required by bill, such ground not having been properly averred in original. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. Where original petition asked for equitable relief only, count in amended petition for damages for conversion held properly stricken. Red Diamond Clothing Co. v. Steideman, 120 Mo. App. 519, 97 S. W. 220. Cause of action accruing after filing of original petition cannot be added by amendment. Second count of amended petition held properly stricken. Id. Entirely new cause of action arising pendente lite cannot be brought in by amendment in action at law. Cause of action on instalment note given as part of purchase price of machine, maturing pending action on three other instalment notes due when action was commenced. Pape v. Carlton [Wis.] 109 N. W. 968.

Amendment held not to set up new or different cause of action: In suit to quiet title, amendment to bill seeking to estop defendant from showing that deed to complainant's grantor was never delivered. Gulf, Coal & Coke Co. v. Alabama Coal & Coke Co. [Ala.] 40 So. 397. Amendments to bill to enforce vendor's lien and to enjoin cutting of timber on land, seeking to make clear the lands intended to be conveyed. Reynolds v. Lawrence [Ala.] 40 So. 576. In suit for cancellation of note and mortgage on ground of undue influence and want of consideration, amendment to original bill held not inconsistent with it and not a departure in pleading. Phillips v. Bradford [Ala.] 41 So. 657. Where original complaint was on common counts, amendment setting up new claim based on contract which was foundation of action on common counts. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Amendment of complaint in ejectment so as to change action from one by plaintiff individually and as guardian of lunatic to one by her alone in her individual capacity. Henry v. Frohlichstein [Ala.] 43 So. 126. Where original complaint alleged that plaintiff was wrongfully ejected from car by company's agent, count added by amendment alleging negligence in giving plaintiff transfer, by reason of which he was ejected, held not such a departure as would authorize court to refuse to allow it or to strike it out. Montgomery Traction Co. v. Fitzpatrick [Ala.] 43 So. 136. In action for personal injuries, amended complaint alleging cause of injury substantially as stated in original, but containing additional specifications of damages. Little Rock Traction & Elec. Co. v. Miller [Ark.] 96 S. W. 993. In original complaint plaintiff sought to recover on implied assumpsit money paid by her as surety on note. Copy of note attached thereto was stamped paid. Held that amended complaint alleging that note was transferred to plaintiff and in which she sought to recover as owner thereof was not inconsistent with original, and its allowance was not abuse of discretion. Barling v. Weeks [Cal. App.] 88 P. 502. Amended complaint in action pursuant to adverse to application for patent to mining claim, the ultimate facts relied on in both cases being plaintiff's exclusion from his interest in premises, and his interest therein as cotenant, though, with respect to original, facts pleaded were somewhat different. Davidson v. Fraser [Colo.] 84 P. 695. Original complaint held to set up cause of action for quieting title so that amended complaint was not objectionable. Knight v. Boring [Colo.] 87 P. 1078. Amended complaint held not to shift burden of proof, though it may have changed order of proof. Id. Where defendant's answer showed that he relied solely on tax title, held that he could not complain even though original complaint was one to remove cloud caused by his tax deed and amended complaint was complaint to quiet title. Id. Where original declaration contained count in trover for conversion of horses and counts in case for damages for their detention, additional count claiming damages for negligence in care and custody of horses, injury complained of being same wrong. Beasley v. Baltimore & P. R. Co., 27 App. D. C. 595. Amendment to complaint in action for personal injuries resulting from being struck by pole while riding on street car held germane and material, so that its disallowance was error. Salmon v. City Elec. R. Co., 124 Ga. 1056, 53 S. E. 575. Amendment held merely to remove ambiguity as to what was the cause of action originally alleged. Atlanta & W. P. R. Co. v. Georgia R. & Elec. Co., 125 Ga. 798, 54 S. E. 753. Amendment amplifying allegations of negligence in paragraph of petition held germane to such paragraph and improperly disallowed. Blackwell v. Ramsey-Brisben Stone Co., 126 Ga. 812, 55 S. E. 968. Where defendant pleads discharge in bankruptcy in action on debt, plaintiff may amend by alleging new promise made after the adjudication in bankruptcy and before

suit was brought. Shumate v. Ryan [Ga.] 56 S. E. 103. Where original petition sought to hold defendant liable for debts of bank as a stockholder, amendment merely identifying him as a subscribing stockholder, and hence as belonging to class who were liable under individual liability clause of its charter, which was foundation of cause of action. Reid v. Jones [Ga.] 56 S. E. 128. See, also, Reid v. Hearn [Ga.] 56 S. E. 129. Where amount due landlord is measured by value of specifics in which rent is payable, he may, after distress warrant has been converted into mesne process by filing of counter affidavit, amend pleadings by alleging that value of specifics was sum other and larger than that originally named in affidavit upon which warrant was based. Cornwell v. Leverette [Ga.] 56 S. E. 300. Where petition in action against carrier for damages resulting from delay in shipment alleged that defendant was last of connecting carriers, but not that delay occurred upon defendant's line, or that goods were received in good order, amendment supplying latter allegations. Southern R. Co. v. Gardner [Ga.] 56 S. E. 454. In action for death due to negligence, negligence charged in original count and that charged in additional count held same, though mode and manner in which it caused death were somewhat differently stated, and hence demurrer to plea of limitations to additional count was properly sustained. South Chicago City R. Co. v. Kinnare, 216 Ill. 451, 75 N. E. 179. Amendment at close of evidence in action for death by wrongful act giving Christian names of three of next of kin instead of referring to them as "Mrs." followed by their husbands' names, and giving correct Christian name of another erroneously stated in original declaration. Grace & Hyde Co. v. Strong, 224 Ill. 630, 79 N. E. 967. In action for injuries due to defective sidewalk amendment alleging that plaintiff stepped upon and broke through broken and decayed plank instead of that she tripped and stumbled upon and against it, wrong being same in both cases and only mode or manner in which it resulted in injury being stated differently. City of Evanston v. Richards, 224 Ill. 444, 79 N. E. 673. In suit to foreclose mechanic's lien merely changing date at which claim for lien was alleged to have been filed from Oct. 7 to July 19, of same year. Treloar v. Hamilton, 225 Ill. 102, 80 N. E. 75. In action for negligence amendment to declaration setting out in further detail result of injuries. Postal Tel. Cable Co. v. Likes, 124 Ill. App. 459, afd. 225 Ill. 249, 80 N. E. 136. Where praecipe and summons stated truly names of real defendants, amendment of declaration to correspond. Wabash R. Co. v. Barrett, 117 Ill. App. 315. Where original declaration alleged that plaintiff became passenger of defendant at its station in Chicago, additional count alleging that injuries were inflicted while she was in and about one of defendant's stations for purpose of becoming a passenger. Chicago Terminal Transfer R. Co. v. Young, 118 Ill. App. 226. Allowing plaintiff to amend so as to change cause of action from one to recover for labor to one for money had and received held authorized by statute and proper. De Moss v. Thomas, 116 Ill. App. 467. Amended declaration differing from original only in alleging that plaintiff's intestate was exercising due care at time of accident. Madl v. Chicago City R. Co., 121 Ill. App. 602. Amended bill in suit to foreclose mechanic's lien, though allegations as to contract under which work was done differed in few minor particulars. Eisendrath v. Gebhardt, 124 Ill. App. 325. More specific statement of facts proposed to be proved in support of charge of negligence originally made. Gordon v. Chicago, R. I. & P. R. Co., 129 Iowa, 47, 106 N. W. 177. Where original petition alleged that defendant G. received from defendant M stock of goods in satisfaction of claim against him, and on further consideration that it would pay his outstanding indebtedness and that it had failed to pay plaintiff's claim, amendment alleging that agreement was that G. should either pay M.'s creditors in full or should pay them their pro rata share of property received by it, and that it had paid all other creditors at certain rate which was an equitable pro rata share of amount received by it. Williams Shoe Co. v. Gotzian & Co., 130 Iowa, 710, 107 N. W. 807. In any event its allowance was not prejudicial where defendant introduced evidence as to entire transaction, and amendment was for purpose of conforming pleadings to proof. Id. Where complaint in action by vendee of land to recover advance payments alleged previous rescission by vendee for fraud amendment alleging previous rescission by defendant and seeking to recover payments by reason thereof. Pedley v. Ffeeman [Iowa] 109 N. W. 890. In statutory proceeding by citizen denying statement of consent to issuing of liquor licenses, amendment alleging citizenship of plaintiff which was not alleged in original denial. Dye v. Augur [Iowa] 110 N. W. 323. Amendment striking from title and body of petition words describing plaintiff as a corporation, when made after running of limitations, related back to filing of original petition. American Bonding Co. v. Dickey [Kan.] 88 P. 66. Where original petition sought to subject homestead lot to judgment against decedent, amended petition merely correcting mistaken description of such lot. No new summons necessary. Moore's Guardian v. Robinson, Norton & Co., 29 Ky. L. R. 43, 91 S. W. 659. Where petition in action by vendee of land to recover damages for destruction of building thereon by fire through the negligence of the vendor alleged lease of property by vendee to vendor, amendment correcting such allegation which was stated to have been made erroneously and setting out contract to convey under which vendee was entitled to possession and alleging that covenant for possession was erroneously omitted from deed. Kincheloe v. Smith, 28 Ky. L. R. 1329, 91 S. W. 1145. Both original and amended petitions held based on negligence of lessor in failing to keep cistern on leased premises in reasonably safe condition, so that amendment, merely setting out more specifically the facts relied on to show such negligence, did not set up new cause of action. Mills' Adm'r v. Cavanaugh, 29 Ky. L. R. 685, 94 S. W. 651. Amended petition in action against carrier for ejecting plaintiff from train held to merely set out more fully cause of action attempted to be set up in original, so that motion to strike it was properly overruled. Louisville & N. R. Co. v. Fowler, 29 Ky. L. R. 905, 96 S. W. 568. Amendment to petition in action on fire insurance policy alleging waiver of forfeiture for nonpayment of pre-

mium note. Home Ins. Co. v. Ballew, 29 Ky. L. R. 1059, 96 S. W. 878. In action against railroad for damages for killing plaintiff's minor son, amendment correcting deceased's Christian name, which was wrongly stated in original petition, deceased having been otherwise sufficiently identified in original. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. Where petition alleged that delay in transportation of livestock was due to defendant's negligence, amendment alleging that it was due to negligence of connecting carrier. Ingwersen v. St. Louis & H. R. Co., 116 Mo. App. 139, 92 S. W. 357. Amendment substituting corporation as plaintiff instead of owners of all its corporate stock should have been allowed. Hackett v. Van Frank, 119 Mo. App. 648, 96 S. W. 247. In action against railroad company for killing stock, amendment charging defendant with negligence in failing to keep gate closed held intended to assert such failure as a result of defective condition of gate and adjoining fence and not as a wrong done in failing to keep a lawful gate closed, and hence did not state a different cause of action from that alleged in original petition, viz., a failure to maintain a lawful fence. Perry v. Quincy, etc., R. Co. [Mo. App.] 99 S. W. 14. In action to rescind contract for sale of land and to recover part of purchase price paid, amendment to cross petition seeking to recover balance due on contract, identity of cause being clearly preserved and relief asked substantially the same. Jordan v. Jackson [Neb.] 106 N. W. 999. In action to recover damages resulting from fire alleged to have been caused by defendant's carelessness, where petition in county court and original petition in district court on appeal alleged that fire occurred on or about Sept. 22, 1902, amendment alleging that it occurred on or about Oct. 21, 1902, damages alleged being same and being caused by only one fire. Union Pac. R. Co. v. Murphy [Neb.] 107 N. W. 757. Where basis of both petitions was written contract, copies of which were attached thereto and incorporated therein additional allegation of petition filed in district court that plaintiff's name appearing at top of page of contract was placed there by him and intended as signature. Myers v. Moore [Neb.] 110 N. W. 989. In partition amendment of complaint which simply supplied an omission therein, to show how the parties received the interests it was claimed they had. Perkins v. Storrs, 114 App. Div. 322, 99 N. Y. S. 849. Where action on contract for benefit of third person was brought in name of one of the parties thereto, held proper to allow complaint to be amended so as to indicate that action was for use of such third person. Dilcher v. Nellany, 102 N. Y. S. 264. Correcting mistake as to year for which crop is claimed or was taken pertains only to one of the elements of cause of action for conversion, and complaint may be amended in that particular. More v. Burger [N. D.] 107 N. W. 200. Where in both amended and original petition object sought is recovery of damages for same personal injuries, variation being only as to precise manner in which they were inflicted. John Kauffman Brewing Co. v. Betz, 8 Ohio C. C. (N. S.) 64. Where material furnished and work performed and amount claimed were same, amendment seeking to recover on quantum meruit instead of on contract. Limerick v. Lee [Okl.] 87 P. 859. In action for wrongful death against several defendants jointly, amendment to complaint changing allegation that deceased was employed by defendants jointly to averment of his employment by one of them alone, allegation of employment being merely to show that he was rightfully at place where he was killed. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230. In action for damages for overflowing land, amendment to statement of claim held merely a restatement of grounds upon which plaintiff sought to recover, and hence permissible. Taylor v. Canton Tp., 30 Pa. Super. Ct. 305. Amendment increasing demand for damages. Pickett v. Southern R., 74 S. C. 236, 54 S. E. 375. In action against carrier for injuries to passenger, amendment to complaint held to merely state new facts or issues appertaining to that already alleged, and its allowance was proper under Code Civ. Proc. 1902, § 194. Id. Where complaint alleged that infant walking on track was killed by negligence of railroad company's employes, amendment alleging failure to use ordinary and reasonable care to stop train after discovery of infant's peril. Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832. In action for agreed price of services, amendment alleging reasonable value of services. Casady v. Casady [Utah] 88 P. 32. In action against railroad for injuries to stock during transportation, amendment changing allegations as to destination of stock from point at end of defendant's line to point beyond it. Fell v. Union Pac. R. Co. [Utah] 88 P. 1003. Defendant held not prejudiced, where court confined recovery to injuries occurring on its line. Id. Original petition held to set up express contract, so that amendment was not a departure. Ragley v. Godley [Tex. Civ. App.] 14 Tex. Ct. Rep. 153, 90 S. W. 66. In action for rent commenced in justice's court, held that on appeal to county court plaintiff should have been allowed to amend so as to demand recovery of rent which had accrued since commencing suit. Blackwell v. Speer [Tex. Civ. App.] 17 Tex. Ct. Rep. 511, 98 S. W. 903. Correction of mistake in allegation of petition as to number of pounds of oats sold, the total amount charged therefor not being changed. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 99 S. W. 128. Where both original and amended petition sought to recover same property upon ground of title and conversion, though latter was much more elaborate. Parlin & Orendorff Co. v. Glover [Tex. Civ. App.] 99 S. W. 592. In action to cancel deed where original complaint alleged that it was executed because parties believed it was necessary to enable grantee to look after property and sell it at advanced price, amended complaint alleging that it was procured through fraud. Hadevis v. Nutting [Wash.] 86 P. 197. Where complaint sets forth all the facts warranting equitable relief, prayer may be amended to demand other and further relief consistent with cause of action originally described in allegation of facts, within perior described in Rev. St. 1898, § 2685, and by authority of that section. North Side Loan & Bldg. Soc. v. Nakielski, 127 Wis. 539, 106 N. W. 1097. Original complaint in action on employe's bond alleging mistake, etc., held to state cause of action in equity for accounting, though prayer was for recovery of money only, so that amended complaint am-

Statutes in some states limit the number of amended pleadings which a party may file.[89]

Amendments which are insufficient in substance,[90] or which would result in a misjoinder of parties and causes of action,[91] or which set up unnecessary or immaterial matters,[92] or present questions previously decided,[93] or which do not differ substantially from allegations previously held insufficient,[94] are ordinarily not permissible, though it has been held that an amended pleading is entitled to consideration on its merits even if, in all essential particulars, the same as a previous one held bad on demurrer.[95] An order allowing an amendment setting up an additional plea is not conclusive as to the merits of the plea, where it expressly recites that the court does not undertake to pass upon the question whether or not it sets up a good defense.[96]

The filing of additional counts is not an abandonment of those originally filed,[97] but an amended pleading supersedes the original [98] and relates back to the time of

plifying facts and praying reformation, accounting, and money judgment, did not state new cause of action. Id.

89. Rev. St. 1899, § 623, providing that if third petition, answer, or reply, be filed or adjudged insufficient on demurrer, or whole or some part thereof be stricken out, party filing it shall pay treble costs and no further one shall be filed, but judgment shall be rendered, construed, and held that where third amended petition stated cause of action after motion to strike parts of it had been sustained, he was entitled to go to trial on what was left, and case was improperly dismissed. Roth Tool Co. v. Champ Spring Co. [Mo. App.] 99 S. W. 827.

90. Amendment held properly rejected. Morrison-Trammell Brick Co. v. McWilliams [Ga.] 56 S. E. 306.

91. In action for enticing plaintiff's minor son from home, refusal to allow plaintiff to amend by adding an additional defendant and charging him with harboring the minor held proper. Soper v. Crutcher, 29 Ky. L. R. 1080, 96 S. W. 907.

92. In action of trover, where plaintiff sought to recover property itself and defendant's plea amounted to no more than the general issue, held error to allow amendments to petition offering to reimburse defendant for amount expended in repairing property, and amounting to offer to submit to conditional recovery, they being wholly unnecessary and irrelevant, and tending to help plaintiff before jury at defendant's expense, and also being in nature of offer to compromise. Malcolm v. Dobbs [Ga.] 56 S. E. 622.

93. In action under statute providing for protection of labels of trades unions, amendment of complaint held properly disallowed on ground that if facts stated therein were found true they would present no different question from that already decided on previous appeal. Lawlor v. Merritt [Conn.] 65 A. 295.

94. Denial of amendment is harmless, where it is but a repetition of what was in original complaint. Huggins v. Southern R. Co. [Ala.] 41 So. 856. In action for negligence amendment held not a repetition or substitution of the original complaint, and its denial was error. Id. Refusal to permit filing of amended petition held proper, where it only set forth in more elaborate form matters of evidence pleaded in paragraph stricken from original. Torian v. Terrell, 29 Ky. L. R. 306, 93 S. W. 10. Amended bill filed after demurrer had been sustained to original held properly stricken as not avoiding defects for which demurrer had been sustained to original, purpose of bill being to set aside decree under which lands were sold for taxes, and it not being one for leave to file bill of review, or to open up decree for correction of errors, and complainant not bringing herself within statute relating to setting aside of tax sales and want of jurisdiction not being alleged. Carpenter v. Auditor General, 144 Mich. 251, 13 Det. Leg. N. 160, 107 N. W. 878. If, after leave is taken to file amended petition, another petition containing no new allegations of fact, and substantially same as former one, is filed, it is proper practice to strike it from files. Loghey v. Fillmore County [Neb.] 106 N. W. 170.

95. Motion to strike held improperly sustained where it stated cause of action. Hays v. Peavey [Wash.] 86 P. 170.

96. Order allowing plea of res adjudicata to be filed as part of defendant's pleading. Gainesville & Dahlonega Elec. R. Co. v. Austin [Ga.] 56 S. E. 254. So long as case was in limine and there was no estoppel, court had power of its own motion to order plea stricken as legally insufficient in matter of substance, or to order jury to disregard defense thereby sought to be interposed. Id. Where plea was without merit and plaintiff was not estopped to call its legal sufficiency in question, held that defendant could not complain that court ignored it in its instructions and thereby deprived him of that defense. Id.

97. Merker v. Belleville Distillery Co., 122 Ill. App. 326.

98. Western Union Tel. Co. v. Campbell [Tex. Civ. App.] 14 Tex. Ct. Rep. 484, 91 S. W. 312. Demurrers to original pleas cannot be considered where it does not appear that they were afterwards interposed to the pleas as amended. Harrison v. Alabama Midland R. Co., 144 Ala. 246, 40 So. 394. Defendant held not entitled to complain of the overruling of a demurrer to the original complaint, where no demurrer was interposed to amended complaint, and demurrer to original was not refiled after amendment. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

filing the latter,[99] except in so far as it sets up new and distinct causes of action,[1] or brings in new parties.[2]

As a general rule after defendants have appeared and filed and served answers, no order amending the summons or complaint can be granted except on notice to them.[3] In some states a copy of an amended pleading must be served on the opposite party if it in any way changes or adds to the traversable allegations or aids the cause of acton or defense.[4] Amendments by leave of court must be filed within the time specified in the order granting such leave.[5]

Order sustaining the demurrer held to refer to amended one, and judgment dismissing action on failure to amend was not objectionable on ground that amended demurrer had not been disposed of. Estudillo v. Security Loan & Trust Co. [Cal.] 87 P. 19. After petition was amended by striking therefrom one of two defendants named therein, held that demurrer for misjoinder of parties defendant presented no question for consideration. Seaboard Air Line R. Co. v. Randolph, 126 Ga. 238, 55 S. E. 47. Question of departure in reply to be determined by reference to amended petition only. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. Answer to unverified amended complaint need not be verified though original complaint was verified. Brooks Bros. v. Tiffany, 102 N. Y. S. 626. In action on policy of fire insurance, amended petition which fails to allege any consideration for contract is demurrable, though original petition supplied omission. Kehm v. Insurance Co., 8 Ohio C. C. (N. S.) 486. Where second amended declaration did not refer to original and first amended ones to which demurrers had been sustained, and they were not made a part of it but it was complete in itself, held that upon demurrer its sufficiency was to be determined by its own averments. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54, S. E. 465.

99. As respects limitations, where it does not set up new cause of action. Curry v. Southern R. Co. [Ala.] 42 So. 447; Gordon v. Chicago, etc., R. Co. 129 Iowa, 747, 106 N. W. 177; Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. Amendment merely curtailing superfluous description of realty in declaration held to make no change requiring any new pleading on part of defendant, or to which plea on file was not as fully an answer as it was to original declaration so that it was not error to proceed to ex parte trial without order of specific notice to defendant of such amendment or a rule on her to plead further. Race v. Isaacson, 124 Ill. App. 196. Where amendment is allowed after cause is properly on trial calendar and has been set for trial on day certain, no new notice of trial or note of issue is necessary. Kerr v. Grand Forks [N. D.] 107 N. W. 197. Where an amended declaration is filed after an appearance by defendant, new process is not necessary. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465.

1. If amendment introduces new cause of actlon, it is regarded as new suit commenced when amendment is made and limitations may be pleaded accordingly. Heffron v. Rochester German Ins. Co., 77 N. E. 262, afg. 119 Ill. App. 566. Failure of defendant to object and except to filing of amended declaration is not waiver of right to plead limitations, nor is order of court allowing amended declaration to be filed on adjudication that causes of action set up in original and amended declarations are same. Id. Where original declaration stated no cause of action and additional counts filed after running of limitations stated good cause of action held that it necessarily followed that latter stated "another and different cause of action" from that originally stated, and demurrer to pleas of limitation were properly overruled. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603, afg. 124 Ill. App. 166. Averments of pleas of limitations that additional counts state another and different cause of action held equivalent to statement that they contained a new and different cause of action. Id. Defendant is not required to take notice of a new substantive cause of action set up by amendment until a rule to plead thereto has been laid upon him. Gilbert v. American Trust & Sav. Bank, 118 Ill. App. 678. Setting aside default judgment and permitting plaintiff to file amended declaration setting up new and distinct substantive causes of action and entering new default judgment thereon, without notice to defendant or ruling him to plead, held error. Id. Wherever there is a cause of action set up in an amended bill wholly distinct from that set up in original and bar of statute of limitations has become complete in interim between filing of the two, no recovery can be had on new cause set up in the amended bill. Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739.

2. Amendment of summons and complaint so as to charge defendant individually instead of in his capacity as trustee held not to amount to the bringing in of a new party so as to entitle defendant to plead limitations. Boyd v. United States Mortg. & Trust Co. [N. Y.] 79 N. E. 999, afg. 110 App. Div. 866, 95 N. Y. S. 1115.

3. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335. Order which is irregular because made ex parte and because copy of amended pleading was not attached, cannot be affirmed and confirmed nunc pro tunc on motion. Id.

4. Order directing complaint to be amended "by suggestion upon the record" held erroneous. Abrahams v. Finkelstein, 49 Misc. 448, 97 N. Y. S. 987. Under B. & C. Comp. § 100, held error to enter judgment against a defendant on an amended complaint not served on him. Nodine v. Richmond [Or.] 87 P. 775. Providing in order allowing amendment of complaint that it should stand as said amendment, and that copy thereof should be served on defendant, instead of requiring service of copy of amended complaint, held not error. McDaniel v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 543.

5. Court held not to have abused discretion in setting aside default of plaintiff for

On appeal from a judgment dismissing a complaint, plaintiff is not aided by a request to amend made after the granting of the motion to dismiss,[6] nor is his right to take a nonsuit affected by the fact that defendant thereafter asks to amend so as to demand affirmative relief.[7] An amendment interlined in the petition after judgment cannot be looked to to supply deficiencies in the pleadings as they stood when the judgment was rendered.[8]

The party offering an amendment must abide by a ruling of the court refusing to allow it, his remedy being by exception to such ruling.[9]

§ 8. *Supplemental pleadings.*[10]—The codes generally provide that, upon the application of either party, the court may permit him to file a supplemental complaint, answer or reply alleging material facts which have occurred since the filing of his former pleading, or of which he was ignorant at that time.[11] A plaintiff has

failure to file amended complaint after demurrer sustained within time specified, and granting leave to file amended complaint. Barling v. Weeks [Cal. App.] 88 P. 502. Where court passed order sustaining special demurrer to plea and allowing defendants additional time to file amendment thereto, and subsequently still further extended such time by verbal orders, held that it was not error at subsequent term to allow order to be taken nunc pro tunc, giving additional time allowed in such verbal orders over plaintiff's objection that defendants had had sufficient time and that it should not be extended. Lovelace v. Browne, 126 Ga. 802, 55 S. E. 1041. Subsequent order had effect of preventing judgment from becoming conclusive as against defendants until after expiration of time within which they were to amend under its terms. Id. Where defendant's failure to serve amended answer within the time specified in order granting leave to amend on striking out parts of original answer was excusable, held that plaintiff was properly required to accept answer thereafter, though defendant had failed to pay certain motion costs imposed on him in the mean time. Code Civ. Proc. § 723, providing for stay of proceedings on failure to pay motion costs not operating to deprive defendant of his right to present his defenses or to make a trial amendment for that purpose. Tracy v. Lichtenstadter, 113 App. Div. 754, 99 N. Y. S. 331.

6. Sutherland v. Ammann, 112 App. Div. 332, 98 N. Y. S. 574.

7. Right to nonsuit under Sayles' Ann. Civ. St. 1897, art. 1301, is to be determined by fact that at time he asks for same there is no pleading of defendant asking for affirmative relief. Walker & Sons v. Hernandez [Tex. Civ. App.] 15 Tex. Ct. Rep. 456, 92 S. W. 1067.

8. Amendment alleging execution of note by defendant individually instead of by a firm of which he was a member. King v. Monitor Drill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046.

9. Cannot introduce evidence in support of its allegations. Cornwell v. Leverette [Ga.] 56 S. E. 300.

10. See 6 C. L. 1046.

11. In action to recover damages for injuries to land due to excavation of adjoining land, allowing filing of supplemental complaint alleging continuation of alleged wrongful acts of defendant after the filing of the complaint held not error. Schmoe v. Cotton [Ind.] 79 N. E. 184. Material facts occuring after the service of the complaint, or of which plaintiff was ignorant when it was served, may only be set up by supplemental complaint and not by amendment, and other facts existing before commencement of action can only be set up by amendment. Horowitz v. Goodman, 112 App. Div. 13, 98 N. Y. S. 53. Cannot in one complaint termed an "amended and supplemental complaint" set up facts occurring before and after the commencement of the action, and attempt thereby to sustain a new cause of action against the defendant. Id. Where original complaint was in equity and sought to enjoin defendant from making certain changes in premises leased by him to plaintiff, held that it was error to allow plaintiff to file a so called "amended and supplemental complaint," alleging facts set up in original complaint and other facts happening before commencement of action, and further alleging that subsequent to commencement of action defendant entered on premises and made such changes and seeking to recover damages therefor, there being no such pleading known to the Code, but plaintiff should have been allowed to file suuplemental complaint setting up acts act of defendant after service of former pleading. Id. In action for damages for personal injuries due to negligence where, after defendant answered and noticed case for trial and placed it on calendar, plaintiff settled his claim with defendant and executed release, held that, under Code Civ. Proc. § 544, release could only be interposed as a defense by leave of court and in form of supplemental answer, and not by amendment as of course. Galm v. Sullivan, 101 N. Y. S. 1060. Court has power to allow filing of supplemental complaint. Code Civ. Proc. subsecs. 87, 89. United States v. Rio Grande Dam & Irri. Co. [N. M.] 85 P. 393. Granting of leave is discretionary and court's action will be reviewed on appeal unless gross abuse is shown. Id. May allege such facts as will authorize granting of other and different relief than that sought by original complaint, provided entirely new and different cause of action, founded on facts wholly foreign to those alleged in original, is not set up. Id. Supplemental complaint in action to enjoin construction of irrigation system held not objectionable as setting up cause of action irreconcilable and inconsistent with amended complaint (Id.), or as setting up an entirely independent cause of action. Id. Code Civ. Proc. subsec. 104, as amended by Laws 1901, c. 11,

no right by supplemental complaint to establish a cause of action where none existed when the suit was brought.[12]

§ 9. *Motions upon the pleadings.*[13]—Motions to strike out parts of a pleading are ordinarily addressed to the discretion of the trial court.[14] Improper pleadings may be stricken out by the court on its own motion.[15] In some states the court may strike out any pleading that is defective or irregular or so framed as to prejudice, embarrass, or delay a fair trial.[16] Misconduct of counsel is no ground for striking a pleading from the files where his client in no way instigates or participates in the same.[17] A motion to strike an amended pleading on the ground that it states the same facts as the original previously held bad on demurrer is equivalent to a demurrer to the amended pleading.[18] Striking an amended pleading on motion of one of several defendants, made in his own behalf, does not affect it as to defendants who have previously answered or been defaulted.[19]

Motions to strike must be made in apt time.[20] A motion to strike a count because there is no evidence to support it should be made when all the evidence on both sides is in.[21] A motion to quash auxiliary proceedings by sequestration may

p. 29, construed, and held that it was not error to permit filing of supplemental complaint during regular term without notice, it having been served on attorneys on same day it was filed. Id. Where filing of supplemental complaint was in no sense a new cause of action, issuing and serving of new process was not necessary. Id. New parties defendant may be brought in by supplemental petition when the necessity for bringing them in grows out of facts pleaded in the answer of the original defendant. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866. Under rule 5 of district and county courts authorizing plaintiff to allege new facts in a supplemental petition in reply to those alleged by defendant, where after reversal of judgment for plaintiff defendant filed plea in abatement alleging dissolution of plaintiff corporation, held that supplemental petition filed by another corporation alleging such dissolution, and that it had succeeded to all of plaintiff's rights, was sufficient to authorize it to prosecute suit. Standifer v. Bond Hardware Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 770, 94 S. W. 144.

12. South Shore Traction Co. v. Brookhaven, 102 N. Y. S. 1074. Where at time of commencing suit to enjoin municipal authorities from granting right to use streets to another street railway company, consents to plaintiff company had not become operative by reason of its failure to file required bond, and hence city had right to grant consent to another company held that plaintiff could not plead subsequent filing of bond by supplemental complaint. Id.

13. See 6 C. L. 1047.

14. Refusal to allow it is not an abuse of discretion. Reynolds v. Lawrence [Ala.] 40 So. 576. It is within the discretion of the court to strike out or retain allegations of evidential facts, which, in so far as they pertain to stating a cause of action are redundant and irrelevant. Sramek v. Sklenar [Kan.] 85 P. 566. In action for breach of contract of marriage refusal to strike out as redundant allegations as to matters proper to be considered in aggrevation of damages, though not in themselves constituting part of cause of action, held not error. Id. Motions to expunge and to require more particular statements of cause of action appeal to discretion, and will not be allowed to be used for purpose of so altering, emasculating, and revising complaint that it may thereafter be unable to withstand demurrer. Ginty v. New Haven Iron & Steel Co., 143 F. 699.

15. Mt. Pleasant Cemetery Co. v. Erie R. Co. [N. J. Law] 65 A. 192. Power is inherent in court, and fact that practice act indicates that they are to be stricken on notice does not limit power in this regard, unauthorized pleas in ejectment.

16. Prac. Act, § 110. In declaration by administration which avers granting of leters with their date and officer by whom granted, want to profert of letters held not a defect of sufficient importance to require court to strike out declaration, in view of Practice Act, § 127, declaring that no pleading shall be deemed insufficient for any defect which could formerly be objected to only by special demurrer. Sautter v. Metropolitan Life Ins. Co. [N. J. Law] 63 A. 994. Joinder of three counts, one containing common money counts in assumpsit, and other two being special counts setting up causes of action on life insurance policies, held not to tend to prejudice or embarrass fair trial. Id.

17. Striking of answer from files because counsel for defendant absented himself from court on day set for hearing demurrer thereto and took papers with him, and was also absent on day set for trial, held error. Chenault v. Norton [Ky.] 99 S. W. 899.

18. Order granting it is in effect the sustaining of a demurrer. Hays v. Peavey [Wash.] 86 P. 170.

19. Carpenter v. Auditor General, 144 Mich. 251, 13 Det. Leg. N. 160, 107 N. W. 878.

20. Where motion to strike reply as sham was not made until after cases had been appealed from county court to district court, and until day of trial, held that it might have been denied as not made in apt time. Florence Oil & Refining Co. v. Oil Well Supply Co. [Colo.] 87 P. 1077.

21. White v. Wilmington City R. Co. [Del.] 63 A. 931.

be filed and acted upon at any time before the case is disposed of.[22] Failure to serve a written notice of motion is waived where no objection on that ground is interposed.[23]

It is error to sustain a motion to strike portions of a pleading unless they are statements of matter foreign to the cause and raise no issue proper to be raised in the case, and unless the motion is made by a party prejudiced thereby.[24] Striking out parts of a pleading is harmless where evidence of the facts therein stated is admissible under the remaining allegations,[25] nor is it prejudicial to refuse to strike parts of a pleading containing matter which is proper evidence in the case and in no way imposes any additional burden on the opposite party.[26] On striking out parts of a pleading the court may order an amended pleading to be served on the opposite party.[27]

§ 10. *Right to object, and mode of asserting defenses and objections; whether by demurrer, motion, etc. Want of jurisdiction*[28] may be raised by demurrer if apparant on the face of the complaint,[29] but if not must be set up by answer.[30] After a motion to dismiss has been overruled, a plea to the jurisdiction on the same ground will not be entertained.[31] The fact that plaintiff sues in equity when his remedy is at law is no ground for dismissing the complaint, but the remedy is by a transfer to the proper court.[32]

Objections to process[33] or to the service thereof are to be taken by motion or plea in abatement, not by demurrer.[34]

Objection to parties[35] for want of capacity to sue may be raised by special demurrer if apparent on the face of the complaint,[36] or by plea or answer if not,[37]

22. Need not be filed or presented before pleas to the merits. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

23. Where written motion for judgment on pleadings made by defendant's counsel was denied, and, though present in court, he made no objection to oral motion by plaintiff for judgment on ground that no written notice of motion had been served, held that he waived service of such notice and could not, on appeal, predicate error on failure to give it. Hickey v. Anheuser-Busch Brewing Ass'n [Colo.] 85 P. 838.

24. Portions of petition. Berry v. Geiser Mfg. Co., 15 Okl. 364, 85 P. 699.

25. State v. Richardson [Or.] 85 P. 225.

26. Though petition would have been sufficient without it. Monson v. Ray [Mo. App.] 99 S. W. 475

27. Guess v. Southern R. Co., 73 S. C. 264, 53 S. E. 421.

28. See 6 C. L. 1048.

29. If want of jurisdiction of person of defendant appears on face of petition, must be taken advantage of by demurrer. Farmers' Bank v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286. Objection that causes of action are not within jurisdiction should be raised by demurrer for want of jurisdiction. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234.

30. Of person of defendant. Farmers' Bank v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286. Where there is nothing on face of complaint in action in court of general to show whether or not court has jurisdiction, jurisdiction will be presumed, and question cannot be raised by demurrer but only by answer. Rudisell v. Jennings [Ind. App.] 77 N. E. 959. In trustee process, trustee can only raise it by plea in abatement, or by motion to abate when essential facts of defect appear by inspection. Hibbard v. Newman, 101 Me. 410, 64 A. 720. Failure of complaint in action in municipal court to allege that defendant foreign corporation had an office in the city, which was essential to jurisdiction, a defect which could be taken advantage of by answer. Epstein v. Weisberger Co., 102 N. Y. S. 488. Want of jurisdiction because of nonresidence of the plaintiff corporation must be pleaded in answer, and is not raised by denial of allegation of residence. Ubart v. Baltimore & O. R. Co., 102 N. Y. S. 1000.

31. Martin v. Chicago & M. Elec. R. Co., 220 Ill. 97, 77 N. E. 86.

32. Kirby's Dig. § 5991. Wood v. Stewart [Ark.] 98 S. W. 711.

33. See 6 C. L. 1048.

34. The privilege of a nonresident witness from service of mesne process by summons in a civil case cannot be pleaded in abatement. Wilkins v. Brock [Vt.] 64 A. 232.

35. See 6 C. L. 1048.

36. Objection to petition in which requirements of Code Civ. Proc. § 24, authorizing unincorporated companies, etc., to sue by their usual names without pleading names of parties composing them, are not followed in alleging capacity to sue. Meyer v. Omaha Furniture & Carpet Co. [Neb.] 107 N. W. 767.

37. Must be set up by plea in abatement and not by motion to quash. Albert v. Freas, 103 Md. 583, 64 A. 282. Must be raised by answer where all that may be said is that capacity does not affirmatively appear, that not being ground for demurrer. Independent Trembowler Young Men's Benev.

but does not amount to a failure to state a cause of action,[38] and the same is ordinarily true of misjoinder or nonjoinder of parties.[39]

Misjoinder of causes of action [40] is ordinarily ground of demurrer,[41] but should be raised by answer if not apparent on the face of the complaint.[42] In some states a motion to strike [43] or to require an election is proper.[44] If the objection is to the manner of statement only, the remedy is ordinarily by motion to separate [45] or to require an election,[46] and not by demurrer [47] or motion in arrest of judgment,[48]

Ass'n v. Somach, 102 N. Y. S. 495. Want of due appointment of guardian ad litem must be taken advantage of by answer if not apparent on face of complaint. Rev. St. § 2649. Hughes v. Chicago, etc., R. Co. 126 Wis. 525, 106 N. W. 526.

38. Cannot be raised by demurrer for want of facts. Palmer v. Roods, 101 N. Y. S. 186. Objection that plaintiff, a foreign corporation, has not complied with statutes is not raised by demurrer for want of facts, Mills' Ann. Code, § 51, requiring grounds to be directly specified. Page Woven Wire Fence Co. v. Joslin [Colo.] 88 P. 142.

39. Misjoinder or nonjoinder of parties plaintiff is made ground for special demurrer by Code Civ. Proc. § 430. Conde v. Dreisam Gold Min. & Mill Co. [Cal. App.] 86 P. 825. Misjoinder is not ground for dismissal, but remedy is by demurrer. Mansf. Dig. §§ 5028, 5102, Ind. T. Ann. St. 1899 §§ 3233, 3307. Tishomingo Elec. Light & Power Co. v. Burton [Ind. T.] 98 S. W. 154. Objection of nonjoinder of necessary parties plaintiff should be raised by an exception of nonjoinder, and cannot be set up under an exception of no cause of action. Davis v. Arkansas Southern R. Co., 117 La. 320, 41 So. 587. When clearly appears from petition that there is misjoinder of parties and actions, it is proper to point it out by special exception. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 99 S. W. 577. Misjoinder not apparent on face of complaint must be taken advantage of by answer. Mau v. Stoner [Wyo.] 87 P. 434.

40. See 6 C. L. 1049.

41. Code Civ. Proc. § 488, subd. 7. People v. Koster, 50 Misc. 46, 97 N. Y. S. 829. Where complaint containing four separate causes of action was demurrable because all of them did not affect all the defendants, held that, under Code Civ. Proc. § 497, it was proper to require plaintiff to divide his action into four separate actions without giving him leave to amend. Meyers v. Lederer, 101 N. Y. S. 1088. Adverse decision on motion to compel plaintiff to separately state and number his two causes of action, based on ground that only one cause was stated held not a bar to subsequent demurrer for misjoinder of causes of action. O'Connor v. Virginia Passenger & Power Co., 184 N. Y. 46, 76 N. E. 1082. Remedy is by demurrer. Ennis v. Padgett [Mo. App.] 99 S. W. 782. Should be raised by demurrer for misjoinder. Smith v. Newberry, 140 N. C. 385, 53 S. E. 234. Can only be raised by demurrer. Allwein v. Brown, 29 Pa. Super. Ct. 331. Since it is made distinct and special ground for demurrer by Ball. Ann. Code & St. § 4907, objection is not raised by general demurrer. Ames v. Kinnear, 42 Wash. 80, 84 P. 629.

42. Mau v. Stoner [Wyo.] 87 P. 434.

43. Motion to strike out cause improperly joined or to compel election made before filing answer held proper practice under Kirby's Dig. § 6081. Jett v. Maxfield [Ark.] 96 S. W. 143. Is not ground for dismissal, but remedy is by motion to strike. Mansf. Dig. §§ 5016, 5102, Ind. T. Ann. St. 1899, §§ 3221, 3307. Tishomingo Elec. Light & Power Co. v. Burton [Ind. T.] 98 S. W. 154.

44. Kirby's Dig. § 6081. Jett v. Maxfield [Ark.] 96 S. W. 143. Not by motion to strike. High v. Southern Pac. Co. [Or.] 88 P. 961.

45. That causes of action properly united were not separately stated is not ground for demurrer. Beckman v. Waters [Cal. App.] 86 P. 997. Where complaint states two causes of action, remedy is by motion to require them to be separately stated if they could be properly joined, and not by motion to strike. High v. Southern Pac. Co. [Or.] 88 P. 961. Where complaint in action for divorce stated three causes of action, fact that they were all stated in one paragraph or count in form of single cause of action, in violation of rule requiring separate statement, held not to authorize court to ignore all but one and determine case on sufficiency of evidence as to that, but plaintiff should have been required by order to conform complaint to rules on penalty of dismissal. Page v. Page [Wash.] 86 P. 582. If good cause of action is stated demurrer will not reach duplicity, but remedy is by motion to separate. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. Remedy is by motion to strike out or to separate into paragraphs. Western Union Tel. Co. v. McClelland [Ind. App.] 78 N. E. 672.

46. Objection that two grounds of negligence alleged in one count of petition are repugnant can only be reached by demurrer to petition or motion to elect, and not by demurrer to evidence. McQuade v. St. Louis & S. R. Co. [Mo.] 98 S. W. 552. Remedy for improper joinder of causes of action in same count is by motion to require election. Clancy v. St. Louis Transit Co., 192 Mo. 615, 91 S. W. 509; Ennis v. Padgett [Mo. App.] 99 S. W. 782. Not by demurrer. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

47. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1. Joinder of three claims of set-off in one paragraph of answer not ground for demurrer. Schnell v. Schnell [Ind. App.] 80 N. E. 432. Under Virginia practice duplicity cannot be taken advantage of by demurrer, special demurrer having been abolished by Code 1887, § 3272. J. W. Bishop Co. v. Shelhorse [C. C. A.] 141 F. 643.

48. If original petition and amendment constituted but one count and allege two inconsistent causes of action or contracts, held that, if either was made out by evidence, motion in arrest of judgment for duplicity was unavailing. Code, §§ 3563, 3758. Robbins v. Bosserman Bros. [Iowa] 110 N. W. 587.

though a general [49] or special demurrer [50] is proper in some states. Where legal and equitable causes of action are improperly joined, a court of equity before which the case is pending may give plaintiff the option of filing a declaration on the law side, or having the legal cause of action dismissed.[51]

Irrelevant [52] and redundant or immaterial matter [53] is reached by motion to strike.

Formal defects [54] can ordinarily be reached only by motion to require their correction,[55] or to strike,[56] and are not ground for demurrer [57] except where special demurrers are authorized.[58]

49. Duplicity may be taken advantage of by general demurrer. Milske v. Steiner Mantel Co., 102 Md. 235, 63 A. 471.

50. Objection that count is bad for duplicity because containing two separate and distinct causes of action, one for negligence of defendant and other for that of its servants, being one to form of declaration, can only be availed of by special demurrer and not by general demurrer. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459.

51. Chapman v. Yellow Poplar Lumber Co. [C. C. A.] 143 F. 201.

52. See 6 C. L. 1049. In action for injuries to minor servant held that allegation in plea that defendant would not have placed him on duty except for his assurance that he understood the work, if improper, should have been reached by motion to strike rather than demurrer. King v. Woodstock Iron Co., 143 Ala. 632, 42 So. 27. Objection to allegations in complaint as to speculative damages held properly raised by motion to strike, though might also have been reached by objections to evidence or requested instructions. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008. In action by sheriff on indemnity bond in attachment, held that objection to item of expenditure set up in complaint and sought to be recovered could not be raised by demurrer, but remedy was by motion to strike. Whinnery v. Wiley [Colo.] 88 P. 171. Pleading may be purged of irrelevant and redundant matter only by motion to strike and not by demurrer. Code Civ. Proc. § 742. Plymouth Gold Min. Co. v. United States Fidelity & Guaranty Co. [Mont.] 88 P. 565. Cannot contend on appeal that special demurrer directed to particular lines and paragraphs should be regarded as in effect a motion to strike, where did not submit it below on that theory. Id. Irrelevant, redundant, immaterial, or prolix allegations may be stricken on motion provided defect is plain. Ginty v. New Haven Iron & Steel Co., 143 F. 699. Invalid averment in count which contains other valid averments can be reached only by motion to strike. Latham v. Staten Island R. Co., 150 F. 235.

53. If when read as a whole petition contains enough to constitute a cause of action, demurrer to whole petition must be overruled without regard to redundant or immaterial matter therein. Gordon v. Chicago, etc., R. Co., 129 Iowa, 747, 106 N. W. 177.

54. See 6 C. L. 1049.

55. Objection that widow has not filed title papers of her deceased husband with petition in action for allotment of dower, as required by Civ. Code Prac. § 499, is not ground for demurrer, but remedy is to have her ruled to file them if there be any accessible to her. Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535. Objection that defendant setting up counterclaim in action against him by committee of an incompetent had failed to comply with St. 1903, § 2154, requiring claims against estates of incompetents to be verified and proven, cannot be raised by demurrer, but remedy is by rule to show cause why counterclaim should not be dismissed. Sebree v. Johnson's Committee [Ky.] 99 S. W. 340. Failure to comply with statute as to docketing notice of motion for judgment under Code 1899, c. 121, § 6, not ground for quashing such notice. Anderson v. Prince [W. Va.] 55 S. E. 656.

56. Objection that demurrer lacks certificate of counsel that it is not interposed for delay. Ballantine v. Yung Wing, 146 F. 621.

57. Defendant having answered and gone to trial in county court, and appealed from judgment against him, held that objection on his part to going to trial in district court on graund that complaint failed to state cause of action was properly overruled, where there was not substantially complete failure to state cause of action, though subject to special demurrer or motion. Davie v. Lloyd [Colo.] 88 P. 446. Where the intendment of the declaration is clearly discernable from language used, mere clerical and grammatical errors do not render it obnoxious to general demurrer. Meyer v. Ross, 119 Ill. App. 485. Defects of form, of averment, or uncertainty cannot be considered on general demurrer, but remedy is by motion. Whitacre v. Nichols [Okl.] 87 P. 865. In action by state to collect franchise tax on deposits in savings bank, objections of ambiguity and inconsistency in plea that defendant was not a savings bank being defects of form and plea setting up a defense sufficient in substance, held that demurrer to plea was properly overruled under Code Pub. Gen. Laws 1888, art. 75, §§ 6, 7, prohibiting special demurrers and providing that general demurrers shall not be allowed for mere informal statement of cause of action or defense. State v. German Sav. Bank, 103 Md. 196, 63 A. 481.

58. Defects which are of an amendable nature should be taken advantage of by demurrer, and cannot be reached by motion in arrest of judgment. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64. Where allegations and prayers of petition were sufficient for suit for damages for cutting timber, but there was not attached a sufficient abstract of title to comply with statute requiring attaching such abstracts in suits to enjoin cutting of timber in certain cases, held that defective parts might have been eliminated by special demurrer. James v. Saunders [Ga.] 56 S. E. 491. General demurrer does not reach matters of form must be special. Golderg v. Harney, 122 Ill. App. 106. Objec-

Uncertainty [59] is ground for a motion to make more definite and certain,[60] but not for objection to the introduction of any evidence [61] or for demurrers,[62] ex-

tion that interpleading answer is not verified can only be raised by special demurrer or exception, and not by general demurrer. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

59. See 6 C. L. 1049.

60. Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773. If allegations of complaint were deemed insufficient for failure to show particular acts of particular agents constituting negligence of defendant, held that remedy was by motion to make more specific. Choctaw, etc., R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Allegations of complaint in action for personal injuries in regard to duty to inspect cars held sufficient on appeal in absence of motion to make more definite and certain. Southern R. Co. v. Roach [Ind. App.] 78 N. E. 201; Id. [Ind. App.] 77 N. E. 606. In action by contractor to foreclose lien for street improvements, where it was uncertain from complaint whether action was based on bonds issued by city in anticipation of assessment for improvement, or on lien created by assessment of benefits against defendant's property, remedy was by motion to make more specific. Shirk v. Hupp [Ind.] 78 N. E. 242. Unless alternative averments are such as to vitiate complaint it will not be held bad on demurrer, remedy being as a rule, by motion to make more specific. Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539. If account filed with petition in action on open account is not sufficiently specific, remedy is by motion to make more definite and certain under Civ. Code Prac. § 134. Snowden v. Snowden, 29 Ky L. R. 1112, 96 S. W. 922. In denial by reference to original folios of complaint is so indefinite and uncertain as to leave doubt as to allegations intended to be put in issue, remedy is by motion to make more definite and certain. Thompson v. Wittkop, 184 N. Y. 117, 76 N. E. 1081. In absence of motion to make more definite and certain, definiteness will not be regarded as essential to a good averment, for that will be deemed to be alleged which can by reasonable and fair intendment be implied from the allegation. Howe v. Hagan, 110 App. Div. 392, 97 N. Y. S. 86. In absence of motion to make more definite and certain, plaintiff held not entitled to claim that allegation of assignment of insurance policies precluded showing of any assignment other than an absolute one. Id. Where complaint stated facts according to their legal effect, and was vague and indefinite, held that remedy was by motion to make more definite and certain, or demand for bill of particulars, and not by demurrer. Fleck v. Friedman, 49 Misc. 220, 97 N. Y. S. 231. Where answer did not state date of execution and delivery of release relied on as a defense, remedy was by motion to make more definite and certain, and not by application for bill of particulars. Pigone v. Lauria, 100 N. Y. S. 976. Where complaint is not sufficiently specific, remedy is by motion to make more definite and certain. Town of Hadley v. Garner, 101 N. Y. S. 777. Remedy is by motion and not demurrer. Berry v. Geiser Mfg. Co., 15 Okl. 364, 85 P. 699. Objections that complaint in action by receiver did not allege that he was duly qualified and acting receiver when action was brought, that mere allegation that he was appointed and qualified was not sufficient, and that complaint fails to state in what case or court he was appointed, cannot be raised by demurrer, but remedy is by motion. Allen v. Baxter, 42 Wash. 434, 85 P. 26. If denial was indefinite or uncertain so as to raise doubt in plaintiff's mind as to what was meant thereby, held that his remedy was by motion under Pierce's Code, § 402, Ball. Ann. Codes & St. § 4932. O'Brien v. Seattle Ice Co. [Wash.] 86 P. 399. Objections that amount of damages is not alleged, and that no facts are stated warranting recovery of more than nominal damages, should be raised by motion or demurrer, and not by motion for judgment on pleadings. Hubenthal v. Spokane & I. R. Co. [Wash.] 86 P. 955. When pleadings do not fully disclose ground of claim, fuller and more particular statements may be required on motion. Ginty v. New Haven Iron & Steel Co., 143 F. 699.

61. Where petition stated cause of action, held that objection that it alleged both injuries for which defendant was liable and injuries for which it was not liable in such a manner that it could not be determined what part of the damages claimed was referable to each could not be raised by objection to introduction of any evidence, the remedy being by motion to strike or special demurrer. Fisher v. St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917. Objection to introduction of any evidence under petition is good only when is total failure to allege some matter essential to relief sought, and is not good when allegations are simply incomplete, indefinite, or statements of conclusions of law. First Nat. Bank v. Cochran [Okl.] 87 P. 855.

62. Dockstader v. Young Men's Christian Ass'n [Iowa] 109 N. W. 906. If a good cause of action is stated demurrer will not reach uncertainty, inconsistency, or repugnancy, but remedy is by motion to make more definite and certain. Complaint in action for death by wrongful act held sufficient as against demurrer. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. If pleading is not sufficiently specific remedy is by motion, and defect cannot be taken advantage of by demurrer. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186. But if it is so uncertain as not to state intelligibly a substantial good cause of action or defense, it is subject to demurrer as not stating a cause of action or defense. Complaint in action for negligent killing held good as against demurrer. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. Cannot be taken advantage of by demurrer nor by objection to introduction of evidence. Burnette v. Elliott, 72 Kan. 624, 84 P. 374. Allegation in action on contract that order for book had been accepted held sufficient on general demurrer, since if defendant desired to know what action had been taken to indicate acceptance, should have assailed petition by motion. Harris v. Paine [Neb.] 107 N. W. 748. Uncertainty cannot be considered on general demurrer, but remedy is by motion.

cept where special demurrers are authorized.[63] A motion or demand for a bill of particulars is the proper course to obtain a more specific statement of plaintiff's claim.[64]

Inconsistency or departures in pleading are ordinarily reached by motion.[65]

Failure to state a cause of action[66] may be reached by demurrer,[67] objection to the introduction of evidence,[68] motion to dismiss the complaint,[69] or for nonsuit,[70] or motion for a peremptory instruction,[71] but not by motion to strike the pleading from the files.[72]

Whitacre v. Nichols [Okl.] 87 P. 865. That defendant cannot on facts pleaded recover the damages which he demands in his counterclaim, or that the rule of damages is not such as he asserts it to be, is not good ground for demurrer if facts stated show a good cause of action. Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 98 N. Y. S. 1018. Statement of claim held not demurrable though as to some items defendant might be entitled to ask for more precise details by demand for more specific statement or bill of particulars. De Galindez v. Ennis, 149 F. 911.

63. Can only be taken advantage of by demurrer. Alabama Great Southern R. Co. v. Sanders [Ala.] 40 So. 402. Can only be taken by special and not by general demurrer. Hunt v. Jones [Cal.] 86 P. 686. Uncertainties appearing on face of pleadings must be raised by special demurrer rather than by general one. Gutshall v. Kornaley [Colo.] 88 P. 158. Objection that denials in answer in mandamus are too general should be taken by special demurrer. People v. Chicago Board of Trade, 224 Ill. 370, 79 N. E. 611. Vagueness and uncertainty must be reached by exceptions on that ground and do not warrant dismissal on an exception of no cause of action. Davis v. Arkansas Southern R. Co., 117 La. 320, 41 So. 587. Allegations held sufficient in absence of special demurrer on ground of indefiniteness and uncertainty. Murray v. Butte [Mont.] 88 P. 789. Objection that allegations of amendment attempting to set up waiver are not sufficiently specific should be taken by exceptions to pleading, and not by objection to evidence. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400.

64. Where complaint was sufficiently definite and certain to enable defendants to answer safely and intelligently, held that their remedy to obtain a more particular statement of plaintiff's claim, with a view of protecting themselves against surprise and limiting the issue at the trial, was by application for bill of particulars after issue joined, and not by motion to make more definite and certain. Mullen v. Hall, 99 N. Y. S. 841. Complaint in action for services performed in different capacities held not demurrable because different items were not more specifically stated, but if defendant desired more detailed statement his remedy was by a demand for bill of particulars as provided by Rev. St. 1898, § 2988. Nelson v. Henrichsen [Utah] 87 P. 267.

65. Demurrer will not raise question. Walters v. Chance [Kan.] 85 P. 779. Objection that amended counts constitute a departure from cause of action originally stated cannot be raised by demurrer. Curry v. Southern R. Co. [Ala.] 42 So. 447.

66. See 6 C. L. 1050.

67. Objection that declaration in action for slander does not set out cause of action by reason of failure to state sufficient circumstances to show sense in which words were spoken can be taken advantage of only by demurrer. Ward v. Merriam [Mass.] 78 N. E. 745.

68. May be raised by objection to introduction of any evidence and motion for judgment on pleadings, where objection goes to the substance of the pleading rather than the form and the defect is not curable by amendment. Hubenthal v. Spokane, etc., R. Co. [Wash.] 86 P. 955. Is only when petition fails to state cause of action that such objection can be successfully interposed. Fisher v. St. Louis Transit Co., 198 Mo. 562, 95 S. W. 917. Where it appears from petition that contract sought to be specifically enforced is not one which should be so enforced and that complainant has adequate remedy at law, objection to introduction of evidence thereunder is properly sustained. Haffner v. Dobrinski [Okl.] 88 P. 1042.

69. Objection that complaint does not state facts sufficient to constitute cause of action need not be presented by demurrer or answer, but, under Code Civ. Proc. § 499, may be raised by motion to dismiss complaint on that ground made at the trial. Kelly v. Security Mut. Life Ins. Co., 186 N. Y. 16, 78 N. E. 584. Though Municipal Court Act (Laws 1902, p. 1536, c. 580, § 145, subdv. 2), provides that where written complaint is served a written answer or demurrer must be filed, defendant may raise question of sufficiency of written complaint by motion to dismiss it for want of facts, which motion will be treated as a demurrer. Brown v. Reiter, 99 N. Y. S. 861. Though act does not expressly provide for dismissal of written complaint on ground that it does not state facts sufficient to constitute cause of action unless written demurrer has been interposed, power to so dismiss is inherent in the court. Rogers v. Fine, 49 Misc. 633, 97 N. Y. S. 1004.

70. Since, under Code Civ. Proc. § 499, objection is not waived by failure to raise question by demurrer or answer, it may be raised by motion for nonsuit after evidence has been taken at trial. Wood v. Ball, 100 N. Y. S. 119. Because of failure to allege that foreign corporation plaintiff had complied with statute relating to right of foreign corporations to do business in state. Id.

71. Is ground for an instruction to the jury to find for defendant. McPherson v. Hattich [Ariz.] 85 P. 731.

72. Proper mode of testing sufficiency of pleadings, when neither prolix, irrelevant, or frivolous, is by demurrer, and not by motion to strike. Owensboro Wagon Co. v.

Matters of defense[73] must ordinarily be raised by pleading[74] unless apparent on the face of the complaint.[75] Defenses not raised by answer or demurrer are deemed waived.[76]

Hall [Ala.] 43 So. 71. Objection to petition on ground that it does not state facts sufficient to constitute cause of action can only be raised by demurrer, or by objection to introduction of evidence at trial, and not by motion to strike it from files. First Nat. Bank v. Cochran [Okl.] 87 P. 855. Motion to strike is not proper method of testing sufficiency of pleading. Grand Lodge I. O. O. F. v. Troutman [Kan.] 84 P. 567. Motion to strike may be used to eliminate amended pleading which is mere repetition of one held defective on demurrer, but where amended petition, filed on leave, sets forth additional facts as well as fuller and more specific statement of facts in original, and is apparently a bona fide attempt to meet objections to original, and to state cause of action, motion to strike because of sameness will not lie. Id. Question as to whether pleading states cause of action or defense should be presented by demurrer or by motion at trial either at opening, or when evidence is offered, or at close of case, and not by motion to strike before trial, particularly where question arises as to items or measure of damages. Fox v. Chapman, 102 N. Y. S. 378. In action for damages for negligent killing of plaintiff's testator striking out allegations as to hospital and funeral expenses on motion before trial held error. Id.

73. See 6 C. L. 1051.

74. Improper claim of damages in complaint cannot be reached by demurrer. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. Mere fact that declaration or a count thereof sets up elements that do not enter into measure of damages, or greater damages than case made entitles plaintiff to recover, does not make it demurrable, but such questions are properly raised by objections to evidence, or instructions, or may be ground for reforming declaration under Rev. St. 1892, § 1043, as calculated to embarrass a fair trial of the case. Western Union Tel. Co. v. Barlow [Fla.] 40 So. 491. Matters which may be pleaded in abatement are not ground for arresting a judgment authorized by the pleadings. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64. Objection that another suit is pending for same matter is in general taken by plea and not by motion. Van Houten v. Stevenson [N. J. Eq.] 64 A. 1094. In action at law, defense of statute of limitations should be made by plea and not by demurrer. Curry v. Southern R. Co. [Ala.] 42 So. 447. Defense of statute of limitations cannot be raised by demurrer, but must be pleaded. Jolly v. Miller [Ky.] 98 S. W. 326; Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25. Plaintiff is not required to plead in complaint facts taking case out of statute of limitations either as part of his cause of action or in anticipation of setting up of statute as defense, but that defense must be set up by answer and cannot be taken advantage of by demurrer. Code Civ. Proc. § 413. Willis v. Wileman, 102 N. Y. S. 1004. Objection that court has no jurisdiction because limitations had run held to amount merely to an objection that defense of statute of limitations was disclosed by averments of the complaint, which could not be raised by demurrer though stated as jurisdictional question. Bergmann v. Leavitt, 113 App. Div. 899, 99 N. Y. S. 748. In action on contract, advantage of failure of consideration must be taken by answer. Harris v. Paine [Neb.] 107 N. W. 748. Failure to perform conditions precedent to right to sue on contract can only be taken advantage of by demurrer or special plea. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35. Failure to submit amount of loss to arbitration as required by fire insurance policy. Id.

75. See, also, § 5a, ante. Laches apparent on face of bill in equity may be taken advantage of by demurrer for want of facts. Wadleigh v. Phelps [Cal.] 87 P. 93. In suit to have deeds declared mortgages and to redeem, trial amendment alleging that one of the deeds was given to secure a different debt as well as further security for one originally alleged held in no way to detract from original claim that it was given to secure later debt. Id. Objection that action is prematurely brought can be reached by general demurrer only when declaration affirmatively shows that cause of action has not yet accrued. American Exch. Nat. Bank v. Seaverns, 121 Ill. App. 480. Question of contributory negligence may be determined on demurrer to complaint for want of facts. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. Where petition shows on its face that contract sued on is void under statute of frauds, such defense may be interposed by general demurrer. Stovall v. Gardner [Tex. Civ. App.] 94 S. W. 217. In action to recover for services rendered as real estate broker, petition showing on its face that contract of agency was not in writing is subject to demurrer. Smith v. Aultz [Neb.] 110 N. W. 1015.

76. Defense of statute of limitations. Hewell v. Hogin [Cal. App.] 84 P. 1002; Cox v. American Freehold & Land Mortg. Co. [Miss.] 40 So. 739. Unless specially pleaded. Connell v. Clifford [Colo.] 88 P. 850. Cannot be claimed on appeal that part of cause of action was barred by limitations where statute was not pleaded below. St. Louis, etc., R. Co. v. Stites [Ark.] 95 S. W. 1004. Defendant held not entitled to raise question of effect of judgment sustaining demurrer to complaint as res judicata of plaintiff's cause of action where he did not present it in his answer to the amended complaint subsequently filed. Thomason v. Seaboard Air Line R. Co., 142 N. C. 300, 55 S. E. 198. In action by town on contract, claims that vote of electors and resolution of town board were necessary preliminaries to bringing of suit held matter in abatement which was waived where it was not expressly pleaded. Town of Beloit v. Heineman, 128 Wis. 398, 107 N. W. 334. Defense of statute of frauds must be in some manner interposed in trial court or it is waived. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93.

§ 11. *Waiver of objections and cure of defects.*[77]—Objections to pleadings must as a rule be made [78] and brought to hearing [79] at the earliest opportunity, and, while entire failure to state a cause of action may be availed of at any time,[80] other deficiencies are waived by pleading responsively,[81] failure to object by motion,[82] or

77. See 6 C. L. 1051.

78. Objection that plea of statute of limitations was insufficient for failure to allege subdivision of statute referred to held waived by failure to urge it in trial court. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155. Where plaintiff delivered bill of items to defendant several months before trial, latter could not object to its sufficiency for first time at trial by objection to introduction of evidence. Flynn v. Seale, 2 Cal. App. 665, 84 P. 263. Where in mandamus issues were made up as in chancery proceeding instead of adopting practice pointed out in statute, case will be so treated on appeal, though such course might have been ground for reversal if taken advantage of in apt time. City of Chicago v. Chicago, etc., R. Co., 121 Ill. App. 197. Objection that supplemental answer was never notified to plaintiff held too late after judgment. Fluker v. De Grange, 117 La. 331, 41 So. 591. Under Rev. Codes 1899, § 5300, Rev. Codes 1905, § 6886, trivial defects should be disregarded where no objection is made before trial. Grammatical error in answer whereby denial of ownership was made in present tense. Ward v. Gradin [N. D.] 109 N. W. 57. Objection of misjoinder of parties and causes of action held waived where three terms of court intervened between filing of first answer and second amended answer in which such objection was first raised. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 17 Tex. Ct. Rep. 564, 95 S. W. 617.

79. Defect of petition in suit to cancel deed in failing to tender return of consideration held waived by filing answer and failure of defendants to have court act on demurrer on that ground filed after filing answer. May v. May, 29 Ky. L. R. 1033, 96 S. W. 840. Where motion to dismiss, made in circuit court on appeal from justice court, on ground that plaintiff had filed no paper of any kind on which to base cause of action, was never passed on, and defendant went to trial without calling court's attention thereto, held that he waived defects in plaintiff's statement. Warner v. Close, 120 Mo. App. 211, 96 S. W. 491. Failure to argue general demurrer held not a waiver of defense of statute of frauds where defendant's counsel were willing to argue demurrer if requested to do so by court, which request was not made. Stovall v. Gardner [Tex. Civ. App.] 94 S. W. 217. Where record does not show that demurrers and special exceptions to petition were called to attention of trial court and passed upon, will be deemed waived. Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116.

80. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. May be first raised on appeal. Dessart v. Bonynge [Ariz.] 85 P. 723. Under B. & C. Comp. § 72. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473. May always be inquired into on appeal from judgment. Murray v. Butte [Mont.] 88 P. 789. Is not cured by decision and judgment, but question may be presented at any time during progress of case. Code Civ. Proc. § 685. On appeal. Thornton v. Kaufman [Mont.] 88 P. 796. Is not waived by failure to demur, and hence may be urged on appeal though demurrer on that ground is withdrawn. Santa Rosa Bank v. Paxton [Cal.] 86 P. 193. Where defendant withdrew his demurrer to complaint, for failure to state cause of action, and by his answer put in issue precise facts which he claimed were not well pleaded, and went to trial on merits, and virtually conceded correctness of decision against him by failure to preserve evidence in record by bill of exceptions or otherwise, held that he could not raise contention on appeal. Id. Objection to admission of any evidence on such ground may be taken at any time during trial, and is not waived by answer or failure to demur. Gordon v. Omaha [Neb.] 110 N. W. 313. Verdict does not cure defect where declaration omits to allege any substantial fact essential to right of action which is not implied in or inferable from findings of those which are alleged. McAndrews v. Chicago, etc., R. Co., 222 Ill. 232, 78 N. E. 603, afg. 124 Ill. App. 166. In action for negligence omission to allege existence of duty on part of defendant to plaintiff not cured. Id. Failure of complaint, in action by servant for personal injuries, to allege breach of duty, or that person whose negligence was cause of injuries was not a fellow-servant, not cured. The Pullman Co. v. Woodfolk, 121 Ill. App. 321. Failure of complaint in action on fire insurance policies to allege that houses insured were occupied as dwelling houses, and furniture was in specified house, at time of fire, as required by policies in order to impose liability on defendant, held not cured by verdict, even in absence of obpection by demurrer or answer in lower court. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. Submission of questions of fact to jury by instructions offered by defendant held not a waiver of objection that declaration did not state cause of action raised by motion for peremptory instruction. The Pullman Co. v. Woodfolk, 121 Ill. App. 321.

81. Objection that amendment set up entirely separate and distinct cause of action which could not be joined with that stated in original complaint. Choctaw, etc., R. Co. v. Hickey [Ark.] 99 S. W. 839. In view of caption and other allegations of complaint in action on contract, absence of positive allegation that defendants were partners held a mere irregularity which was waived by answering over, no demurrer having been interposed, and answer reciting that defendants made defense. Spears v. Pechstein [Colo.] 84 P. 979. Objection that suit is brought in firm name without naming partners waived by pleading general issue. West Chicago Park Com'rs v. Schillinger, 117 Ill. App. 525. Where partnership appeared and filed answer to cross petition without objection, held that they could not object for first time on appeal that Christian name of one of the partners was not given in such petition. Merchants' Nat. Bank v. Ford [Ky.] 99 S. W. 260. Garnishee by re-

demurrer or answer[83] going to trial on the merits,[84] the submission of the case

plying to merits of plaintiff's denial of his answer held to have waived all defects except those so fundamental in character that a verdict could not cure them. Kiernan v. Robertson, 116 Mo. App. 56, 92 S. W. 138. Where bill was not originally framed to include defendant by name, held defects of form were waived by appearance and joining issue by answer to merits. First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778. Where allegations of negligence strongly stated by inference that defect and defendant's knowledge thereof both existed for time sufficient for defendant to have made place safe had it used ordinary care, held that defendant, by pleading to merits, waived right to take advantage of absence of direct averment to that effect. Dodge v. Manufacturers' Coal & Coke Co., 115 Mo. App. 501, 91 S. W. 1007. One who fails to test sufficiency of amendable complaint by demurrer, but answers on merits, cannot demand reversal on ground that general objection to introduction of evidence because complaint did not state facts sufficient to constitute cause of action was overruled. Rev. Code Civ. Proc. 1903, § 136. Nerger v. Equitable Fire Ass'n [S. D.] 107 N. W. 531. Where court had jurisdiction by reason of diversity of citizenship and amount of plaintiff's personal claim, held that defendant could not, after plea in bar to statement, showing assignment, etc., object to nonjoinder of assignors of other claims on which plaintiff also sued, objection being to a mere matter of form curable by amendment. Seymour v. Du Bois, 145 F. 1003. Pleas in abatement held too late when filed along with other pleas going to the merits, and on same day that answer to bill was filed. Town of New Decatur v. Smith [Ala.] 41 So. 1028. Plea to the merits filed by defendant simultaneously with a plea to the jurisdiction over the person waives the latter plea irrespective of the order in which they are numbered. Putnam Lumber Co. v. Ellis-Young Co., 60 Fla. 251, 39 So. 193. Permitting matter to be proved under general issue without objection is implied waiver of special plea. Snellgrove v. Evans [Ala.] 40 So. 567.

82. Where complaint declared on guaranty as sealed instrument, but at close of trial plaintiff was permitted to add counts declaring on it as an unsealed instrument, held that defendants could not contend that plaintiff had lost any of its rights by election or ratification where they did not ask that he be required to elect on which counts he would rely but stated that they had no desire to go to jury under court's rulings and verdicts were thereupon returned against them, and plaintiff did not know of alleged alteration of instrument by placing seals thereon until after filing of answers setting it up. Tulane University v. O'Connor [Mass.] 78 N. E. 494.

83. Misjoinder or nonjoinder of parties plaintiff. Code Civ. Proc. §§ 430, 434. Conde v. Dreisam Gold Min. & Mill. Co. [Cal. App.] 86 P. 825. Want of capacity to sue. Leonard v. American Steel & Wire Co. [Kan.] 84 P. 553. Want of jurisdiction of person af defendant. Farmers' Bank v. St. Louis & H. R. Co., 119 Mo. App. 1, 95 S. W. 286. Defect of parties plaintiff. Wilsons' Rev. & Ann. St. 1903, §§ 4293, 4295. Oklahoma Gas & Elec. Co. v. Lukert, 16 Okl. 397, 84 P. 1076. Objection that complaint is uncertain and ambiguous, unless taken advantage of by special demurrer. San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. Uncertainties appearing on face of pleadings being subject of special demurrer, where only demurrer was general one. Gutshall v. Kornaley [Colo.] 88 P. 158. Objection that court had no jurisdiction in equity of action to recover cost of bridge over stream forming boundary between two towns, when not raised by answer. Colby v. Mt. Morris, 100 N. Y. S. 362. Misjoinder of causes of action not apparent on face of complaint, unless taken advantage of by answer. Rev. St. 1899, § 3537. Mau v. Stoner [Wyo.] 87 P. 434. Objection that answer was not made a counterclaim, and that its allegations were not sufficiently specific as to manner in which damage resulted from breach of warranty complained of, held waived when not raised by demurrer or motion before filing reply, and hence not available on appeal. Goodman v. Beard & Co., 29 Ky. L. R. 544, 93 S. W. 666. In view of Code Civ. Proc. § 96, providing that demurrer shall specify grounds of objection or it will be regarded solely as one for want of facts, objection that petition did not state a specific prayer for relief held waived where not specifically pointed out by demurrer or otherwise. Oklahoma Gas & Elec. Co. v. Lukert, 16 Okl. 397, 84 P. 1076. Right to object to sufficiency of petition because of defect of parties, by failure to specify that as ground of demurrer. Helm & Son v. Briley [Okl.] 87 P. 595. While averment that an act has not been duly performed is ordinarily but a legal conclusion, in absence of special demurrer or objection on that ground it will be held sufficient to authorize admission of evidence upon the issue. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415. If parties proceed to trial without such objection and introduce evidence on such issue, will not be permitted after decision thereon, to contend that it was not before court for decision, particularly where party making such averment supplements same with averment of probative facts on which he relies in support of averments that act was not duly performed. Id. Want of due appointment of guardian ad litem goes to his capacity to sue, and, under Rev. St. 1898, § 2649, 2653, when not apparent on face of complaint is waived unless objection is taken by answer. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526. In view of Code Civ. Proc. § 389, requiring court to order bringing in of necessary parties, objection to nonjoinder of necessary parties is not waived because not raised by demurrer or answer. Mitau v. Roddan [Cal.] 84 P. 145.

84. Indefiniteness. Nelson v. Cowling, 77 Ark. 351, 91 S. W. 773. Action in name of state for violation of municipal ordinance relating to sale of intoxicants being civil action, objection that complaint failed to name parties to whom illegal sales were made, and that action was brought in name of people of state to use of municipality instead of in name of people of state. Creighton v. People [Colo.] 83 P. 1057. Failure of

under a stipulation not raising them,[85] or by suffering a default.[86] Omissions in a pleading supplied by the pleadings of the adverse party are thereby cured.[87] After

complaint in action for negligence to allege that negligent act of defendant's agent was committed while acting within line of his duty or employment held matter to be reached by demurrer. Alabama Great Southern R. Co. v. Sanders [Ala.] 40 So. 402. Where plaintiff, when amended answer was filed, made no motion to strike out that portion claimed by it to be new defense, but went to trial on issues thereby raised, held that it could not after judgment and on appeal object to allowance of amendment on ground that it set up new defense. Hibernia Sav. & Loan Soc. v. Hinz [Cal. App.] 88 P. 730. Where party appeared to cross complaint, filed demurrer and answer thereto, and afterwards went to trial without objection to propriety of cross complaint as a pleading in the action and in pursuance of stipulation to submit for decision a particular question arising out of its allegations, held that it was too late to object for first time on appeal that it was improperly filed and did not come within provisions of statute authorizing cross complaints. Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 P. 1003. Defect of complaint, in action by levying officer on receipt for attached property, in not stating time of demand as related to rendition of judgment in attachment action, held a defect of form and waived by failing to demur, denying allegation as made, and going to trial on merits. Dejon v. Street [Conn.] 65 A. 145. Overruling motions to strike separate divisions of amended answer and demurrers thereto cannot be assigned as error on appeal where plaintiff proceeded to trial on amended answer and did not subsequently present to court his objections to pleadings. Puritan Mfg. Co. v. The Emporium, 130 Iowa, 526, 107 N. W. 428. Where defendant answered and there was trial on merits, held immaterial that petition was not signed by attorney as provided by Civ. Code Prac. § 115 (Abernathy v. Meyerbridges Coffee & Spice Co. [Ky.] 99 S. W. 942), and that petition did not contain sufficient prayer for relief, and that prayer was at end of reply and not in petition. Civ. Code Prac. § 90 (Id.). Where defendant failed to demur and went to trial on issues raised by pleadings as they stood, could not on appeal raise point that certain counts of declaration in action for slander did not set out good cause of action by reason of failure to state sufficient circumstances to show sense in which words were spoken. Ward v. Merriam [Mass.] 78 N. E. 745. Where administrator elects to go to trial on merits on claim as filed against decedent's estate without moving to have it made more definite and certain, he thereby waives objection that its nature was insufficiently stated, and cannot raise it after verdict. Britian v. Fender, 116 Mo. App. 93, 92 S. W. 179. After answer to merits and trial it is too late to raise any objection to petition than failure to state cause of action or want of jurisdiction. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. Denial in reply held not a nullity, even if defective, so that defect could only be reached by motion or demurrer before trial, and not by motion for judgment on pleadings at close of evidence. Seffert v. Northern Pac. R. Co. [Or.] 88 P. 962. Misjoinder of causes of action in contract and tort held waived by voluntary trial on merits and judgment. Allwein v. Brown, 29 Pa. Super Ct. 331. Where plea of nonassumpsit not accompanied by affidavit required by Code 1899, c. 125, § 46, is filed without objection, and case proceeds to trial, statutory requirement will be treated as having been waived. Hi Williamson & Co. v. Nigh, 58 W. Va. 629, 53 S. E. 124.

Joinder of issue waived: Judgment will not be reversed for failure to file reply where there was no objection in lower court and case was tried on merits. Fitzpatrick v. Vincent, 28 Ky. L. R. 121, 88 S. W. 1073. Where no reply is filed but cause is tried and submitted on theory that a material allegation of answer is in issue, claim that such allegation stands admitted is too late when first made after verdict. In re Cheney's Estate [Neb.] 110 N. W. 731. Where, after defendant's motion for judgment on counterclaim for want of a reply was denied, he did not rest on his exception, but offered proof of the facts, held that final judgment would not be directed on counterclaim on appeal. Flynn v. Smith, 111 App. Div. 870, 98 N. Y. S. 56. Formal reply to counterclaim held waived where trial proceeded from beginning to end upon theory on both sides that allegations thereof were in issue. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540. Trial of issues tendered by a pleading as though properly made, in absence of any plea, answer, or replication which raises them, estops parties from subsequently denying that such issues were duly made, and from taking any advantage of lack of such plea, answer, or replication. Plaintiffs held not entitled to insist on absence of answer to amended petition for first time on appeal. Bank of Havelock v. Western Union Tel. Co. [C. C. A.] 141 F. 522.

85. Weir v. Bagby, 72 Kan. 67, 82 P. 585.

86. Uncertainty as to whether there were one, two, or three plaintiffs held aided by default and judgment. Meyer v. Ross, 119 Ill. App. 485.

87. **Defects held cured:** In action for damages for death due to negligence, held that, if petition failed to state cause of action against one of the defendants, any defect therein by answer admitting its ownership of railroad where injury occurred, etc. Chicago, etc., R. Co. v. Hollis' Adm'r, 28 Ky. L. R. 1102, 91 S. W. 258. Failure of petition to allege law of foreign state relied on, by answer tendering the issue of the law of such state, which plaintiffs accepted by a general denial. Lee v. Missouri Pac. R. Co. 195 Mo. 400, 92 S. W. 614. Failure to allege that defendant received catt's for transportation as common carrier for hire, by answer to merits pleading entire contract of affreightment from which it appeared beyond question that such relation existed. Ficklin v. Wabash R. Co., 117 Mo. App. 211, 93 S. W. 861. Objection that bill of lading described in petition named plaintiff as consignee, while bill itself showed on its face that bank was consignee, held obviated by admission in answer that bill was issued for

verdict no defect which might have been cured will avail.[88] Pleading over[89] or

car consigned and to be shipped to plaintiff. Starr-Hardnett & Edmiston Co. v. Missouri, etc., R. Co. [Mo. App.] 97 S. W. 959. In action for libel petition defective in matter of charging publication of alleged defamatory matter, by answer admitting publication. Sheibley v. Huse [Neb.] 106 N. W. 1028. Failure of complaint in action for damages for breach of contract to deliver hops to aver that plaintiffs were ready and willing at time and place specified to perform on their part by paying purchase price, by allegations of answer that defendant had hops ready for delivery at time and place specified but that no one was present to receive and pay for them, on which issue was joined by denial in reply. Catlin v. Jones [Or.] 85 P. 615. In an action for recovery for death under a policy of accident insurance, containing provision that company insures against death resulting from injuries alone, judgment against the company will not be reversed for failure to allege in petition that death was caused solely by accident, where answer affirmatively alleged another cause, thereby presenting that issue. Travelers' Ins. Co. v. Leibus, 8 Ohio C. C. (N. S.) 201. Whether allegations of bill to restrain infringement of patent were sufficient to give jurisdiction in equity held immaterial on appeal, in view of answer admitting validity of patent as covering composition of plaintiff and seeking to avoid its effect by allegation of differences between two compounds, and of fact that question was not raised below. Lane v. Levi, 21 App. D. C. 168. Failure of bill to restrain infringement of patent to sufficiently describe subject-matter of patent held not available on appeal, where defendant neither demurred or objected in any manner on preliminary hearing, but admitted existence of patent and denied that he was making and vending composition claimed thereunder by complainant. Id.

Defects not cured: Failure of complaint in action on fire insurance policies to allege that insured houses were occupied as dwelling houses, and that furniture was in specified house, at time of fire, as required by policies, by allegations of answer that greater portion of furniture had been removed from house at time of fire, except possibly as to furniture policy. Arnold v. American Ins. Co., 148 Cal. 660, 84 P. 182. In suit to enjoin county and its officers from carrying out contract employing one to search for omitted and unassessed personalty, failure of bill to allege that there was any such property, by allegations of answer that there was, such allegations not purporting to answer any specific allegations of the complaint but merely setting up a state of facts in justification of the contract, an answer in equity being evidence only when responsive to the bill and when its statements are not made on information and belief. County of Henry v. Stevens, 120 Ill. App. 344. Plaintiff cannot sustain a cause of action upon an allegation in the answer denied in the reply. Cohn-Baer-Myers & Aronson Co. v. Realty Transfer Co., 102 N. Y. S. 122.

88. Judgment will be set aside if pleadings are so defective that no legal judgment can be rendered. Civ. Code 1895, § 5364. Reid v. Hearn [Ga.] 56 S. E. 129. Judgment cannot be set aside or arrested for any defect in pleadings which is aided by verdict or amendable at matter of form. Civ. Code 1895, § 5365. Id. Whenever the complaint contains terms sufficiently general to comprehend a matter so essential and necessary to be proved that, had it not been given in evidence, jury could not have found the verdict, want of an express statement of such matter will be cured by verdict, since evidence of the fact would be the same whether allegation is complete or imperfect. Madden v. Welch [Or.] 86 P. 2. Defects or omissions in substance or from which would have been available on demurrer are cured by the verdict where the issues joined are such as necessarily require proof of the facts so defectively presented, and without which proof it is not to be presumed the court would have directed, or the jury would have given, the verdict. Grace & Hyde Co. v. Sanborn, 225 Ill. 138, 80 N. E. 88, afg. 124 Ill. App. 472.

Defects held cured by verdict: Obligation that answers of certain defendants should be disregarded because they have not complied with statute in making themselves parties. Burnett v. Doyle [Colo.] 83 P. 967. In action to enforce liability of stockholder in bank, failure of petition to allege that defendant was a subscribing stockholder, subscribing stockholders alone being liable under bank's charter. Reid v. Hearn [Ga.] 56 S. E. 129. Objection to complaint on ground of duplicity. Robbins v. Bosserman Bros. [Iowa] 110 N. W. 587. Failure of complaint in action for negligence to state in what way defendant was negligent. Grace & Hyde Co. v. Sanborn, 225 Ill. 138, 80 N. E. 88, afg. 124 Ill. App. 472. Defective statement of the cause of action in the declaration. Chicago, Peoria, etc., R. Co. v. Laumyer, 123 Ill. App. 49. Under Burns' Ann. St. 1901, § 44, no judgment may be reversed for error in sustaining or overruling demurrer for misjoinder of causes of action. City of Huntington v. Stemeh [Ind. App.] 77 N. E. 407. In action by coal miner for injuries sustained by falling of slate from roof, defect in petition in failing to allege that accident occurred before expiration of reasonable time after employer promised to furnish props for want of which slate fell, where case was tried as if omitted allegation was in petition, evidence was given to support it, and court made right to recover depend in part on existence of facts constituting it. Drakesboro Coal, Coke & Min. Co. v. Jernigan [Ky.] 99 S. W. 235. Declaration in action against railroad for injuries to servant held sufficient after verdict to show that negligence relied on was original defective construction of switch and not negligence of fellow-servant in adjusting it. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. In action against railroad under statute for double damages for killing of stock by reason of defective fences, failure of petition to sufficiently allege in what manner fences and cattle guards were defective. Clem v. Quincy, etc., R. Co., 119 Mo. App. 246, 96 S. W. 226. Misjoinder of causes of action. Barnes v. Metropolitan St. R. Co., 119 Mo. App. 303, 95 S. W. 971. Statement of two causes of action in one paragraph.

amending [90] after ruling on demurrer waives any error in the ruling, but this rule does not apply to a demurrer for want of jurisdiction [91] or for want of facts.[92] The

Mullich v. Brocker, 119 Mo. App. 332, 97 S. W. 549. Case having been tried on theory that permission to plaintiff to walk on track arose from long public use, insufficient averment of that fact in petition. Frye v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 566. In action to recover for feed furnished horses and for care of same, failure of complaint to allege that feed or care had been furnished at defendant's request or that he had promised to pay for same, since issue joined necessarily required proof of one of such facts. Madden v. Welch [Or.] 86 P. 2. If evidence supports verdict, mere defects of averment. Preiss v. Zitt [C. C. A.] 148 F. 617. Where there was general verdict, motion in arrest of judgment on ground that there were two inconsistent counts in the declaration, and no evidence to support first one, held properly overruled. Mercantile Trust Co. v. Hensey, 27 App. D C. 210. Where plea of set-off was good in substance and only objection thereto was that it was not allowable in the particular case because it showed on its face that cause of action therein set forth arose after the institution of plaintiff's suit, but there was no objection to it on that ground, held that court did not err in submitting issue thereby raised to jury, and such objection could not be raised after verdict. Den Loach Mill Mfg. Co. v. Standard Sawmill Co., 125 Ga. 377, 54 S. E. 157. Declaration in action for negligence held sufficient after verdict though it failed to allege that defendant knew or ought to have known of injury. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136, afg. 124 Ill. App. 459. Sufficiency of answer cannot be questioned for first time on appeal. Unger v. Mellinger [Ind. App.] 77 N. E. 814. Objection that widow did not file title papers of deceased husband with petition in action for allotment of dower, as required by Civ. Code Prac. § 499, cannot be first raised after trial and judgment. Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535. Where question of sufficiency of complaint was not raised below, and defect was curable by amendment, held that it was not available on appeal to reverse order granting a new trial. Russell v. Barron, 111 App. Div. 382, 97 N. Y. S. 1061. In action by broker to recover balance due on purchase and sale of cotton on cotton exchange, held that contention that complaint alleging purchase and sale of certain numbers of bales failed to state cause of action because it did not state number of pounds of cotton in bale or total number of pounds bought or sold, or price per bale, held too late after verdict, pleadings being framed and trial having proceeded on theory that bale contains five hundred pounds. Overbeck, Starr & Cooke Co. v. Roberts [Or.] 87 P. 158. defendant in action to enforce mechanic's lien held not entitled to object on appeal that complaint was fatally defective because allegations as to ownership were in alternative, where he neither demurred nor objected to introduction of evidence on that ground, and entered into written stipulation as to ownership, the defect, if any, being curable by amendment. Burgi v. Rudgers [S. D.] 108 N. W. 253. Where defect pointed out is one which might have been obviated by amendment below, it will be deemed amended on appeal. Burns' Ann. St. 1901, § 670. Richardson v. Stephenson [Ind. App.] 78 N. E. 256. Supreme court will consider the complaint amended if need be to conform to proof. Collins v. Denny Clay Co., 41 Wash. 136, 82 P. 1012; Coolot Co. v. Kahner [C. C. A.] 140 F. 836. After verdict and judgment, in all formal and technical matters complaint will be treated as amended to conform to facts. Whether cross petition was properly amended held immaterial. Michigan Home Colony Co. v. Tabor [C. C. A.] 141 F. 332. In a suit involving the distribution of funds in court, irregularities in pleadings will not prevent the appellate tribunal from disposing of the case on its merits. Gilbert v. Endowment Ass'n, 21 App. D. C. 344.

89. Wade v. Goza [Ark.] 96 S. W. 388; Adams v. Clark [Colo.] 85 P. 642; Village of Palestine v. Siler, 225 Ill. 630, 80 N. E. 345; Carlson v. People, 118 Ill. App. 592; Walters v. Stacey, 122 Ill. App. 658; Glassey v. Sligo Furnace Co., 120 Mo. App. 24, 96 S. W. 310; Brannock v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 604. Uncertainty as to whether complaint sought damages for breach of executory contract or violation of terms of one consummated. Ramsay v. Meade [Colo.] 86 P. 1018. Where answer taken in connection with complaint tendered issue as to whether defendant negligently failed to furnish cars, and defendant, after its demurrer to complaint had been overruled, answered over and went to trial on merits of such issue upon proofs introduced without objection, which supplied any defects in complaint, error, if any, in court's ruling that complaint was sufficient was cured after verdict. St. Louis, etc., R. Co. v. Wynne, Hoop & Cooperage Co. [Ark.] 99 S. W. 375. Where defendant answered over and accepted issue on only ground on which complaint was demurrable, if at all, held that it could not contend on appeal that order overruling demurrer was erroneous. Choctaw, A. & G. R. Co. v. Doughty, 77 Ark. 1, 91 S. W. 768. Where, after overruling of demurrer to complaint on ground of absence of allegation of demand, defendant answered, not only traversing allegations of complaint but set up independent defense showing that demand would have been unavailing, and hence was unnecessary, held that it could not raise question of necessity of demand on appeal. Eau Claire Nat. Bank v. Jackman, 27 S. Ct. 391. Where defendant excepted to ruling sustaining demurrer to amended answer and striking out portions thereof, held not to have abandoned defenses so stricken or to have lost right to question ruling on appeal by filing "second amended original answer" omitting such defenses. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925.

90. Sidney Novelty Co. v. Hanlon [Conn.] 63 A. 727; Long v. Furnas, 130 Iowa, 504, 107 N. W. 432; Wells v. Dane, 101 Me. 67, 63 A. 324; Helm v. Lynchburg Trust & Sav. Bank [Va.] 56 S. E. 598; Hays v. Peavey [Wash.] 86 P. 170.

91. Objection that court has no jurisdiction of subject-matter is not waived, by answering to merits after demurrer on that

rule is ordinarily applicable to rulings on motions,[93] though there seems to be some conflict of authority in this regard;[94] but a party does not waive error in striking a part of a pleading and sustaining a demurrer thereto by going to trial on the pleading as thus modified.[95] Going to trial without objection and without asking leave to plead further or differently to an amended pleading is a waiver of the right to so plead.[96] The withdrawal or other express waiver of an objection [97] or the failure to procure a ruling thereon [98] precludes its being subsequently urged. Pleading to the merits ordinarily waives a previous demurrer.[99] A general appearance waives defective service of process.[1] The objection that no notice of motion for leave to amend was given,[2] that an amended pleading was not served on the opposite party,[3] and objections to the allowance of amendments,[4] cannot be first raised on appeal, nor can one object to the allowance of an amendment on the ground of surprise where he failed to ask for a continuance on that ground.[5] Misjoinder of causes of action may be cured by dismissal as to part of the defendants, and filing an amended complaint.[6]

ground has been overruled. Goodnough Mercantile Co. v. Galloway [Or.] 84 P. 1049.

92. Though defendant waived demurrer to complaint and interposed answer, held that he could subsequently move to be dismissed from the action on ground that complaint did not state a cause of action against him, where complaint was amended after demurrer was interposed. Hemrich Bros. Brewing Co. v. Kitsap County [Wash.] 88 P. 838.

93. Answering to merits held waiver of exception to overruling of motion to make complaint more definite and certain. McMillen v. Columbia [Mo. App.] 97 S. W. 953. Alleged error in overruling motions to strike, to make more definite and to elect. Dakan v. Chase & Son Mercantile Co., 197 Mo. 238, 94 S. W. 944. By answering over after overruling of motion to strike amended petition, defendant held to have waived departure. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. Refusal to strike parts of reply as departure held proper where defendant had waived departure by previously answering over after refusal to strike amended petition on that ground. Id.

94. In Federal courts where court erroneously struck out part of petition on motion and thereby deprived plaintiff of substantial part of his cause of action, error and exceptions thereto held not waived by filing amended petition omitting stricken allegations, pursuant to order permiting him to do so. Williamson v. Liverpool & London & Globe Ins. Co. [C. C. A.] 141 F. 54. Missouri rule to contrary held not binding on Federal courts in that state. Id.

95. Answer. Federal Iron & Brass Bed Co. v. Hock, 42 Wash. 668, 85 P. 418.

96. Of right to object on ground of want of opportunity to do so. Race v. Isaacson, 124 Ill. App. 196.

97. Failure of bill to quiet title to allege that complainant was owner of interest to which title was sought to be quieted held mere irregularity, which was waived by abandonment of demurrer raising such objection. Kendrick v. Colyar, 143 Ala. 597, 42 So. 110. Consenting that a demurrer may be overruled is equivalent to its withdrawal. Santa Rosa Bank v. Paxton [Cal.] 86 P. 193. Where demurrer challenging sufficiency of complaint has been filed and waived, complaint will be considered sufficient, 2 Bal. Ann. Codes & St. § 4911, authorizing such objection at any time, being inapplicable to such a case. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849. An objection to introduction of any evidence held that it was proper to refuse to consider sufficiency of complaint where a demurrer had been interposed on that ground and expressly waived. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849. Waiver of demurrer does not waive right to question sufficiency of facts proved and if they are no broader than complaint, question may be raised by motion to dismiss or for nonsuit. Id.

98. Where no ruling is had on demurrer, but parties go to trial on merits without calling court's attention thereto. Dessart v. Bonynge [Ariz.] 85 P. 723.

99. Denial of entire complaint held waiver of demurrer to one paragraph thereof previously filed. Jackson v. Savage [Conn.] 64 A. 737.

1. See, also, Appearance, 7 C. L. 251; Process, 6 C. L. 1078. Written offer to confess judgment held general appearance giving court jurisdiction over person of defendant. Kannow v. Farmers' Co-op. Shipping Ass'n [Neb.] 107 N. W. 563.

2. Where it does not appear that such objection was interposed when motion was made and heard, in open court in presence of counsel, and during hearing upon motion for new trial. Lellman v. Mills [Wyo.] 87 P. 985. Situation not changed by fact that motion was put in formal shape and filed after hearing, it not appearing that objection was made at time that motion was not in writing. Id.

3. Where evidence as to property first described therein was received without objection. Musselman v. Musselman [Cal. App.] 84 P. 217.

4. Where record showed that there was no opposition to amendment of complaint so as to change cause of action, and no exception taken, and no application for adjournment made. Devery v. Winton Motor Carriage Co., 49 Misc. 626, 97 N. Y. S. 392.

5. DeMoss v. Thomas, 118 Ill. App. 467. Though objects to its allowance when offered. Smith v. Michigan Lumber Co. [Wash.] 86 P. 652.

6. Knight v. Boring [Colo.] 87 P. 1078.

Misjoinder of causes and parties may be cured on appeal by setting aside a judgment in favor of the party improperly joined, and dismissing his action.[7]

§ 12. *Time and order of pleadings.*[8]—Pleadings must ordinarily be filed within the time fixed by statute[9] or the rules of court,[10] though the court may in its discretion allow a pleading to be filed out of time[11] or extend the time for pleading,[12] and the parties may extend the time by stipulation.[13]

7. Texas Mexican R. Co. v. Lewis [Tex. Civ. App.] 99 S. W. 577.

8. See 6 C. L. 1057.

9. Motion to strike demurers to both original and amended complaint filed on day of filing later as having been filed too late, held properly overruled. Bufford v. Chambers [Ala.] 42 So. 597. Rev. St. 1892, § 1031, requiring replications to be filed at rule day next succeeding that upon which the plea shall have been filed unless term of court intervenes, in which event issues, must be made up by first day thereof, does not inhibit plaintiff from filing replication at any time after plea is filed, and it may be filed on same day plea is filed if plaintiff so elects. Flournoy v. Munson Bros. Co. [Fla.] 41 So. 398. Where defendant, after demurring to petition at appearance term, died during such term and before time allowed for demurring had expired, held that his executor, who was made a party defendant in his stead at next succeeding term, succeeded to his rights as they existed at time of his death and, as testator had further time in which to demur, executor was entitled to like time for that purpose, and, where he immediately offered to amend demurrers, it was not error to allo whim to do so. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81. Under Prac. Act. § 17, plaintiff held to have had right to file declaration ten days before second term of court. Dismissal for want of prosecution held error. Wells v. Knuth, 122 Ill. App. 93. Act does not peremptorily require a dismissal for failure to file declaration ten days before second term, but gives defendant right to nonsuit which he may waive by pleading to declaration not filed in time and hence declaration not filed in time must be considered a part of the files and record and considered in determining whether suit is for same cause of action as a subsequent one. Donnelly v. Chicago City R. Co., 124 Ill. App. 18. Cross petition in action on purchase money note for land and to foreclose vendor's lien held not an amendment which could only be filed by permission of court but a supplementary pleading in nature of an interpleader rendered necessary to enforce indorser's rights to subrogation which could be filed in vacation. Matney v. Williams, 28 Ky. L. R. 494, 89 S. W. 678. Time within which to demur to pleading served by mail begins to run from date to mailing and not from date of receipt. People v. West Side Brotherly Love Benefit Soc., 99 N. Y. S. 206. Where summons and complaint are personally served, even without the state, under an order for service by publication, the attorney for defendant so served has no right, on appearing, to demand another copy of the complaint, but time for answering runs from date of such service. Kinley v. American Hardware Mfg. Co., 49 Misc. 334, 99 N. Y. S. 199. Plaintiff held not entitled to have motion for default on ground that defendant had failed to plead within time allowed by law, sustained, where motion was not made until ten days after appearance of defendant by filing motion to make complaint more definite which was sustained. Washington Dredging & Imp. Co. v. Cannel Coal Co. [Wash.] 88 P. 836. In action requiring an inquiry of damages as in assumpsit upon an account, a plea may be filed at the first term after office judgment or at any later term before the inquiry of damages is executed. Walls v. Zufall & Co. [W. Va.] 56 S. E. 179.

10. Rule twelve of practice in circuit and inferior courts of common-law jurisdiction prohibiting plea of abatement to be received, if objected to, unless filed within time allowed for pleading, has no application to plea which is in substance amendatory of former pleas filed in time, to which demurrers have been sustained with leave to amend. Abraham Bros. v. Southern R. Co. [Ala.] 42 So. 837.

11. Is discretionary to allow or reject additional pleas proposed to be filed after defendant has pleaded and time for pleading as prescribed by rules of practice has passed, and exercise of such discretion is not reviewable on appeal. Cahaba Southern Min. Co. v. Pratt [Ala.] 40 So. 943. Code 1896, § 3304, applies only to amendments to pleas to correct defects, and not to additional pleas. Id. Refusal to permit plaintiff, after issues were made up and case submitted to jury, to file demurrers to a plea held not reviewable. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71. Refusal to strike plea in abatement because not filed in time held not an abuse of discretion. Abraham Bros. v. Southern R. Co. [Ala.] 42 So. 837. Where plaintiff introduced evidence tending to rebut allegations of defendant's counterclaim as if they were denied, though he had filed no reply, held that it was within court's discretion to permit him to thereafter file a formal reply. Beekman Lumber Co. v. Kittrell [Ark.] 96 S. W. 988. Though rule 12 (Code 1896, p. 1197) requires pleas in abatement to be filed within time allowed for pleadings, and ordinarily such a plea should not be entertained at a subsequent term, held that, where corporation was sued jointly with an individual in county where latter resided, and hence under Code 1896, §§ 4205, 3271, question of venue was not open to it as long as individual remained a party, it should have been permitted to plead to jurisdiction where during trial plaintiff was allowed to amend by striking name of individual. Eagle Iron Co. v. Baugh [Ala.] 41 So. 663. Where complaint was amended by striking out name of individual defendant, held that corporation defendant should have been allowed to file plea in abatement to jurisdiction. Eagle Iron Co. v. Malone [Ala.] 42 So. 734. Allowing defendants to file answer and cross petition after evidence

§ 13. *Filing, service, and withdrawal.*[14]—Statutes in some states provide that no pleading shall be considered filed in the cause or taken from the clerk's office until a memorandum of the date of filing is made in the appearance docket.[15] Failure to docket the notice of motion for judgment in proceedings under the West Virginia statute is a mere irregularity, which is waived by failure to ask for a continuance.[16] Where two attorneys representing different plaintiffs sign a complaint service of the answer on either is sufficient.[17] In Louisiana a supplemental answer need not be notified to plaintiff otherwise than by its filing.[18] Where the judgment may determine the ultimate rights of two or more defendants as between themselves, a defendant desiring such a determination is sometimes required to demand it in its answer, and to serve a copy of such answer on the attorney of each of the defendants to be affected thereby.[19]

The court may permit copies of lost pleadings to be substituted therefor,[20] or direct the record thereof to be used in place of the original.[21]

had been taken and testimony closed held discretionary. Hall v. Kary [Iowa] 110 N. W. 930. Where no answer had been filed when case was reached for trial, held that court had discretionary power under Revisal 1905, § 512, to permit defendants to answer or demur instead of granting motion for judgment. Morgan v. Harris, 141 N. C. 358, 54 S. E. 381. Defendant held not entitled to judgment by default on his counterclaim, where formal denial was entered at next term by leave of court, allowance of such denial being discretionary under Revisal 1905, § 512. Tillinghast, Styles Co. v. Providence Cotton Mills [N. C.] 55 S. E. 621.

12. Under Kirby's Dig. §§ 6111, 6188, court is not required to render judgment by default against a defendant who fails to answer within time prescribed, but matter is discretionary, and it may grant further time upon just and reasonable terms. Ozark Ins. Co. v. Leatherwood [Ark.] 96 S. W. 374. Defendant filed demurrer and answer after expiration of time fixed by statute, and plaintiff moved to strike same from files on ground that they were filed too late and that action had been compromised. Court took evidence and ascertained that case had been settled for less sum than that claimed, and, upon defendant's refusal to pay that sum, struck its pleadings from files and rendered judgment against it for full amount claimed, with interest and costs. Held error, as court should have rendered judgment for plaintiff for amount of compromise on her remitting balance, or on her failure or refusal should have granted defendant privilege of pleading and maintaining its defenses. Id. Where defendant was given until next term to file answer, case was referred without objection on ground that no answer was filed, and plaintiff introduced his evidence before the referee, held that it was not reversible to admit defendant's evidence over objection, first made when it was offered, that no answer had been filed, it appearing that plaintiff knew nature of defenses which would be interposed, that he was furnished with list of credits claimed by defendants, and that no injustice resulted, etc. Bader v. Schult & Co., 118 Mo. App. 22, 94 S. W. 834. Where affidavit for extension of time to answer was defective in not complying with requirments of rule 24, held that provision extending defendants time to answer in order requiring nonresident plaintiff to furnish security for costs would be stricken out on motion. Kinley v. American Hardware Mfg. Co., 49 Misc. 334, 99 N. Y. S. 199.

13. Whether or not court had power by second extension to extend defendant's time to plead for more than thirty days, plaintiff was not entitled to have default entered on expiration of first extension, where extension granted by her written stipulation had not yet expired. Voorman v. Superior Ct. of San Francisco [Cal.] 86 P. 694. Effect of stipulation and whether defendants waived right to demur could not be considered on certiorari to review order denying motion to vacate second extension and giving defendants leave to demur forthwith. Id.

14. See 6 C. L. 1058.

15. Code § 291, mandatory, and court cannot consider pleading as filed in absence of such memorandum. Johnson v. Berdo [Iowa] 106 N. W. 609. Fact that cause was heard before referee is immaterial. Id.

16. Proceedings under Code 1899, c. 121, § 6. Anderson v. Prince [W. Va.] 55 S. E. 656.

17. Where three of the plaintiffs appeared by one attorney and fourth by another. Miller v. Philadelphia, 114 App. Div. 139, 99 N. Y. S. 618.

18. Fluker v. De Grange, 117 La. 331, 41 So. 591.

19. Code Civ. Proc. § 521. In suit to foreclose railroad mortgage, where one of the defendants did not serve copy of its answer on intervening defendants held that it was not entitled to determination of ownership of certain bonds as between itself and such intervenors. Knickerbocker Trust Co. v. Oneouta, etc., R. Co., 101 N .Y. S. 241. Service twenty days before trial actually comes on is in time, though case was previously set for earlier date and adjourned, and service was not made twenty days before it was placed on calendar. Muller v. Philadelphia, 114 App. Div. 139, 99 N. Y. S. 618.

20. Held proper exercise of discretion under Comp. Laws 1897, § 2685, subsec. 116. Lund v. Ozanne [N. M.] 84 P. 710.

21. Action of court in denying motion for continuance on ground that original pleadings had been lost, and had not been

A demurrer cannot be withdrawn without leave, whether leave shall be granted being within the discretion of the trial court.[22]

§ 14. *Issues made, proof, and variance.*[23]—No issue can be joined on an immaterial allegation in a pleading.[24] An issue made by the denial of irrelevant or redundant matter is immaterial.[25] A denial renders admissible only evidence of what the other party is bound to prove to sustain his allegations.[26] The denial of a conclusion of law raises no issue of fact.[27] Proof of a plea presenting an immaterial issue entitles defendant to the affirmative charge.[28]

The general issue and general denials.[29]—A general denial puts in issue all the allegations to which it is directed,[30] and renders admissible all evidence which directly tends to disprove any or all of them.[31] All dilatory defenses are waived by

substituted, and in ordering that record might be used in all respects as original, held proper under Code 1890, §§ 2644, 2645. Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024.

22. National Contr. Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92

23. See 6 C. L. 1058.

24. Residence of plaintiff being material to the jurisdiction and not to the cause of action, denial of allegation that plaintiff was a resident of the state held to raise no issue. Ubart v. Baltimore & O. R. Co., 102 N. Y. S. 1000.

25. If motion to strike irrelevant or redundant mater from complaint is denied, and such matter is controverted in answer (Brownell v. Salem Flouring Mills Co. [Or.] 87 P. 770), error committed in overruling motion to strike out irrelevant or redundant matter can be corrected by objecting and excepting to admission of evidence tending to establish issue raised by denial of such matter in answer, and also requesting instruction not to consider such evidence (Id.).

26. A mere denial of a claim based on written contract raises no issue under which evidence of custom or usage is admissible to show trade meaning of words used therein, but custom must be pleaded. Code, § 3615. Tubbs v. Mechanics' Ins. Co. [Iowa] 108 N. W. 324.

27. Schoonover v. Birnbaum, 148 Cal. 548, 83 P. 999.

28. But evidence must show without conflict the truth of the facts averred in the plea. Moss v. Mosley [Ala.] 41 So. 1012.

29. See 6 C. L. 1059. See, also, § 3, ante.

30. In action for negligence plea of not guilty puts in issue all material allegations of the complaint. Johnson v. Birmingham R. Light & Power Co. [Ala.] 43 So. 33. Plea of general issue in detinue is equivalent to plea of non detinet at common law and puts in issue plaintiff's right of recovery. Ryall v. Pearson Bros. [Ala.] 41 So. 673.

31. **Facts provable under general denial:** Any fact which goes to destroy and not to avoid plaintiff's cause of action, and facts independent of those averred in complaint, of a nature affirmative, but which have a negative effect upon the issues. Cheney v. Unroe [Ind.] 77 N. E. 1041. Proof that contract sued on was illegal as in violation of statute held admissible both on this ground and because invalidity was disclosed by plaintiff in endeavoring to establish a contract which he had right to recover, which he was bound to do because of such denial. Id. In action for wrongful death where defendant alleged that deceased intentionally placed herself on railroad track for purpose of being run over, held that plaintiff could show that deceased was subject to attacks of pleurisy which at times rendered her helpless. Elec. R. Light & Ice Co. v. Brickell [Kan.] 85 P. 297. In action of assumpsit on promissory note, want or failure of consideration. Clark v. Holway, 101 Me. 391, 64 A. 642. In replevin action, fraud in purchase of goods by plaintiff. Rusho v. Richardson [Neb.] 109 N. W. 394. In action for negligence, intoxication as constituting contributory negligence. Sharpton v. Augusta & A. R. Co., 72 S. C. 162, 51 S. E. 553. Statute of frauds, but defendant is still obligated to make his defense good by objecting to parol evidence offered to prove contract. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Defense of statute not interposed by request for peremptory instruction not stating for what reason it was asked. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. In action by stockholder for benefit of corporation to recover money appropriated by treasurer for salary under void resolution, where petition alleged that amount fixed by resolution was excessive and that services were not worth more than certain sum, held that defendant could show that such salary was reasonable, and also the reasonable value of his services. Greathouse v. Martin [Tex.] 16 Tex. Ct. Rep. 89, 94 S. W. 322.

Evidence held admissible: In detinue, evidence negativing defendant's wrongful possession or plaintiff's right to immediate possession. Snellgrove v. Evans [Ala.] 40 So. 567. In action to subject certain lot to judgment on ground that it had been conveyed in fraud of creditors, that funds for purchase of lot and making improvements thereon were furnished by person in whose name it stood. Veerkamp v. Goodrich [Colo.] 86 P. 1017. In action of assumpsit evidence tending to show that plaintiff assented to abandonment and repudiation of contract sued on. McKinna v. McKinna, 118 Ill. App. 240. In action for damages for personal injuries, evidence as to plaintiff's belief in Christian Science offered for purpose of showing her insensibility to suffering. Ft. Worth & D. C. R. Co. v. Travis [Tex. Civ. App.] 99 S. . 1141.

Facts not provable under general denial: Justification, in action for false imprison-

pleading the general issue.[32] A general denial raises no issue when followed by a special plea of confession and avoidance,[33] though there seems to be some conflict of authority in this regard.[34] Special pleas setting up matter provable under the general denial are properly stricken.[35] General denials place upon plaintiff the burden of proving all material allegations of the complaint by competent evidence.[36]

Special issues and special denials.[37]—As a general rule matters which lie in affirmative proof because of presumptions of law to the contrary, such as contributory negligence,[38] waiver,[39] estoppel,[40] payment,[41] fraud,[42] and the like, must be

ment. Gambill v. Fuqua [Ala.] 42 So. 735. General settlement cannot be impeached for errors occuring through fraud or mistake, but those matters must be distinctly alleged. Johnson v. Berdo [Iowa] 106 N. W. 609. Where answer did not specify consideration for written contract pleaded as defense, law implied one, and issue of no consideration was not raised where defense was only controverted by general denial in reply. Avery Mfg. Co. v. Lambertson [Kan.] 86 P. 456. Issue as to fraud in giving chattel mortgage. Rice-Stix Dry Goods Co. v. Sally, 198 Mo. 682, 96 S. W. 1030. In action for injuries to pedestrian by failing over defendant's cellar door in street, defendant held not entitled to raise question of municipal permission. Blake v. Meyer, 110 App. Div. 645, 97 N. Y. S. 424. In action against street railway for injuries to bicycle rider due to spreading of slot in street, held that defendant could show that it was not responsible for spreading. Griffin v. Interurban St. Ry. Co., 46 Misc. 328, 94 N. Y. S. 854. Contributory negligence. Goodloe v. Metropolitan St. R. Co., 120 Mo. App. 194, 96 S. W. 482. Where answer in action for negligence was general denial only, held that plaintiff's contributory negligence was no defense unless his evidence so clearly showed it as to justify court in denying him a recovery. Fechley v. Springfield Traction Co., 119 Mo. App. 358, 96 S. W. 421. Under circuit court rule 71 providing that, in actions for torts, plea of not guilty shall operate as denial of breach of duty or wrongful act alleged to have been committed by defendant, and not of facts stated in the inducement, that no other defense than such denial is admissible under that plea, and that all other pleas in denial shall take issue on some particular matter of fact alleged in declaration, and rule 72 requiring matters in confession and avoidance to be pleaded specially contributory negligence must be specially pleaded. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Does not put in issue either the character in which plaintiff sues or the character or capacity in which defendant is sued. Pennsylvania Co. v. Chapman, 220 Ill. 428, 77 N. E. 248. In action against railroad for injuries to employe, defendant, by filing only general issue, held to have impliedly conceded that it was operating particular line of road mentioned in declaration, and that operators in charge of trains were its servants and employes. Id. Pleaded. Leonard v. American Steel & Wire Co. [Kan.] 84 P. 653. Defense that foreign corporation has not been granted authority to carry on business in state must be specially pleaded. Allegation that person by whom plaintiff prosecuted action had been appointed her next friend "by order of the court" held not put in issue, special denial being necessary as allegation meant that appointment was matter of record in court where case was pending. Wegenschiede v. St. Louis Transit Co., 118 Mo. App. 295, 94 S. W. 774. Does not put in issue those facts raised only by plea in abatement, such as capacity in which plaintiff sues. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Under Rev. St. 1899, §§ 598, 599, 602, where plaintiff assumes to sue in representative capacity, that capacity must be raised by special denial where facts to constitute capacity are sufficiently stated, or by special demurrer if they are not. Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856.

Evidence held inadmissible: In suit for damages for breach of executory contract for sale of personalty, evidence of subsequent amendment of contract by mutual assent. Hager v. Donovan [Kan.] 88 P. 637. In action for rent, evidence of eviction or of an accord and satisfaction, plaintiffs not being called upon to prove contrary as part of their cause of action. Schwartz v. Ribaudo, 101 N. Y. S. 699.

32. All matters merely in suspension or abatement of the action, as a failure to submit amount of loss under fire insurance policy to arbitration. Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35.

33. Cannot both traverse and at same time confess and avoid same allegation at common law or under Code. State v. Delmar Jockey Club [Mo.] 98 S. W. 539.

34. Where in action on bond surety interposed general denial and special plea admitting execution of bond, held that such admission in no wise limited scope and effect of general denial, and could not be considered support of averments of petition. Pope v. American Surety Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 50, 93 S. W. 480.

35. Walls v. Zufall & Co. [W. Va.] 56 S. E. 179.

36. Littler v. Robinson [Ind. App.] 77 N. E. 1145.

37. See 6 C. L. 1060. See, also, § 3, ante.

38. See Negligence, 6 C. L. 748.

39. See Election and Waiver, 7 C. L. 1222; Contracts, 7 C. L. 761. Permitting plaintiff in action on insurance policy to prove waiver under an allegation of performance, though an exception to the general rule in actions on contracts, does not deprive defendant of its property without due process of law, or deny it the equal protection of the laws. Suess v. Imperial Life Ins. Co., 193 Mo. 564, 91 S. W. 1041. At common law waiver held not provable under special count on contract as written. Schaeffer Piano Mfg. Co. v. National Fire Exting. Co. [C. C. A.] 148 F. 159.

40. See Estoppel, 7 C. L. 1489. An estoppel in pais need not be pleaded. Fact that

specially pleaded. In some states special pleas have been done away with, and the defendant is instead required to file a brief statement of special matters of defense where a special plea would otherwise be required,[43] in which the facts relied on and necessary for the defense must be set out with certainty to a common intent.[44]

Proof and variance.[45]—Since a party must recover, if at all, on the cause of action set up in his pleadings, his allegations and proofs must substantially correspond.[46] Where the deficiency of evidence is as to the entire scope of the pleading,

plaintiff in action on fire insurance policy pleaded in terms a waiver instead of an estoppel held immaterial. Bernhard v. Rochester German Ins. Co. [Conn.] 65 A. 134.

41. See Payment and Tender, 6 C. L. 987.

42. See Fraud and Undue Influence, 7 C. L. 1813. Where defendant presented accord and satisfaction as a defense, held that plaintiff was properly allowed to show that fraud vitiated settlement though he had not pleaded it, since he could not be presumed to have known that a defense would be interposed. Whitehead v. Trussed Concrete Steel Co., 101 N. Y. S. 250.

43. Clark v. Holway, 101 Me. 391, 64 A. 642. In action of assumpsit upon promissory note, brief statement is not necessary in order to set up failure of consideration, since it may be taken advantage of under general issue. Id.

44. Clark v. Holway, 101 Me. 391, 64 A. 642. Statement held sufficient to give plaintiff notice of defense of failure of consideration as well as of facts relied on as constituting it, regardless of what defense may have been called therein. Id. If facts stated and admitted or found constituted failure of consideration, held that judgment was properly ordered for defendant on that ground, though defense was not set up by that name in brief statement or elsewhere. Id.

45. See 6 C. L. 1060.

46. Mott v. Scott [Colo.] 83 P. 779. To support plea in equity, all its averments must be established as made. Shiff v. Andress [Ala.] 40 So. 824. Clear variance in material particular is ground for reversal when pointed out in apt time at close of plaintiff's evidence. Chicago Union Traction Co. v. Rosenthal, 118 Ill. App. 278. Must recover on some definite theory shown by complaint, and cannot proceed upon one theory and recover upon a substantially different one. Cool v. McDill [Ind. App.] 78 N. E. 679. In suit on promissory note or other chose in action, the specific title alleged must be proved as laid. Digan v. Mandel [Ind.] 79 N. E. 899. Proof offered should tend to support issues made by pleadings. Shacklett v. Henderson County Sav. Bank [Ky.] 100 S. W. 241. Cannot recover on cause of action not alleged, and destructive of his judicial allegations and evidence. Lazarus v. Friedrichs, 117 La. 711, 42 So. 230. Cannot plead one cause of action and recover upon another is seasonable objection is made and no amendment of the complaint is asked for or allowed. Stern v. Mayer, 113 App. Div. 181, 98 N. Y. S. 1028. Facts proven but not alleged cannot form the basis of a recovery. Smith v. First Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111. Where there was a material variance between plaintiff's pleadings and proof, held improper to render judgment for plaintiff after properly denying leave to amend. Genger v. Westphal, 128 Wis. 426, 107 N. W. 330. Rule that, in action on special contract, plaintiff can recover only on contract pleaded does not prevent one, for whom money has been collected by an agent pursuant to some contract, from recovering same in action for money had and received merely because he misstates contract authorizing defendant to collect, particulars of contract not being of the essence of the case. Crigler v. Duncan [Mo. App.] 99 S. W. 61.

No variance: Between allegation that trespass sued for was to a boom in a certain creek, and proof that boom was a cross end of a lake which was an inlet forming a part of said creek. Syson Timber Co. v. Dickens [Ala.] 40 So. 753. Affirmative charge based on ground that averment that car was wrecked was not proved held properly refused, where no negligence was alleged with respect to wreck, nor any of plaintiff's injuries attributed to it. Birmingham R., Light & Power Co. v. Moore [Ala.] 42 So. 1024. Between allegation of contract between plaintiff and defendant, and contract offered in evidence which was signed by them and also by a third person, where later was not a party thereto because he did not agree to do anything. Hlass v. Fulford, 77 Ark. 603, 92 S. W. 862. Between allegation that it was necessary for deceased miner to approach shaft in order to get on cage which was being lowered to raise him to surface, and proof that he approached shaft for purpose of leaning against guard rail while waiting for cage. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. Consideration as alleged held substantially same as that recited in contract sued on. McKenna v. McKenna, 118 Ill. App. 240. Writing admitted in evidence held not contract sued on or contract at all, and not to have been admitted as such, or as tending to prove a contract, but merely to prove performance of alleged contract, so that there was no basis for claim of variance. Hughes v. Ferriman, 119 Ill. App. 169. Between allegation that bones of plaintiff's body were broken and proof that it was bones of legs and arms. Elgin, Aurora & Southern Traction Co. v. Wilson, 120 Ill. App. 371. In action for libel, between allegations and proof as to libelous article. Ball v. The Tribune Co., 123 Ill. App. 235. Under averment of ownership in partition, either legal or equitable title may be proved. Shetterly v. Axt [Ind. App.] 77 N. E. 865. Between allegations and proof as to manner in which accident occurred. Pittsburg, etc., R. Co. v. Cozatt [Ind. App.] 79 N. E. 534. Contract between grantor and grantee of land for construction of building thereon held not foundation of cause of action for purchase price of material furnished by third person for such construction but merely evidence

going to support it, so that discrepancies between said contract and allegations as to its terms in petition were immaterial. Kansas City Hydraulic Press Brick Co. v. Pratt, 114 Mo. App. 643, 93 S. W. 300. Allegation of order given plaintiff to do a certain act held supported by proof that order was given to plaintiff and another without specifying which of them should do it, so that instruction on latter theory was not at variance with the petition. Cessna v. Metropolitan St. R. Co., 118 Mo. App. 659, 95 S. W. 277. Partial failure of consideration may be shown under allegation of total failure. Rev. St. 1899, § 645, construed. National Tube Works Co. v. Ring Refrigerating & Ice Mach. Co. [Mo.] 98 S. W. 620. Where petition charged that floor of car was rotten, worn, loose, and unfit for use, held that plaintiff was not confined to proof of rottenness, but could show that it was loose, etc. Jorden v. St. Louis & M. R. Co. [Mo. App.] 99 S. W. 492. Between allegation that floor of car was unfit for use and proof that injury was caused by giving away a trap door therein, door being part of floor. Id. In an action for damages for injury to a passenger in a street car caused by a collision between the car and a wagon, an averment in the petition that the motorman negligently, carelessly, and unskillfully permitted his car to run into the wagon is sufficiently broad to render competent testimony to the effect that the motorman was intoxicated five hours before the accident occurred. Cincinnati Traction Co. v. Baron, 3 Ohio N. P. (N. S.) 633. Both counts held to state causes of action against railroad for negligence under statute requiring whistle to be sounded and every possible means to be employed to stop when any object is seen on track, so that it was error to charge on common law exception so far as it was included in statute. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. Where complaint alleged title to land in plaintiff's by regular claim from sovereignty, and also a limitation title, held that they could show either title or both. Alford Bros. & Whiteside v. Williams [Tex. Civ. App.] 14 Tex. Ct. Rep. 778, 91 S. W. 636. Between allegation that there was no time specified in contract within which work was to be completed, and proof that it was to be done as quickly as possible. Jefferson & N. W. R. Co. v. Dreeson [Tex. Civ. App.] 96 S. W. 63. In trespass to try title by a "railroad" company, held that evidence that a "railway" company, whose name was otherwise the same as plaintiff's, to whom certain defendants had given written acknowledgments of title which were in evidence, was the plaintiff, held admissible without specially pleading misnomer. Texas, etc., R. Co. v. Haynes [Tex. Civ. App.] 17 Tex. Ct. Rep. 422, 97 S. W. 849. Petition construed to allege that contract sued on was that of each of the defendants, and not of both jointly, so that it was sufficient to sustain judgment against one alone, particularly as case was tried on that theory. McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 518, 98 S. W. 943. In action to rescind contract of sale and recover part payment, where plaintiff alleged and proved facts sufficient to entitle her to recover against one of the defendants, fact that she failed to prove allegations that he was agent of other defendant and made false representations on his behalf did not constitute variance. Freeman v. Gloyd [Wash.] 86 P. 1051. Where person giving notice of motion for judgment on note under Code 1899, c. 121, § 6, correctly describes himself therein as payee thereof, word "assignee" added to his signature to notice may be ignored as mere description of the person, not of the note, and will not sustain exception on ground of variance. Anderson v. Prince [W. Va.] 55 S. E. 656. In action for negligence liability held predicated in suddenly and violently starting train while plaintiff was alighting so that there was no variance between allegation that train was violently jerked after it had stopped and proof that it was violently jerked in stopping. Hopkins v. Chicago, etc., R. Co., 128 Wis. 403, 107 N. W. 330.

Fatal variance: Between allegation describing judgment sued on, rendered on a certain date and proof of judgment rendered on different date. Fulenwider v. Ridgway [Ala.] 41 So. 846. In action for breach of marriage promise between allegation of promise to marry on request, and proof of promise to marry after death of plaintiff's mother which had not yet occurred. Bailey v. Brown [Cal. App.] 88 P. 518. Between answer and defendants' evidence in action to recover mining property. Larsh v. Boyle [Colo.] 86 P. 1000. Plea based on one statute of limitations will not admit the defense of another. Connell v. Clifford [Colo.] 88 P. 850. Where complaint in action for damages resulting from wrongfully turning cattle on land alleged that plaintiff owned the land, held that he could not recover on proof that his only right of action was based on assignment to him of claim of lessee of part of premises. Mott v. Scott [Colo.] 83 P. 779. Where petition alleged a cause of action for the recovery of value of house built by plaintiff on defendant's land while in possession under contract of sale which was subsequently breached by defendant, held that he could not recover on proof that he made improvements while in possession as a renter. Burdette v. Crawford, 125 Ga. 577, 54 S. E. 677. Between allegations of bill to set aside deed and for an accounting that defendant promised to purchase indebtedness secured by trust deed and permit plaintiff to pay him when he became able, and proof that defendant promised to bid in land at foreclosure sale and permit plaintiff to get it back when he got ready. Pankau v. Morrissey, 224 Ill. 177, 79 N. E. 643. Between allegation that deceased attempted to get on elevator when it was stopped, and proof that he attempted to get on when it was moving. Rothschild & Co. v. Levy, 118 Ill. App. 78. In action against trustees of church, allegations that contract sued on was executed by three persons appointed as a committee for that purpose by trustees held not supported by proof that contract was ratified by trustees after it was executed, there being no proof of prior authority and contract purporting to be individual undertaking of signers. Ashley v Henderson [Ind.] 76 N. E. 985. In action on benefit certificate between allegations in answer of a ruling of clerks of local camp refusing an assessment on certain grounds, and that no appeal was taken as provided by by-laws, and proof of decision or ruling by local camp refusing to receive assessments

for different reasons. Taylor v. Modern Woodmen, 72 Kan. 443, 86 P. 1099. Between allegation that delay in transportation was due to negligence of defendant, the initial carrier and proof that it was due to negligence of connecting carrier. Ingwersen v. St. Louis & H. R. Co., 116 Mo. App. 139, 92 S. W. 357. In action against carrier for delay in transportation of livestock, where petition founded cause of action solely on defendant's negligence, held that he could not recover for breach of contract to furnish cars at specified time. Ficklin v. Wabash R. Co., 117 Mo. App. 211, 93 S. W. 861. In action on express contract alleged to have been performed by plaintiff, cannot be a recovery on quantum meruit. Wade v. Nelson, 119 Mo. App. 278, 95 S. W. 956. Where complaint in action against director of corporation to charge him with a debt of the corporation, under Laws 1892, p. 1832, c. 688, § 30, for failure to file annual report was framed upon theory that debt arose by reason of breach of contract, held that it was error to permit recovery, without amendment and over proper objection, on theory that debt was one in assumpsit arising on rescission of such contract. Hill v. Weidinger, 110 App. Div. 683, 97 N. Y. S. 473. Where complaint alleged sale and delivery of coal by plaintiffs, held that they were not entitled to recover on proof of delivery under contract made by a firm of same name of which they were the successors. Piper v. Seager, 111 App. Div. 113, 97 N. Y. S. 634. Trustee in bankruptcy suing to recover property transferred to a creditor by the bankrupt on theory that transfer was voidable preference under bankruptcy act held not entitled to recover on proof that creditor purchased property and later refused to pay for it but said that he would keep it and apply it on debt. Stern v. Mayer, 113 App. Div. 181, 98 N. Y. S. 1028. Where a plaintiff pleads right alleged to be vested in himself, and proof disclosed right vested jointly in himself and another who is not a party to the action, suit falls and should be dismissed. Aetna Life Ins. Co. v. Penn. 6 Ohio N. P. (N. S.) 97. In action against railroad for killing stock, allegation of failure to fence held not supported by proof that gate in fence actually constructed was negligently left open. High v. Southern Pac. Co. [Or.] 88 P. 961. Plaintiff having proved entirely different contract from that declared on held not entitled to recover without an amendment. Friedman v. Urmann, 28 Pa. Super Ct. 440. In action by broker to recover commissions between allegations that owner of land sold it to purchaser procured by plaintiffs and proof that he exchanged it for other land. Steere v. Gingery [S. D.] 110 N. W. 774. Is error to instruct jury to find for plaintiff upon issue not made by his pleadings, and thus error, though not assigned, is so fundamental as to require court to act on it. San Antonio Traction Co. v. Yost [Tex. Civ. App.] 13 Tex. Ct. Rep. 575, 88 S. W. 428. In a suit for damages to crops by water accumulated by defendant's road-bed plaintiff cannot show an assignment of the right of action in a third person to an undivided interest where he alleged that he was the owner of all. St. Louis Southerwestern R. Co. v. Jenkins [Tex. Civ. App.] 14 Tex. Ct. Rep. 77, 89 S. W. 1106. Permitting parties who have based cross-action solely on verbal contract to recover on written contracts never declared on, but claimed throughout by pleadings to be absolutely void, is fatal to judgment. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400. Where only ground alleged for setting aside judgment claims against decedent's estate was that they were barred by limitations, held that judgment allowing claims for half their amount, on ground that claimant and decedent were cosureties on notes which had been paid in full by former, was erroneous. Swart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. Instruction held erroneous as authorizing recovery for injury occurring in different manner than that alleged. Texas, etc., R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. Where petition alleged that appeals had become damaged at arrival at destination, held that damages arising after that time could not be recovered. Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751. Where defendant denied that contract sued on was made at all, and did not allege that if made it was breached by failure to perform within time agreed upon, held that he could not take advantage of such breach, there being no issue as to whether work was to be performed within specified time. Jefferson & N. W. R. Co. v. Dreeson [Tex. Civ. App.] 96 S. W. 63. Allegations of answer that plaintiffs wrongfully, forcibly, and without defendant's consent, entered upon premises and took possession of crop and damaged same by reckless and careless manner in which they gathered it, held not to authorize recovery on evidence showing that they took possession of crop and undertook to gather it with defendant's consent, but, by negligent method of gathering it, defendant was damaged, cause of action alleged growing out of tort, and that proven from negligent performance of contract. McFaddin v. Sims [Tex. Civ. App.] 16 Tex. Ct. Rep. 757, 97 S. W. 335. One sued as administrator in action at law on note for debt claimed to be due from estate cannot be held as an individual upon cause of action in equity, on ground of constructive trust or estoppel, since two causes of action could not be joined and hence one cannot be turned into the other. Tyler v. Stitt, 127 Wis. 379, 106 N. W. 114.

Action by or against several jointly: In action against several defendants as joint tort-feasors, failure to prove joint liability is failure to prove cause of action alleged. Livesay v. First Nat. Bank [Colo.] 86 P. 102. In action against two defendants jointly for attorney's fees, held that plaintiff could only recover on joint cause of action binding both. Dussoulas v. Thomas [Del.] 65 A. 590. Where joint action at law, not involving any equitable proceeding, is brought by several plaintiffs to recover land, and there is no prayer for a several recovery, it can only be sustained by proof showing a joint right of recovery in all of the plaintiffs. Glore v. Scroggins, 124 Ga. 922, 53 S. E. 690. Where petition alleged that note was executed by partnership and sought recovery thereon against firm, and plaintiff was allowed to discontinue as to one of the partners, held that judgment could not be rendered against other individually where no proof was offered except note purporting to be executed by firm. King v. Monitor Drill Co. [Tex.

and not merely to some particular part therof, there is a failure of proof.[47] The parties may enlarge the issues by mutually trying out issues of fact not involved in the pleadings.[48]

Matters laid under a videlicit need not be proved as alleged.[49] A failure to prove all that is charged does not preclude a recovery provided a cause of action is made out.[50] Immaterial allegations,[51] and allegations amounting to mere conclusions of law [52] need not be proved.

Civ. App.] 15 Tex. Ct. Rep. 315, 92 S. W. 1046. Where complaint in trespass charged several defendants jointly, held that fact that they filed joint answer did not prevent them from taking advantage of fact that joint liability was not established by evidence. Mau v. Stoner [Wyo.] 87 P. 434.

Particular facts descriptive of transaction: Where plaintiff avers particular facts descriptive of the transaction upon which he bases his action, he must prove them as laid, even though it is not necessary for him to aver such particular description, and this rule prevails not only in actions ex contractu but also in actions ex delicto where gist of action is negligent performance of a contract. Faulkner v. Birch, 120 Ill. App. 281. When petition charges negligence specifically, the acts constituting it, or some of them, must be proven, or verdict for plaintiff cannot stand, even though petition is founded on relation of carrier and passenger. Van Horn v. St. Louis Transit Co., 198 Mo. 481, 95 S. W. 326. In action against railroad for damages from fire evidence held not to sustain only allegation of negligence. McCoy v. Carolina Cent. R. Co., 142 N. C. 383, 55 S. E. 270. Where plaintiff in action for personal injuries undertakes to specify his injuries, he cannot recover for any not so specified. Southwestern Tel. & T. Co. v. Tucker [Tex. Civ. App.] 17 Tex. Ct. Rep. 598, 98 S. W. 909. Damages for delay and hinderance in completing building which plaintiff had contracted to complete within a specified time held part of general damage which law presumes from wrongful levying upon and carrying away of bricks being used by him in erection of such building, so that clause in declaration alleging such damage could be rejected as surplusage, and plaintiff's right of recovery was not confined thereto. Malnati v. Thomas, 26 App. D. C. 277. In action by passenger against railroad for assault and battery by one of its employes, where plaintiff, instead of alleging generally that at time of assault he was a passenger, particularly stated the termini of his journey, and evidence showed that neither terminus was correctly described, held that variance required a reversal, where it was pointed out in apt time and plaintiff failed to amend. Lake Street El. R. Co. v. Collins, 118 Ill. App. 270.

47. Variances held not such as to constitute a failure of proof under Code Civ. Proc. § 471, even though they actually misled defendant to her prejudice, so that full and adequate remedy could have been afforded by amendment of complaint on terms under § 469. Pollitz v. Wickersham [Cal.] 88 P. 911. Where complaint in trespass charged joint liability, held that plaintiff could not recover on proof of several separate and independent wrongs on the part of the several defendants. Mau v. Stoner [Wyo.] 87 P. 434. When timely objection is made at trial, judgment cannot be sustained on appeal if cause of action alleged is improved in its entire scope and meaning. Code Civ. Proc. § 541. Rosenfeld v. Central Vermont R. Co., 111 App. Div. 371, 97 N. Y. S. 905. Where complaint in action against carrier for failure to deliver goods alleged express contract made by defendant as initial carrier, but evidence showed their receipt by defendant as connecting carrier only, held that there was failure of proof, and judgment based on its common-law liability in that capacity could not stand. Rosenfeld v. Central Vermont R. Co., 111 App. Div. 371, 97 N. Y. S. 905.

48. Nonsuit held proper though defense of assumption of risk was not properly pleaded, where case was tried upon that theory of the defense, and plaintiff's evidence showed that she had no case. Coulter v. Union Laundry Co. [Mont.] 87 P. 973. Where parties contest question of fact by examining and cross-examining witnesses with reference thereto without objection by either, neither can contend that finding with reference thereto is without the issues. Avery Mfg. Co. v. Lambertson [Kan.] 86 P. 456.

49. Date of injury. Chicago Terminal Transfer R. Co. v. Young, 118 Ill. App. 226.

50. In actions ex delicto it is not necessary for plaintiff to prove all the material allegations of his declaration, but he may recover if he proves enough of them to make out a cause of action. No variance in action for negligence. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136, afg. 124 Ill. App. 459. Is sufficient if testimony sustains all material allegations of statement of claim, and proof and allegations do not contradict each other or differ, fact that every detail of negligence alleged is not proven being immaterial. Williams v. Meadville & Cambridge Springs Street R. Co., 31 Pa. Super. Ct. 580. Where complaint contains statement of facts constituting cause of action upon a contract which is sustained by proof, recovery is authorized though it also contains allegations of a tort not proved, latter being regarded as surplusage. Connor v. Philo, 102 N. Y. S. 427.

51. Strange v. Bodcaw Lumber Co. [Ark.] 96 S. W. 152. Whether there was any evidence to support allegations treated as surplusage is immaterial. Hobbs v. Eaton [Ind. App.] 78 N. E. 333. Where evidence showed that defendant was guilty of negligence charged no matter to whom pole on which plaintiff was injured belonged, and without regard to whether negligence of another company contributed to injury, or whether such other company knew that it was stringing poles, allegations as to existence of such facts were not essential to plaintiff's cause of action against defendant and hence it was unnecessary to prove them and immaterial if evidence disproved them. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136, afg. 124 Ill. App. 459.

52. See, also, § 1, ante. In action for

Immaterial variances will be wholly disregarded.[53] By statute in some states no variance is to be deemed material unless it has actually misled the other party to his prejudice in maintaining his action or defense upon the merits.[54]

The question of a variance between the praecipe, summons, and declaration, can only be raised by motion to dismiss or plea in abatement, and not by demurrer.[55] A variance is waived by failure to object on that ground at the trial[56] though the contrary has been held in regard to a so called fatal variance.[57]

death by wrongful act in another state, plaintiff held not required to prove allegation of complaint that courts of such state would in such case hold plaintiff entitled to recover, following allegations as to law of such state. St. Louis, etc., R. Co. v. Johnson [Kan.] 86 P. 156.

53. Variance held immaterial: In action against railroad for injuries to mare, failure to prove exact date of injury laid in complaint. Southern R. Co. v. Taylor [Ala.] 42 So. 625. As to means whereby title was acquired, where ultimate fact in issue was title to certain stock. Oligarchy Ditch Co. v. Farm Inv. Co. [Colo.] 88 P. 443. Between allegation that plaintiff was indebted to defendant in certain sum, the balance due upon two notes, and proof that he was in fact so indebted upon one note, particularly where averments remained unchallenged through three trials. Mills v. Larrance, 120 Ill. App. 83. Between allegation that cause of injury was defective coupling on car which plaintiff was endeavoring to set out on stub track, and proof that defective coupling was on next car to it. Chicago & E. I. R. Co. v. Snedaker, 122 Ill. App. 262. Between allegation that hand car which frightened horses was negligently left on crossing and proof that it was left on margin of way. Merely technical, and to be treated as though obviated by amendment. Baltimore & O. S. W. R. Co. v. Slaughter [Ind.] 79 N. E. 186. Between allegation that car had stopped and proof that it still had barely perceptible motion. Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401. Allegation in action for personal injuries that car had stopped held matter of inducement only, negligence charged being in starting it, so that it was immaterial that proof showed that it still had barely perceptible motion. Forrester v. Metropolitan St. R. Co., 116 Mo. App. 37, 91 S. W. 401. Between allegation that draft was payable to plaintiff bank and proof that it was payable to "P. cashier," where evidence showed that P. was plaintiff's cashier and took draft as its agent. State Bank v. American Hardwood Lumber Co. [Mo. App.] 98 S. W. 786. If material allegation of complaint is not established in the exact detail of the charge, but is as to the substance thereof. Hodge v. Smith [Wis.] 110 N. W. 192. Fact that defense as pleaded alleges six years' limitation, while statute relied on fixes it at three years. Ramsden v. Gately, 142 F. 912.

54. Code Civ. Proc. §§ 138, 139, 144, relative to variances and amendments are applicable to trials de novo in supreme court on appeal in suit in equity. Lichty v. Beale [Neb.] 106 N. W. 1018.

Variance held immaterial: Objection to sufficiency of complaint to entitle plaintiffs to recover certain damages held mere question of variance which court was authorized to disregard under Code Civ. Proc. § 469. Crocker v. Garland [Cal. App.] 87 P. 209. In suit to foreclose mechanic's lien, between allegation that value of materials furnished was $132 on which nothing had been paid, and proof that value was $212, of which $80 had been paid. Star Mill & Lumber Co. v. Porter [Cal. App.] 88 P. 497. Between allegation that injuries were due to defect in barge and proof that plaintiff was injured on a boat, in view of Burns' Ann. St. 1901, § 394. Monongahela River Consol. Coal & Coke Co. v. Hardsaw [Ind. App.] 79 N. E. 1062. In view of Code Civ. Proc. § 770 and § 778, providing that errors, etc., not affecting substantial rights of parties shall be disregarded, between allegation that train killed bull and proof that it was fatally injured and was killed to end its suffering. Poindexter & Orr Live Stock Co. v. Oregon Short Line R. Co., 33 Mont. 338, 83 P. 886. Between allegations of complaint in action to recover commissions that defendant delivered five hundred bales of hops to plaintiff to sell and proof of delivery of a less number. Horst v. Lovdal, 113 App. Div. 277, 98 N. Y. S. 996. Rev. Codes 1899, § 5293. Between allegation that defendants guarantied actual value of certain stock, and finding, based on evidence received without objection, that they guarantied its value when estimated in particular way agreed upon, question as to what contract was having been fully litigated. Robertson v. Moses [N. D.] 108 N. W. 788.

55. Wabash R. Co. v. Barrett, 117 Ill. App. 315.

56. Objection must be made in trial court when evidence is offered, as supposed variance must be pointed out. City of Aurora v. Plummer, 122 Ill. App. 143; Chicago & E. I. R. Co. v. Snedaker, 122 Ill. App. 262; Landt v. McCullough, 121 Ill. App. 328. Is waived otherwise. Preiss v. Zitt [C. C. A.] 148 F. 617; Buffalo Coal Creek Min. Co. v. Troendle [Ky.] 99 S. W. 622. Objection that evidence introduced by plaintiff in ejectment did not correspond to abstract of title furnished to defendant pursuant to Code 1896, § 1531. Henry v. Frohlichstein [Ala.] 43 So. 126. Where only objection to introduction of evidence was a general one, variance was waived, and court was not bound to entertain subsequent motion to strike evidence, the matter being discretionary. Faulkner v. Birch, 120 Ill. App. 281. Cannot be first raised on appeal. Ingwersen v. St. Louis & H. R. Co., 116 Mo. App. 139, 92 S. W. 357; Alton Light & Traction Co. v. Oller, 119 Ill. App. 181. Variance between allegation that plaintiff was employed to teach until May 1, and proof that he was employed until May 31, mistake being clearly a clerical one, case being treated by both parties and court as though latter date had been alleged, and there being no objection to evidence. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107 Where evidence is admitted

Admissions in pleadings or by failure to plead.[58]—A party is bound by statements and admissions in his pleadings.[59] Allegations of a pleading which are ad-

without objection, question cannot be raised upon an instruction. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Waived where no objection was made to admissibility of evidence, and no motion to exclude it on account of supposed variance, in view of Code 1904, § 3384. Newport News & O. P. R. & Elec. Co. v. McCormick [Va.] 56 S. E. 281. Objection that waiver of provisions of contract as to delivery and consent to later delivery on which finding for plaintiff was based was not pleaded held not available after verdict and judgment in view of state and Federal statutes in regard to amendments and the disregarding of variances, etc. Schaeffer Piano Mfg. Co. v. National Fire Extinguisher Co. [C. C. A.] 148 F. 159. Rule that practice of questioning sufficiency of pleading by objecting to introduction of evidence is not to be encouraged does not arise where complaint states cause of action for primary negligence on part of defendant, and defendant objects to introduction of evidence as to negligence of his employe, since objection on ground of variance cannot be raised before trial. Kelly v. Northern Pac. R. Co. [Mont.] 88 P. 1009. Variance in name of defendants between summons and declaration held waived by appearance and filing of demurrer by real defendants. Wabash R. Co. v. Barrett, 117 Ill. App. 315. Variance between praecipe, summons, and declaration, held waived when question not raised by motion or plea in abatement. Id. In action under statute to recover money lost at gaming, variance between allegation that it was lost at roulette and proof that it was lost at craps held waived, where there was no objection to evidence or to submission of case to jury on that ground, and cause proceeded as though means by which money was lost was immaterial. Clark v. Slaughter [Wis.] 109 N. W. 556. Being no objection to evidence as to other losses than those specified in bills of particulars, variance was waived and defendant could not contend that verdict for full amount proved was excessive. Id. Objection that evidence as to waiver was inadmissible because waiver was not pleaded held waived where evidence was not objected to. Burrowes Co. v. Rapid Safety Filter Co., 97 N. Y. S. 1048. There being no failure of proof, variance, whether material or immaterial, held waived where there was no objection to evidence, nor any claim upon trial that defendant was surprised or misled. Civ. Code Prac. §§ 129, 130, 131. Tyler v. Coleman, 29 Ky. L. R. 1270, 97 S. W. 373. If commingled in one statement are two causes of action, and evidence supports either, judgment or verdict cannot be set aside on ground of alleged variance which defendant has waived. Ramsay v. Meade [Colo.] 86 P. 1018.

57. Unless plaintiff obtains leave to amend complaint to conform to proof, defendant is entitled to nonsuit for fatal variance, though evidence was admitted without objection. Bailey v. Brown [Cal. App.] 88 P. 518.

58. See 6 C. L. 1063.

59. Where relation of principal and surety and defendant's liability for amount paid by administrator of one of his sureties followed as conclusions of law from facts admitted, held that denials and averments to contrary in answer raised no issues. Townsend v. Sullivan [Cal. App.] 84 P. 435. Held error to permit defendants to wholly disregard and repudiate defense alleged in verified answer and to give evidence which was fatal variance from, and contradictory of, it. Larsh v. Boyle [Colo.] 86 P. 1000. Allegations in answer that land was part of street held binding on defendants, where they did not ask to amend on ground that such admissions were improvidently or erroneously made. Chicago, etc., R. Co. v. People, 120 Ill. App. 306. Where petition for certiorari recognizes validity of statute and alleges that its provisions were not complied with, petitioner cannot atack it as invalid in the proceedings. Barnes v. Drainage Com'rs. 221 Ill. 627, 77 N. E. 1124. Averment in complaint that after execution sale execution creditor by its attorneys receipted to sheriff on execution for certain sum, held to affirm authority of attorneys to execute receipt. Fuller v. Exchange Bank [Ind. App.] 78 N. E. 206. Allegation in action for negligence that employer did not provide means whereby entrance of steam and water into boiler could be securely excluded, held implied admission that some means were supplied. Ft. Wayne Iron & Steel Co. v. Parsell [Ind.] 79 N. E. 439. Admissions in pleadings are solemn judicial admissions, made for the purpose of the trial, and the party making them is absolutely concluded thereby. That plaintiff was in possession of property. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726. Where petition, after alleging several pretermitted duties and acts of negligence, averred "all of which directly contributed to cause the injuries hereinafter complained of," held that defendant did not thereby plead his own contributory negligence and thereby state himself out of court. Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737. Where answer to complaint against street railroad for injuries denies that defendant's car injured plaintiff, an admission therein that defendant operated "certain" cars on different thoroughfares, including that where the accident happened, is not an admission that it was defendant's car which caused the injury, and does not excuse plaintiff from showing that the car which injured him was owned, operated, or controlled by defendant. Gargano v. Forty-Second St., etc., R. Co., 94 N. Y. S. 544. In action by subcontractor to foreclose lien on funds in hands of city applicable to payment of repairs to school, where answer admitted contract between city and principal contractor, held that it could not thereafter contend that contract was with board of education. Bader v. New York, 101 N. Y. S. 351. Admissions by a party against his interest in his pleadings should be treated as admitted facts, and he will not be heard to question correctness thereof at any stage of the case in trial court, or on appeal when properly preserved in transcript or case made, so long as they remain a part of the record. Rogers v. Brown, 15 Okl. 524, 86 P. 443. If made by himself or his counsel under honest mistake or misapprehension of the

mitted by pleadings of the opposite party[60] and matters well pleaded,[61] which are not denied or avoided by the pleading of the opposite party,[62] are taken as estab-

facts, and he desires to be relieved from effects thereof, should apply to court for leave to withdraw such admissions or pleadings, and, if required to do so, make showing of good faith, in support of application which should be granted or refused in furtherance of justice. Id. Filing of amended answer held not to relieve defendant from effect of admissions in original. Id. Court, in passing on subsequent amended pleading filed by him, should take such admissions into consideration and treat them as admitted facts in the case. Page v. Geiser Mfg. Co. [Okl.] 87 P. 851. Allegation that, if plaintiff was injured, it was due to risk assumed by him in his contract of employment, held an admission that there was such a contract. McCabe & Steen Const. Co. v. Wilson [Okl.] 87 P. 320. Where complaint in action for breach of contract for sale of realty alleged demand for conveyance and refusal, and allegation was not traversed, and answer expressly admitted that defendant had not delivered conveyance and that plaintiffs had demanded it, held that defendant could not question sufficiency of demand at trial. Jennings v. Oregon Land Co. [Or.] 86 P. 367. Where answer admitted that defendant was indebted to plaintiffs in some amount, held not error for court to assume that fact. Trabue v. Wade [Tex. Civ. App.] 15 Tex. Ct. Rep. 591, 95 S. W. 616.

60. Court is not bound to admit evidence supporting admissions in pleadings. Townsend v. Sullivan [Cal. App.] 84 P. 435. Held that there was no admission in pleadings which prevented judgment that certain hops received under contract covering successive years were to be applied on contract for a particular year. Mitau v. Roddan [Cal.] 84 P. 145. Denial that defendants mentioned in complaint, or any of them, took chattels held not to admit joint taking alleged in complaint in action for conversion. Livesay v. First Nat. Bank [Colo.] 86 P. 102. Admission in answer that allegations in certain paragraph of petition are true cannot be construed to apply to an amendment thereof containing additional and more specific allegations, which is offered after answer is filed. Watson v. Barnes, 125 Ga. 733, 54 S. E. 723. Allegations of bill held an admission that association was not organized under law relating to associations not for pecuniary profit, and hence to estop complainant from insisting to contrary. Cratty v. Peoria Law Library Ass'n, 120 Ill. App. 596. Argumentative general denial cannot be construed as confessing facts denied. Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524. Admission that during his lifetime decedent had deposited certain sum with defendant held not an admission that it was still on deposit at time of his death in view of express denial of that fact and evidence of withdrawal. Harris v. State Bank, 49 Misc. 458, 97 N. Y. S. 1044. In action on life insurance policy, admission by defendant of allegation that insured had performed all things on his part to be fulfilled held to preclude it from objecting to introduction of policy on ground that it did not appear that insured had paid first premium while in good health, which was condition precedent to taking effect of policy. Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 A. 51. Where answer in nature of bill of interpleader denied that defendant had been guilty of fraud, held that fraud was not admitted by subsequent allegation that claim of fraud was made. Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577. Answer held not to admit repayment of certain money. Devereux v. Peterson, 126 Wis. 558, 106 N. W. 249.

61. Not conclusions of law. Clement v. Graham, 78 Vt. 290, 63 A. 146.

62. Wade v. Goza [Ark.] 96 S. W. 388; Townsend v. Sullivan [Cal. App.] 84 P. 435; Louisville & N. R. Co. v. Scomp [Ky.] 98 S. W. 1024; Fidelity Title & Trust Co. v. Illinois Life Ins. Co., 213 Pa. 415, 63 A. 51; Clement v. Graham, 78 Vt. 290, 63 A. 146. Corporate existence of a defendant. Simon v. Calfee [Ark.] 95 S. W. 1011. Where the issue was joined on replication denying all the issues of plea setting up new matter only, other matters alleged in declaration. Hartman v. Thompson [Md.] 65 A. 117. Rendition of judgment. Henry v. Henry [Neb.] 107 N. W. 789. In action for libel, publication of defamatory matter. Woolley v. Plaindealer Pub. Co., 47 Or. 619, 84 P. 473. Allegations of answer stating facts necessary to make defendants bona fide purchasers not denied by reply. Haines v. Connell [Or.] 87 P. 265. Fact that answer also denied allegations of notice in complaint held not to render denial of affirmative plea of bona fide purchaser in answer unnecessary, since such denial did not entitle plaintiff to make that defense. Id. Allegations of partnership and agency in petition were not denied under oath. Western Union Tel. Co. v. Carter [Tex. Civ. App.] 15 Tex. Ct. Rep. 657, 94 S. W. 205. There being no general denial, allegations of petition not specially denied. Mentz v. Haight [Tex. Civ. App.] 16 Tex. Ct. Rep. 943, 97 S. W. 1076. Where allegations in complaint, in proceedings to compel payment of certain school orders, that orders were drawn in due form were not denied, held that proofs and findings in that regard were unnecessary. Escondido Lumber, Hay & Grain Co. v. Baldwin, 2 Cal. App. 606, 84 P. 284. In ejectment, answer putting in issue plaintiffs' title and right of possession, and cross complaint averring possession in defendants, which is not denied by plaintiffs, held sufficient proof of ouster. Dondero v. O'Hara [Cal. App.] 86 P. 985. Failure of defendant to answer amendment to petition, offered after answer to original was filed, held not to relieve plaintiff from supporting allegations thereof by evidence. Watson v. Barnes, 125 Ga. 733, 54 S. E. 723. Where several pleas are filed to bill to which complainant does not reply, bill is properly dismissed if any of them are good. Laing v. Fish, 119 Ill. App. 645. Where reply to plea of statute of limitations in answer was bad, held that defendant was entitled to judgment on pleading. Jolly v. Miller [Ky.] 98 S. W. 326. Where allegation that certain streets were regularly dedicated as public highways of defendant city was not denied by answer, held that defendant could not show that dedication had never been accepted. City of

lished and need not be proved; but this rule has been held not to apply to allegations that a statute is invalid.[63] Admissions are only binding on the parties making them and not on coparties.[64] An allegation that, under the facts pleaded, a party is entitled to recover a certain amount does not preclude an amendment in which it is alleged that, under the same facts, he is entitled to a larger recovery.[65]

Judgment on the pleadings[66] should be granted when they present such a case of conceded facts as entitles either party to relief,[67] but is improper where there is any material issue of fact.[68] A motion therefor admits all the allegations of the

Louisville v. Hall, 28 Ky. L. R. 1064, 91 S. W. 1133. Under Code Pub. Gen. Laws 1888, art. 75, § 23, subsec. 108, allegation of execution of any written instrument filed in cause is to be taken as admitted for purpose of action unless denied in next succeeding pleading of opposite party. Fifer v. Clearfield & Cambria Coal & Coke Co., 103 Md. 1, 62 A. 122. Failure to specifically deny execution of contract set out verbatim in declaration held to have relieved plaintiff from proving it, but not to operate as admission that persons alleged to have executed it as defendant's agents were in fact their agents authorized to bind them as alleged. Id. Where allegation in petition that certain trust company was lawfully appointed and duly qualified curator of plaintiff was not specially denied in answer, it would be taken as admitted, issue not being raised by general denial. Baxter v. St. Louis Transit Co., 198 Mo. 1, 95 S. W. 856. Though plaintiff, in order to state cause of action in replevin, was not required to allege nature or source of his title, held that, where he did so, the allegation was material within meaning of Rev. St. 1899, § 628, and stood admitted when not traversed in answer. Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. App. 471, 95 S. W. 279. Where answer alleged finding in previous action that plaintiff had entered into an agreement to remove frame building erected within fire limits within specified time, held that a failure to deny in the reply that such finding had been made precluded plaintiffs from showing fraud or duress in making of contract, question whether they made contract being concluded by the former adjudication. Wheeler v. Aberdeen [Wash.] 87 P. 1061. Allegation of due appointment of guardian ad litem of infant held admitted by failure to properly put it in issue, so that due appointment was adjudicated and settled and judgment binding upon defendant and infant plaintiff. Hughes v. Chicago, etc., R. Co., 126 Wis. 525, 106 N. W. 526.

Default after personal service confesses every material allegation of the complaint which is well pleaded. Parratt v. Hartsuff [Neb.] 106 N. W. 966. Every material and traversable fact alleged in declaration. Meyer v. Ross, 119 Ill. App. 485.

63. Because not passed in manner required by constitution. Adams v. Clark [Colo.] 85 P. 642.

64. Graham v. Smart, 42 Wash. 205, 84 P. 824.

65. Huger v. Cunningham, 126 Ga. 684, 56 S. E. 64.

66. See 6 C. L. 1064.

67. Where defendant filed unverified answer to verified complaint, held that plaintiff was entitled to judgment and was not required to resort to motion to strike. Stockton Lumber Co. v. Blodget [Cal. App.] 84 P. 441. Motion for judgment properly granted where no material issue of fact was made by answer. Schoonover v. Birnbaum, 148 Cal. 548, 83 P. 999. Where demurrer to replication was by consent treated as motion for judgment on pleadings, no evidence was heard or offered by either party, and first defense of answer was general denial of material averments of complaint, held that judgment of dismissal was proper. Combs v. Farmers' High Line Canal & Reservoir Co. [Colo.] 88 P. 396. Judgment held properly entered in favor of plaintiff, where defendant declined to plead further after demurrer to petition. Continental Casualty Co. v. Waters [Ky.] 97 S. W. 1103. Where objection to introduction of any evidence on ground that petition fails to state cause of action is sustained, and plaintiff elects to stand on petition, or does not take leave to amend, judgment should be entered for defendant. Gordon v. Omaha [Neb.] 110 N. W. 313. Fact that court directed verdict for defendant and entered judgment thereon instead of dismissing action held not reversible error. Id. Where plaintiff demurred to a separate defense, thereby admitting the facts therein alleged, order sustaining demurrer was reversed on appeal and demurrer overruled, and no leave to withdraw demurrer was reserved to plaintiff by the judgment, and it did not appear that demurrer was in fact withdrawn, held that defendant was entitled as a matter of law to a final judgment dismissing the complaint. National Cont. Co. v. Hudson River Water Power Co., 110 App. Div. 133, 97 N. Y. S. 92. In action on note, plaintiff's motion for judgment held properly sustained in view of admissions in original answer. Page v. Geiser Mfg. Co. [Okl.] 87 P. 851. Where pleadings in action against carrier for damages for injuries to livestock failed to allege compliance with provision of contract of affreightment, requiring notice of claim of loss as condition precedent to liability, or a waiver of such notice, held that defendant's motion for judgment should have been granted. St. Louis & S. F. R. Co. v. Phillips [Okl.] 87 P. 470. Motion by defendant for judgment is properly granted, where under all allegations of complaint and affirmative allegations of reply, taken as true, he was not entitled to recover, there being no necessity for proof in such case. Fishburne v. Merchants' Bank, 42 Wash. 473. 85 P. 38. Where petition for mandamus did not allege facts authorizing the granting of the relief prayed, held that it was error to grant writ on striking demurrer to petition from files and refusal of respondents to plead further. Commissioners' Court v. State [Ala.] 41 So. 463.

68. Denials of allegations as to forfeiture

opposite party which are well pleaded,[69] but not conclusions of law.[70] It is in the nature of a demurrer, and the court ordinarily has discretionary power to deny it and to allow the opposite party to amend, where the defect can be thus obviated.[71]

PLEAS, see latest topical index.

PLEDGES.

§ 1. Definition and Nature (1431).
§ 2. Right to Make (1433).
§ 3. Property Subject to be Pledged (1433).
§ 4. The Contract and Its Requisites (1433).
§ 5. Rights, Duties, and Liabilities Under the Pledge (1434).

§ 1. *Definition and nature.*[72]—A pledge is a bailment of personal property as security with implied power of sale on default.[73] Whether a transaction is a pledge,[74] an agreement to pledge,[75] or an absolute transfer, will depend on the intention of the parties as manifested in their acts and in all the instruments which are part of the transaction.[76] Where property is delivered and relied upon as secur-

of right to purchase property because of failure to make payments as required by contract held sufficient to prevent judgment. Womble v. Wilbur [Cal. App.] 86 P. 916; Mills Novelty Co. v. Dunbar, 11 Idaho, 671, 83 P. 932. If the answer puts in issue the material allegations of the complaint, plaintiff's motion for judgment is properly denied. Pleadings in action in ejectment held to put in issue ownership of the land as one of the material facts to be determined before court could decide ultimate rights of parties, so that it was error, while such issue was undetermined, to render judgment for defendant. McCready v. Dennis [Kan.] 85 P. 531. In action for trespass where answer did not assert title or possession to any part of the land claimed by plaintiffs, but that land upon which trespass was committed was not embraced in boundary described in petition, held that defendants were not entitled to judgment on failure of plaintiffs to reply. Morgan v. Lewis, 29 Ky. L. R. 197, 92 S. W. 970. In action on life insurance policy where complaint showed that insured died more than a year before the action was brought, but did not set out the policy or refer to any limitation therein, held that an allegation of a one-year contract limitation in the answer could not be taken as admitted for the purpose of a motion to dismiss the complaint on the pleadings, and hence dismissal on ground that action was barred was error. Bannister v. Michigan Mut. Life Ins. Co., 111 App. Div. 765, 97 N. Y. S. 843. Where complaint alleged contract of sale and a breach thereof by defendant, and defendant denied that sale was an absolute one, and alleged by way of counterclaim a consignment of goods for sale and demanded an account, held that complaint was a denial of counterclaim so that defendant was not entitled to judgment by default on his counterclaim before issues raised in reference to plaintiff's cause of action were determined. Tillinghast, Styles Co. v. Providence Cotton Mills [N. C.] 55 S. E. 621.

69. State v. Goffee, 192 Mo. 670, 91 S. W. 486. Plaintiff's motion admits for purposes of motion truth of all allegations of answer and falsity of his own allegations which are denied. Mills Novelty Co. v. Dunbar, 11 Idaho, 671, 83 P. 932. Defendant's motion admits all allegations of complaint and affirmative allegations of reply considered together. Fishburne v. Merchants' Bank, 42 Wash. 473, 85 P. 38. Where judgment is rendered on pleadings, allegations of petition must be taken as true on appeal. Miller v. Hart, 29 Ky. L. R. 73, 91 S. W. 698.

70. Plaintiff's motion for judgment does not admit allegation in answer, in nature of special plea in bar, that action is barred by statute of limitations, such plea being conclusion which, while law tolerates it in pleading for convenience, depends for its sufficiency on facts admitted or proven. Daniels v. Daniels [Cal. App.] 85 P. 134.

71. Bergerow v. Parker [Cal. App.] 87 P. 248. Rule is equally applicable where defect is failure to verify answer to verified complaint in mandamus proceedings. Id.

72, 73. See 6 C. L. 1065.

74. Evidence held to show that a note had been delivered by the cashier of a bank to another bank as collateral for the debt of the cashier, and not merely to be sold and the proceeds accounted for. First Nat. Bank v. Gunhus [Iowa] 110 N. W. 611.

75. The payee and pledgor of a note having purchased property under agreement to secure the price by his interest in the note, in company with the seller, requested the pledgeholder to hold the note as collateral for both claims against the payee and pay them out of the proceeds. Held an actual pledge to seller and not a mere agreement to pledge. Ladd v. Myers [Cal. App.] 87 P. 1110.

76. One loaned money, taking a note for the amount, also an absolute conveyance of a policy, and an assignment with a defeasance. Held a pledge and not a sale. Daly v. Spiller, 222 Ill. 421, 78 N. E. 782; Id., 119 Ill. App. 272. In an action by a surety to recover from his principal the amount paid on a note, evidence held to authorize submission to the jury of the question whether certain stock deposited with plaintiff was a pledge or a conditional sale. Smith v. Nixon, 145 Mich. 593, 13 Det. Leg. N. 569, 108 N. W. 971. Assignment of subcontractor's bond by contractor to owner held collateral only as shown by defendant's witness and the fact that another action was pending by con-

ity, the transaction is not less a pledge because notes or mortgages are also taken by the creditor.[77] The relation existing between a stockbroker and his customer is generally held to be that of pledgor and pledgee,[78] and this, though the broker instead of requiring a margin of the customer advances the whole amount necessary for the purchase.[79] A deposit of securities with a stockbroker by a customer as margin and as security against losses in stock transactions under an agreement which does not contemplate a sale of the securities except in the event of losses also con-

tractor against subcontractor. Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F. 672.

77. Defendant held a pawnbroker within laws regulating the business of such brokers. Levison v. Boas [Cal.] 88 P. 825.

78. A stockbroker who purchases and carries stock for a customer on margins furnished by the latter holds the stock as pledgee. Customer entitled to stock or proceeds in bankruptcy of broker. In re Bolling, 147 F. 786.

NOTE. The relation between broker and principal in margin transactions: It is customary for a broker purchasing stock on margin for a client by advancing upon interest the money required for the purchase in addition to the margin deposited, to have the shares registered in his own name, and, without attempting to keep separate the identical certificates purchased upon a particular client's order, to pledge them for his own debts. Dos Passos, Stockbrokers and Stock-Exchanges, 187, 251; Markham v. Jaudon, 41 N. Y. 235, 239. Although these customs are well established, the American decisions interpreting them are not harmonious. Most courts, following New York decisions, describe the relation between principal and broker as that of pledgor and pledgee. The broker, it is held, acts properly in taking title to the stock in his own name. Horton v. Morgan, 19 N. Y. 170, 75 Am. Dec. 311 n. Moreover, as shares of stock are fungible, he need not keep separate or retain those purchased for a particular customer; but he must under his control keep sufficient shares of a like kind to be able to make delivery at any time to all customers without being obliged to purchase in the market. See Douglas v. Carpenter [N. Y.] 17 App. Div. 329, 335. Accordingly, it has recently been held that if he sells stock purchased for a customer without retaining other stock of a like kind and amount, he is guilty of conversion. Content v. Banner, 34 N. Y. L. J. 1899; Stenton v. Jerome, 54 N. Y. 480; Gillett v. Whiting, 120 N. Y. 402.

Has the broker a right to repledge? At common law a pledgee has apart from special agreement no such right. Such an agreement, however, the courts generally imply in these cases by virtue of the general custom of repledging. Skiff v. Stoddard, 63 Conn. 198, 219. But the broker is liable in conversion if he pledges for an amount greater than the customer's indebtedness. Douglas v. Carpenter, 17 N. Y. App. Div. 329, 335. Dividends or assessments, though in the first instance received or paid by the broker as the record owner, are to be credited or charged to the client. See Chase v. Boston, 180 Mass. 458, 460.

The Massachusetts court, interpreting apparently identical customs, holds that the broker merely contracts to deliver stock to the customer in the future. The broker's duties under this view have not, however, been satisfactorily worked out. Obviously, though, unless restrained by special contract, he may pledge ad libitum stock purchased upon a customer's order. Rice v. Winslow, 180 Mass. 500, 503; Wood v. Hayes, 81 Mass. 375. It is said that the broker's contract requires him to purchase the stock and to procure delivery. Chase v. Boston, 180 Mass. 458, 460; Covell v. Loud, 135 Mass. 41, 43, 46 Am. Rep. 446. His contract, if it does not require such delivery, is illegal. Marks v. Metropolitan Stock Exchange, 181 Mass. 251; Rice v. Winslow, 180 Mass. 500, 503. It has been added, however, that though he must procure delivery, he need not retain under his control sufficient stock for all customers. In re Swift, 104 F. 493, 498; cf. Bentinck v. London Joint Stock Bank, (1893) 2 Ch. 120, 140. But it would seem that the customer contracts for a right to have stock actually held by the broker, and intends not to rely upon the financial ability of the broker to purchase it, for otherwise the contract would permit the broker to speculate at his client's expense. Even, however, if this be conceded, important practical differences would still exist between the New York and Massachusetts rules. Under the former rule the customer, upon a wrongful sale, can recover the value of the stock in conversion (Baker v. Drake, 53 N. Y. 211, 13 Am. Rep. 507; Id., 66 N. Y. 518, 23 Am. Rep. 80), or affirm the sale and recover the proceeds (Taussig v. Hart, 58 N. Y. 425, 429); under the latter rule his recovery is for breach of contract. Under only the former does the customer, if the broker becomes insolvent, possess rights higher than those of a general creditor. Skiff v. Stoddard, 63 Conn. 198, 219, 224.

The facts that the customer pays interest, bears the burden of assessments, and receives the benefit of dividends, and incurs the liability for depreciation, seem clearly to show an intention not to create merely a contract right to future delivery, but to vest in him the beneficial ownership of the stock, subject only to a security title in the broker. As the title to the stock is in the broker, it is more accurate to describe the transaction as a chattel mortgage than as a pledge. So to hold does not conflict with the conclusions reached by courts which regard the contract as one of pledge. The doctrine of fungible goods seem equally applicable to the relations of mortgage and pledge. If a mortgagee wrongfully disposes of chattels before or after tender of the amount due, the mortgagor may recover in conversion. Eslow v. Mitchell, 26 Mich. 500; Pierce v. Hasbrouck, 49 Ill. 23.—See 19 Harv. L. R. p. 529.

79. Sale by broker without proper notice held conversion. Content v. Banner, 184 N. Y. 121, 76 N. E. 913.

stitutes a pledge.[80] A bank issuing a commercial letter of credit by which goods obtained by merchants thereunder and the bills of lading therefor are held by it for advances acquires title to the goods and is not a mere pledgee.[81]

§ 2. *Right to make.*[82]—An officer of a corporation who may borrow money may pledge property of the company, especially if the course of dealing of the company shows that he has plenary authority to act on behalf of the company.[83] A person who takes property from a trustee on pledge is put upon inquiry to ascertain the authority of the trustee,[84] and may, in the absence of such authority, be compelled to reassign the property to the estate if the trustee embezzles the proceeds of the loan.[85] While a husband may pledge community property purchased by the wife,[86] he can not pledge her separate property without her consent.[87] The Louisiana Code expressly authorizes the making of a pledge for holding a surety harmless.[88]

§ 3. *Property subject to be pledged.*[89]

§ 4. *The contract and its requisities.*[90]—Possession by the pledgee is essential to the existence of a valid pledge,[91] but if the property is not capable of manual transfer, a constructive delivery is sufficient, as in the case of corporate stock,[92] or property represented by bills of lading.[93] In the case of a pledge of warehouse receipts, it is a sufficient change of possession of the property that it is placed in the exclusive and absolute control of the warehouseman.[94] Like other contracts, the agreement is subject to the statute of frauds,[95] the principles governing unilateral engagements,[96] and to public police regulations.[97] A negotiable promissory note

80. Where securities had not been sold prior to broker's bankruptcy, they could be recovered from the trustee. In re Jacob Berry & Co. [C. C. A.] 149 F. 176.

81. Moors v. Bird, 190 Mass. 400, 77 N. E. 643. And the bankers do not lose their title by delivering the goods to the merchants to sell for the benefit of the bankers. Id. Should the merchants sell the goods to a firm with which the merchants had a standing contract as to the terms of such sale, the transaction amounts to a sale by the bankers to the purchasers under the terms of the contract between such purchasers and the merchants. Id.

82. See 6 C. L. 1065.

83. Love v. Export Storage Co. [C. C. A.] 143 F. 1. Even though the officer's authority be defective in some particulars, if the company receives the fruits of the transaction, it cannot take advantage of such defects, nor can any one claiming through it. Id.

84. There is no presumption of the trustee's right to sell as there is in the case of an executor. Kenworthy v. Levi, 214 Pa. 235, 63 A. 690. Where deed of trust provided "that the principal of the estate shall not become impaired or encumbered," trustee could not pledge a mortgage belonging to the estate. Id.

85. Mortgage. Kenworthy v. Levi, 214 Pa. 235, 63 A. 690.

86. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442.

87. Evidence held not to estop a wife from denying the authority of her husband to pledge stock belonging to her. Doran v. Miller, 124 Ill. App. 551.

88. Code, art. 3140. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

89, 90. See 6 C. L. 1065.

91. Cotton v. Arnold, 118 Mo. App. 596, 95 S. W. 280. Where one rented a pasture and placed his own cattle therein under agreement that the cattle should stand good for the rent, possession was in the tenant and a subsequent mortgage from him prevailed over the alleged pledge, though the landlord rendered some slight services in caring for the cattle under a subsequent arrangement. Id.

92. See 3 Clark & M. Corp. § 617 et seq. Corporate stock not being capable of manual delivery, a pledge thereof may be effected by a written transfer without delivery of the scrip. First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. S. 717.

93. A pledge of a bill of lading is equivalent to delivery of possession of the goods. Kentucky Refining Co. v. Bank of Morillton, 28 Ky. L. R. 486, 89 S. W. 492.

94. Where storage company leased lumber yard and stationed a man on premises to assert control and prevent interference. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

95. In replevin for a diamond ring, a receipt given by a pawnbroker held a sufficient memorandum within statute of frauds. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947.

96. Contract for pledge of diamond ring providing for payment of a certain amount, if payment was not made within one year, held not invalid as unilateral, since it gave pledgor the right to redeem within a reasonable time after one year. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947.

97. A pledge made with a pawnbroker who had not procured a license and did not make the proper entries under the statute making such failures misdemeanors is void (Levison v. Boas [Cal.] 88 P. 825), and the

may be pledged without the special indorsement of the pledgor.[98] The fact that a warehouseman had not paid the statutory privilege tax will not invalidate a pledge of property held by him as against a bona fide pledgee.[99] An agreement that a pledge shall cover any future liability is sufficient to create a pledge to secure such liability when subsequently created.[1]

§ 5. *Rights, duties, and liabilities under the pledge.*[2]—A pledgee may repledge the property to secure a debt of his own.[3] If he holds securities he is entitled to all the remedies necessary to make them available in discharge of the debt,[4] and with the power to make the securities available necessarily goes the right to transfer the assignor's interest therein.[5] He is entitled to interest on money expended in furthering the undertaking secured by the pledge.[6] An absolute assignment of an insurance policy to a creditor having several claims may be shown to have been assigned to secure a particular debt only and will be valid to that extent alone,[7] but in such case the burden of proof is on the assignor.[8] The mere renewal of an obligation to pay money does not release or discharge securities deposited as collateral;[9] but a change in the contract between the debtor and the creditor may release any property which a surety has pledged.[10] One does not waive a pledge by signing a trust agreement which expressly recognizes his rights.[11]

Possession and custody.[12]—The lien continues only so long as possession is retained.[13] Where property is repledged subject to a prior pledge possession of the prior pledgee may be regarded as that of the second pledgee through the former's agency.[14] If several pledgors consent to a mingling of the property, they cannot thereafter rightfully complain of the result.[15]

creditor acquires no right to the property thereunder (Id.). Contracts not severable. Id.

98. Clark v. Whitaker, 117 La. 298, 41 So. 580. For pledging the note of a third person payable to maker's order and by him endorsed in blank, no indorsement of the pledgor is required. Fidelity & Deposit Co. v. Johnson, 117 La. 880, 42 So. 357.

99. Failure made misdemeanor under Tenn. Acts 1901, c. 128. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

1. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

2. See 6 C. L. 1066.

3. Holder of note secured by collateral could pledge note and collateral. Eddy v. Fogg [Mass.] 78 N. E. 549.

4. Anderson v. Messinger [C. C. A.] 146 F. 929. Where the holder of a note secured by collateral pledges the same for his own debt, the pledgee is entitled to collect the pledged note either by a suit thereon, or by a sale of the collateral, or both. Eddy v. Fogg [Mass. 78 N. E. 549.

5. Anderson v. Messinger [C. C. A.] 146 F. 929.

6. Bonds were deposited with a trust company to indemnify the purchaser of an uncompleted street railroad under a contract that the bonds should "fully cover the cost of completion." The purchaser, himself, completed the work, making advances for labor and material. Held he was entitled to interest, to be paid from the indemnity fund. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 194, 107 N. W. 1109.

7. Evidence insufficient to show admission on part of assignee that policy was collateral for one debt only. Reinhardt v. Marks' Adm'r, 29 Ky. L. R. 388, 93 S. W. 32.

8. Evidence held not to support finding that a policy was assigned to secure a particular debt only. Reinhardt v. Marks' Adm'r, 29 Ky. L. R. 388, 93 S. W. 32.

9. Evidence held not to show that the debt had been paid. First Nat. Bank v. Gunhus [Iowa] 110 N. W. 611.

10. Where a corporation pledged property to secure its debt and pledgee in turn pledged his individual interest to secure a debt of the corporation to another person, an agreement between the corporation and the second pledgee, fixing amount due and providing for a sale of the property, released the liability of the first pledgee and entitled him to possession. Wright Steam Engine Works v. McAdam, 113 App. Div. 872, 99 N. Y. S. 577.

11. Where a trust agreement for the organization of a new corporation to take over the assets of a bankrupt expressly provided that a bank, which was one of the creditors, should retain its right to the proceeds of certain lumber pledged to it over what was necessary to pay a certain note on account of the bankrupt's liability as indorser on certain other notes, and that to the amount it so received from the lumber it should not be entitled to the common stock in the new corporation, held the bank's signature to such trust agreement did not constitute a waiver of pledge. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

12. See 6 C. L. 1067.

13. Where pledgee failed to retain possession, he could not claim the property as against pledgor's trustee in bankruptcy. Goodrich v. Dore [Mass.] 80 N. E. 480.

14. Stock. First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. S. 717.

15. Where a pledgee bank by direction of the pledgors had certain stock exchanged

Title to the property.[16]

Duty to realize on collaterals and prevent loss.[17]—The pledgee is not bound to sell collaterals where a sale is optional with him under the contract.[18]

Conversion by the pledgee.[19]—A wrongful sale is not essential to conversion, it being sufficient if the relation of pledgor and pledgee is renounced and the pledgee claims the property as his own.[20] Where a sale to the pledgee is merely voidable and thereafter the pledge is exchanged for other property, the pledgor's rights in the new property are the same as those he had in the old,[21] and failure of the pledgee, upon tender of the debt, to deliver to the pledgor the property originally pledged is not a conversion,[22] but in such case the pledgor should require redemption of the property substituted.[23] If the pledgee has so acted that he cannot return the property pledged, the pledgor need not tender the amount of the debt as a condition to a suit in conversion,[24] nor is a tender necessary if the value of the property exceeds the amount of the debt.[25] In an action for the conversion of bonds a judgment for their value at the date of conversion credited with the amount of the debt at that date is proper.[26]

Redemption and surrender.[27]—The obligation having been discharged, the pledgor is entitled to a return of the pledge,[28] and though he fails to pay the debt when due, all his right in the property is not thereby extinguished, the right of redemption still continuing until barred by proper procedure,[29] or by laches or waiver.[30] So also, if there be a seasonable and proper offer to pay the debt,[31] the right to redeem is not affected by the fact that subsequent offers are made.[32] All the claims secured must be paid or tendered,[33] and a tender must be kept good.[34]

for other stock, but the stock received in exchange was issued to only one of the pledgors on three certificates, no one of which represented merely the shares due any pledgor, held the pledgors themselves assented to the mingling of the shares though the bank had originally agreed to keep the stock of each separate. Smith v. Becker [Wis.] 109 N. W. 131.

16, 17. See 6 C. L. 1067.

18. Where under an arrangement between a debtor and a creditor the later was to hold certain stock, and, in the event he decided to sell it, should turn over to the former the difference between the proceeds and the amount of the debt, an instruction imposing upon the creditor the duty to sell the stock was erroneous. Smith v. Nixon, 145 Mich. 593, 13 Det. Leg. N. 569, 108 N. W. 971.

19. See 6 C. L. 1068.

20. Especially where he thereafter sells the property as his own. Lowe v. Ozmun [Cal. App.] 86 P. 729.

21. Hebblethwaite v. Flint, 101 N. Y. S. 43.

22. Where complaint merely alleged refusal to deliver certain stock, which it appeared on the trial had been transferred by the pledgee for bonds after a voidable foreclosure sale to him, held a money judgment was unauthorized, no conversion having been pleaded or proven. Hebblethwaite v. Flint, 101 N. Y. S. 43.

23. Hebblethwaite v. Flint, 101 N. Y. S. 43. Even if plaintiff was entitled to a money judgment on failure to deliver the property, it would be for the actual value of the property received in exchange and not for its par value. Id.

24. Wrongful sale and conversion. Austin v. Vanderbilt [Or.] 85 P. 519.

25. Conversion is satisfaction of debt and tender not necessary in action to recover excess. Lowe v. Ozmun [Cal. App.] 86 P. 729.

26. Lowe v. Ozmun [Cal. App.] 86 P. 729.

27. See 6 C. L. 1068.

28. Evidence held to show that plaintiff had deposited with defendant $100 as security for the execution of a lease, and the lease having been executed plaintiff was entitled to recover the deposit. Rosenfeld v. Silver, 49 Misc. 117, 96 N. Y. S. 1027. A purchaser who deposits money as security for performance is entitled to the return unless there has been such a failure as to give a cause of action against him for default. Wells Fargo & Co. v. Page [Or.] 82 P. 856.

29. Daly v. Spiller, 119 Ill. App. 272.

30. The right to redeem will not be denied on the ground of laches or waiver so long as it is recognized by the parties as still existing. Bringing suit to foreclose and retaining note held recognition of its existence. Daly v. Spiller, 222 Ill. 421, 78 N. E. 782.

31. Evidence held to sustain finding of such offer. Chapman v. Benedict [Cal. App.] 86 P. 736.

32. Chapman v. Benedict [Cal. App.] 86 P. 736.

33. Where certain collateral was pledged to secure three debts, the pledgor could not require a return of collateral equal to the amount of two which were paid, but pledgee could apply all the necessary collateral to the third debt. Ex parte Powell, 74 S. C. 193, 54 S. E. 236. Assignment of collateral construed. Id.

34. One who seeks to recover property pledged must show not only a tender of the amount of the debt but that the tender had been kept good at all times. Not shown that

Where the running of interest has been stopped by a proper tender, one is entitled to redeem by payment of the debt and interest to such date,[35] though by mistake of law the complaint claims exemption from interest only from a later date.[36] A judgment giving the right to redeem should specify the time within which payment should be made.[37]

Default, foreclosure, and sale.[38]—The pledgee is not always bound to sell.[39] The right of sale accrues upon default of the debtor, but if the pledgee by word or conduct waives this right and gives further time, he will not be permitted suddenly to repudiate such waiver and dispose of the property to the prejudice of the pledgor who is unprepared;[40] and if a wrongful sale is thus made, the pledgor is not bound after an offer to redeem to keep the tender alive by payment into court.[41] In the absence of contract stipulation, the sale must be a public one.[42] A public sale must be made at public auction in the manner and on the notice usual in respect to auction sales of similar property and must be for the highest price obtainable.[43] Notice is essential unless waived,[44] and a sale without notice constitutes a conversion.[45] The pledgor and pledgee may, however, agree for any means of disposing of the pledge to satisfy any claim upon it, which is not in contravention of a statute, against public policy or fraudulent.[46] Hence, a contract authorizing the pledgee to sell at public or private sale with or without notice,[47] and to himself become a purchaser, is valid.[48] "Private sale," though, means a sale conducted in the ordinary and usual manner, and not merely a taking over of the property by the pledgee to himself at such price as he may elect to consider an offer.[49] A sale of stocks will be found where they were transferred in the customary way by brokers.[50] Sales must be fair and prudently made.[51]

tender kept good up to trial. Andrews v. Uncle Joe Diamond Broker [Wash.] 87 P. 947.

35. Where interest stopped by tender as provided by Civ. Code, § 1504. Chapman v. Benedict [Cal. App.] 86 P. 736.

36, 37. Chapman v. Benedict [Cal. App.] 86 P. 736.

38. See 6 C. L. 1069.

39. An assignment of a life policy by insured and beneficiary as collateral gave the assignee the right to receive a paid up policy if premiums were not paid. The debt was greater than the paid up policy received by the assignee and was not paid. Held the assignee could treat the paid up policy as so much money and apply it on the debt without attempting to make a sale of it as pledged property. Du Brutz v. Bank of Visalia [Cal. App.] 87 P. 467.

40. Where defendant's president detained plaintiff in Mexico on promise that sale of stock would be delayed, held plaintiff could recover the stock or its value where it was wrongfully sold. Furber v. National Metal Co., 103 N. Y. S. 490. In suit to set aside sale of pledge, evidence held insufficient to sustain finding that plaintiff had reasonable ground for belief that his note would be extended or renewed. Haines v. Barber, 113 App. Div. 696, 100 N. Y. S. 75.

41. Furber v. National Metal Co., 103 N. Y. S. 490.

42. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1.

43. Civ. Code, § 3005. Lowe v. Ozmun [Cal. App.] 86 P. 729. Where stock was pledged with an agent to secure a debt to the principal, the latter had no right to sell it except at public auction on personal notice to pledgor of time and place of sale. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1. Notice must contain a statement of the time and place of sale. Notice by stockbroker to customer that if latter did not take certain stock former would sell, held inadequate. Content v. Banner, 184 N. Y. 121, 76 N. E. 913.

44. Notice of sale required by Civ. Code, § 3002, may be waived by pledgor at any time as authorized by § 3003. Lowe v. Ozmun [Cal. App.] 86 P. 729.

45. Sale of stock "on the curb" without adequate notice held conversion. Content v. Banner, 184 N. Y. 121, 76 N. E. 913.

46. In re Mertens [C. C. A.] 144 F. 818.

47. Private sale without notice confers title. Lowe v. Ozmun [Cal. App.] 86 P. 729.

48. Agreement authorizing public or private sale with or without notice to pledgee. In re Mertens [C. C. A.] 144 F. 818.

49. Lowe v. Ozmun [Cal. App.] 86 P. 729.

50. Evidence held to warrant finding of a sale of pledged stock sent by a bank to brokers for sale, though some of the stock had been transferred to the broker's clerks who had no interest in it and still remained in their names, where the evidence showed that it was customary to make sales in that way. Smith v. Becker [Wis.] 109 N. W. 131.

Identification of property sold: Where a bank which held shares of stock as collateral to a note owned some of the same stock and sent it all to a broker for sale, and a portion of the shares was sold by the broker and the proceeds credited on the note, there was, as between pledgor and pledgee, an identification of the shares sold as those of the pledgor. Smith v. Becker [Wis.] 109 N. W. 131.

51. Where the indebtedness was long past due and at least a fair market price

The rule that a pledgee cannot purchase at his own sale does not apply to a judicial sale made by an officer of the law.[52] Mere inadequacy of price is not, in itself, ground for setting aside the sale,[53] nor is a sale invalidated by a slight misdescription of the property where no prejudice results to the pledgor.[54] The pledgor may be estopped by acquiescence and conduct from contesting the validity of a sale,[55] or he may waive a sale altogether.[56] The pledgee will be required to account to the pledgor for any surplus remaining in his hands after he has been fully reimbursed.[57] In an action by an assignee to recover a surplus, it is immaterial what consideration the plaintiff paid the pledgor or that he gave none or whether he was an innocent purchaser.[58] In such action the issue should be confined to the indebtedness of the pledgor to the pledgee as it was at the date of notice of the assignment.[59] If the proceeds of the sale of two wrongful pledges become inseparably mixed, they will be divided ratably between the true owners.[60]

Where a mortgage is pledged and the pledgee acquires title to land by foreclosure, he holds the land in trust for the pledgor as security in lieu of the mortgage,[61] but if there is an agreement that the pledgee may acquire title absolutely in his own right and he does so, a duty then devolves upon him to account to the pledgor for the valuation at which he acquired the title.[62] A pledge in the nature of an equitable lien or charge must be enforced by an equitable action or counterclaim and cannot be asserted under an answer which merely sets up a statutory lien of a different character.[63]

satisfactory to plaintiff pledgor was obtained, the fact that certain stock pledged was sold upon a rising market was immaterial. Smith v. Becker [Wis.] 109 N. W. 131. Sale to pledgee held not fraudulent where in strict accordance with contract and no unconscionable advantage was taken. In re Mertens [C. C. A.] 144 F. 818. Evidence insufficient to establish defendant's contention that plaintiff failed to exercise proper care in the sale of certain bonds. Farmers' Nat. Bank v. Venner [Mass.] 78 N. E. 540.

52. Anderson v. Messinger [C. C. A.] 146 F. 929. When a public sale is had, the pledgee may purchase the property. Civ. Code, § 3010. Lowe v. Ozmun [Cal. App.] 86 P. 729.

53. Though sale is made to pledgee as authorized by the contract, where due care is exercised to protect pledgor's rights. Farmers' Nat. Bank v. Venner [Mass.] 78 N. E. 540.

54. Where, before certain six per cent. bonds were pledged, the interest was changed to five per cent., but they had never been so stamped, and in a notice of foreclosure they were described as six per cent. bonds, such misdescription was not fatal to the validity of the sale, it being shown that six per cent. bonds of the same issue were sold by the same auctioneers before and after the sale in question, for the same price as the five per cent. bonds. Farmers' Nat. Bank v. Venner [Mass.] 78 N. E. 540.

55. Where pledgor made no objection to sale and afterwards received commission for procuring another sale. Rose v. Doe [Cal. App.] 89 P. 135.

56. Where pledgee with pledgor's consent credited value of stock on the debt and pledgee thereafter settled for the balance, pledgee could not be heard to say that he was not the owner of the stock. Ohio Valley Nat. Bank v. Hulitt, 27 S. Ct. 179.

57. Required to account for proceeds of insurance policy. Daly v. Spiller, 119 Ill. App. 272. In suit against a bank to recover the balance of insurance collected under a policy, held by it as collateral, evidence held to require submission to jury of question whether the debts secured were enough to absorb the insurance money. Tharp v. Porter [Tex. Civ. App.] 16 Tex. Ct. Rep. 120, 93 S. W. 530. The bank had a right to apply the fund to payment of claims owed by the debtor jointly with others where debtor was the principal debtor in each instance. Id.

58. To recover proceeds of insurance policy after payment of debt. Tharp v. Porter [Tex. Civ. App.] 16 Tex. Ct. Rep. 120, 93 S. W. 530.

59. Tharp v. Porter [Tex. Civ. App.] 16 Tex. Ct. Rep. 120, 93 S. W. 530.

60. Pledgees mixed the proceeds of wool belonging to one company with that of another company on which a bank had a claim. Smith v. Moors & Co. [Pa.] 64 A. 593.

61. Munson v. American Sav. Bank & Trust Co. [Wash.] 86 P. 1047.

Contra: The trust is transferred to the proceeds of the sale. Anderson v. Messinger [C. C. A.] 146 F. 929. A certain agreement between assignor and assignee considered and held not to affect the result. Id.

62. Munson v. American Sav. Bank & Trust Co. [Wash.] 86 P. 1047. Where pledgor failed to exercise option to take the property pursuant to agreement, evidence held to show that pledgee intended to purchase in his own right. Id. Evidence considered and proper amount due pledgor determined. Id.

63. Defendant in replevin, who merely pleaded a boardinghouse keeper's lien under Rev. St. 1898, § 3344, could not hold the property by showing that a wife had pledged it for a board debt due from her husband for the board of both, Chickering-Chase

Right of action on the debt.[64]—While it is a good defense that the pledgee refuses to surrender the property in any event,[65] a pledge does not alter the liability of the debtor on the principal obligation,[66] and so the creditor may prosecute his claim to judgment and still retain his lien.[67] The testimony of defendant that he understood that plaintiff had taken certain notes as payment is insufficient to overcome a finding that they were accepted merely as collateral.[68]

Effect of insolvency and bankruptcy.[69]—The fact that the pledgor has become bankrupt does not affect the right of the pledgee to have the contract of pledge reformed in a suit against the bankrupt and his trustee.[70] Under the present bankruptcy act, a pledgee is at liberty until the date of the adjudication to convert the security into money pursuant to his contract and thereafter prove the unsatisfied balance of his claim.[71] A pledge given to cover any liability thereafter contracted will entitle the pledgee to maintain his right to the property pledged for such future liability as against the pledgor's trustee in bankruptcy.[72] A creditor of a bankrupt partnership holding securities of an individual partner as pledge is entitled to have his claim against the partnership allowed without any deduction.[73]

Equities and defenses between one of the parties and third persons.[74]—The pledgee of a note may sue on it as owner,[75] though by such proceeding defendant will not be cut off from equities he might have pleaded had plaintiff sued as pledgee.[76] Plaintiff is entitled to the judgment for the full amount, with liability to account to the owner of the note for any surplus,[77] but this rule does not obtain where the pledgor is himself made a party to the action.[78] In a suit on pledged collateral, the immaturity or contingency of the principal obligation is immaterial.[79] The pledgor of a promissory note may sue thereon though the pledgee also has that right,[80] but in such case the pledgee is a necessary party unless the note is transferred back to the pledgor before trial.[81] A pledgee of the interest of the pledgor in a mortgage held by another pledgee with directions to turn such interest over to the second pledgee after satisfaction of the debt may maintain a bill in equity against the parties interested to compel the payment of such balance.[82] Where an owner of stock makes a fraudulent sale through an innocent pledgee, the latter may

Bros. Co. v. White, 127 Wis. 83, 106 N. W. 797.

64. See 6 C. L. 1070.

65. Where the pledge consisted of a block of common stock and a block of preferred stock, held that an affidavit of defense averring that the common stock "belonged with" the preferred stock, and that the plaintiff was not entitled to recover unless he returned both to defendant, stated a good defense. Hook v. Jones [Pa.] 64 A. 533.

66. Pledge to secure payment of a note. Diffenbacher's Estate, 31 Pa. Super. Ct. 35.

67. Pledgor cannot offset pledge against principal contract unless pledgee has converted the property. Diffenbacher's Estate, 31 Pa. Super. Ct. 35.

68. There being no evidence of novation. Grimmett v. Owsley [Ark.] 94 S. W. 694.

69. See 6 C. L. 1070.

70. First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. S. 717.

71. No objection that sale was made after filing of petition. In re Mertens [C. C. A.] 144 F. 818.

72. And this even though the pledge was made within four months prior to the filing of the petition in bankruptcy, provided the pledgee acts in good faith. Love v. Export Storage Co. [C. C. A.] 143 F. 1.

73. In re Mertens [C. C. A.] 144 F. 818. The fact that insurance policies on the life of a partner and payable to his estate were pledged as security for a debt to the partnership is no evidence that they were the property of the partnership. Id.

74. See 6 C. L. 1070.

75, 76. Fidelity and Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

77. Camden Nat. Bank v. Fries-Breslin Co., 214 Pa. 395, 63 A. 1022.

78. Where pledgor was indorser. Bank of Montreal v. Howard [Wash.] 86 P. 1115.

Note: This decision is not placed on the ground stated in the above text, but see 22 Am. & Eng. Enc. of L. [2d Ed.] 899.

79. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

80. Code Civ. Proc. § 367, and Civ. Code, § 3006. Graham v. Light [Cal. App.] 88 P. 373.

81. Not necessary where such transfer had been made. Graham v. Light [Cal. App.] 88 P. 373. Where pledgee was not made party and there was no apparent necessity for the suit, plaintiff should not be allowed attorney's fees. Id.

82. Apollo Trust Co. v. Safe Deposit & Title Guar. Co., 31 Pa. Super. Ct. 524.

recover from the purchaser the amount of his interest as pledgee but cannot recover the full purchase price.[83] One who assigns a debt to another without transfering collaterals to which the latter thus becomes entitled will be required to exhaust the collaterals before proceeding against the assignee to recover the consideration.[84] A pledgee of an insolvent who sues exclusively for the purpose of establishing a preference as against other creditors is not entitled to charge the fund with counsel fees and expenses.[85]

Bona fide pledgees of negotiable paper will be protected,[86] but where a pledged note is saved from nullity only because taken by a pledgee in good faith before maturity, the judgment against the maker will not be absolute, but will be so framed as to be executory only in so far as may be necessary for carrying out the purposes of the pledge.[87] Where one takes collateral under such circumstances as not to be an innocent holder,[88] a surety who pays the debt takes it also subject to equities.[89] An assignee of a note in the hands of a pledge holder as security for different claims takes it subject to such claims and cannot by failing to make inquiry occupy the position of an innocent purchaser.[90] If a pledgee receives other property in good faith from a person clothed with apparent ownership, he may hold the property against the real owner,[91] if the latter authorized or contributed to such ownership.[92] A pledgor of corporate stock who has not conferred upon the pledgee apparent ownership may follow the stock into the hands of third persons to whom it has been wrongfully sold[93] in the absence of some element of estoppel,[94] and his rights in this respect does not depend on reimbursement to the purchaser.[95] Where in such case the transferee refuses to surrender the stock on demand, the owner is entitled

83. Though he had paid the principal. Fraud of principal imputed to agent except as to advances. Leo v. McCormack, 186 N. Y. 330, 78 N. E. 1096.

84. Folmar v. Lehman-Durr Co. [Ala.] 41 So. 750.

85. Where commission merchant exclusively for his own benefit enforced his rights as pledgee. Smith v. Equitable Trust Co. [Pa.] 64 A. 591.

86. Where wife permitted husband to pledge her note and mortgage for husband's debt. Clark v. Whitaker, 117 La. 298, 41 So. 580. Pledgee in good faith taking note without knowledge of want of consideration held protected as against maker. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357. Where defendant's cashier delivered to plaintiff bank a note and mortgage as collateral for his personal debt, evidence held not to charge plaintiff with notice of any equities of defendant in the note, or to show lack of good faith, though plaintiff's cashier had been stockholder and president of defendant bank. First Nat. Bank v. Gunhus [Iowa] 110 N. W. 611.

87. No consideration. Fidelity & Deposit Co. v. Johnston, 117 La. 880, 42 So. 357.

88. Where bank took collateral for a pre-existing debt without any new consideration. Rockefeller v. Larick [Neb.] 110 N. W. 1022.

89. Rockefeller v. Larick [Neb.] 110 N. W. 1022.

90. Ladd v. Myers [Cal. App.] 87 P. 111.

91. The owner of a certificate of stock allowed it to be taken out in the name of a third person to enable him to raise money on it for the owner's benefit, but the third person pledged it for his own benefit to an innocent pledgee. Gurley v. Reed, 190 Mass. 509, 77 N. E. 642. Immaterial that consideration for note was in part a pre-existing debt. Id. Pledge of corporate stock. See 3 Clark & M. Corp. § 617 et seq.

92. If one pledges the goods of another without authority, the fact that he has apparent ownership thereof will not protect an innocent pledgee unless such ownership was authorized or contributed to by the conduct of the true owner. Where an agent wrongfully took warehouse receipts in his own name, piedgee held not entitled to protection under Civ. Code, § 2991, without proof that owner "had allowed another to assume ownership of the property for the purpose of making a transfer of it." Akron Cereal Co. v. First Nat. Bank [Cal. App.] 84 P. 778.

93. Where pledgor did not sign power of attorney or assign stock, but merely placed his name in the body of the power of attorney and delivered stock to pledgee's agent who sold at private sale with no notice to pledgor, held no title passed. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1. Complaint in suit to recover stock alleging that plaintiff pledged it to secure a debt does not allege that he signed power of attorney or assigned the stock. Id.

94. Where purchasers were put upon inquiry by failure of pledgor to sign power of attorney or assign the stock, pledgor was not estopped to claim it from purchaser. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1.

95. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1. Conceding tender was necessary, held it was waived by refusal of purchaser to give up the stock (Id.), and a tender would not have been necessary before trial (Id.).

to either the stock itself or its value at the time of trial.[96] Where a new corporation is organized to take over the property of an old one whose stock is held in pledge, but before the new stock is issued the pledgor assigns a portion of it to one having notice, such assignee takes subject to the rights of the first pledgee.[97]

While in Texas a mere lienholder it not entitled to the remedy of the trial of the rights of property, such remedy is given to a pledgee if an officer in making a levy takes possession of the property to the exclusion of the pledgee.[98] The lien of a pledge will prevail over a prior mortgage of which the pledgee had no notice,[99] and a pledge of a bill of lading prevails over a subsequent attachment of the goods in the hands of the carrier.[1] Where a bank takes bills of lading as security for money expended on a shipment, it is entitled to hold the property until the debt is paid,[2] and its right to so hold it is not affected by the fact that the bills are exchanged for warehouse receipts,[3] even though the receipts are nonnegotiable.[4] The fact that the bank subsequently sells the property and takes the buyer's note will not impair its security if the warehouse receipts are still retained under agreement that they be held in pledge.[5]

The holder of collateral pledged as security for a debt, having undertaken in a court of equity to account to the other creditors of the pledgor, is bound to show that he has taken from the fund no greater sum than was secured by the pledge.[6]

A pledgee of national bank stock renders himself laible as stockholder where with the consent of the pledgor he credits the value of the stock on the debt and collects only the balance[7] and this notwithstanding the registered ownership is in another person who holds the stock for him.[8]

POINTING FIREARMS, see latest topical index.

POISONS.[9]

The unlawful administration of poison is specially defined as an offense in many states.[10] An indictment for unlawfully prescribing poison must allege all facts necessary to bring the case within the prohibition of the statute.[11] Statutes regulating or prohibiting the sale of poisons are not retroactive.[12]

POLICEMEN; POLICE POWER; POLLUTION OF WATERS; POOR LAWS; POOR LITIGANTS; POSSE COMITATUS, see latest topical index.

96. Though it had increased in value. Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1.

97. That pledgee knew of the assignment did not affect his rights where he did not release the lien of the pledge. Dexter-Horton & Co. v. McCafferty, 42 Wash. 221, 84 P. 733.

98. National Bank v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

99. When record did not give notice. Sweeney v. Taylor Bros. [Tex. Civ. App.] 14 Tex. Ct. Rep. 696, 92 S. W. 442.

1. Kentucky Refining Co. v. Bank of Morillton, 28 Ky. L. R. 486, 89 S. W. 492.

2. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

3. Where railroad company had the property stored. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

4. Where it was customary for compress company to consider the holders of the receipts as owners and entitled to demand the property. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

5. National Bank of Cleburne v. Citizens' Nat. Bank [Tex. Civ. App.] 93 S. W. 209.

6. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 194, 107 N. W. 1109. Could not subject fund to usurious commission charge. Id.

7. Held real owner. Ohio Valley Nat. Bank v. Hulitt, 27 S. Ct. 179. Pledgor could waive strict performance as to disposal of collateral. Id.

8. Ohio Valley Nat. Bank v. Hulitt, 27 S. Ct. 179.

9. See 4 C. L. 1060.

10. Under a statute against administering poison which poison shall be "actually taken," the word "taken" means taken into system in any way. State v. Stuart [Miss.] 40 So. 1010.

11. An indictment for prescribing morphine contrary to Acts 29th Leg. p. 45, § 2, which act contains a proviso that it shall not prevent any physician from prescribing, in good faith, for the use of any habitual user of narcotic drugs, such substances as he deems necessary, must allege that defendant did not deem the morphine prescribed necessary for the habit, an allegation of bad faith not being sufficient. Blair v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 702, 96 S. W. 23.

12. Where there is evidence of sales be-

POSSESSION, WRIT OF.[18]

The writ issues only for the possession of real property,[14] and, if personalty be seized thereunder, the owner's remedy is by common law action.[15] While equity will not enjoin the seizure of property not covered by the writ where there is an adequate remedy at law,[16] it will restrain execution at the suit of an occupant who was not a party to the action in which it was awarded and does not claim under any party thereto,[17] though if he be ousted it will not restore possession without a showing of injury.[18] A false return of service and delivery may be quashed and an alias writ issued upon due showing.[19]

POSSESSORY WARRANT.[20]

A possessory warrant does not lie to determine the right of possession where it was originally obtained under contract and without fraud.[21]

POSTAL LAW.

§ 1. The Federal Postal System and Its Administration (1441).
§ 2. Use of Mails, and Mail Matter (1442).
§ 3. Postal Crimes and Offenses (1443). Use of Mails to Defraud (1443). Embezzlement and Larceny From the Mails (1445).

§ 1. *The Federal postal system and its administration.*[22]—The constitutional power of congress over the postal system is not infringed by a state statute making the liability of a railroad to a mail clerk the same as that to an employe.[23] The postmaster general has no power to discontinue a post office at a county seat for the purpose of consolidation,[24] and if he does so, mandamus will lie to compel restoration [25] at the instance of the citizens.[26] A railway postal clerk is not entitled to reimbursement for expenses incurred on his regular run.[27] A letter carrier is entitled to pay during suspension unless the suspension is specified to be without pay

fore and after the act went into effect, an instruction to find the defendant guilty, if the jury believed from "the evidence" that he "sold or gave away any cocaine", etc., is erroneous. Brendecke v. People, 118 Ill. App. 42.

13. See 6 C. L. 1072.

14. Personal property cannot be seized. Keystone Coal Co. v. Williams [Pa.] 65 A. 407.

15. Where reference is made to the personalty in the judgment, writ, and return, the defendant's remedy is by common-law action and not by rule to open judgment and vacate the writ. Keystone Coal Co. v. Williams [Pa.] 65 A. 407.

16. Remedy under Code, § 919, held full, complete, and adequate. Bolen v. Allen [Ala.] 43 So. 202.

17. Bennett v. Preston, 59 W. Va. 681, 53 S. E. 562.

18. Smyth v. Wallace [Ky.] 100 S. W. 1186.

19. Smith v. Hardwick, 28 Ky. L. R. 597, 89 S. W. 724.

20. See 6 C. L. 1072.

21. Possession must be acquired by one of the modes set out in Civ. Code 1895, § 4799. Brown v. Todd, 124 Ga. 939, 53 S. E. 678. Cases of Meredith v. Knott, 34 Ga. 222; Hillyer v. Brodgen, 67 Ga. 24; Wynn v. Harrison, 111 Ga. 816, 35 S. E. 643; and Sheriff v. Thompson, 116 Ga. 436, 42 S. E. 738, distinguished. Id. The power conferred by Civ. Code 1895, § 4807, upon the judge of the superior court upon a hearing of a certiorari from a magistrate in a possessory warrant case to render a final judgment therein has no application where the possessory warrant is not the appropriate remedy. Id.

22. See 6 C. L. 1072.

23. Pa. Act of April 4, 1868. Martin v. Pittsburg & L. E. R. Co., 27 S. Ct. 100.

24. Act of Congress of June 9, 1896 (29 Stat. at L. 313, c. 386). United States v. Cortelyou, 26 App. D. C. 298.

25, 26. United States v. Cortelyou, 26 App. D. C. 298.

27. The appropriation for actual and necessary expenses of railway postal clerks, "while actually traveling on business of the department and away from their designated headquarters," applies only to special runs. Parshall v. U. S. [C. C. A.] 147 F. 433; Hartman v. U. S., 40 Ct. Cl. 133. Nor is such clerk an "office clerk or employe traveling under the order or direction of the postmaster general." Id.

or the restoration is specified to be with loss of pay.[28] Postmasters claiming additional compensation under a readjustment must show positively the readjustment[29] by record evidence unless proper foundation for parol is laid.[30] While a postmaster is liable on his bond for recommending and securing the appointment of an unnecessary employe in his office,[31] and for wages paid an appointee who does not render services therein, the mere fact that the employe does some of the work through a sub-employe creates no liability,[32] and a recital in his bookkeeper's statement of account that no services were rendered,[33] or the fact that the employe did not report to his successor for work,[34] are not admissible to disprove a bona fide employment. The proposal bond of a bidder for a contract to carry mail is liable, upon breach, for the full amount therein stated; irrespective of the injury sustained,[35] and a recovery of the actual damages from the contract surety is no defense to a suit thereon.[36] Courts cannot take judicial notice of the postal department regulations.[37]

§ 2. *Use of mails, and mail matter.*[38]—A determination by the postmaster general as to classification under the postal rate law will not be disturbed by the courts unless clearly erroneous.[39] A publication to be entitled to the second class rates as a "periodical" must not only have the feature of periodicity, but must be periodical in the ordinary sense.[40] The postmaster general may recover upon an undertaking given as a condition to a temporary injunction restraining the enforcement of a higher rate upon final determination in his favor.[41] A corporation is not entitled to have mail delivered to it in preference to another corporation of a similar name which rightfully used the same in the state.[42]

The postmaster general may deny the use of the mails in the furtherance of

28. Steele v. U. S., 40 Ct. Cl. 403.

29, 30. Peysert v. U. S., 41 Ct. Cl. 311.

31. Where the alleged unnecessary appointee was a janitor, evidence that a janitor was needed and that upon taking his office defendant was given a letter by his predecessor in which the first assistant postmaster general authorized the appointment, makes a case for the jury. Nagle v. U. S. [C. C. A.] 145 F. 302.

32. Nagle v. U. S. [C. C. A.] 145 F. 302.

33. Rev. St. U. S. § 886 (U. S. Comp. St. 1901, p. 670), merely authorizes the admission in evidence, in a suit against an officer charged with the disbursment of public moneys, a certified copy of the bookkeeper's plain statement of account, and does not authorize the admission of a recital therein that no services were rendered in return for moneys paid to a certain laborer. Nagle v. U. S. [C. C. A.] 145 F. 302.

34. Nagle v. U. S. [C. C. A.] 145 F. 302.

35. Especially where it recites that it is given pursuant to and subject to the terms of Act June 23, 1874, c. 456, § 12, 18 Stat. 235 (U. S. Comp. St. 1901, p. 2695), which provides that the amount of the bond is liquidated damages. United States v. Alcorn, 145 F. 995; United States v. U. S. Fidelity & Guaranty Co., 151 F. 534.

36. In an action on a proposal bond given by a bidder for a contract to carry mail under Act. June 23, 1874, c. 456, § 12, 18 Stat. 235 (U. S. Comp. St. 1901, p. 2695), for a breach of the contract, it is no defense that the government has recovered the actual damages from the surety on the contract. United States v. Alcorn, 145 F. 995.

37. A Federal appellate court can not take judicial notice of regulations of the postal department, but when relied on they should be read and put into the record in the trial court. Nagle v. U. S. [C. C. A.] 145 F. 302.

38. See 6 C. L. 1073.

39. United States v. Cortelyou, 28 App. D. C. 570. The publication "Wiener Chic," devoted to dressmaking, and consisting of colored plates showing costumes, etc., patterns of which are for sale by the publishers, is not so clearly a "periodical publication" as to justify the courts in reversing a determination of the postmaster general to the contrary. United States v. Cortelyou, 28 App. D. C. 570.

40. Although a publication must conform to § 14, Act of Congress of March 3, 1879 (20 Stat. at L. 355, c. 180, U. S. Comp. St. 1901, p. 2647), to be entitled to second class rates, it must also be a "periodical publication" within § 10, which means not only must it be published periodically, but must be a periodical in the ordinary sense of the term. United States v. Cortelyou, 28 App. D. C. 570.

41. Contention that the back rates can only be collected by the United States, and since it was not a party to the injunction suit, no liability on the undertaking exists, held without merit. Cortelyou v. Houghton, 27 App. D. C. 188; Cortelyou v. Bates & Guild Co., 27 App. D. C. 201.

42. Where a foreign corporation doing business in Illinois had not complied with regulatory statutes in respect thereto at the time of the incorporation of an Illinois corporation under a name practically identical, it cannot maintain a bill to have mail delivered to it in preference to the Illinois corporation where there is nothing to indicate to which it belongs. Central Trust Co. v. Central Trust Co., 149 F. 789.

a lottery,[43] or a fraudulent scheme,[44] which scheme need not be lacking in all the clements of a legitimate business,[45] nor is it material that a full equivalent is given for the money received.[46] Congressmen cannot appear for compensation in a fraud order inquiry before the postoffice department.[47]

§ 3. *Postal crimes and offenses.*[48]—Any one who knowingly[49] mails or causes to be mailed[50] any obscene matter,[51] or information as to where the same may be procured, is criminally liable. A count alleging two reasons why the circular was nonmailable under the statute is not objectionable as double.[52]

Use of mails to defraud.[53]—Any person who, having devised a fraudulent scheme or artifice[54] with intent to defraud[55] to be effected by the use of the

43. A scheme conducted by the issuance of "diamond leases" arranged in series and consecutively numbered, each purchaser to pay $110 in installments, to be applied in fixed proportions to the expenses of the company and the redemption of the oldest leases of the same and prior series by the purchase and delivery of certain diamonds, the company having no other funds, is a lottery within Rev. St. §§ 3920, 4041, as amended by Act Sept. 19, 1890, c. 908, §§ 2, 3, 26, Stat. 466 (U. S. Comp. St. 1901, pp. 2686, 2749). Preferred Mercantile Co. v. Hibbard, 142 F. 877.

44. A promise to refund the purchase price if the goods were not satisfactory, and a return thereof in a few instances, is not conclusive against an intent to defraud. Harris v. Rosenberger [C. C. A.] 145 F. 449. While considerable latitude is allowed to trade puffing, it does not extend to misrepresentations of material facts made with the intent and adapted to deceive. Id.

45. Authority under Rev. St. §§ 3929, 4041 (U. S. Comp. St. 1901, pp. 2686, 2749). Harris v. Rosenberger [C. C. A.] 145 F. 449.

46. Harris v. Rosenberger [C. C. A.] 145 F. 449.

47. A fraud order inquiry pending before the postoffice department is a proceeding in which the United States is "directly or indirectly interested" within U. S. Rev. St. § 1782, prohibiting a senator to appear in any such proceeding. Burton v. U. S., 26 S. Ct. 688.

48. See 6 C. L. 1074

49. An indictment charging the defendant with "willfully, unlawfully, wrongfully, and knowingly," mailing an obscene circular, the sufficiency of which is not questioned until after verdict, must be construed to mean that it was mailed with knowledge of its contents. Burton v. U. S. [C. C. A.] 142 F. 57.

50. Where, in the execution of a joint enterprise, one partner deposits a nonmailable circular in the mails by the authorization of another or with his knowledge and acquiescense, the latter causes the circular to be deposited within Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658). Burton v. U. S. [C. C. A.] 142 F. 57. A defendant knowingly causes the article to be deposited when he so acts that the same will naturally and probably go into the mails. Wrote an article for a newspaper which he knew was distributed through the mails. Demolli v. U. S. [C. C. A.] 144 F. 363. Defendant need not be responsible for the mailing of the entire contents, as where one writes for a newspaper knowing it is distributed through the mail. Id.

51. The entire contents need not be objectionable. Demolli v. U. S. [C. C. A.] 144 F. 363. Where the acts described and the ideas conveyed in a book are calculated to deprave the morals of the reader by exciting sexual desires and libidinous thoughts, the book is obscene within Rev. St. § 3893, (U. S. Comp. St. 1901, p. 2658), notwithstanding the information is accurate and scientific and of value to mankind. Burton v. U. S. [C. C. A.] 142 F. 57. In determining whether or not a book is obscene under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658), the entire book need not be considered, but only the alleged obscene parts and so much of the context as is necessary to a proper understanding. Id. If the matter was in fact obscene and defendant knew its contents, it is immaterial that he did not regard it of obscene character. Id. Hence communications with the postal authorities as to its mailability are not admissible to show good faith. Id.

52. A count for mailing a single copy of a circular nonmailable under Rev. St. § 3893 (U. S. Comp. St. 1901, p. 2658), was not double because it alleged two reasons why it was nonmailable, viz., that it gave information where an obscene book could be obtained and was itself obscene. Burton v. U. S. [C. C. A.] 142 F. 57.

53. See 6 C. L. 1074.

54. There must be a fraudulent scheme or artifice. Brown v. U. S. [C. C. A.] 143 F. 60. The fraudulent scheme may consist of expressions of opinion or assurances of past, present, or future, conditions, provided they be designed and reasonably adapted to deceive. Brooks v. U. S. [C. C. A.] 146 F. 223. Laudatory and extravagent advertisements held in themselves to constitute most convincing evidence of a fraudulent scheme. Id. A scheme to induce persons by letters to send money for life readings is one to defraud, if accused intended to and did return a stock letter purporting to be a special reading. United States v. White, 150 F. 379. A scheme to induce persons to purchase paper made in imitation of parchment represented to be pure and as having certain charms over the lives of persons using it is fraudulent if the accused knew the representations to be false. Id. Indictment held to sufficiently alleged a fraudulent scheme to obtain money under the guise of a brokage business. Brooks v. U. S. [C. C. A.] 146 F. 223.

55. Where the alleged fraudulent scheme consisted of offers to impart information to persons sending money as to how they could acquire occult and supernatural power, the question is not whether defendant could per-

United States mail,[56] deposits or causes to be deposited[57] any matter in the mail in furtherance thereof,[58] is criminally liable under Rev. St. § 5480. While the indictment must allege all the essential elements,[59] the gravamen of the offense being the depositing of matter in the mail in furtherance of the fraudulent enterprise,[60] the scheme need not be pleaded with the same particularity as is required in respect to the mailing,[61] though it must be set out with sufficient certainty to show its existence and character and to fairly acquaint the accused with what he must meet.[62] The particular scheme charged must be proven[63] substantially as alleged.[64] Generally speaking, anything which tends to show the fraudulent character of the scheme[65] as correspondence of the accused[66] or his agent,[67] though not the particular letter pleaded and relied upon for conviction,[68] is admissible. While a single indictment cannot charge more than three offenses committed within the same six

form such promises, but whether he in good faith intended and believed he could do so. United States v. White, 150 F. 379.

56. The scheme must contemplate the use of the mails. Brown v. U. S. [C. C. A.] 143 F. 60; Brooks v. U. S. [C. C. A.] 146 F. 223. Not necessary that the mails be the sole means of effecting the fraud. It is sufficient if it was simply used to induce the victim to call upon the accused. Brown v. U. S. [C. C. A.] 143 F. 60. Evidence that defendant published advertisements soliciting persons who read the same to write to him, and that he had made arrangements to carry on a systematic correspondence upon receiving letters justifies a finding that the scheme was to be effected through the mails. United States v. White, 150 F. 379.

57. Evidence that defendant was the owner of the business and had charge of the correspondence, and that letters relating to the business were mailed, justifies the jury in drawing the inference that they were mailed by defendant or under his direction. Brooks v. U. S. [C. C. A.] 146 F. 223.

58. While there must be a deposit in furtherance of the scheme (Brown v. U. S. [C. C. A.] 143 F. 60), the letter need not contain any false representations (Rumble v. U. S. [C. C. A.] 143 F. 772). Where the alleged scheme was to insert advertisements in newspapers, inviting correspondence in respect to a trade of merchandise, and "upon receiving inquiries" from such persons "as might read the advertisements", etc., a direct charge that the letter deposited was in furtherance of the scheme is sufficient without an allegation that it was directed to one who had read the advertisement and had answered. Brown v. U. S. [C. C. A.] 143 F. 60.

59. An indictment which states the essential elements of the offense with such reasonable particularity of act, intent, time, place, and circumstances, as will apprise the defendant of the nature of the accusation and enable him to prepare his defense and plead his conviction or acquittal in bar to a subsequent prosecution for the same offense is sufficient. Brown v. U. S. [C. C. A.] 143 F. 60.

60. An instruction that defendant cannot be convicted for devising a fraudulent scheme, but that the gravamen of the offense consisted of depositing mail in furtherance thereof, and that the jury must find that defendant placed or caused the letters to be placed in the mail as alleged held correct. Brooks v. U. S. [C. C. A.] 146 F. 223.

61, 62. Brooks v. U. S. [C. C. A.] 146 F. 223.

63. One charged with the use of the mails to effect a fraudulent scheme to sell "green paper as counterfeit money" cannot be convicted of a scheme to sell "counterfeit money." Beck v. U. S. [C. C. A.] 145 F. 625.

64. Brown v. U. S. [C. C. A.] 146 F. 219. A scheme alleged to consist of inserting an advertisement in a newspaper containing the words "How to speculate on Board of Trade, sent free by J. L. Brown & Co.", etc., to induce the public to send money for purchases on the board which defendant intended to convert, is not supported by proof that one sent $1,000, with instructions to buy options on pork, that defendant immediately returned a memorandum showing a sale by him to the sender, which was in accordance with bucket shop practice and satisfactory to the purchaser, and that the only difficulty arose upon settlement. Id.

65. Where it is shown that defendant participated in the procurement of a false and laudatory letter and affidavit used in advertising such advertisements and copies of the letter and affidavit are admissible. Brooks v. U. S. [C. C. A.] 146 F. 223. Where a witness testified that he and his father were defrauded by defendant, and that he transacted the entire business because of the extreme age of the father he may testify that the father was induced by the false statements to purchase. Rumble v. U. S. [C. C. A.] 143 F. 772. Where the fraudulent scheme consisted of inducing parties to enter into contracts impossible of performance, evidence relating to the possibility of performance is admissible. Klein v. U. S. [C. C. A.] 151 F. 420.

66. A letter written to defendant and not answered, but which is shown to be a part of a larger corespondence between the parties, and which in connection with such correspondence tends to show that the alleged representations made by defendant are false, is admissible. Rumble v. U. S. [C. C. A.] 143 F. 772.

67. Especially where approved by the accused. Rumble v. U. S. [C. C. A.] 143 F. 772. Where it is shown that a letter by an agent containing false representations was approved by defendant, it is immaterial how much of the information therein was acquired by a personal investigation by the agent. Id.

68. Prosecution is not limited to the letters pleaded. Brooks v. U. S. [C. C. A.] 146 F. 223; Rumble v. U. S. [C. C. A.] 143 F. 772

calendar months,[69] several indictments may be tried together to avoid delay and expense where the accused is not prejudiced thereby,[70] though they allege more than three offenses extending over more than six months.[71]

Embezzlement and larceny from the mails.[72]—While the strict rules of pleading applicable to larceny do not apply to the statutory crime of feloniously stealing mail,[73] the indictment must allege an unlawful or fraudulent taking.[74] An indictment for statutory embezzlement by a postal clerk must allege that the money came into his hands as such clerk.[75]

POSTPONEMENT, see latest topical index.

POWERS.

§ 1. Nature and Kinds (1445).
§ 2. Creation, Construction, Validity, and Effect (1445).
§ 3. Execution of Powers (1446).

§ 1. *Nature and kinds.*[76]—In the most common acceptation of the term, a power is an authority vested in one person to dispose of or limit an interest in lands belonging to another.[77] Mere powers of attorney to convey land are elsewhere treated.[78]

§ 2. *Creation, construction, validity, and effect.*[79]—Power to dispose of a fee may be given to a life tenant.[80] The kind of power created is largely a matter of construction.[81] A power to dispose of a fund "to and among" grandchildren in such shares and manner as the donee shall think proper is nonexclusive.[82] A mere naked collateral power repugnant to an absolute fee is void.[83] Where the title to land is conveyed to secure a debt and the instrument is not merely a mortgage, a power of sale is coupled with an interest and is not revoked by the death of the

69. The charging of offenses not committed within the same six calendar months, contrary to Rev. St. § 5480, as amended March 2, 1889 (25 Stat. 873, c. 393, § 1 [U. S. Comp. St. 1901, p. 3696]), is no ground for quashing the indictment where a nolle prosequi is entered as to the objectionable counts. Rumble v. U. S. [C. C. A.] 143 F. 772.

70. Brown v. U. S. [C. C. A.] 143 F. 60.

71. Rev. St. § 5480 (U. S. Comp. St. 1901, p. 3696), limiting the number of offenses which may be charged in a single indictment to three committed within the same six calendar months, held not to prohibit such joint trial. Brown v. U. S. [C. C. A.] 143 F. 60.

72. See 6 C. L. 1074.

73. Do not apply to offenses created by Rev. St. § 5469 (U. S. Comp. St. 1901, p. 3692). Bowers v. U. S. [C. C. A.] 148 F. 379. Sufficient if it charges that defendant unlawfully stole from a designated post office a letter, described sufficiently for identification, and it is unnecessary to aver that it contained anything of value, whose property it was, or that it was in the post office for transmission through the mails. Id.

74. In order to constitute an offense under Rev. St. 5469 (U. S. Comp. St. 1901, p. 3692), the mail must be taken unlawfully or fraudulently and an indictment leaving it open to an inference that the mail might have been mistakenly delivered is demurrable though it follows the language of the statute. United States v. Meyers, 142 F. 907.

75. Indictment under Rev. St. § 4046, (U. S. Comp. St. 1901, p. 2752), held defective for failing to allege that defendant received the money as a clerk, though following the language of the statute. United States v. Allen, 150 F. 152.

76. See 6 C. L. 1074.

77. See definitions collected in Cyc. Law Dict. "Powers."

78. See Agency, 7 C. L. 61.

79. See 6 C. L. 1075.

80. Burnett v. Piercy [Cal.] 86 P. 603. A power of disposition in fee added to a life estate is not repugnant to the life estate or to a remainder over. Donee had power to dispose of the land. Grace v. Perry, 197 Mo. 550, 95 S. W. 875.

81. A provision in a will that if the "use and improvement" of certain real estate should be insufficient for the support of a widow, she might sell so much as would be sufficient for that purpose, created a limited power of sale in case the "use and improvement" became insufficient. Bartlett v. Buckland, 78 Conn. 517, 63 A. 350.

82. No grandchild could be excluded. Cameron v. Crowley [N. J. Eq.] 65 A. 875. Use of the word "manner" does not imply power of selection. Id. That donor's will, provided that he had full confidence in donee's discretion and fairness, did not show intention to vest such power Id.

83. Where a devise conferred a fee simple upon the vestry of a church, a provision that it was for such church purposes as the rector might direct was void. Doan v. Vestry of Parish of Ascension, 103 Md. 662, 64 A. 314.

debtor.[84] A power to dispose of real estate by the joint act of the donee and another ceases to exist upon the death of the latter.[85] Land held by an equitable life tenant with a limited, contingent, power of appointment by will cannot be subjected to the claims of creditors of the donee after his death.[86]

§ 3. *Execution of powers.*[87]—The execution of a power of sale contained in a security deed is not a suit against the administrator of the debtor so as to require a delay before action can be taken.[88] A devisee of a life estate with a limited power of sale in case of necessity may exercise the power on the actual existence of the necessity without an order of court.[89] A power of revocation reserved to a grantor is personal to him and cannot be exercised by his heirs.[90] A power vested in several donees must be exercised by a majority,[91] but if exercised by a minority, the others may ratify.[92] A general residuary clause in the will of a donee will be treated as an appointment unless the will indicates a different intent.[93] The question of whether a deed was made in execution of a power is one of intention to be gathered from circumstances and the terms of the deed.[94] Where the deed is silent and the grantor had an interest which could pass without regard to the power, this tends strongly to show that there was no intention to execute the power,[95] but this common-law rule of construction does not apply where a contrary intent is shown.[96] A fee simple deed by a donee without any vested legal interest is construed as an execution of the power, though no reference is made thereto.[97] A general unrestricted power to dispose of land in fee simple includes power to mortgage it,[98] and where the mortgage contains limitations over of the surplus after satisfaction of the debt, it will operate as a complete execution of the power.[99] A power to devise real estate in equal or unequal shares to any or all persons of a certain class may be properly exercised by an appointment of the land to one person subject to a money charge in favor of the others.[1] A power to dispose of a specified sum of money to one class

84. Baggett v. Edwards, 126 Ga. 463, 55 S. E. 250.

85. Where deed to a wife prohibited alienation except by joint deed of herself on death of husband. Burnett v. Piercy [Cal.] 86 P. 603.

86. Where life tenant was authorized to appoint his children or descendents but left none. Price v. Cherbonnier, 103 Md. 107, 63 A. 209. An agreement by tenant that he would divise a portion of the land to certain creditors held ineffectual. Id.

87. See 6 C. L. 1075.

88. Delay of twelve months not necessary. Baggett v. Edwards, 126 Ga. 463, 55 S. E. 250.

89. Where widow could sell realty if "use and improvement" thereof should be insufficient for her support. Bartlett v. Buckland, 78 Conn. 517, 63 A. 350.

90. Stamper v. Venable [Tenn.] 97 S. W. 812.

91. One of three could not execute. Hill v. Peoples [Ark.] 95 S. W. 990.

92. Evidence held to show ratification by two trustees of sale made by only one through an agent. Hill v. Peoples [Ark.] 95 S. W. 990. Ratification held equivalent to sale by trustees themselves. Id.

93. Especially where such construction would result in the same disposition of the fund as testator attempted to make by an insufficient clause. Tudor v. Vail [Mass.] 80 N. E. 590.

94. Walters v. Bristow, 77 Ark. 182, 91 S. W. 305. Where life tenant had power to dispose of "the absolute estate in fee simple" and conveyed the deed "the absolute estate in fee simple", there was a sufficient indication that the deed was an execution of the power, though the power was not expressly referred to. Grace v. Perry, 197 Mo. 550, 95 S. W. 875.

95. Where life tenant conveyed for one-third value being joined by a remainderman, held the power was not executed. Walters v. Bristow, 77 Ark. 182, 91 S. W. 305.

96. Where widow describing herself as such conveyed decedent's real estate in which she had life estate, deed containing full covenants of warranty and grantee paying full value. Vines v. Clarke, 111 App. Div. 12, 97 N. Y. S. 532. That a subsequent husband joined in the deed was immaterial. Id.

97. Middlebrooks & Co. v. Ferguson, 126 Ga. 232, 55 S. E. 34. Where property was willed to testator's wife in trust for use of herself and children with power of sale and provision that upon the death any remaining property should be sold and divided among the children, held, the wife took no vested legal interest and a deed by her of the fee of certain land not referring to the power was an execution thereof and vested in the grantee a fee and not merely the wife's interest. Id.

98, 99. Grace v. Perry, 197 Mo. 550, 95 S. W. 875.

1. Power to appoint to any or all children or grandchildren in such shares as a widow should elect justified her in imposing a charge on share devised to a grandchild for debts of grandchild's father and brother to

of appointees and the balance to another class is not validly executed by the appointment of a larger sum to the one class and selection of members of the two classes not mentioned in the alternative disposition of the donor in case of no appointment.[2] Where a power is nonexclusive, an appointment excluding any intended appointee is invalid.[3] Whether an appointment in excess of a special and restricted power is wholly void depends upon whether the excess is distinct and separable from the authorized portion of the appointment.[4] An appointment long asquiesced in may be held valid though it was not strictly regular.[5] In the case of an imperfect execution of a power, equity will interpose to carry out the intention of the donee in favor of persons peculiarly within its protective power,[6] but will not aid mere volunteers.[7] An imperative power coupled with a trust as distinguished from a mere naked or discretionary power [8] must be executed,[9] and if an execution attempted in good faith proves void, equity will protect innocent parties by subrogating them to the rights of the beneficiary.[10] A valid exercise of a power of appointment immediately vests title in the appointee.[11] Where a power reserved to a grantor gives to him the right to dispose of the land to others for his own benefit,[12] and the power is exercised by a subsequent conveyance to a third person, a reconveyance by such person is immaterial on the issue of the rights of the original grantee.[13] It has been held in New York that where an estate is devised to remaindermen subject to a power of appointment in the life tenant which is executed by the latter in such manner that the remaindermen take exactly the same estate as they would have taken in the absence of any appointment, the remaindermen may elect to take under the will of the donor and not under the power of appointment.[14] Upon the death of a grantor in a security deed with power of sale, the property should be sold as a part of his estate.[15]

Powers of Attorney; Praecipe; Prayers; Precatory Trusts; Preliminary Examination; Preliminary Suits; Prescription; Presumptions; Principal and Agent; Principal and Surety; Prior Appropriation; Priorities Between Creditors, see latest topical index.

testatrix's estats for the purpose of equalizing the respective shares in the property. Monjo v. Woodhouse, 111 App. Div. 80, 97 N. Y. S. 653; Monjo v. Woodhouse, 185 N. Y. 295, 78 N. E. 71. That will provided that payment should be made to testatrix's executrix "as part of testatrix's residuary estate," did not render the execution invalid. Id. Even if execution of the power should be considered invalid, grandchild could not complain for in that case she would have received nothing. Monjo v. Woodhouse, 111 App. Div. 80, 97 N. Y. S. 653.

2. Roger's Estate, 31 Pa. Super. Ct. 620.

3. Appointment excluding any of the grandchildren held invalid. Cameron v. Crowley [N. J. Eq.] 65 A. 875.

4. Where dones was directed to appoint a specified sum to members of family of the mother of executrix and the balance of the fund to members of the family of her father and appointment to mother's family was excessive, held excess was not devisible. Rogers' Estate, 31 Pa. Super. Ct. 620.

5. Where a deed authorized the appointment of certain property for the use of some religious denomination for religious services with power of reappointment when such services should be discontinued, evidences held to show a valid and proper appointment to a successor of the original appointee. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.

6. Such as creditors, purchasers, wives and children. Rogers' Estate, 31 Pa. Super. Ct. 620.

7. Nor give any assistance where both remainderman, under alternative devise over of donor, and appointees, are mere volunteers and stand in equal equity. Rogers' Estate, 31 Pa. Super. Ct. 620.

8. Where testatrix ordered and directed executrix to apply rents and profits and sell real estate for support and education of daughter, the power was imperative and not discretionary. Cutter v. Burroughs, 100 Me. 379, 61 A. 767.

9. Cutter v. Burroughs, 100 Me. 379, 61 A. 767.

10. Where guardian of testatrix's daughter, instead of the trustee, assumed to sell real estate for the daughter's benefit, and the sales were therefore void so that title passed to heirs and devisees, the latter took it charged with a trust in favor of the purchasers and those who had rendered services for the daughter's benefit. Cutter v. Burroughs, 100 Me. 379, 61 A. 767. See Trusts, 6 C. L. 1736.

11. Though appointee was nonresident, where property was in this state, it became subject to inheritance tax. In re Lord's Estate, 111 App. Div. 152, 97 N. Y. S. 553.

12. Deed of father to sons held to still leave fee in him under Civ. Code, §§ 905,

PRISONS, JAILS, AND REFORMATORIES.

§ 1. Nature and Classes (1448).
§ 2. Custody, Discipline, Government, and Employment of Inmates (1448). Credits for Good Behavior (1448).
§ 3. Administration and Fiscal Affairs (1449).

§ 1. *Nature and classes.*[16]

§ 2. *Custody, discipline, government, and employment of inmates.*[17]—The legality of a confinement in a particular place cannot be determined in habeas corpus proceedings in the Federal court for release on the ground of incarceration without due process of law.[18] In Kentucky a circuit court may, in its discretion, transfer a prisoner from one jail to another in the same county,[19] and the governor of Oklahoma may direct the return of an insane convict imprisoned in Kansas under contract to the county committing him.[20]

In Michigan a mechanical trade, or any part thereof,[21] cannot be taught to convicts either by theoretical teachings or by practical work.[22]

In Texas the defendant must be under sixteen years of age at the time of trial to entitle him to a reformatory sentence,[23] and under the Missouri statute the court and not the jury determines whether such a sentence shall be imposed.[24] A deputy warden in Michigan has power in the absence of the warden to issue a warrant for the return of a parolled prisoner who has violated the terms of his release.[25]

Credits for good behavior.[26]—A statute authorizing the commutation of a penal sentence for good behavior according to a specific schedule of credits[27] is valid and becomes a part of the sentence.[28] The Federal act in relation thereto is not applicable to sentences imposed before it took effect.[29] Before such act Federal prison-

909, 918-922, vesting in holder of a power on estate in fee. Lewis v. Lewis [Cal. App.] 86 P. 994.

13. Lewis v. Lewis [Cal. App.] 86 P. 994. Though consideration was small, it could not be said that conveyence was not for grantor's benefit. Id.

14. Daughter who was alive at her grandfather's death could elect to take under his will and not under that of her mother and thus escape a transfer tax imposed after grandfather's death. In re Lansing's Etate, 182 N. Y. 238, 74 N. E. 882.

Note: Since the devise of the remainder to the heirs at law of the children was made subject to the power of each child to devise it to his or her heirs at law or collateral relatives, it would seem that when this power was in fact exercised the devise of the grandfather to the remaindermen lapsed, and the fact that in this particular case the appointment attempted to carry only an estate identical with that devised by the grandfather should not affect the question.—Editor.

15. Baggett v. Edwards, 126 Ga. 463, 55 S. E. 250.

16. See 4 C. L. 1067.

17. See 6 C. L. 1076.

18. Refusal to pass upon the validity of the contract whereby prisoners of Oklahoma were confined in the Kansas penitentiary. In re Terrill [C. C. A.] 144 F. 616.

19. Monroe v. Berry, 29 Ky. L. R. 602, 94 S. W. 38.

20. Since under the terms of the contract Kansas was entitled to return insane prisoners, there was such necessity for the transfer as to come within the phrase "or other necessity" contained in St. Okl. 1893, § 5485. In re Terrill [C. C. A.] 144 F. 616.

21. Const. art. 18, § 3, held violated though only one of the thirteen processes in the manufacture of a broom was taught to a single convict. Manthey v. Vincent, 145 Mich. 327, 13 Let. Leg. N. 465, 108 N. W. 667.

22. Const. art. 18, § 3, providing that no mechanical trade shall be taught, etc., to convicts, prohibits the employment of the convicts in such manner that they shall learn the trade as well as theoretical teaching. Manthey v. Vincent, 145 Mich. 327, 13 Det. Leg. N. 465, 108 N. W. 667.

23. Code Cr. Proc. 1895, art. 1145. Aikins v. State [Tex. Cr. App.] 91 S. W. 790.

24. Rev. St. 1899, § 7759, providing that all boys convicted of crime, the punishment for which is death or imprisonment in the pentitentiary for not less than 10 years, "may be imprisoned in the penitentiary or committed to the state reform school" leave it to the court to decide and an instruction as to assessment of punishment need not refer thereto. State v. Darling [Mo.] 97 S. W. 592.

25. Comp. Laws 1897, § 2086. Ex parte Fox [Mich.] 110 N. W. 517.

26. See 6 C. L. 1077.

27. Shannon's Code, § 7423, held void as a delegation of legislative power in that the deduction was left to the arbitrary action of the board of commissioners of the county workhouse, and no schedule was prescribed. Fite v. State, 114 Tenn. 646, 88 S. W. 941.

28. Fite v. State, 114 Tenn. 646, 88 S. W. 941.

29. Act of Congress, June 21, 1902, c. 1140, § 1, 32 Stat. 397 (U. S. Comp. St. Supp. 1905, p. 751). Woodward v. Bridges, 144 F. 156.

30, 31. In re Naples, 142 F. 781.

ers, being subject to the same discipline as state convicts in the same prison, were entitled to credits according to the state law,[30] and the state authorities have the power to parol such convicts.[31] Where one of several cumulative sentences is invalid, the deduction for good behavior must be computed upon the aggregate of the valid sentences only.[32] While earned credits are not forfeited by the breach of a subsequent conditional pardon,[33] it may be decreased for insubordination in some states.[34]

§ 3. *Administration and fiscal affairs.*[35]—The maintenance of a jail by a city is in discharge of a governmental function and no liability is incurred for nonfeasance in respect thereto.[36] A jailer's compensation is fixed by statute in Kentucky and the fiscal court has no power to allow other or additional salary,[37] or for janitor services.[38] The cost of keeping a prisoner who is acquitted after a reversal of a conviction is upon the county in which the alleged crime was committed and not upon the state.[39] The ordinary or board of county commissioners, and not the county treasurer,[40] is charged with the disbursement of the funds arising from the hire of convicts,[41] and must apply it, in order, to the costs of the particular case, to the insolvent costs in other cases, and pay any balance which may remain into the county treasury.[42]

PRIVACY, RIGHT OF; PRIVATE INTERNATIONAL LAW; PRIVATE SCHOOLS; PRIVATE WAYS; PRIVILEGE; PRIVILEGED COMMUNICATIONS; PRIZE, see latest topical index.

PRIZE FIGHTING.[43]

PROBATE, see latest topical index.

PROCESS.

§ 1. Nature and Kinds, Form and Requisites (1449).
§ 2. Issuance (1451).
§ 3. Extraterritorial Effect or Validity (1452).
§ 4. Actual Service (1452).
A. Personal (1452).
B. Substituted (1456).
C. The Server, His Qualifications, and Protection (1457).
§ 5. Constructive Service (1457).
§ 6. Return and Proof of Service (1461).
§ 7. Defects, Objections, and Amendments (1464).
§ 8. Privilege and Exemptions from Service (1467).
§ 9. Abuse of Process (1467).

§ 1. *Nature and kinds, form and requisites. Definition.*[44]—In a strict sense "process" means only mandates of a court under seal,[45] but as here used it includes

32. Deduction for good behavior under Rev. Laws Mass. c. 225, § 113. Woodward v. Bridges, 144 F. 156.

33. Credits under Vt. St. 5274. Ex parte MeKenna [Vt.] 64 A. 77.

34. Where the prison board had authority to determine the amount of good time to be deducted for insubordination, a determination is conclusive in a habeas corpus proceeding to obtain the prisoner's discharge on the ground of commitment without due process of law. In re Terrill [C. C. A.] 144 F. 616. Where the prison board deprived a prisoner of a portion of his credit on account of insubordination and subsequently adjudged him insane, there is no presumption that he was insane at the time of insubordination but the contrary. Id.

35. See 6 C. L. 1077.

36. Injuries to inmates due to lack of heat. Jones v. Corbin [Ky.] 98 S. W. 1002.

37. Fixed by Ky. St. 1903, §§ 356, 1730. Mitchell v. Henry County [Ky.] 100 S. W. 220. Under Ky. St. 1903, § 3948, it is made the duty of the jailer to superintend the public square, courthouse, and other county buildings, and, as no compensation is authorized, it must be regarded as ex officio duty for which no allowance can be made by the fiscal court, § 1749. Id.

38. Ky. St. 1903, § 1840, authorizing the fiscal court to appropriate funds for keeping public buildings in repair, does not authorize an appropriation for janitor service. Mitchell v. Henry County [Ky.] 100 S. W. 220.

39. Code of Cr. Proc. §§ 378, 380. Brown County v. Lampert [Neb.] 107 N. W. 746.

40. Hence, mandamus will not lie to compel him to pay a claim payable out of such fund. Sapp v. De Lacy [Ga.] 56 S. E. 754.

41, 42. Sapp v. De Lacy [Ga.] 56 S. E. 754.

43. No cases have been found for this subject since the last article. See 4 C. L. 1070.

44. See 6 C. L. 1078.

45. See Encyclopedic Law Dict. "Process."

all original writs, summonses, and orders. A court has no jurisdiction to adjudicate the rights of litigants without notice actual or constructive,[46] and knowledge on the part of a defendant will not supply the want of service.[47] Notices required to be given in judicial proceedings are ordinarily held sufficient if the object and intent of the law is substantially attained thereby.[48]

Designation of court and parties.[49] A plaintiff may designate a defendant in petition and summons by such name as he supposes he possesses if in verifying his petition he shall state that he could not discover the true name.[50] A mistake in the name of a plaintiff or defendant is no ground for quashing the writ or the service,[51] and the omission of a defendant's Christian name is not fatal if the right person was in fact served.[52] A statute providing a manner of service if defendant is a lunatic does not require the summons to be issued against him as a lunatic.[53] A warning order issued in a suit for divorce in Arkansas warning a nonresident to appear in the action is not a writ or judicial process within the statute of that state providing that writs or judicial process shall run in the name of the state.[54]

Signing and sealing.[55]—A process should be signed by the clerk himself or by some one in his presence,[56] but if signed by one authorized by the clerk in his absence, it will not be void but only irregular.[57] Surplus titles attached to the clerk's name will not invalidate a notice otherwise properly signed.[58] Failure to state in a summons the street number of plaintiff's attorney is not jurisdictional.[59] A summons without a seal is held void by some authorities,[60] while by others the omission is considered a mere irregularity.[61] In Louisiana the service of a citation though it has no seal will stop the running of limitations.[62]

Indorsement.[63]—A statute requiring the indorsement on a process of the name and place of residence of an assignee is mandatory and must be complied with.[64]

Direction and delivery.[65]

46. See, also, Jurisdiction, 8 C. L. 579.

47. Foreign corporation not bound to act on information given by a stranger who had been served in a suit against it and could have enforcement of default judgment enjoined. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 89 P. 535.

48. In condemnation proceedings by drainage district, notice to owners held sufficient under Hurd's Rev. St. 1905, c. 42, §§ 93, 132, as against objection that it did not state in what capacity the owners were notified. Waite v. Green River Com'rs, 226 Ill. 207, 80 N. E. 725.

49. See 6 C. L. 1079.

50. Davis v. Jennings [Neb.] 111 N. W. 128.

51. "Christ" for "Christian" in summons. Davis v. Jennings [Neb.] 111 N. W. 128. See post, § 7, subd. How Objections Made; also, subd. Amendments.

52. Where record in foreclosure showed that there was but one minor defendant and she was regularly served, she could not avoid service after judgment. Gravelle v. Canadian & American Mortg. & Trust Co., 42 Wash. 437, 35 P. 36.

53. No objection that summons was issued against him individually. Eversole v. Eastern Kentucky Asylum [Ky.] 100 S. W. 300.

54. Stuart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1040.

55. See 6 C. L. 1080.

56. Civ. Code 1895, § 4360, par. 4. Rucker v. Tabor, 126 Ga. 132, 54 S. E. 959.

57. Especially where writ was a mesne process. Rucker v. Tabor, 126 Ga. 132, 54 S. E. 959.

58. That clerk of county court in signing notice to owners in condemnation proceedings also designated himself "County Clerk" and "ex officio clerk" of the drainage district, held not fatal. Waite v. Green River Com'rs, 226 Ill. 207, 80 N. E. 725.

59. Failure to state as required by Code Civ. Proc. § 417, a mere irregularity. Sullivan v. Harney, 103 N. Y. S. 177.

60. Summons issued by clerk of district court without seal of court held void so as to confer no jurisdiction by service. Kelso v. Norton [Kan.] 87 P. 184.

61. In the absence of a controlling statute, the omission from the summons of a seal of court is at most an amendable defect in no way affecting the jurisdiction of the court or the legalty of its proceedings. Benedict v. Hadlow Co. [Fla.] 42 So. 239.

62. King v. Guynes [La.] 42 So. 959.

63. See 6 C. L. 1080.

64. Rev. St. c. 84, § 144, providing that the name and place of residence of an assignee if known shall, at any time during the pendency of the suit, be endorsed by the request of the defendant on a writ or process, or further proceedings thereon shall be stayed, is mandatory. Liberty v. Haines, 101 Me. 402, 64 A. 665. Under the evidence in this case, a finding that there had been no assignment could not be reviewed. Id.

65. See 6 C. L. 1080.

Stating nature of cause of action.[66]—The failure of a praecipe for a summons to state the nature of the cause of action does not affect the jurisdiction of the court but is at most an amenable defect.[67]

Penalties or consequences of nonappearance.[68]

The apearance day.[69]—The notice of commencement of suit and copy of the bill will be considered together for the purpose of determining the term of court at which defendant is required to appear.[70]

Return day.[71]—Under a rule of court requiring a writ to be returned within a specified time, "unless otherwise provided," a writ by its terms made returnable at a later day is valid if it has indorsed thereon an order of court allowing it.[72]

Alias, counterpart, or supplemental process.[73]—An alias summons cannot issue without a previous return that the original summons cannot be served,[74] neither can it issue after a cause has been stricken,[75] unless the cause has been reinstated.[76] A second summons if not sufficient as an alias writ may be treated as a new summons for a new suit, if limitations has not run and the first suit failed for want of service.[77]

§ 2. *Issuance.*[78]—When process is issued out of a court of general jurisdiction, all the essential requisities of the statute must be substantially complied with.[79] If a statute requires proof of the existence of certain facts to be made before process can issue and there is an entire absence of proof as to any of the essential facts, the process is void;[80] but if there is proof having a legal tendency to establish every essential fact, the process is not void even if erroneously issued because the evidence adduced is legally insufficient.[81] To be valid process must be issued by an officer having authority,[82] and within the time prescribed by law,[83] and if a statute prohibits its issuance on a legal holiday, process issued and served on such a day is void.[84] If the cause of action remains substantially the same it is not necessary to issue a

66. See 4 C. L. 1072.

67. Benedict v. Hadlow Co. [Fla.] 42 So. 239.

68, 69. See 6 C. L. 1080.

70. In suit for accounting and division of real property service not invalidated because notice did not state the term of court. Williams v. Williams, 221 Ill. 541, 77 N. E. 928.

71. See 6 C. L. 1080.

72. Certiorari. Richardson v. Smith [N. J. Law] 65 A. 162.

73. See 6 C. L. 1081.

74. Municipal court act 1902, p. 1499, c. 580, § 30. Berkman v. Weisinger, 50 Misc. 515, 99 N. Y. S. 466.

75. Where cause stricken for irregular service of original process. Park Land & Imp. Co. v. Lane [Va.] 55 S. E. 690.

76. Court should have set aside prior decree striking cause and this would have given plaintiff the right to an alias. Park Land & Imp. Co. v. Lane [Va.] 55 S. E. 690.

77. Frantz v. Detroit United R. Co. [Mich.] 13 Det. Leg. N. 1009, 110 N. W. 531. This not in conflict with provisions "a" and "b" of circuit court rule 1, providing that when the sheriff makes return that he has failed to serve a writ an alias may issue within ten days. Id.

78. See 6 C. L. 1081.

79, 80. Lord v. Dowling Co. [Fla.] 42 So. 585.

81. Lord v. Dowling Co. [Fla.] 42 So. 585. Applied to proof as prerequisete to issuance of writ of attachment. Id.

82. A warning order in a divorce suit against a nonresident in Arkansas may be made by the clerk and it is not necessary that it be made by the court. Stuart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1040.

83. Under Code Civ. Proc. § 581, subd. 7, requiring service of summons to be made within one year after commencement of action, where an action was properly brought against heirs to foreclose a mortgage and an administrator was afterwards appointed, summons could be served on him after one year from commencement of action and within the year within which action may be brought against an administrator as provided by § 353. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155.

84. Citation in divorce proceeding whether original or an alias issued on February 22d is invalid under Rev. St. 1895, art. 2939, prohibiting the issuance of "process" on any legal holiday. Michael v. Michael [Tex. Civ. App.] 100 S. W. 1018. Under Sayle's Ann. Civ. St. 1897, art. 1180, prohibiting the service of process on legal holidays except in certain cases, personal service without the state in an action of trespass to try title, on February 22nd, a legal holiday in Texas, is void. Norvell v. Pye [Tex. Civ. App.] 95 S. W. 666. Sayle's Ann. Civ. St. 1897, arts. 1504a-1504f, refer to suits in which defendants are served by publication and do not apply to nonresidents personally served outside the state. Id. As to law controlling where personal service is made out of the state, see post, § 5, subd. Personal Service in Lieu of Publication.

new summons on amended or supplemental petitions,[85] and where an original complaint discloses the character of the claims of cross complainants and fairly informs defendant that these claims will be adjudicated, it is not necessary that summons issue on the cross complaint as against parties in court on the original complaint.[86]

§ 3. *Extraterritorial effect or validity.*[87]—In the absence of express statute, a court has no power to order personal service of process on a defendant beyond its territorial jurisdiction.[88] A personal judgment is not authorized on such service.[89] The difference between jurisdiction in rem and in personam [90] and the extraterritorial effect of judgments [91] are discussed elsewhere.

§ 4. *Actual service. A. Personal. In general.*[92]—Personal service in lieu of publication is treated in a subsequent section.[93] In the absence of appearance or other waiver,[94] actual service is essential to the rendition of a binding judgment in personam.[95] Service must be made within the time [96] and in the manner prescribed by statute,[97] especially in the case of infants [98] or insane persons;[99] but if a

85. A proceeding in which plaintiff had obtained an attachment for rent was transferred to the circuit court and an answer was filed by the tenant. Amended petition was then filed asking personal judgment and summons was executed thereon. Held, such summons was unnecessary and no summons was needed for a supplemental petition thereafter filed for rent pendente lite. Civ. Code Prac. § 135. Moshell v. Reed [Ky.] 97 S. W. 372. Where in proceedings to subject a homestead lot to the claim of a creditor the lot had been incorrectly described in the petition and judgment, and for that reason an amended petition was filed, no new summons was necessary on the amended petition. Moore's Guardian v. Robinson Norton & Co., 29 Ky. L. R. 43, 91 S. W. 659. Where supplemental complaint was filed in open court and a copy served on defendant's attorney. United States v. Rio Grande Dam & Irr. Co. [N. M.] 85 P. 393. In **Virginia,** if defendant is in court when a cause is remanded to rules to enable plaintiff to file an amended declaration, the cause may be regularly proceeded with after the filing of such declaration without the service of any new summons. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465.

86. Elsman v. Whalen [Ind. App.] 79 N. E. 514.

87. See 6 C. L. 1082.

88. Jennings v. Johnson [C. C. A.] 148 F. 337. Under § 8 of Federal Judiciary Act of 1875 (Act March 3, 1875, c. 137, 18 St. 472 [U. S. Comp. St. 1901, p. 513]) providing for notice to nonresidents in suits to foreclose liens, etc., and authorizing the court to make an order directing defendant "to appear, plead, answer, or demur, by a day certain", the court has no power to direct service of process on defendant by the marshal of a district in another state. Id.

89. Service in another state. Bank of Horton v. Knox [Iowa] 109 N. W. 201. See post, § 4, subd. Service on Nonresidents, and § 5, Constructive Service.

90. See Jurisdiction, 8 C. L. 579.

91. See Foreign Judgments, 7 C. L. 1734.

92. See 6 C. L. 1082.

93. See post, § 5, Constructive Service, subd. Personal Service in Lieu of Publication.

94. See Appearance, 7 C. L. 251; Jurisdiction, 8 C. L. 579, and also Waiver of Irregularities, post, § 7.

95. No jurisdiction in personam acquired over nonresident directors sued for negligence where the service was by publication and mailing only. Lanning v. Twining [N. J. Eq.] 64 A. 466. Evidence held to show that defendant was not served with summons. Pfotenhauer v. Brooker, 101 N. Y. S. 762. An order made in receivership proceedings on another state determining the amount of the stockholders' liability for the debts of a corporation and also for the expenses of receivership proceedings and the expenses of enforcing the liability and making an assessment for such amounts, was not conclusive on one who was not served with process and did not appear. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. Where it appeared in an action by a landlord to recover possession that one of the tenants had been served with the precept but that he had not received a notice required by the lease and the other who had received notice had not been served with the precept, the court could not decide in favor of the landlord. Adler v. Lowenstein, 102 N. Y. S. 492. In proceedings to vacate a judgment, evidence held to sustain finding that defendants had not been summoned. Francis v. Lilly's Ex'x [Ky.] 98 S. W. 996 Two affidavits, one showing that a copy of petition and summons was left with each defendant and one showing that the server was qualified held proof of valid service. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256.

96. Under Hurd's Rev. St. 1903, p. 227, c. 22 (Chancery Code) § 16, where suit was commenced to November term, and defendant was not served thirty days prior to the first day of such term, but default was not entered until December term and defendant was served thirty days before the first day of the latter term, a sufficient time intervened between date of service and date of default. Williams v. Williams, 221 Ill. 541, 77. N. E. 928.

97. Service on a creditor in receivership proceedings of an order to show cause why he should not repay a portion of the assets to cover expenses of the receivership, the order purporting to be issued in a case of the receiver against the creditor, is not such service of process as is necessary to institute

defendant is actually served, mere defects or irregularities are not jurisdictional,[1] but can render the judgment in the case voidable only.[2] Where service is not had on defendant but on a total stranger to the suit, no jurisdiction is acquired thereby over the person or property of any one.[3] In cases of attachment where no personal judgment is sought, the levy takes the place of service.[4]

Upon nonresidents or their agents.[5]—The Vermont statute authorizing the service of a certified copy of the writ on a co-defendant on whom the original could not be served because of his absence from the state applies to nonresidents as well as to residents of the state.[6] In the absence of waiver a nonresident or a foreign corporation must be served personally within the state before jurisdiction in personam can be acquired.[7]

Upon municipal corporations.[8]

Upon domestic corporations.[9]—Though a statute providing a method of serving process does not mention corporations by name, they will be included if they fall within the general reason and design of the act,[10] and such service on a corporation defendant is authorized as is equivalent to personal service on an individual.[11] Statutes generally provide for service on an agent or managing agent.[12] By "managing agent" is meant any person holding some responsible representative relation to the corporation such as the term managing agent would ordinarily include.[13] A statute requiring the public record of an agent upon whom process "may" be served

a suit under Rev. St. 1899, §§ 569, 570, defining a summons and providing for the manner of service. Orchard v. National Exch. Bank [Mo. App.] 98 S. W. 824.

98. Under Code 1854, § 437, providing that in revival of a judgment against infants notice must be served on them and their father or guardian, and if neither a guardian nor the father can be found then on the mother, service on them and the mother is sufficient if the father is dead and it does not appear that they have a guardian. Galloway v. Craig, 29 Ky. L. R. 1, 92 S. W. 320. Reading the summons in the presence and hearing of a minor defendant in partition held not a sufficient compliance with Gen. St. 1865, p. 652, c. 162. McMurtry v. Fairley, 194 Mo. 502, 91 S. W. 902.

99. Under Civ. Code Prac. § 53, providing that if defendant is of unsound mind, summons must be served as therein prescribed, service by delivering a copy to him personally and another copy to the superintendent of the asylum is valid, the lunatic not having any committee, father, guardian, or wife, and the fact that the summons was issued against him individually and not as a lunatic was immaterial. Eversole v. Eastern Kentucky Asylum [Ky.] 100 S. W. 300.

1. Service by deputies of sheriff who was a party. Hansford v. Tate [W. Va.] 56 S. E. 372. See post, § 7.

2. Hansford v. Tate [W. Va.] 56 S. E. 372.

3. Court could not establish a railroad lien against defendant nor in any way affect the rights of another railroad company which was served but which was not shown to have had any connection with the suit. Litle Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944. Not a mere question of misnomer. Id.

4. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

5. See 6 C. L. 1083.

6. Vt. St. § 1091. Nonresident served within state. Wilkins v. Brock [Vt.] 64 A. 232.

7. Statute authorizing service on state auditor in suit against foreign corporation held unconstitutional. Cella Commission Co. v. Bohlinger [C. C. A.] 147 F. 419. See post this section, Service on Foreign Corporations. Personal judgment not authorized on personal service in another state. Bank of Horton v. Knox [Iowa] 109 N. W. 201.

8, 9. See 6 C. L. 1084.

10. "Person" in Chancery act (Act April 3, 1902 [P. L. p. 511, art. 2, § 5]), includes a corporation. Martin v. Atlas Estate Co. [N. J. Err & App.] 65 A. 881. Section 65, Code Civ. Proc, applies to corporations as well as to individuals, and if an action is rightly brought in one county, summons may be served on a corporation in another county. Cobbey v. State Journal Co. [Neb.] 110 N. W. 643. Statutory provisions construed. Id.

11. Service of subpoena or process for appearance on any officer or agent of a corporation organized under Act April 21, 1906 (P. L. p. 277), whose duty it is either in his official capacity or by virtue of his employment to communicate the fact of such service to the governing body of the corporation, is equal to personal service in the case of a natural person. Martin v. Atlas Estate Co. [N. J. Err. & App.] 65 A. 881. Contention that service could be made only upon the stockholders or directors or trustees when convened, or upon the statutory agent, held untenable. Id.

12. An agent who is not hired by a defendant corporation, performs no service for it and is not under its control, is not such an agent as represents it for purposes of service of summons. Chicago, etc. R. Co. v. Suta, 123 Ill. App. 123.

13. In suit against a domestic corporation evidence held to show that person served was "managing agent within Code Cr. Proc. § 431, subd. 2. Brun v. Northwestern Realty Co., 102 N. Y. S. 473.

does not provide an exclusive method of acquiring jurisdiction.[14] An agent of a lessee railroad company is not the agent of the lessor corporation for the purpose of service upon the latter.[15] Where a statute provides for service on certain officials, if service cannot be had on other chief officials, an attempt must be made to serve the chief officials before the alternative service can be resorted to.[16] A service of summons on a corporation by leaving a certified copy at the usual place of residence of the president does not answer the statutory requirements, in Ohio.[17] Where a statute provides that suits against a corporation shall be brought in the county where some person resides upon whom process may be served, service in such county gives no jurisdiction where the action is brought in another county.[18]

Upon foreign corporations.[19]—Statutes regulating the service of process on foreign corporations are liberally construed,[20] and where several methods of procedure are provided neither one is exclusive.[21] When a foreign corporation does business within the state or district,[22] service may ordinarily be had on its president or other officer,[23] or on its agent or attorney,[24] managing agent,[25] or person conducting its business.[26] A statute authorizing service on an agent does not require that the agent be a general one, but is complied with though the agent has only limited authority.[27]

14. Act. April 20, 1898 (P. L. p. 410). Martin v. Atlas Estate Co. [N. J. Err. & App.] 65 A. 881. Service of subpoena ad respondendum upon a domestic corporation defendant in foreclosure by delivering same at registered office of the company in the state to the vice president, also a director, held service on corporation. Id.

15. Agent must be appointed by and represent corporation as a matter of fact, and must not be a mere constructive agent. Chicago, etc., R. Co. v. Suta, 123 Ill. App. 123. Distinguished from cases where lessor is held liable for lessee's torts. Id.

16. Under Wilson's Rev. & Ann. St. 1903. service on a railroad company must be had on the chief officials or agents designated in §§ 4269-4271, or on the agent appointed for purposes of service, and if service cannot be had on any of these, the return must show why it could not be so had and the official character of the person on whom service was had. St. Louis & S. F. R. Co. v. Clark [Okl.] 87 P. 430. See post, § 6, subd. Return of Service on Corporations.

17. State v. King Bridge Co., 7 Ohio C. C. (N. S.) 557.

18. Ballinger's Ann. Codes & St. § 4854. Hammel v. Fidelity Mut. Aid Ass'n, 42 Wash. 448, 85 P. 35. See Venue and Place of Trial, 6 C. L. 1806.

19. See 6 C. L. 1085.

20. Federal Betterment Co. v. Reeves [Kan.] 84 P. 560.

21. Though § 1262, Gen. St. 1901, provides for directing and delivering of summons to secretary of state, a foreign corporation may also be served by service on its managing agent as per § 4504. Federal Betterment Co. v. Reeves [Kan.] 84 P. 560.

22. A foreign newspaper corporation which in addition to its ordinary business of publishing a newspaper at its domicile maintains a permanent office force in the District of Columbia charged with the duty of furnishing general press reports to other newspapers is "doing business" in the district within D. C. Code, § 1537 (31 St. 1419, c. 854). Ricketts v. Sun Printing & Pub. Ass'n, 27 App. D. C. 222.

23. Under Municipal Court Act (Laws 1902, p. 1500, c. 580, § 31), authorizing service on the president, etc., of a corporation resident in the city, held, where the president of a foreign corporation was served, the court obtained jurisdiction, it not appearing that such officer was a nonresident of the city. Epstein v. Weisberger Co., 102 N. Y. S. 488.

24. Under Code Civ. Proc. 1882, § 155, authorizing service on an agent or attorney of a foreign corporation, in an action to set aside a judgment obtained by a foreign corporation service could be had, after the judgment was entered, on the attorney who obtained it. Sellers v. Home Fertilizer Chemical Works [S. C.] 56 S. E. 978. Service on a timekeeper of a foreign corporation doing construction work in the state held by divided court to be service on its "agent" within Code Civ. Proc. § 155. Jenkins v. Penn Bridge Co., 73 S. C. 526, 53 S. E. 991.

25. Cobby's Ann. St. 1903, §§ 1074, 1076, authorizes service on foreign corporations by serving process on the managing agent in suits growing out of business transacted within the state. Ord Hardware Co. v. Case Threshing Mach. Co. [Neb.] 110 N. W. 551. A service of summons on a foreign corporation by delivering a copy thereof to a superintendent of such company, "he being in charge of the usual place of doing business of said company," but it not appearing that he is the "managing agent" of said company, is defective and will be quashed if it appears that the corporation as required by Rev. St. 148d, has designated another person as the one on whom process should be served. State v. King Bridge Co., 7 Ohio C. C. (N. S.) 537.

26. Under D. C. Code, § 1537, service may be had upon the person conducting its business regardless of whether he is technically the agent of the foreign corporation. Ricketts v. Sun Printing & Pub. Ass'n, 27 App. D. C. 222.

27. Could be made on attorney who had obtained judgment which it was sought to set aside. Sellers v. Home Fertilizer Chemical Works [S. C.] 56 S. E. 978.

A "managing agent" is one who is required to exercise his independent judgment in the exclusive control of some department of the business of the corporation.[28] Service on an officer of a foreign corporation only temporarily within the state does not confer jurisdiction where the corporation does no business in the state and has no agent or property therein,[29] and a statute authorizing a personal judgment against any foreign corporation upon service on the state auditor is unconstitutional.[30]

Statutes often require foreign corporations doing business within the state to designate in writing a person on whom process may be served,[31] and provide for service on some state officer if no designation is made,[32] or if for any reason the corporation shall cease to have a statutory agent.[33] Such statutes do not as a rule provide an exclusive method of service,[34] unless they are the only legislation on the subject.[35]

To authorize the service of process in a Federal court on an agent or officer of a foreign corporation temporarily within the state or district, the corporation must be actually and substantially engaged in business within the state or district,[36] its

28. And who exercises such authority that it may be fairly said that service on him will result in notice to the corporation. Within Rev. St. 1901, § 4504. Federal Betterment Co. v. Reeves [Kan.] 84 P. 560. An agent who is required to exercise judgment in the business matters of his principal and who has charge of such business in the territory covered by his contract is a "managing agent" within Cobbey's Ann. St. 1903, §§ 1074, 1076. Ord Hardware Co. v. Case Threshing Mach. Co. [Neb.] 110 N. W. 551. The collection of subscriptions for lands of a foreign corporation does not make the collector a "managing agent" of the corporation on whom service of summons may be made, notwithstanding he is a director of the company. Foote v. Central American Commercial Co., 7 Ohio C. C. (N. S.) 531.

29. Grant v. Cananea Consol. Copper Co., 102 N. Y. S. 642. Court in this case follows federal supreme court, though ruling is contrary to a previous New York decision, a Federal question being involved. Id.

30. Ark. act February 26, 1901. Kirby's Dig. § 835. Cella Commission Co. v. Rohlinger [C. C. A.] 147 F. 419. Entire statute is void and cannot be held valid as to corporations doing business in state. Id.

31. Allegation in complaint that at all times therein mentioned defendant was a foreign corporation doing business in a designated county in the state held sufficient within St. 1899, p. 111, c. 94, without further showing of continuance of such business. Olender v. Crystalline Min. Co. [Cal.] 86 P. 1082.

32. A statute requiring foreign corporations to designate an agent on whom process may be served and in default thereof that service will be made on the secretary of state is constitutional. Olender v. Crystalline Min. Co. [Cal.] 86 P. 1082. St. 1899, p. 111, c. 94, substitutes service on the secretary of state for service by publication prescribed by Code Civ. Proc. § 412, when a foreign corporation has no agent in the state. Id.

33. An insurance company being a foreign corporation doing business in California may be served under § 411, Code Civ. Proc. if it has a "managing or business agent, cashier or secretary" within the state, or, if it has filed with the insurance commissioner the name of its agent, it may also be served under Pol. Code, § 616, but substituted service under this section may be had on the insurance commissioner only when the company has ceased to have the agent specified therein. Buckingham v. North German Fire Ins. Co., 149 F. 622. Substituted service on the secretary of state provided for by statute in case of the death or removal of the designated agent of a foreign corporation doing business within the state is not authorized after the corporation has ceased to do business therein. Not authorized under § 16 of general corporation law of New York (Laws 1892, p. 1806, c. 687), where corporation merely maintained an action in the state court relating to its previous business therein. Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co., 150 F. 666.

34. Ballinger's Ann. Codes & St. § 2818, requiring foreign insurance companies to appoint agents on whom process may be served is not exclusive, but service may be had on an agent merely authorized to solicit insurance as provided by 2 Ann. Ballinger's Codes & St. § 4875. Tatum v. Niagara Fire Ins Co. [Wash.] 86 P. 660. A foreign insurance company in California may be served under § 411, Code Civ. Proc. if it has a "managing or business agent, cashier or secretary" in the state, or under Pol. Code, § 616, if it has filed with insurance commissioner the name of an agent. Buckingham v. North German Fire Ins. Co., 149 F. 622.

35. Where a foreign corporation other than a railroad or stage company has complied with the provisions of art. 23, c. 18, Wilson's Ann. St. 1903, and appointed an agent in this territory for service of process with his office and place of business at an accessable point in the territory, service must be had on such agent and is irregular if made on any other person. Bes Line Const. Co. v. Schmidt, 16 Okl. 429, 85 P. 711. Wilson's St. §§ 4270, 4271, 4272, 4273, 4274, apply only to railroad or stage companies. Id. Company not required to appoint an agent in each county. Id.

36. Soliciting trade by agent and correspondence contracts not being made within state held not doing business. Buffalo Glass Co. v. Manufacturers' Glass Co., 142 F. 273.

business must be transacted by some agent or manager representing the corporation,[37] and it must appear that the local statute provides for suit against such foreign corporation which has been permitted to transact business within the state.[38] While service of subpoena from a Federal court in equity on a nonresident corporation is not controlled by state statutes, yet, if there is no applicable provision in the Federal statute, the procedure of the state statute may be followed if deemed proper and reasonable,[39] as where the state statutes declares on what persons service may be had,[40] and the construction put upon such statute by the state courts will then be accepted as correct.[41]

Upon foreign unincorporated associations.[42]

(§ 4) *B. Substituted.*[43]—Provisions for substituted service must be strictly complied with.[44] The affidavit must show what efforts were made to obtain personal service,[45] and the order and papers on which it is based must be filed within the time prescribed by statute.[46] This kind of service is generally authorized where defendant has a residence or usual place of abode within the jurisdiction,[47] but after diligent efforts made cannot be personally served.[48] If defendant has a legal residence within the state, substituted service should be made by leaving a copy at his place of abode though he may be out of the state for an indefinite length of time.[49] In a suit on a foreign judgment which is attacked for want of legal service of process, one who holds a general power of attorney and transacts some business thereunder for defendant will be held to be an agent, managing clerk or representative, carrying on his business, within the meaning of a foreign statute authorizing service on such clerk or representative in case defendant is out of the territory.[50] In

37, 38. Buffalo Glass Co. v. Manufacturers' Glass Co., 142 F. 273.

39. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

40. Proper to serve "managing agent" as per Rev. St. Ohio 1896, § 5043. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

41. Under Rev. St. Ohio 1896, § 5043, authorizing service upon the "managing agent" of a foreign corporation, the person who chiefly represents such corporation as agent for the sale of its goods in a locality in the state and who maintains an office or storeroom is a managing agent though he receives only commissions. Toledo Computing Scale Co. v. Computing Scale Co. [C. C. A.] 142 F. 919.

42. See 4 C. L. 1076.

43. See 6 C. L. 1088.

44. Where officer did not explain the purport of a summons delivered to defendant's wife, that defendant received it from his wife in time to make defense but after return day did not cure irregularity. Park Land & Imp. Co. v. Lane [Va.] 55 S. E. 690.

45. Affidavit for substituted service insufficient for failure to state what efforts were made to obtain service. Wolter v. Liebmann, 102 N. Y. S. 487. Default judgment based on substituted service thus obtained not sustainable where defendant's trustee deposed on knowledge that defendant was not a resident of New York of which plaintiff's attorney had knowledge. Id.

46. Where order allowing substituted service and papers on which it was based were not filed six days before return day of summons, the order was inoperative. Municipal Court Act (Laws 1902, p. 1501, c. 580, § 34). Stephens v. Molloy, 50 Misc. 513, 99 N. Y. S. 385.

47. Rev. St. § 17, provides that in attachment proceedings against a resident defendant, a separate summons shall be delivered to defendant "or left at his last and usual place of abode." Abbott v. Abbott, 101 Me. 343, 64 A. 615. Where in attachment proceedings plaintiff moved for an order of service on defendant on the ground that defendant had no last and usual place of abode within the officer's jurisdiction at the time when service should have been made, and defendant was described in the writ as a resident of the state, substituted service could be made upon him by leaving the summons at his last usual place of abode as expressly provided by Rev. St. § 17, in the case of resident defendants, and the case did not call for an order of notice to defendant as a nonresident. Id. That order provided that a "new summons issue and be served on defendant" did not require personal service by giving him the summons in hand. Id.

48. Order for substituted service held regular where plaintiff made diligent efforts to serve defendant but knowledge of his whereabouts was persistently refused. Bishop v. Hughes, 102 N. Y. S. 595.

49. In suit for divorce and alimony, service on defendant should have been made personally or by leaving a copy at the most notorious place of abode where it appeared that the parties had a legal residence and family domicile in the state, even though defendant was out of the state for an indefinite length of time. Stallings v. Stallings [Ga.] 56 S. E. 469. Could not be made on defendant's attorney and a copy sent by registered mail. Id.

50. Where defendant's brother under power of attorney made settlement of an indebtedness, service on him proper under § 14, Consolidated Ordinances of N. W. Ter.

the District of Columbia, service of a subpoena may be had on the solicitor of a defendant in a cross bill [51] if the bill is properly framed and is in any substantial part defensive.[52]

(§ 4) *C. The server, his qualifications, and protection.*[53]—Service must be made by one who has authority.[54] Process directed to a sheriff who is a party to the suit or otherwise disqualified to serve it is defective,[55] and service thereof may be quashed if motion is made at the proper time.[56] An entry of service being signed by one as sheriff, it will be presumed that he acted as sheriff of the court from which the process issued.[57] In Arizona where the sheriff is a party, process may be served on him by any disinterested person.[58]

§ 5. *Constructive service. Service of publication.*[59] The legislature may provide that constructive service by publication and mail may be had on a resident defendant so as to authorize a personal judgment against him where actual service cannot be had in the county where the suit is properly brought.[60] A statute providing for service of process by publication in any court of record is sufficiently broad to include process issuing from an appellate court.[61] To constitute due process of law, constructive service must be of such character as will have a reasonable tendency to convey information to interested persons that an action is pending which affects their rights.[62] A statute is not necessarily unconstitutional because it provides for a notice to nonresidents which is not equal in time to that given to residents.[63] Statutes authorizing constructive service on persons outside the territorial jurisdiction of the court are strictly construed because in derogation of the common law,[64] and matters required to be made of record must be so shown, although as to

of Canada 1898, p. 198. Alaska Commercial Co. v. Debney [C. C. A.] 144 F. 1.

51. Where court directed service on the solicitors by name and the solicitors acted for defendant not only in the main suit in which he was complainant but in an action at law which he sought to enjoin, he could not object that since there had been no appearance to the cross-bill he had no solicitors which could be served. American Graphophone Co. v. Smith, 26 App. D. C. 563.

52. Need not be wholly defensive. Bill held to authorize service on solicitor. American Graphophone Co. v. Smith, 26 App. D. C. 563.

53. See 6 C. L. 1089.

54. Return held to show service by a sheriff by duly authorized deputy. Eversole v. Eastern Kentucky Asylum [Ky.] 100 S. W. 300.

55. Hansford v. Tate [W. Va.] 56 S. E. 372.

56. Objection too late. Hansford v. Tate [W. Va.] 56 S. E. 372. See post, § 7, subd. When Objections Made.

57. Where process issued from city court contention that it had been served by the sheriff of the county was untenable. Rucker v. Tabor, 126 Ga. 132, 54 S. E. 959.

58. Under the general provision of Rev. St. 1901, par. 1327, and paragraphs 1101, 1319, making it the duty of the coronor or constable to make service in such case, does not preclude such service. Lewis v. Cunningham [Ariz.] 85 P. 244.

59. See 6 C. L. 1090.

60. Hurd's Rev. St. 1905, c. 110, par. 5, not unconstitutional as authorizing service which is not due process of law. Nelson v. Chicago R. Co., 225 Ill. 197, 80 N. E. 109, and authorities cited.

61. Publication of citation on appeal held authorized by Comp. Laws, § 2964. Baca v. Anaya [N. M.] 89 P. 314.

62. Publication of summons in actions to quiet title, though in the form prescribed by c. 5, p. 9, Laws 1901, is not "due process of law" where the land is not described nor the adverse claimants specifically named. Fenton v. Minnesota Title Ins. & Trust Co. [N. D.] 109 N. W. 363. Four weeks' notice by publication to nonresidents in proceedings to sell lands within the levee district created by Ark. act of Feb. 15, 1893, as provided by § 11, as amended in 1895, is sufficient to afford due process of law. Ballard v. Hunter, 27 S. Ct. 261. Personal notice not necessary. Id. Where the nonresident owners did not assert the existence of conditions which would entitle them to personal service under the act, they could not say that they were deprived of property without due process of law because the complaint in the suit failed to deny the existence of such conditions. Id.

63. Nonresident owners of lands are not denied the equal protection of the laws or the privileges or immunities of citizens of the United States, because § 11 of the Arkansas act of 1893, as amended in 1895, requires personal service upon resident owners or occupants at least twenty days before rendition of a decree of sale for unpaid levee taxes and provides for publication as to nonresidents for only four weeks. Ballard v. Hunter, 27 S. Ct. 261.

64. Cohen v. Portland Lodge No. 142, 144 F. 266. Where a defendant is sought to be brought into court by some statutory method other than personal service, which may or may not reach him and which is more or less unsatisfactory, the statute is strictly

other matters the jurisdiction may be aided by presumption.[65] As a general rule, no personal jurisdiction is acquired by constructive service only.[66]

When proper.[67]—Constructive service is generally authorized when defendant is a nonresident,[68] and it is sought to affect some res within the territorial jurisdiction of the court.[69] Hence, it has been held proper in attachment,[70] suits for the construction of a will,[71] or for specific performance.[72] To enable a Federal court to obtain jurisdiction of nonresident defendants by substituted service, the suit must be one concerning the title to some specific property within the district.[73] Service by publication may be had on a railroad company in Illinois where no officer or agent is found in the county where the suit is properly brought.[74] If a defendant is dead, service by publication is ineffectual.[75] A negligent failure to bring in necessary nonresident parties by publication is ground for dismissal.[76]

Procedure to authorize.[77]—A statute providing that the court shall make an order of publication in certain cases does not require the court to examine the files and make orders of publication without the suggestion of counsel.[78] In North Carolina it is not necessary to issue a summons when a defendant is without the reach of process and cannot be personally served, an affidavit showing such facts being the first step in the proceeding.[79] One of several plaintiffs may make an affidavit show-

construed and it is essential that all the required steps should be followed with substantial accuracy. Stull v. Masilonka [Neb.] 108 N. W. 166.

65. Cohen v. Portland Lodge No. 142, 144 F. 266.

66. By publication and mailing. Lanning v. Twining [N. J. Eq.] 64 A. 466. A personal judgment by default cannot be rendered against a nonresident on constructive service. Judgment void. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572.

67. See 6 C. L. 1090.

68. Service by publication ineffective where defendant was a resident of the state. Topliff v. Richardson [Neb.] 107 N. W. 114.

69. A check drawn by the treasurer of the United States in settlement of a claim against the government is "personal property" within D. C. Code, § 105 (31 St. 1206, c. 854), authorizing service by publication as to nonresidents in suits to enforce liens against real or personal property in the district. Jones v. Rutherford, 26 App. D. C. 114. Held property in the district. Id. Where a husband wrongfully leaves his wife and goes to another state, he does not carry the marriage relation with him so as to enable the court in that state to grant him a decree of divorce on constructive service on the wife which will be entitled to full faith and credit under the Federal constitution. Haddock v. Haddock, 201 U. S. 562, 50 Law. Ed. 867.

70. A plaintiff in an attachment suit, upon a showing that summons cannot be served upon the defendant within the county, is entitled to obtain service by publication. Foote v. Central American Commercial Co., 7 Ohio C. C. (N. S.) 531.

71. Service by publication on a nonresident defendant is allowed in a suit for the construction of a will by Code, § 3534, permitting such service in suits relating to real property, for the establishment or setting aside of a will, etc. Dillavou v. Dillavou [Iowa] 106 N. W. 949.

72. Legislature may provide for service of nonresidents by publication in suits to determine title to real estate within its jurisdiction. Clem v. Given's Ex'r [Va.] 55 S. E. 567. Va. Code 1904, §§ 3230-3232, comprehend quasi proceedings in rem to reach and dispose of property in the state, and in an action for specific performance brought against a nonresident, executor, and the widow and children, it was proper to proceed against the executor by publication. Id.

73. Substituted service not authorized under Act March 3, 1875, c. 137, § 8, 18 St. 472 (U. S. Comp. St. 1901, p. 513), where writ was merely one to wind up a partnership on ground of mismanagement, though the partnership owned some stock in certain railroads within the district. Jones v. Gould [C. C. A.] 149 F. 153.

74. May be had under Practice'Act (Hurd's Rev. St. 1905, c. 110, pars. 2, 5, and c. 22, §§ 12, 13), referred to therein, so as to authorize a personal judgment, though the principal office of defendant is in the state. Nelson v. Chicago, etc., R. Co., 225 Ill. 197, 80 N. E. 109. Not necessary to show that defendant has gone out of state or is concealed or cannot be found in state. Id.

75. Foreclosure. Topliff v. Richardson [Neb.] 107 N. W. 114.

76. Pitkin v. Flagg, 198 Mo. 646, 97 S. W. 162.

77. See 6 C. L. 1090.

78. Not under Rev. St. 1899, § 577, providing that when sheriff makes return of non est, the court on being satisfied that process cannot be served shall order publication. Pitkin v. Flagg, 198 Mo. 646, 97 S. W. 162. Where plaintiff, after warning, negligently failed to take steps to bring in nonresidents, he could not avoid dismissal by contending that the court should have ordered publication on its own motion. Id.

79. Under Revisal 1905, §§ 429, 430, 442, requiring actions to be commenced by summons and that when it appears by affidavit that defendant cannot be found in the state, an order shall be made for publication. Peters Grocery Co. v. Colling Bag Co., 142 N. C. 174, 55 S. E. 90. McClure v. Fellows, 131 N. C. 509, 42 S. E. 951, overruled, and Best v.

ing that plaintiffs have no knowledge of the names and whereabouts of unknown heirs provided lack of knowledge on the part of each of the plaintiffs is sufficiently shown,[80] and where a complainant's agent swears positively that he knows that the names of certain defendants are unknown to complainant, it will be presumed that the facts are within affiant's knowledge.[81] In an affidavit for publication made for another, a recital of agency is sufficient to show authority.[82] A complaint and affidavit may be included in one instrument if it contains all the essentials of both.[83] The fact that a warning order is not properly indorsed on the complaint as required by the Arkansas statute as a preliminary to bringing in a nonresident defendant by publication does not invalidate the judgment.[84] The affidavit must set out all the essential statutory facts authorizing service by publication[85] such as diligence on plaintiff's part,[86] and that defendant cannot be found,[87] or that his residence is unknown.[88] Under a statute requiring the affidavit to set out a cause of action, the affidavit is sufficiently definite if it fairly notifies defendant of the particular nature of the cause.[89] Under the Missouri statute, a publication is not invalid because neither the affidavit nor the order therefor alleges that defendant cannot be served with process within the state.[90] The failure to file the affidavit and order for publication until one day after the filing of the summons and complaint does not invalidate the publication, the statute not requiring the affidavit or order to be filed when the complaint is filed.[91] To establish due diligence, it is not always necessary to show that the summons was actually placed in the hands of the sheriff for service.[92] The publication is authorized if it fairly appears that diligence was used,[93] and it is only where recitals in the affidavit are mere legal conclusions that a finding

Mortgage Co., 128 N. C. 351, 38 S. E. 923, reinstated. Id.

80. Stull v. Masilonka [Neb.] 108 N. W. 166.

81, 82. Birmingham Realty Co. v. Barron [Ala.] 43 So. 346.

83. Proceedings to enforce payment of levee taxes. Ballard v. Hunter, 27 S. Ct. 261.

84. Decree confirming tax title. Arbuckle v. Kelley, 144 F. 276.

85. An affidavit which is not merely informal but which entirely fails to state essential statutory facts will not authorize service by publication. Johnson v. Hunter [C. C. A.] 147 F. 133. Under Ark. Special Statute (Laws 1893, pp. 24, 119; Laws 1895, p. 88), relating to the enforcement of levee taxes in the chancery courts and providing that notice may be given by publication, "but actual service of the summons shall be had when defendant is in the county or if there is an occupant upon the land," and § 5679, Sand. & H. Dig., which the act makes applicable to such suits, on affidavit that defendant is a nonresident and is not in the county and that there is not an occupant upon the land is strictly jurisdictional. Id. Sections 3579, 4111, 4112, Rev. Laws 1905, made no substantial change in the law as to service of summons by publication in an action for divorce (Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243), and an affidavit showing that personal service cannot well be made and containing the statements required by § 4111, with the return of the sheriff that defendant cannot be found, is sufficient to authorize the publication of the summons without any further affidavit after the order for publication has been made (Id.). Though affidavit was somewhat argumentative as to plaintiff's knowledge of defendant's residence, it was sufficient. Id.

86. Affidavit held to show due diligence so as to authorize publication of summons in foreclosure. Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40.

87. The fact that a defendant cannot be found in the state must be established by affidavit under Revisal 1905, § 442. Peters Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90.

88. Affidavit for publication of summons in foreclosure of tax lien stating that affiant was "unable to find either the residence or post office address of defendant" held to sufficiently state that place of residence was not known. Bardon v. Hughes [Wash.] 88 P. 1040.

89. Affidavit alleging that action arose upon a breach of warranty contained in a deed from defendant to plaintiff recorded in M. county held a sufficient reference to the deed, definite enough description of the land, and an implied allegation of eviction. Lemly v. Ellis [N. C.] 55 S. E. 629.

90. Hedrix v. Hedrix, 103 Mo. App. 40, 77 S. W. 495, overruled. Harbert v. Durden, 116 Mo. App. 512, 92 S. W. 746. Where affidavit alleged that defendants were nonresidents so that the ordinary process of law could not be served on them. Id.

91. Foreclosure. Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40.

92. It is the fact that due diligence of some kind is shown that gives validity to order of publication. Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40.

93. A finding that the facts stated in the affidavit are true will not be disturbed if it fairly appears that such facts show due diligence. Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40.

of diligence will not be upheld.[94] An adjudication by the court that the facts are sufficient to justify service by publication is conclusive on collateral attack of the judgment rendered if the affidavit contained some competent evidence, though insufficient to withstand a direct appeal.[95] Where the statute is silent, no different or additional procedure is necessary in making service by publication because a defendant is a minor.[96]

How and when made.[97]—The publication must be made within the time limited after the filing of the complaint.[98] The fact that at the time an order of publication was made a supplemental writ had been ordered for the purpose of bringing in other parties does not affect the validity of the publication.[99] The notice is generally given by publication in a newspaper of general circulation [1] and mailing a copy of the process to defendant unless his address is unknown,[2] and sometimes by posting a copy of the order at the door of the court house.[3] A published notice reciting that the action arose upon a breach of warranty in a deed from defendant to plaintiff recorded in a specified county sufficiently states a cause of action.[4] While Christian names should be given in full, yet, in proceedings in rem or quasi in rem, a published summons or notice will be held sufficient, though it gives the initials only if the party was generally known by such name,[5] or if a defendant has himself used only his initials in connection with the subject-matter of the suit.[6]

Order of publication.[7]—The order must be made within reasonable time after the affidavit is made [8] and must fix the appearance day as prescribed by law.[9] A mistake in the order as to what is directed to be mailed will not nullify the proceeding if the proper paper is in fact mailed.[10] An order of publication as to unknown defendants is sufficient in Alabama though containing no reference to the subject-

94. Statement that a defendant resided at a specified place is not a legal conclusion. Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40.

95. Affidavit of diligent search as to whereabouts of a minor defendant held to justify service by publication in foreclosure proceeding where affiant had been informed that said defendant was attending school in another state. Cohen v. Portland Lodge No. 142, 144 F. 266.

96. Under B. & C. Comp. Or. §§ 56, 57. Not necessary that papers should be mailed to person who had care and control of minor and with whom he resided. Cohen v. Portland Lodge No. 142, 144 F. 266.

97. See 6 C. L. 1091.

98. Service of summons insufficient in foreclosure where first publication was more than ninety days after filing complaint. Fuhrman v. Power [Wash.] 86 P. 940.

99. Where defendant in foreclosure was given notice by publication and mailing of summons, it was immaterial that at the time of the order of publication as against her a supplemental and amended summons had been ordered for the purpose of bringing in tenants of the property. Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. S. 496.

1. On plea in abatement, evidence held to sustain finding that the paper in which was published notice to defendant, a nonresident, of the pendency of divorce proceedings, was a newspaper of general circulation as required by Burn's Ann. St. 1901, § 1048. Ruth v. Ruth [Ind. App.] 79 N. E. 523.

2. Mailing of process is dispensed with where it appears by affidavit that plaintiff or his attorney does not know defendant's address. In suit to foreclose a tax certificate, the fact that defendant's deed filed five years before contained defendant's address did not show that affiant knew what it was when the affidavit was made. Kahn v. Thorpe [Wash.] 86 P. 855.

3. In service by publication the certificate of the clerk should show the posting of a copy of the order at the door of the court house. Lafiin v. Gato [Fla.] 42 So. 387.

4. Where it did not appear that there were other deeds. Lemly v. Ellis [N. C.] 55 S. E. 629.

5. Foreclosure of tax certificate. Kahn v. Thorpe [Wash.] 86 P. 855.

6. In divorce, where defendant had been married in the name of "A. G." instead of "Alonzo G." McDermott v. Gray, 198 Mo. 266, 95 S. W. 431.

7. See 6 C. L. 1092.

8. Held within reasonable time where made on fourth day after making of affidavit and third day after sheriff's return. In re Geith's Estate [Wis.] 109 N. W. 552.

9. Order for service by publication fixing appearance day fifty-two days from its date held void unler statute prescribing that the date shall not be less than thirty nor more than fifty days. Lafiin v. Gato [Fla.] 42 So. 387.

10. Where the order of publication in foreclosure required plaintiff to deposit in the post office a "notice of the object of the action" instead of the complaint as required by Code Civ. Proc. § 440, but both the notice and the complaint were in fact mailed and the order was subsequently amended nunc pro tunc, the irregularity was not such as to render a title based on the foreclosure

matter of the suit and to the title and interests of such defendants therein.[11] The fact that an order is not signed and attested by the clerk will not invalidate it if the published order returned to his office is certified by him as a true copy of the order made in the cause.[12] Amendments may be made to show the truth before or after judgment.[13]

Personal service in lieu of publication.[14]—It is provided by statute in some jurisdictions that in certain cases personal service may be made on a defendant out of the state.[15] Service of this kind is governed by the laws of the forum,[16] and statutes authorizing it are generally construed strictly.[17] Where a citation addressed to a foreign country may be served by any disinterested person, failure to serve it in the county of defendant's residence does not render the service invalid in the absence of statute.[18]

§ 6. *Return and proof of service. Official return.*[19]—To authorize a judgment against a defendant who has not appeared or otherwise submitted himself to the jurisdiction of the court, there must be not only a service of process upon him but also a legal return of such service.[20] To be legal the return must be made by the proper officer [21] within the statutory period,[22] and must show service by a qualified person [23] and in the proper manner.[24] An affidavit of service must also be sworn to

unmarketable. Mishkind-Feinberg Realty Co. v. Sidorsky, 111 App. Div. 578, 98 N. Y. S. 496.

11. Though Code 1896, § 690, provides that register must describe such unknown parties as near as may be by the character in which they are sued and with reference to their title or interest in the subject-matter. Birmingham Realty Co. v. Barron [Ala.] 43 So. 346.

12. McDermott v. Gray, 198 Mo. 266, 95 S. W. 431. Had this been an irregularity, it would not render the decree subject to collateral attack. Id.

13. Where order of publication directed mailing of a notice instead of the complaint but complaint was in fact mailed, order could be amended nunc pro tunc after sale in foreclosure. Mishkind-Feinberg Realty Co. v. Sidorsky, 98 N. Y. S. 496.

14. See 6 C. L. 1093.

15. Personal service on a defendant out of the state is authorized in condemnation proceedings in Washington. Laws 1905, c. 55, § 5, providing that a summons shall be served as in civil actions. State v. Superior Ct. for Whatcom County, 42 Wash. 521, 85 P. 256. An action in partition under Code Proc. § 448, is commenced by a summons and complaint, while under the Revised Statutes it was commenced by petition and notice. The Code makes applicable the provisions of the Revised Statutes in partition suits brought thereunder, and the Revised Statutes provided that the "petition and notice" could be served on a minor outside the state. Held service of the "summons" on an infant and on the person with whom she resided outside the state was regular in an action under the Code. O'Donaghue v. Smith, 184 N. Y. 365, 77 N. E. 621.

16. Personal service outside the state on a day which was a legal holiday in Texas held void. Norvell v. Pye [Tex. Civ. App.] 95 S. W. 666.

17. Under Federal judiciary act of 1813, § 8, authorizing court to make order requiring absent defendant to appear, plead, or demur, it is not sufficient for the court to merely order service of process on defendant. Jennings v. Johnson [C. C. A.] 148 F. 337.

18. Citation addressed to defendants at London, England, but served in Surrey county. Stein v. Mentz [Tex. Civ. App.] 15 Tex. Ct. Rep. 4, 94 S. W. 447.

19. See 6 C. L. 1093.

20. Albright-Prior Co. v. Pacific Selling Co., 126 Ga. 498, 55 S. E. 251.

21. Where a summons was directed to the sheriff of a county, return held to sufficiently raise presumption that the person signing it by another was sheriff of that county and that the person by whom it was served was a deputy duly authorized. Eversole v. Eastern Kentucky Asylum [Ky.] 100 S. W. 300.

22. Code Civ. Proc. § 581, subd. 7, requiring dismissal of an action on failure of plaintiff to cause summons to be returned with proof of service within three years after commencement of suit, applies only to actions which are untried, and a judgment rendered against a defendant regularly served with process will not be set aside because there is on file no proof of service. Jones v. Gunn [Cal.] 87 P. 577. The West Virginia practice of taking judgment on a money contract after notice of a motion for judgment requires service only not return of the notice within the time fixed. Knox v. Horner, 58 W. Va. 136, 51 S. E. 979. If not returned before term, the right to docket it at that term is lost. Id.

23. See ante, § 4 C. Under a statute authorizing service by any person over twenty-one years of age, the proof of service must show that the server was over twenty-one when service was made. Recital that server "is" over twenty-one insufficient. French v. Ajax Oil & Development Co. [Wash.] 87 P. 359. Where return to summons failed to show that it was served by one who was qualified, a recital in the judgment that defendant was "personally served" did not show legal service on appeal from order denying motion to vacate and permit a defense, the attack being direct and the court not having certified due and legal service. Id.

24. See ante, §§ 4, 5. A return on substi-

before an officer authorized to administer oaths.[25] It is the service itself, however, that confers jurisdiction,[26] and so a failure to make proof is not necessarily fatal.[27] A sheriff's return on a process is evidence only to show how the process was executed.[28] A finding of notice in an order of court is conclusive proof thereof in probate proceedings in Montana.[29]

Return of service on corporations.[30]—To authorize a judgment by default against a corporation, the record must show that proof was made that the person on whom process was served was authorized by law to receive service on behalf of the corporation.[31] Where a statute authorizes service at a certain place, that place must be shown by the return.[32] If an alternative service is made, the statutory occasion must be set forth.[33]

Amendment of return.[34]—The court will generally allow the return to be amended[35] before or after judgment, as where there has been a failure to sign it[36] or to state where the process was left.[37] A refusal to amend the return will not be disturbed where the evidence is conflicting as to the truth of the statement sought to be inserted.[38] Where no amendment is actually made pursuant to leave granted, the

tuted service must show that the process was left at "defendant's" place of abode. Return of summons in attachment stating that it was left at "the last and usual place of abode," etc., held defective. Abbott v. Abbott, 101 Me. 343, 64 A. 615.

25. Where affidavit of service of notice and copy of bill was sworn to before a justice of the peace of Virginia and clerk of circuit court of county where justice resided attached his certificate under seal to jurat of justice that latter was authorized to take acknowledgments and administer oaths, this was sufficient. Williams v. Williams, 221 Ill. 541, 77 N. E. 928.

26. Jones v. Gunn [Cal.] 87 P. 577. See, also, ante, § 4.

27. Upon a judgment roll being offered in evidence containing an unsigned return, parol evidence is admissible to show actual service. Jones v. Gunn [Cal.] 87 P. 577.

28. Not admissible in criminal case for purpose of discrediting affidavit for a continuance, there being no question as to execution of the process. State v. Rugero, 117 La. 1040, 42 So. 495.

29. Under Code Civ. Proc. § 2796, requiring proof of notice on a hearing in probate proceedings, and that a finding in the order of court shall be conclusive, held, where on appeal from allowance of administrator's account the order finds that notice was given in the manner and for the time ordered by the court, this is conclusive. In re Davis' Estate, 33 Mont. 539, 88 P. 957.

30. See 6 C. L. 1094.

31. Ex parte National Lumber Mfg. Co. [Ala.] 41 So. 10.

32. Under Rev. St. 1889, § 995, authorizing service by leaving a copy at "any business office" of the corporation, the return must specify that service was had on the agent at the business office of the corporation. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944.

33. Where substituted service on a foreign insurance company doing business in California is made on the insurance commissioner under Pol. Code, § 616, the return must show that by reason of resignation or otherwise the company is without the statutory agent provided for therein on whom service may be made. Buckingham v. North German Fire Ins. Co., 149 F. 622. If service on a railroad company cannot be had on the chief officials or agents designated in Wilson's Rev. & Ann. St. 1903, §§ 4269-4271, or on the appointed agent, the return must show why it could not be so had and the official character of the person served. St. Louis, etc., R. Co. v. Clark [Okl.] 87 P. 430.

34. See 6 C. L. 1095.

35. Chapter 7, on Amendments and Jeofalls (Hurd's Rev. St. 1905), authorizing amendments to processes, returns, etc., after judgment, applies to a special proceeding by a drainage district to condemn land, and the return of service of notice to owners may be amended after the term at which damages were awarded where notice was in fact properly given and no rights of third persons intervened. Waite v. Green River Com'rs, 226 Ill. 207, 80 N. E. 725. Where the order allowed the amendment to be made by the special deputy sheriff who made the service and the amended return was signed by the sheriff by such deputy, it was proper. Id.

36. Upon sufficient showing being made, a court may allow the return on a summons to be properly signed by the sheriff after judgment. Where by inadvertence deputy omitted to sign sheriff's name by himself as deputy. Lies v. Klaner, 121 Ill. App. 332. Where it appeared that service of process was actually made on a defendant in foreclosure, held, court could allow the return to be signed some twelve years afterward when the judgment roll was offered in evidence in another suit. Jones v. Gunn [Cal.] 87 P. 577.

37. Where the return failed to state that a summons was left at "defendant's" usual place of abode and there was nothing to show whether or not this was a mere error, exceptions on appeal must be sustained (Abbott v. Abbott, 101 Me. 343, 64 A. 615), but the cause will be remanded to the lower court where the truth may be ascertained and the officer allowed to amend the return if necessary (Id.), and in such case the action will not be dismissed (Id.).

38. Where it was sought to amend return so as to show that officer explained to defendant's wife the purport of the writ. Park Land & Imp. Co. v. Lane [Va.] 55 S. E. 690.

document remains unaffected.[39] A sheriff cannot without notice file an amended return showing proper service.[40]

Impeachment and contradiction of return.[41]—At common law the officer's return is conclusive in the suit as between parties and privies and cannot be impeached except for fraud or mistake,[42] but this rule no longer obtains in many of the states provided the evidence is sufficient,[43] the statutes often making the return prima facie evidence only.[44] If a return of personal service on two defendants is ambiguous and open to the construction that but one copy was delivered to both, parol evidence is admissible to show that no service in fact was had on one of the defendants.[45] The return of an officer to the service of a summons in the original action may be impeached in a proceeding to revive the judgment,[46] and in some states, affidavits are admissible for such purpose.[47]

Waiver of irregularities [48] in the process or service as distinguished from irregularities in the return are treated in the succeeding section.[49]

Return on constructive service and proof of service by publication.[50]—The affidavit of publication must show the times and dates of publication,[51] and if the order required the mailing of process to several defendants, it must also show that a copy was mailed to each of them.[52] It is generally signed by the editor or publisher of the paper.[53] If there is a mistake in the affidavit, a proper publication may be shown by outside evidence unless the statute makes the affidavit conclusive.[54] A delay in making complete proof does not invalidate the proceeding if proper service was actually made.[55] If an order or notice is not jurisdictional the rendition of a decree without

39. Chicago, etc., R. Co. v. Suta, 123 Ill. App. 125.

40. Amendment discretionary with court and parties affected have right to a day in court. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944.

41. See 6 C. L. 1096.

42. If a return of service of summons commencing suit is sufficient on its face, such facts stated therein as it was the duty of the officer to set forth in it cannot be put in issue by either a plea in abatement or a motion to set aside a judgment by default. For reasons of public policy, contradiction of such returns is not permitted in any form except upon allegations of fraud or collusion. Talbott v. Southern Oil Co. [W. Va.] 55 S. E. 1009.

43. See 6 C. L. 1096. A mere general statement in an affidavit of defendant, that the summons and complaint were not personally served on him, is not sufficient to overcome the proof of service afforded by an affidavit of service in regular form. Marin v. Potter [N. D.] 107 N. W. 970. Evidence insufficient to impeach certificate showing service of precept in dispossess proceeding, or to show that affidavit of process server of service of statutory demand for rent was false. Reich v. Cochran, 102 N. Y. S. 827.

44. Except where a sheriff's return of service is made conclusive by statute in the absence of fraud, the return may be shown to be false without showing that it was procured by the fraud of plaintiff. National Metal Co. v. Greene Consol. Copper Co. [Ariz.] 89 P. 535, and authorities referred to.

45. Jackson v. Tenney [Okl.] 87 P. 867. Where the evidence showed that a defendant was not served, a motion to set aside the judgment made at the term of rendition, being a direct proceeding, should have been sustained. Id.

46. Johnson v. Carpenter [Neb.] 108 N. W. 161.

47. So held under Code Civ. Proc. § 370. Johnson v. Carpenter [Neb.] 108 N. W. 161.

48. See 6 C. L. 1097.

49. See post, § 7, subd. Waiver of Irregularities or Lack of Process.

50. See 6 C. L. 1097.

51. Affidavit of publication of a warning order in an Arkansas divorce suit stating that it was published in a weekly newspaper for six consecutive weeks commencing April 18, and ending May 23, held to sufficiently show the number of times it was published and the dates of the papers in which it was published. Stuart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1049.

52. Affidavit that "a copy of said summons attached to a copy of the complaint directed to" the defendants named was mailed, held not to show complete service. Harris v. Morris [Cal. App.] 84 P. 678.

53. That affiant signed himself "publisher" instead of "editor, proprietor, or manager," as required by the statute, did not render publication defective. Stewart v. Cole [Tex. Civ. App.] 15 Tex. Ct. Rep. 748, 92 S. W. 1040.

54. That publication was made a sufficient length of time before the term of court. Harbert v. Durden, 116 Mo. App. 512, 92 S. W. 746. Where statute merely provided that affidavit of publisher should be "sufficient evidence," the affidavit was not the exclusive evidence. Id. Where evidence showed due publication, motion to quash execution was properly denied. Id.

55. Failure to file affidavit of mailing copy of summons and complaint to nonresident in divorce proceeding until after judgment not fatal where papers were actually

proof that is was published is not a denial of due process of law.[56] That a decree recites publication in a certain newspaper when in fact it was made in another paper does not affect its validity.[57]

§ 7. *Defects, objections, and amendments. In general.*[58]—Defects in the return have already been considered.[59] Mere defects or irregularities in the service of process do not go to the jurisdiction of the court if defendant was in fact actually served.[60] The question of want of service on a defendant cannot be raised by a co-defendant who is in no way affected.[61] A judge who is doubtful of his jurisdiction to hear a case because of defects in the service of the summons should call the attention of counsel to the supposed defects in order that they may be corrected by amendment and should not arbitrarily refuse to try the cause.[62]

Alterations. Amendments.[63]—Amendments will usually be allowed at any stage of the proceeding providing the cause of action is not changed,[64] but after defendants have appeared and answered, the court cannot grant an order allowing an amendment of the summons and complaint without notice.[65] If a defendant objects to a mistake in his name, the court should require the process to be amended by inserting the true name.[66] Where an action is prosecuted against defendants as trustees but is changed to one against them individually, the summons should be amended as well as the complaint.[67] If a motion to amend nunc pro tunc is overruled and movant is given simply the right to amend but fails to do so, he will be deemed to have elected to stand on the original process [68] and cannot be heard to say that the amendment which was allowed would not have availed him as against a plea of limitations.[69]

When objections made.[70]—Where a process is merely irregular, objection thereto should be made promptly, otherwise it will be waived.[71] A defendant in

mailed prior thereto. In re Geith's Estate [Wis.] 109 N. W. 552.

56. A decree for the sale of land for unpaid levee taxes based on constructive service cannot be deemed to deny due process of law because there was no sufficient proof of publication of a warning order or notice filed or produced in court, where under the local procedure the entry of a warning order, even if required, is not jurisdictional. Ballard v. Hunter, 27 S. Ct. 261.

57. Divorce decree. McDermott v. Gray, 198 Mo. 266, 95 S. W. 431.

58. See 6 C. L. 1097.

59. See ante, § 6, Return and Proof of Service.

60. That service was made by deputies of sheriff who was a party. Hansford v. Tate [W. Va.] 56 S. E. 372.

61. Where in foreclosure only the owner of the land appeared and contended that debt was not due, he could not quash process and vacate default of the other defendants, the makers of the note and mortgage, on ground that they had not been served. Gottschalk v. Noyes, 225 Ill. 94, 80 N. E. 72.

62. State v. Murphy [Nev.] 85 P. 1004.

63. See 6 C. L. 1098. For amendment of return, see ante, § 6.

64. Where a praecipe calls for a summons in trespass, but by mistake of the clerk a summons is issued in assumpsit, the summons may be amended to conform to the praecipe even after the statutory period of limitations has passed. Amendment did not create new cause of action. Wilkinson v. Northeast Borough [Pa.] 64 A. 734.

65. So as to bring in as defendants other parties in suit to set aside fraudulent conveyances. Luckey v. Mockridge, 112 App. Div. 199, 98 N. Y. S. 335. Order also irregular where copy of amended pleading was not attached thereto. Id. Could not be be confirmed nunc pro tunc. Id.

66. Davis v. Jennings [Neb.] 111 N. W. 128.

67. Southack v. Gleason, 49 Misc. 445, 98 N. Y. S. 859.

68. Goldie v. Stewart [Neb.] 107 N. W. 245.

69. Court could not anticipate such plea. Goldie v. Stewart [Neb.] 107 N. W. 245.

70. See 6 C. L. 1098.

71. Where process was signed in clerk's absence by an assistant whom the clerk had given general authority, instead of by clerk himself. Rucker v. Tabor, 126 Ga. 132, 54 S. E. 959. When a defendant desires to take advantage of the omission of a seal from the summons and failure of the praecipe to state the nature of the cause of action, it should be done before default. It is too late to move to quash summons and service and in arrest of judgment after motion to set aside default on grounds recognizing the court's jurisdiction, especially where no complaint is made of service of summons properly returnable and hearing evidence of its official source and purpose and leave has been asked to appear and plead to declaration showing the nature of the action. Benedict v. W. T. Hadlow Co. [Fla.] 42 So. 239. Objection that process was served by sheriff who was a party. Hansford v. Tate [W. Va.] 56 S. E. 372.

equity may question the jurisdiction of the court for lack of proper service in limine before answer.[72] An order denying a motion to dismiss for want of process not being appealable, the motion may be renewed before another justice.[73]

How objections made.[74]—Where the question of intention is involved, a motion to set aside the service in a Federal court on the ground that defendant was not an inhabitant of the district will not be determined alone on the ex parte affidavit of defendant,[75] nor will it be passed for determination on plea or answer if defendant is under arrest;[78] but the issue will be referred to a master to take testimony subject to cross-examination.[77] If a defendant is designated by a wrong name, he may make objection thereto by motion in the nature of a plea in abatement.[78] In New York when a default judgment is based on an insufficient affidavit for substituted service, the remedy is by appeal and not by motion to set aside the order for substituted service.[79]

Waiver irregularities or lack of process.[80]—Service of process or defects therein is waived by general appearance [81] and asking relief on the merits,[82] or by otherwise treating a service as valid,[83] and general appearance after substituted service waives the want of personal jurisdiction; [84] but pleading to the merits or taking part in the proceeding is not a waiver after the overruling of a motion to quash to which exception has been duly taken.[85] A demand in recoupment, is, however, a submission to

72. Lanning v. Twining [N. J. Eq.] 64 A. 466.

73. The order of a justice made on return day denying a motion to dismiss because no jurisdiction was obtained by the alias summons, not being appealable under Municipal Court Act (Laws 1902, pp. 1562, 1563, c. 580, §§ 253-255), the motion may be renewed at the trial before another justice and granting the motion would not be a review of the order of another justice. Berkman v. Weisinger, 50 Misc. 575, 99 N. Y. S. 466.

74. See 6 C. L. 1098.

75, 76, 77. Canadian Pac. R. Co. v. Wenham, 146 F. 206.

78. Not ground for quashing process. Davis v. Jennings [Neb.] 111 N. W. 128.

79. Municipal Court Act (Laws 1902. p. 1578, c. 580, §§ 310, 311. Wolter v. Liebmann, 102 N. Y. S. 487.

80. See 6 C. L. 1100.

81. Hatcher v. Faison 142 N. C. 364, 55 S. E. 284; Wilkinson v. New York City R. Co., 50 Misc. 652, 99 N. Y. S. 380. General appearance before filing of amended declaration held waiver of want of service of new process thereon. Norfolk & W. R. Co. v. Sutherland, 105 Va. 545, 54 S. E. 465. Where notice in probate proceedings serves the purpose of a summons in ordinary actions, giving of notice is waived by appearance and participation in proceedings. In re Davis' Estate, 33 Mont. 539, 88 P. 957. Where defendant was personally served and appeared and suffered judgment to be rendered, an objection that the summons was invalid because it was directed "to defendant" who was named in the caption but not in the body of the summons, was not considered by the court. Glenn v. Augusta Drug Co. [Ga.] 55 S. E. 1032.

82. A motion to set aside a judgment establishing a railroad lien on the ground that as to one defendant the court acquired no jurisdiction under the allegations of the petition because it was not made a party and as to the other because it was not served or brought into court does not challenge the petition. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944.

83. Any irregularity in service on a corporation by leaving subpoena with vice president and director instead of with the statutory agent held waived where officers and statutory agent received the process later and stipulated for extension of time to answer. Martin v. Atlas Estate Co. [N. J. Err. & App.] 65 A. 881.

84. Luetzke v. Roberts [Wis.] 109 N. W. 949.

85. Bes Line Const. Co. v. Schmidt, 16 Okl. 429, 85 P. 711; St. Louis & S. F. R. Co. v. Clark [Okl.] 87 P. 430. No waiver where defendant moved to dismiss and pleaded want of service at time of filing defense. Stallings v. Stallings [Ga.] 56 S. E. 469. Where a defendant appears specially and objects to jurisdiction over his person and his objection is overruled, he does not waive his objection by filing an answer and cross examining witnesses, where he expressly renews his objection before any testimony is taken, and again at the close of plaintiff's case puts in no defense and expressly refuses to make any motion on the merits. Stephen v. Molloy, 50 Misc. 518, 99 N. Y. S.

NOTE. Waiver by proceeding to merits after overruling of motion to quash service: The diversity of views held by the courts relative to the right of a defendant to plead generally, without waving the objection to the jurisdiction of the court over the person, after a motion to quash the writ for defects therein has been overruled, and exception to such ruling saved, is well illustrated in the majority and dissenting opinions in the recent case of Fisher, Sons & Co. v. Crowley, 57 W. Va. 312, 50 S. E. 422. It was there held that a defect in the summons commencing an action in a court of record is not waived by pleading to the merits after the overruling of a motion to quash, to which an exception has been taken and made a part of the record.

While this is, we believe, the better rule,

the jurisdiction of the court, though exception has been taken.[86] If a judgment by default is entered without proper service, the objection is not waived by a special

it is by no means uniformly so held by the courts. In Ry. Co. v. Wright, 50 W. Va. 653, which the court attempts to distinguish in principle from the principal case, the rule is state as follows: "When a defendant appears and objects to the jurisdiction and his objection is overruled, he must then elect either to stand upon his objection or go into the merits. Going into the merits waives his exceptions to the service of process. This latter rule is founded on justice and reason. For although the defendant may not be served with process, yet if he appears and contests the case and a fair trial is had why should he be permitted to invalidate the judgment thus obtained, because the process to bring him into court was not legally served upon him?" This view has been accorded the support of many of the courts, and the decisions sustained by a course of reasoning which is quite similar in all the opinions. A fair example is that of Sealy v. California Lumber Co., 19 Or. 94, wherein the court said, "A defendant cannot answer the complaint and make a full defense on the merits without making a general appearance in spite of his special appearance, and when he does so he invokes the judgment of the court and submits himself and his rights to its jurisdiction and cannot longer be heard to say that it had no jurisdiction. He cannot fight his battle on the merits under a special appearance. The law will not allow him to occupy an ambiguous position to avail himself of its jurisdiction when the judgment is in his favor and to repudiate it when the result in adverse to him. He ought to do one thing or the other, either fight it out on the line of special appearance, or if he appear and go to trial, accept its incidents and consequences. Garrett v. Herring Furn. Co., 69 S. C. 278, 48 S. E. 254; Franklin Life Ins. Co. v. Hickson, 97 Ill. App. 387. But the objection to this argument lies in the fact that it would either make of every trial court a court of last resort, or require the defendant "to do what is impossible for other mortals, correctly forecast what will be the decision of the court of last resort upon the question."

As supporting the rule announced in this principal case, and contrary to that last expressed, we quote from the case of Chandler v. Citizens Nat. Bank, 149 Ind. 601, as follows: "The settled rule in this jurisdiction and in others also, is that a party to an action who under a special appearance, in due season, unsuccessfully denies the jurisdiction of the court over his person, does not waive the question of jurisdiction of his person by thereafter answering over, and going to trial upon the merits of the cause of action. The authorities assert that the defendant under such circumstances, having at the very threshold resisted the jurisdiction of the court in a legitimate manner to the full extent of his power, is not required to desert his case, and leave his adversary to take judgment against him by default." Having unsuccessfully contested the jurisdiction, it is his privilege and duty to make the best defense of which he is capable. Benedict v. Johnson, 4 S. D. 387; Am. Wire & Steel Bed Co. v. Goldman, 83 N. Y. S. 330; Mullen v. Canal Co., 114 N. C. 8. The defendant should appear specially, object to the jurisdiction, and if the objection is adversely ruled upon, save an exception for appeal. That this is the proper practice is indicated by the following cases: Perkins v. Hayward, 132 Ind. 95; Winfield Nat'l Bank v. McWilliams, 9 Okl. 493; Mullen v. Canal Co., 114 N. C. 8; Lilliard v. Brannin, 91 Ky. 511. The case assumes a different aspect when the defendant, although objection is made specially to the jurisdiction of the court over his person, files a counterclaim or asks affirmative relief. He thereby becomes an actor in the suit and institutes a proceeding which has for its basis the existence of an action to which he must be a party. He thereby submits himself to the jurisdiction of the court and no disclaimer which he may make on the record, that he does not intend to do so, will be effectual to defeat the consequence of his act. 2 Enc. Pleading and Practice, p. 626; Chandler v. Citizens' Nat. Bank, 149 Ind. 601; Montague v. Marunda [Neb.] 99 N. W. 653; Lower v. Wilson, 9 S. D. 252; Grant v. Birrell, 72 N. Y. S. 366. But the court went further and held that it is not necessary for a defendant in appearing for the purpose of quashing the writ to cause the record to recite that his appearance is for that purpose only, but whether an appearance is general or special is to be determined by the record as it stands at the time the motion is made. In State v. Thaker Coal & Coke Co., 49 W. Va. 140, the record recited that the defendant appeared by attorney and moved to quash the summons and the return of the sheriff thereon endorsed which motion the court overruled, whereupon the defendant then and there excepted to the ruling of the court. The court held the appearance to be general and said, "An appearance for the purpose of taking advantage of defective execution or non-execution of process must be a special appearance for that purpose alone, and must be so stated at the time of making the appearance." Although attempting to "reconcile" the conflicting views as expressed in several previous opinions, the court apparently overlooked this case, which seems in point, and expresses, we think, the sounder view. It is true one may not make a general appearance special by denominating it such; but the tendency of the courts is to construe that a general appearance which is not designated, or is not clearly shown to be, a special appearance. It is certainly the more prudent course to specifically state in each special appearance pleading that "the defendant appears specially and for the purpose of this motion only," and this practice is amply supported by authority. Kinkade v. Myers, 17 Or. 470; Collier v. Faek, 66 223; Deshler v. Foster, 1 Morris [Ia.] 403.—3 Mich. L. R. 652.

86. Especially in view of Ill. Rev. St. c. 110, §§ 30, 31, authorizing judgment for a defendant for any balance found due him. Merchants' Heat & Light Co. v. Clow & Sons, 27 S. Ct. 285.

appearance in which defendant moves to vacate the default and asks leave to file an answer to the merits.[87]

§ 8. *Privilege and exemptions from service.*[88]—Nonresidents are generally held exempt from service of civil process while in attendance on judicial proceedings [89] in the absence of waiver.[90] A resident of the state of Kansas is exempt from service of summons in an action brought in a county other than his residence while he is there in attendance upon court either as a party or as a material witness,[91] and this rule applies even though the attendance may be voluntary.[92] In the absence of fraud an extradited person is liable to service of civil process without an opportunity being given him to return to the state whence he was brought.[93] While in Vermont one who is privileged from arrest on mesne process in a civil case may plead such facts in abatement,[94] the privilege of a nonresident witness from service of mesne process by summons in a civil case cannot be so pleaded.[95]

§ 9. *Abuse of process* [96] is considered in another article.[97]

PRODUCTION OF DOCUMENTS, see latest topical index.

PROFANITY AND BLASPHEMY.[98]

An indictment charging the use of profane language in a public place, contrary to statute, must particularize the place.[99]

PROFERT; PROFITS A PRENDRE, see latest topical index.

PROHIBITION, WRIT OF.

§ 1. Nature, Function, and Occasion of Remedy (1467). | **§ 2. Practice and Procedure (1471).**

§ 1. *Nature, function, and occasion of remedy.*[1]—The writ does not lie to restrain action by purely administrative or legislative bodies,[2] but against judicial

87. So far as appearance was general defendant was not bound by orders of court made without jurisdiction before his appearance. French v. Ajax Oil & Development Co. [Wash.] 87 P. 359.

88. See 6 C. L. 1101.

89. Summary proceedings for dispossessing a tenant under Gen. St. p. 1919, § 16, are "judical proceedings" within the rule exempting nonresident parties and witnesses in judical proceedings from service of civil process. Richardson v. Smith [N. J. Law] 65 A. 162. A hearing before a referee in bankruptcy is within rule exempting one from service of process while away from his place of residence attending a judicial hearing. Morrow v. Dudley & Co., 144 F. 441.

90. Delay of three weeks in applying to set aside service made on one while going to the train after attending a hearing held no waiver. Morrow v. Dudley & Co., 144 F. 441.

91. Underwood v. Fosha [Kan.] 85 P. 564.

92. Civil Code, § 337, exempting witness while in attendance under subpoena, does not imply that one attending voluntarily shall not be exempt. Underwood v. Fosha [Kan.] 85 P. 564.

93. Rutledge v. Krauss [N. J. Law] 63 A. 988.

94, 95. Wilkins v. Brock [Vt.] 64 A. 232.

96. See C. L. 1102.

97. See Malicious Prosecution and Abuse of Process, 8 C. L. 797.

98. See 6 C. L. 1102.

99. An indictment under Ann. Code 1892, § 1219, merely alleging that defendant used profane language in "a public place", held demurrable. State v. Shanks [Miss.] 40 So. 1005.

1. See 6 C. L. 1102.

2. The action of a civil service commission in investigating charges, where it is without prove to remove the offender, is an administrative and not a judicial act. People v. Milliken, 185 N. Y. 35, 77 N. E. 872. The writ of prohibition will not lie to enjoin a commissioner's court from proceeding further with a contract already let for the construction of a bridge (Goodwin v. State [Ala.] 40 So. 122), nor to restrain the allowance of a claim for it and the issuance of a warrant, this being a purely ministerial act (Id.). The Missouri primary election law, providing that "judges, clerks, and challengers, who shall serve at said primary, shall be selected by the election commissioners from lists submitted by the managing committee of the party holding the same, does not confer judicial powers upon the election commissioners. Their action in making such selection is purely administrative and will not be restrained by prohibition. Kalbfell v. Wood, 193 Mo. 675, 92 S. W. 230. The general committee of a

tribunals only. Though the practice in issuing and enforcing the writ is regulated by statute, its nature, object, and function, as well as the facts governing its issuance, are largely regulated by the common law.[3] It will be granted only when the court or other tribunal is without jurisdiction,[4] or where its action is in excess of

political party is purely an administrative body and prohibition does not lie to restrain the threatened action of a majority of such committee to oust a minority. State v. Witthoeft, 117 Mo. App. 625, 93 S. W. 284. The state board of health is a ministerial and not a judicial body and prohibition does not lie to restrain it from investigating charges preferred against a physician, although if such charges are found to be true it may revoke the license of such physician. State v. Goodier, 195 Mo. 551, 93 S. W. 928.

3. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

4. Kalbfell v. Wood, 193 Mo. 675, 92 S. W. 230. The only question reached by an application for a writ of prohibition is the jurisdiction of the court in the matter complained of, and the propriety of his order cannot be considered. Dupayster v. Clarke, 28 Ky. L. R. 655, 90 S. W. 1. The jurisdiction of the court is the only question involved upon an application for a writ of prohibition. People v. District Ct. [Colo.] 86 P. 87. The writ will issue only when it appears that the judge or court sought to be restrained assumed to exercise and apply judicial powers not granted by law, or in a proceeding within its jurisdiction that the court assumes to apply judicial force in excess of its power and authority to do so. State v. Stobie, 194 Mo. 14, 92 S. W. 191.

Granted where probate court whose lunacy jurisdiction depended on "property" of the lunatic in the county was proceeding to adjudge sanity of one who had only an annuity payable out of a trust. Carter v. Bolster [Mo. App.] 98 S. W. 105. A statute providing for the deportation of a nonresident insane person and making it the duty of the sheriff to convey such person to his home is void, and the court being without jurisdiction to decree such deportation, prohibition lies to restrain it from doing so. State v. Superior Ct. [Wash.] 88 P. 207. Where jurisdiction to issue high prerogative writs of the common-law is vested in supreme court alone, the action of an inferior court in issuing such writs for the purpose of supervising and controlling an election will be restrained by prohibition. People v. District Ct. [Colo.] 86 P. 87. Writ lies where information in a criminal proceeding is insufficient to confer jurisdiction upon the court. People v. Dunning, 113 App. Div. 35, 98 N. Y. S. 1067. The St. Louis court of appeals is without appellate jurisdiction where a constitutional question is involved and proceedings under a writ of prohibition granted by it in a matter where such question is involved will be restrained by a writ granted by the supreme court. State v. Nortoni [Mo.] 98 S. W. 554. The board of drainage commissioners of North Dakota acts judicially in assessing benefits to lands embraced within drainage districts, and in the absence of fraud their action is final, hence in such case a court is without jurisdiction to enjoin its acts and prohibition will issue to prevent it from doing so. State v. Fisk [N. D.] 107 N. W. 191.

Denied: Where a party appears by an attorney in an action, a dismissal signed by him without the consent of his attorney does not deprive the court of jurisdiction over such action, nor does a subsequent motion by his attorney in open court to dismiss, and a writ of prohibition to restrain the court from making order in the action except one of dismissal will be denied. Boca & L. R. Co. v. Superior Ct. [Cal.] 88 P. 718. Prohibition to restrain a city council from proceeding with an election contest was refused where the law made that body judge of the election and qualifications of its members. State v. Craig [Minn.] 111 N. W. 3. An objection to the nonjoinder of parties in an election contest does not go to the jurisdiction of the court and prohibition will not lie to restrain action in such proceedings on that ground. State v. McElhinney [Mo.] 97 S. W. 159.

5. It runs against the exercise of unauthorized power in a proceeding of which the lower court has jurisdiction as well as when the proceeding itself is instituted without jurisdiction. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330. Any order made by a court during the pendency of an action or in its inception which for any reason it is without power to make is in excess of its jurisdiction and will be restrained by prohibition although the court has jurisdiction over the subject-matter of the action and the parties. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257. Court of general sessions is without power to grant a new trial in a criminal case after judgment except on ground of newly-discovered evidence, and prohibition lies in behalf of the people to prevent it from doing so. People v. Court of General Sessions, 185 N. Y. 504, 78 N. E. 149, afg. 12 App. Div. 424, 98 N. Y. S. 557 which rvd. People v. Goff, 49 Misc. 72, 98 N. Y. S. 66. The fact that criminal proceedings sought to be restrained by prohibition were instituted for the sole purpose of hindering and impeding other criminal prosecutions does not deprive the court in which they are pending of jurisdiction and forms no basis for the issuance of the writ. State v. Stobie, 194 Mo. 14, 92 S. W. 191. Trying a person on a criminal charge where he has already been placed in jeopardy for the same offense, though gross error, is not an act in excess of the court's jurisdiction, and prohibition will not lie to restrain such trial. State v. Williams, 177 Mo. App. 564, 92 S. W. 151. Prohibition lies to restrain a court from hearing and determining as a criminal charge matter which does not constitute an offense but which was well pleaded, had such matter constituted an offense. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257. The granting of a preliminary mandatory injunction when the state of the case does not warrant it does not make the action of the court coram non judice and amounts to nothing more than mere judicial error to restrain which prohibition will not lie. Id. An injunction granted without notice or hearing requiring defendant to yield possession of his property which at the time the injunction was

jurisdiction,[5] and where the proceeding is not wholly void on its face;[6] and it must also appear that wrong, damage, or injustice, are likely to follow from the threatened action, and that no other remedy will afford full relief;[7] but it has been held that a usurpation of power will be restrained by prohibition without regard to the nature or extent of the injury wrought by its exercise.[8] It is immaterial whether the rights disturbed by the usurpation of power be constitutional, statutory, or common.[9] Ordinarily the jurisdiction of the court below should be challenged as a prerequisite to the writ.[10] Prohibition from the court of last resort to an appellate court will lie where the lower court misuses the writ to control a case not reviewable by itself.[11] Prohibition is in effect an injunction against a court as distinguished from an injunction proper.[12] Its object is not the correction of errors or relief from action already taken.[13] It differs from mandamus in that it is a negative and not an affirmative remedy,[14] but in some states it is made the counterpart of mandamus by statute.[15] Prohibition is not a writ of right, but issues only in the exercise of sound judicial discretion.[16] It does not lie for the purpose of regulating the course of a trial, or obviating the effect of rulings made by a court engaged in trying issues over which it has jurisdiction.[17] Prohibition does not lie to prevent an anticipated action on the part of an inferior court,[18] nor to restrain an act which has been fully

awarded was in his possession under a perfect title or a bona fide claim of title is void, and a contempt proceeding predicated upon a disobedience thereof will be restrained by prohibition. Id. Ballinger's Ann. Codes & St. § 2660, providing for the deportation of insane persons has no application to insane persons against whom criminal proceedings are pending and prohibition lies to restrain a court from ordering their deportation upon entering a decree adjudging them to be insane. State v. Superior Ct. [Wash.] 88 P. 207. Where before the trial of a person accused of a capital offense it is suggested by affidavit that she is insane, the court has inherent jurisdiction to appoint a commissioner to investigate as to her sanity and upon the report of such commission to decree her insane, and a writ to prevent the entry of such decree will be denied. Id. Where the law provided that the superior court of the county in which application for letters should be first made should have exclusive jurisdiction over the estate of the decedent, the action of the superior court of another county in assuming jurisdiction after application had been made to the court of another county is in excess of its jurisdiction and will be restrained by prohibition. Dungan v. Superior Ct. [Cal.] 84 P. 767. The court having jurisdiction to enjoin the exhibition of an accused person's photograph in the "rogues gallery," its action in doing so will not be restrained by prohibition. Schulman v. Whitaker, 115 La. 628, 39 So. 737.

6. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

7. Turner v. Langan [Nev.] 88 P. 1088.

8, 9. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257.

10. If a stay has ousted its jurisdiction, it should be so informed. McAneny v. Superior Ct. [Cal.] 87 P. 1020.

11. Case involving constitutional question. State v. Nortoni [Mo.] 98 S. W. 554.

12. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

13. It is not a substitute for appeal, its sole province being to prevent an inferior tribunal from usurping a jurisdiction which it does not possess. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

14. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

15. Rev. Codes N. D. 1899, § 6123. State v. Fisk [N. D.] 107 N. W. 191.

16. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

17. The writ was denied to prevent a court having jurisdiction from admitting evidence, the reception of which at most would constitute mere error. Johnston v. Superior Ct. [Cal. App.] 87 P. 211. Where the court has jurisdiction, the mere fact that the petition or complaint by which the action was inaugurated is defective is not ground for the issuance of the writ. State v. Stobie, 194 Mo. 14, 92 S. W. 191. Error in granting a preliminary injunction upon a defective bill cannot be relieved against by prohibition. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257. Defects and irregularities in proceedings of inferior tribunal is not ground of the issuance of the writ as prohibition is a preventive, not a corrective remedy. State v. Craig [Minn.] 111 N. W. 3. Admission of erroneous evidence in an election contest proceeding. Turner v. Langan [Nev.] 88 P. 1088. Refusal of lunacy commission to allow prosecuting attorney to be present during portion of examination of an alleged lunatic against whom a criminal prosecution is pending cannot be reviewed. State v. Superior Ct. [Wash.] 88 P. 207. Writ does not lie for an injury apprehended on the theory that the court may decide erroneously, and when jurisdiction exists, it will not issue to prevent errors of law or procedure. People v. Wyatt, 113 App. Div. 111, 99 N. Y. S. 114.

18. Prohibition was refused where court prepared a decree granting an injunction but did not sign or enter it owing to the pendency of the prohibition proceedings. Zell v. Judges of Circuit Ct. [C. C. A.] 149 F. 86. Where a motion to dimiss is pending in lower court and operation of a preliminary injunction suspended, a writ of

accomplished.[19] Prohibition will be denied where the object sought to be accomplished thereby has been effected by the parties themselves,[20] or where the matter involved has become a mere moot question.[21] On an application for prohibition to stay a criminal proceeding, the guilt of innocence of the relators forms no basis for the issuance of the writ.[22] The supervisory jurisdiction of the supreme court will not be exercised by means of prohibition so as to give the right of appeal where the law does not allow an appeal and there is no usurpation of power on the part of the court below,[23] nor will the writ lie to usurp the functions of appeals, writs of error, or certiorari.[24] The writ is justified only by extreme necessity when the grievance cannot be redressed by ordinary proceedings at law,[25] and the fact that the legal remedy may be indirect or inconvenient does not alter the rule;[26] but the mere fact that a remedy by appeal exists is not sufficient to warrant a denial of the writ, it must be speedy and adequate.[27] But the mere fact that there is no right of

prohibition will be denied as it will not be assumed that lower court in determining the motion to dismiss will not give the petitioner all the relief to which he is entitled. Boca & L. R. Co. v. Superior Ct. [Cal.] 88 P. 718.

19. An order of the court continuing an attachment pending an appeal from a judgment for defendant in the same action is not a fully accomplished judicial act, as the injury is recurring. Primm v. Superior Ct. [Cal. App.] 84 P. 786.

20. Relator was ordered to turn over all the property and effects of the office of sheriff to a rival claimant and upon his failure to do so was imprisoned for contempt but prior to the application for a permanent writ of prohibition, relator leased, there being nothing upon which the court could operate, it was denied. Hubbell v. Abbott [N. M.] 85 P. 476.

21. Where it was sought by prohibition to restrain the election commissioners from selecting election officers for a primary election at such a time that the primary was held before the return day of the provisional order and so late that a new primary could not be held before the election, only a moot question was involved and the writ was denied. Kalbfell v. Wood, 193 Mo. 675, 92 S. W. 230.

22. Such matters are matters of defense and will not be determined upon an application for the writ. State v. Stobie, 194 Mo. 14, 92 S. W. 191.

23. In re Theriot, 117 La. 532, 42 So. 93.

24. State v. Stobie, 194 Mo. 14, 92 S. W. 191. The writ cannot be used as a substitute for the ordinary methods of review. State v. McElhinney [Mo.] 97 S. W. 159.

25. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, afg. 113 App. Div. 111, 99 N. Y. S. 114; People v. District Ct. [Colo.] 86 P. 322; Turner v. Langan [Nev.] 88 P. 1088. Where during the pendency of an action of assumpsit the plaintiff in such action commenced an action for an accounting against the same defendant and its appeal from an order overruling its plea to the jurisdiction was dismissed, and the plaintiff pursuant to an order elected to proceed in chancery, prohibition was denied, there being an adequate remedy in the same action. Port Huron Sav. Bk. v. Law [Mich.] 14 Det. Leg. N. 2, 111 N. W. 202. Where court of general sessions, which is without power to grant a new trial in a criminal case after judgment except on the ground of newly discovered evidence, grants such new trial, the people not having the right of appeal are entitled to the benefit of the writ. People v. Court of General Session, 185 N. Y. 504, 78 N. E. 149, afg. 112 App. Div. 424, 98 N. Y. S. 557, which rvd. People v. Goff, 49 Misc. 72, 98 N. Y. S. 66. Where relator has an adequate remedy by certiorari, the writ will be denied. People v. Butler, 103 N. Y. S. 329.

26. Where magistrate issuing subpoena was not only without jurisdiction but the subpoena void on its face the writ was refused on the ground that the relator had an adequate remedy by habeas corpus. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, afg. 113 App. Div. 111, 99 N. Y. S. 114.

27. Remedy held inadequate: Where court had no jurisdiction to enjoin state drainage commissioners from taking proceedings to establish a drain, the remedy by appeal was held to be inadequate. State v. Fisk [N. D.] 107 N. W. 191. An appeal from an order, continuing an attachment in force pending an appeal from a judgment for defendant in the action to which it is ancillary, is not sufficiently adequate to warrant a denial of the writ to prevent such continuance. Primm v. Superior Ct. [Cal. App.] 84 P. 786. Where a court of one county was without jurisdiction over the settlement of the estate of a decedent, the court of another county having first acquired exclusive jurisdiction, the remedy by appeal is not sufficiently adequate to preclude the issuance of the court. Dungan v. Superior Ct. [Cal.] 74, 84 P. 767.

Held adequate: Where in election contest the nonjoinder of an unsuccessful candidate who obtained more votes than the contestant is objected to, the contestee has an adequate remedy by appeal and prohibition will be denied. State v. McElhinney [Mo.] 97 S. W. 159. Appeal coupled with right to supersede order held adequate. McAneny v. Superior Ct. [Cal.] 87 P. 1020. Admission on petition for letters of administration of evidence that petitioner's intestate was not her husband held remediable by appeal. Johnson v. Superior Ct. [Cal. App.] 87 P. 211. In an action by one claiming to hold office in a county to restrain another claimant from performing the duties of such office, the remedy by appeal is ample and such injunction proceedings will not be enjoined by prohibition. State v. Superior Ct. [Wash.] 86 P. 632. In Alabama a writ of

review is not of itself ground for the issuance of the writ,[28] nor is the mere fact that an appeal lies a bar to prohibition where it is the appropriate remedy.[29] The writ will not issue as ancillary to a contemplated writ of error or appeal.[30] The applicant for the writ must have some interest in the relief sought to be obtained.[31]

§ 2. *Practice and procedure.*[32]—Jurisdiction to issue the writ is not affected by any misstatement or concealment of fact in the petition but upon the facts disclosed by the record.[33] The United States circuit court of appeals is without jurisdiction to issue a writ of prohibition as an original or independent proceeding.[34] An application for a writ of prohibition impliedly admits the existence to the body to whom it is directed.[35] If the inadequacy of the legal remedy lies in the facts of the particular case which are denied, issue must be joined and such facts tried [36] and a submission on the return without so doing is fatal to the application.[37] Where it is contended that one of two courts has exclusive jurisdiction over a proceeding because of having first obtained it, the truth of the facts necessary to give such court jurisdiction cannot be questioned on an application for prohibition against the court attempting to acquire jurisdiction, such matters being for the court having jurisdiction to determine.[38] The return should be fairly construed.[39] If the return to an alternative writ of prohibition is incomplete, the relator should move for a further return, and not move for an absolute writ upon the papers as they are, as upon a motion for an absolute writ without a trial of the issues the return is conclusive as to all matters not traversed even though they constitute new matter.[40]

PROMOTERS, see latest topical index.

PROPERTY.[41]

Definition and nature.[42]—A right may be property if valuable though not capable of unrestricted transfer.[43] Part of the right of property is the right to re-

prohibition to restrain a county commissioner from a general discharge of official duty in the future will not be as there is a plain and adequate remedy at law. Code 1896, p. 966, c. 94, § 3420. Goodwin v. State [Ala.] 40 So. 122. Where action complained of is the threatened admission of erroneous evidence in an action over which the court has jurisdiction, the remedy by appeal is adequate. Turner v. Langan [Nev.] 88 P. 1088. A defendant in a criminal action who has been placed in jeopardy has an adequate remedy by appeal and prohibition will be denied to restrain the court from placing him twice in jeopardy. State v. Williams, 117 Mo. App. 564, 92 S. W. 151.

28, 29. Powhatan Coal & Coke Co. v. Ritz [W. Va.] 56 S. E. 257.

30. Zell v. Judges of Circuit Ct. [C. C. A.] 149 F. 86.

31. A public administrator who has applied for letters of administration and the next of kin of the decedent have a sufficient beneficial interest to entitle them to apply for a writ to prevent the court of another state from wrongfully assuming jurisdiction. Dungan v. Superior Ct. [Cal.] 84 P. 767. Where information in a criminal proceeding is insufficient to give the court jurisdiction, prohibition lies at the suit of a witness subpoenaed to testify in such proceeding to restrain further action in the matter. People v. Dunning, 113 App. Div. 35, 98 N. Y. S. 1067.

32. See 6 C. L. 1106.

33. State v. Nortoni [Mo.] 98 S. W. 554.

34. Zell v. Judges of Circuit Ct. [C. C. A.] 149 F. 86.

35. The court intimates that the constitutionality of a statute creating a state board cannot be questioned by a writ directed to the members of such board. Davenport v. Elrod [S. D.] 107 N. W. 833.

36, 37. Appeal alleged to be inadequate because of supersedeas in amount beyond appellant's ability to give. McAneny v. Superior Ct. [Cal.] 87 P. 1020.

38. Under the law of California which provides that upon the death of a nonresident leaving property in more than one county, the court of that county in which application for letters is first made shall have exclusive jurisdiction, held that on an application for prohibition to prevent a court of one county from taking any proceedings in the settlement of a decedent's estate on the ground that application was first made in the court of another county, the question as to whether deceased left property in the latter county cannot be raised. Dungan v. Superior Ct. [Cal.] 84 P. 767.

39. Averment that writ was issued on "information and belief of the affiant" shows that it was on oath. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330.

40. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330, afg. 113 App. Div. 111, 99 N. Y. S. 114.

41. Includes general principles pertinent to the nature of property. See 4 C. L. 1087, N. 31.

42. See 6 C. L. 1106.

fuse to sell it save to accredited buyers who agree to sell only at a fixed price.[44] The right of property in domesticated deer does not entitle the owner to violate regulations respecting all deer made to protect wild game.[45] A license to pursue an occupation partakes of the nature of property.[46]

Possession.[47]—Possession imports ownership,[48] but it is not conclusive.[49] There can be no constructive possession on a void claim of ownership.[50]

Realty or personalty.[51]—Oil in place is part of the freehold,[52] but on severance becomes personalty.[53] Trees are realty unless severed actually or constructively.[54]

Formulae, information, processes, literary and like mental productions.[55]—Market quotations are property [56] and a limited communication of them to exchange members and their customers does not amount to a free publication.[57] Such quotations until free publication will be protected from disclosure or publication by one not entitled and who gains knowledge of them by fraud.[58] The common-law right of literary property ends when copyright begins,[59] and resale of a copyrighted book cannot be restricted by mere notice not partaking of contract with the purchaser.[60] While every one may reproduce literary works that have become free, it may be unfair competition to do so in close imitation of the typography and binding designed by others.[61] Property rights in a secret process may be protected by contract limitations on a buyer's right of resale restricting it to approved persons and at fixed prices.[62] An employe impliedly agrees to keep such secrets [63] and this implication is not supplanted by an express agreement having relation to other secrets and for the benefit of other persons.[64] Neither should an express promise to keep secret all processes be so construed as to disentitle an employe to make known process learned by him independently.[65] The property rights in a secret trade process may be protected by injunction against disclosure [66] and in hearing such a bill, a disclosure of the process should not be required even in camera, if the fact of a secret process can be otherwise shown.[67] Disclosure will not be compelled merely to prove that the owner is a manufacturer and as such tax exempt,[68] but the formula of a proprietary medicine will not be protected by denying a commission to take testimony on behalf of state authorities who allege that such medicine is a liquor being sold without license.[69]

Creation and transfer.[70]—Transfer is usually by sale,[71] gift,[72] inheritance,[73] or will.[74]

43. Seat in stock exchange. O'Dell v. Boyden [C. C. A.] 150 F. 731.

44. Dr. Miles Medical Co. v. Platt, 142 F. 606.

45. Dieterich v. Fargo, 102 N. Y. S. 720.

46. United States v. Macfarland, 28 App. D. C. 552.

47. See 6 C. L. 1106.

48. Jones v. Great Northern R. Co. [Minn.] 110 N. W. 260; Churchill v. More [Cal. App.] 88 P. 290; Koehler v. King, 119 Ill. App. 6.

49. Ware v. Souders, 120 Ill. App. 209.

50. Ramos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898.

51. See 6 C. L. 1107.

52. Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 P. 317.

53. Isom v. Rex Crude Oil Co., 147 Cal. 659, 82 P. 317. And its unauthorized severance is waste. Id. Civ. Code, § 1930, held to entitle landlord to rescind lease for unauthorized abstraction of oil in place on the premises by assignee of tenant. Id.

54. Sale not contemplating immediate removal is not constructive severance. Bell County Land & Coal Co. v. Moss [Ky.] 97 S. W. 354.

55. See 6 C. L. 1107.

56, 57, 58. Chamber of Commerce v. Wells [Minn.] 111 N. W. 157.

59, 60. Bobbs-Merrill Co. v. Strauss [C. C. A.] 147 F. 15.

61. Dutton & Co. v. Cupples, 102 N. Y. S. 309.

62. Such contract is not in restraint of trade. Hartman v. Park & Sons Co., 145 F. 358.

63, 64, 65. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695.

66. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695; Mahler v. Sanche, 121 Ill. App. 247.

67. Taylor Iron & Steel Co. v. Nichols [N. J. Eq.] 65 A. 695; Sterling Varnish Co. v. Macon [Pa.] 66 A. 78.

68. State v. Tichenor Antiseptic Co. [La.] 43 So. 277.

69. Cullinan v. Dwight, 51 Misc. 221, 100 N. Y. S. 896.

70. See 6 C. L. 1108.

71. See Sales, 6 C. L. 1320; Judicial Sales, 8 C. L. 574; Executions, 7 C. L. 1614.

72. See Gifts, 7 C. L. 1878.

Loss and abandonment.[75]—Abandonment will not be found from mere absence of the owner,[76] or from mere cessation of use,[77] or from mere failure to assert a claim.[78] The finder of property may hold it as against all others save the owner [79] but not against the owner unless the owner has abandoned it [80] and the owner need not demand it.[81]

PROSECUTING ATTORNEYS; PROSTITUTION; PROXIES; PUBLICATION; PUBLIC BUILDINGS AND PLACES, see latest topical index.

PUBLIC CONTRACTS.

§ 1. Power of Government and Authority of Its Officers to Contract (1473).
§ 2. How Initiated (1477).
§ 3. How Closed (1479).
§ 4. Essential Provisions in, and Conditions Pertaining to, Public Contracts (1480).
§ 5. Interpretation and Effect of Public Contracts; Performance and Discharge (1482).
A. Construction and Interpretation (1482).
B. Performance and Discharge (1482). Time (1484). Payment (1484).
§ 6. Remedies and Procedure (1484).
A. By Taxpayer (1484).
B. By Bidder (1485).
C. On the Contract Proper (1485).
D. On the Contractor's Bond (1486).
E. Under Lien Laws (1486).

This topic includes all questions relating to the making, validity, and performance of public contracts generally, excluding some matters peculiar to contracts of particular public corporations [82] and excluding also matters common to private contracts [83] and those peculiar to contracts for public improvements.[84]

§ 1. *Power of government and authority of its officers to contract.*[85]—Municipal corporations can make such contracts as they are expressly authorized to enter into,[86] such contracts as are essential to the declared objects and purposes of the corporation, not simply convenient but indispensable,[87] and such as are implied as incident to powers granted,[88] and no others.[89] Acceptance of benefits estops a party

73. See Descent and Distribution, 7 C. L. 1137.

74. See Wills, 6 C. L. 1880.

75. See 6 C. L. 1108.

76. Evidence held insufficient. Lindblom v. Rocks [C. C. A.] 146 F. 660.

77. Disuse of track for twelve years not abandonedment of railroad. Valentine v. Long Island R. Co. [N. Y.] 79 N. W. 849.

78. Foster v. Hobson [Iowa] 107 N. W. 1101.

79, 80, 81. Kuykendall v. Fisher [W. Va.] S. E. 48.

82. See Counties, 7 C. L. 976; Municipal Corporations, 8 C. L. 1056; States, 6 C. L. 1515; United States, 6 C. L. 1770.

83. See Building and Construction Contractors, 7 C. L. 480; Contracts, 7 C. L. 761.

84. See Public Works and Improvements, 6 C. L. 1143.

85. See 6 C. L. 1109.

86. May v. Chicago, 124 Ill. App. 527. County by Hurd's R. S. 1903, c. 34, § 24, par. 3, given power to contract and do other acts in relation to the property and concerns of the county, and by § 25, c. 34, R. S., levy and collect taxes, has authority to contract with a person to search for omitted and unassessed personal property and moneys due the county from other sources. County of Henry v. Stevens, 120 Ill. App. 344.

87. Cleveland School Furniture Co. v. Greenville [Ala.] 41 So. 862. Powers to grade and pave any street, etc., and "all powers necessary and proper in the exercise of said powers" include the power to designate which streets shall be paved and what material shall be used. City of Baltimore v. Flack [Md.] 64 A. 702.

88. Where charter powers exist for ownership of certain public utilities, including the power "to construct and establish gas works and to regulate the establishment thereof" by others, such charter power include by implication at least power to purchase gas works. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640. A power to contract for the furnishings educational institutions cannot be implied as incident to the objects and purposes of municipal corporations, and therefore in the absence of express authority the municipality cannot be bound by such contract. Cleveland School Furniture Co. v. Greenville [Ala.] 41 So. 862.

89. Authority to expend a road fund "for work done on the roads of the county in such places" as the board shall determine does not authorize the expenditure of money from the fund to buy road machinery, especially where the township trustees have power to buy such machinery. Harrison County v. Ogden [Iowa] 110 N. W. 32. Where a contract to pave a street only is duly authorized, a contract to pave the street, set new curb stones, reset old curb stones, etc., is not authorized, and, if such contract is not a separable contract, it cannot be enforced or recovered upon in whole or in part. Rodgers v. New York, 51 Misc. 119, 100 N. Y. S. 745.

to a public contract from questioning the authority of the officer executing it,[90] or of the municipality.[91]

If the method of entering into a contract is prescribed by charter or statute, such method must be strictly complied with [92] and the doctrine of implied contract does not ordinarily apply,[93] persons dealing with municipal corporations being bound to take notice of the limitations of their powers; [94] but acceptance of benefits has been frequently held to raise an obligation to pay.[95] Where no method is prescribed, contracts which fall within the ordinary powers of a city may be entered into without resolution or ordinance, and, in the absence of any statute requiring it, without writing.[96] Public officers [97] and boards [98] have only such power to contract on be-

90. One receiving advance payments in consideration of a release of all damages growing out of a certain contract held estopped to question the authority of the secretary of the navy to make the agreement. Cramp & Son v. U. S., 41 Ct. Cl. 164.

91. One having used property leased from a municipality cannot assert lack of power to lease. Town of Beloit v. Heineman, 128 Wis. 398, 107 N. W. 334.

92. Where action by the mayor is necessary the council alone cannot make a valid contract (State v. Jones, 98 Minn. 6, 106 N. W. 963), but, where the mayor's action is merely ministerial, he can be forced by peremptory mandamus to sign a contract made by the council under authority given them (State v. Fisher [Del.] 64 A. 68). Purchase of a road machine being a legislative act, a majority of the supervisors must act on deliberation (Austin Mfg. Co. v. Ayr, 31 Pa. Super. Ct. 356), but deliberation is presumed from the joint action (Id.). Where either of three officers was entitled to act, action by them jointly is valid. City of Fayette v. Rich [Mo. App.] 99 S. W. 8. The same rule applies as to a city comptroller signing a contract. Detroit Reduction Co. v. Blades, 143 Mich. 591, 13 Det. Leg. N. 73, 107 N. W. 286.

93. Harrison County v. Ogden [Iowa] 110 N. W. 32; City of Springfield v. Schmook, 120 Mo. App. 41, 96 S. W. 257; Miland v. Bowrou, 113 App. Div. 661, 99 N. Y. S. 914. A contractor cannot recover for expenses incurred in preparing to perform an invalid contract which he is not permitted to carry out. Johnston v. U. S., 41 Ct. Cl. 76. Where one railroad agrees to transport troops over its own and connecting lines under contracts with the latter, there is no such privity of contract between the government and an intermediate line as to authorize a recovery against the former for a mistake in fixing its charges, though the government gets the benefit. Mobile & Ohio R. Co. v. U. S., 40 Ct. Cl. 232.

94. Niland v. Bowron, 113 App. Div. 661, 99 N. Y. S. 914.

95. A promise of compensation will be implied where the government occupies realty without claiming title thereto. Philippine Sugar Estates Development Co. v. U. S., 40 Ct. Cl. 33. Where private property is taken for the use of the army subsequent to the executive instructions directing payment, an implied contract arises to pay its reasonable value (Id.), and the rule applies to territory which has been the seat of war if it has been reduced to subjection (Id.). See, also, post, § 66, as to recovery by contractor on quantum meruit.

96. City of Decatur v. McKean [Ind.] 78 N. E. 982.

97. An officer having authority to certify the amount to be paid on work done under a statute, has no authority to certify a larger amount than that authorized by statute. State v. Young [Iowa] 110 N. W. 292. Under Highway Laws 1890, pp. 1193-1197, c. 568, art. 4, and sections 80 to 98 inclusive, providing for the laying out, altering and discontinuing highways, the proceedings, method of paying damages and costs, declaring the determination of commissioners appointed by court and all orders shall be filed in the town clerk's office and that such orders shall be carried out by the town commissioner of highways where the court commissioners report in favor of a highway and that the cost should be about $1,000, the town commissioner has no authority to make a contract for the construction of the highway which will cost $6,000. Niland v. Bowron, 113 App. Div. 661, 99 N. Y. S. 914. Under the Act, 13th July, 1892 (27 Stat. p. 145, § 6), the postmaster-general had no authority to contract for the use of patented pneumatic tubes for dispatching mail. Beach v. U. S., 41 Ct. Cl. 110. A public officer cannot contract with himself, see infra, § 4. Power to contract for publication of delinquent tax list being elsewhere, no such power is implied in general powers of county commissioners. Brown v. State [Kan.] 84 P. 549.

98. A county building commission created under Act March 22, 1900 (P. L. p. 190), to control on behalf of the county the purchase of land, the erection of buildings and the payment therefor, the county being bonded to raise the funds for payment, acts as agent for the county, and a contract made by it for the erection of a county courthouse is the contract of the county. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742. Except under St. 1884, p. 185, c. 226 (Rev. Laws, c. 50, § 11), the board of street commissioners cannot bind the city by an executory contract. Whitcomb v. Boston [Mass.] 78 N. E. 407. A board having authority to expend a special sum raised by taxation for a particular purpose may expend it by the issuance of warrants payable out of such fund, but cannot incur obligations expressly payable in the future out of such fund. It has authority to expend but not to contract indebtedness. Harrison County v. Ogden [Iowa] 110 N. W. 32. The armory board constituted by Military Code, § 134, Laws 1898, p. 563, c. 212, has no authority to bind the city to pay for architect's services until authorized to incur such indebtedness by the commissioners of the sinking fund. Horgan v. New

half of the public as is conferred upon them by law, and one contracting with them is bound to know the scope of their authority.[99] The public powers devolved by law or charter upon the governing body of a municipality cannot be delegated to others,[1] but the council may select several materials out of which a specified officer shall select the one to be used,[2] or provide for purchase at a value fixed by appraisal.[3] As to matters within the business functions of municipalities, officers may bind the municipality beyond their terms of office [4] provided the obligations fixed on the municipality are so adjusted that the debt limit or the current appropriation is not exceeded.[5] They cannot by contract surrender any of its legislative or administrative

York, 100 N. Y. S. 68. Under the Building Code enacted under Greater New York Charter, Laws 1901, c. 466, p. 2081, § 470, providing that in cases of danger arising from the threatened falling of buildings, etc., the department of buildings shall cause the necessary work to be done to make the same temporarily safe, that department has no authority to contract for the storage of materials taken from a collapsed building, or for the employment of watchmen to protect the same. People v. Metz, 100 N. Y. S. 913. Under Mans. Dig. § 832, providing that "where there is one or more districts in the city for the same general purpose * * * the boards of different districts may combine so as to form only one board for the whole territory to be thus improved so as to make the whole improvement uniform; but no money raised by assessment in one district shall be expended in another district," the boards of improvements of several districts may combine to provide waterworks for the districts, but the contracts, for the work in the several districts, must be made on separate estimates, and one district cannot be obliged to pay any of the expense incurred by another. Crescent Hotel Co. v. Bradley [Ark.] 98 S. W. 971.

99. Under section 91 of the city and village act (Hurd's Rev. St. 1905, p. 308, c. 24), which provides that no expense shall be incurred by any of the officers or departments of the corporation, unless an appropriation shall have been previously made, the city is not bound by the city collector's promise to pay his clerks extra for extra work, no appropriation having been made therefor. May v. Chicago, 222 Ill. 595, 78 N. E. 912. Where architects draw plans for an armory under authority of a resolution, they are bound to know the limitation on the cost of the armory set by that resolution. Horgan v. New York, 100 N. Y. S. 68. Where the publication of a delinquent tax payer's list is made under an order limiting the amount to be paid therefore, the publisher is bound by that rate whether it is reasonable or not. Dodge v. Kings County [Cal.] 98 P. 266; Sanger v. U. S., 40 Ct.-Cl. 47. City collector attempted to contract with clerks for overtime, there being no appropriation for such purpose. May v. Chicago, 124 Ill. App. 527.

1. A contract between the board of education of a school district authorized by 3 Priv. Laws 1867, p. 321, and the state board of education whereby the former delegates to the latter certain discretionary powers to conduct and manage common schools, is void. Lindblad v. Board of Education, 221 Ill. 261, 77 N. E. 450. A public board or body can delegate mere ministerial work but cannot delegate work which involves judgment or discretion. A school board having authority to select a site for a school house, adopt plans and award the contract for building the same, cannot appoint a committee to exercise such power in its place. Kinney v. Howard [Iowa] 110 N. W. 282.

2. A council having power to select the material to be used in paving a street may designate several materials in the alternative, and may provide that the city engineer shall after the bids thereon have been opened choose which of the materials shall be used. City of Baltimore v. Gahan [Md.] 64 A. 716. The action of a council in designating in the alternative the kind of material to be used in improving a street, is not a surrender of any of the legislative power with which it is invested, and its agent, the board of public service, has the right under such a determining ordinance to make the selection from the materials named, and the material so selected becomes the material chosen by council. Scott v. Hamilton, 4 Ohio N. P. (N. S.) 1.

3. Under a contract for the purchase of a gas plant by a city if it exercise its option, a provision that the value shall be fixed by appraisement is not a delegation of municipal authority. City of Indianapolis v. Consumers' Gas Trust Co. [C. C. A.] 144 F. 640.

4. May make twenty-five-year contract for water supply. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. A board of aldermen cannot make a contract for the employment of legal services which will be binding for an unlimited time and irrevocable by their successors. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

5. The fact that council limited the amount for which contracts would be let for the construction of a waterworks system to the sum then available for that purpose, whereas a much larger sum will eventually be needed to complete the system, does not indicate that council has no intention of making further appropriation at some future date, and the letting of a contract for a part of the system within the limitation is not an abuse of power. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1. A charter restricting the amount payable any one year under a contract to the amount appropriated that year for that purpose does not prohibit a municipality from making contracts for a reasonable term of years for usual and necessary things and stipulating therein for annual payments which will be within the revenue and appropriations for the several years in which they are to be made, when it is for the best interests of the municipality that such contracts should be made, and their provisions are fair and reasonable. So under Bridgeport City Charter, as

powers,[6] nor can a provision in a city charter be made unenforceable by contract,[7] but franchises excluding the city may be granted.[8] Exemptions from taxation are only sustained where a fair equivalent is received.[9] Power conferred to enter into a specific contract is exhausted by a single exercise thereof.[10]

A municipal corporation may ratify the unauthorized contracts of its agents if it had the power to make the contract in the first instance, but not otherwise,[11] as an

amended in 1893, which provides for the appointment of a board of appropriation and taxation with power to make appropriations and lay taxes for city purposes, but without power to make appropriations in excess of the revenues of the city, a fair and reasonable contract for the removal of garbage for the term of ten years at an annual payment not exceeding the amount which had been appropriated for that purpose during that year, though the total sum payable under the contract is greater than the sum appropriated for any one year, is valid. Toomey v. Bridgeport [Conn.] 64 A. 215.

6. Contract giving up control of park. State v. Minneapolis Park Com'rs [Minn.] 110 N. W. 1121. A contract by a city by which the police power is attempted to be forever abdicated is ultra vires and void. State v. St. Paul, etc., Co., 98 Minn. 380, 108 N. W. 261. A contract with a municipality by which a railroad company is relieved from the obligation to construct and maintain in suitable repair safe crossings at streets and highways laid out over the road, and the municipality deprived of the right of enforcing such obligation as a police regulation, is ultra vires and void. State v. Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269.

7. Where a city charter provides that a regularly appointed policeman shall hold office for two years unless sooner discharged for cause, a contract made between a man and a city whereby the former in consideration of his appointment as a police officer agreed that either the city, its marshal, or its city council might discharge him without notice and with or without cause at any time, is against public policy and void. City of Paris v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 549, 98 S. W. 925.

8. Under a power to provide for the erection and maintenance of a system of waterworks to supply the city with water, the city may make a contract for the supply of water for a period of years and may therein exclude all third parties and even itself from constructing and operating waterworks for the period of years covered by the contract. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. 1102. A contract which gives to a company the exclusive right and privilege for the period of thirty years from the time the ordinance takes effect, of erecting, maintaining and operating a system of waterworks to supply the city and its inhabitants for public and private use, excludes the city as well as everyone else from competing with the grantee company. Id.

9. A contract between a city and an electric light company by which the latter supplied the former with street lights without charge, and the former exempted from taxation all property of the latter and agreed if any tax was levied on the latter's property to pay such tax, is invalid as contravening sections 170 and 174, of the constitution which provide no property shall be exempt from taxation other than that named therein, and does not name property of an electric light company. Board of Councilmen of Frankfort v. Capital Gas & Elec. Light Co., 29 Ky. L. R. 1114, 96 S. W. 870. See City of Nashville v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 607, where a contract with a telephone company providing for a yearly payment to the city in lieu of all taxes was upheld as a special tax for occupation and as not giving immunity from a general tax.

10. A city having contracted with a railway company to pave a certain street has no power during the continuance of such contract to contract with others to pave the same street at the expense of the property owners. City of Chicago v. Newberry Library, 224 Ill. 330, 79 N. E. 666. Under an ordinance authorizing a contract for a term of ten years to provide receptacles for waste papers, etc., on the streets, there is no authority after a ten-year contract has been made, although terminated before the ten years have expired, to make another contract for the balance of the ten years. Buffalo Clean Street Co. v. Buffalo, 113 App. Div. 887, 98 N. Y. S. 784. Under a statute providing that where no bids for laying sidewalks are received, the city officials shall construct the walk in accordance with the plans filed, and shall keep an accurate account of the cost including all labor and material, the same to be charged as a special tax against the abutting property, the city officials have no authority to contract with any individual or firm to do the work for one sum. City of Elsberry v. Black, 120 Mo. App. 20, 96 S. W. 256. Vote of town meeting rejecting proposition to buy water plant, does not exhaust town's right to vote on the proposition again. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Permission to an abutter to pave the street in front of his land is not such an exercise of the power to pave as to preclude repaving by the city. City of Louisville v. Gast, 28 Ky. L. R. 1256, 91 S. W. 251.

11. Where cedar poles are sold and delivered to a city on an order given by the director of public works, who had no authority to give such order, the validity of the bill may be recognized by the councils and mayor and the same shall be enforceable against the city. Valentine Clark Co. v. Allegheny City, 143 F. 644. A claim for materials furnished a city under a contract made without the formalities provided for by the act of March 7, 1901, art. 15 (P. L. 20, 36), and of June 20, 1901 (P. L. 586, 592), may be legalized by a joint resolution passed by a two-thirds vote of the councils and the 1874 (P. L. 232), § 5. Id. A contract by unapproval of the mayor under act May 23, authorized city officers is ratified by suit thereon by the city. City of Worcester v.

ultra vires act is void and cannot be ratified.[12] Ratification may be implied from formal acceptance of the work and recognition of liability in judicial proecedings founded on the contract.[13] Where an appropriation is made for a certain purpose and the details of the work are left to a department, a contract is not void because it is insufficient to accomplish the desired object.[14]

§ 2. *How initiated.*[15]—If so required the specifications in the published notice must be so framed as to secure fair competition on equal terms to all bidders,[16] and requirement of patented materials or appliances invalidates the contract if it tends to give one person a monopoly [17] but not if it leaves room for competition,[18] and for like reason a requirement, that public printing bear a trades union label is invalid.[19] A contract to apply to work scientific knowledge and skill need not be let in competitive bidding.[20]

Worcester & H. Consol. St. R. Co. [Mass.] 80 N. E. 232.

12. Niland v. Bowron, 113 App. Div. 661, 99 N. Y. S. 914; Harrison County v. Ogden [Iowa] 110 N. W. 32.

13. Where a municipality having authority to contract for water for public and private purposes receives a supply without any express contract and collects payment therefor, there is sufficient evidence of a ratification, and, when coupled with the act of recognizing the liability to pay by a bill of interpleader, there is clearly a ratification. New Jersey Suburban Water Co. v. Harrison, 72 N. J. Law, 196, 62 A. 490. The acts of a committee are made the acts of the board of supervisors by their acceptance thereof and resolutions passed to the same effect as the acts of the committee, and it is immaterial whether such acceptance is made before or after an injunction against the committee has been asked for. Raymond v. McKenna [Mich.] 13 Det. Leg. N. 935, 110 N. W. 121.

14. Channel to be dredged so as to enable all classes of vessels to pass through while the one contracted for was insufficient. San Francisco Bridge Co. v. U. S., 40 Ct. Cl. 139.

15. See 6 C. L. 1112.

16. Where a statute requires competition in the letting of contracts for the construction of public improvements or the doing of public works, any provision contained in an ordinance therefor which tends to prevent or restrict competition among persons who may desire to become bidders is in contravention of such statute and therefore illegal. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280. A provision for an indemnity bond and for the retention of ten per cent. of the price for a year is not invalid as limiting competition. Dillingham v. Spartanburg [S. C.] 56 S. E. 381.

17. Under § 580, c. 24, Hurd's Rev. St. 1905, providing that public improvement contracts to be paid for by special assessment shall be let to the lowest responsible bidder, and § 582, c. 24, supra, requiring notice by publication that bids will be received and contract awarded to lowest responsible bidder, an ordinance requiring the improvement to be made with a patented article which could be made by only one company, is illegal. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280. Where a city council enters into a contract for the paving of a certain street with a vitrified brick manufactured and sold by one company only, there being other available kinds of vitrified brick equally good for the purpose, the contract is void under Gen. St. 1901, § 747, requiring such contracts to be let to the lowest bidder, as it is against public policy and restricts or prevents free competition. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034.

18. As where price at which all may obtain such material is known. Bye v. Atlantic City [N. J. Law] 64 A. 1056. Requirement of a patented material does not invalidate the contract. Dillingham v. Spartanburg [S. C.] 56 S. E. 381. Competitive bidding is not necessarily narrowed, but may be broadened, by admission to the competition of material which is monopolized by reason of patents, and, in the exercise of a sound discretion, it is competent for the proper city authorities, in advertising for bids for a street improvement, to call for material which is covered or the assembling of which is covered by patents. Holbrook v. Toledo, 8 Ohio C. C. (N. S.) 31.

Where a mayor and council are not required by statute or by charter to award street paving contracts to the lowest bidder, a contract for paving with a patented article or process is not illegal because of an ordinance requiring such contracts to be given out only after competitive bidding. Bunker v. Hutchinson [Kan.] 87 P. 884. A contract involving in its execution the use of a patented material or process is not invalid on that account, when the contract for performing the work and furnishing the materials is let to the lowest responsible bidder with the understanding that the patentee would allow the use of his patent and superintend its construction in consideration of a certain specified sum paid him by whoever secured the contract. City of Baltimore v. Flack [Md.] 64 A. 702. A provision that "none but citizens of the city of Wichita are to be employed on said work" added at the request of the contractor to the contract after the same had been awarded without any such clause in the specifications does not violate Gen. St. 1901, § 747, providing for competitive bidding, etc. American Bonding Co. v. Dickey [Kan.] 88 P. 66.

19. Where the county board are authorized to ask for bids for the public printing, a requirement that the printing shall have a certain trades council label, where half the printers of the county have no right to use that label, is unlawful as a restraint on competition. People v. Edgcomb, 112 App. Div. 604, 98 N. Y. S. 965.

20. Horgan v. New York, 100 N. Y. S. 68.

Statutory requirements as to advertising for bids,[21] as to entering specifications in a book,[22] as to getting an approval affixed to a contract,[23] or as to requiring an estimate of the cost to be made before the letting of a contract,[24] and other requirements, must be complied with,[25] although substantial compliance may be sufficient.[26] The advertisement for bids not being a legislative function may be delegated to a committee of the city council.[27] A valid contract cannot be awarded to bidders on specifications containing illegal provisions.[28]

The material to be used is sometimes required to be specified [29] and several materials, full specifications for each being made, may be specified, the material to be actually used to be selected after the bids have been opened.[30] Where the nature of

21. Agreement by which paving contractor whose work was unsatisfactory agreed to replace it with another pavement of different kind for the balance unpaid on first pavement is a new contract within the provision for advertisements. Cahn v. Metz, 101 N. Y. S. 392. A provision that municipal officers "may" advertise for bids is permissive (Dillingham v. Spartanburg [S. C.] 56 S. E. 381), and, having advertised, all bids may be rejected and the contract let without bidding (Id.).

22. Under Act of April 4, 1870 (P. L. 834), which relates to bridge contracts, and provides that the specifications of the work shall be written or printed in a book for at least four weeks before the time appointed for opening bids, and that no contract shall be awarded until approved by one of the judges of the court of common pleas, and makes it a misdemeanor to enter into any contract otherwise, a contract, the specifications of which were not put in a book, and to which no judge affixed his approval, is void. Venango County v. Penn Bridge Co. [Pa.] 64 A. 445.

23. Venango County v. Penn Bridge Co. [Pa.] 64 A. 445, as noted.

24. A contract for the disposal without cost to the city of garbage collected and delivered by the city to the contractor does not require the construction of any public works and therefore does not come within § 12 of the board of public works act which requires an estimate by the commissioner in cases of contracts for such constructions. Detroit Reduction Co. v. Blades, 143 Mich. 591, 13 Det. Leg. N. 73, 107 N. W. 286. Charter requirement that an estimate of cost shall be published with the advertisement and no bid accepted which exceeds the estimate is mandatory. Raising of estimate after bids are opened ineffectual. Murphy v. Plattsmouth [Neb.] 110 N. W. 749.

25. Under Laws 1899, p. 116, c. 83, § 2, giving the chairman of a town board authority to contract for the purchase of a road machine "on being petitioned by a majority of the tax payers * * * representing more than one-half of the taxable property * * * to be ascertained from the last preceding assessment roll," the sufficiency of the petition should be tested as of the time of the certification of the petition by the town clerk for presentation to the chairman and not as of the date of the signing of the petition. Pape v. Carlton [Wis.] 109 N. W. 968.

26. Under a statute requiring the common council to give notice of the letting of contracts, by publication, such statute is complied with where the notice is given by the clerk in conformity with the statute but stating the hour for the closing of the reception of bids to be different from the hour set by the council and directed by them to be published. Shirk v. Hupp [Ind.] 78 N. E. 242.

27. City of Fayette v. Rich [Mo. App.] 99 S. W. 8.

28. Where the law requires the award of a sewer contract to the lowest responsible bidder, the insertion in the specifications of illegal or unauthorized conditions or obligations on the contractor, compliance with which on his part will necessarily and illegally increase the cost of the work, will render the contract illegal and void. A specification making the contractor liable to replace all watercourses and drains, pipes, poles, maintenance of travel over any railroad or street car line, which might be obstructed by reason of said work, and to repair any injury to the same, is such illegal obligation. Anderson v. Fuller [Fla.] 41 So. 684.

29. Gen. St. 1901, § 730, requiring a petition for paving a street to state a specific description of the material to be used, is fully complied with where the petition states "vitrified brick" and the quality desired. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034.

30. A commission may prepare three sets of specifications for paving, each requiring a different paving material, may receive bids on all of the specifications, then select the material they think best and award the contract to the lowest responsible bidder on the specifications calling for that material, even though a bid on another material made by a responsible person was lower. City of Baltimore v. Flack [Md.] 64 A. 702; City of Baltimore v. Gahan [Md.] 64 A. 716.

A council may designate in the alternative the kind of material to be used. Scott v. Hamilton, 4 Ohio N. P. (N. S.) 1. Municipal Code, § 55, providing that an ordinance shall contain "a statement of the general nature of the improvement and character of the material thereof," is complied with by an ordinance providing the improvement shall be of "either sheet asphalt block or vitrified brick" as decided upon by the board of public service after the bids therefor were received. Scott v. Hamilton, 7 Ohio C. C. (N. S.) 493. Section 55 of the Municipal Code §§ 1536—215, Rev. St. 1906 [Bates' 5th ed.], providing that improvement ordinances shall contain a statement of the general nature of the improvement and the character of the materials thereof, is complied with by an ordinance for street improvement which provides that the paving material shall be "as-

the work does not allow exact specifications, specifications which are approximate as to the quantity of work and material are sufficient.[31]

§ 3. *How closed.*[32]—An unqualified acceptance is essential [33] but may be implied.[34] An acceptance is not binding when qualified by a limitation of liability to a particular fund already chargeable with contracts of equal right exceeding the fund.[35] An official's mere offer to "mark off" the amount of such contract from the appropriation does not set it apart for the contract and supply the lacking mutuality.[36] Where bids are called for they must be responsive to the advertisement,[37] though a municipality is not bound to reject a bid which fails to comply with a provision wholly for the benefit of the municipality.[38]

Although under a rule requiring contracts to be let to the lowest responsible bidder there is no requirement that the contract shall be let to the lowest bidder unless he is a responsible bidder [39] and furnishes proof thereof,[40] the lowest bidder if responsible must be awarded the contract [41] although a mathematical computation as

phalt brick or other material, as may hereafter be determined." Emmert v. Elyria, 74 Ohio St. 185, 78 N. E. 269.

31. Where bids for the construction of a dam are called for on specifications expressly stated to be based on the estimates of the commissioners' engineer, but which were stated to be merely approximate and the quantity of work or material might be more or less as might be required by developments as the work progressed, it being impossible to give more exact specifications until the excavations disclosed further the nature of the rock and soil under ground, such specifications are proper. Walter v. McClellan, 113 App. Div. 295, 99 N. Y. S. 78.

32. See 6 C. L. 1113.

33. A person bidding for a contract to clean the streets of one district "subject to a sufficient appropriation" is not bound thereby where the city appropriates for street cleaning of the whole city an amount less than the total of the bids for cleaning the several districts. Hinkle v. Philadelphia, 214 Pa. 126, 63 A. 590; Toomey v. Bridgeport [Conn.] 64 A. 215.

34. Adoption by municipality of order for laying out of street is acceptance of proposition by abutters to postpone payment of damages if such street be laid out at once. Boston Water Power Co. v. Boston [Mass.] 80 N. E. 598. The acceptance by council of the surveyor's report as to the work done under a paving contract together with the payment of the money due according to that report, without specific objection to the pavement, constitutes an acceptance thereof by the city so far as the quality of the work and its completion according to specifications was concerned. Central Bitulithic Pav. Co. v. Mt. Clemens, 143 Mich. 259, 12 Det. Leg. N. 996, 106 N. W. 888. Where the government made no reply to one offering his patented pneumatic mail transmitting device for a specific purpose, the acceptance and use of another device infringing thereon did not amount to an acceptance. Beach v. U. S., 41 Ct. Cl. 110.

35, 36. Hinkle v. Philadelphia, 214 Pa. 126, 63 A. 590.

37. City of Baltimore v. Flack [Md.] 64 A. 702. Specifications required the rolling of the various layers of paving to be done by a seven-ton roller, and the contract provides that the rolling should be done by a city roller to be specified by the city engineer. City of Boonville v. Stephens [Mo. App.] 95 S. W. 314. A contract entered into for paving a street which varies in its specifications from the advertised specifications or the ordinance authorizing the work is unenforceable. Id. A bid substantially variant from the advertisement cannot be received though the error was in a blank which the advertisement required to be used by bidders. City Council of Montgomery v. Barnett [Ala.] 43 So. 92. A contract let to the best bidder containing substantial provisions beneficial to him not included in the specifications upon which bids were made is void. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329. The attachment of a proviso in the contract to the liquidated per diem damage clause of the specifications that it should not apply if the delay resulted from unavoidable causes construed as merely a reasonable interpretation of the specifications, and not to avoid the contract. Id. Where the specifications provided for payment out of several funds while the contract limited it to one, the variance was detrimental to the contractor. Id. Held apparent that the clause in the specifications for replacement of the payment if it became defective within ten years was only to apply where the defect was due to a default of the contractor, and hence a contract so providing in terms did not reduce the contractor's obligations. Id.

38. Requirement that proof of responsibility accompany bid. Nathan v. O'Brien, 102 N. Y. S. 947.

39. Scott v. Hamilton, 7 Ohio C. C. (N. S.) 493.

40. Where the charter provides that contracts shall be let to the lowest bidder furnishing "satisfactory proof" of responsibility, the bidder must not only be able to perform but must satisfy the municipal authorities thereof. Barber Asphalt Paving Co. v. Trenton [N. J. Law] 65 A. 873.

41. Under P. L. 1904, Sp. Sess. p. 21, requiring that a contract for the supply of coal to the schools shall be awarded the lowest responsible bidder, a contract awarded to one whose bid was higher than that of another responsible bidder is void. Jacobson v. Board of Education [N. J. Law] 64 A. 609. Where the charter of a city requires the award of contracts for sewers to be

to who is the lowest responsible bidder is not necessary;[42] but where the determining body is allowed to use its discretion in awarding the contract, they do not have to award it to the lowest bidder[43] and, where their action is free from fraud, the exercise of their discretion cannot be controlled.[44] A determination against the responsibility of a bidder requires notice to him before his bid can be refused.[45] A contract awarded on a bid for the work and material together is not made invalid because of an ordinance requiring separate bids for work and materials where the separate bids received amounted to more in the aggregate than the bid accepted.[46]

§ 4. *Essential provisions in, and conditions pertaining to, public contracts.*[47]—The contract must be authorized by a valid law or ordinance[48] and must conform thereto.[49] All statutory conditions must be complied with[50] as to the mode of exercising the power to contract,[51] the making of an estimate before,[52] and as to making appropriations before entering into contracts where such appropriations are made

made to the lowest bidder, a contract made with other than the lowest bidder is illegal and void. Anderson v. Fuller [Fla.] 41 So. 684.

42. The provision of section 143 of the Municipal Code that the board of public service shall make a contract with the lowest and best bidder, or may reject any and all bids, does not limit the board to a mathematical computation as to who is the lowest responsible bidder but permits the board to go beyond the price bid and the character of the bidder and to accept the best proposition offered, considering quality, feasibility and efficiency of the thing to be furnished, the qualifications and responsibility of the bidder, and the price proposed in view of all the other considerations. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1.

43. Where commissioners are authorized to accept the bid "which will, in their judgment, best secure the efficient performance of the work," they are not bound to accept the lowest bid, but where time is of the essence of the contract, may accept a higher bid where they honestly believe such acceptance will be for the benefit of the public. Walter v. McClellan, 113 App. Div. 295, 99 N. Y. S. 78. The statute governing cities of the second class does not require contracts for paving streets to be awarded to the lowest bidder, but leaves the award to the discretion of the mayor and council. Bunker v. Hutchinson [Kan.] 87 P. 884.

44. The discretion of the board of public service is not to be interfered with in the matter of awarding the contract to another than the lowest bidder except for fraud or its legal equivalent. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1.

45. Jacobson v. Board of Education [N. J. Law] 64 A. 609.

46. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1.

47. See 6 C. L. 1115.

48. Where parts of an ordinance are void, and those parts are easily severable and made independent of the other valid parts, and there can be no doubt the city council would have passed the ordinance with the invalid parts omitted because they concerned the interest of the contractor and not the city, etc., inhabitants and taxpayers, the whole ordinance is not void. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. A contract for paving improvement made under a valid ordinance authorizing the same, but not until after a delay of one year and six months after the passage of the ordinance, is valid, and when completed according to its terms the tax bills issued in payment thereof are enforceable. Jaicks v. Middlesex Inv. Co. [Mo.] 98 S. W. 759. Under the Cities and Villages Act no department can bind a city for administrative expenses unless they were included in the annual appropriation ordinance. Sections 89, 90. City collector contracting to pay clerks for overtime. May v. Chicago, 124 Ill. App. 527.

49. Where a contract does not conform with the resolution authorizing it, it is immaterial that the bidders understood the matter of the change, that the alterations resulted in just as satisfactory results as the designations contained in the resolution. City of Boonville v. Stephens [Mo. App.] 95 S. W. 314. Where a city ordinance requires the several layers of street paving to be rolled with a seven-ton roller, no contractor, city engineer, or other officer, has power to change that provision. Id. That a contract between municipal officers and a street railroad as to certain improvements departs from requirements imposed on the company by the council held not to affect its validity. City of Worcester v. Worcester & H. Consol. St. R. [Mass.] 80 N. E. 232.

50. A contract made by a city for the construction of public improvements therein will not be held void, as in violation of section 747, Gen. St. 1901, providing for the publication for bids and awards to the lowest responsible bidder, unless it be shown that the contract was in some way the result of acts done which are prohibited by such statute. American Bonding Co. v. Dickey [Kan.] 88 P. 66. Tax bills issued for the payment of work and an affidavit of due publication of the notice constitute a prima facie case of publication according to statute. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856.

51. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280.

52. An estimate by a city engineer "that the work should be done at a cost not to exceed $1.47 per square yard" is not an estimate within the meaning of a statute requiring an estimate to be submitted by the engineer before any contract for work could be made. City of Boonville v. Stephens [Mo. App.] 95 S. W. 314.

a prerequisite to the making of the contract.[53] Any material departure from the terms on which bidding was had invalidates the contract.[54] It must, if so required, be in writing,[55] signed in the name of the city by the proper official.[56] Contracts must conform to the principles of public policy; hence, a public official cannot contract with himself,[57] or with a partnership of which he is a member,[58] or a corporation of which he is an officer.[59] The assignment of a contract calling for the payment of money by the United States is void,[60] and like provision is sometimes made

53. Under section 5, article 9, of the act of May 23, 1889 (P. L. 303), providing that "every contract involving an appropriation of money shall designate the item of appropriation on which it is founded and the estimated amount of the expenditure thereunder shall be chafged against such item and so certified by the comptroller on the contract before it shall take effect as a contract," etc., an appropriation made before the contract is a prerequisite to its valid existence. Mandamus denied. Commonwealth v. Foster [Pa.] 64 A. 367. Sections 45 and 45a of the Municipal Code (Rev. St. 1906 [Bate's 5th ed.] §§ 1536-205, 1536-205a), providing that no contract involving the expenditure of money shall be entered into unless the auditor shall first certify to council that the money required is in the treasury to the credit of the fund from which it is to be drawn and not appropriated for any other purpose, and that a contract entered into contrary to such provision shall be void, and that the money derived from lawfully authorized bonds or notes sold and in process of delivery shall be deemed in the treasury and in the appropriate fund, do not apply to contracts for street improvements, when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement. Emmert v. Elyria, 74 Ohio St. 185, 78 N. E. 269. See, also, Hinkle v. Philadelphia, 214 Pa. 126, 63 A. 590. See, also, supra, § 3.

54. Murphy v. Plattsmouth [Neb.] 110 N. W. 749. Where bids are asked for on a basis of completing the work in ninety days, a contract awarded to one of the bidders but not setting the ninety-day limit for the completion of the work, is invalid as against the statute requiring advertisement for bids. Turner v. Springfield, 117 Mo. App. 418, 93 S. W. 867.

55. Need not be in writing unless so required by law. City of Decatur v. McKean [Ind.] 78 N. E. 982. A contract for professional services need not be written but may be made by official resolution. Horgan v. New York, 100 N. Y. S. 68. Resolution of school board instructing architect to prepare plans for school building, presentation of plans to board at later date, the record of the adoption of the same, and the approval and allowance of bills therefor, held sufficient compliance with statutes requiring public contracts involving amounts in excess of $200 to be in writing. School Dist. v. Davis [Neb.] 107 N. W. 842. Where a contract is on its face regular, and the requirements of the statutes in connection therewith have been complied with, the comptroller is bound at once to number the contract according to its date, charge it against the proper item of appropriation, and certify it accordingly. Commonwealth v. Larkin [Pa.] 64 A. 908. A reply letter of a quarter master accepting a proposal letter which does not show all the terms thereof is not a contract within Rev. St. 3744, requiring all such contracts to be reduced to writing and signed by the parties thereto. Johnston v. U. S., 41 Ct. Cl. 76. An oral direction by an officer to a contractor to prepare immediately tugs and lighters and to be ready to do the lighterage for vessels expected to arrive soon does not constitute a valid contract under Rev. St. § 3744, requiring all contracts entered through naval officer to be reduced to writing and signed by the parties. Id. A contract entered into through the war department does not become binding upon the government until a formal contract is executed. Act June 2, 1862 (12 Stat. 411, c. 93; Rev. St. §§ 512-515, 3744-3747). Hence where the accepted proposal was for the entire work but the formal contract severed it, the latter controls. Sanger v. U. S., 40 Ct. Cl. 47.

56. A contract made between "W. S. Dehoney, mayor of the city of Frankfort, party of the first part, and W. F. Browner, party of the second part," and signed "City of Frankfort, by W. S. Dehoney, Mayor," is the contract of the city and valid, the mayor being given authority by section 3450, Ky. St. 1903, to enter into such contracts. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1. Where a city solicitor under Laws 1895, c. 182, p. 264, employs attorneys to collect unpaid taxes, the contract for the services of such attorneys is between them and the city solicitor and not with the city itself. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

57. A person appointed by the board of road commissioners to superintend the construction of a road and see that it was made according to contract acts in a trust capacity on behalf of the tax payers and therefore is precluded from accepting work on the road from the contractor building the same, as this is expressly prohibited by Burns' Ann. St. 1901, § 2136, and therefore any contract entered into by him with such contractor is void and unenforceable, regardless of whether or not there was fraud. Cheney v. Unroe [Ind.] 77 N. E. 1041.

58. Where a contractor enters into a contract with a city, and then a partnership including one of the city's councilmen is formed to take over the contractor's interest and perform the work, such second contract is a nullity by reason of the law prohibiting a public officer from being a party to a public contract, and the original contract is also a nullity in consequence. McManus v. Scheele, 116 La. 72, 40 So. 535.

59. Approval by board of which mayor is chairman of assignment of uncompleted contract to bank of which mayor is president is invalid where such board must inspect and approve work when completed. People's Sav. Bank v. Big Rock Stone & Const. Co. [Ark.] 99 S. W. 836.

as to contracts by municipalities.[61] A provision in the contract against assignment is valid and the assignee cannot recover on the contract.[62]

Bonds[63] with sureties[64] executed before the officer or board having charge of the subject-matter of the contract[65] and in an amount sufficient to secure its faithful execution[66] are usually required. The bond ordinarily required on contracts for public improvements to protect against claims of materialmen and subcontractors is elsewhere treated.[67]

§ 5. *Interpretation and effect of public contracts; performance and discharge. A. Construction and interpretation.*[68]—The written bid in connection with the advertisement and the acceptance thereof constitute the contract.[69]

A provision in a paving contract that the contractor shall keep up repairs for a specified time is a mere guaranty of good work[70] and does not amount to an abrogation of a governmental function,[71] nor amount to a contract for work to be done in the future.[72] One of several officers, jointly executing a contract cannot bind the municipality by statements as to its construction.[73]

(§ 5) *B. Performance and discharge.*[74]—A stipulation in a contract making an engineer, inspector, or other person the arbiter of the sufficiency of performance is valid,[75] and his action thereunder is final in the absence of fraud or such gross

60. Henningsen v. U. S. F. & G. Co. [C. C. A.] 143 F. 810; Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

61. Charter of the city of St. Paul, § 12, c. 15, does not prohibit the assignment of money due or to become due under a contract with the city. Dickson v. St. Paul [Minn.] 106 N. W. 1053. See Ege v. Phoenix Brick & Const. Co., 118 Mo. App. 630, 94 S. W. 999. A contract to grade a street which provides that it shall not be assigned, but if it is assigned gives the city a right to amend the contract, is not annulled by reason of an assignment acquiesced in by the city. Ege v. Phoenix Brick & Const. Co., 118 Mo. App. 630, 94 S. W. 999. See further Dickson v. St. Paul [Minn.] 106 N. W. 1053, to the effect that money due from the city may be assigned.

62. Murphy v. Plattsmouth [Neb.] 110 N. W. 749.

63. See 6 C. L. 1117.

64. The legislature may require that persons contracting with cities for the improvement of streets shall give bonds for faithful performance, executed by a surety company authorized to do business in the state. Parker-Washington Co. v. Kansas City [Kan.] 85 P. 781. Action on contractor's bond, see infra, § 6 D.

65. Under a statute requiring a publisher of textbooks adopted by the common schools to "execute before the ex officio members of the state board of education" the bond required, a bond signed by sureties in another county and sent by them to be delivered to the members of the state board is executed "before the ex officio members" within the statute, and is valid. Reid v. Com., 29 Ky. L. R. 672, 94 S. W. 641.

66. By an ordinance requiring a bond "in the amount of the contract price," a contract for five years at an annual payment necessitates a bond each year to the amount of that annual payment, each bond becoming due when the consideration becomes payable. Hallock v. Lebanon [Pa.] 64 A. 362.

67. See Public Works and Improvements, 8 C. L. 1506.

68. See 6 C. L. 1118.

69. Especially in determining whether the final contract conforms to the real contract in a proceeding to reform. Milliken Imprinting Co. v. U. S., 40 Ct. Cl. 81. A provision in the preliminary agreement that the government would not increase the number of manufacturing contractors during the life of the manufacturing contract let, is a material part of the contract. Id.

70. A guaranty to keep in repair for ten years contained in a contract to pave with asphaltum a street where there are gas mains includes repairs made necessary by leakage of gas. Barber Asphalt Pav. Co. v. Louisville, 29 Ky. L. R. 1255, 97 S. W. 31. A contract to furnish paving bricks of such a kind and quality as to require no repairing for five years contains a guaranty of the quality of the brick rather than an agreement to maintain the pavement and keep it in repair for that period. City of New Haven v. Eastern Pav. Brick Co., 78 Conn. 689, 63 A. 517.

71. A contract to pave city streets whereby the contractor agrees to keep the same in repair is not invalid on the ground that it amounts to an abrogation by the contractor of a governmental function, or of the police power, or that it relieved the city of its duty to protect the lives and property of its citizens. Barber Asphalt Pac. Co. v. Louisville, 29 Ky. L. R. 1255, 97 S. W. 31.

72. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

73. Douglas v. Lowell [Mass.] 80 N. E. 510.

74. See 6 C. L. 1120.

75. A contract for a street improvement which provides that the work shall be done to the satisfaction of the civil engineer and a paving committee does not exhibit such a delegation of authority as to render the contract void. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317.

mistakes as implies bad faith.[76] A provision for a certificate of completion in a building contract is waived where the owner completes the work under the contract.[77] A contract for the improvement of a street to make it conform to certain specifications made on a basis of a certain amount per foot of material used is performed by altering that part of the street only which did not conform with the specifications.[78] A Pennsylvania statute provides for an acceptance subject to deduction and an appeal by the contractor therefrom.[79]

A contract may be so forfeited by nonperformance [80] as to entitle the municipality to make a new contract for the improvement without a formal declaration of forfeiture.[81] A contract awarded to one of several bidders who have formed an illegal combination to prevent competitive bidding may be rescinded by the municipality.[82] Where work authorized by a single resolution is let in two contracts, one contractor having performed is entitled to recover though the other contract let to another was not performed.[83] There can be no acceptance of work before it can be known whether it meets a prescribed condition,[84] and use by the public does not waive failure to comply with specifications.[85] A variation in respect to materials may usually be authorized by the officers charged with inspection and approval.[86] Where under a government forage contract certain rights are vested in an officer superior to the receiving official, the contractor must on breach by the receiving officer so act as to enable him to protect the interests of the government.[87] There may be recovery for

76. In re Morris & Cummings Dredging Co., 101 N. Y. S. 726. Under a contract making engineers or inspectors final arbiters, a municipality is not bound by all the mistakes of its inspectors where such mistakes are not honest and not made in good faith. Guild v. Andrews [C. C. A.] 137 F. 369. Where the secretary of state has authority to determine where certain book binding has been done according to law and properly, his determination in such matters is final in the absence of fraud. State v. Young [Iowa] 110 N. W. 292. Where an engineer is the arbiter under a contract and certifies that a drain and sewer have been put in as called for by the contract or in a satisfactory manner, when an ordinary man experienced in such matters could see that they had not, the engineer's certificate is not final and conclusive. Guild v. Andrews [C. C. A.] 137 F. 369.

77. Bader v. New York, 101 N. Y. S. 351.

78. Shirk v. Hupp [Ind.] 78 N. E. 242.

79. Where under the act of June 13, 1836 (P. L. 551), inspectors have reported that a bridge was not built according to contract and a certain amount should be deducted from the contract price, and the contractor has elected to show cause against the report, the court of quarter sessions can only approve, modify, or disapprove, and set aside the report, it has no authority to enter judgment against the contractor. Mahoning Creek Bridge, 24 Pa. Super. Ct. 576.

80. A contractor who fails to perform under a contract with a county on the theory that his contract is unenforceable cannot after the time for performance has expired obtain equitable relief compelling the county to abide by the contract, nor enjoining it from letting the work to another contractor under later proceedings. Brown & Co. v. Pottawattamie County Sup'rs, 129 Iowa, 553, 105 N. W. 1019.

81. A county may treat a contract for a public improvement on which there has been no performance whatever up to the expiration of the time for the completion of the contract as forfeited without a formal declaration and may institute new proceedings for the construction of the public improvement in an altered way. Brown & Co. v. Pottawattamie County Sup'rs, 129 Iowa, 533, 105 N. W. 1019.

82. Where several banks enter into an illegal combination to suppress bidding for county funds, whereby each bank is to receive a share of the funds received by the bank getting the deposit, such share being held subject only to county demands, the county may rescind the contract for deposit and may demand of each bank as principal the share of the funds deposited in it. Such shares do not become assets of the bank awarded the contract for deposits when that bank becomes bankrupt. In re Salmon, 145 F. 649.

83. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22.

84. Building plans limited to a certain cost not acceptable till bids are in. Horgan v. New York, 100 N. Y. S. 68.

85. Douglas v. Lowell [Mass.] 80 N. E. 510.

86. Under Ky. St. 1903, §§ 3451-3453, 3458, providing for the supervision of work by the mayor and engineer, the acceptance by the council, and that the defense that the work was not done according to contract shall not exempt the property from liability, but that the court trying the case shall render such judgment against the property as will do complete justice to the parties, a contract to pave a street with bricks may be changed so as to substitute macadam for brick between railway tracks, such change being an improvement and decreasing the expense of the work. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

87. Ketcham v. U. S., 40 Ct. Cl. 220. Where the quarter-master at New York alone was authorized to cancel a forage con-

extra work ordered by an authorized person [88] but the proof as to the amount thereof must be specific.[89]

Time.[90]—Where the only time limit is specified in the contract, it may be extended for any good cause shown,[91] and further extensions of time assigning no cause are presumed to be for the good cause assigned on the first.[92]

Payment.—A certificate of amount due on work done under contract, when the certificate is duly issued, is not invalid because after its issuance the court decided that the basis on which the amount was computed is incorrect and made the amount greater than what was proper, but said certificate is valid as to the lesser amount which would be due under the computation set down by the court.[93]

§ 6. *Remedies and procedure. A. By taxpayer.*[94]—A taxpayer may maintain a bill to restrain public officials from paying out public moneys upon a void contract,[95] and may maintain, in his own name,[96] injunction against entering into any illegal contract which may result in the creation of a public burden.[97] But a citizen or taxpayer cannot bring a bill to restrain payment on a legal contract which has not been performed in the manner contracted for until the proper authorities have been called upon and have refused to act.[98] A taxpayer may sue for an injunction only when performance of the contract will result in damage to him.[99] If he seeks enforcement of a legal right to have a contract made, his remedy is mandamus.[1] Certiorari will issue at the instance of a taxpayer to review award to one whose bid fails in material particulars to conform to the specifications.[2] An award of a contract though possibly irregular may be affirmed on certiorari where the quashing of it can result in no benefit to the public.[3] That the contractor was absent from the state and was not served does not impair jurisdiction to issue preliminary injunction against the contract.[4] The making of a contract by county commissioners is an administrative act and no appeal lies by a taxpayer therefrom to the circuit court.[5] A contract will not be restrained at the instance of a taxpayer where it appears that he sues not in the interest of taxpayers but of an unsuccessful bid-

tract, it was the duty of the contractor upon the refusal of the receiving officer to accept to make a tender or serve notice on the New York official so as to afford an opportunity to accept or to cancel the order and failure to do so precludes recovery. Ketcham v. U. S., 40 Ct. Cl. 220.

88. City surveyor held to have power to require work beyond what was covered by contract. Mott v. Utica, 100 N. Y. S. 150.

89. Evidence as to quantity of debris not within street cleaning contract which was removed by contractor held not sufficiently clear to entitle him to any compensation for extra work. Mott v. Utica, 100 N. Y. S. 150.

90. See 6 C. L. 1121

91. Failure to complete the contract within the specified time, due to the request of the commission to stop work until other work was completed, such request being made for the benefit of the city and in good faith, does not make the contract void. Hellar v. Tacoma [Wash.] 87 P. 130.

92. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22.

93. Moody & Co. v. Sewerage & Water Board, 117 La. 360, 41 So. 649.

94. See 6 C. L. 1123.

95. Anderson v. Fuller [Fla.] 41 So. 684. Contract by district school board turning over the district school system to the state board of education. Lindbald v. Board of Education, 221 Ill. 261, 77 N. E. 450.

96. Need not proceed on relation of attorney general. Village of River Rouge v. Hosmer [Mich.] 13 Det. Leg. N. 1015, 110 N. W. 622.

97. An owner of property may, under chapter 334, § 1, p. 550, of the Laws of 1905, maintain an action against the mayor and council to enjoin them from entering into any contract for the paving of a street, or the doing of any illegal act which may result in the creation of a public burden, or in the levy of an illegal tax, charge or assessment, although the amount to be charged against his property has not been ascertained. Bunker v. Hutchinson [Kan.] 87 P. 884.

98. A mere request to the mayor to refuse to make payments is not sufficient. Merrimon v. Southern Pav. & Const. Co., 142 N. C. 539, 55 S. E. 366.

99, 1. Contract by local school board to allow normal school students to teach and to join in paying critics held remediable by both modes. Lindblad v. Board of Education, 221 Ill. 261, 77 N. E. 450.

2. Barber Asphalt Pav. Co. v. Trenton [N. J. Law] 65 A. 873.

3. Atlantic Gas & W. Co. v. Atlantic City [N. J. Law] 63 A. 997.

4. Village of River Rouge v. Hosmer [Mich.] 13 Det. Leg. N. 1015, 110 N. W. 622.

5. Burn's Ann. St. 1901, § 7859; Kraus v. Miami County Com'rs [Ind. App.] 80 N. E. 544.

der desiring the contract at a higher price.[6] A contract on its face grossly unreasonable and oppressive may be set aside by the court.[7]

(§ 6) *B. By bidder.*[8]—Certiorari will not lie at the instance of a higher bidder.[9] Mandamus lies against a city controller to require him to execute a contract legally made by the common council,[10] and against a mayor to oblige him to sign a contract where the signing is a ministerial act merely.[11] Where specifications contain an illegal clause, a person bidding thereon and giving a bond for performance except as to the illegal clause may enforce his contract, unless such illegal clause is shown to have prevented fair competition or injured the public.[12]

(§ 6) *C. On the contract proper*[13] *or on quantum meruit.*—There can be no recovery on an unauthorized contract,[14] nor have materialmen and subcontractors any recourse against the public after a rescission.[15] Failure through inadvertance to file an auditor's certificate does not necessarily render the contract so void as to cut off all rights and liabilities,[16] but may be made to have that effect.[17] A contractor or subcontractor may recover from a city any balance due on the original contract after deducting the cost to the city of completing the work after the original contract was abandoned, there being a provision in the contract for such completion.[18] Where at the time of final settlement the contractor reserved specific claims, all others are waived.[19] In some jurisdictions a municipality having received the benefit of performance of an invalid contract is liable on a quantum meruit[20] but

6. Natham v. O'Brien, 102 N. Y. S. 947.

7. An ordinance contracting for the supply of water to a city which is upon its face so unreasonable and oppressive as to indicate that it was passed solely in the interest of the grantee of the franchise will be set aside by the court, whether or not there was any intentional fraud. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. A motion to strike will not lie as to an averment that the county commissioners combined and confederated with the defendant bridge company in making the contract and stipulating a price to be paid for the bridge which was grossly and unlawfully in excess of the true and reasonable value thereof as the county commissioners and the defendants well knew. State v. Huston, 4 Ohio N. P. (N. S.) 423.

8. See 4 C. L. 1103.

9. He has lost naught but a bid that could not be accepted. Atlantic Gas & W. Co. v. Atlantic City [N. J. Law] 63 A. 997.

10. Detroit Reduction Co. v. Blades, 143 Mich. 591, 13 Det. Leg. N. 73, 107 N. W. 286.

11. State v. Fisher [Del.] 64 A. 68.

12. People v. Edgcomb, 112 App. Div. 604, 98 N. Y. S. 965.

13. See 6 C. L. 1123.

14. Harrison County v. Ogden [Iowa] 110 N. W. 32.

15. Under a contract with the United States containing a provision that the contract should not be assigned and that any assignment would cause the annulment of the contract as far as the United States was concerned, materialmen and subcontractors have no claim against the United States, but must look to the contractor or party to whom the material was supplied. Mosier v. Kurchhoff, 101 N. Y. S. 643.

16. But where the contract has been repudiated, and there is no fraud claimed, and effort is being made to place the parties as nearly as possible in statu quo, the effort should be forwarded by the courts. State v. Fronzier, 8 Ohio C. C. (N. S.) 216, afg. Id., 3 Ohio N. P. (N. S.) 303.

17. Under Laws 1902, c. 4, p. 4, the presentation for audit of a claim for an unpaid salary is a prerequisite to maintaining an action to enforce the same. Lyons v. Syracuse, 101 N. Y. S. 247.

18. Under a contract for the erection of a school building, having a provision for completion by the city in case of abandonment by the contractor, after abandonment and completion by the city, the contractor or subcontractor may recover from the city the balance due under the contract after deducting the cost of completing the building. Bader v. New York, 101 N. Y. S. 351.

19. A reservation of claims for extra work and for damages caused by delays waives claims for losses due to a change of plans requiring less material. Sanger v. U. S., 40 Ct. Cl. 47.

20. Where an electric light company furnished street light to a city in consideration of a void contract by the city to exempt the company's property from taxation or to pay any tax assessed thereon, such company is entitled to recover on a quantum meruit. Board of Councilmen of Frankfort v. Capital Gas & Elec. Light Co., 29 Ky. L. R. 1114, 96 S. W. 870. A person may recover the value of crushed stone taken with his consent by the street commissioner under instruction of the street committee at a price agreed upon between the owner and the commissioner, without any official act of the council, but used on the city streets for repairs. This liability is imposed by the general law. Central Bitulithic Pav. Co. v. Mt. Clemens, 143 Mich. 259, 12 Det. Leg. N. 996, 106 N. W. 888. Where under a contract to deliver stone "as required," no stone was delivered according to contract, but the instalments, though delivered late, were received, accepted, and used, with knowledge on his part of vendor's breaches, the vendee may be held liable for the value of the ben-

in other states it is otherwise held;[21] but payment having been made it cannot be recovered back,[22] at least without relinquishing the benefits received,[23] although, if a statute limits the amount to be paid for work done under it, any money in excess of that amount which is paid out upon certificate can be recovered.[24] Where a contractor cannot collect on a contract for street paving because the work was not completed within the time specified, he has no recovery on a quantum meruit.[25] Estoppel does not arise to prevent a city from refusing payment on a contract where the work was not completed according to contract, by reason of knowledge of the defect in the abuttors and their failure to complain.[26] An abutting property owner cannot ordinarily enforce the penalty provided for delay in a contract with the city to pave a street,[27] nor can the municipality enforce such a penalty if it has caused the delay.[28] The remedy of a contractor for failure of commissioners to issue bonds as required by a statute to provide a fund for payment is by mandamus and not by action,[29] and where bonds are legally issued by a township and afterward the township is abolished, mandamus lies to compel the county authorities through whom taxes are assessed and levied to levy a tax to pay a judgment on the township bonds.[30]

(§ 6) *D. On the contractor's bond.*[31]—Liability to materialmen and subcontractors on bonds given for their benefit is elsewhere treated.[32] Where, on failure of a contractor to perform, a county relets the contract at an increased cost necessitating an increased assessment on the abutting land, an action on the bond must be in the name of the state on relation of taxpayers assessed for the additional cost.[33]

(§ 6) *E. Under lien laws.*[34]

PUBLIC LANDS.

§ 1. The Public Domain and Property Therein (1487).
§ 2. Lands Open for Settlement and Lands Granted or Reserved (1487).
§ 3. Mode of Locating and Acquiring Title (1488).
A. Federal Lands (1488). Railroad Grants (1489). Swamp Land Grants (1490). Cancellations and Forfeitures (1491). Jurisdiction of Land Officers and Courts (1491).
B. State Lands (1492). Grants and Patents (1496). Rescissions, Cancellations, Forfeitures, and Reversions (1497).

efits received, less his losses by reason of any breach. The right of recovery is predicated on the promise implied from the acceptance or benefit, independent of the express contract. United States v. Molloy [C. C. A.] 144 F. 321.

21. There can be no recovery on an indebtedness which was incurred without any authority, nor on a quantum meruit. Harrison County v. Ogden [Iowa] 110 N. W. 32. Where a contractor bids to build new bridges knowing that the officials with whom he acted had no authority to bind the town, and his bid is accepted, and before he has built any bridges the town board challenged the legality of the contract under section 10 of the Highway Law, such contractor has no right to recover damages from the town. People v. Voorhies, 99 N. Y. S. 918.

22. Where a village having power to contract for the building of a bridge, being justified by necessity in contracting for one, and contracting for one, but omitting to enter into the same according to the manner and form required by law, although such contract is void, the village, after the bridge was built according to specifications, accepted by it, and $500 and bonds for the balance given in payment therefor, cannot maintain an action to recover the money and bonds paid therefor. Village of Pillager v. Hewett, 98 Minn. 265, 107 N. W. 815.

23. While a prosecuting attorney is empowered under Rev. St. § 1277 as amended Apr. 25, 1898, to institute an action for recovery of money paid for a bridge under an illegal contract, recovery of the whole amount paid will not be permitted unless a willingness is exhibited to relinquish any claim of the county to the bridge. State v. Fronizer, 8 Ohio C. C. (N. S.) 216.

24. State v. Young [Iowa] 110 N. W. 292.

25. City of Springfield v. Schmook, 120 Mo. App. 41, 96 S. W. 257.

26. Where the finished work does not meet with the requirements of the contract, the city may reject the work and refuse to make payment therefor, and no estoppel arises from the fact that the abuttors on the road knew of the defective work but made no complaints. Wingert v. Snouffer [Iowa] 108 N. W. 1035.

27. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

28. Callahan Road Imp. Co. v. Oneonta, 101 N. Y. S. 1056.

29. Board of Jackson County Com'rs v. Branaman [Ind. App.] 79 N. E. 923.

30. Graham v. Folsom, 200 U. S. 248, 50 Law Ed. 464.

31. See 6 C. L. 1124.

32. See Public Works and Improvements, 8 C. L. 1506.

33. State v. Karr [Ind. App.] 76 N. E. 780.

34. See 4 C. L. 1105.

§ 4. Interest and Title of Occupants, Claimants, and Patentees (1498).
A. Federal Lands (1498). Railroad Land Grants (1500). Area Acquired and Boundaries (1500). Adverse Possession (1500).
B. State Lands (1501). Area Acquired and Boundaries (1501). Adjudication of Title by the Courts (1502).

§ 5. Leases of Public Lands and Rights Thereunder (1502).

§ 6. Spanish and Other Grants Antedating Federal Authority (1503).

§ 7. Regulations and Policing, and Offenses Pertaining to Public Lands (1504). Cutting Timber on Public Lands (1504). Crimes and Offenses Against Public Lands (1505). Fencing (1505).

This topic includes both state and Federal lands. The treatment of each is separate from the other within each section, but many principles common to both may be found.

§ 1. *The public domain and property therein.*[35]—Tide lands belong to the state within which they are situated.[36] Where land within the boundaries of a state had been patented by the United States prior to the admission of such state into the union, no title thereto passed to the state.[37] State lands are not subject to taxation.[38] During the time which elapses between the filing of an application for the location of scrip upon certain lands belonging to the United States and the approval of the application by the commissioner of the general land office, the land is not subject to taxation by the state.[39] A grant to a state of the 16th section in each township of the public lands gives the state no rights in Indian lands ceded to the United States but still occupied by the Indians under treaty pending assignment of a permanent reservation.[40] Where the legal title remains in the United States, the land is subject to taxation by the state only after full consideration has been paid and perfect equitable title vested in the purchaser.[41]

§ 2. *Lands open for settlement and lands granted or reserved.*[42]—The area of land opened for entry by a particular proclamation depends on the construction to be given such proclamation.[43] A public levee is not public land open to entry though the bed of the body of water on which it is constructed belongs to the estate.[44] In Michigan lands sold to the state for taxes which are "actually occupied" are not subject to disposition as homestead lands.[45] A plat of tide lands made by the local

35. See 6 C. L. 1126.

36. The common-law doctrine that the ownership of and dominion over tide lands is in the state is in force in this country. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307.

37. Where an island in the Missouri River was patented by the United States before Missouri was admitted, no title thereto passed to the state of Missouri. Stoner v. Royar [Mo.] 98 S. W. 601. An island in the Missouri River surveyed by the United States prior to the admission of Missouri into the Union belonged to the United States and passed under a Federal patent. Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691.

38. Lands granted to the state by Act Cong. July 4, 1836, and Act June 13, 1842, in lieu of sixteen sections, known as "Chickasaw School Lands," have never been subject to taxation. Edwards v. Butler [Miss.] 42 So. 381. Laws 1888, p. 40, c. 23, quieting title to certain lands in the Yayoo Delta, embraces no other lands and has no relation to Chickasaw school lands which had been illegally sold for taxes. Id.

39. State v. Itasca Lumber Co. [Minn.] 111 N. W. 276.

40. State of Wisconsin v. Hitchcock, 201 U. S. 202, 50 Law. Ed. 727.

41. State v. Itasca Lumber Co. [Minn.] 111 N. W. 276. The doctrine of estoppel applies only when necessary to protect the rights of parties who have acquired a right or claim to the title. Id. Where the holder of a patent issued by the state to land entered with internal improvement warrants consents to the cancellation of his entries and authorizes the delivery of the warrant to a third person by whose transferee they are used for the entry of other lands, the title to the lands first entered becomes vested again in the state and cannot thereafter be divested by sale of taxes. Slattery v. Glassell, 117 La. 550, 42 So. 135.

42. See 6 C. L. 1127.

43. The strip of land, referred to in the president's proclamation of August 19, 1893, "100 feet in width around and immediately within the outer boundaries of the entire tract of country to be opened for settlement," ran around and immediately within the outer boundaries of the tract opened and not around the outer boundaries of the entire tract specified in the cession and relinquishment of the Cherokee Indians. Saylor v. Frantz [Okl.] 86 P. 432.

44. An embankment built out in a lake, with earth from the bottom of the lake, to serve as a public levee, and still serving as such, is not subject to entry and sale as public land, though the bed of the lake belongs to the state. State v. Blanchard, 117 La. 91, 41 So. 363.

45. Under the statutes of Michigan where lands sold to the state for taxes were shown

board of tide land appraisers and ratified by the legislature vacates a former plat made by the owners of adjoining upland.[46] Land which at the date of a grant has been withdrawn in view of a prior grant is not public land, and if not located under the first grant does not revert to the second but to the public domain.[47] Withdrawal of a body of land "about" twenty miles in width, as shown by a map attached, is sufficiently definite.[48]

§ 3. *Mode of locating and acquiring title. A. Federal lands.*[49]—An entry must be made by one qualified to enter,[50] with intent to make his home there and cultivate the land.[51] Where one is in actual possession of Federal lands, enclosed by a substantial fence, using it for agricultural purposes and claiming title, it is not subject to homestead entry and another can acquire no rights by filing on it, paying fees, obtaining a certificate, and taking peaceable possession.[52] An entry may be made on land selected by an agent,[53] and fraud may not be inferred from the fact that a large number of entries have been solicited and located by one person, if the entries are legal.[54] The proceeding by which title is sought to be acquired must be free from fraud,[55] and it must appear that the land is not sought for speculative purposes.[56] Title passes when the patent is issued and recorded[57] and not before,[58] though a title in fee may pass by a treaty without act of congress or patent,[59] and

to be "actually occupied," they are not subject to disposition as homestead lands. Meagher v. Dumas, 143 Mich. 639, 13 Det. Leg. N. 108, 107 N. W. 701.

46. Henry v. Seattle, 42 Wash. 420, 85 P. 24. Laws 1897, p. 30, c. 27, directing the board of state land commissioners to cancel deeds covering tide land lots which were street projections, where such streets had been vacated, does not apply to street shown by a former plat which had been vacated prior to the sale of lots affected thereby. Id.

47. Construing Act July 2, 1864, in aid of Northern Pacific Railroad Company. Northern Lumber Co. v. O'Brien, 27 S. Ct. 249.

48. Northern Lumber Co. v. O'Brien, 27 S. Ct. 249.

49. See 6 C. L. 1128.

50. One who was within the Ponca Indian reservation before the hour of 12 o'clock noon, September 16, 1893, and made the race from there to that part of the Cherokee outlet opened for settlement on that date, is not disqualified from making a homestead entry. Saylor v. Frantz [Okl.] 86 P. 432. Under Rev. St. U. S. § 452, providing that officers and employes of the general land office are prohibited from purchasing or becoming interested in any public land, a special timber agent appointed by the commissioner of the general land office is disqualified to make a timber culture entry. Prosser v. Finn, 41 Wash. 604, 84 P. 404. Act March 3, 1885, c. 319 (23 Stat. 340), relative to the sale of the Umatilla Indian reservation in Oregon, providing that each purchaser might purchase 160 acres, and Act July 1, 1902, c. 1380 (32 Stat. 730), authorizing a private sale of such of those lands as were not sold at the public sale, are to be construed together, and a purchaser of 160 acres under the first act was not entitled to purchase another 160 acres under the second act, though he was a settler on the tract he sought to purchase. Jones v. Hoover, 144 F. 217.

51. It is not a compliance with the homestead law for a man to file on a tract of land with no intention of making it his home, with no purpose to live there, with no intention of cultivating any part of it, and acquiring it for a place to reside in. United States v. Richards, 149 F. 443.

52. Gragg v. Cooper [Cal.] 89 P. 346.

53. A soldier of the United States may enter a homestead selected by an agent without ever viewing it. United States v. Richards, 149 F. 443.

54. United States v. Richards, 149 F. 443.

55. Allegations that pursuant to state law one applied for and obtained a quitclaim deed for land which the state claimed under the swamp land grant, and later used such deed as evidence to obtain a patent from the United States under a prior homestead entry, is insufficient to show fraud, though it is also alleged that the state had previously conveyed to another of which fact he knew and concealed it. Kerns v. Lee, 142 F. 985. Where title is acquired under the homestead laws after a contest before the land department, the adverse claimant cannot have the title adjudged a trust for his benefit on the ground of fraud, where the only fraud alleged is that the successful party procured a judgment on testimony which he avers is false, when a full hearing is shown to have been given. Greenameyer v. Coate [Okl.] 88 P. 1054.

56. Under Act Cong. June 3, 1878, c. 151 (20 Stat. 89), providing for the sale of timber lands, that the application must be for the sole benefit of the applicant and not for the purpose of speculation, held that the facts stated in the application that it is not made for the purpose of speculation must be true when made and also when the land is paid for and certificate of purchase issued. United States v. Brace, 149 F. 869.

57. United States v. Laam, 149 F. 581.

58. A purchaser prior to patent issued cannot claim to be a bona fide one. United States v. Laam, 149 F. 581.

59. Treaty of Sept. 1819, with Chippewa Indians giving land to specified individual Indians passed a fee therein to them. Francis v. Francis, 27 S. Ct. 129.

such fee having passed, restraints on alienation in the patent subsequently issued are nugatory.[60] Delivery of a patent is not essential to pass title.[61] A patent by the Federal government is prima facie evidence that all prerequisites of the law have been complied with,[62] but a patent to lands previously reserved or otherwise appropriated is void.[63]

A conveyance of a townsite lot to one not entitled to it is void.[64] The procedure by which title to town site lots in Alaska may be acquired is regulated by statute,[65] and the action of land department officials is final in the absence of fraud.[66]

It is perjury for an applicant to swear falsely as to the good faith of his application.[67]

Fees taken by a county official in taking homestead proofs are received in his official capacity.[68]

Railroad grants[69] take effect in praesenti,[70] and title passes on filing of the map of definite location,[71] acceptance of the grant,[72] or compliance with or perform-

60. Francis v. Francis, 27 S. Ct. 129.

61. A title from the United States to a state of swamp lands is competent evidence though the patent is not shown to have ever been received by the state. Warner Valley Stock Co. v. Morrow [Or.] 86 P. 369; United States v. Laam, 149 F. 581.

62. Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691. The action of the Federal land department in accepting final proofs of a homestead entryman and issuing patent to him is conclusive that the land was not swamp land at the time of the swamp land grant, and one who claimed through such grant under the state is bound whether or not he contested such fact. Kerns v. Lee, 142 F. 985. A patent is prima facie valid and a purchaser from the patentee is not required to ascertain whether conditions precedent to its issue have been complied with. United States v. Laam, 149 F. 581.

63. The true owner may recover the land in an action at law if he has such title as will support ejectment. Eastern Oregon Land Co. v. Brosnan, 147 F. 807.

64. Under Rev. St. U. S. § 2387, providing for granting of public lands settled as a townsite to a probate judge in trust for occupants, a conveyance by such judge to one who never occupied the land is void. Roberts v. Ward [Cal. App.] 84 P. 430.

65. Under Act Cong. March 3, 1891, c. 561 (26 Stat. 1899), providing for the disposition of townsite lots in Alaska and authorizing the trial of conflicting claims before a trustee with an appeal to the general land office, the decision of the trustee is final in the absence of fraud or mistake with reference to questions of fact except on review before the general land office. Miller v. Margerie [C. C. A.] 149 F. 694.

66. The fact that the proceeding in which title was obtained was ex parte does not show fraud warranting a court of equity in inquiring into the truth or falsity of the evidence on which the trustee acted. It must appear that a complainant was prevented by fraud or accident from appearing before the trustee. Miller v. Margerie [C. C. A.] 149 F. 694. The bill must allege such facts. Id.

67. The register of a land office has power to administer an oath in examining an applicant for the purchase of public lands on his examination with reference to the good faith of the application, and an applicant who swears falsely in such examination is guilty of perjury. United States v. Brace, 149 F. 869. One who induces him to make the application and in furtherance thereof swears falsely is guilty of subornation of perjury. Id.

68. Under Rev. St. U. S. § 2294, amended by Act March 11, 1902, c. 182, the clerk of a district court who takes homestead proofs does so in his official capacity and all fees received by him must be accounted for to the county. Rhea v. Washington County Com'rs [Idaho] 88 P. 89.

69. See 6 C. L. 1128.

70. The Act of Congress July 26, 1886, granting to the Union Pacific a right of way 200 feet wide through the "Osage Ceded Lands," was an absolute grant in praesenti vesting title from the passage of the act. Missouri, etc., R. Co. v. Watson [Kan.] 87 P. 687. It is presumed that the president approved the definite location of the road. Id. The title of the United States is fully divested by a grant in praesenti of all lands within the place limits of the grant and not within exceptions thereto, and subsequent proceedings affecting the patent to such lands in the interior department do not suspend limitations in favor of one claiming under the grant. Wiese v. Union Pac. R. Co. [Neb.] 108 N. W. 175.

71. The grant to the Union Pacific Railway Company of the odd numbered sections within a certain distance on either side of the tract became effective upon filing the map of definite location, and related back and vested an interest in the railway company as of the date of the grant of 1862. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473. Acts Cong. July 1, 1862 (12 Stat. 489), and of July 2, 1864 (13 Stat. 356), granting lands to the Union Pacific and Souix City & Pacific Railroads, transfer a present legal title when the terms of the grant are complied with and the lands are identified by the map of definite location. A patent when issued relates back to date of the grant. Wiese v. Union Pac. R. Co. [Neb.] 108 N. W. 175.

72. Rev. St. U. S. § 2477, granting a right of way for public roads along the section lines of public lands, became effective in Kansas when the grant was accepted by Laws 1873, p. 55, c. 22. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473. This grant never applied to the odd numbered

ance of other conditions,[73] and cannot thereafter be divested.[74] Lands actually occupied are generally excepted,[75] or are construed as not within the terms of the grant.[76] Under such exception, no lands may be withdrawn from entry prior to definite location of the line.[77]

Swamp land grants.—The swamp land grant of September 28, 1850 (9 Stat. 519), did not attach to any particular land until it had been identified as swamp land by the secretary of the interior.[78] The mere selection and filing of lists by state agents did not operate to segregate such lands from the public domain nor prevent their passing under a subsequent railroad grant excepting "lands reserved for any purpose whatever."[79] A grant by the Federal government of land that had passed to the state under the swamp land grants may be ratified and confirmed by the state.[80]

sections in Russell county which had previously been granted to the railroad company, but did apply to even numbered sections within the railroad limits provided they were public lands and no right of preemption or homestead had attached prior to the granting of Act of July 26, 1866. Id.

73. Legal title to a right of way sought by a railroad company under Act Cong. March 3, 1875, c. 152 (18 Stat. 482), vests upon approval of the secretary of the interior of the profile of the road and not before. Phoenix & E. R. Co. v. Arizona Eastern R. Co. [Ariz.] 84 P. 1097. The determination by the Federal supreme court that the grant to the Southern Pacific Railroad Company by Act of Cong. March 3, 1871, did not include lands within the limits of the grant to the Atlantic & Pacific Company by the act of 1866 refers only to lands within the 20 mile limit of the former falling within like limits of the latter, and not to indemnity lands to which title accrues only upon selection and which may be selected from any public lands within the indemnity limits. Southern Pac. R. Co. v. Bovard [Cal. App.] 87 P. 203.

74. In the absence of forfeiture of its rights by any act of its own congress could not derogate therefrom after the filing of the map of definite location. Walbridge v. Russell County Com'rs [Kan.] 86 P. 473.

75. Under the proviso of Act Cong. February 8, 1887, all lands occupied by actual settlers, at the time of definite location of the road, etc., were excepted from the New Orleans Pacific Railway Company, which was not concerned with the rights of settlers, quoad the government. Lisso v. Devillier [La.] 43 So. 163. A grant to the state for railroad purposes, excepting lands theretofore reserved or otherwise appropriated, excepts land occupied by a settler under a pre-emption or homestead claim duly filed, though the entry was subsequently canceled, but does not except land merely occupied by a settler who had made no filing thereon under the general land laws. Eastern Oregon Land Co. v. Brosnan, 147 F. 807. A railroad grant excepting lands "granted, sold, reserved, or occupied, by homestead settlers, pre-empted or otherwise disposed of," did not attach to lands homesteaded or pre-empted at the time the map of definite location became effective. Oregon & C. R. Co. v. U. S. [C. C. A.] 148 F. 603. Act Cong. March 3, 1877, granting a railroad right of way through Hot Springs reservation conferred only a pre-emption right "to the land occupied," and did not pass the fee to streets on which the railroad tracks were laid which was reserved by the government. Little Rock, etc., R. Co. v. Greer, 77 Ark. 387, 96 S. W. 129.

76. The grant by Act Congress, July 25, 1866 (14 Stat. 239), to aid in the construction of the Central Pacific Railroad, was a grant in praesenti and did not pass land subject to a live homestead entry, though such entry was relinquished prior to filing the map of definite location. Such land was not "public land" within the meaning of the grant. United States v. Oregon & C. R. Co. [C. C. A.] 143 F. 765.

77. Where in a grant to a railroad company there is expressly reserved all lands to which the right of homestead or pre-emption has attached when the line is definitely fixed, the land commissioner in the absence of direction by congress and prior to the definite location of the line may not withdraw from pre-emption or homestead settlement any of such lands. Brandon v. Ard [Kan.] 87 P. 366.

78. United States v. Chicago, etc., R. Co., 148 F. 884. Under the Swamp Land Act Sept. 28, 1850 (9 Stat. 519), by which the secretary of the interior was required to make out a list of swamp lands within a state and transmit it to the governor and on his request cause patent to issue, the state had no duty to perform in selecting swamp lands, and a selection by its officers was not binding on the United States and gave the state no equitable title or vested right which it could convey, where the selection had not been ratified or confirmed by the secretary of the interior. Kerns v. Lee, 142 F. 985. While Swamp Land Act, Sept. 28, 1850 (9 Stat. 519), operated as a grant in praesenti, a state did not take equitable title or vested interest in any particular tract until it had been identified by a list made or approved by the secretary of the interior, and could not convey it as against the United States. Id. A state patent to land as swamp land does not prove per se that title passed to the state under Acts Cong. 1849, 1850, commonly known as the "swamp land grants." Moulierre v. Coco, 116 La. 845, 41 So. 113. Under Acts 1861, p. 12, providing for the sale of state swamp lands, the state had no authority to issue a patent until the land had been patented by the United States or certified by the state as belonging to it. Henry v. Brannan [Ala.] 42 So. 995.

79. United States v. Chicago, etc., R. Co., 148 F. 884.

80. Under Swamp Land Grants of 1849

Cancellations and forfeitures.[81]—The United States may maintain a bill in equity to cancel a patent issued through inadvertence or mistake to land previously selected by the state as indemnity school land,[82] and need not tender purchase money received as a condition precedent.[83] One equitably entitled to land may maintain suit against a subsequent patentee regardless of fraud or mistake.[84] A judgment in an action to cancel a patent is not binding on one not made a party.[85] The United States may maintain suit on a money demand against a railroad company to which land was erroneously patented, where the company has disposed of the land.[86] A private citizen who asserts no interest may not assail a title on the ground of noncompliance with statutory conditions.[87] An entryman who did not himself pay for land cannot recover the payment on cancellation of the entry.[88]

Jurisdiction of land officers and courts.[89]—The Federal land department is the tribunal specially designated by law to determine rights growing out of settlements on public lands, and its judgment upon the weight of evidence produced is conclusive,[90] and its discretion cannot in the absence of fraud [91] be controlled by injunc-

and 1850. Railroad Lands Co. v. Shreveport, 117 La. 140, 41 So. 443. Where such subsequent grant is made to the state itself in aid of a railroad and the state accepts the grant and in turn grants to the railroad company, such action operates as a consent to the subsequent grant, a ratification of it. Id. Where owing to such subsequent grant the general land department has refused to confirm the land to the state under the swamp land grant, but the state has issued a patent therefor, as land belonging to it under the "swamp land grant" and such title came in opposition to the title under the subsequent grant, the latter will prevail. Id.

81. See 6 C. L. 1129.

82. The state is not in a position to maintain suit to protect its equitable title while the United States is under obligation to do so. United States v. Laam, 149 F. 581.

83. In a suit by the United States to cancel a patent so that it may convey the land to one equitably entitled to it, it need not tender the purchase money paid by the patentee. United States v. Laam, 149 F. 581.

84. One who acquired an equitable title or vested interest in land while title remained in the United States may maintain suit to determine his right to the legal title as against one to whom the land was subsequently patented through error of law on the part of the land department, regardless of the question of fraud or mistake in the transaction. Kerns v. Lee, 142 F. 985.

85. A judgment against the United States in an action to cancel a patent to a railroad company will not bar a homestead entryman from pleading his homestead settlement as a defense in ejectment against him by a grantee of the railroad company. Brandon v. Ard [Kan.] 87 P. 366. A decision by the commissioner of the general land office, in a former contest between an occupying claimant and a contestant, canceling the claimant's entry for alleged abandonment, which decision became final because not appealed from, is not conclusive that the defeated occupying claimant had no right to the land as against a subsequent homestead applicant, who was not a party to the first contest or in privity with the successful contestant. Martinson v. Marzolf [N. D.] 108 N. W. 801. It appearing that the decision canceling the claimant's entry for abandonment was erroneous, and that he had complied with the law and had not abandoned, and the successful contestant not having exercised his preference right, a stranger to that proceeding whose application to enter the land as a homestead had been accepted while the occupying claimant's entry appeared canceled of record, acquired no equitable right to the land. Id.

86. Acts March 3, 1887 (24 Stat. 556), and Act March 2, 1896 (29 Stat. 42), authorizing the United States to sue a railroad on a money demand when land was erroneously patented to it and it has sold to a bona fide purchaser only after a determination by the land department that it has been so sold, authorizes a suit in equity though no claim has been made by a purchaser, but there is a basis for one. Oregon & C. R. Co. v. U. S. [C. C. A.] 144 F. 832. The objection that such statutes are retroactive and void cannot be made where it appears that the sum sought to be recovered is less than was received by the company for the land. Id.

87. If the Federal government is willing that a claimant's heir retains title to land acquired without strict compliance with the law, a private citizen has no right to complain. Kennedy v. Dickie [Mont.] 85 P. 982.

88. Act June 16, 1880, providing for payment "to the person who made such entry" on cancellation, contemplates payment by the entryman. Stoiber v. U. S., 41 Ct. Cl. 269.

89. See 6 C. L. 1130.

90. Kennedy v. Dickie [Mont.] 85 P. 982. A court of equity will not interpose to determine as to the ultimate legal title to public lands while the same remains in the United States but will interpose to give or maintain possession where it is essential for completing purchase under the acts of congress, and to that end will review acts of the land department in its construction of the law applicable to prevailing conditions. Jones v. Hoover, 144 F. 217. A finding by the secretary of the interior that a subsequent contest is not a separate action, but merely a proceeding supplemental to the original case, will be adopted as true in a collateral action. Best v. Frazier, 16 Okl. 523, 85 P. 1119. Where it appears the order of the secretary of the interior finally disposing of a contest between the parties is dated prior to the service of notice, in an

tion,[92] or mandamus.[93] But after title passes from the government, state courts have jurisdiction to determine controversies between adverse claimants.[94] Fraud which will justify a court of equity in interfering with a finding of the land department in a contest must have been extrinsic to the matter tried.[95] The commissioner of the land department may review decisions of his predecessor if the proceeding in which they were rendered was irregular,[96] and decision on a contest does not prevent the land department from making further investigation at any time before patent is issued.[97] The land decisions of the department of the interior are not binding on the Federal courts, but where the construction of an obscure statute by the department has been uniform, the court will accept such interpretation.[98]

(§ 3) *B. State lands.*[99]—That lands were granted to a state to be disposed of as the legislature should direct does not relieve the legislature from the restraints of the state constitution in making such disposition.[1] The manner in which state lands may be disposed of is regulated by statute,[2] and statutory requirements must be conformed to.[3] The law in force at the date of the entry controls.[4] The grant

action of forcible entry such notice is not premature although the fact of such decision is not known to the parties at the time of service thereof. Id.

91. If the officers of the land department err in the interpretation of law, or fraud is practiced by one rival claimant upon another or if the officers themselves are chargeable with fraud, their action may be reviewed and annulled by a court of equity. Kennedy v. Dickie [Mont.] 85 P. 982. The application by the secretary of the interior, of the law to a certain state of facts in a contest, will not be disturbed by the courts unless it already appears that there was a misapplication. Greenameyer v. Coate [Okl.] 88 P. 1054.

92. Courts have no jurisdiction to interfere with allotment and patenting while title is still in government. Suit by state to restrain patenting of alleged swamp lands. State of Oregon v. Hitchcock, 202 U. S. 60, 50 Law. Ed. 935. Suit against secretary of interior or commissioner of general land office to restrain allotment infringes immunity of United States from suit. Id.

93. The decision of the secretary of the interior in construing statutes as to the rights of a claimant of a certificate of entry cannot be controlled by mandamus. United States v. Hitchcock, 28 App. D. C. 338.

94. Wilcox v. Phillips [Mo.] 97 S. W. 886.

95. The fact that false testimony was given at a hearing of the contest will not justify interference by a court. Kennedy v. Dickie [Mont.] 85 P. 982. The validity of a finding of the land office in a contest for priority of claims cannot in a collateral proceeding be based on the fact that a contestant brought a distant witness and on inquiry as to how he would testify sent him away so the other party could not get him. Id. The fact that a party to a contest and his witnesses were intimate and testified at the criminal trial of certain persons, does not show that they conspired to convict the person charged and thus prevent him from testifying at the contest. Id. If a judgment of the land department might be overturned by a court of equity on the ground of false swearing at the hearing of a contest, the allegations and proof must be more than a rehearing on substantially the same case submitted at the hearing which resulted in the judgment. Id.

96. Morse v. Odell [Or.] 89 P. 139.

97. Love v. Flahive, 27 S. Ct. 486.

98. United States v. Burkett, 150 F. 208.

99. See 6 C. L. 1131.

1. State of Montana v. Rice, 27 S. Ct. 281.

2. Laws 1901, p. 295, c. 125, § 5, providing that tracts lying partly within and partly without the absolute lease district shall be considered as wholly without, does not apply to a tract sixty miles long and of varying width embracing 150,000 acres, but to sections within such body. Raper v. Terrell [Tex.] 99 S. W. 93. Laws 1905, p. 161, c. 103, § 3, providing that the envelope in which a purchaser makes his bid shall be preserved by the commissioner and opened the day after the land comes on the market, held where such day was a legal holiday it could be opened the day following. Fessenden v. Terrell [Tex.] 17 Tex. Ct. Rep. 326, 98 S. W. 640. Act No. 239, p. 239, of 1857, fixing at $1.25 per acre the minimum price at which school lands may be sold, is superseded by Rev. St. 1870, § 2960, prescribing the manner, terms and conditions of the sale of such lands, and says nothing of the minimum price, and the repealing clause of which repeals all laws on the same subject-matter. Board of Directors v. Lanier, 117 La. 307, 41 So. 583. Rev. St. 1895, art. 4218c, providing that on death of a purchaser of free school or asylum land his heirs may make payment, was not repealed by Acts 1905, p. 159, c. 103. Clark v. Terrell [Tex.] 17 Tex. Ct. Rep. 325, 98 S. W. 642. Acts 1900, p. 34, § 9, requiring proof of occupancy with intention of acquiring the land as a homestead to be filed in the land office before January 1, 1902, as a prerequisite to issuance of patent, is not in excess of the powers of the legislature. Haney v. Atwood [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1093.

3. Under Rev. St. 1895, arts. 4218f, 4218g, and Laws 1905, p. 159, c. 103, after the land commissioner notifies the county clerk of the appraisement of school lands, which have never been leased, he is without power to fix a date for the receiving of bids on such land different from the date when the clerk was notified. Estes v. Terrell [Tex.] 15 Tex. Ct. Rep. 443, 92 S. W. 407.

4. A grant by the state based upon prior entry and issued in accordance with such entry on payment of the purchase price is not affected by a law enacted between date

must be made by the officers of the political subdivision authorized to dispose of the land.[5] In Kansas proceedings to sell leased lands may be instituted on the expiration of the lease [6] and not before.[7] A valid entry is not indispensable to the validity of a grant.[8] An application to purchase must conform to statutory requirements [9] and be made by one entitled to purchase [10] prior to the attaching of superior rights.[11] The affidavit of an applicant must set forth all the requirements of the statute and the facts stated must be true.[12] The application to purchase must be free from fraud,[13] and if tainted with fraud an assignee acquires no greater rights than his assignor.[14] In Texas an application made before school lands are placed on the market is not void.[15] An applicant must settle on the land within the period

of entry and issuance of grant. Bealmear v. Hutchins [C. C. A.] 148 F. 545. Where an application to lease certain land under Rev. St. 1895, art. 4218t, requiring the applicant to try to procure water, was made prior to Laws 1905, p. 163, c. 103, giving a lessor or his assignee the right to purchase under leases made prior to the enactment of the law, but the lease was taken out after the law went into effect, it did not apply. Trezevant v. Terrell [Tex.] 99 S. W. 94.

5. Under Pub. Laws 1850-51, p. 97, cc. 38, and 39, creating Jackson county from a part of Macon and Haywood counties but providing that officers of the old counties should exercise jurisdiction over the territory cut off as before, Jackson county had no legal existence until Laws 1852, c. 44, p. 97, was enacted, and an entry on public lands until that date was properly made before the officers of the other counties. Bealmear v. Hutchins, 148 F. 603. It was competent for officers of Trego County on February 4, 1886, to sell school lands situated in the unorganized County of Gove which was then attached to Trego County for judicial purposes. Spencer v. Smith [Kan.] 85 P. 573.

6. Whenever a lease of school lands has expired, proceedings to sell such land to actual settlers is proper. Bushey v. Hardin [Kan.] 86 P. 146.

7. It is irregular and improper to inaugurate proceedings to sell school lands subject to an existing lease when the sale must occur after the lease has expired. Bushey v. Hardin [Kan.] 86 P. 146.

8. Under the statutes of Tennessee a valid entry is not essential to a valid grant. The older of two conflicting grants, each based on a void entry, passes the state's title. Reeve v. North Carolina Land & Timber Co. [C. C. A.] 141 F. 821.

9. Laws 1905, p. 159, § 3, providing for the indorsement on the envelope containing an application to purchase state lands, when such land is to come onto the market at a future date, of the description, name of the grantee, etc., applies only where land is to come onto the market at a future date and not where the land is on the market at the date the application is filed. Flores v. Terrell [Tex.] 15 Tex. Ct. Rep. 123, 92 S. W. 32. A copy of an application for the purchase of state lands, certified by the surveyor general, purporting to be sworn to before a notary, with his seal attached, and indorsed showing the action taken in the office of the surveyor general, prima facie establishes execution of the instrument. Pardee v. Schanzlin [Cal. App.] 86 P. 812.

10. Under Rev. St. 1895, arts. 4218f, 4218y, and Laws 1901, p. 296, c. 125, §§ 7, 8, a foreign corporation authorized to do business in the state may not purchase timber on school lands. Lufkin Land & Lumber Co. v. Terrell [Tex.] 100 S. W. 134.

11. Evidence sufficient to show that at the time an application to purchase was made another had acquired a superior right to the land. Winans v. McCabe [Tex. Civ. App.] 92 S. W. 817. Where such superior right was shown, it was harmless error to exclude evidence of the other application. Id.

12. Miller v. Donovan [Cal. App.] 85 P. 159. One who seeks to purchase swamp lands must aver in his affidavit that he does not know of any claim to the lands other than his own as required by Acts March 28, 1868. Waters v. Pool [Cal.] 87 P. 617. Known claim to island held not to falsify affidavit for purchase of lands on "left bank of" river, though subsidary description by section might be construed as extending to such island, but if the certificate be issued on a second application and the affidavit be true at that time the certificate is valid. Id. Holder of occupant's right of prior claim had lost it by laches in meantime (Id.), though the original affidavit, false when made, is attached to the second application (Id.). Where after one affidavit to purchase is made it is found that the survey conflicted with another prior survey and a new survey was made to which the original affidavit was attached, held that the affidavit must be treated as a new application. Id.

13. Under the statutes of Oregon relative to the sale of school lands when prior to patent issued it is ascertained that the application to purchase was fraudulent, the board of land commissioners has power to institute a hearing on notice and on proof of fraud decline to issue a deed. De Laittre v. Board of Com'rs, 149 F. 800. Under Ball. Ann. Codes & St. § 2198, providing that state land official may review its official acts relating to the sale of state lands until execution of the contract, and Laws 1903, p. 113, c. 79, declaring that a lease or sale may be declared void for fraud or mistake where affidavits alleging fraud are presented after execution of a deed but before delivery, the board of public land commissioners may suspend delivery thereof until it investigates the charges. State v. Ross [Wash.] 87 P. 262.

14. Where a certificate for the purchase of state school lands was obtained by fraud, an assignment of it to one ignorant of the fraud did not entitle him to a patent. He acquired only the rights of his assignor. De Laittre v. Board of Com'rs, 149 F. 800.

15. It may be made the basis of an award where no superior rights have been ac-

prescribed after his application is accepted.[16] After a contest for the purchase of school lands has been referred to the court, the surveyor general has no power to receive an application from a third person for the purchase of the land involved.[17]

It is generally required that an applicant to purchase be a citizen of the United States [18] or shall have declared his intention to become such.[19] If land is suitable for cultivation it is generally provided that actual settlers only are entitled to purchase.[20] In Texas only an actual settler on a home section may purchase additional land.[21] In determining whether one is an actual settler on his home section, all facts and circumstances for a reasonable period before and after the date of his application may be considered.[22] An award of an additional section to one who was not an actual settler on his home section at the time of his application to purchase is ineffective.[23]

A preference right to purchase must be exercised within the period [24] and in the manner prescribed by law [25] by one entitled by law to exercise it.[26]

quired. Williams v. Barnes [Tex. Civ. App.] 99 S. W. 127.

16. Under Laws 1905, p. 162, c. 103, § 4, providing that an applicant to purchase land must settle thereon within ninety days from the date his application is accepted and within thirty days thereafter file affidavit that he has settled, held that a settlement within one hundred and twenty days is insufficient. Suares v. Terrell [Tex.] 99 S. W. 541.

17. Darlington v. Butler [Cal. App.] 86 P. 194.

18. Under Pol. Code, § 3495, requiring an applicant for the purchase of school lands to make affidavit that he is a citizen of the United States or has declared his intention to become one, and section 3500, providing that a false statement in the affidavit defeats the right of the applicant, the fact that one averred that he was a citizen when he had only filed his application to become such is not such a defect as will defeat his rights. Pardee v. Schanzlin [Cal. App.] 86 P. 812.

19. Where an applicant to purchase state lands filed her intention to become a citizen on the same day she made her affidavit attached to her application to purchase land but the application was not filed for five days, the facts were sufficient to show that she had filed her intention to become a citizen. Pardee v. Schanzlin [Cal. App.] 86 P. 812.

20. Under Const. art. 17, § 3, providing that school land suitable for cultivation shall be granted only to actual settlers, it cannot be granted to others if any part of the subdivision in question is suitable for cultivation. Sanford v. Maxwell [Cal. App.] 84 P. 1000. Where in a contest the court found that plaintiff was an actual bona fide settler and also that he had never been in actual possession, such findings will be construed to mean that he had made an actual settlement without actual possession of more than his house and its environs. Id. Const. art. 17, § 3, provides that state lands suitable for cultivation shall be granted to actual settlers only, not exceeding three hundred and twenty acres to each, Pol. Code, § 3495, provides that the smallest legal subdivision shall be deemed suitable for cultivation if one-half its area will produce crops, held that such provision did not construe the constitutional provision further than to provide that every legal subdivision coming within the description should be deemed suitable for cultivation, nor provide that land not coming within the description should be suitable for cultivation. Id. "Suitable for cultivation" means a tract one-third of which is susceptible of ordinary cultivation the remainder to be used for pasture. Id. The question whether it was suitable for cultivation at the time application was made, and not purchasable by one not an actual settler, may be raised after the applicant has paid the purchase price and received a certificate of purchase. Boggs v. Ganeard, 148 Cal. 711, 84 P. 195. Const. art. 17, § 13, providing that lands "suitable for cultivation" shall be granted only to actual settlers, applies to land originally unfit for cultivation but which at the time of application had been made fit, without regard to how it had been reclaimed. Id. St. 1903, p. 67, c. 61, amending Pol. Code, § 3443, so as to provide an additional method for contesting the right to purchase state land on the ground that at the time of application it had been made fit for cultivation, is remedial, and, though retroactive, impairs no contract obligation. Id. Such statute is not special legislation. Id. Evidence sufficient to show actual settlement where an unmarried man went on the land with wagon and provisions and set up a tent with the intention of making the place his home. Smith v. Florence [Tex. Civ. App.] 16 Tex. Ct. Rep. 846, 96 S. W. 1096.

21. Where it is asserted that one to whom additional land was awarded was not an actual settler, it is admissible to show the inhabitability of the only house on the premises and that the awardee lived at another place. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010.

22. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010.

23. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010. Where in trespass to try title it is asserted that one to whom an additional section was awarded was not an actual settler, the court may refuse to charge that the act of the land commissioner in awarding the land was prima facia evidence that all requisites of the law were complied with. Id.

24. Where lands were segregated in 1870 and it appeared that one had been in possession since 1863 and in 1871 it appeared that a survey had been made at the instance

Where an application for the purchase has been accepted by the commissioner and the land awarded, it is presumed that it has been properly classified and appraised.[27] The appointment of appraisers must be made as required by law,[28] but their appraisement may be disregarded if grossly inadequate.[29] On an issue as to the validity of a sale of school land where an award has been shown, a purchaser may show that he continued to pay interest and reside on the land as required by law.[30]

The land commissioner has no power to require a subsequent patentee to make affidavit that the land had not been occupied from the date of another application, as a condition to selling the land,[31] but record notice[32] or actual knowledge by a

of another, held that the settler had lost his preference right to purchase by failing to make application within ninety days after filing his affidavits. Express provisions of St. 1869-70, p. 878, c. 575. Waters v. Pool [Cal.] 87 P. 617. A lessee of state land has a preference right to purchase provided his right is exercised prior to the expiration of the lease. Welhausen v. Terrell [Tex.] 16 Tex. Ct. Rep. 922, 97 S. W. 79. Evidence held to show that a lessee lost his preference right to purchase by failing to do so prior to the expiration of his lease. Id. Under Laws 1905, Reg. Sess. Leg. p. 163, c. 103, § 5, relative to the preference rights of assignees of leases to purchase where one took an assignment the day the lease expired and immediately mailed notice of his purpose to purchase but the notice did not reach the land commissioner until the day after the lease expired, he acquired no preference right. Murphy v. Terrell [Tex.] 100 S. W. 130.

25. By the Act of 1875 (Laws 1875, p. 123), "an act authorizing parties living on school lands selected in lieu of sections sixteen and thirty-two to purchase the same when the state acquires title," persons who complied with the act had a preference right to purchase "indemnity school land" and had title to improvements made by them thereon. State v. McCright [Neb.] 108 N. W. 138. The fact that an occupant of indemnity school land has attempted to enter the same under the homestead laws of the United States and has in good faith contested the right of the state to the same does not estop him to assert his rights under act of 1875 relating to improvements by settlers on lands so obtained from the state. Id.

26. Under Sayles' Ann. Civ. St. 1897, art. 4218j, providing that an owner of land forfeited for nonpayment of interest shall have a preference right to purchase for ninety days without the condition of settlement and occupancy where it has been occupied for three years, and art. 4218z, providing that surveys in counties organized before Jan. 1, 1875, which are detached from other public lands may be sold without actual settlement to any purchaser except a corporation, a corporation which has acquired rights of a purchaser is not entitled to the preference given by the first mentioned statute where the land is detached and located in a county organized prior to January 1, 1875. Mound Oil Co. v. Terrell [Tex.] 15 Tex. Ct. Rep. 440, 92 S. W. 451.

27. Smithers v. Lowrance [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064. The commissioner of the land office has no express statutory authority to cancel an award of dry grazing land on the ground that it should have been classified as dry agricultural land, and, where it is sold to another under the latter classification, the second purchaser has the burden to show that the first award was void. Id. A certificate of the land commissioner that the records of his office showed that a certain section of land was classified as dry grazing land on the classification and appraisement in uses under the laws of 1895, and that the records in use prior to that time showed that it was classified as dry agricultural land, is admissible. Id. A copy of the classification and appraisement records certified as true by the land commissioner with a further statement that it was made under the act of 1895 is admissible. Id. The certificate of the commissioner to a county clerk of the classification and valuation of land in his county, made as required by Laws 1901, p. 292, is admissible on the question whether lands sold prior to making the certificate were classified as applied for. Id. Laws 1901, p. 292, c. 125, requiring the commissioner to notify the county clerks of the classification and value fixed on land in their county, authorizes him to include in such list lands unsold and also lands sold but to which the purchaser has not perfected his title. Id. Where a witness testifies that he made copies of the record of the general land office, pointed out to him as the appraisement and classification records, such copies are admissible. Id.

28. Under Comp. St. 1881, the county treasurer, county judge and county clerk are required, in appointing appraisers to value school lands for the purpose of sale, to act together. An appointment otherwise made is void. State v. Eaton [Neb.] 110 N. W. 709. Under Gen. St. 1905, § 6871, relating to the sale of school lands, it is the duty of the county commissioners to give their consent to the appointment of appraisers by the county superintendent in proper proceedings for the sale of the land, when such appraisers are duly qualified and satisfactory. Bushey v. Hardin [Kan.] 86 P. 146.

29. Where a lessee of school land exercises his option to purchase, the board of educational lands and funds may reject the appraisement if it appears to be so much less than the actual value of the land as to lead to the conclusion that it was the result of fraud or mistake. State v. Eaton [Neb.] 110 N. W. 709.

30. Smithers v. Lowrance [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064.

31. Haney v. Atwood [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1093.

32. Where field notes of a survey made in

subsequent locator of a prior location precludes him from deriving any advantage from the fact that there was no evidence in the surveyor's office at the date of the subsequent location.[33] Where one's right to purchase his home section was not contested, the land commissioner had no right to deny the incidental right to purchase additonal land.[34] Where the land commissioner has made a sale of school land, another cannot purchase the same land until it is shown that the former sale is void.[35] Where land was sold by the state land commissioner as swamp lands, the title of the purchaser cannot be affected by a showing that at the time the land was chiefly valuable for the timber thereon.[36] The survey and location of public land by virtue of a bounty warrant severs it from the public domain and vests title in the owner of the warrant for whom location and survey was made.[37] Where a bounty warrant issued by the state was not located at the time of a sale of it, it was personal property.[38] Title to state lands cannot be acquired by adverse possession.[39]

Grants and patents.[40]—A state grant regular on its face is prima facie valid.[41] It is presumed where a patent is issued by a state or by the United States that all prerequisites were complied with and the title is not open to collateral attack.[42] A patent is not void because it excludes prior grants without identifying them,[43] but

1840 were recorded but the patent was not issued until 1846 when the field notes were returned to the land office, such patent was superior to one issued in 1845 on a conflicting survey, as the record was notice to subsequent locators. Waterhouse v. Corbett [Tex. Civ. App.] 16 Tex. Ct. Rep. 612, 96 S. W. 651. Where a survey was recorded in 1840, after Sayles' Early Laws, art. 838, requiring field notes to be returned to the land office within a year, but the field notes were not returned until 1846 when a patent was issued, another patent issued in 1845 on a prior survey cannot be declared superior because of delay in returning field notes of the original survey, in view of statutes extending the time for the return of the field notes. Id.

33. Waterhouse v. Corbett [Tex. Civ. App.] 16 Tex. Ct. Rep. 612, 96 S. W. 651.

34. Murphy v. Terrell [Tex.] 100 S. W. 130. Under Acts 29th Leg. p. 35, c. 29, §§ 1, 2, one claiming no right in the home section of an original settler may not attack the validity of his claim thereto for the mere purpose of resisting his right to purchase additional land. Id.

35. Weyert v. Terrell [Tex.] 100 S. W. 133. Where more than a year elapsed after a sale of school land had been reinstated without suit being brought to reinstate the same as required by Laws 1905, c. 29, it could not thereafter be vacated on the ground that it was unlawfully reinstated. Id.

36. White & Street Townsite Co. v. Neils Lumber Co. [Minn.] 110 N. W. 371. Selection of land by state land commissioner for state institutions held valid under Gen. St. 1894, §§ 4028, 4038, the land being swamp land. Id.

37. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406. Rev. St. 1895, art. 5269, expressly provides that the survey of land by virtue of a bounty warrant gives sufficient title to maintain trespass to try title. Id. The effect of a survey of public lands by virtue of a bounty or land warrant is to sever such lands from the public domain. Id.

38. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406.

39. Green v. Pennington, 105 Va. 801, 54 S. E. 877.

40. See 6 C. L. 1133.

41. It is presumed that it conveys lands subject to entry. Bealmear v. Hutchins, 148 F. 545.

42. Warner Valley Stock Co. v. Morrow [Or.] 86 P. 369. Where a survey is actually made and the field notes recorded, it being the surveyor's duty to return the certificate and field notes to the land office, and it appearing that a patent was issued it is presumed that regular steps were taken. Waterhouse v. Corbett [Tex. Civ. App.] 16 Tex. Ct. Rep. 612, 96 S. W. 651. Under Laws 1878, p. 42, § 4, authorizing sale of state lands, not exceeding three hundred and twenty acres to one person, but where it is possible for a patentee to have the certificates of others transferred to him, it cannot be said that a patent of five thousand acres to one person is void. Warner Valley Stock Co. v. Morrow [Or.] 86 P. 369. The recital in the body of a grant, as recorded, of the affixing of the seal of the state is sufficient evidence of its regularity and the grant is not rendered void by the fact that it does not appear of record that the seal was copied thereon. Broadwell v. Morgan, 142 N. C. 475, 55 S. E. 340. A patent to land as a homestead donation is not subject to collateral attack in an action by the patentee to recover certain other land. Carter v. Clifton [Tex. Civ. App.] 17 Tex. Ct. Rep. 177, 98 S. W. 209. A warrant, the survey on which it is based, and a patent, are prima facie evidence that the provisions of a statute authorizing the issuance of a patent to state land have been complied with. Houseman v. International Nav. Co., 214 Pa. 552, 64 A. 379. Contests relating to public lands under Pol. Code, § 3414, are governed by Pol. Code, § 3514, amended by Code Amendments 1873-74, making the certificate of purchase prima facie evidence of title and not by Code Civ. Proc. § 1925, making it primary evidence of title. Miller v. Donovan [Cal. App.] 85 P. 159. Complaint in an action under Pol. Code, §§ 3414, 3415, to determine conflicting claims held sufficient. Id.

43. Kountze v. Hatfield [Ky.] 99 S. W. 262. A patent which is definite in its de-

is void as to lands included by mistake.[44] One who claims land to be within an exception in a patent has the burden of proving it.[45] The title of a patentee of swamp land from the states relates back on issuance of patent by the United States to the date of the grant to the state.[46] A patent is to be construed according to the plain import of its terms,[47] and doubt and ambiguity as to the location of a patent arising from the certificate of survey, plat and patent is to be construed most strongly against the patentee for whom the surveyor acted.[48] Grants of land by the state are to be strictly construed against the grantee.[49] Where one held under a senior state grant and had been in possession for several years, a junior grant held by one who had never been in possession is void.[50] A priority of state grants settled by the court of last resort of such state is binding on a federal court sitting in such state.[51] Registration of a grant is not essential to its validity as passing title.[52]

Rescissions, cancellations, forfeitures and reversions.[53]—In the absence of some prior right or equity, no one except the state may assail a patent upon the ground that title was procured by fraud.[54] A forfeiture may be declared for abandonment of the land by an applicant,[55] or for his failure to comply with statutory requirements,[56] or conditions of the grant.[57] A state cannot be precluded from declaring

scription is not void because older patents included in it are not excepted, such portions being excluded by operation of law. Fox v. Cornett, 29 Ky. L. R. 246, 92 S. W. 959.

44. Where the governor pursuant to Laws 1901, p. 267, c. 193, conveyed certain lands to a railroad company, the deed was void as to lands included therein by mistake. White & Street Townsite Co. v. Neils Lumber Co. [Minn.] 110 N. W. 371.

45. East Lake Lumber Co. v. East Coast Cedar Co., 142 N. C. 412, 55 S. E. 304. Exception of certain land from a patent held not void for uncertainty. Id.

46. Warner Valley Stock Co. v. Morrow [Or.] 86 P. 369.

47. A recital in a patent issued in 1863 to the heirs of A., by virtue of a certificate, that the certificate was conveyed in 1854 to A. deceased, shows that A. was dead at the date of the patent but not at the time of the conveyance of the certificate. Pfeuffer v. Bondies [Tex. Civ. App.] 15 Tex. Ct. Rep. 6, 93 S. W. 221.

48. Description in a state patent construed and given effect so that the description and plat agreed, and the survey closed and embraced about the quantity of land called for. Mineral Development Co. v. Tuggle Land & Timber Co. [C. C. A.] 151 F. 450.

49. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307.

50, 51. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

52. Failure to register a state grant within two years from issuance thereof held not to avoid it. Statutes construed. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

53. See 6 C. L. 1134.

54. A private person whose claims had their inception after the patent was issued may not. Frontroy v. Atkinson [Tex. Civ. App.] 100 S. W. 1023.

55. Laws 1901, p. 294, c. 125, expressly provides that one who abandons school land for which he has made application to purchase as a home tract and additional lands forfeits all rights acquired by the application. Edwards v. Terrell [Tex.] 93 S. W. 426. Acts 27 Leg. p. 294, § 3, providing that absence from the land by a settler on account of sickness, etc., shall not work a forfeiture, means temporary abandonment for no longer than is necessary under the circumstances. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010. One does not forfeit his purchase rights where he temporarily abandons the land from fear of death or great bodily injury. As against one in possession under a lease who has not made the improvements required by law. Carter v. Clifton [Tex. Civ. App.] 17 Tex. Ct. Rep. 177, 98 S. W. 209. Evidence held to require submission to the jury of the question whether plaintiff had abandoned her town lot located on the public domain. Lindblom v. Rocks [C. C. A.] 146 F. 660.

56. Under Acts 1900, p. 34, § 9, requiring homestead claimants to make proof of occupancy and payment before January 1, 1902, and Rev. St. 1895, art. 4171, providing for forfeiture of the land where a homesteader fails to make proof of payment and occupancy, one who does not comply with the former statute forfeits his rights. Haney v. Atwood [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1093. Gen. Laws 1905, p. 161, c. 103, § 4, expressly provides that a sale of school lands may be canceled if the purchaser fails to file proof of settlement within 120 days after the land was awarded to him. Jones v. Terrell [Tex.] 100 S. W. 136. On an issue as to the validity of the purchase of school lands, evidence that the commissioner canceled the awards and evidence that they had been marked "canceled" on the file wrappers is admissible. Smithers v. Lowrence [Tex.] 15 Tex. Ct. Rep. 953, 93 S. W. 1064. Failure to make improvements as required by Laws 1901, p. 294, standing alone is not ground for forfeiture. Carter v. Clifton [Tex. Civ. App.] 17 Tex. Ct. Rep. 177, 98 S. W. 209.

57. Where lands were granted to a railroad company by Sp. Laws 1881, p. 964, c. 415, the interest of the railroad company revested in the state without act on its part for failure of the company to complete its road within the time limited by the grant. White & Street Townsite Co. v. Neils Lum-

a forfeiture by a custom of land officials.[58] A statement by the commissioner of the land office that a purchaser was in good standing does not estop the state from declaring forfeiture for nonpayment of interest.[59] The right of a state to maintain a suit to cancel a patent of swamp lands given by it depends on its having some interest in the lands.[60] To effect a forfeiture of a purchase of school land, strict compliance with the requirements of the statute is necessary.[61] A forfeiture is based on the written notice of default issued by the county clerk and the return of the sheriff showing the time and manner of service on file in the county clerk's office.[62] A purchaser of school land who has failed to pay interest and taxes when due, but whose rights as a purchaser have not been forfeited, may maintain mandamus to compel the county treasurer to accept a tender of money to meet delinquencies of interest and taxes.[63] Only a person who has some proprietary interest or right of possession is entitled to initiate a contest before the surveyor general against a proposed sale on the ground that the land is suitable for cultivation.[64] One who institutes a contest involving title to public lands need not allege or prove previous knowledge on the part of an assignee of an applicant who intervenes of fraud in procuring to assignor's certificate.[65] One whose land is forfeited may be reinstated upon compliance with statutory conditions.[66]

§ 4. *Interest and title of occupants, claimants, and patentees. A. Federal lands.*[67]—A settler of public lands upon which there is a road in general use as a highway takes subject to the public easement, though the road has never been estab-

ber Co. [Minn.] 110 N. W. 371. Where in 1885 a county contracted for the digging of a ditch to be paid for in swamp lands, and in 1893 the time for doing the work was extended, with a proviso that land of which any person was in possession should not be taken in payment, a patent to one who took possession in 1887 will not be set aside at the suit of the contractors, since their contract did not call for any particular lands, and there was enough aside from that in dispute to satisfy their claim. Himmelberger-Luce Land & Lumber Co. v. Blackman [Mo.] 100 S. W. 1049.

58. Where no statute requires the land office to notify purchasers that their claims are subject to forfeiture for nonpayment of interest, failure to give notice does not estop the state from declaring forfeiture though it had been the custom of such office to give notice. Mound Oil Co. v. Terrell [Tex.] 15 Tex. Ct. Rep. 440, 92 S. W. 451.

59. Inquiry was not made as to payment of interest. Mound Oil Co. v. Terrell [Tex.] 15 Tex. Ct. Rep. 440, 92 S. W. 451.

60. State v. Warner Stock Co. [Or.] 86 P. 780. Complaint held to show that the state had no interest in the lands. Id. A state which has no interest in public lands may not maintain a suit praying that persons who settled on and claimed land under the Federal homestead, pre-emption, or timber culture laws, are entitled thereto as against patentees under the swamp land laws. Id. Complaint alleging that persons so settled does not show any interest in the state. Id.

61. Where the return of the sheriff upon a notice of default in the payment fails to show that it was served upon all persons in possession of the lands, it is fatally defective and forfeiture cannot be predicated thereon. Phares v. Gleason [Kan.] 85 P. 572.

62. Where these fail to show legal notices, there is no forfeiture, and oral proof is not admissible to show that the notice was in fact sufficient or to amend the return of service. Spencer v. Smith [Kan.] 85 P. 573. The equitable interest in school land acquired by a purchaser under the certificate of sale is not lost by mere abandonment. Id.

63. Spencer v. Smith [Kan.] 85 P. 573.

64. One who claims no interest and does not himself propose to purchase cannot. Dollenmayer v. Pryor [Cal.] 87 P. 616. Pol. Code, § 3414, authorizing the surveyor general to submit to the court contests arising before him as to locations on public lands, does not give the court jurisdiction where the contest was instituted by one who had no interest in the land. Id.

65. The assignee has no greater rights than his assignor. Miller v. Donovan [Cal. App.] 85 P. 159. The state is not precluded by Pol. Code, §§ 3414, 3519, 3521, from entertaining a contest involving title to public lands, or from ordering a reference therein because of full payment for the land by one of the applicants. Id.

66. Under Sayle's Ann. Civ. St. 1897, art. 4218f, providing that purchasers who have forfeited their rights for nonpayment of interest may be reinstated unless the rights of third persons have intervened, where an application was made after forfeiture, and the proper payment made, the fact that part of the payment was returned by mistake does not affect the validity of the application and the applicant whose rights had vested. Mound Oil Co. v. Terrell [Tex.] Tex. Ct. Rep. 440, 92 S. W. 451. Under this statute, if the applicant's application is not accompanied by an obligation for a sufficient amount, if the original purchaser applies for reinstatement before the necessary amount is paid, the reinstatement should be granted. Id.

67. See 6 C. L. 1135.

lished by state law,[68] and an unlocated railroad right of way ordinarily takes precedence of private settlement;[69] but a homesteader whose possessory right has attached does not take subject to a railroad right of way where the map of definite location had not been filed,[70] nor subject to the rights of an irrigation company which had not constructed its ditch.[71] One acquires no right to the exclusive possession of public lands by enclosing them.[72] A right to indemnity land under the Forest Reservation Act attaches on selection thereof.[73] Where one selected public lands in lieu of others taken for a forest reservation, under a contract to secure title for another in an action to restrain him from conveying to a third person, a preliminary injunction will issue.[74] One who claims under a warranty deed of land to which patent has not been issued is under no duty to notify the general land office of his claim and take steps to perfect entry or notify the prospective patentee to do so.[75] Where through fraud, mistake, or other cause, a patent is issued to a party not entitled to it, he will be declared a trustee for the true owner.[76] Upon the death of a timber culture claimant before performance of the conditions entitling him to a patent, his heirs succeed to the claim and may obtain a patent in their own names by performance of the conditions.[77] A homesteader whose entry has been approved may maintain an action to protect his possession and to recover for trespass.[78] An entryman who has obtained a receiver's receipt has sufficient title upon which to maintain or defend suit concerning the land.[79] The wife of an entry-

68. Van Wanning v. Deeter [Neb.] 110 N. W. 703. Under Rev. St. U. S. § 2477, lands of the general government not reserved for public purposes may be taken and used for public roads. Van Wanning v. Deeter [Neb.] 110 N. W. 703. An acceptance of a dedication made by such statute may be shown by acts of the public authorities or of the public itself. Id.

69. The grant by Act July 26, 1866, to the Union Pacific Railroad Company of a right of way through the Osago ceded lands gives an absolute present right and subsequent locations by individuals were subject to the railroad's right of location. Missouri, etc., R. Co. v. Watson [Kan.] 87 P. 687.

70. Act Cong. March 3, 1875 (18 Stat. 482), granting a right of way over public lands for the construction of railroads, confers no right to such easement in lands occupied by a homesteader whose possessory right attached before the railroad was constructed or the map of definite location approved, though the company was entitled to take and had determined by final survey the exact location of the road before the homesteader acquired any rights. Doughty v. Minneapolis, etc., R. Co. [N. D.] 107 N. W. 971.

71. The rights of a homestead entryman who filed before an irrigation company constructed its canal on government land are not subject to the rights of the irrigation under Rev. St. U. S. §§ 2339, 2340, providing that patents of public lands shall be subject to vested water rights or ditch rights in connection therewith. Atkinson v. Washington Irr. Co. [Wash.] 86 P. 1123. The fact that the entryman made no objection to the construction of the ditch until after he obtained his patent did not estop him from asserting that it was not subject to the company's rights. Id.

72. Hardman v. King, 14 Wyo. 503, 85 P. 382.

73. Under the Forest Reservation Act (Act Cong. June 4, 1897, c. 2 [30 Stat. 11]), providing that whenever land is reserved persons owning within the reservation may upon surrender of the same select in lieu thereof other public land, where one surrendered land and selected in lieu of it other public land, he acquired an inchoate equitable right to the selection and one to whom he contracted to convey could maintain specific performance to the extent of the selector's title. Farnum v. Clarke, 148 Cal. 610, 84 P. 166. This is so though the commissioner of the general land office has not approved the selection. Id.

74. Farnum v. Clarke, 148 Cal. 610, 84 P. 166. The fact that the commissioner of the general land office had not acted on the selections does not warrant the dissolution of such injunction. Id.

75. Menasha Wooden Ware Co. v. Nelson [Wash.] 88 P. 1018.

76. Green v. Clyde [Ark.] 97 S. W. 437.

77. Hence the county court has no jurisdiction of the claim and may not authorize the administrator to borrow money on it for the purpose of purchasing it. Haun v. Martin [Or.] 86 P. 371. Where the county court authorized the administrator to mortgage it and afterwards authorized a sale of the premises to pay the mortgage, an heir of the entryman not shown to have had actual knowledge of the sale is not estopped to assert title as against the purchaser. Id.

78. Mott v. Hopper, 116 La. 629, 40 So. 921. Under Rev. St. U. S. 1899, § 3054, making an entry on public lands sufficient to support ejectment, the absence of patent does not vitiate title when all requirements of the law have been complied with. Metz v. Wright, 116 Mo. App. 631, 92 S. W. 1125.

79. Although title does not pass from the United States until patent has issued, a receiver's receipt issued to a homestead entryman constitutes ample title to enable him to maintain or defend a suit concerning the land. One in possession and claiming

man divorced before patent takes no interest.[80] Federal decisions are controlling as to rights of an entryman and of his surviving spouse.[81]

A contract whereby one agrees to convey the legal title to a homestead after he has obtained it from the United States is void,[82] but it is not a violation of the law for a homestead entryman to agree prior to proving up, to give an option to purchase after he has proved up.[83] A mortgage is not an alienation within the meaning of the Federal homestead laws.[84] Sale of a homestead entry before patent though void may be treated by the land department as an abandonment of the entry.[85] An entryman may acquire a valid title under the homestead law though he enters with a view of disposing of the land after he proves up,[86] provided that before proving up he has not entered into an agreement that another should receive the benefit of his purchase.[87] The exemption of lands acquired under the homestead and timber culture laws from any "debt contracted" prior to their acquisition does not exempt from liability for the torts of entrymen previously perpetrated.[88]

Railroad land grants are usually on condition that the aided road transport government troops and supplies at rates to be fixed by congress.[89]

Area acquired and boundaries.[90]—Swampy lands subject to inundation, but reclaimable to some extent, lying between the government meander line and to channel of a river, do not pass to the grantee of adjoining land by virtue of riparian rights.[91] A condition not inconsistent with the conveyance of a fee will not be held to defeat such an estate.[92]

Adverse possession[93] does not run against lands granted to a railroad for right of way.[94] Limitations do not run against a homestead entryman until patent is issued.[95]

land under Rev. St. U. S. § 2290. Thompson v. Basler, 148 Cal. 646, 84 P. 161. Under Rev. St. U. S. § 2291, a patent may issue to a homestead entryman upon proof or residence and cultivation for five years. By § 2297, his rights may be forfeited by proof of nonresidence on the land or abandonment thereof for six months. Held, where an entryman showed issuance of a receiver's receipt and gave evidence of possession, one could not attach his rights under a tunnel location on the ground that he had not complied with statutory requirements as to residence and cultivation. Id.

80, 81. Hall v. Hall, 41 Wash. 186, 83 P. 108.

82. Jackson v. Baker [Or.] 85 P. 512. Where an entryman agreed to convey to a third person for a consideration to be paid by a different person, the party paying the consideration was in pari delicto and could not recover what he had paid. Id. Though a homesteader may not sell the land before patent issued, his testimony cannot be heard as having preponderance against the testimony of witnesses that he sold after and not before receiver's receipts had been issued to him. Wood v. Noel, 116 La. 516, 40 So. 857. An agreement by a homesteader prior to proving up to sell land in violation of the homestead laws need not be in writing nor sufficient in form or nature to be enforceable. It is sufficient that there be an intent that when title was acquired it should inure to the benefit of another. United States v. Richards, 149 F. 443.

83. United States v. Richards, 149 F. 443.

84. Stark v. Morgan [Kan.] 85 P. 567. Where such mortgage is not intended to transfer title, it is not void. Id. And where the mortgagor subsequently procures title, he is estopped from defeating the enforcement of the mortgagor. Id.

85. Love v. Flahive, 27 S. Ct. 486.

86, 87. United States v. Richards, 149 F. 443.

88. Brun v. Mann [C. C. A.] 151 F. 145.

89. A road over whose line government freight was hauled as part of a through contract between the United States and another road is in no such privity to the United States as will enable it to sue for the difference between regular rates and land grant rates erroneously reckoned on its haul. Mobile & Ohio R. Co. v. U. S., 40 Ct. Cl. 232. A railroad company operating as lessee over a land grant aided road must haul government freigt at the rate prescribed for the land grant road. Astoria & Columbia River R. R. Co. v. U. S., 41 Ct. Cl. 284.

90. See 6 C. L. 1139.

91. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534. A letter by the secretary of the interior to the commissioner of the general land office, written at a time when there was no contest as to such lands, is not admissible in an action to quiet title to such lands. Id.

92. Patent issued to a charitable trust containing no conditions except the forbidding of boring for hot water held to convey a fee. Fordyce v. Woman's Christian Nat. Library Ass'n [Ark.] 96 S. W. 155.

93. See 6 C. L. 1139.

94. Missouri, etc., R. Co. v. Watson [Kan.] 87 P. 687.

95. Northern Pac. R. Co. v. Slaght, 27 S. Ct. 442.

(§ 4) *B. State lands.*[96]—As between conflicting grants, the prior grantee has the better title.[97] A claim of a preference right to purchase state tide lands may be assigned.[98] Such right will also descend to the claimant's heirs.[99] Where one purchased lands from the state and paid for them, he could recover for logs cut therefrom though patent did not issue until after action commenced to recover for the logs.[1] One who enters leased land which has been long abandoned may acquire rights of a settler,[2] and its sale as leased land may be enjoined at his instance.[3] Persons who settle on unsurveyed public lands, not swamp lands nor reserved as such nor otherwise reserved with intent to acquire title under the homestead laws, acquire no rights therein under the state swamp land laws.[4] Riparian rights do not necessarily attach to grant of state tide lands lying below tidal high water mark.[5] Bounty warrants are assignable.[6] After entry under a military bounty warrant, the holder is the equitable owner,[7] and the land may be taxed by the state.[8] In Texas a settler may not sell his land until after he has filed affidavit of actual settlement,[9] but he may mortgage the land before he has completed his three years occupancy.[10] Under the rule prohibiting alienation, a lease for 99 years is void.[11]

Area acquired and boundaries.[12]—One who claims under a gratuitous grant from the sovereign must clearly show the land in question to be within the terms of his grant.[13] Where a probate judge in whom is vested title to a townsite

96. See 6 C. L. 1139.

97. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278. Evidence sufficient to show that one claiming under a junior grant had been in adverse possession of so much thereof as conflicted with the senior grant. Id. Where one grant conflicts with another, the elder patentee acquires constructive possession of the land described, the junior patentee acquires constructive possession of the land described in his grant, except the tract embraced in the interlock. Green v. Pennington, 105 Va. 801, 54 S. E. 877.

98, 99. Hotchkin v. Bussell [Wash.] 89 P. 183.

1. White & Street Townsite Co. v. Neils Lumber Co. [Minn.] 110 N. W. 371.

2. Where school land has been leased for a term of years under Gen. St. 1905, § 6873, and the lessee is long in arrears in rent and has abandoned the land, though no steps have been taken to forfeit the lease, a settler who enters the day before the lease expires is not a trespasser, but can acquire the rights of a settler by occupancy and improvement. Davies v. Benedict [Kan.] 88 P. 536.

3. Where school land is leased for a term of years and the lease has expired, injunction will lie at the suit of one claiming rights in the land as a settler, to enjoin its sale as leased land. Davies v. Benedict [Kan.] 88 P. 536.

4. Such lands were subsequently opened for settlement. State v. Warner Stock Co. [Or.] 86 P. 780.

5. City of Providence v. Comstock, 27 R. I. 537, 65 A. 307. The title to the tide lands granted by the state to the city of Providence is not modified or restricted by littoral or other rights of adjoining property owners. Id. A grantee under Acts Assem. 1856-66, p. 160, c. 44, providing that rights of owners acquired thereunder shall extend to ordinary low water mark does not confer exclusive right of fishery opposite the shore beyond low water mark. Whitehead v. Cape Henry Syndicate, 105 Va. 463, 54 S. E. 306.

6. Warrants issued for public service. Wilcox v. Phillips [Mo.] 97 S. W. 886.

7. The bare legal title remains in the government. Wilcox v. Phillips [Mo.] 97 S. W. 886.

8. Wilcox v. Phillips [Mo.] 97 S. W. 886. Rev. St. 1899, § 9187, providing that land entered prior to June 1, shall be taxable for that year, contemplates assessment in the name of the entryman. Id. For the purpose of determining who is owner, the books of the register of the land office may be resorted to and the entryman taken as the owner unless other records show title in another. Id. A patent is not different from a deed within the recording statutes, and if by failure to record the land is assessed to the entryman, the rights of the purchaser at the tax sale must prevail. Id.

9. Laws 1905, p. 159, c. 103, providing that a settler may not sell prior to actual settlement and affidavit thereof filed in the land office. Held such statute requires actual filing and where the affidavit was mailed but never reached the land office it was not sufficent and the purchaser forfeited his rights by selling. Good v. Terrell [Tex.] 17 Tex. Ct. Rep. 324, 98 S. W. 641; Brown v. Terrell [Tex.] 99 S. W. 542.

10. A purchaser of school lands may mortgage the same before he has completed his three years occupancy and such mortgage is valid against a succeeding purchaser after he has completed his occupancy. Harwell v. Harbison [Tex. Civ. App.] 16 Tex. Ct. Rep. 510, 95 S. W. 30.

11. Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131.

12. See 6 C. L. 1140. Kreft patent of 1684, held to convey to the town of Hempstead land bounded by high water mark in Hempstead Bay and Matthus Ganetson's Bay but not land under water in either of such bays. Town of North Hempstead v. Eldridge, 111 App. Div. 789, 98 N. Y. S. 157.

13. Town of North Hempstead v. Eldridge, 111 App. Div. 789, 98 N. Y. S. 157. History and grants held to show that title to

in trust for the occupant is authorized to determine summarily on a petition the right of an occupant to the land and to deed it to him, his decision to be final and conclusive, unless a rehearing was obtained, the validity of his deed is not affected by the fact that the boundaries are not the same as those in the petition.[14]

Adjudication of title by the courts.[15]—No affirmative action can be had against the state or officer thereof whereby it could be required to execute deeds or issue patents or perform any act requisite to perfect title. But the state board of land commissioners may be restrained from violating contractual relations between the state and the purchasers.[16] Mandamus to compel the commissioner of public lands and buildings to execute a contract for the sale of school lands will be denied unless it is clear that the law has been substantially complied with and the board has abused its discretion in rejecting his application.[17] A proceeding before the land department to determine a preference right to purchase state tide lands is not adversary in the sense that one of the parties seeks to recover the land from another, and the jurisdiction of the court to review the determination of the land office is wholly appellate.[18] The state of Louisiana has provided for the sale of state lands under certain conditions by the register of the land office, and has also provided for a review of the decisions of that officer rejecting the claim of an applicant, and where there is nothing left between the parties for him to decide, the appeal lies and carries all questions interlocutory or otherwise.[19]

§ 5. *Leases of public lands and rights thereunder.*[20]—State lands may be leased only where authorized by law.[21] Where the legislature authorizes leasing of state school lands, it has the right to fix the terms of the lease.[22] A lease of mineral lands on royalty is not a sale within a constitutional requirement that sale of state swamp and school lands shall be public.[23] The provision of the statute authorizing the leasing of state school lands, giving the lessee the right to sue for waste, is not inconsistent with the idea that a conveyance for ninety-nine years creates a leasehold estate only.[24] To ascertain the rights of a lessee for ninety-nine years the courts must, where the terms of the lease are plain, seek the definition of the word lease, and they cannot turn from that definition to the conditions of the country existing when the lease was made.[25] A lessee of school lands is conclusively pre-

submerged land was passed to the town of North Hempstead. Id.

14. Wilson v. Chicago Lumber & Timber Co. [C. C. A.] 143 F. 705.

15. See 6 C. L. 1134.

16. De Laittre v. Board of Com'rs, 149 F. 800. Under Const. Or. art. 8, § 5, providing that certain state officers should be a board for the sale of school lands, their decision as to who is entitled to a patent prior to the issuance thereof is not subject to review by the courts. Id. Where in trespass to try title it is alleged in the answer that land settled on is part of the public domain and it does not appear that it is public school land, it is to be treated as public domain in passing on exceptions to the answer. Haney v. Atwood [Tex. Civ. App.] 15 Tex. Ct. Rep. 597, 93 S. W. 1093.

17. State v. Eaton [Neb.] 110 N. W. 709.

18. Hotchkin v. Bussell [Wash.] 89 P. 183. Under the statutes of Massachusetts on an appeal from the land court to the superior court, the latter may amend the issues framed by the land court when necessary to a determination of the matters specified in the appeal. Luce v. Parsons [Mass.] 77 N. E. 1032.

19. Darby v. Emmer [La.] 43 So. 148.

20. See 6 C. L. 1141.

21. Under the laws of New York the loan commissioners have no power to lease lands obtained by the state on foreclosure of a mortgage given to secure a loan from the United States deposit fund. Watkins v. Clough, 103 N. Y. S. 270. Occupants of indemnity school lands who had complied with the act of 1875 before repeal thereof were entitled to have the land appraised separately from the improvements and to be given an opportunity to lease the land upon such appraisement before being ejected therefrom. State v. McCright [Neb.] 108 N. W. 138.

22. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873. Conveyance by county supervisors reciting that they thereby leased a section of school land for ninety-nine years held in view of the statute only authorizing a lease to create a leasehold estate only. Id.

23. Laws 1889, c. 22, does not infringe Const. art. 8, § 2. State v. Evans, 99 Minn. 220, 108 N. W. 958.

24. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

25. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873. The

sumed to have taken his lease for agricultural purposes only with such rights as go with such a lease, which do not include the right to cut and sell timber.[26] The state in leasing its lands does not act in its political character as a sovereign but as a private citizen and the lease is to be construed as if made between individuals.[27] A lease of submerged state lands may be canceled in equity for false representations of the lessee that he was owner of the shore front on which the lease was conditioned.[28] Leases may be forfeited [29] or canceled [30] only where statutory conditions are complied with,[31] and a lessee is entitled to redeem from forfeiture [32] or be reinstated upon compliance with such conditions.[33] Th recordation of assignments of leases is regulated by statute.[34] The fact that the commissioner of the land office did not consent to the transfer of a lease of state lands is no defense to a note given for the purchase price of such lease.[35] A lessee of homestead lands is not responsible for failure of the entryman to comply with the law relative to residence on the land.[36]

§ 6. *Spanish and other grants antedating Federal authority.*[37]—A Spanish grant of a right to cut timber did not pass title.[38] A Spanish grant for the use of the inhabitants of a certain district on which to cut timber inures to the benefit of future generations [39] but confers no rights on one not an inhabitant.[40] Where the

phrase "the right, title, use, interest, and occupation," as used in statutes relative to the leasing of state school lands, must be construed in connection with the estate authorized to be conveyed. Id.

26. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 12 So. 290, 873.

27. Under a lease providing for payment of water rates and taxes assessed against buildings put on the premises, which should be deemed personal property, a lessee may recover an additional tax under Rev. Laws, c. 12, § 20, authorizing such recovery. Boston Molasses Co. v. Com. [Mass.] 79 N. E. 827. St. 1904, p. 340, c. 385, considered in connection with Rev. Laws, c. 12, § 15, and St. 1902, p. 74, c. 113, imposes a tax on leased state lands and not merely a tax on the leasehold interest. Id. Exemption from taxation of state lands occupied by a person under bond for a deed is not taken away by St. 1904, p. 340, c. 385, providing for taxation of leased state lands. Corcoran v. Boston [Mass.] 79 N. E. 829.

28. Grey v. Morris & Cummings Dredging Co. [N. J. Err. & App.] 63 A. 985. Evidence insufficient to show that such representations were false. Id.

29. Ball. Ann. Codes & St. §2155, requiring the commissioner of public lands to keep a record of leases and serve notice of delinquency on the first of each month, does not require personal service, and service by mail is sufficient upon which to base a forfeiture for relinquency. State v. Ross, 42 Wash. 439, 85 P. 29.

30. Evidence insufficient to show cancellation of a lease. Patterson v. Knapp [Tex. Civ. App.] 99 S. W. 125. Oral evidence of the land commissioner based entirely upon his records, is not admissible, but a copy or certificate of their contents should be produced. Id.

31. But where such notice by mail was not received by the lessee and was returned to the state and the rent was tendered within sixty days from date of service of the second notice the commissioner had no power to cancel the lease. State v. Ross, 42 Wash. 439, 85 P. 29.

32. A lessee of school lands or his assignee under a lease executed pursuant to Law 1883, p. 302, c. 74, who is delinquent in payments reserved by the instrument, is entitled to redeem from a forfeiture incurred by such delinquency at any time before the lands are resold or released. Hile v. Troupe [Neb.] 109 N. W. 218.

33. Laws 1901, p. 98, c. 62, § 1, authorizing an appeal from orders or decisions of the board of state land commissioners, does not authorize appeal from an order of commissioner of public lands canceling a lease of tide lands and does not deprive the lessee of a right to maintain mandamus to compel reinstatement of the lease. State v. Ross, 42 Wash. 439, 85 P. 29.

34. An assignment of a lease of school lands that was executed prior to the passage of Laws 1885, p. 335, c. 85, is not affected by the provisions of that act requiring such assignments to be recorded in the office of the commissioner of public lands and buildings. Hile v. Troupe [Neb.] 109 N. W. 218.

35. Wilkinson v. Sweet [Tex. Civ. App.] 14 Tex. Ct. Rep. 529, 93 S. W. 702.

36. That one leases homestead lands from entrymen for grazing purposes does not make him responsible for failure of the entrymen to comply with the law relative to residence on the land. United States v. Richards, 149 F. 443.

37. See 6 C. L. 1142.

38. A Spanish grant of the right to cut timber to the inhabitants of a certain town did not pass title which remained in the Spanish government and became a part of the public domain of the United States, and a tax sale in the name of such inhabitants conveys no title. Richard v. Perrodin, 116 La. 440, 40 So. 789.

39. Richard v. Perrodin, 116 La. 440, 40 So. 789. The grant was for the benefit of present inhabitants as well as of those living at the date of the grant. Id.

40. A Spanish grant to the use of the inhabitants of a certain town for the purpose of cutting wood confers no rights on one

grant defined the lands as swamp lands, it cannot be determined after one hundred years that they were not because at the present time they are arable.[41] Ancient Mexican grants are presumed to have passed title to all land within the boundaries of the grant [42] but no more.[43] Ancient Mexican grants are construed so as to effectuate the intention of the parties [44] and to vest title in the person entitled to it.[45] The unauthorized act of the governor of Tamaulipas in issuing a final title to lands after his power to do so had been terminated took away no existing right of the grantee in the land.[46] The Republic of Texas had power to confirm or ignore Spanish or Mexican grants to municipalities.[47] The commissioners for consideration of Florida land claims are prohibited from reporting for confirmation any claim which had been previously rejected for fraud by any commission or other public officer acting under the authority of congress, and a judge of the superior court of West Florida acting under congressional authority is such an officer,[48] likewise a rejection by him because of an alteration of the record of the grant so as to make it appear to antedate the treaty of cession is a rejection for fraud within the statute [49] and such judge has jurisdiction to reject for that reason though he had no power to inquire whether grants fell within exceptions in the treaty.[50]

§ 7. *Regulations and policing, and offenses pertaining to public lands. Cutting timber on public lands.*[51]—In most states [52] as well as under the Federal laws it is a crime to cut timber from public lands.[53] A statute imposing multifold dam-

not an inhabitant. Richard v. Perrodin, 116 La. 440, 40 So. 789.

41. Richard v. Perrodin, 116 La. 440, 40 So. 789.

42. Mexican grant of five leagues which included in the description an excess of such quantity held to pass title to all land within the description. Corrigan v. State [Tex. Civ. App.] 14 Tex. Ct. Rep. 979, 94 S. W. 95. Petition in an action by the state to determine the boundaries of a Mexican grant held not subject to demurrer. Sullivan v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 234, 95 S. W. 645.

43. Where a survey caused to be made by the owners of a grant under the confirmation act of 1852 included other land than that in the original grant, it was void as to the excess. Sullivan v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 234, 95 S. W. 645.

44. Where a grant of sale was made by the governor of a state in Mexico to a Mexican officer to be located on the vacant lands of the department of Nacogdoches, a power of attorney and act of sale executed by the grantee to another who applied to the proper officers for a location and grant and obtained a grant, held that the instrument executed by the original grantee was an act of sale and not a mere power of attorney. Allen v. Parmalee [C. C. A.] 142 F. 354. Facts sufficient to justify the presumption of an ancient Mexican grant are sufficient to establish a right to the grant. Evidence sufficient to establish such facts. Haynes v. State [Tex.] 100 S. W. 912.

45. Where a Mexican citizen in 1830 applied to the governor of Texas for a grant which was allowed and he conveyed his right to one who petitioned for a survey, and the governor of Texas executed an instrument reciting that he had conceded the land to the original applicant, held that on extension of final title the fee vested in the applicant's grantee. Surghenor v. Taliaferro [Tex. Civ. App.] 17 Tex. Ct. Rep. 411, 98 S. W. 648. The effect of extension of final title and placing the grantee in possession being to vest title in him cannot be avoided by extraneous evidence. Id. Order of the governor of the province of Regidor authorizing a survey and the placing of a certain person in possession held insufficient to constitute a valid grant but the same was inchoate and uncomplete. Upson v. Campbell [Tex. Civ. App.] 99 S. W. 1129.

46. Haynes v. State [Tex.] 100 S. W. 912.

47. City of Victoria v. Victoria County [Tex. Civ. App.] 15 Tex. Ct. Rep. 873, 94 S. W. 368. Under 1 Gammel's Laws, pp. 56-58, 834, 1208, a reservation in a Spanish grant for municipal buildings was for the benefit of the precinct or subdivision corresponding to a county and not for the town alone. Id.

48. Act June 22, 1860. United States v. Dalcour, 27 S. Ct. 58.

49, 50. United States v. Dalcour, 27 S. Ct. 58.

51. See 6 C. L. 1142.

52. Under Pub. Acts 1903, p. 312, No. 210, making it a felony to cut timber from state tax homestead lands, amending Comp. Laws, § 1394, providing for punishment for willful trespass, the offense is complete though there is no intention to commit trespass. People v. Christian, 144 Mich. 247, 13 Det. Leg. N. 222, 107 N. W. 919.

53. Under Rev. St. § 1025, providing that an indictment shall not be deemed insufficient by any defect in matter of form which does not prejudice defendant, an indictment for cutting timber is not bad for duplicity in alleging that one cut timber with intent to unlawfully export and with intent to dispose of the same. Morgan v. U. S. [C. C. A.] 148 F. 189. Rev. St. § 2461, prohibiting the cutting of timber and imposing a penalty of fine and imprisonment, was repealed by Act June 3, 1878, c. 151 (20 Stat. 89), Act August 1892, c. 375 (27 Stat. 348), and § 4 (20 Stat. 90). Id. Where in a prosecution for

age for trespass on state lands does not violate constitutional rights of a citizen though the same act is punishable as a crime.[54] Equity will not restrain the cutting of timber on the public domain either to prevent multiplicity of suits,[55] or because ingenious concealment makes the remedy at law difficult,[56] or because a discovery is desirable, if the remedy by statutory examination of a party is adequate,[57] or because one of the defendants is executor of a wrongdoer.[58] Nor, because permits to cut on certain lands have been exceeded, are the licensees trustees ex maleficio as to the excess [59] or liable to accounting.[60]

Crimes and offenses against public lands.[61]—It is an offense against the United States to conspire to fraudulently obtain public lands.[62] The United States has a direct interest in the public lands within the rule prohibiting public officers from accepting compensation for services rendered in a proceeding in which the United States is interested.[63] The fact that a third person advanced money to a homesteader to prove up and make improvements is not unlawful, and can be considered only in determining whether there was a conspiracy to violate the homestead laws.[64] An indictment for conspiracy to defraud the United States of public lands must describe the proposed fraud with reasonable certainty.[65] Such an indictment need not allege particular land as the object of the conspiracy.[66]

Fencing.[67]—Federal statutes forbid the enclosure of public lands.[68] Under an indictment for inclosing public lands without claim or color of title, it is competent to show acts, conduct and statements of the defendants tending to show assertion of a right to exclude the general public.[69]

PUBLIC POLICY, see latest topical index.

cutting timber the sentence for fine and imprisonment was void because of repeal of the statute providing for it, the circuit court of appeals could not correct the sentence by eliminating the portion providing for imprisonment as it could not be said that the jury found defendant guilty of an intent to export and dispose of the timber, where they might have found that he cut it innocently. Id.

54. State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935. Chapter 153, p. 349, Gen. Laws 1895, declaring certain acts of trespass on state lands a crime imposing a penalty and fixing the measure of damages to be recovered, held to impose on a casual or involuntary trespasser criminal punishment and also double damages. Id.

55, 56, 57, 58, 59, 60. United States v. Bitter Root Development Co., 200 U. S. 451, 50 Law. Ed. 550.

61. See 6 C. L. 1143. Perjury and subornation of perjury in affidavit that application is for sole benefit of applicant, see Perjury, 8 C. L. 1344.

62. An indictment for conspiring to defraud the United States of title to a portion of the public domain which alleges overt acts in obtaining and using before the land office false and bogus affidavits represented to be genuine in making proof of an entry theretofore regularly made, held not defective for uncertainty. United States v. Burkett, 150 F. 208. Under Act Cong. June 14, 1878, § 2 (20 Stat. 113, c. 191), providing that final certificate of a timber culture claim shall not issue until eight years after date of entry, and if five years after such time the planting and cultivation of the necessary number of trees shall be proved patent shall issue, held that where a timber culture entry did not become absolutely void because not forfeited for failure to make final proof within five years, it was merely suspended and was sufficient to sustain a prosecution for conspiracy to obtain title by false proofs. Id.

63. The United States has a direct interest in its public lands and in the right of entry or purchase thereof within Rev. St. § 1782, making it unlawful for an officer of the government to accept compensation for services rendered to any person in relation to any proceeding in which the United States is interested. United States v. Booth, 148 F. 112. A receiver of the land office violates such act when he accepts compensation for advance information of the restoration of lands to the public domain, which lands thereby become subject to entry. Id.

64. United States v. Richards, 149 F. 443.

65. Averments of manner in which it was proposed to obtain patents to fictitious persons held sufficient. Hyde v. U. S., 27 App. D. C. 362.

66. Hyde v. U. S., 27 App. D. C. 352.

67. See 6 C. L. 1143.

68. Indictment under Act Feb. 25, 1885, c. 149, § 1 (23 Stat. 321), for enclosing and asserting a right to the exclusive use of public lands without claim or color of title acquired in good faith, held good. Krause v. U. S. [C. C. A.] 147 F. 442.

69 Krause v. U. S. [C. C. A.] 147 F. 442.

PUBLIC WORKS AND IMPROVEMENTS.

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§ 1. *Definitions and scope of title.*[70]—This article treats generally of public works and improvements, the powers and duties of municipalities with respect thereto, the procedure to be followed in the making thereof, and the manner of providing for the cost, including local assessments. The taking of property for public use,[71] the construction and operation of particular public works,[72] and matters peculiar to the powers and fiscal affairs of particular public bodies [73] are specifically treated elsewhere. While the manner of letting a contract for a public work, and the validity of provisions peculiar to contracts of this kind, are here treated, matters pertaining to the making and validity of public contracts in general are not included.[74] Liability for personal injuries resulting from negligence in constructing a work is also excluded.[75]

§ 2. *Power, duty, and occasion to order or make improvements.*[76]—The power of a state to construct public works and make public improvements within its boundaries is exclusive, except where it has been delegated to the Federal government under some provision of the constitution of the United States.[77] But every statute

70. See 6 C. L. 1143.
71. See Eminent Domain, 7 C. L. 1276.
72. See Highways and Streets, 8 C. L. 40; Sewers and Drains, 6 C. L. 1448; Waters and Water Supply, 6 C. L. 1840.
73. See Counties, 7 C. L. 976; Municipal Corporations, 8 C. L. 1056; Towns; Townships, 6 C. L. 1709; States, 6 C. L. 1515.
74. See Public Contracts, 8 C. L. 1473; also Building and Construction Contracts, 7 C. L. 480.
75. See Negligence, 8 C. L. 1090; Municipal Corporations, 8 C. L. 1056; Independent Contractors, 8 C. L. 176.
76. See 6 C. L. 1144.
77. The state has power to make surveys for public improvements and to mark the boundaries of its civil divisions, and the existence of the power necessarily implies the right to make it practical and effective. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. It is competent for a state acting through its counties to protect the ports, harbors, bays, and rivers therein if the control of the general government within its sphere is not thereby interfered with. Board of Com'rs of Escambia County v. Pensacola Pilot Com'rs [Fla.] 42 So. 697.

providing for the construction of a public work or improvement must conform to the constitution of the state.[78] It must not violate a constitutional inhibition against local and special legislation [79] or a constitutional requirement that legislative boards shall be elected by the qualified voters.[80] The legislature acting reasonably may impose upon a municipality or collection of municipalities the duty, in part, of maintaining a bridge not located within its or their boundaries.[81] Where it cannot be said that the legislature would have passed any of the provisions of an act authorizing a municipality to construct a public work or improvement, independently of one provision which is unconstitutional, the entire act will fail.[82] The power to make local improvements is almost universally delegated to municipalities and other inferior political bodies. Such bodies can act only under the sanction of such delegated authority,[83] and in the construction of the improvement they must conform to the terms of the statute by which the authority is delegated. Many of the peculiar provisions of such statutes, and of municipal ordinances enacted under their authority, have been interpreted by the courts.[84] The power of a city to grade and improve its streets is an inherent corporate power, and is included in the general grant to the corporation to be a city.[85] In Illinois the municipal authorities are the sole judges of the necessity for a local improvement.[86] A city authorized by its char-

78. The Maryland statute, Act of 1904, c. 274, providing for the opening and improvement of streets situated exclusively in the annex portion of Baltimore city, is constitutional, and it was within the legislative power of the general assembly to enact it. City of Baltimore v. Flack [Md.] 64 A. 702.

79. A statute empowering cities of the first class to construct a sewerage system, and providing for the appointment of commissioners of sewerage does not violate such a constitutional inhibition merely because there is only one city of the first class in the state, although by inadvertance the statute, in one section, mentions that city. Miller v. Louisville [Ky.] 99 S. W. 284.

80. A statute providing for a municipal sewerage system and for the appointment of commissioners of sewerage, whose powers are to be purely ministerial, is not violative of section 160 of the constitution of Kentucky, providing that members of legislative boards must be elected by the qualified voters. Miller v. Louisville [Ky.] 99 S. W. 284.

81. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974. The maintenance of a bridge across a large stream, requiring a larger expenditure than could be justly imposed upon a municipality in which it is located, is not a purely local affair of the town or village in which it is located. To require other municipalities to assist in maintaining it does not violate the principles of local self-government. Id. The maintenance of a bridge in one municipality in part at the expense of another under the supervision of the executive officers of the two and in pursuance of a duty imposed by law does not violate the constitutional inhibition as regards the state engaging in works of internal improvement. Id.

82. Smith v. Haney [Kan.] 85 P. 550.

83. In Indiana a board of county commissioners cannot construct public improvements or enter into contracts therefor without statutory authority. Kraus v. Lehman [Ind. App.] 80 N. E. 550.

84. Street improvements: Under the Illinois Act of 1875 (Hurd's Rev. St. 1905, c. 24, §§ 294-296c), no improvements can be made except sidewalks and their necessary parts. An ordinance under such statute providing for side-filling is void. People v. Patton, 223 Ill. 379, 79 N. E. 51. Municipal ordinance construed and held not to require the city engineer to pave the streets with vitrified brick by day labor, contrary to the provisions of the city charter. City of Baltimore v. Gahan [Md.] 64 A. 716.

Drains: Under the Illinois Drainage Act of May 29, 1879 (Hurd's Rev. St. 1905, c. 42), a drainage district has the right to take in contiguous territory lying within an incorporated city organized under the city and village act of 1872 (Hurd's Rev. St. 1905, c. 24), where the territory sought to be taken in has not been organized by the city as any part of a district for drainage purposes, and watercourses within such territory remain unimproved. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

Dams and reservoirs: Under the various New York statutes relating to the power of the aqueduct commissioners, such commissioners had power after June 1, 1901, to contract for the construction of a new dam and reservoir. Walter v. McClellan, 113 App. Div. 295, 99 N. Y. S. 78. Under the New York statutes, Laws 1883, p. 666, c. 490, § 2, and § 36, p. 678, of the same act as amended by Laws 1887, p. 229, c. 196, the aqueduct commissioners had power to build a dam in the county of Westchester on a tributary of the Croton River. Id. The director of public works of a municipality having power to direct minor and incidental changes becoming necessary in the construction of a reservoir held authorized to order the performance of certain extra work which was clearly incidental to the general work. Clark & Sons Co. v. Pittsburg [Pa.] 66 A. 154.

85. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310.

86. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794. Upon a consideration of the evidence it was held that no

ter to construct sewers may, where the natural flow of water in alley is obstructed by a railroad, construct a sewer over the property of the railroad company, under an agreement that the latter shall pay the cost thereof.[87] In the construction of a public work or improvement, the laws of the state must be complied with.[88] Sometimes the authority delegated to municipalities is coupled with a condition, as that the improvement shall not be made without a certificate of authority from a state commission,[89] or a recommendation of the board of public works[90] or park board,[91] or requiring an ordinance providing for the improvement to be submitted to popular vote.[92] Where a municipality has by its charter authority to provide for the erection and maintenance of a system of waterworks to supply it with water, and to that end to contract with a party who shall build and operate waterworks, it may, in the exercise of this power, exclude itself for a period of years from constructing and operating waterworks.[93] The actual work of constructing a municipal improvement, or the performance of merely ministerial acts, may be delegated to a municipal officer or subordinate body.[94] But authority granted to a municipality to

abuse of the discretion vested in the board of local improvements was shown in this case in deciding to make a street improvement, and that an ordinance based upon the recommendation of the board was a proper exercise of powers conferred. Howe v. Chicago, 224 Ill. 95, 79 N. E. 421.

87. City of Louisville v. Hess' Adm'x [Ky.] 99 S. W. 265.

88. The erection under statutory authority of an additional court house in a city other than the county seat of a county is not a change of the site or location of a county building within the meaning of the New York statute, Laws 1892, p. 1753, c. 686, §§ 31-33, prohibiting such change unless certain preliminary requirements have been performed. Lyon v. Steuben County Sup'rs, 100 N. Y. S. 676.

89. The New York Laws 1905, p. 2096, c. 737, § 11, prohibiting any municipality from building a lighting plant for other than municipal purposes without a certificate of authority from the gas and electricity commission, applies to a village whose only expenditure of money, before the passage of the act, having relation to a lighting plant, was for investigating the feasibility of constructing such a plant, and for the payment of an engineer to make plans and specifications therefor. Potsdam Elec. Light & Power Co. v. Potsdam, 112 App. Div. 810, 99 N. Y. S. 551.

90. The provision in the Kansas City charter, art. 9, § 2, that no resolution or ordinance for a street improvement shall be passed except upon the recommendation of the board of public works indorsed thereon, does not apply to roads, parkways and boulevards under control of the park board. Jaicks v. Merrill [Mo.] 98 S. W. 753. Section 36, art. 17, of the charter of Kansas City, requiring ordinances establishing or re-establishing the grade of streets to have endorsed upon them a certificate of the board of public works, does not render invalid an ordinance providing for the paving of a street the grade of which had already been established by an ordinance in conformity with art. 10, § 31, of the charter. Id.

91. Where under the charter of Kansas City the park board merely recommends the improvement of a boulevard and the common council adopts the recommendation and provides for the improvement by ordinance, the constitution of Missouri is not infringed. Jaicks v. Merrill [Mo.] 98 S. W. 753.

92. By the provisions of a New Jersey statute, § 46, of an act for the incorporation of cities, etc. (P. L. 1899, p. 302), an ordinance to erect a fire house on a city lot must be submitted to a vote of the citizens. Lockwood v. East Orange [N. J. Law] 64 A. 144. Section 71 of the Act of 1899 (P. L. p. 313), which provides that no certiorari shall be allowed to set aside any ordinance for any improvement after the contract therefor shall have been awarded, does not apply to an ordinance to build a fire house. Id.

93. City of Vicksburgh v. Vicksburgh Waterworks Co., 202 U. S. 453, 50 Law. Ed. 1102. The Mississippi Const. § 178, which provides that "the legislature shall have power to alter, amend, or repeal any charter of incorporation * * * whenever, in its opinion, it may be for the public interests to do so; provided, however, that no injustice shall be done to stockholders," does not authorize legislation giving a municipality authority to issue bonds and build its own waterworks, where such municipality has by ordinance, passed under legislative sanction, conferred upon a waterworks company the exclusive right to supply the municipality with water for a period of years. Id.

94. Where a municipality is authorized to construct an improvement at its own expense, the council may direct a committee to do the work. City of Fayette v. Rich [Mo. App.] 99 S. W. 8. The preparation by the board of public service of plans, estimates, specifications, and profiles for a new municipal waterworks system, in accordance with a determining ordinance by council, is not an exercise of legislative power, and authority so to do is conferred upon such board and may be exercised by it, notwithstanding section 127 of the Municipal Code which provides that all power unless otherwise provided is to be exercised by council. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1. A board of public service, where required by a street improvement ordinance to choose one of three materials after bids were received, performs only a ministerial act and as the agent of the city council executes its legislative command. Scott v.

grade and pave streets and sidewalks is legislative, and the amount of the improvement, its kind, and character, must first be ascertained by the legislative body of the municipality and cannot be so delegated.[95] Where, however, there has been such an unauthorized delegation of power, the acts done under it may by subsequent ratification be made the acts of such legislative body.[96] Where a municipal council or other body having authority is acting within the scope of the authority conferred, its discretion in any matter relating to the improvement cannot be controlled by the courts if its action is not fraudulent, unreasonable, or oppressive.[97] Where two municipal corporations are jointly charged with the maintenance of a bridge, and one unreasonably neglects or refuses to perform in that regard, the other may carry the entire burden for the time being and subsequently recover of the former, on an implied promise, its just share of the expense.[98]

§ 3. *Funds for improvement and provision for cost.*[99]—A statute conferring authority upon a county or municipal corporation in regard to the levying of taxes or use of funds for local improvements must conform to the constitution of the state.[1] But the fact that a municipal corporation is indebted up to the constitutional limit does not prevent it from levying taxes for public improvements within the limits fixed by the laws governing such corporations.[2] The power to issue bonds

Hamilton, 7 Ohio C. C. (N. S.) 493; Id., 4 Ohio N. P. (N. S.) 1. A municipal ordinance for the paving of streets conferring upon the board of awards power to determine with which of several specified materials the paving should be done after the opening of the bids held not to be invalid as a delegation of legislative authority. City of Baltimore v. Gahan [Md.] 64 A. 716.

95. Harton v. Avondale [Ala.] 41 So. 934. A municipal ordinance providing that "the width of the sidewalk shall not be less than five feet, laid so that the center edge shall be as directed by the city engineer," is not in itself a delegation of legislative authority to a ministerial officer in derogation of the municipal charter. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350. But where in such case the space between the property line and the curbing is eleven feet, and consequently the engineer is left to say where the walk shall be within that space, a power is delegated to him in derogation of the charter. Id. An ordinance providing that a street "be curbed according to the established grade" refers to a grade previously established, and does not leave any legislative function to be exercised by the city engineer. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701.

96. Harton v. Avondale [Ala.] 41 So. 934.

97. There is no statutory provision requiring that the discretion of the board of public service in the selection of material for the improvement of a street shall be controlled by the wish of the property owners, and, where the board exercises its discretion in good faith, its decisions cannot be interfered with by the courts. Scott v. Hamilton, 7 Ohio C. C. (N. S.) 493; Id., 4 Ohio N. P. (N. S.) 1. In Illinois, in the case of a street improvement, the discretionary power of the city council, as to the limits of the district proposed to be improved, cannot be disturbed unless they have abused their discretion and exercised their power in an unreasonable manner. Gardner v. Chicago, 224 Ill. 254, 79 N. E. 624. Upon the evidence the ordinance in this case, providing for a new curb to replace an existing one, was held not to be unreasonable, unjust, or oppressive. Chicago Union Trac. Co. v. Chicago, 223 Ill. 37, 79 N. E. 67. In Louisiana the obligation to provide good and sufficient court houses for their respective parishes and of determining how the money of which they have the administration shall be expended is imposed by law upon the police juries, not upon the courts; and for the judiciary to meddle in such matters, where, as in this case, allegations of gross abuse of power, oppression, and fraud are wholly unsupported by proof, would be for it to invade the domain of other departments of the government in violation of the express prohibitions of the constitution. Murphy v. Police Jury [La.] 42 So. 979.

98. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974. The proper remedy in such case is an action at law, not mandamus. Id. A municipality neglecting or refusing to contribute to the work of keeping up a joint bridge cannot escape its pro rata liability by objecting that it was not notified or consulted as to what should be done. Id.

99. See 6 C. L. 1146.

1. Smith v. Haney [Kan.] 85 P. 550. A statute authorizing the use of a part of the general revenue of a county for the building of a court house is violation of a constitutional inhibition against a diversion of a tax from the object for which it is levied. Id.

2. People v. Chicago & T. R. Co., 223 Ill. 448, 79 N. E. 151. Tax levied by municipality for school building purposes not violative of constitution of Ill. art. 9, § 12. Id. A contract by a city which merely binds the city to levy and collect a special benefit assessment does not create a debt against the city within a statute fixing a debt limit. And an action for damages for failure of the city to levy such assessment is an action in tort and not one founded on a debt. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329. An injunction restraining a city from entering into any contract for the

in aid of internal improvements cannot be implied from any general grant of power to counties or other municipalities [3] and is limited to such works as pertain to the particular municipality,[4] but a specific power given is construed as covering all the objects embraced by it.[5] The necessary preliminary sanction by voters is essential in such a tax.[6] Whether a debt may be created to fund all works of a class or must be specifically devoted to particular works depends on the statute.[7] In some states authority is delegated to municipalities to decide whether the cost of local improvements shall be paid for out of the fund raised by general taxation or by assessment upon the property benefited by the improvement,[8] but this power must be exercised fairly as between taxpayers.[9] Many of the peculiar provisions of statutes authorizing municipalities and other inferior political bodies to raise and appropriate funds for local improvements, and prescribing the conditions under which they may be raised or appropriated,[10] and the formal requisites of bonds issued for

pavement of a particular street whereby it will incur a financial obligation does not prevent it from executing a contract to pay by special benefit assessments. Especially where the restraining order was so drawn as to indicate that such contract was excluded. Id.

3. State v. King County [Wash.] 88 P. 935.

4. Under a statute authorizing counties to contract indebtedness and to issue bonds to procure money for strictly county purposes, a county cannot issue bonds to pay for the construction of a ship canal for the Federal government. Washington Laws 1889-90, p. 37, §§ 2, 3. State v. King County [Wash.] 88 P. 935. A river, harbor or bay of a port is a public highway useful to the people of the county in which it is situated and its protection from injury by being filled in is within the purposes for which county governments are established, and, under the laws of Florida, county funds may be appropriated for such a work. Board of Com'rs of Escambia County v. Pensacola Pilot Com'rs [Fla.] 42 So. 697.

5. But where a board of education is authorized to build a new school building and issue bonds therefor and levy a tax to supplement the bonds, it has authority to levy a tax to pay for a heating plant for the building. St. Louis, etc., R. Co. v. People, 224 Ill. 155, 79 N. E. 664.

6. In Illinois a levy of a tax by a school district for building purposes is illegal unless the building has first been authorized by a vote of the people. St. Louis, etc., R. Co. v. People, 224 Ill. 155, 79 N. E. 664.

7. In Ohio a city is not authorized to issue bonds to provide a fund from which to pay its part of the cost of improvements that may from time to time be made, but it may issue bonds to pay its part of the cost of specific improvements. Heffner v. Toledo, 75 Ohio St. 413, 80 N. E. 8.

8. Under the Kentucky statute, Ky. St. 1903, § 3706, the board of trustees of a town have power to decide whether the whole of a street improvement, including intersections and crossings or any part of it, shall be paid for by the town or by the abutting owners whether the improvement be made under the cash system or the ten-year bond plan. Morton v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807. Under the laws of Iowa a general municipal ordinance providing for assessment of the expense of paving street intersections and spaces in front of city and government property upon the property of private owners does not render void a subsequent provision for the payment of deficiencies in the amount raised by a special assessment from a fund raised by general taxation. Corey v. Ft. Dodge [Iowa] 111 N. W. 6.

9. But a municipal charter providing for the issuance of bonds whenever the council resolve that an extraordinary expenditure ought "for the benefit of the city" to be made does not authorize the issuance of bonds to relieve certain property owners from their legal burden of contributing to the expense of a sewer. Charter of Oneida § 59, subd. 25, as amended (Laws 1904, p. 563, c. 273). City of Oneida v. King, 101 N. Y. S. 239.

10. The bonds provided for by the California street improvement act, Act March 23, 1876 (St. 1875-76, p. 433, c. 326), were to be paid out of a special fund to be raised by means of a special tax upon the lands to be benefited by the improvement. The debt created by them did not become a general obligation of the city to be enforced by a personal judgment against it. Meyer v. San Francisco [Cal.] 88 P. 722. But the bondholders could maintain an action against the city to establish and perpetuate the bonds as a claim upon the funds to be raised, and to prevent the bar of the statute of limitations. Id. The bonds did not bear interest after maturity. Id. In Illinois where a petition by highway commissioners of a township to the board of supervisors of the county shows a compliance with section 19 of the act in regard to roads and bridges in counties under township organization, as amended by the act of June 17, 1891 (Laws 1891, p. 188), and the necessary facts are found to exist, it is the duty of the board to appropriate a sum sufficient to meet half the expenses of building the bridges to which the petition relates, and this duty will be enforced by mandamus. Board of Sup'rs of Phillips v. People, 222 Ill. 9, 78 N. E. 13. But if the acts enjoined by the statute cannot be performed in a particular case without a violation of the constitution, their performance will not be enforced. Id. A proper levy and extension of taxes for school building purposes under the Illinois statute. People v. Chicago & T. R. Co., 223 Ill. 448, 79 N. E. 151. Power of boards of supervisors of two counties under Iowa statute, Acts

such improvements,[11] have received the interpretation of the courts. An ordinance providing for funds for a local improvement must conform to the requirements of a statute prescribing the formal requisites of municipal ordinances.[12] The courts are frequently called upon to interpret the peculiar provisions of ordinances appropriating money for public improvements.[13] Where both a city and a street railway company are interested in the paving of a street, the city may be bound by a contract between them by which the city agrees to do the work and the railway company agrees to pay therefor a stipulated price.[14] Where such a contract is entered into on behalf of the city by municipal officers, a suit brought thereon by the city amounts to a ratification thereof.[15] A special indebtedness for local improvements incurred by a void municipality cannot, after the legal creation of the corporation, be so ratified as to convert the liability from that of a special indebtedness to a general one enforceable against all the taxpayers.[16]

§ 4. *Proceedings to authorize or validate making. A. In general.*[17]—Statutes prescribing the proceedings essential to authorize public improvements must conform to the constitution of the state.[18] A public building partially completed under illegal proceedings may be utilized and completed subsequently under proceedings complying with the statute.[19]

30th General Assembly, pp. 69-71, c. 68, §§ 28, 30, 32, 33, 34, to determine how funds shall be raised, where drainage district extends into both counties. Wood v. Hall [Iowa] 110 N. W. 270. The proviso in section 3457, Ky. St. 1903, does not preclude a municipality from binding itself for street improvements although the ordinance and contract therefor do not specify how the work shall be paid for. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310. Under the New York Laws 1892, p. 1759, c. 686, § 63, the power of the board of supervisors of a county to appropriate county funds to aid a town unreasonably burdened by expenses for the construction and repair of bridges extends to the appropriation of such funds, within the limits prescribed, for the payment of bonds issued by the town to pay for the construction of a bridge. Knowles v. Chemung County Sup'rs, 112 App. Div. 138, 97 N. Y. S. 1111. The bonds authorized by section 53 of the Ohio Municipal Code of 1902 cannot be provided for by resolution or ordinance until after the passage of an ordinance providing for the improvement. Heffner v. Toledo, 75 Ohio St. 413, 80 N. E. 8. But under Rev. St. § 2835, the municipal council may, by resolution or ordinance passed by the affirmative vote of not less than two-thirds of the members, provide for the issuing of bonds to pay the city's part of the cost of a specific improvement before the passage of a resolution declaring the necessity for the improvement. Id. Under an Ohio statute a fund raised for the purpose of paying the city's share of contemplated improvements is a general fund from which the city may draw from time to time, as occasion arises, to pay its share of such improvements wherever they may be located within the boundaries of the city, and, in providing for this fund, it is not necessary to wait until legislation with respect to a particular improvement has gone forward to the point where an assessment has actually been levied. Heffner v. Toledo, 9 Ohio C. C. (N. S.) 1.

11. The provisions of the Ohio statutes, Rev. St. 1906, §§ 1536—285, 1536—287, requiring bonds issued for street or sewer improvements to have the name of the street or district written or printed upon them, do not apply to bonds issued to pay the city's part of the cost of such improvements. Heffner v. Toledo, 75 Ohio St. 413, 80 N. E. 8. See, also, Municipal Bonds, 8 C. L. 1046.

12. Ordinance to provide for the issuing of bonds to pay the city's part of the cost of a number of street improvements held not in conflict with the statutory requirement that "no by-law or ordinance shall contain more than one subject, which shall be clearly expressed in its title." Heffner v. Toledo, 75 Ohio St. 413, 80 N. E. 8. Where a parish tax is levied on all property subject to parochial taxation, the allegation, unsupported by proof, that the property in a particular town is to be exempted constitutes no ground for an attack upon an ordinance providing for the building of a court house and dedicating part of the parish tax therefor. Murphy v. Police Jury [La.] 42 So. 979.

See, also, Municipal Corporations, 8 C. L. 1056.

13. Ordinances of police jury appropriating money for the construction of a court house construed with reference to the amount appropriated. Murphy v. Police Jury [La.] 42 So. 979.

14. City of Worcester v. Worcester & H. Consol. St. R. Co. [Mass.] 80 N. E. 232. The fact that the construction provided for by such a contract was a departure from the order of the board of aldermen was held not to affect the validity of the contract. Id.

15. City of Worcester v. Worcester & H. Consol. St. R. Co. [Mass.] 80 N. E. 232.

16. State v. Moss [Wash.] 86 P. 1129.

17. See 6 C. L. 1148.

18. Kansas Laws 1901, p. 673, c. 366 (Gen. St. 1901, § 1068), not unconstitutional. Clarke v. Lawrence [Kan.] 88 P. 735.

19. Where issue of bonds and construction of a court house had been restrained because the action of county commissioners was not according to statutory require-

(§ 4) *B. By whom and how initiated.*[20]—In many states the making of certain kinds of improvements [21] are required to be initiated by a petition of the persons whose property will be benefited by the improvement or is situated within the district to be improved.[22] The petition must conform to the requirements of the statute.[23] It is usually required to be signed by the majority of the landowners whose lands will be benefited by the improvement or lie within the district to be improved,[24] or by the majority of the owners in value of such lands,[25] or perhaps more frequently in the case of street improvements by the owners of a majority of the foot frontage of property in the improvement district.[26] In Indiana boards of county commissioners in counties having over 25,000 inhabitants are authorized to construct court houses only upon petition of 500 resident freeholders of the county.[27] An omission by a petitioner for a street improvement to note in the petition the date of his signature, as required by statute, will not render the proceedings wholly void.[28] In Arkansas none of the signers of the second petition for an improvement within an improvement district can withdraw their names therefrom after the appointment of the board of improvement.[29] In Kansas the action of the mayor and council of a

ments, in a subsequent action to restrain the county commissioners from proceeding in the same matter according to law, the destruction and removal of the partially completed court house will not be required. State v. Newton County Com'rs [Ind. App.] 76 N. E. 308.

20. See 6 C. L. 1148.

21. Facts not constituting a change in the "established" grade of a street within the meaning of a provision in a municipal charter declaring that the established grade of a street shall not be changed except upon petition of abutting owners. People v. Common council, 99 N. Y. S. 657.

22. In Nebraska it is not competent for a city of the metropolitan class to petition itself for improvements in a street improvement district within such city. Herman v. Omaha [Neb.] 106 N. W. 593.

23. Sufficiency of petition for construction of gravel road, under the Indiana statute, Acts 1903, p. 255, c. 145, § 2, to confer upon board of county commissioners jurisdiction of the subject-matter. Todd v. Crail [Ind.] 77 N. E. 402. Petition for the widening and improvement of a **drain,** and proceedings subsequent thereto held not to be so defective as to deprive the probate court of jurisdiction of the proceedings for the improvement under the Michigan statutes. Auditor General v. Bolt [Mich.] 111 N. W. 74. The provisions of the Kansas statute (Gen. St. 1901, § 730), requiring that the petition for **street paving** shall give a specific description of the material to be used, is fully complied with in cases where vitrified brick is to be used, by the use of the words "vitrified brick," followed by words describing the standard of quality desired. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034. Petition for **new sidewalk** held sufficiently specific as to location. City of Fayette v. Rich [Mo. App.] 99 S. W. 8. The petition for a **sidewalk** need not state the kind of walk, the material, nor the length or width of the same, where the statute does not require it to do so. Id.

24. In Ohio an improvement of a public road in a county is initiated by a petition to the county commissioners, by a majority of all the owners of real estate who are residents of the county and own lands lying within one mile of the road to be improved. Act of April 4, 1900, § 1 (94 Ohio Laws, p. 96). Alexander v. Baker, 74 Ohio St. 258, 78 N. E. 366. A petition not signed by a majority of such resident landowners does not confer jurisdiction upon the commissioners, and if they assume to act on it, they may be restrained by injunction. Id.

25. In Arkansas the names of the majority of the owners in value of the real estate in an improvement district must be signed to a petition for an improvement. Kirby's Dig. § 5667; Lenon v. Brodie [Ark.] 98 S. W. 979. In determining whether the names of such majority are signed to the petition, the value of church and college property in the district should not be included in the valuation, but the **assessed value** instead. Kirby's Dig. §§ 5717, 6987. Id. Nor ought the value of a **street railway franchise** in the district to be included in the valuation where the company owning it has no easement or freehold interest in the soil or exclusive control of the highway. Id.

26. Public parks belonging to a city of the metropolitan class are not taxable property within the meaning of the Nebraska statute, § 110 (111), c. 12a, Comp. St. 1903, and are properly excluded in determining whether a petition for a street improvement includes the record owners of a majority of the foot frontage of taxable property in the improvement district. Herman v. Omaha [Neb.] 106 N. W. 593. The Indiana Acts 1903, p. 255, c. 145, do not contemplate that a petition for the improvement of a highway shall be signed by more than one landholder for each abutting tract, and the one intended is the owner of the fee. Kemp v. Goodnight [Ind.] 80 N. E. 160. Upon the question whether a petition for the improvement of a highway was signed by the required number of abutting landowners, evidence held sufficient to show that certain land abutted on the highway. Id.

27. Burn's Ann. St. 1901, § 5589a. Kraus v. Lehman [Ind. App.] 80 N. E. 550. No duty is imposed on the board to act upon such a petition. Id.

28. State v. Several Parcels of Land [Neb.] 110 N. W. 753.

29. Lenon v. Brodie [Ark.] 98 S. W. 979.

city of the first class in determining the sufficiency of a petition for a street improvement is a final determination and conclusive evidence as to the sufficiency of the petition.[30] Under the charter of Kansas City, the owners of a majority in front feet of the lands fronting on a street to be paved may by petition select the paving material.[31]

A municipal council does not lose jurisdiction over a petition for a street improvement by reason of a delay of two years in taking action thereon.[32] In some of the states before the enactment of an ordinance for a local improvement, it is required that there shall be a preliminary resolution by the mayor and council,[33] or the board of local improvements.[34] The resolution is generally required to describe the work to be done and the materials to be used.[35] The object of the Illinois local improvement act is attained if the resolution contain such a description of the improvement as to give property owners a general understanding of what is proposed to be done and the estimated cost.[36] An agreement with the proprietors of a cemetery to connect a branch sewer with the cemetery drainage will not invalidate the original resolution for the construction of the main sewer.[37] An ordinance to serve as the basis of construction of sidewalks at abutter's cost must do more than merely locate the sidewalks, it must create a duty to construct them,[38] and if theirs is the primary duty, a notice and reasonable time must precede a default.[39] It is sometimes required by statute that the resolution for a municipal improvement shall be published in a newspaper for a certain number of days.[40] It is essential to the

30. Union Pac. R. Co. v. Kansas City [Kan.] 85 P. 603.

31. In computing the time within which such petition is required to be filed, Sundays are included. Curtice v. Schmidt [Mo.] 101 S. W. 61.

32. Whipple v. Toledo, 7 Ohio C. C. (N. S.) 520.

33. Under the Kansas statute (Gen. St. 1901, § 1068), relating to cities of the second class having a population of more than 10,000 inhabitants, a street improvement is inaugurated by a resolution of the mayor and council. Clarke v. Lawrence [Kan.] 88 P. 735. Under the Missouri statute, Rev. St. 1899, § 5860 (Ann. St. 1906, p. 2967, § 5859), the passage and publication of a preliminary resolution is not essential to the validity of an ordinance for the construction of a sidewalk. City of Joplin v. Hollingshead [Mo. App.] 100 S. W. 506.

34. In Illinois city councils are not authorized to originate any improvement to be paid for by special assessment or special taxation, but every scheme for such an improvement must have its origin with a board of local improvements. Ogden, Sheldon & Co. v. Chicago, 224 Ill. 294, 79 N. E. 699.

35. Under the Missouri Laws 1901, p. 65, § 5859, a resolution for paving a street specifying the material for the pavement and that the paving is to be done in accordance with plans and specifications to be furnished by the city engineer is sufficient, although the plans and specifications are not on file when the resolution is passed. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22. A resolution of intention to macadamize a street held to be defective in not describing the work to be done, as required by the California statute (St. 1891, p. 196, c. 147, § 3), the kind or quality of rock to be used not being specified. Lambert v. Cummings, 2 Cal. App. 642, 84 P. 266. The same resolution held equally defective as to gutters for the same reason. Id.

36. Ogden, Sheldon & Co. v. Chicago, 224 Ill. 294, 79 N. E. 699. All the details of the improvement need not be set out. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675; Gage v. Chicago, 225 Ill. 218, 80 N. E. 127. Resolutions for the curbing, grading, and paving, with asphalt of a street are sufficient though they do not specify the width of the roadway, give the thickness of the asphalt wearing surface, or name the places where the grading is to be done. Ogden, Sheldon & Co. v. Chicago, 224 Ill. 294, 79 N. E. 699. A resolution for a street improvement is sufficient if it identifies the improvement in a general way by reference to a previous resolution, although it does not include in the description the adjustment of sewers and other things provided for in the first resolution. Id. Resolutions held sufficiently specific. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

37. Edwards v. Cooper [Ind.] 79 N. E. 1047.

38. Angle v. Stroudsburg Borough, 29 Pa. Super. Ct. 601.

39. Angle v. Stroudsburg Borough, 29 Pa. Super. Ct. 601. Thirty days to build sidewalks held too little where the previous custom was to allow sixty. Id.

40. Under the Kansas statute (Gen. St. 1901, § 1068), a resolution of the mayor and council for a street improvement in a city of the second class must be published in the official daily paper for five consecutive days. Clarke v. Lawrence [Kan.] 88 P. 735. In the publication of such resolution, the unauthorized placing of a headline which states that the first publication was made on a date one day earlier than it actually occurred, will not, in the absence of proof that any one interested was misled to his prejudice thereby, vitiated such publication. Id.

validity of a municipal improvement that an ordinance providing for it should be adopted by the legislative body of the municipality, which is usually the council.[41] Such an ordinance must conform to the municipal charter or the statute delegating authority to make the improvement, and must comply with all other statutory requirements,[42] and in St. Louis must not conflict with general ordinances.[43] In Illinois if there is, in the case of a street improvement, a willful or susbtantial varience between the resolutions of the board of local improvements or the estimate of the engineer, and the ordinance authorizing the improvement, the ordinance will be invalid.[44] In that state an ordinance for a local improvement must prescribe the nature, character, locality, and description, of such improvement.[45] An ordinance for a street improvement must give such a description of the improvement that an intelligent and correct estimate of its cost can be made, and, in order to do this, the ordinance must, either upon its face or by reference to some other ordinance, map, profile, or specifications, indicate the grade of the street which it proposes to improve.[46] The ordinance must also describe the location [47] and dimensions [48] of the

41. In Arkansas the legislature has imposed the duty of forming improvement districts in municipalities and defining their boundaries upon the municipal councils. Lenon v. Brodie [Ark.] 98 S. W. 979. Where in order to construct a municipal street improvement it is necessary to lengthen existing culverts, such work must be provided for by a regular ordinance adopted by the council. It cannot be by resolution or instruction. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675.

42. Under sections 1 and 2 of Ordinance A 1080, p. 83, Code and Charter of the city of Spokane, the municipal council may by a **two-thirds vote** initiate proceedings for a sewer improvement without a petition therefor. City of Spokane v. Preston [Wash.] 89 P. 406. Under Ky. St. 1903, § 3567, two-thirds of the members of the council of a city of the fourth class concurring may order a street improvement without a petition from a majority of the property owners, but where there is such a petition the improvement must be ordered at one meeting by a majority yea and nay vote. City of Latonia v. Hedger [Ky.] 100 S. W. 267. Under the statutes of Illinois, and ordinance for a municipal improvement can be passed only by the vote of the majority of the members of the city council; a majority of a quorum is not sufficient for this purpose. McLean v. East St. Louis, 222 Ill. 510, 78 N. E. 815. Proceedings of a municipal council authorizing a sewer improvement held to show a substantial compliance with the South Dakota statute (Rev. Pol. Code, § 1209), requiring a **yea and nay vote** to be taken and an entry made in the record. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

43. Under the charter of St. Louis, a special ordinance for a street improvement whose provisions as to width of roadway and sidewalk are in conflict with a prior general ordinance is void. Asphalt & Granitoid Const. Co. v. Hauessler [Mo.] 100 S. W. 14.

44. Gardner v. Chicago, 224 Ill. 254, 79 N. E. 624; Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675; Howe v. Chicago, 224 Ill. 95, 79 N. E. 421. But it is not every subtle distinction in words that ingenious counsel can detect that constitutes a willful and substantial variance. Howe v. Chicago, 224 Ill. 95, 79 N. E. 421. Material and substantial variance as to portion of street to be paved, invalidating ordinance. Gardner v. Chicago, 224 Ill. 254, 79 N. E. 624. A willful and substantial variance as to the grade of the improvement. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675. Resolution of board of local improvements not fatally at variance with improvement ordinance. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127. No variance as to the extent of the improvement. Id., 225 Ill. 135, 80 N. E. 86. Variance as to gutter and curb neither willful nor substantial. Howe v. Chicago, 224 Ill. 95, 79 N. E. 421. No variance as to description of curb Lyman v. Cicero. 222 Ill. 379, 78 N. E. 830. Variance as to extent of sidewalks to be laid not material. Gage v. Chicago, 223 Ill. 602, 79 N. E. 294.

45. Local Improvement Act of 1897 (Hurd's Rev. St. 1897, p. 356), Chicago Union Trac. Co. v. Chicago, 222 Ill. 144, 78 N. E. 54. A substantial compliance with the terms of this statutory requirement is all that is necessary. Id. It is not essential that the details and all the particulars of the work should be stated. Id. Where the descriptive terms used in the ordinance have a well-known and established meaning, any apparent defect or omission in the description will be removed. Id.

46. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675. An ordinance for the paving and grading of a street in a city where the streets are universally known to be upon a practically dead level is sufficient if it establishes the grade at points where streets intersect, though it does not specifically state what the grade shall be at other points. Ogden, Sheldon & Co. v. Chicago, 224 Ill. 294, 79 N. E. 699.

47. Ordinance for a street improvement held not to be void for uncertainty as to where curbstones are to be placed. Beers v. Chicago, 225 Ill. 376, 80 N. E. 288. Ordinance for construction of sidewalk sufficiently certain as to the incline of the walk and its location with reference to the property line. Gage v. Chicago, 223 Ill. 602, 79 N. E. 294. A sidewalk ordinance which contains nothing from which it can be inferred, whether the walk is to adjoin the curb line or property line, is void for un-

improvement, the kind [49] and amount [50] of material to be used, and, where catch basins are required, the number of them.[51] An ordinance for the construction of a sewer must specify its dimensions and the materials to be used.[52] The objection that it contains no provisions for excavating and filling is not available where from its terms it can readily be ascertained what amount of excavating and filling will be necessary.[53] In Missouri the failure of an ordinance for a local improvement to fix the time for the completion of the work does not invalidate the ordinance.[54] Whether or not ordinances for a street improvement may divide the distance to be improved, and provide for the improvement of each division by a separate contract, is to be determined from the terms of the statute authorizing the improvement.[55] An invalid section of an ordinance for a street improvement cannot be rejected and the remainder of the ordinance stand, unless such remainder would be complete authority under the municipal charter to construct the work provided for.[56] Whether a statute requiring publication of ordinances applies to an ordinance for a local improvement is to be determined from an interpretation of its terms.[57] A presumption exists in favor of the validity of an ordinance for a local improvement if properly adopted by municipal authority.[58]

The courts cannot interfere with the discretion vested in the municipal council

certainty. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350.

48. Ordinance for a street improvement held not to be void for uncertainty as to how such roadway is to be paved at the intersection of two streets. Beers v. Chicago, 225 Ill. 376, 80 N. E. 288. A paving ordinance held to be sufficiently definite as to the height of the curb at alley intersections. Gage v. Chicago, 225 Ill. 135, 80 N. E. 86. An ordinance for a street improvement sufficiently specifying the dimensions of the foundation of cinders required to be placed under the combined curb and gutter and gutter flags. Uhlich's Estate v. Chicago, 224 Ill. 402, 79 N. E. 598.

49. Paving ordinance meeting requirements of Ohio statute, Municipal Code, § 55 (Rev. St. 1906, § 1536—215), that ordinance shall contain a statement of the general nature of the improvement and the character of the materials which may be bid upon therefor. Emmert v. Elyria, 74 Ohio St. 185, 78 N. E. 269. In a paving ordinance the term "asphaltic cement," as descriptive of one of the ingredients of the pavement, was held to be sufficiently certain under the Illinois statute, and evidence that such term had a well understood meaning among contractors and persons familiar with the construction of asphalt pavements was held competent to explain its meaning in such ordinance. Chicago Union Traction Co. v. Chicago, 223 Ill. 37, 79 N. E. 67; Id., 222 Ill. 144, 78 N. E. 54.

50. Ordinance for street improvement sufficiently certain as to amount of granite and gravel to be used. Gardner v. Chicago, 224 Ill. 254, 79 N. E. 624.

51. Ordinance for street improvement ambiguous and uncertain as to the number of catch-basins to be used. Gardner v. Chicago, 224 Ill. 254, 79 N. E. 624.

52. Under Missouri statute, Rev. St. 1899, § 5848 (Am. St. 1906, p. 2956), requiring that sewers "shall be of such dimensions and materials as may have been prescribed by ordinance," an ordinance for the construction of a sewer held to be sufficiently specific as to dimensions and materials. City of Joplin v. Hollingshead [Mo. App.] 100 S. W. 506. Ordinance for sewer improvement from which the thickness of the house slants to be used in the improvement sufficiently appears. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

53. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

54. Jaicks v. Middlesex Inv. Co. [Mo.] 98 S. W. 759.

55. Such ordinances following the recommendations of the board of public works held valid under the provisions of a municipal charter. Geiwitz v. Landis [Mo. App.] 101 S. W. 154.

56. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350. A municipal ordinance authorizing the construction of a sewer is not rendered invalid by the fact that it attempts, without authority, to fix the amounts to be assessed on abutting property, if after eliminating such provision, it contains the essentials of a complete ordinance for the purpose for which it is enacted. In re Wheeler Ave. Sewer, 214 Pa. 504, 63 A. 894.

57. Section 3487, Ky. St. 1903, relating to the publication of ordinances does not apply to an ordinance for a street improvement passed, without petition, by a two-thirds majority of the council of a city of the fourth class. City of Latonia v. Hedger [Ky.] 100 S. W. 267.

58. City of Belleville v. Herzler, 225 Ill. 404, 80 N. E. 269. In the absence of proof to the contrary, it will be presumed from an ordinance fixing a grade with reference to the town datum that such datum has theretofore been established by the municipality, and it is not essential in making out a prima facie case where it is necessary to show the grade of the street or improvement, and the ordinance fixing that grade refers to town datum to introduce the ordinace establishing the town datum. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 4

unless the ordinance is so unreasonable and oppressive as to render it void.[59] Some of the peculiar provisions of ordinances relating to street improvements have received interpretation in the cases cited.[60]

In some states authority in relation to public improvements is conferred on public boards of commissioners,[61] and the qualifications of such commissioners, and the performance of certain conditions as a prerequisite to their right to act as such, prescribed.[62] In Arkansas the order of a county court forming a levee district regular on its face, and containing all the necessary jurisdictional recitals is prima facie sufficient to prove that the district was legally established.[63]

(§ 4) *C. Notice and hearing.*[64]—The statutes generally provide that notice shall be given of a contemplated local improvement. It is sometimes required in the case of a street improvement, to be posted along the line of the contemplated work.[65] Usually it is required to state the nature and location of the improvement and to inform landowners as to what premises will be affected by it.[66] Sometimes it is provided that it shall not be permissible to order the work done until after the expiration of a prescribed number of days after publication of notice,[67] and a

59. City of Belleville v. Herzler, 225 Ill. 404, 80 N. E. 269; City of Belleville v. Pfingsten, 225 Ill. 293, 80 N. E. 266. Unless it is shown that the municipal council acted in bad faith and not for the best interests of the public, an ordinance for a street improvement will be upheld although another grade than that established might have been better. City of Belleville v. Herzler, 225 Ill. 404, 80 N. E. 269. Evidence held not to warrant the court in holding an ordinance for a street improvement void for unreasonableness. City of Belleville v. Pfingsten, 225 Ill. 293, 80 N. E. 266; City of Belleville v. Herzler, 225 Ill. 404, 80 N. E. 269. An ordinance for the construction of a pumping station and system of sewers held to be void on the ground of unreasonableness. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93.

60. Terms of ordinance for street improvement construed and held not to provide for the construction of a curb on the west side of a certain street mentioned therein. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42. Under an ordinance for a street improvement which fixes the **grade of the street** at intersections, the grades at the intermediate points will be a line drawn from the grade fixed at one intersection to the grade fixed at another intersection; that is the grade is to be fixed on a line which is the shortest distance between the two points. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675. Language of an ordinance for a street improvement held to be too general to make a **profile referred to** in the prior resolution of the board of public improvements a part of the ordinance. Id.

61. Decision of board of commissioners that jurisdiction has attached to it of proceedings for the construction of a gravel road, under the Indiana statute, Acts 1903, p. 255, c. 145, conclusive. Todd v. Crail [Ind.] 77 N. E. 402. Where a board of public works has authority to open streets and to obtain the right of way for a sewer, the fact that it adopts a resolution for the building of a sewer in a proposed street not yet opened is a mere irregularity of which no property owner can complain, where the street is regularly opened before the final hearing. Edwards v. Cooper [Ind.] 79 N. E. 1047.

62. Under the Michigan statute (Comp. Laws, § 4317), a county road commissioner is not disqualified from acting as a special county drain commissioner. Auditor General v. Bolt [Mich.] 111 N. W. 74. Under the Michigan statutes, a special drain commissioner is not required to file an oath of office, but only a bond. Id.

63. Overstreet v. Levee Dist. [Ark.] 97 S. W. 676.

64. See 6 C. L. 1150.

65. The California Street Improvement Act (St. 1891, p. 196, c. 147, § 3), which provides that notices of a contemplated improvement shall be "posted along the line of said contemplated work or improvement at not more than one hundred feet in distance apart, requires notices not more than 100 feet longitudinally along the line of the improvement; but if the notices are not more than 100 feet apart, measuring the distance along the center of the improvement, the statute is complied with, it matters not upon which side of such center line the notices are actually posted. Pepper v. Neiman [Cal. App.] 87 P. 286.

66. Notice required to be given by the Illinois statute, Local Improvement Act, § 34 (Hurd's Rev. St. 1905, c. 24, § 540), of the passage of an ordinance for local improvements, held sufficient to inform the owner or occupant of the nature of the improvement and of the premises affected by the ordinance. Gage v. Chicago, 223 Ill. 602, 79 N. E. 294. Petition and notice in proceedings for the construction of a ditch, sufficiently describing the proposed beginning and route of the ditch, to give the court jurisdiction and to put the landowners upon notice of the proceedings. Ritter v. Drainage Dist. [Ark.] 94 S. W. 711.

67. Under the California statute (St. 1885, p. 147, c. 153), providing that at the expiration of twenty days after the expiration of the time of publication of notice of intention to have street improvement work done, a municipal council shall have jurisdiction to order the work done, an ordinance ordering the work done passed prior to the expiration of such twenty days is without

reasonable time should be allowed property owners to do the work before doing it at their expense.[68] A public hearing of objections by interested landowners is often required. In Illinois the board of local improvements, in the resolution for a proposed improvement, are required to fix the time and place for such hearing.[69] Whether after such public hearing it is permissible to make changes in the improvement or additions thereto without a further hearing is to be determined from the particular statute involved.[70]

(§ 4) *D. Protests and remonstrances.*[71]—Protests and remonstrances against the proposed improvement are governed by the peculiar provisions of the statutes in the several states.[72]

(§ 4) *E. Estimates of cost.*[73]—It is perhaps a universal requirement that an estimate of the cost of the improvement shall be made by the municipal engineer or some other officer authorized to make it.[74] An estimate of the cost of a local improvement should be sufficiently itemized and so specific as to give the property owners a general idea of what it is estimated the substantial component elements of the improvement will cost.[75] In Illinois when an improvement consists of substantially different parts or elements, the estimate must state each part or element separately, with the cost of each in separate items.[76]

jurisdiction and void, though it is not signed by the mayor and published until after the expiration of the twenty days. Mulberry v. O'Dea [Cal. App.] 88 P. 367.

68. Thirty days for sidewalk held too little. Angle v. Stroudsbury Borough, 29 Pa. Super. Ct. 601.

69. It is essential that the requirement of the Illinois local improvement act, that the board of local improvements must, in the resolution for a proposed improvement, fix the time and place for a public hearing shall be complied with, notwithstanding the improvement might be inaugurated by the board in any event. Lyman v. Cicero, 222 Ill. 379, 78 N. E. 830. A resolution by the board of local improvements fixing a day for a public hearing for a proposed improvement, but not fixing the hour or place of hearing, is not a compliance with the Illinois local improvement act, and an attempt by the clerk in notices of such hearing to fix the time and place would be ineffectual to cure such defect. Id.

70. Under the Indiana statute (Acts 1901, p. 608, c. 262), relating to municipal improvements, it is lawful for the board of public works, after the general hearing on a resolution to construct a district sewer has been had, to modify the resolution by adding a branch of the proposed work, without giving a further hearing after the modification, on the character of the work proposed. Edwards v. Cooper [Ind.] 79 N. E. 1047.

71. See 6 C. L. 1151.

72. In Kansas, in cities of the second class, after a resolution for a street improvement has been published, the mayor and council have power to cause the improvement to be made, unless a majority of the resident property owners liable to taxation for such improvement shall, within twenty days of the last publication, file with the city clerk their protest in writing against the improvement. Gen. St. 1901, § 1068. Clarke v. Lawrence [Kan.] 88 P. 735. Under the Missouri Laws 1901, p. 65, § 5859, it is sufficient if plans and specifications for a street improvement are prepared and accessible to the property owners in time for inspection and protest, although they are not marked "filed," and are not actually filed until after the publication of the resolution for the improvement. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22. In a proceeding under Indiana Acts 1903, p. 261, c. 145, for the improvement of a highway, the decision of the board of commissioners upon certain causes of remonstrance is final, and no appeal lies therefrom. Kemp v. Goodnight [Ind.] 80 N. E. 160.

73. See 6 C. L. 1152.

74. Under the Nebraska Laws 1879, p. 197, § 20, an estimate of the cost of a municipal improvement must be made and submitted to the city council by the city engineer before a contract for such improvement is let. The requirement of this statute is mandatory. Murphy v. Plattsmouth [Neb.] 110 N. W. 749. Where it is provided that estimates of the cost of an improvement may be made by the city engineer or other proper officer, such estimates may be made by any officer or officers the municipal council selects. City of Fayette v. Rich [Mo. App.] 99 S. W. 8.

75. Doran v. Murphysboro, 225 Ill. 514, 80 N. E. 323. Estimate held fatally defective. Id. Estimate of cost of a local improvement, calling for a special assessment, held not to be open to the objection that it contained items of expense which were required to be paid by the city out of the general fund. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127. The engineer's estimate of the cost of a street improvement stated that it included labor, material, "and all the other expenses attending the same, as provided by law." It was itemized, and among the items was not included the making and levying the assessment, the letting and executing the contract, the making and returning the assessment roll, or the advertising for bids. It was held that the estimate was unobjectionable. Id., 223 Ill. 602, 79 N. E. 294.

76. Lyman v. Cicero, 222 Ill. 379, 78 N. E. 830. Cost of improvement not properly itemized. Id.

(§ 4) *F. Approval and acceptance of work.*[77]—It is often provided by statute or contract how work shall be inspected, accepted and approved, before the public liability is mature,[78] and until it is done, bonds issued in payment should not be delivered.[79] An engineer whose decision is made final is not thereby inhibited from taking counsel thereto provided the decision made is his own.[80]

(§ 4) *G. Curative legislation and ratification.*[81]

§ 5. *Proposals, contracts and bonds. Advertisements, bids, and awarding of contract.*[82]—Most public improvement statutes contain the requirement that there shall be competitive bidding for the contract for the work. This requirement does not always extend to every item of the work.[83] A provision that the public officers "may" advertise does not require them to do so,[84] and, in rejecting all bids and negotiating new contracts privately at a lower figure, the taxpayers are not damnified.[85] The failure to advertise renders the contract void only when advertisement is a prerequisite to power to let the contract.[86] After the abandonment of a contract the municipality may complete the work without again advertising for bids.[87] Notice of the letting of the contract must be published in the manner prescribed by statute,[88] and the advertising must be done and the award made by the municipal council or other body or officer authorized.[89] In the absence of a statutory requirement to that effect a municipal council need not fix the time at which bids will be received or opened.[90] Generally as a prerequisite to the bidding it is required that plans and specifications of the improvement shall be made and filed.[91] The specifi-

77. See 6 C. L. 1153.

78. See Public Contracts, 8 C. L. 1473; Building and Construction Contracts, 7 C. L. 480.

79. The requisite confirmation and finding that the improvement conformed to the ordinance must precede delivery of improvement bonds to the contractor where the assessments were laid on the instalment plan. Case v. Sullivan, 123 Ill. App. 671.

80. Bowers Hydraulic Dredging Co. v. U. S. 41 Ct. Cl. 214.

81, 82. See 6 C. L. 1153.

83. In New York services required in the construction of a public work or improvement requiring scientific knowledge and skill need not be obtained by competitive bidding. Horgan v. New York, 100 N. Y. S. 68. Thus it was held not to be necessary to let the contract for the preparation of plans and specifications for a proposed armory by competitive bidding. Id.

84, 85, 86. Dillingham v. Spartanburg [S. C.] 56 S. E. 381.

87. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

88. Under the Iowa statute, Code, § 813, providing for two publications of notice of the letting of bids for contracts for street and sewer improvements, each publication must be at least ten days before the day fixed for opening the bids and awarding the contract. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51. Notice of the letting of a contract for a street improvement held sufficient under the Indiana statute, Acts 1901, p. 534, c. 231, § 1, requiring the common council to give notice of the letting of such contracts by three weeks publication in a newspaper. Shirk v. Huff [Ind.] 78 N. E. 242.

89. The New Jersey statute, Act March 22, 1900 (P. L. p. 190), makes the county building commission created by it agents of the county to award a contract for the building of a county courthouse, and, therefore, a contract awarded by such commission is binding on the county. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742. Where authority is vested in a municipal council to advertise for bids and let a contract for a public improvement, the action of the council in directing a committee to advertise for bids is not a delegation of its powers, the act being in no sense legislative. City of Fayette v. Rich [Mo. App.] 99 S. W. 8. But it cannot in such case delegate to the committee power to make the contract. Id. But this objection cannot be raised where no contract was made by the committee and the council subsequently directed the work to be done by the committee at the expense of the municipality. Id.

90. Under the California Street Improvement Act, § 5 (St. 1891, p. 199), the municipal council is not required to limit the time within which proposals for street improvements may be delivered to its clerk, or to fix the day or hour at which it will open or consider them; nor is it required to direct the clerk to designate in his notice inviting such proposals any day or hour at which they shall be delivered to him. Beckett v. Morse [Cal. App.] 87 P. 408.

91. In Ohio bridges cannot be contracted for and constructed without any plans and specifications being prepared therefor, and an averment in an action by the county that a contract was entered into without proposals being solicited for a structure in accordance with any plans whatever, and that no plans were kept on file with the county auditor, is therefore good against a motion to strike out. State v. Huston, 4 Ohio N. P. (N. S.) 423. The Missouri Laws 1901, p. 65, § 5859, does not require that plans and specifications for a street improvement shall be

cations should be clear enough to enable bidders to bid intelligently.[92] It is not always essential that bids for the whole work be invited.[93]

It is a general rule that where a statute requires competition in the letting of contracts, any provision contained in an ordinance therefor which tends to prevent or destract competition among persons who may desire to become bidders is in contravention of the statute and therefore illegal.[94] Any provision included in the bids and carried into the contract which manifestly increases the amount of the bids and prevents fair and reasonable competition will render the contract void,[95] but adding conditions to safeguard and guarantee the work though tending to a higher contract price is not for that reason a burden on free and fair competition.[96] To secure fair competition and avoid extravagance the statutes usually provide that the contract shall be let to the lowest responsible bidder. In determining whether a letting is violative of such a provision the terms of the statute and the facts of the particular case must be considered.[97] Any material departure in the contract awarded from the terms and conditions upon which the bidding was had is in evasion of such a requirement.[98] In Ohio, South Carolina, and Iowa it has been held that it is not a

on file any specified number of days before the making of the contract for the work. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22.

92. Where the work is of the character involved in the building of an extensive municipal waterworks plant, it is not necessary that the specifications to be submitted to the bidders should go into any greater detail than is required to make the matter intelligent to persons competent to do the work and furnish the materials. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1. Specifications for contract held not to be too vague and indefinite in the description of the materials, manner, and extent of the work to admit of competitive bidding. Jaicks v. Merrill [Mo.] 98 S. W. 753.

93. It is proper for aqueduct commissioners charged with the construction of dams and reservoirs to ask for bids at unit prices for doing the work and furnishing the materials. Walter v. McClellan, 113 App. Div. 295, 99 N. Y. S. 78.

94. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280.

95. As there was no authority under the Iowa statute, Acts 30th, General Assembly, p. 61, c. 68, for the boards of supervisors of counties in letting contracts for drains to provide that the contractors should purchase bonds to provide for the preliminary expenses, and for the rights of way, and for the inclusion of this matter in the bids, such requirement, as it manifestly increased the amount of the bids and prevented fair and reasonable competition, was held to be sufficient ground, in the absence of other matters, to avoid the contract. Wood v. Hall [Iowa] 110 N. W. 270. But in a suit in equity by taxpayers to annul such contracts on this ground, it was held that under all the circumstances of the case an estoppel arose against plaintiffs. Id. When a contract for a public improvement is void for the reason that no opportunity is given therein for free competition in the purchase of materials used, the whole proceedings are void. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 103.

96. Dillingham v. Spartanburg [S. C.] 56 S. E. 381. Provisions for indemnity bond and for withholding ten per cent. of the compensation for a year are not invalid as unduly limiting competition to those financially able to perform them. Id.

See, also, ante, Public Contracts, 8 C. L. 1473.

97. Where a municipal ordinance provides for the letting of a contract to the lowest and best bidder, the municipality is bound to follow that method although the statute does not in express terms make that method exclusive. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701. The provision of section 143 of the Municipal Code that the board of public service shall make a contract with the lowest and best bidder, or may reject any and all bids, does not limit the board to a mathematical computation as to who is the lowest responsible bidder, but permits the board to go beyond the price bid and the character of the bidder and to accept the best proposition offered, considering quality, feasibility, and efficiency of the thing to be furnished, the qualifications and responsibility of the bidder, and the price proposed in view of all the other considerations. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1. A contract made by a city for the construction of public improvements therein will not be held void because in violation of the Kansas statute, Gen. St. 1901, § 747, requiring such contracts to be let to the lowest responsible bidder unless it be shown that the contract was in some way the result of acts done which are prohibited by the statute. American Bonding Co. v. Dickey [Kan.] 88 P. 66. The discretion of the board of public service is not to be interfered with in the matter of awarding the contract to another than the lowest bidder except for fraud or collusion. Scott v. Hamilton, 4 Ohio N. P. (N. S.) 1.

98. Murphy v. Plattsmouth [Neb.] 110 N. W. 749. Where a statute provides that an estimate by the city engineer of the cost of a municipal improvement shall be published with the advertisement for bids for making such improvement, and that no contract shall be let for a price exceeding such estimate, the inhibition against letting a contract at a price in excess of the estimate

violation of such requirement to prescribe the use in the improvement of a patented material.[99] But in Illinois a contrary decision has been reached.[1] In Missouri and Kansas it has been held that such requirement is violated by prescribing the use of a brick manufactured by a certain company in the paving of streets.[2] But it is not a violation of such a requirement to insert in the contract for the improvement a provision for compensation for extra work, where such provision is known to all bidders.[3] The waiver by the lowest bidder of a provision in the bid for extra compensation being for the benefit of the property owners and not amounting to the making of a new contract without bids cannot be objected to on that ground.[4] Where officers charged with the construction of a public work are authorized to accept the bid therefor "which will in their judgment best secure the efficient performance of the work," they are not bound to let the contract to the lowest bidder.[5] Where in the award fraud or collusion are shown the contract is void.[6] Some statutes

cannot be evaded by raising the estimate after the bids have been made and opened. Id. But putting several kinds of paving materials upon which bids had been made in competition with each other, and after bids were opened selecting one of the materials and awarding the contract to the lowest responsible bidder upon that kind of material, is not a violation of a municipal charter providing that all bids for work shall be awarded to the lowest responsible bidder, even though a bid had been filed on some other material which was lower than the lowest responsible bid on the selected material. City of Baltimore v. Flack [Md.] 64 A. 702. Where the charter and an ordinance of a municipality require contracts for street improvements to be let on a bid, another charter provision authorizing the council to stop any local improvement and change the plans thereof does not confer the power to dispense with the formalities of a new contract after a plan has been changed. Auditor General v. Stoddard [Mich.] 13 Det. Leg. N. 1062, 110 N. W. 944.

99. In the exercise of a sound discretion, it is competent for the proper city authorities, in advertising for bids for a street improvement, to call for material which is covered or the assembling of which is covered by patents. Holbrook v. Toledo, 8 Ohio C. C. (N. S.) 31. The Iowa statute, Code, § 813, requiring contracts for street improvements to be let to the lowest responsible bidder, is not violated where a contract is let to such bidder, though the resolution of the municipal council and the advertisement for bids require a patented material to be used in the improvement. Saunders v. Iowa City [Iowa] 111 N. W. 529. Use of patented article is not burden on competition. Dillingham v. Spartanburg [S. C.] 56 S. E. 381.

1. Under the Illinois Local Improvement Act, §§ 74, 76 (Hurd's Rev. St. 1905, c. 24, §§ 580, 582), a patented material which can be obtained from but one person cannot be lawfully prescribed by an ordinance providing for the construction of an improvement by special assessment as the effect thereof would be to stifle competition. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280.

Evidence held to show that asphalt is not a patented article, and not under the exclusive control of any company or trust; and, while some of the machinery used by certain companies is patented, there is other machinery which is not patented, and asphalt material can be procured from other companies. Scott v. Hamilton, 4 Ohio N. P. (N. S.) 1.

2. Where a municipal charter requires contracts for municipal improvements to be let to the lowest and best bidder, an ordinance and provision of the board of public works requiring that in a street improvement vitrified brick manufactured by a certain company shall be used, such brick being a common article of manufacture and sale, and a contract for the improvement embodying such requirement, are void. Curtice v. Schmidt [Mo.] 101 S. W. 61. Where a contract for street paving provides that brick of a particular brand manufactured and sold by but one company shall be used, and other kinds of brick equally good for the purpose are made, and sold by other companies, the contract is void under the Kansas statute, Gen. St. 1901, § 747, requiring such contracts to be let to the lowest bidder, and contrary to public policy in restricting and preventing free competition. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034.

3. So held where such provision was inserted in a contract for the construction of a reservoir. Clark & Sons Co. v. Pittsburg [Pa.] 66 A. 154.

4. Wood v. Hall [Iowa] 110 N. W. 270.

5. Walter v. McClellan, 113 App. Div. 295, 99 N. Y. S. 78. Where such authority is conferred upon aqueduct commissioners charged with the construction of reservoirs and dams, they may let the contract for constructing a dam to one whose bid is considerably higher than that of the lowest bidder where time of completion is essential to be considered and the engineers reported in favor of the contractors to whom the award is made, especially where their bid is not much higher than the average bid, is under the estimate of the chief engineer, and considerably less than the highest bid. Id.

6. Where a contract for street lighting is let to the lowest responsible bidder, the fact that there were only three bidders and that the company bidding highest was controlled by the same interests as the company to whom the contract was awarded does not show fraud and collusion rendering the contract void. Sawyer v. Pittsburg [Pa.] 66 A. 86.

require bidders to accompany their bids with an affidavit of noncollusion and a bond for faithful performance.[7]

Limitations on official power to contract are chargeable to all persons and a contract exceeding them though otherwise good is not binding.[8] Where a municipal council has limited the amount for which contracts for an improvement will be let to the sum immediately available for the purpose, though a much larger sum will eventually be needed to complete the improvement, the letting of a contract for part of the improvement within that limitation it not an abuse of power.[9] Under some of the statutes before a contract is made or expenditures incurred an appropriation must be made,[10] or a certificate of the auditor of the county or municipality,[11] or a resolution of the commissioners of the sinking fund,[12] is required; or it is provided that the contract shall be approved by the city attorney.[13] Where a statute which provides that before a contract is let certain requirements shall be performed is mandatory, a contract made without complying with such requirements is void.[14] Long delay in letting the contract does not necessarily affect the power to contract.[15] A contract will not be enjoined on the ground that it was imprudently let where no actual fraud is shown, and there is a conflict of evidence as to whether the price at

7. That part of § 4 of the Indiana Act of Feb. 27, 1899 (Acts 1899, p. 171, c. 110), which requires an affidavit of noncollusion and bond from bidders for the construction of "county work," is void because the subject thereof is not expressed in the title as required by the constitution of the state. State v. Dorsey [Ind.] 78 N. E. 843. A free gravel road is a county work within meaning of such a statute. Id. To satisfy a provision in a municipal charter requiring each bid for a public improvement to have thereon the affidavit of the bidder that such bid is genuine and not collusive or sham, in a case where a bid is made by several persons, there must be an affidavit by each of them. The affidavit in this case was held not to meet the requirement of the charter in this respect and to be otherwise defective. Flinn v. Strauss [Cal. App.] 87 P. 414.

8. Sanger v. U. S., 40 Ct. Cl. 47.

9. Yaryan v. Toledo, 8 Ohio C. C. (N. S.) 1.

10. In Pennsylvania a prior appropriation by a city of the third class is essential to every contract entered into by it in which "the appropriation of money" is involved, and this rule applies to a contract for furnishing electric lights. Therefore the controller of such a city cannot be compelled by mandamus to certify such a contract and countersign warrants drawn for light furnished under it, in the absence of such prior appropriation. Commonwealth v. Foster [Pa.] 64 A. 368.

11. In an action brought by a prosecuting attorney, under Rev. St. § 1277, to recover back money paid out on an illegal county bridge contract, a motion to strike out will not lie as to an averment that there was no certificate of the county auditor as required by the Burns Law that the money required for payment for this bridge was in the bridge fund, or levied, or in process of collection. State v. Huston, 4 Ohio N. P. (N. S.) 423. Where the facts pleaded show good faith in all that was done, failure, through inadvertance, to file an auditor's certificate that the money needed to carry out the contract for a county bridge is in the treasury, as required by Rev. St. § 2834b, does not necessarily render the contract so void that no rights or liabilities can grow out of the transaction; but where the contract has been repudiated, and there is no fraud claimed, and effort is being made to place the parties as nearly as possible in statu quo, the effort should be forwarded by the courts. State v. Fronizer, 8 Ohio C. C. (N. S.) 216, afg. 3 Ohio N. P. (N. S.) 303. Sections 45 and 45a of the Municipal Code of Ohio (Rev. St. 1906 [Bates' 5th Ed.] §§ 1536—205, 1536—205a), providing that no contract involving the expenditure of money shall be entered into unless the auditor of the corporation shall certify to the council certain facts, do not apply to contracts for street improvements when bonds have been authorized by the municipality to be issued to pay the entire estimated cost and expense of the improvement. Emmert v. Elyria, 74 Ohio St. 185, 78 N. E. 269.

12. The armory board of New York city, under Laws 1898, p. 563, c. 212, § 134, had no power to incur any indebtedness for architect's fees which the city would have been liable to pay until it had been authorized to do so by resolution of the commissioners of the sinking fund. Horgan v. New York, 100 N. Y. S. 68.

13. Where a statute providing that a contract for a municipal improvement shall be approved by the city attorney does not provide that the contract shall be void in case his approval is not indorsed thereon, the provision may be regarded as directory and not mandatory. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

14. So held where the requirement was that an estimate of the cost of a municipal improvement should be made and submitted to the city council by the city engineer. Murphy v. Plattsmouth [Neb.] 110 N. W. 749.

15. Long delay in letting a contract for a street improvement, under the facts disclosed, held not to affect the power to contract or the right of the contractor to recover the amount due him on the completion of the contract. Jaicks v. Middlesex Inv. Co. [Mo.] 98 S. W. 759.

which it was let was extravagant.[16] The commissioner of public works in Chicago can not alter a contract made with the city.[17]

By accepting a formal contract substantially departing from the preliminary bids, and acceptance, the contractor is bound.[18]

Form of contract.—It is not necessary that a contract let by an armory board in New York for the preparation of plans and specifications for the erection of a proposed armory should be in writing.[19]

Particular contract provisions.[20]—Where a contract for a municipal improvement is made on behalf of a city by an officer authorized to do so, it must show on its face that it is the contract of the city.[21] In determining whether a contract for a public improvement is valid, regard must be had to the terms of the statute and ordinance, under which it is made and to the facts of the particular case.[22] In the particulars that contracts for municipal improvements are out of harmony with the ordinances authorizing them, the contracts must yield.[23] Of course the contract must not violate any constitutional inhibition,[24] nor must its terms be violative of a restraining injunction.[25] A provision in a contract for the construction of a municipal improvement, imposing conditions on the contractor that will naturally tend to increase the cost of the work, will render the contract void.[26] Under some circumstances, as incident to the subject-matter of a contract, the work may be extended beyond what is expressly covered by its terms.[27] But ordinarily the express

16. Wood v. Hall [Iowa] 110 N. W. 270.
17. City of Chicago v. Duffy, 117 Ill. App. 261.
18. Sanger v. U. S., 40 Ct. Cl. 47.
19. Horgan v. New York, 100 N. Y. S. 68.
20. See 6 C. L. 1154.
21. A contract for a street improvement, between "W. S. Dehoney, mayor of the city of Frankfort, party of the first part, and W. F. Brawner, party of the second part." signed: "City of Frankfort, by W. S. Dehoney, Mayor," sufficiently shows that it is the contract of the city, and it is valid under the Kentucky statute, Ky. St. 1903, § 3450. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.
22. Contracts for street improvements held to come within the requirements of the Iowa statute, Code, § 830, relating to the payment for such improvements from the city improvement fund. Corey v. Ft. Dodge [Iowa] 111 N. W. 6. A provision in a contract for a drainage improvement requiring the contractor to take drainage bonds of two counties in payment for his work will not avoid the contract where the proceedings of the boards of supervisors show that the bonds were to be issued in accordance with the provisions of the Iowa statute, Acts 30th General Assembly, p. 61, c. 68. Wood v. Hall [Iowa] 110 N. W. 270. A contract for a public improvement which provides that the vouchers to be issued in payment therefor shall bear interest, both principal and interest to be paid when collected by the city from the property owners, is not void, and its enforcement cannot be avoided on the ground that payment of interest on assessments cannot legally be required of property holders where such interest has been paid by them voluntarily under a mistake as to their legal rights. City of Chicago v. McGovern, 226 Ill. 403, 80 N. E. 895.
23. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701. But the failure to make special mention of manholes and lampholes in a sewer in the resolution of intent and the notice to bidders will not destroy the effectiveness of a contract for the construction of the sewer providing for such holes. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.
24. Contracts for street improvements made under a statute providing therefor, the cost of which is to be assessed against the abutting property and payment therefor made by delivery to the contractor the assessment certificates with a special provision specifying the manner in which probable deficiencies shall be raised, do not create a municipal indebtedness within the meaning of a constitutional provision limiting municipal indebtedness. Corey v. Ft. Dodge [Iowa] 111 N. W. 6.
25. A temporary injunction restraining a municipality from entering into any contract for street improvements involving the expenditure of any current funds of the municipality, except such as can be lawfully raised by special assessments upon property benefited by such improvements other than property belonging to the municipality, is not violated by a contract providing that the work shall be paid for out of money lawfully raised by special assessment upon real estate and property benefited by the improvement other than real estate belonging to the municipality. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329.
26. Mulberry v. O'Dea [Cal. App.] 88 P. 367. See, also, ante, this section. Such a provision is one imposing upon the contractor liability for all loss or damage arising from the nature of the work, or from any unforeseen obstruction or difficulties which may be encountered in the prosecution of the same, or from the action of the elements, or from any encumbrances on the lines of the work, or from any act or omission on the part of the contractor, or any person or agent employed by him, not authorized by the government. Id.
27. In this case the city surveyor had au-

terms of the contract govern in determining what is covered by it, and compensation cannot be recovered under it for work not covered by such terms.[28] Where specifications are referred to in a contract for a street improvement between owners of frontage and a contractor, for a particular specified purpose, they must be treated as irrelevant for any other purpose.[29] Contract for street improvements usually contain a guaranty of the material and workmanship and sometimes the further guaranty that the street shall be kept in repair for a time specified. Under such a provision the contractor is only obligated for such repairs as are made necessary by the defectiveness of the work or materials,[30] and such provisions do not impose an unauthorized burden on the abutters.[31] It is held that such a provision is void if without sanction in the statutes or ordinances.[32] Where a contractor for a street improvement agrees to accept payment of deficiencies between the amount of a special assessment and the contract price out of a specified fund, it will be presumed that he has in mind a payment in the manner and upon the terms which the law authorizes.[33] Contracts for public improvements sometimes provide that the contractor may, under certain contingencies, be turned off the work before its completion.[34] Notices of the maturity of payments under a contract for a street improve-

thority to so extend a street cleaning contract. Mott v. Utica, 100 N. Y. S. 150.

28. Reservation in a contract for a street improvement held not to extend the power to enlarge the contract so as to include additional work, although only a mathematical calculation was required to determine the cost of such additional work at the rate provided for in the contract. Auditor General v. Stoddard [Mich.] 13 Det. Leg. N. 1062, 110 N. W. 944. Where a bid for the excavation of a borough sewer and the contract executed in conformity therewith and approved by the borough council contain no reference to rock excavation, the contractor cannot recover additional compensation for rock excavation, although he was induced to execute the contract by the assurances of the borough engineer that rock excavation would be paid for at the established and usual rate. Farrell v. Coatesville Borough, 214 Pa. 296, 63 A. 742.

29. Moreing v. Weber [Cal. App.] 84 P. 220.

30. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1. An agreement to furnish brick of such a quality that the pavement constructed of them will require no repairs on account of defective brick for a period of five years after its completion is a guarantee of the character and quality of the brick rather than an agreement to maintain the pavement and keep it in repair for a certain period. City of New Haven v. Eastern Pav. Brick Co., 78 Conn. 689, 63 A. 517. Provision in contract to furnish paving brick to a municipality that if within a certain period any portion of the pavements, because of any broken or worn bricks caused by the defective brick used, should in the opinion of the director of public works require repairs, that then the director should notify the contractor, construed. Id.

31. A contract for the improvement of a street requiring the contractor to keep the same in repair for a specified time is not invalid as imposing on abutting owners the costs of repair when the condition does not impose on the contractor any greater burden than using good material and doing the work in an honest and faithful manner. Morton v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807. Where a contract provides that the street improvements shall be of good workmanship and quality and imposes on the contractor the burden of keeping the pavement in repair for a specified time, the two clauses are to be considered as affording a remedy for the contractor's failure to construct as agreed and hence not imposing on the abutting owner cost of repairs. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

32. Where neither the statute nor the ordinance under which a street improvement is made authorizes any contract to be made for future maintenance, or any appropriation of the money to be raised by the sale of bonds to the payment of any such contract, an agreement for future maintenance cannot be incorporated in the contract for the improvement. City Council of Montgomery v. Barnett [Ala.] 43 So. 92.

33. Corey v. Ft. Dodge [Iowa] 111 N. W. 6. A contract providing for the payment of the amount due for a street improvement in excess of the amount raised by special assessment out of the "paving fund," and another contract providing for the payment of such excess out of the "general paving fund," refer to the fund specified in the Iowa Code, §§ 830, 894, the fund referred to in both sections of the code being the same. Id.

34. Contract for the construction of a reservoir for a municipality conferring upon the director of public works the right under certain contingencies to notify the contractor to discontinue the work and giving the municipality the right to have the work completed by another in accordance with the terms of the contract. Clark & Sons Co. v. Pittsburgh, 146 F. 441. An arbitration clause in a contract for building a reservoir for a municipality held not applicable where the contractor was turned off the work and prevented from completing it by the municipality, under another clause in the contract reserving that right to the municipality, the election to act under the latter clause being a waiver by the municipality of its right to arbitration. Id. Provision in a contract for the construction of a reservoir for a municipality for a final estimate

ment between the owners of frontage and a contractor sent to the signers of the contract cannot affect the contract if the intention of the parties appears clearly and unmistakably from its terms.[35] Some of the peculiar provisions of contracts for public works and improvements have received the interpretation of the courts.[36]

Performance of contract.[37]—The completed work must conform to the initial resolution for the improvement [38] and to the contract therefor. Where the contractor fails in a substantial degree to comply with his contract, the municipality may reject the work and refuse to make payment therefor.[39] A contract exactitude in

upon the completion of the work, and as to the mode and time of payment for the work, held not applicable where the contractor was turned off the work and prevented from completing it, under a right reserved to the municipality under another clause in the contract. Id. Where a contractor for a municipal work is turned off the work before its completion, under a right reserved to the municipality in the contract, it is not incumbent upon him to show what it cost the city to complete the work in order to fix any balance due him. In such case the evidence of increased cost, if there was any, is peculiarly within the knowledge of the municipality, and such increase is a matter of affirmative defense. Id.

35. Moreing v. Weber [Cal. App.] 84 P. 220.

36. Liability for cost of improvement: Under an ordinance for a street improvement and a contract executed in pursuance thereof, it was held that the municipality was liable for the cost of the improvement unless it had authority to bind and had bound the abutting property for the cost thereof. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310. Where a municipality passes an ordinance for a street improvement, creates an assessment district, lets a contract in which it agrees to levy a special assessment, issues warrants on the special fund, and the abutting property owners pay the larger part of the assessments, no general liability will arise against the municipality compelling it to issue general fund warrants. State v. Moss [Wash.] 86 P. 1129.

Agreement to receive special assessment certificates in part payment: Rights of contractor for a street improvement who has contracted to receive special assessment certificates in part payment, under the terms of the contract, and the provisions of the municipal charter, and of the Wisconsin statute, Rev. St. 1898, § 1210d, as amended by Laws 1903, p. 432, c. 276. Dahlman v. Milwaukee [Wis.] 110 N. W. 483.

Width of driveway: Where an ordinance and contract for a street improvement provides that the driveway shall be fifty feet in width, it means fifty feet between the curbing and not fifty feet including the curbing. Otter v. Barber Asphalt Pav. Co., 29 Ky. L. R. 1157, 96 S. W. 862.

Completion of contract by sureties of contractor, under authorization of county authorities, did not constitute a new contract within meaning of original contract cutting off rights of creditors of original contractor with respect to remainder of contract price unearned at time of abandonment of contract. Union Stone Co. v. Hudson County Chosen Freeholders [N. J. Eq.] 65 A. 466.

Private contract between owners of frontage on a street and a contractor for the improvement of the street, held, under the express language of the contract, to bind the owners to the contractor by a joint and several liability. Moreing v. Weber [Cal. App.] 84 P. 220. Who may be joined in an action to recover what remains due on such contract under the California Code Civ. Proc. § 383, after the contractor has received a part of what was due from certain of the owners Id.

37. See 6 C. L. 1155.

38. Initial resolution of municipal council for street improvement satisfied if, when improvement is completed, every part of the street is in a condition strictly in accordance with the specifications for the improvement. Shirk v. Hupp [Ind.] 78 N. E. 242. In Illinois the board of local improvements must comply with the provisions of § 84 of the Local Improvement Act, as amended in 1903 (Hurd's Rev. St. 1903, c. 24), by filing in the court where the assessment for a local improvement was confirmed the certificate provided for therein to be filed, and there must be a hearing upon such certificate, and the court must enter an order that the improvement, as completed, conforms in substance to the improvement ordinance, as a condition precedent to the right of the city to issue to the contractor the improvement bonds provided to be issued in payment of the improvement where the assessment is divided into installments, in cases where the contractor has agreed to accept such improvement bonds in payment of the work. Case v. Sullivan, 222 Ill. 56, 78 N. E. 37.

39. Wingert v. Snouffer [Iowa] 108 N. W. 1035. Evidence examined and held to show that in a substantial degree the work of improvement failed of compliance with the contract. Id. Architects employed to furnish plans and specifications for the erection of a proposed armory cannot recover the customary price therefor where it is stipulated that the plans and specifications shall be for a building not to cost over a specified amount, and the plans and specifications made are for a building substantially exceeding that sum. Horgan v. New York, 100 N. Y. S. 68. But in such case if the architects do a large amount of work in elaborating the ideas of the armory board with respect to the proposed armory, and finally by their labors demonstrate that the building cannot be erected within the sum provided, and as a result a larger appropriation is made and the armory erected at about the cost called for by the plans prepared, the architects should, it would seem, be entitled to recover upon a quantum meruit for the actual value of the services in fact performed. Id.

work may be required though the contract specifies tools which cannot produce such exactitude.[40] There must be an acceptance of the work by the municipal council, if so agreed,[41] or an approval thereof by the designated inspectors of work.[42] The stipulated mode of measurement controls.[43] Sometimes the contractor is required to secure certificates of completion before he shall become entitled to payment.[44] Under most contracts the work is to be completed within a prescribed time, and it must be so completed unless there is an excuse which the law recognizes as adequate for the delay.[45] Sometimes the contracts of subcontractors bind them under certain penalties to complete the work [46] or to a penalty for delay in completing the work, and, where the law imposes upon a municipality the duty of regulating the time within which an improvement shall be completed, it may relieve the contractor from liability for such penalty.[47]

Allowance of claims and recovery by contractor.—Contracts for public improvements may confer upon some public officer authority to pass upon claims for extra work.[48] When at settlement a specific claim is reserved, all others are waived and settled.[49] An engineer's estimate may be corrected [50] and such correction may be by new certificate made by a successor.[51] Delays due to the inaction of Congress form no basis of recovery against the Federal government.[52] Where a contract with a city for a public improvement expressly provides that it shall not be assigned, such provision is enforceable, and an assignee thereof cannot recover the money due thereunder or any part thereof.[53]

40. Sanger v. U. S., 40 Ct. Cl. 47.

41. Where a majority of the municipal council vote for a motion to reconsider a resolution to accept a street improvement work, such work cannot be considered as accepted. Wingert v. Snouffer [Iowa] 108 N. W. 1035.

42. A contract for a street improvement which provides that the work shall be done to the satisfaction of the civil engineer and paving committee does not exhibit such a delegation of authority as to render the contract void. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317.

43. Contract construed to exclude payment for earth excavated between vertical and slope lines. Bowers Hydraulic Dredging Co. v. U. S., 41 Ct. Cl. 214.

44. Where a contract for the repair of a public building provides that certificates of completion must be secured before the contractor shall become entitled to payment, such certificates are waived when the owner completes the work pursuant to the contract. Bader v. New York, 101 N. Y. S. 351.

45. Contract for a street improvement construed in connection with a general ordinance held to require the completion of the work in ninety days, unless completion is prevented by injunction suits or other unavoidable causes. City of Springfield v. Schmook, 120 Mo. App. 41, 96 S. W. 257. Whether the completion was unavoidably prevented is a question for the court. Id. Under a municipal charter and a contract made in pursuance thereof providing that the failure of a contractor to complete a public work within the time prescribed shall render the contract void, such a contract will not be invalidated by failure of the contractor to complete the work within the prescribed time where the work was stopped by direction of the municipal officer having control of it. Hellar v. Tacoma [Wash.] 87 P. 130. A contract for a street improvement provided that the work should be finished within a specified time, but that delays caused by acts or omissions of the municipality should be excluded in computing the time. Obstructions upon the line of work were required to be removed by the contractor. It was held that delays caused by obstructions which the contractor had no legal right to remove should be excluded in computing the time allowed for the completion of the contract. Smith Cont. Co. v. New York, 100 N. Y. S. 756.

46. Terms of subcontract for construction of a public improvement, relating to completion of the work, construed and held not to operate as an equitable mortgage on the personal property of the subcontractor used in the prosecution of the work. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102. Prayer in bill to obtain possession of such property held equivalent to a prayer for specific performance. Id. The court refused to decree specific performance in such case, it not being alleged or proved that his property could not have been readily obtained elsewhere and the plaintiffs having an adequate remedy at law. Id.

47. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

48. Under the authority conferred by a clause in a contract for a public work, the finding of the director of public works as to the amount due the contractor for extra work held final, conclusive, and binding on both the municipality and the contractor in the absence of fraud, accident or mistake. Clark & Sons Co. v. Pittsburg [Pa.] 66 A. 154.

40. Sanger v. U. S., 40 Ct. Cl. 47.

50, 51. West Chicago Park Com'rs v. Schillinger, 117 Ill. App. 525.

52. Sanger v. U. S., 40 Ct. Cl. 47.

53. Murphy v. Plattsmouth [Neb.] 110 N. W. 749.

The remedies of public contractors are generally determined by the terms of the statutes.[54] One who has performed work for a municipality in accordance with his contract and has not been paid therefor has a right to a judgment at law for the contract price, and he cannot resort to mandamus to compel the levying of an assessment of tax to pay his judgment until it appears that it cannot be enforced by execution.[55] In Indiana a contractor under a contract for the construction of a public street may sue upon the assessment made therefor and rely upon his statutory lien, or he may sue upon the bonds issued by the city in anticipation of the assessment.[56] Also, in that state, an appeal from the allowance by the board of county commissioners of a claim for the preliminary plans for a court house calls in question all prior proceedings upon which the allowance was based.[57] If a municipal corporation receives and retains substantial benefits under a contract for a public improvement which it was authorized to make, but which was void because irregularly executed, it is liable in an action brought to recover the reasonable value of the benefits received.[58] Under some circumstances the contractor may recover the reasonable value of work done not within the terms of the contract. But he must prove with reasonable certainty the amount of such work.[59] Under authority of statute the court may sometimes correct mistakes in the contract.[60] On an issue as to the good faith of the municipaliy in making a settlement of a claim for which the contractor was liable over, a statement of the contractor to a municipal officer two years before the settlement is not admissible.[61] Certificates of engineers or superintendents are presumed to include none but proper items.[62] Where in an action by a contractor a disputed question of fact is presented as to the amount of overtime for which the contractor should be charged under such a contract, the question should be submitted to the jury.[63]

Enjoining performance of illegal contract.—Where a contract for the construction of a municipal improvement is illegal, its performance may be restrained by injunction at the suit of taxpayers.[64]

54. A contractor who has constructed a street improvement may, under the Indiana statute, Acts 1901, p. 537, c. 231, § 6, at his option, sue on the lien created by the assessment for benefits or on the bonds issued by the municipality in anticipation of the assessment. Shirk v. Hupp [Ind.] 78 N. E. 242.

55. State v. Mt. Vernon, 4 Ohio N. P. (N. S.) 317.

56. Under Acts 1901, p. 537, c. 231, § 6. Shirk v. Hupp [Ind.] 78 N. E. 242.

57. Kraus v. Lehman [Ind. App.] 80 N. E. 550. The decision of a board of county commissioners to construct a court house is not such a decision as may be appealed from, and is not conclusive in an appeal from an allowance by the board of a claim for preliminary plans for the court house of the power of the board to contract for the construction of the court house. Id.

58. Rogers v. Omaha [Neb.] 107 N. W. 214.

59. Mott v. Utica, 100 N. Y. S. 150. Evidence not proving with reasonable certainty the amount of material removed by a street cleaning contractor beyond what the terms of the contract called for, and, therefore, insufficient to support a judgment for the contractor for the reasonable value of his services in removing such material. Id.

60. In Kentucky in an action by a contractor against a city of the third class to recover for the improvement of the extension of a street between high and low water mark in a navigable river, if the contract is invalid because it provides that the abutting owners shall be liable for the cost, the court may correct the mistake and enter judgment against the city for the contract price of the improvement. Ky. St. 1903, § 3458. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310.

61. City of New York v. Baird, 102 N. Y. S. 915.

62. City of Chicago v. Duffy, 117 Ill. App. 261.

63. Directing a verdict in such case is error. Smith Cont. Co. v. New York, 100 N. Y. S. 756. Where the contract authorizes the director of public works to pass upon "any question or dispute * * * respecting any matter pertaining to" the contract, he has authority to pass upon the claim of the municipality for a stipulated sum per day for delay in completing the work. Clark & Sons Co. v. Pittsburg [Pa.] 66 A. 154.

64. A bill for such an injunction need not be filed on the relation of the attorney general. Village of River Rouge v. Hosmer [Mich.] 13 Det. Leg. N. 1015, 110 N. W. 622. The absence of the contractor from the state and consequent inability to serve him with the injunction or other process does not deprive the court of jurisdiction to grant such an injunction, and mandamus to compel the court to dissolve an injunction granted under such circumstances will be refused. Id.

Bonds.[65]—The bonds of public improvement contractors must conform to the provisions of the statutes or municipal ordinances requiring them to be given.[66] The terms of the bond determine what persons are entitled to indemnity under it.[67] A municipal contractor's bond will protect the taxpayers against the increased cost of construction caused by the abandonment of the contract.[68] A surety on the contractor's bond is severally as well as jointly liable.[69] Where a bond is conditioned to perform "all the terms and conditions" of the contract, notice to the contractor of his failure to perform such terms and conditions is not an essential prerequisite to the right of recovery on the bond.[70] A surety cannot escape liability merely because of an extra allowance on account of a mistake in the bid.[71] Accord and satisfaction is not a good defense to an action on the bond unless it covers the claim is the basis of the action.[72] The surety on a municipal contractor's bond is estopped from denying that the municipality was proceeding regularly in advertising for bids for constructing the improvement.[73] The complaint in an action on the contractor's bond must show that the bond was at least in effect executed by the defendant,[74] and that there has been a breach of the contract resulting in damage to the plaintiff.[75] But, in an action against a surety, the complaint need not allege that the municipality took the preliminary steps required by statute to authorize the improvement.[76] Interest on the amount sought to be recovered need not be demanded in the complaint.[77]

65. See 6 C. L. 1156. See, also, post, § 6, Bonds to Secure Laborers.

66. In Minnesota a county may exact a bond to indemnify from damages caused by the construction of a drainage ditch. Bond so taken held to be statutory and not common law. Eidsvik v. Foley, 99 Minn. 468, 109 N. W. 993. The requirements of a municipal ordinance requiring bonds to be given by contractors for the building of waterworks held to have been met by the giving of a bond or bonds upon the completion of the work, conditioned for furnishing the water supply according to the contract. Hallock v. Lebanon [Pa.] 64 A. 362.

67. Ditch contractor's bond construed and held to furnish indemnity to all persons who may be damaged as a direct result of the contractor's failure to construct the ditch in the manner required by his contract. Eidsvik v. Foley, 99 Minn. 468, 109 N. W. 993.

68. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561. After such abandonment, readvertising for bids is not essential to render the sureties liable. Id.

69. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561. Therefore in an action on the bond the surety cannot set up the defense that the contractor was not served with process. Id.

70. City of New Haven v. Eastern Pav. Brick Co., 78 Conn. 689, 63 A. 517.

71. The bid in this case, notwithstanding the extra allowance, was lower than that of the next lowest bidder. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

72. The mere acceptance of a public improvement by a municipality and payment to the contractor of the balance due him is not an accord and satisfaction of all the differences between the parties and will not release the contractor and his bondsman from liability for the amount of a judgment recovered against the municipality for personal injuries caused by the neglect of the contractor to guard an excavation. City of Spokane v. Costello, 42 Wash. 182, 84 P. 652. And in such case the failure of the municipality to retain from the contractor a sufficient sum to satisfy any judgment that might be recovered for such negligence will not release the surety on the contractor's bond where the municipality was not required by the contract to withhold any fixed sum. Id. In such action it was held that certain testimony of the plaintiff in the former action against the municipality, such plaintiff having since died, was not admissible, but that its admission was not prejudicial error. Id.

73. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

74. Complaint held to sufficiently show that while the bond was nominally executed by a corporation it was in effect executed by the defendant. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

75. Complaint in an action on the bond of a contractor for paving brick held to be sufficient to sustain a judgment based upon the finding that the contractor failed to furnish brick of the kind and quality called for by the contract. City of New Haven v. Eastern Pav. Brick Co., 78 Conn. 689, 63 A. 517. In an action on a ditch contractor's bond given pursuant to the Minnesota statute, Laws 1902, p. 99, c. 38, § 10, complaint held to state facts constituting a cause of action. Eidsvik v. Foley, 99 Minn. 468, 109 N. W. 993.

76. It is sufficient to allege that the municipality was proceeding to construct the improvement. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561.

77. In an action by a municipality on a contractor's bond to recover the amount of a judgment recovered against it for personal injuries caused by the neglect of the contractor to guard an excavation, interest on the sum paid by the municipality may be recovered although the complaint contains

§ 6. *Security to subcontractors, laborers and materialmen.*[78]—Statutes frequently require a bond or create a lien for this purpose.

A bond[79] should be taken by the proper officer,[80] and should conform to the statutes or ordinances prescribing the terms of the bond.[81] But such a bond, if voluntarily given, may be enforced according to its terms, although it exceeds the requirements of the ordinance,[82] though, if it be a common-law bond, remedies pertinent to the statutory bond do not apply.[83] In Minnesota and Michigan, a statutory liability is imposed upon a municipal or other public corporation to persons who furnish labor or material for a public improvement, when it neglects to take from the contractor the bond required by the statute.[84] The obligation of a surety on a municipal contractor's bond must always be strictly construed.[85] Whether the contractor's bond will cover the claims of laborers and materialmen depends on its terms.[86] A Federal contractor's bond is for the benefit of all persons furnishing such material or labor previous or subsequent to the giving of the bond, and the covenants in the bond are several and run to each such person,[87] and by Federal statute the assignment of the contract is void as against the United States, the surety, the laborers, and the materialmen;[88] and an agreement inter se by which one of several joint public contractors took over the contract does not affect the public or substitute new parties.[89] The words materialman and subcontractor have their ordinary meaning.[90] A bond to protect against liens is broken when a lien is attached, and the validity of such lien is not essential to the city's case.[91] The terms of the bond determine what claims are covered by it.[92] It may be liable for a debt for materials furnished to complete the work after the contract time.[93] The con-

no demand for such interest. City of Spokane v. Costello, 42 Wash. 182, 84 P. 652.

78, 79. See 6 C. L. 1156.

80. Where a city enters into a contract for the construction of a public sewer, and takes a bond from the contractor for the protection of materialmen and laborers, as provided by the Kansas statute (Gen. St. 1901, § 5130), such bond will be deemed to have been taken by a public officer within the purview of such statute. American Bonding Co. v. Dickey [Kan.] 88 P. 66.

81. A bond executed in pursuance of a municipal ordinance, although more explicit than the requirements of the ordinance, was held not to be broader than the purpose and scope thereof. City of Philadelphia v. Nichols Co., 214 Pa. 265, 63 A. 886.

82. City of Philadelphia v. Nichols Co., 214 Pa. 265, 63 A. 886.

83. Penn Iron Co. v. Trigg Co. [Va.] 56 S. E. 329.

84. Black v. Polk County Com'rs, 97 Minn. 487, 107 N. W. 560. Under Comp. Laws, § 10,743. Smith v. Hubbell, 142 Mich. 637, 12 Det. Leg. N. 860, 106 N. W. 547. The liability is incurred when the contract is valid and is for the construction of public improvements which are being made by the corporation in the exercise of its public governmental, as well as its private corporate powers. Black v. Polk County Com'rs, 97 Minn. 487, 107 N. W. 560.

85. Searles v. Flora, 225 Ill. 167, 80 N. E. 98.

86. If a municipal contractor's bond is entered into for the sole benefit of the municipality, a materialman cannot recover thereon. Searles v. Flora, 225 Ill. 167, 80 N. E. 98. A bond given by a contractor for the construction of a state college building, whereby the sureties are bound to the college and "to all persons who may become entitled to liens under the contract," does not render the sureties liable for the failure of the contractor to pay materialmen, when the latter are not entitled to a lien. Smith v. Bowman [Utah] 88 P. 687.

87. United States v. U. S. Fidelity & Guaranty Co., 78 Vt. 445, 63 A. 581.

88. Henningsen v. U. S. Fidelity & Guaranty Co. [C. C. A.] 143 F. 810.

89. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

90. One who takes over and finishes the uncompleted work as incident to a loan of credit to the original contractor is not a subcontractor or materialman. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

91. But under the New York Laws 1882, p. 441, c. 410, as amended by Laws 1895, c. 605, a recovery could be had on a bond given by a municipal contractor to pay the amount found to be due on the claim of a subcontractor under which a lien was filed, without establishing the validity of the lien, or showing that anything was due and owing from the municipality to the contractor. McDonald v. New York, 113 App. Div. 625, 99 N. Y. S. 122.

92. Where the bond is conditional to pay all sums of money which may be due for labor and materials furnished and supplied or furnished in and about the work, the liabilities of signers is limited to payment for materials or labor which the contract covers. City of Philadelphia v. Malone, 214 Pa. 90, 63 A. 539. Coal supplied for use in an engine used in excavation. Id.

93, 94. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 F. 507.

struction and validity of a statutory bond exacted under state law is a question of general law wherein the Federal courts are not bound by local decisions.[94] If a bond is given to secure payment for materials and labor, recovery may be had thereon, though no lien exists and there is no statutory requirement that such a bond shall be taken.[95] The bond in Kansas is independent of the contract for the work and is not impaired by invalidities in such contract.[96] Notice of claim when required must be given or filed.[97]

Materialmen and subcontractors having knowledge of the facts making a contract illegal cannot recover in an action against the surety on the contractor's bond.[98] A contractor having performed a contract and received tax bills in payment therefor cannot deny the validity of the contract in a suit by the materialman.[99] One who subcontracts to finish a work for a compensation limited to the avails of the contract has no recourse on the bond after taking such avails.[1] In an action on a bond given by a contractor to a city to protect materialmen and subcontractors, the contractor may set off against the claim of a materialman or subcontractor expenses caused him by delay on the part of the suing materialman or subcontractor in furnishing material.[2] The jurisdiction and venue of an action on the bond is to be determined by the general rules of law relating to those subjects, or the particular provisions of a statute relating to suits on such bonds.[3] It has been held in Virginia that the Federal statutes requiring bond do not apply to any but public works of fixed location,[4] and, consequently, a bond taken on marine construction to the United States is not suable in the state court by a materialman.[5] A provision that no action shall be brought after a certain short time from completion of work is subject to the

95. Smith v. Bowman [Utah] 88 P. 687.

96. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 F. 507.

97. Under the Washington statute (2 Ballinger's Ann. Codes & St. § 5927, as amended by Laws 1899, p. 172, c. 105), it is essential to the right of a materialman to maintain an action on the bond of a school contractor that he should have filed the notice required by the statute. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849.

98. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034. It is a defense that the signatures to the petition for the improvement were procured by fraud. Atkin v. Wyandotte Coal & Lime Co. [Kan.] 84 P. 1040. Or that the contract for the improvement was illegal and void because against public policy. National Surety Co. v. Kansas City Hydraulic Press Brick Co. [Kan.] 84 P. 1034. Or is void because no opportunity is given therein for free competition in the purchase of the materials used. Id. But a materialman was held not to be precluded from recovering on the contractor's bond by the fact that a clause in the contract for the improvement, which was required to be let to the lowest responsible bidder, provided that none but citizens of the municipality were to be employed on the work, where it did not appear that such clause constituted a part of the advertisement for bidders, or in any way affected the price for which the work was to be let, nor that the materialman knew when the materials were furnished of the existence of the clause. American Bonding Co. v. Dickey [Kan.] 88 P. 66.

99. Where work on a paving contract was completed, and tax bills in payment thereof issued and turned over to the contractor, all in accordance with the terms of the contract, the contractor when sued by a materialman cannot say that the contract and ordinance under which the work was done was illegal and void. Kansas City v. Schroeder, 196 Mo. 281, 93 S. W. 405.

1. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465.

2. Brown v. Gourley, 214 Pa. 154, 63 A. 607.

3. In an action on a bond given under the provisions of the Act of Congress of August 13, 1894, c. 280 (28 Stat. 278 [U. S. Comp. St. 1901, p. 2523]), the United States is a mere formal party, and the statute does not confer jurisdiction thereof on the Federal courts. Burrell v. U. S. [C. C. A.] 147 F. 44. But where such a suit was brought by the assignee of a subcontractor, in the name of the United States, and the residence of such assignee was in one state and the residences of the signers of the bond were in other states, and the amount in controversy exceeded $2,000, it was held that the Federal courts had jurisdiction on the ground of the diverse citizenship of the parties. Id. A bond given to relieve the county from liability to subcontractors as to the distribution of the money due to a contractor for the construction of a public building is within the provision of the Iowa Code, § 3098, and an action thereon by a subcontractor may be brought in the district court of the county where the property is situated. Thompson v. Stephens [Iowa] 107 N. W. 1095.

4. Not to a sea-going dredge. Penn Iron Co. v. Trigg Co. [Va.] 56 S. E. 329.

5. Penn Iron Co. v. Trigg Co. [Va.] 56 S. E. 329.

general statute excepting actions reasonably begun but reversed, or in which plaintiff shall fail otherwise than on the merits.[6]

Liens.[7]—In many jurisdictions the statutes give subcontractors and persons furnishing labor and materials a lien on the improvement, or on the moneys coming due to the contractor or applicable to the payment of the work.[8] A county building a court house is a "municipality" within the New Jersey statute allowing such a lien on moneys due under a contract for municipal work [9] and the later amendments do not deprive an assignment of his right.[10] Some statutes confer no lien but merely a claim or demand for labor or material furnished and used.[11] One who advances money to a public contractor to enable him to perform his contract and receives an assignment of money to become due thereon is not entitled to a lien under a statute providing for a lien for "labor" and "materials" furnished.[12] The amount recoverable in an action to foreclose the lien upon funds in the possession of a municipality may be affected by the terms of the contract between the municipality and the principal contractor.[13] It is essential to the creation of a lien under the New York statute that notice thereof be filed.[14] As between laborers, or labor lien creditors and other creditors of the contractor, the right to priority depends upon the terms of the statute,[15] and the time the liens are filed.[16] In New York a lien on moneys due by a municipality for the construction of a public improvement may be discharged by an

6. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 F. 507.

7. See 6 C. L. 1156.

8. In New York the lien of a subcontractor for work done on a public school house is not a lien on the building or premises, but is a lien on the funds applicable to the payment of the work. Bader v. New York, 101 N. Y. S. 351.

9. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742; Union Stone Co. v. Hudson County Chosen Freeholders [N. J. Eq.] 65 A. 466. The county building commission is agent of Essex county and the contract made by it is a county contract. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742.

10. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742.

11. Under the Iowa statute (Code 1897, § 3102), a subcontractor furnishing labor or materials for a public building acquires no lien upon the building or upon the moneys which become due from the county to the contractor, but he may acquire a priority as to the distribution of such fund, by strictly following the statutory provisions in the nature of a lien. Thompson v. Stephens [Iowa] 107 N. W. 1095; Penn & Co. v. Northern Bldg. Co., 140 F. 973. The fact that the material used in the construction of a courthouse was furnished under a contract to supply all that was necessary for a lump sum and that consequently no account of the separate items had been kept will not relieve claimant from compliance with the statute requiring such a claim to be itemized. Penn & Co. v. Northern Bldg. Co., 140 F. 973.

12. In re Cramond, 145 F. 966.

13. If the contract authorizes the municipality upon the abandonment of the work by the contractor to complete the same and make the cost thereof a charge against the contractor, the subcontractor may, upon such abandonment, recover the balance due him less the cost of the completion. Bader v. New York, 101 N. Y. S. 351.

14. Laws N. Y. 1897, p. 517, c. 418, §§ 5, 12. In re Cramond, 145 F. 966. The priority of liens under this statute is determined by the date of filing. Id. Lien of subcontractor filed in time under New York statute in a case where the contractor abandoned the work and the city completed it. Bader v. New York, 101 N. Y. S. 351. Verification of lien by agent held sufficient under the New York statute requiring notice of lien of a subcontractor to be verified by the "oath or affirmation of the claimant." McDonald v. New York, 113 App. Div. 625, 99 N. Y. S. 122.

15. Under the Federal Bankruptcy Act, Act July 1, 1898, c. 541, § 64b, 30 Stat. 563 (U. S. Comp. St. 1901, p. 3447), wages due to laborers employed on a public improvement are entitled to priority over the claims of general creditors. In re Cramond, 145 F. 966. Where money has been advanced to a public contractor to enable him to perform his contract, and an assignment made to the person advancing it of moneys to come due on the contract, such assignee, after the performance of the contract and the acceptance of the work, has an equitable lien on the fund superior to the right to priority of payment given by the bankruptcy act to labor creditors having no other lien, and this, though some of the advances were made after the contractor became insolvent. Id. In New York liens of laborers and materialmen are superior to those of subcontractors. Falvello v. New York, 103 N. Y. S. 260.

16. Persons who have advanced money or furnished materials to a public contractor and have received an assignment of money to become due on the contract are, upon the contractor becoming insolvent, entitled to priority over labor lien creditors who filed their liens subsequent to such assignment, where the statute under which such liens were required made the filing thereof essential to their protection. In re Cramond, 145 F. 966.

undertaking executed by the contractor conditioned for the payment of any judgment which may be recovered in an action to enforce the lien,[17] and an assignee in whole or in part of the contract may procure such discharge,[18] but the condition as prescribed in the statute is essential to such a bond.[19] The right to set up a defense to an action by a subcontractor to enforce his lien may be lost by waiver or estoppel,[20] but until some action founded thereon, an assignee subject to claims cannot hold a city estopped to prefer such claims by a resolution since rescinded to pay the assignee.[21] In an action to foreclose a subcontractor's lien for work done under a municipal contract, a provision in such contract of attaching a forfeiture to the noncompletion of the work by a specified date cannot be urged as a defense, where the municipality incurred no damage by reason of the failure to complete it within the time specified.[22] A provision that the money withheld be paid over to a claimant if his sworn claim was substantiated on an investigation by the council does not arrogate the power of court.[23]

Unless provision is made by statute, a lien for labor and materials though given cannot be enforced against the state upon funds for construction of public works.[24] An action to enforce the lien of a subcontractor, laborer, or materialman, must be brought in the court having jurisdiction thereof,[25] and all necessary parties must be brought into the suit.[26] The action must be commenced and notice of pendency filed within the time prescribed by statute.[27] After the lien is released by bond

17. Such discharge may be procured by the filing by the assignee of the contractor of such an undertaking as principal. In re Hudson Waterworks, 111 App. Div. 860, 98 N. Y. S. 33. Where an application for the discharge of the lien is denied on the ground that a proper bond was not presented, an appeal lies, notwithstanding that the order denying the application gave the privilege of renewing the motion upon additional papers, such privilege conferring no right that the appellant would not otherwise have had. Id.

18, 19. Russell & Erwin Mfg. Co. v. New York, 103 N. Y. S. 9.

20. In an action by a subcontractor against a municipality to foreclose a lien upon funds applicable to the payment of repairs to a school house, where the complaint alleged a contract between the principal contractor and the municipality and the answer admitted such contract, the municipality cannot thereafter object that the action should have been brought against the board of education. Bader v. New York, 101 N. Y. S. 351. In an action to foreclose a subcontractor's lien for work done on a municipal school building, the objection cannot be urged that the contract between the principal contractor and the municipality prohibited the assigning or subletting of the contract, where the only penalty provided for such subletting was that the contract might be revoked at the option of the president of the board of education, and it appeared that the board of education was aware that the plaintiff was working under a subcontract and made no objection thereto, and did not assume to annul the contract on that ground. Id.

21. Carlisle v. Spain [Mich.] 13 Det. Leg. N. 1002, 110 N. W. 532.

22. Bader v. New York, 101 N. Y. S. 351.

23. Carlisle v. Spain [Mich.] 13 Det. Leg. N. 1002, 110 N. W. 532.

24. There is no provision in the Code of Civil Procedure for the enforcement of liens given by Laws 1897, p. 517, c. 418, § 5, amended by Laws 1902, p. 74, c. 37, on funds in the hands of the state appropriated for public improvements on performance of the work. Mason v. New York State Hospital Trustees, 50 Misc. 40, 100 N. Y. S. 272. Where the state is made a party to an action to enforce such lien its demurrer on the ground of want of jurisdiction will be entertained. Id.

25. The New York Code of Civ. Proc. §§ 3400, 3418, do not confer jurisdiction upon the supreme court to enforce a lien acquired by a subcontractor upon funds in the hands of the state appropriated for a public improvement under Laws 1897, p. 517, c. 418, § 5. Mason v. New York State Hospital Trustees, 50 Misc. 40, 100 N. Y. S. 272.

26. A bank claiming a portion of the fund under assignment is a necessary party whether its claim be prior or subsequent. Herman v. Essex County Chosen Freeholders [N. J. Eq.] 64 A. 742.

27. The New York Lien Law (Laws 1897, p. 522, c. 418, art. 1, § 17), is self operative, and under it the lien of an employe of a municipal contractor is discharged without order or action, if an action to enforce it be not brought within ninety days after filing the lien, and if notice of pendency thereof be not filed within the same period with the financial officer of the municipal corporation with whom the notice of the lien was filed, provided, of course, that the lien has not been continued by order of the court. In re Rudiger, 102 N. Y. S. 1053. In New York municipal contractors may give notice to persons having a lien on money due them from the municipality, under Code Civ. Proc. § 3417, requiring the lienors to commence their action to enforce the lien within the time therein specified, and on their failure to do so the court is authorized to cancel the lien. Id. Upon an application for an order canceling a lien, filed by employees

pending suit to enforce the lien, a personal judgment though not prayed, may go against the contractor if the pleadings admit of such relief.[28]

§ 7. *Hours and conditions of labor.*—A statute making it a misdemeanor for any state or municipal officer or agent or any contractor to employ any mechanic or laborer in the prosecution of a public work for more than eight hours a day, cannot be sustained as a valid exercise of the police power.[29] But such a statute is valid on the ground that the state, in its proprietary capacity, may properly prescribe for itself and its auxiliary arms of government the terms and conditions on which work of a public nature may be done.[30] A contract for a local improvement is not invalidated by the incorporation in it of the provisions of an eight hour labor ordinance.[31] Under Federal statute the requiring of a laborer on government work to work more than eight hours per day is a crime of the director of such work [32] and is committed in the state whence the work is directed.[33] The date of such offense need not be proved as laid.[34] The burden of proving defensively that an "extraordinary emergency" existed which by law excused such acts is on defendant,[35] but an "extraordinary emergency" cannot be said to exist during the whole life of a contract.[36]

§ 8. *Injury to property and compensation to owners. A. In general.*[37]—Owners whose property is damaged in the prosecution of a public improvement are within the protection of the constitutional inhibition against damaging private property for public use without just compensation.[38] In the presentation of public works by or under the authority of the state, except under the right of eminent domain or common-law necessity, there is immunity from liability for entry upon private lands, only to the extent that the entry or occupation is temporary or the infliction of damages is incidental and incipient or preliminary.[39] If officers of the state assuming to act under its authority permanently occupy private lands or do substantial damage to them, they will be liable therefor to the landowner as private individuals.[40] Sometimes the state engineer and his assistants are authorized by statute to go upon private lands for the purpose of making surveys and performing the work provided

of a contractor for municipal improvements, the question cannot be raised whether suit to foreclose the lien was barred by the statute of limitations. Such question must be presented by pleading the statute in connection with the facts. Id.

28. In New York where action is brought by a subcontractor to foreclose a municipal lien, and the lien is subsequently discharged, if the complaint demanded judgment establishing plaintiff's claim against the contractor for a specified sum, though it did not expressly demand judgment therefor, and the contractor had notice that a personal judgment was the only judgment that could be recovered against him, a personal judgment may be rendered in such action. McDonald v. New York, 113 App. Div. 625, 99 N. Y. S. 122.

29. Keefe v. People [Colo.] 87 P. 791.

30. Keefe v. People [Colo.] 87 P. 791. The Colorado statute embraces within its operation the city and county of Denver. Id.

31. Curtice v. Schmidt [Mo.] 101 S. W. 61.

32, 33. Work on Kentucky side of Ohio river directed from Ohio. United States v. Sheridan-Kirk Contract Co., 149 F. 809.

34, 35, 36. United States v. Sheridan-Kirk Contract Co., 149 F. 809.

37. See 6 C. L. 1156.

38. Where a state constitution provides that private property shall not be taken or damaged for public use without just compensation therefor, and that no property nor right of way shall be appropriated to the use of any corporation until full compensation therefor shall be first made or secured to the owner, an owner of property abutting on a street, whose property is not taken, but only damaged incidentally by a municipal improvement, cannot maintain a bill to enjoin such improvement until the resulting damages to his property are ascertained and paid, but his remedy is by action at law for such damages. De Lucca v. North Little Rock, 142 F. 597. Rule applied to erection of viaduct on street in front of plaintiff's lot, where plaintiff owned fee in street. Id. For injuries to property entailed by the work to be done the city is liable. Tunnel work. City of Chicago v. Rust, 117 Ill. App. 427.

39. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

40. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Acts of the state engineer and his assistants, so far as they were in excess of the inherent power of the state to make survey of its civil divisions, held to be unauthorized trespasses for which they were liable to the landowner as private individuals and subject to be restrained by injunction from entering on the premises and continuing such trespasses. Id.

for by the statute, subject to liability for damages to the land.[41] In assessing damages to private property caused by a municipal improvement, special benefits resulting to the property from the improvement may be set off against the damages.[42] Sometimes landowners enter into an agreement to set off damages resulting to their property against betterments thereto.[43] In an action against a municipality for damages to property caused by the construction of a local improvement, no evidence is admissible that is not relevant and material.[44]

(§ 8) *B. Establishment or change of grade of street.*[45]—A municipality has the legal right to change the grade of a street without compensation to adjoining lot owners, if there be no injury done to their property.[46] The owner of a lot abutting on a public street holds it subject to the right of the state or any duly authorized governmental agency to improve the street, by altering the grade thereof;[47] and in the absence of legislation or a valid contract, the owner has no right of action against a city authorized by law to grade and improve the street for injury to the lot or for the impairment or destruction of the incidental right of ingress and egress and of light and air which the street affords,[48] provided there is no diversion of the street from its proper street purposes, and the injury to the lot or the impairment or destruction of the incidental rights is a mere consequence from the lawful use or improvement of the street as a highway, and there is no physical invasion of or trespass upon the lot and no malice, negligence or unskillfulness, to the injury of the lot owner.[49] But in some states there are constitutional or statutory enactments providing for compensation to landowners whose property is injured by a change in the grade of a street.[50] These enactments sometimes authorize the restraint of the

41. The New York statute (Laws 1903, p. 698, c. 348), was not retrospective in its operation. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

42. Spokane Traction Co. v. Granath, 42 Wash. 506, 85 P. 261. Where a bridge is constructed and the approach thereto graded by a railroad company under the direction, authority, and supervision of a municipality, and for the benefit of the latter as well as the railroad company, it is in effect the same as if the work was done by the municipality through a contractor exclusively for its own benefit, so far as the right to offset benefits to adjacent property against the damages thereto is concerned. Id. In an action to have assessed the amount of damages sustained by reason of the erection of a public improvement, it will be presumed upon appeal, where the case was tried by the court without a jury, that the court in determining the amount of benefits to be offset against the damages considered and weighed the evidence with reference to those benefits which under the law could be deemed special. Id.

43. The adoption of an order for the laying out of a street by a municipality, including the assessment of damages, followed by a seasonable construction of the street, held to be an acceptance in writing of the terms of an agreement of landowners to set off damages resulting to their property against betterments thereto. Boston Water Power Co. v. Boston [Mass.] 80 N. E. 598. Under a contract between a city and landowners providing for the setting off of a claim for damages resulting from the improvement against betterments, it was held that until the city neglected to do its part under the contract within a reasonable time, and upon request of the landowners, it was not in default, and the landowners were not relieved from their obligation to set off the damages against betterments. Id.

44. In an action against a municipality for damages to property caused by the construction of a sewer and drain, evidence as to the proper method of making joints in drain pipes is not admissible, where there is no offer to show that the joints used were not made in the manner described. Newberg v. Boston, 191 Mass. 70, 77 N. E. 486.

45. See 6 C. L. 1157. See, also, Highways and Streets, 8 C. L. 40.

46. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025.

47. Bowden v. Jacksonville [Fla.] 42 So. 394.

48. Bowden v. Jacksonville [Fla.] 42 So. 394. Application of rule to change of grade by building a viaduct thereon. Id.

49. Bowden v. Jacksonville [Fla.] 42 So. 394. There is no common law, and in Wisconsin no constitutional right to recover damages for the authorized grading of a street by a municipal corporation when there is no negligence in the act. Dahlman v. Milwaukee [Wis.] 110 N. W. 479. Where a building has been constructed with reference to a change in the grade of a street by the erection thereon of a viaduct and its use as the street is acquiesced in, the owner of the building cannot afterwards complain of the diversion of the street by the erection of the original viaduct, when it is being rebuilt so as to change its grade. Bowden v. Jacksonville [Fla.] 42 So. 394.

50. Such is the New York Statute, Laws 1890, p. 473, c. 255, § 9. In re Van Rensselaer & Roseville Sts. in Buffalo, 101 N. Y. S. 928. In Georgia since the adoption of the

prosecution of the work until just compensation is paid for the injury.[51] Whether or not damages may be recovered in a particular case depends upon the evidence adduced.[52] The right to compensation may be lost by waiver or estoppel.[53] The measure of damages recoverable by an abutting owner for a change in the grade of a street is the resultant dimunition in the market value of his property.[54] Where the recovery of damages is regulated, by statute, the amount recoverable is to be determined from the terms of the statute and the facts of the particular case.[55] In New York the damage allowable is limited to that done to the building,[56] and since maps of the improvement when filed are binding on property owners, even though subject to change[57] damage to a building erected thereafter cannot be allowed.[58] In the assessment of damages it is not necessarily error not to assess damages to improvements in the same proportion as they are assessed in the case of the land itself.[59] Where the construction of a bridge and the grading and filling of a street are parts of one and the same plan of improvement, special benefits which accrue to property in the immediate vicinity by reason of the construction of the bridge may be offset against the damages caused to such property by the grading and filling of the street in front thereof.[60] A statutory remedy for the recovery of damages can be enforced only in the names provided in the statute.[61] A suit for damages must be brought within the time provided by the statute of limitations.[62]

constitution of 1877, a municipal corporation is liable to a property owner for consequential damages resulting from raising the grade of a street in front of his premises, thereby impairing or destroying his means of ingress and egress. So changing it that a catch basin overflowed on land which did not previously occur is a damaging. Miles v. Brooklyn, 98 App. Div. 195, 90 N. Y. S. 702.

51. Under the constitution of Alabama, if in changing the grade of a street the property of an abutting owner is or will be injured, the further prosecution of the improvement may be restrained until just compensation is paid for the injury. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. And where no compensation has been made, such owner may, under proper averments in his bill, require the restoration of the street to its former condition, and this though there is no negligence in the doing of the work. Id. It is proper to dissolve the injunction upon the making of a cash deposit and giving of bond to pay such damages as may be sustained. Id.

52. Evidence supporting recovery of damages assessed in favor of a property owner caused by raising the grade of a street. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103.

53. The fact that an abutting owner joins in a petition for the paving of a street does not constitute a waiver of his right to compensation for injury to his property resulting from a change of grade in constructing the pavements. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. But an abutting owner who requests that a change be made in the grade of a street and thereby induces the municipality to incur expense in making such change cannot recover damages to his property resulting therefrom, or arrest the doing of the work upon the ground that compensation had not first been paid him. Id.

54. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103; Warren County v. Rand [Miss.] 40 So. 481. In arriving at the market value, the jury may consider the situation of the property, the uses to which it was put and adopted, the location as a residence and business point, the fact that changes have to be made by reason of the change of grade, and the accessibility of the property both before and after such change. Warren County v. Rand [Miss.] 40 So. 481.

55. A change in the grade of a street practically destroyed the value of a soap factory. The factory was located partly on a lot abutting on the street and partly on a lot cut off from the street by a strip of land owned by the municipality, both belonging to the owner of the factory, and partly, with the consent and acquiescence of the municipality, upon the strip referred to. It was held that the owner of the factory was entitled to recover under the New York statute (Laws 1890, p. 473, c. 255, § 9), such an award as would compensate him for the damages done to the real estate owned by him and to the buildings and machinery erected thereon, and also for such damages as resulted to the buildings and machinery erected upon the property of the city. In re Van Rensselaer & Roseville Sts. in Buffalo, 101 N. Y. S. 928.

56. Construing N. Y. City Charter (Laws 1901, p. 411, c. 466, § 980). In re Vyse St., 95 N. Y. S. 893.

57, 58. In re Vyse St., 95 N. Y. S. 893.

59, 60. Spokane Traction Co. v. Granath, 42 Wash. 506, 85 P. 261.

61. Partridge v. Arlington [Mass.] 79 N. E. 812. A third person who moved for leave to be made a party to an action to recover damages for the alteration and repairing of the grade of a street held to have lost both her right and her remedy by her failure to act in the manner and within the time provided by statute. Id. If it be assumed that two or more persons may upon compliance with the Massachusetts statute join in the same petition to recover damages for the alteration and repairing of a highway, yet the rights of husband and wife are several,

The declaration in such a suit must contain allegations fixing the responsibility of the defendant,[63] and showing that there has been such a change in the street as will warrant a recovery.[64]

§ 9. *Local assessments. A. Power and duty to make.*[65]—The legislature has authority to divest the whole or such part as it may prescribe of the expense of a public improvement to be assessed upon the owners of land benefitted thereby,[66] and it may tax particular districts for local benefits or improvements,[67] and this right being wholly statutory, it may suspend or repeal the law authorizing such assessments, except so far as contractual rights or obligations are involved.[68] An assessment may also be lawfully made under a statute passed after the work is done.[69] The several statutory steps required for the improvement of a street by pavement or sewer constitute a "proceeding" within a saving clause.[70] The improvement for which the assessment is made must be a public improvement; hence, assessment can be made against abutting property for the improvement of a street, if the street has not been dedicated to the public.[71] Power may be delegated to municipal corporations or designated county officers to order and levy special assessments,[72] but the statutory authority must be clear,[73] and the municipality may by contract placing the burden elsewhere disable itself to assess the abutters.[74] Under some statutes the duty to make the assessment is mandatory.[75] A valid assessment cannot be made under an invalid ordinance.[76] In Minnesota a municipal corporation has the power to order and levy a local assessment without a preliminary petition by property owners affected by the improvement.[77] A statute conferring power on a municipality to levy special assessments is to be strictly construed in favor of

and a compliance with the statutory requirements by one of them will not inure to the benefit of the other. Id.

62. In Georgia a suit for damages instituted within four years from the time the change in the grade of the street was made, is not barred by the statute of limitations (Civ. Code 1895, § 3898), and in this case the jury were authorized to find that the change was made within four years preceding the institution of suit. City of East Rome v. Lloyd, 124 Ga. 852, 53 S. E. 103.

63. No sufficient allegation in declaration fixing responsibility for alleged delay in construction of viaduct, changing grade of street, upon defendant city, and person against whom delay is alleged not before court. Bowden v. Jacksonville [Fla.] 42 So. 394.

64. Declaration in an action by a lot owner for damages not alleging the diversion of the street from its proper street purposes, etc., is demurrable. Bowden v. Jacksonville [Fla.] 42 So. 394.

65. See 6 C. L. 1158.

66. City of Ashville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800.

67. City of Hyattsville v. Smith [Md.] 66 A. 44. The action of the legislature in fixing the boundaries of a levee district and levying assessments therefor must in general be deemed conclusive. St. Louis Southwestern R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

68. Stone v. Boston Street Com'rs [Mass.] 78 N. E. 478. The Massachusetts statute (Acts 1900, p. 222, c. 296, § 1), repealed by implication the law relating to betterment assessments so far as the particular improvement referred to in the act was concerned. Id.

69. Boston Water Power Co. v. Boston [Mass.] 80 N. E. 598.

70. Amount assessed remains unaffected. City of Toledo v. Marlow, 8 Ohio C. C. (N. S.) 121.

71. Dulaney v. Figg, 29 Ky. L. R. 678, 94 S. W. 658.

72. Wolfe v. Morehead, 98 Minn. 113, 107 N. W. 728. The legislature of a state has power to authorize a municipal corporation to open, grade, pave, and curb, any street, and to assess the cost of doing such work upon the property abutting on such street. City of Hyattsville v. Smith [Md.] 66 A. 44. In Missouri a county board of equalization has jurisdiction over lands assessed for levee purposes, and authority to raise assessments against all lands. Rev. St. 1899, §§ 8449, 9131. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333.

73. In re City of New York, 114 App. Div. 519, 100 N. Y. S. 140.

74. A municipality, by a contract with railroad companies under which they are to pave a particular part of a street, precludes itself, while the contract remains in force, from making such improvement at the expense of abutting owners. City of Chicago v. Newberry Library, 224 Ill. 330, 79 N. E. 666.

75. The New Jersey statute (Act of 1898, § 3 [P. L. p. 466]) makes it mandatory upon the city council to proceed to have an assessment made upon the property benefited by the improvement authorized by that act. Durrell v. Woodbury [N. J. Law] 65 A. 198.

76. Ramsey v. Field, 115 Mo. App. 620, 92 S. W. 350.

77. Wolfe v. Morehead, 98 Minn. 113, 107 N. W. 728.

the person against whom the assessment is levied.[78] The ordinary grant to a municipality of power to levy takes for municipal purposes does not include such power.[79] Some of the peculiar provisions of statutes conferring authority upon municipalities to levy assessments for local improvements have received the interpretation of the courts.[80]

(§ 9) *B. Constitutional and statutory limitations.*[81]—Statutes authorizing the levying of special assessments on private property to pay the cost of public improvements must not violate any constitutional provision or inhibition.[82] Local assessments are a tax and not subject to the limitations upon a taking of private property for public use.[83] A delegation of power being strictly construed, the power to assess benefits will not support an assessment for the cost of paying damages caused by the improvement.[84] In New Jersey it is held unconstitutional to assess the cost of water service pipes laid in the street on the lots abutting.[85]

Equality and uniformity.[86]—It is a rule almost universally recognized sometimes by constitutions and statutes that each lot or tract of land liable to assessment shall bear its proportionate part of the cost of the improvement measured by the special benefits accruing to it.[87] It would not be possible to assess such

78. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

79. City of Asheville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800.

80. Authority for the assessment of benefits is found in the New Jersey statute (Act of 1898 [P. L. 466]). Durrell v. Woodbury [N. J. Law] 65 A. 198.

The power to levy assessments upon lots to which special and peculiar benefits accrue from a public improvement is conferred upon the city of Asheville by its charter. City of Asheville v. Wachovia Loan & Trust Co. [N. C.] 65 S. E. 800.

Statute authorizing assessment for curbing street: Under the Missouri statute (Rev. St. 1889, § 1592, as amended by Laws 1893, p. 107), authorizing a city to cause streets to be "constructed" and "paved" at the expense of abutting owners and the cost collected by special tax bills the city may assess upon such owners the cost of curbing the street and issue special tax bills to pay therefor. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701.

Repairs on public road: Under section 15 of the constitution of Alabama and Gen. Acts 1903, p. 307, a court of county commissioners has power to levy a special tax to meet the cost of contemplated repairs on a public road. Southern R. Co. v. Cherokee County, 144 Ala. 579, 42 So. 66.

Street extension: Under the charter of Port Chester, New York (Laws 1868, p. 1872, c. 818, tit. 5, § 4, as amended by Laws 1902, c. 219, pp. 589, 594, §§ 3, 5), where a street is extended by unanimous action of the board of trustees taken without petition, the board has power to assess the expense of the improvement, other than the amount paid by the issue of village bonds, upon the property benefited thereby. In re Locust Ave., 185 N. Y. 115, 77 N. E. 1012.

Assessment for sewer running mainly through private lands valid under Massachusetts statute (Rev. Laws, c. 49). Taylor v. Haverhill [Mass.] 78 N. E. 475.

Time at which assessment should be made: Municipal sewer held to have been ordered and constructed under Mass. St. 1891, p. 880, c. 323, and the amendatory acts, and not under St. 1899, p. 496, c. 450, and, therefore, that the assessment should have been made in accordance with provisions of St. 1902, p. 430, c. 521, after the completion of the improvements of which the sewer was only a part. Tappan v. Boston Street Com'rs [Mass.] 79 N. E. 796.

Municipalities within operation of Washington statutes: The operation of the Washington Laws 1887-88, p. 16, c. 13, conferring upon municipalities power to create a special assessment district and to levy a special assessment for a public improvement was confined to municipalities having a population of six thousand or more. State v. Moss [Wash.] 86 P. 1129. But Session Laws 1887-88, p. 224, c. 126, conferred upon municipalities having a population of less than six thousand power to create assessment districts and levy special assessments for street improvements. Id.

81. See 6 C. L. 1160.

82. The Maryland statute (Acts of 1906, p. 143, c. 113, § 22) authorizing the mayor and council of a municipality to cause sidewalks to be constructed, "as they may determine necessary for the public benefit," and to assess the cost thereof on abutting property, is not unconstitutional. City of Hyattsville v. Smith [Md.] 66 A. 44. Statutes under which sewer assessment laid held unconstitutional and void. Smith v. Boston [Mass.] 79 N. E. 786.

83. The constitutional guaranty of an appeal from assessments of damages by viewers has no application to local assessments for improvements. Relates solely to "taking," etc., of property while the assessment is a tax. Brackney v. Crafton Borough, 31 Pa. Super. Ct. 413.

84. Barnett's Case, 28 Pa. Super. Ct. 361.

85. Doughten v. Camden, 72 N. J. Law, 451, 63 A. 170.

86. See 6 C. L. 1160.

87. People v. Kingston Common Council, 99 N. Y. S. 657; Shirk v. Hupp [Ind.] 78 N. E. 242; Hudlemyer v. Dickinson, 143 Mich. 250, 12 Det. Leg. N. 1000, 106 N. W. 885; In re Davidson [Minn.] 107 N. W. 151; City of

benefits, with mathematical exactness, and the courts have only required a measurable approximation to it. In determining whether a particular measure or scheme of assessment conforms to the rule, regard must be had to the nature of the improvement and its location with reference to the property assessed. Thus while it may frequently be proper to assess lands for a street improvement at a uniform rate according to frontage,[88] yet the circumstances and situation of lands on the different sides of a street may be such as to make the adoption of the foot-frontage rule improper,[89] and it has been held that the cost of a public main cannot be assessed by such rule.[90] Courts in several states have recently passed upon the validity of several other plans or schemes of assessment.[91] Under the rule that assessments shall be made upon the principle of benefits derived, no lands benefited should be omitted from the assessment, and no land can be assessed for benefits not accruing to it.[92] An assessment cannot be enforced against one property owner of a class, where all of the class originally liable to the assessment cannot be compelled to pay

Asheville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800. An ordinance held not to be in compliance with a statute requiring lands to be assessed for a local improvement in proportion to the benefits derived from the improvement. Monk v. Ballard, 42 Wash. 35, 84 P. 397.

88. An ordinance for a street improvement which provides that the cost of the "improvement shall be assessed per lineal foot against the property abutting" thereon, according to the provisions of certain statutes, does not attempt to prevent the assessment of abutting property according to the benefits. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 741. Where a provision in a municipal charter relating to assessments for street improvements declares that the assessor "shall make a just and equitable assessment" against the owners of the land deemed to be benefited, "assessing each parcel in proportion to the benefit which in his judgment has been derived from said improvement," if the assessor exercises his best judgment, and follows no erroneous principle in making the assessment, it should not be set aside simply because he has made it on the "foot-front" plan (People v. Kingston Common Council, 99 N. Y. S. 657), and this is so though the property of one owner is vacant and unimproved, while much of the other property is built upon (Id.).

89. People v. Desmond, 186 N. Y. 232, 78 N. E. 857. Circumstances rendering the foot-frontage rule improper in a sewer assessment under a statute requiring assessments to be proportioned to benefits. Id.

90. The assessment upon land abutting on a public street of a certain sum per front foot to pay the cost of a public water main under such street can be sustained neither under the power of general taxation, nor the power to assess property benefited by a local improvement to the extent of, and not in excess of, benefits, nor under the police power. Doughten v. Camden, 72 N. J. Law, 451, 63 A. 170.

91. Sewer assessment on basis of square feet: An assessment for a sewer is not an equal assessment in proportion to benefits where the lots on both sides of a block were assessed on the basis of square feet alone, and the sewer was designed to furnish house drainage only for the lots on one side of the block, although it was intended to carry off surface drainage from the whole block. Auditor General v. O'Neill, 143 Mich. 343, 12 Det. Leg. N. 1013, 106 N. W. 895.

Lots assessed according to cost of improvement in front of each: Under a city charter which required the cost of sewer improvements to be assessed upon the real estate benefited in proportion to the benefits, the board of public works adopted an arbitrary and illegal principle in assessing the lots involved according to the cost of the improvement in front of them respectively, when according to the evidence all the lots were equally benefited. In re Davidson [Minn.] 107 N. W. 151.

In Washington it would seem that a statute is constitutional and valid which provides that the cost of a local improvement shall be apportioned according to benefits, or upon the property benefited according to value of property assessed, if the assessment be not in excess of benefits derived. Monk v. Ballard, 42 Wash. 35, 84 P. 397.

92. So held under the Michigan statute (Comp. Laws 1897, § 4350), relating to assessments for drains. Hudlemyer v. Dickinson, 143 Mich. 250, 12 Det. Leg. N. 1000, 106 N. W. 885. The whole cost of an improvement was assessed against the petitioners, who were less than a majority of the abutting owners both in numbers and feet front. Held inequitable and not in accordance with a fair construction of the petition. Whipple v. Toledo, 7 Ohio C. C. (N. S.) 520. In Nebraska all property in a sewer district in a city which is benefited by the improvement should have its fair proportion of the necessary expense of rebuilding and repairing the sewer or a part of the sewer in such district. The city council cannot determine in advance, and without a hearing, that a part only of the property in the district will be benefited, and for the purpose of making the improvement create a new sewer district embracing only such part of the property, and assessing the cost to the property benefited. Shannon v. Omaha [Neb.] 106 N. W. 592. The charter of the city of Asheville is open to criticism in that under it the mayor may arbitrarily impose upon such persons as he supposes affected the entire cost of a public improvement. City of Asheville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800. But in Missouri it has been held that the mere fact that all lands in a levee district that are benefited by a levee have not been assessed will not ipso facto render in-

it because of the failure of the corporate authorities to perfect its assessments against all the properties before the adoption of a constitutional provision, inhibiting the making and levying of such assessments.[93] In the case of a street improvement, if the special benefits resulting therefrom all fall on one side of the street, that side alone is assessable.[94] An assessment omitting state lands and imposing the whole cost of the improvement on the other lands in the improvement district is valid, where there is no authority to assess state lands.[95] Whether different tracts of land in an improvement district have been equally benefited by the improvement is a question largely for legislative inquiry and determination, and such determination must be respected by the courts.[96]

Competitive bids.[97]—Under charter provisions giving to a city power to impose the cost of improvements on abutting property only upon competitive bids, the city can not contract for a street improvement which involves the use of a patented article, thus eliminating competition, and charge the cost of the improvement against the abutting owner.[98]

Due process of law.[99]—Statutes and ordinances providing for special assessments for public improvements must not violate the constitutional inhibition against depriving one of his property without due process of law.[1] Due notice of the assessment must be given to the owners of the property assessed, and it is necessary to the validity of every law prescribing a method for imposing a special assessment that it provide for such notice and afford the property owner an opportunity to be heard concerning the correctness of the assessment at some stage of the proceeding before the assessment becomes absolute or his property is taken to satisfy the lien of the same.[2]

valid the assessment against other lands that are benefited and that have been legally assessed. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333.

93. Fulkerson v. Bristol, 105 Va. 556, 54 S. E. 468.

94. So held under the Indiana statute relating to street improvements. Acts 1901, p. 536, c. 231, § 3. Shirk v. Hupp [Ind.] 78 N. E. 242.

95. So held under a municipal charter relating to street improvements, providing that all property within an assessment district liable to contribute to the improvement shall be assessed therefor equally and ratably in proportion to frontage. City of Spokane v. Security Sav. Soc. [Wash.] 89 P. 466.

96. St. Louis Southwestern R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

97. See ante, § 5.

98. Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099. A modification of such charter provisions, authorizing the city to acquire the right to operate under a patent for a royalty, and then to let the actual work to the lowest bidder, and assess upon abutting owners the royalty in addition to the cost of the actual work performed, does not authorize the city to confer upon a patentee a contract for a large part of the improvement without the formality of bidding, and to assess the cost on abutting owners. Id.

99. See 6 C. L. 1162.

1. The Maryland statute, Acts 1906, p. 143, c. 113, § 22, authorizing a municipality to assess the costs of sidewalks upon abutting property, does not violate § 23 of the Bill of Rights, which provides that no man shall be deprived of property except by the judgment of his peers or the law of the land. City of Hyattsville v. Smith [Md.] 66 A. 44. A provision in a municipal charter, making the right to plead objections to the validity of special tax bills dependent upon the filing of such objections with the board of public works within a limited time after issuance, violates the constitutional inhibition against deprivation of property without due process of law. Curtice v. Schmidt [Mo.] 101 S. W. 61.

2. State v. Seattle, 42 Wash. 370, 85 P. 11. Ordinances which require the paving of streets not as a matter of ordinary repair but upon specified conditions only, and impose the burden thereof not upon the city treasury but upon a specified class of individuals are in their nature judicial, and, if passed without notice to those property owners who are affected by their provisions, are invalid. Sears v. Atlantic City [N. J. Err. & App.] 64 A. 1062. The question whether the benefit received by such owners is less than the burden imposed has no bearing in determining whether such an ordinance is legislative or judicial in its character. The fact that it imposes a burden upon the abutting land is the only test. Id. The notice required to be given by the Arkansas statute, Kirby's Dig. §§ 1414-1450, relating to the establishment of drainage districts, of the establishment of the district and assessment of lands is not so unreasonable and insufficient as to make the assessment under the statute a taking of property without due process of law. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711. The Illinois local improvement act is not unconstitutional on the ground that it does not provide for notice of the assessment proceedings to the owners of the property assessed. Gage v. Chicago, 225 Ill. 136, 80

As a general rule to render the assessment valid even when made under a constitutional law it is essential that the notice be given at that stage of the proceedings the law directs that it be given, and if more than one is provided for more than one must be given.[3] The fact that an assessment is invalid as to part of a tract of land because made without notice to the owners will not invalidate it as to the remainder of the tract.[4]

(§ 9) *C. Persons, property, and districts liable, and extent of liability.*[5]—The whole idea of local assessments goes upon the theory of commensurate benefits received, either actual or conclusively presumed from the exercise of the authority,[6] and in some jurisdictions it is the established rule that the assessments shall not be in excess of the benefits conferred.[7] This rule, however, has not been universally adopted.[8] Property included in a city by annexation may be assessed for pending improvements where the law requires assessment to await completion of the work and ascertainment of the cost, and the fact of a previous assessment restricted to

N. E. 86; McChesney v. Chicago, 226 Ill. 238, 80 N. E. 770. Notice under Indiana statute, Burns' Ann. St. § 4294, sufficient to give the board of trustees of a town complete jurisdiction over persons of landowners within taxing district. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 741. In a proceeding to enforce an assessment for a street improvement, it is no defense that the owner of the property assessed did not receive the notice of the assessment provided for in section 34 of the Illinois Local Improvement Act where such notice was mailed to him. City of Chicago v. Galt, 225 Ill. 368, 80 N. E. 285.

3. State v. Seattle, 42 Wash. 370, 85 P. 11. Assessment held void because sufficient notice was not given at that stage of the proceedings at which it was required by statute and ordinance. Id. Notice insufficient to authorize municipal council to amend assessment roll so as to make it include property not included in the original roll. Id. Failure of council to determine in advance the manner in which an assessment shall be levied, or to give notice to property owners of an intention to levy an assessment, does not render the assessment invalid, where the petition for the improvement did not specify the manner in which it was desired the assessment should be levied or particularize in other ways as to the plan to be adopted in proceeding with the improvement. Whipple v. Toledo, 7 Ohio C. C. (N. S.) 520.

4. State v. Seattle, 42 Wash. 370, 85 P. 11.

5. See 6 C. L. 1162.

6. Edwards v. Cooper [Ind.] 79 N. E. 1047.

7. Under the constitution of New Jersey an assessment for benefits cannot exceed the actual amount of special benefits conferred upon the properties to be assessed. Durrell v. Woodbury [N. J. Law] 65 A. 198. It is the established rule in this state that, in order to sustain an assessment for benefits conferred by a street improvement, it must affirmatively appear that the assessment is not in excess of the benefits conferred upon the land. Burnett v. Boonton [N. J. Law] 63 A. 995. In Alabama assessments upon property for public improvements in excess of the increased value of such property by reason of the special benefits derived from such improvements are expressly forbidden by the constitution. Const. of Ala. § 223. Harton v. Avondale [Ala.] 41 So. 934. This constitutional provision has nothing to do with the manner in which the assessment is apportioned whether by front foot or otherwise, but only fixes a limit beyond which it cannot go. Id. In conforming to the limitation in the case of a street improvement, the assessment must frequently not be uniform among the abutting owners, and an assessment separately against each owner, based alone on the cost of the work abutting his property, is not invalid. Id. Under this constitutional provision the property owner has the right in some form to contest the fact as to the benefits accruing and to produce evidence upon the subject, and, if this opportunity is not given him, the courts can inquire into and enforce his rights. Id. Provision in municipal charter held not to violate this constitutional limitation. Id. In apportioning the costs of widening an alley under the act of Congress of July 22, 1892, c. 230 (27 Stat. 255), as amended by the act of August 24, 1894, c. 328 (28 Stat. 501), the amount assessed must be limited to the benefits conferred. Martin v. District of Columbia, 27 S. Ct. 440.

8. In Kentucky the owner of abutting property may be compelled to pay his share of the cost of a street improvement although he receives no particular benefit because of the improvement. Otter v. Barber Asphalt Pav. Co., 29 Ky. L. R. 1157, 96 S. W. 862. But if the cost of a street improvement equals the value of the property sought to be taxed, it amounts to a spoliation and will not be enforced by the courts. Id. If, however, the cost of the improvement does not equal the value of such property, the courts will uphold the assessment and enforce its collection. Id. The price which the property assessed brings at decretal sale is not the absolute test of its value. Id. The fact that the abutting owner has other property lying behind the property assessed with no other outlet save over the property assessed cannot enter into the question of the value of the latter property. Id. Evidence examined and held to show that the assessment was only about two-thirds of the value of the property assessed. Id. The Arkansas statute, Kirby's Dig. §§ 1414-1450, relating to the establishment of drainage districts, is not unconstitutional and void because it does not

lots originally in the limits is no obstacle, it having been vacated [9] and the city having power to enlarge the assessed area [10] or to correct an erroneous assessment by reassessment. In such a case a purchaser is charged with notice of liability by the visible pendency of the improvement.[11] The rule of equality and uniformity, prescribed in cases of taxation for state and county purposes, does not require that all property of all persons in a county or district shall be taxed for local improvements.[12] The Pennsylvania rule that none but abutters on the improvement can be assessed has been applied to the rectification of a stream though it benefits a large watershed.[13] The method of ascertaining the amount of benefits to accrue from the improvement must not be arbitrary or unreasonable.[14] If by the improvement the value of the property assessed is increased for any use for which it is adapted, it is benefitted thereby.[15] Increased light and air resulting from a street improvement cannot be considered as a "benefit" arising from the improvement.[16] Lots cannot be assessed for the construction of a sewer where they are not connected and are not entitled to connection with such sewer.[17] But lots that have been assessed for a main sewer may subsequently be assessed for branch sewers to connect them therewith.[18] A drainage system may be a benefit to lands already tiled by the owners but which tiling being inefficacious is made so by the system.[19] A drainage system which accelerates the discharge of flood water before destruction of crops is a benefit though it does not prevent overflow.[20] If the location of property or the view therefrom enhances its value this is a circumstance entitled to be taken into consideration in determining what proportion of the costs of a street improvement the property shall bear.[21] Statutes authorizing assessments for local improvements generally contain specific provisions as to what property shall be liable to assessment. Some of those provisions have recently been interpreted by the courts.[22] The fact

limit the assessment upon lands to the value of the benefits conferred by the improvement. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

9, 10. Construing Rochester Charter, §§ 198 et seq. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

11. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

12. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333. An assessment in a levee district embracing all the lands in the district to be benefited by the levee, and no others, is valid under the Missouri statute, Rev. St. 1899, §§ 8437, 8441. Id.

13. Grafius' Run, 31 Pa. Super. Ct. 638.

14. A statute assessing property for a local improvement according to its value as appraised for state and county taxation is not open to the objection that it is an arbitrary or unreasonable method of ascertaining the amount of benefits to accrue from the improvement. Rule applied to assessment of railroad for construction of levee. St. Louis S. W. R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

15. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794. Where a levee results in benefit to property, it is not necessary to warrant an assessment thereon that it should receive absolute protection from overflow, nor that it should have been entirely without protection and subject to inundation before the levee was built. St. Louis S. W. R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

16. Lanfersiek v. Cincinnati, 8 Ohio C. C. (N. S.) 472.

17. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93.

18. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93. But in determining the amount of the subsequent assessment the the amount already assessed should be taken into account for the purpose of equalizing assessments between different lots. Id.

19, 20. Commissioners of Spoon River Drainage Dist. v. Conner, 121 Ill. App. 450.

21. In re Lakeview Ave. [Wash.] 89 P. 156.

22. Arkansas improvement districts: In Arkansas the property to be included in an assessment district ought to adjoin the locality to be affected by the improvement. Kirby's Dig. § 5667. Lenon v. Brodie [Ark.] 98 S. W. 979. In Arkansas money raised by assessment in one improvement district in a municipality cannot be expended in another district. Mansfield's Dig. § 832. Crescent Hotel Co. v. Bradley [Ark.] 98 S. W. 971. If the board of improvements have wrongfully, by fraud or culpable negligence, imposed an unjust burden upon one district by a contract for excessive cost of the improvement, the remedy is against them and not against the taxpayers of another district. Id.

Sewer assessment: Where land is "approximate" to a street in which a sewer is placed, within the meaning of a statute or ordinance providing that an assessment for the sewer shall be made on lands "contiguous or approximate" to the street in which the sewer is placed. Monk v. Ballard, 42 Wash. 35, 84 P. 397.

Street improvement assessments: Under

that the property assessed has been benefited must be established by competent evidence.[23] In the case of a sidewalk the mere fact that the property abuts thereon may be taken as evidence of benefit.[24] In an action for the reduction of a street assessment on the ground of lack of benefits, testimony and estimates as to the value of abutting property before and after the improvement which leave the court in doubt will be resolved against the plaintiff.[25] It is proper to make the amount of the assessment sufficient to cover the cost of all work necessary in the construction of the improvement.[26] The extent of the improvement and what is included in it is to be determined from the terms of the ordinance authorizing it.[27] Generally abutting owners are not liable to assessment for repairs to a street or sidewalk but only for reconstruction or repaving,[28] and sometimes their liability is confined to an original improvement.[29] The question whether the assessment should include the cost of taking and collecting it is to be determined from the terms of the statute under which it is made.[30] Interest is properly included where an assessment was

the California Street Improvement Act, subd. 7 (St. 1891, p. 202), where a subdivision street terminates in another street, the expenses of the work done on one-half of the width of the subdivision street must be assessed upon the lots fronting on such termination. Beckett v. Morse [Cal. App.] 87 P. 408. Where defendant owned land situated in the southwestern corner of a tract of land entirely surrounded by principal streets except on a part of the west side, the defendant owning the land on that side over which the street would run if extended, it was proper to treat the tract as a square for the purpose of assessing property owners for the improvement of an alley extending part way through the tract from the east side thereof to an alley running north and south, and therefore the quarter square system of assessment provided for by Ky. St. 1903, § 2833, was the only one applicable to the case, and so much of defendant's property as was situated in what would be the square if the street on the west was extended was liable to assessment, although it did not touch the alley. Holt v. Figg, 29 Ky. L. R. 613, 94 S. W. 34.

Grading assessments: Under the Kingston City Charter, New York Laws 1896, p. 972, c. 747, § 147, grading assessments are limited to the property fronting on the improvement. People v. Common Council of Kingston, 99 N. Y. S. 657.

Extension of street for wharf purposes: Under section 3457, Ky. St. 1903, the improvement of an extension of a street for wharf purposes between low and high water mark on the bank of a navigable river cannot be made at the expense of the abutting owners. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310.

Where a drainage district, organized under the Illinois Drainage Act of May 29, 1879 (Hurd's Rev. St. 1905, c. 42), takes in contiguous territory lying within an incorporated city, it cannot without the consent of the city make and enforce payment of assessments for street benefits resulting from the construction of the improvement. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

23. In proceedings under the Arkansas statute, Kirby's Dig. §§ 1414-1450, for the construction of a ditch or drain, the report of the viewers is sufficient evidence to support the finding of the county court as to probable benefits to property in the drainage district. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

24, 25. Westenhaver v. Hoytsville, 8 Ohio C. C. (N. S.) 284.

26. An assessment for a street improvement properly includes the cost of regrading, so far as such regrading is necessary in the construction of the improvement. Morton v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807.

27. The word "street" as used in an ordinance for a street improvement held to include the sidewalk, and that, therefore, abutting owners were assessable for the cost of the sidewalk. Morton v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807.

28. Walker v. Detroit, 143 Mich. 427, 106 N. W. 1123; Morton v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807. Under Detroit City Charter, §§ 57 and 193, an abutting property owner is chargeable with the cost of laying a new walk to replace one so out of repair that it cannot be repaired, since, though the city is liable for the costs of repairing, the property owner is liable for cost of construction. Walker v. Detroit, 143 Mich. 427, 106 N. W. 1123.

29. Where a city has from time to time repaired a street by macadamizing it but without special assessment against the abutting owners, an ordinance requiring the pavement of the street with brick calls for an original improvement and not a reconstruction, within the purview of the Kentucky statute, and hence the abutting property is subject to assessment. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1. In Pennsylvania macadamizing may be regarded as a permanent roadway so as to absolve abutters from assessment for later repaving. Chester City v. Evans, 32 Pa. Super. Ct. 641. Under this rule a purpose to change the character of a street to that of a permanent artificial roadway may be inferred. Express declaration by ordinance is not essential proof. Id.

30. Under section 94 of the Illinois local improvement act, as amended in 1901 (Hurd's Rev. St. 1901, c. 24), a special assessment cannot be levied to pay the costs and expenses of maintaining a board of local improvements or any expense except the cost of making and collecting the particular

deferred and reassessment made and the law requires the entire cost to be met by assessment, the city having been meanwhile chargeable with interest.[31] When a part of one's land is taken for an improvement, the part so taken cannot be assessed for benefits.[32] but the part not taken may be.[33] In the absence of express statutory authority a city cannot subject state lands to a special assessment for local improvements.[34] In Indiana the right of way of a railroad company abutting upon a street is subject to assessment for the improvement of the street.[35] In Arkansas in assessing a railroad track for a local improvement it is proper to include in the property assessed ties, angle bars, and rails.[36] Some statutes in express terms limit the assessment to real property.[37] In determining whether lands of a certain character or in a certain location are liable to assessment, regard must always be had to the terms of the statute authorizing the assessment.[38] Under some of the statutes certain lands are exempted from assessment.[39] But a constitutional exemption from "taxation" does not exempt from special assessments for local improvements.[40] Some statutes preclude the assessment of lands abutting on a street improvement

assessment. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42. Village charter authorizing special assessment for street improvement held not to make property liable to special assessment, chargeable with costs incurred by village in unsuccessful attempt to enforce an invalid assessment. In re Locust Ave., 185 N. Y. 115, 77 N. E. 1012.

31. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

32. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

33. The fact that a portion of certain lots are taken for the widening of a street and compensation awarded therefor will not preclude an assessment of the remainder of such lots for benefits accruing to them by reason of the improvement. In re Pike Street, 42 Wash. 551, 85 P. 45.

34. Such authority is not conferred by a statute which in general terms delegates power to levy special assessments upon private property benefited by the improvement. City of Spokane v. Security Sav. Soc. [Wash.] 89 P. 466. In the absence of a statute expressly authorizing such a procedure, an assessment for a municipal improvement cannot be enforced against the interest of a lessee of state lands, where the assessment was made prior to the time the lease was bid for. Rabel v. Seattle [Wash.] 87 P. 520. Where an ordinance providing for improvements, for the payment of which an assessment was sought to be levied, was passed prior to the issuance of a lease of state lands and presumably to the bidding therefor, and the assessment purports to be made against the entire property instead of merely the leasehold, it cannot be enforced. Id.

35. Pittsburg, etc., R. Co. v. Tabor [Ind.] 77 N. E. 741.

36. Kirby's Dig. §§ 6940-6944. St. Louis Southwestern R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

37. The poles and wires of a telegraph company erected along the right of way of a railroad company, under a contract providing that they "shall be and remain the personal property of the former, are not assessable for the purpose of raising revenue for an irrigation district, under the California Statute, St. 1887, p. 37, § 18, authorizing the assessment of all "real property" in the district. Western Union Tel. Co. v. Modesto Irr. Co. [Cal.] 87 P. 190.

38. Under a statute providing that assessments for street improvements shall be made on the lots benefited in the proportion in which they will be benefited, school lands if not expressly exempted will be liable to assessment. So held in construing the Washington statute, Sess. Laws 1893, p. 186, c. 84. In re Howard Avenue [Wash.] 86 P. 1117. The Minneapolis city charter does not empower the city to levy local assessments upon property abutting approaches to a bridge crossing railway tracks. State v. Smith, 99 Minn. 59, 108 N. W. 822.

39. **Burial ground:** Under the New York Laws 1879, p. 397, c. 310, §§ 1 and 2, a burial ground is exempt from assessment for a public improvement, even though the improvement is authorized by a special act. In re White Plains Presbyterian Church, 112 App. Div. 130, 98 N. Y. S. 63.

Certain number of feet frontage on corner lot: In the assessment of benefits in the construction of a sewer it was held that a lot located on a street at a point where if turned at an obtuse angle was not a corner lot within a rule of assessment exempting a certain number of feet frontage on a corner lot. Newell v. Bristol, 78 Conn. 571, 63 A. 355.

The right of way of a railroad company paying a gross earnings tax in lieu of all taxes and all assessments as provided by the Minnesota statutes, Sp. Laws 1873, p. 302, c. 111, is exempt from assessments for special benefits accruing thereto by the construction of a public ditch. In re Drainage Ditch No. 6 [Minn.] 109 N. W. 993.

School districts not exempted: Provisions of municipal charter and ordinances held not to exempt school districts from assessments for street improvements. In re Howard Avenue [Wash.] 86 P. 1117.

Swamp and overflowed lands which were granted to the state of Arkansas by the United States, under the act of congress of September 28, 1850, are not exempt from assessment for the construction of a drain. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

40. In re Howard Avenue [Wash.] 86 P. 1117. Thus the constitution of Washington, art. 7, § 2, exempting school districts from

beyond a certain depth,[41] and others limit assessments for municipal improvements to a certain per cent of the actual value of the land at the time of the levy,[42] or to a certain per cent of the cost of the improvement;[43] or limit the per cent of special assessments to be raised in any one year.[44] The rate or amount of lawful assessment by a municipality for a street improvement, such as a pavement or sewer, upon benefited or abutting property, is governed by the statute in force at the beginning of the proceeding.[45] Where a municipal council does not enforce a penalty against a contractor for not finishing an improvement within the time stipulated, a property owner is not entitled to a credit for any part of such penalty where he is in no way prejudiced by the delay.[46] In Illinois an abutting owner may relieve his property from liability to assessment for a sidewalk by building the sidewalk himself.[47] A municipality may by contract preclude itself from levying special assessments for a certain improvement,[48] or may charge itself with benefits which accrue to certain property,[49] or it may bind itself to postpone the collection of assessments until the damages caused to the property assessed have been determined.[50] The action of a

"taxation," does not exempt such districts from special assessments for street improvements. Id.

41. Under the charter of St. Louis, art. 6, § 18, for a street improvement, abutting property can only be assessed to a depth of one hundred and fifty feet. Asphalt & Granitoid Const. Co. v. Hauessler [Mo.] 100 S. W. 14.

42. Baily v. Sioux City [Iowa] 110 N. W. 839. The Iowa Code of 1897, § 792a, provides that a special assessment for a public improvement shall be in proportion to the special benefits conferred and shall not exceed twenty-five per centum of the actual value of the land. Section 816 provides that "the lien of a special tax for street improvements in case of abutting property shall not cover to exceed one hundred and fifty feet in depth from the abutting line." Under these statutes in fixing the assessment on property which is more than one hundred and fifty feet in depth, the assessment is limited to twenty-five per cent of the value of a strip one hundred and fifty feet in depth. Rawson v. Des Moines [Iowa] 110 N. W. 918. Reduction of assessments proper where in excess of twenty-five per cent. Baily v. Sioux City [Iowa] 110 N. W. 839.

43. Assessment held to violate provision in municipal charter declaring that not more than one-third of the cost of a street improvement shall be assessed against the owners of abutting property. Harton v. Avondale [Ala.] 41 So. 934.

44. The Michigan statute, § 22, Act No. 39, p. 55, Pub. Acts 1899, providing for the payment of special assessments in yearly instalments, but making no reference to the per cent of the assessment authorized, does not conflict with or impliedly repeal the provisions of the general village act, Comp. Laws, § 2856, limiting the per cent of special assessments to be raised in any one year. Corliss v. Highland Park [Mich.] 13 Det. Leg. N. 912, 110 N. W. 45. An assessment made pursuant to the provisions of such statute in excess of the per cent fixed by such general village act is unauthorized and void. Id.

45. City of Toledo v. Marlow, 8 Ohio C. C. (N. S.) 121. The adoption of the preliminary resolution declaring the necessity of a street improvement, such as a pavement or sewer, is, in the absence of a petition by property owners for the improvement, the beginning of a proceeding which is thereafter "pending" within the meaning of § 79, Rev. St. of Ohio, and unaffected, in respect to limitation of rate of assessment, by an amendatory act not expressly retroactive. Id.

46. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

47. The abutting owner by building a sidewalk in front of his property within forty days after the taking effect of the ordinance providing for the walk will relieve his property absolutely from any assessment for the cost of intersections or any other portion of the sidewalk. Local Improvement Act (Laws 1897, p. 101), as amended by Laws 1901, p. 105, § 34. City of Chicago v. Burkhardt, 223 Ill. 297, 79 N. E. 82. A notice to such an abutting owner that he will be allowed until a specified date to complete the sidewalk opposite his land and thereby relieve the same from assessment, except for his proportionate share of the cost of intersections, is not such a notice as the statute contemplates. Id.

48. In Massachusetts the board of street commissioners of a city cannot bind the city by contract to give up betterments assessable upon the laying out of a street, except under the Act of 1884, p. 185, c. 226 (Rev. Laws, c. 50, § 11). Whitcomb v. Boston [Mass.] 78 N. E. 407.

49. Agreement between municipality and proprietors of cemetery for construction of branch sewer for drainage of cemetery held to bring cemetery into assessment district and to charge the municipality with benefits which would have been chargeable to the cemetery had the property not been held as such. Edwards v. Cooper [Ind.] 79 N. E. 1047.

50. It would seem that a contract signed by property owners along the line of a proposed street which requires the postponement of the collection of betterments until the damages caused to the several signers shall be determined, and prescribing a set-off of the damages against the betterments, would be binding on the municipality if the authorities in laying out the street, and

municipal council in including property in an improvement district is conclusive of the fact that it is adjoining the locality to be affected, except when attacked for fraud or demonstrable mistake.[51] And it is invested with the same discretion in excluding property from a district as it is in including it, and the same conclusiveness attends its action.[52]

(§ 9) *D. Procedure for authorization, levy, and confirmation of assessments.*[53] *Statutes, ordinances and jurisdiction of proceedings.*—The legislature must establish the district within which the improvement is to be made and the special benefits assessed, or assign the duty to do so.[54] It is not necessary that the boundaries of the district should be coterminous with any of the political divisions of the state.[55] A statute conferring upon a municipality power to levy special assessments is not invalid merely because it does not specifically prescribe the details of the procedure to be pursued in its exercise,[56] but a prescribed mode of procedure must be strictly followed[57] if applicable.[58] By a saving clause, powers contained in a former city charter may be preserved for the enforcement of assessments made thereunder.[59] Where power is delegated to a municipality, it must be exercised in a valid manner, and all the requirements of the statute must be complied with.[60] But the fact that one section of an ordinance providing for an assessment is invalid will not necessarily invalidate the whole ordinance.[61] The jurisdiction of assessment proceedings and the powers and duties of public officers in matters connected with such proceedings are generally regulated by statute. Powers that are purely ministerial may be delegated to clerks and other inferior officers or agents.[62]

afterwards in constructing it, accepted the offer, though the contract was not signed by any one representing the municipality. Aspinwall v. Boston, 191 Mass. 441, 78 N. E. 103. But in such case there must be an acceptance of the offer by the city, by the performance of the entire agreement referred to in the writing, within a reasonable time. Id.

51. Lenon v. Brodie [Ark.] 98 S. W. 979. In Arkansas the findings of the county court in proceedings for the construction of a ditch or drain raise at least a prima facie presumption of benefit to the lands included in the drainage district, and such findings will not be set aside where there is evidence to support them, even though against the preponderance of the evidence. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

52. Lenon v. Brodie [Ark.] 98 S. W. 979.

53. See 6 C. L. 1165.

54, 55, 56. City of Ashville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800.

57. Siegel v. Chicago, 223 Ill. 428, 79 N. E. 280; Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

58. The Arkansas statute (Acts 1905, p. 543), relating to the mode of levying assessments in a levee district, does not apply to the Redfork levee district. Redfork Levee Dist. v. St. Louis, etc., R. Co. [Ark.] 96 S. W. 117.

59. The Omaha charter of 1897, saving the validity of taxes and assessments made previously to be collected or enforced in the manner provided or to be provided, does not repeal in regard to such tax the power to relevy a special assessment which was attempted to be levied under a former act, but failed because of irregularity in procedure. Mercer Co. v. Omaha [Neb.] 107 N. W. 565.

60. In the exercise of the power of levying special assessments conferred by its charter upon the city of Ashville, the board of aldermen must establish the limits of the district within which they are to be made. City of Ashville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800. Ordinance held to sufficiently provide for the making and filing of a special tax list, and for the issuing of a warrant to the village collector for the collection of the same, as provided by statute. Hurd v. People, 221 Ill. 398, 77 N. E. 443.

61. Where a section of an ordinance for a street improvement provides that a specific sum raised by special assessment shall be appropriated to the payment of certain costs, part of which it is not permissible to raise by special assessment, the other provisions of the ordinance are not affected by the illegality of such section. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42.

62. Not necessary to transfer proceedings to circuit court to warrant an assessment against a municipality on account of benefits to outlying cemetery property, as provided by the Indiana statute (Acts 1901, p. 616, c. 262, § 5). Edwards v. Cooper [Ind.] 79 N. E. 1047. Under the Missouri statute (Rev. St. 1899, § 8441), the determination of the question as to what lands in a levee district will be benefited by the levee, is left to the assessor. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333. Under the Illinois statute (Hurd's Rev. St. 1905, c. 24, § 547), the affidavit of the examination of the collector's books to ascertain the person paying the taxes on the property assessed, may be made by a person acting under the direction of the officer making the return, though he be not an employe of the

Essential prerequisites to assessment.—In addition to the necessary preliminary ordinance or statute,[63] and a legally authorized improvement,[64] the assessment must be predicated on proceedings adequate to form a binding contract.[65] The assessment district should be defined before the assessment is made,[66] and before the final apportionment is made and judgment rendered, the cost of the improvement must be ascertained.[67] In the case of drainage works in Illinois where part of the land is to be taken for the improvement, the condemnation damages should first be ascertained.[68] If the jury determines that the land not taken is not damaged, it is then proper to assess the benefits.[69] If there is an option to make the improvement as an individual, proper notice must precede the assessment.[70]

Defective or excessive assessments.—Where the mode or time of making an assessment is prescribed by statute, the statute must be followed.[71] Defects in assessment proceedings that are jurisdictional will render the proceedings and assessments made under them void.[72] But a mere irregularity that is not jurisdictional will not invalidate the proceedings.[73] In Kentucky where an assessment is in excess of what the statute under which it is made permits, the circuit court may correct it.[74]

Assessment roll or report.[75]—The assessment roll or report should contain a correct description of the property assessed,[76] but if the description is the same as that by which the owner acquired title, it is sufficient as against him.[77] A viewer's report should not be a mere ratification of a preliminary engineer's estimate.[78] Prop-

office. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794. Under the charter of Kansas City, tax bills may be signed in the name of the president of the board of public works by a person by the board specially authorized by resolution in writing to do so. Jaicks v. Merrill [Mo.] 98 S. W. 753. The mere arithmetical work of the apportionment of the total cost of a street improvement to the several abutting lots by the clerks in the office of the city engineer is not a delegation of the authority of the board of public works and council to such clerks. Id.

63. See ante, this section.

64. See ante, § 4.

65. See ante, § 5.

66, 67. City of Ashville v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 800.

68. So held in a proceeding for the establishment of a drainage district under the Illinois Drainage Act of May 29, 1879 (Hurd's Rev. St. 1905, c. 42). City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

69. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

70. State v. Several Parcels of Land [Neb.] 107 N. W. 566.

71. An assessment in a levee district made in accordance with the order of court held not open to the objection that it was not made at the first annual assessment after the district was organized as required by the Missouri statute (Rev. St. 1899, § 8441). State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333. The fact that the board of trustees in making an assessment under the Indiana statute (Burn's Ann. St. §§ 4293, 4294), adopted the report of the engineer the night the committee reported the same, did not render its act invalid. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 74.

72. Where a resolution for the building of a sewer was modified by providing for a branch sewer, the omission of the board of public works to enter a finding concerning benefits, after the order for the construction of the branch, was a jurisdictional defect in the proceedings rendering them void, under the Indiana statute (Acts 1901, p. 608, c. 262). Edwards v. Cooper [Ind.] 79 N. E. 1047. Facts not showing that property owners assessed for the construction of the sewer were not prejudiced by such omission. Id. No descriptive list of railroad property subject to levee taxation having been filed by the board of inspectors of a levee district in accordance with the provisions of the Arkansas statutes, assessments upon such property were invalid. Redford Levee Dist. v. St. Louis, etc., R. Co. [Ark.] 96 S. W. 117. See, also, post, § 9 J, Collateral Attack.

73. Reference of assessment for municipal improvements to street and alley committee of council instead of to city commissioners as required by the Indiana statute (Burns' Ann. St. §§ 3623a-3623h), a mere irregularity not invalidating the proceedings. Boswell v. Marion [Ind. App.] 79 N. E. 1056.

74. Morten v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807.

75. See 6 C. L. 1166.

76. Under the Illinois statute it is the duty of the superintendent of assessments to assess each lot, block, tract, or parcel of land, which he finds will be benefited by the improvement, by its legal description as one tract, without attempting to divide it into smaller tracts to correspond with some legal existing subdivision of other property that was included in the benefited district. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

77. Wiemers v. People, 225 Ill. 82, 80 N. E. 68; People v. Wiemers, 225 Ill. 17, 80 N. E. 45.

78. Where a judicial discretion is vested in the viewers appointed to determine the benefits to accrue to property from a municipal improvement, their report adopting the estimate made by the municipal engineer

erty that will not be benefited by the improvement should be omitted from the assessment report.[79] The presumption is that property omitted from the report will not be benefited, and this presumption is not overcome by the fact that the property abuts on the improvement.[80] The certificate of a city engineer annexed to the assessment roll, that he has apportioned the amounts assessed according to benefits, is subject to review, when it conclusively appears that the apportionment does not correspond to the actual benefits and was not designed to do so.[81] Where a municipality is not required by statute to give notice of the hearing of objections to a proposed assessment roll, notice actually given by it will not preclude the property holders not appearing from challenging the correctness of the roll after it has been approved and adopted.[82]

Confirmation of assessments.[83]—Due process of law does not necessarily require personal notice of confirmation proceedings to the property owners. A statute providing for constructive notice appropriate to the nature of the case, which will afford the property owner the opportunity to contest the validity of the assessment, is sufficient.[84] Statutory requirements as to notice must be complied with.[85] In confirmation proceedings in Illinois the property owners are entitled to a trial by jury.[86] Under an Illinois statute, if the proceedings are regular on their face, the court must confirm the assessments unless the objectors offer testimony.[87] An assessment will not be confirmed where the plans and specifications for the improvement are too indefinite to enable the property owners to tell whether or not it will take or damage their property.[88] Where an extension of culverts is essential to a street improvement, an assessment therefor cannot be confirmed until legal provision has been made for such extension.[89] It is no valid objection to the confirmation of an assessment that the land upon which the improvement is to be located was acquired by purchase and not by condemnation proceedings, where no one has questioned the legality of the purchase.[90] Confirmation cannot be defeated merely be-

and included in the improvement ordinance is insufficient and should be set aside. So held in relation to a report of viewers in a proceeding under the Pennsylvania statute (Act May 16, 1891 [P. L. 75]), to ascertain benefits resulting from the construction of a sewer. In re Wheeler Ave. Sewer, 214 Pa. 504, 63 A. 894.

79. It is the duty of the officer to omit from his report a lot that will not be benefited by a proposed sewer, although the city council had provided for house slants in front of such lot on the supposition that the sewer would be a benefit to it. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539. Where the cost of a levee is to be borne exclusively by lands in the levee district benefited thereby, it is not necessary to assess the value of lands which will not be benefited. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333.

80. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

81. Auditor General v. O'Neill, 143 Mich. 343, 12 Det. Leg. N. 1013, 106 N. W. 895.

82. Monk v. Ballard, 42 Wash. 35, 84 P. 397.

83. See 6 C. L. 1166.

84. Notice provided for in this case held sufficient. Gage v. Chicago, 225 Ill. 218, 80 N. E. 127.

85. Affidavit showing compliance with requirements as to notice: The requirement of the Illinois statute, Local Improvement Act, § 41 (Hurd's Rev. St. 1903, c. 24, § 547), that an affidavit shall be filed before final hearing of the correctness of assessments for a local improvement, "showing a compliance with the requirements of this section," refers only to the giving of the notice provided for in the section. In this case the requirement was sufficiently complied with. Howe v. Chicago, 224 Ill. 95, 79 N. E. 421.

Rebate order may be entered without notice: Under the Illinois statute (Hurd's Rev. St. 1905, p. 425, c. 24, § 84), if the assessment is payable in a single payment, the court must upon receiving the certificate enter the rebate order provided for by the statute where the amount assessed exceeds the cost of the improvement, without notice to the owners of property assessed. People v. McMahon, 224 Ill. 284, 79 N. E. 645.

86. Local Improvement Act, § 48 (Hurd's Rev. St. 1905, p. 417, c. 24). Doran v. Murphysboro, 225 Ill. 514, 80 N. E. 323.

87. Illinois statute relating to assessments for drains (Act of May 29, 1879, § 37, as amended by Act of June 30, 1885 [Hurd's Rev. St. 1905, c. 42]). Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

88. So held in proceedings by a drainage district for the confirmation of an assessment for the construction of drains. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

89. Lindblad v. Normal, 224 Ill. 362, 79 N. E. 675.

90. This was an assessment for a pump-

cause the engineer's certificate accompanying the estimate of cost uses the language, "all other expenses" instead of the "lawful expenses," as prescribed by statute.[91] The fact that the court causes a plat to be made of an imaginary subdivision of objector's land, merely for its convenience in considering objections, is not a valid objection to confirmation.[92] Nor can an assessment be defeated on the ground that a portion of the improvement was improperly included in the ordinance therefor, where the amount thereby added to the objector's assessment is trifling.[93] The objection cannot be raised that the right of way for constructing the improvement has not been obtained, unless the objector shows that some of his property has been taken or damaged.[94] Persons who petition for an improvement on the frontage plan cannot object that the assessments are invalid because the benefits are not equal.[95] Power is sometimes conferred upon the court to reduce the assessment.[96] Objections to confirmation must be specific and definite.[97] In Washington a filing fee of two dollars is required as a condition precedent to the filing of objections to an assessment for a street improvement.[98] The striking out of defendant's answer is not reversible error, where he is given an opportunity to introduce evidence at the hearing concerning all of the matters alleged in such answer.[99] In Illinois the court may, for good cause shown at any time before confirmation, allow additional objections to be filed, or make any order altering, changing, annulling, or modifying, the assessment, or continuing the hearing, as it may deem just and equitable.[1] The question of the necessity for the improvement is not for the jury, the municipal authorities being the sole judges of the necessity.[2] An instruction reciting that the assessment was levied by authority of the board of local improvements is not harmful error, if the jury is not required to determine whether the assessment was lawfully levied.[3] Evidence that certain terms used in the ordinance for the improvement, descriptive thereof, have a well-known meaning among public contractors, is

ing station and system of sewers, and benefit rather than injury would accrue to the property owners assessed by devoting the land to the improvement. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93.

91. Gage v. Chicago, 225 Ill. 135, 80 N. E. 86.

92. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

93. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42.

94. So held in proceedings by a drainage district for the confirmation of an assessment for the construction of drains. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

95. Ebensburg Borough v. Little, 28 Pa. Super. Ct. 469. When so petitioned the cost may be pro rated according to frontage, though the amount of work done is greater in some sections of the street than others. Id.

96. The court under the power to modify, change, alter, or annul, the assessment, may order a per centum to be deducted from it and made a charge against the general fund of the city. In re Pike Street, 42 Wash. 551, 85 P. 45.

97. Objection to confirmation of a special assessment held sufficiently specified to raise the question of the sufficiency of the estimate of the cost of the improvement. Doran v. Murphysboro, 225 Ill. 514, 80 N. E. 323. Objections held sufficient to raise the question of the unreasonableness, unjustness, and oppressiveness, of an ordinance for a street improvement. City of Belleville v. Herzler, 225 Ill. 404, 80 N. E. 269. Where in proceedings for the confirmation of a special assessment, counsel for an objector concedes that he has not read the legal objections filed, but thinks they "are copied right from the stereotype blanket form," and is unable to state any reason in support of the objections, the action of the trial court in overruling such objections will not be reviewed on appeal. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794.

98. But where a number of property owners join together on one common answer or set of objections to the assessments made upon their properties, only one fee of $2 is required. State v. Case, 42 Wash. 658, 85 P. 420.

99. In re Pike Street, 42 Wash. 551, 85 P. 45.

1. Hurd's Rev. St. 1905, pp. 416, 417, c. 24, §§ 46-49, 52. Doran v. Murphysboro, 225 Ill. 514, 80 N. E. 323; City of Belleville v. Perrin, 225 Ill. 437, 80 N. E. 270. It is error not to permit objectors to file objections to the merits after the court has overruled the legal objections. Doran v. Murphysboro, 225 Ill. 514, 80 N. E. 323. Where objections were amended by adding another ground of objection, it was held that it was not reversible error for the trial court to refuse to require the objectors to point out more specifically the grounds upon which the objection was made. City of Belleville v. Perrin, 225 Ill. 437, 80 N. E. 270.

2, 3. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794.

competent.[4] Evidence of petitioner engineer and of a subsequent ordinance is admissible to show that a property owner would obtain the benefits of the improvement which he could not have obtained under the ordinance originating the improvement.[5] A certified copy of an ordinance for a street improvement is not rendered inadmissible in evidence in a confirmation proceeding by the fact that there are certain interlineations and erasions which were made before the ordinance was passed and approved.[6] If the evidence has no relation to the expense about to be entailed on the taxpayers,[7] or to the validity of the improvement or tax,[8] it is inadmissible. Plats offered must correctly show the material facts.[9] It is not error for the court to refuse to adjourn the proceedings where a sufficient reason for adjournment is not shown.[10] The court during the term at which a judgment is rendered confirming the assessment may amend or correct the record and make it conform to the rulings of the court.[11]

(§ 9) *E. Reassessments and additional assessments.*[12]—Municipal corporations are generally authorized to make a new assessment where the original assessment was invalid. The constitutionality of some of the statutes conferring such authority has been upheld.[13] Where a municipality has power to make a valid as-

4. Such evidence in the absence of objection or contradiction will cure an insufficient description in the ordinance. McChesney v. Chicago, 226 Ill. 238, 80 N. E. 770.

5. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794.

6. Gage v. Chicago, 223 Ill. 602, 79 N. E. 294.

7. Evidence as to whether the estimate of the cost of levying and collecting a special assessment included illegal items not admissible, where the estimate is within the amount allowed by statute, and the amount of the property owners would be required to pay would not depend upon the amount estimated, but on the legitimate items of cost. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93. In proceedings for the confirmation of an assessment for the widening of a street, it is not error to refuse to hear evidence as to damages to buildings caused by the improvement. In re Pike Street, 42 Wash. 551, 85 P. 45. Evidence that property that has not been assessed for the construction of sewers will be benefited by them is not admissible where there is no offer to prove that such property had or even would have any connection with the sewers or right to drain into them. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93.

8. Evidence to prove that a prior proposed improvement had been abandoned, and an agreement made between counsel for the city and the property owners that a new improvement should not be constructed, is incompetent. Howe v. Chicago, 224 Ill. 95, 79 N. E. 421.

9. In a proceeding for the confirmation of a sewer assessment, upon the question of the cost of the improvement, a plat showing the length of the main sewer, but not showing the location of other sewers with which it is to contract, is not admissible to prove the total length of the sewer. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

10. Circumstances under which the court did not err in refusing to adjourn the trial to enable an objector to measure the distance between the termini of the proposed sewer. Sheedy v. Chicago, 221 Ill. 111, 77 N. E. 539.

11. McChesney v. Chicago, 226 Ill. 238, 80 N. E. 770.

12. See 6 C. L. 1168.

13. Under the charter of the city of Flint, any special assessment, which is in the opinion of the council invalid by reason of irregularity or informality in the proceedings, may be validated by a new assessment for the same purpose for which the former assessment was made. Stewart Co. v. Flint [Mich.] 111 N. W. 352. Under the Washington statute (Ballinger's Ann. Codes & St. § 1139), authorizing a city to make a reassessment for a street improvement, while the original assessment must, as a matter of law, be invalid to authorize a reassessment, no prior adjudication of such invalidity is necessary. City of Spokane v. Security Sav. Soc. [Wash.] 89 P. 466. Under the Indiana statute (Burn's Ann. St. 1901, §§ 4293, 4294), the power of the board of trustees to make an assessment for a street improvement continues until legally exercised, and if after an assessment, it is found, that the description of the property in the engineer's reports and subsequent proceedings is insufficient and it requires new or amended reports and takes the proper steps to make an assessment containing correct descriptions of the property, such assessment supersedes and vacates the first assessment and is valid. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 741. Under the Missouri statute (Rev. St. 1899, § 5950) giving a municipal council power to correct an assessment for a street improvement and to make a new levy and assessment, it may correct an ordinance directing a tax bill to be made out in favor of the municipality by a subsequent ordinance, amending the same to conform to the statute, by authorizing the levy of a special assessment in favor of the committee of the council in charge of the work. City of Fayette v. Rich [Mo. App.] 99 S. W. 8. The Kansas Laws 1903, p. 207, c. 122, § 129, providing for the relevy of an assessment, void for want of jurisdiction to levy it, is a constitutional enactment, and applies to a levy

sessment, the fact that it makes an invalid one will not preclude it from making a reassessment on the same property.[14] The question whether reassessment proceedings are controlled by a particular statute must be determined from the terms of the statute and the facts of the particular case.[15] Upon a reassessment of special taxes against a part only of the property benefited by the improvement, notice to the owners of the other property benefited, who had paid the taxes originally assessed, is not required.[16] Whether a reassessment will be declared invalid on the ground that the proceedings on which it is based are irregular or defective, or because statutory requirements have not been complied with, will depend on the terms of the statute and the facts of the particular case.[17] A reassessment will not be invalidated by a defect in proceedings preliminary to the improvement ordinance, where such defect did not invalidate the ordinance.[18] In a reassessment, as in the original assessment, there must be equality and no erroneous principle of law must be followed.[19] A reassessment may include property that became liable after the work was begun but before liability accrued.[20] Reassessment cannot be made when the assessment has been satisfied by a sale of the property.[21] A reassessment must be made within the time limited by statute.[22] In order to sustain a supplemental assessment to complete an improvement, the estimate and report on which it is based must be valid.[23] Where a contractor for a street improvement is to be paid in bonds redeemable out of a fund to be created by a special assessment, and the assessment

which is void for want of a sufficient petition for the improvement. Kansas City v. Silver [Kan.] 85 P. 805. The Wisconsin statute (Laws 1903, p. 572, c. 354), providing that in an action at law to recover damages arising from failure to make a proper assessment for a street improvement or from failure to observe any provision of law, a reassessment of damages and benefits shall be made as well as in an action in equity to set aside the assessment and with like effect on the action, is constitutional and valid. Dahlman v. Milwaukee [Wis.] 110 N. W. 479.

14. State v. Seattle, 42 Wash. 370, 85 P. 11. Under the Wisconsin reassessment statutes (Laws 1897, p. 499, c. 262 [Rev. St. 1898, § 1210d], as amended by Laws 1901, p. 9, c. 9), where a municipality having authority to make an assessment for street improvements makes an invalid assessment, it may order a reassessment without first adopting Rev. St. 1898, c. 40a. Dahlman v. Milwaukee [Wis.] 110 N. W. 479.

15. Proceedings for reassessment not controlled by the Illinois statute (Hurd's Rev. St. 1903, c. 24, § 605), providing that prior laws should continue to apply to proceedings pending at the time of its taking effect, etc. Gage v. People, 225 Ill. 144, 80 N. E. 90.

16. So held where the reassessment was for a sewer improvement under the Nebraska statute (Comp. St. 1901, c. 12a, § 161). Richardson v. Omaha [Neb.] 110 N. W. 648.

17. In a Minnesota case objections were raised to a reassessment on the grounds that the proceedings for the improvement and assessment were jurisdictionally defective, that no valid contract for the improvement was entered into, and that in the reassessment proceedings additional territory was, without notice to the property owners, added to the original assessment district. Following recent decisions of the supreme court, a decision was rendered adverse to the objectors. State v. District Ct. of Ramsay County, 98 Minn. 63, 107 N. W. 726.

18. City of Chicago v. Galt, 225 Ill. 368, 80 N. E. 285.

19. Reassessment held not demonstrably unequal or unfair and not based on an erroneous principle of law. State v. District Court of Ramsey County, 98 Minn. 63, 107 N. W. 726.

20. In re Hollister, 96 App. Div. 501, 89 N. Y. S. 518.

21. Authority to correct defective assessments by reassessment does not cover the case of defective sale. Gaston v. Portland [Or.] 84 P. 1040.

22. The Washington statute (Laws 1895, p. 270), limiting the time within which an action may be commenced to enforce an assessment after it has been levied, applies to the right to make a reassessment. Therefore, a reassessment cannot be compelled by mandamus more than ten years after the original assessment was declared void. Frye v. Mt. Vernon, 42 Wash. 268, 84 P. 864.

23. Where commissioners were appointed to estimate the amount necessary to be realized by a supplemental assessment to complete a street improvement, and after the death of one of them the other two reported that "we estimate the additional amount of moneys necessary to be realized * * * at $19,329.73," it was held that the report was fatally defective in not showing that the third commissioner acted with the two making the report. Town of Cicero v. Andren, 224 Ill. 617, 79 N. E. 962. Whether under such circumstances the surviving commissioners may report for all three, quaere. Id. Where under an ordinance for a third assessment for street improvements, commissioners were appointed to estimate the amount of money necessary to be realized by such supplemental assessment, their report that a specified sum "together with the amount of said first assessment" would be sufficient to cover the cost of the improvements, not mentioning the second assessment, was held invalid. Id.

is void because of failure to notify the property owners, mandamus to compel a new assessment is the proper remedy of the contractor.[24]

(§ 9) *F. Maturity, obligation, and lien of assessments.*[25]—A municipality can impose a valid municipal lien for street improvements only when the improvements are made in pursuance of law and the mode pointed out by the city ordinance is strictly followed.[26] In Connecticut an assessment for benefits puts the owner of the land in the position of a debtor.[27] Under some statutes interest may be recovered on special assessments or tax bills if not paid within a time prescribed,[28] and under others assessments are made payable in yearly instalments with interest.[29] An error in providing that a single instalment of an assessment shall draw interest does not defeat the whole assessment where the levy is explicit and there is nothing in the ordinance to show that there is any necessity for interest, such as would preclude disregarding the interest provision therein and sustaining the remainder.[30] An unqualified grant of power to impose an assessment lien carries with it power to impose a lien which shall continue as long as the occasion for it continues,[31] but in order to preserve the lien against third persons becoming interested in the land, the performance of certain conditions is sometimes imposed.[32] The terms of the statute or ordinance under which the lien arises generally determine the date at which it attaches,[33] and the interest that is bound by it;[34] and where lots subject

24. State v. Seattle, 42 Wash. 370, 85 P. 11. Having been no party his failure to object does not estop him. Id.

25. See 6 C. L. 1169.

26. In re Scranton Sewer, 213 Pa. 4, 62 A. 173.

27. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658.

28. Under the Missouri statute (Rev. St. 1899, § 5686), interest is not recoverable on a special tax bill, although it is not paid within thirty days after its issue, and demand was made within that time, where the name of a deceased person is inserted in the bill as the owner of the property assessed and the action is against her heir. City of St. Joseph v. Forsee, 115 Mo. App. 570, 91 S. W. 445.

29. Under the New York Laws 1893, p. 1447, c. 644, making assessments for local improvements payable in yearly instalments with interest, the interest assessable with each instalment is the interest for one year on that particular instalment, and not the interest on the amount of the total instalments remaining unpaid. Hagemeyer v. Grout, 113 App. Div. 472, 99 N. Y. S. 369. Where taxes assessed for a street improvement under the Kentucky statute (Acts 1888, p. 255, c. 158), are due in ten yearly instalments with interest on the amount unpaid in any year, it is not proper to add the total amount of interest due for ten years to the principal sum and allow interest on the total. Pfirrman v. District of Clifton, 29 Ky. L. R. 1003, 96 S. W. 810.

30. McChesney v. Chicago, 226 Ill. 238, 80 N. E. 770. In such case the court may properly provide in its judgment that the instalment shall not draw interest. Id. In Arkansas if assessments for a levee are not paid within thirty days, a penalty of ten per cent. attaches for such delinquency. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676.

31. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658. A municipal ordinance, enacted pursuant to a charter providing that an assessment for benefits to real estate for any public work should be a lien upon such real estate, held to impose a perpetual lien for assessments. Id.

32. The provision of a municipal charter requiring as an essential to the preservation of the lien of a tax bill issued against land for local improvements, that notice of suit on such bill shall be given within one year after the maturity of the last instalment, was intended for the benefit of third persons who may become interested in the land, and has no application in a contest between the holder of the bill and the landowners in a suit brought for the enforcement of the lien. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856. The provision in Pennsylvania that one who is registered as owner shall have notice of scire facias applies only to the scire facias which transforms the lien into a judgment and not to scire facia thereafter issued to revive such judgment. City of Philadelphia v. Neil, 31 Pa. Super. Ct. 78. The later writs continue but do not create a lien and a subsequent grantee though registered takes subject to the lien and is bound by notice to his registered grantor. Id.

33. In Ohio the lien of an assessment attaches from the date of the passage of the assessing ordinance. Purchasers of property prior thereto and without notice are not liable for the assessment. Whipple v. Toledo, 7 Ohio C. C. (N. S.) 520. In Michigan special assessments become a lien upon the lots assessed from the date of their confirmation. Comp. Laws, § 2841. Corliss v. Highland Park [Mich.] 13 Det. Leg. N. 912, 110 N. W. 45. Municipal charter construed and held that special tax bills for certain public improvements are not a lien on the property charged therewith, until they are delivered to the party designated in the charter to receive them. Mercantile Trust Co. v. Niggeman, 119 Mo. App. 56, 96 S. W. 293.

34. Lien of borough for laying sidewalk in front of lot binds life estate only under

to an assessment lien are sold, the lien may be enforced against the vendees.[35] When money has been paid into court to discharge a lien, the money stands as a substitute for the lien which is discharged,[36] and defendant may assert that the lien had never been perfected. The legislature may give such liens priority over antecedent mortgages and contract liens.[37] Tax bills issued against land for a local improvement are prima facie evidence of the validity of the liens under them.[38] If in such case tax bills have been issued prior to the condemnation proceedings and part of the damages found in such proceedings are deposited in court for the payment of the tax bills, and accepted as sufficient for that purpose by all parties interested, the land will become released from the liens of such bills, and thereafter the fund will stand for the res to which the liens attached.[39] Before the lien can be enforced, any statutory conditions made a prerequisite to enforcement must be performed.[40] The claim of lien in Pennsylvania must in substance state all facts necessary to sustain its validity.[41] In Pennsylvania the lien must be revived by scire facias.[42] The time allowed by scire facias to continue the lien is not tolled by a writ quashed because it was valid.[43] In Indiana a statute providing for a reasonable attorney's fee in a decree for the foreclosure of a lien for betterment assessments is not unconstitutional.[44]

(§ 9) *G. Payment and discharge.*[45]—Whether an assessment must be paid in full when made, or may be paid in installments, is to be determined from the statute or ordinance under which it is made.[46] If sheriff's sale of the land legally discharges the land, the misapplication of proceeds thereafter does not prevent it.[47] A receipt given for the amount of a tax bill, together with the fact that the bill is

the Pennsylvania statute (Act of April 3, 1851 [P. L. 320]). Meanor v. Goldsmith [Pa.] 65 A. 1084.

35. When the lien of a street assessment is enforced against several lots, each owned by a different vendee of the person owning the lots when the assessment was made, the property should be compelled to satisfy the lien in proportion to the square feet contained in the respective lots. Moxley v. Lawler [Ky.] 97 S. W. 365. But if the vendor has a lien on any of the lots, such lots should be first subjected to the extent of such lien, and if the vendor has conveyed any of the lots by warranty deed, the vendees of such lots may upon cross petition be given judgment over against the vendor for the amount they are compelled to pay to relieve their property of the lien. Id. Where the owner of three lots subject to the lien of an assessment for a street improvement sold the lots to different persons, the fact that one of the vendees was not made a party to an action to enforce the lien until after the claim was barred by the statute of limitations was held not to preclude the enforcement of the lien against the other lots for the full amount of the assessment. Id.

36. Philadelphia v. Merz, 28 Pa. Super. Ct. 227.

37. Olyphant Borough v. Egreski, 29 Pa. Super. Ct. 116. It has been held that such priority attaches to liens antedating the act of June 4, 1901, but not to subsequent liens. Oil City Bldg. & Loan Ass'n v. Shanfelter, 29 Pa. Super. Ct. 251.

38. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856.

39. This is so though the bills grow by accumulation of interest to exceed the amount of the fund. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856.

40. A demand upon the owner of a lot to pave the sidewalk and his refusal to do so are essential to entitle the borough to enforce a lien for such paving, under the Pennsylvania statute (Act of 1851 [P. L. 320]). Meanor v. Goldsmith [Pa.] 65 A. 1084.

41. Must show for what character of work claimed. Philadelphia v. Steward, 31 Pa. Super. Ct. 72.

42. A lien for the cost of abating a nuisance in Philadelphia is lost if, within each five-year period after filing, a scire facias under the proper act is not issued. Philadelphia v. Sciple, 31 Pa. Super. Ct. 64. The proviso that failure to prosecute the sci. fa. to judgment shall not destroy the lien does not imply that one sci. fa. issued and not prosecuted shall revive, and continued indefinitely in the face of another provision that sci. fa. must issue every five years. Id.

43. Scanton City v. Stokes, 28 Pa. Super. Ct. 437.

44. Shirk v. Hupp [Ind.] 78 N. E. 242.

45. See 6 C. L. 1170.

46. Under the ordinances for a street improvement and the Indiana statute (Burn's Ann. St. 1901, § 4294), the owner of assessed property who does not file the agreement provided for in the statute is not entitled to pay his assessment in instalments, but will be required to pay it in full when made. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 741.

47. Prior to the Act of June 4, 1901, a sheriff's sale, if for more than would pay the lien in full discharged certain liens and mistake, in distributing the proceeds to some other junior liens does not prevent such discharge. Olyphant Borough v. Egreski, 29 Pa. Super. Ct. 116.

marked "paid" on the record, as required by the municipal charter, is prima facie evidence, if not absolute proof of payment.[48] Where the liens of tax bills issued against separate lots for a street improvement are entirely separate and distinct from each other, and their individuality is preserved in a judgment rendered in an action to enforce them, one or more of them may be paid and released without effect upon the others.[49] The lien of a street assessment against property appropriated by the city for park purposes is merged in the higher title of the fee thereby acquired, and the city is entitled to retain the present value of assessments remaining unpaid from the amount assessed as compensation to the landowner.[50]

(§ 9) *H. Enforcement and collection.*[51] *Mode of collection.*[52]—Where the legislature specifically points out the mode by which assessments for benefits may be collected, a provision in the municipal council's order of assessment in conflict therewith is surplusage and without legal significance.[53]

Warrant and tax report.—A warrant issued by a county clerk to a city collector for the collection of a special assessment is not rendered invalid by the collector's placing upon it in red ink a memorandum showing that the property assessed had been sold for taxation after confirmation of the assessment, together with the name of the purchaser.[54] Where a statute requires a report of a special tax for local improvements to be made by the village clerk to the general officer of the county authorized to apply for judgment against and sell lands for taxation, the terms of the statute must be looked to, to determine what the report shall contain.[55]

Character of action and parties.—Statutory remedies must be confined to the particular liens or assessments to which they apply.[56] In Pennsylvania assumpsit will lie only when all statutory prerequisites are done to making the assessment a personal liability.[57] An ordinance in Pennsylvania requiring the owner of a sidewalk to lay a pavement thereon is a police regulation, and the amount expended in enforcing it may, in the absence of statutory remedy, be recovered in an action at common law.[58] But an assessment for the construction of a sewer or for paving the roadway of a street in front of a lot is a species of local taxation. The land itself is debtor and the assessment cannot be enforced by a suit at common law.[59] In determining the character of the action or proceedings for the enforcement of a delinquent assessment, by whom and in whose name it may be brought, and the necessary parties thereto, regard must be had to the terms of the statute or ordin-

48. Adams v. Lewellen, 117 Mo. App. 319, 93 S. W. 874. Where such receipt has been given and entry made, no recovery can be had on the bill, although subsequently an indorsement appears on the record stating that the bill has not been paid, but the previously entered satisfaction belonged to another lot. Id.

49. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856.

50. Scully v. Cincinnati, 9 Ohio C. C. (N. S.) 63.

51. See 6 C. L. 1170.

52. See 6 C. L. 1170, n. 98-2.

53. So held where the order of the municipal council attempted to restrict the mode of collection to one of the two modes specifically pointed out by the legislature. Shirk v. Hupp [Ind.] 78 N. E. 242.

54. Noonan v. People, 221 Ill. 567, 77 N. E. 930.

55. What must be contained in the report under the Illinois statute, Hurd's Rev. St. 1903, p. 340, c. 24, § 4. Hurd v. People, 221 Ill. 398, 77 N. E. 443.

56. A lien for the cost of removing a nuisance in Philadelphia is not enforced according to act of July 26, 1897, but by the unrepealed earlier acts. Philadelphia v. Sciple, 31 Pa. Super. Ct. 64. The act of July 26, 1897, is strictly limited to the liens covered by it and repeals nothing outside that scope. Philadelphia v. Steward, 31 Pa. Super. Ct. 72. Does not apply to lien for repairing sidewalk. Id. The act of June 4, 1901 (P. L. 364), being prospective, a scire facias conforming to it is not a proper writ to enforce liens under earlier acts which prescribe a scire facias of different kind. Scranton City v. Stokes, 28 Pa. Super. Ct. 434.

57. The claim for assessment must be registered by Act May 23, 1889. Scranton City v. Robertson, 28 Pa. Super. Ct. 55, distinguishing Franklin v. Hancock, 204 Pa. 110, 53 A. 110.

58. Meanor v. Goldsmith [Pa.] 65 A. 1084. In Pennsylvania prior to the special remedy provided by the act of 1851, an action at common law would lie to enforce such obligation. Id.

59. Meanor v. Goldsmith [Pa.] 65 A. 1084.

ance authorizing the assessment. The nature of the proceedings must be such as to comply with the due process of law clause of the Federal constitution.[60]

Service of summons and warning order.[61]—A statute requiring personal service of summons upon resident owners, in suits to enforce the payment of special assessments for at least twenty days before the rendition of the decree of sale, and providing for constructive service by publication upon nonresident owners of only four weeks, is not unconstitutional.[62] Where the suit is against nonresident owners, the fact that a warning order is not entered on the record or on the complaint will not make a decree of sale in such suit a violation of the constitutional inhibition against depriving of property without due process of law, where such entry is not, under the legal procedure, made jurisdictional.[63] In Pennsylvania where the proceeding is in rem against the land but notice is prescribed to all registered owners, a devisee pending scire facias is bound without notice if he fails to register.[64] A terre tenant who had no notice may open a default judgment on scire facias to show that the lien was already discharged.[65]

Pleading and proof.[66]—The general rule of pleading that every fact which it is necessary to prove to entitle the plaintiff to recover must be averred in the complaint applies to actions to enforce the payment of special assessments but with certain qualifications and limitations.[67] The complaint need not deny the existence of certain conditions where there is no pretense that such conditions exist.[68] What averments are necessary must in a large measure be determined by the terms of the statute under which the suit is brought.[69] Though an averment is but a legal conclusion, it is sufficient in the absence of a special demurrer or objection on that ground.[70] Where the complaint does not sufficiently show the nature of the

60. The Arkansas statute, Act of Feb. 15, 1893, providing that proceedings to enforce the payment of levee taxes and the judgment therein shall be in the nature of proceedings in rem, and that it shall be immaterial that the ownership of the lands are incorrectly alleged, is not a violation of the due process of law clause of the Federal constitution; and the fact that an owner of the land is not made a party to such proceedings is not a violation of such clause. Ballard v. Hunter, 27 S. Ct. 261. Under ordinances relating to a street improvement, contractor held entitled to maintain action against abutting owners for the amount assessed against them. Morton v. Sullivan, 29 Ky. L. R. 943, 96 S. W. 807. Under the laws of Arizona a suit to collect a delinquent special assessment for a municipal improvement was held to be properly brought in the name of the territory, at the relation and to the use of the treasurer and tax collector of the county. English v. Territory [Ariz.] 89 P. 501.

61. See 6 C. L. 1170, n. 3-8.

62. Arkansas Act of Feb. 15, 1893, § 11, as amended in 1895. Ballard v. Hunter, 27 S. Ct. 261.

63. Ballard v. Hunter, 27 S. Ct. 261.

64. Philadelphia v. Smith, 29 Pa. Super. Ct. 450.

65. Olyphant Borough v. Egreski, 29 Pa. Super. Ct. 116.

66. See 6 C. L. 1171.

67. Edwards v. Cooper [Ind.] 79 N. E. 1047. In an action to enforce a sewer assessment lien under the Indiana statute, applicable to cities of a certain class, it is not essential to aver in the complaint that ten days' notice was given the defendant of the amount of the assessment and where it might be paid. Id. In an action upon special tax bills the plaintiff by the allegation that instalments are due and unpaid tenders the issue of their maturity, and he may show that by charter provision such instalments became due on account of default in the payment of the first. Jaicks v. Merrill [Mo.] 98 S. W. 753.

68. So held in an action under the Arkansas statute, Act of Feb. 15, 1893, as amended in 1895, to enforce the payment of levee taxes against nonresident owners where the defendants complained that the complaint was insufficient as an affidavit for service by publication. Ballard v. Hunter, 27 S. Ct. 261.

69. In an action under the Indiana statute, Acts 1901, p. 492, c. 218, it is sufficient, so far as the final assessment is concerned, to show in the complaint the amount and date thereof. Edwards v. Cooper [Ind.] 79 N. E. 1047. Improvement sufficiently identified in complaint under this statute, which requires that complaint state name of street or alley improved. Id. Petition in an action on special tax bills held sufficient under the Missouri statute, Rev. St. 1899, § 5858 (Ann. St. 1906, p. 2962), providing that such bills shall "be prima facie evidence * * * of the validity of the bill * * * and of the liability of the property for the charge stated in the bills." City of Joplin v. Hollingshead [Mo. App.] 100 S. W. 506.

70. The averment that a resolution ordering the improvement was duly passed is, in the absence of a special demurrer or objection on the ground that it is but a legal

action, the remedy is by motion to make more specific.[71] A petition is good though it seeks to subject to the payment of the claim more land than is within the taxing district.[72] If the complaint substantially meets every requirement of the form authorized by statute, the mere fact that it goes further in setting out the performance of certain stautory requirements will not raise the presumption that other requirements as to which it is silent have not been performed.[73] An answer in an action to enforce the payment of an assessment or to foreclose an assessment lien must contain certain allegations of facts sufficient to support the defense set up by it.[74] Errors, defects, or irregularities in the improvement or assessment proceedings must be alleged in the answer.[75] An allegation in the complaint that the defendant's property is contiguous to the improvement, if not controverted by the answer, must be taken as true.[76] The allegation in the answer that the assessment was not made in the manner and form prescribed by law, not setting forth the particulars in which it was defective, is but the averment of a legal conclusion and not of a fact.[77] It is a presumption that the improvement and assessment proceedings were regular and valid,[78] and if in an action to enforce the payment of an assessment the defendant would rely upon any error, defect, or irregularity in the proceedings, the burden is upon him to show the same by affirmative evidence.[79] But such prima presumption may be overcome by affirmative evidence of defects or irregularities.[80] Under

conclusion, sufficient to authorize the introduction of evidence on the issue. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415.

71. So held in a suit by a contractor under the Indiana statute, Acts 1901, p. 537, c. 231, § 6, where the complaint was so drawn as to make it uncertain whether the action was based on the lien created by the assessment for benefits or on bonds issued by the municipality in anticipation of the assessment. Shirk v. Hupp [Ind.] 78 N. E. 242.

72. Holt v. Figg, 29 Ky. L. R. 613, 94 S. W. 34.

73. Edwards v. Cooper [Ind.] 79 N. E. 1047. No inference that map was not filed because it is alleged that details, drawings, and specifications were on file. Id.

74. Answer not supporting defense of equitable estoppel to action to foreclose an assessment lien. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658. But in an action to recover from a municipality the amount due on improvement certificates, a plea that the certificates were fraudulently issued, though not stating facts and circumstances to sustain the allegation, is good on general demurrer. O'Neil v. Hoboken [N. J. Law] 63 A. 986.

75. If the defendant would rely upon any error, defect, or irregularity that may have supervened in the proceedings subsequent to the ordering of the work, he must allege such defect. Beckett v. Morse [Cal. App.] 87 P. 408. In an action by a contractor on tax bills for a local improvement if the defendant would rely on the defense that the specifications on which the contract was let were defective, misleading, and too indefinite to admit of competitive bidding, he must plead these matters in his answer. Jaicks v. Merrill [Mo.] 98 S. W. 753.

76. English v. Territory [Ariz.] 89 P. 501.

77. Beckett v. Morse [Cal. App.] 87 P. 408.

78. Action by municipal officers in regard to the imposition of special taxes for public improvements comes within the protection of the general maxim that public officers are presumed to have rightly acted until the contrary is clearly made to appear. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701.

79. So held in regard to proceedings subsequent to the ordering of the work. Beckett v. Morse [Cal. App.] 87 P. 408. By the introduction of the warrant, assessment, and diagram in evidence, with an affidavit of demand and nonpayment, the plaintiffs throw upon the defendants the burden of showing any defect in the proceedings prior thereto. Flinn v. Strauss [Cal. App.] 87 P. 414; Beckett v. Morse [Cal. App.] 87 P. 408. In an action to recover assessments made for the construction of a levee, copies of the record of the board of directors of the levee district reciting that a meeting was held to revise and adjust assessments, after notice given, is sufficient to establish a prima facie case in favor of the validity of the assessment. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676. In Illinois upon an application for judgment of sale of lands for delinquency in the payment of a special assessment, the county collector's sworn report of delinquent lands together with the proof of publication thereof and notice of the application for judgment, makes a prima facie case, and judgment must be entered thereon unless good cause is shown to the contrary. Wiemers v. People, 225 Ill. 82, 80 N. E. 68; Hurd v. People, 221 Ill. 398, 77 N. E. 443.

80. Evidence of defect in proceedings held sufficient to overcome plaintiff's prima facie case. Flinn v. Strauss [Cal. App.] 87 P. 414. Where in an action to enforce the collection of tax bills issued against land for a local improvement the publisher's verified proof of the required publication of notice of the letting of the contract for the improvement is introduced in evidence, the burden of proof devolves upon the defendant to show any infirmity in the publication that will invalidate the liens of the tax bills. Copy of the newspaper in which the notice is alleged to be published, not containing the notice, is not sufficient for this purpose if it is not au-

the provisions of some municipal charters, special tax bills issued in payment of municipal improvements are themselves prima facie evidence of all things essential to make out a case for the plaintiff in an action thereon.[81] A prima facie presumption exists that the benefits conferred by the improvement exceeded, or at least equaled, the assessment imposed, and that all property liable to be assessed was included in the assessment.[82] Under an Illinois statute secondary evidence of the location of lands is admissible on application for judgment of sale of such lands for delinquency in the payment of a special assessment.[83] Any defense set up must be sustained by evidence sufficient to support it and of such character as the law requires.[84] The evidence must be sufficient to support the findings of the court.[85]

Defenses.[86]—The owner of property assessed may contest the validity of an assessment whenever it is sought to be enforced.[87] It is a good defense to proceedings to enforce the payment of an assessment or special tax for a municipal improvement that the ordinance authorizing the improvement,[88] or the contract for its construction,[89] was void; or that the improvement as constructed was not a substantial compliance with the ordinance and contract therefor;[90] or that for some

thenticated as being one of an edition put in circulation by the publisher. Ross v. Gates, 117 Mo. App. 237, 93 S. W. 856.

81. In an action by a contractor on special tax bills, when he has established the genuineness of the tax bills and the receipt therefor by him, he has established a prima facie case under the Kansas City charter. Jaicks v. Merrill [Mo.] 98 S. W. 753. Under the charter of Excelsior Springs, in an action to enforce special tax bills issued in payment of street improvements, the tax bills themselves are prima facie evidence of the regularity of the proceedings for the special assessments of the validity of the bills of the doing of the work, of the furnishing of the materials charged, and of the liability of the property. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701. But such presumptions go no further than to cast the burden of proof on defendant to clearly show that the proceedings were not in substantial conformity to the requirements imposed by law. Id.

82. City of Spokane v. Security Sav. Soc. [Wash.] 89 P. 466.

83. Hurd's Rev. St. 1905, c. 30, § 35, and c. 109, § 2. People v. Wiemers, 225 Ill. 17, 80 N. E. 45.

84. Upon an application for judgment and order of sale of certain land to satisfy a delinquent sewer assessment, the defense was that the city at the time the assessment was levied had not acquired the land necessary to make the improvement, and proceedings to acquire the land had not been begun and prosecuted to judgment. It was held that a plan of the proposed improvement attached to and made part of the ordinance providing for the improvement, did not show facts sustaining such defense. Cline v. People, 224 Ill. 360, 79 N. E. 663. Proof by affidavit required by a city ordinance of the publication of a notice to nonresident property owners to construct sidewalks was not sufficient, but the fact of publication was sufficiently proven by other evidence. State v. Several Parcels of Land [Neb.] 107 N. W. 566. In proceedings for the sale of property to satisfy a delinquent special assessment, the defendant cannot avail himself of the defense that the county court was without jurisdiction to render the judgment confirming the assessment on account of the existence of facts set forth in a stipulation of the parties, where neither the judgment of confirmation nor the record of the confirmation proceedings is introduced in evidence. People v. Second Ward Sav. Bank, 224 Ill. 191, 79 N. E. 628.

85. In an action to foreclose special assessments evidence held insufficient to support a finding that defendant was paid a consideration for signing a petition for the improvement. State v. Several Parcels of Land [Neb.] 110 N. W. 665.

86. See 6 C. L. 1171.

87. He is not deprived of this right by the provisions of the Greater New York Charter, precluding an action or special proceeding for affirmative relief. In re City of New York, 114 App. Div. 519, 100 N. Y. S. 140.

88. People v. Patton, 223 Ill. 379, 79 N. E. 51. But unless there is a total failure to include in an ordinance for a local improvement the necessary elements of a specification of the nature, character, locality, and description of the improvement required by statute, the mere fact that the specification is defective in some respect is not a defense to an application for judgment of sale of lands assessed. People v. Wiemers, 225 Ill. 17, 80 N. E. 45.

89. Where a contract for a local improvement is void because it tends to further monopoly and stifle competition, tax bills issued thereunder are void. Curtice v. Schmidt [Mo.] 101 S. W. 61. But a special tax bill is not void because the contract for the improvement required the contractor to observe an eight-hour labor ordinance. Id.; City of Boonville v. Stephens [Mo. App.] 95 S. W. 314. Under a general ordinance requiring all contracts for improvements to be completed within the time specified, tax bills cannot be collected to pay for work done under a contract entered into under an ordinance authorizing the same but setting no time limit for performance, where such work is not completed within the time specified in the contract itself. City of Springfield v. Schmook, 120 Mo. App. 41, 96 S. W. 257.

90. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701. The fact that full performance would be unduly burdensome or even impossible furnishes no excuse

other reason the proceedings to levy the assessment were jurisdictionally defective.[91] But certain defects or irregularities in the proceedings to authorize the improvement or in the letting of the contract therefor have been held not to constitute a good defense to proceedings to enforce the payment of an assessment.[92] Under a

in law for a failure to perform all of the conditions. Id. Facts under which it was held that there was no substantial difference between the improvements as authorized and as constructed. Id.; People v. Wiemers, 225 Ill. 17, 80 N. E. 45.

Modification of contract: Under Ky. St. 1903, §§ 3451-53-58, an abutting owner cannot defend against an assessment for paving on the ground that there has, with the consent of the city, been a modification of the contract, especially where the modification diminished the cost of the improvement and he has made no objection to the making of the improvement as modified. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1. A deviation from the true center of a street so that a minor portion of the roadway encroached on the sidewalk space was held not a defense, where the petition for paving conformed to the visible location of the graded way of the street and where no part of the roadway was outside the street lines. Montgomery's Estate v. Pittsburg, 29 Pa. Super. Ct. 312.

91. Auditor General v. Stoddard [Mich.] 13 Det. Leg. N. 1062, 110 N. W. 944.

Map of sewer changed after adoption by council: A property owner cannot be compelled to pay an assessment for benefits to his property arising from the construction of a sewer, where the map of the sewer and its connections were changed by the chief engineer after adoption by the council. In re Scranton Sewer, 213 Pa. 4, 62 A. 173.

A failure to publish notice inviting proposals for the construction of the improvement at the time required by statute will invalidate an assessment made for such improvement. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

Failure to specify extent and dimensions of improvements: Under the charter of Excelsior Springs the failure of the city in advertising for bids and letting the contract for a street improvement to specify the extent and dimensions of the improvements was a failure to perform a condition prerequisite to the exercise of the right to levy an assessment, and, where it was not performed, the assessment cannot be enforced. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701.

Bid without affidavit: The failure of contractors for a public work to make with their bid an affidavit that the bid is genuine and not collusive or sham, as required by the charter of San Francisco, will render the contract and the assessment for the work done under it absolutely void. Flinn v. Strauss [Cal. App.] 87 P. 414.

Verbal contract without competitive bidding: Under the Missouri statute, Rev. St. 1899, §§ 5889, 5892, a verbal contract for a street improvement without competitive bidding and without an account kept of the items of cost was unauthorized, and a special assessment for the cost of the work cannot be enforced. City of Elsberry v. Black, 120 Mo. App. 20, 96 S. . 256.

Contract modified: Where after a contract for a sewer improvement was let it was modified by providing for a sewer of less depth, and the price was modified proportionately, it was held that the failure to advertise and let the contract as modified left the question of actual lawful cost of the sewer not susceptible of determination, and therefore that a decree could not be had against the owners assessed for the improvement, although a statute provided for a new assessment where the former one was invalidated by irregularity in the proceedings. Stewart Co. v. Flint [Mich.] 14 Det. Leg. N. 55, 111 N. W. 352.

Contractor given additional work without a bid: Assessment for a street improvement unauthorized and void where the charter and an ordinance of the municipality required contracts for such improvements to be let on a bid, and after the contract for the improvement was let on a bid, additional work was given out to the same contractor without a bid. Auditor General v. Stoddard [Mich.] 13 Det. Leg. N. 1062, 110 N. W. 944. But the fact that a contract for a public improvement makes provision for work not included in the plans and specifications will not invalidate a special assessment where the contractor did not enlarge his bid on account of such additional work. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

Noncompliance with statutory requirements as to bill of costs: Upon an application for a judgment and order of sale of a lot for failure to pay a special tax for a municipal improvement, the certificate of the bill of costs not being in compliance with the provisions of the Illinois statute, Laws 1875, p. 63, § 2 (Hurd's Rev. St. 1905, c. 24, §§ 294-296c), the application was properly dismissed. People v. Patton, 223 Ill. 379, 79 N. E. 51.

Unauthorized delegation of power cured by subsequent ratification: An assessment for a street improvement is not void on account of an unauthorized delegation of authority to a street committee to determine the kind and character of the improvement where the proceedings of the committee were subsequent to the assessment ratified by acceptance of the improvement by the municipal council. Harton v. Avondale [Ala.] 41 So. 934.

92. **The omission of a minor statutory requirement, in a petition** for a street improvement, which is directory only, will not, ordinarily, defeat an assessment where objection to such omission was not seasonably taken. State v. Several Parcels of Land [Neb.] 110 N. W. 753. Thus an omission by a petitioner to note in the petition the date of his signature will not defeat an assessment after the improvement has been completed without objection by anybody. Id.

Delay in taking action on petition: Petitioners for a street improvement are not relieved from their obligation to pay an assessment therefor by reason of a delay of two years by the municipal council in taking action on the petition. Whipple v. Toledo, 7 Ohio C. C. (N. S.) 520.

Variance between resolution and ordinance: A variance between a resolution of

Kentucky statute no error in proceedings of the general coucnil will exempt from payment of an assessment after the work has been done as required by either the ordinance or contract.[93] Certain provisions in contracts for public improvements which cannot affect the amount of assessments therefor have been held not to constitute a good defense to actions on the assessments.[94] An assessment is not affected by a void provision in the contract for the improvement at variance with the ordinance authorizing it.[95] A change in the law regulating the levying of assessments made while the petition for the improvement is pending before council does not necessarily have the effect of invalidating the assessment.[96] It is a good defense to an action on improvement certificates that such certificates were fraudulently issued.[97] In Louisiana a slight mistake in the amount of an assessment certificate issued to a municipal contractor, and recorded by him, will not preclude recovery on such certificate.[98] In Illinois a delay beyond the statutory period in filing the certificate of the date and amount of the first voucher will not prevent a delinquency

intention to improve certain streets, and an ordinance passed in pursuance thereof as to the mode of payment for the improvement, will not invalidate assessments made therefor where the variance is a mere clerical error and cannot result in injury to any of the parties interested because all acted upon the theory that the ordinance did comply with the resolution, and such irregularity was corrected by a subsequent ordinance. Lister v. Tacoma [Wash.] 87 P. 126.

Change in ordinance establishing grade of street: An owner of property abutting on a street is not afforded such a grievance by a change in the ordinance establishing the grade of the street, made before he had incurred any expense in improving his property with reference to the grade first fixed, and before anything had, in fact, been done to change the surface of the street to conform to such grade, as will enable him to urge that an assessment against him is void because the change was not petitioned for as required by provision in the municipal charter. People v. Common Council, 99 N. Y. S. 657.

The report and schedules of the viewers in a proceeding under the Arkansas statute, Kirby's Dig. §§ 1414-1450, for the construction of a drain, held not so insufficient as to avoid the whole proceeding and render an assessment for the improvement invalid. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

Work let in one contract though authorized by separate ordinances: The fact that the entire work of improving a street and constructing a sewer was let in one contract for a single sum, though four separate ordinances were passed authorizing such work, did not invalidate the proceedings where the cost of each separate piece of work was ascertained and the assessments made separately for each. People v. Common Council, 99 N. Y. S. 657.

93. Ky. St. 1903, § 3100. Under this statute, after the work has been completed according to contract, it is no defense to an action to recover an assessment that the council left to the city engineer, the street committee, or the mayor any matter which it should have determined itself. Noland v. Mildenberger, 29 Ky. L. R. 1179, 97 S. W. 24.

94. The inclusion in a contract for a public improvement of an agreement on the part of the contractor to pay "the engineering expenses for laying out and superintending and issuing tax bills for the same" cannot affect the validity of assessments and tax bills for the improvement where the ordinance did not require the payment of such expenses by the contractor, and they were not included in the estimates filed by the engineer, and, therefore, could not have been taken into consideration in the bidding. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701. In an action to foreclose a street assessment lien, where the contract for the improvement was regularly let to the lowest bidder, the defendant cannot base a good defense on a provision in the contract for the improvement solely affecting the cost of the improvement to the contractor. So held where the contract contained a provision as to the pay and hours of labor of the employees of the contractor alleged to be unconstitutional. Flinn v. Peters [Cal. App.] 84 P. 995.

95. Where an ordinance for a municipal improvement requires the work to be completed within a certain number of days without condition or qualification and grants to the city engineer no authority to extend the time, a provision in a contract for the improvement authorizing such extension is void, and such variance cannot affect the validity of an assessment for the improvement and tax bills issued to pay for it. City of Excelsior Springs v. Ettenson, 120 Mo. App. 215, 96 S. W. 701.

96. It was held not to have the effect where the petitioners did not abandon the effort to secure the improvement, and the validity of the assessment was based upon their agreement to pay it, and not upon any statute. Whipple v. Toledo, 7 Ohio C. C. (N. S.) 520.

97. The New Jereey statute, Act of April 8, 1903, does not preclude such defense. O'Neil v. Hoboken [N. J. Law] 63 A. 986.

98. Moody & Co. v. Sewerage & Water Board, 117 La. 360, 41 So. 649. A certificate issued in due form before the decision was rendered in Barber Asphalt Paving Co. v. Watt, 26 So. 70, 51 La. Ann. 1345, though for a larger amount than due under the rule of computation laid down in that decision, will hold good for the less amount actually due. Id.

arising if the proper proceedings are taken after it is filed.[99] An averment that a lot was not assessed for any one of the separate sums stated in the complaint is insufficient as a defense to an action for the aggregate of those sums, if such separate, sums could have been properly assessed against the lot for the proportion of the cost of the entire work.[1] One whose property is not taken for or damaged by an improvement cannot defeat an assessment for benefits accruing to his property from such improvement, on the sole ground that others, whose property has been taken or damaged, have waived their right to compensation in money and have accepted something else in lieu thereof.[2] In Illinois the fact that the county court for no authorized cause entered an order recalling a warrant which had been issued to the city collector for the collection of the amount due on a special assessment, and that no new warrant has been issued, is no defense to an application for judgment and order of sale against the property assessed.[3] The integrity of an assessment cannot be impeached by the unauthorized misrepresentation of a public officer concerning its amount.[4] The fact that a sewer is so built as to avoid creating a public nuisance will not prevent the levying of a tax for its construction upon a special assessment district.[5] When the particular ordinance which orders an improvement provides that it must be completed within a certain time and the prescribed time is exceeded, tax bills cannot be collected.[6] It is no defense to an action on tax bills for a paving improvement that the municipality neglected to enforce the obligation of a railway company to pave certain parts of the street.[7] Under a municipal ordinance imposing a perpetual lien for assessments the municipality has not the legal title to the property upon which the assessment is made, and the possession of the owner of such property, before foreclosure, can never be adverse to it.[8] No defense will avail unless the facts in evidence support it,[9] and whether a defense set up is a good one is sometimes to be determined from the circumstances of the particular case.[10] In New Jersey improvement certificates issued by a municipality are not

99. Gage v. People, 221 Ill. 527, 77 N. E. 927.

1. Beckett v. Morse [Cal. App.] 87 P. 408.

2. State v. Several Parcels of Land [Neb.] 110 N. W. 753.

3. Noonan v. People, 221 Ill. 567, 77 N. E. 930.

4. So held where the alleged misrepresentation was made by a director of a levee district at a meeting of landholders, held under the Arkansas statute, Kirby's Dig. §§ 4941-4943. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676.

5. Sewer carried to a point where by turning it into a river the public health would be as little affected as possible. Stewart Co. v. Flint [Mich.] 14 Det. Leg. N. 55, 111 N. W. 352.

6. City of Springfield v. Schmook, 120 Mo. App. 41, 96 S. W. 257. The law seems to be the same way where the particular ordinance is silent regarding the time for completion, but there is a general ordinance relating to public improvements in force requiring the work to be performed within the agreed time. Id. But it is no defense to an action on special tax bills that the work was not completed within the time specified in the contract where the time for its completion was extended by the municipal council under a provision in the contract authorizing it to do so. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22. Paving contract construed and tax bills held not void on ground that work was not completed within time specified. Curtice v. Schmidt [Mo.] 101 S. W. 61.

7. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22.

8. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658.

9. **Work done in bad faith:** That work on a street improvement was done in bad faith is not shown by the fact that after the contract was let and before the work was done the owner of property assessed served notice on the contractor and the city that the judgment of confirmation was erroneous, and that he would sue out a writ of error, the contractor having a right to proceed in reliance upon such judgment. City of Chicago v. Galt, 225 Ill. 368, 80 N. E. 285.

10. **Allowance of rebates by contractors to property holders:** The prohibition of the charter of New Orleans against the allowance or promise of allowance of rebates by paving contractors to property holders has no application to the remission of a trivial amount in a settlement made more than four years after the work had been completed and accepted, there being no evidence tending to show that such remission was made pursuant to any previous understanding or agreement between the parties. In re Ayers Asphalt Pav. Co. [La.] 43 So. 262.

Laches: Circumstances under which laches was not a good defense to an action to foreclose an assessment lien. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658.

barred by any statute of limitations.[11] Where a municipal ordinance enacted pursuant to a charter authorizing it imposes a perpetual lien for assessment, an action to foreclose such a lien will not be barred though an action on the assessment regarded as a debt would be barred by the statute of limitations.[12] A statute providing for the foreclosure of assessment liens in the manner in which tax liens are foreclosed does not impose the same limitations as to the time within which foreclosure proceedings must be brought.[13] Where a city charter provides for the enforcements of assessments by executions, the owner of property assessed cannot defeat the execution or delay the city in its collection by setting up a demand which he may have against it.[14]

Waiver of and estoppel to urge defenses.[16]—Irregularities in a special assessment for a public improvement may be waived [16] and in some states there are statutory provisions relating to such waiver.[17] One whose land has been assessed for a public improvement may by his conduct or acquiescence be estopped from objecting to the assessment on the ground of the invalidity of the original ordinance for the improvement,[18] or because there have been irregularities in the proceedings therefor,[19] or from contesting the discretionary power of the municipal authorities in deciding the propriety of substituting a new for an old pavement,[20] or from denying that a street had been dedicated to the public and on this ground defending against an assessment of land abutting thereon.[21] The signing by a property owner of a petition for the improvement of a street to a certain grade does not estop him from contesting the legality of an assessment for the improvement, where the original petition was referred back to the property owners with the direction to file a new petition for an improvement at a different grade, and the second petition was not signed by the contesting owner.[22] By failing to object at the proper time one may become estopped to attack a defect,[29] or by his failure to take an appeal there-

11. Under the Act of April 8, 1903 (P. L. p. 614), making improvement certificates, if not paid within ten years after their issuance, a lawful indebtedness of the municipality, improvement certificates issued in 1866 under authorization of the Act of April 4, 1866 (P. L. 991), are not barred by any statute of limitations. O'Neil v. Hoboken [N. J. Law] 63 A. 986.

12. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658.

13. Connecticut Gen. St. 1902, § 1954. City of Hartford v. Mechanics' Sav. Bank [Conn.] 63 A. 658.

14. Draper v. Atlanta, 126 Ga. 649, 55 S. E. 929.

15. See 6 C. L. 1172.

16. Richardson v. Omaha [Neb.] 110 N. W. 648.

17. The provisions of the Iowa Code, § 824, relating to the waiver of objections to errors in the making of special assessments, "or in any of the prior proceedings or notices," are intended to cover errors and irregularities arising out of the exercise of a jurisdiction acquired, and have no relation to errors involving a want of jurisdiction. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

18. Where a city has been permitted to go on and incur the expense of the improvement without objection as to the validity of the improvement ordinance, and it then proceeds to assess the benefits, it is too late for a party thus assessed to object to the assessment on the ground of the invalidity of the original ordinance. Durrell v. Woodbury [N. J. Law] 65 A. 198.

19. Property owners cannot lie by and see a local improvement progress to completion without any effort to stop it and then defeat the contractor in his suit upon the tax bills on the plea that there have been irregularities in the proceedings for the improvement. Jaicks v. Merrill [Mo.] 98 S. W. 753.

20. Under the charter of the city of Atlanta an abutting owner is estopped to contest by illegality such discretionary power after the new pavement has been laid, assessment made, and execution issued. Draper v. Atlanta, 126 Ga. 649, 55 S. E. 929.

21. Dulaney v. Figg, 29 Ky. L. R. 678, 94 S. W. 658.

22. Carlisle v. Cincinnati, 8 Ohio C. C. (N. S.) 46.

23. In Illinois objections that could have been raised in the proceedings for the making of the assessment, or at the hearing on the confirmation thereof, cannot be raised on application for judgment of sale of lands assessed unless they go to the jurisdiction of the court. Hurd's Rev. St. 1903, p. 406, § 66. Noonan v. People, 221 Ill. 667, 77 N. E. 930; People v. Wiemers, 225 Ill. 17, 80 N. E. 45. Thus an attempt to question the sufficiency of the estimate of the engineer is not available upon the application for judgment and order of sale. Noonan v. People, 221 Ill. 567, 77 N. E. 930. In Washington objections to mere irregularities in assessment proceedings must be made before the mu-

from.[24] But where an omission in a public improvement proceeding is jurisdictional, and the landowner gives timely notice to the contractor that he will contest the assessment if the improvement is made, he will not be estopped to set up such omission as a defense to an action to enforce the assessment merely because he did enjoin the making of the improvement.[25]

The judgment.[26]—A judgment should describe the property and state the amount due,[27] but this may be done by reference to a schedule in the case,[28] and a reasonable construction is proper.[29] A finding by the court that the board of supervisors of a municipality did pass each and every resolution relating to the improvement mentioned in the complaint is to be regarded as the finding of a fact.[30] In an action upon a street assessment a finding by the court that a resolution ordering the improvement was "duly" passed is a determination that the municipal officers passing the resolution had jurisdiction to do so.[31] In Illinois it is essential that a copy of the published delinquent list be presented and filed as part of the record.[32] It is proper for the court to render a personal judgment against a railroad company in an action to recover an assessment of benefits for the improvement of a street under the Indiana statute.[33] Mistakes in ascribing the ownership of

nicipal council, and one who has failed to thus raise them cannot raise them for the first time in an action to foreclose the assessment lien. City of Spokane v. Preston [Wash.] 89 P. 406. Property owners cannot defeat a contractor in his suit on the tax bills issued to pay for work done under a paving contract where the work has been been done according to the contract, the property owners have known of the work but have not notified the contractor that there was any defect in the proceedings authorizing the contract and have done nothing to stop the work, and where the ordinances have been substantially complied with. Jaicks v. Merrill [Mo.] 98 S. W. 753. To constitute an estoppel as to works of public improvement the owner must have known of the improvement, and of the infirmity or defect under which the proceedings were had which would render them invalid although not void, and that there is some special benefit to the owner's property distinct from that of the general public. Wood v. Hall [Iowa] 110 N. W. 270. Although generally speaking the doctrine of estoppel does not apply to public corporations such as counties, it does apply to the acts of private individuals who are attacking certain contracts made by public officers with private individuals. The doctrine does apply to cases involving works of public improvements. Id.

24. Under the laws of Arizona, Rev. St. pars. 478, 479, 483, property owners who fail to appeal to the district court within twenty days after the affirmation by the municipal council of the report of the assessment committee lose their remedy for correcting any errors in the assessment and cannot set up such errors as a defense in an action to collect the assessment. English v. Territory [Ariz.] 89 P. 501. If in an assessment under the California Street Improvement Act, subd. 7 (St. 1891, p. 202), a lot is assessed for more than its lawful proportion of the cost of the work, the error is waived by the failure of the lot owner to appeal to the city council. Beckett v. Morse [Cal. App.] 87 P. 408.

25. Edwards v. Cooper [Ind.] 79 N. E. 1047. Where upon a petition for the sale of lands for delinquency in the payment of an assessment thereon for a street improvement the proceedings to levy the assessment were found to be jurisdictionally defective, the defendant was held, under the circumstances, not to be estopped from setting up the want of jurisdiction. Auditor General v. Stoddard [Mich.] 13 Det. Leg. N. 1062, 110 N. W. 944.

26. See 6 C. L. 1174.

27, 28. A judgment for delinquent special assessment held to sufficiently describe the property and the amount due under the requirements of the Illinois statute, Revenue Act, § 191 (Laws 1871-72, p. 47). Gage v. People, 225 Ill. 144, 80 N. E. 90.

29. A judgment which is for the assessment "costs" and "printer's fees," whereas costs includes printer's fees, does not import a double allowance of printer's fees. Gage v. People, 225 Ill. 144, 80 N. E. 90.

30. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415. Where in an action upon a street improvement assessment the court finds that the resolution ordering the improvement had been duly passed by the board of supervisors, and from the evidence set forth in a statement of the case on a motion for a new trial it clearly appears that the board was without jurisdiction to order the improvement, a new trial should be granted. Id.

31. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415.

32. On appeal from a judgment and order of sale entered against certain property for a special tax for a municipal improvement, it was held that the statutory requirement that the printed list of delinquent lands with the certificate of the publisher be presented when judgment is prayed and a copy thereof filed as part of the records of the court had not been complied with. Drennan v. People, 222 Ill. 592, 78 N. E. 937. Facts held not to aid defect. Id. On the same appeal it was held that the published delinquent list was defective in not complying with the statute requiring the publication of the year or years for which the delinquent taxes were due. Id.

33. Pittsburg, etc., R. Co. v. Taber [Ind.]

lands in a decree of sale in a suit to enforce the payment of levee taxes, not increasing the taxation or casting that which should have been paid by one tract of land upon another tract, is not a deprivation of property without due process of law.[34] Nor is such constitutional inhibition violated by a decree, in such a suit, which erroneously includes costs not allowed by law.[35] The effect of a judgment of foreclosure, in an action to foreclose a lien for a street grade assessment, followed by a sale of the premises and a sheriff's deed to the purchaser, is to divest the title of the defendant.[36] Such a judgment is binding on one claiming under an unrecorded assignment of a certificate of purchase at a judicial sale, where his grantor was a party to the foreclosure action, and a lis pendens was duly filed therein.[37] A judgment in an action to enforce the collection of the first installment of a special assessment, when it has been reversed and the cause remanded is not res judicata in an action to enforce the collection of the second installment.[38] Where an asssessment judgment has been entered and has never been set aside, a second judgment for the same assessment is void, the court having no jurisdiction to award it.[39] It does not follow that an assessment is void because in another suit by a different party such a decision was allowed to become final.[40] Mere clerical miscalculations of the amount may be corrected.[41] The intentional act of a municipality in assessing property owners for the paving of a street which a railroad company is legally bound to pave, under a contract with the municipality, is a fraud against the property owners which will justify the court in vacating a judgment for such assessment at a subsequent term.[42] In Indiana in an action to collect assessments of benefits from a street improvement the amount found to be due by special finding is too large, the remedy is by motion for a new trial, assigning that as a cause, and not by motion to modify.[43]

A law allowing attorney's fees when suit is required is valid.[44]

The sale and redemption.[45]—Under some systems the sale for taxes merges all general and special taxes in one proceeeding.[46] Statutes for the summary sale of property for nonpayment of delinquent special assessments must be strictly pursued[47] and deed cannot pass till all conditions are met by the purchaser.[48] A sale which satisfies and cancels the assessment cannot be rectified if invalid by a reassessment authorized to correct invalidities in the assessment.[49]

77 N. E. 741. Amount assessed by court held not to exceed the assessment of benefits, interest, and attorney's fees. Id.

34, 35. Ballard v. Hunter, 27 S. Ct. 261.

36, 37. Wright v. Jessup [Wash.] 87 P. 930.

38. Wiemers v. People, 225 Ill. 82, 80 N. E. 68.

39. Otis v. Weide, 98 Minn. 227, 107 N. W. 540.

40. In re City of New York, 114 App. Div. 519, 100 N. Y. S. 140.

41. Where it appears that the engineer's estimate for a street improvement was erroneous and that on the face of the papers defendant's assessment should be for a emaller amount than that adjudged against him, thie may be corrected as a clerical misprision by motion in the circuit court. Lindsey v. Brawner, 29 Ky. L. R. 1236, 97 S. W. 1.

42. City of Chicago v. Newberry Library, 224 Ill. 330, 79 N. E. 666.

43. Burn's Ann. St. 1901, § 568, cl. 5. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. N. E. 741.

44. The Indiana statute which provides that "if the property owner refuses to pay the assessment made against his property the contractor may sue and recover in addition to the assessment a reasonable attorney's fee" is constitutional. Pittsburgh, etc., R. Co. v. Taber [Ind.] 77 N. E. 741.

45. See 6 C. L. 1175.

46. See Taxes, 6 C. L. 1602.

47. Loeb v. Asberry [Wash.] 87 P. 510.

48. Under the charter of the city of Tacoma, § 157, a purchaser of property sold for nonpayment of a delinquent assessment is not entitled to a deed until he has **paid all subsequent assessments** for local improvements and general taxes, and if he fails to do so the original owner may redeem the property upon payment of the entire amount due with interest (Sess. Laws 1899, p. 234, c. 124), the purchaser being entitled only to be reimbursed what he paid with interest at ten per cent. Loeb v. Asberry [Wash.] 87 P. 510.

49. The purchaser is bound by the rule caveat emptor under the charter of Portland and, when the sale is void, a refund of the price paid cannot be made. Gaston v. Portland [Or.] 84 P. 1040. The city cannot re-

Settlement and compromise of suits involving the validity of local assessments may be entered into by city authorities, in Nebraska.[50]

(§ 9) *I. Recovery back of assessments paid.*—Unless in law the circumstances make the payment a voluntary one,[51] or the right to object has been waived,[52] over payments or payments compelled under a void assessment may be recovered.[53] In New York it is not necessary to first procure a vacation of the assessment.[54] In Illinois assumpsit lies for the abutter's share of surplus from an assessment fund after paying for the work done.[55] And the fact that the city has depleted such fund is no defense.[56] The pleadings should state the facts which make the assessment illegal.[57]

(§ 9) *J. Remedies by injunction or other collateral attack, and grounds therefor.*[58]—The equalization and adjustment of assessments are sometimes quasi judicial and when so are not collaterally assailable,[59] though the judgment record

assess and resell the property. The provision in the charter authorizing such resale and payment of the proceeds to the purchaser at the former sale is unconstitutional. Id.

50. The provisions of § 4, art. 9, of the constitution of Nebraska, do not apply to special assessments to pay for local improvements levied upon the property benefited thereby; and municipal authorities have power to settle and compromise suits involving the validity of such special assessments, notwithstanding that section. Farnham v. Lincoln [Neb.] 106 N. W. 666.

51. Though a municipality has no authority to require the payment of interest on aseessments for a public improvement, if such interest is paid voluntarily under a mistake of law, it cannot be recovered back. City of Chicago v. McGovern, 226 Ill. 403, 80 N. E. 895. The provision of a local improvement act requiring the return to the property owners of the excess, where a larger sum has been collected than is needed for the construction of the improvement, has no application in such case. City of Chicago v. McGovern, 226 Ill. 403, 80 N. E. 895.

52. See § 9H, Waiver and Estoppel to Urge Defenses.

53. Where the statute under which an assessment for municipal improvements is made is unconstitutional, and the assessment is paid under protest, it may be recovered back in an action of contract. Smith v. Boston [Mass.] 79 N. E. 786. The assessment may be recovered back in such case though a petition for a writ of certiorari to quash the assessment brought by another landowner affected thereby was dismissed, and though the benefit to petitioner's land from the improvement exceeded the amount of the assessment, and a person claiming under the plaintiff had made use of the improvement. Id.

54. Under the Greater New York charter which precludes the court from annulling an assessment on the ground that it is void, the party assessed may pay the assessment when enforcement thereof is threatened, and recover back the amount thus paid without first vacating the assessment. In re City of New York, 114 App. Div. 519, 100 N. Y. S. 140.

55. City of Chicago v. Fisk, 123 Ill. App. 404.

56. City of Chicago v. McCormick, 124 Ill. App. 639.

57. Petition in action to recover back the amount of assessments for street watering held insufficient. Hodgdon v. Haverhill [Mass.] 79 N. E. 818. In an action to recover back the amount of an assessment for street watering, an averment in the petition that the lot opposite the petitioner's estate is unoccupied, belongs to two owners, and is divided in the middle by a fence, is not equivalent to an averment that the petitioner's estate is not an occupied estate within the central portion of a large city. Id.

58. See 6 C. L. 1175.

59. The duly delegated county authorities in readjusting an assessment for benefits acts judicially and its act in designating a percentage of increase cannot be questioned collaterally. So held where a county board of equalization, acting under the Missouri statute (Rev. St. 1899, §§ 8449, 9131), increased an assessment for levee purposes. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333. Assessments for public improvements under the practice as it exists in Indiana are in the nature of judgments, and, in the absence of fraud, cannot be overthrown on collateral attack, except on the ground of a want of jurisdiction. Edwards v. Cooper [Ind.] 79 N. E. 1047. Under the Indiana statute (Acts 1901, p. 536, c. 231, § 4), relating to street improvements, when an assessment is once made by the common council, its validity cannot be questioned except by a direct appeal to the circuit court. Shirk v. Hupp [Ind.] 78 N. E. 242. Where no objections were made to the estimate of the cost of a street improvement and the apportionment of such cost to the abutting property according to frontage as made and returned by the engineer under section 4293, Burn's Ann. St. 1901, and the board of trustees approved the report, such assessment is valid and conclusive against collateral attack. Pittsburgh, etc., R. Co. Taber [Ind.] 77 N. E. 741. When it appears from the record that an inferior court of special and limited jurisdiction, before which proceedings for the construction of a public improvement are conducted, has once acquired jurisdiction of the subject-matter and parties in the manner provided by statute, its orders, rulings, and judgments, are as invulnerable against collateral attack for error or irregularity in the proceedings, and are supported by the same presumptions of regularity, as if rendered by a court of general jurisdiction. Todd v. Crail [Ind.]

is informal and irregular;[60] but recitals of the doing of all prerequisities acts will not overcome a record showing of the contrary.[61] If jurisdiction does not appear on the face of the record of the court or judicial body before whom the proceedings were conducted, it may in Indiana be established by extrinsic evidence.[62] One failing to object because not party to the proceeding, may bring mandamus to compel reassessment on the ground of an invalid assessment.[63] One who procured the assessment to be made can not object that there was a preliminary defect of jurisdiction.[64]

The right to injunction may coexist with the right to a statutory stay of the assessment.[65] When a motion to vacate an assessment lies, mandamus is not the remedy.[66] Persons whose property is liable to be assessed for a local improvement may invoke the aid of a court of equity to restrain the execution of an unauthorized contract for such improvement[67] or any payment of money pursuant thereto.[68]

77 N. E. 402. Where a proceeding was commenced to construct a gravel road under the Indiana statute (Acts 1903, p. 265, c. 145), it was held that landowners whose lands were assessed for the improvement could not attack collaterally by injunction the proceedings before the board of county commissioners, in matters over which the board had jurisdiction. Id. Not reviewable in equity unless fraudulent. Johnson v. Pettit, 102 N. Y. S. 131. The city council of Omaha will not be restrained from passing an ordinance levying a special assessment, equalized by it when sitting as a board of equalization, in the absence of proof of fraud, gross injustice, or mistake in such equalization. Richardson v. Omaha [Neb.] 110 N. W. 648. Judgments in local assessment proceedings under the charter of the city of Mankato stand upon the same basis as judgments in ordinary tax proceedings and cannot be impeached in a collateral action by showing irregularities in the assessment proceedings. Willard v. Hodapp, 98 Minn. 269, 107 N. W. 954.

Admissibility of evidence: In an action by landowners to enjoin the levy of an assessment for the construction of a gravel road, it was not error to refuse to allow plaintiffs to introduce a part only of the viewers' report. Todd v. Crail [Ind.] 77 N. E. 402. In such an action evidence offered in support of averments of complaint charging fraud and irregularity in the viewer's report and other proceedings is not admissible. Id. In an action by landowners to enjoin the levy of an assessment for the construction of a gravel road, the introduction in evidence, several days after the evidence was closed, of the original petition for the road, etc., was within the sound discretion of the court. Id.

60. Todd v. Crail [Ind.] 77 N. E. 402. Proceedings before commissioners for the construction of a road under the Indiana statute (Acts 1903, p. 255, c. 145), were sustained upon collateral attack by landowners whose lands were assessed for the improvement, although the final order did not state the kind, width, and extent, of the road as required by section 5 of the statute, where the intention to adopt the viewers' report, which described the road in detail, was manifest. Id.

61. The finding of a municipal council in the resolution ordering an assessment for a public improvement that all the previous steps required to be taken had been taken in conformity with law cannot prevail in a suit to restrain the collection of an assessment therefor over the undisputed facts appearing on the record showing affirmatively a want of jurisdiction. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

62. So held in a collateral attack upon proceedings before board of commissioners for construction of gravel road under Indiana statute (Acts 1903, p. 255, c. 145). Todd v. Crail [Ind.] 77 N. E. 402.

63. Where a street improvement was made under the Washington statute (Laws 1899, p. 234, c. 124), and a contract made in pursuance thereof, it was held that the contractor was not a party to the assessment proceedings, in such a sense that his failure to raise objections thereto will estop him from questioning the validity of the assessment in a mandamus proceeding to compel a new assessment. State v. Seattle, 42 Wash. 370, 85 P. 11.

64. West Chicago Park Com'rs v. Novak, 121 Ill. App. 287.

65. The Wisconsin statute (Rev. St. § 1210e, as amended by Laws 1903, p. 572, c. 364), does not prevent an action to enjoin the sale of land for nonpayment of a street improvement tax on the ground that the tax is illegal. Dahlman v. Milwaukee [Wis.] 110 N. W. 483.

66. Where in an assessment for local improvements in New York city under the New York Laws 1893, p. 1447, c. 644, making assessments for local improvements payable in yearly instalments, there is an error in determining the amount of interest due on an instalment, and the error is not the result of a mere clerical calculation, but is one of substance, made by the assessors in their determination of the procedure of assessment and impost, the method of review is by application to a justice of the supreme court to vacate the assessment and not by mandamus. Hagemeyer v. Grout, 113 App. Div. 472, 99 N. Y. S. 369.

67. City Council of Montgomery v. Barnett [Ala.] 43 So. 92. An injunction restraining a municipality from performing a contract as ultra vires, will not be granted where the bill fails to show that any acts have been done or any liability incurred under such contract. County of Henry v. Stevens, 120 Ill. App. 344.

68. Where a contract for a street improvement is invalid and the invalidity is

The fact that a court divides on the question whether property has been specially benefited in the amount of the assessment does not afford ground for disturbing the assessment in the absence of some of the grounds usually invoking equitable intervention.[69] Chancery can grant relief in assessment proceedings on the ground that the officers making the assessment were guilty of fraudulent conduct.[70] A suitor in equity for an injunction must offer equity by tendering what is concededly or justly due [71] and must be free from laches.[72] Injunction must be sought within the special limitation if any imposed on such action.[73] A limitation on "all proceedings" to vacate or reduce assessments has no application to mandamus proceedings to compel the proper officials to do the formal act of vacating on the books an assessment that has been adjudged void and vacated in a suit brought for that purpose.[74] If landowners have been put on inquiry as to the time and fact of the making and approval of an assessment roll, an action by them to annul such assessment made upon their lands must be commenced within a reasonable time.[75] In an injunction suit the assessments laid on the several plaintiffs may be aggregated to make up the

of a character likely to prejudice an abutting owner in a manner and degree not readily separable from the burdens which might lawfully be imposed upon him, the payment of any money or the issue of any special assessment certificates or improvement bonds to the contractor should be enjoined. Allen v. Milwaukee, 128 Wis. 678, 106 N. W. 1099.

69. Mechlem v. Cincinnati, 7 Ohio C. C. (N. S.) 212.

70. Hudlemyer v. Dickinson, 143 Mich. 250, 12 Det. Leg. N. 1000, 106 N. W. 885. Complainant held entitled to an injunction restraining officers charged with the duty of making an assessment of benefits for drains from including his land in the assessment district, and other relief, the proof showing fraudulent conduct on the part of such officers. Id.

71. An objection to a special assessment which goes simply to its amount and not to its validity, and is accompanied by no offer to pay the amount conceded to be just, will not justify the interference of a court of equity. Corey v. Ft. Dodge [Iowa] 111 N. W. 6. One whose property has been benefited by the construction of a sewer, and who has neither paid nor offered to pay any part of the cost of the improvement, will be denied all relief in an action to enjoin the collection of a special tax levied to pay for the construction of the sewer. City of Paola v. Russell [Kan.] 89 P. 651.

72. A court of equity will not restrain the collection of a special assessment where the complainant has stood by and permitted a special improvement to be made, knowing that such improvement is to be compensated by a special assessment upon a district in which his property is located. Stewart Co. v. Flint [Mich.] 14 Det. Leg. N. 55, 111 N. W. 352. Where an abutting owner stands by until a municipal street improvement is completed, knowing his rights, and does not take those steps which are open to him, but suffers money to be expended by the contractor with the city, and his property is benefited thereby, he impliedly consents that an assessment may be made against his property for the improvement, and whether it is legal or not is estopped from enjoining its collection. Boswell v. Marion [Ind. App.] 79 N. E. 1056. Where an abutting owner appeared before the council and objected to the acceptance of a municipal street improvement on the ground that it had not been completed according to plans and specifications but made no other objection, he was held estopped from enjoining the collection of an assessment on his property on the ground that proper steps to authorize the assessment had not been taken. Id. The collection of a tax for a street improvement will not be restrained at the suit of taxpayers where the suit was not instituted, and no legal measures were taken, until the improvement had been fully completed, the cost and expense incurred, and the benefit therefrom realized and enjoyed. Shaw v. Ypsilanti [Mich.] 13 Det. Leg. N. 922, 110 N. W. 40. In an action by abutting owners to restrain a municipality from levying an improvement assessment and issuing certificates based thereon, on the ground of the failure of the contractor to perform his contract, the fact that the character of the work done was known to the plaintiff while it was in process of construction and no objection was made, and that in response to a notice published pursuant to a resolution of the city council, none of the plaintiffs appeared and filed objections to the work, will not estop them from insisting that the contractor had not complied with his contract. Wingert v. Snouffer [Iowa] 108 N. W. 1035.

73. In Kansas the validity of an assessment for special improvements authorized by the mayor and council of a city of the first class, when the proceedings upon their face are regular in form, cannot be attacked by an action to enjoin the collection and assessment, unless the action is brought within thirty days from the time the amount of the assessment is ascertained. Gen. St. 1901, § 766. Union Pac. R. Co. v. Kansas City [Kan.] 85 P. 603.

74. The statute construed in this case was the New York statute (Laws of 1903, p. 1106, c. 482, § 6), constituting part of the charter of a municipality. People v. Brush, 101 N. Y. S. 312.

75. Monk v. Ballard, 42 Wash. 35, 84 P. 397. An action commenced within thirty days from the time the ordinance went into effect approving the assessment roll was commenced within a reasonable time. Id.

jurisdictional amount in controversy.[76] Such an injunction does not tend to stop ordinary business of the corporation and the notice required by statute in suits so tending need not be given.[77] In Wisconsin the holder of the tax certificate must be brought in as a party.[78] In Iowa tax sale purchasers after suit begun need not be brought in.[79] The plaintiff has the burden of proving the vitiating facts.[80] Where a bill filed to restrain the collection of special assessments is silent upon the question of notice to the property owners of the assessment, it will be presumed that proper notice had been given.[81]

The injunction must not be so worded as to forbid the lawful exercise of power to correct the illegality.[82] An assessment for a street improvement may be enjoined in so far as it includes damages awarded to the property owners, or the costs of a suit to assess compensation therefor, or the cost of grading or lowering the street to the new grade.[83]

(§ 9) *K. Appeal and other direct review.*[84]—The general questions pertinent to Appeal and Review are treated in that topic.[85] The right of appeal is statutory[86] and must be taken within the time prescribed if any.[87] Presumptions favor the record of what was done,[88] but defects apparent on the record cannot be thus overcome.[89] Nonjudicial personal communications are not to be made the basis of review.[90] When the return to a writ or certiorari to review an assessment for a mu-

76. Where abutting owners join in an action to restrain the collection and for the cancellation of a sewer assessment, and the amount assessed upon all their properties amounts to more than $100, the rule forbidding an appeal where the amount involved is less than $100 does not apply. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

77. Code § 4359, prohibiting the granting of an injunction stopping such ordinary business, except on reasonable notice. Wingert v. Souffner [Iowa] 108 N. W. 1035.

78. In an action to enjoin the sale of land for nonpayment of a street improvement tax, the person to whom the tax certificate has been issued, if he has not been made a party in the first instance, must be brought in by the court under the mandatory rule of the Wisconsin statute (Rev. St. 1898, § 2610), whether either of the parties move the court to that end or not. Dahlman v. Milwaukee [Wis.] 110 N. W. 483.

79. Comstock v. Eagle Grove City [Iowa] 111 N. W. 51.

80. In an action to enjoin the collection of a sidewalk assessment on the ground of irregularities of procedure, the burden is upon the plaintiff to point out and establish irregularities warranting the setting aside of the assessment. Westenhaver v. Hoytsville, 8 Ohio C. C. (N. S.) 284.

81. City of Hyattsville v. Smith [Md.] 66 A. 44.

82. Error to enjoin the city from "collecting or attempting to collect any further amount" on account of the improvement, where it has the right to reassess the property. Lester v. Seattle, 42 Wash. 539, 85 P. 14.

83. Carlisle v. Cincinnati, 8 Ohio C. C. (N. S.) 46.

84. See 6 C. L. 1176.

85. See 7 C. L. 128.

86. Right of appeal given by sec. 4 of the Massachusetts statute (Rev. Laws, c. 49), applies to a person whose property is assessed under sec. 5 of the statute. Taylor v. Haverhill [Mass.] 78 N. E. 475. When mandamus to compel sale of real estate under a special assessment judgment reviewable by supreme court under the Illinois statute (Prac. Act, § 88 [Hurd's Rev. St. 1903, c. 110, § 89]). Murphy v. People, 221 Ill. 127, 77 N. E. 439. If an assessment under the California Street Improvement Act, subd. 7 (St. 1891, p. 202) is not made in accordance with the provisions of the statute, or is not authorized by it, the only remedy is an appeal to the city council. Beckett v. Morse [Cal. App.] 87 P. 408. An order sustaining objections in proceedings for the confirmation of a special assessment is a final and appealable order, for it defeats the entire proceedings, making it necessary to start them over again. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

87. Advertisement of assessment held not to be notice of a perfected assessment, and therefore not to start the running of the period of limitation, under the Connecticut statute (Sp. Laws 1893, p. 138, Act. No. 113, §§ 3, 4), conferring a right of appeal from appraisals to be exercised within ten days after notice. Velhage v. Stanley, 78 Conn. 520, 63 A. 347.

88. That the estimate of the cost of the improvement contains no improper items. McChesney v. Chicago, 226 Ill. 238, 80 N. E. 770. On an appeal from a judgment sustaining an assessment, claimed to have been invalid because based on a frontage greater than the actual frontage, it was held that the trial judge in finding the issues for the defendant may properly have regarded the finding of the committee appointed to try the issues as not amounting to a finding that the measurements testified to by plaintiff's engineer were correct. Newell v. Bristol, 78 Conn. 571, 63 A. 355.

89. Where the city in its pleadings claimed to have constructed the sewer under an ordinance that the court found to be invalid, the cancellation of the assessment was held proper. Cook v. Independence [Iowa] 110 N. W. 1029.

90. Upon an appeal from an assessment on the ground that the officer making it has been guilty of fraudulent conduct, it is not

nicipal improvement is silent as to material allegations of facts contained in the petition, the presumption is that the officers making the return intended to admit such allegations.[91] The return should be supplied on certiorari with additional matters of record proper to be considered.[92] In the writ of review given by the Oregon statute, the practice in framing the petition for the writ [93] and on motion to quash [94] is similar to ordinary certiorari. The nature and scope of the review is determined by ordinary rules in respect to common-law remedies [95] and by the statute giving the remedy in others.[96]

PUIS DARRIEN CONTINUANCE; PURCHASE-MONEY MORTGAGES; PURCHASERS FOR VALUE; QUARANTINE; QUASI CONTRACT, see latest topical index.

QUESTIONS OF LAW AND FACT.

Province of Court and Jury in General (1567). | Particular Facts or Issues (1569).

Scope of topic.—Only the general principles with a few illustrative applications are here treated. Whether particular facts or issues are questions of law or fact are treated in the topic to which they are germane.[97] The propriety of taking a case from the jury is also elsewhere treated,[98] as is the revisory power of appellate courts over decisions of questions of fact.[99]

permissible for such officer to appear privately before the tribunal having jurisdiction to hear the appeal and discuss matters that are before it for determination. So held on an appeal from the drain commissioner to the board of review. Hudlemyer v. Dickinson, 143 Mich. 250, 12 Det. Leg. N. 1000, 106 N. W. 885.

91. People v. Desmond, 186 N. Y. 232, 78 N. E. 857. Upon certiorari to review a sewer assessment, a general allegation in the return that the sewer "as laid is a benefit to the property owners equally upon both sides of the street" does not controvert the specific averments of the petition that petitioner's property already had sufficient drainage by a pre-existing sewer, the cost of which had been paid by them and their grantors, and, therefore, the allegations of the petition will be deemed admitted. Id.

92. Upon a review by certiorari of an assessment for benefits conferred by a street improvement, it was held that before determining the cause a rule should be granted under the certiorari act (P. L. 1903, p. 346, § 12), requiring the board of assessments to make a certificate to the court concerning such essential matters as were omitted from their report to the council. Burnett v. Boonton [N. J. Law] 63 A. 995.

93. Upon a reassessment of property for street improvements, it is not proper under the Oregon statute (B. & C. Comp. § 596), to attach to a petition for a writ of review numerous exhibits which are copies of the record or proceedings to be reviewed. Gaston v. Portland [Or.] 84 P. 1040.

94. Upon a writ of review in a reassessment case, if a motion to quash the writ is necessary or permissible under the Oregon Code, the proper procedure is to file the same on the return day after the return of the writ. Gaston v. Portland [Or.] 84 P. 1040. Where in a reassessment case a petition is filed for a writ of review, under a motion to quash the writ, the allegations of the petition are taken as true, and it will only be necessary to ascertain whether the petition states facts sufficient to warrant the issuance of the writ. Id.

95. In New York questions relating to the justice and equality of assessments for street improvements not raised before the assessor on grievance day, cannot be reviewed on certiorari. People v. Common Council, 99 N. Y. S. 657. Where on appeal from the action of a municipal council in assessment proceedings the evidence as to the value of the lots assessed was conflicting, the supreme court will not disturb the findings of the trial court unless clearly against the weight of the evidence. Bally v. Sioux City [Iowa] 110 N. W. 839. Ordinarily the question whether property will be especially benefited by a street improvement is one of fact for the determination of a local board or officer making it, and, in the absence of fraud, mistake, or a transgression of authority, such determination will not be reviewed by the courts. State v. Several Parcels of Land [Neb.] 110 N. W. 753. Under the Illinois statute (Hurd's Rev. St. 1901, c. 24, § 553), the rulings of the court in regard to the admission of testimony in reference to the distribution of the cost of a street improvement between the public and the property benefited in proceedings for the levying of an assessment cannot be reviewed on appeal. Chicago Consol. Trac. Co. v. Oak Park, 225 Ill. 9, 80 N. E. 42.

96. On a reassessment of property, the court cannot upon a writ of review under the Oregon statute (B. & C. Comp. § 603), dismiss the proceedings, they must be acted upon in accordance with the statute. Gaston v. Portland [Or.] 84 P. 1040.

97. See such titles as Contracts, 7 C. L. 761; Master and Servant, 8 C. L. 840; Negligence, 8 C. L. 1090; Carriers, 7 C. L. 522; Railroads, 6 C. L. 1194; Street Railways, 6 C. L. 1556; Highways and Streets, 8 C. L. 40; Wills, 6 C. L. 1880, and similar topics.

98. See Directing Verdict and Demurrer to Evidence, 7 C. L. 1146; Discontinuance, Dismissal and Nonsuit, 7 C. L. 1155.

99. See Appeal and Review, 7 C. L. 128.

Province of court and jury in general.[1]—It is the province of the jury to determine issues of fact [2] and of the court to decide questions of law.[3] Whether there is any legally sufficient evidence is for the court,[4] which question is presented at the close of the evidence in every case in the Federal courts;[5] but there being such evidence [6] its sufficiency to establish the issue is for the jury,[7] who are the sole [8] judges of the credibility of the witnesses [9] and of the weight to be given to the evidence,[10] hence it is error to direct a verdict in favor of the party having the burden where the evidence is parol.[11] It is error to submit to the jury an issue which is not in the case [12] or not supported by legally sufficient evidence.[13] While it is for

1. See 6 C. L. 1178.

2. Liability of defendant to be sued in a particular county as dependent upon the fact of participation in trespass and conversion of mortgaged property. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

3. In an action for damages due to a street car striking a vehicle and knocking it against plaintiff's wagon, an instruction telling the jury that if the motorman negligently caused the car to strike the vehicle and throw it against plaintiff's wagon, thereby doing damage, he could recover, is not objectionable as submitting a question of law to the jury. Steinmann v. St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799.

4. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144; Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190.

5. Crookston Lumber Co. v. Boutin [C. C. A.] 149 F. 680. And in passing thereon, the evidence must be construed most favorable to plaintiff and all reasonable inferences allowed (Id.), and the undisputed evidence must be so conclusive that only one reasonable inference can be drawn therefrom and that the court would be obliged to set aside a verdict in opposition to it before a verdict can be directed (Id.).

6. Where the evidence was sufficient to create more than a suspicion of plaintiff's right to recover, it is proper to submit the issue to the jury. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627.

Evidence held sufficient for the jury: Violation of a speed ordinance and failure to give warning signals. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144. Identity of the point measured with the place where plaintiff was injured. Culver v. South Haven & E. R. Co. [Mich.] 13 Det. Leg. N. 719, 109 N. W. 256. Evidence in support of adverse possession. Ball v. Loughridge [Ky.] 100 S. W. 275. Financial ability of a purchaser obtained by a broker to buy the property. Clark v. Wilson [Tex. Civ. App.] 14 Tex. Ct. Rep. 770, 91 S. W. 627. Evidence that decedent was furnished an unsafe place to work by his employer. Meade v. Ashland Steel Co. [Ky.] 100 S. W. 821.

Evidence held insufficient: As to misrepresentations and concealment of the extension of a note. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 S. W. 122. That a contract to erect a house was a mere pretence and that the contractee was in fact a mere superintendent. Rheam v. Martin, 26 App. D. C. 181.

7. Meade v. Ashland Steel Co. [Ky.] 100 S. W. 821; Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144; Continental Lumber Co. v. Munshaw & Co. [Neb.] 109 N. W. 760; Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652.

8. The weight of evidence being for the jury, an instruction that, in determining the amount of timber of a certain kind on a tract of land, the testimony of one who cut the timber should be given preference to expert estimates held erroneous. Coulter v. Thompson Lumber Co. [C. C. A.] 142 F. 706.

9. American Life Ins. Co. v. Melcher [Iowa] 109 N. W. 805; Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636. It is error to direct a verdict in face of substantial evidence on the ground that the witness is not worthy of belief. Waters v. Davis [C. C. A.] 145 F. 912. The jury need not accept the testimony of a party as establishing the facts though he is unimpeached and there is no contradictory evidence. Burleson v. Tinnin [Tex. Civ. App.] 100 S. W. 350. The mere fact that only the parties to an alleged contract testify does not necessarily entitle him to a verdict. Murphy v. Hiltibridle [Iowa] 109 N. W. 471.

10. Husenetter v. Little [Neb.] 110 N. W. 541; American Life Ins. Co. v. Melcher [Iowa] 109 N. W. 805; Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. Though the court is of the opinion that weight thereof favors defendant. Chicago Union Trac. Co. v. Lowenrosen, 222 Ill. 506, 78 N. E. 813. In an action for the death of one killed by a train, an instruction leaving it to the jury to determine whether a speed ordinance was being violated at the time, and, if so, then declaring defendant guilty of negligence, is not objectionable as on the weight of the evidence. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

11. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636.

12. Submission of issue not in issue. Walker v. Tomlinson [Tex. Civ. App.] 17 Tex. Ct. Rep. 157, 98 S. W. 906. Issue admitted by the parties. Kampman v. McCormick [Tex. Civ. App.] 99 S. W. 1147. The admission of evidence inadmissible under the pleadings without objection will not sustain a charge thereon. Moody & Co. v. Rowland [Tex.] 99 S. W. 1112.

13. Authority or ratification of a wrongful act of an agent. Gambill v. Fuqua [Ala.] 42 So. 735. Question of custom. Wilson v. Griswold [Conn.] 63 A. 659. Negligence. Hoffman v. Philadelphia Rapid Transit Co., 214 Pa. 87, 63 A. 409. Willful commission of acts endangering own life and those of others contrary to statute. Wilmington Star Min. Co. v. Fulton, 27 S. Ct. 412. Where the evidence shows without controversy that plaintiff was not a partner of one not joined as plaintiff and that defendant could not

the jury to determine conflicting evidence [14] and to draw conclusions from established facts where reasonable minds might differ in respect thereto,[15] the court may decide an issue where the evidence is undisputed [16] and will permit of but one reasonable inference.[17] The competency of a witness is a preliminary question for the court.[18]

suffer by the nonjoinder of such party, it is not error to refuse to submit the question of partnership to the jury. Lasher v. Colton, 225 Ill. 234, 80 N. E. 122.

14. Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636; Osborne v. Boston Ice Co., 191 Mass. 596, 77 N. E. 1033; Sheker v. Machovec [Iowa] 110 N. W. 1055. Whether false representations were made. Cascade Foundry Co. v. Mueller Furnace Co., 140 F. 791. Whether plaintiff was a passenger on defendant's train. Chicago Union Trac. Co. v. Lowenrosen, 222 Ill. 506, 78 N. E. 813. Whether signals were given by the defendant's train which killed plaintiff's decedent. Detroit Southern R. Co. v. Lambert [C. C. A.] 150 F. 555. Whether buggies were tendered in the condition called for by the contract of settlement. Capital City Carriage Co. v. Moody [Iowa] 110 N. W. 903. Knowledge of and participation in a fraudulent scheme of a widow to appropriate moneys belonging to deceased husband's estate by the debtor. Paulus v. O'Neill [Wis.] 111 N. W. 333. Error for the court to hold a contract void and direct the return of a portion of the consideration retained where there was a conflict of evidence of an accord and satisfaction. Conte v. New York, 101 N. Y. S. 491. Where the evidence in regard to whether a promise was original or collateral is so conflicting that a verdict thereon for either party could not be set aside as without evidence to support it or as plainly against the weight and preponderance of the evidence, the question is one of fact for the jury. Johnson v. Bank [W. Va.] 55 S. E. 394. In trespass alleged to have been committed by one acting on behalf of defendant, an affirmative charge for defendant cannot be given where the evidence tends strongly to show that he was so acting, though susceptible of some doubt. Syson Timber Co. v. Dickens [Ala.] 40 So. 753.

15. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337; Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712, 13 Det. Leg. N. 631, 108 N. W. 1081; Cascade Foundry Co. v. Mueller Furnace Co., 140 F. 791; Cleveland, etc., R. Co. v. Henry [Ind. App.] 80 N. E. 636; Nolan v. Bridgeton & Millville Trac. Co. [N. J. Err. & App.] 65 A. 992; Dederick v. Central R. Co. [N. J. Law] 65 A. 833; Mumma v. Easton & A. R. Co. [N. J. Err. & App.] 65 A. 208; Merritt v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 925, 94 S. W. 372.

Held for jury: Blowing off of steam under a wagon bridge. Mumma v. Easton & A. R. Co. [N. J. Err. & App.] 65 A. 208. Whether defendant mine owner was not negligent in not discovering the dangerous condition of his mine from the close proximity of a mine filled with water. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Question whether in the incorporation of Del Rio more territory had been included than was intended to be used for strictly town purposes, contrary to Acts 24th Leg. (Laws 1895), p. 17, c. 16, § 1, and Acts 25th Leg. (Laws 1895), p. 193, c. 131, held under the facts for the jury. Merritt v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 925, 94 S. W. 372. Where a foreman negligently failed to take precautions to guard against the tipping of a girder while being raised, and it was tipped by the slipping of a lever, it cannot be said as a matter of law that the proximate cause of the resulting injury was the slipping of the lever rather than the failure to guard against such actions. Bokamp v. Chicago & A. R. Co. [Mo. App.] 100 S. W. 689.

16. Negative evidence of persons not in a position to sense the fact in issue does not create a conflict. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 N. W. 446. Testimony of three witnesses, half a mile from the scene and behind closed doors engaged in other affairs, that they did not hear train signals given does not create a conflict where six persons testify that they were given. Id. Where the evidence on one side of a controverted question of fact accords with what must necessarily have been the case under given undisputed circumstances, based on natural law, the determination is for the court and not the jury (Chybowski v. Bucyrus Co., 127 Wis. 332, 106 N. W. 833), as is the question whether such a situation exists (Id.). From the mechanism of a steam hammer held so contrary to natural laws that it should strike two blows where only one was desired, to make a question for the court, though there is testimony that it did so strike. Id.

17. Parker v. Fairbanks-Morse Mfg. Co. [Wis.] 110 N. W. 409. Where a newly constructed scaffolding collapsed under the weight of an employe using it in the ordinary manner, the court should instruct as a matter of law that the employer had failed to provide a safe place to work. Id. Court held authorized under Ballinger's Ann. Codes & St. § 4994, to direct a verdict, there being no conflict of testimony and no evidence to support the defense interposed. Sessions v. Warwick [Wash.] 89 P. 482. Where the removal was only for a few months and there was no evidence of any intention to abandon, an instruction that the continuity of adverse possession was not broken held proper. Roberson v. Downing Co., 126 Ga. 175, 54 S. E. 1020. Where the evidence clearly and undisputably established an extension of a note, the court should declare such fact and not submit it to the jury. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 S. W. 120. Where a tenant took possession under a lease from an adverse claimant and never thereafter surrendered possession so as to claim adversely, and testifies positively that she did not claim adversely, the court may declare that the continuity of the adverse claimant's possession was not broken, even though the tenant consulted a lawyer about setting up adverse title (Roberson v. Downing Co., 126 Ga. 175, 54 S. E. 1020), and though she paid taxes thereon, where she testifies that they were paid by her in consideration of her use of the premises (Id.).

18. Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817.

Particular facts or issues.[19]—It is the province of the court to determine the meaning, legal effect,[20] and nature,[21] unless affected by customs[22] of written instruments, but where they do not constitute an agreement, inferences to be drawn therefrom are for the jury,[23] as is also the construction of a foreign statute by the courts of such state where the evidence consists of parol testimony.[24]

Assumption of risk,[25] negligence,[26] and contributory negligence,[27] are essentially questions of fact for the jury to be taken from them only where the facts are undisputed and such that reasonable minds draw but one inference from them,[28] or where the act is per se negligent, as in violation of an ordinance, etc.[29]

19. See 6 C. L. 1180.

20. Error to submit it to the jury. Rheam v. Martin, 26 App. D. C. 181. Where a statement of claim contains a copy of the contract upon which the action is based and all the accounts between the parties and the affidavit of defense denies not material averment in the statement, the case is for the court (Ryon v. Starr, 214 Pa. 310, 63 A. 701), although the affidavit denies the inferences to be drawn therefrom (Id.).

21. Whether contract was a conditional sale. Staunton v. Smith [Del.] 65 A. 593.

22. Question whether telegrams under trade customs constitute a sale or merely authorized a sale as a broker held properly left to the jury. Morris & Co. v. Schaefers [Ky.] 100 S. W. 327.

23. Where letters between an insured and the insurer relative to an appraisement did not amount to a compact but would permit of a conclusion that neither was sincere in respect to the arbitration, the inference to be drawn therefrom was for the jury. Carp v. Queen Ins. Co., 116 Mo. App. 528, 92 S. W. 1137.

24. St. Louis, etc., R. Co. v. Conrad [Tex. Civ. App.] 99 S. W. 209.

25. While the question of assumption of risks is often for the court, it is for the jury where different inference may be drawn from the facts by reasonable minds. Meade v. Ashland Steel Co. [Ky.] 100 S. W. 821.

26. Davidson Steamship Co. v. U. S., 27 S. Ct. 480. Where the measure of duty is ordinary and reasonable care, negligence is always a question for the jury. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Where the nature and attributes of the act relied upon to show negligence can only be correctly determined by considering all the surrounding circumstances and facts, it falls within the province of the jury to characterize it. Baltimore & O. R. Co. v. State [Md.] 64 A. 304.

Held for jury: Negligence of a hospital in not warning an apprentice nurse of the contagious character of the disease. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. Whether a master furnished enough men to do a piece of work in a safe manner. Bokamp v. Chicago & A. R. Co. [Mo. App.] 100 S. W. 689. Failure to provide a safe place for servant to work. Martin v. South Covington & C. St. R. Co., 29 Ky. L. R. 148, 92 S. W. 571. Negligence of a mine owner to guard and protect the men against known dangers from accumulated waters in an adjoining mine. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Providing sufficient fastenings for gate at farm crossing. Roberts v. Chicago & A. R. Co., 119 Mo. App. 372, 94 S. W. 838. Leaving of telephone wire down in a public street for twelve hours. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879. An instruction that where the negligence of two unite in causing an accident, it is no defense to one to show that the other was to blame, held not objectionable as assuming negligence on the part of two. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652.

27. Powers v. St. Louis Transit Co. [Mo.] 100 S. W. 655; Fetterman v. Rush Tp., 28 Pa. Super. Ct. 77.

Held for the jury: Driving into a hole in a road. Nolan v. Bridgeton & Millville Trac. Co. [N. J. Err. & App.] 65 A. 992. Using a scaffolding without examining it. Parker v. Fairbanks-Morse Mfg. Co. [Wis.] 110 N. W. 409. Continuing to work in mine after being informed of reports of danger from water accumulated in an adjoining mine. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337. Negligence of a motorman in running his car upon the track in front of an approaching train. Baltimore & O. R. Co. v. State [Md.] 64 A. 304. Whether a boy eleven and one-half years old was guilty of contributory negligence in crossing street car tracks immediately after a car had passed without looking to see if it was followed by another. Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737. Negligence of plaintiff after receiving a belated message. Western Union Tel. Co. v. Salter [Tex. Civ. App.] 15 Tex. Ct. Rep. 362, 95 S. W. 549.

28. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 99 S. W. 200; Mortimer v. Beaver Valley Trac. Co. [Pa.] 65 A. 758; Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563; Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053; Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737; Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652. A plaintiff can be charged with contributory negligence as a matter of law only when, assuming all evidence in his favor true, and drawing all legitimate favorable inferences therefrom, the act is so decisively negligence that ordinary minds would not differ in so declaring. Baltimore & O. R. Co. v. State [Md.] 64 A. 304.

Held not negligent as a matter of law: For a switchman to go between the cars to uncouple them instead of going to the other side and using the coupling rod. Texas Mexican R. Co. v. Higgins [Tex. Civ. App.] 99 S. W. 200. One intoxicated but not deprived of his faculties in attempting to cross a track in front of an approaching train. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

Negligent as a matter of law: Cleaning of a pulley of a log carriage to a saw mill by standing on the track in front of the saw with full knowledge that the carriage was liable to start. Crookston Lumber Co. v.

Questions of knowledge [30] or what a person should have known,[31] intention,[32] performance of contract,[33] damages,[34] identity of parties,[35] reasonableness of time within which to act,[36] and election,[37] are facts for the jury, but whether a particular device or character constitutes a seal,[38] what are proper costs and by whom payable,[39] in whom title vested upon final extension thereof by the governor,[40] and, the evidence being undisputed, the sufficiency of a deed to pass title,[41] the defense of limitations,[42] the existence of a contract,[43] and proximate cause,[44] are questions of law for the court. Legal domicile [45] and waiver of the right to declare a forfeiture of a contract under the terms thereof [46] are mixed questions of law and fact.

QUIETING TITLE.

§ 1. Chancery and Statutory Remedies and Rights (1570). Title and Possession (1572). Defenses (1575).
§ 2. What is a Cloud or Conflicting Claim (1575).
§ 3. Procedure (1576). Process (1577). Parties (1577). Bill, Complaint, or Petition (1577). Answer and Other Pleadings (1579). Evidence (1580). Joinder of Causes (1580). Trial (1581). Jury Trial (1581). Findings, Decree, or Judgment (1581). Costs (1582).

§ 1. *Chancery and statutory remedies and rights. Nature and office.*[47]—The first essential to the maintenance of the action is a cloud on plaintiff's title,[48]

Boutin [C. C. A.] 149 F. 680. Engineer entering switch yards without control of his engine and in violation of rules. Brown v. Northern Pac. R. Co. [Wash.] 86 P. 1053. Where an appreciable time elapsed between the time that plaintiff started toward the tracks indicating that he intended to cross and when he was struck, the court may instruct as a matter of law that he was entitled to a warning. Deschner v. St. Louis & M. R. Co. [Mo.] 98 S. W. 737.

Held not free from negligence as a matter of law: Captain attempting to enter a harbor in which he had not been for a year without familiarizing himself as to improvements which he knew were being made. Davidson Steamship Co. v. U. S., 27 S. Ct. 480.

29. Violation of speed ordinances. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

30. As relating to the assumption of risks held for the jury under the facts. Williams v. Sleepy Hollow Min. Co. [Colo.] 86 P. 337.

31. The question whether plaintiff at the time he represented that he had never been postponed or rejected by an insurance company should have known that a prior application had been unfavorably acted upon. Langeau v. Hancock Mut. Life Ins. Co. [Mass.] 80 N. E. 452.

32. Intention to be ascertained from disputed or ambiguous circumstances. Question of acceptance of defective goods in consideration of a reduction of purchase price. Continental Lumber Co. v. Munshaw & Co. [Neb.] 109 N. W. 760. Whether the parties to an absolute deed intended it as a mortgage is a fact to be determined from all the competent evidence, direct and circumstantial, including the indicia present. Fridley v. Somerville [W. Va.] 54 S. E. 502.

33. Question whether defendant had prepaid the freight as required by contract of settlement. Capital City Carriage Co. v. Moody [Iowa] 110 N. W. 903.

34. Amount of damages for failure to comply with building specifications set off in an action on the contract. Barbee v. Findlay, 221 Ill. 251, 77 N. E. 590.

35. On the admissibility of telephone communications alleged to have been had with a party to the suit, evidence that the telephoning party represented that he was the party to the action, that such party was the only person likely to telephone and had been instructed so to do, makes question of identity for the jury. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

36. Whether the time provided by a carrier's contract of shipment is reasonable or not is a question of fact to be determined from the circumstances of the case. St. Louis, etc., R. Co. v. Phillips [Okl.] 87 P. 470. Reasonable time to give notice under contract. Portland Ice Co. v. Connor, 32 Pa. Super. Ct. 428.

37. While the construction of a deed is for the court, the question whether the vendee was notified that the survey did not include all the land and whether he elected to adopt the description made by the surveyor and caused a deed to be prepared in accordance therewith is for the jury. Williams v. Virginia-Pocahontas Coal Co. [W. Va.] 53 S. E. 923.

38. Langley v. Owens [Fla.] 42 So. 457.

39. Adkins & Co. v. Campbell [Del.] 64 A. 628.

40. The question whether title vests in the grantee upon extension of final title by the governor when he was given possession or in one for whom he was acting as attorney in fact was a question of law for the court. Surghenor v. Taliaferro [Tex. Civ. App.] 17 Tex. Ct. Rep. 411, 98 S. W. 648.

41. Deed given while the land was in the adverse possession of another. Anniston City Land Co. v. Edmondson [Ala.] 40 So. 505.

42. Munn v. Masonic Life Ass'n, 101 N. Y. S. 91.

43. Freifeld v. Groh's Sons, 101 N. Y. S. 863.

44. Fanizzi v. New York, etc., R. Co., 113 App. Div. 440, 99 N. Y. S. 281.

45. As affecting jurisdiction. Stallings v. Stallings [Ga.] 56 S. E. 469.

46. As to which the judgment of the ap-

but if an instrument create a cloud it is immaterial to plaintiff's right to sue for its removal that he was not a party thereto.[49] A statute giving a right of action as to lands not in possession is not an infringement upon the exclusive jurisdiction of the common-law courts,[50] and the action is equitable in its nature notwithstanding the fact that by statute it may be commenced by one not in possession,[51] consequently the action does not lie where plaintiff has an adequate remedy at law,[52] but it has been held that the fact that complainant has a remedy by way of ejectment does not oust equity of jurisdiction where equity would have had jurisdiction prior to the extension of the legal remedy,[53] and the fact that complainant may have an adequate remedy at law in the state courts will not deprive the Federal courts of jurisdiction.[54] The action being equitable, plaintiff may be required to do equity as a condition to relief.[55] But where in an action to remove an outlawed

pellate court is final. Harley v. Sanitary Dist., 226 Ill. 213, 80 N. E. 771.

47. See 6 C. L. 1183.

48. The fact that a defendant claiming no interest in the land in controversy may avoid the burden and risk of defending by disclaiming does not affect the rule that in order to maintain the action the adverse claim made by defendant must be such as to constitute a cloud on complainant's title. Merritt v. Alabama Pyrites Co. [Ala.] 40 So. 1028. Plaintiff commenced an action against the heirs of a former owner of the property and against the holder of a tax deed who had agreed to convey to him; but asked no affirmative relief against the latter. Held, upon plaintiff purchasing the adverse title of the heirs, the action should be dismissed, there being no cloud to be removed from plaintiff's title. Sternberger v. Ladd [Colo.] 88 P. 872.

49. Sheriff's deed. Williams v. Hays, 29 Ky. L. R. 583, 93 S. W. 1063.

50. A statute providing that where lands are in the possession of no one they shall be presumed to be in the peaceable possession of one who claims same in fee under a recorded instrument and who shall have paid taxes thereon for five consecutive years, and authorizing such person to bring an action in equity to try title to same, is constitutional. It does not infringe upon the exclusive jurisdiction of the courts of common law, as at common law the courts could not entertain such an action, the defendant not being in possession. McGrath v. Norcross [N. J. Err. & App.] 65 A. 998.

51. Costello v. Muheim [Ariz.] 84 P. 906; Nugent v. Stofella [Ariz.] 84 P. 910.

52. The action does not lie where the complainant has an adequate remedy by way of specific performance or an equitable action for a rescission. Recorded contract of sale under which the vendee has defaulted. McClave v. McGregor [N. J. Eq.] 64 A. 1066. Where a week before the bill was filed defendant plowed the land in question for a half day for the purpose of cultivation, which fact was known to complainant at the time the bill was filed, held it was incumbent upon complainant to exercise at least a reasonable effort to procure the necessary evidence upon which to base an action at law before applying for the statutory remedy to quiet title under the claim of a peaceable possession. Steelman v. Blackman [N. J. Eq.] 65 A. 715. A grantor who has conveyed premises in consideration of an agreement to support has an adequate remedy at law by way of ejectment upon a breach of the condition and an action to cancel the deed as a cloud on her title does not lie. Mash v. Bloom [Wis.] 110 N. W. 203. The deed of a married woman given to secure the debt of the husband being void, not being in possession, she has an adequate remedy at law by ejectment and an action to quiet title does not lie. Patterson v. Simpson [Ala.] 41 So. 842. A defendant against whom judgment in an ejectment suit was entered and whom a sheriff threatens to oust under a writ of possession, which does not cover the lands in suit, has an adequate remedy at law and the action will not lie. Bolen v. Allen [Ala.] 43 So. 202. Remedy at law by ejectment held inadequate as necessitating a second action in equity to annul the legal title held by defendant. Coleman v. Jaggers [Idaho] 85 P. 894. A bill in equity to quiet title to land lies at the suit of one in possession as he is without a remedy at law. Wilmore Coal Co. v. Brown, 147 F. 931. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555; North Carolina Min. Co. v. Westfeldt, 151 F. 290.

53. Under the West Virginia Code, ejectment lies at the suit of one in possession against one not in possession. Whitehouse v. Jones [W. Va.] 55 S. E. 730. A statute giving a remedy by ejectment does not deprive equity of jurisdiction over a bill to quiet title. Pennsylvania statutes, Acts May 25, 1893 (P. L. 131), and June 10, 1893 (P. L. 415), gives one in possession the right to require one not in possession but claiming title to bring ejectment. Hutchinson v. Dennis [Pa.] 66 A. 524.

54. The fact that a plaintiff in possession may have an adequate remedy at law in a state court is not a ground for the dismissal of an action in the Federal court. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

55. Where portion of money loaned on a void mortgage was used to pay off a valid mortgage on the land, the plaintiff may be required to repay such portion as a condition precedent to the removal of such mortgage as a cloud on his title. Henry v. Henry [Neb.] 107 N. W. 789, modifying [Neb.] 103 N. W. 441, on rehearing. As a condition precedent to setting aside a void tax deed as a cloud on title, the court may require the plaintiff to pay the purchaser the amount of taxes paid him for his tax title. Fenton v. Minnesota Title Ins. & Trust Co. [N. D.] 109 N. W. 363. One standing in the shoes of the mortgagor may be required to pay an outlawed mortgage on the land as a condition

mortgage as a cloud on the title the defendant by way of cross bill demands as affirmative relief the foreclosure of the mortgage, the court may declare such mortgage barred by limitation without requiring the plaintiff as a condition to relief to tender the amount due under same.[56] The rule that plaintiff must do equity will not be extended so as to cover an incumbrance which was never a lien on plaintiff's title,[57] nor where the defendant seeks relief from the result of his own fraudulent acts.[58] Plaintiff must recover upon the strength of his own title,[59] but where both parties rely on a common source of title, plaintiff need not go back of it in making his case, and irregularities prior thereto are immaterial,[60] and in such case, where plaintiff shows the better title from the common source, defendant cannot attack the title of the common source in order to defeat plaintiff's right to recover.[61] An action to quiet title presupposes complete title in the plaintiff as against the defendant,[62] and it is none the less an action to quiet title because the relief sought is the modification of a judgment enjoining plaintiff from entering upon the land of defendant.[63] The action under the Maine statute to require an adverse claimant to bring an action to try title must be brought while such person claims the title,[64] and a purchaser pendente lite is not bound by the judgment where the action was not commenced by his grantor at the time of the purchase.[65] The Massachusetts statute relative to undischarged mortgages which have been dormant for twenty years contemplates the absolute discharge of the mortgage upon a compliance with the statutory conditions.[66]

Title and possession.[67]—Independent of statute, both possession[68] and legal

precedent to the title being quieted in him. Burns v. Hiatt [Cal.] 87 P. 196. Heirs may be required to refund to commissioner purchase price of land purchased by him as such from the estate as a condition to quieting their title. Penn v. Rhoades [Ky.] 100 S. W. 288. The rule has no application in an action by the heirs at law of a mortgagor to have a void mortgage on a homestead canceled as against one claiming under such mortgage. Woods v. Campbell, 87 Miss. 782, 40 So. 874.

56. Peterson v. Ramsey [Neb.] 110 N. W. 728.

57. The court find that in 1854 one C. owned an interest in the land and at that time executed a mortgage to defendant; that in 1883 plaintiff deraigned title through mesne conveyances from the land commissioners and for eighteen years had been in possession adverse to all the world paying taxes thereon. Held that, there being no finding that plaintiff deraigned title through C. the mortgage was never a lien on plaintiff's title and he could not be required to do equity as a condition to relief. Marshutz v. Seltzor [Cal. App.] 89 P. 877.

58. Defendant held a mortgage on land purchased by plaintiff and with full knowledge of the facts evaded plaintiff's efforts to pay same and secured a deed from plaintiff's grantor recording it prior to the recording of plaintiff's deed, and at the same time releasing his mortgage, his acts being for the sole purpose of defrauding plaintiff. Held in an action to cancel the deed to defendant plaintiff could not be required as a condition precedent to relief to pay defendant the amount of his mortgage. Nugent v. Stofella [Ariz.] 84 P. 910.

59. Cook v. Ziff Colored Masonic Lodge [Ark.] 96 S. W. 618. In an action to quiet the title to wild and unoccupied land, the plaintiff must recover upon the strength of his own title and not upon the weakness of his adversary's. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534.

60, 61. Harrison Machine Works v. Bowers [Mo.] 98 S. W. 770.

62. If the defendant has some real interest in the land as distinguished from a mere apparent or asserted right, the action must fail as the court will not measure the extent of that interest. So held where plaintiff attempted to declare a forfeiture under a contract of sale making no provision therefor. Cody v. Wiltse, 130 Iowa, 139, 106 N. W. 510.

63. Richey v. Beus [Utah] 87 P. 903. In a former action plaintiff was enjoined from entering defendant's land for the purpose of repairing a pipe line located thereon. Subsequent to the rendition of such judgment plaintiff acquired from the owner thereof an easement to pass over said property for such purpose and commenced an action to modify the judgment in the former suit as a cloud on his easement. Id.

64. A petition to require respondent to bring an action to try title to land cannot be maintained where after the filing of the petition respondent conveys the property or is adjudged a bankrupt. Allen v. Foss [Me.] 66 A. 379.

65. Allen v. Foss [Me.] 66 A. 379.

66. Rev. Laws, c. 182, § 15. Mitchell v. Bickford [Mass.] 78 N. E. 453.

67. See 6 C. L. 1184.

68. Whitehouse v. Jones [W. Va.] 55 S. E. 730; Poling v. Poling [W. Va.] 55 S. E. 993. Disputed boundary. Dolan v. Smith [Mich.] 13 Det. Leg. N. 1030, 110 N. W. 932. Constructive possession arising simply by virtue of the legal title is insufficient, but actual possession of the principal tract is sufficient possession of adjoining uninclosed land

title in complainant are indispensable to the maintenance of the action,[69] unless the land is wild or unoccupied, in which case possession is unnecessary,[70] or only constructive possession is required,[71] as in such cases it follows the title.[72] Possession alone without other evidence of title is not sufficient to sustain the action.[73] The possession of a tenant is the possession of the owner,[74] and the possession of a tenant for life is that of the remainderman.[75] Equity will sometimes give relief upon the principle of quia timet even though the plaintiff is not in possession, but only in cases where the hostile cloud could not be removed without resort to evidence inadmissible in an action at law.[76] A warrantor of title has sufficient interest,[77] and one having but an equitable title in the inception of the suit may perfect his title pendente lite.[78] The action may be maintained by a remainderman during the

held under the same title and used in connection therewith. Elliot v. Atlantic City, 149 F. 849. An abandoned wife who leaves the homestead temporarily to give the children educational adavantages still has sufficient possession to sustain an action to quiet title. Has actual possession within Code of Civ. Proc. § 589 (Wilson's Rev. & Ann. St. 1903, § 4787). Womble v. Pike [Okl.] 87 P. 427.

69. Cook v. Ziff Colored Masonic Lodge [Ark.] 96 S. W. 618. As against a stranger to the transaction a title fraudulently obtained by a conveyance not disaffirmed by the true owners is sufficient to sustain the action. The fact that such conveyance was voidable at the option of the persons defrauded is not a defense when raised by a stranger to the transaction whose conduct was not influenced thereby and who made no claim under or through the persons defrauded. Pence v. Long [Ind. App.] 77 N. E. 961. Judgment in ejectment establishing plaintiff's title is conclusive of that fact in an action to quiet title. Whitehouse v. Jones [W. Va.] 55 S. E. 730. One claiming under a city assessment certificate but who is not entitled to a deed thereunder because of a failure to comply with conditions precedent to its issuance has not an interest sufficient to maintain the action. Coffman v. London & Northwest American Mortg. Co., 98 Minn. 416, 108 N. W. 840. The devisee of one in possession and claiming ownership of certain lands has a prima facie title sufficient to maintain the action. Plaintiff's devisor purchased certain lands which at the time were enclosed by a board fence and placed a sign thereon indicating that they were for sale by him. He also paid the taxes during six years and one special assessment. Held plaintiff's title was sufficient prima facie to sustain the action. Glos v. Ptacek, 226 Ill. 188, 80 N. E. 727. Where defendant relied upon a deed which did not cover the land in controversy and did not present a case entitling him to a reformation, a deed from the owner to plaintiff before the commencement of the action covering such land cures whatever infirmities may have existed in plaintiff's title. Adams v. Betz [Ind.] 78 N. E. 649. A possessory right to oyster beds on tide lands owned by the state may be the basis of an equitable action to quiet the title thereto. The laws of California provide that a person planting and marking such beds shall have the exclusive right to the occupation and use of the lands as against one not in possession but who claims some adverse right or interest in the land. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555. Evidence held sufficient to show title in plaintiff. Collinsworth v. Enterprise Land, Mineral & Lumber Co. [Ky.] 99 S. W. 234; Adams v. Betz [Ind.] 78 N. E. 649; McLean v. Baldwin [Cal.] 89 P. 429. Evidence held insufficient. Turner v. Ladd, 42 Wash. 274, 84 P. 866; Lewis v. Louisville & N. R. Co. [Ky.] 99 S. W. 658; Overton v. Overton, 29 Ky. L. R. 736, 96 S. W. 469.

70. Where it appeared that a fence around certain lots had been permitted to decay and the boards used for other purposes, that at the time of the filing of the bill there was no fence around the property and that the public passed over it, and that the plaintiff never in any way used or occupied the property, it is properly regarded as unoccupied. Glos v. Ptacek, 226 Ill. 188, 80 N. E. 727.

71. Under a statute authorizing the action by one in peaceable possession, either actual or constructive, the constructive possession which exists in the holder of the legal title is sufficient. Ala. § 809, Code 1896. Kyle v. Alabama State Land Co. [Ala.] 41 So. 174.

72. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534.

73. Cook v. Ziff Colored Masonic Lodge [Ark.] 96 S. W. 618.

74. A residuary legatee whose testator executed a lease to defendant has a sufficient possession to maintain the action where all the terms of the lease had been complied with and at the time of the action the lease had still fourteen years to run. Miller v. Ahrens, 150 F. 644.

75. Where a deed conveying an estate for life to one remainder to plaintiff was destroyed and defendants denied the existence of the remainder, plaintiffs were not required to wait until the death of the life tenant before bringing the action, as lapse of time might deprive them of the evidence to prove their claims. Alley v. Alley, 28 Ky. L. R. 1073, 91 S. W. 291.

76. Relief refused in an action to cancel a deed for breach of a condition subsequent expressed therein. Mash v. Bloom [Wis.] 110 N. W. 203.

77. One who has sold land with a warranty of title may maintain an action to have the land declared free of the lien of a judgment, notwithstanding the fact that until the plaintiff has been compelled to pay the judgment his grantee could recover only nominal damages against him. Jackson Mill. Co. v. Scott [Wis.] 110 N. W. 184.

78. A deed of the premises to plaintiff was in every respect regular and sufficient

continuance of the particular estate,[79] and the statute of limitations runs against him and his grantees from the time the adverse claim attaches,[80] and this is true although the remaindermen are infants where the adverse claim attached during the lifetime of the person through whom they derive title.[81] Where equity has jurisdiction because of fraud it may remove a cloud although the plaintiff is not in possession.[82] There is a distinction between the assertion of a hostile superior title and an effort to deprive one of title by converting it to the other party's use; in the latter case possession in complainant is unnecessary.[83] The Federal courts applying the common law require possession in complainant as a condition to the granting of relief,[84] but the Federal courts will enforce a statutory action to quiet title.[85] Statutes in many states have materially modified the common-law rule rendering possession,[86] and in some states legal title,[87] in complainant unnecessary. In such states it is no longer necessary that plaintiff should first establish his title in an action at law.[88]

to convey the legal title except that it was missealed and therefore conveyed only an equitable title. During the pendency of an action to quiet title this defect was remedied. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

79. But this form of action must be distinguished from an action where the right to possession is involved. First Nat. Bank v. Pilger [Neb.] 110 N. W. 704; Lyons v. Carr [Neb.] 110 N. W. 705.

80. First Nat. Bank v. Pilger [Neb.] 110 N. W. 704.

81. Lyons v. Carr [Neb.] 110 N. W. 705.

82. Action to cancel a deed procured by fraud. Du Bose v. Kell [S. C.] 56 S. E. 968.

83. Plaintiff was the owner of the mineral rights in certain land acquiring title through one in possession holding the equitable title. Defendants claimed title through owners of the record title. Held that defendants through their apparent title sought to deprive plaintiff of its property, and possession in plaintiff was unnecessary, the action not being one for the removal of a cloud. Eversole v. Virginia Iron, Coal & Coke Co., 29 Ky. L. R. 151, 92 S. W. 593. Evidence held to show an attempt on the part of the plaintiff to deprive defendant of his property by converting it to its own use and that, therefore, defendant's title asserted in his counterclaim could be quieted, although it was not shown that he was in possession. Fox v. Cornett, 29 Ky. L. R. 246, 92 S. W. 959

84. An action to quiet title cannot be maintained in the Federal court unless the plaintiff is in possession. Miller v. Ahrens, 150 F. 644. His remedy otherwise is by an action of ejectment. Ashburn v. Graves [C. C. A.] 149 F. 968.

85. Under C. C. P. Cal. § 738, authorizing an action by any person against one claiming an estate or interest in real property adverse to him for the purpose of determining such adverse claim, the Federal courts have jurisdiction over an equitable action to quiet title to a possessory right to an oyster bed situated in that state. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555. Where a local statute authorizes the action although the plaintiff is not in possession, relief will be granted in appropriate cases. Ashburn v. Graves [C. C. A.] 149 F. 968.

86. Idaho, § 4538, Rev. St. 1887. Coleman v. Jaggers [Idaho] 85 P. 894. In Mississippi the action may be maintained by an owner out of possession if there is no adverse occupancy. Ann. Code 1892, § 499. Gambell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485. In Washington the action may be maintained even though the defendant is in possession. Ferrell v. Lord [Wash.] 86 P. 1060. Under the Texas statute, one holding the legal title to land may maintain an action to quiet title against a tax deed though not in possession. Until the passage of the act of 1897, § 650, Rev. St. 1899, the owner of wild and unoccupied lands could neither maintain ejectment or an action to quiet title against one holding a tax deed, neither having possession, and an action may be brought within five years after the passage of that act to quiet title though the sale took place twenty years previously. Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520.

87. Idaho, § 4538, Rev. St. 1887, Coleman v. Jaggers [Idaho] 85 P. 894. Under the Wisconsin statute the owner or the holder of any lien or incumbrance on land may maintain the action to test the validity of any claim, lien, or incumbrance on same. Rev. St. 1898, § 3186. The grantee of a purchaser under an unconfirmed mortgage foreclosure sale has sufficient title. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290. An equitable title is sufficient where the defendants hold the legal title as constructive trustees for the plaintiff. A conveyance under a power in a will conveying only the equitable title because not executed by a coexecutor, although given with his consent, is sufficient. Brown v. Doherty, 185 N. Y. 383, 78 N. E. 147. In North Carolina an equitable title will support the action. Deed conveying only equitable title because unsealed. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

88. Under Code Civ. Proc. Cal. § 738, providing that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim, it is unnecessary that plaintiff should wait until his legal title is established at law before bringing the action. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555. Under a statute authorizing an action to determine adverse claims by a person against one claiming any estate or interest in real property adverse to him, it is unnecessary that plaintiff should first establish his title in an ac-

In Alabama and New Jersey peaceable possession is required.[89] After plaintiff's superior title has been established by an action of ejectment, an action to quiet title lies to cancel title papers upon which defendant's continued to assert a claim of title.[90] Under the Alabama statute the court is not required to determine the strength or validity of complainant's title.[91] The legal title must prevail over an equitable title.[92]

Defenses.[93]—The action being equitable the right of action may be barred by laches, though the full statutory period of limitations has not run.[94] The action must be commenced within the period limited by statute,[95] but it is a real and not a personal action within the meaning of a statute applying a different period of limitation to each.[96] The pendency of an action at law in the nature of ejectment in a state court is not a bar to an action to quiet title in a Federal court,[97] nor is an action at law in another jurisdiction involving only a portion of the controversy and to which complainant is not a party a bar.[98] A conveyance of part of the land in controversy by the plaintiff pendente lite is not ground for abatement as to such portion, especially where the grantee retains a portion of the purchase money as security for the removal of a cloud.[99] The fact that in the event of the happening of a certain contingency defendant intended to commence an action to have certain conveyances to plaintiff set aside as a fraud on creditors is not a defense to an action to quiet title,[1] nor is it ground for abatement.[2] Defendant may set up any equitable claim he may have upon the land which if valid is enforceable and if spurious constitutes a cloud,[3] but he cannot by setting up an outlawed mortgage in his cross complaint obtain its foreclosure as affirmative relief.[4]

§ 2. *What is a cloud on convicting claim.*[5]—A cloud is an apparent[6] legal or

tion at law. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

89. Steelman v. Blackman [N. J. Eq.] 65 A. 715. Evidence held insufficient to show peaceable possession in complainant. Johnson v. Johnson [Ala.] 41 So. 522.

90. Whitehouse v. Jones [W. Va.] 55 S. E. 730.

91. The sole question to be determined is whether the defendant has any right, title, or interest in or incumbrance upon the land and what it is and upon what part of the land it exists. Kendrick v. Colyar, 143 Ala. 597, 42 So. 110. Where the deed upon which defendant asserts his title passed no title to him, the question of whether complainant's title is superior is immaterial. Id.

92. Resulting trust. Spotswood v. Spotswood [Cal. App.] 89 P. 362.

93. See 6 C. L. 1185.

94. Ferrell v. Lord [Wash.] 86 P. 1060; Costello v. Muheim [Ariz.] 84 P. 906; Hodges v. Wheeler, 126 Ga. 848, 56 S. E. 76; Turner v. Burke [Ark.] 99 S. W. 76; Osceola Land Co. v. Henderson [Ark.] 100 S. W. 896. As to what constitutes laches, see Equity, 7 C. L. 1347.

95. Under Comp. Laws, § 9167, a judgment creditor levying on an equitable interest of a judgment debtor must institute statutory proceedings to determine the interests of the debtor within one year after the sale and upon a failure to do so his remedy is gone. Tiedeman v. Kroll, 144 Mich. 308, 13 Det. Leg. N. 148, 107 N. W. 883. A suit by the fee holder to remove as a cloud a lien which is subordinate to a mortgage which he holds separate from the fee is not barred by the fact that limitations have run against such mortgage. Katz v. Obenchain [Or.] 85 P. 617.

96. The period of limitations is governed by art. 1, ch. 48, Rev. St. 1899, relating to real actions and not by art. 2 of the same chapter relating to personal actions. Haarstick v. Gabriel [Mo.] 98 S. W. 760.

97. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

98. An action at law for damages for the alleged wrongful acts of the defendants in mining coal in lands held under lease by the plaintiff, was commenced in the United States circuit court of New York. During the pendency of that action, one not a party to same commenced an action in the United States circuit court of Pennsylvania against the plaintiffs therein to quiet his title to said lands alleging that the leases held by the plaintiff had been abandoned. Held the pendency of the action at law was not a bar to the proceeding to quiet title. Wilmore Coal Co. v. Brown, 147 F. 931.

99. Boyer v. Robison [Wash.] 86 P. 385.

1. Defendant alleged that he had commenced an action against a former owner of the land involved upon a claim held against him and in the event of the successful outcome of that action he intended to institute proceedings to have conveyances to plaintiff and to plaintiff's grantor set aside as a fraud upon him. Dorris v. McManus [Cal. App.] 86 P. 909.

2. Dorris v. McManus [Cal. App.] 86 P. 909.

3. Mortgage. Sebree v. Johnson's Committee [Ky.] 99 S. W. 340.

4. Marshutz v. Seltzor [Cal. App.] 89 P. 877.

5. See 6 C. L. 1186

6. A decree entered in a suit between strangers to the title is not a cloud upon the title of the true owner. Haggart v.

equitable title to land but which is in fact without foundation,[7] and, therefore an instrument void on its face does not constitute a cloud,[8] though a contrary rule has been adopted in West Virginia.[9] The claim of an easement is not a cloud upon the title to the fee.[10] A mere verbal assertion of ownership is not a cloud,[11] but under the Mississippi statute a cloud for the removal of which an action will lie may consist in a recorded instrument or a mere assertion of an unknown but hostile claim.[12] Since the bar of limitations is available by way of defense only and not by way of action, a cloud cannot be predicated on the sole fact that a mortgage on the land is barred;[13] though in exceptional cases the title to personal property may be quieted, a mere verbal claim cannot be made the basis of the action.[14]

§ 3. *Procedure.*[15]—The Federal courts will not entertain an action to quiet title against a claim under a treaty where defendant disclaims interest thereunder.[16] In Massachusetts, jurisdiction over an action to remove a cloud from title is not transferred from the superior court to the land court under a statute transferring other actions involving land to that court.[17] Where the complaint alleges possession in plaintiff, equity does not lose jurisdiction because defendant moves to transfer to law alleging possession in himself.[18]

Chapman & Dewey Land Co., 77 Ark. 527, 92 S. W. 792. A deed from a stranger to the title is not a cloud. Ashburn v. Graves [C. C. A.] 149 F. 968; McMullen v. Cooper, 125 Ga. 435, 54 S. E. 97.

7. Held to constitute a cloud: Execution sale on a judgment against the husband of property conveyed by him to his wife prior to the commencement of the action against him. Pettit v. Coachman [Fla.] 41 So. 401. A contract of sale unenforceable by the vendee because of his default. Whiteford v. Yellott [Md.] 64 A. 936. An abandoned mineral lease. Wilmore Coal Co. v. Brown, 147 F. 931. Void certificate of sale for local improvements. Ellis v. Witmer, 148 Cal. 528, 83 P. 800. Street assessment liens adjudged barred by limitations, even though defendant admits that they do not constitute a lien. Cushing v. Spokane [Wash.] 87 P. 1121. A sheriff's deed to property conveyed prior to the levy of an execution. Williams v. Hays, 29 Ky. L. R. 583, 93 S. W. 1063. Mortgages and other liens. Sebree v. Johnson's Committee [Ky.] 99 S. W. 340. An unrecorded mortgage. Robertson v. Sebastian [Ky.] 99 S. W. 933. Where a deed of a waterworks plant to a town was ineffective because of the invalidity of the proceedings on the part of the town relative to the purchase, the latter was held ehtitled to a cancellation of same as a cloud on the title which it might subsequently acquire under statutory proceedings for the purchase of the plant. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

8. An instrument conveying a portion of a lot so infinitesimal as to be absolutely imperceptible to the senses does not constitute a cloud. A tax deed conveying one vigintillionth part of a lot 25 feet wide attempts to convey something which can neither be found nor identified and is void on its face. Petty v. Beers, 224 Ill. 129, 79 N. E. 704. Where proceedings for the extension of the corporate limits of a municipality were unconstitutional, a certificate of sale for taxes by the city on land illegally included therein would recite the proceedings leading up to it and show the illegality of the sale on its face. City of Ensley v. McWilliams [Ala.] 41 So. 296. An unconstitutional statute. Devine v. Los Angeles, 202 U. S. 313, 50 Law. Ed. 1046.

9. A deed or other muniment of title void on its face constitutes a cloud against which equity will relieve; thus void decree allowing redemption from tax sale is a cloud. Whitehouse v. Jones [W. Va.] 55 S. E. 730.

10. Under § 47, c. 106, Rev. St., one claiming an adverse interest in real property, which claim constitutes a cloud upon the title thereto, may be summoned and required to show cause why he should bring an action to try his title to such property; but where the only claim made by the defendant is an easement of right of way, over the land, which easement has in no way been disturbed, the proceeding does not lie as there is no incompatibility between the ownership of the fee and the claim of an easement to pass over it. Smith v. Libby, 101 Me. 338, 64 A. 612.

11. Devine v. Los Angeles, 202 U. S. 313, 50 Law. Ed. 1046.

12. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss 773, 40 So. 485.

13. Gibson v. Johnson [Kan.] 84 P. 982.

14. Machinery in a building, defendant claiming it as a fixture. Red Diamond Clothing Co. v. Steideman, 120 Mo. App. 579, 97 S. W. 220.

15. See 6 C. L. 1186

16. Plaintiffs alleged that defendant claimed adverse rights in percolating and other waters owned by them under the treaty of Guadalupe Hidalgo. Defendant by its answer claimed title under and not adverse to plaintiffs. Held the disclaimer deprived the court of jurisdiction. Devine v. Los. Angeles, 202 U. S. 313, 50 Law. Ed. 1046.

17. St. 1904, p. 448, c. 44, transfers to the land court jurisdiction over writs of entry under Rev. Laws, c. 179, petitions to require actions to quiet title real estate under Ch. 182, §§ 1-5, petitions to determine the validity of incumbrances under Ch. 182, §§ 11-14, and petitions to discharge mortgages under Ch. 182, § 15. First Congregational Soc. v. Metcalf [Mass] 79 N. E. 343.

18. Earle Imp. Co. v. Chatfield [Ark.] 99 S. W. 84.

Process.[19]—Under the 14th Amendment the defendant has an absolute right to notice of the proceedings, and, while the legislature has the right to regulate the manner in which notice shall be given, a statute so inadequate in this respect as practically to authorize proceedings without notice is void.[20]

Parties.[21]—One whose interest in the land is such that no decree can be entered without affecting his rights is a necessary party,[22] and the converse is also true.[23] The action may be maintained by a trustee of an express trust,[24] by a husband without joining the wife,[25] by legatees under a will.[26] Under a statute authorizing the action against anyone claiming an estate in lands for a term of not less than ten years, it cannot be maintained against the assignee of a subtenant under a lease terminating in five years.[27] The title of one not a party to the action cannot be litigated,[28] and one not a party will not be bound by the judgment.[29] An action to determine adverse claims does not become an action against all persons unknown merely because defendants are sued by fictitious names it being alleged that their true names are unknown and not that the defendants themselves are unknown.[30]

Bill, complaint, or petition.[31]—All facts essential to the maintenance of the action,[32] including title,[33] and possession in complainant,[34] and a disturbance of his

19. See 6 C. L. 1186.

20. Ch. 5, Laws 1901, providing for the publication of the summons in an action to quiet title rendering it unnecessary to name as defendants any one except those in possession or those whose adverse claims appear of record and dispensing with the necessity for publishing a description of the land in connection therewith is unconstitutional as depriving a person of his property without due process of law. Fenton v. Minnesota Title Ins. & Trust Co. [N. D.] 109 N. W. 363. The California statute providing for an action in rem by any person claiming title to real property in case of the destruction of public records by fire, flood, or earthquake, rendering it unnecessary to name the defendants and authorizing the publication of the summons as to all persons whose residence is unknown, is constitutional. Title & Document Restoration Co. v. Kerringan [Cal.] 88 P. 356.

21. See 6 C. L. 1186.

22. North Carolina Min. Co. v. Westfeldt, 151 F. 290. A warrantor whose deed is sought to be canceled. Gibson v. Tuttle [Fla.] 43 So. 310.

23. In an action between a claimant through the owner of the fee and the holder of a tax deed a mortgagee is not a necessary party. Grigsby v. Wolven [S. D.] 108 N. W. 250. Neither the board of commissioners nor the county auditor are necessary or proper parties to an action to quiet title to school lands, and a judgment quieting title as against them does not bind the state. State v. Wimer [Ind.] 77 N. E. 1078. A receiver of the estate of a decedent is not a proper party plaintiff in an action to remove a cloud from the land. He has no interest in the land, the title being in the heirs and devisees. Gibson v. Tuttle [Fla.] 43 So. 310.

24. One to whom property is conveyed without consideration in trust for the grantors, same to be conveyed as they may direct, is the trustee of an express trust within the meaning of Ballinger's Ann. Codes & St. § 4825, and may bring an action to quiet title without joining the beneficiaries. Carr v. Cohn [Wash.] 87 P. 926.

25. In an action by a husband to remove a cloud from title to land owned by him, his wife is not a necessary party. Puritan Oil Co. v. Myers [Ind. App.] 80 N. E. 851.

26. An action to cancel a deed fraudulently executed by an executrix since deceased, the legatees under the will may maintain the action without having an administrator appointed where it appears that all parties in interest are before the court. Hodges v. Wheeler, 126 Ga. 848, 56 S. E. 76. And see Gibson v. Tuttle [Fla.] 43 So. 316.

27. Hollister v. Wohlfeil, 100 N. Y. S. 907.

28. In an action to quiet title to land within a disputed boundary the ownership of a small strip between the land of plaintiff and defendant cannot be considered the owner thereof not being a party. Matthews v. French, 194 Mo. 553, 92 S. W. 634.

29. In Missouri an action to quiet title is not an action in rem and a judgment does not settle title as against the whole world but only as against those who are parties to the action. Harrison Mach. Works v. Bowers [Mo.] 98 S. W. 770.

30. City of Los Angeles v. Los Angeles Farming & Mill. Co. [Cal.] 89 P. 615.

31. See 6 C. L. 1187.

32. Must show the perfect fairness of the complainant's title and the invalidity of the defendant's claim. Complaint held not to state a cause of action for the removal of a cloud under § 500, Ann. Code 1892. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485. A complaint asserting possession in defendant and demanding a recovery of the land does not state a cause of action to quiet title notwithstanding the fact that it contains allegations customary in such an action and prays as additional relief that the title be quieted. Such allegations make it a complaint in ejectment. Turner v. Johnson, 29 Ky. L. R. 543, 93 S. W. 1038. A complaint alleging possession in plaintiff setting up his title and asking to have same quieted, gives equity jurisdiction. Earle Imp. Co. v. Chatfield [Ark.] 99 S. W. 84. A complaint alleging that plaintiffs are owners in fee and lawfully seised and possessed of the premises in controversy as tenants in common, that defendant claims an estate or interest therein adverse to

rights,[35] must be alleged, but the character of his title or the alleged title of the defendant need not be averred [36] unless the nature of defendant's claim is known to plaintiff,[37] in which case the facts demonstrating its invalidity must be alleged.[38] It is unnecessary that possession should be specifically alleged if the court can determine possession from the facts alleged,[39] and an allegation that the lands in suit are in the possession of defendant is not ground for dismissal, being ground for only a transfer to the law court.[40] A complaint seeking other relief primarily may state facts sufficient to sustain the action.[41] The allegation of an estate in fee includes a lesser title,[42] but it has been held that where plaintiff alleges fee simple he must prove it in order to recover.[43] Though the Alabama statute requires an allegation of ownership in the complaint, such an allegation is not jurisdictional and if alleged need not be proved by documentary evidence of title.[44] When the action is in equity the bill should show the inadequacy of the legal remedy.[45] Where the bill alleges that the land in controversy is located in the county in which the action is brought, the court has jurisdiction, although the residence of the parties is not averred,[46] and, where complainant is a resident and defendant appears unconditionally, the failure to allege the residence of either is immaterial.[47] In

plaintiff which claim is without right, is sufficient. Boyer v. Robison [Wash.] 86 P. 385. Bill alleging ownership and peaceable possession in complainant and an unfounded claim made by defendant to test which no action is pending held sufficient. Southern R. Co. v. Hall [Ala.] 41 So. 135. One seeking to set aside a decree as a cloud on his title must allege that is was obtained by fraud under such circumstances as to give equity jurisdiction, or that his title is equitable, or that the lands are wild and uncultivated, or that he is in possession. Ropes v. Goldman [Fla.] 42 So. 322.

33. Plaintiff must aver perfect title in himself or that he is the true owner or allege such facts as show title. McMullen v. Cooper, 125 Ga. 435, 54 S. E. 97. Bill held demurrable as not showing title in complainant. Thames v. Duvic [Miss.] 42 So. 667. Complaint held to sufficiently allege title in plaintiff and a general allegation of ownership was not qualified by a subsequent allegation that plaintiff "claimed" ownership. Knight v. Boring [Colo.] 87 P. 1078. A petition alleging that plaintiff is the owner in "fee simple" sufficiently alleges title. One claiming a fee simple estate need not plead the evidence of his title. Parker v. Conrad [Kan.] 85 P. 810.

34. Possession in plaintiff must be alleged or it must be alleged that the lands are wild. McMullen v. Cooper, 125 Ga. 435, 54 S. E. 97; Lambert v. Shumway [Colo.] 85 P. 89. Possession in complainant actual or constructive must be averred. Merritt v. Alabama Pyrites Co. [Ala.] 40 So. 1028. A complaint failing to allege possession in plaintiff impliedly alleges adverse possession in defendant by praying a writ of possession. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485. Allegations of bill held insufficient to show possession in plaintiff. Ashburn v. Graves [C. C. A.] 149 F. 968. A bill alleging ownership of property in question in complainant and setting forth particularly the chain of title, that the defendant's claim an adverse estate or interest in the premises which so affects complainant's title as to render a sale impossible and disturbs complainant in the right of possession, sufficiently alleges possession in complainant. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

35. Merritt v. Alabama Pyrites Co. [Ala.] 40 So. 1028.

36. It is sufficient to allege plaintiff's ownership and possession and that defendant is asserting a claim thereto adverse in him. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555.

37. Where the nature of the hostile claim is known to the plaintiff, the particular muniment of title relied upon by defendant must be specifically referred to. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485. Where plaintiff alleges ignorance of the nature of defendant's claim, he is not bound to set it up. In such case he is entitled to discovery, and the duty of setting up the nature of his claim devolves upon the defendant. Parker v. Conrad [Kan.] 85 P. 810.

38. An allegation of deraignment of title by both plaintiff and defendant from a common source is an admission that plaintiff is advised of the nature and character of the adverse claim asserted by defendant. Gambrell Lumber Co. v. Saratoga Lumber Co., 87 Miss. 773, 40 So. 485.

39. Womble v. Pike [Okl.] 87 P. 427.

40. Gaither v. Gage & Co. [Ark.] 100 S. W. 80.

41. Complaint seeking primarily the reformation of a deed held to state all the essential averments of an action to quiet title. Gibbs v. Potter [Ind.] 77. N. E. 942.

42. Under a complaint alleging ownership in fee in plaintiff the court may find a right in the nature of an easement. Bashore v. Mooney [Cal. App.] 87 P. 553.

43. Stewart v. Lead Belt Land Co. [Mo.] 98 S. W. 767.

44. Kendrick v. Colyar, 143 Ala. 597, 42 So. 110.

45. A bill which alleges that plaintiff is in possession sufficiently shows that plaintiff is without a remedy at law. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555.

46. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13.

47. The object to be obtained by averring residence is to expedite the service of

Alabama the bill must allege that no suit in pending to determine the title.[48] The plaintiff may rely upon as many sources of title as he puts in issue,[49] but he cannot by amendment change a cause of action to remove a cloud on title to one to quiet title.[50] Where defendant's sole claim of title is predicated upon a tax deed, error in permitting plaintiff to change by amendment an action to remove a cloud to one to quiet title does not prejudice him.[51]

Answer and other pleadings.[52]—Defendant may plead as many defenses as he desires but each must be complete of itself and must be tested by its own allegations.[53] Defendant need not allege his source of title,[54] but under a statute requiring the answer to contain a specific avowal of the extent, nature, and source of defendant's claim, a plea is improper.[55] Material averments not denied are deemed admitted.[56] All matters of defense may be proved under a general denial where such a pleading is authorized.[57] A cross complaint being an affirmative attack on complainant's title must show title in defendant.[58] One of two contending claimants claiming under the same grantor may in an action to quiet title commenced by the other set up his title as a counterclaim, both claims arising out of the same transaction.[59] And in such a case the recovery is not limited to the value of the improvements.[60] Where a cross complaint shows on its face that the relief demanded therein is barred by limitation, the objection may be raised by demurrer.[61] Although the filing of a cross complaint may be an improper form of procedure, a failure to object thereto by demurrer or a motion to strike out is a waiver of the right to object.[62] Where the legal title set up by plaintiff is admitted by the defendant who asserts an equitable title, plaintiff may set up that he is a bona fide purchaser for value without notice,[63] but facts which cannot be set up in the complaint as a basis for affirmative relief cannot be set up in the reply.[64]

process and to secure costs where complainant is a nonresident. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13.

48. Ala. Code 1896, §§ 809-813. Bolen v. Allen [Ala.] 43 So. 202.

49. Held error to exclude a certain claim of title. Morehead v. Allen [Ga.] 56 S. E. 745.

50. Complaint held to state a cause of action for the quieting of title which was not changed by amendment to an action for the removal of a cloud. Knight v. Boring [Colo.] 87 P. 1078.

51. Knight v. Boring [Colo.] 87 P. 1078.

52. See 6 C. L. 1188.

53. Lambert v. Shumway [Colo.] 85 P. 89.

54. A denial of the plaintiff's right is sufficient. Peterson v. Plunkett [Cal. App.] 88 P. 283.

55. Kinney v. Steiner Bros. [Ala.] 43 So. 25.

56. Henry v. Henry [Neb.] 107 N. W. 789. Plaintiff alleged title in a certain association at a certain time. Defendants proved to have succeeded to the rights of such association. Held it was not necessary for defendants to prove title in the association. Harris v. Harris [Cal. App.] 88 P. 384.

57. Gibbs v. Potter [Ind.] 77 N. E. 942. Where the petition alleges that defendant was not an innocent purchaser, a general denial by the defendant is sufficient to put that question in issue. Heffernan v. Ragsdale [Mo.] 97 S. W. 890.

58. Cook v. Ziff Colored Masonic Lodge [Ark.] 96 S. W. 618.

59. An owner conveyed certain land and mining property to plaintiff as security against loss on a bail bond. The bond was forfeited and plaintiff paid it, subsequently selling the mining property for a sum in excess of the face of the bond. Defendant by a quitclaim deed obtained the legal title to the mining property from plaintiff's grantor and acquiring title to the land by a tax deed. Held the facts could properly be set up by way of counterclaim under Rev. Code Civ. Proc. § 127. Danielson v. Rua [S. D.] 107 N. W. 680.

60. Danielson v. Rua [S. D.] 107 N. W. 680.

61. Foreclosure of mortgage. Marshutz v. Seltzor [Cal. App.] 89 P. 877.

62. Proceeding by cross complaint where defendant claims title in himself. Johnson v. Taylor [Cal.] 88 P. 903.

63. In such case the defendant stands in the same position as if he were the plaintiff and the reply is therefore a matter of defense and not a basis for affirmative relief. Pheby v. Lake Superior & Arizona Min. Co. [Ariz.] 85 P. 952.

64. To a complaint, alleging in general terms an unfounded claim made by defendant to the land in question, defendant answered setting up a mortgage. Held plaintiff could not in his reply allege that the mortgage was outlawed and pray its cancellation as a cloud on his title as he could not have demanded such relief in his complaint. Gibson v. Johnson [Kan.] 84 P. 982.

Evidence.[65]—Possession shown in complainant's grantor is presumed to continue under him and those claiming under him.[66] The burden is upon plaintiff to show title where the land in controversy is wild and unoccupied,[67] and to show that the instrument creating the cloud is without legal effect.[68] Under the Alabama statute proof of peaceable possession in complainant and that there was no suit pending at the time of the filing of the bill is sufficient to place the burden upon defendant to show good title.[69] To put the burden of proving title and possession on plaintiff, defendant must assert an adverse interest in himself, specifying its nature.[70] The burden is upon the defendant to establish a claim asserted in his answer.[71] Possession is evidence of title to the extent of requiring one seeking to oust it to show title in himself.[72] Evidence of acts and circumstances tending to show actual possession is admissible.[73] The payment of taxes on land is not evidence of actual possession,[74] but in connection with evidence of actual possession it is admissible to show the extent of such possession.[75] A deed which on it face shows that it does not refer to the land in controversy is inadmissible.[76] Evidence of a boundary established by the owner of land is admissible against those claiming under him.[77] A void tax deed is inadmissible to show color of title in complainant unless there is evidence that he actually entered into possession under it.[78] Plaintiff cannot allege ownersip in one person, and, after defendant has by his answer admitted such ownership, seek to prove that such person held the land in trust for another.[79] Where both parties set up a claim of title to the land, neither is bound to disprove the other's claim but may rest upon proof of his own.[80] Testimony by complainant that he is the owner and in peaceable possession of the land described in the bill is sufficient evidence of possession.[81]

Joinder of causes.[82]—An action to remove a cloud on title cannot be joined with a cause of action to quiet title and one to recover a money judgment,[83] but

65. See 6 C. L. 1188.

66. North Carolina Min. Co. v. Westfeldt, 151 F. 290.

67. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534.

68. Mortgage given without consideration. Robertson v. Sebastian [Ky.] 99 S. W. 933.

69. Kendrick v. Colyar, 143 Ala. 597, 42 So. 110.

70. Mere denials are not sufficient. Lambert v. Shumway [Colo.] 85 P. 89.

71. Claim of title as heir. Coates v. Teabo [Wash.] 87 P. 355. The burden is upon the defendant to show that a mortgage get up by him is a lien on plaintiff's title. Marshutz v. Seltzor [Cal. App.] 89 P. 877.

72. Cook v. Ziff Colored Masonic Lodge [Ark.] 96 S. W. 618.

73. The fact that up to two or three years prior to the commencement of the action certain buildings were located on the land and that subsequent thereto complainant's constructed jetties thereon may be considered as showing actual possession of beach lands. Elliot v. Atlantic City, 149 F. 849.

74, 75. Southern R Co. v. Hall [Ala.] 41 So. 135.

76. Tax deed describing certain property as being in a certain addition within a certain city is inadmissible where it is admitted that the land in controversy is not within such city. Oldham v. Ramsner [Cal.] 87 P. 18.

77. Defendant's grantor and plaintiff erected a partition fence along the agreed boundary of their land. In an action by plaintiff to quiet title to a strip of land located within his portion of the partition fence it was held that evidence of the erection of such fence was admissible against the defendant. Adams v. Betz [Ind.] 78 N. E. 649.

78. Southern R. Co. v. Hall. [Ala.] 41 So. 135.

79. Plaintiff alleged that at a certain time one M was the owner of the land which allegation was admitted by the answer. Defendant claimed title through a tax deed and a conveyance from M. At the trial plaintiff sought to prove that M held the title in trust for a third person and that defendant knowing of the trust took title to the property subject to the equity in such third person, which equity plaintiff then owned. Sturtevant v. McDougall [Wash.] 88 P. 1035.

80. Where defendants pleaded such title as they had and introduced no evidence in support of it, it was not necessary for plaintiff to disprove the claim so set up, as he was entitled to rest upon his own showing of title. Dorris v. McMannus [Cal. App.] 87 P. 287.

81. Southern R. Co. v. Hall. [Ala.] 41 So. 135.

82. See 6 C. L. 1189.

83. Complaint to cancel a tax deed and a certificate of sale and the correction of errors in the county treasurer's books showing that the taxes had not been paid or the refunding of the money paid on account of the taxes, alleging that defendant claimed an estate adverse to plaintiff and asking that

where an action to quiet title is improperly joined with another action without objection on the part of either party, and issue was made thereon, the court has jurisdiction to grant relief in both actions.[94]

Trial.[85]—Where upon demurrer the court finds complainant's title fatally defective, the bill should be dismissed,[89] and after such dismissal it is improper to allow an amendment that the decree is without prejudice.[97] Where plaintiff answers a cross petition demanding an accounting and partition, the court may permit plaintiff to dismiss his petition without prejudice to defendant's right to equitable relief on his cross petition.[88] Under the Nebraska Code the court may order an accounting as a preliminary step to its conclusion.[89] Under the Pennsylvania statute where both the title and possession are disputed, the remedy is a rule for an issue to be framed by the court, but where the possession is unquestioned and the title only is disputed, a rule to bring ejectment should be granted [90] and a mere denial of possession in the pleadings is not of itself sufficient to warrant a rule for the framing of issues by the court.[91]

Jury trial.[92]—Where the action is purely an equitable one the parties are not entitled to a trial by jury,[93] but in New York [94] and Indiana [95] the action is triable by a jury as a matter of right.

Findings, decree, or judgment.[96]—All issues raised by the pleadings must be determined [97] and the judgment must identify the land with sufficient certainty, but it is sufficient if the land described in the judgment can be identified by extraneous evidence.[98] Under a complaint setting up ownership of an entire tract, plaintiff may be awarded judgment for an undivided half interest.[99] The relief awarded must conform to the pleadings [1] and the evidence [2] and should as far as

he be required to plead his title and that plaintiff's title be quieted. Knight v. Boring [Colo.] 87 P. 1078.

84. Action for divorce and for an adjudication as to the separate character of certain described property and a decree quieting title thereto. Glass v. Glass [Cal. App.] 88 P. 734.

85. See 6 C. L. 1189.

86, 87. Morgan v. Jones [Fla.] 42 So. 242.

88. Hanson v. Hanson [Neb.] 111 N. W. 368.

89. Action to quiet title to partnership lands. Hanson v. Hanson [Neb.] 111 N. W. 368.

90. Where plaintiff claimed land as his own and erected a wall on it and the city claimed the same land as part of a public street, the plaintiff's remedy was a rule for the issues to be framed by the court under Act June 10, 1893 (P. L. 415) and not a rule to bring ejectment under Act March 8, 1889, (P. L. 10). Fearl v. Johnstown [Pa.] 65 A. 549.

91. Fearl v. Johnstown [Pa.] 65 A. 549.

92. See 6 C. L. 1189.

93. Smith Oyster Co. v. Darbee & Immel Oyster & Land Co., 149 F. 555.

94. Code Civ. Proc. § 1642, provides that the proceedings, trial, and judgment shall be the same in an action to determine adverse claims as in ejectment. Section 968 provides that issues of fact in ejectment must be tired by a jury. Held defendant in an action under § 1642 was entitled to a trial by jury without making the application therefor required by § 970, which applies only to actions not enumerated in § 968. Ryan v. Murphy, 101 N. Y. S. 553.

95. Adams v. Betz [Ind.] 78 N. E. 649.

96. See 6 C. L. 1189.

97. Spencer v. Beiseker [N. D.] 107 N. W. 189. A finding that the allegations of the complaint are true is a sufficient finding of title where the complaint alleges ownership in plaintiff. An allegation of ownership is an allegation of ownership in fee. Meyer v. O'Rourke [Cal.] 88 P. 706. Where defendant sets up an outlawed mortgage demanding its foreclosure as affirmative relief, a finding that it is barred is in effect a removal of the cloud which it created. Marshutz v. Seltzor [Cal. App.] 89 P. 877. Failure of judgment to determine that plaintiff has a right, title, or interest in the lands in suit is harmless where the plaintiff's title is clear from the evidence and is fully set forth in the findings of fact. Coe v. Rockman, 126 Wis. 515, 106 N. W. 290.

98. A judgment describing land as "80 acres of land situated about a mile north of the Town of Redwater, Bowie County, Texas, a part of the H. headright survey and being the same land occupied as a home and cultivated as a farm by the plaintiffs" describes the land involved with sufficient certainty. Kelly v. Howard [Tex. Civ. App.] 16 Tex. Ct. Rep. 103, 94 S. W. 379.

99. Tabler v. Peverill [Cal. App.] 88 P. 994.

1. A judgment canceling a power of attorney is not erroneous although it embraces other land, as the judgment only operates to cancel it so far as the land in suit is involved. Priddy v. Boice [Mo.] 99 S. W. 1055.

2. A decree finding that defendant has no interest in the property in suit is erroneous

possible protect the defendant as against third persons.[3] The decree may permit defendant to redeem from a tax sale and require the complainant to quitclaim to him, although no affirmative relief is requested by the defendant.[4] In the proper case, when demanded,[5] the court in addition to quieting the title may grant as ancillary relief an injunction,[6] reformation,[7] or the rental value of the property during the time plaintiff was deprived of its enjoyment,[8] but it is held that the court has no power to decree an accounting.[9] Judgment on default may be entered without evidence to substantiate plaintiff's case.[10] The opening of default judgments where the defendant was constructively served is generally regulated by statute.[11] On a motion to set aside a judgment by default on the ground of mistake and inadvertence the defendant must show what he can prove in support of the right or title claimed in the answer.[12]

Costs.[13]—Costs are properly taxed against a defendant who appears in the action solely for the purpose of hindering and delaying same.[14]

QUORUM, see latest topical index.

QUO WARRANTO.

§ 1. Nature, Function, and Occasion of the Remedy (1582).
§ 2. Jurisdiction (1585).
§ 3. Parties and Right to Prosecute (1585). Leave to File an Information (1586). Joinder of Parties (1587).
§ 4. The Information or Complaint (1587).
§ 5. Answers and Other Pleadings, and Motions to Quash or Dismiss (1587).
§ 6. Trial and Judgment (1588).
§ 7. New Trial and Review (1589).

§ 1. *Nature, function, and occasion of the remedy.*[15]—Quo warranto is a high prerogative writ and in theory at least issues from the sovereign calling upon the

where he has an equitable interest therein. Contract held to create an equitable interest in defendant. Howard v. Brown, 197 Mo. 36, 95 S. W. 191.

3. Judgment cancelling a street assessment lien as a cloud on title should not direct the defendant to make an entry canceling the lien without a reference to show that it was by order of the court. This is to protect the city officers from being charged with the liens as having been paid. Cushing v. Spokane [Wash.] 87 P. 1121.

4. Miller v. Steele [Mich.] 13 Det. Leg. N. 686, 109 N. W. 37.

5. Unless partition is requested in the bill or in a cross bill, it is properly refused. Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502.

6. Cutting of timber under void claim of title enjoined, although there was no proof of the insolvency of the defendant. Whitehouse v. Jones [W. Va.] 55 S. E. 730. Defendant may be enjoined from proceeding by distress warrant or lien foreclosure to enforce the rights of a landlord where deed under which defendant claims was given as security for a loan and plaintiff has never attorned to nor recognized him as a landlord. Brown v. Bonds, 125 Ga. 833, 54 S. E. 933. Under a general prayer for relief the court in addition to quieting title may grant injunctive relief. Richey v. Beus [Utah] 87 P. 903.

7. Where defendant claims that land in controversy was by mutual mistake of fact omitted from the conveyance to him, he may by joining his grantor with the plaintiff as defendants to his cross complaint have the deed reformed so as to express the true intent of the parties and then have his title quieted as against the plaintiff. Adams v. Betz [Ind.] 78 N. E. 649.

8. Tex. Rev. St. 1895, art. 5273. Bryson & Hartgrove v. Boyce [Tex. Civ. App.] 14 Tex. Ct. Rep. 651, 92 S. W. 820.

9. Howard v. Brown, 197 Mo. 36, 95 S. W. 191; Id., 197 Mo. 52, 95 S. W. 195.

10. City of Los Angeles v. Los Angeles Farming & Mill. Co. [Cal.] 89 P. 615.

11. In Arkansas a defendant who has been constructively served may have a judgment entered by default opened and appear and defend the action at any time within three years after the entry of judgment. Acts 1891, p. 132, and 1893, p. 204, gave a defendant constructively served one year to defend, but provdided that the title to the property covered by the decree should not be affected where it passed to a bona fide purchaser. Act. of 1899, p. 134, gave such a defendant three years to have the judgment opened upon showing a meritorious defense. Held the Act of 1899 repealed the acts of 1891 and 1893. Lawyer v. Carpenter [Ark.] 97 S. W. 662.

12. A mere offer to show that plaintiff is without title is insufficient. Peterson v. Plunkett [Cal. App.] 88 P. 283.

13. See 6 C. L. 1190.

14. Defendant received a certain sum in full settlement of his claim against the property but refused to give a quitclaim deed thereof and appeared in the action denying plaintiff's title for the sole purpose of delaying the action and increasing the costs. Glos v. Ptacek, 226 Ill. 188, 80 N. E. 727.

15. See 6 C. L. 1190.

respondents to show by what right they assume to exercise powers and franchises which can only proceed from the sovereign,[16] or having had such powers why they should not be forfeited for some serious violation of the implied condition upon which such powers were granted.[17] It will not lie because of mere errors committed in the exercise of that power,[18] and it is not a writ of error to purge the records of public corporate bodies of mere mistakes and errors.[19] It lies to try title to a public[20] office averred to be exercised without right,[21] which office must have a legal existence,[22] and the person proceeded against must be a de facto or a de jure officer in possession of the office and the facts must be in dispute.[23] It cannot be converted by allegation into a statutory election contest,[24] and until all provisions of the election law for ascertaining and declaring the result of an election,[25] and all other matters preliminary to assumption of office,[26] are complied with, the successful candidate cannot invoke this remedy. It is the proper remedy to determine the validity of the organization of a village,[27] or to question the right of drainage commissioners to annex lands in their district,[28] or to question the legality of a dramshop license,[29] or to try title to corporate office,[30] and to oust a person claiming to be an officer of a corporation after he has been legally expelled by the board of directors,[31] and in such a proceeding the only question to be determined is the legality of the action of the board.[32] It may be predicated upon a nonuser as well as a

16, 17. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

18. Under a law providing that the village clerk should be clerk of the drainage commissioners and should enter in a book the record of all of its proceedings, the fact that such proceedings were written out by the attorney for the commissioners from pencil notes taken during the hearing, and by the clerk signed and pasted in the record book instead of having been written out by the clerk himself in such book, is not a matter of substance which would in any way affect the legality of the proceedings. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

19. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

20. Where the duties prescribed for the officer are of legislative creation and of a public character, and the tenure is for a definite period and the emolument or pay is regulated by law, the office is a public one. State v. Kitchens [Ala.] 41 So. 871. School district trustee held a public office. Id.

21. Is proper remedy to try title to the office of school director, there being a de facto incumbent. Caffrey v. Caffrey, 28 Pa. Super. Ct. 22.

22. Hedrick v. People, 221 Ill. 374, 77 N. E. 441.

23. It does not lie to compel an outgoing officer to turn over books and papers of the office to his successor. In re Smith, 101 N. Y. S. 992.

24. Where an attempt to do so is apparent from respondent's answer, the fact that he alleges that relator did not receive the highest number of votes and therefore was not elected instead of alleging that respondent did receive the highest number of votes and therefore was elected will not change the result. People v. Horan, 34 Colo. 304, 86 P. 252.

25. Under a law providing that after the ballots have been counted the proper officers shall canvass them and declare the result of the election and enter a statement thereof in their journal, quo warranto does not lie to oust an incumbent until such canvass has been made and the result declared. If the officers wrongfully neglect to perform their duty mandamus is the proper remedy. Carlson v. People, 118 Ill. App. 592.

26. Although a provision that the official **oath be filed** in the office of the village clerk may be directory only, it is essential to the maintenance of quo warranto that such oath be first filed. Carlson v. People, 118 Ill. App. 592.

27. Where unplatted agricultural lands lying a quarter of a mile from the platted portion were included within the corporate limits of a village without the consent of the owner and for the purpose of obtaining the number of residents necessary to incorporate, a judgment of ouster was entered. State v. Clark [Neb.] 106 N. W. 971.

28. No appeal lies from the decision of the drainage commissioners when assuming to act by virtue of § 44 of the Farm Drainage Act of Illinois, either as to the annexation of lands outside the district or the classification of lands so annexed. People v. Arcola Drainage Com'rs, 123 Ill. App. 604.

29. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

30. Complainants and defendants claimed the office of trustees of an incorporated religious association, each set contending that the election of the other was void. Barna v. Kirczow [N. J. Eq.] 63 A. 611.

31. Commonwealth v. Jankovic [Pa.] 65 A. 1099.

32. Respondent was notified to appear before the board of directors of a corporation of which he was treasurer on a day certain to answer certain charges of defalcation which had been preferred against him. He did not appear and was expelled. On a petition in quo warranto to remove him it was held that his explanation of the apparent defalcations could not be considered. Commonwealth v. Jankovic [Pa.] 65 A. 1099.

misuser of corporate franchises.[33] The right to the occupation of the streets of a city by a street railroad company is a franchise and quo warranto lies at the suit of the state to determine the legality of such occupation,[34] and the exercise of an expired franchise is without warrant of law and is a power "not conferred by law."[35] A corporation is a "person" within the meaning of a statute authorizing quo warranto against any person unlawfully holding or exercising a franchise.[36] The remedy by quo warranto will not be denied merely because the act of forfeiture has a criminal aspect exposing it to punishment,[37] or because it may be restrainable in equity;[38] but the function of quo warranto will not be performed by injunction.[39] The right of a person having a prima facie title to an office can be questioned by a proceeding in the nature of quo warranto only.[39a] Where the incorporation of an organization for a particular purpose is justified by express sanction of the legislature, and the sanction is not unconstitutional, the courts are not at liberty to dissolve the organization on the ground that its purpose is not beneficial to its members or to the public.[39b] Where a corporation of a mutual character is not subsidiary to or controlled by a corporation for profit, the fact that some of its officers, directors, and members are also officers, directors, and stockholders of a corporation for profit, does not constitute an offense against the law or call for a revocation of its charter.[39c] Trivial irregularities and omissions of statutory requirements, in an attempt made in good faith to organize a corporation not for profit, are not a sufficient basis for a judgment of ouster, but the corporation will be recognized as a de facto organization and its board of directors as a de facto board, and a decree will be granted requiring that a legal organization be effected.[39d] The fact that the writ was refused to other persons is not a bar,[40] and an estoppel on private persons to question incumbent's title may not bind the court.[41] Relators are not concluded by having appeared as

33. A corporation formed for the purpose of encouraging agriculture, to maintain a fair grounds and race track, and to give agricultural exhibitions and horse races, is guilty of a fatal nonuser by maintaining a race track only and that for the sole purpose of gambling. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

34. Not a mere contract with the city in regard to which neither the state nor the general public had any interest. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

35. Statute authorizing proceedings in the nature of quo warranto against any person unlawfully holding or exercising a franchise and against any corporation for acts for which its corporate rights may be forfeited or for exercising powers not conferred by law. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

36. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

37. A corporation was formed for the purpose of encouraging agriculture, to maintain a fair grounds, a race track, etc., but the only use made of its franchise was to maintain a race track for the purpose of gambling. Held quo warranto could be maintained notwithstanding the corporate officers were charged with the commission of a criminal offense, neither proceeding being a bar to the other. State v. Delmar Jockey Club [Mo.] 92 S. W. 185. The trial and conviction of the offending officers is not a condition precedent to the maintenance of the action. Id.

38. The fact that a bill in equity would lie to restrain the violation of an anti-trust law by a foreign corporation is not a bar to an information in the nature of quo warranto to revoke its license to do business in the state in which the information is filed. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868.

39. See Hubbell v. Armijo [N. M.] 85 P. 1046, denying injunctive relief against a prima facie officer de jure.

39a. Relief in equity was denied to restrain one having a prima facie right to an office from performing the functions of such office. Hubbell v. Armijo [N. M.] 85 P. 1046; Carlson v. People, 118 Ill. App. 592; People v. Arcola Drainage Com'rs, 123 Ill. App. 604; Heidelberg Garden Co. v. People, 124 Ill. App. 331; Louisville & N. R. Co. v. Hubbard [Ala.] 41 So. 814.

39b, 39c, 39d. State v. Burial Ass'n, 8 Ohio C. C. (N. S.) 233.

40. Denial of previous application held not a bar by judgment where not all of present relators applied and where the denial being by a judge in vacation lacked finality. People v. Arcola Drainage Com'rs, 123 Ill App. 604.

41. Relators and respondents were nominated for the office of aldermen of a certain ward and accepted the nomination without any objection on the part of relators. The aldermen from each ward were erroneously voted for by the citizens at large. Held on quo warranto that, although relators might be estopped, such estoppel would not prevent the court from determining respondents' right to the offices. Dunton v. People [Colo.] 87 P. 540.

objectors to the proceeding the result of which is attacked by quo warranto.[42] Where the attorney general may in his discretion commence an action of quo warranto to try title to a public office, the determination of a prior attorney general not to institute such proceedings does not constitute res adjudicata so as to preclude his successor from doing so.[43]

§ 2. *Jurisdiction.*—Where there is no statutory authority for the issuance of the writ the common law governs,[44] and where the common law relating to proceedings in the nature of quo warranto has not been adopted, the court is without jurisdiction to issue the writ.[45] The original jurisdiction of an appellate court is only such as is expressly conferred,[46] the only jurisdiction in all other cases being in the court of general original jurisdiction.[47] The appearance of the respondent in answer to the petition in quo warranto gives the court jurisdiction over the parties[48] In Ohio quo warranto proceedings brought by the attorney general against several corporations to oust them from their corporrate franchises on the ground that they have entered into an illegal agreement or conspiracy in restraint of trade and in viotion of the anti-trust laws of the state may be commenced in the circuit court of any county where one or more of the defendant corporations is situated or has a place of business, and process may issue thence to any other county where any other of the defendant corporations is situated.[49] Want of jurisdiction because of failure to obtain leave to file an information may be waived by the parties.[50] Under a statute providing that the courts shall at all times be open for proceedings in the nature of quo warranto, a judgment of ouster is not void or irregular because it was rendered at a time other than during the regular term of court.[51]

§ 3. *Parties and right to prosecute.*[52]—The circumstances under which a private relator may file an information in quo warranto is largely a matter of statutory regulation.[53] Quo warranto to try title to a public office will lie upon the

42. Fact that relators appeared before the drainage commissioners on the hearing of objections to the classification of lands according to benefits does not estop them from questioning by quo warranto the right of the commissioner to annex lands owned by relators. People v. Arcola Drainage Com'rs, 123 Ill. App. 604.

43. People v. McClellan, 103 N. Y. S. 146.

44. There is no statutory authority for the issuance of the writ in Indian Territory. Painter v. U. S. [Ind. T.] 98 S. W. 352.

45. The statute 9 Anne, c. 9, authorizing proceeding in the nature of quo warranto upon the relation of a private individual was never in force in Indian Territory. Painter v. U. S. [Ind. T.] 98 S. W. 352.

46. Supreme court has no original jurisdiction of quo warranto to try title to office of road overseer. State v. Sams [Ark.] 98 S. W. 955. In Michigan quo warranto to revoke the license of a foreign corporation for a violation of the anti-trust law may be brought by the attorney general in the first instance in the supreme court. Act No. 255, p. 409, Pub. Acts 1899, §§ 2, 3. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868.

47. State v. Sams [Ark.] 98 S. W. 955.

48. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

49. For purposes of prosecution an illegal combination among corporations in restraint of trade exists in each and every county where its constituent members exist and act, hence the contention is erroneous that quo warranto proceedings based upon such illegal combination must be brought in a county where the combination does business as a separate entity. State v. King Bridge Co., 7 Ohio C. C. (N. S.) 557.

50. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868.

51. Jackson v. State, 143 Ala. 145, 42 So. 61.

52. See 6 C. L. 1191.

53. Under a statute authorizing a private person to bring the action against any one unlawfully holding a public office when the office usurped pertains to a county, town, city, village, or school district, one who is a citizen, tax payer, and property owner in a city and whose children attend the public schools thereof may maintain quo warranto against persons claiming to hold the office of directors of the school board of such city. State v. Lindemann [Wis.] 111 N. W. 214. Under a statute authorizing any one claiming an interest in the office, franchise, or corporation which is the subject of the information to file such information one not claiming such interest cannot institute quo waranto proceedings to have the charter of a corporation forfeited. State v. Point Roberts Reef Fish Co., 42 Wash. 409, 85 P. 42. Citizens holding property abutting on the street may bring quo warranto against a street railway company occupying such street after the expiration of its franchise under a statute authorizing any one interested to bring such an action upon the refusal of the county attorney to do so. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

relation of a private individual where the relator himself claims the office,[54] otherwise the action must be brought by the attorney general.[55] The fact that relator is the de facto officer will not support a proceeding instituted on his relation.[56] The question of the interest of the relator in the prcoeedings becomes immaterial where before the joinder of issue the public attorney in behalf of the state appears in the action, files a new petition, and serves a new notice, and the respondent appears thereto.[57] By statute in Kansas the state is the proper party to institute quo warranto proceedings against a corporation for the purpose of forfeiting its charter.[58] The fact that the attorney general files an information on the relation of private parties to have the license of a foreign corporation revoked is immaterial; the proceeding being in the name of and for the benefit of the public [59] and a prosecution for private ends or for personal spite is not inferable from that fact alone [60] or from the fact that private counsel assisted the state's attorney. Although the relators in an information to question the right of the drainage commissioners to annex certain lands belonging to the relators may have a direct personal interest in the action different from that inuring to the general public, still the drainage district being a public corporation the public has a sufficient interest in the matter to warrant the granting of leave to file the information.[61] Especially is this true where the information is filed by the state's attorney and he denies that it is brought solely for the benefit of the relators and that he has instituted it in his official capacity for the benefit of the public.[62]

Leave to file an information is usually a prerequisite to the maintenance of quo warranto by an individual, but it is incumbent upon the respondent to show that leave had not been obtained.[63] An application for leave to file an information is a preliminary question addressed to the discretion of the court,[64] but that discretion must not be abused,[65] and once it is decided the discretion is exhausted.[66] Where a statute does not require notice to the defendant as a condition to the granting of leave to file an information, such notice is unnecessary,[67] and the failure of the statute to provide for notice does not render it unconstitutional as depriving a person of his property without due process of law or a denial of the equal protection of the law under the Federal Constitution.[68] An order granting leave to file an information determines nothing except the privilege of the relator to institute and

54, 55, 56. State v. Johnson, 8 Ohio C. C. (N. S.) 535.

57. The Iowa Code (tit. 21, c. 9) authorizes the county attorney in his discretion to commence proceedings in the nature of quo warranto in certain cases and provides that upon his refusal to do so any person interested may commence such proceedings, first obtaining leave of the court. It was held that where the county attorney refused to commence such proceedings, and a private person obtained leave to and did do so, the subsequent appearance of the county attorney before the joinder of issue and the appearance of the respondent in answer to his amended petition rendered the relator's interest immaterial. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

58. State v. Inner Belt R. Co. [Kan.] 87 P. 696.

59. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868.

60. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

61, 62. People v. Arcola Drainage Com'rs, 123 Ill. App. 604.

63. And this is true even though there is nothing in the summons or copy served to show that leave had been obtained. It is respondent's duty to determine from the files whether such is the case. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868.

64. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

65. Refusal to allow filing of petition for a quo warranto held erroneous where it was sought to question the right of the drainage commissioners to annex lands in a certain district owned by relators. People v. Arcola Drainage Com'rs, 123 Ill. App. 604.

66. Where upon the refusal of the county attorney to proceed private relators obtain permission to file an information under a statute authorizing any person interested to commence such proceedings, first obtaining leave, upon the refusal of the county attorney to do so the court is without power to order a compulsory dismissal of the private relator's proceeding merely because the county attorney subsequently files an amended petition in the action and the defendant appears in answer thereto. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

67, 68, 69. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

prosecute the suit, it adjudicates nothing against the defendants, nor does it dispense with the necessity of proving every fact essential to the relief demanded.[69] One not interested in a corporation but injured by its usurpation may under the Washington statute obtain an order to proceed upon the refusal of the public attorney to do so.[70]

Joinder of parties[71] as permitted by statute in Colorado, where several persons claim the "same" office in order that their title thereto may be determined in one action, included the case where different memberships in the same official body are claimed.[71a] Where one of two parties to an unlawful combination is amenable to the law, he cannot object to an information in the nature of quo warranto on the ground that such other party was not made a party to the proceeding.[72] Under the Alabama statute the petitioner must be joined with the state as a party plaintiff.[73]

§ 4. *The information or complaint.*[74]—The general rules of pleading are the same in quo warranto as in other forms of common-law actions.[75] The information in quo warranto to try title to a public office must show a prima facie right thereto in the relator,[76] and the doing of every act prerequisite to assumption of office,[77] and where it is an office created by a local law, the legal existence of the office must be affirmatively and distinctly, not inferentially, alleged.[78] In quo warranto to try title to public office, particularity of averment in the information as to the functions and powers exercised is unnecessary. It is sufficient to aver in general terms, designating the particular office, the usurpation, intrusion into, and unlawful holding of the same.[79] The words "upon the relation of" in an information in the nature of quo warranto are superfluous as the state is the party plaintiff in any event.[80] The information need not be sworn to in Alabama.[81]

§ 5. *Answers and others pleadings, and motions to quash or dismiss.*[82]—In quo warranto to have a dramshop license declared void a plea which shows a prima facie right to the license is sufficient and it need not anticipate objections,[83] but it

70. May by order of the court compel him to commence quo warranto proceedings to have charter dissolved, under a statute providing that an information in the nature of quo warranto may be filed by the county attorney or by anyone claiming an interest in the office, franchise, or corporation which is the subject of the information. State v. Point Roberts Reef Fish Co., 42 Wash. 409, 85 P. 22.

71. See 6 C. L. 1192.

71a. Civ. Code Proc. § 294. Where relators claimed to be legally entitled to the offices of county commissioners and that respondents had unlawfully usurped such offices, it was held that rights of the parties to such offices could be determined in a joint action of quo warranto against the respondents. People v. Stoddard, 34 Colo. 200, 86 P. 251.

72. Action to revoke the license of a foreign corporation on the ground of a violation of the anti-trust law. Held that the fact that there were several parties to the illegal combination could not be availed of by the holding company in an action against it alone. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. 991, 106 N. W. 868.

73. Code 1896, § 3426. A petition which recited "Your petitioner, and relator, the State of Alabama by the relation of H. respectfully represents" etc., held a sufficient compliance with the statute. State v. Kitchens [Ala.] 41 So. 871.

74. See 6 C. L. 1193.

75. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

76. Where an information showed that relator was a de facto officer, it was held insufficient to show a prima facie title in him. State v. Johnson, 8 Ohio C. C. (N. S.) 535.

77. Must show filing of oath. Carlson v. People, 118 Ill. App. 592.

78. In quo warranto, to try title to the office of chief sanitary inspector of Chicago, an information alleging that the office to which relator was appointed was created under an ordinance authorizing the commissioner of health to appoint an assistant a "medical sanitary inspector" and "such other employes as may be necessary," but not expressly naming the office of "Chief sanitary inspector," does not sufficiently allege the legal existence of the office. Hedrick v. People, 221 Ill. 374, 77 N. E. 441.

79. A petition alleging that the respondent has usurped, intruded into, and unlawfully holds without warrant or authority of law a designated office and claims to be clothed with the powers, etc., of said office and is now exercising the powers of such office, is sufficient. Jackson v. State, 143 Ala. 145, 42 So. 61.

80. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

81. Jackson v. State, 143 Ala. 145, 42 So. 61.

82. See 6 C. L. 1193.

83. Where the pleas set forth the title re-

has been held that an answer setting up a mere prima facie title is insufficient in proceedings to try title to a public office.[84] A plea setting up a bare conclusion of law is defective.[85] Error in striking plea from the files is harmless where even though frivolous and impertinent matter continued therein were eliminated it would still be defective, and where all of its material allegations are contained in other pleas.[86] The replication may set up matters in avoidance of a prima facie defense set up in the plea.[87] All material facts set out in the plea which are not specifically traversed by the replication are admitted.[88] A demurrer to an information admits every material allegation contained therein.[89] On a demurrer to the plea the court will consider only the matters set forth therein.[90] Where the attorney general is without authority to commence the proceeding, objection should be raised by a motion to set aside the service of the summons and not by a plea in bar.[91] An order granting leave to file an information cannot be reviewed or collaterally attacked upon a motion to set aside or dismiss.[92] A motion to set aside an order granting leave to file an information in quo warranto is addressed to the discretion of the court.[93]

§ 6. *Trial and judgment.*[94]—In Texas the constitutional right to a trial by jury as to disputed questions of fact applies to proceedings in the nature of quo warranto.[95] The burden is on respondent claiming a public office to show by what right he holds such office.[96] In quo warranto, to determine the validity of the organization of a drainage district, clerical errors in the record of the commissioners may be cured by amendment after the filing of the information so as to make the record conform to the facts and the amended record is admissible in evidence.[97]

lied upon, the ordinance, and the steps taken in compliance therewith, it is not necessary that the plea should anticipate the objection that the part of the city in which the dramshop is located is subject to a different license law where such fact does not appear from the pleadings. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

84. The answer set up a commission from the governor but did not allege the authority of the governor to make the appointment. Jackson v. State, 143 Ala. 145, 42 So. 61.

85. Pleas setting up validity of dramshop license held defective on this ground. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

86. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

87. An information asked that respondent show its authority under which it claimed to be a corporation and its authority to do business in the state in which the action was brought. The plea attempted to show such authority. The replication attacked the showing upon both points by claiming the invalidity of its incorporation because of a violation of the laws of the state under which it was incorporated and its right to do business in the state in which the action was commenced by reason of a violation of its laws. It was held that the matters set up in the replication were proper in avoidance of the plea and could not be said to raise an issue not germane to the information. Attorney General v. Booth & Co., 143 Mich. 89, 12 Det. Leg. N. 991, 106 N. W. 868.

88. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

89. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.

90. In quo warranto to test the validity of a dramshop license the plea set up a prima facie title under the dramshop license law. The court held on demurrer that the fact that a different license law may have governed portion of the city in which respondent's dramshop was located should have been made to appear by the replication and could not be considered on demurrer. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

91. A motion to set aside the service of the summons on the ground that a decision of the relator's predecessor not to commence the action was binding upon him held the proper method in which to raise the question of the attorney general's authority to institute the proceedings. People v. McClellan, 103 N. Y. S. 146.

92. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

93. Heidelberg Garden Co. v. People, 124 Ill. App. 331.

94. See 6 C. L. 1193.

95. Held the question as to whether territory embraced within proposed city was intended to be used strictly for city purposes should have been left to the jury. Merritt v. State [Tex. Civ. App.] 15 Tex. Ct. Rep. 925, 94 S. W. 372.

96. A mere prima facie title evidenced by a commission from the governor is not sufficient without showing that the governor was lawfully authorized to act. Jackson v. State, 143 Ala. 145, 42 So. 61. Respondent held not injured by a ruling imposing the burden of proof upon the relator and giving him the right to open and close. Dunton v. People [Colo.] 87 P. 540.

97. Where at the time of the filing of the information, owing to a clerical error, it appeared from the record of the commission-

If all matters of substance are duly proven the proof of slight informalities will not support a judgment of ouster except wherein the law has made mandatory some particular form.[98]

Matters admitted or in issue.—By proceeding in quo warranto the relator conclusively admits that the office to try the title to which the information was filed, is in the possession of the respondent,[99] and by instituting such proceedings he abandons possession of the office sought.[1] By commencing quo warranto proceedings against a corporation in its corporate name, to forfeit its charter, the state does not thereby admit its legal corporate existence.[2]

Costs.[3]

§ 7. *New trial and review.*[4]—A motion for a new trial in quo warranto proceedings suspends the judgment and it does not become final for the purpose of an appeal until the motion has been disposed of.[5] The refusal to allow the filing of an information in the nature of quo warranto, although within the discretion of the court, is subject to review.[6] Under a statute allowing an appeal where the judgment appealed from amounts to $100 or over exclusive of costs or relates to a franchise or freehold, an appeal does not lie from an order dismissing a writ of quo warranto.[7] An order of the court refusing to compel the county attorney to commence quo warranto proceedings against a corporation usurping powers which it does not lawfully possess is appealable, and on such an appeal the sufficiency of the complaint of the person demanding such a proceeding will be reviewed.[8] On appeal from an order denying a motion to dismiss, the only question to be considered is whether the relator has made such a showing as, if made good by the evidence, affords a proper case for the application of the remedy.[9-13]

RACING.[14]

The holding of races has such a substantial relation to the public welfare as to render it subject to legislature control,[15] and the racing commission of Kentucky

ers that the petition for the formation of the district had not been signed by a sufficient number of property owners, that the commissioners failed to find in their final order of organization that the cost of the improvement would be less than the benefits derived therefrom and that the land would be benefited for sanitary and agricultural purposes thereby, it was held that at a meeting held subsequent to the filing of the information the drainage commissioners had power to amend the record so as to make it conform to the facts. People v. Zellar, 224 Ill. 408, 79 N. E. 697.

98. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

99. Where a sheriff commenced mandamus proceedings against the clerk of court to compel him to turn over the jury venires and pending an appeal from an adverse decision commenced quo warranto proceedings against an adverse claimant, the appeal in the mandamus proceedings was dismissed on the ground that having admitted that he no longer held the office no relief could be afforded. Territory v. Dame [N. M.] 85 P. 473.

1. Territory v. Dame [N. M.] 85 P. 473.

2. State v. Inner Belt R. Co. [Kan.] 87 P. 696. See dictum to the contrary. State v. Louisiana, etc., Gravel Road Co., 116 Mo. App. 175, 92 S. W. 153.

3. See 6 C. L. 1193.

4. See 4 C. L. 1180.

5. Under a statute providing that an appeal from a judgment in quo warranto must be taken within ten days after the entry of judgment, the appeal is taken in time if taken within ten days after a motion for a new trial has been denied. State v. Kitchens [Ala.] 41 So. 871.

6. People v. Arcola Drainage Com'rs, 123 Ill. App. 604.

7. The remedy is by a writ of error, but where the court has jurisdiction over the parties a motion to dismiss the appeal may be granted and the clerk ordered to enter the case as pending on a writ of error. People v. Horan, 34 Colo. 304, 86 P. 252.

8. State v. Point Roberts Reef Fish Co., 42 Wash. 409, 85 P. 22.

9-13. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

14. See 6 C. L. 1193. See, also, Betting and Gaming, 7 C. L. 434.

15. Discrimination and classification made by Act Ky. March 26, 1906, in regulating running races only and excluding fair associations from its application, held to be justified and the act constitutional. Granger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513, rvg. 146 F. 414.

has power to assign and fix dates of associations for holding them.[16] A corporation formed to encourage agriculture and raising of fine stock, especially race horses, by giving exhibitions of agricultural products and contests of speed, substantially fails to fulfill the purpose of its organization when it maintains a racing course solely for gambling and its franchise may be forfeited.[17]

RAILROADS.

§ 1. Definition and General Nature of Railroads (1590).
§ 2. Franchises, Licenses, Permits, and the Like (1591).
§ 3. Route, Location, Termini, and Stations (1592). Alteration and Changes (1593).
§ 4. Rights of Way and Other Lands, and Acquirement Thereof (1594). Grants in Highways and Streets (1595). Rights in Public Lands (1597). Right of Eminent Domain (1597). Private Grants (1597). Conditions and Reservations in Private Grants (1598). Adverse Possession by or Against Railroad Companies (1599). Abandonment of Right of Way (1599).
§ 5. Aids and Bonuses (1599).
§ 6. Taxes, Fees, and License Charges (1600).
§ 7. Public Control and Regulation (1601). Control by Railroad Commissions (1601).
§ 8. Construction and Maintenance (1602). Establishment and Maintenance of Depots (1602). Private Farm Crossings (1603). Public Crossings (1604). Damages for Negligent Construction (1606). Abolition and Prevention of Grade Crossings (1607). Crossings With Other Railroads, Street Railroads, and Canals (1607). Rights on Tracks of Other Companies (1607). Cattle Guards, Fences, and Stock Gaps (1608). Drainage and Disposal of Surface Water (1609). Obstruction of Watercourses (1609).
§ 9. Sales, Leases, Contracts, and Consolidation (1610). Duties and Liabilities Subsequent to Sale or Lease (1610). Contracts (1611). Consolidation (1611).
§ 10. Indebtedness, Insolvency, Liens, and Securities (1612). Bonds and Mortgages and Priority of Claims (1613). Foreclosure of Mortgages (1614).
§ 11. Duties and Liabilities Incident to Operation of the Road (1614).
A. Obligation to Operate and Statutory Regulations (1614). Injuries to Adjacent Owners From Smoke, Noise, etc. (1614). Equipment of Cars (1615). Speed Regulations (1616). Obstructions at Crossings (1616). Stops at Railroad Crossings (1616). Conveniences at Depots (1617).
B. General Rules of Negligence and Contributory Negligence (1617).
C. Injuries to Passengers and Freight (1619).
D. Injuries to Employes (1619).
E. Injuries to Licensees and Trespassers (1619). Employes of Other Roads and of Independent Contractors (1622). Persons at Stations (1623). Persons Loading and Unloading Cars (1624). Children on or Near Tracks (1625). Adults Walking on Tracks (1626). Persons Standing, Sitting, or Lying on Tracks (1629). Persons Along or Between Tracks (1629). Persons on Bridges or Trestles (1629). Persons Near Crossings (1630). Persons in Switch Yards (1631). Persons Stealing Rides (1631). Persons Using Hand Cars or Railroad Tricycles (1633).
F. Accidents to Trains (1633).
G. Accidents at Crossings (1633).
1. Care Required on the Part of the Company (1633).
2. Contributory Negligence (1639).
H. Injuries to Persons on Highways or Private Premises Near Tracks (1644).
I. Injuries to Animals on or Near Tracks (1646). How Far Liability Extends (1646). Place of Entry on Right of Way (1651). Duty to Maintain Fences (1651). Gates (1653). Cattle Guards (1654). Contributory Negligence of Owner (1654).
J. Fires (1655). Duty as to Equipment and Operation of Engines (1656). Contractual Exemptions from Liability (1657). Contributory Negligence (1657). Pleading (1657). Evidence, Burden of Proof and Presumptions (1657). Admissibility of Evidence (1659). Instructions (1660). Damages (1661).
K. Actions for Injuries (1661). Pleadings (1661). Burden of Proof (1661). Evidence (1662). Instructions (1663). Double Damages and Attorney's Fees (1665).
§ 12. Railroad Corporations (1665). Powers of Corporations and Authority of Officers (1666).
§ 13. Actions by and Against Railroad Companies (1666).
§ 14. Offenses Relating to Railroads (1667).

The rights and duties of railroads as common carriers,[18] their liability to employes,[19] and matters common to all corporations,[20] are elsewhere treated.

§ 1. *Definition and general nature of railroads.*[21]—Where the term "railroad" is used in statutes, steam railroad is meant, unless it clearly appears that some

16. Act Ky. Mar. 26, 1906, authorizes the racing commission to assign and fix dates. Granger v. Douglas Park Jockey Club [C. C. A.] 148 F. 513, rvg. 146 F. 414.
17. State v. Delmar Jockey Club [Mo.] 92 S. W. 185.
18. See Carriers, 7 C. L. 522, and see Commerce, 7 C. L. 667.
19. See Master and Servant, 8 C. L. 840.
20. See Corporations, 7 C. L. 862.
21. See 6 C. L. 1195.

other meaning is intended.[22] The term "railroad" includes all side tracks necessary, or convenient for the transaction of the company's business.[23] A terminal company may be a railroad company,[24] but a manufacturing company operating a switch engine on its own private tracks is not.[25] A railroad does not lose its character as such because of the line of road being very short.[26] A railroad is a public highway,[27] and a charter granted for the purpose of constructing one is for a public purpose.[28]

§ 2. *Franchises, licenses, permits, and the like.*[29]—Statutes granting franchises involving rights of the public are to be construed liberally in favor of the public and strictly against the corporation.[30] The right to acquire land for the

22. An interurban railroad for the operation of electric cars is not within 97 Ohio Laws, p. 54, providing how railroad and highway crossings shall be constructed. Commissioners of Ross County v. Scioto Valley Trac. Co., 75 Ohio St. 548, 80 N. E. 176. The section of the statute giving railroad commissioners authority to determine an application by one company to cross the track of another does not apply where the line of an electric railroad is sought to be crossed. Kansas City, etc., R. Co. v. Railroad Com'rs [Kan.] 84 P. 755. In defining "railway company" as used in railroad commissioner's law, to mean a company whose road is operated by steam, the statute forbids that such term be construed to include a road operated by electricity except where such intention is expressly manifested. Id. A railway operated wholly by electricity is not one operated by steam within the meaning of the railroad commissioners' law, though owned and managed by a corporation whose charter permits the use of steam as motive power. Id.

23. Roby v. State [Neb.] 107 N. W. 766. A side track constructed and used by the company, connecting with its main line, and occupying a portion of the public street under grant from the city, is presumed to be a part of the system of such company and a public highway within Const. art. 11, § 4, declaring such highways free to all persons for their transportation. Id. Evidence sufficient to show that it was such highway. Id. The constitutional declaration that all railroads are public highways and all railroad companies common carriers applies not only to main lines but also to subsidiary tracks used for the purposes of railroad traffic. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627.

24. A terminal company receiving cars coming from another state, and delivering them within its yards to the engineers of a railroad company, is engaged in interstate traffic within the Safety Appliance Act March 2, 1893, c. 196 (27 Stat. 531). United States v. Northern Pac. Terminal Co., 144 F. 861. If it were a question of real doubt as to what is the real character of a corporation, its name might be considered. But that the company is called a terminal company, will not change its character within the meaning of the law. Bridwell v. Gate City Terminal Co. [Ga.] 56 S. E. 624.

25. A manufacturing company which maintains in its yards a number of tracks and a switch engine is not a railroad corporation operating a railroad within 93 Ohio Laws, p. 342, requiring such corporations to block their frogs. Taggart v. Republic Iron & Steel Co. [C. C. A.] 141 F. 910.

26. The fact that a railroad will be only about three miles in length and will for a considerable part of its course lie within the corporate limits of a city and that it will connect with other railroads at the outer terminus does not prevent it from falling within the purview of the general laws for incorporating railroads. Bridwell v. Gate City Terminal Co. [Ga.] 56 S. E. 624.

27. Under the statutes of Pennsylvania, the owner of a coal mine adjacent to a right of way has a right to connect switch tracks built on his own land with the tracks of such road. Olanta Coal Min. Co. v. Beach Creek R. Co., 144 F. 150. Where a company was chartered to build a road, and after a part of it was completed the scheme failed for lack of funds, and a receiver sold certificates to complete it to a town and operated it for four years without being able to pay interest on the certificates or salary to himself, when it was sold to holders of the certificates, the franchise was forfeited for failure to incorporate and the receiver was permitted to dismantle and sell the rails and rolling stock. Held that though the state was not a party to such proceedings, the purchasers could not be compelled after several years to replace the rails so the road could be operated by others as a public highway. State of South Carolina v. Jack [C. C. A.] 145 F. 281; Wolfard v. Fisher [Or.] 87 P. 530. Where a railroad switch though used largely by one road is open to all persons for shipping purposes, it is a public trust and its presence in a street is not a nuisance per se. Id. Owners of mills and factories have a statutory right to connect their private sidings with railroads in the vicinity which they cannot be deprived of by agreement between the railroad company and a land owner that no other siding upon such owner's land shall be constructed in the vicinity. Reeser v. Philadelphia & R. R. Co. [Pa.] 64 A. 376. A railroad company is accountable for the condition of its right of way and may be compelled to construct side tracks if necessary to the discharge of its duty to the public, and a person in possession of right of way cannot by denying the necessity of side tracks require the company to bring ejectment, but he may be enjoined from obstructing the right of way. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

28. A charter granted by the state for the purpose of constructing and operating a commercial railroad is for a public purpose. Bridwell v. Gate City Terminal Co. [Ga.] 56 S. E. 624. It cannot be used for a private purpose nor can the company exercise the power of eminent domain for a private purpose. Id.

29. See 4 C. L. 1184.

30. State v. St. Paul, etc., R. Co., 98 Minn.

construction of a road is statutory and statutes must be complied with.[31] The validity of a franchise will not be determined in the absence of a full hearing.[32]

§ 3. *Route, location, termini, and stations.*[33]—A railroad company has a right to select the route which it deems most advantageous and has power to secure land necessary for its use in constructing its road in such manner as to afford security to life and property,[34] but after its discretion in selecting its route has once been exercised, its power of choice is exhausted and it cannot change its location without legislative authority.[35] A substantial compliance with the route prescribed by the charter is sufficient.[36] The location can be made only by regular corporate acts.[37] A right to location is generally acquired by staking the route on the ground and filing a map of definite location.[38] As between rival companies claiming the same location, priority of location gives superiority of right,[39] and interference with such

380, 108 N. W. 261. A company organized as a steam railway changed its motive power to electricity and applied for a permit to operate on streets. Held that if the purpose of the application was to enable the company to do the business of a street surface railway the application was properly denied as it was not organized for that purpose, and had not procured the consent of owners and city authorities as required by Laws 1890, p. 1108, c. 565, § 91. In re Keeseville, etc., R. Co., 101 N. Y. S. 237. Under the statutes of New York, railroad franchise held not invalid. New York, etc., R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316.

31. Under Laws 1892, p. 1395, c. 676, amended by Laws 1895, p. 317, c. 545, § 59, providing that construction shall not begin until railroad commissioners issue certificate of necessity and providing for an application to the court if such certificate is refused the application comes before the court as an original one to be determined on the record before the commissioners or upon such further evidence as the court deems essential. In re Rochester, C. E. Trac. Co., 102 N. Y. S. 1112. In such case great weight is to be given the decision of the commissioners. Id. An application to construct a trolley road should not be denied though it will parallel steam roads and reduce their earnings. Id. Granting a certificate is called for though the line will parallel another where persons along the route testify that it will be a convenience, that trains on parallel roads are infrequent, and that some people had to travel long distances to reach such roads, etc. Id.

32. The validity of a franchise in which a large amount of capital is invested and great public interests are involved will not be determined on affidavits, and where a judgment against the corporation would prevent completion within the time set therefor, on which completion its franchise is conditioned, this question will not be determined in advance of the trial but a restraining order permitting continuance of the work under the franchise will be granted until trial of the case. New York, etc., R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316.

33. See 6 C. L. 1195.

34. State v. District Court [Mont.] 88 P. 44.

35. See post, this section, Alterations and Changes.

36. Where a charter fixed one termini at a station outside the city and described the road as running easterly to a point near the center of the city, but a line run due east would not enter the city at all, the corporation had a discretion to locate the other terminus at or near the center of the city and a line running from the initial termini in a general southeasterly direction was not a violation of the charter. Bridwell v. Gate City Terminal Co. [Ga.] 56 S. E. 624.

37. Where a company was incorporated under the general law with power to construct a railroad from a point outside a populous city to a point within it, if the power to locate the line could be conferred by the directors upon the president, yet under the general power to manage the business subject to the approval of the directors, conferred by by-laws, he could not lawfully fix the route and terminus, and proceed with condemnation proceedings without such approval. Bridwell v. Gate City Terminal Co. [Ga.] 56 S. E. 624. Where notice as to the commencement of condemnation proceedings was given by the president's direction without authority and the time had expired under its terms for the appointment of an assessor by the land owner, the directors could not by ratifying the act of the president cause such ratification to relate back and to give such notice the same effect which it would have if it had been legal when given. Id.

38. A company organized under the laws of New Mexico to construct a road within the territory acquires an interest in a location which in good faith it has surveyed, staked on the ground and adopted as its final location, sufficient to maintain action against a trespasser, and will not until after lapse of a reasonable time after final location for filing lose such interest by failure to file a map of location as required by statute. Arizona & C. R. Co. v. Denver, etc., R. Co. [N. M.] 84 P. 1018. An averment for acts of trespass on its location that it had "adopted" such location as final is good against demurrer without direct allegation that it was done by the board of directors, that being the method of adoption prescribed. Id. Rev. St. 1899, § 1056, requiring the filing of a map of the profile of the proposed route in the office of the county clerk, is not satisfied by the filing of a map showing a part of the route in the county. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881. Under Kirby's Dig. § 6569, a railroad must file a map showing the profile of its line before it commences work of construction, and is liable in damages if it commences construction work before it does so. White River R. Co. v. Batesville & Winerva Tel. Co. [Ark.] 98 S. W. 721.

39. Where one company had notice of a prior survey at the time it attempted to

right may be enjoined,[40] but a senior right to locate a right of way does not, until the line is located, give a right to enjoin the location of another line.[41] Where grants of two franchises are indefinite as to the exact route to be selected, the prior right will attach to the company first locating its line by marking its route and adopting it by corporate action.[42] A statutory right to cross or intersect with another line does not give a right to arbitrarily select a route through the terminals of such other company.[43] Federal grants of rights of way usually vest upon approval by the secretary of the interior of the profile of the line.[44] Where rival aspirants for the same right of way file profiles, a duty devolves upon the secretary of the interior to deetermine which company has the superior claim.[45] While such contest is pending before him, courts should not assume jurisdiction to determine the ultimate right of possession,[46] but pending determination of such contest the court ought, in the interest of the public as well as in the interest of the company showing the greater immediate equity upon application, by temporary orders protect it in the construction of the road.[47] There is no legislative provision prohibiting a railroad from building or causing to be built, a parallel line.[48]

Alterations and changes.[49]—Where a railroad has exercised its discretion in selecting its route, its power of choice is exhausted and it cannot subsequently change its location without express legislative authority.[50] Where one company

make a survey over the same route, it was immaterial to the priority of the company making the first survey that it did not firet file for record its map of location as required by Ky. St. 1903, § 767. Cumberland R. Co. v. Pine Mountain R. Co., 28 Ky. L. R. 574, 96 S. W. 199. Where one company has actually located its route and is in good faith following up its location by buying or condemning land, another company cannot go to a point on the route which is neither the beginning nor ending of its proposed line and locate a right of way on the same line. Id.

40. A complaint which avers that one company is by repeated acts of trespass on the location of another, seeking to deprive the latter of its location without due process, threatens to continue such acts; that such location has been surveyed and staked at great expense; is the best possible location between the points, though not the only one; that multiplicity of suits and irreparable damage will result if such purpose is accomplished, states a cause of action for an injunction. Arizona & C. R. Co. v. Denver, etc., R. Co. [N. M.] 84 P. 1018. Allegations of acts of trespass however numerous or continuous is not an admission that the trespasser is in possession or that title is in dispute, where it is alleged that the company is in possession and that the trespasser is seeking to deprive it of its location. Id.

41. One who has a senior right to locate a right of way for a logging road may not enjoin another company from locating a right of way over such land until it has located its own right of way, but may enjoin the use of a certain class of locomotives in order to preserve timber from catching fire. Marion County Lumber Co. v. Tilghman Lumber Co. [S. C.] 55 S. E. 337.

42. Fayetteville St. R. Co. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345. Where a company by directors' resolution adopted an abandoned roadbed as its route, staked it, engaged agents to procure options, and the directors ratified and readopted such route, held a prior location as against another company which subsequently surveyed, purchased, and condemned over the same roadbed. Id. Revisal 1905, § 2600, requiring map and profile of the route to be filed within a reasonable time with the corporation commission, does not require such filing as an essential of completed location as against another company. Id. Where a right of way is clearly defined and staked and the route so marked is adopted by the company, the entry of an engineer and a survey is not necessary to the location as against another company seeking the same location. Id.

43. Ball. Ann. Codes & St. § 4335, providing for the right of one railroad to cross, connect, or intersect, with another, does not confer on the new locator of a line the arbitrary power to select a route through the terminals of an existing company in such manner as to seriously interfere with the usefuiness of the latter where a different location would reasonably serve the purposes of the new locator. State v. Superior Court of Whitman County [Wash.] 88 P. 201. Public interest held not to require such route. Id.

44. Legal title to a right of way sought under the grant of Act Cong. March 3, 1875 (18 Stat. 482), vests upon approval by the secretary of the interior of the profile of the road and not before. Phoenix & E. R. Co. v. Arizona Eastern R. Co. [Ariz.] 84 P. 1097.

45, 40, 47. Phoenix & E. R. Co. v. Arizona Eastern R. Co. [Ariz.] 84 P. 1097.

48. Memphis, etc., R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019.

49. See 6 C. L. 1195.

50. Brown v. Atlantic & B. R. Co., 126 Ga. 248, 55 S. E. 24. Civ. Code 1895, § 2171, does not authorize a company which obtained its charter under the general railroad laws, after having located, constructed, and operated, its line for some time, to tear up and

owned two lines which separated at an acute angle, it may not tear up a portion of one line from such point on the ground that it has leased another line which intersects with its road at a different point and over which it could furnish as good service to the public, where the terms of the lease do not appear.[51] In some states a change of route is authorized if it has not been finally located,[52] and it may follow as an incident to acts required by law of the company.[53] An inhibition against changing the rule does not apply where such change is required by law.[54] A railroad company which has obtained the approval of the secretary of the interior of a profile of its road may change a portion of its location if intervening rights are not thereby interfered with.[55] A rival company which was not misled by such change and has not acquired intervening rights may not complain.[56]

§ 4. *Rights of way and other lands, and acquirement thereof.*[57]—A railroad right of way as an easement and lies only in grant from the owner or from the state through the exercise of condemnation proceedings or by prescription.[58] Rights of

relocate a section of it at its own volition, though the portion sought to be relocated is outside the limits of a town or city. Id.

Note: It is generally held that where a railroad company to which has been given the power to choose a particular route between designated termini has exercised its discretion in this regard, its power of choice is exhausted, and it cannot subsequently change its location without express legislative authority. Thus, a change cannot be made for reasons of convenience, expediency, or economy, merely. 23 Am. & Eng. Enc. L. [2d ed.] 690; Leverett v. Middle Georgia & A. R. Co., 96 Ga. 385, 24 S. E. 154; State v. Dodge City, etc., R. Co., 53 Kan. 329, 36 P. 755, 24 L. R. A. 564; Lusby v. Kansas City, M. & B. R. R. Co., 73 Miss. 360, 19 So. 239, 36 L. R. A. 510; Lake Shore, etc., R. Co. v. Baltimore, etc, R. Co., 149 Ill. 272, 37 N. E. 91; Ill. C. R. Co. v. People, 143 Ill. 434, 19 L. R. A. 119; Brigham v. Agricultural Branch R. Co., 1 Allen [Mass.] 316; Morris & E. R. Co. v. Central R. Co., 31 N. J. Law, 205; Mason v. Brooklyn, etc., R. Co., 35 Barb. [N. Y.] 373; In re Providence, 17 R. I. 324, 21 A. 965.—See Brown v. Atlantic & B. R. Co. [Ga.] 55 S. E. 24.

51. Brown v. Atlantic & B. R. Co., 126 Ga. 248, 55 S. E. 24. The fact that the company had commenced to tear up the track before injunction was applied for is not ground for refusing it, if it is wrongful and working special damage. Id. A mandatory injunction to require relaying a substantial portion of the track torn up and the operation of the road would not issue. Id.

52. Acts 1887, p. 112, c. 39, authorizing the board of directors of a railroad company which has not finally located its line to change its terminus, is not a special law violation of the constitution. Memphis, etc., R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019. Acts 1887, p. 112, c. 39, authorizing a board of directors of a railroad which has not finally located its line to change a terminus, was not repealed by Acts 1889, p. 303, c. 158. Id. The charter of a railroad company authorized it to construct its road between two certain points. A part of the road was constructed but the remainder of the line was not located. Held the road was not finally located and the terminus could be changed. Id.

53. Under Revisal 1905, § 1097, empowering the corporation commission to require the construction of union depots in cities and towns and giving railroads subject to such requirement power to condemn lands, confers on the roads the incidental power to make such changes in their route as is necessary to make the depot available to the traveling public. Dewey v. Atlantic Coast Line, 142 N. C. 392, 55 S. E. 292. Where the erection of such depot and change of foute is authorized by law, it will not be restrained though causing injury to private interests. Id.

54. Revisal 1905, § 2573, prohibiting changes in routes in cities except where sanctioned by the city authorities, applies only where the change is made by the railroad of its own volition and not where it is required by the corporation commission. Dewey v. Atlantic Coast Line, 142 N. C. 392, 55 S. E. 292.

55. Under Act Cong. March 3, c. 152 (18 Stat. 483). Phoenix & E. R. Co. v. Arizona Eastern R. Co. [Ariz.] 84 P. 1097.

56. Phoenix & E. R. Co. v. Arizona Eastern R. Co. [Ariz.] 84 P. 1097.

57. See 6 C. L. 1197.

58. Clark v. Wabash R. Co. [Iowa] 109 N. W. 309. Where land was sold under execution after a railroad had appropriated a right of way through it, and was afterwards repurchased, the railroad could not escape paying for the land on ground that when the owner reacquired the property it was burdened with the easement of the railroad. Scovell v. St. Louis Southwestern R. Co., 117 La. 459, 41 So. 723. Where a railroad tortiously builds its road, buildings, etc., on land of another, and, such owner sells, his grantee may not recover damages for the tort as such right of action remains in the original owner. Bruce v. Seaboard Air Line R. Co. [Fla.] 41 So. 883. Where a railroad company encroached on an owner and constructed structures prior to an action for trespass and immediately on commencement of such action instituted condemnation proceedings, a mandatory injunction requiring removal of the structures would not issue. Colgate v. New York Cent., etc., R. Co., 100 N. Y. S. 650. Where no right to lay tracks on projected streets shown by a plat was acquired under a lease of a portion of the land, such right could be acquired only by condemnation or agreement with the own

way are generally acquired by the exercise of the power of eminent domain delegated by the state to the company [58] and cannot be acquired by dedication.[60] An easement of a right of way will be protected by injunction regardless of the solvency of the persons who interfere with it.[61] But before injunction will issue the company must show that it has a right of way, its extent, and that the defendants are interfering or are threatening to obstruct it.[62] In some states an entry on private land for the purpose of making a preliminary survey is authorized.[63]

Grants in highways and streets.[64]—A railroad company receives its charter and franchise subject to the implied right of the state to establish and open such streets and highways over and across it as public convenience and necessity may require.[65] In the absence of statutory authority, a municipality has no power to grant to a railroad the exclusive use of the streets,[66] and in the absence of express power in its charter to grant a permanent easement, a license to lay tracks in the street cannot be regarded as a permanent easement.[67] Municipalities may grant to railroad companies the reasonable use of streets for the construction and operation of railroads,[68] but such grants are subject to prior rights of the public [69] and will not be permitted

ers. Northern Cent. R. Co. v. Canton Co. [Md.] 65 A. 337. Lease of a platted track to a railroad company construed and held to give no right to lay tracks across a certain projected street. Id.

59. See Eminent Domain, 7 C. L. 1276.

60. Scovell v. St. Louis Southwestern R. Co., 117 La. 459, 41 So. 723.

61, 62. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

63. Gen. Acts 1903, p. 320, § 9, authorize an entry on land for the purpose of making a preliminary survey, held an entry under such statute constituted "a legal cause and good excuse," within Code 1896, § 5606, providing a punishment for an entry on premises of another without legal cause, etc. State v. Simons [Ala.] 40 So. 662. Gen. Acts 1903, p. 320, § 9, authorizing an entry on land for the purpose of making a preliminary survey subject to liability for damages is not a taking of property without due process. Id.

64. See 6 C. L. 1197.

65. That right on the part of the state attaches by implication of law to the franchise of the company and imposes on it the duty to construct and maintain suitable crossings at new highways and streets to the same extent as required by the common law at streets and highways in existence when the railroad was built. State v. St. Paul, M. & M. R. Co., 98 Minn. 380, 108 N. W. 261. A charter granting the right to run the track along, under, over, upon, and across, highways and streets, providing such way is left in such condition as not to interfere with its free and proper use, applies to highways laid out after construction of the railway. Id.

66. A municipal council is without power, under existing laws, to authorize a railroad company to occupy a street or public landing with an overhead structure, resting upon fixed permanent supports of the character shown in this case and necessarily involving the exclusive use of the grounds so occupied, and an ordinance granting the right to erect such a structure is void. Louisville & Nashville R. Co. v. Cincinnati, 4 Ohio N. P. (N. S.) 497.

67. State v. Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290.

68. Use held not unreasonable or such as to impair public easement. City of Colorado Springs v. Colorado & Southern R. Co. [Colo.] 89 P. 820. Laws of New York relative to the laying of tracks in streets, tunneling, etc., construed and applied to articles of incorporation, and held that such articles were not void. New York & L. I. R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316. Under Civ. Code Ga. § 2167, authorizing a railroad company to lay its tracks along any street or highway with the consent of the municipal authorities, a lot owner cannot enjoin such laying along a street on which his lot abuts on the ground that it will result in incidental damages where the construction is consented to by the authorities. The rule is the same whether the municipality has the fee or an easement only, as damages arising are recoverable only in an action at law. Whitaker v. Atlanta, B. & A. R. Co., 143 F. 583. The California statutes expressly provide that railroads may be constructed along or across highways. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

69. A grant by a city to a railroad of the right to maintain tracks on a street and to maintain permanent buildings is void as interfering with the rights of the public. Chicago, etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790. Such a grant with reference to a public landing is also void. Id. While from the purposes of its creation and dedication a public landing includes the free and unobstructed passage of travelers and vehicles, its function is much broader and more important than that of a mere street, and considerations which would forbid the occupation of a street by a railway structure are of commanding application in the case of such a landing. Louisville & Nashville R. Co. v. Cincinnati, 4 Ohio N. P. (N. S.) 497. Mandamus will not lie to compel a municipality to grant a permit to lay an additional track on a right of way across a boulevard, though it is necessary to lessen danger in traffic and elevation of the track would cost an immense sum. People v. South Park Com'rs, 221 Ill. 522, 77 N. E. 925. Abutting owners

to interfere with the rights of abutters unless they are compensated.[70] Where a railroad company granted a right of way along a street turned the same into a switching yard, causing irreparable injury to adjacent owners, such taking was for private use and became a nuisance which abutting owners could restrain.[71, 72] A railroad is not entitled to continue to use a street as a switch yard because of the fact that such nuisance was created before such owners constructed their buildings.[73] The right to construct tracks in a street can be acquired only by compliance with the law authorizing it,[74] but when acquired it carries with it incidental rights.[75] Where the right to use streets is upon condition and such condition is broken, the railroad company is without authority,[76] and where a contract constituted a mere license, the city is not precluded from thereafter exercising its public power by forbidding trains to stop in the street.[77] A statute authorizing change in location of a highway for the pupose of avoiding or improving a grade crossing does not authorize discontinuance of a highway,[78] and where a railroad is authorized to change the site of a public road, the new road must be constructed to the same width as the original one.[79]

who sign frontage consents for the construction of a railroad in the street may withdraw them at any time before finally acted upon by the mayor. People v. Decatur, etc., R. Co., 120 Ill. App. 229.

70. A railroad company occupying a public street without clear legislative authority is a nuisance and may be enjoined at the suit of a private citizen specially injured. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798.

71, 72. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177. In such case there is no adequate remedy at law. Id. In such case evidence that owners were required to shovel cinders from their roofs that roofs had been rotted by water held by such cinders, and that smoke and noise prevented renting the buildings, and that the premises depreciated in value, shows special damage. Id. A railroad company may not object to a decree enjoining it from using a street in such manner as to create a nuisance because of the fact that the relief granted by the decree would be given without its aid when a new depot, in course of construction was completed. Id.

73. Galveston, etc., R. Co. v. Miller [Tex. Civ. App.] 15 Tex. Ct. Rep. 47, 93 S. W. 177.

74. Under Laws 1890, p. 1087, c. 565, § 11, prohibiting construction of a railroad on a village street without an order of court on notice to the trustees of the village, a railroad company may not arbitrarily extend its road over streets and where it applied for such right and village authorities opposing it showed that it would run on some of the busiest streets and that public interests would not be promoted, it was properly denied. In re Keeseville, etc., R. Co., 101 N. Y. S. 237. Where prior to constructing a tunnel in any street or public place the company as required by statute procured the consent of abutting owners, it need not procure such consent as to every street in its proposed route prior to constructing on any street. New York, etc., R. Co. v. O'Brien, 50 Misc. 13, 100 N. Y. S. 316.

75. A railroad company which has a statutory right to construct a tunnel under a street may use the surface temporarily in furtherance of its work where it does not interfere with public travel regardless of the city's right to the street which had not been used as such for twenty years, except by a trolley line. Hoboken & M. R. Co. v. Hoboken [N. J. Eq.] 64 A. 641.

76. Edwards v. Pittsburg Junction R. Co. [Pa.] 64 A. 798. Under Act June 19, 1871 (P. L. 1630), authorizing a private citizen to challenge the right of a corporation where his property rights are being injured, he may enjoin a railroad company from blowing its whistle or using bituminous coal, where a municipality authorized the company to use the street on condition that its steam whistle should not be used nor coal used for fuel. Id.

77. State v. Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290.

78. Under Pub. St. 1901, c. 159, § 14, authorizing railroad commissioners to authorize a railroad to change the location of a highway for the purpose of avoiding or improving a grade crossing, does not authorize the discontinuance of a highway. Blake v. Concord & M. R. Co. [N. H.] 64 A. 202. While the question whether the discontinuance of a portion of a highway and laying out of a portion in another place is a change of location such as railroad commissioners had power to authorize, or is a discontinuance of one highway and the laying out of another, is a question of fact; and while the new portion need not start at the point of discontinuance, and rejoin at the end of the portion discontinued, the new route must, in order to be regarded as a mere change, serve substantially the same public purpose and accommodate the same travel. Id.

79. Under Act Feb. 19, 1849, § 13 (P. L. 85), providing that if a railroad finds it necessary to change the site of a public road it shall reconstruct the same at its own expense where it does so reconstruct it, must do so to the original width of the road though it was not opened to its full width, and, where it erects buildings within such width, it constitutes a nuisance which may be enjoined. Commonwealth v. Delaware, etc., R. Co. [Pa.] 64 A. 417.

Rights in public lands [80] are acquired by Federal grant and the extent of the right acquired rests in the terms of the grant.[81]

Right of eminent domain.[82]—Where the charter of a railroad company states that its purpose is to construct a road by a designated route, the purpose is limited to the route substantially as designated.[83] A charter provision authorizing construction of a road between two certain points does not authorize condemnation of land between the initial point and another on the chartered route where it appears that the purpose is to build only to such point.[84] A specific right granted by franchise to condemn abandoned rights of way does not authorize condemnation of an abandoned right of way on which there is a prior location by a street railway.[85] Proceeding to condemn land must be in strict compliance with the statute.[86]

Private grants.[87]—A warranty deed of a strip of land for a right of way conveys an interest limited by the use for which the land is acquired, and on abandonment of the road the land will revert to the adjoining owner.[88] A railroad on receiving a deed from the free owner has no right to enter until a tenant has been compensated.[89] An owner who conveys a strip of land for a right of way cannot recover for injuries to his land caused by blasting in the course of construction.[90] A grant of a right of way over so much as the railroad was authorized to condemn passes a right in the maximum area it was authorized to condemn.[91] A contract to convey

80. See 6 C. L. 1198; and see Public Lands, 8 C. L. 1486.

81. Act Cong. March 3, 1877, granting a right of way through the Hot Springs Reservation, conferred only a pre-emption right "to the land occupied" and did not pass the fee to streets on which tracks were laid, which was expressly reserved for the use of the public. Little Rock, etc., R. Co. v. Greer, 77 Ark. 387, 96 S. W. 129.

82. See 6 C. L. 1198. And see Eminent Domain, 7 C. L. 1276.

83. Limitations cannot be circumvented by assuming to be a person seeking to require property for any of the uses mentioned in Code Civ. Proc. § 1238, reciting the uses for which land may be condemned. Boca & L. R. Co. v. Sierra Valleys R. Co. [Cal. App.] 84 P. 298. A railroad corporation has no power to condemn a crossing fifteen miles beyond the terminal of its road as designated by its articles of incorporation. Id. A branch line not authorized by the articles of incorporation if not incident to the main line nor is it an adjunct such as is referred to in Civ. Code, § 465, providing that a railroad company may take voluntary grants to aid construction, and the company may not condemn a crossing on the branch road. Id. Where a railroad relying on its charter authorizing it to construct a road between two certain points seeks to condemn land between the initial point and another, it has the burden to show that such other point is on the chartered route. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881. Where the enumerated powers of a corporation included only the construction of a main line and east branch, it could not claim the right to construct a west branch on the ground that it was necessary to the expressed objects of the corporation. Boca & L. R. Co. v. Sierra Valleys R. Co., 2 Cal. App. 546, 84 P. 298. Const. art. 12, § 17, providing that every railroad to intersect, connect, or cross, with every other railroad, is not self executing in the sense that a company may cross the tracks of another without regard to the power granted in the articles of incorporation. Id.

84. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881.

85. Fayetteville St. R. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345. Where a railroad has no express grant to condemn a right of way already located by a street railway company, and no necessity exists for such proceeding, and such right of way is only wide enough for one track, the general power of condemnation is insufficient to authorize such compensation. Id.

86. Under Code Civ. Proc. § 1244, the complaint in condemnation proceedings must show the location, general route, and termini. Boca & L. R. Co. v. Sierra Valleys R. Co., 2 Cal. App. 546, 84 P. 298. Complaint held sufficient. Id.

87. See 6 C. L. 1198.

88. Abercrombie v. Simmons, 71 Kan. 538, 81 P. 208.

89. Ft. Smith Suburban R. Co. v. Maledon [Ark.] 95 S. W. 472. The tenant may recover for damages to crops planted on the right of way after the deed was recorded. Id. Where an owner granted a right of way while a lessee was in possession and an independent contractor of the railroad entered and tore down fences and cattle escaped and injured crops, the company was held liable to the tenant. Clark v. St. Louis, etc., R. Co. [Ark.] 94 S. W. 930. Where a railroad company after acquiring a deed from the fee owner directed a construction contractor to enter on the land, it was jointly liable to the tenant for injury to crops. Ft. Smith Suburban R. Co. v. Maledon [Ark.] 95 S. W. 472. Complaint joining the railroad company and the contractor held not a misjoinder of parties. Id.

90. St. Louis, etc., R. Co. v. Hanks [Ark.] 97 S. W. 666.

91. A railroad was incorporated under an act authorizing it to condemn land for a right of way. An owner granted to it a right of way to so much and no more than it was authorized to condemn. Held it took

land for railroad purposes is to be given effect as other contracts[92] according to its terms.[93] Where a railroad has an option to purchase certain land for a right of way, its commencement of condemnation proceedings operates as an election not to take advantage of its option;[94] but the mere fact that a railroad company continued condemnation proceedings after obtaining from the owner of mortgaged premises an option to purchase is not a waiver of its rights under the option.[95] Where a railroad company builds its road upon land of another without other authority than parol license such license may be revoked at any time.[96] In North Carolina it is provided by statute that, in the absence of any contract, a railroad is presumed to have been granted its right of way, unless the owner within a specified time after location of the line applies for an assessment of damages.[97]

Conditions and reservations in private grants.[98]—A covenant to build right of way fences as a condition precedent runs with the land for failure to perform which the railroad is liable to a tenant of a subsequent grantee of adjoining land.[99] A reservation of a crossing reserves the right to cross only at a definite place to be selected, and when so selected precludes the right to cross at any other point.[1] Under a provision for reverter to the grantor on abandonment, the land reverts to the grantor though he has conveyed his remaining land, excepting the right of way.[2]

an easement in one hundred feet wide as that was the maximum it was authorized to condemn. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

92. Contract by which an Indian sold certain land to a railroad for reservoir purposes, at a time when the company had no right to condemn such land and when the right of occupancy and not the fee could be acquired from the Indian, held sufficiently performed by the Indian to entitle him to recover the purchase price. Choctaw, O. & G. R. Co. v. Bond [Ind. T.] 98 S. W. 335. Corporate successor of the purchaser held not entitled to defend an action for the purchase price of such land on the ground that it was ultra vires. Id. A contract with an owner in connection with a proceeding to condemn a right of way, reserving to the owner as a means of access from one part of his farm to another, and under grade crossing, and which was considered in awarding damages in condemnation proceedings, is binding on both parties. Chicago, etc., R. Co. v. Wynkoop [Kan.] 85 P. 595.

93. A tripartile agreement under which a right of way was acquired providing that other railroads should have a right to use such right of way construed and held not to confer on such other companies a right to use industrial tracks and terminal facilities subsequently constructed "off" such right of way. Central Trust Co. v. Wabash, etc., R. Co., 144 F. 476.

94. Stamnes v. Milwaukee & S. L. R. Co. [Wis.] 109 N. W. 100.

95. The mortgagee has a right to an award independent of such option. Stamnes v. Milwaukee & S. L. R. Co. [Wis.] 111 N. W. 62.

96. Johanson v. Atlantic City R. Co. [N. J. Err. & App.] 64 A. 1061. Where a railroad without authority laid tracks on a projected street under license from the owner of the land, and without further authority placed additional tracks across such streets, the landowner is entitled to a writ of mandamus to compel the removal of such additional tracks. Northern Cent. R. Co. v. Canton Co. [Md.] 65 A. 337.

97. Under Acts 1862-63, p. 30, c. 26, § 9, providing that in the absence of any contract a railroad is presumed to have been granted its right of way, unless the owner shall apply for assessment of its value within two years, where such assessment is not applied for, the statute applies though side tracks are built within two years. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

98. See 6 C. L. 1199.

99. Indianapolis Northern Trac. Co. v. Harbaugh [Ind. App.] 78 N. E. 80. It is immaterial that such covenant was not carried forward into the deed to the railroad. Id. Where a contract for the sale of land for a right of way contained a covenant to fence as a condition precedent, and action for injuries to stock growing out of failure to fence held based on the contract and not on the subsequent deed which was not alleged to contain such covenant. Id.

1. Chesapeake & O. R. Co. v. Richardson [Ky.] 98 S. W. 1042. Where the track is raised at a point where there is a private crossing so that such crossing cannot be used without extending the approaches beyond the right of way, an owner may recover diminution in the value of his land caused thereby. Id. One is not estopped to claim such damages though he renders it impossible to construct a crossing at such point. Id.

2. Where a right of way was conveyed by a deed providing that if the premises were not used for railroad purposes they should revert to the grantor, on abandonment of the premises by the railroad company, they reverted to the grantor though he had conveyed remaining land to another excepting the right of way. Spencer v. Wabash R. Co. [Iowa] 109 N. W. 453. This is so notwithstanding Code, § 2015, providing that on abandonment by the railway company for eight years, the right of way shall revert "to the owner of the land from which the right of way was taken." Id. Under the

A forfeiture will not be declared if the conditions of the deed are substantially complied with.[3] If upon a bill to compel specific performance of covenants to construct cattle guards, a shute for a quarry, and an outlet for a spring, it does not appear that any use of such structures would be made, relief will be denied and the plaintiff remitted to his action at law.[4]

Adverse possession by or against railroad companies.[5]—Where the right to land is acquired by prescription, all rights incident to ownership follow.[6] The term of occupancy essential is regulated by statute.[7] Only the area actually used can be acquired by adverse possession.[8] Land appurtenant to a railroad right of way is not ordinarily subject of adverse possession.[9]

Abandonment of right of way.[10]—A railroad company has no power to willfully abandon a part of its route,[11] and if it does so it forfeits its right to condemn for the part not abandoned.[12] Where a portion of land conveyed for railroad purposes is abandoned, the grantor may recover that portion.[13]

§ 5. *Aids and bonuses.*[14]—Public land grants to railroads[15] and municipal aid bonds[16] are treated elsewhere. An election for the purpose of voting a railroad aid tax must be held in the manner prescribed by law.[17] A town may not contest

laws of New York where land was acquired on the condition that it should revert when the company ceased to exist, and the company consolidated with another, the land did not revert on expiration of the period for which the grantee was incorporated, but title vested in the consolidated corporation for use during its existence. Colgate v. New York Cent., etc., R. Co., 100 N. Y. S. 650.

3. Where one donated land "for railroad purposes only," he could not have the deed canceled on the ground that it was understood that the land was to be used in connection with the main line, but it was used only in connection with a branch. Mobile, etc., R. Co. v. Kamper [Miss.] 41 So. 513.

4. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200.

5. See 6 C. L. 1200.

6. By entering on and occupying a right of way for two years, not only an easement to use such way is acquired but also the right to drain surface water therefrom, provided it does so without negligence and unnecessary injury to adjacent lands. Parks v. Southern R. Co. [N. C.] 55 S. E. 701. Where a railroad is built along a street with consent of owners and maintained for twenty years, further maintenance will not be enjoined at the suit of such owners. Wolfard v. Fisher [Or.] 84 P. 850.

7. The two-year prescription applies only where there has been a judgment of expropriation and the corporation has entered into possession before payment of compensation awarded. Amet v. Texas & P. R. Co., 117 La. 454, 41 So. 721.

8. Where an original entry by a railroad company was without authority and it did not appropriate a way sixty feet wide which it was authorized to take under its charter, it may be enjoined from subsequently taking more land, as it acquired by occupation only the land actually used. Leidigh v. Philadelphia, etc., R. Co. [Pa.] 64 A. 539.

9. Reading Co. v. Seip, 30 Pa. Super. Ct. 330. Under Revisal 1905, § 388, providing that a railroad shall not be barred of or presumed to have conveyed its right of way, possession thereof by individuals does not operate as a bar nor raise a presumption of abandonment. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

10. See 6 C. L. 1200.

11. A railroad company has no power to willfully abandon a part of its route, notwithstanding Rev. St. 1899, § 1161, providing that if work is not commenced within two years and finished in ten years, the charter shall be forfeited, provided that if a portion of the road has been constructed it may be retained. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881.

12. Kansas City Interurban R. Co. v. Davis, 197 Mo. 669, 95 S. W. 881.

13. Mobile, etc., R. Co. v. Kemper [Miss.] 41 So. 513.

14. See 6 C. L. 1200.

15. See Public Lands, 8 C. L. 1486.

16. See Municipal Bonds, 8 C. L. 1046.

17. Under Const. 1879, art. 242, Act 1886, No. 35, p. 44, and Act 1894, No. 153, p. 191, the petition of taxpayers calling for an election upon the question of tax in aid of railroad construction need not specify the amount to be raised. The law mentioned is complied with when the rate is designated, the period fixed, and such rate receives the requisite votes at the election. State v. Knowles, 117 La. 129, 41 So. 439. Where, under Const. 1879, art. 242, Act 1886, No. 35, p. 44, and Act 1894, No. 153, p. 191, upon the petition of taxpayers and agreeably to the result of an election, a tax is levied for ten years in aid of railroad construction, such tax is to be collected each year during the term upon the basis of the assessment each year. Id. Under Burn's Ann. St. 1901, § 5340, requiring a petition for a railroad aid appropriation to be signed by twenty-five freeholders, the fact that many signed their Christian names by initials only does not render the proceeding void. Good v. Burk [Ind.] 77 N. E. 1080. A tax voted in the following terms: "For a special tax of five mills on the dollar of all assessed property within the corporation limits of the town of Russell for ten years, in aid," etc., held to mean that such a tax should be levied and paid to the beneficiary each year for the

the regularity of an election held by itself for voting a railroad aid tax, especially after the tax has been earned by the construction of the road.[18] A compliance with the terms upon which the aid is voted entitled the railroad to it.[19] A petition for mandamus to enforce levy of a tax that has been voted in aid of railroad construction need not recite every detail of the proceedings by which the election was held.[20] The assignment by a railroad company to private individuals of the right to the avails of such a tax is not an abandonment of the tax where the right to assign was unconditionally granted to the company.[21] A private individual may be the beneficiary of such a tax where he becomes such by assignment.[22]

Subscriptions.[23]—A railroad company for the purpose of aiding in the construction of its road may accept and enforce an obligation payable to it on condition that it completes the line to a certain point within a specified time and establishes a depot there.[24] A substantial compliance with such contract is sufficient.[25] Whether there has been a sufficient compliance may be a question of fact.[26] A note payable to a director of a railroad company for his personal benefit on condition that the road is completed to a certain point by a certain time is void as contrary to public policy.[27]

§ 6. *Taxes, fees, and license charges.*[28]—An occupation tax may be levied on railroads[29] if authorized.[30]

term, especially where such construction had been adopted and acted on by the town for four years. Arkansas Southern R. Co. v. Wilson [La.] 42 So. 976.

18. Arkansas Southern R. Co. v. Wilson [La.] 42 So. 976. Such an action is prescribed in three months. Id.

19. A provision in a notice of election on the question of levying a tax that the tax shall be collected the first year after being voted, if the line is in operation between certain points and a depot constructed at a certain place, is complied with if the line is in operation and the depot constructed in a permanent manner, though off the main line on a spur track. Whitney v. Chicago, etc., R. Co. [Iowa] 110 N. W. 912. Where a railroad aid tax is voted to be paid when the line is in operation between certain points, such condition is complied with when the road is in operation between such points, regardless of the financial condition of the company to extend it further. Id. Where in constructing its road a company incumbers it for more than is allowed by Code, § 2088, but cancels the excess of the bonds before the hearing, there is no fraud to sustain an injunction against the collection of a railroad aid tax. Id. Under Ky. St. 1887-88, authorizing Estill county to subscribe for railroad stock and issue bond in payment of it and levy taxes to pay for them, the liability to levy the tax does not depend on the performance of the condition by the railroad to commence construction work within a year but upon the proper issue of the bonds. Estill County v. Embry [C. C. A.] 144 F. 913. See, also, Counties, 7 C. L. 976.

20. All that is necessary to allege is that on a certain day an election touching the imposition of the tax was held, that the result was favorable to the tax, that the railroad has been completed and the tax earned. Arkansas Southern R. Co. v. Wilson [La.] 42 So. 976.

21. Arkansas Southern R. Co. v. Wilson [La.] 42 So. 976.

22. It is no concern of the taxpayers or the town whether such assignment was based on a consideration. Arkansas Southern R. Co. v. Wilson [La.] 42 So. 976.

23. See 6 C. L. 1200.

24. Piper v. Choctaw Northern Townsite & Imp. Co., 16 Okl. 436, 85 P. 965. A contract was given to "A." Co. promising to pay it a certain amount if its line was completed to a certain point within a certain time. The name of the road was afterwards changed by a charter amendment and the line constructed. Held such latter road could recover. Id.

25. A railroad subscription contract requiring the road to be commenced near a certain point and extend by way of a certain place did not require that such place be on the main line. A branch line is sufficient. Hunt v. Upton [Wash.] 87 P. 56. A substantial performance with the terms of a subscription contract as distinguished from a strict compliance is all that is required. Id. Where a subscription contract required the construction of the road, the construction thereof by a corporation of which the person who obtained the subscription was a majority stockholder is a compliance with the contract. Id.

26. Where a railroad subscription contract provided that the work should be commenced at or near a certain place, and it was commenced a mile from such point, whether it was commenced "at or near" was held a question for the jury. Hunt v. Upton [Wash.] 87 P. 56.

27. McGuffin v. Coyle, 16 Okl. 648, 85 P. 954, 86 P. 962.

28. See 6 C. L. 1201. See, also, Taxes, 6 C. L. 1602.

29. Gen. Laws 1905, p. 336, c. 141, imposing a tax of one per cent of gross receipts, is an occupation tax, and not an interference with interstate commerce. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. Such statute imposes a tax on the gross receipts of a railroad derived from any source. Id.

30. In Georgia a municipal corporation is

§ 7. *Public control and regulation.*[31]—A penalty may be inflicted for refusal to redeem passenger tickets.[32] The state may, in the exercise of its police power, impose upon railroad companies, whose lines intersect public highways laid out after the construction of the road, the uncompensated duty of constructing and maintaining at such crossings all such safety devices as are reasonably necessary for the protection of the traveling public.[33] A contract with a municipality by which the company is relieved of such obligation and the municipality deprived of its right to enforce it as a police regulation is ultra vires and void.[34] Such requirement being referable to the police power is not a taking of private property for public use.[35] It is within the police power of the state to require interchange of cars at switching points where there is physical connection with other roads.[36] It is also a valid exercise of the police power to prohibit the use of steam whistles in close proximity to streets.[37]

Control by railroad commissions.[38]—Generally, railroad commissioners have only such powers as are expressly or impliedly conferred upon them by statute,[39] and a statute giving them supervision over steam railroads by implication denies them power over electric railroads.[40] An order of a commission requiring interstate trains to stop at a particular station is not a burden on interstate commerce,[41] nor is a statute which requires railroads to report to a state commission.[42] It is the duty of railroad companies to obey valid orders of the commission.[43] An appeal to

not vested with authority to levy an occupation tax on a commercial railroad doing business within the municipality. Town of Arlington v. Central of Georgia R. Co. [Ga.] 56 S. E. 1015.

31. See 6 C. L. 1201. See, also, Carriers, 7 C. L. 522, as to regulation of contracts and charges for carriage.

32. Under Code Supp. 1902, §§ 2128a, 2128c, a railroad is liable for the statutory penalty where an agent refuses to redeem a passenger ticket, though he had been authorized to do so. Rohrig v. Chicago, etc., R. Co., 130 Iowa, 380, 106 N. W. 935.

33. State v. St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261. A bridge over the tracks when necessary to make the crossing safe is a "safety device" within the meaning of that expression. Id., State v. Northern Pacific R. Co., 98 Minn. 429, 108 N. W. 269. Use of street by the public held to render contemplated viaduct necessary. State v. Wisconsin, etc., R. Co., 98 Minn. 536, 108 N. W. 822.

34. State v. Northern Pac. R. Co., 98 Minn. 429, 108 N. W. 269.

35. State v. St. Paul, etc., R. Co., 98 Minn. 380, 108 N. W. 261.

36. Louisville & N. R. Co. v. Central Stockyards Co. [Ky.] 97 S. W. 778.

37. City ordinance prohibiting the use of steam whistles on locomotives, except as brake signals or to prevent accidents, and prohibiting the escape of steam from cylinder cocks when the engine is running in proximity to a street or crossing is a valid exercise of the police power. Chicago, etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602.

38. See 6 C. L. 1201. See, also, Commerce, 7 C. L. 667.

39. In mandamus to enforce one of their orders, such order should appear on its face to be within their powers and authority. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875. If the order contains a material provision not within their power and compliance forthwith is commanded by the writ, it is demurrable since it must be enforced as a whole if at all. Id. Civ. Code 1892, § 2094, giving the railroad commission power to fix storage rates and the time when storage charges shall begin, does not give it power to fix the time when the relation of carrier ceases and that of warehouseman commences. Jones Bros. v. Southern R. Co. [S. C.] 56 S. E. 666. Laws 1905, c. 18, construed, and held that the railroad commission had power to employ an expert to ascertain the cost of constructing railroads and fix his salary which could not be reviewed by the state auidtor under Ball. Ann. Codes & St. § 134, in the absence of fraud. State v. Clausen [Wash.] 87 P. 498.

40. Kansas City O. B. & Elec. R. Co. v. Railroad Com'rs [Kan.] 84 P. 755. Has no jurisdiction to entertain an application by a railroad company for leave to cross its track with that of an electric railroad. Id.

41. See, also, Commerce, 7 C. L. 667. Where railroad commissioners have determined that accommodations furnished at a particular station are inadequate, its order requiring interstate mail trains to stop on flag is not a burden on interstate commerce. Railroad Com'rs v. Atlantic Coast Line R. Co., 74 S. C. 80, 54 S. E. 224. Mandanus will issue to compel such action, the writ being so framed as to give the railroad company the privilege to provide, in the alternative, facilities substantially the same as would be afforded by the stopping of such trains. Id.

42. Hurd's Rev. St. 1905, c. 114, requiring a report to the state, railroad and warehouse commission, substantially the same as the railroad is required to make to be interstate commerce commission; does not violate the commerce clause of the Federal constitution. People v. Chicago, etc., R. Co., 223 Ill. 581, 79 N. E. 144. This statute applies to foreign corporations doing business in the state as well as the domestic ones. Id.

43. When railroad commissioners make a

the courts lies from orders of the commission only where such appeal is allowed by law.[44]

§ 8. *Construction and maintenance.*[45]—A company chartered to construct a road between two named termini must perform the duty imposed [46] or substantially perform it.[47] In some states it is provided by statute that a certain length of track must be completed each year.[48] The right to bridge streams is regulated by statute,[49] and the limitations therein prescribed must be observed.[50] Whether a railroad is required to bridge a stream may depend on statute.[51]

Establishment and maintenance of depots.—A railroad must exercise its powers to determine the location of depots with reasonable discretion, taking into account the convenience of the public and its own interests,[52] and statutory require-

valid order for prevention of unjust discrimination and for the observance of rates, it is the duty of the railroad company to obey it, and such duty may be enforced by mandamus. State v. Atlantic Coast Line R. Co. [Fla.] 40 So. 875.

44. Acts 1905, p. 88, c. 53, § 6, authorizing an appeal to the court from any "rate classification rule, charge or general regulation" of the railroad commission, no appeal lies from an order requiring installation of an interlocking device at a crossing. Grand Rapids & I. R. Co. v. Hunt [Ind. App.] 78 N. E. 358. Under Burns' Ann. St. Supp. 1905, § 5405f, providing for an appeal to the appellate court from any "rate classification rule, charge or general regulation" of the railroad commission and for an appeal to the circuit court from an order as to the crossing of one railroad by another, held no appeal lies to the appellate court from an order in a proceeding under Burn's Ann. St. 1901, §§ 5158a, 5158h, authorizing a petition by one road to compel the use of an interlocking device at a crossing. Grand Rapids & I. R. Co. v. Railroad Commission [Ind.] 78 N. E. 981.

45. See 6 C. L. 1201.

46. A company chartered to construct a line between two certain points only built to a junction near one of them after a lease of the road, the charter was amended to release the company from its obligation to construct its line to such city provided it would construct a depot therein to which trains could be run over a connecting line. The lessee accepted such compromise and conformed to it for several years. Held that, though the original company had not financial ability to pay charges imposed by the connecting line or to construct a new line its lessee or practical owner was bound to do so. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692. The fact that it would entail financial loss to build the new line or pay the charges of the connecting line would not excuse performance of the duty imposed by its charter running trains to the terminus. Id.

47. Where a company accepted a charter to build its road between certain terminl and an amendment was accepted releasing it from the obligation to build the road to one termini provided it would run its trains there over a connecting line, it could fulfill its duty either by constructing a road of its own or running its trains over the connecting line. Winchester & S. R. Co. v. Com. [Va.] 55 S. E. 692. In proceedings before the corporation commission it appeared that a company was released from a duty imposed by its charter to build its road to a certain point provided it should run its trains over another line. Held that such connecting line not made a party to the proceeding was not subject to any order of the commission as to the running of trains over its line. Id.

48. A road only about three miles long does not fall within the restriction contained in Civ. Code 1895, § 2176, providing for future of charter if a certain length of line is not completed within a certain period. Bridwell v. Gate City Terminal Co. [Ga.] 56 S. E. 624. Civ. Code § 468, requiring railroads to complete every years five miles of the line or forfeit the right to extend beyond the point to which it is completed, does not limit the right to construct a road to one not less than five miles long. Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27.

49. A charter authorizing construction of a road across a river "above or near" a certain town authorizes construction of a bridge "above or near" such town but not necessarily above. Pedrick v. Raleigh, etc., R. Co. [N. C.] 55 S. E. 877. Where a company had full power to construct a draw bridge over a navigable stream, evidence held insufficient to show that such construction would constitute a nuisance justifying preliminary injunction. Id.

50. A railroad exercising the power conferred by Burn's Ann. St. 1901, § 5153, authorizing it to construct its road across any stream, etc., in a manner to afford security for property, etc., can do so only subject to the limitation prescribed. Graham v. Chicago, etc., R. Co. [Ind. App.] 77 N. E. 1055. Such statute does not apply merely to navigable streams. Id. A railroad company constructing its road without reference to the restriction imposed by this statute cannot confer to its grantee any greater right than it possessed nor relieve it from performance of its statutory duty. Id.

51. Where a dam was removed destroying a ferry, a railroad company was held not required under Act Feb. 27, 1879, and Act May 20, 1887, to furnish a bridge over the river to its railroad. Chesapeake & O. R. Co. v. Com., 105 Va. 297, 54 S. E. 331.

52. Chicago, etc., R. Co. v. People, 222 Ill. 396, 78 N. E. 784. A location of a union depot at the foot of an important street, 210 feet from the corporate line, within 4 blocks of a former depot, and within the police jurisdiction of the city, as ordered by the

ments.[53] A railroad company acting in good faith has the right as against the public to change the location of depots if it furnishes reasonably safe, accessible, and convenient depot accommodations,[54] and the fact that private interests will be prejudiced by the change is immaterial.[55] In some states the places where depots shall be established rests with the public authorities, which also have power to direct as to the accommodations to be furnished.[56] A statute requiring the construction of suitable buildings and conveniences at stations includes necessary side tracks.[57]

Private farm crossings.[58]—It is generally required by statute,[59] or charter provision,[60] that suitable private crossings shall be maintained where they are necessary,[61] and such duty, whether arising from statutory or contract obligation, may be enforced [62] after the right to the crossing has been fixed,[63] and damages may be

corporation commission, will not be enjoined because beyond the city limits. Dewey v. Atlantic Coast Line, 142 N. C. 392, 55 S. E. 292.

53. Whether Ky. St. 1903, § 772, requiring railroads to provide suitable and convenient waiting rooms, has been complied with is for the jury. Illinois Cent. R. Co. v. Com. [Ky.] 99 S. W. 320.

54. Where uncontrolled by contracts or previous acts on its part. Chicago, etc., R. Co. v. People, 222 Ill. 396, 78 N. E. 784. Where it was sought to compel a railroad to continue a depot it was threatening to abandon, evidence held sufficient to show that the location of depots at other places furnished safe, accessible, and convenient accommodations to the public. Id. Where in mandamus to compel the continuance of a depot the railroad threatened to abandon, the court held that no judgment could be predicated on an allege contract, and no error was assigned, the court on appeal must hold that such contract was of no force and the only question is whether the railroad company abused its discretion in changing the location of its depots. Id.

55. That private citizens have constructed dwellings and business houses in expectation that a depot will be continued after having been maintained for many years is of no force in mandamus to compel its continuance and the stopping of trains there. (Chicago, etc., R. Co. v. People, 222 Ill. 396, 78 N. E. 784), nor can the fact that the depot is surrounded by saloons and other places of vice be considered (Id.).

56. Under U. S. § 3890, providing that railroads shall establish depots at such places as the supreme court shall deem necessary, and § 3989, as amended by Acts. 1902, No. 68, providing that railroad commissioners may order additions to or changes in station houses or the location thereof, or new stations or houses, the power to establish a station at a certain point is in the supreme court and the power of the commissioners is only with regard to buildings where stations are established. In re Board of Railroad Com'rs [Vt.] 65 A. 82. The mere occasional stopping of trains at a point where a railroad had discontinued a station does not create a station so as to give the commissioners power to order construction of station houses. Id.

57. Under Rev. St. 1895, arts. 4492, 4493, 4519, requiring railroads to locate depot grounds before constructing their roads and forbidding any change therein and requiring them to erect suitable buildings, etc., held side tracks at stations are "an essential part of the road and the operation of cars thereon, in the absence of negligence, does not give an adjacent owner a cause of action for discomfort. St. Louis, etc., R. Co. v. Shaw [Tex.] 15 Tex. Ct. Rep. 129, 92 S. W. 30.

58. See 6 C. L. 1201.

59. Code § 2022, requiring railroads to construct private crossings when one person owns land on both sides of the track, applies and is not unreasonable where in the absence of such crossing an owner was compelled to go 160 rods to a highway. Mattice v. Chicago Great Western R. Co., 130 Iowa, 749, 107 N. W. 949. A strip of land 100 feet wide along the right of way purchased to protect the track from snow is a part of the railroad within this statute, though Code § 1994, provides for the taking otherwise than by consent of the owner only 100 feet. Id. Rev. St. 1899, § 1105, requiring construction of farm crossings, requires such construction where after the construction of the road land is acquired by one person on both sides of the track. Quantock v. Missouri, etc., R. Co., 197 Mo. 93, 94 S. W. 978.

60. Under a charter provision requiring farm crossing to be put in when necessary, when one crossing was put in and the land was subsequently divided, the company was required to put in a crossing for the portion of the land without one. Louisville & N. R. Co. v. Emerson [Ky.] 100 S. W. 863.

61. Where a railroad company is required to furnish a reasonable crossing, it is improper to instruct that it was only necessary to furnish such crossing as made it possible for the owner to have ingress and egress. Kendall v. Chicago, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 309, 95 S. W. 757. One who is a tenant of an adjoining farmer and frequently used a farm crossing maintained by the railroad company is not a bare licensee. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186. A bare licensee assumes the risks arising from defects existing in the premises. Id.

62. Specific performance of covenants on the part of a railroad company to build, provide, and maintain crossings, cattle guards, etc., entered into as part of the consideration for the grant of a right of way, may be enforced by mandatory injunction. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200. Where a railroad company to which land was conveyed covenanted as part of the consideration to maintain a suitable crossing and it was agreed that the cross-

recovered for failure to perform.[64] Contributory negligence of one injured at a private crossing bars recovery of damages by him.[65]

Public crossings.[66]—The discretionary power of public authorities to locate crossings will not be interfered with unless abused.[67] A charter provision requiring a railroad company to construct and maintain good and sufficient crossings imposes a contract duty [68] and may be enforced in the manner prescribed by statute.[69] Statutory authority to change the place or nature of a crossing, with the approval of public authorities, does not confer on such authorities power to grant any dispensation to the railroad.[70] If overhead crossings are not required by mandatory statute, it is optional with the railroad to grade or bridge.[71] Where it is reasonably practicable to build a bridge spanning an entire highway, a railroad company may be enjoined from erecting abutments in the highway,[72] unless the highway has not been

ing should be an opening through the embankment, and a successor in title of the railroad closed the opening, equity has jurisdiction to compel its restoration. Acts Feb. 19, 1849, § 12 (P. L. 84), applies only where land was taken in condemnation proceedings. Id.

63. No right of action accrues on a covenant to construct crossings at such places as the covenantee may designate until such designations have been made and notice thereof given. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200.

64. Where in constructing a road the company neglected for a long time to put in a suitable crossing, as it promised to do, and it had notice that the land owner was desirous of getting out wood he had cut, it was liable for loss of profits resulting from inability to sell the wood. Kendall v. Chicago, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 309, 95 S. W. 757. A railroad on receiving a conveyance agreed to maintain fences on each side of the track and provide the grantor with a crossing at the time of the conveyance. The land was farm land and the crossing connected portions of the farm. Fences with bars at the crossing were maintained for many years. Held a farm crossing only. Speer v. Erie R. Co. [N. J. Err. & App.] 65 A. 1024. Damages held excessive for destruction of such crossing. Measure of damages for breach of contract to build farm crossing is difference in value of farm with and without such crossing. Brown v. Pittsburg, etc., R. Co., 29 Pa. Super. Ct. 131.

65. Where one is injured in passing over a bridge at a private crossing which he knows to be defective and dangerous, he is guilty of contributory negligence and cannot recover. Houston, etc., R. Co. v. Evans [Tex. Civ. App.] 15 Tex. Ct. Rep. 872, 92 S. W. 1077.

66. See 6 C. L. 1201.

67. A county court in Tennessee which is vested with discretionary power in the location of highways cannot be enjoined from locating a grade crossing, unless a taking of property essential to the operation of the road or other irreparable injury be shown, or that the proposed action is a violation of some law. Cincinnati, etc., R. Co. v. Morgan County [C. C. A.] 143 F. 793.

68. A railroad charter requiring it to construct and maintain good and sufficient crossings is a contract between the corporation and the state in the sense that it could not be altered or the franchise withdrawn in the absence of reservation in the charter, and its acceptance imposed such contractual duty on the railroad company. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484.

69. P. L. 1903, p. 660, § 29, providing that where a railroad does not properly construct or maintain crossings the township or municipality may maintain specific performance to compel it to do so, is not unconstitutional as providing a compulsory remedy as distinguished from a preventitive remedy. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484. The remedy provided by P. L. 1903, p. 660, § 29, authorizing a township to maintain specific performance to compel a railroad to maintain its crossing in proper repair, is available regardless of remedies by mandamus, ejectment, or indictment. Id. Where a railroad company refused to comply with a provision in its charter that the raising or lowering of highways must be done to the satisfaction of the town council, it was the duty of the town to make the alteration itself and recover from the railroad. Briden v. New York, etc., R. Co., 27 R. I. 569, 65 A. 315.

70. P. L. 1868, p. 1037, authorizing change of location of grade of a highway at a crossing provided no such change should be made without concurrence of highway surveyors, does not confer on surveyors authority to vacate any portion of a highway in the interests of a railway company. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484. P. L. 1868, p. 1037, § 1, authorizing certain railroad companies to shorten and straighten their line to cause the same to pass above or below a public highway or street and if necessary change the location or grade so as to make the crossing more convenient, provided no such change should be made without concurrence of municipal authorities, does not authorize township officers to grant any dispensation to one of the railroad companies mentioned. Id.

71. Acts Ark. 1905, p. 116, requiring railway companies to grade crossings and streets and providing that crossings in cities and towns may be by bridge, is not mandatory with respect to bridges, and it is optional with the railroad company to grade or bridge a crossing. De Lucca v. North Little Rock Co., 142 F. 597.

72. Radnor Tp. v. Philadelphia, etc., R. Co., 214 Pa. 299, 63 A. 694.

opened to its full width.[73] The division of cost of construction of a crossing on a highway laid out after the railroad was built is sometimes regulated by statute.[74] Such method is also prescribed in case of change in the nature of the crossing.[75]

Railroad companies are required to keep their tracks and approaches thereto at public crossings in good repair,[76] whether such approach was constructed by them or not,[77] and are liable in damages for injuries resulting from failure to do so[78] if such injuries result from their negligence,[79] and not from the contributory negligence of the person injured,[80] especially where such duty is imposed by law.[81] But

73. Where because of peculiarities of the country a road 33 feet wide has only been opened 20 feet wide, a railroad company constructing an overhead crossing will not be restrained from constructing a bridge 20 feet wide. Radnor Tp. v. Philadelphia, etc., R. Co., 214 Pa. 299, 63 A. 694.

74. Under Cobbey's Ann. St. 1903, § 6106, it is the duty of a railroad company to make and keep in repair crossings and approaches notwithstanding the railroad was constructed before the highway was laid out. Public authorities are required to build that part of the highway within the right of way which they would be required to make had the railway not been constructed. Missouri Pac. R. Co. v. Cass County [Neb.] 107 N. W. 773. Under this statute a railroad cannot recover damages from a county for the cost of putting in cattle guards, erecting sign posts, building wing fences, planking the track, and constructing approaches. Id. Compensatory damages should be allowed for the land taken from the right of way. Id. Where in making approaches it is necessary to grade nearly all the width of the right of way, the railroad should be allowed such sum as the county would have been compelled to expend in grading the road had the railroad never been built. Id.

75. St. 1900, p. 411, c. 439, § 6, requiring a railroad to pay a part of the cost of an overhead bridge at a crossing, held constitutional. In re Bristol County [Mass.] 79 N. E. 339. Under Heydecker's Gen. Laws, p. 3292, c. 39, §§ 62, 65, providing that when a change is made in a grade crossing, half the expense shall be borne by the railroad, one-fourth by the state, and one-fourth by the municipal corporation, and that no claim for damages to property shall be allowed unless notice be filed with the railroad commissioners, etc., filing such claim with the village is insufficient as it is under no duty to forward it to the commissioners. Mehlenbacker v. Salamanca, 101 N. Y. S. 1073.

76. A bridge which runs up to the cross ties at a crossing is such an approach as the railroad is required to keep in repair. Southern R. Co. v. Morris [Ala.] 42 So. 19. Under as well as independently of Code 1896, § 1164, providing that when a railroad crosses a public highway it must place the road in a condition satisfactory to county commissioners, the company must not only put but must keep the approaches in proper repair. Southern R. Co. v. Morris, 143 Ala. 628, 42 So. 17.

77. Since it is the duty of a railroad to keep approaches in repair, failure to prove that the company constructed an approach does not defeat recovery by one injured at a crossing. Southern R. Co. v. Taylor [Ala.] 42 So. 625. Failure to allege that the railroad company constructed the approach, is immaterial, it being its duty to keep it in repair regardless of who constructed it. Southern R. Co. v. Morris [Ala.] 42 So. 19. Failure to prove the date of the injury as alleged is not a fatal variance. Southern R. Co. v. Taylor [Ala.] 42 So. 625.

78. Whether a railroad company was negligent in maintaining a defective crossing where a horse fell and injured its rider held a question for the jury. Southern R. Co. v. Clark [Va.] 56 S. E. 274. Where one was injured because of a defective walk over a crossing, whether the hole or depression was such a defect as to render defendant railroad company guilty of negligence in permitting it to remain is a question for the jury. Durr v. New York, etc., R. Co., 184 N. Y. 320, 77 N. E. 397. That a railway company dug a hole on its premises close to a frequented park is some evidence of wanton disregard of those using the park. Ruddell v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 528. Whether one injured on a way across a railroad track had a right to be there, and whether the public used such way with the consent of the railroad company, held questions for the jury. Id.

79. The mere fact that a spike at a crossing became loose, worked up half an inch, and a mule caught its foot on it and was injured, does not show negligence, as a matter of law. Perdue v. St. Louis S. W. R. Co. [Ark.] 100 S. W. 901. A railroad which constructs steps over its right of way fence impliedly invites people to use them and is liable where injuries result from failure to use ordinary care to keep the steps in repair. St. Louis, etc., R. Co. v Dooley, 77 Ark. 561, 92 S. W. 789. Where the essence of a case for injury is that the railroad company removed the original walk at a crossing and replaced it so that it was five inches higher and that plaintiff fell and was injured, the allegation as to the removal of the original walk was immaterial and recovery might be had without proof thereof. Hopkins v. Grand Rapids & I. R. Co. [Mich.] 13 Det. Leg. N. 1067, 110 N. W. 1064. An answer in the affirmative to an interrogatory whether an accident at a crossing would have happened by reason of a defect therein except for the manner in which the plaintiff's wagon was loaded construed to mean that it would. Chicago, etc., R. Co. v. Gallion [Ind. App.] 80 N. E. 547.

80. Where a traveler was injured at a crossing because of a defect therein of which he had no notice, the question of his negligence was held for the jury. Chicago etc., R. Co. v. Gallion [Ind. App.] 80 N. E. 547. Where one was injured by being thrown from his wagon while going over a crossing, whether the condition of the crossing was sufficient warning of the danger was

railroad companies are not required to keep in repair portions of a street which are not a part of an approach,[82] nor to repair the portion of a highway beneath its overhead crossing.[83] The duty of a railroad company to construct highway bridges over its tracks is a continuing one and it should be required to strengthen the bridge whenever for any reason it becomes insufficient for highway traffic.[84]

Damages for negligent construction.[85]—Where a railroad is constructed in a street, an abutting owner may recover for injuries incident thereto regardless of negligence,[86] and, where private rights are violated in course of construction, the railroad is liable.[87] If a track is so constructed as to be reasonably sufficient for the purpose intended, it is sufficient.[88]

held for the jury. Lowenstein v. Missouri Pac. R. Co., 117 Mo. App. 371, 93 S. W. 871. Where one was injured while driving over a crossing, an instruction requiring him to not only use reasonable care to prevent being thrown from the wagon but also to "brace himself" was erroneous. Id. Where a traveler with a loaded wagon was injured by reason of his load tipping over because of a defect in a crossing, an instruction that if the wagon was so loaded that it was liable to tip on an uneven road, etc., there could be no recovery, held erroneous as eliminating what a reasonably prudent man would have done under the circumstances. Chicago, etc., R. Co. v. Gallion [Ind. App.] 80 N. E. 547. In an action for injuries by reason of a defective crossing, an instruction that if the plaintiff's wagon was so loaded that the load was liable to tip while passing over uneven ground, etc., was erroneous as assuming that the acts hypothesized constituted contributory negligence as a matter of law. Id.

81. Where a duty is imposed by law on a railroad company to keep crossings in a safe condition or to provide temporary crossings where alterations are being made at the regular one, it may not escape liability for injury to a traveler because it intrusted such duty to an independent contractor. Choctaw, O & W. R. Co. v. Wilker, 16 Okl. 384, 84 P. 1086.

82. Evidence sufficient to show that filled portions of a street, made in constructing a viaduct over a railway constituted a mere raising of the street grade and was no part of the viaduct or its approaches, and that railroad was not required to keep it in repair. State v. Northern Pac. R. Co., 99 Minn. 280, 109 N. W. 238, 110 N. W. 975.

83. A railroad charter requiring the company to construct and keep in repair bridges or passages over or under the track at crossings does not require it to maintain the highway under its overhead crossing in repair. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484.

84. From increased travel or greater weight of vehicles. Briden v. New York, etc., R. Co., 27 R. I. 569, 65 A. 315. Laws 1844, § 11, incorporating a railroad and providing that the road should be so constructed as not to impede travel or obstruct a highway, and if a highway was raised or lowered it should be done in a manner satisfactory to the town council, does not authorize a city to compel a railroad to strengthen a bridge over its tracks so that it will sustain street cars. The city was relieved of its statutory duty relative to the bridge which was imposed on the railroad company, and such duty was fulfilled if the bridge was made safe for travelers and teams. Id. The statute has no application to a proceeding by a city to compel the railroad company to strengthen the bridge so that it would bear street car traffic. Id.

85. See 6 C. L. 1202.

86. When a railroad is constructed in the street, abutting owners are entitled to recover for injuries sustained because of flooding, noise, smoke, and cinders, regardless of the question of negligence. Schier v. Cane Belt R. Co. [Tex. Civ. App.] 100 S. W. 360. When an abutting owner's property was injured by flooding, noise, smoke, and cinders, because of the construction of a railroad in the street, it was no defense that the road was skillfully constructed and the the trains carefully handled, as negligence therein was not alleged. Id.

87. Where damages were not claimed for negligence in construction, but negligence in tearing down a fence, diverting a stream, etc., was asserted, an instruction that the owner was estopped from asserting damage caused by negligent construction because he had released them by the contract granting the right of way was inapplicable. Kendall v. Chicago, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 309, 95 S. W. 757. Where in the construction of a road a pasture fence is negligently tore down, no crossing furnished, and a stream diverted, an owner is not required to make reasonable expenditure to prevent damages resulting therefrom. Id. In an action for negligently tearing down a pasture fence, refusing to rebuild it, refusing to construct a crossing, and negligently diverting a stream, an answer that the company purchased the right of way for $2,500, which included full remuneration for all damages, was not open to exception. Id. Under the statutes of Arkansas, where a right of way was acquired by purchase over land upon which a telephone line had been constructed by consent, the railroad was held not entitled to remove the line and destroy its utility where it was not a nuisance, though it had repeatedly demanded that the telephone company remove it. St. Louis, etc., R. Co. v. Batesville & Winerva Telephone Co. [Ark.] 97 S. W. 660. If dirt and rock from excavation be deposited on adjoining premises, owner may recover in trespass. Bigham v. Pittsburg Const. Co., 29 Pa. Super. Ct. 86.

88. The fact that a passing track at a station is not so constructed as to take a rapidly moving train is not proof of negligence where it is sufficient for the purposes

Abolition and prevention of grade crossings.[89]—In some states the establishment of future grade crossings is prohibited.[90] A change in a grade crossing should not be ordered if it would be useless.[91]

Crossings with other railroads, street railroads, and canals.[92]—A constitutional right of a railroad company to intersect, connect with, or cross any other railroad, is not confined to main tracks but extends to spur and other tracks forming a part of the same system.[93] Though such right exists, a contract therefor may be based on a sufficient consideration.[94] In Wisconsin it is provided that if terms of crossing cannot be agreed upon they shall be fixed by a commission [95] when it is determined that such crossing is necessary,[96] and no appeal lies from a determination that it is necessary.[97] A railroad company has no right in the street at crossings except subject to the proper use of such premises for street purposes and may not enjoin a street railway company from crossing its road at grade where the latter has obtained a right to construct its road.[98]

Rights on tracks of other companies are provided for by statute,[99] and, where one railroad has a right to run its trains over the line of another and to have its road connected therewith, injunction will issue to compel the granting of such right.[1]

for which it was intended and safe for passage of trains under control. St. Louis, etc., R. Co. v. Bishard [C. C. A.] 147 F. 496.

89. See 6 C. L. 1202.

90. Act June 7, 1901 (P. L. 531), prohibiting grade crossings except where allowed by the court, does not apply to streets established by ordinance three years prior to the date of the act. Ligonier Valley R. Co. v. Latrobe Borough [Pa.] 65 A. 548.

91. It is improper for railroad commissioners to order a change of a crossing at grade to one under grade which would render the highway impassable for a great portion of the year because of overflow and the only relief afforded would be a proposed grade crossing maintained by the railroad company which it would permit the public to use at will. In re Delaware, etc., R. Co., 101 N. Y. S. 9.

92. See 6 C. L. 1203.

93. Kansas City, etc., R. Co. v. Louisiana W. R. Co., 116 La. 178, 40 So. 627.

94. Under Const. § 216, requiring one railroad to allow another to cross its tracks, a contract by which one allowed another to cross on condition that it should be liable for all damages by reason of collisions because of failure of its employes to stop trains is based on a consideration. Owensboro City R. Co. v. Louisville & N. R. Co., 29 Ky. L. R. 596, 94 S. W. 22. Where one company desires to construct its tracks over those of another, they may agree as between themselves as to the terms of crossing, including compensation for the right to cross and the expense of constructing and maintaining an interlocking system as well as to who shall pay flagman and other operatives. Hydell v. Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066.

95. Under Rev. St. 1898, § 1828, providing that when railroads cannot agree as to terms of a crossing the same shall be determined by commissioners appointed by the court, a railroad desiring to cross is not required to do any particular act in furtherance of an agreement, and there was no response by the other road to their proposition within a month, a finding that the parties could not agree was justified. In re Eastern Wisconsin R. & Light Co., 127 Wis. 641, 107 N. W. 496.

96. Under Rev. St. 1898, § 1828, relative to the right of one railroad to cross or intersect with another, the necessity of the crossing petitioned for is to be determined by the legislature and not by the court or commissioners appointed to determine the terms on which the crossing may be made. In re Eastern Wisconsin R. & Light Co., 127 Wis. 641, 107 N. W. 496. Where an electric railway could not enter a city over its proposed route without crossing the tracks of a street railway, the necessity of such crossing sufficiently appeared though the latter offered the use of certain portions of its tracks. Id.

97. Under Laws 1905, p. 912, c. 497, providing for an appeal to the court from an award of commissioners appointed to determine the terms on which one railroad may cross another, held that whether petitioner was entitled to a grade crossing was not reviewable on appeal from an order fixing the right to a crossing and providing for appointment of commissioners. In re Eastern Wisconsin R. & Light Co., 127 Wis. 641, 107 N. W. 496.

98. Pennsylvania Co. v. Lake Erie, etc., R. Co., 146 F. 446. This is the rule in Illinois. East St. Louis R. Co. v. Louisville & N. R. Co. [C. C. A.] 149 F. 159. The plenary power given to city councils by Hurd's Rev. St. 1905, to regulate the use of streets, includes power to authorize the crossing of a railroad track over a street by a street railway. Such power is not taken away by Act July 1, 1889, p. 223, creating the State Railway and Warehouse Commission. Id.

99. Where a railroad charter (Acts 1870, p. 739, c. 412, § 10, and Acts 1872, p. 171, c. 119, §§ 4, 5), shows that the purposes of the existence of such road was its use by other railroads, and provides that "all railroad companies" shall have equal right to run trains over its tracks, held that such statutes impose on such road the duty to allow the use of its track to other railroads and also gives other roads the right to have connection made. Union R. Co. v. Canton R. Co. [Md.] 65 A. 409.

1. No adequate remedy at law. Union R. Co. v. Canton R. Co. [Md.] 65 A. 409.

Cattle guards, fences, and stock gaps.[2]—At common law, railroads are not quired to fence their right of way,[3] but in many states railroads are required by statute to construct fences and cattle guards,[4] especially where the road runs through cultivated fields,[5] and are required to construct and maintain stock gaps where it runs through pasture lands [6] or lands which are enclosed,[7] and failure to comply with such statute renders the company liable for damages done by trespassing stock [8] or for cattle lost.[9] But such statutes do not impose a liability for injuries not proximately resulting from failure to comply with the statute,[10] nor for injuries not falling within the terms of the statute.[11] In Indiana if a railroad company refuses to fence its right of way an adjacent owner may do so and recover the cost thereof [12] together with necessary attorney's fees.[13]

2. See 6 C. L. 1204.

3. Mangold v. St. Louis, etc., R. Co., 116 Mo. App. 606, 92 S. W. 753.

4. Burns' Ann. St. 1901, § 5323, requiring railroads to maintain fences along their tracks sufficient to turn stock, is a valid exercise of the police power to provide against accidents to life or property in any business or employment. Chicago I. & L. R. Co. v. Irons [Ind. App.] 78 N. E. 207. It is proper to charge that it is the duty of railroad companies to construct lawful fences and cattle guards, and, if damage is done by trespassing cattle because of their failure to do so, they are liable. Rosentingle v. Illinois Southern R. Co. [Mo. App.] 99 S. W. 788. Where in an action for damages caused by stock trespassing after crossing cattle guards the company alleged that the cattle guards used at such place were a certain standard kind used generally on all railroads, without alleging that they were reasonably sufficient to turn stock, was fatally defective. Seaboard Air Line R. Co. v. Wright [Ala.] 41 So. 461.

5. See post, § 11, Injuries to Animals.

6. Under Kirby's Dig. §§ 6732, 6743, 6757, 6758, a foreign corporation leasing a railroad in the state is liable under the statute requiring it to erect stock gaps where the road passes through enclosed land. St. Louis, etc., R. Co. v. Hale [Ark.] 100 S. W. 1148; Chicago, etc., R. Co. v. Fitzhugh [Ark.] 100 S. W. 1149. Under Kirby's Dig. § 6045, providing that summons may be served on any station agent, and that a notice to the company may be served in the same manner, service of notice on such agent in an action to recover a penalty for failure to put in stock gaps is sufficient. St. Louis & S. F. R. Co. v. Hale [Ark.] 100 S. W. 1148. Under a statute requiring construction of stock gaps where the road passes through enclosed land, such gaps must be erected where land is surrounded by a good wire fence, though it is not a lawful fence under the statute. Id. The statute applies where the railroad owns the fee of the right of way by purchase from the owner. Id.

7. Code 1892, § 3561, requiring the construction of necessary stock gaps and cattle guards where the road passes through enclosed land, applies only where land is substantially enclosed. Yazoo & M. V. R. Co. v. Sallis [Miss.] 42 So. 202. Does not apply if the field is not enclosed or where the fence enclosing it is in such a delapidated condition that it will not turn stock. Id.

8. Complaint held to state a cause of action under Rev. St. 1899, § 1105, making a railroad liable for injuries done by trespassing cattle because of failure to construct cattle guards and fences. Rosentingle v. Illinois Southern R. Co. [Mo. App.] 99 S. W. 788. An action for damages done by trespassing cattle because of failure to maintain fences is not governed by Rev. St. 1899, § 3339, providing that actions for injuries to animals shall be brought before a justice in the township where the injury occurred. Id.

9. A railroad failed to put cattle guards where the road entered a pasture. A third person cut the right of way fence and cattle escaped. Held failure to place the cattle guards and the cutting of the fence both operated to bring about the result of cattle escaping and being lost. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431. The act of the third person in cutting the fence was the primary cause of the loss and a judgment against him in favor of the railroad was proper. Id. Where a railroad was run through a pasture, the right of way fenced and cattle guards placed at a crossing left for cattle, held failure to place cattle guards where the track entered the pasture was a violation of the statute relative to fencing. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431. The purpose of the statute requiring cattle guards to be placed at the exit and entrance of a railroad into and from a pasture is to prevent escape of cattle as well as depredations on enclosed land. Id.

10. Under Rev. St. 1899, § 1105, requiring railroads to fence their right of way where the road passes through fields or unenclosed lands or be liable for damages to crops by trespassing animals, imposes no liability on the theory that one was prevented from planting a crop because it would have been destroyed by cattle if he did. Mangold v. St. Louis, etc., R. Co., 116 Mo. App. 606, 92 S. W. 753.

11. Under Code 1896, § 3480, requiring a railroad company to put in cattle guards wherever an owner demands and shows necessity therefor, one not an owner may not recover damages for failure to put in such guards nor for damages caused by hogs entering his land through a gap not on his land. Central of Georgia R. Co. v. Sturgis [Ala.] 43 So. 96. A complaint under such statute alleging damages because of failure to repair guards, but not alleging that plaintiff is the owner of the land or that the company ever erected guards thereon, is demurrable. Id. Amended complaint under this statute held good as against demurrer. Id.

12. Under Burn's Ann. St. 1901, §§ 5323, 5325, requiring railroads to fence their

Drainage and disposal of surface water.[14]—Railroads must be so constructed as not to interfere with the escape of surface water,[15] and in Texas it is required that such drainage facilities be installed as the natural lay of the land requires.[16]

Obstruction of watercourses.[17]—If the flow of a stream is obstructed in violation of a statute, a railroad company is liable regardless of the question of negligence,[18] but in the absence of such statute a railroad is not liable if the injury would

tracks and providing that if they fail to do so an adjacent owner may recover the cost, such owner may construct a woven wire fence, though it costs more than barbed wire, since the statute does not prescribe the kind of fence he is required to build. Terre Haute & L. Co. v. Salisbury [Ind. App.] 77 N. E. 1097. The erection of a fence between the right of way and land of an adjoining owner is a substantial compliance with Burn's Ann. St. 1901, §§ 5323, 5324, requiring the fence to be built on the margin as near as practicable to the line and entitled the owner to recover the cost thereof. Vandalia R. Co. v. Stephens [Ind. App.] 78 N. E. 1055. A claim showing an itemized statement presented to the railroad company providing that if the company neglects for sixty days "to pay said account" suit may be maintained to recover the reasonable value of the fence, is not an account within Burn's Ann. St. 1901, § 365, providing that when a pleading is founded on an account the original or a copy must be filed. Id. Under Burn's Ann. St. 1901, § 5325, providing that where a railroad neglects to keep a fence in good repair a notice of probable cost of repair shall be served upon the agent, and § 5324 relative to the proceeding where a railroad neglects to construct a fence, but not providing for such notice, a notice of probable cost is not necessary where a fence has become so decayed that it will not turn cattle at any part of its course. Vandalia R. Co. v. Kanarr [Ind. App.] 77 N. E. 1135. A notice by a landowner of his intention to construct a fence addressed to the Terre Haute & Indianapolis Railroad Company, but served on the Terre Haute & Logansport Railroad Company, which owned the road in question, who forwarded the notice, is good notwithstanding the mistake in the name of the company. Id. Where a right of way fence after being repaired by the railroad company pursuant to notice was ineufficient to turn stock as required by Burn's Ann. St. 1901, § 5323, the landowner was entitled to repair or rebuild and recover the cost and attorney's fee from the company. Chicago, etc., R. Co. v. Irons [Ind. App.] 78 N. E. 207.

13. Burn's Ann. St. 1901, §§ 5323-5325, authorizing recovery of attorney's fees in an action by a landowner to recover cost of a fence built by him after failure of the railroad to build it, is valid. Terre Haute & L. R. Co. v. Salisbury [Ind. App.] 77 N. E. 1097. Record held sufficient to show that an attorney had been employed and that the plaintiff was entitled to recover attorney's fees. Id. Where an adjoining owner seeks to recover the cost of a fence, he may recover attorney's fees without proof that he employed an attorney. Vandalia R. Co. v. Stephens [Ind. App.] 78 N. E. 1055.

14. See 6 C. L. 1204.

15. A railroad has no right to obstruct the flow of surface water by the construction of an embankment. Alabama Great Southern R. Co. v. Prouty [Ala.] 43 So. 352. Where damages resulted from flooding caused by embankment, evidence as to negligence held for the jury. White v. Atchison, etc., R. Co. [Kan.] 88 P. 54. Damages are recoverable by a landowner for negligent maintenance of an insufficient culvert causing lands to be flooded, though damages may have been recovered for the location of the road, since damages there recoverable were estimated on the theory that the road would be constructed and maintained in a reasonably proper and skillful manner. Chicago, etc., R. Co. v. Ely [Neb.] 110 N. W. 539. Where a railway company constructing an overhead crossing constructed abutments in the highway and failed to provide proper drainage facilities it was bound to displace the abutments and properly drain the cul de sac formed. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484. Negligent construction of railroad bridge whereby lands were flooded held for jury. Miller v. Buffalo & S. R. Co., 29 Pa. Super. Ct. 515.

16. Under a statute requiring construction of necessary culverts as the natural lay of the land demands, a railroad company is liable for damages caused by overflow regardless of negligence in construction of its road and culverts. Missouri, etc., R. Co. v. Crow [Tex. Civ. App.] 15 Tex. Ct. Rep. 839, 95 S. W. 743. Rev. St. 1895, art. 4436, requiring the construction of necessary culverts according to the lay of the land, applies not only to surface water but to water overflowing from a stream in times of ordinary flood. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. Under Rev. St. 1895, art. 4436, requiring the construction of drainage facilities as the natural lay of the land requires, a company constructing an embankment and switch without providing such culverts is liable for injuries caused by flooding. Houston, etc., R. Co. v. Barr [Tex. Civ. App.] 99 S. W. 437. In an action for flooding caused by alleged failure to construct necessary culverts, etc., whether the flood was an unprecedented one was held for the jury. Baugh v. Gulf, etc., R. Co. [Tex. Civ. App.] 100 S. W. 958. Where a railroad fails to construct necessary sluices and culverts, it is liable for damages caused by flooding regardless of the care used in construction. Id.

17. See 6 C. L. 1204.

18. Where the flow of a stream is obstructed by embankment in violation of statute, the railroad company is liable for ensuing damages regardless of the question of negligence. Missouri, etc., R. Co. v. Dubose [Tex. Civ. App.] 15 Tex. Ct. Rep. 714, 95 S. W. 588.

have occurred regardless of the obstruction.[19] The construction of an embankment across a watercourse is a continuing wrong.[20]

§ 9. *Sales, leases, contracts, and consolidation. Leases.*[21]—A railroad company may lease its property and franchises where it is authorized to do so by its charter.[22] The lease must be pursuant to regular corporate act.[23] The contract must be lawful.[24] The rights of the parties rest in the terms of the lease.[25] A lease is presumed to express the contract of the parties and to merge a prior contract pursuant to which it was executed, though it differs from the terms of such contract.[26] The terms of a lease may be specifically enforced if their is no adequate remedy at law.[27]

Duties and liabilities subsequent to sale or lease.[28]—A lessee of a railroad has such an interest in the property as entitles it to an injunction to prevent any illegal

19. In an action for injuries from flooding caused by construction of an embankment along, and bridges across, a stream, an instruction that the railroad would not be liable if the flood was unprecedented and would have occurred regardless of its embankment held improperly refused because not covered by other instructions. Missouri, etc., R. Co. v. Bell [Tex. Civ. App.] 93 S. W. 198. Evidence of other injuries by the same flood to land similarly located held admissible on the question as to whether the flood was unprecedented. Id. Requested instruction was not erroneous as excluding an alleged ground of liability arising from narrowing the channel and otherwise obstructing the flow of water. Id.

20. Where a railroad embankment is constructed across a watercourse and lands are flooded, the negligent construction is a continuous wrong, and damages accruing six years prior to action brought may be recovered. Lawton v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 128.

21. See 6 C. L. 1205.

22. Acts 1848-49, p. 138, c. 82, incorporating the North Carolina Railroad Company and conferring on it the right to transport passengers and freight and to "farm out" the right of transportation, authorizes it to lease its property and franchises. Hill v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 854. Under Comp. Laws, § 6339, authorizing the leasing of a railroad to either domestic or foreign corporation and declaring that the lessee shall operate it subject to privileges and duties prescribed by the laws of the state, a lease to a nonresident company for ninety-nine years is valid and relieves the lessor from liability for acts done by the lessee in maintenance and repair of the road bed. Ackerman v. Cincinnati, S. & M. R. Co., 143 Mich. 58, 12 Det. Leg. N. 908, 106 N. W. 558.

23. Laws 1893, p. 907, c. 433, expressly provides that where two-thirds of the stock of a railroad corporation represented at a meeting called for purpose of leasing the road votes in favor of it, the authority is sufficient. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

24. A lease of a portion of the right of way for business purposes with a view to securing freight is not contrary to public policy. City of Detroit v. Little Co. [Mich.] 13 Det. Leg. N. 803, 109 N. W. 671. If a provision in a lease was intended to restrict the right of the lessor to mortgage, its reversion is void as restraining alienation. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

25. Where a lease contained a covenant not to fix certain than a higher maximum freight rate but did not provide for forfeiture for breach of such covenant, an action for damages and not for forfeiture is the proper remedy. Hill v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 854. Where under a lease of a railroad it was determined that the lessor was entitled to the benefit of a reduced rate of interest on a certain issue of stock, it was held that an agreement apportioning such benefit between the parties sanctioned by the stockholders of both companies was binding on both and concluded stockholders. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026. Where a lease of a railroad provided that the lessee should pay interest on the lessor's bonds as part of the rental, a provision that the lessor should not issue additional bonds does not prevent it from issuing new bonds to pay old ones. Id. Where a lease of a railroad provided that the lessee should pay interest on the lessor's bonds as part of the annual rental, also that if the lessor should pay the principal the lessee would pay semi-annually the equivalent of the interest stopped, that if the lessor did not pay a certain issue at maturity the lessee should and the lessor would issue new bonds in lieu thereof, held that the lessor was entitled to pay of the issue and secure any advantage it could by a reduction of interest on a reissue. Id.

26. Grand Trunk W. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 785. Series of leases and agreements between a terminal railroad and its constituent companies as tenants providing for the use by them of the tracks and terminal facilities of the lessor and the payment of rent on a wheelage basis held not to contain a covenant on the part of one of the lessees which could be enforced by others in their own right. Id. Such lease held not to contain a covenant binding the lessees to use the tracks and terminal facilities during the term but merely a grant of the right to do so to the extent desired. Id.

27. A contract of lease by which a lessee railroad company agrees to run its trains over the tracks and use the terminal facilities of the lessor and pay rental on a wheelage basis for nine hundred and ninety-nine years may be specifically enforced in equity. Grand Trunk W. R. Co. v. Chicago, etc., R. Co. [C. C. A.] 141 F. 785.

28. See 6 C. L. 1206.

interference with its enjoyment of the leased property.[29] In the absence of statute a lessor is liable for a conversion committed by the lessee in the operation of the leased property and franchises,[30] and in some states it is liable for injuries to employes,[31] and a railroad company may not excuse itself from liability by any contract with its lessee where injury results from the lessee's negligence in conduct of the road.[32] In the absence of an assumption clause a grantee company is not liable for torts of its grantor committed prior to the transfer.[33]

Contracts.—Contracts between railroad companies are to be construed in the light of attending circumstances,[34] and the construction given by the parties and acted upon will be adopted by the courts.[35] Like other contracts they must be legal [36] and are to be enforced according to their terms.[37]

Consolidation.[38]—There is a distinct difference between consolidation and merger. In a consolidation both companies go out of existence and a new corporation is created which takes their place and property.[39] In case of merger one company absorbs the other and remains in existence and succeeds to the property of the

29. May maintain suit in a Federal court to enjoin an unauthorized crossing of its tracks by another company, a citizen of another state, though the lessor is a citizen of the same state as the defendant. Pennsylvania Co. v. Lake Erie, etc., R. Co., 146 F. 446.

30. If a lessee of the property and franchises, in the operation of its cars and the exercise of the franchise, commits a conversion of property, the lessor is liable therefor in the absence of legislative provision to the contrary. Proper pleading in such an action discussed. Georgia R. & Banking Co. v. Haas [Ga.] 56 S. E. 313. The lease in this case was no exception to the general rule. Id.

31. Smalley v. Atlanta & C. Air Line R. Co., 73 S. C. 572, 53 S. E. 1000. Under Acts 1902, p. 1152, a lessor company is liable for injury to an employe of the lessee sustained in operation of the road. Reed v. Southern R. Co. [S. C.] 55 S. E. 218. Where no issue was presented that a defendant was only a lessor company and that a lessee was operating the road, a contention that the presumption of negligence created by Kirby's Dig. § 6773, making railroads responsible for injuries caused by the operation of trains applied only against the corpus of the property and not against the company, was untenable. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616.

32. Illinois Cent. R. Co. v. Lucas [Miss.] 42 So. 607.

33. Where because of failure to fence cattle destroyed crops from May to August and the road was conveyed in October by a deed under which the grantee did not assume liability for such damage, the grantee is not liable. Lawson v. Illinois Southern R. Co., 116 Mo. App. 690, 94 S. W. 807. Where one company purchases the franchise, assets, and line of another as authorized by Rev. St. 1899, § 1060, by a conveyance containing no assumption of liability for torts of the grantor, the grantee is not liable therefor. Porter v. Illinois Southern R. Co., 116 Mo. App. 526, 92 S. W. 744.

34. Where one company grants another the joint use of its line for nine hundred and ninety-nine years, at a stated annual sum to be increased by interest on sums expended for permanent improvements, the expense of maintenance including taxes to be divided, held the word "taxes" included special assessments. Chicago Great Western R. Co. v. Kansas City Northwestern R. Co. [Kan.] 88 P. 1085.

35. Where a contract relative to terminal facilities and division of cost of maintenance was construed by the companies and acted upon for several years, such construction will be adopted by the courts. Columbus, etc., R. Co. v. Pennsylvania Co. [C. C. A.] 143 F. 757. Series of contracts as to acquisition of additional property and cost of maintenance construed. Id. Where a series of contracts between two companies relative to the joint use of terminals, in fixing the division of cost of maintenance, used "wheelage" and "car and engine mileage" indiscriminately, but in the execution of the contracts based such division on wheelage from the first, that construction will be adopted by the courts. Id.

36. Contract by a railroad company by which the other party was to build up the business of transportation of milk construed and held not contrary to public policy, nor in violation of the anti-trust or interstate commerce acts. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51.

37. A contract by which a railway company agrees with a landowner that if he will develop his coal lands and construct a spur track thereto and give the company running rights over the same it would haul loaded cars out of and empties into such land free of charge, but not providing how long such contract is to run, may be terminated by the company at its election. Stonega Coke & Coal Co. v. Louisville & N. R. Co. [Va.] 55 S. E. 551. Under a contract by which a railroad company agreed to construct a spur track on its land to accommodate a shipper and providing that it might be removed whenever necessary for accommodation of its business without liability for damages, the decision to remove was final, and evidence that it was not necessary for accommodation of its business is not material, unless bad faith is shown. Whittemore v. New York, etc., R. Co., 191 Mass. 392, 77 N. E. 717.

38. See 6 C. L. 1205.

39. Lee v. Atlantic Coast Line R. Co., 150 F. 775.

other and issues its stock to stockholders of the company merged.[40] Consolidation may be effected where authorized by law.[41] Authority to consolidate upon conditions binds the consolidated company to perform such conditions.[42] The rights of the consolidated company do not depend on the chartered powers of the companies consolidated.[43] The Connecticut statute authorizing a railroad company owning three-fourths of the stock of any steamboat, bridge, wharf, or railroad corporation to condemn the balance, does not deny due process or impair the obligation of a contract.[44]

§ 10. *Indebtedness, insolvency, liens, and securities. Mechanics' and materialmen's liens.*[45]—A lien for materials can be had only where the materials furnished the materials fall within the terms of the statute,[46] and it attaches only to the property therein specified [47] and when statutory requirements have been complied

40. Agreement of consolidation and merger held to constitute a merger and not a consolidation. Lee v. Atlantic Coast Line R. Co., 150 F. 775.

41. Laws 1869, p. 2399, c. 917, § 1, authorizing consolidation when roads form a continuous line or by means of an intervening bridge, authorizes consolidation where a continuous line is formed by means of an intervening bridge owned by another company. New York Cent., etc., R. Co. v. Yonkers, 103 N. Y. S. 252. Hurd's Rev. St. 1905, c. 32, §§ 50-58, providing for changing of names, places of business, and objects for which a corporation was formed, and also for giving of notice whenever one railroad corporation desires to consolidate with another, applies to railroad companies. Cairo, etc., R. Co. v. Woodyard, 226 Ill. 331, 80 N. E. 882.

42. Authority from a railroad commission to consolidate with a narrow guage line upon the express condition that such line should be broadened and standardized and be made a part of the main line absolutely binds such company to perform its agreement. Mobile, etc., R. Co. v. State [Miss.] 41 So. 259. Where in proceedings to enjoin a change in the course of the narrow gauge line no claim was made, its charter authorized such a change, the company was not entitled on a second appeal to claim the benefit of the charter provision. Id.

43. Under such statute the consolidated company may prescribe the period of corporate life of the consolidated company irrespective of the life of either of the companies consolidating. New York Cent., etc., R. Co. v. Yonkers, 103 N. Y. S. 252. Where a road limited to three tracks consolidates with one not limited to any number, the consolidated company is not limited to three. Id. Where an original act incorporating a railroad company limited the number of tracks it could operate to three, but the company consolidated under the general consolidation act with a company not limited to the number of tracks, the consolidated company was not limited to three tracks. Colgate v. New York Cent., etc., R. Co., 100 N. Y. S. 650.

44. Gen. Stat. Conn. §§ 3694, 3695. Offield v. New York, etc., R. Co., 27 S. Ct. 72.

45. See 6 C. L. 1206.

46. A claim for furnishing coal, oil, and tools is not within Sayle's Rev. Civ. Stat. art. 3294, giving a lien for construction materials. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212. Under Rev. St. 1899, § 4239, giving a lien for material furnished a railroad, a contractor who is furnished powder to quarry rock on his own land to be delivered to the railroad company at a certain station, but the purpose for which and the place where it was to be used by the railroad, if at all, is not given, has no lien. Indiana Powder Co. v. St. Louis, etc., R. Co., 116 Mo. App. 364, 92 S. W. 150. Under the railroad lien act of Arkansas, one who furnishes material to a subcontractor for railroad construction is entitled to a lien. Midland Valley R. Co. v. Moran Nut & Bolt Mfg. Co. [Ark.] 97 S. W. 679. Where materials for which one was entitled to a lien were sold to be used partly in one state where a lien could be had and partly in a state where it could not, the seller was entitled to a lien for only so much as was used in the state where the lien could be had. Id. Rev. St. 1906, § 3208, providing for a lien to one who furnishes materials for construction, includes only articles used in such construction and does not include hay and grain for teams employed on the work. Pennsylvania Co. v. Mehaffey, 75 Ohio St. 432, 80 N. E. 177. Section 3211, while in terms extending the provisions of section 3208 to persons who furnish hay and grain, does not enlarge the meaning of the word "materials," nor does it impose on the railroads liability for such articles if no lien be perfected. Id. Where a railroad company repairing its track posted notices that it would "protect all claims for materials, labor, and board," hay and grain for teams employed on such work is not within such notice and the company did not obligate itself to protect such claims. Pennsylvania Co. v. McLaffey, 75 Ohio St. 432, 80 N. E. 177. Under W. Va. Code 1899, c. 75, § 7, a corporation employed to supervise the construction of an electric railway is entitled to a lien for the services of its officers and servants. Wetzel & T. R. Co. v. Tennis Bros. Co., 145 F. 458. Where a railroad company had broken a construction contract and was in the hands of a receiver, it was estopped from objecting to the amount found due the contractor and to the priority of lien awarded him. Id.

47. Sayle's Rev. Civ. St. art. 3294, providing for a lien on a railroad for construction materials, does not give a lien on the road but only on the particular building or article made or repaired. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212.

with.[48] One entitled to a lien is not deprived of his right because the amount of his compensation is not definitely fixed,[49] nor because he had an option to take a part of his compensation in bonds.[50] Procedure by which a lien is to be established [51] or enforced [52] is regarded by statute. On foreclosure of a lien a sale of the property should be decreed.[53] Whether a lien takes priority to a mortgage, may depend upon the facts of the case.[54]

An execution sale of a portion of the property of a railroad company may be valid though it is required by statute that the entire property be sold.[55]

Bonds and mortgages and priority of claims.[56]—The question of priority of claims is sometimes regulated by statute.[57] Claims for operating expenses are prior to a mortgage.[58] In Missouri claims for damages to abutting property are prior to a mortgage.[59] To entitle a creditor of an insolvent railroad company for supplies to preference of a prior mortgagee, it must appear that credit was given upon faith of payment out of net earnings, and that there was a diversion of such income, to

48. Acts 1893, p. 32, c. 24, § 1, providing for laborers' and materialmen's liens and providing that the company shall require from the contractor a bond conditioned for the payment of laborers, etc., or shall be liable, does not make a company failing to take such bond liable in an action directly against it without notice of liens as required by statute, but excepts the company from liens where the bond is taken. Laidlaw v. Portland, etc., R. Co., 42 Wash. 292, 84 P. 855.

49. The fact that a construction provided that compensation should be measured by cost of construction, which was ascertainable instead of a specific sum, does not affect the right to a lien. Wetzel & T. R. Co. v. Tennis Bros. Co., 145 F. 458.

50. Where an option in a construction contract which entitled the contractor to take one-half his compensation in bonds was not availed of, but instead of tendering the bonds the railroad company canceled the contract and denied liability thereunder, such option did not deprive the contractor of his right to a lien given by state laws. Wetzel & T. R. Co. v. Tennis Bros. Co., 145 F. 458.

51. Under Rev. St. 1899, § 4245, the owner of a railroad is a necessary party to a suit to establish a lien against the road. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944. A railroad company which has acquired the road is a necessary party. Id. A suit to charge a railroad with a lien was brought against the company alleged to be the owner and summons served on another not alleged to be the owner and it was not alleged that it operated the road. Held not sufficient to authorize the court to establish a lien against the owner. Id. Under Rev. St. 1899, § 4256, persons having liens may assign them and the assignee may maintain action thereon. Id.

52. A justice of the peace has no jurisdiction to foreclose lien on several miles of track, a locomotive, and other property. Lewis v. Warren, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 890, 97 S. W. 104.

53. Where a contractor was entitled to a lien on the road for breach of a construction contract and the appointment of a receiver, it was proper for the court on foreclosure of such lien to decree a sale of such property. Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458.

54. Claims for construction material are inferior to a mortgage which was on the road when the materials were furnished and the lien given by Sayles' Rev. Civ. St. arts, 3294-3301, unless the materials were used for betterment of the road, whereby the security was improved. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212.

55. Under Sayle's Rev. Civ. St. art. 3313, providing that where a judgment for wages is rendered against a railroad company so much of the property shall be sold as is necessary to pay the judgment, an execution sale of part of the property is not illegal, notwithstanding Sayles' Rev. Civ. St. 4553, that the entire property shall be sold when a judgment is levied on the road bed, franchise, track, etc. Weddington v. Carver [Tex. Civ. App.] 100 S. W. 786.

56. See 6 C. L. 1207.

57. Where claims against a railroad company in the hands of a receiver did not fall within the classes enumerated in Sayles' Rev. Civ. St. art. 1472, the court had authority to determine their priority in accordance with what it deemed equitable under the circumstances. Waters-Pierce Oil Co. v. U. S. & Mexican Trust So. [Tex. Civ. App.] 99 S. W. 212.

58. Debts incurred by commitee of bondholders of railroad while under their management for the benefit of bondholders held entitled to preference over mortgage of the road on foreclosure. Queen Anne's Ferry & Equipment Co. v. Queen Anne's R. Co., 148 F. 41. Debt for advertising contracted by mortgage trustee in operating the road under terms of the mortgage, or by committee of bondholders, held entitled to priority also. Id.

59. Under Const. Mo. art. 2, § 21, providing that private property may not be taken without just compensation, that the fee of lands taken for railroads without consent of the owner shall remain in such owner, claims for damages to an abutting owner resulting from construction of a road are on the same footing as those for property taken and are prior to a mortgage on the road, and is entitled to preference when the road is sold in foreclosure proceedings. Fordyce v. Kansas City & N. Connecting R. Co., 145 F. 566.

the benefit of the mortgagee.[60] The holder of an unsecured claim for damages arising from negligence of a mortgagor railroad company prior to appointment of receivers is not entitled to priority over mortgage creditors.[61]

Foreclosure of mortgages.[62]—The rule that a provision in a mortgage requiring a request to the trustee by the holders of the majority of the bonds secured, and tender of indemnity against liability for costs as a condition precedent to a suit to foreclose must be strictly complied with, does not apply where it appears from the bill of a bond holder to foreclose that such compliance is impossible, and that the trustee is antagonistic to foreclosure because of his interest in a second mortgage.[63] Where a mortgage authorized foreclosure by the trustee on default in payment of interest on the bonds and authorized a majority of the bond holders to require foreclosure, the truteee's right to foreclose in his discretion was not dependent on request of bondholders.[64] Where a decree foreclosing two mortgages required the purchaser to pay all claims filed within six months which should be adjudged prior to the mortgages, where the proceeds of the sale paid the first mortgage, the purchaser is liable for a claim filed within the time specified which is prior to the second mortgage.[65]

§ 11. *Duties and liabilities incident to operation of the road. A. Obligation to operate and statutory regulations. Keeping stations open.*[66] In many states it is required by statute that trains stop at certain stations[67] and that ticket offices be kept open a certain length of time prior to the departure of trains.[68]

Injuries to adjacent owners from smoke, noise, etc.—As a general rule there is no liability to an adjacent owner for personal inconvenience to him occasioned by

60. Fordyce v. Kansas City & N. Connecting R. Co., 145 F. 566. Where a railroad is in the bands of a receiver, though at the instance of a mortgagee, unless there has been an inequitable division of earnings from operation to the betterment of the road, the corpus of the property may not be diverted to the payment of claims for operating expenses prior to appointment of the receiver in the absence of statute giving such claims priority. Waters-Pierce Oil Co. v. U. S. & Mexican Trust Co. [Tex. Civ. App.] 99 S. W. 212. Claims for supplies which were on hand when the receiver took possession are not such as to entitle them to be classed as debts created by the receiver. Id.

61. Atchison, etc., R. Co. v. Osborn [C. C. A.] 148 F. 606. An interlocutory decree appointing receivers in a foreclosure suit directed them to pay out of the earnings of the road liabilities incurred in operating. The final decree and order of sale required the purchaser to pay in addition to the purchase price all claims prior to the mortgage upon the court adjudging them to be prior. Held a claimant who had not been paid by the receivers could compel payment from the purchasers only by establishing on principles of equity that his demand was prior to the mortgage on a hearing in conformity with the provisions of the interlocutory decree. Atchison, etc., R. Co. v. Osborn [C. C. A.] 148 F. 606.

62. See 6 C. L. 1207.

63. In such case demand is unnecessary. Cochran v. Pittsburg, etc., R. Co., 150 F. 682.

64. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 101 N. Y. S. 241. Hence an issue could not be raised as to the identity of such holders. Id. Where a trustee has a discretionary right to foreclose on default in payment of interest, an issue as to the ownership of the bonds is immaterial, though the mortgage provided that the trustee should not be bound to recognize any person as a bondholder unless his bonds were submitted and his title established if disputed. Id. Where in proceedings by a mortgage trustee to foreclose interveners have contested the ownership of some of the bonds, but defaulted a part of the judgment establishing ownership of the bonds and directing the referee to take, proof as to the balance should be stricken. Knickerbocker Trust Co. v. Oneonta, etc., R. Co., 188 N. Y. 38, 80 N. E. 568. Where in a suit to foreclose a railroad mortgage the property was sold and the purchaser gave bond for the payment of charges out of the proceeds, one praying to intervene held not entitled to. Seaboard Air Line R. Co. v. Knickerbocker Trust Co., 125 Ga. 463, 54 S. E. 138.

65. Central Indiana R. Co. v. Grantham [C. C. A.] 143 F. 43.

66. See 6 C. L. 1208.

67. Hurd's Rev. St. 1903, p. 1451, c. 114, § 25, requiring railroads to stop their trains at county seats, does not apply to a proceeding in mandamus to compel a railroad to stop its trains at one depot at a county seat where it maintains another depot there. Chicago & E. I. R. Co. v. People, 222 Ill. 396, 78 N. E. 784.

68. Sayle's Ann. Civ. St. 1897, art. 4542, requiring ticket offices to be kept open half an hour before the departure of each train, is not complied with where within the half hour the agent absented himself for a period sufficient to attend to two business matters and hold a conversation. Gulf, etc., R. Co. v. Dyer [Tex. Civ. App.] 15 Tex. Ct. Rep. 632, 95 S. W. 12.

the regular operation of trains,[69] unless trains are so operated as to create a nuisance,[70] or in violation of statutory regulations [71] or private rights.[72]

Equipment of cars.[73]—The purpose of Congress in enacting the Safety Appliance Act was humanitarian, and it should be given effect whenever applicable.[74] If an interstate carrier receives and hauls a defectively equipped foreign car which it cannot be required to do, it violates the Safety Appliance Act.[75] A car received

69. Personal inconvenience and discomfort occasioned to an abutting owner by operation of a railroad in the street gives him no cause of action. Grossman v. Houston, etc., R. Co. [Tex.] 15 Tex. Ct. Rep. 572, 92 S. W. 836. The use of side tracks for regular traffic and the storing of engines in a reasonable manner is not a nuisance for which the company is liable to an adjacent owner, though causing injury to his property by noise, smoke, and vibration incident to such use. Thomason v. Seaboard Air Line R. Co., 142 N. C. 318, 55 S. E. 205. A railroad is not liable for damages for annoyance from noise, cinders, etc., occasioned by reasonable use of switch tracks. Houston, etc., R. Co. v. Barr [Tex. Civ. App.] 99 S. W. 437. In an action for injury to property because of the maintenance of a line of road, depot, and stock pens, and instruction that the benefits plaintiff received in common with the community generally should not be considered, held proper, because if the property was specially benefited such fact should be considered. Dallas, etc., R. Co. v. Langston [Tex. Civ. App.] 17 Tex. Ct. Rep. 316, 98 S. W. 425. Where a railroad was required to operate its trains on temporary structures in a street during certain construction work being made by the public, the company was not liable to an abutting owner for acts of the public board while the railroad structure was in its possession for the purpose of construction. Foster v. New York Cent., etc., R. Co., 103 N. Y. S. 531.

70. Where trains are so operated that stock cars were left on tracks in a residence portion of the city, with accompanying noises, offensive odors, etc., at all times of the day and night, and whistles and bells were sounded, unnecessarily, such acts constituted a nuisance and could be enjoined. Colgate v. New York Cent., etc., R. Co., 100 N. Y. S. 650. Where a spur track was operated on land outside the right of way and adjacent owners were kept in constent dread of injury and because of smoke, soot, and cinders, the value of their property was depreciated, such facts show a nuisance. Thomason v. Seaboard Air Line R. Co., 142 N. C. 300, 55 S. E. 198. In determining the amount of damages, injury to furniture caused by smoke and cinders is to be considered, also the depreciation in value of the property and discomfort of the owners. Id. A complaint that a railroad company has negligently maintained a nuisance consisting in the use of side tracks in such manner as to cause injury to adjacent owners from smoke, noise, and vibration, alleges a nuisance. Thomason v. Seaboard Air Line R. Co., 142 N. C. 318, 55 S. E. 205. That a railroad company owning a short line has consolidated with other companies, and the use of a station is increased, to the increased annoyance of an adjacent owner, does not affect such owner's rights against the company. Id. Where an adjacent owner sues for injuries for the construction and maintenance of a spur track, the question was whether the railroad maintained a nuisance outside the right of way. Thomason v. Seaboard Air Line R. Co., 142 N. C. 300, 55 S. E. 198. Where a railroad erected a spur track on a lot outside the right of way on a trestle ten feet high, close to a fence and dwelling of an adjacent owner, and several times pushed cars over such trestle so that the owner was in danger of being hurt, the operation of such track was a nuisance and the company was liable. Id.

71. Shifting of cars in making up a train in a street constituted violation of an ordinance prohibiting engines to stop in the street except at the foot of the same for the reception and delivery of freight. State v. Atlantic, etc., R. Co., 141 N. C. 736, 53 S. E. 290.

72. A railroad company which negligently permits its cars to run off a spur track and knock down a fence of an adjacent owner is liable for injuries to the fence. Thomason v. Seaboard Air Line R. Co., 142 N. C. 300, 55 S. E. 198.

73. See 6 C. L. 1208. See, also, Master and Servant, 8 C. L. 840.

74. The Safety Appliance Act, Act Cong. March 2, 1893, requiring the use of automatic couplers, requires couplers that can be coupled as well as uncoupled without men going between the cars. Southern R. Co. v. Simmons, 105 Va. 651, 55 S. E. 459. A railroad company is subject to the penalty prescribed by the safety appliance act where it uses a car on which the coupling is so defective as not to be efficient to prevent men from going between the cars to make a coupling. United States v. Great Northern R. Co., 150 F. 229. Intent is not an essential element in a violation of the safety appliance act. Id. Where working parts of an automatic coupler are in perfect repair but a chain was not attached so that it could be operated, it is presumed that the apparatus had been only partially completed, and the statute was not complied with. Id. The amendment of 1903 to the safety appliance act was for the purpose of including vehicles omited from the former statute and to include cars "used" by an interstate carrier on any part of its line. United States v. Chicago, etc., R. Co., 149 F. 486. A coupler must couple automatically by impact in order to comply with the statute. Chicago & Alton R. Co. v. Walters, 120 Ill. App. 152.

75. United States v. Chicago, etc., R. Co., 149 F. 486. A coupler which couples by impact but cannot be uncoupled except by going between the cars is prohibited. Id. Act March 2, 1893, c. 196, amended by Act April 1, 1896, c. 87, and by Act March 2, 1903, c. 976, requiring carriers engaged in interstate commerce, to equip their cars with automatic couplers, applies to all cars when in use on such roads. United States v. Great Northern R. Co., 145 F. 438.

in defective state must be repaired at the earliest opportunity.[76] The act as penal in its nature, and mere failure of inspectors on first inspecting a car before delivering it to a connecting carrier to discover that it was out of repair, the same having been repaired on a subsequent inspection before delivery is not a violation of the act.[77] One furnishing cars for transportation over a railroad must use reasonable care to see that they are in a safe condition for those whose duty it is to handle them.[78] The special term of the supreme court of the District of Columbia is a "district court of the United States" within the statutes giving to such courts jurisdiction of actions for penalties for violation of the Safety Appliance Act.[79]

In some states it is required by statute that separate coaches be furnished for negro passengers.[80]

Speed regulations.[81]—In some states railroads are forbidden to operate trains in cities and towns at higher than a specified rate of speed.[82]

Obstructions at crossings.[83]—Where a railroad crosses a highway, traveler and railway company have an equal right to pass, but the traveler must yield the right to the railroad company in the ordinary course of the latter's business,[84] but if a crossing is unnecessarily and unlawfully blocked, the railroad is liable for injuries sustained as a result thereof.[85]

Stops at railroad crossings.[86]—In the absence of violation of statutory regulations, whether one road is liable to the servants of another for injuries sustained in a crossing collision depends on the question of negligence.[87]

76. Hauling a defective car three hundred and seventy-nine miles past three places where it could have been repaired, so as to repair it in larger and more commodious shops, violates the act. United States v. Chicago, etc., R. Co., 149 F. 486.

77. United States v. Atchison, etc., R. Co., 150 F. 442.

78. Is liable where the defect arises after construction as well as where it is in original construction. Leas v. Continental Fruit Exp. [Tex. Civ. App.] 99 S. W. 859. Complaint held to state a cause of action where a brakeman was injured because of a defective car furnished by a refrigerator car company for transportation over the line on which he was employed. Hand hold defective. Leas v. Continental Fruit Exp. [Tex. Civ. App.] 99 S. W. 859.

79. Act March 2, 1893. United States v. Baltimore & O. R. Co., 26 App. D. C. 581.

80. Laws 1891, p. 44, c. 41, requires of a train which carries passengers that separate coaches be furnished for negro passengers. Southern Kansas R. Co. v. State [Tex. Civ. App.] 99 S. W. 166. Press of business does not excuse noncompliance with such statute. Id.

81. See 6 C. L. 1208, Violation as Element of Negligence. See post, this section.

82. Restriction to a rate of six miles an hour in cities and villages is not unreasonable. State v. Wisconsin Cent. R. Co., 128 Wis. 79, 107 N. W. 295. Rev. St. 1898, §§ 1809, 1809a, 1819, prescribing rate of speed in cities and towns, and providing a penalty, construed and held to prohibit a rate of speed exceeding six miles an hour in cities and villages, except where safety gates are maintained. Id. The penalty provided by Rev. St. 1898, § 1809a, for violation of statutory regulations to be recovered in an action in the name of the state, is recoverable without proof of private injury. Id.

83. See 6 C. L. 1209.

84. Duffy v. Atlantic & N. C. R. Co. [N. C.] 56 S. E. 557.

85. A railroad is liable for obstructing the passway of an adjacent owner only where such obstruction is negligent, and not where it is necessary to the conduct of the business of the railroad. Louisville & N. R. Co. v. Scomp [Ky.] 98 S. W. 1024. Where a railroad unlawfully and unnecessarily blocks a street and as a direct consequence a driver of a runaway horse is required to make a short turn and is thrown from his vehicle and injured, the company is liable. Duffy v. Atlantic & N. C. R. Co. [N. C.] 56 S. E. 557. Where one was injured by being thrown from his vehicle because required to make a short turn because a railroad train blocked a crossing, he has the burden to show that such obstruction was unlawful and was the proximate cause of the injury. Id.

86. See 6 C. L. 1209.

87. Where there is a conflict of evidence as to custom in the moving of trains, it cannot be said the jury found there existed a custom which exonerated the towerman of negligence where it was equally possible under the testimony to have found that it was his negligence in the giving of signals which caused the accident. Lake Shore, etc., R. Co. v. Burtscher, 8 Ohio C. C. (N. S.) 137. Whether or not, under the circumstances of this case, a towerman was negligent in giving the signal which he did give was a proper question for the jury. Id. The fact that the negligence of the engineer of the second engine in the collision contributed to the accident would not relieve the railway company from liability to the injured engineer of the first engine, where the primary cause of the accident was the negligence of the towerman. Id. Within a limited area the duties of a towerman are analagous to those of a train despatcher, and under the current of authority he stands in the posi-

Conveniences at depots.—Statutes requiring the maintenance of water closets at stations are to be reasonably construed.[88] The Texas statute relative to this requirement is void.[89]

(§ 11) *B. General rules of neglience and contributory negligence.*[90]—As to all persons who are rightfully on or about the tracks,[91] a railroad company owes the duty of observing all statutory regulations,[92] and, in addition, to take every precaution dictated by reasonable prudence.[93] What is reasonable care depends largely

tion of superior of an engineer, and where the negligence charged by an injured engineer was in the signals given by the towerman, a verdict supporting that contention will not be disturbed on the ground that they were fellow-servants. Id. Instructions on the question of negligence, where one train collided with another at a junction crossing of the two lines, held proper. Baltimore, etc., R. Co. v. Kleespies [Ind. App.] 78 N. E. 252. Under an agreement by which one railroad company crossed the road of another, the company maintaining a signalman was held liable to a servant of the other company who was injured because of the negligence of the signalman. Hydell v. Toledo, etc., R. Co., 74 Ohio St. 138, 77 N. E. 1066. Where an engineer approaching a junction with the tracks of another company found the signals turned against him and waited until he was signalled by the towerman of the other company, he was not negligent. Baker v. Philadelphia & R. R. Co., 149 F. 882. Where railroads cross it is the duty of each to see that the crossing is safe, and liability to a person injured cannot be avoided by contract between the railroads. Brecher v. Chicago Junction R. Co., 119 Ill. App. 554.

88. A statute requiring suitable water closets for the accommodation of travelers to be maintained "at all stations" does not require the maintenance at mere flag stations which are open platforms with no station or buildings in connection. State v. Baltimore & O. R. Co. [W. Va.] 56 S. E. 518.

89. Under Const. art. 3, § 39, providing that no law shall take effect until 90 days after adjournment of the legislature enacting it acts 29th Leg. p. 324, proscribing a penalty for failure to maintain water closets at passenger stations, violated the due process clause, as the railroad was not required to take notice of it until the expiration of the 90 days, and then it was too late to avoid the penalty. Missouri, K. & T. R. Co. v. State [Tex.] 100 S. W. 766.

Decisions under statute before its invalidity was determined: Laws 1905, p. 324, c. 133, § 1, requiring to maintenance of water closets at pasenger stations, and imposing a penalty for violation thereof, applies to the lessee of a road. State v. Southern Kansas R. Co. [Tex. Civ. App.] 99 S. W. 167. Evidence sufficient to show that a company was operating a line within the contemplation of such statute. Id. Petition for a penalty held to sufficiently allege that the defendant was operating a railroad within the state. Id. A judgment for the penalty under such statute does not bear interest. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 25, 97 S. W. 724. Under Acts 29th Leg. p. 324, c. 133, providing a penalty for each week a railroad fails to maintain a water closet at passenger stations, the penalty may be recovered for each week, but not for each station where the statute is not complied with. Id. Acts 29th Leg. p. 324, c. 133, imposing a penalty for failure to maintain water closets at passenger stations, does not violate the due process clause of the constitution, nor does it deprive the railroad company of equal protection of the laws. Missouri, K. & T. R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. Acts 29th Leg. p. 324, c. 133, imposing a penalty for failure to maintain water closets at passenger stations, is not void for indefinitness and uncertainty. Id. Such statute is not void as containing more than one subject not expressed in its title. Id.

90. See 6 C. L. 1209.

91. Licensees, trepassers, etc., see post, § 11 E.

92. Acts 1901, p. 213, requiring a **constant lookout** to be kept for persons on the track, applies to the operation of trains and engines in railroad yards, and requires a lookout to be kept for laborers. Kansas City Southern R. Co. v. Morris [Ark.] 98 S. W. 363. Failure to give statutory signals on approaching a crossing, if proximately resulting in injury to a traveler, is negligence per se. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206. Rev. Laws, c. 111, § 200, requiring that a trusty **brakeman shall be kept on the rear car of every freight train** does not apply to a work train used to distribute ties and sand. Bacon v. New York, etc., R. Co. [Mass.] 80 N. E. 458. One injured by a work train while the engine and crew were putting work cars on a storage track preparatory to coupling onto freight cars and running on was not injured by a freight train within Rev. Laws, c. 111, § 200. Id. Lake City is authorized by its charter to pass an ordinance regulating the speed of trains within the city limits, not in conflict with § 2264, Rev. St. 1892, but under such section an ordinance cannot apply to a train running on a "traveled street" if in conflict therewith. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235.

93. Semaphore wire sagged down in the street. Logue v. Grand Trunk R. Co. [Me.] 65 A. 522. A railroad company is not liable where it interferes with the running of hose across its tracks by municipal firemen, unless it is actually notified of the conditions which make the use of its own property an interfering one. To render it liable such interference must be willful, or due to failure to exercise due care. American Sheet & Tin Plate Co. v. Pittsburgh, etc., R. Co. [C. C. A.] 143 F. 789. Not liable where one train with another running close behind ran between firemen and a fire, where after it was stopped it could not back up, and it did not appear that the train employes knew of the fire in time to avoid the interference. Id.

on the circumstances of each particular case.[94] In operating trains in a street, only such care is required for the safety of persons on the streets as would be exercised by a person of ordinary prudence under the circumstances,[95] and persons using streets upon which tracks are located must exercise the degree of care required of ordinarily prudent persons under the circumstances.[96] In the absence of statute or ordinance regulating the speed of trains on city streets, whether a given rate of speed is negligence is ordinarily a question of fact depending on the conditions,[97] but failure of a railroad running through the streets of a populous city to use ordinary care to regulate the speed of the train so as not to injure anyone is negligence at common law.[98] As a general rule contributory negligence is not a defense where a recov-

94. No statute requires the **whistle** to be blown merely because no train is rounding a curve. Vaundry v. Chicago & N. W. R. Co. [Wis.] 109 N. W. 926. Private owners of cars by permission of the railroad company placed them on a siding. Held they were not liable for injuries to a brakeman from other cars on the switch being pushed off the siding onto the main line and colliding with a train on which he was employed. Keeney v. Campbell [Pa.] 64 A. 687. Where a train was derailed because an object had been pressed into a switch frog by a preceding train, which caused the switch to open, and ordinary care would not have ascertained the defect nor could the operators of the train discover it, the derailment was held to be an accident not due to negligence. Houston & T. C. R. Co. v. Anderson [Tex. Civ. App.] 17 Tex. Ct. Rep. 122, 98 S. W. 440. Where the derailment of an oil train was not due to negligence, and the force of men was not sufficient to clear the wreck, put the track in repair, and also prevent the escape of oil. Held, ordinary care did not require delay in repairing the track in order to prevent the escape of oil which was damaging adjacent property. Id. Negligence in failing to stop the flow of oil under such circumstances held for the jury. Id. No rate of **speed in rural districts,** is of itself, negligence. Hoffard v. Illinois Cent. R. Co. [Iowa] 110 N. W. 446. Persons in charge of a train are under **no duty to slacken speed on approaching a curve,** though it is in a cut, as a precaution against injury to persons on the track but not known of nor seen. Id. It is not negligence to run cars rapidly in the open country, or to operate them on a dark night without sufficient headlight. Johnson v. Birmingham R. Light & Power Co. [Ala.] 43 So. 33. Where it did not appear that servants in charge of a train which collided with a car in which a person was living either saw or knew that he was in the car and there was testimony that sometimes when a car was switched such servants would notify persons living in the car and at other times would not, evidence held insufficient to show willful negligence. Mobile, etc., Co. v. Smith [Ala.] 40 So. 763. Negligence in obstructing a street for an unreasonable length of time may be the proximate cause of an injury to one who attempted to climb over the train. Atchison, etc., R. Co. v. Pitts, 123 Ill. App. 607.

95. International, etc., R. Co. v. Hall [Tex. Civ. App.] 14 Tex. Ct. Rep. 347, 92 S. W. 996. Where a plea in an action by one injured by a train on the street set up contributory negligence in walking on an unfinished track where his attention was absorbed in watching where to step, and that there was a good sidewalk on the street, there was some evidence in support of such plea. Held proper to instruct that he could not recover if a person of ordinary prudence would not have walked on the street in its then condition, and such action contributed to his injury. Id. An engine running on a street has no precedence over pedestrians and it is error to so instruct where one is injured. Texas & P. R. Co. v. Huber [Tex. Civ. App.] 16 Tex. Ct. Rep. 154, 95 S. W. 568. Where it was pleaded and proved that at the time of the accident decedent was boarding a rapidly moving train, a request specifically submitting this form of negligence should have been given. Id. The fact that a public road is located on the right of way does not affect the reciprocal duties of the railroad and the traveling public. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206.

96. Evidence insufficient to show contributory negligence as a matter of law where one driving in the street was injured. Haley v. Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120. The fact that one knew that the street on which a track was laid was narrow and that he was liable to encounter a train there, and that he could not pass it with his wagon, did not make it negligence per se for him to drive there. Id. Where a person could have seen an engine approaching had he stopped and looked, and an ordinarily prudent person would have looked or listened, he was guilty of contributory negligence. Texas & P. R. Co. v. Huber [Tex. Civ. App.] 16 Tex. Ct. Rep. 154, 95 S. W. 568.

97. Haley v. Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120. Whether 20 miles per hour was negligence held a question for the jury. Id.

98. Haley v. Missouri Pac. R. Co., 197 Mo. 15, 93 S. W. 1120. Complaint for injuries to one driving in a narrow street held to allege negligence, though the speed ordinance alleged to have been violated had been repealed. Id. The fact that the grade of a track laid in the street of a populous city was such that trains could not ascend without momentum acquired by high speed did not justify such speed where people were liable to be injured, or where it rendered it impossible to stop the train in time to avoid injury to one in a perilous position. Id. Allegations charging negligence in the matter of speed and also in failing to stop the train after danger was apparent are not necessarily inconsistent. Id. While it is negligence to run a train into a place where

ery is sought solely on the ground of discovered peril.[99] What constitutes contributory negligence depends on the particular circumstances,[1] but one who attempts to cross in front of an approaching train is negligent as a matter of law.[2] The duty of a railroad company with reference to its stations is less onerous and exacting than its duty with reference to its rolling stock and road bed.[3] A railroad company is liable to one who goes to a depot on business with the company and in the course of its transaction is insulted and humiliated by the conduct of the agent.[4]

(§ 11) *C. Injuries to passengers and freight.*[5]

(§ 11) *D. Injuries to employes.*[6]

(§ 11) *E. Injuries to licensees and trespassers. General rules.*[7]—In the operation of its trains a railroad company must exercise ordinary care for the safety of persons lawfully on its tracks or right of way,[8] and as to them, failure to

danger of collision is to be expected at such speed that it cannot be stopped quickly, the railroad is not liable for failure to stop the train if it could not be stopped after the peril was discovered. Id.

99. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469.

1. Evidence insufficient to show freedom from contributory negligence where a licensee was killed at a point where approach of a train could be seen for 1000 feet, and there was no necessity for his being in the dangerous position he was, and he could have gotten to a place of safety easily. Keeler v. New York Cent. etc., R. Co., 100 N. Y. S. 235.

2. Where one saw a train approaching and in attempting to cross ahead of it was struck, held he was guilty of contributory negligence as a matter of law, precluding recovery unless after his peril was discovered injury could have been avoided by the trainmen. Illinois Cent. R. Co. v. Willis' Adm'r, 29 Ky. L. R. 1187, 97 S. W. 21. Where one with full knowledge that a train is approaching goes upon the track directly in front of it, it is immaterial whether or not statutory signals were given. Id. Where one hears a train approaching and by the exercise of ordinary care can avoid being struck, the speed of the train is immaterial. Id. One who on a dark night at a place where there is no public crossing steps on the track within three feet of an aproaching engine, of which she had notice, is guilty of contributory negligence barring recovery where it appears that the operatives of the train were guilty of no negligence. Seaboard Air Line R. Co. v. Barwick [Fla.] 41 So. 70.

3. Fitch v. Central R. Co. [N. J. Law] 64 A. 992 A railroad company is not negligent merely because there is ice on a station platform. Whether it is negligent depends on whethere is it allowed to remain there an unreasonable length of time. Id.

4. Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37.

5. See Carriers, 7 C. L. 522.

6. See Master and Servant, 8 C. L. 840.

7. See 6 C. L. 1210.

8. Held lawfully on the premises: A landowner charged with the duty of repairing fences along the right of way is not a trespasser where struck by a train while engaged in such duty. Houston & T. C. R. Co. v. O'Donnell [Tex.] 15 Tex. Ct. Rep. 505, 92 S. W. 409. **A quarantine guard** whose duty is to prevent unauthorized persons from passing of a "quarantine line" across the tracks, is not as a matter of law a trespasser upon the tracks a few feet from the line, the railroad company probably being aware of his presence. Louisville & N. R. Co. v. Goulding [Fla.] 42 So. 854.

Contractual right to use track: Where a railroad company granted a lumber company the privilege of running a logging train over its road, and the train was derailed and the conductor injured because of a defective bridge, the railroad was liable. Hamilton v. Louisana, etc., R. Co., 117 La. 243, 41 So. 560.

One walking on a street is not a trespasser, though it is also used by a railroad company as a track. Manion v. Lake Erie & W. R. Co. [Ind. App.] 80 N. E. 166. A pedestrian on a street does not become a trespasser merely because a city has given a railroad company a right to temporarily lay its track in the streets for its own convenience. Keller v. Philadelphia & R. R. Co., 214 Pa. 82, 63 A. 413. Where the **superintendent of a milling company** was injured between cars and a spout through which grain was loaded into cars, the question of negligence in backing the cars onto the switch without giving warning was held for the jury. Toledo, St. L. & W. R. Co. v. Connolly [C. C. A.] 149 F. 398. One upon the **premises occupied by an elevator company** with its consent is not a trespasser as to the railroad company which owns the land upon which the elevator is located. Missouri, etc., R. Co. v. Taylor [Kan.] 85 P. 528.

Extra brakeman while crossing tracks held not a trespasser. Best v. New York Cent., etc., R. Co., 102 N. Y. S. 957. An **employe of a contractor** repairing a depot, who went from his place of employment to the depot platform to get a tool belonging to the railroad company, was not a trespasser, though there was no agreement with the railroad company that the contractor could use such tool and another could have been easily procured. Pittsburg, etc., R. Co. v. Cozatt [Ind. App.] 79 N. E. 534. One upon a railroad at a **public crossing** is not a trespasser. McGuire v. Chicago & Eastern Ill. R. Co., 120 Ill. App. 111. One who went onto the tracks in a depot yard to **talk to persons loading cars,** was held at most a mere licensee, to whom the railroad owed no greater duty than the exercise of ordinary care. Illinois Cent. R. Co. v. Willis' Adm'r, 29 Ky. L. R. 1187, 97 S. W. 21.

give statutory signals,[9] or signals required of them in the exercise of ordinary care, is negligence.[10] But as a general rule no duty is owed to trespassers [11] or licensees [12] except to refrain from willfully injuring them [13] after their presence is [14] or should

9. See post, Persons Walking on Tracks.

10. Where engineer and fireman and two others who stood near testify that the bell was rung constantly as the engine backed toward the place of the accident, held the testimony of witnesses who were not paying attention and were not in a position to have heard was insufficient to constitute a substantial conflict and warrant a finding of negligence in failing to ring the bell. Rich v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79. Where a witness testifies that as he came up the track where an accident occurred he noticed that there was no light on the engine that struck a licensee, such evidence was sufficient to charge negligence in failing to carry a light to warn pedestrians. Id. A railroad company is not as a matter of law free from negligence in backing a long freight train at night, without headlight, or ringing of bells, or other warning, to a quarantine guard on the track, at his post of duty, whose presence there was acquiesced in by the company. Louisville & N. R. Co. v. Goulding [Fla.] 42 So. 854.

11. **Held trespassers:** One walking along a path on the right of way. St. Louis Southwestern R. Co. v. Bryant [Ark.] 99 S. W. 693. A boy on the track at a switch within the exclusive possession of the railroad is a trespasser though persons frequently crossed the track near the place where he was injured. Elliott v. Louisville & N. R. Co. [Ky.] 99 S. W. 233. Where an employe of lessees of a railroad company in repairing a building on the leased premises built a staging on other land of the railroad company, which staging was struck by a train and the employe injured, he was held a mere licensee to whom the railroad owed no duty except to refrain from willfully injuring him, though it was shown that such land was previously used in repairing the building, but the extent of such prior use or the company's notice thereof did not appear. Burke v. Boston, etc., R. Co. [Mass.] 80 N. E. 695. An officer of the watch who boards a train for the purposes of arresting persons whom he has no right to arrest without a warrant which he has not got is a bare licensee. Creeden v. Boston, etc., R. Co. [Mass.] 79 N. E. 344. One who walks upon the track not for any purpose of business with the company but merely for his own convenience is a trespasser. McGuire v. Chicago & Eastern Ill. R. Co., 120 Ill. App. 111. One who seeks to board a train at a place where there is no station and at which he has no right to be is a trespasser. Ahern v. Chicago & Erie R. Co., 124 Ill. App. 36. Whether one injured on the track was a mere licensee or on the tracks by invitation held a **question for the jury.** Pittsburg, etc., R. Co. v. Simons [Ind.] 79 N. E. 911. A railroad company does not, by carrying vendors of fruit, etc., for sale to passengers on its cars, invite the public to enter its trains at stations for the sole purpose of making purchases, and failure to object to persons frequently doing so does not create more than a permissive license. Peterson v. South & W. R. Co. [N. C.] 55 S. E. 618. Where one went aboard a train for the sole purpose of making a purchase from the news agent and was injured by being thrown from the train by the jerking of cars, the company was not liable, though no signal was given before the train started. Id. Where one having business with a circus company which leased cars from the railroad went upon the premises of the railroad without the knowledge of the railroad employes and was injured by negligence of the circus employes, she was a mere licensee to whom the railroad was not liable in the absence of willful injury. Illinois Cent. R. Co. v. Lucas [Miss.] 42 So. 607.

12. The license of a licensee is subject to the right of the company to operate trains and the railroad company owes him no duty except to refrain from recklessly injuring him. Rosenthal v. New York, etc., R. Co., 112 App. Div. 431, 98 N. Y. S. 476. Whether one walking on the track is thereby invitation or as a trespasser is material. Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321. Where licensees are such by mere tolerance or have become such by repeated acts of trespass against the will of the railroad company, no duty is owed them. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569. No duty is owed to a bare licensee on the track of employing competent servants to operate trains, or to run them in any particular manner or at a limited speed. Norfolk & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19.

13. Rosenthal v. New York, etc., R. Co., 112 App. Div. 431, 98 N. Y. S. 476; Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47; McGuire v. Chicago & Eastern Ill. R. Co., 120 Ill. App. 111; Ahern v. Chicago & Erie R. Co., 124 Ill. App. 36; Janowicz v. Pittsburg, etc., R. Co., 124 Ill. App. 149; Prince v. Illinois Cent. R. Co. [Ky.] 99 S. W 293; Hoback's Adm'r v Louisville, etc., R. Co. [Ky.] 99 S. W. 241; Carr v. Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874; Atlantic Coast Line R. Co. v. Riley [Ga.] 56 S. E. 635; Chesapeake & O. R. Co. v. Nipp's Adm'x [Ky.] 100 S. W. 246. As against a trespasser walking on the track at night, failure to have the headlight burning is not negligence. Frye v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 566. The presumption of negligence arising from excessive speed is rebutted by proof that the person injured was a trespasser. McGuire v. Chicago & Eastern R. Co., 120 Ill. App. 111. Failure to keep a lookout or to give signals does not show willful negligence. Janowicz v. Pittsburg, etc., R. Co., 124 Ill. App. 149; Louisville, etc., R. Co. v. Woolfork [Ky.] 99 S. W. 294; Chesapeake & O. R. Co. v. Barbours' Adm'r, 29 Ky. L. R. 339, 93 S. W. 24; Thompson v. Cleveland, etc., R. Co., 123 Ill. App. 47. Where one was struck by a car against which a train had been backed, an instruction that if backing the train against the car was negligence there could be a recovery was erroneous for failure to require some dereliction of duty aside from backing the train. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222. Where negligence is alleged to have been willful and wanton, it is immaterial that the injured person was a

have been discovered.[15] But this rule is not universal and in some states it is required that ordinary care be exercised to discover the presence of trespassers.[16] As a general rule operatives of trains are not required to anticipate the presence of trespassers on the tracks, and the duty of using ordinary care does not arise until his presence is discovered.[17] This general rule applies to children as well as to grown persons.[18] But where circumstances are such that the presence of trespassers on the track may be anticipated by train operatives, they must take ordinary care to prevent injury to them.[19]

trespasser. Mobile, etc., R. Co. v. Smith [Ala.] 40 So. 763. A railroad company is liable if a trespasser is injured because of reckless and wanton negligence. Davis v. Arkansas Southern R. Co., 117 La. 320, 41 So. 587.

14. If the perilous position of a trespasser is discovered in time to avoid injury to him by taking proper precautions, the railroad company is liable if it does not do so. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692; Burde v. Chicago, etc., R. Co. [Mo. App.] 100 S. W. 509; Rosenthal v. New York, etc., R. Co., 112 App. Div. 431, 98 N. Y. S. 476; Houston & T. C. R. Co. v. Ramsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 745, 97 S W. 1067; Frye v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 566; Texas & P. R. Co. v. Modawell [C. C. A.] 151 F. 421. The rule of discovered peril does not make a railroad liable, notwithstanding contributory negligence, unless the peril was discovered in time to avoid the accident. International & G. N. R. Co. v. Ploeger [Tex. Civ. App.] 14 Tex. Ct. Rep. 474, 16 Tex. Ct. Rep. 183, 93 S. W. 226. A railway is not liable for injuries to a trespasser on the theory that the motorman could have stopped the car in time to have avoided the injury in the absence of proof that the motorman had notice of the perilous position of the trespasser. Johnson v. Birmingham R. Light & Power Co. [Ala.] 43 So. 33. Where a licensee was killed while walking along the track, the doctrine of last clear chance does not apply where it appears that he was not seen by the operatives of the train. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569. A trespasser has the burden to show that he was unconscious of his peril and that the engineer should have discovered it in time to avoid injury to him. Burde v. Chicago R. Co. [Mo. App.] 100 S. W. 509.

Evidence insufficient to show whether a trespasser who was killed was lying or walking on the track or that he was seen in time to have avoided injury to him. Johnson v. Birminghan R. Light & Power Co. [Ala.] 43 So. 33. Where a boy, a trespasser, familiar with the conditions, was injured on the track, evidence insufficient to show the company liable where after the boy was seen signals were given and he would have cleared the track had he not fallen. Sanders v. Texas & P. R. Co. [La.] 42 So. 764. In an action for death of a trespasser a jury is not authorized to infer that she was seen in time to avoid injury to her from the mere fact that she might have been seen. Chesapeake & O. R. Co. v. Barbour's Adm'r, 29 Ky. L. R. 339, 93 S. W. 24. When a trespasser was injured he is not prejudiced by the exclusion of evidence as to the distance within which a train could be stopped, where there is no evidence that he was seen by train operatives before he was struck. Beiser v. Chesapeake & O. R. Co., 29 Ky. L. R. 249, 92 S. W. 928. Evidence held insufficient to go to the jury in the question of negligence based on failure to stop the train after discovery of a pedestrian in a place of danger. Sites v. Knott, 197 Mo. 684, 96 S. W. 206. Where a trespasser was injured by a truck car which got beyond the control of persons operating it, he could not complain because a freight train made so much noise that he could not hear the warning shouted to him. Illinois Cent. R. Co. v. Johnson [Ky.] 97 S. W. 745. Railroad company held not liable where a truck car on the track got beyond the control of employes and could not be stopped after discovery of the presence of a trespasser on the track. Illinois Cent. R. Co. v. Johnson [Ky.] 97 S. W. 745. Where one was struck by a train while caught in cattle guards, whether a proper effort was made to stop the train after his peril was discovered held **for the jury.** Thayer v. New York Cent., etc., R. Co., 102 N. Y. S. 135. Where a trespasser was killed, evidence held sufficient to show that no effort was made to stop the train after his peril was discovered. Houston, etc., R. Co. v. Ramsey [Tex Civ. App.] 16 Tex. Ct. Rep. 745, 97 S. W. 1067.

15. A railroad is liable for injuries to a trespasser resulting from failure of an engineer to stop on signal though he did not know why he was signalled to stop. Chicago, etc., R. Co. v. Pritchard [Ind.] 79 N. E. 508. Evidence sufficient to show that a trespasser's peril should have been apparent to the engineer. Burde v. Chicago, etc., R. Co. [Mo. App.] 100 S. W. 509.

16. Reasonable diligence must be used to discover the presence of trespassers on the track. International & G. N. R. Co. v. Ploeger [Tex. Civ. App.] 14 Tex. Ct. Rep. 474, 16 Tex. Ct. Rep. 183, 93 S. W. 226.

17. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692. An engineer may presume that the track is clear except at places where people have a right to be. Burde v. Chicago, etc., R. Co. [Mo. App.] 100 S. W. 509. A railroad company is not required to anticipate the presence of trespassers upon its tracks, but after discovery of their presence reasonable care must be exercised to avoid injury to them, and if the danger be imminent such means as are available which are consistent with the higher duty to passengers must be exercised. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569. Where the portion of a track where a trespasser was injured was not in the street or other public place, its frequent use by pedestrians did not create one upon it a licensee to whom the duty of ordinary care was owed. Illinois Cent. R. Co. v. Johnson [Ky.] 97 S. W. 745.

18. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692.

19. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692. On an issue as to

Employes of other roads and of independent contractors.[20]—A railroad company must exercise ordinary care for the protection of employes of other roads who are lawfully on the premises,[21] and for the safety of servants of railroad contractors,[22] and persons to whom cars are furnished,[23] and such persons must likewise

whether the presence of persons on the track should be anticipated, the existence of parts by gaps, stiles, or gates, long continued use of such vicinity as a crossing, etc., may be considered. Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967. Ordinary care must be exercised to prevent injury to a person on the track at a place where his presence is to be anticipated. Id. Whether operatives of a train had reason to anticipate the presence of persons on the track at a point where one was injured held a question for the jury. Id. As to licensees, where there is reason to expect their presence, it is the duty of persons in charge of trains to avoid injuring them after their presence is discovered or should have been discovered. Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321. But the company is not required to provide additional force to keep proper lookout. Id.

20. See 6 C. L. 1212.

21. Where a depot employe was injured on the track, evidence held insufficient to show that the injury was the result of negligence in operating a train at a dangerous rate of speed. Joyce v. Great Northern R. Co. [Minn.] 110 N. W. 975. Instruction in an action for injuries to an employe of a contractor repairing a depot held erroneous as omitting reference to negligence of the railroad company and restricting rights of the parties to immaterial facts. Pittsburg, etc., R. Co. v. Cozatt [Ind. App.] 79 N. E. 534. Where an employe of a contractor, repairing a depot was injured by being caught between a car moved by employes of the railroad and a bumping post, and at the instant the car was started the railroad employe's knee gave way, held the proximate cause of the injury was the moving of the car, and not the giving way of the employe's knee. Id. Proof held not to vary from the allegations of a complaint in an action for injuries to an employe of an independent contractor who was repairing a depot. Id. A car inspector engaged in inspecting cars for one company on tracks used jointly with another, who knew that the yard master of the other company had seen him at work, may assume that the yard master would not cause cars to be run against those he was inspecting. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. Where a rule of one company using tracks jointly with another requiring the car inspector to carry a flag would not have been regarded if obeyed, failure to observe it was held not the proximate cause of the injury. Id. Refusal to charge contributory negligence in not displaying the flag held not error under the circumstances of this case. Id. When a car inspector of one company was inspecting cars on tracks used jointly with another to the knowledge of such other company, instruction ignoring the fact of such notice properly refused. Id. Where a car inspector was injured by moving cars on tracks used jointly with another company, and there was no evidence that the cars he was inspecting should have been coupled to others, an instruction predicated on such fact was inapplicable to the issues. Id. A railroad company is liable where by its negligence it caused the death of a person on the track of another company. Seaboard Air Line R. v. Randolph, 126 Ga. 238, 55 S. E. 47. Where an engineer of one road was running a train over the track of another, instruction as to the duty of keeping the track in repair held not error in view of other instructions given. Southern Kansas R. Co. v. Sage [Tex. Civ. App.] 16 Tex. Ct. Rep. 254, 94 S. W. 1074. Where in an action for injuries by an employe of one road while running a train over the track of another the negligence alleged was failure to keep the road bed in good condition, but the answer set up contributory negligence in running the train backwards at a dangerous speed, held not error to show that another engineer on a different engine had charge of the air and control of the train. Id. Where an employ of another road was inspecting cars switched from defendant road onto the transfer track, and while so engaged another car was switched onto such track against the cars he was inspecting and he was injured, a complaint was held demurrable as not showing that the defendant violated any duty it owed the plaintiff, it not appearing that there was any time when cars might not be switched onto such track and it not appearing that defendant's servants knew plaintff was a car inspector or even that he was about the premises Lake Erie & W. R. Co. v. Hennessey [Ind. App.] 78 N. E. 670. Where a flagman in the employe of a contrator who was working for the railroad company, who had worked continuously for three days and nights, was sent down the track to flag train and where last seen was lying on the track but seemed drowsy, there was no direct evidence of the manner of the accident, but from the place he was last seen he could see 500 yards up the track. Held insufficient to show negligence on the part of the railroad. Parks v. Southern R. Co. [C. C. A.] 143 F. 276. Where an employe of another road was knocked off the platform of a coach just as he stepped onto it and there was no opportunity to do anything after his position was discovered, the last clear chance rule was held inapplicable. Baltimore & O. R. Co. v. Lee [Va.] 55 S. E. 1.

22. Where employes of a contractor for construction of a railroad were killed while walking on the track to their work, an instruction that they were on the track by invitation if so contemplated by the construction contract, or such use of the track was practically necessary, was erroneous in the absence of evidence of the terms of the contract, or that such use was necessary and was not justified by evidence that the track was only a convenient way to reach the work. Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321.

23. A railway company which furnishes a defective car to the employer of another is not liable for injuries to the servant where the employer knew of the defect in time to

exercise care commensurate with the perils of their situation.[24] In Pennsylvania it is provided by statute that under certain circumstances persons injured on railroad premises on trains have the same and no greater right of action as an employe,[25] and such statute is valid as applied to railway postal clerks.[26]

Persons at stations.[27]—A railroad company is liable for injuries sustained by one lawfully at a depot which result from the negligence of the company,[28] and if

have repaired it or to have warnsd his servant thereof. McCallion v. Missouri Pac. R. Co. [Kan.] 88 P. 50. Evidence held to show contributory negligence where a Pullman employe was killed in the yards. Michigan C. R. Co. v. Cudahy, 119 Ill. App. 328.

24. Where an experienced track repairer working at a junction crossing of railroads knew that a train was coming but continued to work without looking up on the supposition that trains approaching from that direction would pass on another track, he was guilty of contributory negligence as a matter of law. Belt R. Co. v. Skszypczak, 225 Ill. 242, 80 N. E. 113. Questions of negligence and contributory negligence held for the jury where an employe of an independent contractor repairing a depot was injured by being caught between a car moved by employes of the railroad, and a bumping post. Pittsburgh, etc., R. Co. v. Cozatt [Ind. App.] 79 N. E. 534. Employe of a contractor repairing a depot held not guilty of contributory negligence as a matter of law where he was injured while going in the most direct route to procure a tool to work with, though such route was dangerous. Id. Where the servant of a contractor widening a cut was killed by a train which was moving slowly and was seen by deceased, who could easily have avoided injury, evidence sufficient to show that the railroad company was not negligent and that the licensee was guilty of contributory negligence. Buckley v. New York, etc., R. Co., 148 F. 460.

25. Act April 4, 1868 (P. L. 58), § 1, providing that when any person not an employe is injured about the premises of a railroad company or on a train, or car, he shall have the same right of action as an employe, applies in two classes of cases: Where one not a passenger is injured while lawfully engaged on the premises of the railway company, and where a person is on or about a train or car engaged in railroad work. Hayman v. Philadephia & R. R. Co., 214 Pa. 436, 63 A. 967. A carpenter employed in locomotive works, and loading a locomotive belonging to defendant railway company on cars standing on its tracks, and such cars were moved while he was at work and he was injured while walking on the track, back to the works, is within the statute. Id. This statute does not apply to a stevedore's employe who was injured while standing near the track after the end of his day's work merely waiting to give in his time. He is not employed or engaged about the premises of the railroad company within the meaning of the statute. Hobbs v. Pennsylvania R. Co., 143 F. 180. Where two railroads have joint trackage rights over the same track and an employe of one is injured by the negligence of the other, the track, for the application of the statute, must be regarded as the property of each road while using it. Yarington v. Delaware & Hudson Co., 143 F. 565. If the place of the accident is clearly and for general purposes the premises of the defendant company, it is sufficient for the application of the act if the person injured is engaged in and about such premises and is not a passenger. Id. If the accident occurs in a place which is not exclusively and for general purposes the premises of the railroad company, the nature of the employment becomes material, and, if the work has no relation to railroad work as such but is only connected with it by circumstances of locality, the statute does not apply. Id. The Act of April 4, 1868 (P. L. 58), does not apply where a railway mail clerk engaged in the performance of his duties on one road is injured in a collision with a train on another road at a point where the two roads have joint trackage rights and the defendant road had failed to flag the train as it should. The place where the accident occurred not being by right the premises of the defendant company at the time, nor the plaintiff being engaged in work ordinarily performed by its employes. Id. The act does not apply where an employe of one railroad is injured by the negligence of another while rightfully using its tracks. Baker v. Philadephia & R. R. Co., 149 F. 882.

26. Martin v. Pittsburg, etc., R. Co., 27 S. Ct. 100.

27. See 6 C. L. 1212.

28. Eivdence sufficient to show negligence where one was injured on the track at a depot. Perkins v. Chesapeake & O. R. Co., 29 Ky. L. R. 660; 94 S. W. 636. Newsboy taking papers from train in station killed by passing locomotive which could not be stopped because of defect. Waltz v. Pennsylvania R. Co., 31 Pa. Super Ct. 286. Where a licensee was injured while in a station office by derailment of a train, evidence held sufficient to show that the train was being operated at a dangerous rate of speed in view of the defective condition of the track. Croft v. Chicago, etc., R. Co. [Iowa] 108 N. W. 1053. Where the wife of a station agent who was in the habit of assisting him in the office was injured through the negligence of the railroad company, evidence that her conduct was known to the division superintendent was not objectionable on the ground that such person was not the superintendent where he acted as such. Id. A wife of a station agent who assists her husband in the office with the knowledge of the officers of the road is a licensee, and the company is liable where she is injured owing to derailment of a train while running over a defective track at a dangerous rate of speed. Id. The fact that there was a notice on the door leading to the office forbidding all persons to enter except employes did not of itself change her status as a licensee but was a question for the jury. Id. Where the wife of a station agent who

injury results from the joint negligence of several companies, all are liable,[29] but it is not liable if the injury results from the contributing negligence of the person injured.[30]

Persons loading or unloading cars.[31]—Persons upon the right of way for the purpose of unloading cars are not trespassers[32] and are entitled to the exercise of reasonable care on the part of the railroad company,[33] both as to keeping the prem-

was in the habit of assisting him in the office was injured by the negligence of the company, an instruction held not erroneous as leading the jury to believe that the consent of her husband to her presence there imposed a duty on the railroad company. Id. Instruction in such case held not erroneous as eliminating the claim of a defective track. Id. Where a licensee was injured, evidence held sufficient to show negligence in the defective condition of the track and in the manner of operation of the train derailment of which caused the injury. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723. The wife of a station agent who with knowledge of the company assists her husband at the office does not assume the risk of affirmative negligence of the company in permitting the track to be in a defective condition causing the derailment of a train which smashed into the depot and injured her, nor of the running of the train at an excessive speed. Id. Where a railroad company has knowledge that a station agent's wife assists him at the depot, it is bound to exercise reasonable care to prevent injury to her. Id. Where a railroad company permits a station agent to live in the depot building, giving over to him a portion of the building for residence purposes, and had notice that the agent was the head of a family, it was bound to know that the family included children and to exercise reasonable care to prevent injury to them. Id. Railroad company held liable for death of a child killed through its negligence. Id. Evidence sufficient to show that one who accompanied passengers to a train was a licensee. Gulf, etc., R. Co. v. Bates [Tex. Civ. App.] 16 Tex. Ct. Rep. 319, 95 S. W. 738.

29. One who sues for injuries sustained at a union depot and shows negligence on the part of persons operating a train which was made up of cars belonging to one company, propelled by engines of another, by a crew paid by a third, and the depot was maintained for the common benefit of all, shows a joint liability without proving the contract relations between the parties. Brown v. Southern Pac. Co. [Utah] 88 P. 7.

30. Evidence insufficient to show contributory negligence as a matter of law where one was injured while going across the tracks at a station to board a train, though he did not look, where it was customary for people to pass there to and from trains, etc. Perkins v. Chesapeake & O. R. Co., 29 Ky. L. R. 660, 94 S. W. 636.

31. See 6 C. L. 1213.

32. One who goes upon a siding to help unload a car is not a trespasser. Louisville & N. R. Co. v. Farris [Ky.] 100 S. W. 870. Where a consignee of ice at the invitation of the conductor of a freight train boarded the caboose for the purpose of unloading it, he was not a mere licensee, but was there by invitation and was entitled to be protected against negligence. Santa Fe, etc., R. Co. v. Ford [Ariz.] 85 P. 1072. The conductor having apparent authority to invite him to board the train, his actual authority is immaterial. Id. One loading a car who goes beyond the routine of his duties, when some one standing near by shouted an alarm to stop a train, to a point where he could see the train and render any assistance emergency might require, is not a trespasser. Chicago, etc., R. Co. v. Pritchard [Ind.] 79 N. E. 508. Where one loading a car left his duties when some one shouted an alarm to stop an approaching train and went to a point where he could see the train, the jury could presume in the absence of evidence that he went there through a sense of duty to render any assistance emergency might require. Id. Where one was struck while unloading bedding into stock cars, a statement by the station agent to his fellow workman that no train was coming is admissible as a declaration made in course of his duty and as evidence of permission to go upon the tracks. Chicago & A. R. Co. v. Cox [C. C. A.] 145 F. 157. A consignee engaged in unloading a car on the unloading track is on the railroad premises by invitation, and is not required to watch out for unusual dangers, and employes switching cars onto such track must give him notice. Lovell v. Kansas City Southern R. Co. [Mo. App.] 97 S. W. 193. He is entitled to notice if the employes should have considered the likelihood of his presence in the car. Id.

33. Where one unloading cars on a siding is injured by the car being moved without warning, the company is liable though the moving of such car resulted from a latent defect in the coupling. Louisville & N. R. Co. v. Farris [Ky.] 100 S. W. 870. Where a third person was killed while loading cars, it must be shown that the company was negligent or that its servants were grossly negligent or unfit, as provided by Rev. Laws, c. 111, p. 267, and c. 171, § 2. Pearlstein v. New York, etc., R. Co. [Mass.] 77 N. E. 1024. Evidence that a servant employed to assist such person started to jump, dance, and jerk a rope attached to a machine being loaded, for the purpose of steadying it, but immediately desisted when requested, does not show gross negligence. Id. Where one who boarded a caboose at the invitation of the conductor to unload goods consigned to him and was injured by a jar when a coupling was made, instructions as to negligence and contributory negligence held proper. Santa Fe, etc., R. Co. v. Ford [Ariz.] 85 P. 1072. Other instructions held erroneous as imposing too light a degree of care. Id. Where one was injured while unloading a car by the bumping of other cars against it, whether the giving of notice to a boy on the wagon was the exercise of ordinary care was for the jury when it was disputed that there was a boy on the wagon. Little Rock, etc., R. Co. v. Cross [Ark.] 93 S. W. 981. Where a consignee was in a car on the unloading

ises safe [34] and on the part of railroad servants whose duty it is to assist them.[35] But they must exercise reasonable care for their own safety and may not recover for an injury which results from their contributory negligence.[36]

Children on or near tracks.[37]—If a child is a trespasser no higher duty is owed him than is owed any other trespasser [38] until his presence is discovered, and then, if he is of tender age, there is no presumption that he will act with the discretion of an adult.[39] But where a child is rightfully on railroad premises, ordinary care under the circumstances must be exercised for his protection.[40] Whether the degree

track and was injured by other cars being switched onto such track during the noon hour, when it was supposed by railroad employes that no one was in the car and there was no signs of activity about **evidence held insufficient to show negligence** on the part of the railroad. Lovell v. Kansas City Southern R. Co. [Mo. App.] 97 S. W. 193.

34. Where a night watchman whose duty it was to look after the closing and sealing of cars knew that a car was being unloaded after business hours, the company owed such person the duty not to negligently injure him where he did not know he was violating any rule of the company and employes of the road having charge of unloading cars knew of his position. Little Rock, etc., R. Co. v. McQueeney [Ark.] 92 S. W. 1120. A railroad company which choses to deliver freight from a car instead of from the freight house must keep the car safe for the use of the consignee. Ladd v. New York, etc., Co. [Mass.] 79 N. E. 742. By using a freight car of another company as a place for the delivery of freight, the company becomes liable for injuries resulting from defects in the car. Id. Where the servant of a railroad company which is using a car for the delivery of freight instead of using the freight house is notified of a defect in such car, the company is negligent where such defect was not repaired until after a servant of the consignee was injured while unloading. Id. The company was not relieved because of the fact that the consignee knew of the defect, he having notified the company of it. Id. Where one loading a car left his employment when an alarm to stop an approaching train was shouted, and went to where he could see the train and was thrown onto the track and killed by the train by the failing of poles caused by a defect in the car, the proximate cause of the accident was a question for the jury. Chicago, etc., R. Co. v. Pritchard [Ind.] 79 N. E. 508. If the defect was the result of negligence of the company and was the proximate cause of the injury, the company was liable though there was no priority of contract between it and the decedent. Id. Where one company controls others by stock ownership and operates all lines as a single system, though the general management of each road is retained by the corporation owning it, the dominant corporation bears the relation of principal with respect to traffic originating on lines of the former and is directly liable for an injury to one employed in unloading one of its own cars on the track of a subordinate company through negligence of employes of the latter. Lehigh Valley R. Co. v. Delachesa [C. C. A.] 145 F. 617.

35. Where one loading cars was under no contract relation with the railroad company, he did not assume the risk of negligence on the part of servants of the railroad company employed to assist him. Pearlstein v. New York, etc., R. Co. [Mass.] 77 N. E. 1024. Where one loading a machine into a car was injured, evidence that a servant of the railroad company who was assisting started to jump, dance, and whistle, and jerked a rope attached to the machine just prior to the accident, justifies a finding that such negligence was one of the causes of the accident. Id.

36. Where one unloading a car on a side track is warned to get off when the car was about to be moved, the railroad is not liable. Louisville & N. R. Co. v. Farris [Ky.] 100 S. W. 870.

37. See 6 C. L. 1213.

38. A boy eight years old finding the crossing blocked went to the depot about fifty feet away and stepped onto a flat car which was moved by an engine and he was thrown under the car and killed. The train employes did not know of his presence. Held he was a trespasser to whom no other duty was owed than to refrain from willfully injuring him. Hasting v. Southern R. Co. [C. C. A.] 143 F. 260. Evidence held to require nonsuit where a boy trespassing on a retaining wall which a railroad company was erecting fell and was injured when the watchman approached. Weatherbee v. Philadelphia, etc., R. Co., 214 Pa. 12, 63 A. 367.

39. As to a child of tender years on the track, no presumption arises that it will appreciate danger and act with the discretion of an adult in getting out of the way of an approaching train, and employes operating the train may not act on such presumption. Southern R. Co. v. Chatman, 124 Ga. 1026, 53 S. E. 692.

40. Where a child was fishing in a stream which ran through a lumber yard to which all persons were admitted and was killed by a car which was knocked over the end of a siding, the railroad was held liable though ties and rails had been thrown up at the end to prevent cars from going over. Black v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 863, 109 N. W. 1052. Where a boy standing by a locomotive at a station is killed by reason of a known defect in such locomotive, the railroad company is liable. Waltz v. Pennsylvania R. Co. [Pa.] 65 A. 401. Where a child eight years old was injured by a train being backed down upon him while he was on the track by invitation, the company could not relieve itself on the theory that the child voluntarily encountered the danger where it is not shown that he appreciated the danger, since such appreciation would not be presumed in a child of that age. Pittsburgh, etc., R. Co. v. Simons [Ind.] 79 N. E. 911. Complaint held sufficiently specific in an action where a child was injured on a crossing generally used by the

of care necessary has been exercised,[41] and whether the child was guilty of contributory negligence is generally a question of fact,[42] unless the circumstances show otherwise as a matter of law.[43]

Adults walking on tracks.[44]—People who walk on tracks must exercise vigilence commensurate with known risks.[45] In some states it is held to be contributory negligence as a matter of law to walk on a railroad track,[46] but if one is lawfully on the tracks [47] by virtue of custom or long continued use of the track at a certain

public by getting his foot caught in an unblocked frog and being run over by a train running backwards. Id. Where a child was injured at a permission crossing by being run over by a train while his foot was caught in an unblocked frog, the admission of affirmative evidence on the question whether he could have crossed safely had his foot not caught held not reversible error. Id. Where a boy was injured while asleep on a platform, evidence that the track was out of repair at that point, causing passenger coaches to project over the edge of the platform, was admissible. Mann v. Missouri, etc., R. Co. [Mo. App.] 100 S. W. 566. Where a boy was struck while asleep on a platform, evidence that the engineer's view of the platform was unobstructed is admissible. Id. In such case evidence that the train was past due and running at thirty-five miles an hour was admissible. Id.

41. Questions of negligence and contributory negligence held for the jury where a licensee (child) was injured on the track. Norfolk & W. R. Co. v. Carr [Va.] 56 S. E. 276. Whether a railroad was negligent where a boy sleeping on a platform was struck, held for the jury. Mann v. Missouri, etc., R. Co. [Mo. App.] 100 S. W. 566.

42. Question of contributory negligence held for the jury where a boy seven years of age walking on the track was struck by a train. Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832. Whether a boy eight or nine years of age in walking along the track was guilty of contributory negligence in failing to keep a lookout up and down the track held for the jury. St. Louis, etc., R. Co. v. Sparks [Ark.] 99 S. W. 73. Where a boy was killed at a permissive crossing and no one witnessed the accident, evidence held to sustain a judgment for the railroad company. Grant v. Philadelphia, etc., R. Co. [Pa.] 64 A. 463. Contributory negligence of boy nine years old killed while crossing track in city street held for jury. Metzler v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 180.

43. It is contributory negligence for a boy familiar with the locality and movement of trains to go to sleep in a position where he knew a passing train would strike him. Mann v. Missouri, etc., R. Co. [Mo. App.] 100 S. W. 566. A boy twelve years old with a knowledge of the method of operating trains and appreciates the danger of being on the track is guilty of contributory negligence where without necessity he stands or walks on track laid in the street. Coy v. Missouri Pac. R. Co. [Kan.] 86 P. 468. Evidence held sufficient to show contributory negligence where a boy of ordinary intelligence, thirteen years of age, attempted to pass in front of a moving engine. Chicago, etc., R. Co. v. Laughlin [Kan.] 87 P. 749. Rev. St. Wis. 1898, § 1810, imposes liability on a railroad when it fails to fence its track only when injuries are the proximate result of such failure, and injuries result to a small boy who entered where a fence should have been by reason of a car standing on a grade being loosened by trespassers. Such failure was not the proximate cause of the injury. Paquin v. Wisconsin Cent. R. Co., 99 Minn. 170, 108 N. W. 882.

44. See 6 C. L. 1214.

45. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235. A licensee walking on the track is charged with a duty to care for his own safety, with a knowledge of the frequent passing of trains and that the method of shifting cars at such place was by flying switches. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569. If heedlessness or imprudence of a person was the sole and proximate cause of his injury, he cannot recover, however negligent the railroad company may have been. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235. A licensee must vigilantly look and listen for the approach of trains from the rear as well as from in front. Norfolk & W. R. Co. v. Denny's Adm'r [Va.] 56 S. E. 321.

46. One who stands or walks on a railroad track in a street when there is no necessity for doing so is guilty of contributory negligence. Coy v. Missouri Pac. R. Co. [Kan.] 86 P. 468. Though implied permission to walk on the track may relieve a person from the imputation of being a trespasser, yet, if he walks on the track when he could with equal convenience walk on a path beside it, he is guilty of contributory negligence as a matter of law. Gulf, etc., R. Co. v. Mathews [Tex.] 15 Tex. Ct. Rep. 957, 93 S. W. 1068. Under Rev. St. 1899, § 1105, it is negligence per se to walk on a railroad track. Frye v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 566. In Georgia, under Civ. Code 1895, § 2322, if the injured party was guilty of contributory negligence to some extent, such fact is to be considered in fixing the measure of damages to be recovered. Macon & B. R. Co. v. Parker [Ga.] 56 S. E. 616.

47. Where a railroad company cut a car loose on a down grade where by its own momentum it crashed into cars in the yard of a mill company and killed an employe of such company, who was lawfully in the yard, and the railroad company had no one in a position to exercise control over or note where the detached car was going, it was negligent. Hudson v. Atlantic Coast Line R. Co., 142 N. C. 198, 55 S. E. 103. A railroad company is liable where it injures a trespasser walking by the side of the track if he was in the exercise of ordinary care and the company knew of his presence or failed to exercise ordinary care to discover it when the circumstances were sufficient to put a person of average prudence on inquiry. Brown v. Boston, etc., R. Co., 73 N. H. 568,

point by pedestrians, they can claim the rights of a licensee. Ordinary care must be exercised for their protection,[48] and trains must be operated with a view to their probable presence on the track.[49] The rule that ordinary care must be used where the presence of persons on the track is to be anticipated applies where the track has been used by them for a long time in cities and thickly populated communities and not in rural or sparsely settled communities.[50] So, also, if tracks are located on a street or public highway, due care must be taken for the protection of persons lawfully on the track,[51] and as to them statutory regulations must be observed.[52] A railroad is not required to observe unreasonable precautions in the operation of its

64 A. 194. Laws 1899, p. 316, c. 75, limiting the liability of railroads to injuries caused by gross negligence, does not limit liability to injuries occasioned by gross or willful negligence where one was struck by a train while walking along the side of the track in the absence of posted notice forbidding such use of the track. Id. Such act is not complied with by showing that notice was at some time posted without showing that at the time of the accident the notice was so maintained that the persons for whose benefit it was intended could see it by exercise of reasonable care. Id. A notice posted on a gate leading to a private crossing dated in 1895, purporting to conform to Pub. St. 1901, c. 266, requiring the gate to be closed and forbidding trespassing, is not notice under Laws 1899, p. 316, c. 75, limiting liability to gross negligence where notice has been posted. Id. Where a licensee was killed while walking on the track, allegations that the train was running at a dangerous rate of speed and that no signals were given as should have been given, in the exercise of ordinary care, shows common-law negligence though there is no statute regulating speed or requiring signals. Missouri, etc., R. Co. v. Snowden [Tex. Civ. App.] 99 S. W. 865.

48. If the portion of the track where a pedestrian is injured is so frequently used by the public with the knowledge of the railroad company as to require it, in the operation of trains, to anticipate the presence of persons, it is a question of fact whether the operatives were negligent in operating a train in such manner that it was impossible to stop it after discovery of a person on the track in a perilous position. Shaw v. Georgia R. Co. [Ga.] 55 S. E. 960. Instructions disapproved. Id. Evidence that the place where an injury occurred was in a populous town, that the track was frequently used by pedestrians, was admissible to show necessity for increased vigilance where cars were backed over the track at that point. St. Louis, etc., R. Co. v. Sparks [Ark.] 99 S. W. 73. The fact that a great many people trespass upon the track with the acquiescence of the company which does not openly complain does not confer on the public a legal right to do so. Chesapeake & O. R. Co. v. Barbour's Adm'r, 29 Ky. L. R. 339, 93 S. W. 24.

49. A train running through a populous community where it is known that the track is often used by pedestrians must be operated with a view to the probable presence of persons on the track. Illinois Cent. R. Co. v. Murphy's Adm'r [Ky.] 97 S. W. 729. Lookout must be kept and train kept under control. Where one was injured on a portion of the track much used by pedestrians, it was not error to refuse to charge that no duty was owed him until his presence was discovered. Macon & B. R. Co. v. Parker [Ga.] 56 S. E. 616. Where one, though a trespasser in a certain sense, is on a part of the track so frequented by the public as to give operatives of trains notice to apprehend their presence, the company must exercise ordinary cars to discover and protect him. Id. Complaint held sufficient on this theory. Id.

50. Chesapeake & O. R. Co. v. Kipp's Adm'x [Ky.] 100 S. W. 246.

51. Train operatives running along a street or way are bound to anticipate the presence of persons on the track and to exercise reasonable care to avoid injuring them. Manion v. Lake Erie & W. R. Co. [Ind. App.] 80 N. E. 166. A complaint for injuries to a traveler by a train run on a track in a street, alleging that the train was carelessly and negligently run at a high rate of speed, without pointing out in what manner it was so run and without alleging violation of ordinance, and not showing in what manner the company was negligent or what duty it violated, states no cause of action. Southern R. Co. v. Hansbrough's Adm'x, 105 Va. 527, 54 S. E. 17. Allegations in a complaint for injuries to a traveler by a train run on a track in the street, that the train was run at an excessive rate of speed, and that no signals were given without alleging statutory necessity therefor, and not showing failure to exercise due care to prevent injury after seeing him, shows no duty of the company violated and states no cause of action. Id.

52. Where a traveler was injured by a collision with a train run in a street, allegations of an ordinance prohibiting the running of trains at a higher rate of speed than five miles per hour, and requiring ringing of bell, and alleging violation of such ordinance as the proximate cause of the injury states a cause of action. Southern R. Co. v. Hansbrough's Adm'x, 105 Va. 527, 54 S. E. 17.

53. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235. Servants in charge of a train who see a person on the track may regard him as one in possession of his senses and no duty is imposed on them by the fact that he is deaf. Houston & T. C. R. Co. v. O'Donnell [Tex.] 15 Tex. Ct. Rep. 505, 92 S. W. 409. An engineer on seeing one on the track may presume that he would leave it in time to avoid injury and need not at once take steps to stop the train. Id. Where a particular point on the track had been used by pedestrians largely on Sundays and during the daytime, a railroad is not required to be on the lookout for persons on the track at midnight. Hoback's Adm'r v. Louisville, etc., R. Co. [Ky.] 99 S. W. 241.

trains.[53] Whether a railroad has been guilty of actionable negligence,[54] and whether a pedestrian has been guilty of contributory negligence, is generally a question of fact,[55] unless the circumstances show otherwise as a matter of law.[56] The doctrine of last clear chance does not apply where one walking on the track voluntarily placed himself in a place of danger from which he had present means of escape and remained there without exercising the precautions of an ordinarily prudent man.[57] One invoking this rule has the burden to prove facts making it applicable.[58]

54. Question of negligence where a person on the track was injured, held for the jury. Johnson v. Center [Cal. App.] 88 P. 727. Where a pedestrian on the track was injured, evidence as to the negligence of the operatives of the train held for the jury. Edwards v. Chicago, etc., R. Co. [S. D.] 110 N. W. 832. Evidence sufficient to show that one injured on the track was free from contributory negligence. Best v. New York Cent., etc., R. Co., 102 N. Y. S. 957. Where one working on an elevated road containing four tracks was killed, evidence held to show that failure of the train to give warning of its approach was not the proximate cause of his injury. Grathwohl v. New York Cent., etc., R. Co., 101 N. Y. S. 667. Evidence sufficient to show negligence in failing to stop the train after the presence of a person on the track was discovered as well as in failing to give signals. Illinois Cent. R. Co. v. Murphy's Adm'r [Ky.] 97 S. W. 729. Where in an action against the railroad company and the engineer a verdict was returned against the company alone, evidence held sufficient to sustain it. Id. Whether the speed of a train in a populous community where it is known that the track is often used by pedestrians is so great as to amount to negligence as against a trespasser is for the jury. Id.

55. Where an employe of a mill went between cars and a bumping post in the mill yard, and while there was killed by cars being bumped into him by a car negligently cut loose on a down grade by a railroad company, he was not guilty of contributory negligence as a matter of law. Hudson v. Atlantic Coast Line R. Co., 142 N. C. 198, 55 S. E. 103. Evidence sufficient to show that a night watchman killed was guilty of contributory negligence. Hancock v. Gulf, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 128, 92 S. W. 456. Where one was killed on an elevated road containing four tracks, he was not shown to have been free from contributory negligence where his view was unobstructed and he had knowledge that trains were liable to run on any track at any time. Grathwohl v. New York Cent., etc., R. Co., 101 N. Y. S. 667. Where one hastening to catch a train was struck by a train passing on another track, evidence of negligence and contributory negligence held for the jury. Hicks v. Union Pac. R. Co. [Neb.] 107 N. W. 798. Evidence of negligence and contributory negligence held for the jury where one was killed by a train while walking on a path along the edge of the track. Brown v. Boston, etc., R. Co., 73 N. H. 568, 64 A. 194. Evidence sufficient to show that a person injured on the tract was guilty of contributory negligence. Shepard v. Lewiston, etc., R. Co. [Me.] 65 A. 20. Evidence insufficient to show that one on the track was guilty of contributory negligence. Stegner v. Chicago, etc., R. Co., 97 Minn. 571, 107 N. W. 559. Evidence held to show that one injured while walking on the track was guilty of contributory negligence where, while walking a distance of forty feet along the side of the track, she was safe and stepped onto the track without looking, though she knew a train was approaching. Cranch v. Brooklyn Heights R. Co., 186 N. Y. 310, 78 N. E. 1078.

56. Where one with good sight and hearing walks on the track when he can with equal convenience walk on a path beside it, and knows that it is near train time, and is struck at a point where he has a view of the track for half a mile, he is guilty of contributory negligence as a matter of law. International & G. N. R. Co. v. Ploeger [Tex. Civ. App.] 96 S. W. 56. Where one knew a train was approaching and stepped onto the track immediately in front of it, she was guilty of contributory negligence. Hutchinson v. Missouri Pac. R. Co., 195 Mo. 547, 93 S. W. 931. A person thirty-four years old in full possession of his faculties who walks for half a mile on the track without once looking back or listening is guilty of contributory negligence as a matter of law. Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47. Where a mere licensee was killed while walking on the track, evidence sufficient to show contributory negligence as a matter of law. Gibbons v. Northern Pac. R. Co., 99 Minn. 142, 108 N. W. 471. Where a person on the track heard the whistle of the engine and saw the headlight, failure to give statutory signals is immaterial. Hutchinson v. Missouri Pac. R. Co., 195 Mo. 547, 93 S. W. 931.

57. Northern Pac. R. Co. v. Jones [C. C. A.] 144 F. 47. The fact that the wind was blowing in his face and that the sound of an approaching train was deadened by a waterfall in the vicinity did not excuse failure to look back but rendered use of his senses more imperative. Id.

58. Where it appeared that one struck by a train while walking on the track was guilty of contributory negligence as a matter of law, he must show in order to recover that after the train operatives discovered his peril they failed to use all means at hand to stop the train. International, etc., R. Co. v. Ploeger [Tex. Civ. App.] 96 S. W. 56. If one struck by a train was negligent, the railroad is not liable unless he was in a perilous position and the servants saw him and realized that he could not or would not extricate himself. Houston & T. C. R. Co. v. O'Donnell [Tex.] 15 Tex. Ct. Rep. 505, 92 S. W. 409. If the peril of a person on the tracks should in the exercise of reasonable care have been discovered in time to prevent injury to him, the company is liable though he was not in fact discovered in

Persons standing, sitting, or lying on tracks[59] are negligent,[60] but such fact does not relieve the company from the duty to exercise ordinary care after their presence is discovered.[61]

Persons along or between tracks.[62]—Injury to persons near the track is not ordinarily to be anticipated in the operation of trains,[63] but in throwing articles therefrom care must be used not to injure such persons.[64] Likewise, persons standing so close to the track as to be struck by passing trains are usually deemed negligent,[65] but contributory negligence is for the jury when the injury is caused by articles thrown from the train,[66] or defective appliances unduly projecting,[67] or where the injured person is engaged in rescuing one in peril.[68]

Persons on bridges or trestles.[69]—As a general rule, one who goes upon a bridge

time. Texas & P. R. Co. v. Modawell [C. C. A.] 151 F. 421.

59. See 6 C. L. 1215.

60. It is negligence for a person to stand on one track absorbed in watching a train on another. Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967.

61. Where operatives of a train discovered a person lying on the track either drunk or asleep when three hundred and eighty yards from him, within which time the train could have been stopped, an issue of discovered peril was raised and the verdict of the jury holding the railroad liable was sufficiently sustained. Texas & P. R. Co. v. Brannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 844, 96 S. W. 1095. Where one was injured while standing on the track, an instruction that if operators of the train failed to exercise ordinary care, etc., he could recover, held not to ignore existence of concurrent negligence. Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967. Where one was injured while standing on the track within city limits, where he could have been seen for three hundred yards, was standing with his back to the train, no signals were given as required by law, held operatives of the train failed to exercise ordinary care. Id.

62. See 6 C. L. 1214.

63. Where the circumstances were such as to authorize a finding that an engineer was bound in the exercise of ordinary care to anticipate the perilous position of one on the right of way with his team, it was proper to refuse to instruct that no duty was owed him until he was discovered. Southern R. Co. v. Hill, 125 Ga. 354, 54 S. E. 113. Where a licensee on the right of way was injured by a **brake shoe flying from a passing train,** the railroad company was guilty of no negligence. Carr v. Missouri Pac. R. Co., 195 Mo. 214, 92 S. W. 874. Evidence insufficient to show negligence on the part of a railroad where a boy was injured while walking near the track of a railroad company temporarily laid in the street. Keller v. Philadelphia & R. R. Co. 214 Pa. 82, 63 A. 413.

64. Where it is the custom to throw a bundle of newspapers from a moving train, which fact is known to the railway company, it is liable where the track runs along the side of a highway and one on the opposite side of such way is struck by the bundle. Clifford v. New York Cent. etc., R. Co., 111 App. Div. 809, 97 N. Y. S. 954. Where a fireman knew of the presence of a person at a crossing, his act of recklessly and negligently throwing a shovel of burning cinders on her from the passing train renders the company liable irrespective of whether she stood at or near the crossing as alleged. Louisville N. R. Co. v. Eaden, 29 Ky. L. R. 365, 93 S. W. 7. A complaint that while a person was lawfully standing near a private crossing, a fireman on a passing train negligently and recklessly threw a shovefull of burning cinders, embers, and ashes, into her face, is good against general demurrer and a motion in arrest of judgment, where it is also alleged that the fireman knew of her presence at the crossing. Id.

65. Where one sitting on a platform beside the track was injured by being struck by a car, evidence held to show contributory negligence. Burde v. Chicago, etc., R. Co. [Mo. App.] 100 S. W. 509. One standing on the right of way near the track 30 feet above the crossing, who is struck by an engine moving backwards, cannot recover. Bradley v. Louisville & N. R. Co. [Ala.] 42 So. 818. Where one whose duty it was to stand near a switch was killed by a caboose running loose and colliding with an engine near the switch, and he had no notice of the approach of the caboose until too late to get out of the way, the question of contributory negligence was held for the jury. Pittsburgh, etc., R. Co. v. Bovard, 223 Ill. 176, 79 N. E. 128.

66. A boy who is standing in the street where he is in no danger of being struck by a passing train is not guilty of contributory negligence precluding recovery where he is struck by a piece of ice kicked off the caboose by a brakeman. Willis v. Maysville, etc., R. Co., 29 Ky. L. R. 178, 92 S. W. 604. Where a trespasser was struck by an article thrown from a passing train, the jury could not disregard testimony of persons who threw it that they did not see him. St. Louis Southwestern R. Co. v. Bryant [Ark.] 99 S. W. 693.

67. Licensee standing at what would ordinarily be safe distance from track held not guilty of contributory negligence in not observing that step of approaching car was so bent as to unduly project. Missouri, etc., R. Co. v. Taylor [Kan.] 85 P. 528.

68. Where one was injured while attempting to rescue a passenger from a dangerous position near the track, question of negligence in failing to discover that the passenger was in danger, held for the jury. Missouri, etc., R. Co. v. Harrison [Tex. Civ. App.] 99 S. W. 124.

69. See 6 C. L. 1215.

or trestle is a trespasser [70] to whom no look out duty is owed,[71] and where a sign warning against trespassing is kept at each end of a bridge, one who goes upon it is none the less a trespasser because others trespassed.[72]

Persons near crossings. Persons crossing tracks away from established crossings.[73]—A railroad owes a duty to give warning of approaching trains at a point where the public is accustomed to cross and the company has recognized the right to do so,[74] and to take other precautions for their safety if necessary in the exercise of reasonable care,[75] such persons not being deemed trespassers.[76] But if there is no open crossing and the company has not actually nor impliedly recognized the right of the public to cross, no such duty is owed.[77] One using a permissive crossing is bound to use due care under all the circumstances,[78] but negligence of a

70. One who goes upon a bridge in a switch yard, there being a warning against trespassers, is a trespasser, the yard not being within city limits and the bridge not being at a crossing. Prince v. Illinois Cent. R. Co. [Ky.] 99 S. W. 293. No rights are acquired by habitually walking on a railroad bridge not adapted to the use of pedestrians and which, though within city limits, is no part of nor near any street. Louisville, etc., R. Co. v. Woolfork [Ky.] 99 S. W. 294.

71. All the law requires is that after his peril is discovered reasonable diligence be used to prevent injury to him. Beiser v. Chesapeake & O. R. Co., 29 Ky. L. R. 249, 92 S. W. 928. This is so, though the bridge is within city limits, where it is between 25 and 30 feet above street grade. Id.

72. Beiser v. Chesapeake & O. R. Co., 29 Ky. L. R. 249, 92 S. W. 928.

73. See 6 C. L. 1215.

74. Where it had been customary to place cars so as to leave an opening, warning should be given before they were pushed together. Sites v. Knott, 197 Mo. 684, 96 S. W. 206. It is negligence for a railroad company to run trains at a rapid rate of speed, without headlight or other signal being given, over a part of the track much used for crossing and by pedestrians, and if failure to give such warning or use care is the proximate cause of an injury, the company is liable. Heavener v. North Carolina R. Co., 141 N. C. 245, 53 S. E. 513. A railroad must use ordinary care to protect persons who are crossing at a place where the general public has been long accustomed to cross with the tacit consent of the company. Frye v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 566. The right of the public to cross at a particular point and the assent of the company thereto may be established by circumstantial evidence. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222.

75. Whether a railroad company was negligent in failing to block a frog lying in a path used by the public generally held a question of fact. Pittsburgh, etc., R. Co. v. Simons [Ind.] 79 N. E. 911. Where one was struck near a crossing, evidence that the view from the right of way to the highway was obstructed is not admissible because liable to lead the jury to believe that extra precautions on the part of the railroad company were required and that failure to observe them was negligence. Houston & T. C. R. Co. v. O'Donnell [Tex.] 15 Tex. Ct. Rep. 505, 92 S. W. 409. An engineer seeing a pedestrian approaching a recognized crossing may presume that he will stop before placing himself in a perilous position, where it does not appear that such pedestrian is unmindful of approaching danger, and until the engineer has reason to believe that he will not stop, he is not required to use means to prevent injury to him Sites v. Knott, 197 Mo. 684, 96 S. W. 206. Where one walking along the track at a place used by pedestrians was killed, evidence held insufficient to show that the railroad company was negligent. Chesapeake & O. R. Co. v. Farrow's Adm'x [Va.] 55 S. E. 569.

76. One is on the track by invitation or license where the track is generally used by pedestrians with the knowledge, consent, or acquiescence of the company. International, etc., R. Co. v. Ploeger [Tex. Civ. App.] 14 Tex. Ct. Rep. 474, 16 Tex. Ct. Rep. 183, 93 S. W. 226. One crossing track at station platform designed primarily for passengers, but which the public was accustomed to use as a crossing, held not a trespasser. Metzler v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 180. One on a path on the track which has been commonly used by pedestrians for 10 years with the permission of the railroad company is not a trespasser. Missouri, etc., R. Co. v. Snowden [Tex. Civ. App.] 99 S. W. 865. Mere acquiescence in persons crossing the tracks away from an established crossing does not confer upon them a right to do so, and the company is not bound to provide safeguards for their safety. McLain v. Chicago & N. W. R. Co., 121 Ill. App. 614.

77. Sites v. Knott, 197 Mo. 684, 96 S. W. 206. Evidence insufficient to show that the place where a pedestrian was struck was a regularly used crossing and that the company had recognized a right in the public to cross at such point. Id. Evidence sufficient to show that the railroad company had no notice that the general public were accustomed to cross the track at a particular point. Frye v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 566. Failure to give crossing signals is not negligence as to a trespasser injured near the crossing. Chesapeake & O. R. Co. v. Nipp's Adm'x [Ky.] 100 S. W. 246. Where an accident occurred between two crossings in a city, but not closer than 250 yards from either, failure to comply with the law as to keeping trains under control and ringing the bell at public crossings, may be considered as a circumstance of negligence in connection with other facts in the case. Macon & B. R. Co. v. Parker [Ga.] 56 S. E. 616.

78. If from the evidence two views of the conduct may fairly be entertained, it is a question for the jury whether one struck by an engine on the track is guilty of con-

pedestrian does not preclude recovery where operatives of the train could have seen his perilous position in time to have avoided injury by the exercise of ordinary care.[79]

Persons in switch yards.[80]—Where the general public have for a long period with the acquiescence of the company been using railroad yards as a thoroughfare, due care must be taken to avoid injury to persons whose presence there is to be anticipated,[81] and in some states a statutory duty is imposed.[82] The pedestrian is under a correlative duty of exercising due care for his own safety.[83]

Persons stealing rides.[84]—A person stealing a ride is a trespasser[85] and his status is not changed by an unauthorized invitation to ride[86] or a collusive agreement with the conductor,[87] and no duty is owed him except to refrain from willfully injur-

tributory negligence. Mackowik v. Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256. Where one was injured at a permissive crossing, evidence held to require a verdict for the railroad company. Hoffman v. Pennsylvania R. Co. [Pa.] 64 A. 331. One of mature judgment, of good sight and hearing, who knew of the frequent passage of trains, who steps onto the track in front of an engine which he sees but did not stop to ascertain whether it was standing or moving, was guilty of contributory negligence, barring recovery, though the engine was running at a prohibited speed and no signals were given. Mackowik v. Kansas City, etc., R. Co., 196 Mo. 550, 94 S. W. 256. There is no presumption that one relied on a speed ordinance when going upon the track, though he has a right to presume that it would be obeyed where he was present and testified at the trial, but did not testify that he relied on observance of the ordinance. Id. Where some witnesses testify positively that signals were given and others who were in a position to hear them if they had been given testify that they did not hear them, the question is for the jury. Chesapeake & O. R. Co. v. Nipp's Adm'x [Ky.] 100 S. W. 246.

79. Sites v. Knott, 197 Mo. 684, 96 S. W. 206.

80. See 6 C. L. 1216.

81. Baltimore & O. R. Co. v. Campbell, 8 Ohio C. C. (N. S.) 569. It is negligence to back a train into a railroad yard where persons are lawfully moving about without warning and without any lookout on the rear of the train. Ray v. Aberdeen & R. R. Co., 141 N. C. 84, 53 S. E. 622. Backing a train at the rate of six miles an hour in a freight yard on a clear track is not negligence when a licensee was injured by striking a plank on the track before the train could be stopped. Dacey v. Boston, etc., R. Co., 191 Mass. 44, 77 N. E. 523. Where a licensee was injured in a railroad yard, evidence held to show that proper lookout was kept from the engine which caused the injury. Id. Where one was injured while standing between two cars in a railroad yard, the mere fact that one of the operatives of the train saw him crossing the tract and standing near the cars was insufficient to charge the company with notice that he was in a place of danger. Hocker v. Louisville & N. R. Co., 29 Ky. L. R. 842, 96 S. W. 526. Where one lawfully on railroad premises was negligent in being so near the track as to be in a dangerous position, yet, if the railroad could by exercising proper care have discovered his peril in time to avoid injury to him but failed to do so, it is liable. Ray v. Aberdeen & R. Co., 141 N. C. 84, 53 S. E. 622.

82. Acts 1891, p. 213, requiring train operatives to keep a constant lookout for persons and property applies to trains running in yards. Little Rock, etc., R. Co. v. McQueeney [Ark.] 92 S. W. 1120.

83. That a railway company permits the public to use its yards as a common passageway, and thereby obligates itself to use due care to avoid injuring them, does not relieve one so using the yard from the duty of exercising ordinary care for his own safety. Rich v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79. Where a man 39 years old, in full possession of all his senses, undertook to cross a railroad yard where switching was constantly carried on, evidence held to conclusively show that he was guilty of contributory negligence. Id. A boy 17 years of age who in crossing a switch yard was injured by cars making a flying switch, held guilty of contributory negligence, where he went onto a track without looking, after seeing the train about to make the flying switch on another track. Cranbuck v. Delaware, etc., R. Co. [N. J. Err. & App.] 65 A. 1031. A boy 17 years of age who apprehends the danger in a railroad yard and recognizes his duty to safeguard himself in crossing it is guilty of contributory negligence if he fails to perform his duty. Id.

84. See 6 C. L. 1216.

85. One intending to take a train but who boarded it while in motion and was required to ride on the steps because the vestibule doors were locked is a trespasser. Graham v. Chicago & N. W. R. Co. [Iowa] 107 N. W. 595.

86. Where a 15 year old colored country boy ignorant of the manner of operating trains gets onto a freight train at the direction of a brakeman and without right, he is a trespasser. Folley v. Chicago, etc., R. Co., 16 Okl. 32, 84 P. 1090. One who on the invitation of a brakeman rides on a freight train in the yards is a trespasser and cannot recover where he is injured because of the sudden starting of the train. Skirvin v. Louisville & N. R. Co. [Ky.] 100 S. W. 308.

87. Where a freight conductor collusively agrees to carry a person on the train without payment of fare, the company is not liable where the conductor forces him to leave the train while it is in motion. Graham v. International & G. N. R. Co. [Tex.] 15 Tex. Ct. Rep. 759, 93 S. W. 104. Where a person was permitted to ride on a freight train by paying a nominal sum to

ing him,[88] but if he is willfully injured he may recover,[89] and the rule as to punitive damages applies.[90] The rules applicable to adults in this respect apply to children,[91] unless by reason of circumstances their presence on the train is to be anticipated.[92]

the conductor for his one use, though he testified that he did not know of the rule of the company to the contrary, held to show that he knew that the conductor had no authority to permit him to ride as a passenger. Id.

88. Whether such duty was observed in expelling such person from a train is a question of fact when the material facts are disputed. Toledo, etc., R. Co. v. Gordon [C. C. A.] 143 F. 95. Where after operatives of a train ascertained the perilous position of a trespasser they did not use emergency brakes, which was dangerous to passengers, but took steps to admit him to the car, failure to use emergency brakes was not negligence. Graham v. Chicago & N. W. R. Co. [Iowa] 107 N. W. 595. Where a trespasser on a train was struck by a portion of a viaduct structure, evidence sufficient to show that operatives of the train had no notice of his perilous position. Id. Where a trespasser is injured while being ejected from a car, he has the burden to prove wilful negligence on the part of the railroad company. Miller v. Detroit United R., 144 Mich. 1, 13 Det. Leg. N. 140, 107 N. W. 714. The only duty owed a trespasser is to refrain from willfully injuring him, and where one attempted to board a train at the invitation of the brakeman, and where it was impossible to stop the train after his danger was discovered, the company was not liable. Skirvin v. Louisville & N. R. Co. [Ky.] 100 S. W. 308. Where one not an employe is riding on an engine and jumps off immediately in front of a moving car, the railroad is not liable if the person in charge of the car discovered his peril too late to avoid injury to him. St. Louis Southwestern R. Co. v. Hunt [Tex. Civ. App.] 100 S. W. 968. Where one riding on a freight train by invitation of the conductor was injured, and there was no proof of willful negligence or wanton injury, he could not recover. Vassor v. Atlantic Coast Line R. Co., 142 N. C. 68, 54 S. E. 849. Where one riding on a locomotive jumped off without looking or listening and stepped upon another track immediately in front of a moving car, he was guilty of contributory negligence. St. Louis Southwestern R. Co. v. Hunt [Tex. Civ. App.] 100 S. W. 968.

89. A railroad company is liable where a conductor willfully ejects a trespasser from a moving train in a dangerous place, or compelled him to jump from the train by threats or demonstrations of violence which would have been yielded to by a reasonable prudent man. Toledo, etc., R. Co., v. Gordon [C. C. A.] 143 F. 95. Where a person stealing a ride was injured and testified that he was kicked off the top of moving cars and the train crew testified that he was not kicked or pushed off and that they did not know he was on the train, the question was for the jury. Paruio v. Philadelphia & R. R. Co., 145 F. 664. It is willful and wanton negligence to expel a trespasser from a rapidly moving train by threats of violence and show of force. Foiley v. Chicago, etc., R. Co., 16 Okl. 32, 84 P. 1090. A railroad company is liable where the condutor of a freight train in removing a trespasser therefrom inflicts wiiiful or wanton injury upon him. Id. Where a trespasser was forcibly ejected from a rapidly moving train by a brakeman, and in falling struck a post and was thrown under the train, the wrongful act of the brakeman was the proximate cause of the injury. Hayes v. Southern R. Co., 141 N. C. 195, 53 S. E. 847. A freight brakeman has authority to eject trespassers from a train and the company is liable if he does so in a violent and unlawful manner. Id. A trespasser on a train attempting to perpetrate a fraud on the road by beating his way with connivance of a brakeman may recover for injuries sustained by violence of such brakeman in forcibly ejecting him. Id. In an action for injuries sustained by a trespasser while being ejected from a train, it was not error to submit the issues; was he injured by the negligence of the defendant, and was he injured negligently and wantonly as alleged. Id. Liable where brakeman ejects a trespasser from a moving train. Chicago, etc. R. Co. v. Moran, 117 Ill. App. 42.

90. Punitive damages may be recovered where a trespasser is wantonly ejected from a rapidly moving train. Hayes v. Southern R. Co., 141 N. C. 195, 53 S. E. 847. Such damages may be recovered only where the act was accompanied by malice, recklessness, and wantonness. Id. The general law of punitive damages applies to a brakeman ejecting a trespasser as well as to the conductor. Id. A railroad company is not liable in punitive damages where a conductor wrongfully ejects a trespasser from a moving train in a dangerous place where it neither authorized nor ratified the act. The fact that the conductor was not discharged does not show ratification. Toledo, etc., R. Co. v. Gordon [C. C. A.] 143 F. 95.

91. Where a boy was injured, evidence that previous to the accident he had been in the habit of riding on cars was not admissible where it did not appear that he attempted to jump onto the train at the time he was injured. St. Louis, etc., R. Co. v. Sparks [Ark.] 99 S. W. 73. Where a boy playing on a car was injured, evidence sufficient to show that his presence was not known to the engineer, though there was another boy playing nearby whom the engineer did see. Elliott v. Louisville & N. R. Co. [Ky.] 99 S. W. 233. Where a boy was injured while alighting from an engine, evidence held to show that employes on the train had notice of his peril in time to avoid the injury. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469.

92. Where a child was in the habit of playing on cars, and was on when the train started and fell between cars, a wanton disregard for his safety is not shown by the fact that a brakeman who knew he was on did not take steps to have him get off before signalling the train to start. Anternoitz v. New York, etc., R. Co. [Mass.] 79 N.

Persons using hand cars or railroad tricycles [93] are entitled to the exercise of due care on the part of the railroad company.[94]

(§ 11) *F. Accidents to trains.*[95]

(§ 11) *G. Accidents at crossings.* 1. *Care required on the part of the company. General rules.*[96]—Travelers on the highway and railroads have reciprocal right at crossings [97] and failure of either to observe the rights of the other constitutes negligence [98] or contributory negligence.[99] Whether each has observed the required duties is often a question of fact [1] dependent on the circumstances

E. 789. Where for two or three years a small boy had been in the habit of playing in railroad yards and riding on trains there to the knowledge of the employes of the company it was their duty to use reasonable care to avoid injury, though they had attempted to stop the custom. Davis v. St. Louis Southwestern R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 825, 92 S. W. 831. Whether a boy between 8 and 9 years of age, fairly intelligent, was of sufficient discretion to appreciate the danger of riding on freight cars in a railroad yard and guilty of contributory negligence in jumping from a train, held for the jury. Id. Where a boy was injured while riding on a freight car in the yards, evidence as to the negligence of the company in failing to use ordinary care to prevent him from getting on the train and in failing to discover his position and avoid injuring him, held for the jury. Id.

93. See 6 C. L. 1216.

94. Questions of negligence and contributory negligence held for the jury where one riding a railroad velocipede was killed. Hurdle v. Missouri Pac. R. Co. [Kan.] 85 P. 287. Where an engineer testified that he could distinguish a man on a velocipede only at a distance of 750 yards, it was competent to show by experiments, that he could be seen at a distance of 1000 yards. Houston, etc., R. Co. v. Ramsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 745, 97 S. W. 1067.

95, 96. See 6 C. L. 1217.

97. Instructions as to respective duties of train operatives and persons at a crossing approved. Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622. Where a railroad company for many years has permitted the public to cross its tracks at a certain point, not a public crossing, it owes the duty of reasonable care to those using such crossing. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Whether such care has been exercised is ordinarily a question of fact. Id. In order to recover for negligence in failing to give signals, it must have been the proximate cause of the injury. Elgin, etc., R. Co. v. Hoadley, 122 Ill. App. 165.

98. Evidence held to show negligence where a child was struck at a crossing and dragged fifteen feet before any attempt was made to stop the train, where the engineer was blind in one eye and the fireman deaf. Missouri, etc., R. Co. v. Nesbit [Tex. Civ. App.] 97 S. W. 825. Where emergency brakes were not applied until a child struck at a crossing was dragged for 5 feet, such fact was admissible to show that she was not seen. Id. Evidence sufficient to sustain a verdict for plaintiff in an action for injuries at a crossing. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616; Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622; Ritter v. Chicago, etc., R. Co., 128 Wis. 276, 106 N. W. 1103 Evidence sufficient to sustain a judgment for a boy 12 years old who was injured at a crossing. Byron v. Central R. Co. [Pa.] 64 A. 328. The fact that an engineer was keeping a lookout on one side when an accident occurred was not sufficient to relieve the company from the charge of negligence where because of a curve a lookout should have been kept on the other side to protect persons passing over a crossing. St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613. Where one who attempted at the permission of a brakeman on watch to pass between portions of a train cut in two at a crossing, and in an endeavor to escape when the train moved tripped on a stone and was injured, it was proper to refuse to charge that if such accident could not have been anticipated by the company there could be no recovery. Boyce v. Chicago & A. R. Co., 120 Mo. App. 118, 96 S. W. 670. In an action for injuries sustained in a collision between a train and a street car, it is admissible to show that the railroad employes violated rules for the management of trains at crossings. St. Louis, etc., R. Co. v. Andrews [Tex. Civ. App.] 99 S. W. 871. But it is not admissible to prove that after the accident the street car company adopted a rule requiring conductors to go to the crossing in advance of their car. Id.

99. See post, § 11 G. 1.

1. In an action for injuries at a crossing, evidence as to negligence and contributory negligence held for the jury. Williams v. Southern R. Co., 126 Ga. 710, 55 S. E. 948; Massey's Adm'x v. Southern R. Co. [Va.] 56 S. E. 275; Courtney v. Minneapolis, etc., R. Co. [Minn.] 111 N. W. 399; Illinois Southern R. Co. v. Hamill, 226 Ill. 88, 80 N. E. 745. Where a crossing was at an acute angle and a driver approaching on a dark night had his wheel caught in the planking between the rails and while unloading so his team could pull out heard a train approaching and ran down the track and swung his lantern but the train struck his wagon and it was disputed whether the train stopped with reasonable promptness, the questions of negligence and contributory negligence were of fact. Hummer v. Lehigh Valley R. Co. [N. J. Law] 65 A. 126. Whether running a locomotive at a given rate of speed across a street in a populous locality is negligence is a question for the jury under the evidence as to the circumstances surrounding the case, and so also the question of proper care in the matter of looking and listening on the part of one crossing a railway track at grade. Wheeling & Lake Erie Railway v. Parker, 9 Ohio C. C. (N. S.) 29.

Question of negligence held for the jury in a crossing accident. Hartman v. Chicago,

of the particular case.[2] But it is negligence as a matter of law to disregard statutory regulations,[3] nor does observance of such regulations absolve the company if reasonable care required more.[4] Contributory negligence of a traveler will not bar recovery by him if the injury could have been avoided by the railroad company after his perilous position was discovered.[5] Liability for negligence at

etc., R. Co. [Iowa] 110 N. W. 10 In an action for injuries at a crossing it was held for the jury whether the engineer saw the team on the crossing in time to have stopped the train or whether the team was standing near the crossing apparently under control and continued in that position until it was too late to stop the train. Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553. On conflicting evidence as to whether statutory signals were given and whether the headlight on the engine was burning, the question of negligence is for the jury. Line v. Grand Rapids & I. R. Co., 143 Mich. 163, 12 Det. Leg. N. 929, 106 N. W. 719. The question of negligence on the part of a railroad company is for the jury where one was killed at a crossing and no one witnessed the accident. Kreamer v. Perkiomen R. Co., 214 Pa. 219, 63 A. 597. Question of negligence of the railroad held for the jury where one injured at a crossing stopped to look and listen 80 feet from the crossing where people usually stopped, and it appeared that the safety gates were raised. Messinger v. Pennsylvania R. Co. [Pa.] 64 A. 682. In the absence of a statute declaring it negligence to fail to keep a lookout for persons crossing or about to cross, the question whether failure to do so is negligence is for the jury. St. Louis Southwestern R. Co. v. Elledge [Tex. Civ. App.] 15 Tex. Ct. Rep. 545, 93 S. W. 499. In an action for injuries at a crossing, whether the railroad was negligent and whether the negligence was the proximate cause of the injury were questions for the jury, and it was proper to refuse requests for instructions requiring proof of willful misconduct. Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039. Where one was killed at a crossing, **evidence held insufficient** to show that the railroad company was negligent. Chicago, etc., R. Co. v. Clarkson [C. C. A.] 147 F. 397. Where one approached a crossing without paying any attention to his surroundings, and on seeing him the engineer blew three quick blasts of the whistle and then set the air brakes, when the traveler paid no heed to the whistle, held the engineer was not gulity of gross negligence. Rowe v. Southern California R. Co. [Cal. App.] 87 P. 220. Intestate's contributory negligence and not negligence of the engineer in failing to stop the train was the proximate cause of the injury. Id. Where one was killed at a crossing, evidence held insufficient to go to the jury on the question whether the train could have been stopped in time to avoid the accident after the peril of the traveler was discovered. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83.

It is not negligence to construct a depot and other buildings where they obstruct a view of a crossing. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308. Where trains were run at from 50 to 60 miles an hour over a crossing where 100 to 125 teams passed daily, and the whistle was sounded one-fourth of a mile off and the bell rung from that time until the train passed the crossing **evidence held insufficient to show a willful injury** on the part of the railroad company where a team was struck at such crossing. Pittsburg, etc., R. Co. v. Ferrell [Ind. App.] 78 N. E. 988.

2. In running a train during a storm which obscures the view and deadens sound, the greatest caution must be observed and a higher degree of care taken than while running the train in ordinary weather. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14. If a railroad company knows that a **crossing is unusually dangerous** and that statutory signals were not sufficient to give warning, it is its duty to use such other means as are necessary to prevent accidents. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308. It is incompetent to admit testimony that certain buildings should have been erected on the opposite side of the track so that they would not obstruct the company's view of a crossing. Id. That a crossing was in a dangerous condition was held insufficient to show negligence, in the absence of evidence that such dangerous condition contributed to the injury. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880. Absence of a flagman may be a circumstance tending to show negligence, though not alleged. Aurora, Elgin & C. R. Co. v. Gary, 123 Ill. App. 163.

3. Civ. Code S. C. 1902, §§ 2132, 2139, prescribing the duties and liabilities of railroads at crossings, appiles only where an injury occurred at a crossing and by reason of a collision with a frain. Hasting v. Southern R. Co. [C. C. A.] 143 F. 260. Complaint in an action based on Shannon's Code, § 1574, requiring lookout to be kept for objects on the track and signals given and brakes shut down if danger of collision appeared, held to state a cause of action. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. It is negligence to approach a street crossing in the daytime in a dense fog at a rapid rate of speed without giving signals. Wabash R. Co. v. Barrett, 117 Ill. App. 315. Rev. St. 1892, § 2264, requiring signboards at crossings, does not apply to streets of an incorporated city, nor does the speed limit therein provided apply to any streets except those traveled streets of a city upon or through which a track is located. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235.

4. The statutory requirement as to signals at a crossing is not exclusive, but failure to use ordinary care in the matter of warning signals renders the company liable, as does also failure on the part of the engineer and fireman to use ordinary care in keeping a lookout. Wheeling & Lake Erie Railway v. Parker, 9 Ohio C. C. (N. S.) 29. Where a complaint for injuries at a crossing states a good cause of action in other respects, it is not demurrable because the speed ordinance alleged to have been violated is unconstitutional. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713.

5. While one was negligent in attempt-

a crossing cannot be avoided by one company turning over the operation of its trains to another.[6] No duty is owed a trespasser except to refrain from willfully injuring him.[7]

Duty to signal.[8]—As a general rule the exercise of ordinary care requires warning signals be given by an approaching train,[9] and, where signals are required by statute failure to give them[10] in the manner prescribed is negligence per se.[11]

ing to cross at a sharp curve without stopping to look or listen, the company is liable where it appears that the engineer saw him in time to have avoided the accident by blowing the whistle or applying the brakes. Ross v. Sibley, etc., R. Co., 116 La. 789, 41 So. 93. Held error to refuse an instruction as to the "last clear chance" in an action for injuries at a crossing when a team was seen by the engineer steanding near the track. Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553. Whether operatives of a train exercised proper care after discovery of the perilous position of one about to cross the track held for the jury. Griffie v. St. Louis, etc., R. Co. [Ark.] 96 S. W. 750. Where train operatives saw one approaching a crossing, and gave signals and shut off steam, they could presume that he would not attempt to cross, and were not negligent in failing to stop the train. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880. Negligence of one injured at a crossing will not preclude recovery if the operatives of the train failed to use all means at hand to avert the accident after the danger to him was discovered. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144.

6. Harbert v. Atlanta & C. Air Line R. Co., 74 S. C. 13, 53 S. E. 1001.

7. Employes of a railroad company are required only to refrain from willifluly injuring trespassers, or mere licensees on a crossing. Chicago, etc., R. Co. v. McCandish [Ind.] 79 N. E. 903.

8. See 6 C. L. 1217.

9. Though a railroad is under no statutory duty to sound its whistles at private crossings, yet a common-law duty requires it to take notice of the location of such crossing, and if safety of persons using the crossing requires the giving of danger signals, failure to do so is negligence. Hartman v. Chicago, etc., R. Co. [Iowa] 110 N. W. 10. Whether failure to give signals and whether they were especially needful at a particular crossing, held for the jury. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308. Instruction that if the place where one injured attempted to crawl under the drawheads was not a crossing, where the presence of persons should have been anticipated, and the train was started without giving signals the railroad was liable, held erroneous as imposing a liability, even if there was no reason to anticipate the presence of persons. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162. As Shannon's Code, § 1574, relative to the duty to keep lookout and give signals, is declaratory of the common law so far as it goes, a complaint framed under the statute but also alleging further common-law negligence will be treated as wholly under the common law. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. It is negligence to run an engine over a public crossing without giving signals. Elgin, etc., R. Co. v. Hoadley, 122 Ill. App. 165.

10. Failure to give statutory signals is negligence. Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039. That statutory signals were not given is sufficient evidence of negligence. Corbs v. Michigan Cent. R. Co., 144 Mich. 73, 13 Det. Leg. N. 232, 107 N. W. 892. Under Rev. St. 1899, § 1102, requiring signals to be given 80 rods from a crossing, it may be shown in rebuttal of evidence that proper signals were given, that the whistling post was 160 and not 80 rods from the crossing. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. A prima facie case is established by proof of injury and failure to prove statutory signals. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Under Ky. St. 1903, § 786, requiring the giving of signals 50 rods from a crossing, it is proper to charge that it is negligence to fail to give notice of approach of a train, and it is not error to refuse to modify such charge by one that it is the duty of a traveler to stop, look, and listen. Louisville, etc., R. Co. v. Sander's Adm'r, 29 Ky. L. R. 212, 92 S. W. 937. Where a whistling post was outside city limits, failure to give statutory signals is not excused because the company was not required to give them within city limits, though the crossing was within such limits. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Under U. S. 3987, and 3989, as amended by Acts 1902, p. 62, No. 68, providing for an investigation of the cause of a crossing accident by commissioners, and that they may order a change in the manner of operation where commissioners gave a railroad notice of an investigation but did not give notice that a change in the manner of operation would be ordered, an order thereafter made was without jurisdiction and void. In re Rutland R. Co. [Vt.] 64 A. 233. Negligence for jury where train aproached crossing of city street at thirty miles per hour and gave no signal. Metzler v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 180. Shannon's Code, § 1574, requiring signals to be given intermittently from a point outside a city until a depot is reached, is not declaratory of the common law, and evidence of noncompliance is admissible in a complaint under the statue but not under one declaring on common-law liability. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. Under Code 1902, § 2139, punitive damages may be awarded for willful or reckless failure to give crossing signals, if it is alleged that such failure was reckless. Cole v. Blue Ridge R. Co. [S. C.] 55 S. E. 126.

11. Evidence sufficient to show that statutory signals as required by Ky. St. 1903, § 786, were not given, and that a recovery was authorized in the absence of contributory negligence. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14. Evidence sufficient to show that a pedes-

Statutes requiring signals apply to all public crossings [12] bu tnot to private ones,[13] and there is no absolute duty to signal as a train approaches an overhead crossing.[14] It is said to be doubtful whether a statute respecting the giving of audible signals applies to a train running backward.[15] If failure to give signals is the proximate cause of the injury, the railroad company is liable,[16] and the failure to give signals is not excused by taking other precautions.[17] On conflicting evidence as to whether or not the statute has been complied with, the question is for the jury.[18] All testimony tending to show whether or not signals were given is admissible.[19]

trian was struck by a train at a crossing. Id. Failure to give signal eighty rods from the crossing and to continue ringing the bell or blowing the whistle until the crossing is passed as required by statute is negligence. St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613. Ky. St. 1903, § 786, requiring signals to be given continuously from a distance fifty rods from a crossing, applies at all times and under all circumstances, and compliance therewith exempts the company from liability for accidents at crossings, in the absence of circumstances requiring the application of the rule of discovered peril. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14. Under Ky. St. 1903, § 786, requiring signals fifty rods from the crossing and a continuous ringing of bell or blowing of the whistle until the crossing is reached, an instruction requiring notice to be given of the approach of a train by the blowing of a whistle or ringing of a bell did not require the degree of care imposed. Nashville, etc., R. Co. v. Higgins, 29 Ky. L. R. 89, 92 S. W. 549.

12. Where a railroad obstructs a public crossing and directs travel to a private one, the latter must be treated as a public crossing so far as the giving of statutory signals are concerned. Hartman v. Chicago, etc., R. Co. [Iowa] 110 N. W. 10. Evidence sufficient to show that failure to give such signals was negligence where it had been in the habit of giving them. Id. A public road within the meaning of the blow post law is one which has its origin in prescription, dedication, legislative act, or order of court. Southern R. Co. v. Combs, 124 Ga. 1004, 53 S. E. 508. The words "established pursuant to law" in Civ. Code 1895, § 2220, following "public roads or private ways," limit only the words "private ways," Id. Where a crossing though not a public one had been used by from twenty-five to seventy-five persons daily for twenty-five years, the same care with regard to it should be taken as if it was a public crossing. Davis v. Louisville, etc., R. Co. [Ky.] 97 S. W. 1122. Evidence sufficient to show that the crossing was within city limits. Mitchell v. St. Louis, etc., R. Co. [Mo. App.] 97 S. W. 552. A statute requiring signals at any road or street crossing applies to a road which is not laid out and maintained by the county. St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613. Statutes requiring signals to be given from a certain distance from a crossing apply to streets in an incorporated city. Elgin, etc., R. Co. v. Hoadley, 122 Ill. App. 165.

13. A railroad is not required to give signals on approaching a private crossing in a sparsely settled community in the country. Hoback's Adm'r v. Louisville, etc., R. Co. [Ky.] 99 S. W. 241. Where there is no obligation to give signals at private crossings, failure to give the usual signal upon approaching a station about one thousand seven hundred feet from a private crossing is not negligence, though it might have been heard. Annapolis, W. & B. R. Co. v. State [Md.] 65 A. 434.

14. Black v. Bessemer & L. E. R. Co. [Pa.] 65 A. 405. Not where a traveler has a clear view of the track for one thousand five hundred feet while approaching. Id.

15. Goodwin v. Central R. Co. [N. J. Err. & App.] 64 A. 134.

16. Where a traveler looked and listened but saw no train but his horse became frightened by the approach of a train without giving signals and ran onto the track, failure to give signals was the proximate cause of the injury. Mitchell v. St. Louis, etc., R. Co. [Mo. App.] 97 S. W. 552. Where one approaching a crossing was signaled by the watchman to proceed and while on the track was struck by a train approaching without signals at a high rate of speed, the crossing being a much frequented thoroughfare, the negligence of the train operatives was the proximate cause of the injury. Illinois Cent. R. Co. v. Bethea [Miss.] 40 So. 813. When evidence shows that an accident resulted from blowing the whistle while on a crossing, it was error to submit failure to give statutory signals on approaching a crossing as a ground of negligence. Paris, etc., R. Co. v. Calvin [Tex. Civ. App.] 98 S. W. 222.

17. Though the lowering of crossing gates is notice that it is dangerous to cross, it does not excuse failure to give signals required by Civ. Code, §§ 2132, 2139, at least thirty seconds before the train is moved. Weaver v. Southern R. Co. [S. C.] 56 S. E. 657.

18. On positive testimony that signals were given and also testimony by witnesses who were where they should have heard the signals if given that they did not hear them, the question is for the jury. Detroit Southern R. Co. v. Lambert [C. C. A.] 150 F. 555. On positive testimony that statutory signals were not given and like testimony that they were, the question should be submitted to the jury. Goodwin v. Central R. Co. [N. J. Err. & App.] 64 A. 134. Whether statutory signals were given held a question for the jury. Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88. On conflicting evidence as to whether statutory signals were given, the question is for the jury. Fitzhugh v. Boston & M. R. R. Co. [Mass.] 80 N. E. 792. Held a question for the jury whether a speed ordinance was violated, whether signals were given, and whether all means at hand were used to stop the train after the danger to one at a crossing was discovered. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144.

Evidence sufficient to show that proper signals were given on approaching a cross-

Speed.[20]—A city may regulate speed of trains within its sparsely settled limits where there are public crossings and no unreasonable extent of territory is included.[21] In the absence of statute or ordinance,[22] whether or not a given rate of speed is negligence depends on the circumstances of each particular case.[23] Violation of an ordinance regulating speed is not negligence per se but it is a circumstance to be considered.[24] The running of a train over a crossing at a rate of speed in excess of that allowed by ordinance is not wanton or willful misconduct unless persons in charge of the train were conscious that injury would probably exist.[25] Whether or not a speed ordinance has been violated is a question of fact on doubtful or conflicting evidence of speed.[26]

ing. Columbia & P. D. R. Co. v. State [Md.] 65 A. 625. Evidence insufficient to show that statutory signals were not given on approaching a crossing. Eissing v. Erie R. Co. [N. J. Law] 63 A. 856.

19. Testimony of persons who were in a position to hear signals if they had been given that they heard none is some evidence that they were not given. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Where in an action for injuries at a crossing it was alleged that the electric warning bell was out of order and did not give warning and the railroad company introduced evidence showing that it was in order shortly prior to the accident and that it would be impossible for it to have failed to work, the plaintiff was entitled to show that its operation was intermittent, at times sounding for one train and not for the next. Metcalf v. Central Vermont R. Co., 78 Conn. 614, 63 A. 633. The mere fact that a person, who was a mile away from the place where a railroad company was required to commence to ring the locomotive bell, did not hear it at that point nor later while the train was moving away from him, does not show that the bell was not rung, in the absence of proof that it could be heard at such distance. Eissing v. Erie R. Co. [N. J. Law] 63 A. 856. Where a witness heard a bell ringing after the accident but not before, it was no evidence that the bell on the engine with which the collision occurred was not being rung prior to the accident. Id.

20. See 6 C. L. 1218.

21. Houston, etc., R. Co. v. Dillard [Tex. Civ. App.] 15 Tex. Ct. Rep. 393, 94 S. W. 426.

22. The violation of a speed ordinance is negligence per se whether the railroad company had accepted it or not. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Where a crossing was provided with no wing fences, the track was unfenced within an ordinance limiting speed of trains on an unfenced track. Id. In his charge the court recognized that the statute regulating speed of trains at crossings would not apply to a train started at or near the crossing and submitted the issue of fact as to the distance from the starting point to the crossing. Central of Georgia R. Co. v. Harper, 124 Ga. 836, 53 S. E. 391. An ordinance prohibiting trains to run at higher than a prescribed rate of speed, and at night without a headlight, applies, whether at public or permissive crossings, where people habitually pass with the acquiescence of the company. Texarkana, etc., R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. The substance of a complaint that one was killed at a certain point in a city by a train running at a prohibited rate of speed is that he was killed at a point within city limits used by the public for crossing, and failure to show that he was killed at the point alleged is immaterial. Id. Evidence sufficient to show that violation of a speed ordinance was the proximate cause of an injury. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. A complaint stating a good cause of action is not demurrable because not alleging that the violation of a speed ordinance, if valid, was the proximate cause of the injury. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713.

23. No rate of speed in the open country is negligence as to persons at a crossing, but it may become a factor when taken in connection with other circumstances in determining whether due care has been exercised. Hartman v. Chicago, etc., R. Co. [Iowa] 110 N. W. 10. Where evidence in an action growing out of a crossing accident tended to show that the morning was dark, that statutory signals were not given, and that the train was going at an unusual rate of speed, a charge that the rate of speed was not of itself negligence, but was introduced simply on the question of contributory negligence, was proper. Line v. Grand Rapids & I. R. Co., 143 Mich. 163, 12 Det. Leg. N. 929, 106 N. W. 719. Evidence as to speed of a train held admissible on the question as to whether one injured at a crossing did what a prudent man would do under the circumstances where testimony showed that the train suddenly appeared out of the darkness without giving statutory signals and that plaintiff had looked and listened when thirty feet from the crossing. Id. There is no rule of law that it is not negligence to run an engine over a crossing within a city at twenty miles per hour if warning is given and the engine is under control, and such diligence is exercised as is necessary to be observed under the ordinary necessities of the company's business. Negligence depends on the circumstances of the case. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235. It is a question of fact whether a given rate of speed is negligence under the circumstances of the case. Wabash R. Co. v. Barrett, 117 Ill. App. 315.

24. Erie R. Co. v. Farrell [C. C. A.] 147 F. 220.

25. Louisville & N. R. Co. v. Muscat [Ala.] 41 So. 302. Error in instructing that it is willful misconduct is not cured by an instruction correctly stating the law. Id.

26. Where evidence tended to show excessive speed, the question was properly submitted to the jury. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144.

Gates.[27]—In some states railroads are required by statute or ordinance to erect and maintain crossing gates.[28] If an injury results from failure to properly operate the gates, the railroad is liable.[29] A railroad company is required only to exercise reasonable care in the construction and maintenance of crossing gates.[30]

Flagmen.[31]—The duty to maintain a flagman at a crossing cannot be inferred alone from the fact that trains are run over the crossing at a high rate of speed,[32] but depends on the circumstance of each case,[33] but whether or not a flagman is required by law if a railroad assumes to maintain one, it is bound to see that he performs his duty.[34] Where a railroad man killed at a crossing knew that switching was habitually carried on over the crossing and was going on at the time, and that no flagman was kept at that place, the company was not negligent in failing to have a flagman at the crossing to warn pedestrians.[35] If a watchman fails to properly tend gates or give warning, the railroad is liable.[36]

Switching and backing trains.[37]—It is negligence to kick cars over a much used crossing.[38] The mere fact that the approach of a freight train backward is accom-

Speed of train beyond city limits held admissible as bearing on violation of speed ordinance. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. Testimony as to the speed of a train between different stations near the place where the accident occurred is admissible as tending to show that it was greater at that place than the engineer testified it was. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144. Under a city charter providing that printed ordinances should be admissible held that ordinances requiring signals and limiting speed of trains were admissible, being read from a book entitled "Charter and Ordinances of the city of," etc. Texarkana, etc., R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. Where a speed ordinance was alleged to have been violated, evidence that the city did not exercise jurisdiction over a gas plant near the place of accident was not admissible as tending to show that the place of the accident was not within the city. Id. In an action for injuries at a town crossing where it appears that the railroad company had notice of a speed ordinance, such ordinance was admissible, though only open for inspection to voters of the town. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713.

27. See 6 C. L. 1219.

28. Where a railroad company recognized the validity of an ordinance requiring maintenance of crossing gates, by partially complying with it by operating gates during the daytime, it thereby waives notice to erect gates, after the enactment of the ordinance, under Hurd's Rev. St. 1905, c. 114, § 99. Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654.

29. Where a passenger on a street car was injured by a collision at a crossing, the question whether failure to lower gates was negligence held for the jury, where the street car conductor gave an erroneous signal to the motorman after going forward to the crossing. Id. Where a street car was struck at a crossing and the motorman killed, and it appeared that at the time of the accident the safety gates were raised, the railroad company was entitled to an instruction calling attention to a rule of the street car company that the position of safety gates should not be relied upon. Baltimore & O. R. Co. v. State [Md.] 64 A. 304. Where a gateman closed the gate on one side of the track after a street car had passed through and started to lower the one on the other side, but before he could do so a street car going in the opposite direction passed through. The gateman saw a train approaching and raised the opposite gate so that the car could escape, but before it could do so was struck by the train. Held the railroad was not negligent in raising the gate. Renders v. Grand Trunk R. Co., 144 Mich. 387, 13 Det. Leg. N. 314, 108 N. W. 368.

30. Where negligence charged was that the gates were up and that there was no flagman, exclusion of evidence that because of severity of the weather ice had formed on the gates so that they could not be operated and that it was being removed at the time of the accident was reversible error. Recktenwald v. Erie R. Co., 99 N. Y. S. 1094.

31. See 6 C. L. 1219.

32. Latham v. Staten Island R. Co., 150 F. 235.

33. Where a street car passenger was injured at a crossing, an instruction held erroneous as withdrawing from the jury the duty to furnish a watchman at the crossing. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 99 S. W. 867.

34. Chicago & Alton R. Co. v. Wright, 120 Ill. App. 218.

35. Chicago, etc., R. Co. v. Clarkson [C. C. A.] 147 F. 397.

36. The railroad is liable where a crossing watchman fails to tend the gates or give signals if the person injured was not guilty of contributory negligence. Louisville & N. R. Co. v. Wilson [Ky.] 100 S. W. 302. It is the duty of a brakeman stationed at a crossing, where a train has been cut in two, to use reasonable care to prevent injury to persons who pass between the cars. Boyce v. Chicago & A. R. Co., 120 Mo. App. 168, 96 S. W. 670. Whether a watchman gave the proper signal was for the jury, though the preponderance of evidence was that he did. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713. It is the duty of a crossing flagman to know of the approach of trains and to give timely warning. Chicago & Alton R. Co. v. Wright, 120 Ill. App. 218. Where a flagman is maintained at a crossing, his presence there and that he will perform his duty may be relied upon. Id.

37. See 6 C. L. 1219.

38. Wilson v. Atlantic Coast Line R. Co.,

panied by ringing the bell and sounding the whistle does not show that the company has discharged its full duty,[39] but whether in view of the time, place, and circumstances, further precautions are required, is ordinarily a question of fact.[40]

(§ 11 G) 2. *Contributory negligence. General rules.*[41]—One approaching a crossing must exercise such care as an ordinarily prudent person would exercise under like or similar circumstances,[42] but he may assume that the railroad company will also exercise the degree of care imposed upon it.[43] More caution is required of one crossing an electric railroad in the country than in the city.[44] The question whether a traveler exercised the degree of care required of him is usually one of fact,[45] unless the circumstances show negligence as a matter of law.[46] If the con-

142 N. C. 333, 55 S. E. 257. An instruction that negligence may be inferred from the fact that cars were kicked over a crossing without having a man on the end car, as required by ordinance, held proper. Id. A complaint alleging that a car was kicked over a crossing at a rate of speed of fifteen to twenty-five miles an hour, without warning or signals, where servants in charge of the train had notice that it was probable that people would be crossing, charges willful and wanton negligence. Southern R. Co. v. Haywood [Ala.] 41 So. 949. Where one attempted to cross in front of a flat car being pushed in front of an engine, and the night was so dark that he could not see the car, and a switchman if he had been stationed on the front end of the car could not have seen him, the switchman's failure to station himself with a lantern at the end of the car instead of in the middle of it was not negligence. Chicago, etc., R. Co. v. Clarkson [C. C. A.] 147 F. 397.

39. An inference of negligence may arise in such case where the crossing is over a system of switches, in a populous district, and was used by a great many people at all hours, where there were no lights on the rear of the train, nor anyone there to give warning. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Evidence sufficient to show that the proximate cause of the injury was failure to give warning while backing a train over a crossing, and that one injured was not guilty of contributory negligence. Id.

40. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. That a logging train is backed over a crossing at a high rate of speed without a lookout on the rear car to warn pedestrians is not gross negligence justifying recovery by one killed because of his own contributory negligence. Baker v. Tacoma Eastern R. Co. [Wash.] 87 P. 826. Where one was struck by a train moving backward without a lookout and without giving signals, evidence as to whether the injury would have occurred if the signals had been given held for the jury, though the injured person was also negligent. Davis v. Louisville, etc., R. Co. [Ky.] 97 S. W. 1122. It is competent to admit testimony that no man was stationed at the rear end of a train backing over a crossing, though such was not required by statute or ordinance. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801.

41. See 6 C. L. 1219.

42. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14; Fitzhugh v. Boston, etc., R. Co. [Mass.] 80 N. E. 792; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308.

Due care in a child of tender age is such care as its mental and physical capacity fits it to exercise under the circumstances of the case. Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039. Whether a minor above seven years of age was guilty of contributory negligence held for the jury. Wabash R. R. Co. v. Jones, 121 Ill. App. 390.

Evidence insufficient to show that one approaching a crossing exercised the degree of care required of him. Fisher v. Central Vt. R. Co., 103 N. Y. S. 513. Evidence held to show contributory negligence where one was killed at a crossing. Baltimore, etc., R. Co. v. Ayers, 119 Ill. App. 108.

43. One approaching a crossing may assume that a speed ordinance will be obeyed whether or not he sees or hears the train, unless his senses inform him that it is not being obeyed. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713.

44. Higher rate of speed is permissible in the country. Phillips v. Washington & R. R. Co. [Md.] 65 A. 422. It is contributory negligence for one to ride a horse across an electric railroad crossing where he could have seen an approaching care in time to avoid injury had he looked. Id.

45. Evidence of contributory negligence held for the jury where one was killed at a crossing. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757; Corbs v. Michigan Cent. R. Co., 144 Mich. 73, 13 Det. Leg. N. 232, 107 N. W. 892; Mitchell v. St. Louis, etc., R. Co. [Mo. App.] 97 S. W. 552; Chesapeake & O. R. Co. v. Vaughn [Ky.] 97 S. W. 774; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308; St. Louis, etc., R. Co. v. Wyatt [Ark.] 96 S. W. 376. Questions of contributory negligence held for the jury in a crossing accident on conflicting evidence as to the giving of signals. Wilbur v. Michigan Cent. R. Co., 145 Mich. 344, 13 Det. Leg. N. 522, 108 N. W. 713. Whether a pedestrian was guilty of contributory negligence in failing to see a headlight, held for the jury. Roedler v. Chicago, etc., R. Co. [Wis.] 109 N. W. 88.

Where a child was killed at a crossing and he was of such age and capacity as to exercise care, whether he did or not was held for the jury. McLarty v. Southern R. Co. [Ga.] 56 S. E. 297. Whether a child eleven years of age was guilty of contributory negligence at a crossing, held for the jury. St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613. Question of contributory negligence held for the jury **where one went between two parts of a train** which

had been cut at a crossing. Boyce v. Chicago & A. R. Co., 120 Mo. App. 168, 96 S. W. 670. Where the issue of contributory negligence was for the jury, it was proper to refuse to instruct that if the train could have been seen for three hundred yards plaintiff was conclusively presumed to have seen or heard it. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616. Where one driving a team of mules looked for trains at a point thirty feet from the track, and not seeing one, which had not rounded a curve, drove on and the mules came to a sudden stop on the track because of a shout of a brakeman riding on the rear of a train moving backwards and giving no signals. On being started they cleared the track but the tail end of the wagon was struck. Held a question of fact and not of law whether the driver was guilty of contributory negligence. Goodwin v. Central R. Co. [N. J. Err. & App.] 64 A. 134. Evidence of contributory negligence held for the jury **where a street car was struck** and the motorman killed. Baltimore & O. R. Co. v. State [Md.] 64 A. 304. A traveler is never wholly absolved from using his faculties to avoid danger, and, in an action growing out of an accident at a grade crossing, a charge to the jury is erroneous which makes the railroad company liable on account of the negligence of the watchman in failing to signal danger, independent of the fact that the decedent and her husband, who was riding with her, depended on the watchman more than on their own faculties to discover whether a train was coming. In such a case the extent to which the decedent and her husband used their senses to discover whether a train was approaching, or the degree of negligence, if any, of which they were guilty, are questions for the jury. Cincinnati, etc., R. Co. v. Levy, 8 Ohio C. C. (N. S.) 353. Where the preponderance of evidence was that a watchman warned one approaching the crossing in time to avoid injury, but there was evidence that the warning was given too late and the evidence as to the care exercised by the traveler in approaching was also disputed, the question of his contributory negligence was for the jury. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713. Evidence insufficient to show that one killed at a crossing was free from contributory negligence where there was no flagman at the crossing nor signals given, but another person walking in the opposite direction saw the approaching train. Wright v. Boston, etc., R. Co. [N. H.] 65 A. 687. It is within the power of a municipal corporation to require street car conductors to go forward to the crossing, and also forbidding the motorman to proceed until he is signaled. Indianapolis Traction & Terminal Co. v. Formes [Ind. App.] 80 N. E. 872. A traveler approaching a crossing is presumed to have seen or heard what he should have seen or heard by looking and listening. St. Louis, etc., R. Co. v. Wyatt [Ark.] 96 S. W. 376. Evidence sufficient to show that a pedestrian struck at a crossing was free from contributory negligence. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14. Evidence sufficient to show that there was no contributory negligence. Baltimore, etc., R. Co. v. Rosborough [Ind. App.] 80 N. E. 869.

Evidence insufficient to show contributory negligence as a matter of law where a pedestrian approaching a crossing looked and listened, saw cars at some distance but could not see that they were moving, and was struck by a train going at the rate of eighteen miles an hour, giving no signals; no crossing watchman. Garran v. Michigan Cent. R. Co., 144 Mich. 26, 13 Det. Leg. N. 97, 107 N. W. 284. One is not guilty of contributory negligence as a matter of law by standing close to the track, where he might have been looking out for possible danger and met his death because of unlawful and excessive speed. Pittsburgh, etc., R. Co. v. O'Donnell, 118 Ill. App. 335. Where one familiar with a crossing and the passage of trains was struck by a switch engine bearing a small light only, and there was evidence that no crossing signals were given and that the engine was running at a high rate of speed. Schremms v. Pere Marquette R. Co., 145 Mich. 190, 13 Det. Leg. N. 427, 108 N. W. 698. Where a traveler stopped twenty-five feet from the track, looked and listened, and no train was in sight from one direction for two hundred yards and he drove on watching carefully in the other direction from which he apprehended danger, and did not again look the other way, held he was not guilty of contributory negligence as a matter of law where the rear end of his wagon was struck by a train coming from the direction he least expected it. St. Louis, etc., R. Co. v. Dillard [Ark.] 94 S. W. 617. Where one was killed at a permissive crossing by a train running within city limits at a prohibited speed, and it appeared that a high wind was blowing, decedent could not be held guilty of contributory negligence as a mater of law, though intoxicated to some extent. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563. Failure to stop, look, and listen, but instead relying upon signals which it is the duty of the railroad to give, is not negligence per se. Chesapeake & O. R. Co. v. Vaughn [Ky.] 97 S. W. 774. It is not contributory negligence to run a traction engine upon a crossing without having a watchman two hundred yards in advance as required by Shannon's Code, §§ 1609-1616. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. Where an injury occurred because of failure to give signals and running of the train at an excessive rate of speed, it was proper to charge that, if the injured party was thrown into a sudden state of fear resulting from excessive speed, he was not guilty of contributory negligence if he adopted what he supposed the best means of escape but made an error of judgment. Maysville & B. S. R. Co. v. McCabe's Adm'x [Ky.] 100 S. W. 219. Evidence insufficient to show contributory negligence as a matter of law. Fitzhugh v. Boston, etc., R. Co. [Mass.] 80 N. E. 792. Where passengers riding in a public carriage are about to cross a railroad, it cannot be said as a matter of law that they are negligent if they are not as alert as the driver of the team over which they have no control in looking and listening. It is a question of fact whether they are exercising ordinary care. Wood v. Maine Cent. R. Co., 101 Me. 469, 64 A. 833.

46. Contributory negligence as a matter of law: Where at one hundred yards there was a view of the track for three hundred yards and no train was seen. At the crossing the view was entirely obstructed. Held

tributory negligence of one approaching a crossing was the proximate cause of his injury, the railroad company is not liable,[47] unless it violated the "last clear chance" rule.[48]

Acts required of traveler.[49]—The law requires of one about to cross railroad tracks the vigilant exercise of his faculties of sight and hearing at such short distance as will be effectual for his protection.[50] In some states a traveler is required

a traveler struck by a train going forty miles an hour when the statutory limit was six, and no statutory signals were given, was not guilty of contributory negligence as a matter of law. Hopson v. Kansas City, etc., R. Co., 87 Miss. 789, 40 So. 872. Where one approached a crossing where he had a clear view of the track at twenty-five feet for from two hundred to four hundred and fifty feet, but did not stop and there was no evidence that he looked or listened, and one occupant of the wagon saw the train just as the horses reached the track, the driver was held contributorily negligent as a matter of law. Sanguinette v. Mississippi River, etc., R. Co., 196 Mo. 466. One who on approaching a crossing sees a train but urges his team onto the track in front of it is guilty of contributory negligence as a matter of law. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880. One who sees an approaching train and attempts to cross ahead of it is guilty of negligence precluding recover. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. One who drives rapidly onto a crossing without looking or taking precautions for his safety is negligent, though the gates are open. Koch v. Southern California R. Co., 148 Cal. 677, 84 P. 176. In an action for injuries sustained at a crossing, it was error to exclude testimony to the effect that the team was driven up close to the track in order to get them used to trains, etc. Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553. Where one stopped one hundred feet from the crossing, where he had a view of the track for eight hundred feet, and just before coming onto the track he could see one thousand four hundred feet, and his horse was struck on the track, a nonsuit was required. Sellers v. Philadelphia & R. R. Co., 214 Pa. 298, 63 A. 606. Where a train partially blocks a street in such way as to indicate that it is liable to be moved at any minute, it is contributory negligence to attempt to cross back of it where a slight movement would necessarily result in an accident. Chicago Terminal Transfer Co. v. Helbreg, 124 Ill. App. 113. Evidence sufficient to show contributory negligence in a crossing accident. Recktenwald v. Erie R. Co., 99 N. Y. S. 1094; Cleveland, etc., R. Co. v. Alfred, 123 Ill. App. 477. Evidence held to show contributory negligence at crossing. Cleveland, etc., R. Co. v. Sparks, 122 Ill. App. 400. Where a railroad man of long experience was killed at a crossing over which he knew switching was habitually carried on, and at the time of the accident could have distinctly seen the headlight of the engine had he looked, he is legally charged with having seen it. Chicago, etc., R. Co. v. Clarkson, 147 F. 397. Where one was killed at a crossing, evidence held to show that he saw the approaching train and took the chance of crossing in front of it. Ellis v. Pennsylvania R. Co. [Pa.] 65 A. 803. Evidence held to show contributory negligence as a matter of law where one was injured at a crossing. Columbia, etc., R. Co. v. State [Md.] 65 A. 625. In an action for injuries at a crossing, evidence held to require a nonsuit. Mankewicz v. Lehigh Valley R. Co. [Pa.] 63 A. 604.

47. Contributory negligence is a defense. Louisville & N. R. Co. v. Wilson [Ky.] 100 S. W. 302. Instruction as to contributory negligence held not erroneous as directing a finding for the plaintiff if it was determined that his negligence did not contribute to the occurrence. El Paso & N. E. R. Co. v. Campbell [Tex. Civ. App.] 100 S. W. 170. Contributory negligence in order to preclude recovery must proximately contribute to or cause the injury. Illinois Cent. R. Co. v. Bethea [Miss.] 40 So. 813. Where one was struck at a crossing by a work train moving backward, held that after seeing the cars he was not justified in ignoring the probability that they would move backwards, yet, under the circumstances, the question of his contributory negligence was for the jury. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757. Where one was injured while climbing between cars at a crossing, evidence that others crossed that way is admissible. Weaver v. Southern R. Co. [S. C.] 56 S. E. 657. Negligence of a minor while driving his father's team in approaching a crossing cannot be imputed to a person riding with him as his guest. Baker v. Norfolk & S. R. Co. [N. C.] 56 S. E. 553. Where contributory negligence concurs with negligence of the trainmen, there can be no recovery. Sims v. St. Louis S. R. Co., 116 Mo. App. 572, 92 S. W. 909.

48. The last clear chance rule does not apply where one deliberately drives upon a crossing in the daytime immediately in front of moving cars which he should have seen in the exercise of ordinary care, those in charge of the train being justified in supposing that he did see them and would stop. Illinois Cent. R. Co. v. Ackerman, 144 F. 959. Where evidence showed contributory negligence and there was no evidence of willful or wanton negligence on the part of the railroad company, a verdict should be directed for the company. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909.

49. See 6 C. L. 1220.

50. If he neglects to take such precautions he may not recover, though the injury would not have occurred except for negligence of the railroad company. Chicago Great Western R. Co. v. Smith [C. C. A.] 141 F. 930. Where one approaching a crossing can by the use of his senses discover the approach of a train and thereby avoid danger, his failure to do so is contributory negligence precluding recovery, not withstanding negligence of the railroad in failing to give statutory signals. Martin v. Southern Pac. Co. [Cal.] 88 P. 701. Where it did not appear that a child five years old who was struck at a crossing looked or otherwise ex-

to "stop, look, and listen," [51] and this rule is not complied with by stopping where one cannot see.[52] Where this rule prevails a traveler must look and listen in both directions and continue to do so until danger has passed,[53] and failure to do so is not excused because of omission of duty on the part of the railroad;[54] but the rule of "stop, look, and listen" is not of invariable application,[55] and one who exercises

ercised care on her approach, a nonsuit should be granted. Serano v. New York Cent., etc., R. Co., 99 N. Y. S. 1103. Evidence sufficient to show contributory negligence as a matter of law where one failed to look before driving onto a crossing. Swanger v. Chicago, etc., R. Co. [Iowa] 109 N. W. 308. Persons driving herd of cattle over crossing held to have used due care in looking and listening. Salathe v. Delaware, etc., R. Co., 28 Pa. Super. Ct. 1. Where one driving on a country road with an unobstructed view of the track waits for one train to pass and without looking or listening immediately drives onto the crossing and is struck by a train following the one he waited upon, he is guilty of contributory negligence, though the second train was not scheduled to pass, and he acted upon the supposition that one train would not immediately follow another. Jackson v. Mobile & O. R. Co. [Miss.] 42 So. 236. Where physical facts show that if one had looked he could have seen the approaching train, he is guilty of contributory negligence. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909. One who walks on the track without looking or listening where he has a good view of the track is guilty of contributory negligence barring recovery, though statutory signals are not given. International, etc., R. Co. v. Edwards [Tex.] 15 Tex. Ct. Rep. 681, 93 S. W. 106. A traveler approaching a crossing who does not see the flagman and is not misled by his inaction is charged with the duty to look and listen. Tiffin v. St. Louis, etc., R. Co. [Ark.] 93 S. W. 564. When contributory negligence in the act and manner of crossing is set up and there was evidence that the injured person walked onto the track without looking or listening, that he was walking fast and went immediately in front of the train, a charge that he was not guilty of contributory negligence if he exercised ordinary care in attempting to cross is erroneous as eliminating such negligence in the manner of crossing. Missouri, etc., R. Co. v. Sissom [Tex. Civ. App.] 92 S. W. 271.

51. Mankewicz v. Lehigh Valley R. Co. [Pa.] 63 A. 604. Drivers of fire engines and hose carts are not excepted from the "stop, look, and listen" rule. Thompson v. Pennsylvania R. Co. [Pa.] 64 A. 323. A fireman riding on an engine who knew that no stop would be made at the railroad crossing assumed the risk. Id. A traveler who does not stop, look, and listen, held not entitled to recover under the circumstances of this case. Missouri, etc., R. Co. v. Jenkins [Kan.] 87 P. 702. One who goes upon a crossing without stopping to look or listen, where had he done so he could have noted the approach of a train, is guilty of contributory negligence as a matter of law. Allen v. Atlanta, etc., R. Co., 141 N. C. 340, 53 S. E. 866.

52. Where he cannot see any distance up the track from his vehicle, he must get out and walk to a place where he can see. Mankewicz v. Lehigh Valley R. Co. [Pa.] 63 A. 604.

53. St. Louis, etc., R. Co. v. Dillard [Ark.] 94 S. W. 617. A traveler must not only look and listen before going upon the track but must continue to look and listen until he has passed the point of danger. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757. Where a boy sui juris, having good eyesight and hearing, approached a crossing where he had a good view of the track and looked and listened when fifty feet from the track but not thereafter, though he had been warned that it was about train time, held he was guilty of contributory negligence as a matter of law. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. An instruction that it is the duty of a person approaching a crossing to look and listen is not erroneous because not stating the direction in which such person should look. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Where a pedestrian could see in both directions, and on looking in one direction saw part of a train. He looked in the other direction and attempted to cross without again looking where he had first looked. Held he was guilty of contributory negligence as a matter of law. Griffie v. St. Louis, etc., R. Co. [Ark.] 96 S. W. 750; St. Louis, etc., R. Co. v. Dillard [Ark.] 94 S. W. 617. One who looks when he is a block from the crossing and not again is guilty of contributory negligence as a matter of law. St. Louis, etc., R. Co. v. Portis [Ark.] 99 S. W. 66. Where a traveler familiar with a crossing looked when thirty-five feet from it, at which time he had a view for four hundred feet, but did not look again, though when twenty feet from the track he could see for one thousand feet, held he was guilty of contributory negligence as a matter of law. Chicago, etc., R. Co. v. Wheelbarger [Kan.] 88 P. 531.

54. Failure to look both ways and listen is not excused by failure to give statutory signals. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880. Where one attempted to go upon a crossing without looking or listening, the negligence of the company in backing the train without a brakeman on lookout on the back of the car was not the proximate cause of the injury. Baker v. Tacoma Eastern R. Co. [Wash.] 87 P. 826. Where a traveler looked and listened at a point seventy-five feet from the track where his view was obstructed and did not look again, though at a distance of forty feet from the track he could have seen seven hundred feet down the track, he was guilty of contributory negligence precluding recovery, though statutory signals were not given by the train. Southern R. Co. v. Jones [Va.] 56 S. E. 155.

55. Whether reasonable care requires it or whether he may rely on danger signals, or other circumstances, is for the jury except in cases free from doubt. Hartman v. Chicago G. W. R. Co. [Iowa] 110 N. W. 10.

reasonable prudence under all the circumstances in endeavoring to pass a crossing is not negligent merely because he fails to "stop, look, and listen." [56] That another person crossed in safety two minutes before does not excuse one from stopping and looking.[57] Where a person at a crossing apprehends more danger from one side than from the other, he may give more attention to that direction.[58]

Duty where view of track is obstructed.[59]—When the view of a traveler on approaching a crossing is obstructed, a higher degree of care is imposed on him and also upon the railroad company than if the obstruction did not exist,[60] but the fact that the view is obstructed does not require him to stop his horse and go forward on foot to a place where he can see, where he was in a position to hear warning signals and listened for them.[61]

Parallel tracks.[62]—It is contributory negligence to go upon a network of tracks without stopping to look and listen,[63] and no recovery can be had though the railroad was also negligent.[64] The question of negligence under such circumstances may be one of fact.[65]

Right to rely on crossing signals, gates, flagmen, etc.[66]—A traveler approaching a crossing where a flagman is kept who notes that the flagman is absent is put on his

It is not contributory negligence as a matter of law to fail to stop, look, and listen. Davis v. Louisville, etc., R. Co. [Ky.] 99 S. W. 930; Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 99 S. W. 959. Failure to look and listen is not conclusive of negligence where no warning signals were given. Davis v. Louisville, etc., R. Co. [Ky.] 97 S. W. 1122. Failure to stop, look, and listen is not of itself negligence where no train was due at the time. Louisville & N. R. Co. v. Lucas' Adm'r [Ky.] 98 S. W. 308. Where injuries were sustained at a crossing where a watchman was kept, allegations that the injured person drove upon the track without looking or listening do not affirmatively show contributory negligence. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713. Whether failure to look down the track was contributory negligence held a question for the jury. Martin v. Southern Pac. Co. [Cal.] 88 P. 701. Failure to look and listen is not negligence per se where a watchman is kept and the gates are up. Louisville & N. R. Co. v. Wilson [Ky.] 100 S. W. 302.

56. Metcalf v. Central Vermont R. Co., 78 Conn. 614, 63 A. 633.

57. Salathe v. Delaware, etc., R. Co., 28 Pa. Super. Ct. 1.

58. St. Louis, etc., R. Co. v. Tomlinson [Ark.] 94 S. W. 613.

59. See 6 C. L. 1222.

60. Southern R. Co. v. Jones [Va.] 56 S. E. 155. Where one killed at a private crossing knew the hours trains passed, and stopped and listened at a point where he could not see up the track and could have seen if he had advanced a short distance further, held he was guilty of contributory negligence, though the company failed to give signals as it was customary for it to do. Annapolis, etc., R. Co. v. State [Md.] 65 A. 434.

61. Mitchell v. St. Louis, etc., R. Co. [Mo. App.] 97 S. W. 552.

62. See 6 C. L. 1222.

63. A man of experience, forty-nine years of age, who steps onto a crossing where there are a network of tracks and trains are passing continually, without stopping to look or listen, is guilty of contributory negligence though the train which struck him is obscured by steam and smoke of other engines. Baker v. Tacoma & Eastern R. Co. [Wash.] 87 P. 826.

64. Where one well acquainted with a crossing where there were six tracks, in the daytime drove onto such crossing without stopping to look and listen when there was a clear view of the track for four hundred feet and was struck by a string of cars being backed on the tracks, he was guilty of contributory negligence, though the railroad was also negligent with respect to speed of the cars and failure to give signals. No recovery. Illinois Cent. R. Co. v. Ackerman [C. C. A.] 144 F. 959.

65. Where one was killed at a crossing where there were several tracks by a train going at the rate of fifty miles an hour in violation of law, evidence held insufficient to show contributory negligence as a matter of law, there being a train at the crossing when he arrived and he heard the whistle of the train which struck him a mile off and attempted to pass in front of it. Welch v. Michigan Cent. R. Co. [Mich.] 13 Det. Leg. N. 1079, 110 N. W. 1069. Where one was killed by a work train while standing on a side track waiting for a train to pass on the main line, it was error to charge that it was negligence if he could have waited before going on the side track, because the fact of his going there had no relation to his injury. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757. Complaint in an action for injury to one who stopped on a side track on a crossing between cars to await the passing of a train on the main track and was killed by cars running on the side track, held insufficient to show that decedent was a traveler and in the ordinary use of the highway which entitled him to the exercise of ordinary care on the part of the employes of the railroad. Chicago, etc., R. Co. v. McCandish [Ind.] 79 N. E. 903. Plaintiff saw train entering spur track which he had crossed and did not notice that several cars had been detached and kicked down the main track. Scott v. St. Louis, etc., R. Co. [Ark.] 95 S. W. 490.

66. See 6 C. L. 1222.

guard and must look and listen and exercise ordinary care for his safety,[67] but he may rely on signals of the watchman.[68] The fact that safety gates are raised does not relieve a traveler from exercising due care.[69]

(§ 11) *H. Injuries to persons on highways or private premises near tracks. Injuries from frightened horses.*[70]—A railroad is not liable for injuries caused by a team taking fright at the ordinary operation of a train upon its road.[71] But operatives of trains must exercise ordinary care to prevent frightened horses on road in close proximity to the tracks,[72] especially where they are aware that a team is becoming frightened.[73] What constitutes negligence depends largely on the circumstances of each particular case.[74] Where operatives of a train have reason

67. Hodgin v. Southern R. Co. [N. C.] 55 S. E. 413.

68. Where one approaching a crossing where a train had been cut in two was told by the brakeman on watch to pass, and as she attempted to do so the train started to close and in her fright she stepped on a stone and sprained her ankle, held negligence in moving the train and not stepping on the stone was the proximate cause of the injury. Boyce v. Chicago & A. R. Co., 120 Mo. App. 168, 96 S. W. 670. Where one was injured while attempting to pass between two parts of a train at a crossing, evidence held to show that a brakeman told her to pass. Id. Where one was injured at a crossing, it appeared that a flagman signaled him and the evidence was conflicting whether the signal was one to proceed or of warning. Held that it was not error to admit evidence of a rule of the company that in switching one of the crew must protect the crossing, the court having instructed that there could be no recovery if signals were misconstrued or ignored. Illinois Cent. R. Co. v. Bethea [Miss.] 40 So. 813.

69. Such fact is to be considered by the jury in determining whether he did exercise due care. Messinger v. Pennsylvania R. Co. [Pa.] 64 A. 682.

70. See 6 C. L. 1223.

71. Clinebell v. Chicago, etc., R. Co. [Neb.] 110 N. W. 347. The running of a freight car by gravity on a track by the side of a street, with no unusual noise is not negligence and gives rise to no cause of action to one whose team became frightened and ran away while he was driving along such street. Everett v. Great Northern R. Co. [Minn.] 111 N. W. 281. Where one is injured at a crossing and there is no negligence on the part of the railroad company, there can be no recovery though the injured party was not guilty of contributory negligence. Black v. Bessemer, etc., R. Co. [Pa.] 65 A. 405.

72. An answer to a complaint for frightening a team at a crossing held demurrable as not showing that it was the driver's duty to stop, look, and listen, that the running of the train was not the proximate cause of the accident, that the train was operated carefully and that the giving of signals was not required. Nashville, etc., R. Co. v. Reynolds [Ala.] 41 So. 1001. A complaint for frightening a team by runing a train over a crossing at a rapid rate of speed, etc., held good as against demurrer. Id. Evidence sufficient to authorize a verdict for plaintiff in an action for injuries caused by frightening a team. Southern R. Co. v. Hill, 125 Ga. 354, 54 S. E. 113.

73. Operatives of a train who discover that a person driving on a road parallel to the track is liable to be injured by his horse becoming frightened must do all in their power consistent with the safety of the train to avert the injury. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206.

74. Where operatives of a locomotive without cars attached blow the whistle without reason under a highway bridge and a horse passing over the bridge is frightened and injures a traveler, a judgment of nonsuit should be reversed. Question of negligence should be submitted to the jury. Mumma v. Easton & A. R. Co. [N. J. Err. & App.] 65 A. 208. Whether operatives in charge of an engine which was making an unusual noise in the street were negligent in failing to discover that the noise was frightening horses, held a question for the jury. Feeney v. Wabash R. Co. [Mo. App.] 99 S. W. 477. Whether a railroad company was negligent in failing to check or stop a train after it was discovered that a team was frightened and before they backed the wagon against the train, held a question for the jury. Louisville & N. R. Co. v. Mertz, Ibach & Co. [Ala.] 43 So. 7. Where a train, approaching to where a conflagration was about extinguished, blew the whistle as a warning and at about the same instant run over and cut a chemical hose stretched across the track, which frightened horses and caused injury to one near the fire, evidence held insufficient to show negligence on the part of the railway company. Gendreau v. Minneapolis, etc., R. Co., 99 Minn. 38, 108 N. W. 814. Except in cases of peril, the ordinances of the city of Minneapolis prohibit the blowing of whistles within the city limits. Case held within the exception where a train was approaching to where a conflagration was being extinguished. Id. Regulations of railroad commissioners limiting speed of trains are designated for the safety of trains and do not affect the duty of the company to one permitting a horse to stand near the track. Gerry v. New York, etc., R. Co. [Mass.] 79 N. E. 783. Rev. Laws, c. 111, § 120, requiring railroad companies to fence their tracks is for the protection of adjoining owners only and does not alter the company's liability for injuries to one who left his horse standing near the track. Id. The mere fact that a train was standing across a public street so that one driving a runaway horse was obliged to turn into an alley and in doing so his vehicle was overturned and he was injured is not negligence. Duffy v. Atlantic, etc., R. Co. [N. C.] 56 S. E. 557.

to believe that the blowing of the whistle will cause a runaway, it is their duty to refrain from blowing it unless it is necessary to avoid some other danger which cannot be otherwise averted.[75] Whether train employes should keep a lookout on road parallel to the track may be a question of fact,[76] but due care requires a lookout to be maintained where tracks are in a street.[77] Persons driving on roads contiguous to the tracks have a right to rely on the giving of statutory signals,[78] though in some states, a contrary rule prevails.[78] But the giving of statutory signals is not of itself negligence.[80]

It is negligence to leave a handcar in such close proximity to a crossing that it frightens horses of ordinary gentleness,[81] or to operate a handcar in such manner as to cause a runaway.[82] So, also, any other obstacle of like character left near a crossing renders the company liable where teams are frightened.[83]

75. Puppovich v. Galveston, etc., R. Co. [Tex. Civ. App.] 99 S. W. 1143. Whether there was negligence in blowing the whistle in close proximity to a horse, held for the jury. Id.

76. Whether operatives of a train are required to keep a lookout for teams on a road which runs parallel to the track at a distance of twenty-five feet from it and avoid frightening them, is for the jury. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206. Where a traveler on a highway running parallel to the track at a distance of twenty-five feet from it was injured by his horse becoming frightened at the approach of a train, it was necessary to charge that if it was the duty of the engineer to keep a lookout on such highway, and he failed to do so, and the injury was the proximate result of such failure, the railroad was liable unless the traveler was guilty of contributory negligence. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206. It cannot be said as a matter of law that operatives of trains are under no duty to watch out for teams on a street parallel to and near the track and to avoid frightening them by excessive speed or blowing of whistles. Missouri, etc., R. Co. v. Sanders [Tex. Civ. App.] 15 Tex. Ct. Rep. 460, 94 S. W. 149.

77. Where the track is in the street, engine operatives must be on the lookout when unusual noises are being made and stop the noise when it is apparent that horses are becoming frightened. Feeney v. Wabash R. Co. [Mo. App.] 99 S. W. 477. That horses were frightened by noise made by the blower in getting up steam is sufficiently shown by evidence that the team was well broken and used to engines. Id. And if they do not and a runaway is caused, the company is liable. Id.

78. One driving horses on a public highway contiguous to a railroad track has a right to rely on the giving of statutory signals on approaching a crossing. Louisville & A. R. Co. v. Davis, 29 Ky. L. R. 846, 96 S. W. 533.

79. A railroad company is not under legal duty to give the signal required by Gen. St. 1894, § 6337, for the benefit of a person driving on a street parallel to the track, but who does not intend to use the crossing. Everett v. Great Northern R. Co. [Minn.] 111 N. W. 281. Where the approach of a train frightens horses and causes a runaway, negligence cannot be predicated on failure to give crossing signals, in order that the driver might have warning in time to care for his team. Id. Assuming that it is question for the jury whether trains approaching a private subway crossing should give signals, omission to do so cannot be made the basis of a recovery where a team is frightened after it has passed through the subway and traveling on a road parallel to the track though but fifty feet from the crossing. St. Louis, etc., R. Co. v. Morrison [Kan.] 85 P. 295. Nonliability is not affected by the fact that the place where the team was frightened was one of peculiar danger because the road was confined in a narrow lane by a barbed wire fence parallel to the track. Id.

80. A company is not chargeable with negligence in giving statutory signals which frighten a horse being driven along a parallel road where he was not seen by the trainmen, and they were under no duty to keep a lookout for him. Louisville & N. R. Co. v. McCandless, 29 Ky. L. R. 563, 93 S. W. 1041.

81. A complaint in an action for injuries sustained by a team becoming frightened at a hand car left on a farm crossing held not demurrable because not alleging that the hand car and articles on it were calculated to frighten horses of ordinary gentleness. Baltimore, etc., R. Co. v. Slaughter [Ind.] 79 N. E. 186. Whether the placing of a hand car within the limits of a farm crossing was so calculated to frighten teams as to be an act of negligence is a mixed question of law and fact which is presented by an allegation that the act was negligently done. Id. Where a team became frightened at a hand car left on a farm crossing, a complaint for injuries sustained alleging that the mule which was one of the team was well broken, etc., is not bad for failure to allege that it was an animal of ordinary gentleness. Id. On an allegation that a hand car at which a team became frightened was left on a farm crossing, proof that the car was not within the traveled way of the crossing is not a material variance. Id. Where a hand car was left just outside the traveled way of a crossing and a team became frightened at it and ran away, the fact that it was not within the traveled way of the crossing as alleged would not preclude recovery if it was negligently left in such a position that it was calculated to frighten teams of ordinary gentleness. Id.

82. A railroad may be liable where a section crew makes such noise with a hand

Contributory negligence of a driver of a team precludes recovery by him.[84] Whether a driver who was injured by his team becoming frightened at the whistle of a locomotive was negligent in being seated in such position that he could not brace himself so as to hold his team, was a question for the jury.[85]

In actions for injuries a causal connection must appear between the negligence alleged and the injury sustained,[86] and the negligence must appear to be that of the defendant company.[87] The evidence must tend to prove the negligence alleged.[88]

(§ 11) *I. Injuries to animals on or near tracks. How far liability extends.*[89] In many states it is provided by statute that the killing of animals by a train is prima facie proof of negligence,[90] and the introduction of such evidence casts on the railroad company the burden to prove its freedom from negligence,[91] if they were killed under certain circumstances.[92] Whether this presumption is overcome

car while one lawfully using a private farm crossing is near whereby his team becomes frightened and runs away and injures him. Houston, etc., R. Co. v. Beard [Tex. Civ. App.] 93 S. W. 532.

83. Under a complaint alleging that one was injured because his horse became frightened at a **locomotive standing on the highway,** that such locomotive was of great size and unusual color and shape and naturally calculated to frighten gentle horses, the plaintiff has the burden to prove such facts as alleged. Butler v. Easton & A. R. Co. [N. J. Law] 65 A. 872. Where **mail bags are dumped from a train** and negligently allowed to lie in close proximity to a highway for an unreasonable length of time, they became a nuisance. Horr v. New York, etc., R. Co. [Mass.] 78 N. E. 776. Where a horse was frightened at mail sacks dumped from a train close to a highway, the question of negligence on the part of the railroad company was for the jury. Id.

84. It is not negligence as a matter of law to leave a team tied within 100 feet of the track where it is known that a train will soon pass in the absence of evidence that they were liable to be frightened. Gee v. St. Louis & C. R. Co. [Mo. App.] 99 S. W. 506. Where a driver knows a train is approaching and that his team is likely to be frightened, it is his duty to watch them until the train has passed and if he does not and they become frightened and break loose and run onto the track, he cannot recover. Id. Where one saw an engine standing in the street and his team being well broken he drove them toward it, held he was not guilty of contributory negligence in doing so where the horses became frightened and ran away when the engine commenced to steam up. Feeney v. Wabash R. Co. [Mo. App.] 99 S. W. 477. One who without looking drove close to track and then could not control his team not entitled to recover. Salathe v. Delaware, etc., R. Co., 28 Pa. Super. Ct. 1.

85. Chicago, etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602.

86. See, also, post, § 11 K. A complaint alleging that a railroad violated an ordinance by blocking a street for more than five minutes and that a team near the crossing became frightened and ran away does not show causal connection between violation of the ordinance and the injury. Wilson v. Louisville & N. R. Co. [Ala.] 40 So. 941. Where an injury occurred because of horses becoming frightened, the fact that the view of the track at a crossing where the road started to run parallel to the track was obstructed by trees allowed to grow on the right of way was immaterial, as such obstruction was not a contributing cause. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206.

87. Where a union station company owning the tracks therein ordered a train into a station twenty minutes ahead of time for departure and so located it that it extended into a street and frightened a team which ran into a pedestrian the railroad company was not liable as the location of the train was the wrongful act of the station company. Burns v. Delaware & Hudson Co., 101 N. Y. S. 225.

88. Proof that steam and hot water were thrown so near a horse as to frighten him is a departure from allegations that the engine sudenly discharge steam "at and upon" the horse. St. Louis, etc., R. Co. v. Bruce [Ark.] 97 S. W. 297. Where injuries occurred because of a horse becoming frightened and there was evidence that it had been frightened shortly before by another train, testimony that the horse was afraid of trains was admissible in corroboration. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206.

89. See 6 C. L. 1224.

90. Under Civ. Code 1895, § 2321, proof that animals were killed by a train establishes a prima facia case. Southern R. Co. v. Sheffield [Ga.] 56 S. E. 838. Negligence is presumed where a horse is killed on the track by being struck by a train. Kansas City Southern R. Co. v. Cash [Ark.] 96 S. W. 1062. Proof of killing of an animal is prima facie proof of negligence. Arkansas & L. R. Co. v. Sanders [Ark.] 99 S. W. 1109.

91. Where it is shown that a horse was killed by a train, the company has the burden to prove that it was not the result of its negligence. St. Louis S. W. R. Co. v. Hutchison [Ark.] 96 S. W. 374. Under Ky. St. 1903, § 809, providing that injuring or killing cattle by locomotive or cars shall be prima facie negligence, the burden is on the railroad company to show that the injury could not have been avoided by the exercise of ordinary care. Mobile & O. R. Co. v. Morrow [Ky.] 97 S. W. 389. Proof that stock is killed casts on the company the burden of providing itself free from negligence. Kansas City Southern R. Co. v. Wayt [Ark.] 97 S. W. 656.

92. Under Ann. Code 1892, § 1808, providing that the killing of an animal at night

is a question for the jury,[93] unless the evidence introduced conclusively overcomes it;[94] but in the absence of such a statute, there is no such presumption,[95] and negligence must be alleged and proved.[96] No presumption of negligence arises from

at a crossing by a train established a prima facie want of reasonable care, the railroad has the burden to show the contrary. Young v. Illinois Cent. R. Co. [Miss.] 40 So. 870. An instruction in an action for killing a cow that to cast on the railroad the burden to disprove negligence, the plaintiff must show that the defendant inflicted the injury and that it occurred at or near a crossing, station, etc., as declared by Code 1886, § 3443, was correct and it was error to refuse it. Western R. Co. v. McPherson [Ala.] 40 So. 934.

93. Whether the prima facie case established under Ann Code 1892, § 1808, by showing that an animal was killed at a crossing at night was overcome by proof that statutory signals were given, held under the facts of this case, a question for the jury. Young v. Illinois Cent. R. Co. [Miss.] 40 So. 870. whether the presumption of negligence raised by Ky. St. 1903, § 809, from the act of killing stock was overcome by the testimony of employes of the company, in view of the physical facts held for the jury. Illinois Cent. R. Co. v. Stanley, 29 Ky. L. R. 1054, 96 S. W. 846. The statutory presumption arising from the fact that animals were killed is not overcome by testimony of a fireman alone, who did not see the animals and could not say of his own knowledge whether the engineer took appropriate steps to avoid injury after he discovered them. Georgia R. & Banking Co. v. Andrews, 125 Ga. 85, 54 S. E. 76.

94. The uncontradicted testimony of employes in charge of the train overcomes the statutory presumption. Mobile & O. R. Co. v. Morrow [Ky.] 97 S. W. 389. The presumption of negligence arising from the fact that animals are killed is overcome by proof that they were seen too late to stop the train and that the whistle was blown in an attempt to frighten them. Lane v. Kansas City Southern R. Co. [Ark.] 95 S. W. 460.

95. Negligence cannot be presumed from the fact that animals were on the track and were killed by a train. Atchison, etc., R. Co. v. Adcock [Colo.] 88 P. 180. In an action for cattle killed, evidence as to the killing without evidence of negligence will not authorize a recovery. Instructions to such effect disapproved. Id. Where there is no statutory presumption of negligence from the fact that an animal is killed on the track, negligence must be proven. Kansas City Southern R. Co. v. Lewis [Ark.] 97 S. W. 56.

96. A paragraph of the complaint based on the railroad's negligence, but failing to allege excuse for the horses being on the track, is insufficient. Campbell v. Indianapolis & N. W. Traction Co. [Ind. App.] 79 N. E. 223. A complaint alleging that an engineer failed to keep proper lookout, did not blow the whistle or ring the bell, and operated the engine so carelessly as to injure a cow at a point within the corporate limits of a certain town, held not demurrable for failure to alleged what the negligence consisted of, in what way the engine was negligently operated, or that the animal was killed by a negligent act of a servant within the scope of his employment, and as not showing where the injury occurred. Western R. Co. v. McPherson [Ala.] 40 So. 934. A complaint for killing mules by the negligent running of a train is not demurrable as assuming that the running of a train is negligence. Western R. Co. v. Mitchell [Ala.] 41 So. 427. A complaint that a train negligently operated between two certain stations killed mules held sufficiently specific as to the place of accident, sufficiently certain as to what servants were negligent, and to allege negligence with sufficient certainty. Id. A complaint that a railroad business was so negligently operated that a train was run into mules, killing them, was not demurrable because not showing what engine inflicted the injury, in failing to show by whom the engine was operated or in failing to show that the alleged negligence was the proximate cause of the injury. Id. A complaint for killing a hog alleging negligence in permitting the right of way to be so grown up with brush, etc., which concealed the hog until it approached so near the track that the train could not be stopped in time to avoid injury to it, sufficiently alleges negligence as the proximate cause of the injury. Curry v. Southern R. Co. [Ala.] 42 So. 447. A complaint alleging such facts states a cause of action. Id. It may be proved by circumstantial evidence that stock was killed by a train. St. Louis, etc., R. Co. v. Stites [Ark.] 95 S. W. 1004. Testimony that witness saw blood and hair on the track and that the hair looked like that of plaintiff's horse was some evidence of plaintiff's ownership. Southern R. Co. v. Pogue [Ala.] 40 So. 565. Proof that the animal killed was a "mare" does not vary from a complaint for killing a "horse". Id. Instructions in an action for killing animals approved. Central of Georgia R. Co. v. Hughes [Ga.] 56 S. E. 770. In an action for killing stock, it is erroneous to grant a third new trial from a verdict for the plaintiff. Berry Southern R. Co., 126 Ga. 426, 55 S. E. 239.

Evidence sufficient to show negligence where cattle were killed. Sands v. Chicago, etc., R. Co. [Neb.] 110 N. W. 855. Evidence sufficient to show that no effort was made to stop a train and that such negligence was the proximate cause of injury to a horse on the track. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Where a horse which had escaped and was on the road was killed at a crossing, evidence held to show negligence of the trainmen. Kansas City, etc. R. Co. v. Rockwell [Kan.] 85 P. 802. Where evidence showed that stock recently broke from the pasture and was closely pursued by one who upon the approach of a train stood in the center of the track and waved his hands which if heeded by the engineer would have averted the injury, the evidence held sufficient to sustain the verdict of negligence by the jury. Central of Georgia R. Co. v. McKenzie, 124 Ga. 222, 53 S. E. 591. Evidence sufficient to support a verdict for plaintiff in an action for animals killed. St. Louis, etc., R. Co. v. Courtney, 77 Ark. 431, 92 S. W. 251. Evidence sufficient to au-

the fact that a dog is killed on the track.[97] In some states an engineer is required to keep a lookout.[98] Where cattle are negligently permitted to stray onto the track, the company is not liable unless it failed to use ordinary care to avoid injuring them after discovering their presence,[99] and in districts where a stock law is in force, gross negligence must be shown.[1] If an animal comes suddenly upon the track so

thorize a finding that an engineer was negligent in not having seen an animal on the track. Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688. Evidence sufficient to show negligence where a horse was killed on the track. Kansas City Southern R. Co. v. Cash [Ark.] 96 S. W. 1062. Evidence sufficient to show negligence where stock was killed. Kansas City Southern R. Co. v. Ingram [Ark.] 97 S. W. 55. A judgment for killing a hog is sustained where railroad employes testified that the hog came suddenly on the track from weeds growing on the right of way, but other evidence showed that there were no weeds there, but the place of injury was in a cut, that a hog could not come suddenly on the track at that point, and the there was a good view of such point from quite a distance. Kansas City Southern R. Co. v. Blair [Ark.] 97 S. W. 296. Evidence sufficient to support the verdict for animals killed. Southern R. Co. v. Sheffield [Ga.] 56 S. E. 838. Evidence sufficient to show that a railroad was liable for cattle killed where the accident occurred on a clear day and the track was straight for two miles. Union Pac. R. Co. v. Meyer [Neb.] 107 N. W. 793.

Evidence insufficient to show negligence where cattle were killed. Mobile & O. R. Co. v. Morrow [Ky.] 97 S. W. 389; Kansas City Southern R. Co. v. Buckner [Ark.] 97 S. W. 439. Evidence insufficient to show negligence where a horse was killed. Missouri, etc., R. Co. v. Webb [Ind. T.] 97 S. W. 1010. Evidence held to show no negligence where a mule was killed at night by a train running slowly through a fog, whistling continuously, and the animal came onto the track directly in front of the engine. Kansas City Southern R. Co. v. Lewis [Ark.] 97 S. W. 56. Evidence that a horse was killed on a crossing at night and that a train passed without giving signals, without a showing that that particular train killed the horse, is insufficient to show negligence. Missouri, etc., R. Co. v. Baker [Tex. Civ. App.] 15 Tex. Ct. Rep. 264, 93 S. W. 211. Negligence must be shown where cattle are killed at a point where no fence is required. Evidence insufficient to show negligence where stock was killed where the track was not required to be fenced. Texas, etc., R. Co. v. Langham [Tex. Civ. App.] 15 Tex. Ct. 567, 95 S. W. 686.

97. Fowles v. Seaboard Air Line R. Co., 73 S. C. 306, 53 S. E. 534. Statutory crossing signals need not be given to warn a dog, but if one is seen on the track not in possession of his faculties, precautions must be taken to avoid injury to him. Id. Where it does not appear that negligence in running a train at a high rate of speed was the proximate cause of killing a dog, and it does not appear that the presence of the dog should have been anticipated or that injury to it could have been avolded after it was discovered, the company is not liable. Gulf, etc., R. Co. v. Blake [Tex. Civ. App.] 16 Tex. Ct. Rep. 264, 95 S. W. 593.

98. It is eror to authorize a verdict for the company on a finding that a horse came suddenly upon the track so close in front of the engine that the accident could not be avoided, without a finding that a proper lookout was kept by the engineer, and though the train was properly equipped and the horse might have been sooner discovered in dangerous proximity to the track. Central of Georgia R. Co. v. Brister [Ala.] 40 So. 512. If it proper in an action for killing a horse to refuse an instruction which does not hypothesize the fact that a proper lookout was kept, that the train was properly equipped, and that the horse could not have been discovered before it was. Southern R. Co. v. Pogue [Ala.] 40 So. 565. An instruction that if an ox killed came suddenly on the track so close to the train that the accident could not be averted, the railroad was not liable, was bad because not postulating the fact of a proper lookout being kept. Kansas City, etc., R. Co. v. Simmons [Ala.] 40 So. 573. It is the duty of the engineer to exercise such lookout as is consistent with his other duties and if such precaution would have revealed the presence of stock on the track in time to have avoided injury, the company is liable, though they were not actually seen until too late to stop the train. Stading v. Chicago, etc., R. Co. [Neb.] 111 N. W. 460. Evidence sufficient to show negligence. Id. Evidence sufficient to show that no lookout was kept. Arkansas & L. R. Co. v. Sanders [Ark.] 99 S. W. 1109. Kirby's Dig. § 6607, requiring locomotive engineers to keep a lookout for stock and use ordinary care to avoid injury to them, has never been made a part of the law of Indian Territory. Kansas City Southern R. Co. v. Ingram [Ark.] 97 S. W. 55.

99. Cumming v. G. N. R. Co. [N. D.] 108 N. W. 798. Evidence sufficient to disprove negligence on part of the railroad. Id. The only duty owed where cattle are unlawfully on the right of way is to use reasonable care after their presence is discovered. Leslie v. Wabash R. Co., 118 Ill. App. 606.

1. No liability results from killing an animal at a crossing in a district where the stock law is in force in the absence of gross negligence. Missouri, etc., R. Co. v. Scofield [Tex. Civ. App.] 17 Tex. Ct. Rep. 319, 98 S. W. 435. Not where the train could not be stopped after the animal was discovered. Id. A railroad is not liable for killing stock negligently permitted to run at large in a precinct, where the stock law is in force, unless it is guilty of gross negligence. Ft. Worth, etc., R. Co. v. Hudgens [Tex. Civ. App.] 16 Tex. Ct. Rep. 44, 94 S. W. 378. Operatives of a train are not bound to exercise care to avoid injury to animals improperly on the right of way within a precinct where the stock law is in force, until a reasonably prudent man would have realized that they probably would not get off the track Id. No lookout need be kept for stock negligently permitted to run at

close that it is impossible to stop the train, the railroad is not laible.[2] Negligence cannot be inferred from the fact that a train is run at a high rate of speed and cattle are killed,[3] unless it appears that such act is negligence as a matter of law.[4] It is negligence to run a train at night at such speed that it cannot be stopped within the glare of the headlight,[5] or to operate an engine with a defective headlight,[6] and it is also negligence to fail to give statutory signals,[7] or to take other precautions dictated by the principles of ordinary care.[8] Whether animals were killed as a result of negligence of the railroad is often a question of fact.[9]

large in a precinct where the stock law is in force. Id. In this case where a horse was injured by a train the evidence was held to show that it was not running at large requiring proof of willful negligence on the part of the railroad company. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Acts 1905, p. 226, c. 117, relative to liability for killing stock where the stock law is in force, is not retroactive. Missouri, etc., R. Co. v. Scofield [Tex. Civ. App.] 17 Tex. Ct. Rep. 319, 98 S. W. 435. Whether cattle were running at large within Code, § 2055, held a question for the jury, where after being driven across the track they entered a defective wing fence and were killed while being driven out. Morris v. Chicago, G. W. R. Co. [Iowa] 110 N. W. 154.

2. It is error to refuse to charge that if the engineer's view was obstructed until the cow suddenly emerged from beyond a trestle or culvert, and that from the time it so emerged until it was struck he did all he could to avoid the injury, the railroad was not liable. Western R. Co. v. McPherson [Ala.] 40 So. 934. Where it appeared that a horse was first seen about ten or fifteen yards from the track when the train was 150 yards off when the whistle was blown and brakes put on and when the train was fifty yards off the horse suddenly ran onto the track, it was error to refuse to instruct that if the train was properly equipped, a lookout kept, and that the horse came upon the track so suddenly that the injury could not be avoided there could be no recovery. Central of Georgia R. Co. v. Brister [Ala.] 40 So. 512. A railroad is not liable where stock comes so suddenly upon the track at night that the train cannot be stopped in time to avoid injury to them. Central of Georgia R. Co. v. Main, 143 Ala. 149, 42 So. 108. Where it appeared that an animal came so suddenly onto the track that it was impossible to stop the train in time an instruction hypothesizing that all appliances known to skillful engineers to stop the train were used was properly refused. Id.

3. Texas, etc., R. Co., v. Langham [Tex. Civ. App.] 15 Tex. Ct. Rep. 567, 95 S. W. 686. Operatives of a special train are not negligent in runing at a high rate of speed past a station where there are only two or three houses and are not required to anticipate the presence of cattle at the depot. Id.

4. It is gross negligence for an engineer to drive his train at a rate of forty or fifty miles per hour, after seeing a fog bank some distance ahead, and where after entering such bank he could not see animals on the track in time to stop the train. Western R. Co. v. Mitchell [Ala.] 41 So. 427.

5. It is proper to charge that if a horse was killed because the train was running at such speed that it could not be stopped within the glare of the headlight, the railroad is liable. Southern R. Co. v. Pogue [Ala.] 40 So. 565. It is negligence to run a train at night at such rate of speed that it cannot be stopped where animals are seen on the track within the glare of the head light. Central of Georgia R. Co. v. Main, 143 Ala. 149, 42 So. 108.

6. Where it is material as to what condition the locomotive headlight was in at the time of the collision, evidence as to its condition at a point four or five miles distant is relevant. Central of Georgia R. Co. v. Hughes [Ga.] 56 S. E. 770. A railroad company is liable for killing animals, where, if the headlight had been in good condition, he could have seen them in time to have avoided the injury had he kept a lookout. Jonesboro, L. C. & E. R. Co. v. Guest [Ark.] 99 S. W. 71. Evidence sufficient to show that if the headlight had been in good condition and the engineer had been keeping a lookout, he could have seen the horses in time to have avoided the injury. Id. It is negligence to run a train in the night time with a headlight not having sufficient capacity to illuminate the track for a distance within which the train could be stopped. Western R. Co. v. Mitchell [Ala.] 41 So. 427.

7. Ann. Code 1892, § 3547, requiring signals on approaching a crossing, is for the protection of animals as well as persons. Young v. Illnois Cent. R. Co. [Miss.] 40 So. 870.

8. Failure to stop a train is neglegence where the operatives can see that if they do not stop it a horse will attempt to go onto a trestle or culvert and be injured. Paragould S. E. R. Co. v. Crunk [Ark.] 98 S. W. 682. Where horses were seen on the track a quarter of a mile distant it was negligence not to stop or have attempted to stop the train. Mobile & O. R. Co. v. Morrow [Ky.] 97 S. W. 389. In an action for killing a mule it is permissible to show that at the place where the accident occurred the country was level, the track straight, and the view unobstructed, and that an object as large as a mule could be seen for a quarter of a mile by the light thrown by the headlight. Kansas City Southern R. Co. v. Lewis [Ark.] 97 S. W. 56. Where operators of a train negligently fail to slacken speed after discovery of cattle on the track, the railroad is liable though the owner of the cattle was also negligent. Barnard v. Chicago, etc., R. Co. [Iowa] 110 N. W. 439.

9. Evidence held for the jury as to whether cattle should have been seen, 75 or 100 yards distant from the place where they were struck by the train. Kansas City Southern R. Co. v. Wayt [Ark.] 97 S. W. 656. Evidence of negligence on the part of the railroad where a horse was killed on the

The procedure in actions for the recovery of damages for injuries to animals is governed by the general rules as [10] to pleading,[11] evidence,[12] and instructions.[13]

track held for the jury. Norfolk & W. R. Co. v. Smith [Md.] 64 A. 317. Where there was a dispute in the testimony as to the distance between cattle on the track and the point where they were discovered and the jury found that the train could have been stoped in time to avoid the injury their verdict will not be disturbed. Atlantic Coast Line R. Co. v. Strickland, 125 Ga. 352, 54 S. E. 168. In an action for killing stock the engineer should be permitted to testify as to what he did to prevent the injury, and leave to the jury whether the acts detailed constituted sufficient diligence. Macon, etc., R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197. In an action for killing stock, it is a question for the jury whether due diligence required operatives of the train to sound the cattle alarm, and whether such alarm, if given, would have averted the injury. Darien & N. W. R. Co. v. Thomas, 125 Ga. 801, 54 S. E. 692. Evidence of negligence held for the jury in an action for killing a horse. Southern R. Co. v. Pogue [Ala.] 40 So. 565. Question of engineer's negligence held for the jury where mules were killed. Hoye v. Southern R. Co. [Ala.] 41 So. 425. Question of negligence when a horse was killed held for the jury. Arkansas & L. R. Co. v. Sanders [Ark.] 99 S. W. 1109. Question of negligence held for the jury where an animal was killed on the track. Kansas City Southern R. Co. v. Edwards [Ark.] 96 S. W. 1061. The question was so clearly one of fact that an appeal was frivolous, and taken for delay only, authorizing infliction of the statutory penalty for taking such an appeal. Id. When it appears that an animal came on the track not suddenly but 106 yards ahead of the train and no signals given or the speed slackened, a peremptory instruction for the railroad is properly refused. Central of Georgia R. Co. v. Mains, 143 Ala. 149, 42 So. 108. Whether an engineer saw a mule on the track held under the evidence a question for the jury. Wright v. Quincy, etc., R. Co., 119 Mo. App. 469, 95 S. W. 293. Evidence of negligence held for the jury where ponies were killed on the track. Anson v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 398, 94 S. W. 94.

10. See, also, post, § 11 K.

11. Complaint alleging number of animals killed, sex, time and place of injury, and average value, is not demurrable on the ground that it does not sufficiently set forth the items of damage. Southern R. Co. v. Sheffield [Ga.] 56 S. E. 838. An allegation that a cow was killed within one-fourth of a mile of a public crossing, while material with respect to locating the place where the accident occurred, was not descriptive of the subject of the action and need not be strictly proved as alleged. Western R. Co. v. McPherson [Ala.] 40 So. 934.

12. Where there was no direct proof that defendant owned the road but there was evidence from which ownership could be inferred, and no evidence that it did not own the road, ownership was sufficiently proven. Moore v. Quincy, etc., R. Co. [Mo. App.] 97 S. W. 607. Opinion testimony as to the distance the horse killed could have been seen by the engineer is admissible. Arkansas & L. R. Co. v. Sanders [Ark.] 99 S. W. 1109. Where negligence relied on in an action for killing a horse was failure to make any effort to stop the train, evidence that the train was late and running at twenty-five miles per hour was admissible, the jury having been instructed that such facts were not proof of negligence. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Whether or not a train slackened speed at a given point where stock was injured and if so to what extent, being in conflict, evidence that it was behind time was admissible to show that there was reason or motive for not stopping or for making rapid speed. Southern R. Co. v. Puryear [Ga.] 56 S. E. 73. In an action for animals killed an engineer, who testified that he did not run the train at a high rate of speed and did not kill the animals, may be cross-examined to contradict such testimony, to show that the train was run at a high speed, and that under such conditions, circumstances on the way were sometimes not noticed. Anson v. Gulf, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 398, 94 S. W. 94. In an action for animals killed, testimony of the train dispatcher that the train was behind time, and that some time, but not universally, such trains were run faster than schedule time, was admissible to show that the train was run at high speed and to weaken testimony that the train was run at the usual rate of speed. Id. In an action for killing mules, evidence of their speed and agility is not admissible, if such inquiry would be proper, it should be limited to the time of the injury. Hoge v. Southern R. Co. [Ala.] 41 So. 425. In an action for killing mulee, it is not permissible to show that horse was killed at the same time. Id. Where several acts of negligence in killing a cow are alleged in the conjunctive form, all acts averred must be proven. Western R. Co. v. McPherson [Ala.] 40 So. 934. Testimony of an engineer that he could have done no more than he did to stop the train is a **mere conclusion.** Macon, etc., R. Co. v. Stewart, 125 Ga. 88, 54 S. E. 197.

13. Where in an action for cattle killed there was evidence that the company converted the carcasses, held that a nonsuit should not be granted where no negligence was proven, but the question of conversion should have been submitted. Atchison, etc., R. Co. v. Adcock [Colo.] 88 P. 180. Where an answer alleged that an ox came suddenly on the track from under a trestle, an instruction that if the ox came suddenly upon the track, etc., but omitting "came from under the trestle," was bad for nonconformity to the plea. Kansas City, etc., R. Co. v. Simmons [Ala.] 40 So. 573. An instruction that unless the jury believe that the engineer could have avoided striking the cow they should find for the railroad was erroneous as placing on plaintiff the burden to prove that the injury was not due to unavoidable accident. Western R. Co. v. McPherson [Ala.] 40 So. 934. Where a railroad tried a case on the theory that stock was killed at a crossing, it cannot complain on appeal that the case was submitted on the theory that it was its duty to give statutory signals. Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585,

Place of entry on right of way.[14]—The place where an animal enters upon the right of way may be material on the question of the liability of the railroad, where fence laws are in force,[15] but such laws do not absolve the company from liability for its negligence.[16]

Duty to maintain fences.[17]—In many states railroads are required by statute to fence their tracks and are liable for killing animals if they do not,[18] except where stock laws are in force.[19] Such statutes apply to electric railways,[20] but negligence must appear,[21] and it must also be shown that failure to fence was the proximate cause of the injury,[22] and that the injury inflicted was one falling within the terms

95 S. W. 688. Instruction that if it was believed that animals were killed within switch limits of a town, then before a recovery could be had the defendant must have been negligent, held not to authorize recovery without submitting facts constituting negligence. Id. An instruction that it is gross negligence to fail to give signals on approaching a crossing is erroneous where it is for the jury to say whether such negligence existed. Missouri, etc., R. Co. v. Scofield [Tex. Civ. App.] 17 Tex. Ct. Rep. 319, 98 S. W. 435. An instruction in an action for killing a horse which makes the question of negligence depend upon whether the train operatives "in good faith exercised the best judgment they could under the circumstances" is erroneous. Arkansas & L. R. Co. v. Sanders [Ark.] 99 S. W. 1109.

14. See 6 C. L. 1225.

15. Burn's Ann. St. 1901, §§ 5321, 5322, relative to private gates, etc., does not change the rule that if cattle come onto the track where it should be fenced but is not and wander upon the track to where it cannot lawfully be fenced and are injured, the company is liable, but if they go upon the track where it is fenced and are injured where it is not, the company is not liable. Chicago I. & L. R. Co. v. Ramsey [Ind. App.] 79 N. E. 1065. Evidence sufficient to show that the point at which a cow entered the right of way could have been fenced without obstructing a street, detriment to the public or danger to employes. Eaton v. Illinois Southern R. Co., 119 Mo. App. 640, 95 S. W. 271. Proof that cattle strayed upon the track where no fence had been maintained as required by statute and were killed after crossing a place where a cattle guard should have been maintained is not a variance from allegations that they were killed because of failure to construct a fence. Kirkpatrick v. Illinois Southern R. Co. [Mo. App.] 96 S. W. 1036. The place where stock comes upon the track does not determine the company's liability under the fencing act. Toledo, etc., R. Co. v. Delliplane, 119 Ill. App. 122.

16. Burn's Ann. St. 1901, § 5322, does not absolve the railroad from liability for injuries to stock resulting from negligence though they entered through a private gate, and where an engineer could have seen the cattle eight hundred feet before they were struck and did see them four hundred feet off, it cannot be said that there was freedom from negligence. Chicago, etc., R. Co. v. Ramsey [Ind. App.] 79 N. E. 1065.

17. See 6 C. L. 1226.

18. Cobbey's Ann. St. 1903, § 10,020, making railroad companies liable for injuries to stock where they fail to maintain fences or cattle guards, was not intended to provide a penalty for such failure but merely to render the companies liable to the owner of the stock. Chicago, etc., R. Co. v. King [Neb.] 107 N. W. 981. Comp. Laws 1897, § 6294, requiring tracks to be fenced, requires cattle guards and wing fences at the point where the fenced track leaves the unfenced station grounds. Stewart v. Grand Rapids & I. R. Co. [Mich.] 13 Det. Leg. N. 948, 110 N. W. 126. 3 Starr & C. Ann. St. 1896, p. 3253, c. 114, § 68, requiring fences and maintenance of cattle guards at crossings, requires a railroad where it crosses another railroad to construct cattle guards and wing fences regardless of whether the other road does so or not. Illinois Cent. R. Co. v. Davidson, 225 Ill. 618, 80 N. E. 250. Failure to keep the right of way sufficiently fenced renders the railroad liable for cattle killed as a result of such failure. Chicago & Alton R. Co. v. Nevitt, 122 Ill. App. 505.

19. Where animals are killed in a precinct where owners are forbidden to permit stock to run at large, and there was no evidence of negligence on the part of the railroad company, it was error to charge Rev. St. 1895, § 4528, making railroad companies liable where the right of way is not fenced. Ft. Worth, etc., R. Co. v. Hudgens [Tex. Civ. App.] 16 Tex. Ct. Rep. 44, 94 S. W. 378. Sayle's Supp. St. 1897-1904, pp. 533-538 (Stock Law), making it unlawful for animals to run at large in counties where adopted, supersedes the fence law requiring railroads to fence their right of way, and no recovery can be had for animals killed in the absence of negligence on the part of the company. Houston, etc., R. Co. v. Nussbaum [Tex. Civ. App.] 16 Tex. Ct. Rep. 15, 94 S. W. 1101.

20. An electric railway which fails to fence its track as required by Burn's Ann. St. Supp. 1905, § 5479d, is liable for injuries to a horse straying upon the track where it was negligent though the injury was not wantonly inflicted. Campbell v. Indianapolis & N. W. Trac. Co. [Ind. App.] 79 N. E. 223.

21. Under Burn's Ann. St. Supp. 1905, § 5479d, requiring electric railways to fence their track, failure to do so is not alone sufficient to render it liable for injuries to a horse straying onto the track, negligence must be shown. Campbell v. Indianapolis & N. W. Trac. Co. [Ind. App.] 79 N. E. 223.

22. A petition for damages under such statute which contains no allegations tracing injury to failure to maintain such fences or guards, is fatally defective. Chicago, etc., R. Co. v. King [Neb.] 107 N. W. 981. Petition held insufficient to state a cause of action. Id. A complaint alleging that an electric railway failed to fence its track and that servants operating a train negligently

of the statute.[23] The intent of the statute requiring railroads to erect and maintain fences and cattle guards is to compel complete inclosure of the track, except in cities and towns so as to prevent access thereto at all points except at crossings and station grounds.[24] Failure to fence the track at an unincorporated town is excused only to the extent necessary to afford the public and the company opportunity for transacting business reasonably to be expected at such point.[25] Statutes requiring fences do not apply to yards,[26] nor to depot grounds,[27] nor highways,[28] but do apply

chased a horse which strayed onto the track along it to a bridge not suitable for horses to cross on, and it was injured, states a cause of action. Campbell v. Indianapolis & N. W. Trac. Co. [Ind. App.] 79 N. E. 223. Where in an action for injuries to a horse negligence in failing to fence the track is alleged and also negligence of servants operating a train, it need not be alleged that the negligent acts of the servants were performed in line of their employment. Id. Where a railroad fails to fence its track, as required by Code, § 2057, it is liable for injuries to animals in the absence of willful negligence by the owner, but is not liable if cattle escape onto a track through a gate at a private crossing left open by the owner of the cattle. Claus v. Chicago, G. W. R. Co. [Iowa] 111 N. W. 15. When cattle stray upon the track because of failure to fence as required by Rev. St. 1899, § 1105, and are killed after crossing a place where a cattle guard should have been constructed, failure to construct the fence and not the cattle guard was the proximate cause of the injury. Kirkpatrick v. Illinois Southern R. Co. [Mo. App.] 96 S. W. 1036. An allegation of failure to fence the track is not supported by proof that a gate in the fence was negligently left open. High v. Southern Pac. Co. [Or.] 88 P. 961. Evidence sufficient to show that horses entered upon the right of way through a defective fence. Missouri, etc., R. Co. v. Cassinoba [Tex. Civ. App.] 99 S. W. 888. It is erroneous to require plaintiff to prove that his pasture gates were closed and that the horses injured entered through a defective right of way fence, it being sufficient to show that they entered through the defective fence independent of the gates. Id.

23. To recover for injuries to a horse under a statute requiring the right of way to be fenced, the injury must have been caused by the car actually striking the horse. Campbell v. Indianapolis & N. W. Trac. Co. [Ind. App.] 79 N. E. 223. Where one owner gave another permission to pass through his land, held such other was not entitled to turn stock onto such land and thereby become an adjoining proprietor within the statute requiring railroads to fence their track. Carpenter v. Chicago, etc., R. Co., 119 Mo. App. 204, 95 S. W. 985. Under Rev. St. 1899, § 1105, requiring the track to be fenced where it passes through cultivated fields, the company is liable where an animal which is trespassing on land adjacent to the right of way escapes onto the track through a defective fence. Perry v. Quincy, etc., R. Co. [Mo. App.] 99 S. W. 14.

24. Chicago, etc., R. Co. v. Sevcek [Neb.] 110 N. W. 639. See same case [Neb.] 101 N. W. 981. By fencing on each side of the main track at a certain point in the vicinity of a station, the company is regarded as having exercised its discretion to determine the boundaries of its grounds. Stewart v. Grand Rapids, etc., R. Co. [Mich.] 13 Det. Leg. N. 948, 110 N. W. 126.

25. Rosenbery v. Chicago, etc., R. Co. [Neb.] 110 N. W. 641. Whether or not the railroad company was excused for not fencing its track at the unincorporated station of Adelia, held a question for the jury. Id.

26. In an action for injuries to animals, evidence that at a certain place there are various switches leading to brickyards, factories, and ice houses, and that cars were stored and inspected there, held to require a finding that the premises was a "yard" and company was not required to fence. Bird v. Michigan Cent. R. Co., 145 Mich. 706, 13 Det. Leg. N. 639, 108 N. W. 1100.

27. B. & C. Comp. § 5139, making railroads liable where animals are killed on an unfenced track does not extend to depot grounds which the company is not required to fence. Wilmot v. Oregon R. Co. [Or.] 87 P. 528. Whether a railroad is required under B. & C. Comp. § 5139, to fence depot grounds is a question of law, and on conflicting evidence as to whether the point where cattle strayed onto the track was depot grounds or not, the question is one of law. Id. Station grounds include the place where passengers get aboard and alight from trains, grounds necessary for tracks, switches and turnouts, and ground necessary for storing cars and making up trains and so much of the main line as is necessary for the handling of trains. Id. Where grounds have been surveyed and set apart for station purposes, such appropriation affords strong presumption that the boundaries include no more ground than is necessary. Id. Whether the point at which cattle strayed onto the track was within depot grounds where the railroad company was not required to fence held a question for the jury. High v. Southern Pac. Co. [Or.] 88 P. 961. Where in an action for killing a mule one count was based on Rev. St. 1899, § 1105, requiring the company to fence their track, and another was based on common-law negligence where evidence showed that the mule got on the track at depot grounds and was run down by negligence of the engineer, and there was a finding for the railroad on the first count, it was not error to overrule a motion to require an election between counts. Wright v. Quincy, etc., R. Co., 119 Mo. App. 469, 95 S. W. 293.

28. Railroad companies are not required to fence their right of way where de facto highways cross them. Dow v. Kansas City Southern R. Co., 116 Mo. App. 555, 92 S. W. 744.

to shop yards [29] and flag stations.[30] Such fence must be sufficient to turn stock.[31] Statutes require that sufficient gates be maintained at private crossings,[32] and that the fence be kept in repair.[33] Statutes relative to fencing are enacted not only for the protection of animals but also for the protection of human life due to derailments caused by colliding with animals.[34] The Minnesota railroad fence statute was designed to prevent children as well as animals from entering on the tracks and applies to cattle guards constructed as part of the fence.[35] A covenant in a deed of land for a right of way binding the grantor to maintain fences along the right of way runs with the land, and precludes the recovery by a successor in title of the grantor for cattle injured because of failure to fence.[36]

Gates.[37]—Statutes requiring the track to be fenced require that sufficient gates be maintained at private crossings,[38] and that such gates be supplied with proper

29. Railroad shop yards come within the scope of the Minnesota statute requiring railroads to be fenced. Whether yards in question could be fenced including construction of cattle guards, without impairing the usefulness of the yards, held a question for the jury. Mattes v. Great Northern R. Co. [Minn.] 110 N. W. 98.

30. A station at which there is only a platform where trains stopped when flagged and where no agent was kept, but a spur track had been built on the right of way for a mill owner is not a station within the statute requiring the right of way to be fenced and the company is liable in double damages for stock killed there. Moore v. St. Louis, etc., R. Co. [Mo. App.] 92 S. W. 756 [advance sheets only].

31. Whether a railroad negligently failed to construct proper fence and cattle guards held for the jury on conflicting evidence as to the sufficiency of such obstructions to turn cattle. Conrad v. Illinois Southern R. Co., 116 Mo. App. 517, 92 S. W. 752. In an action for injuries to cattle occasioned by failure to fence as required by Rev. St. 1899, § 1105, it is proper to define a lawful fence as one sufficient "to resist" horses, cattle, swine, and like stock. "Resist" not being as strong as "prevent" used in the statute. Hax v. Quincy, etc., R. Co. [Mo. App.] 100 S. W. 693. In an action under Rev. St. 1899, § 1105, where evidence showed that a horse escaped from one field into an adjacent field, thence onto the tract, it was error to fail to submit whether the fence between the two fields was a lawful one, because if it was the company owed plaintiff no duty to fence its track. Carpenter v. Chicago, etc., R. Co., 119 Mo. App. 204, 95 S. W. 985. It was not prejudicial error to submit whether the fence was a lawful one when constructed though there was no evidence showing that it was not, where it appeared that the fence was defective and that the defect was of long standing. Hax v. Quincy, etc., R. Co. [Mo. App.] 100 S. W. 693.

32. Code, § 2057, requiring the fencing of tracks, requires sufficient gates at private crossings. Claus v. Chicago G. W. R. Co. [Iowa] 111 N. W. 15. A complaint alleged failure to maintain a lawful fence. Held an amendment that the company maintained a gate and negligently permitted it to remain open and out of repair, etc., was properly allowed as alleging failure to maintain a fence as required by Rev. St. 1899, § 1105. Peery v. Quincy, etc., R. Co. [Mo. App.] 99 S. W. 14. If a railroad in the exercise of ordinary care should have discovered and repaired an opening in the right of way fence made by a stranger and such failure was the proximate cause of cattle being injured, the railroad is liable. Id. Question of negligence in failing to discover and repair such opening held for the jury. Id.

33. Contributory negligence is no defense under Gen. St. 1901, § 5859, where stock is killed where the road is unfenced, or where the fence is so defective that stock can pass onto the right of way. Atchison, etc., R. Co. v. Paxton [Kan.] 88 P. 1082. Where the track runs through a pasture, the adoption of the stock law does not relieve the company from the duty of keeping its right of way fence in repair. Gulf, etc., R. Co. v. Coffin [Tex. Civ. App.] 17 Tex. Ct. Rep. 291, 97 S. W. 1066. Where a right of way fence is taken down under orders from the company's engineer and cattle stray upon the track and are injured, the company is liable. Missouri, etc., R. Co. v. Armstrong [Tex. Civ. App.] 99 S. W. 431. Whether a railroad was negligent in not discovering and repairing a defective wing fence within a month and whether such negligence was the proximate cause of injury to cattle, held questions for the jury. Morris v. Chicago G. W. R. Co. [Iowa] 110 N. W. 154. A railroad company is liable where employes in repairing a fence took off a gate at a farm crossing and merely set it across the opening at night and a colt went through it onto the track and was killed. Baltimore, etc., R. Co. v. Zollman [Ind. App.] 80 N. E. 40.

34. Texas, etc., R. Co. v. Langham [Tex. Civ. App.] 15 Tex. Ct. Rep. 567, 95 S. W. 686. The first duty of an engineer on discovering cattle on the track at a point where fence is not required is to look to the safety of passengers and if it is dangerous to them to attempt to stop the train, it is his duty not to do so. Id.

35. Mattes v. Great Northern R. Co. [Minn.] 110 N. W. 98.

36. Satterly v. Erie R. Co., 113 App. Div. 462, 99 N. Y. S. 309

37. See 6 C. L. 1227

38. Under Sayle's Rev. Civ. St. art. 4528, declaring railroads liable regardless of negligence where the track is not fenced, it is liable where it allows a gate to become defective and out of repair by reason of which cattle escape onto the track and are killed. Cole v. St. Louis S. W. R. Co. [Tex. Civ. App.] 16Tex. Ct. Rep. 14, 94 S. W. 1128. Burn's Ann. St. 1901, § 5321, providing that

fastenings,[39] and be kept in proper repair;[40] but an owner may not recover if the injury is due to a defective fastening constructed by himself.[41]

Cattle guards[42] need not be maintained where they will interfere with the operation of the road.[43] It must appear that failure to maintain cattle guards was the cause of the injury.[44]

Contributory negligence of owner[45] of the stock injured or killed precludes recovery by him[46] if it is the proximate cause of the injury.[47] What constitutes contributory negligence depends on the circumstances of each particular case,[48] and is generally a question for the jury.[49]

where an owner maintains a private crossing he shall keep gates locked, and section 5322 provides that the railroad shall not be liable for injuries to animals when they enter through such private gates. Held where cattle entered the right of way where there was no fence, and from there went across the lands of another and entered through a private gate, the railroad was liable. Chicago, etc., R. Co. v. Ramsey [Ind. App.] 78 N. E. 669. Where an animal escaped onto the track through a defective gate, the fact that it gained access to the gate by reason of an insufficient fence on the owner's land was no defense to the company since the owner was entitled to permit his stock to run on his own premises. Missouri, etc., R. Co. v. Dunnaway [Tex. Civ. App.] 16 Tex. Ct. Rep. 347, 95 S. W. 760. Whether a defective gate in the right of way fence could have been repaired by the landowner practically without labor or expense, held for the jury where there was evidence that it could have been repaired at a cost of about one dollar. Id. In an action under Rev. St. 1899, § 1105, for damages to stock for failure to maintain gates at farm crossings, evidence held to show that plaintiff owned the field from which the horse escaped. Carpenter v. Chicago, etc., R. Co., 119 Mo. App. 204, 95 S. W. 985.

39. Where in an action for killing animals which had passed through an open gate which did not comply with statutory requirements as to the manner of fastening but was so constructed that cattle could not open it and it did not appear that one who opened it would have been more apt to fasten it had it been a statutory gate, evidence held insufficient to show that improper construction of the gate was the proximate cause of the injury. Rowen v. Chicago G. W. R. Co., 198 Mo. 654, 96 S. W. 1009. In an action for injuries to an animal at a farm crossing, whether the gate was provided with a sufficient fastening was held a question for the jury. Roberts v. Chicago, etc., R. Co., 119 Mo. App. 372, 94 S. W. 838. Where a horse escaped onto the track by reason of the insufficiency of a fastening on a gate at a farm crossing under Rev. St. 1899, § 1105, and it appeared that the horse was lawfully on adjoining land and that the gate in question was at a necessary farm crossing, it was proper to submit these questions without instructions. Id.

40. Where a gate at a private crossing had been for a long time in a dilapidated condition and cattle passed through it onto the track and were injured the company was liable unless the injury was chargeable to willful negligence of the owner. Claus v. Chicago G. W. R. Co. [Iowa] 111 N. W. 15. Whether they escaped onto the track through the willful negligence of the owner held a question for the jury where they had been placed in a pasture not bordering on the right of way at that point, and escaped from the pasture and passed through the defective gate. Id.

41. Under Rev. St. 1899, § 1105, requiring railroads to instal gates at crossings and provide them with latches or hooks, an owner may not recover where an animal escaped through an open gate, the fastening of which he had himself constructed. Francis v. Quincy, etc., R. Co., 118 Mo. App. 435, 93 S. W. 876.

42. See 6 C. L. 1227.

43. Under Rev. St. 1899, § 1106, a railroad is not required to maintain cattle guards at a place where they would endanger employes. Gilpin v. Missouri, etc., R. Co., 197 Mo. 319, 94 S. W. 869. In such case where cattle are killed the company has the burden to show that the presence of cattle guards at such place would endanger employes. Id. Where it appeared that the place where the cattle entered the track was at a point where there were three tracks, and the plaintiff testified that cattle guards there would endanger employes in switching, his own evidence showed excuse for not placing them there. Id.

44. Evidence that a mule which escaped through a defective cattle guard was found dead on the right of way with no marks upon it to show that it had been struck or evidence that a train had passed, except signs of blood and hair on the track, is insufficient to warrant a recovery. Texas & P. R. Co. v. King Bros. [Tex. Civ. App.] 99 S. W. 1030.

45. See 6 C. L. 1227.

46. Code Pub. Gen. Laws, art. 23, § 287, making railroad companies liable for stock injured on the track unless they can prove freedom from negligence, does not change the common-law rule that contributory negligence on the part of the owner precludes recovery if it was the cause of the injury. Norfolk R. Co. v. Smith [Md.] 64 A. 317.

47. Negligence in permitting animals to escape from an inclosure is not the proximate cause of their being killed on the railroad track at some distance from the enclosure, over which track defendant had no control. Mobile & O. R. Co. v. Christian Moerlein Brewing Co. [Ala.] 41 So. 17.

48. Turning hogs into a field adjoining a right of way not fenced as required by Rev. St. 1899, § 1105, from which it was known that they could escape through such fence to another field, is not contributory negligence barring recovery for injuries done by trespassing. Kirpatrick v. Illinois Southern Ry. Co. [Mo. App.] 96 S. W. 1036.

(§ 11) *J. Fires.*[50]—Those who establish themselves in the neighborhood of railroads must know that trains are expected to run, and if there are risks arising from no want of care in the equipment or management of trains, they are incident to the situation;[51] and a railroad is not liable if without negligence on its part fire is communicated to adjacent property,[52] but if a railroad permits combustible material to accumulate and remain on its right of way and fire is communicated to such material by a passing locomotive and spreads to adjoining lands, the railroad is liable,[53] and the fact that due care is taken in other respects is immaterial.[54] So also, if there is negligence in the management or equipment of locomotives and fire is set,[55] or if fire is set through any other act of negligence on its part,[56] the com-

Where a cow was killed at a crossing, evidence that she was nervous because separated from her calf and had been placed in a pasture from which there was an inference that she had escaped did not show contributory negligence. France v. Salt Lake & O. R. Co. [Utah] 88 P. 1. The mere fact that a horse was on the railroad track does not show contributory negligence on the part of the owner, nor is it proof of negligence though the horse was allowed to run at large or was negligently cared for. Norfolk & W. R. Co. v. Smith [Md.] 64 A. 317. Where animals are injured on an unfenced track, the mere fact that the owner permitted them to unlawfully run at large does not constitute contributory negligence per se. Sarja v. Great Northern R. Co., 99 Minn. 332, 109 N. W. 600. It is not contributory negligence to permit a colt to follow its dam while being driven. Toledo, etc., R. Co. v. Delliplane, 119 Ill. App. 122.

49. Whether an owner was guilty of contributory negligence in turning horses out to graze on unenclosed land near the depot held a question for the jury. Wilmot v. Oregon R. Co. [Or.] 87 P. 528. Where animals were injured, whether the owner was guilty of contributory negligence in turning them into a clearing on his own land, knowing the fence adjoining the right of way was insufficient to hold them, held a question for the jury. Sarja v. Great Northern R. Co., 99 Minn. 332, 109 N. W. 600.

50. See 6 C. L. 1227.

51. In such case the railroad is only charged with a degree of care proportionate to the danger. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903. It is erroneous to charge that it is the duty of a railway company to keep its right of way clear of combustible materials and structures where buildings on the right of way with wooden roofs took fire from sparks and communicated to another's property. Atchison, etc., R. Co. v. Sprague [Kan.] 87 P. 733.

52. A railroad company, free from negligence is not liable for damages from fire kindled by sparks from a locomotive. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903. A railroad is not liable if fire catches off the right of way from sparks from an engine properly equipped and carefully operated, as there is no negligence. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

53. Baltimore & O. S. W. R. Co. v. O'Brien [Ind. App.] 77 N. E. 1131. Where fire catches in combustible material negligently permitted to accummulate on the right of way from an engine on which the spark appliances are in good condition, and it is being carefully operated, the company is liable. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448. Evidence sufficient to show negligence in permitting fire to escape from a right of way when it appeared that combustible materials allowed to accumulate on the right of way had caught, and that a wind was blowing toward plaintiff's premises and the fire commenced to spread shortly after a train passed. Baltimore & O. S. W. R. Co. v. O'Brien [Ind. App.] 77 N. E. 1131. The act of a railway company in permitting its right of way to be covered with inflammable material is negligence and sufficient in itself to authorize recovery where fire spread therefrom to adjoining land without intervening or independent cause. Knott v. Cape Fear & N. R. Co., 142 N. C. 238, 55 S. E. 150. Whether a railroad company permitted combustible material to accumulate on the right of way held a question for the jury. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

54. Where combustible materials are permitted to accumulate on the right of way, the use of the best and most approved spark arresters will not excuse negligence in other respects. McMahon v. Hetch-Hetchy & Y. V. R. Co., 2 Cal. App. 400, 84 P. 350. The company is liable if fire orginates in combustible material permitted to accumulate on the right of way, though the engine may have been properly equipped and handled. North Fork Lumber Co. v. Southern R. Co. [N. C.] 55 S. E. 781.

55. Evidence sufficient to show that a fire was set by a locomotive. Union Pac. R. Co., v. Murphy [Neb.] 107 N. W. 757. Whether a shed was set on fire by sparks from an engine held for the jury where the fire was discovered one-half to three-quarters of an hour after engines passed working hard and smoke blew over the premises and there had been no other fire on the premises within an hour before the trains passed. Colorado Midland R. Co. v. Snider [Colo.] 88 P. 453.

56. Where employes of the company set a fire close to a platform upon which cotton was placed for shipment, evidence sufficient to show that it was burned because of negligence of the company's employes. St. Louis, etc., R. Co. v. Clements [Ark.] 99 S. W. 1106. A railroad company is liable for the burning of a building by a fire set by employes on the right of way. Missouri K. & T. R. Co. v. Fithian [Kan.] 85 P. 594. A railway company owes to the owners of isolated buildings near its tracks no duty to diminish the customary speed of trains as they pass on dry and windy days in the ab-

pany is liable. But it must appear that the fire was the result of negligence on the part of the company [57] and that damage was sustained.[58]

Duty as to equipment and operation of engines.[59]—If fire is set by a spark from a defective locomotive or one not having proper appliances or because carelessly operated, the company is liable whether the fire originates on or off the right of way,[60] but a railroad is not absolutely bound to use the safest and best spark appliances but only to use reasonable care to supply the safest and best.[61] A railroad

sence of previous fires or other evidence of the danger of setting a fire. Woodward v. Chicago, etc., R. Co.[C. C. A.] 145 F. 577. Evidence sufficient to show that a fire was the result of negligence of the railroad company. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448. A railroad cannot contend that title to a crop burned was in a tenant where such tenant testified and made no claim thereto. Toledo, etc., R. Co. v. Farris, 117 Ill. App. 108. Liability for fire extends to those having charge of the engine as well as to the owner of the road. Chicago & Erie R. Co. v. Neilson, 118 Ill. App. 343.

Note: Negligence may be affirmatively proven by the emission of cinders unusual in quantity or size or carried to an unusual height or distance. Anderson v. Railway Co., 45 Or. 211, 77 P. 119; Jacksonville, etc., R. Co. v. Peninsular Land, Transp. & Mfg. Co., 27 Fla. 1, 157, 9 So. 661, 17 L. R. A. 33; Bedell v. Long Island R. Co., 44 N. Y. 367, 4. Am. Rep. 688. Although such circumstantial evidence is not of the most satisfactory character, the jury should weigh it. Johnson v. Railway Co., 31 Minn. 59, 16 N. W. 488; O'Neill v. Railway Co., 115 N. Y. 583, 22 N. E. 217; Henry v. Southern Pac. Ry. Co. 5 Cal. 176; Great Western R. Co. v. Haworth, 39 Ill. 346; Chicago, etc., R. Co. v. Quaintance, 58 Ill. 389; Texas, etc., R. Co. v. Insurance Co. [Tex. Civ. App.] 73 S. W. 1088; Glany v. Railway Co., 119 Iowa, 611, 93 N. W. 575; Huyitt v. Railway Co., 23 Pa. 273. Lowry, J., said: "When we find fires started by a locomotive at distances from 80 to 150 feet from the road how can we say that there is no evidence of negligence." That a fire was started at a distance of 60 feet (Chicago, etc., R. Co. v. McCahill, 56 Ill. 29; of 63 feet Louisville, etc., R. Co. v. Malone, 109 Ala. 509, 20 So. 33; of 65 feet L. E., etc., R. Co. v. Block, 54 Ill. App. 85), or of 100 feet (Illinois Cent. R. Co. v. McClellan, 42 Ill. 355), has been held substantive and independent evidence of negligence to be considered by the jury. And see Hull v. R. Co. 14 Cal. 388, 73 Am. Dec. 656; Anderson v. Railway Co., 45 Or. 211, 77 P. 119; Sibiirud v. Railway Co., 29 Min. 58, 11 N. W. 146. On the other hand in Smith v. N. P. R. Co., 3 N. D. 17, 53 N. W. 173, it is held that the mere fact that sparks set fire out at a distance of 118 feet from the track in a heavy wind is not affirmative evidence of negligence. That case has been severely criticised (2 Thompson, on Negligence, 796) and is not in harmony with the weight or better reason of the authorities.—See Continental Ins. Co. v. Chicago & N. R. Co. [Minn.] 107 N. W. 548.

57. Evidence that a fire which burned over a meadow apparently burned from the direction of a railroad is insufficient to show negligence. Funk v. Quincy, etc., R. Co. [Mo. App.] 100 S. W. 504. Evidence insufficient to show that a fire was started by sparks from a locomotive where it was not emitting sparks when it passed the building. Wind blowing in an opposite direction, engine not working hard and smoke stack and spark arrester in good condition. Cyle v. Denver & R. G. R. Co. [Colo.] 86 P. 1010. Evidence that a building near the right of way was discovered to be on fire a few minutes after an engine passed is sufficient in the absence of other explanation to justify a finding that it caught by sparks from the engine. St. Louis, etc., R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27. Whether fire was communicated from an engine **held a question for the jury.** Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448. Rebuttal evidence consisting largely of expert testimony held insufficient to take the case from the jury. Continental Ins. Co. v. Chicago & N. W. R. Co., 97 Minn. 467, 107 N. W. 548.

58. Evidence insufficient to show that an owner sustained any damage where the fire burned grass and grass roots on land in possesion of a tenant who had been compensated for his loss. Meyn v. Chicago G. W. R. Co. [Iowa] 109 N. W. 1096.

59. See 6 C. L. 1228.

60. North Fork Lumber Co. v. Southern R. Co. [N. C.] 55 S. E. 781. Where the jury found that the engine was defective, failure to submit the issue as to the condition of the right of way did not prejudice the railroad company. Id. Where fire escapes from a defective engine or defective spark arrester or from a good engine not carefully operated, or not by a skillful engineer, the railroad company is liable. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448. Complaint alleging that a railroad company negligently failed to provide an engine with a proper spark arrester by reason of which fire was set to a certain storehouse from which it was communicated to the premises in question by spreading, held to sufficiently allege negligence. Birmingham R. Light & Power Co. v. Martin [Ala.] 42 So. 618. Evidence sufficient to show negligence where it apeared that locotives all equipped with the same kind of screens had the day before thrown out large cinders and set a house on fire. Chesapeake & O. R. Co. v. Richardson [Ky.] 99 S. W. 642. Question of negligence in the management of an engine setting a fire when it appeared that the wheels slipped in starting and a volume of sparks were emitted held properly submitted. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833.

61. St. Louis, etc., R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27. Are required only to exercise reasonable care in providing appliances and keeping them in good condition so as to prevent fires. St. Louis, etc., R. Co. v. Thompson-Hailey Co. [Ark.] 94 S. W. 707. Instruction held not objectionable as stating the duty of the company too strictly in re-

may not escape liability for failure to make inspection of spark arresters by merely showing that it had employed a competent inspector, but must show that a reasonably careful inspection was made.[62]

Contractual exemptions from liability.[63]—A railway company being under no legal duty to grant a privilege to construct an elevator upon its right of way, may without violating any rule of public policy, grant such privilege on condition that it shall not be liable for damages for fire set by its engines.[64]

Contributory negligence[65] of the owner of the property destroyed bars a recovery by him.[66]

Pleading.[67]—The sufficiency of a complaint in alleging negligence is governed by the general rules of pleading.[68]

Evidence, burden of proof, and presumptions.[69]—In an action for damages caused by fire, the ground of recovery is negligence and one seeking to recover has the burden of proof,[70] and he must establish the negligence alleged.[71] He is entitled

quiring it to have its engines equipped with the most approved spark appliance. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. A railroad is not liable if locomotive is equipped with the best and most approved spark arrester, unless it is carelessly managed. Chesapeake & O. R. Co. v. Richardson [Ky.] 99 S. W. 642.

62. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448. Instruction held erroneous for not including the element of reasonably careful inspection. Id.

63. See 6 C. L. 1228.

64. James Quirk Milling Co. v. Minneapolis, etc., R. Co., 98 Minn. 22, 107 N. W. 742.

65. See 6 C. L. 1228.

66. Where one knew of fire on the right of way a day or two before his barn was burned and left the door of his barn facing the fire open, he was guilty of contributory negligence which precluded recovery, though not pleaded. Brown v. Oregon R. & Nav. Co., 41 Wash. 688, 84 P. 400. Where cotton was burned on a depot platform where it was placed preparatory to being delivered for shipment, the railroad company has the burden to prove that the owner was negligent in watching the cotton. St. Louis, etc., R. Co. v. Clements [Ark.] 99 S. W. 1106.

67. See 6 C. L. 1228.

68. To constitute negligence in "allowing" a burning negligence must be alleged in the communication or other circumstance that would cast a duty upon the company to put out the fire. Atlantic Coast Line R. Co. v. Benedict Pineapple Co. [Fla.] 42 So. 529. In an action for fire, the fact that the railroad company had notice of holes in the spark arrester is covered by an allegation of negligence in maintaining such arrester and need not be specially set out. Lake Erie & W. R. Co. v. Ford [Ind.] 78 N. E. 969. Allegations that fire was set to pasture and fences by sparks does not require proof that the fire was set directly to such objects. It is sufficient if proof shows that fire set by such sparks spread to the fences. Fleming v. Pullen [Tex. Civ. App.] 16 Tex. Ct. Rep. 891, 97 S. W. 109. Where the first paragraph of a complaint alleged negligence in omitting to use a safe spark arrester and another paragraph alleged that the spark arrester was in the exclusive control of the railroad company and that plaintiff could not allege what mechanism should have been used, held the latter averment was immaterial and did not negative the prior allegation that defects alleged were the cause of the fire. Lake Erie & W. R. Co. v. Ford [Ind.] 78 N. E. 969.

69. See 6 C. L. 1229.

70. The plaintiff to establish his cause of action must trace the fire from its place of origin and identify it as the cause of the injury. If the evidence shows several prairie fires of different origin, each originating several miles distant, it is not sufficient to show that it is more probable that the fire started by the railroad company was the one that caused the damage. Union Pac. R. Co. v. Fickenscher [Neb.] 110 N. W. 561; Union Pac. R. Co. v. Fosberg [Neb.] 110 N. W. 567; Union Pacific R. Co. v. Westlund [Neb.] 110 N. W. 567; Union Pac. R. Co. v. Fickenscher [Neb.] 110 N. W. 567. Hence an instruction that "the jury are not permitted to infer or presume for want of positive truths to the contrary that the fire was communicated by the operation of the railroad," is correct. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903. Where witnesses testified that an engine discharged sparks, and when it was started the wheels slipped and a volume of sparks was emitted and blown toward the building, and fire was first seen on the roof, a prima facie case was established. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. Where negligent operation of the locomotive consisting in the use of too much steam is relied upon, the connection between such act and the escape of sparks must be shown. Louisville & N. R. Co. v. Vinyard [Ind. App.] 79 N. E. 384. Evidence of other fires set by the locomotive does not show such connection. Id. Where it is alleged that a fire was set by a locomotive, it is not necesary, where evidence as to its origin is conflicting, that the evidence should exclude all possibility of a different origin, but it is sufficient if it warrants a conclusion that the fire did not originate from some other cause. Monte Ne R. Co. v. Phillips [Ark.] 96 S. W. 1060. Evidence sufficient to show negligence in equipping engine, though witnesses for the railroad company swore positively that the spark arrester was in good condition. Cincinnati, etc., R. Co. v. Falconer [Ky.] 97 S. W. 727. Where there is evidence that fire was set by sparks emitted from a locomotive which

to the benefit of the rule of evidence as to what will constitute a prima facie case, though the fact that fire was communicated from an engine is controvertible.[72] Where a prima facie case is made by showing that fire was set by sparks from an engine, the company has the burden to rebut the presumption of negligence, but the burden of proof does not shift so as to require it to establish the rebuttal by a preponderance of evidence,[73] and where the railroad shows that it has done all that was required of it by law in the equipment and management of the engine, whether the prima facie case is overcome is a question of fact,[74] unless such presumption is overcome as a matter of fact.[75] At common law no presumption of negligence arises from the fact that fire is set out by a locomotive.[76] But in many states proof that fire was so set out is prima facie proof of negligence[77] and casts upon the railroad company the burden of proving its freedom from negligence.[78]

was not equipped with a proper spark arrester and was carelessly and negligently operated, it was error to direct a verdict for the railroad. Wilcox v. Evans [Ga.] 56 S. E. 635. Where it appeared that a fire was caused either by a locomotive or by a stove in plaintiff's house, it was proper to refuse to instruct that the verdict should be for the railroad if the jury failed to find the origin of the fire. Monte Ne R. Co. v. Phillips [Ark.] 96 S. W. 1060. Ownership and operation of trains prima facie established. Chicago & Erie R. Co. v. Neilson, 118 Ill. App. 343.

71. Where the only allegation of negligence was permitting the right of way to become foul with combustible matter and the plaintiff's only witness testified that the place where the fire caught was clean, that the season was dry, and that the fire caught off the right of way, the evidence failed to prove the negligence alleged. McCoy v. Carolina Cent. R. Co., 142 N. C. 382, 55 S. E. 270.

72. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. Instructions to what would consititute a prima facie case held proper. Id.

73. St. Louis, etc., R. Co. v. Hooser [Tex. Civ. App.] 17 Tex. Ct. Rep. 27, 97 S. W. 708. Instruction requiring such rebuttal held erroneous. Id. Under Rev. St. Ohio 1906, § 3365-6, making the setting of fire by a locomotive prima facie evidence of negligence, the railroad company is required only to counterbalance and not overcome such presumption. The ground of recovery being, as at common law, negligence, the burden is on the plaintiff. Toledo, etc., R. Co. v. Star Flouring Mills Co. [C. C. A.] 146 F. 953. Where fire is communicated to premises outside the right of way by sparks, the company must show that it used ordinary care to have its engines equipped with the best spark applicances in general use, that ordinary care was used to keep them in repair, and ordinary care in operating the locomotives. St. Louis. S. R. Co. v. Connally [Tex. Civ. App.] 93 S. W. 206. The burden to prove that the engine was equipped with a proper spark arrester is on the railroad company. North Fork Lumber Co. v. Southern R. Co. [N. C.] 55 S. E. 781. Testimony that the most modern and approved spark arrester was used may be rebutted by evidence that ten fires were set the same day by the engine within two miles of the property burned and by testimony of experts that such fact would indicate that the spark arrester was out of order. Toledo, etc., R. v. Star Flouring Mills Co. [C. C. A.] 146 F. 953.

74. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833.

75. Where the prima facie case made by showing that fire originated in grass and stubble near the right of way is rebutted by proof that the engine was properly equipped and handled, testimony that a quarter of a mile from the place where the fire originated the engine emitted a great many sparks, and that several fires had been set by sparks during the past few years, is insufficient to go to the jury. Farley v. Mobile & O R. Co. [Ala.] 42 So. 747. The prima facie case made by showing that fire was set out by sparks is not rebutted by proof that the engine was properly equipped. Chicago & Erie R. Co. v. Neilson, 118 Ill. App. 343.

76. No presumption of negligence arises from the fact of fire being communicated by an engine in use on the railroad. Baltimore, etc., R. Co. v. O'Brien [Ind. App.] 77 N. E. 1131.

77. Where fire was caused by violation of Ky. St. 1903, § 782, requiring railroads to keep appliances on their engines that will prevent escape of sparks "as far as possible," where fire is shown to have been set by sparks, the railroad has the burden to show that the engine was equipped as required by statute. Cincinnati, etc., R. Co. v. Falconer [Ky.] 97 S. W. 727. Evidence that a fire caught from sparks is sufficient to raise a presumption of negligence. St. Louis, etc., R. Co. v. Dawson, 77 Ark. 434, 92 S. W. 27. Proof that fire was set out without fault on the part of the landowner raises a presumption of negligence in the equipment or management of the engine. Shipman v. Chicago, etc., R. Co. [Neb.] 110 N. W. 535. But in such case if the evidence is evenly balanced, it is error to instruct that the plaintiff should recover. Id.

78. In an action for damages by fire set by an engine, Gen. St. 1894, § 2700, throws the burden of proof on the railroad company to rebut the presumption of negligence arising from the fact that fire was set. Continental Ins. Co. v. Chicago & N. W. R. Co., 97 Minn. 467, 107 N. W. 548. This presumption may be rebutted by proof of nonconnection as cause, or of such construction, equipment, and operation of the engine as was required under the circumstances. Such proof must conform in character and extent to the standard by which ordinary cases

Admissibility of evidence.[79]—The origin of the fire may be proven by circumstantial evidence.[80] The emission of sparks at other times may be shown,[81] but it is not admissible to show that other fires were set at other times[82] or that other engines emitted sparks,[83] unless it appears that all were similarly equipped[84] or that

are measured. Id. The adequacy of such proof must also be determined in view of any other facts tending to show negligence, appearing in the testimony in addition to those sufficient to give rise to the statutory presumption which tend to show negligence. Id. Unless the rebutting evidence is conclusion as to both facts and inferences, the question is for the jury. Id. The presumption of negligence or of defects in machinery from scattering fire, raised by Minn. Gen. St. 1894, § 2700, was created to change the burden of proof. When this has been done and the evidence introduced, it is functus officio, and cannot be used to raise an issue which the evidence does not present. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577. Where employes of a railroad company testify that there are no defects in a locomtive or that care has been used to avoid them and that a locomtive was operated with care, and the evidence is so conclusive that an opposite finding could not be sustained, the statutory presumption is overcome as a matter of law. Id.

NOTE. Rebuttal of the statutory presumption of negligence: Many courts hold that it is necessarily for the jury to weigh the statutory presumption of negligence in the balance against the evidence of the railroad company in rebuttal. Greenfield v. Railway Co., 83 Iowa, 270, 49 N. W. 95; West Side M. F. I. Co. v. Railway Co. [Iowa] 95 N. W. 193; G. N. R. Co. v. Coates, 53 [C. C. A.] 382, 115 F 452; Atchison, etc., R. Co. v. Bales, 16 Kan. 252; Atchison, etc, R. Co. v. Geiser, 68 Kan. 281, 75 P. 68; St. Louis, etc., R. Co. v. Funk, 85 Ill. 460; Sappington v. Missouri Pac. R. Co., 14 Mo. App. 86; Palmer v. Railway Co., 76 Mo. 217; Babcock v. Railway Co., 62 Iowa, 593, 13 N. W. 740; Hagan v. Railway Co. 86 Mich. 615, 49 N. W. 509; 2 Thompson, Commentaries on the Law of Negligence, p. 840, Railway companies argue against this rule that it amounts to judicial legislation inasmuch as it converts a rebuttable presumption into an unrebuttable one in effect. According to other authorities, rebuttal by proof that the engine was properly constructed. equipped, maintained, inspected, and operated, is as broad as the presumption of negligence, and justifies the trial court in directing a verdict for the railroad company. Daly v. Railway Co., 43 Minn. 319, 45 N. W. 611; Rosen v. Railway Co., 83 F. 300; Anderson v. Railway Co., 45 Or. 211, 77 P. 119; Indiana, etc., R. Co. v. Craig, 14 Ill. App. 407; Gulf, etc., R. Co. v. Benson, 69 Tex. 407, 5 S. W. 822, 5 Am. St. Rep. 74; Menominee Co. v. Milwaukee, etc., R. Co., 91 Wis. 447, 65 N. W. 176; Smith v. N. P. R. Co., 3 N. D. 17, 53 N. W. 173; Louisville, etc., R. Co. v. Marbury Lumber Co., 125 Ala. 237, 28 So. 438, 50 L. R. A. 620; 2 Thompson, Commentaries on the Law of Negligence, p. 796 N. 30.—See Continental Ins. Co. v. Chicago & N. R. Co. [Minn.] 107 N. W. 548.

79. See 6 C. L. 1229.

80. Kearney County v. Chicago, etc., R. Co. [Neb.] 108 N. W. 131. Evidence sufficient to show the origin of the fire. Id. It may be proved by circumstantial evidence that fire was set by sparks. Direct evidence is not necessary. Fleming v. Pullen [Tex. Civ. App.] 16 Tex. Ct. Rep. 891, 97 S. W. 109. Negligence in permitting fire to escape from the right of way may be established by circumstantial evidence. Baltimore, etc. R. Co. v. O'Brien [Ind. App.] 77 N. E. 1131. In an action for burning a barn and house where it was claimed that the barn was set by sparks from an engine and the fire communicated to the house from the barn, evidence as to how the sparks were carried from the burning barn is admissible as part of the occurrence tending to show the extent of the fire. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448.

81. Evidence of the emission of sparks from engines about the time of or a little before the fire is admissible. McMahon v. Hetch-Hetchy & Y. V. R. Co., 2 Cal. App. 400, 84 P. 350. Proof that the engine which set the fire was seen to emit sparks at other times is admissible. Fleming v. Pullen [Tex. Civ. App.] 16 Tex. Ct. Rep. 891, 97 S. W. 109. Evidence that an engine emitted sparks the day after the fire was set is admissible. Johnson v. Atlantic Coast Line R. Co., 140 N. C. 574, 53 S. E. 362. A question asked a witness as to the emission of sparks from an engine "a short while" prior to the time of the fire held not objectionable for indefiniteness as to time, since it could be ascertained with more definiteness by cross-examination. Birmingham R. Light & Power Co. v. Martin [Ala.] 42 So. 618. Where a fire was set on April fourth, testimony that the engine was seen to emit sparks between the preceding February and April which set fire on the right of way near where the fire in question was set is admissible. Knott v. Cape Fear & N. R. Co., 142 N. C. 238, 55 S. E. 150.

82. Proof of, fires at othe times near where the engine passed is not admissible. Fleming v. Pullen [Tex. Civ. App.] 16 Tex. Ct. Rep. 891, 97 S. W. 109. Where in an action against a railroad company for damages from a fire caused by sparks emitted from a particular engine it is error to admit evidence that other engines at other times set fires. Cleveland, etc., R. Co. v. Loos [Ind. App.] 77 N. E. 948. In an action for fire set by sparks from an engine, testimony by one that he rode on what he thought was the same train the day following the fire, and a car of cotton seed hulls attached to the train caught fire, was not admissible where he did not state that the engine emitted sparks or set the fire. Johnson v. Atlantic Coast Line R. Co., 140 N. C. 574, 53 S. E. 362.

83. Where evidence identified the engine from which sparks setting the fire were emitted, and there was no evidence that any other engine caused the fire, testimony that at another time sparks were emitted by another engine is not admissible Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. Error in admitting such evidence is cured by directing the jury not to consider it. Id.

84. Where it appears that locomotives are all under one management and are all

such testimony is introduced only for the purpose of impeachment.[85] It is also admissible to show the condition of the spark appliances.[86] Evidence of a custom of inspection by the railroad company is admissible.[87] An experienced engineer may testify as an expert as to the proper manner of handling an engine near combustible material.[88]

Instructions[89] must properly submit the issues made by the pleadings and evidence,[90] must not be misleading,[91] argumentative,[92] on the weight of evidence,[93] nor impose too high a degree of proof,[94] nor summarize the facts upon which recovery may be had without stating the exceptions.[95]

An alleged variance consisting of a finding that the fire started in a manure pile instead of in a barn as alleged cannot be raised on answers to interrogatories.[96]

equipped with the same kind of spark appliances, it is admissible to show that cinders were thrown out by other engines or that fires were set by them. Chesapeake & O. R. Co. v. Richardson [Ky.] 99 S. W. 642.

85. Where witnesses for the railroad company testified that all locomotives were properly equipped with spark arresters and plaintiff's evidence tended to show that the fire was set by sparks from a certain engine, it was held proper to ask plaintiff's witness whether engines operated on the road emitted sparks and whether they were of unusual size and quantity, as such testimony tended to contradict the defendant's witness. Birmingham R. Light & Power Co. v. Martin [Ala.] 42 So. 618.

86. Testimony of the condition of devices upon a locomotive for arresting sparks at various times within a month preceding a fire set is not too remote. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577. Where the cause of action generally alleged was permitting combustible material to accumulate on the right of way, but it is also alleged that the spark arrester on the engine was defective, testimony that fire box and and spark arrester was defective is harmless. Knott v. Cape Fear & N. R. Co., 142 N. C. 238, 55 S. E. 150.

87. Testimony that for a number of years the company had required the firemen of passenger trains, and that it had been their custom, to inspect dampers, ashpans, etc., before starting on their trips, and if anything was needed to report, is competent on an issue of negligence of the railroad company. Woodward v. Chicago, etc., R. Co. [C. C. A.] 145 F. 577. Evidence of a book of private rules regulating the conduct of the business of the railroad company held inadmissible. Continental Ins. Co. v. Chicago & N. W. R. Co., 97 Minn. 467, 107 N. W. 548.

88. St. Louis, etc., R. Co. v. Dawson [Ark.] 92 S. W. 27.

89. See 6 C. L. 1230.

90. Where cotton was burned after being placed upon a depot platform preparatory to being delivered to the company for shipment, instructions held to cover the issue of contributory negligence. St. Louis, etc., R. Co. v. Clements [Ark.] 99 S. W. 1106. Instructions in an action for a fire set out by sparks held not to narrow or vary from the issues. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903. An instruction in an action for fire set by sparks that, unless the fire was set by sparks, the jury should find for the railroad company, presented the defense that engines were equipped with spark arresters and carefully handled, only in a general way and a more specific charge should be given when requested. St. Louis Southwestern R. Co. v. Connally [Tex. Civ. App.] 983 S. W. 206.

91. An instruction that it is the duty of the railroad to use all "reasonable precaution" in operating trains and providing its engines with spark arresters, followed by an instruction stating the circumstances hypothetically that "a greater degree of care" was required than under ordinary conditions, held the latter instruction was misleading in requiring more than ordinary care under the circumstances hypothesized Lake Erie & W. R. Co. v. Ford [Ind.] 78 N. E. 969. Where the only issue was whether the fire was caused by negligent operation of a locomotive, it was not error to refuse to instruct that the law did not require the use of coal as fuel, and that the use of wood would not be negligent. Monte Ne R. Co. v. Phillips [Ark.] 96 S. W. 1060.

92. Instruction that the fact of fire being communicated to a building by an engine might be established by proof of circumstances giving rise to inferences, provided such circumstances constituted a preponderance of the evidence, held not argumentative. Illinois Cent. R. Co. v. Bailey, 222 Ill. 480, 78 N. E. 833. Instructions that the mere fact that fire originated from sparks emitted was not sufficient to fasten liability upon the company, and that the mere fact that fire originated along the road does not show that it was set by the engine held argumentative. Birmingham R. Light & Power Co. v. Martin [Ala.] 42 So. 618.

93. An instruction that the railroad was not liable because the engine was properly equipped and carefully operated was properly refused as on the facts. Williams v. Atlantic Coast Line R. Co., 140 N. C. 623, 53 S. E. 448.

94. Instruction defining ordinary care in an action for fire set by sparks held not to impose too high a degree of care. St. Louis S. W. R. Co. v. Connally [Tex. Civ. App.] 93 S. W. 206.

95. An instruction authorizing recovery if combustible material was permitted to accumulate on the right of way, and fire caught and spread therefrom, held not erroneous as summarizing the facts upon which a recovery might be had without stating the exceptions. St. Louis S. W. R. Co. v. Connally [Tex. Civ. App.] 93 S. W. 206.

96. Lake Erie & W. R. Co. v. Ford [Ind.] 78 N. E. 969.

Damages[97] recoverable are such as might reasonably be expected to follow.[98]

(§ 11) *K. Actions for injuries.*[99]—The venue of actions is governed by statute.[1] The law of the place where the injury occurred controls as to the duties of the train employes.[2]

Pleadings[3] must conform to statutory requirements,[4] and allegations of negligence should be specific.[5] A general allegation of negligence is sufficient.[6] A general allegation of wantonness and willfulness will authorize any proof on the subject.[7] If plaintiff claims to have been a licensee the complaint should so aver.[8]

Burden of proof.[9]—One injured at a crossing has the burden to prove negligence on the part of the railroad company and that he was free from contributory negligence,[10] in the absence of statutes making negligence presumptive.[11] After a

97. See 6 C. L. 1230. See, also, Damages, 7 C. L. 1029.

98. A complaint for damages to fruit by freezing because the covering was burned by sparks from a locomotive must show that the railroad knew that such result might reasonably be expected to follow from the burning. Atlantic Coast Line R. Co. v. Benedict Pineapple Co. [Fla.] 42 So. 529. Where wood is burned, the measure of damages is the value of the wood in the locality at the time, not its value standing plus cost of cutting. Hart v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 559.

99. See 6 C. L. 1230.

1. Under Civ. Code Prac. § 73, where one is killed while passing over a track, the venue of an action by his administrator is the residence of the intestate and not residence of the adminstrator. Illinois Cent. R. Co. v. Willis' Adm'r, 29 Ky. L. R. 1187, 97 S. W. 21. Under Civ. Code Prac. § 73, providing that actions for injuries must be brought where defendant resides, or where the injury occurred, or where plaintiff resides, he may sue where he resides if the company has a track in such county, though trains have never been operated upon it. Louisville, etc., R. Co. v. Sander's Adm'r, 29 Ky. L. R. 212, 92 S. W. 937. Kirby's Dig. § 6776, localizing the action for killing stock to the place of injury, does not prevent bringing an action in Arkansas for stock killed in Indian Territory, as such action does not grow out of the statute. Kansas City Southern R. Co. v. Ingram [Ark.] 97 S. W. 55.

2. In an action in Arkansas for killing stock in Indian Territory, the law of the latter place governs as to the duty of the engineer. Kansas City Southern R. Co. v. Ingram [Ark.] 97 S. W. 55. Under the law of that territory it was proper to instruct that it was the duty of the engineer to keep a lookout for stock after they had been discovered, or should have been discovered. Id.

3. See 6 C. L. 1230. Where two steers were struck within two hundred feet by the same train going at the rate of twenty-five miles an hour, and when the second was struck the first was being dragged by the locomotive, there was a single cause of action for killing both. Chicago, etc., R. Co. v. Ramsey [Ind. App.] 78 N. E. 669.

4. Code 1876, § 1711, requiring the time and place where the killing occurred to be alleged, has been repealed. Western R. Co. v. McPherson [Ala.] 40 So. 934.

5. A complaint based on Rev. St. Mo. 1899, § 2864, making railroads liable for negligence of any officer, agent, servant, or employe, while running a train, need not allege that the negligence was that of the agent, etc., but it is sufficient to allege that it was that of the company. Chicago & A. R. Co. v. Cox [C. C. A.] 145 F. 157. In an action for death at a crossing, facts disclosing a legal duty owed and negligent performance or failure to perform such duty must be alleged. Chicago, etc., R. Co. v. McCandish [Ind.] 79 N. E. 903. In an action for killing an animal, an allegation that the track runs through a certain township without alleging that it run anywhere else is insufficient without express allegation that the accident occurred in that township. Wright v. Quincy, etc., R. Co., 119 Mo. App. 469, 95 S. W. 293.

6. Specific acts need not be alleged. Nashville, etc., R. Co. v. Higgins, 29 Ky. L. R. 89, 92 S. W. 549.

7. Bradley v. Louisville & N. R. Co. [Ala.] 42 So. 818.

8. Where a complaint alleges the injured person to have been a licensee but the evidence shows he was a servant, the variance is fatal. Alabama Great Southern R. Co. v. Burks [Ala.] 41 So. 638. A complaint by a trespasser which fails to show willful or intentional injury does not state a cause of action. Norfolk & W. R. Co. v. Stegall's Adm'x, 105 Va. 538, 54 S. E. 19; Rosenthal v. New York, etc., R. Co., 112 App. Div. 436, 98 N. Y. S. 479. Amendment to a complaint for injuries to a trespasser held to sufficiently meet the objections urged by the demurrer. Atlantic Coast Line R. Co. v. O'Neill [Ga.] 56 S. E. 986.

9. See 6 C. L. 1231.

10. Wright v. Boston, etc., R. Co. [N. H.] 65 A. 687. Where one was killed at a crossing, the absence of evidence of what he did at the time cannot be supplied by conjecture or by the theory that he did what an ordinarily prudent person would have done. Id. One injured at a crossing must prove the negligence alleged. Southern R. Co. v. Reynolds, 126 Ga. 657, 55 S. E. 1039. On a general allegation of negligence in running a train and particular negligence in failing to give statutory signals, proof that plaintiff was injured by a train makes out a prima facia case and shifts the burden of proof to the company. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616. Where one was killed at a crossing his freedom from contributory negligence is not established by presenting no evidence, but relying on his instinct of self preservation as proof that he exercised due care. Wright v. Boston & M. R. R. Co. [N. H.] 65 A. 687.

11. Ann. Code 1892, § 1808, providing that proof of injury inflicted to persons or prop-

plaintiff shows that he was injured, a presumption of negligence as alleged arises and the company has the burden to make out its defense.[12] Because of the natural instinct of self preservation, it is presumed in the absence of evidence that one approaching a railroad crossing exercises due care and caution.[13] But in the absence of testimony it is not presumed that his team became frightened and that he lost control of them.[14] This presumption is one of fact and is rebuttable and cannot exist where it is incompatible with the conduct of a person to whom it is sought to apply it.[15] Where a licensee is killed, the presumption based on instinct of self preservation that he exercised due care does not apply where surrounding circumstances conclusively show contributory negligence.[16] Whether the presumption that one killed at a crossing stopped, looked, and listened, is rebutted, is for the jury, unless evidence to the contrary is positive or a verdict against it would be erroneous as a matter of law.[17]

Evidence.[18]—The evidence should be confined to the issues made by the pleadings,[19] but all evidence relevant to such issues is admissible.[20] Rules of a defendant

erty by the running of trains is prima facia proof of negligence on the part of the railroad company, imposes a liability where one is killed by a train unless the company exonerates itself. Yazoo & M. V. R. Co. v. Landrum [Miss.] 42 So. 675. Evidence sufficient to show the company liable. Id.

12. This is so though it is alleged in different counts that the injury occurred in either one of two ways because of various acts of negligence alleged. Gainesville & Dahlonega Elec. R. Co. v. Austin [Ga.] 56 S. E. 254. Under Laws 1891, c. 4071, p. 113, when an action is brought against a railroad for personal injury, plaintiff has the burden of proving the injury and the railroad company its freedom from negligence. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235.

13. Wabash R. Co. v. De Tar [C. C. A.] 141 F. 932. Where one is killed at a crossing and there are no witnesses, it is presumed that he exercised ordinary care on approaching the crossing. Atchison, etc., R. Co. v. Baumgartner [Kan.] 85 P. 822. Where one was killed at a crossing and it did not appear that he did not look and listen, the company has the burden to show that he did not do so in order to prove contributory negligence. Choctaw, etc., R. Co. v. Baskins [Ark.] 93 S. W. 757. Where one is killed it is presumed in the absence of any evidence that he exercised due care. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880. Natural instincts of self-preservation are to be considered. Elgin, etc., R. Co. v. Hoadley, 122 Ill. App. 165.

14. Atchison, etc., R. Co. v. Baumgartner [Kan.] 85 P. 822. One presumption cannot be made the basis of another. Id.

15. Where inconsistent with testimony of eyewitnesses or by evidence of physical surroundings and other conditions. Wabash R. Co. v. De Tar [C. C. A.] 141 F. 932.

16. Rich v. Chicago, etc., R. Co. [C. C. A.] 149 F. 79. This presumption is inferior in probative force to credible evidence explanatory of the actual occurrence, and, in those courts where the presumption underlies the rule that the burden of proving contributory negligence is on the defendant and must be maintained by a fair preponderance of evidence, its force is so largely embodied in that rule that it has little independent application save as it rests on the general rule of human experience. Wabash R. Co. v. De Tar [C. C. A.] 141 F. 932. The presumption that one killed at a crossing exercised due care to avoid injury is destroyed where it appears that had he looked or listened he could have heard and seen the train approaching. Bressler v. Chicago, etc., R. Co. [Kan.] 86 P. 472. The presumption that one killed at a crossing exercised due care is overcome by evidence that if he had looked and listened he could have heard and seen the train approaching. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880.

17. Kreamer v. Perkiomen R. Co., 214 Pa. 219, 63 A. 597.

18. See 6 C. L. 1232.

19. Allegations of injury sustained in a crossing collision is not sustained by proof that he was injured while alighting from a train. Louisville & N. R. Co. v. Wilson [Ky.] 100 S. W. 302.

20. On conflicting evidence as to the rate of speed where a witness testified that the train was running at the "usual rate," evidence as to the usual rate is not error. Louisville & N. R. Co. v. Goulding [Fla.] 42 So. 854. An allegation that plaintiff "had occasion to walk a short distance on the railroad track of the defendant" and was struck by an engine authorizes him to testify that at the time and place of the injury he was walking on the track. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235. In an action for damages on account of the striking of the decedent by a locomotive at a grade crossing, testimony is competent as to the presence of a side track with cars standing upon it, which to some degree obstructed the view of the decedent as he approached the crossing, and records of railroad company showing the presence of such cars is competent, although not produced by the party who made the records. Wheeling & Lake Erie R. Co. v. Parker, 9 Ohio C. C. (N. S.) 28. Evidence that the decedent was familiar with the crossing is competent, but evidence tending to show that he was guilty of negligence at the same crossing on previous occasions is incompetent. Id.

Photographs of a crossing where an accident occurred taken three years after the accident are inadmissible where it is not shown that the locus in quo remained in the

company are admissible upon the issue of negligence without being pleaded.[21] Plaintiff may show that accident occurred at time when there was usually the greatest amount of travel on the crossing.[22] The order of proof rests in the discretion of the court.[23] Any intelligent person who has observed the speed of trains and timed them is competent to give an opinion as to the speed of a particular train.[24] Whether an engineer took every precaution he could take to stop the train and avoid injury is not a proper subject for expert testimony,[25] nor is the question whether a crossing is dangerous.[26]

Instructions[27] should specifically[28] submit the issues made by the pleadings[29] and none other.[30] Questions of law should not be submitted.[31] The issues should

same condition. Columbia, etc., R. Co. v. State [Md.] 65 A. 625. Statements by one immediately after he was run over at a crossing that the injury was the result of his own negligence are admissible as **res gestae.** Chicago, etc., R. Co. v. Clarkson [C. C. A.] 147 F. 397. It is competent to show that the street crossing where an injury occurred had been abandoned and was not commonly used as a crossing. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162. Witnesses who saw the accident may testify that they could have heard signals if any had been given. St. Louis, etc., R. Co. v. Knowles [Tex. Civ. App.] 99 S. W. 867. Testimony of witnesses as to the distance within which they had seen similar trains stopped is not objectionable as an opinion as to the distance within which such a train could be stopped. Texas & P. R. Co. v. Brannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 844, 96 S. W. 1095. Rules of an electric company governing employes where they are at a crossing are competent on the question of their conduct. Chicago City R. Co. v. Lowitz, 119 Ill. App. 360.

It is not competent to show that a railroad was not prosecuted for obstructing a crossing, that it had been closed up and abandoned after the accident. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162. Evidence that a number of persons had been killed at a crossing did not tend to show that it was dangerous. Tiffin v. St. Louis, etc., R. Co. [Ark.] 93 S. W. 564. Not error to exclude evidence that it was the **habit and rule of the company to give warning** whenever a train was moved. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162.

An ordinance closing a street held not admissible as the city council had no authority to close it and give the railroad exclusive use of the place. Gulf, etc., R. Co. v. Garrett [Tex. Civ. App.] 99 S. W. 162.

21. Rules of a railroad company. Galveston, etc., R. Co. v. Garrett [Tex. Civ. App.] 17 Tex. Ct. Rep. 616, 98 S. W. 932.

22. Metzler v. Philadelphia & R. R. Co., 28 Pa. Super. Ct. 180.

23. Speed ordinance is admissible though no foundation is laid. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713.

24. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. One familiar with trains and possessed of a knowledge of time and distance is competent to testify as to speed of a train. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. Persons who live at the side of the track, who can tell when a train is going at a high rate of speed, and who have observed trains and their speed, are competent to testify as to the speed of a particular train. Garrau v. Michigan Cent. R. Co., 144 Mich. 26, 13 Det. Leg. N. 97, 107 N. W. 284. One who has lived by the side of a track for four years and has observed the speed of trains and had timed trains between stations is competent to give an opinion as to the speed of a train when it collided with a team at a crossing. Line v. Grand Rapids & I. R. Co., 143 Mich. 163, 12 Det. Leg. N. 929, 106 N. W. 719. One who has railroaded for from sixteen to twenty years is competent to give an opinion as to the speed of a train. Seaboard Air Line R. Co. v. Smith [Fla.] 43 So. 235.

25. Johnson v. Center [Cal. App.] 88 P. 727.

26. Tiffin v. St. Louis, etc., R. Co. [Ark.] 93 S. W. 564.

27. See 6 C. L. 1233.

28. Where mules were killed, an instruction referring to the negligences of the company should state what it consisted of. Johnston v. Atchison, etc., R. Co., 117 Mo. App. 308, 93 S. W. 866. Such instruction should also include the hypothesis whether the negligence was the proximate cause of the accident. Id.

29. Instruction in an action for frightening a team held erroneous for failure to require that the negligence hypohesized was the proximate cause of the injury. Louisville & N. R. Co. v. Mertz, Ibach & Co. [Ala.] 43 So. 7. Instructions in an action for injuries at a crossing that if decedent by approaching cautiously could have seen or heard the train, and if he voluntarily placed himself in danger he could not recover, and that he was not excused from looking and listening by the fact that the train was running at high speed, was late, and passed at an unusual time, and that the train was entitled to the right of way, held to properly submit the questions of proximate cause and contributory negligence. Illinois Cent. R. Co. v. Bethea [Miss.] 40 So. 813. An instruction that if the collision was the proximate result of the company's negligence, and the injured party was free from contributory negligence, fairly submitted the question of negligence in failing to ring the bell or blow the whistle. St. Louis Southwestern R. Co. v. Elledge [Tex. Civ. App.] 15 Tex. Ct. Rep. 545, 93 S. W. 499.

30. Where a complaint alleges two statutory grounds of recovery and evidence is introduced in support of both, but there is no right of recovery as to one, it is error to refuse to withdraw it from the jury. Chicago & A. R. Co. v. Cox [C. C. A.] 145 F. 157. It was proper to refuse an instruction as to whether a gate at a farm crossing was left

be submitted fairly.[32] Instructions should not be on the weight of evidence.[33] Controverted facts should not be assumed.[34] Undue prominence should not be given to particular facts [35] and material facts should not be ignored.[36] Instructions should not conflict with each other [37] nor be misleading.[38] Requested instructions not

open by third persons where there was no evidence that such was the fact. Roberts v. Chicago & A. R. Co., 119 Mo. App. 372, 94 S. W. 838. Where a complaint charges a liability predicated on violation of a statute, it is error to charge anything on common-law liability except so far as the two were concurrent. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. The better practice in such case is to charge the statute and not mention the common law. Id. Instructions in an action predicated on violation of a statutory duty held erroneous because inapplicable to the pleadings. Id. Where the condition of a crossing was not shown to have had anything to do with an accident, it was error to instruct relative to its dangerous condition. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880.

31. An instruction submitting whether a horse was lawfully in a field held erroneous as submitting a question of law. Carpenter v. Chicago & A. R. Co., 119 Mo. App. 204, 95 S. W. 985.

32. Instruction held erroneous as requiring a finding of freedom from contributory negligence in order to exonerate the railroad. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. Where in an action for injuries at a crossing, whether the company was guilty of negligence was sharply contested. Held error to give a separate and distinct instruction postulating right to recover on freedom from contributory negligence. Houston, etc., R. Co. v. Dillard [Tex. Civ. App.] 15 Tex. Ct. Rep. 393, 94 S. W. 426. Where a complaint alleged negligence generally but evidence tended to show specific acts, an instruction as broad as the allegations is erroneous. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. Where one on the right of way contended that his injury was caused by the negligent and wanton acts of train operatives, it was proper to refuse an instruction designating the occurrence as an accident. Southern R. Co. v. Hill, 125 Ga. 354, 54 S. E. 113.

33. Instruction in an action for injuries at a crossing held not to constitute an opinion on the facts. Wilson v. Atlantic Coast Line R. Co., 142 N. C. 333, 55 S. E. 257. An instruction leaving to the jury whether a speed ordinance had been violated, and if so declaring it to be negligence and requiring the jury to find the proximate cause of the injury, held not on the weight of evidence. Texarkana & Ft. S. R. Co. v. Frugia [Tex. Civ. App.] 16 Tex. Ct. Rep. 724, 95 S. W. 563.

34. Where evidence showed that a licensee was not seen by operatives of the train, an instruction relative to the duty of such operatives, if the place of the accident was used as a crossing by a large number of people, held not to assume that he was seen. Norfolk & W. R. Co. v. Carr [Va.] 56 S. E. 276. Where evidence showed that operatives in charge of a train did not see a licensee, it was proper to refuse an instruction assuming that they did. Id. It is error to assume that one injured at a crossing knew a train was approaching where the evidence tended to show otherwise. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144. Instruction in an action for injuries at a crossing held to assume that the person injured was guilty of contributory negligence and that he did not look and listen. Baltimore & O. R. Co. v. State [Md.] 64 A. 304. It is error to refuse to charge on the hypothesis of sudden appearance on the crossing too late to stop the train, though testimony of train operatives on such point was controverted. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368.

35. An instruction that it is the duty of a pedestrian approaching a crossing to stop, look, and listen, gives undue prominence to facts constituting contributory negligence. Louisville & N. R. Co. v. Ueltschi's Ex'rs, 29 Ky. L. R. 1136, 97 S. W. 14. Instructions as a whole held not to authorize a recovery in the absence of negligence. Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688.

36. An instruction ignoring the fact that a watchman was kept at a crossing to warn travelers of approaching trains is properly refused. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713. Instruction in an action for injuries at a crossing held erroneous as ignoring evidence of the company's duty to have a man on the rear of a train backing over a crossing. Mulderig v. St. Louis, etc., R. Co., 116 Mo. App. 655, 94 S. W. 801. Instruction held not objectionable as lending color to plaintiff's theory that the injured person was walking along the track with his back to the train and did not see its approach. Galveston, etc., R. Co. v. Murray [Tex. Civ. App.] 99 S. W. 144.

37. An instruction that the running of the train at a higher speed than was permitted by town ordinance was not negligence which would render the company liable is not contradicted by one to the effect that such fact, if it was a fact, could be considered. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713. Instructions in an action for injuries sustained at a defective crossing held irreconcilably conflicting. Porter v. Missouri Pac. R. Co. [Mo.] 97 S. W. 880. Nor is it in conflict with one to the effect that a traveler approaching a crossing might assume that the speed ordinance would be obeyed, and the fact that it was not, if so, could be considered in determining the question of contributory negligence. Id.

38. In an action for injuries to property, instructions held not misleading as containing conflicting statements. Chesapeake & N. R. Co. v. Crews [Tenn.] 99 S. W. 368. Instructions in an action for injuries sustained because of a team becoming frightened at the approach of a train, held misleading. Johnson v. Texas & G. R. Co. [Tex. Civ. App.] 100 S. W. 206. Where there was evidence that the engineer saw a traveler on the track in a place of danger and could have stopped the train in time to have avoided the injury, it was proper to refuse an instruction that there could be no recovery if there was mutual negligence, and

substantially covered by other instructions should be given,[39] but if substantially covered they may be refused.[40] If instructions taken as a whole are correct, it is sufficient.[41]

Double damages and attorney's fees [42] are provided for by statute.[43]

§ 12. *Railroad corporations.*[44]—In organizing a railroad corporation statutory requirements must be complied with.[45] Failure of a railroad company to organize under an act authorizing its organization within the time prescribed does not prevent a valid organization thereafter, unless a forfeiture has been declared by the state.[46] Though a railroad corporation is quasi public in its nature, its property is private property and cannot be taken for private use.[47] A railroad corporation which succeeds to the property and rights of another on sale on foreclosure or other judicial sale is not liable for the general debts of such corporation.[48] In interstate operations railroads are subject to Federal control.[49] The fact that a railroad attempts

each contributed to the injury. Johnson v. Center [Cal. App.] 88 P. 727. Failure to define negligence in an action for injuries to a horse held not error where no request was made. Colorado & S. R. Co. v. Webb [Colo.] 85 P. 683. An instruction that statutory signals need not be given within city limits was not erroneous for failure to define "city" so as to include the city where the accident occurred. Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509.

39. In an action for death of one killed at a crossing, an instruction that, if deceased stepped in front of the train when it was so near that it could not be stopped, he could not recover held not covered by other instructions as to the duties of the parties in the premises, and it was error to refuse it. International & G. N. R. Co. v. Ploeger [Tex. Civ. App.] 14 Tex. Ct. Rep. 474, 16 Tex. Ct. Rep. 183, 93 S. W. 226.

40. Refusal of an instruction as to the duty of a railroad company to keep gates at a crossing held not error because it was covered by other instructions. Tiffin v. St. Louis, etc., R. Co. [Ark.] 93 S. W. 564. Instructions as to the duty of a traveler approaching a crossing held to fully cover the law on the issue of contributory negligence and that it was not error to refuse requests on that point. St. Louis, etc., R. Co. v. Dillard [Ark.] 94 S. W. 617.

41. Where it was charged that if the railroad was negligent in running its train and plaintiff was free from contributory negligence he could recover, such instructions were not objectionable for failure to confine the jury to the negligence alleged; correct instructions as to negligence having been given. St. Louis, etc., R. Co. v. Evans [Ark.] 96 S. W. 616. In an action for injuries at a crossing where the main charge fairly submitted the question of contributory negligence, a requested instruction not strictly correct was properly refused. St. Louis Southwestern R. Co. v. Elledge [Tex. Civ. App.] 15 Tex. Ct. Rep. 545, 93 S. W. 499. An instruction in an action for injuries at a crossing, designed to inform the jury as to the injured party's duty where he found himself in a perilous position because of failure to give statutory signals, was not erroneous for failure to include the element that failure to give such signals was the cause of the injury. Illinois Cent. R. Co. v. Hamill, 226 Ill. 88, 80 N. E. 745. A charge that if plaintiff's own negligence contributed to his injury, followed by another that if he showed by a preponderance of evidence that he was injured by reason of the company's negligence the burden was on the company to show contributory negligence, construed as a whole, held not to withdraw evidence of contributory negligence from the jury. Little Rock, etc., R. Co. v. McQueeney [Ark.] 92 S. W. 1120. An instruction that there can be no recovery where each party is equally negligent held not erroneous though not a complete statement of the law where other instructions supplemented it. Johnson v. Center [Cal. App.] 88 P. 727. Where in an action for injuries to a horse at a farm crossing the submission of whether the gate was open because of absence of hook or latch was not error where "hook or latch" was defined in other instructions. Roberts v. Chicago & A. R. Co., 119 Mo. App. 372, 94 S. W. 838.

42. See 6 C. L. 1235.

43. Where in an action under Rev. St. 1899, § 1105, for killing stock, where the jury returns a verdict for damages and "all other and proper relief according to the statute," the court properly doubled the damages as provided. Carpenter v. Chicago & A. R. Co., 119 Mo. App. 204, 95 S. W. 985.

44. See 6 C. L. 1235. See, also, Corporations, 7 C. L. 862.

45. Under Code Pub. Gen. Laws, art. 23, §§ 243, 245, providing that incorporators of a railroad company shall make a certificate specifying the names of the places of termini and the places through which it shall pass, and authorizing such company to construct a road between such points, etc., the termini need not be at or in any town, city, or village, and the certificate is sufficient if the places of termini are definitely designated or fixed. Union R. Co. v. Canton R. Co. [Md.] 65 A. 409.

46. Seaboard Air Line R. Co. v. Olive, 142 N. C. 257, 55 S. E. 263.

47. 24 St. at L. p. 956, requiring railroad companies to build spur tracks connecting industries with the main line, costs to be paid by the industries and repaid from freight charges, is a taking of private property for private use. Mays v. Seaboard Air Line R. Co. [S. C.] 56 S. E. 30.

48. Lincoln Tp. v. Kansas City & O. R. Co. [Neb.] 108 N. W. 140.

49. That the Hepburn Act prohibits a railroad from transporting from state to state a commodity mined or produced by it or in which it has an interest is not ground for forbidding a receiver of such road to

to prevent legislation by bribery does not render it liable on an obligation to be imposed by such legislation.[50] A railroad corporation may not be restrained from doing an unauthorized act at the suit of a private individual.[51] A state legislature has power to regulate the increase of capital stock of railway corporations.[52] In the exercise of this power the legislature may prescribe for what purpose and upon what terms, conditions and limitations an increase of capital stock may be made, and confer upon a commission the duty of supervising any proposed increase.[53] It may also delegate the duty of finding facts in each particular case and authorize and require it, if it finds the existence of facts which bring the case within the statute, to allow the proposed increase, otherwise to refuse it.[54] Any statute, however, which attempts to authorize the commission in its judgment to allow an increase for such purposes and on such terms as it may deem advisable, or in its discretion to refuse it, is void as an attempt to delegate legislative power.[55]

Powers of corporations and authority of officers [56] are defined by its articles and by-laws.[57] The power to offer a reward for the arrest and conviction of persons placing obstructions on the track is incident to the business and duties of the general manager of a railroad and within the scope of his agency.[58]

§ 13. *Actions by and against railroad companies.*[59]—The venue of actions against railroad companies is controlled by statute,[60] as is also the service of process.[61] Actions against receivers for violation of the interstate commerce act must

issue certificates and expend money to open and develop new mines, it not appearing that all the coal could not be marketed in the state or the mines sold. Central Trust Co. v. Pittsburg, etc., R. Co., 101 N. Y. S. 837.

50. Where the right of a state to recover from a railroad company net profits in excess of a certain per cent. on the cost of construction depended on prior legislative action which had not been taken, the fact that the railroad had attempted to prevent such legislation by bribery is insufficient to render it liable. State v. Terre Haute & I. R. Co. [Ind.] 77 N. E. 1077.

51. Only the public and not a private owner can restrain the construction of an elevated side track from the main line to an industrial establishment regardless of whether such construction is authorized. Thornton v. Stevens Coal Co., 117 Ill. App. 376. An owner may not restrain a railroad company from constructing and operating tracks and freight sheds on its own property where it is separated from the property of the abutting owner by a sixty-foot street, notwithstanding injury may result to his property. Walther v. Chicago & Western I. R. Co., 117 Ill. App. 364.

52, 53, 54. State v. Great Northern R. Co. [Minn.] 111 N. W. 289.

55. Section 2872, Rev. Laws 1905, is void as delegating legislative power. State v. Great Northern R. Co. [Minn.] 111 N. W. 289.

56. See 6 C. L. 1236.

57. Under the by-laws of a company providing that the president should be chief executive officer and supervise all other officers and departments, one appointed consulting engineer by the board of directors could be directed by the president to perform such services in connection with a contemplated extension of the road. Bogart v. New York, etc., R. Co., 102 N. Y. S. 1093. Railroad Laws, Laws 1895, p. 317, c. 545, § 59, providing that no railroad shall exercise its corporate powers until articles of association have been published and proof of publication filed, nor until the railroad commissioners shall certify that public convenience requires construction of the road, limits the authority of the board of commissioners to issue the certificate of necessity, and it has no power to grant the certificate if the route asked varies materially from that proposed in the articles. In re Directors of Ticonderoga Union Terminal R. Co., 101 N. Y. S. 107.

58. Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802. Where offers of such rewards had been posted for three years to the knowledge of the president, evidence held sufficient to show that he ratified the offer. Id. Acts of a general manager of a railroad are admissible to show the extent of his authority. Id.

59. See 6 C. L. 1236.

60. An action of injunction to prevent closing of an under grade crossing operates in personam and is not one of those provided by Civ. Code, § 46, which must be brought in the county where the subject of the action is situated. Chicago, etc., R. Co. v. Wynkoop [Kan.] 85 P. 595.

61. Evidence sufficient to show that persons on whom process was served were agents of the railroad company and that service was properly made on them. Choctaw, etc., R. Co. v. Locke [Tex. Civ. App.] 14 Tex. Ct. Rep. 356, 92 S. W. 258. Hurd's Rev. St. 1905, c. 110, par. 2, providing for suing a railroad company, and service of process authorizes service by publication when no officer is found in the county where service is brought, though the principal officer of the company is in the state and the action is for a judgment in personam. Nelson v. Chicago, etc., R. Co., 225 Ill. 197, 80 N. E. 109. Such statute is not void as authorizing service which does not constitute due process. Id.

be brought within the limitation period.[62, 63] The penalty for violation of the safety appliance act may be recovered against any one or all of the companies joined.[64]

§ 14. *Offenses relating to railroads.*[65]—In many states statutes have been enacted declaring certain acts committed by a railroad company to be criminal, such as running freight trains on Sunday,[66] failure to give crossing signals,[67] failure to supply drinking water for passengers,[68] obstructing crossings [69] and the like. It has also been declared an offense to loiter around railroad premises [70] or to place obstructions on a railroad track.[71]

RAPE.

§ 1. Nature and Elements (1667).
A. In General (1667).
B. Female Under Age of Consent (1668).
C. Attempts and Assaults With Intent to Commit Rape; and Carnal Abuse (1668).
§ 2. Indictment and Prosecution (1669).
A. Indictment or Information (1669). Joinder and Election (1669).
B. Evidence (1671).
1. Admissibility (1671).
2. Weight and Sufficiency (1673).
C. Instructions (1674).
D. Trial and Punishment (1676).

§ 1. *Nature and elements. A. In general.*[72]—Rape is the unlawful carnal knowledge of a woman by force and without her consent.[73] While force is thus

62, 63. An alleged liability of receivers of a railroad company for participating in a through freight rate which was in violation of the interstate commerce act not presented within time limited by decree of sale of railroad company's assets held unenforceable either against the receivers or the succeeding corporation. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343. Where receivers of a railroad company had been finally discharged and released from all liability on their bonds more than four years before the bringing of an action to enforce an interstate commerce reparation order, for an alleged participation by the receivers in an illegal freight rate, and there was no evidence of any vacation of the orders of discharge or any application in that behalf, the receivers were not liable as such. Western New York & P. R. Co. v. Penn Refining Co. [C. C. A.] 137 F. 343.

64. In a joint action against more than one railroad to recover the penalty for violation of Safety Appliance Act, 27 Stat. 531, a recovery may be had against any one or all of the defendants as the proof warrants. United States v. Chicago, etc., R. Co., 143 F. 353.

65. See 6 C. L. 1237.

66. Pen. Code 1895, § 420, which prohibits running of freight trains on Sunday, does not apply to a railroad which begins and ends in other states and runs only thirty miles in Georgia. Griggs v. State, 126 Ga. 442, 55 S. E. 179. A verdict of guilty under such state of facts is without support. Id. Pen. Code 1895, § 420, making it a misdemeanor to run a freight train on Sunday, is an internal police regulation and applies to interstate trains. Seale v. State, 126 Ga. 644, 55 S. E. 472.

67. Evidence sufficient to support a conviction for violation of Ky. St. 1903, § 786, requiring giving of crossing signals. Mobile & O. R. Co. v. Com., 28 Ky. L. R. 1360, 92 S. W. 299.

68. It is within the general constitutional power of the general assembly to impose upon a railroad the duty to furnish pure drinking water for passengers and to make failure to do so punishable by fine. Southern R. Co. v. State, 125 Ga. 287, 54 S. E. 160. The provision for punishment other than by fine imposed by Pen. Code 1895, § 522, is inoperative because incapable of enforcement. Id.

69. Cr. Code 1896, § 5388, prohibiting obstruction of a highway "by fence, bar or other impediment," does not include a freight car pushed across the highway permitted to remain there for seven hours when it was voluntarily removed. Central of Georgia R. Co. v. State [Ala.] 40 So. 991. An indictment under such statute for running a freight car across the road need not allege want of consent by the county commissioners, such impediment not being a "gate." Id. A railroad unnecessarily placing cars across a highway may be prosecuted for maintaining a nuisance, though under Ky. St. 1903, § 4335, a penalty may be recovered in a civil action. Commonwealth v. Illinois Cent. R. Co., 29 Ky. L. R. 102, 92 S. W. 944.

70. Ordinance making it unlawful to trespass on or loiter around railroad yards or tracks held not unconstitutional as embracing offenses described in other statutes. Tuggles v. Com. [Ky.] 100 S. W. 235.

71. On prosecution of a boy fifteen years of age for putting obstacles weighing from one hundred and fifty to two hundred pounds on the track, where it appeared that he was below average intelligence, and there was little evidence aside from his confession, it was error to refuse to construct for an acquittal if it was found that other persons placed the obstructions on the track. Kirby v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 73, 93 S. W. 1030. On the prosecution of a boy fifteen years of age for obstructing a track, evidence that he was of weak mind and below average intelligence is insufficient to take the case to the jury on the question of insanity. Id. Where in an indictment for obstructing a track owner-

essential,[74] it may be constructive as by fear induced by threats.[75] The carnal knowledge must be against the will of the woman,[76] a mere reluctance or passive attitude being insufficient;[77] and hence resistance, though not an element of the crime, becomes a material fact as bearing upon consent,[78] which is presumed unless she resists to the utmost [79] of which she is capable under the circumstances,[80] and continues the same until the consummation of the offense.[81] It is now a universal rule that any penetration, however slight, is sufficient.[82]

(§ 1) *B. Female under age of consent.*[83]—Carnal knowledge of females under a prescribed age constitutes rape under the statutes of most states regardless of consent,[84] though in Tennessee no conviction can be had for intercourse with a lewd [85] girl over twelve though under the age of consent. Nonconsent not being an element of statutory rape, resistance is immaterial.[86] A pupil after school hours is still under the care of her teacher within the Missouri statute making it a felony for one to have carnal knowledge of a girl under eighteen confided to his care.[87]

(§ 1) *C. Attempts and assaults with intent to commit rape; and carnal abuse.*[88]—Every element of rape is an ingredient of assault with intent to commit rape except the consummating element of penetration.[89] There must be an intent on the part of one having physical capacity to commit rape [90] to use such force as may be necessary to overcome all resistance and to accomplish sexual intercourse,[91]

ship of the track is laid in a name which imports a corporation, a presumption arises that it is a corporation and it is not necessary, even against special demurrer, to allege the fact of incorporation. Alsobrook v. State, 126 Ga. 100, 54 S. E. 805. Indictment for obstructing track in violation of Pen. Code 1895, § 520, held not to charge two offenses. Id.

72. See 6 C. L. 1237.

73. See **Clark & Marshall on Crimes, p. 416.**

Instructions defining rape held sufficient in the absence of a request for further instructions in respect thereto. People v. Murphy, 145 Mich. 524, 13 Det. Leg. N. 602, 108 N. W. 1009.

74. Under Hurd's Rev. St. 1905, c. 38, § 237, force is an essential element of rape upon a female over eighteen years of age. Rucker v. People, 224 Ill. 131, 79 N. E. 606.

75. Threatened to cut prosecutrix's throat. Vanderford v. State, 126 Ga. 753, 55 S. E. 1025. In determining the sufficiency of the force or the effect of the threat, where both are employed, it is proper to consider the cogency which the threats may have contributed to the force to intensify the influence which the force may have contributed to the threats. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036.

76. The facts that no outcry was made at the time, that no complaint was made for nearly a month thereafter, are to be considered in determining her consent, and the court should so instruct upon request. Vaughn v. State [Neb.] 110 N. W. 992.

77. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036; Brown v. State, 127 Wis. 193, 106 N. W. 536.

78. State v. Cowing, 99 Minn. 123, 108 N. W. 851; Vaughn v. State [Neb.] 110 N. W. 992.

79. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036; Vaughn v. State [Neb.] 110 N. W. 992. Verbal protests and refusals are not sufficient resistance. Brown v. State, 127 Wis. 193, 106 N. W. 536. There must be the most vehement exercise of every physical means within her power to prevent penetration, as the use of the limbs, etc. Id.

80. There must be resistance by the female, depending in amount on the surrounding circumstances and the relative strength of the parties. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036; Vaughn v. State [Neb.] 110 N. W. 992.

81. Brown v. State, 127 Wis. 193, 106 N. W. 536.

82. Statutory rape. People v. Rivers [Mich.] 14 Det. Leg. N. 6, 111 N. W. 201. In a prosecution for carnally knowing and abusing a child of six years, held not necessary that the vagina itself be entered. Williams v. State [Fla.] 43 So. 431. An instruction as to the penetration necessary to a conviction held sufficient. Id.

83. See 6 C. L. 1238.

84. State v. Stimpson, 78 Vt. 124, 62 A. 14; Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 73, 97 S. W. 94.

85. The word "lewd" as used in Acts 1901, p. 29, c. 19, means chastity, not general lewd acts (Jamison v. State [Tenn.] 94 S. W. 675), but includes private acts of intercourse as well as notorious unchastity (Id.). Must be lewd at the time of intercourse, and hence one once lewd but reformed is protected. Id.

86. Resistance is not essential to statutory rape as defined by Code, § 4756. State v. Blackburn [Iowa] 110 N. W. 275.

87. Rev. St. 1899, § 1845 (Ann. St. 1906, p. 1276). State v. Oakes [Mo.] 100 S. W. 434. The fact that the visits were made with the knowledge and consent of the prosecutrix's mother is immaterial. Id. Evidence held sufficient to warrant a conviction. Id.

88. See 6 C. L. 1239.

89. Newman v. People, 223 Ill. 324, 79 N. E. 80.

90. A child under fourteen years who has not physical capacity to commit rape cannot be convicted of an assault with intent to rape. State v. Fisk [N. D.] 108 N. W. 485.

91. Newman v. People, 223 Ill. 324, 79 N. E. 80. Where the intent is sufficient, the

and an assault to effectuate such intent which assault must not be with the woman's consent, unless she is under the age of consent,[92] in which case resistance [93] is not essential.

Criminal or carnal abuse as defined by some statutes is the debauchery or injury of the sexual organs of a female and differs from rape in that penetration is not necessary.[94]

§ 2. *Indictment and prosecution. A. Indictment or information.*[95]—As in other cases, confusion of names in the charging part of the indictment renders it fatally defective,[96] though not the omission of the word "feloniously" or its equivalent in Wisconsin.[97] All the ingredients of the offense must be alleged, as force [98] and nonconsent,[99] or facts making the act statutory rape;[1] but the sex of the prosecutrix may be pleaded by implication,[2] and it is generally held unnecessary to allege that of accused.[3] Where the punishment only, and not the offense, is dependent upon the age of the female, her age need not be alleged.[4]

In statutory rape the information must aver that the female was under the age of consent at the time of carnal knowledge,[5] and where the punishment is affected by consent or nonconsent both may be alleged in separate counts.[6]

An indictment for assault with intent to rape may allege the assault generally without particularizing,[7] but must allege an intent to use all force necessary to carnally know the female against her consent.[8]

Joinder and election.—While the indictment must show under what statute it is drawn, if the facts alleged suggest more than one statutory crime,[9] if the

mere fact that intercourse is not accomplished does not affect the crime. Bourland v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 61, 93 S. W. 115. Intent may be shown by the contemporaneous acts and declarations of the accused. Newman v. People, 223 Ill. 324, 79 N. E. 80. Instructions of the court in respect to intent to use force held sufficient. Bawcom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 222, 94 S. W. 462.

92. Intent to use force is not necessary and hence indictment need not allege such intent. Gibbs v. People [Colo.] 85 P. 425.

93. State v. Johnson [Iowa] 110 N. W. 170.

94. The New Jersey statutory crimes of "carnal abuse" and rape are distinct, in that penetration is an element of the latter but not of the former. State v. Hummer [N. J. Err. & App.] 65 A. 249. In a prosecution for carnally knowing or abusing a female under ten years of age, an instruction that if the jury believed that defendant attempted to have intercourse with prosecutrix and there was injury, however slight, to her sexual organs, though there was no penetration, defendant was guilty, held proper. Sims v. State [Ala.] 41 So. 413.

95. See 6 C. L. 1239.

96. Names of defendant and prosecutrix interchanged. State v. Stephens [Mo.] 97 S. W. 860.

97. Brown v. State, 127 Wis. 193, 106 N. W. 536.

98. Hubert v. State [Neb.] 106 N. W. 774.

99. Where an indictment for rape alleged that defendant unlawfully, willfully, feloniously, forcibly ravished, etc., it is sufficient although it does not allege that the act was against the consent of the prosecutrix, where the objection is raised for the first time on appeal. Beard v. State [Ark.] 95 S. W. 995.

1. In the latter case the law will conclusively presume force and nonconsent. Hubert v. State [Neb.] 106 N. W. 774. An indictment for statutory rape need not allege that the act was with or without the consent of prosecutrix. Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 73, 97 S. W. 94.

2. Where an indictment gives the Christian name of the person upon whom the crime was committed and uses the pronoun "her," it is not defective for failing to directly allege that she was a female. State v. Barrick [W. Va.] 55 S. E. 652.

3. Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 73, 97 S. W. 94.

4. Where the indictment is silent as to the age of prosecutrix, it will be presumed that she was over twelve years of age. Webb v. Com. [Ky.] 99 S. W. 909; Jones v. Com. [Ky.] 97 S. W. 1118.

5. An information alleging that on a certain day the accused did then and there carnally know the prosecutrix," a female under the age of eighteen years," sufficiently alleges that she was under the age of eighteen at the time of carnal knowledge. State v. Falsetta [Wash.] 86 P. 168.

6. State v. Hensley, 75 Ohio St. 225, 79 N. E. 462.

7. Sufficient without setting forth the manner, means, or mode, of the assault. State v. Payne, 194 Mo. 442, 92 S. W. 461.

8. An indictment which charges that the defendant "unlawfully and feloniously made an assault in and upon the body of Jennie Tuttle there being, with intent her, the said Jennie Tuttle, then and there unlawfully, forcibly, and against her will, feloniously to ravish and to know," sufficiently charges intent. State v. Payne, 194 Mo. 442, 92 S. W. 461.

9. An indictment merely alleging the child was under fourteen years of age, and not showing whether she was over or under ten

offense may be committed in different ways,[10] a single indictment may charge commission by all the statutory means. Conviction must be limited to the particular act charged.[11] Where a charge is double,[12] the state must elect upon which charge it will rely. Each act of intercourse with one under the age of consent is a distinct offense,[13] and where more than one is proven, the state must elect upon which it will rely,[14] unless the indictment contains several counts and defendant does not demand an election,[15] and the court should confine the jury to the one selected.[16] Where it appears that the prosecuting attorney knows at the commencement of the trial that several acts can be established, he must then elect;[17] but where the evidence is problematic, the election may be postponed until the close of the state's case.[18]

Conviction of included offenses.—Where the offense charged includes lesser offenses[19] which are sustained by the evidence,[20] defendant may be convicted thereof.[21]

Variance.—There must be no variance between the allegations and the proof.[22]

years of age, is insufficient for uncertainty as failing to show whether the prosecution is under Code 1896, § 5447, or § 5448. Sims v. State [Ala.] 41 So. 413. An indictment charging that defendant made an assault upon the body of the prosecuting witness and ravished and carnally knew her, she then and there being a female of such imbecility of mind as to prevent effectual resistance, held to charge rape upon an imbecile within Code, § 4758, and not objectionable as being uncertain as failing to show whether the offense charged was in violation of the section quoted or section 4756, defining statutory rape. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

10. Cr. Code, § 12, as amended by Laws 1895, p. 314, c. 74, construed to define but one crime which may be committed in various specified ways. Hubert v. State [Neb.] 106 N. W. 774.

11. It is not proper to prove more than one act, and when more are proven, the court should limit consideration to one specific act. Henderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 76, 93 S. W. 550. An instruction that the acts charged might be proved by circumstances is erroneous where there is no circumstantial evidence as to the particular intercourse charged, but is as to prior like offenses as to which direct evidence was excluded. Kevern v. People, 224 Ill. 170, 79 N. E. 574.

12. In a prosecution under Code, § 4758, for rape upon a female of such imbecility of mind as to prevent effectual resistance, an allegation of assault is proper and the implied allegation of force may be treated as surplusage and, therefore, no charge of rape by force. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

13. State v. Palmberg [Mo.] 97 S. W. 566; Jamison v. State [Tenn.] 94 S. W. 675.

14. Jamison v. State [Tenn.] 94 S. W. 675. And where only one offense is charged, and several acts are shown, the state must elect upon which it will base its conviction. State v. Palmberg [Mo.] 97 S. W. 566.

15. Where the indictment contains several counts, each alleging a separate and distinct rape and no steps are taken by defendant to secure an election, the court may submit the case without an election. Blackwell v. State [Tex. Cr. App.] 100 S. W. 774.

16. State v. Palmberg [Mo.] 97 S. W. 566.

17. State v. Palmberg [Mo.] 97 S. W. 566. Where, on a prior trial, the state fully developed its case and proved several offenses, it should elect at the commencement of the new trial. Id.

18. State v. Palmberg [Mo.] 97 S. W. 566.

19. The offense of assault with intent to ravish, defined by Code 1896, § 4346, includes the lesser offenses of assault and battery and simple assault. Payne v. State [Ala.] 42 So. 988. Where the indictment charges assault with intent to rape and contains no allegations of battery, the court need not instruct as to assault and battery. State v. Johnson [Iowa] 110 N. W. 170.

20. Where under the evidence the conviction must be of rape or nothing, instructions respecting lower degrees need not be given as where prosecutrix testified to a complete act of intercourse which was denied in toto by defendant. Webb v. Com. [Ky.] 99 S. W. 909; State v. Stevens [Iowa] 110 N. W. 1037. Evidence held to raise an issue of aggravated assault and battery, requiring a charge in respect thereto. Taylor v. State Tex. Cr. App.] 17 Tex. Ct. Rep. 73, 97 S. W. 94.

21. One charged with rape may be convicted of an assault with an intent to commit rape. People v. Murphy, 145 Mich. 524, 13 Det. Leg. N. 602, 108 N. W. 1009. Where there is evidence upon which a conviction for a lesser offense may be had, it is not error to refuse to direct an acquittal. Payne v. State [Ala.] 42 So. 988. A charge of statutory rape though containing no allegations of force includes the lesser offense of attempt to rape, and under Ballinger's Ann. Codes & St. § 6955 the accused may be convicted of the latter. State v. Marselle [Wash.] 86 P. 586. In a prosecution for assault with intent to ravish, a requested instruction to find defendant not guilty, if the jury believed the evidence, is properly refused where the evidence was such that the jury could have convicted of a lesser crime. Pitman v. State [Ala.] 42 So. 993.

22. There is no variance between an indictment referring to prosecutrix by the name by which she was known and proof that she was married to a man bearing a different name. Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036.

(§ 2) *B. Evidence.* 1. *Admissibility.*[23]—The general rules as to relevancy and materiality apply,[24] and, where evidence is otherwise admissible, it is not rendered inadmissible because it tends to prove another offense.[25] Prosecutrix may testify directly that the act was against her consent,[26] but not being a party to the prosecution, her statements are not admissible as admissions against interest,[27] nor as original evidence in her favor,[28] unless they are a part of the res gestae,[29] and the details of accusations made to the accused cannot be shown as preliminary to the admission of incriminating statements called forth by them.[30] The fact of complaint, if timely,[31] may be shown in corroboration of prosecutrix,[32] but not the particulars thereof,[33] and failure to make such complaint may be shown defensively in common law but not in statutory rape.[34] Prosecutrix's reputation for chastity as known before the offense [35] is admissible upon the issue of consent but not as affecting her credibility as a witness,[36] and where pregnancy is relied upon as corroboration, any fact impeaching her chastity may be shown,[37] but proof of intercourse with other men for this purpose should be limited to the period of conception [38] and not admitted generally to contradict her denials thereof,[39] nor to suggest a motive for the charge against defendant.[40] Evidence tending to corroborate the

23. See 6 C. L. 1241.

24. Where there is evidence that the street door leading to the room in which the rape is alleged to have occurred was locked, evidence of a witness that she had accompanied defendant to the room is inadmissible where it does not appear that they entered by such door or that the visit occurred during the time it was claimed to have been locked. Dalton v. People, 224 Ill. 333, 79 N. E. 669. Where prosecutrix testified that her husband had left her a few months previous, evidence as to how she supports herself is admissible as fixing her status as a witness. People v. Murphy, 145 Mich. 524, 13 Det. Leg. N. 602, 108 N. W. 1009. Subsequent marriage is no defense and hence a question put to prosecutrix whether she was at the time of the trial the wife of the accused is immaterial. State v. Falsetta [Wash.] 86 P. 168. Where evidence is introduced that the husband of prosecutrix wrote defendant a letter demanding that he convey all his property to him and leave the country, evidence that he was excited when he signed it was inadmissible to disprove blackmailing. Smith v. State [Tex. Cr. App.] 100 S. W. 924. In a prosecution for carnally knowing or abusing a child under the age of ten years, it is not error to permit the mother to testify as to the time of the alleged assault, though she fixes a different date than that previously testified to by the child. Sims v. State [Ala.] 41 So. 413.

25. On a prosecution for assault with intent to rape, evidence that the house in which the assault occurred was closed is not inadmissible because it might suggest that defendant was also guilty of burglary. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533. The state may show that defendant is the father of prosecutrix as showing domination over her, notwithstanding it shows incest. Smith v. State [Tex. Cr. App.] 100 S. W. 924.

26. Brown v. State, 127 Wis. 193, 106 N. W. 536.

27. Made to examining physician. Brown v. State, 127 Wis. 193, 106 N. W. 536.

28. Statements to the county attorney and grand jury. Skeen v. State [Tex. Cr. App.] 100 S. W. 770. Statements of the prosecutrix as to who committed the act made the day after the assault and not in accused's presence are inadmissible. Jeffries v. State [Miss.] 42 So. 801.

29. Statements made by prosecutrix on the following day to her physician that she made no resistance are not admissible as res gestae. Brown v. State, 127 Wis. 193, 106 N. W. 536. Statements made at county attorney's office while identifying defendant held inadmissible and not so closely connected with the offense as to be res gestae. State v. Hoover [Iowa] 111 N. W. 323. Evidence that prosecutrix fainted after breaking away from her assailant and running about two hundred yards is admissible as res gestae. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533.

30. Kevern v. People, 224 Ill. 170, 79 N. E. 574.

31. Where the complaint was not made until eighteen months after defendant was charged with first taking indecent liberties with her person, about eight months after his first assault, and nearly six months after the rape, there being no excuse for such delay, it is error to submit it to the jury as corroborative of the prosecutrix's story. State v. Griffin [Wash.] 86 P. 951.

32. State v. Griffin [Wash.] 86 P. 951.

33. State v. Bateman [Mo.] 94 S. W. 843; Sanders v. State [Ala.] 41 So. 466. As that she named the accused as the guilty party. State v. Griffin [Wash.] 86 P. 951.

34. State v. Johnson [Iowa] 110 N. W. 170. And see State v. Palmberg [Mo.] 97 S. W. 566.

35. A witness testifying as to prosecutrix's reputation must testify to knowledge acquired prior to the alleged offense. State v. Barrick [W. Va.] 55 S. E. 652.

36. State v. Detwiler [W. Va.] 55 S. E. 654.

37. As being out late at night. State v. Mobley [Wash.] 87 P. 815.

38. State v. Blackburn [Iowa] 110 N. W. 275.

39. Contradiction on immaterial matter. State v. Blackburn [Iowa] 110 N. W. 275.

40. State v. Stimpson, 78 Vt. 124, 62 A. 14.

commission of the offense,[41] or to identify the defendant as the perpetrator,[42] is admissible, but not the fact that others are suspected.[43] That accused is in loco parentis to prosecutrix may be proved to show domination [44] or opportunity.[45]

In statutory rape prosecutrix's moral character is admissible for impeachment,[46] and the birth of a child within the period of gestation after the alleged offense,[47] the child itself,[48] and evidence of lascivious conduct and acts of intercourse between the parties, both prior [49] and subsequent [50] if not too remote,[51] are generally held admissible on the fact of intercourse, although there is some conflict as to the latter,[52] as is also an attempt at abortion,[53] renewal of promise of marriage,[54] flight of defendant,[55] and the birth of a child of a subsequent intercourse,[56] but not evidence of defendant's abusive conduct toward prosecutrix [57] or another,[58] or of an attempt to bribe the latter to have intercourse.[59] Where a forcible ravishment is relied upon in a prosecution for statutory rape, any evidence competent in a prosecution for common-law rape is admissible.[60] Evidence tending to show prosecutrix's age is admissible,[61] and she may testify thereto although her knowledge is based upon hearsay.[62]

41. As prosecutrix's condition immediately after (Sims v. State [Ala.] 41 So. 413), and on the night following (Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533). While prosecutrix's menstrual condition at the time of examination may be material, a general question in respect thereto is incompetent. Sanders v. State [Ala.] 41 So. 466.

42. In a prosecution for carnally knowing or abusing a female under 10 years, in which the place of the alleged crime is undisputed, evidence that the mud at such place was of the same character as that on defendant's trousers is admissible. Sims v. State [Ala.] 41 So. 413. In a prosecution for assault with intent to ravish, evidence that prosecutrix's father came into the room and fired a pistol, that defendant was subsequently seen going to his room, and that he failed to come to breakfast at the house of prosecutrix's father, held properly admitted. Pitman v. State [Ala.] 42 So. 993.

43. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533.

44. Smith v. State [Tex. Cr. App.] 100 S. W. 924.

45. In statutory rape it is competent to show that defendant is the step-father of prosecutrix as showing opportunity. Barra v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 171, 97 S. W. 94.

46 Her reputation for chastity is contemplated by Code, § 4614. State v. Blackburn [Iowa] 110 N. W. 275. Even if the bad character of the prosecutrix in statutory rape is admissible, testimony that she was seen on the streets drinking is not competent as showing bad character. Clark v. Com., 29 Ky. L. R. 154, 92 S. W. 573.

47. State v. Blackburn [Iowa] 110 N. W. 275. Testimony of physicians as to the period of gestation is admissible, it appearing that the child was born within the possible period. Id.

48. State v. Palmberg [Mo.] 97 S. W. 566.

49. People v. Morris [Cal. App.] 84 P. 463; State v. Palmberg [Mo.] 97 S. W. 566; State v. Mobley [Wash.] 87 P. 815; State v. Conlin [Wash.] 88 P. 932. Similar acts are not admissible to prove the substantive offense but as bearing upon the probability thereof. Testimony of the prosecutrix that defendant had intercourse with her during August, 1904, is not rendered inadmissible by the fact that she testified on a former trial that it took place in April, 1904, however it may bear upon the weight of it. Alcorn v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 240, 94 S. W. 468.

50. People v. Morris [Cal. App.] 84 P. 463. Held no abuse to admit evidence of sexual intercourse occurring 15 months after the one charged. State v. Stone [Kan.] 85 P. 808.

51. In a prosecution for rape upon an imbecile, evidence of lascivious conduct toward the prosecutrix some two years before the alleged offense is not too remote where there is evidence tending to show that it was continued to the time of the alleged crime. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

52. Proof of subsequent acts are inadmissible. State v. Palmberg [Mo.] 97 S. W. 566.

53, 54. State v. Stone [Kan.] 85 P. 808.

55. State v. Stone [Kan.] 85 P. 808. While flight may be prima facie indictive of guilt, it raises no presumption. State v. Blackburn [Iowa] 110 N. W. 275.

56. State v. Stone [Kan.] 85 P. 808.

57. Father having intercourse with his daughter with her consent. Smith v. State [Tex. Cr. App.] 100 S. W. 924.

58. Sims v. State [Ala.] 41 So. 413.

59. State v. Marselle [Wash.] 86 P. 586.

60. Jury may take into consideration facts disproving force, as failure to make outcry, timely complaint, injury to complainant's person and clothing. State v. Griffin [Wash.] 86 P. 951. Although force is not an element of statutory rape, evidence of the force employed is admissible as a part of the res gestae. State v. Falsetta [Wash.] 86 P. 168.

61. Where in statutory rape a witness testifies that prosecutrix was born during the year of a certain election, evidence is admissible to show when such election occurred. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Where in statutory rape a witness has testified to prosecutrix's present age, it is not error to exclude his opinion as to her age, when she came to the United States. State v. Falsetta [Wash.] 86 P. 168.

In assault with intent to rape, evidence tending to characterize the intent, as statements [63] and prior attempts at intercourse with prosecutrix is admissible.[64]

(§ 2 B) 2. *Weight and sufficiency.*[65]—As in other criminal cases, all the essential elements, including fact of intercourse,[66] force,[67] or threats[68], nonconsent of prosecutrix,[69] penetration,[70] nonconsenting capacity of prosecutrix in statutory rape,[71] the specific intent of defendant in assault with intent to rape,[72] and the identity of defendant,[73] must be proved beyond a reasonable doubt. Where the only

62. As statements by her mother. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058.

63. Declarations of defendant of an intent to have intercourse are admissible, though directed toward no one in particular. Bawcom v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 222, 94 S. W. 462. Evidence of a statement by accused two years before that he would get prosecutrix out in his boat and would take good care that she was alone held admissible as characterizing his conduct upon the boat, he denying that any assault took place. State v. Callahan [Minn.] 110 N. W. 342.

64. In a prosecution for assault with intent to rape on one under the age of consent, evidence of prior similar attempts is admissible as showing intent. State v. Johnson [Iowa] 110 N. W. 170.

65. See 6 C. L. 1244.

66. Evidence held sufficient: People v. Morris [Cal. App.] 84 P. 463; People v. Biglizen, 112 App. Div. 225, 98 N. Y. S. 361. Positive testimony of prosecutrix in a prosecution for statutory rape as to sexual intercourse held sufficient to sustain a conviction. State v. Mathews [Mo.] 100 S. W. 420. Coupled with defendant's suspicious conduct. State v. Conlin [Wash.] 88 P. 932. In a prosecution under Code, § 4758, for rape upon a female of such imbecility of mind as to prevent resistance, prosecutrix's pregnancy together with defendant's conduct toward her about the time conception must have taken place and his inconsistent statements and conduct when accused held to warrant a conviction. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

Evidence held insufficient: Testimony of prosecutrix held so inconsistent and improbable as not to warrant a conviction. Klawitter v. State [Mo.] 107 N. W. 121; Alcorn v. State [Tex. Cr. App.] 16 Tex. Ct. Rep 240, 94 S. W. 468; Livinghouse v. State [Neb.] 107 N. W. 854. Where both the prosecutrix and defendant deny positively that any intercourse occurred and the only affirmative evidence is suspicious circumstances. Skeen v. State [Tex Cr. App.] 100 S. W. 770. Evidence that appellant was seen sleeping on a pallet with prosecutrix and her mother but there was no testimony of intercourse and the state failed to call either the prosecutrix or her mother who were in the courtroom, evidence held insufficient to warrant holding the defandant to await the grand jury. Ex parte Patterson [Tex. Cr. App.] 16 Tex. Ct. Rep. 710, 95 S. W. 1061.

67. Evidence of prosecutrix and defendant together with the fact that she made no complaint against the accused when she swore out a warrant shortly after the intercourse, charging certain others with rape held insufficient to show force. Rucker v People, 224 Ill. 131, 79 N. E. 606.

68. Evidence held sufficient to sustain a conviction of rape by threats. Vanderford v. State, 126 Ga. 753, 55 S. E. 1025.

69. Evidence held sufficient to show nonconsent. Ryals v. State, 125 Ga. 266, 54 S. E. 168; State v. Bateman [Mo.] 94 S. W. 843.

Evidence held insufficient. Vaughn v. State [Neb.] 110 N. W. 992; Perez v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 520, 94 S. W. 1036. Failed to make outcries sufficient to awake a brother sleeping in the same room and also to make timely complaint. Elliott v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 93 S. W. 742. Testimony inconsistent. State v. Cowing, 99 Minn. 123, 108 N. W. 851. Mere general statements of the prosecutrix that she did her utmost to resist without detailing acts of resistance. Brown v. State, 127 Wis. 193, 106 N. W. 536; State v. Cowing, 99 Minn. 123, 108 N. W. 851.

70. Evidence insufficient: Where the only evidence bearing on penetration as the conflicting testimony of prosecutrix a conviction is improper. State v. Forshee [Mo.] 97 S. W. 933.

Evidence sufficient: Positive testimony of a 11 year old child corroborated by her condition. Young v. State [Tex. Cr. App.] 93 S. W. 743.

71. Evidence held sufficient to show that prosecutrix was under the age of consent: Testimony of prosecutrix and of her parents, although not very accurate as to details. Blackwell v. State [Tex. Cr. App.] 100 S. W. 774. Testimony of prosecutrix, her father and mother, together with an admission of defendant. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. Testimony of the mother as to the child's age, supported by record entries made in the family bible showing the date of her birth. Clark v. Com., 29 Ky. L. R. 154, 92 S. W. 573.

72. Evidence held sufficient. Horseford v. State, 124 Ga. 784, 53 S. E. 322; State v. Callahan [Minn.] 110 N. W. 342; State v. Platner, 196 Mo. 128, 93 S. W. 403; State v. Payne, 194 Mo. 442, 92 S. W. 461; Bourland v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 61, 93 S. W. 115. Held sufficient to go to the jury. State v. Marselle [Wash.] 86 P. 586; Payne v. State [Ala.] 42 So. 988.

Evidence held insufficient: Defendant's acts coupled with the fact that he desisted, saying "of course, I can do nothing against your will," as soon as prosecutrix threatened to call. Newman v. People, 223 Ill. 324, 79 N. E. 80. Evidence that appellant reached through a window and touched prosecutrix but ran away as soon as she screamed. Scott v. State [Tex. Cr. App.] 100 S. W. 159.

73. Evidence held insufficient. State v. Hoover [Iowa] 111 N. W. 323; Thomas v. Com. [Va.] 56 S. E. 705 The corpus delicti being established, defendant's admissions held sufficient to sustain a conviction. People v. Darr [Cal. App.] 84 P. 457.

issue is consent, medical proof of intercourse is not necessary.[74] In a prosecution for assault with intent to rape against one presumed incapable of committing the graver offense,[75] the state must establish such capacity.[76] A consenting victim of statutory rape is not an accomplice,[77] but in many states,[78] though not in all,[79] the prosecutrix must be corroborated,[80] not, however, as to the fact of intercourse itself, but only as to material facts and circumstances tending to substantiate her story.[81] Corroboration is sometimes required in prosecutions for assault with intent to rape.[82] The question whether there is any corroborating evidence is for the court,[83] but its sufficiency is for the jury.[84]

(§ 2) *C. Instructions.*[85]—In giving instructions the court must refrain from prejudicial language.[86] Instructions not applicable to the evidence,[87] inherently

74. State v. Bateman [Mo.] 94 S. W. 843.

75. There is a presumption that a male under 14 years is not physically capable of consummating rape, and under § 8891, Rev. Codes 1905 (§ 7157, Rev. Codes 1899), no conviction can be had unless his physical ability to accomplish penetration is proved as an independent fact. State v. Fisk [N. D.] 108 N. W. 485.

76. A boy under 14 years of age is presumed to be incapable of committing rape, and ability to accomplish penetration must be shown by the state. State v. Fisk [N. D.] 108 N. W. 485.

77. Smith v. State [Tex. Cr. App.] 100 S. W. 924; State v. Mobley [Wash.] 87 P. 815.

78. Nebraska. Fitzgerald v. State [Neb.] 110 N. W. 676; Klawitter v. State [Neb.] 107 N. W. 121; Livinghouse v. State [Neb.] 107 N. W. 854.

79. Washington. State v. Conlin [Wash.] 88 P. 932; State v. Mobley [Wash.] 87 P. 815.

Wisconsin: But the evidence must be most clear and convincing. Brown v. State, 127 Wis. 193, 106 N. W. 536.

Virginia: Identity may be established by the uncorroborated testimony of prosecutrix Thomas v. Com. [Va.] 56 S. E. 705.

80. Held corroborative evidence: In a prosecution for statutory rape, evidence that accused paid special attention to prosecutrix and stopped in her room to converse with her late at night when passing through. State v. Waters [Iowa] 109 N. W. 1013. Private parts of prosecutrix were torn and bleeding. Sanders v. State [Ala.] 41 So. 466. In a prosecution for statutory rape, the commission of the crime being established, evidence tending to connect defendant therewith was corroborative evidence within the statute. State v. Waters [Iowa] 109 N. W. 1013. Testimony of physicians as to slight discoloration and a scratch about prosecutrix's neck and of the rupture of the hymen held of little corroborative value where the examination was not made until nearly a week after the alleged offense. State v. Cowling, 99 Minn. 123, 108 N. W. 851. In a prosecution for statutory rape the fact that accused was keeping company with the prosecutrix, was frequently alone with her, and therefore, had opportunity to commit the act, does not of itself corroborate the prosecutrix that he had intercourse. Fitzgerald v. State [Neb.] 110 N. W. 676.

Corroboration held sufficient: In a prosecution of statutory rape, admissions of defendant showing that he planned and procured an opportunity, together with admissions of familiarities evincing a mutual disposition to commit the act. Loar v. State [Neb.] 107 N. W. 229. Defendant's connection with the offense by circumstances rendering him the only possible guilty party. State v. Steven [Iowa] 110 N. W. 1037. In a prosecution for assault with intent to rape on one under the age of consent, evidence of defendant's conduct in seeking the child, in decoying her away, and in fastening the door when in the room with her. State v. Johnson [Iowa] 110 N. W. 170.

Held insufficient: Testimony of a physician who examined the prosecutrix nearly a month after the alleged offense that she had had intercourse with some one held not sufficiently corroborative of the charge against defendant to warrant a conviction. Klawitter v. State [Neb.] 107 N. W. 121.

81. Livinghouse v. State [Neb.] 107 N. W. 854; Klawitter v. State [Neb.] 107 N. W. 121.

82. McConnell v. State [Neb.] 110 N. W. 666.

83. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

84. State v. Crouch, 130 Iowa, 478, 107 N. W. 173; State v. Waters [Iowa] 109 N. W. 1013. Whether prosecutrix's testimony has or has not been corroborated is for the jury. Ryals v. State, 125 Ga. 266, 54 S. E. 168.

85. See 6 C. L. 1245.

86. In a prosecution for rape an instruction that the people should be protected against such outrages if they have been perpetrated, that every citizen should be protected against conviction for such crime if he has not committed it, and that it was the duty of the jury to determine where the truth lies, is not erroneous. People v. Lambert, 144 Mich. 678, 13 Det. Leg. N. 299, 108 N. W. 345.

87. Where prosecutrix testifies positively and directly to the facts of the alleged rape, a charge on circumstantial evidence is not required, even if she be regarded as an accomplice. Moore v. State [Tex. Cr. App.] 96 S. W. 327. Where the offense under the statute may be committed by different modes, it is not error to omit a particular mode from the instructions where the mode alleged and supported by the evidence is included. Webb v. Com. [Ky.] 99 S. W. 909. Where statutory rape was accomplished with the consent of the prosecutrix, failure to make timely complaint does not render the offense improbable and an instruction in respect thereto is inapplicable. State v. Palmberg [Mo.] 97 S. W. 566.

erroneous,[88] or already covered in substance,[89] need not be given. The general rule that instructions should not be misleading,[90] argumentative,[91] or on the weight of the evidence,[92] obtains. Requested instructions placing the burden of proof should be given,[93] as should instructions on all included offenses which the evidence tends to show[94] and every theory of defense supported by evidence.[95] Where the court is permitted to give his impression of the evidence, it is not error to state that the evidence seems to establish a particular element.[96] Unless the court is required of its own motion to give an instruction,[97] failure to give is not a reversable error in the absence of a request therefor.[98]

88. An instruction charging the jury that "a probability that some other person may have attempted to ravish" the prosecutrix, is sufficient to raise a reasonable doubt as to defendant's guilt, held properly refused as both may have been guilty. Pitman v. State [Ala.] 42 So. 993.

89. Where the court instructed that the jury must find that prosecutrix resisted to the utmost, it is not error to refuse an instruction that in determining whether she offered such resistance to consider the relative size of the parties, there being no evidence in respect thereto. People v. Lambert, 144 Mich. 578, 13 Det. Leg. N. 299, 108 N. W. 345. An instruction that there could be no conviction unless prosecutrix's testimony was corroborated by other evidence connecting defendant with the crime and that whether defendant was the father of the child alleged to have resulted from the offense was immaterial, sufficiently charged that the birth of the child did not connect defendant with the crime. State v. Blackburn [Iowa] 110 N. W. 275.

90. Instruction held misleading in that the jury might have inferred that corroboration was not essential. McConnell v. State [Neb.] 110 N. W. 666. In a prosecution for assault with intent to ravish, an instruction charging the jury that they must "acquit" defendant of an assault with intent to ravish if they believe the evidence, held misleading in that the jury might have inferred that they could not convict of a lesser offense. Pitman v. State [Ala.] 42 So. 993. A charge "If you believe that at the time defendant had sexual intercourse with prosecutrix as alleged she was of the age of fifteen years or over, then you will find the defendant not guilty; or if you have a reasonable doubt of the fact that she was under the age of fifteen years, you will give defendant the benefit of such doubt and find him not guilty", does not place the burden on defendant to show that prosecutrix was over the age of consent. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058.

91. In a prosecution for rape upon a negress, an instruction that the known character, proclivities, and habits as to chastity of females of the negro race in general, might be considered on the question of consent, held properly refused as argumentative and as not based on any evidence in the case. Sanders v. State [Ala.] 41 So. 466. An instruction held not argumentative and as stating that the testimony of prosecutrix was corroborated by the circumstances. Ryals v. State, 125 Ga. 266, 54 S. E. 168.

92. On a prosecution for statutory rape, the court charged that "If you believe that at the time defendant had sexual intercourse with prosecutrix as alleged she was of the age of fifteen years or over, then you will find the defendant not guilty; or, if you have a reasonable doubt of the fact that she was under the age of fifteen years, you will give the defendant the benefit of such doubt and find him not guilty", held not a charge on the weight of the evidence. Curry v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 566, 94 S. W. 1058. An instruction that "the evidence of the prosecuting witness alone is sufficient to establish the commission of the offense charged," etc., construed as stating that she need not be corroborated and not that her evidence was sufficient in fact to establish such issue. State v. Blackburn [Iowa] 110 N. W. 275.

93. A requested instruction that if the jury believed that there might be some person who committed the crime and the name had not been disclosed, it was not required of defendant to show the name, should have been given. Jeffries v. State [Miss.] 42 So. 801.

94. Where, in a prosecution for statutory rape, the evidence tends to show that what was done was with prosecutrix's consent, but that no penetration was effected, a charge on assault with intent to rape is proper. Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 73, 97 S. W. 94. An instruction that the injury might be either bodily pain, constraint, or sense of shame, or other disagreeable emotion, should be given only when there is evidence of aggravated assault (Henderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 76, 93 S. W. 550), but in statutory rape, the fact that the evidence tends to show consent does not render it improper (Taylor v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 73, 97 S. W. 94).

95. That defendant was accused to shield another. State v. Griffin [Wash.] 86 P. 951. Where the evidence fixes the time of the act and defendant seeks to establish an alibi, the court should instruct the jury upon request that they must find that the act was committed about that time, especially where the charge was statutory rape and it appeared that the parties were living together. People v. Morris [Cal. App.] 84 P. 463.

96. Fact of abuse at some time. State v. Hummer [N. J. Err. & App.] 65 A. 249.

97. Pen. Code, § 283, requiring corroboration of prosecutrix, simply states a rule of law and does not require the court of its own motion to give an instruction in respect thereto. People v. Biglizen, 112 App. Div. 225, 98 N. Y. S. 361.

98. As to necessity of corroboration. People v. Biglizen, 112 App. Div. 225, 98 N. Y.

(§ 2) *D. Trial and punishment.*[99]—Appearance in bastardy proceedings growing out of the same act does not necessarily disqualify the prosecuting attorney to prosecute for rape.[1] Imbecility destroying prosecutrix's consenting capacity does not necessarily render her incompetent as a witness.[2] While the ordinary rules respecting rebuttal testimony apply,[3] a wide latitude should be allowed in cross-examination as to prosecutrix's association with other men where pregnancy is relied upon for corroboration.[4] Because of prosecutrix's natural embarrassment in relating details, leading questions may be permitted.[5] Defendant is not entitled to have the jury examine his person to disprove physical capacity.[6] The fact that prosecutrix held the child alleged to be the fruit of the act while testifying is not reversible error.[7] Where the jury acquits as to the only possible offense established by the evidence, the defendant must be discharged.[8] Where different counts charge rape with and without consent for the purpose of fixing the punishment, the verdict must specify under which conviction is had.[9] While appellate court will not interfere with any sentence authorized in nature,[10] in Iowa power of review and reduction is given by statute.[11]

RATIFICATION, see latest topical index.

REAL ACTIONS.[12]

REAL COVENANTS; REAL ESTATE BROKERS, see latest topical index.

REAL PROPERTY.

Definitions and Nature of Real Property (1677).
The Rule in Shelley's Case (1677).
Restraints on Alienation (1677).
Present and Future Estates (1677).
Rents and Charges (1677).
Common Lands (1678).
Entails (1678).
Restrictive Covenants (1678).
Covenants Running With the Land (1678).
Possession (1679).
Merger (1679).
Abandonment (1679).

Scope.—This topic is restricted to such infrequently involved parts of the law of real property as do not lend themselves to separate topical treatment and to

S. 361. As to right of jury to convict of a lesser degree. McConnell v. State [Neb.] 110 N. W. 666.

99. See 6 C. L. 1247.

1. The fact that the prosecuting attorney appeared in bastardy proceedings arising out of the same transactions does not disqualify if he appeared on behalf of the public although it would if he appeared solely on behalf of the mother, looking to the proceeds for compensation, and the circumstances were such as might raise a suspicion that he was prosecuting in rape to aid in the bastardy action. Fitzgerald v. State [Neb.] 110 N. W. 676.

2. State v. Crouch, 130 Iowa, 478, 107 N. W. 173.

3. Where prosecutrix is cross-examined in reference to her having first charged another with the offense, it is proper on redirect examination to permit her to explain why she did so. People v. Darr [Cal. App.] 84 P. 457.

4. Though no distinct offer is made to show intercourse. State v. Gerike [Kan.] 87 P. 759.

5. In the discretion of the court. State v. Blackburn [Iowa] 110 N. W. 275.

6. Especially where there is no evidence that they would be able to ascertain the fact. State v. Stevens [Iowa] 110 N. W. 1037.

7. Especially where it was immediately removed upon objection. Alcorn v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 240, 94 S. W. 468.

8. Where an information charges statutory rape and also taking indecent liberties, and the jury convict as to the latter upon evidence showing rape if any, the defendant must be discharged. People v. Rivers [Mich.] 14 Det. Leg. N. 6, 111 N. W. 201.

9. State v. Hensley, 75 Ohio St. 255, 79 N. E. 462. An instruction to return a general verdict of guilty held erroneous. Id.

10. Held not excessive: Imprisonment for 99 years for rape on a female nine years old. Moore v. State [Tex. Cr. App.] 96 S. W. 327. Fifteen years imprisonment for an assault with intent to commit rape by a man of mature years upon a child under ten. State v. Johnson [Iowa] 110 N. W. 170.

11. Held excessive: A sentence of fifteen years imprisonment for statutory rape, where it appeared that the act was as much at the procurement of the prosecutrix as the defendant. State v. Spears, 130 Iowa, 294, 106 N. W. 746.

12. No cases have been found for this subject since the last article. See 6 C. L. 1247.

definitions of "real property." Separate topics are devoted to most of the branches of real property law.[13]

Definitions and nature of real property.[14]—The ownership of whatever partakes of the immobility of land is real property, for example, trees.[15] Ownership of trees carries the right to have them grow on the soil.[16] The land includes all that is appurtenant to it, but a mere grant will not create appurtenances.[17] One estate cannot be an appurtenant to another of like nature.[18] A vested remainderman subject to a life estate is not a freeholder.[19]

The rule in Shelley's Case [20] applies when the word "heirs" is used as one of limitation,[21] and when the first taker has a freehold.[22] It does not apply when the first taker has an equitable and the other a legal estate.[23]

Restraints on alienation [24] consistent with the estate given may be imposed to the limited extent permitted by the rule against perpetuities;[25] but a provision in a lease that the lessor may not mortgage the reversion is void.[26]

Present and future estates.[27]—A future estate in derogation of the preceding one cannot be if defeasible by the first taker.[28] By statute estates in future may be created,[29] and in such a situation, a remainder may be supported on an estate for years.[30]

Rents and charges.[31]—An irredeemable lease containing provision for new leases by way of apportioning the rent is mutually extinguished by joining in new leases making a substantially different apportionment,[32] and when this is done subsequent to a law making all future long leases redeemable, the right to redeem attaches despite contrary provisions.[33] Rents payable by deed from a tenant in fee cannot be effectually reduced as to the future by mere promise to do so,[34] but when a subsequent grantee has come in and the rent was redeemable, the reserved rate of rent cannot be exacted after a custom of accepting less until notice is given.[35]

13. See the latest topical index for such separate topics as Adverse Possession, 7 C. L. 41; Deeds of Conveyance, 7 C. L. 1103; Life Estates, Reversions and Remainders, 8 C. L. 762.

14. See 6 C. L. 1248.

15. Hence life tenant may maintain trespass quare clausum but not trover or trespass de bonis. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 So. 858. But when purchased to be severed, they are not a landed estate of peculiar desire inestimable in money within the rules of specific performance. Marthinson v. King [C. C. A.] 150 F. 48.

16. Williams v. Jones [Wis.] 111 N. W. 505.

17. Muscogee Mfg. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S. E. 1028.

18. Land not appurtenant to land or easement to easement. Moss v. Chappell, 126 Ga. 196, 54 S. E. 968, citing on the general proposition 2 Am. & Eng. Enc. Law [2d Ed.] 524; Harris v. Elliot, 35 U. S. 25, 9 Law Ed. 333; New Orleans Pac. R. Co. v. Parker, 143 U. S. 42, 36 Law Ed. 66; Investment Co. v. Railway Co., 41 F. 378, also Missouri Pac. Ring Co. v. Maffit, 94 Mo. 56, 6 S. W. 600 (distinguishing the case where the parties intended a special meaning of the word "appurtenant").

19. Mountville Borough, 31 Pa. Super. Ct. 18.

20. See 6 C. L. 1248. Rule defined. Vogt v. Vogt, 26 App. D. C. 46.

In respect to personalty "heirs" primarily means next of kin. Vogt v. Vogt, 26 App. D. C. 46.

21. Rissman v. Wierth, 220 Ill. 181, 77 N. E. 108; Walker v. Taylor [N. C.] 56 S. E. 877; Perry v. Hackney, 142 N. C. 368, 55 S. E. 289. Words restricting enjoyment of estate and restraining alienation held repugnant to rule. Kepler v. Larson [Iowa] 108 N. W. 1033. A provision that the net income from land is in any event to go to the cestui, with power to collect and without any discretionary control in the trustee, conveys to the cestui an equitable estate, which under the rule in Shelley's Case is an equitable fee with the power of appointment merged in the power of alienation. Bates v. Winifrede Coal Co., 4 Ohio N. P. (N. S.) 265.

22. Gift held not a freehold. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

23. Vogt v. Vogt, 26 App. D. C. 46.

24. See 6 C. L. 1248.

25. See Perpetuities and Accumulations, 8 C. L. 1348.

26. Railroad lease forbidding further issue of bonds by lessor. Continental Ins. Co. v. New York & H. R. Co. [N. Y.] 79 N. E. 1026.

27. See 6 C. L. 1249. See, also, Life Estates, Reversions and Remainders, 8 C. L. 762.

28. Gift over on death of fee owner who was given full power of disposal is void. Bernstein v. Bramble [Ark.] 99 S. W. 682.

29, 30. Shafer v. Tereso [Iowa] 110 N. W. 846.

31. Interpretation of charging provisions, see Wills, 6 C. L. 1880.

32, 33. Maulsby v. Page [Md.] 65 A. 818.

34, 35. In the latter situation it may be that the owner in reliance on the reduction

Common lands.[36]

Entails.[37]—The statute De Donis is not recognized in Iowa, and when issue is born, the fee becomes alienable.[38] By statute in Missouri estates tail are converted into life estates with remainder over in fee.[39] Statutes converting them to fees simple do not apply where the words as of inheritance are not intended as such.[40]

Restrictive covenants are most frequently building restrictions.[41] A provision inhibiting a certain use of property is primarily a restrictive covenant and not a condition subsequent.[42] A restrictive covenant releasable only by deed is not barred by forbearance to forfeit the estate while known breaches of the covenant were being pursued in other ways.[43] In New York it is held that a change in the character of the locality such as to destroy the purpose of the covenant defeats it.[44]

Covenants running with the land [45] are those for the use or benefit of the land and connected therewith not being collateral merely,[46] and it is sometimes said they must be in respect to something in esse.[47] Such covenants created in a contract to sell need not be carried into subsequent conveyances of the land.[48] If the covenant is for the benefit of the land, the word "assigns" is not necessary in order that it should run with the land.[49] A covenant for water supply in a grant of a spring will not be construed as one to supply it from anywhere so as to make the covenant collateral.[50] A restriction applicable to all lots in a region and designed for the benefit of each may be enforced by the owner of any lot.[51] Even personal covenants may under circumstances of equity be enforced against the grantee of the covenantor.[52] The union of the burdened and the benefited estates will extinguish the covenant,[53] unless a contrary intention clearly appears.[54]

forbore to redeem as he might. Fidelity Trust Co. v. Carson, 28 Pa. Super. Ct. 418.

36, 37. See 6 C. L. 1249.

38. Kepler v. Larson [Iowa] 108 N. W. 1033.

39. Will held not to create estate tail so converted. Gannon v. Pauk [Mo.] 98 S. W. 471.

40. Adair v. Adair's Trustee [Ky.] 99 S. W. 925.

41. See Buildings and Building Restrictions, 7 C. L. 507.

42. Land not to be used as cemetery. St. Peter's Church v. Bragaw [N. C.] 56 S. E. 688.

43. Restriction on sale of liquor had been frequently violated but prosecutions had been begun. Woodbine Land & Imp. Co. v. Riener [N. J. Eq.] 65 A. 1004.

44. Change in locality held to deprive lots of any residential value so that covenant became unenforceable. Schwarz v. Duhne, 103 N. Y. S. 14.

45. See 6 C. L. 1249.

46. See **Tiffany, Real Property,** p. 115. Distinction between covenants personal and covenants running with the land, see Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S. E. 1028; Atlantic K. & N. R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701.

Illustrations of covenants running with land. Covenant to make and maintain a ditch in consideration of release of damages for diverting a stream and flowing land. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34. Agreement to pay share of cost of party wall when used. Rugg v. Lemly [Ark.] 93 S. W. 570. Agreement to pay share of cost of party wall whenever covenant or should build, expressed to be a covenant running with the land. Jabeles & Colias Confectionary Co. v. Brown [Ala.] 41 So. 626. Agreement in consideration of right of way to build and keep up retaining wall. Flege v. Covington & C. El. R. & Transfer & Bridge Co., 28 Ky. L. R. 1257, 91 S. W. 738. Covenant to supply water to a grantor's residence for the use of occupants out of the granted spring. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701. Agreement by railroad company to build and maintain fences enclosing right of way. Indianapolis Northern Trac. Co. v. Harbaugh [Ind. App.] 78 N. E. 80. Covenant to extent a street for benefit of specific property granted by covenantee. Jayne v. Cortland Waterworks Co., 107 App. Div. 517, 95 N. Y. S. 227.

See, also, ante, Restrictive Covenants.

47. A covenant to supply water from a certain spring is of a thing in esse notwithstanding the piping is yet to be laid. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701.

48. Indianapolis Northern Trac. Co. v. Harbaugh [Ind. App.] 78 N. E. 80.

49. Covenant to maintain a ditch. Brockmeyer v. Sanitary Dist., 118 Ill. App. 49.

50. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701.

51. Evans v. Foss [Mass.] 80 N. E. 587.

52. Where land was benefited and grantee had notice. Hunt v. Jones [Cal.] 86 P. 686.

53, 54. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S. E. 1028. The use in solido of numerous water lots each having a power right appurtenant held to negative an intent to preserve a covenant binding some lots for the benefit of others, Id.

Possession.[55]—Constructive possession is accessory to the title.[56]

Merger[57] is the annihilation of a lesser estate by union with a greater in the same person or right.[58] A ground rent merges in the fee when the same is acquired by the owner of the rent,[59] and as to a bona fide purchaser therafter, an intervening estate which is a secret one does not prevent merger,[60] nor does the fact that the acquisition of the fee was by purchase at a sheriff's sale expressly made subject to the rents.[61] A legislative grant of public lands carrying a water power to a city or local public corporation with plenary power to sell or lease does not prevent a merger when the rights granted by the city unite in one holder.[62] Merger does not take place contrary to the intention of the grantee,[63] but the burden of proving an intent that merger should not result is on him who is entitled to and does deny such result.[64]

Abandonment[65] is a relinquishment without reference to any particular person or purpose.[66]

Reasonable Doubt; Recaption; Receiptors; Receipts, see latest topical index.

RECEIVERS.

§ 1. Nature, Grounds, and Subjects of Receivership (1680). Liability for Wrongful Appointment (1683).
§ 2. Appointment, Qualification, and Tenure of Receivers (1683).
A. Proceedings For Appointment and Qualifications (1683). Bonds (1684).
B. Who May Be Appointed (1684).
C. Tenure of Receiver (1684).
§ 3. Title and Rights in and Possession of the Property (1684).
A. Title in General (1684).
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§ 4. Administration and Management of the Property (1686).
A. Authority and Powers in General (1686).
B. Payment of Claims Against Receiver or Property (1687). Debts Created by Receiver and Expenses of Administration (1688). A Receiver's Certificate (1690). Counsel Fees (1690).
C. Sales by Receivers (1690).
D. Actions by and Against Receivers (1691).
§ 5. Accounting by Receivers (1693).
§ 6. Compensation of Receivers (1694).
§ 7. Liabilities and Actions on Receivership Bonds (1695).
§ 8. Foreign and Ancillary Receivers (1696).

Rules peculiar to receivers of foreign[67] or domestic[68] corporations, and to those appointed in mortgage foreclosure[69] or supplementary proceedings,[70] are treated elsewhere.

55. See 6 C. L. 1249.

56. Hence did not exist under a judicial proceeding not carried forward to the transition of title. Ramos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898.

57. See 6 C. L. 1249.

58. Both estates must coalesce in one and the same right. Topliff v. Richardson [Neb.] 107 N. W. 114. Equitable life estate not in legal remainder. Toombs v. Spratlin [Ga.] 57 S. E. 59. The wife's acceptance of her husband's conveyance merges her dower inchoate. Scheuer v. Chloupek [Wis.] 109 N. W. 1035. The lien of a street assessment against property appropriated by the city for park purposes is merged in the higher title of the fee thereby acquired, and the city is entitled to retain the present value of assessments remaining unpaid from the amount assessed as compensation to the landowner. Scully v. Cincinnati, 9 Ohio C. C. (N. S.) 63.

59, 60, 61. Frank v. Guarantee Trust & S. D. Co. [Pa.] 64 A. 894.

62. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S. E. 1028.

63. Evidence held to show no intention to merge mortgage in fee though deed was taken in satisfaction, there being a judgment lien on the land. Moffet v. Farwell, 222 Ill. 543, 78 N. E. 925. Will not take place where intervening rights negative such intent. Topliff v. Richardson [Neb.] 107 N. W. 114.

64. Muscogee Mfg. Co. v. Eagle & Phenix Mills, 126 Ga. 210, 54 S. E. 1028.

65. See 6 C. L. 1250. See, also, Adverse Possession, 7 C. L. 41. Abandonment and nonuser of easement. See Easements, 7 C. L. 1203. Abandonment of location or entry, see Public Lands, 8 C. L. 1486; Mines and Minerals, 8 C. L. 985.

66. Resale is not "abandonment." St. Peter's Church v. Bragaw [N. C.] 56 S. E. 688.

67. See Foreign Corporations, 7 C. L. 1725, also see particular corporation articles, such as Railroads, 8 C. L. 1590; Street Railways, 6 C. L. 1556, etc.

68. See Corporations, 7 C. L. 862, also particular corporation articles, such as Railroads, 8 C. L. 1590; Street Railways, 6 C. L. 1556, etc.

69. See Foreclosure of Mortgages, etc., 7 C. L. 1678.

§ 1. *Nature, grounds, and subjects of receivership.*[71]—Proceedings for the appointment of a receiver are ancillary, and as a general rule the appointment will not be granted where that is the final and practically only relief sought,[72] hence, the appointment must be predicated upon some pleading praying affirmative relief.[73] The appointment of a receiver is not a matter of right,[74] but rests in the sound judicial discretion of the court.[75] The propriety of the appointment can only be considered on an appeal involving the order of appointment and not collaterally,[76] and an exercise of the power will not be disturbed unless it affirmatively appears to have been unwarranted.[77] The decree of appointment is conclusive of all prior matters involved therein.[78] Statutes authorizing the appointment of a receiver[79] must be

70. See Supplementary Proceedings, 6 C. L. 1586.

71. See 6 C. L. 1250.

72. Civ. Code Prac. § 298, provides for the appointment of a receiver in proper cases only during the pendency of the action. Campbell v. Rich Oil Co., 29 Ky. L. R. 716, 96 S. W. 442. It is a matter of serious doubt whether a court has authority to appoint a receiver upon a bill whose sole purpose is to get a receivership and stave off lien holders. Gutterson v. Lebanon Iron & Steel Co., 151 F. 72. The appointment of a receiver adjusts and determines the right of no party to the proceedings and grants no relief directly or indirectly. Joslin v. Williams [Neb.] 107 N. W. 837.

73. A cross bill in a foreclosure suit seeking to reach through a receiver the rents, issues, and profits, of premises sold during the period of redemption, is filed in sufficient season, although not filed until after the final decree executed by sale of the premises. Ruprecht v. Muhlke, 225 Ill. 188, 80 N. E. 106. Cross bill seeking appointment of a receiver of rents and profits during the period of redemption was held sufficient, although it failed to allege that the property was improved and yielded rents. Id.

74. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897. A provision in a mortgage that upon default a receiver may be appointed does not per se require such appointment. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092.

75. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897. It is for the court in every instance to determine whether it should take upon itself the trust. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092. The power lies within the undoubted discretion of the court but should only be used with great caution. Anderson v. Hultberg, 117 Ill. App. 231; Spies v. Butts, 59 W. Va. 385, 53 S. E. 897. The use of the discretion was sustained where money had been fraudulently converted, the defendant was insolvent and had left the state, and the complainant's rights would have been prejudiced by an attempt to find and serve notice on defendant. Anderson v. Hultberg, 117 Ill. App. 231. On the pleadings and evidence, the refusal to appoint a receiver held not to be an abuse of discretion in Virginia-Carolina Chem. Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929. When the equities of the bill are fully and fairly denied by the answer, unless the denial is overcome by the plaintiff by other testimony, the question is no longer addressed to the discretion of the court but it is error to appoint a receiver. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897.

76. On such an appeal the merits of the case, such as the title and interests of the appellees, cannot be gone into. Cotton v. Rand [Tex. Civ. App.] 14 Tex. Ct. Rep. 624, 92 S. W. 266; Haywood v. Scarborough [Tex. Civ. App.] 14 Tex. Ct. Rep. 784, 92 S. W. 815. The appointment of a receiver cannot be collaterally attacked in a suit by the receiver to levy an assessment. If the decree of appointment is to be attacked, it must be done in the court where it was made. Backenstoe v. Kline, 31 Pa. Super. Ct. 268. The complaint in the original proceeding who bids in the property at the receiver's sale cannot question the appointment of the receiver in action brought by the receiver for the purchase price. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703. A determination that a court has jurisdiction to appoint a receiver, the fact that a receiver was appointed and recognized as the officer in charge of the property are res adjudicata in proceedings upon a final accounting and distribution. Campau v. Detroit Driving Club, 144 Mich. 80, 13 Det. Leg. N. 200, 107 N. W. 1063.

77. A great preponderance of evidence is necessary. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897.

78. Backenstoe v. Kline, 31 Pa. Super. Ct. 268.

79. Code Civ. Proc. § 2464, authorizing the appointment of receivers in proceedings supplemental to execution to hold the property of the judgment debtor, construed. Jones v. Arkenburgh, 112 App. Div. 483, 98 N. Y. S. 532. It was decided that the plaintiffs had not brought their case calling for the appointment of a receiver within the terms of acts 1898, pp. 312, 313, No. 159, § 1. Meyer v. Meyer Bros., 116 La. 456, 40 So. 794. Rev. St. 1899, § 1305, construed and held that a fraud order issued by the U. S. Post Office department is not a ground for applying for a receivership by the secretary of state. State v. People's U. S. Bank, 197 Mo. 605, 95 S. W. 867. Rev. St. 1895, art. 1465, authorizing the appointment of a receiver upon the application of one jointly owning or interested in any property or funds whose right is probable, construed and held that a mortgagee has such an interest as to bring him within the terms of the statute. Cotton v. Rand [Tex. Civ. App.] 14 Tex. Ct. Rep. 624, 92 S. W. 266. Civ. Code Prac. § 299, providing for the appointment of a receiver of mortgaged property which is in danger of being lost, removed, or materially injured, or when the condition has not been performed and the property is probably insufficient to pay the debt, construed Murray v. Murray [Ky.]

strictly complied with.[80] There should be a reasonable probability that the party asking for the appointment will ultimately succeed in obtaining the general relief sought.[81] The remedy lies in the extraordinary power of chancery,[82] and the appointment will not be made unless it appears either that the plaintiff has a clear legal right in himself to the property in question,[83] or that he has some lien upon it,[84] or that it constitutes a special fund out of which he is entitled to satisfy his demand,[85] or that the possession of the defendant was obtained by fraud,[86] or that the property or income therefrom is in danger of loss from neglect, waste, misconduct, removal,[87] or that the defendant is insolvent.[88] A receiver will not be appointed at

99 S. W. 301. Under Code Civ. Proc. § 140, giving the court power to enforce payment of or security, for temporary alimony, court expenses, etc., during divorce proceedings, through a receiver the filing of an undertaking to stay proceedings pending an appeal deprives the court of power to enforce the order appealed from and the appointment of a receiver is in excess of the jurisdiction of the court, since Code Civ. Prac. § 946, forbids further proceedings upon the matter appealed from. McAneny v. Superior Ct. [Cal.] 87 P. 1020.

80. Comp. Laws, §§ 436, 437, prescribing appointment of receivers in judgment creditors' bills construed, and where the bill framed in complanice with it is formally sufficient, a receiver may be appointed even in the face of denials by the debtor that there is any property reachable by the bill. Campau v. Detroit Driving Club, 144 Mich. 80, 13 Det. Leg. N. 200, 107 N. W. 1063. Under Code Civ. Proc. § 2468, subd. 1, a receiver may not be appointed in supplemental proceedings until the judgment creditor has exhausted his remedy by execution. Damers v. Sternberger, 102 N. Y. S. 740.

81. Hayes v. Jasper Land Co. [Ala.] 41 So. 909.

Contra: In making an appointment the court does not consider the merits of the case and will not even regard an objection that the bill is multifarious or faulty for misjoinder of parties. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897.

82. Ray v. Carlisle, 125 Ga. 316, 54 S. E. 119. The power is a chancery one. Daley v. Nelson, 119 Ill. App. 627; Virginia-Carolina Chem. Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929. The appointment of a receiver is a remedy and it is part of the procedure of courts of chancery to conserve and enforce equitable rights. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092. Generally a common cerditor by note or open account, with no judgment or lien, is not entitled to such relief. Virginia-Carolina Chem. Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929. The remedy cannot be had in extreme cases. Hayes v. Jasper Land Co. [Ala.] 41 So. 909. "The power of appointing a receiver is a most delicate one and should be exercised by the court with extreme caution and only under special and peculiar circumstances requiring summary relief." Horner v. Bell [Md.] 66 A. 39. "The power to appoint a receiver and put him in possession of another's property is one of the most important prerogatives of equity, only to be exercised by the conscientious chancellor when it is clear there is no other adequate means of doing justice between the parties and preventing the accomplishment of a wrong." Rich v. Mulloney, 121 Ill. App. 503. An overissue of stock by a company alone is not sufficient to warrant the appointment of a receiver at the suit of one to whom stock has been pledged before the overissue. Virginia-Carolina Chem. Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929.

83. Thompson v. Adams [W. Va.] 55 S. E. 668.

84. Code 1899, § 28, c, 133 [Ann. Code 1906, § 4031], providing for appointment of receivers, construed and held not to extend this remedy to a common creditor simply as such to prevent waste or misappropriation. Thompson v. Adams [W. Va.] 55 S. E. 668.

85. Thompson v. Adams [W. Va.] 55 S. E. 668.

86. Thompson v. Adams [W. Va.] 55 S. E. 668. An appointment was sustained by bankruptcy court where insolvent partners made five distinct transfers of property available to general creditors, within one week, to father, brothers, sister-in-law, and sweetheart, of one or the other of them, as part of a "skin game." Horner-Gaylord Co. v. Miller, 147 F. 295. By virtue of Bankr. Act. July 1, 1898, c. 541, § 23, cl. b. 30 Stat. 552 [U. S. Comp. St. 1901, p. 3431], as amended by act Feb. 5, 1903, c. 487, §§ 8, 13, 15, 32 Stat. 798, 799, 800 [U. S. Comp. St. 1905, pp. 686, 689, 690], which give jurisdiction to bankruptcy courts of suits by trustees for recovery of property conveyed by the bankrupt as a preference or in fraud of creditors and by virtue of cl. 3 of § 2 of act July 1, 1898, giving power to appoint receivers after the filing of the petition and until it is dismissed or the trustee qualified, a bankruptcy court has jurisdiction to appoint a receiver, after the filing of the petition and before adjudication, to receive property, conveyed by the bankrupt in fraud of his creditors within four months prior to the filing of the petition. Id. Appointment held improper in a suit to set aside a conveyance of stock and land on the ground of undue influence and fraud where there was no allegation of insolvency of the defendant or that he had not ample means to respond in damages, and his answer under oath, which fairly met the allegations in the bill, was adopted by a majority of those in interest. Horner v. Bell [Md.] 66 A. 39.

87. Thompson v. Adams [W. Va.] 55 S. E. 668. Appointment is proper where a defendant who was jointly interested in book accounts with the plaintiff was collecting them from persons whom the plaintiff did not know and had no means of knowing and made false representations about the collections and refused to account. Bauer v. Haggerty, 42 Wash. 313, 84 P. 871. Civ. Code of 1895, § 4904 construed, and the fact that a building on defendant's land was un-

any stage of the proceedings if any other remedy will adequately protect the party applying,[89] and the imperative necessity for the appointment must appear, especially when the proceeding is opposed by those in interest.[90] A special receiver may be appointed to collect a claim which might have been collected by the original receiver.[91] In Ohio a creditor cannot ask for the appointment of a receiver until he has reduced his claim to judgment.[92] The general rule is that, to justify the ap-

insured, and if destroyed by fire the land was not sufficient to protect the plaintiff, declared not to constitute such "a manifest danger of loss or destruction" of property to warrant the appointment of a receiver Ray v. Carlisle, 125 Ga. 316, 54 S. E. 119. Bill for the appointment of a receiver is sufficient in which it appears that, through failure to perform an executory contract to purchase standing timber, loss may result to the vendor because of the limited time in which the timber could be removed under other contract. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897. Civ. Code Prac. § 298, providing for the appointment of a receiver on motion of one who has a lien on property or a fund which is in danger of being lost, removed, or materially injured, construed and held not to authorize such appointment where there was no danger of material injury, although the property may be insufficient to pay the debt. Murray v. Murray [Ky.] 99 S. W. 301. Under Code Civ. Prac. § 298, which provides for the appointment of a receiver at the instance of one who has or probably had a right to, lien upon, or an interest in, any property or fund the right to which is involved in action and which is in danger of being lost, removed, or materially injured, the appointment is proper upon the motion of a holder of eighteen promissory notes maturing annually, secured by mortgage which covered the property and its rents and profits where several of the notes had been defaulted, although the property might be sufficient security. Handman v. Volk [Ky.] 99 S. W. 660. Pending a proceeding for partition, a receiver may be appointed when the defendant threatens to destroy or remove the property. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782. If a defendant in divorce proceedings remains beyond the jurisdiction so that application for temporary alimony cannot be served on him personally, and his property in the state is in imminent danger of being lost, destroyed, depreciated by waste, or removed, so that if judgment for permanent alimony is obtained there will be nothing out of which it can be paid, the court probably may appoint a receiver to preserve and hold the property until a judgment can be obtained. Stallings v. Stallings [Ga.] 56 S. E. 469. Rev. St. 1895, art. 1465, providing for the appointment of a receiver on the application of one jointly owning or interested in any property or fund whose right to or interest in the property or fund or to the proceeds thereof is probable, held not to apply, and appointment refused when plaintiff had no interest or probable interest in a mill which had not become part of the realty and whose sole cause of action was damages for alleged breach of contract to cut lumber. Wotring & Son v. Indemnity Imp. Co. [Tex. Civ. App.] 100 S. W. 358. There must be imminent danger of irreparable loss to the property the subject of the suit. Hayes v. Jasper Land Co. [Ala.] 41 So. 909. Appointment of a receiver upheld where a bankrupt, who prior to adjudication had given notes waiving homestead rights, nevertheless had them set off to him by his trustee in bankruptcy, the plaintiff not having proved his claim in bankruptcy and having no remedy at law. This case was decided on grounds set forth in Bell v. Dawson Grocery Co., 48 S. E. 150, 120 Ga. 628; Keller v. Bowen [Ga.] 56 S. E. 634.

88. Thompson v. Adams [W. Va.] 55 S. E. 668. The justification for the exercise of the power of appointment is the preservation of the subject of litigation or of the immediate rents and profits, and the averments of insolvency of the party in possession is most important in making out a strong and special case of imminent danger of loss. Horner v. Bell [Md.] 66 A. 39. Appointment upheld where bill alleged that a partner who had collected large sums due the partnership and appropriated them to his own use without entering them on the books was insolvent, and despite the fact that the defendant held the legal title, the plaintiff having paid money into the business. Brooke v. Tucker [Ala.] 43 So. 141. Civ. Code Prac. § 298, authorizing the appointment of a receiver during the pendency of the action to prevent loss, injury, or removal of property, or a fund, construed, and under it a receiver may not be appointed where there is no disagreement of partners alleged or any fraud or wrongdoing on the part of any of them or any that the firm is insolvent, but only the mismanagement of an employe. Campbell v. Rich Oil Co., 29 Ky. L. R. 716, 96 S. W. 442. Appointment of a receiver at the instance of a husband is proper where the wife, although enjoined, rented property whose ownership was in question, albeit the wife was solvent. Thompson v. Thompson, 125 Ga. 102, 53 S. E. 607. The mere insolvency of a corporation is not sufficient ground to warrant the appointment of a receiver. American Fruit & Steamship Co. v. Dox, 4 Ohio N. P. (N. S.) 155.

89. The fact that the directors and officers of a corporation are fraudulently misappropriating corporate assets will not, if they are solvent, constitute a ground for the appointment of a receiver. Remedy of accounting sufficient. Hayes v. Jasper Land Co. [Ala.] 41 So. 909.

90. Appointment is improper where property was taken from a solvent trustee, despite the protest of the owners of two-thirds of the property. Rich v. Mulloney, 121 Ill. App. 503.

91. Special receiver appointed to enforce a stockholder's liability for debts of insolvent bank in hands of a receiver appointed by same court. Covell v. Fowler, 144 F. 535.

92. American Fruit & Steamship Co. v. Dox, 4 Ohio N. P. (N. S.) 155. A contract creditor of a corporation will not be heard to ask for the appointment of a receiver to collect unpaid stock subscriptions until he

pointment of a receiver pendente lite a mortgagee must show that the premises are insufficient to secure payment of the debt and that the mortgagor is insolvent.[93]

Liability for wrongful appointment.[94]—One who procures the appointment of a receiver is liable for the legitimate expenses of the receivership if the appointment is wrongful,[95] or if the fund sequestrated is inadequate therefor.[96] The legitimate expenses include counsel fees,[97] cost of the bond,[98] the personal expenses,[99] and the compensation of the receiver.[1] Where a receiver is wrongfully appointed at the instance of the state, the compensation is not payable out of the funds in the receiver's hands, although no judgment for costs could be rendered against the state.[2]

§ 2. *Appointment, qualification, and tenure of receivers. A. Proceedings for appointment and qualifications.*[3]—In a petition for a receiver of a mutual insurance company, the members thereof need not be made parties defendant as well as the company,[4] and the insurance commissioner if he has knowledge of and assents to the proceeding, need not be joined as a party.[5] Except in cases of emergency, notice of the application must be given,[6] nor will a receiver be appointed before answer except in case of necessity,[7] nor according to chancery practice will the appointment be made after answer under oath which fairly meets the averments of the bill and the case is heard on bill and answer.[8] When an ex parte application is made the usual mode of procedure is to set a time for the hearing of the application and meantime, if the necessities of the case are shown to require it, to appoint a temporary receiver.[9] In a federal court of equity it is improper to appoint a receiver where the complainant has failed to take exceptions or filed replications within the time limited or nunc pro tunc, to answers wholly denying the complainant's right.[10] An appointment

has reduced his claim to judgment and execution has been returned unsatisfied, nor will jurisdiction of the cause be retained for the benefit of such cross petitioners. Id.

93. Aetna Life Ins. Co. v. Broecker [Ind.] 77 N. E. 1092. Refusal to appoint receiver upheld where, although the rents and profits were specifically mortgaged, yet the property was of sufficient value to be good security. Id.

94. See 6 C. L. 1252.

95. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113; Harrington v. Union Oil Co., 144 F. 235.

96. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113.

97, 98, 99, 1. Harrington v. Union Oil Co., 144 F. 235.

2. State v. People's United States Bank, 197 Mo. 605, 95 S. W. 867.

3. See 6 C. L. 1253.

4. Service on the proper officers of the corporation made every policy holder a party and the answer of the company not before decree dissented from, will now, after decree unappealed from, be deemed as concurred in by the policy holder. International Sav. & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200.

5. International Savings & Trust Co. v. Kleber, 29 Pa. Super. Ct. 200.

6. Emergencies such as necessity for immediate action to prevent present in jury or threatened, impending, irreparable loss, or the impossibility of allowing sufficient time for notice, or the fact of nonresidence of the trustee of the property, will justify an ex parte appointment. Cotton v. Rand [Tex. Civ. App.] 14 Tex. Ct. Rep. 624, 92 S. W. 266. The appointment of a receiver without notice or an attempt to give notice is improper in the absence of any emergency requiring it. Dow Co. v. Deist, 123 Ill. App. 864. If a receiver to continue till the final trial and not merely temporarily till the application can be heard will be appointed at all without service or notice, it will only be under extraordinary circumstances. Stallings v. Stallings [Ga.] 56 S. E. 469. Where in divorce proceedings it appeared that service was not lawfully perfected on the defendant, it was error over his objection to receive an application for and appoint a receiver for his property and order payments for temporary alimony and suit expenses to be made by the receiver. Id. Rev. St. 1895, arts 1465 and 1493, the latter applying rules of equity to the appointment of receivers, construed and order appointing set aside. Haywood v. Scarborough [Tex. Civ. App.] 14 Tex. Ct. Rep. 784, 92 S. W. 815. The facts showing the emergency calling for the ex parte appointment must appear in the petition. Id. Rev. St. c. 69, § 3, providing for notice, construed. Anderson v. Hultberg, 117 Ill. App. 231. Emergency not shown to exist for the appointment of a receiver without notice. Wotring & Son v. Indemnity Imp. Co. [Tex. Civ. App.] 100 S. W. 358.

7. Fraud or some other strong ground to induce the court to act must be presented and clearly proved by affidavit. Daley v. Nelson, 119 Ill. App. 627. A strong and special case of imminent danger of loss is always required as essential to a departure from the old rule not to make such an appointment in any case under any circumstances before answer. Horner v. Bell [Md.] 66 A. 39.

8. Horner v. Bell [Md.] 66 A. 39.

9. Stallings v. Stallings [Ga.] 56 S. E. 469.

10. Equity rule 66 construed, and held

invalid because ex parte may be validated by ratification by the court after a full hearing of the parties.[11]

A petition for a receiver must be verified [12] and if the motion is based upon the allegations of the bill, that pleading must be sworn to.[13] The court appointing a receiver has power to accept his resignation and appoint a successor [14] ex parte without notice,[15] and the fact that proper notice therefor was not served cannot be taken advantage of in a collateral proceeding.[16] A receivership may be extended to another suit filed later.[17] Where a court appoints a receiver upon a bill alleging insolvency and other causes, although the decree does not set forth the reasons and it was without power to appoint for insolvency alone, the excess of jurisdiction is of the kind remediable by appeal only and the proceedings are not void.[18]

Bonds.[19]—Where a receiver is appointed, the complainant should be required to file a bond.[20] The amount of the complainant's bond lies within the discretion of the court appointing,[21] and the remedy for a defective or insufficient bond is not by appeal but by application to said appointing court.[22] An order appointing a receiver and requiring the complainant to file a bond may be entered together and the appointment need not be deferred until the bond is actually executed and filed.[23]

(§ 2) *B. Who may be appointed.*[24]—A state statute forbidding the appointment of a nonresident receiver applies solely to the state courts and cannot control the Federal courts.[25]

(§ 2) *C. Tenure of receiver.*[26]

§ 3. *Title and rights in and possession of the property. A. Title in general.*[27]—The effect of the appointment of a receiver is not to oust any party of his right to the property but merely to retain it for the benefit of the party who may ultimately appear to be entitled to it,[28] nor does the appointment extinguish titles or

that complainant should have been defaulted and dismissed. Harrington v. Union Oil Co., 144 F. 235.

11. Cotton v. Rand [Tex. Civ. App.] 14 Tex. Ct. Rep. 624, 92 S. W. 266.

12. Order appointing receiver held improper in the case of an unverified bill to foreclose a trust deed despite the provisions of said deed. Daley v. Nelson, 119 Ill. App. 627.

13. Daley v. Nelson, 119 Ill. App. 627. Allegations which were positively sworn to held sufficient if taken as true to justify the receivership. Anderson v. Hultberg, 117 Ill. App. 231.

14, 15. Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704.

16. Action by receiver of a mutual insurance company to collect an assessment from a member. Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704.

17. And this without formal order therefor, where the parties to the first suit were parties to the second and both they and the court treated the cases as consolidated in fact and the receivership as extended. Gila Bend Reservoir & Irr. Co. v. Gila Water Co., 202 U. S. 270, 50 Law. Ed. 1023. A receivership to collect and pay rents admeasured as dower will not be extended to a suit to set aside a fraudulent conveyance of the dower right. Dolan v. Conlon, 99 N. Y. S. 1090.

18. Bankruptcy statutes are practical and the fact that the court appointed a receiver either on the ground of insolvency alone or with other causes satisfies clause 4 of § 3, Act July 1, 1898 (30 Stat. 546, c. 541 [U. S. Comp. St. 901, p. 3422]), amended by Act of Feb. 5, 1903, p. 683 (32 Stat. 797, c. 487, § 2 [U. C. Comp. St. Supp. 1905]). Beatty v. Anderson Coal Min. Co. [C. C. A.] 150 F. 293.

19. See 6 C. L. 1255.

20. Act of May 15, 1903, requiring this, construed. Anderson v. Hultberg, 117 Ill. App. 231. The complainant's bond is for damages resulting and attorney's fees rendered necessary by the appointment and acts of the receiver if the appointment is revoked or set aside. Id. Code of Civ. Proc. § 269, provides that every order appointing a receiver shall require the applicant to give a good and sufficient bond conditioned to pay all damages which the other parties to the suit or any of them may sustain by reason of such appointment in case it is decided to be wrongful. Joslin v. Williams [Neb.] 107 N. W. 837.

21. The court has power on proper representation to change the amount if it can be shown to be insufficient. Anderson v. Hultberg, 117 Ill. App. 231.

22. Bond claimed not to comply with statute. Anderson v. Hultberg, 117 Ill. App. 231.

23. The receiver is but an officer and arm of the court which appoints him and will not be allowed under such order to assume the duties of his office until the contemporaneous order concerning the bond is fulfilled. Anderson v. Hultberg, 117 Ill. App. 231.

24. See 6 C. L. 1255.

25. City of Defiance v. McGonigale [C. C. A.] 150 F. 689.

26. See 6 C. L. 1255.

27. See 6 C. L. 1256. See, also, Abatement and Revival, 7 C. L. 1.

28. In re Nelson & Bro. Co., 149 F. 590. It is a proper exercise of discretion for a court

rights.[29] A receiver takes no title to the property,[30] and he has no power to take possession of property outside of district in which he is appointed.[31] An interlocutory order appointing a receiver confers no vested rights on any claimant which cannot be modified by later orders or the final decree.[32]

(§ 3) *B. Rights as between receivers, claimants, or lienors.*[33]—As before stated the appointment of a receiver in no way affects the title to the property,[34] all interests and valid liens thereon being preserved[35] as of the date of the appointment.[36] While the property is in the custody of the court by the receiver, a lien cannot be perfected without permission of the court,[37] and the proper procedure being to apply for an order for a sale and to have the lien transferred to the funds in lieu of the property.[38] A receiver of an insolvent corporation is not entitled to retain possession as against the trustee in bankruptcy.[39]

(§ 3) *C. Possession and restitution.*[40]—A receiver is an officer of the court appointing him,[41] his possession being deemed that of the court,[42] and an interference therewith is a contempt of court.[43] He is bound to keep assets within the jurisdiction where he was appointed.[44] Where property in the possession of a receiver is

to retain a fund within its jurisdiction until it is finally determined to whom it belongs by enjoining the receiver from parting with the funds in his hands pending suit. American Can Co. v. Williams [C. C. A.] 149 F. 200. Where a junior mortgagee is illegally deprived of possession of property by the wrongful appointment of a receiver, he is entitled to the rents and profits collected by the receiver. Ruprecht v. Muhlke, 225 Ill. 188, 80 N. E. 106. Where an action to sell property to pay the debts of a decedent is dismissed without prejudice to the rights of certain defendants holding mortgages, and upon whose application a receiver has been appointed to collect rents for use in procuring insurance and redeeming the property from forfeiture for unpaid taxes, and the fund has not been so applied, the receiver does not hold the fund for the benefit of the successful party, but is bound to account therefor to the court appointing him. Eichert v. Eichert, 8 Ohio C. C. (N. S.) 526.

29. The appointment of a receiver does not divest the right of the owner of an equity of redemption of mortgaged property to the rents and profits pending redemption, less necessary expenditures for preserving the property. Standish v. Musgrove, 223 Ill. 500, 79 N. E. 161. See infra, subdivision C.

30. His sole title is derived from the order of court appointing him. Covell v. Fowler, 144 F. 535. Code of Civ. Proc. § 2468, construed and it was held that it did not apply to property held by a defendant in a representative capacity such as executor (Jones v. Arkanburgh, 112 App. Div. 483, 98 N. Y. S. 532), or to the real estate of the judgment debtor and that the receiver had no power to sell or convey it (Damers v. Sternberger, 102 N. Y. S. 740).

31. Morrill v. American Reserve Bond Co., 151 F. 305.

32. Atchison, etc., R. Co. v. Osborn [C. C. A.] 148 F. 606.

33. See 6 C. L. 1256.

34. See ante, subd. A, this section.

35. The court suggested that a lien for improvements on leased premises might be preserved. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337. The effect of a receivership is to suspend the ordinary remedies for the enforcement of liability and render a resort to the court having jurisdiction therein necessary. Hubbard v. Security Trust Co. [Ind. App.] 78 N. E. 79. A receiver of an execution defendant who has obtained the release of property by a delivery bond holds the same position to the property released as the execution defendant did. Id. A receiver of an insolvent bank takes a sum of money held as trust fund subject to the rights of the beneficiary. National Life Ins. Co. v. Mather, 118 Ill. App. 491. Where a cashier of a bank, also county commissioner, wrongfully deposited taxes in the bank which went into a receiver's hands, a trust was declared and given preference. Board of Com'rs of Crawford County v. Patterson, 149 F. 229.

36. Mechanic's lien. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

37. The granting permission to join the receiver in a suit to perfect the lien would not authorize a sale of the property or a foreclosure. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

38. When the court orders a sale of property subject to a lien, the duty arises to protect the lien out of the funds. Baldwin v. Spear Bros. [Vt.] 64 A. 235.

39. Hooks v. Aldridge [C. C. A.] 145 F. 865. See Bankruptcy, 7 C. L. 387.

40. See 6 C. L. 1257.

41. Covell v. Fowler, 144 F. 535.

42. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172. An attorney who receives payment of check drawn as a retainer by a corporation, after he knows receivers have been appointed, must turn over the sum received to them. Bowker v. Haight & Freese Co., 146 F. 257.

43. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172; Davis Coal & Coke Co. v. Hess, 30 Pa. Super. Ct. 193. As by a suit or other adverse proceeding without first obtaining leave of court. Kemp v. San Antonio Catering Co., 118 Mo. App. 134, 93 S. W. 342. Where an ancillary receiver is appointed in bankruptcy proceedings, the money in his possession is in custodia legis and not subject to attachment. In re Nelson & Bro. Co., 149 F. 590.

44. Coe v. Patterson, 103 N. Y. S. 472.

claimed by a third person, a petition should be made to the court appointing for an order for its restitution to the party to whom it belongs.[45] In the absence of statute, other courts will recognize and respect the custody of the court of appointment.[46]

§ 4. *Administration and management of the property. A. Authority and powers in general.*[47]—Primarily the receiver represents the court alone,[48] but under certain circumstances he also represents the insolvent[49] and the creditors.[50] A receiver is an officer or agent of the court appointing him[51] and has only such authority or powers as are conferred upon him by said court.[52] Persons dealing with a receiver are charged with knowledge of his functions and contract with him at their peril,[53] and he is liable on official contracts only to the extent of the property in their hands.[54] In the absence of any statute or order of court, a receiver is only bound to use such care in dealing with the property in his hands, as an ordinarily prudent person would use toward his own.[55] A receiver may not derive personal profit from his office.[56] A court will assume that its receiver continued to act as

45. Kemp v. San Antonio Catering Co., 118 Mo. App. 134, 93 S. W. 342.

46. Davis Coal & Coke Co. v. Hess, 30 Pa. Super. Ct. 193. The control of the court, appointing a receiver, over assets and its right of action for any injury to or misappropriation of its property cannot be interfered with by process of any other court. American Steel & Wire Co. v. Bearse [Mass.] 80 N. E. 623.

47. See 6 C. L. 1257.

48. Before a decree of dissolution of a partnership a receiver appointed pendente lite to conserve the property represents nobody but the court. Brockhurst v. Cox [N. J. Eq.] 64 A. 182.

49. Where creditors relying upon subscriptions have extended credit to a corporation, a subscriber cannot rescind his subscription contract on the ground of fraud and in such case a receiver appointed for the corporation represents both it and the creditors and is not estopped by the fraud of the corporation. Marion Trust Co. v. Blish [Ind.] 79 N. E. 415. Is not agent for insolvent in such sense that can bind him by contract. Stannard v. Reid & Co., 103 N. Y. S. 521.

50. After a decree of dissolution of a partnership, the situation is entirely changed. The court directs that the property is to go first to pay the creditors and a receiver appointed then becomes the representative of the creditors and as such may by suit or defense avoid a void chattel mortgage given by partnership. Brockhurst v. Cox [N. J. Eq.] 64 A. 182.

51. Anderson v. Hultberg, 117 Ill. App. 231; Foreman v. Defrees, 120 Ill. App. 486; Roller v. Paul [Va.] 55 S. E. 558; Hall v. Stulb, 126 Ga. 521, 55 S. E. 172. A receiver is not an agent of any party to the suit. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113; Hall v. Stulh, 126 Ga. 521, 55 S. E. 172. An "assistant receiver" appointed in accordance with a stipulation entered into by the parties and approved by the court is not a mere agent of the parties but is a substituted receiver and is liable to account to the court which retained jurisdiction. Johnson v. Johnson [Iowa] 107 N. W. 802. Strictly speaking a receiver is not a public officer. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172.

52. Campau v. Detroit Driving Club, 141 Mich. 80, 13 Det. Leg. N. 200, 107 N. W. 1063. A receiver appointed under 1 Mills' Ann. St. § 497, providing for the dissolution of mining companies and for receivers to effect this, who is ordered to take charge of the affairs and property of the company, has no power to work the mines. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. A description of the property to be held by receiver in the order of appointment as "the premises described in plaintiff's petition" is sufficient. Cotton v. Rand [Tex. Civ. App.] 14 Tex. Ct. Rep. 624, 92 S. W. 266. Where a receiver to collect rents and profits was later appointed to collect the same rents in a suit for partition which was voluntarily discontinued, the court only had authority to vacate the order of appointment leaving the parties to their rights for an accounting of rents received in the former suit. Horn v. Horn, 100 N. Y. S. 790. Appointment to have care and possession of property "subject nevertheless to the orders of the court" carries no powers by implication beyond those merely incidental to the care and management of the property itself. Preston v. American Surety Co. [Md.] 64 A. 292. Under an order directing receiver to sell property at a given price, the receiver has no discretionary power and is not intended to take possession of the property. Wardlaw v. Herrington, 125 Ga. 828, 54 S. E. 699.

53. They are presumed to know the pleadings of the action in which he was appointed and are charged with knowledge of the order defining his powers. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. All orders of the court regulating the powers of a receiver must be regarded as notice to all persons dealing with the receiver, and it is the duty of merchants and others dealing with a receiver to examine the records and ascertain the extent of his authority. In re Erie Lumber Co., 150 F. 817.

54. Stannard v. Reid & Co., 103 N. Y. S. 521.

55. Rev. St. 1895, art. 1462, directing a court officer to seal up any money deposited in court and deposit it in some bank or vault accessible to the court, does not apply to funds in a receiver's hands. Groesbeck Cotton Oil Gin & Compress Co. v. Oliver [Tex. Civ. App.] 17 Tex. Ct. Rep. 241, 97 S. W. 1092.

56. A receiver who bought up claims at less than face value may not credit himself

such until the contrary is shown,[57] and a receiver cannot defend a disobedience of the court's orders on the ground that the party in interest is estopped, by assent to the acts, to complain.[58] A receiver may apply to the court for specific orders and directions before acting.[59] Receivers have a reasonable time in which to elect whether or not to accept a lease held by the debtor,[60] and if they do so accept they become tenants under it.[61] As regards liability for rent, a distinction lies between statutory receivers[62] who take title,[63] and chancery or court receivers[64] who have no title.[65] Being an officer of the court the receiver has no right to appeal from orders by it as to distribution of assets.[66] They may, however, appeal from orders relating to his compensation or account.[67] A discretionary order of court to a receiver cannot be reviewed in a collateral matter unless void.[68] The court and its receiver, in the mere administration of contract obligations in a representative capacity are bound by the law in respect thereto, in the same way in which the original possessor of the property was.[69] In New York a receiver of an insolvent corporation is not entitled as of right to change his attorney at his own volition.[70]

(§ 4) *B. Payment of claims against receiver or property.*[71]—A receiver has no discretion, generally speaking, as to the application of funds which are in his hands by virtue of the receivership. He holds them strictly subject to the order of the court to be disposed of as the court may direct.[72]

on his account with the face value but this profit enures to benefit of the beneficiaries of the funds in his hands as well as interest and they need not elect which they will take. Roller v. Paul [Va.] 55 S. E. 558. Where a receiver sells lumber in his hands to a firm of which he was a member, he must produce clear and positive proof that the full market price was paid therefor. In re Receivership [La.] 42 So. 789. Comp. Laws, § 437, giving power to decree satisfaction of the amount remaining due on a judgment out of property belonging to the debtor discovered in a chancery proceeding, does not authorize a judgment creditor appointed receiver to use the proprty for his benefit to the exclusion of that of other creditors. Campau v. Detroit Driving Club, 144 Mich. 80, 13 Det. Leg. N. 200, 107 N. W. 1063.

57. Even then the court will not permit its officer to abandon his official character at his convenience or interest where that abandonment will work an injustice to the parties or either of them. Starrett v. Berkovec, 118 Ill. App. 683.

58. Receiver to collect rents not allowed to show that he collected as agent and not receiver with the assent of the defendant. Starrett v. Berkovec, 118 Ill. App. 683.

59. Stanmeyer v. Rosenwald, 121 Ill. App. 583.

60. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337.

61. And are bound by its covenants including that for rent. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337. A lease of the whole premises by a receiver appointed in action to foreclose an undivided nine-tenths interest in the premises and who was authorized by the order to lease the premises may not be summarily canceled by the court, where the tenant had entered, made improvements, and gone to other expense. Witthaus v. Capstick, 102 N. Y. S. 166. A distinction is made between a receiver's entry of a leasehold and his electing to hold under a lease. Under the latter he is bound to pay the rent reserved during his occupancy. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337. Where a receiver of an insolvent lessee is appointed to collect rents of a sublessee, the lessor was entitled to receive the rent from the receiver and without first obtaining judgment against the lessee. Kemp v. San Antonio Catering Co., 118 Mo. App. 134, 93 S. W. 342.

62. Receivers of corporations on dissolution. Prince v. Schlesinger, 101 N. Y. S. 1031.

63. Take title to the property coming to them as such and by taking and occupying leased property incur liability under lease for so long as they occupy Prince v. Schlesinger, 101 N. Y. S. 1031.

64. Those appointed pending mortgage foreclosure or winding up of partnership. Prince v. Schlesinger, 101 N. Y. S. 1031.

65. They can create no privity of estate by entry and if liable at all are liable only for the period of occupancy. Id.

66. Such an appeal will be dismissed by the court of its own motion. Foreman v. Defrees, 120 Ill. App. 486.

67. Foreman v. Defrees, 120 Ill. App. 486.

68. Order setting aside assessment of receiver of a mutual insurance company not reviewable in an action to collect a new assessment from a member. Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704.

69. R. S. 1898, § 2316a, requiring five days public notice before a sale without the mortgagor's consent, construed and held to bind court and its receiver. Bekkedal v. Johnson, 127 Wis. 624, 107 N. W. 5.

70. But court will allow change unless satisfied from proper evidence before it that it would be prejudicial to the interests of the trust. People v. Bank of Staten Island, 112 App. Div. 791, 99 N. Y. S. 486.

71. See 6 C. L. 1259.

72. Roller v. Paul [Va.] 55 S. E. 558. Money cannot be deposited in a bank in the individual name of a receiver and drawn

Debts created by receiver and expenses of administration.[73]—As a general rule, allowances to a receiver for the expenses of the receivership should be made to the receiver himself,[74] but expenses incurred without the authority of the court will not be allowed [75] or charged against either party to the action.[76] Courts of equity have the power to appoint receivers and direct them to care for, protect, and preserve the property and decree the charges and expenses therefor as prior and preferred liens,[77] but, except in the case of a public service corporation, it has no authority to direct the receiver to carry on the business of the insolvent and charge the expenses of the business and operations as a prior or preferred lien over property over that of prior subsisting liens thereon.[78] To constitute debts of general creditors preferential over a mortgage, which covered not only the corpus of the property but also the net income after deducting the operating expenses, the debts must have been

out by him at pleasure. Fields v. U. S., 27 App. D. C. 433. The order should direct the receiver to make proper distribution to the parties entitled thereto. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. Sayle's Rev. Civ. St. art. 1472, fixing manner of distribution of funds in receiver's hands and preferring certain classes of claims, construed, and held that, where claims did not fall within any class designated by the statute, the court might decide the question of priority in accordance with what seemed equitable and just under the circumstances. Waters-Pierce Oil Co. v. U. S. & Mex. Trust Co. [Tex. Civ. App.] 99 S. W. 212. Decree disallowing payments for water taxes and repairs upheld upon appeal. Stanmeyer v. Rosenwald, 121 Ill. App. 583. Where an "assistant receiver" was appointed to take over the property and distribute the assets in accordance with a stipulation approved by the court, a creditor whose claim was duly listed by the receiver and unchallenged and ignored by the assistant receiver was allowed to intervene and pray for payment of the claim Johnson v. Johnson [Iowa] 107 N. W. 802.

73. See 6 C. L. 1260.

74. It is improper to render a judgment in favor of creditors who furnish supplies and labor to the receiver. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. A receiver improperly appointed as against a junior mortgagee lawfully in possession and entitled to rents and profits may be allowed from the expenses incurred by him to make the premises yield rent, which expenses the mortgagee would necessarily have incurred. Ruprecht v. Muhlke, 225 Ill. 188, 80 N. E. 106. An expert accountant employed by receiver under an order of court is an employe of the receiver and not of the court and subject to his orders and cannot recover for work done in excess of the receiver's orders. Grabbe v. Moffit [Iowa] 110 N. W. 142.

75. Expenses incurred by a receiver, who without authority worked a mine, disallowed. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. Where a fund is derived from the adventures of a receiver who discovered no property but continued to run the business, all disbursements connected with and necessary to the business should be allowed. Payments for interest and taxes which did not benefit the business not allowed. Campau v. Detroit Driving Club, 144 Mich. 80, 13 Det. Leg. N. 200, 107 N. W. 1063. It is improper for a receiver appointed pending a mortgage foreclosure to expend large sums upon the property for the benefit of the holder of the certificate of purchase. Standish v. Musgrove, 223 Ill. 500, 79 N. E. 161.

76. An independent action necessary to establish the liability. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113.

77. In re Erie Lumber Co., 150 F. 817. Receivership expenses have priority over other claims. Orchard v. National Exch. Bank [Mo. App.] 98 S. W. 824. The rental of leaseholds for which receivers are liable is regarded as part of the costs and is to be paid before the claims of general creditors. Perrin & Smith Printing Co. v. Cook Hotel & Excursion Co., 118 Mo. App. 44, 93 S. W. 337. Operating expenses incurred under order of court stand on the same footing with receiver's certificates as regards priority. In re Erie Lumber Co., 150 F. 817. The income of a railroad while in the hands of a receiver is subject to equitable charges of a different character from those to which the fund realized by sale of the corpus is subject. Atchison, etc., R. Co. v. Osborn [C. C. A.] 148 F. 606. Claims for supplies furnished a railroad prior to the receivership do not fall in the same class as debts created by the receiver. Waters-Pierce Oil Co. v. U. S. & Mex. Trust Co. [Tex. Civ. App.] 99 S. W. 212. An unliquidated claim for damages for an alleged breach of contract by receivers has little or not superior dignity to a claim of a general creditor. In re Erie Lumber Co., 150 F. 817. Creditors who furnish goods to receivers for an amount in excess of the indebtedness which the receivers are authorized by the court to incur cannot have their claims given priority as part of the operating expenses. Id.

78. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113. 1 Mills' Ann. St. § 497, providing for the dissolution of mining companies and the appointment of receivers for this purpose, construed, and held that an order giving to receiver all the powers usual in receivership cases and power to take charge of the affairs and property of the defendant company did not give power to run the mines. Id. A managing receivership of a private business corporation is never undertaken except with a view to winding up the affairs of the company and a sale of the property, the business being taken over and continued in order that the whole may be disposed of in the end as a going concern. Gutterson v. Lebanon I. & S. Co., 151 F. 72.

contracted upon the faith of being paid from such current income,[79] and there must also have been a diversion of net income from the operation of the property for the benefit of the mortgagee.[80] Such diversion must have been made subsequent to the creation of the debts sought to be enforced as an equitable lien.[81] The court may by its decree and order of sale direct the manner of payment of priorities [82] and adjust set-offs.[83] A right of a creditor to priority may be waived by some act inconsistent with the continuance of such right.[84] Legitimate expenses of the receivership should be taxed as costs.[85] The complainant may be held liable for the costs and expenses of a receivership where the assets are insufficient therefor,[86] or where the appointment was wrongful.[87] An order for the disbursement of money paid to a receiver under order to the credit of a certain person may be made without notice to the receiver,[88] but such order should be addressed to him as receiver [89] and should not be personal unless he has through fault or misconduct lost the money,[90] but it

79. Fordyce v. Omaha, K. C. & E. R. R., 145 F. 544; Fordyce v. Kansas City & N. Connecting R. Co., 145 F. 566. Rental of locomotives and expenses advanced in maintaining a joint system of officers and offices, and the purchase of ballast cars, for improving the road, held not to be preferential. Fordyce v. Omaha, K. C. & E. R. R., 145 F. 544. Unsecured claims for damages arising from the negligence of a mortgagor company before the appointment of receivers are not entitled to preference over mortgage creditors. Atchison, etc., R. Co. v. Osborn [C. C. A.] 148 F. 606.

80. Fordyce v. Kansas City & N. Connecting R. Co., 145 F. 566. Where a railroad is in the hands of a receiver at the instance of holders of a mortgage, unless there has been an inequitable division of earnings from operation to the betterment of the mortgagee's postion, the court cannot appropriate the corpus of the property to the payment of operating expenses in preference to the prior mortgage debt in the absence of statute giving them a preference. Waters-Pierce Oil Co. v. U. S. & Mex. Trust Co. [Tex. Civ. App.] 99 S. W. 212. Where there is no proof of a diversion for the benefit of the mortgagee and there is a deficit in the net income arising from an operation of the road in a business like way, and the property brings less than the mortgage debts at the foreclosure sale, no equity exists in favor of such general creditors over the mortgagee entitling them to be paid out of the purchase money or from the corpus of the property Fordyce v. Omaha, K. C. & E. R. R., 145 F. 544.

81. The claimant has the burden of showing this. Fordyce v. Omaha K. C. & E. R. R., 145 F. 544. Rental paid by receiver on a lease made before the receivership and adopted by them is not a diversion of income but an operating expense. Id. Even if there is a diversion of income before a claimant can charge the corpus of the property, he has the burden of showing that but for the diversion there would have been a net surplus of earnings subject to equitable liens. Id.

82. Decree providing for adjudication by it of priorities before their payment by the purchaser, construed. Atchison, etc., R. Co. v. Osborn [C. C. A.] 148 F. 606. The fact that the court in the order appointing the receiver may have directed that preferential claims for supplies and materials be paid from the proceeds of the sale or from the corpus of the property in the hands of the receiver does not prevent the purchaser from contesting the priority of such claims. Fordyce v. Omaha, K. C. & E. R. R., 145 F. 544. A decree ordering a receiver's sale of a railroad and providing that the purchasers should take subject to the payment of all claims against the receivers and pay any and all claims heretofore filed, or that may be filed hereafter within four months from the date of entry of the decree, but only when and as the court shall allow such claims, held not to include claims for damages pending or arising within the period limited and undetermined. Daniels v. Bay City Trac. & Elec. Co., 143 Mich. 493, 13 Det. Leg. N. 15, 107 N. W. 94. Where a mortgagor to a building association conveyed his interest to the receivers of the association, who bought up prior incumbrances and sold the estate but without agreement with the mortgagor as to the application of the proceeds, the court ordered the proceeds to be applied first in extinguishment of the prior incumbrances. Sengel v. Patrick [Ark.] 97 S. W. 448.

83. Court appointing receiver held not deprived of right to set off judgment previously recovered by company against an allowed claim of the judgment debtor by reason of fact that judgment debtor failed to file complaint in original action asking a set off in accordance with Gen. St. 1902, § 654. Betts v. Connecticut Life Ins. Co., 78 Conn. 442, 62 A. 345.

84. Where a mortgagee so far approves a receivership as to seek and secure benefits under it, he is precluded from claiming priority of his mortgage over operating expenses and other obligations incurred in carrying on the business which was intended to conserve his security. In re Erie Lumber Co., 150 F. 817.

85. Operation of business held without scope of receivership. Hendrie & Bolthoff Mfg. Co. v. Parry [Colo.] 86 P. 113.

86. Trustee of a mortgage to secure bonds, instead of foreclosing by sale, instituted a suit and had a receiver appointed, so held, where property brought insufficient sum. Atlantic Trust Co. v. Chapman [C. C. A.] 145 F. 820.

87. Harrington v. Union Oil Co., 144 F. 235.

88, 89, 90, 91. United States Blowpipe Co. v. Spencer [W. Va.] 56 S. E. 345.

must be made to appear that he has received the money or has negligently failed to collect it.[91] Where property is turned over by a receiver to third parties as owners thereof, the court may order it back to pay the expenses of the receivership, if, when the final settlement is made, the assets in the receiver's hands are insufficient therefor,[92] and the order to pay back may be enforced by contempt proceedings, sequestration of assets, or appropriate equitable remedy.[93]

A receiver's certificate [94] does not acquire priority over all claims.[95] It is doubtful whether certificates may be issued in receiverships of private corporations.[96] Bankruptcy courts have the power to authorize the issuance of receiver's certificates.[97] Other lienholders have no right to complain of the priority of such certificates since their issuance and existence are matters of record,[98] and they are not negotiable.[99]

Counsel fees.[1]—Counsel fees should be allowed out of the general assets.[2] A receiver is not entitled to be allowed for counsel fees where no services inured to the benefit of the person entitled thereto.[3] A receiver is not a party to the cause by reason of his appointment and is not entitlel to a decree in his own name for his own and counsel fees and disbursements.[4] One who procures the wrongful appointment of a receiver is liable for the counsel fees.[5] A receiver's fee should be taxed as costs.[6]

(§ 4) *C. Sales by receivers.*[7]—Whenever a receiver by direction of the court appointing him makes a sale for assets, the parties concerned in the sale are bound to recognize him as an officer of said court, and consequently, said court not only has power summarily to enforce the completion of the contract of sale but the parties involved are deemed to have consented to such a proceeding.[8] The general employment of an attorney as counsel and attorney by a receiver does not authorize him to make a sale of the assets and take the proceeds thereof.[9] It is an accepted rule that considerable discretion is allowed the receiver as to whether he shall sell the property in his hands in bulk or in parcels.[10] In the absence of any statute, it is within the discretion of the court appointing to permit a sale to be made in a county other than

92. Where a bank has received assets from a receiver and then comes into court and objects to the expense account of the receiver, the court has jurisdiction to make an order for the return of assets. Orchard v. National Exch. Bank [Mo. App.] 99 S. W. 824.

93. Orchard v. National Exch. Bank [Mo. App.] 98 S. W. 824.

94. See 6 C. L. 1261.

95. Is postponed to a claim for rent of leased land which receiver took over and for the improvement of which by the erection of a hotel they issued certificates, and this is so although the lease was not recorded. Perrin & Smith Printing Co. v. Cook Hot. & Ex. Co., 118 Mo. App. 44, 93 S. W. 337.

96. Perrin & Smith Printing Co. v. Cook Hot. & Ex. Co., 118 Mo. App. 44, 93 S. W. 337.

97. In the case of a private corporation as well as to railways and quasi public corporations. In re Erie Lumber Co., 150 F. 817. Under Bankr. Act July 1, 1898, c. 541, 30 Stat. 546 (U. S. Comp. St. 1901, p. 3421), and its amendments, which vests bankruptcy courts with power to authorize the business of bankrupts to be conducted for limited periods by receivers, such courts had power to authorize the issuance of receiver's certificates to raise funds immediately necessary for operating charges. Id.

98, 99. In re Erie Lumber Co., 150 F. 817.

1. See 6 C. L. 1261.

2. Not out of a trust fund for debenture holders not collected by the receiver and as to which he had no necessary duties to perform. Girard Trust Co. v. McKinley-Lanning Loan & Trust Co., 143 F. 355.

3. Counsel fees refused where after claims had been settled receiver represented persons opposed in interest to the debtor who was entitled to the balance of the fund. Roller v. Paul [Va.] 55 S. E. 558. Refused where a receiver without authority so to do managed the debtor's business and accumulated a fund. Campau v. Detroit Driving Club, 144 Mich. 80, 13 Det. Leg. N. 200, 107 N W. 1063.

4. They should be taxed as part of the costs in the case in the regular way. McReynolds v. Brown, 121 Ill. App. 261.

5. Also sum allowed for future counsel fees. Harrington v. Union Oil Co., 144 F. 235.

6. A decree therefor in receiver's own name improper. McReynolds v. Brown, 121 Ill. App. 261.

7. See 6 C. L. 1262.

8, 9. Mason v. Wolkowich [C. C. A.] 150 F. 699.

10. Rev. St. § 1799, construed, and held that, where creditors holding a vast majority of claims in amount requested a sale in bulk, an order to this effect was proper, no sufficient reason to the contrary being shown. Wenar v. Leon L. Schwartz, 117 La. 81, 41 So. 360.

that where the land is situated.[11] No other notice than that directed by the decree authorizing the sale need be given.[12] Even though the appointment of a receiver is later reversed on appeal, a sale made by him by order of a court having jurisdiction is not affected thereby.[13] The sale or the manner in which it was made can only be questioned in the court where the sale was ordered.[14] A purchaser at a receiver's sale is not bound to examine into all the proceedings in the suit for receiver.[15] In the absence of the receiver the court may appoint a special master or auctioneer to conduct the sale,[16] and such special master or auctioneer need not give a bond or take the oath.[17] An order of court confirming a receiver's sale need not contain the word "confirm."[18] In Pennsylvania a sale by a receiver under a decree of court is in effect under execution process.[19] Receiver's sale cannot be collaterally attacked if the court had jurisdiction of the receivership.[20] Where a suit to enforce a purchase money lien is brought after the goods have passed into the hands of a receiver, and such suit resulted in a judgment before the receiver's sale was perfected, the vendee at the receiver's sale took the goods subject to the lien of such judgment.[21]

(§ 4) *D. Actions by and against receivers.*[22]—The court which appoints a receiver holds and administers the estate through the receiver as its officer and must decide whether it will determine for itself all claims or allow them to be litigated in other courts.[23] Generally, where it is desired that a receiver shall bring suit, application is made to the court of his appointment setting out the grounds for suit, and upon proper showing the court passes an order giving direction to the receiver.[24] The authority of a receiver to bring suit may however be found in the order of appointment.[25] A receiver need not allege that he has obtained leave of court to bring an action.[26] When a receiver sues and jurisdiction to appoint him is denied, he

11. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587.

12. Wilson's Rev. & Ann. St. Okl. 1903, § 4648, requiring notice of sales of lands and tenements taken on execution, held not to apply to receiver's sales. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

13. This is so even where the plaintiff in the suit in which the receiver is appointed is the purchaser at the receiver's sale. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703. The general rule is that a purchase at a decretal sale made by a court of competent jurisdiction, though reversible, is valid unless void. Id.

14. Not in an action by the receiver against the bidder for the purchase price. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703. If the decree ordering the sale is so irregular that the purchaser will not get a good title, his remedy is to apply to the court directly to set aside the decree on that ground. Id.

15. It is sufficient for him to see that there was a suit in equity in which a receiver was appointed, that such receiver was authorized to sell and did sell under such authority, that the sale was confirmed by the court, and that the deed given by the receiver accurately described the property and interests thus sold. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

16. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

17. Wilson's Rev. & Ann. St. Okl. 1903, § 4443, construed, and held to relate solely to giving of receiver's bonds. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703. The purchaser at the sale would pay to the receiver and not the special master and so would be protected by the receiver's statutory bond. Id.

18. It is sufficient where the order is made, after a motion to set aside is refused, ordering the bidder to pay the money to the clerk of court and upon such payment the receiver to make, execute, and deliver a deed of the property to him. Threadgill v. Colcord, 16 Okl. 447, 85 P. 703.

19. Wage claimants lose their right of preference by failing to give notice prior to the sale. Mould v. Mould, 28 Pa. Super. Ct. 318.

20. Robyn v. Peckard [Ind. App.] 76 N. E. 642.

21. Cameron & Co. v. Jones [Tex. Civ. App.] 90 S. W. 1129.

22. See 6 C. L. 1263.

23. American Steel & Wire Co. v. Bearse [Mass.] 80 N. E. 623.

24. Where a receiver of a railroad company did not intervene in a suit against the company but after judgment, without leave of court, entered an appeal after filing an insufficient appeal bond, the appeal was dismissed. Palmer v. Pittsburg, etc., R. Co. [Pa.] 64 A. 686.

25. Where the order gave the receiver full power over "all and singular the property choses in action, franchises and rights" of the corporation, and vested him with full power to demand and receive and take into his possession the same, it was proper for him to sue in the name of the corporation for profits made by its trustee and not accounted for, although his powers were interlocutory and he was appointed assignee or trustee to wind up the corporation. Bay State Gas Co. v. Rogers, 147 F. 557.

26. Allen v. Baxter, 42 Wash. 434, 85 P. 26.

must prove not only the appointment but also such procedure as will in law support jurisdiction.[27] Ordinarily the receiver of a corporation is the proper party to bring suit against offending officials.[28] In the absence of some conveyance or statute vesting the property of the debtor in the receiver, he cannot sue in courts of a foreign jurisdiction upon the order of the court which appointed him, to recover the property of the debtor.[29] A receiver may sue stockholders on their statutory liability in a forum other than that in which he was appointed, provided the corporation was a party to the receivership proceedings,[30] but an order in receivership proceedings will not bind stockholders not served with process or appearing, unless the corporation can be considered as representing them.[31] A receiver may bring a suit in his own name to collect assessments levied by the court.[32] The necessity for and the amount of an assessment on stockholders levied by the court after the appointment of a receiver cannot be attacked in a collateral proceeding.[33] An order changing the venue cannot be attacked in a collateral proceeding.[34] As a general rule a receiver cannot have a right of action not vested in the debtor whose assets and rights are placed in his hands by the order of the court.[35] Defenses available against the holder of a promissory note are available against a receiver appointed by the court to collect the note.[36] In New York a nonresident suing as receiver must give security for costs.[37] Where it is sought to bring an action against a receiver as such,

27. Suit by a trustee for creditors and policy holders of a mutual insurance company for an assessment. Swing v. St. Louis Refr. & Wooden Gutter Co. [Ark.] 93 S. W. 978.

28. Receiver represents both the corporation and creditors for the purpose of recovering from delinquent directors damages caused by their wrongdoing. Bowers v. Male, 186 N. Y. 28, 78 N. E. 577. A court of equity has jurisdiction of a suit by a receiver of an insolvent bank against directors of the corporation for losses caused by their fraud or breaches of trust in their management of the affairs of the bank. Emerson v. Gaither, 103 Md. 564, 64 A. 26. Liabilty of a corporate officer for money misapplied is a claim of the corporation on which its receiver may sue. Richardson v. Agnew [Wash.] 89 P. 404.

29. Covell v. Fowler, 144 F. 535. In a statement of claim in an action by a receiver in the court appointing him, the whole record need not be attached. Act of May 25, 1887, § 3 (P. L. 271), construed, and held that under it a statement of a claim by a receiver in the court which appointed him need not have annexed a copy of the record and proceedings as to his appointment, but that a mere reference to it is sufficient. Rathfon v. Locher [Pa.] 64 A. 790. The failure of a receiver to allege in his complaint that he was duly qualified and acting at the time of bringing the action and to allege in what case or court he was appointed cannot be taken advantage of by demurrer under the Wash. Code, but may be by a proper motion. Allen v. Baxter, 42 Wash. 434, 85 P. 26.

30. Stockholders of a bank are bound by proceedings of a court of another state which appointed a receiver, determined that the claims had been proved and that the bank was insolvent, and ordered the receiver to bring suits to enforce the statutory liability against stockholders, although they were not parties to the suit, it being sufficient that the bank was served with notice and appeared. Francis v. Hazlett [Mass.] 78 N. E. 405.

31. An order fixing the amount of an assessment upon stockholders held not to be binding in that the corporation was a stranger to any contract raised by the state constitution between its creditors and its shareholders. Converse v. Aetna Nat. Bank [Conn.] 64 A. 341. A Minn. Stat. of 1899, directing receivers of corporations other than manufacturing or mechanical to enforce the double liability of stockholders and providing for an assessment on the stockholders to provide for the payment of the corporation debts, receivership expenses, and the estimated expenses of the receiver for future actions to collect the assessment, was held unconstitutional on the ground that it impaired the obligation of the defendant's contract by adding the burden of paying the cost of actions to collect the assessment. Id.

32. Backenstoe v. Kline, 31 Pa. Super. Ct. 268.

33. Action by receiver to recover the assessment from a policy holder. International Sav. & Tr. Co. v. Kleber, 29 Pa. Super. Ct. 200; Backenstoe v. Kline, 31 Pa. Super. Ct. 268.

34. Action by receiver of mutual insurance company against a member thereof to collect an assessment. Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704. Members of a corporation numbering nine thousand are not entitled to notice of an application for change of venue of receivership proceedings. Id.

35. Marion Trust Co. v. Blish [Ind. App.] 79 N. E. 415.

36. Hutchins v. Langley, 27 App. D. C. 234.

37. Code Civ. Proc. §§ 3268 and 3271, construed, and held to apply to receivers. Myers v. Stephens, 102 N. Y. S. 929.

permission of the court appointing must be obtained.[38] Such permission is a prerequisite to the right to sue such receiver,[39] either within the jurisdiction of his appointment,[40] or in any other forum.[41] The failure to obtain leave of the court appointing to sue a receiver is not fatal, however, since it may be waived by the receiver.[42] The power to grant leave that a receiver may be made a party defendant in the forum of his appointment or elsewhere carries with it the authority to revoke such leave.[43] An allegation of leave by the court to sue a receiver is immaterial and no issue can be raised on it.[44] The general rule as to continuance and postponement apply.[45] Criminal actions against receivers are governed by statute.[46] A receiver of a corporation cannot deny the de facto status of the corporation.[47]

§ 5. *Accounting by receivers.*[48]—The rendering of accounts or statements is regulated by statute in some states.[49] Due notice of the filing of accounts by receivers must be given.[50] Claims set out in a receiver's account if opposed, must be proved with legal certainty,[51] but a receiver has the burden of justifying and vouching his accounts so far, at least, as they are called in question by exceptions.[52] Even

38. Kemp v. San Antonio Catering Co., 118 Mo. App. 134, 93 S. W. 342. Act of Congress of March 3, 1887, amended by Act of 1888, providing that a Federal receiver may be sued in respect of any act or transaction of his in carrying on the business connected with property in his hands without previous leave of the court appointing and providing further that such suit shall be subject to the general equity jurisdiction of the appointing court, construed and held that although a judgment against a Federal receiver could be obtained in a state court, still it could not be enforced against property in the receiver's hands without leave of the Federal court. Davis Coal & Coke Co. v. Hess, 30 Pa. Super. Ct. 193.

39, 40. Ray v. Trice [Fla.] 42 So. 901.

41. An injunction made by a judge of one circuit in a cause pending in his circuit restraining and enjoining a receiver appointed by a judge of another circuit from applying to the judge whose receiver he was for possession of the property to which he had claims as such receiver is ill advised, irregular, and without authority. Ray v. Trice [Fla.] 42 So. 901.

42. Suit against directors, to which corporation was not a necessary party and no attempt was made to take any property or right of the corporation from the receivers, nor to prevent them from reaching any such property. American Steel & Wire Co. v. Bearse [Mass.] 80 N. E. 623.

43. Where after obtaining leave to sue a receiver out of the forum of his appointment a complainant obtained an injunction in the new forum restraining the receiver from applying to the court of appointment for possession of property, the court of appointment properly required the complainant to have the injunction dissolved on pain of revocation of the order allowing him to sue the receiver. Ray v. Trice [Fla.] 42 So. 901.

44. Action for goods alleged to have been sold receiver. Hutchinson v. Bien, 46 Misc. 302, 93 N. Y. S. 189.

45 The discretion of the court was not abused where a continuance in order to take depositions of absent witnesses was refused, when it did not appear that the presence of two could not have been obtained and where the effect of their testimony would have been merely to contradict a decree annuling a fraudulent sale and where the testimony of a third witness would not show a good defense. Fields v. U. S., 27 App. D. C. 433.

46. D. C. Code, § 841 (30 Stat. at L. 1326, p. 854), defining embezzlement by a receiver as fraudulent conversion and appropriation to his own use of property which "may come" into his possession, construed to include property which came into his hands prior to the passage of the act but embezzled thereafter. Fields v. U. S., 27 App. D. C. 433. Ownership by the debtor is sufficiently shown where it appears that the funds were proceeds of real estate of the debtor which passed into the possession of the receiver by virtue of his appointment. Id.

47. Proof was necessary under allegations of an indictment against a receiver accused of embezzling money of a corporation held by him by order of court. Fields v. U. S., 27 App. D. C. 433.

48. See 6 C. L. 1265.

49. Act No. 159 of 1898, § 9, p. 315, requiring quarterly statements of receivers, is for the purpose of showing accurately the condition of the business at the end of every three months for the information of the court and parties in interest. In re Receivership of Dugdamonia Shingle & Lumber Co. [La.] 42 So. 789.

50. Publication is required by statute in Louisiana. In re Receivership of Dugdamonia Shingle & Lumber Co. [La.] 42 So. 789. Where a motion for passing the accounts of a receiver in an action to dissolve a domestic corporation is made in a county other than that in which the action is pending, but due notice has been given to all interested parties and no objection to the motion is raised, it will not be vacated later, the court having had jurisdiction. People v. Anglo-American Sav. & Loan Ass'n, 101 N. Y. S. 270.

51. Documents in record in another case against the insolvent company are inadmissible as evidence in the trial of oppositions to the account. Zeigler v. Interior Decorating Co., 116 La. 752, 41 So. 59.

52. Gutterson v. Leabanon I. & S. Co., 151 F. 72.

in the absence of objections by an interested party, a court should closely scrutinize the accounts of a receiver before approving them.[53] An order for accounting and distribution by a receiver pendente lite is proper where the action has been finally determined between the plaintiff and the only parties in interest.[54] Where a receiver to collect rents pendente lite was also receiver for the same purpose in prior action, upon the voluntary discontinuance of the later action the court could only vacate the order appointing the receiver in that action and leave the parties to apply for an accounting and distribution by the receiver in the former action.[55] Upon a final accounting the receiver may be ordered to turn over the property to the person entitled to it subject to all contracts and liabilities then incumbent upon the receiver.[56] The court may in its discretion investigate and determine the correctness of all the accounts of a receiver when the final report is filed.[57]

§ 6. *Compensation of receivers.*[58]—A receiver's compensation and by whom it shall be paid are matters to be determined by the appointing court alone.[59] An order allowing compensation to a receiver requires notice to parties interested and a hearing at which they may be heard.[60] The compensation of a receiver should be taxed as part of the costs,[61] and as a general rule should be paid out of the funds in his hands.[62] A receiver may waive his right to compensation.[63] The question of forfeiture of commissions and charges of a receiver under a criminal statute is for the determination of the court appointing at the hearing on the final account.[64] If the receiver be improperly appointed the party procuring the appointment is liable for his compensation.[65] A final order allowing compensation to a receiver is appealable.[66] The owner of property may except to and appeal from a

53. It is improper to approve a report without vouchers for expenditures and without investigation into the necessity for them. Standish v. Musgrove, 223 Ill. 500, 79 N. E. 161.

54. The pendency of a counterclaim by a defendant who had no interest will not prevent the issuing of such an order. Katz v. Tobias, 99 N. Y. S. 613.

55. Horn v. Horn, 100 N. Y. S. 790.

56. John Kauffman Brewing Co. v. Betz, 8 Ohio C. C. (N. S.) 64. Where a receiver turns over to the company owning it the plant and assets in his hands, upon the condition that all contracts and liabilities incurred by or incumbent upon him as receiver shall be assumed by the company, a suit against him as receiver for damages for personal injuries is included therein, and the obligation thus assumed for the benefit of others is enforceable by a third person coming within its provision. Id.

57. Notwithstanding the fact that a partial report had been previously approved. Standish v. Musgrove, 223 Ill. 500, 79 N. E. 161.

58. See 6 C. L. 1265.

59. A contract made by a receiver with the party who is also the purchaser at a sale by the receiver, under which the latter is liable for the payment of the receiver's compensation at a stated amount or at an amount to be later determined, is contrary to public policy and void unless authorized or approved by the court appointing the receiver. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172. Compensation was refused where a receiver without authority so to do managed the debtor's property and accumulated a fund. Campau v. Detroit Driving Club, 144 Mich. 80, 13 Det. Leg. N. 200, 107 N. W. 1063.

60. "Nothing is better settled than that the allowance to a receiver by way of compensation for his services is not subject to the arbitrary determination of the court but should be made upon a hearing at which the parties interested have an opportunity to contest the claim." The order here was made by the court of its own motion without application by the receiver. Ruggles v. Patton [C. C. A.] 143 F. 312.

61. State v. People's U. S. Bank, 197 Mo. 605, 95 S. W. 867.

62. State v. People's U. S. Bank, 197 Mo. 605, 95 S. W. 867. Nor out of a trust fund for debenture holders not collected by the receiver and as to which he had no necessary duties to perform. Girard Trust Co. v. McKinley-Lanning Loan & Trust Co., 143 F. 353.

63. Hall v. Stulb, 126 Ga. 521, 55 S. E. 172.

64. D. C. Code, § 841 (30 Stat. at L. 1326, p. 854), declaring a forfeiture of commissions and charges in the case of an embezzlement by a receiver, construed and held not to empower the court having jurisdiction of the offense to impose it as part of the punishment. Fields v. U. S., 27 App. D. C. 433.

65. Harrington v. Union Oil Co., 144 F. 235.

66. "The test of the finality of a decree affecting either the conduct or the compensation of a receiver is not found in the mere fact as to whether the receivership was thereafter continued but in the nature and character of the order itself." Ruggles v. Patton [C. C. A.] 143 F. 312. An order which authorizes a receiver to pay himself a specific sum out of funds in his hands for past services withdraws that amount of money absolutely from the custody of the court and

judgment awarding a retiring receiver a portion of the fund and directing his successor to pay the same,[67] and on such appeal the receiver's successor is a necessary party.[68] In New York, the people, represented by the attorney general and the receiver and his attorney, being the only parties to a reference fixing the compensation of the receiver, the special term cannot reduce the amount so fixed.[69]

§ 7. *Liabilities and actions on receivership bonds.*[70]—Receivers are trustees and not liable individually unless they are shown to have been in positive fault.[71] Where funds are lost by negligent failure to collect, a decree may be entered charging the receiver personally or leave may be given to sue on his bond.[72] Creditors who furnish goods to a receiver for an amount in excess of the indebtedness which the receiver was authorized to contract may bring actions on the receiver's bond.[73] Where liability upon a temporary receiver's bond is unmistakably conditioned upon a joint receivership, upon the retirement of one of the receivers neither he nor the surety is liable for the defaults of the other, who was appointed permanent receiver, after the joint receivership had ceased to exist.[74] A receiver of funds which he is ordered by the court to invest is liable for interest thereon.[75] A surety is not liable for acts of the receiver which were not and could not have been in the time of its execution.[76] Decree in court having jurisdiction of receivership ordering payment is conclusive on sureties.[77] The measure of damages on the bond is to be determined in an independent suit.[78] An order confirming a receiver's report and ordering the

is a final order. Id. Unless the amount is so unquestionably inadequate or so manifestly excessive that it is clear that it was not the result of deliberative judgment, the compensation allowed a receiver will not be disturbed on appeal. Where a receiver acted as such for seven days and $1,000,000 passed through hands, an allowance of $2,500 for personal services, $500 for attorney's fees, and $150 for legal advice, is not so inadequate as to justify reversal. State v. People's U. S. Bank, 197 Mo. 605, 95 S. W. 867.

67. This was a vacation appeal. Polk v. Johnson [Ind.] 78 N. E. 652.

68. By statute authorizing appeals, all persons named in or affected by a judgment from which a vacation appeal is taken must be made parties. Polk v. Johnson [Ind.] 78 N. E. 652, overruling [Ind.] 76 N. E. 634.

69. People v. Federal Bank, 114 App. Div. 374, 100 N. Y. S. 44.

70. See 6 C. L. 1266. Liability of **railroad receivers,** see Railroads, 8 C. L. 1590. **Validity of bonds,** see ante, § 2 A.

71. Gutterson v. Lebanon I. & S. Co., 151 F. 72. Receiver are sui juris and personally responsible for any wrong ex contractu or ex delicto which they may have committed. In re Erie Lumber Co., 150 F. 817. Receivers are personally liable where they diverted funds to the payment of matters not directly concerned with the receivership, the payments being made by order of court but ex parte upon the representations, which were untrue, that such payments could be made out of current funds without detriment to the business. Gutterson v. Lebanon I. & S. Co., 151 F. 72. Where receivers know that they are losing money, they are bound not to prefer creditors but to make pro rata payments from available assets, and for such preferences they are personally liable to the other creditors. Id. Receivers who grossly mismanaged business, failing to keep cost sheets to show the condition of the business and running up large bills which they could not pay, held personally liable. Id.

72. United States Blowpipe Co. v. Spencer [W. Va.] 56 S. E. 345.

73. In re Erie Lumber Co., 150 F. 817.

74. The bond was conditioned that "if they [the principals] shall well and truly perform their duties under such appointment and in the event that they shall hereafter * * * be affirmed or appointed in said action either as temporary or permanent receivers * * * their duties as such receiver then this obligation shall be void, otherwise in full force and effect." State v. Spittler [Conn.] 65 A. 949. The unspecified "conduct" of the retiring receiver in applying for the application of a permanent receiver and his failure to require a new bond upon the apointment, did not estop him from charging liability for the devastavit of the other joint receiver while acting as sole permanent receiver. Id.

75. Code of 1887 [Va. Code 1904, p. 1811], § 3409. Under § 3413, he is liable for simple interest only and not compound. Roller v. Paul [Va.] 55 S. E. 558.

76. The liability on a receiver's bond providing for faithful performance of "the trust reposed in him by said order, or that may be reposed in him by any future order or decree in the premises", has relation necessarily only to duties falling within the scope of the order. Preston v. American Surety Co. [Md.] 64 A. 292.

77. Coe v. Patterson, 102 N. Y. S. 472.

78. **Measure of damages.** The rental value of premises held by receiver and not the amount of rents collected by him is the proper measure of damages. Joslin v. Williams [Neb.] 107 N. W. 837. Fees of attorney who procured the vacation of the order appointing the receiver is an element of damage to be considered in the measure of damages. Id.

distribution of funds in his hands does amount to an adjudication of the question of damages between the parties arising from a wrongful appointment.[79]

§ 8. *Foreign and ancillary receivers.*[80]

RECEIVING STOLEN GOODS.

§ 1. Nature and Elements; Other Crimes Distinguished (1696).

§ 2. Indictment and Prosecution (1696). Evidence (1696). Instructions (1696). Verdict (1697).

§ 1. *Nature and elements; other crimes distinguished.*[81]—The offense at common law consisted in knowingly receiving stolen goods with felonious intent,[82] it being essential that the goods be actually stolen,[83] and that the receiver knows them to have been stolen,[84] but he need not know where.[85] Though one section of a statute deals with reception of a certain kind of property and omits one species thereof, the omitted species is not thereby excluded from another section relating to reception of stolen property generally.[86]

§ 2. *Indictment and prosecution. Indictment.*[87]—An indictment under a statute which denounces the offense by name must charge it in common-law form.[88] The indictment need not negative consent of the owner to the reception unless the statute makes want of such consent an element,[89] the words "unlawfully and feloniously" sufficiently charging the criminal intent.[90] Under the rule that when crimes are denounced disjunctively but charged conjunctively, the prosecution is not put to the proof of more than one of them, proof alone of aiding in concealing stolen property will support a conviction under an indictment charging buying and receiving also.[91] Evidence that the property belonged to an individual is fatally variant from an indictment laying property in a corporation.[92]

Evidence.[93]—The rule that the recent possession of stolen property casts on the defendant the onus of explaining his possession applies in prosecutions for receiving stolen property.[94] Evidence of the possession of like property by defendant at or near the same time is inadmissible unless it is also shown to have been stolen,[95] but it need not be shown that it was received by defendant with knowledge thereof,[96] nor that it was stolen by the same person.[97] The prosecution must prove all the elements of larceny in the original taking of the goods,[98] and any evidence admissible on a trial for larceny is competent to that end.[99]

Instructions.[1]—Pursuant to the general rule there is no error in refusing requested instructions which are covered in substance by the instructions given,[2] nor those which present immaterial matters.[3]

79. Petitioner had not participated in the accounting nor derived any advantage from it. Joslin v. Williams [Neb.] 107 N. W. 837.

80. See 6 C. L. 1266. Suits by and against foreign and ancillary receivers, see ante, § 4 D.

81. See 6 C. L. 1267.

82. State v. Banister [Vt.] 65 A. 586.

83. **It is not an attempt** to commit the offense to receive property under mistaken belief that it is stolen. People v. Jaffe, 185, N. W. 497, 78 N. E. 169, rvg. 112 App. Div. 516, 98 N. Y. S. 486.

84. **Verdict** held insufficient to sustain a conviction because not finding scienter. Harris v. State [Fla.] 43 So. 311.

85. Moss v. State [Ala.] 39 So. 830.

86. Reception of stolen hogs in an offense under Kirby's Dig, § 1830, though not under § 1829, relating to reception of stolen animals. Thrash v. State [Ark.] 96 S. W. 360.

87. See 6 C. L. 1267.

88. Indictment held sufficient under Vt. St. 4947. State v. Banister [Vt.] 65 A. 586.

89, 90. Bise v. U. S. [C. C. A.] 144 F. 374.

91. Ter. v. Neatherlin [N. M.] 85 P. 1044.

92. Aldrich v. People, 225 Ill. 610, 80 N. E. 320.

93. See 6 C. L. 1267.

94. Boyd v. State [Ala.] 43 So. 204. Failure to make a reasonable explanation of the recent possession of stolen property raises a presumption of guilt which will support a conviction. Id.

95, 96, 97. Gassenheimer v. U. S., 26 App. D. C. 432.

98. Boyd v. State [Ala.] 43 So. 204.

99. On an issue whether the alleged stolen property was taken from a corporation with its consent, evidence tending to show the authority committed by it to its agents, in the premises is admissible. Boyd v. State [Ala.] 43 So. 204.

1. See 6 C. L. 1268.

2. Good faith. Commonwealth v. Phelps [Mass.] 78 N. E. 741. Failure of defendant to acquire knowledge. Id.

3. Instruction as to defendant not being

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Where the defense was that the goods had been left with defendant for storage by a stranger without knowledge of defendant that they were stolen, a charge so hypothesizing, to which was added a charge on circumstantial evidence, sufficiently presented his defensive theory.[4]

Verdict.—A verdict finding reception but not guilty knowledge is a nullity.[5] An unauthorized assessment of punishment may be treated as surplusage.[6]

RECITALS, see latest topical index.

RECOGNIZANCES.[7]

RECORDARI; RECORDING DEEDS AND MORTGAGES, see latest topical index.

RECORDS AND FILES.

§ 1. What Are Records (1697).
§ 2. Keeping and Custody (1698).
§ 3. Publicity and Access (1698).
§ 4. Proof of Records and Use in Evidence (1701).
§ 5. Crimes Relating to Records (1702).

This topic treats only of the nature and characteristics of public records, questions as to the registration of private instruments[8] and the doctrine of notice[9] being treated elsewhere, as are also proof and restoration of lost instruments and records,[10] judgment records,[11] and records on appellate review.[12]

§ 1. *What are records.*[13]—The word "record" in a general sense includes not merely technical records or memorials but all documents and papers on file in a public office,[14] and it will be construed in this broad sense when used in a statute designed to protect public records and files from destruction, as distinguished from the use of the word in describing a record which shall conclude rights.[15] And where by law or regulation a document is required to be filed and kept in a public office, it is when so filed a public record so far as the law of evidence is concerned,[16]

member of firm receiving goods, when not expressly directed to absence of motive. Gallaher v. State [Ark.] 95 S. W. 463.

4. Jaramillo v. State [Tex. Cr. App.] 100 S. W. 921.

5. Harris v. State [Fla.] 43 So. 311.

6. Jury authorized to either assess fine, or leave penalty to court, awarded imprisonment. Moss v. State [Ala.] 39 So. 830.

7. No cases have been found for this subject since the last article. See 6 C. L. 1268.

8. See Notice and Records of Title, 6 C. L. 814; Chattel Mortgages, 7 C. L. 634; Sales, 6 C. L. 1320; Wills, 6 C. L. 1880.

9. See Notice and Records of Title, 6 C. L. 814.

10. See Restoring Instruments and Records, 6 C. L. 1310.

11. See Judgments, 6 C. L. 214; Foreign Judgments, 7 C. L. 1734.

12. See Appeal and Review, 7 C. L. 128; Certiorari, 7 C. L. 606; Indictment and Prosecution, 8 C. L. 189.

13. See 6 C. L. 1269.

14. McInerney v. U. S. [C. C. A.] 143 F. 729.

15. Words "record," "proper," and "document," used in this general sense in Rev. St. § 5403, U. S. Comp. St. 1901, p. 3656, relating to offense of stealing or destroying public "records." McInerney v. U. S. [C. C. A.] 143 F. 729. Original application for naturalization and papers relating thereto held a "record" within such statute. Id. Words "any record" as used in this statute are broad enough to include any part, even one line, of a record. Id.

16. Claims and vouchers required to be filed by another by Vt. St. 305. Clement v. Graham, 78 Vt. 290, 63 A. 146. The word "bill" as used in this statute includes all claims and accounts against the state which by law may be presented to the auditor for allowance. Id. Letter on file in office of commissioner of general land office held part of records of such office and provable by certified copy. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 S. W. 614. Notice from commissioner of land office to state treasurer of cancellation of certain lease held not part of records of latter's office so as to be provable by copy, but copy of such notice filed in office of former was part of records if such former office and provable by copy. Id. Under 2 Gam-

and it may be a public record for this purpose even though there is no requirement that it be kept,[17] and though it is not made by an official person.[18] But the mere fact that records are authorized by law and are kept by public officers does not make them public records and as such open to inspection where they are kept for private purposes.[19] Minute memoranda of court proceedings will be considered as the record until they are extended on the record proper.[20]

§ 2. *Keeping and custody.*[21]—In some states it is proper practice for parties or counsel to prepare entries for the court to sign.[22]

A court has inherent power to amend its records in accordance with the facts,[23] and such amendment may be made at any time,[24] upon the court's own motion,[25] and without notice to the parties affected;[26] but where the record itself does not furnish the data necessary for the amendment, notice and an opportunity to be heard should be given to the parties.[27] Whether an amendment will be allowed is within the sound discretion of the court.[28]

§ 3. *Publicity and access.*[29]—The right to inspect public records is a common-law right,[30] sometimes recognized by statute,[31] and exists in favor of all who have a sufficient interest therein,[32] when it will not be detrimental to the interests of the state,[33] but mere inconvenience to the public officers is no reason for denying the right.[34] Even in the absence of statutory authority, therefore, anyone has a right to inspect and copy land title records free of charge, either for himself or as agent for another, so far as they relate to current transactions;[35] but he has no right to inspect and copy such records for the purpose of compiling books to be used in a business enterprise of furnishing abstracts and information to persons thereafter

mel's Laws, p. 635, a certificate of the clerk of a district court that a claimant had recovered a judgment establishing a land certificate, is when filed in the land office a part of the records of such office, and a certified copy thereof was admissible to prove the facts recited therein though no copy of the judgment was ever filed in the land office Kirby v. Hayden [Tex. Civ. App.] 99 S. W. 746.

17. Report of alien passengers made to inspection officers as required by Act March 3, 1891, c. 551, § 8 (26 Stat. 1085 [U. S. Comp. St. 1901, p. 1298]), held admissible as a public record. McInerney v. U. S. [C. C. A.] 143 F. 729.

18. Ship's manifest required by law to be kept by ship's officer. McInerney v. U. S. [C. C. A.] 143 F. 729.

19. Land title records authorized by Rev. St. c. 115, § 25, to be kept by the county recorder, are not kept in a strictly official capacity but for purpose of enabling county to deal in abstracts, etc., as a private business. Davis v. Abstract Const. Co., 121 Ill. App. 121. Land title records in Nevada are not such public records as are subject to inspection regardless of the personal pecuniary interest of the applicant as are such records as those relating to elections, revenues, etc. State v. Grimes [Nev.] 84 P. 1061.

20. Warburton v. Gourse [Mass.] 79 N. E. 270.

21. See 6 C. L. 1270.

22. Stephens v. City Council of Marion [Iowa] 107 N. W. 614.

23. Petition by sheriff asking to amend his return of sale of equity of redemption. In re Tolman, 101 Me. 559, 64 A. 952. District court has power to amend its judgment. Christisen v. Bartlett [Kan.] 85 P. 594.

24. After expiration of term. Christisen v. Barlett [Kan.] 85 P. 594.

25. Christisen v. Bartlett Kan.] 85 P. 594.

29. Notice is not jurisdictional and its absence bears only on question as to whether court has abused its discretion. Christisen v. Bartlett [Kan.] 85 P. 594. Gen. St. 1901, § 5055, providing that mistakes or omissions of clerk or irregularities in obtaining judgment shall be corrected by motion upon reasonable notice, etc., applies only to vacation or modification of judgments or orders actually made, and has no reference to mistakes made in registering them; but even if it did relate to errors of clerk in recording judgments or orders, it would not be exclusive of court's intrinsic power to correct its records. Id.

27, 28. In re Tolman, 101 Me. 559, 64 A. 952.

29. See 6 C. L. 1270.

30. Clement v. Graham, 78 Vt. 290, 63 A. 146.

31. Right to inspect claims and vouchers required to be filed by state auditor by Vt. St. 305, recognized by Laws 1904, p. 27, No. 24, making the auditor a certifying officer with regard to such claims, etc. Clement v. Graham, 78 Vt. 290, 63 A. 146.

32. Taxpayers have right to examine claims and vouchers filed by state auditor pursuant to Vt. St. 305 for purpose of ascertaining whether the auditor has been guilty of fraud or mismanagement. Clement v. Graham, 78 Vt. 290, 63 A. 146.

33, 34. Clement v. Graham, 78 Vt. 290, 63 A. 146.

35. State v. Grimes [Nev.] 84 P. 1061.

desiring the same,[36] and such right is not conferred by a statute giving the right to

36. State v. Grimes [Nev.] 84 P. 1061; Davis v. Abstract Const. Co., 121 Ill. App. 121.

Note: The decisions on the extent of the right to examine land title records and on similar questions rest largely on statutes not in unformity with each other and there is a lack of harmony in the decisions of the different states, and even in the same states. In Webber v. Townley, 43 Mich. 534, 5 N. W. 971, 38 Am. Rep. 213, it was held that there was no common-law right to make copies or abstracts for merely speculative purposes, and that no such right was conferred by Pub. Acts 1875, p. 51, No. 54, giving general right of examination of records to "all persons having occasion to examine them for any lawful purpose." This decision was overruled by the language of Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, but the real holding in this case was only salesbooks kept by receiver of taxes and by him turned over to city treasurer were open to inspection by one employed by property owner to make examination as to tax sales with reference to particular property. In Day v. Button, 96 Mich. 600, 56 N. W. 3, it was held that Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, established the right to examine records for purpose of making abstract books. In Burton v. Reynolds, 110 Mich. 354, 68 N. W. 217, mandamus was refused upon a petition by an abstracter seeking to examine file in action between private persons, where the petition negatived constructive notice of the action and did not assert actual notice nor state that the relief sought was necessary to the interest of his employer, though it did state that it was necessary to completion of petitioner's work. In Brown v. County Treasurer, 54 Mich. 132, 19 N. W. 778, 52 Am. Rep. 800, a citizen desiring to prosecute for infraction of liquor law, was refused inspection of liquor bonds filed with county treasurer. In Lurn v. McCarty, 39 N. J. Law, 287, a leading case cited to support Burton v. Tuite, 78 Mich. 363, 44 N. W. 282, 7 L. R. A. 73, the court overruled Flemming v. Clerk of Hudson County, 30 N. J. Law, 280, and held that county clerks were not entitled to fees for searches of land, title, records, not made by them, but no right of an abstracter for speculative purposes was involved. In Ferry v. Williams, 41 N. J. Law, 332, 32 Am. Rep. 219, it was held that every one has right to inspect public documents provided he has a proper interest therein, and the English cases were reviewed. In West Jersey Title & Guaranty Co. v. Barber, 49 N. J. Eq. 474, 24 A. 381, it was held that an abstract company has the same right as individuals to search records when employed to examine title of particular property, though it contemplates guaranteeing the title. In Barber v. West Jersey Title & Guaranty Co., 53 N. J. Eq. 158, 32 A. 222, it was decided that an abstract company had right to examine titles for purpose of guaranteeing them but not for purpose of setting up business in competition with that of the clerk. In Fidelity Trust Co. v. Clerk, 65 N. J. Law, 495, 47 A. 451, the court sustained the refusal of the clerk to permit an examination of certain indices of the supreme court relating to judgments which were a lien upon lands. In Newton v. Fisher, 98 N. C. 23, 3 S. E. 823, it was held that no one had the right to make copies and abstracts of records for speculative purposes. In Randolph v. State, 82 Ala. 527, 2 So. 714, 60 Am. Rep. 761, following Brewer v. Watson, 71 Ala. 299, 46 Am. Rep. 318, and Phelan v. State, 76 Ala. 49, it was held that Code 1876, § 698, providing that probate records shall be open to inspection "to all persons", etc., did not give the right to make copies for future use. In State v. King, 154 Ind. 621, 57 N. E. 535, it was held that a citizen and taxpayer had the right to examine county records in order to ascertain condition of fiscal condition of county affairs. In Buch v. Collins, 51 Ga. 393, 21 Am. Rep. 236, the right to make an abstract of public records for publication was denied under Code 1873, § 14, giving right of public inspection to "all persons", and § 3695 providing for clerk fees for making abstracts. In Clay v. Ballard, 87 Va. 787, 13 S. E. 262, the right of a citizen to take copies of registration books was upheld under Code 1897, § 84 (Code 1904, p. 51), providing that such books shall be open at all times to public inspection, the case turning upon the construction of the statute. In Cormack v. Wolcott, 37 Kan. 391, 15 P. 245, and Boylan v. Warren, 39 Kan. 304, 18 P. 174, 7 Am. St. Rep. 551, it was held that the right to copy county records for future use or speculative purposes was not conferred by a statute giving right of inspection of "all books and papers," etc., to any person, and a similar decision was made upon a similar statute in Bean v. People, 7 Colo. 200, 2 P. 709, and later this rule was changed by statute in Colorado. Stockman v. Brooks, 17 Colo, 248, 29 P. 746. Under Comp. St. Neb. 1903, c. 74, providing that all citizens and all others interested have right to examine public records free of charge, it was held that an attorney in fact of party to suit had right to examine entries relating to judgment of justice of peace and had such interest as to entitle him to a transcript. By statute in New York, abstract companies are entitled to free access to and to copy records. People v. Reilly, 38 Hun [N. Y.] 431; People v. Richards, 99 N. Y. 620, 1 N. E. 258. Under Wis. Rev. St. 700, providing that the register of deeds shall open to examination of "any person all books and papers," etc., "and permit any person so examining to take copies," etc., it was held that this right was not limited to lands in which such persons or his clients were pecuniarily interested and that any one might examine such books and make abstracts. Under Gen. St. Minn. 1878, c. 8, § 179, as amended by Laws 1885, p. 108, c. 116, abstract companies are held to have right to examine and copy records. State v. Rachac, 37 Minn. 373, 35 N. W. 7. In Vermont under a statute providing that books and records of justices of peace shall be open "at all times" to inspection of "any person interested," it was held that a citizen was not entitled to see complaint and warrant in a criminal case. Perkins v. Cummings, 66 Vt. 486, 29 A. 675. By statute in Connecticut coroner's records are open to inspection by accused and by any person interested. Daly v. Dimock, 55 Conn. 579, 12 A. 405. In State v. Hobiitzelle, 85 Mo. 624,

inspect such records and to take memoranda and abstracts therefrom.[37] Private records, though kept by a public officer pursuant to law, are not open to public inspection either at common law[38] or under a statute authorizing inspection of "records."[39] Statutory provisions for official examination of public records are not necessarily exclusive of the common-law right.[40]

the question whether poll books were open to inspection by one actuated only by curiosity was queried, but right was upheld in favor of one claiming to have been elected to office. In Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927, it was held that the person desiring inspection must have interest therein. In State v. Reed, 36 Wash. 638, 79 P. 306, it was held that a general demand by a citizen for inspection of "any and all books and public records" in county treasurer's office would not enforced by mandamus. In Marsh v. Sanders, 110 La. 726, 34 So. 752, general right to inspect and copy poll tax books was upheld. In Pennsylvania it has been held that in absence of statutory authority public records were open to inspection only to those having definite interest therein. Owens v. Woolridge, 8 Pa. Dist. R. 305. In Herbert v. Ashburner, 1 Wilson, 297, court said that the books of the sessions of Kendale were public and that everyone had right to see them, and in Rex v. Chapman, 1 Wilson, 305, that the books of the poor's rates were open to all parishioners, the rulings in these cases being evidently based on right of rights of members of body politic to see books of corporation. In King v. Shelley, 3 Term R. 142 and Talbot v. Villebeys, M. 23 Geo. 11, B. R. it was said that one man had no right to look into another's deeds where he has no interests therein. In King v. Babb, 3 Term R. 580, Lord Kenyon said an unlimited inspection of books of municipal corporation would not be granted to a stranger. Inspection of criminal records was refused in King v. Purnell and King v. Canelius, 1 Black, 27; 1 Wilson, 239. In Stoan Filter Co. v. El Paso Co., 117 F. 504, users of machine claimed to be an infringement of a patent were held to have the right to inspect court records in suit between other parties involving validity of the patent. In English law tenants of a manor could always inspect manor records in order to ascertain their titles. Rex v. Shelley, 3 Term R. 141. So also where authority of a mayor was in question, citizens could inspect records of borough to ascertain the facts. Rex v. Babb, 3 Term R. 579. Under Act Aug. 12, 1848, c. 166 (9 Stat. 292), giving right to inspect circuit and district court records to "any person * * * without any fee or charge therefor, and Act Aug. 1, 1888, c. 729, 25 Stat. 357, providing that indices and records of judgments" shall at all times be open to the inspection and examination of the public, it is held that all citizens have the right to examine such records free of charge, notwithstanding Act Feb. 26, 1853, c. 80 (10 Stat. 163,) allowing fees to clerk for searching records. It is also held that a title insurance company has right to examine such records free of charge in connection with current business. Title & Trust Co. v. Bell, 105 F. 548, afd. Commonwealth Title & Trust Co. v. Bell, 110 F. 828, afd. 189 U. S. 131, 47 Law. Ed. 741, 23 Sup. Ct. 569, though the act of 1888 did not retain the words "without any fees or charges therefor." Cases such as State v. Donovan, 10 N. D. 209, 86 N. W. 709; State v. Cummins, 76 Iowa, 136, 40 N. W. 124, and Johnson v. Wakulla Co., 28 Fla. 731, 9 So. 690, relating to records as evidence are not pertinent to question as to right of abstracting company to examine records for purpose of making abstracts, nor are cases, such as Park v. Lathrop, 142 Mass. 35, 6 N. E. 559 and Banks & Bros. v. West Pub. Co., 27 F. 50, upholding free inspection of legislative enactments, in print on such question. Records of courts concerning private affairs the publication of which would only satiate thirst for scandal constitute a class as to which there are often stronger reasons for denying inspection, than in case of land title records. Burton v. Reynolds, 110 Mich. 354, 68 N. W. 217; In re Caswell's Request, 18 R. I. 835, 29 A. 259, 27 L. R. A. 82, 49 Am. St. Rep. 814. See, also, Colman v. Ore, 71 Cal. 43, 11 P. 814. So also a member of a municipal corporation may have a general interest sufficient to entitle him to inspection of corporate records. People v. Cornell, 47 Barb. [N. Y.] 329, reversing 32 How. Prac. [N. J.] 149. Under statutes relating to clerk's fees and at common law, persons are generally allowed to inspect and copy records relating to their own holdings free of charge, except in Maryland. Belt. v. Abstract Co., 73 Md. 289, 20 A. 982, 10 L. R. A. 212. In England judgments were not a lien upon land, and the seller of realty was required to furnish an abstract which relieved the purchaser of the necessity of examining the records, while the reverse is true in this country. Brown v. Bellows, 4 Pick. [Mass.] 193; Espy v. Anderson, 14 Pa. 312; Easton v. Montgomery, 90 Cal. 313, 27 P. 280, 25 Am. St. Rep. 123; Dwight v. Cutler, 3 Mich. 566, 64 Am. Dec. 105. In this country the right of inspection is necessary in order to enable a purchaser of land to protect himself. Grellett v. Hellshorn, 4 Nev. 526; Wilson v. Wilson, 23 Nev. 273, 45 P. 1009; McCabe v. Gray, 20 Colo. 516. The result of the cases, therefore, is that persons having an interest, either for themselves or as agents for others, in the examination of land title records in connection with current transactions have the right to make such examination and to take copies, etc., at all reasonable hours, but that in the absence of clear and specific statutory authority such right does not exist when the object is to prepare a set of books or abstracts for future use or for speculative purposes—See State v. Grimes [Nev.] 84 P. 1061.

37. See Rev. St. c. 115, § 21, amending Act March 9, 1874. Davis v. Abstract Const. Co., 121 Ill. App. 121. Rev. St. c. 115, §§ 21, 25, authorizing public inspection of all records, indexes, abstracts and "other books", authorizes inspection of only such other books as are the same character as those enumrated. Id.

38. Land title records are only quasi public. Davis v. Abstract Const. Co., 121 Ill. App. 121; State v. Grimes [Nev.] 84 P. 1061.

39. Davis v. Abstract Const. Co., 121 Ill. App. 121.

Mandamus [41] is available to one asserting the right of inspection for the public benefit, though he has no personal pecuniary interest in the matter.[42] A bill to enforce the right of inspection need not allege how the defendant's duty to allow the inspection was created,[43] or that the records, required by law to be kept, exist,[44] or that they are public records.[45] It is doubtful whether a court has power to compel a party to a decree sustaining a patent to recall circulars sent out to customers stating the holding of the courts, or to further advise the recipients of the circulars that the decree has been appealed from and superseded by the adverse party, where the decision of the court does not appear to have been willfully perverted.[46] The question as to what are public records is treated elsewhere.[47]

§ 4. *Proof of records and use in evidence.*[48]—The court will take judicial notice of a law requiring certain records to be kept.[49] A public record may be proved by the record itself,[50] by certified copy,[51] or by examined and sworn copies.[51a] Where the certificate to a certified copy is ambiguous, it will be construed in such manner as to make the action of the recording officer in recording the original lawful.[52] A transcript properly certified at the time it is made and filed is not rendered inadmissible by a subsequent amendment to the statute relating to the certification of transcripts where the amendment expressly relates only to transcripts thereafter

40. Examination of state auditor's accounts provided for by U. S. 320, as amended by Laws 1904, p. 25, No. 21, held not exclusive of taxpayer's right to inspect claims and vouchers required to be filed by U. S. 305. Clement v. Graham, 78 Vt. 290, 63 A. 146.

41. See 4 C. L. 1256, note.

42. Mandamus by taxpayer to enforce right to inspect state auditor's accounts. Clement v. Graham, 78 Vt. 290, 63 A. 146.

Note: Applying this principle mandamus has been allowed at instance of citizens of city to compel compliance with railroad charter in matter of terminus of road. Union Pacific R. Co. v. Hall, 91 U. S. 343, 23 Law. Ed. 428. At instance of voter to compel allowance of inspection of registration books. Clay v. Ballard, 87 Va. 787, 13 S. E. 262. At instance of citizens of county to compel allowance of inspection of returns of election relating to bonding of county. Payne v. Staunton, 55 W. Va. 202, 46 S. E. 927. At instances of parishioner to compel allowance of copies of borough rates or assessments. Kink v. Justices of Leicester, 4 B. & C. 891. At instance of parishioner to compel allowance of inspection and copying of parish accounts. Rex v. Guardians, etc., of Great Faringdon, 9 B. & C. 41. Inspection of registration lists and poll books by defeated candidate. State v. Hoblitzelle, 85 Mo. 620. Inspection of registration lists and poll books by party committee, prior to election. State v. Williams, 96 Mo. 13, 8 S. W. 771. Inspection of records relating to liquor license by citizens. Ferry v. Williams, 41 N. J. Law, 332, 32 Am. Rep. 219. Inspection of city accounts by citizens and taxpayers. State v. Williams, 110 Tenn. 549, 75 S. W. 64 L. R. A. 418. Inspection of county records in office of county auditor. State v. King, 154 Ind. 621, 57 N. E. 535—See Clement v. Graham [Vt.] 63 A. 146.

43. Bill by taxpayer against state auditor. Clement v. Graham, 78 Vt. 290, 63 A. 146. An allegation that it is the defendant's duty to exhibit certain records upon request is an allegation of a mere conclusion and hence not traversable. Id.

44. Vt. St. 305, requires auditor to file and preserve vouchers for paid claims against the state. Clement v. Graham, 78 Vt. 290, 63 A. 146.

45. Clement v. Graham, 78 Vt. 290, 63 A. 146.

46. Victor Talking Mach. Co. v. American Graphophone Co., 145 F. 188.

47. See ante, § 1 What are Records.

48. See 6 C. L. 1271.

49. Vt. St. 305, requiring auditor to file and preserve vouchers of paid claim against the state. Clement v. Graham, 78 Vt. 290, 63 A. 146.

50. Record of same court trying case may be proved by production of record itself, whether on interlocutory or final hearing of such case. Sellers v. Page [Ga.] 56 S. E. 1011.

51. See Rev. St. 1895, arts. 2306, 2308. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 S. W. 614. A certificate to a transcript from the records of a court of ordinary signed by a certain person as ordinary of a certain county sufficiently authenticates the record when it appears affirmatively in the certificate that the ordinary had no clerk and was himself acting as clerk of his own court. See Civ. Code 1895, § 4250. Sellers v. Page [Ga.] 56 S. E. 1011.

51a. Sworn copy from Federal internal revenue records admissible to show that defendant charged with violation of prohibition law was engaged in liquor business where neither original nor certified copies of such records were obtainable. State v. Nippert [Kan.] 86 P. 478; State v. Schaeffer [Kan.] 86 P. 477.

52. Certificate reciting that the copy was a "true and correct copy of the original deed * * * ; that the same was presented for registration" on certain day, etc., held not to show that a copy of the deed was recorded and that the certified copy offered was a copy of a copy and hence inadmissible, since clerk would not have been authorized to register a copy. Williams v. Cessna [Tex. Civ. App.] 16 Tex. Ct. Rep. 162, 95 S. W. 1106.

made.[53] Records which are merely copies of other records are not admissible unless they are properly certified.[54] The admissibility of a paper of a public character is not dependent entirely upon its strict regularity.[55] Records of the Federal internal revenue department are available to a litigant only upon such terms as are fixed by or under the authority of the Federal government.[56] A transcript from such records is sufficient to make a prima facie case in actions against officers accountable for public moneys,[57] and the burden is cast upon the defendant to prove any credits which have not been allowed to him,[58] but the transcript is not conclusive of the government's claims.[59] Such a transcript will not be excluded merely because it contains items of credit and debit in regard to which it is not admissable,[60] or because it contains matter explanatory of the rejection of credits claimed by the defendant;[61] but it is not admissible to prove receipt by an officer of moneys that did not come into his hands through the ordinary channels of the department.[62] Court records, even though they are meager and in the form of minute entries, cannot be enlarged or diminished by parol evidence,[63] and if incorrect, they can be corrected only by an amendment allowed by the court or magistrate of whose judicial action it purports to be a record.[64] The question as to what are public records is treated elsewhere.[65]

§ 5. *Crimes relating to records.*[66]—Falsification of a record is sometimes made a crime regardless of the motive.[67] The fact that a record is incomplete or open to technical criticism is no defense to a prosecution for stealing or destroying it.[68] The question as to what is a "record" is treated elsewhere.[69]

REDEMPTION; RE-EXCHANGE, see latest topical index.

REFERENCE.

§ 1. Definitions and Distinctions, Master and Referee, Referee and Umpire or Arbitrator (1703).
§ 2. Occasion for Reference (1703).
§ 3. Time and Stage of Proceedings (1704).
§ 4. Motion and Order for Reference, and Stipulations or Consents on Voluntary Reference (1704).
§ 5. Selection and Qualifications of the Referee; His Oath and Induction Into Office (1704).
§ 6. General Scope of Reference and Powers of Referees or Masters (1704).

53. Transcript from books of treasury department certified and authenticated as required by Rev. St. § 886 (U. S Comp. St. 1901, p. 670), not rendered inadmissible by Act March 2, 1895, c. 177, § 10, 28 Stat. 809 (U. S. Comp. St. 1901, p. 671), changing method of certification. United States v. Pierson [C. C. A.] 145 F. 814.

54. Plat books made from records of United States land office records and in custody of county clerk, but not certified by register or receiver of such office as required by Rev. St. Mo. 1899, § 3094, are not admissible. Stewart v. Lead Belt Land Co. [Mo.] 98 S. W. 767.

55. Sufficient if made by authority and under positive law and in accordance with substantial requirements. McInerney v. U. S. [C. C. A.] 143 F. 729.

56. Available in state courts only upon rule of court upon secretary of treasury. Meyer v. Home Ins. Co., 127 Wis. 293, 106 N W. 1087.

57. See Rev. St. § 886 (U. S. Comp. St. 1901, p. 670), as amended by Act March 2, 1895, c. 177 § 10, 28 Stat. 809 (U. S. Comp. St. 1901, § 671). United States v. Pierson [C. C. A.] 145 F. 814; Ewing v. U. S. [Ariz.] 89 P. 593. Provision that "the court trying the cause shall be authorized to grant judgment and award judgment accordingly," does not authorize court to withhold judgment where a prima facie case is made from the transcript and no other evidence is offered. United States v. Pierson [C. C. A.] 145 F. 814.

58. United States v. Pierson [C. C. A.] 145 F. 814.

59. Credits rejected by the department may be established either from the transcript itself or by extraneous evidence. United States v. Pierson [C. C. A.] 145 F. 814.

60, 61, 62. United States v. Pierson [C. C. A.] 145 F. 814.

63, 64. Warburton v. Gourse [Mass.] 79 N. E. 270.

65. See ante, § 1, What are Records.

66. See 6 C. L. 1272.

67. Under Code, § 4910, falsification of a court record by an officer required to keep the same is a misdemeanor regardless of the motive, as distinguished from the offense under § 4853 of falsifying public records with intend to defraud, which is made a forgery. State v. Hanlin [Iowa] 110 N. W. 162.

68. Prosecution under Rev. St. § 5403 (U. S. Comp. St. 1901, p. 3656). McInerney v. U. S. [C. C. A.] 143 F. 729. As to what are records, etc, within this statute, see ante, § 1, What are Records.

69. See ante, § 1, What are Records.

§ 7. Appearance Before Referee, Hearing and Adjournments, Trial and Practice Thereon (1705).
§ 8. The Report, Its Form, Requisites and Contents, and Return and Filing (1705).
§ 9. Revision of Report Before the Court (1706).
§ 10. Decree or Judgment on the Report, Confirmation or Overruling, Recommittal or Additional Findings, Modification, Conformity of Judgment With Report (1706).
§ 11. Appellate Review (1708).
§ 12. Compensation, Fees, and Costs (1708).

Reference to masters in chancery is elsewhere treated,[70] as is reference to arbitrators,[71] the topic including only reference of actions at law and under the codes.

§ 1. *Definitions and distinctions, master and referee, referee and umpire or arbitrator.*[72]

§ 2. *Occasion for reference.*[73]—A reference is proper in all cases where the stating of an account is required.[74] Compulsory references are generally governed by statute and are not authorized unless some statutory ground appears,[75] but they are generally granted where the trial would involve the examination of a long account,[76] and it is sufficient if it appears from the pleadings that such an examination is involved.[77] Under such statutes it is not necessary that the action should be strictly based upon the account or for an accounting, but it must be a matter forming substantially the basis of the claim [78] and when the account is to be examined for the purpose only of affording evidence upon which plaintiff relies to fix the amount of his recovery, he cannot be compelled to accept a reference.[79] How long the account must be in order to justify a reference is a matter peculiarly within the discretion of the trial court.[80] But it has been held that the court is without power to

70. See Masters and Commissioners, 8 C. L. 951.

71. See Arbitration and Award, 7 C. L. 254.

72, 73. See 6 C. L. 1272.

74. In an action to quiet title to partnership lands, the court directed a reference for the purpose of stating the partnership account as a preliminary step in determining the interests of the partners to the land in dispute. Hanson v. Hanson [Neb.] 111 N. W. 368. Account of an assignee for the benefit of creditors. In re Venable, 111 App. Div. 508, 97 N. Y. S. 938. Where the character of plaintiff's claim in an action to foreclose a mechanic's lien in such that matters of account are in controversy, New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444.

75. In an action for an accounting on a contract for the payment of royalties and for a permanent injunction restraining defendant from making or selling the device on which the royality was to be paid, the court by an interlocutory judgment established defendant's liability but on its own motion ordered a reference to take proof as to the amount due plaintiff for royalties and damages and to report such proof with his opinion thereon to the court, reserving its opinion as to the awarding of the injunctive relief until the coming in of the referee's report, the reference was held unathorized under either §§ 827, 1013 or 1015, New York Code Civ. Proc., because not requiring an examination or inquiry (§ 827), nor the examination of a long account not involving the decision of difficult questions of law (§ 1013), and because not occurring after interclocutory or final judgment (§ 1015). Russell H. & I. Mfg. Co. v. Utica D. F. & T. Co., 112 App. Div. 703, 98 N. Y. S. 777.

76. Compulsory reference held proper where it would have been necessary for plaintiff to prove all receipts and sales of lumber at a certain yard in order to show defalcation of an employe in charge of the yard in an action against his surety. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483.

77. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483. Where a complaint alleged that between certain dates plaintiff rendered medical services to defendant and members of his family, and a schedule attached to and made a part of it gave the dates and charges for each visit, and the answer admits that services were rendered during such time but denies the dates and value of the visits set out in the schedule, it was held not to appear from the pleadings that the examination of a long account was involved so as to justify a compulsory reference. Fowler v. Peck, 99 N. Y. S. 816.

78. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483. Where in an action for services in auditing books the defendant interposes as a counterclaim defalcations of its servants due to the negligence of plaintiffs, an examination of the books to ascertain such defalcations is only incidentally involved and does not justify a compulsory reference. Smith v. London Assur. Corp., 100 N. Y. S. 194.

79. In an action for commissions for advertising space procured for defendant, the fact that plaintiff's commission is to be determined from the gross amount of all of defendant's contracts with the publishers of certain newspapers, nearly 400, does not render such accounts directly involved in the action. Bentz v. Carleton & Hovey Co., 100 N. Y. S. 206.

80. Sales and receipts of lumber at a certain yard during a period of nine months held sufficient. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483. The mere fact that services evtended over a period of years

grant a compulsory reference in an action at law even though the examination of a long account is involved, and that a statute authorizing reference in such cases applies only to equitable actions.[81] Reference is sometimes authorized in special proceedings[82] but ordinarily rests in discretion.[83] Where the cause of action set up in the complaint is not referable, it cannot be made referable by anything set up in the answer unless the allegations of the complaint are not denied.[84]

§ 3. *Time and stage of proceedings.*[85]

§ 4. *Motion and order for reference, and stipulations or consents on voluntary reference.*[86]—A statute providing that upon agreement of the parties the court may appoint a referee in any cause pending therein authorizes a reference only upon agreement of the parties.[87] An order erroneously made in the absence of parties will not be vacated after the absent parties have come in and asked that the order of reference be affirmed.[88] Irregularities in granting the reference are waived by failure to object or the subsequent conduct of the parties before the referee.[89]

§ 5. *Selection and qualifications of the referee; his oath and induction into office. Removals and substitutions.*[90]—A trial judge has no authority to act as referee in an action at law without the consent of the parties.[91] The court at all times has general authority over referees and upon the resignation of one may appoint another to fill the vacancy even after the term at which the order of reference was made.[92] A referee may be removed for unreasonably delaying a report.[93]

§ 6. *General scope of reference and powers of referees or masters.*[94]—The powers and duties of the referee are measured by the order of reference[95] and only the issues joined at the time thereof pass to the referee.[96]

and were performed on many different days does not necessitate the examination of a long account within the meaning of the statute where they were performed under one employment and are the same in character. Smith v. London Assur. Corp., 100 N. Y. S. 194.

81. In an action for a balance due on an alleged contract the court of its own motion discharged the jury and appointed a referee ot take testimony and report his findings to the court, held the constitutional right to trial by jury applied and § 4415, Rev. St. 1887, authorizing a reference where a long account is involved, must be construed as applying to equitable actions only. Russell v. Alt [Idaho] 88 P. 416.

82. A proceeding to appraise the property of a decedent subject to taxation is a special proceeding within the meaning of § 2546 of the New York Code, providing that "in a special proceeding, other than one instituted for probate or revocation of a will, the surrogate may in his discretion appoint a referee to take and report to the surrogate the evidence upon the facts, or upon a specific question of fact." In re Bishop's Estate, 111 App. Div. 545, 97 N. Y. S. 1098. Where the appraiser reported the property of the decedent in the state subject to taxation, and the comptroller moved that the matter be sent back to the appraiser to ascertain and report the property not in the state, but which would be subject to taxation if the decedent were a resident, a question of fact was presented for determination which it was proper to refer. Id.

83. Habeas Corpus. Ex parte Cannon [S. C.] 55 S. E. 325.

84. In an action upon a promissory note the answer denied none of the allegations of the complaint but set up a counterclaim involving the examination of an account consisting of 340 items, held properly referred. Kindberg v. Chapman, 100 N. Y. S. 686.

85, 86. See 6 C. L. 1273.

87. American Can Co. v. Grimm [Vt.] 65 A. 531.

88. On appeal they asked by their brief for affirmance. In re Wetmore, 113 App. Div. 232, 98 N. Y. S. 952.

89. Bader v. Schult & Co., 118 Mo. App. 22, 94 S. W. 834. A reference was ordered before the time to file an anewer had expired; neither party objected and both appeared before the referee, the plaintiff objecting to the introduction of evidence in behalf of the defendant after he had rested on the ground that no answer had been filed, held the irregularity had been waived. Id. Defendant by proceeding to trial before a referee waives objection to reference. New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444.

90. See 6 C. L. 1274.

91. Where a referee delayed making his report for three years, the court was without power to order the return of the evidence taken before the referee on an ex parte application and over the objection and exception of one of the parties proceed to try the case on such testimony without the intervention of a jury. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 523.

92. A statute providing that a judgment cannot be vacated by a trial court after the term at which it was entered has no application to the appointment of a referee to fill a vacancy. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540.

93. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 523.

94. See 6 C. L. 1274.

95. McElroy v. Whitney [Idaho] 88 P. 349.

96. Under a statute authorizing a reference upon agreement of the parties, a plea

§ 7. *Appearance before referee, hearing and adjournments, trial and practice thereon.*[97]—Under the New York statutes the referee has the same power to amend pleadings so as to make them conform to the proof as the court.[98] A referee who is ordered to report evidence taken before him to the court with his opinion is not bound to admit irrelevant evidence.[99] Where an auditor reports that a view is necessary, before the introduction of evidence, to the proper determination of the case, it is within the discretion of the court to allow such view.[1] If a referee unreasonably delays a report the court may direct him to speed the case and if he neglects to do so may force a report, or it may remove him and appoint another, but without the consent of the parties it cannot itself assume his duties.[2] All irregularities not going to the jurisdiction [3] are waived by consent thereto [4] or failure to object.[5]

§ 8. *The report, its form, requisites and contents, and return and filing.*[6]—The report of the auditor follows the case wherever it goes and if material and relevant is admissible in whatever court the trial takes place,[7] and this is true even though the matter be subsequently referred to a master on appeal [8] and it will be assumed that the auditor's report contained statements material to the inquiry.[9] The referee must pass on all matters submitted,[10] state the account if one is referred,[11] and make his findings separately [12] in his report.[13] Where a rule submitting the cause to the master does not call for a report of the evidence, such report is unnecessary.[14] The report is a nullity unless filed within the time prescribed by law [15] and during the

in offset filed by defendant after case had been referred does not pass to the referee under the general reference. To a declaration in assumpsit defendant pleaded the general issue and by agreement the matter was referred; subsequent to the reference the defendant filed a plea in offset for breach of contract; it was held that the subsequent plea raised new issues which could not be determined by the referee without the consent of the plaintiff. American Can Co. v. Grimm [Vt.] 65 A. 531.

97. See 6 C. L. 1274.

98. Code Civ. Proc. §§ 723, 1018. Perkins v. Storrs, 99 N. Y. S. 849.

99. In re Paul Jones & Co., 102 N. Y. S. 983.

1. Clark v. Baker [Mass.] 78 N. E. 455.

2. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 523.

3. The taking of testimony by a referee outside of the jurisdiction of the court appointing him without a special order of reference goes only to the jurisdiction of the person and may be waived. Where a referee, appointed to take testimony of witnesses residing more than twenty miles from the place of trial, took the testimony of a witness in another county over plaintiff's objection and exception, the cross-examination of such witnesses by the plaintiff was a waiver of the irregularity. Sharkey v. Candiani [Or.] 85 P. 219.

4. Where a party consents to an amendment, he cannot afterward object that the referee had no power to allow it. Perkins v. Storrs, 99 N. Y. S. 849.

5. Statutory provisions requiring that testimony of witnesses taken before referee be subscribed by such witnesses are waived when the matter is submitted to the referee without calling his attention to the fact that depositions are unsigned. In re Hirsch's Estate, 101 N. Y. S. 893.

6. See 6 C. L. 1275.

7, 8, 9. Collins v. Poole, 190 Mass. 599, 77 N. E. 484.

10. Failure of the referee to find as to particular issues is a mistrial as to such issues. Action by a corporation to determine the ownership of its certificates; the parties were all before the court but the referee failed to determine the ownership of certain of the certificates. Geneva Mineral Springs Co. v. Steele, 111 App. Div. 706, 97 N. Y. S. 996.

11. Where a referee is directed to take an accounting of the business and transactions of a partnership, it is his duty to make a statement showing the items of account between them and which items were allowed and which rejected. The account in this case involved several thousand items. McElroy v. Whitney [Idaho] 88 P. 349.

12. Under a statute requiring that the referee state his findings of fact and conclusions of law separately where the entire issue of fact has been referred, such separate statement is unnecessary where the entire issue has not been referred. In re Paul Jones & Co., 102 N. Y. S. 983.

13. This requirement is not complied with by filing with the report a separate paper containing a statement of facts found by the referee but not incorporated in his decision. Hudson & M. R. Co. v. Wendel, 100 N. Y. S. 737. A finding marked "found" by the referee but not incorporated in his report is not a finding of fact. Holmes v. Seaman, 102 N. Y. S. 616. The filing of a separate finding is not a compliance with this rule. Bushe v. Wright, 103 N. Y. S. 410.

14. Gurley v. Reed, 190 Mass. 509, 77 N. E. 642.

15. Under the New York Code providing that unless the report is filed within sixty days after the cause is finally submitted either party may upon notice elect to end the reference, the administratrix of a deceased assignee for the benefit of creditors

pendency of the action.[16] Where a party by his conduct in submitting briefs and findings treats the cause as not having been finally submitted, he is precluded from afterward asserting upon a motion to end the reference that the cause was finally submitted at an earlier date and that the referee's report was consequently not filed within the time allowed by law.[17]

§ 9. *Revision of report before the court. Objections and exceptions.*[18]—A party objecting to the findings of a master should apply to the master to have them corrected and in the event of his failure to do so should have him certify along with his report the evidence upon which his contested conclusions of fact were based.[19] Upon the filing of exceptions to the referee's report the opposite party may move to strike them out as improper and to confirm the report, or he may treat them as presenting a case for the jury and proceed to trial.[20] Exceptions to auditor's report must be specific and definite [21] and must show in what respect alleged error was prejudicial,[22] but a general exception that the report is contrary to the evidence is sufficient where the report itself is general.[23] An exception classified as an exception of fact but which in reality raises a question of law should be stricken out.[24] The time within which exceptions to the auditor's report must be filed is generally limited by statute,[25] but under such a statute it has been held that the allowance of an amendment after the expiration of the time limited is in effect a judgment of the court that the exception is amendable at that time and, so long as it remains unreversed, the exception will be treated as having been duly filed.[26] Where plaintiff treats exceptions filed to the report by defendant as presenting an issue for the jury and proceeds to trial thereon, he cannot prevent defendant from introducing evidence in his own behalf.[27]

§ 10. *Decree or judgment on the report, confirmation or overruling, recommittal or additional findings, modification, conformity of judgment with report.*[28]—The report of a referee is merely advisory [29] and is not binding upon the court.[30]

to take whose account the reference was ordered may terminate the reference upon notice after the expiration of such time. In re Venable, 111 App. Div. 508, 97 N. Y. S. 938.

16. Where an assignee for the benefit of creditors to take whose account a reference is ordered dies, a report filed subsequent to his death and prior to the substitution of his administrator is a nullity. In re Venable, 111 App. Div. 508, 97 N. Y. S. 938.

17. Burritt v. Burritt, 102 N. Y. S. 477.

18. See 6 C. L. 1275.

19. San Jacinto Oil Co. v. Culberson [Tex. Civ. App.] 96 S. W. 110.

20. New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444.

21. Exceptions that "said lien is invalid in law and of no force and effect" and "other reasons to be assigned at the hearing of these exceptions" are insufficient both in form and substance. Title G. & T. Co. v. Burdette [Md.] 65 A. 341. An exception based upon the admission of evidence should set forth the evidence objected to. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004. An exception which is indefinite or which raises an immaterial issue should be stricken. Id.

22. An exception that the referee erred in stating accounts in the form of firm accounts in that he should have first stated the same in the form of an account of one of the individual partners with the firm is defective under this rule; the action being for a partnership accounting. Brown v. Rogers [S. C.] 56 S. E. 680.

23. Where the referee finds generally for the plaintiff and against the defendant in a mechanic's lien foreclosure, his account being a mere copy of the bill of particulars stating the full contract price mentioned therein although some of the items were omitted from the report, an exception that the report is contrary to the evidence suffices. New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444.

24. An exception that auditor allowed eight per cent. interest against a guardian, and that eight per cent. was the contract rate of interest and therefore such charge against the guardian was contrary to law, amounts to an exception of law and not of fact. Griffin v. Collins, 125 Ga. 159, 53 S. E. 1004.

25. Ga. Civ. Code 1895, § 4589; Moss v. Chappell, 126 Ga. 196, 54 S. E. 968.

26. The Georgia Code provides that exceptions must be filed within twenty days after the filing of the auditor's report, defective exceptions were filed within that time and after the expiration of the twenty days a motion to amend the exceptions was made and allowed. Moss v. Chappell, 126 Ga. 196, 54 S. E. 968.

27. New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444.

28. See 6 C. L. 1277.

29. Allowance of attorney's fees in an action for divorce. Schulz v. Schulz, 128 Wis. 28, 107 N. W. 302.

30. In re Paul Jones & Co., 102 N. Y. S. 983.

As a general rule the report of a referee is prima facie correct.[31] In California and some other states the finding of facts reported by a referee is equivalent to a special verdict or the findings of fact made by the court upon its trial of a cause and entitled to the same weight [32] and, where the evidence is conflicting and the credibility of witnesses involved, they will be set aside only when clearly and palpably wrong.[33] In some jurisdictions the order of judgment on the report is pro forma and the court will not review errors in the referee's report. If the error is manifest application should be made to the referee to correct it.[34] In those states in which the report of a referee is entitled to the same weight as the verdict of a jury, the court can set aside his findings, but only under the same circumstances in which it has authority to set aside the verdict of a jury.[35] In Missouri it is held that, where the reference is by consent in a matter in which the court could not grant a compulsory reference, the finding of the referee is in effect the same as the verdict of a jury and binding upon the court unless for good cause set aside; [36] but the referee's conclusions of law based on such findings are not binding upon the court and it may enter judgment under a different conclusion on the same findings of fact.[37] Referee's report will not be set aside because he gave more weight to certain evidence than the facts disclosed by entire record would warrant.[38] In the absence of exceptions before the master and in the absence of the evidence upon which his conclusions of fact are based, the court will review only such errors as are apparent on the face of the master's report.[39] The court may in its discretion recommit a matter to the referee to take additional evidence thereon,[40] but where there has been a fair hearing before the referee and there is no evidence of accident or surprise nor that upon a second hearing additional evidence will be adduced which may change result reached by referee, a motion to recommit will be denied.[41] Under certain circumstances it is within the court's discretion to order the issue to be submitted to a jury even after the coming in of the master's report.[42] The court may draw inferences of fact from specific findings by the auditor different from those found by him.[43] Where some issues are referred and others tried by the court, evidence as to an item not within the scope of the reference should not be excluded on the trial.[44] Insanity of the referee is ground for the vacation of a judgment directed by him, but not unless his insanity was such as to render him incapable of performing his duties,[45] and the mere fact that on the day he signed the decision he was adjudged insane is not conclusive.[46] Upon

31. New York Metal Ceiling Co. v. Kiernan [N. J. Err. & App.] 65 A. 444; Anderson v. Metropolitan Stock Exch., 191 Mass. 117, 77 N. E. 706.

32. The weight of evidence, the resolution of any conflict in the evidence, the credibility of witnesses, and the character of their testimony are matters wherein his judgment will be taken as correct unless clearly shown to be erroneous. Bernard v. Sloan, 2 Cal. App. 737, 84 P. 232. Or. B. & C. Comp. § 168. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 523. Where there is sufficient evidence to uphold his findings although there is a conflict of testimony, they will not be disturbed. Shannon v. Petherbridge [Okl.] 87 P. 668.

33. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 523.

34. Kilduff v. John A. Roebling's Sons Co., 150 F. 240.

35. Puffer v. American Cent. Ins. Co. [Or.] 87 P. 523.

36, 37. Kansas City H. P. Brick Co. v. Pratt, 114 Mo. App. 643, 93 S. W. 300.

38. Mistake by referee as to witness who gave certain testimony. State v. Omaha Elevator Co. [Neb.] 110 N. W. 874.

39. San Jacinto Oil Co. v. Culberson [Tex. Civ. App.] 96 S. W. 110.

40. State v. Omaha Elevator Co. [Neb.] 110 N. W. 874. A motion to recommit a master's report is addressed to the discretion of the court. Gurley v. Reed, 190 Mass. 509, 77 N. E. 642.

41. State v. Omaha Elevator Co. [Neb.] 110 N. W. 874.

42. But not where by reason of the failure of the parties to demand a jury trial before the reference was ordered the findings of the master are conclusive. San Jacinto Oil Co. v. Culberson [Tex. Civ. App.] 96 S. W. 110.

43. Wirth v. Kuehn, 191 Mass. 51, 77 N. E. 641.

44. Morris v. Lemp [Idaho] 88 P. 761.

45. The fact that the referee may have entertained delusions upon other matters, if his judgment was unimpaired as to the matters before him, would not, of itself, make his actions in respect to such matters void. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650.

46, 47. Schoenberg & Co. v. Ulman, 99 N. Y. S. 650.

a motion to set aside a decision of the referee upon the ground of his insanity, the question as to his mental condition must be determined as of the date upon which he signed the decision and gave notice thereof to the party entitled thereto.[47] Upon the submission of the auditor's report, the court may amend the record as to make it conform to the facts.[48] The fact that no exception was taken to the report of the referee does not prevent court from modifying it.[49]

§ 11. *Appellate review.*[50]—Where it does not appear that the reference was by consent, the auditor's findings are not final so as to preclude a review on appeal.[51] Where findings of the auditor are concurred in by the court below, they will not be disturbed on appeal unless error is manifest.[52] The court on appeal will not consider a finding which is not incorporated in the report of the referee.[53] Where no prejudice results from an erroneous order refusing to allow an amendment of the referee's report, the order will be reversed without prejudice to proceedings taken subsequent to the filing of the report.[54] Error in refusing to vacate a reference on the ground of prejudice of the referee is harmless where the referee resigns and another is appointed in his stead.[55] The mere appointment of a master on appeal from confirmation does not supersede the report of the auditor in the same proceeding.[56]

§ 12. *Compensation, fees, and costs.*[57]—The amount to be awarded the referee as compensation for his services is to be determined by the circumstances of each particular case.[58] Under a statute requiring the commissioner to file a verified statement of the number of days he has acted as such before any allowance shall be made for his compensation, it is improper to allow any compensation until such statement is filed.[59]

REFORMATION OF INSTRUMENTS.

§ 1. The Remedy (1708).
A. Nature and Office (1708).
B. Right to Remedy (1709).
C. Instruments Reformable (1711).
§ 2. Procedure (1711).
A. Jurisdiction and Form of Proceeding (1711).
B. Parties (1712).
C. Pleading and Evidence (1712).
D. Trial and Judgment (1713).

§ 1. *The remedy. A. Nature and office.*[60]—Reformation is the equitable remedy whereby a written contract which fails to express the real agreement of the

48. Where order of reference recited that it was made upon motion of the court whereas it was made upon agreement of the parties, the court granted an amendment of the order so as to make it show that it was made by consent. Delany v. Knight [R. I.] 65 A. 607.

49. Referee in action for a divorce allowed $474 attorney's fees which court cut to $250. Schulz v. Schulz, 128 Wis. 28, 107 N. W. 302.

50. See 6 C. L. 1278.

51. Petition for letters was referred to the auditor to determine the domicile of the deceased, and a second petition, objecting to the jurisdiction of the court on the ground that decedent's domicile was without the District of Columbia was referred on motion of the petitioner. Thorn v. Thorn, 28 App. D. C. 120.

52. Hutchins v. Munn, 28 App. D. C. 271. Findings of fact by an auditor when approved by the court are regarded as the verdict of a jury and will not be disturbed except upon the clearest proof of mistake. Weldon's Estate, 31 Pa. Super. Ct. 47. Where referee's findings of fact on conflicting evidence have been approved by the court, they will not be disturbed in the absence of fraud or manifest error. Alexander v. Hamilton, 31 Pa. Super. Ct. 189. In the absence of manifest error, referee's findings of fact will not be disturbed where they have been approved by the court. Yeager's Estate, 31 Pa. Super. Ct. 202.

53. Holmes v. Seaman, 102 N. Y. S. 616.

54. At the request of defendant the referee found certain facts but his findings were not embodied in his report, being contained in a separate paper filed at the same time. The plaintiff stipulated that such finding might be attached to and made a part of the judgment roll, but defendant declined to take advantage of it. Held that an order refusing to allow an amendment of the report so as to show such facts would be reversed but that such reversal would not nullify proceedings taken since the filing of the report. Hudson & M. R. Co. v. Wendel, 100 N. Y. S. 737.

55. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540.

56. Collins v. Poole, 190 Mass. 699, 77 N. E. 484.

57. See 6 C. L. 1278.

58. Two thousand one hundred and fifty dollars held not excessive for services as such for thirty days. Jordan v. Western Union Tel. Co. [Kan.] 85 P. 285, modifying on rehearing 69 Kan. 140, 76 P. 396.

59. Co-operative Mfg. P. & H. Co. v. Rusche, 30 Ky. L. R. 790, 99 S. W. 677.

60. See 6 C. L. 1279.

parties [61] because of mutual mistake or unilateral mistake induced by fraud [62] is made to conform thereto [63] in appropriate cases.[64]

(§ 1) *B. Right to remedy.*[65]—A contract will not be reformed in a particular liable to defeat the whole contract.[66] To authorize reformation there must be a valid agreement,[67] and the nonconformity of the instrument thereto must be nonintentional [68] and the result of either mutual mistake [69] of the parties thereto [70] or a unilateral mistake induced by fraud or other unconscionable conduct.[71] While relief will not generally be granted from a pure mistake of law, it will not be denied

61. In reforming a contract, equity looks at the substance and not at the form of the transaction, and gives effect to the real contract made. Lockwood v. Geier, 98 Minn. 317, 108 N. W. 877, 109 N. W. 245. Where the written contract corresponds to the real contract made and expresses the intention of the parties, it cannot be reformed to make more definite. Auer v. Mathews [Wis.] 108 N. W. 45. Contract held to have been intentionally left indefinite as to the amount conveyed. Id. Where stokers were warranted to develop full horse power by the use of rice anthracite coal "which would pass over a three-sixteenth and through a three-eighth inch mesh," the contract cannot be reformed as to the size of the coal to be used, although the parties believed that the coal in use was the coal described. Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 101 N. Y. S. 303.

62. Where a party deliberately signed a bill of sale, knowing that it was such, but for the sole purpose of enabling the other party to handle the goods as his own, the court cannot convert it into a power of attorney. Hurley v. Walter [Wis.] 109 N. W. 558.

63. Where an instrument given to carry into effect a written agreement is inconsistent therewith, it may be corrected. Northwest Eckington Imp. Co. v. Campbell, 28 App. D. C. 483. Where under a written agreement a party thereto was to receive a one-third undivided interest in certain property upon carrying out certain building undertakings, an absolute deed given pursuant thereto during the progress of the work will be declared conditional upon completion. Id.

64. For right to remedy see post, § 1 B.

65. See 6 C. L. 1279.

66. A contract which is based solely on the ownership of certain stocks and without which it cannot be performed, will not be reformed so as to permit the other party thereto to attack such ownership. North Chicago St. R. Co. v. Chicago Union Trac. Co., 150 F. 612.

67. An insurance policy will be reformed to conform to the contract made with the agent only upon a showing that the agent had power to make such contract. Floors v. Aetna Life Ins. Co. [N. C.] 56 S. E. 915. Not reformed so as to waive prompt payment of premiums where it appears that by the terms of the policy the agent had no authority to make a contract allowing thirty days in which to make payment. Vardeman v. Penn Mut. Life Ins. Co., 125 Ga. 117, 54 S. E. 66.

68. Evidence held to show that the matter sought to be inserted was expressly omitted at plaintiff's instance. Caudell v. Caudell [Ga.] 55 S. E. 1028.

69. The mistake must be mutual. Stoll v. Nagle [Wyo.] 86 P. 26; East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768; Bower v. Bowser [Or.] 88 P. 1104; Quiggle v. Vining, 125 Ga. 98, 54 S. E. 74; Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505. Failure of a justice employed by grantor and grantee to effectuate the intention of the parties is a mutual mistake of the parties. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791. A designation of the land to be sold to a member of a partnership in negotiations subsequently abandoned charges the partnership with notice so as to render a mistake in the description mutual, although the members purchasing believed he was buying the land actually described. Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505. A contract in the form of a rent note will not be reformed so as to reserve the fruit growing on the premises to the lessor where the lessee did not so understand the contract. Quiggle v. Vining, 125 Ga. 98, 54 S. E. 74. A Federal contract will not be reformed in the absence of evidence showing that the government intended to enter into any contract other than the one sought to be reformed. United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980.

70. Where the agent of an insurance company had authority to solicit applications only and not to issue policy, the mistake to be mutual must be a mistake of the company and of the insured. Floors v. Aetna Life Ins. Co. [N. C.] 56 S. E. 915. No evidence to show that the policy issued was not the one intended to be issued by the company. Id. A contract entered into by the directors of a corporation in the hands of receivers affecting interests in the hands of the latter cannot be reformed at the suit of stockholders on the ground of mistake after it has been ratified and signed by the receivers under order of court, made with full knowledge of the facts. North Chicago St. R. Co. v. Chicago Union Trac. Co., 150 F. 612.

71. Cox v. Beard [Kan.] 89 P. 671.

Reformation allowed where the grantor fraudulently led the grantee to believe that the description included all. Cox v. Beard [Kan.] 89 P. 671. Where the grantor, without the knowledge of the grantee, inserted restrictive covenants contrary to the sale agreement. Lloyd v. Hulick [N. J. Err. & App.] 63 A. 616. That a bill to reform a deed alleged that by mistake of the scrivener a husband was named therein as grantee instead of the wife, while the evidence shows that the husband directed him to do so, does not preclude a reformation. Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105.

Reformation denied: The mere fact that a vendee knew of an existing lease and requested the agent not to mention it in the deed, which was done, is not such fraud as to justify reformation where it does not appear that the land was to be sold subject to such lease, or that the vendee made any

where it is a mixed one of law and fact,[72] as where it results from a mutual non-appreciation of the legal effect of words intentionally used.[73] Reformation will only be granted where it will serve a beneficial purpose.[74] but it is not material whether the instrument is executory or executed if relief can be afforded.[75] The remedy being an equitable one, the party seeking it must first do equity [76] and be free from fault.[77] The relief is most frequently invoked to correct mistakes of the scrivener in reducing the agreement to writing,[78] and to correct errors in deeds whereby land is mistakenly included.[79] Where an insurance agent negligently fails to attach a granted vacancy permit to a policy according to custom between the parties, the policy may be reformed.[80]

representations as to the contents of the deed. Weinhard v. Summerville [Wash.] 89 P. 490.

72. Where it is the intention of all parties to execute a deed vesting a life estate in the grantee's husband with a remainder to the wife and her heirs, the mistake of the scrivener in drawing a deed ineffectual for such purpose is one of mixed law and fact, subject to reformation. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

73. Barataria Canning Co. v. Ott [Miss.] 41 So. 378. Where a reservation was made in a deed of "all littoral and aquatic rights appurtenant" to the land, with the intention to reserve oyster rights, it may be reformed. Id.

74. Burner v. Higman & Skinner Co. [Iowa] 110 N. W. 580.

Reformation denied: Where duplicate copies of an agreement differ, since parol evidence is admissible in a suit on the erroneous copy to show which is the true agreement. Bowman v. Poppenberg, 103 N. Y. S. 245. Where a deed mistakenly describes a part of the land twice, an action for overpayment being sufficient. Willson v. Legro, 73 N. H. 515, 63 A. 399. Where a mortgage executed by an incompetent's guardian was void because not confirmed by the court a mistake therein will not be corrected. Montgomery v. Perryman & Co. [Ala.] 41 So. 838. A trustee's deed of the property described in a trust deed cannot be reformed so as to include a tract mistakenly omitted from the trust deed. Harper v. Combs [W. Va.] 56 S. E. 902. A contract for a lease, which "when executed" should be subject to the approval of the attorneys of the parties, will not be reformed so as to provide for approval before execution, since it will be given that effect by construction. Pittsburgh Amusement Co. v. Ferguson, 101 N. Y. S. 217. In an action for personal injuries, received in an elevator, brought against the landlord, the lease will not be reformed so as to omit the reservation to the landlord of the right to use the elevator, since the material fact of control may be proven or disproven without regard thereto. Burner v. Higman & Skinner Co. [Iowa] 110 N. W. 580.

Reformation granted: The running of the statute of limitations against a debt secured by a trust deed does not destroy the rights existing under the deed, and hence a reformation thereof will not be denied as futile. Travelli v. Bowman [Cal.] 89 P. 347. Where a lessor refuses to perform a contract of lease, the mere fact that the lessee may show by parol the misdescription in the lease, in an action for damages, is not such adequate remedy at law as to prevent reformation. Braithwaite v. Henneberry, 124 Ill. App. 407.

75. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

76. Where a deed conveying a right of way to a railroad is ambiguous, the company is not entitled to a reformation making it convey a strip on either side of the road as constructed until they have fulfilled their undertaking to construct fences, gates, etc. Champion v. Grand Rapids, etc., R. Co., 145 Mich. 676, 13 Det. Leg. N. 611, 108 N. W. 1078.

77. Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505. Failure to read a deed held not such negligence as to prevent relief from a fraudulently inserted restrictive covenant. Lloyd v. Hulick [N. J. Err. & App.] 63 A. 616. Failure to compare a deed with the contract and to note that it did not except a certain strip not sold held not such gross negligence as to prevent reformation. Los Angeles R. R. Co. v. New Liverpool Salt Co. [Cal.] 87 P. 1029. Where a lot owner did not know the true boundary of her lot but pointed out to her agent what she wished sold, she was not guilty of such negligence in signing a deed including more than she intended to convey so as to prevent reformation. Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505. Where an agent makes a mistake in drawing a contract, such mistake is not negligence of the principal, preventing reformation. McCain v. Columbia Finance & Trust Co., 29 Ky. L. R. 1292, 97 S. W. 343. Failure to discover a mistake that would have been ascertained by the most ordinary care held such negligence as to defeat reformation. Grieve v. Grieve [Wyo.] 89 P. 569.

78. Thomas v. Robinson, 29 Ky. L. R. 769, 96 S. W. 459; Stinson v. Ray [Ark.] 96 S. W. 141.

79. Laufer v. Moppins [Tex. Civ. App.] 99 S. W. 109. A vendor can maintain an action to reform a deed which through mutual mistake includes more than was intended. Stapleton v. Schaffer [Mich.] 13 Det. Leg. N. 792, 109 N. W. 665. Where a lease reserved from the "leased premises" that portion lying between the tracks of the L. Railroad, etc., and granted an option to the lessee to purchase the "leased premises." Held that the reserved portion was also excepted from the option and hence a deed made pursuant thereto and failing to except that portion through mistake may be reformed. Los Angeles & R. R. Co. v. New Liverpool Salt Co. [Cal.] 87 P. 1029.

80. Mississippi Fire Ass'n v. Stein [Miss.] 41 So. 66.

The right to reformation may be lost by a ratification of the mistake,[81] by laches,[82] or by estoppel,[83] or be barred by the statute of limitations.[84] An acceptance of partial performance in a particular not affected by reformation [85] or an adjudication of rights under the instrument as executed [86] is no bar to a reformation. A demand for correction is not usually a condition precedent.[87]

An instrument may be reformed as against the parties thereto,[88] their assignees,[89] and other parties standing in their place,[90] but not as against third parties without notice.[91] An heir has the same right to correct an erroneous deed as his ancestor.[92]

(§ 1) *C. Instruments reformable.*[93]—Equity will not reform a voluntary conveyance [94] or correct any deed in Wisconsin so as to include an omitted homestead during the life of the grantor or his widow.[95]

§ 2. *Procedure. A. Jurisdiction and form of proceeding.*[96]—Reformation, being an equitable remedy, cannot be granted in an action at law in the absence of statute,[97] but a stay should be allowed to enable the issue to be tried in equity.[98] Where, however, a court has both legal and equitable jurisdiction, a contract may be reformed and enforced in the same action.[99] The court of claims has jurisdiction of an action to reform and enforce a contract against the Federal government.[1]

81. No ratification where mistake was unknown until shortly before suit. Detweiler v. Swartley [Kan.] 86 P. 141.

82. Held not barred: Mistake was not discovered until the suit was commenced. Detweiler v. Swartley [Kan.] 86 P. 141. Mistake discovered about a month before suit and there being no circumstances to put plaintiff on inquiry. Travelli v. Bowman [Cal.] 89 P. 347. The fact that plaintiff's attorney, who did not know that the instrument was among his papers, did not examine it is not such laches as to prevent reformation. Id. Where the purchaser of a nursery stock notified the purchaser shortly after the agreement was made that the written contract did not conform to the real agreement and not to send the stock, to which the seller made no reply but four months later sent the consignment, when the purchaser promptly brought an action to reform. Goodrich v. Fogarty, 130 Iowa, 223, 106 N. W. 616.

83. There can be no estoppel preventing a reformation where the party against whom it is sought has not changed his position. Detweiler v. Swartley [Kan.] 86 P. 141.

84. Where reformation is asked by way of defense, the statute of limitations is not applicable. Defendant in ejectment filing crossbill praying for a reformation of a deed so as to perfect his title. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791. Where it was the intention of a grantor to convey a life estate to his daughter with remainder to her children, a child who permits her mother to hold possession and make valuable improvements in the belief that the deed gave a life estate is estopped to plead the statute of limitations to reformation. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

85. McCain v. Columbia Finance & Trust Co., 29 Ky. L. R. 1292, 97 S. W. 343.

86. An appellate decision. Barataria Canning Co. v. Ott [Miss.] 41 So. 378.

87. Braithwaite v. Henneberry, 124 Ill. App. 407. Where a pledgor has become bankrupt, a demand upon the bankrupt or the trustee is not a condition precedent to an action for reformation. First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. S. 717.

88. Where a deed recites a consideration paid to the parties of the first part, husband and wife, and there is no allegation or evidence that the wife did not receive a part thereof, an objection that the deed should not be reformed so to include land for which she received no consideration is without merit. Scheuer v. Chloupek [Wis.] 109 N. W. 1035.

89. Massey v. Lindeni, 98 Minn. 133, 107 N. W. 146.

90. A pledge may be reformed as against a trustee in bankruptcy. First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. S. 717.

91. Reformation of a lease reserving the right to the landlord to jointly use the elevator cannot be reformed as against one suing for personal injuries therein. Burner v. Higman & Skinner Co. [Iowa] 110 N. W. 580. A deed cannot be reformed so as to injure purchasers of the property without notice. Brown v. Gwin, 197 Mo. 499, 95 S. W. 208. Evidence held sufficient to show that defendant had no actual notice. Reid v. Rhodes [Va.] 56 S. E. 722. A description by boundaries in a deed controls a call for acreage, and hence the recordation thereof is not constructive notice that land not within the defined limits was intended to be included. Id.

92. Siling v. Hendrickson, 193 Mo. 365, 92 S. W. 105.

93. See 6 C. L. 1282.

94. Finch v. Green, 225 Ill. 304, 80 N. E. 318; Smith v. Smith [Ark.] 97 S. W. 439.

95. Scheuer v. Chloupek [Wis.] 109 N. W. 1035.

96. See 6 C. L. 1282.

97. Rev. St. c. 84, §§ 16, 17, authorizing equitable defenses in an action at law, held not to authorize the reformation of a deed in a possessory action. Martin v. Smith [Me.] 65 A. 257.

98. Martin v. Smith [Me.] 65 A. 257.

99. Floars v. Aetna Life Ins. Co. [N. C.] 56 S. E. 915; Bonvillain v. Bodenheimer, 117 La. 793, 42 So. 273. Under the express provisions of Civ. Code, § 3402, a written contract may be reformed and enforced in the same action, and it is not error to permit

(§ 2) *B. Parties.*[2]—All persons affected by the reformation are necessary parties.[3]

(§ 2) *C. Pleading and evidence.*[4]—Reformation may be sought by way of answer, asking affirmative relief to perfect a defense.[5] The contract sought to be reformed should be set out or attached as an exhibit,[6] and the petition must show the particular mistake, or the fraud and mistake, and how it occurred,[7] and, if reformation of a deed is sought as against a subsequent purchaser, it must allege notice.[8] A petition to reform a trust deed must allege nonpayment of the secured debt.[9] Complainant need not anticipate the plea of limitations and plead matters in avoidance thereof,[10] but as a general rule the statute must be pleaded as a defense.[11] Where suit is instituted long after the execution of the instrument, complainant must plead facts avoiding the defense of laches.[12]

Since reformation destroys that which the parties have deliberately created as the evidence of their agreement, a higher degree of proof is required than in ordinary civil actions,[13] and the party seeking relief has the burden [14] of establishing his case by full, clear, and satisfactory evidence; [14a] and where the relief is sought in a

an amendment of a verified petition for specific performance so as to ask reformation. Messer v. Hibernia Sav. & Loan Soc. [Cal.] 84 P. 835.

1. Act March 3, 1887, c. 359, § 1 (24 Stat. 505, U. S. Comp. St. 1901, p. 752). United States v. Milliken Imprinting Co., 202 U. S. 168, 50 Law. Ed. 980.

2. See 6 C. L. 1283.

3. An alleged latent misdescription in a deed forming a link in a chain of title cannot be corrected at the instance of one called in warranty where the grantor therein is not a party to the action. Bonvillain v. Bodenheimer, 117 La. 793, 42 So. 273.

4. See 6 C. L. 1283.

5. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791.

6. So that from it and the allegations it may clearly appear that it does not conform to the real contract. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., 126 Ga. 380, 55 S. E. 330.

7. Delaware Ins. Co. v. Pennsylvania Fire Ins. Co., 126 Ga. 380, 55 S. E. 330. A petition to reform a contract of reinsurance so as to cover a period of three years instead of one held insufficient to show that the real contract was for three years, how the mistake was made, or why the plaintiff did not know of it sooner. Id.

8. Harper v. Combs [W. Va.] 56 S. E. 902. In an action to reform a deed of trust, an allegation that the purchaser combined with the grantor to defraud complainant "with full knowledge that the same was plaintiff's land" held insufficient. Id.

9. Debt past due. Dessart v. Bonynge [Ariz.] 85 P. 723.

10. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

11. A demurrer being insufficient. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

12. Must not only allege that the mistake was not discovered until shortly before the suit was commenced but must allege facts excusing an earlier discovery. Harper v. Combs [W. Va.] 56 S. E. 902.

13. The presumption is that a written instrument is the true agreement and a heavy burden rests upon seeking the reformation. Dorris v. Morrisdale Coal Co. [Pa.] 64 A. 855.

14. Stein v. Phillips, 47 Or. 545, 84 P. 793.

14a. Pyne v. Knight, 130 Iowa, 113, 106 N. W. 505; Cohen v. Numsen [Md.] 65 A. 432; Bower v. Bowser [Or.] 88 P. 1104; Folmar v. Lehman-Durr Co. [Ala.] 41 So. 750; Crabtree's Adm'x v. Sisk, 30 Ky. L. R. 572, 99 S. W. 268; Stein v. Phillips, 47 Or. 545, 84 P. 793; Stoll v. Nagle [Wyo.] 86 P. 26; Graham v. Carnegie Steel Co. [Pa.] 66 A. 103. Especially where parol evidence is relied upon. Brown v. Gwin, 197 Mo. 499, 95 S. W. 208. A party seeking reformation of a definite and unambiguous deed must establish not only by the preponderance of the testimony but practically to the exclusion of every other reasonable hypothesis that mutual mistake, fraud, or error occurred in its execution. Jones v. Jones [Miss.] 41 So. 373.

A mere preponderance is sufficient. Tillar v. Wilson [Ark.] 96 S. W. 381; Davenport v. Hudspeth [Ark.] 98 S. W. 699; Fitch v. Vatter, 143 Mich. 568, 13 Det. Leg. N. 68, 107 N. W. 106.

Evidence held sufficient to authorize reformation of an absolute deed of an ignorant woman to her adopted son so as to reserve rents until he attained his majority. Pickett v. Taylor, 29 Ky. L. R. 1219, 96 S. W. 1111. A bill of sale so as to make the street instead of the center thereof the boundary. Rundle v. Bohrer, 222 Ill. 475, 78 N. E. 831; Paterson v. Hannan [Ala.] 43 So. 192. A contract for the sale of nursery stock by inserting a provision that payment need not be made until the grape vines were in bearing, when payment should be made in fruit. Goodrich v. Fogarty, 130 Iowa, 223, 106 N. W. 616. A deed so as to reserve certain alleys. Fitch v. Vatter, 143 Mich. 568, 13 Det. Leg. N. 68, 107 N. W. 106. A deed so as to require the vendee to assume an outstanding mortgage, complainant testifying positively to the mistake and the relative value and price being greatly disproportionate. Massey v. Lindeni, 98 Minn. 133, 107 N. W. 146. A deed which did not describe the land which the parties supposed was sold. Scheuer v. Chloupek [Wis.] 109 N. W. 1035. A good will physician's contract so as to prohibit the retiring physician to practice in "Madison, Neb., or vicinage," instead of "Madison" alone. Baker v. Montgomery [Neb.] 110 N. W. 695. A deed er-

common-law action, the judge should not permit the jury to grant reformation where he would not sanction it in equity.[15] Parol evidence is admissible to show the mistake.[16] As in actions generally, there must be no variance between allegations and proof.[17]

(§ 2) *D. Trial and judgment.*[18]—Where reformation is sought as preliminary to other relief, it will be refused if the primary relief is denied.[19] It is no abuse of discretion to refuse an amendment after trial where the party had due notice that it might be necessary.[20] A foreclosed mortgage will not be reformed so as to include additional land without directing a new foreclosure.[21]

REFORMATORIES; REGISTERS OF DEEDS; REGISTRATION; REHEARING; REINSURANCE; REJOINDERS; RELATION, see latest topical index.

roneously including land not sold. Laufer v. Moppins [Tex. Civ. App.] 99 S. W. 109. A deed vesting a fee so as to create a life estate with remainder over. Williamson v. Brown, 195 Mo. 313, 93 S. W. 791. A pledge so as to include omitted essentials upon undisputed evidence of mutual mistake. First Nat. Bank v. Bacon, 113 App. Div. 612, 98 N. Y. S. 717. A collateral agreement to a deed providing for a sale and a refund of the excess of the proceeds over the indebtedness as to the amount stated therein as due. Detweiler v. Swartley [Kan.] 86 P. 141. A contract of sale by striking therefrom the words "at the election of said second parties" after a provision for cancellation if the grantor was not able to convey good title. Lockwood v. Geier, 98 Minn. 317, 109 N. W. 245, rvg. 98 Minn. 317, 108 N. W. 877. A sale contract so as to specify for interest on the deferred payments upon evidence that without interest the vendor really sold the land for about $5 per acre less than a rejected offer together with admissions of the vendee that he was to pay interest. McCain v. Columbia Finance & Trust Co., 29 Ky. L. R. 1292, 97 S. W. 343. The fact that a mortgagee agreed without pecuniary gain to purchase the property at foreclosure sale and to deed it to a third person for the benefit of the mortgagor held sufficient to show that it did not intend to warrant the title and to authorize the reformation of a general warranty deed into a special warranty. Karl v. Conner, 30 Ky. L. R. 238, 98 S. W. 1111. The practical construction placed upon an ambiguous deed and surrounding circumstances held to show that it was the intention to give a life estate to Kate Swinebroad with remainder to her children, and to justify a reformation to that effect. Swinebroad v. Wood, 29 Ky. L. R. 1202, 97 S. W. 25.

Evidence held insufficient to authorize reformation of a settlement so as to justify a recasting thereof. Crabtree's Adm'x v. Sisk, 30 Ky. L. R. 572, 99 S. W. 268. An insurance policy so as to authorize the insured to take out additional insurance. Kelly v. Liverpool & London & Globe Ins. Co. [Minn.] 111 N. W. 395. A deed so as to impose upon the grantee a contract of the grantor to furnish the hops raised thereon to a third person. Bower v. Bowser [Or.] 88 P. 1104. A contract so as to make the parties thereto partners in a lease which was the basis thereof, the evidence being conflicting. Stein v. Phillips, 47 Or. 545, 84 P. 793. A deed so as to omit some of the land included therein. Jones v. Jones [Miss.] 41 So. 373. A contract of sale by striking out the words "more or less" after a metes and bounds description. Cohen v. Numsen [Md.] 65 A. 432. A deed, reserving a right of way, in which the words "nine degrees" were claimed to have been used by mutual mistake for "nine per cent." on testimony of two witnesses who negotiated for plaintiff, it appearing that they did not know the difference between the two phrases, and against the positive testimony that degrees was intended. Graham v. Carnegie Steel Co. [Pa.] 66 A. 103. A settlement so as to include a particular claim where the evidence shows that the party seeking relief and his attorneys read the settlement with such claim in mind and yet signed it although it clearly excluded the claim. Tillar v. Wilson [Ark.] 96 S. W. 381. Evidence held insufficient to show mutuality of mistake in the face of positive testimony of defendant that the deed conveyed just what she intended to sell, which was corroborated. Stoll v. Nagle [Wyo.] 86 P. 26. An administrator's deed will not be reformed as to description where the only proof of its existence is an entry in an abstract of the county and there is no evidence to show that the land described therein is not the land ordered to be sold. Cunningham v. Edsall [Mo.] 98 S. W. 545. Where a mortgage is executed subject to any rights which may exist under a certain mortgage, and the evidence is conflicting as to what occurred at the time of execution but it does appear that the language was used advisedly, it will not be reformed to make it subject absolutely to the first mortgage. Nicholson v. Aney, 127 Iowa, 278, 103 N. W. 201. Testimony of a single interested witness contradicted by the positive testimony of another and the facts and surrounding circumstances held insufficient to sustain a reformation. Marquette Timber Co. v. Abeles & Co. [Ark.] 99 S. W. 685. A finding that there was no mistake of description in a deed held not so against the weight of the evidence as to require a reversal. Tillar v. Wilson [Ark.] 96 S. W. 381.

15. Reformation on insufficient proof. Dorris v. Morrisdale Coal Co. [Pa.] 64 A. 855.

16. Stoll v. Nagle [Wyo.] 86 P. 26.

17. Where the petition for reformation of a sale contract alleges that the price of the grape vines was to be paid in fruit and the proof showed such agreement and also that the seller agreed to assist in planting, there was no variance, but relief should be limited to the allegations. Goodrich v. Fogarty, 130 Iowa, 223, 106 N. W. 616.

18. See 6 C. L. 1285.

RELEASES.

§ 1. Nature, Form, and Requisites (1714).
§ 2. Parties to Release (1714).
§ 3. Interpretation, Construction, and Effect (1714).
§ 4. Defenses to, or Avoidance of, Releases (1715).
§ 5. Pleading, Proof and Practice (1717). The Burden of Proof (1717). Evidence (1717).

This topic includes only formal releases, excluding settlements and the effect of a release as an accord and satisfaction.[22] The rule of public policy respecting release of liability for future negligence is also excluded.[23]

§ 1. *Nature, form, and requisites.*[24]—Though acceptance of a payment made in full may operate as a compromise,[25] a formal release becomes effective only on its execution and not by acceptance of the payment tendered therewith.[26] At common law release must be by specialty the seal importing consideration,[27] but by statute in many states, the seal is dispensed with,[28] and in some the fact that the instrument is in writing is given the effect which at common law attached to a seal.[29] A seal affixed to the signature of one joint releasor is presumptively adopted by the other when sealing by both is recited.[30]

§ 2. *Parties to release.*[31]—A statute making a contract expressly for the benefit of a third person enforceable by him renders a release for the benefit of a third person available by him as a defense.[32]

§ 3. *Interpretation, construction, and effect.*[33]—A general release will be construed to apply only to the precedent particular transactions recited therein,[34] but general words are not necessarily restricted to a particular item thereafter mentioned.[35] A general release with an exception releases all not strictly within the ex-

19. Deed sought to be reformed preliminary to having it declared a mortgage. Goodbar & Co. v. Bloom [Tex. Civ. App.] 16 Tex. Ct. Rep. 765, 96 S. W. 657.

20. Failed to amend the answer so as to show the homestead character of the land although the evidence in respect thereto was received subject to objections. Scheuer v. Chloupek [Wis.] 109 N. W. 1035.

21. So as to give all interested an opportunity to redeem. Carrigg v. Mechanics' Sav. Bank [Iowa] 111 N. W. 329.

22. See Accord and Satisfaction, 7 C. L. 10.

23. See Contracts, 7 C. L. 761; Carriers, 7 C. L. 522.

24. See 6 C. L. 1286.

25. See Accord and Satisfaction, 7 C. L. 10.

26. But the mere receipt of a check and voucher showing it to be on account of damages and reciting that the indorsement of the voucher constitutes a full release of the account does not render the papers effective as a release. Indiana Union Trac. Co. v. McKinney [Ind. App.] 78 N. E. 203.

27. Probate Court v. Enright [Vt.] 65 A. 530; Allen v. Ruland [Conn.] 65 A. 138. An unsealed release is merely a receipt effective or not according to the adequacy of the actual consideration (Farmers' & Mechanics' Life Ass'n v. Caine, 224 Ill. 599, 79 N. E. 956, afg. 123 Ill. App. 419), and hence is a discharge only of so much of the debt as is equal in amount to the sum received (Id.).

Consideration held sufficient: A promise to release, based on services already rendered of such character and performed under such circumstances as entitles the releasee not only to expect but to enforce compensation, is supported by a sufficient consideration. Rockefeller v. Wedge [C. C. A.] 149 F. 130. Adequacy not considered where release was of unliquidated claim. Allen v. Ruland [Conn.] 65 A. 138. When a release is executed by an employe jointly with his employer for injuries sustained by each through the negligence of the releasee, the fact that the employer received all the consideration paid does not necessarily affect the validity of the release given by the employe. Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851. Evidence held insufficient to show want of consideration in obtaining release. Narretti v. Scully [C. C. A.] 139 F. 118.

Insufficient: A release given by a discharged employe for no more than the amount of wages due him at the time is no consideration for a release of his claim for a wrongful discharge. Caffyn v. Peabody, 149 F. 294.

28. Earle v. Berry, 27 R. I. 221, 61 A. 671.

29. When a release is in writing a consideration is presumed. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

30. Rockwell v. Capital Trac. Co., 25 App. D. C. 98.

31. See 6 C. L. 1286.

32. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

33. See 6 C. L. 1286.

34. Release of coereditor held inapplicable to claim against land sought by releasor to be impressed with trust in hands of releasee. Eisert v. Bowen, 102 N. Y. S. 707.

35. Release of August 15, 1903, covering from the beginning of the world to and including its date and especially on account of a certain accident which occurred on or about July 18, 1903, held to cover an accident occurring March 8, 1902. Chicago Union Trac. Co. v. O'Connell, 224 Ill. 428, 79 N. E. 622.

ception.[36] Release by an injured person bars an action for death resulting from the injury.[37] Construction of ambiguous terms is for the court.[38] In the absence of statute [39] the voluntary release of one joint debtor,[40] or joint tort feasor,[41] releases all. But this rule applies only to a formal release as distinguished from a mere payment,[42] or a covenant not to sue,[43] to one who is in fact a joint tort feasor with him who claims the benefit of the release,[44] and in the absence of an express limitation in the release,[45] the consideration of the release operating in such cases as payment pro tanto.[46]

§ 4. *Defenses to, or avoidance of, releases.*[47]—A release like any other contract is vitiated by incompetence of a party,[48] fraud [49] with which the other party is

36. When one has released his rights except as to negligence, he cannot recover in trespass. Murphy v. Black [Ala.] 41 So. 877.

37. Strode v. St. Louis Transit Co., 197 Mo. 616, 95 S. W. 851; Bruns v. Welte, 126 Ill. App. 541.

38. Murphy v. Black [Ala.] 41 So. 877.

39. In Kansas one joint debtor may be released without releasing the others of their proportionate liability. Smith v. White [Kan.] 85 P. 588.

40. Married woman held not joint debtor with husband on their joint note. Banking House v. Rose [Neb.] 111 N. W. 590. A succession in estate by one co-obligor to the obligation is not a "transfer" to him which would release all. Does not extinguish obligation. Enscoe v. Fletcher, 1 Cal. App. 659, 82 P. 1075.

41. A release of one of several joint trespassers for a valuable consideration is a release of all. Allen v. Ruland [Conn.] 65 A. 138. Where an agent is intrusted with the discount of the notes of a third person by his principal, the liability of the principal to the third person arising from the agent's conversion of the proceeds of the notes brings the case within rule that the release of one of the joint tort feasors releases all. Chicago Herald Co. v. Bryan, 195 Mo. 574, 92 S. W. 902. Hence, a release of the principal by such third person is conclusive of the right of the latter to proceed against the agent. Id. A release to a county by releasor through whose land the county's contractors were building a sewer of all damages by the contractors except from their negligence as to crops outside the right of way is an acquittance of the contractors of all trespasses, subject only to the express reservation. Murphy v. Black [Ala.] 41 So. 877.

42. Brennan v. Electrical Inst. Co., 120 Ill. App. 461.

43. A covenant not to sue one of several joint tort feasors is not equivalent to a release. Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654.

44. Release to commonwealth for injuries to employe of contractor engaged in doing work for the commonwealth held not release of contractor. Pickwick v. McCauliff [Mass.] 78 N. E. 730. Street railway held not joint tort feasor with railroad. Pittsburgh Ry. Co. v. Chapman [C. C. A.] 145 F. 886, afg. 140 F. 784.

45. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. When the ultimate owner of property has enforced his rights by following it into the hands of one who has obtained it unlawfully and given a release for less than the sum lost, reserving the right to proceed against another through whose fault the loss occurred, the latter cannot avail of the release as a defense to its liability, whether tortious or contractual. Morris v. North American Mercantile Agency Co., 103 N. Y. S. 761.

46. In the absence of a release or an accord and satisfaction, the receipt of compensation from a joint tort feasor is applicable merely pro tanto in satisfaction of a claim against another joint tort feasor. Brennan v. Electrical Inst. Co., 120 Ill. App. 461. When the language of a release shows that the release had in view even in part its protection against suit for the cause of action described in the release the consideration paid is applicable pro tanto on the liability of another liable for the same tort, notwithstanding parol evidence tending to show that it was paid as a mere gratuity. El Paso & S. R. Co. v. Darr [Tex Civ. App.] 15 Tex Ct. Rep. 145, 93 S. W. 166.

47. See 6 C. L. 1287.

48. A release given by one when, by reason of recent injury, he is shocked and dazed and not mentally in a condition to understand what he is doing, may be avoided by the releasor. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 98 S. W. 907.

49. Release held void for false representations in its procurement. Galveston etc., R. Co. v. Cade [Tex. Civ. App.] 15 Tex. Ct. Rep. 66, 93 S. W. 124, afg. [Tex.] 15 Tex. Ct. Rep. 826, 94 S. W. 218. Mere concealment of the contents of a release from the releasor cannot operate as an inducement for him to sign so as to make it voidable for fraud. Instruction held erroneous. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 S. W. 907. A releasor is not bound by a release obtained from him by false representations of one sustaining a confidential relation toward him, though he have some doubt as to the absolute correctness thereof. Viallet v. Consolidated R. & Power Co., 30 Utah, 260, 84 P. 496. A release procured from an illiterate person which does not contain the benefits promised him in the prior negotiations is vitiated by the fraud. Hayes v. Atlanta & C. Air-Line R. R. Co. [N. C.] 55 S. E. 437. When a release is obtained for a less sum than is due in settlement of a liability about which there is no dispute on the false representation that nothing is due under circumstances calculated to affect the releasor's ability to insist on full payment or nothing, the fraud is such as may be interposed to impeach the release in an action at law.

chargeable,[50] or mistake,[51] and such invalidity may be urged by replication to the release in an action at law,[52] notwithstanding the pendency of a suit in equity to rescind.[53] A voidable release must be disaffirmed within a reasonable time,[54] which time may be less than that required to complete the bar of limitations against the cause of action,[55] but cannot extend beyond such bar.[56] The validity of a release does not depend on its having been read by the releasor when at the time of signing he believes it to be a release,[57] nor when he is able to read and is afforded opportunity to read it,[58] nor can one who negligently fails to read or have read a release executed by him be heard in an action at law to say that his signature thereto was obtained by fraud or artifice;[59] but a releasor induced by the false statements of the releasee or his authorized agent to sign the release without reading it is not bound thereby.[60] A release may be avoided for failure to pay the promised consideration.[61] As to whether return of the consideration received for a release is essential to successful maintenance of a suit on the cause of action described therein, the authorities conflict.[62] Tender back of the amount received as a consideration for a release may be waived.[63]

Farmers' & Mechanics' Life Ass'n v. Caine. 123 Ill. App. 419, afd. 224 Ill. 599, 79 N. E. 956.

50. Fraud by physician employed by releasee who did not procure the release and whose statements were unknown to the agent who did. Gulf, etc., R. Co. v. Huyett [Tex.] 15 Tex. Ct. Rep. 502, 92 S. W. 454.

51. Mere ignorance of a releasor as to the contents of the release at the time of its execution is not ground for avoidance of it. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 S. W. 907.

52. Rockwell v. Capital Traction Co., 25 App. D. C. 98.

53. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884. When one has been defrauded of money and through the duress and fraud of the tort feasor has accepted a note for the amount, and, also given a general release, he may, in trover to enforce the tort-feaser's liability, impeach the release. Creshkoff v. Schwartz, 103 N. Y. S. 782.

54. Disaffirmance within two years after attaining majority of a release given by an infant is within a reasonable time. Chicago Tel. Co. v. Schulz, 121 Ill. App. 573.

55. Galveston, etc., R. Co. v. Cade [Tex.] 15 Tex Ct. Rep. 826, 94 S. W. 219, disapproving [Tex. Civ. App.] 15 Tex. Ct. Rep. 66, 93 S. W. 124.

56. A bill in equity to set aside a release will not lie when it is determinable therefrom that an action at law could not be maintained on the claim released even though the relief prayed was granted. Madison Coal Co. v. Caveglia, 122 Ill. App. 415.

57. Schenfeld v. Hochman, 100 N. Y. S. 1020.

58. Bennett v. Himmelberger-Harrison Lumber Co., 116 Mo. App. 699, 94 S. W. 808.

59. Heck v. Missouri Pac. R. Co., 147 F. 775.

60. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884.

61. When a draft is given as consideration for a release, but is not paid on presentation, the release is no bar of the cause of action described therein. Kirby Lumber Co. v. Chambers [Tex. Civ. App.] 14 Tex. Ct. Rep. 913, 95 S. W. 607.

62. **Condition precedent:** Tender back of consideration received is condition precedent to rescission of a release (Memphis St. R. Co. v. Giardino [Tenn.] 92 S. W. 855), and the tender must be made promptly (Id.). Delay of about two years held fatal. Id. The repayment or tender of the consideration received for a release is a condition precedent to its rescission when it is not within the power of the court to fully protect the interest of the adverse party in case of rescission. Price v. Connors [C. C. A.] 146 F. 503. Tender back of the amount received for a release obtained by fraud is a condition precedent to a suit at law on the cause of action described in the release. Heck v. Missouri Pac. R Co., 147 F. 775. Failure of plaintiff in an action ex delicto to return to the defendant the consideration received for a release thereof is fatal to the maintenance of the action (Lomax v. Southwest Missouri Elec. R. Co., 119 Mo. App. 192, 95 S. W. 945), nor is such tender obviated by a statute permitting plaintiff, by reply to an answer setting up a release, to plead that it was procured by fraud and providing for trial of the issue by the jury along with the case (Id.).

Contra: Return of the consideration paid for an invalid release is not a condition precedent to suit on the cause of action described therein. St. Louis, etc., R. Co. v. Sandidge [Ark.] 99 S. W. 68. Tender back of consideration received is not essential to meet the defense of release when want of consideration therefor is pleaded and proved. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. When the releasor is through the fraud of the releasee deceived by failure to put in the instrument the contract as agreed to, the return of the consideration received is not a condition precedent to a suit on the cause of action alleged to have been released thereby. Hayes v. Atlanta & C. Air Line R. Co. [N. C.] 55 S. E. 437. When a release obtained by fraud is pleaded as a defense, the plaintiff's rights are not lost by refusal to pay the consideration received into the registry of the court, but his rights are saved by expressing a tender or willingness in the pleadings to allow the same against any judgment rendered Galveston, etc., R. Co. v. Cade [Tex. Civ. App.] 15 Tex. Ct. Rep.

§ 5. *Pleading, proof, and practice.*[64]—Release as a defense must be pleaded,[65] and at common law must be pleaded as a specialty,[66] and a plea of an express release will not admit evidence of an estoppel in pais to assert the claim.[67] A replication in avoidance of a release must give color,[68] and must confess the release to be avoided.[69]

The burden of proof[70] is on one seeking to avoid a release for mistake, fraud,[71] or want of consideration.[72]

Evidence[73] of an offer of more than was paid for the release is admissible on an issue of fraud, but it must be restricted to such purpose.[74] Pursuant to the general rule it is held that extrinsic evidence is inadmissible to make releases anything but that which they appear on their face to be;[75] but when the scope of a release is in doubt parol evidence is admissible to show the surrounding circumstances to aid the court in its construction of the instrument,[76] and parol evidence as to the intention of the parties to a release is admissible to show the effect the instrument shall have with respect to others liable on the cause of action described therein.[77] As in other cases there must be clear and convincing proof to avoid a release for fraud,[78] duress,[79] or incapacity of the releasor,[80] but evidence thereof unless palpably insufficient presents a question for the jury,[81] and on conflicting evidence, factum[82] and consideration[83] are likewise jury questions. When mental incompetency of re-

66, 93 S. W. 124, af'd [Tex.] 15 Tex. Ct. Rep. 826, 94 S. W. 219. The amount paid for an invalid release unsuccessfully pleaded in defense of an action is a proper credit on the amount recoverable. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 S. W. 687. Tender of the consideration of a release obtained by fraud is not a condition precedent to an action on the cause of action described in it when the fraud is not discovered by the releasor until after the commencement of the action. St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884. It is time enough to make the tender of return of consideration for a release, to defeat its operation, after the release is pleaded in bar of an action at law. Rockwell v. Capital Trac. Co., 25 App. D. C. 98.

63. Fact of nontender held not available to reverse judgment when it was lost sight of as an issue by counsel on the trial. Robertson v. George A. Fuller Const. Co., 115 Mo. App. 456, 92 S. W. 130.

64. See 6 C. L. 1288.

65. Isabella Gold Min. Co. v. Glenn [Colo.] 86 P. 349.

66. Caffyn v. Peabody, 149 F. 294.

67. Missouri, etc., R. Co. v. Schroeder [Tex. Civ. App.] 100 S. W. 808.

68 Replication of fraud in obtaining release to plea of release held insufficient. Heck v. Missouri Pac. R. Co., 147 F. 775.

69. Hypothetical confession insufficient. Heck v. Missouri Pac. R. Co., 147 F. 775.

70. See 6 C. L. 1288, n. 59.

71. Wallace v. Skinner [Wyo.] 88 P. 221.

72. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

73. See 6 C. L. 1288, n. 1.

74. Cannot be considered in support of cause of action alleged to have been released. Loveman v. Birmingham Ry., L. & P. Co. [Ala.] 43 So. 411.

75. Allen v. Ruland [Conn.] 65 A. 138. In the absence of fraud or mistake, parol evidence to contradict the plain terms of a receipt is inadmissible. Murphy v. Black [Ala.] 41 So. 877.

76. Jersey Island Dredging Co. v. Whitney [Cal.] 86 P. 691.

77. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. Parol evidence held admissible to show that satisfaction of a judgment against an alleged joint tort feasor was other than for a release of liability or as compensation in whole or in part for the tort, as against another alleged joint tort feasor whose liability had been reduced to judgment. Ryan v. Becker [Iowa] 111 N. W. 426.

78. Lomax v. Southwest Missouri Elec. R. Co., 119 Mo. App. 192, 95 S. W. 945.

Evidence held sufficient. Capital Fire Ins. Co. v. Montgomery [Ark.] 99 S. W. 687; Creshkoff v. Schwartz, 103 N. Y. S. 782.

Evidence held insufficient. Narretti v. Scully [C. C. A.] 139 F. 118; Probate Court v. Enright [Vt.] 65 A. 530; Blair v. Utica, etc., R. Co., 98 N. Y. S. 614; Chicago, etc., R. Co. v. Williams [Tex. Civ. App.] 99 S. W. 141.

79. **Evidence held insufficient to show duress.** Narretti v. Scully [C. C. A.] 139 F. 118.

80. Evidence held to show that releasor was **rational** at time of executing release. McLoughlin v. Syracuse Rapid Transit R. Co., 101 N. Y. S. 196.

81. Whether purported release was obtained by fraud. McCormick H. M. Co. v. Zakzewiski, 121 Ill. App. 26; Rockwell v. Capital Traction Co., 25 App. D. C. 98; Gulf, etc., R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 774, 95 S. W. 720; Galveston, etc., R. Co. v. Cade [Tex. Civ. App.] 15 Tex. Ct. Rep. 66, 93 S. W. 124, afd. [Tex.] 15 Tex. Ct. Rep. 826, 94 S. W. 219; Viallet v. Consolidated R. & Power Co., 30 Utah, 260, 84 P. 496. Whether release through fraud of releasee did not contain the contract as agreed to. Hayes v. Atlanta & C. Air Line R. R. Co. [N. C.] 55 S. E. 437.

82. Castor v. Bernstein, 2 Cal. App. 703, 84 P. 244.

83. Bennett v. Himmelberger-Harrison Lumber Co., 116 Mo. App. 699, 94 S. W. 808.

leasor at the time of execution of a release is in issue, the refusal of a charge presenting the same is erroneous.[84]

RELIEF FUNDS AND ASSOCIATIONS, see latest topical index.

RELIGIOUS SOCIETIES.

§ 1. Organization as a Corporation, and Status of Society (1718).
§ 2. Membership and Meetings (1718).
§ 3. Ministers (1718).
§ 4. Powers and Liabilities of Society in General (1718).
§ 5. Property and Funds (1719).
§ 6. Jurisdiction of Courts (1721).
§ 7. Actions by or Against Society or Members (1721).

§ 1. *Organization as a corporation, and status of society.*[85]—The organization and maintenance of a communistic religious corporation is not obnoxious to public policy though not in accordance with prevailing American ideals [86] and though considerable property is held and controlled, if the property is so managed as not to injure the state,[87] and such society does not exercise the functions of a corporation for pecuniary gain in violation of its corporate powers, where the members receive no profits and it is indispensable to their religious faith that they own their property in common and live a communistic life.[88] A corporation created under a statute governing the incorporation of charitable and scientific societies and not under the laws for the incorporation of religious societies is not a religious corporation and cannot consolidate with a religious corporation under a law providing for the consolidation of religious corporations.[89] The refusal to grant a charter to an association on the ground that the name sought is so similar to that of another congregation as to lead to confusion is a matter within the sound discretion of the court.[90]

§ 2. *Membership and meetings.*[91]—An expulsion of members pursuant to a fraudulent scheme to obtain possession of the church property is void though the members on joining the society agree to expulsion without trial.[92] Where there are no by-laws or customs fixing the time for holding meetings, evidence of the date of a meeting of a faction of the congregation after its division is not admissible to prove a custom as to the holding of annual meetings before the division.[93] A resolution by the general conference of a society bidding God speed to any church or circuit which had decided to disaffiliate themselves, and praying for an enlargement of their opportunities for religious work under their new association, is not an authorization or approval of a withdrawal from the conference.[94]

§ 3. *Ministers.*[95]

§ 4. *Powers and liabilities of society in general.*[96]—Though the vestry of a church may have the right under a contract to reject plans for the construction of a church building if they are not satisfactory, yet if it choses to delegate the matter to the rector and president and the architects follow his directions, it cannot thereafter

84. Missouri, etc., R. Co. v. Craig [Tex. Civ. App.] 17 Tex. Ct. Rep. 547, 98 S. W. 907.
85. See 6 C. L. 1289.
86, 87. State v. Amana Soc. [Iowa] 109 N. W. 894.
88. Where each member received only sufficient money to meet the necessities of a most economical existence. State v. Amana Soc. [Iowa] 109 N. W. 894.
89. Corporation formed under Laws 1848, p. 447, c. 319, and not under Act Apr. 5, 1813 (2 Rev. L. 1813, p. 212, c. 60), could not consolidate with religious corporation under Laws 1894, p. 484, c. 723, § 12. Selkir v. Klein, 50 Misc. 194, 100 N. Y. S. 449.
90. Superior court would not review discretion of court of common pleas in refusing to grant charter under the name of Polish National Catholic Church of St. Francis where another unincorporated congregation by the name of the St. Francis Roman Catholic Church resisted the application. Polish Nat. Catholic Church of St. Francis, 31 Pa. Super. Ct. 87.
91. See 6 C. L. 1289.
92. Plaintiffs held members so as to be able to maintain suit to protect the church property. Hendryx v. People's United Church, 42 Wash. 336, 84 P. 1123.
93. Firestone v. First Slavish Roman Catholic Greek Rite Church [Pa.] 63 A. 1038.
94. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.
95, 96. See 6 C. L. 1290.

reject the plans on the ground that they are not satisfactory.[97] A formal resolution is not essential to clothe a rector, who is also president f he vesry, with authority to act as the agent of the vestry in the preparation and acceptance of plans.[98] An incorporated church will be bound by a construction contract executed by its rector and afterwards assented to by it.[99]

A religious corporation engaged in administering a charitable trust not created by the grantor of its property is liable for the torts of its agents to persons who are not beneficiaries of the trust fund.[1] The trustees of a religious corporation can bind the society only by their action as a board.[2]

§ 5. *Property and funds.*[3]—Under the form of government applicable to Baptist churches, it would seem that the control of the church property is lodged either in the congregation as a body or its trustees, and not in the deacons.[4] If the laws of a state forbid the incorporation of any religious association and its holding of property as a corporation, a foreign religious corporation cannot as such take property by devise,[5] but a trust created in its favor will be governed by the local laws regulating the right of unincorporated religious societies to take and hold property.[6] In Maryland every sale of land to any religious denomination without the sanction of the legislature is void except sales of not exceeding five acres for a house of worship, or parsonage, or for a burying ground,[7] but though a deed be void, if possession is taken thereunder and held for the statutory period, the association may acquire title by adverse possession.[8] In Massachusetts a voluntary religious society possesses all the qualifying attributes of a duly organized corporation for the purpose of taking, holding, and transmitting property.[9]

A conveyance of property to be held by officers and members of a church and their successors for religious worship creates a trust of the property to be held for the use and benefit of the congregation named in the deed.[10] Where the legal title

97. Cann v. Church of Holy Redeemer [Mo. App.] 98 S. W. 781.

98. Oral authority from majority of members given in session sufficient. Cann v. Church of Holy Redeemer [Mo. App.] 98 S. W. 781. Held a question for the jury whether rector had been given proper authority. Id.

99. Evidence held to show ratification of contract made by rector who had complete charge of everything connected with the work. Condon v. Church of St. Augustine, 112 App. Div. 168, 98 N. Y. S. 253.

1. The principle that a corporation engaged in administering a charitable trust is not liable for torts of its agents is limited in its application to those who are beneficiaries of the trust fund (Bruce v. Central Methodist Episcopal Church [Mich.] 13 Det. Leg. N. 1099, 100 N. W. 951), and hence, though a church fund is a charitable trust fund (Id.), a religious corporation incorporated under Pub. Acts 1899, Act 11, p. 10, providing for the incorporation of Methodist Episcopal churches, is liable for injuries to an employe of a contractor under contract for decorating its church property, through the negligence of its agents in furnishing a defective scaffolding (Id.). The principle enunciated in Downes v. Harper Hospital 101 Mich. 555, 60 N. W. 42, 45 Am. St. Rep. 427, 25 L. R. A. 602, held inapplicable and other cases considered and harmonized. Id.

2. First Presbyterian Church v. McColly, 126 Ill. App. 333.

3. See 6 C. L. 1290.

4. Held questionable whether deacons and only one trustee could sue for injunction. Drew v. Hogan, 26 App. D. C. 55.

5. Especially in view of W. Va. Code 1896, § 1322, providing that foreign corporations shall be subject to the same restrictions as are imposed on domestic ones. Miller v. Ahrens, 150 F. 644.

6. Under Code 1899, c. 57, § 7 (Code 1906, § 2613), limiting the amount of land that can be held to four acres in a city, town, etc., and 60 acres outside of such city, town, etc., a trust created by will for the benefit of a foreign religious corporation devising 351 acres of land in West Virginia was contrary to public policy. Miller v. Ahrens, 150 F. 644. Held void as a trust for uncertainty as to beneficiaries. Id.

7. Unsanctioned sale of less than five acres, deed not showing that it was within exceptions, held void. Regents of University v. Calvary M. E. Church South Trustees [Md.] 65 A. 398.

8. Regents of University v. Calvary M. E. Church South Trustees [Md.] 65 A. 398.

9. Under Gen. St. 1860, c. 30, § 24, Pub. St. 1882, c. 39, § 9, Rev. Laws, c. 37, § 12, providing that unincorporated religious societies shall have like powers as incorporated societies to manage, use, and employ any gift or grant made to them. First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778.

10. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432.

to land is held by certain persons as trustees of an association, "their heirs and assigns," the mere subsequent appointment of new trustees does not show title in the latter.[11] A statute providing that where property is conveyed for church purposes it shall vest in the church or its trustees to be held in succession, according to the government of the church, does not apply where property is conveyed for an educational as well as a religious purpose.[12] If a consolidation of a charitable or scientific society with a religious corporation is unauthorized, the real estate of the former does not vest in the consolidated company.[13]

The use of property must be limited to the extent specified in a grant thereof.[14] Where trustees are authorized to appoint property for the use of some religious denomination for religious services and an appointment is accordingly made, such appointment necessarily implies a limitation of the use of the property to the furtherance of the doctrine and purposes of the denomination to which the appointee belongs,[15] especially where such are the requirements of the discipline and regulations of a superior organization.[16] And neither the officers nor a majority of the members of an incorporated society have the power to divert its property from the uses defined by a grant to it [17] or from the purposes of its organization as regards the particular religious belief it was organized to promote.[18] Where a deed authorizes trustees to appoint property to the use of a society for religious services on certain days in the week and to reappoint when services are withdrawn, the trustees have no power to revoke an appointment once made [19] but can reappoint only when the appointee withdraws its services.[20]

In New York a religious corporation may not sell or mortgage any of its real property without first obtaining leave of court [21] and such leave can be granted only when the interests of the corporation will be promoted by a sale.[22] If a sale is made without authority, the corporation may recover the property though the purchaser has paid the price and taken possession.[23] Leave of court need not be obtained, how-

11. Certain persons acted for a religious society and land was conveyed to them, "trustees, their heirs, and assigns." Held, in a suit to recover the property brought by trustees of another church against new trustees, the intention of the grantor to convey the land to the grantees as trustees and not as individuals was immaterial there being nothing to show that the original grantees had parted with title. Lee v. Methodist Episcopal Church [Mass.] 78 N. E. 646.

12. Civ. Code 1895, § 2353, did not apply, and where property was conveyed in trust for the use of members of the Methodist Episcopal church and also for educational purposes with a provision that on a failure of trustees new ones should be appointed by the proper authority, and there was a vacancy, neither the trustees of the church nor the trustees of the academy were shown to be the successors of the original trustees legally appointed. Harris v. Brown, 124 Ga. 310, 52 S. E. 610. Court of equity was proper authority to appoint trustees. Id.

13. Title not marketable. Selkir v. Klein, 50 Misc. 194, 100 N. Y. S. 449. See ante, § 1,

14. Where use was granted on certain days in the week it was limited to the hours specified. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.

15. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.

16. Where property was appointed to a Primitive Methodist society which held its property subject to uses not inconsistent with the Primitive Methodist church. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928

17. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.

18. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928. Where religious property was restricted to use by a society supporting the doctrines of the Primitive Methodist denomination, its use by a corporation formed by a majority of its members which severed its connection with the Methodist conference and applied for affiliation with churches of the Congregational denomination constituted a diversion of the property from its restricted use. Id.

19. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.

20. No withdrawal where after appointee had been supplanted by another society it made strenuous efforts to regain possession for the purpose of conducting its services. Cape v. Plymouth Congregational Church [Wis.] 109 N. W. 928.

21. Prohibited by religious corporations law (Laws 1895, p. 483, c. 723, as amended by Laws 1896, p. 277, c. 336; Laws 1901, p. 527, c. 222). Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12, 98 N. Y. S. 1082.

22. Code Civ. Proc. §§ 3391, 3393. Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12, 98 N. Y. S. 1082.

23. No estoppel. Associate Presbyterian Congregation v. Hanna, 113 App. Div. 12, 98

ever, where the corporation merely takes the legal title as trustee for another to whom it is bound to convey it.[24] If a majority of the directors or trustees of a seminary are authorized to convey lands belonging to it, a power of attorney executed by the president and authorizing one to execute deeds is insufficient to show authority.[25] Where property is conveyed in trust to be used for maintaining a church of worship it is not a breach of such trust to lease a small portion of the land for commercial purposes, the rent to be applied to the use of the church.[26] And where a parish has no further use for a meeting house and the land on which it stands it is not ultra vires for it to lease the land to one who agrees to buy the meeting house, the parish agreeing to pay, on the termination of the lease, a reasonable sum for buildings and improvements put upon the land during the term.[27]

§ 6. *Jurisdiction of courts.*[28]—Civil courts will grant relief against a fraudulent diversion of church property to foreign purposes for selfish ends whether such diversion is attempted by expulsion of members or in any other fraudulent manner.[29] Though such courts will not enforce the judgments of ecclesiastical courts they will enforce an award of arbitration made by an ecclesiastical court as arbitrator providing it is shown that the parties agreed to submit the controversy to such court and abide by the judgment.[30]

§ 7. *Actions by or against society or members.*[31]—A bill in equity will lie to restrain the forcible trespass by strangers upon church property involving a disturbance of orderly worship,[32] and such bill does not invoke the interposition of a civil court in an ecclesiastical controversy.[33] Such bill will also lie to restrain persons claiming to be trustees of an incorporated association from refusing the congregation admission to the church building,[34] but not where this is only its ostensible object and the real aim is to have it determined which of two sets of trustees are legally elected.[35] A member of a church for the use of whose members property is conveyed in trust has a sufficient interest in the trust to enable him to file a bill in equity to enjoin an unauthorized sale and have trustees appointed.[36] The use of a disjunctive in the name of a church as it appears in a complaint does not render the pleading open to the objection that plaintiff trustees are attempting to act for two churches.[37] When one society claims the right to control the affairs and property

N. Y. S. 1082. A provision in the judgment for recovery of the property adjudging the deed void and directing its cancellation of record was not prejudicial to defendant especially where the consideration was directed to be restored to him. Id.

24. Where pending consummation of contract to convey land the vendor devised it to a religious corporation, vendee should have accepted deeds without insisting on leave of court being obtained. Edelstein v. Hays, 50 Misc. 130, 100 N. Y. S. 403.

25. No presumption that president was authorized by trustees or directors to execute the power of attorney. New Glasgow Planing Mill Co. v. Shaw [Ky.] 99 S. W. 661.

26. Courts will not interfere in such cases unless there is such misuse of funds as to amount to a perversion of the charity. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432.

27. Hollywood v. First Parish [Mass.] 78 N. E. 124.

28. See 6 C. L. 1291.

29. Regardless of the right of a civil court to review adjudications of ecclesiastical bodies. Hendryx v. People's United Church, 42 Wash. 336, 84 P. 1123.

30. No such agreement shown. Paggenborg v. Conniff, 29 Ky. L. R. 912, 96 S. W. 547.

31. See 6 C. L. 1291.

32. Forcible entry by non-members threatening to interfere with rights of trustees, etc. Christian Church v. Sommer [Ala.] 43 So. 8.

33. Christian Church v. Sommer [Ala.] 43 So. 8. There is no adequate remedy at law. Id.

34. Members being beneficiaries for whom property is held in trust. Barna v. Kirczow [N. J. Eq.] 63 A. 611.

35. In such case remedy is at law. Barna v. Kirczow [N. J. Eq.] 63 A. 611.

36. Harris v. Brown, 124 Ga. 310, 52 S. E. 610.

37. Complaint alleging that plaintiffs are trustees of the "Christian Church or Church of Christ" and that defendants are trustees of the "Christian Church" and held possession of certain property without right held to aver that plaintiffs were trustees of a church of one name and that defendants were trustees of a church of another name, and not to be open to the objection that plaintiffs were attempting to act as trustees of two churches. Bush v. Bullington [Ind.] App.] 78 N. E. 640.

of another, the burden is upon it to show the source of its authority.[38] A voluntary association having all the powers of a corporation with respect to the taking, holding, and transmitting of property, has the implied correlative right to show by its records not only its organization but a vote taken to purchase land and erect thereon a building for religious worship.[39] Courts will take judicial notice of the North and South divisions of the Methodist Episcopal church, of the territory over which jurisdiction was to be and has been exercised by the subdivisions, and of the articles of separation with reference to a territorial division of the common property.[40]

REMAINDERS; REMEDY AT LAW; REMITTITUR, see latest topical index.

REMOVAL OF CAUSES.

§ 1. Right to Remove From State to Federal Court (1722).
§ 2. What is a "Suit" or "Action" so Removable (1723).
§ 3. Nature of Controversy or Subject-Matter, and Existence of Federal Question (1723).
§ 4. Diversity of Citizenship and Alienage of Party (1724).
§ 5. Prejudice and Local Influence and Denial of Civil Rights (1726).
§ 6. Amount in Controversy (1726).
§ 7. Procedure to Obtain and Effect the Removal (1727).
§ 8. Transfer of Jurisdiction and Other Consequences of Removal (1729).
§ 9. Practice and Procedure After Removal; Remand or Dismissal (1730).
§ 10. Transfers Between Courts of the Same Jurisdiction (1732).

While the rule that a cause to be removable to a Federal court must be one within its jurisdiction is here treated, the nature and extent of that jurisdiction pertains to another topic.[41]

§ 1. *Right to remove from state to Federal court.*[42]—The right of removal is not dependent upon the consent of plaintiff.[43] In determining the removability of a cause, state courts are controlled by decisions of the Federal supreme court.[44] A landowner in condemnation proceedings is a defendant within the meaning of the removal statute.[45] New parties in ancillary proceedings are affected with the same disabilities as regards removal as rested upon the parties whom they supersede.[46] The joinder of a party against whom no cause of action is stated is no obstacle to a removal by one entitled thereto.[47]

38. Evidence held to show that a certain religious society had never become affiliated with another church so as to be subject to its ownership and control. Lee v. Methodist Episcopal Church [Mass.] 78 N. E. 646. Even if it had become affiliated with the other church the court could not say that its property would belong to that church by force of the "discipline" of the church there being nothing to show what that discipline was. Id.

39. Where an unincorporated society alleged in an action to quiet title that defendant's ancestor took title in his own name for plaintiff's benefit, entries made by the ancestor while acting as clerk, in one of the record books of the society, were relevant to show that he was acting in plaintiff's behalf in taking the title. First Baptist Church v. Harper, 191 Mass. 196, 77 N. E. 778. Not self-serving declarations in derogation of defendant's title. Id. Entries in hand writing of ancestor in his account book relating to expenditure of the money contributed by the members for the purchase of the land held binding on defendants. Id.

40. Malone v. La Croix, 144 Ala. 648, 41 So. 724. Where trustees were designated in a trust deed as trustees of the Methodist Episcopal Church of America, the fact that their successors afterwards appointed under the statute were designated as trustees of the Methodist Episcopal Church South was immaterial. Id. In action in ejectment held error to exclude evidence of plaintiffs' appointment. Id.

41. See Jurisdiction, 8 C. L. 579.

42. See 6 C. L. 1292.

43. A suit by an alien against a nonresident corporation, if otherwise removable to the Federal courts in the state, is removable without plaintiff's consent. Iowa Lillooet Gold Min. Co. v. Bliss, 144 F. 446. But see Ex parte Wisner, 27 S. Ct. 150, and post, § 4.

44. Texas & P. R. Co. v. Huber [Tex.] 15 Tex. Ct. Rep. 642, 92 S. W. 832.

45. Iowa Code 1897, § 2009, declaring that on appeal to district court from the award the landowner shall be plaintiff and the corporation defendant, does not fix status of parties under removal act. Mason City & Ft. D. R. Co. v. Boynton, 27 S. Ct. 321.

46. Where third persons were brought in because they claimed an interest in the property involved, and filed a regular complaint against defendants on substantially the same cause of action, they could not remove though they were nonresidents since the original plaintiffs could not. Nash v. McNamara, 145 F. 541.

47. Eastin v. Texas & P. R. Co. [Tex.] 45 Tex. Ct. Rep. 646, 92 S. W. 838.

§ 2. *What is a "suit" or "action" so removable.*[48]—The cause must be within the original jurisdiction of the Federal court.[49] A proceeding in garnishment after judgment under the Washington statute is a "civil suit" which may be removed by a nonresident garnishee on issue being joined as to his liability though the parties to the judgment are citizens of the same state.[50] A condemnation proceeding in Montana is also removable as a civil suit.[51]

§ 3. *Nature of controversy or subject-matter, and existence of Federal question.*[52]—In order that a defendant may be deprived of his right to remove a bill in equity on the ground of diversity of citizenship, complainant must show that he has no remedy in equity in the Federal court,[53] that he has a remedy in equity in the state court,[54] and that such remedy is based on a state statute and not on a view of the ordinary jurisdiction of a court of equity different from that entertained by the Federal court.[55] To authorize the removal of a cause solely on the ground that it arises under a law of the United States, a Federal question must exist as to all the defendants[56] even though they all join in the petition for removal.[57] It is for the court to determine on petition for removal whether an action is maintainable under a state or a Federal law, if at all,[58] and, if one construction of a Federal statute will sustain and another defeat a recovery, the action will be held to be one arising under a law of the United States.[59] The existence of a Federal question must appear from plaintiff's own statement of his case[60] and cannot be shown by the petition for removal.[61] A defendant who is sued by the receiver of a national bank may have the

48 See 6 C. L. 1292.

49. A suit which by reason of the nonresidence of both parties could not have been brought in the circuit court in the first instance is not removable thereto over plaintiff's objection even if the consent of both parties would justify such removal. Ex parte Wisner, 27 S. Ct. 150. The case of Manufacturers' Commercial Co. v. Brown Alaska Co., 148 F. 308 seems to hold contrary to the last case cited. See post, § 4. Suit not removable where neither party was a citizen or resident of the state. Yellow Aster Min. & Mill Co. v. Crane Co. [C. C. A.] 150 F. 580. Suit against defendant as "duly qualified and acting postmaster of Dallas, Texas" and seeking relief against official acts is one arising under laws of United States within jurisdiction of circuit court, and hence removable. Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321. Cause remanded for want of jurisdiction in Federal court to enforce state statute enlarging equitable jurisdiction of state courts. Mathew's Slate Co. v. Mathews, 148 F. 490.

50. Laws 1893, p. 95, c. 56, Ballinger's Ann. Codes & St. § 5390 et seq. Baker v. Duwamish Mill Co., 149 F. 612.

51. Proceeding under Code Civ. Proc. tit. 7, pt. 3. Helena Power Transmission Co. v. Spratt, 146 F. 316.

52. See 6 C. L. 1293.

53. Circuit court of United States sitting in equity has no jurisdiction of a bill for accounting brought by insured under a tontine policy against the insurance company. Peters v. Equitable Life Assur. Soc., 149 F. 290.

54. Peters v. Equitable Life Assur. Soc., 149 F. 290.

55. Equitable jurisdiction of Massachusetts courts of bill for accounting by tontine policy holder against insurer is based on Rev. Laws, c. 159, § 3, cl. 6, defining the equitable jurisdiction of the judicial and superior courts. Peters v. Equitable Life Assur. Soc., 149 F. 290.

56. Railway company could not remove though organized under act of congress where its resident servant as to whom no Federal question existed was also made defendant. Texas & P. R. Co. v. Huber [Tex.] 15 Tex. Ct. Rep. 642, 92 S. W. 832; Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838. That servant was charged with negligence in the discharge of his duties did not make a case under the Federal laws as to him. Texas & P. R. Co. v. Huber [Tex.] 15 Tex. Ct. Rep. 642, 92 S. W. 832.

57. That codefendant as to whom no Federal question existed joined in petition for removal presented by railroad company organized under act of congress did not avail. Texas & P. R. Co. v. Huber [Tex.] 15 Tex. Ct. Rep. 642, 92 S. W. 832; Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838.

58. Hall v. Chicago, etc., R. Co., 149 F. 564. Conceding that plaintiff's petition implied reliance upon the act of congress requiring railroad cars to be equipped with automatic couplers (Act March 2, 1893, §§ 1, 2), held not error to refuse removal where it did not appear that defendant was engaged in interstate commerce, said act applying only to such railroads. International & G. N. R. Co. v. Elder [Tex. Civ. App.] 99 S. W. 856.

59. Hall v. Chicago, etc., Co. 149 F. 564. "Employer's Liability Act" (Act June 11, 1906, c. 3073, 34 Stat. 232) did not apply to causes of action existing at time of its adoption hence this case did not arise under a Federal law and was therefor remanded. Id.

60, 61. Hall v. Chicago, etc., R. Co., 149 F. 564.

cause removed on the ground that the suit arises under the laws of the United States.[62]

§ 4. *Diversity of citizenship and alienage of party.*[63]—To authorize a removal on the ground of diversity of citizenship when there is no separable controversy, all the defendants must be nonresidents of the state in which the action is brought.[64] The authorities are conflicting as to the right of removal without plaintiff's consent where both parties are nonresidents.[65] That a defendant is an alien nonresident is not now a ground for removal.[66] For a determination of the existence of diversity of citizenship the parties will be arranged according to the real pecuniary interests in the controversy,[67] and parties improperly joined will be disregarded.[68] Thus, in a suit between citizens, a nonresident may intervene and have the cause removed if he is the real and only defendant in interest.[69] A foreign corporation may retain its status as such for the purpose of removing a cause against it though it is a domestic corporation for other purposes,[70] and the fact that a domestic corporation pursuant to legislative authority consolidates with a foreign one does not make it a foreign corporation for such purpose, especially where the statute provides that both shall be domestic corporations.[71]

62. Since receiver could have had cause removed if action had been against him. Johnson v. Rankin [Tex. Civ. App.] 15 Tex. Ct. Rep. 477, 95 S. W. 665.

63. See 6 C. L. 1293.

64. Though plaintiff was a citizen of a state other than that of either of two defendants, and both joined in the petition, the cause was not removable under clause 2, § 2, Act Aug. 13, 1888, c. 866, 25 Stat. 434 (U. S. Comp. St. 1901, p. 509), where only one defendant was a nonresident of the state where the action was instituted. Blackburn v. Blackburn, 142 F. 901. Moving party resident. McFadden v. McFadden, 32 Pa. Super. Ct. 534.

Note: It is held in National Bank of Battle Creek v. Howard, 103 N. Y. S. 814, that when the controversy is wholly between citizens of different states and can be fully determined as between them and removal is sought under clause 3 of § 2 of the removal act, it is not essential that the removing defendant be a nonresident; but this is probably contrary to the weight of authority. See 4 Fed. Stat. Ann., p. 321.

65. **Cause held removable:** The requisite amount being involved, a suit between an alien and a nonresident corporation defendant is removable without plaintiff's consent. Iowa Lillooet Gold Min. Co. v. Bliss, 144 F. 446. Since such suit is removable under clause 2 of section 2 of the removal act, it is no objection that it is not a suit "between citizens of different states" and that therefore the suit is not removable under clause 3. Id. Though a plaintiff cannot sue in a Federal court in a district in which neither he nor defendant resides, yet, if he brings an action in a state court in such district, defendant may have it removed to the Federal court. Manufacturer's Commercial Co. v. Brown Alaska Co., 148 F. 308.

Held not removable: A suit which could not have been brought in the Federal court in the first instance, because of the nonresidence of both parties, is not removable thereto without plaintiff's consent. Ex parte Wisner, 27 S. Ct. 150.

66. U. S. Rev. St. § 639, subsec. 1 and 2 (U. S. Comp. St. 1901, p. 520) repealed by act of 1875 and the subsequent removal statutes. O'Conor v. Texas, 202 U. S. 501, 50 Law. Ed. 1120, and authorities cited.

67. On an issue of the liability of a garnishee to defendant in the main action, defendant and plaintiff should be arranged on the same side for removal purposes. Baker v. Duwanish Mill Co., 149 F. 612. Where one defendant was a mere stakeholder and two others had interests identical with complainants, remaining nonresident could remove. Johnston R. Frog & Swith Co. v. Buda Foundry & Mfg. Co., 148 F. 883.

68. Where resident principal was improperly joined in suit on a fidelity bond. Iowa Lillooet Gold Min. Co. v. Bliss, 144 F. 446. Where a bill in equity on its face states no ground of relief against two citizen defendant corporations, such defendants should be eliminated in determining the right of removal by a nonresident. Cella v. Brown [C. C. A.] 144 F. 742.

69. In a suit to compel a resident railroad to grant switch connections, a nonresident lessee company which had assumed all obligations could intervene and remove cause. Chase v. Beech Creek R. Co., 144 F. 571.

70. Where a foreign corporation became merged with another corporation under Code of Laws S. C. 1902, § 2050 et seq., the fact that thereafter it obtained a certificate or charter of consolidation from the state of South Carolina did not deprive it of its right to remove a cause as a foreign corporation. Lee v. Atlantic Coast Line R. Co., 150 F. 775.

71. Where a domestic railway corporation consolidates with a foreign corporation under Priv. Laws 1899, p. 212, c. 105, authorizing such consolidation but providing that the consolidation shall not oust the jurisdiction of the courts of the state, but that the corporations shall be domestic corporations, the consolidated corporation within the state is a domestic corporation and when served therein cannot have the cause removed for diversity of citizenship. Staton v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 794. Where several corporations consolidate under the

A separable controversy [72] such as will justify a removal by a nonresident defendant notwithstanding the joinder of resident parties exists only when the whole subject-matter of the suit can be determined between the parties to the controversy without the presence of the other parties.[73] The fact that a plaintiff avails himself of a statutory permission to unite several parties in the same action does not of itself make the cause of action joint or joint and several.[74] In the absence of fraud the question whether a controversy is separable or not must be determined from the record in the state court as it stands when the petition for removal is filed [75] without regard to that petition.[76] Hence, where a complaint states a joint cause of action against both resident and nonresident defendants,[77] a Federal court acquires no jurisdiction by removal unless a fraudulent joinder for the purpose of preventing re-

laws of different states, the stockholders of the old companies becoming stockholders of the new, the consolidated company is a corporation of each of the states under whose laws it was consolidated. Wasley v. Chicago, etc., R. Co., 147 F. 608.

72. See 6 C. L. 1296.

73. **No separable controversy:** In suit against two defendants for injuries to plaintiff's easement in streets by running trains thereon pursuant to agreement between defendants and for injunctive relief. Staton v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 794. In suit to enjoin destruction of water privilege wherein those undertaking diversion were joined with their contractor. McMillan v. Noyes, 146 F. 926. In condemnation there is no separable controversy between plaintiff and a nonresident holder of the legal title where the equitable title is held by a resident. Helena Power Transmission Co. v. Spratt, 146 F. 310.

Controversy held separable: Where suit was brought against principal and surety on a fidelity bond in which the only obligation on part of principal was to hold surety harmless, and in the same action plaintiff sought to recover against the principal for the default. Cause removable without regard to citizenship of principal. Iowa Lillooet Gold Min. Co. v. Bliss, 144 F. 446. In a suit for specific performance against a nonresident, wherein plaintiff claims to be entitled to an aliquot proportion of certain bonds and securities controlled by the nonresident against whom a decree for such allotment would apparently afford complainants complete relief, another citizen defendant to whom the nonresident has made an allotment of like apportionment without complainant's consent is not such a necessary party as to prevent removal. Cella v. Brown [C. C. A.] 144 F. 742.

74. Liabilities of maker and indorsers of a note are each distinct, and controversy is severable though all are sued in one action under a statute. Manufacturers' Commercial Co. v. Brown Alaska Co., 148 F. 308.

75. Where pleadings did not show that one defendant in ejectment claimed only a distinct portion of the land. City of Cleveland v. Cleveland, etc., R. Co. [C. C. A.] 147 F. 171. Courts are controlled absolutely by proponent's pleadings as shown on the face of his declaration at law or bill in equity, except so far as matters are alleged which are plainly contradictory, irrelevant, or immaterial, or unless the party seeking removal submits evidence of an improper joinder for the purpose of defeating Federal jurisdiction. McMillan v. Noyes, 146 F. 926. The case made in complaint determines right to remove. Joint suit against master and servant by coservant. Thomas v. Great Northern R. Co. [C. C. A.] 147 F. 83. See, also, post, § 9.

76. Shane v. Butte Elec. R. Co., 150 F. 801; Staton v. Atlantic Coast Line R. Co. [N. C.] 56 S. E. 794; Louisville & N. R. Co. v. Vincent [Tenn.] 95 S. W. 179. Independently of the allegations of petition or of the affidavits of petitioner. Allegation in petition that a codefendant was not a party to the negligence charged could not be considered. Offner v. Chicago & E. R. Co. [C. C. A.] 148 F. 201.

Contra: Except where a removal is sought on the ground that a Federal question is involved or where the case is otherwise provided for, the court may look into the record including the petition for removal in order to determine whether a separable controversy exists. Helena Power Transmission Co. v. Spratt, 146 F. 310.

77. A plaintiff in ejectment may join a lessee in possession having an equity, with the lessor, so as to conclude both by one judgment, and one of the defendants so joined cannot make the controversy separable. City of Cleveland v. Cleveland, etc., R. Co. [C. C. A.] 147 F. 171.

Joint cause of action stated in tort: In suit against railroad and resident servants. Dudley v. Illinois Cent. R. Co., 29 Ky. L. R. 1029, 96 S. W. 835; Louisville & N. R. Co. v. Vincent [Tenn.] 95 S. W. 179; Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838. In suit for wrongful death against resident and nonresident corporations. White's Adm'r v. St. Louis, etc., R. Co., 29 Ky. L. R. 1062, 96 S. W. 911. Servant and master may be sued jointly for tort of servant, and master cannot contend that codefendant is a mere sham. Baker v. Southern R. Co. [S. C.] 56 S. E. 540. An action for injury to a passenger is one ex delicto and plaintiff may join as defendants the railway company and the employe, where their joint negligence is alleged to have been the cause of the injury; and the cause is then not separable. Knuth v. Butte Elec. R. Co., 148 F. 73. In a suit against a corporation for **injunctive relief,** a cause of action may be stated against the officers and agents of the corporation joined in the suit, and the corporation cannot remove on the theory that its officers are not proper parties. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 57 S. E. 5.

moval is both properly alleged [78] and proven [79] by the petitioning party. And it is immaterial in such case what plaintiff's motive was in suing jointly,[80] or that defendants could have been sued separately,[81] or that it may turn out that only one is liable,[82] or that a Federal court might hold the joinder improper,[83] or that negligence imputed to a nonresident arises solely from the doctrine of respondeat superior.[84] If on the trial a nonresident can establish a fraudulent joinder the cause may then be removed.[85] A joint cause of action being stated against two defendants against one of whom a judgment is entered by default, and plaintiff taking an appeal from a judgment in favor of the other, it is not determined until final disposition of the appeal that a separable controversy existed between plaintiff and the defaulting defendant.[86]

§ 5. *Prejudice and local influence and denial of civil rights.*[87]—Prejudice and local influence is not an independent ground for the removal of a cause [88] but only extends the time for removal,[89] and hence the requisite diversity of citizenship must also exist.[90]

§ 6. *Amount in controversy.*[91]—A suit is not removable unless it appears that the requisite jurisdictional amount is involved.[92] In a suit arising under the laws

78. Petition for removal on ground of fraudulent joinder held insufficient to authorize removal where complaint stated joint cause of action. White's Adm'r v. St. Louis, etc., R. Co., 29 Ky. L. R. 1062, 96 S. W. 911. A mere statement unaided by specific facts that plaintiff intends to pursue only one of two joint tort feasors and does not seek judgment against the resident defendant does not compel an inference of bad faith when the legal right to sue both clearly exists and when plaintiff denies it in apparent good faith. Shane v. Butte Elec. R. Co., 150 F. 801. Neither is an allegation that the **resident defendant is financially irresponsible** sufficient to overcome a joint cause properly stated against both. Id. Where the complaint states a joint cause of action in tort, allegations in the petition which are **mere denials** of allegations in the complaint are not sufficient to show a fraudulent joinder. Thresher v. Western Union Tel. Co., 148 F. 649.

79. Must be alleged and proven that joinder was for fraudulent purpose. Knuth v. Butte Elec. R. Co., 148 F. 73. A mere statement that a codefendant was fraudulently joined unsupported by proof insufficient. Offner v. Chicago & E. R. Co. [C. C. A.] 148 F. 201. An allegation of fraudulent joinder will be disregarded in the absence of proof. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 57 S. E. 5; Stotler v. Chicago & A. R. Co. [Mo.] 98 S. W. 509. See, also, post, § 9.

80. Louisville & N. R. Co. v. Vincent [Tenn.] 95 S. W. 179; Knuth v. Butte Elec. R. Co., 148 F. 73. Allegation that a resident was joined for the purpose of preventing removal not sufficient, it not being alleged that the joinder was wrongful. Thomas v. Great Northern R. Co. [C. C. A.] 147 F. 83.

81. Shane v. Butte Elec. R. Co., 150 F. 801. In an action for a joint tort, the fact that resident defendants are not necessary parties will not justify removal. Blackwell's Durham Tobacco Co. v. American Tobacco Co. [N. C.] 57 S. E. 5.

82. This follows from the fact that Federal court will not try merits on motion to remand. Shane v. Butte Elec. R. Co., 150 F. 801. In this connection see, also post, § 9.

83. Thomas v. Great Northern R. Co. [C. C. A.] 147 F. 83.

84. Where master sought removal in suit against him and his servant. Lanning v. Chicago Great Western R. Co., 196 Mo. 647, 94 S. W. 491.

85. White's Adm'r v. St. Louis, etc., R. Co., 29 Ky. L. R. 1062, 96 S. W. 911.

86. Latter, a foreign corporation held not entitled to remove cause pending appeal on ground that separable controversy existed. Lathrop, Shea & Henwood Co. v. Interior Const. & Imp. Co., 143 F. 687.

87. See 6 C. L. 1296.

88. City of Cleveland v. Cleveland, etc., R. Co. [C. C. A.] 147 F. 171; Southern R. Co. v. Thomason [C. C. A.] 146 F. 972.

89. When requisite diversity of citizenship exists. City of Cleveland v. Cleveland, etc., R. Co. [C. C. A.] 147 F. 171.

90. City of Cleveland v. Cleveland, etc., R. Co. [C. C. A.] 147 F. 171. Cases "in which there is a controversy between a citizen of the state in which suit is brought and a citizen of another state" do not include those in which the controversy is partly between citizens of the same state, though the party seeking removal is a nonresident. Southern R. Co. v. Thomason [C. C. A.] 146 F. 972, and cases cited.

91. See 6 C. L. 1297.

92. Where several counts each claimed $1,900 and the pleading also claimed certain injunctive relief but did not show the value of the matter involved in such relief, a removal was authorized in view of the fact that the petition for removal stated that the amount in controversy was $3,800. Southern Cash Register Co. v. National Cash Register Co., 143 F. 659. Petition of two counts each claiming $1,900, and which claims $1,900 damages to present and accrued sales and a like sum for damages to future business, held to claim a sufficient amount to authorize removal. Southern Cash Register Co. v. Montgomery, 143 F. 700. Complaint, in suit for death by wrongful act, containing several counts each for less

of the United States and seeking relief by injunction, the amount in controversy may be shown by the petition for removal if it is not stated in the bill.[93] Two separate actions on separate contracts against the same defendant, each involving less than the jurisdictional amount, are not removable in the absence of fraud though the aggregate amount sued for exceeds such sum,[94] and the fact that on defendant's motion the two causes are consolidated for "taking proof and hearing" does not render the consolidated cause removable.[95] Where damages sued for are set out minutely in the declaration but do not reach the requisite amount, a concluding statement that plaintiff claims a certain sum is not controlling.[96] In actions sounding in damages the amount in controversy is determined from plaintiff's demand in his complaint regardless of whether he sets out a cause of action for greater damages,[97] and it is not an abuse of discretion for the court to allow an amendment of the complaint in such cases so as to conform to the demand even after the petition for removal has been filed.[98] If the sum claimed in good faith is sufficient in amount, the fact that a smaller sum is recovered does not affect the jurisdiction acquired by removal.[99]

§ 7. *Procedure to obtain and effect the removal.*[1]—The proper procedure under the act of 1888 is for defendant to file a petition and bond in the state court and enter a transcript of the state court record in the Federal court on the first day of its next session.[2] The right to remove may arise at any time in the progress of the case whenever by a change in the pleadings or proceedings the cause is rendered for the first time removable.[3] The holdings are not uniform on the right of parties to extend by stipulation the time for removal.[4] Averments in the petition should be clear and specific so that the court can see that it affirmatively presents a case which should be removed.[5] When it is sought to establish a fraudulent joinder, facts must be set out from which it may be inferred.[6] As to a cor-

than $2,000, held not to show a sufficient amount in controversy. Nashville, etc., R. Co. v. Hill [Ala.] 40 So. 612.

93. Order of R. R. Telegraphers v. Louisville & N. R. Co., 148 F. 437.

94. Where separate suits on two insurance policies were brought in state court. Holmes & Co. v. U. S. Fire Ins. Co., 142 F. 863.

95. Holmes & Co. v. U. S. Fire Ins. Co., 142 F. 863.

96. Where statement of claim against a railroad company for over charges amounted to only $1,674, a statement that plaintiff had been damaged in the sum of $2,500 by defendant's failure to pay the damages alleged did not justify removal. Barataria Canning Co v. Louisville & N. R. Co. [C. C. A.] 143 F. 113.

97. Personal injury suit. Stark v. Port Blakely Mill Co. [Wash.] 87 P. 339. An action on the case to recover $2,000 damages for negligence is not removable though the actual damages are alleged to be greater. Barber v. Boston & M. R. Co., 145 F. 52.

98. Where complaint alleged damages amounting to over $2,000 but prayed for judgment for $1,982, held not abuse of court's discretion to allow amendment so as to conform to demand though petition for removal had been filed. Stark v. Port Blakely Mill Co. [Wash.] 87 P. 339.

99. Roessler-Hasslacher Chemical Co. v. Doyle [C. C. A.] 142 F. 118.

1. See 6 C. L. 1297.

2. Bond to be conditioned that on first day of next session defendant will enter in Federal court transcript of record and pay costs in case of wrongful removal. Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321.

3. Barber v. Boston & M. R. Co., 145 F. 52.

4. See Tevis v. Palatine Ins. Co., 149 F. 560, where conflicting cases are cited. Agreement that no advantage should be taken of time that might elapse by virtue of a certain other agreement and that if it should not become effective defendant should have twenty days thereafter in which to make defense held to preclude plaintiff from asserting that removal was too late. Russell v. Harriman Land Co., 145 F. 745. Where plaintiff's counsel stipulated in writing that defendant might have until a certain date within which to plead or make such motion as he might be advised, plaintiff could not contend that the time for removal was not extended. Tevis v. Palatine Ins. Co., 149 F. 560. Attorney could not disavow his own authority. Id. Where defendant took no exception to an order allowing plaintiff ninety days in which to file complaint and granting defendant ninety days thereafter to answer, and after filing of complaint at a succeeding term defendant requested and was granted sixty days in which to answer, he was not entitled to remove cause though he could not know before complaint was filed that a sufficient amount was involved. Bryson v. Southern R. Co., 141 N. C. 594, 54 S. E. 434.

5. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 15 Tex. Ct. Rep. 889, 94 S. W. 1070.

6. Not sufficient to allege as mere conclusion that plaintiff made fraudulent joinder

poration, an allegation that it is a citizen of a certain state is not sufficient; it must be stated that it was created by the laws of that state;[7] but where a petition alleges that a corporation was organized under the laws of a state other than that in which it is sued, an allegation that it is not a citizen of the latter state is not necessary.[8] Mere formal defects in the petition are waived by motion to remand on the ground that an alleged cause for removal does not exist.[9] Where the complaint alleges a joint tort against two nonresidents both must join in a petition for removal,[10] but the fact that necessary parties defendant join is to no purpose unless they are all entitled to remove.[11]

An undertaking to dissolve a foreign attachment under the law of Pennsylvania constitutes "special bail" within the requirement of the removal act that the removal bond shall be conditioned for the entry of special bail when originally requisite,[12] but since a defendant in a foreign attachment suit in that state is not bound to enter such an undertaking, the removal bond need not be so conditioned,[13] nor need it be so conditioned where such bail has already been filed in the state court.[14] When the seal of a corporation is attached to a bond it is not rendered invalid because the written authority of an attorney in fact to execute it does not appear,[15] and defects in the bond may be cured by amendment in the Federal court.[16]

An oral motion in the state court for the removal of a cause is a sufficient presentation of the petition and bond already on file with the clerk,[17] but if such motion is erroneously overruled and defendant takes no further action until the next term, he will be held to have temporarily withdrawn the motion[18] and the state court will retain jurisdiction until it is again presented.[19] The state court is without authority to inquire into the truth of facts alleged in the petition for removal but must order the cause removed and leave such questions to be determined in the Federal court.[20] If at the close of plaintiff's case no cause of action has been made out against a resident defendant, a motion to remove previously denied may be renewed and granted,[21] but an amendment to the complaint which leaves the existence of a Federal question no clearer than before will not authorize

for purpose of preventing removal. Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838.

7. Defendant's allegation as to plaintiff's citizenship held insufficient. Barataria Canning Co. v. Louisville & N. R. Co. [C. C. A.] 143 F. 113.

8. Lee v. Atlantic Coast Line R. Co., 150 F. 775.

9. That petition was not proper in form and duly authenticated. Tomson v. Iowa State Traveling Men's Ass'n [Neb.] 110 N. W. 997.

10. Baber v. Southern R. Co. [S. C.] 56 S. E. 540.

11. Removal could not be effected because of existence of Federal question where co-defendant was not affected thereby. Texas & P. R. Co. v. Huber [Tex.] 14 Tex. Ct. Rep. 642, 92 S. W. 832. That resident servant joined with nonresident master did not avail. Eastin v. Texas & P. R. Co. [Tex.] 15 Tex. Ct. Rep. 646, 92 S. W. 838.

12. Act March 3, 1875, c. 137, § 3, 18 St. 470 (U. S. Comp. St. 1901, p. 510). Preston v. McNeil Lumber Co., 143 F. 555.

13. Preston v. McNeil Lumber Co., 143 F. 555.

14. Where undertaking to dissolve foreign attachment had already been given. Preston v. McNeil Lumber Co., 143 F. 555.

15. Bond contained an affidavit that affiant saw the corporate seal attached and saw M sign as attorney in fact. Mutual Life Ins. Co. v. Langley, 145 F. 415.

16. Contention that bond was defective because there was no written authority to the attorney in fact to execute it. Mutual Life Ins. Co. v. Langley, 145 F. 415.

17. Mays v. Newlin, 143 F. 574.

18. Where court refused to accept bond and petition because case was still at rules and not on docket. Mays v. Newlin, 143 F. 574.

19. Attachment not invalid because issued after filing of petition and bond for removal. Mays v. Newlin, 143 F. 574.

20. Where defendant charged that plaintiff was joining a defendant whom he had not served and did not intend to serve, etc. Shane v. Butte Elec. R. Co., 150 F. 801. Case is different where record presents purely a question of law. Id.

21. There being nothing to warrant presumption that a stronger case could have been made out. Dudley v. Illinois Cent. R. Co., 29 Ky. L. R. 1029, 96 S. W. 835, distinguishing Whitcomb v. Smithson, 175 U. S. 635, 44 Law. Ed. 303.

the renewal of a motion to remove.[22] Upon removal being had the entire record in the case should be brought to the Federal court.[23]

§ 8. *Transfer of jurisdiction and other consequences of removal.*[24]—Upon the timely filing of a proper petition and bond in the state court and of a certified copy of the record in the Federal court, the latter court acquires jurisdiction without an order of the state court transferring the cause;[25] and if the state court erroneously denies a motion to transfer, the Federal court may grant an ancillary injunction restraining the opposite party from taking further proceedings in the state court.[26] There are cases, however, which hold that the petition and bond must be actually presented to the state court for acceptance before its jurisdiction is divested and that merely filing them with the clerk is not sufficient.[27] After removal, and pending proceedings in the Federal court, the state court has no jurisdiction in the case,[28] and, if plaintiff brings a second suit on the same cause of action in a state court pending litigation in the Federal court, defendant may have such proceeding stayed,[29] and the right to a stay is not waived by appearance in the state court.[30] Where a removal is had, notwithstanding a denial of a motion to remove, and the resisting party after denial of a motion to remand appears in the Federal court and consents to a nonsuit, he cannot thereafter prosecute the same suit in the state court.[31] After removal of a cause to the Federal court and discontinuance on plaintiff's motion on payment of costs, plaintiff may bring a new action in the state court based on the same cause of action but for a sum too small for Federal cognizance.[32]

A removal does not render nugatory an attachment in the state court though there is no service, actual or constructive, in either court and no general appearance.[33] It does not deprive a state court of jurisdiction of an action by plaintiff's attorney to enforce an attorney's lien on the proceeds of a settlement made by the parties after removal,[34] or preclude a defendant from challenging the jurisdiction of either the state or the Federal court over his person.[35] It waives an objection

22. St. Louis, etc., R. Co. v. Neal [Ark.] 98 S. W. 958.

23. Under Ga. Civ. Code 1895, § 4518, providing that an attachment against a nonresident may be made returnable to the superior court of any county, where an attachment is sued out in one county and executed by serving summons of garnishment in another county, and a certified copy of the affidavit and bond is filed therein, the proceedings in the court where service is made are ancillary to and a part of the original suit and should be included in the record required to be filed on removal. Woodward Lumber Co. v. Vizard, 144 F. 982.

24. See 6 C. L. 1300.

25, 26. Mutual Life Ins. Co. v. Langley, 145 F. 415.

27. The jurisdiction of a state court is not terminated until the petition and bond for removal are presented to the court for acceptance. Mere filing with clerk not sufficient. Mays v. Newlin, 143 F. 574, citing conflicting cases.

28. Ferriday v. Middlesex Banking Co. [La.] 43 So. 403. During the pendency of a controversy in the Federal court as to whether the cause was properly removed, the state court is without jurisdiction to proceed or to make any judgment or order in the suit. Error to refuse to set aside judgment entered pending such controversy, though at time of its rendition record of state court did not disclose want of jurisdiction. Tomson v. Iowa State Traveling Men's Ass'n [Neb.] 110 N. W. 997.

29. Ferriday v. Middlesex Banking Co. [La.] 43 So. 403.

30. Where after dismissal in Federal court plaintiff brought a new suit in state court, that defendant demurred and pleaded prescription and after overruling of motion to stay entered into agreement as to what judgment the court should render, did not waive his right to thereafter move for a stay. Ferriday v. Middlesex Banking Co. [La.] 43 So. 403.

31. Texas & P. R. Co. v. Huber [Tex. Civ. App.] 16 Tex. Ct. Rep. 154, 95 S. W. 568.

32. Where original suit was for $10,000. Young v. Southern Bell Tel. & T. Co. [S. C.] 55 S. E. 765. It is the "suit," "cause," or "action," that is removed, and not the "cause of action." Id.

33. Since the fact that defendant had the cause removed showed that he had notice of it, the Federal court could render a judgment enforcible against the property attached (Clark v. Wells, 27 S. Ct. 43), though it could not render a judgment in personam (Id.).

34. Oishei v. Pennsylvania R. Co., 102 N. Y. S. 368.

35. Davis v. Cleveland, etc., R. Co., 146 F. 403; Clark v. Wells, 27 S. Ct. 43.

that the suit is pending in the wrong district,[36] except where the state court was without jurisdiction and there is no general appearance in the Federal court.[37] Where a nonresident secures a removal on the ground that the controversy is severable, the Federal court obtains no jurisdiction over the other defendants or the causes of action against them.[38]

§ 9. *Practice and procedure after removal; remand or dismissal.*[39]—The petition for removal may be amended in the Federal court when there is no doubt as to the facts,[40] but cannot be so amended as to set forth grounds for removal not presented to the state court and inconsistent with previous allegations.[41] If service of summons is avoided on defendant's motion after removal, the Federal court may permit plaintiff to file an amended petition and may order summons to issue thereon.[42]

If a cause is improperly removed it should be remanded at any stage at the instance of any party or on the court's own motion whenever such fact appears;[43] but one who has wrongfully procured a removal from a local court in Porto Rico to the Federal district court of a cause within the original jurisdiction of the latter court conferred by the act of 1901 will not be heard after judgment against him to assert want of jurisdiction in the Federal court because of the irregularity of the removal.[44] A cause will not be remanded unless there is reason to believe that it involves a controversy not within the jurisdiction of the Federal court,[45] and hence, if it is properly removable, it will not be remanded for mere irregularities in the proceedings for removal or because defendant proceeded under the wrong statute.[46] When the jurisdiction of the Federal court is doubtful, while that of the state court is unquestionable, it is proper to remand the cause.[47] If a state court has jurisdiction in equity not possessed by a Federal court to which a bill has been removed for diversity of citizenship and adequate relief cannot be obtained at law in the Federal court, a complainant will not be compelled to sue at law therein but the cause will be remanded.[48] A cause to obtain both legal and equitable relief is not made two distinct actions by a removal because plaintiff is required to file separate pleadings;[49] and so, where it is decided that the proceeding at law was improperly removed and a decree on the equity side is subsequently reversed on appeal, the suit should be remanded to the state court.[50]

36. United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144.

37. Davis v. Cleveland, etc., R. Co., 146 F. 403.

38. Where indorser removed cause as to it in suit against it and maker and other indorsers. Manufacturers' Commercial Co. v. Brown Alaska Co., 148 F. 308.

39. See 6 C. L. 1300.

40. May be amended by a direct allegation of citizenship of a plaintiff's assignor where the record already shows such citizenship in legal effect and that the case is properly removable. Flynn v. Fidelity & Casualty Co., 145 F. 265. Could be amended to show citizenship on motion to remand as against objection that Federal court had no jurisdiction and hence had no power to allow amendment. Muller v. Chicago, etc., R. Co., 149 F. 939.

41. Petitioner could not amend so as to show that a codefendant was a nonresident where in state court he proceeded on the theory that he was a resident. Shane v. Butte Elec. R. Co., 150 F. 801.

42. United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144.

43. Though before trial counsel determined not to make motion to remand, cause was remanded after judgment where there was no separable controversy. International & G. N. R. Co. v. Hoyle [C. C. A.] 149 F. 180.

44. Where under Act March 2, 1901, § 3 (31 St. 953, c. 812), Federal court would have had jurisdiction if suit had been there originally brought, defendant could not avoid the judgment by showing that a codefendant was a resident and citizen of Porto Rico. Garrozi v. Dastas, 27 S. Ct. 224.

45. Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321.

46. Not remanded though in suit against a postmaster removal was had under Rev. St. § 643, instead of under the act of 1888. Bryant Bros. Co. v. Robinson [C. C. A.] 149 F. 321.

47. Nash v. McNamara, 145 F. 541.

48. Where equity jurisdiction of state court was based on statute. Peters v. Equitable Life Assur. Soc., 149 F. 290.

49. Under circuit court rule 19. Utah-Nevada Co. v. De Lamar [C. C. A.] 145 F. 505.

50. Appellee contended that decree should

The right to remove a suit in equity must be determined from the bill as filed in the state court,[51] and neither the allegations of a bill of repleader filed in the Federal court after removal nor of the answer can be considered.[52] Allegations in the petition for removal, a consideration of which would involve a trial of the case on its merits, will not be regarded on a motion to remand.[53] No exact line can be drawn marking a distinction between a wrongful and a justifiable purpose in seeking one jurisdiction rather than the other, but the showing made in each case must guide the court.[54] Remand is properly refused where, for example, it appears that a resident defendant has been joined merely for the purpose of defeating a transfer;[55] but where plaintiff is following a legal right and states a joint cause of action in tort and there is nothing to impugn his good faith except an allegation that a resident defendant is financially irresponsible, and that on the merits the essential facts are different from those alleged,[56] then no real issue of fraud is proven so as to justify the removal.[57] On a motion to remand a cause commenced by a bill in a state court intended to invoke a special statutory jurisdiction which cannot be exercised by a Federal court of equity, the court will not retain jurisdiction merely because the application of the statute to the facts alleged is in doubt.[58] The proper remedy where a Federal court refuses to remand a cause of which it has no jurisdiction is mandamus rather than prohibition.[59]

Where a suit in equity is removed it must thereafter conform to the equity practice and rules in force in the Federal court regardless of the forms of practice in equitable proceedings in the state court.[60] The rule that a Federal court will not review acts done by the state court prior to the removal of a cause does not apply where the state court was without jurisdiction.[61] Where a cause is removed after entry of judgment in the state court, the Federal court cannot enter an order of nonsuit and dismissal and grant costs to defendant on the ground that plaintiff fails to proceed with the case,[62] but can only dismiss the proceedings and remand them to the state court.[63]

A plaintiff may not object on appeal that the Federal court should not have determined on affidavits the question of his good faith in joining a resident defendant, where he made no objection below and himself filed a counter affidavit.[64] The state court after remand cannot question the correctness of the order of remand but must proceed to exercise jurisdiction,[65] and its acceptance of jurisdiction does

be reversed with directions to permit the parties to amend so as to show diversity of citizenship. Utah-Nevada Co. v. De Lamar [C. C. A.] 145 F. 505.

51, 52. Cella v. Brown [C. C. A.] 144 F. 742.

53. A joint cause of action in tort being stated in the complaint, allegations in the petition for removal which are in substance merely denials of allegations of fact made in the complaint cannot be considered on the merits on a motion to remand, but the allegations in the complaint must be taken as true. Thresher v. Western Union Tel. Co., 148 F. 649; Shane v. Butte Elec. R. Co., 150 F. 801.

54. Shane v. Butte Elec. R. Co., 150 F. 801.

55. Wecker v. National Enameling & Stamping Co., 27 S. Ct. 184. Uncontradicted testimony that a resident employe sued jointly with the employer was merely a draftsman who had nothing to do with planning an alleged defective apparatus held to justify conclusion of fraudulent joinder. Id. Where information was within plaintiff's reach, he could not object that he did not know the true relation of the employe and hence could not be guilty of fraud. Id.

56, 57. Shane v. Butte Elec. R. Co., 150 F. 801.

58. That question properly determinable by state court. Mathews Slate Co. v. Mathews, 148 F. 490.

59. Ex parte Wisner, 27 S. Ct. 150.

60. The Conformity statute (Rev. St. § 914, U. S. Comp. St. 1901, p. 684), does not include equity suits. Bryant Bros. v. Robinson [C. C. A.] 149 F. 321.

61. Motion to quash service of process could be renewed after removal. Lathrop-Shea & Henwood Co. v. Interior Const. & Imp. Co., 150 F. 666.

62, 63. Dawson v. Kinney, 144 F. 710.

64. Wecker v. National Enameling & Stamping Co., 27 S. Ct. 184.

65. Feeney v. Wabash R. Co. [Mo. App.] 99 S. W. 477.

not deprive defendant of any of his constitutional rights.[66] An order of remand cannot be reviewed on appeal to the supreme court of the state.[67]

§ 10. *Transfer between courts of the same jurisdiction.*[68]—The constitutional provision with reference to the transfer of causes from the district court of appeal in California to the supreme court has no application to matters of habeas corpus.[69] Under that provision the petition must be filed within thirty days after the judgment becomes final in the district court.[70] The necessity of a speedy decision is no ground for transferring a case from the supreme court to a district court of appeal in that state.[71] In the municipal court of New York a defendant must demand a transfer of the cause to another district before issue is joined either in writing or in open court, and must in so doing specify the proper district.[72] In North Carolina, when a cause is instituted before the clerk of the superior court and thereafter transferred to term, the pleadings may be amended by alleging equitable matter though such matter was not cognizable by the clerk.[73] A case will be transferred to the supreme court in Indiana when the judges of the appellate court are equally divided.[74] Provision is generally made for the disposition of pending cases when a new county is organized[75] or a new judicial district established.[76] An objection that a transfer was irregular is too late after judgment.[77]

RENDITION OF JUDGMENT; REPLEADER; REPLEGIANDO, see latest topical index.

REPLEVIN.

§ 1. Nature and Form of Action (1733).
§ 2. Right of Action and Defenses (1733).
§ 3. Jurisdiction and Venue (1735).
§ 4. The Affidavit (1735).
§ 5. Plaintiff's Bond (1735).
§ 6. The Writ and Its Execution (1735).
§ 7. Custody and Delivery of Property (1735). Forthcoming Bond (1736).
§ 8. The Pleadings and Parties to the Action (1736).

66. Defendant could not complain in state court of error on part of Federal court in not retaining jurisdiction. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83.

67. St. Louis, etc., R. Co. v. Neal [Ark.] 98 S. W. 958.

68. See 6 C. L. 1301.

69. Court, art. 6 § 4. Ex parte Williams [Cal.] 87 P. 568. Rule 33 (78 Pac. xiii), providing that when the judges of a district court of appeal fail to agree on a judgment in any case and their opinions have been forwarded to the supreme court, that court will order the cause to be transferred to it or to some other court of appeal, does not apply to habeas corpus proceedings, and, where the justices fail to agree in such proceeding, the writ must be dismissed. Ex parte Oates, 2 Cal. App. 13, 83 P. 261.

70. Const. art. 6, § 4, modification of judgment on motion for rehearing did not change its character and hence application was too late. National Bank v. Los Angeles Iron & Steel Co., 2 Cal. 659, 84 P. 466, 468. Petition filed more than ten days after judgment became final in district court, held too late. Hewlett v. Beede [Cal.] 83 P. 1089.

71. Such orders are made only for the purpose of facilitating the business of the supreme court, and convenience of parties or necessity for speedy decision is immaterial. Gates v. Green, 148 Cal. 728, 84 P. 37.

72. Municipal Court Act 1902, p. 1497, c. 580, § 25, subd. 4. Demand irregular and made too late. Pomerantz v. Sroka, 102 N. Y. S. 534.

73. Seeking reformation of a deed. Buchanan v. Harrington, 141 N. C. 39, 53 S. E. 478.

74. Under the express provisions of Acts 1901, p. 569, c. 247, § 15, where the six judges of the appellate court are equally divided on the proper determination of an appeal, it will be transferred to the supreme court. Chicago, etc., R. Co. v. Pritchard [Ind. App.] 78 N. E. 1044.

75. By the act of August 21, 1905, when a new county is organized, the jurisdiction of all suits pending in the counties from which it is laid off, of which the courts of the new county have cognizance under the constitution and laws of the state, is transferred immediately to the courts of the new county. Motion to dismiss writ of error on ground that transcript should have been sent up by court of old county, overruled. Atlantic & B. R. Co. v. Johnson [Ga.] 56 S. E. 482.

76. Under Act March 11, 1902, c. 183, § 7, 32 St. 66 (U. S. Comp. St. Supp. 1905, p. 114), dividing the state of Texas into four Federal judicial districts and providing that pending suits in which evidence had been taken should be disposed of in the courts where pending, an action in which evidence had been taken and in which a judgment of dismissal had been entered remains in the court where such judgment was entered for the purpose of determining jurisdiction of an ancillary bill in equity to set aside the dismissal, though if an original suit it would be within the jurisdiction of the courts of the new district. O'Connor v. O'Connor, 146 F. 994.

77. After judgment it is too late to object

§ 9. Evidence (1737).
§ 10. Trial (1738). Verdict and Findings (1739).
§ 11. Judgment and Award of Damages (1740).
§ 12. Costs (1741).
§ 13. Review (1741).
§ 14. Liability of Plaintiff or His Bond, and of Receiptors, etc. (1741).

§ 1. *Nature and form of action. Distinctions.*[78]—Replevin is the appropriate action where one claims goods in the possession of another without regard to the manner in which possession was obtained.[79] The question of ownership and the right of possession are the only questions involved.[80] The right to corporate office is not involved in an action of replevin by a corporation against its secretary where an allegation that the defendant held such office was denied by the corporation and no evidence was introduced by either party relative to the issue thus raised.[81] The question as to whether a bill of sale from plaintiff to an intervener in a replevin action created a trust may be tried in that action.[82]

§ 2. *Right of action and defenses.*[83]—Present right to possession,[84] usually arising as an incident to title,[85] in plaintiff, and possession in defendant[86] at the

to the irregularity of a transfer of the cause from one division to another of the civil district court, parish of Orleans. Fluker v. De Grange, 117 La. 331, 41 So. 591.

78. See 6 C. L. 1301.

79. Drumgoole v. Lyle, 30 Pa. Super. Ct. 463.

80. It is immaterial that after the property replevied by plaintiff was turned over to him by the sheriff it was taken from him by a third person under a claim of ownership. Staunton v. Smith [Del.] 65 A. 593. The question is one of property either general or special and the right of possession. Drumgoole v. Lyle, 30 Pa. Super. Ct. 463.

81. Action by a corporation to regain possession of its records and seal in the hands of its secretary who was by law the lawful custodian thereof. Stovell v. Alert Gold Min. Co. [Colo.] 87 P. 1071.

82. Hurley v. Walter [Wis.] 109 N. W. 558.

83. See 6 C. L. 1302.

84. Plaintiff though the owner must also have the right to possession. Held to appear that the charter of an association and the secretary's recording book, though owned by plaintiff, were in the temporary possession of the lawful custodian. County Armagh Ladies' Social & Benevolent Ass'n v. Lennon, 102 N. Y. S. 522. The right to possession in plaintiff at the time of the issuance of the writ is essential to the maintenance of the action. Staunton v. Smith [Del.] 65 A. 593. One not entitled to possession cannot recover even as against one wrongfully in possession. La Salle Pressed Brick Co. v. Coe, 126 Ill. App. 308. Under Rev. St. § 4965 (U. S. Comp. St. 1901, p. 3414), relative to the infringement of copyrights and authorizing a recovery of one dollar for every sheet of the same found in the possession of the defendant, plaintiff having neither the title nor the right of possession of the material cannot seize same under replevin proceedings for the sole purpose of recovering the statutory penalty in an action of assumpsit. Hills & Co. v. Hoover, 142 F. 904. Purchaser under a contract of sale to whom title has not yet passed cannot maintain the action. Collins v. Beckley, 29 Ky. L. R. 813, 96 S. W. 479. Evidence held to establish plaintiff's right to possession as a matter of law. Barber v. Harper [N. M.] 86 P. 546.

85. A receiver cannot maintain the action where at the time of his appointment the legal title had passed to a third person. Gilroy v. Everson-Hickok Co., 103 N. Y. S. 620. A corporation may maintain an action in its own name for the recovery of its records and seal although the secretary is by law the custodian thereof, as the ownership is in the corporation. Stovell v. Alert Gold Min. Co. [Colo.] 87 P. 1071. The fact that a mortgage covered a painting by a certain artist and that a painting by that artist is in the possession of the heirs of the mortgagor is not sufficient evidence of title where the mortgagor always treated it as his own property and it had never been claimed by the mortgagee or its successors with the exception of plaintiff. Hoffman House v. Barkley, 111 App. Div. 564, 97 N. Y. S. 1095. In an action to recover timber plaintiff proved that he was the owner of the original title to the land, acquiring title after the timber had been cut, and that he owned the cut timber under a bill of sale, that a tax title under which defendant claimed was void, held to show title in plaintiff. Gustin v. Embury-Clark Lumber Co., 145 Mich. 101, 13 Det. Leg. N. 546, 108 N. W. 650. An officer levying an execution loses his special property in the chattels levied on where they are not reduced to possession within the required period, and at the expiration of that period he has not sufficient title to maintain the action. Field v. Fletcher, 191 Mass. 494, 78 N. E. 107. Evidence held to show title in plaintiff as a matter of law. Gunn v. Mumford [N. J. Err. & App.] 65 A. 989. Evidence held sufficient to show title in intervener as assignee of an insolvent corporation. Alper v. Tormey [Cal. App.] 85 P. 661.

86. Hyde v. Elmer [N. M.] 88 P. 1132; Clark v. Sublette, 117 Mo. App. 519, 94 S. W. 733. A complaint which affirmatively shows that defendant has parted with possession is demurrable. Kierbow v. Young [S. D.] 107 N. W. 371. Where a replevin action is dismissed and a return to the sheriff ordered, and the sheriff accepts a tender and receipts for it in writing and upon demand refuses to turn it over, his

time of the commencement of action, are essential; but in states where the codes have extended the action of replevin so as to cover the common-law action of detinue, the action lies against one who has parted with possession prior to the issuance of the writ.[87] Plaintiff's right to possession is shown by actual and undisputed possession at the time of a wrongful taking of the property by the defendant [88] and possession by plaintiff's agent is his possession,[89] but, where the replevied chattels are in the possession of the defendant, the plaintiff must prove ownership.[90] An officer taking property from a person arrested on a charge of theft, under statutory authority, is not as to third persons claiming the property a trespasser,[91] and as against him mere proof of prior possession is not sufficient.[92] Plaintiff must recover upon the strength of his own title and not upon the weakness of defendant's.[93]

Title coupled with the right of possession [94] or a special right of possession is a good defense,[95] and the fact that defendant acquired possession in an unlawful manner is immaterial if his detention is lawful.[96] A defendant cannot set up title in a third person unless he connects his right to possession with the title of such third person,[97] and, where property was taken from the actual and undisputed possession of plaintiff, defendant can defeat recovery only by proving a superior title in himself.[98] Property in custodia legis is not subject to replevin [99] notwithstanding the invalidity of the proceedings under which it was taken.[1]

The action lies by a tenant against a landlord distraining the goods of the former for rent.[2] Defendant's right to the property taken must be determined in the action in which it was taken and he cannot maintain replevin against the officer taking the goods under the writ to regain possession.[3]

possession is sufficient to sustain an action against him although he did not have manual possession. Hyde v. Elmer [N. M.] 88 P. 1132. Evidence held sufficient to require the submission to the jury of the question of whether defendant was in possession at the time of the institution of the action. Barnes v. Plessner [Mo. App.] 97 S. W. 626.

87. Held error to dismiss as to an agent who had wrongfully traded certain property to a third person prior to the commencement of the action. Jones v. Richards, 50 Misc. 645, 98 N. Y. S. 698.

88, 89. Sanford v. Millikin, 144 Mich. 311, 13 Det. Leg. N. 171, 107 N. W. 884.

90. Hoffman House v. Barkley, 111 App. Div. 564, 97 N. Y. S. 1095. Plaintiff must prove title where he was not in actual and undisputed possession of the property at the time it was taken by defendant. Sanford v. Millikin, 144 Mich. 311, 13 Det. Leg. N. 171, 107 N. W. 884.

91, 92. Murray v. Lyons [Tex. Civ. App.] 15 Tex. Ct. Rep. 569, 95 S. W. 621.

93. It is not sufficient to show that a third person was entitled to possession or that the possession of the defendant was obtained through an irregular sale by the sheriff. Kelly v. Lewis [Colo.] 88 P. 388.

94. Evidence held insufficient to sustain a verdict that defendant was the owner of the property in controversy. Harrison Bank v. Porter [Okl.] 87 P. 585. Evidence held to establish title in defendant. Dutch v. Parker, 97 N. Y. S. 966.

95. An equitable lien. Reardon v. Higgins [Ind. App.] 79 N. E. 208. A judgment for plaintiff is erroneous where at the time of the seizure under a writ of execution defendant was the holder of a prior outstanding lien on the goods. Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. App. 471, 95 S. W. 279. Evidence held to show that defendant had no lien for storage on the chattels in controversy. Alper v. Tormey [Cal. App.] 85 P. 661.

96. Defendant acquired possession through plaintiff's agent and held the property, claiming an equitable lien thereon. Reardon v. Higgins [Ind. App.] 79 N. E. 208.

97. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271.

98. Title in a third person is insufficient. Sanford v. Millikin, 144 Mich. 311, 13 Det. Leg. N. 171, 107 N. W. 884.

99. Replevin does not lie to regain possession of goods owned by plaintiff in possession of the sheriff under a writ of attachment against a third person. Baltimore, etc., R. Co. v. Klaff & Co., 103 Md. 357, 63 A. 360.

1. Under the Kansas statute the writ does not lie where the property sought to be recovered was taken in execution on any order or judgment against the plaintiff, or any other mesne or final process issued against him, held the writ does not lie to recover goods seized by the marshal under a void ordinance. Karr v. Stahl [Kan.] 89 P. 669.

2. Pa. Act Apr. 19, 1901 (P. L. 88). Drumgoole v. Lyle, 30 Pa. Super. Ct. 463.

3. A replevin action was commenced against plaintiff by a third person and certain property taken under the writ and turned over to such third person by the officer, plaintiff then commenced an action against the officer alleging that more property was taken than was described in the

A demand is unnecessary as a condition precedent to suit where defendant's claim of title is independent of any contractual relation with plaintiff,[4] or where possession has been refused,[5] or the possession of goods has been wrongfully obtained.[6] A refusal of possession on one ground waives all other grounds.[7] An equitable defense when allowable at all must go to the question of possession.[8]

§ 3. *Jurisdiction and venue.*[9]

§ 4. *The affidavit.*[10]—The filing of an affidavit is essential and a writ issued without it will on application be quashed,[11] but the office of the affidavit ceases, if a petition is filed, when the property has been delivered thereunder and jurisdiction conferred.[12] An affidavit and process in a firm name is not so fatally defective as to oust the court of jurisdiction where the allegations of the affidavit referring to a mortgage under which the firm claimed title sufficiently identified the plaintiffs.[13] The facts set forth in the affidavit form no part of the issues in the case unless they are again set forth in the pleadings.[14]

§ 5. *Plaintiff's bond.*[15]—The court may permit plaintiff to file a new bond where the bond first filed, being a mere indemnity bond, was entirely insufficient.[16]

§ 6. *The writ and its execution.*[17]—The return must recite the township in which the defendant resides, or in which the goods are found, or a justice of the peace is without jurisdiction.[18] It must state that the property was taken from the possession of the defendant,[19] but it is not conclusive as to the possession of the defendant at the time the suit was instituted.[20]

§ 7. *Custody and delivery of property.*[21]—By the execution of the writ the property passes to the sheriff and it cannot be divested so as to relieve him of liability except in one of the ways which the law recognizes.[22] A provision that the

complaint, held plaintiff should have interposed a defense in the first action and the second could not be maintained. Kierbow v. Young [S. D.] 107 N. W. 371.

4. Plaintiff upon finding certain goods turned it over to defendant in his individual capacity with the understanding that defendant should ascertain whether it belonged to an estate of which he was administrator and if not it should be returned, he thereupon charged himself with it as administrator, held defendant by charging himself as administrator attempted to terminate the bailment and in an action of replevin against him in his fiduciary capacity demand was unnecessary, the claim not being based upon a contractual relation. Kuykendall v. Fisher [W. Va.] 56 S. E. 48.

5. Demand is unnecessary where defendant informs plaintiff that he will not be allowed to remove the property nor to go upon the land where it is situated for that purpose. Casings in an oil well to which plaintiff acquired title under execution against a lessee of defendant's vendor. Churchill v. More [Cal. App.] 88 P. 290.

6. Adams v. Wallace, 122 Ill. App. 550. Where a vendee purchases goods with knowledge that his vendor had obtained them by fraudulent means. Id.

7. Where defendant refused to turn over possession on the ground that the person from whom plaintiff purchased the property was indebted to him, he could not justify his refusal upon the ground that plaintiff had not produced a written order from such person. Mason v. Rodgers, 116 Mo. App. 611, 92 S. W. 745.

8. Roach v. Curtis, 50 Misc. 122, 100 N. Y. S. 411.

9. See 6 C. L. 1303.

10. See 6 C. L. 1304.

11. Neb. Code Civ. Proc. § 182. Case Threshing Mach. Co. v. Rosso [Neb.] 110 N. W. 686.

12. First Nat. Bank v. Cochran [Okl.] 87 P. 855.

13. The affidavit claimed title under a chattel mortgage and the declaration referred to the note and mortgage by date. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

14. First Nat. Bank v. Cochran [Okl.] 87 P. 855.

15. See 6 C. L. 1304.

16. Donley v. Fowler [Mich.] 13 Det. Leg. N. 1074, 110 N. W. 1097.

17. See 4 C. L. 1288.

18. Rev. St. 1898, § 3839, provides that replevin actions shall be brought before some justice of the peace "where the defendants or one of them resides or in any adjoining township, or wherein the plaintiff resides and the defendants or one of them may be found, and if the defendant is a nonresident of the county in which plaintiff resides the action may be brought before some justice of any township in such county where the defendant may be found." Barnes v. Plessner [Mo. App.] 97 S. W. 626.

19. Clark v. Sublette, 117 Mo. App. 519, 94 S. W. 733.

20. There may be a difference in time between the service of the writ and the date upon which the action was commenced Clark v. Sublette, 117 App. 519, 94 S. W. 733

21. See 6 C. L. 1305.

22. Hearn v. Ayres, 77 Ark. 497, 92 S. W 768.

property may be left in the possession of the defendant, where the plaintiff does not demand its delivery to him and directions to that effect are given to the officer by the plaintiff or his attorney in writing, is not jurisdictional.[23]

Forthcoming bond.[24]—To warrant a judgment as of course against the sureties on a delivery bond, upon judgment being rendered for the plaintiff, the bond must be in the form provided by the statute authorizing such a proceeding.[25] Upon a judgment in favor of plaintiff, judgment cannot be entered against the sureties on defendant's retaining bond for the amount of the debt due plaintiff from defendant.[26] The costs contemplated by the statute relating to delivery bonds are those which are occasioned by the taking or detention of the property,[27] and the sureties on such a bond are not liable for a judgment for costs rendered against defendant on a motion for a continuance where defendant recovered judgment for the possession of the property.[28]

§ 8. *The pleadings and parties to the action.*[29]—The complaint must aver ownership and right to possession in the plaintiff at the time of the commencement of the action,[30] but an allegation of absolute or qualified property in plaintiff and the facts upon which his title is based is sufficient,[31] and it must identify the property sought to be recovered with reasonable certainty.[32] Plaintiff is not bound to state the nature and source of his title;[33] but where he does so he is bound by the source of title alleged, and a failure to deny it is an admission of a material fact.[34] The petition and the affidavit must substantially correspond.[35] A declaration in assumpsit for a balance due on a promissory note cannot be combined in one count with a declaration in replevin.[36] Where the petition sufficiently identifies the property, a description in the cross bill by reference to the petition is sufficient.[37] A

23. It is intended solely for the protection of the plaintiff and the officer and an omission to make the direction in writing is not ground for nonsuit. Pedrick v. Keummell [N. J. Law] 65 A. 906.

24. See 6 C. L. 1305.

25. An undertaking to "pay to the plaintiff such sums not exceeding $200 as may be adjudged to him in the action," or that the property "shall be forthcoming and subject to the order of the court for the satisfaction of such judgment as may be rendered in the action, whichever shall be directed by the court," is not a bond "to perform the judgment of the court in the action" and does not authorize a summary judgment against the sureties for costs. Dillard v. Nelson [Ark.] 95 S. W. 460.

26. Under Kirby's Dig. § 6870, the judgment against the sureties can only be for the value of the property and all damages sustained by the detention thereof as the same may be found by the court or jury trying the case. Woodburn v. Driver [Ark.] 99 S. W. 384.

27. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534.

28. The condition of the bond was that defendant should appear and defend the action and deliver the property to plaintiff if he recovered judgment therefor and to pay all costs and damages that might be adjudged against "them" for the taking or detention of the property. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534.

29. See 6 C. L. 1305.

30. An allegation that plaintiff was entitled to possession on the day preceding the filing of the complaint is not sufficient. Manti City Sav. Bank v. Peterson, 30 Utah, 475, 86 P. 414. Plaintiff must allege owership or some special property in the goods or a right to possession at the time of the commencement of the action. Kierbow v. Young [S. D.] 107 N. W. 371.

31. Plaintiff is not bound to anticipate a possible defense and traverse it. Drumgoole v. Lyle, 30 Pa. Super. Ct. 463.

32. The complaint must describe the goods with such certainty that they can be identified by the officer serving the process and sufficiently to apprise the defendant of what property he is charged with detaining to enable him to make his defense. A description as "goods, wares, and merchandise to the amount and value of $1,200" is insufficient. Kierbow v. Young [S. D.] 107 N. W. 371.

33, 34. Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. App. 471, 95 S. W. 279.

35. A technical correspondence is unnecessary. First Nat. Bank v. Cochran [Okl.] 87 P. 855. When the issues raised are on the facts set forth in the petition, a variance between its allegations and the allegations of the affidavit is immaterial. Id.

36. Knowles v. Cavanaugh, 144 Mich. 260, 13 Det. Leg. N. 238, 107 N. W. 1073.

37. Action to recover portion of rice crop grown on land described in the petition as "about 200 acres out of the south side of the Lewis & Robertson survey out of the Silvey league of land in Matagorda county," held the description was sufficient. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

counterclaim setting up facts which entitle the defendant to possession is proper,[38] but, the action being possessory only, defendant cannot set up as a counterclaim the damages caused by the replevied cattle while trespassing upon his close.[39] Plaintiff's title and right of possession, the value of the property, and the damages for the taking or detention thereof are put in issue by a general denial.[40] Where the complaint alleges fraudulent concealment of the property in controversy as a basis for a body execution, fraudulent concealment must be proved,[41] and in such case it is immaterial that no order of arrest has been issued.[42]

Where plaintiff has taken the property under the writ, it is improper to allow a stranger to be substituted for the original plaintiff.[43] Under the Mississippi statute a stranger to the action cannot intervene,[44] the remedy of one claiming a joint interest in the property being in equity.[45] A third person claiming a lien on the property in controversy has a right to be made a party to the action under the New York Code providing for the bringing in of new parties where a complete determination cannot be had without their presence.[46]

§ 9. *Evidence.*[47]—Where possession in plaintiff at a particular time is shown, it is presumed to continue.[48] The burden is upon plaintiff to show his right to possession at the time of the commencement of the action[49] although defendant also claims title,[50] and the fact that plaintiff may at one time have been the owner of the property does not change the burden.[51] The burden of proving that the wrongful detention caused loss, and the amount of the damages sustained, is upon the party claiming it.[52] The fact that the complaint suggests the reason for de-

38. A counterclaim setting up an equitable lien upon the property in controversy by virtue of an agreement to turn same over as security for money advaced is good although defendant may have acquired possession unlawfully. Reardon v. Higgins [Ind. App.] 79 N. E. 208.

39. This is true although the statute gives him a lien on the cattle for the damages caused thereby where it does not authorize him to withhold possession from the owner. Linn v. Hagan's Adm'r, 28 Ky. L. R. 1292, 92 S. W. 11.

40. Jackson v. Morgan [Ind.] 78 N. E. 633. Under the Massachusetts Practice Act of 1852, the general denial is broader than the common-law plea of non cepit and under it defendant may prove any facts which tend to contradict the contention of plaintiff that the title and right of possession are in him. An officer holding goods under attachment may prove that the transfer from the attachment defendant to the plaintiff in the replevin suit was in fraud of creditors. Pan-American Amusement Co. v. Maguire [C. C. A.] 142 F. 126.

41. The complaint alleged that the property had been concealed and disposed of, so that it could not be found with intent to deprive the plaintiff thereof, but there was no evidence of such concealment, held a judgment for plaintiff was improper. Merriam v. Johnson, 101 N. Y. S. 627, rvg. 50 Misc. 661, 99 N. Y. S. 425.

42. Merriam v. Johnson, 101 N. Y. S. 627, rvg. 50 Misc. 661, 99 N. Y. S. 425.

43. Plaintiff sued in a trade name. At the trial it was proved that there was no such concern doing business in the state and that the business was owned by one "A." Held error to allow "A" to be substituted for the original plaintiff. Meyer v. Omaha Furniture & Carpet Co. [Neb.] 107 N. W. 767.

44. Code 1892, § 714, providing that on the affidavit of the defendant before the plea that a third person has a claim to the property and that he is ready to pay or dispose of the same as the court may direct, the court may order such third person to be made a party to the action, is intended to protect an original defendant desiring to disclaim in behalf of a third person. McCracken v. Lewis [Miss.] 42 So. 671.

45. McCracken v. Lewis [Miss.] 42 So. 671.

46. A machine was turned over to one "S" for the purpose of making repairs. "S" after partly repairing it turned it over to defendant to complete the work with instructions to deliver it to plaintiff upon the payment of the bill for all the repairs made. Held in an action of replevin against defendant alone, "S" should have been allowed to come in. Friedman v. Schreiber, 50 Misc. 617, 98 N. Y. S. 235.

47. See 6 C. L. 1307.

48. Sanford v. Millikin, 144 Mich. 311, 13 Det. Leg. N. 171, 107 N. W. 884.

49. La Salle Pressed Brick Co. v. Coe, 126 Ill. App. 308; Woods v. Latta [Mont.] 88 P. 402. The burden is upon plaintiff to show a special property in the chattels replevied on the date of the issuance of the writ. Field v. Fletcher, 191 Mass. 494, 78 N. E. 107. Where plaintiff claimed title through a person in her individual capacity and defendant through the same person in her capacity as administratrix, the burden was upon plaintiff to show that the property was owned by her individually and not as administratrix. Austin v. Terry [Colo.] 88 P. 189.

50. Frank v. Symons [Mont.] 88 P. 561.

51. An instruction that if the jury found that plaintiff had at any time been the owner of the property it would devolve upon the defendant to prove his title is erroneous. Woods v. Latta [Mont.] 88 P. 402.

52. Where defendant denied plaintiff's

fendant's conduct in taking the goods does not change the order of proof.[53] Where defendant denies possession at the time of the commencement of the action and introduces evidence in support of his denial, the plaintiff must prove that he was in fact in possession.[54] The burden is upon plaintiff to show that the property replevied and delivered to him under the writ is his property,[55] but when the plaintiff makes out a prima facie case the burden is upon the defendant to prove liens set up in the plea.[56]

Evidence tending to establish [57] or to negative [58] a claim of ownership, or to show good faith when material,[59] is admissible; but evidence of title in a third person is inadmissible in behalf of the defendant where the property was taken from the exclusive and undisputed possession of plaintiff.[60] Where the legal title to the property had passed to a third person, the plaintiff cannot show the consideration for the transfer,[61] but, where defendant claims title through a third person, evidence that such person's ownership was fraudulent is admissible.[62]

Proof of ownership and the right to possession in plaintiff makes a prima facie case,[63] and an affidavit that the mortgagor is the owner of the chattels covered by the mortgage, if admitted without objection, is prima facie evidence of ownership in the mortgagor in behalf of one claiming under the mortgage.[64] The evidence must be sufficient to identify the property which is the basis of the action.[65] Evidence of a direction by plaintiff to send goods by a certain carrier is sufficient to sustain the direction of a verdict sustaining the carrier's lien for its unpaid charges.[66]

§ 10. *Trial.*[67]—Failure on the part of the plaintiff to bring the case on for trial [68] or to prove an element essential to recovery [69] is ground for nonsuit, but

title and claimed damages for wrongful taking, it was error to refuse an instruction that defendant must prove that he suffered damages together with the amount thereof. Haggerty Bros. v. Lash [Mont.] 87 P. 907.

53. Drumgoole v. Lyle, 30 Pa. Super Ct. 463.

54. An instruction that plaintiff was entitled to recover if at the time of the institution of the suit he was the owner of the property is erroneous where defendant denies possession in himself at such time and introduces evidence tending to establish that fact. Clark v. Sublette, 117 Mo. App. 519, 94 S. W. 733.

55. An instruction requiring defendant to prove its right to the property replevied from it is erroneous. Second Nat. Bank v. Thuet, 124 Ill. App. 501.

56. Kebabian v. Adams Exp. Co. 27 R. I. 564, 65 A. 271. Where plaintiff has made out a prima facie case of title under a mortgage, the burden is upon one claiming under a prior mortgage to show the priority of his mortgage and that the chattels described therein are the chattels in controversy. State Bank v. City Nat. Bank [Okl.] 89 P. 206.

57. In an issue as to the ownership of property in a corporation, evidence of its merger with a corporation in whom title appears is admissible. Churchill v. More [Cal. App.] 88 P. 290.

58. Where plaintiff claims title through a person in his individual capacity and defendant claims title through the same person in his official capacity as administrator, an inventory showing the property in controversy to be property of the estate is admissible. Austin v. Terry [Colo.] 88 P. 189. Evidence tending to overcome plaintiff's claim that goods were covered by a chattel mortgage is admissible. Spiegel v. Fehr, 101 N. Y. S. 651.

59. In an action of replevin to recover certain logs converted by defendant, evidence that it had purchased all the title there was of record is admissible, although such title was invalid, for the purpose of showing good faith, and not to defeat plaintiff's title. Gustin v. Embury-Clark Lumber Co., 145 Mich. 101, 13 Det. Leg. N. 546, 108 N. W. 650. Where defendant claims the right to possession as an officer having taken the property from one charged with theft, evidence that he thought the property stolen and that the justice of the peace and the county attorney told him to keep it is admissible. Murray v. Lyons [Tex. Civ. App.] 15 Tex. Ct. Rep. 569, 95 S. W. 621.

60. Sanford v. Millikin, 144 Mich. 311, 13 Det. Leg. N. 171, 107 N. W. 884.

61. Action by a receiver; prior to his appointment the judgment debtor conveyed the property. Gilroy v. Everson-Hickok Co., 103 N. Y. S. 620.

62. Shine v. Culver, 42 Wash. 484, 85 P. 271.

63. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271.

64. Metropolitan Music Co. v. Shirley, 98 Minn. 292, 108 N. W. 271.

65. Evidence held sufficient to identify property involved as that of plaintiff as a matter of law. Crowley v. Shepard [Colo.] 88 P. 177.

66. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271.

67. See 6 C. L. 1307.

68. Laws 1903, p. 578, c. 247, apply to

nonsuit is improper after plaintiff has made out a prima facie case.[70] Where plaintiff has title and the right to possession at the time of the issuance of the writ, he is deprived of neither by a subsequent levy upon the goods under an execution against him, and a nonsuit is improper.[71]

Instructions must be applicable to the pleadings and evidence [72] and must not exclude defendant from sources of title upon which, under the evidence he is entitled to rely,[73] nor ignore essentials to recovery.[74] An instruction as to the property, the title to which plaintiff must prove in order to recover, is sufficient if the jury can determine therefrom what property is referred to.[75]

Under the Missouri statute the value of defendant's special interest in the property must be submitted to the jury.[76] The parties may waive their right to a jury trial by injecting an equitable issue into their pleadings.[77] Where there is evidence to support defendant's contention that property owned by him was unlawfully taken under the writ, upon electing to take judgment for its value he is entitled to have the issue submitted to the jury.[78]

Verdict and findings.[79]—The verdict should directly decide the issues raised by the plea,[80] but a verdict that defendant is entitled to a portion of the property in plaintiff's possession under the writ is an inferential finding that plaintiff is entitled to the remainder and is sufficient [81] although there is no direct finding as to the amount to which plaintiff is entitled.[82] A finding that plaintiff is the owner

actions of replevin and nonsuit is proper where plaintiff fails to bring the case on for trial pursuant to his own notice although a replication had not been filed and the cause was not at issue. Stein v. Goodenough [N. J. Err. & App.] 64 A. 961.

69. A nonsuit is properly granted as to a defendant who is not shown to have been connected with the taking or detention of the property claimed. Kebabian v. Adams Exp. Co. [R. I.] 66 A. 201.

70. Proof of ownership and the right to possession is sufficient. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271.

71. Pedrick v. Keummell [N. J. Law] 65 A. 846.

72. An instruction as to sawed and unsawed timber in the possession of defendant is erroneous where only sawed timber is in issue. Gustin v. Embury-Clark Lumber Co., 145 Mich. 101, 13 Det. Leg. N. 546, 108 N. W. 650.

73. An instruction limiting defendant's source of title to purchase or gift from the plaintiff is erroneous where as to all but one of the articles in controversy he claimed title through purchase from another. Woods v. Latta [Mont.] 88 P. 402.

74. An instruction that if plaintiff was shown to have owned the property at any time the burden would shift to defendant to show ownership ignores the question of which party was entitled to possession and is erroneous. Woods v. Latta [Mont.] 88 P. 402.

75. An instruction making plaintiff's right to recover depend upon whether the property taken by the marshal was covered by his mortgage is proper though there is no evidence as to what property was so taken where there is no claim that the marshal had not taken the property claimed by the plaintiff or that he had taken any not so claimed. National Bank v. Schufelt [C. C. A.] 145 F. 509. Where the holder of a chattel mortgage sued to recover 326 steers described as being located on a certain feed lot and of a certain age, and which afterward became intermingled with cattle covered by another mortgage it is immaterial whether an instruction describes them by reference to their age or their location at the date of the mortgage as in either event the jury would be able to determine which cattle were referred to. Id.

76. Where after verdict in his favor defendant disclaims all interest in the property except his charges as pound master, it is error for the court to assess such charges as damages on defendant's bare statement, the question should have been submitted to the jury. Watkins v. Green [Mo. App.] 92 S. W. 1131.

77. A complaint praying in addition to the specific return of the goods the setting aside of a bill of sale to defendant raises an equitable issue Hurley v. Walter [Wis.] 109 N. W. 558.

78. Patterson v. Spooner, 143 Mich. 698, 13 Det. Leg. N. 83, 107 N. W. 450.

79. See 6 C. L. 1308.

80. A verdict sustaining a defendant's lien is incorrect in form where it merely finds the defendant not guilty, assesses damages, and directs the return of the goods, as it does not directly find on the issue raised by the plea setting up the lien. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271.

81. Replevin to recover 1,708 sheep, verdict that defendant was entitled to 183 of them of the value of $551, with specified damages for detention held sufficient. Campbell v. First Nat. Bank [Idaho] 88 P. 639.

82. Where defendant claimed a portion of 1,708 sheep replevied by plaintiff and plaintiff admits that defendant is entitled to 183, and the case is tried upon the question of how many sheep defendant is entitled to have returned to him, while it would have been proper to find as to the number to which plaintiff as well as defendant is entitled, such finding is unnecessary where

and entitled to the possession of the property in controversy is a finding of an ultimate fact [83] and controls a finding of probative facts.[84] A verdict will not be set aside as indefinite if in itself, or taken in connection with the pleadings, it so identifies the property that a judgment based on it could be enforced with reasonable certainty.[85]

§ 11. *Judgment and award of damages.*[86]—Where plaintiff is placed in possession under the writ, judgment for defendant may be for the return of the property, or its value if return cannot be had, and for damages for wrongful detention.[87] Under a statute authorizing an alternative judgment, defendant cannot complain of a judgment for the return of the property only.[88] Where the judgment recites that the property has been disposed of and cannot be returned, it is not necessary that it should find the value of each article [89] and, where it is sought to recover several articles, the judgment may be for the aggregate value of the articles.[90] Under the Michigan statute where each of two defendants claims a lien on the property, the liens of each may be determined in the action and the court may render such judgment as may be just between the parties.[91] Where the statute does not define the measure of damages in replevin, it is the same as in conversion.[92] Punitive damages cannot be recovered.[93] Where the complaint asks damages for the unlawful taking and detention of the property and not a return of the property and part of the property is returned, plaintiff is entitled to recover the value of the property not delivered and nominal damages for the unlawful taking and detention of the property delivered;[94] but where the plaintiff deliberately refrains from bringing a possessory action to recover property wrongfully seized until it has been greatly enhanced in value through process of manufacture, he is not entitled to a recovery of the property in specie but only to the value of the property at the time of the conversion with interest from that date.[95] The fact that the goods were left in the possession of the defendant under the writ does not deprive the plaintiff of the right to recover damages for their unlawful taking and detention.[96] Where the plaintiff recovers possession under the writ, the measure of damages is the damage proved to have been sustained by reason of the detention [97] and where no dam-

the jury find that defendant is entitled to a specified number. Campbell v. First Nat. Bank [Idaho] 88 P. 639.

83. Vasey v. Campbell [Cal. App.] 88 P. 509.

84. In replevin against the district attorney the court found that the articles seized by him were adapted to and ordinarily used for gambling purposes, that at the time of the seizure one article was used for a gambling purpose, but it was not found that the property was intended by plaintiff to be used in violation of the gambling laws or that it could not be used legitimately, held not to overcome an express finding of ownership and right to possession in plaintiff. Vasey v. Campbell [Cal. App.] 88 P. 509.

85. In an action to recover the furniture of a barber shop including four barber chairs "all of the value of $59.70," a verdict for "three barber chairs or $59.70" is not so indefinite as to constitute ground for setting the verdict aside. Phoenix Furniture Co. v. Jaudon [S. C.] 55 S. E. 308.

86. See 6 C. L. 1308.

87. Rev. St. 1887, § 4453. Campbell v. First Nat. Bank [Idaho] 88 P. 639.

88. Though an alternative judgment should be awarded, it is for the protection of the plaintiff only. Copeland v. Kilpatrick [Colo.] 88 P. 472.

89. Plaintiff took the property under sequestration proceedings and defendant replevied it, plaintiff was awarded judgment in the sequestration proceedings. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

90. A finding as to the separate value of each is unnecessary. Copeland v. Kilpatrick [Colo.] 88 P. 472.

91. Comp. Laws, § 10,675. Duke v. Beatty [Mich.] 14 Det. Leg. N. 25, 111 N. W. 176.

92. The damages for detention should be confined to interest from the date of the seizure. Webster v. Sherman, 33 Mont. 448, 84 P. 878.

93. But where defendant himself sets up a claim for punitive damages, he cannot complain of an instruction allowing the recovery of such damages. Brayton v. Beall, 73 S. C. 308, 53 S. E. 641.

94. Staunton v. Smith [Del.] 65 A. 593.

95. Plaintiff allowed timber owned by him to be cut, rafted, and part of it manufactured into lumber before bringing his action. Gustin v. Embury-Clark Lumber Co., 145 Mich. 101, 13 Det. Leg. N. 546, 108 N. W. 650.

96. Pedrick v. Keummell [N. J. Law] 65 A. 846.

97. The value of the goods is not the measure of damages. Hyde v. Elmer [N. M.] 88 P. 1132.

age is proved only nominal damages may be awarded.[98] The expense of caring for the property should be deducted from the value of its use during the period of detention.[99] Where plaintiff introduces evidence of damages, a failure to award damages in the judgment giving him possession is equivalent to a finding that none had been suffered.[1]

§ 12. *Costs.*[2]—The successful party in the action is entitled to costs.[3] Where defendant refuses to comply with a demand for possession and persists in his refusal, plaintiff is entitled to costs accruing both before and after the service of the writ.[4] A mere request to the constable to withhold any costs until the trial if possible is not such a disclaimer as will protect the defendant from a judgment for costs.[5]

§ 13. *Review.*[6]—A finding of fact that plaintiff is not entitled to damages will not be reviewed.[7] Where the evidence is before it, the court on appeal may reform a judgment in so far as it fails to state the value of each article separately.[8]

§ 14. *Liability of plaintiff or his bond, and of receiptors, etc.*[9]—Where the plaintiff in a replevin suit permits the action to be dismissed for want of prosecution, in an action on the bond he cannot contest the defendant's title to the goods taken under the writ[10] except to plead and prove his title in mitigation of damages;[11] the judgment in replevin being conclusive upon the parties or their privies as to all matters which were or might have been litigated under the issues.[12] The condition of a bond for the prosecution of the action is separate from the conditions for the return of the property and the payment of damages and may become effective independently of the other conditions.[13] The prosecution of the action contemplated by the condition of the bond is to the determination of the issues by a final judgment,[14] and a failure to prosecute the action to a valid,[15] final, judg-

98. Hyde v. Elmer [N. M.] 88 P. 1132.

99. An instruction that defendant is entitled to the value of the use of the property from the time it was taken is erroneous. Haggerty Bros. v. Lash [Mont.] 87 P. 907.

1. Constanzo v. Central R. Co. [N. J. Law] 64 A. 1067.

2. See 4 C. L. 1293.

3. Constanzo v. Central R. Co. [N. J. Law] 64 A. 1067.

4. Evidence held to show a refusal on the part of defendant to comply with plaintiff's demand for possession. Mason v. Rodgers, 116 Mo. App. 611, 92 S. W. 745.

5. Where constable before serving writ demanded possession on several occasions, his demand being refused, a letter from defendant's attorney to the constable requesting him to withhold further costs is not equivalent to a relinquishment of the property. Mason v. Rodgers, 116 Mo. App. 611, 92 S. W. 745.

6. See 6 C. L. 1309.

7. Constanzo v. Central R. Co. [N. J. Law] 64 A. 1067.

8. Cummings & Co. v. Masterson [Tex. Civ. App.] 16 Tex. Ct. Rep. 33, 93 S. W. 500.

9. See 6 C. L. 1309.

10 Defendant in an action upon a replevin bond executed a chattel mortgage to the plaintiff which was subsequently foreclosed, he then commenced an action of replevin against plaintiff, obtaining possession of some of the goods but the action was dismissed for want of prosecution, held in the action on the bond he was precluded from contesting plaintiff's title to the property. Hock v. Magerstadt, 124 Ill. App. 140.

11. Hock v. Magerstadt, 124 Ill. App. 140.

12. Where the question of damages might have been litigated in the replevin action, the judgment therein is conclusive in an action on the bond. Jackson v. Morgan [Ind.] 78 N. E. 633. Under the Indiana statute whether the verdict and judgment be for the plaintiff or the defendant for the return of the property or the value thereof and all damages for its taking and detention, must be determined in the replevin action and defendant cannot afterward bring a separate action upon the bond to recover damages for the taking and detention. Burns' Ann. St. 1901, § 558, provides that in actions for the recovery of specific personal property the jury must assess the value of the property, as also the damages for the taking or detention, whenever by their verdict there will be a judgment for the recovery or return of the property, section 581 provides in an action to recover the possession of personal property judgment may be for the delivery of the property or the value thereof in case delivery cannot be had and damages for the detention, held where a judgment for the value of the property is satisfied a separate action on the bond for damages does not lie. Id.

13. It becomes operative before final judgment while the other conditions do not become operative until after judgment. Siebolt v. Konatz Saddlery Co. [N. D.] 106 N. W. 564.

14. The commencement of the action and the taking of the property under the writ is not a fulfillment of the condition. Siebolt v. Konatz Saddlery Co. [N. D.] 106 N. W. 564.

15. The fact that the judgment was void through the fault of the justice of the peace

ment operates as a breach of the condition.[16] In Georgia, upon a judgment for the defendant, judgment enters as of course against the plaintiff and the sureties on his bond for the amount mentioned therein.[17] In Texas a judgment against the sureties must allow them ten days within which to return all or a part of the goods taken under the writ, and allow credit for the value of the goods returned,[18] and the value of each article replevied must be stated separately,[19] and, where goods taken in sequestration proceedings and replevied by defendant are not delivered to the sheriff within ten days after the entry of judgment for the plaintiff in the sequestration action, judgment is properly entered against the replevin plaintiff's sureties.[20] Persons not parties to a replevin bond are improperly joined as defendants in an action upon the bond.[21] The value of the property stated in the writ and bond is at least prima facie evidence of its value in an action against the sureties [22] and, in the absence of evidence to the contrary, is conclusive [23] and general rules as to evidence of value obtain.[24] Where plaintiff fails to return the property after an alternative judgment has been entered, the measure of damages in an action against the sureties is the amount of the alternative judgment.[25] The sureties on a replevin bond are not liable for costs where the property was replevied from the plaintiff in a sequestrian action and the plaintiff in that action recovers judgment.[26]

REPLICATION; REPORTED QUESTIONS; REPORTS; REPRESENTATIONS; REPRIEVES; RES ADJUDICATA; RESCISSION; RESCUE; RES GESTAE; RESIDENCE; RESISTING OFFICER; RESPONDENTIA; RESTITUTION, see latest topical index.

RESTORING INSTRUMENTS AND RECORDS.

§ 1. Evidence and Proof of Loss and of Contents (1742).
§ 2. Proceedings in Equity or Otherwise to Restore Lost Papers or Instruments (1743).
§ 3. Procedure in Equity or Under the Burnt Records Act to Restore Records (1743).

§ 1. *Evidence and proof of loss and of contents.*[27]—A record book of deeds is admissible as a circumstance to show the execution and contents of lost instruments recorded therein,[28] and this is true notwithstanding irregularities in the recording when the testimony of the person who did the copying explains that the defects arose from the ancient and faded condition of the instruments.[29] The restoration of an instrument or record will, ordinarily, only be made on clear and satisfactory

alone does not exonerate plaintiff from compiying with the conditions of the bond. Siebolt v. Konatz Saddlery Co. [N. D.] 106 N. W. 564.

16. Where judgment rendered for plaintiff was on appeal declared void on jurisdictional grounds and the plaintiff did nothing further toward maintaining his right to the property by action, the condition of the bond was broken. Siebolt v. Konatz Saddlery Co. [N. D.] 106 N. W. 564.

17. It is not necessary to institute a separate proceeding against the bondsmen. Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55.

18. A judgment against the sureties in default of their restoring the property prior to the date of the judgment is erroneous. Cummings & Co. v. Masterson [Tex. Civ. App.] 16 Tex. Ct. Rep. 33, 93 S. W. 500.

19. Cummings & Co. v. Masterson [Tex. Civ. App.] 16 Tex. Ct. Rep. 33, 93 S. W. 500.

20. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

21. Jackson v. Morgan [Ind.] 78 N. E. 633.

22, 23. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.

24. An affidavit for replevin made four years prior to the trial is inadmissible to prove value of the property taken. Gilroy v. Everson-Hickok Co., 103 N. Y. S. 620. In an action for damages on the bond for a breach of a condition to prosecute the action, evidence of the value of the property taken under the writ and not returned is admissible. Siebolt v. Konatz Saddlery Co. [N. D.] 106 N. W. 564.

25. It is not based upon the value of the property or the value of the interest in it held by the defendant. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.

26. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

27. See 6 C. L. 1310.

28, 29. Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417.

evidence;[30] and it is especially true as to a claimant sustaining a confidential relation towards a grantor under whose deed he claims as a lost or destroyed instrument that its execution and delivery must be so shown.[31]

§ 2. *Proceedings in equity or otherwise to restore lost papers or instruments.*[32]—Courts of record have inherent power to substitute lost records and files.[33] Lost records of judicial proceedings may be proved by parol,[34] but where the proceeding is statutory it must be shown that the petition by which it was instituted contained all jurisdictional averments.[35] An instrument void on its face cannot, of course, be restored.[36] Equity has jurisdiction to restore a destroyed deed of adoption for use as evidence in future litigation prior to the assertion of any property right thereunder.[37] The Alabama statute providing for appeal from an order substituting copies for lost papers in judicial proceedings applies only to orders in determined causes and not in pending ones.[38]

§ 3. *Procedure in equity or under the burnt records act to restore records.*[39]—The California statute for restoration of records and quieting of titles, the record whereof was destroyed by flood, fire, and earthquake, which statute prescribes a proceeding "in rem" and published citation to all persons without naming them unless known as claimants, has been held valid.[40] Equity has jurisdiction to restore the record of a deed of adoption for use as evidence in future litigation prior to the assertion of any property right under the deed.[41]

Restraint of Alienation; Restraint of Trade; Retraxit; Returnable Package Laws; Returns; Revenue Laws; Reversions; Review; Revival of Judgments; Revivor of Suits; Revocation, see latest topical index.

REWARDS.

§ 1. Nature and Definition (1743).
§ 2. The Offer (1743).
§ 3. Earning Reward (1744).

§ 1. *Nature and definition.*[42]

§ 2. *The offer.*[43]—The power of a corporate officer to offer a reward,[44] and the ratification of an offer by him,[45] are governed by the general rules pertaining to the powers of such officers.[46] But this, like other powers of municipal officers, must be clearly bestowed by statute or charter.[47]

30. **Evidence held sufficient:** To establish the **execution and acknowledgment** of a **deed of adoption** which with the record thereof had been destroyed. Haworth v. Haworth [Mo. App.] 100 S. W. 531. To show **execution and delivery of title bond** pleaded as a lost instrument. Hogg v. Combs, 29 Ky. L. R. 559, 93 S. W. 670.

Evidence held insufficient: To show **execution and delivery** of alleged **lost deed.** Hutchins v. Murphy [Mich.] 13 Det. Leg. N. 901, 110 N. W. 52. To show the **genuineness** of a **lost deed.** Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417.

31. **Evidence held insufficient** to show the execution and delivery of an alleged lost or destroyed **deed** from deceased wife to her surviving husband claiming thereunder. Kenady v. Gilkey [Ark.] 98 S. W. 969.

32. See 6 C. L. 1311.

33. Alabama City, etc., R. Co. v. Ventress [Ala.] 42 So. 1017.

34. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

35. **Adoption proceedings.** Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767.

36. Deed of **wife to husband** in which he did not join. Poling v. Poling [W. Va.] 55 S. E. 993.

37. Haworth v. Haworth [Mo. App.] 100 S. W. 531.

38. Alabama City, etc., R. Co. v. Ventress [Ala.] 42 So. 1017.

39. See 4 C. L. 1295.

40. Does not deny due process or infringe on judicial power or regulate practice or jurisdiction needlessly by local statute. Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356.

41. Haworth v. Haworth [Mo. App.] 100 S. W. 531.

42. See 2 C. L. 1521.

43. See 6 C. L. 1311.

44. The superintendent and general manager of a railroad has implied authority to bind his company by the offer of a reward. Arkansas Southwestern R. Co. v. Dickinson [Ark.] 95 S. W. 802.

45. Offer held known to corporation and ratified by failure to repudiate. Arkansas Southwestern R. Co. v. Dickinson [Ark.] 95 S. W. 802.

46. See Corporations, 7 C. L. 862.

47. A reward for evidence is not an "ex-

§ 3. *Earning reward.*[48]—Strict performance[49] with knowledge of the offered reward[50] is necessary to entitle thereto, and, as a matter of public policy, one who obtains evidence for which a reward is offered by agreement to compensate an accomplice in the crime is not entitled to the reward.[51] Where the reward is offered for the conviction of any person committing a certain offense, a record of conviction establishes prima facie the commission of such offense by the person convicted.[52]

RIGHT OF PRIVACY; RIGHT OF PROPERTY, see latest topical index.

RIOT.[53]

A common intent[54] executed by an unlawful assemblage of threatening attitude with disorder and violence[55] is essential to riot. Rioters are "acting together" within the Oregon statute if they are actuated by a common interest and encourage, assist, or abet each other in the execution thereof,[56] and from such co-operation the existence of a common intent may be inferred.[57] And by a further provision of the same statute all participants are liable for a felony committed by one in the course of the riot.[58] While it is material whether the populace was terrified, a witness may not state his conclusion on the subject,[59] and declarations of a participant thirty minutes later is no part of the res gestae.[60]

RIPARIAN OWNERS.

§ 1. Persons Who Are Riparian Owners, and Title to Lands Under Water (1744).
§ 2. Rights Attendant on Change in Bed of Stream or in Shore Line (1746).
§ 3. Rights Incidental to Riparian Ownership (1748).
§ 4. Subjection to Public Easements (1749).
§ 5. Action for Protection of Riparian Rights (1749).

Scope of title.—This topic includes matters relating to ownership and use of the soil bordering on and under water, accretion, reliction, erosion, and avulsion, and rights incidental thereto. Matters relating to water, navigable or otherwise, are treated elsewhere.[61]

§ 1. *Persons who are riparian owners, and title to lands under water.*[62]—The owners of land, which is filled out by them to a water front, become thereby riparian

pense necessarily incurred" by a district attorney (County Law, § 230, sub. 2), nor "money necessarily expended in executing the duties of his office" (id., sub. 9). McNeil v. Suffolk County Sup'rs, 100 N. Y. S. 239.

48. See 6 C. L. 1312.

49. An offer of a reward for an arrest is not accepted by furnishing information which leads to an arrest. McClaughry v. King [C. C. A.] 147 F. 463. Furnishing information which leads to arrest is not acceptance of offer for arrest. Id. A valid arrest of the principal is essential to the recovery of a reward offered by his bail for his apprehension. Moore v. Peace [Ky.] 97 S. W. 762. An offer of a reward restricted to past offenses involves no liability as to future offenses. People v. Brower, 111 App. Div. 915, 97 N. Y. S. 349.

50. Offer by proclamation of governor. Couch v. State [N. D.] 103 N. W. 942. Offer by sheriff. Broadnax v. Ledbetter [Tex.] 99 S. W. 1111, suggesting doubt whether offer by government under authority of law would be governed by the rule stated in the text.

51. Reward for evidence of sale of notes cannot be recovered by one who obtained the evidence under an agreement with the buyer of such votes to divide the reward. Mount v. Montgomery County Com'rs [Ind.] 80 N. E. 629.

52. Arkansas S. W. R. Co. v. Dickinson [Ark.] 95 S. W. 802.

53. See 6 C. L. 1312.

54. Instruction held erroneous. Hunter v. State [Ga.] 55 S. E. 1044.

55. Acts of a number of persons who looted an unoccupied building held not riot. Adamson v. New York, 188 N. Y. 255, 80 N. E. 937.

56. B. & C. Comp. § 1913. State v. Mizis [Or.] 85 P. 611. Actual violence by each not essential. Id.

57. Evidence held sufficient to show riot and participation of defendant therein. State v. Mizis [Or.] 85 P. 611.

58. Defendant held punishable as for assault with dangerous weapon because one rioter made such assault. State v. Mizis [Or.] 86 P. 361.

59, 60. Shuler v. State, 126 Ga. 630, 55 S. E. 496.

61. See Waters and Water Supply, 6 C. L. 1840; Navigable Waters, 8 C. L. 1083.

62. See 6 C. L. 1313.

owners when the work is done under statutory authority and promise of perpetual rights,[63] and neither they nor their successors in title can be deprived of their rights except under the power of eminent domain.[64] Whether title to soil under navigable waters passes to the grantee of shore lands is determined by the law of the state in which the land is located,[65] but it is held in most jurisdictions that the title to the bed is in the state for the use of the public,[66] and as a corollary that the riparian proprietor owns only to high water mark or the limit of the bed,[67] nor does it affect the private owner's rights that the conveyance under which he holds calls for side lines of specific length,[68] though the grantee in such case must show that the high water line has moved from his front lateral line towards the stream to entitle him to establish his right to more land than called for by his deed.[69] The rule is merely one of intention [70] and when the intention is ascertainable from the record of a proceeding or the face of an instrument, other evidence is inadmissible.[71] Nevertheless, it is held in Kentcky that a call in a deed for a certain distance to a river passes title to an island in the channel toward the shore conveyed, though the call falls short of the channel.[72] Riparian owners on each side of a navigable fresh water stream, unaffected by the tides, own the old bed thereof to the former thread of the stream when the stream changes its course as the result of avulsion.[73] The public right in the land forming the bank of a navigable river, between high and low water mark, is paramount to the rights of the owner of the adjacent fee.[74] Prior to the inclusion of a navigable body of water in a state, the United States government has no absolute power of disposal of the shores thereof below ordinary high water mark, but holds the same for the benefit of the future commonwealth.[75] Hence, a state, on admission, becomes entitled to exercise sovereignty thereover [76] except in so far as it disclaims such right.[77] As a consequence of ownership by the state, title to the bed and banks of a navigable stream cannot be acquired by adverse possession,[78] nor can a patent by inference or implication pass title in the bed or shore of a navigable stream,[79] and any private interest acquired by a grant of such lands is subservient to the right of the public to use and the power of the government to control the waters thereof,[80] nor can the unauthorized grant thereof by a public official estop the government from asserting its rights.[81] The shifting water line and not the meander line is the boundary of a government survey abutting on navigable waters,[82] especially where there is evidence of the existence of the body of water substantially as shown on the government survey.[83] The location of the line of ordinary high

63, 64. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.

65. Harrison v. Fite [C. C. A.] 148 F. 781.

66. Fowler v. Wood [Kan.] 85 P. 763; Harrison v. Fite [C. C. A.] 148 F. 781.

67. Harrison v. Fite [C. C. A.] 148 F. 781.

68. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

69. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927. Evidence held to show existence of high water line of navigable stream coincidental with platted lines of lots in controversy. Id.

70. Fowler v. Wood [Kan.] 85 P. 763. The rule that where land is conveyed described as bounded by, or upon, or as running to, or along, the sea or shore or bank of a river or stream, the grant carries the entire estate of the grantor, whether limited by high or low water mark or by the thread of the stream has no application to a conveyance of platted land with calls falling short of the bank without indicating whether the water was or was not intended to be the boundary line. Polson v. Aberdeen [Wash.] 87 P. 73.

71. Fowler v. Wood [Kan.] 85 P. 763.

72. Huffman v. Charles [Ky.] 97 S. W. 775.

73. Kinkead v. Turgeon [Neb.] 109 N. W. 744, rvg. on rehearing [Neb.] 104 N. W. 1061.

74. Hence a city cannot by ordinance or contract require abutting servient property to pay for improvements ordered by it within such space, especially in the absence of charter authority to direct the assessment to be made in that way. Terrell v. Paducah, 28 Ky. L. R. 1237, 92 S. W. 310.

75, 76, 77. Kalez v. Spokane Valley Land & Water Co., 42 Wash. 43, 84 P. 395.

78. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

79, 80, 81. Carver v. San Pedro, etc., R. Co., 151 F. 334.

82. Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046; Berry v. Hoogendoorn [Iowa] 108 N. W. 923.

83. Sherwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046.

tide as shown on a government survey of lands abutting on an ocean is presumed to be correct.[84] A meander line is not itself the shore line but is only a means of measuring correctly the shore line.[85] When a stream has definite banks they are the best evidence of the location of the high water line.[86] The title of each riparian owner on a nonnavigable stream extends to the thread of the stream,[87] and one owning and in possession of lands on both sides thereof is presumed to have title to an intervening island,[88] hence, a conveyance of land by such owner includes by implication an island between the shore thereof and the thread of the stream.[89] The rule that under a grant of lands bounded on nonnavigable water the grantee takes to the center of the water ratably with other riparian proprietors does not apply to give the grantee title to low, swampy, lands, checked by bayous, subject to inundation and reclaimable to some extent for agricultural purposes.[90] When a street on the shore line of a harbor is widened, the riparian rights of the city attendant thereon remain the same.[91]

§ 2. *Rights attendant on change in bed of stream or in shore line.*[92]—Title to reclamations of [93] and accretions to land on navigable waters goes with the fee,[94] and boundaries private as well as municipal [95] change to effect the result. When accretions form in front of the property of several riparian owners, each is entitled merely to his proportion,[95] nor can one be cut off from the water front merely because his side and lateral lines extended would form a perfect rectangle before reaching the water line,[97] but, to entitle him to a proportional part of the receded shore line it is essential for him to show the length of the new shore line and the length of the corresponding old shore line, so that the new line may be apportioned in parts corresponding to the parts of the old shore line belonging to the different owners.[98] The repeal by congress of an act declaring a stream navigable does not affect accretion rights of riparian owners as they exist at the time of the repeal.[99] A temporary disappearance of water from a lake meandered by a government survey gives riparian owners no rights by accretion or reliction.[1] Hence, their ownership

84, 85. Kimball v. McKee [Cal.] 86 P. 1089.

86. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 327.

87. Foster v. Bussey [Iowa] 109 N. W. 1105; Harrison v. Fite [C. C. A.] 148 F. 781.

88, 89. Wall v. Wall, 142 N. C. 387, 55 S. E. 283.

90. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534.

91. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.

92. See 6 C. L. 1314.

93. Sioux City v. Chicago N. W. R. Co., 129 Iowa, 694, 106 N. W. 183.

94. Sioux City v. Chicago N. W. R. Co., 129 Iowa, 694, 106 N. W. 183. Accretions belong to the owner of the fee to which they attach. Bouldin v. Kosminsky [Ark.] 100 S. W. 892. In Arkansas a riparian owner takes all accretions whether the water course be navigable or not. Harrison v. Fite [C. C. A.] 148 F. 781.

95. Hence jurisdiction of court of county bounded by river is not affected by accretions adding to the quantity of lands in the county. Bouldin v. Kosminsky [Ark.] 100 S. W. 892. Formations resulting from accretion or reliction must be made to the contiguous land and operate to produce an expansion of the shore line outward from the tract to which they adhere to effect a change of boundary. Fowler v. Wood [Kan.] 85 P. 763.

96. Berry v. Hoogendoorn [Iowa] 108 N. W. 923; Frederitzie v. Boeker, 193 Mo. 228, 92 S. W. 227. In apportioning accretion each riparian owner should be allotted such proportion of the new shore line as his ownership of the original bears to the whole line on which the accretion abuts (Hathaway v. Milwaukee [Wis.] 111 N. W. 570), and the allotment made by connecting the points where division lines of coterminous owners intersect the original shore line and the corresponding points on the new shore line by straight lines, unless inequities result (Id.). Contention that apportionment restricted within government line as to both original and present water frontage would result in more equitable distribution of area and water line held untenable. Id. The use of a portion of the new shore line of an area subject to apportionment as accretion for a tunnel to take water for municipal purposes into a city claiming an interest in the accretion does not prevent such portion of the shore from being treated as the natural water and shore line in making the apportionment. Id.

97. Frederitzie v. Boeker, 193 Mo. 228, 92 S. W. 227.

98, 99. Berry v. Hoogendoorn [Iowa] 108 N. W. 923.

1, 2. State v. Thompson [Iowa] 111 N. W. 328.

continues to be limited by the high water mark.[2] Whether a particular formation constitutes accretion to other land is a question of fact.[3] A formation which begins by a deposit against the shore of the mainland is not deprived of its character as an accretion by the subsequent advent of a stream between the accretion and the mainland.[4] In California owners of lands abutting on the ocean have no title to extensions thereto by accretion.[5] The right to accretion does not become a vested right before it actually exists in the sense that it may not be divested by legislative action without compensation.[6] Where riparian land is subject to an easement, it attaches to accretion apportioned thereto,[7] and when lost by erosion and subsequently restored by accretion, the easement is also restored.[8] The government meander line and the shore line of a stream are not synonymous terms in determining the rights of riparian owners to accretion,[9] and a change in the shore line is essential to legitimate a claim of such character.[10] Though riparian owners are entitled to accretions to their land caused by artificial means or obstructions, they cannot by filling or consenting to others filling their property acquire the filled land by accretion.[11] When part of a body of land on a navigable stream has been submerged, one acquiring the upland from a grantor who also owns the low land takes no title to the low land by the conveyance,[12] but his title to the low land may be perfected by its becoming attached to the upland by accretion or reliction.[13] If the channel of a river separating mainland belonging to one proprietor and an island, restored land, or other formation, belonging to another proprietor, be deflected and filled up so that the two bodies of land join, each owner is entitled to the accretions to and relictions from his own shore,[14] but if the channel fill up from the bottom without accretion to or reliction from either side, the boundary is the center of the channel as it was before the water left it.[15] When a portion only of land subject to partition was partitioned on the mistaken assumption that the other had been lost to the proprietors by a submergence which had taken place, but it subsequently reappeared along with accretions, the restored land with accretions thereupon became partitionable between the same parties and privies, on the equitable ground of mistake as to the existence of a part of the subject-matter of the former suit.[16] The doctrine of accretions applies as well to islands as to the mainland.[17] The owner of an island in navigable water is the owner also of accretions to any part of it remaining after the government survey under which his patent thereto was issued.[18] A transfer by number of a meandered lot abutting on a lake according to the government survey, without words of restriction, conveys all the land which has become a part of the lot by re-

3. Houseman v. International Nav. Co., 214 Pa. 552, 64 A. 379. Whether formations attaching to an island were accretions thereto held a question for the jury. Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691. Evidence, including view of premises by court, held to sustain finding that land in dispute was formed by natural causes, by imperceptible degrees, by the accumulation of materials, and by recession of the water. Hatton v. Gregg [Cal. App.] 88 P. 592. Evidence held insufficient to show any change, since the government survey and conveyance thereof respectively in the elevation of lands claimed as belonging to plaintiff by virtue of his alleged riparian rights. Chapman & Dewey Land Co. v. Bigelow, 77 Ark. 338, 92 S. W. 534.

4. Dowdle v. Wheeler, 76 Ark. 529, 89 S. W. 1002.

5, 6. Western Pac. R. Co. v. Southern Pac. Co. [C. C. A.] 151 F. 376.

7. Hathaway v. Milwaukee [Wis.] 111 N. W. 570.

8. Elliott v. Atlantic City, 149 F. 849.

9. City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N. E. 296.

10. Evidence held insufficient to show change. City of Peoria v. Central Nat. Bank, 224 Ill. 43, 79 N. E. 296.

11. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

12, 13, 14, 15, 16. Fowler v. Wood [Kan.] 85 P. 763.

17. Hilleary v. Wilson [Ky.] 100 S. W. 1190; Fowler v. Wood [Kan.] 85 P. 763. Evidence held to show that certain land was made by accretion to an island and a tow head, which extended year by year till the tow head and the island united. Hilleary v. Wilson [Ky.] 100 S. W. 1190.

18. Bradshaw v. Edelen, 194 Mo. 640, 92 S. W. 691.

cession of the lake.[18] On the reappearance of land submerged by avulsion in a navigable stream, it is subject to reclamation when its identity is established.[20] The right of reclamation is determined by the natural shore line unless the artificial conditions are definite, substantial, and permanent.[21] When avulsion changes the course of a navigable fresh water stream, unaffected by the tides, riparian owners on each side take title to the old bed to the former thread of the stream.[22]

§ 3. *Rights incidental to riparian ownership.*[23]—Proprietors of land abutting on an arm of the sea hold the same under the Massachusetts colonial ordinance, in fee to low water mark, subject, however, as to that portion between high and low water mark, to the easement of the public for the purposes of navigation and free fishing and fowling, and of passing freely over and through the water without any use of the land underneath wherever the tide ebbs and flows;[24] but while there is a right to swim or float in or on public waters as well as to sail upon them, it does not include the right to use for bathing purposes that part of the beach or shore above low water mark, where the distance to high water mark does not exceed 100 rods whether covered with water or not.[25] In the courts of American states, the measure of the right of the riparian owner to the use of land below high water mark of an arm of the ocean for the purpose of access to navigable water is not to be ascertained by reference to the common-law rule at the time of grants of the foreshore made by the British crown,[26] before the revolution, and this is true notwithstanding the state wherein the land is located has adopted such parts of the common law as were in force at the time of the grants and has passed no statute in derogation thereof,[27] hence, they cannot be deprived of a reasonable exercise of their right of access notwithstanding their holding under such grants.[28] Access as one of the rights of riparian owners on a navigable stream is not cut off by the Iowa statute defining the jurisdiction and right of control which the board of park commissioners is given over the banks of the Des Moines river in that state.[29] The assumption of jurisdiction and control over the bed and banks of a navigable river between high and low water mark, by the state or a board under its authority, is not inconsistent with the riparian owners' right of access.[30] A riparian owner on a navigable stream has the right to protect his soil against inroads of the water,[31] to secure accretions which form against his bank,[32] and to erect and maintain improvements necessary to promote commerce, navigation, fishing, and other uses of the stream as a navigable one,[33] but he has no right to deflect it into a new channel by obstructing the main current.[34] The right of a riparian owner is subject to such restrictions as may be imposed upon the municipality wherein the land is located under which the right is claimed,[35] or as such as may be imposed by law, including those imposed by law on the municipality's power to grant the permit, or inherent in the nature of its title.[36] A public landing is dedicated to the public use and is held in trust for the public the same as a street and cannot be devoted

19. Therwin v. Bitzer, 97 Minn. 252, 106 N. W. 1046.
20. Fowler v. Wood [Kan.] 85 P. 763.
21. Moran v. Denison [Conn.] 65 A. 291.
22. Kinkead v. Turgeon [Neb.] 109 N. W. 744, rvg. on rehearing [Neb.] 104 N. W. 1061.
23. See 6 C. L. 1315.
24, 25. Butler v. Attorney General [Mass.] 80 N. E. 688.
26, 27. Trustees of Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 665.
28. Trustees of Brookhaven v. Smith, 188 N. Y. 74, 80 N. E. 665. The use by riparian owners of the foreshore of an arm of the sea in the driving of piling therein for the construction of a pier to make practical their right of access to navigable waters for their pleasure craft is not an unreasonable exercise of their right. Id.
29, 30. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.
31, 32, 33, 34. Fowler v. Wood [Kan.] 85 P. 763.
35, 36. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353.
37. Chicago, etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790.

to any use inconsistent with the use of the public,[37] hence, a grant thereof for exclusive private purposes is void.[38] A statute requiring fences on lines between adjoining owners as affecting liability for damage by cattle running at large does not apply when the lands are separated by a stream of such character as makes a fencing thereof impossible.[39]

§ 4. *Subjection to public easements.*[40]—One exercising his right of floatage on a navigable stream is liable to a riparian owner for injury to his land only for negligence in the exercise of the right,[41] and whether he has been guilty of negligence is a question of fact.[42] One constructing a dam by authority of the state is not liable to riparian owners for damage necessarily resulting from such construction unless such liability is imposed by statute.[43] So long as the owners of irrigating rights in a navigable body of water make no use thereof which will cause it to rise above ordinary high water mark, nor to recede below ordinary low water mark, a riparian owner of the shores has no cause to complain of the use.[44] There is no reservation or recognition of bathing on the beach as a separate right of property in individuals or the public under the colonial ordinance of Massachusetts,[45] and there is no such right at common law.[46] A riparian owner cannot treat tracts separated by a navigable stream as contiguous in his claim for compensation arising from the exercise of the right of eminent domain as to one of them,[47] especially when they are held under conveyance recognizing the tracts as not contiguous.[48]

§ 5. *Action for protection of riparian rights.*[49]—One in possession of an oyster bed on tide lands owned by the state, may maintain a suit to quiet title thereto as against an adverse claimant.[50] Injunction lies at the suit of a riparian owner to prevent the threatened unlicensed use of his bank by one using the waters for frontage purposes.[51] A riparian owner is entitled to look to a principal operating through an undisclosed agent for an injury to his property from negligent use of the waters of a navigable stream on which his land abuts.[52] The rule followed in some states that a view of the premises by the court may be treated as independent evidence applies in respect to matters affecting riparian owners.[53] In a suit by one deraigning title to land to restrain trespass thereon, one asserting title thereto by avulsion as a defense has the affirmative of the issue and the burden of proof rests on him.[54]

ROBBERY.

§ 1. Nature and Elements (1749).
§ 2. Indictment and Prosecution (1750).
A. Indictment (1750).
B. Evidence (1750).
C. Instructions (1751).

§ 1. *Nature and elements.*[55]—Robbery is the taking of personal property from the person of the owner or in his presence[56] with felonious intent,[57] by

38. City ordinance held invalid as granting to railroad exclusive privilegee in public landing. Chicago, etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790.
39. Foster v. Bussey [Iowa] 109 N. W. 1105.
40. See 6 C. L. 1317.
41. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.
42. Negligence in floatage held question for jury. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.
43. Statute held to create liability for resulting damage. Sutton v. Catawba Power Co. [S. C.] 56 S. E. 966.
44. Kalez v. Spokane Valley Land & Water Co., 42 Wash. 43, 84 P. 395.
45, 46. Butler v. Attorney General [Mass.] 80 N. E. 688.
47, 48. St. Louis, etc., R. Co. v. Aubuchon [Mo.] 97 S. W. 867.
49. See 6 C. L. 1317.
50. Under the California statutes. Smith Oyster Co. v. Darbee & Immel Oyster Land Co., 149 F. 555.
51, 52. Mitchell v. Lea Lumber Co. [Wash.] 86 P. 405.
53. Hatton v. Gregg [Cal. App.] 88 P. 592.
54. Bouldin v. Kosminsky [Ark.] 100 S. W. 892.
55. See 6 C. L. 1317.
56. Words "from the person" in statute given common-law interpretation including "in the presence." Larceny from safe ef-

force or violence,[58] or by putting him in fear by such threats as would intimidate a reasonably courageous man.[59] The Georgia statute defining robbery by sudden snatching does not create an independent and new offense,[60] nor abolish violence as the distinctive element which differentiates the crime of robbery from larceny.[61] Hence the crime is punishable under the statute prescribing the punishment for the offense of robbery by force.[62] In several states additional punishment is prescribed if accused be at the time of the robbery armed with a dangerous weapon with intent to use the same if resisted.[63]

§ 2. *Indictment and prosecution. A. Indictment.*[64]—An averment of the particular kind of money taken,[65] or that it was personal property,[66] is not required in addition to an averment that it was a specific sum in lawful money of the United States, and only a substantial correspondence of averment and proof in respect thereto is required.[67] The information need not aver that an assault was made,[68] nor the kind of fear produced.[69] An indictment for assault with intent is not bad because it alleges completed robbery.[70] By plea of guilty defendant waives a failure to aver ownership of the property in the victim.[71] An indictment alleging taking from the "person or possession" is bad.[72] Under the Kentucky statute to provide for increased punishment for bank robbery and safe blowing, an indictment for attempting to blow open a bank safe need not aver that the bank is a corporation.[73]

(§ 2) *B. Evidence.*[74]—When it is shown on a prosecution for robbery by one armed with a dangerous weapon that the weapon used was a gun or revolver and that it was pointed at the victim, it devolves on defendant to show that it was

fected by assault on watchman is robbery. O'Donnell v. People, 224 Ill. 218, 79 N. E. 639. Must be either on person or under immediate personal control. Hill v. State [Ala.] 40 So. 654.

57. One forcibly taking property from another, believing at the time it is the property of the taker, is not guilty of robbery under the Texas Penal Code. Glenn v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 878, 92 S. W. 806. Compelling a debtor to pay the amount demanded by the creditor on an unliquidated debt, by putting in fear, is robbery. Fanin v. State [Tex. Cr. App.] 100 S. W. 916. An intent to permanently deprive the victim of his property is not an element of assault with intent to rob. State v. Bateman, 196 Mo. 35, 95 S. W. 413.

58. Snatching bill from prosecutor's hand while holding it to exchange for silver held to constitute sufficient force. Stockton v. Com. [Ky.] 101 S. W. 298. Force sufficient to require the victim to part with his property is all that is required to sustain a conviction. State v. Parsons [Wash.] 87 P. 349. Pulling the hand of the owner of a pocketbook out of his pocket where the pocketbook is kept is sufficient to sustain a conviction of robbery by force. Moran v. State, 125 Ga. 33, 53 S. E. 806.

59. Taking by putting in fear without the concurrence of violence constitutes robbery. Commonwealth v. Titsworth [Ky.] 98 S. W. 1028. Robbery may be by intimidation, without force, in taking possession of the purloined article. Grant v. State, 125 Ga. 259, 54 S. E. 191. Evidence held insufficient to sustain conviction of physician of robbery of patient steered to the office by a third person. Steward v. People, 224 Ill. 434, 79 N. E. 636.

60. Pride v. State, 125 Ga. 748, 54 S. E. 686. A conviction of robbery by sudden snatching may, however, be had even though there is used force sufficient to constitute robbery by force in addition to the other elements of the former offense. Hickey v. State, 125 Ga. 145, 53 S. E. 1026. Pocket picking by stealth insufficient. Morris v. State, 125 Ga. 36, 53 S. E. 564.

61. Pride v. State, 125 Ga. 748, 54 S. E. 686.

62. Pride v. State, 125 Ga. 808, 54 S. E. 686; Pride v. State, 125 Ga. 750, 54 S. E. 688.

63. To be a dangerous weapon under such statutes, a revolver must be actually loaded, and it is not sufficient to characterize it as a dangerous weapon that the person robbed was in fact intimidated by its use. Lipscomb v. State [Wis.] 109 N. W. 986. Presumed from use of revolver that it was in fact loaded. Id.

64. See 6 C. L. 1318.

65, 66. People v. Howard [Cal. App.] 84 P. 462.

67. Where defendant was charged with taking a bill of a certain denomination and the proof showed that the taking was the result of a disagreement between prosecutor and defendant as to the amount due the latter for wages, and that he compelled prosecutor to throw down a bill of the kind alleged and another to take it and get it changed and return to prosecutor the sum left after taking out the amount of his claim, there was no variance. Fanin v. State [Tex. Cr. App.] 100 S. W. 916.

68, 69. People v. Howard [Cal. App.] 84 P. 462.

70. Lipscomb v. State [Wis.] 109 N. W. 986.

71. In re Myrtle, 2 Cal. App. 383, 84 P. 335.

72. Hill v. State [Ala.] 40 So. 654.

73. Stamper v. Com. [Ky.] 99 S. W. 304.

74. See 6 C. L. 1319.

not loaded.[75] Possession by accused of property other than that charged taken at the same time may be shown.[76] The evidence must identify accused as the perpetrator,[77] or conspiracy if it is attempted to so inculpate him [78] and show the larceny [79] by force or threat [80] and the felonious intent.[81]

(§ 2) *C. Instructions.*[82]—Instructions must conform to the case made by the allegation and proof.[83] Evidence admissible for a single purpose should be limited by instruction.[84]

RULES OF COURT, SAFE DEPOSITS, see latest topical index.

SALES.

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§ 1. *Definition; distinction from other transactions.*[85]—A sale is the transmutation of property or a right, from one person to another in consideration of a

75. Lipscomb v. State [Wis.] 109 N. W. 986.

76. People v. Castile [Cal. App.] 86 P. 745, 746.

77. Evidence held sufficient: To identify defendant as the guilty person. People v. Castile [Cal. App.] 86 P. 745; State v. Vaughan [Mo.] 97 S. W. 879; Smith v. People [Colo.] 88 P. 1072.
Insufficient. Walker v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 598, 96 S. W. 35.

78. Whether conspiracy to rob was formed between persons charged with robbery held question for jury. State v. Dilley [Wash.] 87 P. 133.

79. Evidence held **insufficient.** State v. Jamieson [Wash.] 88 P. 214.

80. Evidence held to show **a putting in fear** as cause for the victim parting with his property. People v. Howard [Cal. App.] 84 P. 462; Grant v. State, 125 Ga. 259, 54 S. E. 191. Evidence insufficient. Steward v. People, 224 Ill. 434, 79 N. E. 636.

81. Evidence held to show taking under

sum of money as opposed to barters, exchanges, and gifts.[86] As used in this topic the term is limited to cases where the subject-matter is personalty.[87] A definite subject-matter, an agreed price, a seller and a buyer, and an agreement of the seller to sell and the buyer to buy for the agreed price, are essential attributes of a contract of sale,[88] and hence such contract should be distinguished from an offer or option to sell,[89] a bailment,[90] or a contract of agency.[91] A contract for the sale

claim of right. Glenn v. State [Tex. Cr. App.] 15 Tex. Rep. 878, 92 S. W. 806.

82. See 6 C. L. 1320.

83. Charge as to robbery by force held erroneous where the only crime proved was robbery by intimidation. Grant v. State, 125 Ga. 259, 54 S. E. 191.

84. Possession of stolen property not described on information. People v. Castile [Cal. App.] 86 P. 745, 746.

85. See 6 C. L. 1320.

86. Giving note as purchase price of another's note is not a sale of the buyer's note. German Nat. Bk. v. Princeton State Bk., 128 Wis. 60, 107 N. W. 454. See Exchange of Property, 7 C. L. 1612, and Gifts, 7 C. L. 1878.

87. Sales of realty, see Vendors and Purchasers, 6 C. L. 1781.

88. In re Columbus Buggy Co. [C. C. A.] 143 F. 859. Evidence that the owner of cotton intended or agreed to haul it to a certain place and there sell it to plaintiff, and an agreement on the part of the latter to accept the same and pay the highest cost price on the day of delivery, did not show a sale. Rea v. Schow [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706.

89. Where property was sent one under an agreement that he could keep the property and account to plaintiff for their specified value if he was pleased with it, otherwise he should return them within a reasonable time, the agreement was not a contract of "sale or return" but was a mere option to purchase or return. Gottlieb v. Rinaldo [Ark.] 93 S. W. 750. See post, § 2, Contract Requisites of Sale.

90. The power to require the **restoration of the subject of the agreement** is generally held an indispensable incident of a contract of bailment (In re Columbus Buggy Co. [C. C. A.] 143 F. 859), though it has been held neither a stipulation for the return of the property nor a **definite term** is necessary to constitute a **bailment** such a contract (In re Angeny, 151 F. 959). Where goods were delivered under a written agreement expressly providing that the one to whom they were delivered was a bailee for hire and that if default in payment of any of the rents for the use and hire of the goods, wares, and merchandise by the bailee were made, the bailor was authorized to repossess himself of the property, held a bailment and not a conditional sale. Id.

Shipment or consignment, title to remain in shipper until goods were sold and had been settled for by the consignee and the latter to be liable for all loss, goods unsold to be taken back, etc., held a bailment and not a sale. Federal Chem. Co. v. Green [Ky.] 97 S. W. 803. A lease of sheep under an agreement that they shall be branded with the lessee's mark and **commingled** with sheep of his own having the same mark, the lessors to be paid so much wool per sheep and a certain rate of increase each year, is a bailment. Manti City Sav. Bk. v. Peterson, 30 Utah, 475, 86 P. 414. Lease of sheep, **same number to be returned** and a certain amount of wool and certain number of lambs to be returned as rental, held a bailment. Rich v. Utah Commercial & Sav. Bk., 30 Utah, 334, 84 P. 1105. Shipment of goods to be **paid for when sold,** and in future letters the consignor referred to the goods as "dead stock," held a bailment not a sale. In re Smith & Nixon Piano Co. [C. C. A.] 149 F. 111. Where one delivers grain to another under an agreement that the **identical** grain or grain of a **similar kind and quality** from the common mass into which it was placed shall be returned, there is a bailment (Savage v. Salem Mills Co. [Or.] 85 P. 69), but when, either from the express agreement of the parties or from the general course of business, the party receiving the grain has a right to use it in his business and as a part of his consumable stock and is not obliged to return the identical grain nor grain of a similar grade and quality from the common mass, but may discharge his obligation to the storer by paying the market price when demanded or by returning other grain of the same kind and quality, there is a sale (Id.). A contract for the delivery of ore, for reduction, to defendant, the ore to be paid for on samples, and after samples were taken **ore was mixed with other ore,** defendant taking all risk of theft or failure of ore to come up to sample, held a sale and not a bailment. Chisholm v. Eagle Ore Sampling Co. [C. C. A.] 144 F. 670. Sale of specified number of cattle of a specified weight at a named price per pound, payment not to be made for some months, during which time the cattle were to be fed by the buyer and then **resold to the seller** at an increased price per pound, held a sale. Gills v. George, 8 Ohio C. C. (N. S.) 393. Where goods were billed at definite prices and on fixed terms of credit and discount, the consignee undertaking to settle or pay for them and to be responsible for the freight. He also agreed to give the consignor his exclusive trade and to render accounts for goods sold every six months. He was also required to hold separate and in trust all "goods unsold and all currency, open accounts, notes, liens, mortgages, or other values received for goods sold," and that, where goods were sold on credit, notes should be taken on blanks furnished by the consignor and payable to his order, the consignee indorsing and guarantying them. Held a sale and not a bailment. In re Heckathorn, 144 F. 499. See Bailment, 7 C. L. 353.

91. Evidence held to show a contract of agency, not a sale. Dowler v. Swift & Co., 113 App. Div. 260, 98 N. Y. S. 983. The fact that a contract provides that the receiver of goods is to account for those sold at fixed prices and to retain the difference for storage, insurance, commission, and expenses, does not make the contract an agreement of sale. In re Columbus Buggy Co. [C. C.

of articles in existence or such as the seller in the ordinary course of his business manufactures or procures for the general market, whether on hand at the time or not, is a contract for the sale of goods.[92] Neither breach of the contract nor a request for modification thereof affects its existence.[93] Sales are executed or executory,[94] absolute or conditional.[95] In determining the amount of damages for a breach, contracts of sale are again divided into manufacturing and other similar contracts.[96] When the question is presented in the Federal courts, the character of the contract is to be determined by the local law.[97]

§ 2. *Contract requisites of a sale.*[98]—The sale being a contract, it must contain all the requisites thereof as to parties,[99] consideration,[1] mutuality,[2] and freedom from fraud [3] or mistake,[4] and in this connection the carefulness of the complaining

A.] 143 F. 859. See Agency, 7 C. L. 61. A contract whereby defendant stipulated to sell its entire manufactured products to plaintiff as its sole agent in a territory mentioned, such products being designated in a schedule of furniture and list prices, held a sale and not a contract of agency. Heywood Bros. & Wakefield Co. v. Doernbscher Mfg. Co. [Or.] 86 P. 357.

92. Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555.

93. Where correspondence showed a meeting of the minds as to the price and place and time of delivery of five car loads of lumber, there was a contract of sale though there was a short delay by the buyer in sending shipping directions and he requested a variance from the terms of the contract, though recognizing its binding effect on him. Floyd v. Mann [Mich.] 13 Det. Leg. N. 811, 109 N. W. 679.

94. See post, § 6, Transition of Title.

95. See post, § 14, Conditional Sales.

96. See post, § 12, Damages for Breach of Sale and Warranty.

97. Bankruptcy proceedings. In re Heckathorn, 144 F. 499.

98. See 6 C. L. 1322. See, also, Contracts, 7 C. L. 761.

99. Order signed solely by agent of seller as such held not a contract binding on an alleged purchaser. Huber Mfg. Co. v. Wagner [Ind.] 78 N. E. 329.

1. Where an offer is made and accepted, the shipping of the goods is a sufficient consideration to sustain the contract. Zielms v. Parish [Kan.] 87 P. 685. Where an offer is made and accepted, the shipping of the goods is a sufficient consideration to sustain the contract and in an action on such contract it is not necessary for the seller to prove the value of the goods. Id.

2. Contract to furnish a certain quantity of stone, the purchaser's engineer to be the sole arbitrator of any differences that might arise, held mutual. Quigley v. Spencer Stone Co. [C. C. A.] 143 F. 86. A contract for the sale of seven hundred and fifty tons of salt was not void for uncertainty or want of mutuality because it gave the buyer the right to order any one or all of the nine different grades specified in the contract. Mobius & Drescher Co. v. Mills [Cal.] 88 P. 917.

3. That the fraudulent misrepresentations were made during the negotiations does not affect their use as a defense. Ordinarily, in such a case, the evidence tending to establish such a defense, a party is entitled to trace the negotiations to their inception. So held where made two days before sale was consummated. Hauptman v. Pike [Neb.] 108 N. W. 163. Fraud may consist of any disposition or artifice used to circumvent, cheat, or deceive another. Roebuck v. Wick, 98 Minn. 130, 107 N. W. 1054. False representations of traveling salesman that he had made sales of similar articles to a competitor engaged in the same business in the same place as the vendee, in evidence of which he produced a fictitious contract of sale to such competitor, is an artifice used to deceive within the meaning of the rule. Id. Intent at the time of purchase not to pay for goods held fraud. Atlas Shoe Co. v. Bechard [Me.] 66 A. 390. False and fraudulent representations made to induce sale of goods upon credit. Id. And in such a case the seller, relying upon the representations, may rescind, although there was at the time of the sale a bona fide intention to pay at some future time. Id. Allegations showing procurement of drunkenness of seller held sufficient to constitute fraud. Pritz v. Jones, 102 N. Y. S. 649. In an action to recover for goods sold under a contract set out, defendant alleged that though the fraud of plaintiff's agent who secured the order the contract was substituted for an order for the goods which defendant thought he was signing. Held to state a good defense. Price v. Huddieston [Ind.] 79 N. E. 496. Confidential agent and friend obtaining bonds from feeble old man held to have the burden of proving that he acquired them honestly and in good faith. Moseley v. Johnson [N. C.] 66 S. E. 922. Where a financial statement is given to be used for future credit, the seller to be notified of any changes, a change in the buyer's condition without notice being given warrants the rescission of a sale subsequently made. Atlas Shoe Co. v. Bechard [Me.] 66 A. 390. Where seller told purchaser's agent he did not know market value of property but relied on agent's statement of same, held agent's statement of market price was a statement of fact and not merely an expression of opinion. American Hardwood Lumber Co. v. Dent [Mo. App.] 98 S. W. 814. Where in an action to replevin goods alleged to have been fraudulently procured on credit there was no proof that any representations were made by the purchaser as to its solvency or insolvency, or as to its knowledge of its condition, or as to the intention with which the goods were purchased, a verdict was properly directed for defendants. Goodyear India Rubber Glove Mfg. Co. v. Appel Clothing Co. [Colo.] 86 P.

party[5] and his knowledge of the business[6] are important. The minds of the parties must meet,[7] and hence all the terms of the contract must be agreed upon or be capable of ascertainment.[8] An offer to sell or buy is revocable at any time

120. Held no evidence of fraud in procuring contract. Wisdom v. Nichols & Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18. Evidence held to show fraud by purchaser in procuring sale. National Bank of Commerce v. Chatfield, Woods & Co. [Tenn.] 101 S. W. 765. Evidence held insufficient to show that contract was obtained by fraud. Price v. Huddleston [Ind.] 79 N. E. 496. Sale of fertilizer, evidence held not to show fraud. Goodman v. Beard & Co., 29 Ky. L. R. 544, 93 S. W. 666.

4. Where buyer at seller's request checked over order, held he could not avoid payment of the price on the ground of mistake in its terms. Bevins v. Coates, 29 Ky. L. R. 978, 96 S. W. 585. Where a letter quoted flour for immediate acceptance "$5.10 jute or $6.00 bulk," it disclosed a mistake on its face as to flour in sacks so that plaintiff, an experienced flour buyer, could not create a binding contract of sale by accepting the offer for delivery of flour in jute sacks. Buckberg v. Washburn-Crosby Co., 115 Mo. App. 701, 92 S. W. 733. Where a buyer of materials at the tome he received the seller's estimates and a letter offering to furnish the materials for $700 knew that the correct aggregate charge was $801 and that the $700 offer was a mistake, the buyer was liable for such amount, unless at the time of the offer the seller knew of the mistake in the addition of the figures in the estimates and with such knowledge offered and intended to furnish the materials for the lesser sum. Adkins & Co. v. Campbell [Del.] 64 A. 628.

5. Where a purchaser verbally ordered a certain amount of goods of a salesman and he placed before her a written contract calling for a greater quantity of goods and she signed it, held she could not avoid the obligation of the written agreement. Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748. In an action for the price of a restaurant business and personal property connected therewith, it is no defense that the sellers had misrepresented the quality of the property and the value of the business, since, by an inspection, the buyers could have determined the truth or falsity of the representations. Jones v. Reynolds [Wash.] 88 P. 577.

6. Where a buyer of a stock of jewelry was a grocer and unfamiliar with the jewelry business or quality or value of jewelry purchased, but relied expressly on the knowledge of the seller and on the seller's representations with reference thereto, the rule of caveat emptor does not apply. Lyon v. Lindblad, 145 Mich. 588, 13 Det. Leg. N. 574, 108 N. W. 969.

7. Evidence held to show that minds of parties never met. Barton-Parker Mfg. Co. v. Taylor [Ark.] 94 S. W. 713. An owner of a half-hide measuring machine advertised it for sale as an "S. measuring machine" and in correspondence with a prospective purchaser agreed to sell an S. measuring machine as described in the advertisement. The prospective purchaser, however, referred to it in his letter as an "S. whole-hide measuring machine," which he subsequently claimed was worth much more than the agreed price, and agreed to buy a whole-hide measuring machine. Held the minds of the parties did not meet on the article sold. Charles Holmes Mach. Co. v. Chalkley [N. C.] 55 S. E. 524.

8. To become a part of the contract terms must be communicated to the other party and accepted by him. Notice in book that it should not be resold prior to a certain date held not a part of the contract. Authors' & Newspapers' Ass'n v. O'Gorman Co., 147 F. 616. A contract for the sale of seven hundred and fifty tons of salt is not void for uncertainty because it gives the buyer the right to order any one or all of the nine different grades specified in the contract. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. A clause requiring shipments to be made according to shipping instructions to be given from time to time by the buyers does not render the contract void for uncertainty or unenforceable except at the option of the buyers. Salmon v. Helena Box Co. [C. C. A.] 147 F. 408. A contract for the sale of lumber to be delivered at S. recited that the price to be paid should be a specified sum "as fast as loaded on cars at M., 60 days negotable bankable paper," held not indefinite. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008. Where defendant ordered from plaintiff jewelry from plaintiff's stock to a specified value, the order to be made up of the articles named in the order, but no definite quality, price, or number of any one or more of the articles was mentioned, and plaintiff selected goods to the value named and shipped them to defendant, there was no binding contract of sale owing to the indefiniteness of the order. Price v. Atkinson, 117 Mo. App. 52, 94 S. W. 816. Offer to buy about one thousand tons of coal a month for nine months, details to be arranged later, followed by a letter which recited that the addressee, in accordance with the previous conversation, might enter the writer's order for about one thousand tons of a specified kind of coal per month at a specified sum per ton and that for a few months the writer might not be able to take the full monthly quota, no reply being made to this letter, held no contract. Thedford v. Herbert, 102 N. Y. S. 1083. A contract for the sale of a certain proportion of the nut and slack produced from the operation of a coal mine is not mutually binding upon the parties and cannot be enforced, when by its terms it is left entirely optional with the sellers whether or not they will separate any or all of the nut and slack from the run of the mine. Artemus-Jellico Coal Co. v. Ulland, 7 Ohio C. C. (N. S.) 605. A telegram, "Ship hundred at once, eggs," and a letter in reply thereto stating that the addressee of the telegram was shipping "the hundred" and that they were good eggs, did not amount to a contract, the papers being silent on the subject of the quality, quantity, and price. Potomac Bottling Works v. Barber & Co., 103 Md. 509, 63 A. 1068.

before,[9] but not after,[10] acceptance in the manner provided in the contract, and the acceptance to create a valid contract of sale must be an unconditional acceptance of all the terms of the offer as stated;[11] but where the acceptance of an offer is otherwise sufficient, it is not rendered ineffective by the addition of words which do no more than state a condition which the law would imply in any event.[12] The acceptance must be made within the time specified, or, if no time is specified, within a reasonable time,[13] that is, within such time as is reasonably in contemplation between the parties at the time the offer was made and delivered,[14] though acceptance of a contingent offer[15] at any time before revocation makes a binding contract.[16] In the absence of evidence to the contrary,[17] the presumption is that an order taken by a commercial traveler is subject to approval by the house which he represents.[18] An offer being accepted in the manner stated a contract is formed.[19] All conditions precedent must be performed.[20] The acceptance being silent as to certain terms,

9. Written order signed by the buyer, sent the seller for acceptance, and revoked before such acceptance, does not constitute a contract. Northwest Thresher Co. v. Le Sueur [Kan.] 88 P. 541. Order given commercial traveler may be revoked at any time before acceptance by the latter's principal. Bauman v. McManus [Kan.] 89 P. 15.

10. Nichols & Shepard Co. v. Horstad [S. D.] 109 N. W. 509. Evidence held not to show conclusively that an attempt was made to withdraw the order before acceptance. Bauman v. McManus [Kan.] 89 P. 15.

11. Where acceptance of offer to sell added terms as to credit, held no contract. Babcock Bros. Lumber Co. v. Georgia, etc., R. Co. [Ga.] 56 S. E. 457. Offer of cases "to be shipped from factory," acceptance stated f. o. b. cars at place where factory was located, held a completed contract. Crystal Case Co. v. Arnett [Kan.] 85 P. 302. Where a telegram accepting an offer for the sale of cotton contained the words "ship promptly," such words cannot be construed as adding a new term to the seller's offer. McCleskey & Whitman v. Howell Cotton Co. [Ala.] 42 So. 67. Where goods shipped were inspected on Saturday after 5 P. M., and found not to conform to the contract and the buyer was notified and told that the goods would be accepted if bank was wired to reduce draft, "Answer quick" held offer not accepted by simply wiring bank and the latter notifying the buyer on Monday morning. Edgeworth v. Talerico [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677. Where traveling man's principal had the right to accept or reject orders taken by him, held they were mere offers and if the goods were shipped on terms different from those stated in the order the purchaser was not bound to accept them. Baird v. Pratt [C. C. A.] 148 F. 825. Plaintiff wrote to defendant offering to take 100 or 150 cars of coal at a fixed price. Defendant replied that he would supply plaintiff with 100 cars at the price fixed if plaintiff could furnish cars. Plaintiff replied that he had taken the matter in hand as to the cars and that he would do what he could to improve the condition. Held insufficient to establish a contract, though plaintiff stated in his last letter that he understood defendant's letter to be an acceptance of the offer and though defendant made no reply thereto. Hudson v. Arnold, 29 Ky. L. R. 375, 93 S. W. 42.

12. Honest weights. Bennett v. Cummings [Kan.] 85 P. 755.

13. Paducah Packing Co. v. Polk Co. [Ky.] 99 S. W. 929. Option to sell. Hollis v. Libby, 10 Me. 302, 64 A. 621. One year and eight months held more than a reasonable time. Id.

14. Instruction in the language of the text held correct as against a claim that the words, "considering the nature of the case", should have been inserted in lieu thereof. Paducah Packing Co. v. Polk Co. [Ky.] 99 S. W. 929.

15. Abrohams v. Revillon Freres [Wis.] 107 N. W. 656. Memoradum stating kinds of furs and prices and reciting that the offerer would take up at his selection "only this section goods" from plaintiff at the specified prices "up to sales in January or on or about February, 1904," held a continuing offer to buy such goods and not a mere price list. Id.

16. Abrohams v. Revillon Freres [Wis.] 107 N. W. 656.

17. Evidence held to show that buyer had a right to assume that traveling salesman had full authority to make contract without submitting offer to his principal. Brennan v. Dansby [Tex. Civ. App.] 15 Tex. Ct. Rep. 744, 95 S. W. 700.

18. Bowlin Liquor Co. v. Beaudoin [N. D.] 108 N. W. 545; Gould v. Cates Chair Co. [Ala.] 41 So. 675. Hence the proposed buyer has an unqualified right to withdraw such an order at any time before it is accepted. Bauman v. McManus [Kan.] 89 P. 15; Ziehme v. Parish [Kan.] 87 P. 685.

19. Written order to ship certain goods at specified prices constitutes a contract of purchase and sale when the order is accepted and the goods shipped. Solicitation of offer; offer made stating terms, answer in the form of a statement that offeree will on the exact terms stated in the offer, held a contract of sale. Bennett v. Cummings [Kan.] 85 P. 755. Where an order for goods is signed on the understanding that only a part of the goods specified are to be purchased, and the vendor approves the order for the less amount, contract held binding only for the less amount. Howell v. Maine & Co. [Ga.] 56 S. E. 771.

20. An order for goods containing stipulations intended to be binding on the purchase, but providing that it should be subject to approval by the person to whom it was addressed, held not binding until ap-

they are deemed incorporated in the terms of the offer.[21] What constitutes an acceptance depends upon the facts of the case,[22] and it may be inferred from acts and conduct,[23] but not from mere silence alone.[24] Consequently, in the absence of affirmative conduct, notification of rejection may be made at any time.[25] An acceptance of an order is effectual from the moment the letter of acceptance, properly directed and stamped, is deposited in the post office, or, if by wire, the moment the telegram is paid for and delivered to the telegraph company for transmission,[26] but a revocation of an order does not take effect until the letter or telegram of revocation is received.[27] Hence, the mere production of a letter countermanding an order given is insufficient to show a revocation without proof that the letter was ever mailed to or received by the seller.[28] A mere quotation does not amount to an offer.[29]

proved and accepted by the vendor. Howell v. Maine & Co. [Ga.] 56 S. E. 771.

21. Where solicitation of offer states one time for delivery and offer states another, and the final answer was silent on the subject, held to constitute an acquiescence by the seller of the time proposed by the buyer. Bennett v. Cummings [Kan.] 85 P. 755.

22. Where seller wrote letter acknowledging receipt of order for certain lumber and stated that he had sent order to mill with instructions to commence cutting at once, and that the lumber would be shipped via a certain railroad, unless plaintiff preferred a different delivery, held to constitute a valid contract of sale. Crane v. Barron, 100 N. Y. S. 937. Plaintiff orally offered to buy about 1000 tons of coal a month for nine months, and thereafter wrote a letter to defendant which recited that he might enter plaintiff's order for about 1000 tons of a specified kind of coal for nine months at a specified sum per ton. Defendant did not reply but on plaintiff telephoning for coal delivered a small quantity thereof. Held insufficient to show that any coal was delivered under a contract for the sale thereof. Thedford v. Herbert, 102 N. Y. S. 1083.

23. Where goods were shipped and buyer called on seller's agent to assist in unloading, held there was an acceptance of the order by the seller. Nichols & Shepard Co. v. Horstad [S. D.] 109 N. W. 509. Part performance may be evidence of the fact that the minds of the parties met. Crystal Case Co. v. Arnett [Kan.] 85 P. 302. Where there was an offer to sell railroad ties to be delivered "this year and the next," and the reply offered to take all ties delivered "within the next 12 months," held, after having received and paid for ties for a few months, there was a binding contract. Louisville & N. R. Co. v. Coyle [Ky.] 97 S. W. 772. Petition for a new trial overruled. Id. [Ky.] 99 S. W. 237. Where traveling salesman made a contract and his firm on receipt of same wrote buyer thanking them for the order and only complaining of the time of shipment, held not a repudiation. Brennan v. Dansby [Tex. Civ. App.] 15 Tex. Ct. Rep. 744, 95 S. W. 700. Where an order for goods is taken by a traveling salesman and transmitted to his employer, who thereupon writes to the proposed buyer acknowledging the receipt of the order, thanking him for it and saying that it will have prompt and careful attention, such communication either is in itself an absolute acceptance of the order or is such an expression as may, in connection with an otherwise unexplained omission for a long time to make any further response, be deemed some evidence from which an acceptance may be inferred if not conclusively an acceptance it may be given that effect if the subsequent conduct of the parties indicates that they have so treated it. Banman v. McManus [Kan.] 89 P. 15. Such a communication may be regarded as having been interpreted as an acceptance by both parties where it is followed by correspondence between them in which the buyer claims a right to change or cancel the order at any time in virtue of an asserted special agreement made with him by the agent who took it and the seller denies the existence of such right and the making of such agreement. Id.

24. Order taken by salesman, two months silence. Gould v. Cates Chair Co. [Ala.] 41 So. 675.

25. A letter written two months after receipt of offer declining to accept held sufficient rejection. Gould v. Cates Chair Co. [Ala.] 41 So. 675.

26. Price v. Atkinson, 117 Mo. App. 52, 94 S. W. 816. Where defendants directed plaintiff's agent to offer plaintiff certain cotton at a specified price the agent did so, whereupon plaintiff immediately telegraphed the agent an acceptance of such offer. The delivery of the telegram to the telegraph company before plaintiff was notified of the withdrawal of the offer constituted a sufficient acceptance to form a contract of sale. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67.

27. Price v. Atkinson, 117 Mo. App. 52, 94 S. W. 816.

28. Moneyweight Scale Co. v. Loewenstein, 103 N. Y. S. 80.

29. Buckberg v. Washburn-Crosby Co., 115 Mo. App. 701, 92 S. W. 733. Where plaintiff wrote defendant concerning the price of flour and defendant replied quoting certain flour at "$5.10 jute and $6.00 bulk," and stated that such quotation was for immediate acceptance, held an offer to sell and not a mere quotation. Id. A buyer, after having obtained from the seller quotations for specified goods, wired an order for a specified quantity which the seller by wire accepted. The seller wrote requesting the buyer to furnish satisfactory references or remit one-half of the price and give the seller the privilege of forwarding shipment with sight draft attached to bill of lading.

Where goods sold are received and are of any value, in the absence of a return or tender the seller may recover the amount of the value even if the goods were not of the value represented,[30] and the same rule applies where only part of the goods were received.[31] If part of an entire order of goods is accepted and retained after or with knowledge that the whole will not be furnished, an implied contract arises to pay pro rata subject in some courts to a counterclaim for damages for non-completion.[32]

Who are the parties to the sale largely depends upon the circumstances surrounding the making thereof,[33] and in this connection a duty rests on one to speak when by silence another acting in good faith may be misled.[34] So far as affects this question, the fact that the sale was made through an agent is immaterial.[35] The fact that goods are charged to a certain person and the bill therefor is made out to him is a fact to be considered in determining to whom the sale was made, but is not conclusive.[36] Notice to a commercial traveler of a change of ownership in the purchasing store is not binding on his principal.[37] The validity of the contract is governed by law of the state where made.[38] Ordinarily, a sale made with the knowledge and intention of both parties that the subject-matter thereof shall be used for an illegal purpose is illegal;[39] but where such use is not in the contemplation of the parties at the making of the sale, a subsequent use of the subject-matter for an unlawful purpose does not render the sale illegal.[40] The

Before the buyer received the letter it wired the seller to ship the goods at the earliest possible date. Thereafter the seller wrote that it had entered the order and expressed a hope to receive a reply to the former letter. Held not to establish a contract of sale. Scaife & Sons Co. v. Standard Ice Co. [Wash.] 89 P. 882.

30. Price v. Huddleston [Ind.] 79 N. E. 496. Defective goods being kept, the seller is entitled to recover upon a quantum meruit. Harris v. Gill, 102 N. Y. S. 665.

31. The purchaser receiving and retaining goods sold cannot refuse to pay therefor on the ground that a few articles are missing, but is liable for the contract price less the value of the missing articles. Bartlick v. Wortman [Pa.] 65 A. 622.

32. Benjamin on Sales [7th Ed.], Bennett's Notes, p. 80. United States v. Molloy [C. C. A.] 144 F. 321. Rule applied where plaintiff's delivery of stone to defendant was not in accordance with the terms of their contract, but defendant received, accepted, and used stone delivered by plaintiff under the contract with knowledge of plaintiff's breaches. Id.

Note: From a survey of the authorities it appears that the cases which deny any right of recovery for the value of a partial performance after acceptance proceed upon the theory either that under the terms of the contract entire performance was a condition precedent to any right of recovery, or that the acceptance is predicated upon the understanding that the performance is pro tanto in fulfillment of the contract and with the expectation that it will be substantially carried out, or upon the general ground that a contract cannot be implied where there is an existing contract. See review of authorities in United States v. Molloy [C. C. A.] 144 F. 321.

33. Where goods were sold, payments to be made to a certain bank, which expressly stated that its interest was solely that of a pledge, held not to constitute sale by the bank and it could not recover the purchase price without proving an existing indebtedness between it and the real seller. Thalmann v. Giles, 101 N. Y. S. 980. Where goods were ordered by third party, goods to be shipped to another, and they were sent to the latter and the invoice and letters sent him showed that the seller regarded the sale as made to him, held to justify a finding of acceptance without reference to the question as to who ordered it, though the buyer had told the carrier to deliver to another. Long Bell Lumber Co. v. Nyman, 145 Mich. 477, 13 Det. Leg. N. 577, 108 N. W. 1019.

34. Where one allows another to transact business in his name, he becomes liable for the indebtedness incurred. Sale of goods to purchaser of store continuing the business in the name of the seller. Mackay-Nisbet Co. v. Kuhlman, 119 Ill App. 144. Where goods were ordered to be sent to a third party and the seller so sent them and notified such party that it regarded the sale as being made to him and he did not repudiate the transaction until several months after, held in an action for the price to require an instruction as to the duty resting on a party to speak when by silence another acting in good faith is misled, and as to what amounts to ratification of an unauthorized act of another. Long Bell Lumber Co. v. Nyman, 145 Mich. 477, 13 Det. Leg. N. 577, 108 N. W. 1019.

35. Where order is signed by the buyer and directed to the seller and the latter accepts it, they are the parties to the sale even though it was made through an agent. Kohl v. Bradley Clark & Co. [Wis.] 110 N. W. 265.

36. Frazer v. Mott, 103 N. Y. S. 851.

37. Mackay-Nisbet Co. v. Kuhlman, 119 Ill. App. 144.

38. As within statute of fraud. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641.

39, 40. John v. Reed [Neb.] 109 N. W. 738.

contract must not be against public policy [41] nor in restraint of trade.[42] Wherever the law imposes a penalty for making a contract, it impliedly forbids parties from making such a contract, and, when a contract is prohibited, whether expressly or by implication, it is illegal and cannot be enforced.[43] In some states sale of secondhand clothing is prohibited.[44] An executory agreement for the sale of goods to be delivered at a future day is valid, though at the time it is made the seller has not the goods in his possession, has not contracted to purchase them, and has no expectation of acquiring them otherwise than by purchasing them at some time before the day of delivery.[45] Such a transaction is not invalid unless it is made to appear that neither of the parties contemplated an actual delivery of the goods, and it was the intention of both that there should be no actual delivery, but on the day fixed for the delivery there should be a settlement of the differences, based on the market value of the goods on that day.[46] A contract providing for the absolute delivery of a minimum amount is not void as an option contract though it likewise contains a provision for the delivery of a maximum amount at the option of the purchaser.[47]

§ 3. *Modification, rescission and revival.*[48]—While one of the parties cannot, without the consent of the other, modify or change the contract in any way,[49] still the parties may by mutual consent [50] change the contract in any way without additional consideration.[51] The contract providing that certain conditions be performed or the contract could be canceled, the right to cancel for the breach rests in the party for whose benefit the condition was made.[52] The modification of a written

41. As applied to copyrighted books a contract whereby the purchaser agrees not to resell within a year is not unreasonable nor against public policy. Authors' & Newspapers' Ass'n v. O'Gorman Co., 147 F. 616.

42. Provisions in a contract for the sale of a secret process restraining its use or its communication to others are not invalid as in restraint of trade because necessary to protect the property right in the subject-matter of the contract, but such considerations do not apply to contract for the sale of the article produced by such process which are subject to the same rules as contracts for the sale of any other article of manufacture. Hartman v. Park & Sons Co., 145 F. 358. A system of contracts made by the manufacturer of a proprietary medicine between him and wholesale dealers, to whom alone he sold his medicine, by which they were bound to sell only at a certain price and to retail dealers designated by him and between him and the retailers by which in consideration of being so designated, they agreed to sell to consumers only at a certain price, is not unlawful as in restraint of trade. Id.

43. Benjamin on Sales [3rd Am. Ed.], § 530. That animals sold were infected with tuberculosis is a defense to an action for the purchase price in Maine, though the seller had no knowledge of such fact. Rev. St. ch. 19, § 19, construed. Church v. Knowles, 101 Me. 264, 63 A. 1042.

44. Pen. Code 1895, § 490, construed and held only applicable to sales of secondhand clothing imported into the state. Smith & Co. v. Evans, 125 Ga. 109, 53 S. E. 589. Answer failing to allege that clothing was imported into state held demurrable. Id.

45, 46. Watson v. Hazlehurst [Ga.] 56 S. E. 459.

47. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139.

48. See 6 C. L. 1327.

49. Staunton v. Smith [Del.] 65 A. 593. Where after contract for sale of bottles to be manufactured was signed authorized agent of seller wrote on its face, "bottles to be made by union workmen, or contract to be canceled" held a modification. Earnshaw v. Whittemore [Mass.] 80 N. E. 520. Where the quality of cattle was to be passed on by the purchaser, evidence that about the time the purchaser commenced the inspection of the cattle the seller arranged with a third person to furnish certain cattle on the contract, if necessary, was incompetent, it not appearing that the purchaser was informed of the arrangement. Hanley Co. v. Combs [Or.] 87 P. 143. The fact that one requests a modification in the terms of the contract does not constitute a breach thereof, the request recognizing the binding effect of the contract. Floyd v. Mann [Mich.] 13 Det. Leg. N. 811, 109 N. W. 679.

50. Aaron & Co. v. Smith Co. [Tex. Civ. App.] 100 S. W. 347. Parties may modify sale before delivery so as to provide that the seller should retain title and possession until payment was made. Lamb v. Utley [Mich.] 13 Det. Leg. N. 904, 110 N. W. 50. Where there was a contract for the sale of corn to be grown, and the date of planting was changed with the consent of all parties, such change is no defense to an action for damages for failure to accept. Pancoast v. Vail [Del.] 65 A. 512. Buyer ordering shipment of goods purchased after letter from seller suggesting different terms held not a consent to the modification. Brennan & Son v. Dansby [Tex. Civ. App.] 95 S. W. 700.

51. Elliott v. Howlson [Ala.] 40 So. 1018.

52. Where a contract for the manufacture and sale of bottles required that they be made by union workmen or that the contract be canceled, the provision for the cancellation was for the sole benefit of the buyer, whose right to abandon the contract did not arise until breach on the part of the

contract may be by parol.[53] Except where the contract is rendered voidable by fraud, breach of warranty or other similar cause [54] it can only be rescinded or canceled by mutual consent.[55] Breach of any part of an entire contract warrants rescission.[56] Where the course of dealing under a continuing contract indicates no intention to insist upon a literal compliance with the terms thereof, one cannot rescind for failure to literally comply therewith without fair notice to the other party.[57] Where an order of reinstatement changes the terms of the original contract, it does not operate as a reinstatement of such contract.[58]

§ 4. *General rules of interpretation and construction.*[59]—The construction of a contract, whether committed to writing contained in correspondence or entirely verbal, is a matter of law, and the meaning of its terms, if precise and explicit, is a question for the court; [60] but if such meaning is doubtful or uncertain,[61] or in case the terms of a verbal contract are disputed, it may be submitted to the jury under proper instructions. The intention of the parties governs [62] and the contract being ambiguous, this intention may be ascertained from the customs and usages of the trade,[63] the terms of the contract,[64] the circumstances of the case,[65] and from the

seller. Earnshaw v. Whittemore [Mass.] 80 N. E. 520

53. Elliott v. Howison [Ala.] 40 So. 1018. Where contract contained no time for delivery, evidence that seller agreed to deliver within a specified time held admissible. Id.

54. See **post**, § 10, subd. A, and § 11, subd. A.

55. Bevins v. Coates & Sons, 29 Ky. L. R. 978, 96 S. W. 585. Held no cancellation where buyer said he canceled the contract but seller refused to do so and both parties subsequently treated the contract as in force. Demarest v. Dunton Lumber Co., 151 F. 508. Where after the sale of a mule the seller agreed to take it back and on its return accepted and used it held the contract of sale was annulled. Russell v. Stewart [Ark.] 94 S. W. 47.

56. So held where one of several instalment shipments failed to conform to the contract. Moran v. Wagner, 28 App. D. C. 317.

57. Goff-Kirby Coal Co v. Marine Co., 31 Pa. Super. Ct. 60.

58. A letter reinstating a countermanded order but changing the terms thereof held not to reinstate the original contract without change or modification. Kempner v. Advance Thresher Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 945, 97 S. W. 1078.

59. See 6 C. L. 1328.

Construction of the specific separate terms of the contract is treated in the subsequent sections, only the general rules being treated here.

60. Register-Gazette Co. v. Larash, 123 Ill. App. 453. The terms of the contract being clear and there being no ambiguity on its face, its construction is a question of law for the court. Bosler v. Cohle, 14 Wyo. 423, 84 P. 895.

61. As to whether parties intended a present or future sale. Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383. There being a conflict as to the meaning of the words: "April 1, 7-10 thirty days extra", held question was for the jury. United States Hat Co. v. Koch [Mass.] 80 N. E. 810. There being a conflict in the evidence as to the meaning of the words "sixty-five cents on the dollar" in a contract for the sale of a stock of merchandise, held the question was for the jury. Moritz v. Herskovitz [Wash.] 89 P. 560.

62. Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427; Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845. It is a fundamental rule that the intention of the parties as gathered from the language of all parts of the agreement, considered in relation to each other and interpreted with reference to the situation of the parties, and the manifest object they had in view, must always be allowed to prevail, unless some substantial principal of law or sound public policy would thereby be violated. Bell v. Jordan [Me.] 65 A. 759. As to whether there was a present or future sale. Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383.

63. Bell v. Jordan [Me.] 65 A. 759. No ambiguity, custom inadmissible. Shelby Iron Co. v. Dufree [Ala.] 41 So. 182. A contract by which the seller agrees to deliver coal "by wagons to their (defendant's) furnaces", and the purchaser agrees to pay a certain sum per bushel, "to be measured in the cahs" of the purchaser "at their furnaces", cannot be modified or explained by parol evidence of a custom of the purchaser and others; the purpose of such evidence being to show that the amount of coal should be determined by its bulk at the elevator or furnace proper. Id. In an action in which a buyer claimed damages for breach of a contract to sell five carloads of lumber, evidence of common usage was permissible to show what a carload of lumber consisted of. Floyd v. Mann [Mich.] 13 Det. Leg. N. 811, 109 N. W. 679.

64. The contract must be construed by reference to its terms for the purpose of giving it the meaning and construction the parties intended. Adkins & Co. v. Campbell [Del.] 64 A. 628.

65. The court or jury may consider all the evidence touching the relations and conduct of the parties having a tendency to show their intentions and their contract obligations, if any, implied thereby. Lawrie v. Lininger & Metcalf Co. [Neb.] 107 N. W. 259. A contract may be explained by reference to the circumstances under which it

practical construction of the contract by the parties,[66] though it should be remembered that a written contract is to be taken without qualification by any evidence as to the dealings, negotiations, or conversations, between them prior to or at the time of the making of said agreement.[67] In arriving at the meaning of a contract, the court should give effect to each word if possible, should take into consideration all its parts in ascertaining the meaning of each particular part, should construe written and printed portions together when they do not contradict each other,[68] and where one of the parties has a printed agreement and simply fills out the blanks, any ambiguity must be resolved against him.[69] The principle of technical nicety cannot be strictly applied to the construction of every day oral contracts made by plain business men in their course of trade and traffic, as to do so would frequently result in overthrowing the meaning and understanding of the parties.[70] In order for a custom or usage to be regarded as part of the contract, it must be a general custom or usage,[71] or it must have been known to the parties and they must have contracted with reference to it,[72] and it must be consistent with the contract,[73] and not unreasonable or illegal.[74] Evidence of prior or contemporaneous parol agreements is inadmissible to vary, alter, or add, to the terms of a complete written contract of sale,[75] though it may be admitted to explain ambiguous,[76] but not

was made and the matter to which it relates. Civ. Code, § 1647. Shafer v. Sloan [Cal. App.] 85 P. 162. Rule applied to show that sale of goods coupled with agreement not to enter into business in the same town was a contract for the sale of the business. Id.

66. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559. In the case of an oral contract, where there is some conflict in the testimony as to just what language was used by the respective contracting parties, the construction placed upon the terms and conditions of the contract by the parties themselves may be shown and will govern. Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427. Evidence tending to show a subsequent recognition of a contract for the sale of corporate stock, including a written calculation made by the seller as to the amount due by the purchaser under a contract of like effect made with another stockholder, is admissible to show upon what terms the parties understood the stock was to be sold. Hightower v. Ansley, 126 Ga. 8, 54 S. E. 939. Practical construction of f. o. b. contract held to require shipper to furnish cars. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139.

67. Staunton v. Smith [Del.] 65 A. 593.

68. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559. Where a consigment receipt, and a deposit agreement for the sale of a ring on instalments were executed at the same time, between the same parties, and with reference to the same subject, they should be read together as one instrument. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022.

69. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022.

70. Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427.

71. Where witness was asked whether there was any custom among lumbermen for settlement of count and inspection guarantied, and answered that the custom was for the millmen and shippers to settle according to reports as to count, inspection and freight received by the shippers from the consignee at the point of destination, held answer was insufficient to prove a general custom or a usage so generally recognized as to be binding. Byrd v. Beall [Ala.] 43 So. 749.

72. The seller, for the purpose of showing the meaning of the words "sixty-five cents on the dollar", in a contract of sale of a stock of merchandise to defendant at such price, cannot show a particular custom at the place of sale as to adding freight charges to the cost of merchandise, there being nothing to show that defendant was acquainted with the local custom or that he purchased with reference thereto. Moritz v. Herskovitz [Wash.] 89 P. 560.

73. A written contract for the sale of specified quantities of specified kinds of grapes for specified prices, to be delivered at the winery of the buyer, without limitation as to the amount of the daily deliveries, cannot be contradicted by proof of a custom relating to daily deliveries at the winery. Leonhart v. California Wine Ass'n [Cal. App.] 89 P. 847.

74. The rule pertaining to usages is limited to such usages as are not in opposition to well-settled principles of law and is not unreasonable. Ollenheimer v. Foley [Tex. Civ. App.] 95 S. W. 688. A usage compelling the shipper of lumber under a contract guarantying count and inspection at destination to settle on the unsworn statement of consignee and orderer held illegal. Byrd v. Beall [Ala.] 43 So. 749.

75. Evidence of contemporaneous agreement of seller's agent to attach printed slip containing new terms held inadmissible. Biggers v. Equitable Mfg. Co., 124 Ga. 1045, 53 S. E. 674. Where a written order for the sales of certain vehicles contained a detailed description of each, parol evidence was not admissible to prove that, at the time the contract was executory, certain agreements were made which were not included in the contract. Buckeye Buggy Co. v. Montana Stables [Wash.] 85 P. 1077. A written contract complete in itself and providing that

plain,[77] terms in the instrument, and to render it complete,[78] or to show that the contract was obtained by fraud.[79] Direct oral statements of intention in respect of the subject of a written dispositive[80] contract are admissible only when the language used is equivocal[81] and, even though the terms used be uncertain on their face, they must be shown by extrinsic evidence to be equivocal.[82] Parol evidence is admissible to show that the sale was in fact a mortgage[83] and to deny the execution of the contract set forth.[84] Parol evidence is inadmissible to show that the law of the place of performance does not govern the construction of the contract.[85] An agreement not to recognize any conditions or agreements not contained in the original contract may operate as an estoppel.[86] The constructions placed upon particular contracts are stated in the notes.[87]

the sale was made "under inducements herein expressed and no others", may not be varied by parol evidence that at the time of the negotitations it was orally agreed that the seller would not sell a similar line to competing local merchants, and that he would furnish a catalogue for the purpose of facilitating exchange, authorized by the contract. Brennard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 41 So. 671. Code, § 4617, providing that when the terms of an agreement have been intended in a different sense by the parties to it, that sense is to prevail against either party in which he had reason to suppose the other parties understood it, applies to written agreements only when they are ambiguous, and does not authorize parol evidence that a seller was informed by the buyer, that if the machinery sold did certain specified work it would be satisfactory as affecting the construction of a written agreement that the machinery should be satisfactory to the buyer. Inman Mfg. Co v. American Cereal Co. [Iowa] 110 N. W 287.

76. Parol evidence is admissible to prove anything pertaining to the contract that is not included in or covered by the writings, or to explain any elements of the contract that are left ambiguous and uncertain. United R. & Elec. Co. Co. v. Wehr & Co., 103 Md. 323, 63 A. 475. Held admissible to show whether structural iron was included in sale of scrap iron. Id. In a sale of "Texas red rust-proof oats" held competent to show by parol that the term included only oats raised in the state of Texas. Brackett & Co. v. Americus Grocery Co. [Ga.] 56 S. E. 762.

77. Townsend v. Southern Product Co. [Ga.] 56 S. E. 436.

78. United R. & Elec Co. v. Wehr & Co., 103 Md. 323, 63 A. 475. Parol evidence is admissible to show that a paper signed by defendant did not in fact become his contract until plaintiff's salesman attached a slip containing a certain clause as agreed on between them. Barton-Parker Mfg. Co. v. Taylor [Ark.] 94 S. W. 713. Parol evidence is admissible to show that a writing which is, in form, a complete contract, of which there has been a manual tradition, was not to become a binding contract until the performance of some condition precedent resting in parol; but the rule is a narrow one. Gilroy v. Everson-Hickok Co., 103 N. Y. S. 620. Evidence of general conversations had at the time of the execution of a bill of sale, or of the circumstances under which it was executed, was not admissible to show that it was not to take effect as a transfer until certain conditions had been complied with. Id. Such evidence should be confined to what was said respecting any conditions as to its taking effect as an absolute transfer. Id.

79. Elgin Jewelry Co. v. Withoup & Co., 118 Mo. App. 126, 94 S. W. 572.

80. Contract signed by both parties and containing mutual promises held dispositive. Grout v. Moulton [Vt.] 64 A. 453.

81. Grout v. Moulton [Vt.] 64 A. 453.

82. Grout v. Moulton [Vt.] 64 A. 453. So held as to words "satisfactory demonstration" in written contract of sale of an automobile. Id.

83. Gibbons v. Joseph Consol. Min. & Mill. Co. [Colo.] 86 P. 94. See Chattel Mortgages, 7 C. L. 634.

84. Denying the execution of a written contract and setting up an oral one is not attempting to vary the terms of a written contract by parol. American Standard Jewelry Co. v. Goodman [Ga.] 56 S. E. 642. Parol evidence is admissible to show that a contract of sale was not the one executed by the buyer, but that it was so altered so as not to express the agreement between the parties. Price v. Stanbra [Wash.] 88 P. 115.

85. That the agent of the seller resided in New York, and the sale was negotiated and executed in Illinois under the laws of both of which states the construction of the contract was different from that of Iowa in which it was to be performed, does not entitle the seller to introduce parol evidence that its understanding of the contract was according to the laws of New York and Illinois. Inman Mfg. Co. v. American Cereal Co. [Iowa] 110 N. W. 287.

86. By agreeing in the written contract that "separate and verbal or written agreement with salesmen are not binding upon" the seller and that the sale was "made under inducements and representations herein expressed and no others", the purchaser bars himself from showing that he bought the goods on the oral agreement of the seller's salesman that the purchaser should have the exclusive sale of the goods in his city. Cannon v. Burrell [Mass.] 79 N. E. 780.

87. Under contract for the sale of fanning mills held seller was to do the reselling at the buyer's expense. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Where in a contract for the sale of oil by an oil company it was provided that the contract should be voidable in case "of **failure of**

The entirety of the contract depends upon the intention of the parties and not

oil wells", held the contract was voidable on failure of oil wells then sunk and in operation. San Jacinto Oil Co. v. Ft. Worth Light & Power Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 82, 93 S. W. 173. A substantial failure of oil wells, such as to cause a deficiency in supply and render the owner unable to fill his contracts, constitutes a "failure of oil wells" within the meaning of a contract to supply oil which was made voidable on a "failure of oil wells". Id. Where at the time of entering into such contract the seller's wells were "gushers", held a failure of the wells to flow by natural forces constituted a "failure of oil wells" within the meaning of the contract. Id. Where three persons enter into a written contract for the purchase of personal property, each signing his individual name, with a third party, in the absence of an allegation in the pleading or proof to the contrary, they will be deemed to be joint owners. Austin Mfg. Co. v. Hunter, 16 Okl. 86, 86 P. 293. In an action by the buyer for breach of a contract of sale of scrap iron at a certain price per ton **"as the scrap lies"** a ruling assuming that all the cost of preparation for delivery was to be paid by the buyer held properly refused. United R. & Elec. Co. v. Wehr & Co., 103 Md. 323, 63 A. 475. Where a building and construction contract **calls for inspection at a certain place** and the contractor in his contract of purchase of such articles expressly provides for inspection at another place, such provision governs though the contract of purchase refers to the building and construction contract. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. Under a contract for the sale of coal from a designated mine, and that if there should be **"a shortage of cars"** the shipment should be divided in fair proportion with other orders, the term "shortage of cars" means that the car supply at the mine from which the coal is produced is short. Phillips v. Pilling [Pa.] 64 A. 396. The words **"upon accepting this option"** contained in an option contract for the sale of bonds held to refer not to an acceptance of the paper creating the contract but to defendant's election to purchase a block of bonds referred to in the first clause of the option contract. Martyn v. Hitchings [Mass.] 78 N. E. 380. Where the seller agreed to sell and the buyer to buy a certain quantity of goods at a certain rate, etc., held a printed specification that the **purchaser should give to the seller specifications for goods** covering shipments not less than ten days before time of shipment, only referred to the amount in excess of the weekly rate. Nicholls v. American Steel & Wire Co., 102 N. Y. S. 227. A sale of property in consideration of the organization of a corporation and the **transfer to the seller** of one-fourth of the **stock** thereof held to contemplate that the buyer would contribute something of value in consideration of three-fourths of the stock which should issue to it. Cranor Co. v. Miller [Ala.] 41 So. 673. Where a contract for the sale of certain property provided for payment in cash and for a second deferred **payment in cash or by assumption of a chattel mortgage,** the option could be exercised by the purchasers assuming the mortgage debt and it was no ground for a rescission that the mortgagee refused to release the seller under the mortgage. Morris v. Persing [Neb.] 107 N. W. 218. A contract whereby the first party agreed to **manufacture and sell certain lumber** to the second party recited that the price to be paid should be a certain sum per thousand feet, "as fast as loaded on cars at M., for all lumber, dressed or rough, and for all dry-kiln lumber shipped by the second party previous to the erection and operation of a planing mill by the second party. Held that a contention that the provision fixing the price to be paid rendered the contract incomplete, because it only fixed the price for such lumber as might be shipped previous to the erection of the mill, was intenable, as the words **"previous to the erection and operation"** were limited to the dry-kiln lumber shipped and not to all lumber dressed or rough. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008. A contract whereby defendant agreed to sell to plaintiff all the furniture manufactured by the former during a certain time, and which plaintiff stipulated to buy at regular factory prices less a certain discount, and further providing: "A schedule of said prices, based on the present list, to be made out, showing the net prices on each article of the entire line, such schedule to remain in force until such time as a new price list shall be issued, at which time a new price schedule is to be made out, the schedule referred to to be attached and made a part of this contract. The **list prices to be low enough** at all times to enable [plaintiff] **to meet competition** in the aforesaid territory", held not to guaranty to plaintiff any rate per cent of profit on the sale of the furniture. Heywood Bros. & Wakefield Co. v. Doernbecher Mfg. Co. [Or.] 86 P. 357. Defendant contracted to sell to plaintiff certain **first-mortgage bonds of a corporation.** At the time set for the delivery of the bonds, a **prior mortgage had not been released,** although all but a few of the bonds secured thereby had been paid and a fund set apart for payment of the remainder. Held that time was not of the essence of the contract so as to entitle plaintiff to rescind it because of defendant's failure to obtain a release of the first mortgage prior to the time set for the delivery of the bonds. Nes v. Union Trust Co. [Md.] 64 A. 310. A contract by which the **seller guaranteed count and inspection of all lumber** at destination should be construed merely to mean that the seller guarantied that the lumber, when it reached its destination, should come up to the count and inspection specified in the bills rendered to the buyer, and had no reference to the evidence necessary to prove what the real condition of the lumber was on arrival. Byrd v. Beall [Ala.] 43 So. 749. A contract for the sale and purchase of a large quantity of "New River" **coal,** be delivered at Chicago, which provided that it should be approved by the shippers, and which was **approved and signed by the owners of certain mines** in the New River district, bound the seller to furnish coal from such mines, and the purchaser was not bound to accept coal from others in such district, even though it may have been the same or equally good in quallty. Hesser v. Chicago & Welleston Coal Co. [C. C. A.] 151 F. 211.

on the divisibility of the subject,[88] the question being generally one of fact.[89] If several articles are sold for a single and entire consideration without any apportionment of the purchase price as between the several articles, the contract of sale is entire and cannot be severed, except by agreement of the parties,[90] On the other hand, if several articles are sold, and a separate price is agreed upon for each, although a single instrument of conveyance may be executed reciting a single consideration for the whole, yet for sufficient cause shown the contract may be rescinded as to a part and enforced as to the remainder,[91] and, the contract being silent in this regard, it is competent to prove by parol what the agreement was in that respect.[92]

§ 5. *Property sold. Amount, kind, nonexistence, and failure of consideration.*[93] *The kind and quality,*[94] *the identity, the title, and the quantity* [95] of property

88. McKeefry v. U. S. Radiator Co., 31 Pa. Super. Ct. 263. The intention of the parties to the contract is paramount, and, even where the contract according to its language is entire in form, its entirety may be broken by the concurrent acts of both parties. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845; Sterling v. Gregory [Cal.] 85 P. 305; Henderson Elevator Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50. A contract for the sale of 20,000 bushels No. 2 white corn, bulk, at 59 1-2 cents per bushel, 10,000 bushels to be shipped in February, and 10,000 bushels in March, is an entire contract. Id. Two orders held to constitute separate contracts. Lestershire Lumber & Box Co. v. Ritter Lumber Co. [C. C. A.] 144 F. 568. Provision for services held severable from contract of sale. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008. Sale of bombs, firing canes, and ammunition, and they were shipped in separate boxes, and the firing canes were not up to sample, held the buyer could reject the entire consignment. Keeler v. Paulus Mfg. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 842, 96 S. W. 1097. Where defendant agreed to buy all the oranges grown by plaintiff in a certain grove, in consideration of defendant's having the handling of the oranges grown in another grove, the contract was entire and the agreements not severable. Sterling v. Gregory [Cal.] 85 P. 305. A contract for potatoes in carload lots at an agreed price, per bushel for all that may be loaded during the week, under which the seller has loaded and shipped four carloads, is entire in the sense that either party had the right to a full performance. Peycke v. Shinn [Neb.] 107 N. W. 386. Where by writing a stock of goods was sold and by another instrument the building in which the business was carried on was leased to the buyer for a term of years, held an entire contract. Floyd v. Arky [Miss.] 42 So. 569. Where the defendant ordered one car of sash, with the privilege of three, at 78 per cent. off list, specifications for first car to be furnished within twenty days, and, if others are taken, all to be furnished by April 1st, etc., the order was severable, so that defendant could not escape liability for breach of the contract, growing out of the failure to furnish specifications on the first car within the time specified. Rock Island Sash & Door Works v. Moore & Handley Hardware Co. [Ala.] 41 So. 806. A manufacturer of lumber agreed to sell the output of a mill during a year. The contract provided that the lumber should be delivered to the buyer in his lumberyard, that immediately on the delivery of any lumber title should at once vest in the buyer, that all lumber cut should be graded and measured by the buyer as the same was sawed, that all lumber should be paid for by the buyer according to the schedule of prices every fifteen days, at which time all lumber delivered during the preceding fifteen days should be reported by the buyer's inspector to the buyer and paid for by check, held a severable contract. Strother v. McMullen Lumber Co. [Mo.] 98 S. W. 34. The several nature of the subject-matter may often assist in determining the intention, but will not overcome the intent to make an entire contract when that is shown, nor will the mode of measuring the price, as by the bushel, ton, or pound, change the effect of the agreement, even in entire contracts from agreeing to partial payments pending the full performance. McKeefry v. U. S. Radiator Co., 31 Pa. Super. Ct. 263. Sale two hundred tons iron "at $21.00 per gross ton, Time of delivery, one car per week, July and August," entire contract. Id. Sale of an entire quantity of goods to be shipped in instalments is an entire contract. Moran v. Wagner, 28 App. D. C. 317.

89. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845.

90. Buckeye Buggy Co. v. Montana Stables [Wash.] 85 P. 1077.

91. Buckeye Buggy Co. v. Montana Stables [Wash.] 85 P. 1077. Where a written contract for the sale of two articles stated a single sum as the price of both, it was, nevertheless, competent to show by parol that a separate price was agreed upon for each of the articles so that the contract was severable. Id. A contract having several distinct items and founded upon a consideration apportioned to each is severable. Pratt & Co. v. Metzger [Ark.] 95 S. W. 451. Where hats in a shipment were separate in pattern and the price of one was in no way dependent upon the price of the other, held the contract was severable. Schiller v. Blythe & Fargo Co. [Wyo.] 88 P. 648.

92. Buckeye Buggy Co. v. Montana Stables [Wash.] 85 P. 1077.

93. See 6 C. L. 1331.

94. See 6 C. L. 1332. It would seem that the word "merchantable" in a sale of hay means hay salable in the market because of its fitness to feed stock. Eaton v. Blackburn [Or.] 88 P. 303. Contract for "No. 1 ground Angostura tonka beans," "the best article

purchased depends upon the terms of the contract. The obvious intention of a contract for the sale of a business, coupled with an agreement by the seller not to engage in the business in the same town so long as the buyer continues in business, is to sell the good will of the business.[96] In the absence of fraud an agreement to sell certain goods of an estimated quantity is not one for the sale of a definite quantity but of the goods designated regardless of departures from estimates.[97] In the absence of an estoppel[98] the contract by merely providing for determining the

and perfectly pure," requires the delivery of pure unadulterated ground tonka beans. Neal v. Taylor [Va.] 56 S. E. 590. That the buyer purchased a new machine but by fraud or mistake an old machine was delivered is a complete defense to an action for the purchase price. International Harvester Co. v. Smith, 105 Va. 683, 54 S. E. 859.

95. See 6 C. L. 1332. Finding of trial court, on conflicting evidence, of amount of brush sold under a parol contract, held sustained by the evidence. Anthes v. Erickson [Wash.] 86 P. 668. Sale of all the cattle bearing certain brands held to pass title to the cattle and the brands. Barber v. Harper [N. M.] 86 P. 546. Contract right to have certain property installed held to pass under sale of "all property, rights, and assets." Hogan v. Detroit United R. Co. [Mich.] 14 Det. Leg. N. 87, 111 N. W. 765. Where timber, sawmill and machinery were sold, held the term "sawmill" was limited to a machine constructed for the purpose of sawing logs and therefore did not include the shed covering the mill. Alexander v. Beekman Lumber Co. [Ark.] 95 S. W. 449. Clause that the buyers understood that the seller would be able to ship from forty to fifty cars per month in accordance with shipping directions held imposed in favor of the seller to safeguard it against excessive orders at any one time and did not impose on the buyer the obligation to order that amount monthly. Salmon v. Helena Box Co. [C. C. A.] 147 F. 408. Bill of sale given by lessee of a livery stable to the lessor, reciting that the former sells to the latter all his right, title, and interest in and to "the following described personal property," then after the words "to wit" enumerating the property sold, after which are the words "and all and every kind of property of every name and nature now used in conducting the dray and livery business," transfers only the personalty used in the business and not the lease. Johnson v. Levy [Cal. App.] 86 P. 810. Where plaintiff wrote that he had a lot of timber which might take him the rest of the year and the next, in a small way, to have made up in ties and get out, and ask defendant if it would take at a certain price all he could get out, not exceeding six thousand ties, and defendant answered that it would take all ties delivered within the next twelve months, and plaintiff assented by proceeding to deliver, there was a mutual contract to deliver and receive as many of the ties as plaintiff could get out by ordinary care and diligence in the time fixed. Louisville & N. R. Co. v. Coyle [Ky.] 99 S. W. 237. A contract for the sale and delivery by a lumber company of its entire cut of lumber for a specified year, except what it shall require for its retail trade at its mill, and which further provides that it is agreed that the cut for the year shall not be less than 2,000,000 feet, cannot be construed to require the delivery of 2,000,000 feet. Demorest v. Dunton Lumber Co., 151 F. 508. Where seller agreed to make the purchaser its sole customer on condition that the latter take certain quantities of the product and if it did not do so the seller could sell to others. The contract also provided for payment for amounts "taken" by the purchaser, held that the contract did not bind the purchaser to accept or take the product in the amounts specified. Amalgamated Gum Co. v. Casein Co., 146 F. 900. Plaintiff was a jobber in steel and defendant gave him a written order to ship from one hundred to one hundred and twenty-five tons of soft steel at $1.50 base, half extras f. o. b. mill for deliveries to July 1, 1906. Above the order was written the words "Our requirements approximately," held defendant was bound to take at least one hundred tons of steel. Taylor Co. v. Niagara Bedstead Co., 102 N. Y. S. 173. In the absence of any agreement to the contrary, either express or implied, the sale of the output of an oil well will be taken to mean the total output, and the seller cannot divert a certain proportion of the output for the remuneration of the furnisher of air pressure for bringing up the oil, it not appearing that such air pressure could not have been secured by means of money. Crusel v. Tierce [La.] 42 So. 940. Sale of "all my right, title, and interest in and to the goods, wares, and merchandise in my storeroom," etc., excepting certain articles specified, coupled with an agreement that the seller should not enter into or engage in the business or occupation of second-hand dealer in the same town so long as the buyer should continue in business, indicates upon its face the sale of a business. Shafer v. Sloan [Cal. App.] 85 P. 162.

96. Shafer v. Sloan [Cal. App.] 85 P. 162.

97. Sale of lumber on hand at mill and loading station; also "entire cut" of lumber during year 1903. Inman Bros. v. Dudley & Daniels Lumber Co. [C. C. A.] 146 F. 449. Where a sale is made of certain goods identified by reference to independent circumstances and the quantity is named with the qualification "about" or words of like import, the naming of the quantity is not deemed binding on either party, but the sale is of the specific amount. Sale of "season's output of linters * * * estimated at two hundred to two hundred and fifty bales" held a sale of the output regardless of the number of bales. Loeb v. Winnsboro Cotton Oil Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 913, 93 S. W. 515.

98. Where quantity was overestimated, held mere overpayment by the seller to his insolvent vendor did not bar the buyer's right to a correction, he not having knowledge of the original vendor's insolvency, possible loss to his seller, and not being negligent in making the count or in dis-

quantity sold by counting or measuring at the place of delivery does not bar either party of the right to a correction on discovery of a mistake.[99] Hidden property of which neither the buyer nor the seller had knowledge does not pass.[1]

Failure of consideration [2] is a defense and partial failure of consideration is a defense pro tanto.[3] An agreement by the buyer not to plead failure of consideration until certain reasonable conditions are complied with is binding on the promisor.[4]

§ 6. *Transition of title.*[5]—The transition of title in order to determine the locus of a crime, as in the sale of inhibited articles, is largely treated elsewhere.[6]

Meaning and effect of contract.[7]—The time when title passes depends upon the intention of the parties,[8] and this intention is a question of fact for the jury.[9] An executed contract for the sale of a chattel vests the title at once, but an executory contract always leaves something to be done before the title to the property will vest in the purchaser.[10] Whether the contract is executed or executory is to be gathered from its terms and purposes, the nature, condition, and situation of the property, and the circumstances surrounding the parties.[11] Conditions precedent

covering and reporting it within a reasonable time. Hasty v. Hampton Stave Co. [Ark.] 97 S. W. 675.

99. Hasty v. Hampton Stave Co. [Ark.] 97 S. W. 675.

1. Where at the time of the sale of a table neither the seller nor the buyer knew or had reason to believe that there was money or other thing of value therein, a pocketbook and contents hidden in the drawer thereof did not pass. Evans v. Barnett [Del.] 63 A. 770.

2. Where seller was to furnish advertising matter on buyer's request, held in the absence of such a request failure to send such advertising matter did not constitute a failure of consideration though the seller had voluntarily sent some booklets. Make-Man Tablet Co. v. Chapman, 119 Mo. App. 427, 95 S. W. 282.

3. There is a partial failure of consideration constituting a defense pro tanto where one purchases an interest in a business on the faith of an inventory which is incorrect, the resources being overstated and the liabilities underestimated. Steckbauer v. Leykom [Wis.] 110 N. W. 217. Where one purchased for $4,000 a quarter interest in a firm in reliance on the inventory, which showed resources of $18,500, his damages by reason of the overstatement of the resources to the amount of $1,050 is not one-quarter of $1,050 but one-quarter of thirty-two thirty-sevenths of the whole as the proportional loss due to such overstatement, but as to understated liabilities one-quarter thereof should be allowed. Id.

4. Biggers v. Equitable Mfg. Co., 124 Ga. 1045, 53 S. E. 674.

5. See 6 C. L. 1332.

6. See Intoxicating Liquors, 8 C. L. 486.

7. See 6 C. L. 1332.

8. Rea v. Schow & Bros. [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706. The intention of the parties governs, and the mere fact that something remains to be done will not govern such intention. Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383. Under an agreement between plaintiff and defendants, by which plaintiff was to buy cotton and turn it over to defendants to gin, after which defendants would buy the cotton from plaintiff, defendants, prior to the ginning and bailing of the cotton, acquired no title. O'Neal v. Richardson [Ark.] 92 S. W. 1117. Where plaintiff agreed to buy cotton for defendants, to be ginned, reserving a lien thereon and on the fund derived from the sale thereof for his advancements, the title to the cotton was in defendants, and a sale thereof to a bona fide purchaser for value passed title freed from plaintiff's lien. Id. Where goods are shipped subject to inspection and a draft with bill of lading attached was paid before the goods arrived, testimony of seller's bookkeeper that seller had made various shipments to the buyer, and sometimes would bill a car load for the actual amount, and at other times would draw and hold the goods in his warehouse, and that the purchaser always paid the drafts so drawn, held admissible as tending to show the intention of the parties as to the transfer of the title. Giffen v. Selvia Fruit Co. [Cal. App.] 89 P. 855. Where an instrument to secure an indebtedness provided that the title to certain described horses should be and remain in the creditors until the note should be paid in full, and on this was indorsed a transfer in the following terms: "For value received we hereby sell, assign and transfer the following terms to A. H. J., together with all our rights, titles, liens and interests thereto and therein, the within instrument, together with note attached thereto, without recourse," this operated to pass the legal title to the horses, and not merely the title and interest which the creditors had in the instrument. Joiner v. Stallings [Ga.] 56 S. E. 304.

9. Sale of hay to be balled by purchaser. Wheelock v. Starkweather [Mich.] 13 Det. Leg. N. 682, 108 N. W. 1085. Where it is not clear from a written contract as to whether the parties intended a present or future sale, the question is for the jury. Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383.

10. No sale is complete so as to vest the buyer with an immediate right of property so long as anything remains to be done between the parties in relation to the goods. Parlin & Orendorff Co. v. Kittrell [Tex. Civ. App.] 16 Tex. Ct. Rep. 103, 95 S. W. 703.

11. A memorandum reciting that plaintiff "had bought of" defendants seven hundred and fifty tons of salt held an executory con-

imposed by the contract must be performed before title passes.[12] Title does not pass where property is sold subject to trial.[13] Where goods are sold upon a condition precedent, an election to treat the condition as fulfilled operates to pass title.[14] Where goods are sold by sample, title does not pass until they have been received and accepted, even though payment has been made previous thereto.[15] Where there is a sale upon trial with a time fixed by the parties, a failure to return the goods or give notice in accordance with the agreement makes the sale absolute.[16] That a sale by the true owner operates as a breach of contract does not affect the buyer's title.[17]

Separation and designation of goods.[18]—In the absence of evidence showing an intent to the contrary, title does not pass where there is no selection or identification out of a common mass,[19] though in a sale of a part of an entire mass of goods,

tract in view of the circumstances surrounding it. Mebius & Drescher Co. v. Mills [Cal.] 88 P. 917. Where defendants wrote that they had booked plaintiff's order for a car load of corn, the corn to be loaded and sent to destination as promptly as railroad facilities would permit, the contract was an executory one. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949. Correspondence held to show an absolute sale by plaintiff to defendant of all the property described on certain pages of a stock book referred to in the correspondence. Bierce v. Davies, 116 La. 1059, 41 So. 314. A sale of a specific lot of rice, at a fixed price, payable within ten days, to be shipped on order of buyer, is not a promise of sale but a completed sale by which the ownership passes to the buyer. Bloom's Son Co. v. Union Rice Mill. Co. [La.] 42 So. 947. On an issue whether title to hay passed when it was baled by the purchaser on the seller's farm, a stipulation that the seller should draw it to cars did not alone show that the contract was executory at the time of baling. Wheelock v. Starkweather [Mich.] 13 Det. Leg. N. 682, 108 N. W. 1085. A seller proposed to sell three hundred round pine pilings, ten inches at small end and forty feet long, at $4 each, f. o. b. cars, to be paid for as delivered. The buyer accepted the proposition, and stated that the pilings should be ten inches in diameter at small end and be practically straight, held an executory contract of sale. Elliott v. Harrison [Ala.] 40 So. 1018. A contract for the sale of a stock of millinery goods, under which nothing remained to be done to determine the quality, quantity, or value of the goods, and all that remained to be done was to check up the invoice furnished by the seller to ascertain what deduction should be made on account of goods sold out of the stock subsequent to the time the invoice was furnished, held an executed contract. Thomas v. Thomas [Ala.] 41 So. 141. A contract for the sale of timber bound the seller to let the buyer have all the timber controlled by the seller, and bound the seller to haul and load the same on board of cars within fifty miles of a designated town for a specified sum per one thousand feet, and bound the buyer to furnish a specified sum to the seller in advance. Held that the contract was a present sale of timber, with an agreement for future services concerning the same, and whenever logs were cut within fifty miles of the designated town by the seller they became the property of the buyer. St. Louis, etc., R. Co. v. Wynne Hoop & Cooperage Co. [Ark.] 99 S. W. 375. Although the full consideration named in a contract of sale in restraint of trade has been paid, the contract does not thereby become an executed contract in the absence of an actual taking possession by the purchaser. Fisher v. Flickinger Wheel Co., 7 Ohio C. C. (N. S.) 533. A contract for the sale of twenty-two cattle of a specified aggregate weight and at a named price per pound, payment not to be made for some months, during which time the cattle were to be fed by the buyer and then resold to the seller at an increased price per pound, is an absolute sale and title passes. Gills v. George, 8 Ohio C. C. (N. S.) 393.

12. Payment of part of the price and execution of notes for the balance. Norris v. St. Joseph, etc., R. Co. [Mo. App.] 101 S. W. 159. Where one was given a half interest in the horses he could gather of a certain brand, held title did not pass until horses were gathered in by him. State v. Cotterel [Idaho] 86 P. 527. Where horse is sold at auction and payment is made a condition precedent, death of the horse prior to payment throws the loss on the seller. Brown v. Reber, 30 Pa. Super. Ct. 114.

13. Quaker Mfg. Co. v. Zucker, Levett & Loeb Co., 124 Ill. App. 547. In case of loss buyer is not liable for the purchase price. Id.

14. Goods sold on trial to be returned, if not satisfactory within a stated time, held failure to so return them operated to pass title. In re Froehlich Rubber Refining Co., 139 F. 201.

15. So held goods shipped and draft with bill of lading attached forwarded and paid before goods arrived. Giffen v. Selma Fruit Co. [Cal. App.] 89 P. 855.

16. In re Downing Paper Co., 147 F. 858.

17. Though one cut wood and put it on the railroad under a contract with a corporation, the contract being such that the wood did not become the property of the corporation until delivered at another place, a sale by the owner before shipment passed title to the purchaser. Smiley v. Hooper [Ala.] 41 So. 660.

18. See 6 C. L. 1334.

19. The goods sold must be ascertained, designated, and separated from the stock or quantity with which they are mixed before the property can pass. Parlin & Orendorff Co. v. Kittrell [Tex. Civ. App.] 16 Tex. Ct. Rep. 103, 95 S. W. 703. Where by an entire contract a buggy and harness was sold, the seller to purchase a harness for the buyer, held until the designation of the harness

if the purchaser is allowed to take possession of the whole for the purpose of enabling him to separate the part sold, the title to that part passes to the purchaser.[20] If by the contract anything remains to be done by the seller, such as weighing for the purpose of ascertaining the extent of the property or the amount of the purchase price to be paid, title does not pass.[21] A contract for the sale of specific specified chattels to be afterwards acquired transfers the beneficial interest in such chattels to the buyer as soon as they are acquired by the seller.[22]

Payment.[23]—Unless the sale is either expressly or presumptively for cash [24] or there are provisions to the contrary,[25] it is not necessary to the passage of title that the purchase price be paid [26] or even ascertained.[27] One may waive nonpayment as a condition precedent,[28] the question of waiver being one of fact,[29] but, in the absence of an intent so to do, delivery of possession does not act as such a waiver.[30] Where a sale is made on condition that a cash payment shall be made and a draft given for the cash payment is dishonored, the title does not pass.[31]

Delivery and acceptance.[32]—While delivery is often important as bearing on the question of intent, unless made a condition precedent to the contract, actual delivery is not essential to the passage of title [33] and symbolical delivery certainly suffices; [34] but it has been held that, delivery being a necessary incident of a sale,

title to the property did not pass. Id. Where a contract to furnish water to irrigate rice fields provided that plaintiff should be entitled in return for water so furnished to one-fifth of the rice grown on the land after the same was threshed and sacked, plaintiff had no title to any portion of the rice until it was threshed and sacked, and plaintiff's portion designated and set apart to it. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

20. Sale of a part of a mass of logs. Croze v. St. Mary's Canal Min. Land Co. [Mich.] 13 Det. Leg. N. 215, 107 N. W. 313.

21. Collins v. Beckley, 29 Ky. L. R. 813, 96 S. W. 479. Buyer could not maintain replevin even though seller was insolvent. Code Civ. Proc. § 180, considered. Id. But see Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383.

22. Block v. Shaw [Ark.] 95 S. W. 806. Rule held not to apply to a sale of a certain number of bales of cotton of a particular grade at a price named, no particular cotton being specified. Id.

23. See 6 C. L. 1334.

24. Where terms were agreed upon and $1 given to bind the trade, held title did not pass, nothing being said as to the terms of payment and it consequently being presumed that the sale was for cash. Adair v. Stovall [Ala.] 42 So. 596.

25, 26. Montant v. Johnson, 99 N. Y. S. 395.

27. May be subsequently ascertained or, in any event, buyer is liable for value. Leist v. Dierssen [Cal. App.] 88 P. 812.

28. Victor Safe & Lock Co. v. Texas State Trust Co. [Tex. Civ. App.] 99 S. W. 1049; Ewing v. Sylvester [Tex. Civ. App.] 15 Tex. Ct. Rep. 850, 94 S. W. 405.

29. Victor Safe & Lock Co. v. Texas State Trust Co. [Tex. Civ. App.] 99 S. W. 1049. Failure to assert one's right to retake property within a reasonable time held to waive right to payment as a condition precedent. Id. By subsequently treating transaction as a sale, the seller waives the cash payment as a condition precedent. Ewing v. Sylvester [Tex. Civ. App.] 15 Tex. Ct. Rep. 850, 94 S. W. 405.

30. Where the price is payable on delivery but is not paid, the title does not pass though the seller on the faith of the contract makes an actual delivery. Strother v. McMullen Lumber Co. [Mo.] 98 S. W. 34; Ewing v. Sylvester [Tex. Civ. App.] 15 Tex. Ct. Rep. 850, 94 S. W. 405; Susong v. McKenna, 126 Ga. 433, 55 S. E. 236. Where a sale is for cash, a delivery without payment through mistake does not pass title. Southern Pine Co. v. Savannah Trust Co. [C. C. A.] 141 F. 802. If the property be sold upon the express condition that it is to be paid for on delivery, and it is delivered upon the faith that the condition will be immediately performed, and performance is refused upon demand in a reasonable time, no title passes to the buyer. Wilson v. Comer, 125 Ga. 500, 54 S. E. 355.

31. Ewing v. Sylvester [Tex. Civ. App.] 15 Tex. Ct. Rep. 850, 94 S. W. 405.

32. See 6 C. L. 1334.

33. Klein v. Patterson, 30 Pa. Super. Ct. 495. Neither the transfer of absolute control nor delivery is necessary to the transition of title. Rea v. Schow & Bros. [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706. Where specific articles are sold and especially where they are manufactured pursuant to an order from the buyer, title passes without delivery. See St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040. Tender of goods will sustain action for the price. Smith v. Eitel, 121 Ill. App. 464.

34. Transfer of a warehouse receipt transfers title. Kessler & Co. v. Zacharias, 145 Mich. 698, 13 Det. Leg. N. 658, 108 N. W. 1012; Kessler & Co. v. Lackie [Mich.] 13 Det. Leg. N. 794, 109 N. W. 671. The manual delivery of goods being inconvenient on account of their bulk, a symbolic delivery suffices. Warehouse receipt held sufficient. Twenty-four bales of hops. Horst v. Montauk Brewing Co., 103 N. Y. S. 381.

proof of a sale of personal property is evidence of the delivery thereof.[35] Title passes on delivery to the buyer, the seller having nothing more to do.[36] In the absence of any stipulation or agreement as to the place of delivery [37] or of conditions showing a contrary intent,[38] delivery to a common carrier for transportation to the buyer presumptively passes title to the latter,[39] and this is true though the bill of lading is not forwarded to the buyer, the goods being consigned directly to the latter.[40] The rule, however, is based upon the authority the carrier has or is deemed to have from the buyer,[41] and hence it is well settled that, in the absence of an agreement to the effect that the carrier shall and does have power to accept the goods as to quality, the right of inspection rests in the purchaser who may exercise such right when the goods reach their destination, and may accept or reject the goods according to their compliance as to quality with the conditions of the purchase.[42] A delivery through carriers and warehousemen to a drayman, to whom the one who ordered the goods has by written order directed the warehousemen to deliver all his freight, is a delivery to the purchaser though the latter never in fact receives the goods.[43] Where failure of carrier to deliver is caused by seller's not sending the package to the buyer's usual shipping point, held the seller could not recover on the theory that the carrier was the buyer's agent.[44] A bill of lading does not have the effect of passing the title where the evidence clearly shows a contrary intent.[45] Where goods are shipped with draft attached to the bill of lading, a presumption arises that the intention was that title should be retained in the seller after delivery to the carrier.[46] The purchase of a draft with bill of lading attached is not a purchase of the goods represented by the bill of lading.[47]

How proved.[48]—It is seldom necessary that a bill of sale be acknowledged in

35. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406.

36. Andrews & Co. v. U. S., 41 Ct. Cl. 48.

37. Where goods were bought f. o. b. at a certain place, the carrier became the seller's agent and there was no sale until delivery at the point of destination. Alabama Nat. Bk. v. Parker & Co. [Ala.] 40 So. 987. Where the seller himself undertakes to make delivery at a distant place and selects his own carrier, the carrier is not the buyer's agent but the agent of the seller, and delivery of the goods to the carrier is not delivery to the buyer (Tanssig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602), and this rule is not altered by a stipulation in the contract that the buyer should pay the freight and deduct it from the price of the goods (Id.). Hence, where defendant contracted to sell plaintiff lumber f. o. b. cars at S. under terms of two per cent. discount for cash, if remitted within ten days from the date of the invoice, plaintiff did not become liable for a shipment until delivery at S., and was entitled to a discount on payment within ten days of such delivery. Id.

38. The sale of property f. o. b. on platform, the seller not being entitled to his pay until he delivered the bill of lading to the purchaser or to a bank with draft attached, is not completed by the delivery of the cotton to the carrier on the platform. Garner v. St. Louis, etc., R. Co. [Ark.] 96 S. W. 187.

39. Bowlin Liquor Co. v. Beaudoin [N. D.] 108 N. W. 545; Templeton v. Equitable Mfg. Co. [Ark.] 96 S. W. 188; Cox v. Anderson [Mass.] 80 N. E. 236; Rabinowitz v. Hall, 123 Ill. App. 65. Freight prepaid. Andrews & Co. v. U. S., 41 Ct. Cl. 48. Generally title passes as of the date of shipment. Civ. Code, §§ 1140, 1141, construed. Grange Co. v. Farmers' Union & Mill. Co. [Cal. App.] 86 P. 615. When a purchaser orders goods to be sent to him and delivered to a person named or to a common carrier authorized to receive them for his use, it is a delivery to him and the sale and purchase are completed. Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555.

40. Templeton v. Equitable Mfg. Co. [Ark.] 96 S. W. 188.

41. Delivery to a common carrier is not delivery to the consignee unless such delivery is actually or impliedly authorized by the latter. Rounsaville v. Leonard Mfg. Co. [Ga.] 56 S. E. 1030.

42. Schiller v. Blyth & Fargo Co. [Wyo.] 88 P. 648.

43. Harris v. Pellenz [Mich.] 13 Det. Leg. N. 875, 109 N. W. 1044.

44. American Standard Jewelry Co. v. Witherington [Ark.] 98 S. W. 695.

45. Giffen v. Selma Fruit Co. [Cal. App.] 89 P. 855.

46. Cragun Bros. v. Todd [Iowa] 108 N. W. 450. Where the evidence in this regard was undisputed, held error to submit the question to the jury. Id. And a verdict based on the finding that title had passed was erroneous. Id.

47. Leonhardt & Co. v. Small & Co. [Tenn] 96 S. W. 1051. So held where bank purchased drafts for the price of a sale of hay and indorsed all but three of them with the statement that it was not responsible for the quantity, quality, or delivery of the goods covered by the bills of lading. Id.

48. See 6 C. L. 1336.

order that it be admissible as evidence of a sale.[49] An invoice is not evidence of a sale; it is a mere detailed statement of the nature, quantity, and cost or price of the things invoiced, and is as appropriate to a bailment as to a sale.[50] A claimant in bankruptcy proceedings has the burden of showing that contract was not one of sale.[51]

Revesting of title.[52]—A breach does not operate to revest him with title to property delivered.[53] A sale being procured by fraud, the seller may on discovering the fraud avoid the sale and revest title in himself.[54]

Ad interim damages.—Though the prospective buyer has possession if the seller retains title he must suffer any loss or damage from any cause not resulting from the prospective buyer's negligence.[55]

§ 7. *Delivery and acceptance under the terms of the contract. A. Necessity, time, place, amount, etc.*[56]—Unless delivery according to terms be waived,[57] it is ineffectual unless it corresponds to the terms of the contract respecting place,[58] amount,[59] and time, when of the essence of the contract,[60] but no time being speci-

49. So held construing Acts 1897, p. 28, No. 6, §§ 55, 57. Epperson v. Crozier [Ariz.] 85 P. 482.

50. In re Smith & Nixon Piano Co. [C. C. A.] 149 F. 111.

51. In re Heckathorn, 144 F. 499.

52. See 6 C. L. 1336.

53. Where defendant sold to plaintiff certain cattle of a particular brand, the delivery of horses in lieu of undelivered cattle did not reinvest the seller with title and ownership of the undelivered cattle thus branded. Barber v. Harper [N. M.] 86 P. 546.

54. Atlas Shoe Co. v. Bechard [Me.] 66 A. 390. See post, § 10, subd. A.

55. Gottlieb v. Rinaldo [Ark.] 93 S. W. 750.

56. See 6 C. L. 1336.

57. Where contract provided for the delivery of certain cans at a certain place and in certain amounts, and the purchaser requested delivery at another place, held the cans so delivered should be considered as a portion of the deliveries required by the contract. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886.

58. Plea showing delivery at place other than that specified in the contract held not demurrable. Green & Sons v. Lineville Drug Co. [Ala.] 43 So. 216. Where cattle by a contract of sale were to be accepted at a specified place, an instruction imposing the duty on the purchaser to accept them at another place was erroneous. Hanley Co. v. Combs [Or.] 87 P. 143. Sale of coal to be delivered "at their (buyer's) furnaces" held to mean on the furnace grounds at such place as the buyer might indicate. Shelby Iron Co. v. Dupree [Ala.] 41 So. 182. A contract whereby, a coal company agreed to furnish to defendant all the coal that might be required by the latter for the use of an illuminating company "of Detroit" for certain purposes at "the following prices, f. o. b., Michigan Central Railroad," to wit, etc., required the delivery of the coal on the track of such railroad company at Detroit. Detroit Southern R. Co. v. Malcolmson, 144 Mich. 172, 13 Det. Leg. N. 191, 107 N. W. 915. Postal cards sent by the coal company to defendant reading: "In our office. We ship this day on your account," followed by numbers of cars, etc., and the words "Remarks—Weight to follow," etc., signed by the coal company, held not inconsistent with such construction. Id.

59. Where contract called for fifty bales of cotton, a delivery of forty-nine bales authorized the buyer to refuse to accept them. Inman v. Elk Cotton Mills [Tenn.] 92 S. W. 760. Where one purchased a bill of goods on the understanding that all or none of the goods were to be delivered, and the goods tendered lacked some of those ordered, the purchaser had a right to refuse to accept the entire bill. Langan & Taylor Storage & Moving Co. v. Tennelly, 29 Ky. L. R. 367, 93 S. W. 1. Where goods are sold by an entire contract and are lost in transit, the seller cannot recover therefor without showing a shipment of all articles sold. Sutherland Medicine Co. v. Baltimore [Ark.] 98 S. W. 966. Sale of five thousand cases of sweet corn. Contract read: "In case of short crop, owing to circumstances beyond the control of the packer, seventy per cent. delivery to be guaranteed buyer, and ten per cent. of purchase price to be paid buyer by seller for any quantity delivered short of the seventy per cent. guaranteed by this contract." Held that it was not the intention of the parties that the sellers should be relieved of the obligation of their guaranty to deliver seventy per cent. by any other circumstances than that of a short crop, and in that event the intention disclosed by the contract is that the sellers were to deliver such part of the seventy per cent. as the condition of the crop would enable them to provide and to pay ten per cent. of the purchase price of the balance. Bell v. Jordan [Me.] 65 A. 759.

60. In contracts of sale time of delivery is ordinarily of the essence of the contract. Frommel v. Foss [Me.] 66 A. 382. Sale of lath, time of delivery held of the essence. Frost-Trigg Lumber Co. v. Forrester [Mo. App.] 101 S. W. 164. Seventeen days' delay in shipment held not to show an unreasonable delay as a matter of law. Green & Sons v. Lineville Drug Co. [Ala.] 43 So. 216. Where seller agreed to deliver elevator fronts "with all diligence" and to have the fronts ready to put in "when the stains are put in," he was not obligated to deliver the fronts at an earlier date than when the stairs were ready to put in, if by the exer-

fied,[61] or delivery being required "promptly,"[62] a reasonable time is implied. What is a reasonable time is a question for the jury,[63] and in determining this question it may consider the declarations of the parties, whether oral or written and whether previous to the contract or not, and the conduct of the parties subsequent to the contract.[64] When no other place is specified in a contract for a tender, the law will presume that the tender should be made at the place of the contract [65] or where the goods are located when sold,[66] but an unconditional refusal to accept the tender at any place waives the necessity for a technical tender at the place of the contract.[67] Where a tender other than money is made, the tenderer must, if possible, keep the property in condition to make the tender good while an action for rescission is pending.[68] If, after making the tender, he exercises acts of ownership over the property tendered inconsistent with the theory that he is holding the property for delivery to the party to whom it was tendered, such conduct amounts to a withdrawal of the tender.[69] Where goods are to be shipped within a stated time on the buyer's orders, it is the buyer's duty to seasonably order the shipments so that the seller can secure the cars, prepare them for use, load them, and deliver them at the place of delivery within the contract time.[70] A seller of articles to be delivered daily as ordered is not bound to deliver on Sundays.[71] Payment and delivery being concurrent acts, the mere transportation of the property to the place of delivery at the time designated is not sufficient to constitute a delivery without the presence of the seller or his agent to make delivery and receive the purchase price.[72] Unless supplemented by language giving them a broader scope, the words "more or less" apply only to such accidental or immaterial variations in quantity as would naturally occur in connection with the transaction.[73] It would seem that the sufficiency of cumulative deliveries must be determined by regarding each delivery separately.[74]

cise of all diligence he could do so, but the agreement as to all diligence was limited by the other stipulation. Powell v. Champion Iron Co., 144 Mich. 540, 13 Det. Leg. N. 273, 108 N. W. 359. Where an order for pins and needles recited from forty to ninety days to get them from the factory and the buyer knew his advertisement had to be printed on the paper before the pins could be arranged thereon, he is not entitled to defend an action for the price on the ground that the goods were to be shipped at once and were not. Bevins v. Coates, 29 Ky. L. R. 978, 96 S. W. 585.

61. Glasgow Mill. Co. v. Burgher [Mo. App.] 97 S. W. 950; Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008; Crane v. Banon, 100 N. Y. S. 937; United R. & Elec. Co. v. Wehr & Co., 103 Md. 323, 63 A. 475; Duke v. Norfolk & W. R. Co. [Va.] 55 S. E. 548. Refusal of buyer to receive after a certain date held only to entitle seller to damages in case the date mentioned did not allow a reasonable time for the performance of the contract. Id.

62. The words "ship promptly" mean within a reasonable time. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67.

63. Bailey v. Leishman [Utah] 89 P. 78.

64. Duke v. Norfolk & W. R. Co. [Va.] 55 S. E. 548.

65. Hefner v. Robert [Neb.] 107 N. W. 258.

66. Salmon v. Helena Box Co. [C. C. A.] 147 F. 408; Bowlin Liquor Co. v. Beaudoin [N. D.] 108 N. W. 545; Drumm-Flato Commission Co. v. Edmisson [Okl.] 87 P. 311.

67, 68, 69. Hefner v. Robert [Neb.] 107 N. W. 258.

70. Frommel v. Foss [Me.] 66 A. 382. Shipment of potatoes to be made in March, failure to order thirty cars before March 24th, held to warrant refusal of the seller to perform. Id. Where the seller agrees to deliver within a specified time if cars can be had, the goods to be delivered as buyer orders, the seller is entitled to have an opportunity seasonably to try to secure cars, and it is the duty of the buyer, by giving orders for delivery seasonably, to afford the seller a reasonable opportunity to perform or to endeavor to perform his contract. Id. Where a certain amount of cement is sold to be delivered within a certain time and as the buyer wants it, it is the buyer's duty to notify the seller where he wants it and in what quantities. St. Louis Expanded Metal Fireproofing Co. v. Halliwell Cement Co. [Mo. App.] 101 S. W. 128. It is essential that the buyer demand delivery under a contract requiring deliveries in such quantities as the buyer may require. Guffey Petroleum Co. v. Vicksburg Waterworks Co. [Miss.] 42 So. 284. Where goods were to be shipped in instalments in accordance with shipping directions to be given by the buyer from time to time, held the buyers were bound to give shipping instructions within a reasonable time and the seller was required to make shipments according to instructions within a like reasonable time. Salmon v. Helena Box Co. [C. C. A.] 147 F. 408.

71. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886.

73. Catlin v. Jones [Or.] 85 P. 515.

73. Hadley-Dean Glass Co. v. Highland Glass Co. [C. C. A.] 143 F. 242.

74. Where a contract provided for the

To justify a recovery upon a contract as substantially performed, the omission must be the result of mistake or inadvertance and not intentional.[75] In the absence of fraud or of provisions to the contrary, the determination of inspectors, appointed and acting under the terms of the contract, as to the quantity and quality delivered, is conclusive.[76] In the absence of provisions to the contrary, the seller performs his part of the contract by making delivery at the designated point.[77] In the absence of any stipulation or agreement as to the place of delivery, delivery to a common carrier for transportation to the buyer is delivery to the latter,[78] and it follows that under an option to purchase or return a delivery to a responsible public carrier constitutes a delivery to the offeror.[79] The phrase "f. o. b. cars" when used in a contract between a buyer and seller of commercial commodities, where the use of a common carrier is necessary, means that the seller will secure the cars, load them, and do whatever may be required to accomplish the shipment and consignment of the goods to the buyer free of expense to him.[80] Where goods are sold free on board and the carrier refuses to ship them unless freight is paid in advance, whereupon the seller pays it, he is entitled to recover the amount so paid from the buyer.[81]

(§ 7) *B. Sufficiency of delivery; actual, symbolical.*[82]—Delivery imports the passage of control over the property.[83]

(§ 7) *C. Acceptance; necessity; time; what is.*[84]—An acceptance to be good must be such as to conclude the agreement or contract between the parties, i. e., an acceptance to bind the parties must be unconditional and unqualified and intended as such where it modifies the terms of the original agreement.[85] The buyer has the right to inspect the goods before acceptance,[86] and this right must be exercised

daily delivery of tin cans to a canning factory as ordered, and the seller knew that an excessive delivery on one day was nevertheless all used on that day, he was not excused by such excessive delivery from a failure to deliver the proper amount on the succeeding day. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886.

75. Riley v. Carpenter [N. C.] 55 S. E. 628. Intentionally shipping goods sold, billed to the shipper with draft attached, is a breach of a contract that the bills were to be sent direct to the depot and on the receipt of the goods the buyer would remit to the seller. Id.

76. Where the sale of the total equipment of a telephone company provided for an inventory by third parties, experienced telephone men, and that such third parties should "be the sole judges of all values," held that the appraisement in the absence of fraud was conclusive as to the amount of material as well as the valuation, the stipulation as to values indicating merely that the valuation was to be based on the appraisers' expert knowledge. Rogers v. Rehard [Mo. App.] 97 S. W. 951.

77. Where the property is to be delivered by the seller "f. o. b. transportation companies, either at the distributing point or at the factory point," a delivery by the seller at the factory point absolves him for liability for delay of the carrier in delivering the goods to the buyer. Templeton v. Equitable Mfg. Co. [Ark.] 96 S. W. 188. Where the contract provided that the goods should be billed to a certain railroad shipping point, the seller performed his whole duty when he shipped the goods to the buyer to that point and notified him of their arrival, after which the seller was entitled to leave the goods at the place of delivery as the property of the buyer and sue him for the price. Bevins v. Coates & Sons, 29 Ky. L. R. 978, 96 S. W. 585.

78. Moneyweight Scale Co. v. Loewenstein, 103 N. Y. S. 80. See ante, § 6.

79. Returned by same carrier as shipped in the first instance. Gottlieb v. Rinoldo [Ark.] 93 S. W. 750.

80. Hurst v. Altamont Mfg. Co. [Kan.] 85 P. 551. In an action by the buyer for nondelivery, petition need not allege that plaintiff furnished cars ready to receive the goods. Id. A seller contracting to deliver goods f. o. b. cars impliedly agrees to supply the cars necessary. Elliott v. Howison [Ala.] 40 So. 1018.

81. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551.

82. See 6 C. L. 1338.

83. Delivery is not established by loading goods on cars and taking bill of lading to seller. Kitchin v. Clark, 120 Ill. App. 105.

84. See 6 C. L. 1338.

85. Acceptance of machinery under a contract to manufacture the same complete and put the same in running order before the same is completed. Rapp v. Jennings State Bank [Okl.] 87 P. 598.

86. Carload of lumber. Buyer did not know who seller was until after inspection. Armstrong v. Columbia Wagon Co. [Del.] 66 A. 366. Where goods of a particular description are ordered to be sent by a carrier, the buyer may receive them to see whether they answer the order, and there is no acceptance of the goods as long as the buyer can consistently object to them as not answering the order. Elliott v. Howison [Ala.] 40 So.

within a reasonable time.[87] Failing to so do an acceptance will be presumed.[88] It follows that loss suffered by reason of the buyer's failure to have the goods unloaded and cared for within a reasonable time after their arrival must be borne by him.[89] The question of acceptance is generally for the jury,[90] and in determining such question it may look to the circumstances of the case.[91] The necessity for acceptance largely depends upon the terms of the contract,[92] and, the goods tendered not conforming to the contract, the buyer need not accept them,[93] but if the buyer has accepted a portion of a quantity of goods contracted for and they prove inferior to those stipulated for, he cannot for this reason refuse to accept the residue, but if this residue prove inferior he may refuse to accept it.[94] Where a seller is required by an entire contract to make successive deliveries of the articles sold and the first deliveries fail to comply with the terms of the agreement either in the quality or quantity of the goods or in the times or places of delivery, the vendee by prompt notice of his refusal to further perform upon the discovery of the failure may relieve himself from liability for subsequent deliveries.[95] This, however, is not his

1018. Where under the terms of an executory contract of sale the delivery of bulky articles which require inspection and examination is to be made at a particular place, tender must be seasonably made so that the vendee, who is bound to attend for the purpose of receiving the property, may have an opportunity to examine and inspect it by daylight to ascertain whether it complies with the contract. Sale of hops. Catlin v. Jones [Or.] 85 P. 515. Where by an entire contract goods were sold and a building leased and at the time of performance the seller afforded the buyer ample opportunity to inspect the goods, and the buyer declined to avail himself stating that if not right he would return the goods but not the building and the seller thereupon refused to surrender possession, held no denial of the right of inspection. Floyd v. Arky [Miss.] 42 So. 569.

87. Elliott v. Howison [Ala.] 40 So. 1018; Ward Furniture Co. v. Isbell & Co. [Ark.] 99 S. W. 845.

88. Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845; Elliott v. Howison [Ala.] 40 So. 1018.

89. Brooke v. Baker, 123 Ill. App. 493.

90. Elliott v. Howison [Ala.] 40 So. 1018. An instruction that the unloading of the first lot of goods delivered to the buyer did not alone amount to an acceptance held properly refused as invading the province of the jury. Id.

91. On the issue whether a buyer of a specified number of pine pilings accepted a carload of piles delivered, it was competent to show the circumstances attending the unloading of the carload, together with the fact that the railroad company required that the piles be unloaded. Elliott v. Howison [Ala.] 40 So. 1018.

Shipping goods to third party in exchange for other goods held an acceptance. Williams v. Meagher [Mich.] 13 Det. Leg. N. 679, 109 N. W. 38.

92. Where in a sale of phosphate rock a certain percentage of bone phosphate rock was warranted and if the warranty was broken the contract provided for a reduction in price held on breach of warranty, the price should be correspondingly reduced though the buyer should not be required to accept the rock if it was so materially lower than the warranty so as to make the rock not reasonably suited for the purpose for which it was sold. Stono Mines v. Southern States Phosphate & Fertilizer Co. [S. C.] 56 S. E. 982. For one to order goods under a contract and then refuse to receive them constitutes a breach. Ketcham v. U. S., 40 Ct. Cl. 220.

93. If the sale is executory and the property tendered is materially different from that ordered, the buyer may refuse to accept it. Hutchinson Lumber Co. v. Dickerson [Ga.] 56 S. E. 491. Where goods received by a purchaser are not substantially the goods described in his contract, he has a right to refuse them and will incur no liability under the contract until the seller delivers or tenders the goods he engaged to deliver. Price v. Huddleston [Ind.] 79 N. E. 496. Where the goods tendered do not conform to the contract requirements, the buyer may refuse to accept them and is not required to assign any reason for his refusal. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260. If article is not reasonably fit for the purposes for which it is ordered nor substantially of the quality described in the contract, the buyer need not accept it. Armstrong v. Columbus Wagon Co. [Del.] 66 A. 366. Where plaintiff contracted to sell defendant lumber of certain grades and age, the specifications were not mere warranties but conditions precedent, which gave the purchaser the right, if the lumber was not according to contract, to reject the same or to accept and bring a cross action, or to use the breach by way of recoupment in an action by the seller for the price. Ward Furniture Co. v. Isbell Co. [Ark.] 99 S. W. 845. Evidence held to show that goods tendered conformed to the contract requirements. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260.

94. Henderson Elev. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50.

95. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. Where the contract is entire and part of the goods do not conform to the contract, the purchaser must reject all or none. Ward Furniture Co. v. Isbell & Co. [Ark.] 99 S. W. 845. Where two articles are sold by an entire contract, an acceptance of one of the articles amounts, in law, to an acceptance of both.

only remedy. He has the option, upon the discovery of the seller's default, to refuse to receive and pay for future deliveries and thus to terminate the contract or to permit its performance to proceed and to rely upon his damages for the vendor's breach.[96] But he may not delay the exercise of this choice. Delay, vacillation, silence, or the absence of an immediate notice that he will not further perform, is an election by the vendee that the performance of the contract shall proceed and that he will rely upon his claim against the vendor for damages for the breach and upon that claim alone for his remedy.[97] The contract being severable and part of the goods conforming to the contract and part not, the buyer must accept those goods which are up to the contract.[98] A buyer may not reject a delivery of goods conformable to the contract when made in time merely because there has been a prior offer of goods not receivable and rejected upon that ground.[99] Where goods are not according to the contract and the latter provides that defective goods will be replaced, the buyer is merely bound to notify the seller that the goods will not be accepted.[1]

(§ 7) *D. Excuses for and waiver of breach.*[2]—A party must fulfill all conditions precedent.[3] Nothing short of a breach of contract or actual insolvency of the buyer will excuse the seller from fulfilling the contract on his part.[4] A distinct, unequivocal, and absolute refusal by one of the parties to perform constitutes a breach of contract excusing performance by the other party.[5] Failure to pay for goods shipped under a former contract is no defense for failure to ship goods required by a later contract.[6] Where a seller has agreed to deliver the goods in instalments and the buyer has agreed to pay the price in instalments, which were proportioned payable on delivery of each instalment, default by either party with reference to any one instalment will not ordinarily entitle the other to abrogate the contract.[7] Time of delivery being of the essence, failure to deliver within the contract time authorizes the buyer to repudiate the contract.[8] As to whether a "strike clause" constitutes an excuse depends upon the wording thereof and the facts of the case.[9] A seller,

Buckeye Buggy Co. v. Montana Stables [Wash.] 85 P. 1077.

96, 97. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360.

98. Pratt & Co. v. Metzger [Ark.] 95 S. W. 451. The contract being severable, the buyer may accept part and reject part. Schiller v. Blyth & Fargo Co. [Wyo.] 88 P. 648.

99. McBath v. Jones Cotton Co. [C. C. A.] 149 F. 383.

1. Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill. App. 13.

2. See 6 C. L. 1339.

3. Conditions precedent being fulfilled, seller must deliver. Fuller v. Christian, 50 Misc. 646, 98 N. Y. S. 638. Where buyer refused to give the shipping directions as required by the contract, held the seller's failure to ship within the contract time was excused. Foote & Co. v. Heisig [Tex. Civ. App.] 16 Tex. Ct. Rep. 7, 94 S. W. 362.

4. Frohlich v. Independent Glass Co., 144 Mich. 278, 13 Det. Leg. N. 152, 107 N. W. 889. Refusal to pay unpaid account of previous year held not to justify seller in refusing to deliver. Id.

5. Frohlich v. Independent Glass Co., 144 Mich. 278, 13 Det. Leg. N. 152, 107 N. W. 889. Refusal to perform until payment of buyer's unpaid account for previous year held distinct, unequivocal, and absolute. Id. Where after entering into a contract for the purchase of glass and before the time for its delivery the buyer wrote the seller that he would not use at any price any more of a particular brand of glass, describing only a small part of the glass made by the seller, and "trust you will make the assignments with standard tank factories whose produce is up to the usual standard of quality," held not a distinct, absolute, and unequivocal refusal to receive performance. Id. A failure to tender delivery cannot be exercised unless the buyer, in anticipation, makes the clearest announcement of his repudiation of the agreement and his refusal to go on. McBath v. Jones Cotton Co. [C. C. A.] 149 F. 383. Notice by the buyer before delivery that he will not accept and pay for the goods amounts to a breach of the contract. Rounsaville v. Leonard Mfg. Co. [Ga.] 56 S. E. 1030.

6. Lestershire Lumber & Box Co. v. Ritter Lumber Co., 144 F. 568.

7. Rock Island Sash & Door Works v. Moore & Handley Hardware Co. [Ala.] 41 So. 806.

8. Frost-Trigg Lumber Co. v. Forrester [Mo. App.] 101 S. W. 164.

9. Under a strike clause one is not liable for failure to deliver on days when his employes refuse to work. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886. Where a contract for the sale of coal provided that deliveries should be subject to strikes "which might delay or prevent shipment," the seller was not excused from performance because of a strike at the mine

or a buyer rejecting without cause a part of the goods delivered under the contract, may declare the same at an end and is not required to proceed further.[10] Where goods are bought and sold, the original buyer may terminate the contract with his buyer for breach by the latter without any act on the part of the original seller.[11] A breach of the contract may be waived,[12] the question being one of intent depending upon the facts of the case.[13] Acquiescence in breach bars recovery therefor.[14] The mere acceptance of a purchased article after the agreed time of delivery does not constitute a waiver of damages for failure to deliver in time, unless such acceptance is accompanied by other circumstances which manifest an intention on the part of the buyer to waive such damages.[15]

§ 8. *Warranties and conditions. A. In general. Nature and distinctions. Descriptions and representations.*[16]—A warranty is an agreement collateral to the contract [17] and must be supported by a consideration,[18] though it has been held that on the sale of personal property a warranty of its quality is not a separate and independent contract but is one of the terms of the contract of sale.[19] No particular words are necessary to create a warranty.[20] Every affirmation made by the seller, as a fact, at the time of a sale, and as an inducement to the sale, if relied upon by the buyer, amounts to a warranty.[21] The point of distinction being as to whether the representations during the treaty of sale are direct and positive affirmations of a question of fact, or whether they are the mere expressions of opinion, it

which did not prevent or delay shipments of coal, but merely increased the cost of production and the cost to the seller, and its refusal to make deliveries for that reason was a breach of the contract. Cottrell & Son v. Smokeless Fuel Co. [C. C. A.] 148 F. 594.

10, 11. Aaron & Co. v. Smith Co. [Tex. Civ. App.] 100 S. W. 347.

12. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008.

13. Where the goods shipped do not conform with the contract, in order to waive the breach it must appear that the goods shipped were accepted in lieu of those that ought to have been sent. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551. There is no waiver of plaintiff's right to damages for defendant's wrongful rejection of a car of corn bought by it from the fact that plaintiff's agent, sent to resell the corn when it was rejected, resold it to defendant, its offer being the best made. Arkansas & Texas Grain Co. v. Young & Fresch Grain Co. [Ark.] 96 S. W. 142. One who sells a car of corn does not waive his right to damages for wrongful rejection by his giving the purchaser, after the arrival of the car, the right to inspect the corn, he having refused to accept unless this was granted. Id. Where no objection was made by the purchaser of cattle to passing on the quality of the cattle offered because the entire number was not delivered at the time, he cannot claim that the seller did not comply with his contract because he did not offer for inspection the entire number of cattle he agreed to deliver. William Hanley Co. v. Combs [Or.] 87 P. 143. A contract bound defendant to furnish a specific kind of lumber within a reasonable time. Defendant failed to do so and wrote to plaintiff excusing his failure and advising plaintiff to look elsewhere for the lumber. Plaintiff replied by stating that he had been depending on defendant and would ask him to use every exertion possible to furnish the lumber at an early date. Held that plaintiff waived the breach. Crane v. Barron, 100 N. Y. S. 937.

14. Ketcham v. U. S., 40 Ct. Cl. 220.

15. Johnson v. North Baltimore Bottle Glass Co. [Kan.] 88 P. 52. An acceptance of goods not delivered within the contract time does not necessarily preclude a claim for damages on account of the delay. Beyer v. Henry Huber Co., 100 N. Y. S. 1029.

16. See 6 C. L. 1341.

17. Bagley v. General Fire Extinguishing Co. [C. C. A.] 150 F. 284.

18. Warranty made after giving of option to buy held not supported by consideration. Manasquan Gravel Co. v. Sandford Ross [N. J. Law] 63 A. 1091.

19. McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467.

20. Ellison v. Simmons [Del.] 65 A. 591. Neither the word "warranty" nor any other particular phraseology is necessary. Childs v. Emerson, 117 Mo. App. 671, 93 S. W. 286. No particular form of expression is necessary to constitute a warranty. It is a question of intention from the words used and the circumstances of the case. Forster, Waterbury & Co. v. Peer, 120 Ill. App. 199.

21. Ellison v. Simmons [Del.] 65 A. 591. So held as to affirmation that horse was sound and all right. Id. A statement of a salesman of a seller of automobiles that the tires of the machine were as good as new held merely an expression of their condition and not a statement of a present existing fact necesary to constitute a warranty. Warren v. Walter Automobile Co., 50 Misc. 605, 99 N. Y. S. 396. There must be a positive affirmation, not made as a matter of belief or opinion, for the purpose of assuring the buyer of the truth of the fact affirmed and inducing him to make the purchase, and which is so received and relied upon by the purchaser. Forster, Waterbury Co. v. Peer, 120 Ill. App. 199.

is always, after all, a matter of contract between the parties, and the decisive question is the real intention as to whether the affirmation of fact was made for the purpose of inducing the purchase in the one instance and whether it was relied upon by the purrhaser in the other.[22] There is a conflict as to whether words of description constitute a warranty; the true rule would appear to be that the intention of the parties governs.[23] Where a written order excluding warranties is given and canceled and the sale then made orally, oral warranties made at such time are valid and binding.[24] An agreement to replace or repair is not a warranty.[25] Except where the existence of the warranty depends upon the terms of the contract,[26] the question is one for the jury.[27]

(§ 8) *B. Express and implied warranties and fulfillment or breach thereof.*[28] In the absence of express or implied warranties, the rule of caveat emptor applies.[29] In the absence of fraud or mistake, parol evidence is inadmissible to add a warranty to a complete written contract of sale,[30] or to add to an unambiguous writing facts which may aid the implication of a warranty.[31] And while a written contract supersedes prior oral negotiations,[32] still an oral warranty being made the fact that the buyer receives and retains from the seller a writing containing a different warranty does not show his assent thereto but the terms of the original warranty may be shown by parol.[33] A warranty is express where the seller makes some positive representations or affirmation with respect to an article to be sold pending the treaty of sale, upon which it is intended that the buyer shall rely in making his purchase.[34]

22. Childs v. Emerson, 117 Mo. App. 671, 93 S. W. 286. Where seller's agent stated that buyer could not be compelled to take goods ordered from others as the orders had not been legally approved, held mere matter of opinion. Nichols & Shepard Co. v. Horstad [S. D.] 109 N. W. 509. Where seller told purchaser's agent he did not know market value of property but relied on agent's statement of same, held agent's statement of market price was a statement of fact and not merely an expression of opinion. American Hardwood Lumber Co. v. Dent [Mo. App.] 98 S. W. 814. Where a quantity of oil was sold and the seller agreed not to make any more contracts until this one was fulfilled, held a representation by the seller as to the amount of oil at the time of executing the contract was binding on the seller and, though not true, he was obliged to account for so much oil. Crusel v. Tierce [La.] 42 So. 940. A statement by the seller of fruit trees after having explained to the buyer that they had not been very well taken care of and were of the cheapest grade, that they were good trees if taken care of, amounted merely to an expression of an opinion and did not constitute a warranty of merchantableness. Brackett v. Martens [Cal. App.] 87 P. 410.

23. While words of description may amount to a warranty, before they should be so held, it must be made to appear clearly that they were so intended by the parties. Central Mercantile Co. v. Graves [Kan.] 88 P. 78. Words descriptive of the subject-matter of the sale and the time of shipment are ordinarily to be regarded as a warranty. Henderson El. Co. v. North Georgia Milling Co., 126 Ga. 279, 55 S. E. 50. Mere words of description in an executory contract of sale do not amount to a warranty. Staiger v. Soht, 102 N. Y. S. 342. For a variance between the article delivered and the article described, the remedy is for breach of the contract of sale and does not survive acceptance of the goods where the defects are patent. Id.

24. Hooven & Allison Co. v. Wirtz [N. D.] 107 N. W. 1078.

25. Puritan Mfg. Co. v. The Emporium, 130 Iowa, 526, 107 N. W. 428.

26. Register-Gazette Co. v. Larash, 123 Ill. App. 453.

27. Forster, Waterbury & Co. v. Peer, 120 Ill. App. 199.

28. See 6 C. L. 1343.

29. Dorsey v. Watkins, 151 F. 340.

30. McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467. Contract held complete in itself. Id. When a contract is in writing, an additional warranty not expressed nor implied by its terms, that the article is fit for the particular use, cannot be added by implication. Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555.

31. Detroit Shipbuilding Co. v. Comstock Co., 144 Mich. 576, 108 N. W. 286. In the sale of a boiler representations that the boiler would give greater capacity, steam pressure, power, and economy than the old boiler owned by the buyer, held at most evidence of a parol warranty. Id.

32. Where several defendants buying a horse understood that the conversations had with them by the agent of the seller were tentative, and that the sale was only to be consummated after the required number of buyers had been obtained, and then only when they had formed a voluntary associatlon, the written contract of warranty given at a meeting at which the association was formed superseded the oral warranties made in such conversations. Dunham v. Salmon [Wis.] 109 N. W. 959.

33. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428.

34. Childs v. Emerson, 117 Mo. App. 671, 93 S. W. 286, quoting from Biddle on War-

An indorsement on a bill of sale by the buyer in reselling chattels guarantying their delivery is not a warranty of title.[35] A warranty by a duly authorized agent is binding on the principal,[36] but the warranty being so made, the buyer to enforce it must prove either that the agent had express authority to make it, or that such sales are usually attended with such a warranty.[37] In many states the rule is stated generally that an express warranty excludes implied warranties,[38] in others the rule is limited to implied warranties as to the same obligation,[39] and in others the rule is held to exclude all implied warranties except those of title.[40] An agreement to replace or repair is not a warranty [41] and does not prevent reliance by the buyer upon oral warranties and representations as to quality or particular description.[42] Warranties are sometimes implied by statute regardless of the fact that the contract provides for more.[43] Where several persons join in purchasing an article, it would seem as though there could be no warranty unless made to all,[44] and proof that an oral warranty was made to one of several buyers raises no presumption that it was made to the others.[45]

Except where implied warranties are prohibited by statute or the terms of the sale,[46] a manufacturer impliedly warrants that the article sold is merchantable,[47] free from latent defects arising from the manner in which the article was manufactured, and not discoverable upon ordinary examination,[48] and if ordered for a

ranties for the Sale of Chattels. Petition alleging that defendants agreed that the combination mattresses sold "should and were to be of first class style, make and pattern and suitable for a first class hotel business and were to be of a first class grade and condition, and that plaintiff therefor agreed to pay a first class price," held to allege an express warranty. Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919. Representation that bonds were valid held to constitute an express warranty that they had a valid legal existence as securities. Union Bank v. Oxford, etc., R. Co. [C. C. A.] 143 F. 193.

35. Pincus v. Muntzer [Mont.] 87 P. 612.

36. Ellison v. Simmons [Del.] 65 A. 591.

37. Dunham v. Salmon [Wis.] 109 N. W. 959.

38. Springer v. Indianapolis Brewing Co., 126 Ga. 321, 55 S. E. 53; International Harvester Co. v. Dillon, 126 Ga. 672, 55 S. E. 1034; Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555; Thomas v. Thomas [Ala.] 41 So. 141. Contract for installation of sprinkler system. Bagley v. General Fire Extinguishing Co. [C. C. A.] 150 F. 284. Express warranty of title held to exclude any warranty of quality. McNaughton v. Wahl, 99 Minn. 92, 108 N. W. 467. In a suit to recover the purchase price of goods sold under an express warranty, with a plea of partial failure of consideration, the issues presented are whether the goods delivered were of the quality waranted and if not, to what extent the purchase price is to be abated. Springer v. Indianapolis Brewing Co., 126 Ga. 321, 55 S. E. 53. Where a contract for the manufacture of machines provided that the manufacturer should make the machines like a certain sample, and he expressly refused to assume responsibility for the working of the machines, but agreed to make good any defects in workmanship or material when called upon, there was no implied warranty that the machines should be fit for the purposes for which they were to be used. Monroe v. Hickox, Mull & Hill Co., 144 Mich. 30, 13 Det. Leg. N. 123, 107 N. W. 719.

39. Warranty against defects in cans during process of canning held to exclude implied warranty as to defects discovered after canning. Wasatch Orchard Co. v. Morgan Canning Co. [Utah] 89 P. 1009.

40. International Harvester Co. v. Smith, 105 Va. 683, 54 S. E. 859.

41, 42. Puritan Mfg. Co. v. The Emporium, 138 Iowa, 526, 107 N. W. 428.

43. Implied in written contract containing no warranties and providing that oral warranties would not be recognized. Hooven & Allison Co. v. Wirtz [N. D.] 107 N. W. 1078. Balls of twine are within the meaning of statutes providing for an implied warranty of soundness in a sale of goods inaccessible to examination. Rev. Codes 1899, § 3978 construed. Id.

44, 45. Dunham v. Salmon [Wis.] 109 N. W. 959.

46. On a sale for charges by warehousemen of unclaimed goods, there is no implied warranty to the purchaser that cases listed in the catalogue as "German dyestuff" contained such commodity; the commencement in the catalogue: "Buyers beware. Examine the goods before buying, as the description on this catalogue and contents of package are not guaranteed. The goods are sold as they are at time of sale, and no allowance will be made for any cause," having been read at the sale. Hirsh v. Duval Co., 101 N. Y. S. 35. See supra this subdivision, Express Warranty Excludes Implied.

47 Sale of flour. Glasgow Milling Co. v. Burgher [Mo. App.] 97 S. W. 950. Sale of corn. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949.

48. Inherent defects resulting from process of manufacture or inherent in the materials used. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617.

special purpose, that it is reasonably fit for such purpose,[49] unless the article is known, described, or defined,[50] though in this latter case there is an implied warranty that the article delivered or furnished complies with the description.[51] Within the rules just stated, a quarryman would seem to be a manufacturer.[52] There is a conflict as to whether or not there is an implied warranty of quality by a seller who is not the manufacturer.[53] In order to recover on an implied warranty one must have been justified in relying thereon.[54] An implied warranty does not arise merely because the seller or manufacturer is personally wiser, more learned, or more experienced, than the purchaser. It is entirely impersonal.[55] It assumes in the case of a manufactured article coming within the rule of implied warranty that the manufacturer has made it and sold it to do the work for which it was intended, in legal effect contracting that it will do such work.[56] This excludes all known experimental devices, all additions or annexations to another machine not manufactured or delivered by the seller, where the capacity to do the work intended must be the joint product of the new device and the old machine.[57] The buyer having equal knowledge with the seller who is not the manufacturer, no implied warranty of fitness arises.[58] One manufacturing special machinery under a warranty is in duty bound to avail himself of any and all knowledge he can reasonably obtain of the character

49. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617; Bagley v. General Fire Extinguishing Co. [C. C. A.] 150 F. 284; Oil Well Supply Co. v. Davidson, 8 Ohio C. C. (N. S.) 417. Sale of corn. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949. Instruction making the implied warranty that they would be reasonably fit for "some" purpose "or" in a merchantable condition, held erroneous. Id. On the sale of a boiler for a steamship it is the duty of the seller to furnish one reasonably suitable for supplying a sufficient quantity of steam to the engine. Detroit Shipbuilding Co. v. Comstock, 144 Mich. 516, 108 N. W. 286. In sales of goods where the purchaser has had no opportunity to inspect them, there is an implied warranty that they are reasonably fit for the purpose for which they are ordinarily used; and when they are, under such circumstances, purchased for a particular purpose known to the seller, there is an implied warranty that they are fit for such purpose. Grapes bought for shipment and resale. Truschel v. Dean, 77 Ark. 546, 92 S. W. 781.

50. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617. Where a known, described, and defined, article is ordered of the manufacturer, although it is stated to be required by the purchaser for a particular purpose, still if the known, described and defined thing be actually supplied, there is no warranty that it shall answer the particular purpose intended by the buyer. Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555. Rule applied to sale of automatic water-wheel governor. Id. Sale of a "Huntington Mill" of the "latest improved" pattern. Mine Supply Co. v. Columbia Min. Co. [Or.] 86 P. 789. When, in a contract for the sale of machinery, its power and capacity are expressly described, there is no implied warranty that it will be adequate to the purpose for which it is to be used, though that purpose is known by the vendor at the time of making the contract. Cleveland Punch & Shear Works Co. v. Consumers Carbon Co. 75 Ohio St. 153, 78 N. E. 1009. Where steel bars of a specified size were used, the fact that the size of such bars was not adequate for the use to which they were to be put is immaterial, where the defense is that the bars were not of the size ordered. Froment v. Mugler, 99 N. Y. S. 877.

51. Braun & Ferguson Co. v. Paulson, [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617; Mine Supply Co. v. Columbia Min. Co. [Or.] 86 P. 789. Rule applied to a sale of a "Huntington Mill" of the "latest improved" pattern and the delivery of a mill of an old style. Id. Sale of a jack. Childs v. Emerson, 117 Mo. App. 671, 93 S. W. 286. Tone and character of marble being specified held a matter of description and warranted. Rhind v. Freedley [N. J. Law.] 64 A. 963. The article being sold by a particular description it is a condition precedent to the seller's right of action that the article delivered conform to the description. Elliott v. Howlson [Ala.] 40 So. 1018.

52. Rhind v. Freedley [N. J. Law.] 64 A. 963.

53. That there is not. Pascal v. Goldstein, 100 N. Y. S. 1025. Inherent defects in spur wheel. Howard Iron Works v. Buffalo El. Co., 113 App. Div. 562, 99 N. Y. S. 163. That there is. Where a "Filler" cable was sold for use in drilling wells held there was an implied warranty that it was fit for such purpose. Oil Well Supply Co. v. Watson [Ind.] 80 N. E. 157.

54. Where machine did not correspond to blue prints as the buyer's employes well knew, held no right to rely on warranty. Merrimac Chem. Co. v. American Tool & Mach. Co. [Mass.] 78 N. E. 419.

55, 56. Logeman Bros. Co. v. Preuss Co. [Wis.] 111 N. W. 64.

57. So held where an attachment for punching and riveting steel strips was attached to an old press. Logeman Bros. Co. v. Preuss Co. [Wis.] 111 N. W. 64.

58. Where the purchaser of a herd of dairy cows was a competent judge of such property and with full opportunity and ample time inspected the herd before pur-

of the buildings and the place where the machine is to be located and the purposes for which it is to be used, and to perform the work in accordance with such condition.[59] In a sale by sample there is a warranty that the goods will conform to the sample,[60] but not that they will be suitable for the buyer's use.[61] The exhibition of a sample to the purchaser at the time of the sale does not make a sale by sample, in the absence of a showing that the parties contracted solely with reference to the sample, or that they mutually understood that the bulk of the commodity should correspond with it.[62] Where the quality of the article is represented by description and specimen, the sale is not one by sample.[63] Where goods of a certain brand and quality are sold and the buyer afterwards orders another shipment of the same brand and quality, which order is accepted and the goods shipped thereon, the seller warrants the last shipment to be of equal quality with the first.[64] In the sale of a by-product it would seem that there is no implied warranty that the quality will continue to be the same as at the time of the sale.[65] A warranty of title and against incumbrances is implied.[66] No warranty of soundness or wholesomeness arises from a sale of food provisions to a dealer or middleman, who buys not for consumption but for sale to others,[67] and a purchase from the dealer cannot hold the original seller to a higher degree of duty than that cast upon him by the common law with respect to his own vendee,[68] but the rule is otherwise in a sale of articles of food for immediate use.[69] A retailer of illuminating oil must be held to contemplate that it will be used in the ordinary and usual lamps in the households of purchasers, and where the oil sold is not of the quality called for, but is unfit and dangerous for such purpose, the seller is liable for an injury resulting from such ordinary use to a member of the purchaser's family.[70] Cases dealing with the sufficiency of evidence to show a warranty are shown in the notes.[71]

A warranty will be limited to the matters [72] imported by its terms.[73] Where machinery is warranted to do certain work, the warranty is fulfilled when the machine

chasing, no warranty of the fitness of the animals for dairy purposes can be implied. Dorsey v. Watkins, 151 F. 340.

59. Ice plant. Wilmington Candy Co. v. Remington Mach. Co. [Del.] 65 A. 74.

60. Implied warranty. Keeler v. Paulus Mfg. Co. [Tex. Civ. App.] 16 Tex Ct. Rep. 842, 96 S. W. 1097; Walter Pratt & Co. v. Metzger [Ark.] 95 S. W. 451; Giffen v. Selma Fruit Co. [Cal. App.] 89 P. 855; Main Co. v. Fields [N. C.] 56 S. E. 943. A sale by sample amounts to an express warranty, even without express words of affirmation. Staiger v. Soht, 102 N. Y. S. 342.

61. Pratt & Co. v. Metzger [Ark.] 95 S. W. 451. Where a manufacturer of bricks submits to his customers a number of bricks as samples, and stipulates to sell others as good in quality, such stipulation amounts to an express warranty that the bricks sold and to be delivered will be of as good quality as the sample submitted. Carolina Portland Cement Co. v. Turpin, 126 Ga. 677, 55 S. E. 925.

62. Pascal v. Goldstein, 100 N. Y. S. 1025.

63. Hence Act Pa. April 13, 1887 (P. L. 21) does not apply. Cox v. Andersen [Mass.] 80 N. E. 236.

64. Springer v. Indianapolis Brewing Co., 126 Ga. 321, 55 S. E. 53.

65. Sale of screenings of a flour mill. Listman Mill Co. v. Miller [Wis.] 111 N. W. 426.

66. Mason v. Bohannan [Ark.] 96 S. W. 181. Title failing, buyer may recover purchase price with interest. Caproon v. Mitchell [Neb.] 110 N. W. 378.

67. Tomlinson v. Armour & Co. [N. J. Law.] 65 A. 883.

68. Tomlinson v. Armour & Co. [N. J. Law.] 65 A. 883. Declaration alleging that defendant had packed diseased ham in a can and had sold it to a retail dealer of whom it was bought by the plaintiff who from eating a piece of such ham became sick, held demurrable. Id.

69. Milk. Carpenter v. Crow, 77 Ark. 522, 92 S. W. 779.

70. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829.

71. Evidence as to oral warranty held sufficient to go to the jury. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428.

72. See 6 C. L. 1346.

73. Representation that automobile had fusible plug—all of the sellers 1903 cars having such plugs while the 1902 cars were without such equipment, held to amount to a representation that the car sold was a 1903 car. Grout v. Moulton [Vt.] 64 A. 453. Where salesman of automobile represented to the buyer that the tires of the machine were fine tires of a particular make and as good as new and the buyer knew that the automobile had been used in a rock-climbing contest and had gone about 250 miles, held not to show a warranty of the tires. Warren v. Walter Automobile Co., 50 Misc. 605, 99 N. Y. S. 396. A written warranty that an engine will work satisfactorily and

is put into condition to do the work for a reasonable time, without breaks due to accident, and until, in due course, the wear of the machinery would tell on its work.[74] An agreement to set a machine up and put it in good working order does not amount to a warranty that the machine when put in order will do the particular work for which the buyers require it.[75] In considering the assets of a corporation with a view to determining the value of the stock, the face or prima facie value of a promissory note at any point of time is the principal with the interest then accrued.[76] It does not include unearned interest, and this is true, even though the unearned interest has in form been added to the face of the note.[77]

(§ 8) *C. Conditions and fulfillment or breach.*[78]—Conditions must be substantially complied with.[79] Cases dealing with the existence [80] and construction [81] of con-

develop specified power is a warranty that the engine will work satisfactorily in all respects and the warranty is not limited to the development of power only. Houghton Impl. Co. v. Vavrousky [N. D.] 109 N. W. 1024. Warranty that heating apparatus would heat the rooms of a building to 70 degrees Fahr., but that the seller did "not guarantee the warming of the corridors to seventy degrees, providing the corridors are more than one story high," held to imply that the corridors were to be heated to some extent. American Foundry & Furnace Co. v. Board of Education [Wis.] 110 N. W. 403. Where a mare, on being put up for sale, was warranted sound, any disease or infirmity not visible or palpable at the time of the sale which impaired her value or usefulness, constituted a breach of the warranty whether the owner had knowledge thereof or not. Ellison v. Simmons [Del.] 65 A. 591. A bolter was guaranteed, in connection with other machinery in a mill, to produce fifty barrels of flour per twenty-four hours, and as good results as that of any other mill using an equivalent amount of machinery and milling like grade, quantity, and quality, of wheat. Held the guaranty contemplated, not only the quantity of flour the mill was capable of producing, but embraced all matters affecting the question of the profitableness of the work done by the mill. Sprout v. Hunter [Ky.] 98 S. W. 1006. In an action for damages by the overflow of a sprinkler system, the fact that certain sprinkler heads located under a skylight fused from the direct rays of the sun, held insufficient to establish that the work was not performed in a "workmanlike manner," the fusing being largely due to the closing of certain ventilators. Bagley v. General Fire Extinguishing Co. [C. C. A.] 150 F. 284. Evidence held to show breach of warranty of value of certain bank stock. Robertson v. Moses [N. D.] 108 N. W. 788. Evidence held sufficient to show breach of warranty of engine. Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265. Evidence held to show breach of warranty of heating plant. American Foundry & Furnace Co. v. Berlin Board of Education [Wis.] 110 N. W. 403. Evidence held sufficient to show breach of express warranty that mule was gentle. Long v. Mitchell, 126 Ga. 841, 55 S. E. 1033.

74. Sprout, Waldron & Co. v. Hunter [Ky.] 98 S. W. 1006.

75. McSwegan v. Gatti-McQuaid Co., 50 Misc. 338, 98 N. Y. S. 692.

76, 77. Robertson v. Moses [N. D.] 108 N. W. 788.

78. See 6 C. L. 1347.

79. Where the seller agreed to deliver a bond to secure performance of his part of the business, a mailing of the bond to a banker at the buyer's place of business, but with no instructions as to delivery, held insufficient. Loveland v. Steenerson, 99 Minn. 14, 108 N. W. 831. Where a contract for the sale of jewelry required the sellers to give a bond to secure the faithful performance of their part of the contract, including a guaranty to the buyer of certain specified profits on the sale of the goods, held the provisions regarding the bond were a substantial part of the contract, a breach of which justified a return of the goods. Id. Where there was a contract for the sale of bottles and the seller notified the buyer that it was impossible for it to perform certain conditions, and the buyer insisted on performance and made a claim for damages, and the seller at the buyer's request delivered the molds to another manufacturer, held an inexcusable breach by the seller. Earnshaw v. Whittemore [Mass.] 80 N. E. 520.

80. Evidence held insufficient to show that cattle were sold subject to inspection. Bennett v. Thuett, 98 Minn. 497, 108 N. W. 1. Where buyers' agent telephoned buyer in the presence of the secretary of the seller, a corporation, that the seller could deliver promptly, and the buyer replied that in that case to buy, and the sale was therefore made, held that the evidence warranted a finding that the seller assented to the condition as to prompt deliveries. Pittsburgh & Ohio Min. Co. v. Scully, 145 Mich. 229, 13 Det. Leg. N. 476, 108 N. W. 503.

81. In a contract for the sale of rolled gold plate jewelry, providing that if the jewelry furnished thereunder did not "wear well" or "sell readily," the seller would exchange the same and replace the articles thus deficient by others, a provision that the purchaser waived the right to claim a failure of consideration without first exhausting the terms of the contract as to exchange, held to apply only to articles of jewelry not wearing well or not selling readily, and not to articles different in kind and quality from those ordered. Loveland v. Steenerson, 99 Minn. 14, 108 N. W. 831. A contract bound a manufacturer to sell goods to a buyer. It stipulated that the buyer should make specifications for all goods to be taken under the contract in time to allow for their manufacture and delivery prior to a specified time. Held that, as the stipulation was for the benefit of the manufacturer it was not required to manufac-

ditions are shown in the notes. Conditions precedent must be performed [82] and in order to take advantage of a protective condition, one must have fulfilled his part of the contract.[83] No time being fixed for the performance of a condition, a reasonable time is allowed.[84] Where an article is to be satisfactory to the buyer, the latter is, in general, the sole arbiter of a performance of the agreement and is entitled to relieve himself from liability by expressing dissatisfaction within a reasonable time,[85] and this is true though the article would be satisfactory to a reasonable or ordianry person.[86] In such cases, however, the purchaser must be dissatisfied in good faith and not pretend to be so on selfish or dishonest grounds.[87] Where the property is to be satisfactory to a designated party, the latter's action, in the absence of fraud or such gross mistake as would necessarily imply bad faith or a failure to exercise an honest judgment is conclusive upon the parties,[88] and this right is not lost by failure to make objections as the work progresses.[89] An agreement to return if unsatisfactory is satisfied when an offer to return is made and refused.[90] Where a contract requires notice before shipment, a notice timely sent through the mail in a postpaid wrapper, duly addressed to the buyer, constitutes a sufficient performance of the condition.[91] A condition providing for notice of defects or variance from "order" is held not applicable to a fraudulent shipment of low grade goods instead of high grade goods.[92] The fulfillment of the condition must be consistent with honesty.[93]

(§ 8). *D. Conditions on a warranty.*[94]—A contract of sale may fix conditions precedent to the existence of any rights under the warranty if they are reasonable,[95] and a failure by the buyer to comply with such conditions is fatal to his remedy for a breach of the warranty, whether he institutes an action himself or sets up the breach in defense of an action for the purchase money.[96] Where goods are bought for resale to a third person, an express warranty is not by implication conditional that

ture the goods after the buyer's failure to specify the goods desired, but could treat the contract as breached by the buyer and sue therefor. Florence Wagon Works v. Kalamazoo Spring & Axle Co., 144 Ala. 598, 42 So. 77.

82. Where contract for the sale of mill machinery provides for a millrun test under certain conditions before the payment of the price, held such provision was not collateral and the prescribed test must be made or waived before an action for the price can be maintained. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559. Where contract gave exchange privilege for goods not selling readily and provided that seller would, upon compliance by the purchaser of all the terms of the contract, repurchase goods unsold if the profits on those sold did not net a certain sum, held the purchaser's exercise with reasonable diligence of the right of exchange was a condition precedent to the right to enforce the repurchase agreement offer. Johnson County Sav. Bank v. Hutchinson [Mo. App.] 97 S. W. 630.

83. A provision in a contract for sale of machinery that the seller should not be responsible for repairs or alterations unless made with its written consent or liable for damages on account of delays caused by such repairs or alterations is enforceable only where the seller has fulfilled his part of the contract. Held not enforceable, seller having failed to deliver machine of the kind ordered. Mine Supply Co. v. Columbia Min. Co. [Or.] 86 P. 789.

84. Filing or bond. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628. It is doubtful if three weeks is a reasonable time within which to file a bond but six weeks is not as a matter of law. Id.

85. Tatum v. Geist [Wash.] 89 P. 547. Where immediately on receipt the buyer expressed his dissatisfaction and continued to do so until machine was burned, held no acceptance, the buyer in answer to a letter asking for payment having desired liability because of defects in the machine. Id.

86, 87. Garland v. Keeler [N. D.] 108 N. W. 484.

88, 89. Ark-Mo Zinc Co. v. Patterson [Ark.] 96 S. W. 170.

90. Civ. Code § 1496, considered. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665.

91. Frontier Supply Co. v. Loveland [Wyo.] 88 P. 651.

92. Elgin Jewelry Co. v. Withaup & Co., 118 Mo. App. 126, 94 S. W. 572.

93. Where hay is to be sold according to weight and certain scales are insisted on by the seller and subsequently found to be incorrect, the buyer is entitled to refuse to take any more hay until a new scale is agreed upon or the old one fixed. Allen v. Rushforth [Neb.] 110 N. W. 687.

94. See 6 C. L. 1348.

95. Main Co. v. Griffin-Bynum Co., 141 N. C. 43, 53 S. E. 727.

96. Condition as to notice. W. F. Main Co. v. Griffin-Bynum Co., 141 N. C. 43, 53 S. E. 727; International Harvester Co. v. Dillon, 126 Ga. 672, 55 S. E. 1034; Payne v. Bowie Lumber Co., 117 La. 107, 41 So. 431. Notice of breach required within five days after delivery. Pratt & Co. v. Metzger [Ark.] 95 S. W. 451. Production or return of article made a condition precedent. Wasatch Or-

such third person will accept the goods.[97] The burden is on the buyer of showing a compliance with such conditions.[98] The warranty being broken and conditions precedent being complied with, the buyer has a cause of action for damages.[99] Where by the conditions of a warranty possession for a certain time is made conclusive evidence of the fulfillment of the warranty, the "possession" mentioned is held to mean a possession coupled with a possibility or opportunity of using or testing the property for the uses and purposes to which it is to be applied.[1] Where the contract provides for a test to show the fulfillment or breach of the warranty, a test made while the articles are in such condition that they can be fairly tested is sufficient.[2] The contract making a warranty to be determined by a test to be made by an expert named, but not specifying the kind of test, leaves that question to be determined by the expert in case more than one kind of test is known and used.[3] A warranty that a machine will work satisfactorily means that it will work satisfactorily to the purchaser.[4] Storing the goods and notifying the seller that they are subject to his order does not constitute a return.[5] Constructions placed on various conditions are shown in the notes.[6]

(§ 8) *E. Waiver of warranties and conditions; excuse for breach.*[7]—In ordinary contracts for the sale of goods to be shipped by the seller to the buyer, it is the duty of the buyer to inspect and accept or reject the goods sent him in a reasonable

chard Co. v. Morgan Canning Co. [Utah] 89 P. 1009. Where a warranty provided that on proof of breach and return of the article at certain time and place the seller would exchange the article sold, and the buyer did not return or offer to return the article at such time or place, he cannot rely on a breach of warranty. Dunham v. Salmon [Wis.] 109 N. W. 959. Notice of defects being a condition precedent to liability on the warranty, it must be given before advantage can be taken of the breach. Hanson v. Lindstrom [N. D.] 108 N. W. 798. Sale of fire hose warranted to stand a certain pressure test on delivery held not to require such test as a condition precedent to recovery on the warranty. Gutta Percha & Rubber Mfg. Co. v. Cleburne [Tex. Civ. App.] 95 S. W. 1131. Where a contract for the manufacture of machines provides that the manufacturer will make good any defects in workmanship or material when called upon, no action will lie because of defective materials or workmanship until the manufacturer has been notified thereof and given an opportunity to remedy the defects. Monroe v. Hickox, 144 Mich. 30, 13 Det. Leg. N. 123, 107 N. W. 719. Where warranty provided that if machine was not satisfactory it should be returned and money repaid, and buyer notified seller of defect and the seller directed the buyer to find out how much it would cost to fix it, held buyer could not retain the machine and defend an action for the price upon the ground that it was unsatisfactory. Stone v. Victor Elec. Co. [Colo.] 85 P. 327.

97. Wise v. Wilby, 30 Pa. Super. Ct. 484.

98. Nichols & Shepard Co. v. Miller [Neb.] 107 N. W. 1010; International Harvester Co. v. Dillon, 126 Ga, 672, 55 S. C. 1034.

Evidence held to show that conditions of the warranty as to notice and return of the machine had been complied with. Case Threshing Mach. Co. v. Balke [N. D.] 107 N. W. 57.

99. Where warranty provided that if breach was discovered within five days notice should be given the seller and he should be allowed a reasonable time to remedy the defect, and if after such notice and opportunity the machine could not be made to fulfill the warranty it should be returned, held if the buyer under this contract returned the machine he would have a cause of action against the seller for his damages. Wisdon v. Nichols & Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18.

1. Sale of threshing machine. Harrison v. Russell & Co. [Idaho] 87 P. 784.

2. Arkwright Mills v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783.

Note: It would seem, however, that if the test was delayed any considerable time that rescission would not be allowed but that the buyer's sole remedy would be an action for damages. See Arkwright Mills v. Aultman & Haylor Mach. Co. [C. C. A.] 145 F. 783.

3. Arkwright Mills v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783.

4. Houghton Impl. Co. v. Vavrousky [N. D.] 109 N. W. 1024.

5. International Harvester Co. v. Dillon, 126 Ga. 672, 55 S. E. 1034.

6. Condition in warranty of beet pulp dryer that the warranty was based on the pulp when delivered to the dryer carrying about 80 per cent of moisture and to be throughly disintegrated held to apply equally to subsequent warranties as to previous ones. Cummer & Sons Co. v. Marine Sugar Co. [C. C. A.] 146 F. 240. A contract for the sale of a traction engine contained a special warranty as to its capacity and in another portion of the instrument there was a general warranty as to material, construction, etc., followed by conditions providing that notice of the failure of the engine to fill "this" warranty should be given the seller and making possession by the buyer for ten days conclusive evidence of the fulfillment of the warranty. Held that these conditions had no reference to the special warranty. Lindsay v. Fricke [Wis.] 109 N. W. 945.

7. See 6 C. L. 1348.

time,[8] and this is true where the goods are delivered to a duly authorized agent but never in fact delivered by the purchaser himself.[9] For the purpose of inspection he has the right to receive the goods and do whatever is necessary to make a proper inspection, and such acts will not constitute an acceptance of the goods on his part, and if, on inspection, they turn out to be defective, the buyer has the right to reject them.[10] But the parties can make whatever contract they please regarding the inspection and acceptance of goods sold, and, when made, their contract will govern,[11] and such conditions are generally held to be of the essence of the contract,[12] and hence, becoming impossible of performance,[13] and not being waived or disregarded by the parties,[14] the contract falls, though in this connection one may become estopped to take advantage of the waiver or disregard of the condition.[15] An express warranty survives acceptance[16] unless the buyer at the time of acceptance has knowledge of the defects,[17] and, while the buyer must ascertain the defects and notify the seller thereof within a reasonable time,[18] he is not obliged to inspect the goods before acceptance,[19] nor is there any obligation on him to return the goods in order to enforce the warranty.[20] The warranties which the law implies or exceptions to the rule of "caveat emptor" do not survive acceptance where the defects are patent,[21] otherwise, if latent.[22] Owing to the question being largely one of

8. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. Three months' delay held to raise question as to whether or not defects were waived. Levy v. Redfern, 102 N. Y. S. 494.

9. Delivery to drayman. Harris v. Pellenz [Mich.] 13 Det. Leg. N. 875, 109 N. W. 1044.

10. Western Const. Co. v. Romona Oelitic Stone Co. [Ind. App.] 80 N. E. 856. The use of an article being no more than is necessary to discover a latent defect constituting a breach of warranty does not constitute an acceptance. Rhind v. Freedley [N. J. Law] 64 A. 963.

11, 12, 13. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856.

14. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. Where stone was to be inspected at a certain place by a third party and the latter refused to inspect, held removal of the stone by the buyer constituted an acceptance. Id.

15. Where buyer removed stone before inspection by inspector and it was later inspected and rejected, held seller's appealing from the decision of the inspector and continuing to ship under the contract did not stop him from claiming an acceptance by the buyer. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856.

16. Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 98 N. Y. S. 1018. If the defects are not discovered until after acceptance, the buyer may plead such in abatement of the price. Springer v. Indianapolis Brew. Co., 126 Ga. 321, 55 S. E. 53; Carolina Portland Cement Co. v. Turpin, 126 Ga. 677, 55 S. E. 925. Where defendant contracted to deliver pure ground Angostura tonka beans to a tobacco company, it was their duty to disclose any material adulteration, unless the same was known to the company, and in the absence of such knowledge an acceptance of an adulterated article would not prejudice the company's right to demand further deliveries of unadulterated beans. Neal v. Taylor [Va.] 66 S. E. 590.

17. Springer v. Indianapolis Brew. Co., 126 Ga. 321, 55 S. E. 63; Carolina Portland Cement Co. v. Turpin, 126 Ga. 677, 55 S. E. 925. Warranty of quality. Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50. Seller is not liable for damages resulting. Id.

18. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. Where article is required to be of a particular character. Forster, Waterbury & Co. v. MacKinnon Mfg. Co. [Wis.] 110 N. W. 226. Where the manufacturer and seller of iron castings was to deliver them by instalments, and after two shipments complaint was made as to defects in the castings, and in order to remedy the defects the patterns were improved and thereafter shipments were made from time to time during an interval covering six months and no further complaint was made until the shipments were completed, defects as to the castings made after the patterns were improved were waived. Id. Where the warranty is broken the buyer must promptly notify the seller thereof (Sprout v. Hunter, 30 Ky. L. R. 380, 98 S. W. 1006), and using the property without protest or notice for an unreasonable length of time is a waiver of the breach (Id.).

19. Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50.

20. Staiger v. Soht, 102 N. Y. S. 342. A sale by sample amounts to an express warranty even without express word of affirmation. Id.

21. Staiger v. Soht, 102 N. Y. S. 342. Nonconformity of goods to contract. Armstrong v. Columbia Wagon Co. [Del.] 66 A. 366. There being an acceptance, buyer cannot claim damages for defects as to quality or condition. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856. The acceptance of merchandise without objection, where an inspection could be made, is a waiver of defects in quality in the absence of a warranty surviving acceptance. Central Mercantile Co. v. Graves [Kan.] 88 P. 78.

22. Acceptance does not waive breach of implied warranty of quality of milk. Carpenter v. Crow, 77 Ark. 522, 92 S. W. 779.

fact,[23] there is considerable conflict as to whether acceptance [24] and payment [25] after inspection or an opportunity to inspect waives an implied warranty. Some of the cases holding that there is no waiver, lay particular stress upon whether or not the contract is executory.[26] Of course the seller rendering inspection unnecessary, there is no waiver.[27] Where goods are received and paid for before an opportunity for inspection is afforded, the buyer is entitled to recover the purchase price upon discovering that the goods do not conform to the contract,[28] and this is true where the purchase price has necessarily been paid a third person.[29] Though the goods are sold f. o. b. cars at the seller's place of business, the buyer has the right on tender of the goods at destination to examine the same and to reject them if not according to sample.[30] The right of inspection may, however, be waived.[31] Delay after discovery [32] or conduct inconsistent with reliance on the breach [33] may waive it. The defects being latent the buyer has a reasonable time to inspect the goods even though the contract places an unreasonable restriction on such rights,[34] but a reasonable restriction will be binding.[35] Mere use of breach does not necessarily constitute an acceptance.[36] Holding goods subject to the seller's order or reshipping them to him does not bar the buyer's rights.[37] Where articles of a particular description are agreed to be manufactured or sold, and the articles are not of the kind specifically described, a retention of part of the articles after the defect could with reasonable diligence have been discovered does not waive the right to reject future

23. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949.

24. That it does. Pewett v. Richardson [Ark.] 95 S. W. 787. Where complete inspection was not made, the seller stating that all were like sample, held no waiver. Id. Question as to whether such statement was made held for the jury. Id.

That it need not. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949.

25. That it need not. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949.

26. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949.

27. Pewett v. Richardson [Ark.] 95 S. W. 787.

28. Drake v. Pope [Ark.] 95 S. W. 774.

29. So held where bill of lading was forwarded with draft, in favor of a third person, attached. Drake v. Pope [Ark.] 95 S. W. 774.

30. Keeler v. Paulus Mfg. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 842, 96 S. W. 1097.

31. Where merchandise is sold subject to inspection after delivery and before acceptance, if the purchaser accept the property without making any objection and sells it upon the market, he must pay the contract price, whether he actually inspected it or not. Central Mercantile Co. v. Graves [Kan.] 88 P. 78.

32. Where goods were sold in November, 1904, and defects in quality were discovered on their receipt, and in January, 1905, notes were given for the purchase price, it is too late in an action on the notes to complain that the quality of the goods was not as represented. Rouse, Hempstone & Co. v. Sarrett, 74 S. C. 575, 54 S. E. 757.

33. Where the contract provided for notice of any alleged defects in the quality of the goods and an opportunity to remedy the same before the purchaser should be entitled to repudiate the contract and on delivery of the goods the buyer notified the seller, "goods just received and found all O. K.," and retained possession thereof for more than a year without complaint, held any breach of warranty of quality was waived. Main Co. v. Giffin-Bynum Co., 141 N. C. 43, 53 S. E. 727. One obtaining an extension of one of several notes, given for the purchase price, with knowledge of the breach of a warranty, is estopped as to the note so extended to defend on the ground that the warranty had been breached. Gutta Percha & Rubber Mfg. Co. v. City of Cleburne [Tex. Civ. App.] 95 S. W. 1131.

34. Where goods sold are warranted to be like sample and the defects are latent and not readily discoverable, the buyer has a reasonable time in which to inspect the goods and notify the seller of any defects in them, notwithstanding the contract of sale specifies that the buyer waives all right to object to the goods by failure to notify the seller within two days from their receipt of defects in the same. Main Co. v. Fields [N. C.] 56 S. E. 943.

35. Where warranty provided that retention of machine for thirty days should be conclusive proof of fulfillment of warranty, held pleadings showing such a retention and answer setting up breach of warranty stated no defense. Berlin Mach. Works v. Marbury Lumber Co. [Ala.] 40 So. 951.

36. That the buyer continued to use a heating apparatus after notifying the seller that it did not comply with the warranties under which it was sold and to remove it from the building as provided for by the contract did not constitute an acceptance thereof. American Foundry & Furnace Co. v. Berlin Board of Education [Wis.] 110 N. W. 403. Where a known and described article was sold, a breach of the implied warranty that it will conform to description is not waived by the buyer's endeavoring to use the article. Mine Supply Co. v. Columbia Min. Co. [Or.] 86 P. 789.

37. Price v. Stanbia [Wash.] 88 P. 115.

deliveries for such defects.[38] Breach of warranty being brought about by the buyer, the latter cannot recover therefor,[39] but the buyer having rightfully rescinded, he need not subsequently render the seller any assistance in attempting to remedy the defect.[40] The purchaser by rejecting the goods upon stated grounds is deemed to have waived all other objections.[41]

Where the conditions of a warranty provide that upon a breach written notice of the defects and an opportunity to amend should be given, the purpose of the notice is deemed to be to allow the seller to send its agent or employe to the property and remedy the defects, and where that purpose has once been secured and the agent or employe has actually gone and taken charge of the property and undertaken to put it in running order, the purpose of the notice is served and it becomes immaterial whether any notice has been given at all.[42] So also, notice being actually given, the fact that it was not given in the manner required by the contract is immaterial.[43] The conditions may themselves be waived [44] by an agent of the seller,[45] even though the contract apparently provides otherwise.[46] The burden is on the buyer to show a waiver of conditions of a warranty imposing duties upon him.[47] Fulfillment of conditions being rendered impossible by the other party, he cannot take advantage of their breach.[48] Cases dealing with the construction [49] and fulfillment [50] of condi-

38. Gair Co. v. Lyon, 101 N. Y. S. 787.

39. If the failure of an ice plant, purchased by plaintiff under warranty, to perform the work warranted was caused by the incompetency or negligence of plaintiff's employes or because defendant's instructions were not followed, or for any other fault attributable to plaintiff, it was not entitled to recover on the warranty. Wilmington Candy Co. v. Remington Mach. Co. [Del.] 65 A. 74.

40. The purchaser of an engine did not waive the warranty by failure to render friendly assistance and co-operation in, and opportunity of, a test of the engine by the expert sent by the seller, the purchaser having before this rescinded the contract and returned the engine as he had a right to do because of failure to seasonably send the expert. Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265.

41. Ginn v. W. C. Clark Coal Co., 143 Mich. 84, 13 Det. Leg. N. 240, 107 N. W. 904. Evidence of other defects held inadmissible to reduce damages. Id. Where after testing machine and making certain demands, which were complied with, the buyer stated his willingness to pay providing the seller complies with a demand arising out of another transaction, objections that the article did not conform to contract is not entitled to favorable consideration. Payne v. Bowie Lumber Co., 117 La. 107, 41 So. 431.

42. Sale of threshing machine. Harrison v. Russell & Co. [Idaho] 87 P. 784.

43. Requirement that notice be given by registered mail. Main Co. v. Fields [N. C.] 56 S. E. 943; Peter v. Plano Mfg. Co. [S. D.] 110 N. W. 783. Where contract required notice by registered mail to home office, it is enough if notice is given by unregistered letter to the seller's manager at another place, he having responded thereto by sending men to make repairs. Westbrook v. Reeves & Co. [Iowa] 111 N. W. 11. Where warranty provided for notification of defects by registered mail, a response to an unregistered notification of defects and an attempt, through the seller's agent, to remedy the defects, was a waiver of the requirement as to registration. Nichols & Shepard Co. v. Bryeans [Mo. App.] 93 S. W. 827. Port Huron Mach. Co. v. Bragg [Neb.] 109 N. W. 398.

44. Where contract provided that upon breach of warranty of the machine the buyer should return it to the place where it was delivered, and it is conceded that the warranty is broken but by a new contract the parties agree that the buyer shall store the machine and the seller shall repair it within a stated time, and the seller fails to do so, the buyer may at the expiration of such time rescind the contract without returning the machine to the place of delivery. Frick Co. v. Fry [Kan.] 89 P. 675.

45. General agent held to have authority to waive conditions on warranty. Peter v. Plano Mfg. Co. [S. D.] 110 N. W. 783.

46. Where the seller was a corporation, held full force could not be given to a stipulation that "no person has any authority to add to, abridge or change this warranty in any manner, and to do so will render it void and of no effect." Peter v. Plano Mfg. Co. [S. D.] 110 N. W. 783. A provision in a contract that "no promises whether of agent, employe, or of attorney, in respect to the payments, and security, or the working of the machine, will be considered binding unless made in writing, ratified by the home or branch office," does not prevent the company's agent waiving written notice by going to the place where the machinery is operated and taking charge of the machinery and working on it with a view to putting it in a condition so that it will comply with the warranty. Harrison v. Russell & Co. [Idaho] 87 P. 784.

47. Nichols & Shepard Co. v. Miller [Neb.] 107 N. W. 1010.

48. Where buyer attempted to exercise privilege of exchange in an option but was prevented from so doing by the false representations of the seller, the right of the buyer to recover for breach of warranty could not be defeated on the ground that he did not comply with the warranty by re-

tions upon warranties are shown in the notes. No time for performance of duties being specified, a reasonable time will be implied,[51] and what is a reasonable time is a question of fact for the jury.[52]

Conditions.[53]—Failure to object or demand compliance with conditions may waive noncompliance.[54] Receipt of the property does not necessarily waive breach of a claim for failure to deliver as required.[55] Use by the purchaser of property sold under a contract providing for a test which the purchaser is under no obligation to bring about and which a seller can delay indefinitely does not constitute a waiver of the condition.[56] One cannot take advantage of his own default.[57] Generally a positive refusal to perform waives the performance of conditions precedent on the part of the other party.[58] Waiver is generally a question for the jury.[59]

(§ 8) *F. Remedies*[60] on the warranty and breach of condition have been reserved for other parts of the title[61] together with damages for breach[62] and rights of assignees and subsequent purchasers.[63]

§ 9. *Payment, tender, and price, as terms of the contract.*[64]—In the absence of proof of either contract or custom, payment is presumed concurrent with delivery,[65] and if not paid interest will run for that time.[66] An offer to sell being ac-

taining the article. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428. Where it is claimed that engine did not pump sufficient water, held proper to show that there was not enough water in the well. Maxcy & Anderson v. Fairbanks Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 300, 95 S. W. 632. In an action for the purchase price of part interest in a ranch where the defense was misrepresentation of plaintiff as to his ability in managing the same, held proper to instruct the jury that plaintiff could not be held responsible for any losses resulting from defendant's interference with plaintiff's plans. Bosler v. Cable, 14 Wyo. 423, 84 P. 895.

49. Where warranty required notice, then lapse of a reasonable time to remedy defects, then if not remedied a return of the machine, held a return was unnecessary where notice was given but no man was sent to put the machine in order, though a reasonable time was allowed therefor. International Harvester Co. of America v. Dillon, 126 Ga. 672, 55 S. E. 1034.

50. A requirement of a warranty that on breach notice stating wherein the engine fails to fill the warranty shall be given is satisfied by a letter of the buyer stating the engine was not running satisfactorily, that it would not run at all except for a little while at a time, that he had been able to saw only at the rate of two or three cords a day, that he was unable to say why it did not work but that it did not, that the seller's agents attempted to make it run but failed, that it runs dry and does not have sufficient power to run a saw. Kohl v. Bradley-Clark & Co. [Wis.] 110 N. W. 265.

51, 52. Oil Well Supply Co. v. Watson [Ind.] 80 N. E. 157.

53. See 6 C. L. 1350.

54. No objections being made to noncompliance with condition requiring payment within ten days after shipment, held compliance therewith was waived as to past shipments but not as to future ones, and hence the seller could not refuse to deliver for past defaults. Demarest v. Dunton Lumber Co., 151 F. 508. Allowing the buyer to retain possession and resell property without a demand for compliance with the conditions of the sale held to constitute a waiver thereof estopping the original seller from claiming that title never passed to the subsequent purchaser. Gilroy v. Everson-Hickok Co., 103 N. Y. S. 620. Where seller agreed to furnish advertising matter on buyer's request, held in the absence of such a request buyer could not defend action for the price on the ground that seller did not ship such advertising matter, though the seller had voluntarily sent some booklets. Make Man Tablet Co. v. Chapman, 119 Mo. App. 427, 95 S. W. 282.

55. Sale of coal to be delivered promptly. Pittsburgh & Ohio Min. Co. v. Scully, 145 Mich. 229, 13 Det. Leg. N. 476, 108 N. W. 503.

56. Sale of mill machinery. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559.

57. Default in mill-run test being caused by purchaser furnishing inferior wheat, held purchaser could not take advantage of his own default and claim the test conclusive. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559.

58. Civ. Code, § 1440, considered. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665.

59. Waiver of conditions precedent. Etna Mfg. Co. v. Enos, 31 Pa. Super. Ct. 393.

60. See 6 C. L. 1351.

61. See post, § 10. Remedies of the Seller, § 11, Remedies of the Purchaser.

62. See post, § 12.

63. See post, § 13.

64. See 6 C. L. 1352.

65. Howard Supply Co. v. Bunn [Ga.] 56 S. E. 757; McCarthy v. Nixon Grocery Co., 126 Ga. 762, 56 S. E. 72; Lamb v. Utley [Mich.] 13 Det. Leg. N. 904, 110 N. W. 50; National Cont. Co. v. Vulcanite Portland Cement Co. [Mass.] 78 N. E. 414; Poliakoff v. Petry, 50 Misc. 602, 99 N. Y. S. 481; Catlin v. Jones [Or.] 85 P. 515; Adair v. Stovall [Ala.] 42 So. 596. Civ. Code 1895, § 3550. McCarthy v. Nixon Grocery Co., 126 Ga. 762, 56 S. E. 72. On an issue as to whether under a contract for the sale of goods to be delivered in instalments and fixing no time for payment it was agreed that a certain credit should be extended, findings that under a former similar contract payments

cepted the law implies a promise to receive and pay for the goods,[67] and one receiving and using goods is liable for the reasonable value thereof regardless of the existence or validity of the contract of sale.[68] Where part consideration for the purchase of property is other property to be delivered by the purchaser, which by the terms of the agreement is a fixed proportion of the purchase price, the purchaser may avail himself of the privilege of making payments by delivery of such property, but in case of his failure or refusal so to do the primary object of the promise will prevail, and the price agreed upon will become a money demand.[69] Whether the giving of the buyer's note to the seller constitutes a payment of the purchase price depends upon the agreement of the parties.[70] It is only after the seller has taken it up and regained possession of it before payment that he is remitted to his original rights under the contract of sale, if there was an agreement that the note should be taken in absolute payment.[71] If such note is negotiable and the seller and payee transfers it to a third party, so long as it remains in the third party's hands it operates as an absolute payment of the original consideration upon which it was taken.[72] So too, where upon the sale and delivery of goods the seller receives from the purchaser the note of a third person, the presumption is that the note was accepted in payment and satisfaction of the purchase price.[73] Where goods are sold to be delivered in instalments with payment on delivery, the seller is entitled at any time to require payment for instalments already delivered as a condition precedent to the delivery of future instalments,[74] but the buyer has no right to retain sums due for instalments delivered as security against an anticipated breach by defendant of the provisions of the contract as to future deliveries,[75] and the technical insolvency of the buyer does not affect their rights.[76] Though the seller state a separate value on each of several articles sold, yet, if he sells all in solido at a less aggregate price, he cannot against the will of the buyer retake one of the articles and recover the value stated of the rest as upon an agreement to pay that value,[77] but he can only recover their reasonable value less the damages suffered by the buyer by the retaking of the property.[78] Payment of the purchase price may be rendered conditional and if so it is not due until the conditions have been fulfilled.[79] Payment

were made thirty days after delivery, that it was the custom of the trade under such contracts for payments to be made thirty days after delivery, and that it was understood and impliedly agreed that payments should be so made, were proper and material. National Cont. Co. v. Vulcanite Portland Cement Co. [Mass.] 78 N. E. 414.

66. Howard Supply Co. v. Bunn [Ga.] 56 S. E. 757; McCarthy v. Nixon Grocery Co., 126 Ga. 762, 56 S. E. 72.

67. Bailey v. Leishman [Utah] 89 P. 78.

68. Elliott v. Howison [Ala.] 40 So. 1018; Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551; Stewart v. Jacob Sachs & Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 845, 96 S. W. 1091. Where green wood is kept but not accepted under the contract for dry wood, the reasonable value of green wood and not the contract price controls. Duvall v. Ferwerda [Mich.] 13 Det. Leg. N. 659, 108 N. W. 1115. Where the minds of a prospective purchaser and a prospective seller do not meet on the subject-matter of an attempted sale by correspondence, but the purchaser keeps the article and converts it to his own use, he is liable for its price. Holmes Mach. Co. v. Chalkley [N. C.] 55 S. E. 524.

69. Porter v. Brown [Ariz.] 89 P. 408.

70, 71, 72. McLean v. Griot, 103 N. Y. S. 129.

73. McLean v. Griot, 103 N. Y. S. 129. See Payment and Tender, 8 C. L. 1329.

74, 75, 76. National Cont. Co. v. Vulcanite Portland Cement Co. [Mass.] 78 N. E. 414.

77, 78. Nelson v. Nelson [Mo. App.] 98 S. W. 101.

79. Where the contract for a sale of a stallion provided that the vendee pay for him entirely from funds obtained as service fees, the death of the horse not due to the fault of the vendee relieves the latter for liability for further payments under the contract. Swaney v. Alstott [Iowa] 111 N. W. 406. Where plaintiff sells articles to be paid for in thirty days, performance of its agreement in the contract of sale to do a certain amount of advertising within a year is not a condition precedent to its right to sue for the price. Vio Chem. Co. v. Studholme, 103 N. Y. S. 463. Where a contract recited that the first party agreed to manufacture, sell, and deliver lumber to the second party from time to time, who was obligated to receive the lumber, and in conclusion the price to be paid per thousand feet was stated, the stipulation to deliver the lumber was an independent covenant and a condition precedent to the duty of payment

as a condition precedent may be waived.[80] The construction placed on various terms concerning payment and price are shown in the notes.[81] A buyer cannot, in an action for the agreed price, show that the goods bought were not worth what he promised to pay for them,[82] and hence a petition alleging that the price for which the articles were sold was the reasonable value thereof, recovery of the reasonable value is rightfully denied.[83] Cases dealing with the sufficiency of the evidence to show payment are shown in the notes.[84]

§ 10. *Remedies of the seller. A. Rescission and retaking of goods or action for conversion. Rescission.*[85]—While it is generally stated that the seller may avoid the sale for the buyer's fraud[86] or undisclosed intention not to pay,[87] still it has

by the purchaser, so that a failure or refusal to deliver would constitute a breach for which an action would immediately lie. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008.

80. Where in replevin by the buyer the seller insisted there was no sale and the seller had absolutely refused to deliver and would not receive the purchase price, held to waive a tender of the price. Witt v. Dersham [Mich.] 13 Det. Leg. N. 660, 109 N. W. 25. Even though payment is to precede delivery, still, if the seller admits that he does not intend to make a delivery according to the terms of the contract, the buyer is justified in refusing to pay the purchase price. Rownd v. Hollenbeck [Neb.] 108 N. W. 259. The right of a seller of goods to be delivered from time to time to terminate the contract, on the refusal of the purchaser to perform by payment for the goods already delivered, may be waived expressly or by conduct. Byrne Mill Co. v. Robertson [Ala.] 42 So. 1008. Where the contract provides for delivery in instalments, failure to pay cash where the first delivery is made is waived by the seller making a second delivery before the first is paid for. Both deliveries being paid for, seller cannot on such account refuse to deliver future instalments. Moers v. Dietz, 101 N. Y. S. 590. Where a seller stated to the buyer that he would not accept a note for the purchase price, it is immaterial whether the buyer actually tendered the note. Austin v. Smith [Iowa[109 N. W. 289. Where buyer failed to make payments as required and the seller claimed damages therefor, held the buyer should be allowed to show the reason for his default. Shurter v. Butler [Tex. Civ. App.] 16 Tex. Ct. Rep. 267, 94 S. W. 1084.

81. A written contract whereby a seller transfers property for $25,000 and the further consideration that the buyer sell the property and pay forty per cent. of the proceeds above a certain sum to the seller is to be construed as a matter of law as requiring the payment of the forty per cent. in addition to the $25,000. Bosler v. Cobie, 14 Wyo. 423, 84 P. 895. Where a contract for the sale of hay provided that the buyer should bale the hay at once at his own expense and should pay the seller $8 a ton when the hay was delivered at the car at a certain station, the buyer could not maintain replevin for the hay without tendering the price, in the absence of a waiver thereof. Witt v. Dersham [Mich.] 13 Det. Leg. N. 660, 109 N. W. 25. A contract containing the following: "Terms: Cash Disc. 6 per cent. 10 days, 3 per cent. 20 days, net 30 days. Special time payments: 1-4 due in 4 months, 1-4 due in 6 months, 1-4 due in 8 months, 1-4 due in 10 months. Special time payments must be closed by note within 10 days," and the purchaser refuses after more than ten days has elapsed to execute notes in accordance with the conditions for the purchase price, the entire bill becomes due in thirty days. Ziehme v. Parish [Kan.] 87 P. 685. A contract for the sale of mill machinery and its installation in a mill, which provides that when the machinery is operated so as to meet the requirements of a milling guaranty under which it is sold the purchaser will accept and pay for it, which guaranties that the mill will perform according to the milling guaranty when operated by the seller, and which requires the purchaser to furnish wheat, labor, and power to operate the mill at its full capacity when the seller is ready to operate it, contemplates a mill-run demonstration of the guaranteed capacity of the mill as a condition precedent to the payment of the price. Ehrsam Mfg. Co. v. Jackman [Kan.] 85 P. 559. A manufacturer of lumber agreed to sell the output of a mill during a year. The contract provided that the lumber should be delivered to the buyer in his lumberyard; that immediately on the delivery of any lumber title should at once vest in the buyer; that all lumber cut should be graded and measured by the buyer as the same was sawed, that all lumber should be paid for by the buyer according to the schedule of prices every fifteen days, at which time all lumber delivered during the preceding fifteen days should be reported by the buyer's inspector to the buyer and paid for by check, held a sale for cash. Strother v. McMullen Lumber Co. [Mo.] 98 S. W. 34.

82. Kessler & Co. v. Zacharias, 145 Mich. 698, 13 Det. Leg. N. 658, 108 N. W. 1012.

83. Austin v. Smith [Iowa] 109 N. W. 289.

84. Evidence held sufficient to show payment through a factor. Long v. Mitchell, 126 Ga. 841, 55 S. E. 1033.

85. See 6 C. L. 1352.

86. German Nat. Bank v. Princeton State Bank, 128 Wis. 60, 107 N. W. 454; Samaha v. Mason, 27 App. D. C. 470. Changes in financial condition constituting a departure from financial statement previously given for use until notice given. Atlas Shoe Co. v. Bechard [Me.] 66 A. 390. Fraudulent representations as to credit. Id. What constitutes fraud, see ante, § 2, Contract Requisites of Sale, also topic Fraud and Undue Influence, 7 C. L. 1813.

87. German Nat. Bank v. Princeton State Bank, 128 Wis. 60, 107 N. W. 454.

been held that, to authorize the rescission of a sale on the ground of fraud on the part of the vendee so that a recovery may be had in detinue or trover against the first purchaser or a subpurchaser, the following conditions or facts must be combined: (1) The purchaser must at the time of the transaction have been insolvent or in failing circumstances;[88] (2) The first purchaser must have had either a preconceived design not to pay for the goods or no reasonable expectation of being able to pay for them;[89] (3) The purchaser must have intentionally concealed these facts or made a fraudulent representation in regard to them;[90] (4) The sale must have been induced by the fraudulent representation or concealment,[91] though if intentionally made and relied upon the fraudulent statements need not be the sole inducing cause of the contract but it is sufficient if they are a contributing cause,[92] and the burden of proof in the first instance rests upon the seller to reasonably satisfy the jury of each of the foregoing requirements.[93] If he fails to carry this burden in any of the four particulars, a recovery cannot be had either against the original vendee or another claiming under him, whether a bona fide or a mala fide purchaser or even a stranger.[94] If the evidence reasonably satisfies the jury of the existence of each of the essentials above stated, it is incumbent upon one claiming to be a subvendee to show that he is in fact a purchaser from the original vendee and that he paid value for the goods,[95] and whether he paid cash, in whole or in part, for the chattels or took them in payment of a debt, he would be a purchaser for value within the meaning of this rule,[96] and the fact that he paid greatly less than the value of the property will not take him out of it.[97] If the jury should believe from the evidence, including all the facts and circumstances, that what appeared in form to be a sale and conveyance to the subvendee was a secret trust for the original purchaser, then the same principles, and those only, would apply that arise in this class of cases against such original purchaser, since one holding goods under a pretended sale in secret trust for the original purchaser must stand in the shoes of such purchaser.[98] If the subpurchaser successfully carries the burden as above indicated, then the onus is shifted to the plaintiff to prove to the reasonable satisfaction of the jury that the subpurchaser had notice of the fraud when he purchased, or before he paid the purchase money or parted with the consideration, or had knowledge of facts putting him on inquiry which, if diligently prosecuted, would have brought to him knowledge of the seller's claim.[99] The mere fact that the purchase by the subpurchaser was made with intent to defraud the creditors of the buyer will not authorize the seller to rescind the sale and recover the goods.[1] It is essential that the fraud be in the particular sale in question.[2] The fact that the buyer is to his own knowledge insolvent at the time of the purchase is not of itself sufficient to show that he had no intention to pay for the property.[3] The right to rescind for fraud may be waived.[4] Failure to pay the purchase price as required will not warrant

88. Pelham v. Chattahoochee Grocery Co. [Ala.] 41 So. 12. Instruction authorizing recovery without reference to solvency or insolvency of buyer held erroneous. Id.

89, 90. Pelham v. Chattahoochee Grocery Co. [Ala.] 41 So. 12.

91. Pelham v. Chattahoochee Grocery Co. [Ala.] 41 So. 12. Instruction permitting inquiry into the alleged fraud held proper. Id. Failure of instruction to define elements of a fraudulent sale held not serious, since such defect might have been obviated by a requested explanatory charge. Id.

92. American Hardwood Lumber Co. v. Dent [Mo. App.] 98 S. W. 814.

93, 94, 95, 96, 97, 98, 99, 1. Pelham v. Chattahoochee Grocery Co. [Ala.] 41 So. 12.

2. Fraud in other sales immaterial. Pelham v. Chattahoochee Grocery Co. [Ala.] 41 So. 12.

3. German Nat. Bank v. Princeton State Bank, 128 Wis. 60, 107 N. W. 454.

4. In order to ratify a contract procured by fraud the buyer must have knowledge of the fraud. Plea held defective. Grayhill v. Drennen [Ala.] 43 So. 568. A seller, requesting a payment from the buyer, does not thereby waive his right to rescind the sale and recover the goods in the hands of a third person on the ground of the fraud of the buyer. Pelham v. Chattahoochee Grocery Co. [Ala.] 41 So. 12. Where a bankrupt has procured a sale of goods to himself through fraud and the seller, with

rescission as to goods delivered,[5] but it may warrant the seller to rescind to the extent of refusing future deliveries.[6] Rescission abrogates the contract[7] and must be in toto,[8] hence, upon rescission, partial payments must be returned.[9]

Recovery of chattels. Replevin.[10]—Where conditions precedent are not performed and consequently title does not pass, trover will lie to recover the goods or their equivalent in money.[11] The contract of sale being void, neither the seller nor any one claiming under him with knowledge of the facts can recover the property or sue in conversion without returning to the buyer the purchase money paid.[12] Cases dealing with the sufficiency of the evidence are shown in the notes.[13]

(§ 10) *B. Stoppage in transitu.*[14]—In case of a sale of goods on credit the seller may resume possession of the goods while they are in the hands of a carrier, a middleman, or forwarding agent,[15] in transit to the buyer on his becoming insolvent.[16] This right continues until the delivery of the goods to the buyer or his agent is completed,[17] and cannot be impaired or extinguished during its existence by seizure under legal process on behalf of the buyer's creditors.[18] No particular form of exercising the right of stoppage in transitu is required. The material and important thing is to inform the carrier or person in possession of the goods before their delivery to the consignee that the seller directs the further transit of the goods to cease.[19] The reason or impulse which instigates the act is not important.[20] The

knowledge of the facts, proves his claim and votes as a creditor in the bankruptcy proceedings, he is concluded thereby and cannot withdraw his claim and recover the goods. Standard Varnish Works v. Haydock [C. C. A.] 143 F. 318.

5. Failure of buyer to pay purchase price will not set aside the sale nor authorize the seller to do so without the buyer's consent. Bloom's Son Co. v. Union Rice Mill. Co. [La.] 42 So. 947. Failure to pay balance of purchase price due within stipulated time is not ground for cancellation in equity. Godwin v. Phifer [Fla.] 41 So. 597. Where a specific lot of rice is sold at a price payable in ten days, it is a completed sale, and the buyer's refusal to have a draft for the price after the ten days will not set the sale aside if it precludes the idea of an abandonment of the contract. Bloom's Son Co. v. Union Rice Mill. Co. [La.] 42 So. 947. Where contract authorized a deduction of two per cent. if purchase price was paid within a certain time, held a deduction after such time by the buyer was insufficient to authorize the seller to rescind, the breach being insignificant and the seller could have been compensated for it in damages. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602.

6. Where a buyer fails to pay for goods delivered and evinces a purpose either not to pay for future deliveries called for or not to abide by the terms of the agreement but to insist on different terms, whether in respect to price or to any other material stipulation, the seller may rescind and sue for the goods delivered. Peters Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90. A seller agreed to sell to a buyer a specified number of peanut bags at a price named and also a specified number of cotton sheets. The agreement was modified by a reduction of the price and an allowance of a credit of ten days. The cotton sheets were delivered according to contract but the buyer refused to pay for them and insisted on a credit of thirty days to pay for all the goods. Held that the seller was entitled to rescind and recover for the goods delivered. Id.

7. Where contract is rescinded during shipment and the property injured but repaired by the carrier and then sent to the buyer, held the seller could recover of the carrier in conversion. Norris v. St. Joseph, etc., R. Co. [Mo. App.] 101 S. W. 159.

8, 9. Samaha v. Mason, 27 App. D. C. 470.

10. See 6 C. L. 1354.

11. Wilson v. Caner, 125 Ga. 500, 54 S. E. 355.

12. Sale by foreign corporation void because of corporation's noncompliance with statutes. Corporation's rights assigned to purchaser with notice. Roeder v. Robertson [Mo.] 100 S. W. 1086.

13. Evidence held sufficient to make question of fact, whether engine was "operated by competent persons" or was unskilfully built. Port Huron Mach. Co. v. Bragg [Neb.] 109 N. W. 398.

14. See 6 C. L. 1355.

15. Frame v. Oregon Liquor Co. [Or.] 85 P. 1009. Warehouseman who had authority from the buyer to receive all goods consigned to him and to forward the same to the point of destination when ordered to do so held a mere forwarding agent. Id. Where property was held by one to whom the buyer had directed that it be consigned, held not a mere forwarding agent, and hence a notice to him that the seller held shipping receipts and demanded warehouse receipts did not constitute a stoppage in transitu. Grange Co. v. Farmers' Union & Mill. Co. [Cal. App.] 86 P. 615.

16. Frame v. Oregon Liquor Co. [Or.] 85 P. 1009. Where evidence showed that conditional buyer was solvent and offered to perform, held seller was not entitled to stop the goods in transitu. Rex Buggy Co. v. Ross [Ark.] 97 S. W. 291.

17, 18. Frame v. Oregon Liquor Co. [Or.] 85 P. 1009.

19. Frame v. Oregon Liquor Co. [Or.] 86 P. 791. Where goods were in the hands of a warehouseman awaiting the buyer's order

protest of a note, while a circumstance to be considered, is not conclusive evidence of insolvency.[21]

(§ 10) *C. Lien.*[22]

(§ 10) *D. Resale.*[23]—If the purchaser refuses to accept and pay for the goods the seller may sell the property, acting for this purpose as the agent of the buyer, and recover the difference between the contract price and the price at resale,[24] plus the reasonable expenses of the resale,[25] and this right of the seller to recover for the reasonable and necessary expense of resale does not depend on the contract of sale.[26] It is the duty of the seller to use ordinary care in the preservation of the goods between the date that the goods were to be accepted and the date of resale, and the seller cannot hold the buyer responsible for deterioration during such time in the value of the goods unless it appears that the failure to exercise due care resulted from the conduct of the buyer.[27] Except where the resale is made to the original purchaser, it is essential that notice of the intent to resell be given.[28] It is not necessary that the notice should contain information as to the time and place of sale, but there must be a notice of an intention to sell for the benefit of the buyer.[29] The sale must be made in good faith and within a reasonable time.[30] Changes in the market value, etc., control in determining what is a reasonable time.[31] When the buyer is notified by the seller of the intention to resell, and after such notice a sale is properly made, the original buyer is conclusively bound by the resale and the amount realized under it.[32]

(§ 10) *E. Action for the price and quantum valebat. Right of action and conditions precedent.*[33]—Before a seller can maintain an action on the contract for the agreed price of a chattel, there must be such a delivery, actual or constructive, as will pass the title and invest the ownership of the property in the purchaser;[34] and it has been held that if the possession and the title remains in the seller and the purchaser renounces his contract, the law requires the seller to treat the property as his own and to sue, if at all, for the damages he has sustained,[35] but this is not the general rule.[36] Where the buyer returns the goods the right of the seller to recover

for forwarding at the time the buyer became insolvent, and he requested the seller to take back the goods and authorized him to demand a return from the warehouseman and he did so, it did not amount to a claim of possession by reason of a rescission of the contract of sale rather than under the right of stoppage in transitu. Id.

20. Frame v. Oregon Liquor Co. [Or.] 86 P. 791.

21. Rex Buggy Co. v. Ross [Ark.] 97 S. W. 291.

22. See 6 C. L. 1355.

23. See 6 C. L. 1356.

24. Mendel v. Miller & Sons, 126 Ga. 834, 56 S. E. 88; Foote & Co. v. Heisig [Tex. Civ. App.] 16 Tex. Ct. Rep. 7, 94 S. W. 362.

25, 26. Foote & Co. v. Heisig [Tex. Civ. App.] 16 Tex. Ct. Rep. 7, 94 S. W. 362.

27. Mendel v. Miller & Sons, 126 Ga. 834, 56 S. E. 88.

28. Arkansas & Texas Grain Co. v. Young & Fresch Grain Co. [Ark.] 96 S. W. 142.

29. Mendel v. Miller & Sons, 126 Ga. 834, 56 S. E. 88.

30. Where the seller waited two or three months, tendered the goods and resold without further notice, held it acted in good faith with due diligence and within a reasonable time. Ford v. Erde, 50 Misc. 665, 99 N. Y. S. 487.

31. Where through the breach of the contract by buyers sellers are entitled to resell the goods and charge the buyers with loss and reasonable expense, the buyers cannot assert that the right was not reasonably exercised because of delay in making resale where there is no change in the market between the time the right to resell occurred and the time the resale was made. Foote & Co. v. Heisig [Tex. Civ. App.] 16 Tex. Ct. Rep. 7, 94 S. W. 362.

32. Mendel v. Miller & Sons, 126 Ga. 834, 56 S. E. 88.

33. See 6 C. L. 1356.

34, 35. Murphy Co. v. Exchange Nat. Bank [Neb.] 107 N. W. 845.

36. A purchaser contracted to buy a telephone instrument in a house on premises sold and also some telephone stock. The seller after the purchaser took possession of the property offered to deliver the stock and demanded payment, the telephone instrument being in the house occupied by the purchaser. Held that the seller's offer to deliver and the buyer's refusal to accept entitled the seller to recover the price. Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781. See post this section subdivision H. Choice and Election of Remedies.

the purchase price is determined by whether he accepts the return as a rescission or not.[37] The cause of action accrues when the price becomes due.[38] The seller must prove that all conditions precedent, as distinguished from collateral and independent conditions, on his part have been complied with or waived.[39] A seller may maintain a suit in equity to recover the price of the thing sold from a second purchaser who has assumed the obligation to pay such price, notwithstanding his retention of title as security or his taking a bond from the first purchaser where neither affords him an adequate remedy.[40]

Abandonment.[41]

Defenses and election between them.[42]—False representations merely depreciating but not destroying the value of the article sold constitute a defense merely to the extent that the value of the article is diminished.[43] The article sold failing to comply with the terms of the contract, the seller cannot recover the purchase price thereof,[44] nor can he in such case recover the value of the article delivered [45] unless he shows the value of such article as compared with that contracted for.[46] Except where the goods conform to the contract,[47] the delivery or tender of valueless goods is a complete defense to an action for the purchase price.[48] A partial or total failure of consideration may be shown against the original payee of a promissory note without alleging fraud.[49] Breach of a stipulated condition that no samples should be sold competitors of buyer bars recovery of the purchase price no matter how unsubstantial the violation may appear.[50] In an action upon a written contract of sale; defendant may deny the execution of such written contract and further plead an oral contract and that plaintiff had not fulfilled his part thereof.[51] Breach of warranty is a matter of defense [52] available in mitigation of damages.[53]

The complaint.[54]—The complaint must show a contract of sale,[55] compliance

37. The seller of goods may recover their price though the buyer returned them, the seller having, before they were reshipped, notified the buyer that they would not be received and on their arrival stored them subject to defendant's order. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669. Where the seller of goods took them back after the buyer's refusal to accept and it did not appear that he kept the goods as the purchaser's, he could not maintain an action for the price. Glasgow Mill. Co. v. Burgher [Mo. App.] 97 S. W. 950. A month's acquiesence in the return of part of the goods and acceptance of a check for the balance held to prevent recovery of purchase price for goods returned. Chamberlain Medicine Co. v. Elk Drug Co., 99 N. Y. S. 805.

38. Action for price of crop sold, the purchaser to cut and bale the same, may be commenced before the crop is harvested and baled, the seller having delivered possession to the buyer and the latter having failed to harvest and bale the crop. Cannon v. McKenzie [Cal. App.] 85 P. 130.

39. A stipulation that a competent man is to be furnished by the manufacturer to install machinery sold to a purchaser to be paid for within a certain time is not a condition precedent to a right of action for the purchase price but a separate and independent agreement. Lombard Water-Wheel Governor Co. v. Great Northern Paper Co., 101 Me. 114, 63 A. 555. Where contract for the sale of mill machinery provides for a millrun test under certain conditions, before the payment of the price, held such provision was not collateral and the prescribed test must be made or waived before an action for the price can be maintained. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559.

40. Quigley v. Spencer Stone Co., [C. C. A.] 143 F. 86.

41, 42. See 6 C. L. 1357.

43. Fayette Nat. Bank v. Summers, 105 Va. 689, 54 S. E. 862.

44, 45, 46. Bixby v. Bastady [Cal. App.] 88 P. 493.

47. The goods conforming to the contract, the fact that they are worthless is no defense. Johnson County Sav. Bank v. Hutchinson [Mo. App.] 97 S. W. 630.

48. Price v. Huddleston [Ind.] 79 N. E. 496.

49. Rouse, Hempstone & Co. v. Sarratt, 74 S. C. 573, 54 S. E. 757.

50. Wilmerding v. Feldman, 50 Misc. 341, 98 N. Y. S. 688.

51. American Standard Jewelry Co. v. Goodman [Ga.] 56 S. E. 642.

52. Ryan v. Hooton, 122 Ill. App. 514.

53. Dooley & Co. v. Hasenwinkle Grain Co., 120 Ill. App. 43.

54. See 6 C. L. 1358.

55. A complaint alleging that plaintiff manufactured for defendants certain gowns at an agreed price to be used in a musical production owned by defendants, that the gowns were delivered to them, that afterwards plaintiff made alterations upon the gowns for defendants at an agreed price and that they were used in the production, contains sufficient averments of a request by the defendants for the manufacture of

therewith,[56] including delivery and performance of conditions precedent,[57] and must show that all or part of the purchase price is due and unpaid.[58] Under the statutes of some states plaintiff may file a petition, as in an action on a book account, though the transaction has never actually been entered in an account book.[59] Counts for trover and the recovery of the purchase price are inconsistent.[60]

Answer, counterclaim, and reply.[61]—The allegations of the answer must be definite[62] statements of fact as distinguished from conclusions of the pleader[63] and must set forth the contract.[64] The answer should deny all material allegations of the complaint,[65] allege all new matter relied on by defendant, and not contain inconsistent defenses.[66] A general averment that a thing is wholly worthless is equivalent to a declaration that it is entirely destitute of value.[67] The answer setting up a counterclaim for fraud and false representations by the seller as to their quality, the defendant may rely on a breach of an implied warranty of the quality.[68] In an action for the price of goods, the defense that the seller failed to ship the same in time and that the goods came too late to be of ready sale is new matter and the burden of proving it is on the buyer.[69] Nonperformance of conditions precedent or concurrent must be taken advantage of by the answer or in the evidence,[70] and the buyer may set up a variance in the quality of the goods delivered from those ordered and an offer to return them without filing a counterclaim.[71] Pleas of nonconformity of goods delivered with contract and of rescission are not demurrable on the

the goods and of a promise to pay therefor. Osborn Co. v. Shubert, 101 N. Y. S. 761.

56. A declaration alleging a sale of "No. 2 mixed corn" and a shipment of "No. 2 yellow corn" is not sufficient on its face to show a compliance by the plaintiffs with their contract, in the absence of allegations that the corn ordered and shipped were the same, or that the defendant accepted the corn shipped. Heile & Sons v. South Georgia Grocery Co., 125 Ga. 562, 54 S. E. 540.

57. Biggers v. Equitable Mfg. Co., 124 Ga. 1045, 53 S. E. 674.

58. A petition in an action for the balance of the price of materials sold under a verbal contract, which alleges the date of the contract, and that certain materials were to be furnished for a specified purpose at a certain price, and the date when the contract was completed, and that the seller had performed its part of the contract and that the buyer had not paid according to the contract but had paid only a specified part thereof, sufficiently states that the balance was due and unpaid. Davis v. Big Horn Lumber Co., 14 Wyo. 517, 85 P. 980.

59. So held under Rev. St. 1889, § 3560. Frontier Supply Co. v. Loveland [Wyo.] 88 P. 651.

60. Ehrsam & Sons Mfg. Co. v. Jackman [Kan.] 85 P. 559.

61. See 6 C. L. 1358.

62. Cross bill alleging that goods were for use under a certain contract, that valuable rights depended on such contract being fulfilled on a certain date, that the seller knew these facts when the sale was made, and that failure to deliver caused a breach of the contract and certain specified damages resulted, held sufficiently definite. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551.

63. In an action to recover the price of goods sold, a plea that the goods delivered were of a different kind from that which the person agreed to purchase and were of little value to wit, $10, is insufficient as being a mere conclusion of the pleader. McAllister-Coman Co. v. Matthews [Ala.] 43 So. 747. A notice of recoupment stating that the goods were not the goods "represented and warranted to be" but were of an inferior quality or grade is insufficient. Richardson & Co. v. Noble, 143 Mich. 545, 13 Det. Leg. N. 59, 107 N. W. 274.

64. In an action to recover the price of goods sold, a plea which does not set out the contract in words or by reference, but alleges that the plaintiff agreed to furnish a showcase and did not ship it with the goods, without alleging that it was not furnished or that the plaintiff had failed or refused to furnish it, is demurrable. McAllister-Coman Co. v. Matthews [Ala.] 43 So. 747.

65. A plea alleging that the goods delivered did not conform to the contract and that the goods pointed out by the seller for future delivery also failed to conform to the contract held not demurrable for failing to deny an allegation in the complaint that the seller was ready and willing to deliver the goods in accordance with the contract. Elliott v. Howison [Ala.] 40 So. 1018.

66. Plea alleging nonconformity of goods with contract, refusal to accept, subsequent contract to handle them on account of the seller, and offering to set off damages against amount plaintiff was entitled to, held not demurrable on the ground that it did not allege a rejection of the shipment and as containing the defense of rescission and breach of warranty. Belote & Son v. Wilcox [Ala.] 41 So. 673.

67. Price v. Huddleston [Ind.] 79 N. E. 496.

68. Pascal v. Goldstein, 100 N. Y. S. 1025.

69. Ainsfield Co. v. Rasmussen, 30 Utah, 453, 85 P. 1002.

70. Frontier Supply Co. v. Loveland [Wyo.] 88 P. 651.

71. Avil Pub. Co. v. Bradford [Mo. App.] 97 S. W. 238.

ground that they confessed that the buyer was indebted to the seller for goods sold.[72] Where it is uncertain, from the language of a declaration, whether it intends to allege delivery to the defendant at the point of shipment or at the point of destination or any delivery at all to the defendant, a special demurrer raising that point will be sustained.[73] That the defendant cannot on the facts pleaded recover the damages which he demanded, or that the rule of damages is not such as he asserts it to be, is not good ground for demurrer if the facts stated show a good cause of action or defense.[74] That a plea, termed one of recoupment, is not good as such does not render it demurrable, it being good as a set-off.[75] A claim for merely nominal damages will not generally be held to constitute a counterclaim or set-off.[76] The construction placed upon specific answers are shown in the notes.[77]

Variance.[78]—The proof must sustain the allegations of the pleadings.[79]

Presumptions and burden of proof.[80]—The burden is on the seller to prove all material allegations of the complaint not admitted by the answer,[81] including the performance of conditions precedent[82] and delivery,[83] but it has been held that the defense that the seller failed to ship the goods in time and that the goods came too late to be of ready sale is new matter and the burden of proving it is on the buyer.[84] Plaintiff showing a delivery in accordance with the contract, he need not show an acceptance[85] except where the article is to be satisfactory to the buyer.[86] A plea

72. Elliott v. Howison [Ala.] 40 So. 1018.

73. Heile & Sons v. South Georgia Grocery Co., 125 Ga. 562, 54 S. E. 540.

74. Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 98 N. Y. S. 1018.

75. In an action for the price of a stock of millinery goods, a plea termed by the defendant a "plea of recoupment," claiming a sum had and received by plaintiff, which the defendant offers as a set-off against the demands of the plaintiff and claims judgment for the excess, was not demurrable, being good as a set-off though not as a plea of recoupment. Thomas v. Thomas [Ala.] 41 So. 141.

76. In an action on a note given for the price of an interest in a corporation, failure of the seller to transfer certain land which he held as trustee for the corporation, but which the corporation continued to use and occupy and which the seller offered to convey at the trial, was at most grounds for nominal damages to the buyer and did not constitute a counterclaim or set-off. Bosler v. Coble, 14 Wyo. 423, 84 P. 895.

77. In an action for breach of contract to purchase hay, defendants alleged that plaintiff agreed to sell them good, No. 1, merchantable hay, and the reply denied that the hay delivered was not good or merchantable and controverted all other allegations of new matter in the answer. Held that this was equivalent to denying that plaintiff stipulated to sell No. 1 hay, and evidence that the hay delivered was merchantable was within the issues. Eaton v. Blackburn [Or.] 88 P. 303. Where an original complaint for the price of goods sold contained three counts for account, account stated, and merchandise sold, respectively, and a fourth count was added by amendment claiming for goods sold under a special agreement, a plea purporting to answer the entire complaint, referring to the claim as the "account sued on," is nevertheless an answer to the count based on the special contract where it clearly refers to the same transaction. McAllister-Coman Co. v. Matthews [Ala.] 43 So. 747.

78. See 6 C. L. 1359.

79. There is no legal identity between an alleged contract of sale, accompanied with delivery made on September 26, 1904, and a conditional agreement of sale made on July 26, 1904, and the variance is fatal. Davenport Locomotive Works v. Lemann Co. [La.] 42 So. 770. Where the answer alleges fraud, defendant cannot set up that the property has been fully paid for by notes not yet due and that freight charges only are acceptable. Nichols & Shepard Co. v. Horstad [S. D.] 109 N. W. 509. A statement of account filed in justice's court, which recites that defendant is indebted to plaintiff in a specified sum for "one telephone and telephone stock," is consistent with evidence of a contract of sale of a telephone instrument and telephone stock at a stipulated price. Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781.

80. See 6 C. L. 1360.

81. Where defendant denied the allegations of the complaint and set up an affirmative defense and the jury was instructed that he must establish his defense by a preponderance of the evidence, held error to refuse to charge that plaintiff must prove the material allegations of the complaint by a preponderance of the evidence. Ainsfield Co. v. Rasmussen, 30 Utah, 453, 85 P. 1002.

82. Biggers v. Equitable Mfg. Co., 124 Ga. 1045, 53 S. E. 674.

83. Biggers v. Equitable Mfg. Co., 124 Ga. 1045, 53 S. E. 674. In an action for goods sold and delivered, it is necessary to show that the goods were in fact delivered. Dinsmore v. Butler, 98 N. Y. 7. 835. One suing for the purchase price of goods has the burden of proving a sale and delivery. Ashton v. Edward Thompson Co. [Colo.] 85 P. 697.

84. Ainsfield Co. v. Rasmussen, 30 Utah, 453, 85 P. 1002.

85. Cathcart v. Webb, 144 Ala. 559, 42 42 So. 25.

86. Where the article is to be satisfactory to the buyer, the burden is on the seller to

of non est factum casts the burden of proving the contract on the plaintiff.[87] Breach of warranty being set up there is a conflict as to who has the burden of proof.[88] The burden of proving a defense rests on the defendant.[89] In an action to recover the price paid, where it is undisputed that the goods have been returned to the seller, it is no burden on the plaintiff to show that defendant is indebted to him.[90] In the absence of evidence to the contrary where a contract made to govern future orders is shown to be in force, as of a certain date, its existence will be presumed and its terms will govern a sale made a month after such date.[91] A showing that conditions had been fulfilled previous to the time for performance is insufficient to even raise a presumption of performance at such time.[92] A plea of total failure of consideration in a suit for the contract price of certain articles is not supported where the evidence fails to show that the articles are entirely worthless,[93] and in the absence of any data from which it can be ascertained how much less the goods are worth than the contract price, it is error for the court to direct a verdict for the defendant.[94]

Evidence; admissibility and sufficiency.[95]—As the familar rules of evidence[96] determine the questions of admissibility, relevancy, and competency, illustrations only are given.[97] Hearsay evidence[98] and evidence constituting merely the opinion

show by proof of the acceptance of the machinery that the buyer's obligations to make payments had matured. Inman Mfg. Co. v. American Cereal Co. [Iowa] 110 N. W. 287. Instruction that buyer must prove dissatisfaction and that his action was not based on any whimsical, fictitious notion or mercenary motive, held erroneous. Id.

87. Feagan v. Barton-Parker Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 665, 93 S. W. 1076.

88. The goods being sold by sample and the buyer alleging that they did not come up to sample, the plaintiff has the burden of proving that the goods delivered were equal to the sample. Rosenstein v. Casein Mfg. Co., 50 Misc. 345, 98 N. Y. S. 645. Must offer evidence of this fact. Id. Defendant setting up breach of warranty, he must prove it. Prizer-Painter Stove & Heater Co. v. Peaslee, 99 Minn. 275, 109 N. W. 232. The goods being accepted and damages for breach of warranty being set up as a counterclaim in an action for the price, the burden of proving breach of warranty is on defendant. Wyandotte Portland Cement Co. v. Bruner [Mich.] 13 Det. Leg. N. 1042, 110 N. W. 949. A defense of breach of warranty in a sale of chattels is an affirmative defense and several persons buying a horse under an alleged oral warranty must prove that the warranty was made to each one of them Dunham v. Salmon [Wis.] 109 N. W. 959.

89. Nichols & Shepard Co. v. Miller [Neb.] 107 N. W. 1010. The buyer claiming rescission for fraud, the burden is on him to show the fraud. Lyon v. Lindblad, 145 Mich 588, 13 Det. Leg. N. 574, 108 N. W. 969.

90. Bazelon v. Lyon, 128 Wis. 337, 107 N. W. 337.

91. Fruit Dispatch Co. v. Le Seno [Mich.] 13 Det. Leg. N. 991, 110 N. W. 526.

92. On an issue as to whether sacks of fertilizer purchased by defendant were properly tagged at the time of delivery, evidence that tags were placed on the sacks at the time they were shipped gave rise to no presumption that the tags still remained there when the sacks were delivered. Alabama Nat. Bank v. Parker & Co. [Ala.] 40 So. 987.

93, 94. Clegg-Ray Co. v. Indiana Scale & Truck Co., 125 Ga. 558, 54 S. E. 538.

95. See 6 C. L. 1360.

96. See Evidence, 7 C. L. 1511

97. In an action by the seller's assignee to recover the price, it is proper to permit plaintiff to show **delivery** of the goods and the **date thereof.** Stark v. Burke [Iowa] 109 N. W. 206. In an action for the price of building material, testimony by one who personally **knew nothing about** the contract but who had figured the work for the seller "as to what was figured" was immaterial. Rikerd Lumber Co. v. Charles Hoertz & Son [Mich.] 13 Det. Leg. N. 809, 109 N. W. 664. A witness in an action to recover the price of jewelry sold, who was **not shown to have any knowledge** in regard to the character, quality, and value of the goods testified about, is incompetent to testify as to their quality or value, McAllister-Coman Co. v. Matthews [Ala.] 43 So. 747. Where plaintiff claimed a sale and defendant a contract of agency, a **warehouse receipt** for the property, though taken after the commencement of the suit, is admissible. Owensboro Wagon Co. v. Hall [Ala.] 43 So. 71.

Evidence that the public demanded fusible plugs in steam automobiles is admissible in assumpsit for the price of an automobile lacking such plug as bearing on its value. Grout v. Moulton [Vt.] 64 A. 453. In an action for the price of patterns, where the defendant pleaded a set-off for patterns returned to plaintiff, a **written contract** between the parties whereby the defendant agreed to retain the patterns sent him till a date later than that at which he actually returned them is admissible. Butterick Pub. Co. v. Crawford Mercantile Co. [Ala.] 41 So. 80. Evidence held admissible to show that **account was a new one** and that this was the reason deviation from plaintiff's regular terms had been made as defendant contended, and also that plaintiff had previously filled orders from defendant on the same

of the witness [99] is inadmissible. Testimony of experienced men as to similar facts within their own experience is admissible.[1] In proper cases the court may limit the number of witnesses to any one point.[2] The only pleas being the general issue and set-off, evidence of breach of warranty and of fraud is inadmissible.[3]

The evidence must preponderate [4] to establish the sale between the parties,[5] its terms,[6] the performance or breach thereof,[7] and delivery where essential,[8] the cases

terms. Central Texas Grocery Co. v. Globe Tobacco Co. [Tex. Civ. App.] 99 S. W. 1144. In an action for the price of beer, where the plaintiff's evidence tended to show that the defendant ordered it delivered at a certain place, which the defendant denied, evidence that he was **not the owner or in possession or carrying on business at the place named,** and that the parties were engaged in business there and ordered the beer, was admissible. Loewers Gambrinus Brewing Co. v. Kuku, 99 N. Y. S. 480. In a suit for the purchase price of certain coal, it being conclusively proven that a receipt had been given for every ton of coal delivered to defendant at any time with the exception of one ton delivered subsequent to April 20, 1903, it was not error to exclude such **receipts** offered merely to prove that the coal in question was not within purchases made prior to that date. McRavy v. Barto, 99 N. Y. S. 712. In assumpsit to recover for materials furnished to a government contractor, **statements furnished** by the latter **to the government** of his plant, labor, and materials employed in the work actually done by him for which he asked payment, were inadmissible to show that defendant was not delayed in his work by reason of plaintiff's default or that such contract did not actually need the materials which were required by him and which plaintiff failed to furnish. United States v. Molloy [C. C. A.] 144 F. 321. In an action on a note given for the purchase of a steam engine, where the issue was whether plaintiff agred to take back such engine and return the note if defendant would buy goods in which plaintiff was interested at a certain price, evidence that plaintiff was **offered by another, after the sale** to defendant, without knowledge thereof, the same price defendant had paid was relevant. Strickland v. Phillips [S. C.] 55 S. E. 453. In an action for the price of a shipment of hats, the buyer's manager could testify that the samples from which he ordered were designated by numbers and that plaintiff agreed to send hats made up exactly like the samples which were all in perfect condition as to plumage and make, though the manager **never saw those shipped,** his testimony being competent in connection with other testimony to show that the hats delivered did not conform to the order. Schiller v. Blyth & Fargo Co. [Wyo.] 88 P. 648. Where it was claimed that lumber sold did not come up to warranty, evidence of **similar sales and no compiaint** made is inadmissible. Hutchinson Lumber Co. v. Dickerson [Ga.] 56 S. E. 491. Where a contract was made for the sale of certain **lumber,** stated to be **air-dried** and of a specified character, evidence that it was stacked in piles "with sticks between it, so that air could go through and ventilate it," was admissible. But evidence that the mill superintendent was an old hand at stacking lumber and **would have stacked** each day's cutting the next day was not admissible. Id. Where in an action for the price of a raft of **logs** sold and delivered, which defendant refused to accept, the only issue was whether they were delivered in the condition required, and it appeared that they **sank after delivery,** it was error to admit the testimony of a witness as to his **raising some of the logs** after they had been sunk and **selling them to defendant.** Cathcart v. Webb 144 Ala. 559, 42 So. 25. Where, in an action for breach of a contract of sale, it was claimed that the seller did not file a bond as required by the contract within a reasonable time, and the evidence showed that letters passed between the buyer and seller, which were sent through the mail by which a bond not received was claimed to have been sent by the seller, evidence that it **took three or four days for a letter to pass between** the buyer and seller was admissible. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628.

98. Conversation between seller and witness in the absence of the buyer held inadmissible as against the latter. Austin v. Smith [Iowa] 109 N. W. 289.

99. In a case where the place of sale is directly in issue, testimony of a witness that he bought the goods at a given place from the seller's traveling salesman, who agreed to deliver them at that place, but not showing what was said and done, is merely the opinion of the witness as to the legal effect of the transaction and has no probative force as against evidence which showed that the salesman had no authority to make a sale and that the transaction was in legal effect a sale in another place. Bowlin Liquor Co. v. Beaudoin [N. D.] 108 N. W. 545.

1. McDonald v. Sundstrom, 31 Pa. Super. Ct. 241.

2. Where sale was made in the presence of more than 200 people, held proper to limit evidence on any issue as to terms to five witnesses. Austin v. Smith [Iowa] 109 N. W. 289.

3. Thomas v. Thomas [Ala.] 41 So. 141.

4. See 6 C. L. 1361.

5. Evidence held sufficient to warrant submission to the jury of the question of sale. Frazer v. Mott, 103 N. Y. S. 851.

6. Evidence held insufficient to sustain a finding as to the price at which goods were sold. Standard Ice Co. v. Pratt [Wash.] 87 P. 936. In an action for breach of a contract to buy from plaintiff all the oranges grown in a certain grove, evidence held to warrant a finding that the agreement was in consideration of defendant having the handling of the oranges grown in another grove. Sterling v. Gregory [Cal.] 85 P. 305.

7. Evidence held sufficient to show that pumping plant fulfilled warranties and that buyers accepted it as in full compliance with the terms of the contract. Bixby v.

cited being illustrative of this rule and plaintiff's right to recover.[9] Retention of invoice and itemized account without objection is evidence of more or less weight, according to the circumstances and length of time retained, that all the goods invoiced and charged were received.[10] While a plea for total failure of consideration includes partial failure of consideration, there must be evidence introduced showing the extent to which the consideration has failed before a verdict can be rendered giving the defendant the benefit of a partial failure.[11] The mere presentation of a bill for merchandise is no proof of the sale and delivery thereof.[12]

Trial and instructions.[13]—The general principles of trials [14] and instructions [15] are treated elsewhere. Particular cases hereunder discuss the applicability of the instructions to the cases as defined by its issue,[16] and their sufficiency to fairly present such issues [17] without misleading the jury.[18] Instructions should not be on the

Bastady [Cal. App.] 88 P. 493. Evidence held to show breach of implied warranty of quality of grapes sold. Truschel v. Dean, 77 Ark. 546, 92 S. W. 781. In an action for the price of coal sold, evidence held sufficient to sustain defendant's claim for damages for failure of plaintiff to deliver all the coal sold. Germer Stove Co. v. Haws Hardware & Furniture Co. [Neb.] 110 N. W. 576. Evidence held sufficient to show that required quantity was delivered. Johnson v. Crawford, 144 F. 905. Evidence held insufficient to show a delivery. Dinsmore v. Butler, 98 N. Y. S. 835; Datz Co. v. Dieckman, 99 N. Y. S. 319.

8. Kitchin v. Clark, 120 Ill. App. 105.

9. Uncontradicted testimony of buyer as to alteration of order held sufficient to relieve him from liability. Price v. Stanbra [Wash.] 88 P. 115. Evidence held to show that destruction of property was due to defect in spur wheel sold. Howard Iron Works v. Buffalo El. Co., 113 App. Div. 562, 99 N. Y. S. 163. In an action by a dressmaker for price of dress made for defendant's wife, evidence held sufficient to make out a prima facie case. Fribourg v. Hall, 103 N. Y. S. 207.

10. Hamilton-Brown Shoe Co. v. Choctaw Mercantile Co. [Ark.] 97 S. W. 284. Where nearly five months intervened between shipment and objection and in the meantime over half of the bill was paid, held facts required an instruction authorizing the jury to consider the effect of the failure to report a claim for shortage within a reasonable time. Id. Failure to so instruct held to constitute prejudicial error. Id.

11. Grier v. Enterprise Stone Co., 126 Ga. 17, 54 S. E. 806.

12. Ashton v. Edward Thompson Co., [Colo.] 85 P. 697.

13. See 6 C. L. 1361.

14. See Trial, 6 C. L. 1731.

15. See Instructions, 8 C. L. 333.

16. Where the genuiness of certain signatures was admitted, held proper to instruct that if such signature were genuine they might be used for comparison. Stark v. Burke [Iowa] 109 N. W. 206. In an action for the price of building material, the dispute being over certain items claimed by the plaintiff, an instruction setting forth the contention and making plaintiff's right of recovery dependent upon a finding as to whether or not the items in dispute were included in the contract held proper. Rikerd Lumber Co. v. Hoertz & Son [Mich.] 13 Det. Leg. N. 809, 109 N. W. 664. In an action for the price of machinery sold under a warranty that it would work satisfactorily and was accepted in writing by defendants, held that an instruction authorizing a recovery if the machine proved satisfactory, even though the written acceptance was procured by fraud, did not authorize a recovery upon a different cause of action from that pleaded, the allegation of a written acceptance being immaterial. Leyner Engineering Works Co. v. Brass Ring Co., 117 Mo. App. 378, 93 S. W. 875. Where in a given case the only plea is a plea of total failure of consideration and the evidence for the plaintiff authorizes a finding for the full amount claimed, and the evidence for defendant authorizes a finding that the consideration has wholly failed as well as that the article sold was of some value, but there is no evidence as to value other than a full value, a new trial will not be granted on account of an instruction to the effect that the jury should find for the defendant in the event that the article was entirely worthless, nor because of an instruction that if they should find that the goods were reasonably suited for the purposes intended they should find for the plaintiff. Grier v. Enterprise Stone Co., 126 Ga. 17, 54 S. E. 806.

17. Action by seller to recover purchase price, held matters in issue were fairly submitted to the jury. Laurie v. Lininger & Metcalf Co. [Neb.] 107 N. W. 259. Where defense was that written contract was not in the terms orally agreed upon, held instruction erroneous, it not submitting an issue of fraud. Paris Mfg. & Importing Co. v. Carle, 116 Mo. App. 581, 92 S. W. 748.

18. An instruction correctly stating the law of implied warranties of an article to be manufactured held not ambiguous, nor misleading, nor upon the weight of the evidence. Brown & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617. Sale of fertilizer. Evidence showed that fertilizer bought should contain as much available phosphoric acid as one thousand one hundred pounds of bone per ton. Held not misleading to charge that the jury should find for plaintiff if the fertilizer delivered contained one thousand one hundred pounds of bone to the ton or its equivalent in fertilizing properties. Goodman v. Beard & Co., 29 Ky. L. R. 544, 93 S. W. 666. Where the buyer denies the allegations of the complaint and pleaded as an affirmative de-

weight of the evidence.[19] The refusal to give a certain instruction may be cured by the giving of other instructions.[20]

Questions of fact are for the jury,[21] those of law for the court.[22]

In questioning witnesses the terms "merchantable" and "marketable" are deemd synonymous.[23]

The recovery awarded must be in accordance with the pleadings [24] and facts.[25]

(§ 10) *F. Action for breach.*[26]—A tender by the seller is generally a condition precedent to an action for failure to accept.[27] Subject to exceptions it is the general rule that where one party to an executory contract before performance is due expressly renounces the contract and gives notice that he will not perform it, his adversary, if he so elects, may treat the renunciation as a breach of the contract and at once sue for damages,[28] but the party desiring to so treat such renunciation must elect to do so within a reasonable time.[29] Where the seller declines to recognize a renunciation by the buyer before the time for performance, he must, in

fense the failure of the seller to ship the goods in time, an instruction that if the evidence was equally balanced the verdict should be for the defendant held misleading because calculated to lead the jury to apply the instruction to the affirmative defense. Ainsfield Co. v. Rasmussen, 30 Utah, 453, 85 P. 1002.

19. In an action to recover the price paid for goods which were in fact returned and accepted by the sellers, where the only contested issues were whether the buyer got credit for the goods so returned, and whether the sellers were entitled to credit on counterclaims, an instruction that the goods did not correspond with those ordered and were returned is not erroneous as covering a point on which there is conflicting evidence. Bazelon v. Lyon, 128 Wis. 337, 107 N. W. 337. Where in an action for the price of shoes a witness for defendant testified that they were worth less than the contract price, but there was testimony to the contrary, an instruction that if one witness testified that the shoes were worth less than the contract price the damages on each shoe would be the difference between the contract price and the price at which the witness fixed it, was erroneous as unduly emphasizing the testimony of a witness. Richardson & Co. v. Noble, 143 Mich. 545, 13 Det. Leg. N. 59, 107 N. W. 274.

20. Refusal to give instruction as to implied warranty of merchantable quality of grapes held not cured by an instruction that in determining whether grapes were in merchantable condition when shipped certain facts might be considered. Truschel v. Dean, 77 Ark. 546, 92 S. W. 781.

21. Question as to whether there was a sale or a contract to sell on commission held for the jury. Morris & Co. v. Schaefers & Sons [Ky.] 100 S. W. 327. Fraud, question for jury. Moneyweight Scale Co. v. Loewenstein, 103 N. Y. S. 80. As to whether bananas were "cargo run" held for the jury. Fruit Dispatch Co. v. Le Seno [Mich.] 13 Det. Leg. N. 991, 110 N. W. 526. Where it is claimed that bond though mailed is not received, the question of receipt is one for the jury. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628. Where seller agreed to furnish aid, etc., in helping resell the goods, held for the jury whether he had carried out his contract. Simpson v. Crane [Mich.] 13 Det. Leg. N. 1071, 110 N. W. 1081. Evidence considered, and held that question whether the buyer was justified in refusing the goods on the ground that they were not the goods ordered was for the jury. Price v. Stanbra [Wash.] 88 P. 115. Whether railroad ties were delivered under a certain contract or not held for the jury. Juntilla v. Calumet & H. Min. Co., 145 Mich. 618, 13 Det. Leg. N. 592, 108 N. W. 1076.

22. Where in an action for breach of a contract of sale the seller had not filed a bond required by the contract within a reasonable time, an instruction that, if the bond was filed within such time as to afford the buyer all the protection he was entitled to under the contract, plaintiff was entitled to recover was properly refused as submitting a question of law to the jury. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628.

23. Eaton v. Blackburn [Or.] 88 P. 303.

24. Where the sole question was the measure of damages, a verdict awarding ownership and damages held unsustainable even in part, the awarding of ownership not being a mere matter of surplusage. Richardson & Co. v. Noble, 143 Mich. 545, 13 Det. Leg. N. 59, 107 N. W. 274. A petition which alleges that defendant is indebted for horses sold to defendant and which demands judgment and is accompanied by an itemized bill showing that the sum claimed is the balance due from defendant on horses sold to him and for feed does not authorize a recovery of the difference in the contract price on a sale of horses to defendant and the price obtained on resale on his refusing to accept and pay for them. Campbell v. Myers [Mo. App.] 99 S. W. 45.

25. Where goods were sold for cash, a judgment computing interest on the basis of a sale of goods on thirty days' time is erroneous as to the interest. McCarthy v. Nixon Grocery Co., 126 Ga. 762, 56 S. E. 72.

26. See 6 C. L. 1362.

27. Sale of corn to be grown. Pancoast v. Vail [Del.] 65 A. 512.

28. Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124. The buyer repudiating the contract before the date of delivery, the seller is entitled to recover damages for breach of contract. McBath v. Jones Cotton Co. [C. C. A.] 149 F. 383.

29. Alger-Fowler Co. v. Tracy, 98 Minn. 423, 107 N. W. 1124.

order to recover for the failure of the buyer to accept the goods, perform all conditions on his part.[30] The complaint must allege performance by plaintiff of all conditions on his part[31] and must, by allegations of fact,[32] show the breach by the defendant.[33] An allegation that it was the duty of defendants under said contract to perform their part, without stating the facts imposing such duty, is not equivalent to an allegation that the plaintiffs had performed their part.[34] A plea showing a breach by the plaintiff states a good defense.[35] In an action for breach of the contract for the refusal on the part of the buyer to accept the goods tendered, the burden of proving that the goods tendered met the contract requirements is on the plaintiff.[36] Cases dealing with the admissibility,[37] competency,[38] and sufficiency[39] of the evidence, are shown in the notes. Questions of fact are for the jury.[40]

(§ 10) *G. Action for damages for goods not accepted.*[41]

(§ 10) *H. Choice and election of remedies.*[42]—If the buyer refuses to accept the subject-matter of the bargain when tendered by the seller in proper condition and at the proper time and place, the law allows the seller several modes of redress. If the contract has been so far performed by the seller that the property is ready for delivery before he has notice or knowledge of the buyer's intention to decline accept-

30. Must tender goods. Inman v. Elk Cotton Mills [Tenn.] 92 S. W. 760.

31. Complaint showing that selection of goods was to be made by the seller but failing to show that such selection had been made held defective on demurrer. Puritan Mfg. Co. v. Bouteiller & Co. [Conn.] 64 A. 227. In an action for the breach of a contract to buy and move lumber cut "in accordance with sizes and prices in said contract stated," in the absence of an allegation that the plaintiff cut the lumber "in accordance with the sizes and prices in said contract stated," and of a legal excuse for not doing so, and there is no general allegation of performance by the plaintiffs, the declaration is demurrable. Milligan v. Keyser [Fla.] 42 So. 367.

32. An allegation in a count of the declaration of duty and obligation of the defendants under the contract is a mere conclusion, and, where the count does not contain allegations of fact showing the duty and the obligation, it is demurrable. Milligan v. Keyser [Fla.] 42 So. 367.

33. A count in a declaration in an action for a breach of contract to buy and move lumber cut "upon terms and conditions agreed upon," which contains no allegations as to what were the terms and conditions and of facts showing a breach of the contract, is demurrable. Milligan v. Keyser [Fla.] 42 So. 367. In an action for breach of a contract to buy and move "all the lumber cut by plaintiff's mill, * * * in accordance with sizes and prices in said contract stated," an allegation that the defendants refused to move "lumber cut by plaintiffs for defendants under the said contract" is not the equivalent of an allegation of refusal to move lumber cut "in acordance with sizes and prices in said contract stated," and, when the count contains no other allegations sufficiently stating the breach, it is demurrable. Id.

34. Milligan v. Keyser [Fla.] 42 So. 367.

35. In an action by a seller for damages for refusal to receive goods sold, a plea setting up the unfulfilled promise of the selling agent of plaintiff that the goods would be delivered within ten days, and that if the promise had not been made defendant would not have signed the contract, held not demurrable. Green v. Lineville Drug Co. [Ala.] 43 So. 216. Plea that plaintiff failed to comply with the contract, in that he did not ship and deliver the goods as called for by the contract and that defendant was ready and willing to comply with the contract, held to merely amount to the general issue and was not demurrable. Id.

36. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260.

37. A letter written by the seller to the buyer after the latter had refused the goods, on a disagreement as to the meaning of certain words setting out the seller's version, is inadmissible, being but a self-serving declaration, constituting no part of the res gestae and immaterial as notice. Moritz v. Herskovitz [Wash.] 89 P. 560. In an action by a seller of grapes for breach of contract of sale by the buyer caused by his delay in accepting grapes at his winery as they matured, evidence that other sellers were delayed in the delivery of their grapes was admissible to show the congested condition and lack of facilities at the winery for accepting grapes. Leonhart v. California Wine Ass'n [Cal. App.] 89 P. 847.

38. In an action for breach of a contract whereby plaintiff's flouring mill sold to defendant "280 tons bulk of No. 2 screenings (more or less) * * * to be our output" during a certain time, it was competent for defendant, in order to show the character of the mill process producing the screenings, to introduce in evidence samples of the contents of the cars shipped him and to testify that the contents were not No. 2 bulk screenings. Listman Mill Co. v. Miller [Wis.] 111 N. W. 496.

39. Sale of coal to be mined. Evidence held to show breach by purchaser. Thistle Coal Co. v. Rex. Coal & Min. Co. [Iowa] 109 N. W. 1094.

40. Sale of wheat screenings held question for the jury whether screenings contracted for were in fact shipped. Listman Mill Co. v. Miller [Wis.] 111 N. W. 496.

41. See 6 C. L. 1362.

42. See 6 C. L. 1363.

ance, he may treat the property as belonging to the buyer, hold it subject to the later's order, and recover the full agreed price;[43] or he may resell the property for the best price obtainable at the place of delivery, or, if there is no market for the goods there, in the most accessible market, charging the buyer with the reasonable expenses of the sale and of keeping the goods and recover the purchase price less the net amount realized for the goods at said sale;[44] or he may treat the sale as ended by the buyer's default and the property as his (the seller's), and recover the actual loss sustained,[45] which is ordinarily the difference between the agreed price and the market price,[46] and if he elects to keep the goods he cannot be charged with whatever amount he may realize from a sale of the goods in the future.[47] The buyer repudiating the contract before delivery, the seller cannot subsequently deliver the goods and recover the contract price.[48] In a sale for cash, if the seller delivers the goods and immediately demands payment, he may, upon payment being refused, retake the goods,[49] and for such purpose is entitled to sue in conversion.[50] Where a buyer retained the goods after notice from the seller that he could do so only on payment of a specified price and failed to return them as promised in consideration of the seller returning the buyer's check for a smaller sum sent in full payment, the seller could elect either to insist on an implied contract to pay the specified price and recover that sum, or he could sue on the breach of promise to return, in which event the damages might exceed the specified price under special circumstances, such as necessity of expenses and consequent loss of profit, if such could be proved to have been within the reasonable anticipation of the parties.[51] What constitutes an election of one of several remedies is largely a question of fact.[52] Where the contract provides that payment of the purchase price shall be secured by a trust deed on certain property, the seller, on the buyer's refusal to perform, is entitled to a lien on the property which was to have been included in the deed of trust.[53]

§ 11. *Remedies of purchaser. A. Rescission.*[54]—Equity will rescind a sale at the instance of the buyer because of the seller's false representations concerning material evidence not open to inspection on which the buyer had a right to rely

43. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040. He may hold the property for the buyer and at his risk and recover the purchase money at the contract price. Sour Lake Townsite Co. v. Deutser Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 631, 94 S. W. 188. In an action for goods sold and delivered the seller may, upon tender of performance on his part and demand of payment and refusal of the purchaser to perform, treat the property as belonging to the purchaser and sue for a recovery of the price agreed to be paid. Horst v. Montauk Brewing Co., 103 N. Y. S. 381.

44. Sour Lake Townsite Co. v. Deutser Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 631, 94 S. W. 188. He may sell it for the buyer's account, taking the requisite steps to protect the latter's interest, and get the best price obtainable and then recover the difference between the proceeds of the sale and the agreed price, St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040.

45. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040.

46. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040. He may retain the goods and recover the difference between the contract price and the market price at the time and place of delivery. Sour Lake Townsite Co. v. Deutser Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 631, 94 S. W. 188. See post, § 12 C, Breach by Purchaser.

47. Sour Lake Townsite Co. v. Deutser Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 631, 94 S. W. 188.

48. Delivery to a carrier. Rounsaville & Bro. v. Leonard Mfg. Co. [Ga.] 56 S. E. 1030.

49, 50. Lamb v. Utley [Mich.] 13 Det. Leg. N. 904, 110 N. W. 59.

51. American Foundry & Furnace Co. v. Settergren [Wis.] 110 N. W. 238.

52. Commencement of suit for the price held an affirmance of the sale and to bar replevin and rescission of the contract for fraud. Baker v. Brown Shoe Co. [Ark.] 95 S. W. 808. Where a seller sued for breach of contract for failure of the buyer to return the goods and claimed damages in excess of their alleged value, the buyer was entitled to show the reasonable value of the goods, for the seller, in seeking to enhance its recovery above the alleged price, opened the door to prove that its damages from a nonreturn was less than that price. American Foundry & Furnace Co. v. Settergren [Wis.] 110 N. W. 238.

53. Barnard & Leas Mfg. Co. v. Smith, 77 Ark. 590, 92 S. W. 858.

54. See 6 C. L. 1363.

and did rely and was injured, provided the buyer promptly disaffirms on discovery of the fraud and does not thereafter deal with the property acquired as his own.[55] A promise, a prophecy, an expressed opinion or belief concerning future events or conditions, furnishes no ground for the rescission of a contract of sale.[56] The subject of an actionable misrepresentation must be the existence or nonexistence of a fact at the time the statement is made,[57] and a misrepresentation which will induce a court of equity to avoid a contract of sale must be material, inducing,[58] and, except where the buyer is induced to accept an article different from that contracted for,[59] damaging.[60] This right to rescind does not apply to a sale within the rule of caveat emptor.[61] The right is not defeated by a provision that before one can claim failure of consideration or defect in quality he must take advantage of an exchange privilege.[62] In Texas the fact that the buyer was himself guilty of fraud will not preclude him from obtaining a rescission of the contract for the seller's fraud.[63] In some states failure of consideration authorizes rescission.[64] As to whether breach of warranty [65] or condition [66] authorizes rescission, there is a conflict, some courts mak-

55. Graybill v. Drennen [Ala.] 43 So. 568; Clark v. Wooster [Conn.] 64 A. 10. Plea in a suit to cancel held defective in not alleging that buyer relied on independent investigations. Graybill v. Drennen [Ala.] 43 So. 568. Plea held defective in not alleging discovery of a negligence in discovering fraud while buyer was in possession. Id. Plea held defective in failing to charge the buyer of corporate bonds with notice of condition of the corporation's mine or business. Id. Sale of herd of dairy cattle. Evidence held not to show fraud warranting rescission. Dorsey v. Watkins, 151 F. 340.

56. Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480. Sale of stock with the misrepresentation that when issued it would be fully paid and nonassessable held no ground for rescission. Id.

57. Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480.

58. Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480. Sale of stock of bridge company with the misrepresentation that the company had a certain toll contract with a railroad held no ground for rescission, such contract being secured before the bridge was finished. Id. A purchaser of chattels may not rescind the contract for misrepresentations as to the place where the goods were manufactured, there having been no misrepresentation as to the manufacturer and the misrepresentations not being shown to be material. Brennard Mfg. Co. v. Citronelle Mercantile Co. [Ala.] 41 So. 671.

59. Where by the fraud of the seller the buyer is induced to accept an article different from that contracted for, he may rescind and recover money paid without a showing of damage. Jakway v. Proudfit [Neb.] 109 N. W. 388.

60. Where buyer loses his right to rescind on some false representation as to its quality, condition, or matter affecting its value. Jakway v. Proudfit [Neb.] 109 N. W. 388; Marquise v. Tri-State Land Co. [Neb.] 109 N. W. 397. Petition held obnoxious to a demurrer ore tenus. Id. A suit to rescind for fraud cannot be maintained unless it is shown that substantial injury will result unless relief by rescission is granted. Blair v. Baird [Tex. Civ. App.] 15 Tex. Ct. Rep. 59, 94 S. W. 116. A contract of sale expressly providing for the protection of the purchaser against existing liens on the property, the purchaser could not rescind because the seller falsely represented that no such liens existed. Id. Where in a sale of cattle estimates of the number were given, the buyer is not entitled to rescind because of a deficiency in the number unless this deficiency was material and the buyer was injured by the representations. Id.

61. The rule sometimes applied that a party to a sale may be entitled to a rescission where he was misled to his injury by representations made by the other party which proved to be untrue, although they were made in good faith on the ground that it would be inequitable to permit him to retain the benefit of a contract so induced, cannot be applied to a sale within the rule of caveat emptor. Dorsey v. Watkins, 151 F. 340.

62. Lyon v. Lindblad, 145 Mich. 588, 13 Det. Leg. N. 574, 108 N. W. 969.

63. Blair v. Baird [Tex. Civ. App.] 15 Tex. Ct. Rep. 59, 94 S. W. 116.

64. So held under Civ. Code, § 1689. Sterling v. Gregory [Cal.] 85 P. 305.

65. Where goods warranted to be of a certain quality were valueless, and the seller, on being notified of this refused to remedy the defects, the buyer may rescind the contract and lawfully refuse payment. Main Co. v. Field [N. C.] 56 S. E. 943. Breach of warranty warrants rescission. Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265. On an executed sale a mere breach of warranty does not give the buyer the right to rescind and return. Clark v. Wooster [Conn.] 64 A. 10. If a sale is executed a breach of warranty will not annul it or authorize the purchaser afterwards to return the property without the consent of the seller, but will give the purchaser a right to damages. Hutchinson Lumber Co. v. Dickerson [Ga.] 56 S. E. 491.

66. The failure of a seller of a machine to fulfill a promise to put it in good working order will not justify a rescission of the sale and recovery of the purchase price, but merely damages for failure to fulfill the contract. McSwegan v. Gattl-McQuade Co., 50 Misc. 338, 98 N. Y. S. 692.

ing the question depend upon fraud in making the warranty.[67] It is not every breach that will amount to such a repudiation or authorize the other party to rescind the contract and retain what has been paid or advanced thereon. The nature of each case must be considered and it is probably impossible to state a rule applicable to all the varying facts. "In general terms, the doctrine is that the breach to justify a rescission must be of a dependent covenant, or willful, or in a substantial part comprehending the root of the whole." [68] Substantial conformity with contract will bar rescission.[69] Where the contract calls for deliveries in instalments, the price of each instalment to be paid for on delivery, a refusal to pay on delivery warrants rescission.[70] The rule of caveat emptor applying, one cannot rescind on account of defects in the property, the seller not being guilty of fraud.[71] The terms of the contract sometimes give the right to rescind.[72]

A buyer seeking to rescind a contract of sale on the ground that the seller did not perform his undertaking must act within a reasonable time,[73] and, where the rescission is not by mutual consent, notice of the rescission must be brought to the opposite party and a reasonable time must be given after the notice to comply with the contract,[74] and the buyer must be able to put the seller in statu quo.[75] It follows that goods having been delivered, all of the goods [76] must be returned or a return

67. Where a vendor's warranty was both false and fraudulent, an action will lie for rescission of the contract of sale and recovery of the purchase price, but, if the warranty proves false but was not fraudulently made, the remedy of the vendee is in a suit for damages on account of the breach. Allen v. Hass, 7 Ohio C. C. (N. S.) 579. For breach of an express warranty against incumbrances, the remedy, in the absence of fraud or concealment of facts, is to sue for the amount of damages sustained by reason of such incumbrances and not by replevin. Mason v. Bohannan [Ark.] 96 S. W. 181.

68. Bishop, Contracts [En. Ed.], § 828. William Hanley Co. v. Combs [Or.] 87 P. 143. Where the purchaser of cattle was to pass on their quality before acceptance, the mere refusal to pass cattle which in fact complied with the contract, if done in good faith, will not justify the seller in rescinding the contract, though it may render the purchaser liable in damages for a breach thereof. Id.

69. Defendant contracted to sell to plaintiff certain first mortgage bonds of a corporation. At the time set for the delivery of the bonds a prior mortgage had not been released, although all but a few of the bonds secured thereby had been paid and a fund set apart for payment of the remainder. Held such a substantial compliance as not to warrant rescission. Nes v. Union Trust Co. [Md.] 64 A. 310. Where defendant contracted to sell to plaintiff bonds to be secured by a first mortgage on certain property, the fact that part of this property was conveyed to the mortgagor by a deed having a defective acknowledgement, which, however, was cured by a confirmatory deed upon attention being called to the error, did not entitle plaintiff to rescind the contract. Id.

70. So held when the buyer refused to pay on the ground that he had paid more on previous instalments than he ought to have, the estimates being made by the buyer's inspector. Strother v. McMullen Lumber Co. [Mo.] 98 S. W. 34.

71. The rule of caveat emptor applying, the purchaser of a herd of dairy cows cannot rescind on account of the diseased condition of some of the cows in the absence of fraud on the part of the seller. Dorsey v. Watkins, 151 F. 340.

72. Clark v. Wooster [Conn.] 64 A. 10.

73. Elliott v. Howison [Ala.] 40 So. 1018. Seven months' delay held not to bar rescission of contract of sale, an attorney selling bonds to his client. Hill v. Hall, 191 Mass. 253, 77 N. E. 831. Election to rescind held exercised with reasonable promptness. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585.

74. Elliott v. Howison [Ala.] 40 So. 1018. Plea held demurrable for failing to show the allowance of such a reasonable time. Id. A plea in an action for breach of an agreement to purchase a specified number of pine pilings, which alleges that the seller agreed to deliver the piling within ten days from the making of the contract, that a part of the pilings delivered did not comply with the terms of the contract, that pilings cut by the seller for delivery did not comply with the contract and that the buyer notified the seller of his intention to rescind the contract, is not demurrable for failing to aver that the seller was given a reasonable time in which to perform his undertaking after the buyer's notice of rescission. Id.

75. Civ. Code 1895, § 3712. Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50. Where there was a contract for the sale of corn and a portion was delivered, paid for, and used by the purchaser, he cannot rescind the contract upon the ground that the quantity received and accepted by him was inferior in quality to that stipulated in the contract. Id.

76. A contract of sale of personal property cannot generally be rescinded by a return or offer to return only that part of the property unsold. Owens Co. v. Doughty [N. D.] 110 N. W. 78. Where cow and calf were sold, the contract providing that they were to be treated as one animal and that on breach of warranty as to the cow being a

tendered and refused or waived.[77] The law of sales has no such self-executing kind of attachment as holding for damages,[78] and if he holds them for the declared purpose of obtaining general damages, he becomes liable in an action by the seller on the contract for the price.[79] In short, rescission at law after delivery of goods sold consists of a return of the goods within a reasonable time upon sufficient ground and refusa to pay the stipulated price therefor.[80] Though it has been held that a buyer of goods purchased for resale electing to rescind the contract for fraud, the seller is entitled to recover the proceeds of the goods sold by the buyer.[81] Except where the parties, either expressly or impliedly, designate another place,[82] the place for redelivery is the place of delivery under the terms of the contract,[83] and, in order to take advantage of an offer to return, it is not necessary that the buyer bring the goods into court and there tender them to the seller.[84] On rescission the seller must return all purchase money paid.[85] Except in the case of a divisible contract, a party cannot rescind in part and affirm in part.[86] One who is entitled to rescind a part of a divisible contract connot therefore rescind the whole.[87] A buyer cannot rescind and recover damages for breach.[88] What constitutes a rescission is largely a question of fact.[89] Mere words of disaffirmance followed by positive acts

breeder the "animal" might be returned, held to require a return of the calf as well as the cow. White v. Miller [Iowa] 109 N. W. 465.

77. Owens Co. v. Doughty [N. D.] 110 N. W. 78; Elliott v. Howison [Ala.] 40 So. 1018; Houghton Implement Co. v. Vavrousky [N. D.] 109 N. W. 1024; Dunham v. Salmon [Wis.] 109 N. W. 959. Where fraud is practiced on the buyer, his offer to return the goods followed by a tender of the same in court operates as a rescission of the contract. Lyon v. Lindblad, 145 Mich. 588, 13 Det. Leg. N. 574, 108 N. W. 969. Where in an action for the purchase price the defendant sets up breach of an express warranty as a defense but not as a counterclaim, he must show a rescission of the contract by showing the return or offer to return the goods. Roots Co v. N. Y. Foundry Co., 101 N. Y. S. 104.

Evidence held to show offer of return, goods not conforming to the contract. Avil Pub. Co. v. Bradford [Mo. App.] 97 S. W. 238. If a buyer has the right to disaffirm a contract of sale and to decline to receive the goods because of delay in delivery, he must, in order to avail himself of this right, either return the goods or hold them subject to the seller's order. Dougherty Bros. Tent & Awning Co. v. Peru-Van Zandt Implement Co. [Kan.] 89 P. 900.

78, 79. Dougherty Bros. Tent & Awning Co. v. Peru-Van Zandt Implement Co. [Kan.] 89 P. 900.

80. Main v. Prockmow [Wis.] 111 N. W. 508. A buyer contracted in writing to buy jewelry, specifically described. The contract did not call for goods saleable in a particular place or low-priced goods or goods containing any portion of rings gentlemen's size. Held that a letter by the buyer that he had examined the goods delivered, and that they did not come up to expectations, were too high priced for him to handle, would not sell in the neighborhood, and contained no rings gentlemen's sizes, and that he held the goods subject to the order of the seller, was not a rescission of the contract. Id.

81. Lyon v. Lindblad, 145 Mich. 588, 13 Det. Leg. N. 574, 108 N. W. 969.

82. Where seller instructed the buyer to inspect property and the inspection necessitated the unloading of the goods and the hauling of them to the buyer's place of business where they could be cared for, held the seller's direction to inspect operated to change the place of delivery to the buyer's place of business and constituted a consent that the buyer on rescinding the sale might tender a return at such place. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585.

83. Avil Pub. Co. v. Bradford [Mo. App.] 97 S. W. 238. Where plaintiff bought an engine of defendant through defendant's agent, defendant shipping it to his agent who delivered it, the return of the engine to the agent by plaintiff on rescinding the contract was sufficient. Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265.

84. Avil Pub. Co. v. Bradford [Mo. App.] 97 S. W. 238.

85. Wagman v. Julius Kessler Co. [Neb.] 110 N. W. 545.

86. Main v. Procknow [Wis.] 111 N. W. 508; Owens Co. v. Doughty [N. D.] 110 N. W. 78.

87. Westbrook v. Reeves & Co. [Iowa] 111 N. W. 11.

88. Main v. Procknow [Wis.] 111 N. W. 508.

89. Where instead of defending an action to recover the purchase money paid the seller starts replevin to regain possession, held there was a rescission. Wagman v. Julius Kessler Co. [Neb.] 110 N. W. 545. Notifying seller that goods did not conform to the order and requesting draft for freight charges paid, and shortly afterwards again notifying the seller "to get car of lumber out of the way," held to show an election by the buyer to rescind. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585. A contract bound defendant to furnish a specific kind of lumber within a reasonable time. Defendant failed to do so and wrote to plaintiff excusing his failure and advising plaintiff to look elsewhere for the lum-

acquiescing in the contract will not effect a rescission of the same.[90] As a general rule equity has jurisdiction of a suit for rescission,[91] though in some cases equitable relief has been denied upon the theory that the right to rescind and resell constitutes an adequate remedy at law.[92]

(§ 11) *B. Action to recover purchase money paid or to reduce price.*[93]—If one of the parties to a contract wrongfully refuses to comply therewith, the other party, if not himself in fault, may elect to treat the contract as rescinded and recover back the consideration, or whatever else has been paid thereon.[94] And he is not obliged to allege or prove a tender or offer to perform the rescinded contract.[95] A party who has advanced money in part performance of a contract and then refused to proceed to its ultimate conclusion, the other party being ready and willing to perform on his part, will not be permitted to recover back what he has advanced,[96] but if the breach by a buyer be not of such a character as to amount to a repudiation of the contract or a refusal to proceed to its ultimate conclusion, and the seller, without a demand or offer to perform and without notice to the buyer, disposes of the subject of the contract, the latter may treat it as a wrongful rescission, and the law will give him a right of action to recover back the consideration paid in part performance.[97] Whether one intends to abandon the contract or to refuse to comply with it is generally a question for the jury.[98] An action to recover back money paid on a contract which has been wrongfully rescinded is in form assumpsit.[99] A surety of the buyer is not a necessary party to a suit by the buyer to recover the purchase price on rescission.[1] The general rules as to the admissibility of evidence apply.[2] The general rules governing instructions[3] and

ber. Plaintiff replied by stating that he had been depending on defendant and would ask him to use every possible exertion to furnish the lumber at an early date. Held that plaintiff did not rescind the contract. Crane v. Barron, 100 N. Y. S. 937.

90. Owens Co. v. Doughty [N. D.] 110 N. W. 78.

91. Sale of bonds by attorney to client. Hill v. Hall, 191 Mass. 253, 77 N. E. 831. An action at law against the vendor of the stock of a corporation for damages is not as adequate, nor is it as complete or efficient, as a suit in equity against the vendor and the corporation to rescind the sale, to recover the purchase price, and to relieve the complainant from liability to the corporation on account of the stock. Farwell v. Colonial Trust Co. [C. C. A.] 147 F. 480.

92. Where a sale of a horse was effected by fraud and the buyers gave their note for the price, the fact that the horse is useless and that his care will be an expense to the buyers does not afford a ground for equitable relief, since, on the rescission of the contract, they can, after giving the owner opportunity to take him away, sell the horse for the best price obtainable, using the proceeds to reimburse their expenses and holding the balance for the use of the party entitled thereto. Johnson v. Swanke, 128 Wis. 68, 107 N. W. 481.

93. See 6 C. L. 1366.

94, 95. William Hanley Co. v. Combs [Or.] 87 P. 143.

96. William Hanley Co. v. Combs [Or.] 87 P. 143; Trauerman v. Nebraska Land & Feeding Co. [Neb.] 109 N. W. 379.

97. William Hanley Co. v. Combs [Or.] 87 P. 143. To subject the purchaser to this penalty or forfeiture it should clearly appear that he has wholly abandoned the contract and willfully refused to proceed thereunder. Trauerman v. Nebraska Land & Feeding Co. [Neb.] 109 N. W. 379.

98. So held where purchaser of cattle refused to pass on quality of same before acceptance. William Hanley Co. v. Combs [Or.] 87 P. 143.

99. William Hanley Co. v. Combs [Or.] 87 P. 143. Is on an implied contract within the meaning of the attachment laws. Id.

1. Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265.

2. In an action to recover the purchase price of a team sold under a contract that it would be taken back and the purchase money refunded if unsatisfactory, evidence as to the unsoundness of one of the horses was admissible as indicating the reasonable character of plaintiff's claim that the team was unsatisfactory. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665. Where a warehouse receipt was admissible, held the seller should be permitted to show that the signature on the receipt was his together with other circumstances tending to identify the receipt. Julius Kessler & Co. v. Burckell [Tex. Civ. App.] 99 S. W. 173. Where misrepresentation is alleged and it is denied, held competent to show by warehouse receipts that the goods sold were delivered to the buyer. Id. Where engine was warranted to do the work for which it was made and sold, telegram to the seller stating breach of warranty and failure of the seller to send an expert held admissible as showing notice. Kohl v. Bradley-Clark & Co. [Wis.] 110 N. W. 265. Where an order given by plaintiff to defendant for an engine contained the terms of sale and warranty, and the correspondence received, as

special interrogatories [4] apply. Cases dealing with the sufficiency of the evidence are shown in the notes.[5]

(§ 11) *C. Actions for breach of contract.*[6]—The buyer being ready and willing to perform,[7] and the seller refusing to perform, the buyer may recover damages [8] and is also excused from further performance on his part.[9] Payment and delivery being concurrent acts and the purchaser being ready to perform at the appointed time and place, his right of action is complete without tender or demand.[10] An order to sell being deemed to continue in force until it has been answered, its withdrawal before acceptance is a matter of defense.[11]

A complaint naming the parties, the thing sold, the amount sold, the price to be paid therefor, and the conditions and place of delivery, is sufficient.[12] The petition must set forth facts showing in what the damages consisted.[13] If it be conceded that an averment of a demand is necessary, a refusal, ex vi termini, imports that a demand was made.[14] An allegation that a written contract was "entered into" is sufficient to admit proof that a memorandum was delivered [15] and of a parol acceptance of a written offer to sell.[16] The sufficiency of particular allegations or denials of facts are shown in the notes.[17] Failure to allege certain facts may be cured by answer.[18] The reply must be consistent with the petition or complaint.[19] Cases

well as the delivery of the engine on such order, showed an acceptance of the order, it is properly admitted in evidence in an action to recover the price paid after rescission for breach of warranty. Id.

3. Where misrepresentation is alleged and the seller denies making any representations, it is error to charge that if the seller represented the article to be as it actually was he could recover. Julius Kessler & Co. v. Burckell [Tex. Civ. App.] 99 S. W. 173. Also in such a case it is error to refuse to charge that if the seller had not misrepresented the article he would be entitled to recover. Id. A request to charge that defendant was not bound to teach plaintiff how to start or operate the engine is properly refused, there being no evidence that defendant was bound to teach plaintiff how to operate it. Kohl v. Bradley-Clark & Co. [Wis.] 110 N. W. 265.

4. In an action to recover the price after rescission for breach of warranty, the defendant not having asked for a special verdict is not entitled to have the question: Was the engine, with proper use and management, capable of doing well the work for which it was made and sold? submitted. Kohl v. Bradley-Clark & Co. [Wis.] 110 N. W. 265.

5. In an action to recover back the price paid for cattle taken from the purchaser by the Federal authorities because they were smuggled into the country, held, under the evidence, that the question of the purchaser's knowledge of the smuggling was one of fact. Badger v. Cook, 101 N. Y. S. 1067. Evidence in an action for failure to deliver cotton alleged to have been sold by defendants to plaintiffs and to recover the purchase money paid, held to show that the purchase was made for plaintiffs by defendants as cotton buyers. Robert Beatty & Co. v. Martin & Co. [Miss.] 42 So. 130.

6. See 6 C. L. 1367.

7. Payment and delivery being concurrent acts, the purchaser cannot recover damages for a failure to deliver, unless he was ready and willing to perform, by accepting and paying at the time and place appointed. Catlin v. Jones [Or.] 85 P. 515.

8. Earnshaw v. Whittemore [Mass.] 80 N. E. 520. Where seller of bottles refused to perform, held direction of buyer to send molds to another manufacturer did not constitute a breach. Id. See, also, Ketcham v. U. S., 40 Ct. Cl. 220.

9. Earnshaw v. Whittemore [Mass.] 80 N. E. 520.

10. Catlin v. Jones [Or.] 85 P. 515.

11. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67.

12. Bailey v. Leishman [Utah] 89 P. 78.

13. Langan & Taylor Storage & Moving Co. v. Tennelly, 29 Ky. L. R. 367, 93 S. W. 1.

14. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. Complaint alleging defendant's refusal to deliver and plaintiff's readiness and willingness to accept and pay for the goods is sufficient. Id.

15, 16. Bailey v. Leishman [Utah] 89 P. 78.

17. An averment in a petition that the plaintiff had purchased of the defendant a specified quantity of a given article at a stated price to be delivered at a stated time and place is a sufficient allegation that the plaintiff had agreed to receive the article at the time and place fixed and to pay for the same. Watson v. Hazlehurst [Ga.] 56 S. E. 459. Where in an action for failure to deliver the complaint alleges that plaintiff bought in for the account of defendant sixty-six bales of middling cotton at a certain price, and the answer "denies that plaintiff bought for the account of defendant sixty-six bales of cotton at any price," held a mere denial that the cotton was bought for the account of defendant, so that plaintiff's testimony that the sixty-six bales of cotton he bought was worth, in the market when he bought it, eleven and one-half cents a pound, will be treated as evidence that middling cotton was then worth that amount. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413.

18. Payment and delivery being concurrent acts, failure of the buyer to allege his

dealing with the admissibility [20] and sufficiency [21] of the evidence are shown in the notes. The burden is on the plaintiff to prove performance of conditions precedent.[22] Questions of fact are for the jury.[23] The general rules of instructions apply.[24] The making and breach of the contract being established without adverse inference, the plaintiff is entitled to nominal damages.[25]

(§ 11) *D. Action for breach of warranty.*[26]—Within the meaning of statutes of limitation, the cause of action upon a breach of warranty accrues at the time of making the sale [27] and not subsequently when consequential damages arise or the breach is discovered.[28] Within the statute of limitations where an action is founded on a written instrument, the agreement alleged to be broken must appear by express terms in the instrument itself. [29] Action for breach of an express warranty may be maintained without a return of the goods.[30] Conditions precedent must have been performed.[31] Where several persons associate themselves together for the purchase

willingness to perform in his complaint is cured by the answer alleging nonperformance by the plaintiff and the latter taking issue with such allegation. Catlin v. Jones [Or.] 85 P. 515.

19. Where complaint sought damages for nondelivery, a counterclaim in the reply for the purchase price should be stricken out. Langan & Taylor Storage & Moving Co. v. Tenneily, 29 Ky. L. R. 367, 93 S. W. 1.

20. Where the plaintiff sues for damages for breach of an executory contract for the sale of personal property, evidence of a subsequent annulment of the contract by mutual consent is not admissible under a general denial. Hager v. Donovan [Kan.] 88 P. 637. Proof of the consideration moving to the holder of corporate stock which induced him to agree to sell it at the stipulated price is admissible, though the evidence on this point should properly be so restricted as to eliminate all unnecessary details. Hightower v. Ansley, 126 Ga. 8, 54 S. E. 939. Letter forming part of the negiotations held admissible as part of the res gestae, though signed in a name other than that of the seller or its manager who conducted the negiotations. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413. In an action for the breach of a contract for the sale of lumber on hand at mill and at loading station and also of "entire cut" of lumber during year 1903, evidence of quantity cut in 1903 is material on the question of damages. Inman Bros. v. Dudley & Daniels Lumber Co. [C. C. A.] 146 F. 449. A person whose business is such that he is familiar with the value of an article which is the common subject of sale is competent to testify to its market value, although he has no personal knowledge of any particular sales. Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817.

21. Evidence held insufficient to show that buyer's agent stated that specifications, orders, and directions as to shipments would be given. Nicholls v. American Steel & Wire Co., 102 N. Y. S. 227. Evidence held to show that failure to deliver was caused by railroad's failure to deliver cars. Langan & Taylor Storage & Moving Co. v. Tenneily, 29 Ky. L. R. 367, 93 S. W. 1.

22. Sagola Lumber Co. v. Chicago Title & Trust Co., 121 Ill. App. 292.

23. Evidence held to require submission of question of making the contract to the jury. Jenkins & Reynolds Co. v. Alpena Portland Cement Co. [C. C. A.] 147 F. 641. Evidence being conflicting as to terms of contract question is for the jury. Epstein v. Shepard & Morse Lumber Co., 102 N. Y. S. 627.

24. Where it is claimed that the contract is partly written and partly oral, it is proper to refuse an instruction that, as a matter of law, the entire contract is not embodied in the writings submitted. United R. & Elec. Co. v. Wehr & Co., 103 Md. 323. 63 A. 475. Refusal of instruction stating facts warranting rescission by the seller and stating that if they were found the verdict should be for him held not cured by an instruction that there could be no judgment for the seller unless these facts were found. American Hardwood Lumber Co. v. Dent [Mo. App.] 98 S. W. 814.

25. In such case affirmative charge held proper. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67.

26. See 6 C. L. 1369.

27. Code Civ. Proc. § 339, subd. 1, considered. Brackett v. Martens [Cal. App.] 87 P. 410.

28. Statute of limitations commenced to run against a cause of action for breach of warranty of a machine when the machine was installed and not subsequently when consequential damages arose, and without regard to when he discovered the breach, and though the seller, after installing the machine, undertook to render it effective. Fairbanks, Morse & Co. v. Smith [Tex. Civ. App.] 99 S. W. 705.

29. Where there was no express warranty of title, the fact that the sale of chatteis was evidenced in writing and that Civ. Code, § 2372, creates an implied warranty of title by the seller of personal property did not create a warranty in writing within the meaning of Code Civ. Proc. § 512, limiting the bringing of an action on a written obligation to eight years. Pincus v. Muntzer [Mont.] 87 P. 612.

30. Duncan-Hobson Elec. Co. v. Coleman [Tex. Civ. App.] 100 S. W. 1004.

31. When the quality of an article sold is guarantied by warranty, one of the conditions of which being that in case of a defect being discovered the seller shall be liable only on condition of the production or return of the defective article, such condition is a condition precedent and must be complied with or there can be no recovery. Wasatch Orchard Co. v. Morgan Canning Co. [Utah] 89 P. 1009.

of an article and give their joint notes for the price, they are entitled to join in an action for breach of warranty.[32]

The pleadings must allege facts showing actual pecuniary loss.[33] The sufficiency of particular pleadings and specific allegations are shown in the notes.[34]

The burden is on plaintiff to prove breach of warranty [35] and that all conditions precedent on the part have been fulfilled,[36] but it is sufficient to show that there was a breach of any material condition of the warranty.[37] The buyer must also offer some evidence of the value of the article sold.[38]

As a general rule evidence of similar transactions with third persons is inadmissible [39] except sometimes where the making of the warranty is in issue.[40] On the sale of a heating plant, no change being made therein after breach of warranty, evidence of efficiency of the apparatus after such time is admissible.[41] Inconsistent allegations in former pleadings in the cause may be shown.[42] Hearsay evidence is inadmissible.[43]

32. Dougherty v. Burgess & Son, 118 Mo. App. 557, 94 S. W. 594.

33. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. Allegations that machinery did not have the capacity warranted, or was useless to or unsuited for the buyer's business, are insufficient, there being allegations showing that the buyer still retains possession. Id.

34. A complaint alleging that a seller of a horse warranted it, that the buyer bought it, relying on the warranty, that the horse was not as warranted and that the seller knew it, counts on a breach of warranty and does not set forth an action for fraud. Clark v. Wooster [Conn.] 64 A. 10. Where the contract provided that all warranties should be void upon the failure of the buyer to settle according to agreement, a counterclaim to an action by the seller pleading the breach of the special warranty and denying a refusal to make settlement according to the agreement is good as against demurrer. Lindsay v. Fricke [Wis.] 109 N. W. 945. A complaint in an action for breach of warranty of variety of seed sold, which alleges that the seller warranted the wheat to be "White Australian," but that the wheat was of an inferior variety and produced a crop inferior to that which would have been grown had it been as represented, and that by reason thereof the buyer was damaged in a specified sum, shows a breach of contract of warranty entitling a recovery of at least nominal damages as against a general demurrer. Moody v. Peirano [Cal. App.] 88 P. 380. Where the defense is breach of an implied warranty assuming that an averment of reliance is necessary, an allegation that "relying on the presumed knowledge of the plaintiff of the required qualities of said cable from their exposing it for sale and selling the same, they purchased it as herein stated," held sufficient. Oil Well Supply Co. v. Watson [Ind.] 80 N. E. 157. In an action for the purchase price of a cable, the defense was a breach of warranty of fitness and the answer alleged that the cable was sold with the knowledge that it was to be used in drilling wells, that it was rotten and would not sustain the weight of the drill, and that it broke off before it had drilled fifty feet, and that as soon as defendants discovered the worthlessness of the cable they notified plaintiffs and returned the cable. Held that the allegations on demurrer were sufficient averments as to the character of the test and to show the unfitness of the property for the purpose contemplated and to warrant proof of the particular time at which or during which the test was made. Id.

35. By a preponderance of the evidence. Wilmington Candy Co. v. Remington Mach. Co. [Del.] 65 A. 74.

36. Where the contract provides that a test is to be made, the burden is on the plaintiff of showing that the required test was made. Arkwright Mills v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783.

37. Meyer v. Seely, 103 N. Y. S. 719.

38. Breach of warranty being alleged, the buyer must offer some evidence as to the value of the machine in order to have a basis for the award of damages. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 100 S. W. 959.

39. Where issue is breach of warranty of machine to do satisfactory work, evidence that other similar machines sold in the same locality had failed to do the work for which they were purchased is inadmissible. Leyner Engineering Works Co. v. Brass Ring Co., 117 Mo. App. 378, 93 S. W. 875.

40. Where in an action for breach of warranty of variety of seed wheat sold the seller denied the making of the warranty and the evidence showed that he had only a different variety of wheat for sale, evidence that he sold wheat during the same season to third persons and warranted it to be of the variety warranted to plaintiff was admissible as bearing on the fact in issue. Moody v. Peirono [Cal. App.] 88 P. 380.

41. American Foundry & Furnace Co. v. Berlin Board of Education [Wis.] 110 N. W. 403.

42. Where a buyer, suing for a breach of warranty in the sale of a horse, withdrew the allegations of the petition setting forth a written warranty and alleged an oral warranty, the allegations of the written warranty were admissible as evidence contradicting the claim that an oral warranty was made, but did not estop the buyer from relying on the oral warranty. Hollowell v. McLaughlin Bros. [Iowa] 111 N. W. 428.

43. In an action for breach of warranty of a machine for the manufacture of ice, slip showing the amount of ice used by

General rules as to the admissibility of evidence apply.[44] A buyer, in an action for breach of warranty, is entitled to prove the making of the warranty, the breach thereof, and the damages sustained thereby, but he cannot prove that he rescinded the sale and returned the property.[45] Where suit is on a general express warranty and there is only a special express warranty, a verdict will be directed for defendant.[46] Cases dealing with the sufficiency of the evidence are shown in the notes.[47] Questions of fact are for the jury.[48] General rules as to instructions[49] and findings[50] apply.

(§ 11) *E. Recovery of chattel; replevin or conversion.*[51]

(§ 11) *F. Lien for price paid.*[52]

plaintiff held admissible over an objection that they were hearsay. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465.

44. Action for breach of warranty, evidence of test made after fifteen months' use, and after changes had been made, held inadmissible. Wilmington Candy Co. v. Remington Mach. Co. [Del.] 65 A. 74. Where in an action for breach of warranty in the sale of an ice machine for use in plaintiff's candy factory it was shown that defendant made the contract knowing that plaintiff was a candy manufacturer, and defendant agreed to make the machine for the proper use of such establishment, plaintiff was entitled to show that it used a particular method and appliances for the manufacture of chocolate, and that such method and appliances were proper and such as were generally employed. Id. Action for breach of warranty. Complaint alleging making of warranty by two defendants personally and together, evidence of a warranty made by one defendant, acting for himself, and as the agent of the codefendant, is inadmissible. Clark v. Wooster [Conn.] 64 A. 10. In an action for breach of warranty of a machine for the manufacture of ice, the issue was one concerning the capacity of the machine. Slips were admitted in evidence to show the amount of ice actually made by the machine could be shown by the difference between the ice consumed and the ice bought. Held that the slips connected with the testimony promised to be introduced tended to show the amount of ice made by the machine and hence was conditionally relevant and admissible. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465.

45. Clark v. Wooster [Conn.] 64 A. 10.

46. Creel v. Turner Bros., 125 Ga. 797, 54 S. E. 724.

47. Evidence held insufficient to show a breach of an agreement by the seller to guaranty delivery of the goods sold. Pincus v. Muntzer [Mont.] 87 P. 612. Evidence of condition of objects in the room held sufficient to support a finding that death was caused by the explosion of a lamp due to the dangerous character of the oil sold and used in it. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829. Where defendants contracted to deliver pure ground Angostura tonka beans, held evidence showed that all deliveries were adulterated but of an apparently pure article, and that defendants knew that the beans delivered were accepted under the belief that they were pure. Neal & Binford v. Taylor [Va.] 56 S. E. 590. In an action for breach of a contract to deliver a carload of merchantable corn, evidence that the corn was wet, soured, and rotten, on reaching a certain place, although the weather was good and the corn unexposed, showed that such corn was not in sound condition and of merchantable quality two days prior thereto on reaching a point fifty-six miles distant. Atkins Bros. Co. v. Southern Grain Co., 119 Mo. App. 119, 95 S. W. 949.

48. Held under the evidence a question for the jury whether a written warranty was superseded by a verbal warranty. Daugherty v. Burgess & Son, 118 Mo. App. 557, 94 S. W. 594. Whether test was made in accordance with terms of warranty and if it was accepted by the parties as a sufficient test under the contract held for the jury. Arkwright Mills v. Aultman & Taylor Mach. Co. [C. C. A.] 145 F. 783. Where breach of warranty in machinery for flooding rice fields is alleged, held question as to whether loss of crop was due to the insufficiency of the buyer's water supply was properly submitted to the jury. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 100 S. W. 959.

49. Error in failing to define an express warranty held cured by an instruction that the buyer should recover if the seller made the representations alleged. Haines v. Neece, 116 Mo. App. 499, 92 S. W. 919. Where breach of warranty in engine was set up, held proper to refuse an instruction authorizing a verdict for defendant without reference to whether the engine was properly operated by the buyer. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 100 S. W. 959. In an action for breach of warranty in the sale of a horse plaintiff claimed that a codefendant was interested in the horse, while the codefendant claimed that he had, prior to the sale, sold the horse to the other defendant. Prior to the action the codefendant had recovered from plaintiff a judgment for keeping the horse. Held that an instruction authorizing plaintiff to recover the money which plaintiff paid on the judgment, which was not reversed nor set aside, was erroneous as to the codefendant. Clark v. Wooster [Conn.] 64 A. 10.

50. Findings in an action for breach of warranty of variety of seed wheat sold, that the seller warranted the wheat to be "white Australian," and that the wheat was of an inferior variety and produced a crop inferior to that which would have grown had it been "white Australian" seed wheat, are sufficient to entitle a buyer to a judgment in his favor. Moody v. Peirono [Cal. App.] 88 P. 380.

51. See 6 C. L. 1370.

52. See 2 C. L. 1576.

(§ 11) *G. Recoupment and counterclaim.*[53]

(§ 11) *H. Choice and election of remedies.*[54]—Where the contract provides for the remedies of the parties on breach, such provisions govern.[55] Upon discovering that the goods delivered do not conform to the contract, the buyer may either stand by the contract, accept the property and sue at law for the recovery of such damages as he may have sustained by reason of the contract,[56] or he may rescind the sale, refuse to accept the property, and sue for the recovery of money paid or expense incurred on account of the contract,[57] or, in most states, he may retain the goods and recover damages for the breach,[58] though some courts regarding this last remedy as a partial rescission do not afford him the right.[59] This controverted remedy is, however, always allowed where the breach is one of warranty.[60] Where the buyer is given the option of exchange on breach of warranty, he is not required to exercise the option but on a breach may keep the article and recover his damages.[61] Equity will not enforce a contract for the sale of an article of commerce which can at all times be bought in the market, but the remedy for a breach thereof is at law.[62] If a seller by fraud sells and warrants an article, the buyer may have his remedy either upon the practiced deceit or upon the warranty as he chooses.[63] Where on breach of warranty the buyer has the right to rescind or to have the articles repaired, a request to repair waives the right to rescind.[64] Where seller agrees to repurchase at the contract price if requested, and upon request refuses to do so, the buyer can recover contract price,[65] and, the seller refusing to accept a return of the property, the property becomes the seller's, the purchaser holding it as a depository for hire.[66] Where the title to the chattel fails and the buyer's note for the purchase price has been transferred to a bona fide purchaser, the buyer can recover the purchase price and interest from the seller.[67] As to whether statutory remedies are cumulative depends upon the statute.[68]

§ 12. *Damages for breach of sale and warranty. A. General rules.*[69]—One party to an executory contract of sale has always the right, subject to the obligation to pay damages to the other, to stop the performance of the contract whenever for any reason he deems it to his interest to terminate it, and the other party is not at

53, 54. See 6 C. L. 1371.

55. Where the parties to a contract of sale have agreed on the warranties and the remedies that accrue on the breach of them, the remedies constitute the only relief afforded a party and he must look to the contract and be governed by its terms. Wisdom v. Nichols-Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18. Where warranty gave seller the right upon breach to replace the defective part or the entire machine, the buyer could not upon breach return the machine and rescind the contract without giving the seller a chance to exercise his option. Westbrook v. Reeves & Co. [Iowa] 111 N. W. 11. Where buyer of fruit agreed to accept all fruit sent him and in case of complaint to make a claim for damages, held if fruit of grade ordered was shipped but the quality was unsatisfactory he was bound to accept, pay for the fruit and make a claim for damages. Fruit Dispatch Co. v. Le Seno [Mich.] 13 Det. Leg. N. 991, 110 N. W. 526.

56. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585.

57. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585. If the property does not comply with the contract the buyer need not keep them. Avil Pub. Co. v. Bradford [Mo. App.] 97 S. W. 238.

58. Main v. Procknow [Wis.] 111 N. W. 508.

59. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585.

60, 61. Hallowell v. McLaughlin Bros. [Iowa] 111 N. W. 428.

62. Sale of cotton. Block v. Shaw [Ark.] 95 S. W. 806.

63. Crockett v. Burleson [W. Va.] 54 S. E. 341.

64. Lawson v. Williams Hardware Co. [Mo. App.] 99 S. W. 814. Especially where defense was unreasonable delay in repairing. Id. Instructions authorizing rescission in such a case held erroneous. Id.

65. Campbell v. Woods [Mo. App.] 99 S. W. 468.

66. Civ. Code, § 1503, considered. Sierra Land & Cattle Co. v. Bricker [Cal. App.] 85 P. 665.

67. Caproon v. Mitchell [Neb.] 110 N. W. 378.

68. The purchaser of a horse cannot recover actual damages for breach of warranty and also statutory damages under Ballinger's Ann. Codes & St. § 7176, rendering one who makes a **false statement as to the pedigree of a horse** liable for double the purchase price. Galbraith v. Carmode [Wash.] 86 P. 624.

69. See 6 C. L. 1372.

liberty to proceed thereafter with the performance in order to enhance the damages to be paid.[70] The damages recoverable are the natural and necessary consequences of the breach, flowing directly therefrom and such as are within the contemplation of the parties.[71] Where it does not already appear that the penalty inserted in a contract of sale is intended as security for the payment of actual damages in case of breach of contract, the court will regard the amount as liquidated damages.[72] Damages being liquidated it is unnecessary to plead or prove the impracticability of fixing the damages.[73] The computation of damages must be based upon data furnished by the pleadings and the evidence, and, if they fail to furnish such data, no recovery can be had beyond nominal damages.[74] It follows that loss of profits cannot be recovered unless pleaded.[75]

(§ 12) *B. Breach by seller.*[76]—The seller is liable for all damages as resulting directly from such breach and which may be reasonably supposed to have been in contemplation of the parties, at the time of making the contract as likely to result therefrom.[77] In the absence of proof aliunde of knowledge by the defaulting party at the time an ordinary contract of sale is made of special circumstances which make other damage the natural and probable effect of its breach,[78] the difference between the value of the goods furnished and the value of the goods the vendor agreed to furnish constitutes the measure of damages which the vendee may recover for a failure to furnish articles of the agreed character.[79] The article being rejected and an acceptable substitute procured, the measure of damages is the difference between the contract price and the price of the nearest substitute procurable,[80]

70. Ollenheimer & Bro. v. Foley [Tex. Civ. App.] 15 Tex. Ct. Rep. 593, 95 S. W. 688.

71. Green v. Lineville Drug Co. [Ala.] 43 So. 216, following Alabama Chemical Co. v. Geiss, 143 Ala. 591, 39 So. 255.

72. Shafer v. Sloan [Cal. App.] 85 P. 162.

73. So held in an action for breach of a contract for the sale of the good will of a business providing for the payment of the seller, on breach of the contract, of a certain sum to the purchaser. Shafer v. Sloan [Cal. App.] 85 P. 162.

74. Parkins v. Missouri Pac. R. Co. [Neb.] 101 N. W. 260. One claiming damages must show the amount thereof. Snyder v. Lingo, 30 Pa. Super. Ct. 651.

75. Stecker v. Weaver Coal & Coke Co., 102 N. Y. S. 89.

76. See 6 C. L. 1372.

77. Where purchaser needed material to complete sewer, his contract for the building of which, to the seller's knowledge, provided for liquidated damages for delay, held the seller failing to deliver and thereby causing a delay in building the sewer was liable for the amount of liquidated damages, the expense of a watchman, and of re-excavation so far as rendered necessary by the failure to furnish the brick. Shurter v. Butler [Tex. Civ. App.] 16 Tex. Ct. Rep. 267, 94 S. W. 1084. Where seller fails to furnish advertisng matter and aid in resales as required by the contract, held the buyer was entitled to deduct from the contract price the amount of damages he could show he had suffered by the breach. Simpson v. Crane [Mich.] 13 Det. Leg. N. 1071, 110 N W. 1081.

78. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. Proof of knowledge by the defaulting party at the time he makes the contract of special circumstances which make damages other than those implied by the contract and naturally flowing from it, the natural and probable effect of its breach, will warrant the recovery thereof. Id. Loss of time, trouble, and extra work of superintendence, caused by defects in bands sold to be used to bind together staves in wooden water pipes, held too remote and speculative. Id. Not so, however, as to the expense of hauling, loading unloading, distributing, gathering, counting, painting, and putting bands on and taking them off when broken. Id. In an action to recover damages for failure of the seller to deliver machinery according to the terms of his contract, it is proper to allege that the machinery was intended to be used in a manufacturing plant in process of erection, and that the vendor was so informed, such facts making it appear that the loss of the use of the plant was, within the contemplation of the parties, an injury to result from a breach of the contract by the vendor, and therefore a proper element of recovery. Cleveland Punch & Shear Works Co. v. Consumers' Carbon Co., 75 Ohio St. 153, 78 N. E. 1009.

79. McDonald v. Kansas City Bolt & Nut Co. [C. C. A.] 149 F. 360. Where goods delivered were defective, measure of damages difference between actual value and value as they should have been. Forster, Waterbury & Co. v. MacKinnon Mfg. Co. [Wis.] 110 N. W. 226.

80. Rhind v. Freedley [N. J. Law] 64 A. 963. Where a seller knows that an article is bought for resale under a particular contract and delivers a defective article and the buyer procures the consent of his buyer to the substitution of another make of the article, the measure of damages is the difference between the contract price and the

together with any expenses necessarily caused by the seller's default. To recover damages the breach must be substantial.[81] Loss of profits if certain may be recovered.[82] A buyer electing to rescind, he cannot recover damages for the seller's breach of contract,[83] his pecuniary recovery being limited to money paid or expense incurred by him on account of the contract.[84]

On the seller's failure to deliver,[85] the measure of damages is the difference between the contract price and the market value at the time and place of delivery [86] or if there be no market at the place of delivery, then the value in the nearest and most available market to which the buyer must resort in order to supply himself with the cost of transportation and compensation for the time, trouble, and expense, of making the repurchase added.[87] There would seem to be a conflict as to whether this rule applies when there has been a previous renunciation of the contract by the seller.[88] Where the sale is one at wholesale, the measure of damages is the difference between the contract price and the increased wholesale price.[89] Where the seller knows that the goods are intended for resale at a particular place, the measure of damages for failure to deliver is the difference between the contract price and the market price at the place of resale.[90] Where no time for delivery is fixed, the measure of damages for refusal of the seller to deliver is the difference between the market price at the time of the refusal to deliver and the contract price.[91] Where the

price of the substituted article together with the cost of installing and removing the rejected article. Crowley v. Burns Boiler & Mfg. Co. [Minn.] 110 N. W. 969.

81. Where purchaser testified that by reason of seller's failure to deliver he was forced to delay work held to show a substantial breach of the contract. United States v. Malloy [C. C. A.] 144 F. 321.

82. Even loss of opportunity to make profits in a business is a proper subject for compensation in damages by the person producing such loss, and that proof of profits derived from such business covering a considerable period of operations furnishes a legitimate basis for determining the compensation recoverable for profits prevented through a discontinuance thereof produced by breach of contract. Forster, Waterbury & Co. v. MacKinonn Mfg. Co. [Wis.] 110 N. W. 226. On breach of a contract by a seller to furnish a boiler of a certain kind, purchaser had the right to abandon his contract with a town to which he was to sell it and recover as damages the profit lost on such contract, or to perform the contract by furnishing a boiler of a different make which the town was willing to accept in compliance with the original contract. Crowley v. Boiler & Mfg. Co. [Minn.] 110 N. W. 969.

83. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585.

84. Phares v. Jaynes Lumber Co., 118 Mo. App. 546, 94 S. W. 585. If the buyer rescinds and returns the thing sold, having the right to do so, either for fraud or by a term of the contract, he can, as a general rule, recover only what he has paid under the contract. Clark v. Wooster [Conn.] 64 A. 10.

85. See 6 C. L. 1372.

86. Alger-Fowler Co. v. Tracy, 98 Minn. 432, 107 N. W. 1124; Frohlich v. Independent Glass Co., 144 Mich. 278, 13 Det. Leg. N. 152, 107 N. W. 889; Tillinghast, Styles Co. v. Providence Cotton Mills [N. C.] 55 S. E. 621; Bell v. Jordan [Me.] 65 A. 759; Moers v. Dietz, 101 N. Y. S. 590. Sale of potatoes by the barrel, failure to deliver proper size barrels. Belote & Son v. Wilcox [Ala.] 41 So. 673. Shipping in way different from terms of contract. Riley v. Carpenter [N. C.] 55 S. E. 628. So held where goods were to be delivered in instalments. Sagola Lumber Co. v. Chicago Title & Trust Co., 121 Ill. App. 292 Value of property at the time of the breach less purchase price, with legal interest. Livesley v. Johnston [Or.] 84 P. 1044. Not difference between the contract price and the price for which the purchaser agreed to sell the goods to a third person. Potomac Bottling Works v. Barber & Co., 103 Md. 509, 63 A. 1068. Not difference between price buyer had contracted to pay and the price for which he had previously contracted to sell. Floyd v. Mann [Mich.] 13 Det. Leg. N. 811, 109 N. W. 679. Where it was impossible for a buyer of cans to purchase cans to supply a shortage resulting from the seller's breach of contract, the buyer's measure of damages was not that specified by Cal. Civ. Code, §§ 3308, 3354. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886.

87. McCleskey v. Howell Cotton [Ala.] 42 So. 67; Cleveland v. Rowe, 99 Minn. 144, 109 N. W. 817. Evidence held to sustain verdict. Id.

88. That it does. Frohlich v. Independent Glass Co., 144 Mich. 278, 13 Det. Leg. N. 152, 107 N. W. 889. Measure of damages is to be ascertained as of the day the buyer ascertained the seller would not perform. Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413.

89. Error to admit evidence of retail price in the absence of proof that there was no wholesale price. Kilpatrick v. Whitmer & Sons, 103 N. Y. S. 75.

90. Langan & Taylor Storage & Moving Co. v. Tennelly, 29 Ky. L. R. 367, 93 S. W. 1.

91. United R. & Elec. Co. v. Wehr & Co., 103 Md. 323, 63 A. 475.

property has a rental value it is not permissible to prove the rental value or hire of the property per day, computing for a long period of time.[92] Special damages may be recovered [93] especially where the seller has knowledge of the special circumstances.[94] Loss of profits being certain and within the contemplation of the parties at the time of entering into the contract, the amount thereof may be recovered as damages.[95] Speculative damages cannot be recovered.[96] Freight advanced may be recovered.[97] Interest is of course to be added to the damages awarded.[98] Items expressly excluded by the terms of the contract cannot be recovered.[99] It is the buyer's duty to use all available means to avert or lessen the damages,[1] but it being impossible to purchase a similar article at the time of the breach, the buyer is not precluded from recovering damages after such time as he could have procured a similar article.[2]

(§ 12) *C. Breach by purchaser.*[3]—On a suit for a breach of a contract for the sale of goods to be paid for on delivery, resulting from a failure to pay the

92. Parlin & Orendorff Co. v. Kitrell [Tex. Civ. App.] 16 Tex. Rep. 103, 95 S. W. 703.

93. Failure to deliver resulting in closing up of buyer's factory held in addition to loss of profits from contracts he was unable to fill, the buyer was properly allowed damages to the extent of the loss of the rent of the factory and 6 per cent. interest on the capital invested during the time they were necessarily idle because of the seller's default. Nicholls v. American Steel & Wire Co., 102 N. Y. S. 227.

94. Tillinghast, Styles Co., v. Providence Cotton Mills [N. C.] 55 S. E. 621. Where failure to deliver makes the buyer break another contract, the seller is liable for the resulting damages only where he had notice of such contract at the time of sale. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551.

95. Loss of profits which purchaser might have made by retail sales cannot be recovered unless contemplated by the parties at the time of entering into the contract. Stecker v. Weaver Coal & Coke Co., 102 N. Y. S. 89. Where the seller of wood failed to deliver whereby the purchaser was unable to fulfill a contract for the sale of the wood to third parties, held he was entitled to recover as damages the loss of prospective profits. Duvall v. Ferwerda [Mich.] 13 Det. Leg. N. 659, 108 N. W. 1115. In an action for breach of a contract to deliver cans to a cannery, plaintiff held entitled to recover profits on fruits sold, but not delivered, plus the cost of fruit thrown away, and the cost of labor not utilized. Cal. Civ. Code, § 3300, construed. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886. Where defendant broke an agreement to ship pianos direct to plaintiffs at once for immediate resale by them, plaintiffs could not recover for loss of profits where they relied only upon defendant's failure to ship direct and not upon its failure to ship promptly, since the prospective purchasers might have refused to accept them because of the delay in delivery. Rudolph Wurlitzer Co. v. Buford Bros. [Tex. Civ. App.] 101 S. W. 1060.

96. Where a contract required defendant to sell and deliver to plaintiff certain described lumber that might be made by defendant while operating his mill on regular orders, in an action by plaintiff for damages because of defendant's refusal to deliver lumber, no damages could be recovered based on a prospective operation of the mill, as such damages would be entirely speculative. Byrne Mill Co. v. Robertson, [Ala.] 42 So 1008.

97. Rudolph Wurlitzer Co. v. Buford Bros. [Tex. Civ. App.] 101 S .W. 1060.

98. Livesley v. Johnston [Or.] 84 P. 1044. Where a contract required defendant to sell plaintiff an ice machine and required plaintiff to prepare his building for the reception of the machine, in an action for damages for defendant's failure to deliver the machine, plaintiff was not precluded from recovering interest on the amount expended in preparing the building where defendant's breach was not in time to have shown plaintiff that he would not require the foundations for the machine. Wolf Co. v. Galbraith [Tex. Civ. App.] 16 Tex. Ct. Rep. 207, 94 S. W. 1100.

99. Where contract expressly stated that seller should only be liable to make defects good and should not be liable for freight, etc., held on claim for defects in the machinery, the buyer could not recover for freight or hauling charges nor for loss involved in running the machinery. Barnard & Leas Mfg. Co. v. Smith, 77 Ark. 590, 92 S. W. 858.

1. In an action by the buyer for breach of a contract to deliver a certain kind of lumber, it was error to exclude testimony that all lumber of that kind came from a certain portion of the state, and that, upon defendant's refusal to deliver, plaintiff could have bought lumber and shipped it for less than he contracted to pay defendant, since it was plaintiff's duty if he had the means to avert or lessen the damages growing from defendant's breach. Taussig v. Southern Mill & Land Co. [Mo. App.] 101 S. W. 602.

2. Where the seller of an ice machine failed to deliver it, and the purchaser did not have time, after learning of the breach by the seller, to purchase and install another plant in time for the ice season, which was then upon him, the purchaser was not precluded from recovering damages after such time as he could have procured and installed another machine. Wolf Co. v. Galbraith [Tex. Civ. App.] 16 Tex. Ct. Rep. 207, 94 S. W. 1100.

3. See 6 C. L. 1375.

purchase price, the measure of damages is the agreed price, with interest from the time of delivery, or, in the absence of an agreement as to the price, the reasonable value of the article sold with interest from the date of delivery.[4] Plaintiff admitting part payment of the amount claimed, his recovery must be limited to the balance.[5] The seller must use reasonable efforts to prevent accumulation of damages.[6]

For nonacceptance.[7]—In the case of an article of merchandise,[8] the measure of damages for the refusal to receive the goods is the difference between the contract price and the market value at the time and place of delivery,[9] or has been stated at the time of refusal;[10] if no market value at such price, then the market value at the nearest available market where the articles could have been sold, less freight and other expenses attending the transportation to that market.[11] The amount brought at a resale fairly made after notice establishes the market value.[12] If no notice is given, the market value must be established by proper evidence, the amount realized at the resale generally being some evidence tending to prove that value.[13] If the sale is at wholesale, it is the wholesale price that governs.[14] Where a seller on refusal of buyer to complete the contract, sells the goods elsewhere at an advanced price, he is not entitled to anything.[15] Where articles are to be procured from third persons,[16] or are to be manufactured, or minerals are to be mined, the measure of damages is the difference between the contract price and the cost of producing and delivering the article,[17] though it has been held that the measure of damages in such case is determinable by what the seller can procure the articles for

4. McCarthy v. Nixen Grocery Co., 126 Ga. 762, 56 S. E. 72.

5. Zweifash v. Weller, 102 N. Y. S. 503.

6. Instruction on measure of seller's damages held faulty in overlooking duty to use reasonable efforts to prevent accumulation of damages. Allen v. Rushforth [Neb.] 110 N. W. 687.

7. See 6 C. L. 1375.

8. Contract for the sale of granite blocks of certain sizes, no quarry being specified held a sale of merchandise. Haddam Granite Co. v. Brooklyn Heights R. Co., 186 N. Y. 247, 78 N. E. 858.

9. Salmon v. Helena Box Co. [C. C. A.] 147 F. 408; Reese v. Hoffecker [Del.] 65 A. 588; Haddam Granite Co. v. Brooklyn Heights R. Co., 186 N. Y. 247, 78 N. E. 858; Allen & Rushford [Neb.] 110 N. W. 687; Hassel Iron Works Co. v. Cohen [Colo.] 85 P. 89; Anderson Carriage Co. v. Gilmore [Mo. App.] 99 S. W. 766; Sour Lake Townsite Co. v. Deutser Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 631, 94 S. W. 188; Ketcham v. U. S., 40 Ct. Cl. 220. Sale of corn to be grown. Pancoast v. Vall [Del.] 65 A. 512. Refusal to receive measure of damages is the amount necessary to put seller in the position he would have been in if no breach had been committed. Ketcham v. U. S., 40 Ct. Cl. 220.

10. Hanks Foundry Co. v. Woodstock Iron Werks [Ga.] 56 S. E. 106

11. Salmon v. Helena Box Co. [C. C. A.] 147 F. 408 If no market price at the time and place agreed upon, then such sum as the seller might have obtained by reasonable effort. Allen v. Rushforth [Neb.] 110 N. W. 687.

12. Anderson Carriage Co. v. Gilmore [Mo. App.] 99 S. W. 766; Louisville & N. R. Co. v. Coyle [Ky.] 97 S. W. 772 The purchaser refusing to accept a resale in good faith and with due diligence fixes the measure of damages. Ford v. Erde, 50 Misc. 665, 99 N. Y. S. 487. Purchaser refusing to accept, seller may resell and if fairly made for best price possible it will determine measure of damages. Henderson El. Co. v. North Georgia Milling Co., 126 Ga. 279, 55 S. E. 50. In order that the price obtained at a resale may be used in determining the measure of damages, the seller must show that the amount obtained was the market value of the goods or that the sale was fairly made and for the best price reasonably obtainable. Weldert Grocery Co. v. Beenville El. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 623, 94 S. W. 108 Amount obtained at resale is admissible in evidence. Eagle Iron Co. v. Baugh, [Ala.] 41 So. 663. There being no market value, an instruction authorizing a recovery of the "reasonable selling value" is not erroneous. St. Louis Range Co. v. Kline-Drummend Mercantile Co., 120 Mo. App., 438, 96 S. W. 1040.

13. Anderson Carriage Co. v. Gilmore, [Mo. App.] 99 S. W. 766.

14. Failure to deliver coal to retail dealer, damages are difference between wholesale and contract price on day of delivery. Stecker v. Weaver Coal & Coke Co., 102 N. Y. S. 89. Not difference between wholesale and retail prices at such time. Id.

15. Cannot collect a draft deposited as part of the purchase price. Biescar v. Pratt [Cal. App.] 87 P. 1101.

16. Parkins v. Missouri Pac. R. Co. [Neb.] 107 N. W. 260.

17. Hadley Dean Plate Glass Co. v. Highland Glass Co. [C. C. A.] 143 F. 242. Sale of coal to be mined. Thistle Coal Co. v. Rex Coal & Min. Co. [Iowa] 109 N. W. 1094. Railroad cross-ties. Duke v. Norfolk & W. R. Co. [Va.] 55 S. E. 548.

from others.[18] Where goods ordered were to be manufactured and were sold but seller could have obtained more at the same price, the measure of damages for refusal to receive them is the difference between the contract and purchase prices,[19] and it makes no difference in principle whether the seller is himself the manufacturer, or procures others to manufacture, or can go into the open market and purchase for delivery the goods he, in turn, has agreed to sell to others.[20] Where there is a sale of goods to be manufactured and part are manufactured and shipped, the measure of damages is the difference between the contract price and the cost of manufacture, including material, labor, etc., for the entire order, and in addition thereto the difference between the cost of manufacturing that part of the order which was filled and shipped less the value of the goods so manufactured and tendered at the date of their rejection by the buyer.[21] Where seller has ordered material but has not incurred any liability on the order and no part of the material has been manufactured or paid for,[22] the seller cannot recover the difference between the contract price and the cost of the material to him.[23] Interest is generally recoverable.[24]

(§ 12) *D. Breach of warranty.*[25]—In an action for a breach of warranty the buyer can generally recover all he can legally prove he has lost by the breach.[26] On retention of the property the measure of damages is the difference between the actual value of the chattel and its value as warranted[27] at the time and place of delivery,[28] and the question is not affected by the fact that the buyer has sold the property at an increased price,[29] though such fact may be useful in determining the value of the property at the time of delivery.[30] The warranty being made to cover a resale in a foreign country, the market values in such country at the time of delivery there governs.[31] But there may be special circumstances which will enhance the damages. In such case the buyer will be entitled to recover such damages

18. Louisisville & N. R. Co. v. Coyle [Ky.] 97 S. W. 772.

19, 20. Taylor Co. v. Niagara Bedstead Co., 102 N. Y. S. 173.

21. Schloss v. Josephs, 98 Minn. 442, 108 N. W. 474. Where articles sold were to be manufactured and the buyer refused to accept before all were finished, held measure of damages was contract price less amount paid out and cost of finishing contract and reasonable selling value of goods on hand. Mercantile Co., 120 Mo. App. 438, 96 S. W. St. Louis Range Co. v. Kline-Drummond 1040. Defendant contracted to purchase of plaintiff stoves, to be manufactured by plaintiff, and after a number of the stoves had been completed and all the parts for the remainder had been manufactured, but the parts not assembled, defendant refused to accept the stoves, and in an action for damages the evidence was conflicting as to whether the stoves were worthless, held an instruction on the measure of damages was subject to the criticism for speaking of the property left on plaintiff's hands as "material" out of which to complete the remaining stoves. Id.

22, 23. Isaacs v. Terry & Tench Co., 103 N. Y. S. 103.

24. From the date of the accrual of the action. Parkins v. Missouri Pac. Ry. Co. [Neb.] 107 N. W. 260. Under a contract for the sale of wheat under which the value became due on demand, interest is recoverable from that time under B. & C. Comp. § 4596, providing for interest on the moneys after they became due. Savage v. Salem Mills Co., [Or.] 85 P. 69.

25. See C. L. 1376.

26. Clark v. Wooster [Conn.] 64 A. 10.

27. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 100 S. W. 959; Springer v. Indianapolis Brewing Co., 126 Ga. 321, 55 S. E. 53; Henderson El. Co. v. North Georgia Mill. Co., 126 Ga. 279, 55 S. E. 50; Ellison & Co. v. Johnson & Co., 74 S. C. 202, 54 S. E. 202; Mine Supply Co. v. Columbia Min. Co. [Or.] 86 P. 789; Macrea v. Gotham Rubber Co., 113 App. Div. 455, 99 N. Y. S. 373; Petrified Bone Min. Co. v Rogers, 150 F. 445; Ellison v. Simmons [Del.] 65 A. 591; Edgeworth v. Talerico [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677; Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 98 N. Y. S. 1018; Dooley & Co. v. Hasenwinkle Grain Co., 120 Ill. App. 43. Where there is a warranty of the value of certain corporate stock and the seller in making such warranty included the unearned interest upon the bills receivable as on an asset, held proper to award as damages the difference in value from the erroneous computation. Robertson v. Moses [N. D.] 108 N. W. 788.

28, 29. Ellison & Co. v. Johnson & Co., 74 S. C. 202, 54 S. E. 202.

30. Ellison & Co. v. Johnson & Co., 74 S. C. 202, 54 S. E. 202. The buyer's measure of damages is not at all dependent upon a resale by him or upon the price obtained at a resale, but where the goods are finally resold without a warranty of quality and with full knowledge of both parties of the inferiority of the article, the price obtained while not conclusive, is some evidence of the actual value. Petrified Bone Min. Co. v. Rogers, 150 F. 445.

31. Petrified Bone Min. Co. v. Rogers, 150 F. 445.

as he may have sustained as the direct and proximate result of the breach,[32] also the buyer may recover for loss of profits if time is required to obtain other goods.[33] In an action for damages for breach of a warranty of title, the buyer can recover the damage sustained not exceeding the value of the article at the time of the sale,[34] but he has no right, at the expense of the seller, to incur costs which may exceed that sum.[35] These rules are, however, subject to the qualification that the buyer must use reasonable diligence to mitigate the damages caused by the breach, and in contracts of this kind should provide himself as he conveniently can from the most accessible sources.[36]

On a guaranteed warranty guarantors who have stipulated a sum as their liability will not be liable for any more.[37]

(§ 12) *E. Evidence as to damages.*[38]—In order to sustain an award of damages there must be evidence thereof.[39] The burden is on the one claiming damages to show the elements thereof.[40] The buyer refusing to accept and there being no market value, the reasonable value of the property at the time and place of delivery should be ascertained by any testimony tending to throw light on the subject, such as sales actually made, the frequency of sales, and the testimony of expert witnesses who are familiar with the trade in such articles and the value of such commodities, as to the value of those in question for any use of which they are susceptible.[41] The general rules as to the admissibility of evidence apply.[42] Cases dealing with sufficiency of the evidence [43] and inferences therefrom are shown in the notes.[44]

32. Heisig Rice Co. v. Fairbanks, Morse & Co. [Tex. Civ. App.] 100 S. W. 959; Mine Supply Co. v. Columbia Min. Co. [Or.] 86 P. 789 In a sale of a mill for reducing ore held buyer was entitled to recover expenses and labor incurred in testing the mill, freight paid or imperfect parts which could not be used, the cost of providing new parts necessary to make the mill conform with the contract if the seller refused or neglected to supply them, for loss of free gold while testing the mill, wages paid to mining crew while idle on account of the defective mill, but not for loss from delay in shipment. Id. Where a purchaser ascertains defects in a machine, sold with guaranty, and yet persists in using it, whereby losses and expenses are incurred, he does so in his own wrong, and cannot recover the amount of such losses and expenses as damages for a breach of warranty. Extra expense in running refrigerating plant to warranted capacity. Isbell-Porter Co. v. Heineman, 113 App. Div. 79, 98 N. Y. S. 1018. In an action for a breach of warranty of an ice plant installed in plaintiff's factory, plaintiff was entitled to recover the difference in the value of the plant as actually installed and what its value would have been if it complied with the warranty, together with any expenditures for ice, coal, additional employes and servants made necessary and actually incurred by reason of defects or insufficiency of the plant, under the terms of the warranty. Wilmington Candy Co. v. Remington Mach. Co. [Del.] 65 A. 74. Freight paid for delivery of the goods may be recovered in an action or counterclaim for breach of warranty. Case Threshing Mach. Co. v. Balke [N. D.] 107 N. W. 57. Breach of warranty, recovery of purchase price, and special damages held erroneous. Westinghouse, Church, Kerr & Co. v. Remington Salt Co., 101 N. Y. S. 303.

33. Edgeworth v. Talerico [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677.

34, 35. Tennis v. Gifford [Iowa] 110 N. W. 586.

36. Edgeworth v. Talerico [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677.

37. The warranty signed by the seller alone was a "guarantee" of an animal with an agreement to refund the price and expenses. Subjoined was an agreement to pay a sum if he failed to "come up to written guarantee." Wood v. Stewart [Ark.] 98 S. W. 711.

38. See C. L. 1378.

39. Main v. Procknow [Wis.] 111 N. W. 508.

40. Defective article furnished, burden on buyer to prove price paid for substituted article. Crowley v. Burns Boiler Mfg. Co. [Minn.] 110 N. W. 969. To show conditions justifying the recovery of profits. Edgeworth v. Talerico [Tex. Civ. App.] 15 Tex. Ct. Rep. 405, 95 S. W. 677.

41. St. Louis Range Co. v. Kline-Drummond Mercantile Co., 120 Mo. App. 438, 96 S. W. 1040.

42. Evidence that the article has a market value is admissible. Haddam Granite Co. v. Brooklyn Heights R. Co., 186 N. Y. 247, 78 N. E. 858. In an action against a seller by a buyer for breach of an implied warranty of title in the sale of a horse, the buyer having paid a judgment claim the judgment is admissible to show the connection between the seller's breach and the buyer's damage. Tennis v. Gifford [Iowa] 110 N. W. 586. As tending to reduce any damages the seller may recover for failure of the buyer to take the goods, the amount of fire insurance collected by the seller on the goods and the disposition thereof may be shown. Moritz v. Herskovitz [Wash.] 89 P. 560.

43. Evidence held sufficient to go to the jury on the question of damages for breach

§ 13. *Rights of bona fide purchasers and other third persons.*[45]—As a general rule it may be said that the true owner of personalty may retake the same whenever found in the tortious possession of another,[46] and, in the absence of estoppel or other equitable considerations, one purchasing from one having no title does not acquire title as against the true owner even though the purchaser acted in good faith.[47] Generally, either a change of possession or a recordation of the bill of sale is necessary in order to be protected against innocent third persons.[48] Where the owner of property confers upon another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party, who has dealt with the apparent owner in reference thereto, without knowledge of the claims of the true owner.[49] Delivery of possession is necessary to the passing of title to personalty on a sale thereof as against everyone except the seller and a subsequent buyer taking the property with knowledge of the sale.[50] A sale of personalty by one claiming title to it is void as against one holding it adversely at the time.[51] The concurrent or joint possession of goods by a seller and buyer is not sufficient to constitute a delivery to the buyer.[52] It is essential to the character of an innocent purchaser that the latter have no knowledge of the defects in his seller's title.[53] The doctrine of caveat emptor applies to purchases in open market.[54] A bill of sale received in payment of an antecedent debt protects the buyer to the same extent as though there had been a new consideration, if taken in good faith and without an intention to defraud the other creditors of the seller.[55] In some states it is a crime to fraudulently dispose of goods bought on credit,[56] in others, a sale in bulk is deemed fraudulent unless attended with certain formalities.[57] The creditors of a vendor who has made an illegal sale of his property cannot seize the same unless they can show that such transfer was an invasion of and prejudicial to their rights.[58] Hence, in the absence of fraud, a sale is superior to the rights of a sub-

of warranty. Wyandotte Portland Cement Co. v. Bruner [Mich.] 13 Det. Leg. N. 1042, 110 N. W. 949.

44. In a case of the accumulation of a large quantity of manufactured articles, all of the same general kind made at the same factory and from the same patterns or designs, and a large proportion proving defective in certain particulars it is a fair inference, in the absence of evidence to the contrary, that the balance of the lot is likewise defective. Forster, Waterbury & Co. v. MacKinnon Mfg. Co. [Wis.] 110 N. W. 226.

45. See 6 C. L. 1378.

46. Merchants Nat. Bank v. Bales [Ala.] 41 So. 516.

47. Bennett & Co. v. Brooke [Ala.] 41 So. 149. A bill of lading or even a negotiable warehouse receipt obtained by one whose possession of the property is tortious cannot by assignment, even to an innocent purchaser, divest the title out of the true owner. Merchants' Nat. Bank v. Bales [Ala.] 41 So. 516.

48. In re Montague, 143 F. 428. No delivery being made it must be shown that the buyer had actual knowledge of the previous sale or knowledge of such facts as would put a reasonable man on inquiry, which, if made, would result in knowledge of the previous sale. Farmer v. Hughes [Colo.] 88 P. 191. A sale of horses and mules which were thereafter permitted to run in the seller's pasture and were used by her employes held invalid as to subsequent mortgages. Austin v. Terry [Colo.] 88 P. 189.

49. McLean v. Grioot, 103 N. Y. S. 129.

50. Farmer v. Hughes [Colo.] 88 P. 191. One purchasing from one in possession but having no title, the purchaser having knowledge of such fact, acquires no title. Mortant v. Johnson, 99 N. Y. S. 395.

51. Posey v. Gamble [Colo.] 41 So. 416.

52. Farmer v. Hughes [Colo.] 88 P. 191.

53. A subpurchaser having knowledge of the equities of the seller takes subject to them. Cranor Co. v. Miller [Ala.] 41 So. 678. Purchaser knowing that another was claiming the property of the seller in the courts is not an innocent purchaser. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135. Where a seller was induced to sell on the faith of a false statement by his vendee as to his assets and liabilities, the fraud being with the connivance and consent of a large creditor, the indebtedness to whom was concealed, held the property could be recovered from such creditor to whom it had ostensibly been sold but the real purpose of the transfer being to pay the indebtednes mentioned. Parlin & Orendorff Co. v. Glover [Tex. Civ. App.] 99 S. W. 592.

54. Schmidt v. Rankin, 193 Mo. 254, 91 S. W. 78.

55. Stan v. Dow [Neb.] 108 N. W. 1065.

56. See False Pretenses and Cheats, 7 C. L. 1646.

57. See Fraudulent Conveyances, 7 C. L. 1841.

58. Johns v. Reed [Neb.] 109 N. W. 738.

sequent creditor of the former owner.[59] The sale being procured by fraud, the seller may recover the goods of the buyer's assignee.[60] A retailer of illuminating oil must be held to contemplate that it will be used in the ordinary and usual lamps in the households of purchasers, and, where the oil sold is not of the quality called for but is unfit and dangerous for such purpose, the seller is liable for an injury resulting from such ordinary use to a member of the purchaser's household.[61]

There being no contractual relation between a third party and the seller of goods, the former cannot sue the latter on the contract of sale.[62] In a suit to recover against a third party, it is not necessary to make the original purchaser a party.[63] The burden is on a subsequent purchaser to show that he is a bona fide purchaser.[64] General rules of evidence apply.[65]

§ 14. *Conditional sales. Definition, validity, and formation.*[66] In a conditional sale the transfer of title to the purchaser or the retention of it by him depends upon the performance of some condition.[67] While technically distinct from chattel mortgages, sales upon condition, loans, agreements to sell, bailments, and contract of agency, the classification of a given transaction is often difficult,[66] the

59. Sentel v. Jennings, 123 Ill. App. 469.

60. Atlas Shoe Co. v. Bechard [Me.] 66 A. 390.

61. Standard Oil Co. v. Parrish [C. C. A.] 145 F. 829.

62. Where on sale of threshing machine the seller warranted it and agreed to send an expert to set up and start the machine, and a third person for whom the buyer desired to thresh requested the seller's agent to send an expert, which was done, held the third person could not sue the seller for breach of contract, the seller having no contract with him. Case Threshing Mach. Co. v. Sanford [Ky.] 97 S. W. 805.

63. Parlin & Orendorff Co. v. Glover [Tex. Civ. App.] 99 S. W. 592.

64. So held where subsequent purchaser claimed title as the indorsee of evidences thereof, whether they were bills of lading or warehouse receipts. Seller showed fraud. National Bank v. Chatfield, Woods & Co. [Tenn.] 101 S. W. 765. Purchaser has the burden of showing that he is an innocent purchaser for value. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135.

65. Where after a person purchased a horse it was branded with his brand, a copy of which was recorded, such copy was admissible in an action of replevin as tending to show the purchaser's good faith. Leavitt v. Shook, 47 Or. 239, 83 P. 391.

66. See C. L. 1380.

67. There being an express stipulation that the title is to remain in the seller until payment of the purchase price, it is a conditional sale. Riley v. Dillon [Ala.] 41 So. 768. Title does not pass until the condititon is fulfilled. Huston v. Peterson Colo.] 87 P. 1074.

"A conditional sale is one in which the vesting of the title in the purchaser is subject to a condition precedent, or in which its revesting in the seller is subject to a failure of the buyer to comply with a condition subsequent." In re Columbus Buggy Co. [C. C. A.] 143 F. 859.

Note: In this last case it would seem as though the court had confused "conditional sales" and "sales upon condition."—Ed.

68. ILLUSTRATIONS. **Contracts held conditional sales:** "Loan" of property; title to pass on final payment, held a conditional sale. Knowles Loom Works v. Knowles [Del.] 65 A. 26. Where purchase-money notes provided that **title should not pass** until they were paid, held a conditional sale. Kester v. Schuldt, 11 Idaho, 663, 85 P. 974.

"Lease" of road roller for a stated sum payable in instalments heldl a conditiona sale. Kelly Springfield Road Roller Co. v. Spyker [Pa.] 64 A. 546.

Lease of property, rent to apply on purchase price if lessee desired to purchase, held a conditional sale. Unitype Co. v. Long [C. C. A.] 143 F. 315. Where horses were **hired out,** title to pass if note given for their use was paid when due, held a conditional sale. Staunton v. Smith [Del.] 65 A. 593.

"Lease" of piano, rent to be applied on purchase price if lessee desired to purchase, held a conditional sale and not a bailment. Hamilton v. Hilands [N. C.] 56 S. E. 929. Where purchaser agreed to pay freight, insurance, and taxes, and house articles when received, and assume all risk of loss and pay for goods at net cash prices, and **no provision was made for the return of goods unsold,** held a conditional sale and not a contract of agency. Bradley, Alderson & Co. v. McAfee, 149 F. 254. Sale of ring, title not to pass until paid for, **"deposits"** to be made weekly and to be the absolute property of the seller, held a conditional sale. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022. Where machinery is sold on condition that the **title should remain in the sellers** until the buyer paid the purchase price, for which drafts were given, the transaction was not a chattel mortgage. Tompkins v. Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933. An instrument in the form of a note, but containing a recital that the note was given for a horse, the title to which was to remain in the payee until the note was paid, and containing further provisions that the maker thereby **sold and transferred** to the payee all his rights and title to the horse and authorized the payee to take possession of the same on nonpayment of the debt, sell it, and apply the proceeds to the satisfaction of the note, etc., held a con-

question being frequently deemed one for the jury.[69] Whether the parties to a transfer of personal property, the title to which does not pass until the purchase price is paid, intended to make a sale, in the absence of evidence of subsequent conduct of the parties must be ascertained from the terms of the instrument.[70] The negotiations leading up to the contract may be considered in determining its character.[71] Under some contracts one may be given the option to treat it as either of several kinds of contracts.[72] The character of a conditional sale is not destroyed by delivery of possession to the buyer nor by requiring additional security.[73] In Tennessee a conditional sale to a retail merchant of goods to be resold in and for the purposes of, and in prosecution of his business is illegal.[74] The buyer by giving a purchase-money mortgage on the property to the seller estops himself from subsequently claiming that the sale was a conditional one.[75]

Rights of parties to the contract.[76]—The buyer under a contract of conditional sale acquires no title,[77] but he has the right to the possession of the property for the purposes for which they are sold.[78] The title reserved, while affording a means of security, is not a lien.[79] Acceptance of the goods by the buyer does not render the condition inoperative.[80]

tract of conditional sale and not a mortgage. Tweedie v. Clark, 99 N. Y. S. 856.

Contracts held not conditional sales: Rent of cableway, rent to apply on price if renter desired to purchase, held a bailment. Lambert Hoisting Engine Co. v. Carmody [Conn.] 65 A. 141. Where goods were delivered under a written agreement expressly providing that the one to whom they were delivered was a **bailee for hire** and that if default in payment of any of the rents for the use and hire of the goods, wares, and merchandise by the bailee were made the bailor was authorized to repossess himself of the property, held a bailment and not a conditional sale. In re Augeny, 151 F. 959.

Lease of rails, steam shovel, and dump cars, rent payable in instalments, and on payment of $10 more lessee could have entire property. Articles leased were referred to in contract as "said equipment," but were separately valued. Shovel and cars were marked with lessor's name. Held contract one of bailment as to cars, shovel, and rails. Cincinnati Equipment Co. v. Strang [Pa] 64 A. 678. A contract between a furnisher of goods and the receiver that the latter may **sell them at such prices as he chooses,** that he will account and pay for the goods sold at agreed prices, that he will bear the expense of insurance, freight, storage, and handling, and that he will hold the unsold merchandise subject to the order of the furnisher, shows a bailment and not a conditional sale. In re Columbus Buggy Co. [C. C. A.] 143 F. 859. Where goods were delivered to president of corporate buyer on the express understanding that they were not to be delivered to the common carrier until paid for, held not a conditional sale but a cash sale in which payment was a condition precedent. Southern Pine Co. v. Savannah Trust Co. [C. C. A.] 141 F. 802.

69. Slayton v. Horsey [Tex. Civ. App.] 91 S. W. 799. Where stock was given as security for the payment of a note on condition that if the note was not paid at maturity the stock should become the property of the payee without further ceremony, held for the jury whether the transaction was a pledge or conditional sale. Smith v. Nixon, 145 Mich. 593, 13 Det. Leg. N. 569, 108 N. W. 971.

70. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

71. Lambert Hoisting Engine Co. v. Carmody [Conn.] 65 A. 141.

72. Where conditional sale was termed a "lease" and it was provided that if the instalments of rent were paid as they fell due the party paying the same should, while the lease continued in force, have the right to purchase the piano at an agreed price, all sums paid as security or as rent to be deducted from that price, held any election by the buyer to treat the transaction as a bailment had to be made before the full time for payment of the instalments had expired. Hamilton v. Hilands [N. C.] 56 S. E. 529.

73. Bierce v. Hutchins, 27 S. Ct. 524.

74. Star Clothing Mfg. Co. v. Nordeman [Tenn.] 100 S. W. 93. Acts 1899, p. 24, c. 15, providing that the retention of title and conditional sales shall be invalid, unless evidenced by written contract, which merely forbids the making of such contracts by parol without altering the essential nature thereof. Id.

75. Blue v. American Soda Fountain Co. [Ala.] 43 So. 709.

76. See 6 C. L. 1381.

77. Roach v. Curtis, 101 N. Y. S. 333.

78. Where the goods are sold for resale at retail, title to remain in the original seller until paid for, and the buyer agreed to execute notes for the purchase price, held upon executing the notes the buyer was entitled to the possession of the property and to retail the same in the due course of trade until he failed to comply with the conditions of the sale. Rex Buggy Co. v. Ross [Ark.] 97 S. W. 291. See, also, Bierce v. Hutchins, 27 S. Ct. 524.

79. Townsend v. Southern Product Co. [Ga.] 56 S. E. 436. The title of an unconditional assignee of a note given for the purchase price of personalty, wherein the seller retains title to the property sold until the

Upon default, the rights of third parties not having intervened, the seller has the option to demand a return of the goods [81] and to maintain replevin therefor [82] or sue for the unpaid purchase price,[83] but the latter proceeding affirms the sale and waives the reservation of title.[84] Also, the buyer refusing to accept and pay for the goods, the seller may exercise the right of resale.[85] The purchaser defaulting and the seller retaking the goods, the seller cannot recover the instalments due and unpaid.[86] What constitutes an election between the remedies depends upon the facts of the case.[87] Where default is made after part payment, the property should ordinarily be sold, the expenses and balance due the seller paid, and the surplus, if any, awarded the buyer.[88] Where upon breach the seller is refused possession, his damages are limited to the amount unpaid on the contract at the date of the conversion.[89] The seller wrongfully depriving the buyer of the possession and use of the property sold, he cannot enforce a forfeiture for failure to pay future instalments.[90] Performance by the seller of all conditions on his part and placing the buyer in statu quo is essential to a recovery of the chattels.[91] By statute in some states the seller must refund the amount paid less a reasonable compensation for the use of the property and for any damage done to it while in the possession of the buyer or his assigns,[92] and these statutes are generally held to apply to a mortgagee or purchaser from such original vendee.[93] In those states where such statutes exist, the property being taken in replevin by the seller without such tender, the defendant is entitled to have adjudged to him as damages the amount which should have been tendered by the seller.[94] By accepting payment the seller waives his right to forfeit the contract and retake the property because of breach

purchase money is paid, will prevail over the lien of a subsequent mortgage, though the assignee had previously bought the property from the original purchaser after the execution of the mortgage and had taken a bill of sale thereto with a stipulation that the title was conveyed subject to liens of record. Id.

80. Gaar, Scott & Co. v. Fleshman [Ind. App.] 78 N. E. 348.

81. Seller is entitled to the possession of the chattels. Pels & Co. v. Cambridge Architectural Iron Works [Mass.] 77 N. E. 1152. May retake the property. Butler v. Dodson & Son [Ark.] 94 S. W. 703; Roach v. Curtis, 101 N. Y. S. 333; Jessup v. Fairbanks, Morse & Co. [Ind. App.] 78 N. E. 1050. Unless performance be waived or extended the seller has the right to take possession of the property upon breach of the condition. Staunton v. Smith [Del.] 65 A. 593.

82. Scotch Mfg. Co. v. Carr [Fla.] 43 So. 427.

83. Butler v. Dodson & Son [Ark.] 94 S. W. 703; Jessup v. Fairbanks [Ind. App.] 78 N. E. 1050. The seller having the option to treat the sale as absolute upon nonpayment of the price, he can after a tender and delivery maintain an action for the purchase price. So held where contract provided that title should remain in the seller until settlement was concluded and accepted by the seller. Gaar, Scott & Co. v. Fleshman [Ind. App.] 77 N. E. 744. Petition for rehearing overruled [Ind. App.] 78 N. E. 348.

84. Butler v. Dodson & Son [Ark.] 94 S. W. 703; Jessup v. Fairbanks [Ind. App.] 78 N. E. 1050.

85. Mendel v. Miller & Sons, 126 Ga. 834, 56 S. E. 88. See ante, § 10 D, Resale.

86. Edmead v. Anderson, 103 N. Y. S. 369.

87. Where plaintiff, having installed a heating plant under contract that its title should remain in him until fully paid for, filed a mechanic's lien on the premises for an unpaid balance, such filing constituted an election of plaintiff to abandon title to the plant and recover the purchase price. Kirk v. Crystal, 103 N. Y. S. 17. That the seller brought an action to enforce materialman's lien on mistaken theory that title had passed does not constitute an election preventing him from bringing replevin for the goods. Bierce v. Hutchins, 27 S. Ct. 524.

88. Hamilton v. Hilands [N. C.] 56 S. E. 929.

89. Davis v. Bliss [N. Y.] 79 N. E. 851.

90. Rule applied to attaching creditor of buyer and assignee of seller. Pearne v. Coyne [Conn.] 65 A. 973.

91. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534. In replevin to recover the goods plaintiff must prove performance on his part and breach by the buyer. Id.

92. Bates, Ann. St. § 4155—3, as amended March 19, 1902 (95 Ohio Laws, p. 60), construed. National Cash Register Co. v. Cervone, 75 Ohio St. 639, 80 N. E. 1129.

93. So held as to Bates, Ann. St. § 4155—3, as amended March 19, 1902 (95 Ohio Laws, p. 60). National Cash Register Co. v. Cervone, 75 Ohio St. 637, 80 N. E. 1129.

94. National Cash Register Co. v. Cervone, 75 Ohio St. 637, 80 N. E. 1129.

of an implied warranty of quality in goods taken in exchange.[95] Where there is an express contract that the title be retained in the seller, it is not waived by him by implication because he takes the security of a trust deed.[96] Where the seller is forced to retake his property against his will and after refusing to do so, he may take the property and upon accounting for the reasonable value thereof recover the balance due.[97] The seller may seize the property under an attachment sued out for the purchase price without first filing and having a bill of sale to the buyer recorded;[98] and the mere fact that, before the rendition of judgment in favor of the plaintiff in attachment, the property is illegally brought to sale by the levying officer and is purchased by the plaintiff affords no reason for holding he is thereby estopped from prosecuting his suit on the theory that by becoming the purchaser at the illegal sale he elected to rescind the contract between himself and the buyer.[99] The taking of a renewal note operates as an extension of the time of payment.[1] The terms of the contract frequently limit the rights of the parties.[2] In some states statutes require a sale at public auction within a stated time after the retaking.[3] The commencement of a replevin suit by the seller in a conditional sale does not deprive him of interest on the purchase price in a subsequent action to recover the same.[4] Where the property is destroyed without the fault of either party after delivery to the buyer, the latter is liable for the purchase price.[5] It follows that the seller on default is entitled to recover the unpaid balance of the purchase price

95. Sale of milk. Carpenter v. Crow, 77 Ark. 522, 92 S. W. 779.

96. Greenwald v. Tinsley [Miss.] 42 So. 89.

97. So held where sellers expressly refused to retake property conditionally sold in satisfaction of the debt, and did not take it until directed to do so by the buyers after its abandonment by them, and after it became evident that the property would be a total loss to both parties if they failed to take it. Jones v. Reynolds [Wash.] 88 P. 577.

98, 99. Cooper v. Smith, 125 Ga. 167, 53 S. E. 1013.

1. Staunton v. Smith [Del.] 65 A. 593.

2. Where a contract for the conditional sale of a cash register authorized the buyer to turn in an old register at a specified valuation, and he failed to pay that amount or turn in the old register, the seller was entitled to recover the new register, his remedy not being limited to the recovery of the old register or its value. National Cash Register Co. v. Petsas [Wash.] 86 P. 662. Where conditional seller agreed upon default to give buyer an article of the same general kind as that bought and of the value of the payments made instead of the article sold, held upon default the seller could not obtain the return of the article without tendering a similar article of the value of the payments made. People v. Gluck, 188 N. Y. 167, 80 N. E. 1022.

3. Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, providing that if the seller retakes the goods he must sell at public auction within 60 days or repay the purchase money paid, apply to cases where the goods are retaken by replevin as well as where they are surrendered voluntarily. Roach v. Curtis, 101 N. Y. S. 333. Where seller had reacquired goods and there had been negotiations pending for an adjustment of the matter, held for the jury to determine whether buyer had waived his right to insist upon the seller complying with Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, requiring the seller upon retaking the goods to sell the same at public auction within 60 days or repay the purchase price paid. Id. Where in default of payment a seller replevied goods sold with a reservation of title in himself until they were paid for and the buyer made no appearance in the action, her attempt to open a default cannot be construed as an abandonment of her rights under Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, providing that where the seller retakes goods, he is liable to the buyer for the amount paid on them unless he sells them at public auction within 60 days from the retaking. Id. The seller having retaken the goods and failed for more than 60 days thereafter to sell them is liable, under Laws 1897, p. 541, c. 418, § 116, as amended by Laws 1900, p. 1624, c. 762, to the buyer for the amount paid on them, notwithstanding the buyer's failure to accept an offer of a return of the goods on the payment of the balance due. Id. Under Lien Laws 1897, p. 535, c. 418, § 83, providing that at any time before the property is sold to satisfy the lien the owner may redeem by paying the amount due, and upon making such payments the owner is entitled to possession of the property, the sale of the property subject to the lien transfers to the buyer the right to redeem. Tweedie v. Clark, 99 N. Y. S. 856

4. Johnson v. Crawford, 144 F. 905.

5. Phillips v. Hollenberg Music Co. [Ark.] 99 S. W. 1105. Though notes for purchase price had not in fact been executed. Marion Mfg. Co. v. Buchanan [Tenn.] 99 S. W. 984.

though the property sold has been destroyed without the fault of the purchaser.[6] Where there is a breach of a contract of conditional sale of household goods by failure to pay the instalments, the mere fact that the purchaser is suffering from some degree of ill health and needed the goods does not make a retaking under the contract wrongful;[7] but, to have such effect, the purchaser's need must be such that to deprive him of the furniture will expose him to increased sickness and suffering, and such fact must be known to the person demanding and removing the property.[8] Though the property may be attached to real estate, it remains personalty as between the contracting parties,[9] though as to bona fide purchasers it may become a fixture.[10] The purchaser claiming an accord and satisfaction, he must prove it.[11] Waiver of performance cannot be availed of unless pleaded.[12]

Rights of third persons. Notice, record, and filing.[13]—Except in those states where recordation is required,[14] the buyer not being a dealer and there being no evidence that he bought with the intention of reselling or that the seller had any reason to believe that the article would be resold, the seller may recover as against a subsequent purchaser.[15] The recording acts apply to contracts whereby an article is manufactured for and delivered to another, title to remain in the seller until payment in full.[16] The character of bona fide purchaser is not completed unless the whole amount of the purchase money is paid before the purchaser becomes chargeable with notice of the outstanding equity,[17] and this rule prevails under most of the conditional sale statutes,[18] and the subsequent purchaser learning of the outstanding equity before completing his payments, he may return the property, recover the money already paid, and any damages which may have resulted to him from his seller's defective title.[19] As a general rule the conditional seller's rights are superior to those of the vendor of real estate upon which the chattels are placed while the real estate is held by the purchaser of the chattels under a contract of sale,[20] and where such rule prevails the seller's rights are not affected by a provision

6. Jessup v. Fairbanks, Morse & Co. [Ind. App.] 78 N. E. 1050.

7. Flaherty v. Ginsberg [Iowa] 110 N. W. 1050.

8. Flaherty v. Ginsberg [Iowa] 110 N. W. 1050. Facts held insufficient to warrant a recovery. Id.

9. Heating plant. Kirk v. Crystal, 103 N. Y. S. 17.

10. Kirk v. Crystal, 103 N. Y. S. 17.

11. National Cash Register Co. v. Petsas [Wash.] 86 P. 662. Privilege of discounting purchase price by cash payment held not to show an intention to receive such payment as full payment without turning in of old register. Id.

12. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534.

13. See 6 C. L. 1383.

14. **Michigan:** Must be recorded. Sale of railroad equipment, Comp. Laws 1897, § 6336, construed. Hogan v. Detroit United R. Co. [Mich.] 14 Det. Leg. N. 87, 111 N. W. 765.

Nebraska: To be valid against purchasers in good faith, judgment and attaching creditors of seller must be recorded. Starr v. Dow [Neb.] 108 N. W. 1065. Conditional sale void as to purchasers and judgment creditors of seller unless written and recorded. Cobbey's Ann. St. 1903, § 5975, Compiled Statutes 1903, c. 32, § 26, construed. Jones v. Reed [Neb.] 109 N. W. 738.

New York: Unfiled conditional sale, purchaser takes fee therefrom. Kirk v Crystal, 103 N. Y. S. 17.

North Carolina: Revisal North Carolina 1905, § 983, requiring registration in the county where the purchaser resides, refers to the county where he resides at the time the contract was made and no new registration is necessary by reason of the purchaser removing, with the property, to another county. Rule applied where at the time of purchase the buyer had no fixed residence in the state but was then residing and receiving his mail in the county where the contract was made and to which the property was shipped. In re Franklin, 151 F. 642.

15. Fairbanks Co. v. Graves [Miss.] 43 So. 675. Where conditional buyer of mule was not in the business of selling mules, held seller could assert title as against a subpurchaser. Watts v. Ainsworth [Miss.] 42 So. 672. On default seller may recover property even though it be in the hands of a third person. Riley v. Dillon [Ala.] 41 So. 768.

16. Laws 1897, p. 540, c. 418, § 112, construed. McLean v. Bloch, 102 N. Y. S. 838.

17. Subsequent purchaser himself bought under contract of conditional sale. Bowen v. Dawley, 101 N. Y. S. 878.

18. So held under Laws 1897, p. 540, c. 418, § 112. Bowen v. Dawley, 101 N. Y. S. 878.

19. Subsequent purchaser himself bought under contract of conditional sale. Bowen v. Dawley, 101 N. Y. S. 878.

20. Davis v. Bliss [N. Y.] 79 N. E. 851. A contract for the sale of a mill, to be paid for in instalments, provided for payment to

in the contract for the sale of the realty that all improvements, repairs, or machinery placed upon the premises should become a part of the realty and should not be removed without the vendor's consent.[21] This priority may, however, be lost by delay.[22] The fact that the buyer by his conditional purchase has broken a contract with a third party does not affect the seller's rights.[23] By being silent while others rely upon the apparent title of the conditional buyer, the seller may lose his right to priority.[24] The buyer or his transferee being allowed to remain in possession after default, a demand is necessary before the seller can maintain conversion.[25] Property in possession of a bankrupt under an unrecorded conditional sale, the title to which remains in the seller under the state law, except as against attaching creditors or subsequent purchasers from the purchaser without notice, does not pass to the trustee in bankruptcy.[26] An unconditional assignment of a note given for the purchase of personalty, wherein the seller retains title to the property sold until the purchase money is paid, does not extinguish the security but carries it along, and the title retained by the seller becomes vested in the assignee until the purchase debt is paid.[27] Where seller is also protected by a trust deed on the buyer's property, suing to foreclose the trust deed does not waive his rights under the sale as against the buyer's creditors.[28] Generally an attaching creditor only acquires the rights of the buyer.[29]

In an action to enforce the seller's rights, the general rules as to the admissibility of evidence apply.[30]

SALVAGE; SATISFACTION AND DISCHARGE, see latest topical index.

the extent of $1,000 by improvements on the property by labor, repairs, and new machinery "unincumbered by mechanics' liens, mortgage, or purchase price," held to justify the inference that the parties contemplated the instalment on the premises of machinery which should be subject to a lien on behalf of the seller for the unpaid purchase price which should be prior to the rights of the vendor. Id.

21. Davis v. Bliss [N. Y.] 79 N. E. 851.

22. As against a mortgagee of realty, ten years' delay of conditional seller in asserting rights held to constitute a waiver and abandonment thereof, the chattels having become fixtures with the seller's consent. Knowles Loom Works v. Knowles [Del.] 65 A. 26.

23. Where a contract for the sale of a mill provided that the vendee should not remove any of the machinery from the premises without the vendor's consent, the fact that the vendee did remove an old engine without the vendor's consent, which was replaced by a new gasoline engine purchased from plaintiffs under a conditional contract reserving the title in plaintiffs until paid for, did not affect plaintiffs' rights under such conditional contract of sale. Davis v. Bliss [N. Y.] 79 N. E. 851.

24. The seller being present and allowing the buyer to sell the property to a bona fide purchaser, he cannot claim title as against such purchaser. Huston v. Peterson [Colo.] 87 P. 1074. Permitting the sale of part of the property does not prevent the seller from claiming title as against a mortgagee of the buyer who did not rely on the fact of such sale. Id.

25. Tompkins v. Fonda Glove Lining Co., 188 N. Y. 261, 80 N. E. 933.

26. New Hampshire law considered. In re Cavagnaro, 143 F. 668. Unrecorded sale being valid except as against purchasers, attaching or judgment creditors, it is valid against buyer's trustee in bankruptcy In re Great Western Mfg. Co. [C. C. A.] 152 F. 123.

27. Townsend v. Sothern Product Co. [Ga.] 56 S. E. 436.

28. Foster v. Briggs Machinery & Supply Co. [Ind. T.] 98 S. W. 120. Where there was nothing to indicate that the creditor had lost anything thereby, held the seller was not estopped from asserting his rights under the notes. Id.

29. Under Gen. St. 1902, § 834, an attaching creditor of the buyer only acquires the right of the buyer, and hence payment by him of the unpaid portion of the purchase price does not entitle him to enforce a forfeiture for failure of the buyer to pay an instalment as it falls due. Pearne v. Coyne [Conn.] 65 A. 973. A conditional sale is valid as between the parties and all except bona fide purchasers without notice and actual creditors attaching or levying in good faith. Kimball Co. v. Cruikshank, 123 Ill. App. 580.

30. In an action by the seller against a subpurchaser, evidence of a conversation between the parties, after the defendant had bought the property, relative to the balance unpaid, held inadmissible. Watts v. Ainsworth [Miss.] 42 So. 672. Declarations of deceased stockholder and director of corporate buyer held admissible to show that such buyer knew that its seller held under a conditional sale. Tompkins v. Fonda Glove Lining Co., 188 N. Y. 26, 80 N. E. 933.

SAVING QUESTIONS FOR REVIEW.

§ 1. Inviting Error (1822).
§ 2. Acquiescing in Error (1824). Change of Theory (1826).
§ 3. Mode of Objection, Whether by Objection, Motion, or Request (1830).
§ 4. Necessity of Objection (1832).
§ 5. Necessity of Motion or Request (1836). In General (1836). Motion for Judgment or Nonsuit, or Direction of Verdict (1836). Motion to Strike Out (1836). Motion for New Trial (1836). Request for Instructions (1838). Request for Findings (1840).
§ 6. Necessity of Ruling (1840).
§ 7. Necessity and Time of Exception (1841). Time of Taking Exceptions (1843).
§ 8. Form and Sufficiency of Objection (1843).
§ 9. Sufficiency of Exception (1847).
§ 10. Waiver of Objections and Exceptions Taken (1849).

Scope of title.—This title covers the things that must be done in the lower court in order to save matters for review in an appellate court. It does not, however, include bills of exceptions, statements of case, or any of the formal steps incidental to the transmission of the case to the appellate court,[31] nor does it include the manner of objecting to pleadings.[32] Objections to jurisdiction and waiver thereof are more fully treated elsewhere.[33]

§ 1. *Inviting error.*[34]—A party cannot complain of error which he invites.[35] He cannot complain of instructions given at his own request,[36] of modifications the substance of which is contained in his own instructions,[37] or of the modification of erroneous instructions requested by him,[38] or of instructions substantially the same as those which he himself has requested,[39] or which are in accord with his own

31. See Appeal and Review, 7 C. L. 128.
32. See Pleading, 6 C. L. 1008.
33. See Jurisdiction, 6 C. L. 267; Appearance, 7 C. L. 251.
34. See 6 C. L. 1385.
35. Where defendant prevented rendering of decree pro confesso, he cannot complain of its absence. Williams v. Clyatt [Fla.] 43 So. 441. Examination of ballots by court of appeals in election contest. Combs v. Combs [Ky.] 99 S. W. 1150. Where defendant in registration proceedings objected to finding that one of his deeds was void, he could not object to dismissal of proceedings as to land covered by such deed. Glos v. Murphy, 225 Ill. 58, 80 N. E. 59. Exhibit attached to complaint on defendant's own motion. Heaston v. Kreig [Ind.] 77 N. E. 805. Party inducing other party to waive jury cannot object to capacity of such other to do so. Pratt v. Davis, 118 Ill. App. 161. Contestant stipulating that will is valid cannot complain of sufficiency of attestation. Hogan v. Hinchey, 195 Mo. 527, 94 S. W. 522.

Federal appellate practice is not affected by state practice in regard to invited error. Francisco v. Chicago & A. R. Co. [C. C. A.] 149 F. 354. U. S. Rev. St. 1899, § 914, relating to conformity to state practice, does not change this rule, since it does not apply to appellate practice. Id.

36. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347; Tennessee Cent. R. Co. v. Brasher's Guardian, 29 Ky. L. R. 1277, 97 S. W. 349; Stecher Cooperage Works v. Steadman [Ark.] 94 S. W. 41; St. Louis, etc., R. Co. v. Nance [Tex. Civ. App.] 101 S. W. 294. Though it is erroneous in substance. Cownie Glove Co. v. Merchant's Dispatch Transp. Co., 130 Iowa, 327, 106 N. W. 749. Submission of question of law as question of fact. Georgetown Water, Gas, Elec. & P. Co. v. Smith, 30 Ky. L. R. 253, 97 S. W. 1119; St. Louis, etc., R. Co. v. Smith [Ark.] 100 S. W. 884.

37. Chicago Tel. Co. v. Schulz, 121 Ill. App. 573. Where both instruction and modification failed to include doctrine of last clear chance, modification not objectionable on this account. Henderson v. Los Angeles Traction Co. [Cal.] 89 P. 976.

38. Jones & Adams v. George [Ill.] 81 N. E. 4. Where modification does not render instruction more erroneous. Anderson v. Northern Pac. R. Co. [Mont.] 85 P. 884. Where party reads to jury modification of instruction erroneous as requested. Yazoo & M. V. R. Co. v. Byrd [Miss.] 42 So. 286.

39. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903; Habig v. Parker [Neb.] 107 N. W. 127; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; Chicago etc., R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169; Chicago City R. Co. v. Pural 224 Ill. 324, 79 N. E. 686; Purtle v. Bell, 225 Ill. 523, 80 N. E. 350; Central R. Co. v. Sehnert, 115 Ill. App. 560; Springfield Consol. R. Co. v. Farrant, 121 Ill. App. 416; Warth v. Loewenstein, 121 Ill. App. 71; Gibson v. Reiselt, 123 Ill. App. 52; Village of Lockport v. Licht, 123 Ill. App. 426; Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325; Frankfort & Versailles Traction Co. v. Marshall, 30 Ky. L. R. 431, 98 S. W. 1035; Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78; Clippard v. St. Louis Transit Co. [Mo.] 101 S. W. 44; Patterson v. Frazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 78, 93 S. W. 146; Louisiana & Texas Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140; St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534; American Freehold Land Mortg. Co. v. Brown [Tex. Civ. App.] 101 S. W. 856; Choctaw, etc., R. Co. v. Hickey [Ark.] 99 S. W. 839. Though request was refused. Western Union Tel. Co. v. Rowe [Tex. Civ. App.] 16 Tex. Ct. Rep. 863, 98 S.

theory of the case,[40] or which are too numerous, the greater number having been given at the party's own request,[41] or of conflict between a correct instruction and an erroneous one, the latter having been given at his own request,[42] or of absence of instructions refused on his own objections,[43] or the refusal of which is required by his own theory,[44] or of failure to select the most specific of several special instructions requested covering the same point,[45] or of the assumption of the correctness of an instruction given at the party's own request.[46] A party cannot complain of evidence which he himself introduces,[47] or which is similar to that which he introduces,[48] or for which he opens the way,[49] or which he himself brings out,[50] or the exclusion of which he prevents,[51] or of the absence of evidence excluded on his own objection,[52] or of a construction of the evidence adopted at his request,[53] or for which he has opened the way;[54] but one is not precluded from objecting to the ad-

W. 228. Presumed that appellant requested instructions similar to those objected to. Farnsworth v. Union Pac. Coal Co. [Utah] 89 P. 74. Instruction on second trial identical with one given on appellant's request on former trial and approved by appellate court. Galveston etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355.

Not invited: Appellant's instructions held not to invite ignoring of question of proximate cause. Texas, etc., R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694.

40. Walker v. Simmons Mfg. Co. [Wis.] 111 N. W. 694. Submission of issues. National Tube Works Co. v. Ring Refrigerating & Ice Co. [Mo.] 98 S. W. 620. Instruction in response to issue raised by pleadings of both parties. Brayton v. Beall, 73 S. C. 308, 53 S. E. 641. Measure of care owed to plaintiff. Hardin v. Ft. Worth & D. C. R. Co. [Tex. Civ. App.] 100 S. W. 995. Plaintiff cannot complain of instruction fixing damages or of time fixed by petition. Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751. Instruction in accord with counsel's statement that he did not rely on language of telegram as notice of damages incurred by failure to deliver. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062. Party cannot complain that instruction is not sustained by evidence when his own instructions are predicated upon existence of such evidence. Gatewood v. Garrett [Va.] 56 S. E. 335. Instructions predicated upon same statute. Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903. Where railroad company tried case on theory that stock was killed at a public crossing, it could not complain of charge requiring defendant to give the statutory signal. Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688.

41. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860.

42. United Fruit Co. v. New York & Baltimore Transp. Co. [Md.] 65 A. 415; Hammer v. Crawford [Mo. App.] 93 S. W. 348; Councilman v. Towson Nat. Bank, 103 Md. 469, 64 A. 358.

43. Hines v. Kansas City, 120 Mo. App. 190, 96 S. W. 672.

44. Refusal of instruction to disregard count because not supported by evidence, when party had procured instruction predicated upon existence of evidence to sustain other counts. Quincy Horse R. & Carrying Co. v. Rankin, 123 Ill. App. 472.

45. St. Louis S. W. R. Co. v. Haney [Tex. Civ. App.] 16 Tex. Ct. Rep. 19, 94 S. W. 386.

46. Sufficiency of evidence determined with reference to definition given at appellant's request. Ladd v. Germain, 145 Mich. 225, 13 Det. Leg. N. 443, 108 N. W. 679.

47. Breiner v. Nugent [Iowa] 111 N. W. 446; State v. Jackson [Vt.] 65 A. 657; Madera R. Co. v. Raymond Granite Co. [Cal. App.] 87 P. 27; Winters v. Stoddard & Co., 20 Colo. App. 566, 85 P. 1008.

48. Introducing similar evidence precludes party from objecting on appeal to that of his opponent. Chicago & A. R. Co. v. Jennings, 120 Ill. App. 195. Where opinion evidence was erroneously introduced on direct examination, appellant who on cross-examination had the benefit of a similar opinion, could not complain. Curtis v. Barber Asphalt Pav. Co. [Wash.] 87 P. 345.

49. One who examines his witnesses as to certain matter cannot complain that other party examines his witnesses as to same matter. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068. By cross-examniation. Grand Lodge A. O. U. W. v. Young, 123 Ill. App. 628. Where party first introduced evidence of kind objected to. Kansas City Southern R. Co. v. Belknap [Ark.] 98 S. W. 366. Introduction of same evidence by other party on subsequent trial. Nelson County v. Bardstown & L. Turnpike Road Co., 30 Ky. L. R. 1254, 100 S. W. 1181.

50. On cross-examination. Pacific Exp. Co. v. Needham [Tex. Civ. App.] 15 Tex. Ct. Rep. 889, 94 S. W. 1070; Southern Coal & Coke Co. v. Swinney [Ala.] 42 So. 808; New Orleans Furniture Mfg. Co. v. Hill Furniture Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 731, 94 S. W. 148; Moore v. Supreme Assembly of Royal Soc. of Good Fellows [Tex. Civ. App.] 15 Tex. Ct. Rep. 654, 93 S. W. 1077.

51. Comer v. Ritter Lumber Co., 59 W. Va. 688, 53 S. E. 906.

52. Lincoln County v. Chicago, etc., R. Co. [Neb.] 108 N. W. 178; Hepler v. People, 226 Ill. 275, 80 N. E. 759; Happel v. Rosenthal, 103 N. Y. S. 715. Evidence withdrawn on objection. Roche v. Nason, 185 N. Y. 128, 77 N. E. 1007.

53. Mills v. Smith [Mass.] 78 N. E. 765.

54. Where party objected to evidence offered to clear up ambiguity in written instrument and court's construction was as

mission of evidence by the erroneous exclusion of other evidence, where the admission of the latter would not have cured the error in the admission of the former.[55] One cannot object to the exercise of jurisdiction which he himself invokes,[56] or where he is responsible for the objection thereto.[57] Nor can one complain of an order or judgment entered on his own motion,[58] nor of a nonsuit which he himself invites,[59] nor of litigation of rights by party whom he himself has impleaded,[60] nor of failure to grant relief not asked for.[61]

§ 2. *Acquiescing in error.*[62]—As a general rule there can be no error in the absence of an asserted right,[63] and only such questions as are raised in the appellate court will be considered on appeal.[64] Some of the questions to which this rule has been applied are: Qualification of the trial court or tribunal;[65] prematurity[66] or abandonment of the action;[67] pendency of another suit;[68] status of parties;[69] joinder and nonjoinder of parties;[70] sufficiency of pleadings;[71] allowance of amendments;[72] change of venue;[73] summoning,[74] swearing,[75] qualification,[76] and treat-

much within meaning of instrument as that contended for by the party. Zerr v. Klug [Mo. App.] 98 S. W. 822.

55. Objection to one method of ascertaining damages does not preclude objection to other methods. Home Land & Cattle Co. v. McNamara [C. C. A.] 145 F. 17.

56. Jurisdiction to act on exceptions to award. Waisner v. Waisner [Wyo.] 89 P. 580.

57. Jurisdiction on appeal to district court. McCauley v. Jones [Mont.] 88 P. 572.

58. Raymond v. Tiffany, 100 N. Y. S. 807. Order of reference. Schrader v. Fraenckel, 113 App. Div. 395, 99 N. Y. S. 137. Order made on motion of both parties. Dockery v. Lowenstein [Mo. App.] 99 S. W. 40.

59. Francisco v. Chicago & A. R. Co. [C. C. A.] 149 F. 354.

60. Ellis v. National Exch. Bank [Tex. Civ. App.] 86 S. W. 776.

61. Plaintiff in securing dismissal of mechanics' lien proceedings failed to have his right to personal judgment preserved. Service v. McMahan, 42 Wash. 452, 85 P. P. 33. Decree held not to give full relief claimed. Multnomah County v. White [Or.] 85 P. 78.

62. See 6 C. L. 1387.

63. Dunn & Lallande Bros. v. Gunn [Ala.] 42 So. 686.

64. Frisby v. Thomas Jefferson Council No. 138 [N. J. Law] 64 A. 1053; Hogan v. Sullivan [Vt.] 64 A. 234; Mead v. Morse [Mass.] 80 N. E. 513; Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613; Abraham Lincoln B. & H. Ass'n v. Zuelk, 124 Ill. App. 109; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Nye v. Karlow, 98 Minn. 81, 107 N. W. 733; Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826; Ludwig v. Spicer, 99 Minn. 400, 109 N. W. 832; McCabe v. Desnoyers [S. D.] 108 N. W. 341; Ginn v. W. C. Clark Coal Co., 143 Mich. 84, 12 Det. Leg. N. 1012, 106 N. W. 867; Walker v. Lee [Fla.] 40 So. 881. Insufficiency of bond and affidavit for sequestration. Vaughn v. Lee [Tex. Civ. App.] 16 Tex. Ct. Rep. 13, 94 S. W. 912. Refusal of referee to take further testimony until his fees are paid. State v. Frost [Or.] 36 P. 177.

Failure to invoke the rule will not necessarily prevent its application, as the court will apply it of its own motion where justice requires it. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166.

Grounds for affirmance not raised below will not be considered on appeal unless it appears beyond doubt that appellant's rights will not be prejudiced thereby. Scott v. Herrell, 27 App. D. C. 395.

65. County commissioners in proceedings to establish public drain. Carr v. Duhme [Ind.] 78 N. E. 322.

66. Blackmore v. Winders [N. C.] 56 S. C. 874; Van Camp v. Keokuk, 130 Iowa, 716, 107 N. W. 933.

67. Geisenberger v. Cotton, 116 La. 651, 4 So. 929.

68. Wetzel & T. R. Co. v. Tennis Bros. Co. [C. C. A.] 145 F. 458.

69. Of complainant in suit to cancel mortgage. Griffin v. Erskine [Iowa] 109 N. W. 13. Of trustee in bankruptcy to attack chattel mortgage. Frank v. Vollkomer, 27 S. Ct. 596. Of guardian ad litum to file cross bill. Ziegler v. Ziegler [Ind. App.] 78 N. E. 1066. Question as to plaintiff's emancipation. Hellthaler v. Teft Weller Co., 50 Misc. 358, 98 N. Y. S. 823. Contention that complaint did not allege permission to sue mechanics' lien bondsmen. Miller v. Isear, 99 N. Y. S. 869. Objection that stockholder who was also a creditor but who was party to suit by receiver to recover on delinquent stock, only as defendant, had no such status as to entitle him to appeal from decree excluding his claim from consideration in computation of extent of stockholders' liability. Easton Nat. Bank v. American Brick & Tile Co. [N. J. Err. & App.] 64 A. 917. When plaintiff stated that action was for services against the executor, and defendant did not object, latter could not on appeal object that word "as" did not appear after his name and before word "executor." Pryor v. Milburn, 101 N. Y. S. 34.

70. See post, § 4, Necessity of Objection, subd. To Parties.

71. See post, § 4, Necessity of Objection, subd. To Pleadings.

72. Howard v. Norton-Morgan Commercial Co. [Ariz.] 89 P. 541; Rhodes & Son Co. v. Charleston [Ala.] 41 So. 746. Setting aside judgment and allowing amendment by allegation of diversity of citizenship, and ordering plea, and notice to stand as filed to the declaration as amended. Holloway v. White-Dunham Shoe Co. [C. C. A.] 151 F. 216. Defendant who fails to request ad-

ment of jury;[77] admission,[78] exclusion,[79] and sufficiency of evidence;[80] variance between pleadings and proof;[81] arguments of counsel;[82] remarks of trial judge;[83] giving and refusal of instructions;[84] sufficiency of findings;[85] settlement of accounts;[86] form[87] or sufficiency[88] of verdict, and time of directing verdict;[89] amount of judgment,[90] recitals,[90a] and time of rendition;[91] correctness of findings;[92] costs;[93] attorney's fees;[94] reinstatement;[95] bond on intermediate appeal.[96]

journment cannot complain of amendment on ground of surprise. Vucci v. Pellettieri, 103 N. Y. S. 104.

73. Coffey v. Carthage [Mo.] 98 S. W. 562. Irregularity in removal of the case from one division of civil district to another. Fluker v. De Grange, 117 La. 331, 41 So. 591. That transcript of record on change of venue was not signed by clerk. Becker v. Lincoln Real Estate & Bldg. Co., 118 Mo. App. 74, 93 S. W. 291.

74. Objection that summoning officer was not sworn. San Antonio Traction Co. v. Davis [Tex. Civ. App.] 101 S. W. 564.

75. Form of oath. Dunaway v. Ferst [Fla.] 41 So. 451.

76. Objection on account of relationship to parties. Ferguson v. Loudermilk [Ga.] 56 S. E. 119. Incompetency of juror propter defectum waived by failure to challenge. Parris v. State, 125 Ga. 777, 54 S. E. 751.

77. Failure to order jury into custody of officers. Wallace v. Skinner [Wyo.] 88 P. 221. Giving whiskey to juror. Ferguson v. Loudermilk [Ga.] 56 S. E. 119. Act of counsel in directing attention of jury to certain particulars of object being viewed. McMahon v. Lynn & B. R. Co., 191 Mass. 295, 77 N. E. 826.

78. See post, § 4, Necessity of Objection, subd. To Evidence.

79. Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606; Carr v. Prudential Ins. Co., 101 N. Y. S. 158.

80. See post, § 4, Necessity of Objection, subd. To Evidence.

81. Richards v. Richman [Del.] 64 A. 238; Newport News & O. P. R. & Elec. Co. v. McCormick [Va.] 56 S. E. 281; Mount v. Montgomery County Com'rs [Ind.] 80 N. E. 629; Chicago, etc., R. Co. v. Snedaker, 223 Ill. 395, 79 N. E. 169; Petersen v. Elholm [Wis.] 109 N. W. 76; Donner v. Genz [Wis.] 107 N. W. 1039; Bird v. Gustin-Boyer Supply Co. [Mo. App.] 99 S. W. 775; Gaume v. Horgan [Mo. App.] 99 S. W. 457; Farmers' & Merchants' Bank v. Richards, 119 Mo. App. 18, 95 S. W. 290; Tew v. Powar [Colo.] 86 P. 342; Thompson-Starrett Co. v. Fitzgerald [C. C. A.] 149 F. 721. In giving instructions court may ignore variances where there is no objection to evidence on account thereof. Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514. Due to clerical error. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107. Evidence of negligence not alleged. Beverley v. Boston El. R. Co. [Mass.] 80 N. E. 507. Evidence of justification admitted under general issue in action for assault. Silva v. Silva, 27 R. I. 562, 65 A. 272. Between counterclaim and proof. Cannon Weiner El. Co. v. Boswell, 117 Mo. App. 473, 93 S. W. 355. Variance caused by dismissal as to one sued as joint tort feasor without amendment. Parmalee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652.

82. In re Shelton's Will [N. C.] 55 S. E. 705; Ferguson v. Loudermilk [Ga.] 56 S. E. 119. Especially where appellant responded thereto. American Freehold Land Mortg. Co. v. Brown [Tex. Civ. App.] 101 S. W. 856.

83. Medis v. Bentley [Pa.] 65 A. 758.

84. Gray v. Parrott, 30 Ky. L. R. 777, 99 S. W. 640; Harms v. Sheppard, 30 Ky. L. R. 404, 98 S. W. 1012. Giving of instructions. Kountze v. Hatfield, 30 Ky. L. R. 589, 99 S. W. 262; Proctor v. Cable Co., 145 Mich. 503, 13 Det. Leg. N. 644, 108 N. W. 992; Nickles v. Seaboard Air Line R. Co. 74 S. C. 102, 54 S. E. 255; Brickman v. Southern R. Co., 74 S. C. 306, 54 S. E. 553; Conrey v. Nichols [Colo.] 84 P. 470. Stating issues. Parks v. Lauren Cotton Mills [S. C.] 45 S. E. 234. In absence of any complaint of instructions a verdict justified thereby cannot be attacked as contrary to law. Gray v. Parrott, 30 Ky. L. R. 777, 99 S. W. 640. Objections on account of technical or verbal errors or unintentional misstatement of the law. Kolbe v. Boyle, 99 Minn. 110, 108 N. W. 847. Modification. Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505. Failure to charge. Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826.

Excusable failure to object: Where failure to object to the court's statement of a party's contentions is due to excusable misapprehension of such statement, it will not be binding upon the party. Kaess v. Tivoli Brew. Co. [Mich.] 111 N. W. 106.

85. Schelske v. Orange Tp. [Mich.] 13 Det. Leg. N. 988, 110 N. W. 506.

86. Mistake in guardian's account not pointed out below not correctible on appeal. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504.

87. Byrne v. Morrison, 25 App. D. C. 72; Jackson v. McFall [Colo.] 85 P. 638.

88. Where verdict is replevin for an engine and tender did not find issues in respect to tender. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726.

89. Error in directing verdict on plaintiff's claim before trial on counterclaim waived by proceeding to trial on counterclaim. Dunnevant v. Mocksoud [Mo. App.] 99 S. W. 515.

90. Due to error in computation of amount. Jones, Downs & Co. v. Chandler [N. M.] 85 P. 392. Judgment exceeded ad damnum. Polowski v. Derengowski, 124 Ill. App. 445.

90a. Recital in decree must be held correct where error was not brought to the attention of the lower court. Myers v. Myers, 143 Mich. 32, 12 Det. Leg. N. 585, 106 N. W. 402.

91. Entry of decree without filing of master's report or giving party opportunity to except thereto. Polk County Nat. Bank v. Darrah [Fla.] 42 So. 323. Rendered on next to last day of term instead of two

A party cannot complain of error which he could have avoided,[97] and he may be estopped by subsequent participation in the proceedings.[98] A fortiori is one estopped to predicate error upon matters to which he has expressly consented,[99] but mere clerical assistance does not constitute consent.[1] Exceptions to conclusions of law admit the correctness of the findings of fact,[2] and submission of the case upon agreed facts waives all objections to the form of the action and technical defects in the pleadings.[3] Errors may also be waived by an agreement for refiling of the case.[4]

Questions involving fundamental errors apparent on the fact of the record will be considered though not saved below.[5]

Change of theory.[6]—The case will be tried on appeal on the same theory on which it was tried below,[7] whether such theory relates to the pleadings,[8] the evi-

days before end of term as required by rule 66 [67 S. W. xxv]. Rowe v. Gohlman [Tex. Civ. App.] 17 Ct. Rep. 40, 539, 98 S. W. 1077.

92. Finding not assailed is confessed. Rogers v. Ogden Bldg. & Sav. Ass'n, 30 Utah, 188, 83 P. 754.

93. Blain v. Park Bank & Trust Co. [Tex. Civ. App.] 94 S. W. 1091.

94. Appellate court cannot order a remittitur on account of an inadvertant admission of liability for too large amount of attorney's fees when attention of trial court was not called to matter. Finn v. Seegmiller [Iowa] 111 N. W. 314.

95. Entertaining insufficient motion. City of Atlanta v. Miller, 125 Ga. 495, 54 S. E. 538.

96. Griswold v. Smith, 116 Ill. App. 223.

97. Plaintiff failed to call court's attention to mistake in handing clerk instruction marked "given" along with those refused. Fowler v. Prichard [Ala.] 41 So. 667. In Illinois dismissal of action as to common counts will not preclude objection to sustaining of demurrer to special count though matter covered by latter was provable under former. Barrows v. Mutual Reserve Life Ins. Co. [C. C. A.] 151 F. 461.

98. Where plaintiff dismissed appeal from order granting new trial, consented to filing of amended answer, and went to trial on issues thus raised. Church v. Odell [Minn.] 110 N. W. 346. Acquiescence in a ruling that a case is subject to nonsuit, and introduction of evidence to save the case waives objection to the ruling. Crawford v. Roney, 126 Ga. 763, 55 S. E. 499.

99. Instructions. Jones v. Hoadley, 101 N. Y. S. 470; Gans Salvage Co. v. Byrnes, 102 Md. 230, 62 A. 155; Cook v. Chicago, etc., R. Co. [Neb.] 110 N. W. 718; Cutcliff v. Birmingham R., L. & P. Co. [Ala.] 41 So. 873. Statement of measure of damages. Kendall v. Chapel [Mich.] 14 Det. Leg. N. 58, 111 N. W. 339. Use of literal copies of pleadings in preparation of instructions. Oxford Junction Sav. Bank v. Cook [Iowa] 111 N. W. 805. **Severance** after consolidation. Fowler v. Metzger Seed Oil Co. [Wis.] 111 N. W. 677. **Trial by court without jury.** Hutchinson v. Ward, 99 N. Y. S. 708. **Examination of witnesses** by court in absence of parties. Dawson v. Dawson, 40 Wash. 656, 82 P. 937. **Amendment** of pleading. Pyke v. Jamestown [N. D.] 107 N. W. 359. **Computation of interest** from certain time. Ellis v. National City Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 892, 94 S. W. 437. **Decree** appointing receiver. Campbell v. Kracke [Tex. Civ. App.] 100 S. W. 1028. **Scope of judgment** in that it included certain items. Chicago Union Trac. Co. v. Brody, 123 Ill. App. 331. Adjudication of certain claims by decree in bankruptcy. In re Blake [C. C. A.] 150 F. 279. Decree for **alimony.** Patrick v. Patrick, 30 Ky. L. R. 1364, 101 S. W. 328. **Oral evidence** on question of admissibility of ordinance. Chicago & A. R. Co. v. Wilson, 225 Ill. 50, 80 N. E. 56. Reading of **deposition** not properly certified. Smith v. Sisters of Good Shepherd, 29 Ky. L. R. 912, 96 S. W. 549. Waiver of **notice of motion** for new trial. Theodore Hamm Brew. Co. v. Kneise [Minn.] 111 N. W. 577; Buckle v. McConaghy [Idaho] 88 P. 100. Discharge of **jury.** Williams v. Jones [Ariz.] 85 P. 399. Joining in **issues** in equity suit precludes objection that such issues are not cognizable in equity. Carnohan v. Carnohan, 143 Mich. 390, 12 Det. Leg. N. 1023, 107 N. W. 73.

1. Preparation of findings and conclusions by direction of court. Frank L. Fisher Co. v. Woods [N. Y.] 79 N. E. 836.

2. Indianapolis Northern Traction Co. v. Harbaugh [Ind. App.] 78 N. E. 80.

3. In re Blake [C. C. A.] 150 F. 279.

4. All errors in a case in probate court are waived by refiling case by agreement in district court after papers have been certified to such court. Greeley v. Greeley, 16 Okl. 325, 83 P. 711.

5. Hahl v. Kellogg [Tex. Civ. App.] 16 Tex. Ct. Rep. 30, 94 S. W. 389. **Interest on judgment.** Missouri, etc., R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. Void judgment. Alexander v. Porter [Miss.] 41 So. C. Failure of complaint to state canse of action. See post § 4, Necessity of Objections, subd. To Pleadings.

6. See 6 C. L. 1391.

7. Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29; McDonald v. Cabiness [Tex. Civ. App.] 17 Tex. Ct. Rep. 518, 98 S. W. 943; Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737; Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213; Donner v. Genz [Wis.] 107 N. W. 1039; Matousek v. Bohemian Roman Catholic First Cent. Union, 192 Mo. 588, 91 S. W. 538; Lord v. Johnson, 120 Ill. App. 55; Benjamin v. Tupper Lake, 110 App. Div. 426, 97 N. Y. S. 512; Dal v. Fischer [S. D.] 107 N. W. 534; Wright v. Eckert, 100 N. Y. S. 979; City of Chicago v. Chicago Terminal Transfer R. Co., 121 Ill. App. 197. Where in an equity case the court adopts the verdict of jury rendered under instructions

dence,[9] the issues [10] of law [11] or of fact,[12] the relief sought,[13] grounds of recovery [14]

given at instance of parties, the appellate court will presume that the findings are based on same theory adopted in the instructions. McGinnis v. Rigby Printing Co. [Mo. App.] 99 S. W. 4.

8. No contention made below that demurrer should be treated as motion to strike. Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co. [Mont.] 88 P. 565. Petition to vacate judgment treated as one in equity. Morrion v. Steenstra [Wash.] 88 P. 104. Case tried on theory that action was ex delicto. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. Papers filed by several defendants treated as single demurrers. Lewisohn v. Stoddard, 78 Conn. 575, 63 A. 621. Amendment treated as filed. Foley v. Cedar Rapids [Iowa] 110 N. W. 158. Where defense was stricken on plaintiff's motion, he could not assert on appeal that such defense should have been pleaded and that evidence in regard thereto was therefore properly excluded. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 86 P. 324. One who stands by and permits the court to render judgment against him under a mistake as to the condition of the pleadings cannot urge the error for the first time on appeal. Heilner v. Smith [Or.] 88 P. 299. Where in response to a rule to show cause appellant demurred to the complaint and failed to asked for leave to answer after it was overruled, it is too late to object on appeal that his demurrer was treated as an answer to the rule. Guerin v. Macfarland, 27 App. D. C. 478.

9. Assumption of burden of proof with consent of adversary. Kentucky Vermillion Min. & Concentrating Co. v. Norwich Union Fire Ins. Soc. [C. C. A.] 146 F. 695. Fact that parties treat matter as being in issue does not authorize introduction of incompetent evidence. Craig v. A. Laschen & Sons Rope Co. [Colo.] 87 P. 1143. Admissibility of affidavits of good faith on motion to remand case to state court. Wecker v. National Enameling & Stamping Co., 27 S. Ct. 184. Affidavits and papers not presented to the court on motion to dissolve an injunction cannot be considered on appeal from order granting or denying the motion. Dougal v. Eby, 11 Idaho, 789, 85 P. 102.

10. Issues not raised below cannot be raised on appeal. Atterbury v. Hopkins [Mo. App.] 99 S. W. 11; Ironside v. Vinita, [Ind. T.] 98 S. W. 167; Goehrend v. Pere Marquette R. Co. [Mich.] 13 Det. Leg. N. 851, 109 N. W. 849; Murphy v. Wells-Fargo & Co. Exp., 99 Minn. 230, 108 N. W. 1070; Bankers Union of the World v. Landis [Neb,] 106 N. W. 973. Case will be tried on issues considered below though not raised by pleadings. National Union Bank v. Hollingsworth [N. C.] 55 S. E. 809; Heffernan v. Ragsdale [Mo.] 97 S. W. 890; Lindstrom v. Hope Lumber Co. [Idaho] 88 P. 92; Avery Mfg. Co. v. Lambertson [Kan.] 86 P. 456; Nelson v. Campbell & Cameron Co., 128 Wis. 82, 107 N. W. 297; Rigsby v. Oil Well Supply Co., 115 Mo. App. 297, 91 S. W. 460. Where parties treated issues as regularly made up, appellate court will so regard them. Harrison v. People, 124 Ill. App. 519. Condemnation proceedings having proceeded as far as the order of condemnation without objection, it is presumed that issues were properly made and plaintiffs cannot object that defendants failed to answer. Yellowstone Park R. Co. v. Bridger Coal Co. [Mont.] 87 P. 963. Matters treated as in issue below will be so treated on appeal regardless of admissions of pleadings. Frick v. Kansas City, 117 Mo. App. 488, 93 S. W. 351. Sufficiency of answer to raise issue will not be considered where plaintiff attempted to meet such issue. Cook v. Bagnell Timber Co. [Ark.] 94 S. W. 695. Where appellant neither objected nor excepted to statement of court that issue was whether appellant was a shareholder or a creditor, appellant could not urge on appeal that jury should have been allowed to determine whether he sustained any relation to the company whatever. Richardson v. Devine [Mass.] 79 N. E. 771. Where defendant in objecting to testimony states that a particular issue is the only one in the case, the trial court may proceed on that theory. Murray v. Butte [Mont.] 88 P. 789. Where case was tried on theory that there were two issues before the jury. Foland v. Southwest Missouri Elec. R. Co., 119 Mo. App. 284, 95 S. W. 958. Where parties contested the question neither could say that court's findings were without the issues. Avery Mfg. Co. v. Lamberstson [Kan.] 86 P. 456. Parties cannot contend that judgment on the issues was not within pleadings. Florence Oil & Refining Co. v. McCumber [Colo.] 88 P. 265; Foster v. Balch [Conn.] 65 A. 574.

Issue of law or fact: Where a party treats a question as one of law, he cannot on appeal urge that it is one of fact. Dugan v. Blue Hill St. R. Co. [Mass.] 79 N. E. 748. When defendant moved to dismiss complaint and verdict was directed for plaintiff, defendant could not claim that case should have been submitted to jury. Sturmdorf v. Saunders, 102 N. Y. S. 1042. On other hand a party who treats a question as one of fact cannot on appeal urge that it be disposed of as one of law. Shipp v. Patton, 29 Ky. L. R. 480, 93 S. W. 1033; St. Louis, etc., R. Co. v. Fisher [Ark.] 97 S. W. 279; Chicago City R. Co. v. Nelson, 116 Ill. App. 609; Illinois Third Vein Coal Co. v. Cioni, 215 Ill. 583, 74 N. E. 751; McDonald v. Ideal Mfg. Co., 143 Mich. 17, 12 Det. Leg. N. 896, 106 N. W. 279.

11. Validity of contract. Louisville & N. R. Co. v. U. S. Iron Co. [Tenn.] 101 S. W. 414. Validity of ordinances as contract. City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S. W. 314. Maturity of mortgage sought to be subjected to claim of intervener. Mahaska County v. Whitsel [Iowa] 110 N. W. 614. Right of landowner to litigate necessity of taking in condemnation proceedings. Vandalia Coal Co. v Indianapolis & L. R. Co. [Ind.] 79 N. E. 1082. Right of heir to maintain partition. Breidenstein v. Bertram, 198 Mo. 328, 95 S. W. 828. Sufficiency of description in tax deed. John v. Young [Kan.] 86 P. 295. Whether statements of insured were representation or warranties. Ranta v. Supreme Tent, Knights of the Macabees of the World, 97 Minn. 454, 107 N. W. 156. Whether certain land was part of public street. Chi-

cago, etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790. Whether statute was one of limitation or raised presumption of payment. Cobb v. Houston, 117 Mo. App. 645, 94 S. W. 299. Where validity of replevin bond was not raised below appellate court will consider only its sufficiency to sustain judgment. Cummings v. Masterson [Tex. Civ. App.] 93 S. W. 500. One who contended that notes were given on false representations that a contract was illegal could not on appeal contend that contract was illegal. Simon v. Calfee [Ark.] 95 S. W. 1011. Where plaintiff's motion to set aside an order of dismissal and modify a judgment as to costs was granted as to the modification of the judgment but overruled as to the order of dismissal, and plaintiff's exception was limited to the action of the court in overruling the motion to set aside the dismissal, plaintiff could not complain of the modification of the judgment. Sidway v. Missouri Land & Live Stock Co., 197 Mo. 359, 94 S. W. 855.

Constitutional questions will not be considered on appeal where they are not raised below. Fleischman, Morris & Co. v. Southern R. Co. [S. C.] 56 S. E. 974; Mays v. Seaboard Air Line R. Co. [S. C.] 56 S. E. 30; Walker v. Southern R. Co. [S. C.] 56 S. E. 952; Brickman v. Southern R. Co., 74 S. C. 306, 54 S. E. 553. Constitutionality of Act 1898, No. 941, p. 117, relating to construction of new court house. Murphy v. Policy Jury, St. Mary's Parish [La.] 42 So. 979.

12. Whether defendant was negligent in certain particulars cannot be raised for first time on appeal. Van Alstine v. Standard L. H. & P. Co., 101 N. Y. S. 696. Fact admitted in the pleadings cannot be questioned on appeal. Rogers v. Ogden Bld'g & Sav. Ass'n, 30 Utah, 188, 83 P. 754. Party cannot complain of lack of evidence of assumed fact. Carey v. Metropolitan St. R. Co. [Mo. App.] 101 S. W. 1123; Gordon v. Park [Mo.] 100 S. W. 621. Party cannot raise issue on appeal as to facts averred in own pleadings. Deslauries v. Soucie, 222 Ill. 522, 78 N. E. 799. Where case was tried on theory that child was sui juris, such question was not open on appeal. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83; Tiffin v. St. Louis R. Co. [Ark.] 93 S. W. 564. Ownership at time of service of notice to quit cannot be denied on appeal in forcible entry and detainer where such ownership was assumed below. Willis v. Weeks, 129 Iowa, 525, 105 N. W. 1012. Where case was tried on question of constructive fraud, question of intentional fraud was not open on appeal. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127. When replevin case was tried on theory that property was delivered to plaintiff, judgment could not be attacked on contrary theory. Jonesboro, etc., R. Co. v. United Iron Works Co., 117 Mo. App. 153, 94 S. W. 726. Defendant cannot on appeal urge lack of evidence of correctness of account where such matter was not in issue below. Shinn v. Platt, Newport & Co. [Ark.] 101 S. W. 742. Question of whether fellow-servant act was properly passed involved a question of fact and hence could not be first raised on appeal. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. When case was tried in lower court, intermediate appellate court and supreme court in disregard of a conceded fact, such fact was not available after removal of the intermediate court. City Council of Marion v. National Loan & Inv. Co., 130 Iowa, 511, 107 N. W. 309. Under Hurd's Rev. St. 1905, c. 110, § 88, authorizing appellate court to recite in its final decree the facts as found by it when such decree is based in whole or part upon findings different from those below, such court is not authorized to make findings of fact not responsive to any issue of fact raised on trial. Gillmore v. Chicago, 224 Ill. 490, 79 N. E. 596. Exception to conclusion of law admits correctness of findings of fact. Eisman v. Whalen [Ind. App.] 79 N. E. 514.

13. Accounting for rents cannot be had on appeal in suit to recover land where no such relief was sought below. Green v. Clyde [Ark.] 97 S. W. 437. Where in action for compensation for building plans plaintiff did not insist on compensation for both sets he had drawn for defendant, he could not do so on appeal. Dunne v. Robinson, 103 N. Y. S. 878. Right to have title quieted or to llen on land for money paid at execution sale cannot be considered on appeal in suit brought for sole purpose of canceling certificate of redemption as fraudulent. Carroll v. Hill Tract Imp. Co. [Wash.] 87 P. 835.

14. Grounds of recovery not urged below cannot be urged on appeal. Rogers v. Detroit Sav. Bank [Mich.] 13 Det. Leg. N. 889, 110 N. W. 74; Hall v. Potter [Ark.] 99 S. W. 687; Moerlein v. Heyer [Tex.] 17 Tex. Ct. Rep. 164, 97 S. W. 1040. Appellate court cannot treat a possessory action as though it were petitory. Garland v. Wunderlich, 117 La. 346, 41 So. 644.

Grounds not available because not urged below: Where plaintiff in ejectment disclaimed any claim of adverse possession. Coleman v. Robens [Mich.] 13 Det. Leg. N. 740, 109 N. W. 420. Grounds of invalidity of tax bills. Bridewell v. Cockerell [Mo. App.] 99 S. W. 22. Grounds of attack on deed. Stamper v. Venable [Tenn.] 97 S. W. 812. That a tax deed did not contain grantee's name. Vogler v. Stark [Kan.] 89 P. 653. Validity of will not questioned or passed upon on trial of petition against probate. In re Sullivan's Estate, 40 Wash. 202, 82 P. 297. Estoppel of carrier to assert title to property which it accepted from plaintiff for carriage. Valentine v. Long Island R. Co. [N. Y.] 79 N. E. 849. That holder of trust deed exhausted power by appointing substitute trustee, as grounds for cancellation of conveyances under trust deed. Watkins v. McDonald [Miss.] 41 So. 376. That assignment admitted by pleadings was not made. Id. Invalidity of ordinance as ground for injunction. Ironside v. Vinita [Ind. T.] 98 S. W. 167. Case tried on general right to recover regardless of special grounds alleged. Foster v. Balch [Conn.] 65 A. 574. Illegality of grading proceedings as ground of recovery in action for reducing grade. Dahlman v. Milwaukee [Wis.] 111 N. W. 675. Right to railroad rails as part of realty purchased as ground for recovery in action for conversion of rails. Valentine v. Long Island R. Co. [N. Y.] 79 N. E. 849. Verdict based on negligence cannot be sustained on ground of nuisance. York v. New York, etc., 108

or defense,[15] capacity of parties,[16] measure of damages,[17] referee's report,[18] rules of court,[19] or stipulations on appeal.[20]

App. Div. 126, 95 N. Y. S. 1105. Theory as to plaintiff's right to recover regardless of waiver of contract provisions excluded consideration of waiver on appeal. Westbrook v. Reeves & Co. [Iowa] 111 N. W. 11. When creditors asserted liens as superior to rights of purchaser they could not on appeal avoid sale by reimbursing purchaser. Cook v. Martin, 75 Ark. 40, 87 S. W. 625, 1024. Where plaintiff's recovery of certain item was based on certain finding, he could not on appeal claim such item in disregard of such finding. Hildebrand v. Head [Tex. Civ. App.] 13 Tex. Ct. Rep. 599, 88 S. W. 438. Where in mandamus to compel removed officer to turn over books, etc., it was alleged that the removal was for failure to make reports, the disqualification of the officer could not be urged on appeal. Village of Kendrick v. Nelson [Idaho] 89 P. 755. Where right to injunction against erection of library building in park was based on denial of any authority whatever to erect such building, limitations of such authority could not be considered on appeal. Spires v. Los Angeles [Cal.] 87 P. 1026. Where right to have irrigation appropriation was based solely on insufficiency of notice in prior proceedings, other grounds could not be considered on appeal. Farmer's Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042. Where suit to enjoin laying tracks in street was tried solely with regard to right to lay sidings, right to lay main tracks could not be considered on appeal. Beaver Borough v. Beaver Valley R. Co. [Pa.] 66 A. 520. Where right of state to lands as escheated was tried on theory that state must prove that the alien was a non-resident of United States, such proof could not be dispensed with on appeal. Donaldson v. State [Ind.] 78 N. E. 182. Federal statute relating to equipment of railroads for safety of employes. Hamilton v. Kansas City Southern R. Co. [Mo. App.] 100 S. W. 671.

15. Defense pleaded but not considered by trial court not available on appeal. Trotter v. Grand Lodge of Iowa Legion of Honor [Iowa] 109 N. W. 1099.

Defenses not made below will not be considered on appeal. Buchanan v. Randall [S. D.] 109 N. W. 513; Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 825; City of Mattoon v. Noyes, 218 Ill. 594, 75 N. E. 1065; Polhemus v. Polhemus, 100 N. Y. S. 263; Crane v. Judge, 30 Utah, 50, 83 P. 565. Account stated. Union Elec. L. & P. Co. v. Surgical Supply Co. [Mo. App.] 99 S. W. 804. Limitations. St. Louis, etc., R. Co. v. Stites [Ark.] 95 S. W. 1004; Spradlin v. Stanley's Adm'r, 30 Ky. L. R. 928, 99 S. W. 955; Ex parte Savings Bank, 73 S. C. 393, 53 S. E. 614; Easton Nat. Bank v. American Brick & Tile Co. [N. J. Err. & App.] 64 A. 917. Whether limitation prescribed by Act April 22, 1856 (P. L. 532), is bar to recovery by plaintiffs in a suit for partition. Lehman v. Lehman [Pa.] 64 A. 598. Statute of frauds. Beld v. Darst [Mich.] 13 Det. Leg. N. 729, 109 N. W. 275; International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Laches. Mortgage Trust Co. v. Elliott [Colo.] 84 P. 980. Laches is available on appeal in equity if petition and evidence show it, though not specially pleaded, especially where limitations are pleaded. Dexter v. Macdonald, 196 Mo. 373, 95 S. W. 359. Estoppel. McQueen v. Bank of Edgemont [S. D.] 107 N. W. 208. Usury. Dickey v. Porter [Mo.] 101 S. W. 585. Legality of transaction. Norden v. Duke, 113 App. Div. 99, 99 N. Y. S. 30. Validity of ordinances. People v. Harrison, 223 Ill. 550, 79 N. E. 164. Invalidity of tax bill. Dickey v. Porter [Mo.] 101 S. W. 585. Question as to identity of person sued as member of partnership. Hafferberth v. Nash, 50 Misc. 328, 98 N. Y. S. 684. Authority of pledgee of note to accept another note in payment conceded by instruction given at instance of payee. Wright v. Fetters [Mo. App.] 97 S. W. 627. Insufficiency of abstract not urged on trial of specific performance suit. Kettering v. Eastlack, 130 Iowa, 498, 107 N. W. 177. That county could not acquire title by adverse possession as against United States to road claimed to have been obstructed by defendant. Parkey v. Galloway [Mich.] 14 Det. Leg. N. 34, 111 N. W. 348. Interest of third party in recovery. Kepner v. Ford [N. D.] 111 N. W. 619. Failure to present claim for damages to carrier as required by bill of lading. Norfolk & W. R. Co. v. Wilkinson [Va.] 56 S. E. 808. Release of action for damages to shipment of stock. St. Louis, etc., R. Co. v. Beets [Kan.] 89 P. 683. Officer's lack of authority to bind corporation. Simon v. Calfee [Ark.] 95 S. W. 1011. That assignment did not cover plaintiff's claim. Courter v. Pierson, 72 N. J. Law, 393, 61 A. 81. That tax assessment was void because of indefiniteness of description of city. Reid v. Southern Development Co. [Fla.] 42 So. 205. That shipment was interstate commerce as defense in action against carrier for conversion. St. Louis S. W. R. Co. v. Arkansas & T. Grain Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 372, 95 S. W. 655. That date of instrument had been changed, defendant having claimed below that date was mistake. Harden v. Card [Wyo.] 88 P. 217. That benefits proven were not peculiar to property taken. Burton Lumber Corp. v. Houston [Tex. Civ. App.] 101 S. W. 822. That release given by plaintiff could only be set aside in court of equity. Hartford Life Ins. Co. v. Sherman [Ill.] 78 N. E. 923. That special assessment was on property in gross instead of in parcels. Watts v. Village of River Forest [Ill.] 81 N. E. 12. That "scow" which plaintiff was repairing when injured was not a "structure" within Laws 1897, p. 467, c. 415, § 18, relating to master's liability, and that support on which plaintiff was working was not a "scaffold" within such act. Madden v. Hughes, 185 N. Y. 466, 78 N. E. 167. That there was no proof of purchaser's insolvency, as defense to action against carrier for delivery in violation of right of stoppage in transitu. St. Louis S. W. R. Co. v. White Sewing Mach. Co. [Ark.] 93 S. W. 58. Where right to accretions was tried on theory that river was navigable, defendant could not deny such fact on appeal. Board of Park Com'rs v. Taylor [Iowa] 108 N. W. 927.

16. Plaintiff cannot change from repre-

Under the same rule only such objections will be considered on appeal as were urged below.[21]

§ 3. *Mode of objection, whether by objection, motion, or request.*[22]—Irrelevant and redundant matter in pleadings should be eliminated by motion to strike and not by demurrer.[23] A motion for judgment on the pleadings is proper when no cause of action is stated and the pleadings are not amendable,[24] but not where there is merely a failure to allege the amount of damages.[25] The absence of alle-

sentative to personal capacity. Ortiz v. Hansen [Colo.] 83 P. 964.

17. Appellate court will accept same measure adopted below. Morrison v. American Tel. & T. Co., 101 N. Y. S. 140; Fuess v. Kansas City, 191 Mo. 692, 90 S. W. 1029. Allowance of punitive damages could not be complained of for first time on appeal. Brayton v. Beall, 73 S. C. 308, 53 S. E. 641. That contract provides measure of damages cannot be urged for first time on appeal. National Contracting Co. v. Hudson River Waterpower Co., 103 N. Y. S. 641. Contention that defendant in conversion was entitled to expenses incurred with regard to property cannot be made for first time on appeal. Kempner v. Thompson [Tex. Civ. App.] 100 S. W. 351. Where defendant did not object to evidence in support of a certain measure of damages, he could not complain thereof on appeal. Clark v. Wabash R. Co. [Iowa] 109 N. W. 309. Contention that plaintiff could not recover for medical expenses, loss of time, etc., could not be made for first time on appeal. Little Rock Trac. & Elec. Co. v. Miller [Ark.] 96 S. W. 993. Objection that market value eo nomine as distinguished from value or real value cannot be raised for first time on appeal. Caplen v. Cox [Tex. Civ. App.] 15 Tex. Ct. Rep. 266, 92 S. W. 1048. In action against receiver's sureties for his failure to pay judgment as directed, sureties cannot urge for first time on appeal that they are not liable for costs included in judgment. Coe v. Patterson, 103 N. Y. S. 472.

18. Where parties proceeded on theory that report was before court, they could not urge on appeal that no evidence was before court, though the report was not final and the evidence was improper. Milwaukee Mechanics' Ins. Co. v. Warren [Cal.] 89 P. 93.

19. Defendant below who urged enforcement of rule against plaintiff could not assert its invalidity on appeal because it was enforced against himself. Morrison v. Atkinson, 16 Okl. 571, 85 P. 472.

20. Meaning will not be given to stipulation different than that given by parties below. Ellis v. Pelham, 106 App. Div. 145, 94 N. Y. S. 103.

21. Mullen v. Galveston, etc., Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 963, 92 S. W. 1000; Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78; Brown Borough v. Beaver Valley R. Co. [Pa.] 66 A. 520. Grounds of resistance of defendant's discharge in bankruptcy. Bond v. Milliken [Iowa] 109 N. W. 774. Specific ground of **unconstitutionality of statute** excludes consideration of other grounds on appeal. Borough of Park Ridge v. Reynolds [N. J. Err. & App.] 65 A. 990; Grounds of **nonsuit.** Martin v. Royster Guano Co., 72 S. C. 237, 51 S. E. 680. Objections to **submission of issues.** Grout v. Moulton [Vt.] 64 A. 453. Where a cause of action is stated only, the **grounds of demurrer** assigned below will be considered. Strother's Adm'x v. Strother [Va.] 56 S. E. 170; United States Mineral Co. v. Camden [Va.] 56 S. E. 561; Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034. Objections to **instructions.** St. Louis, etc., R. Co. v. Sparks [Ark.] 99 S. W. 73; Rhodes & Son v. Charleston [Ala.] 41 So. 746; Sears v. Duling [Vt.] 65 A. 90; Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870; Walsh v. Yonkers R. Co., 100 N. Y. S. 278. The admissibility of **evidence** will be determined solely with regard to the purpose for which it was offered. Korby v. Chesser, 98 Minn. 509, 108 N. W. 520; Deering & Co. v. Mortell [S. D.] 110 N. W. 86; Lenfest v. Robbins, 101 Me. 176, 63 A. 729; Appeal of Melony, 78 Conn. 334, 62 A. 151; Bolen v. Hoven, 143 Ala. 652, 39 So. 379; Oldham v. Ramsner [Cal.] 87 P. 18; Sanitary Dist. v. McMahon & Montgomery Co., 110 Ill. App. 510. Only the objections to evidence made below will be considered on appeal Jones' Estate v. Neal [Tex. Civ. App.] 17 Tex. Ct. Rep. 392, 98 S. W. 417; Glassey v. Sligo Furnace Co., 120 Mo. App. 24, 96 S. W. 310; Texas & P. R. Co. v. Coggin [Tex. Civ. App.] 14 Tex. Ct. Rep. 295, 90 S. W. 523; Malott v. Central Trust Co. [Ind.] 79 N. E. 369; Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706; Dorough v. Harrington [Ala.] 42 So. 557; Elliott v. Howison [Ala.] 40 So. 1018. Where a party moves to strike out evidence on specific grounds, the ruling will be reviewed only on those grounds. Hoodless v. Jernigan [Fla.] 41 So. 194; Columbus R. Co. v. Patterson, [C. C. A.] 143 F. 245. Erroneous rejection of evidence on ground that claim was barred cannot be sustained on ground that evidence was offered too late. Foley v. Cedar Rapids [Iowa] 110 N. W. 158. Objections to **hypothetical question.** City of Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349. Objections to reading of **foreign statutes and decisions.** Christiansen v. Graver Tank Works, 223 Ill. 142, 79 N. E. 97. Grounds of exception to denial of **new trial.** Missouri, etc R. Co. v. Wilhoit [Ind. T.] 98 S. W. 341. Objection that motion for new trial on ground of newly-discovered evidence cannot be considered in absence of settled case as required by Code Civ. Proc. § 997, cannot be raised for first time on appeal. Rosenthal v. Bell Realty Co., 103 N. Y. S. 194. On a review of the propriety of granting a new trial, the appellate court will consider only the grounds presented below. Armstrong v. Musser Lumber & Mfg. Co. [Wash.] 86 P. 944.

22. See 6 C. L. 1393.

23. Plymouth Gold Min. Co. v. U. S. Fidelity & Guaranty Co. [Mont.] 88 P. 565.

24. Hubenthal v. Spokane & I R. Co. [Wash.] 86 P. 955.

25. Mode of objection in such case is by motion to make more specific or by demurrer. Hubenthal v. Spokane & I R. Co.

gations of damage and the formal ad damnum cannot be raised by motion in arrest of judgment after demurrer to the complaint has been overruled and answer made.[26] A motion for a new trial is not available to call into question pleadings or amendments thereto.[27] Disallowance of an amendment must be saved by an exception and not by offering evidence thereunder and complaining of its rejection.[28] Nonjoinder of parties must be objected to by plea in abatement if not patent on the face of the record.[29] Exceptions to arguments of counsel must be followed by a motion for the court to act thereon.[30] A pleading will be liberally construed when the question is raised by objection to evidence under it.[31] Objections to the report of an auditor, referee, or commissioner should be taken by exception, motion to recommit or objection to the acceptance of the report,[32] except when a question of law is pointed out by such auditor, referee, or commissioner, and referred to the court,[33] but the questions submitted should be pointed out with the same precision as in an exception.[34]

In certain cases improper evidence may be reached by a motion to strike it out.[35] When it is agreed that an auditor's findings are to be final, errors in the admission of evidence may be reached by a motion to recommit.[36] As a foundation for an objection the report of an official surveyor made after due notice to the parties, an exception must be made to the report.[37] Where the evidence is admitted without objection, the question of a variance cannot be raised by objections to instructions,[38] and an affidavit of surprise is required in some jurisdictions.[39] Where the objection to evidence offered does not appear until the close of all the party's

[Wash.] 86 P. 955. But judgment of dismissal on pleadings in such case will not be reversed where this feature of the complaint was not called to the attention of the trial court. The judgment will be only modified so as to save right to bring another action. Id.

26. Price v. Art. Printing Co., 112 Ill. App. 1.

27. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672.

28. Cornwell v. Leverette [Ga.] 56 S. E. 300.

29. H. E. Mueller & Co. v. Kinkead, 113 Ill. App. 132.

30. Taylor v. Modern Woodmen of America, 42 Wash. 304, 84 P. 867. See post, § 5, Necessity of Motion on Request. Must be followed by request for an instruction to disregard. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010.

31. Objection to reception of evidence on plaintiff's behalf in action on bond because of variance between names of obligee and plaintiff held untenable. State v. Delaney [Mo. App.] 99 S. W. 1.

32, 33. Hogan v. Sullivan [Vt.] 64 A. 234.

34. General submission of all questions of law presented by the facts does not present to the court any question of admissibility and sufficiency of evidence. Hogan v. Sullivan [Vt.] 64 A. 234.

35. See post, § 4, subd. Time of Objection; post, § 5, subd. Motion to Strike Out. This is mode of objecting after question is answered, objection not being proper in such case. Oxford Junction Sav. Bank v. Cook [Iowa] 111 N. W. 805. Motion to strike proper where the objection to the evidence develops on cross-examination. Theodore Land Co. v. Lyon [Ala.] 41 So. 682; Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 14 Tex. Ct. Rep. 46, 89 S. W. 995. That a party fails to object to a question asked a witness does not preclude the court from granting his motion to strike the evidence if it deems it improper. Spotswood v. Spotswood [Cal. App.] 89 P. 362. Where a question was not objected to, a motion to exclude a responsive answer is properly denied. Smith v. Birmingham R. L. & P. Co. [Ala.] 41 So. 307. A motion to strike is the proper method to reach an irresponsive answer to a proper question. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516. Motion to strike is improper when objection to the evidence was patent when it was offered. Chicago Union Tract. Co. v. May, 221 Ill. 530, 77 N. E. 933; Martin v. Corscadden [Mont.] 86 P. 33. Motion to strike responsive answer not available where question was objected to and ruling on objection to answer was not excepted to. Breiner v. Nugent [Iowa] 111 N. W. 446. The granting of motion to strike rests in the discretion of the trial judge when no objection was made when the evidence was offered. Tutwiler, Coal & Iron Co. v. Nichols [Ala.] 39 So. 762. A motion to strike out evidence must be predicated upon some feature of irrelevancy, incompetency, or legal inadmissibility in the evidence itself. Appropriate instructions and not a motion to strike is the proper method of reaching the objection that one who has introduced a deed has not proved title in his grantor. Wilson v. Johnson [Fla.] 41 So. 395.

36. Petty v. Benoit [Mass.] 79 N. E. 245.

37. Williams v. Virginia-Pocahontas Coal Co. [W. Va.] 53 S. E. 923.

38. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93.

39. Wilson v. Johnson [Fla.] 41 So. 395.

evidence, it may be saved by a request for an instruction.[40] Certain objections to depositions must be made by a motion to suppress,[41] and objections on account of form are sometimes required to be in writing.[42] The question of the sufficiency of the evidence may be raised by a request for a peremptory instruction at the close of the plaintiff's case.[43] A demurrer to the evidence as a challenge of its sufficiency is unknown to the practice in Arkansas.[44]

Conclusions of law on special findings should be tested by exceptions to the conclusions.[45]

§ 4. *Necessity of objection. In general.*[46]—A timely [47] objection is essential to the preservation of questions for review, and only such questions as are thus saved will be considered by the reviewing court.[48]

To jurisdiction.[49]—An objection below is essential to the saving of certain questions as to jurisdiction,[50] but not questions relating to jurisdiction of the subject-matter.[51]

40. Parol evidence of contract which does not conclusively appear to be within statute of frauds until close of party's evidence. Schmidt v. Rozier [Mo. App.] 98 S. W. 791.

41. Objection for lack of notice to take. Kelly v. Ning Yung Benev. Ass'n, 2 Cal. App. 460, 84 P. 321. Exceptions pending taking must be brought to notice of court by motion to suppress. Whitehouse v. Jones [W. Va.] 55 S. E. 730.

42. Rev. St. 1895, art. 2289. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 99 S. W. 128.

43. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135. The offering and overruling of an instruction in the nature of a demurrer to the evidence at the close of plaintiff's case, and the overruling of a motion for a directed verdict at the close of the whole case, authorizes a review of the sufficiency of the evidence as a whole to sustain a verdict for plaintiff, exceptions being duly taken. De Maet v. Fidelity Storage, Packing & Moving Co. [Mo. App.] 96 S. W. 1045.

44. Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135.

45. As a general rule, motion to modify or substitute is insufficient. Walters v. Walters [Ind.] 79 N. E. 1037.

46. See 6 C. L. 1394.

47. See post, this section, subd. Time of Objection.

48. Chaves v. Myer [N. M.] 85 P. 233. See ante, § 2, Acquiescing in Error. Limiting number of **witnesses.** Warden v. Madisonville, etc., R. Co. [Ky.] 101 S. W. 914. Improper remarks of witness on leaving stand. Hartzell v. Murray, 224 Ill. 377, 79 N. E. 674. **Conduct of trial judge** in making certain remarks. Peoria & Pekin Terminal R. Co. v. Hoerr, 120 Ill. App. 65. **Conduct of counsel.** Union Pac. R. Co. v. Edmondson [Neb.] 110 N. W. 650. Remarks of counsel. Lawsville & E. R. Co. v. Vincent, 29 Ky. L. R. 1049, 96 S. W. 898. That **instructions** ignored certain evidence. Tepper v. Boston El. R. Co. [Mass.] 78 N. E. 384. Error in submitting certain elements of damages separately in condemnation proceedings. Shipley v. Pittsburg, etc., R. Co. [Pa.] 65 A. 1094. Code Pub. Gen. Laws, art. 5, § 9, expressly provides that instruction given shall not be deemed defective on account of assumption of facts unless objected to. Mylander v. Beinschla, 102 Md. 689, 62 A. 1038. This statute does not apply to rejected prayers for instruction. Id. That **verdict** was not sufficiently specific. Kolleen v. Atchinson, etc., R. Co., 72 Kan. 426, 83 P. 990. Objection to **executor's account.** Brown v. Brown [S. C.] 54 S. E. 838; In re Ramsey's Estate [N. J. Eq.] 66 A. 410. Order for **distribution of estate.** Brown v. Brown [S. C.] 54 S. E. 838. Allowance of claims not properly verified in **commissioner's report.** Spradlin v. Stanley's Adm'r [Ky.] 99 S. W. 965. Correctness of master's findings. Matthews v. Whitethorn, 220 Ill. 36, 77 N. E. 89. The rule that an improper decree based upon a master's findings will be reversed though no objections to report are filed, has reference only to decrees not sustained by the findings and does not reach errors in the findings themselves. Id. Refusal to set aside referee's report on ground that certain matters were heard by him together not reviewable where no objection to the hearing was made before the referee. My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540.

Dissmissal of action for want of service where defendant was present and did not object. Reeves v. Jones [N. J. Law] 66 A. 113. Objection that motion for judgment on pleadings was determined without written **notice** as required by statute. Hickey v. Anheuser-Busch Brewing Ass'n [Colo.] 85 P. 838. Lack of notice of final **hearing** and failure to give notice thereof. Williams v. Clyatt [Fla.] 43 So. 441.

49. See 6 C. L. 1395.

50. Objection to **jurisdiction of equity** on account of remedy at law. Goldsmith v. Koopman [C. C. A.] 152 F. 173; Champion v. Grand Rapids, etc., R. Co., 145 Mich. 676, 13 Det. Leg. N. 611, 108 N. W. 1078; Lawrence v. Kirby, 145 Mich. 432, 13 Det. Leg. N. 497, 108 N. W. 770; McGaw v. Manning, 145 Mich. 378, 13 Det. Leg. N. 503, 108 N. W. 512. See Code, § 3432, providing for transfer to proper docket instead of dismissal. Blondel v. Ohlman [Iowa] 109 N. W. 806. Where parties mutually agreed to try disputed boundary question in equity. Williams v. Wetmore [Fla.] 41 So. 545. Jurisdiction of **intermediate appellate court** as affected by method of bringing case to such court, whether by appeal or writ of error, cannot be questioned by one who appears in such court and appeals from its decision. Sullivan v. People, 224 Ill.

To parties.[52]—An objection below is necessary to save any question as to the capacity [53] or nonjoinder [54] of parties, or to the bringing in of new parties.[55]

To pleadings.[56]—As a general rule objections to pleadings cannot be made for the first time on appeal.[57] No objection below is necessary, however, to save the question as to whether the declaration or complaint states a cause of action,[58] but

468, 79 N. E. 695. Where defendant files cross bill in case of which court has no jurisdiction by reason of **amount in controversy.** Champion v. Grand Rapids, etc., R. Co., 145 Mich. 676, 13 Det. Leg. N. 611, 108 N. W. 1078. Failure to object to amendment adding allegation of **diversity of citizenship** waives the point. Holloway & Bro. v. White-Dunham Shoe Co. [C. C. A.] 151 F. 216. Failure to object to sufficiency of evidence to prove diversity of citizenship waives the point. North Jersey St. R. Co. v. Purdy [C. C. A.] 142 F. 955.

51. Columbia National Sand Dredging Co. v. Morton, 28 App. D. C. 288. When lack of jurisdiction of subject-matter was apparent on face of record. Little Rock Trust Co. v. Southern Missouri & A. R. Co., 195 Mo. 669, 93 S. W. 944. Where judgment was entered against defendant after remand without new trial as required by law, defendant's failure to object to the proceedings did not waive the right to urge their invalidity on appeal. Riley v. Loma Vista Ranch Co. [Cal. App.] 89 P. 849. Objection to jurisdiction of appeal from justice to district court on acount of failure to file notice before it was served. McCauley v. Jones [Mont.] 88 P. 572. Jurisdiction of appellate court of case involving freehold may be objected to for first time on appeal to supreme court. Town of Audubon v. Hand, 223 Ill. 367, 79 N. E. 71. Jurisdiction of special term to review action of election board with reference to certificate of nomination at instance of elector not qualified to institute the proceedings. In re Logan, 102 N. Y. S. 200. Failure to object to the jurisdiction of a **Federal court** does not confer jurisdiction unless the case presented is such as to bring it within that class of cases where jurisdiction has been conferred by the constitution, as where diversity of citizenship does not affirmatively appear. Henrie v. Henderson [C. C. A.] 145 F. 316.

52. See 6 C. L. 1396.

53. Plaintiff's capacity to sue. Franklin Union No. 4 v. People, 121 Ill. App. 647.

54. H. E. Muller & Co. v. Kinkead, 113 Ill. App. 132. Objection to jurisdiction of circuit court on appeal from justice's court on account of absence of codefendant waived by general appearance. Goode v. Illinois Trust & Sav. Bank, 121 Ill. App. 161. See Appearance, 7 C. L. 251.

55. That new defendants had not complied with law so as to entitle them to file answer. Burnett v. Doyle [Colo.] 83 P. 967.

56. See 6 C. L. 1396.

57. Dal v. Fischer [S. D.] 107 N. W. 534. Failure to offer to place defendant in statu quo. Smith v. Smith [Kan.] 89 P. 896. Where sufficiency of declaration is not challenged on motion under Code 1899, c. 134 (Code 1906, § 4636), to set aside a default, such question will not be considered on appeal unless the declaration fails to state a cause of action. Talbott v. Southern Oil Co. [W. Va.] 55 S. E. 1009. Sufficiency of answer. Unger v. Mellinger [Ind. App.] 77 N. E. 814. That answer in ejectment failed to deny plaintiff's title. Dredla v. Patz [Neb.] 111 N. W. 136. That answer setting up want of necessary parties failed to specify such parties. Mishler v. Finch [Md.] 64 A. 945. That affidavit on motion to discharge mechanic's lien does not allege sufficient reasons for requiring a shorter notice than eight days. Danella v. Paradise, 102 N. Y. S. 807. Failure to reply to counterclaim where other party did not request judgment below. Hardie v. Bissell [Ark.] 94 S. W. 611.

Uncertainty or inadequacy of averments Indianapolis Traction & Terminal Co. v. Smith [Ind. App.] 77 N. E. 1140. Indefiniteness. Mitchell v. Monarch El. Co. [N. D.] 107 N. W. 1085. Uncertainty or ambiguity as to amount due San Gabriel Valley Bank v. Lake View Town Co. [Cal. App.] 86 P. 727. That complaint did not state positively that defendants were partners. Spears v. Pechstein [Colo.] 84 P. 979. That plea of statute of limitation, Code Civ. Prac. § 339, failed to refer to the particular subdivision relied on as required by section 458. Churchill v. Woodworth, 148 Cal. 669, 84 P. 155. Failure of cross petition to sufficiently designate parties against whom it was filed, when such parties appeared and answered without raising the point. Merchants' Nat. Bank v. Ford [Ky.] 99 S. W. 260. Alternative allegation of ownership cured by failure to object and entering into stipulation as to ownership. Burgi v. Rudgers [S. D.] 108 N. W. 253. **Propriety** of cross complaint in that it was not within Code Civ. Proc. § 442. Riverside Heights Water Co. v. Riverside Trust Co., 148 Cal. 457, 83 P. 1003; Hughes Bros. v. Hoover [Cal. App.] 84 P. 681. That plea in action at law presented equitable defense. Cook v. Foley [C. C. A.] 152 F. 41. **Manner of signing** petition. Good v. Burk [Ind.] 77 N. E. 1080. Insufficient **verification** of bill. First Baptist Soc. v. Dexter [Mass.] 79 N. E. 342 Time of **filing** reasons why defendant in divorce proceedings did not obey summons to return. Baurens v. Giroux, 117 La. 696, 42 So. 224. Lack of service on defendant of **notice of pleadings** of codefendants seeking adjustment of equities waived by failure to object to evidence in support thereof. Beale's Heirs v. Johnson [Tex. Civ. App.] 99 S. W. 1046. Failure to serve notice of motion for leave to amend. Lellman v. Mills [Wyo.] 87 P. 985. That after hearing the motion was put in formal shape and filed did not alter the case, since there was no objection that motion was not in writing. Id. Failure to serve amendment waived by failure to object to evidence thereunder. Musselman v. Musselman [Cal. App.] 84 P. 217. **Multifariousness.** Ellis v. Crawson [Ala.] 41 So. 942. **Misjoinder** of partition and specific performance. Noecker v. Wallingford [Iowa] 111 N. W. 37. That reply was a **departure** from petition. Grimshaw v. Kent [Kan.] 89 P. 658.

58. Western Union Tel. Co. v. Hidalgo [Tex. Civ. App.] 99 S. W. 426; Usher v.

such is not the rule with regard to whether the answer states a defense.[59] Pleadings attacked for the first time on appeal will be liberally construed.[60]

To evidence.[61]—The admission of evidence will not be reviewed on appeal when no objection was made below.[62] The same rule applies to objections as to the manner in which the evidence was elicited,[63] depositions,[64] and sufficiency of the evidence.[65]

Western Union Tel. Co. [Mo. App.] 98 S. W. 84; Magoun v. Quigley, 100 N. Y. S. 1037; Moore v. Lanier [Fla.] 42 So. 462. On appeal from judgment. Murray v. Butte [Mont.] 88 P. 789. Failure to state cause of action cannot be raised for first time **on appeal from denial of new trial.** Leggat v. Gerrick [Mont.] 88 P. 788.

59. Hynes v. Plastino [Wash.] 87 P. 1127.

60. Chicago, etc., R. Co. v. Kerr [Neb.] 104 N. W. 49; Vandalia Coal Co. v. Indianapolis & L. R. Co. [Ind.] 79 N. E. 1082. Complaint will be held sufficient if sufficient to bar another action. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347; Southern R. Co. v. Roach [Ind. App.] 78 N. E. 201; Aetna Life Ins. Co. v. Bockting [Ind. App.] 79 N. E. 524. Where complaint in suit for injury to a laborer's lien contained no formal allegation that lien notice had been filed. Fischer v. Cone Lumber Co. [Or.] 89 P. 737. Defendants not named in the body of the complaint but properly named in the caption held sufficient. Indianapolis St. R. Co. v. Coyner [Ind. App.] 80 N. E. 168. Complaint attacked for first time on appeal held sufficient as against objection that it did not show a sufficient consideration for defendant's agreement that his inventions should belong to plaintiff, his employer. Portland Iron Works v. Willett [Or.] 89 P. 421.

61. See 6 C. L. 1397.

62. Silva v. Silva, 27 R. I. 562, 65 A. 272; Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136; Cable Co. v. Elliott, 122 Ill. App. 342; Van Vlissingen v. Roth, 121 Ill. App. 600; Howard Supply Co. v. Bunn [Ga.] 56 S. E. 757; Bussey v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 163; Pearlstine v. Phoenix Ins. Co., 74 S. C. 246, 54 S. E. 372; Little Rock R. & Elec. Co. v. Goerner [Ark.] 95 S. W. 1007; Chesapeake & O. R. Co. v. Satterfield [Ky.] 100 S. W. 844; Spaulding v. Edina [Mo. App.] 97 S. W. 545; Duff v. Bailey, 29 Ky. L. R. 919, 96 S. W. 577; Wald v. Wald, 119 Mo. App. 341, 96 S. W. 302; Make-Man Tablet Co. v. Chapman, 119 Mo. App. 427, 95 S. W. 282; Hogan v. Hinchey, 195 Mo. 527, 94 S. W. 522; Kaufman & Sons v. Foster [Miss.] 42 So. 667; Mississippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505; Rice v. Cummings [Fla.] 40 So. 889; Womble v. Wilbur [Cal. App.] 86 P. 916; Pierson v. Fisher [Or.] 85 P. 621; Paine v. Willson [C. C. A.] 146 F. 488. Admission of deed. Howard v. Brown, 197 Mo. 36, 95 S. W. 191; Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587. No objection that deed did not conform to the abstract furnished under Code 1896, § 1531. Henry v. Frohlichstein [Ala.] 43 So. 126. Where register's note of submission is silent as to objections to evidence and no objection is otherwise shown. Harper v. Hays Co. [Ala.] 43 So. 360. That evidence was admissible as to only one of defendants. Tyner v. Barnes, 142 N. C. 110, 54 S. E. 1008. **Affidavits** in support of motion for new trial. Anderson v. Anderson [Cal. App.] 87 P. 558. On account of **variance.** Donner v. Genz [Wis.] 107 N. W. 1039; Thompson-Starrett Co. v. Fitzgerald [C. C. A.] 149 F. 721. Evidence not within issues. Brittain v. Murphy, 118 Mo. App. 235, 94 S. W. 303. Objection that state land certificates were not the **best evidence.** Wade v. Goza [Ark.] 96 S. W. 388. That tax receipts were best evidence and should have been produced. Dondero v. O'Hara [Cal. App.] 86 P. 985. Failure to object to **parol evidence** of a contract waives the statute of frauds not specially pleaded. International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93. Ownership and location of real estate proved by parol. Littler v. Robinson [Ind. App.] 77 N. E. 1145. Admission of oral evidence as to contents of lost instruments without proof of loss. Kennedy v. Borah, 226 Ill. 243, 80 N. E. 767. Objection to **competency of witness** as expert. Texas & P. R. Co. v. Warner [Tex. Civ. App.] 15 Tex. Ct. Rep. 530, 93 S. W. 489. That witness was not qualified to give opinion as to value of services. Southwestern Commercial Co. v. Owesney [Ariz.] 85 P. 724. Competency of applicant for registration of title to testify in own behalf. O'Laughlin v. Covell, 222 Ill. 162, 78 N. E. 59. In absence of objection to competency of testimony by one interested in transaction with deceased person, such testimony will be liberally construed. Moore v. Moore's Adm'r [Ky.] 101 S. W. 358.

63. Statement volunteered by witness. Luty v. Cresta [Cal. App.] 88 P. 642. Improper question by judge. Merrill v. Coates [Minn.] 111 N. W. 836. Leading questions. McCullough v. Seitz, 28 Pa. Super. Ct. 458.

64. Objection that it did not appear that witness was beyond reach of process of court. Columbus R. Co. v. Patterson [C. C. A.] 143 F. 245.

65. Code Pub. Gen. Laws, art. 5, § 9. Mylander v. Beimschla, 102 Md. 689, 62 A. 1038. Lack of proof of demand, notice, and protest of notes. Love v. Export Storage Co. [C. C. A.] 143 F. 1. That there was no evidence of particular damage for which recovery was allowed but only of total damage. Mercantile Trust Co. v. Hensey, 27 S. Ct. 535. Failure of plaintiff, a physician suing for fees, to prove recorded license where it appeared that he was a physician. Dorion v. Jacobson, 113 Ill. App. 563. Where a party complaining of the decision of the trial court by motion under Hurd's Rev. St. 1903, c. 110, § 67, abolishing writs of error coram nobis and substituting a motion in the trial court therefor, fails to raise the question of the sufficiency of the evidence in some proper way in the trial court, such question will not be considered on appeal. Domitzki v. American Linseed Co., 221 Ill. 161, 77 N. E. 428.

Time of objection.[66]—An objection to the status of the plaintiff must be raised by the pleadings and comes too late on the trial.[67] An objection that an instruction is oral must be made at the time the instruction is given.[68] An objection that matters treated as in issue were admitted comes too late after verdict.[69] Objections to arguments and remarks of counsel should be taken when the cause of objection arises.[70] Objections to the verdict should be taken when it is announced.[71] An objection to failure to follow the statutory course of procedure comes too late on a motion for a new trial.[72] Allowance of master's fees may be objected to after his report is allowed.[73]

Objections to evidence should be made when the evidence is offered,[74] and a ground of objection not urged at such time will not be considered.[75] So also, an objection to a question must be made before it is answered,[76] but when the question is unobjectionable and the objection to the answer is that it is unresponsive, an objection immediately after the answer is in time.[77] A motion to strike[78] may be made when the objection to the evidence first appears,[79] and if not made at this time it is too late.[80] The time of objection to depositions is sometimes controlled by statute.[81] Objection to the sufficiency of evidence comes too late on a motion for new trial.[82] Question as to the timeliness of an objection should be raised when the objection is made.[83] A request for peremptory instruction for the defendant may be made either at the close of plaintiff's evidence or at close of all the evidence.[84]

66. See 6 C. L. 1398.

67. Authority of town to sue. Town of Beloit v. Heineman, 128 Wis. 398, 107 N. W. 334.

68. Doyle v. Nesting [Colo.] 88 P. 862.

69. In re Cheney's Estate [Neb.] 110 N. W. 731.

70. Missouri, K. & T. R. Co. v. Nesbit [Tex. Civ. App.] 97 S. W. 825. Too late on motion for new trial. Doerhoefer v. Shewmaker, 29 Ky. L. R. 1193, 97 S. W. 7.

71. Dantzler v. Cox [S. C.] 55 S. E. 774.

72. Smith v. Smith [Kan.] 89 P. 896.

73. Not necessary to file objections before master and to renew them as exceptions or to enter motion to retax costs. Gottschalk v. Noyes, 225 Ill. 94, 80 N. E. 72.

74. Patton v. Bank of Lafayette, 124 Ga. 965, 53 S. E. 644; Martin v. Corscadden [Mont.] 86 P. 33. Objections to certain deeds admitted in evidence made after the close of the case and while it was under advisement are too late. Einstein v. Holliday-Klotz Land & Lumber Co., 118 Mo. App. 184, 94 S. W. 296. Too late to object to the admissibility of receipts after argument to jury has begun. Terry v. Williams [Ala.] 41 So. 804. Plaintiff cannot object to introduction of evidence as to one defendant where it has already been admitted without objection as to another defendant. Cane Hill Cold Storage & Orchard Co. v. San Antonio & A. P. R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751. An objection to a discussion of evidence by the party introducing evidence will not relieve the adverse party from the failure to object to its admission. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Objection to consideration of **affidavits** not made at time they are presented to the court but at the close of petitioners case is too late. Franklin Union No. 4 v. People, 121 Ill. App. 647. Objection for **variance** must be taken when the evidence is offered. Preiss v. Zitt [C. C. A.] 148 F. 617.

75. Objection pending argument that proper foundation was not laid. Patton v. Bank of Lafayette, 124 Ga. 965, 53 S. E. 664.

76. Oxford Junction Sav. Bank v. Cook [Iowa] 111 N. W. 805; Lutz v. Metropolitan St. R. Co. [Mo. App.] 100 S. W. 46; International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93; Thomas v. Metropolitan St. R. Co. [Mo. App.] 100 S. W. 1121; Cullinan v. Horan, 102 N. Y. S. 132; West Pratt Coal Co. v. Andrews [Ala.] 43 So. 348; Southern Coal & Coke Co. v. Swinney [Ala.] 42 So. 808; Southwestern Alabama R. Co. v. Maddox & Son [Ala.] 41 So. 9; Chicago & Alton R. Co. v. Kirkland, 120 Ill. App. 272.

77. City of Aurora v. Plummer, 122 Ill. App. 143.

78. See ante, § 3, Mode of Objection.

79. On cross-examination. Wolf Cigar Stores Co. v. Kramer [Tex. Civ. App.] 14 Tex. Ct. Rep. 46, 89 S. W. 995; Theodore Land Co. v. Lyon [Ala.] 41 So. 682.

80. Too late after dismissal of witness. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654. Too late after close of evidence. Bienville Water Supply Co. v. Hieronymus Bros. [Ala.] 43 So. 124.

81. Objection to form must be made before expiration of first term after filing. Rev. St. 1895, art. 2289. Borden v. Le Tulle Mercantile Co. [Tex. Civ. App.] 99 S. W. 128.

82. That there was no proof of ownership of conveyance by carrier. Vicksburg R. & Light Co. v. Cameron [Miss.] 40 So. 822.

83. Where after a witness had answered defendant objected that the evidence was incompetent and court ruled on merits of objection, no point being then made that the objection came too late. Sneed v. Marysville Gas & Elec. Co. [Cal.] 87 P. 376.

84. Nashville R. & Light Co. v. Henderson [Tenn.] 99 S. W. 700.

A motion for a new trial is ineffective to save questions where it is not filed in proper time.[85]

§ 5. *Necessity of motion or request. In general.*[86]—Errors correctible on motion below are not reviewable where no such motion was made,[87] and a motion or request is often necessary to invoke the action of the court so as to predicate error upon its failure to act.[88] Motion to open a default is a prerequisite to the consideration of the correctness of the default judgment.[89]

Motion for judgment or nonsuit, or direction of verdict.[90]—Where the plaintiff upon failure to make out his case fails to ask for a nonsuit, he cannot complain of a directed verdict against him.[91] A motion, a nonsuit, or for a directed verdict, is necessary to save any question as to the sufficiency of the evidence.[92]

Motion to strike out.[93]—A motion to strike[94] is necessary where evidence has been admitted without objection,[95] or where the grounds of objection do not appear until the evidence is in,[96] or even in some cases where the question has been objected to.[97] An objection to remarks of counsel must be followed by a motion to strike them out or to arrest the trial.[98]

Motion for new trial.[99]—Lack of uniformity in the practice in the several states precludes the formulation of any general doctrine as to the necessity of a new

85. Carmack v. Edenberger, [Neb.] 110 N. W. 315. See New Trial and Arrest of Judgment, 6 C. L. 796.

86. See 6 C. L. 1399.

87. Failure of judgment of justice to show that case was disposed of on merits. Rapp v. Hansen [N. D.] 107 N. W. 48.

88. Failure of court to make third person party. Chambers & Co. v. Herring [Tex. Civ. App.] 13 Tex. Ct. Rep. 586, 88 S. W. 371. In action against a guardian, ward could not complain of court's failure to make any statement of account showing charges against and credits to the guardian, no request having been made therefor. Wells v. Baker [Colo.] 88 P. 152. Not only must objections be made and exceptions taken but a ruling must be invoked. Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116. Where court ignored request for peremptory instruction party should have insisted on ruling. Nashville, etc., R. v. Hayes [Tenn.] 99 S. W. 362. Mere protest against proceeding without party's evidence held not sufficient to invoke ruling. Williams v. Wetmore [Fla.] 41 So. 545. A party who does not request a continuance on account of the allowance of an amendment to the other party's pleading cannot complain of such amendment where the amendment was otherwise proper. Maurice v. Hunt [Ark.] 97 S. W. 664.

89. Fred S. Chute Co. v. Westbay, 101 N. Y. S. 527.

90. See 6 C. L. 1399.

91. Watson v. Barnes, 125 Ga. 733, 54 S. E. 723.

92. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966. Motion for verdict accompanied by instruction in writing to find for the party. Variety Mfg. Co. v. Landaker [Ill.] 81 N. E. 47. Motion for directed verdict essential. Godair v. Ham Nat. Bank, 225 Ill. 572, 80 N. E. 407. For review in the supreme court as a question of law. Illinois Southern R. Co. v. Hayer, 225 Ill. 613, 80 N. E. 316.

93. See 6 C. L. 1400.

94. See ante § 3, Mode of Objection. Ante, § 4, subd. Time of Objection.

95. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136; Dunham v. Salmon [Wis.] 109 N. W. 959. Where a question calling for declarations of a decedent did not call for facts not within his personal knowledge, and no motion is made to strike out the answer because it included such facts, the objection cannot be raised on appeal. Putnam v. Harris [Mass.] 78 N. E. 747.

96. Where question is proper and the vice is in the answer. Chicago City R. Co. v. O'Donnell, 114 Ill. App. 359; Lovell & Co. v. Snead [Ark.] 95 S. W. 157. Where answer is unresponsive. Misssissippi Cent. R. Co. v. Hardy [Miss.] 41 So. 505; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Where evidence is admitted under condition of being made relevant by other evidence which was not introduced. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465; Root v. Kansas City Southern R. Co., 195 Mo. 348, 92 S. W. 621; Putnam v. Harris [Mass.] 78 N. E. 747. Where a hypothetical question is admitted upon an undertaking to supply the basic facts later, and such facts are not supplied. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503; Indiana Union Traction Co. v. Jacobs [Ind.] 78 N. E. 325. Where preliminary evidence is not followed up, a motion to withdraw it from the jury is necessary in order to save the point. Citizen's Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879. Where on cross-examination it appears that testimony given in chief was hearsay. Little Rock, etc., W. R. Co. v. Cross [Ark.] 93 S. W. 981. When answer is improper only in part, a motion to strike the objectionable part is necesary. Cudahy Packing Co. v. Hays [Kan.] 85 P. 811. Where expert witness goes beyond scope to which his testimony is limited by the court. Patton v. Sanborn [Iowa] 110 N. W. 1032.

97. Where question withdrawn upon objection and exception but answer left in. Van Cleve v. St. Louis, etc., R. Co. [Mo. App.] 101 S. W. 632.

98. Hasper v. Wietcamp [Ind.] 79 N. E. 191.

99. See 6 C. L. 1400.

trial, and the local statutes and decisions must be consulted in this regard.[1] Where

1. **Alabama:** Necessary to save exceptions taken at trial. Geter v. Central Coal Co. [Ala.] 43 So. 367. In the absence of an assignment of error complaining of the denial of a new trial, the sufficiency of the evidence to sustain questions of fact cannot be reviewed. Nashville, etc., R. Co. v. Moore [Ala.] 41 So. 984.

Arizona: Necessary to save question as to denial of defendant's motion for judgment at conclusion of plaintiff's case. Roy v. Flin [Ariz.] 85 P. 725.

Arkansas: Necessary to save question as to refusal of instructions. Massey Bros. v. Dixon Bros. [Ark.] 99 S. W. 383.

California: Necessary to save question as to sufficiency of evidence. Forsythe v. Los Angeles R. Co. [Cal.] 87 P. 24.

Georgia: It seems that in no case can there be exception to a final judgment in the absence of a motion for a new trial, except upon controlling rulings. Cox v. Macon R. & L. Co., 126 Ga. 398, 55 S. E. 232. Cox and Lumpkin, JJ., dissenting from this idea.

Illinois: Necessary to save questions as to instructions. Lasher v. Colton, 225 Ill. 234, 80 N. E. 122; Aultman-Taylor Mach. Co. v. Sheets, 123 Ill. App. 466. Necessary to save questions as to admission, exclusion, or sufficiency of evidence. Id. Rejection of evidence bearing upon the damages alone cannot be complained of by one who fails to make the excessiveness of the judgment for a new trial or to assign the same in his assignment of errors. Danley v. Hibbard, 123 Ill. App. 666. Necessary to save question of jury taking will to jury room. Trubey v. Richardson, 224 Ill. 136, 79 N. E 592.

Indiana: Necessary as to refusal of instructions. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448. Necessary as to sufficiency of evidence. Polk v. Johnson [Ind. App.] 77 N. E. 1139. Necessary as to admission of evidence. Perdue v. Gill, 35 Ind. App. 99, 73 N. E. 844. Necessary as to denial of motion to remove to Federal court. Southern R. Co. v. Roach [Ind. App.] 78 N E. 201. Necessary as to denial of change of venue. Bonham v. Doyle [Ind. App.] 77 N. E. 859. Rule that a refusal to grant a change of venue must be made a ground of a motion for a new trial does not apply where motion for a change is made after motion for a new trial for cause has been ruled on. Bonham v. Doyle [Ind. App.] 79 N. E. 458. Error of the circuit court in dismissing an appeal from a determination of a county board is properly raised for first time by assignment of errors in the appellate court, and not by a motion for a new trial. Kelly v. Lawson [Ind. App.] 80 N. E. 553.

Indian Territory: Necessary as to instructions given. Missouri, etc., R. Co. v. Wilhoit [Ind. T.] 98 S. W. 341.

Kansas: Necessary as to errors occuring on trial. Coffeyville Gas Co. v. Dooley [Kan.] 84 P. 719. Neither necessary nor proper where a demurrer to the evidence is sustained. White v. Atchison, etc., R. Co. [Kan.] 88 P. 54. Under Code Civ. Proc. § 306, defining "new trial," a motion for a new trial is not necessary unless an issue of fact has been fully determined by the verdict of a jury or its equivalent (Wagner v. Atchison, etc., R. Co. [Kan.] 85 P. 299), and hence such motion is not a prerequisite to the review of a decision sustaining a motion for judgment on the pleadings and plaintiff's opening statement (Id.) and sustaining an objection to the introduction of any evidence in the case (Id.). Gruble v. Ryus, 23 Kan. 195, and other cases disapproved. Id.

Kentucky: In absence of a motion for a new trial, there is nothing for the appellate court to consider except as to whether the pleadings state a cause of action. Orient Ins. Co. v. Meers & Son, 29 Ky. L. R. 206, 92 S. W. 584. Necessary to review errors occurring on trial by court. Cincinnati, etc., R. Co. v. Hansford [Ky.] 100 S. W. 251. Necessary as to instructions given. Blake v. Whitt [Ky.] 94 S. W. 661; Gray v. Parrott & Jones [Ky.] 99 S. W. 640; Merchants' Nat. Bank v. Ford [Ky.] 99 S. W. 260; City of Brownsville v. Arbuckle [Ky.] 99 S. W. 239. Appellees cannot on cross appeal urge that their verdict is inadequate where they failed to move for a new trial. Asher v. Helton [Ky.] 101 S. W. 350. When all facts necessary to determination of question are disclosed by record, motion for new trial is unnecessary. Forrester v. Howard [Ky.] 98 S. W. 984. Judgment unwarranted by face of record may be reversed even in absence of motion for new trial. Cincinnati, etc., R. Co. v. Hansford [Ky.] 100 S. W. 251.

Massachusetts: Necessary as to sufficiency of evidence. Hayes v. Moulton [Mass.] 80 N. E. 215.

Michigan: Necessary as to sufficiency of evidence. Clarke v. Case, 144 Mich. 148, 13 Det. Leg. N. 193, 107 N. W. 893.

Missouri: Necessary as to granting change of venue. Coffey v. Carthage [Mo.] 98 S. W. 562. Not necessary as to ruling on demurrer. Crow v. Reliable Jewelry Co., 116 Mo. App. 124, 92 S. W. 742; Cape Girardeau & C. R. Co. v. Wingerter [Mo. App.] 101 S. W. 1113.

Nebraska: The necessity of a motion for a new trial was not dispensed with by Laws 1905, p. 657, c. 174. Carmack v. Erdenberger [Neb.] 110 N. W. 315. Necessary as to sufficiency of evidence. Kafka v. Union Stock Yards Co. [Neb.] 110 N. W. 672. Necessary as to refusal to strike averments from pleadings. Caproon v. Mitchell [Neb.] 110 N. W. 378. Not necessary where judgment is rendered on pleadings alone. First Nat. Bank v. Sutton Mercantile Co. [Neb.] 110 N. W. 306.

New Hampshire: Necessary as to inconsistency of verdicts in favor of one defendant and against the other. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190.

New Mexico: Unless motion for new trial is made in a jury case, no question proper to be presented to the lower court thereby can be reviewed on appeal. Henry v. Lincoln Lucky & Lee Min. Co. [N. M.] 85 P. 1043.

New York: Necessary as to sufficiency of evidence. Prager v. Schafuss, 99 N. Y. S. 840.

Rhode Island: Not necessary to review order granting nonsuit for insufficiency of evidence. Kebabian v. Adams Exp. Co., 27 R. I. 564, 65 A. 271.

South Dakota: Necessary as to findings of

the motion is required, the grounds of objection [2] must be specifically stated therein,[3] and must be consistent.[4]

Request for instructions.[5]—As a general rule error cannot be predicated upon failure to give instructions in the absence of a request therefor.[6] This rule is peculiarly applicable to errors of omissions in the instructions given,[7] even when the

referee. Nelson v. Lybeck [S. D.] 111 N. W. 546.

South Carolina: Necessary to save question as to general verdict in favor of all defendants though one had defaulted and his liability was admitted. Dantzler v. Cox [S. C.] 55 S. E. 774.

Tennessee: Assignments of error not specified as ground for motion for new trial as required by rule of lower court will not be considered on appeal. St. Louis, etc., R. Co. v. Hatch [Tenn.] 94 S. W. 671. Necessary to review of giving of peremptory instruction. Seymour v. Southern R. Co. [Tenn.] 98 S. W. 174.

Texas: Not necessary to review of exclusion of evidence. McFadden v. Missouri, etc., R. Co. [Tex. Civ. App.] 14 Tex. Ct. Rep. 952, 92 S. W. 989. Not necessary to review of question as to instructions. Id. Not necessary where the case is tried before the court without a jury, and the judgment is excepted to. Foote & Co. v. Heisig [Tex. Civ. App.] 16 Tex. Ct. Rep. 7, 94 S. W. 362. Not necessary in order to save the objection that the judgment does not conform to the verdict. Letot v. Peacock [Tex. Civ. App.] 16 Tex. Ct. Rep. 345, 94 S. W. 1121. Assignments of error may be considered on appeal though embraced only in an amended motion for a new trial, filed more than two days after judgment, allowance of amendment being discretionary with court. Texas & N. O. R. Co. v. Green [Tex. Civ. App.] 15 Tex. Ct. Rep. 133, 95 S. W. 694. Necessary to support assignment of error attacking a verdict on ground that certain essential fact was not proved. Riske v. Rotan Grocery Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 392, 93 S. W. 708. Necessary to raise objection that verdict was against weight of evidence and that it disclosed that jury was actuated by prejudice against appellant because he was negro. Friar v. Orange & N. W. R. Co. [Tex. Civ. App.] 101 S. W. 274.

Wyoming: Necessary to review of any reason for new trial, though case tried by court. Rev. St. 1899, § 3748, as amended by Laws 1901, p. 69, c. 66, § 1. See, also, supreme court rule 13 [26 P. xii]. Todd v. Peterson, 13 Wyo. 513, 81 P. 878.

2. A specification of error that the verdict is contrary to the instructions presents nothing for review on appeal. Hogg v. Gammon [Ga.] 56 S. E. 404. See, also, Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606.

3. Henley v. Brockman, 124 Ga. 1059, 53 S. E. 672. Ground of motion for new trial on account of admission of evidence must show what objection was urged at time evidence was admitted. Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606. Assignment of error to fragmentary portion of a single sentence of charge held insufficient. Holland v. Williams, 126 Ga. 617, 55 S. E. 1023. That court erred in glving certain instruction described by number, insufficient where there is no such number. Kelly v. Wing Yung Benev. Ass'n, 2 Cal. App. 460, 84 P. 321. An assignment as a ground that court erred in giving instructions numbered from 1 to 15 "asked by respondents and given at their request" was sufficient assignment to giving instructions from 1 to 15 asked by respondent as modified by court, there being no other to which it could refer. Chicago & S. L. R. Co. v. Mines, 221 Ill. 448, 77 N. E. 898. That verdict is "contrary to law" is too general. Deitz v. Lensinger, 77 Ark. 274, 91 S. W. 755. Mistake in copying verdict into judgment not raised by specification that judgment was contrary to verdict and not supported thereby. Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116. Where the jury renders a general verdict with special findings, an assignment of error for a new trial that the evidence was contrary to law only preserves the question whether the evidence supports th verdict, and the court cannot consider the facts specialiy found. Chicago, I. & L. R. Co. v. Pritchard [Ind.] 79 N. E. 508. Assignment that the "judgment" is not sustained by sufficient evidence does not come within Burns' Ann. St. 1901, § 568, providing that a new trial may be granted where "verdict or decision" is not sustained by sufficient evidence. Polk v. Johnson [Ind. App.] 77 N. E. 1139. Insufficiency in specifications of insufficiency of evidence to sustain new trial will not prevent the question from being reviewed on appeal where such question is raised by exceptions to admission of evidence and to ruling denying motion for nonsuit. Southern Pac. R. Co. v. Lipman, 148 Cal. 480, 83 P. 445.

4. On exception to refusal to grant new trial on ground that verdict is without evidence to support it, that it is against the weight of the evidence and that it is excessive, only first ground will be considered. Sutton v. Catawba Power Co. [S. C.] 56 S. E. 966.

5. See 6 C. L. 1402.

6. Thomas v. Stickler, 29 Ky. L. R. 351, 93 S. W. 648; Packham v. Glendmeyer, 103 Md. 416, 63 A. 1048. Court need not instruct of its own motion, though one party asks no instructions and all asked by the other party were refused. Osgood v. Skinner, 111 Ill. App. 607. Error in refusing special instructions can not be considered where they do not purport on their face to have been asked by appellants or their counsel and are not signed by either and it does not otherwise appear that they were requested. Selman v. Gulf, etc., R. Co. [Tex. Civ. App.] 101 S. W. 1030.

7. Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co. [S. C.] 57 S. E. 201; Snipes v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 959; Holland v. Williams, 126 Ga. 617, 55 S. E. 1023; Davis v. Keen [N. C.] 55 S. E. 359; Murphy v. Hiltibridle [Iowa] 109 N. W. 471; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374; Burton Lumber Corp. v. Houston [Tex. Civ. App.] 101 S. W. 822; Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 99 S. W. 409; Galveston, etc., R. Co. v. Stoy [Tex. Civ. App.] 99 S. W. 135; St. Louis, etc., R. Co. v. Know-

instruction given is misleading,[8] but the rule is not without exception.[9] A request is likewise necessary to invoke a more explicit,[10] emphatic,[11] or specific [12] instruc-

les [Tex. Civ. App.] 99 S. W. 867; McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229; St. Louis S. W. R. Co. v. Pope [Tex. Civ. App.] 17 Tex. Ct. Rep. 32, 97 S. W. 534; International, etc., R. Co. v. Wray [Tex. Civ. App.] 16 Tex. Ct. Rep. 676, 96 S. W. 74; International Harvester Co. v. Campbell [Tex. Civ. App.] 16 Tex. Ct. Rep. 653, 96 S. W. 93; Louisiana & Texas Lumber Co. v. Meyers [Tex. Civ. App.] 15 Tex. Ct. Rep. 779, 94 S. W. 140; Galveston, etc., R. Co. v. Fitzpatrick [Tex. Civ. App.] 14 Tex. Ct. Rep. 790, 91 S. W. 355. Notwithstanding Ballinger's Ann. Codes & St. § 4993, making it duty of court to charge on law of risk. Duteau v. Seattle Elec. Co. [Wash.] 88 P. 755. Failure to instruct on **particular matters.** New Castle Bridge Co. v. Doty [Ind.] 79 N. E. 485; Marable v. Southern R. Co., 142 N. C. 557, 55 S. E. 355; Gaither v. Carpenter [N. C.] 55 S. E. 625; Glettler v. Sheboygan L., P. & R. Co. [Wis.] 109 N. W. 973; Proctor v. Hobart M. Cable Co., 145 Mich. 503, 13 Det. Leg. N. 644, 108 N. W. 992; Long v. Nute [Mo. App.] 100 S. W. 511; Williams v. St. Louis, etc., R. Co., 119 Mo. App. 663, 96 S. W. 307; Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633; Howard v. Morton-Morgan Commercial Co. [Ariz.] 89 P. 541. Defendant's duty to provide inspectors. Nelson v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 88 P. 785. Whether motorman was acting within the scope of his authority. Wahl v. St. Louis Transit Co. [Mo.] 101 S. W. 1. In regard to a counterclaim. Whitehead v. Emmerich [Colo.] 87 P. 790. Element of discovery of an obstruction in time to avoid an injury was left out. Union Pac. R. Co. v. Shovall [Colo.] 89 P. 764. In what case damages claimed would have been in contemplation of the parties at time of delivery of a telegram. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062. Failure to offer instruction that though plaintiff assumed risks arising from negligence of fellow-servants defendant would be liable if his negligence concurred with that of a fellow-servant. Nelson v. Boston & M. Consol. Copper & Silver Min. Co. [Mont.] 88 P. 785.

Modifications or additions must be requested. Coney Island Co. v. Dennan [C. C. A.] 149 F. 687. Where certain **evidence** was ignored. Tepper v. Boston El. R. Co. [Mass.] 78 N. E. 384. Burden of proof and meaning of "preponderance of evidence." Lacey v. Bentley [Colo.] 89 P. 789. Failure to limit effect of evidence. Woodward v. Keck [Tex. Civ. App.] 17 Tex. Ct. Rep. 425, 97 S. W. 852. Failure to limit effect of evidence. Stark v. Burke [Iowa] 109 N. W. 206. Failure to limit effect of evidence admissible as to one defendant but inadmissible as to another. Sweet v. Montpelier Sav. Bank & Trust Co. [Kan.] 84 P. 542. Sufficiency of evidence. Pardon v. Paschall, 142 N. C. 538, 55 S. E. 365. As to relative value of interested and disinterested **witnesses.** Standen v. Pennsylvania R. Co., 214 Pa. 189, 63 A. 467. Failure to submit certain **theory.** Ward Furniture Mfg. Co. v. Isbell & Co. [Ark.] 99 S. W. 845; Falender v. Blackwell [Ind. App.] 79 N. E. 393; Proulx v. Bay City, 143 Mich. 550, 13 Det. Leg. N. 56, 107 N. W. 273. Failure to submit certain **issues.** Scanlon v. Northwood [Mich.] 13 Det. Leg. N. 1013, 110 N. W. 493; Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265; Johnson v. Smith Lumber Co., 99 Minn. 343, 109 N. W. 810; Keller v. Home Life Ins. Co., 198 Mo. 440, 95 S. W. 903; Gulf, etc., R. Co. v. Josey [Tex. Civ. App.] 15 Tex. Ct. Rep. 585, 95 S. W. 688; Chicago, R. I. & P. R. Co. v. Hiltibrand [Tex. Civ. App.] 99 S. W. 707; Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126. Under Sayles' Rev. Civ. St. § 1331, it is not reversible error for the trial court to refuse to submit special issues unless the party requests them in substantially proper form. Moore v. Pierson [Tex. Civ. App.] 15 Tex. Ct. Rep. 219, 93 S. W. 1007. Where the court has expressly submitted some issues and excluded others but there has been no written request for submission of those excluded, the parties must be deemed to have consented that the court try those not submitted. Laws 1897 (Sp. Sess.) p. 15, c. 7, amending Rev. St. 1895, art. 1331. Moore v. Pierson [Tex.] 16 Tex. Ct. Rep. 191, 94 S. W. 1132. It having been determined to submit the cause on special issues, a request to submit the whole cause upon a general charge invoking a general verdict could not be regarded as a request for the submission of issues. Id. Failure to submit **defenses.** Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826. Where the court sustains an objection to improper **remarks of counsel,** the remarks constitute no ground for reversal in the absence of a request for a special instruction advising the jury to disregard them. Jones v. Wright [Tex. Civ. App.] 14 Tex. Ct. Rep. 971, 92 S. W. 1010.

8. Reiter-Conley Mfg. Co. v. Hamlin, 144 Ala. 192, 40 So. 280; Buford v. Christian [Ala.] 42 So. 997; Galveston, etc., R. Co. v. Patillo [Tex. Civ. App.] 101 S. W. 492. Party cannot complain of accurate instruction on proximate cause on ground that it might mislead jury to ignore contributory negligence, where he fails to request an instruction in respect thereto. Virginia Bridge & Iron Co. v. Jordan, 143 Ala. 603, 42 So. 73. In absence of request for additional instructions, plaintiffs could not complain that a charge authorized recovery only on proof of all the acts of negligence alleged. De Castillo v. Galveston, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 481, 95 S. W. 547.

9. Where subject comes within evidence, court must instruct thereon even in absence of request. Schwaninger v. McNeeley & Co. [Wash.] 87 P. 514.

10. People v. Waters, 100 N. Y. S. 177; Indianapolis & N. W. Traction Co. v. Henderson [Ind. App.] 79 N. E. 539; Gulf, etc., R. Co. v. Bunn [Tex. Civ. App.] 14 Tex. Ct. Rep. 721, 95 S. W. 640; Gamache v. Johnston Tin Foil & Metal Co., 116 Mo. App. 596, 92 S. W. 918. Instruction submitting issue of negligence of "both" parents of child injured. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222. Failure to specify particularly what the allegations of plaintiff's petition were. Barrow v. Barrow [Tex. Civ. App.] 16 Tex. Ct. Rep. 951, 97 S. W. 120. Failure to properly explain and define words or terms. Louisville & E. R. Co. v. Vincent, 29 Ky. L. R.

tion. But the failure to request instructions will not waive objection on account of substantive error in instructions given by the court's own motion,[13] or at the instance of the other party.[14]

Request for findings.[15]—Error cannot be predicated upon failure to make findings of fact when none were requested,[16] and the scope of review may otherwise be limited by the absence of findings or a request therefor.[17] So, also, on a trial by the court without a jury, a request for findings of law is necessary to save questions of law.[18] It is even held that voluntary findings may be ignored.[19] A proposition of law must be confined to questions of law exclusively and exclude all questions of fact.[20]

§ 6. *Necessity of ruling.*[21]—Questions not ruled on in the trial court will not be considered on appeal.[22] The ruling, furthermore, must be definite and positive.[23] A ruling on a former trial is insufficient.[24]

1049, 96 S. W. 898; Bugg v. Holt, 29 Ky. L. R. 1208, 97 S. W. 29; Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633; Henderson v. Los Angeles Traction Co. [Cal.] 89 P. 976. Plaintiff could not complain that court charged that he could recover if apples shipped were "heated, scalded, and decayed," where he made no request for a disjunctive charge and had himself used the conjunctive in his pleading. Cane Hill Cold Storage & Orchard Co. v. San Antonio, etc., R. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 362, 95 S. W. 751.

11. Where in sustaining an objection to a question the court states that it is improper, the party at whose instance the objection is sustained cannot complain that the court was not sufficiently emphatic where he does not, subsequently request an instruction on the matter. Airikainen v. Houghton County St. R. Co., 138 Mich. 194, 101 N. W. 264.

12. Ives v. Atlantic & N. C. R. Co., 142 N. C. 131, 55 S. E. 74. On proximate cause. Northern Texas Traction Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 48, 95 S. W. 708. Measure of damages. Gulf, etc., R. Co. v. Moseley [Ind. T.] 98 S. W. 129. Failure to direct jury specifically to issues. St. Louis, I. M. & S. R. Co. v. Jackson [Ark.] 93 S. W. 746.

13. Turner v. Terrill [Ky.] 97 S. W. 396; South Covington & C. St. R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562.

14. Dawson v. Wombles [Mo. App.] 100 S. W. 547.

15. See 6 C. L. 1402.

16. Lee Joe Yen v. U. S. [C. C. A.] 148 F. 632; In re Clark [Conn.] 64 A. 12; Nance v. Smyth [Tenn.] 99 S. W. 698; Caplen v. Cox [Tex. Civ. App.] 15 Tex. Ct. Rep. 266, 92 S. W. 1048. Failure of court of chancery appeals to embrace certain evidence in supplemental findings. Marion Mfg. Co. v. Buchanan [Tenn.] 99 S.W. 984. A judgmeht cannot be reversed for failure to make special findings, no request therefor having been made in writing. Code Civ. Proc. § 1114. Gans & Klein Inv. Co. v. Sanford [Mont.] 88 P. 955. Code 1896, § 1320, does not require special findings in absence of request. Crew v. Heard [Ala.] 40 So. 337.

17. Under Code 1896, §§ 3319, 3320, 3321, court's conclusion on evidence not reviewable where there are no special findings of facts even made or requested. Crew v. Heard [Ala.] 40 So. 337. Where a jury is v. Marshall Car Wheel & Foundry Co. [Tex. waived and no special findings of fact are requested, the only questions reviewable on appeal are whether the judgment is supported by the pleadings, whether it is supported by substantial evidence, and whether error was committed in the admission or exclusion of evidence. City of Mankato v. Barber Asphalt Pav. Co. [C. C. A.] 142 F. 329.

18. People v. Harrison, 223 Ill. 550, 79 N. E. 164; Wallace v. Bozarth, 123 Ill. App. 624. Where no declarations of law are asked, the only question on appeal is whether the evidence supports the finding. Luster v. Robinson, 76 Ark. 255, 88 S. W. 896. In absence of request for findings of law, only question reviewable is whether evidence supports judgment. State v. Shacklett, 115 Mo. App. 715, 91 S. W. 956. Questions of law not reviewable in absence of motion for separate findings of law and fact. Orient Ins. Co. v. Meers & Son, 29 Ky. L. R. 206, 92 S. W. 584. Where no declarations of law are asked or given, it will be presumed that the judgment was based on that theory of the case which authorized it. Farmers' Bank v. Barbee, 198 Mo. 465, 95 S. W. 225. Under Prac. Act, § 42 (Hurd's Rev. St. 1903, p. 1405, c. 110), where a case is tried before the court, questions of law not arising from rulings can only be preserved and presented to the supreme court by submission of written propositions of law, and the statute is applicable though the case is tried on an agreed statement of facts. Mutual Protective League v. McKee, 223 Ill. 364, 79 N. E. 25.

19. The trial court is not required to file conclusions of law and fact under Rev. St. 1895, art. 1333, unless requested, and if he voluntarily files them no assignments or exceptions are necessary to authorize an attack of the judgment for want of evidence. City of Houston v. Kapner [Tex. Civ. App.] 16 Tex. Ct. Rep. 331, 95 S. W. 1103.

20. Whipple v. Tucker, 123 Ill. App. 23.

21. See 6 C. L. 1404.

22. Hogan v. Sullivan [Vt.] 64 A. 234. Issue raised but not decided. Kidd v. New Hampshire Trac. Co. [N. H.] 66 A. 127. Question not decided by court of chancery nor disposed of by decree. Myers v. Steel Mach. Co., 68 N. J. Eq. 795, 64 A. 746. Withdrawal of parties. Baker v. Gowland [Ind. App.] 76 N. E. 1027. Exceptions to pleadings will not be considered in absence of order of trial court disposing thereof. Ellis v. Marshall Car Wheel & Foundry Co. [Tex.

§ 7. *Necessity and time of exceptions.*[25]—Generally a ruling must be excepted to in order to be reviewed.[26, 27, 28] In some jurisdictions, however, certain matters

Civ. App.] 14 Tex. Ct. Rep. 719, 95 S. W. 689. Motion to require defendant to separate defenses. State v. Lanner [Wash.] 88 P. 321. Admissibility of **evidence** must be ruled on. Phillips v. Hazen [Iowa] 109 N. W. 1096; Cable Co. v. Elliott, 122 Ill. App. 342. Where objectionable testimony was prevented by timely objection. Kaylor v. Cornwall R. Co. [Pa.] 65 A. 65; Sellers v. Farmer [Ala.] 41 So. 291. Exclusion of evidence. In re Clark [Conn.] 64 A. 12. Exceptions to depositions. Fulton v. Messenger [W. Va.] 56 S. E. 830. **Misconduct of counsel** must be ruled on. Renshaw v. Dignan, 128 Iowa, 722, 105 N. W. 209. Remarks of counsel. Chicago & Joliet Elec. R. Co. v. Patton, 122 Ill. App. 174. Disqualification of **jurors.** Ferguson v. Loudermilk [Ga.] 56 S. E. 119. Failure to strike **cost** bill. Smith v. Dow [Wash.] 86 P. 555.

23. Remarks of court held to constitute a ruling excluding certain evidence and not a mere colloquy. Stroker v. St. Joseph, 117 Mo. App. 350, 93 S. W. 860 Such remarks as "proceed" and "subject to objection" are too indefinite. Morrison v. Turnbaugh, 192 Mo. 427, 91 S. W. 152. Where after sustaining demurrers court remarked that under no state of facts would defendant be liable, this was not a ruling so as to sustain an appeal. Esters v. Hurt [Ala.] 43 So. 565. Not enough that chancellor's opinion stated that objections to evidence are well made and must be sustained. Sellers v. Farmer [Ala.] 41 So. 291. Where trial court in overruling motion for a new trial stated that "the verdict * * * was doubtless too large to stand, but under § 4910, Code 1906, it had no power to interfere," there was no ruling on excessiveness of the verdict. Yazoo, etc. R. Co. v. Wallace [Miss.] 43 So. 469.

24. On demurrer. Equitable Mfg. Co. v. Howard [Ala.] 41 So. 628.

25. See 6 C. L. 1404.

26. Trafton v. Osgood [N. H.] 65 A. 397; Rikerd Lumber Co. v. Hoertz [Mich.] 13 Det. Leg. N. 809, 109 N. W. 664; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824; Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826; Simpkin v. Sny Island Drainage Dist. Com'rs, 223 Ill. 67, 79 N. E. 38. Supreme court rule 27 [39 S. E. vii]. Pace v. Raleigh, 140 N. C. 65, 52 S. E. 277. Code Pub. Gen. Laws, art. 5, §36. Shugars v. Shugars [Md.] 66 A. 273. Sustaining demurrer to **pleading.** Hews v. Stonebraker [Iowa] 109 N. W. 1092. Overruling demurrer. Lang v. Yearwood [Ga.] 56 S. E. 305. Refusal to state counts. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. Refusal to strike plea. Pond v. Huling [Mo. App.] 101 S. W. 115. Where by statute a motion to elect between counts must be in writing and no exception is taken to the overruling of the written motion but only to the overruling of an oral renewal motion, nothing is saved for review. White v. St. Louis, etc. R. Co. [Mo.] 101 S. W. 14. Refusal of **continuance.** Creech v. Aberdeen [Wash.] 87 P. 44. In absence of exception to refusal to order additional writs against nonresidents, plaintiff was not entitled to benefit of Rev. St. 1899, § 583, authorizing plaintiff to proceed against those alone who have been summoned or notified. Pitkin v. Flagg, 198 Mo. 646, 97 S. W. 162. Admission of **evidence.** National Bank of Boyertown v. Schufelt [C. C. A.] 145 F. 509; Prioleau v. U. S. [C. C. A.] 143 F. 320; Green v. Dodge [Vt.] 64 A. 499; City of Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349; Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794; Little Rock R. & Elec. Co. v. Goerner [Ark.] 95 S. W. 1007; Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967; In re Painter's Estate [Cal.] 89 P. 98; First Nat. Bank v. Carroll [Mont.] 88 P. 1012. Answers made to jury though previously ruled out. Miller v. Canton [Mo. App.] 100 S. W. 571. Action of the court in connection with an exhibit. Van Leuven v. Van Leuven [Cal. App.] 85 P. 860. Erroneous reception of evidence in a case not properly tried under § 5630, Rev. Codes 1899, as amended by Laws 1903, does not authorize a new trial under that section but is error of law occurring at the trial which must be objected to, excepted to, specified in the statement of the case, and assigned as error before the same will be reviewed. More v. Burger [N. D.] 107 N. W. 200. Exclusion of evidence. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558; Kaufmann v. Brennan, 103 N. Y. S. 912; Henderson v. Agon [Mich.] 14 Det. Leg. N. 106, 111 N. W. 778; Holmes v. Adams [Tex. Civ. App.] 100 S. W. 816; Feagan v. Barton-Parker Mfg. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 665, 93 S. W. 1076; Lellman v. Mills [Wyo.] 87 P. 985; Borden v. Lynch [Mont.] 87 P. 609. Evidence offered before a master. Lee v. Methodist Episcopal Church [Mass.] 78 N. E. 646. Evidence offered before referee. See P. L. 725, 1363. Morgan v. Lehigh Valley Coal Co. [Pa.] 64 A. 633. Refusal to consider affidavits. Dougal v. Eby, 11 Idaho, 789, 85 P. 102.

Variance between pleadings and proof in equity case not ground for reversal where no exception filed below. See Code Pub. Gen. Laws, art. 5, § 36. Shugars v. Shugars [Md.] 66 A. 273.

Remarks of trial judge. Hey v. Hawkins, 120 Ill. App. 483; Peoria & Pekin T. R. Co. v. Hoerr, 120 Ill. App. 65; Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86; Drumm-Flato Com. Co. v. Edmisson [Okl.] 87 P. 311.

Arguments and remarks of counsel. Louisville & E. R. Co. v. Vincent, 29 Ky. L. R. 1049, 96 S. W. 898; Hooks v. Pafford [Tex. Civ App.] 95 S. W. 742; Choctaw, etc., R. Co. v. Craig [Ark.] 95 S. W. 168; Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967. Ruling as to remarks of counsel. Aurora, etc., Co. v. Gary, 123 Ill. App. 163; Bush v. Brandecker [Mo. App.] 100 S. W. 48.

27. Refusal of court to withdraw a submission because of remarks of counsel. Malott v. Central Trust Co. [Ind.] 79 N. E. 369. Giving and refusal of instructions. Haas v. Powers [Wis.] 110 N. W. 205; Walsh v. Yonkers R. Co., 100 N. Y. S. 278; Thomas v. Strickler, 29 Ky. L. R. 1017, 96 S. W. 833; St. Louis & S. W. R. Co. v. James [Ark.] 95 S. W. 804; Mitchell v. Robertson, 117 Mo. App. 348, 93 S. W. 871; Harness v. McKee-Brown Lumber Co. [Okl.] 89 P. 1020. Instructions given. Tromp v. Cramp & Sons

need not be excepted to.[29] Matters sufficiently covered by exceptions to other matters need not be excepted to.[30] So, also, the necessity of formal exceptions may be

Ship & Engine Bldg. Co. [C. C. A.] 143 F. 867; Allen v. Field [C. C. A.] 144 F. 840; Snipes v. Norfolk & Southern R. Co. [N. C.] 56 S. E. 477; Mead v. Cutler [Mass.] 80 N. E. 496; Pierce Co. v. Casler [Mass.] 80 N. E. 494; Ahearn v. Boston R. Co. [Mass.] 80 N. E. 217; Hayes v. Moulton [Mass.] 80 N. E. 215; Wahrman v. Board of Education of New York, 187 N. Y. 331, 80 N. E. 192; Crafer v. Hooper [Mass.] 80 N. E. 2; Kaplan v. Shapiro, 103 N. Y. S. 922; Ambellan v. Barcalo Mfg. Co., 102 N. Y. S. 993; Anderson v. Wood, 50 Misc. 595, 99 N. Y. S. 474; McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472; Ranta v. Supreme Tent, 97 Minn. 454, 107 N. W. 156; White River R. Co. v. Batesville & Winerva Tel. Co. [Ark.] 98 S. W. 721; Millren v. Sandy Tp., 29 Pa. Super. Ct. 580. Refusal of instructions. Dean v. Carpenter [Iowa] 111 N. W. 815; Union Pac. R. Co. v. Meyer [Neb.] 107 N. W. 793. Refusal to give instructions not considered where no exceptions were preserved. Griswold v. Nichols, 126 Wis. 401, 105 N. W. 815. Under Act April 15, 1834, § 104 (P. L. 537), does not make submission of issue indispensible in all cases of appeal from settlement of borough officers to common pleas. Dunmore Borough School Dist. v. Wahlers, 28 Pa. Super. Ct. 35. Giving or refusal of **special interrogatories** must be excepted to. Bartz v. Chicago City R. Co., 116 Ill. App. 554.

Report of referee or master. Huntress v. Hanley [Mass.] 80 N. E. 946; Brown v. Rogers [S. C.] 56 S. E. 680; My Laundry Co. v. Schmeling [Wis.] 109 N. W. 540. Where a question of law is not excepted to before the assessor so as to be disclosed by his report, it cannot be considered on appeal. Hart v. Brierly [Mass.] 78 N. E. 307. Objection that referee was not authorized to report findings of fact held waived where trial before him was on theory that he was so authorized and no exception was filed in court. Mogenson v. Zubler [Colo.] 84 P. 981. On appeal only such questions will be considered as were presented by exceptions to report of master. Hutchinson v. Spoehr, 221 Ill. 312, 77 N. E. 580. Order allowing amendment of exceptions to an auditor's report after expiration of time for filing exceptions. Moss v. Chappell, 126 Ga. 196, 54 S. E. 968.

Findings of fact. Ironton Cross Tie Co. v. Evans [Mich.] 13 Det. Leg. N. 716, 109 N. W. 254; Hoeschler v. Bascom [Wash.] 87 P. 943; Bybee v. Bybee [Wash.] 87 P. 1122. In actions at law. Snuffer v. Karr, 197 Mo. 182, 94 S. W. 983. Where defendants did not except to overruling of their exceptions to court's findings nor make any point thereon in motion for new trial. Farmers' Bank of Polo v. Barbee, 198 Mo. 465, 95 S. W. 225. Direction of **verdict.** Banton v. Herrick, 101 Me. 134, 63 A. 671; Roberts, Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218. Refusal to direct verdict. Bills v. Stevens Co. [Mich.] 13 Det. Leg. N. 868, 109 N. W. 1059.

28. Form of verdict. Poston v. Ingraham [S. C.] 56 S. E. 780. An exception to the **judgment** entered is necessary where the cause was tried without a jury and error is not apparent on face of record as made up. Coppenbarger v. Scroggins & Co., 123 Ill. App. 599. There being no exception to the judgment, the sufficiency of the evidence to sustain it could not be considered. Spears v. Pechstein [Colo.] 84 P. 979. Refusal of plaintiff's motion for judgment on pleadings. Sartor v. Wells [Colo.] 89 P. 797. Under Code Pub. Gen. Laws, art. 5, § 36, the court must decree in accordance with the proof in absence of exceptions filed, and an objection that decree is not in accordance with prayer is unavailable. Gerting v. Wells, 103 Md. 624, 64 A. 298, 433. Refusal of **new trial.** Bills v. Stevens Co. [Mich.] 13 Det. Leg. N. 868, 109 N. W. 1059; Culver v. South Haven & E. R. Co., 144 Mich. 254, 13 Det. Leg. N. 185, 107 N. W. 908; Ginn v. Clark Coal Co., 143 Mich. 84, 12 Det. Leg. N. 1012, 106 N. W. 867; Hoodless v. Jernigan [Fla.] 41 So. 194. Failure to except to the overruling of a motion for a new trial is a waiver of error as to such ruling, and all alleged errors of law occurring at the trial for which a new trial might be granted. City of Enid v. Wigger, 15 Okl. 507, 85 P. 697. Refusal to set aside verdict and failure to except concludes the question unless upon application to lower court the party shows himself entitled to it on account of accident, mistake, or misfortune. Gendron v. St. Pierre, 73 N. H. 419, 62 A. 966. Denial of motion in **arrest of judgment.** Dunbar v. Central Vermont R. Co. [Vt.] 65 A. 528. Taxation of **costs.** Prestwood v. McGowin [Ala.] 41 So. 779.

29. On appeal from an order removing a trustee, all questions presented by the record are open to review, irrespective of exceptions. In re Thieriot, 102 N. Y. S. 952. Failure of facts found by court to sustain the judgment. Webb v. National Bank of Republic [C. C. A.] 146 F. 717. Where there is a statement of facts in the record, it is not necessary to take exceptions to findings of law and facts. Hahl v. Kellogg [Tex. Civ. App.] 16 Tex. Ct. Rep. 30, 94 S. W. 389. Order sustaining demurrer. Merker v. Belleville Distillery Co., 122 Ill. App. 326. Where a case is submitted to the jury on the erroneous theory that the jury should render verdict against defendant notwithstanding they found for only the amount tendered and deposited in court, the appellate court is not limited by the fact appellant failed to except to the instruction where made a motion for a new trial on the ground that the verdict is contrary to law. Goldman v. Swartwout, 102 N. Y. S. 302. Denial of motion to set aside default held an "interlocutory order or decision finally determining the rights of the parties or some of them" within Code Civ. Proc. § 647, dispensing with necessity of exceptions. Roberts v. Wilson [Cal. App.] 84 P. 216.

30. Where party moves to dismiss, he need not except to subsequent instructions on a decisive issue as to which there is no evidence. Barrett v. Brewer [N. C.] 55 S. E. 414. Exceptions that the verdict is contrary to the evidence are superfluous, being covered by exception that verdict is contrary to the law (Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606), and hence such an as-

dispensed with by the rules or common practice of the trial court.[31] In some states specifications of error on a motion for a new trial cannot take the place of exceptions,[32] but in others the rule is otherwise.[33] Exceptions by the appellee are necessary to sustain cross assignments of error.[34]

Time of taking exceptions.[35]—Exceptions must be timely.[36]

§ 8. *Form and sufficiency of objection.*[37]—An objection must point out specifically the matter objected to[38] and the grounds of the objection.[39] All the

signment as ground for a new trial presents nothing for the review of the appellate court (Hogg v. Gammon [Ga.] 56 S. E. 404).

31. Practice of deeming exceptions taken and incorporating them in bill of exceptions, though not actually taken. Odell v. Petty [S. D.] 104 N. W. 249. Rule that no objections will be sustained to remarks of counsel dispenses with necessity of exceptions to such remarks. Galveston, etc., R. Co. v. Washington [Tex. Civ. App.] 15 Tex. Ct. Rep. 425, 92 S. W. 1054.

32. Geter v. Central Coal Co. [Ala.] 43 So. 367.

33. Southern Pine Lumber Co. v. Ward, 16 Okl. 131, 85 P. 459. On appeal from denial of new trial requested on grounds specified in Code Civ. Proc. § 999, such grounds may be considered though not made the basis of exceptions. Crane v. Barron, 100 N. Y. S. 937. In Minnesota, under Gen. Laws 1901, c. 113, p. 121, a definite and specific assignment in a motion for a new trial constitutes a sufficient exception, and such assignment need not be followed by an exception to the ruling thus assigned as error. Prizer-Painter Stove & Heater Co. v. Peaslee, 99 Minn. 275, 109 N. W. 232; Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824. Either an exception or a motion for a new trial is necessary. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824. Dalby v. Lauritzen, 98 Minn. 75, 107 N. W. 826.

34. Jamison v. Alvarado Compress & Warehouse Co. [Tex. Civ. App.] 99 S. W. 1053. Where defendant did not except to findings, he could not have them reviewed on plaintiff's appeal. Matthews v. Fry [N. C.] 55 S. E. 787.

35. See 6 C. L. 1406.

36. In order to preserve error as ground for new trial, exception must be taken thereto before the ruling on the motion for a new trial, notwithstanding Acts 1903, p. 338, c. 193, § 1, providing that exceptions may be taken at any time during the term. Providence Washington Ins. Co. v. Wolf [Ind.] 80 N. E. 26. Under Act April 22, 1874, P. L. 109, exceptions must be filed within thirty days after notice of judgment. Wingert v. Teitrick, 31 Pa. Super. Ct. 187. An exception taken at the time the court announces its conclusions of law. is in time. Indianapolis Northern Trac. Co. v. Harbaugh [Ind. App.] 78 N. E. 80. Exceptions to **evidence,** remarks of judge, etc., must be taken at the time as required by Revisal 1905, § 554, subsec. 2, the exception provided for by § 554, subsec. 3, and § 591, being confined to exceptions to the charge. Alley v. Howell, 141 N. C. 113, 53 S. E. 821. Under Rev. Code Civ. Proc. § 257, exceptions to **instructions** must be taken before entry of final judgment. Mossteller v. Holborn [S. D.] 108 N. W. 13. Exception to refusal to put instructions in writing as required by Revisal 1905, § 356, may be set out for first time in case on appeal. Sawyer v. Roanoke R. & Lumber Co., 142 N. C. 162, 55 S. E. 84. Under Acts 1903, p. 338, c. 193, § 1, permitting exceptions to refusal of instructions to be taken at any time during the term and providing that the party excepting shall enter at the close of such exceptions a memorandum which shall be dated and signed, etc., failure to date renders the exceptions void. Inland Steel Co. v. Smith [Ind.] 80 N. E. 538. In the Federal courts exceptions to instructions must be taken before the jury retires (Klaw v. Life Pub. Co. [C. C. A.] 145 F. 184; Montana Min. Co. v. St. Louis Min. & Mill. Co. [C. C. A.] 147 F. 897), and this rule not changed by Rule 58 of circuit court for Montana, such rule being intended only to prevent a miscarriage of justice through enforcement of general rule (Montana Min. Co. v. St. Louis Min. & Mill. Co. [C. C. A.] 147 F. 897). Filing of exceptions to **finding** of facts and of a statement of facts held timely though not made within five days from filing of findings, where made within five days after findings were served on appellant. Mann v. Provident Life & Trust Co., 42 Wash. 581, 85 P. 56. Complaint could not be made on appeal that there was not time or opportunity to move against the **report of a referee** where last evidence was taken over eighteen months prior to date of filing report and attorneys were present at all the hearings, though findings and judgment were made and entered on same day report was filed. Lindstrom v. Hope Lumber Co. [Idaho] 88 P. 92. Exception to overruling of motion for **verdict** should be taken at the close of all the evidence. McQuiggan v. Ladd [Vt.] 64 A. 503.

37. See 6 C. L. 1407.

38. Brown v. Savings Bank, 28 App. D. C. 351; Brown v. Brown [S. C.] 54 S. E. 838. Question of excessiveness of verdict held sufficiently presented to trial court in motion for new trial. Williams v. Spokane Falls & N. R. Co. [Wash.] 87 P. 491.

39. Brown v. Savings Bank, 28 App. D. C. 351. Motion to dismiss an appeal on ground that "no sufficient bond was filed" is too general. Jackson v. Barrett [Idaho] 86 P. 270. Rule applicable to motion to dismiss. Clark v. Middleton [N. H.] 66 A. 115. Refusal to direct verdict will not be considered when motion specified no grounds. Wood v. Public Service Corp. [N. J. Law] 64 A. 980. Where appellant fails to point out particulars in which a hypothetical question is not warranted by the evidence, the appellate court will not be over diligent in searching them out. Bird v. Utica Gold Min. Co., 2 Cal. App. 674, 84 P. 256. Where counsel for an objector in a proceeding to confirm a special assessment conceded that

grounds of objection which a party wishes to urge on appeal should be specified, for only those grounds urged below will be considered.[40] Technicalities must be observed in making technical objections.[41]

To evidence.[42]—Objections to evidence must designate the evidence objected to [43] and specifically point out the ground of objection,[44] general objections on ac-

he has not read the legal objections filed but thinks they are a copy of the blanket form and is unable to state any reason in support of them, the court on appeal will not review the overruling of them. Lingle v. West Chicago Park Com'rs, 222 Ill. 384, 78 N. E. 794. Demurrer on grounds that several causes of action were improperly united and that complaint was ambiguous, unintelligible and uncertain, held not to specify the grounds upon which objections were taken as required by Mill's Ann. Code, § 51. Lacey v. Bentley [Colo.] 89 P. 789. Ground of demurrer that the declaration is too general and fails to set forth "specific acts of negligence," is itself so general that the appellate court will only consider whether there is any essential element missing. Jacksonville Elec. Co. v. Schmetzer [Fla.] 43 So. 85. Where both proper and improper charges are imposed as terms upon which a pleading may be amended, the pleader is not required to tender the proper charges in order to avail himself of the error on appeal. Williams v. Myer [Cal.] 89 P. 972.

40. See ante, § 2, Acquiescing in Error, subd. Change of Theory.

41. Where in motion to dismiss appeal the grounds were too general. Jackson v. Barrett [Idaho] 86 P. 270.

42. See 6 C. L. 1407.

43. Joint objection to several answers to several questions held insufficient. McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67. Objection to evidence collectively is insufficient if any of the evidence is admissible. Martin v. Gainesville, 126 Ga. 677, 55 S. E. 499; General Hospital Soc. v. New Haven Rendering Co. [Conn.] 65 A. 1065; Horner v. Beasley [Md.] 65 A. 820; McCleskey v. Howell Cotton Co. [Ala.] 42 So. 67; Holman v. Clark [Ala.] 41 So. 765; Tuttle v. Moody & Son [Tex.] 17 Tex. Ct. Rep. 161, 97 S. W. 1037; Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 199, 93 S. W. 1024; Kerbaugh v. Caldwell [C. C. A.] 161 F. 194. Joint objection to two questions is insufficient if either is proper. Theodore Land Co. v. Lyon [Ala.] 41 So. 682. General objection that an answer is not responsive is insufficient where the answer is responsive in part. Baltimore & O. R. Co. v. Whitehill [Md.] 64 A. 1033. Objection to whole of a certificate of commissioner of land office, a part being admissible. Winans v. McCabe [Tex. Civ. App.] 92 S. W. 817. Incompetency to testify as to transaction with deceaesd person not raised by general objection to competency, witness being competent for other purposes. Smith v. Humphreys [Md.] 66 A. 67. Objection to admission of ordinance must point out parts claimed to be inadmissable. Spaulding v. Edina [Mo. App.] 97 S. W. 546. Objection to question before it is completed is not sufficient as against an answer to whole question and not to part objected to. Redus v. Milner Coal & R. Co. [Ala.] 41 So. 634. Disobedience in toto of order for production of several kinds of evidence raises no question as to validity order as to a single kind. Hammond Packing Co. v. State [Ark.] 100 S. W. 407.

44. Remington Mach. Co. v. Wilmington Candy Co. [Del.] 66 A. 465; Howard Supply Co. v. Bunn [Ga.] 56 S. E. 757; Tucker v. Duncan, 224 Ill. 453, 79 N. E. 613; Arnold v. Harrington Cutlery Co., 189 Mass. 647, 76 N. E. 194; Ward v. Meredith, 122 Ill. App. 169; Graves v. Bonness, 97 Minn. 278, 107 N. W. 163; Spaulding v. Edina [Mo. App.] 97 S. W. 545; Howard v. Brown, 197 Mo. 36, 95 S. W. 191; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; Jones v. Deardorff [Cal. App.] 87 P. 213; Moynahan v. Perkins [Colo.] 85 P. 1132. Objection to question stating that counsel did not see how it was competent is not a valid objection. Hasper v. Wietcamp [Ind.] 79 N. E. 191. General objection does not reach errors of form in question objected to. Jewell Belting Co. v. Hamilton Rubber Mfg. Co., 121 Ill. App. 13; Wabash R. Co. v. Johnson, 114 Ill. App. 545. Objection to evidence as tending to prejudice jury against defendant and as being irrelevant held too general. McQueen v. Bank of Edgemont [S. D.] 107 N. W. 208. Objection to written assignment of cause of action on ground that no predicate has been laid to authorize its admission is too indefinite. Pecos & N. T. R. Co. v. Evans-Snider-Buel Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 199, 93 S. W. 1024. Objection to introduction of record in proceedings to enforce a tax bill, that notice of sale was insufficient, held not to justify review of question of sufficiency of the notice because the middle initial of defendant in the tax suit was erroneous. Howard v. Brown, 197 Mo. 36, 95 S. W. 191. Objection "plaintiff objects to what occurred between witness and G's representatives" in an action against G, and L, witness being an agent of L held sufficient. Trammell v. Guffey Petroleum Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 492, 94 S. W. 104. Where objection is to substance and form, and after the question has been reworded, the objector interposes "the same objection, except as to form," the objection to the substance is sufficient. In re Small's Will, 103 N. Y. S. 706. An objection that it had not been shown that witness knew anything about the knowledge of her son as to the dangers of electricity held a sufficient challenge of the competency of the witness' evidence on the subject. Sneed v. Marysville Gas & Elec. Co. [Cal.] 87 P. 376. Objection "no proper foundation laid and incompetent," to **expert testimony** held too general. Chicago City R. Co. v. Foster, 226 Ill. 288 N. E. 762. To **hypothetical question.** Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809. Objection that hypothetical question does not contain correct statement of evidence is sufficiently specific in absence of request by court to make more specific. Frigstad v. Great Northern R. Co. [Minn.] 111 N. W. 838. An objection to the consideration of **affidavits**

count of irrelevancy, immateriality, and incompetency, being insufficient unless the evidence is inadmissible on any ground or for any purpose whatever,[45] and a general objection in any case being held sufficient when and only when the evidence is wholly inadmissible for any purpose whatever;[46] but the mere fact that an objection is specific does not necessarily make it sufficient, since it may fail to reach the point desired to be saved,[47] and only the grounds properly specified below will be considered on appeal.[48] The rules applicable to objections to the admission of evidence also apply to motions to strike out evidence,[49] and to objections to the sufficiency of evidence.[50]

failing to state the ground thereof is insufficient. Franklin Union No. 4 v. People, 121 Ill. App. 647. General objection to evidence is insufficient to raise the question of **variance.** Faulkner v. Birch, 120 Ill. App. 281. Objection to evidence on ground of variance without pointing out variance is insufficient. Landt v. McCullough, 121 Ill. App. 328.

45. Norfolk & W. R. Co. v Sutherland, 105 Va. 545, 54 S. E. 465; Davis v. Holy Terror Min. Co. [S. D.] 107 N. W. 374. Presumption is that court instructed as to legal tendency of evidence and the jury followed instruction. Haskell v. Manchester St. R. Co., 73 N. H. 587, 64 A. 186. An objection for incompetency is more general than an objection for irrelevancy, it not being necessary to specify wherein evidence is irrelevant, but the reason for incompetency must be pointed out. Stoner v. Royar [Mo.] 98 S. W. 601.

Objections held too general: "Incompetent." Renders v. Grand Trunk R. Co., 144 Mich. 387, 13 Det. Leg. N. 314, 108 N. W. 368. "Irrelevant." Armour & Co. v. Ross [S. C.] 55 S. E. 315. "Improper and immaterial." American Car & Foundry Co. v. Brinkman [C. C. A.] 146 F. 712. "Irrelevant and immaterial." McCabe v. Desnoyers [S. D.] 108 N. W. 341. "Incompetent, irrelevant, and immaterial, and does not tend to prove any issue in the case." Malott v. Central Trust Co. [Ind.] 79 N. E. 369. "It is not applicable to any issue in the case and does not tend to prove the earning capacity of decedent." Id. Objection for the invalidity does not raise question of remoteness. Dean v. Kansas City, etc., R. Co. [Mo.] 97 S. W. 910. "Immaterial and incompetent" does not go to competency of the witness Wilson v. Godkin, 142 Mich. 631, 12 Det. Leg. N. 849, 105 N. W. 1121. Objection to evidence as to injured eyesight that it was "immaterial and irrelevant" is too general to raise the point that such injury had not been pleaded. Galveston, etc., R. Co. v. Powers [Tex. Civ. App.] 101 S. W. 250. General objection to deeds admissible as ancient instruments is properly overruled notwithstanding they are not admissible as duly recorded deeds affecting the defense of limitations. Flack v. Braman [Tex. Civ. App.] 101 S. W. 537. General objection to admission of a copy of a will that it was incompetent, irrelevant, etc., did not present ground that will had not been admitted to probate. Samuel and Jessie Kenney Presbyterian Home v. Kenney [Wash.] 88 P. 108. General objection of incompetency, irrelevancy, and immateriality, is not sufficient to raise the question as to whether matter is subject to expert testimony and as to qualification of witness as an expert. Bundy v. Sierra Lumber Co. [Cal.] 87 P. 622. Objection to evidence of custom as immaterial does not raise question of generality or reasonableness of custom. Costilla County Bank v. Willis [Colo.] 85 P. 423.

46. Sufficient only where evidence is inadmissible for any purpose. Chicago, etc., R. Co. v. Rathneau, 225 Ill. 278, 80 N. E. 119. Sufficient where evidence wholly inadmissible. Spaulding v. Edina [Mo. App.] 97 S. W. 545. General objection held sufficient to a question whether a defendant in a personal injury action was insured against accidents to employe. Capital Const. Co. v. Holtzman, 27 App. D. C. 125.

47. Objection to competency of evidence does not reach competency of witness. Brown v. Brown [Neb.] 108 N. W. 180. An objection to competency of witness does not reach materiality of evidence. El Campo Rice Milling Co. v. Montgomery [Tex. Civ. App.] 16 Tex. Ct. Rep. 269, 95 S. W. 1102. Competency of evidence is not raised by an objection on account of the time of its introduction. Van Camp v. Keokuk, 130 Iowa, 716, 107 N. W. 933. Objection that certain testimony was "an opinion" does not raise question of competency of witness to testify as an expert. Texas & P. R. Co. v. Warner. [Tex. Civ. App.] 15 Tex. Ct. Rep. 530, 93 S. W. 489. Objection that witness did not see street car until it had crossed railroad did not reach admissibility of testimony as to whether it was custom for railroad trains to stop to let street cars cross. Northern Texas Tract. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869. Objection to question leading in form and substance and not predicated on any evidence in case does not reach competency of the question. Aurora, etc., R. Co. v. Gary, 123 Ill. App. 163. Objection in an action for money had and received through forged drafts, to monthly statement of drawee, showing payment, that drafts are not connected with case, it not appearing that they were paid to defendant, does not raise point as to propriety of method adopted to show payment. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527.

48. See ante § 2, Acquiescing in Error, subd. Change of Theory.

49. Motion to strike must state grounds. Vicksburg R. & Light Co. v. Cameron [Miss.] 40 So. 822. Motion on general ground of immateriality, irrelevancy, and incompetency, is insufficient. Hamlin v. Hamlin, 102 N. Y. S. 571. No point saved by motion to exclude evidence a part of which is admissible. Wright v. Charbonneau, 122 Ill. App. 52; Schultz v. Ford Bros. [Iowa] 109 N. W. 614; Birmingham, R., Light & Power Co. v. Livingston, 144 Ala. 313, 39 So. 374; Davis v. Arnold, 143 Ala. 228, 39 So. 141. Motion to strike out evidence as irrelevant must

To exclusion of evidence.[51]—As a foundation for the predication of error upon the exclusion of evidence, an offer of proof must be made showing what the evidence is [52] and its purpose.[53] A collective offer will not sustain an objection if any of the evidence is inadmissible,[54] nor will an unrestricted offer sustain an objection if the evidence is inadmissible for any purpose,[55] and where the offer is for a specific purpose, the admissibility of the evidence for another purpose is not raised.[56] The offer must be to prove facts,[57] and an offer of an answer to a question must be responsive to the question.[58] An offer is ineffectual if there are no means of proof at hand.[59]

The foregoing rules, however, are not without exception.[60]

point out irrelevant portion. Metz v. Willitts, 14 Wyo. 511, 85 P. 380. Where part of answer is responsive, general motion to strike out the answer is too broad. Pittsburg, etc., R. Co. v. Collins [Ind.] 80 N. E. 415. Motion to strike out several instruments as an entirety is properly overruled where any one is admissible. Hoodless v. Jernigan [Fla.] 41 So. 194. Motion to strike out or request for instruction to disregard evidence is too broad where any of the evidence covered by the motion on request is admissible. Porter v. Buckley [C. C. A.] 147 F. 140. Where opinion evidence is based partly on knowledge of facts and partly on hearsay evidence, motion to strike out the evidence is too broad. Colorado Farm & Live Stock Co. v. York [Colo.] 88 P. 181.

50. Motion for directed verdict based on insufficiency of evidence must point out wherein evidence is insufficient. Hanson v. Lindstrom [N. D.] 108 N. W. 798. In suit on a note defendant could not contend for first time on appeal that proof of ownership was not sufficient without explanation of plaintiff's indorsement on the note, where when note was introduced in evidence he objected only on the ground that complaint which set out the note did not state a cause of action. Gumaer v. Jackson [Colo.] 86 P. 885. In action by employe for injuries caused by defective machinery, requested instruction for directed verdict in favor of defendant preserves question as one of law whether there is any evidence fairly tending to show that plaintiff knew or had equal opportunity with appellant of knowing of defects. Elgin, etc., R. Co. v. Myers, 226 Ill. 358, 80 N. E. 897. Objection on account of irrelevancy goes only to admissibility, and not to weight or sufficiency. Metz v. Willitts, 14 Wyo. 511, 85 P. 380.

51. See 6 C. L. 1410.

52. Evansville & Princeton Trac. Co. v. Broermann [Ind. App.] 80 N. E. 972. Expected answer must be stated. Dunbar v. Central Vermont R. Co. [Vt.] 65 A. 528; Pond v. Pond's Estate [Vt.] 65 A. 97; Bowden v. Bowden, 125 Ga. 107, 53 S. E. 606; Thomas v. Robinson, 29 Ky. L. R. 769, 96 S. W. 459; Louisville & M. R. Co. v. Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130; Brusseau v. Lower Brick Co. [Iowa] 110 N. W. 577; International Harvester Co. v. McKeever [S. D.] 109 N. W. 642; Baines v. Coos Bay, etc., Co. [Or.] 89 P. 371; Hager v. Donovan [Kan.] 88 P. 637; First Nat. Bank v. Carroll [Mont.] 88 P. 1012; Southern R. Co. v. Lester [C. C. A.] 151 F. 573. Offer to show pecuniary condition of plaintiff in assault case at time of assault too general when it did not appear whether plaintiff expected to prove whether he was rich or poor. McQuiggan v. Ladd [Vt.] 64 A. 503.

53. Purpose must be shown so as to show relevancy. Canada-Atlantic & Plant S. S. Co. v. Flanders [C. C. A.] 145 F. 875. Exclusion of incompetent testimony of isolated fact is not error in absence of offer to show its competency by the introduction of other evidence. Pier v. Speer [N. J. Err. & App.] 64 A. 161. An appellant, suing for services rendered which were to be paid for when certain sums were realized, cannot contend on appeal that a certain chancery record should have been received to show that such sums were not realized until within the statutory period of limitations before commencing suit, where the offer was general and it was not stated that it would show that specific fact. Boogher v. Roach, 25 App. D. C. 324. Where the court, in stopping a proposed line of inquiry, is under a misapprehension as to the purpose of inquiry, it is the duty of counsel to correct him by a statement of the questions desired to be asked or of the particular facts to be inquired about. Pickford v. Talbott, 28 App. D. C. 498.

54. Where a part of the evidence objected to is competent for another purpose, the offerer should separate the same and make an offer of proof. City of Chicago v. Saldman, 225 Ill. 625, 80 N. E. 349.

55. Unrestricted offer in behalf of all of defendants of evidence admissible as to only part of them will not sustain objection to its exclusion. Evans v. Scott [Tex. Civ. App.] 16 Tex. Ct. Rep. 885, 97 S. W. 116.

56. Offer to prove that title was not in plaintiff did not include offer to prove title in defendant. Sanford v. Millikin, 144 Mich. 311, 13 Det. Leg. N. 171, 107 N. W. 884.

57. Offer to prove insolvency is an offer to prove a conclusion, and is properly rejected on objection to its competency, relevancy, and materiality, being made. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558.

58. Tinkle v. Wallace [Ind.] 79 N. E. 355. Where answer of witness so far as it had proceeded was not responsive, objection to its exclusion was unavailable in absence of any showing as to what rest of answer would be. Packham v. Glendmeyer, 103 Md. 416, 63 A. 1048.

59. Rose v. Doe [Cal. App.] 89 P. 135.

60. Where after excluding a contract sued on as void the court allows plaintiff to amend his complaint but in so doing declares that the amendment does not alter its construction of the contract, plaintiff need not offer the contract a second time in order to base error on its exclusion. Mebius & Drescher Co. v. Mills [Cal.] 88

To instructions.[61]—An objection to an instruction as a whole will not reach particular defects therein,[62] nor will an objection to instructions in gross raise any question for review where some of the instructions were proper.[63]

To report of referees, etc.[64]—Objections to reports of referees must be specific.[65]

§ 9. *Sufficiency of exception.*[66]—An exception must point out specifically the error complained of,[67] must contain within themselves sufficient to show that the excepting party was aggrieved,[68] must be brought to the attention of the court and the opposing counsel,[69] and should not be in gross.[70]

An objection is not an exception,[71] but under some circumstances may be treated as such.[72]

P. 917. Failure to formally state what answer a witness was expected to make to an excluded question does not preclude a review where that fact was apparent from the previous questions and where the court excluded it on the same ground as the previous ones. Robinson v. Old Colony St. R. Co., 189 Mass. 594, 76 N. E. 190.

61. See 4 C. L. 1395.

62. General objection to instruction as to measure of damages will not reach error in including item not supported by evidence. Ft. Smith Light & Trac. Co. v. Carr [Ark.] 93 S. W. 990; Roberts-Johnson & Rand Shoe Co. v. Westinghouse Elec. & Mfg. Co. [C. C. A.] 143 F. 218. General objection to instruction as a whole held not to raise question that it erroneously imposed upon plaintiff the burden of showing notice to defendant of plaintiff's rights. Frazier v. Poindexter [Ark.] 95 S. W. 464. General objection to a charge on damages including a number of elements is not sufficient to raise the specific objection that it allows the infant to recover for loss of time because of the injury before maturity which compensation belonged to the parent. McDermott v. Severe, 202 U. S. 600, 50 Law. Ed. 1162.

63. Kansas City Southern R. Co. v. Belknap [Ark.] 98 S. W. 366; Lindblom v. Fallet [C. C. A.] 145 F. 805.

64. See 6 C. L. 1410.

65. Kirby's Dig. §§ 6336, 6340. Walworth v. Birch [Ark.] 98 S. W. 717.

66. See 6 C. L. 1411.

67. Porter v. Buckley [C. C. A.] 147 F. 140; Montana Min. Co. v. St. Louis Min. & Mill. Co. [C. C. A.] 147 F. 897; Ex parte Miley, 73 S. C. 325, 53 S. E. 535. When tested by mere general exception a **pleading** will be liberally construed. Exception to answer because it pleaded damages which were too remote is general. Gorham v. Dallas, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 365, 95 S. W. 551. General exception to ruling, granting appellee leave "to plead to the merits within twenty four hours upon payment of all costs," which does not point out whether objection is to substance of ruling, time granted, or condition imposed is insufficient. Brown v. Savings Bank, 28 App. D. C. 351. Exception that it was too late to obtain relief sought goes only to time of filing petition and raises no question as to sufficiency of the allegations. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. Grounds of exception to admission of **evidence** must be stated. Matthews v. Targarona [Md.] 65 A. 60; Bussey v. Charleston & W. C. R. Co. [S. C.] 55 S. E. 163. Grounds of exception to exclusion of evidence must be stated. Hutchins v. Langley, 27 App. D. C. 234. Exception to rejection of evidence must show definitely what the evidence was that was offered, and is insufficient where it does not show which of several offers was intended to be presented to the court. Pier v. Speer [N. J. Err. & App.] 64 A. 161. Where appellant excepted to the refusal of the master to admit evidence as follows, setting out questions and answers which did not appear in the master's report, the admissibility of such evidence is not reviewable. Young v. Winkley, 191 Mass. 570, 78 N. E. 377. Where one wishes a master to report rejected evidence offered so as to review the ruling thereon, he must limit his request to the particular evidence and not ask generally that evidence relating to the issue be reported. Id. Credibility not raised by exception to admissibility or competency or to allowance of amendment. Trafton v. Osgood [N. H.] 65 A. 397. Exception to asking witness to produce receipt not sufficient where no exception was filed to testimony of witness or introduction of receipt. Gerting v. Wells, 103 Md. 624, 64 A. 298, 433. Exception must be taken to the particular question eliciting the objectionable testimony. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945.

68. Lenfest v. Robbins, 101 Me. 176, 63 A. 729.

69. Where remarks of counsel are replied to in kind and exceptions thereto are taken without the knowledge of the offending counsel, they do not constitute a ground for a new trial. St. Louis S. W. R. Co. v. Granger [Tex Civ. App.] 100 S. W. 987.

70. General exception to a number of different rulings on a motion to reform pleading is unavailing unless all rulings are erroneous. Avery Mfg. Co. v. Lambertson [Kan.] 86 P. 456. Exception to overruling of separate demurrer to each paragraph of complaint is not exception in gross. Bessler v. Laughlin [Ind.] 79 N. E. 1033, rvg. [Ind. App.] 77 N. E. 1047; City of Decatur v. McKean [Ind.] 78 N. E. 982; Whitesell v. Strikler [Ind.] 78 N. E. 845. Where several persons act separately but present but a single paper to the court and the court by a single action rules against all, the exceptions thereto as recorded by the clerk should be liberally construed so as to afford an appropriate exception to each exceptor. Id.

71. Eppstein v. Missouri Pac. R. Co., 197 Mo. 720, 94 S. W. 967.

72. Where parties in superior court treated objections before master as exceptions, appellate court will so regard them

To instructions.[73]—Exceptions to instructions must designate the particular instruction or part thereof excepted to [74] and must state the grounds of exception.[75] On the other hand exceptions should not be taken to disconnected fragments of the charge.[76] It is sufficient, however, if the court understands the exception, though not in best form,[77] and an error appearing on the face of the record will be reviewed though exceptions to instructions be in gross.[78] Nor is it necessary to state the grounds of an exception to a distinct proposition of law contained in an instruction;[79] but it must designate the portion excepted to either by a recital of the language or the substance of such portion.[80]

The same general rules apply to exceptions to the refusal of instructions.[81]

To the findings and judgment.[82]—A general exception to the findings [83] or the

although there is no order making objections exceptions. Otis v. Cottage Grove Mfg. Co., 121 Ill. App. 233.

73. See 6 C. L. 1411.

74. An exception to instructions in gross cannot be sustained if any of the instructions are correct. Jones v. Hoadley, 101 N. Y. S. 470; McDermott v. Severe, 25 App. D. C. 276; Zitske v. Grohn, 128 Wis. 159, 107 N. W. 20; Moore v. Lanier [Fla.] 42 So. 462; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; Hasse v. Herring [Colo.] 85 P. 629; Kansas City Southern R. Co. v. Morris [Ark.] 98 S. W. 363; Walnut Ridge Mercantile Co. v. Cohn [Ark.] 96 S. W. 413. Exception to instructions held to be in gross. Alexander v. Beekman Lumber Co. [Ark.] 95 S. W. 449; Montana Min. Co. v. St. Louis Min. & Mill. Co. [C C. A.] 147 F. 897; Foote v. Kelley, 126 Ga. 799, 55 S. E. 1045; Inland Steel Co. v. Smith [Ind.] 80 N. E. 538; Gibney v. Everson [Mass.] 77 N. E. 1155. Held doubtful whether numerous instructions were properly excepted to for failure to state the issues more clearly. Wallace v. Skinner [Wyo.] 88 P. 221. Ground in motion for new trial that court erred in giving five instructions referred to by number held in gross and unsustainable, at least one being correct. Wade v. Goza [Ark.] 96 S. W. 388. Where on plaintiff requesting a particular charge the court replies that it has so charged, it is equivalent to giving such charge though it had not in fact been given, and the exception of defendant, "I except to the charge" refers to the particular charge and not to the main charge. Schechwitz v. New York City R. Co., 103 N. Y. S. 781. Exception to "whatever court said" on certain subject in oral charge held insufficient. People v. Waters, 100 N. Y. S. 177.

Held sufficient: Several exception to each instruction orally taken is sufficient under the act of March 9, 1903, to bring such instructions up for review. Baltimore & O. S. R. Co. v. Kleespies [Ind. App.] 78 N. E. 252. A general exception to a series of instructions by number severally and to each and every one of them is sufficiently specific. Snyder v. Stribling [Okl.] 89 P. 222.

75. Township Com'rs of St. Andrews Parish v. Charleston Min. & Mfg. Co. [S. C.] 57 S. E. 201; Tucker v. Southern R. Co., [S. C.] 55 S. E. 154; Coney Island Co. v. Dennan [C. C. A.] 149 F. 687. Exception "for errors in the charge" held too general. Davis v. Wall, 142 N. C. 450, 55 S. E. 350. An exception to "your honor's instructions as to the measure of damages" is insufficient. Rowe v. Whatcom County R. & L. Co. [Wash.] 87 P. 921. Exception "to the failure to charge as requested, in so far as there may have been an omission to charge as requested and to the charge as given upon these points on those general requests" held too general to be noticed. White v. Lumiere North American Co. [Vt.] 64 A. 1121.

76. Indiana Fruit Co. v. Sandlin, 125 Ga. 222, 54 S. E. 65.

77. When court in refusing an instruction said there was nothing in case to justify it, an exception to the charge "as given in respect to said requests" was equivalent to an exception to the refusal to instruct upon such subject. Sias v. Consolidated Lighting Co. [Vt.] 64 A. 1104.

78. Error in instruction arising from construction of a contract set out in bill of exceptions. Alexander v. Beekman Lumber Co. [Ark.] 95 S. W. 449.

79. Smith v. Atlantic City R. Co. [N. J. Err. & App.] 65 A. 1000; Jansen v. Goerke Co. [N. J. Law.] 65 A. 856; Van Blarcom v. Central R. Co. [N. J. Err. & App.] 64 A. 111; Spears v. Du. Rant [S. C.] 56 S. E. 652.

80. Exception to "charge to the jury on the question of damages" held insufficient. Smith v. Atlantic City R. Co. [N J. Err. & App.] 65 A. 1000. Exception "to that portion of the court's charge which defines the effect of the automobile act of 1903" held too indefinite where court laid down numerous propositions as flowing from such act. Addis v. Rushmore [N. J. Err. & App.] 65 A. 1036.

81. Exception to refusal to give several instructions in gross cannot be sustained if any of the requests are bad. Kansas City Southern R. Co. v. Belknap [Ark.] 98 S. W. 366; Kansas City Southern R. Co. v. Morris [Ark.] 98 S. W. 363. When part of charge requested as whole was erroneous. Galveston, etc., R. Co. v. Still [Tex. Civ. App.] 100 S. W. 176. General exception to refusal to give any of several instructions is insufficient. McCabe & Steen Const. Co. v. Wilson [Okl.] 87 P. 320. Ruling on each instruction will be considered although bill of exceptions does not recite that they were separately requested where it appears that they were separately considered and marked "refused." Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034.

82. See 6 C. L. 1412.

83. Webb v. National Bank of Republic [C. C. A.] 146 F. 717.

Held sufficiently specific; exception on ground that finding was not within pleadings, was not supported by competent evidence, and was based on inadmissible ex-

judgment [84] is insufficient. Exceptions to the denial of a motion for a judgment on the general findings of fact and law on a trial without a jury present only the question whether the ruling was correct upon the whole evidence, aided by all the inferences which a jury would have been justified in drawing.[85] An exception to the report of a master [86] must be specific [87] and must set out the evidence necessary to the determination of the question involved.[88] An exception to a decree confirming such a report must likewise be specific.[89]

§ 10. *Waiver of objections and exceptions taken.*[90]—Objections and exceptions taken may be waived by withdrawal,[91] by failure to comply with statutory formalities,[92] by failure to take advantage of an opportunity to correct the error,[93] by compliance with ruling,[94] by failure to invoke a ruling on the objection or exception,[95] by answering over [96] and going to trial on the merits,[97] by the introduction of

hibit, held sufficient. Kossuth County Bank v. Richardson [Iowa] 106 N. W. 923. A ground for a new trial that "said decision is not justified by the evidence and is contrary to law" is sufficient to raise question as sufficiency of findings of fact. Nye v. Karlow, 98 Minn. 81, 107 N. W. 733. Under Ballinger's Ann. Codes & St. § 5055, providing that exceptions may be taken by a party by stating to the court when the ruling is made that he excepts to the same an exception to the court's finding of the amount of interest due on a note as follows: "Because the evidence is insufficient to support the finding and the same is contrary to the evidence," is sufficient to raise the question of the proper rate of interest the note bears after maturity. Bank v. Doherty, 42 Wash, 317, 84 P. 872. Exception to the verdict as contrary to the law is sufficient without specifying that it is contrary to the charge or to specified portion thereof. Bowden v. Bowden 125 Ga. 107, 53 S. E. 606.

84. Under Act May 11, 1901, P. L. 185, relating to appeals in settlement cases of municipal officers, exception to the judgment does not bring case up for review on either merits or for review of findings of fact and conclusions of law. Dunmore Borough School Dist. v. Wahlers, 28 Pa. Super Ct. 35.

85. Weight of evidence not presented. Delaware, etc., R. Co. v. Kutter [C. C. A.] 147 F. 51.

86. Where no objections to the draft of a master's report are filed and the exceptions to the report are not allowed by special order, chancery rule 31 is not complied with and nothing is saved for review. Huntress v. Handley [Mass.] 80 N. E. 946.

87. First Nat. Bank v. Trigg Co. [Va.] 56 S. E. 158; Brown v. Rogers [S. C.] 56 S. E. 680.

General exceptions held sufficient where report was on single fact. Thorn v. Thorn, 28 App. D. C. 120.

88. Certain amended exceptions held defective for referring to evidence not set out and not pointing out the place in the record where the evidence might be found. Moss v. Chappell, 126 Ga. 196, 54 S. E. 968.

89. Where decree confirmed report generally with certain exceptions, and a search of the record would have been necessary to ascertain which exceptions were sustained and which overruled. Baxter v. Camp [Ga.] 54 S. E. 1036.

90. See 6 C. L. 1413.

91. Cross complaint striken on motion but restored by consent. Hughes Bros. v. Hoover [Cal. App.] 84 P. 681. Where a party to consolidate causes withdraws his exceptions to an auditor's report, another party who has not taken an exception cannot complain. Gilbert v. Endowment Ass'n, 21 App. D. C. 344.

92. Under U. S. 939, failure to ask master to state his decision in admitting or rejecting evidence is waiver of the objection. Allen's Adm'rs v. Allen's Adm'rs [Vt.] 64 A. 1110.

93. Failure to reoffer evidence after such change of ruling as waived have let it in. Zeller v. Leiter, 99 N. Y. S. 624; St. Louis & S. F. R. Co. v. Conrad [Tex. Civ. App.] 99 S. W. 209.

94. Amendment of plaintiff's pleading in conformity to court's holding on measure of damages held waiver of any error in such holding. Carle v. Oklahoma Woolen Mills, 16 Okl. 515, 86 P. 66.

95. Phillips v. Hazen [Iowa] 109 N. W. 1096. See ante, § 5, Necessity of Motion or Request; ante, § 6, Necessity of Ruling. An objection taken under advisement is waived if it is not thereafter renewed by a request for a ruling. Stitt v. Rat Portage Lumber Co., 98 Minn. 52, 107 N. W. 824. Exceptions to depositions are waived by failure to bring them to the attention of the trial court so as to obtain a ruling thereon. Fulton v. Messenger [W. Va.] 56 S. E. 830.

96. Answering after motion to strike amended petition for departure will be treated on appeal as waiving the departure where there is nothing to show that motion was overruled or an exception taken. Walker v. Wabash R. Co., 193 Mo. 453, 92 S. W. 83. Although defendant answers after the overruling of demurrer, sufficiency of complaint may be considered on appeal where motion in arrest of judgment is made on that ground. Clifford v. St. Louis Transit Co. [Mo.] 101 S. W. 44.

97. But see Woodward & Woodward v. Tri-State Mill. Co., 142 N. C. 100, 55 S. E. 70, where it was held that proceeding with trial after overruling of motion to dismiss on special appearance does not waive objection. A defendant who proceeds with the trial waives right to urge error in the overruling of his motion for a nonsuit. Newell v. National Advertising Co. [Colo.] 89 P. 792. Going to trial after overruling of demurrer and motion to strike answer without again raising the point. Puritan Mfg. v. The

evidence,[98] by requested instructions,[99] and by failure to report the objection.[1] A

Emporium, 130 Iowa, 526, 107 N. W. 428. Where exception of no cause of action is tried with merits without objection on the part of defendant who obtains judgment on merits and no ruling is made on the exception, the exception will be considered waived where no amendment is asked by him on appeal. Doullut v. Smith, 117 La. 491, 41 So. 913. Objection to jurisdiction of court to convene at a certain place is not waived by going to trial, as where district court convened at place other than county seat to try contested election case involving trial of questions of fact. Bell v. Jarvis, 98 Minn. 109, 107 N. W. 547. Where a change of venue is refused for want of power, an objection to such ruling is not waived by insisting upon the court's passing upon merits of the application. Sanders v. German Fire Ins. Co., 126 Wis. 172, 105 N. W. 787.

98. Introducing evidence after refusal to take case from jury at close of plaintiff's evidence waives objection to refusal. Johnson v. Johnson [Md.] 65 A. 918; Riggs v. Turnbull [Md.] 66 A. 13; Williams & Davisson Co. v. Ferguson Cont. Co. [W. Va.] 55 S. E. 1011; Grooms v. Neff Harness Co. [Ark.] 96 S. W. 135; Nashville R. & L. Co. v. Henderson [Tenn.] 99 S. W. 700. Introducing evidence after reservation of ruling on motion for nonsuit for variance. Franklin v. Burris [Colo.] 84 P. 809. Objections and exceptions to evidence are waived by proof of same facts by one's own witnesses. Southern R. Co. v. Blanford's Adm'x, 105 Va. 373, 54 S. E. 1. Where over objection one who presented a note as a claim against an estate was permitted to testify as to its execution, etc., the fact that a partial payment on the part of decedent was brought out on cross-examination did not waive the right to object to the holder testifying as to such payment in an action against the surviving maker and the executor of the comaker. Crow v. Crow [Mo. App.] 100 S. W. 1123. Refusal to consider stipulation as proof of contested fact, though excepted to, cannot be assigned as error where both parties introduce evidence as to such fact and no objection or exception is taken to either such evidence or instructions pertaining thereto. Logan County Bank v. Beyer [Okl.] 87 P. 607.

Not waived: Objections to evidence are not waived by introduction of evidence to meet that erroneously admitted. Kelsey v. Continental Casualty Co. [Iowa] 108 N. W. 221; Metropolitan St. R. Co. v. Walsh, 197 Mo. 392, 94 S. W. 860. One does not waive an exception to exclusion of evidence by introducing other evidence of the same matters though court had rule that only one expert could testify on a side. Party did not waive exception to exclusion of testimony of deceased expert by introducing another expert. Wallach v. Manhattan El. R. Co., 105 App. Div. 422, 94 N. Y. S. 574. Where a certified transcript of a deed is erroneously excluded on the ground that the certificate of acknowledgment was insufficient and the offerer duly excepts, he does not lose the benefit of his exception by offering one of the grantors who testifies that she was not before the certifying officer. Middlebrooks v. Stephens [Ala.] 41 So. 735.

99. Where the defendant moves for a peremptory instruction of "not guilty," and, when this is overruled, submits instructions on the negligence of the plaintiff as a question of fact, he cannot afterwards insist that the plaintiff was negligent, as a matter of law. Chicago Union Traction Co. v. O'Donnell, 113 Ill. App. 259. Objections to the theory adopted by instructions are not waived by subsequently requesting an instruction based on the same theory but intended merely to present the case to the jury in the most favorable light possible under the theory adopted by the court. Trotter v. St. Louis & S. R. Co. [Mo. App.] 99 S. W. 508.

1. See ante, § 5, Necessity of Motion or Request. Failure to object to similar **evidence** subsequently offered. Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164. But see contra, Bjorkegren v. Kirk, 103 N. Y. S. 994. Rights of party who has taken proper exceptions to the admission of evidence are not lost by failing to except to charge submitting it to jury. Pierson v. Boston El. R. Co., 191 Mass. 223, 77 N. E. 769. While failure to move for a dismissal admits that there is evidence to go to the jury, it does not admit its admissibility and hence does not waive an objection and exception saved thereto. Bjorkegren v. Kirk, 103 N. Y. S. 994. An objection to question being overruled and exception taken, objection need not be renewed when question is renewed. Louisville & N. R. Co. v. Williamson, 29 Ky. L. R. 1165, 96 S. W. 1130. Objection to refusal to direct verdict at close of plaintiff's evidence waived by failure to report at close of all evidence, defendant having introduced evidence. Nashville R. & L. Co. v. Henderson [Tenn.] 99 S. W. 700; Spencer v. State, 187 N. Y. 484, 80 N. E. 375. Failure to object to an **instruction** is not a waiver of objection and exception to a former similar instruction. Baltimore & O. R. Co. v. Lee [Va.] 55 S. E. 1. The benefit of exceptions to instructions may be lost by failure to move for a new trial or to except to the verdict or judgment, and where there was no motion for a new trial and no exception to the verdict or judgment, exceptions to instructions will not be considered where it does not appear that the verdict was controlled by the instructions excepted to. Cox v. Macon R. & L. Co., 126 Ga. 398, 55 S. E. 232. Where party duly objected and excepted to ruling allowing too many peremptory challenges, he does not waive the error by failing to move to discharge the **jury** and by accepting it without objection. Pendley v. Illinois Cent. R. Co., 28 Ky. L. R. 1324, 92 S. W. 1. Objections to **remarks of counsel** need not be repeated when the remarks are repeated. Baxter v. Krainik, 126 Wis. 421, 105 N. W. 803.

Failure to repeat in motion for new trial objections and exceptions saved on the trial constitutes a waiver thereof. Chicago City R. Co. v. Smith, 226 Ill. 178, 80 N. E. 716; Spaulding v. Edina [Mo. App.] 97 S. W. 545; Hatfield v. Adams, 29 Ky. L. R. 880, 96 S. W. 583; Stainback v. Henderson [Ark.] 95 S. W. 786. Failure to repeat objection to evidence conditionally admitted waives objection. Henry v. Frohlichstein [Ala.] 43 So. 126.

waiver of a demurrer to a complaint precludes a consideration of its sufficiency,[2] but does not admit the sufficiency of the facts proven.[3] Exceptions to exclusion of evidence are not waived by an admission that the evidence, after such exclusion, is insufficient to establish the issue.[4]

SAVINGS BANKS; SCANDAL AND IMPERTINENCE; SCHOOL LANDS, see latest topical index.

SCHOOLS AND EDUCATION.

§ 1. **The School System in General (1851).**
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§ 11. **Actions and Litigation (1868).**
§ 12. **Libraries, Reading Rooms, and Other Auxiliary Educational Institutions (1869).**
§ 13. **Private Schools (1869).**

§ 1. *The school system in general.*[5]—The Texas system of community schools was not repealed by the act of 1905 providing for a free school system for such counties as did not elect to continue under the former.[6]

§ 2. *Right, privilege, and duty of attendance.*[7]—A statute requiring attendance of children "between and including" the ages of seven and fifteen years does not apply to children who have passed the fifteenth year.[8] Under the New Hampshire compulsory attendance law, a person living at a distance from a school unreasonable for a child to walk is not required to convey children under his care to school either at his own expense or for a sum thought reasonable by the school board.[9]

Separate schools for races.[10]—The right of inhabitants of African descent, in Missouri, to the establishment of a separate school for their race as disclosed by a mere de facto officer's enumeration is not defeated by a subsequent, adverse, fraudulent, and collusive one taken by an officer de jure.[11] The Kentucky statute relating to the separation of the races in schools is a valid exercise of the police power in so far as it prohibits the maintenance of institutions for the joint instruction of white and negro pupils,[12] but in so far as it provides that private institutions may

2. Demurrer to complaint having been interposed and waived, sufficiency of complaint cannot be tested on appeal notwithstanding Ballinger's Ann. Codes & St. § 4911, providing that an objection that a complaint does not state a cause of action may be made at any stage of the proceedings. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849.

3. And if such facts are no broader than a complaint which is insufficient, the objection may be raised by motion to dismiss or for nonsuit. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849.

4. Kaess v. Tivoli Brewing Co. [Mich.] 111 N. W. 106.

5. See 6 C. L. 1415.

6. Lowrance v. Schwab [Tex. Civ. App.] 101 S. W. 840.

7. See 6 C. L. 1417.

8. Jackson v. Mason, 145 Mich. 338, 13 Det. Leg. N. 469, 108 N. W. 697.

9. State v. Hall [N. H.] 64 A. 1102.

10. See 6 C. L. 1418.

11. State v. Cartwright [Mo. App.] 99 S. W. 48.

12. Berea College v. Com., 29 Ky. L. R. 284, 94 S. W. 623. Does not violate the Bill

maintain distinct branches in a different locality "not less than twenty-five miles distant" for the education exclusively of one race or color, it is an unreasonable distance requirement.[13] Such invalid provision is, however, separable.[14] Whether children have been excluded from one school room and assigned to another on account of their color, in violation of statute is, on conflicting evidence, a jury question in mandamus to compel their admission to the room from which they were excluded.[15]

Vaccination of pupils.[16]—Statutes excluding unvaccinated children from the schools are generally held valid,[17] and enforceable regardless of the nonprevalence of smallpox in a particular locality, notwithstanding another section of the statute includes in its prohibitive features adults as well as children, vaccinated or not, where smallpox prevails.[18] In Pennsylvania the school directors have concurrent power with the boards of health of cities of the third class to make and enforce regulations to prevent the introduction and spread of contagious and infectious diseases.[19] The wrongful refusal of a school committee to admit unvaccinated children to the schools of Massachusetts does not render the town civilly liable therefor.[20]

Duty to furnish school facilities.[21]—A statute requiring under penalty the furnishing of adequate and suitable facilities, does not require transportation to be furnished for children living remote from the school.[22] In the absence of statute [23] there is no duty to furnish such transportation,[24] nor does a power to levy taxes for necessary school expenses authorize a tax for that purpose.[25] Removal into a school district must be primarily for the purpose of obtaining free school privilege to warrant a charge for tuition.[26] Mandamus and not injunction is the remedy for refusing admittance to a public school because of the failure of a pupil to comply with an alleged illegal requirement.[27]

of Rights which guaranties to all citizens the right of enjoying and defending their liberty (Id.), the right of worshipping Almighty God according to the dictates of their own conscience (Id.), the right of seeking and pursuing their safety and happiness (Id.), the right of freely communicating their thoughts and opinions (Id.), the right of acquiring and protecting property (Id.), and the right to freely and fully speak, write, and print on any subject, being responsible for the abuse thereof (Id.). Nor the 14th amendment to the Federal constitution guarantying the equal protection of the laws and prohibiting any state from depriving any citizen of the United States of his property, life, or liberty, without due process of law. Id.

13, 14. Berea College v. Com., 29 Ky. L. R. 284, 94 S. W. 623.

15. Taylor v. Entriken, 214 Pa. 303, 63 A. 606.

16. See 4 C. L. 1402.

17. Stull v. Reber [Pa.] 64 A. 419. The policy of the state of Ohio as to encouraging education and enforcing attendance at school of children of school age does not render invalid a rule requiring vaccination for smallpox as a condition of admission to the public schools. State v. Barberton Board of Education, 7 Ohio C. C. (N. S.) 608. The Pennsylvania act is not invalid as special legislation (Stull v. Reber [Pa.] 64 A. 419), nor repugnant to the constitutional provision requiring the maintenance of public schools where all children above six years of age may receive an education (Id.), nor as involving in its application trespass on the reserved rights of the individual beyond the reach of the police power from the fact that vaccination is the infliction of disease on the subject (Id.).

18. Stull v. Reber [Pa.] 64 A. 419.

19. City of Allentown v. Wagner, 214 Pa. 210, 63 A. 697.

20. Hammond v. Hyde Park [Mass.] 80 N. E. 650.

21. See 6 C. L. 1418.

22. Board of Education of Frelinghuysen Tp. v. Atwood [N. J. Err. & App.] 65 A. 999.

23. School trustees in Indiana are not required by any statute prior to the act of 1907 to provide free transportation of pupils to and from school. State v. Jackson [Ind.] 81 N. E. 62.

24. State v. Jackson [Ind.] 81 N. E. 62. Nor does the fact that such transportation had been furnished by the predecessor of a trustee, sought to be compelled to furnish the same, affect the respondent's legal right. Id.

25. State v. Jackson [Ind.] 81 N. E. 62.

26. State v. Selleck [Neb.] 107 N. W. 1022. State officers residing at the capital held entitled to send their children to school there without payment of tuition, notwithstanding their retention of a legal residence elsewhere. Id.

27. McCaskill v. Bower, 126 Ga. 341, 54 S. E. 942. The mere allegation by a parent that the officers of a public school have passed an illegal regulation, which if enforced would work injury on his child, does not entitle him to injunction against the officers (Id.), but he must show injury or at least that injury is threatened (Id.).

Change of text books.—A change of text books cannot be validly made under the Iowa statutes unless the question is submitted to the electors on the order of the board of directors,[28] nor can the board acting individually confer on its secretary authority to submit the question.[29] An illegal change of text books when merely threatened will not be restrained, but the remedy is to await such illegal action and bring mandamus to compel admission of children who do not comply with the change.[30]

§ 3. *School districts, sites, and schools.*[31] *Formation, alteration, consolidation, and dissolution of districts.*[32]—Under the Kentucky statute providing for the establishment of graded school districts, the county court is without jurisdiction in the creation thereof to take in any part of a common school district unless the proposition is approved in writing on the petition therefor by a majority of its trustees,[33] and when such district has been established without their approval and railroad taxes collected on account of the new district, the common school district injured thereby has a cause of action for its proportion thereof, to have ascertained and determined the boundary between the two districts, and to compel the entry by the county superintendent of the boundary on his books and certification thereof to the railroads affected.[34] In the matter of establishing or refusing to establish a school district, the duties of the county superintendent, in Kentucky, are statutory [35] and purely administrative,[36] and in performing them he cannot be made to observe the personal interests of any individual or class but must look alone to the public interest.[37] Hence the act is not effected until so entered on the public official record as to notify the public that it is done.[38] A school district cannot be validly established by collusive proceeding in which the court, through the imposition of the parties, is led to issue a mandate requiring the assumed officers of the district to perform their duties.[39] A mere conditional promise of an officer whose administrative duty it is to establish new school districts cannot be made the basis of a claim that a district has been validly established when the statutory requisites for its establishment do not exist.[40] The legality of the organization of a school district cannot be collaterally attacked.[41] When a district has existed and been recognized for a long period of time, the notice required by law as a prerequisite to a valid organization will be presumed,[42] and also that the report of reviewers was filed at a term preceding that at which it was confirmed as required by statute.[43] The power to divide or consolidate districts authorizes the creation of a new district by so dividing the territory of an existing district as to create a new district out of a part of the territory of the old district.[44] A petition by two-thirds of the legal voters of territory to be formed into a new district by dividing an existing one gives jurisdiction under the Illinois statute

28. McNees v. School Tp. [Iowa] 110 N. W. 325.

29. McNees v. School Tp. [Iowa] 110 N. W. 325. Notice of submission of question given by secretary held invalid. Id.

30. Harley v. Lindemann [Wis.] 109 N. W. 570.

31. See 6 C. L. 1418.

32. See 6 C. L. 1419.

33, 34. Board of Education of Kuttawa Common School v. Eddyville Graded School Trustees, 30 Ky. L. R. 839, 99 S. W. 905.

35, 36, 37. Mouser v. Spaulding, 29 Ky. L. R. 1071, 96 S. W. 882.

38. Mouser v. Spaulding, 29 Ky. L. R. 1071, 96 S. W. 882. Evidence held insufficient to show establishment of new district. Id.

39. Judgment in mandamus proceeding establishing district held void. Mouser v. Spaulding, 29 Ky. L. R. 1071, 96 S. W. 882.

40. As when neither the new district nor the one from which the territory to constitute it was to be detached would have contained the number of pupils necessary to compose a district as required by the school law. Mouser v. Spaulding, 29 Ky. L. R. 1071, 96 S. W. 882.

41. School Dist. No. 21 v. Fremont County Com'rs [Wyo.] 86 P. 24.

42. Lapse of about fifty years. White Independent School District, 31 Pa. Super. Ct. 205.

43. White Independent School District, 31 Pa. Super. Ct. 205.

44, 45. Bourland v. Snyder, 224 Ill. 478, 79 N. E. 568.

to create the new district.[45] A court will not exercise its discretion to interfere with the setting aside of the organization of a school district the result of which would be to work an injustice.[46] While prior to the Nebraska act of 1879, providing for the issuing and payment of school district bonds, territory detached from a school district, which was indebted, might be held equitably liable to such district for its proportionate share of the debt,[47] such liability could not be enforced at the suit of the judgment creditor except on allegation and proof that there was insufficient property remaining in the original district liable to pay the existing debt.[48] When territory is detached from a school district, its liability for the debts of the district is determined by the laws then in force[49] and cannot be increased by subsequent legislation.[50] When assented to by the districts interested, the bonded indebtedness of a district from which a new one is formed may lawfully be assumed by the new district in consideration of the surrender to it of its undue proportion of real estate and school houses belonging to the old district.[51] A statute abolishing school districts generally must be read in connection with a prior statute continuing abolished districts so far as may be necessary for the enforcement of their rights and liabilities.[52] Where school districts have been abolished and their property vested in towns and an assessment of a tax provided as the only means of enforcing their liabilities, the school property formerly in the abolished districts cannot be reached by creditors,[53] nor does any liability of the town arise by implication, the statute providing only for voluntary assumption of their liabilities by towns.[54]

Establishment of high schools.[55]—Where a school district bound to furnish high school facilities votes to pay tuition so long as its pupils attending a high school continue attendance there, at the time of voting to contract with an academy for high school instruction, a parent's cause of action for tuition paid for continued attendance of his child at the high school does not depend on the validity of the vote.[56]

Sites.[57]—The Washington statute providing for the calling of a special meeting of voters to determine whether the district shall purchase a school house site does not require that polls shall be kept open for any particular time.[58] Hence a notice of such meeting is not invalidated by omitting to state the hours during which the polls will be kept open.[59] In Iowa the local boards of education have the right to select a new location for a school building on account of material changes in the conditions which led to the rejection of sites previously chosen,[60] and their finding that such changes have taken place casts the burden on one seeking to impeach their action.[61] The power of a board to adopt a site and award the contract for a building cannot be delegated,[62] and acts under a delegation cannot be sustained because they may in the future be ratified.[63] In Iowa the remedy of one aggrieved by the relocation of a school house site is by appeal and not injunction.[64]

§ 4. *Organization, meetings, and officers.*[65]—The Alabama statute of 1901

46. Certiorari denied where result would be to have three poor districts instead of two good ones. School Board of Dist. No. 5 v. Hamilton Tp. [Mich.] 13 Det. Leg. N. 795, 109 N. W. 664.

47, 48. Monahan v. Adams County [Neb.] 110 N. W. 860, afd. on rehearing [Neb.] 111 N. W. 800.

49, 50. Manahan v. Adams County [Neb.] 111 N. W. 800, afg. on rehearing [Neb.] 110 N. W. 860.

51. Everson Borough, 31 Pa. Super. Ct. 170.

52, 53, 54. In re Abolishing of School Districts, 27 R. I. 598, 65 A. 302.

55. See 4 C. L. 1404.

56. Burbank v. School Dist. of Pembroke [N. H.] 64 A. 17.

57. See 6 C. L. 1421.

58, 59. Regan v. School Dist. No. 25 [Wash.] 87 P. 828.

60, 61. Doubet v. Taylor County Directors [Iowa] 111 N. W. 326.

62, 63, 64. Kinney v. Howard [Iowa] 110 N. W. 282.

65. See 6 C. L. 1422.

changing the corporate name of the school commissioners of a township to that of trustees is valid.[66] The Oregon Code of Civil Procedure relating to service of notices does not apply to notices of school meetings,[67] and as the posting of such notices is a duty devolving on the clerk of the school board, an entry by him in the record of the time and place where posted is sufficient proof of posting in the absence of any statute requiring proof to be made in a particular manner.[68] Notice of meetings in substantial accord with statutory requirements is sufficient.[69] Ordinarily the question whether notice of a meeting was given is a question of fact.[70] The notice of a meeting must definitely fix the place,[71] and give the requisite information as to the business to be transacted.[72]

The board of education of Greater New York may, for the good of the service and in the interest of economy, abolish an unnecessary position or transfer the person holding it to another position.[73] Nor is a resolution formally abolishing the position,[74] nor a preferment of charges against the incumbent,[75] essential to the exercise of the power. A resident elector of a city and property owner and taxpayer therein having children who are pupils in its public schools may, in Wisconsin, in the name of the state, maintain ouster proceeedings against persons claiming title to the offices of board of school directors.[76] The Wisconsin law of 1905 placing the general management of schools of cities of the first class under the general management and control of a board of school directors is not invalid as special legislation[77] nor as an improper classification of cities,[78] but inasmuch as it confers on the circuit judges of the district wherein such cities are located the power to appoint the directors, it is repugnant to the constitutional provision requiring city officers to be elected or appointed by the authorities thereof.[79] The rule that the due performance of official duty will be presumed applies.[80] While ministerial duties of a board are delegable, an act to be done involving judgment or discretion is not.[81] Under a statute requiring a school board to carry into effect any instructions from an annual meeting of electors on matters within the control of the voters, when the board has determined on the erection of a school house and procured the vote of the annual meeting in favor of it, pursuant to law, the vote and not the record of it is binding on the district.[82] When no record of the proceedings of a school

66. Courtner v. Etheredge [Ala.] 43 So. 368. It is sufficient as to title (Id.), and, the act being intelligible without reference to the original act (Id.), is not violative of the constitutional provision forbidding revisions, amendments, or extensions of laws by reference to their titles only (Id.).

67, 68. Amort v. School Dist. No. 80 [Or.] 87 P. 761.

69. Notice held sufficient under apparently conflicting Iowa statutes. Calahan v. Handsaker [Iowa] 111 N. W. 22.

70. Testimony of the clerk of a school board who keeps the records that all the members were present at a particular meeting except one and that he had been notified by mail three days previously is sufficient to sustain a finding that all the members were notified. Schmitz v. Special School Dist. [Ark.] 95 S. W. 438.

71. Where there were two school houses in a district, a notice that a meeting would be held at the school house was defective. State v. Green [Wis.] 111 N. W. 519.

72. Notice of proposal to adopt and ratify provisions of general charter relating to schools which had been adopted by city council held insufficient as notice of proposal to change school system. State v. Green [Wis.] 111 N. W. 519.

73. Transfer of auditor of board of education to position of accountant in bureau of buildings at less salary held valid. People v. Board of Education of New York, 99 N. Y. S. 737.

74, 75. People v. Board of Education of New York, 99 N. Y. S. 737.

76, 77, 78, 79. State v. Lindemann [Wis.] 111 N. W. 214.

80. Proof that notices were left with teachers with directions to read to pupils and post on school house door held sufficient to show posting thereof on the doors. Calahan v. Handsaker [Iowa] 111 N. W. 22. Where the statute required secretary of school board to certify amount of school tax voted at an elector's annual meeting to county board of supervisors, it will be presumed that he complied. Kinney v. Howard [Iowa] 110 N. W. 282. Where the minutes of a school board affirmatively show that its meetings were held pursuant to its rules, the presumption is that they were so called and held. American Foundry & Furnace Co. v. Board of Education of Berlin [Wis.] 110 N. W. 403.

81, 82, 83. Kinney v. Howard [Iowa] 110 N. W. 282.

board is made, it may be proved by parol.[83] Records of school boards are not required to be conventionally or formally expressed when they show the action in fact taken.[84]

Selection of officers.[85]—The election of a superintendent whose term of office is to begin after the annual election of members of the committee electing him, in violation of a statute requiring the election to be at the first regular meeting succeeding the annual election of members of the committee, is void,[86] and a custom universally observed of electing the superintendent at any time during the year at the discretion of the committee does not validate it.[87] While one not receiving an appointment as clerk of a school district at a regular or special meeting of the board is not the clerk de jure,[88] yet, where the board for several years recognize him as clerk and adopt and profit by his official acts and knowingly permit others to deal with him as a legal officer, he is thereby constituted a de facto officer [89] and his acts will be deemed to have been authorized by the board.[90] Under the Nebraska statute giving the decisions of the state superintendent on disputed questions the force of law until reversed, his decision in favor of a claimant to a school office by virtue of election thereto, though erroneous, constitutes the claimant a de facto officer in the interim.[91] Where, by reason of changes in the law, officers cease to have a right to perform the functions of their office, they are nevertheless de facto officers.[92] Hence mandamus lies to compel them to turn over official documents and property held by them.[93] In some states the failure of trustees elect to qualify within a specified time entitles the county superintendent to fill the position by appointment.[94] The rule that title to office cannot be tried in injunction proceedings applies.[95]

Qualification of officers.[96]—The section of the Mississippi Code making ineligible as a trustee any one who is a trustee of a private or sectarian school or college in the same separate school district is not retroactive.[97]

Tenure of office.[98]

Salaries.[99]—The title of the Michigan statute creating a law department for the city of Detroit is sufficient to require the corporation counsel appointed thereunder to serve the city's board of education without other compensation than therein provided,[1] and though serving the board as to litigation to which the board could not of its own volition become a party nor be made a party thereto against its will, the corporation counsel is limited to the compensation provided by the act.[2] The

84. Record held to show decision of board to propose to electors voting of a school house tax to erect building costing not more than $800. Kinney v. Howard [Iowa] 110 N. W. 282.

85. See 6 C. L. 1424.

86, 87. In re School Committee of Pawtucket, 27 R. I. 596, 65 A. 301.

88, 89. State v. Cartwright [Mo. App.] 99 S. W. 48.

90. State v. Cartwright [Mo. App.] 99 S. W. 48. An enumeration of school population taken and filed with the county clerk by a de facto clerk whose acts had been recognized by the school board for several years as official is binding on the district, though he is not an officer de jure. Id.

91. Bishop v. Fuller [Neb.] 110 N. W. 715.

92, 93. State v. Green [Wis.] 111 N. W. 519.

94. Where the failure of a trustee-elect to qualify before the county superintendent or file a certificate of having qualified before another officer on or before a specified date gives the superintendent power to appoint a trustee in lieu of the defaulting trustee-elect, the fact that the latter has applied at the office of the superintendent and found him absent affords no excuse for not qualifying within the time limited. Smith v. Ritchie, 30 Ky. L. R. 339, 98 S. W. 330. Hence the appointee of the superintendent made after the time limit has expired, in which the trustee-elect must qualify, has title to the office over the claims of the latter based on a subsequent qualification. Id.

95. The title to the office of moderator in a school district cannot be determined in an injunction suit. School Dist. No. 77 v. Cowgill [Neb.] 107 N. W. 584.

96. See 6 C. L. 1424.

97. Tucker v. State [Miss.] 42 So. 798.

98. See 6 C. L. 1424.

99. See 6 C. L. 1425.

1, 2. Tarsney v. Board of Education of Detroit [Mich.] 13 Det. Leg. N. 1021, 110 N. W. 1093.

salaries of janitors of Greater New York are determined by the board of education under the Greater New York charter and not by the labor law.[3]

Bonds.—The New York school law requiring bonds of town supervisors covering school moneys that may come into his hands from any source to be sued by the county treasurer does not apply to bonds given under the town law.[4]

Supervisory control of officers.—Trustees of school boards, though elected by common councils of civil cities, are not "officers and employes of the government of" a civil city within the Indiana statute giving city councils power to investigate the acts of such officers and employes,[5] nor are such boards "corporations" within the provision that the council may investigate the affairs of any corporation in which it may be interested.[6]

Offenses by officers.—An indictment of a school director for being interested in a contract for the sale of supplies to his district, under the Pennsylvania statute, is within the rule making it sufficient to charge substantially in the language of the statute creating the offense,[7] in the absence of application for a bill of particulars,[8] and as the gravamen of the offense is the being unlawfully interested in the contract,[9] an indictment therefor is not bad for duplicity merely because it charges defendant with being unlawfully interested in contracts for sales to more than one school house in his district.[10] A contract between a school director as an individual or as a member of a firm, and the school district, for the sale of supplies or materials by the former to the latter, is within the statute,[11] nor is a corrupt or dishonest intent or unfairness in the price charged or contracted for the supplies or materials an essential element of the offense.[12] An ambiguous receipt given by a teacher to a school director charged with having received a bribe from the teacher is within the rule permitting parol evidence in explanation of receipts.[13]

§ 5. *Property and contracts.*[14]—An exemption of school districts from taxation does not exempt them from special assessments.[15] When a city of a lower grade is raised to one of the fourth class, in Kentucky, a board of education created after the change is entitled to possession of the school property therein as against the trustees of a former graded school district.[16]

School lands.[17]—It is held in Illinois that title to land of a school district may be acquired by adverse possession on the theory that it is not "public property" within the rule exempting the state and its municipalities from the operation of the statutes of limitation.[18] The New Jersey statute enabling Atlantic City to purchase lands, the income of which is required by the constitution to be used for support of the free schools, is valid.[19] When school lands are by congress granted to a state to be held, appropriated, and disposed of for the purpose expressed in the

3. Farrell v. Board of Education of New York, 113 App. Div. 405, 98 N. Y. S. 1046.
4. Palmer v. Roods, 101 N. Y. S. 186.
5, 6. Agar v. Pagin [Ind. App.] 79 N. E. 379.
7. Commonwealth v. Miller, 31 Pa. Super. Ct. 309. It need not aver specifically the kind of supplies and materials to be furnished under the contract (Id.), nor the price or prices agreed on and other particulars (Id.).
8, 9, 10, 11. Commonwealth v. Miller, 31 Pa. Super. Ct. 309.
12. Charge in indictment that defendant was "corruptly" interested in the contract held surplusage. Commonwealth v. Miller, 31 Pa. Super. Ct. 309.
13. Evidence held admissible to show that receipt meant $23. Commonwealth v. Miller, 31 Pa. Super. Ct. 317.
14. See 6 C. L. 1425.
15. In re Howard Avenue [Wash.] 86 P. 1117.
16. Under Ky. St. 1903, §§ 3588-3606. Trustees of Latonia Graded School Dist. v. Board of Education of Latonia, 29 Ky. L. R. 391, 93 S. W. 590.
17. See 6 C. L. 1425. See, also, Public Lands, 8 C. L. 1486.
18. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579.
19. Since it requires the city to pay according to the schedule fixed for all purchasers, it is not repugnant to the constitutional provision adverted to in the text. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081.

grant, in such manner as the legislature of the state may provide, the legislature must act in subordination to the constitution of the state.[20] Hence, when that instrument has constituted the lands an endowment, an act of the legislature providing for the pledge of the proceeds of sales, leases, and licenses to cut timber on the lands as security for the payment of bonds issued for the erection of school buildings is void.[21] A school district empowered to borrow money and mortgage the real property of the district therefor may mortgage all or part of the property as deemed advisable by the school board.[22]

Validity of contracts in general.[23]—School officers may make such contracts as are essential to the exercise of their granted powers [24] and within the scope of their legal interests.[25] Valid statutory authority is essential to the borrowing of money,[26] but failure to observe formal statutory requirements rendering a note for money borrowed, and used by it unenforceable at law affords no ground for enjoining its payment at the suit of taxpayers.[27]

Manner of contracting.—A majority of a board acting independently of each other and not as a board, where not authorized by the board to act in the premises, cannot by signing a contract bind the board,[28] but such contract is not so far contrary to public policy [29] or fraudulent [30] as to be incapable of ratification, and as in other cases ratification thereof may be express [31] or implied.[32] The rule that contracts will be construed as understood and acted on by the parties applies,[33] as does the rule that no formal writing is required to take a contract out of the statute of frauds when required thereby to be in writing.[34] In Iowa the board of directors cannot contract for the purchase of text books without previously advertising for bids and adopting those for which contract of purchase is made.[35] Usually an award of a contract for school supplies must be made to the lowest responsible bidder,[36] but his responsibility cannot be determined without giving him notice and an opportunity to be heard.[37] On certiorari by the lowest bidder to review the action of a board for failure to obey a law requiring an award of a contract for supplies to the lowest responsible bidder, the burden is on the board to show its reason for passing over petitioner [38] or any other bidder whose bid is lower than that of the bidder

20, 21. State of Montana v. Rice, 27 S. Ct. 281.

22. Schmutz v. Special School Dist. [Ark.] 95 S. W. 438.

23. See 6 C. L. 1426. See, also, Public Contracts, 8 C. L. 1473.

24. It is competent for a school board as a preliminary step to the submission of a proposition for the erection of a building to prepare and submit plans and specifications for the proposed building. School Dist. of South Omaha v. Davis [Neb.] 107 N. W. 842.

25. The board of education of the city of Detroit has no power to contract for legal services in litigation to which the state is a party and the board as such has no interest, though it involves school fund revenue. Tarsney v. Board of Education of Detroit [Mich.] 13 Det. Leg. N. 1021, 110 N. W. 1093.

26. The Ohio statute purporting to state the requisites of a valid loan being made by a board of education has been held to be invalid. Rev. St. 2834b, held void for nonuniformity. Bower v. Board of Education of Fulton Tp., 8 Ohio C. C. (N. S.) 305.

27. Bower v. Board of Education of Fulton Tp., 8 Ohio C. C. (N. S.) 305.

28, 29, 30. Richards v. School Tp. [Iowa] 109 N. W. 1093.

31. Resolution of board agreeing to take and pay for mathematical blocks held a ratification of otherwise unenforceable contract. Richards v. School Tp. [Iowa] 109 N. W. 1093.

32. Retention and use of mathematical blocks by board for six years and failure to tender back before suit for price held ratification of otherwise unenforceable contract. Richards v. School Tp. [Iowa] 109 N. W. 1093.

33. Contract between school board and its architect. School Dist. of South Omaha v. Davis [Neb.] 107 N. W. 842.

34. A resolution of a school board instructing an architect to prepare plans, the presentation of the plans at a later date to the board, and the record and adoption of the same, and the approval and allowance of bills therefor, bring the contract within the statute requiring it to be in writing. School District of South Omaha v. Davis [Neb.] 107 N. W. 842.

35. McNees v. School Tp. [Iowa] 110 N. W. 325.

36, 37, 38, 39, 40. Jacobson v. Board of Education [N. J. Law] 64 A. 609.

who was awarded the contract,[39] and, when its award of a contract is set aside, costs should be awarded against it.[40]

Contractors' bonds.[41]—In Washington notice to a school board that materials have been furnished to a contractor of school work is essential to the right of a materialman having knowledge of the existence of the bond to recover thereon,[42] and the burden is on him to show that he had no knowledge of its existence, as an excuse for failure to give notice.[43]

Contracts for text books, etc.[44]—In South Carolina the state board of education is authorized to contract with publishers of text books for the maintenance of a central wholesale depository from which its agencies and county depositories may be supplied at a discount.[45] When the execution of a bond by a publisher of text books is by statute required as a prerequisite to the adoption of such publisher's books for use in the schools, the bond is supported by a sufficient consideration,[46] and such bonds being for the protection of the public, sureties cannot avail of execution before the wrong officer as a defense.[47] A bond to sell books at as low a price as elsewhere is broken by a contract to sell at a lower price in another state [48] books substantially the same,[49] nor is the prevalence of different conditions an excuse for failure to comply with the statute.[50] Several actions in different counties for different breaches of such bonds may be prosecuted at the same time prior to the rendition of a valid [51] judgment in one of them. A surety on such bond is not necessarily liable for breaches of the principal's contract prior to the execution of the bond,[53] and when the bond does not even by implication provide for liability for violations of the school laws prior to its execution, no such liability can be enforced,[54] but the usual rules of suretyship apply.[55] That books speedily became dilapidated is not sufficient to show breach of a bond to secure quality, but reasonable usage of the books must be shown.[56] Where the only remedy given by statute for the breach of a contract for furnishing text books is the collection of a penalty, a statute repealing the act but continuing all existing contracts executed under the old law leaves the penalty enforceable.[57]

Ratification of action of officers.[58]—The rule that a corporate authority may ratify and confirm any act or contract in its behalf or for its benefit which it might have lawfully done or made originally applies,[59] but after ratification of a contract by a majority vote of the board, with a full attendance, the rule that the action of a majority will not bind the district unless other members have been notified of the meeting or participate therein does not apply.[60] Acts of school boards beyond the power conferred on them by the legislature, but within the power of the legislature to confer may be validated by curative statutes when no vested or contract rights have intervened.[61]

41. See 4 C. L. 1408. Bonds of text book contractors, see post, this section.

42, 43. Crane Co. v. Aetna Indemnity Co. [Wash.] 86 P. 849.

44. See 4 C. L. 1407.

45. Duncan v. State Board of Education, 74 S. C. 560, 54 S. E. 760.

46. Graziani v. Burton [Ky.] 97 S. W. 800.

47. Reid v. Com., 29 Ky. L. R. 672, 94 S. W. 641.

48. Actual sales not necessary. Graziani v. Burton [Ky.] 97 S. W. 800.

49. Graziani v. Burton [Ky.] 97 S. W. 800.

50. Johnson Pub. Co. v. Com., 30 Ky. L. R. 148, 97 S. W. 749.

51. Prior collusive judgment held no bar to such action. Johnson Pub. Co. v. Com., 30 Ky. L. R. 148, 97 S. W. 749.

52. Johnson Pub. Co. v. Com., 30 Ky. L. R. 148, 97 S. W. 749.

53, 54, 55. Graziani v. Com. [Ky.] 97 S. W. 409.

56, 57. Rand, McNally & Co. v. Turner, 29 Ky. L. R. 696, 94 S. W. 643.

58. See 6 C. L. 1426.

59, 60. Bishop v. Fuller [Neb.] 110 N. W. 715.

61. Ratification of loan on real estate held not violative of constitutional inhibition of legislation impairing obligation of contracts or destruction of remedy for enforcement thereof. Courtner v. Ethredge [Ala.] 43 So. 368.

§ 6. *Funds, revenues, and taxes.*[62]—The Tennessee act of 1897 to provide for the collection and disbursement of public school funds is valid,[63] and under it the school fund does not go into the county treasury.[64] It cannot be appropriated by the county authorities for any purpose,[65] nor is it subject to the warrant of the chairman of the county court,[66] and it is the only law of the state authorizing a suit in relation to the school fund[67] or authorizing counsel fees to be paid out of them.[68] Under that statute the state superintendent of public instruction is authorized to employ counsel to recover and collect school funds illegally disbursed[69] and to maintain actions in general in relation to school matters,[70] but on his refusal to act the school districts affected and their citizens, taxpayers, and scholastic population can maintain such action.[71] Where an attorney is employed to bring a suit in relation to the school fund by a body having no authority to make an express contract therefor, he can retain no part of a fee paid him for the services under an implied contract,[72] especially when the only officer having authority in the premises has no knowledge of the suit for the prosecution of which the attorney was illegally employed.[73]

Debt limit.[74]—Cities operating under special charters in Wisconsin have been relieved from the limitations of their charters as to the amount for which they may become indebted for the erection of high schools.[75] The question whether the indebtedness incurred in the building of a school house exceeds the limit allowed by law on the taxable property of the district for such purpose is to be determined from the assessment and not the minutes of the school meeting,[76] hence the failure of the record of the school meeting to disclose the fact is immaterial.[77]

Tuition and incidental fees.[78]—A school receiving pupils may maintain a suit in its own name for tuition under a statute giving a right of action therefor without prescribing who shall enforce its provisions.[79]

Levy and collection of taxes.[80]—A school district is a municipality to which the taxing power may be delegated.[81] A district indebted to the constitutional limit may nevertheless levy taxes for any lawful purpose within the limits fixed by the laws governing it.[82]

The provision of the Louisiana constitution requiring a voter to be a taxpayer not only at the date of election but for the previous year does not apply to elections

62. See 6 C. L. 1427.

63. It is sufficient as to title. State v. True [Tenn.] 95 S. W. 1028.

64. State v. True [Tenn.] 95 S. W. 1028.

65. State v. True [Tenn.] 95 S. W. 1028. The public school funds in the hands of the trustees of counties are not property of the counties and their authorized agents have no control over them. Id.

66, 67. State v. True [Tenn.] 95 S. W. 1028.

68. State v. True [Tenn.] 95 S. W. 1028. The quarterly court of a county has no power to employ counsel and procure a suit to be brought to prevent a misappropriation of the public school funds in the hands of the trustee of the county. Id.

69. Acts 1897, p. 163, c. 36. State v. True [Tenn.] 95 S. W. 1028. The unauthorized employment of an attorney under an unlawful agreement as to his fee and its illegal payment out of the public school funds make out a case remediable under the Tennessee statute authorizing the state superintendent of public instruction to employ counsel to recover and collect such funds. Id.

70. State v. True [Tenn.] 95 S. W. 1028.

71. Contention that refusal of state superintendent to bring action authorized county court to employ counsel to do so held untenable. State v. True [Tenn.] 95 S. W. 1028.

72, 73. State v. True [Tenn.] 95 S. W. 1028.

74. See 6 C. L. 1428.

75. Revision 1898. Hall v. Madison, 128 Wis. 132, 107 N. W. 31.

76, 77. Amort v. School Dist. No. 80 [Or.] 87 P. 761.

78. See 6 C. L. 1428.

79. Ricker Classical Institute v. Mapleton, 101 Me. 553, 64 A. 948.

80. See 6 C. L. 1428.

81. The North Carolina private act of 1905, creating a graded school district to include the town of Robersonville, is valid. Smith v. Robersonville Graded School Trustees, 141 N. C. 143, 53 S. E. 524.

82. Otherwise it would be deprived of the only means provided by law by which it could pay its debts or defray its current expenses. People v. Chicago & T. R. Co., 223 Ill. 448, 79 N. E. 151.

for voting in aid of public schools,[83] but such elections are governed by the provisions making a majority in numbers and value controlling,[84] and though the latter contemplates that the voter shall be a property taxpayer at the date of the election, which can be shown only by an assessment,[85] where no assessment has been made for the current year, the assessment for the previous year must govern,[86] but when the assessment for the current year has been made, it necessarily determines who are taxpayers and the values to be voted,[87] nor do the statutory provisions relating to general elections apply in that state,[88] but the failure of property taxpayers voting at a special election to impose a tax for a school to specify on their ballots the property they wish to have counted as a part of their votes is fatal to the validity of the election,[89] nor are voting precincts in that state authorized to impose school taxes by special election.[90] While a levy of taxes by a school district for building purposes is illegal in Illinois unless the building has first been authorized by a vote of the people of the district, a vote authorizing the erection of a new building carries with it authority to levy taxes for the installation of a heating plant therein as part of the new building.[91] An election to vote on a proposition to levy a school tax, as well as a levy predicated thereon, is void under the Texas statutes unless the vote is for a specific tax.[92] The validity of an election under the North Carolina private act of 1905, creating a graded school district to include the town of Robersonville, does not depend on there having been a new registration of election.[93] Personal opportunity to participate in the proceedings which result in the imposition of a tax or to participate in the election of the officers levying the same is not essential to the liability of any particular taxpayer therefor in the absence of statute or constitutional provision giving him such right.[94] When the authority of a school board to levy a tax is derived from a vote at a preceding annual meeting, it is immaterial as affecting the liability of property on which it is assessed for the payment of the same whether the certification thereof was prior or subsequent to the incorporation of the property into the district.[95] In Iowa women are permitted to vote on a proposal to levy a tax for building a school house,[96] but save for sex they must have the same qualifications as men.[97] A statute requiring a voter to designate his vote on a proposal to levy a tax by writing the word "Yes" or "No" in an appropriate place on the ballot is directory only.[98] Mistakes of officials and not of electors in the conduct of an election will not defeat an election fairly held unless prejudice is shown,[99] especially where the ballots were prepared by officials of the school town-

83, 84, 85, 86, 87. Flores v. Police Jury of De Soto Parish, 116 La. 428, 40 So. 785.

88. The commissioners and clerk of a special election for the purpose of voting on a proposition to levy a special tax in aid of the construction of a school house and the support of public schools need not be appointed from lists furnished by opposing parties or factions as required in general elections. Flores v. Police Jury of De Soto Parish, 116 La. 428, 40 So. 785.

89. Regard v. Police Jury of Avoyelles, 117 La. 952, 42 So. 438.

90. Constitution authorizing special elections to be held in any parish, municipal corporation, ward, or school district held not to include voting precinct. Regard v. Police Jury of Avoyelles, 117 La. 952, 42 So. 438.

91. St. Louis, etc., R. Co. v. People, 224 Ill. 155, 79 N. E. 664.

92. Lowrance v. Schwab [Tex. Civ. App.] 101 S. W. 840.

93. Since it directs that elections thereunder shall be conducted according to the laws governing cities and towns (Smith v. Robersonville Graded School Trustees, 141 N. C. 143, 53 S. E. 524), and since those laws do not require new registrations (Id.).

94. Grout v. Illingworth [Iowa] 108 N. W. 528. A taxpayer's opportunity to participate in election of members of school board is not essential to that authority of the board to certify a tax which shall become enforceable against his property. Id. Where a tax is authorized by the vote of the electors of a district, the fact that one whose property is assessed for the payment of the tax was not a resident of the district at the time the tax was voted does not relieve his property from liability for its payment. Id.

95. Grout v. Illingworth [Iowa] 108 N. W. 528.

96. Kinney v. Howard [Iowa] 110 N. W. 282.

97. Kinney v. Howard [Iowa] 110 N. W. 282. Vote of woman under twenty-one yeare of age held illegal. Id.

98, 99. Kinney v. Howard [Iowa] 110 N. W. 282.

ship and the mistake was theirs and not the mistake of the electors, none of who were shown to have been misled thereby.[1] In Iowa notice to electors of a proposal to vote a tax for building a school house when posted by the board's secretary in at least five public places for not less than ten days next preceding the day of the annual meeting of electors, was sufficient even prior to the repeal of the section of the Code requiring notices to be posted at the door of each school house and also at or near the last meeting place.[2] Residence as affecting the right to vote depends on the testimony not only as to residence but also as to intent.[3] It is true equally as to contests of elections to impose school taxes as to other election contests that courts of equity have not inherently and had not at common law jurisdiction to try them.[4] In Texas, when cities constituting independent school districts have voted to be under the control of a board of trustees rather than the city council, the trustees are vested with the absolute control and management of the schools therein,[5] and, when requisition is made by them on the council to levy a tax determined upon by them, the council cannot refuse to make the levy.[6] Under the California statutes relating to high schools it has been held that no vote of the district is necessary to authorize the levy of a tax for the purchase of a site,[7] that the levy of a tax for the construction and maintenance thereof before the acquirement of a suitable lot is valid,[8] that when a levy made is inadequate, a further levy may be made on a new additional estimate being filed with the board of supervisors of the county,[9] and that such statutes are not controlled by those relating to the common schools.[10] While a levy at the maximum rate in Illinois requires the use of the state board of equalization valuation in computation, a levy at less than the maximum requires a computation and extension of the tax on the valuation fixed by the county board of review of the general property and the corporate properties as assessed by the state board of equalization.[11] Certificates of levy of taxes by members of the board of education being amendable under the Illinois revenue act, the fact that they are not signed by a majority of the members of the board of education is not conclusive that they were not made and the tax levied by the acts and authority of the board,[12] and the requirement that they state that the levy was made either for educational or building purposes may be waived.[13] The estate of an infant is not liable for school taxes in a district wherein neither the infant nor his curator resides or has resided since their levy.[14] The Georgia statute of 1905 providing for the creation and operation of local tax district schools is valid [15] except as to those provisions of the act which authorize the im-

1. Kinney v. Howard [Iowa] 110 N. W. 282. Where notices were posted directing the manner of voting on a proposal to levy a tax by marking crosses in squares after the printed words "Yes" and "No," following the custom prevailing at the general elections, the fact that the statute required electors to write the words "Yes" or "No" in an appropriate place on the ballot would not invalidate the election. Id.

2. Kinney v. Howard [Iowa] 110 N. W. 282.

3. Kinney v. Howard [Iowa] 110 N. W. 282. Vote of nonresident held illegal. Id. Voters held not to have changed their residence so as to make them nonresidents within the meaning of the law. Id.

4. Patterson v. Knapp [Ky.] 101 S. W. 379.

5, 6. City Council of City of Crockett v. Independent School Dist. Trustees [Tex. Civ. App.] 17 Tex. Ct. Rep. 252, 98 S. W. 889.

7, 8, 9, 10. Bancroft v. Randall [Cal. App.] 87 P. 805.

11. St. Louis, etc., R. Co. v. People, 225 Ill. 418, 80 N. E. 303.

12. Shriver v. McGregor, 224 Ill. 397, 79 N. E. 706.

13. Stipulation that the money derived from a levy certified to be for paying principal and interest on bonded indebtedness was used for the purpose of erecting school buildings in the district held waiver of requirement. St. Louis, etc., R. Co. v. People, 225 Ill. 418, 80 N. E. 303.

14. State v. Hamilton [Mo.] 100 S. W. 609. Neither the residence of the deceased parents of an infant in a particular school district at the time of their decease (Id.), nor the fact that the infant resided with them at the time (Id.), nor that he was thereafter returned by the taxing officer of the district as a taxpayer therein, is determinative of his liability to pay the taxes assessed against him therein (Id.).

15. The title is sufficient. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725.

position of an ad valorem tax only on property of taxpayers required by law to make return of their property to the county tax receiver,[16] and railroad property, though not specially mentioned in the act, is subject to the tax authorized thereby[17] in the assessment of which, by the county authorities, resort may be had to the returns made by the railroads affected to the comptroller general,[18] even though the act confers no express authority so to do,[19] or in the event such roads are in default with respect to their returns, the assessment laid on their property by the comptroller general may likewise be looked to and used by the county authorities in the collection of the tax,[20] and the tax collector is authorized to issue execution in the enforcement of the tax,[21] but the act is not retrospective in its operation.[22] The fact that a school district is organized subsequently to the date on which personalty is required to be listed for taxation does not render a levy made after its organization invalid as to personalty within the territory comprising the district at all times from and after the date it was required to be listed for taxation and which was not subjected to school taxes for that year in any other district.[23] Substantial compliance with statute authorizing the levy of a special tax for school purposes suffices to validate the proceedings,[24] especially when official action has been taken predicated on a compliance with the statute.[25] One objecting to a levy as informal has the burden of showing the informality.[26] A body claiming to act as a board of education only under a law which has been repealed cannot constitute a de facto board under an existing law so as to make their acts in levying taxes binding on the taxpayers.[27] On repeal of a special charter of a city and its reincorporation under a general law, a levy of taxes for school purposes thereafter made must conform to the general law on the subject,[28] nor can an amendment of an estimate be made to conform to a certificate required by an existing law when made by a body acting as a board of education only under a law that had been repealed.[29] It is within the power of a school district, under the Nebraska statute, by its electors and officers, to procure the opening of a road and to pay therefor by levying a tax for that purpose,[30] and neither the necessity therefor[31] nor the propriety of allowances made to property owners in the assessment of damages can be inquired into collaterally.[32]

In a proceeding to quiet title to land predicated on the invalidity of a sale thereof for taxes levied by a school district, no inquiry can be made into the qualifications of a de facto election board who officiated at the election pursuant to which the tax was levied.[33] Under the statutes of Wyoming the board of county com-

16. Such provisions are invalid for repugnancy to the constitutional requirement of uniformity. Brown v. Southern R. Co., 125 Ga. 772, 54 S. E. 729.

17, 18. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725.

19. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725. The county authorities may obtain a certified copy of such returns from the comptroller general on demand. Id.

20, 21. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725.

22. County in which it became effective by an election subsequent to its taking effect on August 23, 1905, held not entitled to levy and collect a tax thereunder for 1905. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725.

23. Atchison, etc., R. Co. v. School Dist. No. 99 [Kan.] 89 P. 1018.

24. Levy made Sept. 21, held sufficient under statute requiring it to be made Sept. 1. Bancroft v. Randall [Cal. App.] 87 P. 805.

25. In the absence of requirement for any particular form of estimate by school trustees or detailed information, a contention that a purported estimate is not an estimate in fact, but a mere letter without seal or other authentication and is but the conclusions of the so called secretary, is untenable when it has been acted on by the body whose duty it was to act thereon (Bancroft v. Randall [Cal. App.] 87 P. 805), nor is it necessary that all the trustees should attach their names to it (Id.).

26. People v. Chicago & T. R. Co., 223 Ill. 448, 79 N. E. 151.

27. People v. Welsh, 225 Ill. 364, 80 N. E. 313.

28, 29. Levy of school tax of city of Rockford for 1905 held void. People v. Welsh, 225 Ill. 364, 80 N. E. 313.

30, 31, 32. Brockway v. Louisa County Sup'rs [Iowa] 110 N. W. 844.

33. Brasch v. Western Tie & Timber Co. [Ark.] 97 S. W. 445.

missioners has not sufficient interest in taxes voted by a school district to enable it to maintain injunction to restrain the county treasurer from paying taxes over to the district.[34] When school trustees act in the exercise of their duties merely in furnishing estimates of taxes which are to be levied by another body, injunction does not lie at the suit of a taxpayer to prevent them from acting even under a void election.[35] The averment of a bill to enjoin the levy of a special assessment for the erection of a school building that the trustees do not now, and never did, own any lot does not meet the contingency that they may have made provision for a lot.[36]

School bonds.[37]—It is held in Arkansas that a school district is not a municipality within the constitutional inhibition that no county, city, town, or municipality shall issue any interest bearing evidence of indebtedness.[38] A school district empowered to borrow money and issue evidences of indebtedness therefor has power to issue negotiable bonds with interest coupons attached.[39] Inhabitants of contiguous territory attached to a city for school purposes are not entitled to vote on the question of bonding a city to build a school house.[40] The issue of bonds to build a school house is a school matter on which women are entitled to vote in Wisconsin.[41] Spinsters who are taxpayers in a school district,[42] and widows who are such, or have children within school age, are in Kentucky entitled to vote on the question of taxing the district for school purposes.[43] Proceedings for election on bond issue need not specify the term or interest rate of the bonds when the statute fixes them,[44] nor show the amount further than that it is within the debt limit.[45] Canvass and return of votes at a school district election by the county commission are not required in Kentucky.[46] A ballot used at a district meeting referring to previous notices and resolutions on same subject-matter must be construed in connection therewith.[47] Hence a ballot omitting to state the limit of a proposed indebtedness is sufficient when the limit is disclosed in the notices and resolutions.[48] Mere discussion of consolidation of subdistricts without official action thereon does not warrant the assumption that a resolution submitting the question of raising funds for the building of a central school house did not truly express the purpose of the board so as to warrant a court of equity in declaring illegal action in favor of the building proposition at an annual meeting of electors and enjoining the issuance of bonds.[49]

Orders and warrants for payment of claims.[50]—It is held in Oregon that a board authorized to incur an indebtedness for the erection of a school building is not required to advertise at one time for subscriptions for the entire amount of the indebtedness.[51]

Apportionment of funds.[52]—The South Carolina act of 1904, denying to counties voting out dispensaries any portion of the surplus remaining of the dispensary school fund after the deficiency in the various school funds have been made up as required by law, is to that extent inconsistent with the principle of apportionment contemplated by the constitution and therefore void,[53] but the apportionment provision being separable from the rest of the act does not cause the whole act to fall.[54]

34. School Dist. No. 21 v. Fremont County Com'rs [Wyo.] 86 P. 24.

35. Morse v. Jacky [Mont.] 85 P. 882.

36. Bancroft v. Randall [Cal. App.] 87 P. 805.

37. See 6 C. L. 1429. See, also, Municipal Bonds, 8 C. L. 1046.

38, 39. Schmutz v. Special School Dist. [Ark.] 95 S. W. 438.

40, 41. Hall v. Madison, 128 Wis. 132, 107 N. W. 31.

42, 43, 44, 45. Arbuckle v. McKinney [Ky.] 97 S. W. 408.

46. Under Ky. St. 1903, §§ 4460, 4481. Arbuckle v. McKinney [Ky.] 97 S. W. 408.

47, 48, 49. Calahan v. Handsaker [Iowa] 111 N. W. 22.

50. See 6 C. L. 1430.

51. Amort v. School Dist. No. 80 [Or.] 87 P. 761.

52. See 6 C. L. 1430.

53, 54. Murphy v. Landrum [S. C.] 56 S. E. 850.

Appropriations.—In Kentucky the legislature is authorized to make appropriations for the benefit of the state normal schools without submitting the question to the voters.[55]

§ 7. *Teachers and instruction.*[56] *Contracts of employment.*[57]—When the employment of a teacher is within the power of the trustees of the district, their ratification of an invalid appointment binds the district.[58] A teacher's contract signed by another for her by her authority is valid.[59] Where a teacher's contract is entered into at a trustee's meeting, a subsequent statement of one of the trustees at the meeting not embodied in the contract or recorded in the minutes as to the time the school shall begin is no part of the contract,[60] and her failure to begin the school on the date specified in the contract because of a flood preventing her reaching the school house for three days after the school was due to begin did not authorize the employment of another teacher.[61] The Alabama act of 1903, giving the county board of education authority in certain cases to employ teachers, has no application to a district in which a school was established before its passage.[62] One holding a valid contract to teach a school may, as against another claiming to have a contract to teach the same school, maintain injunction to prevent interference with or molestation of him by the latter,[63] but, unless the validity of the plaintiff's contract is established, he is not entitled to injunction,[64] nor will injunction lie to restrain a teacher from teaching a school which she has been put in possession of by and under contract with de facto officers.[65]

Dismissal, suspension, and reassignment.[66]—A school board with general powers as to the employment of teachers may require a stipulation for dismissal in contracts of employment,[67] and notice of dismissal of a teacher may be given before the school begins under a contract providing for dismissal on a specified notice.[68] A teacher voluntarily resigning on becoming married[69] has no right to reinstatement merely because a regulation requiring resignations in such cases is subsequently declared illegal.[70] Where a contract for teaching recites that the teacher is, but does not require him to be, the holder of a license of a specified grade, it is not ground for rescission that prior to the beginning of the term, he passes examination and obtains a lower grade license.[71]

Breach of contract.[72]—A teacher discharged for just cause is entitled to pay only for services rendered, but if the discharge is without cause he is entitled to the agreed compensation for the term less what he has earned at other employment,[73] and evidence is admissible to explain failure to reduce the damage by ob-

55. Sess. Acts 1906, p. 399, c. 102, held valid. Marsee v. Hager [Ky.] 101 S. W. 882.

56. See 6 C. L. 1430.

57. See 6 C. L. 1431.

58. Want of notice by member of board of trustees of meeting at which appointment of teacher was made by majority held cured by ratification of the appointment. School Dist. No. 47 v. Goodwin [Ark.] 98 S. W. 696.

59, 60, 61. Turner v. Hampton, 30 Ky. L. R. 179, 97 S. W. 761.

62. By its express provisions. Brown v. Sanders, 144 Ala. 500, 42 So. 39.

63. Treadway v. Daniels' Adm'r, 29 Ky. L. R. 331, 92 S. W. 981; Turner v. Hampton, 30 Ky. L. R. 179, 97 S. W. 761.

64. Plaintiff's contract held void because of disqualification of appointing officer. Smith v. Ritchie, 30 Ky. L. R. 339, 98 S. W. 330.

65. School Dist. No. 77 v. Cowgill [Neb.] 107 N. W. 584.

66. See 6 C. L. 1432.

67, 68. Dees v. Board of Education of Detroit [Mich.] 13 Det. Leg. N. 696, 109 N. W. 39.

69. Calling attention of a female teacher to by-laws requiring her resignation on her becoming married and stating the necessity for obedience has been held not to be duress on the part of school officers to force her resignation so as to entitle her to reinstatement. Grendon v. Board of Education of New York, 100 N. Y. S. 253.

70. Grendon v. Board of Education of New York, 100 N. Y. S. 253.

71. School Dist. No. 23 v. Ozmer [Ark.] 98 S. W. 974.

72. See 6 C. L. 1432.

73. Evidence held to sustain a verdict for $1,034.35 in action for wrongful discharge, under contract of employment for one year at $1,200, five months before expiration of the contract. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107.

taining other employment.[74] In such case the burden is on defendant to show that plaintiff could have lessened his damages by obtaining employment elsewhere.[75] In Washington an appeal to the county superintendent from a wrongful dismissal by a school board, involving the fitness of a teacher is a condition precedent to his right to sue for breach of contract.[76]

Salary.[77]—A statute prescribing a minimum salary for teachers does not prevent reduction of salaries in excess of the minimum,[78] and this is true notwithstanding the statute also confers the right to continuous employment on the person to whose salaries the reductions apply.[79] The Ohio law permitting teachers to draw pay for attendance at institute is not void for uncertainty in respect to those not under contract for employment at the time the institute is held.[80]

Offenses by teachers or applicants for teachers' licenses.—The Texas statute making the procurement or use by applicants for teachers' licenses of the questions previously prepared by the state superintendent of public instruction a penal offense is valid,[81] but it is essential to a conviction thereunder that the use shall have been fraudulent.[82]

§ 8. *Control and discipline of scholars, and regulation of attendance.*[83]—Under the statutes of Washington rules of a school board depriving members of school fraternities of all privileges of the schools except class attendance are valid notwithstanding the fraternity meetings are held at the homes of the members and membership therein is with the consent of parents.[84] Notice of expulsion or formal trial is not necessary under the Nebraska statute authorizing the expulsion of pupils for gross misdemeanors and persistent disobedience,[85] and the board may adopt any mode of procedure in obtaining information or evidence of conduct of the pupil which it deems best,[86] but, in an action to procure the reinstatement of a pupil that has been expelled, his misconduct can only be shown by witnesses cognizant of the facts.[87] Where a school board may proceed without notice or formal trial to suspend or expel a pupil, mandamus is the proper proceeding to review the action of the board.[88]

Corporal punishment.[89]

§ 9. *Torts and liability for the same.*[90]—The duty to maintain and repair the public school buildings and premises thereto appurtenant, in the city of Philadelphia,

74. He is entitled to show that while his discharge was in January, the customary time of employing teachers is in May and June, and may himself testify as to the custom on qualifying as an expert. Teacher as witness held qualified to testify as expert on custom as to time of employing teachers. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107.

75. Peacock v. Coltrane [Tex. Civ. App.] 99 S. W. 107. Hence when the plaintiff's testimony is uncontradicted as to the amount he earned elsewhere, the amount he admits having earned in other employment is the limit as to credit on that account. Id.

76. Van Dyke v. School Dist. No. 77 [Wash.] 86 P. 402.

77. See 6 C. L. 1432.

78, 79. Buckbee v. Board of Education of New York, 100 N. Y. S. 943, rvg. 51 Misc. 295, 100 N. Y. S. 1063.

80. Beverstock v. Board of Education of Bowling Green, 75 Ohio St. 144, 78 N. E. 1007, afg. 7 Ohio C. C. (N. S.) 373.

81. It is sufficient as to title (Felder v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 310 97 S. W. 701), and is not discriminatory for failure to eliminate in terms county superintendents and boards of examiners as proper persons to hear and use the questions (Id.).

82. Instruction that unlawful use would suffice held erroneous. Felder v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 310, 97 S. W. 701. Evidence held **insufficient to show a fraudulent use.** Id.; Fulsom v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 946, 98 S. W. 853.

83. See 6 C. L. 1433.

84. Participation in athletic, literary, military, musical, and class organizations of the Seattle High School, by members of the Gamma Eta Kappa fraternity, held properly denied. Wayland v. School Directors [Wash.] 86 P. 642.

85. Vermillion v. State [Neb.] 110 N. W. 736. The teacher may, when occasion demands, suspend or expel a pupil (Id.), and the school board on such inquiry as their own judgment may suggest and approve may, without notice to the pupil or parents, also suspend or expel such pupil (Id.).

86, 87, 88. Vermillion v. State [Neb.] 110 N. W. 737.

89, 90. See 6 C. L. 1433.

rests upon the board of public education and its sectional boards.[91] Though a board of education is not liable for the negligent acts of its subordinates,[92] the fact that the duty of repairing school rooms falls on subordinates does not exonerate the board from negligence in failing to close a school room dangerously out of repair, when the liability for negligence is established as the law of the case.[93] Conspiracy by a president of a school board to deprive a teacher of her position is not made out by proof that he acted in the line of his duty and in good faith on reports from fellow teachers in making an investigation which resulted in a demand for her resignation.[94]

§ 10. *Decisions, rulings, and orders of school officers, and review of the same.*[95]—At the suit of a citizen taxpayer or patron, courts will not interfere with the exercise by a board of education of its discretion unless such discretion is manifestly abused to the oppression of the complainant,[96] but the acts of a school board, whether ministerial or judicial, are vitiated by fraud participated in by it,[97] and will be set aside by a court of competent jurisdiction.[98] Remedy by appeal when provided is usually exclusive.[99] The remedy for action working a wrongful exclusion of pupils is ordinarily by mandamus to compel their admission, not by injunction.[1] In Colorado the county superintendent of schools has jurisdiction of an appeal from a district school board closing a district school earlier than customary in the district.[2] When the right of appeal is granted from decisions of local boards to higher officials, the jurisdiction of the latter is appellate only and no original action may be taken nor new conditions imposed,[3] and this rule applies to the decision of the state superintendent on appeal to him as well as to the decisions of the county superintendent.[4] When a school committee of a town is invested by statute with the general charge and superintendence of the schools of the town, a vote of the town assuming to interfere with the committee's decisions respecting the closing of schools and the disposition of pupils made in good faith by the committee is inoperative.[5] It has been held that while the county commissioners may, under the

91. McCullough v. Philadelphia, 32 Pa. Super. Ct. 109. Hence the civil city of Philadelphia is not liable for injuries caused by the negligent maintenance of the pavements within the yard of a school house located therein. Id.

92. Wahrman v. Board of Education of New York, 187 N. Y. 331, 80 N. E. 192.

93. Wahrman v. Board of Education of New York, 187 N. Y. 331, 80 N. E. 192. School board held liable for injuries to pupil by breaking of ceiling of schoolroom and falling down on pupil. Id. Failure to except to a charge given in an action against a school board for negligence on the theory of its liability therefor requires the adoption of that theory as the law of the case. Id.

94. Miller v. Harvey [Pa.] 64 A. 330.

95. See 6 C. L. 1433.

96. Lindblad v. Board of Education, 122 Ill. App. 617. Enforcement of contract contravening a dry, abstract, legal duty (Id), or illegally delegating some of the board's discretionary power, held not restrainable in the absence of allegation of special injury (Id.).

97. State v. Cartwright [Mo. App.] 99 S. W. 48. The rule that an incorrect enumeration taken and filed by a school board in good faith is nevertheless a lawful enumeration, if made and filed in the manner, form, and time prescribed, and that omissions therefrom inadvertently, though incorrectly made, are ground for an action by mandamus to correct the errors by compulsory amendment, which should precede the granting of any relief based on the omitted facts, has no application when the falsehood is intentional, is accompanied by and accessory to fraudulent purpose. Id.

98. Fraudulent enumeration. State v. Cartwright [Mo. App.] 99 S. W. 48.

99. Injunction against relocation of school house denied. Kinney v. Howard [Iowa] 110 N. W. 282. Holder of diploma from Greenville college for women held not entitled to mandamus to compel county board to issue certificate to teach on presentation of diploma. Greenville College for Women v. Board of Education of Greenville County [S. C.] 55 S. E. 132.

1. McCaskill v. Bower, 126 Ga. 341, 54 S. E. 942; Harley v. Lindemann [Wis.] 109 N. W. 570.

2. Hence prohibition does not lie to compel him to desist from exercising the same. School Dist. No. 13 v. Superintendent of Public Schools [Colo.] 85 P. 658.

3. Doubet v. Independent Dist. Directors [Iowa] 111 N. W. 326.

4. Judgments of county and state superintendents fixing sites on appeal held void. Doubet v. Independent Dist. Directors [Iowa] 111 N. W. 326.

5. Morse v. Ashley [Mass.] 79 N. E. 481.

Ohio statutes, step in and perform the ministerial duties of a township board of education which it has voluntarily or wilfully failed to perform, the county board cannot do so with reference to judicial duties of the township board.[6]

§ 11. *Actions and litigation.*[7]—The Kentucky statute permitting school boards of cities of the first class to sue to recover property escheated from alienage, failure of kindred, or other causes, is valid [8] and entitles such boards to sue for real estate held by corporations in such cities for more than five years in excess of their business requirements, and therefore escheated under the constitution of the state.[9] The rule that a simple averment as to the erroneous naming of an obligee in an instrument in a direct action thereon meets all reasonable requirements, without the necessity of a reformation, applies in an action on a school officer's bond even against sureties.[10] The Alabama Girls' Industrial school is a mere agency of the state,[11] hence an action against it is one against the state which is forbidden by the constitution,[12] and this inhibition applies as well to a cross bill in an equitable proceeding by it under which affirmative relief is sought as to a suit directly against it,[13] and since the government is not expressly or by necessary implication included in the constitutional grant of power to corporations generally to sue and be sued, that provision is not apposite,[14] nor is the objection waived by failure to raise the question of jurisdiction in the trial court.[15] The Nebraska statute making it the duty of the school treasurer to appear for and on behalf of the district does not require that he shall control the prosecution or defense of suits by or against school district officers suing or being sued in their official capacity where the district is not a party.[16] While the statute of limitations does not run against the trustees of a school district with respect to matters respecting strictly public rights any more than against the state or other municipal corporation, property held for the use of a particular school district is not subject to the exemption because not "public property" within the rule.[17] Interference with a school board in its control of the schools within its jurisdiction, by persons who unlawfully take possession of school houses in the board's subdistricts and unlawfully assume authority to teach school therein will be restrained.[18] Federal equity jurisdiction attaches to a suit by a bondholder of a school district to enforce the liability of the district after its dissolution by division into new districts under a statute providing for an equitable division of property of the old between the new districts.[19] When school officials while acting within the line of their duty bring on litigation against themselves individually, they are entitled to be indemnified by their municipality for expenses

6. Board of Education of Wayne Tp. v. Shaul, 4 Ohio N. P. (N. S.) 433. When the judicial authoritiy of a board of education is exercised by it contrary to the will of the people and against their protest, the only redress the people have is in the election of other members. Id. County commissioners held to be without authority to interfere or to reverse orders made by township board as to suspension of schools in subdistricts (Id.), or abolition of subdistricts and providing in either instance for the conveyance of the pupils to other public schools or to one or more centralized schools (Id.).

7. See 6 C. L. 1435.

8. Because other cities of the state have not the same right, it is not therefore special legislation. Commonwealth v. Chicago, etc., R. Co., 30 Ky. L. R. 673, 99 S. W. 596.

9. Commonwealth v. Chicago, etc., R. Co., 30 Ky. L. R. 673, 99 S. W. 596.

10 Petition by "School District of Town of Hurdland" held sufficient in action on bond to plaintiff by defendant as "treasurer of Hurdland School Board." State v. Delaney [Mo. App. 99 S. W. 1.

11. Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

12. Alabama Industrial School v. Addler, 144 Ala. 555, 42 So. 116.

13, 14. Alabama Girls' Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

15. Alabama Industrial School v. Addler, 144 Ala. 555, 42 So. 116.

16. Bishop v. Fuller [Neb.] 110 N. W. 715.

17. Adverse possession held good defense to ejectment proceeding to recover land belonging to school district. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579.

18. Board of Education of Wayne Tp. v. Shaul, 4 Ohio N. P. [N. S.] 433.

19. Gamble v. Rural Independent School District [C. C. A.] 146 F. 113.

incurred in making defense.[20] The court may take cognizance of facts agreed to by school districts adversely interested and approve an adjustment of their affairs which the law permits and which they agree is justified or required by the undisputed facts without hearing testimony.[21]

§ 12. *Libraries, reading rooms, and other auxiliary educational institutions.*[22] A library dedicated to the use of an indefinite class of persons is a charity,[23] and hence its property cannot lawfully be seized and sold on execution even under a judgment in tort against it arising out of the negligence of its agents;[24] and though the judgment be allowed to be taken and the property levied on and sold on execution thereunder without the question of exemption being raised, it may nevertheless be recovered in a suit against the purchaser at the execution sale or those claiming under him.[25] The Indiana statute creating a library board to be appointed by the common council of civil cities of a certain population and investing the board with all the power concerning the particular subject-matter that the law permits to be exercised, including the levy of taxes, is valid.[26]

§ 13. *Private schools.*[27]—A university which is a private corporation, but organized for purely charitable purposes, is within the rule that charitable corporations are not liable for the negligent acts of their employes.[28] A voluntary conveyance of land in fee to trustees and their successors in trust, that they shall erect certain academies or seminaries thereon and a church for the use of members of a particular sect, creates an educational and religious trust,[29] and, on the failure of trustees, equity will enforce the same by the appointment of others on the application of a person authorized to bring the action.[30] Statutes authorizing churches themselves or their trustees to hold property conveyed to them for church purposes for their use by succession by church government or rules of discipline exercised by

20. Newton v. Hamden [Conn.] 64 A. 229.

21. Everson Borough, 31 Pa. Super Ct. 170.

22. See 6 C. L. 1435.

23. Library held dedicated to indefinite class. Fordyce v. Woman's Christian Nat. Library Ass'n [Ark.] 96 S. W. 155.

24, 25. Fordyce v. Woman's Christian Nat. Library Ass'n [Ark.] 96 S. W. 155.

26. In view of the provision of the Indiana constitution making it the duty of the legislature to encourage by all suitable means moral, intellectual, scientific, and agricultural improvement, it cannot be said to be an unlawful delegation of the power of taxation (School City of Marion v. Forest [Ind.] 78 N. E. 187), and, as no franchise or authority which such cities did not already possess is granted, no corporation is created by the act (Id.). Hence it is not within the constitutional inhibition that no corporation, other than banking, shall be created by special act. Id. While it is an exercise of a power specially granted to the legislature, it is not a local or special law within that particular inhibition but falls within the constitutional provision under which the question as to whether a general law can be made applicable to the whole state is one for the legislature. Id. Nor is it invalid because of a provision therein authorizing the council to appoint the trustees on petition of at least one hundred citizens and taxpayers, nor a delegation of legislative power (Id), nor does it grant any invidious privilege or deny any person equal protection of the laws or authorize petitioners to levy taxes (Id.).

27. See 6 C. L. 1435.

28. Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991, afg. 121 Ill. App. 512. Because trust fund might be wholly destroyed and diverted from purpose for which it was given, thus thwarting donor's intent as result of negligence for which he was not responsible, and because, since trustees cannot divert funds from purposes for which they were donated, they cannot be directly diverted by tortious or negligent acts of managers of fund or their agents. Id. University granted charter by Priv. Laws 1851, p. 20, held not liable for injuries to student through negligence of professor in laboratory. Parks v. Northwestern University, 218 Ill. 381, 75 N. E. 991.

29. Harris v. Brown, 124 Ga. 310, 52 S. E. 610.

30. Harris v. Brown, 124 Ga. 310, 52 S. E. 610. The owners of property abutting on a tract of land subject to an educational trust have no standing in equity, merely as such to enforce the trust (Id.), nor does the status of citizen and taxpayer in the town and county where it is located give such standing (Id.), but a pecuniary interest, or a showing that the plaintiff is a beneficiary who may attend the school (Id.), or the members of whose family may attend (Id.), or who may in some way avail of its educational advantages, is essential to confer such right (Id.). A member of a church in whose favor an educational and religious trust is created is a beneficiary of the trust. Id.

them do not apply when the trust is in part educational.[31] The right to teach white and negro children in a private school at the same time and place is not a property right.[32] The provision of the Kentucky statute prohibiting the maintenance or operation of colleges, schools, or institutions, where the white and negro races are received as pupils for instruction, that private institutions may maintain district branches in a different locality "not less than twenty-five miles distant" for the education exclusively of one race or color,[33] is invalid, but being separable from the rest of the act its invalidity does not render the entire act a nullity.[34]

SCIRE FACIAS.[35]

Scire facias in the Federal courts is an original suit [36] in which the writ takes the place of the declaration, and its sufficiency must be determined by its averments alone.[37] While errors in the writ which are apparent from the record may be corrected by amendment,[38] there must be no material variance between the writ and the record,[39] which is admissible to establish the cause of action.[40] Defendants in a scire facias in the Federal district court, where more than twenty dollars is involved, are entitled to a jury trial of issues of fact.[41] While nonjurisdictional matters affecting the judgment on which the writ issued cannot be asserted as a defense,[42] want of jurisdiction in the court rendering it is available if apparent on the face of the record.[43] Two returns of nihil to successive writs of scire facias sur mortgage are equivalent to a return of scire feci.[44]

SEALS; SEAMEN, see latest topical index.

SEARCH AND SEIZURE.

§ 1. What is an Unreasonable Search and Seizure (1870).
§ 2. Procedure for Issuance, and Execution of Search Warrants (1871).

§ 1. *What is an unreasonable search and seizure.*[45]—The Federal constitutional prohibition against unreasonable searches and seizures is a limitation upon

31. Harris v. Brown, 124 Ga. 310, 52 S. E. 610.
32. Berea College v. Com., 29 Ky. L. R. 284, 94 S. W. 623.
33. Because of an unreasonable distance requirement. Berea College v. Com., 29 Ky. L. R. 284, 94 S. W. 623.
34. Berea College v. Com., 29 Ky. L. R. 284, 94 S. W. 623. See, also, ante, § 2.
35. See 6 C. L. 1436.
36. The decisions of the supreme court of the United States are conclusive upon the Federal, district, and circuit courts. Hollister v. U. S. [C. C. A.] 145 F. 773.
37. Record on which it issues cannot be considered. Hollister v. U. S. [C. C. A.] 145 F. 773. A scire facias on a forfeited recognizance is not demurrable for failure to allege the nature of the charge against the principal, how he became subject to the jurisdiction of the court, when the recognizance was filed, etc., those being evidenciary facts only. Id.
38. Error as to the amount of the judgment sought to be revived. Schmidt v. Zeigler, 30 Pa. Super. Ct. 104.
39. A scire facias on a forfeited recognizance alleged that it was entered into on July 6, 1904, and was conditioned that the principal appear before "our District Court of the United States, at the next term of the United States District Court to be held in the Federal building at Sioux Falls, South Dakota," etc. The recognizance offered bore date of having been approved July 6, 1904, but the notary who took the sureties' acknowledgment certified that they came before him July 6, 1894, and was conditioned on the appearance of the principal at the next term of the court of the United States to be held at Sioux Falls, S. D., in and for the judicial district of South Dakota. Held no fatal variance. Hollister v. U. S. [C. C. A.] 145 F. 773.
40. Hollister v. U. S. [C. C. A.] 145 F. 773.
41. Const. U. S. Amend. 7, and Rev. St. U. S. § 566 (U. S. Comp. St. 1901, p. 461). Hollister v. U. S. [C. C A.] 145 F. 773.
42. Payment of debt prior to last revival of the judgment. Schmidt v. Zeigler, 30 Pa. Super. Ct. 104.
43. Must be apparent on the face of the record. Mellon v. Sawyer, 31 Pa. Super. Ct. 416.
44. And judgment entered thereon for want of appearance cannot be impeached by evidence that the mortgagor was dead. Freemansburg Bldg. & L. Ass'n v. Billig, 30 Pa. Super. Ct. 101.
45. See 6 C. L. 1437.

Federal power only.[46] A provision for a public inspection of the books of cotton buyers,[47] and a subpoena duces tecum requiring the production of papers relating to a designated matter,[48] are not unreasonable searches and seizures. The procurement of evidence by unreasonable search and seizure does not affect its admissibility against the accused.[49]

§ 2. *Procedure for issuance, and execution of search warrants.*[50]

SEAWEED; SECONDARY EVIDENCE; SECRET BALLOT; SECURITY FOR COSTS, see latest topical index.

SEDUCTION.[51]

§ 1. Nature and Elements of the Tort (1871).
§ 2. Civil Remedies and Procedure (1871). Pleadings (1871). Evidence (1871).
§ 3. The Crime (1872).
§ 4. Indictment and Prosecution (1872). Burden of Proof and Evidence (1872).

§ 1. *Nature and elements of the tort.*[52]—Seduction is the act of inducing a woman of previous chaste character,[53] by the use of arts, persuasions, wiles, and promises,[54] to submit to sexual intercourse.[55]

§ 2. *Civil remedies and procedure.*[56]—The common-law tort action is based upon loss of service and can be maintained only by one sustaining the relation of master and servant to the one seduced,[57] the woman having no cause of action in her own right except in unusual cases.[58]

Pleadings.[59]—An allegation that defendant "seduced" plaintiff is a sufficient averment of chastity.[60] Notice of the defense of unchastity is not required by the circuit court rules of Michigan.[61]

Evidence.[62]—Where intercourse is continued after the seduction, being induced by the same seductive promises, evidence of such subsequent acts and the birth of a

46. Cannot be invoked against state action. Hammond Pack. Co. v. State [Ark.] 100 S. W. 407.

47. Act 1894 (21 St. at Large, p. 793), providing the books of cotton buyers from the original seller shall be open to public inspection, is not unconstitutional. Parks v. Laurens Cotton Mills [S. C.] 56 S. E. 234.

48. A subpoena duces tecum requiring a railroad company to produce before the Federal grand jury letters, papers, memoranda, and documents, relating to certain designated claims, and all papers, documents, books, and memoranda showing the final disposition of the claims and their payment, is not objectionable for unreasonableness. Santa Fé Pac. R. Co. v. Davidson, 149 F. 603.

49. See Indictment and Prosecution, 8 C. L. 208, n. 48.

50. See 6 C. L. 1438.

51. For seduction as an element of damage in an action for breach of promise, see Breach of Marriage Promise, 7 C. L. 457. The Missouri statutory crime of defiling a female intrusted to defendant's care is treated in the topic of Rape, as being more analogous to that crime. See Rape, 8 C. L. 1667.

52. See 2 C. L. 1620.

53. A woman has a right of action under Comp. Laws, § 10,418, for her own seduction only when chaste at the time. Greenman v. O'Riley, 144 Mich. 534, 13 Det. Leg. N. 344, 108 N. W. 421.

54. Evidence held to show such "promises, deceits, artifices, or influences as would overcome the scruples of a chaste woman." Greenman v. O'Riley, 144 Mich. 534, 13 Det. Leg. N. 344, 108 N. W. 421.

55. Definition of seduction held correct. Greenman v. O'Riley, 144 Mich. 534, 13 Det. Leg. N. 344, 108 N. W. 421.

56. See 6 C. L. 1439.

57. Since St. 1903, § 2, authorizing the maintenance of actions for seduction without allegations and proof of loss of services, does not change the law as to who may bring the action, a complaint by the mother must allege that the daughter was under twenty-one or that she was entitled to her services. Taylor v. Daniel [Ky.] 98 S. W. 986.

58. Seduction of a woman while in the employ of defendant's father by threats to discharge held to give no right of action. Welsund v. Schueller, 98 Minn. 475, 108 N. W. 483.

59. See 6 C. L. 1439.

60. Greenman v. O'Riley, 144 Mich. 534, 13 Det. Leg. N. 344, 108 N. W. 421.

61. Although the presumption of chastity requires the accused to introduce the first evidence on the issue, unchastity is not "affirmative matter to avoid the legal effect of or defeat the cause of action set forth" within circuit court rule 7, requiring notice to render it admissible. Greenman v. O'Riley, 144 Mich. 534, 13 Det. Leg. N. 344, 108 N. W. 421.

62. See 6 C. L. 1439.

child resulting therefrom is admissible.[63] Hearsay testimony is inadmissible.[64] Plaintiff must prove that she was unmarried at the time of the intercourse.[65] Strict proof of the date of the promise of marriage as alleged is not required.[66]

§ 3. *The crime.*[67]—The seduction of a virtuous [68] woman under a promise of marriage is a crime in most states. It is generlly held that the promise must have been absolute [69] and prosecutrix must have yielded in reliance thereon [70] though it is not necessary that sexual intercourse ensue immediately upon the promise.[71] A request by prosecutrix that defendant keep his promise and a refusal are not necessary.[72]

§ 4. *Indictment and prosecution.*[73]—An indictment in the language of the statute is usually sufficient.[74] Chastity at the time of intercourse must be alleged.[75]

Suspension of prosecution by marriage.[76]—Where an offer of marriage is made a defense, such offer must be kept open for acceptance until the time of trial.[77] A statute providing for the revival of a suspended prosecution upon wrongful abandonment is applicable only where the marriage was entered into for the purpose of defeating a prosecution already commenced,[78] and it is unconstitutional in those states where a speedy trial is guaranteed.[79]

Burden of proof and evidence.[80]—The state must prove all the essential elements beyond a reasonable doubt,[81] including reformation where prior illicit rela-

63. Breiner v. Nugent [Iowa] 111 N. W. 446.

64. Testimony by plaintiff of statements made by defendant to third person and related to witness is inadmissible. Greenman v. O'Riley, 144 Mich. 534, 13 Det. Leg. N. 344, 108 N. W. 421.

65. Breiner v. Nugent [Iowa] 111 N. W. 446. Where plaintiff's pleadings are introduced in evidence to contradict her testimony as to the time of seduction, the court should have granted a requested instruction that allegations therein that plaintiff was unmarried should be disregarded as self-serving. Id.

66. Although plaintiff testified that the promise of marriage took place on a particular date at which time defendant was in another city, the jury may still find for her where there is other evidence tending to show a promise of marriage prior to the intercourse. Breiner v. Nugent [Iowa] 111 N. W. 446.

67. See 6 C. L. 1439.

68. A virtuous woman under Revisal 1905, § 3354, is one who has never had illicit sexual intercourse, and it is not necessary that her mind be free from lustful and lascivious desires. State v. Whitley, 141 N. C. 823, 53 S. E. 820.

69. Promise conditioned upon resulting pregnancy held insufficient. Russell v. State [Neb.] 110 N. W. 380. Held sufficient under the Minnesota statute. State v. Sontvlet [Minn.] 110 N. W. 100. Evidence held to entitle the defendant to an instruction as to a conditional promise of marriage. Russell v. State [Neb.] 110 N. W. 380.

70. It is not necessary that defendant promise to marry on the express condition that prosecutrix submit to his embraces, but it is sufficient if the jury can infer to the exclusion of a reasonable doubt that the seduction was accomplished by reason of the promise. State v. Ring, 142 N. C. 596, 55 S. E. 194. Evidence held to show that prosecutrix submitted in reliance on defendant's promise of marriage and not to satisfy her own lustful desires. Id. Where prosecutrix testifies that the sexual intercourse was accomplished by force and against her will, but her narration tends also to show seduction, the question is for the jury. Knight v. State [Ala.] 41 So. 850.

71. Under § 50 of the crimes act (P. L. 1898, p. 807), it is sufficient if prosecutrix submits thereto in reliance on the promise. State v. Slattery [N. J. Law] 65 A. 866.

72. Lasater v. State, 77 Ark. 468, 94 S. W. 59.

73. See 6 C. L. 1440.

74. An indictment following the exact words of Revisal 1905, § 3354, held sufficient as to the allegation of a contract of marriage. State v. Whitley, 141 N. C. 823, 53 S. E. 820.

75. An indictment alleging that accused had sexual intercourse with prosecutrix, she "being then and there an unmarried female of previous chaste character," sufficiently alleges chastity at the time of seduction. State v. Sortviet [Minn.] 110 N. W. 100.

76. See 6 C. L. 1440.

77. Especially where the offer is made to prosecutrix's father and not communicated to her, she being willing to accept. Lasater v. State, 77 Ark. 468, 94 S. W. 59. And the fact that the father imposed unreasonable conditions did not justify its withdrawal. Id.

78. Where the marriage was entered into prior to the commencement of suit, a prosecution thereafter commenced cannot be prosecuted under Pen. Code, art. 969, as amended by Acts 28th Leg. p. 221, c. 136. Elege v. State [Tex. Cr. App.] 96 S. W. 39.

79. Acts 28th Leg. p. 221, c. 136, is violative of Const. art. 1, § 10, guarantying a speedy trial. Waldon v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 455, 98 S. W. 848. Also held not to make the abandonment seduction. Id.

80. See 6 C. L. 1440.

81. Promise of marriage held proven: Where the accused takes the witness stand and does not deny the promise of marriage testified to by the prosecutrix. State v. Slattery [N. J. Law] 65 A. 866. Positive testimony of prosecutrix as to the promise of

tions are shown,[92] the question being one for the jury.[83] In many states prosecutrix must be corroborated both as to the promise of marriage and the act of intercourse,[84] but circumstantial corroboration is usually sufficient.[85]

Some states demand chastity in prosecutrix while others merely require a good repute in respect thereto, which distinction is material in determining the admissibility of evidence, since intimacy [88] and indecent familiarity with other men [87] may be shown in the former case, while specific acts of unchastity [88] and lewdness [89] are inadmissible in the latter. Though chastity is the issue, good repute is admissible in proof thereof,[90] especially after prosecutrix's character has been impeached.[91] A teacher's certificate reciting prosecutrix to be a person of good moral character is not admissible to show repute.[92]

The fact of a promise of marriage may be shown by circumstances,[93] but there seems to be a conflict as to the admissibility of declarations of prosecutrix to third persons in respect to such promise.[94]

Testimony of prosecutrix as to the inducements which caused her to yield,[95] and that at a certain time she determined to cease illicit relations and to lead a virtuous life thereafter,[96] is not objectionable as a mere conclusion.

Celibacy may be established by circumstances,[97] and such state being shown to

marriage corroborated by statements of defendant to her brother-in-law that she was his intended wife, held sufficient to take the issue to the jury. Id.

82, 83. State v. Bennett [Iowa] 110 N. W. 150.

84. Proof of one does not furnish the corroboration of the other required by the statute. Russell v. State [Neb.] 110 N. W. 380. Under Kirby's Dig. § 2043, prosecutrix need only be corroborated as to promise of marriage and the act of intercourse. Lasater v. State, 77 Ark. 468, 94 S. W. 59. Where there was evidence of the birth of a child an instruction not to convict unless there was other evidence in corroboration of prosecutrix, connecting defendant with the offense is erroneous as not requiring corroboration both as to the promise of marriage and the act of intercourse. Woolley v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 605, 96 S. W. 27.

85. Corroborating circumstances must have the probative force of a disinterested witness. Russell v. State [Neb.] 110 N. W. 380. The corroboration required by Gen. St. 1901, § 2021 (Gen. St. 1905, § 2112), may be satisfied by proof that the parties were keeping company, conducted themselves as lovers, etc., its sufficiency being for the jury. State v. Waterman [Kan.] 88 P. 1074. Prosecutrix's testimony as to the promise of marriage is sufficiently corroborated where defendant admitted that he kept company with her "pretty regular," that he had had a quarrel with her about permitting another to accompany her home on a certain occasion, and by letters. Lasater v. State, 77 Ark. 468, 94 S. W. 59. While proof of birth of a child is evidence of seduction, it does not tend to connect defendant. State v. Dolan [Iowa] 109 N. W. 609. Instruction held misleading in that the jury might understand that sufficient corroboration might be found in the birth of the child and such other circumstances as they deemed corroborative. State v. Dolan [Iowa] 109 N. W. 609.

86. An instruction limiting its consideration to the discrediting of her claim that her child was the result of her alleged seduction and the improbability of her engagement to defendant held erroneous. State v. Dolan [Iowa] 109 N. W. 609.

87. The fact that prosecutrix permitted indecent liberties to be taken with her person, while evidence to be considered in passing upon her chastity, does not of itself constitute unchastity. State v. Whitley, 141 N. C. 823, 53 S. E. 820. Evidence that prosecutrix consented to have intercourse with a third person if not consummated is inadmissible. Knight v. State [Ala.] 41 So. 850.

88. Or by proof of facts from which unchastity may be inferred, as that other men on certain occasions stayed all night with her. State v. Slattery [N. J. Law] 65 A. 866.

89. Russell v. State [Neb.] 110 N. W. 380.

90. Ex parte Vandiveer [Cal. App.] 88 P. 993.

91. Knight v. State [Ala.] 41 So. 850.

92. Russell v. State [Neb.] 110 N. W. 380.

93. Promises of marriage made subsequent to the alleged seduction and while the immoral relation continued, while not sufficient to sustain the action, may be considered as a circumstance tending to prove a prior promise. State v. Waterman [Kan.] 88 P. 1074.

94. Held inadmissible. State v. Sortviet [Minn.] 110 N. W. 100.

Held admissible. State v. Whitley, 141 N. C. 823, 53 S. E. 820. Statements by prosecutrix to her aunt that defendant was going to marry her and had said he would do so as soon as he got out of the mess with the Davis girl are admissible in corroboration of prosecutrix's testimony as to the promise of marriage. State v. Kincaid, 142 N. C. 657, 55 S. E. 647.

95. State v. Whitley, 141 N. C. 823, 53 S. E. 820. Yielded because of defendant's promises. State v. Bennett [Iowa] 110 N. W. 150.

96. State v. Bennett [Iowa] 110 N. W. 150.

97. That she was living with her parents under her maiden name and receiving at-

exist a few months before the seduction will be presumed to continue.[98] Subsequent declarations of defendant acknowledging and renewing the promise of marriage are admissible,[99] and the state may ask defendant if he did not convey his property to avoid the result of the indictment.[1]

SELF-DEFENSE; SENTENCE; SEPARATE PROPERTY; SEPARATE TRIALS; SEPARATION, see latest topical index.

SEQUESTRATION.

In Texas.[2]—A justice of the peace may not issue the writ before commencement of the suit.[3] A mere joint tort feasor need not be made a party defendant.[4] The application must describe the property sufficiently to enable the officer to identify it.[5] A transposition of defendant's initials in the writ is fatal, there being no personal service or appearance.[6] A bond in the form prescribed for cases in which personalty is levied on is insufficient as a replevy bond for realty,[7] and cannot be sustained as a common-law bond, the party seeking to enforce it not being in privity with the makers.[8] One who invokes the aid of a writ of sequestration has the burden of proving the facts essential to the rendition of the statutory judgment required in the proceeding.[9] The ownership of property being involved, plaintiff must recover on the strength of his own title,[10] and the burden of proving ownership is upon him.[11] Evidence that plaintiff had a mortgage on the property is admissible on the issue of malice in suing out the writ.[12] A judgment against a defendant who has replevied the property must state separately the value of each article replevied,[13] except where the property has been disposed of and cannot be returned,[14] and must run against the obligors in the replevy bond for the value of the property,[15] but a surety should not be held liable for costs.[16] If plaintiff fails

tention of suitors. State v. Waterman [Kan.] 88 P. 1074.

98. Proof that defendant was single some months before the seduction is sufficient proof of celibacy at the time, in the absence of contrary evidence. State v. Slattery [N. J. Law] 65 A. 866.

99. Declarations of defendant to prosecutrix after she became pregnant that he was in a mess with another girl but would break off and marry her as soon as he could are admissible as res gestae, acknowledging and renewing the promise of marriage, though they tend to impeach his character which has not been put in issue. State v. Kincaid, 142 N. C. 657, 55 S. E. 647.

1. State v. Kincaid, 142 N. C. 657, 55 S. E. 647.

2. See 6 C. L. 1441.

3. Where citation ran against J. M. Peters, suit was not commenced against M. J. Peters, and hence writ was premature. Sayles' Rev. Civ. St. art. 4864. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428.

4. In suit to recover property sold on false representations, vendee was not a necessary party, defendants having connived and consented. Parlin & Orendorff Co. v. Glover [Tex. Civ. App.] 99 S. W. 592.

5. Application directing officer to seize an undivided one-fifth of all rice grown on certain land held fatally defective. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

6. Action being docketed against J. M. Peters, writ issued against J. M. Peters held a nullity as to M. J. Peters, the maker of note and mortgage sued on. Watt v. Parlin & Orendorff Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 154, 98 S. W. 428.

7. Bond in form prescribed by Rev. St. 1895, art. 4874, could not take place of that required by art. 4875. Broussard v. Hinds [Tex. Civ. App.] 101 S. W. 855.

8. Broussard v. Hinds [Tex. Civ. App.] 101 S. W. 855.

9. Burden was on plaintiff to show the value of each article replevied by defendant in order that it might be included in the judgment. Rev. St. 1895, arts. 4876, 4877. Martin v. Berry Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 206, 87 S. W. 712.

10. Evidence tending to show that defendant was not the owner held immaterial. Rea v. Schow & Bros. [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706.

11. Instruction to find for defendant if jury found from preponderance of evidence that plaintiff was not the owner held erroneous as imposing burden on defendant. Rea v. Schow & Bros. [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706.

12. Where plaintiff claimed ownership and defendant claimed exemplary damages. Rea v. Schow & Bros. [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706.

13. Rev. St. 1895, arts. 4876, 4877. Martin v. Berry Bros. [Tex. Civ. App.] 13 Tex. Ct. Rep. 206, 87 S. W. 712.

14. Where judgment declares this to be so, it is not essential that it find the value of each separate article. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

15. Rev. St. 1895, arts. 4876, 4877. Martin v. Berry Bros. [Tex. Civ. App.] 13 Tex. Ct.

to recover the property sued for, defendant is entitled to a judgment for its restoration to his possession or for its value if it cannot be returned.[17] A motion to quash auxiliary proceedings by sequestration may be filed and acted upon at any time before the case is disposed of.[18] On error to review the validity of a judgment against the sureties on the replevin bond, the court cannot consider facts transpiring subsequent to its rendition.[19]

Damages for wrongful sequestration.[20]

In Louisiana.[21]—In a possessory action the writ is maintained without reference to the ownership of the property.[22] The writ does not become functus officio when judgment in the cause is rendered or becomes executory,[23] but if maintained by that judgment it holds the property seized in order that the judgment may be executed.[24] A writ issued in a separate proceeding after an appeal from a judgment in a possessory action, but as ancillary to the defense therein, is not dissolved at the cost of defendant at whose instance it was issued by reason of the silence of the decree in the appellate court dismissing the action,[25] but if properly issued originally is thereby maintained at the cost of plaintiff.[26] Where a writ becomes necessary in aid of a defense and the action is dismissed on appeal and the writ maintained, the costs thereof should be taxed to plaintiff.[27]

The sheriff is entitled to a reasonable compensation for administering sequestered property.[28] When the parties leave the amount of the compensation to be fixed by the court without the taking of testimony, the court's decision will be deemed correct, no improper charges affirmatively appearing.[29]

SERVICE, see latest topical index.

SET-OFF AND COUNTERCLAIM.

§ 1. Nature and Extent of Right in General (1875).
§ 2. To be Available as a Set-off or Counterclaim, a Demand Must, Ordinarily, Have Been a Vested and Subsisting Cause of Action at the Time of the Commencement of Plaintiff's Suit (1878).
§ 3. Demands Must Be Mutual, and the Parties Must Stand in the Same Right and Capacity (1878).
§ 4. To Admit of Set-off or Counterclaim the Main Action Must be Similar in Form and Remedy to That Required for the Other (1879).
§ 5. Pleading and Practice (1880).

§ 1. *Nature and extent of right in general. Equitable set-off.*[30]—Cross demands though arising out of disconnected transactions and lacking in mutuality may be enforced in equity by way of offset whenever necessary to prevent wrong and injustice.[31] Though one may not have an immediate right to an equitable set-off

Rep. 206, 87 S. W. 712. In suit to foreclose a mortgage, judgment held properly rendered against mortgagor's sureties on replevy bond. Rev. St. 1897, arts. 4876, 4877. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077

16. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

17. Rea v. Schow & Bros. [Tex. Civ. App.] 15 Tex. Ct. Rep. 931, 93 S. W. 706.

18. Need not be made before answer to merits. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724

19. Where judgment declared that the property had been disposed of by defendant and could not be returned, appellant could not successfully contend that the property was taken by the sheriff three months later. Pipkin v. Tinch [Tex. Civ. App.] 97 S. W. 1077.

20, 21. See 6 C. L. 1442.

22. The question of ownership cannot be raised in a possessory action. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 117 La. 960, 42 So. 467, harmonizing State v. Debaillon, 113 La. 619, 37 So. 534, and Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 116 La. 1053, 41 So. 255.

23, 24, 25, 26, 27. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co., 117 La. 960, 42 So. 467.

28. Jennings-Heywood Oil Syndicate v. Houssiere Latreille Oil Co. [La.] 42 So. 930.

29. Contention that court included attorney's fees. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 42 So. 930.

30. See 6 C. L. 1442.

31. Trustee's estate in suit for accounting held entitled to set off certain claims held against cestue que trust individually,

for the reason that his claims cannot yet be enforced,[32] he may be entitled to a continuance of the main action to enable him to obtain a judgment thereon which can be set off.[33] Where an insolvent makes an assignment owing a debt due at the time, and also holding a claim not yet due against the creditor whom he so owes, the latter may offset his claim against that of the assignee.[34] A counterclaim of an equitable lien under an agreement by which plaintiff was to deliver property to defendant as security is good in an action of replevin though defendant wrongfully obtained possession of the property.[35] A mortgagor of personalty cannot have foreclosure enjoined in order to avail himself of set-off in equity when plaintiff is neither insolvent nor a nonresident.[36] Where neither a debtor nor his estate has been adjudicated insolvent, the question of actual insolvency cannot be litigated in Massachusetts in an action by his executor in order to enable defendant to assert an equitable set-off.[37] An equitable claim cannot be set off in a Federal court in an action at law.[38]

Statutory set-off and counterclaim.[39]—When the respective claims are liquidated, a counterclaim is available regardless of any agreement that it shall be.[40]

It is generally provided by statute, in effect, that a counterclaim or set-off must be either a cause of action arising out of the contract or transaction set forth in the complaint as the basis of plaintiff's claim,[41] or connected with the subject of the action,[42] or, in an action on contract, any other cause of action arising also on con-

the latter's estate being insolvent. Smith v. Perry, 197 Mo. 438, 95 S. W. 337. In suit to recover against purchaser of property wrongfully sold under a mortgage, the amount of the mortgage was properly deducted. Russell v. Deutschman [Tex. Civ. App.] 100 S. W. 1164.

32. Where defendant had a claim which could not be enforced until one year after appointment of executor, and estate had not been declared insolvent. Jump v. Leon [Mass.] 78 N. E. 532.

33. Jump v. Leon [Mass.] 78 N. E. 532.

34. Assets Realization Co. v. Buffalo, 103 N. Y. S. 153. No objection that defendant city could have disallowed the claim of an insolvent bank against it or that the bank's claim was unliquidated. Id.

35. Reardon v. Higgins [Ind. App.] 79 N. E. 208.

36. Arnold v. Carter, 125 Ga. 319, 54 S. E. 177.

37. Actual insolvency could not be shown under Rev. Laws, c. 173, § 28, authorizing defendant to allege any facts entitling him to absolute equitable relief against a plaintiff's claim. Jump v. Leon [Mass.] 78 N. E. 532.

38. In suit to recover a deposit solely the proceeds of notes of plaintiff's officers, the bank could not set off the amount of the note. Brodhead v. Quarryville Nat. Bank, 151 F. 713.

39. See 6 C. L. 1443.

40. Suit on note and counterclaim for money paid at plaintiff's request. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142.

41. In suit for rent of property, counterclaim for breach of warranty of certain machinery held not to arise out of transaction set forth in complaint. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. In suit for breach of contract to accept goods, a claim for money alleged to have been obtained by plaintiff by duress in that plaintiff had exacted it as a consideration for extending notes held not to arise from the transaction set forth in complaint. Lilienthal v. Bechtel Brew. Co., 102 N. Y. S. 1051. In an action for goods sold defendant may not counterclaim damages for a wrongful attachment of the goods in the action. Abernathy v. Myer-Bridges Coffee & Spice Co., 30 Ky. L. R. 844, 99 S. W. 942. But see this case in 30 Ky. L. R. 1236, 100 S. W. 862, where the counterclaim is sustained on the ground that plaintiff was a nonresident. Id. In suit for breach of contract to deliver cans, only so much of a note held against plaintiff could be counterclaimed as represented the price of cans delivered under the contract out of which the controversy arose. Californian Canneries Co. v. Pacific Sheet Metal Works, 144 F. 886. In suit on a contract permitting defendant to fill in a lot belonging to plaintiff, the violation of the contract by plaintiff in stopping the work was a proper subject of counterclaim. Johnston v. O'Shea, 118 Mo. App. 287, 94 S. W. 783. In suit to recover for stock handled by defendant, allegations that defendant had previously sold plaintiff part of the stock and that all the stock was to be sold by defendant who was to reimburse himself the amount owing by plaintiff, held a proper plea in reconvention, the same growing out of plaintiff's demand. McBurnett v. Lampkin [Tex. Civ. App.] 101 S. W. 864.

42. Counterclaim for breach of warranty did not show connection with subject of action for rent. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. In suit for pasturage of cattle, a claim for shortage in cattle sold defendant could not be set off where it did not arise out of, and was not incident to, or connected with, the pasturage of the cattle. Rev. St. 1895, art. 755. Gage v. Hunter [Tex. Civ. App.] 94 S. W. 1104. In suit by lessee against lessor for conversion of buildings, lessor could not counterclaim damages for lessee's failure to bore for oil as required

tract and existing at the commencement of the action,[43] and that it must tend to diminish or defeat plaintiff's recovery.[44] In determining what constitutes a "transaction" and whether different claims arise therefrom, the court may take into account all the facts set up by both parties.[45] A partial failure of consideration due to innocent mistake in an inventory may be enforced by way of counterclaim in an action for the purchase price of an interest in a firm.[46] In a suit to enjoin a trespass, defendant may show that plaintiff's claim rests upon a disputed boundary line and have the true line determined,[47] and a plea for a specific performance is available as a counterclaim in an action by a purchaser to recover money paid based on the unmarketability of title.[48]

While independent torts may not be offset,[49] it is sufficient that there exists in the case an element of contract either express or implied,[50] and a counterclaim in contract is properly allowed if both causes of action arise out of the same transaction, whether plaintiff's action is in contract or in tort.[51]

Ordinarily, an independent, unliquidated, claim cannot be offset against a liquidated one,[52] but in Kentucky an unliquidated claim in tort may be used as a set-off against a non-resident,[53] and it has also been held that where the facts out of which an alleged set-off arises are such that an approximate amount only can be stated,

by the lease. Duff v. Bailey, 29 Ky. L. R. 919, 96 S. W. 577. In suit for goods sold a wrongful attachment of the goods is not connected with the subject of the action. Abernathy v. Myer-Bridges Coffee & Spice Co., 30 Ky. L. R. 844, 99 S. W. 942. On rehearing in 30 Ky. L. R. 1236, 100 S. W. 862, the counterclaim in this case is sustained on the ground that plaintiff was a nonresident. Id. In replevin for a horse, an equitable lien resting in an agreement to deliver the horse to defendant as security is connected with the cause of action as required by Burn's Ann. St. 1901, § 353. Reardon v. Higgins [Ind. App.] 79 N. E. 208. Where in an action on a note defendant paid it in ignorance of an extension a claim for attorney's fees, also paid, held a proper counterclaim, so that the court had jurisdiction thereof, though the claim was below $500 and plaintiff resided in another county. Collins v. Kelsey [Tex. Civ. App.] 16 Tex. Ct. Rep. 955, 97 S. W. 122. In suit for price of putting glass in show cases, defendant held entitled to counterclaim damages to the woodwork. Hutkoff v. Lauckhardt, 101 N. Y. S. 12. No objection that damage was slight. Id.

43. Code Civ. Proc. § 438. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

44. A counterclaim by an attorney sued for the value of insurance policies, the purchase of which by him was alleged to have inured to the benefit of plaintiffs, his clients, alleging that defendant also purchased certain deficiency judgments against plaintiffs, held not to tend to diminish or defeat plaintiffs' recovery as required by Code Civ. Proc. § 501. Nichols v. Riley, 103 N. Y. S. 554.

45. The attempt of two parties to divide coal in the ground according to a surface line difficult to determine is a "transaction" within Burns' Ann. St. 1901, § 354, and where during such attempt each party inadvertently took an equal amount of coal from the land of the other and one sued to recover for the coal taken, the claim of the other for the coal taken from him arose out of the transaction set forth in the complaint and could be set off. Excelsior Clay Works v. De Camp [Ind. App.] 80 N. E. 981.

46. Resources and liabilities incorrectly stated. Steckbauer v. Leykom [Wis.] 110 N. W. 217.

47. Is in nature of a counterclaim arising out of transaction set out in complaint and connected with subject-matter of action. Hackett v. Kanne, 98 Minn. 240, 107 N. W. 1131.

48. Bloomgarden v. Hoffmann, 102 N. Y. S. 20. Where plaintiff appealed from a judgment requiring him to take the land but failed to give a bond as required by Code Civ. Proc. § 1323, defendant could sell the land as therein provided without being guilty of contempt. Id.

49. Trespasses. Smith v. Alvord [Utah] 88 P. 16.

50. In suit to recover for coal deposits inadvertently removed, defendant could set off a claim for coal innocently taken by plaintiff. Excelsior Clay Works v. De Camp [Ind. App.] 80 N. E. 981.

51. Suit for fraudulent representations in sale of a horse and counterclaim for balance of price. Vandervort v. Mink, 113 App. Div. 601, 98 N. Y. S. 772.

52. A claim for damages for failure to deliver goods in pursuance of an executory contract of sale is a claim for unliquidated damages and is therefore not the subject of a set-off. Godkin v. Bailey [N. J. Err. & App.] 65 A. 1032. In an action for the price of goods, a claim for a certain number of sacks shortage in a previous sale at a certain price per sack and for certain sacks that were worthless held liquidated and capable of set-off. Harrington Lumber Co. v. Smith [Tex. Civ. App.] 99 S. W. 110.

53. Claim for wrongful attachment of goods the price of which was sued for. Abernathy v. Myer-Bridges Coffee & Spice Co., 30 Ky. L. R. 1236, 100 S. W. 862.

it is no objection that a set-off is not of a certain liquidated amount.[54] Counterclaims are often recognized by the courts in order that the controversies between the parties may be disposed of in a single action and full justice be done to all concerned, though they may not fall strictly within the terms of any statute.[55]

Since a set-off does not attack plaintiff's claim,[56] it cannot be pleaded by a mortgagor in an affidavit of illegality to the foreclosure of the mortgage,[57] though recoupment may be so pleaded.[58]

Recoupment.[59]—To be available in recoupment, the matters alleged must be immediately connected with or arise out of the same contract or suit on which plaintiff relies.[60] When suit is brought to recover money paid on a contract because of defendant's failure to perform after a breach by plaintiff, the former may recover his damages for the breach by way of recoupment,[61] and this right is not affected by the fact that the contract had been assigned by defendant prior to the action.[62] A mortgagor may avail himself of recoupment in an affidavit of illegality to the foreclosure of the mortgage.[63] Recoupment, as distinguished from a set-off or counterclaim, is available only to reduce or defeat plaintiff's claim and cannot be made the basis of an independent judgment in favor of defendant.[64]

§ 2. *To be available as a set-off or counterclaim, a demand must, ordinarily, have been a vested and subsisting cause of action at the time of the commencement of plaintiff's suit,*[65] hence a tenant may not set off damages for breach of the covenant of quiet enjoyment, there having been no eviction when the action was brought.[66]

§ 3. *Demands must be mutual,*[67] *and the parties must stand in the same right and capacity.*[68]—A joint debt cannot be pleaded as set-off or counterclaim by one of two joint creditors in a suit by the debtor against such joint creditor alone on his individual debt,[69] but if several defendants are jointly and severally liable on an ob-

54. Suit on contractor's bond and set-off for work done. Brown v. Gourley, 214 Pa. 154, 63 A. 607.

55. One inadvertent trespass set up against another. Excelsior Clay Works v. De Camp [Ind. App.] 80 N. E. 981.

56. "Set-off is a defense which goes not to the justice of plaintiff's demand, but sets up a demand against the plaintiff to counterbalance his in whole or in part." Civ. Code 1895, § 3745. Arnold v. Carter, 125 Ga. 319, 54 S. E. 177.

57. Arnold v. Carter, 125 Ga. 319, 54 S. E. 177.

58. See succeeding paragraph, Recoupment.

59. See 6 C. L. 1445.

60. McGuire v. Gerstley, 26 App. D. C. 193. A tenant sued for rent may recoup damages for the landlord's breach of the rent contract. Smith v. Green [Ga.] 57 S. E. 98.

61, 62. Michigan Yacht & Power Co. v. Busch [C. C. A.] 143 F. 929.

63. Arnold v. Carter, 125 Ga. 319, 54 S. E. 177. He cannot, however, plead set-off in Georgia, since in that state set-off admits plaintiff's claim. Civ. Code 1895, § 3745. See preceding text paragraph.

64. Brecht Butchers' Supply Co. v. Stern, 122 Ill. App. 437.

65. See 6 C. L. 1445. Quayle v. Brandow Printing Co., 101 N. Y. S. 323. In suit on notes other notes, title to which defendant had not acquired until after commencement of action, could not be set off at law. Jump v. Leon [Mass.] 78 N. E. 532. The rule that the debt must be due defendant when suit is commenced is not always applied in equity. See ante, § 1.

66. In suit for breach of covenant to assume an unperformed contract. Pocono Spring Water Ice Co. v. American Ice Co., 214 Pa. 640, 64 A. 398.

67. This rule is subject to modification in equity. See ante, § 1. Defendant could not set up a counterclaim where cause of action was in receiver. Hauts v. Sioux City Brass Works [Iowa] 110 N. W. 166. Certain notes held not proper subjects of set-off against an action on another note, there being no mutuality between the claims thereon and plaintiff's claim. Hooker v. Forrester [Fla.] 43 So. 241. In suit against a payee of a note by an indorser for accommodation of both payee and maker, defendant cannot set off an indebtedness from plaintiff to the maker. Foster v. Balch [Conn.] 65 A. 574. Where executors accounted for money collected by a firm of attorneys though the money had not been returned to them, and subsequently the firm was dissolved, they could set off such money in a suit by one of the attorneys to recover the fees. Lupton v. Taylor [Ind. App.] 78 N. E. 689. In suit to recover certain fees, answer alleging that plaintiff as clerk had collected and failed to account for a judgment in defendant's favor held to state a valid set-off. Chenault v. Norton, 30 Ky. L. R. 875, 99 S. W. 899.

68. See 6 C. L. 1446.

69. Where husband was sued he could not counterclaim a debt due from plaintiff to

ligation, any one of them may set off a claim existing solely in his favor though the action be joint in form.[70] In an action brought for the sole benefit of another, defendant may set off a claim against the beneficiary.[71] One not a party to a sealed contract of sale may not counterclaim damages for fraud in its execution in an action against him as indorser on notes given for the purchase price.[72] The claim of a surviving partner for his share of partnership funds in the hands of the widow of the deceased partner is a proper subject of set-off in an action by the widow against the surviving partner on a note, she being the sole representative of the deceased partner and having permitted the partnership affairs to be settled without accounting for the money.[73]

A claim against a decedent may be set up against his administrator if it could have been asserted against intestate in his lifetime.[74] A partnership demand cannot be set up as a counterclaim against an individual liability.[75]

The general rule is that an assignee of a non-negotiable chose in action takes subject to set-offs existing in favor of the debtor before notice of the assignment;[76] but in Texas it is held that where plaintiff assigns his cause of action for value after institution of suit but before answer, a claim against him cannot be set up against the assignee,[77] and a transferee of immatured negotiable paper also takes free from offsets,[78] unless he has knowledge of equities.[79]

§ 4. *To admit of set-off or counterclaim the main action must be similar in form and remedy to that required for the other.*[80]—A claim in tort will not liquidate one in contract[81] or vice versa,[82] unless both causes of action arise out of the same transaction;[83] but though replevin sounds in tort, a claim resting in contract

him and his wife jointly. Ives v. Sanguinetti [Ariz.] 85 P. 480.

70. This rule will apply in a suit to foreclose a mortgage executed by a husband and wife to secure their joint and several bond. American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081.

71. Rev. Laws, c. 174, § 5. In suit on a note, a judgment could be set up against an estate. Jump v. Leon [Mass.] 78 N. E. 532. **Compare** Laundes v. City Nat. Bank [Conn.] 66 A. 514, treated in § 5.

72. Though he was the real purchaser. Elliott v. Brady, 103 N. Y. S. 156.

73. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

74. Under Burns' Ann. St. 1901, § 355, providing that a person shall not be deprived of a set-off by the death of another, a claim against an intestate, though not reduced to judgment until after his death, may be set off against his administrator who secured an assignment of a lien against defendant's property in pursuance of an agreement made by intestate, and sues to enforce the lien. Hatfield v. Mahoney [Ind. App.] 79 N. E. 408.

75. Mill's Ann. Code, § 57. Doyle v. Nesting [Colo.] 88 P. 862.

76. Assignee of lessee held to take a claim against lessor subject to counterclaims, by lessor for advances under the lease. Chung v. Stephenson [Or.] 89 P. 386. A sale of goods the price of which was pledged to plaintiff held an equitable assignment of a chose in action so that the purchaser could set up a claim against the seller as against plaintiff. Thalmann v. Giles, 101 N. Y. S. 980.

77. Gage v. Hunter [Tex. Civ. App.] 94 S. W. 1104.

78. Where not shown that transfer of notes before maturity was made for purpose of avoiding defense of set-off. Cripps v. Buffington [Iowa] 108 N. W. 231.

79. If after the appointment of a receiver for an insolvent corporation, a stockholder transfers its negotiable bonds to one who has knowledge of the transferer's liability on his stock, a judgment subsequently obtained on the stock liability may be set off against the amount of the bonds. Hynes v. Illinois Trust & Sav. Bank, 226 Ill. 95, 80 N. E. 753.

80. See 6 C. L. 1446.

81. Tort may not be set off against cause of action in contract. Quayle v. Brandow Printing Co., 101 N. Y. S. 323. In suit for failure to cultivate trees, defendant could not set off damages to his own trees resulting from plaintiff's negligence. Griffing Bros. Co. v. Winfield [Fla.] 43 So. 687. Damages flowing from an independent tort of a landlord upon the tenant cannot be set off against rent. Smith v. Green [Ga.] 57 S. E. 98. Matters of tort cannot be the subject of set-off under D. C. Code, § 1563 (31 St. L. 1424, c. 854). McGuire v. Gerstley, 26 App. D. C. 193.

82. In suit to recover money left with defendant by a decedent, an allegation that defendant had refused to pay the money to the executor held insufficient to stamp the action as one in conversion so as to defeat defendant's counterclaims on contract. Lange v. Schile, 101 N. Y. S. 1080. Complaint held to set out conversion of personalty so that a counterclaim could not be litigated in the suit under Code Civ. Proc. § 501, subd. 2, providing for counterclaim in actions on contract. McIntyre v. Smathers, 103 N. Y. S. 873.

83. Counterclaim in contract allowable in

may be counterclaimed therein.[84] One who embodies a promissory note in an account with the maker and thereafter discharges the account by credits in his favor will not thereafter be heard to say that the credits cannot be offset against the note.[85] An indebtedness of the plaintiff to the defendant cannot be pleaded as a set-off or counterclaim in an action at law for conversion in a Federal court.[86]

§ 5. *Pleading and practice.*[87]—In a suit by an assignor, of a chose to the use of the assignee, the defendant has no right to have the assignee made a party for the purpose of setting up a counterclaim against him when the suit can be fully determined without his presence and without prejudice to any one.[88] If a transaction amounts to separate sales by partners of a portion of their interests in a firm, and suit is brought by one for the purchase price of the interest sold by him, the others need not be made parties to enable the purchaser to counterclaim a proportionate part of damages on account of innocent misrepresentations.[89] Defendant need not send plaintiff a statement and ask for credit as a condition precedent to the setting up of claims already due and payable.[90] A statute prohibiting the allowance of claims against persons of unsound mind until verified and proven does not preclude the setting up of unverified claims as a defense to a suit brought for an incompetent.[91]

To be available a set-off or counterclaim must be pleaded,[92] and its sufficiency will be determined without regard to other matters set out in the answer unless connected therewith by direct reference.[93] It must state facts sufficient to constitute a good cause of action if defendant had sued plaintiff independently.[94] Hence mere

such case whether plaintiff sues in contract or in tort. Vandervort v. Mink, 113 App. Div. 601, 98 N. Y. S. 772. See, also, ante, § 1, subd. Statutory Set-off and Counterclaim.

84. Equitable lien based on agreement to give possession of a horse held good counterclaim in replevin for the horse. Reardon v. Higgins [Ind. App.] 79 N. E. 208.

85. Could not contend that maker's open account could not be set off, and thus get the benefit of limitations against the credits. Lowry v. Smith [Tex. Civ. App.] 15 Tex. Ct. Rep. 90, 94 S. W. 450.

86. Van Zandt v. Hanover Nat. Bank [C. C. A.] 149 F. 127.

87. See 6 C. L. 1447.

88. Where surety on administrator's bond indemnified the estate and took assignment of all rights against transferee of the misappropriated funds and the latter had a claim against the surety for indemnity on another bond. Lowndes v. City Nat. Bank [Conn.] 66 A. 514. That multiplicity of suits might be avoided was no ground. Id.

89. Steckbauer v. Leykom [Wis.] 110 N. W. 217.

90. Claims for commissions, taxes, and services set up against notes. Rinker v. Lauer [Idaho] 88 P. 1057.

91. Ky. St. 1903, § 2154. Action to quiet title and assertion by defendant of liens for claims held against incompetent. Sebree v. Johnson's Committee, 30 Ky. L. R. 681, 99 S. W. 340. In such case, however, the court will not allow the claims to be prosecuted to judgment until the making of the statutory affidavit. Id. Even if the objection had been tenable, the remedy was not by demurrer but by rule to show cause why the counterclaim should not be dismissed. Id.

92. Set-off. Meyer v. Johnson, 122 Ill. App. 87. In a suit by an army officer for extra pay, no deduction could be made for sums improvidently paid, the United States having filed no set-off or counterclaim. United States v. Mitchell, 27 S. Ct. 463. A tenant may prove that the landlord has violated the rent contract and reduce the rent by the damages sustained without filing other pleadings than the statutory affidavit. Smith v. Green [Ga.] 57 S. E. 98.

93. Counterclaim. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. Counterclaim held insufficient in itself. Clement v. Dowling, 147 F. 929. The fact that plaintiff is a nonresident need not be set out where it appears from the petition. Unliquidated claim for conversion could be set off on ground that plaintiff was a nonresident where this was shown by petition. Abernathy v. Myer-Bridges Coffee & Spice Co., 30 Ky. L. R. 1236, 100 S. W. 862.

94. McGuire v. Gerstley, 26 App. D. C. 193.

Held sufficient: In suit for attorney's fees, set-off by executors, for money not turned over. Lupton v. Taylor [Ind. App.] 78 N. E. 689. Claim for partnership funds in plaintiff's hands. Schnell v. Schnell [Ind. App.] 80 N. E. 432. For work done and money paid. Belote & Son v. Wilcox [Ala.] 41 So. 673. Labor and services. Snowden v. Snowden, 29 Ky. L. R. 1112, 96 S. W. 922. For money paid to plaintiff's attorney. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142. In suit by clients against an attorney for the value of insurance policies, the purchase of which by defendant was claimed to have inured to the benefit of plaintiffs, a counterclaim that defendant also purchased certain deficiency judgments against plaintiffs held to constitute a cause of action. Nichols v. Riley, 103 N. Y. S. 554.

Held insufficient: Breach of a special agreement by plaintiff who sued on a bond.

defensive matter will not avail.[95] It must also show that it arises out of the transaction set forth in the complaint,[96] or is connected with the subject of the action,[97] or if plaintiff's right arises on contract, a cause of action on contract,[98] and that the cause of action existed at the time of the commencement of plaintiff's action.[99] The joinder of several claims in one paragraph is not ground for demurrer if the facts constitute a valid set-off as to any one of the claims.[1] The practical result of separate and similar pleas filed by two defendants is the same as if they were joined in one.[2] A plea may be good as a set-off though insufficient as a recoupment,[3] and whether a pleading is an answer, a set-off, or a counterclaim will be determined from the facts stated,[4] regardless of what it may be styled;[5] but matters available only as a counterclaim or set-off are not sufficient as a mere defense.[6] A sham counterclaim in fraud of jurisdiction will be stricken.[7]

In Illinois a defendant may recover under a plea of set-off an affirmative judgment against plaintiff for damages, though unliquidated, in excess of plaintiff's demand, providing they arise out of the same contract or transaction as that on which plaintiff sues.[8] In order that a plaintiff may be precluded from contesting a counterclaim by his failure to serve a reply, the alleged counterclaim must be distinctly named as such in the answer.[9] Judgment for failure to answer a counterclaim is not authorized after entry of a formal denial by leave of court,[10] or when the complaint in itself constitutes a denial.[11] When an action is dismissed for want of ca-

Too vague and indefinite. McGuire v. Gerstley, 26 App. D. C. 193, afd. in 27 S. Ct. 332. That plaintiff had induced one of the principals to dissolve a partnership. Id. Counterclaim for duress. Lilienthal v. Bechtel Brewing Co., 102 N. Y. S. 1051. That ex-copartner had received firm mail. Bastable v. Carroll, 101 N. Y. S. 637. Claim under a will not set out. Schnell v. Schnell [Ind. App.] 80 N. E. 432. Failure to state that plaintiff's possession of a note was wrongful. Id. Certain **pleas of recoupment** held subject to special demurrer for failure to state when a contract was made, etc., and that the damages were reasonably contemplated. Merrison-Trammell Brick Co. v. McWilliams [Ga.] 56 S. E. 306. A plea of recoupment being a cross action by defendant against plaintiff, its allegations as to damages must be as specific and certain as if made in a petition. Whitt v. Blount, 124 Ga. 171, 53 S. E. 205.

95. Counterclaim must be a "cause of action." In suit for waste, allegations setting up equitable title in defendant and asking that it be granted held not to state a counterclaim. Code Civ. Proc. § 691. Erbes v. Smith [Mont.] 88 P. 568. Plea of set-off held not demurrable as containing defense of "rescission and breach of warranty." Belote & Son v. Wilcox [Ala.] 41 So. 673.

96. In suit for rent of property, counterclaim for breach of warranty of certain machinery held not to show that it arose out of that transaction. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

97. Counterclaim for breach of warranty held not to show connection with subject of action. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512. See ante, § 1, subd. Statutory Set-off and Counterclaim.

98. Code Civ. Proc. § 438. Held subject to special demurrer as showing right to nominal damages only. Harron v. Wilson, Lyon & Co. [Cal. App.] 88 P. 512.

99. Counterclaims held faulty. Quayle v. Brandow Printing Co., 101 N. Y. S. 323.

1. Schnell v. Schnell [Ind. App.] 80 N. E. 432.

2. Objection that one of two sureties could not maintain cross action for damage to both. McGuire v. Gerstley, 26 App. D. C. 193.

3. Plea termed "recoupment" for money had and received, in action for price of goods. Thomas v. Thomas [Ala.] 41 So. 141.

4. Pleading held a counterclaim. Excelsior Clay Works v. DeCamp [Ind. App.] 80 N. E. 981.

5. A pleading shown by its allegations to be a counterclaim will be treated as such though termed a "cross complaint." Reardon v. Higgins [Ind App.] 79 N. E. 208.

6. Though a claim for commissions could have been pleaded as a counterclaim, it was not good as a defense to an action on notes. Prosser v. Maxon, 100 N. Y. S. 815.

7. Claim that hogs killed by defendant had caused it damage to amount of $25 by destroying grass, filed to bring case into district court on appeal. St. Louis, etc., R. Co. v. Bradfield [Okl.] 88 P. 1050.

8. In suit for medical services, defendant could recover such affirmative judgment if sustained by proof, and his rights were not limited merely to defeating plaintiff's claim in whole or in part. Holmes v. McKennon, 120 Ill. App. 320.

9. Where not so named defendant was not entitled to affirmative judgment. American Guild v. Damon, 186 N. Y. 360, 78 N. E. 1081.

10. Tillinghast, Styles Co. v. Providence Cotton Mills [N. C.] 55 S. E. 621.

11. Where in suit for failure to deliver goods, counterclaim was based on a denial that there was an absolute sale. Tillinghast, Styles Co. v. Providence Cotton Mills [N. C.] 55 S. E. 621.

pacity in plaintiff to sue, a counterclaim therein also falls,[12] and a statute preserving a counterclaim or set-off despite a voluntary dismissal does not apply,[13] neither will such a statute preclude plaintiff from dismissing a count in his petition.[14] Failure to set up a counterclaim or set-off is not a bar to a subsequent action thereon.[15]

Evidence.[16]—Defendant must prove the same facts that he would be required to prove had he brought an original action,[17] and the burden is on him to establish his set-off by a preponderance of the evidence.[18] The separate items of the set-off should be proven and not only a total sum.[19]

Instructions.[20]

Limitations.[21]

SETTLEMENT OF CASE; SETTLEMENTS; SEVERANCE OF ACTIONS, see latest topical index.

SEWERS AND DRAINS.

§ 1. State and Municipal Authority and Control (1882).
§ 2. General Powers Under the Various Statutes (1883).
§ 3. Independent Organizations Controlling Drainage, Reclamation, and Sanitation (1883).
§ 4. Procedure in Authorization and Construction of Sewers and Drains (1885).
§ 5. Compensation to Property Owners for Lands Taken or Damaged (1890).
§ 6. Provision for Cost (1891).
§ 7. Management and Operation; Duty to Properly Construct, Maintain, and Repair Works, and Provide Drainage (1894).
§ 8. Private and Combined Drainage (1896).
§ 9. Obstruction of Drains (1896).

§ 1. *State and municipal authority and control.*[22]—Public drainage legislation is based upon the inherent police power vested in the state for the protection of its people,[23] and is generally held constitutional.[24] A statute conferring upon a

12. Where foreign administrator could not sue. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 S. W. 329. Judgment on counterclaim after dismissal held void though administrator afterward qualified. Id.

13. Civ. Code Prac. § 372. McClellan's Adm'r v. Troendle, 30 Ky. L. R. 611, 99 S. W. 329.

14. Could dismiss under Code, § 3764, notwithstanding § 3766. Houts v. Sioux City Brass Works [Iowa] 110 N. W. 166.

15. Where plaintiff in foreclosure could have pleaded the mortgage in a prior action for rent. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57.

16. See 6 C. L. 1448.

17. Russell v. Excelsior Stove & Mfg. Co., 120 Ill. App. 23. Tenant failed to produce evidence as to loss sustained by breach of landlord's covenant to repair. Suit by landlord for breach of tenant's covenant to assume an unperformed contract. Pocono Spring Water Ice Co. v. American Ice Co., 214 Pa. 640, 64 A. 398. Evidence that a named person, "manager for plaintiff" (a corporation), owed defendant a specified amount, for which defendant set up a counterclaim by plea of set-off, did not authorize a verdict against the corporation. Douglas Planing Mill & Novelty Co. v. Anderson [Ga.] 56 S. E. 635.

18. Holmes v. McKennan, 120 Ill. App. 320. In suit for money loaned, evidence held to sustain finding against a counterclaim. Porter v. Magnetic Separator Co., 100 N. Y. S. 888. Counterclaim for defects in stone held not sustained where evidence showed that defendant had accepted it as being in compliance with contract. Western Const. Co. v. Romona Oolitic Stone Co. [Ind. App.] 80 N. E. 856.

19. For alleged negligence of surgeon. Holmes v. McKennan, 120 Ill. App. 320.

20, 21. See 6 C. L. 1448.

22. See 6 C. L. 1448.

23. Attorney General v. McClear [Mich.] 109 N. W. 27.

24. A statute is not unconstitutional as an attempted delegation of legislative authority because it provides for the finding by a court of whether a drainage system first adopted by drainage commissioners is practicable, conducive to public welfare, and will increase the value of lands for the purpose of public revenue. [Laws 1895, p. 287, c. 115, § 12] (State v. Superior Court for Skagit County, 42 Wash. 491, 85 P. 264), nor because it requires a jury to ascertain the damages and benefits to each tract of land and the value of the land to be taken. Did not impose upon court or jury the duty of making assessments where county auditor and commissioners were to take the necessary steps for the assessment and collection of the tax [Laws 1895, pp. 271-296, c. 115] (Id.). That § 5, Laws 1905, pp. 360-365, c. 175, amending the drainage law of 1895 and relating to the bonds of drainage commissioners, was unconstitutional because not included in the title of the act, did not affect the validity of the remaining sections relating to proceedings for the establishment of districts. Id. A city health ordinance requiring sewer connection with cess pools is not necessarily invalid. Ordnance held not in conflict with a statute denouncing certain uses of contents of cess pools. Logan v. Childs [Fla.] 41 So. 197. Court could not know judicially that it was

city power to prescribe the manner in which shall be exercised any privileges granted in the use of streets refers only to privileges already granted and does not authorize an original grant of the right to lay sewers in the streets.[25] An owner whose buildings are connected with the sewers of a sewer company and who has paid sewer rent therefor may question by certiorari the validity of an ordinance granting to a new company the right to take over the plant of the old one and the right to lay sewers in the streets and advancing the sewer rentals.[26] A corporation organized under the general corporation act of a state and not under the act for the creation of sewer companies is not authorized to lay sewers in the public streets of a city.[27] The state board of health of New Jersey has no power to enjoin an alleged pollution of potable waters by reason of the operation of a municipal sewer plant constructed and operated under and pursuant to the directions of the state sewerage commission.[28]

§ 2. *General powers under the various statutes.*—There is no right at common law to construct artificial drains over the lands of others.[29] Though a statute may be broad as to powers conferred on drainage commissioners and provide for a liberal construction, it will not be construed to confer upon them power to establish a district contemplating the destruction of a navigable meandered lake or the impairment of the navigability of a river.[30] A statute requiring a court to cause ditches and drains to be constructed along a railroad if the railway company fails to do so does not authorize the court to make an order upon the railway company to construct drains.[31] The county commissioners in Ohio have no power to convert a living stream of water into a county ditch,[32] nor to locate and establish a ditch in a township ditch until there has been a refusal by the township trustees to act.[33] Under the Indiana act of 1891 for the drainage of cities, a natural watercourse could be diverted so as to constitute either an "inlet" or an "outlet."[34]

§ 3. *Independent organizations controlling drainage, reclamation, and sanitation.*[35]—Drainage statutes commonly provide for the establishment of drainage, reclamation, or sanitation districts to which are intrusted the construction of drains and the reclamation of waste lands.[36]

unreasonable or oppressive. Id. Act April 23, 1903 (Kirby's Dig. §§ 1414-1450), for the establishment of drainage districts, is not unconstitutional because it does not limit the assessments on the lands to the value of benefits. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711. Acts 1906, p. 1, c. 1, empowering cities of the first class to construct a sewer system is not special legislation, though Louisville is the only city of the first class and the act uses the word "Louisville." Miller v. Louisville, 30 Ky. L. R. 664, 99 S. W. 284. That it provides for appointment of a commission to appoint officers and report what system would be most expedient does not contravene constitution providing that legislative boards shall be elected. Id. Is not a special act granting a charter to a corporation, though it provides that the commission shall constitute a corporation. Id. The invalidity of the portion of acts 1893, p. 102, creating a levee district which authorizes the taking of property without just compensation, does not invalidate the entire act. Porter v. Waterman, 77 Ark. 383, 91 S. W. 754.

25. Act. March 24, 1897 (P. L. p. 46). Fogg v. Ocean City [N. J. Law] 65 A. 885.

26. Fogg v. Ocean City [N. J. Law] 65 A. 885.

27. Company organized under Act Apr. 21, 1896, and not under act of June 13, 1890. Fogg v. Ocean City [N. J. Law] 65 A. 885.

28. Chapter 41, Laws 1899, in so far as it authorizes such action, was repealed by Laws 1900, c. 72, if indeed it was not wholly repealed. Board of Health of New Jersey v. Vineland [N. J. Eq.] 65 A. 174.

29. Taylor v. Strayer [Ind.] 78 N. E. 236.

30. Rev. St. 1898, §§ 1379—11 to 1379—31. In re Dancy Drainage Dist. [Wis.] 108 N. W. 202.

31. Rev. St. 1899, § 1110. Sanders v. St. Louis, etc., R. Co., 116 Mo. App. 614, 92 S. W. 736.

32. "Watercourse" as used in the county ditch law (tit. 6. c. 1, Rev. St. 1906) is synonymous with "drain." Greene County Comr's v. Harbine, 74 Ohio St. 318, 78 W. E. 521.

33. As provided by Rev. St. § 4510. Sollars v. Sever, 8 Ohio C. C. (N. S.) 364.

34. Burns' Ann. St. 1901, §§ 3598-3606. City of Huntington v. Amiss [Ind.] 79 N. E. 199. Though this act was repealed by Act 1905, § 14, this, being a pending proceeding, was saved by said section. Id.

35. See 6 C. L. 1450.

36. A proceeding under Rev. St. 1899, art. 3, c. 122, for the incorporation of a drainage

Organization and officers.[37]—On certiorari to review the proceedings of commissioners in organizing a district, error in including or excluding land from a graduated scale which the commissioners were authorized to make cannot be considered.[38] After a drainage district has elected officers, made surveys, condemned land, contracted for right of way, and levied special assessements for work, it is too late to question the legality of its organization by certiorari,[39] at least at the instance of persons who were active in the proceedings.[40] An order of court regular on its face establishing a levee district and containing the necessary jurisdictional recitals prima facie shows that the district was legally created.[41] The sustaining of objections to the confirmation of a special assessment by a drainage district for new work on the ground that no right of way has been obtained is not an adjudication that the proceedings establishing the old district were invalid where there is nothing in the record to indicate that such is the case.[42]

A drain commissioner is not an ordinary local officer but an officer exercising public functions on behalf of the state under its police powers,[43] and hence a statute authorizing the appointment of a commissioner pro tempore by the governor does not contravene the right of local self-government or violate a constitutional inhibition against the state engaging in works of internal improvement.[44] Ownership of land within a drainage district does not disqualify a person as a drainage commissioner[45] nor render the proceedings in which he participated void or subject to attack by a court of equity.[46] The Michigan statute disqualifying a highway commissioner does not apply to road commissioners.[47] Signers of the statutory petition for the appointment by the court of only one commissioner instead of three for a drainage district in Illinois may withdraw their names at any time before action taken on the petition,[48] and before that time and after withdrawal may likewise have their names reinstated.[49] A special drainage commissioner in Michigan is not required to file an oath of office.[50] The amendment to the Washington statute relating to the commissioners' bonds has been held unconstitutional.[51] Under a statute requiring the town clerk to keep a record of the proceedings of drainage commissioners, it is not essential that he should write out on the record with his own hand such proceedings.[52] Drainage commissioners may amend their records to conform to the facts,[53] even after the filing of a petition for quo warranto to determine the

district, is a "civil suit" within the meaning of the venue statute. State v. Riley [Mo.] 101 S. W. 567.

37. See 6 C. L. 1450.

38. Only jurisdictional questions. Barnes v. Divernon Drainage Com'rs, 123 Ill. App. 621; Id. 221 Ill. 627, 77 N. E. 1124.

39. Deslauries v. Soucie, 122 Ill. App. 81.

40. Where petitioners had voted for commissioners, made contracts with them, and waived damages. Deslauries v. Soucie, 122 Ill. App. 81.

41. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676.

42. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

43. Attorney General v. McClear [Mich.] 109 N. W. 27.

44. Local Acts 1905, p. 795, Act 592. Attorney General v. McClear [Mich.] 109 N. W. 27.

45. State v. Fisk [N. D.] 107 N. W. 191. "Competent" in a statute providing for the appointment of drainage commissioners does not mean disinterested. In re Cranberry Creek Drainage Dist., 128 Wis. 98, 107 N. W. 26. Did not disqualify independent of statute. Id.

46. State v. Fisk [N. D.] 107 N. W. 191.

47. Comp. Laws, § 4317. Auditor General v. Bolt [Mich.] 111 N. W. 74.

48. Snedeker v. Matter Drainage Dist., 124 Ill. App. 380.

49. Petition under Rev. St. 1903, p. 736. Snedeker v. Matter Drainage Dist., 124 Ill. App. 380.

50. Auditor General v. Bolt [Mich.] 111 N. W. 74.

51. The amendment to § 6, Laws 1895, c. 115, by Laws 1905, pp. 360-366, c. 176, changing the amount of the bonds to be given by drainage commissioners, is unconstitutional not having been expressed in the title (State v. Superior Court for Skagit County, 42 Wash. 491, 85 P. 264), and hence the bonds must still be $5,000 (Id.).

52. Sufficient, in quo warranto, that lead pencil notes were made at hearing and drainage district's attorney thereafter type wrote the minutes and had them pasted in the record at request of clerk. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

53. If in proceedings to organize a drainage district the clerk errs in certifying the date on which he posted the notices of hearing of the petition, he may correct the

validity of the organization of the drainage disrict,[54] and the record as so amended may be admitted in evidence at the trial.[55] The acts of drainage commissioners may be proven by parol when they act only as agents for private parties and not in their official capacity.[56] The acts of drainage commissioners de facto cannot be questioned by certiorari to review their proceedings for the establishment of a drainage system.[57] In proceedings under the Wisconsin law of 1898 for the establishment of drainage districts, an order appointing commissioners is not a final appealable order.[58]

Limits of districts and changes therein.[59]—Under the Drainage and Levee Act of Illinois, lands, whether dominant or servient, which are or will be benefited by the work of a drainage district, are subject to be attached thereto,[60] and benefits will be deemed to accrue if the effect of the connection of the lands with the drainage district is to decrease an overflow to which they are subject and lessen the period of submergence even though an overflow is not wholly prevented.[61] Territory included within the corporate limits of cities and villages may be included in a drainage district in that state, such territory not having been previously organized by the municipality for drainage purposes.[62] Power in commissioners to include all lands to be benefited includes power to include lands not described in the petition and to exclude lands therein described.[63] It is competent for the legislature to change the boundaries of a levee or drainage district.[64]

Combined systems.[65]—In Illinois an appeal in a proceeding to determine the amount of contribution to be made by a district which is benefited by the enlargement of the drains of another district is governed by the general statute relating to appeals from the county court.[66]

§ 4. *Procedure in authorization and construction of sewers and drains.*[67]—These proceedings being based entirely on statute must be in strict conformity thereto at least as to all substantial matters.[68] There being no common-law right to

certificate so as to make it state the true date. No objection to record attempted to be introduced in evidence in quo warranto. Hepler v. People, 226 Ill. 275, 80 N. E. 759.

54. People v. Zellar, 224 Ill. 408, 79 N. E. 697.

55. Amendment by resolution reciting that petition was signed by majority of adult owners of the land and that lands would be benefited for agricultural and sanitary purposes. People v. Zellar, 224 Ill. 408, 79 N. E. 697.

56. Where one objected to the tearing up of a tile in a servient estate, it could be shown by parol that through the commissioners he had consented thereto for a consideration. Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321.

57. Insufficiency of bonds. State v. Superior Court for Skagit County, 42 Wash. 491, 85 P. 264.

58. Rev. St. 1898, §§ 1379—11 to 1379—17, and § 1379—18, as amended by laws 1901, p. 46, c. 43. In re Horicon Drainage Dist. [Wis.] 108 N. W. 198. Order having been made before Laws 1905, p. 687, c. 419, went into effect, appealability could not be governed by this statute. Id.

59. See 6 C. L. 1451.

60. Act May 29, 1879, as amended by act of 1885. Commissioners of Spoon River Drainage Dist. v. Conner, 121 Ill. App. 450.

61. Instruction erroneously modified. Commissioners of Spoon River Drainage Dist. v. Conner, 121 Ill. App. 450.

62. Act May 29, 1879, and farm drainage acts (Hurd's Rev. St. 1905, c. 42, § 85). City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

63. Barnes v. Divernon Drainage Com'rs, 123 Ill. App. 621; Id., 221 Ill. 627, 77 N. E. 1124.

64. Acts 1905, p. 480, changing the boundaries of a levee district without reference to Act 1893, p. 102, by which the district was created, is not violative of the constitutional provision that no act shall be amended by reference to its title. Porter v. Waterman, 77 Ark. 383, 91 S. W. 754.

65. See 6 C. L. 1451.

66. Hurd's Rev. St. 1903, pp. 776, 777, c. 42, §§ 204-209. Appeal should have been to appellate court, not involving a constitutional question, a freehold, etc. Union Drainage Dist. No. 1 v. Drainage Dist. No. 1, 220 Ill. 104, 77 N. E. 98.

67. See 6 C. L. 1452.

68. Lager v. Sibley County Com'rs [Minn.] 110 N. W. 355. The town supervisors under the town ditch statute (Rev. St. 1898, §§ 1359-1371) constitute a special tribunal for administrative purposes not proceeding according to the course of the common law (Frazer v. Mulany [Wis.] 109 N. W. 139), and hence, as to all substantial matters, an exact compliance with the course of procedure prescribed is essential to jurisdiction (Id.). If they lose jurisdiction by failure to take any necessary step in the establishment of a drain, their proceedings are void and may be attacked collaterally or directly. Id.

construct drains over the lands of others,[69] the repeal of a statute authorizing the establishment of a ditch destroys pending causes not already merged in judgment, unless they fall within some saving provision contained in the repealing act.[70]

Due process of law; notice.[71]—Notice in substantial compliance with the statute,[72] and sufficient to constitute due process,[73] is essential,[74] though actual service is not always required.[75] Failure of the clerk to mail a notice in person is not fatal if the notice is otherwise sufficient.[76] The certificate of the clerk of drainage commissioners, if competent at all, is not the only evidence of the time and place he posted notices of a hearing on a petition for the establishment of a district.[77] A recital of notice in an order of court is at least prima facie evidence thereof.[78]

Petition or application.[79]—Jurisdiction to order the construction of a drain is acquired by the filing of a petition of the requisite number of landowners and an order of the drainage board establishing the drain after a hearing on the petition upon due notice to all concerned.[80] Where it appears that additional land will be taken for new work,[81] objecting landowners are entitled to have the petition, plans, and specifications, specify the character and location of the proposed work with sufficient definiteness to enable them to determine what land will be appropriated.[82] The petition presented to the court by the drainage commissioners under the Washington statute must submit a complete system with plans, specifications, and estimates of cost.[83] The failure of a petition to state the manner in which a repair is to be made is not fatal though it prays that the repair be made in the manner set

69. Taylor v. Strayer [Ind.] 78 N. E. 236.

70. A proceeding wherein a ditch had been ordered established and wherein it was sought to affect certain lakes held not within the saving clause of Acts 1905, p. 480, § 14, excepting proceedings in which a ditch had been ordered established or in which there was no atempt to lower or affect any lake not exceeding ten acres in area, the circuit court having dismissed the proceeding on appeal. Taylor v. Strayer [Ind.] 78 N. E. 236. Not saved by Burns' Ann. St. 1901, §§ 243, 248. Id. Where it did not appear that certain proposed drainage would affect a lake containing a surface area of more than ten acres, the proceedings were not annulled by Acts 1905, p. 456, § 157, though they had not progressed to an order establishing a ditch before the act took effect. Smith v. Gustin [Ind.] 80 N. E. 959.

71. See 6 C. L. 1452.

72. Certain notices considered and held to show substantial compliance with statute as to giving notice of time and place where review of assessments for benefits would be had. Alstad v. Sim [N. D.] 109 N. W. 66.

73. Published notice of proceedings to establish a district provided for by Act April 23, 1903 (Kirby's Dig. §§ 1414-1450), held not a taking of property without due process. Ritter v. Drainage Dist. No. 1. [Ark.] 94 S. W. 711.

74. Failure to give notice of first hearing as required by Rev. St. 1898, § 1360, in proceedings before town supervisors, was fatal. Frazer v. Mulany [Wis.] 109 N. W. 139. That complaint to enjoin proceedings alleged the presence in the record of an affidavit of service did not destroy the effect of a direct allegation that there was no service. Id. That record showed declaration of service did not conclusively show notice. Id. Rev. St. 1905, p. 799, c. 42, § 35, requires notice of letting of contracts and kind of work where cost of constructing a ditch exceeds $500. Rogne v. People, 224 Ill. 449, 79 N. E. 662.

75. Under Hurd's Rev. St. 1905, p. 799, c. 42, § 12, where petition for organization of a drainage district is signed by more than two, notice of first meeting of commissioners to consider petition need only be posted in three public places and need not be served. Rogne v. People, 224 Ill. 449, 79 N. E. 662.

76. Notice to nonresidents. Barnes v. Divernon Drainage Com'rs, 123 Ill. App. 621; Id., 221 Ill. 627, 77 N. E. 1124.

77. In quo warranto. Hepler v. People, 226 Ill. 275, 80 N. E. 759. Relators could not contend that evidence failed to show where notices were posted when they had shut out evidence on that point. Id.

78. Order establishing district. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676. Recital in order of court authorizing construction of a ditch and levying an assessment that notice of filing viewer's report was duly given is prima facie true and throws the burden of showing want of notice on him who attacks the proceeding. Driver v. Moore [Ark.] 98 S. W. 734.

79. See 6 C. L. 1452.

80. Alstad v. Sim [N. D.] 109 N. W. 66. Record held not to sustain contention that an extension of a drain was made before filing of petition. Id.

81. It must be assumed that new land will be taken where it appears that an old ditch is to be extended over half a mile. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

82. Papers held too indefinite. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

83. Laws 1895, pp. 271-296, c. 115, and Laws 1905, p. 362, c. 175. State v. Superior Ct. for Skagit County, 42 Wash. 491, 85 P. 264.

forth.[84] The petition may be amended after submission to the court for the purpose of effecting a change in a system as originally proposed, if notice is given of the amendment and a hearing had on the amended petition.[85] The Ohio statute does not authorize the deepening, widening, or straightening of a watercourse by the county commissioners, upon petition of a mayor of a municipal corporation acting under resolutions in that behalf.[86] The bond to be filed under that statute to support a ditch improvement confers no jurisdiction upon the county commissioners unless signed by at least two sufficient sureties.[87] In some cities a petition for the construction of a sewer is not necessary when the ordinance therefor is passed by a two-thirds vote.[88]

Remonstrances.[89]—Indefinite provisions as to parties entitled to be heard before a board of commissioners in proceedings for the establishment of a drain should be liberally construed so as to effectuate the beneficial purposes of the statute.[90] Under the Minnesota statute the right to be heard in proceedings for the establishment of a county ditch is not confined to those who are strictly parties,[91] but extends to landowners with a well grounded claim for damages, though it may not certainly appear that such damages are recoverable at law.[92] Parties objecting to the construction or improvement of drains on the ground that no right of way has been obtained must show that some of their own property will be taken or damaged.[93] Where after an appeal from an order of a board, the establishment of a proposed ditch is prohibited by statute, the court may permit remonstrant to set up his rights under the new act.[94]

Report of viewers or commissioners.[95]—The failure of viewers to make any showing as to flood gates, waterways, crossings, etc., does not avoid the whole proceeding, it not being contended that substantial rights are affected.[96] An alteration of the termini of a ditch as fixed in the petition will not ordinarily render the proceeding invalid,[97] though neither the report nor the court's order shows the reason therefor,[98] but a statute authorizing a departure by the engineer when it shall appear to him expedient will be construed to authorize only a reasonable departure.[99] A statutory provision as to when the viewers shall file their report is not mandatory.[1]

84. Auditor General v. Bolt [Mich.] 111 N. W. 74.

85. State v. Superior Ct. for Skagit County, 42 Wash. 491, 85 P. 264. A petition being incomplete for failure to contain plans, specifications, etc., the commissioners may choose between amending it and dismissing the proceedings. Id.

86. Bates' Rev. St. § 4483. Copper v. Van Wert County Com'rs, 4 Ohio N. P. (N. S.) 185.

87. Cooper v. Van Wert County Com'rs, 4 Ohio N. P. (N. S.) 185.

88. The council of the city of Spokane may order the construction of a sewer without a petition of property owners filed with the board of public works where the ordinance providing therefor is passed by two-thirds vote. City of Spokane v. Preston [Wash.] 89 P. 406.

89. See 6 C. L. 1452.

90. Laws 1901, c. 258, p. 413, and acts amendatory relating to laying out of county ditches. In re Public Ditch in Isanti County [Minn.] 107 N. W. 730.

91. Laws 1901, c. 258, and amendatory acts. In re Public Ditch in Isanti County [Minn.] 107 N. W. 730.

92. Certain parties held entitled to maintain certiorari. In re Public Ditch in Isanti County [Minn.] 107 N. W. 730.

93. Objection to confirmation of assessment. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

94. Burns' Ann. St. 1901, §§ 5655-5671, repealed by Acts 1905, p. 456, c. 157. Taylor v. Strayer [Ind.] 78 N. E. 236.

95. See 6 C. L. 1452.

96. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

97. Especially where statute allows a variance in certain cases. Driver v. Moore [Ark.] 98 S. W. 734.

98. Statute provided that viewers could extend ditch if necessary to secure sufficient fall. Driver v. Moore [Ark.] 98 S. W. 734.

99. In proceedings under Laws 1905, p. 303, c. 230, the county commisioners are limited in their final order establishing a ditch to description contained in the petition subject to such reasonable departures in course and terminals as are necessary to render improvement of practical utility. Lager v. Sibley County Com'rs [Minn.] 110 N. W. 355. Extension of seven miles held unauthorized. Id.

1. That viewers should file report at least two weeks before next term of court. Driver v. Moore [Ark.] 98 S. W. 734.

The Delaware statute does not require that the report of ditch commissioners must be filed on the first day of the term of court.[2] When a report is inadvertently filed before it is completed, it will be remanded to the commissioners and the case continued until a subsequent term.[3] The court is not deprived of power to approve a proposed system merely because some other system may be more feasible.[4]

Order, ordinance, or resolution for work.[5]—The granting of a petition reciting that a drain is a public necessity and establishment of a drain as prayed for therein necessarily implies a finding that the drain is a necessity.[6] Whether an ordinance is reasonable depends on circumstances.[7] The fact that an ordinance relating to the construction of a sewer fixes the benefits to be assessed against abutters when such amount is to be determined by viewers does not render it wholly invalid.[8] Plans and specifications in conformity to which an ordinance provides for the construction of a sewer are a part of the ordinance.[9] Failure of an ordinance to set forth the thickness of sewer pipe is not fatal where this was stated in the specifications and there is no pretense that an inferior quality was used,[10] and the fact that the amount of masonry to be used is not specified is no defense to an action on the tax bill, it appearing that only an estimate could be made.[11]

Validity and performance of contracts.—These subjects are controlled largely by the general rules governing public contracts[12] and public works and improvements.[13] That the viewers filed their report in advance of the time fixed by the court and the letting of the contract en masse and without notice have been held not to affect its validity under the Arkansas statute.[14] Failure to perform within the stipulated time does not avoid but is only ground for avoiding a contract.[15] By statute in Minnesota a county may exact from the contractor a bond for the benefit of persons who may be damnified by the improper doing of the work.[16]

Defects and irregularities in general.—In the absence of prohibitory legislation, disqualification for the interest of a commissioner who participates in the establishment of a drain renders the proceeding voidable only.[17] Failure of a board to ascertain and embody in their order the amount of benefits to highways so that they may be charged to the town is immaterial unless it appears that a highway will be benefited;[18] but a statutory provision requiring a board of public works to determine the question of benefits to be derived from the construction of a proposed sewer and to proceed with the work only in case the benefits shall equal the estimated cost is jurisdictional and must be observed;[19] and the failure of town super-

2. In re Warrington's Petition [Del.] 64 A. 251.

3. Proceedings for establishment of a ditch not dismissed. In re Warrington's Petition [Del.] 64 A. 251.

4. Question is whether proposed system is feasible. State v. Superior Ct. for Skagit County, 42 Wash. 491, 85 P. 264.

5. See 6 C. L. 1453.

6. Statute not requiring that board make record that necessity existed. Alstad v. Sim [N. D.] 109 N. W. 66.

7. Cost of establishing a drainage system for a village, number of inhabitants, value of the land, etc., considered, and held an ordinance was not unreasonable. Snydacker v. West Hammond, 225 Ill. 154, 80 N. E. 93.

8. In re Wheeler Ave. Sewer, 214 Pa. 504, 63 A. 894.

9. Same as set forth therein. Dickey v. Porter [Mo.] 101 S. W. 586.

10. It having been the custom to use but one character of pipe, defendant could not defeat tax bill, though charter provided that sewers should be of such dimensions as should be prescribed by ordinance. Dickey v. Porter [Mo.] 101 S. W. 586.

11. Dickey v. Porter [Mo.] 101 S. W. 586.

12. See Public Contracts, 8 C. L. 1473.

13. See Public Works and Improvements, 8 C. L. 1506.

14. Objection raised in proceeding to collect assessment. Driver v. Moore [Ark.] 98 S. W. 734.

15. Driver v. Moore [Ark.] 98 S W. 734.

16. Eidsvik v. Foley, 99 Minn. 468, 109 N. W. 993. Bond held to cover indemnity. Id.

17. Carr v. Duhme [Ind.] 78 N. E. 322. That drainage commissioner owns land in district does not render proceedings void. State v. Fisk [N. D.] 107 N. W. 191.

18. Allegation that supervisors failed to determine benefits insufficient. Rev. St. 1898, § 1364. Frazer v. Mulany [Wis.] 109 N. W. 139.

19. Acts 1901, p. 608, c. 262. Edwards v. Cooper [Ind.] 79 N. E. 1047.

visors to file with the town clerk a final certificate showing the cost of the construction of a drain, a description of the several parcels of land benefited, and the amount assessed against each, and the order awarding damages to owners of land, as required by statute, is fatal to further jurisdiction.[20] When a petition is unnecessarily filed the work need not conform thereto.[21]

Waiver of irregularities.[22]—Disqualification for interest may be waived by acquiescence.[23] Objection to the constitutionality of a statute for not providing notice is waived as against one who was actually served, participated in the construction of a ditch, and paid tax instalments.[24]

Attack of proceedings.[25]—It is provided by statute in Michigan that, if no proceeding is brought by certiorari within a specified time to review drain proceedings, the legality of the drain may not thereafter be questioned in law or in equity,[26] and in that state the county drain commissioner must be made a party to any suit to set aside a drain tax or in any way attacking the validity of a proceeding.[27] Fatally defective proceedings may be enjoined in equity, there being no adequate remedy at law by appeal or certiorari.[28] An objection that a board did not secure a right of way before the establishment of a drain cannot be raised by collateral attack.[29]

Incidental remedies and review.—Prohibition lies when a court enjoins proceedings of a drainage board acting regularly and within its exclusive jurisdiction.[30] Mandamus and not appeal is the proper remedy on failure of a court to act upon a petition requesting it to cause ditches to be constructed along a railroad because the company has failed to provide them.[3]

An order refusing to confirm the commissioners' report and finding against the validity of the proceedings is appealable though the court refuses to dismiss the proceedings pending determination of the availability of some other system.[32] To authorize an appeal from the county commissioners in Indiana, in ditch proceedings, it is not necessary that a prayer for an appeal be entered on the order book of the commissioners.[33] The filing of an appeal bond with the auditor is jurisdictional to such appeal,[34] but failure to have the bond approved by the auditor is not ground for dismissal.[35] Only those who were parties to the judgment are necessary parties

20. Rev. St. 1898, §§ 1363, 1364. Frazer v. Mulany [Wis.] 109 N. W. 139.

21. Where it was not necessary that property owners should have filed petition for a sewer. City of Spokane v. Preston [Wash.] 89 P. 406.

22. See 6 C. L. 1453.

23. Objection that county commissioner was interested could not be raised for first time on appeal to circuit court. Carr v. Duhme [Ind.] 78 N. E. 322.

24. Could not avoid obligation to pay remaining instalments. Thompson v. Mitchell [Iowa] 110 N. W. 901.

25. See 6 C. L. 1453.

26. Comp. Laws 1897, § 4346. Crandall v. McElheny [Mich.] 13 Det. Leg. N. 716, 109 N. W. 261. Objections to proceedings for disqualification of drain commissioner that special commissioner acted in name only, and that financial statement was not signed by commissioner. Auditor General v. Bolt [Mich.] 111 N. W. 74.

27. Action to recover of township treasurer money paid as a drain tax held within Comp. Laws, § 4370, as amended by act 1899, No. 141, p. 212. Godkin v. Rutterbush [Mich.] 13 Det. Leg. N. 978, 110 N. W. 505.

28. Proceeding for establishment of drain by town supervisors under Rev. St. 1898, §§ 1359-1371. Fraser v. Mulany [Wis.] 109 N. W. 139. Where county commissioners are wholly without power to act, the establishment of a ditch by them may be restrained by injunction. Greene County Com'rs v. Harbine, 74 Ohio St. 318, 78 N. E. 521.

29. Not ground for injunction against collection of assessments. Alstad v. Sim [N. D.] 109 N. W. 66.

30. Where district court enjoined proceedings for establishment of a drain on alleged ground that certain lands were not benefited. State v. Fisk [N. D.] 107 N. W. 191. Appeal was not an adequate remedy. Id.

31. No appeal from county court in proceedings under Rev. St. 1899, § 1110. Sanders v. St. Louis, etc., R. Co., 116 Mo. App. 614, 92 S. W. 736.

32. Court found against validity of proceedings in so far as they purported to destroy a navigable lake and river. In re Dancy Drainage Dist. [Wis.] 108 N. W. 202.

33. Under Burns' Ann. St. 1901, § 5671. Smith v. Gustin [Ind.] 80 N. E. 959.

34. Appeal should have been dismissed where no bond whatever was filed as required by Burns' Ann. St. 1901, § 5671. Smith v. Gustin [Ind.] 80 N. E. 959.

35. If appellant when required by cir-

on appeal from the circuit court.[36] A probate judge making a return to a writ of certiorari to review drainage proceedings is not entitled to fees for certified copies and exemplifications in Michigan.[37]

In the absence of fraud the finding of a court or local board that lands will be benefited,[38] or that a drain is necessary,[39] or practicable or conducive to the public welfare,[40] is not subject to review by appeal or in subsequent proceedings.

Costs.[41]

§ 5. *Compensation to property owners for lands taken or damaged.*[42]—Failure to consider the question of damages renders the proceeding invalid.[43] Estoppel[44] or a waiver supported by a sufficient consideration will preclude a recovery of damages.[45]

For what allowed.[46]—An owner whose building is damaged by reason of the construction by a city of a sewer so close to its foundations as to cause it to settle is within the protection of a constitutional provision against the taking or damaging of private property without just compensation.[47]

Amount and ascertainment thereof.[48]—A drainage district organized under the Illinois Levee Act should proceed under the eminent domain act to condemn property for right of way and assess damages,[49] and not until the damages have been assessed by a jury in the condemnation proceeding and it has been determined that land not taken is not damaged may the drainage district commissioners assess benefits against such land.[50] The Nebraska statute makes no provision for offsetting benefits against damages in proceedings for assessing the cost of a ditch against the land bene-

cuit court shall file a sufficient bond. Burns' Ann. St. 1901, § 1307. Smith v. Gustin [Ind.] 80 N. E. 959.

36. Persons who did not appeal to circuit court and were not parties to judgment there rendered held not necessary. Smith v. Gustin [Ind.] 80 N. E. 959. On a term time appeal from a judgment of the circuit court dismissing a ditch proceeding, the fact that fifteen persons had signed the petition for the proposed ditch and that their names were all contained in the appeal bond, whereas only six were made appellants, did not invalidate the appeal, the other nine having withdrawn their names before the commissioners. Id.

37. Comp. Laws, § 4392, applies only to copies furnished prior to issuance of writ. Patterson v. Calhoun Circuit Judge, 144 Mich. 416, 13 Det. Leg. N. 269, 108 N. W. 351.

38. The determination of a board of drain commissioners that lands are benefited by a drain is conclusive in the absence af fraud. Alstad v. Sim [N. D.] 109 N. W. 66. Finding of court will be affirmed if there is legal evidence to suport it. Report of viewers is sufficient evidence to support finding. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

39. Determination of trustees of a district that drainage of district was necessary held final in subsequent condemnation proceedings for a ditch. Laguna Drainage Dist. v. Martin Co. [Cal. App.] 89 P. 993.

40. When the question of whether a proposed drain will be conducive to public health, convenience, or welfare, or whether the route thereof is practicable, is submitted for determination to local boards, they are questions of governmental or adminstrative policy not cognizable by the courts. Proceeding under Comp. St. 1903 art. 1, c. 89. Tyson v. Washington County [Neb.] 110 N. W. 634.

41, 42. See 6 C. L. 1453.

43. In proceedings under Rev. St. 1898, §§ 1363, 1364, the town supervisors are bound to consider the question of damages to lands through which a drain will run, before attempting to apportion the expense among those benefited. Fraser v. Mulany [Wis.] 109 N. W. 139. Proceedings which provide only for the assessment of benefits and not for the ascertainment of damages for land to be taken or damaged are insufficient. Under Drainage Act May 29, 1879, §§ 5, 9, 16, 17, 19. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

44. Where in condemnation defendant showed that a laguna to be drained was dry on May 1st, he could not show on question of damages that its drainage would deprive him of seepage therefrom during the summer months. Laguna Drainage Dist. v. Martin Co. [Cal. App.] 89 P. 993.

45. Advantage to appellants and assistance of others who refused to sign petition unless waiver was made held sufficient consideration. Drainage Dist. No. 15 v. Armstrong [Wash.] 87 P. 52. Certain evidence as to alleged representations at time of signing waiver held properly excluded. Id.

46. See 6 C. L. 1453.

47. May recover damages against city under Const. Mo. 1875, art. 2, § 21. Johnson v. St. Louis, 137 F. 439.

48. See 6 C. L. 1454.

49. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

50. After jury has determined that land not taken is not damaged, commissioners may ascertain whether it is benefited and assess benefits. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

fited,[51] but when an action is brought to recover damages, special benefits to a particular tract in excess of that portion of the cost apportioned to it may be set off against consequential damages.[52]

Appeals.[53]—No formal complaint is necessary on appeal to the circuit court under the Indiana statute relative to levees and dikes.[54] An appeal from an assessment of damages due to the construction of a levee, it is not necessary to allege that the corporation constructing the levee was negligent.[55]

§ 6. *Provision for cost. Bonds.*[56]—Under the Iowa statute the boards of supervisors of two counties into which a drainage district extends may jointly determine the statutory method by which funds shall be raised to meet the expense apportioned to each county,[57] but they have no authority to require the contractors to purchase bonds to provide for preliminary expenses and rights of way,[58] and contracts containing such requirements may be avoided in the absence of estoppel.[59] A statute requiring a railroad company to bear the entire expense of rebuilding a bridge and culvert made necessary by a proposed improvement is not unconstitutional.[60]

Local assessmments[61] are treated more extensively elsewhere,[62] only decisions more or less peculiar to the subject in hand being here retained. Persons assessed for an extension should not have their contributions diverted to the payment of the cost of the original drain.[63]

Power to assess and property liable.[64]—A drainage district in Illinois has no power to levy assessments against a city for benefits to public streets without its consent.[65] The fact that a sewer is carried to a point on a stream where the public health will be as little affected as possible does not necessarily make it one for the protection of the public health in such sense as to prevent the imposition of special assessments.[66] A board of drainage commissioners exercises functions in their nature judicial in assessing benefits to land in a district established by it,[67] and when the board has acted regularly its decision is final in North Dakota, unless assailed for fraud or other equitable ground.[68] Property actually taken cannot be assessed for benefits.[69] A railway company paying a gross earnings tax in lieu of all other taxes and assessments is exempt from assessments for special benefits accruing by the construction of a public drain.[70] That title to land was originally derived from

51, 52. Gutschow v. Washington County [Neb.] 107 N. W. 127.

53. See 6 C. L. 1454.

54. Horners' Ann. St. 1901, § 7326. Lewis Tp. Imp. Co. v. Royer [Ind.] App.] 76 N. E. 1068. Allegations held sufficient. Id.

55. Interfering with stream. Lewis Tp. Imp. Co. v. Royer [Ind. App.] 76 N. E. 1068.

56. See 6 C. L. 1454.

57. Acts 30th Gen. Assem. pp. 69-71, c. 68, §§ 28-30, 32-34. Wood v. Hall [Iowa] 110 N. W. 270.

58. Makes bids higher and prevents fair competition. Wood v. Hall [Iowa] 110 N. W. 270.

59. Wood v. Hall [Iowa] 110 N. W. 270. Property owners held estopped by acquiescence. Id. See also, Public Contracts, 8 C. L. 1473.

60. Rebuilding bridge and culvert made necessary by improvement of a creek by drainage commissioners under the Illinois farm drainage act. Not a taking of private property for public use. Chicago, etc., R. Co. v. People 200 U. S. 561, 50 Law. Ed. 596.

61. See 6 C. L. 1454.

62. See Public Works and Improvements, § C. L. 1506.

63. Unpaid orders on exhausted fund for original drain not payable out of surplus of assessment for extension, it not appearing in what proportion the unexpended fund was derived from the new territory. Dean v. Treasurer of Clinton County [Mich.] 13 Det. Leg. N. 897, 109 N. W. 1131. Laws 1903, p. 350, act 222, not applicable. Id.

64. See 6 C. L. 1454.

65. Not authorized under Act May 29, 1879, § 55, or under farm drainage act (Hurd's Rev. St. 1906, c. 42, § 114). City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

66. Does not make it a general public charge. Stewart Co. v. Flint [Mich.] 14 Det. Leg. N. 55, 111 N. W. 352.

67. State v. Fisk [N. D.] 107 N. W. 191.

68. That decision may be erroneous does not authorize injunction. State v. Fisk [N. D.] 107 N. W. 191.

69. Under Act May 29, 1879. City of Joliet v. Spring Creek Drainage Dist., 222 Ill. 441, 78 N. E. 836.

70. Sp. Laws 1873, p 302, c. 111. In re Drainage Ditch No. 6 [Minn.] 109 N. W. 993.

the government is not a valid objection to a drainage assessment.[71] On objection that property is being assessed which is not benefited, the court will not look critically into the amount of benefits,[72] and, if lands receive some benefit from an improvement, a tax will not be held invalid as having been imposed regardless of any benefit.[73] If lands directly benefited are fraudulently and arbitrarily omitted from an assesssment, and lands not benefited included, the action of the board is void.[74]

Procedure.[75]—The statute under which an improvement was made generally controls as to the manner of making assessments.[76] The Illinois act provides for notice by mail to nonresidents of the county.[77] The records of the board of directors of a levee district reciting that a meeting was had to revise and adjust assessments prima facie establishes such fact.[78] Property benefited may be assessed on a valuation basis.[79] When a statute imposes upon the viewers the duty of estimating the cost, damages, and benefits incident to the construction of a sewer, the city may not provide by ordinance, beforehand, the amount to be assessed as benefits and what shall be charged to the general fund,[80] and if it does so and the viewers do not exercise their independent judgment but simply adopt the exact amounts specified in the ordinance, their report should be set aside.[81]

Validity of assessment and objections thereto.—Jurisdiction having been acquired by the filing of a proper petition, matters pertaining to the qualification of officers, the conducting of the work, and the financial statement, though irregular, will not invalidate the tax,[82] neither will an assessment be void because the petition is subsequently lost.[83] The integrity of an assessment cannot be impeached by showing unauthorized representations by an officer of a district as to the amount,[84] and the fact that a village or its officers or agents have violated statutes prohibiting the pollution of streams by sewage is not ground for setting aside an assessment

71. Where state's title had passed to private persons. Ritter v. Drainage Dist. No. 1 [Ark.] 94 S. W. 711.

72. Legislative determination of benefits must be respected. St. Louis Southwestern R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

73. Immaterial whether property is benefited as much as other property in the district. St. Louis Southwestern R. Co. v. Red River Levee Dist. Directors [Ark.] 99 S. W. 843.

74. Proceedings by town supervisors under Rev. St. 1898, §§ 1359-1371. Fraser v. Mulany [Wis.] 109 N. W. 139.

75. See 6 C. L. 1455.

76. Statutes considered, and held a sewer was ordered and constructed under St. 1891, p. 880, c. 323, and amendatory acts, and not under St. 1899, c. 450, and hence the assessment should be made in accordance with St. 1902, p. 430, c. 521, amendatory of act of 1891. Tappan v. Boston Street Com'rs [Mass.] 79 N. E. 796.

77. Notice of meeting to classify lands for drainage assessments given under § 23 of agricultural and drainage act (Hurd's Rev. St. 1905, p. 805), providing for service of a three day's notice on residents of the county and that such notice shall be sent by mail to nonresidents of the county, held sufficient where mailed to a nonresident on the 16th for a meeting to be held on the 20th of the month. People v. Ryan, 225 Ill. 359, 80 N. E. 279. If statute be construed to require merely a reasonable notice, said notice was reasonable under the circumstances. Id.

78. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676.

79. Acts 1893, p. 102, creating a levee district, is not void because providing that taxes for the construction of a drain shall be according to assessed value of property and not according to benefits received. Porter v. Waterman, 77 Ark. 383, 91 S. W. 754. Taxes for levee district assessed according to valuation on the **railroad property** placed by board of railroad commissioners not invalid against objection that ties, rails, etc., should not be taxed for local improvement. St. Louis Southwestern R. Co. v. Directors of Red River Levee Dist. [Ark.] 99 S. W. 843.

80. Act May 16, 1891 (P. L. 75). Where all the abutting property belonged to a single estate. In re Wheeler Ave. Sewer, 214 Pa. 504, 63 A. 894.

81. In re Wheeler Ave. Sewer, 214 Pa. 504, 63 A. 894.

82. Objection to enforcement of tax for repair of a drain. Auditor General v. Bolt [Mich.] 111 N. W. 74.

83. Where order recited filing of petition. Driver v. Moore [Ark.] 98 S. W. 734.

84. Representation made by director at meeting to determine whether certain levee work should be done. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676. A misrepresentation as to the cost of a proposed improvement which was material only in so far as it influenced one to vote for the work will not invalidate an assessment where his

for the construction of the sewers.[85] Objections to the qualifications of persons appointed to assess benefits and damages must be made at the earliest opportunity.[86] One who asserts the excessiveness of an assessment has the burden of overcoming the prima facie fairness established by the return of the assessors.[87] The report of viewers fixing assessments and the order of the court confirming them establish prima facie the benefit to the land and the regularity, fairness and equality of the assessment,[88] and when landowners are given an opportunity to object and to appeal from an order of confirmation, they cannot question an assessment in proceedings to collect it.[89] In such proceeding the validity of a classification roll adopted on an unauthorized appeal may be questioned by landowners who took no appeal,[90] and an objection that the contract was let without notice may be raised, though objector had not first proceeded in equity to prevent execution of the work,[91] but the decision of commissioners that land was connected with ditches so as to render it liable to assessment cannot be impeached,[92] nor will the question of the legality of the organization of a drainage district be considered,[93] nor can mere irregularities be taken advantage of if the local authorities had jurisdiction.[94] If the petition, plans, and specifications for the new work are sufficient on their face to authorize an assessment for new work, the mere filing of objections does not throw the burden upon the district of establishing the validity of the proceeding.[95] Failure to observe a statutory provision requiring a board of public works to determine the benefits to be derived from an improvement and to proceed only in case the benefits shall equal the estimated cost renders an assessment void and unenforceable.[96]

Waiver or correction of irregularities.[97]

Review of assessment proceedings.[98]—Under the Illinois farm drainage act, parties who do not "appear and urge objections" are not entitled to appeal from the decision of drainage commissioners in the classification of land for assessment purposes.[99] On appeal from such decision, any change in the classification of lands objected to by parties who appeal cannot affect the classification of the lands not objected to and owned by parties who did not appeal.[1]

Collection.[2]—Statutory penalties for failure to pay assessments are sometimes imposed.[3] In Idaho special assessments for sewer bonds may be collected as other

vote was not essential to constitute the requisite majority. Id.

85. Cleneay v. Norwood, 137 F. 962.

86. Objection to qualification of members of committee appointed under Burns' Ann. St. 1901, §§ 3598-3606, for the drainage of cities, held too late where not interposed until after committee had reported. City of Huntington v. Amis [Ind.] 79 N. E. 199.

87. Assessments for work in levee district. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676.

88. Driver v. Moore [Ark.] 98 S. W. 734.

89. Driver v. Moore [Ark.] 98 S. W. 734. On ground that viewers did not view or assess the land. Hale v. Moore [Ark.] 100 S. W. 742.

90. Carr v. People, 224 Ill. 160, 79 N. E. 648.

91. Violation of Hurd's Rev. St. 1905, p. 799, c. 42, § 35, providing for notice of letting contracts and kind of work, where cost of constructing a ditch exceeds $500. Rogne v. People, 224 Ill. 449, 79 N. E. 662.

92. Reviewable only by direct proceeding. Shanley v. People, 225 Ill. 579, 80 N. E. 277.

93. Carr v. People, 224 Ill. 160, 79 N. E. 648; Rogne v. People, 224 Ill. 449, 79 N. E. 662.

94. As to amount of assessment, objection being that city included collateral sewers not called for by petition. City of Spokane v. Preston [Wash.] 89 P. 406.

95. Objectors must introduce evidence in support of their objection. Iroquois & Crescent Drainage Dist. v. Harroun, 222 Ill. 489, 78 N. E. 780.

96. Where after adoption of a resolution for a sewer it was modified so as to provide for the construction of an additional branch, held failure to make a new finding as to benefits was a jurisdictional defect. Edwards v. Cooper [Ind.] 79 N. E. 1047.

97, 98. See 6 C. L. 1456.

99. Hurd's Rev. St. 1905, p. 806, c. 42 (Farm Drainage Act, § 24). Appeal and adoption of classification roll thereunder held void. Carr v. People, 224 Ill. 160, 79 N. E. 648.

1. Carr v. People, 224 Ill. 160, 79 N. E. 648.

2. See 6 C. L. 1456.

3. In giving judgment for levee assessments, chancery court should also have imposed the ten per cent. penalty as pro-

taxes are.[4] When a statute provides for a reassessment of invalid taxes, an owner may not restrain the collection of taxes against him on the ground of the unconstitutionality of the statute under which the proceedings were had in the absence of any showing that the taxes ought not to be reassessed;[5] and if a drainage board had jurisdiction, equity will not enjoin the collection of assessments after a ditch has been fully completed, though the board proceeded irregularly in matters pertaining to the construction of the drain.[6] One who is benefited by a sewer towards which he has contributed nothing is not entitled to an injunction restraining the collection of a special tax to pay the cost of construction.[7]

§ 7. *Management and operation; duty to properly construct, maintain, and repair works, and provide drainage.*[8]—A city cannot be required by mandatory injunction to extend a sewer and construct an outlet therefor below the intake of waterworks.[9] When outlying property is taken into a city, it is not responsible for failure to make new drainage improvements or to reconstruct existing drains,[10] but, if it undertakes to make any changes, it will be liable for negligence resulting in the overflow of adjacent property.[11] If a city in making an improvement collects surface water which would otherwise find an outlet without injury to property, it becomes its absolute duty both to provide and maintain an adequate outlet for such water.[12]

A municipality is not liable for mere defects in the original plan for a sewer or drain,[13] neither is it liable for the backing up of water due to an extension of a main sewer and the connection of subsidiary sewers where this is done by the municipal officers and not by the city itself through its governing bodies.[14] A city has no right, however, to build a sewer in such manner that it will deposit filth near private property,[15] and it may not permit the connection of private sewerage with its gutters along the streets so as to create a nuisance.[16]

The use of a public road for the purpose of carrying a sewer beyond the limits of a municipality to a suitable point for discharging its contents into a watercourse

vided by statute. Overstreet v. Levee Dist. No. 1 [Ark.] 97 S. W. 676.

4. Prohibition will not lie to prevent officers of a city from making special assessments for sewer bonds and certifying the levy and assessment to the county tax collector for collection "as other taxes are collected," under Laws 1903, p. 34, § 12, subd. 10, and Laws 1899, p. 209, § 86. Denning v. Moscow, 11 Idaho, 415, 83 P. 339.

5. Thompson v. Mitchell [Iowa] 110 N. W. 901.

6. Alstad v. Sim [N. D.] 109 N. W. 66. Failure to require surveyor to make plans, specifications, profiles, and estimates of cost, for an extension of a drain, such estimates and maps having been filed for the original drain. Id. Irregularity in letting contract for furnishing material. Id. Technical errors as to filing of list of assessments for benefits with county auditor. Id.

7. It not appearing what his objections were. City of Paola v. Russell [Kan.] 89 P. 651.

8. See 6 C. L. 1456.

9. Discretion vested in municipal authorities to determine practicability of sewer and availability of taxation. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. 1102.

10. Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 S. W. 343.

11. Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 S. W. 343. Evidence held to sustain finding that city was not negligent in failing to provide adequate drainage. Id. Instructions approved. Id.

12. Mere ordinary care not sufficient. Destruction of wall. City of Houston v. Richardson [Tex. Civ. App.] 15 Tex. Ct. Rep. 107, 94 S. W. 454. Instruction properly refused as ignoring causal relation between plaintiff's failure to protect wall and its destruction. Id. Contractors not bound to so build wall as to withstand the water. Id.

13. Not liable for backing of water resulting entirely from general plan. Davis v. Bangor, 101 Me. 311, 64 A. 617. City not liable for damages for insufficient capacity of a sewer due to defects in original plan, though sewer was constructed before incorporation of city. Robinson v. Everett, 191 Mass. 587, 77 N. E. 1151. Evidence that trouble remedied by construction of a new sewer in another street was immaterial. Id. Not liable in trespass, there being no negligence in execution of work. Herr v. Altoona, 31 Pa. Super. Ct. 375.

14. There being no negligence in the maintenance of the sewer. Davis v. Bangor, 101 Me. 311, 64 A. 617. Case distinguished from Blood v. Bangor, 66 Me. 154.

15. Causing injury to premises and personal discomfort. City of Madisonville v. Hardman, 29 Ky. L. R. 253, 92 S. W. 930.

16. Where offal was carried to a lot rendering a house uninhabitable. City of Vicksburg v. Richardson [Miss.] 42 So. 234.

cannot be interfered with by an adjacent property owner where the use of the sewer is restricted to surface or storm water;[17] but a landowner whose land is traversed by a creek may enjoin the city from discharging therein sewage as distinguished from surface water,[18] and need not wait until the threatened injury has resulted in material damage.[19] A village having an easement to discharge surface water through a ditch may not enhance the volume of water so as to materially increase the burden on the servient estate.[20]

A city is bound to exercise reasonable diligence to discover and remedy ordinary defects in its sewers,[21] and notice to it of nonrepair is not essential to the fixing of liability for damages.[22] A showing that a sewer broke and that premises were flooded in consequence thereof makes a prima facie case,[23] but mere breakage and damage is not conclusive.[24] Faulty connection of damaged premises with the sewer and the absence of proper check valves to prevent the backing of water is not a defense.[25] If a city adopts a drain as a part of an improvement, it will thereafter be required to keep it open.[26] So, also, if a portion of a drain is adopted by a city as a part of its drainage system, the city is liable for damages due to defects therein of which it is duly notified, regardless of who installed such portion;[27] and if a city substitutes an artificial drain for an adequate one originally on an owner's premises, it will be liable for the insufficiency of such artificial drain.[28] If a city permits a private drain to be maintained under a public sidewalk, it must exercise reasonable care to see that travel is not endangered,[29] but this does not require it to look after the concealed portions of the drain located in the private property.[30] The fact that a city connects its sewers with a natural channel does not impose upon it the liability of keeping such channel open to its mouth,[31] even though the adjacent landowners have converted it into an artificial culvert.[32] A city owes no duty to one fording a creek in a wagon to see that no hole is formed at the mouth of a sewer in the creek so that no accident will happen.[33] A city contractor who as part of his work completes and properly covers up drain pools is under no greater obligation as against the public to keep them covered than any other member of the community, though his work as a whole may not yet have been accepted.[34]

One who desires to have a public ditch cleaned should proceed according to the

17. And construction was authorized by city council and approved by state board and county commissioners. Whitney v. Toledo, 8 Ohio C. C. (N. S.) 577.

18. Unless city has acquired rights by appropriation. Whitney v. Toledo, 8 Ohio C. C. (N. S.) 577.

19. Whitney v. Toledo, 8 Ohio C. C. (N. S.) 577.

20. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27. See, also, Waters and Water Supply, 6 C. L. 1840.

21. Gravey v. New York, 102 N. Y. S. 1010. Evidence of flooding of premises connected with a different system held not to show negligenee as to plaintiff. McKenzie v. New York, 103 N. Y. S. 855. Trespass lies for the backing of water upon private premises due to negligence in maintaining a sewer, but in such action there can be no recovery for injury resulting from the original construction without negligence, regardless of any statutory remedy. Herr v. Altoona, 31 Pa. Super. Ct. 375.

22, 23. Gravey v. New York, 102 N. Y. S. 1010.

24. Where third person allowed marble dust to run into sewer and city, on notice, acted promptly. Watson v. New York, 99 N. Y. S. 860.

25. Karfiol v. New York, 103 N. Y. S. 1036.

26. Improving alley and leaving drain pipe therein. Town of Central Covington v. Beiser, 29 Ky. L. R. 261, 92 S. W. 973. Proof held to support allegations. Id.

27. Liable for damage to plaintiff's premises due to maintenance of a cross pipe through a manhole obstructing flow, though cross pipe had been installed by plaintiff's grantor. Fewell v. Meridian [Miss.] 43 So. 438.

28. Fewell v. Meridian [Mass.] 43 So. 438.

29. Petition before amendment held to state cause of action. Hoffman v. Maysville, 29 Ky. L. R. 1245, 97 S. W. 360.

30. Hoffman v. Maysville, 29 Ky. L. R. 1245, 97 S. W. 360.

31. Dalton v. Towanda Borough [Pa.] 64 A. 547.

32. Borough not liable for injuries. Dalton v. Towanda Borough [Pa.] 64 A. 547.

33. Zehe's Adm'r v. Louisville, 29 Ky. L. R. 1107, 96 S. W. 918.

34. Handy v. Barber Asphalt Co., 117 La. 637, 42 So. 193.

statute provided in such case rather than enter upon the land of others by verbal permission of a drain commissioner.[35] Under the Indiana statute providing that upon the failure of a landowner to clean his allotment of a public ditch the township trustee shall proceed to have the work done, neither the township nor the trustee is liable to the contractor who did the work.[36]

In actions for negligence in the maintenance of sewers or drains, limitations will ordinarily be reckoned back from date of suit rather than forward from the time the street or alley was completed.[37] The burden of proof is on plaintiff throughout the trial.[38]

§ 8. *Private and combined drainage.*[39]—By statute in Illinois, whenever drains have been constructed by mutual consent, none of the interested parties may thereafter fill up or interfere with them without the consent of all.[40] A general easement over the lands of another for drainage purposes does not limit the drainage to any particular drain or depression,[41] nor is the dominant owner bound to maintain the same level.[42] A landowner who consents to the establishment of a ditch and promises to pay a portion of the cost will be held liable therefor.[43] One who fails to make known to a purchaser his right to object to drainage through his land may be estopped thereafter to assert such right.[44] Statutes have been enacted in some states providing that landowners may drain their lands into natural watercourses without being liable in damages therefor.[45] One who by the relocation of a drain is given better drainage facilities than he formerly enjoyed is not entitled to a mandatory injunction to compel the restoration of the drain to its original position.[46]

§ 9. *Obstruction of drains.*[47]—To constitute the offense of obstructing a ditch for the drainage of a highway in Wisconsin, it is not essential that the act be willfully done.[48] A railroad company is properly enjoined from obstructing a natural waterway by the substitution of an inadequate artificial drain.[49] A prima facie lia-

35. Comp. Laws, § 4379, held applicable. Freed v. Stuart [Mich.] 13 Det. Leg. N. 950, 110 N. W. 137. If it be conceded that complainant had the right to so enter, he would have to confine himself to the dimensions of the drain as originally laid out (Id.), and hence, no records of a drain established over ten years having been preserved, he would first have to procure a restoration of the records so far as possible by the commissioner as required by Comp. Laws, § 4381 (Id.).

36. Under Burn's Ann. St. 1901, § 5638, providing that trustee may recover the expense by taxation or by action. Quick v. Parratt [Ind.] 78 N. E. 232.

37. In suit for failing to keep a sewer open where it was not shown that injury was caused by the construction of an alley. Town of Central Covington v. Beiser, 29 Ky. L. R. 261, 92 S. W. 973.

38. Where defense was act of God, held error to instruct that burden was on defendant to establish such defense. City of McCook v. McAdams [Neb.] 110 N. W. 1005.

39. See 6 C. L. 1458.

40. Hurd's Rev. St. 1905, pp. 832, 833, c. 42, § 189. Neither public through highway commissioners nor any private individual could obstruct a tile drain along a highway placed there by consent of the highway commissioners and beneficial to the public. Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321.

41. Additional drains leading to main ditch may afterwards be constructed by upper proprietor. Neuhring v. Schmidt, 130 Iowa, 401, 106 N. W. 630.

42. Could go to lower levels than would be affected in state of nature. Neuhring v. Schmidt, 130 Iowa, 401, 106 N. W. 630.

43. Evidence held to support finding of consent and promise. Showers v. Zanone [Cal. App.] 85 P. 857.

44. Where a company purchased a coal mine in reliance upon the right to drain under the surface of the land of plaintiff and the latter accepted part of the purchase price. Livengood v. Stauffer, 31 Pa. Super. Ct. 495.

45. Where for eight years one acquiesced in use of a ditch constructed by himself along his land for drainage purposes, it became a water course into which an adjoining owner could drain his land. Laws 30th Gen. Assem. c. 70, p. 75. Sheker v. Machovec [Iowa] 110 N. W. 1055.

46. Dunn v. Youmans, 224 Ill. 34, 79 N. E. 321.

47. See 6 C. L. 1458.

48. Word "willfully" was omitted by revision of 1878. Prosecution under Rev. St. 1898, § 1326. State v. Dehn, 126 Wis. 168, 105 N. W. 795. Evidence sufficient to sustain judgment of forfeiture. Id.

49. Proposed artificial drain held insufficient. Fenton & Thompson R. R. Co. v. Adams, 122 Ill. App. 234.

bility is established against one by showing the breaking of a sewer causing damage due to his violation of a city ordinance.[50]

SHAM PLEADINGS; SHELLEY'S CASE, see latest topical index.

SHERIFFS AND CONSTABLES

§ 1. The Office, Election or Appointment (1897).
§ 2. Powers, Duties, and Privileges (1897).
§ 3. Compensation (1897).
§ 4. Deputies, Undersheriffs, and Bailiffs (1899).
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A. Liability in General (1899).
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D. Failure to Take Security (1901).
E. Wrongful Levy, Sale or Arrest (1901).
F. Misappropriation of Proceeds (1902).
G. Rights of Levying Officers (1902).
§ 6. Liability on Bonds (1902).

§ 1. *The office; election or appointment.*[51]—Police officers are not servants or agents of the municipality employing them within the rule respondeat superior,[52] nor does the fact that they act illegally,[53] or at the behest of employes of the city for whose torts the city would be liable,[54] alter the rule. The supreme court of Kansas will not ordinarily exercise its power to remove a sheriff for misconduct,[55] but the proceeding should be first brought in the district court.[56]

§ 2. *Powers, duties, and privileges.*[57]—The acts of an officer outside of his bailiwick are void in the absence of statutory authority.[58] Since the adoption of the New York city consolidation act, it is not the duty of the sheriff of the county and city of New York to notify jurors to attend a trial term of a court of record, but that duty is devolved on the commissioner of jurors.[59] While it is now settled in New York that equity will not ordinarily restrain police officers in the administration of the criminal law,[60] this rule has been held to have no application where such officers proceed wholly outside the law in such manner as to become continual trespassers.[61] In Missouri a policeman is under a positive duty to preserve order at an election,[62] failing in which duty he is criminally neglectful of duty.[63] The indictment for such crime is not double in that it avers several instances in which the neglect consisted,[64] but it must aver a corrupt negligence.[65]

§ 3. *Compensation.*[66]—In Louisiana a sheriff is entitled to compensation for administering sequestrated property.[67] The sheriff's claim for expenses incurred in

50. Where defendant allowed marble dust to run into sewer. Watson v. New York, 99 N. Y. S. 860.

51. See 6 C. L. 1459.

52. Clayman v. New York, 102 N. Y. S. 661.

53. City held not liable for arrest without warrant and without the arresting officers having seen the alleged illegal act committed. Clayman v. New York, 102 N. Y. S. 661.

54. City held not liable for false alleged illegal act committed at behest of street sweeper charged with the duty of enforcing ordinance against sweeping trash into streets. Clayman v. New York, 102 N. Y. S. 661.

55. That final decision cannot be otherwise secured before expiration of his term is not sufficient ground. State v. Welfelt [Kan.] 85 P. 583.

56. The sheriff being in a sense an officer of such court it is in better position to investigate his alleged misconduct. State v. Welfelt [Kan.] 85 P. 583.

57. See 6 C. L. 1459.

58. Attachment in courts where suit is pending by sheriff of another county held void. Jones v. Baxter [Ala.] 41 So. 781.

59. Costa v. New York City R. Co., 100 N. Y. S. 558.

60. See 6 C. L. 1460, n. 86-89.

61. Injunction granted. Hagan v. McAdoo, 113 App. Div. 506, 99 N. Y. S. 255; Devlin v. McAdoo, 49 Misc. 57, 96 N. Y. S. 425.

62. Under Rev. St. 1899, §§ 6212, 6213 and 6232, the police board is charged with the duty of preserving order at public elections, and the policemen under its control are state as well as city officers. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543. Judicial notice may be taken of the vote cast at a preceding election on which the legality of the present election depends. Id.

63. Rev. St. 1899, § 2105. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543. Evidence held sufficient. Id.

64, 65. State v. Flynn, 119 Mo. App. 712, 94 S. W. 543.

66. See 6 C. L. 1460.

67. Jennings-Heywood Oil Syndicate v. Houssiere-Latreille Oil Co. [La.] 42 So. 930.

keeping and caring for attached property is primarily against the plaintiff in attachment.[68] Since the adoption of the New York city consolidation act, devolving the duty of notifying jurors to attend a trial term of a court of record on the commissioner of jurors, a calendar fee cannot be exacted to include fees of the sheriff for such service.[69] In Illinois a sheriff is not entitled to commissions on the proceeds of a sale conducted by the judgment creditor himself which are credited on the judgment.[70] The provision of the Illinois fee and salaries statute, giving a constable $2.50 per day for attendance in the circuit court, refers to attendance on the sessions of the court;[71] hence, the compensation therein provided for is not applicable to services performed by a constable when appointed a special bailiff to secure a special venire on the disqualification of the sheriff.[72] Where the jailer is an elective officer and his allowances and fees are fixed by statute, the fiscal court can not substitute a salary in lieu thereof,[73] nor can the jailer, under guise of employment as janitor receive a salary for services which it is his duty to perform as ex officio superintendent of buildings and grounds without compensation;[74] but where special duties outside those of his office are imposed, fees therefor may be recovered.[75] Where the statute provides that "fees" collected for the sheriff's services shall belong to the county and form a fund from which the sheriff shall be paid a fixed "salary," fees directed to be paid by the county do not inure to the sheriff in addition to his salary, where designed to pay for services and not merely to reimburse.[76] For services not within those contemplated by the salary law he may retain the fees allowed,[77] as may an officer specially performing his duties.[78] Where on failure of criminal prosecutions before justices of the peace, constables' fees are payable out of the county treasury upon audit of the board of supervisors, the constable cannot recover from the county without first presenting his claim for fees to the board in proper form as required by the statute;[79] nor can he recover mileage and expenses taxed for unsuccessful attempts to serve warrants in prosecutions begun by him in bad faith without any reasonable expectation of apprehending the

68. It cannot be charged against the defendant where he has no attachable interest in the property, as where, in resistence to plaintiff's motion to tax the sheriff's expenses against him as costs, the defendant shows that the attached property belonged to his wife. Beeman & Cashin Mercantile Co. v. Sorenson [Wyo.] 89 P. 745.

69. Costa v. New York City R. Co., 100 N. Y. S. 558.

70. Under Rev. St. p. 959, c. 53, § 19, sheriff held, not entitled to commission on proceeds of sale of property subject to chattel mortgage. Whitlock v. Webster, 123 Ill. App. 78.

71. Performing the duties usually required of a tipstaff or court bailiff, such as waiting on the court when in session, preserving order, attending to the wants of juries, and taking charge of juries when they are not permitted to separate, and also when they retire to consider their verdict. County of Carroll v. Durham, 120 Ill. App. 330.

72. County of Carroll v. Durham, 120 Ill. App. 330.

73. Ky. St. 1903, §§ 356, 1730. Mitchell v. Henry County, 30 Ky. L. R. 1051, 100 S. W. 220.

74. Ky. St. 1903, §§ 1749, 3948. Mitchell v. Henry County, 30 Ky. L. R. 1051, 100 S. W. 220.

75. Constable is appointed special bailiff to serve a special venire when the sheriff has been disqualified by the objection of a party. County of Carroll v. Durham, 120 Ill. App. 330.

76. Burns' Ann. St. 1901, § 6528, allowing a fee to be paid by the county for receiving and discharging prisoners at the jail. The sheriff was not entitled to these fees as keeper of the jail, that being one of his official duties as sheriff. Starr v. Delaware County Com'rs [Ind. App.] 79 N. E. 390; Board of Com'rs of Daviess County v. Fitzgerald, [Ind. App.] 79 N. E. 393.

77. The sheriff may retain in excess of his salary his per diem allowance for attendance upon the circuit and commissioner's courts. Board of Com'rs of Daviess County v. Fitzgerald [Ind. App.] 79 N. E. 393.

78. Constable acting as special bailiff in lieu of sheriff. County of Carroll v. Durham, 120 Ill. App. 330.

79. Code, § 4599, requires the facts to be certified by the justice and verified by affidavit. The affidavit must show facts from which the board can determine whether the fees have been earned and are a proper charge against the county. The justice should tax the fees but no formal judgment against the county is required. His action in either case would not be a binding adjudication against the county. McGuire v. Iowa County [Iowa] 111 N. W. 34.

accused.[80] The proper construction of a statute allowing mileage, "to be charged one way only," for each mile actually and necessarily traveled in executing criminal process was left an open question by division of the judges of the supreme court of Arizona.[81] In the absence of statute to that effect, a county is not liable to the sheriff for the hire of deputies.[82] The Pennsylvania statute of 1901 does not change the rule obtaining in that state that as to subpoenas of the common pleas or quarter sessions served by a constable or private person the fees are to be taxed in accordance with the sheriff's fee bill,[83] but it supersedes the previous law on the subject as to the amount of the fee,[84] and applies as did the former law to the service of subpoenas ad testificandum.[85] The act covers the execution of a sentence committing a convict to the penitentiary or reformatory as well as an order committing a lunatic or feeble minded person to an asylum,[86] and entitles a sheriff to collect for mileage circular for services in removing persons to those institutions respectively at the rate of ten cents per mile,[87] and this applies to the execution of all cotemporaneous writs or orders of the court, civil or criminal, unless where both plaintiffs and defendants are the same,[88] and also to charge for reasonable help and expenses in making such deliveries in case of actual necessity for extra help,[89] but the reasonableness of an allowance for help and expense is for the jury.[90] The act, however, does not authorize a sheriff to charge $4 per day for deputies used in the transportation of prisoners.[91]

§ 4. *Deputies, undersheriffs, and bailiffs.*[92]—Absence from the records of the written evidence of appointment required by statute is sufficient to show that one who assumed to act as deputy sheriff had not been appointed as such,[93] and the fact that he signed the return as deputy is not sufficient to prove that he was a deputy de facto.[94] Disqualification of the sheriff extends to his deputy.[95] In Illinois there is no law by which constables can be required to serve in the circuit court.[96]

§ 5. *Liabilities and rights. A. Liability in general.*[97]—When an officer has made a valid attachment, he must maintain it at his peril.[98] In Maine the failure

80. McGuire v. Iowa County [Iowa] 111 N. W. 34.

81. Rev. St. 1904, § 2600. One view was that mileage should be limited to the distance traveled in going to the place of arrest. On the other hand it was contended that mileage should be allowed for the distance traveled until the warrant was completely executed by disposing of the prisoner as therein directed. Coconino County v. Coconino County Sup'rs [Ariz.] 89 P. 543.

82. County not chargeable on implied contract by reason of receiving benefit of deputy's services, nor is the inadequacy of the sheriff's legal compensation material. Board of Com'rs of Decatur County v. Leaman [Kan.] 85 P. 590.

83. Act July 11, 1901 (P. L. 663). Kerr v. Sun Co., 32 Pa. Super. Ct. 239.

84. Act April 2, 1868 (P. L. 3). Kerr v. Sun Co., 32 Pa. Super. Ct. 239. Act July 11, 1901 (P. L. 663), repeals Act April 2, 1868 (P. L. 3). Lenhart v. Cambria County [Pa.] 64 A. 876.

85. Kerr v. Sun Co., 32 Pa. Super. Ct. 239.

86. Act July 11, 1901 (P. L. 663). Lenhart v. Cambria County [Pa.] 64 A. 876.

87. Lenhart v. Cambria County [Pa.] 64 A. 876.

88. In such cases one charge for mileage only is allowed. Lenhart v. Cambria County [Pa.] 64 A. 876. "It does seem an abuse to permit the sheriff to collect from the same party, the county, duplicate charges for mileage in cases where a number of writs or orders of the court are placed in his hands to be executed at the same time by a single trip, but the language of the act bears no other construction." Lenhart v. Cambria County [Pa.] 64 A. 876.

89, 90. Lenhart v. Cambria County [Pa.] 64 A. 876.

91. Though the former statute which it supersedes did. Lenhart v. Cambria County [Pa.] 64 A. 876.

92. See 6 C. L. 1461.

93. Code of 1873, § 766, requiring the appointment to be in writing, approved by the board of supervisors, and filed and kept in the office of the county auditor. Buck v. Hawley, 129 Iowa, 406, 105 N. W. 688.

94. At least not where the truth of the return is the matter in dispute. Buck v. Hawley, 129 Iowa, 406, 105 N. W. 688.

95. Where sheriff disqualified by prejudice from serving venire. State v. Barber [Idaho] 88 P. 418.

96. Since the repeal in 1874 of the Act of 1872. County of Carroll v. Durham, 120 Ill. App. 330. The Criminal Code provision that when the jury retires to consider their verdict in any criminal case a constable or other officer shall be sworn to attend, etc., does not compel a constable to render the service. Id.

97. Ses 6 C. L. 1462.

98, 99, 1, 2. Kelley v. Tarbox [Me.] 66 A. 9.

to make demand for attached property within a specified time after judgment is rendered in favor of the attaching creditor is fatal to the rights of the attaching creditor against the attaching officer under the attachment.[99] Hence in that state the failure of a sheriff to make demand within the time limited on an execution placed in his hands with directions to make demand on his predecessor who had made an attachment in the proceeding renders him liable for all damages caused thereby,[1] and the burden is on him to show affirmatively that demand was made when he interposes as a defense the fact of demand having been made, where the execution has been returned unsatisfied without indorsement of demand.[2] Remissness of a sheriff in answering pertinent inquiries concerning a levy which he has been directed by the inquirer to make is ground for denying recovery of costs by him on an unsuccessful motion to amerce him for failure to execute the process.[3] A sheriff is liable for property lost after seizure in replevin unless he shows that he disposed of it as the law directs and that the loss occurred without his negligence.[4] A sheriff is liable for injuries inflicted by his deputies while acting within their authority although the acts themselves be unlawful,[5] but is not liable where the deputies commit the wrong while acting beyond the scope of their authority.[6]

(§ 5) *B. Failure to execute process or insufficient execution.*[7]—An officer into whose hands an execution comes while property to which he is entitled to possession in his official capacity, otherwise subject to the writ, is in the possession of a third person, but on behalf of the officer, is liable to the judgment creditor for failure to apply the same in satisfaction of the writ;[8] and irregularities in the proceedings leading up to the issuance of the writ do not excuse the officer's default.[9] A sheriff is not liable to amercement for failure to levy on a specific sum of money previously received by a debtor when it is not shown that the money, if subject to levy, was still in hand or in a place of deposit where levy could have been made.[10] A proceeding by motion against the sheriff and his sureties under a statute providing a remedy for failure to levy execution is in the nature of an ordinary civil suit, the prosecution of which though malicious is not actionable.[11]

(§ 5) *C. Failure to return process and false return.*[12]—In an action for false return the recitals of the return are only prima facie evidence in favor of the sheriff.[13] Where the sheriff negligently loses property seized under a writ of replevin, and

3. Middleton Co. v. Souder [N. J. Law] 64 A. 475.

4. Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768. Instruction held proper statement of this rule. Id.

5. As an assault and battery committed in attempting to arrest without warrant for an offense committed within view. King v. Brown [Tex.] 16 Tex. Ct. Rep. 189, 94 S. W. 328, rvg. [Tex. Civ. App.] 15 Tex. Ct. Rep. 214, 93 S. W. 1017. Firing pistols at night so that flash was visible held to have been "in view." Id.

6. As where they commit an assault and battery while attempting to arrest without warrant for a supposed offense not committed in their presence. Brown v. Wallis [Tex. Civ. App.] 101 S. W. 1068, 1070. A party seeking to hold the sheriff liable for injuries inflicted by his deputies cannot invoke the presumption of regularity of official conduct, but must show that the deputies were in some form or manner exercising the power conferred upon them by their appointment. Id. Subsequent language signifying approval of his deputy's wrongful act is not such ratification as will render the sheriff liable therefor if he would not otherwise be so. Brown v. King [Tex. Civ. App.] 15 Tex. Ct. Rep. 214, 93 S. W. 1017.

7. See 6 C. L. 1462.

8, 9. Horrigan v. Savannah Grocery Co., 126 Ga. 127, 54 S. E. 961.

10. Middleton Co. v. Souder [N. J. Law] 64 A. 975.

11. Sayles' Rev. Civ. St. art. 2386, providing for recovery from the sheriff and his sureties of the amount of the execution on motion of the execution creditor made before the court from which execution issued upon five days' notice. Being a civil suit it cannot be made the basis of an action for malicious prosecution. Nowotny v. Grona [Tex. Civ. App.] 17 Tex. Ct. Rep. 44, 98 S. W. 416.

12. See 4 C. L. 1446.

13. If the successful plaintiff in a replevin suit in which the sheriff had made return of delivery to plaintiff brings action against the sheriff for negligent loss of the property, traversing the return, the action is one for false return. Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768.

falsely returns that he delivered it to plaintiff in the replevin suit, the latter, having prevailed in that suit, may recover from the sheriff the full value of the property.[14] A penalty provided by statute for failure to execute process cannot be recovered in an action for false return.[15]

(§ 5) *D. Failure to take security.*[16]

(§ 5) *E. Wrongful levy, sale or arrest.*[17]—It is held in New York that a sheriff is protected by an order of a superior court discharging a prisoner, arrested on civil process, though the order is based on an irregularity warranting reversal, and is in fact subsequently reversed.[18] Writs fair on their face are no justification for levying on the property of persons not named therein.[19] Though a sale at a place different from that advertised is a misfeasance rendering an officer a trespasser ab initio, the rule of law cannot be invoked by a stranger to the writ under which the sale was made.[20] The execution of a forthcoming bond to gain possession of property levied on by an officer having no power to make the levy does not validate the levy [21] or estop the maker to question the validity of the levy.[22] Ordinarily a judgment establishing a claim of exemptions as to property seized is conclusive in an action for its wrongful seizure;[23] but a judgment of a justice of the peace when offered as a justification for seizure of property thereunder, it is held in Arkansas may be impeached by parol evidence.[24] Persons through whose influence in either an official [25] or private capacity [26] an officer wrongfully seizes property on execution are equally guilty with him of the conversion,[27] but unless they participate with him in the seizure they are not liable with him as joint trespassers.[28] Not only the sheriff who executed a writ in a county where it was on its face void but also a constable who sent it out of the proper county and directed the execution is liable.[29] A levying officer when sued for levying on and selling the property of the plaintiff as the property of another is not required to plead facts relied on by him to create an estoppel of the plaintiff.[30] In New Jersey the failure of a claimant to apply to have the right to the property tried within ten days after adjournment, pursuant to the small cause courts act, is fatal to the claimant's cause of action against the levying constable for wrongful sale,[31] nor does the fact that the goods levied on were in the plaintiff's possession and that the constable had not taken manual possession thereof at the time of the levy,[32] or that the notice was delivered to the officer on Sunday, relieve the plaintiff from this rule.[33] The interest of a mortgagor in mortgaged chattels in his possession may be levied on and sold without the levying officer incurring any liability to the mortgagee so long as possession is not taken from the mortgagor.[34] Where one claiming title to attached property by assignment from the debtor is made a co-defendant in the attachment suit and therein successfully litigates his

14. Value at the time the property should have been delivered to plaintiff. Plaintiff not estopped by the value alleged in the replevin suit, but the sheriff becoming privy to that suit by virtue of his levy was bound by the judgment awarding the property to plaintiff. Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768.

15. Kirby's Dig. § 4487, subd. 6. Hearn v. Ayres, 77 Ark. 497, 92 S. W. 768.

16, 17. See 6 C. L. 1462.

18. Levy v. Melody, 50 Misc. 509, 99 N. Y. S. 153.

19. Albie v. Jones [Ark.] 102 S. W. 222.

20. Mortgagee held not entitled to invoke rule. Ryan v. Young [Ala.] 41 So. 954.

21, 22. Jones v. Baxter [Ala.] 41 So. 781.

23. Stallings v. Gilbreath [Ala.] 41 So. 423.

24. Albie v. Jones [Ark.] 102 S. W. 222.

25. Justice of the peace held a joint tort-feaser in trover for conversion by officer (Stallings v. Gilbreath [Ala.] 41 So. 423), but mere giving of instructions to levying officer which do not influence the latter's action does not render one liable as a joint tort feasor (Id.).

26, 27, 28. Stallings v. Gilbreath [Ala.] 41 So. 423.

29. Sneed v. McFatridge [Tex. Civ. App.] 16 Tex. Ct. Rep. 881, 97 S. W. 113.

30. Feinberg v. Allen, 103 N. Y. S. 339.

31, 32, 33. Masters v. Champion [N. J. Law] 65 A. 899.

34. Ayres v. Tinsman [N. J. Law] 65 A. 887.

claim, he is not thereby precluded from his action against the sheriff for the wrongful levy.[35] If the debtor's claims of exemption as to property seized under execution from a justice of the peace is denied by the justice but sustained on appeal without supersedeas, the sheriff who has in the meantime sold the property is liable to the debtor only for the surplus.[36] In a suit against the sheriff for conversion, the plaintiff cannot attack the legality of a statute enlarging the county for the purpose of showing that the levy in the annexed territory was unlawful.[37] A bond to a levying officer indemnifying him for seizing, keeping, or selling property which in his opinion belongs to the defendant in attachment cannot be sued on by the plaintiff in attachment under statutes referring only to actions to recover chattels levied on or damages resulting from levies or sale thereunder.[38]

(§ 5) *F. Misappropriation of proceeds.*[39]—If a constable sells to the execution creditor for more than the debt and costs, he must account for the surplus,[40] and where the statute requires him to return the surplus to the execution debtor, the latter or his assignee may sue therefor without previous demand.[41]

(§ 5) *G. Rights of levying officers.*[42]—An officer who has levied on property under lawful process has at common law the right to maintain an action for its recovery from one who unlawfully takes it from his possession,[43] and such action brought by an officer may be continued in the name of a successor,[44] even after the close of the successor's term.[45] Where personal property upon which a sheriff is instructed to levy is claimed by a third person, the officer is not bound to proceed unless furnished with ample indemnity;[46] and the claim by such third person need not be in writing as a prerequisite to his invocation of the rule.[47] A sheriff who is sued for seizing and selling exempt property is not bound to notify the sureties on his indemnifying bond under the statute,[48] but he may pay the judgment and sue on the bond for reimbursement.[49]

§ 6. *Liability on bonds.*[50]—Generally speaking the sureties on a constable's bond are liable for his official acts or misconduct.[51] By an official act in this con-

35. The rule as to election of remedies does not apply. Neither does the statute for summary trial of right of property providing that a claim thereunder shall operate as a release of damages for the levy. Terry v. Webb [Tex. Civ. App.] 96 S. W. 70.

36. The execution plaintiff is bound for the amount of proceeds applicable to the debt. Fultz v. Castleberry [Ark.] 99 S. W. 71.

37. Ward v. Gradin [N. D.] 109 N. W. 57.

38. Krauss v. Merklee, 103 N. Y. S. 192.

39. See 6 C. L. 1463.

40. It is of no consequence that his return of a "sale" for a sum stated does not show delivery of the property to the purchaser or receipt of any money on the bid, since a sale implies either delivery or payment. Munger v. Sanford, 144 Mich. 323, 13 Det. Leg. N. 146, 107 N. W. 914.

41. The fact that the property is encumbered by chattel mortgage does not justify withholding the surplus where the statute requires levy and sale to be made subject to the mortgage. Munger v. Sanford, 144 Mich. 323, 13 Det. Leg. N. 146, 107 N. W. 914.

42. See 6 C. L. 1463.

43. Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. S. 432.

44. Does not abate by death. Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. S. 432.

45. Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. S. 432.

46, 47. Middleton Co. v. Souder [N. J. Law] 64 A. 975.

48. Colorado Code of Civil Procedure, § 419, providing that if the sheriff give written notice of the action to the sureties the judgment recovered against him shall be sufficient evidence of his right to recover against the sureties, and that judgment may be entered against them on motion and notice. Whinnery v. Wiley [Colo.] 88 P. 171.

49. In such case the judgment against the sheriff is only prima facie evidence against the sureties, and they may show in defense that the judgment was procured by fraud or collusion, or that the sheriff did not adequately defend the action. Whinnery v. Wiley [Colo.] 88 P. 171. Although a bond to indemnify a sheriff against liability for seizure of property known to be exempt would be void as against public policy, a complaint in an action on the bond is not demurrable for that reason unless it shows on its face that the bond was given in furtherance of a collusion between the plaintiff in the writ and the sheriff to violate the exemption right. Id.

50. See 6 C. L. 1464.

51. Hurd's Rev. St. 1905, c. 79, § 9, makes the constable's bond security for his "official acts or misconduct." Under this statute sureties were held liable for an assault and battery committed by a constable while levying an execution, on one engaged in scheduling exempt property. Greenberg v. People, 225 Ill. 174, 80 N. E. 100. The sureties on a constable's official bond are liable for a

nection is not meant a lawful act, but an act done by the officer in his official capacity, under and by virtue of his office.[52] An arrest by a sheriff under a warrant void on its face is not such an official act as will render his sureties liable therefor.[53] Where the sheriff is also public administrator and gives additional bond as such pursuant to statute, the sureties on his sheriff's bond are only secondarily liable for his defaults as administrator,[54] and one who is on the administration bond and is damnified by default can have no recourse against the sheriff's bond.[55] The rule that sureties on official bonds are estopped by recitals therein applies.[56] The liability of sureties for license moneys paid to the sheriff as collector is determined by the conditions fixing the county's title to the moneys, and not by the formal application for and issuance of licenses.[57] In Kentucky compensatory damages only are recoverable in an action on an officer's bond,[58] but this does not necessarily require the exclusion of evidence of malice.[59] When sued for money due the county, sureties on the sheriff's bond cannot set off the amount of outstanding non-negotiable county warrants, drawn in the sheriff's favor, without producing the warrants or showing them to be still held by the sheriff.[60] It has been held in Arkansas that the liability of sureties is limited to the penalty of the bond even though there be a plurality of breaches involving separate and distinct wrongs,[61] and in that state the separate liability of the principal cannot be enforced in an action on his bond.[62]

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false return made by him. Evidence held sufficient to show a false return. Foster v. People, 121 Ill. App. 165.

52. Greenberg v. People, 225 Ill. 174, 80 N. E. 100.

53. Sneed v. McFatridge [Tex. Civ. App.] 16 Tex. Ct. Rep. 881, 97 S. W. 113. But if the sheriff, after lawful arrest, deprives his prisoner of reasonable opportunity to give bail, the sureties are liable. Roberts v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 50, 94 S. W. 388. As to sufficiency of the complaint in an action on the bond for unlawful arrest. Bonebrake v. Hunt [Ariz.] 89 P. 544.

54, 55. Briggs v. Manning [Ark.] 97 S. W. 289.

56. The liability of a surety on a constable's official bond is not affected by the fact that the office is elective only, when the bond recites that the official was appointed. Foster v. People, 121 Ill. App. 165. When sued on a constable's official bond, sureties are estopped to deny their principal's official character stated in the bond. Id.

57. Sureties liable, although no licenses taken out during sheriff's term, if the parties paying the sheriff, afterwards but before his term expires, engage in the business for which licenses are required and thereby become liable under the statute to a civil action for recovery of the license fees. Bingham County v. Fidelity & Deposit Co. [Idaho] 88 P. 829.

58, 59. Scott v. Com., 29 Ky. L. R. 571, 93 S. W. 668.

60. Bingham County v. Fidelity & Deposit

procedure therein,[63] and to the obstruction of navigable waters,[64] are treated elsewhere.

§ 1. *Public control and regulation; extent of state jurisdiction.*[65]—The sovereignty of a state extends to its vessels upon the high seas.[66]

Tonnage tax and light money.[67]—The Federal statutes provide for a tonnage tax of fifty cents a ton on vessels not of the United States which are entered in its ports from any foreign port.[68] A duty of fifty cents a ton, denominated light money, is levied on all vessels not of the United States which may enter the ports of the United States, except unregistered vessels owned by citizens of the United States and carrying a sea letter or other regular document proving them to be American property.[69]

§ 2. *Nationality, registration, enrollment, and ownership.*[70]—Vessels of the United States are such as are registered pursuant to the Federal statutes and those duly qualified to carry on the coasting trade or fisheries.[71] The status of a vessel so registered is not affected by the uses to which she may be put,[72] nor by the fact that her owner may be using her in violation of a state law and is subject to a penalty therefor.[73] She does not lose her status as a vessel of the United States while in the Detroit river.[74]

The owner of a vessel may maintain a suit in admiralty to recover possession thereof from one unlawfully withholding it.[75]

§ 3. *Master and officers.*[76]—The usual rules governing contracts apply in determining whether one has been employed as master of a vessel[77] and the amount of wages he is entitled to receive.[78] Expenses incurred by the owners by reason of

Co. [Idaho] 88 P. 829. The detachment of the territory and annexation to another county after title became fixed is immaterial. Id.

61. Albie v. Jones [Ark.] 102 S. W. 222.

62. Under Kirby's Dig. § 6079, excess of principal's liability over that of sureties held not recoverable in action on bond of officer. Albie v. Jones [Ark.] 102 S. W. 222.

63. See Admiralty, 7 C. L. 30.

64. See Navigable Waters, 8 C. L. 1083.

65. See 6 C. L. 1465.

66. Where two vessels coming into collision both belonged in Delaware, held that passengers and crews on board them were, in contemplation of law, within territory of that state, and hence its statute giving right of action to personal representatives of one killed through negligence of another was applicable. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906. Evidence that insured vessel belonged to residents of Pennsylvania and sailed from port of that state on voyage during which she was lost, held to sufficiently show that it was property within the state where insurance contract was made. Bartlett v. Rothschild, 214 Pa. 421, 73 A. 1030.

67. See 4 C. L. 1450.

68. Rev. St. § 4219. The Alta [C. C. A.] 148 F. 663.

69. Rev. St. §§ 4225, 4226. Claim for light money held properly denied. The Alta [C. C. A.] 148 F. 663.

70. See 4 C. L. 1451.

71. Status depends on registry, enrollment, and license, under U. S. Rev. St. §§ 4131, 4311, 4318. Fleming v. Sloane [Mich.] 13 Det. Leg. N. 1029, 110 N. W. 933. A vessel not registered in the United States is a vessel "not of the United States" within the tonnage tax law, though owned by a citizen of the United States. Subject to tax imposed by Rev. St. § 4219, on her entry from a foreign port. The Alta [C. C. A.] 148 F. 663.

72. Vessel enrolled and licensed in office of collector of customs at Detroit held a vessel of the United States under U. S. Rev. St. §§ 4131, 4311, 4318, regardless of fact that she had abandoned coasting trade for which she was so licensed and was carrying on business of a ferry between Detroit and a Canadian port. Fleming v. Sloane [Mich.] 13 Det. Leg. N. 1029, 110 N. W. 933.

73. Using boat as ferry without state license. Fleming v. Sloane [Mich.] 13 Det. Leg. N. 1029, 110 N. W. 933.

74. Fleming v. Sloane [Mich.] 13 Det. Leg. N. 1029, 110 N. W. 933.

75. Evidence, in suit in admiralty to recover possession of a tug, held not to sustain respondent's claim of ownership. The Robert R. Kirkland, 143 F. 610. Committee of dredge owners' association authorized by vote of directors, approved by individual members, to take legal title to property to be acquired by association under certain contract, and to whom a bill of sale of certain tug was made pursuant thereto, held authorized to sue in their own names to recover possession of tug from one of the members having possession thereof without right. Id.

76. See 6 C. L. 1465.

77. Evidence in action in admiralty for wages held insufficient to show contract by respondent employing libelant as captain of vessel. Donovan v. Salem & Philadelphia Nav. Co., 142 F. 985.

78. Evidence held to entitle master to recover wages and disbursements as claimed

his neglect of duty will be deducted from the amount he would otherwise be entitled to recover.[79] Masters are not entitled to liens for their wages.[80] The master is not a fellow-servant of the officers and crew so as to preclude a recovery of damages for their death in a collision due to his negligence.[81]

The first officer is not chargeable with negligence because of improper navigation where he acts pursuant to the orders of the master.[82]

§ 4. *Seamen. Shipping articles.*[83]—A provision in the shipping articles that the crew shall make no claim for wages or provisions while the vessel is detained by ice prior to her departure on her contemplated voyage is reasonable and valid.[84]

Wages and subsistence.[85]—The Federal statutes provide that a seaman who has signed an agreement and is afterwards discharged before the commencement of the voyage or before one month's wages are earned, without just cause and without his consent, may recover one month's wages in addition to the amount actually earned by him.[86] Such an allowance has, by analogy, been made to an engineer wrongfully discharged at a distant port before the termination of the voyage, though he had served more than a month.[87] Every master or owner who, without sufficient cause, refuses to pay seamen their wages within the time prescribed by statute is made liable for one day's wages for each day's delay.[88] Payment of advance wages in violation of law does not render the contract of shipment void in the absence of a showing that it entered into the contract as one of the things agreed upon by the parties, either expressly or by implication.[89] A seaman wrongfully discharged before the termination of the voyage is ordinarily entitled to recover expenses incurred in returning to the port of shipment.[90] As in other cases, releases of claims for wages obtained through duress and which are without consideration are not binding.[91] The same is true of a release of a seaman's rights under a lay contract executed by him while intoxicated.[92] The owner of a whaling vessel who fails to make

less expense due to neglect of duty. Brennan v. Hagan & Co., 147 F. 290.

79. Expense to which owners were put on account of his intoxication and neglect of duty. Brennan v. Hagan & Co., 147 F. 290.

80. In distribution of proceeds of vessel sold in collision suit, master's wages held not entitled to priority over collision damages, particularly where he was conducting faulty navigation which resulted in collision. The C. J. Saxe, 145 F. 749.

81. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

82. Will not preclude recovery for his death in collision where he was not personally negligent. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

83. See 6 C. L. 1465.

84. Not in conflict with Rev. St. §§ 4511, 4523, 4524. The Joseph B. Thomas [C. C. A.] 148 F. 762, afg. 136 F. 693. Evidence held not to show commencement of work prior to departure of vessel, shoveling of snow off of deck being too trifling to be considered. Id.

85. See 6 C. L. 1466.

86. Rev. St. § 4527, 6 Fed. St. Ann. 864. Seamen held not discharged but merely directed to wait on shore until ship was ready to sail, so that they could not recover penalty. The Joseph B. Thomas [C. C. A.] 148 F. 762, afg. 136 F. 693.

87. Caffyn v. Peabody, 149 F. 294.

88. Rev. St. § 4529, as amended by Act Dec. 21, 1898, c. 28, § 4, 30 St. 756. Where captain has reasonable ground for controversy as to wages due, he has lawful right to have questions adjudicated by court, and refusal to pay wages demanded, under such conditions, is not wrongful withholding of wages without sufficient cause. The Amazon, 144 F. 153. Captain held to have had reasonable grounds for contention, so that seamen were not entitled to recover liquidated damages provided for by said section. Id.

89. Payment in violation of Act Dec. 21, 1898, c. 28, § 24, 30 St. 763, 6 Fed. St. Ann. 871, held not to make contract of shipment void under Rev. St. § 4523, 6 Fed. St. Ann. 862. The Bound Brook, 146 F. 160.

90. Engineer wrongfully discharged in Alaska held entitled, under contract, to recover expenses of his return. Caffyn v. Peabody, 149 F. 294.

91. Release in full signed by fireman on his wrongful discharge held not binding on him where he was required to sign it in order to get any money on account of his wages, and was without money and was unable to obtain judicial process at place of discharge for protection of his rights, and amount paid was no more than amount admitted to be due for services up to date of payment. Caffyn v. Peabody, 149 F. 294.

92. Seaman shipping on whaling vessel under lay contract held not bound by release executed by him while intoxicated on receipt of inadequate sum in full settlement for his share of the catch. The Barbara Hernster [C. C. A.] 146 F. 732.

division of whalebone with a seaman according to the provisions of the contract under which he shipped, but sends it away to market, is liable to him for his proportionate share of its value.[93]

Punishment of seamen.[94]—Seamen and others may be discharged for incompetency or neglect of duty,[95] and forfeit their right to wages by desertion.[96] The court may refuse to consider evidence of offenses by seamen not entered in the official log.[97]

Care of injured seamen.[98]—The liability of the vessel and its owners for injuries to seamen is treated in a subsequent section.[99] The vessel and her owners are bound to furnish proper care and medical treatment for seamen injured in the service.[1] Whether the master is bound to put into the nearest port for that purpose depends upon the circumstances of each particular case, he being only required to exercise a reasonable judgment in the matter.[2] The obligation does not end with the voyage if there was not sufficient time and facilities for the vessel to have then done its duty,[3] nor is the right forfeited by reason of the fact that the injury was received through remissness or not unusual carelessness on the seaman's part, where he has not been guilty of gross negligence or willful neglect of orders.[4] The vessel is not, however, liable for expenditures made by others on his behalf which he is under no obligation to repay and which were made when the cure had been completed, at least so far as the ordinary medical means extend.[5]

§ 5. *Mortgages, bottomry, maritime, and other liens on the vessel, craft, or cargo.*[6]—The Federal statute requiring mortgages on vessels of the United States to be recorded in the office of the collector of customs where such vessel is enrolled supersedes as to such vessels the state law relating to the recording of mortgages.[7] Whether a contract amounts to a mortgage or a sale is a question of intention.[8] A

93. The Barbara Hernster [C. C. A.] 146 F. 732.

94. See 6 C. L. 1467.

95. Evidence held insufficient to justify discharge of engineer on ground that he became incompetent and irresponsible by reason of excessive drinking. Caffyn v. Peabody, 149 F. 294.

96. Shipping articles construed and held that seamen were lawfully logged as deserters for leaving vessel without master's consent before she reached port of final discharge while there was wide margin of time remaining in which to make that port, and that there was no deviation, and hence they were not entitled to recover wages. The Grace Dollar, 149 F. 793. Where seamen were not formally discharged and were not logged as deserters, but left vessel with captain's connivance, held that court was not authorized to treat them as deserters but would regard contract as terminated by mutual consent, and they were entitled to receive pay only for time of actual service at contract rate. The Amazon, 144 F. 153.

97. Rev. St. § 4597, since its amendment by Act Dec. 21, 1898, c. 28, § 20, applies to vessels in coasting trade. The Amazon, 144 F. 153. Seamen leaving vessel held not to be regarded as deserters when not logged as such. Id.

98. See 6 C. L. 1467.

99. See § 18, post.

1. Duty is to furnish means of cure and to use all reasonable efforts for that purpose, word "cure" being used in sense of proper care and not positive cure, which may be impossible. The Mars [C. C. A.] 149 F. 729, afg. 145 F. 446, 138 F. 941. Fact that tug was engaged in comparatively short coastwise trips held not to relieve her from usual obligation in this respect. Id. Right extends to a fireman. Id. Allowance held proper. Id. Master's treatment held not negligent in view of his honest opinion that seaman's leg was not broken. The Kenilworth [C. C. A.] 144 F. 376. Evidence held insufficient to warrant finding that ship was negligent in treatment of seaman, or in failing to leave him at hospital, in view of fact that acted on advice of competent physicians. The Sarnia [C. C. A.] 147 F. 106, rvg. 137 F. 952.

2. Master held not negligent in failing to put into port. The Kenilworth [C. C. A.] 144 F. 376. Steamer held liable in damages for failure of master to put into nearest port. The Cuzco, 148 F. 914.

3. Allowance for future treatment held proper. The Mars [C. C. A.] 149 F. 729, afg. 145 F. 446, 138 F. 941.

4. Not by reason of fact that fireman in trying to tighten screw on valve mistakenly turned it wrong way, thus loosening it and permitting steam which scalded him to escape. The Mars [C. C. A.] 149 F. 729, afg. 145 F. 446, 138 F. 941.

5. The Kenilworth [C. C. A.] 144 F. 376.

6. See 6 C. L. 1467.

7. Recording pursuant to U. S. Rev. St. § 4192. Fleming v. Sloane [Mich.] 13 Det. Leg. N. 1029, 110 N. W. 933. Mortgage so recorded held to take precedence over subsequent garnishment, though not filed in office of city clerk as required by state statute relating to chattel mortgages. Id.

8. Contract held mortgage of vessel only as security for money borrowed and not to make libelant the owner of the vessel. The Clifton [C. C. A.] 143 F. 460.

court of admiralty has no jurisdiction to foreclose mortgages on vessels,[9] nor to afford relief to a mortgagee seeking to recover possession of property mortgaged to secure the payment of a nonmaritime debt,[10] but, when it has a fund to dispose of, it may entertain claims based on mortgages.[11] As in other cases a receiver may be appointed to take charge of a mortgaged vessel when the security is impaired.[12]

A bottomry bond is an obligation executed generally in a foreign port by the master of a vessel for advances to supply the necessities of a ship, together with such interest as may be agreed on, which creates a lien on the vessel enforceable in admiralty in case of her safe arrival in her port of destination, but is void and of no effect in case of her loss before arrival.[13] Such bond will bind the ship only when the supplies or repairs are actually necessary to the performance of a contemplated voyage,[14] and neither the master nor owners have funds or credits available to meet the wants of the vessel.[15] No provision in the charter of the vessel can change the maritime law in this regard or relieve the owners from any lien on the vessel.[16] Where the advances are made at a foreign port and the supplies are purchased and expenditures made by the master who executes the bond, and are necessary for a contemplated voyage, the necessity for credit is presumed, unless it is shown that the master had funds or the owners had sufficient credit, and that these facts were known to the lender.[17]

The right to liens for wages,[18] salvage,[19] and repairs and supplies,[20] is treated in other sections. One advancing money on the credit of the vessel to pay maritime

9. The Conveyor, 147 F. 586.

10. Contract whereby vessel is mortgaged to secure money advanced for payment of purchase price is not maritime in character. The Clifton [C. C. A.] 143 F. 460.

11. Jurisdiction to administer insurance money applicable to payment of maritime liens held not affected by fact that mortgagees also had claims against fund, or by their commencement of foreclosure suits in state court. The Conveyor, 147 F. 586. Agreement between mortgagees and holders of maritime liens for payment out of insurance money of cost of raising sunken vessel, liens for labor and supplies, and repair of vessel, held maritime in character, so that fund was subject to administration of admirality court, though contract was not fully executed. Id.

12. Where all the parties interested in and having control over mortgaged property are personally present, the court may, in proper case, appoint a receiver to take charge of it though it is itself beyond the court's jurisdiction. Eureka Min., Smelting & Power Co. v. Lewiston Nav. Co. [Idaho] 86 P. 49. Removal of mortgaged vessel to different part of river held not to put it in greater danger of loss and destruction than before so as to authorize appointment of receiver to take charge of it, it appearing that it was in charge of competent master and crew. Id. Where mortgage on boat provides that mortgagor shall keep property insured, and that if he fails to do so mortgagee may do so and that all sums paid by mortgagee for insurance shall become part of mortgage debt and be secured by mortgags lien, failure of mortgagor to insure will not amount to such waste of security as to authorize appointment of receiver to take charge of property. Id. Where one takes mortgage on vessel plying on interstate stream in such manner as that its use in navigating such stream will necessarily take it outside of state, and mortgage provides that mortgagor shall not remove vessel beyond the limits of the United States, removal of vessel to another part of river and beyond jurisdiction of state held not such a violation of contract as to require appointment of receiver to take charge of it. Id. Where mortgage requires mortgagor to insure a boat, which it is understood is to ply on certain designated waters, his failure to do so because risk is so great on such waters that insurance cannot be obtained will not of itself warrant appointment of receiver. Id.

13. The Wyandotte [C. C. A.] 145 F. 321, afg. 136 F. 470. Draft drawn by master of vessel in foreign port, when he was ready to sail, had no funds, and was unable to hear from owner, and proceeds of which were used to secure necessary supplies and to pay necessary expenses, held a bottomry bond, or in the nature of one, and enforceable in admiralty by proceeding in rem against vessel. Id. Foreign character of vessel owned in Englandd held not affected by fact that she was chartered in New York. Id.

14. Necessity for supplies is the test, and not that every item must be such as would sustain a libel for a maritime lien. The Wyandotte [C. C. A.] 145 F. 321, afg. 136 F. 470.

15. 16. The Wyandotte [C. C. A.] 145 F. 321, afg. 136 F. 470.

17. Burden is on owner to show that he had such credit or funds. The Wyandotte [C. C. A.] 145 F. 321, afg. 136 F. 470. Liability of English vessel under bottomry bond held governed by laws of United States where charter, which provided that American law should govern, was made, cargo was shipped, and debts for which bond was given were contracted. Id.

18. See §§ 3, 4, ante.

19. See § 13, post.

20. See § 12, post.

claims that are liens, either by virtue of the maritime law or state statutes, and which is actually used for that purpose, has a lien of equal standing with those so discharged.[21] A stockholder of the company owning the vessel is not thereby prevented from contracting with the company and acquiring a lien on such vessel;[22] but the fact that he is also treasurer of the company and, as such, the legal custodian of its funds, is strong but not conclusive evidence that he relied on his ability to pay himself out of such funds, and hence contracted on the personal credit of the company and not that of the vessel.[23]

Liens given by state statutes or the general maritime law have priority over mortgages.[24] Claims of seamen for wages are of the highest rank of maritime liens, taking preference over all other contract claims of the same relative duties [25] and over collision damages.[26] A salvage service, in raising and preserving a sunken vessel, has priority of lien over claims for wages earned and supplies furnished prior to the accident.[27]

Seamen having liens for wages on a vessel which is lost may resort to insurance money in the hands of the owners.[28] The distribution of insurance money among them and other lien holders may be made the subject of contract between the interested parties.[29]

The holder of a maritime lien who participates in a proceeding in a state court resulting in a sale of the vessel at his instance loses his lien, if not by estoppel, at least by laches.[30]

§ 6. *Charter party.*[31]—In construing a charter, when possible force should be given to every term and provision.[32] Proof of usage or custom is inadmissible to vary plain and unambiguous terms.[33] The consignee is not bound by provisions of the charter not made a part of the bill of lading.[34] Memoranda referring to the

21. Must appear that claims paid were liens under state statute or general maritime law. The City of Camden, 147 F. 847. One loaning money on credit both of vessel and owner held entitled to lien. Id.

22. Lien for money loaned to pay claims which were liens. The City of Camden, 147 F. 847.

23. The City of Camden, 147 F. 847. Lien of stockholder and treasurer for money loaned to pay off lien claims not postponed to those of other creditors, where it appeared that company had no funds when loan was made and had had none in his hands since that time and that loan was made at request of manager of company. Id.

24. For wages or supplies. The Conveyor, 147 F. 586.

25. The Eva D. Rose, 151 F. 704. Where seamen intervene with claims for wages in a suit in rem against the vessel, the court will retain their intrepleader, if it has merit, and adjudicate their rights regardless of the disposition of the original libel. Strict rules of pleading will not be applied in such case, seamen being special wards of admiralty. Id.

26. In distribution of proceeds of sale of vessel in collision suit, though they have claim against solvent owner. The C. J. Saxe, 145 F. 749.

27. The Conveyor, 147 F. 586.

28. May resort to insurance money in the hands of the owners for the full payment of their claims, with interest and costs, subject only to claims for salvage services in raising and preserving the vessel, where proceeds of the sale of the vessel are insufficient to pay them. The Conveyor, 147 F. 586.

29. Agreement for payment of cost of raising and repairing vessel and of maritime liens for labor and repairs out of proceeds of insurance held valid and binding and to entitle lien claimants to payment out of such fund in so far as possible, leaving body of boat when raised responsive to any deficit in claims of mortgagees. The Conveyor, 147 F. 586.

30. Northwestern Commercial Co. v. Bartels [C. C. A.] 131 F. 25. Libelant held estopped by conduct to enforce contract lien for services against vessel in admiralty as against purchaser thereof at sale under proceedings in state court, where he participated in such proceedings, consented to sale, urged purchaser to purchase, acquiesced in sale after it was made, etc. Id.

31. See 6 C. L. 1468.

32. Printed provision, "vessel to have turn in loading," held not to supersede subsequent written provision, "vessel to be loaded promptly," but, the two being consistent, both were to be given effect. Harding v. Cargo, etc., of Coal, 147 F. 971.

33. Where charter of sailing vessel provided, "vessel to have turn in loading," held that it could not be modified by showing custom of port that all sailing vessels should be berthed in order in which they arrived, but that preference should be given to steamers requiring coal either for cargo or for bunker use. Harding v. Cargo, etc., of Coal, 147 F. 971.

34. Where bill of lading only obligated consignee to receive goods as unloaded and

charter, inserted in the margin of the bill of lading but not referred to in the body of the bill, are no part of the contract, it not appearing when or how they were inserted.[35]

If the vessel be let so that there is a transfer or relinquishment to the charterer of the entire command, possession, and subsequent control, he will be treated as the owner for the voyage or particular event stipulated for,[36] and will be responsible for the acts and defaults of the master and crew in the navigation of the vessel.[37] But if the charter is merely an agreement or covenant for the use of the vessel or some designated part thereof, the general owner at the same time retaining command, possession, and control over its navigation, the contractor must be regarded as a contractor for a designated or specific service only, and the duties and responsibilities of the owner are not altered.[38] A provision that the owner agrees to hold the charterers free from liability for loss arising through the acts, neglect, or default of the master or crew precludes the recovery of freight where the ship is lost through negligent stranding.[39]

Contracts of affreightment commence from the loading of the vessel, and from the time when the cargo is delivered to the vessel each party is bound to the other for full performance.[40] The time when the vessel is to be delivered to the charterer,[41] and the duration of the charter and the ports to which the voyage may extend,[42] are questions of construction. The charterer is sometimes given the option

not to discharge cargo, held that he was not bound by provisions of charter as to time for discharging or as to rate of demurrage, though bill provided "discharge and all other conditions as per charter," his liability for demurrage in such case, if any, being determined as usual by reference to the evidence as to whether he was guilty of unreasonable delay in taking them and actual damages resulting therefrom. West Hartlepool Steam Nav. Co. v. 450 Tons of Kainit, 151 F. 886.

35. Memorandum "discharge and all other conditions as per charter party" described, held not binding on consignee. West Hartlepool Steam Nav. Co. v. 450 Tons of Kainit, 151 F. 886.

36. Contract held one of letting and hiring and not a mere contract of service, though owner was required to provide efficient crew and pay their wages. Hills v. Leeds, 149 F. 878. Charter held a demise and not a contract of affreightment. Golcar S. S. Co. v. Tweedie Trading Co., 146 F. 563.

37. Since he, and not owner, has right to control their conduct. Hills v. Leeds, 149 F. 878. Burden of showing that owner did not provide efficient crew, as required by charter, is on charterer. Id. Owner not liable for shortage in delivery. Golcar S. S. Co. v. Tweedie Trading Co., 146 F. 563.

38. Hills v. Leeds, 149 F. 878. Charter held mere contract of affreightment so that charterer was not liable for acts and conduct of officers and crew in management of vessel. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389.

39. Burn Line v. U. S. & Australasia S. S. Co., 150 F. 423.

40. Leonard v. Bosch [N. J. Eq.] 64 A. 1001. Where charter provided that vessel guarantied insurance and that charterer was not obliged to begin loading until deposit of specified sum in guaranty of insurance had been made, held that, on the deposit being made and vessel loaded, charterers were bound to take risk of vessel for whole voyage and were therefore entitled to benefit of deposit as security for whole voyage, or at least until insurance for their benefit was effected by vessel owners. Id.

41. Agreement to keep vessels "a regular period apart as much as possible" held not an agreement to keep them apart for two or three weeks or for any stated period. Atlantic & M. G. S. S. Co. v. Guggenheim [C. C. A.] 147 F. 103, afg. 123 F. 330. In any event could be no recovery for breach where no damage was shown to have resulted, and vessels were kept at regular interval apart, ample time being allowed for loading of first before arrival of second. Statement in charter that vessel was then about to leave Boston held not an express warranty that it would reach port of loading at certain time. Id. Where charter provided that vessel should be tight, staunch, strong, and in every way fitted for voyage, and that she should proceed thereunder after completion of voyage on which she was then engaged, held that charterer was entitled to damages incurred by reason of delay due to making of repairs necessary to render vessel seaworthy after completion of her then voyage. Heller v. Pendleton, 148 F. 1014. Owner held not responsible for expenses incurred by respondent through delay in sending boat for cargo, the evidence not showing any definite agreement as to time, and respondent having accepted boat when tendered. Murray v. Jump Co., 148 F. 123.

42. Question whether charter authorized charterer to send vessel to certain ports held one of intention and one of fact not determinable on exception to cross-libel. Tweedie Trading Co. v. Glasgow Steam Shipping Co., 143 F 184. Charter construed and held that charterer, having used vessel for general trading under option to do so in charter was not entitled, without new

to cancel if the vessel does not arrive at the port of loading on or before a specified date.[43] He cannot be compelled to exercise such an option prior to her arrival at such port.[44] The use of the word "about" in fixing the duration of a time charter authorizes the charterer to surrender the vessel some brief time before the expiration of the time agreed upon, which "underlap" is not permissible without it.[45] In respect to overlap, however, it operates merely as an embodiment in the charter of the rule of law that a time charter does not expire until the completion of the voyage on which the vessel is engaged when the term fixed therein ends.[46] It does not operate to enlarge or diminish the charter term except as demanded by reasonable business necessity, and has no relation to its normal expiration or the time of giving notice of its renewal.[47] The rule that the term of a time charter does not expire until the completion of the voyage on which the vessel is engaged when the date fixed arrives should not be extended beyond the requirements of the commercial necessity on which it is based.[48]

It is often provided that the vessel shall be loaded promptly[49] or as fast as she can receive the cargo,[50] or that she shall have her turn in loading.[51] What is prompt loading depends upon the facilities of the port and the existing climatic conditions.[52] Particular circumstances and exceptional conditions may operate to relieve the charterer from liability under his contract to have the cargo ready when the vessel is ready,[53] but they must be clearly proved in order to excuse delay, the burden being upon the charterer.[54] The vessel is ordinarily required to load to her full capacity.[55] So too, the owner may recover the full weight agreed upon where, through the fault of the charterer, only a part of the stipulated cargo is loaded.[56]

agreement, to make voyage to west coast of South America, also provided for therein, which would require extension of time in excess of that fixed in charter. Walsh v. Tweedie Trading Co., 152 F. 276.

43. Provision held not affected by subsequent provision excepting dangers of the sea so as to extend canceling date where arrival was delayed by such dangers. Karran v. Peabody [C. C. A.] 145 F. 166.

44. Right not lost by refusal to exercise option at owner's request after such date when ship was at distant port and charterer had no means of knowing when she would arrive, though owner suffered damages by fall in charter rates in meantime. Karran v. Peabody [C. C. A. 145 F. 166. In any event owners held not entitled to extension where libel did not sufficiently allege that delay was so caused. Id.

45, 46. The Rygja, 149 F. 896.

47. The Rygja, 149 F. 896. Charter for a period of "about" six months provided that charterer might hire vessel for further period of "about" six months more provided he gave notice to that effect a month before expiration of first term, which he did. Held that whole engagement thereby became one for about twelve months, and owner was entitled to redelivery on completion of voyage upon which vessel was engaged at end of twelve months, and charterer could not extend term by claiming overlap at end of both six month periods. Id.

48. The Rygja, 149 F. 896.

49. Where charter provided that vessel was to have her turn in loading and was to be "loaded promptly," held that charterer was required to use normal capacity not only in loading her but also in loading vessels loaded ahead of her, on loading of which her prompt loading depended. Harding v. Cargo, etc., of Coal, 147 F. 971.

50. Where charter provided that coke was to he loaded on schooners "as fast as they can receive the same," held that charterer was liable for demurrage for delay due to failure to have sufficient coke on hand at port of loading. Atlantic etc., Co. v. Guggenheim [C. C. A.] 147 F. 103, afg. 123 F. 330. Defense that charterer was relieved of obligation to furnish cargo because of weather conditions held unsupported by proof and insufficient in law. Id.

51. Provision that vessel was to have "turn in loading" held to mean that she was entitled to be loaded in turn with other vessels in order of their arrival, so that she was not obliged to take her turn with any particular class of vessels. Harding v. Cargo etc. of Coal, 147 F. 971.

52. Vessel held not to have been loaded promptly as required by charter. Harding v. Cargo etc., Coal, 147 F. 971.

53. Harding v. Cargo, etc., of Coal, 147 F. 971.

54. Evidence held to show that vessel was not given her turn in loading as required by charter, and that contention of charterer that she could only be loaded at particular pier was without foundation. Harding v. Cargo, etc., of Coal, 147 F. 971.

55. Charterer held entitled to credit for shortage of cargo caried below carrying capacity of ship on voyages as to which there had been no settlement. Vacarrezza v. 567,000 Gallons of Molasses, 149 F. 792. Claim held foreclosed by payments and settlements of accounts at end of each voyage with full knowledge of facts. Id.

56. Evidence held to sustain finding that owners had not established claim for dead

The owner must provide proper fittings and equipment for the service in which the vessel is to be engaged,[57] and is generally required to furnish a vessel which is staunch, strong, and in every way fitted for the service.[58] A requirement that the vessel shall be in all respects seaworthy for the voyage she is about to undertake requires seaworthiness with respect to the storage of cargo as well as in hull and equipment,[59] but a warranty of seaworthiness does not imply a warranty of insurability at the usual rates.[60] A certificate from the charterer's marine surveyor that the vessel is in proper condition for the voyage is sometimes required.[61] The vessel is sometimes required to guaranty insurance at lowest regular rates[62] and

freight based on ground that water on bar was not deep enough to enable vessel to take full cargo. Pendleton v. U. S. & Venezuela Co. [C. C. A.] 145 F. 508.

57. In absence of special agreement, vessel is required to supply herself with proper fittings for carriage of lawful cargo. Harloff v. Barber & Co., 150 F. 185. Asphalt held "lawful merchandise" in charters including the West Indies, so that where charter required vessel to be ready to receive cargo, and tight, staunch, strong, and in every way fitted for the service, and that she was to be employed in carrying lawful merchandise, it was duty of owner to prepare her to receive cargo of asphalt by lining her if necessary. Dene Shipping Co. v. Tweedie Trading Co. [C. C. A.] 143 F. 854, afg. 133 F. 589. Where master of vessel did not have her lined, as a result of which pressure squeezed asphalt in between battens so that part of it became permanently wedged behind them, reducing to that extent permanent capacity of vessel and rendering hold unfit for carriage of perishable cargo, and owner refused to remove it, held that charterer was entitled to offset against charter hire the cost of removing it and for time lost. Id. No distinction between time charters and voyage charters in this regard. Id. Evidence held not to establish custom that charterer should provide fittings for protection of ship against requirements of lawful cargo, custom shown being one requiring charterer to separate different kinds of cargo when necessary. Id. Question of duty to provide means for removal of cargo held only secondary one in the case. Id. Charterers held responsible for breaking of mast while being used as part of apparatus of derricks in loading unusually heavy cargo, they having assumed that mast was sufficient without making inspection or asking advice, and having rigged an unscientific and necessarily insufficient preventer, though master, who was under orders and direction of charterers, failed to object. British Maritime Trust Co. v. Munson, S. S. Line, 149 F. 533. Vessel's masts, rigging, and cargo appliances, being properly built and well fitted for lifting packages of from three to five tons, and usual and sufficient for her class and rating at Lloyds, and charter requiring her to furnish tackle necessary to handle cargo up to three tons in weight, held that she was "strong" within meaning of charter, and custom of charterers to use masts in loading cargo, not shown to have been known to owners, did not impose on latter duty of providing masts which would sustain loads of unusual weight and sustain strains far above computed working strength, alleged custom being unreasonable. Id. Charter provided that steamer should pay for stowage and that charterer should be in no way liable for improper stowage, and that charterer should furnish dunnage required when not on board. Held that shoring necessary for insurance purposes was disbursement necessary to make vessel seaworthy in that repect, and hence charterer was not liable for cost of same. Capuccio v. Barber & Co., 148 F. 473.

58. Covenant of fitness held not to require removal of stanchions supporting deck beams in order to facilitate loading, where this could not be done with safety unless other provision for support of beams was made, particularly where charter provided for deck load at request of master. Keyser & Co. v. Duit [C. C. A.] 150 F. 328.

59. Harloff v. Barber & Co., 150 F. 185. Evidence held to show that single line of shifting boards in centre of hold, properly secured, would have sufficiently protected cargo of flint boulders from movement, so that owners were chargeable with delay and extra expense incurred by charterers by reason of master's refusal to load until additional precautions had been taken. Id. Test of seaworthiness is whether vessel is reasonably fit to carry the cargo which she has undertaken to transport. Dene Shipping Co. v. Tweedie Trading Co. [C. C. A.] 143 F. 854, afg. 133 F. 589.

60. Refusal of insurance, while it may be considered as evidence of unseaworthiness, more or less convincing acording to the circumstances of the case, is never of itself conclusive evidence thereof, but is a fact to be considered in connection with evidence of actual condition of vessel. Moore & Co. v. Cornwall [C. C. A.] 144 F. 22, afg. 132 F. 868. Evidence held to show that condition of vessel was such as to comply with warranty. Id.

61. Provision requiring captain to furnish such a certificate, and that "should the vessel fail to pass a satisfactory survey, this charter to be void at charterers' option," held to contemplate an actual survey and not arbitrary decision of surveyor, and that surveyor was not justified in refusing certificate merely because she had been eight years on her metal, or because of her age, which was known to charterer when charter was made, and such refusal did not authorize exercise of option by charterer. Moore & Co. v. Cornwall [C. C. A.] 144 F. 22, afg. 132 F. 868. Evidence held to sustain finding that owners did nothing to prevent survey. Id.

62. Clauss in charter party "Vessel to guaranty insurance at lowest regular rates," held not to mean that vessel or owners were

to make a deposit for that purpose.[63] The charterer is responsible for damages to the vessel due to the insufficiency of tackle furnished by him.[64]

The hire to be paid depends, of course, on the terms of the contract.[65] Provision is sometimes made for a pro rata return of hire in case the charterer is deprived of the use of the vessel by an accident due to any defect in her or her outfit,[66] or that hire shall cease in case of loss of time due to a deficiency of men or stores,[67] or to arrests and restraints of princes, rulers, and peoples.[68] The owner is generally given the right to withdraw the vessel from the service of the charterers on default in payment of hire at the time prescribed.[69] It is competent for a time charterer, by a provision in the charter, to pledge the freight to be secured by her during the term to secure the payment of the charter hire, and such a provision gives the owner an equitable lien in admiralty, as of the date of the charter, on any freight subsequently stipulated to be paid, and subrogates him to the lien of the charterer for the freight and the remedies of the charter to enforce its payment.[70] But a cargo owner who, on the issuance to it of a bill of lading, in good faith pays to the charterer a portion of the freight is protected in such payment as against a lien on subfreight reserved by the shipowner in the charter, of which the shipper had no knowledge or notice.[71] Cessor clauses are to be strictly construed,[72] and no lien created thereby can be enforced against the goods of a third party without a meritorious claim for liability against them or him, unless he is clearly shown to be privy to the contract.[73] A provision that vessels are to be kept at regular intervals apart is waived by accepting them when offered for loading and paying freight without objection.[74]

to provide insurance for which they were to be paid at such rates, but that owners guarantied that insurance on cargo by its owners was procurable at such rates. Leonard v. Bosch [N. J. Eq.] 64 A. 1001.

63. Evidence in action by owners of cargo to recover deposit, made by vessel owners in lieu of insurance, held to require finding that both parties intended that deposit was to be made in pursuance of terms of charter and in execution of provision therein that charterers were not obliged to commence loading until deposit in guaranty of insurance had been made, and in order that cargo might be loaded and become subject to terms of charter, and that it was to be for benefit of cargo owners. Leonard v. Bosch [N. J. Eq.] 64 A. 1001. Deposit in lieu of insurance appearing to have been made by owners of vessel for benefit of charterers and to secure loading of vessel by charterers under charter party, held that latter were entitled to hold it for their benefit without regard to any mistake made by depositary or owners in addressing certificate of deposit or letters in relation thereto to another party. Id.

64. Where owner was required to maintain vessel in efficient state, furnish tackle to handle ordinary cargo up to three tons in weight, and to work winches day and night if required, and charterer was to furnish coals and all other charges not otherwise specified, held charterer's duty to make tackle, furnished by it for removal of heavy machinery, fast, so that it could be removed safely, and hence it was liable for damage to vessel due to breaking of a bolt therein while unloading package weighing seven tons. Bollman v. Tweedie Trading Co., 150 F. 434.

65. Charter held not to entitle charterer to deduction of one per cent from prepaid freight. Capuccio v. Barber & Co., 148 F. 473.

66. Evidence held insufficient to sustain burden of proof resting on charterer to show that accident occurred by reason of any defect in yacht or her outfit, charter providing for pro rata return of hire in such case if charterer was thereby deprived of use of yacht for more than 48 hours. Hills v. Leeds, 149 F. 878.

67. Charterer held entitled to deduction of hire during time vessel was detained at quarantine because of illness of crew, officials not allowing her to proceed until new crew was obtained. Tweedie Trading Co. v. Emery Co., 146 F. 618.

68. Detention in quarantine held covered by clause "arrests and restraints of princes, rulers, and peoples always mutually except," so that charterer was not liable for hire during period of such detention. Tweedie Trading Co. v. Emery Co., 146 F. 618.

69. Owner held entitled to exercise right of withdrawal. Wilhelmsen v. Tweedie Trading Co., 149 F. 928.

70. Larsen v. 150 Bales of Sisal Grass, 147 F. 783.

71. Shipowner cannot institute proceeding to enforce lien until there is default in payment of freight any more than charterer could. Libel dismissed. Larsen v. 150 Bales of Sisal Grass, 147 F. 783.

72. West Hartlepool Steam Nav. Co. v. 450 Tons of Kainit, 151 F. 886.

73. Consignee held not bound by provision in charter to which he was not privy, giving vessel lien on cargo for demurrage, etc. West Hartlepol Steam Nav. Co. v. 450 Tons of Kainit, 151 F. 886.

74. Atlantic & M. G. S. S. Co. v. Guggenheim [C. C. A.] 147 F. 103, afg. 123 F. 330.

The charterer is ordinarily required to pay running expenses [75] and port charges,[76] and to make good any alterations made by him in the structure of the vessel.[77] He is sometimes made liable for injuries to the vessel amounting to less than a specified sum.[78] Fittings affixed to a vessel at the instance of the charterer cannot be removed by the vendor on rescission of the contract of sale unless no material injury is thereby done to the ship,[79] nor is the shipowner liable in damages for their detention on refusal of the vendor to remove them on such terms, they being of little or no value to such owner, and the vessel having been damaged in their installation.[80] The vessel is generally required to furnish winches [81] and men to run them.[82] It is frequently provided that the owners shall dock the vessel at specified times.[83] The duty of the charterer to clean the vessel does not include the removal of any of its permanent structure.[84]

As in the case of any other bailee for hire, one hiring a boat is liable for any damage thereto resulting from his negligence,[85] and the same is true of the consignee of the cargo.[86]

75. Owner held entitled to recover amounts paid for running expenses which charter required charterer to pay. Hills v. Leeds, 149 F. 878.

76. Tallying held port charge. Golcar S. S. Co. v. Tweedie Trading Co., 146 F. 563.

77. Alteration in structure of steamship caused by holes made in deck plating by construction of derrick shoe by charterers held to have been made good, demand for entirely new plate being captious. British Maritime Trust Co. v. Munson S. S. Line, 149 F. 533.

78. Where charter provided that hirer was responsible for injury to yacht amounting to less than $100, and was to redeliver her to owner in same condition in which he received her, and evidence showed that propeller blades were bent when she was redelivered, held that owner was entitled to recover amount paid for repairs to propeller, being less than $100. Hills v. Leeds, 149 F. 878.

79. Cooking apparatus, galley fixtures, etc., on rescission of sale for fraud. Bramhall, Deane Co. v. International Mercantile Marine Co., 145 F. 678.

80. Bramhall, Deane Co. v. International Mercantile Marine Co., 145 F. 678.

81. Where charter required vessel to be fitted for service and to have steam winches which were to be at charterer's disposal, held that latter was entitled to allowance for delay in discharging due to fact that winches were out of order and to deficiency of steam to work them. Munson S. S. Line v. Miramar S. S. Co., 150 F. 437.

82. Where charter provided that steamer was to furnish men to work winches day and night if required, charterers to pay extra expenses of night work, held that charterer was liable for sums paid donkeymen for night work, etc. Capuccio v. Barber & Co., 148 F. 473. Under such a provision, vessel held to have assumed risk of any difficulty, not created by charterer, which might prevent use of her own crew for that purpose, and hence was liable for cost of winchmen whom it was necessary to hire because stevedores at certain ports refused to work when winches were run by members of crew. Golcar S. S. Co. v. Tweedie Trading Co., 146 F. 563. Charterers held entitled to set off any damages occasioned by drunkenness or incompetency of winchmen or crew. British Maritime Trust Co. v. Munson S. S. Line, 149 F. 533. Allegations that stevedores would not work on steamer with sailors running winches owing to risk of personal injury, that sailors were without experience in handling heavy cargo and were unfit to act as winchmen in unloading particular cargo; and that it was therefore necessary to employ skilled winchmen, held not supported by proof that stevedores would not work with sailors at winches so long as they could get winchmen belonging to their union. Id.

83. Charter provided for docking whenever charterer and master deemed necessary, but at least once in every six months, payment of hire to be suspended until she was again in proper state for service. Arrived in New York March 30, with cargo for that port and Boston, and went to latter port where she discharged cargo and then returned to New York where she was docked before being reloaded there. Time for docking expired April 13. Held that she returned to New York from Boston on charterer's time, and hire continued except for time actually consumed in docking in New York. Bollman v. Tweedie Trading Co., 150 F. 434. Under simillar provision, held that charterer was entitled to have vessel docked at end of six months after last previous docking, though latter took place prior to the making of the contract, and though it was not actually necessary, particularly in view of general custom. Munson S. S. Line v. Miramar S. S. Co., 150 F. 437. Owners held to have fully complied with charter as to docking, delivery of vessel for that purpose at place where she could not be docked and demand that she be returned there, where she was not wanted and which would have been waste of time, being unreasonable under circumstances, and owner was entitled to recover hire, except for time occupied in docking, and damages for breach of charter. Wilhelmsen v. Tweedie Trading Co., 149 F. 928.

84. Does not require him to remove asphalt which became wedged behind battens because of owner's failure to line hold so as to render vessel seaworthy for such cargo. Dene Shipping Co. v. Tweedie Trading Co. [C. C. A.] 143 F. 854, afg. 133 F. 589.

85. City held liable as bailee for injury to hired scow from floating ice while she was

Where the charter requires the charterer to furnish and pay for certain towage, he is liable to the owner for any injury to the vessel by reason of the negligence of those in charge of the tug performing towage service.[87]

The charterer of a vessel rendering salvage services is entitled to a share of the award, though the charter is not a demise of the vessel.[88]

A bond given to secure the performance of a charter which merely obligates the surety to pay damages in case of a breach is not maritime in character.[89]

The measure of damages for breach of a charter by the charterer is, the net earnings lost by the owner by reason thereof.[90] The owner is bound to use reasonable diligence in rechartering his vessel, and cannot claim damages if he fails to do so.[91]

§ 7. *Navigation and collision. A. Rules for navigation and their operation in general.*[92]—The liability of a vessel in rem for torts is not coextensive with the personal liability of the owner, but she is only liable for injuries for which she is herself in fault.[93] There can be no recovery or partial recovery of damages due to collision unless fault be affirmatively shown.[94] and there is no legal liability for a collision due to inevitable accident.[95] Errors of judgment in extremis will

being removed to safer place on ground of negligence in leaving her in dangerous place. The Three Brothers [C. C. A.] 145 F. 177, afg. 134 F. 1001. Evidence held to show that, capsizing and sinking of pile driver while being towed by charterer was not due to her unseaworthiness but to improper towing, so that charterer was liable for resulting damages. Swenson v. Sanre & Triest Co., 145 F. 727. Findings that sinking of car float at float bridge of railroad company was due to fact that she was unseaworthy because of water in her hold, and that company was not negligent in manner of handling her or in failing to inspect her or measure water, it having no notice of her condition, held supported by evidence. Bush Co. v. Central R. [C. C. A.] 149 F. 734, afg. 130 F. 222.

86. Evidence held to show that injury to barge was due to fault of consignee of cargo in moving her at improper time and unduly exposing her to the effect of the tide. King v. Connabeer, 148 F. 136.

87. Charterer cannot relieve himself from liability by hiring tug. The Naos, 144 F. 292.

88. Charterer is entitled to exclusive use of chartered vessel and to money earned by her during existence of charter, and owner, not having parted with ownership, to remuneration for risk incurred while rendering service. The Arizonan [C. C. A.] 144 F. 81, rvg. 136 F. 1016. Award divided equally between charterer and owner of tug, where tug left tows and rendered services on day when charterer was entitled to her entire services. Id.

89. Admiralty court has no jurisdiction of action thereon against surety. Pacific Surety Co. v. Leatham & Smith Towing & Wrecking Co. [C. C. A.] 151 F. 440.

90. In determining question of damages sustained by shipowner through losing net earnings of vessel upon a voyage by reason of abandonment of charter by charterer, approximate accuracy is all that can be reasonably expected, since it depends upon various contingencies of navigation more or less speculative and incapable of being accurately ascertained. Venus Shipping Co. v. Wilson [C. C. A.] 152 F. 170. Where charterer refused to fulfill charter and new charter was subsequently made between same parties without prejudice to owner's rights to recover for breach of first, held that damages were properly awarded upon basis of difference between net earnings actually realized under second charter and those which would have been realized under first. Id. Average daily time made by vessel on voyage under second charter and time consumed in loading and unloading held properly used as basis for determining probable duration of employment of vessel under first charter if it had been fulfilled. Id. Conclusions of court as to probable net earnings under first charter approved except in minor particular. Id.

91. Moore & Co. v. Cornwall [C. C. A.] 144 F. 22, afg. 132 F. 868. Owner held not bound to accept offer made during lay days contracted for in charter notwithstanding receipt of notice of cancellation based on erroneous assumption of fact and erroneous construction of charter, which was not final or definite rejection of charter, particularly where offer required sending of vessel to another port. Id.

92. See 6 C. L. 1473.

93. The W. G. Mason [C. C. A.] 142 F. 913, rvg. 131 F. 632. Two tugs belonging to same owner were engaged to tow steamer, pilot tug taking initiative in directing movements of tow, but in other respects navigation of other tug being exclusively under control of her own master, each tug acting independently in doing her own part of the work. Held that other tug was not liable in rem for injury to tow due solely to fault of pilot tug. The W. G. Mason [C. C. A.] 142 F. 913.

94. As where evidence is so conflicting that it is impossible to determine to what direct and specific acts the accident is attributable. The Jumna [C. C. A.] 149 F. 171, afg. 140 F. 743.

95. Inevitable accident is an event which party charged with collision could not possibly have prevented by exercise of ordinary care, caution, and maritime skill. The Jumna [C. C. A.] 149 F. 171, afg. 140 F. 743.

not ordinarily be regarded as faults.[96] Faults which do not contribute to the collision are immaterial.[97] The mere fact that a vessel has an unlicensed pilot, though a violation of the statute, is not a contributory fault where his navigation is correct.[98] A burdened vessel guilty of a clear violaton of the rules in itself sufficient to account for the accident cannot escape liability by merely raising a doubt as to the conduct of the privileged vessel.[99] On an issue as to fault for a collision, the original occasion for a vessel being where it has a right to be is immaterial.[1]

Vessel owners are responsible for damages to a breakwater due to the negligence of the captain in running into the same.[2] Captains of vessels navigating the Great Lakes are required to keep themselves informed of changes going on from time to time in the different harbors which they are likely to be called upon to visit.[3]

Ordinarily entries in log books are not receivable in support of the party who makes them,[4] but where they are called for and made use of by the other party for the purpose of cross-examining the opposing witnesses, and the testimony so adduced is more intelligible by reference to them, they should be received.[5]

(§ 7) *B. Lights, signals, and lookouts. Lights.*[6]—Vessels must show the prescribed lights in the prescribed manner.[7]

Is not necessary that accident should be resut of vis major, but may be said to be inevitable where no negligence can be imputed to either vessel and no fault shown. Id. Though collision of tug with vessel lying at pier was primarily the result of the fainting of her wheelsman, held that she was nevertheless liable for resulting damage for failure to have lookout, it appearing that, had there been one, he could have prevented the accident. The Wilkesbarre, 151 F. 501. Plea that collision between moving tug with tow and stationary vessel was due to inevitable accident held not established by proof that former was forced against latter by floating ice, where it appeared that attention of lookout was directed elsewhere, and that properly stationed and attentive lookout could have seen ice in time to have avoided it. New York & Oriental S. S. Co. v. New York, etc., R. Co., 143 F. 991. Collision held due to inevitable accident or an inscrutable cause. The Jumna [C. C. A.] 149 F. 171. Collision between tugs held due to inevitable accident. The Luzerne, 148 F. 133.

96. Where a vessel has been brought into imminent danger by the negligence of another. Gilchrist Transp. Co. v. Sicken [C. C. A.] 147 F. 470. Tow held not in fault for not dropping anchor when cast loose. The Oceanica, 144 F. 301. Change of course held not error in extremis. The Mary P. Mosquito, 145 F. 960.

97. The North Star [C. C. A.] 151 F. 168, modifying, 140 F. 263. Failure to maintain lookout held immaterial. The Richmond, 143 F. 996; Muller v. New York, etc., R. Co., 144 F. 241; The Wrestler [C. C. A.] 144 F. 334; The Three Brothers [C. C. A.] 145 F. 177, afg. 134 F. 1001; La Bretagne, 148 F. 477; The Pocomoke, 150 F. 193. Location of steamer's lookout held not to have contributed materially to collision even if improper. The Mary P. Mosquito, 145 F. 960. Failure of tow to exhibit regulation lights held not to have contributed to collision due to failure of approaching vessel to see that tug had tow, where proper towing lights on tug were not seen, though tug was nearer to approaching vessel than tow. The Nugent C. C. A.] 145 F. 31. Signals even if in violation of statute, held not a contributing cause of collision. The Lake Shore, 149 F. 855. Any error on part of tug in not reversing held not to amount to a legal fault. The Transit, 148 F. 138.

98. The Wrestler [C. C. A.] 144 F. 334.

99. Doubts to be resolved against burdened vessel under such circumstances. The Pocomoke, 150 F. 193.

1. On issue as to fault for collision between tug towing barges which had previously broken from moorings and ferryboat, held that any question as to who was to blame for barges going adrift was immaterial, since ferry was bound to have due regard to rules of navigation in respect to tug and barges without reference to original occasion for their being where they had a right to be. The City of Portsmouth [C. C. A.] 143 F. 856.

2. Davidson S. S. Co. v. U. S., 27 S. Ct. 480, afg. 142 F. 315. Evidence held to have warranted finding that captain of vessel was negligent in running into unfinished government breakwater, question of his negligence and of contributory negligence on part of government in failing to maintain proper lights being for the jury. Id.

3. Davidson S. S. Co. v. U. S. 27 S. Ct. 480, afg. 142 F. 315.

4, 5. The Kentucky, 148 F. 500.

6. See 6 C. L. 1474.

7. Evidence held to show that red light of privileged vessel was burning brightly. The Martha E. Wallace, 148 F. 94. Disabled launch anchored in track of vessels held solely in fault for collision, evidence being insufficient to sustain burden resting on her to show that she exhibited a sufficient anchor light. Muller v. New York, etc., R. Co., 144 F. 241. Tug towing barges held in fault for collision, her side lights being obscured, there being no side lights on barges, and towing lights not being placed according to law. The City of Portsmouth [C. C. A.] 143 F. 856. Evidence held to show that barge in tow displayed proper lights. The Nottingham [C. C. A.] 143 F. 942. Evidence held to show that anchored steamer had proper lights and proper an-

Signals.[8]—The passing[9] and fog signals[10] required by the navigation rules must be given

Lookouts.[11]—Every vessel is required to have a proper and efficient lookout.[12]

(§ 7) *C. Steering and sailing rules.*[13]—As a general rule vessels approaching each other head on, or nearly so, are required to pass port to port, but this does not apply where the courses of the vessels are so far on the starboard of each other as not to be considered as meeting head and head, in which case they are required to pass on the starboard side of each other.[14] When two sailing vessels are approaching each other so as to involve risk of collision, and both are running free with

chor watch. The Job H. Jackson, 144 F. 896. Evidence held to show that there were lights on sunken dredge which were visible and should have been seen by tug which collided with her, and that collision was due to negligence of those on tug in failing to maintain a vigilant lookout. The Fin Mac Cool [C. C. A.] 147 F. 123. It is the duty both of the master of the tug and of those on board the tow to see that the lights required by law to be carried by the tow are in place and are lighted when under way at night, and both are liable for a collision resulting from a failure to carry such lights. The Eugene F. Moran, 143 F. 187.

Stern light of overtaken vessel held compliance with art. 10 of international rules, Act Aug. 19, 1890, c. 802, 26 St. L. 320. The John Bossert, 148 F. 903. Evidence held to sustain finding that schooner was in fault for failure to exhibit required stern light. The Kaiserin Maria Theresa [C. C. A.] 149 F. 97, rvg. 125 F. 145 on other grounds.

Flare up lights: Vessels may, if necessary to attract attention, show a flare up light in addition to those required by the rules to be carried, or use any detonating signal that cannot be taken for a distress signal. Int. Nav. Rules art. 12, Act Aug. 19, 1890, c. 802, 26 St. L. 325, 2 Fed. St. Ann. 158. Rule not being mandatory, failure to exhibit flare up light, and use of globe lamp instead, held not a fault, there being no way of knowing that vessel's lights were not seen and hence no reason for use of torch until collision was unavoidable. The Martha E. Wallace, 148 F. 94.

8. See 6 C. L. 1474.

9. Steamship and tug with carfloat held both in fault for collision for negligence in respect to signals. The Tugboat No. 6, 148 F. 1007.

10. Steamer held to have been equipped with proper and efficient steam whistle and evidence held to show that it was properly sounded in fog. The Kentucky, 148 F. 500.

11. See 6 C. L. 1474.

12. All that the law requires as to a lookout is that there shall be some one properly stationed to best observe, see, and hear, the approach of other vessels. Taking into account size of launch, business in hand, and waters to be traversed, held that no other or additional person than master and deckhand was required. The Pocomoke, 150 F. 193. Removal of lookouts of steamer to bridge held justified under circumstances. The Kaiserin Maria Theresa [C. C. A.] 149 F. 97, rvg. 125 F. 145 on other grounds.

Vessels held in fault for collision for violation of rule. The Charles A. Campbell, 142 F. 99; The Lake Shore, 149 F. 855. Sloop yacht. The International [C. C. A.] 143 F. 468, afg. 125 F. 419. Tug. The City of Portsmouth [C. C. A.] 143 F. 856; The Nugent [C. C. A.] 145 F. 31; The Transit, 148 F. 138. Tug with tow. Carter v. Seaboard Air Line R. Co., 151 F. 531. Ferryboat. The City of Portsmouth C. C. A.] 143 F. 856. Schooner. The John Bossert, 148 F. 903. Schooner for failing to see lights on approaching tow, or to discover bell buoy. The Nottingham [C. C. A.] 143 F. 942. Steamship and tug with carfloat held both in fault for negligence with respect to lookout duty. The Tugboat No. 6, 148 F. 1007. Barge in tow of tug held in fault for collision with schooner in that she kept no proper lookout, did not observe schooner's movements, and therefore made no attempt to change her wheel when collision was imminent, which would at least have lessened force of collision. The Nottingham [C. C. A.] 143 F. 942. Where attention of lookout stationed on cars on carfloat on side of tug was absorbed by necessity of keeping watch upon piers, held that another man should have been detailed to general duty, and tug was in fault. New York & O S. S. Co. v. New York, etc., R. Co., 143 F. 991. Persons navigating batteau in harbor held in fault for collision with tug and tow in failing to take proper care and caution to look out for and observe approach of other vessels lawfully in harbor. Carter v. Seaboard Air Line R. Co., 151 F. 531. Burdened vessel held solely in fault for failure to see lights of approaching vessel until too late. The Martha E. Wallace, 148 F. 94. Though collision of tug with vessel lying at pier was primarily due to the fainting of her wheelsman, which was an inevitable accident, held that she was nevertheless liable for resulting damage because of failure to have proper lookout, it appearing that, had there been one, he could have prevented accident. The Wilkesbarre, 151 F. 501.

13. See 6 C. L. 1475.

14. Inland Rules, art. 18, Rule 1, 30 St. L. 100 2 Fed. St. Ann. 178. One of two steamers held solely in fault for collision for changing course when vessels were close together on mistaking signal of another vessel for that of meeting steamer, where vessels would have passed safely had both continued on original courses. The Atlantic City [C. C. A.] 143 F. 451, afg. 136 F. 996. Tug held in fault for collision with tug and tow for violation of Pilot Rule 1, requiring the vessels to pass port to port under circumstances. The C. C. Clarke, 146 F. 615. Steamer held in fault for collision with tug and floats for attempting to pass to right without consent of tug, the two vessels being on courses which would have enabled them to pass safely starboard to starboard. La Bretagne, 148 F. 477.

the wind on different sides, the one having the wind on the port side must keep out of the way of the other.[15] In case one is running free and the other is close hauled, the former must keep out of the way of the latter.[16] When a steam vessel and a sailing vessel are proceeding in such directions as to involve risks of collision, the former must keep out of the way of the latter.[17] When two steam vessels are crossing so as to involve risk of collision, the vessel which has the other on her own starboard side is required to keep out of the way.[18]

A vessel overtaking another is required to keep out of her way.[19] The rules applicable to the Great Lakes provide that, in all channels less than five hundred feet in width, no steam vessel shall pass another going in the same direction unless the

15. Int. Rules, art 17, Act. Aug. 19, 1890, 26 St. L. 326, 2 Fed. St. Ann. 161. Vessel held in fault for violating rule. The Charles A. Campbell, 142 F. 996.

16. International Rules, art. 17, Act Aug. 19, 1890, 26 St. L. 326, 2 Fed. St. Ann. 161. Schooner sailing free held in fault for collision in open sea with one close hauled for not making sufficient allowance for the yawing of the latter. The Metamora [C. C. A.] 144 F. 936. Vessel sailing free held solely in fault for failure to see lights of approaching vessel until just before collision, and in starboarding her helm to latter's red light. The Martha E. Wallace, 148 F. 94.

17. Art. 20 of rules applicable to rivers, harbors, etc. (30 St. L. 101, 2 Fed. St. Ann. 180). Tug with tows held in fault for collision between one of them and schooner for running too near side of channel and thus giving schooner but little chance to maneuver, and for not making an earlier discovery of schooner's lights and an earlier attempt to perform her duty of keeping out of her way. The Nottingham [C. C. A.] 143 F. 942. Steamer held in fault for not having sooner observed schooner's lights, and for maintaining speed and only slightly changing course after observing them. The Mary P. Mosquito, 145 F. 960. International Rules, art. 20, Act. Aug. 19, 1890, c. 802, 26 St. L. 327, 2 Fed. St. Ann. 162. Steamer held in fault for collision, it being her duty to avoid risk of collision as well as the collision. The Job H. Jackson, 144 F. 896. Tug held solely in fault for double collision. The Richmond, 143 F. 996. Tug with long tow held in fault for collision between one of the barges composing it and a schooner. The Gladys [C. C. A.] 144 F. 653, rvg. 135 F. 601.

18. Art. 19 of rules applicable to rivers, harbors, etc. (30 St. L. 101, 2 Fed. St. Ann. 180). Starboard hand rule held not to apply to case where, though tug and float were on starboard hand of steamer, tug had no definite course. The Tugboat No. 6, 148 F. 1007. Inspectors' rule 3, as amended Jan. 25, 1899, forbidding use of cross signals, applies only to vessels approaching each other from opposite directions, and does not cover vessels on crossing courses where one is burdened and other privileged. The Transfer No. 15 [C. C. A.] 145 F. 503. Tug having another on starboard hand after latter had crossed her bow held not in fault for failing to keep out of her way, latter having no course which could be depended on for purposes of avoiding her. The Transit, 148 F. 838.

Vessels held in fault for collision for violation of rule: Tug for collision between her tow and steamer. The Transfer No. 15 [C. C. A.] 145 F. 503. Tug for collision with tug and tow. The C. C. Clarke, 146 F. 615. Steamer for collision with launch. The Pocomoke, 150 F. 193. Tug for collision with tug and tow about to dock, in not reducing speed to steerage way only and turning toward other side of channel so as to put herself in position to navigate under starboard hand rule. The Transfer No. 10 [C. C. A.] 144 F. 676. Decree dismissing libel against ferryboat by tug for collision when vessels were on converging courses affirmed on ground either that evidence showed that vessels were on crossing courses and that tug having ferry on starboard hand was in fault for failure to permit her to pass ahead in accordance with her signals, and keeping on across her bow, or because evidence failed to sustain burden on libelant to show that ferry was overtaking vessel and that tug being ahead of her owed her no duty. The John McCullough [C. C. A.] 145 F. 501.

19. Inland Nav. Rules, art. 24, Act June 7, 1897, c. 4, 30 St. L. 101, 2 Fed. St. Ann. 180. The John McCullough [C. C. A.] 145 F. 501. Steamer held in fault for violating rule. The Sicilian Prince [C. C. A.] 144 F. 951, afg. 128 F. 133. International rules, art. 24, Act Aug. 19, 1890, c. 802, 26 St. L. 327, 2 Fed. St. Ann. 162. Evidence held to show that schooner approaching tug with tow was not an overtaking vessel. The Gladys [C. C. A.] 144 F. 653, rvg. 135 F. 601. Rule 5 of rules made by secretary of treasury for government of navigation in St. Mary's river does not invariably forbid steamer astern from passing one ahead if latter does not signify her assent and slacken speed, but if general conditions of navigation and relative speed of vessels are such that steamer astern can safely pass other, she is at liberty to do so, and cannot be deprived of privilege by neglect or contumely of steamer ahead. The North Star [C. C. A.] 151 F. 168, modifying, 140 F. 263. Rule recognizes privilege of vessel ahead to maintain speed, and duty of vessel astern to keep out of way until she has overtaken one ahead, but when vessel ahead has been overtaken and overtaking vessel is about to pass ahead, immediate danger which then arises requires former to forego privilege, and it is then, and not before, that rule 6 requires vessel ahead, after signifying her willingness by signals, to slacken to a slow rate of speed. Id. Overtaking steamer held solely in fault for collision, for maintaining unlawful rate of speed, and attempting to pass overtaken steamer at place where it was unlawful to do so, and in defiance of

vessel ahead shall be disabled, or signify her willingness that the vessel astern may pass.[20] In narrow channels every steam vessel, when it is safe and practicable to do so, is required to keep to that side of the fairway or mid-channel which lies on the starboard side of such vessel.[21]

Every vessel directed by the rules to keep out of the way of another must, if the circumstances permit, avoid crossing ahead of her,[22] and must, on approaching her, if necessary, slacken speed or stop and reverse.[23] The privileged vessel is ordinarily required to keep her course and speed,[24] except that, under the international rules, when, in consequence of thick weather or other causes, she finds herself so close that collision cannot be avoided by the action of the burdened vessel alone, she must take such action as will best aid to avert a collision.[25]

In obeying and construing the rules, due regard is to be had to all dangers of

her dissenting signals. Id. Overtaken vessel held not in fault for failure to answer first signal of overtaking vessel nor for dissenting from second passing signals of latter. Id.

20. Rule 25, Act Feb. 8, 1895, c. 64, 28 St. L. 649, 2 Fed. St. Ann. 172. Steamer held in fault for passing steam scow without signals or agreement in violation of rule and of inspectors' rule 6, as result of which she created current or suction causing scow to strike submerged timbers around bridge pier. Kelley Island Lime & Transp. Co. v. Cleveland, 144 F. 207.

21. Art. 25 of inland navigation rules (Act June 7, 1897, c. 4, 30 St. L. 101, 2 Fed. St. Ann. 180). Hudson river near Yonkers held narrow channel within meaning of rule. The Benjamin Franklin [C. C. A.] 145 F. 13, afg. 127 F. 457. Rule held applicable to main channel near Liberty Island in New York Harbor, and tug with car float in fault for its violation. La Bretagne, 148 F. 477. Rule held inapplicable where tug rounded to at entrance to let tide swing tow into creek where barges composing it were to be distributed, the manoeuver being necessary, and with proper precautions, the usual one for taking tows into creek, and vessel whose negligence caused damage was lying at dock and projecting far out across channel. The Overbrook [C. C. A.] 142 F. 950.

Vessels held in fault for violating rule: Tug. The Wrestler [C. C. A.] 144 F. 334. Steamer. The Sicilian Prince [C. C. A.] 144 F. 951, afg. 128 F. 133. Tug with tows, it appearing that it was safe and practical to obey it. The Benjamin Franklin [C. C. A.] 145 F. 13, afg. 127 F. 457. Tug for keeping to left hand side of channel without signifying by proper signals her intention to navigate contrary to rule. The Nugent [C. C. A.] 145 F. 31.

22. Art. 22 of sailing rules, Act Aug. 19, 1890, 26 St. L. 327, 2 Fed. St. Ann. 162. Vessel held in fault for violating rule. The Charles A. Campbell, 142 F. 996. Art. 22 of rules applicable to rivers, harbors, etc. (30 St. L. 101, 2 Fed. St. Ann. 180). Steamer held in fault for collision with launch. The Pocomoke, 150 F. 193. Ferryboat. The John H. Starin, 145 F. 723. Tug for collision between her tow and steamer for proceeding to cross bows of latter without first having, while at safe distance, obtained her assent. The Transfer No. 15 [C. C. A.] 145 F. 503. Tug for collision in channel between scows which she was towing and a schooner, evidence showing that she crossed bow of latter immediately before collision, though latter was privileged vessel. The John Fleming, 149 F. 904.

23. Art. 23 of rules applicable to rivers, harbors, etc. (30 St. L. 101, 2 Fed. St. Ann. 180). Ferryboat held in fault for violating rule. The John H. Starin, 145 F. 723. Steamer for collision with launch. The Pocomoke, 150 F. 193. International Rules, art. 23, Act Aug. 19, 1890, c. 802, 26 St. L. 327, 2 Fed. St. Ann. 162. Rule does not require burdened vessel to make this maneuver if by so doing it would increase, rather than lessen, chances of collision. The Job H. Jackson, 144 F. 896.

24. Art. 21 of rules applicable to rivers, harbors, etc. (30 St. L. 101, 2 Fed. St. Ann. 180). Evidence held insufficient to show that privileged schooner changed course so suddenly and to such a degree as to bring about collision. The John Flemming, 149 F. 904. Launch held not in fault for slowing down and reversing when collision was seen to be inevitable, with view of lessening danger by receiving glancing blow instead of direct one, maneuver being proper under circumstances. The Pocomoke, 150 F. 193.

Vessels held in fault for collision for violating rule. The John H. Starin, 145 F. 723; The Mary P. Mosquito, 145 F. 960; The Stamford, 148 F. 509. Privileged schooner held in fault for negligently taking a course which brought her on bell buoy rendering change of course necessary. The Nottingham [C. C. A.] 143 F. 942.

International rules, art. 21, Act Aug. 19, 1890, c. 802, 26 St. L. 327, 2 Fed. St. Ann. 162. Evidence held not to show that privileged vessel changed course or speed. The Job H. Jackson, 144 F. 896. Schooner close hauled held in fault for collision with one sailing free for allowing herself to fall off owing to fact that master was acting both as wheelsman and lookout, she not being able to show such constant vigilance as was necessary to sustain burden of showing that other vessel was solely in fault. The Metamora [C. C. A.] 144 F. 936.

25. Art. 21, as amended by Act May 28, 1894, c. 83, 28 St. L. 83, 2 Fed. St. Ann. 162. Privileged vessel held in fault for not holding herself against tide and permitting burdened vessel to pass, there being special circumstances warranting a departure from the general rule. The Transfer No. 10 [C. C. A.] 144 F. 676.

navigation or collision, and to any special circumstances which may render a departure therefrom necessary in order to avoid immediate danger.[26] There is no right of way when it is obvious that if adhered to it will result in danger of a collision,[27] and all vessels must stop and reverse or take such other steps as may be necessary when risk of collision becomes imminent.[28] A change of course on the part of the privileged vessel is not a fault when made to avoid a collision which in the best judgment of a competent navigator then seems otherwise unavoidable.[29] The supervising inspectors of steam vessels are authorized to establish such rules to be observed by steam vessels passing each other, not inconsistent with the statutes on the subject, as they may deem necessary for safety.[30] A vessel having the right under the steering and sailing rules to make a particular maneuver cannot be deprived of such right by any rule of the inspectors forbidding her to sound a signal which would indicate her intention to make such maneuver.[31]

The rules as to passing may be changed by mutual agreement, and such agreements when made must be complied with.[32] A vessel is not in fault for failure

26. International rules, art. 27, Act Aug. 19, 1890, c. 802, 26 St. L. 327, 2 Fed. St. Ann. 163. The North Star [C. C. A.] 151 F. 168, modifying, 140 F. 263. Held that there were special circumstances warranting departure from rule requiring privileged vessel to keep course and speed, and she was in fault for failure to hold herself against tide and allow tug and tow to pass. The Transfer No. 10 [C. C. A.] 144 F. 676. Privileged schooner held guilty of contributory fault in holding course when it became evident that such action could only result in collision. The Gladys [C. C. A.] 144 F. 653, rvg. 135 F. 601.

27. Both vessels held in fault for collision brought about by persistent efforts of each to pass ahead of other, though each believed she had right of way. The John H. Starin, 145 F. 723.

28. Tug with tows held in fault for collision with becalmned sloop yacht for not stopping at safe distance or proceeding with utmost caution instead of attempting to pass between yacht and another approaching vessel at full speed. The International [C. C. A.] 143 F. 468, afg. 125 F. 419. Tug held chargeable with contributory fault in not stopping and backing when it became apparent that other vessel was not complying with passing agreement, and that if she kept on collision would result. The Gladiator [C. C. A.] 144 F. 681, afg. 132 F. 876. Both steamer and transfer tug held in fault for proceeding when it became evident that there was a misunderstanding as to signals and for persisting in attempts until too late to avoid collision. The Transfer Tug No. 9, 148 F. 456. Privileged vessel held not in fault for failure to stop and reverse immediately upon discovering danger of collision, it being doubtful if vessels were then far apart enough to avoid it, and plain faults of other vessel being sufficient to account for collision. The C. C. Clarke, 146 F. 615. Rule 3 of board of supervising inspectors providing that if, when steamers are approaching each other, pilot of either fails to understand course or intention of other, he shall give several blasts of whistle, and, if vessels shall have approached within half a mile of each other, both shall be slowed to speed barely sufficient to give steerage way until proper signals have been given, answered, and understood, or until vessels have passed, held to apply only to vessels in narrow channels, or to vessels approaching head on, or nearly so, and not to vessels meeting in wide channel, where each vessel understood intention of other, and vessels would have passed starboard to starboard without risk of collision had both kept original courses, and hence one of two vessels in such situation was not in fault for keeping her course and speed. The Atlantic City [C. C. A.] 143 F. 451, afg. 136 F. 996.

29. Vessel held not in fault. The Charles A. Campbell, 142 F. 996; The Martha E. Wallace, 148 F. 94.

30. Regulations applicable to rivers, harbors, etc. (Act June 7, 1897, c. 4, § 2, 30 St. L. 102, 2 Fed. St. Ann. 181). The Transfer No. 15 [C. C. A.] 145 F. 503.

31. Power to make regulations is restricted to such as are not inconsistent with act conferring it. The Transfer No. 15 [C. C. A.] 145 F. 503.

32. Vessels held in fault for violating agreement: Tug. The Lowell M. Palmer [C. C. A.] 142 F. 937. Tug with car float. The Werdenfels, 150 F. 400. Steamer. Ohio Transp. Co. v. Davidson S. S. Co. [C. C. A.] 148 F. 185; The Transfer Tug No. 9, 148 F. 456. Collision between ferryboat and overtaking tug held due to change of course by former in violation of agreement that tug should pass to the right. The Wyoming, 145 F. 735. Tug held not in fault for collision by reason of fact that she was near shore instead of in center of stream as required by state statute, it appearing that she was proceeding in accordance with well recognized custom in order to safely pass bridge, and that meeting vessel expressly assented to passing in that manner, and that there was ample opportunity to so pass had not latter been navigated negligently. The Lowell M. Palmer [C. C. A.] 142 F. 937. Tug held in fault for allowing two whistle signal, blown to an overtaking vessel, to have full effect on approaching tug whose navigator supposed it was an assent to his own two whistles, and later changed her maneuver to one suitable under one whistle after it was too late for other tug to respond. The Wrestler [C. C. A.] 144 F. 334. Tug held solely in fault for collision with

to assent to a starboard passing where in the exercise of proper precautions, the situation does not, at the time the signal is given, warrant such a maneuver on her part.[33]

Vessels have the right to assume that other vessels approaching them will exhibit proper lights,[34] and keep a proper lookout,[35] and will conform to the rules of navigation,[36] and to such passing agreements as may be made.[37]

Vessels should not assume unnecessary risks or venture into danger which can be easily avoided,[38] loiter in the track of other vessels,[39] or proceed at excessive speed in harbors or other places where other vessels are liable to be encountered.[40] Vessels navigating the East river are required to keep as near the center of the stream as possible,[41] and away from the ends of the piers.[42] A vessel backing across a channel, in the way of other vessels navigating it, is bound to exercise extreme care to notify the other vessels of her maneuver.[43] Steamers navigating in a fog are bound to reduce their speed to such rate as will enable them to stop in time to avoid a collision after an approaching vessel comes in sight, provided the latter is herself going at the moderate speed required by law.[44] Large vessels must exercise

ferryboat though latter was burdened vessel under starboard hand rule, where rule was superseded by two blast agreement initiated by tug which gave ferryboat right to keep her course and speed and to cross tug's bow. The Edwin J. Berwind [C. C. A.] 144 F. 664. Evidence held to show making of such agreement. Id. Steamer held in fault in that master was not sufficiently attentive to signals, that he continued to swing to port after signal assenting to passing port to port was sounded, and that he managed vessel in euch a negligent manner as to cause collision. The Lake Shore, 149 F. 855. Tugs being accustomed to pass in adverse situations, held that their agreement as to manner of doing so when sufficient distance apart to give freedom of choice excluded excuses. The Luther C. Ward, 149 F. 787. Tug held not to have acted under duress in agreeing to passing signals in view of distance between two vessels. Id. Tug with tow agreeing to pass meeting tug starboard to starboard when two were one thouеand feet apart held solely in fault for collision of one of her tows with a dredge for failure to starboard helm promptly, it appearing that there was room enough for her to pass dredge safely had she done so. Id. Tug with car floats held in fault for agreeing to go to left and attempting to do so when her heading was such that passing to right might have been intended and which had effect of making approaching steamer believe that she so intended, especially in view of one blast signal to another vessel. The Transfer Tug No. 9, 148 F. 456.

33. Steam barge held not in fault. The Lake Shore, 149 F. 855.

34. Steamer removing lookouts to bridge, where they had unobstructed view, held not in fault for collision with schooner not exhibiting required stern light for failure to so reduce speed that she would have been able to avoid schooner after making her out. The Kaiserin Maria Theresa [C. C. A.] 149 F. 97, rvg. 125 F. 145.

35. Privileged vessel held to have right to assume that her lights would be seen by approaching vessel until nearly last minute. The Martha E. Wallace, 148 F. 94.

36. A vessel navigating broad river channels is not required to go at slow speed to avoid collision with another vessel which could only occur by a reckless disregard of the rules of navigation. The Atlantic City [C. C. A.] 143 F. 451, afg. 136 F. 996.

37. Tug held not in fault for failure to reverse sooner, she not being bound to anticipate that meeting vessel would not carry out passing agreement, and it appearing that she had sternway when collision occurred. The Lowell M. Palmer [C. C. A.] 142 F. 937.

38. Water boat coming out of pier held solely in fault for collision with schooner in tow of tug. The Golden Rod, 145 F. 840.

39. Steamship stopping to discharge pilot outside entrance of channel held not in fault for collision by reason of fact that she lay across track of inward bound vessels, nor for remaining there too long. The Kentucky, 148 F. 500.

40. Steamer held in fault for navigating in river at speed in excess of that fixed by state statute. The Transfer Tug No. 9, 148 F. 456.

41. Tug held in fault for navigating too near shore. The Dreamland, 149 F. 910.

42. Tug with tow held in fault for collision with batteau in harbor for keeping too close to ends of piers in view of rate of speed at which she was traveling. Carter v. Seaboard Air Line R. Co., 151 F. 531. Rule cannot be invoked by injured vessel which was also violating it. The Golden Rod, 145 F. 840. Tug held not in fault for being near ends of piers in view of short distance she had to traverse. The Transit, 148 F. 138.

43. Steamer held in fault for not sooner perceiving her danger and taking steps to avoid it. The Sicilian Prince [C. C. A.] 144 F. 951, afg. 128 F. 133. Vessel about to dock held in fault for throwing stern into stream without having stern lookout to determine whether lateral motion would interfere with navigation of other vessels. The Dreamland, 149 F. 910.

44. Steamer held in fault for collision because of excessive speed. The Kentucky, 148 F. 500. Steamer held in fault for collision with drifting lighter in Hudson River for failure to observe her, or for excessive speed if it was too foggy to have observed her

proper and reasonable care to prevent injury to small craft by their displacement waves.[45]

Colliding vessels are required to stand by until it appears that assistance is not required.[46]

(§ 7) *D. Vessls anchored, drifting, grounded.*[47]—Moving vessels must ordinarily keep out of the way of those at rest.[48] It is unlawful to tie up or anchor vessels in navigable channels in such manner as to prevent or obstruct the passage of other vessels.[49] When, however, a vessel loses her motive power and cannot safely find a mooring place by the land, she is entitled to anchor where she is.[50]

sooner, as claimed. The Etruria [C. C. A.] 147 F. 216, rvg. 139 F. 925.

45. Evidence held to show that small boat in tow of launch was sunk and cargo of launch injured by waves raised by wind owing to overloading and low freeboard, and not by displacement waves of passing tug. The Newcastle, 147 F. 534. Even though shifting of cargo of logs and listing of lighter was due to displacement waves caused by negligent navigation of steamer, held that it was not proximate cause of loss of logs which rolled from deck when she subsequently resumed unloading, but loss was due to negligence of those in charge of lighter in failing to take precautions to correct list before resuming unloading. The Kaiser Wilhelm der Grosse [C. C. A.] 145 F. 623, rvg. 134 F. 1012. Steamer navigating New York Bay at high speed held liable for injury to barge. The Asbury Park [C. C. A.] 147 F. 194, rvg. 136 F. 269. Large steamer navigating New York Bay and harbor held liable for injuries to scows by swells, it appearing that dangerous swells were not produced by her when speed was reduced to reasonable degree. Ross v. Central R. R. of New Jersey, 146 F. 608. Where vessel was positively identified, discrepancies between evidence of libelant's witnesses and vessel's log as to time and direction in which vessel was going held not to prevent recovery. Id. Steamer held liable for injury to barge. The Asbury Park, 144 F. 553. Those operating steamer creating large waves sufficient to swamp or capsize smaller boat in passing held to owe latter duty of avoiding danger by ceasing normal operation and stopping propeller or paddle wheels until smaller boat had passed out of danger zone. Daniels v. Carney [Ala.] 42 So. 452.

46. Failure to comply with Act Sept. 4, 1890, c. 875, 26 St. 425, merely puts upon a vessel the burden of proving that she was not responsible for collision. The Luzerne, 148 F. 133. Tug held not in fault for failure to stand by and offer assistance to boat in tow of launch, under circumstances. The Newcastle, 147 F. 534.

47. See 6 C. L. 1478.

48. Vessels in motion are required to keep out of the way of a vessel at anchor, if latter is without fault, unless it appears that collision was the result of inevitable accident, rule being that vessel in motion must exonerate herself from blame by showing that it was not in her power to prevent collision by adopting any practicable precautions. Ross v. Cornell Steamboat Co., 143 F. 166, afd. [C. C. A.] 149 F. 196. Tug held in fault for collision at night between her tow and dredge anchored at side of channel where she had been working during day, tug knowing position of dredge and having larger tow than she could properly handle. Id. Evidence held insufficient to show that notice claimed to have been given dredge to move was understood. Id. If moving vessel seeks to exonerate herself on ground that she was under domination and control of tug, and hence not responsible for her own navigation, she must prove as well as allege that fact. The Degama [C. C. A.] 150 F. 323. Evidence held insufficient to show irresponsibility. Id. Tug held in fault for collision between her tow and dredge working in channel, evidence showing that there was sufficient room to enable her to pass safely if properly navigated. The Overbrook, 149 F. 785. Collision between steamer and dredge at work in channel held due to negligence of captain of former in not using sufficient care under the circumstances, he not being excused by reason of fact that dredge had moved buoy, since he could have determined its original position by a known range and since accident would have taken place in any event by reason of his taking unnecessary risk in going too close to shore. The Park City, 144 F. 527. Tug held in fault for collision between tow and anchored yacht for failure to keep on other side of channel. The Margaret, 146 F. 1021. Sailing vessel held in fault for collision with anchored steamer showing proper lights. The Job H. Jackson, 144 F. 896. Where vessel had left her berth, her propeller was moving, her master was on pilot house, and signals were sounded by her to direct movements of other vessels, held that she could not be held to say in excuse of asserted negligence that she was not navigating. The Lake Shore, 149 F. 855.

49. Act March 3, 1899. Steamer held not to have been improperly anchored or to have obstructed channel. The Job H. Jackson, 144 F. 896. Tug held solely in fault for collision between tow and dredge, evidence showing that latter was anchored as near shore as was safe and that there was plenty of room in channel to have passed safely. The Wyomissing, 149 F. 241. Dredge held not to have negligently blocked channel after she had finished working, or to have been in fault for keeping dumper scow on channel side, which was most advantageous position for work in hand. The Overbrook, 149 F. 785. Dredge held in fault for collision with tow for anchoring in channel at night at place where navigation was dangerous. Ross v. Cornell Steamboat Co. [C. C. A.] 149 F. 196, afg. 143 F. 166. Tug held not in fault for collision between her tow and dredge at night, latter having needlessly obstructed channel by not going as close to shore as possible. after quitting work. The Wyomissing, 149 F. 238.

A vessel at anchor must exercise proper care to prevent the dragging of her anchor.[51] Vessels leaving slips must be careful to avoid injury to vessels lying at adjacent piers.[52]

Mutual care and accommodation is required of vessels lying at docks.[53] A vessel lying at a pier is bound to have her anchor out of the way of passing vessels whenever there is liability to collision or danger of interference with their movements.[54] Persons in charge of a vessel tied up at a pier or dock must exercise reasonable care to see that she does not break loose and injure other vessels.[55] Her fastenings should be secure and suitable to sufficiently hold her to the dock, in view of any flood or force which might reasonably be apprehended as likely to affect her,[56] and should be kept in such adjustment, between the vessel and the docks, as to prevent any undue strain from coming upon them in consequence of the lifting of the vessel by reason of the rising of the water.[57] A vessel drifting from her moorings and colliding with another will be held liable for the resulting damages unless she can show affirmatively that the drifting was the result of inevitable accident or a vis major, which human skill or precaution and a proper display of nautical skill could not have prevented.[58]

Vessels without motive power[59] and becalmed sailing vessels[60] should not be allowed to drift into the track of passing vessels.

50. Applies to small boat as well as to large vessel. Muller v. New York, etc., R. Co., 144 F. 241. Disabled launch held not in fault for collision because she anchored outside anchorage grounds and in track of other vessels. Id.

51. Evidence held to show that collision between schooner and barkentine, while both were lying at anchor, was due to fact that latter dragged her anchor so that she was solely in fault. The Clara Goodwin, 143 F. 172. Evidence held to sustain finding that collision between vessel discharging cargo into lighter and another anchored vessel belonging to same company was due to dragging of anchor by former during night, and that carrier was negligent in failing to discover that vessels had drawn so near together that there was risk of collision, and in not taking measures to avert it, so that carrier was liable for injury to cargo in lighter which was cast adrift to prevent it from being crushed between steamers, and struck on rudder of one of them and sank. Higgins v. Hamburg-American Packet Co. [C. C. A.] 145 F. 24.

52. Injury to canal boat forming part of a tow lying at a pier caused by collision with tug lying motionless alongside held due to fault of another tug with tow which, while leaving adjoining slip, pushed tail of other tow too hard in attempting to get it out of her way. The No. 32, 145 F. 737.

53. Lighter damaged by being squeezed between car float and adjoining pier in slip in basin while discharging cargo at wharf through steamship at adjoining wharf taking ground at low tide and listing over against float and pressing her against lighter, held in fault in taking and persisting in remaining in a dangerous berth after due warning by harbor master, and steamship held also in fault for bringing float to her side and forcing it into close proximity to lighter when she knew of danger. The Cuzco, 152 F. 283. Barge and canal boat discharging on opposite sides of narrow creek both held in fault for injury to former caused by the two sagging together in the night when the tide receded because they were left too close together, since probability of such an accident should have been foreseen. The W. C. Kirk, 143 F. 358.

54. Dredge lying at bulkhead at entrance of creek where barges were customarily distributed held in fault for sinking of barge by striking on her anchor which was unnecessarily allowed to hang in water over her side. The Overbrook [C. C. A.] 142 F. 950.

55. Standard is that of man of ordinary foresight and prudence to be determined by that which is usual and ordinary. Sharpsburg Sand Co. v. Monongahela River Consol. Coal & Coke Co., 145 F. 424. Respondent held to have exercised reasonable care in tying up and caring for barges so that he was not liable for injuries to sand boats which they struck after they broke loose, particularly where it appeared that they broke loose because they were struck by overturned boats floating down stream. Id.

56. Evidence held to show that fastenings of vessel tied up for winter were sufficient, if kept in proper adjustment, to repel force of any flood reasonably to be apprehended. The William E. Reis, 143 F. 1013.

57. Breaking loose of vessel in flood held due to negligence in failing to properly adjust lines, so that she was liable for injury to vessels with which she collided. The William E. Reis, 143 F. 1013.

58. The William E. Reis, 143 F. 1013.

59. Tug casting adrift, in Hudson River on foggy day, two lighters having neither motive power nor means of signaling, held in fault for collision between one of them and steamer. The Etruria [C. C. A.] 147 F. 216, rvg. 139 F. 925.

60. Sloop yacht held in fault for not anchoring near shore when wind failed. The International [C. C. A.] 143 F. 463, afg. 125 F. 419

(§ 7) *E. Tugs and tows, pilot boats, fishing vessels, etc.*[61]—The tug is not an insurer of the safety of the tow, but is only bound to exercise reasonable care, caution, and maritime skill under the circumstances.[62] She is bound to know the condition of the channels and other waters in which the service is to be performed [63] and the effect of the tide and current,[64] and it is her duty to see that the tow is properly made up,[65] not to start on the voyage when the weather conditions render

61. See 6 C. L. 1479.

62. Tug has burden of exercising reasonable skill and care in everything relating to undertaking, having due regard to extent of voyage, and any special hazards incident to seas to be traversed, which includes not only proper and safe navigation of tug, but furnishing of safe, sound, and suitable appliances and instrumentalities for service to be performed and proper make up of the tow preparatory to the voyage. The Britannia, 148 F. 495. Burden is on the tow to prove the negligence alleged. Tug held not liable, it appearing that master exercised reasonable care, caution, and maritime skill required. The Winnie [C. C. A.] 149 F. 725, rvg. 137 F. 166. Steamer undertaking to tow vessel to port undertakes to exercise reasonable skill and care in everything relating to work, including entrance to port, and lack of either charges her with liability for resulting damage. Gilchrist Transp. Co. v. Sicken [C. C. A.] 147 F. 470. Injury to barge by striking on pier at entrance to harbor held due solely to negligence of towing steamer. Id. Damage to lighter in tow by collision with schooner lying at wharf held due to negligence of tug in keeping too close to shore and not to collision with another tow. Philadelphia Transportation & Lighterage Co. v. Pennsylvania R. Co., 151 F. 537. Steamer towing barge, which broke her propeller and cut barge loose allowing her to drift onto pier, held solely in fault for resulting damage for being outside of regular channel and where navigation was dangerous for vessels of her size. The Oceanica, 144 F. 301. Tug held solely in fault for capsizing of dredge in tow for excessive speed or want of care in view of weather conditions and construction of dredge, the tug being in full charge and control. Monongahela River Consol. Coal & Coke Co. v. O'Neil [C. C. A.] 144 F. 74. Damage to cargo of wheat by sinking of canal boat held not due to boat's unseaworthiness but to negligence of tug in pushing her into ice in slip and negligence of master of boat in requesting that this be done, so that cargo owner was entitled to recover damages from tug. Bradley v. Lehigh Valley R. Co., 145 F. 569. Tug held in fault for loss of tow caused by running her on sunken wreck at night, evidence showing that light capable of burning twenty-four hours had been placed on wreck, that it had been filled late in afternoon, and that it was burning brightly two hours before accident and that there was no vigilant lookout on the tug. The Volunteer [C. C. A.] 149 F. 723. Owners of cargo of barge sunk by striking wreck held entitled to recover from tug on theory that there was a light on wreck which tug should have seen though they also proceeded against owners of wreck alleging that they were negligent gation was admitted by the tug. Id. Evidence held to show that barge did not strike in failing to maintain a light, which allebottom while being towed. The Asher J. Hudson, 145 F. 731.

63. Is liable for injuries to tow due to master's ignorance of a known obstruction to navigation. The Inca [C. C. A.] 148 F. 363. Evidence held to support finding that tug was solely in fault for sinking of tow in allowing her to ground on mound of rocks in river, which had been there for many years and was known to pilots generally, even though not known to tug's master, and also in method adopted to bring tow clear of obstruction. Id. Must also make known to tow any special hazard to be encountered, and, if she fails in her duty in these particulars and tows vessel into a special hazard, she is responsible for resulting injury regardless of care used in act of towing. The Naos, 144 F. 292. Master of tug held negligent in entering upon towage service at time when grounding was likely to occur owing to condition of tide, even though delay was caused by charterer. Id. Tug held in fault for injuries to tow caused by her striking on sunken wreck in channel, though buoy was unlighted. The E. L. Levy [C. C. A.] 144 F. 666, afg. 108 F. 435. Tug held not in fault for injury to tow caused by running onto submerged crib on which pier of railroad bridge rested, crib not being marked or protected in any way, master not knowing of its existence, and danger not being apparent. The Nonpariel, 149 F. 521. Tug held liable for damage to cargo of tow, it having failed to sustain burden of showing that grounding was due to unknown obstruction. The Resolute, 149 F. 1005.

64. Tug rounding to at entrance of creek in order to let tide swing tow into creek where barges composing it were to be distributed held in fault for collision between barge and dredge lying at bulkhead in failing to take proper precautions to prevent it, fact that master miscalculated force of wind and tide being no excuse. The Overbrook [C. C. A.] 142 F. 950. Tug held solely in fault for injury to tow by collision with jetty at mouth of creek, it being duty of master to know effect of tide and length of hawser necessary to enable him to safely take tow by jetty, and to so arrange tow as to enable him, under circumstances, to conduct barge safely through channel. The Potomac, 147 F. 293.

65. Tugs held liable for sinking of barge by ice due to her exposed position in tow. The Edwin Terry, 145 F. 837. Tug held in fault for failure to furnish safe and suitable hawser to perform contract of towage or to have extra hawsers. The Britannia, 148 F. 495. Tugs held liable for injury to tow by ice if due to absence of breast lines. The Edwin Terry, 145 F. 837. Evidence held to show that tow was made up in usual way so that liability could not be predicated on finding that it was made up in unusual way. The Winnie [C. C. A.] 149 F. 725, rvg. 137 F. 166.

it imprudent to do so,[66] or when she has not sufficient power to handle her under the existing conditions of wind and tide,[67] and to leave the tow in a place of safety,[68] but is not responsible for the loss of a tow due to her unseaworthiness [69] or to the perils of the sea,[70] nor, where the master of the tug, in accordance with the usual custom, undertakes to fasten the hawser on board her, for injuries resulting from her going adrift by reason of the insecurity of such fastening.[71] Where the tow is injured without any fault on her part and under a state of circumstances in which, if proper care is exercised, such misfortune does not ordinarily occur, the tug has the burden of proving the exercise of due care on her part.[72] The master of the tow is bound to use ordinary care to follow the tug, to obey her master, and to avoid injuries and obstructions.[73] The tow may be guilty of contributory fault in consenting to exposure to known or obvious danger.[74] The tug cannot by contract relieve itself from liability for its own negligence.[75] A suit in rem by the owner of a tug to recover for an injury to the former due to the negligence of the latter is a suit ex delicto and not ex contractu.[76]

A tug and her tow are to be regarded as a single vessel for purposes of naviga-

66. Tug held in fault for injury to tow by ice, risk being obvious on account of form of tow and heavy ice to be encountered. The Phoenix, 143 F. 350. Evidence held not to sustain allegations that injury to scow from ice was due to negligence of tug in performing towage service under conditions known to be dangerous, it having been undertaken at request of bailee. The Three Brothers [C. C. A.] 145 F. 177, afg. 134 F. 1001.

67. Evidence held to show that tug was amply able to perform towage service. The Three Brothers [C. C. A.] 145 F. 177, afg. 134 F. 1001. Tugs held liable for injuries due to steamer striking piers, it not being established by a preponderance of evidence that they had right to expect assistance of steam from steamer. The J. S. T. Stranahan, 151 F. 364.

68. Tug and its employer held liable for salvage allowed for rescuing scows which broke loose from pier where they had been negligently tied in violation of statute. The No. K. 1 [C. C. A.] 150 F. 111. Evidence held to sustain findings that it was customary for tugs to furnish barges in tow with anchors when necessary, and that tug was negligent in failing to furnish barge, left while other barges were being distributed, with anchor of sufficient size for its requirements, and hence it was responsible for resulting loss. The Flushing [C. C. A.] 145 F. 614, afg. 134 F. 757. Where tug, in accordance with custom, furnished tow with anchor and cable when it left her while distributing other barges, held that transaction was in effect a loan, and tug was not responsible for manner of its subsequent use. Id. Evidence held not to show negligence on part of tug in failing to take proper care of tow after latter was injured. The Three Brothers [C. C. A.] 145 F. 177, afg. 134 F. 1001. Tug held not in fault for abandoning leaking iron barge or in not sooner going to her rescue in view of belief of masters of both vessels that she had foundered. The Asher J. Hudson, 145 F. 731.

69. Sinking of barge held due to her unseaworthiness, which was not known to master and not apparent, and not to any fault on the part of the steamer towing her. Dady v. Bacon [C. C. A.] 149 F. 401, rvg. 133 F. 986. Evidence held to show that sinking of tow was due to unseaworthiness and not to any negligence on part of tug. The Oak, 148 F. 1005. Libelant held in fault for furnishing scows not sufficiently seaworthy for the voyage. The Britannia, 148 F. 495. Evidence held to support finding that bark was staunch and sound when offered for towage. The Inca [C. C. A.] 148 F. 363, afg. 130 F. 36. In any event, running onto mound of rock was not one of ordinary perils to be encountered on voyage. Id.

70. Loss of tow held not due to perils of sea. The Britannia, 148 F. 495.

71. Where master of canal boat on board her when towage service commenced undertook, in accordance with usual custom, to fasten hawser on board her, held that tug was not responsible for injury to her resulting from her going adrift by reason of insecure fastening. The Lyndhurst [C. C. A.] 147 F. 110. Master cannot be regarded as servant of tug in fastening hawser so as to make her responsible for his negligence. Id.

72. Where steamer was stranded on rocks while being towed through narrow channel, and it appeared that she promptly obeyed signals of tugs. The W. G. Mason [C. C. A.] 142 F. 913, rvg. 131 F. 632.

73. Barge in tow of steamer held not guilty of negligence in failing to throw off or cut tow line before barge struck pier or otherwise. Gilchrist Transp. Co. v. Sicken [C. C. A.] 147 F. 470.

74. The Phoenix, 143 F. 350. Master of tow is not chargeable with contributory negligence in acquiescing in her exposure to unnecessary peril unless he knows of such peril or it is very obvious. The Naos, 144 F. 292. Tow held not in fault, master not being cognizant of hazard and assuming no control over towing. Id.

75. Agreement that towage shall be at risk of tow does not relieve towing vessel from liability for injuries due to her negligence. The Oceanica, 144 F. 301.

76. The W. G. Mason [C. C. A.] 142 F. 913, rvg. 131 F. 632. May be maintained irrespective of any responsibility arising as a result of a breach of contract. The Oceanica, 144 F. 301.

tion with reference to other vessels.[77] The tug must have sufficient power to handle the tow under all ordinary conditions [78] and must signal it promptly when a change of course becomes necessary.[79] Tugs with long tows navigating in the track of other vessels will be held to the most extreme care in handling them.[80] Where the navigation of a vessel is under the sole direction of a tug, neither such vessel nor her owners are responsible for the faults or negligence of the tug.[81]

(§ 7) *F. Sole or divided liability, and division of damages.*[82]—Under the admiralty law, in case a collision is due to the fault of two or more vessels, the damages and costs will be divided equally between them.[83] A vessel paying the entire damage to the cargo of another vessel equally in fault may enforce contribution against the latter by a proceeding in admiralty for that purpose.[84]

(§ 7) *G. Ascertainment and measure of damages.*[85]—In collision cases where repairs are practicable, the measure of damages is the reasonable cost of restoring the injured vessel to the condition in which she was at the time the collision occurred.[86] In case of a total loss, it is her market value at the time and place of her loss.[87] A vessel whose fault causes injuries to another is not liable for such

77. Within meaning of rule requiring steam vessel to keep out of way of sailing vessel. The Gladys [C. C. A.] 144 F. 653, rvg. 135 F. 601.

78. Tugs held not chargeable with contributory fault for collision between ferryboat negligently navigated and tow in fog on ground that they had insufficient power to handle tow with proper dispatch, it appearing that they sounded proper fog signals, that it was clear when they started, that they had sufficient power to handle tow under ordinary conditions, and that they could not handle it faster because of unexpected combination of dense fog and adverse tide. The Chicago [C. C. A.] 146 F. 979, rvg. 134 F. 1013.

79. Tug held in fault for collision with becalmned sloop yacht. The International [C. C. A.] 143 F. 468, afg. 125 F. 419.

80. Tug with three barges on single line, whole being four thousand feet long. The Gladys [C. C. A.] 144 F. 653, rvg. 135 F. 601.

81. Where steamer was wholly in charge of tugs which had been lined to take her from her moorings, held that her owners were not liable for injuries to person on public pier, not a passenger, who was struck by hawser caused to sweep over pier by one of the tugs. International Mercantile Marine Co. v. Gaffney [C. C. A.] 143 F. 305. Evidence held to show that steamer was being moved by independent contractor without any exercise of control by defendant. Id. The test applied in passing upon the liability of a charterer who makes a contract with another to perform a towage service which the charterer is required by the charter to perform is whether or not the charterer assumes or reserves to himself any control over the means or instrumentalities to be employed by the contractor. Evidence held to show that charterer reserved and exercised such control, so that it was responsible for injuries to vessel due to her grounding while being towed, it appearing that charterer detained her until after it was safe to start owing to condition of tide. The Naos, 144 F. 292.

82. See 6 C. L. 1481.

83. Damages for death due to collision between tug with tow and batteau divided, collision being result of combined negligence of those navigating both vessels. Carter v. Seaboard Air Line R. Co., 151 F. 531. Where two tugs and two scows towed by one of them were all in fault for collision, held that damages should be borne in equal shares by each vessel, there being a remedy over against the other for deficiency if value of any was insufficient to pay the amount decreed against it. The Eugene F. Moran, 143 F. 187.

84. Contract relations between such other vessel and her cargo have nothing to do with the case, and her liability is not affected by provisions in her bills of lading giving her benefit of insurance and requiring notice of claim to be given and suit to be brought within specified time. Erie R. Co. v. Erie & W. Transp. Co., 27 S. Ct. 246, rvg. 142 F. 9. Admiralty has jurisdiction of such a libel. Erie R. Co. v. Erie & W. Transp. Co., 27 S. Ct. 246. Former decree dividing damages to vessels, but refusing to divide it as to cargo because such question was not raised by pleadings, held not a bar to libel to compel contribution for cargo damage, right to a division of liability for damage to vessels and contingent claim to partial indemnity for payment of cargo damage being separable, and libelant not being bound to adopt procedure permitted by rule 59. Id.

85. See 6 C. L. 1481.

86. When vessel has been fully repaired and thereby made as serviceable as before, depreciated market value is not an element of damage. The Loch Trool, 150 F. 429. Owner held only entitled to reasonable cost of repairs, which resulted in vessels being restored to old classification, and in her at once resuming making of voyages in same trade as that in which she was formerly engaged. Id. Fair and reasonable cost of repairs to vessel injured in collision and not amount actually expended in making them may be recovered. The Umbria, 148 F. 283. Estimates may be resorted to to show that repair bill was not reasonable cost of repairs called for by survey which was substantially followed. Id. Allowance by commissioner approved. Id.

87. Not cost of vessel to her owner. The

damages as might have been avoided by those in charge of the latter by the exercise of reasonable skill and diligence after the accident.[88] Demurrage may be allowed as an element of damage in proper cases.[89] The allowance of interest is discretionary.[90] Liability for death resulting from a collision is treated in a subsequent section.[91]

(§ 7) *H. Common-law liability for negligent navigation.*—At common law every navigating vessel owes to every other one the duty to observe due care so as to avoid inflicting wrong and injury upon it, and is liable in damages for injuries resulting from an intentional negligent violation thereof,[92] the rights of small craft being the same as those of large vessels in this regard.[93] As in other cases, to charge one with subsequent negligence there must exist a prior knowledge on his part of the peril of the persons injured.[94] The test of a master's liability for the torts of his servants is whether the injury was committed by his authority, expressly conferred or fairly inferred from the nature of the employment and the duties incident thereto.[95]

Tugs are liable for injuries due to negligent towage.[96] If one hires a seaworthy and competently manned tug to tow his vessel and surrenders the navigation thereof to her under such circumstances that no active duty is left for him to perform, the negligence of the tug is not imputable to him.[97] Vessel owners are liable for injuries to a bridge tender due to the negligence of those in charge of the navigation of the vessel.[98]

If a voyage is negligent, or such as reasonably prudent men, familiar with the conditions, would not have undertaken, and such negligence is the proximate cause

Mobila, 147 F. 882. May be determined from opinions and estimates of competent witness when no direct evidence. Id. Finding of commissioner as to value of vessel is entitled to great respect and will not be set aside unless it is made to appear that valuation is manifestly erroneous as against weight of evidence or that there was clear mistake in process by which conclusions were reached. Id. Award of commissioner disapproved. Id.

88. Case is not one of mutual fault authorizing division of damages. The Asbury Park [C. C. A.] 147 F. 194, rvg. 136 F. 269. Though steamer was in fault and responsible for damages to barge in tow caused by her displacement waves, held that she was not liable for the subsequent loss of barge and cargo through sinking due to failure of captain to keep her pumped out, or to notify tug of her condition. Id.

89. See § 10, post.

90. Interest allowed in collision case. The Sicilian Prince [C. C. A.] 144 F. 951.

91. See § 18, post.

92. Daniels v. Carney [Ala.] 42 So. 452.

93. Small craft have an equal right to navigate navigable rivers, right to navigate being equally guarantied to all by Const. 1901, § 24, Code 1896, § 2515. Daniels v. Carney [Ala.] 42 So. 452.

94. In an action for damages for personal injuries resulting in drowning of plaintiff's intestate through negligence of defendant's servants in operation of his steamboat, whereby small boat in which intestate was riding was capsized by swell, count of complaint alleging failure to stop paddle wheels held demurable in failing to sufficiently allege that defendant's servants saw or should have seen small boat. Daniels v. Carney [Ala.] 42 So. 452.

95. In action to recover for death of plaintiff's intestate who was drowned by swamping of small boat alleged to have been caused by negligence of defendant's servants who were operating passing steamer, count of complaint held insufficient in failing to allege that servants were acting within scope and line of their authority, action being one for common-law liability. Daniels v. Carney [Ala.] 42 So. 452.

96. Held not negligent for those in charge of tugs towing caisson to do what was necessary to regulate course of tow in channel even if it subjected appliance to which hawser was attached to unusual strain, and captain had right to exercise his judgment in adopting method of proceeding with one tug before other with hawser attached to bow of caisson. Frederickson v. Central Wharf Towboat Co., 101 Me. 406, 64 A. 666.

97. May recover from defendant for collision due to negligence of his vessel though tug is also negligent. Instruction held erroneous. Rockland Lake Trap Rock Co. v. Lehigh Valley R. Co., 101 N. Y. S. 222.

98. Evidence in action by bridge tender for damages for personal injuries caused by vessel in tow of defendant's tug striking draw held to show that vessels could have passed through draw in safety if they had been properly managed and had followed usual channel, and that accident was due to negligence of those in charge of tug. Stoker v. Hodge Fence & Lumber Co., 116 La. 926, 41 So. 211. Evidence held to show that plaintiff did not delay in opening bridge and not to sustain contention that he was closing instead of opening bridge at time of accident. Id.

of a collision with and damage to a bridge, all persons controlling or participating in such voyage are jointly and severally liable,[99] but if the voyage is not negligent and the accident is caused by negligence in navigation after it is begun, the party or parties so negligent are alone liable.[1]

Contributory negligence on the part of the injured person is ordinarily a defense,[2] but one is not relieved from liability for injury inflicted by him on another by reason of the fact that the latter negligently exposed himself to such danger, if, when that situation was or ought to have been apparent to him, he omitted such reasonable precautions as would, if exercised, have avoided the accident.[3] One cannot recover for injuries to a vessel while in tow which are due to the negligence of his own servants.[4] The occupants of a small boat have the right to assume that passing steamers will observe their duty toward her in avoiding the infliction of injury.[5]

Though the right of vessels to navigate navigable waters is paramount to the right to fish therein, it is not exclusive,[6] and the master of such a vessel may not unnecessarily, by his own negligence, force the two rights into conflict and then claim the benefit of the paramount one.[7] Hence, if persons in charge of a vessel see fish nets in time to avoid them without any appreciable interruption of the voyage, or if their presence is so obvious that such persons must have seen them if performing with ordinary care the duties of the position, the owners of the vessel are liable for damages resulting from running over them,[8] and this is true regardless of whether the owner of the nets had a right under the statute to place them where he did or whether, as to the shore owner, he was a trespasser.[9]

The admiralty rule that in collision cases the defendant cannot rely on a general denial but must set up by way of answer the circumstances relating to the collision has no application to an ordinary law action for negligence against those in charge of a vessel colliding with and injuring a bridge,[10] but in such case defendant may, under a general denial, show that the acts complained of were done by other persons for whose negligence he was not liable.[11]

The usual rules of evidence apply in actions at law for damages for injuries due to negligent navigation.[12]

99. Is no defense for one joint tort feasor that another person was also liable. Multnomah County v. Willamette Towing Co., [Or.] 89 P. 389. Evidence as to whether it was negligent to attempt to take vessel through draw bridge with only one tug held not so clearly in plaintiff's favor as to warrant disturbing trial court's action in granting defendant a new trial. Id.

1. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389. Evidence in action for damages for injury to bridge caused by vessel held to show that proximate cause of injury was not negligence of tug towing such vessel or her master, but of master of vessel who was not party defendant. Id.

2. Evidence held not to show contributory negligence on part of occupant of small boat who was drowned by swamping of boat by displacement waves of passing steamer. Daniels v. Carney [Ala.] 42 So. 452.

3. Question whether tug was liable for death of occupant of rowboat run down by it held for jury. Philadelphia & R. R. Co. v. Klutt [C. C. A.] 148 F. 818, afg. 145 F. 965.

4. In action to recover for services in towing barges, evidence held to show that injury to one of such barges was due to negligence of defendant's servants and not to plaintiff's negligence as claimed. Keller v. Gray [Cal. App.] 84 P. 847.

5. By swells. Daniels v. Carney [Ala.] 42 So. 452.

6, 7. Bishop v. Baldwin [Mich.] 13 Det. Leg. N. 941, 110 N. W. 139.

8. Instruction held erroneous. Bishop v. Baldwin [Mich.] 13 Det. Leg. N. 941, 110 N. W. 139. Evidence held to make case for jury. Id.

9. Even if nets are unlawfully in waters, vessel has no right to wantonly run over them but must use reasonable care to avoid them. Bishop v. Baldwin [Mich.] 13 Det. Leg. N. 941, 110 N. W. 139.

10, 11. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389.

12. Evidence as to custom in towing vessels through bridges held admissible in action by bridge tender for personal injuries resulting from tow striking draw. Stoker v. Hodge Fence & Lumber Co., 116 La. 926, 41 So. 211. Allegations held broad enough to admit evidence as to safest method of towing (Id.), and as to particular injuries (Id.). Testimony of manager of charterer that its officers had nothing to do with management of vessel which injured bridge held admissible, plaintiff having charged

§ 8. *Carriage of passengers.*[13]—A common carrier of passengers by water is not an insurer but is bound so far as it is capable by human care and foresight to carry them safely, and is responsible for all injuries to them resulting from even the slightest negligence on its part.[14] It must use the utmost care to accord passengers respectful treatment by its officers and servants,[15] and is liable for the willful torts of its own servants committed upon them during the voyage.[16] It is also bound to use ordinary care to avoid injury to one going upon its vessel upon its implied invitation and to give him a reasonable opportunity to depart, the measure of its duty in the latter particular depending upon the magnitude of the threatened injury.[17] The breaking or giving away of an instrumentality being used by and under the control of the carrier is prima facie proof of negligence and throws the burden on it to show the absence of negligence.[18] A vessel is liable for injuries received by a passenger as a result of his being compelled to come on deck in stormy weather to receive his food.[19] The Federal statutes provide a penalty, to be recovered by a person suing for the same, for the carrying on any steam vessel of a greater number of passengers than is stated in the certificate of inspection,[20] and make it a penal offense for the master of a vessel bringing immigrants into the United States from a foreign country to fail to provide tables and seats for the use of such passengers

that charterer participated in negligent navigation. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389. Where plaintiff claimed that charterer was party to and participated in alleged negligent navigation of vessel, evidence explaining presence on board thereof of one of its employes held admissible. Id. Testimony of witness that without order of master of vessel to go full speed ahead she would have passed through bridge safely, held admissible. Id. In action for damages for injuries to bridge run into by passing vessel which was being assisted in steering by tug, where towing company claimed that accident was due to captain of vessel ordering engineer to go ahead, testimony as to what captain said at time of, or immediately after, giving such order held admissible as res gestae. Id.

13. See 6 C. L. 1482.

14. Instructions as to degree of care required approved. International Mercantile Marine Co. v. Smith [C. C. A.] 145 F. 891. Ferry boat held liable for injury to passenger walking in unusual place, but where passengers were allowed to go, by falling into unprotected coal hole, of which he was not warned. The Lackawanna, 151 F. 499. In action for damages for death of child by falling through opening in steamer's rail at place where railed bridge or gangway leading from steamer to wharf boat rested, defendant's negligence held question for the jury under the evidence. Coney Island Co. v. Dennan [C. C. A.] 149 F. 687.

15. Disrespectful conduct of master and watchman to passenger who reported that she had been assaulted and robbed held breach of contract of carriage and properly considered in aggravation of damages. The Western States, 151 F. 929.

16. For passenger's jewels stolen from stateroom by steward. The Minnetonka [C. C. A.] 146 F. 509, afg. 132 F. 52. Evidence held to sustain finding that theft was committed by steward. Id. Passenger who had not retired for night and whose light was burning held not negligent in leaving door on hook provided for that purpose. Id. Award of $15,000 damages to passenger, who was assaulted and robbed while asleep in stateroom, and was disrespectfully treated on reporting matter, held excessive and reduced to $5,000. The Western States, 151 F. 929. Vessel held liable for assault and robbery of passenger for failure to have sufficient watch or patrol to protect her while asleep in stateroom. Id.

17. The City of Seattle [C. C. A.] 150 F. 537. Even if one going on board steamer on implied invitation was negligent in failing to leave when whistle blew, held that it was master's duty to put back to dock to enable him to go ashore, in view of length of voyage and fact that he was unprepared for journey. Id.

18. Applies to case where passenger was injured by breaking of hawser being used for purpose of docking vessel. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178. Burden is on carrier to show that parting of hawser was due to circumstances over which it had no control and against which highest degree of care would not avail, whether such a showing has been made being for jury. Id. Evidence held to sustain finding of negligence. Id.

19. Vessel held liable for injuries received by steerage passenger who was knocked over by water or slipped on wet and slippery deck. The Prinzess Irene [C. C. A.] 151 F. 17, afg. 139 F. 810.

20. Rev. St. § 4465, 7 Fed. St. Ann. 184. Master or owner liable to forfeit amount of passage money and $10 for each passenger beyond number allowed. The Charles Nelson, 149 F. 846. Extraordinary conditions existing at San Francisco immediately after earthquake when vessel sailed held to justify and require exercise of judicial discretion in refusing to impose penalty, it appearing that overcrowding was occasioned by intrusion of those who came aboard in darkness, and that after authorized number of passengers had been admitted captain refused to receive any more. Id.

at regular meals.[21] A vessel will not, however, be held liable in damages to passengers for inconvenience due to overcrowding and a shortage of water which are the result of extraordinary conditions and for which the officers are not to blame.[22] Contributory negligence is ordinarily a defense in an action at law.[23] In admiralty it does not necessarily bar recovery but may result in a division of damages.[24]

The carrier is ordinarily liable to a passenger for the loss of his baggage unless caused by the act of God or the public enemy.[25] It may, however, by a special contract, limit its liability to a specified sum[26] provided such limitation is not unreasonable.[27] A limitation printed on a ticket, but not included or referred to in that part of it containing the agreement to transport and signed by the carrier's agent, is generally held to be a mere notice not binding on the passenger unless he is shown to have read it or to have had it called to his attention.[28] The giving of a

21. Act Aug. 2, 1882, c. 374, § 4, 1 Fed. St. Ann. 723. United States v. Lavarrello 149 F. 297. Congress has power to make penal an omission by foreign vessel to so provide for passengers bound to United States and actually brought to port of landing. Id. Provision held sufficiently definite though failing to state how ample facilities shall be it clearly meaning that they shall be reasonably adequate for passengers carried. Id. Indictment charging "that there were no sufficient tables and seats for the use of the said passengers" held not fatally defective though defendant was entitled to be informed in what respects seats were insufficient either by bill of particulars or preferably, by a new indictment. Id.

22. Not where due to extraordinary conditions existing in San Francisco immediately after earthquake and to bad weather, it appearing that officers did best they could under circumstances and overcrowding was due to intrusion of persons coming aboard in darkness. The Charles Nelson, 149 F. 846.

23. Whether carrier was negligent in failing to insert vertical protecting board in front of settee converted into bed, and whether this absence created danger obvious to plaintiff and which he assumed when he consented to occupy settee as bed, held for jury. International Mercantile Marine Co. v. Smith [C. C. A.] 145 F. 891. Instructions on question of contributory negligence of child drowned while attempting to leave steamer approved, and requested instruction properly refused. Coney Island Co. v. Dennan [C. C. A.] 149 F. 687. In action by mother as administratrix of minor son to recover damages for his death from falling off steamer on which he was passenger, instruction that she could not recover if she failed to use reasonable care for his protection, and failure in any way contributed to his loss, properly refused as covering any such negligence on her part, no matter how remote, and there being no evidence justifying finding that she was negligent. Id. Evidence held to sustain finding that plaintiff was not guilty of contributory negligence. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178.

24. Passenger on ferry boat walking in place not designed for use of foot passengers, but where they were permitted to go, held negligent in failing to observe plainly visible coal hole into which he fell in daytime. The Lackawanna, 151 F. 499. Passenger awarded one-third of his damages, the failure of the boat to guard the hole or to warn passenger walking in unusual place being less deserving of condemnation than passenger's carelessness in going into easily discoverable danger. Id.

25. Proof that contents of trunks were in good condition when they went aboard vessel and were found to be wet with salt water at end of voyage held sufficient proof of negligence. Weinberger v. Compagnie Generale Transatlantique, 146 F. 516. Evidence held to show that articles were stolen from passenger's trunk on steamer during her carriage, and carrier was therefore responsible. Smith v. North German Lloyd S. S. Co., 142 F. 1032, afd. 151 F. 222. Agreement making deduction from freight held in full satisfaction of claims for baggage jettisoned. The Eva D. Rose, 151 F. 704.

26. A passage ticket for an ocean voyage is a contract, there being a distinction between it and an ordinary railway ticket, which may often be regarded as a mere token, and hence limitation of liability therein may be binding on passenger though he did not notice it. Tewes v. North German Lloyd S. S. Co., 186 N. Y. 151, 78 N. E. 864, rvg. 93 N. Y. S. 1149. Limitation of liability to $50 unless actual value in excess of that sum was declared at or before the making of the contract, or the delivery of the baggage, and freight paid thereon at current rates, held to limit liability to sum specified, though loss was result of carrier's negligence Id.

27. Provisions limiting liability for baggage held unreasonable and void. Weinberger v. Compagnie Generale Transatlantique, 146 F. 516. Limitation of liability for loss of extra baggage, paid for as such. La Bourgogne [C. C. A.] 144 F. 781.

28. Provision printed in connection with ticket but not made part of it. Weinberger v. Compagnie Generale Transatlantique, 146 F. 516. Limitation printed on back of ticket. La Bourgogne [C. C. A.] 144 F. 781. Provision in margin of ticket, headed "notice," held not part of contract of carriage and not to relieve carrier from full liability, where passenger denied that she had read it or that anything had been said to her in regard to her baggage or its value. Smith v. North German Lloyd S. S. Co., 142 F. 1032, afd. [C. C. A.] 151 F. 222. Conditions exempting carrier from liability for loss through theft, etc., which were printed on back of ticket in small type, and which passenger did not read and which were not called to her attention, held no defense to

specified notice of loss is sometimes made a condition precedent to the right of recovery.[29] The Federal statutes provide that if any shipper of gold or jewels or certain other enumerated valuables shall lade the same as freight or baggage on any vessel without giving written notice of the character and value thereof and having the same entered on the bill of lading therefor, the master and owner of such vessel shall not be liable as carriers thereof in any form and manner, and that they shall not be liable for any such goods beyond the value and according to the character thereof so notified and entered.[30] Such limitations have been held not to apply to extra baggage taken under a subsequent agreement and for the transporting of which additional compensation is paid.[31] The measure of damages for the loss of curios having no market value in the usually accepted sense is their value at the place of shipment as shown by experts.[32]

§ 9. *Carriage of goods.*[33]—In the absence of a valid limitation of liability in the contract of carriage, the carrier is ordinarily liable for any injury to or loss of goods intrusted to it for carriage not caused by the act of God or the public enemy.[34] A carrier cannot, however, be bound for goods not actually received for shipment even though the master of a vessel issues a bill of lading for them.[35] Proof that goods delivered to the carrier in good order were damaged when delivered to the consignee throws the burden on the former to show that it is not liable.[36] Bills of lading generally exempt the vessel from liability for loss due to the perils of the sea,[37] or to leakage of packages.[38] A limitation of the carrier's liability to the

action for theft of jewelry by steward. The Minnetonka [C. C. A.] 146 F. 509, afg. 132 F. 52.

29. Notice given company of loss of jewels held substantial and sufficient compliance with provisions of ticket. The Minnetonka [C. C. A.] 146 F. 509, afg. 132 F. 52.

30. Rev. St. § 4281, 4 Fed. St Ann 837. Statute held intended to apply to cases where goods are received by carrier from shipper for transportation in usual course of business, and not to case of passenger whose jewelry was stolen from her stateroom by one of ship's crew before she had opportunity to deposit it with proper officer for safe keeping. The Minnetonka [C. C. A.] 146 F. 509, afg. 132 F. 52. Statute operates to remove liability of master and owner as carriers only, leaving other and lesser liabilities unaffected. Id. Statute held not to apply to boxes of curios carried as extra baggage by passenger and paid for as such. La Bourgogne [C. C. A.] 144 F. 781.

31. La Bourgogne [C. C. A.] 144 F. 781.

32. Award of commissioner, sustained by district court, approved. La Bourgogne [C. C. A.] 144 F. 781.

33. See 6 C. L. 1483.

34. Evidence held not to sustain claim of shortage in goods delivered, but to show that discrepancy was due to fact that in many cases two bales were fastened into one package and counted as one when discharged. The Charles Tiberhien, 147 F. 307.

35. Steamer held not liable for nondelivery of goods for which it issued bills of lading based on forged receipts purporting to have been signed by shipping clerks, evidence being insufficient to show actual delivery of goods to it. Clark v. Clyde S. S. Co., 148 F. 243.

36. Evidence held to support contention that goods delivered to carrier in good order were damaged when delivered to consignee at destination so that carrier was liable for such damage. United States Lace Curtain Mills Co. v. Oceanic Steam Nav. Co., 145 F. 701.

37. Where bill of lading provided that inflammable goods might be carried on deck and exempted carrier from liability for damages due to dangers of the seas, and evidence showed well defined, universal custom, known to plaintiff, to treat oil clothing as inflammable and to carry it on deck on that account, held that such custom became part of contract and carrier was not liable for loss of goods washed overboard while in transit. Tower Co. v. Southern Pac. Co. [Mass.] 80 N. E. 809. Evidence that plaintiff's oil clothing was difficult to ignite, and upon ignition did not burst into flame but only charred, held properly excluded, since even if combustion from extraneous causes was unlikely, still existed probability of ignition by spontaneous combustion. Id. Damage to arsenic from leakage of oil stowed in same hold held due to perils of sea for which vessel was not liable, it appearing that method of stowing was usual one and that weather of great severity was encountered. The Langford, 143 F. 150. Where bill of lading exempted carrier from liability for damage due to act of God, dangers of the seas, sweating of cargo, etc., and carrier showed that vessel was absolutely seaworthy at every stage of voyage, that cargo was properly stowed, and the exercise of ample care during voyage to prevent entry of sea water, held that vessel was not liable for injury to cargo due either to heat and sweat, or entry of sea water, and consequent heat. The Folmina, 143 F. 636. Where it was proved that vessel was seaworthy at the inception of her voyage, that her hatches were well secured and her cargo well stowed, that pumps were efficient and properly worked, and that she

invoice or declared value of the goods is valid,[39] but a limitation to a specified sum per package, which is not an agreed valuation thereof, is not.[40] A stipulation that no lien shall attach to any of the vessels engaged in the performance of the contract for any breach thereof, but that such lien is thereby expressly waived, is void as contrary to public policy, whether forbidden by the Harter act or not.[41] Going aground is not ipso facto negligence giving to parties having freight aboard a lien on the vessel.[42] The acceptance of goods from a vessel going aground before reaching her destination is a waiver of the consignee's right to have the voyage completed.[43]

In the absence of a charter party, the bill of lading delivered to the shipper is taken as the best evidence of the contract of carriage, or as a substitute for a regularly drawn charter party.[44] Parol evidence is inadmissible to show that an entire contract for the carriage of merchandise on several vessels never went into effect as to one of them because of the failure to fulfill some unexpressed condition precedent as to it.[45] The fact that an owner and shipper of property is doing business under a fictitious or trade name, and that the contract of affreightment was made in that name, does not preclude him from suing in his own name for damages to such property while in transit.[46] A failure to give notice of loss or damage within the time prescribed by the bill of lading is a matter of defense which can only be presented by answer.[47]

The carrier has a special property interest in the goods which he undertakes to transport, and may maintain an action against a wrongdoer to recover damages for their destruction or spoliation.[48] Payment of the loss by an insurer does not prevent a recovery by either the carrier or the shipper in such case.[49]

The Harter Act.[50]—Under the Harter Act the owners, agents, and charterers of a vessel, and the vessel itself, are exempted from liability for loss or damage to goods carried resulting from faults or errors in navigation or in the management of the vessel, provided the owner has exercised due diligence to make her in all respects seaworthy and properly manned, equipped, and supplied.[51] It is also made unlawful to insert in the bill of lading any provision exempting the vessel from

encountered on voyage heavy seas of unusual violence adequate to strain her and cause her to take in unusual quantity of water, held that damage to cargo by water would be attributed to "dangers of the sea" for which ship was not liable under exception in bill of lading, in absence of showing by shipper that it could have been avoided by skill and diligence. Cook v. Southeastern Lime & Cement Co., 146 F. 101. Evidence in action against owner of lighter to recover damages for loss of cargo held not to show that sinking was due to unseaworthiness. National Board of Marine Underwriters v. Bowing & Co., 148 F. 1010.

38. Provision that ship should not be liable for leakage held to protect it as to all leakage, though damages from that cause are excessive, except that caused by negligence. The Claverburn, 147 F. 850. Loss of wood oil held not due to improper stowage but to fact that barrels were insufficient to carry it safely, so that ship was not liable. Id.

39, 40. United States Lace Curtain Mills Co. v. Oceanic Steam Nav. Co., 146 F. 701.

41. Since it is in effect a waiver in advance of one of remedies which law gives for breach of carrier's obligation. The Tampico, 151 F. 689.

42, 43. 44, The Eva D. Rose, 151 F. 704.

45. Contract for shipment of cattle on several vessels held an entire one and not separate contract for each vessel, and hence not within exception which permits parol evidence to show that contract never went into effect for failure to fulfill unexpressed condition precedent. Morris v. Chesapeake & O. S. S. Co. [C. C. A.] 148 F. 11, afg. 125 F. 62.

46. In any event libel may be amended in that regard. The Nonpariel, 149 F. 521.

47. Libel is not subject to exception for failure to show that it was so given. The Tampico, 151 F. 689.

48, 49. The Nonpariel, 149 F. 521.

50. See 6 C. L. 1485.

51. Act Feb. 13, 1893, c. 105, § 3, 27 St. L. 445, 4 Fed. St. An. 857. Owner of seaworthy vessel is not liable to cargo for damage due to errors of navigation. The Eva D. Rose, 151 F. 704. Act held not to apply to question of liability of tug for damage to cargo of seaworthy tow due to tug's negligence where relation of tug was one of towage, though both tug and tow belonged to or were controlled by carrier transporting cargo. Bradley v. Lehigh Valley R. Co., 145 F. 569.

liability from damages arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of merchandise or other property, and such provisions are declared to be void,[52] or to insert any provision whereby the obligation of the owners to exercise due diligence to properly equip, man, provision and outfit the vessel, and to make her seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo, and to care for and properly deliver the same, shall in any wise be lessened, weakened, or avoided.[53]

§ 10. *Freight and demurrage. Freight.*[54]—The amount of freight recoverable depends of course on the terms of the contract.[55] The shipowner's lien for freight for the carriage of goods depends upon possession, and its preservation upon a continuance of possession,[56] and this is true though the lien is specifically provided for in the bill of lading.[57] A provision that the cargo is to be delivered to the person named, or his assigns, he or they paying the freight, is but a recognition or assertion of the owner's or master's right to retain the goods until his lien is satisfied, and imposes no obligation on him to insist on payment before delivery,[58] nor does it prevent him from waiving his lien by delivery before payment and subsequently holding the shipper for the freight.[59] In the absence of a special agreement to the contrary,[60] freight paid in advance is to be refunded if from any cause not attributable to the shipper the goods are not carried.[61] Charter hire and the liability of the vessel for dead freight are treated in a former section.[62]

52. Act Feb. 13, 1893, c. 105, § 1, 27 St. L. 445, 4 Fed. St. Ann. 854. Applies to vessels engaged in domestic commerce. The Tampico, 151 F. 689. Agreement "that no lien shall attach to any of the vessels employed in the performance of this contract for any breach thereof, but such lien is hereby expressly waived," held void and of no effect as to damages arising from negligence in proper custody and care of merchandise. Id. Act applies only to contracts between carrier and shipper and not to charter whereby ship is demised and charterer becomes owner pro hac vice, and does not prevent relieving of shipowner from liability for nondelivery of cargo in such case. Golcar S. S. Co. v. Tweedie Trading Co., 146 F. 663.

53. Act Feb. 13, 1893, c. 105, § 2, 27 St. L. 445, 4 Fed. St. Ann. 856. Section does not apply to passenger tickets. La Bourgogne [C. C. A.] 144 F. 781.

54. See 6 C. L. 1487.

55. Amount of lumber which vessel carried determined. Murray v. Jump Co., 148 F. 123.

56. Lien ceases to be available when possession is lost. Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co., 145 F. 687. Shipper of cargo became bound for freight as surety for consignees who were owners. Vessel was stranded and, with cargo, was abandoned by vessel owner to insurer. Part of cargo was salved and sold for price which included freight value and proceeds turned over to insurer. Insurer subsequently recovered freight from shipper, who thereupon sued carrier and insurer for amount thereof, claiming to be subrogated to carrier's lien for freight on cargo and proceeds, and that such proceeds were held subject to such lien. Held that carrier's lien was lost by abandonment of cargo to insurer, and hence could be no lien on proceeds and no right of subrogation thereto, and shipper had no claim to fund. Id. Where lien is expressly reserved in bill of lading, provision that freight shall be considered earned, steamer or goods lost or not lost, at any stage of the entire transit, does not prevent loss of lien by such abandonment. Id.

57. Stipulation "that the carrier shall have a lien on the goods for all freights, primages, and charges," does not affect or change nature of lien, or constitute a hypothecation whereby lien attaches and continues effective without reference to continuation of possession essential to ordinary lien for freight. Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co., 145 F. 687.

58. Provision is for benefit of owner or master and not for that of the shipper or consignor. Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co., 145 F. 687.

59. Portland Flouring Mills Co. v. Portland & Asiatic S. S. Co., 145 F. 687. Provision that freight was to be collected at point of destination and delivery held tantamount to a direction only to owner to collect it at destination, and not to impose upon him such an obligation to do so that failure would prevent him from looking to shipper for payment. Id. Rights, duties, and obligations of shipowner in this regard held not affected by fact that consignee was primarily liable for freight, and shipper was liable only as his surety. Id.

60. Rule does not apply where charter party incorporates by reference the bills of lading, which provide that freight prepaid is to be considered earned at time of payment, ship lost or not lost. Burn Line v. U. S. & Australasia S. S. Co., 150 F. 423.

61. Burn Line v. U. S. & Australasia S. S. Co., 150 F. 423.

62. See § 6, ante.

Demurrage.[63]—The vessel owner is ordinarily entitled to demurrage for inexcusable failure to give the vessel customary despatch as required by the charter.[64] He cannot, however, recover demurrage for a delay for which he is himself to blame.[65] Bills of lading sometimes provide that both the shipper and the consignee of goods shall be liable for demurrage for delay at the port of discharge.[66] The cargo may by contract remain subject to a lien for demurrage after the vessel has parted with possession thereof.[67] Demurrage may be allowed for unreasonable delay in making repairs.[68]

Demurrage will be allowed as an element of damage in collision cases only when profits have actually been, or may reasonably be supposed to have been, lost, and the amount of such profits has been proven with reasonable certainty.[69] In ascertaining whether earnings have been lost, the inquiry is not whether they could possibly have been made by the use of the vessel during the period for which the owner has been deprived of her use, but whether they would have been made,[70] which may be proved circumstantially and with a reasonable degree of certainty.[71]

§ 11. *Pilotage, towage, wharfage.*[72]—Members of the Virginia Pilot Association are not liable to a piloted vessel for the negligence of one of their number, whether they are regarded as partners or not.[73]

63. See 6 C. L. 1487.

64. Evidence held to support finding that owners had not established that vessel was not given customary despatch in unloading. Pendleton v. U. S. & Venezuela Co. [C. C. A.] 145 F. 508. In suit by vessel owner for demurrage based on alleged verbal charter, evidence held insufficient to establish that charterer agreed to give good dispatch in loading, or to render him liable for delay. Benedict v. Cargo of 6,086 Railroad Ties, 151 F. 366. Under charter providing for customary despatch in discharging, owners held entitled to recover demurrage from charterer for delay due to miscalculation of latter as to time required to discharge part of cargo at one dock in consequence of which she had to wait for berth at others. Leary v. Talbot, 151 F. 355.

65. Not where he could have secured quick discharge by taking boat to another place in yard. Murray v. Jump Co., 148 F. 123. Not for delay pending negotiations for security for freight where he could have put cargo ashore but refused to deliver it and thus secured himself for his charges. Id. Agents of steamers held not liable for demurrage for detention of derricks hired by shipper to transport cargo to steamers and by such agents to load same, it appearing that vessels received and stowed goods with reasonable skill and despatch, and that delay was due to manner in which cargo was loaded on derricks, and to fact that libelant furnished larger number of derricks than could be unloaded at once. Merritt & Chapman Derrick & Wrecking Co. v. Vogeman, 143 F. 142.

66. Bill of lading held to make shipper liable for demurrage for detention at port of discharge, though it also made consignee liable and gave lien therefor. Tweedie Trading Co. v. Pitch Pine Lumber Co., 146 F. 612. Even if only owner or consignee was liable, held that shipper was still liable where it consigned freight to itself and remained consignee until actual delivery, though it indorsed bill of lading to another. Id. Failure to enforce claim for demurrage against consignee or cargo at port of discharge, as had right to do under contract, held not to estop owner from subsequently collecting it from shipper. Id.

67. Part of cargo could not be unloaded by reason of consignee's inability to obtain lighters, and was returned to port of shipment after claim for demurrage had accrued under charter. Was there unloaded under agreement between master and charterer that it was to remain subject to lien for demurrage. In suit to enforce lien corporation, of which charterer was president and manager, appeared as claimant, and asserted ownership of property and that it had paid freight money to charterer under agreement whereby he was to transport property to destination, and that he wrongfully had bill of lading issued to himself as consignee. Neither ship owners nor master had knowledge of claimant's rights. Held that lien was valid whether charterer was regarded as holder of legal title or as general agent of claimant, the detention being due to default of agent and his knowledge of transaction being imputed to claimant. Plummer v. 200 Tons of Rails, 149 F. 887.

68. Time held unreasonable. The Mary N. Bourke [C. C. A.] 145 F. 909, modifying, 135 F. 895.

69. The North Star [C. C. A.] 151 F. 168, modifying 140 F. 263. Damages for loss of use of vessel while undergoing repairs will only be allowed when it is shown that she could have been profitably used during such period, burden being upon libelant to show amount of such damages. The Loch Trool, 150 F. 429. Refusal of commissioner to allow demurrage held proper. Id.

70. Item for demurrage disallowed. The North Star [C. C. A.] 151 F. 168, modifying 140 F. 263.

71. The North Star [C. C. A.] 151 F. 168, modifying 140 F. 263.

72. See 6 C. L. 1488.

73. Voluntary unincorporated association recognized by Va. Code 1887, but having no authority to select or discharge its mem-

The essentials of a valid contract of towage are the same as those of any other contract.[74] Where towage services are accepted after notice that something more than towage will be demanded, the tug is entitled to other and higher remuneration than for ordinary towage service.[75] The distinction between towage and salvage is treated in a subsequent section.[76]

§ 12. *Repairs, supplies, and like expenses.*[77]—It is the duty of one repairing a vessel to release her from dry dock as soon as she is in a condition to float.[78] Where charges for docking and lay days are not fixed by the contract, the person making the repairs is only entitled to collect the customary rate in the harbor where the work is done.[79] Demurrage may be allowed for unreasonable delay in making repairs.[80] The laws of the state where the contract is made and is to be performed, and where the parties thereto reside, will govern in determining the rate of interest to be charged.[81] The construction of particular contracts for repairs will be found in the note.[82] A contract to pull a vessel, lodged in launching, to the owner's satisfaction, requires that the pulling shall be of such a character as to satisfy a reasonably prudent man in the light of the surrounding circumstances.[83] The contractor may in such case recover on a quantum meruit for additional services rendered in pulling the vessel after a pulling sufficient to comply with the terms of the contract.[84]

Liens for repairs and supplies.[85]—The general maritime law gives no lien for repairs or supplies furnished a vessel in its home port,[86] but a lien is frequently given by state statutes in such case,[87] which may be enforced by the admiralty courts, and by them alone when the proceeding is one in rem.[88] Liens created by

bers, or to control or direct them in performance of their duties, even though their fees go into common fund and, after paying expenses, are distributed to members according to number of days they respectively have been on active list. Guy v. Donald, 27 S. Ct. 63, rvg. 127 F. 228.

74. Evidence held not to show contract requiring steamer towing barge to keep near shore. Dady v. Bacon [C. C. A.] 149 F. 401. Master of steamer held not to have exceeded authority in agreeing with master of barge to tow latter beyond point originally agreed upon, master of barge having no knowledge of agreement between owners as to her destination. The Oceanica, 144 F. 301.

75. One thousand dollars awarded for services, without costs, that sum having been previously offered in settlement. The Robert S. Besnard, 144 F. 992.

76. See § 13, post.

77. See 6 C. L. 1488.

78. Owner will not be required to pay charge for lay days for use of dock when work was being done which could as well have been done when vessel was afloat. The Mary E. Bourke [C. C. A.] 145 F. 909, modifying 135 F. 895.

79. Continuing to send boats for repairs after dispute arose held not to impose any duty on respondent to pay higher rate. Burlee Dry Dock Co. v. Morris & Cumings Dredging Co., 145 F. 740.

80. Delay held unreasonable. The Mary E. Bourke [C. C. A.] 145 F. 909 modifying 135 F. 895.

81. Where contracts for repairs of vessel were made in Michigan by citizens of that state and were to be performed there, held that laws of that state would govern. The Mary E. Bourke [C. C. A.] 145 F. 909, modifying 135 F. 895.

82. Contract to prepare boiler of yacht for "dock trial, doing only such work as is absolutely necessary, not to exceed" a certain sum and to keep as much below it as possible, held not to require libelant to remedy inherent defects in boiler or to pay cost of replacing it with one of a different type, which was found necessary before yacht could be used. The Czarina, 152 F. 297. Where libelant guarantied to do repair work in place, held that successful completion of job was at his risk. The Seefahrer, 143 F. 697.

83. Pulling held a compliance with contract in view of fact that clean pull off was not guarantied. Merritt & Chapman Derrick & Wrecking Co. v. Greene, 147 F. 317.

84. Additional services necessary to clean pull off. Merritt & Chapman Derrick & Wrecking Co. v. Greene, 147 F. 317.

85. See 6 C. L. 1488.

86. The Vigilant [C. C. A.] 151 F. 747. No lien for raising sunken vessel in home port. The Paul L. Bleakley, 146 F. 570.

87. The Vigilant [C. C. A.] 151 F. 747. One furnishing life preservers to vessels in New Jersey port in reliance on statement of vice president of owner that vessels were sufficient security held to have lien by agreement, and also under New Jersey statute. The Charles Spear, 143 F. 185.

88. States may create liens which they cannot themselves enforce. The Vigilant [C. C. A.] 151 F. 747. Such a lien created by statutes of Pennsylvania may be enforced by district court of district of New Jersey, sitting in admiralty, having possession of vessel, by a proceeding in rem. Id. Lien given by Ala. Code 1896, § 2758, for work done or material supplied by any person in state in and about the repairing, furnishing and supplying of any steamboat, is en-

state statutes extend only to domestic vessels of the state.[89] Both under the general maritime law [90] and under state statutes,[91] a lien will not attach for repairs or supplies unless they are furnished on the credit of the vessel. Supplies or repairs furnished in a foreign port are presumed to have been furnished on the credit of the vessel unless the contrary is shown.[92] There seems to be some conflict of authority as to whether there is such a presumption where the state statutes give a lien for supplies and repairs furnished in a domestic port, or whether it must be shown that they were furnished expressly on the vessel's credit.[93] One furnishing repairs or supplies with knowledge that the person ordering them has no authority to bind the vessel,[94] or with knowledge that the vessel is being operated under a charter requiring the charterer to pay for them, or under circumstances which put him on inquiry as to the existence and terms of such charter,[95] is not entitled to a lien. The right to a lien may be lost by laches in failing to enforce it within a reasonable time.[96]

forceable in admiralty courts and controlled by principles of admiralty law. The City of Camden, 147 F. 847.

89. N. J. Gen. St., p. 1966, held not to apply to foreign vessels. The Golden Rod [C. C. A.] 151 F. 6. Where coal was furnished in Hoboken, N. J., to a vessel whose owner resided in New York City, held that it was furnished in a foreign port. Id.

90. Lien for supplies furnished in foreign port. The Golden Rod [C. C. A.] 151 F. 6. Fact that owner of vessel which injured another vessel admitted his liability and agreed to pay for repairing her, pursuant to which her master appointed her to libelant for repairs, held not to raise an inference that repairs were made on personal credit of owner of other vessel rather than on credit of repaired vessel, even if libelant knew facts, and did not deprive libelant of lien in absence of further proof that he relied on such owner's personal credit. The Seefahrer, 143 F. 697. Contract between insurance company and libelant, with whom it had been dealing in regard to similar matters for many years, for raising vessel which had sunk in home port, held not to give libelant a lien, it having made no inquiry of the owner in regard to company's agency, no allusion having been made to credit of vessel, and there being no necessity for relying on credit of vessel, and it appearing that credit of insurance company was solely in view. The Paul L. Bleakley, 146 F. 570. Provision of policy as to abandonment, etc., held not to make insurance company owner's agent so as to give it power to pledge vessel under such circumstances. Id.

91. To entitle one to lien under N. Y. Laws 1897, p. 526, c. 418, as amended by Laws 1904, p. 494, c. 246, §§ 30, 32, must appear that supplies were furnished on credit of ship. The Golden Rod [C. C. A.] 151 F. 8, afg. 145 F. 743. Evidence held to show that labor and material ordered by owner's representative were furnished upon credit of vessel, and that libelants did not know that owner had chartered boat, or turned over her possession under some conditional sale, and had no information as to any circumstances which would indicate necessity of further inquiry. Id.

92. The Vigilant [C. C. A.] 151 F. 747.

93. See 6 C. L. 1489, n. 32. Whether or not such a lien exists is to be determined solely by reference to the statute creating it, and without regard to the principles governing liens given by the general maritime law on foreign vessels under similar circumstances. The Vigilant [C. C. A.] 151 F. 747. Under Pa. Act June 24, 1895 (P. L. 251), supplies ordered by master, owner, or consignee, are presumed to be on the credit of the vessel unless the contrary is shown, and burden of showing an express repudiation of such a pledge, known to one who claims lien, rests on party undertaking to rebut its implication, it not being necessary to show that they were furnished expressly on credit of vessel. Id. See, also, The Golden Rod [C. C. A.] 151 F. 8.

94. One of two agents of parties joining in purchasing tug held to have no authority to bind vessel without concurrence of his coagent, so that persons making repairs at his instance with knowledge of the facts and without securing authority from coagent were not entitled to lien therefor. The Robert R. Kirkland, 143 F. 610.

95. When a question as to a maritime lien arises as to a vessel in possession of a purchaser under a conditional sale, she should be considered as though in possession pro hac vice of a charterer to whom the owner had temporarily turned her over. The Golden Rod [C. C. A.] 151 F. 6. One furnishing coal to yacht in possession of purchaser under contract of conditional sale requiring latter to pay for supplies held not entitled to lien where master did not order coal, and before it was furnished representatives of libelant were informed that yacht was under charter or had been bought on instalment plan, but made no effort to inform themselves as to terms of agreement. Id.

96. Even if person raising vessel under contract with insurance company had basis for lien, held that he had lost right to enforce it where he delayed attempt to do so until after owner's right to recover from insurer under policy was barred or had become doubtful by reason of limitation therein. The Paul L. Bleakley, 146 F. 570. As against a bona fide purchaser for value without notice, lien must be enforced within a reasonable time, what is a reasonable time depending upon the circumstances of each case. Extraordinary vigilance not neces-

Since contracts for the building of vessels or for furnishing labor and material in their construction are not maritime in character, and liens given upon them for labor and material so furnished are not maritime liens, state statutes creating such liens are valid, and liens so created may be enforced in state courts,[97] and this is true though the vessel engages in interstate commerce;[98] nor is the state court deprived of jurisdicton over proceedings to enforce such a lien by reason of the fact that the vessel may in the future become subject to superior maritime liens enforceable in a court of admiralty.[99]

§ 13. *Salvage.*[1]—A salvage service is a service which is voluntarily rendered to a vessel needing assistance, and is designed to relieve her from some distress or danger either present or to be reasonably apprehended.[2] If there is no actual or

sary, but lien must be sustained if there has been reasonable diligence in asserting it. The Marjorie [C. C. A.] 151 F. 183. Delay of less than year in enforcing lien for coal furnished at foreign port to pleasure yacht having no definite route and which never again came into such port, held not to bar claim. Id.

97. Lien given by Mich. Comp. Iaws 1897, § 10, 789, for materials furnished in construction of ship, may be enforced in state court. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 27 S. Ct. 509, afg. 142 Mich. 84, 12 Det. Leg. N. 441, 105 N. W. 527. Contention that act is unconstitutional as in conflict with exclusive jurisdiction of Federal courts of admiralty over maritime liens cannot be raised in Federal supreme court in case appealed from state court in which no maritime lien is asserted. Id.

Construction of state statutes: Code Pub. Gen. Laws, art. 63, § 46, construed and held that where proceedings to enforce lien are begun within two years from filing lien claim, lien does not expire at expiration of that time, but final judgment or decree may be rendered thereafter. Lucas v. Taylor [Md.] 66 A. 26. Under § 44, lien claim for installing electric light plant on vessel held in time when filed within six months from commencement of such installation, it not being necessary to file it within six months from commencement of construction of vessel. Id. Lien claim held sufficient compliance with § 44, as to statement of place where boat was built, repaired, equipped, or refitted. Id. Who is to be regarded as the owner of vessel being built under contract to furnish both work and materials, before her completion and delivery, is ordinarily regarded as a question of intention depending on the terms of the contract. Id. Shipbuilding company held to be regarded as owner. Id. Amendment of bill and lien claim in suit to enforce lien, made by leave of court, held not ineffective because amended lien claim was not filed in clerk's office of superior court, defendant not having demurred to amended bill, etc., and only rights of parties to suit being affected thereby. Id. Where lien claim as originally filed described company for which vessel was being built as its owner and shipbuilding company as its "agents and contractors," held that court, in proceedings to enforce lien, had power to allow amendment describing latter company as its owner and builder and former as "now the owner," under Code Pub. Gen. Laws, art. 63, § 41. Id. Contention that Michigan statute did not apply because vessel was not to be used in navigating waters of state, and objection to enforcement of lien because vessel was in hands of bona fide purchaser, and because lien was not filed within prescribed time, held questions of state law upon which judgment of state court was final and conclusive on Federal supreme court. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 27 S. Ct. 509. Items held to have been furnished for the completion of the vessel and to have been fairly a part of her construction, so that fact that they were furnished after vessel was launched did not deprive person furnishing them of right to lien under state statute. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 27 S. Ct. 509, afg. 142 Mich. 84, 12 Det. Leg. N. 441, 105 N. W. 527.

98, 99. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 27 S. Ct. 509, afg. 142 Mich. 84, 12 Det. Leg. N. 441, 105 N. W. 527.

1. See 6 C. L. 1490.

2. Essential element is that property shall be saved from danger either actually impending or reasonably to be apprehended. Service held not a salvage one. The Robert S. Besnard, 144 F. 992. Success is an essential ingredient, and no reward can be given unless service is attended by beneficial results. The Myrtle Tunnel, 146 F. 324. Not where vessel being towed is abandoned and allowed to become a derelict, though she is later saved by others. Id. Fact that service is not entirely successful does not prevent it from being a salvage service, nor is degree of danger important. The I. W. Nicholas, 147 F. 793.

Held to be salvage service: Attempting to put out fire on ferry boat. Clark Co. v. Ferry boat Columbia, 26 App. D. C. 85. Attempt to pull off stranded vessel. The I. W. Nicholas, 147 F. 793. Pulling stranded vessel off shore. The Devonian, 150 F. 831. Towing tug disabled at sea into port. The Chief, 147 F. 875. Towing schooner which had grounded and was leaking. The Rebecca Shepherd, 148 F. 727. Towing vessel with broken shaft to landing, vessel rendering service being under no obligation to do so. Neel v. Iron City Sand Co. [C. C. A.] 149 F. 980. Charge for towing held properly withdrawn from action on account for services in state court, it being really a claim for salvage rightly cognizable by a court of admiralty, and in proceeding in which crew of vessel could participate. Id.

Held not salvage service: Raising of vessel sunk in home port, under contract with insurance company. The Paul L. Bleakley, 146 F. 570.

probable danger, and the employment is simply for the purpose of expediting the voyage, the service is a towage and not a salvage one.[3] If the vessel is in a position which requires towage service only, the mere fact that she has previously suffered injury does not make the service a salvage one, unless there is some circumstance of peril, immediate or reasonably to be apprehended, from which the vessel is relieved, or some hazard encountered, or unusual work done by the relieving vessel.[4] Salvage will not be allowed for services rendered under a contract requiring payment regardless of results,[5] nor for services rendered against the protest of the owner of master.[6]

The United States government, being liable to refund customs duties on imported merchandise destroyed while in the custody of the customs officers, has a direct pecuniary interest in goods on which such duties have been paid and which are saved from loss while on board a vessel and still in the custody of such officers, and the salvors are entitled to an award against it on the basis of the amount thus put at risk.[7]

The right to compensation as a joint or cosalvor exists only where the enterprise is one and the same, and the efforts of the second salvors are in connection with and continuation of those of the first.[8]

The amount to be awarded rests in the sound discretion of the court[9] and depends upon the circumstances of each particular case.[10] The danger to the salved

3. The Robert S. Besnard, 144 F. 992.

4. Service held a towage one. The Robert S. Besnard, 144 F. 992.

5. Where tug contracted to float stranded vessel and deliver her at a certain port, contract to be null and void if it did not float, and failed to deliver her, held that she could not recover salvage for services in attempting performance which resulted in vessel afterwards being floated in high wind when she was rescued by others. The Myrtle Tunnel, 146 F. 324. Evidence held to support finding that contract was not one for salvage service but for payment on the basis of day's pay for such service as plaintiff might render in and about rescue of defendant's stranded barge, irrespective of results. Merritt & Chapman Derrick & Wrecking Co. v. Tice, 103 N. Y. S. 333. In action for services in rescuing stranded barge where defendants claimed that only contract between the parties was one for salvage services, and evidence that defendants were insured was admitted without objection, and it appeared that the defendants had retained bill for services for some time without objecting that only contract was one for salvage, held that evidence that they had submitted bill to underwriters was admissible as indicative of understanding they had concerning nature of plaintiff's employment. Id.

6. Evidence held to show that services of tug in pumping water into burning vessel were not needed, of which fact she had notice before she rendered them, but were detrimental, so that she was not entitled to salvage award. The Mannie Swan, 145 F. 747. Owner held to have ratified consent of captain to accept services of tug. The Banes [C. C. A.] 147 F. 192.

7. Salvors may found claim on assumption that secretary of treasury would have refunded duties as authorized by Rev. St. §§ 2984, 3689, though statute is in terms permissive only. United States v. Cornell Steamboat Co., 202 U. S. 184, 50 Law. Ed. 987, afg. 137 F. 455. Remedy in personam is not confined to legal owner of property saved, but extends to one having direct pecuniary interest therein. Id. Federal district court has jurisdiction of libel in personam to recover for such services under Tucker Act, Act March 3, 1887, c. 359, 24 St. 505, claim being one for unliquidated damages not sounding in tort. Id. Case is not one arising under revenue laws. Id.

8. No such right where first salvors have abandoned their efforts. The Myrtle Tunnel, 146 F. 324.

9. Is not an unlimited discretion but is governed by principle and precedent. The Flora Rodgers, 152 F. 286. Doctrine of compensation as upon a quantum meruit has little application. Id.

10. Award should be sufficiently liberal to prove that courts are not unmindful of such services and to create and promote incentive to vessels and masters and crews to promptly and courageously assume risks to save life and property. The Peter White, 149 F. 594. Rule applies on Great Lakes. Id. Award reduced because libelant attached cargo and thereby caused loss to owners, though shipowner offered to give security for full amount of claim. The Banes [C. C. A.] 147 F. 192.

Awards in particular cases: One thousand six hundred dollars awarded tug for assisting vessel worth $42,000 with cargo, award being reduced because of subsequent attachment of cargo. The Banes [C. C. A.] 147 F. 192. Steamer worth with cargo $149,000 awarded $800 and expenses for services in attempting to release stranded steamer worth with cargo $127,400, service not being one of high merit. The I. W. Nicholas, 147 F. 793. Tug worth with tow about $140,000 awarded $1,000 for towing into port tug which sold for $5,600 at marshal's sale. The Chief, 147 F. 875. Four hundred and fifty dollars awarded tug for towing into port schooner which had grounded and was leaking. The Rebecca Shepherd, 148 F. 727. Award of $25 for towing steam vessel, which

vessel,[11] the value of the two vessels,[12] the risk incurred,[13] the labor expended,[14] the effectiveness of the services rendered,[15] and the skill and promptitude displayed,[16] will be considered. A moity after the payment of expenses will ordinarily be allowed in case the salved vessel is a derelict.[17] The vessel rendering the service should also be reimbursed for expenses and losses actually incurred.[18] The fact that the master of a stranded vessel accepts the services of a tug under the mistaken belief that it belongs to a company usually employed for towage service by the owner is no reason for decreasing the amount of the award, where there is no false pretense on the part of the tug, and the truth is readily ascertainable.[19] The court will not encourage a tugboat to abandon a towage contract and expose her tow to great danger for the purpose of rendering salvage services to another vessel.[20] No rule can be laid down as to the duty of captains in such case, but they will be held to the exercise of good judgment under the circumstances.[21]

A portion of the award is generally divided among the officers and crew of the vessel rendering the service.[22]

The sum awarded is ordinarily required to be paid by the salved vessel and her cargo in proportion to their respective values.[23]

§ 14. *Vessels or persons liable for loss and expense, and limitation of liability therefor.*[24]—Liability as between the owner and a charterer for the acts of the master and crew is treated in a previous section.[25] Though vessels which are a part of the instrumentalities of the state government are not subject to seizure by procedings in rem in admiralty,[26] a municipal corporation is liable under the maritime law on a libel in personam for damages resulting from a collision due to the

had broken her shaft, each party to pay own costs, held inadequate and increased to $100 with costs. Neel v. Iron City Sand Co. [C. C. A.] 149 F. 980. Steamer worth with cargo $575,000 awarded $5,000 for towing steamer with broken crank shaft, worth $330,000, into port on Great Lakes, though no lives were hazarded. The Peter White, 149 F. 594. Tug worth $55,000 awarded $4,500 for pulling off shore stranded vessel, worth with cargo and freight pending, $800,000. The Devonian, 150 F. 831. Award of $100 for services rendered by tug to burning ferry boat increased to $250. James Clark Co. v. Ferryboat Columbia, 26 App. D. C. 85.

11. The Chief, 147 F. 875. Danger is to be regarded as less in proportion as probability of assistance, other than that rendered by the salvors, is greater. The Devonian, 150 F. 831.

12. The Peter White, 149 F. 594. Values are to be considered but are not necessarily controlling. The Rebecca Shepherd, 148 F. 727. Large value of property saved tends to enhance amount of award. The Devonian, 150 F. 831.

13. The I. W. Nicholas, 147 F. 793; The Peter White, 149 F. 594; The Devonian, 150 F. 831.

14. The Chief, 147 F. 875.

15. Fact that services were not entirely successful. The I. W. Nicholas, 147 F. 793.

16. The Peter White, 149 F. 594.

17. Rule, though somewhat flexible, should ordinarily be adhered to. The Myrtle Tunnel, 146 F. 324. Moity allowed, vessel and cargo having been sold for $24,000. Id. Steamship towing two derelicts into port allowed half their value, after deducting pilotage bills, cost of extra coal consumed, value of hawsers lost or impaired, customary charge for towage in bringing vessels into port, etc. The Flora Rodgers, 152 F. 286. Derelict is vessel found deserted or abandoned on seas, whether it arose from accident, necessity, or voluntary dereliction. Vessel held a derelict. The Myrtle Tunnel, 146 F. 324.

18. Reasonable expense incurred for replacing hawser and small ropes. The I. W. Nicholas, 147 F. 793.

19. The Devonian, 150 F. 831.

20. The Rebecca Shepherd, 148 F. 727.

21. Captain held to have exercised good judgment in abandoning tow, there being no great perils of sea or dangers of weather to which she would be exposed. The Rebecca Shepherd, 148 F. 727.

22. One-fifth awarded to officers and crew, as their lives were not greatly exposed. The Peter White, 149 F. 594. Four hundred dollars of award of $450 given to owners, $25 to master, and balance to crew in specified amounts. The Rebecca Shepherd, 148 F. 727. One hundred dollars of award of $800 given to master, and $200 to crew, to be apportioned according to their wages. The I. W. Nicholas, 147 F. 793. Three thousand three hundred of an award of $4,500 given to owner, $500 to master, and balance to crew to be divided in proportion to wages then being paid to each of them. The Devonian, 150 F. 831.

23. The Banes [C. C. A.] 147 F. 192; The Rebecca Shepherd, 148 F. 727.

24. See 6 C. L. 1491.

25. See § 6, ante.

26. Vessels owned by Port of Portland, a municipal corporation. The John McCracken, 145 F. 705.

negligence or fault of the master and officers of vessels employed by it in the performance of the duties for which it was created.[27]

Limitation of liability.[28]—The Federal statutes provide that the liability of the owner of any vessel for any embezzlement, loss, or destruction, by any person, of any property, goods, or merchandise, shipped or put aboard such vessel, or for any loss, damage, or injury by collision, or for any act, matter, or thing lost, damage, or forfeiture done, occasioned, or incurred, without the privity or knowledge of such owner, shall in no case exceed the amount or value of the interest of such owner in such vessel and her freight then pending,[29] and that whenever the whole value of the vessel and the freight for the voyage is not sufficient to compensate all persons suffering loss, it shall be divided pro rata among them, for which purpose appropriate proceeding may be had in any court.[30] The transfer of the owner of his interest in the vessel and freight to a trustee, to be appointed by any court of competent jurisdiction, is made a sufficient compliance with the statute.[31] The admiralty courts have exclusive jurisdiction of the question whether a vessel owner has a right

27. Port of Portland, a municipal corporation created to improve channel of rivers from Portland to sea with authority to employ men, etc., and to do all other necessary acts for that purpose, held liable under maritime law for damages resulting from collision due to negligence or fault of master and officers of tug and dredge, they being its servants for whose acts it is liable. United States v. Port of Portland, 147 F. 865.

28. See 6 C. L. 1491.

29. Rev. St. § 4283, 4 Fed. St. Ann. 839. Purpose of act was to limit liability and not to destroy it, and where owners of two vessels, both in fault for collision, brought proceedings thereunder, and thereby enjoined representatives of passengers and crew, drowned by sinking of one of such vessels, from maintaining actions for damages for their deaths against other vessel in court and under statute of state to which they both belonged, they could maintain a claim therefor in proceedings in admiralty court. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906. Traveling derrick, which was essential to practicability of scow for purpose and object for which she was being used when accident occurred, held a part of her apparel, tackle, and furniture, and therefore liable to extent of appraised value for negligent act complained of. The Buffalo, 148 F. 331. Evidence in proceeding to limit liability for injury to passenger held insufficient to sustain burden resting on her to show that gangplank on which she fell was wet and slippery and in unfit condition as charged, and petitioner allowed to limit liability. In re Starin, 151 F. 274.

Privity or knowledge: Right of owner to limit his liability is dependent upon his want of complicity in acts causing disaster, and burden is upon him to show affirmatively that he has properly officered and equipped vessel for contemplated service. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788, rvg. 133 F. 577. Owner held not entitled to limit liability for injuries to employes of an iron company by explosion of oil tank resulting from negligent acts of its superintending engineer, the evidence raising a strong presumption that he was incompetent to take charge of work involved in changing vessel to oil burner, and it not appearing that owner made any inquiry as to his competency. Id. Superintending engineer held not the alter ego of the shipowner. Id. Where owner has provided suitable person or persons as his agent to inspect or provide for the proper equipment of the vessel, he is not deprived of benefit of statute by proof of negligence of such agent, where he has had no notice or knowledge of such negligence or resultant defect. The Tommy [C. C. A.] 151 F. 570, rvg. 142 F. 1034. Owner of barges held not deprived of right to limit liability for death of employe because due to defective tongs used in unloading rails, which were borrowed from master of another barge than that on which they were used, it appearing that tongs were infrequently used and were not part of regular equipment of each barge, that it was customary to borrow them from other barges having them when needed, that owner had no notice of unfitness, and that his manager replaced unfit tongs when requested, and it not being shown that captains of barges on which tongs were used and from which they were borrowed, or either of them, were unfit to discharge their duties or that owner was negligent in employing them. Id.

30. Rev. St. § 4284, 4 Fed. St. Ann. 849. Ohio Transp. Co. v. Davidson S. S. Co. [C. C. A.] 148 F. 185.

31. Rev St. § 4285, 4 Fed. St. Ann. 850. Statute gives owner absolute right to relieve himself from further liability by turning vessel and freight over to trustee, and, for purpose of determining nature and extent of right, is controlling over admiralty rule 59 authorizing appraisement and payment of amount into court, or giving of a stipulation to do so, in lieu of surrender. Ohio Transp. Co. v. Davidson S. S. Co. [C. C. A.] 148 F. 185. Hence owner, who acts promptly, may, before any order is made on an unaccepted appraisement, dismiss that part of his petition asking for an appraisement and, by amendment, ask for appointment of trustee to whom vessel may be transferred. Id. Fact that vessel has become less valuable by reason of higher insurance rates, greater cost of operation, and poor business, held not to deprive him of such right. Id.

to a limited liability in a particular case,[32] but the right may be interposed as a defense in an action in personam in a state court where there is only a single claim and hence no need of apportionment.[33] Matters of procedure under these statutes are treated elsewhere.[34]

§ 15. *General average.*[35]—The owner or master of a vessel is entitled to contribution from the owners of the cargo toward paying expenses incurred in saving the vessel and cargo from destruction by perils solely incident to navigation and unmixed with negligence on the part of the owner or the crew,[36] and has a lien on the cargo therefor which is generally enforced by requiring a deposit of money on an average bond from the respective owners before delivery of their goods.[37] The consignee cannot, however, be compelled to execute an average bond containing unreasonable terms.[38] The execution of a general average bond by the owner of a part of the cargo does not preclude him from setting up, in defense of liability thereon, that the wreck occurred because of the unseaworthiness or the negligence of the vessel owner, and is therefore not the subject of general average.[39] A final carrier is not bound to investigate, at his own risk the origin and validity of an apparently valid lien for general average asserted against property in transit by a previous carrier, provided it acts in good faith.[40]

§ 16. *Wreck.*[41]

§ 17. *Marine insurance.*[42]—The insurer is generally exempted from liability for loss due to unseaworthiness.[43] Where it appears that a vessel was seaworthy when the policy was issued, it will be presumed that it remained so until it sank, in the absence of evidence to the contrary.[44] So too, if the vessel is seaworthy at the commencement of the voyage and sinks or is lost from an unknown cause, it will be presumed that the loss was occasioned by an unavoidable peril of the sea.[45] Policies

32. In action for wrongful death in state court. The Lotta, 150 F. 219.

33. Held that defense could be interposed in action for wrongful death, and value of vessel could be ascertained in that court, and fact that defendant had had vessel appraised in ex parte proceeding in Federal court, and had paid appraised value into registry of that court, did not authorize enjoining of prosecution of action in state court. The Lotta, 150 F. 219.

34. See Admiralty, 7 C. L. 30.

35. See 6 C. L. 1493.

36. Is no right of general average if wreck was due to unseaworthiness or bad seamanship. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

37. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

38. Where cargo owner refused to sign bond on ground that he was not liable at all, but subsequently offered to sign it, he waived objection that it was unreasonable. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

39. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

40. Where shipment was not shown to have been transported under through bill of lading, and different carriers were not shown to constitute one connecting line and goods were delivered by connecting carrier to final carrier, who knew nothing of circumstances, with instructions not to deliver them to consignee until he executed general average bond attached to waybills, which contained recitals adapted to show that casualty was due to natural maritime peril, held that final carrier had right to refuse to deliver goods until bond was executed without investigating legality of claim to general average. Berry Coal & Coke Co. v. Chicago, etc., R. Co., 116 Mo. App. 214, 92 S. W. 714.

41. See 4 C. L. 1487.

42. See 6 C. L. 1493.

43. Where plaintiff warranted in policy that insured barge was seaworthy, held that evidence that before insured purchased it, and at his request, the insurer through its agents inspected it and reported to insured that it was seaworthy, thereby inducing him to accept policy and pay premium thereon, was admissible for purpose of shewing that insurer admitted barge to be seaworthy at time it issued policy. Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358. Whether loss of barge was due to injuries received from running it into trees held for jury under evidence. Id. Question whether vessel was lost on account of unseaworthiness or on account of peril of river held for jury, though there was no evidence as to exact cause of its sinking. Id. Error in failing to incorporate in instruction a provision of policy that vessel should at all times during its continuance be seaworthy as a condition precedent to plaintiff's right to recover, held harmless in view of fact that uncontradicted evidence showed that it had been kept seaworthy. Id.

44, 45. Paddock-Hawley Iron Co. v. Providence-Washington Ins. Co., 118 Mo. App. 85, 93 S. W. 358.

sometimes provide that there shall be no liability for loss or damage due to stranding unless caused by stress of weather.[46] Whether a liability policy issued to a tug covers expenses incurred by the tug in successfully defending itself against a claim of liability for the loss of barges in its charge depends on the terms of the policy.[47] A valued policy insuring against loss of freight ordinarily covers only freight actually at risk on the voyage.[48] A provision in the policy as to what shall constitute a constructive total loss is controlling.[49] An underwriter taking possession of the vessel for the purpose of repairing her must make such repairs as expeditioulsy as possible, and by delaying them beyond a reasonable time will be deemed to have forfeited his right to return her and to have constructively accepted an abandonment,[50] and this is equally true though the policy provides that the acts of the insurers is recovering, saving, and preserving the property insured in case of disaster shall not be considered a waiver or an acceptance of an abandonment.[51] An act done for the benefit of the property to whomsoever it may belong should not be construed against the party who thus seeks the common interest.[52] The sue and labor clause, while authorizing the insurer to have the vessel recovered and repaired without thereby defeating any defense it may have to any claim of the insured un-

46. Wind causing stranding of vessel held "stress of weather," though such wind was not a tornado or extraordinary, and not unusual in section where stranding occurred. Huntington, A. & B. S. Transp. Co. v. Western Assur. Co. [W. Va.] 57 S. E. 140.

47. Policy held not to cover such expenses. Munson v. Standard Marine Ins. Co., 145 F. 957. "Sue and labor" clause, if applicable to liability policy at all, held to apply only to defense and safeguard of vessels other than tug, and not to render company liable for such expenses. Id.

48. Valued policy insured against loss of freight "on board or not on board," "carried or not carried," and provided "full interest admitted, the policy being deemed sufficient proof of interest." Vessel was stranded and completion of voyage prevented. Part of freight was paid in advance and part of balance earned by forwarding a portion of cargo saved. Held that insured was not entitled to recover full amount of policy, but only such proportion thereof as actual loss of freight bore to freight which would have been earned had voyage been completed, actual loss being amount remaining after deducting amount prepaid and freight on cargo forwarded after stranding less cost of salving it. New York & Cuba Mail S. S. Co. v. Royal Exch. Assurance, 145 F. 713.

49. Where policy provided that there should be no abandonment as for a constructive total loss unless cost of necessary repairs required solely by the disaster, exclusive of cost of raising and rescuing vessel and taking her to dock, etc., should be equivalent to seventy-five per cent. of agreed value of vessel specified in policy, held that constructive total loss thereunder was such a loss as that repairs made necessary thereby, exclusive of cost of raising and rescuing vessel and taking her to dock, would be seventy-five per cent. of her value. Searles v. Western Assur. Co. [Miss.] 40 So. 866. Insured held not entitled to abandon vessel and recover as for constructive total loss where it appeared that to repair damage caused solely by disaster would cost less than twenty-five per cent. of agreed value. Id. Insured could not justify abandonment as for constructive total loss by showing that there were no facilities for raising vessel where disaster occurred and that it was therefore impossible for him to do so, and that nearest point where she could have been docked was four hundred miles away, and making this an element of damage, showing as to him she was worthless, particularly where, if this element was included, whole damage would not equal seventy-five per cent. of value. Id. Though insured was not compelled to make effort to save vessel before he could abandon and sue, held that he was bound to show existence of conditions warranting abandonment. Id. Fact that trial court stated that constructive total loss had to be proven, and that proof of total loss would not prove constructive total or partial loss, if error, held harmless in view of fact that evidence conclusively showed that, if plaintiff had any right to recover for total loss, it could only have been for constructive total loss, and that he declared for, and all his evidence was addressed to, constructive total loss. Id.

50. Hume v. Frenz [C. C. A.] 150 F. 502, rvg. 141 F. 481. Delay of insurers in making permanent repairs, permitting vessel to be sold for cost of such repairs, etc., held, under circumstances, a constructive acceptance of an abandonment, even though owner originally had no right to abandon. Id.

51. Hume v. Frenz [C. C. A.] 150 F. 502, rvg. 141 F. 481. Provision refers only to authorized acts and does not authorize taking posession by insurers for purpose of making partial repairs not amounting to indemnity. Id.

52. Act of insurers in sending agent to take charge of stranded vessel and to salve her if possible not to be construed against them on question of acceptance of abandonment, where it was agreed between them and owners that he was to go as agent for all concerned. Hume v. Frenz [C. C. A.] 150 F. 502, rvg. 141 F. 481.

der the policy, does not ordinarily require it to pursue such a course.[53] When a loss takes place for which an abandonment may be made the master remaining with the ship becomes the agent of those who retroactively become its owners in consequence of that event, and, when an abandonmnt is accepted by the underwriters, they are liable for his wages from the time of the loss to which it relates, though not made or accepted until long afterwards.[54] Where the policy provides that the insurance shall not inure to the benefit of any carrier and shall be void to the extent of any amount paid by or recoverable from any carrier, the insurer, on advancing to the insured the amount of his loss as a loan, and taking an assignment of his claim against the carrier, may recover thereon againt the latter, though the bill of lading provides that the carrier shall have the benefit of any insurance effected by the owner.[55] The admiralty law gives no maritime lien on a vessel for unpaid premiums on insurance thereon.[56] The acceptance of the balance of the premium after loss does not preclude the company from defending on the ground that no such loss has occurred as that sued for.[57]

Provisions as to notice and proof of loss must be substantially complied with.[58] Proof of loss is waived by a promise to pay, or admission of liability,[59] or by a denial of liability on other grounds.[60]

A provision requiring any action on the policy to be brought within a specified time after the loss occurs is valid if reasonable.[61] The complaint in an action at law on a policy should show the nature of the plaintiff's interest in the property,[62] and that the cause of the loss was a risk insured against.[63] An objection that a verdict for a sum which the insurer has absolutely promised to pay by way of compromise is excessive is untenable.[64]

§ 18. *Maritime torts and crimes.*[65]—The Federal statutes make it a penal offense to fail to provide seats and tables for use of immigrants at regular meals, or to carry a greater number of passengers than that authorized by the certfiicate of in-

53. Searles v. Western Assur. Co. [Miss.] 40 So. 866.

54. Insurance companies, who constructively accepted abandonment, and not owner, held liable for wages of master from date of stranding. Hume v. Frenz [C. C. A.] 150 F. 502, rvg. 141 F. 481.

55. Such provision in bill does not amount to an agreement to insure for carrier's benefit. Bradley v. Lehigh Valley R. Co., 145 F. 569. Loan held not to amount to payment so as to estop insurer from claiming benefit of provision of policy. Id.

56. The City of Camden, 147 F. 847.

57. Searles v. Western Assur. Co. [Miss.] 40 So. 866.

58. Company held sufficiently advised about loss to comply with any duty devolving upon libelants with respect to notice of loss. Luckenbach v. Home Ins. Co., 142 F. 1023.

59. Failure to furnish proof within thirty days held waived, no misrepresentation having been shown. Huntington, A. & B. S. T. Co. v. Western Assur. Co. [W. Va.] 57 S. E. 140. Where proofs were waived by compromise or acknowledgment of liability, held that company could not demand proof after expiration of thirty days' period. Id.

60. Denial held waiver of proof and survey. Huntington, etc., Co. v. Western Assur. Co. [W. Va.] 57 S. E. 140.

61. Provision requiring action to be commenced within twelve months held valid. Luckenbach v. Home Ins. Co., 142 F. 1023. Fact that suit was necessary to establish legal liability of tug for loss of tow, which was loss for which recovery was sought on policy, held no excuse for delay, no reason being shown why so much time was lost in invoking remedy. Id.

62. Allegations that plaintiff's interest in vessel was equal in amount to her value as set forth in policy, and, by way of conclusion, that plaintiff had an interest, held insufficient. Dollar S. S. Co. v. Maritime Ins. Co., 149 F. 616.

63. Demurrer on ground that complaint did not show that seizure by man of war was risk insured against overruled, plaintiff contending that policy, in which "warranted free from capture, seizure, and detention" clause had been stricken out, expressly covered such risk, and defendant that it was only intended to cover risks excluded from some other policies by such clause, and hence that latter should have been set forth to show what real risk insured against was. Dollar S. S. Co. v. Maritime Ins. Co., 149 F. 616.

64. Where agent agreed to pay amount demanded by way of compromise, objection that verdict for that amount was excessive, since policy provided that insurer should be liable only in proportion as sum insured bore to value of vessel, was untenable. Huntington, A. & B. S. T. Co. v. Western Assur. Co. [W. Va.] 57 S. E. 140.

65. See 6 C. L. 1493.

spection.[66] The liability of the vessel and its owners for injuries to passengers,[67] or for loss or damage to goods carried,[68] is treated in previous sections. The duty of officer to prevent the unauthorized landing of aliens is treated elsewhere.[69]

Liability in admiralty for personal injuries.[70]—A vessel is bound to use ordinary care to prevent injury to persons rightfully on board,[71] and one undertaking to furnish tackle for loading and discharging cargo must use reasonable care to furnish such as will meet the requirements placed upon it when used in the customary manner.[72] There is a presumption of negligence where an appliance breaks in ordinary use, and it appears that there has been no adequate inspection since it has been subjected to extraordinary strain.[73] A vessel owner agreeing to furnish a competent winchman is responsible for his defaults.[74] It is the duty of the vessel to warn inexperienced employes as to dangers of their employment which they do not know and appreciate.[75] One of two joint tort feasors may not defeat an action against himself by showing that the other was equally responsible for the injury complained of.[76] The vessel is not ordinarily liable for injuries due to the fault or negligence of fellow-servants,[77] provided such negligence is the sole cause of the injuries complained of.[78] The first officer is not chargeable with negligence because of improper navigation where he acts pursuant to the orders of the master.[79] Contributory negligence may preclude recovery[80] or be ground for a division of damages.[81] The faults of a vessel sunk in a collision cannot be imputed to her passen-

66, 67. See § 8, ante.

68. See § 9, ante.

69. See Aliens, 7 C. L. 98.

70. See 6 C. L. 1493.

71. Schooner held liable to master of tug moving it from one berth to another for injuries resulting from falling through hatchway covered by tarpaulin in such a way as to lead one to believe that hatch covers were on when in fact they were not. The Martha E. Wallace, 151 F. 353.

72. Stevedores discharging cargo substituted, with knowledge of officers of vessel, for wire fall rope fall provided to be used at another place for different purpose. Rope broke when sling came in contact with hatch coaming, which was expectable occurrence. Held that vessel was liable for resulting injury to stevedore working in hold. The St. Gothard, 149 F. 790.

73. Vessel held liable for injury to seaman due to breaking of runner passing through eye of rope by which yard was hauled up, though it appeared that it had recently been subjected to unusual strain, it appearing that it had not been adequately inspected after storm. The Lyndhurst, 149 F. 900. Evidence held to require finding that chief officer was not notified of defective condition of runner. Id.

74. Evidence held to show that injury to stevedore was due solely to negligence of winchman furnished by barge in applying power to winch recklessly and violently, so that barge was liable for resulting damages. City of San Antonio [C. C. A.] 143 F. 955, afg. 135 F. 879.

75. Scow held liable to dock laborer, employed in reloading ore onto steamer, who was injured by traveling crane and derrick, for failure to notify him of the danger or to give such proper and suitable warning of forward movement of derrick and of its proximity to the place where he was at work as to reasonably safeguard and protect him, he being inexperienced. The Buffalo, 147 F. 304.

76. Where collision was due to negligence of both vessels, held no defense to action based on state statute against one of them for death of passengers and crew to show that other was also negligent. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

77. Vessel held not liable for injury to stevedore resulting from his falling through hatch when he stepped on hatch cover, he having been injured in course of progressive work, while using structure which his fellow laborers were engaged in perfecting, and to whose assistance he came. The Charles Tiberghien, 143 F. 676. Master, who was responsible for vessel's excessive speed which contributed to collision, held not fellow-servant of subordinate officers and crew acting under his orders. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

78. Defendant not relieved if he is himself at fault. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

79. Will not preclude recovery for his death where he was not personally negligent. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

80. Injury received by chief cook from falling through partially open hatch held due to his own negligence. The Cuzco, 148 F. 914. Tug held not liable for injuries to fireman who was scalded while attempting to tighten packing on valve by reason of turning screw wrong way, the machinery not being materially defective or out of repair. The Mars [C. C. A.] 149 F. 729, afg. 145 F. 446, 138 F. 941. Evidence held insufficient to show that death of port quarantine physician, resulting from his falling through open coal bunker hatch while ship was coaling, was due to negligence of ship's officers, they having warned him, etc. The Euxinia [C. C. A.] 150 F. 541, rvg. 136 F. 502, 144 F. 524.

81. Sailor injured by breaking of runner passing through eye of rope, whereby yard was hauled up, while riding down halyards

gers and crew who were wholly free from blame.[82] The admiralty courts have no jurisdiction under the general maritime law of a proceedng in rem against a vessel for damages for death due to negligence, though they may enforce such liens if given by state statutes.[83] Awards of damages in particular cases will be found in the note.[84]

Common-law liability for injuries to persons employed on board vessels.[85]—As in other cases it is the duty of one employing another to work on board a vessel to provide for him a reasonably safe place in which to work[86] and to provide suitable machinery and appliances and to keep them in repair,[87] and he is liable for injuries proximately resulting from his failure to do so.[88] Where the evidence does not show that the thing which caused the injury was under the management or exclusive control of the defendant, negligence is not to be presumed from the accident itself.[89] The servant ordinarily assumes risks incident to his employment,[90] or which are known to him or so obvious that a person exercising ordinary care would have known of them.[91] Contributory negligence on the part

or immediately after having done so, held guilty of negligence, that practice being forbidden as tending to put unnecessary strain on runner, and damages divided. The Lyndhurst, 149 F. 900.

82. Fact that vessel which was sunk in collision was also negligent held immaterial. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906.

83. Death of passenger. The Lotta, 150 F. 219. Where passengers and crew of vessel were drowned in collision for which both vessels were to blame, and owner commenced proceedings for limitation of liability, held that personal representatives could maintain claims for damages against other vessel in admiralty, the statutes of the state to which both vessels belonged giving a right of action for death due to negligence. The Hamilton [C. C. A.] 146 F. 724, afg. 134 F. 95, 139 F. 906. Where statute gave right of action to widow of deceased, held that, where claim filed stated that claimant was widow of deceased, fact that it also described her as executrix was immaterial and could be disregarded as merely descriptio personae. Id. Amendment so as to allege that petitioner claimed as widow held properly allowed. Id.

84. Award of damages for injury to stevedore through negligence of winchman furnished by barge held not excessive. City of San Antonio [C. C. A.] 143 F. 955, afg. 135 F. 879. Tug captain injured by falling through hatchway on schooner allowed $2,000, and expenses and wages lost. The Martha E. Wallace, 151 F. 353. Dock laborer awarded $6,000 for loss of arm while loading ore from barge onto steamer. The Buffalo, 147 F. 304. Awards made to representatives of passengers and crew drowned in collision approved. The Hamilton [C. C. A.] 146 F. 724, afg. 139 F. 906. Three thousand dollars damages awarded for death of young colored man in collision. Carter v. Seaboard Air Line R. Co., 151 F. 531.

85. See 6 C. L. 1493.

86. Vessel owner held negligent in putting fuel oil in tank during progress of work thereon, and at time when he knew that work remained to be done in drilling holes into tank, without warning men doing work of danger of an explosion. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788, rvg. 133 F. 577. Such negligence held proximate cause of injury to workmen by explosion of tank, since officers should have foreseen that explosion was likely to occur through escape of gas through holes. Id.

87. International Mercantile Marine Co. v. Fleming [C. C. A.] 151 F. 203. Under N. Y. Laws 1902, p. 1748, c. 600, making a master responsible for negligence of his superintendent or foreman, and evidence, held that question whether negligence of foreman employed by owner of vessel to superintend discharge and reloading caused injury to longshoreman who fell through defective hatchway was for jury. Id. Contributory negligence of plaintiff held also for jury. Id.

88. Though negligence of workmen in drilling holes by candle light was contributing cause of explosion, held that negligence of owner was proximate cause since concurring act might have been foreseen and consequences provided against. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788, rvg. 133 F. 577. Where negligence of master in failing to supply proper appliance is concurring cause, he is not relieved from liability because others may be liable also. International Mercantile Marine Co. v. Fleming [C. C. A.] 151 F. 203.

89. Owners of tow held responsible for strength of appliances thereon for adjusting hawser and for management of that end of the latter, owner of tug having no knowledge of the strength of such appliances and nothing to do with such management. Frederickson v. Central Wharf Towboat Co., 101 Me. 406, 64 A. 666.

90. One taking charge of a caisson which is to be towed. Frederickson v. Central Wharf Towboat Co., 101 Me. 406, 64 A. 666. Fact that one is zealous in the performance of his duty does not excuse him from taking precautions for his own safety. Id. Employe does not assume risk caused by master's negligence as one incident to his employment. Monongahela River Consol. C. & C. Co. v. Hardsaw [Ind. App.] 79 N. E. 1062.

91. Doctrine of assumed risk, depending as it does upon an implied contract between the parties, is not raised by showing that employe could have discovered defect

of the person injured is ordinarily a defense.[92] The usual rules of pleading apply in actions for personal injuries.[93]

SIDEWALKS; SIGNATURES; SIMILITER; SIMULTANEOUS ACTIONS; SLANDER, see latest topical index.

SLAVES.

A slave could not take or hold property either in his own name or through the medium of a trustee.[94]

The condition of peonage.[95]—A law authorizing a child under the control of the state to be bound out to service under proper instructions does not violate the constitutional provision against slavery and involuntary servitude.[96]

Slave marriages, their offspring, and inheritance.[97]—A customary marriage of slaves is voidable only and not void,[98] hence the issue thereof is legitimate if the marriage is not disaffirmed.[99] In Louisiana, however, customary marriages are not recognized,[1] and slave marriages, while binding in morals, produced no civil effects until ratified by continual cohabitation after emancipation or by acknowledgment as provided by statute.[2] Mere cohabitation of slaves as man and wife, with the consent of their master, did not constitute a valid marriage,[3] and the parties having separated while still in bondage, and never having cohabited after emancipation, their children were not legitimated.[4] Statutes were enacted in most if not all of the southern states legalizing the status of slaves who were living together as husband

by an examination which he did not make, and, under circumstances, could not reasonably have made or been expected to make. Monongahela River Consol. C. & C. Co. v. Hardsaw [Ind. App.] 79 N. E. 1062. Allegation that plaintiff had no knowledge and was wholly ignorant of defect in barge, by reason of which he was injured, held to negative constructive as well as actual knowledge, and to repel idea of obvious risk. Id. Held error to impute to workman knowledge that space above crude oil in tank was filled with explosive combination of gas and air, and hence to hold that he was negligent in using lighted candle while drilling hole in tank. McGill v. Michigan S. S. Co. [C. C. A.] 144 F. 788, rvg. 133 F. 577.

92. Contributory negligence is not a matter of contract but of conduct, and is ordinarily a question of fact. Monongahela River Consol. C. & C. Co. v. Hardsaw [Ind. App.] 79 N. E. 1062. In action for damages for injuries to longshoreman received by falling through hatch, cover to which was too short, where it appeared that plaintiff assisted in putting on cover, held that exclusion of evidence to show that it was common practice of longshoremen to chock covers when otherwise too short was harmless, since, if plaintiff knew, or should have known, of defect, he was guilty of contributory negligence and assumed risk, irrespective of any omission to chock it, and if he did not know or was not chargeable with notice, omission was of no importance on issue of contributory negligence and assumption of risks, nor was evidence of any importance on issue whether accident was due to negligence of fellow-servants, since failure of master to supply proper appliance was contributing cause. International Mercantile Marine Co. v. Fleming [C. C. A.] 151 F. 203. In action for damages for injury to plaintiff resulting from his falling through hatchway negligently left open by defendant stevedores, question of plaintiff's contributory negligence held for the jury under the evidence. Doyle v. Eschen [Cal. App.] 89 P. 836. Plaintiff held negligent in standing unnecessarily within the bight of the line attached to tow of which he was in charge. Frederickson v. Central Wharf Towboat Co., 101 Me. 406, 64 A. 666. Painter injured by falling through uncovered hatch held guilty of contributory negligence as a matter of law. Jones v. Moran Bros. Co. [Wash.] 88 P. 626.

93. Variance between allegation that injury was caused by defect in "barge" and proof that defect was in a "boat" held immaterial. Monongahela River Consol. C. & C. Co. v. Hardsaw [Ind. App.] 79 N. E. 1062.

94. Evidence insufficient to show as a matter of law that beneficiary in deed of trust was a freed woman. Wright v. Nona Mills Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 620, 98 S. W. 917.

95. See 6 C. L. 1497.

96. Act Dec. 18, 1894, Code 1895, § 2372 et seq. Kennedy v. Meara [Ga.] 56 S. E. 243.

97. See 6 C. L. 1497.

98, 99. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123.

1. While the Louisiana Code of 1825 inferentially permitted the marriage of slaves with the consent of their masters, it did not dispense with the celebration of nuptials. Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

2. As provided by act of 1868. Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

3, 4. Johnson's Heirs v. Raphael, 117 La. 967, 42 So. 470.

and wife, though there had been no marriage.[5] A provision merely conferring on the issue of customary marriages of negroes the rights of legitimate children does not legalize the marriage of their parents.[6] A slave child not the issue of a customary marriage cannot inherit from his father under the Kentucky statute.[7]

SLEEPING CARS; SOCIETIES, see latest topical index.

SODOMY.[8]

Copulation per os is not within the Texas statute.[9] The crime may be charged in the words of statute.[10] The repulsive nature of the facts is not ground for unduly relaxing the rule against the statement of conclusions by witnesses.[11] Where it is claimed that the offense could not have been committed with an animal in the manner stated because of the height of the animal, profert of the animal in court is not proper,[12] but the proof should be made by a witness who had measured it.[13]

SOLICITATION TO CRIME; SPANISH LAND GRANTS; SPECIAL ASSESSMENTS AND TAXES; SPECIAL INTERROGATORIES TO JURY; SPECIAL JURY; SPECIAL VERDICT, see latest topical index.

SPECIFIC PERFORMANCE.

§ 1. Nature and Propriety of Remedy In General (1946).
§ 2. Subject-Matter of Enforceable Contract (1950).
§ 3. Requisites of Contract (1951).
A. Necessity of Contract (1951).
B. Mutuality of Contract (1953).
C. Definiteness of Contract (1954).
D. Legality and Fairness of Contract (1955).
E. Necessity of Written Contract (1956).
§ 4. Performance by Complainant (1957).
§ 5. Actions (1959). Jurisdiction (1959). Parties (1960). Defenses (1960). Pleading (1961). Evidence (1962). The Relief Granted (1962). Findings and Decree (1964). Appeal (1964). Costs (1964).

§ 1. *Nature and propriety of remedy in general.*[14]—Specific performance being a purely equitable remedy, the granting of relief is discretionary with the court,[15] and relief will be denied where the complainant has an adequate remedy at law,[16] or where specific enforcement would be harsh, inequitable, and unjust,[17]

5. Evidence held to show that a certain negress and not another, was living with deceased, a former slave, as his wife at the time of passage of the act of 1865 and its adoption in the constitution of 1869, providing that all persons who had not been married but who were then living together as husband and wife should be held in law as married. Haines v. Haines [Miss.] 43 So. 465.

6. Hence last provision of Act Ky. Feb. 14, 1866, had no extraterritorial effect. Middleton v. Middleton, 221 Ill. 623, 77 N. E. 1123.

7. Ky. St. 1903, § 1399a. Turner v. Terrill, 30 Ky. L. R. 89, 97 S. W. 396.

8. See 6 C. L. 1498.

9. Mitchell v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 74, 95 S. W. 500.

10. Indictment for attempt sustained. People v. Erwin [Cal. App.] 88 P. 371.

11. Statement as to what accused was doing held a conclusion. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 S. W. 1016.

12, 13. Richardson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 220, 94 S. W. 1016.

14. See 6 C. L. 1498.

15. Though all the averments of the bill are admitted. Kott v. Giles, 27 App. D. C. 581. Where a contract for the sale of land is free from unfairness, overreaching, or overkeenness on plaintiff's part, the denial of relief is an abuse of discretion, the contract possessing the other essentials necessary to specific performance. Kirkpatrick v. Pease [Mo.] 101 S. W. 651.

16. Legal remedy adequate: The owner of a judgment has an adequate remedy at law against one agreeing to purchase same. Spotts v. Eisenhauer, 31 Pa. Super. Ct. 89. One appointed an exclusive agent under a contract has an adequate remedy at law upon its breach. Taussig v. Corbin [C. C. A.] 142 F. 660. Construction and maintenance of cross ways across railroad according to covenants not compelled where embarrassing to the railroad and of no utility to complainant, and complainant relegated to his action for damages. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200. Growing trees purchased with a view to severance do not constitute a landed estate of peculiar desire, and hence not appraisable in damages. Marthinson v. Kling, 150 F. 48. A failure to perform a contract to sell growing timber for a sum certain whereby the purchaser lost a resale for a higher sum certain is remediable in damages unless insolvency of the vendor is shown. Id. Legal remedy held adequate for breach of agreement to make deed effective after death in consideration of sup-

or more hurtful to the rights of others in interest than its denial to the suitor,[18] or where any of the parties to the contract is incompetent,[19] or the contract was procured by fraud,[20] bad faith,[21] or misrepresentations[22] which were relied upon by the injured party,[23] but mere representations will not operate as a bar where the party acting on them had equal means of determining their truth.[24] The complainant may be required to do equity,[25] and he may be required to satisfy equities

port during life. Nelson v. Lybeck [S. D.] 111 N. W. 546. Where a vendee in possession under a contract of sale is denied specific performance of the contract on the ground of the invalidity of the contract, the defendant is not entitled to a decree restoring possession to him, the remedy at law being adequate. Simpson v. Belcher [W. Va.] 56 S. E. 211. The parties to an agreement or award identifying a disputed boundary line have an adequate remedy at law. Orr v. Cox [W. Va.] 56 S. E. 522. Where a subcontractor agreed that upon a failure to complete the contract the contractor should have the right to use all tools and machinery used in connection therewith for the purpose of completing the work, upon a breach the latter had an adequate remedy at law and specific performance was refused. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102. Upon a breach of an executory contract for the sale of a staple article of commerce, the parties have an adequate remedy at law. Block v. Shaw [Ark.] 95 S. W. 806. A vendee under a parol agreement to convey land whose only **part performance** was the payment of a portion of the purchase price has an adequate remedy at law. Titus v. Taylor [N. J. Eq.] 65 A. 1003. Agreement to permit plaintiff to build drain on defendant's land for benefit of plaintiff not specifically enforced, though plaintiff had incurred expense on the faith thereof. Robinson v. Luther [Iowa] 109 N. W. 775. It is only performance of a substantial part which will make remedy at law inadequate. About $100 paid on purchase price of $2,900 insufficient. Haffner v. Dobrinski [Okl.] 88 P. 1042.

Legal remedy inadequate: The remedy at law for the breach of a contract to transfer corporate stock of an unknown and unascertainable value is inadequate. Dennison v. Keasbey [Mo.] 98 S. W. 546. Under a contract to make a testamentary disposition of property in consideration of services in caring for the promisor during his life, the law furnishes no adequate remedy to compensate a breach. Berg v. Moreau [Mo.] 97 S. W. 901. Defendant contracted with a city to maintain a pump and engine of a certain capacity and horsepower as part of its waterworks system. Held upon a breach of the contract the city was without an adequate remedy at law. Hubbard City v. Bounds [Tex. Civ. App.] 16 Tex. Ct. Rep. 304, 95 S. W. 69. Remedy at law for a refusal to convey land or any estate therein is inadequate. Wilhite v. Skelton [C. C. A.] 149 F. 67. Where after entering into a binding contract to purchase a waterworks a city refused to appoint appraisers provided for therein to determine its value based upon its productive worth, the waterworks company is without an adequate remedy at law. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8. The grantee under an oral contract to convey land has no adequate remedy at law. White v. Poole [N. H.] 65 A. 255. Legal remedy held inadequate for breach of contract by water company to sell its plant to municipality in view of statute forbidding municipality to erect an independent plant if option to sell was accepted by municipality. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

17. Shakespeare v. Caldwell Land & Lumber Co. [N. C.] 57 S. E. 213.

18. Where an allotment in kind of an aliquot portion of securities intended to be managed by a syndicate for promoting the interest of subscribing stockholders under a general plan for the reorganization of two railroads would disrupt the plan of reorganization and result in inequality between complainants and other shareholders, relief will be denied. Cella v. Brown [C. C. A.] 144 F. 742.

19. Detroit United R. Co. v. Smith, 144 Mich. 235, 13 Det. Leg. N. 228, 107 N. W. 922.

20. A fraudulent representation that only rights and privileges by law incident to a previous grant of coal under a certain tract had been conferred by that grant, whereas additional privileges had been conferred, is a bar. Cleavenger v. Sturm, 59 W. Va. 658, 53 S. E. 593. Where material fraudulent representations have been relied upon by the defendant, the contract will not be enforced though the resulting prejudice is slight. Id. A representation that only 27 or 28 acres of coal on a certain tract had been sold is a bar where plaintiff at the time knew that he had previously conveyed 40 acres of coal on such tract to a third person, though defendant could have determined the amount sold by an examination of the records. Id.

21. Refusal because cross complainant purchaser was agent and trustee for vendor and failed fully to disclose all facts. Jones v. Byrne, 149 F. 457.

22. Where at the time of entering into a settlement which was the basis of a contract to convey plaintiff falsely represented the situation to defendant, specific performance was refused irrespective of whether the misrepresentations were intentional or otherwise. Noecker v. Wallingford [Iowa] 111 N. W. 37. Misrepresentation by complainant's agent to defendants who were illiterate that the right to purchase under the contract expired in one year unless the land was paid for in full is a bar to the relief, the representation being relied upon and the land having been sold by defendants to a third person at the expiration of a year. Brock v. Tennis Coal Co., 29 Ky. L. R. 1283, 97 S. W. 46.

23. Crotty v. Effler [W. Va.] 54 S. E. 345.

24. Representation that 20 or 25 acres of a certain vein of coal in a certain tract remained unsold, though false, is not a bar where the boundaries of the amount sold were pointed out to defendant. Cleavenger v. Sturm, 59 W. Va. 658, 53 S. E. 593.

25. Where a wife did not join in a con-

which have arisen in favor of defendant subsequent to the execution of the contract.[26] A husband may be required to perform a contract to convey land to his wife's children made in consideration of a transfer of land to him by the wife where to refuse relief would work a fraud upon her, although chancery may be without power to empower the wife to convey her real property by her separate deed.[27] The remedy is known to the civil law,[28] and where the damages upon breach of contract are inadequate, the court must award specific performance,[29] but where the parties have by contract liquidated their damages, the damages as liquidated will be deemed adequate.[30] Under the South Dakota statute it is presumed that a breach of a contract to convey cannot be adequately compensated by damages but the presumption is not conclusive.[31] A suit on a contract to devise [32] an action to enforce a contract to convey land,[33] or a bill for an injunction to restrain a defendant from violating his contract,[34] are in substance bills for specific performance. The remedy may be demanded by way of counterclaim in an action by the vendee to recover a portion of the purchase money paid,[35] or by cross bill or answer demanding affirmative relief,[36] or by mandatory injunction when applied to a covenant to maintain cross ways over or under a railroad,[37] and the fact that there is a similar statutory duty enforceable by mandamus does not oust the jurisdiction of equity.[38] Under the New Jersey statute the action lies to compel a railway company to perform its statu-

tract to convey to complainant and subsequently joined with her husband in an agreement to convey to third persons who took with notice, a stipulated sum being agreed to be paid to the wife for her inchoate right of dower, complainant was required as a condition to relief to pay such sum to the wife, or, in case of her refusal to the persons to whom she conveyed, leaving her to her remedy at law as against them. Saldutti v. Flynn [N. J. Eq.] 65 A. 246. A vendee in possession may be required to pay interest on the purchase price though the contract did not provide for the payment of interest in order to offset the benefits derived from his possession. Pillsbury v. Streeter, Jr., Co. [N. D.] 107 N. W. 40. Where defendant agreed in consideration of employment to assign all inventions to plaintiff, the latter was required as a condition to the specific performance of the contract to reimburse defendant for all expenses in procuring the patents. Portland Iron Works v. Willett [Or.] 89 P. 421. Where conditions arise which were unforseen at the time of the execution of the contract, equity may apply the contract to the unexpected conditions and direct a modification as a condition to specific performance, Assignment of patents covering instruments not contemplated at the time contract was entered into. Wright v. Vocalion Organ Co. [C. C. A.] 148 F. 209.

26. Where agreement to lease did not contemplate the payment of a chattel mortgage by the lessee as a condition precedent to the execution of the lease, but before its execution the mortgage matured and was paid by the lessor, the delay in the execution of the lease being at the request of the lessee and the bill offering to pay the amount found due upon performance of the agreement, the lessee was required to pay the mortgage as a condition to relief. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801.

27. Where the conveyance to the husband was executed, the unconstitutionality of a law empowering chancery to authorize the wife to convey by her separate deed is not a defense as he is not thereby deprived of his property without due process of law. Kittredge v. Kittredge [Vt.] 65 A. 89.

28. A contract to convey land will be specifically enforced. Girault v. Feucht, 117 La. 276, 41 So. 572; Lehman v. Rice [La.] 43 So. 639.

29. Girault v. Feucht, 117 La. 276, 41 So. 572.

30. Under the Louisiana Code, art. 2463, where a promise to sell is accompanied by the giving of earnest money, the contract cannot be specifically enforced, as either party may recede from it, the vendee by forfeiting the money paid, and the vendor by refunding double the amount received. Capo v. Bugdahl, 119 La. 992, 42 So. 478. The contrary rule is generally held elsewhere. See post, this section.

31. Rev. Civ. Code, § 2341. Nelson v. Lybeck [S. D.] 111 N. W. 546.

32 In re Peterson [Neb.] 107 N. W. 993.

33. Though the parties term it an action for partition. Noecker v. Wallingford [Iowa] 111 N. W. 37. Complaint held to state facts constituting the action one for specific performance. White v. Sage [Cal.] 87 P. 193.

34. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102. Equity will enforce by injunction covenants in a contract not to manufacture brick or sell fire clay to any one other than the complainant. Sand Co. v. Fire Brick & Clay Co., 124 Ill. App. 599.

35. Bloomgarden v. Hoffmann, 102 N. Y. S. 20.

36. Under the West Virginia Code an answer demanding affirmative relief has the same effect as a cross bill, and where defendant sets up a contract at variance with that alleged by plaintiff and establishes it, he is entitled to have it specifically performed. Garrett v. Goff [W. Va.] 56 S. E. 351.

37, 38. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200.

tory duty to maintain bridges over public highways,[39] and to compel the removal of abuttments in a public highway and the drainage of a cul-de-sac caused by the construction of a bridge over a highway, notwithstanding remedies by mandamus, ejectment, or indictment.[40] A bill cannot be maintained against one willing and able to perform,[41] nor to secure an advance performance of any part of the contract.[42] Where there is a dispute as to the balance due on a contract, the party seeking performance may file a bill for that purpose and submit the dispute to the court;[43] and where a stipulation for the appointment of appraisers to determine the price to be paid for land agreed to be conveyed is not a condition or an essence of the agreement, and the parties cannot be placed in statu quo by a refusal to grant relief, the court may determine the price itself and grant specific performance.[44] One owning land under a contract of sale who had agreed to convey to a third person cannot be compelled by such third person to bring an action for specific performance against his vendor,[45] but a constructive trust arising ex maleficio gives the cestui qui trust the right to enforce specific performance against the constructive trustee.[46] A provision for the payment of liquidated damages in the event of the breach of the contract by either party does not deprive the injured party of his remedy by specific performance.[47] Specific performance will not be decreed where the defendant is incapable of performing,[48] but where specific performance of the entire contract is impossible, performance of such portion of the contract as the defendant is capable of performing may be decreed.[49] Under the Codes the bill will not be dismissed, though it shows on its face that plaintiff has no cause of action because of defendant's inability to perform.[50] The right to relief may be waived[51] or barred by estoppel[52] or laches.[53] Spe-

39. Act held constitutional although it conferred upon the municipality a mandatory as distinguished from a preventive remedy. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484.

40. Borough of Metuchen v. Pennsylvania R. Co. [N. J. Eq.] 64 A. 484.

41. An agreement by an executrix to resign and to waive her right to commissions which she had frequently offered to perform. Spotts v. Eisenhauer, 31 Pa. Super. Ct. 89.

42. A lease with an option to purchase at its expiration cannot be specifically enforced as to the latter until the lease has expired. Collins v. Delaney Co. [N. J. Eq.] 64 A. 107.

43. Dispute as to whether land agreed to be conveyed should be paid for in cash or by the assumption of a trust deed thereon. Johnson v. Tribby, 27 App. D. C. 281.

44. Contract by a city to purchase a waterworks, the price to be paid to be determined by appraisers and to be based upon its productive worth, the city refused to apoint appraisers, held not a condition of the contract. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8.

45. Ferguson v. Kelley, 4 Ohio N. P. (N. S.) 126.

46. Plaintiff orally agreed that the vendor should convey to defendants and that they should in turn give plaintiff a bond for a deed. Held to create a constructive trust enabling plaintiff to compel defendants to carry out their agreement. Peterson v. Hicks [Wash.] 86 P. 634. See, however, Capo v. Bugdahl, 117 La. 992, 42 So. 478.

47. Kettering v. Eastlack, 130 Iowa 498, 107 N. W. 177. Contract not to engage in a certain business in a certain place so long as the other party to the contract was engaged in the same business at that place. Harris v. Theus [Ala.] 43 So. 131.

48. It will be denied where the vendor does not own the land which he has agreed to convey, notwithstanding the fact that he could acquire title to it for a reasonable price. Public Service Corp. v. Hackensack Meadows Co. [N. J. Eq.] 64 A. 976. A prior valid contract to convey to other persons or the pendency of condemnation proceedings renders specific performance by the vendor impossible. Flattau v. Logan [N. J. Eq.] 65 A. 714. Undisputed evidence held to show that defendant did not own land in controversy. Sweeney Cattle Co. v. Erb [S. D.] 108 N. W. 32. Where the vendor is unable to make the deed called for by his contract, the vendee is not entitled to complete specific performance. Gregg v. Carey [Cal. App.] 88 P. 282. A contract to convey cannot be enforced as against one who has parted with his title. Halsell v. Renfrow, 202 U. S. 287, 50 Law. Ed. 1032. Evidence held insufficient to show that defendant was bona fide unable to convey an unincumbered title. Schreiber v. Elkin, 103 N. Y. S. 330.

49. Where specific performance of the entire contract cannot be had because of a deficiency in the amount of land agreed to be conveyed, the vendee may elect to have specific performance with abatement for the deficiency. Garrett v. Goff [W. Va.] 56 S. E. 351.

50. In New York the action will be transferred to the law calendar. Messenger v. Chambers, 103 N. Y. S. 1100.

51. Right to specific performance of an agreement to devise is not waived by failure

cific performance may be had as against a third person to whom the property was conveyed with notice of complainant's equity,[54] and this rule obtains likewise in the civil law,[55] but the contract must create a charge upon the land.[56] Relief cannot be had against a subsequent bona fide purchaser,[57] and the question of notice is ordinarily a question of fact.[58]

§ 2. *Subject-matter of enforceable contract.*[59]—The contract must be of such a nature as to be capable of being specifically enforced,[60] hence contracts for continuing personal services will not be enforced;[61] and in the absence of an express negative covenant, equity will not aid the enforcement of such a contract by injunction,[62] and even where the covenant is express, injunctive aid will be granted only where the services are of such a peculiar or extraordinary nature that no adequate remedy at law can be had in the event of a breach.[63] An agreement to pay moneys received

to object to probate of will which violates the agreement. Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943.

52. Where a vendee under a contract to purchase refuses to make further payments and advises the vendor to find another purchaser and made no offer to complete his purchase until long after his notes for deferred payments fell due, he is estopped to demand specific performance, the vendor having sold the property to a third person in the meantime. Hyden v. Perkins, 30 Ky. L. R. 583, 99 S. W. 290.

53. A delay of ten years on the part of the complainant before tendering performance held to constitute laches. Stevens v. McChrystal [C. C. A.] 150 F. 85. An unexplained delay of three years to sue on contract to sell land held fatal laches. Sharp v. West, 150 F. 458. Long delay by vendee in possession, during which time value of property increased, held ground for denial. Free v. Little [Utah] 88 P. 407. Delay of several years in making any claim under the contract, during which time the land increased tenfold in value, and all burdens due to financial depression were carried by defendant, held to constitute laches though short of the statutory period of limitations. Stewart v. Yesler estate [Wash.] 89 P. 705. Where owing to lapse of time it would be impossible for plaintiff to perform or to place the parties in statu quo, relief will be denied Fielder v. Warner [Ark.] 95 S. W. 452. A delay of three years in enforcing an oral agreement to convey land held not to constitute laches where the delay was caused by an effort to exchange it for other land. White v. Poole [N. H.] 65 A. 255. Delay at the instance of the vendor is not laches, nor is a delay in bringing suit until seven or eight months after his death where no injury results. Lawson v. Mullinix [Md.] 64 A. 938. Defendant in possession is not guilty of laches by failing to demand a deed for several years where such a demand would have been unavailing. Detroit United R. Co. v. Smith, 144 Mich. 235, 13 Det. Leg. N. 228, 107 N. W. 922. Mere forbearance to begin an action for a period within the statute of limitations does not constitute laches where defendant has not been misled to his damage in the belief that his repudiation of the contract had been assented to. Harrison v. Rice [Neb.] 111 N. W. 594. Delay of nearly forty years in bringing an action for the specific performance of a contract to reconvey held not to constitute laches where all parties to the transaction believed a deed of reconveyance by the executor of the grantee to be valid. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760. The fact that land enhanced in value during the delay does not bar relief where the delay is not chargeable to the party seeking it. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768.

54. Waddington v. Lane [Mo.] 100 S. W. 1139.

55. A recorded promise of sale will be enforced though prior to the execution of a deed thereunder the property is sold to a third person. Lehman v. Rice [La.] 43 So. 639.

56. Contract by an owner of land to sell a certain amount of hops to be grown thereon each year does not create an interest in the land which a subsequent purchaser with notice is bound to perform unless he assumes the contract. Bower v. Bowser [Or.] 88 P. 1104.

57. Halsell v. Renfrow, 202 U. S. 287, 50 Law. Ed. 1032. But he is not a bona fide purchaser unless he purchased for a valuable consideration and without notice of complainant's rights. Wilhite v. Skelton [C. C. A.] 149 F. 67.

58. Evidence held to show that third persons to whom land was conveyed took with notice of such facts as would put an ordinarily prudent person on inquiry regarding a prior sale. Waddington v. Lane [Mo.] 100 S. W. 1139.

59. See 6 C. L. 1501.

60. Contract to erect a building will not be specifically enforced. Braithwaite v. Henneberry, 124 Ill. App. 407.

61. Leonard v. Plum Bayou Levee Dist. Directors [Ark.] 94 S. W. 922. One appointed an exclusive agent for a certain defined territory cannot have the contract specifically enforced. Taussig v. Corbin [C. C. A.] 142 F. 660. Contract to act as saleswoman and demonstrator, injunction refused to restrain her from entering the service of another in violation of her contract. Gossard Co. v. Crosby [Iowa] 109 N. W. 483.

62. Gossard Co. v. Crosby [Iowa] 109 N. W. 483.

63. A breach of a contract to act as saleswoman and demonstrator of peculiar kind of corset will not be enjoined, it not appearing that exceptional talent was required to understand the corset nor why any woman of experiece and good address could not perform the services. Gossard Co. v. Crosby [Iowa] 109 N. W. 483.

on an annuity,[64] to convey an easement of right of way,[65] to convey a leasehold interest,[66] a trust,[67] or an option to buy specific property, will be specifically enforced.[68] Specific performance of a contract concerning chattels will not be decreed unless they have a peculiar value not subject to pecuniary compensation,[69] such as chattels having no ascertainable value,[70] but the mere fact that the property is adapted to certain use or work and is at a point where the work is to be done does not bring the contract within the exception.[71] A contract with a city to maintain pump and engine of a certain capacity and horsepower as part of a waterworks system will be specifically enforced.[72] A parol agreement to devise in consideration of support is enforceable,[73] and a contract in writing for the adoption of a child and to make him a legal heir may be specifically enforced,[74] though ineffective as a legal statutory adoption.[75] An agreement or award identifying a disputed boundary line is not a conveyance of land and will not be specifically enforced.[76]

§ 3. *Requisites of contract. A. Necessity of contract.*[77]—It is not essential that the contract be one which would support an action at law,[78] but the contract must be valid [79] and complete.[80] Hence an unaccepted offer,[81] or a contract with-

64. An annuity was purchased by complainant for his sister under an agreement with her to pay over to him all moneys received thereunder during his life. Harris v. Parry [Pa.] 64 A. 334.

65. Burrell v. Middleton [N. J. Eq.] 65 A. 978.

66. A contract to convey a leashold interest in a mine will be specifically enforced. Wilhite v. Skelton [C. C. A.] 149 F. 67.

67. An obligation to pay an annuity imposed by the terms of a will, though the will provided that the payment thereof should not constitute a charge upon the real or personal property of the testator, was specifically enforced where those charged with its payment accepted benefits under the will. Spearman v. Foote, 126 Ill. App. 370.

68. Marthinson v. King, 150 F. 48.

69. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102. Specific performance of an executory contract for the sale of cotton refused on the ground that it could at all times be bought in the market. Block v. Shaw [Ark.] 95 S. W. 806. For breach of contract relating to personalty, the remedy at law is ordinarily deemed adequate, but specific performance may in discretion be awarded. Denial sustained as to contract for sale of corporate stock. Butler v. Wright, 186 N. Y. 259, 78 N. E. 1002.

70. Contract for the transfer of corporate stock enforced when there was no way in which the value of the stock could be determined, none of it being on the market. Dennison v. Keasbey [Mo.] 98 S. W. 546.

71. A subcontractor agreed that upon a failure to complete the work the contractor should have the right to possession and use of all machinery and tools used in connection therewith for the purpose of completing the contract. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102.

72. Hubbard City v. Bounds [Tex. Civ. App.] 16 Tex. Ct. Rep. 304, 95 S. W. 69.

73. An agreement to devise was entered into between plaintiff's parents and the deceased owner in consideration that the former should support the latter. The agreement was performed by the former until their death and thereafter by plaintiff with the consent of decedent. Held plaintiff was entitled to specific performance against the heirs of decedent. Soper v. Galloway, 129 Iowa, 145, 105 N. W. 399.

74. A contract binding the foster parents to make the adopted child an equal heir with their own children may be specifically enforced against the estate of the deceased foster parent dying intestate. Pemberton v. Pemberton's Heirs [Neb.] 107 N. W. 996. Agreement to adopt which was fully executed by plaintiff and her parents. Anderson v. Anderson [Kan.] 88 P. 743.

75. Pemberton v. Pemberton's Heirs [Neb.] 107 N. W. 996. An agreement by a foster parent in consideration of the surrender of a child to him that the child shall have all rights of inheritance may be specifically enforced, though insufficient to constitute an instrument of adoption because not acknowledged and recorded. Chehak v. Battles [Iowa] 110 N. W. 330.

76. Orr v. Cox [W. Va.] 56 S. E. 522.

77. See 6 C. L. 1502.

78. Agreement by father to devise, made in consideration of son's marriage. Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943.

79. Public contract requiring ratification by voters of action of selectmen invalid where there was a popular vote but no precedent action by the selectmen. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Contract entered into without legislative sanction between a town and a city whereby the latter as part of its sewer system through the town agreed to construct and operate a tidal chamber in a certain manner. The tidal chamber was constructed in another municipality and was so operated as to become a nuisance. Relief denied. Belleville Tp. v. Orange [N. J. Eq.] 62 A. 331. An agreement to convey made by a married man without his wife's assent cannot be specifically enforced, at least by one who knew of the marriage at the time of making the agreement. Free v. Little [Utah] 88 P. 407. Contract by an inventor in consideration of employment for a term of years an an increased salary, to assign inventions made during the term of employment is not contrary to public policy. Wright v. Vocalion Organ Co. [C. C. A.]

out consideration,[82] unless under seal,[83] will not be specifically enforced. A gift will not be specifically enforced unless the donee in reliance upon it places himself in a position where it would be inequitable to refuse relief.[84] The fact that the contract provides for the execution of a more formal contract does not render it unenforceable.[85] One not a party or privy to a contract cannot be compelled to carry it out,[86] nor can he maintain an action for its specific performance,[87] but a

148 F. 209. An unacknowledged contract to convey land by a married woman, being void, cannot be specifically enforced. Simpson v. Belcher [W. Va.] 56 S. E. 211. A contract closed between attorneys in fact whereby the principals who were not privies to the estate should co-operate in prosecuting their claims against an estate empowering the agents to that end and to receive and divide the shares recovered is hostile to the estate and not enforceable as a settlement between kin or heirs. Hall v. Hartford, 50 Misc. 133. 100 N. Y. S. 392.

80. An accepted option becomes a binding executory contract to sell. Watkins v. Robertson, 105 Va. 269, 54 S. E. 33. Undisputed evidence held to show no contract to convey land in controversy. Sweeney Cattle Co. v. Erb. [S. D.] 108 N. W. 32. An agreement merely to furnish "a warranty deed and clear title" is not a contract to sell and convey land and cannot be enforced as such. Kingsbury v. Cornelison, 122 Ill. App. 495. An abortive deed, when sufficient in other respects, may constitute a contract for the sale of land which will be specifically enforced. Kirkpatrick v. Pease [Mo.] 101 S. W. 651.

Evidence held insufficient to establish a contract to make a testamentary bequest. Ostrom v. De Yoe [Cal. App.] 87 P. 811; Killian v. Heinzerling, 47 Misc. 511, 95 N. Y. S. 969. An oral agreement to convey in consideration of support. Boam v. Greenman [Mich.] 13 Det. Leg. N. 985, 110 N. W. 508; Fowler v. De Lance [Mich.] 13 Det. Leg. N. 908, 110 N. W. 41. Consideration of clearing land. Fielder v. Warner [Ark.] 95 S. W. 452. An oral contract to execute a quitclaim deed and to release complainant from a claim for damages caused by destroying a spring by the construction of its railroad. Chicago, etc., R. Co. v. Chipps, 226 Ill. 584, 80 N. E. 1069. Evidence held to show merely a license and not a contract to convey. Detroit, P. & N. R. Co. v. Hartz [Mich.] 13 Det. Leg. N. 1086, 110 N. W. 1089.

Evidence held sufficient to establish a parol gift of land. Bevington v. Bevington [Iowa] 110 N. W. 840.

81. It must be one for the sale, not a mere continuing offer to sell. Exchange of telegrams concluding "Have accepted option," held mere offer. Pomeroy v. Newell, 102 N. Y. S. 1098. A written agreement to sell land by a warranty deed for $1,600, the agreement to be in force from its date to April 1st, is a mere offer of sale and unenforceable. Sprague v. Schotte [Or.] 87 P. 1046. An option does not become an executory contract for the sale of land until accepted in accordance with its provisions. Pollock v. Brookover [W. Va.] 53 S. E. 795. Evidence held not to show such assent to contract to support as would entitle to specific performance of agreement to convey in consideration of such support. Nelson v. Lybeck [S. D.] 111 N. W. 546. Acceptance coupled with conditions not good. Sharp v. West, 150 F. 458. A provision in a contract between a water company and a city that the city should have the option of purchasing the plant of the former by giving notice of its intention so to do one year prior to the expiration of the contract is a continuing irrevocable offer which is accepted and becomes a binding contract capable of being specifically enforced when the city gives such notice. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8. Where complainants refused to accept a general plan of reorganization of a railroad except upon conditions which defendants refused to concede, such reorganization did not create a trust in complainants' favor which they could enforce. Cella v. Brown [C. C. A.] 144 F. 742.

82. Where a physician agreed to educate a child in consideration of a release of a claim for damages by the mother for injuries caused at child birth, the evidence was held insufficient to show malpractice, and contract was held to be without consideration. Kirk v. Middlebrook [Mo.] 100 S. W. 450. Consideration sufficient, in contract to employ and pay wages and teach methods, and in return to receive inventions of employé during term of service. Mississippi Glass Co. v. Franzen [C. C. A.] 143 F. 501. A lease giving the lessee the option to purchase is based upon a sufficient consideration. Murphy v. Hussey, 117 La. 390, 41 So. 692. An agreement in writing to sell land by a warranty deed, for $1,600, the agreement to be in force during a certain time, held nonenforceable for lack of consideration. Sprague v. Schotte [Or.] 87 P. 1046. Agreement of father to devise, formally made, in contemplation of son's marriage, will be enforced. Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943.

83. A consideration is necessary where the contract is under seal. Watkins v. Robertson, 105 Va. 269, 54 S. E. 33.

84. Improvements made by a donee held not to be of a sufficiently valuable character as to justify the specific execution of the gift. Young v. Crawford [Ark.] 100 S. W. 87.

85. Pelletreau v. Brennan, 113 App. Div. 806, 99 N. Y. S. 955.

86. An unauthorized contract to convey the interest of another cannot be enforced against the holder of such interest or his vendee. Contract by a life tenant to convey his estate and that of the remaindermen is not binding on the latter. Brustmann v. Motrie, 103 N. Y. S. 541. A contract entered into with an agent in behalf of his principal is not a contract with the agent and consequently specific performance cannot be had against him. Taussig v. Corbin [C. C. A.] 142 F. 660. Contract by a son that if plaintiff would take care of his invalid mother she should be entitled to a child's share of whatever was accumulated

contract not under seal may be specifically enforced against an undisclosed principal.[88] A contract by an unauthorized agent cannot be enforced [89] unless ratified,[90] or the circumstances are such as to estop the principal from denying his authority.[91]

(§ 3) *B. Mutuality of contract.*[92]—A contract to be specifically enforceable must be mutually binding upon the parties to it,[93] and of such a character as to give either of the parties the right to its specific enforcement.[94] There must be mutuality of remedy,[95] but a provision giving the vendee the right to reject a defective title does not render it unenforceable.[96] It must bind each of the parties equally as to its duration.[97] A contract for the sale of land is not rendered unilateral merely because unsigned by the vendee,[98] and though unilateral in its inception, a contract may become mutually binding if executed in whole [99] or in part [1, 2] or if

by the three during the life of the mother and son is not enforceable against the mother. Bunting v. Dobson, 125 Ga. 447, 54 S. E. 102. Defendant's son agreed to sell certain corporate stock to complainant which was owned by his mother and which she agreed to sell to him on terms at variance with his contract with complainant. Held the contract between complainant and defendant's son could not be enforced against defendant. Booth v. Dingley [Mich.] 14 Det. Leg. N. 80, 111 N. W. 851.

87. The vendee under an agreement to convey cannot maintain an action against one who agreed to convey to his vendor to compel the performance of his contract. Ferguson v. Kelley, 4 Ohio N. P. (N. S.) 126.

88. Pelletreau v. Brennan, 113 App. Div. 806, 99 N. Y. S. 955.

89. Thompson v. Marshall [Neb.] 110 N. W. 1104. Evidence held sufficient to show authority of broker to enter into a contract for the sale of the land in controversy. Pierce v. Wheeler [Wash.] 87 P. 361. A contract to divide property established as firm property against an estate held not authorized by a power of attorney as alleged. Hall v. Hartford, 50 Misc. 133, 100 N. Y. S. 392.

90. Acceptance of benefits with knowledge of the fraud. Bennett v. Glaspell [N. D.] 107 N. W. 45. Contract entered into with officers of a corporation having ostensible authority held enforceable against the latter where part of consideration paid was retained until the election of a new board of directors. Davidson v. Cannabis Mfg. Co., 113 App. Div. 664, 99 N. Y. S. 1018. Evidence held to show a ratification of contract by a broker by acceptance of portion of the purchase price. Roberts v. Hilton Land Co. [Wash.] 88 P. 946.

91. Statement that a certain person was authorized to sell held to estop the principal from denying such person's authority. Gregg v. Carey [Cal. App.] 88 P. 282.

92. See 6 C. L. 1502.

93. An agreement which does not bind the vendee to purchase the property cannot be enforced. Kingsbury v. Cornelison, 122 Ill. App. 495. A contract for the sale of several tracts of land, including the homestead, not signed by the vendor's wife, is binding upon him except as to the homestead and hence is not void for lack of mutuality. Johnson v. Higgins [Neb.] 108 N. W. 168.

94. A contract to convey made by one without title cannot be enforced by him against the vendee and hence lacks mutuality. Public Service Corp. v. Hackensack Meadows Co. [N. J. Eq.] 64 A. 976.

95. As the principal under a contract appointing another an exclusive agent for a certain territory could not have the contract specifically enforced against the agent, the latter cannot invoke the remedy in case of a breach by the principal. Taussig v. Corbin [C. C. A.] 142 F. 660.

96. A provision in a contract giving the vendee the right to reject bad title is not a potestative condition which will render the contract unenforceable for want of mutuality. Girault v. Feucht, 117 La. 276, 41 So. 572.

97. Where defendant agreed to furnish sewerage service at a certain annual rental but plaintiff was at liberty to terminate the contract at any time, there was no mutuality of obligation necessary to sustain the action. Soloman v. Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300. A contract which binds one of the parties indefinitely and gives the other the option of terminating it at will lacks mutuality in the sense that it will not be specifically enforced. Taussig v. Corbin [C. C. A.] 142 F. 660.

98. An option to buy real estate given for a valuable consideration does not lack mutuality of obligation merely because it is signed by only the vendor. Woodward v. Davidson, 150 F. 840. Under the New York statutes, a contract for the sale of land is not unilateral because not signed by the vendee, it being shown that he promised to take the property and to pay the consideration named. Boehly v. Mansing, 102 N. Y. S. 171. In Kentucky a contract for the sale of land signed by the vendor alone is binding and enforceable against both of the parties to it. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768.

99. Where the vendor has performed all conditions to be performed by him under the contract, the fact that the vendee could not have enforced the contract against him does not constitute a defense. Johnson v. Higgins [Neb.] 108 N. W. 168. Stipulation to secure resignation of directors of a corporation, the entire assets of which defendant agreed to purchase, where the resignations were secured before the action was brought. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31. The doctrine of nonenforceability in equity for lack of mutuality has no application to an executed contract. Mississippi Glass Co. v. Franzen [C. C. A.] 143 F. 501.

1, 2. A contract is not unenforceable for lack of mutuality because the purchaser is

the defect rendering it unilateral is removed before rescission,[3] or by the filing of a bill for its specific performance.[4] Thus the holder of an option may specifically enforce it, though the vendor could not have done so, as by commencing the action he renders himself subject to the court's decree.[5] An option to purchase land may be specifically enforced.[6]

(§ 3) *C. Definiteness of contract.*[7]—The contract must be definite and certain in its terms,[8] in its description of the subject-matter,[9] as to the purchase price,[10]

not obligated to pay the purchase price if he has in fact paid part of it and has repeatedly expressed his readiness to pay the balance and tenders it in court. Stevens v. Kittredge [Wash.] 87 P. 484. A contract to convey is not unilateral merely because, while the vendor agrees to sell, the vendee does not expressly agree to purchase where part of the purchase price is paid. Lawson v. Mullinix [Md.] 64 A. 938.

3. A contract to convey a homestead signed by the husband alone may be specifically enforced where the wife joins therein prior to a repudiation by the vendee on the ground that the wife had not joined. Kettering v. Eastlack, 130 Iowa, 498, 107 N. W. 177.

4. Where the vendee did not sign a contract to convey land and it was therefore not binding upon him, the subsequent institution of the action by him renders the obligation mutual. Western Timber Co. v. Kalama River Lumber Co., 42 Wash. 620, 85 P. 338.

5. Conner v. Clapp, 42 Wash. 642, 85 P. 342.

6. An option to purchase land upon the performance of certain conditions is not unenforceable for want of mutuality but is enforceable by either party within the time specified. Boston & W. St. R. Co. v. Rose [Mass.] 80 N. E. 498. An option to purchase at the expiration of a lease is enforceable though not binding on the optionee. Meyer v. Jenkins [Ark.] 96 S. W. 991. An accepted option creates a mutual contract which will be specifically enforced. Watkins v. Robertson, 105 Va. 269, 54 S. E. 33. A lease giving the lessee an option to purchase is not unenforceable as wanting mutuality. Murphy v. Hussey, 117 La. 390, 41 So. 692.

7. See 6 C. L. 1503.

8. Abortive deed sought to be enforced as a contract for the sale of land held sufficiently definite in its terms. Kirkpatrick v. Pease [Mo.] 101 S. W. 651. Where land was conveyed under an agreement to reconvey for the purpose of avoiding costs and charges by enabling the grantee to institute actions to settle the title, the agreement to reconvey if otherwise sufficient was not uncertain because of the indefiniteness of the costs and charges. McAlien v. Raphael [Tex. Civ. App.] 96 S. W. 760. Contract to convey undivided portion of a leasehold estate in land held definite. Wilhite v. Skelton [C. C. A.] 149 F. 67. Agreement to adopt held sufficiently definite and certain in its terms. Anderson v. Anderson [Kan.] 88 P. 743. Contract held definite on the question of deferred payments and security therefor. Libby v. Parry, 98 Minn. 366, 108 N. W. 299. A mere executory parol agreement by a father to purchase an unidentified house for his daughter is too indefinite. Baldridge v. George [Pa.] 65 A. 662. A contract mutually to aid each other in prosecuting claims against an estate and to divide the amounts recovered held too indefinite to enforce. Hall v. Hartford, 50 Misc. 133, 100 N. Y. S. 392. Parol agreement to convey held indefinite in that it was not apparent whether a gift in the present or in the future was intended, or whether the estate intended to be conveyed was in fee, for life, for a term of years, or at sufferance. Logue v. Langan [C. C. A.] 151 F. 455. Contract in regard to constructing improveing, and perfecting candy machines and to give the benefit of improvements and inventions was held to be too indefinite to enforce specifically as an agreement to assign patents for inventions. Hildreth v. Duff, 143 F. 139.

9. A contract to convey 47 different descriptions out of a total 57 marked on a plat is too indefinite where no specific tract could be identified as one of the 47 referred to in the agreement, no specific tracts having been agreed upon. Auer v. Mathews [Wis.] 108 N. W. 45. A description "Clinton & Joralemon street" is sufficient as the land intended can be identified by extrinsic evidence. Pelletrau v. Brennan, 113 App. Div. 806, 99 N. Y. S. 955. Where a contract described land as lot 16 on an official map in the vendor's office and the vendee took possession, there was sufficient data for a competent surveyor to locate the land and the description was sufficient. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883. A description which did not mention the state, county, district, or town in which the land was located held sufficient, the contract providing other means of identification. Crotty v. Effler [W. Va.] 54 S. E. 345. Description sufficient to admit parol proof to identify the land. Howison v. Bartlett [Ala.] 40 So. 757. Description of land as "the property and all improvements thereon situated in the square bounded by St. Louis, Toulouse, Rampart and Basin streets and known as 500 to 506 Basin street," held sufficient. Girault v. Feucht, 117 La. 276, 41 So. 572. Description sufficient which stated the names of owners of surrounding lands and described the land as consisting of various lots referred to by their numbers. Whiteside v. Winans, 29 Pa. Super. Ct. 244. Contract to convey a lot to be selected by defendant out of plaintiff's land held too indefinite as not giving dimensions of the lot or the quantity of land to be selected. Freeburgh v. Lamoureux [Wyo.] 85 P. 1054.

10. Contract fixing the price at a specified sum with the added value of improvements is sufficiently clear. Meyer v. Jenkins [Ark.] 96 S. W. 991. Contract held sufficiently definite as to the amount of the purchase price. Peirce v. Wheeler [Wash.] 87 P. 361. Contract reciting the receipt of

its duration,[11] the quantity of the interest agreed to be conveyed,[12] and the manner of its performance,[13] but a contract is not indefinite because of a failure to fix a time for performance.[14] The test to determine whether a parol contract is sufficiently definite is the same as that applied to written contracts.[15]

(§ 3) *D. Legality and fairness of contract.*[18]—Equity will withhold relief where the contract is of such a character,[17] or the circumstances under which it was entered into are such as would render it unconscionable to enforce it,[18] or where the contract is illegal.[19] While mere inadequacy of consideration is not alone sufficient to render a contract unconscionable,[20] unless so gross as to amount to proof

$100 paid to bind the bargain which was to be considered and accepted as part of the purchase price which was $5,500 less commission, not too indefinite to be enforced, since the commission could be ascertained. Whittier v. Gormley [Cal. App.] 86 P. 726.

11. A contract to furnish sewerage service indefinite as to the length of time it should continue will not be specifically enforced. Soloman v. Wilmington Sewerage Co., 142 N. C. 439, 55 S. E. 300.

12. Agreement by a father to convey a quarter interest in a newspaper business to his son held too indefinite as not showing whether a quarter interest in the business was intended, the father not possessing a quarter interest, or a quarter of the father's interest. Sarasohn v. Kamaiky, 103 N. Y. S. 320.

13. Contract by a son that if plaintiff would care for his invalid mother she should be entitled to a child's share in the property accumulated by the three held too indefinite as not providing for the manner in which it should be performed by the son. Bunting v. Dobson, 125 Ga. 447, 54 S. E. 102.

14. Equity will require it to be consummated within a reasonable time. Sawson v. Mullinix [Md.] 64 A. 938. Under Civ. Code 1657, where no time for payment is fixed in a contract for the sale of land, the money is payable at the time of the delivery of the deed. Hence a contract failing to fix a time for payment is not indefinite. Whittier v. Gormley [Cal. App.] 86 P. 726.

15. It is sufficiently definite if it is reasonably certain from the contract itself and the acts of the parties thereunder what land was intended. White v. Poole [N. H.] 65 A. 255.

16. See 6 C. L. 1504.

17. Agreement by a father to convey practically his entire estate to one of his sons after his death, to the exclusion of the other children, without any apparent good reason, held unfair. Sarasohn v. Kamaiky, 103 N. Y. S. 320. Agreement by which purchaser on nominal payment takes possession and is to make no further payments for ten years except from the net profits of the land with no obligation on him to make it yield profits. Haffner v. Dobrinski [Okl.] 88 P. 1042. A contract to sell land with all timber remaining thereon at the end of four years for 50 cents an acre in return for a right to haul logs over complainant's land which was the only outlet is not unconscionable in this sense where the cleared land at that time had little or no value, though since then mineral discoveries have greatly enhanced its value. Cox v. Burgess, 29 Ky. L. R. 972, 96 S. W. 577. A contract mutually to prosecute their claims and divide between one who claimed a partnership in a business constituting part of an estate and one who had agreed with decedent to act as his daughter, in consideration of an agreement to devise the entire estate, held unconscionable on the part of the latter. Hall v. Hartford, 50 Misc. 133, 100 N. Y. S. 392.

18. Where complainants' agent withheld from a widow who agreed to purchase the estate of her deceased husband at a certain price, the fact that he held a large claim against the estate whereby she was induced to purchase at an excessive price, specific performance was refused on the ground that the contract was unconscionable. Van Norsdall v. Smith, 141 Mich. 355, 12 Det. Leg. N. 478, 104 N. W. 660. Where the unfairness of a contract results from old age, mental weakness, poverty, ignorance, inexperience, or sex, relief will be denied though the opposite party was free from any intent to take advantage, if the actual result is inequality. Starcher Bros. v. Duty [W. Va.] 56 S. E. 524. The natural inaccessibility of land is not chargeable as oppression to one who furnishes a right of access in return for a contract to purchase knowingly made. Cox v. Burgess, 29 Ky. L. R. 972, 96 S. W. 577.

19. Contract assigning plaintiff's interest in a lode claim to defendant who owned a placer claim covering the lode for the purpose of procuring a patent to the entire tract and reconveying plaintiff's interest in the lode to him held enforceable though the fee required by the government on a patent for a lode claim was $5 per acre and on a placer claim only $2.50, the government not objecting. Carter v. Gray [Ark.] 96 S. W. 377.

20. The mere fact that the property agreed to be sold for $3,825 was worth from $4,500 or $5,000, does not render the contract unconscionable. Lawson v. Mullinix [Md.] 64 A. 938. Mere inadequacy of consideration not accompanied by other elements of bad faith is insufficient unless so excessive as to furnish satisfactory evidence of fraud. Van Norsdall v. Smith, 141 Mich. 355, 12 Det. Leg. N. 478, 104 N. W. 660. The mere fact that one agreeing, in consideration of a promise to make a testamentary bequest, to live with and take care of another, was in poor and humble circumstances, and would be materially benefited by being provided with a home aside from the bequest, does not render the contract unconscionable. Berg v. Moreau [Mo.] 97 S. W. 901. The fact that land which defendant agreed to sell for $500 was worth $700 is not alone sufficient. Crotty v. Effler [W.

of fraud,[21] in connection with other circumstances it may render the contract unenforceable,[22] and where the consideration agreed upon was adequate at the time the contract was entered into, the fact that the land subsequently increases in value will not bar relief.[23]

(§ 3) *E. Necessity of written contract.*[24]—The contract must be in writing and executed as required by the statute of frauds,[25] but where an agreement has been in part performed,[26] so that to refuse relief would be to perpetrate a fraud upon the grantee,[27] the fact that the agreement was not in writing will not bar relief. The part performance necessary to take an oral agreement sought to be enforced out of the statute must be pursuant and referable to and in performance

Va.] 54 S. E. 345. Contract for the sale of land held not to be unconscionable because sold at a lower price than its estimated value, the real value being speculative and both parties having equal opportunities to determine what it was. Evans v. Evans, 196 Mo. 1, 93 S. W. 969. A contract to sell at $44 per acre land for which the vendor was subsequently offered $50 is not unconscionable. Kilpatrick v. Wiley, 197 Mo. 123, 95 S. W. 213.

21. An agreement to pay $900 for an absolutely worthless judgment will not be enforced. Spotts v. Eisenhauer, 31 Pa. Super. Ct. 89.

22. Vendor declared incompetent twenty days after making of contract and land worth $225 an acre more than agreed price. Knott v. Giles, 27 App. D. C. 581.

23. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768.

24. See 6 C. L. 1505.

25. An agreement to convey not signed by the vendee cannot be specifically enforced as against him. Kingsbury v. Cornelison, 122 Ill. App. 495. A mere draft of a lease unsigned by either of the parties to it does not satisfy the requirements of the statute so as to authorize specific performance. Clement v. Young Amusement Co. [N. J. Err. & App.] 65 A. 185. An agreement to convey definite as to description, time, and consideration, and acknowledging the receipt of a partial payment thereon is a sufficient compliance with the statute of frauds, the only uncertainty being the medium of payment, whether in cash or by the assumption of a trust deed. Johnson v. Tribby, 27 App. D. C. 281.

26. Performance sufficient: Seven years' possession of land under a parol contract for the exchange of land coupled with valuable improvements made thereon with the knowledge and acquiescence of the grantor constitutes sufficient part performance. Evins v. Sandefur Julian Co. [Ark.] 98 S. W. 677. Part payment of the purchase money and taking possession in good faith with the knowledge of the vendor and making valuable improvements is a sufficient part performance. Sutherland v. Tainter [Okl.] 87 P. 900. Moving into the property and making improvements in the way of papering rooms and repairing buildings in sufficient part performance to satisfy the statute. Peterson v. Hicks [Wash.] 86 P. 634. A partition agreement partly in writing and partly by parol, actually executed by taking possession of the parts alloted, is enforceable and equity will require the parties to execute the necessary conveyances to vest each party with the title to his aliquot part. Jones v. Jones, 103 N. Y. S. 141. A parol gift of land will be enforced where the donee goes into possession and expends money in making permanent improvements. Bevington v. Bevington [Iowa] 110 N. W. 840. The statute is not a bar to the specific performance of an oral agreement to devise in consideration of support where complainant has gone into possession thereunder and performed all the conditions on his part to be performed, and this is true though the land is a homestead. Soper v. Galloway, 129 Iowa, 145, 105 N. W. 399. To prevent the statute being a bar to an oral contract, the vendee must show that he acted upon it by taking possession under its terms and that in reliance thereon he has made permanent and valuable improvements upon the land with his own funds with the knowledge of the vendor. Standard v. Standard, 223 Ill. 255, 79 N. E. 92. Part performance of an oral mutual contract to convey is sufficient where the conveyance to defendant has been executed and the vendees under defendant's contract have gone into possession. Kittredge v. Kittredge [Vt.] 65 A. 89.

Insufficient: Payment of part of the purchase price is not a sufficient part performance to warrant a decree. Titus v. Taylor [N. J. Eq.] 65 A. 1003. There was no part performance sufficient to take an oral agreement to convey out of the statute where all steps in that direction were disputed by a tenant in possession under an adverse claim as lessee. Halsell v. Renfrow, 202 U. S. 287, 50 Law. Ed. 1032. Part performance of a parol agreement by a father to purchase a house for his daughter is insufficient where the latter never went into possession except as a member of the family and never made any improvements thereon nor paid any portion of the purchase price. Baldridge v. George [Pa.] 65 A. 662.

27. Oral agreement by an uncle to convey land to a niece as an inducement to her to live near him. She fulfilled her part of the agreement but he died before conveying. Held that having so adequate a remedy at law, a refusal on the part of the executor to convey would operate as a fraud upon her. White v. Poole [N. H.] 65 A. 255. The statute of frauds is not a bar to the specific enforcement of an agreement to convey an easement of right of way where the agreement has been in part performed in such a manner as to render it a fraud upon the vendee to permit the vendor to avail himself of the statute. Burrell v. Middleton [N. J. Eq.] 65 A. 978. Where plaintiff's vendor was insolvent and defendant who held a

of the contract,[28] and must be such as to leave the complainant without an adequate remedy at law.[29] Hence a mere collateral act disconnected therewith will not suffice though done in reliance thereon with the knowledge of defendant and incapable of monetary compensation.[30] Equity will enforce a parol gift of land if accompanied by possession where valuable improvements have been made by the donee on the strength of and in reliance upon the gift.[31] In Pennsylvania conveyance will not be decreed where so doing would reduce a deed to a mortgage, the defeasance being parol.[32] Under a statute requiring contracts for the sale of land to be in writing, an undisclosed principal cannot maintain the action where his relation to the written contract can be established only by parol evidence.[33] A parol contract admitted by the answer will be enforced to the extent of such admission, though within the statute of frauds where the statute is not pleaded.[34] In New York only the seller can raise the question of no written contract.[35]

§ 4. *Performance by complainant.*[36]—One seeking specific performance must show that he has performed[37] within the prescribed time,[38] unless performance

vendor's lien on the land verbally agreed with plaintiff that upon the payment to him by the vendor of the amount due on such lien he would release same, held upon making such payment to the vendor and the latter paying such sum plaintiff was entitled to specific performance of the agreement to release. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

28. An uninterrupted continuation of possession by a tenant is not sufficient part performance of an oral renewal lease within the statute. Henry Jennings & Sons v. Miller [Or.] 85 P. 517. The performance on the part of the promisee under a parol contract to make a testamentary bequest must be referable alone to the contract sought to be enforced and must point to that contract and none other. Kirk v. Middlebrook [Mo.] 100 S. W. 450. Where after the foreclosure of a mortgage the mortgagor continued in possession under an oral contract to purchase, paid part of the purchase price and the taxes, and made improvements of the value of $25, part performance was sufficient. Phillips v. Jones [Ark.] 95 S. W. 164. Possession by a tenant is not such part performance as will take an oral contract to convey out of the statute unless the possession is clearly referable to the contract and not to the lease. Steger v. Kosch [Neb.] 108 N. W. 165, afd. on reargument [Neb.] 110 N. W. 983. Possession as a member of the father's family is insufficient part performance of an oral agreement by the former to convey to the son in consideration of support. Reel v. Reel, 59 W. Va. 106, 52 S. E. 1023. Where prior to taking possession under an oral unrestricted lease for ten years the lessor recedes therefrom and refuses to give other than a restricted lease for five years, the fact that the lessees entered into possession and made improvements claiming a lease for ten years does not entitle them to specific performance of the prior agreement on the ground of part performance. Czermak v. Wetzel, 100 N. Y. S. 167.

29. A contract within the statute of frauds will be specifically enforced on the ground of part performance, only when such partial performance has placed the complainant in a position where he is without an adequate remedy at law. Refused to compel performance of a contract to furnish telephone service though complainant had rendered services and contributed money toward the extension of the line in consideration of a contract for a definite period. Quinn v. Stark County Tel. Co., 122 Ill. App. 133.

30. Prior to the termination of its lease plaintiff secured an option for a lease on another building, but on securing an oral renewal of its lease with defendant for a period within the statute gave up its option with defendant's knowledge. Held insufficient to remove the bar of the statute. Henry Jennings & Sons v. Miller [Or.] 85 P. 617.

31. The making of improvements must be distinctly referable to the gift. Expenditure of $150 during an occupancy of seven years when consistent with the theory that it was made as a token of gratitude for being allowed to live on the land held not sufficient. Logue v. Langan [C. C. A.] 151 F. 455. Part performance sufficient to take a parol gift out of the statute must be such as to indicate an acceptance of the gift upon the terms on which it is alleged to have been made, and such as are fairly referable to no other understanding. Id.

32. Act June 8, 1881, P. L. 84, requires defeasances to be in writing at the time when the deed was made and to be signed, sealed, acknowledged, and delivered, and recorded to be effectual. Sterck v. Germantown Homestead Co., 27 Pa. Super. Ct. 336.

33. Contract for the sale of land signed by the owner and by one avowedly acting as agent for an undisclosed purchaser and therefore incurring no personal liability. Mertz v. Hubbard [Kan.] 88 P. 529.

34. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801.

35. That land to be conveyed by the buyer as part consideration is not identified by the contract does not matter since only the seller can raise the question of no written contract. Pelletreau v. Brennan, 113 App. Div. 806, 99 N. Y. S. 955.

36. See 6 C. L. 1506.

37. Performance deemed sufficient, the conditions precedent in the contract having been waived. Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619. Installation of a crossing will not be specifically compelled till complainant has according to the covenant des-

was waived,[39] or defendant has by his conduct estopped himself from insisting upon performance,[40] or a failure to perform was due to the fault of the defendant;[41] but a failure to perform in time is not a bar unless time is of the essence of the contract.[42] Failure to complete the contract as to mere incidental terms will not bar relief.[43] Complainant must make a tender of performance of all conditions which under the contract he is to perform;[44] but plaintiff need not tender performance of conditions the time for the performance of which has not accrued,[45]

ignated the place thereof. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200. Performance held sufficient under Rev. Codes 1899, § 4970, providing for relief from forfeiture by reason of failure to comply with provisions of contract upon making full compensation to the other party, except in case of a grossly negligent willful or fraudulent breach. Bennett v. Glaspell [N. D.] 107 N. W. 45. Performance by plaintiff under a contract to purchase hops and to make advances thereunder held sufficient. Livesley v. Johnston [Or.] 84 P. 1044. In consideration of defendants' promises to conduct a summer school at a certain place and to erect necessary buildings for that purpose, plaintiff agreed to convey certain land to them. Defendants conducted the school but erected no buildings whatever. Held they were not entitled to specific performance. Seven Mile Beach Co. v. Dollery [N. J. Err. & App.] 65 A. 991. Evidence held to show a failure to perform. Sire v. Long Acre Square Bldg. Co., 50 Misc. 29, 100 N. Y. S. 307. Contract to lease. Pittsburgh Amusement Co. v. Ferguson, 101 N. Y. S. 217. Agreement to assign a lease. Pratt v. Clark, 103 N. Y. S. 612, afg. 49 Misc. 146, 98 N. Y. S. 700.

38. Performance refused where time was made of the essence by agreement and gross laches in making required payments was shown. David Bradley & Co. v. Union Pac. R. Co. [Neb.] 107 N. W. 238. Under a lease giving the lessee an option to purchase within three years from a designated date time is of the essence of the agreement and a tender of performance one day after such time is too late Frey v. Camp [Iowa] 107 N. W. 1106. The optionee must accept within the time limited in the option. Pollock v. Brookover [W. Va.] 53 S. E. 795. Where the purchaser under an option contract abandoned it and failed to make payments called for, specific performance was refused. Hanschka v. Vodopich [S. D.] 108 N. W. 28.

39. Mere delay in paying the price may be excused where the right to forfeit the contract was not exercised and the fact that the land has increased in value does not prevent this. Nonpayment of installments when due or for nine years afterwards but possession retained and tender in full made before entry or forfeiture. Hairston v. Bescherer, 141 N. C. 205, 53 S. E. 845. A provision requiring the delivery of an abstract of title within ten days is waived by accepting an abstract delivered after the expiration of that period without objection. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31. Failure to perfect title within a specified time is waived where after the expiration of that time the vendee demands that title be perfected in a certain manner. Woodward v. McCollum [N. D.] 111 N. W. 623. Failure to furnish abstract showing title in complainant, evidence held insufficient to show a waiver by defendant. Lillienthal v. Bierkamp [Iowa] 110 N. W. 152.

40. Evidence held insufficient to estop defendant from demanding an abstract showing title in complainant. Lillienthal v. Bierkamp [Iowa] 110 N. W. 152.

41. Where a failure to pay the purchase price due on a contract was due to the fault of the vendor, the latter cannot complain. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768. Where the vendor failed to execute a deed and furnish an abstract, he could not contend that the vendee did not perform as soon as he should. Stevens v. Kittredge [Wash.] 87 P. 484.

42. When time is not of the essence of the contract, failure to tender performance within time named is not a defense. Where time is not made of the essence by an express stipulation, the time for performance is governed by equitable principles, and not by the time stipulated in the contract. Boston & W. St. R. Co. v. Rose [Mass.] 80 N. E. 498. Tender five days after time stipulated in contract. Id. Where time is not of the essence, the contract may be enforced after the prescribed time. Failure to pay purchase price within time limited. Libby v. Parry, 98 Minn. 366, 108 N. W. 299.

43. Where a survey was agreed upon as a means to ascertain the total sum to be paid, the price per acre being fixed, such survey is a mere incident and a failure to have the land surveyed does not render the contract incomplete. Howison v. Bartlett [Ala.] 40 So. 757.

44. Where a contract provided that complainant should pay interest on a certain incumbrance mentioned therein from the date of the contract, a tender of same is a condition precedent to relief by way of specific performance. Clark v. Jackson, 222 Ill. 13, 78 N. E. 6. Where a vendee suing for specific performance of a contract to convey deposits the purchase money in court and subsequently withdraws it, circumstances justifying such withdrawal must be shown. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883. The plaintiff need not tender amounts due on other obligations. Murphy v. Hussey, 117 La. 390, 41 So. 692. A tender of the price less amount due to pay off incumbrances is sufficient where the defendant denies liability under the contract. Id. A literal and precise tender is not a condition precedent to bringing suit as the legal effect of the bill is such that the complainant submits himself to perform fully. Tender of performance when at the time complainant had not a clear and unincumbered title. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31.

45. Where plaintiff agreed to pay a certain sum in cash and the balance as re-

nor where a tender would be useless.[46] An offer to perform made for the first time at the trial comes too late.[47] A tender made in good faith with ability to perform if declined excuses a formal tender.[48] A refused tender need not be deposited in court.[49] It is not essential that complainant should be capable of performing at the time of the execution of the contract if he is capable of doing so when the time for performance arrives,[50] and when time is not of the essence of an agreement or the delay has been the fault of the defendant and the contract is free from fraud, the complainant may clear away defects before final decree.[51] Where some of the conditions of a contract are disputed, the party seeking specific performance must perform those which are not disputed and stand ready to perform those which are whenever the dispute is lawfully determined.[52] The incorporators of a defunct corporation which had abandoned its contract are not entitled to specific performance by offering to form a new corporation to carry out the terms of such contract.[53] The vendor must have a merchantable title,[54] and he cannot enforce a contract under which he agreed to convey the land free and clear of all incumbrances where it is subject to restrictions as to its use amounting to an incumbrance.[55]

§ 5. *Actions. Jurisdiction.*[56]—Specific performance being a quasi proceeding in rem, the court may obtain jurisdiction over the property by publication against nonresident defendants,[57] but not over the person of such defendants for the purpose of entering a personal decree against them.[58] In Utah proceedings for specific

quired by defendant's contract with the person from whom he purchased provided that further payment should be made within six months from its date, where suit is brought before the expiration of that period, tender of further payment is unnecessary. Peirce v. Wheeler [Wash.] 87 P. 361.

46. Where defendant repudiates a contract before tender can be made, tender is unnecessary. It is sufficient if complainant offers in his bill to bring the money into court. Sharp v. West, 150 F. 458. Where a portion of the purchase money was to be paid by commissions due the vendee for selling other land, a refusal to allow such commissions was tantamount to a refusal to carry out the contract and excused a tender of the balance of the purchase price. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883. Where the vendor notifies the vendee that he will not receive the money or convey, a tender of the money is not required as a condition of specific performance. Whiteside v. Winans, 29 Pa. Super. Ct. 244.

47. Defendant refused to execute a mortgage containing an objectionable clause, as not being in accordance with the contract. At the trial plaintiff offered to eliminate the clause from the mortgage. Held the offer was too late. Feist v. Block, 100 N. Y. S. 843.

48. Johnson v. Higgins [Neb.] 108 N. W. 168.

49. Murphy v. Hussey, 117 La. 390, 41 So. 692.

50. Contract to convey a homestead signed by the vendor but not signed by his wife. Johnson v. Higgins [Neb.] 108 N. W. 168.

51. Taxes and other liens which might be cleared up without difficulty. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31.

52. A vendee agreed to pay instalments of the purchase price and taxes and to defend adverse litigation. The title was questionable and a dispute arose as to which party should take proceedings to perfect it. The vendee thereupon failed to pay either the taxes or instalments agreed upon. Held that after the vendor had perfected the title and redeemed from the taxes, a tender of performance by the vendee was insufficient. Cook v. Dane [Wash.] 86 P. 947.

53. Seven Mile Beach Co. v. Dolley [N. J. Err. & App.] 66 A. 191.

54. Will not be enforced against a vendee where the title is doubtful and all parties interested are not before the court, although the court may believe that the vendor has a title which could not be overthrown. Relief denied on the ground of a reasonable doubt as to the vendor's title. Fisher v. Eggert [N. J. Eq.] 64 A. 957. Evidence held to show title in complainant although there was a mistake in the description of the land in the conveyance under which he acquired title. Newbold v. Condon [Md.] 64 A. 356. Complainant held to have a marketable title. Woodward v. McCollum [N. D.] 111 N. W. 623. Abstract furnished under contract held insufficient to show clear title in complainant. Clark v. Jackson, 222 Ill. 13, 78 N. E. 6.

55. Land subject to a restrictive covenant that it should not be used for an offensive business, nor for the deposit of any offensive substance, or to the annoyance of an owner of, or a resident on contiguous land. Goodrich v. Pratt, 100 N. Y. S. 187. Performance refused on the ground that a restrictive covenant as to the nature of the buildings to be erected on plaintiff's land rendered the marketability of the title doubtful. Altman v. McMillin, 100 N. Y. S. 970.

56. See 6 C. L. 1507.

57. Under the Virginia code in an action by the vendee for the specific performance of a contract to convey land, the court may obtain jurisdiction by publication against a nonresident executor of the vendor. Clem v. Given's Ex'r [Va.] 55 S. E. 567.

58. The only relief which can be granted

performance of a contract by a decedent should be brought in the probate division of the district court having jurisdiction of the estate.[59] The fact that the apparent record owner of a lease is not before the court does not deprive it of jurisdiction where the court has jurisdiction over the real parties in interest.[60] Where the Federal court has jurisdiction over the person, the fact that a portion of the land affected is beyond its territorial jurisdiction is immaterial.[61]

Parties.[62]—As a rule only the parties to the contract are necessary parties in an action to enforce it,[63] except where an interest thereunder passes to a third person with notice of complainant's rights;[64] but it is held that all owners of the land against whom a decree for specific performance of a contract to convey is sought are necessary parties,[65] and one though not a party to the contract claiming an interest in its subject-matter may be made a party to the bill, for the purpose of barring him from asserting such interest,[66] but he is not a necessary party where he disclaims all interest under the contract.[67] A vendor is a necessary party though his agent had authority to execute a conveyance.[68] Undisclosed persons in interest are properly made parties.[69] Where defendant in an action at law demands specific performance as affirmative relief, it is incumbent upon him to bring in the necessary parties affected by that relief.[70] The court is powerless to grant relief in an action for specific performance against persons not parties of record.[71] Hence the failure to object to the nonjoiner of necessary parties is not a waiver of the defect.[72]

Defenses.[73]—The fact that by mistake the contract called for a general instead of a special warranty or quit claim deed is not a defense where the relief prayed for by the bill is in compliance with the contract as the parties intended it should be.[74] Where a vendee is willing to accept the vendor's title, the latter cannot set up as a defense to a bill a defect in his title.[75] The objection that an agreement to convey was not signed by the vendor's wife is available to heirs who have taken the lands

is the disposition of property within the state. Clem v. Given's Ex'r [Va.] 55 S. E. 567.

59. Rev. St. 1898, § 3935 et seq. Free v. Little [Utah] 88 P. 407.

60. Defendants, lessees, agreed to procure a renewal of a lease and to sublet to plaintiff. The renewal was procured but the lease taken in the name of a nonresident relative. Held the fact that the court did not obtain jurisdiction over the latter did not deprive it of power to enforce specific performance, defendants being the real parties in interest. Capps v. Frederick [Wash.] 86 P. 1128.

61. Wilhite v. Skelton [C. C. A.] 149 F. 67.

62. See 6 C. L. 1507.

63, 64. Cella v. Brown [C. C. A.] 144 F. 742.

65. Relief cannot be granted against one owner only though he was agent and attorney in fact for the others. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46. Where a joint vendee died and certain of his heirs were by consent of all substituted for him, but the vendor refused to convey to such substituted heirs, held in an action for specific performance the vendor and other heirs of the deceased vendee were proper parties, substantial relief being sought against them. Jackson v. Jackson [Ga.] 56 S. E. 318.

66. The wife of a vendor may be made a party to the bill although she did not sign a contract to convey, where she claims the property is community property and the bill alleges she has no interest whatever therein, the object of the action being to estop her from asserting an interest. Woodward v. Davidson, 150 F. 840.

67. A third person with whom a vendee agreed to share as a partner in the proceeds of the crops to be raised thereon is not a necessary party plaintiff in an action to enforce the contract against the vendor. Bennett v. Glaspell [N. D.] 107 N. W. 45.

68. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46.

69. Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831.

70. Action for replevin for cut timber, defendant alleged that he held the equitable title under a contract to convey and demanded specific performance of that contract. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46.

71. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46.

72. Action against a part owner of land who in his own behalf and as attorney in fact for other joint owners agreed to convey, the other owners not being made parties. Arkadelphia Lumber Co. v. Mann [Ark.] 94 S. W. 46.

73. See 6 C. L. 1507.

74. Whiteside v. Winans, 29 Pa. Super. Ct. 244.

75. Lutjeharms v. Smith [Neb.] 107 N. W. 256.

in question under an agreement assigning dower to the widow in other lands.[76] Refusal to perform on specific grounds is a waiver of all other grounds.[77]

Pleading.[78]—The bill,[79] or where relief is sought by answer, the answer,[80] must allege all facts essential to the relief sought. It should contain a sufficient statement of the contract sought to be enforced,[81] and should show the capacity of plaintiff [82] and defendant [83] to perform, and if for the specific performance of a parol contract must definitely and specifically allege its terms.[84] An allegation of an offer in writing and acceptance by defendant sufficiently avers delivery of the contract.[85] Averments of part performance to avoid the statute of frauds must distinctly show that such performance was referable to the very contract sued on.[86] Where the specific performance of a contract relating to chattels is sought, the exceptional facts authorizing such relief must be averred.[87] Laches need not be specially pleaded.[88] Allegations of equitable jurisdiction do not prevail over the bill as a whole showing that damages will be adequate relief,[89] and where a bill fails to state a cause of action for specific performance, a prayer for general relief will not cure a defect caused by the single specific prayer for specific performance.[90] A prayer for damages is properly inserted in the complaint,[91] and objection that the complaint failed to state the time for the performance of the contract should be made by a motion to make definite and certain,[92] but that the contract alleged is unconscionable is such a total failure to state a cause of action as may be raised by objection to any evidence under the bill.[93] Allegations not traversed are deemed admitted.[94] In Louisiana it is held that prescription obviating defects in plaintiff's title alleged in the

76. Free v. Little [Utah] 88 P. 407.

77. Repudiation based upon specified defects in the vendor's title is a waiver of defects not specified. Woodward v. McCollum [N. D.] 111 N. W. 623. Where defendant had refused to convey on the ground that tender was made too late, he cannot later set up the defense that he did not know to whom to deliver the deed or who was entitled to demand one. Balkwill v. Spencer [Wash.] 88 P. 1029.

78. See 6 C. L. 1508.

79. A bill seeking to enforce a contract in which time is expressly stated to be of the essence, which admits that the contract was not performed on the complainant's part in time, is demurrable. Collins v. Delaney Co. [N. J. Eq.] 64 A. 107. The complaint must allege facts showing adequacy of consideration and that the contract was just and reasonable as to the defendant. White v. Sage [Cal.] 87 P. 193. Complaint held to state a cause of action for specific performance and not an action for damages for fraud, deceit, or failure to perform. Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831. Complaint held to state a cause of action for the specific performance of a contract to convey land. Robbins v. Porter [Idaho] 88 P. 86. Bond for title. Hardin v. Neal Loan & Banking Co., 125 Ga. 820, 54 S. E. 755.

80. Answer demanding specific performance as affirmative relief held fatally defective in failing to allege a definite and certain parol contract to convey. Cook v. Embrey [Tex. Civ. App.] 101 S. W. 844.

81. Boston & W. St. R. Co. v. Rose [Mass.] 80 N. E. 498.

82. An averment in a bill that the complainant was ready, eager, and willing to perform, is a sufficient allegation of ability to perform. Kissack v. Bourke, 224 Ill. 352, 79 N. E. 619.

83. In an action for specific performance by a vendee, the bill must allege title in the vendor. Broder v. Gordon, 50 Misc. 282, 100 N. Y. S. 463. A complaint which alleges that the complainant was willing to accept the title which the defendant had need not allege that the defendant had a good and sufficient title at time demand was made for performance. Newell v. Lamping [Wash.] 88 P. 195.

84. Averments as to consideration held too vague. Maloy v. Boyett [Fla.] 43 So. 243.

85. Fogarty v. Smith, 30 Ky. L. R. 1237, 100 S. W. 829.

86. Maloy v. Boyett [Fla.] 43 So. 243.

87. Lewman v. Ogden Bros., 143 Ala. 351, 42 So. 102.

88. It may be considered at the hearing as a matter affecting the merits of the claim in the judicial conscience. Poston v. Ingraham [S. C.] 56 S. E. 780.

89. Marthinson v. King, 150 F. 48.

90. Broder v. Gordon, 50 Misc. 282, 100 N. Y. S. 463.

91. Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831. A prayer for alternative monetary relief does not render the complaint objectionable as stating two separate causes of action. Messer v. Hibernia Sav. & Loan Soc. [Cal.] 84 P. 835.

92. Demurrer is improper as in the absence of an allegation to the contrary the law presumes a reasonable time was intended. Phillips v. Jones [Ark.] 95 S. W. 164.

93. Haffner v. Dobrinski [Okl.] 88 P. 1042.

94. Where defendant in his answer set up a contract varying from the one set up by plaintiff and demanded its specific per-

answer need not be formally pleaded by way of reply.[95] Where a vendor agreed to convey land free from all incumbrances when at the time it was subject to a lease and the lessee refused to surrender, the vendee in an action for specific performance may require the vendor and the lessee to interplead.[96] A bill by mistake asking a general warranty deed may be amended so as to call for a special warranty or quit claim deed.[97]

Evidence.[98]—The burden is upon plaintiff to establish the contract,[99] its precise terms and certainty,[1] and the performance of conditions on his part to be performed.[2] Evidence tending to show that complainant is the owner of the land which is the subject of the action is admissible.[3] Where the complainant agreed to convey land free from all incumbrances, evidence that certain restrictive covenants to which the land was subject enhanced rather than depreciated its value is inadmissible.[4] Where damages are sought, the value of the land must be proved.[5] A parol contract within the statute of frauds must be proved by clear and unequivocal evidence.[6] A parol contract to make a will and performance thereunder must be proved by evidence so clear and cogent as to leave no reasonable doubt of its existence and compliance with its terms,[7] notwithstanding that equity would justify such a contract under the circumstances.[8] A parol contract to make a gift must be clearly and conclusively proved,[9] particularly when the relationship of the parties is close.[10]

The relief granted.[11]—In addition to specific performance the court may as ancillary relief cancel a deed in fraud of plaintiff,[12] order an accounting,[13] or declare

formance as affirmative relief, the failure of the plaintiff to file a special replication thereto is an admission of its truth and entitles defendant to the relief prayed for. Garrett v. Goff [W. Va.] 56 S. E. 351.

95. Defendant alleged that a tax sale through which plaintiff claimed title was void. Soniat v. Donovan [La.] 43 So. 462.

96. Eppstein v. Kuhn, 225 Ill. 115, 80 N. E. 80.

97. Contract by mistake called for a general warranty deed where parties intended a special warranty or quitclaim deed. Upon discovery of the mistake it was held the amendment of the bill to that extent was properly allowed. Whiteside v. Winans, 29 Pa. Super. Ct. 244.

98. See 6 C. L. 1508.

99. Evidence held insufficient to establish the genuineness of a bond for a deed. Jones v. Tennis Coal Co., 29 Ky. L. R. 623, 94 S. W. 6.

1. Hildreth v. Duff [C. C. A.] 148 F. 676. Evidence held insufficient to show that contract to assign patents during the term of employment covered the patent in controversy. Id.

2. Taussig v. Corbin [C. C. A.] 142 F. 660.

3. Deed covering the land in controversy executed prior to the commencement of the action is admissible. City of Waterbury v. Rigney [Conn.] 63 A. 775.

4. Covenant not to use land for an offensive business or for the deposit of offensive substances, or to the annoyance of a resident on, or owner of, contiguous land. Goodrich v. Pratt, 100 N. Y. S. 187.

5. When the only evidence of the value of the land in question was the consideration expressed in a deed by the defendant to third parties on the day he refused to carry out the contract it was held sufficient on which to base the judgment for damages. Balkwill v. Spencer [Wash.] 88 P. 1029

6. Evidence held insufficient to show an agreement to convey land. Standard v. Standard, 223 Ill. 255, 79 N. E. 92. An oral agreement will be specifically enforced only when the evidence is clear and satisfactory as to all essentials to relief. Jones v. Patrick, 145 F. 440. Evidence held sufficient to show binding contract to convey in consideration of support which was fully performed by complainant. Beam v. Beam [Neb.] 109 N. W. 741. Evidence sufficient to establish an oral contract to convey which was fully performed by the complainant. Nealon v. McGargill [Neb.] 108 N. W. 170. A contract to convey inventions in consideration of employment must be clearly proved and its terms as to subject-matter, consideration, and all other essentials, must be specific and unambiguous. Portland Iron Works v. Willett [Or.] 89 P. 421.

7. Evidence held sufficient to show a parol contract to make a testamentary disposition of property in consideration of services. Berg v. Moreau [Mo.] 97 S. W. 901. To enforce a parol contract to make a will the existence of the contract, its terms and performance on the part of the promisee must be proved beyond a reasonable doubt. Kirk v. Middlebrook [Mo.] 100 S. W. 450.

8. Evidence held insufficient. Holt v. Tuite, 188 N. Y. 17, 80 N. E. 364.

9. Young v. Crawford [Ark.] 100 S. W. 87. Evidence held insufficient as being consistent with the theory that only an estate at sufferance was intended to be conveyed. Logue v. Langan [C. C. A.] 151 F. 455.

10. Evidence held insufficient to show a parol gift of land by a father to his son. Meadows v. Meadows [W. Va.] 53 S. E. 718.

11. See 6 C. L. 1509.

12. After the execution of an agreement to convey, the vendor wrongfully declared the contract terminated and conveyed to a

a conveyance pendente lite a trust;[14] but ancillary relief will not be granted as against persons not parties to the action,[15] nor where the party would not have been entitled to such relief in an action brought for that purpose.[16] An injunction in aid of specific performance is merely ancillary and falls with that action.[17] Under the California Code a contract may be reformed and specifically enforced in the same action.[18] Where by reason of the facts plaintiff has not made out a case for specific performance, the bill may be retained to adjust any equities which may exist in plaintiff's favor,[19] but a judgment in the alternative is improper in the absence of a finding that defendant is incapable of performing;[20] and where the defendant renders himself incapable of performing by conveying the property to a third person the plaintiff is entitled to appropriate equitable relief in lieu of specific performance.[21] Damages may be awarded in lieu of specific performance;[22] but where the distinctive claim for equitable relief fails, the court will not take jurisdiction of the ancillary claim to damages.[23] Damages cannot be awarded save as incident to equitable relief.[24] Where it is admitted that complainant is not entitled

third person who took with knowledge of complainant's equitable title. Johnson v. Tribby, 27 App. D. C. 281.

13. Where in an action to specifically enforce a contract to convey in consideration of support the complainant fails to establish the contract, he is entitled to an accounting for money spent in furnishing such support and for improvements placed on the property. Fowler v. De Lance [Mich.] 13 Det. Leg. N. 908, 110 N. W. 41.

14. Where a vendor who agreed to convey to three persons conveyed to the assignee of one of them pendente lite, the decree should adjudge that the grantee held the land in trust for the other two and should direct a conveyance of an undivided third to each. Ocean City Ass'n v. Cresswell [N. J. Err. & App.] 65 A. 454.

15. In an action for specific performance, plaintiff asked that a certain restrictive covenant be declared void. The relief was refused on the ground that all of the parties to the covenant were not parties to the action. Altman v. McMillin, 100 N. Y. S. 970.

16. Where specific performance of a contract to convey is denied a vendee in possession, the defendant is not entitled to have the contract canceled as a cloud on title, not being in possession. Simpson v. Belcher [W. Va.] 56 S. E. 211.

17. Lewman & Co. v. Ogden Bros., 143 Ala. 351, 42 So. 102. An injunction cannot be awarded as ancillary relief where specific performance is denied. Taussig v. Corbin [C. C. A.] 142 F. 660.

18. Messer v. Hibernia Sav. & Loan Soc. [Cal.] 84 P. 835.

19. Mutually abandoned contract to convey land, the vendor retaining a portion of the purchase price and conveying to a third person. Lese v. Lanson, 103 N. Y. S. 303.

20. Levy v. Knepper, 102 N. Y. S. 313.

21. Plaintiff is entitled to an alternative decree that defendant convey or refund the money paid or at least that defendant account for the second sale if made in bad faith toward plaintiff. Barnett v. Sussman, 102 N. Y. S. 287.

22. Hopkins v. Baremore, 99 Minn. 413, 109 N. W. 831. Damages in lieu of specific performance may be awarded by a court of equity, where such a course becomes necessary in order to do full justice between the parties and confers complete relief in one judicial proceeding; but in such a case the damages awarded will not include speculative or accidental profits, and will be limited to saving the parties from loss. Trustees Cincinnati Southern R. Co. v. Hooker, 7 Ohio C. C. (N. S.) 357. Where the vendor is unable to make the conveyance called for by his contract, the vendee is entitled to recover as damages in lieu of specific performance the amount paid on the contract, and where payment of such amount was tendered, no interest will be allowed thereon. Gregg v. Carey [Cal. App.] 88 P. 282. Where the defendant during the pendency of the suit sells the property, equity will retain jurisdiction to award damages, the damages being such as could have been recovered in an action at law for the breach of the contract. Livesley v. Johnston [Or.] 84 P. 1044. Agreement by defendant to convey land not owned by it, evidence held to show bad faith sufficient to warrant the recovery of the market value of the property contracted to be conveyed as damages, under Civ. Code, § 3306. Messer v. Hibernia Sav. & Loan Soc. [Cal.] 84 P. 835. Where defendant by his own act renders performance impossible, the court will retain the action for the purpose of awarding plaintiff damages for the breach. Conveyance to a third person. Levy v. Knepper, 102 N. Y. S. 313.

23. Refused where vendee brought a bill for specific performance knowing that the vendor was without title. Public Service Corp. v. Hackensack Meadows Co. [N. J. Eq.] 64 A. 976. Where suit is brought for specific performance against a defendant who has no title, and his want of title was known to the plaintiff at the time of the bringing of the suit, the petition cannot be retained for assessment of damages. Ferguson v. Kelley, 4 Ohio N. P. (N. S.) 126.

24. Not allowable for breach of covenant to maintain ways where no equity in respect

to specific performance, it is proper for the court to refuse to retain the bill for the assessment of damages where it does not appear that complainant has been damaged by the refusal of defendant to perform.[25] In construing executory contracts of sale, courts will apply the liberal principles of equity rather than strict common-law rules.[26] Where the payment of part of the purchase price is admitted and complainant offers to pay the balance when ascertained, the matter will be referred for the purpose of determining such balance, if complainant is otherwise entitled to specific performance.[27] The contingent interest of a spouse not joining in a contract cannot be acquired by specific performance of the contract,[28] but the complainant may be protected against such interest by a provision in the decree permitting him to retain a fixed proportionate share of the purchase money.[29]

Findings and decree.[30]—In California where it is sought to enforce a contract to purchase land, the court must find the value of the land for the purpose of showing the adequacy of the consideration.[31] The decree should require the performance of the entire contract [32] in accordance with its terms [33] and must correspond with the findings.[34] A decree awarding plaintiff specific performance and providing that upon the failure or inability of defendant to perform plaintiff should be entitled to a certain sum as damages does not give the defendant the right to elect between the payment of damages and performance in specie.[35] A decree against a subsequent purchaser with notice should not require of him a higher deed of conveyance than that under which he holds.[36]

Appeal.—The New York statute, providing that the pendency of an appeal from a judgment in specific performance in favor of the owner of land shall not prevent him from disposing of the land unless a bond is filed by the appellant conditioned to pay damages caused by the appeal upon affirmance of the judgment, applies though specific performance was demanded by way of counterclaim in an action by the vendee to recover portion of the purchase price.[37]

Costs.—Where both parties are at fault neither is entitled to costs.[38]

SPENDTHRIFTS, see latest topical index.

thereto was established. Johnson v. Ohio River R. Co. [W. Va.] 56 S. E. 200.

25. Contract to erect a building. Braithwaite v. Henneberry, 222 Ill. 50, 78 N. E. 34. See, however, Hagins v. Sewell, 30 Ky. L. R. 750, 99 S. W. 673, in which a decree allowing defendant a certain time within which to erect a building under a party wall agreement to avoid a judgment for the cost of erecting the wall was affirmed.

26. Common-law rules governing construction of deeds have no application. Armstrong v. Ross [W. Va.] 55 S. E. 895.

27. Falkner v. Hudson [Ala.] 41 So. 844.

28, 29. Noecker v. Wallingford [Iowa] 111 N. W. 37.

30. See 6 C. L. 1510.

31. White v. Sage [Cal.] 87 P. 193.

32. A decree enforcing a contract for the exchange of property should require the plaintiff as well as the defendant to convey and to pay the additional consideration which he agreed to pay. Freeburgh v. Lamoureux [Wyo.] 85 P. 1054.

33. The court refused to insert in a lease a clause against subletting without the lessor's consent, as the contract did not provide for it but rather contemplated an assignment. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801. The defendant who is decreed to execute a lease is entitled to have the decree recite that it is executed pursuant to the contract which is being specifically enforced and also to a recital of the provisions of the contract. Id.

34. Where in a suit for specific performance a cross complaint sets up a default of payments under a contract to purchase and the findings are in accord therewith, the contention that the judgment should have been as for the foreclosure of a mortgage is untenable. Johnston v. Mulcahy [Cal. App.] 88 P. 491.

35. Such a provision is for the sole benefit of the plaintiff. Johnston v. Long Island Inv. & Imp. Co., 100 N. Y. S. 423.

36. Subsequent purchaser acquiring title by quit claim cannot be required to convey by warranty deed to complainant. Peterson v. Ramsey [Neb.] 110 N. W. 728.

37. Code of Civ. Proc. § 1323. Bloomgarden v. Hoffmann, 102 N. Y. S. 20.

38. Each insisted upon terms to which neither was entitled. Mausert v. Christian Feigenspan, 68 N. J. Eq. 671, 63 A. 610, 64 A. 801.

STARE DECISIS.

§ 1. The Doctrine and Its Application (1965).
§ 2. Decisions and Obiter Dicta (1965).
§ 3. Rules of Property (1966).
§ 4. Courts of Different Jurisdictions (1966).
A. Inferior and Appellate (1966).
B. Federal and State Courts (1967). When Federal Courts Follow State Decisions (1967). When State Courts Follow Federal Decisions (1968).
C. Different Federal Courts (1969).
D. Different State Courts (1969).

Conclusivenes of adjudication of fact are elsewhere treated,[39] as is the binding effect of previous decision on a subsequent review of the same case.[40]

§ 1. *The doctrine and its application.*[41]—The doctrine of stare decisis is a rule to preserve the law as settled by the decisions of a court having final jurisdiction of the questions,[42] and will not be departed from unless for grave necessity.[43] In construing statutes and the constitution, courts will adhere to their former decisions regardless of what the present opinion of the court may be as to their soundness,[44] and a decision holding a law to be unconstitutional is binding upon the court in determining the validity of a subsequent act of the same nature.[45] Former decisions will not be overruled unless they are clearly and manifestly erroneous or no longer adapted to the changed conditions of society,[46] or it is clear that they are not only legally indefensible but that it would be palpably wrong to permit them to stand,[47] and the evil resulting from the principle established by them is manifest,[48] but nothing short of an absolute conviction of the unsoundness of a previous decision will justify the court in overruling it,[49] and the fact that the present members of the court might have arrived at a different conclusion is not sufficient.[50] In Georgia a decision concurred in by all the judges of the court can be overruled only by an unanimous opinion of the entire bench.[51]

§ 2. *Decisions and obiter dicta.*[52]—To constitute a precedent a decision must be upon a question presented to the court under the issues and essential to the disposition of the cause,[53] and will be followed only when the state of the facts makes the same law applicable.[54] The words used in a decision must be liberally construed,[55] and general expressions must be taken in connection with the facts of the case in which they occur and they will not be extended to cases which are fairly subject to the operation of a different principle.[56] The refusal of the court of last resort to grant a writ of error to review a decision by a court of intermediate ap-

39. See Former Adjudication, 7 C. L. 1750.
40. See Appeal and Review, 7 C. L. 235.
41. See 6 C. L. 1510.
42. Diamond Plate Glass Co. v. Knote [Ind. App.] 77 N. E. 954.
43. The fact that a former decision may have taken a technical view of the matter and that it may be opposed to the weight of authority is not alone sufficient. State v. Ross [Wash.] 86 P. 575.
44. Hill v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 854.
45. Law authorizing the issuance of bonds to facilitate the construction of railroads. State v. Wilder [Mo.] 97 S. W. 864.
46. Wiltse v. Red Wing, 99 Minn. 255, 109 N. W. 114.
47. The discovery of new argument why a decision holding an act authorizing women to vote at elections pertaining to school matters to be constitutional erroneous is not of itself sufficient. Hall v. Madison, 128 Wis. 132, 107 N. W. 31.
48. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.
49. Act held general and not special legislation upon the ground of stare decisis. Bowman v. Essex County Chosen Freeholders [N. J. Err. & App.] 64 A. 1010.
50. Bowman v. Essex County Chosen Freeholders [N. J. Err. & App.] 64 A. 1010.
51. Cannot be overruled where one of the justices is absent. Hendricks v. Reid, 125 Ga. 775, 54 S. E. 747.
52. See 6 C. L. 1511.
53. A decision on a question not raised in the action is not authoritive. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387. Voluntary expressions of opinion as to questions not before the court are not authoritive. In re Sullivan [C. C. A.] 148 F. 815. The opinion of a court is not authoritive beyond the questions considered and decided. Fraer v. Fowler [C. C. A.] 144 F. 810.
54. Northwestern Sav. Bk. v. Centreville Station, 143 F. 81.
55. Words "absolutely void" held to mean "voidable." Haggart v. Wilczinski [C. C. A.] 143 F. 22.
56. Damages recoverable for injury to property by reason of the construction of a railroad. Mason City, etc., R. Co. v. Wolf [C. C. A.] 148 F. 961.

pellate jurisdiction elevates the decision of the latter to the dignity of final authority.[57] A decision that a law is unconstitutional based upon a stipulation as to facts does not render the law invalid but merely denies its efficacy as to the party who has admitted the existence of facts which in the opinion of the court renders the law unconstitutional.[58]

§ 3. *Rules of property.*[59]—Decisions which have become rules of property will not be overruled;[60] and contractual relations or valuable rights resting upon the strength of decisions by courts of last resort will not be disturbed where the facts are substantially the same as those upon which the former decisions were grounded,[61] but decisions are not binding precedents as to rights antecedently acquired,[62] and even though of persuasive force they will not be considered where the issues make that law immaterial.[63] Vested rights cannot accrue under a decision where such decision was overruled or modified prior to any action being taken thereunder.[64]

§ 4. *Courts of different jurisdictions. A. Inferior and appellate* [65]—Courts of intermediate appellate jurisdiction must follow the decisions of the court of last resort,[66] except in the case of a state court where a Federal question is involved,[67] and they are also bound by their own previous decisions except where they conflict with the opinion of the court of last resort,[68] but in Illinois it is held that a decision

57. Gray v. Eleazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 13, 94 S. W. 911.

58. Upon a stipulation that but one city came within the purview of an act, it was held unconstitutional as special legislation. Rutten v. Paterson [N. J. Law] 64 A. 573.

59. See 6 C. L. 1512.

60. Hill v. Atlantic, etc., R. Co. [N. C.] 55 S. E. 854. A decision that a city held certain land dedicated to it for a public landing, as an owner and not as trustee, and as such could dispose of it in any way consistent with its charter, establishes a rule of property with respect to the rights of the city in such land regardless of the merits of the original controversy, though made in an action involving only a portion of the entire tract, and although a diversion of the land to a private purpose was not involved in the action. Union R. Co. v. Chickasaw Cooperage Co. [Tenn.] 95 S. W. 171. A decision that a city had a right to lease portions of a tract of land dedicated to it for the purpose of a public landing to individuals for a private purpose, when it was not required for public use, established a rule of property with respect to the validity of a subsequent lease of a portion of such tract. Id. An interpretation of a statute which has become a rule of property will be followed. Right of nephews and nieces to share in the distribution of the estate of a decedent leaving as his survivor a widow but no brothers or sisters. In re Nigro's Estate [Cal.] 87 P. 384.

61. Diamond Plate Glass Co. v. Knote [Ind. App.] 77 N. E. 954. Where contractual relations are entered into upon the strength of a decision of the supreme court, the rights of the parties thereto will not be disturbed although the decision relied upon was subsequently overruled. Right of a defendant to a partition proceeding acquiring an outstanding interest of one not a party to the action to set up such acquired interest against the plaintiff, where at the time of its acquisition under a decision of the supreme court he would not be estopped from setting it up. Hill v. Brown [N. C.] 56 S. E. 693.

62. North Western Sav. Bk. v. Centreville Station, 143 F. 81.

63. Estoppel to deny legality of bonds makes it immaterial whether according to the decisions they were legally issued. North Western Sav. Bk. v. Centreville, 143 F. 81.

64. Liability of city under a collusive default judgment on a void municipal warrant. State v. Tanner [Wash.] 88 P. 321. A party to a contract cannot escape liability through the medium of decisions rendered after the obligation was assumed, where such decisions were subsequently overruled by the supreme court, although at the time of their rendition the court from which they eminated had final jurisdiction. Diamond Plate Glass Co. v. Knote [Ind. App.] 77 N. E. 954.

65. See 6 C. L. 1512.

66. Notwithstanding that the supreme court of the United States has held to the contrary, no Federal question being involved. Dunham v. Hastings Pav. Co., 103 N. Y. S. 480. The denial by the supreme court of a petition to transfer from the appellate court in effect approves the opinion of the appellate court in so far as it was challenged by the specific reasons assigned therein for a transfer and will be followed. New York, etc., R. Co. v. Martin [Ind. App.] 77 N. E. 290. The circuit court of appeals is bound by the decisions of the United States supreme court as to matters of general law. Liability of carrier for injury to passenger, application of doctrine of res ipsa loquitur. Southern Pac. Co. v. Cavin [C. C. A.] 144 F. 348. Though decisions of the state court are numerous. Whether a writ of scire facias is the commencement of a civil action or a continuation of some other original proceeding. Hollister v. U. S. [C. C. A.] 145 F. 773.

67. Grant v. Cananea Consol. Copper Co., 102 N. Y. S. 642.

68. The court of appeals of the District of Columbia is bound by the doctrine enun-

of the appellate court is not binding upon it except in the case in which it was rendered.[69] Inferior courts will not enforce a rule of law which has been disapproved by the court of last resort, although announced at the time by a court of equal jurisdiction, unless property rights have accrued in reliance thereon.[70] The decision of an inferior court is not binding upon an appellate court.[71]

(§ 4) *B. Federal and state courts. When Federal courts follow state decisions.*[72]—The Federal courts are bound by the decisions of the state courts of last resort as to matters of purely local law,[73] such as rules of property,[74] and the constructon and effect of conveyance between private parties,[75] though one court has used the word persuasive in this connection;[76] and by a principle analagous to that of res adjudicata will follow a decision in an action litigated to a final termination in the state courts,[77] but they are not bound where the determination of the general law is involved.[78] The construction placed upon a state constitution or law by the

ciated in a prior case unless contrary to the rulings of the supreme court of the United States. Washington, etc., R. Co. v. Chapman, 26 App. D. C. 472.

69. Strauss v. Merchants' Loan & Trust Co., 119 Ill. App. 588.

70. Where after a contract for the drilling of a gas well had been entered into the appellate court, being then a court of final jurisdiction, decided that contracts of a like nature could be terminated by either party at the end of a year, which doctrine was thereafter overruled by the supreme court, there being no showing that any reliance had been placed upon the decision of the appellate court, it was held that the doctrine of stare decisis did not apply. Diamond Plate Glass Co. v. Knote [Ind. App.] 77 N. E. 954.

71. Decision of the special term of the New York supreme court is not binding upon the appellate division of the same court. In re City of New York, 114 App. Div. 519, 100 N. Y. S. 140.

72. See 6 C. L. 1513.

73. Whether a law exempting from taxation was repealed by a subsequent law is a question upon which the decision of the state court is controlling, unless the exemption is irrepealable as impairing the obligation of a contract. Wicomico County Com'rs v. Bancroft, 27 S. Ct. 21. Whether grant of tide lands by a municipality under grant from the state was in excess of power, and whether such grant had been ratified and to what extent, and the legality of a title based upon an execution sals of same, are questions of local law, and a decision of the state court of last resort is binding on the Federal court. Southern Pac. Co. v. Western Pac. R. Co., 144 F. 160. Extent of an estoppel by judgment of dismissal is a matter of local law. Id. Federal courts will follow decisions of local state courts on questions of the substantive law of property and contracts. Estoppel in pais. South Penn Oil Co. v. Calf Creek O. & G. Co., 140 F. 507. Where after Federal court acquired jurisdiction over an action for damages for the wrongful termination of a contract a receiver was appointed by the stats court, which appointment under decisions of the state terminated all executory contracts without damage for the breach, held such decisions were binding upon the Federal court. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

74. Validity of a tax sale is a rule of property. Paine v. Willson [C. C. A.] 146 F. 488. Action for breach of covenant of quiet enjoyment, question of whether eviction was by reason of act of holder of paramount title for which defendant was responsible is a question of property. Pabst Brewing Co. v. Thorley [C. C. A.] 145 F. 117. The law of the state on the subject of mortgages is a rule of property and the decisions of the state courts of last resort in the state where the mortgaged property is situated and where the controversy arose are binding upon the Federal courts. Haggart v. Wilczinski [C. C. A.] 143 F. 22. Rules of property established by the state court of last resort by its construction of the state constitution or laws must be followed by the Federal court where no question of right under the Federal constitution and laws and no question of general commercial law is involved. Right of a judgment creditor who redeems from a foreclosure sale of mortgaged coal in an open mine to the coal extracted therefrom during the period of redemption. Traer v. Fowler [C. C. A.] 144 F. 810.

75. Construction of an instrument as not conveying a portion of the vein beneath the surface and within the converging lines produced of the plaintiff's location, will be followed by the Federal court. East Cent. Eureka Min. Co. v. Central Eureka Min. Co., 27 S. Ct. 258.

76. Degree of care required at highways crossing street railroads. Milford & U. St. R. Co. v. Cline [C. C. A.] 150 F. 325.

77. Where an injunction to restrain a city from paying water rentals on the ground of the invalidity of the contract was denied by the state court on the ground that relief was barred by limitation, the court expressing the opinion that the city was without equity to raise the question of the invalidity of the contract, such decision will be followed in an action at law in the Federal court against the city to recover rentals under the contract. City of Defiance v. McGonigale [C. C. A.] 150 F. 689.

78. The validity and construction of a bond given by a contractor for public work is a question of general law. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 F. 507. Whether a railway mail clerk is a passenger. Yarrington v. Delaware & Hudson Co., 143 F. 565. Liability under a bill of lading where no value was

supreme court of the state is binding upon the Federal courts.[79] Thus the local decisions are binding as to what are the specific subjects to which an act applies when assailed as an attempted regulation of interstate commerce,[80] or as denying the equal protection of the law,[81] but they are not bound by the construction placed upon statutes merely declaratory of the general law,[82] nor by mere obiter dictum.[83] The construction placed upon a legislative grant and the boundaries located thereunder will be adopted by the Federal court,[84] as will also decisions establishing a rule of property under a treaty unless it is clear that the words of the treaty have been misinterpreted.[85] Where the state courts have not interpreted a local statute, the Federal courts may place such a construction upon it as they deem reasonable;[86] and where property rights vest prior to any decision of the state court construing the provisions of the constitution applicable thereto, the Federal courts will exercise an independent judgment irrespective of decisions of the state court subsequently rendered,[87] and where the original holder of such property rights was entitled to such a construction, his assignee is also.[88]

When state courts follow Federal decisions.[89]—Where a Federal question is involved, the decisions of the Federal courts thereon are binding upon state courts.[90]

given. Macfarlane v. Adams Express Co., 137 F. 982. Where the subject-matter of the action is governed by the common law of the state, the question is one of general law and the Federal courts are not bound by the decisions of the state court of last resort. Fellow-servant doctrine. Jones v. Southern Pac. Co. [C. C. A.] 144 F. 973.

79. A decision that a tax was uniform within the meaning of the state constitution, when it was equal upon all persons belonging to the described class upon which it is imposed, will be followed by the United States supreme court. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451. Must adopt construction placed upon a statute regulating liability of carriers by supreme court of state. Yarrington v. Delaware & Hudson Co., 143 F. 565. Bankruptcy court is bound by state homestead exemption laws as construed by the state court of last resort. In re Wood, 147 F. 877. Bankruptcy court must follow decision of state supreme court construing exemption law as exempting crops grown on homestead. In re Sullivan [C. C. A.] 148 F. 815. Whether a vessel was intended to be used for the navigation of state waters within the meaning of a statute giving a lien for construction, the enforcibility of such lien where the vessel passed into the hands of a bona fide purchaser and whether the proper proceedings to enforce it were taken are questions upon which the decisions of the state courts are conclusive. Iroquois Transp. Co. v. De Laney Forge & Iron Co., 27 S. Ct. 509. A decision by the highest court of the state that a statute is repugnant to its constitution is binding upon the Federal courts. Law authorizing the issuance of bonds secured by state school lands. State of Montana v. Rice, 27 S. Ct. 281. Accrual of stockholder's liability. Ramsden v. Knowles, 151 F. 718. Statute giving right of action for negligence of fellow-servant when employed by railway company, construed to apply to a manufacturing corporation operating a spur track as incidental to its main business, held binding. United States Leather Co. v. Howell [C. C. A.] 151 F. 444. Right of nonresident alien to recover damages for death by wrongful act. Zeiger v. Pennsylvania R. Co., 151 F. 348. Priority of grant of land. North Carolina Min. Co. v. Westfeldt, 151 F. 290. Decisions of local state courts construing statutes as to the remedy will be followed. Statute of frauds. Ballantine v. Yung Wing, 146 F. 621. Statute requiring foreign corporations to do certain acts before transacting business within the state, and the affect of a failure so to do. Tennis Bros. Co. v. Wetzel & T. R. Co., 140 F. 193.

80. Law imposing a tax upon "every meat-packing house doing business in this state" was construed by the supreme court of North Carolina as applying only to the local business of a foreign corporation. Held binding upon the Federal supreme court. Armour Packing Co. v. Lacy, 200 U. S. 226, 50 Law. Ed. 451. Whether a legislative act relating to railroads was an interference with interstate commerce. Louisville & N. R. Co. v. Central Stockyards Co., 30 Ky. L. R. 18, 97 S. W. 778.

81. Act prohibiting dealing in "futures" exempting from its operation certain classes construed to contemplate actual future delivery by the latter and therefore not unequal in its operation. Gatewood v. North Carolina, 27 S. Ct. 167.

82. Assignment of insurance policy to one not having an insurable interest. Mutual Life Ins. Co. v. Lane, 151 F. 276.

83. In re Sullivan [C. C. A.] 148 F. 815.

84. Construction of legislative grant of tide lands "lying between high tide and ship channel." Southern Pac. Co. v. Western Pac. R. Co., 144 F. 160.

85. Indians held to acquire title in fee to lands reserved to themselves under a treaty with the government. Francis v. Francis, 27 S. Ct. 129.

86. In re Sullivan [C. C. A.] 148 F. 815.

87. Method of calling roll call of votes upon a law authorizing the issuance of railway aid bonds. Board of Com'rs v. Tollman [C. C. A.] 145 F. 753.

88. Railway aid bonds. Board of Com'rs v. Tollman [C. C. A.] 145 F. 753.

89. See 6 C. L. 1514.

90. Equality of taxation of national bank shares of stock. Crocker v. Scott [Cal.] 87

State courts are bound by the construction placed upon a Federal act by the supreme court of the United States,[91] and upon such questions state courts of intermediate appellate jurisdiction must follow the decisions of the national courts[92] even to the extent of refusing to follow decisions of their own state court of last resort to the contrary,[93] but they are not bound to follow the construction placed upon a local statute or constitution by the Federal courts.[94]

(§ 4) *C. Different Federal courts.*[95]—The decisions of the circuit court of appeals on the same state of facts will be followed by the circuit court of another circuit where there are no conflicting decisions,[96] but where the court of appeals of two circuits have arrived at a different conclusion on the same state of facts, the court making the earlier decision will adhere to its former ruling unless convinced that the later decision was correct.[97]

(§ 4) *D. Different state courts.*[98]—The decisions of courts in other states are not binding, but should be given weight, according as their reasoning appeals to the judgment of the court considering the question,[99] but, in construing a local statute, the opinions of courts of other states construing similar statutes are of very great weight in the absence of a different construction by the local courts.[1] The construcion placed upon the statute of a state by its own judicial tribunals will be followed by the courts of other states in determining the rights of parties under such statute,[2] even though it differs from the construction placed upon a similar act by the courts of the state in which the action is pending,[3] unless to do so would be to contravene its own policy and laws or effect injuriously the rights of its own citizens,[4] but they are not bound by the application of such decisions to the facts in the case.[5]

STATE LANDS; STATEMENT OF CLAIM; STATEMENT OF FACTS, see latest topical index.

P. 102. Whether a right claimed under the Federal constitution is sufficiently pleaded or brought to the notice of the state court is a Federal question, and the decisions of the Federal courts thereon are binding upon the state courts. Motion to quash an indictment based on a right claimed under the Constitution of the United States. Hill v. State [Miss.] 42 So. 380. The right of a surviving husband or wife in a homestead entry before final proof is a Federal question. Hall v. Hall, 41 Wash. 186, 83 P. 108. Whether a cause is removable to the Federal court presents a Federal question. Texas & P. R. Co. v. Huber [Tex.] 15 Tex. Ct. Rep. 642, 92 S. W. 832.

91. Automatic couplers on railroads. Chicago & Alton R. Co. v. Walters, 120 Ill. App. 152. Right of person other than the government to contest the validity of a contract to construct a bridge across a navigable river without first complying with the Federal act in relation thereto. The People v. Board of Supervisors, 122 Ill. App. 40. The decision of the United States supreme court holding a state law void as in conflict with the Federal constitution is binding upon the courts of another state in construing a similar law. Regulation of railroad rates. Commonwealth v. Atlantic Coast Line R. Co. [Va.] 55 S. E. 572.

92. Service of summons upon an officer of a foreign corporation while temporarily within the state, such corporation having no resident agent or property within the state and doing no business therein. Grant v. Cananea Consol. Copper Co., 102 N. Y. S. 642.

93. Grant v. Cananea Consol. Copper Co., 102 N. Y. S. 642.

94. Taxation of corporate stock. Crocker v. Scott [Cal.] 87 P. 102.

95. See 4 C. L. 1516.

96. Decision of the circuit court of appeals declaring the reissue of a patent valid was followed by the circuit court of another circuit. Thomson-Houston Elec. Co. v. Holland, 143 F. 903.

97. Henry E. Frankenberg Co. v. U. S. [C. C. A.] 146 F. 63.

98. See 4 C. L. 1516.

99. Hicks v. Hicks, 4 Ohio N. P. (N. S.) 25.

1. The decisions of the courts of Maryland construing its statute of descent which for more than a century had been the law of that state and the District of Columbia are entitled to great weight in construing the statute of the latter. McManus v. Lynch, 28 App. D. C. 381.

2. Fellow-servant law. St. Louis, etc., R. Co. v. Conrad [Tex. Civ. App.] 99 S. W. 209. Death by wrongful act. Denver & R. G. R. Co. v. Warring [Colo.] 86 P. 305.

3, 4. St. Louis, etc., R. Co. v. Conrad [Tex. Civ. App.] 99 S. W. 209.

5. Death by wrongful act. Lee v. Missouri Pac. R. Co., 195 Mo. 400, 92 S. W. 614.

STATES.

§ 1. Boundaries, Jurisdiction, and Sovereignty (1970).
§ 2. Property (1971).
§ 3. Contracts (1971).
§ 4. Officers and Employes (1971).
§ 5. Fiscal Management (1974).
§ 6. Claims (1974).
§ 7. Actions by and Against State (1974).

§ 1. *Boundaries, jurisdiction and sovereignty. Boundaries.*[6]—Where a navigable river dividing the territory of two states changes its course by gradual and imperceptible encroachment or recession, the state boundaries follow the shifting thread of the stream,[7] but boundaries are not affected by sudden changes in the course of the stream which do not destroy the identity of the territory affected.[8] Boundaries may be fixed by a commission, their action being ratified by the legislatures of the respective states and by act of congress.[9] A state has inherent power to determine the boundaries of its civil subdivisions,[10] and for this purpose may enter private property,[11] but it has no power in such case to destroy private property without making provision for compensation to the owner.[12]

Jurisdiction and sovereignty.[13]—The jurisdiction of a state is coextensive with its territorial limits,[14] and such jurisdiction is not necessarily divested by a concession of extraterritorial jurisdiction to another state.[15] The sovereignty of a state rests with its people,[16] except so far as it has been abridged by the Federal constitution,[17] or the constitution of the state itself.[18] The state constitution, however, is a self-imposed restriction, being itself merely the voice of the people speaking in their sovereign capacity,[19] and subject to this self-imposed restriction the sovereign people speak through the medium of the state legislature.[20] In the exercise of its sovereignty a state has the power and it is its duty to take all proper steps to protect the welfare of its people,[21] including the purity of the ballot.[22] Except for mere temporary purposes not involving an appropriation or destruction of property,[23] or in the exercise of its power of eminent domain,[24] a state has no right to enter and occupy land without the consent of the owner.[25] No right of the state or any instrumentalities of the government are involved in a Federal law regulating the liability of interstate carriers to their employes.[26]

6. See 6 C. L. 1515.

7. Fowler v. Wood [Kan.] 85 P. 763. Evidence of shifting of main channel of Mississippi from east to west, and vice versa, of island No. 76, and other evidence casting doubt as to where such channel was when Mississippi was admitted into union, held insufficient to overcome plaintiff's evidence showing that the channel was on east side of such island at such time and hence that the island was in Arkansas. Moore v. McGuire, 27 S. Ct. 483.

8. Fowler v. Wood [Kan.] 85 P. 763.

9. Agreement of 1833 between New York and New Jersey fixing state lines at middle of Hudson River and New York Bay. Cook v. Weigley [N. J. Eq.] 65 A. 196.

10. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. See Counties, 7 C. L. 976. See, also, post, § 4, Officers and Employes.

11. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

12. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. See Eminent Domain, 7 C. L. 1276.

13. See 6 C. L. 1515.

14. Cook v. Weigley [N. J. Err. & App.] 65 A. 196.

15. Agreement of 1833, between New York and New Jersey, conceding "exclusive" jurisdiction to New York over waters of Hudson River and New York Bay, and should retain its jurisdiction over certain islands within territory of New Jersey, did not deprive courts of New Jersey of jurisdiction to foreclose mortgage on land situated on such islands. Cook v. Weigley [N. J. Err. & App.] 65 A. 196.

16. In re Sherill, 188 N. Y. 185, 81 N. E. 124; People v. Tool [Colo.] 86 P. 224.

17, 18. People v. Tool [Colo.] 86 P. 224.

19. In re Sherill, 188 N. Y. 185, 81 N. E. 124.

20. In re Sherill, 188 N. Y. 185, 81 N. E. 124. See post, § 4, Officers and Agents.

21. People v. Tool [Colo.] 86 P. 224.

22. Has right to enjoin criminal conspiracy to pollute ballot box. People v. Tool [Colo.] 86 P. 224. See Elections, 7 C. L. 1230; Injunction, 8 C. L. 279.

23. See ante this section, subdivision Boundaries.

24. See Eminent Domain, 7 C. L. 1276. Entry under legislative act before provision is made for compensation is not in exercise of eminent domain. Remington v. State, 101 N. Y. S. 952.

25. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Such entry and occupation is a trespass. Remington v. State, 101 N. Y. S. 952.

26. Act June 11, 1906, 34 Stat. 232, c. 3073,

§ 2. *Property.*[27]

§ 3. *Contracts.*[28]—When a state contracts with a private person it will itself be treated as a private person,[29] and may be held liable as such.[30] So, also, when land is entered and used by the state with permission of the owner, there is an implied agreement on the part of the state to pay a fair value for such use and occupation.[31] Where a contract for public works admits of the construction placed thereon by the agents in charge of such works, such construction will be sustained by the courts.[32] A statute relative to an existing contract of the state but enacted subsequently thereto is not a part of the contract.[33] Prohibition does not lie to prevent the execution of an unauthorized contract by state agents.[34]

§ 4. *Officers and employes.*[35]—The ordinary meaning of "state officer" is a head of a state department, such as governor, secretary of the state, and the like.[36] Occupancy of executive mansion by the governor of a state as required by law is not a "perquisite of office or other compensation."[37] The legality of a commission or office created by the legislature cannot be tested by prohibition, which admits the legality of such commission or office.[38] The commission of a deputy runs only during the continuance of the term of the appointing officer,[39] and a mere acquiescence by subsequent incumbents in such commission is not sufficient to reinvest the deputy with authority.[40]

A state agent cannot take advantage of his agency in order to make additional profit for himself,[41] but an agency is not created by a contract whereby one agrees to manufacture volumes of state reports, the plates to belong to the state,[42] and while the contractor cannot use the materials entrusted to him for private gain,[43] he is not deprived of the right to publish such reports on his own account, the matter not being copyrighted.[44] Persons dealing with special agents or officers of the state are bound by the act of the legislature from which such agents or officers derive their authority,[45] and such persons have the burden of proving the authority of such officers or agents.[46] Unauthorized contracts by state officers can be ratified by the legislature,[47] but not by departmental or executive officers who are themselves

known as Employer's Liability Act, and, among other provisions, abolishing the fellow-servant doctrine. Sneed v. Central of Georgia R. Co., 151 F. 608.

27, 28. See 6 C. L. 1516.

29. Lease of state lands construed same as lease between individuals. Boston Molasses Co. v. Com. [Mass.] 79 N. E. 827.

30. State held liable to lessee of state lands for taxes paid by lessee. Boston Molasses Co. v. Com. [Mass.] 79 N. E. 827.

31. Remington v. State, 101 N. Y. S. 952.

32. Contract under Sess. Laws 1903, p. 718, c. 160, for construction of penitentiary cells and sewerage. Van Dorn Iron Works Co. v. State [Neb.] 107 N. W. 856.

33. Act Feb. 1879, p. 10 (Kirby's Dig. § 4866), providing that state bonds issued Jan. 1st, 1870, should be receivable in payment for real estate bank lands, did not become a part of the contract evidenced by such bonds. Tipton v. Smythe [Ark.] 94 S. W. 678.

34. Did not lie to prevent state capitol commission from letting contracts on ground that it did not have sufficient funds as required by Laws 1895, pp. 275-277, c. 163, §§ 2, 3. Davenport v. Elrod [S. D.] 107 N. W. 833. Did not lie to prevent such commission from inserting in contracts provision that controversies should be settled by architect. Id. As to effect of unauthorized contracts, see post, § 4, Officers and Agents.

35. See 6 C. L. 1516.

36. Such meaning should always be given the term in absence of indication of contrary intent in statute. State v. Chittenden, 127 Wis. 468, 107 N. W. 509.

37. Within constitutional inhibition against receipt by officers of "perquisites of office or other compensation" in addition to their salaries. State v. Sheldon [Neb.] 111 N. W. 372.

38. Remedy is by quo warranto. Davenport v. Elrod [S. D.] 107 N. W. 833.

39. Attorney employed by attorney general under authority of Burn's Ann. St. 1901, § 7683 et seq., to collect war claims from United States, held special deputy within this rule. Hord v. State [Ind.] 79 N. E. 916.

40. Reappointment by subsequent incumbent is essential. Hord v. State [Ind.] 79 N. E. 916.

41, 42, 43, 44. State v. State Journal Co. [Neb.] 110 N. W. 763.

45. People v. Brooklyn Cooperage Co. [N. Y.] 79 N. E. 866; Hord v. State [Ind.] 79 N. E. 916.

46. Hord v. State [Ind.] 79 N. E. 916.

47. Resolution authorizing suit against state for price of military supplies held waiver of lack of authority of officers to

without power to make the contract.[48] An unauthorized contract by a state officer is not within the Federal and state constitutional provisions relative to the impairment of contracts.[49] In the absence of special statutory provisions to that effect, a state is not liable for the torts of its officers or agents,[50] but the officers or agents will be liable where the acts are unauthorized, though under color of statutory authority, or where the attempted authorization is void.[51] Acts of administrative officers in the exercise of quasi judicial powers are as binding upon other tribunals as the adjudications of regularly constituted courts of justice.[52] The determination of a state officer of a matter within his discretion cannot be collaterally attacked.[53] Neither the state nor its officers can be compelled by the courts to perform its political obligations,[54] but violation of its contractual obligations may be restrained.[55]

The powers of the legislature are conferred by and dependent upon the state constitution.[56] The powers thus delegated may be summed up generally as the power to make laws,[57] and this power cannot be delegated,[58] but this restriction does not apply to merely ministerial duties[59] or the administration of the law when made,[60] and the agent or commission may be allowed more or less discretion in the performance of ministerial duties.[61] Where powers are conferred upon the two branches of the legislature jointly, neither can act independently,[62] and separate action in such case, being void, is not capable of ratification by the other branch.[63] A specific delegation of separate powers excludes all other powers except such as may be necessary to the exercise of those expressly granted,[64] the doctrine of inherent powers having no application to the separate branches of a legislature under a con-

incur the debt. Lilly Co. v. Com., 29 Ky. L. R. 589, 93 S. W. 1039.

48. Unauthorized contract by attorney general not capable of ratification by his successor, nor by governor, auditor, or treasurer. Hord v. State [Ind.] 79 N. E. 916.

49. Hord v. State [Ind.] 79 N. E. 916.

50. Laws 1904, p. 1363, c. 561, authorizing court of claims to determine claims for damages from survey of county lines, created no liability against state. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

51. Surveyor acting under color of authority conferred by Laws 1902, p. 1125, c. 473, held liable for unnecessary destruction of trees in laying off boundary between counties. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Laws 1904, p. 1363, c. 561, authorizing court of claims to determine claims for damages arising from survey of county lines, created no liability against state and did not bar suit against surveyor for such damages. Id.

52. De Laittre v. Board of Com'rs, 149 F. 800.

53. Determination of secretary of state as to state printing and binding as authorized by Code, § 120. State v. Young [Iowa] 110 N. W. 292.

54. Issue of land patents. De Laittre v. Board of Com'rs, 149 F. 800.

55. Obligations between state land commission and purchaser. De Laittre v. Board of Com'rs, 149 F. 800.

56. State v. Guilbert, 75 Ohio St. 1, 78 N. E. 931; In re Sherill, 188 N. Y. 185, 81 N. E. 124.

57. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

58. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

Municipal functions, as used in Const. art. 3, § 26, prohibiting the delegation of municipal functions, does not apply to erection of state capitol, the term being held to apply to functions connected with subordinate municipalities, such as cities, etc. Davenport v. Elrod [S. D.] 107 N. W. 833.

Referendum: Reference by the legislature of acts affecting a particular locality to the people thereof is not an unconstitutional delegation of authority. Loc. Acts 1905, p. 1068, No. 627, providing for annexing of territory to city of Detroit. Attorney General v. Springwells Tp., 143 Mich. 523, 13 Det. Leg. N. 30, 107 N. W. 87.

59. Erection of state capitol may be delegated to a commission. See Laws 1905, p. 275, c. 163. Davenport v. Elrod [S. D.] 107 N. W. 833.

60. Some other agency may be authorized to determine the facts essential to the application of the law. State v. Chittenden, 127 Wis. 468, 107 N. W. 500.

61. Laws 1905, p. 275, c. 163, authorized state capitol commission to select building material, and it was not bound to avail itself of Laws 1903, p. 93, c. 85, authorizing gratuitous use of stone cut by convicts from state quarries. Davenport v. Elrod [S. D.] 107 N. W. 833. Sess. Laws 1903, p. 718, c. 160, making appropriation for certain number of "cells and sewage" at penitentiary, left it to discretion of board of public lands and buildings as to necessity of sewage in some of such cells. Van Dorn Iron Works Co. v. State [Neb.] 107 N. W. 856.

62, 63. State v. Guilbert, 75 Ohio St. 1, 78 N. E. 931.

64. Power to appoint select investigating committee for general legislative purposes not implied from powers conferred on senate. State v. Guilbert, 75 Ohio St. 1, 78 N. E. 931. Such power was not conferred by Rev. St. 1906, § 50-55. Id.

stitutional government.[65] One branch of the legislature has no inherent power by independent action to create an investigating committee for general legislative purposes,[66] or with power to sit and act after the close of the session,[67] but this power may be conferred by the legislature sitting as a whole,[68] and also the power to commit witnesses for contempt.[69] In any and every case the exercise of the powers conferred must be in conformity with the state constitution.[70] Since, therefore, the basic constitutional principle upon which a state is divided into political subdivisions is equality of representation,[71] the legislature must, in making such divisions, observe as clearly as possible the constitutional limitations as to population,[72] territory,[73] and time.[74] The courts, however, can consider only whether the legislature

65. The English precedents, therefore, cannot be safely followed in determining the separate powers of a state legislature. State v. Guilbert, 75 Ohio St. 1, 78 N. E. 931.

66. Ohio constitution grants no such powers, either express or implied, to either branch of the general assembly. State v. Guilbert, 75 Ohio St. 1, 78 N. E. 931.

67, 68. Ex parte Caldwell [W. Va.] 55 S. E. 910.

69. Joint resolution Jan. 31, 1905, and Act. Jan. 26, 1906, relative to investigation of state dispensaries. Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

70. See Constitutional Law, 7 C. L. 691; Statutes, 6 C. L. 1520.

State legislature held to have power to make appropriation for medals, statues, etc., for aid of citizens who served to credit of state in Federal army. In re Opinion of the Justices, 190 Mass. 611, 77 N. E. 820.

Powers delegated by Federal government must likewise be exercised in conformity with the state constitution, where the delegation is to the legislature as a parliamentary body, and such was the character of Act Feb. 22, 1889, 25 Stat. 676, c. 180, admitting Montana into the Union and providing that lands therein granted for school purpose should be appropriated to such purposes in such manner as the state legislature should direct. State of Montana v. Rice, 27 S. Ct. 281.

71. Under Const. § 33, providing that representation districts must be as nearly equal in population as possible, and that not more than two counties shall be joined in one district, does not absolutely forbid the joining of more than two counties where this would be necessary in order to secure equality. Rayland v. Anderson, 30 Ky. L. R. 1199, 100 S. W. 865.

72. Under Const. 1894, art. 3, § 4, requiring an approximation of equality in population in senatorial districts, the minimum rights of counties entitled, according to census, to at least one senator, are determined by such enumeration, and such rights cannot be abridged by the legislature by joining to any one of them another smaller county where such a course is not absolutely required by geographical position and the constitutional requirements of compactness and contiguity. In re Sherill, 188 N. Y. 185, 81 N. E. 124, rvg. Payne v. O'Brien, 101 N. Y. S. 367, 858. Division of county into assembly districts held unconstitutional under Const. art. 3, § 5, on account of inequality of population in contiguous districts. In re Timmerman, 51 Misc. 192, 100 N. Y. S. 57. Pub. Acts 1905, p. 352, No. 245, dividing state into two senatorial districts, held unconstitutional on account of inequality of population of various districts. Williams v. Secretary of State, 145 Mich. 447, 13 Det. Leg. N. 433, 108 N. W. 749. Acts 1906, p. 472, c. 139, dividing state into representative districts, held violation of Const. § 33, on account of inequality in population of certain districts. Ragland v. Anderson, 30 Ky. L. R. 1199, 100 S. W. 865.

73. Under Const. 1894, art. 3, § 4, requiring senatorial districts to be as compact as possible, a district comprising portion of a thickly built up city, with streets and blocks, and covering level ground, cannot be lawfully bounded by a rambling territory, including many streets and angles. In re Sherill, 188 N. Y. 185, 81 N. E. 124. Assembly district with many sides and angles in city with blocks and streets held in violation of Const. art. 3, § 5, relating to compactness. In re Timmerman, 51 Misc. 192, 100 N. Y. S. 57. Mere shape of senatorial district is not violation of compactness, where it is compact from standpoint of trade, travel, and interest. Payne v. O'Brien, 101 N. Y. S. 858, afg. 101 N. Y. S. 367. See In re Sherill, 188 N. Y. 185, 81 N. E. 124. Where a county consisted of an island without sufficient population to constitute a separate district, it was proper to place it in a district with another county, notwithstanding the constitutional provision that the districts must consist of contiguous territory. In re Sherill, 188 N. Y. 185, 81 N. E. 124; Payne v. O'Brien, 101 N. Y. S. 858, afg. 101 N. Y. S. 367. Island county could not be joined with inland county. In re Sherill, 188 N. Y. 185, 81 N. E. 124. Constitutional provision that no county shall be divided in formation of senatorial districts unless such county should be equitably entitled to two or more senators, indicates not that the county shall be made the basis of apportionment but that portions of different counties must not be included in the same district, and that when a county is entitled to two or more senators the legislature must make such apportionment within the county according to population on basis of last state enumeration. Williams v. Secretary of State, 145 Mich. 447, 13 Det. Leg. N. 433, 108 N. W. 749.

74. Loc. Act June 8, 1905, p. 1068, No. 627, providing for annexation of territory to city of Detroit, though enacted before apportment act June 16, 1905, did not violate Const. art. 4, § 4, providing for reapportionment by general act. Attorney General v. Springwells Tp., 143 Mich. 523, 13 Det. Leg. N. 30, 107 N. W. 87.

has exercised a constitutional discretion in making such divisions;[75] and where the legislature is vested with exclusive power to determine the title to membership therein a member received as a legally elected member becomes such de facto and de jure.[76] An apportionment act remains in force until supplanted by a subsequent valid act.[77] Where the division of one county into two is declared unconstitutional, the integrity of the original county is restored.[78]

The power of the governor to call an extra session of the legislature[79] is not exhausted by a single exercise thereof.[80]

§ 5. *Fiscal management.*[81]—Constitutional limitations must be observed in contracting debts.[82] Constitutional inhibitions against using the money or credit of the state in aid of private undertakings do not prevent such assistance to educational institutions,[83] nor does a constitutional inhibition against the state's engaging in internal improvements relate to improvements by minor subdivisions of the state with their own funds and under their own management.[84] Matters pertaining to one department are governed by the statutory provisions relating to such department rather than those relating to another department.[85] A tax paying resident has such a special interest as to give him a status to maintain a suit to restrain the destruction of the state properties or unauthorized expenditures of state funds by state agents.[86]

§ 6. *Claims.*[87]

§ 7. *Actions by and against state.*[88]—A state may sue in its own name,[89] and though it may not be subject to all of the conditions attached to the right of individuals to sue,[90] it must have at least an interest in the subject-matter of the

75. As to number. Williams v. Secretary of State, 145 Mich. 447, 13 Det. Leg. N. 433, 108 N. W. 749.

76. Hence decision of court that senatorial apportionment act, Laws 1906, p. 1032, c. 431, was unconstitutional, did not affect the legality of the legislature elected and seated thereunder. In re Sherill, 188 N. Y. 185, 81 N. E. 124.

77. Since apportionment acts of 1901 and 1905 are invalid, notice for election of senators must be given under Act of 1895, in absence of special session and reapportionment by a valid act. Williams v. Secretary of State, 145 Mich. 447, 13 Det. Leg. N. 433, 108 N. W. 749. Legislature in passing apportionment act June 16, 1905, must have had in mind Loc. Act June 8, 1905, p. 1068, No. 627, providing for the annexation of territory to city of Detroit, which provided that the annexation should not take place until April, 1906, and hence, construing the two statutes together, it was the intention of the legislature that the new act should not supplant the old until the annexation actually took place, and hence during the interval the electors of the detached territory were not disfranchised but their rights were to be determined under the old apportionment law. Attorney General v. Springwells Tp., 143 Mich. 523, 13 Det. Leg. N. 30, 107 N. W. 87.

78. County awarded two senators and four representatives after being divided into two counties held entitled to same number of representatives but to only one senator after being restored to single county by court's decision. Heitman v. Gooding [Idaho] 86 P. 785.

79. Under Const. Pa., matter of calling extra session of legislature is within discretion of governor, both as to time and notice. In re City of Pittsburg [Pa.] 66 A. 348.

80. New call may be made including additional subjects for consideration. In re City of Pittsburg [Pa.] 66 A. 348.

81. See 6 C. L. 1518.

82. Act 1868, No. 67, authorizing creation of debt for improvement of navigation of Red River, and issue of bonds payable out of funds in treasury not otherwise appropriated, held violation of Const. 1868, art. 111, providing that general assembly when contracting debt must provide ways and means of payment. Durbridge v. State, 117 La. 841, 42 So. 337.

83. Laws 1898, p. 230, c. 122, giving assistance to Cornell University in establishment of forestry experiment station, etc., held not prohibited by Const. art. 8, § 9. People v. Brooklyn Cooperage Co. [N. Y.] 79 N. E. 866, afg. 100 N. Y. S. 19.

84. Joint maintenance of bridge by two municipalities. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 874.

85. Payment of claims for printing connected with insurance department held governed by provisions relating to such department and not by provisions relating to public printing in general. State v. Wilder [Mo.] 97 S. W. 940.

86. Christmas v. Warfield [Md.] 66 A. 491.

87, 88. See 6 C. L. 1519.

89. Suit to collect hunter's license. State v. Moody [Mo.] 100 S. W. 619. See Fish and Game Laws, 7 C. L. 1659.

90. A state is not bound to place the defendant in statu quo by restoring money received under an illegal contract as a condition to the right to maintain a suit to cancel such contract, since state officers have no power to draw money from state ex-

suit.[91] Provision for suits against a state is sometimes made by the state constitution [92] or statutes,[93] but in the absence of such consent a state cannot be sued in its own courts,[94] and making the attorney general a party will not confer jurisdiction to decree a sale of state lands.[95] Even where the state itself institutes the suit, the defendant cannot be allowed affirmative relief.[96] Not every suit against a state officer is a suit against the state itself.[97] A suit against a state officer to restrain or direct his action in a matter intrusted to his official discretion and involving the pecuniary interests of the state is a suit against the state;[98] but where such a suit involves neither official discretion nor the pecuniary interests of the state, nor the violation of any positive statute indicative of the state's public policy, it is not such a suit against the state as cannot be maintained in the Federal courts [99] and such a suit may be maintained even where the pecuniary interest of the state is involved, if the act of the officer is merely ministerial.[1] A state's constitutional exemption is not destroyed by a constitutional provision that all corporations shall be subject to suit,[2] nor can a state agency, when sued in a matter involving the interests of the state, waive the state's exemption from suit.[3] The interstate commerce clause cannot be invoked in a suit against a state where, in order to pass upon the questions so raised, the court must proceed upon the theory that it had jurisdiction of the whole controversy.[4] Conditions attached to the consent to be sued [5] may render the

cept pursuant to appropriation, and all that can be required is that it consent to the rendition of a judgment against it for such amount. State v. Washington Dredging & Imp. Co. [Wash.] 86 P. 936.

91. Suit to establish title of private individuals to lands claimed under Federal laws. State v. Warner Valley Stock Co. [Or.] 86 P. 780.

92. Const. 1870, providing that suits against state may be brought in such manner and in such courts as legislature may direct held not self-executory. General Oil Co. v. Crain [Tenn.] 95 S. W. 824.

93. Under Code Civ. Proc. § 264, as amended by Laws 1905, p. 851, c. 370, the court of claims has jurisdiction of a claim against the state for trespass by it or under its authority, at least to such extent as it may have occurred within two years preceding the claim. Remington v. State, 101 N. Y. S. 952.

94. Hodgdon v. Haverhill [Mass.] 79 N. E. 830. Const. 1901, art. 1, § 14. Alabama Girls' Industrial School v. Addler, 144 Ala. 555, 42 So. 16. To foreclose mortgage on land escheated to state. Seitz v. Messerschmitt, 102 N. Y. S. 732. Suit against Alabama Girls' Industrial School held a suit against the state. Alabama Girls' Industrial School v. Addler, 144 Ala. 555, 42 So. 116; Alabama Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

95. Seitz v. Messerschmitt, 102 N. Y. S. 732.

96. Defendant cannot file cross bill seeking affirmative relief. Alabama Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

97. Morrill v. American Reserve Bond Co., 151 F. 305.

98. Morrill v. American Reserve Bond Co., 151 F. 305. Mandamus to compel state exposition exhibit commission to audit and allow claim out of appropriation held suit against state. Wilson v. Louisiana Purchase Exposition Commission [Iowa] 110 N. W. 1045. Suit to restrain inspection of oil and collection of fee under Sess. Acts 1899, p. 811, c. 349, held within Acts 1873, p. 15, c. 13, prohibiting suits against state affecting its treasury funds, or property. General Oil Co. v. Crain [Tenn.] 95 S. W. 824. Suit to restrain enforcement of Acts 29 in Leg., p. 358, c. 148, relating to privilege tax on oil wells, held suit against state. Producers Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157.

99. Suit to compel secretary of state to turn over to Federal receiver deposits made by foreign corporation to secure its bonds held not suit against state. Morrill v. American Reserve Bond Co., 151 F. 305. Suit to enjoin assessment and collection of tax by state officers acting under special authority of a statute alleged to be unconstitutional held not a suit against the state. Galveston, etc., R. Co. v. Davidson [Tex. Civ. App.] 15 Tex. Ct. Rep. 274, 579, 93 S. W. 436. Mandamus by insurance company to compel state treasurer to surrender deposit made with him pursuant to statute to protect policy holders held not suit against state. Prewitt v. Illinois Life Ins. Co., 29 Ky. L. R. 447, 93 S. W. 633. Suit to restrain county and city officers from assessment and collection of local taxes held not a suit against the state. Briscoe v. McMillan [Tenn.] 100 S. W. 111. Suit to restrain state railroad commission from enforcing its order that train should stop at certain station held not a suit against the state. Mississippi R. Commission v. Illinois Cent. R. Co., 27 S. Ct. 90.

1. Morrill v. American Reserve Bond Co., 151 F. 305.

2. Alabama Industrial School v. Reynolds, 143 Ala. 579, 42 So. 114.

3. Alabama Girls' Industrial School v. Addler, 144 Ala. 555, 42 So. 116.

4. Where court would have had to decide whether plaintiff's oil was subject to interstate commerce before deciding whether Sess. Acts 1899, p. 811, c. 349, relating to inspection of oil, was constitutional. General Oil Co. v. Crain [Tenn.] 95 S. W. 824.

5. Plaintiff held not to have sustained suit under conditions as to proof imposed

ordinary rule of evidence inapplicable.[6] A suit against a state with its permission is not abated by the death of the plaintiff.[7] A judgment awarding the state affirmative relief in a suit against state officers should be in favor of the state.[8]

Statutes of limitation do not run against the state in respect to public rights, unless the state is expressly included within the terms of the statute,[9] and the same prerogative of exemption extends to the state in its sovereign capacity as to all governmental matters,[10] but if the state becomes a partner with individuals or engages in business, it is divested of its sovereign character and is subject to such a statute.[11] The same rules extend to the municipal subdivisions of the state.[12] But limitations may be pleaded by the state,[13] and the running of limitations in favor of the state cannot be tolled by statute contrary to constitutional provisions.[14]

STATUTES.

§ 1. Enactment (1977). Special Sessions (1977). The Journals (1977). Submission to Popular Vote (1978). Presumptions and Evidence as to Passage (1978). Publication (1979).

§ 2. Special or Local Laws (1979). In General (1979). Classification (1980). Based on Population (1980). Other Classifications (1981). Local Option Laws (1981). County and Township Affairs (1981). Municipalities (1981). Taxation (1982). Courts (1982). Special Privileges (1982). Police Power (1982).

§ 3. Subjects and Titles (1982). Partial Invalidity (1985).

§ 4. Amendments and Revisions (1986). Reference to Act Amended (1986). Effect (1987). Identification (1987). Revisions (1987).

§ 5. Interpretation (1987).
- A. Occasion for Interpretation (1987).
- B. General Rules (1987). Intention to Be Reached (1988). Whole Act to Be Considered (1988). All Language to Be Effectuated (1989). Avoiding Hardship or Absurdity (1989). Presumption of Legislative Knowledge of the Law (1989). General and Particular Provisions (1989).
- C. Aids to Interpretation (1989). The Title (1989). Marginal Notes (1990). Legislative History (1990). Contemporaneous Interpretation (1990). Official Construction (1990). Surrounding Conditions (1990). Prior Acts (1990). Original Act (1991). Re-enactment Statutes (1991). Statutes Adopted From Other States (1991). State Statutes in Federal Courts (1991). Enforcement (1991). Laws in Pari Materia (1991). Acts of Same Date (1992). Acts of Same Session (1992).
- D. Words, Punctuation, and Grammar (1992).
- E. Exceptions, Provisos, Conditions, and Saving Clauses (1992).
- F. Mandatory or Directory Acts (1993).
- G. Strict or Liberal Constructions (1993). Statutes Changing the Common Law (1993). Penal Statutes (1993). Various Other Strict Constructions (1994). Remedial Statutes (1994). Revisions (1994). Other Liberal Constructions (1994).
- H. Partial Invalidity (1994).

§ 6. Retrospective Effect (1995). Curative Acts (1996).

§ 7. Repeal (1996).
- A. In General (1996). Effect on Vested Rights (1996). Effect on Penalties (1997). Effect on Pending Actions (1997). Repeal of Repealing Statutes (1997).
- B. Implied Repeal (1997). General and Special Laws (1998).

by Const. art. 192. Durbridge v. State, 117 La. 841, 42 So. 337.

6. Under Const. art. 192, providing that plaintiff must show his claim to be valid, incurred in strict conformity to law, not in violation of state or Federal constitution, and for a consideration, plaintiff must go behind certificates of engineers and commissioners and show affirmatively and de novo the existence of facts certified therein. Durbridge v. State, 117 La. 841, 42 So. 337.

7. Durbridge v. State, 117 La. 841, 42 So. 337.

8. Judgment for taxes in suit against officers to restrain collection. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157.

9. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579.

In Kentucky limitations run against the state the same as individuals. See Ky. St. § 2523. Louisville & N. R. Co. v. Smith [Ky.] 101 S. W. 317. Hence contention that railroad company could not lose right of way by adverse possession because such company holds such property only in service of state could not be sustained. Id.

10, 11. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579.

12. Brown v. Trustees of Schools, 224 Ill. 184, 79 N. E. 579. Under Hurd's Rev. St. 1905, c. 122, § 60, the use and benefit of school properties are vested in the local district, to the exclusion of the interest of the general public, of the township and the state, and hence limitations may be pleaded in ejectment by township school trustees for benefit of a particular district. Id.

13. Same limitation operates between private persons. McRae v. Auditor General [Mich.] 13 Det. Leg. N. 895, 109 N. W. 1122.

14. Under Const. art. 7, § 6, limitations run in favor of state on claims for assessments on state property for local improvements, notwithstanding contrary provision in Laws 1901, p 1093, c. 407. City of Buffalo v. State, 101 N. Y. S. 595. Under Rev. St. 1839 [1st Ed.] pt. 1, c. 9, tit. 5, art. 5, § 77, providing for auditing by state controller of claims on state lands for legal charges

§ 1. *Enactment.*[15]—Under most constitutions a law is valid without the signature of the governor unless vetoed by him within a certain number of days.[16] Under a constitutional provision that after a bill has passed both houses it shall be approved by the governor, a bill which has been signed by the governor after it has been passed by both houses but pending a motion to reconsider does not become a law.[17] When an act is changed by vote of the house from an amendment to a repeal, it must pass through all the stages of a new act.[18] Where a constitution provides for the establishment of courts by a two-thirds vote, an amendment to an act creating a court may be passed by a majority vote where it relates merely to procedure in such court.[19] A constitutional provision that no bill shall be passed unless it shall have been printed and placed in final form upon the desks of members at least three days prior to its final passage is sufficiently complied with where the bill as it originated in one house with all the amendments there made had been printed and placed on each member's desk for the requisite time.[20] A provision of the constitution requiring that bills shall be signed in the presence of the house and the fact of signing shall be entered on the journal is directory and a statement in the journal that the governor announced that he had signed a bill is a sufficient compliance therewith.[21] A constitutional requirment that amendments shall be printed before final vote does not apply to amendments recommended by a conference committee of the two houses.[22] Where the house refuses to concur in senate amendments, the subsequent adoption by the house of a conference report including certain of the amendments was a sufficient concurrence in these amendments.[23] A single branch of the legislature has no power of independent legislation.[24] Where the constitution provides that legislation is to go into effect ninety days after adjournment of the legislature, a statute in which it is provided that it is to take effect one year after passage takes effect one year after the expiration of the said ninety days.[25] Where an act relating to elections has been declared unconstitutional, mandamus will not lie to compel the printing of the act as provided in the last action thereof.[26]

Special sessions[27] are ordinarily authorized to consider such matters as are embraced in the proclamation by which the session was convoked.[28]

The journals.[29]—A legislative journal may be looked into to ascertain whether or not a law was properly enacted,[30] and courts will not hear evidence contrary to

thereon and for payment of such claims out of state treasury, and Laws 1886, p. 710, c. 435, Laws 1894, p. 572, c. 317, providing that auditor shall be notified of assessments against state property for local purposes, a method was provided for legal consideration of claims against state lands for assessments for local improvements, so that such claims were not within exception of Const. art. 7, § 6, relative to claims not enforceable by any tribunal. Id.

15. See 6 C. L. 1521.

16. Henry v. Carter [Miss.] 40 So. 995. In computing the days allowed a governor within which to return a bill to the legislature, Sundays are to be excluded. Fellman v. Mercantile Fire & Marine Ins. Co., 116 La. 723, 41 So. 49.

17. Bill was sent by the clerk by mistake to the governor. State v. Savings Bank [Conn.] 64 A. 5.

18. Erwin v. State [Tenn.] 93 S. W. 73. Three readings in each house.

19. Dahlsten v. Anderson, 99 Minn. 340, 109 N. W. 697.

20. Const. art. 3, § 15. Laws of 1905, pp. 474, 477, c. 421, §§ 315, 324. Stock transfer tax law. People v. Reardon, 184 N. Y. 431, 77 N. E. 970.

21. Adams v. Clark [Colo.] 85 P. 642.

22, 23. Board of Com'rs of Pueblo County v. Strait [Colo.] 85 P. 178.

24. Appointment of investigating committee. State v. Guilbert, 75 Ohio St. 1, 78 N. E. 931.

25. Shook v. Laufer [Tex. Civ. App.] 100 S. W. 1042.

26. Smith v. Baker [N. J. Law] 63 A. 619.

27. See 6 C. L. 1522.

28. Governor having called special session for specific objects may before its meeting issue another proclamation stating additional objects. Pittsburg's Petition, 32 Pa. Super. Ct. 210.

29. See 6 C. L. 1522.

30. Where the constitution required that the ayes and nays be entered on the journal, a bill does not become a law where the journal does not show such a record. Palatine Ins. Co. v. Northern Pac. R. Co. [Mont.] 85 P. 1032. Where a statute is found incorporated in the Revised Statutes, it is prima facie a valid law, but the court may

the record of the journal to sustain or defeat a statute,[31] but in Texas the journals cannot be looked to to invalidate an act properly signed and approved;[32] and in Tennessee a constitutional provision that bills shall be signed by the speakers in open session, which fact shall appear on the journal, is held to be directory only, and an act will not be declared void if the journal does not show the fact of such signing.[33] Where the journal shows the adoption by ayes and nays, the names of those voting being entered on the journal, of the report of a conference committee recommending amendments to the original bill and the adoption of the report but not recommending the passage of the act, this is a sufficient compliance with the constitution providing for an aye and nay vote on the final passage of an act and that amendments of the other house and conference reports must be adopted by aye and nay votes recorded on the journal.[34] An entry in the journal of the ayes only upon the passage of a measure is a sufficient compliance with the constitution requiring an entry of the ayes and nays for it shows that no nays were cast.[35] The silence of the journal upon acts necessary for the final passage of a bill does not conclusively show they were omitted and the courts will resolve all doubts in favor of the bill,[36] and doubtful and contradictory entries in a journal will not defeat a bill properly enrolled.[37]

Submission to popular vote[38] is not ordinarily deemed an unlawful delegation of legislative power.[39]

Presumptions and evidence as to passage.[40]—The legislative journal is conclusive as to the proper passage of an act,[41] but the presumption in favor of an enrolled bill as found on file in the secretary of state's office having the proper signatures is not overthrown by the silence of the legislative journals on that matter.[42] A compilation of statutes not having been authenticated or adopted by the legislature according to law does not form prima facie evidence of the due passage of statutes therein contained.[43] One questioning the validity of a law on the ground of non-

take judicial notice of the statute rolls in the office of the secretary of state to determine the validity of an act passed in an unconstitutional manner and never re-enacted but incorporated by a committee on revision in the Revised Statutes. Brannock v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 604. Where the history of a bill shows that it was amended but the journal is silent upon that point the courts will uphold the statute as enrolled. City of Belleville v. Wells [Kan.] 88 P. 47. Where the Session Laws show an act to have been passed but the certificates of the presiding officers of both houses are defective in failing to show the requisite number of members present and voting, recourse may be had to the journals to support the validity of the enactment. In re Stickney's Estate, 185 N. Y. 107, 77 N. E. 993.

31. An affidavit of publication of a measure as required by the constitution appeared upon the journal and the court would not hear evidence that the publication was not in fact made. State v. Brodie [Ala.] 41 So. 180. Where the title of a bill as enrolled varies from the title appearing in the journals the latter will control. Wade v. Atlantic Lumber Co. [Fla.] 41 So. 72.

32. It was sought to show that a bill was not read on three separate occasions nor was there a four-fifths vote to suspend the rules. El Paso & S. W. R. Co. v. Foth [Tex. Civ. App.] 100 S. W. 171.

33. Home Tel. Co. v. Nashville [Tenn.] 101 S. W. 770.

34. Laws 1899, p. 331, c. 134. Board of Com'rs of Pueblo County v. Strait [Colo.] 85 P. 178.

35. Board of Com'rs of Salem v. Wachovia Loan & Trust Co. [N. C.] 55 S. E. 442.

36. City of Belleville v. Wells [Kan.] 88 P. 47; Home Tel. Co. v. Nashville [Tenn.] 101 S. W. 770. Journal did not state if bill was signed in the presence of the House. Adams v. Clark [Colo.] 85 P. 642.

37. The entry did not show a constitutional majority while another did. Missouri, etc., R. Co. v. Simons [Kan.] 88 P. 551.

38. See 6 C. L. 1523.

39. Loc. Acts 1905, p. 1068, No. 627, submitting to vote of inhabitants of city an annexation of territory. Attorney General v. Springwells Tp., 143 Mich. 523, 13 Det. Leg. N. 30, 107 N. W. 87. See, also, Intoxicating Liquors, 8 C. L. 486, as to local option laws.

40. See 6 C. L. 1523.

41. The court will not hear evidence that an affidavit of publication appearing on the journal was false. State v. Brodie [Ala.] 41 So. 180.

42. Stetter v. State [Neb.] 110 N. W. 761. The certificate of the secretary of state that a bill has been properly enacted is conclusive in all suits inter partes. Evidence that bill not signed within proper time is incompetent. Bloomfield v. Middlesex County Chosen Freeholders [N. J. Law] 65 A. 890. In Connecticut under Revision 1902, §§ 99, 106, the secretary of state's record of a statute is evidence, ordinarily conclusive of the existence of such statute. State v. Savings Bank [Conn.] 64 A. 5.

43. State v. Carter [Kan.] 86 P. 138.

compliance with statutory requirements must present proper evidence, and a stipulation of counsel agreeing that the mandates of the constitution were ignored in the passage of an act is not competent evidence.[44] Courts will not inquire into motives which prompted the official acts of the legislature.[45]

Publication.[46]—A mere affidavit of publication which does not set out the contents of the notice is insufficient under a constitution requiring a publication of the substance of the law and that an affidavit that notice has been given shall be exhibited to each house.[47]

§ 2. *Special or local laws. In general.*[48]—A statute which relates to persons or things as a class is a general law while a statute which relates to particular persons or things of a class is a special law.[49] Many state constitutions forbid the enactment of special legislation.[50] A special law valid under the existing constitution is not repealed by a constitution later adopted prohibiting special legislation.[51] The constitutional restriction applies to direct legislation, not to the incidental oper-

44. Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313.

45. Court refused to hear evidence that legislature had been bribed not to pass an act. State v. Terre Haute & I. R. Co. [Ind.] 77 N. E. 1077.

46. See 4 C. L. 1524.

47. State v. Brodie [Ala.] 41 So. 180.

48. See 6 C. L. 1623.

49. Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 703, 92 S. W. 1083. For a discussion of the difference between general and special laws, see State v. Braxton County Court [W. Va.] 55 S. E. 382; Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356.

50. The following statutes were void as special legislation: Providing an additional courthouse. Ex parte Birmingham & A. R. Co. [Ala.] 42 So. 118. An act appropriating money for a society would be void. Leatherwood v. Hill [Ariz.] 85 P. 405. Code Civ. Proc. § 1195, providing for attorneys' fees in actions to enforce mechanics' liens. Builders' Supply Depot v. O'Connor [Cal.] 8- P. 982. An act creating the Hopeful school district. Sellers v. Cox [Ga.] 56 S. E. 284. An act providing for the construction of an armory. Terry v. King County [Wash.] 86 P. 210. An act providing for licensing peddlers but that any municipality might suspend the provisions of the act. Brown v. Judge of Superior Ct., 145 Mich. 413, 13 Det. Leg. N. 507, 108 N. W. 717. An act providing for the attachment and garnishment of the wages of employes of some municipal corporations but not of others. Laws 1905, p. 285. Badenoch v. Chicago, 222 Ill. 71, 78 N. E. 31. An act authorizing the issuing of refunding bonds for a city at a different rate and for a longer period of time than that granted by a general act upon the same subject is void. City Council of Montgomery v. Reese [Ala.] 43 So. 116. Laws 1905, p. 122, c. 62, § 124, providing for the payment by the county treasurer of interest and penalties upon delinquent city and city school taxes to the city treasurers is unjust to the other taxing districts. State v. Mayo [N. D.] 108 N. W. 36.

The following statutes were held not to be special legislation: Laws 1903, p. 48, c. 52, authorizing appeals from judgments exceeding $100. Garcia v. Free [Utah] 88 P. **30.** Laws 1905, p. 403, c. 273, providing for the management of schools in different cities of different classes. State v. Lindemann [Wis.] 111 N. W. 214. An act providing for courts in cities of over three thousand inhabitants and providing for judges whenever the city council presents the act for vote to the inhabitants of the city and it is accepted. Chicago Terminal Transfer R. Co. v. Greer, 223 Ill. 104, 79 N. E. 46. A law providing that corporations may by certain acts renew their charters. Jersey City v. North Jersey St. R. Co. [N. J. Law] 63 A. 906. The creation of a library board by Acts 1903, § 4983h et seq. granted no franchise which the city did not already possess and was at most a regulation of an existing right. School City of Marion v. Forrest [Ind.] 78 N. E. 187. An act curing defects in tax deeds is not within the constitutional prohibition against special laws giving effect to invalid deeds, etc., for it applies to all deeds having the defect stated which deeds constitute a class. Baird v. Monroe [Cal.] 89 P. 352. An act prohibiting the sale of liquor within one hundred feet of a school house in a certain county. Loc. Acts 1905, p. 1157, No. 663. White v. Bracelin, 144 Mich. 332, 13 Det. Leg. N. 156, 107 N. W. 1055. Code, § 2485, providing for double damages where a mine operator without permission takes coal from adjoining lands. Mier v. Phillips Fuel Co., 130 Iowa, 570, 107 N. W. 621. Exempting certain persons from the operation of the general stock law. Brown v. Tharpe, 74 S. C. 207, 54 S. E. 363. Hurd's Rev. St. 1905, p. 403, c. 24, requiring plumbers in cities of five thousand or more to be examined and licensed. Douglas v. People, 225 Ill. 536, 80 N. E. 341. An act creating a water board for cities of the first class does not create a private corporation. Kirch v. Louisville, 30 Ky. L. R. 1356, 101 S. W. 373. An appropriation to a society of a fund for the purpose of collecting state history, the expenditures to be reported to the governor. Leatherwood v. Hill [Ariz.] 89 P. 521. A legislative act relating specially to the city and county of Denver is not obnoxious to the constitutional inhibition against special legislation. City of Denver v. Iliff [Colo.] 89 P. 823. Amendment to dispensary law. Murph v. Landrum [S. C.] 56 S. E. 850. And see further cases under special topics.

51. Act fixing salary of the treasurer of a county. Moore v. Houston County [Ga.] 57 S. E. 236.

ation of statutes.[52] A validating act which appears to apply to special cases is unconstitutional.[53] A law which must be general to be constitutional cannot be given an unequal operation by an amendment.[54] A constitutional provision against the enactment of special laws for the granting of corporate powers applies to municipalities as well as to private corporations.[55] Some state constitutions require that notice of intention to introduce special legislation be published.[55a] In Arkansas it is held that the constitutional provision that no special legislation shall be enacted where a general law can be made applicable is merely cautionary to the legislature and is not enforceable by the courts.[56]

Classification.[57]—A law which applies to a particular class of persons or corporations, and operates generally and uniformly throughout the state, is not void as special legislation.[58] The rules for legitimate classification for general legislation are: (a) The classification must be based on substantial distinctions making one class really different from another;[59] (b) the classification must be germane to the purposes of the law;[60] (c) must not be based on existing circumstances only;[61] (d) must apply equally to members of the class;[62] (e) the character of the class must be so different from other situations as to reasonably suggest the necessity or propriety, having regard for the public good, of substantially different legislative treatment therefor from that required for such others.[63] The application of the principle of classification rests with the legislature and is not subject to judicial review.[64]

Based on population.[65]—The classification of cities by population for many purposes is natural and proper for a system adapted to a small town might not be suitable for a large one.[66] Classes may also be subdivided.[67] There may be but one city

52. An act providing for vaccination of school children entitled "for the more effectual protection of the public health in the several municipalities of the state" is a general statute and its bearing on schools and school districts is altogether incidental. Stull v. Reber [Pa.] 64 A. 419.

53. An act confirming proceedings of commissioners appointed to divide cities into wards was limited by existing facts to confirming the proceedings taken in the city of Paterson. Rutten v. Paterson [N. J. Law] 64 A. 573.

54. Inheritance tax law cannot be repealed in part. Friend v. Levy [Ohio] 80 N. E. 1036.

55. Terry v. King County [Wash.] 86 P. 210.

55a. City of Ensley v. Cohn [Ala.] 42 So. 827.

56. Hendricks v. Block [Ark.] 97 S. W. 63.

57. See 6 C. L. 1527.

58. Nebraska Cent. Bldg. & Loan Ass'n v. Board of Equalization [Neb.] 111 N. W. 147; City of Belleville v. Wells [Kan.] 88 P. 47.

59. An act placing villages having bridges on town roads within their boundaries and towns in which such villages are located in a class by themselves. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974.

60. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974. Classification of towns by population is germane to the legislation providing for municipal lighting plants and waterworks. Smith v. Burlington [Wis.] 109 N. W. 79.

61. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974.

62. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974. Acts 1893, p. 65, c. 59, providing for change of venue in police courts of cities of certain size is not void as special legislation. Bumb v. Evansville [Ind.] 80 N. E. 625. Where an act provided that in counties under township organization judges were to be selected upon a basis of the vote cast for governor at the preceding election while in other counties the selection was to be based upon the vote cast at the preceding election, it was not void as special legislation for its operation is uniform and general as to all counties of the two classes. People v. Edgar County Sup'rs, 223 Ill. 187, 79 N. E. 123. Issuance of bonds by cities of first and second class. City of Belleville v. Wells [Kan.] 88 P. 47. Licenses. Kennamer v. State [Ala.] 43 So. 482. An act regulating the practice of pharmacists in towns of one thousand or over applies to all persons as a class under the same conditions and environments. Green v. State [Tex. Cr. App.] 15 Tex. Ct. Rep. 432, 92 S. W. 847.

63. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974. Legislature may create political subdivisions of the state. Maxey v. Powers [Tenn.] 101 S. W. 181. Differentiation in Ky. St. 1903, § 2560, as amended by Act March 14, 1906, relating to holding of local option elections, differentiating between counties which include a city of the fourth class and those which do not, is valid. Board of Trustees of New Castle v. Scott, 30 Ky. L. R. 894, 101 S. W. 944.

64. Parker-Washington Co. v. Kansas City [Kan.] 85 P. 781.

65. See 6 C. L. 1527.

66. Parker-Washington Co. v. Kansas City [Kan.] 85 P. 781; Green v. State [Tex.

in a class if the classification is not colorable and the real purpose is not to limit its application to a single community.[68] If an act has a special provision for any city later coming within the classification, it may fall within the constitutional prohibition and be void.[69] A classificaton of cities by population in a single county is void.[70]

Other classifications.[71]—Some other grounds of classification of cities have been sustained. Thus cities on or near the ocean are capable of a general classification so that acts referring to them alone are not unconstitutional.[72] Where owing to the peculiar situation and conditions of commerce a city is in a class by itself, special legislation for such city is not void under a provision of the constitution.[73] Building and loan associations have a distinctive character warranting their being classed by themselves.[74]

Local option laws[75] are generally held not to be void as granting any special privileges.[76]

County and township affairs.[77]—Some constitutions prohibit special legislation regulating county or township affairs but particular legislation regulating municipal bond issues may still be valid,[78] and an act providing for the change of county seats and making provisions for all the counties according to their needs is not special.[79]

Municipalities.[80]—Some constitutions prohibit special legislation regulating the internal affairs of cities.[81]

Cr. App.] 15 Tex. Ct. Rep. 432, 92 S. W. 847; Bumb v. Evansville [Ind.] 80 N. E. 625; Smith v. Burlington [Wis.] 109 N. W. 79. All the cities in the state divided into four classes. State v. Binswanger [Mo. App.] 98 S. W. 103; Clarke v. Lawrence [Kan.] 88 P. 735; State v. Keating [Mo.] 100 S. W. 648.

67. Clarke v. Lawrence [Kan.] 88 P. 735.

68. Parker-Washington Co. v. Kansas City [Kan.] 85 P. 781; Kirch v. Louisville, 30 Ky. L. R. 1356, 101 S. W. 373. An act empowering cities of the first class to construct sewers, there being but one city in that class and that city being referred to by name, was sustained in Miller v. Louisville, 30 Ky. L. R. 664, 99 S. W. 284. If legislation is general in form and substance, it is not within the constitutional prohibition because it can apply only at the present to two cities and was passed for them. In re City of Pittsburg [Pa.] 66 A. 348.

69. P. L. 1892, p. 119; Gen. St. p. 500, § 202, providing for the government of cities of a certain class, but which is not effective in the event of cities of a smaller class subsequently coming within the first class, is special legislation and unconstitutional. Seymour v. Orange [N. J. Err. & App.] 65 A. 1033. An act providing for the government of cities of the second class but not to take effect as to any city coming into the class under the enumerations of 1905, until 1908, is not special city legislation which is required by Const. art. 12, § 2, to be accepted by mayors of the cities affected. Koster v. Coyne, 184 N. Y. 494, 77 N. E. 983.

70. Judges in cities of a certain size lying within a single township to be paid a salary. State v. Messerly, 198 Mo. 351, 95 S. W. 913.

71. See 6 C. L. 1528.

72. An act providing for the laying out of a street along the beach front. Johnson v. Ocean City [N. J. Law] 64 A. 987; Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081.

73. An act incorporating a grain elevator for the city of Superior. Globe El. Co. v. Andrew, 144 F. 871.

74. Nebraska Cent. Bldg. & Loan Ass'n v. Board of Equalization [Neb.] 111 N. W. 147.

75. See 6 C. L. 1529.

76. Laws Or. 1905, pp. 41, 47, c. 2. State v. Richardson [Or.] 85 P. 225. Laws Or. 1905, pp. 41, 47, c. 2, § 10, requiring the county court in case a majority of the votes cast at any election be in favor of prohibition to declare such a result and make an order prohibiting the sale of liquor, does not contravene Const. art. 4, § 23, subd. 3, prohibiting the passage of special laws regulating the practice in courts of justice. Id.

77. See 6 C. L. 1529. Gen. Laws 29th Leg. p. 91, c. 64, regulating the storage of liquors in local option districts relates to every portion of the state which may adopt local option and is not void as a local act. Ex parte Massey [Tex. Cr. App.] 15 Tex. Ct. Rep. 703, 92 S. W. 1083.

78. An act providing that boards of park commissioners may issue bonds for improvement purposes is not a special or local law regulating county and township affairs so as to be unconstitutional. Kucera v. West Chicago Park Com'rs, 221 Ill. 488, 77 N. E. 912.

79. Ex parte Owens [Ala.] 42 So. 676.

80. See 6 C. L. 1529.

81. An act conferring powers on cities located on or near the ocean to lay out parks is not contrary to this provision. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081. An act by the legislature ratifying and confirming a contract between a city and a street railroad as to extension of tracks is a valid grant of power to the city authorities rather than a grant of a location prohibited by the constitution. Kuhn v. Knight, 101 N. Y. S. 1. Rev. Laws 1905, c. 101, p. 137, authorizing certain cities to issue bonds not special. City of Belleville v. Wells [Kan.] 88 P. 47.

Taxation.[82]—Legislatures may make classifications for the purpose of levying taxes,[83] but the operation of tax laws must be uniform within the class.[84]

Courts.[85]—Acts creating courts are usually upheld as general.[86]

Special privileges.[87]—Special privileges are void and will be presumed not to be intended.[88]

Police power.[89]—All matters which in any peculiar way affect the public health, comfort, or safety, may be the subject of special regulations.[90]

§ 3. *Subjects and titles. In general.*[91]—It is generally provided by state constitutions that a law shall embrace but one subject which must be expressed in its title.[92] The purpose of this provision is to prevent surreptitious legislation and to

82. See 4 C. L. 1525.

83. Pub. Acts 1883, p. 31, No. 39, as amended, providing for the incorporation and taxation of certain water companies, is not special legislation although other companies are incorporated not subject to such tax. Attorney General v. Arnott, 145 Mich. 416, 108 N. W. 646. Legislature may single out and make classifications for the purpose of levying occupation taxes. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157. A tax upon railroad and canal property is not void under the constitution as being a special law. Central R. Co. v. State Board of Assessors [N. J. Law] 65 A. 244. The taxation of railroads is not special. Georgia R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52.

84. Rev. St. 1906, §§ 1343—1 to 1343—4 inclusive, and Rev. St. 1906, §§ 1343a, 1343b, relating to taxation, are general in their nature but void under the constitution as not uniform in operation. State v. Lewis, 74 Ohio St. 403, 78 N. E. 523.

85. See 6 C. L. 1530.

86. Kennedy v. Meara [Ga.] 56 S. E. 243. Creating juvenile courts in certain classes of cities is not special legislation. Mill v. Brown [Utah] 88 P. 609. Creation of different courts for different localities is not special legislation. Dahlsten v. Anderson, 99 Minn. 340, 109 N. W. 697. Acts 1901, p. 120, dividing the twenty-fifth judicial district into two divisions providing for judges, their salaries, and a change of venue, is not special. Coffey v. Carthage [Mo.] 98 S. W. 562. Revised Statutes, § 6454, giving the probate court in certain counties concurrent jurisdiction with the common pleas in all misdemeanors and proceedings to prevent crime, is not unconstitutional for lack of uniform operation. Oberer v. State, 8 Ohio C. C. (N. S.) 93.

87. See 6 C. L. 1530.

88. Beauvoir Club v. State [Ala.] 42 So. 1040.

89. See 6 C. L. 1530. The nature and scope of the police power is elsewhere treated. See Constitutional Law, 7 C. L. 691.

90. Hurd's Rev. St. 1905, p. 403, c. 24, providing for examination and licensing of plumbers is within the police power. Douglas v. People, 225 Ill. 536, 80 N. E. 341. Providing for the vaccination of school children. Stull v. Reber [Pa.] 64 A. 419. Prohibiting the employment of children in certain occupations. St. 1905, p. 11, c. 18, § 2, prohibiting employment in any mercantile institution, office, laundry, manufactory, etc. Ex parte Spencer [Cal.] 86 P. 896. Acts to suppress contagious and infectious diseases among live stock. Noble v. Bragaw [Idaho] 85 P. 903. Restrictions upon railroad corporations. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902. Provision for the revocation of a physician's license for cause by the board of registration of medicine. Kennedy v. State Board of Registration in Medicine, 145 Mich. 241, 13 Det. Leg. N. 431, 108 N. W. 730. Employer's liability act is within the police power of the legislature. Laws 1906, p. 1682, c. 657. Schradin v. New York, etc., R. Co., 103 N. Y. S. 73. Licenses to peddle may be limited to citizens of the United States or those expressing their intention to become so within the police power of the legislature. Commonwealth v. Hana [Mass.] 81 N. E. 149. Licensing junk dealers. State v. Cohen, 73 N. H. 543, 63 A. 928.

91. See 6 C. L. 1531.

92. The matter of title and subject discussed. Wiemer v. Louisville Sinking Fund Com'rs, 30 Ky. L. R. 523, 99 S. W. 242.

Held to violate: The title to Laws 1901, p. 80, an act "creating a state board of health, defining its dutles, providing compensation and for the enforcement of regulations," does not embrace provisions in the body of the act creating county boards of health. Yegen v. Yellowstone County Com'rs [Mont.] 85 P. 740. Sess. Laws 1903, p. 290, c. 151, entitled "An act in relation to fees of state and county officers, etc.," which in fact imposes an ad valorem tax under the guise of a fee, is void. State v. Case, 39 Wash. 177, 81 P. 554. A provision for the filing of a mechanic's lien is in no way germane to the subject of an act creating a municipal corporation. Tommasi v. Bolger, 100 N. Y. S. 367. An act entitled to amend the municipal court act with reference to rules of court and appeals does not embrace a provision in the act itself for the removal of actions. Bonagur v. Orlandi, 101 N. Y. S. 115. The title "'An act relating to foreign corporations doing business in the State of Idaho" does not in any way suggest the subject and sole purpose of the act which was to relieve foreign corporations from the penalties incurred by the transaction of business in violation of constitution and statute. Katz v. Herrick [Idaho] 86 P. 873. The title "An act for the protection of builders" does not express the purpose of the act, which makes it a felony for one contracting to supply labor and materials to fraudulently collect money therefor on the ground that they have been paid for. Laws 1889-90, p. 128. State v. Clark [Wash.] 86 P. 1067. An act entitled "to provide for the salaries of the mayors of the state" actually provided for salaries of certain mayors only. Griffin v. Drennen [Ala.] 40 So. 1016. The title, an act to incorporate a certain railroad

company is not sufficiently broad to cover a grant of land to such company by the legislature. Wade v. Atlantic Lumber Co. [Fla.] 41 So. 72. Hurd's Rev. St. 1905, p. 1075, c. 63, § 63, entitled "an act to provide fees for certain clerks" which in fact places a tax upon certain estates, is void. Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895. An act entitled "for the punishment of crimes against children" which creates a felony not before existing is void under the constitution. Milne v. People, 224 Ill. 125, 79 N. E. 631. An act entitled "to prohibit gambling on races" may not include wagers of every description. State v. Hayes [Tenn.] 93 S. W. 98. Revenue laws. Licenses imposed on occupations in addition to ad valorem taxes and a system of licenses on personal property are not sufficiently germane to be included in a statute whose title was expressly limited to one. Wiemer v. Louisville Sinking Fund Com'rs, 30 Ky. L. R. 523, 99 S. W. 242. Condemnation of property does not include changing the jurisdiction of courts. Franklin Turnpike Co. v. Long Distance Tel. & T. Co. [Tenn.] 99 S. W. 373. An amendment to a dispensary act did not in its title give notice that certain restrictions were to be removed. Croxton v. Truesdel [S. C.] 56 S. E. 45. Title did not show that right of appeal was taken away. Commonwealth v. Luckey, 31 Pa. Super. Ct. 441. An act entitled to restrict the combination of certain railroads provided as penalty a method of forfeiture of franchise different from the general law and such penalty was void for it was such a radical change and so important it should have been given in the title. State v. Cumberland & P. R. Co. [Md.] 66 A. 458. Duties imposed upon board of public works and also creating a separate governmental agency. Christmas v. Warfield [Md.] 66 A. 491.

Held Not to Violate. Validating acts: An act entitled to ratify and to confirm the constitution of the Seneca Nation of Indians which act does nothing more is constitutional. Jimeson v. Lehley, 101 N. Y. S. 215. An act entitled "an act to ratify certain contracts between the city of Buffalo and the B. Ry. Co., the C. St. Ry. Co. of Buffalo, and the W. S. St. Ry. Co., and carry the same into full force and effect, does not violate the constitutional provision that act contain one subject to be embraced in title. Smith v. Buffalo, 61 Misc. 244, 100 N. Y. S. 922. P. L. 1906, p. 685, validating certain acts of bridge construction, and contract was held to have but a single object, and between the body of the act and the title there existed no discrepancy. Bloomfield v. Middlesex County Chosen Freeholders [N. J. Law] 65 A. 890.

Property rights: Negotiable instruments law. Burden of proof. Gilley v. Harrell [Tenn.] 101 S. W. 424. Where an act provides for the descent of homestead and forbids its alienation by devise, there is but one subject for it all deals with the protection of the widow's interest. Saxon v. Rawls [Fla.] 41 So. 594. Act Mar. 21, 1904. An act to amend and re-enact an act entitled "An act concerning conveyances," which makes it unlawful for a clerk to record any deed unless it specifies the next immediate source of the grantor's title. McPherson v. Gordon, 29 Ky. L. R. 826, 1073, 96 S. W. 791.

Governmental and judicial: Setting out the boundaries of a city. Murphy v. Salem [Or.] 87 P. 532. Improvement of highways. Fout v. Frederick County Com'rs [Md.] 66 A. 487. An act defining powers of school trustees. Courtner v. Etheredge [Ala.] 43 So. 368. An act providing for free public schools. Felder v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 310, 97 S. W. 701. Collection and disbursement of school funds. State v. True [Tenn.] 95 S. W. 1028. Laws 1879, p. 234, an act to provide a general election law, the procedure relative to contested elections and the filling of vacancies in office. Dodson v. Bowlby [Neb.] 110 N. W. 698. The title "An act regulating state lands and the product of the same and to repeal certain acts" sufficiently complies with the statute that an act shall comprise but one subject which shall be expressed in the title. State v. Shevlin-Carpenter Co., 99 Minn. 158, 108 N. W. 935. Laws of 1905, p. 275, c. 163, entitled an act to create a state capitol commission for erecting a state capitol, properly included the providing of funds, for it was a natural, reasonable, and appropriate method of accomplishing the purpose of the act to erect a state capitol. Davenport v. Elrod [S. D.] 107 N. W. 833. Laws 1905, p. 68, c. 140, incorporating a certain class of cities and prescribing and regulating their powers and duties, is not void because it enacts that the treasurer of the county in which the only city of that class is located shall be ex officio treasurer of the city, for that is a detail connected with the subject expressed in the title. Cathers v. Hennings [Neb.] 107 N. W. 586. Act May 4, 1895. An act to provide for a law department for the city of Detroit. Tarsney v. Board of Education of Detroit [Mich.] 13 Det. Leg. N. 1021, 110 N. W. 1093. Act relating to attorney's liens. O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150. Acts 1901, p. 120, entitled an act in relation to the twenty-fifth judicial circuit dividing the court, providing judges and fixing salaries, properly contains a provision for change of venue. Coffey v. Carthage [Mo.] 98 S. W. 562. The grant of jurisdiction to police justices over violations of city ordinances and the regulation of procedure is not foreign to the object of an act providing for the appointment of police justices. Sharp v. Sweeney [N. J. Law] 65 A. 859. An act providing for temporary injunctions in such diverse matters as taxation, nuisances, and improvident public contracts, is not void as multifarious. Ch. 334, p. 550, Sess. Laws 1905. State v. Tibbits [Kan.] 85 P. 526.

Criminal: Describing the crime of stealing fowl and fixing the punishment. Diamond v. Comm., 30 Ky. L. R. 655, 99 S. W. 232. The title "An act to provide punishment for safe crackers" sufficiently expresses the subject of the act which provides that any person convicted of using an explosive about a safe, etc., shall be guilty of a larceny. State v. O'Day, 74 S. C. 448, 54 S. E. 607. Laws 1889, c. 20, p. 66. An act providing the mode of inflicting the punishment of death, the manner in which the same shall be carried into effect, and declaring any violations of the act to be a misdemeanor. State v. Pioneer Press Co. [Minn.] 110 N. W. 867.

Police regulations: An act regulating freight rates and providing for damages for loss or injury to goods relates to but one subject. Aycock-Little Co. v. Southern R. Co. [S. C.] 57 S. E. 27. Railroads required to maintain water closets in stations. Mis-

fairly advise the people and legislature of the real nature of the legislation.[93] The courts have generally construed this provision liberally,[94] and in Ohio it is held to be directory and not mandatory and a court will not sit to inquire whether the provision has been complied with.[95] The title need not serve as an index to the

souri, etc., R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. An act to prohibit traffic in nontransferable tickets, etc. Samuelson v. State [Tenn.] 95 S. W. 1012. Laws 1899, c. 17, § 13, p. 91 (148a 14, Comp. St. 1905). Listing of shares of loan associations. Nebraska Cent. Bldg. & Loan Ass'n v. Board of Equalization [Neb.] 111 N. W. 147. 21 St. at Large, p. 793, requiring numbers put upon cotton bales to be the same as put on bills and books, has a proper title. Parks v. Laurens Cotton Mills [S. C.] 56 S. E. 234. An act providing for the means to be used in paying laborers is broad enough to include the times at which they must be paid. Shortall v. Puget Sound Bridge & Dredging Co. [Wash.] 88 P. 212. An act creating the office of state inspector of coal mines providing for the proper ventilation of mines and appropriating money. Koppala v. State [Wyo.] 89 P. 576. Laws 1905, ch. 344, p. 598, "An act for the preservation, propagation, protection, taking, use and transportation of game, fish, and certain harmless birds and animals," embraces only one subject expressed in the title. State v. Tower Lumber Co. [Minn.] 110 N. W. 254. The title "Laws 1901, p. 198, c. 87, 'An act to provide for the organization and government of irrigation districts,'" is sufficiently comprehensive to include provisions for construction of ditches, condemnation of canals, issuance of bonds, and approval of proceedings by the court. Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313. "To regulate the catching and encourage the propagation of fish" includes provision against certain devices. Commonwealth v. Kenney, 32 Pa. Super. Ct. 544. "An act to provide against adulteration of food" embraces a provision as to the sale of adulterated foods. Commonwealth v. Arow, 32 Pa. Super. Ct. 1. Title "Act to prohibit railroad companies from permitting Johnson grass from going to seed on their right of way and fixing a penalty" sustains a provision for recovery of damages by persons injured. Doeppenschmidt v. International, etc., R. Co. [Tex.] 101 S. W. 1080.

Intoxicating liquors: Licensing liquor traffic. Brown-Foreman Co. v. Com., 30 Ky. L. R. 793, 101 S. W. 321. Local option law. Laws 1905, pp. 41, 47, c. 2. State v. Richardson [Or.] 85 P. 225. Title "an act to prohibit the sale of liquor on Sunday" is broad enough to include a penalty for keeping open on Sunday. Beauvoir Club v. State [Ala.] 42 So. 1040. The fact that an act contains two provisions one against the manufacture and the other against the disposition of liquor does not invalidate it as having two subjects. Chaney v. State [Ala.] 41 So. 172. An act relating to intoxicating liquors is broad enough to cover provisions for injunctions against its sale. State v. Thomas [Kan.] 86 P. 499. Acts 1895, p. 248, c. 127, entitled "an act to better regulate and restrain the sale of intoxicating liquors and providing for remonstrance against sale of same," is broad enough to include an amendment providing for blanket remonstrances against any license. Cain v. Allen [Ind.] 79 N. E. 201. An act to prohibit the sale of intoxicating liquors, etc., providing that the clerk of the district court shall not issue licenses, etc., the clerk being the proper officer of the law to issue licenses. Clark v. Tower [Md.] 65 A. 3. An act providing for the appointment of excise commissioners is within the purpose stated in the following title, "An act to regulate the sale of spirituous, vinous, malt, and brewed liquors, etc." Bumsted v. Henry [N. J. Law] 64 A. 475. An act entitled "to prohibit the sale of intoxicating liquors" is broad enough to cover a provision for the appointment of assistants to the attorney general to prosecute offenses against the statute. State v. Brooks [Kan.] 85 P. 1013.

Taxation: Taxation of railroads is a sufficient title. State v. Missouri, etc., R. Co. [Tex.] 100 S. W. 146. An act providing for a license fee is a sufficient title. Glover v. State, 126 Ga. 594, 55 S. E. 592. An act to provide for the levying and collection of local tax by counties for educational purposes. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725. The title to an act to provide for the incorporation of certain organizations to supply water is sufficient to include a provision for the taxation of such corporations. Attorney General v. Arnott, 145 Mich. 416, 108 N. W. 646. Act March 15, 1906, relating to revenue and taxation containing a provision that no mortgage, etc., shall be received for record unless it contains the postoffice address of the party owning the evidence of indebtedness, also a provision that unless an assignment of security is of record the original holder is liable for taxes. Shrader v. Semonin, 29 Ky. L. R. 1089, 96 S. W. 904. Pub. Acts 1893, p. 354, No. 206, entitled an act to provide for the levy and collection of taxes and for the sale and conveyance of lands for taxes and for the inspection and disposition of lands bid off to the state and not redeemed or purchased, is not objectionable as containing a plurality of subjects. Reed v. Auditor General [Mich.] 13 Det. Leg. N. 711, 109 N. W. 275.

The charter of a city containing many different provisions may be accepted as a whole by the legislature after its approval by the people under the California constitution. In re Phahler [Cal.] 88 P. 270.

93. State v. German Sav. Bank, 103 Md. 196, 63 A. 481. An act relating to the payment of taxes by corporations was stated in its title to follow section 81a and be designated as section 81b. There was no section 81a and section 81 referred to a different subject. This title was so misleading as to render the act void. City of Baltimore v. Flack [Md.] 64 A. 702.

94. Fout v. Frederick County Com'rs [Md.] 66 A. 487; Aycock-Little v. Southern R. Co. [S. C.] 57 S. E. 27.

95. State v. Mulhern, 74 Ohio St. 363, 78 N. E. 507.

various provisions of the act.[96] It is sufficient if the title clearly expresses the general purpose of the law, to which all of its provisions are germane and incidental,[97] and it need not express the means or methods of carrying it into effect,[98] nor is it necessary in a statute covering a wide range of important subjects that the title should give notice to all parties whose interests may be affected.[99] An ungrammatical title is valid if its fair intent is an index of the contents of the act.[1] To render an act void something repugnant to the title must be contained therein.[2] A penalty clause may be embraced in an act without being designated in the title.[3] The title to an act retroactive in effect must necessarily be sufficient to give notice of its contents.[4] Where the title to an act does not sufficiently indicate the purpose of the act, such title becomes immaterial upon the adoption of the act into the code,[5] and, where an act embodying more than one subject is later embodied in the Code,[5] and becomes part of the law of the state, the contents of the original act are immaterial.[6] An act which does not refer in its title to a prior act but seeks to repeal such act,[7] or amend it, is void.[8] The test of the constitutionality of the title of a supplementary statute is whether or not it is germane to the subject of the original act.[9] The title of an amendatory act is sufficient if it recites the title or substance of the original act provided the amendment is germane and is embraced within the title of the original act.[10]

Partial invalidity.[11]—An entire act is not necessarily invalid because the title fails to give notice of some particular matter contained therein,[12] but so much as is expressed in the title may be valid,[13] while the remainder, if it can be separated with-

96. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727; Shortall v. Puget Sound Bridge & Dredging Co. [Wash.] 88 P. 212; Fout v. Frederick County Com'rs [Md.] 66 A. 487.

97. Loc. Acts 1905, p. 1088, No. 627, entitled an act to annex certain territory to the city of Detroit and make operative in said territory all statutes, etc., applicable in said city, is valid although it contains incidental provisions whose effect will be to amend the charter and change the boundaries of the city. Attorney General v. Springwells Tp., 143 Mich. 523, 13 Det. Leg. N. 30, 107 N. W. 87. An act providing for the descent of homesteads and forbidding their alienation by devise all deals with one subject, the protection of the widow's interest. Saxon v. Rawls [Fla.] 41 So. 594. Injunctions in diverse matters. State v. Tibbits [Kan.] 85 P. 526.

98. An act relating to street improvement need not state in its title the means of raising the money, the duties of commissioners, etc. City of Baltimore v. Flack [Md.] 64 A. 702. An act prohibiting the sale of liquor and providing appointment of assistants to the attorney general to prosecute offenses. State v. Brooks [Kan.] 85 P. 1013; State v. Thomas [Kan.] 86 P. 499; Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313. Providing funds. Davenport v. Elrod [S. D.] 107 N. W. 833. Act No. 272, p. 418, Pub. Acts 1905, entitled an act to designate the places for holding the circuit which was its sole object, contained other matter which provided for rendering an act effective. Such details are not objectionable. McCall v. Calhoun Circuit Judge [Mich.] 13 Det. Leg. N. 757, 109 N. W. 601.

99. City of Allentown v. Wagner, 214 Pa. 210, 63 A. 697.

1. Douglass v. Leavenworth County Com'rs [Kan.] 88 P. 557.

2. City of Baltimore v. Flack [Md.] 64 A. 702.

3. Pol. Code, 3070-3080, providing bounties for wild animals and penalties for forged bounty certificates and punched scalps. In re Terrett [Mont.] 86 P. 266; Beauvoir Club v. State [Ala.] 42 So. 1040.

4. Katz v. Herrick [Idaho] 86 P. 873.

5, 6. Kennedy v. Meara [Ga.] 56 S. E. 243.

7. House of Refuge v. Luzerne County [Pa.] 64 A. 601.

8. Amendments were properly entitled in the following cases: Title of an amendment referred to the original act by chapter, etc. Ex parte City of Paducah [Ky.] 101 S. W. 898. The title of an act was to amend art. 6, ch. 15, Rev. St. Mo. 1899, by adding thereto sixteen new sections designating the sections and describing their contents to be defining offenses in connection with elections. State v. Keating [Mo.] 100 S. W. 648. The title to an ameidatory act which recites the original act need not state the precise point affected. State Finance Co. v. Mather [N. D.] 109 N. W. 350.

9. City of Allentown v. Wagner, 214 Pa. 210, 63 A. 697.

10. Seaside Realty & Imp. Co. v. Atlantic City [N. J. Law] 64 A. 1081. An act to amend section 1 of an act to prevent hogs from running at large in Madison county actually amended an act forbidding hogs running at large in certain parts of the county so as to cover the entire county. State v. Patterson [Ala.] 42 So. 19.

11. See 6 C. L. 1534.

12. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 16 Tex. Ct. Rep. 302, 95 S. W. 74.

13. St. Louis S. W. R. Co. v. Gentry [Tex. Civ. App.] 16 Tex. Ct. Rep. 302, 95 S. W. 74. In the local prohibition acts, provisions relating to keeping liquors for sale which are not expressed in the title and therefore void may be eliminated, leaving the remaining

out doing violence to the intention of the legislature, is rendered inoperative.[14] If the body of the act, however, is broader than the title of the act, it is unconstitutional.[15]

§ 4. *Amendments and revisions. Amendments*[16] must be germane to the subject of the original act.[17] Statutes may be amended by implication,[18] but the mere fact that some of the provisions of a statute are contained in a new act does not constitute the new act an amendment.[19] An independent act inconsistent with a provision of a prior act is not an amendment thereof but repeals the same by implication.[20] A statute seeking to amend a repealed statute is inoperative.[21] Some constitutions require that no act shall be amended unless the act as amended is published.[22] In such a case the substance only need be given.[23] It is not necessary for an amendatory act to specifically declare that the original act is hereby amended if the purpose to amend is made manifest by the fact that the portions intended to be affected are reenacted as amended.[24]

Reference to act amended.[25]—It is generally provided that an act cannot be amended by reference to its title only.[26] Some constitutions require that the act amended be set out in the amending statute,[27] in which case the constitutional requirement is held to be mandatory,[28] and others require that the act amended merely be described so that the purpose of the amending act is clear.[29] In Iowa the title to an amendment stating it to be an amendment of a certain section of the Code is sufficient.[30] An act independent in itself which impliedly affects prior acts is not an amending act required to state the act so amended.[31] Where the constitution provides that no act shall be amended, revised, or extended by reference to its title

provisions valid. Untreiner v. State [Ala.] 41 So. 170. Laws 1905, pp. 360-365, c. 175. An act to amend sections 3, 9 and 24, of an act to provide for drainage districts attempted to also amend section 5 in the body of the act and was held void as to section 5 but good as to sections given in the title. State v. Superior Court for Skagit County, 42 Wash. 491, 85 P. 264. Where an amendatory act has a title giving two subjects but the act is inoperative as to one, the remainder of the act is valid. In re Terrett [Mont.] 86 P. 266. Where the title to an act requires affidavits with bids for certain specified county work, but in the body of the act this is enlarged to include all county work, such enlargement is void. Acts 1899, p. 171, c. 110. State v. Dorsey [Ind.] 78 N. E. 843.

14. An act to prevent the cutting and removing of timbers from certain lands does not include the taking of turpentine from the trees. Ex parte Knight [Fla.] 41 So. 786.

15. An act entitled to regulate laying out roads in counties of a certain population in fact provided generally for the whole state. Dixon v. State [Tenn.] 94 S. W. 936.

16. See 6 C. L. 1535.

17. Murphy v. Salem [Or.] 87 P. 532; State v. Bristow [Iowa] 109 N. W. 199. Original act provided for the taxation of peddlers whereas the amendment attempted to include those selling by sample and for future delivery. Pub. Acts 1893, p. 354, No. 206, amended by Laws 1897, p. 294, No. 229. Reed v. Auditor General [Mich.] 13 Det. Leg. N. 711, 109 N. W. 275.

18. Parker-Washington Co. v. Kansas City [Kan.] 85 P. 781.

19. State v. Thomas [Kan.] 86 P. 499.

20. An act providing for a recorder's court to have jurisdiction in certain offenses in a city impliedly repeals a provision in the city's charter giving the mayor jurisdiction over such offenses. State v. Hubbard [Ala.] 41 So. 903.

21. In re Terrett [Mont.] 86 P. 266.

22. City of Ensley v. Cohn [Ala.] 42 So. 827; Murphy v. Police Jury, St. Mary Parish [La.] 42 So. 979.

23. City of Ensley v. Cohn [Ala.] 42 So. 827.

24. Murphy v. Police Jury, St. Mary Parish [La.] 42 So. 979.

25. See 6 C. L. 1535.

26. Rose v. Lampley [Ala.] 41 So. 521; Cunningham v. State [Ga.] 57 S. E. 90; Beason v. Shaw [Ala.] 42 So. 611; Murphy v. Salem [Or.] 87 P. 532.

27. State v. Carter [Kan.] 86 P. 138; State v. Superior Ct. of Pierce County [Wash.] 87 P. 521.

28. State v. Carter [Kan.] 86 P. 138.

29. Cunningham v. State [Ga.] 57 S. E. 90. It is sufficient if the body of the act sets out the amendment in full but does not set out the old law as it stood before the amendment. State v. Patterson [Ala.] 42 So. 19. Where the title to an amendment merely refers to the title of the amended law or to the number of the section and the articles amended themselves sufficiently indicate the purposes of the amendment, the title of the amendment is sufficient. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727.

30. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902.

31. Mill v. Brown [Utah] 88 P. 609; Memphis, etc., R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019.

only, an act declaring certain prior acts to be in full force and effect is not an amendment but merely a recognition of the laws of the land and of their continued operation.[32]

Effect.[33]—An act and its amendments must be read together and viewed as one act,[34] and the amendment operates as to subsequent matters as though it had formed a part of the original statute.[35] An amendment should be so construed as to render it effective if possible.[36]

Identification.[37]—In amending an act and its amendments these amendments need not be referred to by the new amending act under a provision requiring amendatory acts to recite the title or substance of the act amended.[38]

Revisions.[39]—A committee appointed to revise, compile, arrange, and publish statutes has no legislative power.[40]

§ 5. *Interpretation. A. Occasion for interpretation. Unambiguous statutes*[41] are to be given their plain meaning and not extended by construction,[42] even to effect what the courts are convinced was the intention of the legislature.[43] Where provisions of a statute are explicit, they cannot be modified or controlled by implications drawn from a provision which has no relation to the subject-matter.[44]

Who may invoke interpretation.[45]

(§ 5) *B. General rules.*[46]—The power of the court is not paramount to that of the legislature and an act cannot be set aside as unconstitutional because it is unwise or inexpedient or supersedes wiser and better laws.[47] Statutes are to be

32. Pol. Code 1893, § 5186, declares certain acts of the legislature of 1893 to be in full force and effect. Palatine Ins. Co. v. Northern Pacific R. Co. [Mont.] 85 P. 1032.

33. See 6 C. L. 1536.

34. Chapter 818, p. 1850, Laws of 1868, incorporating the Village of Port Chester, amended Laws of 1902, c. 219. In re Locust Ave., 185 N. Y. 115, 77 N. E. 1012. Rev. Laws, c. 112, § 144, creating liability of street railroads for injuries due to management and use of tracks. St. 1894, p. 767, c. 548, § 18, and St. 1897, pp. 449, 502, c. 500, §§ 2 and 21, construed with it. Woodall v. Boston El. R. Co. [Mass.] 78 N. E. 446. An amended act is to be construed as though the original had been repealed and a new statute enacted. McGuire v. Chicago, etc., R. Co. [Iowa] 108 N. W. 902. An amendment becomes a part of the original act provided it is germane to the subject-matter. In amending an act and its amendments, these amendments need not be referred to by the new amending act under a provision that all amending acts shall recite the title or substance of the act amended. Galloway v. Memphis [Tenn.] 94 S. W. 75; State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606.

35. Acts 1895, p. 251, c. 127, amended Acts 1905, p. 7, c. 5. Cain v. Allen [Ind.] 79 N. E. 201; State v. Bock [Ind.] 79 N. E. 493; People v Michigan Cent. R. Co., 145 Mich. 140, 13 Det. Leg. N. 552, 108 N. W. 772. An amendment and revision of a general law relating to the organization and government of cities becomes operative upon all cities previously organized without action on their part. State v. Mayo [N. D.] 108 N. W. 36.

36. People v. Weinstock, 102 N. Y. S. 349.

37. See 6 C. L. 1536.

38. Galloway v. Memphis [Tenn.] 94 S. W. 75.

39. See 4 C. L. 1533.

40. Rev. St. 1899, § 1125, was unconstitutional as originally passed and never reenacted, but was incorporated in the Revised Statutes. Brannock v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 604. A revision is presumed not to alter existing law. Becklin v. Becklin, 99 Wis. 307, 109 N. W. 243. The title of the original act cannot be used in its construction after it is embodied in a code. McNeely v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 88, 96 S. W. 1083. Effect on subject and title of act of embodying it in codification of laws, see supra, § 3, In General.

41. See 6 C. L. 1536.

42. Rose v. Lampley [Ala.] 41 So. 521; Smith v. Burlington [Wis.] 109 N. W. 79. The word "or" cannot be changed to "and" in a statute providing for punishment of whoever wilfully or maliciously, etc. State v. Tiffany [Wash.] 87 P. 932. Liability "after notice" cannot be so construed as to create liability "before notice." Cowanshannock Poor Dist. v. Armstrong Co., 31 Pa. Super. Ct. 386; Wadsworth v. Boysen [C. C. A.] 148 F. 771; United States v. Jackson [C. C. A.] 143 F. 783.

43. United States v. Raisch, 144 F. 486.

44. Code Civ. Proc. § 395, dealing with the venue of civil actions, is not controlled by Pol. Code, § 433, giving the comptroller a right to sue in Sacramento county regardless of the defendant's residence. State v. Campbell [Cal. App.] 86 P. 840.

45. See 2 C. L. 1723.

46. See 6 C. L. 1537.

47. Fout v. Frederick County Com'rs [Md.] 66 A. 487. Courts cannot question the validity of a statute on the ground of policy, wisdom, adequacy, etc. Brown v. Tharpe, 74 S. C. 207, 54 S. E. 363; State v. Livingston Concrete Bldg. & Mfg. Co. [Mont.] 87 P. 980.

construed if reasonably possible so as to render them valid,[48] and when the terms of a statute are ambiguous, they are to be given that construction which tends to effectuate the general purpose of their enactment.[49] Wherever power is granted by statute, everything necessary to make it effectual is supplied by the common law and by implication.[50] If statutes are susceptible of more than one construction, the court will adopt the meaning consonant with constitutionality,[51] and will declare an act unconstitutional only in the clearest case.[52] Any doubt as to the meaning of a statute is to be resolved in favor of the public.[53]

Intention to be reached.[54]—The fundamental rule in the construction of statutes is to ascertain the intention of the law makers,[55] Courts will not follow the letter of a statute when it leads away from the true intent and purpose of the legislature,[56] and every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislative body.[57] Statutes are not to be overthrown on account of errors or omissions therein if the intention is clear,[58] nor will a statute be held of no effect because of indefiniteness unless it is impossible to determine the intent and purpose of the legislature.[59]

Whole act to be considered.[60]—The intention of the legislature is to be gathered from the entire body of the statute having in mind the object to be attained,[61] but

48. A construction will not be given a doubtful statute which will render it futile. Sears v. Multnomah Co. [Or.] 88 P. 522. Where the only discrepancy between two sections is the title designating an officer, the courts will disregard it as immaterial. State v. Dunn [Neb.] 107 N. W. 236.

49. Absence from his post of duty by a consul means absence preventing the direction of the affairs of the office, not merely absence from the office. United States v. Day, 27 App. D. C. 458.

50. Hogan v. Piggott [W. Va.] 56 S. E. 189.

51. In re Burnette [Kan.] 85 P. 575. A reasonable doubt as to constitutionality is sufficient to sustain an act. Fout v. Frederick County Com'rs [Md.] 66 A. 487. A provision of the Const. of North Carolina, requiring an entry of votes upon acts passed by the legislature, will not be held to render an act void for failure to enter nay votes when the only votes cast are ayes. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753. Ex parte Spencer [Cal.] 86 P. 896. Sess. Laws 1905, p. 39, as construed, does not violate the constitutional requirement that amendatory acts must set out the section as amended in full. Noble v. Bragaw [Idaho] 85 P. 903; Underwood Typewriter Co. v. Piggott [W. Va.] 55 S. E. 664. The tax on railroads imposing a tax equal to one per cent. of their gross receipts being an occupation tax does not impose a tax on gross receipts, the reference to gross receipts being merely a means for ascertaining the amount of the tax. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71; State v. Lowry [Ind.] 77 N. E. 728.

52. Millard v. Roberts, 25 App. D. C. 221.

53. Prohibition law. Pacific University v. Johnson, 47 Or. 448, 84 P. 704.

54. See 6 C. L. 1537.

55. United States v. Jackson [C. C. A.] 143 F. 783; Primm v. Superior Ct. of Shasta County [Cal. App.] 84 P. 786; Royal Highlanders v. State [Neb.] 108 N. W. 133; Mitchell v. Monarch El. Co. [N. D.] 107 N. W. 1085. Embezzlement by a receiver. Fields v. U. S., 27 App. D. C. 433. The limits of the application of a statute are coextensive with the evil or purpose it was intended to suppress or effectuate. City of Charleston v. Charleston Brewing Co. [W. Va.] 56 S. E. 198. Changes made by a revision of the statutes will not be construed as altering the law unless such intention is clear. Becklin v. Becklin, 99 Minn. 307, 109 N. W. 243. A statute requiring two openings from mines, one of which to be an escapeway, is not satisfied by constructing one opening divided by a board partition. Howells Min. Co. v. Gray [Ala.] 42 So. 448. Cobbey's Ann. St. 1903, §§ 6361, 6359, 6362, providing for punishment for failure to erect fire escapes, cannot be construed so as to extend the provisions to persons to whom it is at least doubtful it was intended to apply. State v. Dailey [Neb.] 107 N. W. 1094. An act to license junk dealers could not be construed as limited to those keeping a shop for the statute was evidently designed to protect the public from the evils resulting from larceny, the spread of disease, and of fire, all of which might result from the various forms of junk dealing. State v. Cohen, 73 N. H. 543, 63 A. 928.

56. Seal of a state not entitled to registration as a trade mark. In re Cahn, Belt & Co., 27 App. D. C. 173.

57. United States v. Jackson [C. C. A.] 143 F. 783.

58. Murphy v. Salem [Or.] 87 P. 532.

59. Laws 1905, p. 105, c. 50, fixing eight hours as a day's work. State v. Livingston Concrete Bldg. & Mfg. Co. [Mont.] 87 P. 980.

60. See 6 C. L. 1538.

61. Stevens v. Nave-McCord Mercantile Co. [C. C. A.] 150 F. 71; Peters Grocery Co. v. Collins Bag Co., 142 N. C. 174, 55 S. E. 90; Commonwealth v. Shaleen [Pa.] 64 A. 797; United States v. Jackson [C. C. A.] 143 F. 783. Treaty with Cuba. United States v. American Sugar Ref. Co., 202 U. S. 563, 50 Law. Ed. 1149. Mechanic's lien law. Eccles Lumber Co. v. Martin [Utah] 87 P. 713. Each Code section is to be considered in ex-

where there is an irreconcilable conflict between different parts of the same act, the last in order of arrangement will control.[62] Rules of grammar and literal interpretation must yield to the plain intention of the legislature gathered from all the parts of the act.[63]

All language to be effectuated.[64]

Avoiding hardship or absurdity.[65]—When the meaning of a statute is doubtful, the consequences may be considered in its construction,[66] and a literal interpretation will not be given to words of an act if it would lead to absurdity or injustice and if a reasonable meaning can be obtained by the aid of any rule for judicial construction.[67] A statute is not, however, to be extended beyond its plain interpretation and construction to prevent injustice.[68]

Presumption of legislative knowledge of the law.[69]—The legislature is presumed to know the law and to intend to act within it,[70] but this presumption is controlled by the plain meaning of the language used.[71]

General and particular provisions.[72]—General terms of a statute are to be given a general construction unless some other provision shows that the legislature intended them to be restricted.[73]

(§ 5) *C. Aids to interpretation. The title.*[74]—In construing an act the title is to be considered in determining the intent of the legislature,[75] but where the

plaining and elucidating every other part. Barron v. Terrell, 124 Ga. 1077, 53 S. E. 181.

62. The last section of Act of Congress June 21, 1902, was held to control so that the act was not retrospective, although the first section apparently provided that it should be. United States v. Jackson [C. C. A.] 143 F. 783.

63. United States v. Raisch, 144 F. 486. Rev. St. 5424 (U. S. Comp. St. 1901, p. 3668), providing that any person applying for citizenship or appearing as a witness who knowingly impersonates another, etc., or who falsely makes, forges, etc., any oath, record, etc., shall be punished, should be so construed as to read or "any person" who falsely makes, forges, etc., so that it applies to all persons and not merely to those applying for citizenship. Id.

64, 65. See 6 C. L. 1538.

66. In re Sammon [Vt.] 65 A. 577.

67. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594; Riley v. Pennsylvania Co., 32 Pa. Super. Ct. 579. A prohibition against changing a county seat does not apply to an act creating an additional county seat. Lyon v. Steuben County Sup'rs, 100 N. Y. S. 676. A tax law will not be so construed as to tax the same property twice unless expressly stated or plainly implied. Georgia R. & Banking Co. v. Wright, 125 Ga. 589, 54 S. E. 52. The word "commission" construed to mean any payment for services in the transfer of real estate, whether a fixed sum or a percentage on the selling price. Mendles v. Danish [N. J. Law] 65 A. 888. Act requiring water closets at all stations does not include flag stops in the country where there is no building and few passengers. State v. Baltimore & O. R. Co. [W. Va.] 56 S. E. 518. Courts will not sustain a contention which necessitates holding that congress violated its trust under a treaty, and also that, in making the boundary line between states it failed to incorporate many miles of the bank of the Mississippi in any state Moore v. McGuire, 142 F. 787. It is inconceivable that congress in drafting the rate law, the object of which is fair treatment to all, should have gotten into such a frame of mind that they would divide prior offenders into two classes so that those who had been indicted under the old law should be prosecuted, while those who had avoided the grand jury should be pardoned. United States v. Standard Oil Co., 148 F. 719.

68. An act requiring the destruction of a will as a revocation is not satisfied by instructions to destroy a will and belief by the testator that her instructions have been carried out. In re Evan's Will, 113 App. Div. 373, 98 N. Y. S. 1042. Statute requiring oath of party not satisfied by affidavit of his attorney. Martin v. Martin & Bowne Co., 27 App. D. C. 59.

69. See 6 C. L. 1538.

70. Webb v. Ritter [W. Va.] 54 S. E. 484; Cain v. Allen [Ind.] 79 N. E. 201; State v. Mulhern, 74 Ohio St. 363, 78 N. E. 507; State v. Lewis, 74 Ohio St. 403, 78 N. E. 523; State v. Cohen, 73 N. H. 543, 63 A. 928.

71. Commonwealth v. Mellet, 27 Pa. Super. Ct. 41.

72. See 6 C. L. 1539.

73. A statute providing a penalty for a false charging of fees by officers applies to those receiving a salary as well as those paid by fees. Skeen v. Craig [Utah] 86 P. 487.

74. See 6 C. L. 1539.

75. The title of P. L. 369, read "An act, etc., to permit corporations organized for manufacturing, or for the supply of water or for the supplying of light to operate other corporations." The body of the act read "any corporation organized for manufacturing or for the supply of water for manufacturing and supplying light," etc. The court held that a literal construction of the body of the act would lead to an absurdity and it would be given the effect clearly intended by the title by supplying the word "or" just before "for manufacturing and supplying light." Spain v. St. Louis & S. F. R. Co., 151 F. 522; State v. Mulhern, 74 Ohio St. 363, 78 N. E. 507; Ex parte Knight

original act is embodied in the Code without its title, such title cannot be used to construe the act.[76] In the United States circuit court it has been held that the title of an act is merely a formal part and cannot be so read into the act as to supply necessary and substantial parts thereof.[77]

Marginal notes.[78]

Legislative history.[79]—The history of legislation in its various stages may be considered in the interpretation of ambiguous statutes.[80] The intent of a Federal statute may be gathered from congressional debate of which the court can take judicial notice.[81]

Contemporaneous interpretation.[82]

Official construction.[83]—The uniform construction of a doubtful statute by officers charged with its execution should not be disregarded,[84] but such construction is not binding on the courts,[85] and will only be followed in those cases where the language of the statute is dubious,[86] and will not be adopted if plainly erroneous.[87]

Surrounding conditions.[88]—In construing a dubious statute the court will take judicial notice of the reasons for its passage and of surrounding conditions,[89] and of the circumstances under which the legislature must have known a statute would operate.[90]

Prior acts[91] on the same subject may be considered to ascertain legislative intent.[92] Acts of congress passed prior to a state law may properly be looked to to discover the meaning intended by the legislature in the use of words and phrases.[93]

[Fla.] 41 So. 786; Thierman Co. v. Com., 30 Ky. L. R. 72, 97 S. W. 366. Laws Minn. 1867, p. 58, c. 31, provided for the issuance of bonds but not restricting the purpose while the title specified bonds for building bridges and it was held that the act was limited by this specification in the title. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824.

76. Pen. Code 1895, art. 794, making it an offense to pull down a fence, as originally enacted, had a title with reference to fences used for agricultural purposes. McNeely v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 88, 96 S. W. 1083.

77. 33 St. 188, § 5 [U. S. Comp. St. Supp. p. 367] provides that "such commissioner shall have power," etc. This is the only reference to a commissioner except in the title and it was held that the title could not aid to designate and create "such commissioner." Rider v. U. S. [C. C. A.] 149 F. 164.

78. See 2 C. L 1723.

79. See 6 C. L. 1539.

80. Nash v. Glen Elder [Kan.] 88 P. 62. The amendments offered should be looked to and the journals resorted to for this purpose. Ex parte Helton, 117 Mo. App. 609, 93 S. W. 913. The history of the various stages of the title to an act and the refusal of the senate to pass a house amendment to the title. State v. Lowry [Ind.] 77 N. E. 728.

81. Wadsworth v. Boysen [C. C. A.] 148 F. 771.

82, 83. See 6 C. L. 1539.

84. Land decisions of the Interior Department. United States v. Burkett, 150 F. 208; State v. New Orleans R. & Light Co., 116 La. 144, 40 So. 597; Tarsney v. Board of Education of Detroit [Mich.] 13 Det. Leg. N. 1021, 110 N. W. 1093; People v. Michigan Cent. R. Co., 145 Mich. 140, 13 Det. Leg. N. 552, 108 N. W. 772. Absence from his post by consular officer means absence from his district. United States v. Day, 27 App. D. C. 458. Form of notice required by statute made out for many years. Regan v. School Dist No. 25 of Snohomish [Wash.] 87 P. 828.

85. Opinions of the attorney generals of the United States or of the various states. Moore v. McGuire, 142 F. 787.

86. District commissioners granting plumbing license. United States v. Macfarland, 28 App. D. C. 552.

87. Absence from post by consular officer means absence from his district. United States v. Day, 27 App. D. C. 458; People v. Consolidated Tel. & Elec. Subway Co. [N. Y.] 79 N. E. 892. The powers of the attorney general conferred by statute cannot be varied or enlarged by usage. Hord v. State [Ind.] 79 N. E. 916.

88. See 6 C. L. 1539.

89. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873. In construing the word "crops," the court will take notice that the growing of cotton is one of the leading agricultural pursuits of the state. State Mut. Ins. Co. v. Clevenger [Okl.] 87 P. 583. Destruction of public records. Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356. Common Carrier's Liability Act. Spain v. St. Louis & S. F. R. Co., 151 F. 522. Under laws providing for taxation of certain corporations, it has been customary for such corporations to report only such capital and loans as were employed in construction within the state and with the full knowledge of the executive, legislative, and legal departments. People v. Michigan Cent. R. Co., 145 Mich. 140, 13 Det. Leg. N. 552, 108 N. W. 772.

90. Code 1906, § 2382, requiring water closets at stations, not so essential in country districts. State v. Baltimore & O. R. Co. [W. Va.] 56 S. E. 518.

91. See 6 C. L. 1540.

92. State v. Twining [N. J. Err. & App.] 64 A. 1073. An act concerning trust companies applies to trust and safe deposit

Original act.[94]

Re-enactment statutes.[95]—Where a statute has been construed by the courts and the legislature re-enacts the same, it is presumed that the legislature adopts such construction,[96] but upon the passage of a new law, the courts are not bound by the construction of the former law.[97] Where a statute specially incorporating a society has been repealed, it is not re-enacted by an act making an appropriation for the benefit of such society. The principle that where a statute is incorporated in another the effect is the same as if the provisions of the former were re-enacted in the latter for all purposes of the latter statute has no application.[98]

Statutes adopted from other states[99] are presumed to have been enacted with reference to the previous construction there given them.[1] But the construction of the state from which the law was adopted will not be followed if it is a general law, substantially the same in several states, and construed differently by their courts, when the construction placed upon it by the court of the state from which it was adopted is opposed to the weight of authority or against the general policy of the laws of the adopting state.[2] A decision handed down since the adoption of a statute is not binding on the courts of the adopting state.[3] Where a statute of one state is similar to that of another, the construction given by the courts of the latter state will have great weight in the absence of different construction by the courts of the former state.[4]

State statutes in Federal courts.[5]—A Federal court should follow the construction of a state court in its interpretation of a legislative act.[6] But where rights have accrued before any interpretation by state courts, the Federal courts in adjudicating such rights are entitled to their own construction of state statutes.[7]

Enforcement.[8]

Laws in pari materia.[9]—Acts in pari materia should be construed together[10] although found in different sections,[11] and a subsequent statute upon the same subject-matter as a prior one may be considered to aid in the interpretation of such former statute.[12]

companies where it appears from various legislative acts that the development of safe deposit companies into safe deposit and trust companies has been recognized by the legislature. Several sections of R. L. 1905, regulating the sale of liquor, construed. State v. Stroschein, 99 Minn. 248, 109 N. W. 235; Schaeffer v. Burnett, 120 Ill. App. 79. Right of illegitimate children. In re Garr's Estate [Utah] 86 P. 757.

93. Laws 1897, p. 253, c. 167, relating to licensing of liquor dealers, exempting wholesale dealers selling not less than five gallons at a time, is similar to 20 Stat. pp. 333, 334, c. 125, and is construed to intend the sale to consumers as well as retailers, the only test being the quantity sold. State v. Bock [Ind.] 79 N. E. 493.

94. See 4 C. L. 1535.

95. See 6 C. L. 1540.

96. State v. Dorsey [Ind.] 78 N. E. 843; Cain v. Allen [Ind.] 79 N. E. 201. Words used in a statute which have been previously construed are used in the light of the construction placed upon them. Sheehan v. Louisville & N. R. Co. [Ky.] 101 S. W. 380.

97. Royal Highlanders v. State [Neb.] 108 N. W. 183.

98. Leatherwood v. Hill [Ariz.] 85 P. 405.

99. See 6 C. L. 1540.

1. Costello v. Muheim [Ariz.] 84 P. 906; McNutt v. McNutt [Ark.] 95 S. W. 778; In re Shapter's Estate [Colo.] 85 P. 688.

2. State v. Campbell [Kan.] 85 P. 784.

3. Wyoming Coal Min. Co. v. State [Wyo.] 87 P. 984.

4. Law of descent. McManus v. Lynch, 28 App. D. C. 381.

5. See 6 C. L. 1540. See, also, Stare Decisis, 8 C. L. 1965, as to following of state decisions by Federal courts on questions of local law.

6. Globe Elevator Co. v. Andrew, 144 F. 871.

7. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

8. See 6 C. L. 1540.

9. See 6 C. L. 1541.

10. Sections 7 and 8 of the Adminstration act construed together do not authorize the court to require executors to give security if the testator provides that none shall be given. Wood v. Stewart, 120 Ill. App. 34; Barron v. Terrell, 124 Ga. 1077, 53 S. E. 181. Court fees and court fines. Glover v. State, 126 Ga. 594, 55 S. E. 592; Noble v. Bragaw [Idaho] 85 P. 903; Ex parte Schwarting [Neb.] 108 N. W. 125. Land titles and taxation are united in one scheme under the constitution. Webb v. Ritter [W. Va.] 54 S. E. 484.

11. Hoffman v. Lewis [Utah] 87 P. 167. The general corporation law, the stock corporation law, and the banking law. Gause v. Boldt, 49 Misc. 340, 99 N. Y. S. 442.

12. Laws 1903, p. 102, c. 41, and Acts

Acts of same date.[13]—Contemporaneous legislation may be referred to in determining intention.[14]

Acts of same session.[15]

(§ 5) *D. Words, punctuation, and grammar. Words.*[16]—The words of a statute are to be construed in their popular, natural, and ordinary sense, unless upon their face it appears that they were not intended to bear that construction,[17] but the precise meaning will yield to the obvious purpose of the act.[18] A word or phrase repeated in a statute will bear the same meaning throughout, unless a different intention appears.[19] Where a general term is used in an act and also a special term, the latter does not limit and define the former, when the special term alone fully expresses the idea,[20] but where specific words are followed by general terms, the latter are to be construed as applicable to things of like character to those specified.[21]

Punctuation.[22]

Grammar.[23]—Grammatical rules may be applied in construction.[24] The grammatical errors will not defeat the operation of a statute.[25]

(§ 5) *E. Exceptions, provisos, conditions, and saving clauses. Things excepted.*[26]

1905, p. 351, c. 129, relating to pensions in cases of death of policeman. Hutchens v. Covert [Ind. App.] 78 N. E. 1061. The word "fees" in an act to be construed according to the intention af the legislature as indicated in a subsequent act. Barron v. Terrell, 124 Ga. 1077, 53 S. E. 181. An act taxing savings banks was later amended by an act providing that certain banks should not be taxed. This latter act was declared void because of a defective title, but in construing the prior act the court held that the fact of the passage of the latter act is evidence that the prior act was intended to apply to all banks. Fidelity Sav. Bank v. State, 103 Md. 206, 63 A. 484. The extension of a statute by a later one is in the absence of limitation as permanent as the statute extended. Repetti v. U. S., 40 Ct. Cl. 240.

An amendment made after an interval of 30 years cannot be used to show the intention of the framers of the original act. Commonwealth v. Hana [Mass.] 81 N. E. 149.

13. See 4 C. L. 1535, n 40 et seq.; 2 C. L. 1726.

14. State v. Lowry [Ind.] 77 N. E. 728.

15. See 2 C. L. 1726.

16. See 6 C. L. 1541.

17. The legislature by omitting from the Adminstration act the provision for writs of certiorari must have thereby intended to abolish it as applied to probate courts. Schaeffer v. Burnett, 120 Ill. App. 79; Brun v. Mann [C. C. A.] 151 F. 145; Smith v. Burlington [Wis.] 109 N. W. 79. "Holiday" includes a consecrated day and a day of cessation from activity. State v. Shelton [Ind. App.] 77 N. E. 1052. The words "exposed for sale" construed as not limited to exposed to view but to include articles contained in receptacles offered for the purpose of sale. Commonwealth v. Hana [Mass.] 81 N. E. 149. The word "notice" in an act providing for publications of notices cannot be taken in a technical sense. Cheney v. State, 165 Ind. 121, 74 N. E. 892. The word "chimney" was held not to include "smokestack." Duehay v. District of Columbia, 25 App. D. C. 434. The word "agent" means one in the employ of another for a specific purpose. Lamb v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 228, 93 S. W. 734; Sidway v. Missouri Land & Live Stock Co., 197 Mo. 359, 94 S. W. 855. Motive cannot be sought. Ohio Nat. Bank v. Berlin, 26 App. D. C. 218. "Pending" is not synonymous with the word "remaining." In re Mark Cross Co., 26 App. D. C. 101. The word "appeal" does not necessarily imply removal to a new tribunal. Nash v. Glen Elder [Kan.] 88 P. 62.

18. Words like "may," "must," "shall," etc., are constantly used without intending them to be used literally and their meaning is controlled by the object designed to be reached. Fields v. U. S., 27 App. D. C. 433. The words "keep and own" as applied to cigarettes are not so distinct but what they are open to construction, and when construed were held to mean keep and own for sale. State v. Lowry [Ind.] 77 N. E. 728. "Or" will not be read "and" unless the conclusion of mistake is required of necessity by the context. Not so read in Code, § 3105, giving lien for labor on property of person owning "and" operating mine. Caster v. McClellan [Iowa] 109 N. W. 1020.

19. State v. Hubbard [Ala.] 41 So. 903.

20. An act providing for the license of dealers in, and keepers of shops for, the sale, etc., of junk, etc., does not apply only to such dealers in junk as keep shop. State v. Cohen, 73 N. H. 543 63 A. 928.

21. The words "for the other necessary expenses of the school" did not authorize a tax for transportation of pupils. State v. Jackson [Ind.] 81 N. E. 62.

22, 23. See 6 C. L. 1542.

24. Statute construed and the subject and predicate of the first alternative supplied in several alternatives connected by "or." Ossie v. State [Ala.] 41 So. 945.

25. Where grammar required the insertion of the words "as are" or transposition of a phrase it may be done by the court. Smith v. Haney [Kan.] 85 P. 550.

26. See 6 C. L. 1542. An exception not provided for by the legislature cannot be read into a statute. Law prohibiting obstruction of saloon windows cannot be con-

The proviso.[27]—A proviso is to be strictly construed and confined to what precedes it,[28] but the inference from the position of a proviso cannot overrule its plain intent.[29]

(§ 5) *F. Mandatory or directory acts.*[30]—Statutes mandatory in form are not necessarily so in effect.[31] Where a provision of a statute relates to some immaterial matter, where compliance is a matter of convenience rather than substance or where the directions of a statute are given with a view to the proper, orderly, and prompt conduct of business merely, the provision may generally be regarded as directory.[32] A mandatory act which does not provide for the raising of money for its execution necessarily carries with it the implied authority to incur the necessary expense.[33] An act directory in form is not invalid in so far as it relates to the future but it cannot decide what the law is or has been, for this is the province of the court.[34]

(§ 5) *G. Strict or liberal constructions. Statutes changing the common law.*[35] Statutes are not to be construed as changing the common law further than they by their terms expressly declare.[36] By statute in Utah, acts in derogation of the common law are to be liberally construed.[37]

Penal statutes.[38]—A penal statute should receive a strict construction and no act should be held a violation which does not fall within the fair import of its language,[39] but should still be construed reasonably in aid of the purposes of the act,[40] and not so strictly as to defeat the intention of the legislature.[41] Where a penalty is fixed to a remedial statute, the penalty is to be strictly construed while the remedial provisions are to be liberally construed.[42]

strued so as to permit pulling down shades when sun shining. Siren v. State [Neb.] 111 N. W. 798.

27. See 6 C. L. 1542.

28. Proviso to paragraph 339, 30 Stat. 181, extends beyond the body of the act. Carter, Webster & Co. v. U. S. [C. C. A.] 143 F. 256.

29. Under paragraph 626 of 30 Stat. 200 (U. S. Comp. St. 1901, p. 1685), petroleum crude or refined is admitted free of duty with a proviso for a retaliatory duty on crude petroleum and the products of crude petroleum. The intent of congress was to induce reciprocity and this proviso cannot be restricted to the paragraph in which it is contained but should be read into every section of the tariff act where a product of petroleum is enumerated. United States v. Downing & Co. [C. C. A.] 146 F. 56.

30. See 6 C. L. 1542.

31. Eccles Lumber Co. v. Martin [Utah] 87 P. 713.

32. Method of procedure for assessors held directory. Reid v. Southern Development Co. [Fla.] 42 So. 206.

33. Village of Bloomer v. Bloomer, 128 Wis. 297, 107 N. W. 974.

34. Richardson v. Fitzgerald [Iowa] 109 N. W. 866.

35. See 6 C. L. 1543.

36. A law giving a right to take memoranda and abstracts of records does not give a right to make substantial copies of entire books. Davis v. Abstract Const. Co., 121 Ill. App. 121; State v. Lowry [Ind.] 77 N. E. 728. Evidence act of May 23, 1887, held not to change common-law rule as to proof of evidence of deceased witness. Keim v. Reading, 32 Pa. Super. Ct. 613.

37. Rights of illegitimate children. In re Garr's Estate [Utah] 86 P. 757.

38. See 6 C. L. 1543.

39. Under an act penalizing loaning money on chattel mortgage notes in which the sum is stated to be greater than that actually loaned, a bill of sale given to secure a loan will not be construed as a mortgage. Morin v. Newbury [Conn.] 65 A. 156. A chattel mortgage statute providing for forfeiture is in the nature of a penal statute and will be strictly construed, and in the following case it was held that the delivery of chattels by a mortgagor to the mortgagee is not a taking by the mortgagee as required by statute. Hammel v. Cairnes [Wis.] 107 N. W. 1089. Claims against municipalities. State v. Wallace [Me.] 66 A. 476.

40. The word "record" in a statute penalizing the destruction of records is not to be confined to its common-law meaning, but being a word in common use is to be accepted more liberally when such purpose is apparent. McInerney v. U. S. [C. C. A.] 143 F. 729. The word corporation in an act will not be construed to include joint stock companies. Commonwealth v. Adams Exp. Co., 29 Ky. L. R. 1280, 97 S. W. 386. Penalty for failure of railroad to maintain water closets at stations. Missouri K. & T. R. Co. v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 21, 97 S. W. 720. Act regulating and prohibiting sale, etc., of cigarettes. State v. Lowry [Ind.] 77 N. E. 728; Ex parte Knight, [Fla.] 41 So. 786. Act of June 10, 1881, P. L. 110, requiring plugging of abandoned oil wells, will not be enforced unless there is one-third sand or oil bearing rock or unless it is physically possible. Dawson v. Shaw, 28 Pa. Super. Ct. 563.

41. Safety Appliance Acts. United States v. Baltimore & O. R. Co., 26 App. D. C. 581. Homicide in the perpetration of burglary is construed as homicide in the res gestae and not as, necessarily, immediately accompanying burglary Conrad v. State, 75 Ohio St. 52, 78 N. E. 957.

42. A penalty to enforce the release of

Various other strict constructions.[43]—A delegation of power primarily vested in the legislature is to be strictly construed,[44] and so with statutes imposing restrictions upon the ordinary occupations of the people,[45] or imposing special burdens on the taxpayer.[46] An act in derogation of the rights and enjoyment of property must be strictly construed.[47]

Remedial statutes.[48]—A remedial clause in a statute calls for a liberal construction.[49] Where a statute imposes a duty where none existed before, the presumption is that the remedy provided for the breach of the duty is exclusive.[50]

Revisions.[51]

Other liberal constructions.[52]

(§ 5) *H. Partial invalidity.*[53]—Where a law is constitutional in part and unconstitutional in part, the former part may often be sustained while the latter fails,[54] but it is indispensable that the two parts are capable of separatiou so that each may

exempted property from attachment. State v. Ross [W. Va.] 57 S. E. 284. Where an act required not only advertising and letting of contracts to the lowest bidder upon certain terms but approval by a judge, a contract entered into otherwise than as provided cannot be enforced. Venango County v. Penn Bridge Co. [Pa.] 64 A. 445. Penal statute in aid of enforcement of contractual obligations to be liberally construed in the absence of clear language to the contrary. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

43. See 6 C. L. 1543.

44. Controlling sea shore fisheries delegated to municipality. State v. Wallace [Me.] 66 A. 476. Statutes delegating the power of taxation. State v. Braxton County Court [W. Va.] 55 S. E. 382.

45. Taxes by way of licenses upon the common occupations. Wilson v. District of Columbia, 26 App. D. C. 110.

46. Organization of irrigation districts. Ahern v. Directors of High Line Irr. Dist. [Colo.] 89 P. 963.

47. Building laws. District of Columbia v. Mattingly, 28 App. D. C. 176.

48. See 6 C. L. 1544.

49. Statute requiring anthracite miners to have a certificate of two years' experience in mines construed to mean anthracite mines. Commonwealth v. Shaleen [Pa.] 64 A. 797. Curative act applicable to sales of real estate for taxes. Hogan v. Piggott [W. Va.] 56 S. E. 189. Courts should seek to uphold an act intended to remedy an evil arising from an unusual circumstance, as the destruction of public records. Title & Document Restoration Co. v. Kerrigan [Cal.] 88 P. 356.

50. Venango County v. Penn Bridge Co. [Pa.] 64 A. 445.

51. See 4 C. L. 1536.

52. See 4 C. L. 1538.

53. See 6 C. L. 1544.

54. Cella Commission Co. v. Bohlinger [C. C. A.] 147 F. 419; Pryor v. Murphy [Ark.] 96 S. W. 445; Ex parte Spencer [Cal.] 86 P. 896; Glover v. State, 126 Ga. 594, 55 S. E. 592; People v. Olsen, 222 Ill. 117, 78 N. E. 23; State v. Heger [Mo.] 93 S. W. 252; State v. Cohen, 73 N. H. 543, 63 A. 928; State v. Johnson [S. C.] 56 S. E. 544; Mill v. Brown [Utah] 88 P. 609; Skeen v. Chambers [Utah] 86 P. 492; State v. Braxton County Ct. [W. Va.] 55 S. E. 382. Tax act. State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606. An act ceding land for a soldiers' home not invalid because of a void clause regarding voting privileges. State v. Willett [Tenn.] 97 S. W. 299. The invalidity of a provision in a prohibition law that part of the fines imposed shall go to the informant does not affect the remainder of the act. Chaney v. State [Ala.] 41 So. 172. Laws 1905, c. 538, to prevent dealing in futures. Gatewood v. North Carolina, 27 S. Ct. 167. An act relating to condemnation of property is valid despite the invalidity of a provision changing the jurisdiction of courts. Commonwealth v. Chicago, etc., R. Co., 30 Ky. L. R. 673, 99 S. W. 596. A provision limiting stockholders' liability may even, if unconstitutional, be eliminated without affecting the validity of the remainder of the Stock Corporation Law, Laws 1892, p. 1841, c. 688, § 55. Gause v. Boldt, 49 Misc. 340, 99 N. Y. S. 442. An invalid provision in an act requiring notice by an injured person upon the person claimed to be liable does not affect another provision of the act authorizing the wrong doer to compel the claimant to come into court for the district in which claimant lives. Buttron v. El Paso Northeastern R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 339, 93 S. W. 676. Act providing for the salary of judges and of the county attorney. Cook County v. Healy, 222 Ill. 310, 78 N. E. 623. Assuming the last part of St. 1903, p. 448, c. 437, § 71, providing for assessment, etc., of taxes on personal property in accordance with the provisions of R. L. ch. 12, 13, to be invalid, this does not affect the validity of a tax assessed on personal property of a foreign corporation kept for use in Massachusetts, such part being separable from the balance. Scollard v. American Felt Co. [Mass.] 80 N. E. 233. Licenses on occupations and licenses on personal property may be separated. Wiemer v. Louisville Sinking Fund Com'rs. 30 Ky. L. R. 523, 99 S. W. 242. An act imposing fine and imprisonment on corporations for failure to supply drinking water could not be enforced as to imprisonment. Southern R. Co. v. State, 125 Ga. 287, 54 S. E. 160. Interstate Common Carrier's Liability Act. Spain v. St. Louis & S. F. R. Co., 151 F. 522. A statute invalid as to provisions relating to interstate commerce may be upheld as to intra state commerce. Furnishing cars. Allen v. Texas & P. R. Co. [Tex.] 101 S. W. 792.

be read and stand by itself,[55] for, if the act contains one general scheme, the entire act is invalid,[56] and so if the provisions of an act are so related that it cannot be said that the legislature would have passed any of them independently of the others, the entire act is void.[57]

§ 6. *Retrospective effect. In general.*[58]—Statutes are presumed to operate prospectively and not retrospectively,[59] but an act may in certain cases be given a retrospective effect if its terms admit of no other reasonable construction,[60] for retrospective legislation is not invalid unless it is prohibited by the constitution or impairs vested rights[61] or contractual obligations.[62] Statutes may operate retro-

55. Where a statute provides for jurisdiction over foreign corporations by service of process upon the state auditor, it is unconstitutional as it authorizes judgment without notice to the defendant and it cannot be held constitutional as to foreign corporations doing business in the state, for it is general in its terms making no distinction. Cella Commission Co. v. Bohlinger [C. C. A.] 147 F. 419; Commonwealth v. Hana [Mass.] 81 N. E. 149; State v. Aetna Banking & Trust Co. [Mont.] 87 P. 268. A statute regarding the sale of patent rights, lightning rods, and stallions, which is void as to the patent rights, is valid as to the rest. Quiggle v. Herman [Wis.] 111 N. W. 479. Taxation of receipts from interstate commerce renders act taxing such receipts and receipts from local traffic together void. Galveston, etc., R. Co. v. Davidson [Tex. Civ. App.] 15 Tex. Ct. Rep. 274, 579, 93 S. W. 436. Where an act provides for the limitation of the heights of buildings and also for damages for such limitation and other acts, the matters are so connected as not to permit of the assessment of damages being declared void, the validity of the balance sustained. American Unitarian Ass'n v. Com. [Mass.] 79 N. E. 878.

56. A tax act exempting certain cities, which exemption is invalid, is entirely void. State v. Chicago, etc., R. Co., 195 Mo. 228, 93 S. W. 784; Commonwealth v. Hana [Mass.] 81 N. E. 149. A repeal act which excepts from its operation part of the original act is void as to such exception, but the remainder may be upheld as it does not appear that the exception was an inducement to the repeal. Friend v. Levy [Ohio] 80 N. E. 1036.

57. Smith v. Haney [Kan.] 85 P. 550; Wright v. Southern Bell Tel. & T. Co. [Ga.] 56 S. E. 116. An act reapportioning the state into senatorial districts being bad as to certain districts is entirely void. In re Sherill [N. Y.] 81 N. E. 124.

58. See 6 C. L. 1545.

59. Ducey v. Patterson [Colo.] 86 P. 109. Laws 1905, p. 536, c. 320, § 4. Walton v. Woodward [Kan.] 84 P. 1028. Laws 1903, p. 698, c. 348, providing for entry upon lands to make surveys. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Amendment of the charter of a benefit association. Brown v. Grand Fountain of U. O., 28 App. D. C. 200. Act permitting evidence of any number of violations of the liquor law upon trial under indictment for one offense does not apply to prosecution begun prior to its passage. Kittrell v. State [Miss.] 42 So. 609. Where an action was pending when Acts 1905, p. 757, c. 169, § 699, known as the public offense act, went into affect, the proceedings are not governed by that act. Stieler v. State [Ind.] 77 N. E. 1083. An employer's liability act which takes away the defence of contributory negligence will not be held to operate retroactively although within the letter of the law which provides that it apply to all actions thereafter brought which would include actions for injuries received prior to the enactment of the act, for such would render it unconstitutional. But the act creates a new right and a new obligation. Plummer v. Northern Pac. R. Co., 152 F. 206. A statute is not retrospective because a part of the requisites for its operation is drawn from a time antecedent to its passing. McDougald v. New York Life Ins. Co. [C. C. A.] 146 F. 674. The treaty with Cuba provided that it should go into effect the tenth day after the exchange of ratifications, but the court refused to construe the treaty retrospectively even though the ratifications had been exchanged some time before the statute was enacted. United States v. American Sugar Refining Co., 202 U. S. 563, 50 Law. Ed. 1149.

Tax laws. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157. Tax laws will not be enforced for the year in which enacted. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. Taxation of franchise does not operate during fiscal year in which it was passed. Ohio Valley Tel. Co. v. Louisville, 29 Ky. L. R. 631, 682, 94 S. W. 17. A tax law passed in a certain year is not retrospective so as to affect taxation for that year but is presumed to be passed in advance to affect the coming year. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725. Acts Mar. 6, 1903, requiring plaintiff to refund taxes, etc., in a suit to set aside a tax deed, does not apply to tax deeds or sales of lands for taxes or to taxes paid prior to the act. Haarstick v. Gabriel [Mo.] 98 S. W. 760 Accord. Manwarring v. Missouri Lumber & Min. Co. [Mo.] 98 S. W. 762. Laws 1902, c. 22, §§ 52, 58, relating to tax sales, clearly express the obvious purpose of definitely fixing the time of new system going into effect as subsequent to 1902. Stein v. Hanson, 99 Minn. 387, 109 N. W 821.

60. P. L. New Jersey 1903, p. 145, providing that proceedings for road improvement entered into before the passage of this act should not abate but such proceeding shall continue as near as may be as if the same had been commenced hereunder, does not impair contracted obligations. Cortelyou v. Anderson [N. J. Law] 63 A. 1095.

61. Plummer v. Northern Pac. R. Co., 152 F 206. An act cannot deny a right of action which has accrued previously. Brennan v. Electrical Inst. Co., 120 Ill. App. 461. Judgment cannot be invalidated by subsequent statute. Powell v. Nevada, etc., R., 28 Nev. 305, 82 P. 96. Revisal 1905, § 1591, providing

spectively which relate merely to procedure [63] or operate to extend remedies for existing rights.[64]

Curative acts.[65]—A curative act will be given retrospective effect if it is intended to give effect to past acts which are ineffective because of neglect to comply with some legal requirement.[66]

§ 7. *Repeal. A. In general.*[67]—An unconstitutional act cannot repeal a prior act expressly or by implication.[68] A statute is not repealed by nonenforcement.[69] When a statute is amended by an act which after repeating the entire original act adds to it new provisions not in conflict and concludes with a repeal of all conflicting acts, the original act is not repealed but remains in force from the time of its original enactment.[70] Where a statute in force in that part of a state which is later ceded to the United States is after the cession repealed such repeal has no effect in the ceded territory.[71]

Effect on vested rights.[72]—Where a board of commissioners appointed by statute to equalize taxation fully performed their duties and made their determination, an act repealing the statute under which they were appointed does not affect an action to collect taxes as determined,[73] but a repeal of a right to levy taxes for revenue only destroyed all right to collect the same although due before the repeal took effect.[74]

for sale of estates upon consent of all having vested rights, although there are contingent interests, is valid. Anderson v. Wilkins, 142 N. C. 154, 55 S. E. 272. In an action for killing of a mule, Acts 1905, p. 226, c. 117, relating to the liability of railroad companies for killing stock, passed since the killing of the mule, has no application. Missouri, etc., R. Co. v. Scofield [Tex. Civ. App.] 17 Tex. Ct. Rep. 319, 98 S W. 435. Sess. Laws N. M. 1901, p. 112, c. 62, put an end to community property but it could have no retroactive effect so as to disestablish rights which had already attached to the community property. In re Chavez [C. C. A.] 149 F. 73.

62. Cortelyou v. Anderson [N. J. Law] 63 A. 1095.

63. Where a statute amending the right of appeal is passed pending an appeal but before entry of the same, such appeal is governed by the amendment. Kansas City v. Dore [Kan.] 88 P. 539. A statute general in form dealing with rules of evidence in civil cases is applicable to all future cases whether the trial was pending or not at the time of its passage. St. 1905, p. 208, v. 288, report of the judge of the land court to be prima evidence. Woodvine v. Dean [Mass.] 79 N. E. 882.

Not retrospective: An amendment providing that shorthand notes of a trial may go on the record upon appeal is not retroactive so as to make such shorthand notes part of the record when filed prior to such amendment instead of the writing as previously required. Manaca v. Ionia Circuit Judge [Mich.] 13 Det. Leg. N. 919, 110 N. W. 75. Laws 1905, p. 185, c. 92, providing that particulars of the insufficiency of evidence need not be stated on motion for a new trial, does not apply to a bill of exceptions made prior to its enactment Martin v. Corscadden [Mont.] 86 P. 33.

64. Wallapai Min. & Development Co. v. Territory [Ariz.] 84 P. 85. An act providing for the extension of chattel mortgages for one year only applies to mortgages in force at the time it became effective. The Aultman & Taylor Mach. Co. v. Fish, 120 Ill. App. 314. Taking away defenses in civil actions based on arbitrary rules of law is not unconstitutional. Statute of limitations. Plummer v. Northern Pac. R. Co., 152 F. 206. Code Civ. Proc., authorizing executions against the wages of the judgment debtor. Myers v. Moran, 99 N. Y. S. 269.

Not retrospective: An act putting in operation the statute of limitations as to married women. Beale's Heirs v. Johnson [Tex. Civ. App.] 99 S. W. 1045. Statute giving lien to judgment. Ohio Bank v. Berlin, 26 App. D. C. 218. An act supplementing the right of lien does not separate so that the supplementary right extends back to the time of the original act. Horn & Brannen Mfg. Co. v. Steelman [Pa.] 64 A. 409. Laws 1871-72, p. 94, as amended by Laws 1903, p. 3, fixing the time for filing claims against an estate, does not affect claims against an estate upon which letters have already been granted. Hathaway v. Merchants' Loan & Trust Co., 218 Ill. 580, 75 N. E. 1060.

65. See 6 C. L. 1546.

66. Defects in deeds, etc. Baird v. Monroe [Cal.] 89 P. 352.

67. See 6 C. L. 1516.

68. Ex parte Clary [Cal.] 87 P. 580; Ex parte Merritt [Ark.] 96 S. W. 983. An act fixing a salary was altered before being signed by the governor and was void leaving the salary as fixed by a prior act in full force. Cook County v. Healey, 222 Ill. 310, 78 N. E. 623. An act which does not refer in its title to a prior act which it seeks to repeal as required by the constitution is void and such prior act remains in full force. House of Refuge v. Luzerne County [Pa.] 64 A. 601.

69. Cain v. Daly, 74 S. C. 480, 55 S. E. 110.

70. Territory v. Ruval [Ariz.] 84 P. 1096.

71. McCarthy v. Packard Co., 105 App. Div. 436, 94 N. Y. S. 203.

72. See 6 C. L. 1547.

73. Foster v. Rowe, 128 Wis. 326, 107 N. W. 635.

74. Wheeler v. Plumas County [Cal.] 87 P. 802.

Effect on penalties.[75]—The repeal of a penal statute at common law extinguished all penalties for offenses against its provisions,[76] but pending prosecutions are not affected by the repeal of statutes when executed by saving clauses.[77]

Effect on pending actions.[78]—The repeal of an act is a complete bar to further proceedings under it,[79] but pending proceedings may be excepted by a saving clause in the repealing act,[80] or by a general law that a repeal shall not affect any suit commenced prior to the taking effect of the repealing act,[81] but if it clearly appears from a repealing act that a general saving statute was not intended to apply, effect will be given such intention.[82]

Repeal of repealing statutes.[83]

(§ 7) *B. Implied repeal. In general.*[84]—Repeal by implication is not favored,[85] and where there are two acts on the same subject, the rule is to give effect to both if possible,[86] the very fact that no repealing clause is attached being worthy of consideration in determining the intention of the legislature,[87] but this rule does

75. See 6 C. L. 1547.

76. United States v. Standard Oil Co., 148 F. 719. Repeal of criminal statute bar and further proceedings after conviction though before final judgment. Sale of liquor. State v. Perkins, 141 N. C. 797, 53 S. E. 735.

77. United States v. Standard Oil Co., 148 F. 719.

78. See 6 C. L. 1547.

79. Doss v. Mermentau Levee Dist. Com'rs, 117 La. 450, 41 So. 720. Petition filed under Burn's Ann. St. 1901, §§ 5655-5671, for the establishment of a ditch across private land. This act was repealed pending hearing on the petition and the right of action was lost. Taylor v. Strayer [Ind.] 78 N. E. 236. Bill to restrain removal of a dead animal through the streets. Defendant filed a plea based on a statute authorizing such an act. Act repealed before final hearing and bill stood as though unanswered. Barnes v. Roy, 27 R. I. 534, 65 A. 277. "Curtis Law" (30 St. 495, c. 517), providing for the recovery for improvements on Indian lands repealed pending an action for such recovery. Sharrock v. Kreiger [Ind. T.] 98 S. W. 161. Where part of a judgment or decree rests on the authority of a statute repealed pending the action, as to such part, the judgment or decree is void. Sharrock v. Kreiger [Ind. T.] 98 S. W. 161. A repeal of a right to levy taxes for revenue only destroyed all right to collect the same although due before the repeal took effect (Wheeler v. Plumas County [Cal.] 87 P. 802), but where a board of commissioners appointed by statute to equalize taxation fully performed their duties and made their determination, an act repealing the statute under which they were appointed does not affect an action to collect taxes as determined (Foster v. Rowe, 128 Wis. 326, 107 N. W. 635).

80. Laws 1906, p. 1405, c. 516, repealing Pen. Code, § 640, but saving pending actions, must have made the exception to save the expense of costs or disbursements to those acting under repeal statute. Bellin v. Wein, 101 N. Y. S. 38. An act repealing a prior drainage act but saving pending proceedings in which a ditch has been ordered or proceedings which will not affect any body of water that has to exceed ten acres of surface at high water, saves pending proceedings which will not affect a body of water as described though the ditch has not yet been ordered. Clemans v. Hatch [Ind.] 78 N. E. 1065.

81. Act of May 16, 1905 (P. L. p. 467) of New Jersey, repealing Act of April 8, 1903 (P. L. p. 514), making improvement certificates a lawful indebtedness, does not affect an action pending in view of Act Mar. 27, 1874 (Gen. St. p. 3194). O'Neill v. Hoboken [N. J. Law] 63 A. 986. An express saving clause has been enacted by congress. Rev. St. § 13 (U. S. Comp. St. 1901, p. 6). United States v. Standard Oil Co., 148 F. 719. A penalty for violation of statute may be recovered after repeal by statutory provision, unless express provision to the contrary appears in the repealing statute. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748.

82. Inheritance tax law repealed. Friend v. Levy [Ohio] 80 N. E. 1036.

83. See 2 C. L. 1733.

84. See 6 C. L. 1548.

85. Caven v. Coleman [Tex. Civ. App.] 16 Tex. Ct. Rep. 778, 96 S. W. 774. Laws 1884, p. 59, c. 29, providing for the sale of lands of deceased persons, does not repeal Laws 1882, p. 23, c. 7. Hagerman v. Meeks [N. M.] 86 P. 801; State v. Perkins, 141 N. C. 797, 53 S. E. 735; Memphis & S. L. R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019; In re Sammon [Vt.] 65 A. 577; United States v. Chicago, etc., R. Co., 151 F. 84. An act giving a right to a widow of a miner to sue for death is not repealed by an act giving such right to the personal representative for wrongful death. Collins Coal Co. v. Hadley [Ind. App.] 78 N. E. 353. An act shortening the time of appeal to six months does not impliedly repeal another act which provides that an absent defendant may have one year after judgment within which to answer to the merits. Fox v. Townsend, 2 Cal. App. 193, 83 P. 272. Act prohibiting the sale of liquor without a license not repealed by an act making it unlawful to carry on special vocations including the sale of liquor without paying the taxes prescribed. McCampbell v. State [Tenn.] 93 S. W. 100. Statutes dealing with contracts for conveyance of realty after a grantor's decease not repealed by a general statute providing for the descent of realty. Griggs Land Co. v. Smith [Wash.] 89 P. 477.

86. Board of Health v. Vineland [N. J. Eq.] 65 A. 174. The performance of a governmental function is not an excuse for the violation of some other law. Palmer v. District of Columbia, 26 App. D. C. 31.

87. Hagerman v. Meeks [N. M.] 86 P. 801.

not apply to a statute creating a new class of offenses.[88] In order that a repeal by implication may be given effect, the two statutes in question must be irreconcilable,[89] in which case the later statute will repeal the prior to the extent of the repugnancy,[90] but, it is not an absolute rule and it will not be allowed to defeat the purpose of the legislature as gathered from the context.[91] Where two acts are in express terms repugnant, if the later act covers the whole subject of the first and embraces new provisions, plainly showing that it was intended as a substitute, it will operate as a repeal,[92] and so where a later act is consistent with a former act, there may be an implied repeal of the former by way of revision.[93] Where a subsequent statute though not wholly repugnant prescribed the only rule governing certain cases, a prior statute is repealed by implication.[94] A later law which is merely a re-enactment of a former does not repeal an intermediate act which has qualified or limited the first one, but such intermediate act remains in force and qualifies the new act in the same manner as it did the first.[95] The re-enactment of only part of an act implies the repeal of the remainder.[96] Repeals by implication do not apply only in case of police regulations.[97]

General and special laws.[98]—A general law does not repeal a special law upon the same subject unless they are repugnant.[99]

88. Allen v. U. S., 40 Ct. Cl. 170.

89. United States v. Chicago, etc., R. Co., 151 F. 84; McCampbell v. State [Tenn.] 93 S. W. 100; Glover v. State, 126 Ga. 594, 55 S. E. 592; Board of Health v. Vineland [N. J. Eq.] 65 A. 174. An act providing for alternative punishment by imprisonment in case of nonpayment of a fine for breach of the peace is not in conflict with and hence not repealed by a later act providing for a direct sentence of imprisonment for the same offense. In re Sammon [Vt.] 65 A, 577. An act providing for a recorder's court to have jurisdiction in certain offenses in a city impliedly repeals a provision in the city's charter giving the mayor jurisdiction over such offenses. State v. Hubbard [Ala.] 41 So. 903.

90. City of Allentown v. Wagner, 214 Pa. 210, 63 A. 697. An act to secure the purity of public supplies of water was followed by an act much broader in its scope pertaining to the same subject which was held to supersede repugnant provisions in the earlier act. Board of Health of New Jersey v. Vineland [N. J. Eq.] 65 A. 174. Act May 3, 1901, providing that state bonds not presented for payment within a certain time should be barred, repeals by implication Kirby's Dig. § 4866, allowing bonds to be received in payment for certain lands. Tipton v. Smythe [Ark.] 94 S. W. 678. Sess. Laws 1901, C. 108, repeals Comp. Laws, § 1794, allowing commission to county assessors on licenses collected. Sandoval v. Bernalillo County Com'rs [N. M.] 86 P. 427; Hubbell v. Bernalillo County Com'rs [N. M.] 86 P. 430. Act July 11, 1901, relating to fees of sheriffs, repeals the fee bill fixed by act of April 2, 1868. Lenhart v. Cambria County [Pa.] 64 A. 876.

91. 98 Ohio Laws, p. 271, an act regulating terms of office provided two separate dates for the commencement of one term of office. State v. Mulhern, 74 Ohio St. 363, 78 N. E. 507.

92. Board of Health of New Jersey v. Vineland [N. J. Eq.] 65 A. 174. Foreign corporations. Western Union Tel. Co. v. State [Ark] 101 S. W. 745. Statute requiring notes to be payable to order or bearer in order to be negotiable repeals statute providing that every note be negotiable. Gilley v. Harrell [Tenn.] 101 S. W. 424.

93. The title to two acts was identical and the general purpose the same. Cortelyou v. Andersón [N. J. Law] 63 A. 1095.

94. Clark v. Baxter, 98 Minn. 256, 108 N. W. 838. Liquor license legislation. Knobluch's License, 28 Pa. Super. Ct. 323.

95. Taggart v. Hillman [Tex. Civ. App.] 15 Tex. Ct. Rep. 273, 93 S. W. 245.

96. Lawyer v. Carpenter [Ark.] 97 S W. 662.

97. Memphis & S. L. R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019.

98. See 6 C. L. 1549.

99. Provision in charter of a railroad company that it should only be sued in its domicile not repealed by a general law allowing suit against carriers either at the point of delivery or their domicile. Hayes v. Morgan's Louisana, etc., S. S. Co., 117 La. 593, 42 So. 150; Canham v. Bruegman [Neb.] 109 N. W. 733; Tommasi v. Bolger, 100 N. Y. S. 367; Mohr v. Scherer, 30 Pa. Super. Ct. 509; Memphis & S. L. R. Co. v. Union R. Co. [Tenn.] 95 S. W. 1019. Acts 1902, p. 269, c. 349, was not repealed by Acts 1903. pp. 443-455, c. 437, §§ 58-95, for they are not inconsistent, the latter being an additional and special enactment providing for the service of process. Scollard v. American Felt Co. [Mass.] 80 N. E. 233. Rev. St. 1899, § 5508, subd. 21, giving cities power to regulate the liquor traffic, was not repealed by the subsequent enactment of a general law. State v. Binswanger [Mo. App.] 98 S. W. 103. A general act providing for the reopening of judgments rendered on constructive service does not apply in an action to quiet title where there is a particular statute covering such actions. Lawyer v. Carpenter [Ark.] 97 S. W. 662. Burn's Ann. St. 1901, § 7473, the "Miners' act" giving right to widow to sue for death is not repealed by Act 1899, p. 405, c. 177, which gave right of action for wrongful

In Georgia, a general law is not subject to repeal by a special or local law,[1] but a particular provision overcomes a general law on the same subject.[2] A general law, however, whose intention is to provide a harmonious system throughout the state will repeal prior special acts.[3] One section of an act cannot be divided into two parts one of which is special and the other general so as to have the special supersede the general.[4] And where two acts can be made to work together and each accomplish a different and independent result, a special law will not be affected by a subsequent general statute.[5]

STATUTORY CRIMES; STAY LAWS, see latest topical index.

STAY OF PROCEEDINGS.

Grounds for Stay (1999).
Power to Grant (2000).
Proceedings to Obtain a Stay (2000).
Effect of Stay (2000).
Waiver of Stay (2001).

Grounds for stay.[6]—The effect of supersedeas bond is treated elsewhere.[7] While matters existing anterior to the judgment cannot be made a ground for supersedeas of an execution on such judgment,[8] yet as to the proper matters arising subsequently, the writ is allowable.[9] Where actions relating to the same subject-matter are pending in courts of concurrent jurisdiction, the last brought will ordinarily be stayed till the determination of the first,[10] and the fact that there has been no seizure nor an actual taking of the res in possession under orders of the first court to acquire jurisdiction is not essential to constitute the pendency of the action, therein ground for staying the subsequent suit.[11] When the pendency of an action in another state between the same parties in relation to the same subject-matter is suggested, it is within the discretion of the court to stay proceedings to await the final disposition of the cause pending in the other state, though it is not ground for plea in abatement,[12] but the pendency of another action is not ground for a stay unless the proceedings relate to the same subject-matter,[13] nor does the pendency of review proceedings in

death to the personal representative, for the miners' act is special, controlling all cases specifically enumerated, while the act of 1899 is general embracing all other cases. Collins Coal Co. v. Hadley [Ind. App.] 78 N. E. 353. A dispensary law was held evidently not intended to repeal any local or general local prohibition law. Rose v. Lampley [Ala.] 41 So. 521. Hurd's Rev. St. 1903, p. 282, providing for an election for city organization, is a special act and not repealed by the Australian Ballot Law of 1891. People v. Weber, 222 Ill. 180, 78 N. E. 66.

1. Pol. Code 1895, § 679. Griffin v. Sanborn [Ga.] 56 S. E. 71.

2. Rev. St. 1899, § 5508, subd. 21, giving cities of second class exclusive power to license, regulate, etc., dram shops, expressly excludes the general state law from operation. State v. Binswanger [Mo. App.] 98 S. W. 103; Aekerman v. Green [Mo.] 100 S. W. 30. Specific provisions upon a particular subject control general provisions for the class to which the subject belongs.

3. The provisions of the city's law and general tax law together provide for a harmonious system of taxation and procedure throughout the state and by implication repeal the previously existing local statutes. Miller v. Donovan [Cal. App.] 85 P. 159. In re Troy Press Co. [N. Y.] 79 N. E. 1006; Id., 100 N. Y. S. 516.

4. State v. Lewis, 73 Ohio St. 101, 76 N. E. 564.

5. Highway Acts. In re Business Men's Ass'n of City of Newburgh, 103 N. Y. S. 843.

6. See 6 C. L. 1550.

7. See Appeal and Review, 7 C. L. 128.

8, 9. Where the sheriff refused to receive property adjudged to party in replevin tendered within the term required by law, supersedeas of execution on replevin bond was proper remedy. Jesse French Piano & Organ Co. v. Bradley, 143 Ala. 530, 39 So. 47.

10. Action for accounting by executor in surrogate's court stayed till determination of action covering same state of affairs brought in supreme court. In re Llado's Estate, 50 Misc. 227, 100 N. Y. S. 495; Ferriday v. Middlesex Banking Co. [La.] 43 So. 403.

11. Proceedings in state court stayed in deference to prior acquisition of jurisdiction by Federal court. Ferriday v. Middlesex Banking Co. [La.] 43 So. 403.

12. Moore v. Maryland Casualty Co. [N. H.] 64 A. 1099.

13. Proceeding to foreclose mortgage on undivided tract of land and suit for partition affecting same held not in relation to the same matter. Van Houten v. Stevenson [N. J. Eq.] 64 A. 1094. Suit for infringement of Selden patent vehicle by a Ford

a collateral matter act as a stay of the proceedings in the primary court.[14] The pendency of litigation affecting the title of property to be sold under order of court in proceedings under the court's control, which depreciates the value of the property, is ground for staying the sale.[15] When the power of a court of law to grant equitable relief by reformation is doubtful, an action at law in which a defense tendered depends on a reformation will be continued a reasonable time to enable the party to present his claim to reformation in a court of equity.[16] Willful disobedience of an order of court is ground for staying affirmative proceedings in a cause by the party in default, though he is absent from the state when the order is moved and entered.[17] Where an appeal bond is executed prior to the principal's effort to take advantage of the bankruptcy law, he is not entitled as matter of right to a stay of proceedings in the appealed cause pending the adjudication of the question of his discharge in bankruptcy.[18] Hence a perpetual stay of execution entered after judgment renders harmless a refusal to grant a stay at an earlier stage of the case.[19]

Power to grant.—When the pendency of litigation affecting the title of property to be sold under order of court in proceedings over which it has control depreciates the value of the property to be sold, a stay of the sale is within the power of the court after the adjournment of the term at which the decree establishing a lien and ordering sale in satisfaction thereof was entered.[20]

Proceedings to obtain a stay.[21]—A statutory provision that an injunction to stay proceedings on a judgment will not be granted in an action brought by the party seeking the injunction in any other court than that in which the judgment was rendered is limited in its application to judgments to which the persons seeking the injunction are parties.[22] In New York a motion for a new trial does not operate as a stay unless an order to that effect is procured and served.[23] Notice to the plaintiff is essential in NewYork to the validity of an order indefinitely staying the prosecution of an action,[24] and ordinarily can be obtained only on motion made within the district in which the action is triable.[25]

Effect of stay.[26]—Since a motion for a new trial does not in New York operate as a stay unless an order to that effect is procured and served, a stay granted at the close of a trial on denial of a motion for new trial, in connection with which no order for a stay was procured and served, does not render irregular a judgment rendered during the period covered by the stay.[27] An order of court staying sale of

vehicle held not ground for stay of suit for infringement of Selden patent by a Mercedes vehicle (Electric Vehicle Co. v. Barney, 143 F. 551), but if the defendant were using a Ford, or if he were asking to have prosecution suspended until the decision of some prior suit against maker, seller, or user, of a Mercedes, the application would probably commend itself to the court (Id.).

14. The pendency of proceedings taken by writ of error to the supreme court of the United States to review the decision of a state court remanding a prisoner under indictment to the custody of a court of concurrent jurisdiction in habeas corpus proceedings does not stay proceedings in the court having jurisdiction of the indictment. Ruef v. Superior Ct. of San Francisco [Cal.] 89 P. 604.

15. United States & Mexican Trust Co. v. Young [Tex. Civ. App.] 101 S. W. 1045.

16. Martin v. Smith [Me.] 65 A. 257.

17. Defendant in divorce, disobeying order to pay counsel fees and alimony pendente lite, held subject to stay from moving the trial until compliance with the order. Harney v. Harney, 110 App. Div. 20, 96 N. Y. S. 905.

18. Because the obligee is entitled to proceed to judgment against him for the purpose of charging the surety in the appeal bond. Flack v. Mooro, 117 Ill. App. 551.

19. Flack v. Moore, 117 Ill. App. 551.

20. United States & Mexican Trust Co. v. Young [Tex. Civ. App.] 101 S. W. 1045.

21. See 6 C. L. 1552.

22. Robinson v. Carlton, 29 Ky. L. R. 876, 96 S. W. 549.

23. Stern v. Wabash R. Co., 101 N. Y. S. 181.

24. Under rule 37 of the general rules of practice (Delahunty v. Canfield, 94 N. Y. S. 815), and irrespective of the rule the plaintiff is entitled to be heard (Id.).

25. Under Code Civ. Proc. § 769. Delahunty v. Canfield, 94 N. Y. S. 815.

26. See 6 C. L. 1552.

27. Such stay affected only the issuance of execution and proceedings supplementary. Stern v. Wabash R. Co., 101 N. Y. S. 181.

property ordered by it to be sold pending the final disposition of other litigation is interlocutory and therefore not reviewable on appeal until finally disposed of in the trial court.[28]

Waiver of stay.[29]—A party entitled to enforce a stay of an appealed cause until costs previously awarded have been paid waives the stay by noticing the cause for argument.[30]

STEAM.[31]

One using steam power must exercise due care in the generation [32] and use thereof, and is liable for a wanton [33] injuring of a trespasser upon his property,[34] unless such party is guilty of contributory negligence.[35]

STENOGRAPHERS.[36]

In a civil action in Georgia a stenographer is entitled to compensation for taking notes under the direction of the court, though he does not transcribe the same [37] which includes the court's charge to the jury,[38] and judgment may be awarded therefor against the party liable without notice,[39] though an ex parte judgment cannot be rendered for transcriptions made at the request of such party.[40] The court will not compel a private stenographer to deliver a copy of his notes without being first compensated therefor.[41] By statute in Kentucky a stenographer is prohibited present during the production of evidence before the grand jury.[42] While mandamus may lie to compel a court to allow stenographer fees in the proper case,[43] it will not issue where the claim has been denied on its merits.[44]

STIPULATIONS.

Right to Make and Form and Construction (2001). | **Enforcement and Effect (2002).**

Right to make and form and construction.[45]—Ordinarily the parties may by stipulation when definitely made [46] control the issues in a cause,[47] the scope of the

28. United States & Mexican Trust Co. v. Young [Tex. Civ. App.] 101 S. W. 1045.

29. See 2 C. L. 1738.

30. Hill v. Muller, 103 N. Y. S. 96.

31. See 6 C. L. 1552.

32. Where a building seventy yards from a mill is set on fire by sparks from an engine therein it is negligence per se to fail to provide any fire arrester at all. Dodd & Co. v. Read [Ark.] 98 S. W. 703. Liability for fires from steam engines is more fully treated in the topics Fires, 7 C. L. 1657, and Railroads, 6 C. L. 1227.

33. To constitute a wanton use of a blow-off pipe it is not necessary that the party know that the trespasser is in a dangerous position at the time steam is allowed to escape, but it is sufficient if he knows that persons are liable to be in a position to be injured thereby. Ambroz v. Cedar Rapids Elec. Light & Power Co. [Iowa] 108 N. W. 540.

34. Ambroz v. Cedar Rapids Elec. Light & Power Co. [Iowa] 108 N. W. 540.

35. Mere knowledge of the existence of a pipe where there is nothing to indicate that it is a blow-off pipe does not render one placing himself in front thereof guilty of negligence as a matter of law. Ambroz v. Cedar Rapids Elec. Light & Power Co. [Iowa] 108 N. W. 540.

36. See 6 C. L. 1552.

37. Civ. Code 1895, § 4447, relates to the taking of the notes only. Seaboard Air Line R. Co. v. Memory, 126 Ga. 183, 55 S. E. 15.

38. Under Civ. Code 1895, §§ 4446, 4447, a stenographer is entitled to compensation for reporting the court's charge. Seaboard Air Line R. Co. v. Memory, 126 Ga. 183, 55 S. E. 15.

39. Under Civ. Code 1895, § 4447, the fees are in the nature of court costs. Seaboard Air Line R. Co. v. Memory, 126 Ga. 183, 55 S. E. 15.

40. Under Civ. Code 1895, § 4448, a stenographer's right to compensation for transcribing notes at the request of a party, is contractual, and his remedy is by action on contract. Seaboard Air Line R. Co. v. Memory, 126 Ga. 183, 55 S. E. 15.

41. State v. Vicknair [La.] 43 So. 635.

42. Cr. Code Proc. § 110. Commonwealth v. Berry, 29 Ky. L. R. 234, 92 S. W. 936. Mandamus will lie to compel a judge to set aside an order directing a stenographer to take down the testimony. Id.

43. As where it is clear that the services were ordered and performed. Pipher v. Superior Ct. of California [Cal. App.] 86 P. 904.

44. Where a judge passes upon a stenographer's claim for transcribing and disallows a part on the ground that no order was made for the transcription, mandamus will not issue to compel him to make a different finding. Pipher v. Superior Ct. of California [Cal. App.] 86 P. 904.

45. See 6 C. L. 1554.

46. A stipulation reserving any "right" to show a waiver does not authorize the admission of evidence of a waiver under an

pleadings [48] or mode of proof,[49] or give to evidence a character which otherwise it would not have,[50] or establish the facts [51] as well as determine the venue or place of trial or hearing,[52] the province of the court and jury, respectively,[53] or matters relating to the entry of judgment [54] or parties,[55] or even as to the law governing the cause [56] or limiting or waiving the right of appeal,[57] but appellate jurisdiction cannot be conferred by stipulation.[58] An attorney of record may without special authority bind his client by a stipulation waiving the right of appeal. Rules of court often regulate the making of stipulations [59] requiring them to be in writing [60] or entered of record.[61] Objections to unauthorized provisions or interlineations in stipulations are waived by retention thereof after discovery by the party adversely affected.[62]

Enforcement and effect.[63]—The rule that ignorance of the law does not excuse applies in obtaining relief from stipulations,[64] as does the rule that a party to an

allegation of full performance. Victors v. National Provident Union, 113 App. Div. 715, 99 N. Y. S. 299.

47. A stipulation in an action on a contract waiving objections to the declaration and providing that all competent and proper evidence to prove plaintiff's case may be introduced thereunder entitles the plaintiff to prove waiver of the conditions of the contract though full performance is alleged. Andrew Lohr Bottling Co. v. Ferguson, 223 Ill. 88, 79 N. E. 35. Stipulation in adverse suit under Rev. St. U. S. §§ 2325, 2326, waiving all other points raised and submitting the sole issue, whether plaintiffs resumed work on mining claim after forfeiture before defendant's location, held valid. Gibberson v. Wilson [Ark.] 96 S. W. 137. Evidence of set-off held admissible under stipulation, though the pleadings were not sufficient to justify its admission. Floyd v. Mann [Mich.] 13 Det. Leg. N. 811, 109 N. W. 679. Testimony elicited from witness tending to show conspiracy to get the witness out of the jurisdiction of the court held inadmissible as violative of stipulation to avoid continuance. Martin v. Fisher, 143 Mich. 462, 13 Det. Leg. N. 8, 107 N. W. 86.

48. Stipulation in action by executor to recover land and the value of personalty alleged to have been converted held to limit court on demurrer for want of facts to question whether executor was entitled to possession of land. Sorenson v. Carey, 96 Minn. 202, 104 N. W. 958.

49. Stipulation that all the laws of a territory may be considered as evidence held waiver of proof of common law thereof. Williams v. Chamberlain, 29 Ky. L. R. 606, 94 S. W. 29.

50. Copy of ordinance held admissible under stipulation without laying foundation for its admission. Coffey v. Carthage [Mo.] 98 S. W. 562.

51. A stipulation agreeing that the allegations of a pleading, a demurrer to which has been overruled, are true, obviates evidence in support thereof. Commonwealth v. Hillis, 29 Ky. L. R. 1063, 96 S. W. 873.

52. Party held not entitled to object to jurisdiction of court to which cause was sent pursuant to stipulation as construed by the parties. Johnson v. St. Paul & W. Coal Co. [Wis.] 111 N. W. 722. Stipulation that application for mandamus should be heard and determined before certain court held conclusive of his right to be heard in a different court. People v. State Racing Commission, 103 N. Y. S. 955.

53. Stipulation that judgment should follow finding of jury as to value of mortgaged property and finding of court as to validity of mortgage held conclusive. Ryan v. Rogers [Idaho] 86 P. 524.

54. Judgment entered in vacation for failure to pay costs pursuant to stipulation held valid. Westhall v. Hoyle, 141 N. C. 337, 53 S. E. 863.

55. Substitution of officer's successor as party by stipulation held binding on defendant at whose suggestion substitution was made. Dickinson v. Oliver, 112 App. Div. 806, 99 N. Y. S. 432.

56. Stipulation that liquors had been legally sold during a specified period at a particular place held binding as to legality of sales. In re Cullinan, 113 App. Div. 485, 99 N. Y. S. 374.

57. A stipulation waiving the right of appeal is valid when supported by a sufficient legal consideration and the contract is in writing and made a part of the record in the cause. Jones & Co. v. Spokane Valley Land & Water Co. [Wash.] 87 P. 65.

58. Stipulation for submission of consolidated causes to be heard on appeal from order made in one case held not enforceable. Headrick v. Larson [C. C. A.] 152 F. 93.

59. The rule of the San Francisco superior court that no agreement or consent between the parties or their attorneys, which is disputed or denied, will be regarded by the court unless made and assented to in open court and entered in the minutes or unless in writing signed by the party against whom it may be alleged, is valid Not inimical to Code Civ. Proc. § 129. Tevis v. Palatine Ins. Co., 149 F. 560.

60. Oral stipulation held unenforceable under rule 27 of the district courts (24 P. xi). Stretch v. Montezuma Min. Co. [Nev.] 86 P. 445.

61. Statement by counsel that a certain thing is conceded by opposing counsel held insufficient proof of concession. Devine v. Kerwin, 102 N. Y. S. 841.

62. Stipulation reciting that the plaintiff having served an amended complaint "as of course," etc., held binding on plaintiff though the phrase quoted was inserted without his consent. Freyhan v. Wertheimer, 102 N. Y. S. 839.

63. See 6 C. L. 1555.

64. Ignorance of counsel in stipulating for time in which to perfect appeal as to the time when the terms of the appellate court are held is not ground for relief from the

agreement cannot be relieved of its burdens while retaining its benefits,[65] but mistake furnishes ground for equitable relief, as in other cases.[66] The authority of a court to relieve a party from a stipulation is, however, the exercise of a judicial discretion which may not be invoked without cause shown.[67] A stipulation procured without fraud, after action has been taken thereunder by a party to his detriment, cannot be set aside without placing him in statu quo.[68] A stipulation making the decision in a subsequent suit determine the result of a prior one is a waiver of a party's right to object that the cause of action has been split by the two suits.[69] When error is predicated on the existence of a stipulation, the party asserting the error must show affirmatively that the stipulation actually existed.[70] One is estopped to assert the invalidity of the form of a motion after it has been acted on pursuant to the form required by stipulation.[71] A stipulation by the receiver of a corporation for entry of the corporation's appearance does not require the receiver to personally appear.[72] The principle that sustains the validity of a stipulation, after suit is begun, to submit the controversy to arbitration, applies to sustain a stipulation that the finding of surveyors in a boundary suit shall be entered on the judgment of the court.[73] An ultra vires stipulation may nevertheless be enforceable on the ground of estoppel.[74] A stipulation waiving liability of a principal wrongdoer is applicable also as a waiver of liability of those guilty of contributing to the wrong.[75] An order relieving from a stipulation is not appealable in New York.[76] By submitting a cause by agreement, on the evidence taken before a referee, a party waives his motion for judgment on the findings by the referee.[77] A stipulation submitting a cause, in which a preliminary restraining order had been issued to the court as a whole, "the pleadings, motions, orders and the evidence," includes the preliminary injunction order,[78] hence the court has power of its own motion to strike out such order.[79] A stipulation made in the course of a trial to meet a contingency arising therein does not apply on future trials in the absence of an express provision to that effect.[80] The construction of a written stipulation is for the trial court.[81]

stipulation. Jones & Co. v. Spokane Valley Land & Water Co. [Wash.] 87 P. 65.

65. Party to stipulation held not relieved from his duty to satisfy judgment entered thereon pursuant to its terms by breach of other party of one of several of its conditions. Emerick & Duncan Co. v. Hascy [C. C. A.] 146 F. 688.

66. It can be found from the fact that a person fails to act because of a mistake of counsel that he was prevented from acting by accident, mistake, or misfortune. Dame v. Wood [N. H.] 66 A. 484.

67. Hering v. Land & Mortgage Co., 103 N. Y. S. 108.

68. In re Richardson's Estate, 103 N. Y. S. 22.

69. Stipulation that prior interpleader suit should abide result of action in which stipulation was made, held waiver of objection that party had split his cause of action in bringing the two suits. Dowling v. Wheeler, 117 Mo. App. 169, 93 S. W. 924.

70. Facts held insufficient to show existence of stipulation. In re Bank's Will, 108 App. Div. 357, 95 N. Y. S. 1113.

71. The invalidity of a motion for new trial, not specifying errors, cannot be asserted by a party who has stipulated that motion for a new trial might be brought on before the court on the general ground that the order for judgment was not justified by the evidence and was contrary to law after the court has granted the new trial for insufficiency of the evidence. Hamm Brewing Co. v. Kneise [Minn.] 111 N. W. 577.

72. In re Muncie Pulp Co. [C. C. A.] 151 F. 732.

73. Burch v. Cohen, 223 Ill. 336, 79 N. E. 96.

74. Where an attorney has assumed to bind his client by a stipulation, neither the client nor attorney can avoid its effect because not executed in conformity to statutory provision that an attorney shall have authority to bind his client in a particular manner, but not otherwise, when the adverse party has been misled thereby to his detriment. Estopped to deny that petition for removal was not filed in time. Tevis v. Palatine Ins. Co., 149 F. 560.

75. Liability for contributory infringement of trade mark held waived by stipulation relieving principal infringer from liability. Hillside Chem. Co. v. Munson & Co., 146 F. 198.

76. Hering v. Land & Mortgage Co., 103 N. Y. S. 108.

77. Hence the submission is on the pleadings and evidence. Walker v. Walker [Okl.] 88 P. 1127.

78, 79. Wolf v. Santa Clara County Sup'rs [Cal.] 89 P. 85.

80. Stipulation made to avoid a challenge of jurors held not available on future trial. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389.

81. Brickman v. Southern R. Co., 74 S. C. 306, 54 S. E. 553.

Concessions of counsel as to irregularities in the passage of a statute will not influence the court in determining its constitutionality.[82] A stipulation that the court may render such judgment on the findings of the jury as the law authorizes adds nothing to and takes nothing from the power of the court to enter a judgment on the special verdict and the undisputed facts not in conflict therewith.[83] A stipulation showing the due execution and delivery of an instrument sued on obviates the necessity for other proof thereof.[84] Where a stipulation in a boundary suit leaves for determination the true boundary between certain surveys, evidence tending to show an agreed or recognized line is admissible.[85] When the illegality of a transaction is required by stipulation to be established to entitle a party to judgment, the court will give the stipulation a strict construction in favor of the adverse party.[86]

STOCK AND STOCKHOLDERS; STOCK EXCHANGES; STOCK YARDS; STOPPAGE IN TRANSIT; STORAGE; STORE ORDERS, see latest topical index.

STREET RAILWAYS.

§ 1. The Franchise or License to Operate a Street Railway and Regulation of Its Exercise (2004).
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§ 10. Statutory Crimes (2040).

§ 1. *The franchise or license to operate a street railway and regulation of its exercise.*[87]—The construction and ownership of a street railway is a work of internal improvement within the prohibition of the Michigan constitution against municipalities engaging therein.[88] The privilege of constructing and operating a street railway is one granted by the state by direct statute,[89] or acting through authority dele-

82. Laws 1893, p. 223, c. 4267, held invalid for insufficiency of title irrespective of concessions of counsel as to irregularities in its passage. Wade v. Atlantic Lumber Co. [Fla.] 41 So. 72.

83. Pinto v. Rintleman [Tex. Civ. App.] 15 Tex. Ct. Rep. 660, 92 S. W. 1003.

84. A stipulation in an action on a school book publisher's bond, required under the Kentucky statutes that the copy thereof attached to the petition is a true, perfect, and complete copy of the bond executed by the defendant before the ex officio board of education, and filed in the office of the superintendent of public instruction and presented in the testimony of a witness named, and that the copy should be considered as evidence, established a substantial compliance with the statute regulating the execution and delivery of such bonds. Rand, McNally & Co. v. Turner, 29 Ky. L. R. 696, 94 S. W. 643.

85. Provident Nat. Bank v. Webb [Tex. Civ. App.] 95 S. W. 716.

86. A stipulation requiring the illegality of the payment of certain orders by the principal in a treasurer's official bond sued on to be established to entitle plaintiff to recover defeats plaintiff's recovery when it is shown that the payment was merely ostensible and that no money passed out of the treasury on account thereof, though it is also shown that he took credit for their payment but had not charged himself with a like amount received at the same time. Town of Washburn v. Lee, 128 Wis. 312, 107 N. W. 649.

87. See 6 C. L. 1557.

88. Construction and ownership of a street railway to be leased to a company for revenue is a work of internal improvement which a city is prohibited by Const. art. 14, § 9, from engaging in. Bird v. Common Council of Detroit [Mich.] 111 N. W. 860.

89. Under Laws 1860, p. 16, providing that it shall be unlawful to lay a track on the streets of New York City except under such regulations as the legislature may provide, a corporation may not be organized under the Act of 1850 to operate a street railroad on such streets, nor could it be formed under such law without specifying its route in its articles. Webb v. Forty-Second St., etc., R. Co., 102 N. Y. S. 762. In such case where an attempt was made to organize under the earlier law, such organization could not be

gated to municipal [90] or other local authorities [91] which has control of the highways and streets. If a franchise or license has not been acquired, a street railway company has no right to lay tracks in the street,[92] but an abutting owner may not restrain the construction of a street railroad in front of his premises on the ground that the company has not acquired a right to construct.[93]

The franchise can be granted only for a public purpose.[94] The statute granting the franchise must be constitutional,[95] and an ordinance by which it is granted must be legally enacted,[96] and where the grant rests upon conditions precedent, they must be complied with,[97] nor can privileges not authorized by the statute be granted.[98]

validated nor a franchise acquired by an assignment to the corporation of a franchise given by Laws 1873, p. 1238, c. 825, nor could such railroad alter or change its course. Id.

90. Baltimore City Charter, §§ 8, 9, 37, relative to the granting of franchises by municipal authorities, does not apply to a franchise granted to a street railway company by acts of the legislature. Acts 1898, p. 999, c. 390. Dulaney v. United Rys. & Elec. Co. [Md.] 65 A. 45. Const. art. 3, § 18, prohibits local bills granting rights to lay railroad tracks. A contract between a city and a company provided that its provisions might be extended to any extension of the lines of the company. Laws 1892, p. 311, c. 15, provided that such contract was binding. Held to constitute a valid grant of power to city authorities and not the grant of a right to lay tracks. Kuhn v. Knight, 101 N. Y. S. 1. The legislature can authorize a company to lay its tracks and operate its lines in the streets of a city and may empower the municipality to grant such authority, and accompany the grant with such restrictions as may seem necessary to protect the public in the use of the highways. McKim v. Philadelphia [Pa.] 66 A. 340. The word "restrictions" in Pub. St. c. 113, § 7, authorizing the board of aldermen in towns to grant original locations to street railway companies subject to such restrictions as they deem public interests require, is equivalent to "conditions," and authorizes the board to impose limitations on the right to the enjoyment granted. Blodgett v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 222.

91. Local authorities of a village may grant a street railway franchise to rival companies if the routes are not the same. People v. Bauer, 103 N. Y. S. 1081.

92. Where a company laid tracks in the highway without obtaining authority as required by statute, the fact that township authorities did not object at the time does not estop the township from maintaining action to compel removal of the tracks. Bangor Tp. v. Bay City Trac. & Elec. Co. [Mich.] 13 Det. Leg. N. 999, 110 N. W. 490. Under the statutes of Michigan where tracks are laid in the highway without authority obtained from the township as required by statute, the township may maintain a bill in chancery to compel their removal as a nuisance. Id. Where a street railway company lays its tracks on a public highway without the consent of an abutting owner, and this is done wrongfully, but without malice, and there is a resultant permanent injury to the real estate, the extent of the damage caused thereby is to be measured by the resulting depreciation in the value of the property. In such a case no malice can be inferred from the mere wrongful laying of the tracks, where the act was committed before the relative rights of street railways and abutting owners had been adjudicated by the courts. Becker v. Lebanon & Meyerstown St. R. Co., 30 Pa. Super. Ct. 646.

93. Webb v. Forty-Second St., etc., R. Co., 102 N. Y. S. 762.

94. Under the laws of New York the board of estimate and apportionment has not power to grant to the owners of a department store the right to construct a private switch track in the street connecting their store with a street railway. Hatfield v. Strauss, 102 N. Y. S. 934. An abutting owner may enjoin such construction. Id.

95. The right given a street railway company to extend its lines under an agreement between a city and the railroad company, ratified by an act of the legislature, is not in violation of the article of the constitution providing that no private or local act shall be passed granting to any corporation or individual the right to lay down railroad tracks, though the right to construct such extension rests on such act. Smith v. Buffalo, 51 Misc. 244, 100 N. Y. S. 922.

96. Defects in a street railway franchise cannot be cured by an amendment to the granting ordinance, which merely sets forth the facts as to what was done in the matter of publication of notice before the bids were received for the construction of the line, and declares that the publication was sufficient to meet the requirements of the granting ordinance. Raynolds v. Cleveland, 8 Ohio C. C. (N. S.) 278. An ordinance granting a franchise to maintain a certain track is not invalidated because only a small sum was paid for it, where no fraud is asserted and it is not claimed that it was not fixed by the prescribed board of estimates. Dulaney v. United Rys. & Elec. Co. [Md.] 65 A. 45.

97. The granting of the state railroad commissioner's certificate of convenience and necessity is not a prerequisite to the granting of a local franchise. People v. Bauer, 103 N. Y. S. 1081. Where the consent to use the streets required the company to give bond to be approved by highway commissioners, the company could not enjoin the granting of the right to another company without showing that the required bond had been given. South Shore Trac. Co. v. Brookhaven, 102 N. Y. S. 1074. Where no time was stated within which such bond must be filed, it must be filed within a reasonable time. Id. Where a company to which a conditional consent to construct

Statutes granting a franchise should be reasonably construed [99] and, when the franchise is granted according to a plat, should be construed in connection with the plat.[1] The term of the franchise rests in the ordinance by which it is granted.[2] A consolidation of various lines, the grants to which expire at different periods, does not operate as an extension of the life of such grants,[3] nor does the consent of the municipal authorities to such consolidation on condition that but one fare should be charged for a continuous ride.[4] Upon the termination of a street railway company's franchise, the title to the rails, poles, and other operating appliances in the streets, remains in the company operating the road.[5]

In some states it is required that a street railway franchise be sold at public auction.[6] This rule does not apply to an extension of the lines.[7] The consent of a

tracks on the streets had been given had not complied with the conditions, it was not entitled to the aid of a court of equity to enforce a negative provision in such consents denying the right of the town to grant to another company the right to use the streets. Id. Under Heydecker's Gen. Laws, p. 3312, c. 39, § 93, providing that local authorities may make their consent to the construction of a track dependent on conditions requiring construction within a certain time, held that city authorities may impose a shorter term for construction and require a bond, and on failure to comply with such condition the right may be granted to another road. South Shore Traction Co. v. Brookhaven, 102 N. Y. S. 75. Where a company treated the conditional consent of an abutting owner to the construction of an elevated railway, as no consent, by including him in those who refused to consent, in their application to the board of commissioners it cannot thereafter, against his claim for damages, assert that he consented. Shaw v. New York El. R. Co. [N. Y.] 79 N. E. 984. Where a company circulated a paper to obtain consent of property owners for construction of an elevated railway, and an owner signed "I am in favor of the road over the center of the street but not over the sidewalk," held, if this was a consent it was qualified and not accepted as the company built the road over the walk. Id.

98. Exemption from obligation to pay the cost of paving of space between its tracks is not a privilege which can be transferred to a corporation organized under a law not containing such an exemption. Under Laws 1867, c. 254, as amended by Laws 1879, c. 503, a lessee railway company may purchase the lessor's capital stock in which case the latter's "estate, property, rights, privileges and franchises" shall vest in the lessee. Rochester R. Co. v. Rochester, 27 S. Ct. 469.

99. An ordinance granting a right to maintain a switch and also imposing a penalty for hindering or delaying traffic in the street should be construed to relate only to unreasonable delay or hindrance. Dulaney v. United R. & Elec. Co. [Md.] 65 A. 45. An ordinance granting a franchise to operate a street railway will be strictly construed. Cleveland Elec. R. Co. v. Cleveland, 27 S. Ct. 202.

1. An ordinance granting a franchise to construct a track on a certain street according to the plat on file in the office of the city engineer should be construed in accordance with the plat, to authorize the laying of a switch across a sidewalk, but to require the rails to be so laid as not to obstruct the flow of water into the gutter nor break the level of the foot pavement. Dulaney v. United Rys. & Elec. Co. [Md.] 65 A. 45.

2. An ordinance of the city of Des Moines, Iowa, granted an exclusive franchise for thirty years. At the time of the grant there was no statute specifically conferring on cities power to grant such franchises, but they were afterwards legalized. The franchise was recognized by the city for thirty years. Held the ordinance granted a franchise in perpetuity, exclusive for thirty years, and created a contract which the city could not impair. Des Moines City R. Co. v. Des Moines, 151 F. 854. An ordinance granting the right to construct a short extension to a named line and to lay a second track along such line to terminate with the expiration of the grant for the "main line" must be construed so far as the life of the grant is concerned to refer to the designated line and not to a separate and distinct line used in connection therewith. Cleveland Elec. R. Co. v. Cleveland, 27 S. Ct. 202. The franchise for an extension to terminate with the expiration of the grant for the main line must be taken to refer to the grant, as it then existed and must be measured by such existing grant and not by subsequent extensions. Id.

3, 4, 5. Cleveland Elec. R. Co. v. Cleveland, 27 S. Ct. 202.

6. Laws 1901, p. 1229, c. 494, § 93, providing that in cities of the first class, consent to operate a street railway must be sold at public auction, but that such provision should not apply to a contract between a certain city and the company operating a line on its streets applies in such city in any case where the contract referred to does not permit of an exception. Kuhn v. Knight, 101 N. Y. S. 1.

7. A road built by one of the parties to the "Milburn Agreement" in Buffalo held extension, and not a franchise to be sold at public auction. Smith v. Buffalo, 51 Misc. 244, 100 N. Y. S. 922. A contract between a city and its street railway corporations provided for the settlement of existing controversies, stipulated for one fare over its lines and confined its operations to lines built except that it might be extended to future extensions thereof, held to authorize city authorities to grant any extension of a line without sale of the franchise at public auction. Kuhn v. Knight, 101 N. Y. S. 1.

certain proportion of the abutting owners is usually a condition precedent to the granting of a franchise.[8] Provisions of the law as to notice must be complied with before municipal authorities can legally act upon an application to construct a street railroad.[9]

The franchise may not be alienated without the consent of the legislature.[10] The franchise may be forfeited because of failure to comply with the conditions upon which it was granted, or by its terms may become void by lapse of time,[11] but forfeiture will not be declared because of nonperformance of an impossible condition.[12] Where an ordinance authorizing the construction of a street railway requires it to be completed within a fixed time, but provides that where construction is enjoined the time during which the injunction was in effect shall not be included, such an injunction excuses performance within the required time.[13] An ordinance extending the duration of a franchise of a line of street railways does not extend the life of a separate and distinct line merely because the latter was permitted to run in connection with the former and to use part of its main line,[14] and a resolution changing the place of connection between such lines does not render one an extension of the other.[15]

Rights and duties under franchise.[16]—The exercise of rights under the franchise is subject to the exercise of the police power of the municipality.[17]

The regulation of street railways must be exercised by the authorities empowered by law.[18] The use of streets for street railway purposes involves a fran-

8. The consent of a municipality legally granted to the construction of a street railway along a street upon which the municipality is an abutting owner, may be counted in ascertaining whether a majority of the frontage has consented to the granting of the franchise. Emerson v. Forest City R. Co., 4 Ohio N. P. (N. S.) 493; Id., 8 Ohio C. C. (N. S.) 560. Laws 1901, p. 1229, c. 494, and Laws 1901, p. 1261, c. 508, relative to acquiring consent of property owners, are unconstitutional as private or local laws so far as they relate to companies whose charters have been forfeited by inaction prior to the enactment of the statutes. In re Brooklyn, etc., R. Co., 185 N. Y. 171, 77 N. E. 994.

9. Railroad act, § 92, requires local authorities to give notice before acting on an application to construct a street railroad and § 91 requires the consent of local authorities in whom control of streets to be occupied is vested when such authority is vested in other than the common council. Held that where a city charter placed the control of such streets in the park board, such board was bound to give the required notice before acting on the application, though the common council also gave notice. Smith v. Buffalo, 99 N. Y. S. 986.

10. A street railway company has no power to alienate its franchise without permission of the legislature. French v. Jones, 191 Mass. 522, 78 N. E. 118.

11. Railroad Laws (Laws 1890, § 99), applying only to street railroads and providing for forfeiture of rights and franchise if work is not commenced within one year, does not provide the only method by which a franchise may be forfeited; but Laws 1890, p. 1084, c. 565, providing that if a railroad corporation does within five years after certificate of incorporation is filed commence work, its corporate powers shall cease, also applies. In re Brooklyn, etc., R. Co., 185 N. Y. 171, 77 N. E. 994. Laws 1890, p. 1084, providing that if work is not commenced, etc., within five years after certificate of incorporation is filed, its corporate existence shall cease, applies to extensions constructed pursuant to a certificate of extension. Id.

12. Where a street railway company obtained a franchise from a township to lay its tracks on a public road, with a provision that, when required by the township, it would remove its track from the side to the center of the road, after the road has been constructed, the township cannot declare a forfeiture of the franchise on refusal of the railway company to so move the track, where it was impossible, because the abutting owners on one side of the road would not consent. Millcreek Tp. v. Erie Rapid Transit St. R. Co. [Pa.] 64 A. 901.

13. Blocki v. People, 123 Ill. App. 369.

14. Such usage does not render it an extension of the main line, both lines having been constructed under different grants and the franchise expiring at different times. Cleveland Elec. R. Co. v. Cleveland, 27 S. Ct. 202.

15. Cleveland Elec. R. Co. v. Cleveland, 27 S. Ct. 202.

16. See 6 C. L. 1560.

17. In the absence of an express exemption, a traction company accepts its franchise subject to legislative control. Bloomington & Normal R. Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639. Where a city granted a franchise to a street railway company, authorizing it to construct, maintain and operate a street surface railroad in the streets of the city, such franchise, though a contract between the city and street car company, is subject to the police power of the city to regulate the manner in which the street should be used. People v. Geneva, etc., Tract. Co., 112 App. Div. 581, 98 N. Y. S. 719.

18. Act 1883 (17 Del. Laws, p. 435, c. 207),

chise.[19] Rights of a street railway company under its franchise are contract rights within the contract clause of the Federal constitution.[20] The franchise does not confer the right to erect structures in the street other than the tracks,[21] and when other structures are erected it is no answer to the company's obligation to remove it that the expense of procuring other property upon which to erect such structures would be great.[22] The right of the company to take up its tracks may be subject to contract conditions.[23] A street railway company authorized to use the streets has equal rights therein with abutting owners[24] and with other travelers,[25] but after the expiration of its franchise it has no rights in the streets.[26] A street railway company

§ 31, creating the government of the City of Wilmington, authorized the council to prescribe and regulate the use of highways, streets, squares, lanes, and alleys, in the city and to have and exercise control over the same. Act April 20, 1887 (18 Del. Laws, pp. 352, 355, c. 188), entitled "An act relating to the streets and sewers of the city of Wilmington," by sections 1, 4, provides that on and after July 1st, 1887, the "Mayor and council of Wilmington," a corporation, is hereby authorized through the agency of a board of directors of a street and sewer department hereby created, etc., to have entire jurisdiction to control within the limits of said city, the streets, squares, lanes, roads, or alleys, thereof, and that they shall have the same rights and powers and be vested with the same authority over the same streets etc., as are now held and exercised by the council. Act April 18, 1883 (17 Del. Laws, p. 408, c. 205), establishing a board of water commissioners, vested in such commissioners the power to regulate the use of the streets as to water. Act May 15, 1891 (19 Del. Laws, p. 438, c. 223), § 4, being the act providing for a municipal police commission for the city of Wilmington, provides in section 4 that in carrying out and affecting the purposes and objects of this act said board of commissioners shall stand in the same position as is now occupied by the mayor, and shall, after May 1st, 1891, be substituted for the mayor aforesaid with the same rights, powers, privileges, and authority, as were, before the passage of this act, and by any means whatsoever, vested in the mayor aforesaid. **Held** that the power to prescribe and regulate the use of streets was by said act of 1887 street and sewer commission, and that the council had no power to pass an ordinance prescribing and regulating the use of safety appliances called "fenders" on street cars. Bullock v. Wilmington City R. Co. [Del.] 64 A. 242. The word "rulings" in Rev. Laws, c. 112, § 100, conferring on the supreme judicial court jurisdiction to review rulings of railroad commissioners, construed in connection with other statutes, and held to apply to rulings of law only and not to findings on questions of fact. Paine v. Newton St. R. Co. [Mass.] 77 N. E. 1026.

19. The use of streets for street railway lines involves a franchise within Code tit. 21, c. 9, providing for a civil action by ordinary proceedings in the name of the state against any person unlawfully exercising a franchise. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867.

20. A suit by a street railway company claiming to have a perpetual franchise to enjoin the city from impairing such contract by inforcing removal of its tracks is one arising under the Federal constitution regardless of the citizenship of the parties. Des Moines City R. Co., v. Des Moines, 151 F. 854. A resolution of a city council directing removal from the streets of the tracks of a street railway is a law of the state within the contract clause of the Federal constitution where the resolution was as effective as an ordinance would be. Id.

21. The granting of a street railroad franchise does not confer the right to erect a signal tower in the street, at least without showing that it could be made of practical use if located on private property. Williams v. Los Angeles R. Co. [Cal.] 89 P. 330.

22. Where a company placed a signal tower at the intersection of streets to the injury of a private owner, it was no answer to the company's obligation to condemn private property for the location of such tower that the expense of such proceeding would be great. Williams v. Los Angeles R. Co. [Cal.] 89 P. 330.

23. Where a company was under contract not to remove its tracks without the consent of the borough and the county reconstructed a bridge so that the tracks thereon did not align with those on the road and the company secretly took up its tracks to readjust them without obtaining the consent of the borough, held injunction at the suit of the company would not lie to enjoin the borough from preventing the company from taking up its tracks without obtaining its consent. Chester, etc., R. Co. v. Darby Borough [Pa.] 66 A. 357. In such case, however, the consent of the borough cannot be arbitrarily withheld, nor be burdened with further pecuniary obligations on the company. Id.

24. Where a street railway company is authorized to use the streets, it and adjoining owners have equal rights in the streets. Dulaney v. United Rys. & Elec. Co. [Md.] 65 A. 45.

25. See post, § 8.

26. Abutting owners may maintain an action in the nature of quo warranto under Code tit. 21, c. 9, against a street railway company using the streets after its franchise has expired. Such statute providing that a citizen having an interest may sue if the county attorney refuses to do so. State v. Des Moines City R. Co. [Iowa] 109 N. W. 867. After the franchise of a street railway company has expired, continued use of the streets constitutes the exercise of a power not conferred by law within Code tit. 21, c. 9, providing for a civil action against a corporation exercising powers not conferred by law. Id. Code tit. 21, c. 9, providing for an action against any person

authorized to conduct express business over its lines may limit such business to a single express company if reasonable express facilities are thereby furnished the public.[27] An abutter seeking to enjoin the construction of a street railway in the streets as a public nuisance must allege facts showing special damage.[28] Liability for the cost of maintaining a flagman at an intersection with a steam railroad must be found in the authority by which it operates or other contract, or legislative duty.[29]

Rates, fares, and transfers.[30]—A franchise providing that the fare should not exceed the rate then charged applies to any line subsequently built or purchased,[31] but not to different lines operated by separate corporations,[32] nor is such a provision to be given effect beyond the evident intent of the legislative body.[33] A requirement as to the giving of transfers is one which council has a right to make, and is not rendered unreasonable by the fact that a company operating street railway lines intersecting the proposed line would be thereby placed at a disadvantage in the bidding.[34] The statutory duty to give transfers to any line "operated by it or under its control" applies only to lines whereof the operation is controlled, not to those whose corporate existence is controlled.[35] A franchise requiring the sale of family tickets

unlawfully exercising a franchise, etc., applies to a street railway company occupying the streets after expiration of its franchise. Id.

27. Dulaney v. United Rys. & Elec. Co. [Md.] 65 A. 45. A railway company which did not limit its business to carrying passengers with ordinary hand luggage, but engages in hauling freight from one point on its line to another and from one town to another along its route is not a street railway. Spalding v. Macomb & W. I. R. Co., 225 Ill. 585, 80 N. E. 327.

28. Complaint held insufficient under Civ. Code, § 3493, which alleges as a conclusion that property rights will be irreparably injured, value diminished, free access impaired, and rental value decreased. City Store v. San Jose-Los Gatos Interurban R. Co. [Cal.] 88 P. 977. Where an elevated railway had acquired the right to operate its line, one who seeks to abate it as a public nuisance on the ground that more trains are being run must show special damage. Wolf v. Manhattan R. Co., 101 N. Y. S. 493. Evidence insufficient. Id. Where an elevated railway company had acquired its easements and paid the owners for light air and access, the increase in the number of cars run on the track does not give an abutting owner the right to recover damages. Id.

29. The requirement that a flagman be stationed at a railroad crossing can only be made where it is found that the crossing is dangerous to the public, and where a railroad company obtains the right to run its trains over a given street crossing than theretofore allowed by the ordinances of the municipality, on condition that a flagman be stationed there, the expense thus incurred cannot be thrown upon a traction company occupying the street, under an agreement whereby the traction company undertook as a condition of making the crossing, to pay all expenses which might be "lawfully required" by the municipality or the state, for maintaining a flagman at that crossing. Akron & Cuyahoga Falls Rapid Transit Co. v. Erie R. Co., 7 Ohio C. C. (N. S.) 199. There are no rights vested in a steam road as an adjoining lot owner which would enable it to enforce a contract containing such a provision. Id. Moreover, the requirement as to a flagman having thus been obtained for the benefit of the steam road alone, there was no consideration moving to the traction company, and payment of the expense thus incurred cannot be enforced against the traction company. Id.

30. See 6 C. L. 1561.

31. West Blomfield Tp. v. Detroit United R. Co. [Mich.] 13 Det. Leg. N. 717, 109 N. W. 258.

32. Under the statutes of New York providing that but one five cent fare shall be charged for continuous passage within the limits of a city and providing for transfers, held a company which operated a surface railway, which leases a steam elevated railway, may charge more than one fare where a passenger rides on both roads, as each road is operated under its respective charter, and such fact is not changed by changing the motive power from steam to electricity. People v. Brooklyn Heights R. Co. [N. Y.] 79 N. E. 838. In the absence of an ordinance requiring street railways to exchange transfers, neither § 2505 c. Rev. St. (91 Ohio Laws, p. 379), nor 91 Ohio Laws, p. 285, makes the power it confers upon urban and interurban companies to agree as to the use by the latter of so much of the tracks and property of the former as may be necessary to enable it to enter or pass through the municipality conditional upon an exchange of passes. Interurban R. & Terminal Co. v. Cincinnati, 75 Ohio St. 196, 79 N. E. 240.

33. Where a passenger engaged in conversation is carried beyond the transfer point and in endeavoring to reach his destination is finally refused a transfer, he is not making a "continuous trip" within a statute providing for one fare for a continuous trip. Hunt v. Brooklyn Heights R. Co., 101 N. Y. S. 209.

34. Raynolds v. Cleveland, 8 Ohio C. C. (N. S.) 278.

35. Senior v. New York City R. Co., 111 App. Div. 39, 97 N. Y. S. 645.

is not complied with by placing the tickets on sale at a store in the city, the passengers having the right to purchase such tickets on cars.[36]

§ 2. *Property and acquirement thereof.*[37]—The use of a street by a street railway company is a public servitude imposing no additional burden upon the abutter.[38] Where the company changes the grade of a highway for the construction of its road according to the locations granted by the municipality, it is not liable in damages to an abutting owner.[39] What is necessary to do in the way of perfecting corporate existence before a company is entitled to acquire a right of way depends on statute.[40]

§ 3. *Taxes and license fees.*[41]—An ordinance imposing a license fee upon cars operated within the limits of the municipality is valid.[42]

§ 4. *Street railway corporations.*[43]—The organization and corporate activities of street railway companies are governed by the general law of corporations.[44] In Massachusetts directors of a street railway company are liable for the debts of the corporation to the extent of the capital stock until it has all been paid in.[45]

36. West Bloomfield Tp. v. Detroit United R. Co. [Mich.] 13 Det. Leg. N. 717, 109 N. W. 258.

37. See 6 C. L. 1561.

38. Where a street railway company obtained from a borough the right to use a certain street, the borough reserving the right to grant the "common use" of such street to another company in common with the first company, and the street was broad enough to accommodate two parallel tracks, it was held that the borough could not require a later company, having permission to use the same street so to lay its tracks as to straddle the tracks of the other company. Commonwealth v. Bond, 214 Pa. 307, 63 A. 741. The damages paid when the street was built were for all time and for all public use fairly contemplated at the time the land was taken. Such inconveniences as are inseparable from the use by the public of a public way cannot be made the foundation of an action for damages. Parsons v. Waterville & O. St. R. Co., 101 Me. 173, 63 A. 728. The mere fact that the road was not located in the center of the highway, but along the side of the road where it worked a greater injury to the land owner, does not affect the rule as to damages or permit the owner to sue as for successive trespasses. Becker v. Lebanon & Meyerstown St. R. Co., 30 Pa. Super. Ct. 546.

39. Hyde v. Boston & W. St. R. Co. [Mass.] 80 N. E. 517. Rev. Laws, c. 48, § 7, and ch. 51, §§ 15, 16, authorizing a person aggrieved by the alteration of a highway to petition for the assessment of damages, affords no relief to an abutting owner injured by a change of grade made by a street railway in constructing its tracks according to plans and locations granted by a municipality. Id. The statute authorizing a town to permit a street railway in constructing its track to change the grade of a street without compensating abutting owners is not unconstitutional, because the owners were compensated when their land was condemned for the highway. Id. A company authorized by St. 1901, p. 388, c. 455, to construct its track largely outside the limits of highways which was empowered by a town to cross a highway below grade, without providing that abutting owners should be compensated, is not liable to an abuting owner either under St. 1906, p. 604, relative to liability of a street railway crossing a public way, or under Rev. Laws c. 112, § 44, authorizing street railway companies, without payment of any fee to open any road on which its line is located. Id.

40. Under Revisal 1905, § 1138, defining a street railway as one located between points in different municipalities lying near each other or between territory contiguous to the home municipality and providing against extension more than fifty miles from the home municipality, it is no objection to the right of a company to locate its right of way between two towns, that no part of its line has been constructed in any town. Fayetteville St. R. Co. v. Aberden & R. R. Co., 142 N. C. 423, 55 S. E. 345. Under Revisal 1905, § 1140, providing that persons associated shall constitute a corporation from the filing of the proper certificate, and § 1141 giving signers of the certificate temporary power to act as directors, it is no objection to the obtaining of a right of way that the stock of a street railway company has not been issued and no money paid thereon. Id. That the capital stock of a corporation has not been issued and no money paid thereon and no part of the road constructed are matters not open to collateral investigation in injunction proceedings to determine the right of such company to a right of way as against a rival railroad company. Id.

41. See 6 C. L. 1562.

42. Bloomington & Normal R. Elec. & Heating Co. v. Bloomington, 123 Ill. App. 639.

43. See 6 C. L. 1562.

44. See Corporations, 7 C. L. 862.

45. Under Rev. Laws, c. 112, § 19, fixing liability on directors of a street railway corporation for all debts to the extent of the capital stock, until it has all been paid in and a certificate to such effect sworn to and filed, the remedy against the directors is in equity. Westinghouse Elec. & Mfg. Co. v. Reed [Mass.] 80 N. E. 621. In such case the filing of an untrue certificate with the secretary of state will not relieve the directors from liability. Id.

In a suit on such liability the corporation is not a necessary party,[46] nor are creditors required to first exhaust their remedy against the corporation.[47] Where one company purchases the capital stock of another, the doctrine that the capital stock is to be deemed a trust fund for the payment of debts does not apply to the property transferred.[48] A street railway company may lease its property where it is authorized to do so.[49] The nature of an instrument, whether a lease or other contract, is to be determined from its terms.[50] In Missouri the lessee company is not liable for the negligence of the lessee.[51] The rights of a purchaser of the property and franchises of a company may be subject to statutory conditions.[52] Contract rights of a company are governed by the general law of contracts.[53]

§ 5. *Location and construction.*[54] *Location.*[55]—A right to maintain tracks in the street on a line different from that established by a municipality may be acquired by acquiescence.[56] Where one company has authority to lay its tracks in the

46. In such a suit the corporation is not a necessary party. Westinghouse El. & Mfg. Co. v. Reed [Mass.] 80 N. E. 621; American Steel & Wire Co. v. Bearse [Mass.] 80 N. E. 623.

47. In such case creditors are not required to exhaust their remedy against the corporation before bringing suit against the directors. Westinghouse El. & Mfg. Co. v. Reed [Mass.] 80 N. E. 621.

48. Where one company paid another an agreed price per share for the stock and received a conveyance of all its property and franchises without further consideration, the doctrine that the capital stock and property of a corporation is to be deemed a trust fund for the payments of debts, and when it has been divided among stockholders leaving debts unpaid the stockholders are bound to refund, does not apply to the property transferred but to the consideration paid. Hagemann v. Southern Elec. R. Co. [Mo.] 100 S. W. 1081. Under Ann. St. 1899, p. 393, § 1187, giving street railway companies power to purchase or sell to other corporations their property and franchises, a company which purchases from another and pays the consideration to the stockholders of the selling corporation is not liable for debts of the latter company which were not liens at the time of the transfer. Id.

49. An ordinance authorizing enumerated street railway companies and their successors to sell or lease their property and privileges to any of the enumerated companies, and authorizing the company acquiring the same to hold during the term of the ordinance, authorizes a purchaser to lease the same without special consent of the municipality notwithstanding Const. art. 12, § 20, forbidding transfer of such franchise without the consent of the municipality. Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261; Id. [Mo.] 100 S. W. 611.

50. Contract by which one company leased its railway, etc., to another company, divesting the former of the use of its property for 40 years in consideration of a certain rental, construed and held not to establish the relation of principal and agent (Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261), nor to make the two companies partners (Id), but such contract was held to constitute a lease (Id.; Moorshead v. United R. Co. [Mo.] 100 S. W. 611). Contract by which one company leased its property and franchises to another for an annual rental, construed and held not to require the former company to turn over to the lessee company rents paid by it to the lessor. Id.

51. Under Rev. St. 1899, § 1187, a company which leases its property and franchises to another company is not liable for negligence of the employes of the lessee resulting in injury to passenger. Moorshead v. United R. Co., 119 Mo. App. 541, 96 S. W. 261; Id. [Mo.] 100 S. W. 611.

52. Under Rev. Laws, c. 112, § 12, authorizing the receiver of a street railway company to sell its property under order of court, and § 13 providing that the purchaser shall within 60 days organize a corporation to hold, own, and operate the railway purchased or forfeit his rights, one who purchases the rails and tracks laid in the street is not required to organize a corporation and operate the road. French v. Jones, 191 Mass. 522, 78 N. E. 118. Where the purchaser of the tracks and rails of a street railway company failed to organize a corporation and operate the road within 60 days as required by Rev. Laws, c. 112, § 13, and thereby forfeited such right and the gross receipts were insufficient to pay operating expenses, such purchaser was under no duty to use the tracks so purchased for the operation of a railway. Id. Rails of a street railway company imbedded in the street remain personal property and are subject to disposition as such. Id.

53. A contract by which an electric interurban railway sold its plant and privileges construed and held to pass the right of the seller to have installed certain rotary motors purchased under conditional sale, but such contract had not been recorded as required by Comp. Laws 1897, § 6336. Hogan v. Detroit United R. Co. [Mich.] 111 N. W. 765.

54. See 6 C. L. 1564.

55. See 6 C. L. 1564, n. 43 et seq.

56. Where a street railway company, in laying its track, failed to follow the exact line established by the borough, but the borough acquiesced in it for ten years, it constitutes a ratification and the borough cannot object where the railroad company follows the same line in relaying its tracks. Borough of Bridgewater v. Beaver Valley Trac. Co., 214 Pa. 343, 63 A. 796.

street, it is a taking of property without due process to grant another company a right to lay tracks in the same space.[57] A change or alteration of route is permitted by general railroad law of 1850 only for improvement of the line and not for the purpose of increasing revenues or changing its direction.[58] A company may be compelled by mandamus to change the location of its line where it is under legal obligation to do so.[59] Injunction will not lie to protect the located right of way from interference by another company which is seeking to acquire the same by purchase and condemnation, and whose engineers are surveying with a view to immediate occupation.[60]

Construction.[61]—A street railway company must keep a portion of the streets occupied by its tracks in repair,[62] and as a general rule it is made a condition of the franchise that the company pave the portion of the street upon which its tracks are laid[63] and keep such portion in repair.[64] This rule applies where the track is extended.[65] Where the street is paved by a municipality, it may recover the cost from

57. Where a street railway company is granted permission to lay its tracks in a street, allowing a later corporation to lay a part of its tracks on the tracks of the first company is an unconstitutional taking of the property of the first company. Commonwealth v. Bond, 214 Pa. 307, 63 A. 741.

58. Webb v. Forty-Second St., etc., R. Co., 102 N. Y. S. 762. The determination of the railroad commissioners in regard to the change of location of a street railroad is final. The omission of the clerk of the railroad commissioners, within five days after the filing of the certificate of their decision, to give notice of such determination to all parties of record, does not deprive the railroad corporation of its right to construct and operate its road, or make that a public nuisance which would otherwise be a lawful use of the street. Parsons v. Waterville & O. St. R. Co., 101 Me. 173, 63 A. 728.

59. Where a street railroad was under a legal obligation to change the location of its line on the demand of the city's board of public works preliminary to the improvement of the street, the city is entitled to compel such change by mandamus. People v. Geneva, etc., Trac. Co., 112 App. Div. 581, 98 N. Y. S. 719.

60. Fayetteville St. R. v. Aberdeen & R. R. Co., 142 N. C. 423, 55 S. E. 345.

61. See 6 C. L. 1564, n. 41 et seq.

62. The portions of streets occupied by a street railway company must be kept in good condition by it, though there is no express contract or statutory direction to that effect. City of Reading v. United Trac. Co. [Pa.] 64 A. 446. A street railway company is bound to keep its road bed in repair. City of Shreveport v. Nelson [La.] 43 So. 389. It must maintain its road bed. Id. A law requiring street railways to keep in repair a certain portion of the street imposes such duty irrespective of request or demand by local authorities. Schuster v. Forty-Second St. etc., R. Co., 102 N. Y. S. 1054. A street railway company required by statute to keep a certain portion of the street in repair owes no duty to travelers in respect to the repair of the street except the specific duty imposed by statute. Crotty v. Danbury [Conn.] 65 A. 147.

63. An ordinance granting a franchise which requires the company to pave the street eight feet wide for single track and sixteen feet for double track does not require the company to pave any portion of a street before it commences to lay its tracks, because until then it is not known how much it is required to pave. Uhlich's Estate v. Chicago, 224 Ill. 402, 79 N. E. 598. Repeal of § 7 did not terminate the obligation of the company to pave streets as imposed by a local grant previously made under the repealed statute. Blodgett v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 222. Section 7, Pub. St. c. 113, provides that the board of aldermen may grant an order for the location of a street railway "under such restrictions as they deem public interests require," and § 32 provides that a street railway shall keep in repair a certain portion of the paving of the streets. Held § 7 is supplementary to § 32 as conferring jurisdiction on the board of aldermen to impose conditions that the company shall pave to a greater width than prescribed by § 32. Id. An act requiring street railroads to stand the cost of paving and repairing that portion of the street occupied by their tracks is valid as within the power reserved by the state to alter or amend the charter of a street railroad company which required it to keep the street between its tracks with a space of two feet on each side of the tracks in good and sufficient repair. Fair Haven & W. R. Co. v. New Haven, 27 S. Ct. 74.

64. An order requiring a street railway company to lay and maintain paving in certain streets held not limited to paving only but included cost of subsequent maintenance. Blodgett v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 222.

65. A street railway company incorporated under Laws 1863, p. 603, c. 361, and authorized to construct an extension by an amendment to the original act. Held bound to pave and repair the streets where the extension was laid, though the amendatory act permitting the extension contained no provision rquiring them to pave. City of New York v. Harlem Bridge, etc., R. Co., 186 N. Y. 304, 78 N. E. 1072. Laws 1890, p. 1113, c. 565, § 98, requires street railway companies to keep in repair a strip of street two feet in width outside their tracks on each side thereof. City of Amsterdam v. Fonda, etc., R. Co., 101 N. Y. S. 694.

the company.[66] The obligation to pave requires the company to use the same material as is used in other portions of the street.[67] The fact that a company complies with an order requiring it to pave certain streets does not estop it to thereafter contest the legality of the order.[68] Before construction work is commenced, conditions precedent must be complied with.[69] In the construction of the track and appliances, the conditions prescribed must be adhered to[70] and improvements stipulated for in the contract must be made.[71] Suitable drainage facilities must be provided if required.[72] The track must be fenced if required.[73] The streets may not be imposed

66. Plaintiff city sued to recover from a street railway company the cost of repaving a part of the street. The evidence showed that after the 30 days' notice required by the ordinance the company failed to do the work. Held that it could not, without showing actual loss, defend on the ground that its obligation was only to repave its portion, while the city was repaving the rest, and the city did not repave until several months after the expiration of the notice, and that after the notice choice of three kinds of pavement was reduced to two. City of Reading v. Reading, etc., R. Co. [Pa.] 64 A. 335. In an action against a street railway company by a city to recover for paving a portion of a street with asphalt, the city must show that the repairs were necessary, that notice had been given by the city to the defendant to repair the tracks by paving them with asphalt, and that the repairing was reasonable, necessary, and proper. City of Reading v. United Trac. Co. [Pa.] 64 A. 446.

67. Under Laws 1871, p. 1436, c. 658, requiring the grantees of a franchise to pave the street, etc. Held where the town authorities determined that a street should be paved with granite block, the company's obligation required it to pave the space between the rails in the same manner, though it necessitated the laying of new pavement. City of New York v. Harlem Bridge etc., R. Co., 186 N. Y. 304, 78 N. E. 1072.

68. Blodgett v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 222.

69. An ordinance which requires street railway companies and other corporations holding fanchises to file an application for a permit before entering upon the streets, and also file epecifications as to the manner in which work is to be constructed, and fix the location and give bond to hold the city harmless for damages caused by the proposed work and giving the city council power to grant or refuse such permit, is not void as interfering with the franchise rights in the streets. State v. Frost [Neb.] 110 N. W. 986. The court will not presume that under such ordinance the council will abuse its discretion but will presume that the permit will be granted if conditions are met. Id.

70. When a trolley company has laid down its railway in the streets of a city and has obtained by petition from the governing body an ordinance granting such a right and fixing the route of the road and the places where the poles are to be located according to a map accompanying said petition, pursuant to the street railway act of April 21, 1896 (P. L. 1896, p. 329), it cannot afterwards lawfully place or erect its poles at places in the street different from those so designated. Moore v. Camden & T. R. Co. [N. J. Err. & App.] 64 A. 116. If a trolley company locate one of said poles in the street at a place upon land not thus fixed and designated and without the authority of the owner of the fee thereof, it becomes a trespasser and the owner may have relief by an action of ejectment to recover possession of the land thus occupied by the pole, such possession to be afterwards held subject to the public ceasement. Id. A city charter provided that if any street in which a street surface railroad "is now or shall hereafter be operated" should be paved, repaired, or altered, etc., the board of public works should have power to require the railroad corporation operating such street surface railroad to change its grade and line to conform to such alteration or improvement in such manner as the board should designate at the expense of such railroad company. Held that such provision was not unconstitutional as an impairment of the contract rights of a street railroad operating its line on the north side of a street under a franchise acquired from the city, though the required change of location would necessitate a large expenditure on the part of the railroad company. People v. Geneva, etc., Trac. Co., 112 App. Div. 581, 98 N. Y. S. 719.

71. Where a railway company and a town agreed to build a bridge and necessary approaches, the question whether the company was to construct a sewer drop on the bridge was one of intent and was for the jury to determine. North Braddock Borough v. Monongahela St. R. Co. [Pa.] 66 A. 152. Where a street railway company is by its charter required to keep in repair a certain portion of the street and no reference is made to bridges as distinguished from streets, the bridges are a part of the "streets" and the company must repair them. Northern Cent. R. Co. v. United Rys. & Elec. Co. [Md.] 66 A. 444. Where a company agreed to build a bridge and approaches so that it would be a part of the street, and a sufficient surface could be obtained only by encroaching on private property or by building a retaining wall, the company was liable for the cost of constructing the retaining wall where it only built a part of it and the borough completed the work. North Braddock Borough v. Monongahela St. R. Co. [Pa.] 66 A. 152.

72. Where an ordinance required a street railway company, its successors and assigns, to construct and maintain openings and passages for water, a purchaser from the constructing company assumed the burden of complying with such ordinance, and was bound to see that they were constructed and kept open. Ft. Smith Light & Trac. Co. v. Soard [Ark.] 96 S. W. 121.

73. An interurban electric railway com-

with a greater servitude than is authorized by the franchise.[74] The manner of constructing crossings is generally regulated by statute,[75] especially at intersections with steam railroads.[76]

A street railway company must exercise reasonable care in its use of the streets [77] and in the construction of its road,[78] and where it places obstructions therein must see that they are properly guarded,[79] but it is not liable for injuries sustained because of defects which it is under no obligation to remedy.[80] In the construction of elevated roads, care must be taken for the safety of persons using the street beneath,[81]

pany authorized to operate a street railroad is within a statute requiring the track to be fenced where it runs through cultivated fields. Riggs v. St. Francois County R. Co., 120 Mo. App. 335, 96 S. W. 707. It is not relieved of such duty because its track is constructed on a public road. Id.

74. A borough, in a bill against a street railway company, charged that it was building a double track railway to the irreparable damage of the borough, and the answer admitted the construction of the double track but denied irreparable damage. Held that under the pleadings the court could not find as a fact that the alleged double track was in fact a turnout. Borough of Bridgewater v. Beaver Valley Trac. Co., 214 Pa. 343, 63 A. 796. A turnout in connection with a street car line is a short line of track having connection by means of switches with the main track, and an additional track in a borough cannot be considered a turnout, where, taken in connection with the original track and with a double track railway with which the two tracks connected at the limits of the borough, it constitutes an unbroken double track line. Id.

75. An interurban railroad for the operation of cars by electricity and by tractive friction is not within 97 Ohio Laws, p. 546, providing how crossings may be constructed. Commissioners of Ross County v. Scioto Valley Trac. Co., 75 Ohio St. 548, 80 N. E. 176.

76. The plenary power given city councils by Hurd's Rev. St. 1905, to regulate the crossing of streets by railroads, includes power to authorize a street railroad to cross a steam railroad, and such power is not taken away by Railroad and Warehouse Commission Act. 3 Stan. C. Ann. St. Ill. c. 114, par. 112. East St. Louis R. Co. v. Louisville & M. R. Co. [C. C. A.] 149 F. 159. Where after the granting of a charter containing such conditions a steam railway company became liable to the city to repair a bridge and did so, it became subrogated to the rights of the city against the street railway company. Northern Cent. R. Co. v. United Rys. & Elec. Co. [Md.] 66 A. 444. In Ohio a street railway company which has acquired the right to construct its track on a street cannot be enjoined by a steam railroad company from crossing its tracks at grade. Pennsylvania Co. v. Lake Erie, etc., R. Co., 146 F. 446. In Illinois authority given a railroad company to cross a street with its tracks does not confer exclusive rights, but the right is subordinate to the use of the street for street purposes, and the railroad company cannot enjoin a street railway company from crossing its tracks at grade on the ground that it will inconvenience it in the operation of trains. East St. Louis R. Co. v. Louisville & N. R. Co. [C. C. A.] 149 F. 159.

77. Where a street railway company makes an excavation in the street and leaves it open without signals, warning lights, or guards, and the driver of a vehicle drives into it, the company is liable. Evarts v. Santa Barbara Consol. R. Co. [Cal. App.] 86 P. 830.

78. The fact that a tile drain eight or nine feet below the foundation of a pillar supporting an elevated railway was broken by the settling of the pillar does not show that it was due to negligence of the company. Epstein v. Interborough Rapid Transit Co., 101 N. Y. S. 793. In an action for injuries to a fireman by striking a guy wire pole maintained by a street railway company as he was riding from the fire house to a fire on the fire wagon, the negligence of the plaintiff and the negligence of the defendant in placing the pole too near the driveway were held to be for the jury. Lambert v. Westchester Elec. R. Co., 100 N. Y. S. 665. Evidence insufficient to show that one who tripped on a frog alleged to have been negligently maintained was in the exercise of due care. Gilligan v. Boston El. R. Co. [Mass.] 80 N. E. 483.

79. Where a street railway having authority to use a street planted a trolley pole in the center of it, the pole being ten inches in diameter and standing on a base two and one half feet in diameter and about eighteen inches high, and no light on the pole, held the city was liable where a man was killed by his wagon being upset by striking the pole. McKim v. City of Philadelphia [Pa.] 66 A. 340. Where a witness described a pole which obstructed a street, its size, location, and conditions, his opinions as to whether it was dangerous was properly excluded. Id.

80. Where a street car company has authority to run its cars over the tracks of another company and is not required to repair the tracks or street, it is not liable where a pedestrian breaks his leg because of a defect in the track. Ross v. Metropolitan St. R. Co., 101 N. Y. S. 932.

81. Whether an elevated railway did all that it could to prevent sparks from falling on pedestrians in the street is a question for the jury. Walsh v. Boston El. R. Co. [Mass.] 78 N. E. 451. Evidence sufficient to show negligence where a pedestrian on the street was injured by a piece of metal falling into his eye from an elevated railway, and it was known for several months prior to the accident that there was considerable trouble from sparks. Woodall v. Boston El. R. Co. [Mass.] 78 N. E. 446. Evidence sufficient to show negligence in failing to provide protection for persons using the surface of the street where a pedestrian was

and appliances necessary to prevent materials from falling on them must be used.[82] The surface of the street is presumed safe for travel and a traveler thereon is not bound to wait until a train on an elevated road has passed or until no train is passing.[83] A pedestrian is not negligent as a matter of law in looking up as he passes under an elevated railway.[84]

§ 6. *Injuries to passengers.*[85]

§ 7. *Injuries to employes.*[86]

§ 8. *Injuries to persons other than passengers or servants. A. General rules as to negligence and contributory negligence.*[87]—Cars must be equipped as required by statute[88] and be operated on their established routes.[89] In the use of its electric motive power, care proportionate to its dangerous character must be exercised,[90] and ordinances regulating the operation of cars must be complied with.[91] As to all

injured by a piece of metal falling into his eye from an elevated railroad. Id. Evidence sufficient to show that a piece of metal falling into a pedestrian's eye fell from the contact shoe on a train running on an elevated railroad. Id.

82. Where an appliance on an elevated railway is necessary for the protection of persons on the street below, the company should apply to the railroad commissioners for their approval of such appliance or put one in without such approval. Woodall v. Boston El. R. Co. [Mass.] 78 N. E. 446. Where an appliance could be used on an elevated railway to prevent sparks falling, it was the duty of the company to use it. It is not enough that the company does all it reasonably can to prevent sparks but it must do all it can, if it is impossible to prevent sparks, to see that no one is injured. Id. Under the Statutes of Massachusetts railroad commissioners are required to approve plans of an elevated railroad before it can be constructed and operated and their approval is conclusive on the right of the company to construct and operate the road, but it is bound to use reasonable care. Id. The certificate of the railroad commissioners is not within Rev. Laws, c. 111, § 20, providing that no advice of commissioners shall impair the obligations of railroads or relieve them from liability for negligence, but is a condition precedent without which an elevated railway company cannot construct or operate its road. Id. Where a pedestrian was injured by a piece of metal falling into his eye from an elevated railroad, a finding of the jury in response to a question whether the negligence was the result of failure to use a different contact shoe or failure to apply to the commissioners for approval of the contact plan, that it was the latter, was a finding that a pen was needed for the protection of pedestrians. Id.

83. Woodall v. Boston El. R. Co. [Mass.] 78 N. E. 446.

84. Walsh v. Boston El. R. Co. [Mass.] 78 N. E. 451.

85. See Carriers, 7 C. L. 522.

86. See Master and Servant, 8 C. L. 840.

87. See 6 C. L. 1567.

88. It is negligence per se to fail to equip cars with fenders as required by ordinance. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016.

89. An ordinance providing that no change in the routing of cars should be made without consent of municipal authorities and that a car should not be turned from its established route except in case of unavoidable accident or when it was about to be turned into a car shed does not prohibit the diversion of a car from its route for the purpose of making up time which had been unavoidably lost. Dryden v. St. Louis Transit Co., 120 Mo. App. 424, 96 S. W. 1044. In such case there is no breach of the carrier's contract where it offers passengers transfers to other cars, though such transfers are refused. Id.

90. An electric railway company in its use of electricity in city streets must use due care and caution for the prevention of accident and for the protection of persons using such streets. Such care must always be in proportion to the danger of the surroundings and to the character of the appliances used. Wood v. Wilmington City R. Co. [Del.] 64 A. 246. For an electric railway company to permit its trolley wire at a point where its line crossed a railroad to sag several feet below the height of twenty-two feet above the railroad track, required by statute, whereby a brakeman on top of a freight train was injured, is negligence, making it liable for the injury. Smedley v. St. Louis & S. R. Co., 118 Mo. App. 103, 93 S. W. 295. Where a street railway company which maintained a grade crossing of a steam railroad failed to elevate its trolley wire in order to conform to the grade of the railroad and a brakeman was injured by coming in contact with it while passing under the same and there was evidence that the wires could have been elevated so as to be out of danger, the question of negligence was for the jury. Pittsburgh Rys. Co. v. Chapman [C. C. A.] 145 F. 886. In such case the steam railroad company and the street railway company are not joint tort feasors where the only act of negligence with which the former could be charged was omitting to warn the brakeman of the danger, or itself requiring the street railway company to raise the wire. Id.

91. Validity and interpretation of ordinances: An ordinance is valid which makes it unlawful for a street car to cross the tracks of a steam railroad until after the conductor goes across on foot and signals the motorman. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068; Indianapolis Trac. & T. Co. v. Formes [Ind. App.] 80 N. E. 872. An ordinance requiring street car conductors to precede their cars over steam railroad crossings, and requiring cars to be stopped twenty feet from a crossing,

persons in the street, a street car company owes the duty of taking all precautions for their safety dictated by reasonable prudence [92] and is liable for injuries resulting to them from its negligence,[93] unless the contributory negligence of the person injured was the proximate cause of the injury.[94] Contributory negligence of the

does not require a car to be stopped between two steam railroad tracks which are about eighty feet apart. Bartholomaus v. Milwaukee El. R. & Light Co. [Wis.] 109 N. W. 143. Code 1896, § 3441, requiring trains to stop within one hundred feet of a crossing and not proceed until they have ascertained that the way is clear, applies to street railroads. Montgomery St. R. Co. v. Lewis [Ala.] 41 So. 736. Evidence sufficient to show that such statute had been violated. Id. A municipality may, within reasonable limits, regulate and prescribe the speed at which cars may be operated over its streets, and when it has done so by valid ordinance it is negligence per se to violate such ordinance. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016.

Violation as negligence: The operation of a car at a greater speed than that limited by law is negligence. Steinmann v. St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799; Campbell v. St. Louis Transit Co. [Mo. App.] 99 S. W. 58; Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860; Anniston El. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 46. The rate of speed may be negligent though within that limited by law. Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876.

92. Where a company is authorized by ordinance to operate its lines on a certain street, no inference arises that it was authorized to exclude the public from the street or operate its railway in such manner as to render the street unnecessarily dangerous. McKim v. Philadelphia [Pa.] 66 A. 340. That a street railroad company was authorized by the railroad commissioners to run cars before its track was finished and put in proper condition does not exempt the company from liability for injuries resulting from the imperfect conditon of the track, and where a horse, frightened by an approaching street car, would nevertheless have caused no injury but for the imperfect condition of the unfinished railroad track, the street railway company is liable for the injury even though there was no fault in the management of the car. Haynes v. Waterville & O. St. R., 101 Me. 335, 64 A. 614. The operation of a street railroad for other purposes than street traffic, before the railroad commissioners have granted a certificate of its safety for public travel, is not forbidden by Rev. St. c. 53, § 20. Parsons v. Waterville & O. St. R. Co., 101 Me. 173, 63 A. 728. Where a street car is obstructed by a coal wagon and the motorman leaves his car, and in attempting to start the horses of the wagon negligently injures the driver, the street railway company is not liable to the driver inasmuch as the motorman was acting outside the scope of his employment. Murphey v. Philadelphia Rapid Transit Co., 30 Pa. Super. Ct. 87. A public street is not to be regarded as a passenger station for the safety of which the company is responsible when persons alight from a car. Thompson v. Gardner, etc., R. Co. [Mass.] 78 N. E. 854.

Speed: It is negligence to operate cars at such a rate of speed as not to have them under control and be able to stop them readily at street intersections. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016. Whether running a car at twenty-five miles per hour in approaching a crossing in the nighttime was negligence held a question for the jury. Carey v. Metropolitan St. R. Co. [Mo. App.] 101 S. W. 1123. For the operatives of a street car to approach a street intersection at a speed of fifteen miles an hour is negligence. Clancy v. New York City R. Co., 100 N. Y. S. 1046. Where the view of a street crossing is obstructed, the motorman in charge of a car must approach it with caution. Mullin v. St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288. A motorman operating a car at a high rate of speed at a crossing where, because of passing vehicles, his view is so obstructed that he cannot determine whether the way is clear. Hafner v. St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291. That because of the frosty condition of the track the motorman was unable to control the car does not relieve the company where the motorman was aware of the danger of a collision for a sufficient length of time to have prevented it. Springfield Consolidated R. Co. v. Gregory, 122 Ill. App. 607. Cars must be run at a reasonable rate of speed and be equipped with signals and means of controlling it. Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617. Where a car is being propelled along a busy street at from twenty to twenty-five miles an hour, ordinary care required the driver to exercise a high degree of vigilance to prevent accidents. Indianapolis Trac. & T. Co. v. Kidd [Ind.] 79 N. E. 347.

93. See, also, post, §§ 8 B, 8 C. Evidence sufficient to show that a collision was due to negligence of the company and that one injured was free from contributory negligence. San Antonio Trac. Co. v. Haines [Tex. Civ. App.] 100 S. W. 788. Evidence insufficient to show contributory negligence as a matter of law where a motorman was injured in a head-on collision with the car of another company, where the injured person had the right of way and was running slowly with headlight burning and the car with which he collided approached without headlight or signal. Cutler v. Grand Rapids, etc., R. Co. [Mich.] 14 Det. Leg. N. 7, 111 N. W. 191.

94. See, also, post §§ 8 B, 8 C. It is proper to instruct that contributory negligence in order to bar recovery must directly contribute to the accident and that though one injured was negligent, yet, if the company could by stopping the car in the shortest space possible have avoided the injury and failed to do so, it was liable. White v. St. Louis, etc., R. Co. [Mo.] 101 S. W. 14. Though a car is run at a rate of speed in excess of the rate prescribed by ordinance, it is not liable where a person steps onto the track immediately in front of the car and such negligence was not the cause of the injury. Foreman v. Norfolk, Portsmouth & Newport News Co. [Va.] 56 S. E. 805. One

person injured is no defense to the company if its negligence was willful.[95] What constitutes negligence or contributory negligence,[96] and whether negligence or contributory nelgigence exists,[97] are generally questions of fact. At common-law the rights of a traveler and a street car company in the street are equal,[98] but due to the fact that a car can be operated only on the portion of the street occupied by the tracks, it is generally held that [99] the rights of the public to use the track is subordinate to the right of the company,[1] but the company has no right to the exclusive use of

injured cannot recover because of the violation of a speed ordinance unless it was the proximate cause of the injury and he was in the exercise of ordinary care. Campbell v. St. Louis Transit Co. [Mo. App.] 99 S. W. 58. An instruction that if the injury was caused by the negligence of the company and without the want of ordinary care on the part of the person injured he was entitled to recover is erroneous, because, if he failed to exercise ordinary care and such failure contributed to the injury, he could not recover. Wilkie v. Richmond Trac. Co., 105 Va. 290, 54 S. E. 43.

95. Contributory negligence is no defense if the company was guilty of wanton or willful misconduct. It may be guilty of such misconduct without actual intention to inflict injury. Birmingham R., Light & Power Co. v. Ryan [Ala.] 41 So. 616. Evidence sufficient to show willful negligence where a car approached a vehicle from the rear at an excessive rate of speed and it appeared that the motorman knew of the perilous position of the driver in ample time to have avoided the accident. Mayesville v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 612. Where one struck was guilty of contributory negligence; he must prove that the motorman was negligently indifferent to his safety and not guilty of a mere error of judgment. Bennett v. Metropolitan St. R. Co. [Mo. App.] 99 S. W. 480. A verdict should be directed where the evidence shows contributory negligence and there is no evidence of wanton negligence on the part of the company. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909.

96. Running cars at a speed in excess of the rate fixed by ordinance is evidence of negligence. Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617. Evidence of negligence in running at an excessive rate of speed and in failing to give signals held for the jury. Cluff v. Pittsburg R. Co., 144 F. 710. Question of contributory negligence in one driving on the track held for the jury. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945. Question of contributory negligence held for the jury. McQuisten v. Detroit Citizens' St. R. Co. [Mich.] 13 Det. Leg. N. 939, 110 N. W. 118; Curran v. St. Paul City R. Co. [Minn.] 110 N. W. 259; Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617. Questions of negligence and contributory negligence held for the jury where a car collided with a vehicle. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. Question of negligence and contributory negligence held for the jury. Hengesbach v. Detroit United R. [Mich.] 14 Det. Leg. N. 35, 111 N. W. 345.

97. The question of contributory negligence is for the jury if reasonable minds may differ as to whether a person injured in a collision at a cross walk was negligent. Bauer v. North Jersey St. R. Co. [N. J. Err. & App.] 65 A. 1037. Where an electric railway is under the control and management of a company and the accident is of such a character as to show that it could not have happened in the ordinary course of events under reasonably careful management, it affords some evidence, in the absence of any explanation, that the accident arose from the want of care, but if it is satisfactorily shown that the defect claimed to have caused the accident did not exist at the time of the accident, negligence would be rebutted. Wood v. Wilmington City R. Co. [Del.] 64 A. 246. Whether a car could have been stopped in time to avoid an injury held a question for the jury. Indianapolis St. R. Co. v. Hackney [Ind. App.] 77 N. E. 1048. Questions of negligence and contributory negligence held for the jury where a pedestrian was killed at night. Goff v. St. Louis Transit Co. [Mo.] 98 S. W. 49. Where a driver was injured at a crossing. Boggs v. Pittsburg, etc., R. Co. [Pa.] 65 A. 535. Question of contributory negligence held for the jury where a pedestrian was injured while crossing the track at night. Armstrong v. Consol. Trac. Co. [Pa.] 66 A. 75. Evidence of contributory negligence held for the jury. Cluff v. Pittsburg R. Co., 144 F. 710. Evidence of contributory negligence held for the jury where a pedestrian was injured at a crossing where the view of the track was obstructed. Milford & U. St. R. Co. v. Cline [C. C. A.] 150 F. 325. Evidence of negligence and of contributory negligence held for the jury where a child was injured. Burns v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 740.

98. Each must use due care. McCarthy v. Consol. R. Co. [Conn.] 63 A. 725. A street railway company has an equal right with the public in the use of the street at street crossings. Neither has a right superior to the other. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016. A street railway company has no superior and predominant right to the use of the streets on which its tracks are laid over the rights of other users, except the right of way when required. Indianapolis Trac. & T. Co. v. Kidd [Ind.] 79 N. E. 347.

99. Persons using the street and cars have common rights in the use of the street, but, as the car must run on the track, other travelers must change their course and give way to the car to prevent collision. Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617.

1. Barto v. Beaver Valley Trac. Co. [Pa.] 65 A. 792. Street railway companies and travelers have equal rights to the use of the street except that it is the duty of the traveler to get out of the way of cars and exercise ordinary care for his own safety. Indianapolis St. R. Co. v. Hackney [Ind. App.] 77 N. E. 1043. Though street railways have no exclusive right to the use of the

any portion of the street, and in the operation of its cars must use the degree of care required of a man of ordinary prudence under like circumstances.[2] In the operation of its cars on the company, it is only bound to exercise the care required of an ordinarily prudent man under similar circumstances to prevent injury to pedestrians,[3] or to fail to give proper warning of the approach of cars at street crossings[4] or railroad crossings.[5] A higher degree of care is required where a car is being operated on a crowded street,[6] or when it is approaching a street crossing,[7] than is required in sparsely settled communities. The duty of the motorman to keep a lookout for persons liable to be run over applies to the entire line of the street and not simply to crossings,[8] and the duty to check the speed of the car in order to avert a collision is not limited to the time of actual danger of collision but applies as soon as danger becomes apparent.[9] Street car operatives must anticipate the presence of persons in the street,[10] and on discovery of a traveler in a perilous position must exercise care to avoid injury to him,[11] but a conductor owes no duty to lookout for persons driving along the track in front of the car.[12] A motorman may presume that a person on the street will remain on the portion of the street not occupied by

tracks, they have the right of way and it is the duty of other persons using the tracks to give way. Ford's Adm'r v. Paducah City R. Co., 30 Ky. L. R. 644, 99 S. W. 355. A street railway has the right of way and ordinarily it is the duty of other travelers to yield it to approaching cars. Daniels v. Bay City Trac. & El. Co., 143 Mich. 493, 13 Det. Leg. N. 15, 107 N. W. 94.

2. San Antonio Trac. Co. v. Kumpf [Tex. Civ. App.] 99 S. W. 863. Instruction stating this rule held proper. Id. It has no exclusive right to the portion of the street upon which its tracks are laid. San Antonio Trac. Co. v. Haines [Tex. Civ. App.] 100 S. W. 788. An instruction that the company has a right to use its track does not mislead the jury to believe that such right is exclusive. Ford's Adm'r v. Paducah City R. Co., 30 Ky. L. R. 644, 99 S. W. 355.

3. Rubinovitch v. Boston El. R. Co. [Mass.] 77 N. E. 895. A motorman is not required to use the highest degree of care to avoid an injury to one crossing the street, but only ordinary care. Solomon v. New York City R. Co., 50 Misc. 557, 99 N. Y. S. 529. An instruction that it is the duty of an operator of a car to use "ordinary care" in its management to avoid injury to persons using the street is not bad for failure to require the exercise of "great care." Henderson v. Los Angeles Trac. Co. [Cal.] 89 P. 976. Conductor held not negligent in failing to warn a pedestrian alighting from the car of the existence of a gutter. Thompson v. Gardner, etc., R. Co. [Mass.] 78 N. E. 854. A statute making railroads responsible for all damages to property caused by the running of trains is not applicable to street railroads. Little Rock R. & Elec. Co. v. Neuman, 77 Ark. 599, 92 S. W. 864.

4. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016.

5. At crossings with steam railroads, a degree of care proportionate to the danger must be observed. It is negligence to run a car across the track of a steam railroad directly in front of an approaching train without effort to stop it and without first ascertaining whether the way was clear. Indianapolis Trac. & T. Co. v. Romans [Ind. App.] 79 N. E. 1068.

6. A street railway company must use greater care in crowded streets and at street crossings. Garrett v. People's R. Co. [Del.] 64 A. 254.

7. More care is required at street intersections than at other points, and it is negligence to run cars over crossings at an excessive or unusual rate of speed. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016.

8. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45.

9. The duty of a motorman to check the speed of his car in order to avert collision is not limited to the time when the vehicle is on the track or in actual danger of collision, but applies as soon as he sees or should see a vehicle approaching the track with the apparent intention of crossing. Barrie v. St. Louis Transit Co., 119 Mo. App. 38, 96 S. W. 233.

10. One operating a car is bound to anticipate the presence of persons in the street. He must be watchful to see that the way is clear and regulate his speed accordingly and operate the car with due regard to the safety of persons using the street. Henderson v. Los Angeles Trac. Co. [Cal.] 89 P. 976.

11. It is the duty of a street railway company to avoid injury to a person on its track in a dangerous position and to stop its car, if there is time to do so, in the exercise of ordinary care, after the danger is or should have been observed. Indianapolis St. R. Co. v. Hackney [Ind. App.] 77 N. E. 1048. Operators of cars must keep them under reasonable control and keep a diligent lookout for persons who are or may go upon the tracks, and if they see any person in danger use reasonable diligence to avoid injury to him. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. Where a motorman can see that a horse is becoming frightened and is likely to back a buggy onto the track in front of the car, it is his duty to slacken speed or stop the car if necessary to avert collision. South Covington, etc., R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 S. W. 283.

12. Wallack v. St. Louis Transit Co. [Mo. App.] 100 S. W. 496.

the railway track, at least until he shows by his actions that he intends to cross.[13] In Missouri it is required by statute that street car operators keep a vigilant lookout for persons on or moving toward the tracks and when danger becomes apparent stop the car in the shortest time possible.[14]

"Last clear chance" doctrine.[15]—Under this doctrine contributory negligence of the person injured is no defense to the company if it was but an intervening cause of the injury and the company could have averted the accident after discovery of the perilous position of the traveler.[16] Whether the motorman had the last clear chance to avert the injury may be a question for the jury.[17]

13. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. Rev. St. 1899, § 2864, providing that when a person shall die because of the negligence of any servant or employe running a car the corporation shall forfeit $5,000, applies to street railways. McQuade v. St. Louis & Suburban R. Co. [Mo.] 98 S. W. 552. This statute gives a cause of action whether the negligence complained of is common law or statutory. Id.

14. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. An ordinance requiring a person in charge of a car to keep a vigilant watch, especially for children, and on the first appearance of danger stop the car in the shortest space possible, is valid, being merely a declaration of the common law. Deschner v. St. Louis & M. R. R. Co. [Mo.] 98 S. W. 737.

15. The "last clear chance" doctrine is applicable in an action for injuries resulting from a collision between a car and a vehicle. Indianapolis St. R. Co. v. Bolin [Ind. App.] 78 N. E. 210.

16. Kramm v. Stockton El. R. Co. [Cal. App.] 86 P. 738; Birmingham R., Light & Power Co. v. Ryan [Ala.] 41 So. 616; Northern Texas Trac. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 48, 95 S. W. 708; McQuade v. St. Louis & Suburban R. Co. [Mo.] 98 S. W. 552. Evidence sufficient to show that the motorman had the "last clear chance" to avoid the accident and failed to exercise the care required of him. Ft. Smith Light & Trac. Co. v. Barnes [Ark.] 96 S. W. 976; Abbott v. Kansas City El. R. Co. [Mo. App.] 97 S. W. 198; Indianapolis Trac. & T. Co. v. Kidd [Ind.] 79 N. E. 347; Richmond v. Metropolitan St. R. Co. [Mo. App.] 100 S. W. 54. Though one driving along the track is negligent, yet if the motorman could or should see him in time to avert collision and fails to exercise ordinary care, the company is liable. Recktenwald v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 557. Where it appeared that one injured drove onto the track when a car was seventy-five or one hundred feet distant, but the motorman admitted that he saw him, and it appeared that the car could have been stopped within fifteen or twenty feet, the court properly refused to nonsuit plaintiff. Wallack v. St. Louis Transit Co. [Mo. App.] 100 S. W. 496. Where one placed himself in a position of peril on the track, the company was liable where it failed to exercise ordinary care to prevent injury to him, though the negligence was not characterized as willful. White v. St. Louis, etc., R. Co. [Mo.] 101 S. W. 14. Where one injured was guilty of contributory negligence, he cannot recover unless the motorman had the "last clear chance" to avoid the collision. Ft. Smith Light & Trac. Co. v. Flint [Ark.] 99 S. W. 79. It is not now the law of Ohio, if it ever was, that a railway company is liable for the injury of one who was guilty of contributory negligence, but whose peril was or might have been seen by the engineer or motorman in time to have prevented the accident. Northern Ohio Trac. Co. v. Drown, 7 Ohio C. C. (N. S.) 549. Where a driver attempting to cross the track had his back to the approaching car and was unaware of any imminent danger, the doctrine of "last clear chance" cannot be invoked by the company. Philbin v. Denver City Tramway Co. [Colo.] 85 P. 630. Contributory negligence in attempting to cross in front of a car will bar recovery if the motorman did not actually see the person in time to stop the car, though he should have seen him in the exercise of ordinary care. Dallas Consol. El. St. R. Co. v. Conn [Tex. Civ. App.] 100 S. W. 1019. Contributory negligence in attempting to cross the track in front of a car will bar recovery if the motorman could not stop the car in time to avoid collision, though he could have stopped it if it had been equipped with proper appliances. Id. Where the plaintiff, a pedestrian injured while crossing a street car track, admitted that he was negligent but relied on the "last clear chance" rule, and the plaintiff testified that he did not slacken his pace or look to see if a car was approaching from the time he left the sidewalk until the moment the car struck him, and it appeared that the distance between the point where he turned to cross the street and the point where he attempted to cross the track was but a few feet, and there was no evidence that the gripman could by the exercise of due care and diligence have stopped the car in time to prevent the accident, it was held that plaintiff's contributory negligence defeated his right to recover. Boring v. Metropolitan St. R. Co., 194 Mo. 541, 92 S. W. 655. If after the driver of a vehicle has driven within the zone of danger the motorman discovers his peril and fails to do all he can to avoid a collision, the driver's negligence would not be the proximate cause of his injury. If a traveler was guilty of contributory negligence, the company is liable only where willful or wanton negligence is shown, or it appears that they were negligent after the peril of the traveler was discovered. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829; Garth v. North Alabama Trac. Co. [Ala.] 42 So. 627. Failure of a motorman to use all means at his command to stop a car upon discovering one in a perilous position does not render the company liable unless the use of such means would have averted the collision. San Antonio Trac. Co. v. Kumpf [Tex. Civ. App.] 99 S. W. 863. Instructions not conforming to this rule held erroneous. Id.

17. Whether a motorman had the last clear chance to avoid a collision held a

(§ 8) *B. Travelers on highway. Injuries to pedestrians.*[18]—A pedestrian in approaching and crossing a street car track must exercise the degree of care required of an ordinarily prudent person under the same circumstances.[19] He must stop and look[20] if the exercise of ordinary care demands such precautions,[21] but the high degree of care required of one about to cross a steam railroad does not apply.[22] A traveler approaching a track may assume that cars will be run thereon in obedience to speed ordinances and that persons in charge of the car will keep a vigilant watch and stop the car if danger becomes apparent,[23] and it is not negligence to attempt

question for the jury. Cole v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 555.

18. See 6 C. L. 1567.

19. A pedestrian crossing a street upon which street cars run must exercise his powers of observation while in a place of safety to discover approaching cars which may put him in a place of danger. Hageman v. North Jersey St. R. Co. [N. J. Law] 65 A. 834. If obstacles obstruct the view of a pedestrian about to cross the track, reasonable prudence requires delay until such observation as is requisite has been made. Id. Ordinary care requires one to be reasonably observant of his condition and surroundings. Saylor v. Union Trac. Co. [Ind. App.] 81 N. E. 94. Mere inattention on the part of one crossing a track does not excuse the exercise of ordinary care. Id. Where, in an action against a street railroad for injuries to one struck by a car while crossing the track, it appeared from her evidence that she looked both ways for a car before leaving the curb, but then proceeded across the street without again looking, she failed to show freedom from contributory negligence. Solomon v. New York City R. Co., 60 Misc. 557, 99 N. Y. S. 529. Ordinary care is such care as an ordinarily prudent person would usually exercise under the same or similar circumstances. Henderson City R. Co. v. Lockett, 30 Ky. L. R. 321, 98 S. W. 303. The care required of a pedestrian approaching a crossing is governed in the Federal courts by the local decisions. Milford & U. St. R. Co. v. Cline [C. C. A.] 150 F. 325.

20. It is negligence barring recovery for one to attempt to cross a track without stopping to look or listen, where if he had done so he could have seen an approaching car. Hooks v. Huntsville R., Light & Power Co. [Ala.] 41 So. 273. Evidence sufficient to show contributory negligence as a matter of law where a pedestrian, familiar with the locality, was struck by a car on double tracks where he neither looked nor listened after he left the sidewalk. Blackwell v. Old Colony St. R. Co. [Mass.] 79 N. E. 335. Where a pedestrian while on the sidewalk sees a car approaching and starts to cross a curved track without again looking and is struck by a car, he is guilty of contributory negligence as a matter of law, though there was another track which went straight ahead past the corner. Pittsburgh R. Co. v. Cluff [C. C. A.] 149 F. 732. Failure to look and listen is contributory negligence as a matter of law. Price v. Rhode Island Co. [R. I.] 66 A. 200. One who fails to look before crossing an electric railroad is guilty of contributory negligence and cannot recover where if he had looked he could have avoided the collision. Phillips v. Washington & R. R. Co. [Md.] 65 A. 422. It is contributory negligence to attempt to cross the track without looking where such precaution would disclose an approaching car in time to avoid accident. Sims v. St. Louis & S. R. Co., 116 Mo. App. 572, 92 S. W. 909. If a traveler without looking turns so suddenly onto the track that it is impossible to avoid collision, the company is not liable. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. Evidence held to show plaintiff to be guilty of contributory negligence in failing to notice an approaching car before crossing a street, there being nothing to distract her or obstruct her view. Binder v. New York City R. Co., 99 N. Y. S. 835.

21. It is erroneous to charge that a person about to cross a track must look and listen, excluding every reason for conditions that might excuse such precautions. Saylor v. Union Trac. Co. [Ind. App.] 81 N. E. 94. One whose view is obstructed by passing vehicles is guilty of negligence in entering upon a track without looking or pausing until the obstruction has been removed. Plaintiff's intestate passed on to a track from behind a wagon which rendered him unable to see an approaching car without waiting for the wagon to pass so that he could ascertain whether a car was approaching. Held guilty of contributory negligence as a matter of law. Hafner v. St. Louis Transit Co., 197 Mo. 196, 94 S. W. 291. Evidence held insufficient to sustain a verdict for plaintiff on the ground of his failure to notice an approaching car before driving in on the track. Bang v. New York, etc., R. Co., 113 App. Div. 673, 99 N. Y. S. 946.

22. One about to cross a street railway track is not required to exercise the same degree of care as one about to cross a steam railroad. Perjue v. Citizens' Elec. Light & Gas Co. [Iowa] 109 N. W. 280. What constitutes ordinary care in crossing street railroads is widely different from what constitutes such care in crossing steam railroads. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738. The requirement to look and listen does not apply to street railroads. Niemyer v. Washington Water Power Co. [Wash.] 88 P. 103.

23. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. Where at the time a person turned to cross a track the car was two hundred feet away, and at the time of the collision was running at an unusual if not unlawful speed, whether the person injured was negligent in failing to look a second time before driving onto the track was a question for the jury. Wider v. Detroit United R. Co. [Mich.] 111 N. W. 100. Where plaintiff stopped his horse and looked for a car where he could see for a distance of seventy-five to one hundred feet up the track, he was not guilty of negligence as a matter of law in failing to stop after pass-

to cross in front of an approaching car if in so doing the degree of care required of a prudent person is exercised,[24] but it is negligence to attempt to cross in front of a car approaching rapidly and only a short distance off.[25] It is generally held that one who alights from a car and passes to the rear of it onto a parallel track without looking for a car approaching from the opposite direction is negligent,[26] but under

ing obstructions intervening with the view where his horse's head would have been within only two feet nearest rail of the track upon which the car was traveling. Hebblethwaite v. Detroit United R. Co., 145 Mich. 13, 13 Det. Leg. N. 391, 108 N. W. 433.

24. Ashley v. Kanawha Valley Trac. Co. [W. Va.] 55 S. E. 1016. A pedestrian about to cross a street where he has seen two cars approaching rapidly from opposite directions, who passes behind one and undertakes to cross in front of the other, is not bound to anticipate negligence on the part of the motorman. But he is not absolved from the duty of exercising due care to avoid being struck by the advancing car. O'Brien v. St. Paul City R. Co., 98 Minn. 205, 108 N. W. 805. Evidence held to show contributory negligence as a matter of law. Id. One is not negligent in attempting to cross in front of a car which he sees approaching if in the exercise of common prudence he may reasonably think there is time to cross safely. McQuisten v. Detroit Citizens' St. R. Co. [Mich.] 13 Det. Leg. N. 939, 110 N. W. 118. One who attempts to cross in front of a car which is one hundred and twenty-five feet distant and he has but fifteen feet to go to be safe is not negligent as a matter of law. Duffy v. Interurban St. R. Co., 101 N. Y. S. 767. The mere fact that a traveler can see a car approaching by which he is struck does not show contributory negligence, as it must be so close and running at such speed that a prudent man would not attempt to cross in front of it. Saylor v. Union Trac. Co. [Ind. App.] 81 N. E. 94. Evidence that a car was three hundred feet away when plaintiff attempted to cross a street, that he thought he would have ample time to drive across, and would have had had the motorman performed his duty, is sufficient to justify the submission of the case to the jury. La Londe v. Trans St. Mary's Trac. Co., 145 Mich. 77, 13 Det. Leg. N. 376, 108 N. W. 365.

25. Evidence held to show contributory negligence as a matter of law where a pedestrian attempted to cross in front of a car approaching at six to nine miles per hour, seventy-five or one hundred feet distant. Healy v. United Trac. Co., 101 N. Y. S. 331. One who attempts to cross in front of a car which is approaching at a rather high rate of speed about one car length off is guilty of contributory negligence. Madden v. Boston El. R. Co. [Mass.] 80 N. E. 447. One who steps onto the track directly in front of an approaching car, where if he had looked he must have seen the car and appreciated his danger, is negligent as a matter of law. Wider v. Detroit United R. Co. [Mich.] 111 N. W. 100. Evidence sufficient to show contributory negligence where a pedestrian stepped on the track immediately in front of a car, though he testified that he did not see it. Stassen v. New York City R. Co., 102 N. Y. S. 468. Where the gong on an approaching car was sounded and the car made sufficient noise to be heard by a traveler before he attempted to cross the track, but notwithstanding he attempted to cross when the car was so close that collision could not be avoided, he was guilty of contributory negligence. Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617. Where plaintiff, desiring to cross a street car track, immediately after the passing of a west-bound car, attempted to cross the track without waiting until the west-bound car had proceeded far enough to be out of his line of vision so that he could see a car approaching from the west on the opposite track by which his vehicle was struck, and he was injured before he had time to cross the track, he was guilty of contributory negligence. Rodgers v. St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154. Defendant's car was proceeding south in a thinly populated part of New York on a dark night at a speed of five or six miles an hour. Plaintiff's decedent appeared in front of the car either on the opposite track or between the two tracks driving some cows. As soon as he was seen the motorman, who was looking in his direction, attempted to stop the car and rang the bell, but deceased paid no attention to the bell. When the car was twenty feet from him, he attempted to cross the track on which the car was proceeding, and before the car could be stopped he was struck. Held insufficient to establish negligence on the part of the railway company. Beirne v. Union R. Co., 99 N. Y. S. 584. Where intestate deliberately stepped in front of defendant's street car when it was very close to him, running at a moderate speed, and after the gong had been sounded in due time, and the interval between his stepping on the track and the time he was struck was very brief, his negligence was part of a continuous transaction that terminated in his death and precluded a recovery. Davis v. People's R. Co. [Del.] 64 A. 70. Evidence sufficient to show contributory negligence where a woman about forty years of age and very deaf walked onto the track after she had looked and knew a car was coming, and her only excuse was that she thought she had time to cross and she kept listening but did not hear the gong. Ft. Smith Light & Trac. Co. v. Barnes [Ark.] 96 S. W. 976. Where before crossing a street plaintiff saw a car approaching at a distance of a block and a half and gave it no further attention but was struck by it when within a few feet of the opposite curb. The car was traveling at the rate of thirty miles per hour, the legal limit being twelve miles. Held the question of contributory negligence was properly left to the jury. Ward v. Marshalltown Light, Power & R. Co. [Iowa] 108 N. W. 323.

26. Evidence sufficient to show contributory negligence as a matter of law where a passenger alighting from a car where he was familiar with the surroundings went

some circumstances the question of his negligence is one of fact.[27] Whether a person walking on the track is guilty of contributory negligence depends on the circumstances,[28] but the mere fact that he walks on the track is not contributory negligence,[29] and like rules apply to those working at or near track.[30] Operatives of cars

behind the car and was struck by a car approaching from the opposite direction on the other track, which he could have seen half a mile off had he looked. Morice v. Milwaukee Elec. R. & Light Co. [Wis.] 109 N. W. 567. Evidence sufficient to show negligence where one alighted from a car within four or five feet of a rapidly approaching car on a parallel track operated by another company, where it appeared that he could have alighted safely on the other side. Foreman v. Norfolk, Portsmouth & Newport News Co. [Va.] 56 S. E. 805. Where a passenger alighting from a street car passed around the rear end of the car and was struck by a car coming in the opposite direction, he was guilty of contributory negligence, either in proceeding further than was necessary to observe the approaching car, or in failing to wait until the car from which he alighted had moved far enough for him to see whether another car was approaching. Hornstein v. United Rys. Co., 195 Mo. 440, 92 S. W. 884. A passenger on alighting from a street car passed behind the car and started to walk diagonally across an adjoining track, where he was struck by a car approaching from the opposite direction. Had he looked he could have seen the approaching car, which was a short distance from him and approaching rapidly. His waiting for a moment until the car had passed would have avoided the accident. Held that he was guilty of contributory negligence as a matter of law. McGreevy v. New York City R. Co., 113 App. Div. 155, 98 N. Y. S. 1024.

27. Where plaintiff alighted from a car on the side next to a parallel track, looked and listened, and, on crossing, was struck by a car coming on that track, and there was evidence that the car came at high speed without lights and without warning, contributory negligence was held to be for the jury. Ft. Smith Light & Tract. Co. v. Carr [Ark.] 93 S. W. 990.

28. Evidence insufficient to show contributory negligence as a matter of law when a man 89 years old was struck by a car near a point where a steam railway was being operated, and the noise of the oncoming car was attributed to that agency rather than to the car. Peyue v. Citizens Elec. Light & Gas Co. [Iowa] 109 N. W. 280. Evidence insufficient to sustain a verdict for one injured at a crossing. Padower v. New York City R. Co., 103 N. Y. S. 953.

Evidence sufficient to show contributory negligence where a pedestrian was struck by a car about 8 o'clock at night, the car had a bright head light, and the injured person had good eyesight. Marguiles v. Interurban St. R. Co., 101 N. Y. S. 499. Where a man 78 years old and very deaf was struck by a car, evidence held to show contributory negligence where at the time he was walking on the track and the motorman after seeing him sounded the gong and did everything he could to stop the car. Adams v. Boston & N. St. R. Co., 191 Mass. 486, 78 N. E. 117. Where a person 78 years of age and very deaf walks on a car track, his lack of hearing makes it incumbent on him to be more alert in the use of his other senses. Id. Where one was killed while walking on the track, the fact that the walking was better there than on the highway is no excuse for walking there when he could have walked on the highway with safety. Id. Evidence sufficient to show contributory negligence where one was injured in a collision on a dark night. Skinner v. Tacoma R. & Power Co. [Wash.] 89 P. 488. Evidence sufficient to show contributory negligence and insufficient to show negligence as a matter of law where a pedestrian retreating from a mule which was frightened at the approach of a car ran into the side of the car. Crenshaw v. Asheville & B. St. R. & Transp. Co. [N. C.] 56 S. E. 945. Evidence held to show contributory negligence where a man 75 years old and partially deaf stood on the track several minutes before he was struck and did not keep watch for approaching cars. Bennett v. Metropolitan St. R. Co. [Mo. App.] 99 S. W. 480. Evidence insufficient to show negligence on the part of a motorman where he did not know one standing on the track was deaf, and where he gave signals as soon as he discovered his peril and did all in his power to stop the car. Id. Evidence sufficient to show contributory negligence where one crossing the street to board a car could have seen the car that struck him if he had looked. Fitzgerald v. Boston El. R. Co. [Mass.] 80 N. E. 224. Where a pedestrian walking on the track had looked prior to stepping onto it and again after proceeding half a block, but was struck by a car traveling at a high rate of speed, in daylight, without giving warning signals, and the noise of running was deadened by the noise of another car running in the opposite direction, contributory negligence if any was but a remote cause of the accident and did not bar recovery. Indianapolis Tract. & T. Co. v. Kidd [Ind.] 79 N. E. 347. Where one attempting to cross a track was struck by a car which he intended to take and could have taken but one or two steps from the time he entered on the line of track and was caught in the space between the rails, he was guilty of contributory negligence. Crooks v. Pittsburg R. Co. [Pa.] 66 A. 142. Where a person sitting on the track was run over and killed under circumstances which seemed to justify a conclusion of negligence, evidence that deceased was subject to atacks of pleurisy which rendered her temporarily helpless was not subject to the objection that it based one presumption upon another. Electric R. Light & Ice Co. v. Brickell [Kan.] 85 P. 297.

29. It is not contributory negligence as a matter of law to walk on a street car track at night. Goff v. St. Louis Transit Co. [Mo.] 98 S. W. 49. When a street is covered with melting ice and snow except the space between the ralls, a pedestrian is entitled to walk on such space using ordinary care for her own safety, and was en-

must anticipate the presence of persons on the street,[31] but may assume that they will exercise ordinary care for their own safety,[32] and that persons on or near the tracks will get out of the way when signals are given.[33] The questions of negligence and contributory negligence are ordinarily for the jury.[34] Ordinary care must be

titled to assume that she would not be run into by a car approaching from the rear at an excessive speed in daylight on a straight track and giving no signals. Indianapolis Trac. & T. Co. v. Kidd [Ind.] 79 N. E. 347.

30. Evidence held to show contributory negligence of plaintiff in failing to get out of the way of a car, he being at the time kneeling on a strip 18 inches wide between defendant's tracks and a trench in which his coemployes were working holding a lighted lantern to enable them to see, and the fact that during the day motormen had sounded a gong on approaching the work did not excuse him, defendant having no notice that the work was resumed after quitting time in the evening. Bushay v. Ocean City Elec. R. Co. [N. J. Law] 64 A. 968.

31. It is the duty of the motorman in addition to operating his car to keep a lookout and observe the streets adjacent to the track to ascertain whether persons are approaching or about to approach it, and he must exercise special care in case of children. Glettler v. Sheboygan Light, Power & R. Co. [Wis.] 109 N. W. 973. When it is apparent that teams in front of the car are frightened and unmanageable, it is the duty of motorman to stop the car or reduce its speed. Evidence held to require submission to jury of question of motorman's negligence in failing to stop car or reduce its speed upon seeing the unmanageable condition of plaintiff's horse. Freyer v. Aurora, Elgin & C. R. Co., 123 Ill. App. 423. Upon descending a grade it is the duty of a motorman in charge of the car to keep it within control, though the speed of cars is not limited by law. White v. Wilmington City R. Co. [Del.] 63 A. 931. Evidence as to the amount of traffic on the street on which the collision occurred at the time of the accident is admissible. Id.

22. A motorman may properly assume that a traveler approaching a crossing, if far enough away to cross safely, will continue and cross in front of the car, and if not far enough away, upon warning by those in charge of the car, will stop and let the car pass first. Garrett v. People's R. Co. [Del.] 64 A. 254. A motorman who sees a person near the track or approaching it with nothing to indicate inability on his part to care for himself may assume that he will act as a prudent man should, and it is not incumbent on him to stop the car until he sees that such person is in danger. Duteau v. Seattle Elec. Co. [Wash.] 88 P. 755. A motorman in charge of a car has a right to presume that a pedestrian at a street crossing, whose view is partially obstructed by passing vehicles will look and see the approaching car and is not bound to anticipate that he will pass onto the track in front of the car. Hafner v. St. Louis Transit Co. 197 Mo. 196, 94 S. W. 291. If a motorman who sees a person on a trestle cannot reasonably anticipate that he will not probably leave the track in time to avoid injury, the company is not liable. Northern Texas Trac. Co. v. Mullins [Tex. Civ. App.] 99 S. W. 433. Where all witnesses testified that the bell was rung prior to the collision, a statement of the plaintiff who was partially deaf and was not listening that he did not hear it was no evidence upon which to raise an issue. Bennett v. Metropolitan St. R. Co. [Mo. App.] 99 S. W. 480. The fact that the gong on a standing car was struck as one was passing does not show negligence on the part of the company, indicating that the person injured was in a place of peril, so as to justify him in stepping onto the adjoining track without looking directly in front of an approaching car. Blackwell v. Old Colony St. R. Co. [Mass.] 79 N. E. 335.

33. A motorman may assume that a person walking near the track will get out of the way in time to avoid being struck when signals are given and need not take steps to stop the car until it was reasonably apparent that he would not. Ford's Adm'r v. Paducah City R. Co., 30 Ky. L. R. 644, 99 S. W. 355. Where the motorman of a street car saw a woman standing between the track and a wagon, at a place where there was ample room for the car to pass without injuring her, and when he was 25 feet distant she suddenly stepped on the track, whereupon he gave signals and made every effort to stop the car, it was held that he was not negligent, not having owed the duty of previously giving signals or checking the speed of his car. Lennon v. St. Louis & S. R. Co., 198 Mo. 514, 94 S. W. 975. Question of negligence of motorman in failing to get his car under such control as to avoid injury to a boy whose foot was caught in a space between the tracks, having seen the boys at a distance of from 300 to 400 feet, though he did not know that the boy was unable to leave the track until within 35 feet of him. McDermott v. Severe, 202 U. S. 600, 50 Law. Ed. 1162.

34. On conflicting evidence as to whether a person injured could have avoided a collision, the issue of his negligence is for the jury. Ft. Smith Light & Trac. Co. v. Flint [Ark.] 99 S. W. 79. Where a person is injured while crossing a street car track and testifies that he stopped, looked, and listened, before going on the track, and was struck by a car which he did not see because the lights were out and no headlight was burning, the question of his contributory negligence is for the jury. Cox v. Schuylkill Valley Trac. Co., 214 Pa. 223 63 A. 599. Whether the company was negligent in imposing on the motorman the duties of the conductor held a question for the jury. Glettler v. Sheboygan, Light, Power & R. Co. [Wis.] 109 N. W. 973. Questions of negligence and contributory negligence held for the jury where a pedestrian was killed while crossing the track. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738. Where a person crossing a street car track is run over by an electric car, whose lights have gone out, rapidly moving down a steep

exercised to discover persons in a position of peril,[35] and, when one is discovered in such position, immediate steps must be taken to prevent injury to him.[36] The degree of care required for the protection of pedestrians applies as to persons working in the streets.[37] If the company fails to exercise the degree of care required of it, and such failure results in injury to a pedestrian, the company is liable.[38] A cus-

grade, the question of the company's negligence is for the jury. Cox v. Schuylkill Valley Trac. Co., 214 Pa. 223, 63 A. 599. In an action for death caused by a collision between a street car and a vehicle, violation of a city ordinance as to the speed of cars is not negligence as a matter of law but presents a question for the jury. Oates v. Union R. Co., 27 R. I. 499, 63 A. 675.

35. Where a person lying on the track could have been readily seen for from 40 to 75 feet and the car was stopped within 30 feet after he was discovered, evidence sufficient to show that the motorman should have discovered him in time to have avoided injury to him. Goff v. St. Louis Transit Co. [Mo.] 98 S. W. 49. An instruction that if persons generally walked on the track at a point where an injury occurred it was the duty of the company to exercise reasonable care to discover their presence, and if in the exercise of reasonable care they fail to do so the company was liable, is bad because, if in the exercise of reasonable care they failed to discover plaintiff's presence, the company was not liable. Wilkie v. Richmond Trac. Co., 105 Va. 290, 54 S. E. 43.

36. Where in an action for the death of plaintiff's intestate in a collision with a street car, there was uncontradicted evidence by two of plaintiff's witnesses that the motorman, as soon as he saw intestate in a dangerous position, applied the brake and did all that he could to stop the car and avoid injuring intestate, there was no sufficient evidence of negligence, though it also appeared that the car was not stopped within a distance certain expert witnesses testified it could have been stopped. Davis v. People's R. Co. [Del.] 64 A. 70. When a car is moving at a lawful rate of speed and a traveler comes suddenly upon the track, the company is required only to exercise ordinary care to avoid injury, but if the car is moving at an excessive rate of speed, and signals cannot be given or appliances to stop the car be used by the exercise of ordinary care, the company is liable as it has brought about a condition which it cannot control. Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617. Instructions in such case approved. Id. Whether a motorman could have stopped his car within 125 feet so as to have avoided an accident held a question of fact. Duffy v. Interurban St. R. Co., 101 N. Y. S. 767. Where a motorman running a car at a high rate of speed in a populous part of the city sees a pedestrian 140 feet away with his back towards the car, apparently oblivious to his danger, he must use all means at his command to warn him and get his car under control and stop if necessary to avoid collision. Saylor v. Union Trac. Co. [Ind. App.] 81 N. E. 94. A motorman who discovers a person on a trestle in a perilous position must use all means within his power consistent with the safety of others to avoid running him down. Northern Texas Trac. Co. v. Mullins [Tex. Civ. App.] 99 S. W. 433.

37. Where one spreading gravel on the street stepped onto the track to let a street sprinkler pass, he was not negligent as a matter of law. Kramm v. Stockton Elec. R. Co. [Cal. App.] 86 P. 738. Question of contributory negligence held for the jury where one assisting an employe of the city in working on the street was struck by a car. O'Leary v. Haverhill & P. St. R. Co. [Mass.] 79 N. E. 733. Where it appeared that, while plaintiff was standing on the hub of his wagon, bending over and lifting out a heavy piece of marble, he was struck by a street car which was approaching at a high rate of speed, that no signal was given until the car was within a foot of the plaintiff, that no car had passed upon the track for 20 minutes and that, even if plaintiff at the time of getting on the wheel of the wagon had looked up the street he could not have seen the car by reason of the fact that it was then on a cross street, it could not be said as a matter of law that he was guilty of contributory negligence. Volosko v. Interurban St. R. Co., 113 App. Div. 747, 99 N. Y. S. 484. Where a lineman started to climb a crooked telegraph pole between tracks of a railway company after having seen a car approaching about 150 feet distant but relied on his foreman to stop the car, evidence held to show that he was not guilty of contributory negligence as a matter of law where he was struck by the car when about half way up the pole. Ahearn v. Boston El. R. Co. [Mass.] 80 N. E. 217. Where a telegraph lineman was injured by being struck by a car while climbing a telegraph pole which slanted over the car track, evidence as to the custom of giving notice by men on the ground was admissible as bearing on the issue of his due care. Where a telegraph lineman was struck by a car while climbing a pole which slanted over the track, evidence that flags were stationed to give notice that there was dangerous construction going on was admissible to show surrounding conditions. Id.

38. It is proper to instruct that the company is liable where it fails to exercise due care to prevent injury to a person crossing the track. Indianapolis St. R. Co. v. Demaree [Ind. App.] 80 N. E. 687. A street car company is liable even to a trespasser where it fails to use ordinary care after his peril is discovered. Goff v. St. Louis Transit Co. [Mo.] 98 S. W. 49. A pedestrian walking on a street car track laid in the public highway is not a trespasser. Id. In an action for injuries to a pedestrian at a crossing, evidence that the motorman disregarded a sign adopted by the company requiring cars to be run slowly at crossings is evidence of negligence sufficient to warrant a verdict against the company. Hayward v. North Jersey St. R. Co. [N. J. Err. & App.] 65 A. 737. Evidence sufficient to sustain a verdict in favor of a person struck

tom to stop cars at street intersections to allow funeral processions to pass does not render the company guilty of negligence for a failure to observe it,[39] and though the driver of a vehicle in such a procession may rely upon such a custom if uniform and continuous, he has no right to do so as against the positive evidence of his senses that the custom will not be followed by an approaching car.[40] It must exercise such degree of care with respect to its appliances [41] and the speed with which cars are operated.[42] In the absence of statutory requirements, if a motorman has no occasion to foresee danger at a street crossing it is not negligence to maintain the usual rate of speed over the crossing.[43]

Children run over.[44]—A child of tender years is bound to exercise only such care as would be ordinary care for one of his age and discretion, to look and listen before crossing a street railway track.[45] If a child is sui juris it is required to exercise the degree of care reasonably to be expected from a child of its age and capacity.[46]

by a car while crossing the street. Indianapolis St. R. Co. v. Demaree [Ind. App.] 80 N. E. 687. Evidence sufficient to support a verdict for one who was struck by a car at a point where just before stepping onto the track the view was obstructed. Ring v. Nassau Elec. R. Co., 101 N. Y. S. 389. Evidence sufficient to show negligence. Northern Texas Trac. Co. v. Mullins [Tex. Civ. App.] 99 S. W. 433. Evidence sufficient to sustain a finding that one killed by a car could have crossed safely if the car had been run at the rate of speed prescribed by ordinance. Powers v. St. Louis Transit Co. [Mo.] 100 S. W. 655. Where a pedestrian stopped, looked, and listened, before crossing a street railway track, this was held to be evidence of due care and sufficient to sustain a verdict for the plaintiff. Doyle v. Chester Trac. Co., 214 Pa. 382, 63 A. 604.

Evidence of negligence held insufficient to go to the jury where a pedestrian was struck by a piece of wood torn from a telephone pole by a runaway car. Small v. Pittsburg R. Co. [Pa.] 66 A. 76. The fact that a motorman did not continuously observe decedent while crossing the street, that he failed to give signals and did not more promptly apply brakes, does not show negligence in retaining an incompetent servant without proof of previous misconduct. Moran v. Milford & U. St. R. Co. [Mass.] 78 N. E. 736. Evidence that the gong was not rung that the velocity of the car exceeded the statutory speed, and that the motorman did not exercise ordinary care in observing the entire width of the street, held insufficient to show gross negligence within Rev. Laws, c. 111, § 267. Id. Where a pedestrian was run over by a car at night and while under the car it was moved so that she could not be gotten out, and when she was found was dead, evidence held insufficient to show negligence in moving the car. Healey v. United Trac. Co., 101 N. Y. S. 331.

39. White v. Wilmington City R. Co. [Del.] 63 A. 931.

40. White v. Wilmington City R. Co. [Del.] 63 A. 931. Evidence that it was customary for street cars to stop to permit of the passage of a funeral procession is admissible, though not pleaded as affecting the degree of diligence required of the driver of a yehicle in such procession. Id.

41. Evidence held to show negligence in failing to furnish proper lights on a car where one was injured while walking on the track at night. Wilkie v. Richmond Trac. Co., 105 Va. 290, 54 S. E. 43.

42. It is not error to submit to the jury whether a certain rate of speed is negligence, though no showing is made of any ordinance in the matter. What speed is usual or the extent of business carried on in such street. Metropolitan St. R. Co. v. Summers [Kan.] 89 P. 652. Where all witnesses agreed that a car was running at about half speed and could have been stopped within 10 or 12 feet, a charge of negligence with respect to the rate of speed is not sustained. Bennett v. Metropolitan St. R. Co. [Mo. App.] 99 S. W. 480. Evidence that at the time of an accident the company was violating a speed ordinance is no evidence of negligence. Ford's Adm'r v. Paducah City R. Co., 30 Ky. L. R. 644, 99 S. W. 355.

43. Skinner v. Tacoma R. & Power Co. [Wash.] 89 P. 488.

44. See 6 C. L. 1570.

45. Instructions requiring ordinary care held properly modified so as to express the degree of care required of a child. Mullin v. St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288.

46. In an action against a street railroad for injuries to a child, the child is to be held responsible only for such care as children of his age, experience, and discretion, ordinarily use under the same and similar circumstances. Wise v. St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898. A child in the street is only required to exercise the degree of care a prudent person of his age would exercise under like conditions. Burns v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 740. Where a child under seven years of age attempts to cross in front of a car, failure to look is some evidence of negligence. Peterson v. Interurban St. R. Co., 103 N. Y. S. 8. A boy 11 years of age who attempts to cross within five or six feet of an approaching horse car proceeding at three miles per hour is guilty of contributory negligence as a matter of law. Bambace v. Interurban St. R. Co., 188 N. Y. 288, 80 N. E. 913. A girl 11 years of age who sees a car approaching about 80 feet distant and then walks leisurely across the track held guilty of contributory negligence as a matter of law. Hollan v. Boston El. R. Co., [Mass.] 80 N. E. 1. Evidence sufficient to show contributory negligence where a boy 11 years of age, familiar with

Street car operatives must exercise the degree of care required of them in regard to children,[47] and contributory negligence is no defense to the company if they had the last clear chance to avert the injury,[48] but if a child suddenly runs in front of a car so close that it cannot be stopped, the company is not liable.[49] Whether a child is sui juris,[50] whether it exercised the degree of care required,[51] and whether the company exercised the degree of care required of it, are generally held to be questions of fact.[52] The doctrine of imputed negligence [53] applies.[54]

(§ 8) *C. Accidents to drivers or occupants of wagons.*[55]—The rights of street railway companies and other users of the streets in the streets are equal and each

the location, started across the street without looking immediately behind a car and was struck by a car coming from the opposite direction. Stackpole v. Boston El. R. Co. [Mass. 79 N. E. 740. Question as to whether a "lively, active, and energetic" child slightly over four years of age was guilty of contributory negligence held properly submitted to the jury. Sullivan v. Boston El. R. Co. [Mass.] 78 N. E. 382.

47. Where a child was struck at a crossing it was error not to embody in an instruction the duty of the motorman to keep a vigilent watch, especially for children approaching the track. Deschner v. St. Louis & M. R. R. Co. [Mo.] 98 S. W. 737. Where a motorman saw a child cross the track in front of the car in such a direction as would take it out of danger, he had a right to presume that it was not in danger and was not required to slacken the speed of the car unless from the actions of the child it was reasonably apparent that it intended to recross the track dangerously near the car. Hanley v. Ft. Dodge Light & Power Co. [Iowa] 107 N. W. 593. Evidence sufficient to show that a motorman was negligent where a boy was injured. Conner v. Pittsburg R. Co. [Pa.] 65 A. 1106. Question of contributory negligence of a child six years of age in failing to look before crossing a street railroad track held properly submitted to the jury. Mullin v. St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288. Evidence sufficient to show that a motorman could have seen a child in time to avoid running into it. Glettler v. Sheboygan Light Power & R. Co. [Wis.] 109 N. W. 973. Where the gripman on a street railroad train saw a boy standing on the track 60 feet ahead, it was his duty to ring the bell and his failure to do so was negligence for which the company was liable. Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877.

48. If a boy killed was on the track or approaching it so that the motorman should have seen him in time to have avoided the accident, there can be a recovery though the boy was negligent. Louisville & N. R. Co. v. Edelen's Adm'x, 29 Ky. L. R. 1125, 96 S. W. 901. Where a motorman saw a child near the track 200 feet distant and could have stopped his car within 70 feet but made no effort to do so, a motion to direct a verdict is properly denied. Louisville R. Co. v. Walker, 29 Ky. L. R. 663, 94 S. W. 635.

49. If a boy standing about eight feet from the track suddenly runs in front of an approaching car so close in front of it that it cannot be stopped in time to avoid injury to him, the company is not liable. Louisville & N. R. Co. v. Edelen's Adm'x, 29 Ky. L. R. 1125, 96 S. W. 901. Where a boy jumped suddenly from behind a covered wagon standing beside the track, and, starting to cross, was struck by a car, it was held that the mere proximity of the wagon to the track was no notice to the motorman that someone was behind it who might suddenly attempt to cross, and that instructions seeming to indicate that the boy had a right to cross as he did were erroneous. Cornelius v. South Covington, etc., R. Co., 29 Ky. L. R. 505, 93 S. W. 643. In a suit for damages on account of the wrongful death of a child who ran from the sidewalk in front of a street car, it is error to charge the jury without qualification that, "if you find from all the evidence that the motorman who had charge of the car which struck the plaintiff could, by the exercise of ordinary care, have seen the plaintiff and stopped the car, and that by reason of the failure to stop the car plaintiff was knocked down and injured, it would be such negligence on the part of the defendant as would enable the plaintiff to recover." Cincinnati Trac. Co. v. Simon, 8 Ohio C. C. (N. S.) 515.

50. Where in an action against a street railroad for the death of a child three years and nine months old, run over by a car, the court left to the jury the question whether the child was sui juris, defendant was entitled to an instruction that if the child was sui juris he was bound to exercise such care and caution as was to be expected of a child of his age under the circumstances. Hirtenstein v. Interurban St. R. Co., 100 N. Y. S. 909.

51. Whether a boy 11 years old who waited for one car to pass and attempted to cross the track without looking and was struck by a car following was negligent was held a question for the jury. Deschner v. St. Louis & M. R. R. Co. [Mo.] 98 S. W. 737. Whether a boy of seven was guilty of contributory negligence in stopping on a car track without looking to see if a car was approaching is a question for the jury. Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877.

52. Whether a motorman saw, or, by the exercise of due care, could have seen, a boy standing on the track, held to be a question for the jury. Wise v. Louis Transit Co., 198 Mo. 546, 95 S. W. 898.

53. See Negligence, 8 C. L. 1090.

54. Whether parents of a child about four years of age were guilty of negligence in a portion of the house whereby child found his way to the street held properly submitted to the jury. Sullivan v. Boston El. R. Co. [Mass.] 78 N. E. 382.

55. See 6 C. L. 1572.

must use them with due regard to the rights of the other,[56] and if injury results because of failure of the company to exercise the degree of care required of it, it is liable,[57] but the negligence must have been the proximate cause of the injury.[58] Whether a given rate of speed is negligence depends on the circumstances.[59] It is negligence as a matter of law to run a car at a rate of speed in excess of that fixed by ordinance.[60] It is sometimes provided that fire apparatus responding to an alarm has the right of way.[61] It is the duty of a motorman to keep a lookout for vehicles liable to get into a perilous position,[62] and if one is seen in such position to take im-

56. Olney v. Omaha etc., R. Co. [Neb.] 111 N. W. 784. Street railway companies and other travelers on the street are required to use the street at all times with just regard to the rights of the other. Indianapolis St. R. Co. v. Bolin [Ind. App.] 78 N. E. 210. The rights of travelers and of the railroad are co-ordinate so that each must exercise the same with due regard to the rights of the other and in a reasonable and careful manner. Weldon v. People's R. Co. [Del.] 65 A. 589. The respective rights of the public and of the railway company to use the streets must be exercised with due regard to the rights of each other and in such manner as not to unreasonably interfere therewith. Heidelbaugh v. People R. Co. [Del.] 65 A. 587. As between a car and a vehicle between crossings, a car has the preferential but not the exclusive right of way. Moore v. New York City R. Co., 102 N. Y. S. 636.

57. Evidence sufficient to sustain a verdict for one injured in a collision between a car and wagon. Klasson v. Interurban St. R. Co., 101 N. Y. S. 581. Evidence sufficient to sustain a verdict for one injured by a collision between a car and a wagon he was driving where before driving onto the track he saw a car a block away and when he was over the first track it was half a block off and the rear end of his wagon was struck. Salcinger v. Interurban St. R. Co., 101 N. Y. S. 804. A complaint alleging that the driver of a vehicle attempting to cross in front of a car approaching up a steep grade 150 feet distant was detained on the track because the rails were raised above the surface, and had the motorman exercised reasonable care he could have seen the wagon and stopped his car in time to have avoided the accident, states a cause of action. Philbin v. Denver City Tramway Co. [Colo.] 85 P. 630. In an action for injuries to a horse, evidence held sufficient to show that the motorman and conductor were employes of the company, acting within the scope of their employment, and that the car was operated by the company on a track owned by it. Indianapolis & N. W. Trac. Co. v. Henderson [Ind. App. 79 N. E. 539.

Evidence insufficient to show negligence: Evidence that, while plaintiff was driving across a street car track near a standing car, his horse and cart were struck by a car on the other track where there was nothing to obstruct the view of the cart from the car, was held insufficient to show negligence, justifying a recovery for injuries suffered by the plaintiff. Messing v. Wilmington City R. Co. [Del.] 64 A. 247. In an action against a street railroad for death occasioned by a collision between a street car and a wagon, evidence that prior to the collision the lights on the car were extinguished by the trolley pole leaving the wire, thereby divesting the car both of light and motive power, is not of itself sufficient to show negligence. Higgins v. St. Louis & S. R. Co., 197 Mo. 300, 95 S. W. 863.

58. Evidence insufficient to show that one was thrown from his wagon by reason of its being struck by a car. Gormley v. Forty-Second St. etc., R. Co., 101 N. Y. S. 583. Where one was injured by a collision with a car running at twenty-five to thirty miles per hour, where the lawful rate was eight miles per hour, and it appeared that the injury was sustained by the injured person's impact with the ground, it was error to charge that the company was not liable if the excessive rate of speed was not the proximate cause of the injury, because whatever additional injury was sustained was due to the negligence of the company. Bresee v. Los Angeles Trac. Co. [Cal.] 85 P. 152. The mere fact that a car is running at an unlawful rate of speed does not entitle one struck by it to recover if he was himself negligent. Harris v. Lincoln Trac. Co.]Neb.] 111 N. W. 580. Where a person injured knew a car was approaching, it was immaterial whether signals were given. Robinson v. Crosstown St. R. Co., 103 N. Y. S. 58. In an action against a street railway company for injuries to plaintiff's horse in collision with a street car, evidence held insufficient to establish plaintiff's claim that as he swung his horse around across the track in front of the approaching car, the car struck the rear wheel of his wagon and threw the horse to the ground, causing the injuries complained of. Thau v. New York City R. Co., 99 N. Y. S. 329.

59. In an action for death caused by a collision between a street car and a wagon, evidence that a car was going at a speed of from six to eight miles an hour is insufficient to show negligence, in the absence of evidence concerning the character of the place of the accident, the amount of travel on the streets there, and of the crossings. Higgins v. St. Louis & S. R. Co., 197 Mo. 300, 95 S. W. 863. It is negligence to run a car over a crossing without signals at twenty miles an hour. Cole v. Metropolitan St R. Co.. [Mo. App.] 97 S. W. 555.

60. Bresee v. Los Angeles Trac. Co. [Cal.] 85 P. 152.

61. Where a fireman was killed at a crossing, it was proper to admit evidence of an ordinance providing that fire apparatus responding to an alarm should have the right of way. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Where one section of an ordinance provided that fire apparatus responding to an alarm should have the right of way and another section provided that cars should have right of way as to teams and vehicles, the former section controls as regards fire apparatus. Id.

62. In an action for injuries to a traveler

mediate steps to get the car under control,[63] and if he does not and injury results, the company is liable,[64] even though the driver of the vehicle was guilty of contributory negligence.[65] The driver of a vehicle must exercise due care under the circumstances of the case,[66] and in some states he is required to look and listen;[67] but one crossing a street railway is not required to exercise the same degree of care as when crossing a steam railway.[68] A traveler may assume that a street car company will exercise ordinary care to prevent a collision with his vehicle,[69] that cars will not be run at a reckless rate of speed,[70] and is not negligent in attempting to cross in front of an approaching car if he has reasonable ground to believe that he can do so safely.[71]

caused by a street car striking his wagon from the rear, an instruction that it was the motorman's duty to use care to look on each side of his car to see that no persons were about to get on the track, and that no conditions or circumstances presented themselves which would evidently compel pereons then in his view passing along the street to go on the track in front of the car, was erroneous, as imposing on defendant a greater burden than the law required. Metropolitan St. R. Co. v. Kirkpatrick [Tex. Civ. App.] 16 Tex. Ct. Rep. 351, 94 S. W. 1092. An instruction requiring a motorman to keep a "vigilant watch" is proper at common law as well as under a city ordinance requiring it. Mertens v. St. Louis Transit Co. [Mo. App.] 99 S. W. 512.

63. When the motorman of a street car could have stopped his car and avoided a collision with plaintiff's wagon, if he had used reasonable care and kept a vigilant watch ahead on the first appearance of danger, plaintiff was entitled to recover for injuries sustained, notwithstanding his own contributory negligence. Rodgers v. St. Louis Transit Co., 117 Mo. App. 678, 92 S. W. 1154. When a motorman sees a person in peril from which he cannot extricate himself, he must so act as not to increase the danger and if he fails to do so and his failure results in injury, the company is liable. Indianapolis Trac. & T. Co. v. Smith [Ind. App.] 77 N. E. 1140.

64. Whether a motorman had opportunity to prevent collision after discovering, a vehicle on the track held a question for the jury. Barrie v. St. Louis Transit Co., 119 Mo. App. 38, 96 S. W. 233. Whether a motorman could have avoided a collision with a vehicle after discovering, its danger held a question for the jury. Daniels v. Bay City Trac. & El. Co., 143 Mich. 493, 13 Det. Leg. N. 15, 107 N. W. 94.

65. Evidence that the driver of a wagon looked but saw no car and as he drove up the track a car struck his wagon, that the motorman saw him when the car was forty feet distant and when he saw the plaintiff was not going to get out of the way he reversed his car and did all that he could to stop it and if it had been equipped with sand appliances he could have stopped it in time, is sufficient to warrant a charge on discovered peril. Dallas Consol. Elec. St. R. Co. v. Com. [Tex. Civ. App.] 100 S. W. 1019. Where a car collided with an open grocery wagon, it was error to refuse to instruct that if the driver saw the car approaching the question of warning given by the motorman was unimportant. Kerin v. United Trac. Co., 102 N. Y. S. 423. One who negligently attempts to cross in front of an approaching car cannot recover unless those in charge of the car are guilty of willful and wanton negligence. Harris v. Lincoln Trac. Co. [Neb.] 111 N. W. 580.

66. One approaching a track with which he is familiar must avail himself of his knowledge of the locality and reasonable use of his senses to prevent accident. Weldon v. People's R. Co. [Del.] 65 A. 589.

67. Where the driver of a vehicle testifies that he did not look until his horse was stepping onto the track and then it was too late to avert a collision, he was guilty of contributory negligence in failing to look and listen before attempting to cross the track. Fechley v. Springfield Trac. Co., 119 Mo. App. 358, 96 S. W. 421. Where, in an action against an electric railway company, it appeared that the plaintiff, approaching a grade crossing driving a wagon, if he had looked, could have seen a fully lighted car approaching from a long distance, but failed to do so, a nonsuit was properly entered. Griffith v. West Chester St. R. Co., 214 Pa. 293, 63 A. 740. It is not enough to look when some distance away from the track, and then not to look again. The driver must look immediately before going on the track. A driver of a team is guilty of contributory negligence where he fails to look before going on street railway tracks at the intersection of two streets. Timler v. Philadelphia Rapid Transit Co., 214 Pa. 475, 63 A. 824.

68. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436.

69. Indianapolis St. R. Co. v. Bolin [Ind. App.] 78 N. E. 210. A driver of a truck who sees a car approaching at some distance may rely on the presumption that the motorman will use ordinary care to prevent collision. Littlefield v. New York City R. Co., 101 N. Y. S. 75.

70. One crossing a car track at night may assume that cars will not be run at a reckless rate of speed over crossings, without a headlight. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436.

71. The driver of a vehicle may proceed to cross a track in front of an approaching car only when he has reasonable ground to believe that he can do so in safety if both he and those in charge of the car act with reasonable regard to the rights of the other. Indianapolis St. R. Co. v. Bolin [Ind. App.] 78 N. E. 210. The driver of an ordinary vehicle is justified in proceeding to cross a street railway track in the face of an approaching car only when he has reasonable ground for believing that he can pass in safety when both he and those in charge of the car act with reasonable regard to the rights of each other. McCarthy

Whether one may assume that he has time to cross safely may be a question of fact.[72] The questions of negligence of the company and contributory negligence of the driver of a vehicle are generally held questions for the jury,[73] unless the evidence and circumstances show negligence as a matter of law.[74]

v. Consol. R. Co. [Conn.] 63 A. 725. In an action against a street railroad for injuries to plaintiff's horse in a collision between plaintiff's team and a car it appeared that, when plaintiff drove into the street in which the tracks were laid, the car was a block away, coming at a speed of fifteen miles an hour, and the team was moving four or five miles an hour; that plaintiff undertook to cross the track, and, when he saw that a collision was probable, turned his team sharply in the direction in which the car was going, held that these facts did not show contributory negligence. Clancy v. New York City R. Co., 100 N. Y. S. 1046. A driver of a vehicle has a right to cross the track between street crossings where he sees a car approaching up a steep grade at one hundred and fifty feet distant. Philbin v. Denver City Tramway Co. [Colo.] 85 P. 630. A complaint alleging that while the driver of a vehicle was attempting to cross in front of a car approaching up a steep grade one hundred and fifty feet distant, he was detained on the track because it was raised above the surface and had no reason to believe that his horse could not safely pull over, negatived any imputation of negligence of the driver on account of the raised track. Id. A driver of a vehicle who when within ten or fifteen feet of the track can see no car approaching for five hundred feet is not negligent in attempting to cross. Heitz v. Yonkers R. Co., 102 N. Y. S. 964. Evidence insufficient to show contributory negligence as a matter of law where one who attempted to cross saw the car approaching over two hundred feet away but misjudged its speed and it appeared that the car was running at about twenty miles an hour and run one hundred and forty feet after the collision. Indianapolis St. R. Co. v. Bolin [Ind. App.] 78 N. E. 210.

72. In an action for a collision between a vehicle and a car running at an excessive rate of speed, it was error to instruct that it was not negligence for the motorman to assume that a person would not attempt to cross the track so near to the car as to render collision probable, it being for the jury to determine whether a person might not assume that he could cross safely. Bresee v. Los Angeles Trac. Co. [Cal.] 85 P. 152.

73. **Questions of negligence and of contributory negligence held for the jury** where the driver of a vehicle was injured in a collision. Indianapolis Trac. & T. Co. v. Smith [Ind. App.] 77 N. E. 1140. Questions of negligence and contributory negligence held for the jury where a collision occurred between a car and a wagon on a bright morning and evidence was conflicting as to speed of the car and whether the gong was sounded. Erb v. Boston El. R. Co., 191 Mass. 482, 78 N. E. 117. If a driver approaching a track checks his horse and at the same time the motorman applies the brakes and stops the car, and the driver urges on his horse and at the same instant the motorman releases his brakes, it is a question for the jury whether either was negligent. Weinberger v. North Jersey St. R. Co. [N. J. Err. & App.] 64 A. 1059. Questions of negligence and contributory negligence held for the jury where a car collided with a wagon while the driver was unloading. James v. Interstate Consol. St. R. Co. [Mass.] 79 N. E. 264. Questions of negligence and contributory negligence held for the jury where a car collided with a vehicle. Green v. Haverhill & A. St. R. Co. [Mass.] 79 N. E. 735; Stubbs v. Boston & N. St. R. Co. [Mass.] 79 N. E. 795. Evidence as to negligence and contributory negligence held for the jury. Olney v. Omaha, etc., R. Co [Neb.] 111 N. W. 784.

Question of negligence held for the jury where the driver of a buggy collided with a car. Sturgeon v. Beaver Valley Trac. Co. [Pa.] 65 A. 757. Question of negligence held for the jury where a car collided with a wagon, injuring the driver. Mortimer v. Beaver Valley Trac. Co. [Pa.] 65 A. 758. Question of negligence held for the jury where a car collided with a buggy at night. Barto v. Beaver Valley Trac. Co. [Pa.] 65 A. 792. Question of negligence held for the jury where a car collided with a wagon at a crossing. Emmel v. Pittsburg Rys. Co. [Pa.] 65 A. 1083. Where it is charged that a car was being run at a high and dangerous rate of speed, which was the cause of the collision, the issue so tendered is for the jury to determine. Indianapolis St. R. Co. v. Bolin [Ind. App.] 78 N. E. 210. Question of negligence where a conductor who knew that a horse was on the street unattended, in failing to notify the motorman of such fact, held for the jury. Carey v. Milford & U. St. R. Co. [Mass.] 78 N. E. 1001. Whether the motorman saw the peril of one who was injured by his team taking fright at a car held for the jury. Folz v. Evansville Elec. R. Co. [Ind. App.] 80 N. E. 868. Question of negligence of the company held for the jury where a person before crossing looked and saw a car a block distant and driving at a slow trot, the car struck the rear of the wagon. Muller v. New York City R. Co., 101 N. Y. S. 98. Whether the motorman could have stopped the car in time to avoid accident after discovering a wagon on the track held a question for the jury. Cross v. St. Louis Transit Co., 120 Mo. App. 458, 97 S. W. 183. Question of negligence held for the jury where a car collided with a vehicle. White v. St. Louis, etc., R. Co. [Mo.] 101 S. W. 14.

Question of contributory negligence in momentarily leaving a horse on the street unattended held for the jury. Carey v. Milford & U. St. R. Co. [Mass.] 78 N. E. 1001. Where in an action for a collision between a car and a vehicle, the driver of the latter testified that he was driving along the car track, in a covered wagon and before starting to cross he looked as far as he could around the cover, it was a question for the jury whether he should have stopped before driving onto the track. Stubbs v. Boston & N. St. R. Co. [Mass.] 79 N. E. 795. Evidence of contributory negligence held for the jury where one crossing the street in a buggy was struck by a car. Grogan v. Boston El. R. Co. [Mass.] 80 N. E. 485. Where

the driver of a wagon was killed in a collision, the question of his contributory negligence was held for the jury. Chaput v. Haverhill, etc., R. Co. [Mass.] 80 N. E. 597. Where one about to drive across the track saw a car at some distance but did not look again, the question of his contributory negligence was for the jury. Muller v. New York City R. Co., 101 N. Y. S. 98. Question of contributory negligence in driving along the track held for the jury. Ciarcia v. Westchester Elec. R. Co., 102 N. Y. S. 428. Whether one was guilty of contributory negligence in not looking the moment he was about to drive onto the track is a question for the jury where he had looked shortly before and at the time it was difficult to distinguish the headlight on the car from other lights, and it was impossible to see a car for any great distance. Niemyer v. Washington Water Power Co. [Wash.] 88 P. 103. Question of contributory negligence held for the jury where a car collided with a vehicle. Carey v. Metropolitan St. R. Co. [Mo. App.] 101 S. W. 1123. When a driver approaches a track on which a car is running in his direction, if from the distance of the car and assuming that it is equipped with brakes and a man to apply them, he may reasonably determine that he has acquired a right to cross first, it is a question for the jury whether the facts justifying that determination are established, and whether the driver exercised reasonable judgment. Weinberger v. North Jersey St. R. Co. [N. J. Err. & App.] 64 A. 1059.

74. It is contributory negligence for the driver of a vehicle to attempt to cross in front of an approaching car without looking. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. One who drove onto the track knowing that a car was close behind him traveling at a high rate of speed, and that he could not get across in front of it is guilty of contributory negligence. Daniels v. Bay City Trac. & El. Co., 143 Mich. 493, 13 Det. Leg. N. 15, 107 N. W. 94. Where one riding in a carriage at the invitation of and being driven by another, does nothing to ascertain his danger or avoid injury to himself, he is guilty of contributory negligence. Fechley v. Springfield Trac. Co., 119 Mo. App. 358, 96 S. W. 421. Where plaintiff, riding in a closed laundry wagon, drove across a car track where he could have seen a car coming if he had looked, he is guilty of contributory negligence. Kannenberg v. Conestoga Trac. Co. [Pa.] 64 A. 680. In an action to recover for a collision between a street car and plaintiff's wagon, where the evidence shows that if plaintiff had continued on his course, he would have cleared the track before the car reached the point of crossing, but, having changed his mind, he attempted to back off, and that the motorman acted on the belief that he would succeed, and plaintiff acted on the same belief, there can be no recovery. Baicker v. People's St. R. Co. [Pa.] 64 A. 675. Where plaintiff, while standing with his cab three yards from a street car track, saw a car approaching at half speed, but turned and drove on the track, and was struck by the car, he cannot recover. Costello v. Forty-Second St., etc., R. Co., 50 Misc. 628, 98 N. Y. S. 648. Deceased, occupying a covered vehicle, with the side curtains on, and driving a gentle horse under perfect control, going at a moderate walk, approached a street railroad track at a point where, just before going on the track, she could have seen a car at a distance of more than five hundred and forty-one feet. Just as the horse had passed over the track, the buggy was struck by a car, and deceased was killed. Experiments showed that, before going on the track, the car was within the view of the deceased. A person some distance farther from the approaching car than deceased heard it, and there was undisputed evidence that the speed of the horse was not increased before or at the time the vehicle reached the track. Deceased had normal hearing and sight, and was a woman of at least ordinary intelligence. Held, that she was guilty of contributory negligence, as a matter of law. Walsh v. Fonda, etc., R. Co., 99 N. Y. S. 773. In an action for death from a collision between a street car and a wagon while crossing the track, where it appeared that the plaintiff could have seen the car if he had looked and heard it if he had listened, he was held guilty of contributory negligence. Higgins v. St. Louis & S. R. Co., 197 Mo. 300, 95 S. W. 863. Where a driver about to cross a track saw a car sixty-five feet distant and the motorman, though he must have seen the vehicle, approached at a high speed, held the motorman was negligent as he could have stopped the car in time to avoid the accident. Littlefield v. New York City R. Co., 101 N. Y. S. 75.

Evidence sufficient to show contributory negligence as a matter of law where a car collided with a vehicle. Harris v. Fitchburg & L. St. R. Co. [Mass.] 78 N. E. 773. Where a cart was injured in a collision, the owner of it was chargeable with the negligence of his driver. Weldon v. People's R. Co. [Del.] 65 A. 589. Where the driver of a vehicle about to cross the track drives so close to it as to be hit by an approaching car while turning into the space between the track and the curb in endeavoring to avoid the car, he is guilty of contributory negligence. McClelland v. Pittsburg Rys. Co. [Pa.] 66 A. 76. Evidence sufficient to show contributory negligence where one drove onto the track in front of an approaching car. Cole v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 555. Evidence sufficient to show contributory negligence where a car collided with a hose cart which was responding to a fire alarm. Wood v. New Orleans R. & Light Co., 117 La. 119, 41 So. 436. Evidence insufficient to show absence of contributory negligence where a car collided with an ice cream delivery wagon. Bernstein v. New York City R. Co., 102 N. Y. S. 799. Evidence sufficient to show contributory negligence where one without looking drove onto the track immediately behind a car and was struck by a car coming from the opposite direction on the other track. MacGuire v. New York City R. Co., 102 N. Y. S. 749. Evidence sufficient to show contributory negligence and freed from negligence where the driver of a truck attempted to cross in front of a car not twenty feet off and the motorman did all in his power to stop the car and avert the collision. Litzour v. New York City R. Co., 101 N. Y. S. 990. Evidence sufficient to show contributory negligence as a matter of law where one drove onto the track directly in front of an approaching car. Harris v. Lincoln Trac. Co. [Neb.] 111 N. W. 580.

Imputed negligence.[75]—The negligence of a driver of a vehicle cannot be imputed to a person riding in the vehicle.[76]

Driving on or near the tracks.[77]—The driver of a vehicle has a right to drive over the portion of the street occupied by the car tracks,[78] but he must be on the alert [79] and take steps to avert injury to himself when he becomes aware that a car is approaching.[80] He may assume that cars approaching from the rear will keep proper lookout and exercise ordinary care to prevent injury to him,[81] and will not be run at a negligent and reckless rate of speed.[82] A motorman may assume that one driv-

75. See 6 C. L. 1575.

76. The negligence of the driver of a vehicle in which a boy sixteen years old is riding is not imputable to the boy. Peterson v. St. Louis Transit Co. [Mo.] 97 S. W. 860. Where a fireman was killed in a collision between a hose cart and car, the negligence of the driver of the cart was not imputable to him. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Where one riding in a carriage with which a car collided is injured, the negligence of the driver is not imputable to him, though such driver was not a common carrier. Fechley v. Springfield Trac. Co., 119 Mo. App. 358, 96 S. W. 421.

77. See 6 C. L. 1575.

78. Where one was injured by the overturning of his sleigh on a ridge of snow between car tracks, and it appeared that he could only drive in the space occupied by the track and tipped while turning to let a car pass, he was not negligent as a matter of law in attempting to turn back so as to get on the other side of the street. McMahon v. Lynn & B. R. Co., 191 Mass. 295, 77 N. E. 826.

79. Evidence sufficient to show contributory negligence where one was driving on the track with his cap pulled down over his ears and knowing that a car might overtake him, and there was no necessity for his driving on the track. Abbott v. Kansas City El. R. Co. [Mo. App.] 97 S. W. 198.

80. Contributory negligence is not shown where one testified that he was driving close to the track because obstructions in the street forced him to do so, but that when he saw a car coming one hundred and fifty feet distant he immediately turned his horses and would have been safe in a moment's more time. Mertens v. St. Louis Transit Co. [Mo. App.] 99 S. W. 512. Plaintiff, the driver of a mail wagon, was injured by a street car striking the step of his wagon as the car rounded a curve. Plaintiff knew the rear end of the car would swing out and he stopped when the part of the car which struck the wagon was sixty-five feet distant. Plaintiff's horse was under complete control, and if plaintiff had pulled in closer to the curb, as he might have done, the accident would have been avoided. Held that plaintiff was guilty of contributory negligence precluding a recovery. Waters v. United Trac. Co., 99 N. Y. S. 763. Evidence insufficient to show negligence where a car ran into a vehicle which was being driven on the track in front of the car, which was seen by the driver, and other persons in the vehicle in time to get out of the way and warning was given by the car in time to have avoided the accident. Schneider v. Mobile Light & R. Co. [Ala.] 40 So. 761.

81. One driving along a street may presume that cars approaching from the rear will keep proper lookout and exercise ordinary care to prevent injury to him. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945. In an action for a collision between a vehicle and car, an instruction on contributory negligence that if the speed of the car was suddenly and without warning increased, so that the person injured could not by the exercise of ordinary care avoid the accident, he could not be guilty of contributory negligence, was proper. Indianapolis St. R. Co. v. Coyner [Ind. App.] 80 N. E. 168. A complaint alleging that, while one in the exercise of due care was driving along a street, a car was negligently run against the rear end of his wagon, is sufficient to show the duty owed the injured person by the company and its breach. Blue Ridge Light & Power Co. v. Tutwiler [Va.] 55 S. E. 539. A person driving along the street close to the track may assume that operatives of cars approaching from the rear will look out for his safety and avoid running into him. Mayes v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 612. Where it appeared that one driving along the track relied on hearing the gong and there was evidence that it was not sounded, an instruction that if plaintiff's peril was discovered by the motorman in time to have avoided the collision, and the plaintiff was free from negligence he could recover, was proper. Recktenwald v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 557. An instruction that it is the duty of a driver of a furniture van to use ordinary care to ascertain the approach of cars, and if he could have avoided the collision he could not recover though the motorman failed to give warning of the car's approach, was erroneous, as the driver was entitled to rely on the gong being sounded on the approach of a car and failure to look back was not such contributory negligence as precluded recovery. American Storage & Moving Co. v. St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184.

82. Where a van was struck from the rear on a very dark night and it appeared that the only portion of the street on which it could travel was on the track, and it appeared that the car was traveling at a high rate of speed, it was held a question for the jury whether the rate of speed was dangerous and reckless. American Storage & Moving Co. v. St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184. Where the evidence, in a suit for damages for injury to a team and carriage which had been struck by a street car, goes to show that the team was being driven parallel with the track and in the same direction the cars run, and to avoid another team which stood in the way was compelled to turn upon the track, when it

ing a vehicle on the track will get off in time to avoid being injured,[83] but if he sees a vehicle on the track or so near to it as to be in danger of injury and can stop the car in time to avoid collision without danger to the passengers and fails to do so, the company is liable.[84] Questions of negligence and contributory negligence are generally held to be of fact,[85] unless the evidence or circumstances show otherwise as a matter of law.[86]

Frightening horses.[87]—A street railway company is not liable for injuries caused by horses taking fright at cars in the absence of negligence,[88] but it is negligence

was struck by a car coming up behind and running very rapidly, it is not error to refuse to direct a verdict for the defendant on the ground of negligence by the driver of the team. Northern Ohio Trac. Co. v. Drown, 7 Ohio C. C. (N. S.) 549.

83. An instruction that a motorman might assume that a traveler would get off the track before a car could reach him, and that the motorman was not required to slacken speed until danger of collision was apparent, properly modified by adding, after "had a right to assume," "if he gave warning of the approach of the car." Recktenwald v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 557. A motorman is not required to stop his car until he is conscious that the driver of a preceding vehicle is heedless of his danger, but when he becomes conscious of such fact he is bound to exercise the highest degree of care. Schneider v. Mobile Light & R. Co. [Ala.] 40 So. 761. Where a car and the driver of a cart are approaching each other, each may assume that the other will act with reasonable prudence under the circumstances. Weldon v. People's R. Co. [Del.] 65 A. 589.

84. Instruction approved. White v. St. Louis, etc., R. Co. [Mo.] 101 S. W. 14. Evidence held to show that the motorman was negligent where he ran into an unloaded lumber wagon, the reach of which protruded several feet to the rear, but the collision occurred under a strong gas light and the team was light gray. Mertens v. St. Louis Transit Co. [Mo. App.] 99 S. W. 512. A gripman who sees a vehicle being driven ahead of his car so close to the track that the car cannot pass, and it is apparent because of vehicles in the way that the driver cannot get away from the track, is negligent where he does not stop his car and avert accident where he has plenty of time to do so. Mayes v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 612. If a motorman sees or should see one driving along the track in time to avoid collision and fails to exercise ordinary care to avert accident, the company is liable. Winn v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 547. Under a complaint alleging that the motorman should have seen one driving along the track in time to have avoided collision by the exercise of ordinary care, the plaintiff may recover though the humanitarian doctrine is not applicable because plaintiff's peril was the result of his own negligence. Recktenwald v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 557. In an action against a street railway company for injuries to a traveler in a collision with a car, the testimony showed that the traveler's wagon was driven for a distance of six hundred feet near the track, and that the motorman could have seen the wagon for at least that distance before he collided with it. The car ran on a down grade at a speed of twenty-five miles an hour. Speed was not checked and no signal given. Held that the traveler, though guilty of contributory negligence, was entitled to recover because of the negligence of the company. Baxter v. St. Louis Transit Co., 198 Mo. 1. 95 S. W. 856. A complaint in an action for injuries sustained in a collision, alleging that because of a ditch beside the track plaintiff was required to drive on the track and the defendant's servants in charge of the car could have discovered his peril in time to avoid injury to him, but after discovering his position negligently ran the car at a dangerous rate of speed until the collision, is good when attacked on appeal. Indianapolis Trac. & T. Co. v. Smith [Ind. App.] 77 N. E. 1140. Where because of a ditch by the side of the track a driver was compelled to drive on the car track and a motorman on a car approaching from the rear could have seen his perilous position in time to have avoided the collision, he was properly charged with the exercise of the highest degree of care. Id.

85. Evidence as to whether a motorman was negligent held for the jury. Winn v. Metropolitan St. R. Co. [Mo. App.] 97 S. W. 547. Whether it was contributory negligence to rely on hearing the gong and not looking out for an approaching car held for the jury. Id.

86. Evidence that while one was driving down a grade as a car approached slowly from the rear its wheels began to slip, and though the current was reversed and sand freely applied the car could not be stopped until it struck plaintiff's wagon, forced it into another wagon ahead, caused the pole to be broken and the plaintiff thrown out and injured, does not show negligence. Blue Ridge Light & Power Co. v. Tutwiler [Va.] 55 S. E. 539. Evidence held to show contributory negligence as a matter of law where one driving on the tracks knew that a car was approaching and turned off the track to let it pass, but before it did pass turned back onto the track. Robinson v. Crosstown St. R. Co., 103 N. Y. S. 58.

87. See 6 C. L. 1578.

88. Question of negligence held for the jury where one was injured by his team becoming frightened at a street car. Carger v. Macon R. & Light Co., 126 Ga. 626, 55 S. E. 914 Evidence insufficient to show negligence where a horse became frightened at a car and jumped onto the track where a collision ensued, there being ample space for the vehicle to pass and the car was not running at an unusual rate of speed. Moxley v. Southwest Missouri Elec. R. Co. [Mo. App.] 99 S. W. 763. Where plaintiff's horse was frightened by the customary noise made in starting a car equipped with compressed air

for a motorman who sees or should see a frightened or unmanageable horse near the track in front of his car to fail to use every reasonable means to prevent a collision.[89] It is not negligence per se to leave a horse attached to a carriage in a street unhitched,[90] but may become negligence under some circumstances.[91]

(§ 8) *D. Bicycle riders; automobiles; animals.*[92]—The law governing the use of public streets by automobiles is the same as that governing the use of such streets by carriages or other ordinary vehicles.[93] The same rule applies as to bicycle rider,[94] and no recovery can be had unless negligence on the part of the company be shown.[95]

brakes, there was held to be no sufficient evidence of defendant's negligence. Hoag v. South Dover Marble Co., 50 Misc. 499, 100 N. Y. S. 639. Where a motorman sees or should eee a horse which is becoming frightened, he must do what he can to avert accident, but if he sees it too late to avoid injury, the company is not liable where the horse rears and alights immediately in front of the car. Olney v. Omaha, etc., R. Co. [Neb.] 111 N. W. 784. Where a horse was frightened by a car run with snow scrapers and ran in front of the car and was injured, evidence insufficient to show negligence on the part of the company. Moulton v. Lewiston, etc., R. Co. [Me.] 66 A. 388. Speed of car held pertinent on the question of negligence where a horse was frightened and in its frightened condition was followed by the car running at a high rate of speed. Applegate v. West Jersey & S. R. Co. [N. J. Err. & App.] 65 A. 127. A complaint in an action by one injured by his team taking fright at a car which does not allege, except by way of recital, that the team would not have become unmanageable if the car had been stopped, nor that failure to stop was the proximate cause of the injury, etc., held demurrable. Folz v. Evansville Elec. R. Co. [Ind. App.] 80 N. E. 868.

89. Heidelbaugh v. People's R. Co. [Del.] 65 A. 587.

90. Moulton v. Lewiston, etc., R. Co. [Me.] 66 A. 388.

91. Where left in the street where there is a car line at a time when conditions are such that cars may be expected to run with snow scrapers, calculated to frighten horses. Moulton v. Lewiston, etc., R. Co. [Me.] 66 A. 388. In such case there can be no recovery where the horse becomes frightened, runs in front of the car, and is injured. Id.

92. See 6 C. L. 1578.

93. The driver of an automobile, approaching a street railway crossing, must use due care. He should have his automobile under control and should be on the lookout for approaching cars. Garrett v. People's R. Co. [Del.] 64 A. 254. A complaint alleging that while one was driving an automobile at night at a point where the highway took a sharp turn and the glare of the headlight on a car approaching at an unlawful rate of speed so blinded him that he could not see and no effort was made to stop the car, and in trying to get out of danger he ran into a trolley post and demolished his machine, states a cause of action for negligence. Garfield v. Hartford & S. St. R. Co. [Conn.] 65 A. 598; Bell v. Hartford & S. St. R. Co. [Conn.] 65 A. 600. Where deceased was killed while crossing a street railway track in an automobile driven by his employer, and there was no evidence that the deceased looked or took any precaution while the employer looked once when some distance away and did not look again until the automobile was on the track, it was held that a judgment for the plaintiff could be sustained. Ward v. Brooklyn Heights R. Co., 100 N. Y. S. 671.

94. The rights of a street car and a bicyclist at street crossings are equal. A bicyclist has a right to assume that a car will approach a crossing at proper speed and under proper control. Where a person riding a bicycle upon the street in the usual way reaches a point twenty feet from a street car track and sees a car approaching one hundred and fifty feet distant, his failure to stop and wait until the car passed is not contributory negligence as a matter of law. Brooks v. International R. Co., 112 App. Div. 555, 98 N. Y. S. 765. A bicycle rider approaching a car track at night is not bound to stop, alight from his wheel, and look intently for cars before attempting to cross. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436. Where a bicycle rider approaching a crossing at night saw a car go by and looked but did not see another one approaching without a headlight, and believing the noise he heard was made by the car just passed he attempted to cross and was struck, held he was not guilty of contributory negligence in failing to hear the car which struck him. Id. Where one riding a bicycle at night was struck by a car while crossing the street proof that the motorman stood in the front of the car and that no headlight was carried was sufficient to show that the motorman had notice that the car carried no headlight. Id.

95. Where one riding a bicycle within a foot or two of the track swerved suddenly onto the track without looking back and was immediately struck by a car following him, held the motorman was not guilty of negligence in failing to anticipate that the rider would attempt to cross and in failing to give warning or stop the car after he started to cross. Harbison v. Camden & Suburban R. Co. [N. J. Law] 65 A. 868. A bicycle rider riding along the street within a foot or two of the track who suddenly swerves onto the track without looking back and is struck by a car following him is guilty of contributory negligence. Id. Instruction held erroneous as withdrawing the issue of contributory negligence from the jury where a bicycle rider was struck by a car approaching from the rear. Romeo v. Union R. Co., 102 N. Y. S. 844. Where a bicycle rider was thrown from his wheel onto the track, an instruction that both he and the company had equal rights in the highway, except that the company had a preference right to the track and "consequently it was

Animals.[96]—No recovery can be had for animals killed, in the absence of negligence.[97] A motorman is under no duty to stop his car to avoid injury to a dog,[98] unless it is apparent to him that the dog is oblivious to his danger.[99] It is not contributory negligence to permit animals to run at large outside stock limits.[1]

§ 9. *Damages, pleading and practice in injury cases.*[2]—Whether a notice of claim is required depends on statute.[3]

Pleadings.[4]—Negligence,[5] or willfulness[6] of the defendant must be clearly al-

plaintiff's duty to avoid being on the track or so close to it as to be in danger," did not charge that the bicyclist had no right to the street though he had been thrown there. Hall v. Washington Water Power Co. [Wash.] 89 P. 553. Evidence sufficient to sustain a verdict for the company where a bicycle rider was thrown from his wheel and injured by a car. Id. Instruction on willful negligence of a motoneer in running down a bicycle rider held correct. Rawitzer v. St. Paul City R. Co., 98 Minn. 294, 108 N. W. 271.

96. See 6 C. L. 1578.

97. In an action against a street railroad for killing a hog, the burden is on the plaintiff to show that the hog was killed through the negligence of the defendant, and there can be no recovery in the absence of evidence that the hog went on the track in front of the motorman in time for him to have stopped the car before striking it, had he seen it and used all the means in his power to that end. Little Rock R. & Elec. Co. v. Newman, 77 Ark. 599, 92 S. W. 864. In an action against a street railroad for the killing of a hog, it was proper to admit evidence that the motorman remarked at the time "that the hog jumped on the track right in front of the car." Id.

98. The motorman of a street car is under no duty to stop the car to avoid injuring a dog, unless there is something about the dog's action and movements, or inaction, to indicate that he is unable to get off the track or oblivious of the approach of the car, but otherwise the motorman is under the duty to use ordinary care to frighten the dog off or check or stop the car. Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281.

99. When dogs are engaged in fighting on the track apparently oblivious to danger, a motorman on discovering their peril must exercise reasonable care to avoid injuring them. Must give proper signals or check the speed of his car. Harper v. St. Paul City R. Co., 99 Minn. 253, 109 N. W. 227.

1. Permitting a cow to run at large outside "stock limits" is not contributory negligence. Little Rock Trac. & Elec. Co. v. Hicks [Ark.] 96 S. W. 385. It is not contributory negligence to allow a hog to run at large outside the "stock limit." Little Rock R. & Elec. Co. v. Newman [Ark.] 92 S. W. 864.

2. See 6 C. L. 1579.

3. Under Pub. St. c. 113, § 32, requiring street railway companies to repair the portion of the streets occupied by their tracks, and c. 52, § 19, providing that one injured because of a defect in a highway must give notice prior to suing, held where one was injured by his sleigh tipping on a ridge of snow between the tracks of a railway, the ridge having been thrown up by a snow plow, he was not required to give notice. McMahon v. Lynn & B. R. Co., 191 Mass. 295, 77 N. E. 826.

4. See 6 C. L. 1579.

5. A complaint alleging that the motorman negligently left his post as he approached a child standing near the track, and negligently waved at the child and so frightened it that it ran onto the track in front of the car, and was struck before the motorman could regain his position and stop the car, shows that the act of the motorman was within the scope of his employment. Wahl v. St. Louis Transit Co. [Mo.] 101 S. W. 1. An allegation that intestate was in a vehicle on a public highway on which defendant's cars were being operated near the intersection of another highway sufficiently shows the relation of the parties from which a duty to exercise care could be inferred. Birmingham R., Light & Power Co. v. Clarke [Ala.] 41 So. 829. Allegations that while one was driving in a populous part of a city across a car track his wheel caught and checked the horse while the car was about forty rods distant and that the collision was due to the motorman wantonly, recklessly, or intentionally, failing to use due care after he knew or should have discovered the peril, does not allege willful or reckless conduct. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. Such complaint, however, sufficiently alleges simple negligence. Id. An allegation that defendant's servant in charge of the car so negligently conducted himself as to run the car against a person is sufficient and not objectionable as a conclusion. Birmingham R., Light & Power Co. v. Ryan [Ala.] 41 So. 616. A complaint alleging that a car ran against a child and that he died by reason of and as a proximate result of the negligence of the company in or about the management of the car charges negligence. Birmingham R., Light & Power Co. v. Jones [Ala.] 41 So. 146. A complaint that a company in disregard of its duty to stop a car, by its agents in charge of the car, negligently ran the car against a horse, sufficiently charges the company with negligence. Indianapolis & N. W. Trac. Co. v. Henderson [Ind. App.] 79 N. E. 539. Where an automobile was injured in a sparsely settled district an allegation that a search light of the dimensions carried by the car was not permitted to be used in populous districts was properly expunged as irrelevant. Garfield v. Hartford & S. St. R. Co. [Conn.] 65 A. 598.

6. Willfulness or wantonness cannot be charged unless it is alleged that the motorman knew that the place where the accident occurred was one where persons passed so frequently that it was probable that persons would be on the track, or that the car was run at such speed that it could not be stopped after one was discovered, or that

leged.[7] Allegations must not be repugnant[8] and there must not be a departure.[8] A causal connection between the negligence alleged and the injury must be apparent.[9] They are to be so construed as to give effect to the intent of the pleader.[10] Contributory negligence as a defense must be pleaded.[11] An allegation that defendant owned and operated a street railway is not denied by a general issue.[12]

Burden of proof and evidence.[13]—One suing for an injury alleged to have been negligently inflicted has the burden of proving negligence,[14] and that it was the proximate cause of the injury.[15] It is presumed where a pedestrian was killed that

the motorman was guilty of willful misconduct after discovering his peril. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. A complaint alleging that the company's servants while running a car "recklessly and wantonly or intentionally" ran it against the wagon on which plaintiff was driving is not demurrable in that it is uncertain whether simple or wanton negligence is charged and that it joins disjunctively in the same count simple and wanton negligence. Garth v. North Alabama Trac. Co. [Ala.] 42 So. 627. A complaint alleging that after a motorman discovered a traveler's peril he wantonly and recklessly ran the car against his wagon, whereby he was injured, sounds in case and not in trespass. Anniston Elec. & Gas. Co. v. Elwell, 144 Ala. 317, 42 So. 45. A complaint alleging that the company wantonly caused or allowed a car to run against a child, thereby wantonly and negligently causing its death, charges an intentional wrong. Birmingham R. Light & Power Co. v. Jones [Ala.] 41 So. 146.

7. A complaint for injuries to a horse alleging that while it was being driven along the street it became frightened and ran on the track in clear view of the motorman who saw or should have seen it in time to stop the car, but in disregard of his duty he ran the car against the horse, held not vitiated because of alternative averments. Indianapolis & N. W. Trac. Co. v. Henderson [Ind. App.] 79 N. E. 539. A complaint in an action for injuries at a crossing alleging in one count that the pedestrian failed to keep a vigilant lookout and also that he failed to stop his car in the shortest space possible does not allege repugnant grounds of negligence. McQuade v. St. Louis & S. R. Co. [Mo.] 98 S. W. 552. Where a complaint alleges that a person was killed by negligence, first in excessive speed and second in not stopping the car when a stop was called for and could have been made, there was no such contradictions in the allegations as to require an election as to which allegation would be relied upon. White v. St. Louis, etc., R. Co. [Mo.] 101 S. W. 14.

8. There is no departure between an original petition alleging that the rate of speed of a car was thirty miles an hour and an amendment alleging that it was in excess of twenty miles per hour. Carey v. Metropolitan St. R. Co. [Mo. App.] 101 S. W. 1123.

9. A complaint setting out a speed ordinance and alleging its violation held demurrable as not showing causal connection between such violation and the injury, nor why the person injured was on the track. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45.

10. A complaint charging certain acts of negligence and that certain other acts constituting statutory negligence contributed to the injury, should be construed that such statutory negligence contributed to other negligence alleged. McQuade v. St. Louis & S. R. Co. [Mo.] 98 S. W. 552; Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737.

11. In an action against a street railroad for injuries, contributory negligence must be pleaded by defendant. Wise v. St. Louis Transit Co., 198 Mo. 546, 95 S. W. 898. Plea setting up contributory negligence in failing to stop, look and listen is not demurrable, because not showing under what circumstances it is necessary to take all of such precautions. Garth v. North Alabama Trac. Co. [Ala.] 42 So. 627.

12. Can be reached only by special plea denying the fact. Chicago Union Trac. Co. v. Jerka [Ill.] 81 N. E. 7.

13. See 6 C. L. 1579.

14. Halloran v. Worcester Consol. St. R. Co. [Mass.] 78 N. E. 381; Heidelbaugh v. People's R. Co. [Del.] 65 A. 587. One whose vehicle is injured in a collision has the burden to prove negligence, the railway company the burden to prove contributory negligence. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945. Where a pedestrian was killed the burden is on the plaintiff to prove that deceased was in the exercise of due care. Adams v. Boston & N. St. R. Co., 191 Mass. 486, 78 N. E. 117. Evidence sufficient to show that the defendant, and not another street car company, was in possession of a line where a car jumped the track and collided with a wagon. Chicago Union Trac. Co. v. Jerka [Ill.] 81 N. E. 7. Where a witness testified that a collision occurred in a certain city describing the locality, it justified a finding that it occurred within the corporate limits. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. Where a motorman saw a pedestrian 50 or 60 feet ahead of the car where the track was slippery and there was a shrply descending grade, expert testimony that the car could have been stopped within such distance was not essential to recovery. Richmond v. Metropolitan St. R. Co. [Mo. App.] 100 S. W. 54. One who sued for an injury negligently inflicted is not bound to exclude all possibility of the accident having happened in some other way than alleged, but is only required to show by a preponderance of evidence that it happened in the manner alleged. Woodall v. Boston El. Ry. Co. [Mass.] 78 N. E. 446.

15. Where one's cart was injured in a collision he has the burden to prove that the railway company's negligence was the proximate cause of the injury. Weldon v. People's R. Co. [Del.] 65 A. 589. In an action against a street car company for the

he was in the exercise of ordinary care,[16] but where a person who goes upon the track without stopping to look and listen is killed, it is presumed that his conduct contributed to his death.[17] The usual rule as to testifying to a conclusion applies.[18] A speed ordinance is admissible on the question of negligence though violation thereof is not declared on.[19] Injuries other than that sued for may be shown to illustrate the force of the collision.[20] Fire department rules not known to the street car company are not admissible.[21] Habits of the driver of a vehicle are admissible on issue of contributory negligence.[22] The weight to be given testimony is for the jury to determine.[23] Within what distance a particular car can be stopped

death of plaintiff's horse, alleged to have resulted from injuries sustained in a collision, it was necessary for the plaintiff, in the absence of a post mortem, to prove that the injuries inflicted were adequate to cause death, or if not adequate of themselves, that they afterwards resulted in a condition which was an adequate cause of death, and that nothing intervened, except the accident, to which the death could be attributed. It was error to charge that in the absence of evidence as to the cause of death there was a legal presumption that it occured from the accident. Nocera v. Brooklyn Heights R. Co., 113 App. Div. 419, 99 N. Y. S. 349. A finding that negligence of the company in imposing on the motorman the dutles of the conductor, and in not keeping a proper lookout, were the proximate causes of an injury, is proper as the company is liable in either case. Glettler v. Sheboygan Light, Power & R. Co. [Wis.] 109 N. W. 973.

16. Goff v. St. Louis Transit Co. [Mo.] 98 S. W. 49. It is presumed that one killed by a car exercised due care. Powers v. St. Louis Transit Co. [Mo.] 100 S. W. 655.

17. Birmingham R. Light & Power Co. v. Ryan [Ala.] 41 So. 616.

18. A witness may not testify that a motorman seemed to do all he could to stop the car as quickly as possible but should state what he did. Birmingham R. Light & Power Co. v. Randle [Ala.] 43 So. 355. A motorman is not entitled to testify whether he stopped the car as soon as he could but is required to state what he did, and whether that was all he could do. Id. Where a motorman testified that he first saw a person walking about three feet from the track, he was entitled to testify whether the car would have struck him at that distance in passing. Id. Testimony "that the motorman tried to stop the car" is objectionable as being a conclusion. San Antonio Trac. Co. v. Klumpf [Tex. Civ. App.] 99 S. W. 863. Opinion evidence of conductor held inadmissible. Oates v. Union R. Co., 27 R. I. 499, 63 A. 675. Testimony of a witness that a car was running at the usual rate of speed, that cars traveled along that street, and that it was pretty good rate as it was down grade there, is competent. Little Rock R. & Elec. Co. v. Green [Ark.] 93 S. W. 752.

19. In an action for death caused by collision between a street car and a vehicle, evidence of a city ordinance as to the rate at which cars were permitted to be run is admissible, though violation of the ordinance was not declared on as a ground of action. Oates v. Union R. Co., 27 R. I. 499, 63 A. 675.

20. Where plaintiff was thrown from a van loaded with furniture in a collision, evidence of the injury to the furniture after the collision is admissible for the purpose of showing the force of the impact and inferentially the speed of the car. Moore v. Westchester El. R. Co., 100 N. Y. S. 610.

21. Where a fireman was killed in a collision between a hose wagon and a car, it is not admissible to show rules of the fire department intended for guidance of the members and issued only to them. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618.

22. Where one was injured in a collision between a car and a vehicle driven by another, evidence of the habits of the driver and the injured persons knowledge thereof is admissible on the question of contributory negligence. Bresee v. Los Angeles Trac. Co. [Cal.] 85 P. 152. But in such case where it was not claimed that the accident was due to lack of control of the horses due to the manner of holding the reins, evidence of the driver's habit of driving with a loose rein was inadmissible. Id.

23. Testimony of a bystander that no bell was rung as a car approached a boy standing on the track is not devoid of probative value as against the testimony of those riding on the car that the bell was rung. Butler v. Metropolitan St. R. Co., 117 Mo. App. 354, 93 S. W. 877. Where horses were killed, positive evidence of several witnesses that there was no signal light burning on the car is not to be set aside merely because the motorman swore to the contrary. Cross v. St. Louis Transit Co., 120 Mo. App. 458, 97 S. W. 183. Where one was struck at night by a car running at a high rate of speed without a head-light, his positive testimony that he looked for a car but did not see one is not so unreliable as to require its rejection, though other witnesses testified that they were able to see the car some distance away. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436. Where persons looking for a street car in the direction from which it is coming, declare that the car which is directly in their sight had no head-light burning and was in complete darkness, their evidence is not negative in distinction to positive evidence. Cox v. Schuylkill Valley Trac. Co., 214 Pa. 223, 63 A. 599. An answer to an interrogatory that the motorman because of deliberate and willful purpose on his part ran the car against the plaintiff is in conflict with the answer to another that the motorman did not see him. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436. In an action for damages for injuries sustained

is a proper subject of expert testimony,[24] but what is a reasonably safe rate of speed for a car to be operated on a particular street is not.[25] A layman may give his opinion as to the rate of speed a car was running.[26]

Instructions[27] must be predicated on the pleadings and evidence.[28] They

by plaintiff's truck in a collision with one of defendant's cars, evidence that plaintiff looked for approaching cars before crossing a track held to be incredible, as a matter of law, as being in contradiction to matters of common knowledge. Golden v. Metropolitan St. R. Co., 49 Misc. 521, 98 N. Y. S. 848.

24. A witness who is qualified to testify concerning the operation of cars may testify as to within what distance a particular car can be stopped. Birmingham R., Light & Power Co. v. Randle [Ala.] 43 So. 355. The court, in refusing to permit a witness showing familiarity with the stopping of electric cars and the conditions and circumstances influencing the stopping of the same to testify that at the time a street car collided with a traveler the motorman made a good stop, and as quick a stop as could be made at the time and place, did not abuse its discretion. Dallas Consol. Elec. St. R. Co. v. English [Tex. Civ. App.] 15 Tex. Ct. Rep. 606, 93 S. W. 1096. It is proper to exclude testimony of a witness as to whether he knew within what distance one of defendant's cable cars when running at its usual rate of speed could be stopped, and, if so, to state within what distance it could be stopped without injury to the passengers, no showing having been made that witness was qualified to express an opinion thereon. Boring v. Metropolitan St. R. Co., 194 Mo. 541, 92 S. W. 655.

25. What is a reasonably safe speed for a car to be operated on a particular street is not a proper subject for expert testimony. Ford's Adm'r v. Paducah City R. Co., 30 Ky. L. R. 644, 99 S. W. 355.

26. A witness may testify that he did not know how fast a car was running, but judging from the ordinary speed of cars, it was running at twenty miles per hour. Little Rock Trac. & Elec. Co. v. Hicks [Ark.] 96 S. W. 385.

27. See, also, Instructions, 8 C. L. 333.

28. Where there was no evidence that a traveler was injured because of failure to turn off the track when called to by the motorman, an instruction predicated on such theory was properly refused. Davis v. Durham Trac. Co., 141 N. C. 134, 53 S. E. 617. Under allegations characterizing as negligence, high speed and failure to sound the gong, and also charging negligence in running the car against plaintiff's buggy, an instruction submitting the last clear chance doctrine is not outside the issues. Indianapolis St. R. Co. v. Marschke [Ind.] 77 N. E. 945. It is error to instruct that the jury must consider whether the motorman was negligent in not stopping or checking the speed of the car, where there was no evidence as to his ability to do so under the evidence. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Where a fireman was killed in a collision between a hose cart and car, it was proper to refuse an instruction that the instinct of self-preservation should not be considered where the attention of the jury was not in any manner called to such doctrine. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. Where a child was killed by being struck by a hand hold fastened to the side of a car, there was no error in refusing to instruct as to the duty to equip the car with fenders. Hanley v. Ft. Dodge Light & Power Co. [Iowa] 107 N. W. 523. Where there was no evidence that a car was not stopped in the shortest space possible, it was not error to nullify by instruction the effect of an ordinance providing that on the first appearance of danger the car should be stopped in the shortest space possible. Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737. Where there was testimony that tho car pushed the wagon in which plaintiff was riding six or eight feet, and that after it stopped plaintiff alighted on his feet and at no time fell to the ground, and he testified that he was not hurt, the court should have instructed that he was not injured. Dallas Consol. Elec. St. R. Co. v. Conn [Tex. Civ. App.] 100 S. W. 1019. The error in submitting to the jury, in an action against a street railway company for injuries in a collision with a car, the issue of the incompetency of the motorman because of the absence of evidence on the question, is not prejudicial, where, in obeying the instructions, the jury found that he was negligent. Ft. Smith Light & Trac. Co. v. Carr [Ark.] 93 S. W. 990. An instruction which does not follow the description of willfullness alleged is erroneous. Garth v. North Alabama Trac. Co. [Ala.] 42 So. 627. Where it was for the jury to determine whether a motorman saw a person about to cross the street and whether failure thereafter to stop the car was willful negligence, it was error to charge that there was no evidence of willful intent to injure plaintiff. Id. An instruction that if a motorman saw the danger in time to avoid the injury and did nothing to reduce the speed of the car, he was negligent, is erroneous where there was no evidence to show that there was time to do anything. Id. Where there was evidence tending to show wantonness on the part of the motorman and instruction that if the motorman saw or should have seen the danger and failed to stop the car, such conduct was willful negligence, was erroneous as not stating to whom the danger became apparent, and in failing to postulate wanton conduct in failing to stop the car. Anniston Elec. & Gas Co. v. Elwell, 144 Ala. 317, 42 So. 45. An instruction hypothesizing failure of a motorman to do all that a reasonably prudent motorman would do under the circumstances to save the life of a child is erroneous where it fails to further hypothesize that such fact was the proximate cause of the injury. Birmingham R. Light & Power Co. v. Jones [Ala.] 41 So. 146. An instruction which is erroneous in that it fails to hypothesize that negligence was the proximate cause of the injury is cured by a subsequent instruction which does so. Id. A plea of contributory negligence in driving on the track in front of a car does not justify an instruction based on the theory that the vehicle was suddenly driven onto the track in front of an ap-

should fairly submit the issues [29] and must not be misleading.[30] Controverted facts

proaching car. American Storage & Moving Co. v. St. Louis Transit Co., 120 Mo. App. 410, 97 S. W. 184.

29. Where an injury occured because a car collided with a vehicle from the rear, it was proper to refuse to instruct that plaintiff must prove that the collision was caused directly and "solely" by defendant's negligence. Wallock v. St. Louis Transit Co. [Mo. App.] 100 S. W. 496. Instruction construed and held not erroneous as telling the jury that the company had an absolute right to run its cars at a certain rate of speed regardless of the circumstances. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504. Instruction held not erroneous as failing to submit that the act of a motorman which caused a child to run onto the track in front of a car was within the scope of his duties. Wahl v. St. Louis Transit Co. [Mo.] 101 S. W. 1. Instructions construed and held that one using ordinary care "at the time" did not limit the time at which the person injured was required to exercise ordinary care to the moment of the collision. Chicago City R. Co. v. Ryan, 225 Ill. 287, 80 N. E. 116. Instruction held not erroneous as charging that contributory negligence was no defense. Wallock v. St. Louis Transit Co. [Mo. App.] 100 S. W. 496. Where an ordinance, giving fire apparatus responding to a call the right of way, was admitted, it was not error to set it out in the instructions and inform the jury as to the legal effect of it. McBride v. Des Moines City R. Co. [Iowa] 109 N. W. 618. In an action for death caused by collision between a street car and a vehicle, the refusal to charge that the violation of the ordinance of the city does not excuse the deceased from exercising reasonable care was error, where the court had just charged that, if the car was being propelled at a greater rate of speed than the ordinance permitted, the company was guilty of negligence as a matter of law, and that, if by reason of such negligence the injury occurred, the plaintiff was entitled to recover. Oates v. Union R. Co., 27 R. I. 499, 63 A. 675. Where, in an action against a street railroad company for injuries, there was no claim or evidence that plaintiff was injured except by being struck by the car, but there was conflict as to whether the car was stopped as soon as possible after plaintiff was thrown on the fender, defendant was entitled to an instruction that, even if defendant was negligent in failing to stop as soon as possible after plaintiff was thrown on the fender, it was not liable because plaintiff was thus carried. Lawrence v. Metropolitan St. R. Co., 99 N. Y. S. 735. Where the petition in an action for personal injuries did not allege that plaintiff received an injury to his neck, and the evidence showed such an injury, an instruction failing to limit recovery to the injuries claimed in the petition was erroneous. Dallas Consol. Elec. St. R. Co. v. English [Tex. Civ. App.] 15 Tex. Ct. Rep. 606, 93 S. W. 1096. Instruction that a motorman was not required to anticipate that the driver of a vehicle would turn onto the track before he actually attempted to do so, etc., held not to cover a request that the motorman was entitled to presume that the driver of a vehicle would remain on the right side of the street until he gave some outward indication to the contrary. Birmingham R. Light & Power Co. v. Clarke [Ala.] 41 So. 829. Failure to instruct that if a child suddenly and unexpectedly attempted to cross the track, and such act was the proximate cause of the injury, is not error where the jury found that the motorman should have discovered the child in time to have avoided the injury. Glettler v. Sheboygan Light, Power & R. Co. [Wis.] 109 N. W. 973. An instruction that plaintiff must prove the material averments of his complaint is not prejudicial to defendant because including facts additional to those alleged. Indianapolis & N. W. Trac. Co. v. Henderson [Ind. App.] 79 N. E. 539. Where a pedestrian was injured in a collision and evidence showed that the car was standing still just before the collision, the company was not prejudiced by an instruction relative to the rate of speed at which cars might be operated in the exercise of due care. Indianapolis St. R. Co. v. Hackney [Ind. App.] 77 N. E. 1048. An instruction that a traveler is not negligent as a matter of law in attempting to drive across the track, if he judged at the time this could be safely done, because of the distance of the car from the place of crossing, invades the province of the jury. Rubinovitch v. Boston El. R. Co. [Mass.] 77 N. E. 895. Instruction held not to be erroneous as rendering a street railroad responsible irrespective of the negligence of a third person which might have contributed to the accident. Steinman v. St. Louis Transit Co., 116 Mo. App. 673, 94 S. W. 799. Where the jury was instructed that if ordinary prudence demanded a signal, it was the motorman's duty to give such signal a failure to instruct as to what would be the consequence of a failure to signal, is not error where under defendant's instructions the burden was upon the plaintiff to prove enumerated alleged acts of negligence one of which was a failure to sound gong. Mullin v. St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288. Where the petition predicates negligence upon excessive speed, failure to sound gong, or to keep the car under control, and the negligent, careless, and unskillful, operation of the car, an instruction eliminating the question of speed and a failure to signal does not take from the consideration of the jury all questions of negligence averred. Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876. Instruction on degree of care required by motorman in case of sudden peril caused by plaintiff unexpectedly driving on track sustained. Bloomington & Normal R. Elec. & Heating Co. v. Koss, 123 Ill. App. 497. Refusal of instruction as to degree of care required by plaintiff before driving on track held error. Bloomington & Normal R., Elec. & Heating Co. v. Koss, 123 Ill. App. 497.

30. An instruction that if a dog was licensed he had a right to be upon the public highway, is misleading, if not erroneous. Klein v. St. Louis Transit Co., 117 Mo. App. 691, 93 S. W. 281. On an issue as to whether a car was moving it was error to charge that the jury must find that the car was not moving or was moving at the rate of

should not be assumed [31] but uncontroverted facts may be.[32] Material issues or evidence should not be ignored.[33] Requested instructions which are substantially covered by those already given may be refused.[34] If more explicit instructions than those given are desired they should be requested.[35]

three or four miles per hour. Devlin v. New York City R. Co., 102 N. Y. S. 430. In an action for injuries received in a street car accident, a charge of court which dwells upon the subject of contributory negligence as an affirmative defense, when there was no such defense interposed, and is silent as to the burden of removing a suggestion of contributory negligence found in the plaintiff's own testimony, is so misleading as to require a reversal of the resulting verdict. Cincinnati Interurban Co. v. Haines, 8 Ohio C. C. (N. S.) 77. While testimony as to speed of a car is always more or less unsatisfactory, yet when the testimony offered on that subject was the best obtainable and was worthy of consideration, the finding of a jury made with reference thereto and in the light of the surrounding circumstances should not be disturbed. Id. Instructions that whether or not a motorman was negligent depended on whether he acted as a reasonably prudent person would under the circumstances, and that if by reason of excitement or other reason he failed to do something that a prudent person would, he was negligent, while perhaps misleading, was not reversible error. Birmingham R., Light & Power Co. v. Ryan [Ala.] 41 So. 616. Where a request to charge "there must be positive proof that the car made an unusual noise" was supplemented by the court "or some other misconduct on the part of the defendant making them negligent," held not prejudicial as the jury will be deemed to have applied the instruction to the case in hand. Applegate v. West Jersey & S. R. Co. [N. J. Err. & App.] 65 A. 127. Instruction held not to give street cars carrying United States mails peculiar rights at street crossings. Tepper v. Boston El. R. Co. [Mass.] 78 N. E. 384.

31. Instruction that it is a motorman's duty to exercise reasonable dlligence to discover persons on or near the track in front of the car, and if he believes that such a person is unconscious of his danger, to use every reasonable effort to stop the car, and if he failed to do so, the company was liable, does not assume that the car could have been stopped. Indianapolis Trac. & T. Co. v. Smith [Ind. App.] 77 N. E. 1140. An instruction that the company is seeking to escape liability for injuries negligently inflicted by setting up contributory negligence assumes that there is a liability. Garth v. North Alabama Trac. Co. [Ala.] 42 So. 627. Where the evidence as to whether a car came in contact with a person injured was conflicting, it is error to assume that the car injured him. Id.

32. Where the evidence was substantially one way to the effect that there was time and space to stop a car after danger became apparent, an instruction assuming such fact is not erroneous. Deschner v. St. Louis, etc., R. Co. [Mo.] 98 S. W. 737. Where, in an action for injuries through negligence, defendant moved to dismiss the complaint on the ground that plaintiff failed to show himself free from contributory negligence, that it affirmatively appeared that he was guilty of contributory negligence, and that no negligence had been made out against defendant, it was to be assumed that plaintiff's evidence was true, and he was entitled to the most favorable inference deducible from the evidence. Volosko v. Interurban St. R. Co., 113 App. Div. 747, 99 N. Y. S. 484.

33. In an action against a street railroad for injuries to one struck by a car while crossing a street, an instruction that if defendant's servant did not have the car under control, and the injuries were caused by defendant's negligence, plaintiff was entitled to recover, was erroneous as ignoring the question of contributory negligence. Solomon v. New York City R. Co., 50 Misc. 557, 99 N. Y. S. 529. It is erroneous to ignore the motorman's duty to slacken speed upon discovering a person in a position of danger, though he was guilty of contributory negligence. Powers v. St. Louis Transit Co. [Mo.] 100 S. W. 655. Instruction held not objectionable as leaving out of view the duty of the motorman. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504. Instructions held not erroneous as ignoring issues of speed and whether a pedestrian was killed by being dragged by the car after he was struck. Id. An instruction that a motorman should keep his car under such control as to be able to bring it to a safe stop before striking one crossing the street is erroneous as ignoring the suddenness with which such person come upon the track. Garth v. North Alabama Trac. Co. [Ala.] 42 So. 627. It is proper to refuse an instruction which ignores the duty of a motorman to keep a lookout for persons on the track. Birmingham R., Light & Power Co. v. Jones [Ala.] 41 So. 146. An instruction ignoring wanton and willful conduct is erroneous where evidence shows that a car was run at a high rate of speed over a populous crossing, without signals, and where it appeared that the motorman knew of the character of the place. Birmingham R. Light & Power Co. v. Ryan [Ala.] 41 So. 616. It is error to instruct that if a person injured saw the car at such a distance as to warrant an assumption that it was safe to cross, he was not negligent in failing to look again, as it authorizes the jury to ignore circumstances that intervened between the time he saw the car and the time of the collision. Marguiles v. Interurban St. R. Co., 101 N. Y. S. 499.

34. Where the court instructed that if a person injured was guilty of certain acts constituting contributory negligence, she could not recover, it was held not error to refuse to give another instruction relative to contributory negligence. South Covington & C. St. R. Co. v. Cleveland, 30 Ky. L. R. 1072, 100 S. W. 283.

35. Instruction as to ordinary care in an action for injuries to a child held not ground for complaint on the part of the plaintiff in that the jury might have been held to believe that the company discharged its duty toward the child by exercising the

§ 10. *Statutory crimes.*[36]—A statute enacted for the regulation of steam railroads does not apply to street railways,[37] In some states a penalty is attached for failure to furnish sufficient cars and proper appliances.[38]

STREETS; STRIKES; STRIKING OUT; STRUCK JURY, see latest topical index.

SUBMISSION OF CONTROVERSY.[39]

Where a good faith affidavit is jurisdictional,[40] it cannot be waived by stipulation.[41] A special case submitted under the Court and Practice Act of Rhode Island will not be considered where all interested parties are not properly before the court [42] or do not concur in the statement of fact,[43] including those summoned by the court,[44] or where it is necessary to grant relief.[45] In the absence of a stipulation permitting it, no inferences of fact can be drawn from the agreed statement,[46] but the provisions of an annexed copy of an instrument in conflict therewith control.[47] The submission of a case at law or one under the Tucker Act,[48] upon an agreed statement of facts without a stipulation to the contrary, waives all technicalities of pleadings [49] and objections to the form of action.[50]

SUBPOENA, see latest topical index.

same degree of care that it would exercise toward a grown person where no more explicit charge was requested. Hanley v. Ft. Dodge Light & Power Co. [Iowa] 107 N. W. 593. If there is an error of omission on the subject of proximate cause in an instruction, a request for a more specific instruction should be made at the time, and no relief will be granted upon an appeal. Northern Texas Trac. Co. v. Thompson [Tex. Civ. App.] 16 Tex. Ct. Rep. 48, 95 S. W. 708.

36. See 6 C. L. 1580.

37. Code 1896, § 5368, making it an offense for a conductor to run a train without a supply of drinking water thereon, does not apply to a street railroad. Dean v. State [Ala.] 43 So. 24.

38. Hurd's Rev. St. 1905, c. 24, § 62, giving cities power to regulate street railways, authorizes an ordinance requiring, under penalty, the furnishing of sufficient cars, keep them at a certain temperature, and operate them in such manner as to prevent unnecessary noise and jarring. City of Chicago v. Chicago City R. Co., 222 Ill. 560, 78 N. E. 890. Chicago Municipal Code, §§ 1958, 1959, requiring the running of sufficient cars to prevent crowding and to furnish heat, etc., is within the police power of the city. Id.

39. See 6 C. L. 1580.

40. The affidavit required by Municipal Court Act, Laws 1902, p. 1560, c. 580, § 241, that the controversy is real and that the submission is made in good faith for the purpose of determining the rights of the parties, is jurisdictional. Weinstein v. Douglas, 101 N. Y. S. 251.

41. Weinstein v. Douglas, 101 N. Y. S. 251.

42. Where it appears that some of the numerous parties are treated as respondents upon whom service of citation should have been made, which service does not appear, and that certain other interested associations were not before the court, the action should be dismissed. In re Guild [R. I.] 65 A. 605.

43. A controversy submitted under Court and Practice Act 1905, p. 93, c. 18, § 323, cannot be determined where it is dependent upon evidence aliunde the concurrent statement. In re Guild [R. I.] 65 A. 605.

44. Where the party summoned refuses to concur in the statement, the court may properly refuse to act. In re Guild [R. I.] 65 A. 605.

45. Under Court and Practice Act 1905, p. 93, c. 18, § 323, the court has no jurisdiction to grant relief in a case submitted thereunder, and hence a special case involving the construction of a will cannot be considered where it will probably become necessary to appoint a trustee to administer a bequest. In re Guild [R. I.] 65 A. 605.

46. Hence plaintiff cannot recover unless the facts actually stated entitle him to a judgment as a matter of law. Coffin v. Artesian Water Co. [Mass.] 79 N. E. 262. Where the agreed fact merely states that plaintiff sold certain goods to one Welsh which came into the possession of defendant after its incorporation, the court cannot infer facts rendering defendant liable on the ground of principal. Koppel v. Massachusetts Brick Co., [Mass.] 78 N. E. 128.

47. Hollywood v. First Parish in Brockton [Mass.] 78 N. E. 124.

48. Variance between the proof and pleadings may be disregarded, especially with the consent of the United States. Conners v. U. S. [C. C. A.] 141 F. 16.

49. In re Blake [C. C. A.] 150 F. 279. Hence the court may determine the plaintiff's right to possession which is the real issue, although the pleadings technically raise the issue of title. Hurd v. Chase, 100 Me. 561, 62 A. 660.

50. Especially where there is no objection made. In re Blake [C. C. A.] 150 F. 279.

SUBROGATION.

§ 1. Definition and Nature (2041).
§ 2. Right to Subrogation (2041).
§ 3. How Forfeited or Lost (2043).
§ 4. Remedies and Procedure (2043).

§ 1. *Definition and nature.*[51]—Subrogation is the substitution of another person in place of a claimant to whose rights he succeeds in relation to the claim, or an equitable assignment vesting one paying the debt of another with all the rights of the creditor thereto.[52]

§ 2. *Right to subrogation.*[53]—The general rule is that when two or more persons are each liable to a third and one of them ought to pay the amount rather than the other, and one of the latter does pay the indebtedness, he is thereupon subrogated so as to stand in the shoes of the creditor with all his rights, and remedies against the principal sureties and cosureties. It is generally and most frequently applied to cases where the person advancing money to pay the debt is a surety or secondarily liable,[54] or where one of several equally liable satisfies the entire claim,[55] and it subsists whether or not the obligation is satisfied of record, [56] but such person cannot be subrogated until a default actually takes place.[57] Thus when an insurer pays a loss occasioned by the tortious act of a third person, he is subrogated to the rights of the insured as against the tort feasor.[58] Subrogation is also applicable to cases where a party is compelled to pay the debt of a third person to protect some interest of his own,[59] or where he is induced to satisfy a preexisting lien through fraud or mistake,[60] but not where there is no interest to protest nor fraud nor mis-

51. See 6 C. L. 1581.

52, 53. See 6 C. L. 1581.

54. Town of Washburn v. Lee, 128 Wis. 312 107 N. W. 649; McIlvane v. Big Stony Lumber Co., 105 Va. 613, 54 S. E. 473; Koppang v. Steenerson [Minn.] 111 N. W. 153; State Bank v. Kahn, 49 Misc. 500, 98 N. Y. S. 858. Where surety on a note buys it in, the note is not discharged but surety subrogated thereto. Marsters v. Umpqua Valley Oil Co. [Or.] 90 P. 151. An executor paying an estate the amount of money misappropriated by the attorney is subrogated to the right of action of the estate against the latter. Lupton v. Taylor [Ind. App.] 78 N. E. 689.

55. A surety is subrogated to the judgment which he pays and may enforce the same against his cosurety. Sanders v. Herndon, 29 Ky. L. R. 322, 93 S. W. 14; Honce v. Schram [Kan.] 85 P. 535; Burrus v. Cook, 117 Mo. App. 385, 93 S. W. 888. A joint judgment creditor who is in fact a surety may pay the judgment and have execution thereon against his cosurety. Sanders v. Herndon, 29 Ky. L. R. 322, 93 S. W. 14. One partner paying a firm indebtedness subrogated to rights of creditor against other partner. Theus v. Armistead, 116 La. 795, 41 So. 95; Pelzer Mfg. Co. v. Pitts [S. C.] 57 S. E. 29. Incoming partner paying old debts, subrogated to rights of creditor against old partners. Reddington v. Franey [Wis.] 111 N. W. 725. The surety on an administrator's bond is subrogated to the claims of creditors against the estate on his payment of a liability of the administrator to such creditors. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

56. Pellerin v. Sanders, 116 La. 616, 40 So. 917; Mergele v. Felix [Tex. Civ. App.] 99 S. W. 709.

57. Raved v. Kibbe, 102 N. Y. S. 490.

58. An insurance company paying a loss by fire for which a railway company is primarily liable is subrogated to the rights of the insurer against the company occassioning the loss. Aetna Ins. Co. v. Charleston, etc., R. Co. [S. C.] 56 S. E. 788. Where the initial carrier having routed a shipment of cattle contrary to the instructions of the shipper becomes an insurer for their safe delivery on payment of a loss, he becomes subrogated to the shipper's rights against a subsequent carrier for their negligent destruction. Texas & P. R. Co. v. Eastin [Tex.] 102 S. W. 105. Where so stated in the contract of insurance, an insurance company paying loss to a mortgagee is subrogated to his rights against the mortgagor. Gillespie v. Scottish Union & National Ins. Co. [W. Va.] 56 S. E. 213.

59. Payment of a valid lien by beneficiary of a trust deed. Flynt v. Taylor [Tex.] 15 Tex. Ct. Rep. 906, 93 S. W. 423. Wife discharging a debt which is a lien on stock is subrogated thereto. Eberharde v. Wahl's Adm'r, 30 Ky. L. R. 412, 98 S. W. 994. One who has interest in land and pays a mortgage thereon is subrogated to the rights of the mortgagee against a receiver in possession to collect the rents and profits for the purpose of paying the interest on the mortgage. Sampers v. Conolly, 100 N. Y. S. 806. A lienholder paying taxes is subrogated to the lien thereof against a dower claimant. Lidster v. Poole, 122 Ill. App. 227. Second mortgagee paying a valid prior lien. Jamaica Sav. Bank v. Butler [Vt.] 65 A. 92. Tenant in common paying prior liens. Parsons v. Urie [Md.] 64 A. 927.

60. Where a signature purporting to be that of the wife but in fact a forgery appears on a mortgage upon a homestead and the proceeds therefrom are devoted to the payment of a prior mortgage, the mortgagor is subrogated thereto. Davies v. Pugh

take,[61] nor where the party seeking subrogation is a party to the fraud [62] or has actual or constructive notice,[63] or where by the exercise of ordinary diligence he could have guarded himself against loss.[64] The right will be granted only to one who has an interest to protect [65] and to the amount of payment made by him.[66] He must have satisfied the entire claim [67] and not be a mere volunteer.[68] Or if without interest, the payor must have acted at the request of the owner.[69] Where a surety is fully compensated for his liability, he cannot recover in subrogation,[70] as where a wife discharges a lien on the homestead with money arising out of the same,[71] and the indebtedness which he pays or the lien which he discharges should not be one which he is equitably or legally bound to pay.[72] The right to subrogation will not be allowed where it will prejudice one party at the expense of another.[73] Where by

[Ark.] 99 S. W. 78. The trustee dying and the property being sold, the sale being void, the heirs and devisees of the decedent who furnish money and services in good faith for the support of the beneficiary are entitled to be subrogated to the rights of the latter. Cutter v. Burroughs, 100 Me. 379, 61 A. 767. When one obtains a mortgage on a life estate purporting to be upon the fee and the money received therefrom is used to pay off an existing mortgage, the mortgagee of the new mortgage is subrogated to the right of the former mortgagee against the remainderman. Hughes v. Thomas [Wis.] 111 N. W. 474. A second mortgagee paying a first mortgage under the belief that his second mortgage is a valid claim, when it is in fact only on a life interest, must in setting up the first mortgage against the remainderman offer to surrender the premises on receipt of the amount due. Stump v. Warfield [Md.] 65 A. 346. The purchaser at a foreclosure sale which was void as to a subsequent lienor because of failure to serve him in the action for foreclosure is subrogated to such mortgages as against the junior lienor though the lack of service appeared in the decree. Home Inv. Co. v. Clarson [S. D.] 109 N. W. 507. The holder of land under a forged deed of trust is subrogated to prior liens paid by him. Helm v. Lynchburg Tr. & Sav. Bank [Va.] 56 S. E. 598. A purchaser at a void foreclosure sale is subrogated to the rights of the original mortgagee. Griffin v. Griffin [S. C.] 53 S. E. 317 Purchaser at a void sheriff's sale. Hamilton v. Rogers [Ga.] 54 S. E. 926. Where a person believing himself to be the owner of land pays an existing lien when in fact he has no title, he becomes the equitable owner of such lien. Taylor v. Roniger [Mich.] 13 Det. Leg. N. 994, 110 N. W. 503.

61. Where no mistake or fraud, the purchaser of a life interest paying a mortgage on the fee is not entitled to subrogation thereto against the remainderman. Coleman v. Coleman, 74 S. C. 567, 54 S. E. 758.

62. New England Mortg. Sec. Co. v. Fry, 143 Ala. 637, 42 So. 57.

63. Bound by records in office of register of deeds.. Kuhn v. National Bk. [Kan.] 87 P. 551.

64. Where at an administrator's sale land of the decedent is sold at so much per acre and the proceeds applied to a satisfaction of a mortgage thereon, and it appears that there is a deficiency in acreage of the farm, the purchaser is not subrogated to the rights of the mortgagee, for with ordinary diligence he could have guarded against loss. Peacock v. Barnes, 142 N. C. 215, 55 S. E. 99.

65. A trustee paying taxes on lands included in a trust deed is not entitled to subrogation thereto against his cotrustees but he may recover therefor in contribution. Foote v. Cotting [Mass.] 80 N. E. 600.

66. Where the owner of a life estate pays a lien, it is subrogated thereto to the amount of payments made. Cumberland University v. Roberson, 30 Ky. L. R. 947, 99 S. W. 1152. A surety of a defaulting contractor can continue the work necessary for his reimbursement but no further. Union Stone Co. v. Hudson County Chosen Freeholder [N. J. Eq.] 65 A. 466.

67. Sipe v. Taylor [Va.] 55 S. E. 542; Strickland v. Magoun, 104 N. Y. S. 425.

68. Thompson v. Griggs, 31 Pa. Super. Ct. 608. A voluntary loan to a manufacturing concern for the purchase of materials and payment of labor does not entitle the lender to be subrogated to the preference given to debts of materialmen and laborers. Bank of Commerce v. Lawrence County Bk. [Ark.] 96 S. W. 749. A man living as the alleged husband with a woman married to another has not sufficient interest as to entitle him to subrogation to a mortgage on her homestead which he pays off. Brown v. Brown [Mass.] 43 So. 178. One having a contract for the purchase of land is a mere volunteer unless the contract is partly performed. Landis v. Wolf, 119 Ill. App. 11.

69. Mergele v. Felix [Tex. Civ. App.] 99 S. W. 709.

70. Culbertson v. Salinger [Iowa] 108 N. W. 454; Thompson v. Griggs, 31 Pa. Super. Ct. 608.

71. Kenady v. Gilkey [Ark.] 98 S, W. 969.

72. Ramoneda Bros. v. Loggins [Miss.] 42 So. 669; McDowell v. Jones Lumber Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 465, 93 S. W. 476. One in possession of land in consideration of paying interest on outstanding mortgtge. Thompson v. Griggs, 31 Pa. Super. Ct. 608. A vendee of property who has part of the consideration assumes a mortgage which secures a debt of the vendor, and the payment of instalments due on building and loan association stock, cannot insist on the application of payments made by him to the mortgage debt but on payment of the entire amount due the association is only entitled to be subrogated to its rights as pledger of the stock. Gunley v. Armstrong [C. C. A.] 133 F. 417.

73. Livingstain v. Columbia Banking & Trust Co. [S. C.] 57 S. E. 182. The holder of a draft of an insolvent bank on a bank

the terms of its charter a street railway company becomes liable for the repair of streets and bridges and subsequently an intersecting steam railway company is also made responsible for the same act, the first company is not discharged from its obligation, but on the making of such repairs by the steam railway the latter is subrogated to the rights of the municipality to enforce payment of its pro rata portion from the street railway.[74] In Louisiana an agreement for subrogation to be enforced must be made at the time of the payment under which it is claimed.[75] In the absence of any agreement a materialman having a lien on premises destroyed by fire is not subrogated to the rights of the insured on the policy.[76] A creditor paying a receiver the amount of a debt owed by the estate is subrogated to the rights of the receiver in certain security held by him as well as the rights of the debtor on other property.[77] Where in an action in which the attorney for the plaintiff has a lien for 50 per cent of the amount to be recovered the defendant and plaintiff compromise the same with full knowledge of the attorney's claim with an agreement that the defendant shall pay the attorney, on payment of the lien by the defendant, he is subrogated to the attorneys rights against the plaintiff.[78] A creditor is subrogated to the surety's right to security given him by the principal for indemnification.[79]

§ 3. *How forfeited or lost.*[80]—Where the principal obligation is barred by statute of limitations, a surety may set that up as a defense against a surety subrogated thereto and suing thereon.[81] The right to subrogation may be barred by laches.[82]

§ 4. *Remedies and procedure.*[83]—The party subrogated may enforce all the remedies to which the creditor was entitled.[84] An individual who has paid money to the government as a surety acquires the same right of priority which belongs to the government, and it may be that the same priority extends to one who has satisfied a moral obligation to the government by responding as surety for a Federal officer or employe who has been guilty of misfeasance.[85] But the surety of a bank designated as the depository of the assets of a bankrupt which is required to give bond to the United States is not entitled to preference on the insolvency of the bank.[86] So where the creditor has attached property on the secured debt, and the

holding security therefor is not entitled to be subrogated to such security, since the relation of a principal and surety does not exist. Id.

74. Northern Cent. R. Co. v. United Rys. & Elec. Co. [Md.] 66 A. 444.

75. Cooper v. Jennings-Refining Co. [La.] 42 So. 766.

76. Vogt Mach. Co. v. Lingenfelser, 30 Ky. L. R. 654, 99 S. W. 358.

77. Mansur v. Dupree [C. C. A.] 150 F. 329.

78. Morehouse v. Brooklyn Heights R. Co., 185 N. Y. 520, 78 N. E. 179.

79. Griffis v. First Nat. Bank [Ind. App.] 79 N. E. 230.

80. See 6 C. L. 1583.

81. Burrus v. Cook, 117 Mo. App. 385, 93 S. W. 888.

82. Hughes v. Thomas [Wis.] 111 N. W. 474.

83. See 6 C. L. 1583.

84. Hubbard v. Security Trust Co. [Ind. App.] 78 N. E. 79. The equity which surety has in the collateral of the principal given to the creditor to secure the debt is merely the right accrued only after the debt is fully paid, to be subrogated to the right of the creditor in respect of the collateral. Advance Thresher Co. v. Hogan, 74 Ohio St. 307, 78 N. E. 436. The surety of a defaulting contractor completing the contract is subrogated to the rights of the contractor to the balance retained by the principal under the terms of the contract. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465. Where the surety of a town treasurer has paid the indebtedness, he may recover the same of the certain banks to whom the unauthorized payments were made, where the bank had notice and knowledge of the lack of surety of such treasurer. The surety has notice respecting the rights of a town. Town of Washburn v. Lee, 128 Wis. 312, 107 N. W. 649. Where a surety is liable for neglect to collect fines and pays the same, he is subrogated to the rights of the county to enforce it. Wilson v. White [Ark.] 102 S. W. 201. Under a bond running to the United States for performance of a building contract, the surety paying the materialman is subrogated to all the rights of the materialman against the contractor. Henningsen v. United States Fidelity & Guaranty Co. [C. C. A.] 143 F. 810.

85. American Surety Co. v. Akron Savings Bank Co., 6 Ohio C. C. (N. S.) 374; Henningsen v. U. S. Fidelity & Guaranty Co. [C. C. A.] 143 F. 810.

86. Has same means of judging of sol-

surety has subsequently paid the same though after the principal became a bankrupt, the surety is subrogated to the attachment lien and can hold the property as against the trustee in bankruptcy,[87] but he also takes subject to such claims of set-off and equities as the principal may have against the surety.[88] A surety on a defaulting administrator's bond who sues a bank for conformity in a breach of trust by the administrator under his right to subrogation can have his claim set off against one of the bank against such administrator on another cause of action.[89]

SUBSCRIBING PLEADINGS, see latest topical index.

SUBSCRIPTIONS.

§ 1. Nature, Requirements, and Sufficiency as a Contract (2044).
§ 2. Rights and Liabilities Arising From Subscriptions (2044).
§ 3. Enforcement, Remedies, and Procedure (2045).

§ 1. *Nature, requirements, and sufficiency as a contract.*[90]—Gratuitous subscribers may withdraw at any time before the proposition has been accepted or acted upon,[91] and when the procuring of subscriptions to a certain amount is a condition to liability, one may withdraw at any time before such amount has been reached.[92] Notice of withdrawal may be sent to the person who procured the signatures and who still holds the paper regardless of whom he acted for.[93] One may not rescind a subscription to corporate stock on the ground of fraudulent representation after others have acted upon the faith of the subscription and the corporation has become insolvent.[94]

§ 2. *Rights and liabilities arising from subscriptions.*[95]—The contract will be construed with reference to the intent of the parties at the time,[96] and in addition to its phraseology, the court will consider the subject-matter, the inducement which influenced the subscription and the circumstances under which it was made.[97] An agreement to procure subscribers for a proposed undertaking implies an agreement that the subscribers shall be financially responsible.[98] Substantial compliance with conditions is all that is required.[99]

vency of bank as others entrusting funds to it. American Surety Co. v. Akron Savings Bank Co., 6 Ohio C. C. (N. S.) 374. Where the funds embezzled by a defaulting county treasurer can be traced into the payment of a mortgage on his property, the county is subrogated thereto. Young v. Pecos County [Tex. Civ. App.] 101 S. W. 1055.

87. Moody v. Huntley, 149 F. 797.

88. Rockfeller v. Larick [Neb.] 110 N. W. 1022.

89. Lowndes v. City Nat. Bank [Conn.] 66 A. 514.

90. See 6 C. L. 1583.

91. American Life Ins. Co. v. Melcher [Iowa] 109 N. W. 805; People's Bk. & Tr. Co. v. Weidinger [N. J. Law] 64 A. 179, and authorities cited.

92. Subscription for a butter factory. Sager v. Gonnermann, 50 Misc. 500, 100 N. Y. S. 406.

93. American Life Ins. Co. v. Melcher [Iowa] 109 N. W. 805.

94. Marion Trust Co. v. Bilsh [Ind. App.] 79 N. E. 415.

95. See 4 C. L. 1587.

96. Business man's subscription to a railroad must be considered with reference to town limits as they were when subscription was made. St. Louis, etc., R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963.

97. Railroad subscription contract. St. Louis, etc., R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963. Time held of essence of agreement to pay a specified sum for a pavement provided work was finished within four months. Barber Asphalt Pav. Co. v. Loughlin [Tex. Civ. App.] 17 Tex. Ct. Rep. 554, 98 S. W. 948. Contract meant four months from date it was signed and not from time work was commenced. Id.

98. Agreement construed to require the procuring of a certain number of subscribers financially responsible or owning a certain number of cows. Sager v. Gonnermann, 50 Misc. 500, 100 N. Y. S. 406. That two of the names of those who were insolvent were on the list when defendant subscribed was not a waiver of it not appearing that he knew of the insolvency. Id.

99. Trifling deviations not materially detracting from benefits to subscriber for a railroad will not avoid his liability. St. Louis, etc., R. Co. v. Houck, 120 Mo. App. 634, 97 S. W. 963. Held for jury to determine whether operation of road had been commenced in good faith. Id.

§ 3. *Enforcement, remedies, and procedure.*[1]—When liability is dependent upon plaintiff's performance of conditions precedent, such performance must be proven.[2]

SUBSTITUTION OF ATTORNEYS; SUBSTITUTION OF PARTIES; SUBWAYS; SUCCESSION, see latest topical index.

SUICIDE.[3]

Since suicide itself is not an indictable offense, an attempt to commit it is not punishable in the absence of a statute so declaring [4] and statutes penalizing offenses or attempts to commit offenses to which no punishment is expressly provided do not apply.[5]

SUMMARY PROCEEDINGS; SUMMARY PROSECUTIONS; SUMMONS, see latest topical index.

SUNDAY.

§ 1. Sunday as Dies Non Juridicus (2045).
§ 2. Violation of Sunday Laws as Defense to Actions (2045).
§ 3. Sunday Laws and Prosecutions for Their Violation (2045).

§ 1. *Sunday as dies non juridicus.*[6]—Receiving and entering a verdict on the minutes of the court may be done on Sunday.[7] And Sunday should be counted in computing time within which a petition should be filed.[8] A tax deed executed on Sunday if void does not merge and destroy the lien of the tax certificate.[9]

§ 2. *Violation of Sunday laws as defense to actions.*[10]—Contracts entered into on Sunday, in violation of a Sunday law, are illegal and cannot be enforced,[10a] and where the inception of a contract is void because it involves the unlawful doing of work on Sunday, the acceptance on another day in a foreign state where the contract might be valid is immaterial.[11] However, contracts made on Sunday and subsequently recognized on a subsequent secular day in such a manner as to amount to an absolutely new contract are then enforceable.[12] The fact, also, that a telegram was sent on Sunday, even if in violation of the Sunday laws making void a contract made on Sunday, is no defense to an action in tort for mental anguish for its wrongful transmission.[13] Dating the contract as of a secular day cannot work an estoppel on a party who knew that it was a Sunday one.[14]

§ 3. *Sunday laws and prosecutions for their violation.*[15]—An ordinance prohibiting the keeping open of barber shops on Sunday is constitutional when there is no attempt to discriminate or classify.[16] And such law is not invalid, as unreasonable, because it covers a period from twelve o'clock Saturday night into Monday morning.[17] If particular occupations "and others" be the subjects of regula-

1. See 6 C. L. 1584.
2. Performance of condition that subscribers for a butter factory be procured representing a certain number of cows held not proven by mere introduction of a list containing names opposite which were figures aggregating the requisite number there being nothing to show that the numbers represented cows or by whom or when they were placed there. Sager v. Gonnermann, 50 Misc. 500, 100 N. Y. S. 406.
3. See 4 C. L. 1589.
As defense to policy of life insurance, see Insurance, 8 C. L. 377.
4. May v. Pennell, 101 Me. 516, 64 A. 885.
5. Rev. St. c. 132, § 9; c. 136, § 1. May v. Pennell, 101 Me. 516, 64 A. 885.
6. See 6 C. L. 1584.
7. It is not a judgment. Moore v. State [Tex. Cr. App.] 96 S. W. 321.
8. Curtice v. Schmidt [Mo.] 101 S. W. 61.
9. Schiffer v. Douglass [Kan.] 86 P. 132.
10. See 6 C. L. 1584. See ante, § 1.
10a. No recovery can be had for labor performed in violation of a Sunday law. Carson v. Calhoun, 101 Me. 456, 64 A. 838.
11. There is no contract to be governed by the lex loci contractus. International Text-Book Co. v. Ohl [Mich.] 14 Det. Leg. N. 100, 111 N. W. 768.
12. Helm v. Briley [Okl.] 87 P. 595.
13. Arkansas & L. R. Co. v. Lee [Ark.] 96 S. W. 148.
14. International Text-Book Co. v. Ohl [Mich.] 14 Det. Leg. N. 100, 111 N. W. 768.
15. See 6 C. L. 1584.
16. McClelland v. Denver [Colo.] 86 P. 126.
17. That part relating to early Monday

tion, the word "others" refers to others of like nature.[18] An exception that certain places may be kept open for certain purposes is strictly limited to those named.[19] What amounts to "keeping open" need not be "keeping wide open" or keeping open in the same manner and for the same purposes as on week days.[20] A city license cannot authorize the violation of a state Sunday law.[21] Selling liquors on Sunday in a city exclusively empowerd to regulate sale of liquor on Sunday cannot constitute a violation of a general law against selling "goods" on Sunday.[22] One engaged in farm work on Sunday, which is not work of necessity, is guilty of violation of the statute forbidding work except of necessity.[23] A state statute however prohibiting the running of freight trains on Sunday does not apply to those engaged in interstate commerce,[24] and an interstate railroad having but 30 miles in Georgia, is not a railroad over 30 miles long.[25] Beer served in a restaurant is merchandise according to the Texas Statute.[26] Religious belief and observance of another day as the Sabbath is no defense to a prosecution for keeping open workshops on Sunday, even though they may be closed to the public on that day.[27] A statute prohibiting the exposure of goods for sale on Sunday is not repealed by nonuser or by implication, and a prosecution under it will not be restrained because it is not enforced against others;[28] but a prosecution under a Sunday law, which is illegal and void because of conflicting with a general statute to the contrary, should be enjoined.[29] Where a portion of a municipal ordinance in respect to the keeping of open doors on the Sabbath was valid, a conviction of one guilty of violating this valid portion is sustainable, although certain other portions of the statute are invalid.[30]

SUPERSEDEAS; SUPPLEMENTAL PLEADINGS, see latest topical index.

SUPPLEMENTARY PROCEEDINGS.

§ 1. Nature, Occasion, and Propriety (2047).
§ 2. Proceedings Necessary on Which to Base Remedy (2047).
§ 3. Application for Examination of Defendant and Debtors (2047).
A. Affidavit and Opposition to Same (2047).
B. Order and Citation Process on Warrant (2047).
§ 4. Procedure at and After Examination (2048).
§ 5. Relief Against Defendant (2048).
A. Order for Payment or Delivery (2048).
B. Receivership or Other Equitable Relief (2049).
C. Contempt (2049).

morning may be disregarded. McClelland v. Denver [Colo.] 86 P. 126.

18. Thus a "penny arcade" is comprehended in a statute prohibiting any merchant, billiard table or tenpin alleykeeper, "or other dealer." Fichtnberg v. Atlanta, 126 Ga. 62, 54 S. E. 933. A farmer, however, selling produce from his wagon is not within the statute prohibiting any "merchant, grocer, or dealer in merchandize or trader in any business, from bartering or permitting his place of business to be open for traffic on Sunday." Hanks v. State [Tex. Cr. App.] 99 S. W. 1011.

19. Running soda fountain, which is permitted, and slot machines, which are not permitted. Fichtnberg v. Atlanta, 126 Ga. 62, 54 S. E. 933.

20. It is sufficient under the law where the workshop is kept open for employes to enter and work although it is closed to the public. Commonwealth v. Kirshen [Mass.] 80 N. E. 2. And the fact that at a place of entertainment, which is forbidden to be open on Sunday, there are fewer electric lights than on other days, that no music is played, attendants are excused, and change is made at soda fountain, which is a permitted occupation, is no defense. Fichtnberg v. Atlanta, 126 Ga. 62, 54 S. E. 933.

21. Operation of slot machines on Sunday. Cain v. Daly, 74 S. C. 480, 55 S. E. 110.

22. State v. Binswanger [Mo. App.] 98 S. W. 103.

23. Lee v. State [Tex. Cr. App.] 100 S. W. 156.

24, 25. Griggs v. State, 126 Ga. 442, 55 S. E. 179. And see, also, Seale v. State, 126 Ga. 644, 55 S. E. 472.

26. Evidence that defendant had a saloon, bar, and restaurant, in the same room and that beer was furnished to the customers from the bar on Sunday is sufficient to convict of selling "merchandise" on Sunday as a dealer. Savage v. State [Tex. Cr. App.] 93 S. W. 114.

27. Defendant conscientiously believes the seventh day of the week should be observed and actually refrains from secular business on that day. Commonwealth v. Kirshen [Mass.] 80 N. E. 2.

28. A slot machine automatically vending wares comes under this statute. Cain v. Daly, 74 S. C. 480, 55 S. E. 110.

29. Selling merchandise in open store on Sunday. Block v. Crockett [W. Va.] 56 S E. 826.

30. Fichtnberg v. Atlanta, 126 Ga. 62, 54 S. E. 933.

§ 1. *Nature, occasion, and propriety.*[31]—A supplementary proceeding is an independent action in no way affecting the merits of the action in which the original judgment was rendered.[32] It is generally had before a judge or other officer having special authority, and is not instituted by or in the court in which the judgment was obtained.[33]

§ 2. *Proceedings necessary on which to base remedy.*[34]—In Kansas, an abstract of a judgment of a justice of the peace duly filed in the district court is a sufficient basis for the proceeding.[35] Execution must have been issued and returned unsatisfied.[36] An advertised sale may be abandoned on execution returned unsatisfied so as to authorize an examination, if the sale would be useless because of incumbrances.[37] The return of the sheriff of an execution unsatisfied is conclusive until impeached.[38]

§ 3. *Application for examination of defendant and debtors. A. Affidavit and opposition to same.*[39]—When a statute makes no provision for notice of an intended application, none is required,[40] and the debtor is not deprived of his constitutional rights because no notice is provided for.[41] In determining on what theory a complaint is based, the court will consider its leading allegations together with the other portions of the record.[42] It must be shown to the satisfaction of the judge that the debtor has property not subject to levy or which is so kept by him that it cannot be clearly identical or with ordinary diligence reached by execution.[43] An application stating that petitioner believes that defendant has property subject to execution and that he has conveyed his property in fraud of creditors is sufficient,[44] but an affidavit by the creditor's attorney based wholly on information and belief is fatally defective, neither the grounds of belief nor the sources of the information being stated,[45] and an allegation of demand and refusal to apply certain property to the satisfaction of the judgment is defective where it fails to show that the refusal was unjust, or whether the creditor's remedy by execution is inadequate.[46] An affidavit that the statements in the petition are true to the best of affiant's knowledge and belief is sufficient under the Missouri statute.[47] An affidavit in opposition to an order for defendant's examination, setting up a previous examination but not stating that defendant has now no property which should be applied on the judgment, is insufficient.[48]

(§ 3) *B. Order and citation process or warrant.*[49]—A defendant cannot be ordered to appear before the clerk of the court and be examined while there is a

31. See 6 C. L. 1586.

32. Evidence affecting original judgment not admissible. Hobbs v. Eaton [Ind. App.] 78 N. E. 333.

33. Code Civ. Proc. § 2434. Lowther v. Lowther, 100 N. Y. S. 965.

34. See 6 C. L. 1587.

35. Objection that full transcript was not filed. Honce v. Schram [Kan.] 85 P. 535.

36. Evidence sufficient to show that judgment had been kept alive by issuance and return of execution. Honce v. Schram [Kan.] 85 P. 535.

37, 38. Maloney v. Klein, 102 N. Y. S. 43.

39. See 6 C. L. 1587.

40. None required under Rev. St. 1899, §§ 4227-3232 (Ann. St. 1906, pp. 1832-1834). Ackerman v. Green [Mo.] 100 S. W. 30.

41. Is not deprived of property without due process or of equal protection of law. Ackerman v. Green [Mo.] 100 S. W. 30.

42. Complaint in proceedings to enforce a commutation money judgment held to state a cause of action under §§ 827, 831, Burns' Ann. St., and not under §§ 828, 831. Hobbs v. Eaton [Ind. App.] 78 N. E. 333.

43. Garcia v. Morris, 101 N. Y. S. 253. Affidavit of creditor's attorney setting out certain statements of creditor and an offer of settlement by defendant's attorney as the source of affiant's information held insufficient to show that debtor had either money or property. Id.

44. Petition also alleging that defendant seemed to be well supplied with money and that his manner of living indicated that he was a man of means. Ackerman v. Green [Mo.] 100 S. W. 30.

45, 46. Garcia v. Morris, 101 N. Y. S. 253.

47. Rev. St. 1899, § 3228 (Ann. St. 1906, p. 1832). Ackerman v. Green [Mo.] 100 S. W. 30.

48. Suit by personal representatives, and affidavit showing examination by plaintiff's attorney three years previously and that defendant had a salary of only $1,000 a year. Smith v. Cowles, 99 N. Y. S. 747.

49. See 6 C. L. 1587.

similar proceeding against him pending on appeal,[50] and when a statute prohibits a discontinuance or dismissal of examination proceedings except by order of the judge, failure to make such order is a valid objection to the making of another order for examination.[51] If there is danger of defendant's leaving the state and it appears that he has property which he unjustly refuses to apply to the satisfaction of the judgment, the judge has power to require him to give security for his appearance at the time designated for examination.[52] An order for the examination of a third person may not be served by the judgment creditor.[53] Witnesses must be cited by subpœna and not by order,[54] and under the New York statute the subpœna must be issued by the judge and not by plaintiff's attorney.[55] No appeal lies from an order for an examination in the absence of statute.[56]

§ 4. *Procedure at and after examination.*[57]—The judge has jurisdiction to determine whether that in which it is claimed the debtor has an interest is property available under the statute.[58] While the issue of the ownership of property claimed by third persons in good faith cannot be litigated in supplementary proceedings,[59] the court being only empowered to authorize the judgment creditor to institute an action to recover it and to forbid its transfer pending suit,[60] the mere fact that property is in the hands of others or that a colorable dispute as to ownership arises does not deprive the judge of power to proceed.[61] The character of the claim on which the judgment was rendered may be shown by parol,[62] but evidence altering or impeaching the original judgment is inadmissible.[63] The granting or denying of motions to adjourn the examination is discretionary with the judge.[64] In Kansas the probate judge acts as a subordinate officer of the court from which the execution issued,[65] and, in the supervision of the probate judge's action, such court exercises original rather than appellate jurisdiction.[66]

§ 5. *Relief against defendant. A. Order for payment or delivery.*[67]—If it is determined that the debtor has property which may be reached under the statute,[68] and which cannot be taken by execution, the magistrate in Massachusetts has power to direct an assignment to the creditor of the debtor's interest therein.[69] In Ohio, ten per cent of the earnings of the debtor may be subjected to the payment of a

50. Ledford v. Emerson [N. C.] 55 S. E. 969.

51. Code Civ. Proc. § 2454. Schwarmecke v. Glenny, 103 N. Y. S. 499.

52. Revisal 1905, § 671. Ledford v. Emerson [N. C.] 55 S. E. 969.

53. The statutes considered. In re Dawes, 108 App. Div. 174, 96 N. Y. S. 52.

54. In re Depue, 185 N. Y. 60, 77 N. E. 798.

55. The proceeding being instituted by the judge and not by a court of record. Code Civ. Proc. § 854. Lowther v. Lowther, 100 N. Y. S. 965. Code Civ. Proc. § 2444, providing that either party may produce witnesses "as in the trial of an action," relates only to the manner of examination after the witness has been properly summoned. Id.

56. No appeal under Rev. St. 1899, §§ 3227-3232. Ackerman v. Green [Mo.] 100 S. W. 30.

57. See 6 C. L. 1588.

58. Rev. Laws, c. 168, §§ 17-25. Tehan v. Justices of Boston Municipal Ct., 191 Mass. 92, 77 N. E. 313.

59. Union Collection Co. v. Snell [Cal. App.] 89 P. 859; Honce v. Schram [Kan.] 85 P. 535. One who gives testimony in answer to a subpœna but who is not made a party and does not intervene to claim the property not bound by order of the judge. Honce v. Schram [Kan.] 85 P. 535.

60. Union Collection Co. v. Snell [Cal. App.] 89 P. 859.

61. Honce v. Schram [Kan.] 85 P. 535.

62. That judgment was for necessaries. Sweet v. Barnum & Co., 8 Ohio C. C. (N. S.) 108.

63. Hobbs v. Eaton [Ind. App.] 78 N. E. 333.

64. Morrison v. Stember, 49 Misc. 464, 98 N. Y. S. 850.

65. Honce v. Schram [Kan.] 85 P. 535.

66. Honce v. Schram [Kan.] 85 P. 535. That such supervision was invoked by a "petition in error" was harmless where court considered the proceedings just as though there had been a formal application. Id.

67. See 6 C. L. 1588.

68. Transaction whereby debtor had transferred a note in consideration of support and transferee had surrendered it to maker in consideration of assumption of obligation to support held legal so that the note could not be reached to satisfy a judgment on another note given before the transfer. Washington Seminary v. Hunt [Wash.] 88 P. 1034.

69. An interest in certain liquor licenses. Rev. Laws, c. 168, §§ 17-25. Tehan v. Justices of Boston Municipal Ct., 191 Mass. 92, 77 N. E. 313.

judgment for necessaries.[70] Property transferred by the debtor for value before entry of judgment cannot be reached.[71] Failure of the judgment debtor to appear and testify does not prevent the judge from making such order as the testimony produced will warrant.[72] Where a proper complaint is sustained by the evidence, it cannot be said that the decision of the court in ordering payment of the judgment is contrary to law.[73]

(§ 5) *B. Receivership or other equitable relief.*[74]—The appointment of a receiver is often authorized.[75] Under a statute providing that the property of the judgment debtor shall vest in the receiver, property held in a representative capacity does not vest in him in supplementary proceedings against executors.[76] If the order appointing a receiver vests the legal title to a chose in action in him, defendant may not thereafter sue on it,[77] and, if it be not so construed, a suit thereon by defendant may be barred by limitations.[78] The remedy by execution must be first exhausted before the receiver is entitled to subject the debtor's real estate to the payment of the judgment.[79] Where the validity of assignments of claims by the debtor is in doubt, the assignee will be enjoined from collecting judgments on them pending suit by the receiver to recover the judgments.[80] The question whether the receiver turned money over to plaintiff voluntarily or under promise that it be returned if necessary is one of fact determinable only in an action and not by motion after demand for its return.[81]

An injunction restraining the disposition of property, issued without notice or the giving of a bond, and naming no return day, is void, no emergency being shown.[82]

(§ 5) *C. Contempt.*[83]—An order to testify served only on the attorney of one who is not a party cannot be made the basis of a contempt proceeding.[84] On default of one who is cited to show cause why he should not be punished for violating an order for his examination, the court is not bound to adjudge him guilty of contempt without a hearing,[85] but may direct that he be brought before it.[86] The judge who takes a debtor's default may entertain a motion to open it, and on reargument may nullify his denial of the motion by opening the default.[87] The fact that an order to show cause why a default should not be opened is made returnable before the judge, who took the default "or one of the other justices" of the court,

70. Sweet v. Barnum & Co., 8 Ohio C. C. (N. S.) 108.

71. In suit by receiver, evidence held insufficient to justify recovery of a note. Stimpson v. Foody, 99 N. Y. S. 317.

72. Honce v. Schram [Kan.] 85 P. 535.

73. Proceeding to enforce commutation money judgment as to which the statute allows no exemptions. Hobbs v. Eaton [Ind. App.] 78 N. E. 333.

74. See 6 C. L. 1588.

75. The city court may appoint a receiver in supplemental proceedings arising out of a judgment recovered in a municipal court in Brooklyn. Code Civ. Proc. § 2434. Fine v. Rabinbauer, 49 Misc. 437, 99 N. Y. S. 896.

76. Code Civ. Proc. §§ 2464, 2468. Jones v. Arkenburgh, 112 App. Div. 483, 98 N. Y. S. 532.

77. Gibbons v. Bush Co., 101 N. Y. S. 721.

78. Plaintiff in this suit contended that his claim was not barred because he had been enjoined from suing on it in previous supplementary proceedings. Gibbons v. Bush Co., 101 N. Y. S. 721.

79. Realty or power of sale not vested in receiver by Code Civ. Proc. § 2468, subd. 1. Damers v. Sternberger, 102 N. Y. S. 740.

80. Fine v. Rabinbauer, 49 Misc. 437, 99 N. Y. S. 896.

81. Where receiver replevied property and before suit went against him turned proceeds of a sale thereof over to judgment creditor. Twelfth Ward Bank v. Columbia Pub. Co., 99 N. Y. S. 908.

82. Meier v. Fidelity Nat. Bk. [Wash.] 86 P. 574, and authorities cited.

83. See 6 C. L. 1589.

84. Order requiring one to appear and testify, served only on her attorney on return of a previous order to show cause why she should not be punished for contempt, held not connected with the prior proceedings and not to sustain a contempt proceeding based on noncompliance therewith. In re Depue, 185 N. Y. 60, 77 N. E. 798.

85. In re Nejez, 104 N. Y. S. 505.

86. That creditor may proceed either by order to show cause or by attachment does not limit power of court. In re Nejez, 104 N. Y. S. 505.

87, 88. Morrison v. Stember, 49 Misc. 464, 98 N. Y. S. 850.

does not invalidate the proceedings since the alternative provision may be regarded as surplusage.[88]

SUPPORT AND MAINTENANCE; SURCHARGING AND FALSIFYING, see latest topical index.

SURETY OF THE PEACE.[89]

By statute in some states one convicted of an offense may be required to give bond to be of good behavior in the future;[90] but in the absence of such statute, security cannot be exacted to prevent habitual violations unless they disturb the peace or constitute a public nuisance.[91]

SURETYSHIP.

§ 1. **Definitions and Distinctions (2050).**
§ 2. **The Requisites of the Contract (2050).**
§ 3. **The Surety's Liability (2051).**
§ 4. **The Surety's Defenses (2052).**
A. Legal Defenses to Surety's Liability (2052).
B. Defenses Based on Extinguishment or Absence of Principal's Liability (2053).
C. Defenses Based on Change of Contract or Increase of the Risk (2053).
D. Defenses Arising Out of Forbearance or Suspension of Liability of Principal (2054).
E. Defenses Based on Impairment of Surety's Secondary Remedies Against Principal or Collateral Securities (2055).
F. Defenses Based on Fraud or Concealment by Creditor of Material Facts (2056).
G. Other Defenses (2056).
§ 5. **Rights of Surety Against Principal and Co-Surety (2057).**
§ 6. **Security Held by Surety and Rights Therein (2058).**
§ 7. **Remedies and Procedure (2058).**

§ 1. *Definitions and distinctions.*[92]—Where one or two persons who are both liable on the same debt to a third, is primarily liable, the relation of principal and surety exists between them,[93] but where neither has the right to look to the other for reimbursement, the relation of suretyship does not exist.[94]

§ 2. *The requisites of the contract.*[95] The promise of the surety must be supported by some consideration,[96] but credit given to the principal is ample consideration.[97]

89. See 4 C. L. 1595.

90. Under Rev. Code 1892, § 1489, the court rightfully demanded a bond of one convicted for the third time of violating the liquor laws. Caldwell v. State, 87 Miss. 420, 39 So. 896.

91. Court of quarter sessions held to have no power to exact security of one habitually violating Act of 1794 by transacting business on Sunday, there being no showing that it disturbed the peace or constituted a public nuisance. Commonwealth v. Foster, 28 Pa. Super. Ct. 400.

92. See 6 C. L. 1590.

93. Brown v. Chicago, etc., R. Co. [Neb.] 107 N. W. 1024. Where of several joint makers, one agrees to pay the debt, he may be treated as a principal by the others who stand as to him in the relation of sureties. Van Meter v. Poole, 119 Mo. App. 296, 95 S. W. 960. Where one surety on a stallion note agrees with the others that if the principal fails to pay, he will take the stallion and pay the entire note, and his promise is based on good consideration as to the other sureties, he is a principal. Hall v. Taylor [Tex. Civ. App.] 16 Tex. Ct. Rep. 374, 95 S. W. 755. When an agent of the payee knows of an understanding between the parties that a note is to be used only as collateral security for a loan to one of them, the others are to be regarded as sureties. Hoffman v. Habighorst [Or.] 89 P. 952. A contractor indorsing the notes of a corporation, and promised to be recompensed for any liability by the president thereof, is a surety. Crosby v. Woodbury [Colo.] 89 P. 34. One who assumes a debt or a mortgage as to the former debtor is a principal. McDowell v. Jones Lumber Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 465, 93 S. W. 476. Incoming partners as regards the former members of a firm stand in the relation of sureties. Reddington v. Franey [Wis.] 111 N. W. 725. An insurance company paying a loss for which a third party is primarily liable stands in a relation of a surety. Aetna Ins. Co. v. Charleston & W. C. R. Co. [S. C.] 56 S. E. 788.

94. Whitney v. Wenman, 140 F. 959. Where the purpose of securing the signature of a certain person to a note is known to the payee to be for the benefit and credit of another than the signer without any personal benefit to the latter, his obligation is merely that of a surety. Windhorst v. Bergendahl [S. D.] 111 N. W. 644. "Collateral for S. Bryon note No. 58" before the signature indicates that the signer is a surety merely. National Bk. of Commerce v. Schirm [Cal. App.] 86 P. 981.

95. See 6 C. L. 1591.

96. Steger v. Jackson [Ky.] 102 S. W. 329; Hunter v. Porter [Iowa] 109 N. W. 283.

97. Advance Thresher Co. v. Hogan, 74 Ohio St. 307, 78 N. E. 436.

§ 3. *The surety's liability.*[98]—Where on the face of an obligation both parties are jointly bound, parol evidence may be admitted to show that the relation of principal and surety exists.[99] Thus a wife signing an obligation with her husband may show that she is in fact a surety.[1] Where by statute she cannot be a surety for her husband, she cannot estop herself by her action so as to become liable.[2] A creditor may elect to sue either the principal or the surety in the first instance [3] and cannot be compelled to choose either,[4] and generally, by an agreement inter se, joint debtors cannot fix their liability so as to bind the creditor,[5] but in Louisiana a surety has a right to have his cosureties included in the suit, and that he be sued for no more than his proportionate share.[6] A creditor need not reduce his claim to judgment to bind the surety.[7] The liability of the surety is that contemplated by the contract,[8] and it is generally held that this liability should be strictly construed,[9] but the liability of a fidelity company engaging in business for profit is not to be construed as in the case of voluntary sureties.[10] A surety for the purchaser at a judicial sale is bound by the order confirming sale although it changes the contract of suretyship.[11] The liability of the surety is limited by that of his principal,[12] and cannot exceed the amount stated in the bond.[13] And judgment against the principal is

98. See 6 C. L. 1591.

99. Western Bk. & Tr. Co. v. Gibbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 754, 96 S. W. 947; Windhorst v. Bergendahl [S. D.] 111 N. W. 544; National Bk. of Commerce v. Schirm [Cal. App.] 86 P. 981.

1. Warner v. Jennings [Ind. App.] 76 N. E. 1013. Where a wife makes a mortgage to secure her husband's debt, she is a surety only. Indianapolis Brew. Co. v. Behnke [Ind. App.] 81 N. E. 119.

2. Indianapolis Brew. Co. v. Behnke [Ind. App.] 81 N. E. 119.

3. City of Milbank v. Western Surety Co. [S. D.] 111 N. W. 561. A surety on a contractor's bond is jointly and severally liable with the contractor and therefore is not entitled to object that the contractor was not sued in the same action. Id.

4. Texas, etc., R. Co. v. State [Tex. Civ. App.] 97 S. W. 142; Bolton v. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210.

5. Worthy v. Battle, 125 Ga. 415, 54 S. E. 667.

6. Parker & Co. v. Guillot [La.] 42 So. 782.

7. Contractor may recover against a surety on the bond of a subcontractor where a lien is filed for materials furnished him though not reduced to judgment. United States Fidelity & Guaranty Co. v. P obst, 30 Ky. L. R. 63, 97 S. W. 405.

8. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F. 17; State v. Briede, 117 La. 183, 41 So. 487; Bolton v. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210. The surety is bound by a provision in a building contract to pay a fixed sum as liquidated damages. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210. Where a deed of trust provides for definite trustee's fees, the sureties cannot object thereto and demand that the trustee shall only receive reasonable fees. Bolton v. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210. The liability of the surety is to be considered according to the terms of the bond itself, and shall not be enlarged. Graziani v. Com., 30 Ky. L. R. 119, 97 S. W. 409. A bond for the faithful performance of the duties of an insurance agent, and payment to the employer of moneys raised by him, includes advances made by the employer to the agent necessary for the carrying on of the agency. Chamberlain v. Hodgetts [Tex. Civ. App.] 99 S. W. 161. The surety on a building bond running to the city is liable to the materialman for his claim against the contractor. City of Philadelphia v. Pierson [Pa.] 66 A. 321. A surety on a contract of employment is not liable for debts arising out of their relations other than those contracted for. Dr. Koch Vegetable Tea Co. v. Gates [Wash.] 86 P. 624.

9. Searles v. Flora, 225 Ill. 167, 80 N. E. 98. A surety is a favorite of the law and never liable beyond the strict terms of his agreement, but his contract is nevertheless an agreement, and like other agreements must receive a just and rational interpretation. United States Fidelity & Guaranty Co. v. Woodson County Com'rs [C. C. A.] 145 F. 144. A contract of suretyship is to be construed as any other agreement. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F. 17.

10. City of New Haven v. Eastern Pav. Brick Co., 78 Conn. 689, 63 A. 517. A surety bond for the performance of a building contract being in the nature of a contract of insurance rather than one of indemnity should be construed most strongly against the surety company. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387.

11. Sipe v. Taylor [Va.] 55 S. E. 542.

12. The debt of the surety is measured by that of the principal. McDonald v. People, 222 Ill. 325, 78 N. E. 609. Where an administrator is liable for interest on money in his hands, a surety is also liable. Id.

13. Bay Shore Lumber Co. v. Donovan [Ala.] 42 So. 1014. A surety on a bond for the performance of a building contract is liable for the damages arising therefrom up to the amount of the bond. City of New Haven v. Eastern Pav. Brick Co., 78 Conn. 689, 63 A. 517. A surety is not liable beyond the strict terms of his contract and bond. Smith v. Bowman [Utah] 88 P. 687. In a replevin bond the value of the property therein stated is conclusive as to the surety's liability in the absence of all other evi-

binding as to the surety's liability,[14] or at least is evidence thereof.[15] The liability of a surety on an agent's or officer's bond extends to subsequent terms or not of office according to the evident intention of the parties as expressed therein,[16] and does not extend before or after the time agreed upon.[17] The sureties on the bond of a public official are answerable only for the faithful performance by him of the duties devolving upon him by law, and not for malfeasance in the performance of duties not thus devolving upon him,[18] and are estopped to deny the official capacity of the principal.[19] After the surety has received the full consideration for execution of an official bond, he cannot set up immaterial variances from the statutory requirements.[20]

§ 4. *The surety's defenses. A. Legal defenses to surety's liability.*[21]—A surety may set up as a defense the nonfulfillment of any condition precedent he may make to his liability, such as notice of default within a certain time,[22] or want of signature of the principal debtor [23] or other sureties.[24] However, if a surety waives exe-

dence. Martin v. Hertz, 224 Ill. 84, 79 N. E. 558. The surety in a government contract, on the failure of his principal, is liable for the difference between the amount of the contract and the amount for which a new contract is made, and default of the second contractor does not increase his liability. Brown v. U. S. [C. C. A.] 152 F. 964. A surety on a statutory bond to discharge a mechanic's lien is not liable thereon unless the judgment declares the lien to be enforcible. Casey v. Connors Bros. Const. Co., 103 N. Y. S. 1103. A surety on bond against liens on a building contract is liable only for default of the principal in paying enforcible liens. Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co. [Cal. App.] 85 P. 156. A surety on a bond to the state for the construction of a public building is not liable for materials furnished, under a provision indemnifying the state against mechanics' liens, for no such lien will lie against a public building. Smith v. Bowman [Utah] 88 P. 687.

14. City of Philadelphia v. Pierson [Pa.] 66 A. 321.

15. Where sureties have notice of impending suit on a bond against the principal, the judgment obtained therein is prima facie evidence of the sureties' liability. Henry v. Heidmaier, 226 Ill. 152, 80 N. E. 705. In the absence of any allegation of collusion between the administrator and the next of kin, a surety is bound by the final decree and cannot open the same in a suit on the administrator's bond brought by such next of kin. In re Haight's Estate, 50 Misc. 238, 100 N. Y. S. 488. A judgment directing the appointment of a receiver to bring suit against the surety on an administrator's bond is not conclusive as to the liability of the surety. Preston v. American Surety Co. [Md.] 64 A. 292. As a general rule an auditor's settlement of a tax collector's account is admissible in evidence against the latter and his sureties (Commonwealth v. Carson, 26 Pa. Super. Ct. 437), and this rule is not changed though the settlement contains an item of charge for which the sureties are not liable (Id.), but in such case the jury should be instructed to disregard such item (Id.).

16. A fidelity bond only covers defalcations from the date thereof to the end of the time of employment, unless the contrary appears. United States Fidelity & Guaranty Co. v. Com. [Ky.] 101 S. W. 360. A surety on the bond of a county depository is liable for loss or defalcations made subsequent and prior to the date of the execution of the bond. Henry County v. Salmon [Mo.] 100 S. W. 20. A surety on a cashier's bond, in the absence of any language in the bond itself, giving a different effect, is not liable beyond the term of office of such cashier, though the trustees of the bank in which he is employed may appoint him for an indefinite period. Wapello State Sav. Bank v. Colton [Iowa] 110 N. W. 450.

17. Where a payment by a tax collector is not identified in a settlement as belonging to any year, it will be presumed in a collateral proceeding in the absence of evidence that the item belonged to the year as to which the settlement was made. Commonwealth v. Carson, 26 Pa. Super. Ct. 437. A complaint against a surety for defalcation of an agent is demurrable unless it shows that the money was in such agent's hands when the fidelity bond was executed. United States Fidelity & Guaranty Co. v. Com. [Ky.] 101 S. W. 360.

18. State v. Cottle, 8 Ohio C. C. (N. S.) 120.

19. Foster v. People, 121 Ill. App. 165.

20. Henry County v. Salmon [Mo.] 100 S. W. 20. Where a bonding company, with knowledge of an informality in the execution of a bond by its agent receives and retains the premium paid for the bond, it is estopped in an action on the bond from urging such informality as a defense. Farmers' & Merchants' Irr. Co. v. U. S. Fidelity & Guaranty Co. [Neb.] 108 N. W. 156.

21. See 6 C. L. 1593.

22. A provision on a contractor's bond for knowledge or notice of default, and in any event within thirty days, is a binding valid condition precedent to liability of the surety. United States Fidelity & Guaranty Co. v. Rice [C. C. A.] 148 F. 206; Heinmann v. Brasch, 103 N. Y. S. 720. Demand on sureties held unnecessary. First Nat. Bank v. Story, 103 N. Y. S. 233.

23. The failure of the principal to sign an application for an indemnity bond does not discharge the surety where the bond recites that it is given "in consideration of mutual covenants." Aetna Indemnity Co. v. Ryan, 103 N. Y. S. 756. The surety can testify that he had no intention of being bound unless the principal joined in the bond,

cution by the principal of a bond which on its face is to be executed by both, the facts should be pleaded.[25] The surety may also set up that the obligation is void because of failure of consideration,[25a] and where a surety has been once discharged, he cannot be held on his new promise to pay the debt unless some new consideration be given therefor.[26] It is a good defense to the surety that there is an alteration on the face of a contract,[27] or that it is unenforceable because of the statute of limitations.[28]

(§ 4) *B. Defenses based on extinguishment or absence of principal's liability.*[29]—Where a creditor releases a principal, he also discharges the surety from all liability on the debt,[30] but a release or discharge of the principal by operation of law does not discharge the surety, and, therefore, bankruptcy of the principal is no defense to the surety.[31]

(§ 4) *C. Defenses based on change of contract or increase of the risk.*[32]—A surety has a right to stand on the strict terms of his agreement and any alteration thereof operates as a new contract to which he is not a party, and he is consequently discharged, and this is true though the surety sustains no injury and even though the change is for his benefit,[33] but not where the alteration is made with the con-

where on the face the bond was not signed by all parties named therein. School Dist. No. 80 v. Lapping [Minn.] 110 N. W. 849. A bond executed by a surety only where the principal is named but does not sign it does not show on its face any obligation on the sureties. Id. Where a bond on its face provides for execution by a principal and sureties, it is void as to sureties, unless executed by the principal. Bjoin v. Anglim, 97 Minn. 526, 107 N. W. 558; Tully v. Lewitz, 50 Misc. 350, 98 N. Y. S. 829; Smith v. Bales, 30 Ky. L. R. 779, 99 S. W. 672.

24. Where there is a secret contract of one cosurety with another, requiring an indemnity bond, the failure to provide such in the absence of notice to the creditor is no defense. Hendry v. Cartwright [N. M.] 89 P. 309. In the absence of notice to the creditor of an agreement between the principal and surety that certain other parties should become cosureties, the surety has no defense thereon. Wollenberg v. Sykes [Or.] 89 P. 148. Where the name of a cosurety appearing on the face of a contract is lacking, failure to obtain his signature is a good defense thereto. Hendry v. Cartwright [N. M.] 89 P. 309.

25. Bjoin v. Anglim, 97 Minn. 526, 107 N. W. 558.

25a. A stay bond where unnecessary is without consideration, and the sureties are not liable thereon. Olsen v. Birch & Co., 1 Cal. App. 99, 81 P. 656.

26. Steger v. Jackson [Ky.] 102 S. W. 329.

27. Hendry v. Cartwright [N. M.] 89 P. 309.

28. The statute of limitations is a good defense to the surety where the principal has tolled the statute by payment of interest, and this is true although the surety is treasurer of the principal, and as such signs the checks by which payment is made. Ulster County Sav. Institution v. Deyo, 101 N. Y. S. 263.

29. See 6 C. L. 1594.

30. Brown v. Chicago, etc., R. Co. [Neb.] 107 N. W. 1024. Where a lease is made for a term of thirty months, a surrender by the lessee concurred in by the lessor discharges the surety. American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F. 17. A judgment in favor of the principal in an action on a redelivery bond in replevin is conclusive as to discharging the sureties. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534.

31. Wolfboro Loan & Banking Co. v. Rollins [Mass.] 81 N. E. 204; Wilson v. White [Ark.] 102 S. W. 201; Wise Coal Co. v. Columbia Lead & Zinc Co. [Mo. App.] 100 S. W. 680.

32. See 6 C. L. 1595.

33. A subsequent provision for sale of property pledged by principal. Wright Steam Engine Works v. McAdam, 113 App. Div. 872, 99 N. Y. S. 577; American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F. 17; American Surety Co. v. Scott & Co. [Okl.] 90 P. 7; State v. Baird [Idaho] 89 P. 298; Miller v. Friedheim [Ark.] 102 S. W. 372. A surety on a contractor's bond cannot set up changes in the contract made before the execution of the bond. Allen County v. U. S. Fidelity & Guaranty Co., 29 Ky. L. R. 356, 93 S. W. 44. Where a bank loaned money on the note of a principal and two sureties for a particular purpose and then appropriated the proceeds to a satisfaction of an existing debt to the bank of the principal, the sureties were released. Planters' State Bank v. Schlamp, 30 Ky. L. R. 473, 99 S. W. 216. There being no limitation in the contract, surety held not discharged by any arrangement made between the principal and the creditor as to the volume and terms of the business between them. McGuire v. Gerstley, 26 App. D. C. 193. A surety for the purchaser at a judicial sale is bound by the order confirming sale although it changes the contract of suretyship. Sipe v. Taylor [Va.] 55 S. E. 542.

Held not to be a material alteration: The removal of the plaintiff's business by the principal, from "B" to "C," when described as "K of B" in the obligation of suretyship, the words are construed as being merely descriptive. Rouss v. King, 74 S. C. 251, 54 S. E. 615. Where the building contractor for a city defaults, and the material man to

sent of the surety.[34] The surety has also an additional ground for discharge from an altered contract on the ground that it increases his risk, and this is held to give complete defense, whether or not the alteration was for his benefit;[35] and overpayment is generally held to operate as a discharge since it increases the risk.[36] The contract, however, may in terms provide and clearly contemplate such alterations, and the surety is then deemed to have given his consent in advance to such change, or where the right to make alterations is reserved in the contract,[37] or where the defense of overpayment would be good, it is waived by the surety consenting thereto in the original contract.[38] A surety is not entitled to notice of default where there is no such provision in the contract;[39] but where a demand on the surety is a condition precedent to liability on the contract, failure to plead that such notice has been given does not preclude its being set up in evidence.[40]

(§ 4) *D. Defenses arising out of forbearance of suspension of liability of*

whom the surety is bound by the terms of his bond continues to furnish bricks for the carrying on of the work which is continued by the city. City of Philadelphia v. Nichols Co., 214 Pa. 265, 63 A. 886. Contract not completed within the requisite time. Kansas City Hydraulic Press Brick Co. v. National Surety Co., 149 F. 507. Where a building contract provides for completion on Nov. 17th, notice of default mailed to the surety on Nov. 21st is substantial compliance with the provision for notice of default. Routt v. Dils [Colo.] 90 P. 67. Where a bond and building contract provides for notice to the sureties only in case the contract is abandoned, the surety is not discharged merely because the contractor is behind in its completion. American Surety Co. v. Scott & Co. [Okl.] 90 P. 7. Extension of time of completion of a building contract does not necessarily operate as a release of surety. Id.; Wing & Bostwick Co. v. U. S. Fidelity & Guaranty Co., 150 F. 672. Increase in size of a cellar in a building, the cost being fully paid for. American Surety Co. v. Scott & Co. [Okl.] 90 P. 7. Change in site of dwelling occasioning no additional expense to the contractor does not release his surety. Segari v. Mazzei, 116 La. 1026, 41 So. 245. Payments on other days of the month than those contracted for are immaterial variances not discharging surety. City of New Haven v. National Steam Economizer Co. [Conn.] 65 A. 959.

Held to be a material alteration: A change in the personnel of a firm is a sufficient alteration to discharge the surety. Friendly v. National Surety Co. [Wash.] 89 P. 177. A change in a building contract which increases the cost $315 where the cost of the building is $16,300, is sufficient alteration to discharge the surety. Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co. [Cal. App.] 85 P. 156. A contract with the defaulting employe permitting him to repay misappropriated money by working a sufficient length of time to compensate his employer therefor is a defense to a surety. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483. Change of compensation of an employe from salary to a commission basis. Germania Fire Ins. Co. v. Lange [Mass.] 78 N. E. 746.

34. State v. Baird [Idaho] 89 P. 298. A failure to notify the sureties of a delay in the performance of a building contract generally discharges the surety, but not where it is specially agreed in such contract that the delay should not be considered a default National Surety Co. v. Long [Ark.] 96 S. W. 745.

35. Fidelity & Deposit Co. v. Agnew [C. C. A.] 152 F. 955.

36. National Surety Co. v. Long [Ark.] 96 S. W. 745.

Held not to be a material increase of the risk: The unconscious overpayment on a building contract does not operate as a discharge. McKenzie v. Barrett [Tex. Civ. App.] 16 Tex. Ct. Rep. 641, 98 S. W. 229. Overpayment in good faith on architect's certificates. City of New Haven v. National Steam Economizer Co. [Conn.] 65 A. 959.

Held to be an increase of the risk: The increase of an amount loaned on a cotton note increases the risk and discharges the surety. Kempner v. Patrick [Tex. Civ. App.] 95 S. W. 51. Where a building contract provides that a twenty per cent. reserve shall be kept in hand for the performance of the same, that no overpayment shall render it void, an overpayment nevertheless constitutes a discharge up to the amount of the reservation, though it does not render the entire obligation void. Town of Guttenberg v. Vassel [N. J. Err. & App.] 65 A. 994. Where twenty-five per cent. of the contract price is to be retained, for thirty-five days after the completion of the building, immediate payment discharges the surety from liability from mechanics' liens up to the amount so paid and he is only liable for the excess thereon. Alcatraz Masonic Hall Ass'n v. U. S. Fidelity & Guaranty Co. [Cal. App.] 85 P. 156.

37. American Surety Co. v. San Antonio Loan & Trust Co. [Tex. Civ. App.] 98 S. W. 387; City of New Haven v. National Steam Economizer Co. [Conn.] 65 A. 959.

38. Enterprise Hotel Co. v. Book [Or.] 85 P. 333. A defense to reserve the amount stipulated in a building contract until after the completion thereof must be pleaded by a surety setting it up as ground for discharge. United States Fidelity & Guaranty Co. v. Probst, 30 Ky. L. R. 63, 97 S. W. 405. A surety setting up as a defense to his liability on an employe's bond, that the risk is materially increased, must specifically plead the same. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483.

39. Clark v. Gerstley, 26 App. D. C. 205.

40. Heinemann v. Brasch, 103 N. Y. S. 720.

principal.[41]—Since a promise on the part of the creditor to extend the time of payment of an obligation would prevent immediate enforcement thereof by the surety on his payment and subsequent subrogation to the rights of the creditor, from the time of the making of such a promise, a surety is discharged.[42] Such promise must be made without the consent of the surety,[43] and be a good defense in a suit brought by the creditor against the principal debtor,[44] and hence be supported by good and valuable consideration.[45] The receipt of interest after maturity not yet earned is usually held to be conclusive of such forbearance,[46] but it has been held that the mere payment and acceptance of interest on an overdue note does not discharge a surety unless it is shown that it is paid in advance, and operates as an extension of time.[47] The receipt of notes of the principal as collateral security does not operate as an extension of time where in fact no such extension is given.[48] Mere neglect to sue, however, is no defense to the surety, and does not operate as an extension of time.[49]

(§ 4) *E. Defenses based on impairment of surety's secondary remedies against principal or collateral securities.*[50]—A surety is discharged pro tanto by the wrongful surrender of the security for the debt.[51] The equity which a surety has in the col-

41. See 6 C. L. 1595.

42. Windhorst v. Bergendahl [S. D.] 111 N. W. 544; Clark v. Gerstley, 26 App. D. C. 205; Fitts v. Messick Grocery Co. [N. C.] 57 S. E. 164; Welch v. Kukuk, 128 Wis. 419, 107 N. W. 301; Vaughan v. Vernon [Ark.] 100 S. W. 92; Hoffman v. Habighorst [Or.] 89 P. 952; First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. The surety on a supersedeas bond is not released by the delay of the creditor when he had not bound himself not to sue. United States Fidelity & Guaranty Co. v. Boyd, 29 Ky. L. R. 598, 94 S. W. 35. If a wife acting as surety for her husband mortgages her own property, the extension of the time of payment of the debt discharges the wife and the mortgage. Diehl v. Davis [Kan.] 88 P. 532. The reason a creditor cannot recover against a surety where he has released the principal is that the creditor cannot intentionally deprive his debtor of his indemnity and still hold him to his obligation. Brown v. Chicago, etc., R. Co. [Neb.] 107 N. W. 1024.

43. Dreeben v. First Nat. Bk. [Tex. Civ. App.] 15 Tex. Ct. Rep. 917, 93 S. W. 510. The consent of a surety to an extension of time given to the principal must be based on some valid consideration to hold him liable if he has been already discharged. First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499. When the indorser of a check presented it to the drawee for certification which was made thereby discharging the indorser, and thereafter the indorser executed an instrument reciting that he consented to the extension of time of payment, held, the instrument not being based on a consideration did not create a liability against the indorser. Id. The extension of time granted by the payee to the maker is a sufficient consideration to bind the surety. He is already discharged on a new promise to pay the debt. Steger v. Jackson [Ky.] 102 S. W. 329. A conditional consent to the extension of time granted by surety is only operative where such conditions are complied with. Long v. Patton [Tex. Civ. App.] 15 Tex. Ct. Rep. 736, 93 S. W. 519.

44. Clark v. Gerstley, 26 App. D. C. 205.

45. Jones v. Cottrell [Iowa] 109 N. W 793; First Nat. Bank v. Currie [Mich.] 13 Det. Leg. N. 965, 110 N. W. 499; Clark v. Gerstley, 26 App. D. C. 205; Parker & Co. v. Guillot [La.] 42 So. 782. Prepayment of interest is good consideration for a promise to extend the time of payment of an obligation. Welch v. Kukuk, 128 Wis. 419, 107 N. W. 301.

46. Cromwell v. Rankin, 30 Ky. L. R. 123. 97 S. W. 415. The prepayment of interest after the maturity of a debt operates as an extension of time where voluntarily accepted by a creditor. Welch v. Kukuk, 128 Wis. 419, 107 N. W. 301. It is competent evidence of the extension of a note for a consideration discharging the sureties thereon that two days before it was legally due the principal paid interest to the maturity of the note, and executed and delivered a new note for the same amount payable by its terms, a year later. Windhorst v. Bergendahl [S. D.] 111 N. W. 544.

47. Bitler's Estate, 30 Pa. Super. Ct. 84.

48. Kingman St. Louis Impl. Co. v. McMaster, 118 Mo. App. 209, 94 S. W. 819. That creditor took short-time notes from principal held not to release surety where the latter could still pay the debt and sue the principal. Fitts v. Messick Grocery Co. [N. C.] 57 S. E. 164.

49. Dreeben v. First Nat. Bk. [Tex. Civ. App.] 15 Tex. Ct. Rep. 917, 93 S. W. 510; Vaughan v. Vernon [Ark.] 100 S. W. 92.

50. See 6 C. L. 1596.

51. In re Sanderson, 150 F. 236; Iowa Nat. Bank v. Cooper [Iowa] 107 N. W. 625; Enterprise Hotel Co. v. Book [Or.] 85 P. 333; Bennett v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 952, 93 S. W. 704; American Bonding Co. v. Pueblo Inv. Co. [C. C. A.] 150 F. 17. Where a creditor has obtained the equity of redemption of mortgage security and applied the same to the principal indebtedness, the surety is released pro tanto, since he would be entitled to the same on the theory of subrogation. Crosby v. Woodbury [Colo.] 89 P. 34. Where a bank takes stock as collateral to a note, part of which stock is owned by the four makers, one of whom is principal and the others sureties, and part of the stock is owned by the principal, the

lateral of the principal given to the creditor to secure the debt is merely the right accruing only after the debt is fully paid, to be subrogated to the right of the creditor in respect of the collateral.[52] A surety is entitled to have the security of the secured debt sold before resort to him, but failure to do so does not operate as a discharge.[53] A surety on a contractor's bond having a right to complete the building and become entitled to the reserve in the hands of the owner does not stand in the position of an assignee, but as an original party in a trilateral agreement.[54]

(§ 4) *F. Defenses based on fraud or concealment by creditor of material facts.*[55]—Before entering upon a contract it is the duty of the creditor or obligee to disclose all pertinent facts regarding the subject of the contract within his knowledge,[56] but such misrepresentations to operate as a discharge must be made before the execution of the contract of suretyship,[57] and in the absence of inquiry, the knowledge of such defect of the principal need not be communicated,[58] nor is negligence on the part of the employer or his agents in not discovering the faults of his servants sufficient to operate as a discharge.[59]

(§ 4) *G. Other defenses.*[60]—Where payments are made by the principal on the debt, failure to apply the same in payment discharges the surety pro tanto,[61] and where in a running account a payment has been credited on a certain debt thereby discharging the party, there can be no revivor of liability except by the consent of the surety.[62] Where a principal owing money to a bank has at the time of the maturity of the debt, more than enough to pay the same, and is permitted to draw the same out on check, the surety is thereby released.[63] The equitable rule as to the application of payments may be changed by agreement between the parties.[64] A failure to pay dividends on stock held as collateral to a note is in favor of the surety and should be credited on the debt, and is no ground for the discharge

sureties are entitled to have the proceeds of a sale of the stock owned solely by the principal first applied to the joint debt. Iowa Nat. Bank v. Cooper [Iowa] 107 N. W. 625.

52. Advance Thresher Co. v. Hogan, 74 Ohio St. 307, 78 N. E. 436.

53. Where a creditor has a right to sell the collateral for a debt, his failure to do so does not discharge the surety, since the latter could have paid the obligation and become entitled to the right. Cromwell v. Rankin, 30 Ky. L. R. 123, 97 S. W. 415.

54. First Nat. Bank v. School Dist. No. 1 [Neb.] 110 N. W. 349. A surety on a contractor's bond does not stand in the position of an assignee with respect to the reserve in the hands of the owner, but an original party to the tri-latteral contract and his rights to such reserve cannot be cut out by garnishment proceedings commenced by a third party who is a creditor of the defaulting contractor. Id.

55. See 6 C. L. 1597.

56. Willoughby v. Fidelity & Deposit Co., 16 Okl. 546, 85 P. 713. If the party who takes a bond for the contract of a principal in an employment knows at the time that the principal is then a defaulter in such employment, and conceals the fact from the surety, such concealment is a fraud upon the surety and discharges him. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483. Failure of the general agent of an insurance company to inform the sureties of the defalcation of a subagent operates as a release of the sureties, though no relation between the sureties and such agent. Hebert v. Lee [Tenn.] 101 S. W. 175. Where the heirs have made false representations to a prospective surety on an administrator's bond as to the condition of the estate, they cannot recover losses caused by a defaulting administrator. Fidelity & Deposit Co. v. Moshier, 151 F. 806.

57. False statement by creditor that principal was not in arrears held not to preclude creditor from recovering for arrears existing prior to such statement. Harris v. Remmel [Ark.] 102 S. W. 716.

58. An obligee on a fidelity bond is not compelled to disclose to a surety that the principal has previously committed forgery in the absence of inquiry by the surety. Wright v. German Brew. Co., 103 Md. 377, 63 A. 807.

59. An innocent misrepresentation, though negligently made, is not sufficient to constitute such fraud as will discharge a surety. Brillion Lumber Co. v. Barnard [Wis.] 111 N. W. 483.

60. See 6 C. L. 1597.

61. Failure to apply payments as directed when such application would have canceled the principal debt, amounts to a discharge of the surety. Western Bank & Trust Co. v. Gibbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 754, 96 S. W. 947.

62. Mitchell v. Wheeler [Iowa] 108 N. W. 1030.

63. Burgess v. Deposit Bank of Sadieville, 30 Ky. L. R. 177, 97 S. W. 761. **Contra.** Davenport v. State Banking Co. [Ga.] 54 S. E. 977.

64. Advance Thresher Co. v. Hogan, 74 Ohio St. 307, 78 N. E. 436. A surety on a

of the principal obligation.[65] Failure to sue at request in the absence of statute is no defense to the surety,[66] and negligent failure on the part of a creditor to sue the principal or to present the claim against him in the bankruptcy courts does not release the surety;[67] but in states where at the request or demand of the surety the creditor must sue, the surety is discharged by his failure to do so, but the surety has no right to demand that suit be brought against the principal unless the latter is in default,[68] and failure of the creditor to sue the principal at the request of the surety does not operate as a discharge when the creditor is not yet the owner of the claim or is not in a position to enforce the same,[69] nor where the principal has absconded and has no property.[70] The request to sue, however, must be plain and unambiguous.[71] The issuance of an unenforceable writ of execution by the creditor against the principal does not release the surety.[72] Where the payment of a note by the principal is set aside by the bankruptcy courts as a preference, the sureties thereon are not released.[73] Sureties on a redelivery bond in an action of replevin are not liable on a judgment of costs rendered against the defendants because of a continuance.[74]

§ 5. *Rights of surety against prinicipal and co-surety.*[75] *Indemnity and contribution.*[76]—Upon payment to the creditor of the full amount of the liability of the principal, the surety is subrogated to his right against the principapl surety and the cosureties for their proportional share of the indebtedness.[77] Moreover on payment of any sum as surety for the principal, the surety has a right of indemnity to recover on the implied contract from the principal,[78] and to contribution from his cosureties for a pro rata amount paid by him on the debt.[79] A subsisting liability of the surety is sufficient consideration for a mortgage to him for indemnification against loss by the principal.[80] Under the statute of California the surety may bring an equitable action against the principal to set aside a fraudulent conveyance

mortgage note is presumed to have notice of the provisions in the mortgage concerning the application of payments made on the mortgage debt. Id.

65. Cromwell v. Rankin, 30 Ky. L. R. 123, 97 S. W. 415.

66. White v. Savage [Or.] 87 P. 1040.

67. Wilson v. White [Ark.] 102 S. W. 201.

68. Raved v. Kibbe, 102 N. Y. S. 490. A surety of a tenant who is not defaulted has no right to ask the landlord to oust the tenant, and failure to do so is no defense to him in an action to recover for subsequent defaults. Id.

69. Wilson v. White [Ark.] 102 S. W. 201.

70. Thompson v. Treller [Ark.] 101 S. W. 174.

71. Where a statute provides for suit by the creditor at the request of the surety, a notice that "P did not intend to pay until the courts say he will have to," is not such a notice as to come within the statute. Williams v. Ogg [Tex. Civ. App.] 15 Tex. Ct. Rep. 940, 94 S. W. 420. Where a surety on a note, in answer to a letter from the owner of the note requesting payment, writes: "Please collect of Mr. Beers (the principal) all you can of this amount, and notify me and I will arrange for the balance," and the owner of the note answers, suggesting that the surety see the principal and secure himself against loss, and the surety immediately replies, saying "I will try and see Mr. Beers (the principal) soon, am very busy for a few days, and will report to you as soon as I can. Thanks for your suggestion," and nothing further is done by either party in reference to the matter, held, that that does not constitute a sufficient notice, according to the provisions of Rev. St. § 5833, to relieve the surety, because of the neglect of the owner to bring suit on said note for six years after such correspondence. Haskell v. Beers, 4 Ohio N. P. (N. S.) 49.

72. Wilson v. White [Ark.] 102 S. W. 201.

73. Hooker v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 993, 97 S. W. 1083; Wright v. Gansevoort Bank, 103 N. Y. S. 47, 548.

74. American Soda Fountain Co. v. Dean Drug Co. [Iowa] 111 N. W. 534. Where a creditor assures a surety on a guardian's bond that no action will be maintained against him, such assurance is a defense to a default judgment. Hall v. Lockerman [Ga.] 56 S. E. 759.

75. See 6 C. L. 1597.

76. See 6 C. L. 1598.

77. See Subrogation, 8 C. L. 2041.

78. Smith v. Nixon, 145 Mich. 593, 13 Det. Leg. N. 569, 108 N. W. 971. Where both husband and wife are deceased and are both liable on a debt, on which the wife stands in the relation of surety, the husband's estate should pay the entire amount of the debt. Browne v. Bixby, 190 Mass. 69, 76 N. E. 454.

79. Smart v. Panther [Tex. Civ. App.] 15 Tex. Ct. Rep. 448, 95 S. W. 679. The heirs of a cosurety are liable in contribution to another surety after the time limited by statute for presentation of claims, on showing that suit could not be commenced at an earlier time. Clevenger v. Matthews [Ind. App.] 75 N. E. 23.

80. Griffis v. First Nat. Bank [Ind. App.] 79 N. E. 230.

of the latter before his debt becomes due.[81] Where a surety has agreed to defend on the principal obligation at the request of the principal, providing the latter would furnish the funds therefor, the surety cannot recover his expenses for such defense where the principal makes no request that he do so.[82]

§ 6. *Security held by surety and rights therein.*[83]—On payment of the indebtedness, a surety is entitled to share in the security deposited with the cosurety for his indemnification,[84] and a creditor is entitled to the security in the hands of a surety for the indemnification of the latter on the debt,[85] but generally a surety is not required to surrender any security given him by the principal as indemnity until his liability to pay is ended;[86] but a statute providing that creditors have the right to the security which the principal gives the surety as an indemnity applies only to cases where the indemnity is furnished by the principal and not where a stranger furnishes such indemnity.[87]

§ 7. *Remedies and procedure.*[88]—A surety is a proper, but not a necessary, party to a suit on an obligation,[89] and where a suit is brought against two or more joint makers on an obligation, other cosureties can be brought in and their rights determined in the original action.[90] Where a statute gives a right of appeal from the final decree to heirs, etc., and other persons interested, the surety on a guardian's bond has a right to appeal.[91]

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TAXES.

[By JOSEPH H. DUNNEBACKE.]

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81. Walters v. Akers [Ky.] 101 S. W. 1179.

82. American Surety Co. v. Lehr [Tex. Civ. App.] 15 Tex. Ct. Rep. 338, 93 S. W. 681.

83. See 6 C. L. 1599.

84. Where a contractor gives the surety certain security in payment of his liability, a cosurety is entitled to share therein. National Bk. of Commerce v. Schirm [Cal. App.] 86 P. 981. Where a surety with his own money purchases the indemnity property at execution on the debt, it does not enure to the benefit of his cosureties. Elrod v. Gastineau, 30 Ky. L. R. 803, 99 S. W. 903.

85. Griffis v. First Nat. Bank [Ind. App.] 79 N. E. 230. The payees of notes have an interest in a mortgage given by a principal to secure a surety against loss. Griffis v. First Nat. Bk. [Ind.] 81 N. E. 490. Where two liens are of equal dignity, a surety of the debtor buying in one lien can enforce it as against the owner of the other. Davis v. Roller [Va.] 55 S. E. 4.

86. Smith v. Wigler [N. J. Eq.] 65 A. 900. However see Noble v. Anniston Nat. Bank [Ala.] 41 So. 136, holding that a surety is not entitled to set off the collateral received by him from the principal against the demand of the creditor for the amount of his claim.

87. O'Neill v. State Sav. Bank [Mont.] 87 P. 970.

88. See 6 C. L. 1600.

89. Bolton v. Gifford & Co. [Tex. Civ. App.] 100 S. W. 210.

90. Hall v. Taylor [Tex. Civ. App.] 16 Tex. Ct. Rep. 374, 95 S. W. 755.

91. In re Switzer [Mo.] 98 S. W. 461.

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§ 1. *Nature and kinds, and power to tax.*[92]—A tax is a charge or burden imposed by the state on persons or property, for the support of the government or for some specific purpose authorized by it.[93] It is not a debt,[94] nor has it any of the elements of a contractual obligation.[95]

The power to tax is an attribute of sovereignty[96] inherent in the legislative branch of the government[97] and subject to no limitations or restrictions beyond those set up in the fundamental law, or found in the structure of the government itself.[98]

Among the limitations which have been expressly incorporated in the written constitutions of the nation and of the various states may be mentioned the provisions of the Federal constitution guaranteeing the equal protection of the laws,[99] forbidding the deprivation of property without due process of law,[1] and denying to the

92. See 6 C. L. 1602.

93. Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895; Reser v. Umatilla County [Or.] 86 P. 595. The franchise tax imposed by N. J. Gen. St. 1895, § 251, et seq., is a tax. State v. Anderson, 27 S. Ct. 137.

94. Carpenter v. Jones County, 130 Iowa 494, 107 N. W. 435. A tax is not a debt in the sense that it will be barred by a statute of limitations. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251. The distinguishing feature between a debt and a tax is that in case of the former there is an express or implied promise to pay, enforcible by ordinary remedies, and in case of the latter such element does not exist and such remedies are ordinarily not applicable. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

95. A tax is an exaction of sovereignty and not something derived from an agreement. People v. Grout, 103 N. Y. S. 975. But see § 16, infra, where cases are cited to the view that license taxes are contractual in their character.

96. State v. Braxton County Ct. [W. Va.] 55 S. E. 382. The right to tax is not granted by the constitution but of necessity underlies it, because government could not exist or perform its functions without it. While it may be regulated and limited by the fundamental law, it exists independently of it as a necessary attribute of sovereignty. People v. Reardon, 184 N. Y. 431, 77 N. E. 970.

97. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594; State v. Braxton County Ct. [W. Va.] 55 S. E. 382.

98. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594. The power of the state to take the property of its citizens by a tax is not broader than the purpose for which the state is formed. Auditor of Lucas County v. State, 75 Ohio St. 114, 78 N. E. 955.

99. The Federal constitution is not violated in this respect by Kentucky statutes imposing a tax on distilled spirits in bonded warehouses. (Thompson v. Com., 29 Ky. L. R. 705, 94 S. W. 654), nor is N. Y. Laws 1905, p. 2059, taxing real estate mortgtges, invalid because made applicable only to mortgages recorded after a future date (People v. Ronner, 185 N. Y. 285, 77 N. E. 1061). See 6 C. L. 1602, n. 58.

1. The following legislative enactments have been sustained as not violative of this provision of the Federal constitution. S. Dak. Rev. Pol. Code, § 2149, making the possession of a tax receipt conclusive evidence of the payment of all prior taxes. Harris v. Stearns [S. D.] 108 N. W. 247, rvg. 17 S. D. 439, 97 N. W. 361. Texas Acts 29th Leg. p. 128, authorizing the fish and oyster commissioner to summarily seize fish sold and held without a permit. Raymond v. Kibbe [Tex. Civ. App.] 15 Tex. Ct. Rep. 988, 95 S. W. 727. W. Va. Acts 1905, p. 285, taxing chattels real. Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928.

states the right to tax objects of interstate commerce;[2] and provisions of state constitutions against unreasonable searches,[3] restricting the rate of taxation,[4] the purposes thereof,[5] and requiring uniformity and equality in the laying of taxes.[6]

There exist also several well defined implied limitations upon the taxing power. Thus the persons and property must be within the territorial jurisdiction of the taxing power[7] at the time of incurring the obligation for which the tax was levied.[8] The tax law must operate uniformly and equally throughout the entire taxing dis-

The Texas Intangible Assets Act (Laws 1905, p. 351). Missouri, etc., R. Co. v. Shannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527; Id. [Tex.] 100 S. W. 135. N. Y. Laws 1905, c. 241, §§ 315, 324, imposing a tax on transfers of shares of stock. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535; Id., 184 N. Y. 431, 77 N. E. 970; Id. 27 S. Ct. 188. Tex. Gen. Laws 1905, p. 336, taxing railroad companies on gross receipts. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. The N. Y. act (Laws 1905, p. 2059), taxing real estate mortgages. People v. Ronner, 185 N. Y. 285, 77 N. E. 1061. Wash. Laws 1903, p. 223, imposing a poll tax. Thurston County v. Tenino Stone Quarries [Wash.] 87 P. 634. The Ky. statutes imposing a tax on distilled spirits in bonded warehouses (Thompson v. Com., 29 Ky. L. R. 705, 94 S. W. 654), and a domestic railway corporation is not deprived of its property without due process because no reduction is allowed from the capital stock taken as the basis of the franchise tax imposed by N. Y. Laws 1896, § 182, notwithstanding a large part of its rolling stock is continually out of the state (People v. Miller, 202 U. S. 584, 50 Law. Ed. 1155). See 6 C. L. 1603, n. 59.

2. Standard Oil Co. v. Fredericksburg, 105 Va. 82, 52 S. E. 817. Interstate commerce is not unconstitutionally interfered with by N. Y. Laws 1896, c. 908, § 182, imposing a franchise tax on domestic railways. (People v. Miller, 202 U. S. 584, 50 Law. Ed. 1155), nor by N. Y. Laws 1905, c. 241, imposing a tax on transfers of corporate stock when applied only to a transfer made within the state (People v. Reardon, 184 N. Y. 431, 77 N. E. 970; Id., 27 S. Ct. 188), but Texas Sess. Laws 1905, p. 336, imposing a tax on the gross receipts of railroads from both state and interstate commerce, is unconstitutional as regulative of interstate commerce (Galveston, etc., R. Co. v. Davidson [Tex. Civ. App.] 15 Tex. Ct. Rep 274, 579, 93 S. W. 436). See 6 C. L. 1603, n. 60.

3. Ind. Acts 1901, p. 109, c. 71, authorizing an order for the inspection of the county assessor of a person's books to determine whether another has returned all his property for taxation, is not in conflict with the constitutional guaranty against unreasonable search. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

4. State v. Braxton County Ct. [W. Va.] 55 S. E. 382; Doniphan Lumber Co. v. Reid [Ark.] 100 S. W. 69. Tax rate held to be excessive. Chicago, etc., R. Co. v. People, 225 Ill. 463, 80 N. E. 295; Gaither v. Gage & Co. [Ark.] 100 S. W. 80.

5. The Ohio act for the relief of the worthy blind (97 Ohio Laws, p. 392) held to be for a private purpose. Auditor of Lucas County v. State 75 Ohio St. 114, 78 N. E. 955. See 6 C. L. 1603, n. 62.

6. Assessing real property at intervals longer than a year, although other classes of property are assessed annually, is not violative of the rule of uniformity. Worton v. Paducah, 29 Ky. L. R. 450, 93 S. W. 617. That property is liable to be taxed in a foreign country does not constitute double taxation, since the power of taxation conferred by the local constitution cannot be made to depend upon the operation of laws of a foreign jurisdiction. Tafel v. Lewis, 75 Ohio St. 182, 78 N. E. 1003. The taxation of mortgaged real estate and the loan secured by the mortgage is not double taxation. Glidden v. Newport [N. H.] 66 A. 117. See 6 C. L. 1603, n. 60.

Statutes sustained: N. C. Laws 1893, p. 430, as amended in 1895, providing that county taxes derived from railroads should be devoted to repairing highways in townships originally extending aid to such railroads. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427. Texas Intangible Assets Act of April 17, 1905. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138. N. Y. Laws 1905, c. 241, §§ 315, 324, imposing a tax on transfers of shares of stock. People v. Reardon, 184 N. Y. 431, 77 N. E. 970. Mich. Pub. Acts 1883, p. 81, imposing a specific tax on corporations organized under the act. Attorney General v. Arnott, 145 Mich. 416, 108 N. W. 646.

Statutes set aside: Illinois Act May 13, 1903 (Laws 1903, p. 87), providing for the destruction of noxious weeds and for the levy of assessments on the owners of the land from which the weeds are removed. People v. Cook County Com'rs, 221 Ill. 493, 77 N. E. 914. N. Y. Laws 1906, p. 474, imposing tax on each share of stock irrespective of its value. People v. Mensching [N. Y.] 79 N. E. 884. Hurd's Rev. St. 1905, c. 53, § 63, regulating the fees of the probate clerk upon the basis of the value of the estate to be administered. Cook County v. Fairbank, 222 Ill. 578, 78 N. E. 895. Ohio Rev. Stat. 1906, § 1343 et seq., providing for tax inquisitors. State v. Lewis, 74 Ohio St. 403, 78 N. E. 523. A law that must have an equal operation to be constitutional cannot be given an unequal operation by an amendment or by an exception in a repealing statement. Either the subsequent statute or so much of it as would have that effect is void. Friend v. Levy [Ohio] 80 N. E. 1036. For cases bearing on the question of whether privilege or **license taxes** are within the uniformity clause of the state constitutions, see § 16 infra.

7. People v. Reardon, 110 App. Div. 821, 97 N. Y. S. 535. See 6 C. L. 1603, n. 65.

8. Taxes on land for municipal obligations incurred before the land was included within the corporate limits of the municipality are void. Holcomb v. Johnson's Estate [Wash.] 86 P. 409.

trict,[9] the tax must be for a public purpose,[10] and the public interest must be coextensive with the territory in which the tax is levied.[11]

Municipal corporations[12] have no inherent power of taxation,[13] and, since the power to tax is within the grant of legislative authority, there can be no delegation of that authority except to the extent to which it is necessary to carry out the ends for which such municipalities are organized.[14]

Construction of tax laws.[15]—It is not easy to give to the various provisions of the tax laws constructions which shall have the effect to make harmonious, complete, and readily applied revenue statutes. The general purpose of the laws must be of necessity kept in mind and given effect. Cases may arise where the broad right of the state must yield to the particular rights of the individual.[16] In the absence of an unmistakable declaration of the legislative will, a statute providing how taxes shall be assessed and collected is not to be given a retrospective operation either as against the tax payer or the government;[17] and where the legislature has passed an act providing for a new revenue system and has thereby changed the former methods of procedure relating to matters of taxation, the courts in construing its provisions are not bound by any administrative construction of the former revenue law.[18] Doubts as to whether a tax amounts to double taxation are always resolved in favor of sustaining the tax,[19] and the sufficiency of an affidavit in a proceeding for the inspection of a person's books to determine whether taxable property of another has been omitted must be judged by the rule that laws relating to taxation are liberally construed in favor of the taxing power.[20] Tax statutes should be given a prospective operation only, but where the legislature has provided a scheme of taxation for a public improvement which is thereafter found to be unjust and inequitable, the burden may be readjustd upon a new and more equitable basis of assessment.[21]

§ 2. *Persons, objects, and interests taxable. A. Taxable property and its*

9. State v. Chicago, etc., R. Co., 195 Mo. 228, 93 S. W. 783; Wright v. Southern Bell Tel. & T. Co. [Ga.] 56 S. E. 116. S. C. Act of Feb. 25, 1904, 24 Stat. at Large, p. 485, amending the General Dispensary Act of that state, sustained. Murph v. Landrum [S. C.] 56 S. E. 850. While the subject of taxation is general in its nature, requiring uniformity of operation throughout the state, the provision in Rev. St. § 1365-25, giving to county commissioners power to extend for thirty days, at their discretion, the time for the payment of taxes, although limited to "counties containing a city of the second grade of the first class," must be regarded as a provision suited to certain localities and merely regulative of the mode of receiving taxes in such localities, and is therefore constitutional. State v. Madigan, 8 Ohio C. C. (N. S.) 553. See 4 C. L. 1607, n. 61.

10. 97 Laws Ohio, p. 392, providing relief for the worthy poor, held to be for a private purpose. Auditor of Lucas County v. State, 75 Ohio St. 114, 78 N. E. 955. The maintenance of militia is a public purpose. Hodgdon v. Haverhill [Mass.] 79 N. E. 830. See 4 C. L. 1608, n. 62.

11. See 4 C. L. 1608, n. 63.

12. See 6 C. L. 1604.

13. State v. Leich [Ind.] 78 N. E. 189. Pennsylvania Local Acts, authorizing city of Harrisburg to impose tax on corporations repealed by Acts of May 23, 1874 (P. L. 230), and May 23, 1889 (P. L. 277). Harrisburg v. Harrisburg Gas Co., 31 Pa. Super. Ct. 530. Act 136 La. Laws 1898, confers no power upon villages to impose license taxes. Arnold v. Jones [La.] 42 So. 727. In West Virginia county courts are subject to legislative control in respect to the amounts of money they may raise by taxation for county purposes. State v. Braxton County Ct. [W. Va.] 55 S. E. 382. See 6 C. L. 1604, n. 67.

14. School City v. Forrest [Ind.] 78 N. E. 187. Mich. Pub. Acts 1883, No. 39, under which a corporation may elect to pay an ad valorem or specific tax, is not void as an unlawful delegation of legislative power. Attorney General v. Arnott, 145 Mich. 416, 108 N. W. 646. N. C. Private Acts 1905, p. 581, creating a school district and authorizing a tax levy when the act is approved by a majority vote of the qualified electors, sustained as a valid exercise of legislative authority. Smith v. Robersonville Graded School Trustees, 141 N. C. 143, 53 S. E. 524.

15. See 6 C. L. 1604.

16. Auditor General v. Clifford, 143 Mich. 626, 13 Det. Leg. N. 127, 107 N. W. 287.

17. Southern Exp. Co. v. Atlanta, 126 Ga. 46, 54 S. E. 771; Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725.

18. Royal Highlanders v. State [Neb.] 108 N. W. 183.

19. State v. Graybeal [W. Va.] 55 S. E. 398.

20. Washington Nat. Bank v. Daily [Ind.] 77 N. E. 53.

21. Durrett v. Davidson, 29 Ky. L. R. 401, 93 S. W. 25; Durrett v. Kenton County, 27 Ky. L. R. 1173, 87 S. W. 1070.

classification.[22]—The legislature has power to classify persons,[23] property, tangible or intangible,[24] and occupations,[25] for the purpose of taxation and to impose different rates upon different classes,[26] or to tax certain kinds of property and not others.[27] It may also provide for different methods of assessment and collection of the taxes upon the different classes.[28] In the exercise of these powers the legislature is subject only to the limitations that the tax imposed must not discriminate in favor of one as against another of the same class,[29, 30] and that the methods prescribed must be consistent with natural justice.[31] The fact that only one person, firm or corporation, falls within a class upon which a license tax is imposed, does not of itself make the tax amenable to the charge of discrimination.[32]

(§ 2) *B. The persons liable.*[33]—As a general rule the person owning property at the time of the assessment is the person liable for the taxes thereon.[34] Legal disability does not relieve an owner from paying taxes.[35] Where land has become liable for taxes it remains so for that year, although subsequently acquired for purposes rendering it exempt.[36]

Vendor and vendee.[37]—As between a vendor and his vendee, taxes which have become a lien before the title passes are chargeable to the vendor,[38] but a purchaser of bank stock held to have taken them subject to the lien for taxes.[39]

Lessor and lessee.—A personal covenant in a lease that the lessee will pay the taxes assessed against the property of the lessor mentioned in the lease does not as between the taxing district and the lessee make the lessee the owner or taxpayer, and hence entitled to notice of proceedings by the owner to apportion taxes upon the leased property and other property of the lessor and owner.[40]

Principal and agent.—By statute in Wisconsin property in possession of an agent on the first of May is to be assessed to the agent,[41] but a reassessment in the

22. See 6 C. L. 1605.

23. Subjecting all male inhabitants between the ages of 21 and 50 years to a poll tax not an unreasonable classification. Thurston County v. Tenino Stone Quarries [Wash.] 87 P. 634. A classification of insurance companies into mutual companies organized for pecuniary profit and those not organized for pecuniary profit and the levying of a franchise or business tax on the one, but not the other, is a valid exercise of the legislative power. Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153.

24. Missouri, etc., R. Co. v. Shannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527.

25. Wright v. Southern Bell Tel. & T. Co. [Ga.] 56 S. E. 116; State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

26. Attorney General v. Arnott, 145 Mich. 416, 108 N. W. 646. See 6 C. L. 1605, n. 83.

27. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594. See 6 C. L. 1606, n. 84.

28. The rule of uniformity has reference to uniformity of burden and not uniformity of methods of imposing tax burdens and realizing thereon. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 577. Thus tangible and intangible values of certain classes may be assessed separately, while upon classes they may be assessed together. Missouri, etc., R. Co. v. Shannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527. See 6 C. L. 1606, n. 85.

29, 30. Tax on number of shares of stock and not on value is illegal. People v. Mensching [N. Y.] 79 N. E. 884. See 6 C. L. 1606, n. 86.

31. The grouping of express, telephone and telegraph companies, into a class for the purpose of levying an occupation tax is not an unreasonable classification. Wright v. Southern Bell Tel. & T. Co. [Ga.] 56 S. E. 116. See 6 C. L. 1606, n. 87.

32. Swift & Co. v. Newport News, 105 Va. 108, 52 S. E. 821.

33. See 6 C. L. 1606.

34. In Indiana the holder of the legal title to realty on April first becomes personally liable for the taxes assessed thereon. Corr v. Martin [Ind. App.] 77 N. E. 870. It is not material that property is shortly thereafter to be brought into the state. People v. O'Donnel, 101 N. Y. S. 610. Dominion of the state over the subject of taxation on the date the tax is required to be leivied is the test. Id. A bank in existence on March first the date of the assessment, but ceasing business in the following May, is nevertheless liable for taxes. Bank of Kentucky v. Com., 29 Ky. L. R. 643, 94 S. W. 620. See 6 C. L. 1606, n. 89.

35. Minor. In re Interstate Land Co. [La.] 43 So. 173. Insane person. De Hatre v. Edmunds [Mo.] 98 S. W. 744.

36. Public Schools of Iron Mountain v. O'Connor, 143 Mich. 35, 13 Det. Leg. n. 551, 108 N. W. 426.

37. See 6 C. L. 1606.

38. See 6 C. L. 1606, n. 93.

39. Bank of Kentucky v. Com., 29 Ky. L. R. 643, 94 S. W. 620.

40. New Auditorium Pier Co. v. Taxing Dist. [N. J. Law] 65 A. 855.

41. Rev. St. 1898, § 1044. State v. Fisher [Wis.] 108 N. W. 206.

name of an agent is illegal where he was not in possession of the property at the time of the reassessment.[42]

Mortgagor and purchasers under mortgage sale.[43]—A person holding a mortgage upon real estate is under no obligation to pay the taxes upon such property unless there is some provision in the mortgage requiring him to do so.[44]

Trust property.[45]—Property transferred by a nonresident to a resident trust company in trust for investment is subject to taxation in the hands of the trust company,[46] and money deposited with one employed by parties to a land contract to pass on the sufficiency of a title is taxable to him.[47]

An assignee for the benefit of creditors is charged with the payment of taxes assessed both before and after the assignment.[48]

A life tenant [49] and not the remainderman, in the absence of statutory provisions, must pay taxes accruing during the continuance of such estate.[50]

Husband and wife.—The mere fact that the relation of husband and wife exists does not impose upon either spouse a legal or moral obligation to pay taxes upon real estate owned by the other.[51]

Estates of decedents [52] are properly taxable to the personal representative,[56] though an assessment in the name of the decedent is valid.[54]

Property of nonresidents.[55]

(§ 2) *C. Corporations, and corporate stocks and property. Corporate franchises and privileges* [56] are proper objects of taxation.[57] They are not taxes on property [58] though the capital [59] or earnings [60] may constitute the means of measuring the amount to be paid.[61] For the purpose of taxation, corporate franchises are classified as creative, such as the right to exist as a corporation,[62] and special, such

42. In re Knight's Estate [Wis.] 108 N. W. 208.

43. See 6 C. L. 1607.

44. Jones v. Black [Okl.] 88 P. 1052.

45. See 6 C. L. 1607.

46. The fact that the trust deed contains provisions for revocation is not material. People v. Wells, 103 N. Y. S. 874.

47. And the relation of the agent is not that of a debtor so as to require a deduction of the amount thereof from his assessment. Title Guarantee & Trust Co. v. Los Angeles County [Cal. App.] 86 P. 844.

48. Carpenter v. Jones County, 130 Iowa, 494, 107 N. W. 435. Mass. St. 1888, p. 365, has no application to common-law assignments. Scollard v. Edwards [Mass.] 80 N. E. 4.

49. See 6 C. L. 1607.

50. Magness v. Harris [Ark.] 98 S. W. 362; Glenn v. West [Va.] 56 S. E. 143.

51. Nagle v. Tieperman [Kan.] 85 P. 941.

52. See 6 C. L. 1607.

53. Gregg v. Hammond, 4 Ohio N. P. (N. S.) 214; Williams v. Brookline [Mass.] 79 N. E. 779.

54. Husbands v. Polivick, 29 Ky. L. R. 890, 96 S. W. 825.

55. See 6 C. L. 1607. See § 4 infra, for cases dealing with the property of nonresidents.

56. See 6 C. L. 1607.

57. Cumberland Tel. & T. Co. v. Hopkins, 28 Ky. L. R. 846, 90 S. W. 594. A corporation owing tank cars for the transportation of oils by railroads is within the terms of Ky. St. 1903, § 4077, imposing a franchise tax. Louisville Tank Line v. Com., 29 Ky. L. R. 257, 93 S. W. 635. In New Jersey, to entitle a corporation to the exemption from the franchise tax on its capital stock, it must appear that at least 50 per cent of its capital stock, issued and outstanding is invested in mining or manufacturing carried on in the state. Simply having a place leased for the purpose of carrying on a manufacturing business, but at which no business is carried on, does not comply with the statute. Halsey Elec. Generator Co. v. State Board of Assessors [N. J. Law] 65 A. 837.

58. The tax imposed by the New York statute, as amended (Laws 1905, p. 131, c. 94), upon foreign insurance companies, is a franchise tax and not a tax on property. People v. Kelsey, 101 N. Y. S. 902.

59. Under the Ky. statutes the bonds, notes, and other intangibles of a corporation are to be considered in fixing the annual franchise tax. Commonwealth v. Cumberland Tel. & T. Co., 30 Ky. L. R. 723, 99 S. W. 604. Massachusetts corporations authorized to construct railroads in foreign countries are now subject to the domestic franchise tax imposed by § 74 of St. 1903, re-enacted by St. 1904, c. 261. Mexican Cent. R. Co. v. Com. [Mass.] 77 N. E. 1034. See 6 C. L. 1609, n. 31.

60. People v. Grout, 103 N. Y. S. 975. Franchise tax measured by a percentage of the market value of gross products. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157.

61. The word franchise in Ky. St. 1903, §§ 4077, 4080, embraces all the intangible property of the company and is not used in its strict technical sense. Commonwealth v. Chesapeake & O. R. Co., 28 Ky. L. R. 1110, 91 S. W. 672.

62. People v. Roberts, 101 N. Y. S. 184.

as the right to collect water rates,[63] or to use the streets of a city for the purpose of exercising corporate powers.[64]

Stocks.[65]—Shares of stock held by individual shareholders are the personal property of the holder and taxable as such.[66] This liability extends to the substantial, beneficial ownership,[67] but not to a pledge thereof.[68] The taxation of both shares and tangible property, being distinct values belonging to different persons, is not double taxation,[69] but a statute imposing a tax on the number of shares regardless of their value is invalid as against the rule of uniformity.[70] Stock once issued is and remains outstanding within the purview of the franchise tax act, although owned by the corporation issuing the same, until retired and canceled.[71]

Banks and trust companies.[72]—Under Federal law no taxes based on income licenses, or franchises, can be imposed on national banks by the state.[73] Real estate owned by a national bank must be assessed to the bank, but it must not be assessed at a higher percentage than other realty of the same class situated in the district where the tax is levied.[74] Capital stock must be assessed to each individual shareholder and not as a whole against the bank,[75] and must not be assessed at a greater rate than other moneyed capital in the hands of individual citizens,[76] and shares owned by nonresidents must be taxed in the city or town where the bank is located.[77] Moneys on deposit are subject to taxation [78] and are not relieved therefrom merely because it may appear that the funds have been checked against. Nor is good faith in issuing of the checks involved. The lien of the state attaches to the deposits on the tax day, unless it appears that prior thereto the checks were presented for payment, or that the bank by certification or otherwise irrevocably committed itself to the holder. In other words, where it appears that the money on deposit on tax day is still subject to the legal demand of the depositor, it is taxable, notwithstanding the fact that there may be checks outstanding against said fund.[79]

Corporate capital and other property.[80]—In a suit to compel the payment of back taxes by a railroad company, the practical construction given by the executive and legislative departments being adopted by the court, the company was held not liable for taxes on its capital stock and loans used without the state.[81] A bridge owned by a railroad and used as a part of its roadbed and tracks is assessable as a part of the road and not as a separate structure, though used as a toll bridge.[82]

Certificate of consolidation construed in determining amount of tax. State v. Consolidated Gas. Elec. Light & Power Co. [Md.] 65 A. 40. See 6 C. L. 1699, n. 24.

63. San Joaquin & K. R. Canal & Irr. Co. Merced County, 2 Cal. App. 593, 84 P. 285. See 6 C. L. 1699, n. 25.

64. Western Union Tel. Co. v. Visalia [Cal.] 87 P. 1023. The Maine act of 1900 (P. L. 1900, p. 502), for the taxation of franchises of persons and corporations using public streets held constitutional. North Jersey Ct. R. Co. v. Jersey City [N. J. Law.] 63 A. 833.

65. See 6 C. L. 1609.

66. See 6 C. L. 1610, n. 41.

67. Central of Georgia R. Co. v. Wright, 124 Ga. 630, 53 S. E. 207.

68. Chase v. Boston [Mass.] 79 N. E. 736.

69. Wilkens Co. v. Baltimore, 103 Md. 293, 63 A. 562.

70. People v. Mensching [N. Y.] 79 N. E. 884.

71. Kniskerbocker Importation Co. v. State Board of Assessors [N. J. Err. & App.] 65 A. 913, rvg. [N. J. Law] 62 A. 266.

72. See 6 C. L. 1610.

73. See 6 C. L. 1610, n. 41.

74. First Nat. Bank v. Albright [N. M.] 86 P. 548.

75. First Nat. Bank v. Albright [N. M.] 86 P. 548. In ascertaining the true value of shares of national bank stock, the N. J. act approved May 11, 1905 (P. L. p. 457), does not require that the nontaxable property of the banks should be deducted from their assets. Lippincott v. Lippincott [N. J. Law.] 66 A. 113.

76. Crocker v. Scott [Cal.] 87 P. 102.

77. Crocker v. Scott [Cal.] 87 P. 102; Judy v. National State Bank [Iowa] 110 N. W. 605.

78. General deposit included within Nebraska Revenue Act of 1903, § 4. Critchfield v. Nance County [Neb.] 110 N. W. 538.

79. Hynicka v. Union Cent. Life Ins. Co., 4 Ohio N. P. (N. S.) 297.

80. See 6 C. L. 1611.

81. People v. Michigan Cent. R. Co., 145 Mich. 140, 13 Det. Leg. N. 552, 108 N. W. 772.

82. State v. Louisiana, etc., R. Co., 196 Mo. 523, 94 S. W. 279.

Promissory notes owned by a corporation and distributed by it among its stockholders in lieu of dividends are nevertheless taxable to the corporation.[83] Where money is invested in raw material which is converted into a product and sold, such cash returns do not constitute "gross earnings."[84] A bridge company, owning a bridge exclusively leased to a street railway company, held not within the terms of the Michigan statute subjecting carrying companies to a specific tax.[85] Under the Nebraska statutes grain brokers are to be assessed on the average amount of capital invested during the previous year.[86] A provision in an ordinance granting a franchise to a telephone company that it should pay a certain sum on each box in use by it in lieu of all other taxes does not relieve the company from the payment of a general ad valorem tax, the constitution and statutes of the state prohibiting the city from exempting property from ad valorem taxation,[87] but such a provision will be taken as the measure of the charges which the city might impose on account of the use and occupation of its streets.[88]

Foreign corporations.[89]—Foreign corporations are subject to such taxes as the state may see fit to impose as a condition of doing business in the state.[90] Thus license taxes[91] are frequently imposed on foreign corporations engaged in business in the state[92] or employing capital therein.[93] A foreign corporation is not taxable on property in Massachusetts under the general laws unless the property falls within one of the exceptions specified in Rev. Laws, c. 12, § 23, of that state.[94]

(§ 2) *D. Public property.*[95]—Public property, Federal,[96] state,[97] and municipal,[98] and the various instrumentalities of government,[99] are not taxable in the

83. Adams v. Delta & Pine Land Co. [Miss.] 42 So. 170.

84. People v. Morgan, 99 N. Y. S. 711.

85. North Park Bridge Co. v. Walker Tp., 143 Mich. 693, 13 Det. Leg. N. 94, 107 N. W. 711.

86. Cobbey's Ann. St. 1903, § 10465. Central Granaries Co. v. Lancaster County [Neb.] 109 N. W. 385.

87, 88. City of Nashville v. Cumberland Tel. & T. Co. [C. C. A.] 145 F. 607.

89. See 6 C. L. 1612.

90. That a foreign corporation had failed to obtain a certificate to do business does not prevent taxation. People v. Raymond 102 N. Y. S. 84. See 6 C. L. 1612, n. 58.

91. See supra, Corporate Franchise and Privileges.

92. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251; American Book Co. v. Shelton [Tenn.] 100 S. W. 726; People v Raymond, 102 N. Y. S. 85. A foreign company transacting all its business, except remitting the surplus, within the state is within these statutes. People v. Wells, 186 N. Y. 264, 76 N. E. 24.

93. The exemption provided for by the New York tax law (Laws 1896, p. 799) has application only where the foreign principal retains control of the funds and the transactions of the agent are confined to the mere loaning of money. People v. Raymond, 102 N. Y. S. 84. The basis for the assessment is the capital, not capital stock, employed in the state. People v. Miller, 112 App. Div. 880, 98 N. Y. S. 751. A corporation whose only business is owning and managing an apartment house within the state is employing its capital within the state. People v. Kelsey, 110 App. Div. 617, 96 N. Y. S. 745.

94. Coffin v. Artesian Water Co. [Mass.] 79 N. E. 262.

95. See 6 C. L. 1612.

96. Richard v. Perrodin, 116 La. 440, 40 So. 789. During the time which elapses between the filing of an application for the location of scrip belonging to the United States and the approval of the application by the commisioner of the general land office, the land is not subject to taxation by the state. State v. Itasca Lumber Co. [Minn.] 111 N. W. 276.

97. Stetson v. Grant [Me.] 66 A. 480.

98. Lands of a sanitary district. Sanitary Dist. v. Hanberg, 226 Ill. 480, 80 N. E. 1012. Lands set apart for school purposes. Edwards v. Butler [Miss.] 42 So. 381. Bonds acquired by a city as a part consideration for the sale of a gas plant and the income of which is devoted solely to lighting its streets are public property. Board of Councilmen of Frankfort v. Com., 29 Ky. L. R. 699, 94 S. W. 648. But the exemption extends only to property used exclusively for public purposes. Clark v. Sprague, 113 App. Div. 645, 99 N. Y. S. 304.

99. Corporations chartered by congress with power to construct and operate railroads through various states as military and post roads are governmental agencies. State v. Texas & P. R. Co. [Tex.] 17 Tex. Ct. Rep. 328, 98 S. W. 834. Texas Sess. Laws 1905, imposing a tax on gross receipts of such railroads, is invalid. So national bonds and securities are immune from taxation. Home Sav. Bk. v. Des Moines, 27 S. Ct. 571; Commonwealth v. Hearne's Ex'r & Trustee, 30 Ky. L. R. 1195, 100 S. W. 820.

Public water supply systems owned by municipalities are exempt from taxation. City of Perth Amboy v. Barker [N. J. Law] 65 A. 201; Milford Water Co. v. Hopkinton [Mass.] 78 N. E. 451; City of Augusta v. Augusta Water Dist., 101 Me. 148, 63 A. 663. The **exemption** is not affected by the fact that sales

absence of express authority.[1] When, however, the beneficial title to public land has passed from the government,[2] or when it is leased for business purposes,[3] such land becomes taxable, and where land has become liable for a tax it remains so for that year although subsequently acquired for public purposes rendering it exempt.[4] The lessee's interest in a lease from the state is not exempt as public property.[5] Lands allotted to Indians, and the proceeds derived from a sale thereof, being held in trust by the United States for the benefit of the allottees and their heirs, are exempt from taxation.[6]

(§ 2) *E. Realty.*[7]—Taxes on lands include buildings, structures, and improvements[8] affixed to the land,[9] and water rights appurtenant thereto.[10] A leasehold interest is to be assessed as realty,[11] but poles and wires of a telegraph company placed on the land of a railway company under a contract reserving them as personalty should be assessed as personalty.[12] Conduits, pipes, and mains, laid in the public streets, are variously taxed as real or personal property.[13] Mineral rights, being capable of ownership apart from the surface soil, are taxable to the owner thereof,[14] and under the Colorado statute all mines and mining property bearing precious metals are taxable whether held under a patent, application for patent, or mining location.[15] Standing timber may be assessed separately from the fee and assessed as realty.[16] A private alleyway is subject to taxation.[17]

(§ 2) *F. Personalty.*[18]—Distilled spirits in bonded warehouses are subject to taxation,[19] and statutes imposing such taxation are not in conflict with the Fed-

of surplus water are made to parties outside of the territorial limits of the city (City of Perth Amboy v. Barker [N. J. Law] 65 A. 201), and lands acquired by a city for water right purposes are not liable to taxation by a county, though situated without the city and no longer used for municipal purposes (City of Colorado Springs v. Fremont County Com'rs [Colo.] 84 P. 1113).

1. Land occupied under bond for a deed from the state is exempt. Corcoran v. Boston [Mass.] 79 N. E. 829.

2. Goudy v. Meath, 27 S. Ct. 48. Where land has been entered under a military bounty warrant, the state is authorized to tax the same Wilcox v. Phillips [Mo.] 97 S. W. 886. Unsurveyed land in the St. Francis levee district held to be subject to taxation. Buckner v. Sugg [Ark.] 96 S. W. 184.

3. Boston Molasses Co. v. Com. [Mass.] 79 N. E. 827.

4. Public Schools of Iron Mountain v. O'Connor, 143 Mich. 35, 13 Det. Leg. N. 551, 108 N. W. 426.

5. Moeller v. Gormley [Wash.] 87 P. 507.

6. United States v. Thurston County [C. C. A.] 143 F. 287, rvg. 140 F. 456. See 6 C. L. 1613, n. 75.

7. See 4 C. L. 1615.

8. Implements used in connection with the operation of a coal mine constitute improvements upon the real estate and are assessable as realty under the Washington revenue laws. Doe v. Tenino Coal & Iron Co. [Wash.] 86 P. 938.

9. See 4 C. L. 1615, n. 47.

10. In re Hall, 102 N. Y. S. 5.

11. Moeller v. Gormley [Wash.] 87 P. 507.

12. Western Union Tel. Co. v. Modesto Irr. Co. [Cal.] 87 P. 190.

13. Conduits of a telephone company, though placed in streets of a city, are taxable as realty. People v. Upham, 221 Ill. 551, 77 N. E. 931. Pipes and mains of a water company laid in the highways of a city held to be properly taxable as personal property. Field v. Guilford Water Co. [Conn.] 63 A. 723. Water pipes and mains belonging to a foreign corporation and laid through private property are not taxable under a statute providing for the taxation of conduits laid in public streets. Coffin v. Artesian Water Co. [Mass.] 79 N. E. 262. Pipes and water mains are not taxable as "machinery employed in manufactures" within Mass. Rev. St. c. 12, § 23. Id.

14. Chap. 244, p. 456, Kansas Laws 1897, relating to the taxation of separately owned mineral rights, has no application except when the right or title to minerals in place has been severed from the right or title to the remainder of the land and has become vested in a person other than the one having the right or title to the remainder of the land. Kansas Natural Gas Co. v. Neosho County Com'rs [Kan.] 89 P. 750. Where a tract of land was assessed at its full value and the tax paid, the sale of the land for taxes on a one-sixteenth interest in any oil that might be produced from such land owned by another was void. Bee v. Barnes [C. C. A.] 149 F. 727. A mining lease held to be taxable as a chattel real under W. Va. Acts of 1905, p. 285. Harvey Coal & Coke Co. v. Dillon, 59 W. Va. 605, 53 S. E. 928.

15. Laws 1887, pp. 340, 341; Mill's Ann. St. §§ 3222-3225. Wood v. McCombe [Colo.] 86 P. 319.

16. Ward v. Echo Tp., 145 Mich. 56, 13 Det. Leg. N. 393, 108 N. W. 364.

17. Hill v. Williams [Md.] 65 A. 413.

18. See 4 C. L. 1616.

19. Thompson v. Com., 29 Ky. L. R. 705, 94 S. W. 654.

eral constitution.[20] In the taxation of personal property the state may include credits,[21] debts,[22] and securities.[23]

§ 3. *Exemption from taxation.*[24]—The state for reasons of policy may exempt from taxation either persons or property.[25] It is customary, therefore, to exempt from taxation property devoted exclusively [26] to religious,[27] educational,[28] charitable,[29] cemetery,[30] or benevolent [31] purposes. Grants of exemptions, being in derogation of the sovereign authority and of common right, are not favored.[32] They must, therefore, be given the most rigid admissible construction,[33] and can never

20. Anderson County v. Kentucky Distilleries & Warehouse Co., 146 F. 999.

21. Moneys due a bank are credits within Montana Pol. Code, § 3695, subd. 8. Clark v. Maher [Mont.] 87 P. 272. Bonds coming into the possession of a resident executor are taxable within the state, notwithstanding the will was executed and probated in a foreign country and that the decedent and all beneficiaries were and are nonresidents. Tafel v. Lewis, 75 Ohio St. 182, 78 N. E. 1003. Warehouse receipts. Commonwealth v. Selliger, 30 Ky. L. R. 451, 98 S. W. 1040. See 4 C. L. 1616, n. 56.

22. See 4 C. L. 1616, n. 57.

23. In Kentucky, notes and mortgages on property within the state but which are owned and kept outside the state are not taxable. Callahan v. Singer Mfg. Co., 29 Ky. L. R. 123, 92 S. W. 581. Mass. Rev. Laws, c. 12, § 12, providing that any loan on mortgage of real estate, taxable as real estate, shall not be taxable as personalty, does not apply to a bond secured by a mortgage of both real and personal property. Brooks v. West Springfield [Mass.] 79 N. E. 337. See 4 C. L. 1616, n. 58.

24. See 6. C. L. 1613.

25. Wilkens Co. v. Baltimore, 103 Md. 293, 63 A. 562. In the absence of a constitutional inhibition, the right to make reasonable exemptions from taxation rests with the legislature. Wallace v. Board of Equalization, 47 Or. 584, 86 P. 365. Exemption laws having been recognized in Ohio ever since the adoption of the present constitution, and long before, it has manifestly been the policy of the state to allow certain property to be exempted from taxation, and § 1038a, Rev. St., relating to deductions from the duplicate for destroyed or injured property must therefore be upheld as valid and reasonable, notwithstanding the constitutional provision as to the taxing of all property by a uniform rule according to its true value in money. State v. Wright, 8 Ohio C. C. (N. S.) 366. Hay cropped by a tenant on shares with the landlord is exempt under Conn. Gen. St. 1902, § 2315, exempting produce of a farm while owned by the producer. Jackson v. Savage [Conn.] 64 A. 737. In Louisiana the manufacture of fertilizers and chemicals is exempt from parochial and municipal taxation. Planters' Fertilizer & Chemical Co. v. Orleans Assessors, 116 La. 667, 40 So. 1035. A statute exempting certain enumerated property of a householder is not uniform in the rate of assessment and taxation as between householders of the state and nonresidents, and is therefore in conflict with a constitutional provision requiring uniformity of taxation. Wallace v. Board of Equalization, 47 Or. 584, 86 P. 365.

26. Where property is used partly for exempt and partly for nonexempt purposes, the value of the former is to be deducted from the latter. Rohrbaugh v. Douglas County [Neb.] 107 N. W. 1000. The personal property of cemetery associations, consisting of horses, hearses, carriages, tools, and other articles, held subject to taxation, though used exclusively in and about their cemeteries. Rosedale Cemetery Ass'n v. Linden Tp. [N. J. Law] 63 A. 904.

27. See 6 C. L. 1614, n. 82.

28. Gymnastic Ass'n of Milwaukee v. Milwaukee [Wis.] 109 N. W. 109; Morgan v. Presbyterian Church [Ky.] 101 S. W. 338. Commercial college held within terms of statute. Rohrbaugh v. Douglas County [Neb.] 107 N. W. 1000. The sale of surplus products of a diary farm connected with an agricultural institute does not render the institution liable to taxation. Commonwealth v. Hampton Normal & Agricultural Institute, Trustees [Va.] 56 S. E. 594. See 6 C. L. 1614, n. 83.

29. Stony Wold Sanatorium v. Keese, 112 App. Div. 738, 98 N. Y. S. 1088; Sisters of Charity v. Corey [N. J. Err. & App.] 65 A. 500. Home for consumptives. Bishop & Chapter of St. John v. Treasurer of Denver [Colo.] 86 P. 1021. See 6 C. L. 1613, n. 80.

30. Rosedale Cemetery Ass'n v. Linden Tp. [N. J. Law] 63 A. 904; In re Perry Ave., 103 N. Y. S. 1069. A plot of ground used for cemetery purposes is within the terms of the Indiana constitution exempting property of religious or charitable institutions. Oak Hill Cemetery Co. v. Wells [Ind. App.] 78 N. E. 350.

31. A fraternal beneficiary association is not a charitable institution and exempt. Royal Highlanders v. State [Neb.] 108 N. W. 183. Where a benevolent society is authorized to hold property exempt to a given amount, all above that amount is taxable. Evangelical Baptist Benevolent & Missionary Soc. v. Boston [Mass.] 78 N. E. 407. Ill. Act. May 18, 1905 (Laws 1905, p. 357), providing for the exemption of money of fraternal societies, does not fall within the terms of art. 9, § 3, of the constitution, authorizing exemption of property held for charitable purposes. Supreme Lodge M. A. F. O. v. Effingham County Board of Review, 223 Ill. 54, 79 N. E. 23. See 6 C. L. 1614, n. 81.

32. Sisters of Charity v. Corey [N. J. Err. & App.] 65 A. 500. The taxing power is never presumed to be relinquished unless the intent to relinquish is expressed in plain terms, and the ascertainment of the intent cannot be left to inference or implication. Baltimore, etc., R. Co. v. Wicomico County Com'rs, 103 Md. 277, 63 A. 678.

33. Rosedale Cemetery Ass'n v. Linden Tp. [N. J. Law] 63 A. 904; State v. New Orleans R. & Light Co., 116 La. 144, 40 So. 597; Supreme Lodge M. A. F. O. v. Effingham

be permitted to extend, either in scope or duration, beyond what the terms of the concession clearly require.[34] Accordingly, when pecuniary gain is derived from the conduct of institutions otherwise entitled to exemptions, the exemption, at least pro tanto, ceases.[35] Exemption, being a favor, must be secured in the manner designated.[36] One cannot wait until sued for the tax to assert the exemption.[37]

Contracts of exemption.[38]—A law exempting property from taxation, coupled with an obligation to contribute to the public support other than by taxation in the ordinary sense, direct taxation of property in consideration of some privilege granted by the state within its power to grant, refuse, or prohibit, is valid, and creates a contract between the owner of the property and the state.[39] The repeal of an exemption granted an educational institution of its leased realty by its charter granted by special act does not violate the New York constitution forbidding the impairment of the obligation of contracts.[40] The Columbian Canal, being exempt from all but state taxes under a contract made by the state with the purchaser of such canal under Act December 24, 1890, the levy and collection of a county tax thereon was void.[41] The Tennessee Act of 1869 and that of 1899, exempting territory annexed to the city of Memphis from liability for existing debts of that city, did not create a contract which could not be impaired.[42] Section 10 of the Virginia act incorporating the Hampton Normal and Agricultural Institute did not constitute a contract between the state and the institute for the exemption of its property from taxation.[43]

County Board of Review, 223 Ill. 54, 79 N. E. 23. The agreement of a city in a sale of its gas plant to a light company to pay taxes assessed to such company is void as in conflict with a constitutional provision requiring all property not exempt by such constitution to be taxed. Board of Councilmen of Frankfort v. Capital Gas & Elec. Light Co., 29 Ky. L. R. 1114, 96 S. W. 870. Where there is a doubt as to whether a statute creates an exemption, it will be resolved in favor of the state and against the exemption. Wallace v. Board of Equalization, 47 Or. 584, 86 P. 365.

34. American Smelting & Refining Co. v. People, 34 Colo. 240, 82 P. 531. An exemption of the property of religious, charitable, and educational institutions from taxation does not extend to mutual insurance companies (Iowa Mut. Tornado Ins. Ass'n v. Gilbertson, 129 Iowa, 658, 106 N. W. 153), nor does an exemption of property from taxation affect the validity of a franchise or business tax levied thereon (Id.). A purchaser at a mortgage sale does not acquire the benefit of an exemption to which the mortgagor was entitled. Baltimore, etc., R. Co. v. Wicomico County Com'rs, 103 Md. 277, 63 A. 678. An exemption from parochial and municipal taxation of the capital, machinery, and other property employed in the manufacture of articles of wood does not extend to a building or a part thereof, which is also used for the storage of other articles purchased for resale. Victoria Lumber Co. v. Rives, 115 La. 996, 40 So. 382. An exemption from a poll tax to those who have lost a hand or foot does not extend to one who has lost part of his fingers or whose foot is useless. Bigham v. Clubb [Tex. Civ. App.] 15 Tex. Ct. Rep. 479, 95 S. W. 675. A statute exempting from taxation for a period of years a new manufacturing business has no application where a concern becomes part of a holding corporation and there is no discontinuance of the former company (Continental Tobacco Co. v. Louisville, 29 Ky. L. R. 616, 94 S. W. 11), or where the corporation is reorganized (Wicomico County Com'rs v. Bancroft, 27 S. Ct. 21). Under a statute exempting corporate stock from taxation where the corporation pays taxes on its corporate property and franchises, shares of stock in a foreign corporation paying taxes on real property in the state but not on its franchises or any of its personal property is not exempt from taxation. Commonwealth v. Lovell [Ky.] 101 S. W. 970.

35. Pocono Pines Assembly, etc. v. Monroe County, 29 Pa. Super. Ct. 36; Trustees of Amherst College v. Amherst Assessors [Mass.] 79 N. E. 248; Commonwealth v. Hamilton College Trustees, 30 Ky. L. R. 1338, 101 S. W. 405. Lands and buildings rented for profit, though such profit be devoted to the educational purposes of the institution are not exempt. Commonwealth v. Hampton Normal & Agricultural Institute Trustees [Va.] 56 S. E. 594. But the renting of certain of its property for residential and business purposes does not deprive a university of the exemption. Vanderbilt University v. Cheney [Tenn.] 94 S. W. 90.

36. Failure for three years to apply for vacation of assessment. Union Waxed & Parchment Paper Co. v. State Board of Assessors [N. J. Law] 63 A. 1006.

37. Town of Canaan v. Enfield Village Fire Dist. [N. H.] 64 A. 725.

38. See 6 C. L. 1614.

39. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

40. Pratt Institute v. New York, 183 N. Y. 151, 75 N. E. 1119.

41. Columbia Water Power Co. v. Campbell [S. C.] 54 S. E. 833.

42. Galloway v. Memphis [Tenn.] 94 S. W. 75.

43. Va. Act 1869-70, c. 122. Commonwealth v. Hampton Normal & Agricultural Institute Trustees [Va.] 56 S. E. 594.

§ 4. *Place of taxation.*[44]—Realty is taxed in the district where located.[45] If a single parcel is divided by a line between two or more tax districts, it is usually assessed in the district in which the owner resides,[46] or where the main buildings are located.[47] It is competent, however, for the legislature to give to property for the purpose of taxation any situs it sees fit,[48] subject only to the rule of uniformity, and to the limitation that there must be some appreciable relation between the municipality exacting the tax and the person upon whom the burden is cast.[49] Whether that relation does or does not exist in any given instance is so conclusively a legislative question that nothing short of capricious action will justify judicial interference.[50] Accordingly we find that personal property of a resident individual is usually taxed at the residence of the owner,[51] and that of a corporation at its principal place of business.[52] Personalty of a nonresident individual [53] or corporation [54] is usually taxed in the jurisdiction where it is employed.[55] Shares of stock in a corporation are assessable to the owner at his residence,[56] if a nonresident of the state then at the principal place of business of the corporation.[57] Notes given for money loaned have a taxable situs in the state of their origin though temporarily removed therefrom.[58] Commodities intended for shipment out of the state are taxable until they are actually launched on their way.[59] Where goods are shipped in

44. See 6 C. L. 1615.

45. See 6 C. L. 1615, n. 96.

46. People v. Gray 185 N. Y. 196, 77 N. E. 1172. A hunting preserve of 32,000 acres held not to be a farm within the purview of N. Y. Laws 1902, p. 504, providing for assessment in the district in which the owner lives. People v. Wilson, 113 App. Div. 1, 98 N. Y. S. 1080.

47. High Shoals Mfg. Co. v. Penick [Ga.] 56 S. E. 648; Chamberlain v. Sherman, 103 N. Y. S. 239. Where a farm is divided by a township and borough line, the mansion house being in the borough, the land in the township is to be assessed in the township and that in the borough in the borough. Follett v. Butler County, 31 Pa. Super. Ct. 571, rvg. 30 Pa. Super. Ct. 21.

48. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 577. Under Wis. St. 1898, § 1040, logs in process of manufacture may be assessed where the mill is located. Wisconsin Sulphite Fibre Co. v. Jeffris Lumber Co. [Wis.] 111 N. W. 237.

49. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 577.

50. Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 577. Under the Nebraska statutes (§ 42, Art. 1, c. 77), the action of the county board of equalization, fixing the place for listing and assessment of personal property, will not be disturbed unless abuse of discretion is shown. Deemer v. Grant County [Neb.] 107 N. W. 216.

51. Commonwealth v. Haggin, 30 Ky. L. R. 788, 99 S. W. 906; High Shoals Mfg. Co. v. Penick [Ga.] 56 S. E. 648; Ayer & Lord Tie Co. v. Keown, 29 Ky. L. R. 110, 400, 93 S. W. 588; State v. Hamilton [Mo.] 100 S. W. 609. Under the Mississippi Statute (Ann. Code, 1892, § 3749), the assessment must be made where the owner **actually** resides at the time of the assessment. Millsaps v. Jackson [Miss.] 42 So. 234. Standing branded trees are taxable at the residence of the owner. Callahan v. Dean Tie Co., 29 Ky. L. R. 142, 92 S. W. 582. Personal property may of course be separated from the domicile of the owner and taxed wherever it is kept for use. Scollard v. American Felt Co. [Mass.] 80 N. E. 233.

52. Harris Lumber Co. v. Grandstaff [Ark.] 95 S. W. 772. Designating in the articles of incorporation a remote township does not make that the principal place of business if the fact is otherwise. Portsmouth Tp. v. Cranage S. S. Co. [Mich.] 14 Det. Leg. N. 101, 111 N. W. 749. It is the settled law of Virginia that a railroad for the purposes of taxation is considered as having its residence where its principal office is located. Board of Sup'rs v. Newport News [Va.] 56 S. E. 801.

53. Ayer & Lord Tie Co. v. Keown, 29 Ky. L. R. 110, 400, 93 S. W. 588. Where one resided in one city and did business as a banker in another, the capital used in the business was taxable at the city of his residence. Prince v. Boston [Mass.] 79 N. E. 741.

54. Personal property of a foreign corporation maintaining an office in Boston, kept for use there, was properly assessed for taxation to the corporation in Boston, and collectible out of the property found within the jurisdiction, as provided by Stat. 1903, p. 448. Scollard v. American Felt Co. [Mass.] 80 N. E. 233.

55. Railroad construction apparatus brought temporarily into a county for use held to have a situs and taxable. Eoff v. Kennefick-Hammond Co. [Ark.] 96 S. W. 986.

56. City of Baltimore v. Chester River Steamboat Co., 103 Md. 400, 63 A. 810.

57. Greene County v. Wright, 126 Ga. 504, 54 S. E. 951.

58. Notes given in return for money loaned by a foreign insurance company were removed from the state in which they were given to the home office of the company, being returned when the notes were paid. Held taxable as credits in the state in which they were given. Metropolitan Life Ins. Co. v. New Orleans 27 S. Ct. 499.

59. Merely carrying them to depot of common carrier is no part of their trans-

the "original packages" and on arrival within the state such cases are opened and the smaller and separate packages are removed therefrom, the latter become liable to taxation within the state.[60] Vessels engaged in interstate commerce, but which have not by the manner of their use obtained an actual situs, are properly taxable at the domicile of the owner.[61] The rule that the domicile of the owner or the actual situs, and not the place of its enrollment, of a vessel engaged in coastwise trade, is the criterion by which to determine its situs for taxation, was not changed by the Act of June 26, 1884, § 21.[62]

§ 5. *Assessment, rating, and valuation. A. Necessity for assessment.*[63]—As an indispensable prerequisite to a valid tax there must have been a valid assessment of the property to be taxed.[64] At least two steps are necessary, first listing the persons and property, and second, estimating and fixing the value of the property.[65]

(§ 5) *B. Assessing officers.*[66]—The assessment must be made by the proper officers; it cannot be made by the court.[67] It is not necessary that all assessments be made through the same officials. It may be made by duly authorized officials or the state may make it directly by appropriate legislative action.[68] Whether particular property is to be assessed by state or local officers depends upon the terms of the statute applicable.[69] The acts of an assessor who has omitted to take the statutory oath are nevertheless those of a de facto officer and binding alike on the government and taxpayer.[70] The Wiconsin Act of 1901, p. 649, creating the office of county supervisor of assessments, is not violative of local self-government.[71] Mandamus lies to compel an assessment.[72]

(§ 5) *C. Formal requisites. Notice.*[73]—Notice and an opportunity to be heard is essential.[74] Evidence of another than the chief officer of a corporation that the corporation had no notice of an assessment is not sufficient,[75] and one to whom the owner of a private alley has given an easement of passage therefor may not object that the owner thereof was not given notice of assessment.[76]

The roll or list.[77]—The assessment roll must properly describe the property to be assessed,[78] indicate the amount of the tax,[79] and must show the name of the true

portation. Ayer & Lord Tie Co. v. Keown, 29 Ky. L. R. 110, 400, 93 S. W. 588.

60. Parks Bros. v. Nez Perce County [Idaho] 89 P. 949.

61. California Shipping Co. v. San Francisco [Cal.] 88 P. 704.

62. Ayer & Lord Tie Co. v. Com., 202 U. S. 409, 50 Law Ed. 1082.

63. See 6 C. L. 1618.

64, 65. Clark v. Maher [Mont.] 87 P. 272.

66. See 6 C. L. 1618.

67. Clark v. Maher [Mont.] 87 P. 272; Judy v. National State Bk. [Iowa] 110 N. W. 605.

68. State v. Baltimore [Md.] 65 A. 369.

69. Property owned by a railroad which is with reasonable diligence being put into a shape to be used for transportation purposes, with the intention to so employ it as soon as the property is fit for use, is assessable alone by the state board of assessors. Jersey City v. Board of Equalization [N. J. Law] 65 A. 903. Bridge leased by a railroad company held to be assessable by state board of equalization. People v. Atchison, etc., R. Co., 225 Ill. 593, 80 N. E. 272. In Maryland county commissioners are required to make a levy to defray expenses legally incurred by other county officers. Levy of $2,000 to defray expenses of holding a primary election. Kenneweg v. Allegheny County Com'rs, 102 Md. 119, 62 A. 249.

70. Blades v. Falmouth, 30 Ky. L. R. 420, 98 S. W. 1017.

71. State v. Samuelson [Wis.] 111 N. W. 712.

72. State v. Bare [W. Va.] 56 S. E. 390; State v. Graybeal [W. Va.] 55 S. E. 398.

73. See 6 C. L. 1619.

74. Baltimore City Charter (Laws 1898, p. 336, c. 123), affords the required notice and opportunity to be heard. State v. Baltimore [Md.] 65 A. 369. Postal card bearing certain statements held to amount to a notice. Trustees of Amherst College v. Amherst Assessors [Mass.] 79 N. E. 248. The assessment of property and its subsequent distraint is not a taking of property without due process where the owner has notice of the assessment and the amount due. Thompson v. Com., 29 Ky. L. R. 705, 94 S. W. 654. Where the state has afforded a taxpayer full opportunity to be heard, the failure to give notice of a special assessment of back taxes on omitted property is not deprivation of property without due process. Security Trust & Safety Vault Co. v. Lexington, 27 S. Ct. 87. See 6 C. L. 1619, n. 24.

75. Louisville Tank Line v. Com., 29 Ky. L. R. 257, 93 S. W. 635.

76. Hill v. Williams [Md.] 65 A. 413.

77. See 6 C. L. 1619.

78. Kruse v. Fairchild [Kan.] 85 P. 303; In re Martinez, 117 La. 719, 42 So. 246; Ra-

owner or person liable for the tax.[80] Rolls must be completed at the time fixed by statute and names cannot thereafter be added,[81] but one discharging former mortgages and substituting new ones in their place for the same property, the same being recorded and the recording tax paid, is entitled to have the former mortgages removed from the assessment roll.[82]

Irregularities.[83]—Unintentional omissions or irregularities referable to mere error of judgment or inadvertance, and not shown to be prejudicial to the taxpayer, will not affect the validity of the tax. Thus, an unverified roll,[84] the omission of taxable property from the tax list,[85] or an incomplete assessment,[86] does not render an assessment void. A dual assessment, however, will invalidate the tax.[87] The legislature has power to legalize assessments and liens irregularly made.[88]

Lists by taxpayers.[89]—Taxpayers are very generally required to list and furnish to the assessing officers a statement of their taxable property,[90] and a penalty may be imposed for failure to comply with such a requirement.[91] That a taxpayer in good

mos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898. The description must be such as will fully apprise the owner without recourse to the superior knowledge peculiar to him as owner. Buckner v. Sugg [Ark.] 96 S. W. 184. In determining the sufficiency of the description, extrinsic evidence is admissible to connect the land with the description used in the assessment list. Id. Single tracts, owned by one individual, need not be subdivided (John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 13 Det. Leg. N. 388, 108 N. W. 494), and abbreviations may be used if easily understood and not misleading (Watkins v. Couch [Iowa] 111 N. W. 315; Baird v. Monroe [Cal.] 89 P. 352).

Sufficient description. Douglass v. Leavenworth County Com'rs [Kan.] 88 P. 557; Husbands v. Polivick, 29 Ky. L .R. 890, 96 S. W. 825; Haynes v. State [Tex. Civ. App.] 99 S. W. 405; Bandow v. Wolven [S. D.] 107 N. W. 204; Beggs v. Paine [N. D.] 109 N. W 322. Property described by reference to the house by number, designation of the lot, and the number of square feet in it, sufficient. Roberts v. Welsh [Mass.] 78 N. E. 408. Where there is a good beginning of proof, three of the four boundary lines of a square being given, and the fourth line is indicated clearly enough by the three lines given, the description will be held sufficient. Shelly v. Friedrichs, 117 La. 679, 42 So. 218.

Insufficient description. Wright v. Fox [Cal.] 89 P. 832. Describing lands as being located on a given street. Lawton v. New Rochelle, 100 N. Y. S. 284. Describing survey as the Joseph M. Meador when it should have been Judson M. Meador, though there was no other "Meador" survey in the county. Pfeuffer v. Bondies [Tex. Civ. App.] 15 Tex. Ct. Rep. 6, 93 S. W. 221. An assessment of two hundred and seven acres of land in the name of "Thomas Carothers" will not sustain a tax sale of a part of four hundred and seven acres in the name of "James Crowthers," there being no evidence to identify the two hundred and seven acres as part of the four hundred and seven acres. Auman v. Hough, 31 Pa. Super. Ct. 337. The term "east middle" of a given town lot is unintelligible. State Finance Co. v. Mather [N. D.] 109 N. W. 350.

79. The omission of words or marks to indicate dollars and cents as the amount of assessment on the assessor's book, when the entries are so made that the omission does not tend to mislead, will not render the assessment void. Reid v. Southern Development Co. [Fla.] 42 So. 206.

80. An assessment in the name of a decedent has been sustained (Husbands v. Polivick, 29 Ky. L. R. 890, 96 S. W. 825), but an assessment on the nonresident list of land occupied by a resident is void (Mittendorf v. Dunscomb, 99 N. Y. S. 306). A mortgage given to two persons described as husband and wife may be assessed in the names of both. City of Detroit v. Jacobs, 145 Mich. 395, 13 Det. Leg. N. 544, 108 N. W. 671. One holding real estate under a tax deed, valid on its face and duly recorded, is a record owner within Mass. Rev. Laws, c. 12, § 15. Roberts v. Welsh [Mass.] 78 N. E. 408. See 6 C. L. 1619, n. 28.

81. Burger v. Farrell, 50 Misc. 497, 100 N. Y. S. 638.

82. In re Pullman, 102 N. Y. S. 356.

83. See 6 C. L. 1620.

84. Bandow v. Wolven [S. D.] 107 N. W. 204; State Finance Co. v. Mather [N. D.] 109 N. W. 350; Sawyer v. Wilson [Ark.] 99 S. W. 389. Compare Beggs v. Paine [N. D.] 109 N. W. 322.

85. Clark v. Lawrence County [S. D.] 111 N. W. 558.

86. Covington & Cincinnati Bridge Co. v. Covington, 30 Ky. L. R. 1115, 100 S. W. 269.

87. Shelly v. Friedrichs, 117 La. 679, 42 So. 218.

88. City of Orlando v. Giles [Fla.] 40 So. 834.

89. See 6 C. L. 1621.

90. The Nebraska statute, Comp. St. 1905, 148a, 14, providing for the manner of listing shares of building and loan associations, sustained as constitutional. Nebraska Cent. B. & Loan Ass'n v. Board of Equalization [Neb.] 111 N. W. 147. Funds derived by an administrator from the sale of mortgaged premises, and deposited by him in bank preparatory to payment to the mortgagees, should be listed by the administrator for taxation, notwithstanding the entire amount will be required to satisfy the liens which have been established and ordered paid. Gregg v. Hammond, 4 Ohio N. P. (N. S.) 214.

91. See 6 C. L. 1621, n. 50.

faith supposed he was a nonresident and was so regarded by the assessors does not justify his omission to furnish lists.[92] One failing to list his debts is not entitled to their deduction from his credit.[93] The state board of assessors have no authority to assess a franchise tax upon a corporation which neglects or refuses to make the return required by statute in excess of the capital stock of such corporation actually issued and outstanding. They can only tax that which by law is taxable.[94] One who lists and returns his personal property in the assumed name of another is estopped to complain of any irregularity arising solely from that cause.[95] Where an agent or bailee refuses to disclose the name of the owner of property in his possession or under his control, it may be assessed to him in his own name.[96] Such an assessment will be set aside on the application of one whose conduct has made it necessary.[97] Where the agent of a married woman filed a tax list in her behalf in which she was represented as the sole owner of certain real estate, she was estopped to deny that the title was wholly in her.[98] The failure of the assessor or his assistant to make at last one visit to each precinct for the purpose of receiving tax returns as required by Florida Acts of 1895, p. 16, will not of itself vitiate an assessment,[99] and where a taxpayer fails to give in a list of his property and the same is valued by the assessor, the latter is not liable in the absence of corruption or malice for costs because of an erroneous assessment.[1] A taxpayer's sworn return of his property is presumed to be true.[2]

(§ 5) *D. Valuation of taxable property. In general.*[3]—In placing valuations upon property, local assessors may be required to follow a state assessment,[4] or state officers may be required to use valuations made by local authorities.[5] Where this is not the case assessors should exercise an independent judgment in placing valuations.[6] The regularity of statutes providing for the valuation of real estate at stated intervals of one or more years is upheld.[7] In the absence of statutory provis-

92. Edwards Mfg. Co. v. Farrington [Me.] 66 A. 309.

93. Pierce v. Carlock, 224 Ill. 608, 79 N. E. 959.

94. Trenton Heat & Power Co. v. State Board of Assessors [N. J. Law] 63 A. 1005.

95. Moore v. Furnas County Live Stock Co. [Neb.] 111 N. W. 464.

96. Security Savings Bank v. Carroll [Iowa] 109 N. W. 212.

97. Lincoln Transfer Co. v. County Board of Equalization [Neb.] 110 N. W. 724.

98. City of Waterbury v. O'Loughlin [Conn.] 66 A. 173.

99. Reid v. Southern Development Co. [Fla.] 42 So. 206.

1. Daugherty v. Bazell, 29 Ky. L. R. 884, 96 S. W. 576.

2. Gibson v. Clark [Iowa] 108 N. W. 527.

3. See 6 C. L. 1622.

4. See 6 C. L. 1622, n. 59.

5. The fact that local assessors of counties through which a railroad line is operated assess property at less than its true value does not make the valuation of the state tax board unequal. Missouri, etc., R. Co. v. Shannon [Tex.] 100 S. W. 138. See 6 C. L. 1622, n. 60.

6. People v. Pulteney Assessors, 101 N. Y. S. 176. The amendment to Rev. St. § 2797, relating to plats of new towns or subdivisions presented to the county auditor for assessment, does not deprive the assessor of authority to assess and return the true valuation of each lot of a newly platted subdivision but merely prescribes the rule which governs him in making such valuation. Where it appears that the assessor acted within the scope of his authority in making his return as to the lots in such a subdivision, but did not equalize his valuations with those of adjacent lots and lands as made by the last decennial appraisement, the error is fundamental and not clerical, and the appeal of the property owner for redress should be to the annual board of city equalization. Davis v. Hamilton County Com'rs, 8 Ohio C. C. (N. S.) 502. A direction given by a county auditor to an assessor as to the minimum aggregate valuation at which he shall return the lots of a new subdivision is without authority, and the return of the assessor may be corrected under the provisions of Rev. St. § 1038, in so far as the assessor was influenced in his valuations by the direction of the auditor, but where it is left to inference only as to whether the direction was followed by the assessor or served to influence his valuations, relief cannot be granted by the courts to the lot owners. Hamilton County Com'rs v. Albers, 8 Ohio C. C. (N. S.) 558. Evidence held insufficient to show that an excessive valuation had been placed upon the property in controversy. Holcomb v. Johnson's Estate [Wash.] 86 P. 409.

7. Worton v. Paducah, 29 Ky. L. R. 450, 93 S. W. 617. Where property was assessed in alternate years and a new ward was added to the city, land therein was held not subject to a levy made in the interim. City of Chattanooga v. Raulston [Tenn.] 97 S. W. 456. See 6 C. L. 1622, n. 58.

ions, no deduction can be made in the taxation of credits for the indebtedness of the taxpayer.[8] In New York a deduction from the assessment of real property of a mortgage therefrom is unauthorized.[9] A taxpayer to be entitled to deduct his indebtedness must assert the right when he lists his credits.[10]

Valuation of corporate property, stock, and franchises.[11]—Methods of determining the taxable value of shares of stock assessed to the owners,[12] of the capital,[13] franchises,[14] or other property of corporations,[15] and methods of computing license or franchise taxes,[16] are treated in the notes. Where a railway runs through a state, or a considerable portion thereof, its value includes not only its roadbed, depot, grounds, rolling stock, and right of way, but its franchises and its corporate rights to operate the same, and hence its value for the purpose of taxation is most satisfactorily ascertained by regarding the whole system as a unit.[17]

(§ 5) *E. Reassessment; omitted property.*[18]—Provision is usually made by statutes for the assessment of property omitted in previous years.[19] An action to

8. A surplus designated as "unassigned funds" collected by an insurance company to guard against unexpected losses does not constitute a liability of the company deductible from its taxable credits. Chicago Life Ins. Co. v. Board of Review [Iowa] 108 N. W. 305. Accumulated deferred dividends or undivided profits arising on life rate endowment policies of a life insurance company are not, under the Ohio statutes of taxation, to be considered as a "legal bona fide debt owing" by the insurance company, and cannot therefore be legally deducted from the company's "credits" when its return for taxation is made up. Hynicka v. Union Cent. Life Ins. Co., 4 Ohio N. P. (N. S.) 297. The reserve fund of a life insurance company cannot be considered a debt, owing to the policy holders, in the sense that it may be deducted from the credits and thus escape taxation. Id. Under the Mississippi statutes a private corporation conducted for pecuniary gain is no more entitled to a deduction than an individual. Code 1906, § 4267. Panola County v. Carrier [Miss.] 42 So. 347. See 4 C. L. 1616, n. 59.

9. Paddell v. New York, 50 Misc. 422, 100 N. Y. S. 581.

10. Pierce v. Carlock, 224 Ill. 608, 79 N. E. 959. See 4 C. L. 1616, n. 60.

11. See 6 C. L. 1623.

12. In determining the value of the stock of a corporation owning and managing an apartment house, the present rental value of the property may be considered. People v. Kelsey, 110 App. Div. 617, 96 N. Y. S. 745. Sec. 13, c. 17, Nebraska Laws 1899, providing the manner in which shares of building and loan associations shall be assessed, is constitutional. Nebraska Cent. B. & Loan Ass'n v. Board of Equalization [Neb.] 111 N. W. 147. An assessment of the amount of mortgages taken to the association which the assessor assumes are unpaid is invalid. Id.

13. People v. Roberts, 101 N. Y. S. 184.

14. That an assessor took into consideration the value of the franchise of an electric company in assessing its plant did not render the assessment void. Lake City Elec. Light Co. v. McCrary [Iowa] 110 N. W. 19.

15. In entering for taxation the property of a railroad which lies partly within and partly without the state, Rev. St. §§ 2772, 2776, should govern and not section 2774. Cincinnati, etc., R. Co. v. Hynicka, 4 Ohio N. P. (N. S.) 345. The value of the real estate owned by banks and trust companies to be deducted in ascertaining the taxable value of their capital stock, surplus, and undivided profits, under the provisions of W. Va. Code of 1899, as amended, is the assessed value, not the actual value thereof at the time of the assessment. State v. Graybeal [W. Va.] 55 S. E. 398. In Maryland, in assessing the value of easements in a street belonging to a gas company, it is error for the appeal tax court to treat the bonded indebtedness of the company as an asset for the purpose of taxation. Consolidated Gas Co. v. Baltimore [Md.] 65 A. 628.

16. A proper method of ascertaining the value of a franchise of a corporation is to deduct from the aggregate market value of its shares the value of its tangible property. Crocker v. Scott [Cal.] 87 P. 102.

17. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594; Chicago, etc., R. Co. v. Babcock, 27 S. Ct. 326; State v. St. Louis S. W. R. Co. [Tex. Civ. App.] 96 S. W. 69; Waterloo & C. F. Rapid Transit Co. v. Blackhawk County Sup'rs [Iowa] 108 N. W. 316. The bridge of the Cincinnati Southern Railway, which spans the Ohio river, together with the viaduct or trestle leading up to it, constitutes, with the underlying ground, a part of the roadbed and is property necessary to the daily operation of the road, and there being no additional charge to shippers or passengers on account of the use of this bridge and viaduct, it should be taxed with the remainder of the road as a unit and "averaged" over the entire road. Cincinnati, etc., R. Co. v. Hynicka, 4 Ohio N. P. (N. S.) 345. The sidetracks of the company, which are in daily use for the loading and unloading of freight, and ground purchased for the purpose of establishing a connection track with another railroad, do not constitute real estate, structures, or stationary, personal property to be "localized" for taxation, but should likewise be "averaged" for taxation over the entire road. Such being the status of railroad property of this character, the auditor cannot after having ascertained its value under Rev. St. § 2772, again tax it as omitted property, nor can he treat it as omitted property which has escaped taxation, nor would he be justified in again placing it on the duplicate on the ground that his action was in effect a revaluation or a correction of an undervaluation. Id.

18. See 6 C. L. 1625.

19. In Michigan no reassessment of rejected drain taxes can be made without au-

recover such taxes cannot be maintained unless the statute has been substantially complied with.[20] The sufficiency of an affidavit in a proceeding for the inspection by the county assessor of a person's books to ascertain whether taxable property of another has been omitted must be judged by the rule that laws relating to taxation must receive a liberal construction.[21] The employment of a city attorney to collect arrearages of taxes, without any limitation as to time, is in law terminable at the will of either party.[22] The validity of and questions arising under tax ferreting contracts are given in the notes.[23]

In some states, notably Kentucky, provision is made by statute for the filing of statements of omitted property by revenue agents.[24] When such a statement is filed a summons is issued and the taxability of the property is determined in a legal proceeding. It is only where the question is not one of valuation but of omission that the court may take jurisdiction.[25] In such a proceeding, where the assessment lists are silent, parol proof may be heard to show what property was intended,[26] and the proceeding is tried de novo,[27] the sole question for consideration being whether the property is subject to assessment.[28] An appeal must be prosecuted within sixty days.[29]

Appeals.—In Mississippi the proper remedy of a revenue agent, where county board has disallowed certain assessments for back taxes, is an appeal from the order of the board.[30] The Colorado statute granting an appeal, because of an erroneous assessment, to the district court does not authorize an appeal from that court.[31] In West Virginia a writ of error does not lie to the supreme court from the decision of a circuit court on appeal from the action of assessing officers.[32]

§ 6. *Equalization, correction, and review.*[33]—Valuations by assessing officers, if legally and not arbitrarily made,[34] are presumptively correct,[35] and final unless an appeal is taken therefrom.[36] This appeal is in the first instance to a board usually constituted for that purpose.[37]

thority from the board of supervisors. Auditor General v. Tuttle [Mich.] 13 Det. Leg. N. 668, 109 N. W. 48.

20. Judy v. National State Bk. [Iowa] 110 N. W. 605.

21. Washington Nat. Bk. v. Daily [Ind.] 77 N. E. 53.

22. City of Wilmington v. Bryan, 141 N. C. 666, 54 S. E. 543.

23. In Illinois since the passage of the Revenue Act of 1898, the power of assessing omitted taxes rests with the board of review and hence the county board has no power to employ a tax ferret. Stevens v. Henry County, 218 Ill. 468, 75 N. E. 1024, rvg. 120 Ill. App. 344; Campbell v. Workman, 124 Ill. App. 404. Under the Colorado statutes there is no implied authority in the board of county commissioners to contract for the discovery of omitted property. Chase v. Boulder County Com'rs [Colo.] 86 P. 1011. In Ohio the sections of the statutes relating to the placing on the tax duplicate of property improperly omitted therefrom, and the employment of tax inquisitors, etc., do not require of the county auditor as a part of the duties of his office that he shall make search for such omissions, and a necessity existed for the employment of a tax inquisitor for the performance of that work at the time the contract in issue in this case was entered into. The phrase "any omissions of property," found in Rev. St. § 1343—1, was intended to mean all omissions, past, present, and future, and the claim that this law does not authorize contracts with tax inquisitors which have a prospective operation is not tenable. State v. Lewis, 4 Ohio N. P. (N. S.) 454. In Indiana such a contract is subject to the provisions of county Reform Act, Acts 1899, p. 343. State v. Parks [Ind.] 81 N. E. 76. Under Ariz. Laws 1903, p. 162, a tax collector cannot make an irrevocable contract with an attorney for such services. McGowan v. Gaines [Ariz.] 89 P. 538.

24. Commonwealth v. Mt. Sterling Nat. Bank, 30 Ky. L. R. 954, 99 S. W. 958; Commonwealth v. Chaudet, 30 Ky. L. R. 1157, 100 S. W. 819.

25, 26. Commonwealth v. American Tobacco Co., 29 Ky. L. R. 745, 96 S. W. 466.

27. Commonwealth v. Haggin, 30 Ky. L. R. 788, 99 S. W. 906; Commonwealth v. Mitchell, 30 Ky. L. R. 775, 99 S. W. 670.

28. Whether a notice to the trustee of the person whose property is sought to be taxed is sufficient cannot be considered. Commonwealth v. Lovell [Ky.] 101 S. W. 970.

29. Commonwealth v. Adams Exp. Co., 30 Ky. L. R. 309, 98 S. W. 288.

30. Adams v. Stonewall Cotton Mills [Miss.] 43 So. 65.

31. Board of Com'rs of Teller County v. Pinnacle Gold Min. Co. [Colo.] 85 P. 1005.

32. McLean v. State [W. Va.] 56 S. E. 884.

33. See 6 C. L. 1627.

34. The determination of a board of review cannot be attacked collaterally except for fraud or error. Briscoe v. McMillan [Tenn.] 100 S. W. 111.

35. Clark v. Middleton [N. H.] 66 A. 115.

36. Lake City Elec. Light Co. v. McCrary

The powers and jurisdiction of county and state boards of equalization as well as the procedure to obtain relief through them [38] are controlled by statute.[39] While a state board of equalization may compel the reassessment of the whole property of a taxing district because assessed at substantially less than its true value,[40] it may not do so merely on a stipulation of facts to which the taxing district affected is not a party.[41] The objection that a member of the board of equalization is not a freeholder as required by statute cannot be made in an action to recover taxes paid.[42] Where members of a board of review hold over and are recognized as such by objecting taxpayers, their acts are valid as de facto officers.[43] Boards of review may be required by mandamus to perform their duties.[44] Adjourning without performing the duties incumbent upon them will not avail.[45]

Notice [46] to the taxpayer affected is usually required, and failure to give is not waived by his voluntary appearance after an increase is made;[47] but where the value of property, as returned by the assessor, as to an entire precinct is relatively too low, it may be raised by the board of equalization without notice previously given.[48]

Review by the courts.[49]—Application to a board of review or other tribunal provided by law is a condition precedent to the right of appeal to the courts,[50] hence, on an appeal, the cause must be tried on the questions raised by the complaint before such tribunal.[51] Where a taxpayer appeals from the action of the

[Iowa] 110 N. W. 19. The excessiveness of an assessment is a question for the board of review and its determination is conclusive. Ward v. Echo Tp., 145 Mich. 56, 13 Det. Leg. N. 393, 108 N. W. 364. In California the remedy for overvaluation is by appeal to the board of equalization, failing in which the owner is concluded. City of Los Angeles v. Glassell [Cal. App.] 87 P. 241. A complainant may maintain a suit under Ohio Rev. St. 1906, § 5848, to restrain the collection of a tax on credits where the question is one of the legality of the tax and not of valuation. McKnight v. Dudley [C. C. A.] 148 F. 204.

37. The power to equalize taxes is not legislative in the sense that it cannot be delegated by the legislature to a board. Foster v. Rowe, 128 Wis. 326, 107 N. W. 635. The power is quasi judicial. Missouri, etc., R. Co. v. Shannon [Tex. Civ. App.] 16 Tex. Ct. Rep. 866, 97 S. W. 527.

38. Objections may be presented orally. Barz v. Board of Equalization [Iowa] 111 N. W. 41. A formal finding by a board of equalization is not necessary as a basis for its action in equalizing assessments between precincts. Lancaster County v. Whedon [Neb.] 108 N. W. 127. A board of equalization has jurisdiction to raise an assessment, though the person assessed has taken no appeal to the board (State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606), but in Louisiana the police jury, sitting as a board of reviewers, has no authority to reduce assessments of its own motion in the absence of a contest by the taxpayer (Police Jury of Concordia Parish v. Campbell, 117 La. 75, 41 So. 358).

39. The Indiana state board of tax commissioners is a statutory body with only such powers with reference to the assessment of property for taxation and the equalizing thereof as is expressly conferred by statute. Bell v. Meeker [Ind. App.] 78 N. E. 641.

40. Central R. Co. v. State Board of Assessors [N. J. Law] 65 A. 244.

41. Central R. Co. v. State Board of Assessors [N. J. Law] 65 A. 244. A township board of review has no authority to transfer property for assessment purposes from one school district in the township to another. Independent School Dist. v. Local Board of Review [Iowa] 108 N. W. 220. Where an inequality exists, an owner discriminated against is entitled to a correction of his assessment, although such relief necessitates the reduction of the valuation of his property below its true cash value. First Nat. Bank v. Montrose County Com'rs [Colo.] 84 P. 1111.

42. State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606.

43. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141.

44. Where it was the duty of the board of review to assess the rights of certain corporations in tunnels maintained in the streets of a city, the board of local assessors having omitted to do so, mandamus was maintainable against the board of review to compel performance of its duty. People v. Upham, 221 Ill. 555, 77 N. E. 931. The city of Geneva held to be a proper party in a mandamus proceeding against the board of supervisors to correct and equalize a tax levy. People v. Ontario County Sup'rs, 50 Misc. 63, 100 N. Y. S. 330.

45. Supervisors of Coles County v. People, 226 Ill. 576, 80 N. E. 1066.

46. See 6 C. L. 1628.

47. Montana Ore Purchasing Co. v. Maher, 32 Mont. 480, 81 P. 13.

48. Lancaster County v. Whedon [Neb.] 108 N. W. 127.

49. See 6 C. L. 1629.

50. The statutes of Nebraska make no provision for an appeal from the order of the county board in making a tax levy. An attempt to prosecute such an appeal confers no jurisdiction on the district court. Whedon v. Lancaster County [Neb.] 107 N. W. 1092.

51. First Nat. Bank v. Webster County [Neb.] 110 N. W. 535, following Nebraska Tel. Co. v. Hall County [Neb.] 106 N. W. 471;

board of equalization, the burden is on the appellant to show that the decision of the board is erroneous.[52] The appropriate form of remedy,[53] the method of perfecting an appeal,[54] and questions of practice thereon,[55] are treated in the notes.

§ 7. *Levies and tax lists.*[56]—The rule of taxation must be prescribed by the legislature.[57] In the levying of municipal taxes, statutory provisions should be strictly followed. Thus, levies must be made by the proper authorities,[58] at the proper time,[59] and in the manner,[60] and for such amounts[61] and purposes,[62] and at such rates,[63] as the law prescribes. The purposes for which a municipal tax is

People v. Gray, 185 N. Y. 196, 77 N E. 1172. See 6 C. L. 1629, n. 41. On appeal from the county board of equalization, the issue is: "What was the actual value of the property in the market in the ordinary course of trade," and is to be tried as other issues in adversary actions. Lancaster County v. Brown [Neb.] 107 N. W. 576.

52. Lancaster County v. Whedon [Neb.] 108 N. W. 127.

53. In New Jersey, in making the assessment of the annual license fee, or franchise tax, upon a corporation which has neglected or refused to make return within the time required by law, the state board of assessors is a special statutory tribunal, and its proceedings are subject to review under the certiorari power of this court, and upon such review the court may determine disputed questions of fact. Trenton Heat & Power Co. v. State Board of Assessors [N. J. Law] 63 A. 1005. In Illinois the remedy of a person aggrieved by the action of a board of review is by bill in chancery against the county clerk to enjoin the extension of the tax against him. Duckett v. Gerig, 223 Ill. 284, 79 N. E. 94. But equity will not interpose its aid where the statute affords a remedy. Western Union Tel. Co. v. Douglas County [Neb.] 107 N. W. 985; Flaherty v. Atlantic City [N. J. Law] 63 A. 992.

54. Improper joinder of parties. People v. O'Donnel, 113 App. Div. 713, 99 N. Y. S. 436.

55. Allegations of petition for certiorari to review an assessment held sufficient. City of New York v. Mitchell, 103 N. Y. S. 87. The insufficiency of a petition in certiorari is waived by making return thereto. The proper practice is to move to dismiss the writ. In re City of New York, 102 N. Y. S. 1. In reviewing a determination by certiorari, the court is bound by the return. People v. Kelsey, 110 App. Div. 617, 96 N. Y. S. 745. Where the petition and return present an issue, the question must be determined by a resort to evidence. People v. Feitner, 101 N. Y. S. 1021.

56. See 6 C. L. 1630.

57. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

58. Shriver v. McGregor, 224 Ill. 397, 79 N. E. 706; Brockway v. Louisa County Sup'rs [Iowa] 110 N. W. 844.

59. Blades v. Falmouth, 30 Ky. L. R. 420, 98 S. W. 1017; Pope v. Matthews, 125 Ga. 341, 54 S. E. 152. Where an estimate was presented in August, a levy thereon made in September was sustained. Bancroft v. Randall [Cal. App.] 87 P. 805. The exercise of the taxing power one time is not final so as to prevent the levy from afterwards being amended. Southern R. Co. v. Hamblen County [Tenn.] 97 S. W. 455.

60. Lyman v. Cicero, 222 Ill. 379, 78 N. E. 330; Brown v. Southern R. Co., 125 Ga. 772, 54 S. E. 729; Johnson v. Pinson, 126 Ga. 121, 54 S. E. 922; Chicago, etc., R. Co. v. People, 225 Ill. 519, 80 N. E. 336. Levy by school board. People v. Welsh, 225 Ill. 364, 80 N. E. 313. Certificate of bill of costs held insufficient. People v. Patton, 223 Ill. 379, 79 N. E. 51. Taxes levied under a law relating to the labor system, the township in which levied at the time operating under the cash system, are void. Litchfield & M. R. Co. v. People, 225 Ill. 301, 80 N. E. 335; Toledo, etc., R. Co. v. People, 225 Ill. 425, 80 N. E. 283; Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 N. E. 1059. The fact that in making a levy of an extra tax county authorities embraced the levy in an order for a county tax did not render the levy of the extra tax illegal, the same being embodied in a separate and distinct portion, and paragraph of said order substantially complete in itself. Johnson v. Pinson [Ga.] 56 S. E. 238. The failure of directors and clerks who held election pursuant to which a school tax was levied to take oath prescribed by the statute did not affect validity of the school tax. Brasch v. Western Tie & Timber Co. [Ark.] 97 S. W. 445.

61. Hospital building held to be a county building and within a constitutional prohibition upon the amount of taxation unless authorized by electors. Superintendents of Wayne County Poor v. Wayne County Auditors [Mich.] 13 Det. Leg. N. 1019, 110 N. W. 1080. Under a statute requiring the specification of the per cent. levied for each purpose, an order specifying the amount to be collected but not the per cent. renders the levy void. Sullivan v. Yow, 125 Ga. 326, 54 S. E. 173. Under the Louisiana constitution and statutes, the petition of property taxpayers calling for an election to aid railroad construction need not specify the amount to be raised. State v. Knowles, 117 La. 129, 41 So. 439.

62. Sutherland v. Randolph County [W. Va.] 57 S. E. 274; People v. Ontario County Sup'rs, 188 N. Y. 1, 80 N. E. 381; Slutts v. Dana [Iowa] 109 N. W. 794; State v. Several Parcels of Land [Neb.] 111 N. W. 601. Mississippi Code 1906, p. 197, c. 168, dividing Jasper county into two judicial districts and providing for additional county buildings, sustained. Turner v. Cochran [Miss.] 42 So. 876. In Illinois boards of education have authority to levy taxes for educational and building purposes only. Installation of a heating plant in a school sustained. St. Louis, etc., R. Co. v. People, 224 Ill. 155, 79 N. E. 664. Taxes levied for a stated purpose and immediately transferred to another and unauthorized purpose renders the levy void. Lincoln County v. Chicago, etc. R. Co. [Neb.] 108 N. W. 178.

63. Limitation on rate held to apply to all taxes levied by county and not merely to

levied must be correctly specified.[64] An excessive levy made for general purposes is illegal to the extent of the excess only.[65] Cases dealing with the extension of the tax will be found in the note.[66]

Mandamus[67] lies at the instance of directors of a school district to compel proper official body to issue certificate essential to extension of tax levied for school purposes,[68] and local officers may be compelled to levy a tax to pay a judgment on township bonds, although the corporate existence of the township has been abolished.[69]

The record[70] should show that each step required by law has been duly taken.[71]

§ 8. *Payment and commutation.*[72]—Taxes are payable in cash[73] and payment extinguishes the lien,[74] but payment to a duly authorized collector before the tax rolls have been delivered to him does not constitute a payment as against the state.[75] Good faith application to the proper officer for the purpose of paying taxes, but prevention through the fraud, mistake, or fault of such officer, is equivalent to a payment.[76] An occupant of land paying taxes thereon in the honest belief of ownership acquires no equitable claim to the land because of such payments,[77] but the payment of delinquent general taxes by a city to protect its lien for special taxes entitles it to an equitable lien on the lots.[78] Money paid by a taxpayer upon an illegal levy may be applied as a credit to him upon a new levy.[79] Payment may be proven by either direct or circumstantial evidence.[80] A tax receipt, however, like other receipts for money paid, is only prima facie evidence of payment and may be explained.[81] Under the present Kentucky constitution, a municipality has no power to compromise taxes.[82] The fact that pending an appeal from the action of

a particular fund. Fremont, etc., R. Co. v. Pennington County [S. D.] 105 N. W. 929. Certain property held to be embraced in the term "landed property" in determining the rate applicable. Hiss v. Baltimore, 103 Md. 620, 64 A. 52.

64. People v. Wisconsin Cent. R. Co., 219 Ill. 94, 76 N. E. 80. An ordinance stating the tax to be "for municipal purposes" held sufficient. Town of Mt. Pleasant v. Eversole, 29 Ky. L. R. 830, 96 S. W. 478. But an item, "For payment of county claims (janitor's services, supplies, repairs, improvements, and current expenses) $12,000," held not sufficient (People v. Cincinnati etc., R. Co., 224 Ill. 523, 79 N. E. 657), and designating tax as for "town purposes" is not sufficient (St. Louis, etc., R. Co. v. People, 225 Ill. 418, 80 N. E. 303). Iowa Code, § 2297, does not impose a tax within the meaning of Const. art. 7, § 7, requiring object of a tax to be specifically stated. Guthrie County v. Conrad [Iowa] 110 N. W. 454.

65. Lincoln County v. Chicago, etc., R. Co. [Neb.] 108 N. W. 178.

66. In Illinois, the maximum tax authorized to be levied for county purposes is to be extended on the equalized valuation as made by the state board and not on the valuation as made by the board of review. Cleveland, etc., R. Co. v. People, 223 Ill. 17, 79 N. E. 17; People v. Chicago, etc., R. Co., 223 Ill. 300, 79 N. E. 22. A statutory provision (Hurd's Rev. St. 1903, p. 1530), that a fraction of a cent shall be extended as a cent, held to apply to the tax rate and not alone to the tax itself. St. Louis, etc., R. Co. v. People, 224 Ill. 155, 79 N. E. 664.

67. See 6 C. L. 1631.

68. School Directors of District 25 v. People, 123 Ill. App. 73.

69. Graham v. Folsom, 200 U. S. 248, 50 Law. Ed. 464.

70. See 6 C. L. 1632.

71. Mere informality of the record with respect to the return, acceptance, and allowance of a city collector's list of delinquent real estate will not sustain an attack upon a sale after the deed has been executed and recorded. Hogan v. Piggott [W. Va.] 56 S. E. 189.

72. See 6 C. L. 1632.

73. The fact that a tax collector was given credit on his personal account for taxes by a taxpayer does not constitute payment. Figures v. State [Tex. Civ. App.] 99 S. W. 412.

74. Where there are two assessments of the same land to different persons for the same year, payment by one discharges the lien, and no collection under the other assessment can be made. Pickler v. State [Ala.] 42 So. 1018. Under the statutes of Pennsylvania, taxes in Philadelphia are discharged by a sheriff's sale if the proceeds of such sale are sufficient to pay them. City of Philadelphia v. Powers, 214 Pa. 247, 63 A. 602.

75. Texas, etc., R. Co. v. State [Tex. Civ. App.] 97 S. W. 142.

76. Hayward v. O'Connor, 145 Mich. 52, 13 Det. Leg. N. 384, 108 N. W. 366.

77. Taylor v. Roniger [Mich.] 13 Det. Leg. N. 994, 110 N. W. 503.

78. Such a payment is not a voluntary payment. City of Spokane v. Security Sav. Soc. [Wash.] 89 P. 466.

79. Johnson v. Pinson [Ga.] 56 S. E. 238.

80. Jordan v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 929, 94 S. W. 398.

81. Johnson v. Pinson [Ga.] 56 S. E. 238.

82. Illinois Cent. R. Co. v. Grayson County, 30 Ky. L. R. 780, 99 S. W. 625.

a board of review in raising an assessment the property owner paid, and the city accepted, the amount due under the assessment as first made, does not estop the city from collecting the additional tax.[83] Assessment of one-half of a tract of land, owned in common by two or more persons, in the name of one tenant, and the residue in the name of his cotenant, does not invalidate or nullify the effect of payment of the taxes so assessed, though no partition of the land had been made.[84]

§ 9. *Lien and priority.*[85]—In the absence of statutory regulation, a tax becomes a lien from the moment it becomes a fixed and determined charge.[86] Where the incorporation of a railroad was authorized by statute and the taxes thereon were made a lien upon the railroad and its appurtenances, the lien was not defeated by the lapse of any less time than suffices to defeat a mortgage lien.[87] Tax liens take priority in the reverse order of other liens.[88] Thus, a title to land resting on a regularly conducted sale for taxes is paramount to the lien of a prior mortgage.[89] A title based on a later tax sale on an earlier tax lien may prevail over a tax title based on an earlier sale on an earlier lien,[90] but a second tax deed does not cut off title acquired under a former deed, both being to the same person,[91] and the fact that defendant's tax deed was of a later date than plaintiff's deed, based on a tax sale antedating the tax sale on which plaintiff's deed issued, did not vest defendant with a paramount title.[92] Where a prior tax sale has been adjudged void, the lien of the state for such taxes, interest, and penalties, becomes revived.[93]

§ 10. *Relief from illegal taxes.*[94]—In some states collection of a tax will not be enjoined.[95] Elsewhere the remedy by injunction is available, provided there are special circumstances bringing the case within some recognized head of equity jurisprudence.[96] But a court will not enjoin the collection of a tax upon the mere ground of illegality,[97] nor will a bill lie by a taxpayer in behalf of himself and other taxpayers to restrain the collection or to set aside the taxes of a municipality generally,[98] such party, if aggrieved by an error or irregularity in the assessment, being left to his appropriate remedy.[99] A person who has received the full benefit of a law subsequently found to be unconstitutional, and who was active in procuring its adoption, may be estopped from contesting the levy and collection of a tax to pay for such benefit,[1] but the estoppel will not be extended so as to conclude him as to

83. City Council of Marion v. National Loan & Inv. Co., 130 Iowa, 511, 107 N. W. 309.

84. Webb v. Ritter [W. Va.] 54 S. E. 484.

85. See 6 C. L. 1633.

86. In Washington the lien upon personal property attaches when the valuation thereof is determined by the assessor. City of Puyallup v. Lakin [Wash.] 88 P. 578.

87. People v. Michigan Central R. Co., 145 Mich. 140, 13 Det. Leg. N. 552, 108 N. W. 772.

88. Auditor General v. Clifford, 143 Mich. 626, 13 Det. Leg. N. 127, 107 N. W. 287; Miller v. Meilstrup, 144 Mich. 643, 13 Det. Leg. N. 350, 108 N. W. 427.

89. Erie County Sav. Bank v. Schuster [N. Y.] 79 N. E. 843.

90. Oakland Cemetery Ass'n v. Ramsey County Com'rs, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237.

91. Patterson v. Cappon [Wis.] 109 N. W. 103.

92. Doolittle v. Gates Land Co. [Wis.] 110 N. W. 890.

93. But under Minn. Gen. St. 1894, § 1602, such lien does not accrue and become delinquent until the state has taken steps to enforce its lien by including the same in the taxes for the current year or as provided by law. Minnesota Debenture Co. v. United Real Estate Corp., 99 Minn. 287, 109 N. W. 251.

94. See 6 C. L. 1634.

95. Propriety of remedy not decided. Paddell v. New York, 50 Misc. 422, 100 N. Y. S. 581.

96. City of Ensley v. McWilliams [Ala.] 41 So. 296. After the purchase of mortgaged premises at foreclosure sale by the mortgagee, the mortgagor cannot maintain an action to restrain the collection of illegal taxes levied after the execution of the mortgage unless bound by a special covenant therein to pay such future assessment. Sholes v. Omaha [Neb.] 111 N. W. 364.

97. It is only where a tax is void or voidable that a court of equity will interfere to prevent its collection. The remedy for all other wrongs and errors in the assessment or levy must be sought at the hands of the taxing officers or by appeal therefrom in the manner provided by statute. Carpenter v. Jones County, 130 Iowa, 494, 107 N. W. 435; Security Sav. Bank v. Carroll [Iowa] 109 N. W. 212.

98, 99. Foster v. Rowe [Wis.] 111 N. W. 688.

1, 2. Sellers v. Cox [Ga.] 56 S. E. 284,

acts not done strictly within the purview of the invalid law, nor from questioning the constitutionality of the law as to such matters as yet remain to be done under the law.[2] Where an increase was made in an assessment without notice to the taxpayer, injunction lies to restrain collection of tax.[3] Payment or tender of taxes justly due is a condition precedent to relief in a court of equity,[4] and it has been held that the state should be made a party.[5] The remedy by petition under the Florida statute is not coextensive with that afforded by a court of equity and is not available after the assessed property has been sold for taxes, and a certificate issued, or a tax deed executed, and the rights of third parties have intervened.[6]

Recovery back of payments.[7]—Illegal taxes paid under duress,[8] or under a sufficient protest,[9] may be recovered,[10] but taxes voluntarily [11] or mistakably [12] paid cannot be. Counties may not be sued to recover illegal taxes paid under protest, but, while the taxes remain in the hands of the collecting officer, a direct action against such officer may be maintained,[13] and the holder of a mortgage, paying taxes thereon to prevent a seizure, is entitled to recover the amount against the person assessed on an implied contract.[14] In a proceeding to recover a tax the taxpayer has the burden of establishing that all steps necessary to a valid assessment were not taken.[15] In an action by a village to recover payment made by it to a town of a tax levied on the property of the village, the court is not at liberty to consider whether the assessment was legal.[16]

Refunding.[17]—Under the revenue laws of South Dakota and Minnesota, when a sale of land is declared void, the money paid by the purchaser, with interest, is to be refunded to him out of the county treasury.[18] When the state becomes liable by

3. Montana Ore Purchasing Co. v. Maher, 32 Mont. 480, 81 P. 13.

4. Where a portion of the tax is just, the owner is not entitled to relief in equity or by mandamus unless he pays or tenders the portion justly due. Grand Rapids & I. R. Co. v. Auditor General, 144 Mich. 77, 13 Det. Leg. N. 249, 107 N. W. 1075. Where suit was brought to enjoin that part of certain taxes only claimed to be invalid, complainants were not required to pay the taxes not sought to be enjoined. Bell v. Meeker [Ind. App.] 78 N. E. 641.

5. Johnson v. Hampton Normal & Agricultural Institute Trustees, 105 Va. 319, 54 S. E. 31.

6. Florida Gen. St. § 2006, providing a summary remedy by petition to declare void an assessment on real estate not lawfully made, embraces those assessments only in which there is error on the face of the assessment. Knight v. Matson [Fla.] 43 So. 695.

7. See 6 C. L. 1636.

8. Wheeler v. Plumas County [Cal.] 87 P. 802. A tax paid under protest to prevent a threatened seizure of the tax payer's property by the officer may be recovered back when it appears that the collection of the tax was unauthorized by law. District of Columbia v. Glass, 27 App. D. C. 576.

9. When recovery is allowed for taxes paid under protest, the element of coercion must be found. In the absence of present and potential compulsion, mere protest is not sufficient. Oakland Cemetery Ass'n. v. Ramsey County Com'rs, 98 Minn. 404, 108 N. W. 857, 109 N. W. 237. Executors of an estate compelled to pay an illegal fee before the issue of letters testamentary may recover, the same being paid under protest. Cook County v. Fairbank 222 Ill. 578, 78 N. E. 895.

10. Where facts de hors which make a tax void are not known to the payor, there is no voluntary payment. Betz v. New York, 103 N. Y. S. 886.

11. Where the tax is wholly void, payment thereof is voluntary (Warren v. San Francisco [Cal.] 88 P. 712), but payment under stipulation as to certain existing conditions is not a voluntary payment (State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606).

12. Baltimore, etc., R. Co. v. Oregon Tp. [Ind. App.] 81 N. E. 105. One paying by mistake taxes on real estate not owned by but assessed to him cannot recover from the owner, the payment being voluntary. Bateson v. Phelps' Estate, 145 Mich. 605, 13 Det. Leg. N. 626, 108 N. W. 1079. Under the scheme of the charter of Greater New York, one erroneously paying taxes upon the property of another cannot recover the amount of the owner. Hubbard v. Blanchard, 113 App. Div. 788, 99 N. Y. S. 262. An overpayment made to a county in redeeming a piece of real estate from a tax sale not discovered within a year is not a mistake for which relief will be granted by statute, within Code Civ. Proc. § 338. Murphy v. Bondshu, 2 Cal. App. 249, 83 P. 278.

13. Commonwealth v. Boske, 30 Ky. L. R. 400, 99 S. W. 316.

14. But he is not subrogated to the city's lien and entitled to a special execution to enforce reimbursement. Stone v. Tilley [Tex. Civ. App.] 15 Tex. Ct. Rep. 583, 95 S. W. 718.

15. Louisville Tank Line v. Com., 29 Ky. L. R. 257, 93 S. W. 635.

16. In re Village of Medina, 103 N. Y. S. 1018.

17. See 6 C .L. 1637.

18. King v. Lane [S. D.] 110 N. W. 37;

statute to refund an illegal tax, interest follows without any express provision on the subject.[19] The Minnesota statute to the effect that taxes refunded upon a void tax judgment shall be included in the next delinquent tax sale is directory, not mandatory.[20] There is a presumption that in valuing the lots of a newly platted subdivision for the purpose of taxation the valuation returned by the assessor covers the lots only and not the land dedicated for street purposes, and without a showing to the contrary the subsequent allowance of a refunder on account of land embraced in the streets is erroneous.[21] Mandamus is a proper remedy to compel a refundment,[22] unless the claim is barred by the statute of limitations.[23]

§ 11. *Collection. A. Collectors; their authority, rights, and liabilities.*[24]—The appointment,[25] qualifications,[26] powers,[27] liabilities,[28] and compensation[29] of tax collectors are regulated by statute. Where a tax collector at the expiration of his term must account for all uncollected taxes, he may continue to collect such taxes though his term has expired.[30] That a tax collector's bond is taken in the name of the commissioners of the county and not in the name of the commonwealth does not avail the sureties.[31] Money received by a sheriff in excess of the legal amount belongs to the owner of the land in the hands of the sheriff, and hence the purchasers are not responsible for the sheriff's misappropriation thereof.[32]

(§ 11) *B. Methods of collection in general.*[33]—The form or method of collecting taxes is a matter entirely of legislative discretion.[34] Sometimes a summary method of collection is awarded, quite generally a lien is provided, in other cases an action of debt is given, and sometimes the right of prohibition of the exercise of corporate functions by injunction.[35] In general, however, two methods are provided: summary proceedings against the person[36] or property, actions at law to

Comstock, Ferre & Co. v. Devlin, 99 Minn. 68, 108 N. W. 888.

19. People v. Kelsey, 99 N. Y. S. 852.

20. Gen. St. 1894, § 1610. Allen v. Ramsey County Com'rs, 98 Minn. 341, 108 N. W. 301.

21. Commissioners of Hamilton County v. Albers, 8 Ohio C. C. (N. S.) 558.

22. People v. Erie County Sup'rs, 99 N. Y. S. 1062.

23. McRae v. Auditor General [Mich.] 13 Det. Leg. N. 895, 109 N. W. 1122; Wilkinson v. Auditor General [Mich.] 13 Det. Leg. N. 945, 110 N. W. 123.

24. See 6 C. L. 1638.

25. Arkansas Act of 1905, p. 207, creating the office of collector of Madison County, held constitutional. Vaughan v. Kendall [Ark.] 96 S. W. 140.

26. It is the signature of the obligors and not the insertion of their names that gives effect to a collector's bond. Baker County v. Huntington [Or.] 87 P. 1036.

27. In Oklahoma the county treasurer's authority is derived from the county clerk's warrant and not from the provisions of the statute. Warrant held sufficient in form. Cadman v. Smith, 15 Okl. 633, 85 P. 346. Under the New Jersey tax laws, since the revision of 1903 and prior to the act of 1906, a borough collector was without power to sell land for taxes after he had ceased to hold the office of collector. Voorhees v. Anglesea [N. J. Law] 65 A. 838. Burns' Ann. Stat. 1901 of Indiana, § 7634, does not authorize the auditor of that state to collect foreign insurance taxes, these being paid directly into state treasury. Sherrick v. State [Ind.] 79 N .E. 193.

28. A tax collecting officer is individually liable for a wrongful collection of taxes (Florida Packing & Ice Co. v. Carney [Fla.] 41 So. 190), though process fair upon its face will protect him (Godkin v. Corliss [Mich.] 13 Det. Leg. N. 871, 109 N. W. 855). He is liable on his bond for taxes received by him though he was without legal warrant to require their payment. Adams v. Saunders [Miss.] 42 So. 602. Under the revenue laws of Virginia, a county treasurer is not entitled to receive credit by any delinquent taxes until the original tax tickets are filed with the clerk. Board of Sup'rs v. Powell [Va.] 56 S. E. 812.

29. State v. Stedman [N. C.] 54 S. E. 269; Hethcock v. Crawford County [Mo.] 98 S. W. 582. The endorsement of the amount of the tax upon an application for a gaming or liquor license, same being already fixed by law, is not an assessment within the meaning of a statute giving the assessor a commission upon all money collected on assessments made to him. Sandoval v. Bernalillo County Com'rs [N. M.] 86 P. 427.

30. Blackwell v. Lewis, 29 Ky. L. R. 385, 93 S. W. 40.

31. Commonwealth v. Singer, 31 Pa. Super. Ct. 597.

32. Moore v. Rogers [Tex.] 99 S. W. 1023.

33. See 6 C. L. 1638.

34. Judy v. National State Bk. [Iowa] 110 N. W. 605.

35. State of New Jersey v. Anderson, 27 S. Ct. 137.

36. In some states if a person refuses or neglects to pay his tax after demand, and the collector cannot find sufficient goods out of which the tax may be had, the taxpayer may be arrested. Kerr v. Atwood, 188 Mass. 506, 74 N. E. 917. In such event, however.

recover the amount,[37] or suits in equity to foreclose the tax lien, followed by a sale of the land [38] in default of personal property.[39] Express statutory authority must be found for the use of either method, and the method prescribed must be strictly followed,[40] but where taxes have been assessed against property and are liens upon it, and there are also other liens assessed by proper authorities, all the taxes due and unpaid, no matter for what purpose imposed, may be collected in one action in the absence of a statute forbidding their collection in this way.[41]

(§ 11) *C. Procedure to enforce collection.*[42] *Limitations.*[43]—Taxes are not collectible until due and delinquent,[44] but suits to enforce payment must be brought within the limitation period,[45] and the right of a municipality to enforce a tax lien may be lost by inexcusable laches.[46]

Notification.[47]—The owner or other person interested [48] is entitled to notice,[49] which notification, whether by summons or otherwise, must be sufficient in form and contents [50] and must be personally served,[51] mailed,[52] posted,[53] or, as is more often required, published in some designated newspaper,[54] which publication in some juris-

it is a prerequisite that the collector should have made diligent search (Id.), but if, prior to arrest, the taxpayer, having goods, fails to exhibit them upon demand, he can claim no immunity from arrest (Id.).

37. A city cannot maintain an action to collect a tax due it in the absence of express statutory authorization. City of Rochester v. Bloss, 185 N. Y. 42, 77 N. E. 794.

38. See infra § 12, Sale for Taxes.

39. Personalty must be exhausted first. Ulrich v. Matika, 30 Pa. Super. Ct. 110; Husbands v. Polivick, 29 Ky. L. R. 890, 96 S. W. 825; Starr v. Shepard, 145 Mich. 302, 13 Det. Leg. N. 528, 108 N. W. 709. Sale of a mill assessed at $8,000 to satisfy tax of $200, there being various machines worth more than amount of tax, rendered sale void. Id.

40. West v. State [Ind.] 79 N. E. 361.

41. Pfirrman v. Clifton Dist., 29 Ky. L. R. 1003, 96 S. W. 810.

42. See 6 C. L. 1639. Herein will be treated procedure with reference both to actions at law and proceedings in equity to foreclose liens.

43. See 6 C. L. 1639.

44. In Oklahoma one-half of all the tax is due on the 15th of December of the year in which the property is assessed. If one-half be paid on or before that date, the remaining half does not become due and collectible until the 15th of June of the calendar year following. If one-half of the tax be not paid by the 15th of December, the whole amount of the tax becomes delinquent on the third Monday in the January following the assessment. Norton v. Choctaw, etc., R. Co., 16 Okl. 482, 86 P. 287. Under Maryland Code Pub. Gen. Laws 1904, taxes levied for the year 1905 could not be enforced by action until the first of January, 1906. City of Baltimore v. Chester River Steamboat Co., 103 Md. 400, 63 A. 810.

45. See 6 C. L. 1639, n. 71.

46. Seibert v. Louisville, 30 Ky. L. R. 1317, 101 S. W. 325.

47. See 6 C. L. 1640.

48. The vendee of an unrecorded contract of sale held entitled to actual notice. Jakobowski v. Auditor General, 144 Mich. 46, 13 Det. Leg. N. 99, 107 N. W. 722. Where a minor is not represented by a tutor or guardian, notice of tax delinquency should be served on a tutor ad hoc appointed for that purpose. In re Interstate Land Co. [La.] 43 So. 173. Where the real owner is known, he is entitled to personal notice. Pyatt v. Hegquist [Wash.] 88 P. 933. If the action to foreclose a tax lien be brought against the real owner of the property, the proceedings are not void because he is not the person shown to be the record owner. Bardon v. Hughes [Wash.] 88 P. 1040.

49. Under the Washington practice it is only necessary to make such persons parties and serve with notice as appear to be owners on the assessment rolls. Darnell Min. & Mill. Co. v. Ruckles [Wash.] 88 P. 101.

50. Abbreviating the name of the county by the use of the initial letter (Chehalis County v. France [Wash.] 87 P. 353), and failure of a summons to contain the alternative direction to pay the amount due, is not fatal. (Callison v. Cole [Wash.] 87 P. 120).

51. A tax warrant under the Massachusetts statutes may be served in any county of the state. Beard v. Seavey, 191 Mass. 503, 78 N. E. 123.

52. Notice by mail held sufficient though not received. Rogers v. Moore [Tex.] 17 Tex. Ct. Rep. 57, 97 S. W. 685.

53. Penn. Act June 10, 1881 (P. L. 91), providing for service by posting an advertisement, applies to taxes. Jones v. Beale [Pa.] 66 A. 254.

54. Chehalis County v. France [Wash.] 87 P. 353; In re Troy Press Co., 100 N. Y. S. 516; Getzschmann v. Douglas County Com'rs [Neb.] 107 N. W. 987. The provisions of the Michigan tax law authorizing the foreclosure of the lien of the state and the sale of the property upon service by publication does not render the act unconstitutional. Toolan v. Longyear, 144 Mich. 55, 13 Det. Leg. N. 134, 107 N. W. 699. Under the Oklahoma statute (Willson's Stat. c. 75, § 101), it is made the duty of the treasurer to select the newspaper in which publication is to be made, and in making such selection he is not governed by any directions of the board of county commissioners. Board of Com'rs v. State Capital Co., 16 Okl. 625, 86 P. 518. Failure to indorse the "warning order" required by the laws of Arkansas as a preliminary step to bring in a nonresident by publication does not invalidate sale. Arbuckle v. Kelley, 144 F. 276. Compensa-

dictions must be based upon an affidavit of nonresidence,[55] due certification,[56] or verification of such service of publication being made.[57]

The delinquent list[58] must contain the true name of the owner,[59] a correct description of the property,[60] the amount of the delinquent tax,[61] the years for which taxes are delinquent,[62] and be properly returned,[63] filed,[64] and recorded.[65]

Parties.—Suit on behalf of the state or municipality must be brought by the proper officer.[67] A receiver may be proceeded against for taxes,[68] and an action to recover taxes on shares of bank stock may be maintained against the bank without joining the stockholders.[69] Where the record owner was not named as defendant, no title passed on execution sale under the judgment rendered.[70]

Pleading.[71]—The complaint should properly describe the property.[72] Under the express provisions of Nebraska Comp. St. 1905, art. 9, ch. 77, the petition shall be taken to be prima facie evidence of the legality of the antecedent steps in the assessment of the property and that the taxes are delinquent.[73] A statutory requirement that an action by a county treasurer to recover personal taxes shall only be brought by the direction of the county board is waived by filing an answer and proceeding to trial without objection.[74]

tion of printer. Bee Pub. Co. v. Douglas County [Neb.] 110 N. W. 624.

55. Stoneman v. Bilby [Tex. Civ. App.] 96 S. W. 50; Johnson v. Hunter [C. C. A.] 147 F. 133. Such an affidavit is not bad for failure to state that place of residence is not known. Bardon v. Hughes [Wash.] 88 P. 1040.

56. Ayers v. Lund [Or.] 89 P. 806; Cook v. Ziff Colored Masonic Lodge No. 119 [Ark.] 96 S. W. 618; Cook v. Jones [Ark.] 96 S. W. 620; Cole v. Van Ostrand [Wis.] 110 N. W. 884.

57. In Colorado an affidavit of publication of notice of tax sale must show that copies of each issue of the paper containing the notice were delivered by carrier or mailed to each subscriber of the paper. Delivery to each subscriber in the county is insufficient. Lambert v. Shumway [Colo.] 85 P. 89. That affidavit of publication was insufficient does not avail an owner after the expiration of the period of limitation. Bandow v. Wolven [S. D.] 107 N. W. 204.

58. A delinquent list is the evidence of delinquency and the notice of delinquency to the owner. Metz v. Starcher [W. Va.] 56 S. E. 196.

59. Foreclosure may be against the owner named on the rolls though deceased. Sherman v. Schomber [Wash.] 86 P. 569. Where the land is assessed to "Valentine Dollar, Assignee," and advertised for sale as belonging to "Valentine Dallen Association," the sale is void (Ropes v. Minshew [Fla.] 41 So. 538), and describing Joseph M. Meador survey as Judson M. Meador survey (Pfeuffer v. Bondies [Tex. Civ. App.] 15 Tex. Ct. Rep. 6, 93 S. W. 221), and using initials for Christian name of owner, the record title giving full name is insufficient (Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520); but where a sale of land for taxes was regular, except that the sheriff advertised the land as the property of "J. A. Bowers" instead of "J. A. Rogers," the sale was not void but voidable only (Moore v. Rogers [Tex.] 99 S. W. 1023).

60. Van Ostrand v. Cole [Wis.] 110 N. W. 891.

61. The amount due must be correctly stated. If it is overstated the proceedings are invalid. Hurd v. Melrose, 191 Mass. 576, 78 N. E. 302. A statement of the amount of taxes in a delinquent list in which the dollars are separated from the cents by the usual heavy ledger lines is legally sufficient (Stein v. Hanson, 99 Minn. 387, 109 N. W. 821), and the absence of a $ mark is not fatal (Carter v. Osborn [Cal.] 89 P. 608; Sawyer v. Wilson [Ark.] 99 S. W. 389; Bandow v. Wolven [S. D.] 107 N. W. 204).

62. A notice stating that certain lands are to be sold for the taxes of certain specified years "and previous years" does not comply with a requirement that the years for which taxes are due be specified. Drennen v. People, 222 Ill. 592, 78 N. E. 937.

63. Bigger v. Scouton, 30 Pa. Super. Ct. 503.

64. The filing of the published list of delinquent lands with the certificate of the publisher in the "office of the country clerk and ex officio clerk of the county court of said county" is not in compliance with a statute requiring it to be filed as part of the records of the county court. Drennen v. People, 222 Ill. 592, 78 N. E. 937.

65. Earle Imp. Co. v. Chatfield [Ark.] 99 S. W. 84.

66. See 6 C. L. 1641.

67. See 6 C. L. 1641, n. 92.

68. Spokane County v. Annis [Wash.] 86 P. 1066.

69. State Nat. Bank v. Memphis [Tenn.] 94 S. W. 606.

70. Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520; Bradley v. Janssen [Tex. Civ. App.] 15 Tex. Ct. Rep. 914, 93 S. W. 506.

71. See 6 C. L. 1641.

72. Failure to give the name of a survey, abstract number, survey number, and number of acres, was not fatal, the description being otherwise sufficient and giving the book and page of a record where a plot could be found.. Haynes v. State [Tex. Civ. App.] 99 S. W. 405. Certain portions of description held to be surplusage. Hayward v. O'Connor, 145 Mich. 52, 13 Det. Leg. N. 384, 108 N. W. 366.

73. State v. Several Parcels of Land [Neb.] 111 N. W. 367.

74. Moore v. Furnas County Live Stock Co. [Neb.] 111 N. W. 464.

Evidence.[75]—In an action to recover taxes the question of whether the owner was in good faith contemplating improvements is for the jury.[76] Where in an action to foreclose a certificate of delinquency the tax rolls reveal an irregular assessment of separate parcels, it is incumbent on the court to then and there determine what would have been proper apportionment of the tax, and this should be done by evidence as to the relative value of the parcels rather than by proving what the assessors did in arriving at the aggregate value of the group of parcels.[77] The assessment roll of a municipality held prima facie evidence of its right to recover.[78] Cases of the admissibility of evidence are given in the note.[79]

Judgment.[80]—Tax judgments are creatures of the law and have only such force and effect as the law accords to them.[81] A judgment foreclosing the state's lien is conclusive against all persons who are parties to the suit and served with citation, whether named in the judgment or not.[82] A judgment based upon assessment, irregular but not void, is valid,[83] and a decree is not void on its face because entered in vacation,[84] but a judgment showing on its face that it was against unknown owners is void.[85] A decree for sale cannot be assailed in a collateral proceeding,[86] but a judgment may be set aside for fraud.[87]

Execution.—A tax execution which omitted the direction to any particular officer was irregular but not void, and could be amended by adding a direction as provided by law.[88] In Georgia the tax collector of the county may enforce the collection of the tax authorized by Acts 1905, p. 46, by execution issued by himself.[89] Where a petition to recover taxes alleged a cause of action for the recovery of city taxes only, and the judgment was for taxes generally, an execution based on such judgment was void.[90]

Costs.[91]—If the action of the board of county commissioners in ordering separate suits results in oppression and palpable wrong, costs may be taxed.[92] Tennessee Acts Ext. Sess. 1891, p. 86, providing that when a bill to collect back taxes shall be dismissed on account of double assessment the assessor shall be liable for costs, does not provide an exclusive remedy relieving the county from liability.[93]

Appeals.[94]—In a proceeding to open a judgment rendered upon publication serv-

75. See 6 C. L. 1642.

76. Stony Wold Sanatorium v. Keese, 112 App. Div. 738, 98 N. Y. S. 1088.

77. Sound Inv. Co. v. Bellingham Bay Land Co. [Wash.] 88 P. 1117, citing 4 C. L. p. 1624.

78. City of Los Angeles v. Glassell [Cal. App.] 87 P. 241.

79. Testimony of collecting officers that the affidavit required by Kirby's Dig. § 7083 had been detached from the list of delinquent taxes and removed from clerk's office, held admissible. Brasch v. Western Tie & Timber Co. [Ark.] 97 S. W. 445. Admission of copy of delinquent tax record sustained, though it did not show in which county the lands in question were assessed, this discrepancy being covered by other testimony. Figures v. State [Tex. Civ. App.] 99 S. W. 412.

80. See 6 C. L. 1642.

81. Smith v. Jansen [Wash.] 85 P. 672. Deficiency judgment. City of Rochester v. Rochester R. Co. [N. Y.] 79 N. E. 1010. The requirements of a conditional order for judgment must comply with the statute governing the same. Washburn Land Co. v. Swanby [Wis.] 110 N. W. 806. That a judgment does not declare a lien, and against specific property, is not fatal. Southern R. Co. v. State [Ala.] 43 So. 718.

82. Ball v. Carroll [Tex. Civ. App.] 15 Tex. Ct. Rep. 422, 92 S. W. 1023.

83. Covington & Cincinnati Bridge Co. v. Covington, 30 Ky. L. R. 1115, 100 S. W. 269.

84. Hoffman v. Flint Land Co., 144 Mich. 564, 13 Det. Leg. N. 374, 108 N. W. 356.

85. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347.

86. Owens v. Auditor General [Mich.] 14 Det. Leg. N. 53, 111 N. W. 354. Default judgment. Rankin v. Porter Real Estate Co. [Mo.] 97 S. W. 877; Squire v. McCarthy [Neb.] 109 N. W. 768.

87. Jordan v. Brown [Tex. Civ. App.] 15 Tex. Ct. Rep. 929, 94 S. W. 398; State v. Omaha Country Club [Neb.] 110 N. W. 693.

88. Winn v. Butts [Ga.] 56 S. E. 406.

89. Georgia R. & Banking Co. v. Hutchinson, 125 Ga. 762, 54 S. E. 725.

90. Rankin v. Porter Real Estate Co. [Mo.] 97 S. W. 877.

91. See 6 C. L. 1643.

92. Whitney v. Morton County Com'rs [Kan.] 85 P. 530.

93. State v. Alexander, 115 Tenn. 156, 90 S. W. 20.

94. See 6 C. L. 1643.

ice under the Kansas statutes, the answer filed in such proceeding held to be full and complete.[95]

(§ 11) *D. Interest and penalties.*[96]—Taxes, being mere statutory impositions, do not bear interest at common law,[97] and statutes relating to usury [98] and providing for interest on debts, contracts, and judgments, have no application.[99] Interest may be recovered on past due taxes,[1] but compound interest is not allowable.[2] Where a city charter itself creates a liability for interest on unpaid taxes, an ordinance is not necessary to make such provision operative.[3] The amount of penalties recoverable [4] and the mode of their recovery [5] are also matters of statutory regulation.[6]

§ 12. *Sale for taxes. A. Prerequisites to sale.*[7]—Since tax sales are made wholly under statutory authority, the provisions of the statute conferring such authority must be fully complied with,[8] and any substantial departure therefrom prejudicial to the owner will invalidate the sale.[9] A valid tax,[10] legally due and unpaid,[11] and enforceable against the particular land to be sold, is essential to a valid sale. In some states it is provided that the county clerk shall examine the delinquent lists, on which judgment has been rendered, on the day advertised for sale, and shall make a certificate which becomes the process for the sale of the delinquent lands.[12] These provisions are mandatory and a certificate made on any day other than the one required will render the sale void.[13] Due notice of the sale must be given.[14]

95. Williams v. Kiowa County Com'rs [Kan.] 88 P. 70.

96. See 6 C. L. 1643.

97. Georgia R. & Banking Co. v. Wright, 124 Ga. 596, 53 S. E. 251; Id., 125 Ga. 589, 54 S. E. 52; Louisville & N. R. Co. v. Com., 29 Ky. L. R. 666, 668, 94 S. W. 655.

98. The subject of usury pertains alone to obligations growing out of contracts and does not hamper the legislature in imposing such rates of interest as it sees fit. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141. A note given to settle the amount due on a tax certificate afterwards ascertained to be void is not an usurious contract, although the three per cent penalty provided by statute is included in the note. Armijo v. Henry [N. M.] 89 P. 305.

99. City of Rochester v. Bloss, 185 N. Y. 42, 77 N. E. 794.

1. State v. Baltimore [Md.] 65 A. 369.

2. Pfirrman v. Clifton Dist., 29 Ky. L. R. 1003, 96 S. W. 810.

3. Nalle v. Austin [Tex. Civ. App.] 14 Tex. Ct. Rep. 660, 93 S. W. 141.

4. Ordinance adopted pursuant to statutory authority providing for a fifteen per cent penalty sustained. Carpenter v. Lambert, 29 Ky. L. R. 183, 92 S. W. 607. Corporation enjoining state from collection of franchise tax held not liable to penalty although litigation resulted unfavorably to it. Louisville & N. R. Co. v. Com., 29 Ky. L. R. 666, 668, 94 S. W. 655. Statute imposing penalty of $200 per day upon railroad defaulting in payment of taxes held violative of constitutional guaranty against excessive fines. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. Penalty of not less than $50 and not more than $100 for failure to make certain reports held disproportionate to amount of tax and unforceable. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157.

5. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594.

6. The charter of the city of Shreveport imposing a penalty on unpaid city taxes not violative of La. constitution, art. 233. Victoria Lumber Co. v. Rives, 115 La. 996, 40 So. 382. The penalty prescribed by Ky. St. 1903, § 4091, applies only to state and not county taxes. Illinois Cent. R. Co. v. Com., 30 Ky. L. R. 190, 98 S. W. 1008.

7. See 6 C. L. 1643.

8. Statutes for the sale of lands for the nonpayment of delinquent taxes must be strictly pursued in order to sustain a title thereunder. Albring v. Petronio [Wash.] 87 P. 49.

9. Lisso & Bro. v. Giddens, 117 La. 507, 41 So. 1029.

10. See 4 C. L. 1639, n. 12.

11. Pope v. Matthews, 125 Ga. 341, 54 S. E. 152; Metz v. Starcher [W. Va.] 56 S. E. 196. Florida Laws 1893, c. 4115, p. 3, authorizes a sale in 1894 for the 1893 assessment. Smith v. Philips [Fla.] 41 So. 527.

12. In Arkansas, under Kirby's Dig. § 7086, the clerk's certificate must be made before the day of sale. Birch v. Walworth [Ark.] 96 S. W. 140.

13. Glos v. Ault, 221 Ill. 562, 77 N. E. 939; McCraney v. Glos, 222 Ill. 628, 78 N. E. 921.

14. Matthews v. Fry, 141 N. C. 582, 54 S. E. 379; Beggs v. Paine [N. D.] 109 N. W. 322. The advertisement of a tax sale in the last week of the thirty days must be published before the day and hour fixed for sale. Buckingham v. Negrotto, 116 La. 737, 41 So. 54. Under Oklahoma statutes, notice less than twenty-one days renders sale void. Cadman v. Smith, 15 Okl. 633, 85 P. 346. Posting a written notice in the United States mails is a sufficient compliance with Tex. St. 1897, art. 2366. Rogers v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 668, 94 S. W. 113.

(§ 12) *B. Conduct of sale.*[15]—The sale should be at the time[16] and place,[17] and by the person,[18] and for the amount,[19] required by law. Only so much land should be sold as is necessary to realize the amount due,[20] and statutory provisions with respect to the sale of parcels as an entirety or in part must be strictly observed.[21] The certificate which usually accompanies a sale must have all the statutory requisites, among which is a correct description of the property,[22] such certificates being capable of assignment.[23] A certificate of delinquency issued by the county treasurer to a third person is valid though issued during the pendency of an action by the county to foreclose a lien obtained by it through the issuance of a general certificate to it prior thereto.[24] Where the statute providing for a certificate of sale has been repealed before a sale has taken place, the sale, if made for the correct amount, is not invalidated by a mistake in the amount named in the certificate.[25] Mere irregularities at a private sale do not affect the title of the purchaser.[26]

(§ 12) *C. Return of sale and confirmation thereof.*[27]—The return of the sale must properly describe the property sold[28] and contains such other recitals as may be required by law.[29] Mere irregularities in the report of sale do not, after confirmation, render the proceedings open to collateral attack.[30]

§ 13. *Redemption.*[31]—Statutory provisions for redemption cannot be made retroactive if the effect is to impose more onerous conditions of redemption than existed at time of sale.[32]

The owner of land,[33] or persons having an interest therein,[34] are usually given

15. See 6 C. L. 1644.

16. Sale required by law to be made first Monday in July but made first Monday in September is void. Rucker v. Hyde [Tenn.] 100 S. W. 739.

17. See 6 C. L. 1644, n. 30.

18. Sale by constable who is not a deputy sheriff conveys no title, the statute requiring sale to be by the sheriff. Barrineau v. Stevens [S. C.] 55 S. E. 309.

19. Where the sum paid for lands is less than that authorized, the sale is void. (Crebs v. Fowler [Ala.] 42 So. 553), but an error of twenty-three cents held not to invalidate sale (Bandow v. Wolven [S. D.] 107 N. W. 204). It is proper to include five cents due the clerk for furnishing copy of delinquent lists to printer and ten cents for attending sale and making record thereof (Brasch v. Western Tie & Timber Co. [Ark.] 97 S. W. 445), but inclusion of printer's fee for publishing notice of sale, he having failed to transmit affidavit of publication within six days as required by the then existing statute, held fatal to sale (Cole v. Van Ostrand [Wis.] 110 N. W. 884). A sale under a statute allowing twenty-four per cent is not affected by a subsequent statute providing a lower rate. Vogler v. Stark [Kan.] 89 P. 653.

20. Husbands v. Polivick, 29 Ky. L. R. 890, 96 S. W. 825. Sale of $8,000 mill property to satisfy $200 tax invalidates sale. Starr v. Shepard, 145 Mich. 302, 13 Det. Leg. n. 528, 108 N. W. 709.

21. Under a statute requiring sale to be in forty acre tracts, a sale of an undivided half interest in eighty acres is illegal. Stevenson v. Reed [Miss.] 43 So. 433; Id. [Miss.] 43 So. 292. Sale of an entire tract, the same being divisible, is void. Stark v. Cummings Ga. 56 S. E. 130. Lands assessed as a whole must be sold as a whole. Bonner v. St. Francis Levee Dist., Directors, 77 Ark. 519, 92 S. W. 1124. A sale of a part of a lot by metes and bounds, the statute providing for a sale of the smallest undivided part, is invalid. Roberts v. Welsh [Mass.] 78 N. E. 408. The sale together of more than one separate and distinct tract, as two or more town lots in different blocks, or two or more tracts of land not contiguous, is void (Cross v. Herman [Kan.] 87 P. 686), and the sale of two or more tracts together which are adjoining and susceptible of being used as one tract may be void (Id.).

22. The omission of the government township and range held fatal. Paine v. Willson [C. C. A.] 146 F. 488, following Sheets v. Paine, 10 N. D. 103, 86 N. W. 117.

23. Root v. Beymer [Mich.] 13 Det. Leg. N. 932, 110 N. W. 57.

24. Under laws of 1897 and 1899, certificates issued to the county are assignable. Holcomb v. Johnson's Estate [Wash.] 86 P. 409.

25. Carter v. Osborn [Cal.] 89 P. 608.

26. The failure of the county treasurer to file with the county clerk duplicate tax receipts on payment of taxes due on lands sold for taxes is not such an irregularity as will affect the rights of the purchaser. Cowles v. Adams [Neb.] 110 N. W. 697.

27. See 6 C. L. 1644.

28. Husbands v. Polivick, 29 Ky. L. R. 890, 96 S. W. 825.

29. See 6 C. L. 1644, n. 45.

30. St. Louis, etc., R. Co. v. Greeson [Ark.] 98 S. W. 728.

31. See 6 C. L. 1645.

32. Johnson v. Taylor [Cal.] 88 P. 903.

33. Where land has been assessed, and for the delinquent tax sold, in its entirety, the owner of an undivided interest therein may redeem such interest less than the whole upon payment of the proportionate amount. Garbanati v. Patterson [Colo.] 85 P. 845.

34. The administrator of an estate, the personal property of which is insufficient to

the right to redeem from a tax sale, the manner of claiming and exercising the right,[35] and the time within which it must be exercised,[36] depending upon the statute. One seeking to redeem must reimburse the purchaser at the sale for the taxes paid,[37] together with the value of such improvements as have been made subsequent to the sale. The right to redeem is an interest in realty capable of sale and transfer.[38]

Notice of the expiration of the period of redemption[39] must usually be given before the purchaser at the sale is entitled to a deed[40] or to possession,[41] or before the owner's equity of redemption can be foreclosed.[42] Statutory requirements control as to the length of the notice,[43] the contents thereof,[44] the manner of notice, whether by personal service,[45] by publication,[46] or by mail,[47] together with the filing of proof of such service,[48] and the persons by whom and to whom[49] notice must be given.

§ 14. *Tax titles. A. Who may acquire.*[50]—One under the obligation to pay taxes cannot directly or indirectly purchase at a sale caused by his own default and thereby acquire title to the property sold. Thus a tenant in common cannot pur-

pay the debts of the deceased, may redeem from a tax sale of the realty. Hogan v. Piggott [W. Va.] 56 S. E. 189. Redemption may likewise be by an heir of the deceased. City of Louisville v. Hughes, 30 Ky. L. R. 231, 97 S. W. 1096.

35. Squire v. McCarthy [Neb.] 109 N. W. 708. Payment held to amount to redemption. Miller v. Steele [Mich.] 13 Det. Leg. N. 686, 109 N. W. 37. An appellate court having adjudged the right of a party to redeem and remanded the cause for further proceedings, mandamus lies to compel the inferior court to act upon the application. King v. Mason [W. Va.] 56 S. E. 377.

36. Section 3, art. 9, of the Nebraska constitution, providing for two years' time within which to redeem from tax sales, applies to judicial as well as administrative sales. Wood v. Speck [Neb.] 110 N. W. 1001. One guilty of laches forfeits his right to redeem. Menasha Wooden Ware Co. v. Harmon, 128 Wis. 177, 107 N. W. 299. Time held to run from date when proof of publication was filed and not from date of first publication. Escanaba Timber Land Co. v. Rusch [Mich.] 14 Det. Leg. N. 24, 111 N. W. 345. Time for redemption by insane person held to be limited to two years. Hall v. Potter [Ark.] 99 S. W. 687.

37. Wood v. Speck [Neb.] 110 N. W. 1001.

38. Philadelphia v. Unknown, 30 Pa. Super. Ct. 516.

39. See 6 C. L. 1646.

40. Johnson v. Taylor [Cal.] 88 P. 903. In Washington, redemption from tax sale being authorized only before issuance of a deed, an action may not be maintained thereafter. Kahn v. Thorpe [Wash.] 86 P. 855.

41. Towry v. Wax [Miss.] 42 So. 536. A grantee in a valid tax deed is not required to give to a grantee in a prior void tax deed the notice in question. Griffin v. Jackson, 145 Mich. 23, 13 Det. Leg. N. 410, 108 N. W. 438. The provisions of the Michigan tax law requiring six months' notice to the owner as a condition to securing possession apply only to titles obtained in chancery proceedings and not to ejectment proceedings. Briggs v. Gulich, 143 Mich. 457, 13 Det. Leg. N. 34, 107 N. W. 269.

42. See 6 C. L. 1646, n. 71.

43. In Michigan six months' notice is required. Williams v. Olson, 141 Mich. 580, 12 Det. Leg. N. 560, 104 N. W. 1101. Under Alabama Acts 1898-9, p. 120, the owner is entitled to sixty days' notice on application to purchase of the auditor. Crebs v. Fowler [Ala.] 42 So. 553.

44. In such notice it is unnecessary to state the amount of taxes for each of several years (Williams v. Olson, 141 Mich. 580, 12 Det. Leg. N. 560, 104 N. W. 1101), but the notice is ineffectual if it fails to state the time when the right of redemption will expire (State Finance Co. v. Beck [N. D.] 109 N. W. 357). The notice should indicate the sum required to be paid for a reconveyance. Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 13 Det. Leg. N. 388, 108 N. W. 494. A notice given under the Michigan statute held insufficient as to contents. O'Connor v. Carpenter, 144 Mich. 240, 13 Det. Leg. N. 231, 107 N. W. 913.

45. Service by deputy sheriff held valid. Williams v. Olson, 141 Mich. 580, 12 Det. Leg. N. 560, 104 N. W. 1101. That the sheriff's return of service is improperly dated does not deprive the notice of its statutory effect. Stein v. Hanson, 99 Minn. 387, 109 N. W. 821. Service of a copy of the notice is sufficient. Richardson Lumber Co. v. Jasspon, 145 Mich. 8, 13 Det. Leg. N. 416, 108 N. W. 497.

46. Notice by publication sustained. In re Troy Press Co. [N. Y.] 79 N. E. 1006; McCash v. Penrod [Iowa] 109 N. W. 180.

47. Notice may be mailed at residence of certificate holder though a nonresident of the state. Nind v. Myers [N. D.] 109 N. W. 335.

48. King v. Lane [S. D.] 110 N. W. 37; Nicol v. Sherman [S. D.] 110 N. W. 777.

49. The notice may be addressed to named persons if described as owners. Williams v. Olson, 141 Mich. 580, 12 Det. Leg. N. 560, 104 N. W. 1101. That the notice was directed to Hans C. Hanson, while the notice as published was directed to Hans C. Hansen, is a mere irregularity. Stein v. Hanson, 99 Minn. 287, 109 N. W. 821.

50. See 6 C. L. 1647.

chase an outstanding title and refuse to permit his cotenant to share.[51] But this sale does not apply where the claimants are asserting hostile claims,[52] nor where the title claimed in common is a nullity.[53] A person holding a mortgage upon property may acquire title to the mortgaged premises by purchase at tax sale and obtaining tax deed therefor.[54] A wife, not being in possession or receiving the rents, and not being under any legal or moral obligation to pay taxes, may acquire title to land owned by the husband and others at a sale for taxes, provided such purchase be made in good faith and with her own money.[55] Where vendors of land, holding a vendor's lien thereon, thereafter purchase the same at a tax sale in order to protect the interests of themselves and their vendee, such purchase amounts but to a payment.[56]

(§ 14) *B. Rights and estate acquired by purchaser at sale.*[57]—A valid tax title cannot be acquired to lands which have never been the subject of taxation.[58] The purchaser at a tax sale acquires the interest sold [59] and owned by the parties to the action for the taxes at the time of the decree of sale.[60] A deed made by a tax purchaser between the date of the sale and the day he received his deed carries title.[61] Since assessing officers in the absence of notice to the contrary may look to the record of deeds to ascertain the owner of property, a purchaser under a judgment against the record owner, in the absence of notice that such person is not the true owner,[62] will be protected against the holder of an unrecorded deed from such apparent record owner,[63] but this rule is inapplicable where the deed from the apparent owner has been recorded and the book containing the record has been lost or destroyed by fire.[64] The sale itself transfers to the purchaser the lien of the state for taxes [65] which is paramount to all other liens,[66] but perfect title cannot be acquired until the period of redemption has expired.[67] The title conveyed under a tax sale is not derivative but a new title, and the purchaser, if his deed is valid, takes free from any incumbrance, claim, or equity, connected with the prior title.[68] A tax

51. Richards v. Richards, 31 Pa. Super. Ct. 509.

52, 53. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 15 Tex. Ct. Rep. 317, 93 S. W. 1027.

54. Jones v. Black [Okl.] 88 P. 1052.

55. Nagle v. Tieperman [Kan.] 85 P. 941, overruling Warner v. Broquet, 54 Kan. 649, 39 P. 228.

56. Osceola Land Co. v. Henderson [Ark.] 100 S. W. 896.

57. See 6 C. L. 1647.

58. Howell v. Miller [Miss.] 42 So. 129.

59. When the purchaser at a tax sale to satisfy taxes of 1879 and previous years does not pay the taxes of 1880 and subsequent years, but merely promises to pay them, the title he acquires is a mere nullity. Fluker v. De Grange, 117 La. 331, 41 So. 591. Quitclaim deed by county construed. Pinkerton v. Fenelon [Wis.] 111 N. W. 220. A statute in force when a tax sale is made enters into and forms a part of the contract between the state and the purchaser, and the rights of the purchaser under the statute are not affected by the subsequent repeal of the statute. Comstock, Ferre & Co. v. Devlin, 99 Minn. 68, 108 N. W. 888.

60. See 6 C. L. 1647, n. 90.

61. Howard v. Brown, 197 Mo. 36, 95 S. W. 191.

62. A purchaser who knows the title to be in a third person under an unrecorded deed gets no title. Stuart v. Ramsey, 196 Mo. 404, 95 S. W. 382.

63. Charter Oak Land & Lumber Co. v. Bippus [Mo.] 98 S. W. 546; Harrison Mach. Works v. Bowers [Mo.] 98 S. W. 770.

64. Manwarring v. Missouri Lumber & Min. Co. [Mo.] 98 S. W. 762.

65. Where lands have been sold for taxes and the purchaser thereafter perfects his title thereunder, the state cannot impeach such title by a resale of the land for the taxes due and unpaid for prior years. Gates v. Keigher, 99 Minn. 138, 108 N. W. 860, following State v. Comp, 79 Minn. 343, 82 N. W. 645.

66. The general rule is that a sale and conveyance in due form for taxes extinguishes all prior liens whether for taxes or otherwise. Auditor General v. Clifford, 143 Mich. 626, 13 Det. Leg. N. 127, 107 N. W. 287. This rule is one of necessity growing out of the imperative nature of the demand of the government for its revenues. Id. Wingfield v. Neal [W. Va.] 54 S. E. 47. But in Delaware a sale for county taxes does not vest in the purchaser the title free from the lien for municipal taxes. Knowles v. Morris [Del.] 65 A. 782.

67. The purchaser gets title as soon as the right of redemption is terminated, though no deed has issued. Beggs v. Paine [N. D.] 109 N. W. 322.

68. Kahle v. Nisley, 74 Ohio St. 328, 78 N. E. 526. The purchaser at the tax sale takes the property free from any contract or leases of the former owner. Carlson v. Curran, 42 Wash. 647, 85 P. 627.

sale, in the absence of legislation to the contrary, is subject to the rule caveat emptor,[69] but the mere fact that the rule of caveat emptor applies to tax sales is not ground for not exercising in behalf of the purchaser the principles usually obtaining in equitable proceedings,[70] and where a tax sale is set aside because of irregularity, the purchaser is entitled to a lien on the land for the taxes with costs and interest,[71] and this right extends to the grantee of the tax purchaser.[72] A tax deed title void for want of jurisdictional defects cannot be validated by a legislative curative act.[73] In the absence of statute the burden is upon the holder of a tax deed to maintain his title by affirmatively showing that the provisions of law have been complied with,[74] but where in an action by the tax purchaser to quiet title the defendant fails to establish title, a judgment for plaintiff is justified though the tax deed is wholly insufficient.[75]

(§ 14) *C. Tax deeds.*[76]—A tax deed to be valid must be executed at the time[77] prescribed by law. It should sufficiently describe the lands sold,[78] contain the recitals required by law,[79] and be executed in the statutory form.[80] A deed which

69. Duncan Land & Min. Co. v. Rusch, 145 Mich. 1, 13 Det. Leg. N. 388, 108 N. W. 494.

70. Powers v. First Nat. Bank [N. D.] 109 N. W. 361.

71. Jones v. Lovfille, 30 Ky. L. R. 108, 97 S. W. 390.

72. One who purchases land upon which there is a tax title takes it subject to all the rights of the holder of such title, and this includes the statutory right to a lien for subsequent taxes paid if the sale is adjudged invalid. Comstock, Ferre & Co. v. Devlin, 99 Minn. 68, 108 N. W. 888.

73. Deed void for failure to include current taxes in amount of purchase price. Olson v. Cash, 98 Minn. 4, 107 N. W. 557.

74. Ayers v. Lund [Or.] 89 P. 806. In an action of ejectment, held that defendant was not required to allege all the initial proceedings resulting in the tax deed to him in order to render such deed admissible. Treasury Tunnel Min. & Reduction Co. v. Gregory [Colo.] 88 P. 445.

75. King v. Lane [S. D.] 110 N. W. 37.

76. See 6 C. L. 1649.

77. A deed issued before the expiration of the period for redemption is void. Griffin v. Jackson, 145 Mich. 23, 13 Det. Leg. N. 410, 108 N. W. 438. Under the express provisions of Revisal 1905, § 950, a sheriff and tax collector selling land at a tax sale may execute a deed therefore after the expiration of his term of office. Southern Immigration, Imp. & Mfg. Co. v. Rosey [N. C.] 57 S. E. 2. Under N. C. Laws 1901, p. 790, a sheriff's deed made after the expiration of two years from the day of sale is invalid. Id.

78. If the deed contain recitals from which by computation or fair inference the consideration for the conveyance of separate tracts can be ascertained, there is a sufficient compliance with the statute. Nagle v. Tieperman [Kan.] 88 P. 969.

Descriptions held insufficient. Kruse v. Fairchild [Kan.] 85 P. 303; Robertson v. Lombard Liquidation Co. [Kan.] 85 P. 528; Pfeuffer v. Bondies [Tex. Civ. App.] 15 Tex. Ct. Rep. 6, 93 S. W. 221; Ames v. Denver [Minn.] 110 N. W. 370; Webb v. Ritter [W. Va.] 54 S. E. 484.

Sufficient description. In re Martinez, 117 La. 719, 42 So. 246; Ontario Land Co. v. Yordy [Wash.] 87 P. 257; Gibson v. Shiner [Kan.] 88 P. 259. Use of the word "about" in giving distances does not create uncertainty. Roberts v. Welsh [Mass.] 78 N. E. 408. Omitting from the description the words "Tallahassee meridian" is not fatal. Smith v. Philips [Fla.] 41 So. 527. Describing a piece of land as the west part of a quarter section "110 acres, more or less" is sufficient, where there has been conveyed to another 50 acres, the east part of the same quarter. Wheeler v. Lynch [Miss.] 42 So. 538. Lands not included within the boundaries stated cannot afterwards be brought within the terms of the deed. Ramos Lumber & Mfg. Co. v. Labarre, 116 La. 559, 40 So. 898. Laws 1901, Ch. 242, p. 433, legalizing acts of county officers in compromising delinquent taxes for the years 1892 to 1900, does not cure a defective description in a deed issued by such officers in 1894 for the taxes of 1886, 1887, and 1888. Worden v. Cole [Kan.] 86 P. 464.

79. Smith v. Philips [Fla.] 41 So. 527; Beggs v. Paine [N. D.] 109 N. W. 322; Jones v. Carnes [Okl.] 87 P. 652; Baird v. Monroe [Cal.] 89 P. 352. A tax deed failing to recite that the probate court rendered a decree for the sale of the land, as required by Alabama Code 1896, § 4056, is void. Southern R. Co. v. Hall [Ala.] 41 So. 135. The statute does not require a tax deed to recite the particular certificate on which the deed was issued when there are several certificates covering the land, nor does it require that the taxes for all the years subsequent to the original sale shall be accounted for in the tax deed. Cowan v. Skinner [Fla.] 42 So. 730. A recital that certain tracts were sold on the 2nd and 4th days of September held insufficient though deed had been recorded 5 years. Robbins v. Frazier [Kan.] 87 P. 1136. Where the only objection made to a tax deed is that a statutory recital is omitted or insufficiently stated, the deed will not be declared void, if, by giving other recitals contained therein fair and liberal constructions, it can be said that such omitted recital is fairly supplied. Gibson v. Trisler [Kan.] 85 P. 413. A deed reciting a sale in gross of separate and disconnected tracts of land is void on its face. Twenty-two lots in fifteen different blocks. Worden v. Cole [Kan.] 86 P. 464. A tax deed reciting the sale of twenty-two lots in fifteen

meets these requirements is at least prima facie,[81] and in some other states conclusive,[82] evidence of the regularity of the proceedings on which it is based,[83] and is prima facie evidence of title in the holder,[84] vesting a perfect title subject to be impeached only for actual fraud.[85] A presumption exists in favor of the validity of a tax deed as against a mere intruder.[86] Under the Michigan statutes the auditor general has power to cancel a deed although the owner took no steps to have the deed set aside within the six months allowed for notice of the sale.[87]

(§ 14) *D. Remedies of original owner.*[88]—The substantive rights of the owner of land sold for taxes are determined by the laws in force at the time adverse proceedings are taken,[89] and he cannot be divested of his title unless all statutory steps have been strictly complied with.[90] The remedies usually pursued by the original owner are actions at law to recover the property sold,[91] or suits in equity to cancel the tax sale and deed, or to remove clouds from title.[92] One bringing such a proceeding must show himself free from laches[93] and must allege and prove title in himself.[94] A sale under a judgment for taxes will be set aside for inadequacy of

different blocks and conveying the "real property last hereinbefore described" conveys only the land included in the last description. Id. Instrument reciting "Certificate of delinquency for years 1893 to 1895 issued to Pierce County, Washington, "on a certain date and for a certain sum included in this certificate and redeemed thereby," held good as to form. Holcomb v. Johnson's Estate [Wash.] 86 P. 409.

80. King v. Lane [S. D.] 110 N. W. 37; Doolittle v. Gates Land Co. [Wis.] 110 N. W. 890. Absence of a seal is not fatal. Spokane Terminal Co. v. Stanford [Wash.] 87 P. 37; Stockand v. Hall [Wash.] 88 P. 123; State v. Olson [Wash.] 89 P. 151. Seal of county clerk instead of seal of county held sufficient. Clarke v. Tilden, 72 Kan. 574, 84 P. 139; Kruse v. Fairchild [Kan.] 85 P. 302. The use of the words "Done in the presence of" in lieu of "Signed and sealed in presence of" does not render deed void. Smith v. Philips [Fla.] 41 So. 527. That a tax deed is dated and acknowledged on a Sunday does not destroy the lien for the taxes. Schiffer v. Douglass [Kan.] 86 P. 132.

81. Little River Lumber Co. v. Thompson [La.] 42 So. 938; McCash v. Penrod [Iowa] 109 N. W. 180; Matthews v. Fry, 141 N. C. 532, 54 S. E. 379; Sawyer v. Wilson [Ark.] 99 S. W. 389. A tax deed executed in compliance with the form and substance of the statute is prima facie evidence of the regularity of the proceedings from the valuation of the land to the date of the deed. Cowan v. Skinner [Fla.] 42 So. 730. The prima facie effect may be overcome, i. e. by showing that the tax had been paid at the time of sale. Smith v. Jansen [Wash.] 85 P. 672. A tax deed in due form and properly executed, witnessed, and acknowledged, is presumptive evidence of the sufficiency of tax proceedings. Emerson v. McDonnell [Wis.] 107 N. W. 1037; Hughes v. Owens, 29 Ky. L. R. 140, 92 S. W. 595.

82. The Oregon statute (B. & C. Comp. § 3127) has no application to a purchase by the county, as no deed is provided for in such case. Ayers v. Lund [Or.] 89 P. 806.

83. Allegations of a complaint held sufficient under a statute making a tax deed prima facie evidence of regularity of assessment and sale. Smith v. Denny & Co. [Miss.] 43 So. 479.

84. Morgan v. Pott [Mo. App.] 101 S. W. 717; Hogan v. Piggott [W. Va.] 56 S. E. 189. Contra. Morse v. Auditor General, 143 Mich. 610, 13 Det. Leg. N. 101, 107 N. W. 317. In Maine a prima facie title in a party claiming under a tax sale is made out by producing in evidence the county treasurer's deed duly executed and recorded. Greene v. Martin, 101 Me. 232, 63 A. 814.

85. Rogers v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 668, 94 S. W. 113.

86. Kries v. Holladay-Klotz Land & Lumber Co. [Mo. App.] 98 S. W. 1086.

87. Hayward v. Auditor General [Mich.] 14 Det. Leg. N. 1, 111 N. W. 190.

88. See 6 C. L. 1651.

89. Stein v. Hanson, 99 Minn. 387, 109 N. W. 821.

90. Under Ballinger's Ann. Codes, § 5504, to constitute title by seven years' payment of taxes, seven years must elapse between the date of the first payment of taxes and the commencement of suit for the recovery of the land. Tremmel v. Mess [Wash.] 89 P. 487.

91. A defense based on a sale for state and county taxes is ineffectual in the absence of proof of a levy of the county tax. Woody v. Strong [Tex. Civ. App.] 100 S. W. 801. A tax deed held by defendant in ejectment is admissible in evidence to bring in the defense of the three year statute of limitations without proof of the validity thereof. Doe v. Moog [Ala.] 43 So. 710.

92. Cadman v. Smith, 15 Okl. 633, 85 P. 346.

93. Earle Imp. Co. v. Chatfield [Ark.] 99 S. W. 84; Osceola Land Co. v. Henderson [Ark.] 100 S. W. 896; Rovens v. McRobinson, 117 La. 731, 42 So. 251; Arbuckle v. Kelley, 144 F. 276; Florida Coast Line Canal & Trans. Co. v. Ellsworth Trust Co. [C. C. A.] 144 F. 972. Failure to pay taxes for twenty years, and filing petition twelve years after sale, held laches. Owens v. Auditor General [Mich.] 14 Det. Leg. N. 53, 111 N. W. 354. But the doctrine of laches is a creation of equity jurisprudence and is applied only when the equity of the case demands it. Haarstick v. Gabriel [Mo.] 98 S. W. 760; Manwarring v. Missouri Lumber & Min. Co. [Mo.] 98 S. W. 762.

94. Glos v. Greiner, 226 Ill. 546, 80 N. E. 1055. Evidence held to establish title. Glos

price so gross as to shock the moral sense.[95] The owner of land who seeks relief on the ground of irregularity in the proceedings will be required to pay the taxes justly due,[96] and to reimburse the purchaser for proper payments made by him in acquiring the tax title,[97] and pay the value of improvements made in good faith,[98] a tender of the amount to which the purchaser is entitled being necessary to relieve the owner of costs;[99] but if the proceedings resulting in a sale are absolutely void, reimbursement of the purchaser is not a condition precedent to relief,[1] although the holder of a void tax title is entitled to be reimbursed by the original owner for the taxes, with interest, paid subsequent to the acquisition of the tax title.[2] Where an excessive tax is levied, a mere tender of the valid portion and refusal of the treasurer to accept the tender will not relieve the land of the tax lien.[3] Where property is illegally sold for taxes, the owner may enjoin the execution of the deed to prevent a cloud upon the title.[4]

Limitations.[5]—Title by prescription under general limitation statutes is elsewhere treated.[6] There are, however, in many states special limitation statutes prescribing the period within which proceedings to test the validity of tax proceedings must be brought.[7] The enactment of these statutes is an act of sovereign power demanded by public policy, and when the time and opportunity allowed are reasonably sufficient, there can be no just cause of complaint that a debarred litigant is deprived of his property without due process of law.[8] Occupancy of possession by the owner of the tax title for the period prescribed gives title and bars an action by the owner,[9] even though the tax deed under which the land is claimed is in fact

v. Bain, 223 Ill. 343, 79 N. E. 111. Possession is not sufficient. Cook v. Ziff Colored Masonic Lodge No. 119 [Ark.] 96 S. W. 618. But a deed from an administrator with the will annexed, regular on its face, taken in connection with proof of two years' possession, was sufficient prima facie evidence of title. Glos v. Ault, 221 Ill. 562, 77 N. E. 939.

95. Where mill property valued at $8,000 was sold to satisfy a tax of $200, the sale was set aside. Starr v. Shepard, 145 Mich. 302, 13 Det. Leg. N. 528, 108 N. W. 709.

96. One seeking the aid of a court to defeat the title of a tax purchaser must do equity and show to the court that all taxes justly due have been paid. Thomas v. Farmers' Loan & Trust Co. [Neb.] 107 N. W. 589; State Finance Co. v. Beck [N. D.] 109 N. W. 357. See, also, Powers v. First Nat. Bank [N. D.] 109 N. W. 361; Fenton v. Minnesota Title Ins. & Trust Co. [N. D.] 109 N. W. 363; Corey v. Ft. Dodge [Iowa] 111 N. W. 6.

97. Heman v. Rinehart [Wash.] 87 P. 953; Ontario Land Co. v. Yordy [Wash.] 87 P. 257; Rogers v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 762, 94 S. W. 114; Doolittle v. Gates Land Co. [Wis.] 110 N. W. 890; Van Ostrand v. Cole [Wis.] 110 N. W. 891; Klenk v. Byrne, 143 F. 1008. The owner must pay face value regardless of what purchaser paid (Maxcy v. Simonson [Wis.] 110 N. W. 803), and the amount is not lessened by the fact that the tax sale certificate was assigned by the county to the purchaser for less than the amount bid by the county (Buchanan v. Griswold [Colo.] 86 P. 1041).

98. Bartley v. Sallier [La.] 42 So. 657; Flanagan v. Mathisen [Neb.] 110 N. W. 1012.

99. Albring v. Petronio [Wash.] 87 P. 49; Solberg v. Baldwin [Wash.] 89 P. 561; Rogers v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 762, 94 S. W. 114.

1. Glos v. Cannata, 121 Ill. App. 215; Burkham v. Manewal, 195 Mo. 500, 94 S. W. 520; Schaffer v. Davidson [Tex. Civ. App.] 97 S. W. 858; State Finance Co. v. Beck [N. D.] 109 N. W. 357; King v. Lane [S. D.] 110 N. W. 37.

2. Wheeler Co. v. Pates [Wash.] 86 P. 625.

3. Schiffer v. Douglass [Kan.] 86 P. 132.

4. Crocker v. Scott [Cal.] 87 P. 102.

5. See 6 C. L. 1654.

6. See Adverse Possession, 7 C. L. 41.

7. In Nebraska an action to foreclose a tax sale certificate may be commenced at any time within five years from the date when redemption from the sale may be made by the owner. Mead v. Brewer [Neb.] 109 N. W. 399. Under Mill's Ann. St. § 3902, vesting in the vendee of a tax deed all the estate of the former owner and making the deed prima facie evidence of certain enumerated facts, and section 3904, providing that an action for the recovery of land sold for taxes must be brought within five years after the delivery of the deed, such an action cannot he commenced against one in possession under the deed for five years after it was recorded, the deed not being invalid on its face. Wood v. McCombe [Colo.] 86 P. 319.

8. Terry v. Heisen, 115 La. 1070, 40 So. 461, cited in Crillen v. New Orleans Terminal Co., 117 Fla. 349, 41 So. 645.

9. Plaintiff in ejectment held to have been in constructive possession. Wisconsin River Land Co. v. Paine Lumber Co. [Wis.] 110 N. W. 220. In Louisiana a purchaser at a tax sale in good faith, who has a title from the proper officer valid in form with no defect upon it and patent, and who has possessed by himself and his authors for ten years, acquires an indefeasible title. Soniat v. Donovan [La.] 43 So. 462. Under Mills' Ann. St. Rev. Supp. § 2923c, giving title to one holding possession under color of title and pay-

void,[10] if such deed is valid upon its face.[11] Such statutes begin to run only from the date of possession under the deed.[12] A valid assessment,[13] judgment,[14] and sale,[15] are essential to the acquisition of a valid title under these statutes. Being of a special character, they are applicable only in cases shown to be within their terms.[16] Where a tax deed has been filed for record for more than five years before it is attacked, all presumptions are in favor of the regularity of the prior tax proceedings.[17] To suspend the running of limitations so as to permit an attack on a judgment for taxes, there must have been not only fraud in obtaining the judgment but such concealment thereof as to prevent its ascertainment by the use of reasonable diligence.[18] The bringing of a petitory action does not interrupt the running of prescription under Art. 233 of the Louisiana Constitution of 1898.[19]

(§ 14) *E. Acquisition of title by state and transfer thereof.*[20]—Provision is usually made for the purchase and acquisition of title by the state or municipality where there is no other purchaser.[21] In the acquisition of such title,[22] and in the assignment thereof,[23] or in the sale of lands so acquired, statutory provisions must be closely followed,[24] but describing land by forties instead of as one description held not to invalidate deed.[25] Where one purchases the interest of the state in several separate pieces of land, they may be all included in one certificate.[26]

ment of taxes for seven years, the payments must be for successive years. Webber v. Wannemaker [Colo.] 89 P. 780. An action of ejectment by a tax deed holder out of possession does not become barred by the Kansas two year statute of limitation while the land is vacant or unoccupied, nor while in the possession of tenants or employes of a nonresident owner who is absent from the state. Gibson v. Hinchman, 72 Kan. 382, 83 P. 981. Where land for a time was fenced with other lands, there was not exclusive possession. Webber v. Wannemaker [Colo.] 89 P. 780. Where the defendant in ejectment is shown to be in possession under a tax deed which is good on its face, and has been of record for five years, the plaintiff cannot attach the deed for latent irregularities without affirmative evidence of occupancy on his behalf during that period. Jones v. Weeks [Kan.] 89 P. 1019. Hiatus in the chain of paper title held fatal to claim of adverse possession. Morgan v. Pott [Mo. App.] 101 S. W. 717.

10. State Finance Co. v. Beck [N. D.] 109 N. W. 357; Brunette v. Norber [Wis.] 110 N. W. 785; Dickinson v. Hardie [Ark.] 96 S. W. 355; Kelley v. McDuffy [Ark.] 96 S. W. 358. **Contra.** King v. Lane [S. D.] 110 N. W. 37.

11. A tax deed is valid upon its face when it gives the name of the grantee, the numbers of the tax certificates, the dates of the tax sales, the name in which the property was assessed, the amount paid, a description of the land, besides the other recitals prescribed by statute, and the execution is in the prescribed form. Cowan v. Skinner [Fla.] 42 So. 730.

12. See 6 C. L. 1654, n. 48.

13. Though property may have been assessed in the name of one not the owner, a sale predicated on such assessment comes within the operation of Louisiana constitution, art. 233, and will not be set aside. Crillen v. New Orleans Terminal Co., 117 La. 349, 41 So. 645. Dual assessment. Little River Lumber Co. v. Thompson [La.] 42 So. 938.

14. See 6 C. L. 1654, n. 50.

15. Doullut v. Smith, 117 La. 491, 41 So. 913.

16. In Washington, absence of a judgment debtor from the state does not extend the duration of a judgment lien beyond the statutory period. Heman v. Rinehart [Wash] 87 P. 953.

17. Gibson v. Trisler [Kan.] 85 P. 413; Robbins v. Phillips [Kan.] 85 P. 815; Vogler v. Stark [Kan.] 89 P. 653. Failure to state day of sale in deed is not fatal, the day on which sale was begun being given (John v. Young [Kan.] 86 P. 295), nor does the sale of two separate tracts together, the tracts from their description appearing to be contiguous, invalidate the deed. Cross v. Herman [Kan.] 87 P. 686.

18. Dunn v. Taylor [Tex. Civ. App.] 15 Tex. Ct. Rep. 669, 94 S. W. 347.

19. Prater v. Craighead [La.] 43 So. 258.

20. See 6 C. L. 1655.

21. Recital, liberally construed, held to conform to statutory requirement of sale to county only when no other person offers amount due. Jones v. Carnes [Okl.] 87 P. 652.

22. A sale to the state does not divest the owner of the legal title. Husbands v. Polivick, 29 Ky. L. R. 890, 96 S. W. 825.

23. Where, at a tax sale, land is bid in for the county, the omission of the deed to state the price is a defect which renders it invalid on its face, and which is not cured by a recital of the amount paid by an individual for an assignment of the certificate when there is no showing as to how much of this was due to subsequent taxes. Robidoux v. Munson [Kan.] 88 P. 1085.

24. To vest title to land in the state as a purchaser thereof at a tax sale, the same degree of strictness in compliance with the law relating to assessment, return of delinquency, and sale, is required as in the case of a valid sale to an individual. Webb v. Ritter [W. Va.] 54 S. E. 484; St. Paul v. Louisiana Cypress Lumber Co., 116 La. 585, 40 So. 906.

25. Jackson, etc., R. Co. v. Solomon Lumber Co. [Mich.] 13 Det. Leg. N. 720, 109 N.

§ 15. *Inheritance and transfer taxes. A. Nature of and power to impose.*[27]—Inheritance or succession taxes are very ancient and are said to have had their origin in the Roman law. They have long been in force in the European states, and in England and her colonies where they are known as "death duties."[28] The terms are used to describe a tax on the right of succession, whether by operation of law, will,[29] gift,[30] or grant. By the uniform current of decision in this country, inheritance taxes are not taxes upon property but upon the right to receive property,[31] and this right of succession is held to be a privilege granted by the state and not a right inherent in the individual. But in Wisconsin this proposition is challenged, the supreme court of that state holding that the right to demand that property pass by inheritance or will is an inherent right subject only to reasonable regulation by the legislature.[32] Constitutional requirements of equality and uniformity do not apply in the manner in which they are applicable to ad valorem property taxes.[33] Hence the state may grant the exemptions usually granted to certain institutions under the general tax laws,[34] may exempt from the operation of the law estates below a certain value while taxing others,[35] may classify the taxable estates according to value and apply thereto a graduated rate,[36] may discriminate between blood relatives and strangers to the blood,[37] or may make no distinction between them or between lineal and collateral descendants.[38] But an inheritance law that must have an equal operation to be constitutional cannot be given an unequal operation by an amendment or by an exception in a repealing statute.[39] The Louisiana inheritance tax law of 1904 was superseded by the Act of 1906, but was not repealed as to taxes due on successions not within the terms of the latter statute.[40] Statutes imposing inheritance taxes are construed strictly against the government and in favor of the taxpayer.[41]

W. 257. A county, unlike an individual, is not required to commence publication within ninety days from the filing of the certificates. Chehalis County v. France [Wash.] 87 P. 353.

26. McLeod v. Matteson, 99 Minn. 46, 108 N. W. 290.

27. See 6 C. L. 1656.

28. Nunnemacher v. State [Wis.] 108 N. W. 627.

29. Where an agreement to make a devise is enforced despite a will in violation thereof, the devolution is by will and hence subject to an inheritance tax. In re Kidd's Estate, 188 N. Y. 274, 80 N. E. 924.

30. Statutes taxing transfers of property made in contemplation of death include gifts inter vivos as well as gifts causa mortis. In re Palmer's Estate, 102 N. Y. S. 236.

31. Cahen v. Brewster, 27 S. Ct. 174; In re Stone's Estate [Iowa] 109 N. W. 455.

32. Nunnemacher v. State [Wis.] 108 N. W. 627.

33. Wis. Const. art. 8, § 1, declaring that the rule of taxation shall be uniform, does not by implied exclusion prohibit the imposition of taxes upon other things than property. Nunnemacher v. State [Wis.] 108 N. W. 627. Under the New Hampshire constitution adopted in 1903, an inheritance tax need not be proportional. Thompson v. Kidder [N. H.] 65 A. 392. Successions which have been finally administered may be exempted from an inheritance tax without rendering the statute void for arbitrary classification. Louisiana Act of June 28, 1904. Cahen v. Brewster, 27 S. Ct. 174.

34. In re White's Estate, 103 N. Y. S. 688. The exclusion of foreign corporations from the exemption from an inheritance tax in favor of property devised for educational purposes as provided by Ill. Act May 10, 1901, does not deny the equal protection of the laws. Board of Education v. People, 27 S. Ct. 171.

35. See 6 C. L. 1656, n. 69.

36. Wis. Laws 1903, p. 65, imposing upon inheritances a tax which is graduated in proportion to the amount of the inheritance and with respect to the degree of relationship of the distributees, is constitutional. Nunnemacher v. State [Wis.] 108 N. W. 627.

37. See 6 C. L. 1656, n. 71.

38. New Hampshire Laws 1905, p. 432, imposing a tax on the value of property passing by will or by intestate laws, except when passing to designated relatives, or when passing to charitable, educational, or religious institutions, is not unequal in that the tax is not assessed on all the property passing. Thompson v. Kidder [N. H.] 65 A. 392.

39. The exception as to estates in which the inventory had already been filed, in the act of April 2, 1906 (98 Ohio Laws, p. 229), repealing the inheritance tax law, would give the law an unequal operation and is therefore void. Friend v. Levy [Ohio] 80 N. E. 1036.

40. Succession of Pritchard [La.] 43 So. 537.

41. People v. Koenig [Colo.] 85 P. 1129; In re Cooley's Estate, 186 N. Y. 220, 78 N. E. 939. An estate should not be taxed except upon clear and convincing proof of the extent of the property passing under the will.

(§ 15) *B. Successions and transfers taxable, and place of taxation.*[42]—As a rule all transfers by will, by conveyance to take effect upon the grantor's death, or made in contemplation of it,[43] or by operation of law upon the ancestor's death, are subject to the tax.[44] Exemptions are to be given a strict construction and will not be extended by inference or implication.[45] A contract between the beneficiaries in a will including a collateral legatee renouncing the provisions of the will and agreeing upon a division of the estate is valid and enforceable, though its effect is to deprive the state of a tax on the legacy to the collateral legatee.[46] Illustrations of the particular application of the inheritance tax laws of the various states are furnished by the notes.[47]

Powers of appointment.[48]—A statute providing that a disposition by the exercise of a power of appointment shall be subject to an inheritance tax in like manner as if a devolution had been by the will of the donee of the power does not deny process or impair the obligation of a contract.[49]

Place of taxation.[50]—Personal property transmitted by will is subject to the collateral inheritance tax at the place of the domicile of the decedent.[51] The transfer by will of a nonresident of property within the state is taxable. Thus, in New York, all bonds, money, and stocks of domestic corporations,[52] and passing as a part of the estate of a nonresident, are subject to the transfer tax.[53] Proceeds of an

In re Kennedy's Estate, 113 App. Div. 4, 99 N. Y. S. 72.

42. See 6 C. L. 1657.

43. In re Graves' Estate, 103 N. Y. S. 571.

44. An assignment of policies of life insurance by a husband to his wife held to have vested the right to the policies in the wife at the time of the assignment and not to take affect at the testator's death. In re Parsons' Estate, 101 N. Y. S. 430; Id., 102 N. Y. S. 168.

45. An exemption to an adopted daughter does not inure to her issue. In re Cook's Estate, 50 Misc. 487, 100 N. Y. S. 628.

46. In re Stone's Estate [Iowa] 109 N. W. 455.

47. Persons and things held taxable: A bequest to a corporation of its debenture bonds passes property to the legatee and the bonds may be assessed at their market value. In re Rothschild's Estate [N. J. Eq.] 63 A. 615. A note possessed by a resident of New Jersey secured by a mortgage on real estate in Michigan, the mortgage being recorded in Michigan, is subject to the inheritance tax law of the latter state. Auditor General v. Merriam's Estate [Mich.] 14 Det. Leg. N. 6, 111 N. W. 196.

Not taxable: Money paid in good faith by administrators in compromise of threatened litigation is not subject to an inheritance tax. In re Hawley's Estate, 214 Pa. 525, 63 A. 1021. Under N. Y. Domestic Relations Law, Law 1896, the son of an adopted daughter is a lineal descendant whose property is not taxable. In re Cook's Estate [N. Y.] 79 N. E. 991. Property acquired by one under an antenuptial contract of a decedent, antedating the transfer tax law, is not subject to a transfer tax. In re Kidd's Estate, 100 N. Y. S. 917. The surviving spouse does not acquire, in usufruct, the estate of the deceased spouse by inheritance, and hence the right of usufruct in such case is not subject to the tax imposed on inheritances. Succession of Marsal [La.] 42 So. 778. Where an estate is in excess of $500 but is distributed among brothers and nephews, none of whom receive as much as $500, the share of each is exempt. In re Mock's Estate, 49 Misc. 283, 99 N. Y. S. 236. An exemption of property held to follow the proceeds used to discharge the legacy. Succession of Becker [La.] 43 So. 701. Interests held not taxable under War Revenue Act of 1898. Blair v. Herold, 150 F. 199; Union Trust Co. v. Lynch, 148 F. 49.

48. See 6 C. L. 1658.

49. Laws N. Y. 1897, c. 284. Chanler v. Kelsey, 27 S. Ct. 550.

50. See 6 C. L. 1659.

51. Evidence examined and held not to establish residence of a testator in New York. In re White's Estate, 101 N. Y. S. 551. See 6 C. L. 1659, n. 99.

52. In re Hillman's Estate, 101 N. Y. S. 640; In re McEwan's Estate, 101 N. Y. S. 733. Bonds of the United States, belonging to a nonresident but actually within the state, were not in October, 1891, property within the meaning of N. Y. Laws 1892, p. 1486, and taxable. In re Schermerhorn's Estate, 50 Misc. 233, 100 N. Y. S. 480. Under the N. Y. statute, as amended, imposing a tax on the transfer by will of any personal property within the state where the decedent was a nonresident at the time of his death, where a New York railroad corporation and a Massachusetts corporation consolidated, and the consolidated corporation was separately organized in each state, there being but a single issue of capital stock, shares in such corporation should be assessed by regarding each organization as owning the property situate within the state of its organization. In re Cooley's Estate, 113 App. Div. 388, 98 N. Y. S. 1006; Id., 186 N. Y. 220, 78 N. E. 939.

53. The stock of a foreign corporation owned by a nonresident decedent is not subject to a transfer tax in New York, although the transfer agent of the corporation does business in that state. Dunham v. City Trust Co., 115 App. Div. 584, 101 N. Y. S. 87.

insurance policy paid to a foreign executor of the insured are not property within the state subject to a transfer tax.[54]

(§ 15) *C. Accrual of tax.*[55]—In the case of estates of present enjoyment, the tax accrues immediately upon the death of the testator,[56] and the right of the state to the tax is at once a vested right which cannot be surrendered by subsequent legislative act.[57] This is also the rule with reference to vested remainders.[58] A tax on a legacy which vests only upon the happening of some uncertain future event so that the true value thereof can not be presently ascertained accrues and becomes payable only when the beneficiary is entitled to possession or enjoyment thereof.[59]

(§ 15) *D. Appraisal and collection.*[60]—Only the amount actually received by a legatee should be considered in computing the tax.[61] Debts must be deducted from the aggregate value of the estate.[62] Where an inheritance consists in part of property which has previously borne its just proportion to taxes, and in part has not, the value subject to inheritance taxes is ascertained by deducting from the total value the property which has previously borne taxation.[63] In Wisconsin the county court, in fixing the fair cash value of corporate stock belonging to a decedent's estate, has no power to compel the corporation to produce its books and papers in court.[64] Cases dealing with the rate of the tax,[65] and the appraisal of corporate stock,[66] are treated in the notes.

Statutes control as to the powers and duties of courts with respect to the appraisal and collection,[67] as to the time within which suits for collection must be brought,[68] as to commissions,[69] and with respect to appellate procedure.[70]

54. In re Gordon's Estate, 99 N. Y. S. 630; Id., 186 N. Y. 471, 79 N. E. 722.

55. See 6 C. L. 1660.

56. Life tenancy. People v. Pulteney Assessors, 101 N. Y. S. 176. Where testator gives a nephew the use of a farm for ten years, the latter to be invested with the fee at the end of that time, the collateral tax is not postponed. In re Dalrymple's Estate [Pa.] 64 A. 554.

57. Construing Stat. 1893, p. 193. Trippet v. State [Cal.] 86 P. 1084, reaffirming Estate of Sanford, 126 Cal. 112, 54 P. 259, 58 P. 462. Stat. 1905, p. 374, constituting a new law on the subject and expressly repealing the act of 1893, does not affect the right of the state to taxes on the estates of persons dying before the law of 1905 took effect, though no steps had been taken prior thereto to collect the taxes on such estates. Trippet v. State [Cal.] 86 P. 1084.

58. See 6 C. L. 1660, n. 10.

59. State v. Probate Court [Minn.] 110 N. W. 865.

60. See 6 C. L. 1660.

61. See 6 C. L. 1660, n. 17.

62. See 6 C. L. 1660, n. 19.

63. Succession of Abadie [La.] 43 So. 306.

64. State v. Carpenter [Wis.] 108 N. W. 641.

65. Where residuary legatees assigned their interests to the heir at law and next of kin, in consideration of an agreement not to contest the will, the rate should be the same as if the residuary legacy had originally been the heir and next of kin. In re Cook's Estate, 99 N. Y. S. 1049. A son of an adopted daughter is not a lineal descendant so as to bring his legacy within the one per cent. rate. Id., 50 Misc. 487, 100 N. Y. S. 628. Under N. Y. Laws 1896, ch. 908, § 221, as amended, legacies to stepchildren to whom the deceased stood in the position of loco parentis for ten years are taxable at the rate of five per cent., unless the parents of the child were deceased when such relationship commenced. In re Wheeler's Estate, 115 App. Div. 616, 100 N. Y. S. 1044; In re Stebbins' Estate, 103 N. Y. S. 563.

66. Shares of stock standing in the name of testator's wife held to be no part of his estate. In re Parsons' Estate, 101 N. Y. S. 430; Id., 102 N. Y. S. 168.

67. The decree of a surrogate may be amended so as to take into account a newly-discovered debt. In re Campbell's Estate, 50 Misc. 485, 100 N. Y. S. 637. A collateral inheritance tax is collectable out of each specific share or interest in the estate. In re Stone's Estate [Iowa] 109 N. W. 455. Where realty was sold by a devisee for $1,600, it was error to appraise the same at $2,860 solely on the testimony of one witness that such was its value. In re Arnold, 99 N. Y. S. 740.

68. Proceedings against personal representatives, trustees, or beneficiaries, under N. Y. Laws 1887, p. 921, as amended held relieved from the bar of Code Civ. Proc. § 382. In re Strang, 102 N. Y. S. 1062.

69. Under the Pennsylvania act (P. L. 83, § 16), it is made the duty of the county register of wills to collect the collateral inheritance tax, and he may retain as his commission such percentage as may be allowed by the auditor general. Allegheny County v. Stengel, 213 Pa. 493, 63 A. 58.

70. Under the New York practice, the method of reviewing the order of a surrogate exempting an estate for taxation is by appeal to the surrogate and thence to the appellate division. In re Costello's Estate, 103 N. Y. S. 6. The error of a surrogate in including in item on property erroneously assumed to have passed to a son is an error of fact and not of law and can be corrected only by an appeal from the order. In re Willets' Estate, 51 Misc. 176, 100 N. Y. S. 850.

§ 16. *License taxes.*[71]—A license is a grant of a special privilege to one or more persons not enjoyed by citizens generally, or at least not enjoyed by the class of citizens to which the licensee belongs.[72] For this privilege the state may impose a charge variously styled a license, privilege, or occupation tax.[73] These taxes are not taxes on property[74] but upon occupations or callings, and therefore constitutional provisions relating to property taxes have no application to taxes of this kind.[75] States have undoubted power to classify trades or occupations and to impose different taxes upon different classes, or to tax some while not taxing others,[76] and legislative discretion in the matter will not be reviewed by the courts provided a classification adopted is not wholly arbitrary and unreasonable.[77] License taxes however, must be given uniform operation.[78] The construction of license tax laws with reference to their applicability in particular instances,[79] and the basis for computing the amount of the tax,[80] is treated in the notes. There being no statute making an occupation tax a lien on property, injunction does not lie to restrain public officers from proceeding to a collection thereof.[81]

§ 17. *Income taxes.*[82]

§ 18. *Distribution and disposition of taxes collected.*[83]—State taxes in the hands of a county treasurer are the property of the state and if lost without the fault of the county the county is not liable to the state therefor.[84] Demand fees,

71. See 6 C. L. 1661.

72. Reser v. Umatilla County [Or.] 86 P. 595. License fees on occupations useful and not hurtful, nor calling for regulation, are generally taxes, while licenses on the liquor traffic and other occupations calling for regulation are licenses, although they yield a revenue in excess of that required for regulation. Schmidt v. Indianapolis [Ind.] 80 N. E. 632.

73. A company engaged in producing and selling gas, though it conveys it from the place of production to the point of consumption, is not within War Rev. Act of 1898, imposing a tax on persons "owning and controlling any pipe line for the transportation of oil, etc.," the transportation being merely incidental. United States v. Northwestern Ohio Natural Gas Co., 141 F. 198.

74. Alabama Gen. Acts 1903, p. 227, imposing a privilege tax on recorded mortgages, repealed Code 1896, § 3911, subd. 7, imposing an ad valorem tax on moneyed capital. Barnes v. Moragne [Ala.] 41 So. 947. State liquor dispensaries held to be within the terms of U. S. Rev. St. § 3232 et seq. South Carolina v. U. S., 199 U. S. 437, 50 Law. Ed. 261. See 15 Yale L. J. 298.

75. State v. Chicago & N. W. R. Co. [Wis.] 108 N. W. 594. Privilege taxes, though indirect taxes on property, are not taxation of property, and so are not referable to the uniformity clause of the Wis. constitution (sec. 1, art. 8). Chicago & N. W. R. Co. v. State [Wis.] 108 N. W. 557 Mississippi Laws 1904, p. 69, imposing a tax on insurance agents and agencies, is a tax on occupations and not violative of constitution. Clarksdale Ins. Agency v. Cole, 87 Miss. 637, 40 So. 228. Texas Acts 29th Leg. p. 358, imposing a tax on ownership or control of producing oil wells, is an occupation tax and not violative of the Texas constitution. Producers' Oil Co. v. Stephens [Tex. Civ. App.] 99 S. W. 157. Oregon Laws 1905, p. 268, taxing foreign sheep pastured in or driven through the state, held to be a revenue measure and violative of the uniformity clause of the Oregon constitution. Reser v. Umatilla County [Or.] 86 P. 595.

76. Where a foreign corporation paid the required license fee, it could not be required to pay an additional tax not levied on domestic corporations. British American Mortg. Co. v. Jones [S. C.] 56 S. E. 983.

77. A license fee imposed on breweries and brewers' agents of $1,000 is not excessive. Schmidt v. Indianapolis [Ind.] 80 N. E. 632.

78. State v. Galveston, etc., R. Co. [Tex.] 16 Tex. Ct. Rep. 909, 97 S. W. 71. The occupation tax on railroads, imposed by the Texas statute, imposing on railroads doing business in the state a tax on gross receipts, is not in conflict with the constitution of that state requiring occupation taxes to be uniform, though the statute has no application to a railroad incorporated under an act of congress. State v. Missouri, etc., R. Co. [Tex.] 100 S. W. 146. Ordinance imposing license tax on "fire or wreck sales of merchandise" not occurring within the city is void. City of Atlanta v. Jacobs, 125 Ga. 523, 54 S. E. 534.

79. An electric light company is not a "manufacturer" in the sense of the exemption clause of art. 229 of the Louisiana Constitution, authorizing the legislature to impose license taxes. State v. New Orleans R. & Light Co., 116 La. 144, 40 So. 597. An ordinance of the city of Mobile imposing a license tax on dealers in beer sustained. Meyer, Jossen & Co. v. Mobile, 147 F. 843.

80. The basis for the assessment of a license fee against a foreign corporation under the New York statute (Heydecker's Gen. Laws, p. 1918, c. 24) is the capital, not the capital stock, employed within the state. People v. Miller 112 App. Div. 880, 98 N. Y. S. 751.

81. Stephens v. Texas & P. R. Co. [Tex.] 16 Tex. Ct. Rep. 918, 97 S. W. 309.

82. See 6 C. L. 1663.

83. See 6 C. L. 1664.

84. Lancaster County v. State [Neb.] 107 N. W. 388.

under the Indiana statute, collected by a county treasurer from delinquent taxpayers and paid into the treasurer's fund, belong to the county and not to the treasurer.[85] In California, graduated penalties on redemption of land sold for taxes are subject to apportionment between the state and county.[86] In New Jersey it is the duty of a borough collector, on or before the 22nd day of December in each year, out of the first money collected to pay to the county collector the state and county taxes required to be assessed in his taxing district.[87] Taxes levied and collected by a county to pay interest upon railroad aid bonds are held by the county treasurer for the benefit of the holder of the bonds and should be paid to the latter upon presentation of the proper coupons.[88] Taxpayers have a standing in court to restrain the unauthorized or illegal expenditure of funds in the possession of tax officers,[89] and money illegally disbursed may be recovered in a taxpayer's action, so called, on behalf of the town.[90]

TELEGRAPHS AND TELEPHONES.

§ 1. Franchises and Licenses, Property and Contracts, and Corporate Affairs (2096). Consideration (2098). License Fees and Taxes (2098). Transfers. Line Contracts, Leases, and Mortgages (2098).
§ 2. Construction and Maintenance of Lines, and Injuries Thereby (2098).
§ 3. Telegraph Messages (2100).
A. Duty and Care (2100). Transmission (2101). Delivery (2102). Delivery to Others for Addressee (2103). Spurious Messages (2104).
B. Injury and Damages (2104). Conflict of Laws (2104). General and Special Damages (2104). Mental Anguish (2105). Exemplary Damages (2108).
C. Procedure (2108).
D. Penalties (2113).
§ 4. Telephone Service (2114).
§ 5. Quotations and Ticker Service (2114).
§ 6. Rates, Tariffs, and Rentals (2114).
§ 7. Offenses (2114).

§ 1. *Franchises and licenses, property and contracts, and corporate affairs.*[91]—The right to use streets and highways may come by direct legislative grant [92] or grant by a delegated municipality,[93] or from constitutional grant of right which must be self-executing.[94] A statute authorizing telegraph or telephone companies to construct telegraph or telephone lines along highways or streets does not authorize a telegraph company to construct a telephone line.[95] When a constitutional grant of right requires general legislation to give it effect, the legislature may by general law delegate regulative power to cities.[96] But a delegation must be clearly intended.[97] The grant of an easement to erect and maintain a telephone line confers the right

85. Board of Com'rs of Clinton County v. Given [Ind.] 80 N. E. 965.
86. Honeycutt v. Colgan [Cal. App.] 85 P. 165.
87. Trewin v. Shurts [N. J. Law] 65 A. 984.
88. Tolman v. Onslow County Com'rs, 140 F. 89.
89. Murphy v. Police Jury, St. Mary Parish [La.] 42 So. 979.
90. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951.
91. See 6 C. L. 1665.
92. In New York the right of telegraph and telephone companies to occupy streets and highways is derived directly from the state. Village of Carthage v. Central N. Y. Tel. & T. Co., 185 N. Y. 448, 78 N. E. 165.
93. See Franchises, 7 C. L. 1771.
94. A constitutional provision giving any one the right to maintain telephone lines within the state and making it the duty of the legislature to give effect thereto by general law is not self-executing. Under Const. art. 15, § 14, placing of poles would be unlawful in absence of legislation (State v. Helena [Mont.] 85 P. 744), and a law on the subject must be a general one so as to give complete effect to the grant. Sess. Laws 1905, p. 122, c. 55, excluding cities and towns, held invalid in so far as it fails to meet requirements of Const. art. 15, § 14. Defect not remedied by Pol. Code, § 4800, subd. 43, as amended by Sess. Laws 1897, p. 203, empowering city councils to regulate construction of lines within city limits. Id.
95. Acts 1885, p. 120, c. 66. Home Tel. Co. v. Nashville [Tenn.] 101 S. W. 770. Statute not unconstitutional for not having been properly signed. Id.
96. May authorize cities to make such reasonable rules for the regulation of the business as may be considered necessary. State v. Helena [Mont.] 85 P. 744.
97. A delegation to villages in regard to the construction of lines and the management and control of these companies will not be implied but must rest in clear and express grant. Power not delegated to village to compel underground construction. Village of Carthage v. Central N. Y. Tel. & T. Co., 185 N. Y. 448, 78 N. E. 165.

to construct a single line of poles and to place thereon any number of cross arms and wires.[98] Where pursuant to a valid statute a municipality grants permission to construct a line on the express condition that the system shall be completed before a certain date, failure of the company to complete the construction by such date justifies the municipality in removing the poles already erected,[99] if no estoppel or waiver has intervened;[1] and the fact that the company had given a bond conditioned to complete the work within the stipulated time is not a valid objection.[2] A deed to a water company of a right of way for the laying of water pipes "with" the right to erect a telephone or telegraph line or lines does not limit the use of the lines to business connected with the waterworks plant,[3] and a bona fide assignee is not bound by an oral agreement between the original parties that the use should be limited to such business.[4] A telephone company may abandon or relinquish its right under an ordinance by conduct showing an acceptance by it of a subsequent one.[5]

In the absence of statutory provisions expressly conferring the right of eminent domain upon foreign corporations, interstate comity does not require that this right be extended to a foreign telephone company,[6] and there is no inherent power vested in such company to condemn private property for purely local purposes and as a part of an interstate system.[7] The erection of poles and wires in streets in conformity with municipal consent and regulations is not in itself an additional burden for which a fee owner is entitled to compensation,[8] and hence unsightliness of the poles and noises ordinarily incidental to the lawful maintenance of the poles and wires and the conduct of the business do not constitute special injury for which damages can be recovered,[9] though appreciable interference with light, air, access, or drainage, is an additional burden.[10] The authorities are not uniform on the question whether a telephone line along a country highway is an additional burden so as to entitle abutting owners to compensation,[11] but even if an abutting owner on a highway is entitled to compensation for the cutting of trees in the construction of a telephone line, he is not entitled to enjoin the work until the same is paid.[12] The New York statute in relation to the erection of poles and wires on the Tonawanda Indian

98. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747.

99. Keystone State Tel. & T. Co. v. Ridley Park Borough, 28 Pa. Super. Ct. 635. Section 4, Act May 1, 1876 (P. L. 90), as amended by Act June 25, 1885 (P. L. 164), not unconstitutional. Id. Five months not an unreasonable time within which to complete line. Id. Poles removable as a nuisance and borough not required to resort to equity. Id.

1. Borough not estopped by delay. Keystone State Tel. & T. Co. v. Ridley Park Borough, 28 Pa. Super. Ct. 635.

2. Bond to forfeit $200. Keystone State Tel. & T. Co. v. Ridley Park Borough, 28 Pa. Super. Ct. 635.

3. Assignee could use line for commercial purposes. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747. Parol evidence inadmissible to limit the grant. Id. To entitle plaintiff to injunction restraining defendant from cutting and removing the wires with strong hand, plaintiff was not required to clearly establish its rights at law. Id.

4. Northeastern Tel. & T. Co. v. Hepburn [N. J. Eq.] 65 A. 747.

5. Evidence held to show acceptance of subsequent ordinance limiting franchise to fifteen years. Cumberland Tel. & T. Co. v. Evansville [C. C. A.] 143 F. 238.

6. Central Union Tel. Co. v. Columbus Grove, 8 Ohio C. C. (N. S.) 81.

7. Central Union Tel. Co. v. Columbus Grove, 8 Ohio C. C. (N. S.) 81. In a condemnation proceeding brought by a foreign telephone company, the petition must allege not only that the petitioner is a corporation of its home state, duly created for the purpose of erecting and maintaining lines of telephone within such state, but also that by its charter it is empowered to appropriate private property therein, and in the absence of such averments the petition is bad on demurrer. Id.

8, 9. Shinzel v. Bell Tel. Co., 31 Pa. Super. Ct. 221.

10. Pole placed so that lumber could not be taken through an alley. Shinzel v. Bell Tel. Co., 31 Pa. Super. Ct. 221.

11. Is not an additional burden. Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003. Where a village street is to all intents and purposes a rural highway, a telephone company may not erect poles therein without the consent of the fee owner and without condemnation. Same rule applicable to village of one thousand inhabitants as to country districts. Powers v. State Line Tel. Co., 102 N. Y. S. 34.

12. Remedy adequate at law. Hobbs v. Long Distance Tel. & T. Co. [Ala.] 41 So. 1003.

reservation in that state is not void as conflicting with the Federal laws [13] or as impairing the obligation of contracts.[14]

Consideration.[15]

License fees and taxes.[16]—Municipal power to regulate the use of streets by telephone companies implies power to impose a money charge as a condition to such use.[17] So, also, a legislative grant of "entire control" of streets by a city includes power to impose rentals,[18] and such power is not nullified by a subsequent general statute granting to telegraph and telephone companies the right to maintain their lines in the streets of cities.[19]

Transfers, line contracts, leases, and mortgages.[20]—If a company accepts its franchise under agreement to permit other companies to use its poles for compensation to be mutually agreed upon or determined by a city officer in case the companies cannot agree, it is bound to agree on the compensation or accept the fair arbitrament of the officer,[21]

§ 2. *Construction and maintenance of lines, and injuries thereby.*[22]—The use of streets and alleys for poles and wires necessary to the operation of a telephone exchange is legal and proper,[23] but the exercise of the right to such use is subject to municipal regulation. Where, however, companies derive power directly from the state to construct and maintain fixtures for their lines "upon, over or under" public streets or highways,[24] power in cities or villages to regulate the erection of poles and stringing of wires "in, over or upon" the streets does not authorize the municipality to compel the placing of wires in conduits.[25] A grant which merely contemplates the construction of lines along highways does not authorize a company to construct them across abutting land.[26] Ejectment lies for stretching a wire over one's premises though the soil is not touched,[27] and prompt removal of the wire after suit is brought does not defeat the action.[28] A mandatory injunction will be granted to compel removal of poles unlawfully placed so near adjoining premises that the cross bars and wires project over them,[29] but a telephone line being a public utility, one may not forcibly remove it from his premises and thus destroy its usefulness.

13. Laws 1902, p. 853, c. 296, requiring payment to Indians to whom allotments had been made, or else condemnation, do not conflict with Federal statutes regulating commerce among Indian tribes, since the state exercises exclusive jurisdiction over the Tonawanda Indians. Jemison v. Bell Tel. Co., 186 N. Y. 493, 79 N. E. 728. Poles could not be erected under the authority of the Tonawanda Indian council on land allotted to an Indian. Id.

14. Jemison v. Bell Tel. Co., 186 N. Y. 493, 79 N. E. 728.

15. See 6 C. L. 1666.

16. See 6 C. L. 1667.

17. City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S. W. 314. Where an ordinance granted a franchise to maintain a telephone system "within the present and future limits of the city" on condition that two per cent. of the receipts from the system be paid to the city, the city, while not entitled to collect for receipts from the operation of long distance lines, could collect for receipts from the use of the system within the city in connection with the long distance lines. Id.

18. Acts Tenn. 1879, c. 11, § 3. City of Memphis v. Postal Tel. Cable Co. [C. C. A.] 145 F. 602.

19. Act Tenn. 1885, p. 120, c. 66. City of Memphis v. Postal Tel. Cable Co. [C. C. A.] 145 F. 602. Such act was not a contract between the state and the telegraph company which would deprive the city of power to impose the rental. Id.

20. See 6 C. L. 1667.

21. Montgomery Light & Water Power Co. v. Citizens' Light, Heat & Power Co. [Ala.] 40 So. 981.

22. See 6 C. L. 1667.

23. City of Lancaster v. Briggs, 118 Mo. App. 570, 96 S. W. 314.

24. Laws 1890, p. 1152, c. 566, art. 8, § 102. Village of Carthage v. Central New York Tel. & T. Co. 185 N. Y. 448, 78 N. E. 165.

25. Village Law, Laws 1897, p. 394, c. 414, § 89, subd. 9. Village of Carthage v. Central N. Y. Tel. & T. Co., 185 N. Y. 448, 78 N. E. 165.

26. Grant to a telephone company to construct and maintain a line "over and along" a tract of land "including poles along the roads adjoining the tract "construed to limit grantee's right to construction and maintenance of lines along the highways only and not across the land. Morrison v. American Tel. & T. Co., 101 N. Y. S. 140.

27, 28. Butler v. Frontier Tel. Co., 186 N. Y. 486, 79 N. E. 716.

29. Continuing trespass. Cumberland Tel. & T. Co. v. Barnes, 30 Ky. L. R. 1290, 101 S. W. 301.

unless it constitutes a nuisance, even though the company's right to maintain it there may have terminated.[30]

Companies are liable for damages to private property due to the negligent erection of poles[31] and for injuries resulting from unlawfully obstructing public streets or highways.[32] They are required, also, to exercise care commensurate with the dangers reasonably to be apprehended to guard against the destruction of property by fire[33] and against casualities due to charged wires.[34] The duty of ascertaining and remedying defects is the duty of the company itself so that if injury or death results from failure to observe it the company cannot escape liability by a plea that its agents or servants were negligent.[35] A telephone company is not liable for injuries received from a fallen wire owned and controlled by a city in consideration of the company's right to erect poles, though such wire was strung on a cross arm on the company's poles.[36]

To authorize a recovery, defendant's negligence must have been the proximate cause of the injury sustained,[37] and plaintiff must have been free from contributory

30. Where railroad was built on telephone right of way after construction of line and telephone company's rights had terminated. St. Louis, etc., R. Co. v. Batesville & Minerva Tel. Co. [Ark.] 97 S. W. 660.

31. Evidence insufficient to warrant submission to jury of defendant's liability for obstructing plaintiff's drainage by negligent erection of a pole. Shinzel v. Bell Tel. Co., 31 Pa. Super. Ct. 221. Statement of claim held sufficient after trial on merits. Id.

32. Louisville Home Tel. Co. v. Gasper, 29 Ky. L. R. 578, 93 S. W. 1057. That a guy wire was anchored eighteen inches within side line of a public alley along a fence of nearly same color held to justify finding of negligence. Id. In suit for injuries from wire sagging over a public highway, evidence of instructions by defendant to his teamsters and foreman to report defects and repair held insufficient to rebut presumption of negligence. Jacks v. Reeves [Ark.] 95 S. W. 781. Defendant held negligent for maintaining a guy wire over a highway so low as to damage a thresher passing on the road, in violation of statute. Chant v. Clinton Tel. Co. [Wis.] 110 N. W. 423. Rev. St. 1898, § 1347b, making owners of steam engines liable for damages caused by propelling them on highways, held inapplicable. Id.

33. While a company is not required to guaranty the safety of its system under all possible conditions (Wells v. Northeastern Tel. Co., 101 Me. 371, 64 A. 648), it is bound to exercise that due and ordinary care which the present state of scientific knowledge and common observation of the nature and power of electricity and lightning would suggest as reasonably necessary for the protection of life and property along its line (Id.). If plaintiff's theory was correct that it was not safe to connect a guy wire with a barn, then evidence warranted finding that defendant did not exercise reasonable care in establishing its line. Id. If defendant's theory that it was impossible to divert the lightning by means of insulators or breakers, it was not error for jury to find that such wire should not have been attached to the barn at all. Id.

34. Though a company is required to use only ordinary care in the maintenance of lines in a safe condition, such care must be proportioned to the circumstances of the case and the dangers to be apprehended. Question of negligence held for jury in suit for death of one coming in contact with wire which had become charged by falling on another wire. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879. Statutes authorizing recovery for death by wrongful act are enforceable against telephone companies for negligence in the maintenance of lines when the negligence is that of the corporation itself as distinguished from that of its servants. Rev. St. 1895, art. 3017, Death from live wire. Id. The maintenance of a wire in such position as to render it likely that in falling it will come in contact with the wire of another company charged with a dangerous current imposes the same degree of care on the company as though its own wire were so charged. Id. Prima facie case of negligence shown where defendant's wire fell on a lower wire which was heavily charged, and lay on street where some one picked it up and wrapped it around a post where decedent came in contact with it while attempting to tie his horse and was killed. Id. Evidence held to show that death resulted from contact with the wire. Id.

See, also, Electricity, 7 C. L. 1258.

35. Citizens' Tel. Co. v. Thomas [Tex. Civ App.] 99 S. W. 879.

36. Not lessee or agent of company. Chicago Tel. Co. v. Hayes, 121 Ill. App. 313. That company had agreed to save city harmless from erection and maintenance of poles could not be taken advantage of by plaintiff, a third person. Id.

37. Obstruction of alley by wire held proximate cause, though third person negligently drove against wire and injured plaintiff. Louisville Home Tel. Co. v. Gasper, 29 Ky. L. R. 578, 93 S. W. 1057. Evidence held to warrant finding that a fire was caused by electricity being conducted to the corner of plaintiff's barn by a guy wire from defendant's line rather than by lightning directly from the clouds. Wells v. Northeastern Tel. Co., 101 Me. 371, 64 A. 648. Defendant's negligence in leaving a pole insecure near a highway held proximate cause of a death though a third person had previously raised and attempted to render it secure. Harton v. Forest City Tel. Co., 141 N. C. 455, 54 S. E.

negligence.[38] Pleadings[39] evidence,[40] and instructions,[41] are governed by the ordinary rules.

§ 3. *Telegraph messages. A. Duty and care.*[42]—Companies must exercise at least ordinary care in their efforts to promptly transmit and deliver messages;[43] and under statutes constituting telegraph companies common carriers, they are bound by the same obligations and restrictions as are placed around corporations of that character.[44] In Oklahoma they are held to the utmost diligence.[45] The duty of a company may also be affected by special agreement, since an operator has implied and apparent authority to contract with the sender to rush a message and deliver it as soon as possible,[46] but a mere promise by the agent that he will do all he can to get a message through is not a special contract to deliver in time.[47] Liability for negligence cannot be avoided by stipulations on the telegram blank.[48] The company may fix office hours provided they are reasonable.[49]

A company is not liable to persons of whose interest it has no notice,[50] and to

299. Negligence of company in permitting a wire to fall and become charged held proximate cause of death, though third person had picked wire up and wrapped it around a post. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879.

38. A driver on a much travelled highway is not required to look up and see if a wire is in reach of the top of his vehicle. Jacks v. Reeves [Ark.] 95 S. W. 781. Not negligence for 14 year old girl accompanied by two grown women to drive a gentle horse on a public highway in broad daylight. Id. Plaintiff's action in jumping from vehicle on its being caught by a wire could not be weighed in scales. Id. Plaintiff held not guilty of contributory negligence as matter of law in running a thresher on a road over which defendant maintained a wire in a sagging condition. Chant v. Clinton Tel. Co. [Wis.] 110 N. W. 423.

39. Complaint for injury to pedestrian by charged wire left sagging by telephone company while stretching its wires along a public street held sufficient against general demurrer. Southern Bell Tel. & T. Co. v. Howell, 124 Ga. 1050, 53 S. E. 577. Allegation of negligence in permitting a wire to fall and remain down held to include a charge of negligence in manner of maintaining it and in permitting it to remain wrapped around a post by a third person. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879.

40. In suit for death from live wire, expert could testify that there is a method by which upper wires may be prevented from falling on lower ones and become charged, as preliminary to testimony as to the practicability of such methods. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879.

41. In suit for injuries from a line maintained over a highway, instruction that plaintiff must show that defendant was negligent, though correct in the abstract, was misleading as ignoring the doctrine of res ipsa loquitur. Jacks v. Reeves [Ark.] 95 S. W. 781. Where evidence showed that falling of a wire on another charged wire and wrapping of fallen wire around a post by a third person were consequences which defendant was bound to have foreseen, held not error to refuse instruction based on likelihood of defendant having foreseen such consequences. Citizens' Tel. Co. v. Thomas [Tex. Civ. App.] 99 S. W. 879. In suit for death from live wire, held not error to charge that defendant was presumed to have such knowledge of condition of its line as it could have had by exercise of ordinary prudence. Id. Not error to refuse to submit question of negligence of defendant's employes in maintaining a line as distinguished from negligence of defendant itself, where there was no evidence of negligence on part of employes. Id.

42. See 6 C. L. 1669.

43. Western Union Tel. Co. v. McDonald [Tex. Civ. App.] 15 Tex. Ct. Rep. 136, 95 S. W. 691. Petition stating that defendant negligently changed a message so as to announce the death of his mother instead of the death of his father, and delayed a reply message by reason of which plaintiff received another message announcing the burial of his father and was thus led to believe that both his parents were dead and suffered mental anguish and made an extra trip, held to state a cause of action. Taylor v. Western Union Tel. Co. [Ky.] 101 S. W. 969. Second message did not as matter of law appraise plaintiff of mistake in the first. Id. Evidence that a message was sent at 1 p. m. to a point in the same state and not delivered there until 8 a. m. next day made out a prima facie case. Alexander v. Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657.

44. Wilson's Rev. & Ann. St. 1903, § 700. Blackwell Mill. & El. Co. v. Western Union Tel. Co. [Okl.] 89 P. 235.

45. Blackwell Mill. & El. Co. v. Western Union Tel. Co. [Okl.] 89 P. 235.

46. Western Union Tel. Co. v. Cook [Tex. Civ. App.] 99 S. W. 1131.

47. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222.

48. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38. That company would not be liable beyond cost of unrepeated message. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495. Contract against liability unless messages were repeated held unreasonable and contrary to public policy where there was unreasonable delay in delivery. Blackwell Mill. & Elevator Co. v. Western Union Tel. Co. [Okl.] 89 P. 235.

49. Carter v. Western Union Tel. Co. 141 N. C. 374, 54 S. E. 274.

50. Face of telegram and other evidence held not to show a wife's interest in a message sent by another to her husband

establish a liability the person who agreed to transmit the message must have been defendant's agent,[51] but one who occupies the company's office and uses the telegraph instruments will be held as the company's agent when a telegram is received by him;[52] and a stipulation making an initial company the agent of the sender to forward the mesage over the lines of other companies does not preclude the sender from showing that the initial company or its agent was in fact the agent of a connecting company.[53] When liability is created by statute, it is no defense that the message was sent on Sunday.[54]

Transmission.[55]—A company owes a public duty to receive and transmit all proper messages presented to it with the necessary compensation.[56] If it receives a telegram for a point beyond its line, it must transmit it with reasonable promptness to the end of its own line and deliver it to the connecting line,[57] and will not be heard to excuse a failure to do so on the ground that the connecting line might have been negligent.[58] It should not accept a message which is libelous on its face, and is liable for the acts of its agents in this regard,[59] but malice and publication must be shown as in other cases of libel.[60] A statute requiring all telegraph companies doing business in the state to accept and transmit all messages tendered does not require a company doing only interstate business to acept an intrastate message.[61] Where a message is refused on one ground, the refusal cannot ordinarily be justified on a different ground.[62] The sender has the absolute right to select connecting routes.[63]

A message must be transmitted with reasonable promptness,[64] especially where the company has notice of its urgency either from its face or otherwise.[65] It is no

announcing death of a baby. Poteet v. Western Union Tel. Co., 126 Ga. 621, 55 S. E. 113.

51. Evidence insufficient to show that person to whom a message was delivered by telephone for transmission was defendant's agent. Planter's Cotton Oil Co. v. Western Union Tel. Co., 126 a. 621, 55 S. E. 495.

52. Delay in delivery. Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274. In suit for delay in transmission, no defense that message was delivered to station clerk who informed sender that operator would not be there for an hour, where clerk was assistant to agent who was also operator and was in charge of office and received message and toll. Arkansas & L. R. Co. v. Lee [Ark.] 96 S. W. 148.

53. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633. Held a question for the jury under the evidence. Id.

54. Suit not being on contract but under Kirby's Dig. § 7947, relating to mental anguish. Arkansas & L. R. Co. v. Lee [Ark.] 96 S. W. 148.

55. See 6 C. L. 1670.

56. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686; Western Union Tel. Co. v. McDonald [Tex. Civ. App.] 15 Tex. Ct. Rep. 136, 95 S. W. 691.

57, 58. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349. 93 S. W. 686.

59. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F. 367.

60. No malice shown where message was handled as a mater of routine and no publication by mere making of letter-press copy. Western Union Tel. Co. v. Cashman [C. C. A.] 149 F. 367. On question of damages, court should have instructed as requested by defendant that jury should consider that defendant's agents were liable under the statute for divulging the contents of a message. Id.

61. Could not be said that another statute imposing conditions to right of a foreign corporation to do intrastate business would be an attempt to regulate interstate commerce. Western Union Tel. Co. v. State [Ark.] 101 S. W. 748.

62. Where a telegram was refused because the agent was "afraid" to send it, refusal could not be justified on ground that message was not written on a regular blank. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686.

63. Western Union Tel. Co. v. McDonald [Tex. Civ. App.] 15 Tex. Ct. Rep. 136, 95 S. W. 691.

64. Negligence shown where operator came to his office about two hours late on Sunday and it took nearly an hour to transmit message from an intermediate office, though it required only a minute. Arkansas & L. R. Co. v. Lee [Ark.] 96 S. W. 148. Record held to show no evidence of delay in transmission, there being no evidence as to time when defendant received message. Western Union Tel. Co. v. Cox, 29 Ky. L. R. 941, 96 S. W. 594. Held for jury to determine whether defendant was negligent in transmitting a message accepting offer to sell realty and whether it cost plaintiff the loss of the contract. Lucas v. Western Union Tel. Co. [Iowa] 109 N. W. 191.

65. Where message showed urgency and agent was also advised. Western Union Tel.

defense that the addressee was not at home at the time the message would have reached its destination had it been promptly transmitted,[66] and the fact that the company had surrendered its wires for the use of a railway company is no excuse for delay in transmitting a death message in the absence of any emergency especially where the sender was not apprised of it.[67] Whether a delay was due to causes beyond the company's control, may be a question for the jury.[68] Due care and skill must be exercised also in transmitting messages correctly,[69] and companies are liable for negligent mistakes causing delay.[70]

Delivery.[71]—It is the duty of a telegraph company to exercise ordinary care[72] to deliver messages within a reasonable time,[73] especially in the case of urgent messages,[74] and delay is not excused because of the operator's conflicting duties as railroad agent.[75] Failure to deliver within a reasonable time raises a presumption of negligence.[76] What is a reasonable time is ordinarily a question for the jury under all the circumstances.[77] If a message urgent on its face cannot be immediately delivered, it is the duty of the receiving agent to notify the sending agent that such is the case.[78] Where a message is received by a company out of office hours, it is not bound to deliver it before the next succeeding office hours,[79] but if a receiving agent accepts an urgent message out of office hours without notifying the sender that it cannot be delivered, the fact that it was received out of office hours is not an excuse for delay.[80] A company is required to use reasonable diligence to deliver to addressees within the territory embraced by the delivery limits of its receiving office,[81] hence the fact that a message is addressed to a particular place within such limits does not conclusively exonerate the company from delivering at other places therein.[82] Where the receiving office already has the sendee's address and can make delivery without difficulty, failure to do so is actionable negligence, though the sender, as agent of the sendee, fails to furnish a better address upon being wired by the receiving office to do so.[83] If the real name of the sender and his name as it appears on the message are idem sonans, the company must exercise ordinary care to deliver to the

Co. v. McClelland [Ind. App.] 78 N. E. 672. Delay of two hours held unreasonable where message was urgent. Id.

66. Question whether sendee would have received message in time held for jury. Western Union Tel. Co. v. Cook [Tex. Civ. App.] 99 S. W. 1131.

67. Where defendant retained only one wire which had to be put out of use. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974.

68. Whether due to natural causes. Western Union Tel. Co. v. McGowan [Tex. Civ. App.] 16 Tex. Ct. Rep. 117, 93 S. W. 710.

69. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495.

70. Blackwell Mill. & El. Co. v. Western Union Tel. Co. [Okl.] 89 P. 235.

71. See 6 C. L. 1671.

72. Question for jury whether defendant exercised ordinary care in attempting to deliver a message. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760.

73. Failure to deliver for twenty-seven hours held to justify jury in inferring unreasonable delay. Eaker v. Western Union Tel. Co. [S. C.] 55 S. E. 129. Where message reached receiving office at 8:55 but was not delivered a mile away until 11:30 delay held prima facie negligent. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363. Evidence sufficient to sustain verdict for plaintiff for nondelivery of a telegram. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760.

74. Wife's telegram to husband "Sick with grippe—not dangerous—want you to come," did not show that it was not urgent so that defendant could take leisure. Gerock v. Western Union Tel. Co., 142 N. C. 22, 54 S. E. 782.

75. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363.

76. Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

77. Whether a delay of twelve minutes in delivery of a message was negligent should have been left to jury. Kernodle v. Western Union Tel. Co., 141 N. C. 436, 54 S. E. 423.

78. Doctor's call received at night. Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

79. Roberts v. Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985.

80. No effort to deliver until next morning. Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

81. Klopf v. Western Union Tel. Co. [Tex.] 101 S. W. 1072.

82. Klopf v. Western Union Tel. Co. [Tex.] 101 S. W. 1072, rvg. [Tex. Civ. App.] 97 S. W. 829. Held for jury whether due diligence was used to find addressees where message was addressed to an independent suburb of the city of defendant's office but addressees resided between the city and the suburb but within delivery limits. Id.

83. Western Union Tel. Co. v. Krichbaum [Ala.] 41 So. 16.

party intended.[84] A mistake in the initials of the sendee is no defense unless the mistake contributed to failure to deliver.[85] Whether a message was addressed to one's residence or to his office is a question of fact.[86] Where delivery is made by mail, the company is responsible for changing the name of the addressee.[87] A contract to deliver "towards" a certain place is too indefinite on which to base an action.[88]

The parties will be deemed to have contracted with reference to reasonable free delivery rules,[89] but if it is found that a vendee lives outside of free delivery limits, it is the duty of the company to demand additional compensation before it can refuse to deliver the message on that account,[90] provided the vendee lives within reasonable limits.[91] Though a company need not surrender a message unless extra charges are first paid,[92] it should not delay a delivery by wiring back to the sending office for such charges where the sendee lives near by, though out of free delivery limits;[93] and if the sender is told by the operator that there will be no extra charges for delivery, it is negligence to fail to deliver promptly because extra charges are not prepaid.[94] That an addressee lived beyond delivery limits is no excuse for non-delivery if by ordinary diligence the message could have been delivered within such limits,[95] or unless failure to deliver was occasioned thereby.[96] A statute requiring delivery of dispatches by messenger to persons residing within certain limits does not excuse failure to make any delivery at all to a well known conductor of a train in whose care a message was sent and to whom delivery could have been made without inconvenience, though neither the conductor nor the addressee resided within such limits.[97] Delivery must be made to the sendee if he can be found by the exercise of reasonable diligence,[98] or to his authorized agent if personal delivery cannot be made.[99]

Delivery to others for addressee.[1]—When a telegram is delivered for tranmission by an agent of the sender, the company is authorized to deliver a reply thereto to such agent.[2] If without direction the company delivers a message to a third person, such person becomes the company's agent.[3] Delivery to an eleven year old son of the sendee at play near home is as a matter of law no delivery.[4]

84. "Wafford" and "Warford." Western Union Tel. Co. v. Wafford [Tex. Civ. App.] 16 Tex. Ct. Rep. 984, 97 S. W. 324.

85. Arkansas & L. R. Co. v. Stronde [Ark.] 100 S. W. 760.

86. Held for jury whether a telegram was addressed to plaintiff's residence or to his office. Western Union Tel. Co. v. Lehman [Md.] 66 A. 266.

87. Evidence sufficient to justify finding that another company was not responsible for changing addressee's name in mailing the message. Western Union Tel. Co. v. Salter [Tex. Civ. App.] 15 Tex. Ct. Rep. 362, 95 S. W. 549.

88. Contract to deliver to sendee "towards Houston Heights" too indefinite on which to base action for tardy delivery. Klopf v. Western Union Tel. Co. [Tex. Civ. App.] 97 S. W. 829.

89. Rules on company's blanks requiring extra compensation for delivery beyond free limits. Western Union Tel. Co. v. Ayers [Tex. Civ. App.] 14 Tex. Ct. Rep. 904, 93 S. W. 199.

90. Should demand additional compensation from sender. Campbell v. Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571.

91. A contract providing for free delivery within certain limits and an extra charge beyond them requires the company to deliver to one outside free delivery limits if upon being notified the sender pays the extra charge, provided the sendee lives within reasonable limits. Campbell v. Western Union Tel. Co., 74 S. C. 300, 54 S. E. 571.

92. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363.

93. Especially if the sender was informed that no extra charge would be made. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363.

94. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363.

95, 96. Arkansas & L. R. Co. v. Stronde [Ark.] 100 S. W. 760.

97. Where delivery could have been made upon arrival of train at station, Act 1852, § 3, did not apply. Western Union Tel. Co. v. Sefrit [Ind. App.] 78 N. E. 638.

98. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405.

99. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405. See next paragraph.

1. See 6 C. L. 1672.

2. Not liable for agent's failure to deliver to principal. Murray v. Western Union Tel. Co., 74 S. C. 64, 54 S. E. 209.

3. To addressee's son passing by on wheel. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363.

4. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405.

Spurious messages.[5]

(§ 3) *B. Injury and damages. Conflict of laws.*[6]—The law of the place of contract governs if the action sounds in contract,[7] and that of the state where the tortious delay occurred where the action is founded on a statutory duty broken.[8] In Kentucky the breach is held to have occurred in the state where delivery is delayed, though the cause of the delay is the mistake of an agent in another state.[9]

General and special damages.[10]—Plaintiff must show that he suffered damages,[11] his damage or injury must have proximately resulted from the negligence complained of,[12] and must have been reasonably within the contemplation of the par-

5. See 6 C. L. 1672.

6. See 6 C. L. 1673.

7. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. Damages for mental anguish not being recoverable in Virginia, from which message was sent, such damages could not be recovered in a suit in North Carolina for failure to deliver in the latter state. Johnson v. Western Union Tel. Co. [N. C.] 57 S. E. 122.

8. Kirby's Dig. §. 7947, making companies liable for mental anguish for negligence in "receiving, transmitting, or delivering" messages, held applicable where message was received in Arkansas for a point in Louisiana and there was delay in transmission in Arkansas. Arkansas & L. R. Co. v. Lee [Ark.] 96 S. W. 148. An addressee in Arkansas may recover for mental anguish though no such recovery is permitted in the state whence the message was sent. Gentle v. Western Union Tel. Co. [Ark.] 100 S. W. 742. If mistake in transmission occurs in initial state, recovery may be had in that state without regard to the law of the state of destination. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38.

9. Liability for delay in delivering a message sent from Indiana into Kentucky is governed by the law of Kentucky, though the mistake which caused the delay was made by an agent in Indiana. Western Union Tel. Co. v. Lacer, 29 Ky. L. R. 379, 93 S. W. 34.

10. See 6 C. L. 1673.

11. Delay in transmitting answer to telegram asking permission to make a bid on goods not actionable where sender had agreed only to advance plaintiff certain money on conditions which it did not appear plaintiff could have complied with. Bird v. Western Union Tel. Co. [S. C.] 56 S. E. 973. Where plaintiff was required to make a useless railroad trip, evidence of the regular fare, cost of sleeping car, etc., was inadmissible, plaintiff being entitled only to his actual expense. Salinger v. Western Union Tel. Co. [Iowa] 111 N. W. 820. Only nominal damages can be recovered for failure to deliver an acceptance of an offer to sell unless the acceptance would have created a contract (Cherokee Tanning Extract Co. v. Western Union Tel. Co. [N. C.] 55 S. E. 777), but if failure to deliver a telegram is the direct and proximate cause of delay in postponing a purchase whereby one is compelled later to pay an advanced price, damages are recoverable though there is no evidence that the offer would have been accepted (Lathan v. Western Union Tel. Co. [S. C.] 55 S. E. 134). Such evidence held admissible as showing intent and motive and as explanatory of delay. Id. Evidence held to show that a principal had sustained a loss of twenty-five cents per barrel on rice purchased by his agent above the market price because of delay in delivering to agent a telegram advising him to pay only $3 per barrel. Western Union Tel. Co. v. Houston Rice Mill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 652, 93 S. W. 1084.

12. Such damages are recoverable as proximately flowed from the negligence complained of. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495. Question whether plaintiff's exposure was proximate result of defendant's failure to deliver a telegram held for jury where operator was told plaintiff lived in country and wanted to go home, and telegram contemplated use of horse and buggy. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

Negligence held proximate cause: Loss due to sale on lower market held proximate result of incorrect transmission. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495. Where offer to sell was refused because of mistake in price in telegram, loss of sale was not too remote a consequence. Thorp v. Western Union Tel. Co., 118 Mo. App. 398, 94 S. W. 554. Failure to receive a message for transmission to a connecting line held proximate cause of injury where company did not know that a previous message had not been delivered and a subsequent message was duly received by sendee. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686.

Held not proximate cause: Though company made a mistake in plaintiff's name in an order for "corn," plaintiff could not recover for failure to receive "corn whiskey" in absence of proof that sendee was deceived by the mistake, and understood that "corn" meant "corn whiskey." Newsome v. Western Union Tel. Co. [N. C.] 56 S. E. 863. Proof that plaintiff had previously purchased whiskey on credit from sendee insufficient. Id. Plaintiff's damages from selling soda in reliance on erroneous telegram quoting price held too remote. Champion Chem. Works v. Postal Telegraph-Cable Co., 123 Ill. App. 20. Probable profits on resale of goods which plaintiff claimed he could have bought held too conjectural. Bird v. Western Union Tel. Co. [S. C.] 56 S. E. 973. Where a proposal to buy was wrongfully transmitted, plaintiff could not recover on basis of a contract which might have been concluded had the offer been correctly transmitted, nor could he recover commissions which would have accrued in such event. Bass v. Postal Telegraph-Cable Co. [Ga.] 56 S. E. 465. Though useless condition of lines was due to defendant's negligence, or even if defendant's agent failed

ties.[13] Notice of sickness charges the company with notice of the character of the sickness.[14] One must use reasonable care to avert or minimize the harmful consequences of the wrong.[15] Delay in the delivery of a mere advisory or cautionary commercial telegram may be actionable where it is shown that it would have been acted upon had it been promptly received.[16] Tolls are recoverable for a negligent delay though plaintiff may not be entitled to other damages,[17] but they cannot be recovered unless negligence is shown.[18]

Mental anguish.[19]—In a majority of states damages are not recoverable for mental anguish unaccompanied by physical injury,[20] and a statute rendering companies liable for delay to any person injured does not alter the rule.[21] The doc-

to advise plaintiff of such condition, plaintiff could not recover if he had routed the message over a connecting telephone line, which also was useless until it was too late to send the message. Western Union Tel. Co. v. McDonald [Tex. Civ. App.] 15 Tex. Ct. Rep. 136, 95 S. W. 691. Agent's silence as to condition of wires held not actionable unless sender was thereby prevented from taking more effective means to forward message. Id. Recovery not justified for expense of making an extra trip where it was not shown that such trip could have been prevented if agent had notified sender that message could not be delivered, as it was claimed the agent had promised to do. Johnson v. Western Union Tel. Co. [S. C.] 54 S. E. 826. Evidence not sufficient to show that plaintiff's wife was quarantined in a town for several weeks as a result of failure to transmit a telegram with reasonable dispatch. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222. One may not recover because he did not arrive at a certain point until a certain time unless but for delay in delivering the telegram he could have reached it earlier. Kernodle v. Western Union Tel. Co., 141 N. C. 436, 54 S. E. 423. See next paragraph.

13. Hancock v. Western Union Tel. Co., 142 N. C. 163, 55 S. E. 82. Such damages are recoverable as directly resulted from the breach and were within contemplation of the parties. Western Union Tel. Co. v. Lehman [Md.] 66 A. 266; Western Union Tel. Co. v. Pratt [Okl.] 89 P. 237. Such as were contemplated or should have been contemplated as likely to follow from negligence. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495. Nothing to notify agent that **an extra trip** was to be apprehended from failure to deliver death message promptly. Johnson v. Western Union Tel. Co. [S. C.] 54 S. E. 826. No recovery for **bodily pain** from being forced to travel while sick, it not being alleged or shown by telegram that defendant had notice of plaintiff's condition. Taylor v. Western Union Tel. Co. [Ky.] 101 S. W. 969. Notice that plaintiff sent for doctor for his wife shows her suffering to have been contemplated without notice that sender was plaintiff's agent. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1088. Plaintiff's **hardship and exposure** due to walking eight miles not contemplated. Key v. Western Union Tel. Co. [S. C.] 56 S. E. 962. Could not have been contemplated that plaintiff would suffer cold and remain in a livery stable because of failure to deliver message notifying his father to meet him at a station (Jones v. Western Union Tel. Co. [S. C.] 55 S. E. 318), and plaintiff could recover only cost of message and the conveyance which he was compelled to hire (Id.). Where a telegram was not all cipher but there was sufficient on its face to show that it affected **commercial matters** of importance, company was liable for failure to deliver in reasonable time. Western Union Tel. Co. v. Houston Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 652, 93 S. W. 1084. Loss due to sale on lower market was or should have been contemplated from incorrect transmission. Western Union Tel. Co. v. Milton [Fla.] 43 So. 495. Loss of a cherry crop in another state could not be shown in suit for failure to correctly transmit this message: "High water, expense heavy, send ten dollars, funds low," no explanation having been made. Western Union Tel. Co. v. Pratt [Okl.] 89 P. 237. Damages for delay in delivering notification of shipment of cattle held to have been within contemplation of parties and plaintiff was not limited to nominal damages. Western Union Tel. Co. v. Lehman [Md.] 66 A. 266.

14. Notice that a wife was ill charged company that illness was confinement in child-birth. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633.

15. One must use reasonable care to avert or minimize the harmful consequences. Failure to deliver message asking father to meet plaintiff at a station. Jones v. Western Union Tel. Co. [S. C.] 55 S. E. 318. Where plaintiff's wife was exposed to smallpox by failure to deliver a message of warning, plaintiff could recover for mental anguish only up to time when with reasonable diligence he could have removed his wife from the danger. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222.

16. Cautionary message as to price agent should pay for rice. Western Union Tel. Co. v. Houston Rice Mill Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 652, 93 S. W. 1084.

17. Where prompt delivery would not have prevented a burial. Klopf v. Western Union Tel. Co. [Tex. Civ. App.] 97 S. W. 829.

18. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062.

19. See 6 C. L. 1674. See special article 6 C. L. 1678.

20. Delay in delivering death message. Rowan v. Western Union Tel. Co., 149 F. 550.

21. Code Iowa 1897, § 2163. Rowan v. Western Union Tel. Co., 149 F. 550.

trine is, however, recognized in several states.[22] In Alabama one may recover for mental anguish if the action is on contract, and this though plaintiff's actual damages are nominal only;[23] but if the action is in tort, the anguish must be accompanied by injury to body or estate.[24] The relationship of father and child,[25] brother and sister,[26] or grandfather and grandson,[27] will sustain a recovery; but mental anguish is not presumed from the plaintiff's being prevented from attending the funeral of a brother-in-law.[28] Recovery may be had not only where the telegram announces the sickness or death of a near relative, but in all cases where mental suffering may be reasonably anticipated as the natural result of breach of the contract.[29]

In all cases it must appear that mental suffering actually existed[30] and was the direct and proximate result of defendant's negligence.[31] Hence one may not recover for not being present at a death bed or at a funeral unless he not only could but would have reached there but for such negligence.[32] Neither can there be a recovery for a mere continuation of mental suffering already existing,[33] though it

22. See special article 6 C. L. 1678. Where sendee could not attend a funeral because of a delay of three hours in delivering a telegram which could have been delivered in twenty minutes, the company was liable. Mott v. Western Union Tel. Co., 142 N. C. 532, 55 S. E. 363.

23. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850.

24. Loss of the toll was damage to estate. Western Union Tel. Co. v. Kirchbaum [Ala.] 41 So. 16.

25. Father entitled to recover for not being with child before it became unconscious, though child was only ten months old, where it was unusually intelligent and manifested a great affection for its father. Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 100 S. W. 977.

26. Telegram announcing sickness of brother. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117.

27. Failure to deliver message informing grandson that grandfather was dying. Western Union Tel. Co. v. Prevatt [Ala.] 43 So. 106.

28. Alexander v. Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657.

29. Daughter compelled to remain at railroad station from midnight till morning because of nondelivery of message announcing her coming could recover for mental anguish resulting therefrom. Postal Tel. Cable Co. v. Terrell, 30 Ky. L. R. 1023, 100 S. W. 292. Plaintiff held entitled to recover for mental anguish due to failure of any one to meet him at a station, though kinship of sendee would not alone sustain such recovery where he was deprived of the assistance of friends as well as their presence on his arrival with the body of a deceased child. Western Union Tel. Co. v. Long [Ala.] 41 So. 965.

30. Question whether stepmother suffered mental anguish from failure to attend funeral of stepson held for the jury under the evidence. Harrison v. Western Union Tel. Co., [N. C.] 55 S. E. 435. Plaintiff's testimony that she would have had no mental anguish if she could have seen her sister before she died did not show that she did not suffer mental anguish when nondelivery of telegram prevented her from attending the funeral. Roberts v. Western Union Tel. Co. [S. C.] 56 S. E. 960

31. Evidence held to sustain finding that had message been promptly transmitted and delivered plaintiff would have reached his son prior to his death. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. Where plaintiff's evidence as to her ability to reach her sister before she died, if a telegram had been promptly delivered, was conflicting, the question was for the jury. Roberts v. Western Union Tel. Co. [S. C.] 56 S. E. 960. Nonsuit properly refused where there was evidence as to when plaintiff could have reached dying son if message had been properly transmitted. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38. If a telegram announcing illness is received at the company's office out of office hours and death ensues before succeeding office hours, the company is not liable for mental anguish due to not being with deceased before his death. Roberts v. Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985. There could be no recovery for delay in delivery where such delay did not prevent plaintiff from taking the first train that left after receipt of message to place of father's death. Western Union Tel. Co. v. Cox. 29 Ky. L. R. 941, 96 S. W. 594. Assuming negligence in failure to notify sender that message to a husband from his wife announcing death of a child was not delivered, such negligence could not support the action where such notice would not have availed. Poteet v. Western Union Tel. Co., 74 S. C. 491, 55 S. E. 113. Evidence insufficient to show that suffering of a wife from absence of husband on death of a child was caused by defendant's negligence. Id. No recovery for delay in delivery where message, even if delivered promptly would not have prevented a burial. Klopf v. Western Union Tel. Co. [Tex. Civ. App.] 97 S. W. 829.

32. Funeral. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 15 Tex. Ct. Rep. 491. 92 S. W. 1036. Defendant held liable for delay only in case plaintiff not only could but would have reached his wife sooner but for the delay. Kernodle v. Western Union Tel. Co., 141 N. C. 436, 54 S. E. 423. Instruction assuming that plaintiff would have reached his wife sooner but for delay in delivering a telegram and submitting only question of whether he could held erroneous. Id.

33. Error to refuse charge that plaintiff

seems that this rule has not always been consistently adhered to.[34] The anguish must be such also as must be presumed to have been fairly within the contemplation of the parties,[35] in view of the notice which the company had when it accepted the telegram.[36] From this it follows that one not mentioned in a telegram or whose interest therein is not communicated to the company cannot recover substantial damages for mental anguish;[37] and one who is deprived of the privilege of attending at the death or funeral of a relative cannot ordinarily recover for not being

could not recover if defendant's negligence merely caused continuation of anguish of plaintiff's wife because of his absence. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633.

34. Note: Defendant failed to deliver to plaintiff a telegram which would have allayed his anxiety over the whereabouts of his wife and children whom he had expected upon a certain train. Held (one judge dissenting), that the defendant was liable in damages for the plaintiff's mental suffering. Dayvis v. Western Union Tel. Co., 139 N. C. 79, 51 S. E. 898. This case helps to remove an objection that has often been interposed to the Texas rule, that it is not consistently applied by its adherents. 1 Mich. L. R. 525. The dissenting opinion in this case relied on Sparkman v. Western Union Tel. Co., 130 N. C. 447, 41 S. E. 881, which at least suggested that there could be no substantial recovery for a culpable failure to deliver a telegram which was meant merely to relieve mental anguish then already existing. Texas had also held that a continuation of mental anguish could not be measured; it was speculative as compared with mental suffering originally caused by failure to deliver a telegram. Rowell v. Western Union Tel. Co., 75 Tex. 26, 12 S. W. 534; Johnson v. Same, 14 Tex. Civ. App. 536, 38 S. W. 64. This is more than a restriction on the original doctrine, it is a contradiction of it. Sutherland Damages (3rd Ed.) § 975. For damages have been given again and again by the Texas courts for the negligent failure of a telegraph company to relieve mental anxiety about the serious illness or the death of a relative. Western Union Tel. Co. v. Cavin, 30 Tex. Civ. App. 152, 70 S. W. 229. And in Same v. Womack, 9 Tex. Civ. App. 607, damages were recovered by a father for the suffering he underwent, and which had gone unrelieved by a telegram that would have informed him of his son's whereabouts, facts similar to those in the present case. For North Carolina then, the present case restores the Texas rule in its full extent.—See 4 Mich. L. R. 245 76a.

35. Western Union Tel. Co. v. Hogue [Ark.] 94 S. W. 924. Damages recoverable only if company had notice of special circumstances causing the anguish. Western Union Tel. Co. v. Raines [Ark.] 94 S. W. 700. Where wife announced death of a daughter to husband in a foreign state, company was charged with knowledge that arrangements could have been made for keeping the body until the husband's arrival. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Where message announced serious illness of a son and requested plaintiff to come, the length of time the body was kept after death and failure of father to accompany the body was in contemplation of the parties. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38.

36. Telegram to third person "Tell M. B. to come at once. Her brother, Charley is dead," held to inform company of importance of prompt delivery. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 15 Tex. Ct. Rep. 491, 92 S. W. 1036. Mental anguish damages recoverable where agent was told of plaintiff's wish to get home that night so as to be with family. Toole v. Western Union Tel. Co. [S. C.] 57 S. E. 117. Telegram notifying plaintiff of death of her stepson and hour of funeral held not to notify merely of hour of interment, hence she was entitled to damages for not being with the remains before as well as at the interment. Harrison v. Western Union Tel. Co. [N. C.] 55 S. E. 435. Telegram to a doctor, "Operate tomorrow. Tell S. not home till Thursday," and information to agent that message was important, held not notice to company that physician's presence was desired at operation and that in his absence, operation would be postponed. Western Union Tel. Co. v. Raines [Ark.] 94 S. W. 700. Telegram that sender would arrive on evening train not notice that parties were to be married so as to justify recovery for mental suffering by sendee because message was not delivered. Western Union Tel. Co. v. Hogue [Ark.] 94 S. W. 924. Where telegram charged company with notice that plaintiff's wife was ill in child-birth, plaintiff could not recover for mental anguish of himself or wife resulting from inability to be present at burial of the infant (Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633.), nor at its death unless death occured during parturition (Id.). In suit for delay in delivering a message announcing death of a son, evidence that trainmen left corpse on a platform in the rain was improper. Hancock v. Western Union Tel. Co., 142 N. C. 163, 55 S. E. 82. Where defendant failed to deliver a telegram intended to prevent plaintiff's wife from visiting in a town where there was small-pox, evidence that the supply of food for the baby was enough to last only one day was inadmissible to show plaintiff's mental anguish, there being nothing to connect the baby with the telegram. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222. Recovery could not be had for failure to attend a funeral at a place different from that from which the message was sent, telegram containing no reference to such place. Western Union Tel. Co. v. Ayers [Tex. Civ. App.] 14 Tex. Ct. Rep. 904, 93 S. W. 199.

37. Evidence insufficient to charge defendant with knowledge that a son sent a message for his father or that the father might suffer mental anguish if telegram was delayed. Helms v. Western Union Tel. Co. [N. C.] 55 S. E. 831.

present to console other relatives.[38] Contributory negligence may also defeat the action.[39]

Only a fair recompense can be recovered for the anguish,[40] and the jury have no right to be guided by "their own feelings."[41] If a message is clearly for the benefit of two persons, the company is liable for the mental anguish of both.[42]

Exemplary damages[43] may be recovered for wanton or willful negligence,[44] but not otherwise.[45]

(§ 3) *C. Procedure.*[46]—The party who was to be served and who was damaged is authorized to sue,[47] but to justify a recovery in contract by an addressee, the sender must have acted as his agent or for his benefit.[48] A principal may maintain an action in his own name for breach of a contract made by his agent, though his name was not disclosed in sending the message.[49] In an action for delay in delivering a telegram, it is quite generally immaterial whether the form of the action is in contract or in tort.[50]

Stipulations requiring the presentation of claims within a reasonable number of days are valid and enforceable.[51] The operator will be held as the sender's

38. The mental anguish of plaintiff for not being with his mother at his father's funeral cannot be recovered for in the absence of notice to the company that it would probably result from delay. Western Union Tel. Co. v. Butler [Tex. Civ. App.] 99 S. W. 704. Plaintiff could not recover because he could not be present with other relatives at the funeral of his brother. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974. Plaintiff not entitled to recover for not being present to console his daughter at death of his wife. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760.

39. In suit for failure to deliver a message in time for addressee to attend a funeral, whether plaintiff was guilty of contributory negligence in not taking a certain train a few minutes after receipt of telegram held for court sitting as jury. Western Union Tel. Co. v. Salter [Tex. Civ. App.] 15 Tex. Ct. Rep. 362, 95 S. W. 549. Evidence held to justify court's finding that plaintiff was not negligent in failing to take a train on another road. Id. Failure of an addressee upon receiving a delayed message to send a telegram requesting postponment of a funeral until her arrival held not negligence as matter of law where death occurred ten miles away from any railroad. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541.

40. Shepard v. Western Union Tel. Co. [N. C.] 55 S. E. 704. Amount of damages for anxiety of sick wife because husband did not arrive in response to a telegram held for jury. Gerock v. Western Union Tel. Co., 142 N. C. 22, 54 S. E. 782.

Not excessive: $2,000 for absence from mother's funeral. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541. $500 for not being with wife at her death and funeral. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. $1,995 for father's being prevented from seeing son before latter's death. Western Union Tel. Co. v. Sloss [Tex. Civ. App.] 100 S. W. 354. $500 for absence of any one to meet plaintiff at train with corpse of child. Western Union Tel. Co. v. Long [Ala] 41 So. 965.

41. Instruction erroneous. Shepard v. Western Union Tel. Co. [N. C.] 55 S. E. 704.

42. Liable for suffering of both husband and wife due to refusal to accept message from wife to husband announcing death and sickness. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686.

43. See 6 C. L. 1675.

44. Jury could infer wantonness from company's failure to repeat an unintelligible message on opportunity therefor being given. Walker v. Western Union Tel. Co. [S. C.] 56 S.E. 38. Changing name of addressee of commercial telegram and delivering it to a competitor held evidence of reckless disregard of plaintiff's rights. Lathan v. Western Union Tel. Co. [S. C.] 55 S. E. 134. Punitive damages recoverable for unexplained delay of twenty-two hours. Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639. Agent's laughing and giving offensive answers when asked about nondelivery of messages justifies punitive damages. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

45. Murray v. Western Union Tel. Co., 74 S. C. 64, 54 S. E. 209. Punitive damages not awardable where agent in good faith made immediate efforts to locate plaintiff, though he telephoned the message instead of sending messenger. Key v. Western Union Tel. Co. [S. C.] 56 S. E. 962. Evidence held not to show willfulness in delaying transmission of a telegram. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222. No willfulness where message could not be sent part of the way by telephone because of defect in the line. Jones v. Western Union Tel. Co. [S. C.] 55 S. E. 318.

46. See 6 C. L. 1676.

47. Sendee could sue irrespective of whose agent sender was or whether latter had been instructed to send the message. Western Union Tel. Co. v. Cook [Tex. Civ. App.] 99 S. W. 1131.

48. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117.

49. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850.

50. Instruction that there was no evidence to show breach of contract held properly refused. Western Union Tel. Co. v. Lehman [Ind.] 66 A. 266.

51. Provision requiring presentation of

agent in writing down a message for him so as to bind him by stipulations on the back of the blank;[52] and where a sender or his agent writes and signs a message on a blank furnished by the company, he will be bound by stipulations on the back of the blank requiring claims to be presented within a specified time,[53] and it is no excuse that the sender's agent was unable to read or write, no fraud being shown.[54] The claim presented must set forth fairly the nature and extent of the demand.[55] A stipulation requiring presentation of "claims" for damages is not satisfied by notice of the negligence on which the claim is based,[56] and there can be no recovery for items not included in the claim.[57] A provision limiting the time within which claims may be presented may be waived,[58] and such waiver may rest in parol.[59] A waiver by a general agent of the company is binding on it, notwithstanding secret limitations on his authority in this regard.[60]

The usual rules of pleading apply.[61] Mere conclusions [62] or inferences [63] should be avoided, the complainant must allege that plaintiff actually suffered damages,[64] and must set out facts from which it will be presumed that defendant contemplated the injury sued for.[65] An allegation that plaintiff is a feme sole is sufficient to show

claims in writing within 60 days after filing of message. Thorp v. Western Union Tel. Co., 118 Mo. App. 398, 94 S. W. 554.

52. As to time for presentation of claims. Western Union Tel. Co. v. Prevatt [Ala.] 43 So. 106.

53, 54. Western Union Tel. Co. v. Prevatt [Ala.] 43 So. 106.

55. A letter to the company asking an explanation of the discourtesy of its agent is not a sufficient claim for damages for nondelivery of a message. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

56. Western Union Tel. Co. v. Moxley [Ark.] 98 S. W. 112.

57. Letter complaining of negligence and asking refund of cost of message and expense of long conversation held not to include mental anguish. Western Union Tel. Co. v. Moxley [Ark.] 98 S. W. 112.

58. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Notice of claim within 60 days not waived because in response to a letter of addressee the company inquired as to what point message was sent from, date, etc. Eaker v. Western Union Tel. Co. [S. C.] 55 S. E. 129. Certain letters held not a waiver of stipulation that claims must be presented within 60 days. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

59. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Evidence held to make question of waiver one for jury. Id.

60. Waiver of written presentation of claim. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117.

61. Complaint held to allege failure to transmit in order of time in which dispatch was received. Western Union Tel. Co. v. McClelland [Ind. App.] 78 N. E. 672. Did not proceed on inconsistent theories because it also alleged willfulness, discrimination, and negligence. Id. Petition held to show that defendant undertook to transmit a message. Western Union Tel. Co. v. Hidalgo [Tex. Civ. App.] 99 S. W. 426. Plaintiff not required to plead evidence to support allegation that had message been promptly transmitted she could and would have arrived in time to attend a funeral. Western Union Tel. Co. v. Rowe [Tex. Civ. App.] 16 Tex. Ct. Rep. 863, 98 S. W. 228. Charge that defendant's agent and operator agreed to rush message and liver it as soon as possible held to allege a contract in absence of special exception. Western Union Tel. Co. v. Cook [Tex. Civ. App.] 99 S. W. 1131. Petition held to raise issue of diligence in transmission and delivery of a message. Id. Variance between petition alleging direction of message in care of Mrs. R. and proof showing care of Mrs. R. held immaterial. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686.

62. If facts are alleged showing that a contract was made it is not necessary to also state that fact. Western Union Tel. Co. v. Rowe [Tex. Civ. App.] 16 Tex. Ct. Rep. 863, 98 S. W. 228. Replication that defendant waived the 60 day stipulations held a mere conclusion. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117.

63. Petition insufficient to show that plaintiff's wife would have left on a certain train to attend a funeral if message had been promptly delivered. Western Union Tel. Co. v. Bell [Tex. Civ. App.] 15 Tex. Ct. Rep. 491, 92 S. W. 1036.

64. Where plaintiff contracted to sell oats on the faith of an erroneous telegram representing that his offer to buy from another had been accepted, it was incumbent upon him to allege that he actually suffered damages because he was unable to fulfill his contract to sell. Bass v. Postal Telegraph Cable Co. [Ga.] 56 S. E. 465. Allegations insufficient. Id.

65. An allegation that the sender informed the agent of the circumstances requiring the speedy transmission of a message, though subject to special demurrer, is sufficient to admit proof of any information to the agent touching the urgency of the message. Western Union Tel. Co. v. Hidalgo [Tex. Civ. App.] 99 S. W. 426. Complaint for delay in delivering telegram to have a conveyance ready for arrival of a corpse held to sufficiently show that it might have been expected that failure to deliver telegram would result in body remaining at station. Carter v. Western Union Tel. Co., 73 S. C. 430, 53 S. E. 539. Petition stating that sender who was plaintiff's brother told agent that sickness of plaintiff's wife caused

that the damages are her separate property.[66] Defensive matter need not be set out in the complaint.[67]

The general principles of evidence determine its admissibility and sufficiency[68] on questions relating to agency,[69] notice to the company,[70] transmission,[71] delivery,[72]

him to send for the doctor held sufficient to show notice to company of suffering of plaintiff's wife without alleging that company had notice that sender was plaintiff's agent. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083.

66. Western Union Tel. Co. v. Rowe [Tex. Civ. App.] 16 Tex. Ct. Rep. 863, 98 S. W. 228.

67. Defensive terms or conditions on the telegram form should be brought forward by plea. Objection that sendee could not introduce in evidence the message received by him but only the one filed by sender. Collins v. Western Union Tel. Co. [Ala.] 41 So. 160. That defendant contracted to deliver only within certain limits is matter of defense. Complaint not defective for failure to allege that plaintiff was within free delivery limits. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405. That a funeral would have been postponed despite delay in transmission and delivery of a message was matter of defense to be established by defendant. Western Union Tel. Co. v. Cook [Tex. Civ. App.] 99 S. W. 1131.

68. Sending operator could read from transcript in a former trial to refresh memory and then state whether she had made a report of the message to the superintendent. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Error to allow company to read "relay copies" of message, since, if copies, better evidence was not accounted for, and if original records it was not shown by whom they were kept or that the records were kept correctly. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974. A company may not excuse a delay by self-serving statements. Could not show on cross-examination that agent had told plaintiff that telegram had been sent to another town by mistake. Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639. Physician suing for loss of telephone service could not testify that certain persons had told him they had tried to reach him by phone to secure his services. Cumberland Tel. & T. Co. v. Hicks [Miss.] 42 So. 285. Proof that plaintiff received a message at 9:25 A. M. did not contradict his allegation that telegram was not delivered until after 8 A. M. Alexander v. Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657. New trial for insufficiency of evidence in suit for failure to deliver a telegram as written held properly denied. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38.

69. A sender may not testify that he delivered a message to the company for the benefit of the addressee. Western Union Telegraph Co. v. Whitson [Ala.] 41 So. 405. Evidence that an eleven year old son had been mailing letters for sendee held inadmissible to show that he was the latter's agent to receive a telegram. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405. Testimony of plaintiff that she placed her claim for damages with F. and the latter's testimony that he orally presented the claim was admissible to show F's authority to represent plaintiff. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Evidence insufficient to show that person to whom message was telephoned was in fact defendant's agent. Planters' Cotton Oil Co. v. Western Union Tel. Co., 126 Ga. 621, 55 S. E. 495.

70. Notice to the agent of the purpose of a message may be shown by the terms of the message and by information given the agent by the sender. That a certain allegation in the complaint had been stricken did not prevent it. Jones v. Western Union Tel. Co. [S. C.] 55 S. E. 318. Where company knew a message was important, admission of evidence interpreting ciphers was not injurious to it. Western Union Tel. Co. v. McGown [Tex. Civ. App.] 16 Tex. Ct. Rep. 117, 93 S. W. 710.

71. Service marks and other evidence held admissible on issue of whether a message had been transmitted. St. Louis S. W. R. Co. v. White Sewing Mach. Co. [Ark.] 93 S. W. 58. Where a railway company contended that it had received no message to stop a shipment, evidence held sufficient to sustain jury's finding to the contrary. Id. Evidence as to absence of a book containing the name of the point of destination on a connecting line held not prejudicial to defendant where agent knew to what point on its own line to send messages intended for points in the state of destination. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686.

72. Not prejudicial error for plaintiff to show by several witnesses that they lived in town where message was received and that messenger made no inquiry of them about plaintiff. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Subsequent statement of messenger that he knew sendee but didn't know his initials held admissible. Id. Testimony of person with whom plaintiff boarded that plaintiff often received messages at her house held admissible to show that defendant had knowledge as to plaintiff's residence and might have delivered message within a reasonable time. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850. Question why witness did not deliver message to his brother held objectionable as seeking to bring out motive. Western Union Tel. Co. v. Long [Ala.] 41 So. 965. Where it was claimed that delay in delivering a telegram was caused by its being mailed to addressee by **erroneous name**, evidence held a sufficient foundation for testimony of postmaster that he received an envelope addressed "Slater" instead of "Salter" and returned it to sender. Western Union Tel. Co. v. Salter [Tex. Civ. App.] 15 Tex. Ct. Rep. 362, 95 S. W. 549. Sender could testify that if it had been reported to him that message could not be delivered because of a mistake in sendee's initials he would have had initials changed. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Evidence insufficient to rebut presumption of negligence from failure to deliver a message within a

mental anguish,[73] willfulness,[74] and damages.[75] In the absence of any claim of variance, the message received by the sendee is admissible in an action by him without accounting for the one filed at the sending office.[76] A physician who is called by telegram may testify that had he received the message he would have gone at once.[77] It is for plaintiff to show that a free delivery rule is unreasonable.[78] If the contract provided for delivery only within free limits, a sendee who sues for nondelivery has the burden on the issue of whether his residence or place of business was within such limits.[79] Defendant is not required to rebut a presumption of negligence by a preponderance of evidence.[80]

Instructions must be warranted by the law,[81] the issues,[82] and the evidence.[83]

reasonable time. Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

73. The presumption of mental anguish resulting from a negligent delay in delivering a telegram announcing the death of a close relative does not preclude direct proof of such anguish. Shepard v. Western Union Tel. Co. [N. C.] 55 S. E. 704. Plaintiff could testify that he suffered mental anguish on account of his failure to receive an expected telegram as to condition of his mother. Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639. Testimony that witness was in the house when plaintiff received the telegram, "and saw her crying," was admissible to show mental anguish. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850. Defendant having introduced evidence tending to rebut the presumption of affection existing between two brothers held error to exclude plaintiff's testimony as to grief he felt on hearing of his brother's burial and because he could not be present. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974. Court properly permitted plaintiff to be asked what was the cause of his failure to be with his wife at her death. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Questions on relations existing between plaintiff and deceased mother not prejudicial as leading. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541. Question whether plaintiff could have come to see her brother if telegram had been delivered between certain dates held not to call for conclusion or mental operation. Western Union Tel. Co. v. Heathcoat [Ala.] 43 So. 117. Not error to refuse new trial for absence of evidence to show that plaintiff's wife was quarantined because of delay in delivering a telegram where complaint was broad enough to sustain recovery for mental anguish for any exposure to smallpox. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222. In an action for being deprived of seeing a father before his death, evidence that the father knew that plaintiff had been called and had expressed his anxiety to see and talk with plaintiff and that this was communicated to plaintiff is admissible on the question of damages. Whitten v. Western Union Tel. Co., 141 N. C. 361, 54 S. E. 289. It was not competent, however, for plaintiff to testify what he was told on his arrival that his father had said. Id. In an action for being prevented from attending the funeral of a brother-in-law, plaintiff may testify as to the intimacy of the relation which existed between him and deceased. That they were like brothers and very closely associated. Alexander v. Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657.

74. Allegations and proof of other refusals to accept the same telegram for transmission held proper as showing a deliberate intent to refuse proper messages and disregard of sender's rights. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Agent's language in refusing a telegram held relevant and proper to show motive. Id.

75. Where answer alleged that plaintiff did not use all means in his power to reduce the damages, evidence that he tried to telephone but could not was admissible. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38. That before suit plaintiff had made a claim for only $25 for delay in delivering a message held admissible against interest subject to explanation. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083. In suit for failure to deliver message that plaintiff's wife was ill in childbirth, plaintiff could show who lived with the wife at the time, their age, and capacity to assist her. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633.

76. Collins v. Western Union Tel. Co. [Ala.] 41 So. 160.

77. Carter v. Western Union Tel. Co., 141 N. C. 374, 54 S. E. 274.

78. In absence of evidence rebutting prima facie reasonableness of free delivery rule held error to submit question of reasonableness of rule. Western Union Tel. Co. v. Ayers [Tex. Civ. App.] 14 Tex. Ct. Rep. 904, 93 S. W. 199.

79. It is for defendants, however, to set up the defense that such contract was made. Western Union Tel. Co. v. Whitson [Ala.] 41 So. 405.

80. Burden is on plaintiff to show negligence. Shepard v. Western Union Tel. Co. [N. C.] 55 S. E. 704.

81. Instruction that defendant was "compelled" to follow instructions of sender as to route held not to impose too high a duty. Western Union Tel. Co. v. McDonald [Tex. Civ. App.] 15 Tex. Ct. Rep. 136, 95 S. W. 691. Instruction that company was "bound to receive, transmit, and deliver," messages, and must use "due care, promptness, and diligence," in transmitting messages, was inaccurate as to company's duty relative to transmission and delivery. Id. Held proper to refuse instruction relieving of liability if defendant's wires were busy regardless of character of business. Western Union Tel. Co. v. Cook [Tex. Civ. App.] 99 S. W. 1131. Instruction held to properly eliminate allegation of complaint that plaintiff was prevented from consoling his daughter at the death of his wife. Arkansas & L. R. Co. v.

The application of other rules is shown in the note.[84] Where defendant would be liable if at all, only for plaintiff's mental anguish from failure to attend a funeral,

Stroude [Ark.] 100 S. W. 760. Instruction authorizing recovery by husband for mental anguish for not being with wife at her death and burial held proper. Id. Requested charge properly refused as ignoring defendant's knowledge of plaintiff's whereabouts and failure to impart it to messenger. Western Union Tel. Co. v. Manker [Ala.] 41 So. 850. There being evidence tending to show that plaintiff's wife suffered mental anguish prior to time plaintiff could have arrived, had message been promptly delivered, held error to refuse to instruct for defendant if defendant's negligence merely caused continuation of such mental suffering. Western Union Tel. Co. v. Craven [Tex. Civ. App.] 14 Tex. Ct. Rep. 819, 95 S. W. 633. Instruction that delivery of message to one person, which is addressed to another, would be a violation of the law, held properly refused, there being no question of willfully revealing the contents of a private telegram. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Charge that plaintiff's failure to use other means of communication would preclude a recovery held properly refused where no degree of diligence in using them could have entirely relieved him of anxiety. Willis v. Western Union Tel. Co., 73 S. C. 379, 53 S. E. 639.

82. Error to submit question of parol modification of stipulations on back of telegraph blank, such stipulations having nothing to do with issue. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083. Instruction that it was the duty of defendant to have competent and diligent servants not erroneous for not being responsive to complaint where it was admitted that defendant was a carrier of news over its telegraph lines. Harrison v. Western Union Tel. Co. [S. C.] 55 S. E. 450.

83. In suit for refusal to transmit a telegram charge that jury could consider for what it was worth, evidence as to the prompt delivery of a subsequent message did not give undue prominence to such evidence. Western Union Tel. Co. v. Simmons [Tex. Civ. App.] 15 Tex. Ct. Rep. 349, 93 S. W. 686. Not error not to submit question of whether an incorrect transmission was due to agencies over which defendant had no control, there being no evidence on the subject. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38. Instruction on waiver of right to observe office hours held justified by the evidence. Harrison v. Western Union Tel. Co. [S. C.] 55 S. E. 450. Evidence held to justify instruction that defendant was bound to deliver messages with reasonable promptness, and if the agent of the company found the message in question in his office the morning after it was received and during office hours failed to deliver it promptly, the company would be responsible for resulting damages. Id. Instruction submitting question as to whether a certain person acted as the company's agent, and as to plaintiff's damage by reason of nondelivery of a telegram on Sunday morning, held justified by the evidence. Id. Not error to submit question of willfulness where evidence was offered on the subject. Id. Where uncontradicted evidence showed a most tender affection between plaintiff and his mother and that plaintiff suffered mental distress, held error to submit question whether plaintiff suffered at least some mental distress. Prewitt v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812. Where undisputed evidence showed that plaintiff would have gone to his mother had he received the message, held error to submit this issue. Id. Instruction that if message had been delivered before a certain time a father could have been with his child "several hours while it was conscious," held not justified by the evidence. Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 100 S. W. 977. Error not cured but rather intensified by subsequent charges. Id. Words "several hours" meant an uncertain number of hours not less than two. Id. Evidence whether a message was addressed to plaintiff being conflicting, the question was properly submitted to the jury. Western Union Tel. Co. v. Wafford [Tex. Civ. App.] 16 Tex. Ct. Rep. 984, 97 S. W. 324. Where sender of a telegraph message was led by the agent to believe that sendee would be communicated with by telephone as soon as by any means, the question of his contributory negligence in failing to resort to the mail or telegraph was not in the case. Prewitt v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812.

84. Where counsel stated that he did not rely on telegram itself to charge defendant with notice, he could not complain of charge requiring other notice in order to hold defendant. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062 Charge, if construed otherwise than that defendant was not liable unless it had notice outside telegram, held harmful to defendant rather than to appellant. Id. Defendants tendered issue as to whether plaintiff by reasonable care could have attended a funeral after receipt of a message held properly refused, it having been covered by other submitted issues. Alexander v. Western Union Tel. Co., 141 N. C. 75, 53 S. E. 657. Objections to instructions and for failure to give other instructions in suit for erroneous transmission of a message considered and overruled. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38. Requested instructions on rights of parties on account of mistake in sendee's initials held properly refused. Arkansas & L. R. Co. v. Stroude [Ark.] 100 S. W. 760. Where nondelivery was not due to a mistake in the initial of the sendee, held not error to refuse instruction that company was not obliged to deliver to sendee a message addressed to one of the same name but for the initials. Id. Requested charge that damages claimed were in contemplation of parties if jury found notice to company and certain other facts held objectionable as being on weight of the evidence. Wolff v. Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062. Charge that plaintiff's exposure was the result of his own act held a charge on the facts. Toale v. Western Union Tel. Co. [S. C.] 57 S. E. 117.

the jury should be instructed that there can be no liability if plaintiff did not intend to attend the funeral.[85] Where the evidence, if true, leaves no doubt that an ordinary person would suffer mental anguish, it is not error to refuse to submit the question whether mental anguish would result to a person of ordinary strength and firmness.[86] The court should define to the jury what elements of damage may be considered.[87] If there is no evidence to sustain a recovery of punitive damages, the court should so charge.[88] It is for the jury to determine the weight of opinions as to the law of another state.[89]

Where a complaint alleges both willfulness and negligence and there is no proof of willfulness, a nonsuit should be granted as to that cause of action only leaving the question of negligence for the jury.[90] Stipulations on the back of the telegram not mentioned in the answer and to which the sender's attention was not called are not ground for a nonsuit.[91] Where there is some evidence to sustain plaintiff's action, a nonsuit[92] or verdict directed for defendant is properly refused.[93]

(§ 3) *D. Penalties*[94] are provided in many states for the negligence or discrimination of companies in the transmission or delivery of messages.[95] Willful wrongdoing is not essential to liability under the Indiana statute.[96] This statute requires prompt "delivery" as well as transmission.[97] A penalty is recoverable though the message was delivered orally to the agent and taken down by him in writing outside the office if he thereafter filed but failed to transmit it.[98] Where an unreasonable delay is shown, the burden is on the company to explain it and not on plaintiff to show the particulars wherein it existed.[99]

85. Roberts v. Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985.

86. There being no evidence of peculiar apprehension or individual temperament. Roberts v. Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985.

87. Instruction authorizing recovery to extent jury should believe plaintiff sustained loss from defendant's delay in delivering notification of shipment of cattle held erroneous but harmless where only actual damages were recovered. Western Union Tel. Co. v. Lehman [Md.] 66 A. 266. A charge on measure of damages should do more than simply instruct to find for plaintiff whatever may have been "due" him. Western Union Tel. Co. v. Stubbs [Tex. Civ. App.] 16 Tex. Ct. Rep. 210, 94 S. W. 1083. Court having affirmatively instructed as to elements of damage jury should consider held not error not to charge that damages could not be allowed for natural grief suffered by plaintiff on account of her mother's death. Western Union Tel. Co. v. Hardison [Tex. Civ. App.] 101 S. W. 541. Not error to charge that jury could award such damages as they concluded resulted from defendant's delay in delivering a telegram where the court at length detailed the duty of the jury in regard to the facts in proof. Harrison v. Western Union Tel. Co. [S. C.] 55 S. E. 450.

88. Murray v. Western Union Tel. Co., 74 S. C. 64, 54 S. E. 209.

89. Misleading instruction properly refused. Hancock v. Western Union Tel. Co., 142 N. C. 163, 55 S. E. 82.

90. There being evidence of negligence. Roberts v. Western Union Tel. Co., 73 S. C. 520, 53 S. E. 985.

91. Walker v. Western Union Tel. Co. [S. C.] 56 S. E. 38.

92. Refusal of nonsuit for delay in transmission held proper under the evidence. Mitchiner v. Western Union Tel. Co. [S. C.] 55 S. E. 222.

93. Directed verdict for defendant properly refused where evidence was conflicting on issues as to terms of contract and whether message could have been delivered without delay. Buchanan v. Western Union Tel. Co. [Tex. Civ. App.] 100 S. W. 974. Held error to direct verdict for defendant where there was evidence of prospective profits on a real estate deal and that message accepting offer was delayed. Lucas v. Western Tel. Co. [Iowa] 109 N. W. 191. Peremptory instruction for defendant held error where plaintiff submitted testimony tending to show that had message been promptly delivered he would and could have reached his father's home in time for funeral. Lawrence v. Western Union Tel. Co. [Tex. Civ. App.] 95 S. W. 27.

94. See 6 C. L. 1676.

95. Company liable for penalty for discrimination under Burn's Ann. St. 1901, §§ 5511, 5512, where it charged excessive rate. Western Union Tel. Co. v. McClelland [Ind. App.] 78 N. E. 672.

96. Laws 1885, p. 151, c. 481, requiring transmission in order of time of receipt and without discrimination. Western Union Tel. Co. v. Sefrit [Ind. App.] 78 N. E. 638.

97. Laws 1885, requiring "transmission" with impartiality, in good faith and in order of time of receipt includes prompt "delivery" as well as transmission. Western Union Tel. Co. v. Sefrit [Ind. App.] 78 N. E. 638.

98. After filing agent acted for company whatever his previous relation. Western Union Tel. Co. v. Sanders [Ind. App.] 79 N. E. 406. Evidence sufficient. Id.

99. Instruction imposing on plaintiff burden of showing that his message was sent

§ 4. *Telephone service.*[1]—A telephone company cannot refuse to continue to furnish telephone service on the ground that there is an amount due from complainant's wife for the use of another telephone.[2] A wrongful deprivation of telephone service renders the company liable not only for actual damages but also for inconvenience and annoyance.[3] Punitive damages are not allowable in the absence of willful or intentional wrong.[4] Discrimination is penalized by statute in some states.[5] One will not be permitted by strength of arms to enforce a supposed or actual right to free communication over a line of which another has control.[6]

§ 5. *Quotations and ticker service.*[7]

§ 6. *Rates, tariffs, and rentals.*[8] —Power in a municipality merely to regulate the erection of poles and wires does not include power to fix service rates,[9] and a company is not bound by rates so fixed even if it accepts its franchise subject to such conditions and for a time furnishes service accordingly.[10] A company may be compelled by mandatory injunction to render service at a reasonable rate.[11]

§ 7. *Offenses.*[12]—Double damages are provided in Arkansas for willful and intentional injury to lines.[13]

TENANTS IN COMMON AND JOINT TENANTS.

§ 1. Definitions and Distinctions; Creation of Relation (2114).
§ 2. Rights and Liabilities Between Tenants (2115). Discharge of Incumbrances, Purchase of Adverse Titles, Rights of Cotenants (2116). Possession (2117). Adverse Possession (2117). Ouster (2118). Notice (2119). Rents, Profits, and Proceeds (2119). Contribution (2119). Agency (2120). Conversion (2120). Trespass and Waste (2120). Actions (2120). The Right and Remedy of Partition (2120).
§ 3. Rights and Liabilities as to Third Persons (2121).

§ 1. *Definitions and distinctions; creation of relation.*[14]—Unity of time, title, interest, and possession, creates a joint tenancy.[15] When cotenants are husband and wife, an estate by the entirety arises, which unlike joint cotenants is not destructible by severance.[16] And such a tenancy is not destroyed by a subsequently enacted "married women's act," [17] or by conduct of the husband treating it as a tenancy in common.[18] Unity of possession alone is necessary to support a tenancy in

out of order properly refused. Western Union Tel. Co. v. McClelland [Ind. App.] 78 N. E. 672. Burden on defendant to show that other messages preceded plaintiff's. Id.

1. See 6 C. L. 1677.

2. Refusal to reinstate complainant's phone on tender of rent due. Cumberland Tel. & T. Co. v. Hobart [Miss.] 42 So. 349.

3. Cumberland Tel. & T. Co. v. Hobart [Miss.] 42 So. 349. One hundred and fifty dollars not excessive. Id.

4. This not shown though company was negligent in attempting to procure one to answer a call. Cumberland Tel. Co. v. Allen [Miss.] 42 So. 666.

5. Acts 1885, p. 178, § 11, forbidding discriminations by telephone companies, construed, and held to impose a penalty not only for "requiring as a condition for furnishing facilities that they shall not be used in the business of the applicant" but for any other discrimination forbidden in the statute. Yancey v. Batesville Tel. Co. [Ark.] 99 S. W. 679. Requiring a telephone subscriber to go to the central office and pay cash in advance when this is not required of other subscribers is an unreasonable discrimination penalized by Acts 1885, p. 178, § 11. Id.

6. Injunction granted to restrain connection of wires. Western Union Tel. Co. v. Ulrich, 120 Mo. App. 177, 97 S. W. 191.

7. See 6 C. L. 1677.

8. See 6 C. L. 1678.

9, 10. Wright v. Glen Tel. Co., 112 App. Div. 745, 99 N. Y. S. 85.

11. Complaint held to state a cause of action for mandatory injunction to compel rendition of service at a reasonable rate. Wright v. Glen Tel. Co., 112 App. Div. 745, 99 N. Y. S. 85.

12. See 4 C. L. 1672.

13. Destruction of portion of telephone line by railroad company under mistaken belief that it was an unlawful obstruction did not justify imposition of double damages under Kirby's Dig. § 1899, penalizing "willful" and "intentional" injury to lines there being also evidence that the line was a hindrance to operation of road. St. Louis, etc., R. Co. v. Batesville & Minerva Tel. Co. [Ark.] 97 S. W. 660.

14. See 6 C. L. 1686.

15, 16. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032.

17. Act June 8, 1893 (P. L. 344), giving a married woman the same rights in her separate property as if unmarried, did not change an existing estate by entirety into one in common. Hetzel v. Lincoln [Pa.] 64 A. 866.

18. The fact that the husband executed a deed to the wife of his interest described as

common,[19] and hence the destruction of any of the other unities of a joint tenancy changes the estate to one in common.[20] Likewise, community property undisposed of by a divorce decree is thereafter held in common.[21] Estates by the entirety [22] and joint tenancies [23] have been abolished in some states, while in others a tenancy in common will be presumed unless the creating instrument manifests a clear contrary intent.[24] A so called "cropper's contract" usually renders the parties to it tenants in common of the crop,[25] unless by statute the contract be deemed one of hire,[26] and, similarly, the owner of land and one cutting timber therefrom on shares are tenants in common of the timber cut.[27] Cotrustees are usually joint tenants of the trust property.[28]

§ 2. *Rights and liabilities between tenants.*[29]—The interest of a joint tenant at death passes to his cotenants by right of survivorship [30] which cannot be defeated by a devise,[31] but a surviving partner has no power to convey property held with the deceased as a tenant in common.[32] While a tenant in common cannot give complete title to any portion of the common property, his deed purporting to do so is only voidable and may become binding upon the cotenants by ratification [33] or es-

"the undivided one-half" does not render his interest subject to an outstanding judgment. Hetzel v. Lincoln [Pa.] 64 A. 866.

19. Under Ky. St. 1903, § 1707, providing that the unmarried infant children of a deceased homestead tenant shall have the right to jointly occupy the homestead with the widow, the children are joint tenants. Potter v. Redmon's Guardian, 29 Ky. L. R. 840, 96 S. W. 529. Where several lot owners desiring to oreate a common alley each grants to the others by warranty of title a strip along their respective lots, they are tenants in common of such alley. Flat Top Grocery Co. v. Bailey [W. Va.] 57 S. E. 302.

20. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032.

21. Tabler v. Peverill [Cal. App.] 88 P. 994.

22. Tenancy by the entirety has not existed in Wisconsin since 1878, and circumstances which would create such a tenancy prior thereto create a joint tenancy. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032.

23. Rev. St. 1898, §§ 2068, 2069, abolish joint tenancies except as to husband and wife. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032.

24. Under Code 2923, a conveyance of a cemetery lot to a father and son creates a tenancy in common, notwithstanding an ordinance providing that such lot shall be indivisible, such ordinance being merely for control and not to affect the estate. Anderson v. Acheson [Iowa] 110 N. W. 335. Under Code, § 683, providing that a joint interest is one owned by several persons in equal shares, acquired by a single transaction, when expressly declared to be a joint tenancy, and § 686, providing that an interest in favor of several persons in their own right is an interest in common unless declared in its creation to be a joint tenancy, a note and mortgage executed in favor of several persons is held by them as tenants in common. Conde v. Dreisam Gold Min. & Mill. Co. [Cal. App.] 86 P. 825.

25. A contract whereby one was to furnish land, teams, seed, and machinery, and the other the labor necessary to raise a crop which was to be divided equally between them, did not constitute them partners but tenants in common of the crop. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 101 S. W. 511.

26. A contract for raising a crop otherwise falling within Code 1896, § 2712, making it a contract of hire, is taken therefrom by a provision that the land owner and the laborer shall each furnish one-half of the fertilizer, and they are tenants in common of the crop under § 2760 (Hendricks v. Clemmons [Ala.] 41 So. 306), and hence neither the minor who furnished the labor nor his parents can recover as for services rendered (Id.).

27. Colby-Hinkley Co. v. Jordan [Ala.] 41 So. 962.

28. LaForge v. Binns, 125 Ill. App. 527. Where a will gave certain property to designated persons with a request that they use it for a certain purpose, they took as trustees and joint tenants not as tenants in common. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030. Upon the death of a trustee holding legal title to land, the title passes to his heirs as joint tenants. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.

29. See 6 C. L. 1687.

30. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032.

31. Right of survivorship takes precedence. Bassler v. Rewodlinski [Wis.] 109 N. W. 1032. Rev. 1878, § 2342, giving married women the right to sell and devise their separate property as if unmarried, does not enable a wife who is a joint tenant with her husband to devise her interest. Id.

32. Anderson v. Goodwin, 125 Ga. 663, 54 S. E. 679.

33. Held ratified by a partition agreement whereby the commissions were to exclude the tracts conveyed and partition the remaining land only. Currens v. Lauderdale [Tenn.] 101 S. W. 431.

NOTE. Assent by Cotenants: "Undoubtedly a conveyance of his interest in the common estate by a tenant in common by metes and bounds of part of the land is good and valid, if the other tenants in common assent thereto, or confirm or ratify such conveyance. Hartford, etc., Ore Co. v. Miller, 41 Conn. 112. Such conveyance becomes operative and passes the land to the grantee

toppel.[34] A cotenant has no undivided interest in standing timber distinct from his interest in the land.[35] Cotenants may contract with each other,[36] and such contracts if made in good faith are binding upon third persons.[37] A tenant must so use the property as not to interfere with the mutual rights of his cotenants.[38]

Discharge of incumbrances, purchase of adverse titles, rights of cotenants.[39]—A semi-fiduciary relation exists among cotenants,[40] and one is presumed to act for all in discharging a lien upon the common property or in buying an outstanding title,[41] and the benefit thereof inures to his cotenants[42] if they elect within a reasonable time[43] to contribute their share of the costs,[44] unless they have repudiated the relation[45] or are estopped from claiming their rights.[46] This doctrine of in-

by metes and bounds if the other cotenants, before partition, confirm and ratify it, and after partition if that portion is allotted to the purchaser thereof, and in either case such deed will convey all of the interest of the grantor and will be binding on him and also on the grantee. Worthington v. Staunton, 16 W. Va. 209. Such assent need not be by deed and may be inferred from any act which shows an acquiescence in the title of the purchaser. Doubtless such assent would be inferred from a silence of thirty years, during which time the interests of the original cotenants have been conveyed to strangers. Goodwin v. Keney, 49 Conn. 563. If all the cotenants give conveyances at different times of the common property in specific parcels by metes and bounds to the same person, their several assent is implied, and the conveyances taken together constitute a valid title, and the same principle seems to apply if the several interests of the cotenants are taken at different times in execution or compulsory proceedings. Stevens v. Norfolk, 46 Conn. 227; Butler v. Wormer, 25 Mich. 53, 12 Am. Rep. 218."—From note to Kenoye v. Brown [Miss.] 100 Am. St. Rep. 651.

34. Where the cotenant acquiesces in the conveyance for over thirty years and permits the grantee to sell the land to innocent purchasers without objections and also excludes it from a partition of the interests of the cotenants selling his interests in the lands allotted to him, he is estopped. Currens v. Lauderdale [Tenn.] 101 S. W. 431.

35. Hence the purchaser gets only the timber on the portion of the common estate set off by partition to his vendor, although it is less than the proportional share of all the timber. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex. Ct. Rep. 110, 95 S. W. 637. He is protected in a partition by a judgment for the timber on the land awarded to his vendor. Id.

36. Where one makes improvements under an agreement with his cotenant to bear one-half of the expense, he may recover on the basis of cost and not on the fair market value of the improvement or what it is reasonably worth. Contaldi v. Errichetti [Conn.] 64 A. 211.

37. Cotenant making improvements waived right of lien both of himself and subcontractor. Westmoreland Guarantee Bldg. & Loan Ass'n v. Connor [Pa.] 65 A. 1089.

38. Cannot maintain injunction to restrain a lessee of his cotenant from entering upon the land. Country Club Land Ass'n v. Lohbauer [N. Y.] 79 N. E. 844. A tenant in common of a mining claim has no right to use a tunnel driven on the claim to convey ore from an outside claim. Laesch v. Morton [Colo.] 87 P. 1081.

39. See 6 C. L. 1688.

40. The rule inhibiting the assertion of an adverse tax title by one cotenant against another is based upon the relation of trust and confidence created between them by their community of interest. Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843. Where the interest of one tenant in common is sold under execution, the purchasers cannot by dealings among themselves, as by partitions and conveyances in which they assumed to have complete title to the whole estate, affect the interest of their cotenant who had no notice. Roll v. Everett [N. J. Eq.] 65 A. 732. Where plaintiff and defendant purchased lands which were placed in third parties to secure purchase-money loans, they were tenants in common and plaintiff could not by notice on defendant to pay his share when due forfeit his interest, but defendant was entitled to a decree vesting him with an undivided interest upon payment to plaintiff of his share of the money. Anderson v. Snowden [Wash.] 87 P. 356.

41. Bought property at tax sale. Richards v. Richards, 31 Pa. Super. Ct. 509. Purchase of common property sold as an entirety for delinquent taxes by one cotenant amounts merely to the payment of taxes, and the purchaser has no additional right in the land except the right to contribution. Williams v. Clyatt [Fla.] 43 So. 441.

42. Puchase at sale for taxes assessed during the tenancy. Dahlem v. Abbott [Mich.] 13 Det. Leg. N. 894, 110 N. W. 47. Where several lot owners by mutual warranty deeds become tenants in common of an alley and one buys a part thereof through a foreclosure of a prior trust deed to one of the lots, such part inures to the benefit of his cotenants. Flat Top Grocery Co. v. Bailey [W. Va.] 57 S. E. 302.

43. Savage v. Bradley [Ala.] 43 So. 20. In ordinary cases in Alabama, cotenants must elect to contribute to a redemption by one from a mortgage foreclosure within two years, and a delay of ten years constitutes laches. Id.

44. Not entitled to benefits until such costs are contributed or tendered, and hence cannot secure a partition. Darcey v. Bayne [Md.] 66 A. 434.

45. Where a plaintiff repudiated the cotenancy existing with the defendant, if there was one, by instituting an action of trespass to try title, he cannot claim that a subsequently acquired title of the defendant inured to him because of such relation. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406.

46. The fact that a cotenant acquiesced in a plan by which the common property was to be bought at the tax sale for his daughters, which plan was never attempted

urement, however, embraces only adverse titles [47] and is not applicable where the common title is a nullity or where the tenants are asserting hostile claims,[48] or, in a few states, where they claim interests under different instruments or acts,[49] and in Michigan, but not in Minnesota,[50] is limited to titles accruing through default of the purchasing tenant.[51] A statute permitting a cotenant to protect his interest by paying his portion of the tax does not enable him to destroy his cotenant's interest,[52] and to enable him to have exclusive benefit of the title purchased it must appear that it included only his interest.[53]

A tenant discharging an incumbrance acquires an equitable lien upon his cotenant's interests for their share of the costs,[54] but if he buys at foreclosure or purchases an adverse title, he holds the title subject to an equity in the others to become co-owners by contributing their portion of the purchase price,[55] and in either case notice must be given of the discharge or purchase before their rights can be cut off.[56]

Possession.[57]—Cotenants have a mutual right to a joint possession [58] of the entire common property,[59] and the forcible dispossession of one does not give him a right of action for the exclusive possession,[60] nor does the Missouri statute authorizing ejectment by one co-tenant against another upon proof of ouster alter the statutory provision that the defendant must be in possession.[61] One common tenant cannot sue another for possession till ouster.[62]

Adverse possession.[63]—The possession of a tenant in common inures to all [64] and is presumed to be according to title,[65] and hence it cannot become adverse until there has been an ouster of the other cotenants, or notice to them of the adverse

of execution, does not estop him from claiming the benefit of a purchase by another cotenant. Richards v. Richards, 31 Pa. Super. Ct. 509.

47. A tenant in common of a leasehold interest may purchase the fee where it is not adverse to the leasehold, there being no fiduciary relation of a copartnership. Kershaw v. Simpson [Wash.] 89 P. 889.

48. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 15 Tex. Ct. Rep. 317, 93 S. W. 1027.

49. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 15 Tex. Ct. Rep. 317, 93 S. W. 1027. Where pending litigation between cotenants and third parties the interest of one was sold at foreclosure, the title secured by the remaining tenant by compromise judgment did not inure to the purchaser. Mayes v. Rust [Tex. Civ. App.] 15 Tex. Ct. Rep. 485, 94 S. W. 110.

50. Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843.

51. Tax titles accruing before the creation of the cotenancy. Olmstead v. Tracy, 145 Mich. 299, 13 Det. Leg. N. 452, 108 N. W. 649.

52. Gen. St. 1894, § 1605. Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843.

53. A general finding that a cotenant paid taxes "upon his undivided one-half of said lands" and that his tax certificates were upon the undivided half "belonging to defendant" is not equivalent to a finding that interest upon which he paid taxes or secured certificates bore record "earmarks" of his ownership. Hoyt v. Lightbody, 98 Minn. 189, 108 N. W. 843.

54. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 15 Tex. Ct. Rep. 317, 93 S. W. 1027. A cotenant may acquire an outstanding lien upon the property and enforce contribution from the cotenants. Hatfield v. Mahoney [Ind. App.] 79 N. E. 408.

55. Within a reasonable time. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 15 Tex. Ct. Rep. 317, 93 S. W. 1027.

56. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 15 Tex. Ct. Rep. 317, 93 S. W. 1027.

57. See 6 C. L. 1688.

58. Where a tenant in common sells his interest but reserves a life estate, no action will lie to oust him or his tenants by the other cotenants, since he is entitled to possession as a cotenant. Stern v. Selleck [Iowa] 111 N. W. 451.

59. An heir at law cannot assert a right of possession to a particular area of the ancestor's land in the possession of the adminstrator until it has vested in her in severalty by an agreement among the heirs or by a partition judgment (Haden v. Sims [Ga.] 56 S. E. 989), and a decree appointing partitioners to set off to her her share out of a certain tract, followed by an allotment, does not vest title in severalty where exceptions to the allotment remain undisposed of (Id.).

60. Personal property. Thompson v. Silverthorne, 142 N. C. 12, 54 S. E. 782.

61. Rev. St. 1899, § 3061, does not authorize ejectment against a cotenant for property in the actual possession of the defendant's tenant. Llewellyn v. Llewellyn [Mo.] 100 S. W. 40.

62. Graham v. Ford, 125 Ill. App. 578.

63. See 6 C. L. 1689.

64. Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870.

65. Cotenant out of possession has a right to rely on such presumption. Oneal v. Stimson [W. Va.] 56 S. E. 889.

holding,[66] although it seems that if the fact of cotenancy is unknown to the others, his possession will be treated as that of a stranger.[67]

Where one cotenant conveys the whole estate and the grantee enters and holds possession thereunder, such occupancy is adverse,[68] if the possession is absolute,[69] and the acceptance of a deed from another cotenant thereafter is not a recognition of the cotenancy of a third.[70] Such effect, however, is not given to a sheriff's deed.[71] Possession pursuant to a partition agreement is not of itself adverse to cotenants not joining therein.[72]

Ouster [73] must be an actual exclusion or acts equivalent thereto in law.[74] Mere exclusive possession does not constitute an ouster,[75] but if it is pursuant to a mortgage or deed by one tenant to the entire property, it is sufficient,[76] though the deed shows that the grantee therein has only an undivided interest,[77] but such ouster does not start the Iowa statute of limitations so long as the grantee remains a nonresident, though in possession by a tenant.[78] Payment of taxes does not amount to an ouster.[79]

Quiet, peaceable, exclusive possession, without payment of rents for twenty or more years, raises a rebuttable [80] presumption of a prior ouster,[81] and it is imma-

66. Clark v. Beard, 59 W. Va. 669, 53 S. E. 597; Oneal v. Stimson [W. Va.] 56 S. E. 889. It is the intention of the tenant in possession to hold the common property in severalty and exclusively as his own, with notice or knowledge to his cotenants of such intention, which constitutes disseisin. Oneal v. Stimson [W. Va.] 56 S. E. 889. An instruction that if the possession was such that those in the neighborhood and in a position to know what was going on appreciated that defendants had possession and claimed exclusive right to the whole property, held erroneous. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380. Where a joint tenant through his agent attempts to sell his interest to his cotenant and the latter takes and holds exclusive possession for thirty-five years, the grantor acknowledging within four years after the sale that he had parted with all his interest, the vendee has an adverse title. Godsey v. Standifer [Ky.] 101 S. W. 921.

Evidence held insufficient to sustain title by adverse possession. Dahlem v. Abbott [Mich.] 13 Det. Leg. N. 894, 110 N. W. 47.

67. The rule that a tenant may assume that his cotenant did not attempt to convey more than his interest does not apply where he does not know of any conveyance. Sanford v. Safford, 99 Minn. 380, 109 N. W. 819.

68. Sanford v. Safford, 99 Minn. 380, 109 N. W. 819; Wiese v. Union Pac. R. Co. [Neb.] 108 N. W. 175; Gulf Red Cedar Lumber Co. v. Crenshaw [Ala.] 42 So. 564.

69. Where some of the tenants in common conveyed the right to cut timber standing on the property for a period of ten years, the right of the grantee to the timber being conditional, the possession was not adverse to the nonjoining tenants. Gulf Red Cedar Lumber Co. v. Crenshaw [Ala.] 42 So. 564.

70. Naylor v. Foster [Tex. Civ. App.] 99 S. W. 114. The fact that the plaintiff in an action to quiet title obtained a quitclaim deed from one of the defendants will not be held to raise a presumption or acknowledgement of cotenancy. Chambers v. Wilcox, 3 Ohio N. P. (N. S.) 269.

71. A sheriff's deed of the interest of a tenant in common does not oust the other cotenant, though the grantee therein does not know of the interest of the cotenant. Curtis v. Barber [Iowa] 108 N. W. 755.

72. Courtner v. Etheredge [Ala.] 43 So. 368.

73. See 6 C. L. 1690.

74. Clark v. Beard, 59 W. Va. 669, 53 S. E. 597. There can be no adverse possession against a cotenant until actual ouster or exclusive possession after demand, or express notice of adverse possession. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59.

Evidence held insufficient to show ouster. Tabler v. Peverill [Cal. App.] 88 P. 994. The fact that a cotenant permitted the land to be pastured, it being wild, open land, that he employed one to look after it, nothing in particular being done, that he paid taxes for some years and bid off the land at tax sales on other years, held not to show an adverse title. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380. Where the purchaser at a mortgage foreclosure of a mortgage covering the whole interest but executed only by one tenant in common, was taken to the land by the sheriff and told that he was given possession, did not constitute an ouster. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59.

75. Especially where the cotenants are closely related. Dahlem v. Abbott [Mich.] 13 Det. Leg. N. 894, 110 N. W. 47.

76. St. Peter's Church v. Bragaw [N. C.] 56 S. E. 688. But such **deed or mortgage without possession is insufficient.** Scottish-American Mortg. Co. v. Bunckley [Miss.] 41 So. 502; Kirby v. Hayden [Tex. Civ. App.] 99 S. W. 746.

77. Names of the grantors followed by the provision "Being part of the heirs of John C. Foster, dec'd; the other heirs being," etc. Naylor v. Foster [Tex. Civ. App.] 99 S. W. 114.

78. Code, § 3447, par. 7. Stern v. Selleck [Iowa] 111 N. W. 451.

79. Clark v. Beard, 59 W. Va. 669, 53 S. E. 597.

80. Where the inference of ouster arising

terial that some of the cotenants are under disability if they claim under an ancestor who could have sued.[82]

Notice.[83] of adverse holding must be actual or the acts constituting the ouster must be of such unequivocal character as to be constructive notice.[84]

Rents, profits, and proceeds.[85]—A tenant using the common property or more than his share thereof must account to his cotenants,[86] though such user constitutes waste,[87] but he is entitled to credit for reasonable expenses incurred unless he is estopped by unconscionable conduct.[88] A joint tenant leasing the entire property is entitled to the rents subject to an accounting to the cotenants.[89]

Where a sale or exchange of property is made by one cotenant, the others may ratify and obtain the benefit thereof [90] by discharging their share of the affirmative obligations of the contract.[91]

Contribution.[92]—A tenant advancing money for the preservation of the common property is entitled to contribution from his cotenants and has a lien upon their interests for the same.[93] A cotenant in possession of a mine is not entitled to contribution for unsuccessful operation undertaken without the others' consent.[94] The right to contribution does not depend on the continuing enforceabiltiy of his obligation by the original creditor against the cotenant.[95]

from 20 years or more of actual occupation by one tenant in common without payment of rents, etc., is contradicted by evidence of an alleged admission of the rights of the cotenants, the question of ouster is for the jury. Hamby v. Folsom [Ala.] 42 So. 548.

81. Twenty years' possession. Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870. Thirty years' possession. Rhea v. Craig, 141 N. C. 602, 54 S. E. 408. A requested instruction in an action for partition that if the tenants had each been in the open and notorious possession of some part of the land the possession of each is presumed to have been in the interest of all, and hence the statute of limitation has not run, is properly refused where the issue is whether it has been continued long enough to raise a presumption of ouster. Id.

82. Dobbins v. Dobbins, 141 N. C. 210, 53 S. E. 870.

83. See 6 C. L. 1691.

84. Clark v. Beard, 59 W. Va. 669, 53 S. E. 597. Where an undivided interest of a cotenant is sold at an execution sale and the purchase conveyed to the wife of a cotenant who was in possession, which conveyance was unrecorded, held that there was nothing to give notice of a claim of adverse possession in the wife. Courtner v. Etheredge [Ala.] 43 So. 368. Notice cannot be predicated upon theory that one tenant with the knowledge of the other makes occassional use of the premises for storage purposes and rents it for a nominal sum insufficient to pay taxes, especially where the occupying tenant is informed of the interest of the other and apparently acquiesces. Curtis v. Barber [Iowa] 108 N. W. 755.

85. See 6 C. L. 1692.

86. Used more than his share of the water of a stream. Roberts v. Claremont R. & Lighting Co. [N. H.] 66 A. 485. In an action for an accounting between joint owners of profits and expenses, the evidence examined and held to sustain the judgment. First Nat. Bank v. Krause [Neb.] 111 N. W. 382.

87. Notwithstanding that the taking of gas from the common property by a cotenant is waste for which he is liable by statute in West Virginia, he may be held to an accounting for the net proceeds. Dangerfield v. Caldwell [C. C. A.] 151 F. 554.

88. The right of a cotenant to credit for the reaonable expenses incurred in taking out gold from a mining claim is not affected by his inequitable conduct in denying his cotenant's title in violating his agreement not to work the mine, in refusing an accounting, or in making a false statement in his answer as to the amount of net profits. Dettering v. Nordstrom [C. C. A.] 148 F. 81.

89. Hence where a guardian of a minor joint tenant leases for the benefit of his ward and is not called upon to account to the other tenants, he is accountable to a subsequently appointed guardian for all the rent collected. Potter v. Redmon's Guardian, 29 Ky. L. R. 840, 96 S. W. 529.

90. Harris v. Umsted [Ark.] 96 S. W. 146.

91. Where a tenant in common agreed to trade for corporate stock at par value, the land being valued at $25 per acre, and his cotenant negotiated a trade on a valuation of $27.50 per acre by paying a bonus, the former can only share in the contract as made by paying his proportional share of the bonus. Spalding v. Lewis, 42 Wash. 528, 85 P. 255.

92. See 6 C. L. 1693.

93. Richards v. Richards, 31 Pa. Super. Ct. 509. Where property is taxed and sold as belonging exclusively to one having only an undivided interest therein, the purchaser at most only becomes a cotenant of the other owners with an equitable lien on their interests for their share of the taxes. Niday v. Cochran [Tex. Civ. App.] 14 Tex. Ct. Rep. 334, 16 Tex. Ct. Rep. 317, 93 S. W. 1027. See ante, "Discharge of Incumbrances," etc.

94. Where after a division of past profits the mine is closed down and later operated by one without the consent of the other, he is not entitled to contribution for expenses from the profits divided. Stickley v. Mulrooney [Colo.] 87 P. 547.

95. Querney v. Querney, 127 Ill. App. 75.

Agency.[98]—While there is no implied agency growing out of the relation,[97] a cotenant may be vested with authority to bind all by act of the parties,[98] and especially is it binding upon a cotenant who participates in the act.[99]

Conversion.[1]—While a joint owner converting common property is liable to his co-owners,[2] he is entitled to credit for converted property perishing in his possession without fault on his part.[3]

Trespass and waste.[4]—While as a general rule a tenant in common cannot maintain trespass quare clausum against his cotenant,[5] the action will lie where the acts amount to a destruction of the common property.[6]

Actions.[7]—As in equitable actions generally, a tenant seeking equitable relief must show that he has done equity.[8] In Illinois assumpsit will not lie to recover of a cotenant rents collected upon the common property.[9] Where an accounting is limited to the output of a mine, the defendant cannot offset expenses not connected therewith without appropriate pleadings.[10] A tenant seeking to offset expenses in an action for an accounting has the burden of establishing the same,[11] and, likewise, one asserting title by adverse possession must prove all the essential elements of such possession.[12] In an accounting for gold taken from a mine by a tenant through a lessee, evidence that such lease was fair and reasonable and a customary one is not admissible as showing the reasonable expense in mining the gold.[13]

The right and remedy of partition is treated in a separate article.[14] The right of partition is usually a concomitant of co-ownership,[15] but a minor female child upon marriage is not entitled to partition land set off to her and decedent's widow

96. See 6 C. L. 1694.

97. See special article "Implied Agency," 3 C. L. 131.

98. A contract whereby tenants in common agree to build is authority for one subsequently entrusted with the duty of purchasing to bind his codefendants, though it does not create an obligation to the seller. Kansas City Hydraulic Press Brick Co. v. Pratt, 114 Mo. App. 643, 93 S. W. 300.

99. Kansas City Hydraulic Press Brick Co. v. Pratt, 114 Ill. App. 643, 93 S. W. 300. Where a tenant in common of a crop gave a mortgage upon the entire interest, a subsequent mortgagee of his cotenant's interest without actual knowledge of such mortgage or of his authority to execute it upon the entire crop is protected, although it is duly recorded. Beaumont Rice Mills v. Bridges [Tex. Civ. App.] 101 S. W. 511.

1. See 6 C. L. 1694.

2. Stock converted to defendant's use and maintenance. Roberts v. Roberts [Tex. Civ. App.] 99 S. W. 886.

3. Roberts v. Roberts [Tex. Civ. App.] 99 S. W. 886.

4. See 6 C. L. 1694.

5. Davis v. Poland [Me.] 66 A. 380.

6. Davis v. Poland [Me.] 66 A. 380. Removal of doors and windows for the purpose of rendering the house uninhabitable held to amount to a destruction of the common property. Id.

7. See 6 C. L. 1695.

8. No relief will be awarded to one seeking to obtain the benefits of a purchase of the fee where it appears no tender of his share of the price was made for three years after the purchase. Kershaw v. Simpson [Wash.] 89 P. 889. In a suit by heirs against coheirs to establish an undivided interest in property purchased with the proceeds of land secured by fraud from their ancestor, they need not reimburse defendant for a mortgage on the original land or for maintenance of the ancestor where it appears that only the proceeds in excess of the mortgage was invested and where the rents exceed the cost of maintenance. Groesbeck v. Groesbeck [Or.] 88 P. 870.

9. Liability not based upon a promise express or implied. Kran v. Case, 123 Ill. App. 214.

10. As expenses in litigating the boundary of the claim and having the same surveyed. Dettering v. Nordstrom [C. C. A.] 148 F. 81.

11. In the absence of such proof it is proper to allow plaintiff his proportional share of the gross out put. Dettering v. Nordstrom [C. C. A.] 148 F. 81.

12. A cotenant claiming by adverse possession has the burden of showing that its possession was accompanied by tortious and disloyal acts to his cotenant which were open, continuious, and notorious, so as to preclude all doubt as to the character of the holdings or the want of cotenants' knowledge that the same was adverse. Rich v. Victoria Copper Min. Co. [C. C. A.] 147 F. 380.

13. Such leases being largely speculative. Dettering v. Nordstrom [C. C. A.] 148 F. 81.

14. See Partition, 8 C. L. 1246.

15. Co-owners of the right to use the waters of a stream may have the water divided and assigned where it is possible without injury to either. Roberts v. Claremont R. & Lighting Co. [N. H.] 66 A. 485. Under Laws 1898, pp. 644, 653, 660, §§ 26, 45, 46, a partition sale of lands held in common may be made though the interest of one is only a life estate partition being unpracticable. Campbell v. Cole [N. J. Eq.] 64 A. 461.

as a year's support.[16] "Improvements" as used in a statute authorizing them to be set off to the tenant making them do not include anything which constitutes waste.[17] Where a cotenant has assumed to convey a particular tract, a court of equity may require that another tenant's interest be set off from the remainder if it can be done without prejudice.[18] A contract between cotenants giving one more than half of the proceeds if the property is sold for a specified sum within a stated time does not entitle him to a major share upon partition after the time.[19]

§ 3. *Rights and liabilities as to third persons.*[20]—A third person whose money is appropriated to the payment of taxes by a tenant is not subrogated to such tenant's rights against his cotenants.[21] Adverse possession perfected as to one joint tenant is sufficient as to all.[22] A tenant in common cannot authorize the commission of waste.[23] In some states all tenants in common must join in action respecting the common property,[24] but, if maintainable by less, recovery is limited to the interests of those who are parties thereto.[25]

TENDER; TERMS OF COURT, see latest topical index.

TERRITORIES AND FEDERAL POSSESSIONS.

§ 1. Acquisition and Political Status (2121).
§ 2. Organization and Government (2122).
§ 3. Jurisdiction, Powers, Duties, and Liabilities (2122).
§ 4. Local Laws and Practice; Territorial Courts (2122).

§ 1. *Acquisition and political status.*[26]—The acquisition of territory by treaty at variance with the authorizing act, may be ratified.[27] A treaty need not contain technical words of conveyance,[28] or describe ceded territory with particularity[29] to pass title. Cuba during the military occupancy of the United States was,[30] and the Isle of Pines[31] now is, a "foreign country" for the purpose of levying a duty on

16. Bridges v. Barbree [Ga.] 56 S. E. 1025.
17. The sinking of a well for oil or gas is a waste within Code W. Va. 1899, c. 92, § 2 (Code 1906, § 3390), rendering such tenant liable to his cotenants, hence it is not to be regarded as an improvement to be set off to him on partition. Dangerfield v. Caldwell [C. C. A.] 151 F. 554.
18. Beale's Heirs v. Johnson [Tex. Civ. App.] 99 S. W. 1045.
19. Sefton v. Roach [Cal. App.] 87 P. 252.
20. As most of these rights and liabilities are not dependent upon co-ownership they are treated in the general topics, this section being limited to principles peculiar to the relationship. See such titles as Ejectment (and Writ of Entry), 7 C. L. 1212; Trespass, 6 C. L. 1721.
21. Foote v. Cotting [Mass.] 80 N. E. 600.
22. All minors except one and under disability. Cameron v. Hicks, 141 N. C. 21, 53 S. E. 728.
23. The fact that one tenant in common of a cemetery lot consented to the removal of his parent's bodies therefrom was no defense to an action by the other heirs for the wrongful removal and for recovery of the lot, since the act was in the nature of an ouster of possession and the commission of waste. Anderson v. Acheson [Iowa] 110 N. W. 335.
24. While tenants in common must join in an action of trespass, nonjoinder of a cotenant can in general only be taken advantage of by a plea in abatement or by way of apportionment of damages. Cummings v. Masterson [Tex. Civ. App.] 16 Tex. Ct. Rep. 33, 93 S. W. 500.
25. Ejectment. Williams v. Coal Creek Min. & Mfg. Co. [Tenn.] 93 S. W. 572. Action for damages to the common property. Birmingham R. Light & Power Co. v. Oden [Ala.] 41 So. 129.
26. See 6 C. L. 1696.
27. Although the acquisition of the Panama canal zone was not in strict accordance with Act, June 28, 1902 (32 Stat. at L. 481, c. 1302, U. S. Comp. Stat. Supp. 1905, p. 707), in that the treaty was made with a different nation, it has been ratified by congress. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.
28. Treaty of November 18, 1903 (33 Stat. at L. 2234), with Panama, granting the perpetual use, occupation, and control, of the Panama canal zone held to pass title. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.
29. Treaty of November 18, 1903 (33 Stat. at L. 2234), with Panama, held to sufficiently locate the boundaries, the description being sufficient to identify, and there being a practical location by the interested nations. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.
30. Galban & Co. v. U. S., 40 Ct. Cl. 495.
31. Within the Dingley Act, since the legislative and executive departments of this government has recognized the de facto sovereignty of Cuba therein until the island's de jure status shall be established. Pearcy v. Stranahan, 205 U. S. 257, 51 Law. Ed. 793.

imports from the United States. Porto Rico is not subject to process or jurisdiction of a state court.[32] The obligations of international law assumed toward Cuba by the treaty of Paris were limited to the period of occupation.[33]

§ 2. *Organization and government.*[34]—The control of the streets of Washington is vested in the commissioners of the District [35] who may maintain a suit in their own name to enjoin an unlawful encroachment therein,[36] but the District is not an insurer of the safety of travelers using the streets.[37]

§ 3. *Jurisdiction, powers, duties, and liabilities.*[38]—The District of Columbia has no inherent legislative powers,[39] but only such as are expressly conferred, implied as incident to those expressly granted, or are indispensable to the object and purpose of its organization.[40] During the military occupancy of Cuba, the president had power to prescribe rules and regulations for the government thereof.[41] The governor of Porto Rico has power to issue requisition to the states.[42]

§ 4. *Local laws and practice; territorial courts.*[43]—A territory acquired by conquest or cession retains the existing municipal laws until altered by the United States or the territorial government.[44] Laws enacted by a territorial legislature are not laws of the United States [45] and are superceded by congressional acts relative to the same subject-matter.[46] The legislatures of the territories have power to prescribe the methods of procedure and practice in the territorial courts.[47] The United States has no right of appeal from an acquittal in a Philippine trial court,[48] and appeals to the supreme court of the island are not tried de novo so as to require the consideration of the sufficiency of a criminal complaint objected to for the first time therein.[49]

TESTAMENTARY CAPACITY; THEATERS; THEFT, see latest topical index.

32. Porto Rico, by virtue of Act Cong. April 12, 1900, c. 191, 31 Stat. 77, providing for the civil government of the island, confers upon it sufficient qualities of sovereignty to render it immune from process and jurisdiction of state courts. Richmond v. People 99 N. Y. S. 743.

33. Galban & Co. v. U. S. 40 Ct. Cl. 495.

34. See 6 C. L. 1696.

35. At least as to protection against encroachment. Guerin v. Macfarland, 27 App. D. C. 478.

36. Guerin v. Macfarland, 27 App. D. C. 478.

37. Scott v. District of Columbia, 27 App. D. C. 413. For general principles of liability, see Highways and Streets, 8 C. L. 40.

38. See 4 C. L. 1678.

39. It sustains the same relation to congress as does a city to the legislature of the state in which it is incorporated. United States v. Macfarland, 28 App. D. C. 552.

40. United States v. Macfarland, 28 App. D. C. 552. District will not be held to possess the power to revoke a license to engage in the plumbing and gas fitting business unless such power clearly appears (Id.), and it will not be implied from the power to regulate such trade, since the act of congress granting such power prescribes a penalty for violation of the rules which must be deemed exclusive (Id.).

41. But he has no power to make it a part of the United States so as to exempt goods imported from the United States from duties. Galban & Co. v. U. S. 40 Ct. Cl. 495.

42. While Porto Rico is not a "territory" of the United States within Rev. St. § 5278 (U. S. Comp. St. 1901, p. 3597), relating to extraditions, such section was extended by Act of April 12, 1900 (31 Stat. c. 191, p. 80), making "the statutory laws of the U. S. not locally inapplicable" applicable to the island, and hence the governor thereof may issue requisition for a fugitive criminal. In re Kopel, 148 F. 505.

43. See 6 C. L. 1696.

44. Rights of creditors in community property of a bankrupt in New Mexico. In re Chavez [C. C. A.] 149 F. 73.

45. Hence one confined pursuant to a conviction upon an indictment by a grand jury selected in violation thereof is not entitled to habeas corpus under Rev. St. § 753 (U. S. Comp. St. 1901, p. 592), from the Circuit Court of Appeals. Ex parte Moran [C. C. A.] 144 F. 594.

46. Arizona Pen. Code, § 246, relating to bigamy, held superceded by the Act of congress relating thereto in the territories. Territory v. Alexander [Ariz.] 89 P. 514.

47. Manner of selecting grand and petit jurors and their qualifications. Ex parte Moran [C. C. A.] 144 F. 594.

48. Such right as conferred by military order No. 58, as affected by the act of the Philippine Commission of August 10, 1901, was taken away by § 5, Act of Cong. of July 1, 1902 (32 Stat. at L. 691, chap. 1369), the word "jeopardy" being used in the American and not the Spanish sense. Kepner v. U. S. 195 U. S. 100, 49 Law. Ed. 114.

49. Refusal to consider does not amount to a conviction without informing him of the nature and character of the offense charged, or to a conviction without due process of law, in violation of the Bill of

THREATS.[50]

TICKETS; TIDE LANDS, see latest topical index.

TIME.[51]

Intervening Sundays[52] and holidays[53] are usually included, but it is held in Louisiana that Sunday is to be excluded from the five days allowed the governor within which to return a bill to the general assembly.[54] Where the last day falls on Sunday, it is usually excluded, but by statute in New York this rule does not apply to computation of a period of months;[55] and an act required to be done on a day certain is not excused because the day happens to be a half legal holiday.[56] Fractions of a day are not considered[57] except where priority of right in fact is involved,[58] and accordingly where time limited runs from an occurrence, the day thereof is included.[59] Where an act is required to be performed within a certain number of months[60] or years,[61] calendar months or years are intended, and performance on the calendar anniversary of the date from which the period runs it too late.[62] Solar time is meant in statutes fixing the lengths of terms of court in the absence of language showing a contrary intent,[63] and governs the length of terms even though a different system is in general use where the court sits.[64] "Several" when used to express time by the hour does not mean a fractional part of an hour, but an uncertain plurality of hours.[65]

TIME TO PLEAD; TITLE AND OWNERSHIP; TITLE INSURANCE, see latest topical index.

TOBACCO.[66]

TOLL ROADS AND BRIDGES.

§ 1. Franchises and Rights of Way, and Acquisition by Public (2123).
§ 2. Public Aid and Immunities (2124).
§ 3. Establishment, Construction, Location, and Maintenance (2124).
§ 4. Right of Travel and Tolls (2125).

§ 1. *Franchises and rights of way, and acquisition by public.*[67]—In Oregon counties may lease certain burdensome public roads and authorize the collection

Rights enacted by congress for the Philippines in the Act of July 1, 1902 (32 Stat. at L. 691, 692, c. 1369). Serra v. Mortiga, 204 U. S. 470, 51 Law. Ed. 571.

50. No cases have been found for this topic during the period covered. See Blackmail, 7 C. L. 442; Extortion, 7 C. L. 1639; Surety of the Peace, 8 C. L.

51. See 6 C. L. 1697.

52. Where property owners have ten days within which to petition for specified kind of material to be used in public improvements, Sunday must be counted in determining their right to petition. Curtice v. Schmidt [Mo.] 101 S. W. 61.

53. The whole of Saturdays when Saturday half-holidays are recognized. Jackson Brew. Co. v. Wagner, 117 La. 875, 42 So. 356.

54. Fellman v. Mercantile Fire & Marine Ins. Co., 116 La. 723, 41 So. 49.

55. Limitation in insurance policy of time to sue thereon. Ryer v. Prudential Ins. Co., 185 N. Y. 6, 77 N. E. 727.

56. Notice of renewal of lease held too late to entitle lessee to renewal. Jackson Brew. Co. v. Wagner, 117 La. 875, 42 So. 356. The rule "de minimis" does not apply. Id.

57. A seller for delivery during the first half of a month of 31 days has at least all of the 15th day of the month in which to make delivery. Hall-Baker Grain Co. v. Le Mar. [Mo. App.] 101 S. W. 1098.

58. As to time filing mortgages. New England Mortg. Sec. Co. v. Fry [Ala.] 42 So. 57.

59. Day of entering judgment in computing time to appeal. Connerly v. Dickinson [Ark.] 99 S. W. 82. Statutes in some states exclude from the computation of time the day of the date on which an act is done. Carroll v. Salisbury [R. I.] 65 A. 274.

60. Oehler v. Walsh, 7 Ohio C. C. (N. S.) 572.

61, 62. Geneva Cooperage Co. v. Brown, 30 Ky. L. R. 272, 98 S. W. 279.

63, 64. Texas Tram & Lumber Co. v. Hightower [Tex.] 16 Tex. Ct. Rep. 790, 96 S. W. 1071.

65. Instruction held erroneous. Western Union Tel. Co. v. De Andrea [Tex. Civ. App.] 100 S. W. 977.

66. No cases have been found for this subject since the last article. See 6 C. L. 1698.

67. See 6 C. L. 1698.

of toll thereon.[68] Where a franchise is silent as to its duration, it will be construed as limited to the corporate life of the toll company.[69] A toll company may be specially authorized by statute to collect tolls on a road within a city's limits if kept in repair by the municipality.[70]

Abandonment and forfeiture.—The Kentucky statute providing for the forfeiture of corporate charters for abuses [71] should be liberally construed and applied only where the criminal laws are inefficient to correct the abuses and the company has disabled itself to serve the purpose for which it was created.[72] A suit in equity will lie in Oregon to cancel a lease for nonperformance of its covenants,[73] but a claim affecting its original validity cannot be joined therewith.[74]

Acquisiton by public.[75]—In an action against a county upon its contract of purchase of a toll road, evidence of what it would cost to construct it at the time it was taken is admissible to show its value.[76]

§ 2. *Public aid and immunities.*[77]—A turnpike road is a public highway.[78]

§ 3. *Establishment, construction, location, and maintenance.*[79]—Under the Kentucky statute making it a criminal offense for the officers of a toll company to fail to make a settlement with the county court during the month of July, an indictment must allege that defendant was an officer during the entire month [80] and failed to make a report during such time.[81]

Personal injuries.—A toll road or bridge company must keep its property in a

68. A contract which, after reciting that a certain road is a public burden, provides that the contracting toll company shall repair and maintain the same, construed as a lease under B. & C. Comp. §§ 4937-4950, and not as an agreement under §§ 5074-5077, relating to condemnation. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 958.

69. Hence upon reorganization at the expiration of its charter it must secure a new franchise from the county board of supervisors before it can collect tolls for use of a bridge across a navigable stream. Rockwith v. State Road Bridge Co., 145 Mich. 455, 13 Det. Leg. N. 548, 108 N. W. 785.

70. Ky. St. 1903, § 4724, prohibiting such charges, is not applicable to the collection of tolls by the Newport L. & A. Turnpike Co. on such roads in the city of Newport, since by amendment to its charter it was given authority to contract with the city with reference to the use, improvement, etc., of its road within the city without impairing its right to collect tolls. Commonwealth v. Newport L. & A. Turnpike Co., 29 Ky. L. R. 1285, 97 S. W. 375.

71. A petition for the forfeiture of the charter of a turnpike company alleging that it had conveyed a part of its road to a railroad company, but which does not allege that such was not necessary for the safety of travelers or that the company has not secured in lieu thereof another and safer route, does not show abuse of corporate power. Commonwealth v. Newport, L. & A. Turnpike Co., 29 Ky. L. R. 1285, 97 S. W. 375. And a further allegation that the company collected toll within 500 yards of toll gate at a "suitable" obstruction in lieu of a gate was meaningless and charged no offense, it not being shown that toll was collected for a distance not traveled or twice collected for a distance traveled. Id.

72. Commonwealth v. Newport, L. & A. Turnpike Co., 29 Ky. L. R. 1285, 97 S. W. 375.

73. Under B. & C. Comp. § 4946, authorizing "an action" to forfeit a lease of a public road for failure of lessee to comply with the conditions, authorizes a suit in equity to cancel since equity alone can grant the relief sought. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 968.

74. As that it was made without authority. Tillamook County v. Wilson River Road Co. [Or.] 89 P. 968.

75. See 6 C. L. 1699.

76. Nelson County v. Bardstown & B. Turnpike Road Co., 30 Ky. L. R. 1258, 100 S. W. 1183. A verdict for $11,000 as the value of a road which has been paying 6 per cent interest on a valuation of $23,000 held not so insufficient as to authorize a reversal especially where it was the third trial. Id.

77. See 6 C. L. 1699.

78. Hence may be made the terminus of another public road (Derry Township Road, 30 Pa. Super. Ct. 538), and the mere fact that the revenue of the turnpike company may be lessened by the expense of a new toll gate does not prevent such use (Id.).

79. See 6 C. L. 1699.

80. An indictment alleging that "on the — day of July" defendant was an officer and did fail to make a report during July, etc., is insufficient, since he may not have been an officer during the entire month. Lyon v. Com. 29 Ky. L. R. 297, 92 S. W. 942.

81. Under Ky. St. 1903, § 4718, requiring the president and managers of toll bridges to make a full settlement in the county court "within the month of July," and indictment alleging that "on the — day of July" the defendants refused to make a full settlement, is insufficient as the report could be made any time during July. Commonwealth v. Houstonville & C. M. Turnpike Road Co., 29 Ky. L. R. 132, 92 S. W. 941.

reasonably safe condition for travel,[82] and is liable only for negligence in failing to do so.[83] It is not required to guard travelers against injuries inflicted by trespassing third persons.[84] As in tort actions generally its negligence must be the proximate cause of the injury,[85] and questions of negligence[86] and contributory negligence[87] are usually for the jury.

§ 4. *Right of travel and tolls.*[88]—One voluntarily leaving at an intermediate point rides through a tunnel within a statute authorizing the collection of tolls of persons riding through.[89] Where future tolls are pledged to the holders of construction bonds for the payment of the same as provided by statute, the state cannot thereafter decrease the tolls,[90] but such pledge of the "whole amount" of the tolls means the net and not the gross amount thereof.[91] A demand of excessive tolls does not authorize a traveler to force a passage by a breach of the peace.[92] Interest as a citizen alone is not sufficient to support an action to compel public authorities to use the fund arising from tolls to maintain a free bridge.[93]

TONTINE INSURANCE; TORRENS SYSTEM, see latest topical index.

TORTS.

§ 1. Elements of a Tort (2125).
§ 2. What is an Injury or Wrong (2127).
§ 3. What is Damage (2127).
§ 4. Parties in Torts (2127).
§ 5. Pleading and Procedure (2129).

§ 1. *Elements of a tort.*[94]—A tort is the interference with another in the enjoyment of a right created by law,[95] absolutely or as the result of a relation established by the parties,[96] and hence the violation of a statutory duty gives rise to a

82. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37. An instruction defining ordinary care in respect to toll bridges as such care as a prudent operator of a toll bridge would use under the same or similar circumstances held not misleading in using the words "prudent operator of a toll bridge" instead of the words "a person of ordinary prudence." Id.

83. Instruction examined and held to authorize a recovery if the jury found that plaintiff slipped on snow and ice and fell, without regard to defendant's negligence in permitting it to be on the walk. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

84. Not bound to erect a barrier to prevent pieces of wood coming down a chute on the neighboring land from flying onto the road. Trout v. Waynesburg, G. & M. Turnpike Co. [Pa.] 64 A. 900.

85. Evidence held to show that the proximate cause was not the absence of a guard rail but the fright of plaintiff's team. Trout v. Waynesburg, G. & M. Turnpike Co. [Pa.] 64 A. 900.

86. Question of negligence in removing snow and slush from the bridge held under the evidence for the jury. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

87. Question of contributory negligence of one stepping from the wagon way onto the walk knowing that the same is covered with snow and ice to avoid teams held under the facts for the jury. Gibler v. Terminal R. Ass'n [Mo.] 101 S. W. 37.

88. See 6 C. L. 1699.

89. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038.

90. Impairs the obligation of a contract. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038.

91. Bonds pledging the "whole amount" of tolls, as required by St. 1897, p. 509, c. 500, § 17, held to permit the deduction of the cost of collection. In re Opinion of the Justices, 190 Mass. 605, 77 N. E. 1038.

92. Committed assault in forcing the gate. Commonwealth v. Rider, 29 Pa. Super. Ct. 621.

93. No allegation that he is a taxpayer or is ever called upon to pay tolls. Laforest v. Thibodaux, 117 La. 266, 41 So. 568.

94. See 6 C. L. 1700.

95. Duty to cancel a bond given by contractors as security against suits growing out of the work held contractual if it exists at all. Cusachs & Co. v. Sewerage & Water Board, 116 La. 510, 40 So. 855. One undertaking to do something which if done negligently will endanger life or property is under an implied obligation of law to exercise due care and may be sued in tort for failure to exercise it, although the contract expressly provides for good workmanship. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. An action against one who had undertaken to erect a windmill on plaintiff's barn in a first class manner for damages for failing so to do, construed as ex delicto. Id. A manufacturer of an explosive and inflammable substance owes a legal duty to remote persons using the same not to conceal its character. Clement v. Crosby & Co. [Mich.] 14 Det. Leg. N. 85, 111 N. W. 745. Being a party to an illegal contract does not prevent the maintenance of a tort action existing independent thereof, as for unlawful interference with plaintiff's employment, which was largely dependent upon his membership in an illegal union. Brennan v. United Hatters [N. J. Err. & App.] 65 A. 165.

96. Action by a tenant against the landlord for unlawful invasion of the leased premises in making repairs held ex delicto. Wood v. Monteleone [La.] 43 So. 657. Ac-

cause of action only in favor of one intended to be protected thereby.[97] Generally speaking, any interference with a property,[98] or a contractual right by a third person,[99] or the right of privacy,[1] constitutes a tort, as does a malicious interferenec with another's business,[2] or the malicious placing of one in a false position before his profession and the public.[3] Again, every person is entitled to a free market [4] subject to the equal right of other men to refrain from contracting [5] singly or in concert,[6] and, in Minnesota, employers conferring together [7] to prevent another from obtaining employment are liable [8] if they are actuated by legal malice,[9] which is the intentional doing of an unlawful act [10] without justification or excuse.[11] The violated duty must be the proximate cause of the injury complained of,[12] in which case it is not material that another's tort contributed to [13] or another cause concurred in the injury.[14] A tort may frequently be waived and a contractual liability implied.[15]

tion for damages for improper application of proceeds of pledge of bonds, deposited with defendants to be pledged for a particular purpose, held one in tort, though defendants' duties were fixed by contract. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

97. Anderson v. Settergren [Minn.] 111 N. W. 279. Gen. St. 1894, § 6946, forbidding the sale or giving of a firearm to a minor under fourteen years of age, etc., held for the protection of one injured by the promiscuous shooting of one given a rifle in violation thereof. Id. Railroad company held under no legal duty to give the signal required by Gen. St. 1894, § 6337 (Rev. Laws 1905, § 5001), for the benefit of one driving along parallel with the track and not intending to cross. Everett v. Great Northern R. Co. [Minn.] 111 N. W. 281.

98. Defendant prevented plaintiff from using land belonging to plaintiff held liable, though he offered to lease or purchase it at a sum in excess of its value. Waggoner v. Wyatt [Tex. Civ. App.] 16 Tex. Ct. Rep. 196, 94 S. W. 1076. Where one by persistent and predetermined effort prevents another from enjoying his property, he is liable for exemplary damages. Id.

99. Where a third person intentionally causes a breach of contract, he is prima facie guilty of a tort. Booth v. Burgess [N. J. Eq.] 65 A. 226.

1. Police officers have no right to photograph a prisoner and to place a copy in the rogues' gallery until he has been convicted. Itzkovitch v. Whitaker, 117 La. 708, 42 So. 228.

2. Depot agent maliciously refused to deliver freight to a drayman who was authorized to receive it and persuaded merchants to break their contracts with him. Southern R. Co. v. Chambers, 126 Ga. 404, 55 S. E. 37.

3. One maliciously publishing a laudatory account of the success of a physician, giving the impression that it was inserted by him as an advertisement and thereby subjecting him to the contempt of his profession, is liable. Martin v. The Picayune, 115 La. 979, 40 So. 376.

4. Hence he is entitled to have all dealers with him left free to deal with him or not at their election. Booth & Bros. v. Burgess [N. J. Eq.] 65 A. 226. Where labor union leaders coerce through threats of fine and expulsion employes to refrain from contracting with their employers in order to compel the latter to boycott a particular concern to coerce it in respect to a matter not affecting the employes first coerced, there is an unjustified interference with the boycotted firm's free market. Id.

5. Interference with one's free market by a refusal to contract is not illegal, and the motive for so doing is beyond investigation. Booth & Bros. v. Burgess [N. J. Eq.] 65 A. 226.

6. Booth & Bros. v. Burgess [N. J. Eq.] 65 A. 226.

7. Whether a written request of a union depot company by a railroad company not to employ one until he signed a release of claims for damages against the latter and a compliance therewith is a conference within Rev. Laws 1905, § 5097, is for the jury. Joyce v. Great Northern R. Co. [Minn.] 110 N. W. 975.

8. Rev. Laws 1905, § 5097. Joyce v. Great Northern R. Co. [Minn.] 110 N. W. 975.

9. Joyce v. Great Northern R. Co. [Minn.] 110 N. W. 975.

10. A wrongful act is one which in the ordinary course will infringe upon the rights of another to his damage, except it be done under an equal or superior right. Brennan v. United Hatters [N. J. Err. & App.] 65 A. 165.

11. Brennan v. United Hatters [N. J. Err. App.] 65 A. 165; Joyce v. Great Northern R. Co. [Minn] 110 N. W. 975. Interference by a railroad company with the employment by a union depot company for the sole purpose of securing release from a liability which may exist for a prior injury is not justified. Joyce v. Great Northern R. Co. [Minn.] 110 N. W. 975. The fact that the person seeking employment was disposed to assert wholly meritless claims against defendant for injuries received through his own fault held to justify an interference. Id.

12. A negligent act or omission to act becomes direct and proximate in its relation to a claimed event, when the event is natural and probable result of such negligent act or omission and one which in the light of the circumstances should have been foreseen as likely to occur. Toledo Rys. & Light Co. v. Rippon, 8 Ohio C. C. (N. S.) 334. Defective condition of the streets delaying the fire department held not the proximate cause of the destruction of plaintiff's building by fire. Hazel v. Owensboro, 30 Ky. L. R. 627, 99 S. W. 315.

13. Concurrent negligence. Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181.

14. Erected a dam which during a freshet overflowed plaintiff's land. Clark v. Patapsco Guano Co. [N. C.] 56 S. E. 858.

15. Where a bailee converts the property,

§ 2. *What is an injury or wrong.*[16]—There is no liability for acts or omissions in the discharge of a governmental duty,[17] or for erroneous judicial action invoked in good faith.[18] One conducting his business in an ordinary manner is not liable for an interference with a superior right unless such interference is willful or results from a failure to use due care.[19]

§ 3. *What is damage.*[20]—Damages which result without a violation of a legal duty are not recoverable.[21]

§ 4. *Parties in torts.*[22]—Joint tort feasors[23] are jointly and severally liable,[24] as are persons acting independently but whose wrongful acts concur in producing a single injury,[25] and, similarly, one who commits a tort in a representative capac-

the conversion may be waived and suit maintained upon the implied promise to return the goods. De Loach Mill Mfg. Co. v. Standard Sawmill Co., 125 Ga. 377, 54 S. E. 157. Evidence examined and held to show a waiver of conversion of corporate funds by the officers and the treatment thereof as a debt of the officers. Security Warehousing Co. v. American Exch. Nat. Bank, 103 N. Y. S. 399.

16. See 6 C. L. 1702.

17. A city is not liable for loss occasioned by the negligence of the fire department in the discharge of its duties. Hazel v. Owensboro, 30 Ky. L. R. 627, 99 S. W. 315. Where an internal revenue tax is assessed and collected under a mistaken interpretation of the statute, a tort is not committed by the collector. Armour v. Roberts, 151 F. 846.

18. A person securing a sale of property under an erroneous order of court in an action prosecuted in good faith is not a tort feasor. The Eliza Lines [C. C. A.] 132 F. 242.

19. A railroad company can not be held liable for interfering with firemen about to lay hose across its track unless such interference is willful or due to a failure to use due care. American Sheet & Tin Plate Co. v. Pittsburgh, etc., R. Co. [C. C. A.] 143 F. 789. Held not liable in failing to stop sooner, there being nothing to apprise the crew of the fire and there being nothing to show that they heard or understood the signals of persons along the track. Id. Held no willful interference in running the train by instead of backing or cutting, it appearing that there was another train following and such action would have been accompanied with danger. Id.

20. See 6 C. L. 1702.

21. Personal inconvenience and annoyance resulting from the operation of a railroad in proper manner. Oklahoma City & F. R. Co. v. Scarborough [Tex. Civ. App.] 16 Tex. Ct. Rep. 506, 95 S. W. 1089. No recovery can be had for the death of one killed while under a car while a switch was being made where the crew had no knowledge of his presence or any reason to suspect that any one was so situated. Prosser v. West Jersey & S. R. Co., 72 N. J. Law, 342, 63 A. 494. Innkeeper held without remedy against a guest who permitted a nurse to remain in his rooms and to be there delivered of an illegimate child, giving rise to a scandal which caused other guests to leave. Parkes v. Seasongood, 152 F. 583. No damages can be recovered for fright or mental suffering unconnected with a physical injury. Huston v. Freemansburg Borough, 212 Pa. 548, 61 A. 1022.

22. See 6 C. L. 1702.

23. **Joint tort feasors:** Partners jointly securing an assignment of their copartner's interest by fraudulent conduct and representations. Goldsmith v. Koopman [C. C. A.] 152 F. 173. Where two railroads and a city jointly contributed to the detention of water which flooded plaintiff's land, they are joint tort feasors. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873. Where an injury resulted from the negligence of a smelting company in erecting a pipe across a railroad track and from the failure of the railroad company to warn plaintiff, a brakeman, of the danger, the smelting company and the railroad company are joint tort feasors. Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181. An allegation that "the Massee & Felton Lumber Co. and T. H. T. Sutton conspired and colluded together, and, acting for the mutual benefit of each * * * entered upon the lands of your petitioner * * * cut and carried away 204 trees," sufficiently declared against the defendants as joint tort feasors and is not demurrable for misjoinder of parties. Hancock v. Massee & Felton Lumber Co. [Ga.] 56 S. E. 1021.

Not joint tort feasors: A railway company negligently maintaining a trolley wire across a railroad track so low as to catch and throw brakeman from the top of a car and negligence of the railroad company in failing to give warning does not render them joint tort feasors. Pittsburgh Rys. Co. v. Chapman [C. C. A.] 145 F. 886. The giving of separate and independent indemnity bonds by execution and attacking creditors to the sheriff levying the writs, thereby ratifying his acts, does not render them joint tort feasors. Livesay v. First Nat. Bk. [Colo.] 86 P. 102. The joining in a joint answer by defendants charged with a joint liability has no weight as evidence of such liability. Id.

24. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230. Civ. Code Prac. § 83. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873. Need not make all parties. Mangan v. Hudson River Tel. Co., 50 Misc. 388, 100 N. Y. S. 539. A complaint which alleges that plaintiff's intestate was killed in a collision caused by the negligence of a railroad company, its train dispatcher, and certain telegraph operators, who were made defendants, states a cause of action for a joint tort and they may be held answerable at common law and under Clark's Code (3d Ed.), § 267, subs. 2, 3 (Revisal 1905, § 469). Hough v. Southern R. Co. [N. C.] 57 S. E. 469.

25. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652; Mangan v. Hudson River Tel.

ity may be jointly sued in such capacity and as an individual.[26] There must, however, be a community in the wrong.[27] While a tort feasor is always liable for his own acts,[28] he may sustain such a relation to another as to render him also liable.[29] At common law a wife is not liable for a tort committed in the presence of her husband.[30]

No right of contribution, direct or indirect,[31] exists among joint tort feasors for intentional and conscious wrongs,[32] but it is usually permitted in the case of passive negligence.[33]

Co., 60 Misc. 388, 100 N. Y. S. 539. The tort feasors cannot compiain of a joint action. Hough v. Southern R. Co. [N. C.] 57 S. E. 469. Miners dumping refuse into stream to the injury of lower riparian owners are each liable for the whole damage. Day v. Louisville Coal & Coke Co. [W. Va.] 53 S. E. 776. Electrical company and a telephone company jointly sued by a workman of the latter, the former for alleged negligence of stringing its wires too near a pole of the latter, and the telephone company for negligence in not furnishing plaintiff with a safe place to work. Drown v. New England Tel. & T. Co. [Vt.] 66 A. 801. A manufacturer of a dangerous substance who fails to label it and a retailer who sells the same with knowledge of its character without warning are jointly liable for a resulting injury. Clement v. Crosby & Co. [Mich.] 14 Det. Leg. N. 85, 111 N. W. 745. Evidence examined and held sufficient to show that the accident whereby decedent lost his life was caused by concurrent negligence of both defendants. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

26. Sued as curator and as an individual for slander of title in maliciously inventoring plaintiff's property as a part of the succession. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153.

27. Where two or more persons act each for himself and independently of each other in a proceeding, the result of which may be injurious to another, they are not jointly liable for the acts of each other. Livesay v. First Nat. Bk. [Colo.] 86 P. 102. To make tort feasors liable jointly, there must be a community in the wrongdoing and the injury must be due to their joint work, but it is not necessary that they act together or in concert if their concurrent negligence causes the injury. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

Community of wrong: Negligence in furnishing an unseaworthy barge and negligence in loading the same concurring to cause injury. Strauhal v. Asiatic S. S. Co. [Or.] 85 P. 230.

No community: Two parties acting independently appropriate separate and distinct parts of plaintiff's land. Millard v. Miller [Colo.] 88 P. 845.

28. Servant cutting timber under the direction of his master is not relieved. Baker v. Davis [Ga.] 57 S. E. 62.

29. Principal and agent: Walking delegate and labor union held joint tort feasors for a tort of the former. Wyeman v. Deady [Conn.] 65 A. 129. Where plaintiff was illegally seized and detained by defendants at their sanitarium, persons at whose request he was seized and detained are joint tort feasors though they did not contemplate or know that he was confined without legal commitment. Allen v. Ruland [Conn.] 65 A. 138. As between principal and agent, the latter is liable for a tort resulting solely from his negligence. Ayer & Lord Tie Co. v. Witherspoon's Adm'r, 30 Ky. L. R. 1067, 100 S. W. 259. See Agency, 7 C. L. 61.

Master and servant: A joint action lies against a master and his servant for a tort of the latter for which the former is liable (Mayberry v. Northern Pac. R. Co. [Minn.] 110 N. W. 356), and even if it be regarded as two causes of action, they may be joined in a single complaint under § 4154, Rev. Laws 1905, as growing out of the same transaction (Id.). A master liable only by virtue of the doctrine of respondeat superior for the tort of his servant cannot be jointly sued with him, and plaintiff must elect. French v. Central Const. Co., 8 Ohio C. C. (N. S.) 425. See Master and Servant, 8 C. L. 840.

Partners: Members of a partnership held jointly and severally liable for a wrongful repledge of pledged property. Interurban Const. Co. v. Hayes, 191 Mo. 248, 89 S. W. 927.

See Partnership, 8 C. L. 1261.

30. Presumed to have resulted from coercion, and the rule still prevails in New Jersey. Emmons v. Stevans [N. J. Law] 64 A. 1014.

31. In an action for breach of contract to transfer certain corporate stock purchased of a third party, an answer alleging that a judgment had been recovered by such third party against defendant for fraud in the purchase to which plaintiff was a party, is irrelevant. Noval v. Haug, 48 Misc. 198, 96 N. Y. S. 708.

32. Noval v. Haug, 48 Misc. 198, 96 N. Y. S. 708; Goldsmith v. Koopman [C. C. A.] 152 F. 173. Where a smelting company negligently erected a pipe across a railroad track and the railroad company failed to warn its brakeman of the danger and he was injured, the companies were active joint tort feasors and hence no right of contribution exists. Consolidated Kansas City Smelting & Refining Co. v. Binkley [Tex. Civ. App.] 99 S. W. 181.

33. Mayberry v. Northern Pac. R. Co. [Minn.] 110 N. W. 356. Railroad allowed to recover where it was passively negligent and its co-tort feasor was actively negligent. Southwestern Tel. & T. Co. v. Krause [Tex. Civ. App.] 92 S. W. 431. Injured through the concurrent negligence of a railroad company and a traction company resulting in a collision. Northern Texas Trac. Co. v. Caldwell [Tex. Civ. App.] 99 S. W. 869. Where plaintiff and defendant are jointly liable for a wrongful death due to their concurrent omissions, and plaintiff pays a judgment under compulsion, he is entitled to contribution under Rev. St. 1899, § 2870 [Ann. St. 1906, p. 1654] (Eaton &

A release of one joint tort feasor releases all [34] if the releasee was liable in fact [35] and subject to suit,[36] unless the release stipulates to the contrary [37] or the parties in fact did not so intend.[38] A covenant not to sue one is no bar to a suit against another joint tort feasor.[39]

Full satisfaction by one tort feasor discharges all,[40] though by statute the wrong is made a liabiliy with statutory punitive damages.[41] A partial satisfaction inures to the benefit of all.[42] Rendition of judgment against one without satisfaction is no bar to a suit against another.[43]

§ 5. *Pleading and procedure.*[44]—In Florida contributory negligence of plaintiff in a personal tort action must be pleaded.[45] Death of plaintiff after judgment does not abate an action for personal torts.[46] Where distinct violations of duty are alleged, it is not necessary to establish all,[47] and though a conspiracy is charged, if the gist of the action is a tort which could be committed by one, a verdict may be returned against a single defendant.[48] A joint action against joint tort feasors may be severed at any stage of the proceedings.[49] Failure to prove a joint liability in a joint action is a fatal variance,[50] and likewise a joint judgment can only be sustained where the evidence makes a cause of action against each defendant.[51] Where wrongdoers may be sued severally, a judgment may be rendered

Prince Co. v. Mississippi Valley Trust Co. [Mo. App.] 100 S. W. 551), though there was no concert of action, the negligence of each being omissions only (Id.).

34. Allen v. Ruland [Conn.] 65 A. 138.

35. Ryan v. Becker [Iowa] 111 N. W. 426. Especially where the release provides that it shall not release the other. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. In an action to cancel a judgment on the ground that a judgment rendered against a joint tort feasor has been satisfied, defendant may show by parol that the satisfied judgment was not rendered on the theory of compensation for the injury but was a compromise to save the judgment debtor the expense of a trip to the place of trial and that he was not in fact liable. Ryan v. Becker [Iowa] 111 N. W. 426.

36. Release of the commonwealth which was not subject to suit. Pickwick v. McCauliff [Mass.] 78 N. E. 730.

37. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166; Morris v. North American Mercantile Agency Co., 103 N. Y. S. 761. Under Code 1896, §§ 1805, 1806, providing that releases shall be given effect according to the intention of the parties, a release of one joint tort feasor which recites that it is not intended as a satisfaction of the amount claimed, nor as a release of any claim against the other tort feasor, releases the latter only pro tanto. Home Tel. Co. v. Fields [Ala.] 43 So. 711.

38. Parol evidence is admissible to show the circumstances under which a release was given and to explain the intent. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

39. Chicago & A. R. Co. v. Averill, 224 Ill. 516, 79 N. E. 654.

40. Satisfaction by joint tort feasor. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166. Where the officers of a corporation without authority applied corporate funds to the payment of private debts, and the corporation waives the tort and treats the claim as a debt against the officers, acceptance of money, notes, and other security, in payment of the debt, released the receiver of the funds from all liability. Security Warehousing Co. v. American Exch. Nat. Bk., 103 N. Y. S. 399.

Not joint tort feasors. McCoy v. Louisville & N. R. Co. [Ala.] 40 So. 106. Principal settled for the tort of his agent. Chicago Herald Co. v. Bryan, 195 Mo. 574, 92 S. W. 902.

41. McCoy v. Louisville & N. R. Co. [Ala.] 40 So. 106.

42. Where money is paid by one to secure a release from further obligations and as part payment for the injury, a wrongdoer sued thereafter is entitled to credit. El Paso & S. R. Co. v. Darr [Tex. Civ. App.] 15 Tex. Ct. Rep. 145, 93 S. W. 166.

43. Reno v. Thompson, 111 App. Div. 316, 97 N. Y. S. 744.

44. See 6 C. L. 1703.

45. Contributory negligence must be pleaded under rules 71, 72, of the circuit court, in common-law actions. Jacksonville Elec. Co. v. Sloan [Fla.] 42 So. 516.

46. Especially where the judgment is merely suspended and not vacated by a motion for a new trial and an appeal from its denial. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178.

47. Sufficient if he proves enough to make a cause of action, i. e., a single negligence. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

48. In an action wherein it is alleged that defendant "did fraudulently, deceitfully, maliciously, and unlawfully conspire, combine," etc., to cheat and deprive plaintiff of her property, the tort working damage to plaintiff and not the conspiracy was the gist of the action. James v. Evans [C. C. A.] 149 F. 136.

49. As by granting a new trial as to one. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178.

50. Livesay v. First Nat. Bk. [Colo.] 86 P. 102.

51. Evidence held insufficient to show that

against one alone in a joint action,[52] even after verdict finding a joint liability,[53] and the granting of a new trial as to one does not vacate the judgment as to the others,[54] unless only one final judgment can be rendered.[55] An action for a single tort cannot be split.[56] It is not error to permit one joint tort feasor who has announced his intention to abide by his motion for a peremptory instruction to cross-examine his codefendant's witness and to argue the evidence.[57] The fact that it does not appear that a releasee was a joint tort feasor with defendant does not render the release inadmissible.[58] Instructions relative to the liability of tort feasors must not assume disputed facts or be misleading.[59]

TOWAGE, see latest topical index.

TOWNS; TOWNSHIPS.

§ 1. Creation, Organization, Status, and Boundaries (2130).
§ 2. General Powers and Exercise Thereof (2131).
§ 3. Property (2132).
§ 4. Contracts (2132).
§ 5. Officers and Employes (2133).
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§ 1. *Creation, organization, status, and boundaries.*[60]—The word "town" is frequently used indiscriminately to denote a territorial subdivision of a county and a village or small city, hence its meaning is largely a question of legislative intent.[61] The word "municipality" has been construed to embrace townships.[62] The advisability of township organization is a legislative question which cannot be imposed upon the judiciary.[63] Where the constitution authorizes the legislature to enact a general statute under which counties may so organize "whenever a majority of voters, voting at any general election," shall so determine, a statute authorizing such

one of the defendants was in control of the wagon doing the damage. United Breweries Co. v. Bass, 121 Ill. App. 299.

52. Defendant against whom rendered held not aggrieved. Ferguson v. Truax [Wis.] 110 N. W. 395. In an action of trespass committed by an attorney on behalf of the client under a void writ, the direction of a verdict in favor of the attorney does not prevent assessment of punitive damages against the client. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108.

53. Plaintiff may take judgment against one and dismiss as to the other. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

54. Under Code Civ. Proc. § 578, providing that in an action against several tort feasors judgment may be rendered in favor of some and against others, the granting of a new trial as to one does not vacate the judgment as to the others. Fowden v. Pacific Coast S. S. Co. [Cal.] 86 P. 178.

55. An action against joint tort feasors being a single action in which there can be but one final judgment under Rev. St. 1895, art. 1337, the vacation of the judgment as to one vacates as to all. St. Louis, etc., R. Co. v. Smith [Tex. Civ. App.] 99 S. W. 171.

56. Where after obtaining a judgment for personal injuries it becomes necessary to amputate two more fingers, additional damages cannot be recovered. Painter v. Norfolk & W. R. Co. [N. C.] 57 S. E. 151.

57. He merely waived the right to have plaintiff's evidence alone considered against him and authorized a consideration of the evidence introduced by his codefendant. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

58. The objection goes to the effect to be given rather than its admissibility. Allen v. Ruland [Conn.] 65 A. 138.

59. An instruction that where the negligence of two unite in causing an accident by which another is injured is not objectionable in using the word "where" instead of "if" as assuming such negligence. Parmelee Co. v. Wheelock, 224 Ill. 194, 79 N. E. 652. Nor is it misleading in using the clause "where the negligence of two unite in causing" instead of "where two unite in negligently causing." Id.

60. See 6 C. L. 1709.

61. "Town" as used in franchise to make and sell gas for the purpose of lighting the streets, buildings, manufactories, and other places situated in the "town of Millville and vicinity" held to mean the village of Millville and not the township. Millville Gas Light Co. v. Vineland Light & Power Co. [N. J. Eq.] 65 A. 504.

62. A municipality within Laws 29th Gen. Assem. 1902, p. 68, c. 108, Code Supp. 1902, § 2575, providing for the location of pest houses in case of controversies between municipalities. Hanson v. Cresco [Iowa] 109 N. W. 1109.

63. Laws 1905, p. 60, c. 21, § 775d, held to vest discretion in the court only in determining whether all the conditions precedent have been complied with and not in passing on the wisdom of the action and hence not unconstitutional. Nash v. Fries [Wis.] 108 N. W. 210.

action when "a majority voting on the question" so decide is unconstitutional,[64] and the fact that a majority of all the voters favored the organization does not render it valid.[65] A petition for resubmission of the question is not invalidated by a superfluous recital of facts justifying it,[66] nor an order of submission by unnecessary but correct directions as to matters regulated by statute,[67] and whether an election is held on the theory of an original submission or a resubmission, the real purpose will be effectuated if possible.[68] The phrase "as now constituted" as used in a consolidating act in respect to a matter to be acted upon by the constituent towns applies to the territorial limits of the old towns and not to the inhabitants.[69] In Ohio a newly created township by division is entitled to a porportional share of taxes levied but not collected at the time of the division.[70] A division of a township does not affect a franchise privilege coextensive therewith.[71]

§ 2. *General powers and exercise thereof.*[72]—A town is a quasi corporation with limited powers having only such as are expressly conferred or clearly implied therefrom.[73] Where a consolidating act provides that a town house shall be located at a particular place unless the old towns otherwise decide, a decision once made [74] renders the provision functus officio and the new town may thereafter locate the same,[75] and, if the statute does not prescribe the manner of taking such independent action, it is left to the reasonable discretion of the old towns acting together as a new town.[76] In New York a taxpayer can only interfere with official action where the acts are unauthorized or where fraud or bad faith amounting thereto is charged,[77] and where a taxpayer has voluntarily paid a tax levied for a particular purpose, he cannot restrain such use.[78]

64. Rev. St. 1879, § 7432 (State v. Munn [Mo.] 99 S. W. 1073), and Rev. St. 1889, § 8427, held violative of Const. art. 9, § 8 (State v. Gibson, 195 Mo. 251, 94 S. W. 513).

65. State v. Gibson, 195 Mo. 251, 94 S. W. 513.

66. A petition under Rev. St. 1889, § 8425c (Rev. St. 1899, § 10,226), for resubmission of the question of township organization, is not rendered invalid by recitals that the county had previously adopted township organization, that the revenues were insufficient to maintain such organization, and that the highways and bridges were becoming dilapidated. State v. Russell, 197 Mo. 633, 95 S. W. 870.

67. Directions as to the form of ballots. State v. Russell, 197 Mo. 633, 95 S. W. 870.

68. Election effectuated as an original submission under § 10,226, Rev. St. 1899, and not as a resubmission under Rev. St. 1899, § 10,317, though conducted on the theory of a resubmission, every thing essential to an original submission being done (State v. Russell, 197 Mo. 633, 95 S. W. 870), hence not material that the latter is unconstitutional (Id.).

69. Act 1861, providing that "whenever the new town of Skowhegan shall vote to build a town house, it shall be located on Skowhegan Island unless a majority of each town, as now constituted, shall otherwise decide." Anderson v. Parker, 101 Me. 416, 64 A. 771.

70. Rev. St. 1906, § 1377, providing "And in the case of division * * * of any township, the funds in the treasury * * * shall be apportioned * * * to the new township * * * to the extent the same were collected from the territory * * * established into the new township," held to include taxes levied but not collected at the time of division. Cooley v. State, 74 Ohio St. 252, 78 N. E. 369.

71. Act of 1871, dividing Hackensack township into three new townships, held not to affect the right of a gas company to lay pipes, etc., in the territory originally embraced in such township as authorized by its charter. Public Service Corp. v. De Grote [N. J. Eq.] 62 A. 65.

72. See 6 C. L. 1710.

73. State v. Lake Sup'rs [Wis.] 109 N. W. 564.

74. To "consent to have" a town "hall" in a certain building is to "decide to build" a town "house" within Priv. & Sp. Laws 1861, p. 25, c. 34, providing that if the new town shall vote to build a town house, it shall be located at a particular place unless a majority of each constituent town shall decide otherwise. Anderson v. Parker, 101 Me. 416, 64 A. 771.

75. Anderson v. Parker, 101 Me. 416, 64 A. 771.

76. Action taken at a meeting called by the new town at which the inhabitants of the old towns voted separate as to the location of a town hall, held to fulfill Priv. & Sp. Laws 1861, p. 25, c. 34, locating it at a certain place unless a majority of the old towns decided otherwise. Anderson v. Parker, 101 Me. 416, 64 A. 771.

77. An action will lie under Laws 1892, p. 620, c. 301, to restrain the highway commissioners from granting a franchise to a public lighting company only in case of fraud or bad faith amounting to fraud. Craft v. Lent, 103 N. Y. S. 866. The fact that the commissioners might have sold the franchise for $1,000 to another company instead of granting it free does not show such bad faith. Id.

78. Has no interest in the money. Bart-

Town meetings.—Presumptions are indulged in favor of regularity of town meetings,[79] and they cannot be collaterally attacked.[80] Failure to swear the moderator does not affect the validity of the meeting.[81] In Illinois the meeting must be held at a single place,[82] and where the purpose of a special meeting is to authorize the borrowing of money for bridge purposes, the general election laws apply.[83] It is the duty of the inspectors of a town meeting to canvass the votes and of the clerk to announce and record the result,[84] and they may be compelled by mandamus to act.[85]

§ 3. *Property.*[86]

§ 4. *Contracts.*[87]—In Wisconsin a town cannot contract with an attorney by the year to prosecute and defend actions generally,[88] and the chairman of the town board can contract for the purchase of a road machine only upon petition of a majority of the taxpayers in a superintendent's district representing more than half the taxable property.[89] In Minnesota townships can only issue bonds for bridge purposes,[90] and bonds issued thereunder for road and bridge purposes are void unless saved by the curative act.[91] In Iowa township trustees are prohibited from becoming parties to any contract to furnish labor or materials to the township [92] and are criminally liable for so doing.[93] One who has enjoyed the full benefits of a contract

lett v. Austin & Western Co. [Mich.] 13 Det. Leg. N. 940, 110 N. W. 123. Payment of money already collected by a tax to raise money to pay off an instalment does not of itself affect a taxpayer's land and hence he is not entitled to an injunction on the ground that the act will create a lien or result in a tax being levied. Id.

79. Especially on collateral attack and where it appears from the clerk's record that the meeting was held on the proper day, that the moderator-elect presided, and that a resolution was read and adopted, it will be presumed that the meeting was held at the regular hour, that the resolution was carried by a majority of the electors present, and that the result was duly declared by the moderator. Parker v. People, 126 Ill. App. 538.

80. Regularity of the town meeting authorizing an action on behalf of the town sought to be impeached in the suit. Parker v. People, 126 Ill. App. 538.

81. Especially on collateral attack. Parker v. People, 126 Ill. App. 538.

82. Although a town is divided into three election precincts under par. 53, c. 139, Hurd's St. 1903, providing that "each town shall, for the purpose of town meetings, constitute an election precinct," town meeting must be held at a single place. Frantz v. Patterson, 123 Ill. App. 13.

83. Meeting not called at the time designated for or conducted in the manner of a general election. Frantz v. Patterson, 123 Ill. App. 13.

84. Laws 1890, p. 1218, c. 569, § 39, as renumbered by Laws 1897, p. 610, c. 481, and as amended by Laws 1899, p. 321, c. 168. People v. Armstrong, 101 N. Y. S. 712.

85. Where the meeting is adjourned without such canvass, mandamus will lie to compel the inspectors to convene, canvass the votes, and to the clerk to enter the result. People v. Armstrong, 101 N. Y. S. 712.

86. See 4 C. L. 1686.

87. See 6 C. L. 1710.

88. Held not authorized by Rev. St. 1898, § 773, authorizing it to make contracts necessary and convenient for the exercise of its corporate powers, in view of § 776 impliedly authorizing the electors to employ attorneys in particular suits only, the practical effect also being to create another town office. State v. Lake Sup'rs [Wis.] 109 N. W. 564.

89. The sufficiency of the petition under Laws 1899, p. 116, c. 83, § 2, is tested by the last assessment roll on file at the time of presentment to the clerk for certification, and not by the last roll on file at the time the petitioners signed. Pape v. Carlton [Wis.] 109 N. W. 968. The roll delivered to the clerk by the assessor under Wis. St. 1898, § 1064, is an assessment roll within the statute though subject to correction. Id.

90. Under Act March 7, 1867 (Gen. St. 1878, § 114, c. 10), a township can only issue bonds for bridge purposes, being so limited by the title of the act. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824. And where bonds issued thereunder recite that they are issued for the purpose of constructing and repairing "roads and bridges," holders thereof take with notice of invalidity. Id.

91. A taxpayer's suit alleging invalidity of such bonds and restraining the town from paying the same questions their validity so as to take them out of the curative act of Laws 1903, p. 387, c. 267, although the bond holders were not a party thereto. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824.

92. A contract with the road superintendent to furnish men and teams to perform labor for the township is a contract with the township within Code Supp. § 468a. State v. York [Iowa] 109 N. W. 122.

93. A violation of Code Supp. § 468a, is an indictable offense though it merely prohibits the trustees from becoming parties to township contracts for labor, in view of Code, § 4905, providing that where an act is prohibited and no penalty is prescribed it shall be a misdemeanor, and § 4906 providing the punishment for misdemeanors not otherwise fixed, the fact that § 468a was passed subsequent to the others being immaterial. State v. York [Iowa] 109 N. W. 122.

cannot deny the corporate power of the town to make it or the authority of the board executing the same.[94] The commissioners of highways may enter into a joint contract for the construction of a bridge over a boundary stream between two towns[95] if they have the funds;[96] and while they have no authority to contract for a bridge not abutting on highways,[97] the opening of such highways during construction cures the irregularity.[98] Such prematurity may also be waived by the towns.[99]

§ 5. *Officers and employes.*[1]—The size of the town committee in New Jersey is dependent upon population.[2] Adjournment of the annual meeting without an attempt to elect officers does not prevent their election at a subsequent meeting under the Vermont statute.[3] In some states one must possess the qualifications of a legal voter to be eligible to office,[4] and in determining such qualifications prior residence in territory made a part of a town is residence therein.[5] A town officer holding over has no right to vote at a town board meeting in the appointment of a successor.[6] A town warden by statute in Rhode Island possesses the powers of a justice of the peace.[7] The board of civil authority of a town in Vermont is not required to canvass and announce the vote of the license question,[8] especially in towns of less than four thousand.[9] Where a salary of a town officer is in full for all services required by law, no additional compensation can be had for official duties,[10] and, if paid, may be recovered,[11] though the disbursing officer has included such item in his accounts

94. Leased a stone crusher. Town of Beloit v. Heineman, 128 Wis. 398, 107 N. W. 334.

95. Highway Law (Laws 1890, pp. 1201, 1202, c. 568, §§ 130-134). No action of the town board or of the electors is required. Colby v. Mt. Morris, 100 N. Y. S. 362.

96. If there are no funds the authority to build or repair rests entirely on the board of supervisors, who are authorized to contract and to borrow money for such purpose by County Law (Laws 1892, p. 1761, c. 686, §§ 68, 69). Colby v. Mt. Morris, 100 N. Y. S. 362.

97, 98. Colby v. Mt. Morris, 100 N. Y. S. 362.

99. Application of the towns to the board of supervisors for leave to construct the bridge and to borrow money, the issuing of bonds for such purpose and the acceptance of the bridge, held to waive all objections that the contract was premature. Colby v. Mt. Morris, 100 N. Y. S. 362.

1. See 6 C. L. 1711.

2. Until a state census is promulgated as provided by law it is inoperative as a basis for determining the number of members of a township committee which may be elected under Act February 26, 1903 (P. L. 1903, p. 21). Buck v. Douglass [N. J. Law] 65 A. 848.

3. Is not a meeting within Vt. St. 2972, and hence under the provision that a failure to hold the annual meeting shall not prevent an election at a subsequent meeting applies. Jenney v. Alden [Vt.] 64 A. 609.

4. As to qualifications of electors for town elections, the town is one election district, so that one who has resided in the town for 30 days may vote without respect to the length of time he has been in any particular election district of the town, and under Hurd's Rev. St. 1905, c. 139, art. 9, § 1, p. 2013, is eligible for the town office of road commissioner for the district of which he is a resident. People v. Markiewicz, 225 Ill. 563, 80 N. E. 256.

5. Attorney General v. McColeman, 144 Mich. 67, 13 Det. Leg. N. 143, 107 N. W. 869. Where, at the session passing an act disorganizing a township and making it a part of another, an act was passed which first took effect creating a new election district in the township annexed to, territory of the disorganized township not falling within the new election district became a part of the old, and hence there was no disfranchisement. Id.

6. Where a supervisor holds over, the office is vacant for the purpose of appointing a successor and on meeting of the town board to fill the vacancy under Laws 1890, c. 569, §§ 234, 232, added by Laws 1893, pp. 788, 789, c. 387 and § 65, as amended by Laws 1897, c. 481, p. 618, the supervisor has no vote. In re Smith, 49 Misc. 567, 100 N. Y. S. 179.

7. May issue warrant to the town sergeant to summon a town meeting to levy a tax. Rose v. McKie [C. C. A.] 145 F. 584.

8. No such duty imposed by Vt. St. §§ 2996, 2983, 2985. Page v. McClure [Vt.] 64 A. 451.

9. Vt. St. 130, as amended by Laws 1902, p. 4, No. 4, providing for the counting and marking of ballots voted under the Australian ballot system by the board of civil authorities, has no application to towns of less than 4,000 population. Page v. McClure [Vt.] 64 A. 451. Courts take judicial notice of the population of towns as shown by the last Federal census. Id.

10. Town clerk is not entitled to compensation for receiving, filing, and computing, the amounts of poor orders issued by the overseer of the poor for outdoor relief in addition to his regular salary (Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951), nor for services rendered to the assessor in keeping track of the exchange of property, death of owner, etc., for if it be regarded as clerical services rendered to the board of assessors, it is a part of his duties, and if it be regarded as services rendered under employment, there was no authority for such employment (Id.).

11. Constitutes waste and injury to the funds of the town, within Laws 1887, p. 885,

and it has been allowed.[12] A town supervisor in New York, paying claims not audited by the town board, is liable therefor,[13] and the fact that his accounts for receipts and disbursements is allowed is no defense.[14] A suit on a supervisor's bond given under Town Laws for failure to turn over local school funds may be prosecuted by his successor.[15] The use of the clerk's office by the assessor for exhibition of the assessment roll for inspection does not make the clerk custodian of the roll so as to entitle him to compensation.[16] Town highway commissioners employing counsel to oppose the laying out of a new highway are liable for his fees[17] with the right of reimbursement.[18] In matters not purely ministerial,[19] a board must act as such after due deliberation,[20] and hence notice and opportunity to attend must be given to all members.[21]

§ 6. *Fiscal management.*[22]—Authority to contract a debt carries an implied authority to appropriate money for its payment[23] and to levy a tax if necessary.[24] In Illinois there are two distinct codes of road and bridge taxes,[25] and the original certificate of levy of the highway commissioners under the labor system must be delivered to the supervisor and by him be submitted to the county board.[26] The tax should be extended upon the valuation of the state board of equalization and not upon the valuation of the county board of review.[27] The certificate of the commissioners to the board of town auditors and assessors for consent to levy in excess of the statutory limit must be in writing and state the contingency which requires the levy.[28] A levy of township taxes must state the purpose to which it is to be applied.[29] In New Jersey a town may impose a license fee upon truck peddlers for revenue.[30] The North Carolina act requiring county taxes collected upon railroad

c. 673, as amended by Laws 1892, p. 620, c. 301. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951.

12. Certification of the supervisor's account under Laws 1890, p. 1233, c. 569, § 161, including disbursements to the town clerk as additional compensation, is not an adjudication of the validity of the claims, but merely attests the correctness of the account. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951.

13. Laws 1892, p. 620, c. 301, § 1, held broad enough to include such defaults. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951.

14. Annis v. McNulty, 51 Misc. 121, 100 N. Y. S. 951.

15. It is only suits on bonds given for school moneys under Consolidated School Law (Laws 1894, p. 1194, c. 556, tit. 2, § 17), which must be prosecuted by the county treasurer. Palmer v. Roods, 101 N. Y. S. 186.

16. People v. Sippell, 102 N. Y. S. 69.

17. McCoy v. McClarty, 104 N. Y. S. 80. The proper procedure is for the commissioners to lay the matter before the town board, which may by resolution employ counsel. Id.

18. McCoy v. McClarty, 104 N. Y. S. 80.

19. Purchase of a road machine held a deliberate as distinct from a purely ministerial act. Austin Mfg. Co. v. Ayr, 31 Pa. Super Ct. 356. The issuing of a license in a particular case, the power to issue a license and the fee being fixed, being purely ministerial, may be issued by a deputed member of the township committee and it is not necessary for the committee to act upon the application by resolution. Buck v. Douglass [N. J. Law] 65 A. 848.

20. Austin Mfg. Co. v. Ayr, 31 Pa. Super. Ct. 356. In an action for the price of a road machine plaintiff makes a prima facie case by showing that they met and conferred with regard to the machine and, after inspecting it, agreed to accept it and did accept it and thereafter took possession, without express evidence that they discussed the matter and honestly considered the interests of the taxpayers. Id.

21. Two selectmen met and acted without notice to a third who was temporarily out of the town. Damon v. Walsh [Mass.] 80 N. E. 644. Rev. Laws, c. 8, § 4, cl. 5, providing that joint authority given to a board of public officers may be exercised by a majority, does not affect the requirement that all should be given notice and opportunity to act. Id.

22. See 6 C. L. 1712.

23. Rose v. McKie, 145 F. 584.

24. Unless expressly withheld. Rose v. McKie, 145 F. 584.

25. Road and bridge act, § 119 (Hurd's Rev. St. 1905, c. 121), held not applicable to townships under the cash system. Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 N. E. 1059.

26. Road and bridge act, § 119 (Hurd's Rev. St. 1905, c. 121), is not complied with by a filing of the original certificate of levy with the town clerk and the sending of a copy to the county clerk. Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 N. E. 1059.

27. St. Louis, etc., R. Co. v. People, 225 Ill. 418, 80 N. E. 303.

28. Under § 14 of the road and bridge act (Hurd's Rev. St. 1905, c. 121). Toledo, etc., R. Co. v. People, 226 Ill. 557, 80 N. E. 1059.

29. A levy of a certain sum as a tax for "town purposes" is insufficient as to designation of purpose and is invalid. St. Louis, etc., R. Co. v. People, 225 Ill. 418, 80 N. E. 303.

30. Act April 28, 1905 (P. L. 1905, p. 360),

property in certain townships to be used therein until the sum expended equals the township's subscription to the road is valid [31] and enforceable by mandamus at the instance of taxpayers of such townships [32] without regard to lapse of time.[33] A statute requiring a particular tax to be invested as a sinking fund for the discharge of certain township bonds does not require that such taxes be used to reimburse the township, the bonds having been paid.[34] Where the future expense of maintaining a highway [35] is excessively burdensome upon the town in which it is located and other towns are "greatly" benefited thereby,[36] it may be apportioned upon application to the superior court.[37] Where a bridge is constructed over a boundary stream between two towns in New York, each is liable for its just and equitable portion of the expense,[38] and where the towns apply to the supervisors for leave to build and to borrow money therefor which leave is granted and exercised, the towns are concluded by the apportionment made by the supervisors.[39]

§ 7. *Claims.*[40]—With a few exceptions,[41] claims in New York must be verified as required by statute [42] and submitted to the town board of audit,[43] whose decision thereon has the conclusiveness of a judgment,[44] but where the power to fix the amount of the claim is vested in another body, the board must audit it as fixed.[45] The auditing of an officer's account including an item for services is not an auditing of the creditor's claim,[46] nor is the rejection of an attorney's claim at a town meeting

held to authorize the imposition of fees therein enumerated for revenue. Buck v. Douglass [N. J. Law] 65 A. 848.

31. Laws 1893, p. 430, c. 448, § 1, as amended by Laws 1895, p. 182, c. 131, held not unconstitutional as violating the provision for uniformity and equality of taxation. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427.

32. Jones v. Stokes County Com'rs [N. C.] 56 S. E. 427.

33. Duty being a continuing one, the statute of limitations cannot run. Jones v. Stokes County Com'rs [N. C.] 56 S. E. 427.

34. Laws 1895, p. 182, c. 131, § 2. Jones v. Stokes County Com'rs [N. C.] 55 S. E. 427.

35. Future expenses and cost of maintenance of an existing highway may be apportioned under Pub. St. 1901, c. 73, § 4. O'Neil v. Walpole [N. H.] 66 A. 119.

36. A petition for apportionment under Pub. St. 1901, c. 73, § 4, must show that the towns sought to be charged are "greatly" benefited by the road. O'Neal v. Walpole [N. H.] 66 A. 119.

37. Application for apportionment should be filed with the superior court and by it referred to the county commissioners, but a filing with the commissioners will not invalidate the proceedings where a hearing is fully given before the proper tribunal. O'Neal v. Walpole [N. H.] 66 A. 119.

38. Under County Law (Laws 1892, p. 1761, c. 686, §§ 68, 69), the towns are not necessarily liable for equal amounts. Colby v. Mt. Morris, 100 N. Y. S. 362.

39. Colby v. Mt. Morris, 100 N. Y. S. 362. Consent of a village within the town is not necessary to the action of the supervisors in apportioning the cost, such consent under County Law (Laws 1892, p. 1762, c. 686, § 70), not being required until a tax is to be imposed. Id.

40. See 6 C. L. 1712.

41. The cost of a bridge over a boundary stream between two towns constructed under a joint contract by the highway commissioners need not be audited (Colby v. Mt. Morris, 100 N. Y. S. 362), the rule that an action cannot be maintained against a town upon a cause of action ex contractu of which the town board has jurisdiction to audit not applying (Id.); but on the acceptance of the bridge by the commissioners and supervisors and the approval thereof by the state engineer, the towns become jointly liable under the terms of the contract (Id.).

42. Where the verification failed to state that the account was correct and that the services charged therein were in fact rendered, as required by Laws 1890, p. 1235, c. 569, § 167, no legal audit could be made. People v. King, 101 N. Y. S. 782.

43. The fact that a purchase of furniture for the clerk's office under Town Law (Laws 1890, p. 1224, c. 569, § 85), is with the consent of the board and for a fixed price, does not relieve the claim from the necessity of being audited, since the act requires that it be audited as other claims. Peck v. Catskill, 104 N. Y. S. 540.

44. Where a claim is audited and allowed under Town Law (Laws 1890, p. 1211, c. 569, § 162, as amended by Laws 1897, p. 610, c. 481), the supervisors who have received money for the payment of the same cannot refuse to pay it on the ground that it is erroneous. In re Mefford, 99 N. Y. S. 400.

45. The duty of fixing the town clerk's compensation for services rendered at an election other than at a town meeting being upon the town board under Laws 1896, p. 906, c. 909, § 18, the board of audit cannot pass upon the reasonableness of the same, but must audit the same as fixed. People v. Sippell, 102 N. Y. S. 69.

46. The auditing and disallowing of the account of the fire warden including an account for services rendered by one in fighting a fire is not an auditing and disallowance of the creditor's claim, especially where it does not show that he had notice or that it was presented on his behalf. People v. King, 101 N. Y. S. 782.

a rejection of the commissioner's claim for reimbursement therefor after payment.[47] A majority vote at a town meeting cannot make an illegal charge binding upon the town as against dissenting taxpayers.[48] The statutory notice of place and personal injury is sufficient if ordinary men by the use of reasonable diligence are able to fix the location therefrom.[49] Towns of Rhode Island are not liable for debts of school districts abolished by Act of 1903, unless they voluntarily assume the same.[50] A town is not liable for costs of a suit against a town officer upon a contract which is personally binding upon him and not upon the town, though he has a right of reimbursement.[51]

§ 8. *Actions by and against.*[52]—The propriety of bringing suits is a legislative question,[53] and where the electors can authorize the institution of a suit in the first instance, they may ratify one commenced without authority.[54] A town may prosecute actions for the protection of its highways.[55] Town auditors have power to retain counsel to defend claim against the town.[56] Laches may be envoked against a town.[57] Questions of parties [58] and admissibility of evidence are largely controlled by general principles.[59] An injunction restraining the payment of certain bonds to which the bondholders are not parties, is no defense to a suit thereon.[60] Matters in abatement must be timely raised as in actions generally.[61] In the absence of

47. McCoy v. McClarty, 104 N. Y. S. 80.

48. Voted to reimburse highway commissioners for attorney fees and for the cost of a suit brought against them as individuals therefor and of an appeal from the judgment. McCoy v. McClarty, 104 N. Y. S. 80.

49. A notice describing the place of injury as "on the Great Neck Road, so called, near Hedden place, so called, in the town of Waterford," is sufficient where the cause of injury is stated as a low limb of a tree extending over the highway, under Gen. St. Conn. 1902, § 2020. Town of Waterford v. Elson [C. C. A.] 149 F. 91.

50. Gen. Laws 1896, c. 54, § 4, providing for a voluntary assumption held to exclude any implied liability which is confirmed by §§ 8-10, providing for payment by assessment. In re Abolishing of School Districts, 27 R. I. 598, 65 A. 302.

51. Employment of an attorney by the highway commissioners. McCoy v. McClarty, 104 N. Y. S. 80. A taxpayer signing a request to the highway commissioners to oppose the opening of a certain proposed road is not thereby estopped from objecting to the charging of the town with the costs of a suit against the commissioners by an attorney employed in opposing the road for his fees and of an appeal. Id.

52. See 6 C. L. 1712.

53. Not to be judicially interfered with in the absence of fraud. Landis Tp. v. Millville Gas Light Co. [N. J. Eq.] 65 A. 716.

54. Electors of a town having authority under Rev. Laws 1905, § 625, subd. 3, to direct the institution of actions on behalf of the town, may ratify a suit commenced without due authority. Town of Partridge v. Ring, 99 Minn. 286, 109 N. W. 248.

55. A township may by injunction restrain a gas company from using its highways for piping where the company has no legislative authority to occupy them. Landis Tp. v. Millville Gas-Light Co. [N. J. Eq.] 65 A. 716. And it may also prevent it from using pipes already laid but not connected. Id.

56. Town Law (Laws 1890, p. 1236, c. 569, § 174), providing that the town auditors shall have the power of the town board in receiving, auditing and rejecting claims, authorizes the retaining of an attorney, since the town board had such power under § 180, subd. 7. Comesky v. Blackledge, 100 N. Y. S. 241.

57. Herrold v. Union Tp., 31 Pa. Super. Ct. 43. Where a judgment is entered by default on a note given by the overseers of the poor and eight different overseers recognize its validity, making some payments thereon, a motion to open the judgment five years after rendition will be denied where the judgment is only voidable. Id.

58. Where a borough is given control of the sidewalks and curb lines and the remainder of the highway is left in the town, the latter is a proper codefendant in an action to determine whether a certain strip is a part of the highway. Pinney v. Winsted [Conn.] 66 A. 337. In an action to set aside audits made by the county board of supervisors of claims against a town, the claimants are necessary parties, and it is error to deny complainant's motion to bring them in. Armstrong v. Fitch, 113 App. Div. 317, 99 N. Y. S. 471.

59. Where on the issue of payment of a bond due for over forty years it appears that it had been in the hands of two officers of the township who had access to the records, evidence of what the officers did in connection with the bond is admissible as tending to show payment and that the bond had been taken from the possession of the township. Collier v. St. Charles Tp. [Mich.] 14 Det. Leg. N. 30, 111 N. W. 340. Evidence held sufficient to support a finding that the bond had been paid. Id.

60. Clagett v. Duluth Tp. [C. C. A.] 143 F. 824.

61. Objections to an action by a town upon an express contract for the payment of money that the action was not authorized by electors in town meeting and that there was no formal resolution by the town board are in abatement and are too late when raised on trial for the first time. Town of Beloit v. Heineman, 128 Wis. 398, 107 N. W. 334.

statute presentment of claims to a town before suit thereon is not necessary to entitle a successful plaintiff to cost.[62]

TRADE MARKS AND TRADE NAMES.

§ 1. Definition, and Words or Symbols Available (2137).
§ 2. Acquisition, Transfer, and Abandonment (2138).
§ 3. Infringement and Unfair Competition (2139).
§ 4. Remedies and Procedure (2140).
§ 5. Statutory Registration, Regulation, and Protection (2141).

Personal,[63] corporate,[64] firm,[65] and associate,[66] names are elsewhere treated, as is the protection of trades union labels [67] and society emblems.[68]

§ 1. *Definition, and words or symbols available.*[69]—A trade mark must be adopted for the purpose of identifying the origin, or ownership of the article to which it is attached.[70] An arbitrary word, not descriptive, may become a trade name,[71] and it is not necessary that it be utterly devoid of aptitude,[72] and so may geometric figures or symbols,[73] or a particular size, shape, and surface appearance of loaf of bread not essential to its economical manufacture.[74] Although a monopoly cannot be obtained in the use of a geographical name, yet where such name applied to a certain commodity has acquired a secondary meaning it cannot be used to describe a competing commodity,[75] nor can a proper name which has acquired such meaning be used except in a manner which will inform the public that the article is not that made by the person originally using the name,[76] and an hotel keeper may acquire the exclusive right to use the name of a town in connection with the word "Inn" to designate his hotel.[77] Words merely descriptive,[78] unless used long enough to become identified with the business,[79] or a telephone number for a particular department, are not subjects of trade mark.[80] A right to a trade mark may be obtained in the title for a portion of a comic section of a newspaper,[81] but the artist

62. Morrill Tp. v. Fletchall [Kan.] 85 P. 753.
63. See Names, Signatures, and Seals, 8 C. L. 1082.
64. See Corporations, 7 C. L. 862.
65. See Partnership, 8 C. L. 1261.
66. See Associations and Societies, 7 C. L. 294.
67. See Trade Unions, 6 C. L. 1718.
68. See Associations and Societies, 7 C. L. 294.
69. See 6 C. L. 1713. See, also, post, section 5, as to what may be registered.
70. A star held not subject of trade mark except in connection with other devices. Galena-Signal Oil Co. v. Fuller & Co., 142 F. 1002.
71. "Hygela" to designate table water held subject of trade name. Hygeia Distilled Water Co. v. Consolidated Ice Co., 144 F. 139; Consolidated Ice Co. v. Hygeia Distilled Water Co. [C. C. A.] 151 F. 10. "Creamalt" bread. Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89.
72. Consolidated Ice Co. v. Hygeia Distilled Water Co. [C. C. A.] 151 F. 10.
73. Keystone. Buzby v. Davis [C. C. A.] 150 F. 275. Cigar bands of certain shape and coloring. Clay v. Kline, 149 F. 912. A star held not subject of trade mark. Galena-Signal Oil Co. v. Fuller & Co., 42 F. 1002.
74. Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89.
75. Buzby v. Davis [C. C. A.] 150 F. 275. Although the original article is no longer made in the place from which it derived its name. Siegert v. Gandolfi [C. C. A.] 149 F. 100.
76. "Webster's" dictionary. Ogilvie v. Merriam Co., 149 F. 858. Use held unfair when circulars advertising the book seek to convey impression that it is a new edition of the book of same name and a successor to it. But use of "Webster's Imperial Dictionary," and of same form and size of book, held not to infringe "Webster's Unabridged Dictionary." Id.
77. Use of same name to designate hotel in same building after complainant had moved to new building held to be unlawful. Busch v. Gross [N. J. Eq.] 64 A. 754.
78. "Twentieth Century" firepots, used by several manufacturers to designate a certain form and construction. Germer Stove Co. v. Art Stove Co. [C. C. A.] 150 F. 141. "Vapor massage" and "multi-nebulizer" held descriptive of atomizer. Dunlap v. Willbrandt Surgical Mfg. Co. [C. C. A.] 151 F. 223.
79. "Oriental Process Rug Renovating Company." Giragosian v. Chutjian [Mass.] 80 N. E. 647.
80. Use of similar number for similar department (trouble department), by rival telephone company, held proper. Rocky Mountain Bell Tel. Co. v. Utah Independent Tel. Co. [Utah] 88 P. 26.
81. Buster Brown. New York Herald Co. v. Star Co., 146 F. 204.

who originated the pictures has no rights, in the absence of a copyright, which is infringed by the subsequent use of similar characters in different scenes and incidents.[82]

A man may use his own name in any reasonable, honest, and fair manner,[83] even though it may result in deceiving intending purchasers of articles manufactured under a similar name,[84] but cannot so use it as to suggest, except as the mere name may do so, that his product is that of a rival.[85] Prior fraud in the use of his name will not deprive a person of the right to use the name in good faith as a trade name.[86] A retiring partner or stockholder in a corporation whose name is part of the firm or corporate trade mark may use his own name in connection with a similar business conducted by him.[87] A corporation may stamp its goods with the initials of its name, although similar initials form part of a trade mark of another corporation,[88] but may not use the initials as part of a device similar to the latter's trade mark.[89]

§ 2. *Acquisition, transfer, and abandonment.*[90]—One manufacturing a commodity which is sold as the product of another acquires no rights in the name under which the latter sells it, which will be protected against infringement by a third person.[91] An assignment of all property for the benefit of creditors, except that exempt from execution, conveys to the assignee the trade name and trade mark of the assignor,[92] but a sale of business and good will by a corporation does not prevent stockholders and officers thereof from using their names to constitute a similar designation for a subsequent competing company.[93]

A partner who owned a trade mark when entering the firm has the exclusive right thereto when the firm is dissolved,[94] but right to a trade mark used to identify a patented article expires with the patent,[95] and a proper name used to describe a copyrighted work becomes public property when the copyright expires.[96] Use of a trade mark upon manufactured product does not deprive the owner of a particular trade name also applied to such product,[97] and acquiescence by a son in his father's joint use of a trade mark was not forfeiture of his right to register the same.[98] Sale by third persons of other brands under the name of a trade named brand does not constitute an abandonment of such trade name, if without the owner's knowledge,[99] and the trade mark right to a title to a portion of a comic section of a newspaper is not lost by publishing the portion for several issues on the fourth page of the

82. Outcalt v. New York Herald, 146 F. 205.

83. "W. H. Rogers of Plainfield, N. J., not connected with any other Rogers" stamped on plated silverware by a bona fide manufacturer thereof, held not infringement of term "Roger's goods." International Silver Co. v. Rogers [N. J. Eq.] 63 A. 977.

84. Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 146 F. 37.

85. International Silver Co. v. Rogers [N. J. Eq.] 63 A. 977. Use by J. E. Faber of the word "Faber" without prefix, on pencils sold in competition with firm using that name as part of their trade name, held to be unfair competition. Von Faber-Castell v. Faber [C. C. A.] 145 F. 626.

86. International Silver Co. v. Rogers [N. J. Eq.] 63 A. 977.

87. White v. Trowbridge [Pa.] 64 A. 862; Lepow v. Kottler, 100 N. Y. S. 779; Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 146 F. 37.

88, 89. Standard Table Oil Cloth Co. v. Trenton Oil Cloth & Linoleum Co. [N. J. Eq.] 63 A. 846.

90. See 6 C. L. 1713.

91. Shelley v. Sperry [Mo. App.] 99 S. W. 488.

92. Lothrop Pub. Co. v. Lothrop, Lee & Shepard Co., 191 Mass. 353, 77 N. E. 841.

93. "Hall's Safe Company" to compete with "Hall Safe and Lock Company." Hall's Safe Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 146 F. 37. But see Hall's Safe & Lock Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 143 F. 231.

94. In absence of assent to retention by other parties of old place of business and future conduct of business. Giles Remedy Co. v. Giles, 26 App. D. C. 375.

95. Whann v. Whann, 116 La. 690, 41 So. 38.

96. Ogilvie v. Merriam Co., 149 F. 858.

97. International Cheese Co. v. Phenix Cheese Co., 103 N. Y. S. 362.

98. Giles Remedy Co. v. Giles, 26 App. D. C. 375.

99. "Philadelphia Cream Cheese" listed on hotel bills of fare and other brands substituted. International Cheese Co. v. Phenix Cheese Co., 103 N. Y. S. 362.

section instead of in its accustomed place on the first page.[1] A trade mark right in the name of a place as applied to goods put up in a certain form of package is lost where the owner uses the same package for goods of the same nature manufactured in a different place.[2]

§ 3. *Infringement and unfair competition.*[3]—A trade mark gives the owner no right to sell the article in violation of a subsequent statute,[4] nor does it give a monopoly on the sale of goods other than those produced by the owner.[5] A name, device, or label, to constitute an infringement of another, must be so similar as to deceive persons of ordinary intelligence using ordinary caution.[6] Such imitation of devices and designs as tends to mislead prospective purchasers is unfair competition though no trade mark is infringed,[7] as is the use of advertising which will mislead purchasers as to the identity of competitors,[8] and innocent use of another's trade name gives the users no right to continue after discovering the infringement,[9] but fraud alone is not sufficient to constitute unfair competition.[10] One manufacturing goods in competition with another cannot use, in designating other non-competitive goods, a term in which the latter person has acquired a trade name,[11] and a manufacturer of parts of a machine made by another person and designated by a trade mark must stamp such parts with his own name.[12] It constitutes infringe-

1. New York Herald Co. v. Star Co., 146 F. 204.

2. National Starch Co. v. Koster, 146 F. 259.

3. See 6 C. L. 1714.

4. "Evaporated Cream" cannot be sold in violation of statute requiring cream to contain twenty per cent. of fat. State v. Tetu, 98 Minn. 351, 107 N. W. 953, 108 N. W. 470.

5. "Bitulithic" pavement, according to specifications contained in proposals for bids, may be contracted for by one not the owner of such trade name. Warren Bros. Co. v. Barber Asphalt Pav. Co., 145 Mich. 79, 108 N. W. 552.

6. White v. Trowbridge [Pa.] 64 A. 862; Hall Safe & Lock Co. v. Herring-Hall-Marvin Safe Co. [C. C. A.] 143 F. 231.

Held infringed: "The New Dominion" as name for hotel held to infringe "The Hotel Dominion." O'Grady v. McDonald [N. J. Eq.] 66 A. 175. "Hall's Safe Company" held to infringe "Hall's Safe and Lock Company." Hall's Safe Co. v. Herring-Hall-Marvin Co. [C. C. A.] 146 F. 37. "Crown Malt" bread held to infringe "Creamalt." Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89. "Webster Star Brand" used on box containing typewriter ribbon, followed by "Underwood," used to indicate machine on which it is to be used, **held not to infringe** "Underwood Typewriter Copying Ink Ribbon, manufactured by J. Underwood & Co." Wagner Typewriter Co. v. Webster Co., 144 F. 405. "Union Leader" tobacco held not to infringe "Central Union," although put up in packages of similar size, shape, and color. United States Tobacco Co. v. McGreenery, 144 F. 531. "Yap" padlock with keystone device held not to infringe "Yale" padlock with trefoil device, though similar in size, shape, and color. Yale & Towne Mfg. Co. v. Alder, 149 F. 783. Six pointed star with words "Extra Star" held not to infringe five pointed star with "Galina" above and "Oil" below and "G" in center. Galena-Signal Oil Co. v. Fuller & Co., 142 F. 1002. "New York Frame and Picture Co." held not to infringe "United States Frame and Picture Co." United States Frame & Picture Co. v. Horowitz, 51 Misc. 101, 100 N. Y. S. 705.

7. Atomizer of same shape as complainants but having name of manufacturer blown thereon. Dunlap v. Willbrandt Surgical Mfg. Co. [C. C. A.] 151 F. 223. Hook and eye cord of Francis Hook and Eye Fastener Co. held not to infringe those of De Long Hook and Eye Co. De Long Hook & Eye Co. v. Francis Hook & Eye & Fastener Co. [C. C. A.] 144 F. 682. Sweet chocolate in slabs containing three divisions, stamped "3 for 1," held not to infringe slab of two divisions stamped "16 to 1." Knickerbocker Chocolate Co. v. Griffing, 144 F. 316. Publication of photographic copies of plaintiff's books, which though not copyrighted were illuminated and illustrated and with elaborate borders and binding, held unfair. Dutton & Co. v. Cupples, 102 N. Y. S. 309. Use of tobacco tag of same size, color and distinctive shape, although name printed thereon is different. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co., 151 F. 819. Although a word being descriptive is not subject of trade mark, yet use of a similar name on competing brands for purpose of deception will be enjoined. "Old Homestead" bread. Banzhaf v. Chase [Cal.] 88 P. 704.

8. Retiring employe's engagement in similar business, under different name but using stationery and cards similar in design with notices that "we have now moved to," and "we are now located at above address," sent to customers of employer, held unfair competition. United States Frame & Picture Co. v. Horowitz, 51 Misc. 101, 100 N. Y. S. 705.

9. Hygeia Distilled Water Co. v. Consolidated Ice Co., 144 F. 139; Consolidated Ice Co. v. Hygeia Distilled Water Co. [C. C. A.] 151 F. 10.

10. Use of package for tobacco of form, size, and color, in common use, with intent to obtain customers from rival manufacturer using similar package, held lawful. United States Tobacco Co. v. McGreenery, 144 F. 531.

11. "Eureka." Eureka Fire Hose Co. v. Eureka Rubber Mfg. Co. [N. J. Eq.] 65 A. 870.

12. To distinguish them from similar parts

ment to use a foreign company's trade name in a certain state, although the company is not authorized to do business in that state,[13] and a wholesaler, whose goods as sold by retailers bear a fraudulent trade mark, may be enjoined although he did not mislead the retailers.[14] The fact that defendant's efforts gave plaintiff's trade name its value gives the former no right to use a similar name in a competing business.[15]

§ 4. *Remedies and procedure.*[16]—One seeking equitable relief against infringement must have clean hands.[17]

The right to injunction may be lost by laches,[18] and release by stipulation of all claim against the principal infringer will estop complainant from seeking equitable relief against one who made the infringing packages for the latter.[19]

One who has commenced suit for unfair competition may send circulars to the trade, stating that fact, together with his claims.[20]

A bill to enjoin the use of a trade mark must contain an averment that the trade mark belongs to plaintiff,[21] and with the evidence must show wherein the articles resemble each other,[22] and when plaintiff is found to have no rights capable of infringement, injunction will not issue against a defendant who has not answered.[23] It is no defense to a suit for unfair competition, brought by one who prior to the suit has been using the trade mark under color of title, that he acquired such title through an unlawful contract.[24]

Although defendant has ceased the use of the infringing devices, plaintiff may have an injunction when he may reasonably anticipate a recurrence of the offense,[25] and the preliminary injunction prayed for should issue in order to preserve the status and until the final hearing.[26]

Where the infringement was without wrongful intent, an account of profits will not be taken [27] unless the infringement is continued after the bill for injunction is filed.[28] When the account of profits is taken, the infringer is liable for all gross profits on sales of infringing goods, although there was no actual deception.[29] Punitive damages cannot be awarded for infringement of a trade mark, although nom-

made by the maker of the machine. Enterprise Mfg. Co. v. Bender, 148 F. 313.

13. Consolidated Ice Co. v. Hygeia Distilled Water Co. [C. C. A.] 151 F. 10.

14. Fox Co. v. Glynn, 191 Mass. 344, 78 N. E. 89.

15. Lessee of hotel whose management gave the hotel its reputation. O'Grady v. McDonald [N. J. Eq.] 66 A. 175.

16. See 6 C. L. 1716.

17. One suing to protect his rights in a proprietary medicine must show that its qualities and ingredients are those claimed for it in advertisements. Moxie Nerve Food not entitled to such protection. Moxie Nerve Food Co. v. Modox Co., 152 F. 493. Misrepresentations as to quality and ingredients of a product held to prevent equitable relief against infringement of trade mark used thereon. Epperson & Co. v. Bluthenthal [Ala.] 42 So. 863; Schuster Co. v. Muller, 28 App. D. C. 409. Representation that complainant's bitters contained no "intoxicating ingredients," when coupled with the statement that the substances composing it were preserved and dissolved in alcohol, held not to constitute misrepresentation. Siegert v. Gandolfi [C. C. A.] 149 F. 100. Misrepresentations in a publication, the title of which is claimed to constitute a trade name, will not deprive the owner of the right to enjoin infringement when they are not calculated to deceive the public. Gruber Almanack Co. v. Swingley, 103 Md. 362, 63 A. 684.

18. Delay of ten years in face of open and notorious infringement held to constitute laches. Burke v. Bishop [C. C. A.] 144 F. 838.

19. Hillside Chem. Co. v. Munson & Co., 146 F. 198.

20. Warren Featherbone Co. v. Landauer, 151 F. 130.

21. Pennell v. Lothrop, 191 Mass. 357, 77 N. E. 842.

22. Mahler v. Sanche, 223 Ill. 136, 79 N. E. 9.

23. Shelley v. Sperry [Mo. App.] 99 S. W. 488.

24. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co., 151 F. 819.

25. Allegation by defendant that plaintiff has lost his exclusive right to the devices held to justify apprehension of renewal of infringement. Saxlehner v. Eisner [C. C. A.] 147 F. 189.

26. Dwinell-Wright Co. v. Co-operative Supply Co., 148 F. 242.

27, 28. Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774.

29. They are not entitled to deduct any portion of general expenses when the same were not increased by the sale of such goods. Regis v. Jaynes, 191 Mass. 245, 77 N. E. 774.

inal actual damages should be.[30] Executive officers of a corporation, who have personally directed an infringement may be held personally liable therefor.[31]

§ 5. *Statutory registration, regulation, and protection.*[32]—A pictorial representation of the arms and seal of a state which simulates such arms and seal, though containing additions and variations,[33] or one simulating the seal of the department of justice, or the Great Seal of the United States, is not entitled to registration,[34] nor is an ordinary family surname,[35] nor a device in which a particular color, unconnected with any symbol or design, is the essential feature,[36] nor words descriptive of character or quality of goods.[37] To come within the proviso of Act Cong. Feb. 20, 1905, § 5, that a mark used exclusively for ten years may be registered, the applicant must show compliance with every condition precedent.[38] An application for registration filed under the Act of 1881 and rejected by the commissioner of patents on appeal, prior to 1905, is not a pending application under Act Feb. 20, 1905, §§ 14, 24,[39] but is pending where the examiner has not filed a decision at the time the latter act was passed.[40] Such an application may be amended for the purpose of determining whether it is a pending application within the latter act.[41]

The commissioner of patents has no authority to say how much of the embellishments used in connection with a desired trade mark shall form a part thereof,[42] but deceptive matter upon the label may be ground for refusing registration of trade mark contained thereon.[43]

An interference proceeding is limited to a determination as to priority of adoption and use,[44] and the one whose evidence shows prior user is entitled to the registration.[45]

A similarity which would constitute ground for opposition to registration is such as would be likely to deceive and mislead purchasers.[46] Whether the words

30. Sale of cigars from box bearing trade mark of another brand. Lampert v. Judge & Dolph Drug Co. [Mo. App.] 100 S. W. 659.

31. Saxlehner v. Eisner [C. C. A.] 147 F. 189.

32. See 6 C. L. 1717.

33. Under Act Feb. 20, 1905. In re Cahn, Belt & Co., 27 App. D. C. 173.

34. In re Connors Paint Mfg. Co., 27 App. D. C. 389; In re American Glue Co., 27 App. D. C. 391.

35. "Spaulding." In re Spalding, 27 App. D. C. 314.

36. Section of tube having sparkling appearance due to mica held not registerable. In re American Circular Loom Co., 28 App. D. C. 446.

37. "Circular loom" as trade mark for conduits and coverings for electrical conductors woven on a circular loom. In re American Circular Loom Co., 28 App. D. C. 450.

38. Application stating prior use to be on "implements, apparatus, and goods used in atheletic games and sports" held insufficient. In re Spaulding 27 App. D. C. 314.

39. In re Mark Cross Co., 26 App. D. C. 101.

40. Although such decision was filed before the act went into effect. Giles Remedy Co. v. Giles, 26 App. D. C. 375.

41. Decision of commissioner held appealable as a rejection of registration where he held that the application was not pending, although in form he dismissed appeal from examiner on ground that remedy was by petition and not appeal. In re Mark Cross Co., 26 App. D. C. 101.

42. When proposed trade mark is used on label, he cannot require other embellishments used on label to be included in application. In re Standard Underground Cable Co., 27 App. D. C. 320.

43. Label on "Muller's Bismarck Bitters" held not deceptive. Schuster Co. v. Muller, 28 App. D. C. 409.

44. The title to certificate of registration, if claimed under act performed after its issue, cannot be so determined. Giles Remedy Co. v. Giles, 26 App. D. C. 375. Nor can a question as to the validity of the statute providing for such registration. Gaines v. Knecht, 27 App. D. C. 530; Gaines v. Carlton Importation Co., 27 App. D. C. 571, Buchanan-Anderson-Nelson Co. v. Breen, 27 App. D. C. 573. Nor whether the names used in the respective trade marks are proper subjects of registration. Buchanan-Anderson-Nelson Co. v. Breen, 27 App. D. C. 573.

45. Evidence held to show Muller's "Bismark Bitters" entitled to registration as against Schuster's "Bismark Bitters." Schuster Co. v. Muller, 28 App. D. C. 409. Rose Shoe Manufacturing Co. held entitled to use of word "Rose" as against A. A. Rosenbush & Co. Rose Shoe Mfg. Co. v. Rosenbush, 28 App. D. C. 465.

46. "Rocca Valley" whiskey accompanied by picture of three ravens on limb of tree held entitled to registration as against claim that it resembled "Old Crow" whiskey with picture of one crow (Gaines v. Knecht, 27

bear such resemblance as to deceive purchasers of goods on which they are used may be determined on demurrer to an opposition to an application for registration.[47] A notice of opposition to registration must be verified by the party.[48] An act giving the penalty for infringement to the person aggrieved is valid.[49]

In Georgia the counterfeiting of a trade mark is made a crime.[50]

TRADE SECRETS, see latest topical index.

TRADE UNIONS.

§ 1. Nature of Trade Unions (2142).
§ 2. The Union and the Public (2143).
§ 3. The Union and Its Members (2145).

§ 1. *Nature of trade unions.*[51]—An act of congress making it a criminal offense for any interstate carrier to require its employes or persons seeking employment to enter into an agreement not to join or remain in a labor organization or to discriminate against union employes is unconstitutional;[52] and even if it were not does not give an incorporated labor union a right of action to enjoin the carrier from interfering with or intimidating its representatives who are neither employes or seeking employment but merely soliciting members among the employes of the carrier.[53] An association of employers for the purpose of securing stability in the building trades by securing an agreement from the employes to settle differences by arbitration instead of a sympathetic strike is lawful.[54] An unincorporated labor union not being a legal entity cannot be sued as such,[55] and in an action at law against a trade union upon objection being made, all of its members must be joined as defendants,[56] but in equity where the members are numerous, a number of members may be made parties defendant as representatives of the class.[57] Though a trade union may not be recognized as an entity separate from its members and cannot sue or be sued in its common name, an injunction may properly be directed against it which will bind all of its members who have knowledge of it,[58] but in such case the union is not subject to a fine for contempt.[59] Individual members of a labor union who are active participants in its management may be punished for a contempt committed by the organization.[60]

Union labels.—The right of a trade union to an exclusive property in a label is governed by statute in various states.[61] Under a statute protecting labels an-

App. D. C. 530), and also "Old Jay Rye" with picture of jay bird as against same claim (Gaines v. Carlton Importation Co., 27 App. D. C. 571). "Anderson" and "Henderson" used in whiskey trade marks held not similar. Buchanan-Anderson-Nelson Co. v. Breen, 27 App. D. C. 573. "Zodenta" for use as a dentifrice held not to resemble "Sozodont" similarly used. Hall v. Ingram, 28 App. D. C. 454. Mixture of ground roots and bark in package having directions for making bitters therefrom by steeping in Holland gin held to be goods of same descriptive property as bitters made from same roots and bark and bottled. Schuster Co. v. Muller, 28 App. D. C. 409.

47. Hall v. Ingram, 28 App. D. C. 454.

48. Verification by his attorney on account of party's absence from country not being sufficient. Martin v. Martin & Bowne Co., 27 App. D. C. 59. Person losing right to opposition through failure to verify still has remedies in law and equity, and possibly by declaration of interference under Act, Feb. 20, 1905, § 7, or by proceedings for cancellation under § 13. Id.

49. Not a taking of property without due process. Bergner & Engel Brew. Co. v. Koenig, 30 Pa. Super. Ct. 618.

50. The purpose of the act is to protect the public against the sale of any article under the trade mark of another, and not merely against sale of spurious articles. Butler v. State [Ga.] 56 S. E. 1000.

51. See 6 C. L. 1718.

52. Act June 1, 1898, c. 370, § 10, 30 Stat. 428 [U. S. Comp. St. 1901, p. 3210]. United State v. Scott, 148 F. 431.

53. Act June 1, 1898, 30 Stat. 424, c. 370 [U. S. Comp. St. 1901, p. 3210]. Order of R. R. Telegraphers v. Louisville & N. R. Co., 148 F. 437.

54. City Trust, etc., Co. v. Waldhauer, 47 Misc. 7, 95 N. Y. S. 222.

55, 56, 57. Pickett v. Walsh [Mass.] 78 N. E. 753.

58, 59. Allis-Chalmers Co. v. Iron Molders' Union, 150 F. 155.

60. Patterson v. Wyoming Dist. Council, 31 Pa. Super. Ct. 112.

61. Under a statute prohibiting the infringement of a label trade mark announc-

nouncing that the articles to which they are attached were manufactured by the members of a union, such announcement must be made in clear and explicit language on the face of the label,[62] and a label defective in this respect cannot be remedied by proof that it was used with the intention of expressing the fact that such articles were manufactured by the members of the union and that the public so understood it.[63] Where a labor union adopts and registers a label and transmits it to subordinate unions, it adopts it for the purpose of designating the products of its members within the New York statute protecting such labels,[64] and though that act prohibits an assignment of the label, it does not prohibit a license to such subordinate bodies or branches to use it in a specified locality,[65] and an action for its infringement may be brought by such licensee,[66] though both the union adopting the label and its licensee may join as plaintiffs.[67] The Pennsylvania act for the protection of union labels has been held to be valid,[68] and under it the crime of selling goods containing a counterfeit label may be prosecuted in the county where the sale is consummated.[69] A label used by a union to denote that articles to which it is attached were manufactured by union labor is not a trade mark under the Connecticut statute.[70]

§ 2. *The union and the public.*[71]—Labor unions have the right to strike, so long as the strike is peaceable,[72] without respect to motive,[73] unless intent is made material by statute,[74] and an agreement to strike is not a conspiracy, neither the act itself nor the manner of doing it being unlawful.[75] They have the right to persuade others to join them,[76] but may not resort to intimidation for that purpose,[77]

ing that the goods to which it is attached were manufactured by an association or union of workingmen, a label adopted by an incorporated union of hat makers, manufacturing no hats themselves but furnishing the labels free to manufacturers employing union labor, is not subject to infringement. Lawlor v. Merritt, 78 Conn. 630, 63 A. 639.

62. Words "United Hatters of North America" and "Union made" on the face of a label do not announce that the article to which it is attached was manufactured by the members of the union. Lawlor v. Merritt [Conn.] 65 A. 295; Lawlor v. Merritt, 78 Conn., 630, 63 A. 639.

63. Lawlor v. Merritt [Conn.] 65 A. 295.

64. N. Y. Laws 1897, p. 466, c. 416, § 15. Lynch v. John Single Paper Co., 101 N. Y. S. 824.

65, 66, 67. Lynch v. John Single Paper Co., 101 N. Y. S. 824.

68. Act of May 21, 1895, P. L. 95, as amended by Act of May 2, 1901, P. L. 114, and Act of April 3, 1903, P. L. 134, entitled "An Act to provide for the adoption of trade marks, labels, symbols, or private stamps by any incorporated or unincorporated association or union of workingmen and to regulate the same," held not defective as to title. Commonwealth v. Meads, 29 Pa. Super. Ct. 321.

69. Where title to consigned goods is not to pass until delivered at the place of consignment the crime of attaching a counterfeit label to such goods may be prosecuted at the latter place. Commonwealth v. Meads, 29 Pa. Super. Ct. 321.

70. Gen. St. 1902, § 4907, relating to the protection of such labels, creates an entirely new cause of action. Lawlor v. Merritt [Conn.] 65 A. 295.

71. See 6 C. L. 1718.

72. A combination of unions and their members to strike and further to enforce the strike and if possible to bring employers to terms by preventing them from obtaining other workmen to replace the strikers is not unlawful when grounded upon the economic advancement of its members. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155.

73. Booth v. Burgess [N. J. Eq.] 65 A. 226.

74. A strike for the purpose of boycotting a certain person's goods with intent to injure him in his business is unlawful under the Illinois statutes. Piano & Organ Workers' International Union v. Piano & Organ Supply Co., 124 Ill. App. 353.

75. Jetton-Dekle Lumber Co. v. Mather [Fla.] 43 So. 590.

76. To induce a man, by argument and by giving him money, to quit his work when he can do so without breaking a contract, there being no compulsion of any sort, no false charges against his employer, and no ill-feeling against his employer, is not unlawful persuasion. Iron Molders' Union v. Greenwald Co., 4 Ohio N. P. (N. S.) 180. Peaceable persuasion to induce fellow workmen to leave their employment may be resorted to. Pope Motor Car Co. v. Keegan, 150 F. 148. Members of labor unions may for the purpose of strengthening their organization persuade and induce others in the same occupation to join their union, and as a means to that end refuse to allow their members to work in places where nonunion men are employed. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155.

77. Persuasion must be by reason and not by threat or violence or intimidation. Pope Motor Car Co. v. Keegan 150 F. 148.

and for the purposes of such persuasion picketing is permissible so long as it is peaceable and not of such a character as to result in intimidation.[78] In considering the conduct of the persons charged with unlawful persuasion, the motives with which the person acted are immaterial, if it appears that such person was in the exercise of a clear legal right or in the performance of a duty.[79] Coercion may consist in a threat by word or act of an individual or by a combination of persons to do something unlawful, reasonably calculated to make the person threatened act or refrain from acting, in which case the nature of the act and the coercion determine the liability, or it may consist in a request or persuasion by or on behalf of a combination of persons resulting in coercion of the will from mere force of numbers, in which case liability is determined by the conspiracy or concerted action and the coercion.[80] The peaceable enforcement by a labor union of its rules by expelling members continuing to work in establishments employing nonunion labor will not be enjoined.[81] But while a peaceable boycott does not constitute a remediable wrong,[82] where the boycott is not voluntary but coercive, equity will restrain it.[83] A strike for the purpose of coercing a person with whom the union has no dispute is unlawful.[84] The members of a union may lawfully refuse to work unless other work germane to their particular line of employment is given to them,[85] hence a contract between a builder's association and a labor union as to certain ancillary lines of work is not invalid as against public policy, though it lessens the opportunity for independent contracting.[86] Strikers not shown to have participated in the acts of violence or intimidation sought to be enjoined will not be restrained even

78. It is unlawful for strikers to assemble in great numbers for the purpose of picketing or to establish many picketing stations in the same neighborhood. Pope Motor Car Co. v. Keegan 150 F. 148. Where peaceful picketing develops into strong, persistent, and organized persuasion, followed by hints of injury, veiled threats, abusive or offensive language, and occasional instances of assault and personal violence, the picketing ceases to be lawful and comes within the ban of an injunction prohibiting coercion and intimidation. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155. Acts of pickets in carrying banners in front of complainant's place of business upon which were printed: "Unfair firm reduced wages of employes 50 cents per day. Please don't patronize," held unlawful and enjoined. Goldberg v. Stablemen's Union Local No. 8760 [Cal.] 86 P. 806. A combination or concert of action may render picketing unlawful as coercive without such a threat of harm as would be necessary to make intimidation by one illegal. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155.

79. Iron Molders' Union v. Greenwald Co., 4 Ohio N. P. (N. S.) 161. Where the record shows that the acts of which the defendant strikers and their leaders have been found guilty consisted in peacefully enticing employes to leave their employment when not under contract to remain, and in giving them railroad tickets and money for traveling expenses to go to another city with their families, a finding that such conduct was unlawful persuasion and in contempt of a previous order of court which enjoined against unlawful persuasion will be reversed on the ground that the defendants were acting within their rights. Id.

80. Evidence held to show coercion by threats of unlawful acts. Allis-Chalmers Co. v. Iron Molders' Union No. 125, 150 F. 155.

81. Jetton-Dekle Lumber Co. v. Mather [Fla.] 43 So. 590.

82. Booth v. Burgess [N. J. Eq.] 65 A. 226.

83. Where an employer declared an open shop and his employes struck a boycott directed toward coercing union employes of customers of plaintiff to refuse to handle his goods on penalty of being required to strike or be expelled from their unions, the boycott was held an infringement upon a free market and was enjoined. Booth v. Burgess [N. J. Eqq.] 65 A. 226. Notice reading "Organized Labor and Friends: Dont drink scab beer," naming various kinds of beer, among them complainant's calling it "unfair" and advising against its use as a protection to health, held to constitute a boycott which would be enjoined. Seattle Brewing & Malting Co. v. Hansen, 144 F. 1011.

84. Union men employed by a contractor cannot lawfully strike because he is constructing a building other than that upon which they are working, upon which certain work is being done by nonunion men employed by the owners of such building, the object being to indirectly coerce the owners to employ union men. Pickett v. Walsh [Mass.] 78 N. E. 753.

85. Bricklayers and masons may refuse to lay brick or stone unless also given the work of painting such brick or stone work, although compliance with their demands will destroy the painters' business and though the latter may be able to do the work more cheaply and with less liability to the contractor. Pickett v. Walsh [Mass.] 78 N. E. 753.

86. National Fireproofing Co. v. Mason Builders' Ass'n, 145 F. 260.

though they would not be harmed by the issuance of the injunction,[87] but in Illinois it is held that an injunction will not be refused merely because there is no evidence to connect a defendant with the acts charged where there is reasonable ground to fear his participation therein.[88]

The action of a trade union through its representative in procuring the discharge of a nonunion employe by threatening or intimidating his employer may be the basis for an action for damages against the union by the discharged employe,[89] and in such a case, to entitle the plaintiff to a joint verdict against the union and its representative, no further proof is required than that they were joint tort feasors in procuring his discharge by such means.[90] Punitive damages may be recovered,[91] and proof of malice other than that which the law might imply from the unlawful act proved is unnecessary.[92] A statute abolishing the crime of conspiracy as to labor disputes, if the act sought to be enjoined could lawfully have been done by an individual, does not deprive the court of the power to enjoin acts of pickets resulting in intimidation,[93] and if it did it would be unconstitutional as depriving a person of the right to acquire, possess, enjoy, and protect property.[94]

§ 3. *The union and its members.*[95]—Membership in a trade is itself a personal right[96] of which a member cannot be deprived or otherwise punished except in the manner provided for by the law,[97] unless he assents to the proceedings under which punishment was imposed.[98] A member of a trade union cannot be expelled therefrom for an offense which is not punishable by expulsion according to the by-laws and constitution of the union.[99] Failure of a member to appear on the day set for his trial does not give the union the right to sentence him to expulsion where the offense with which he is charged is not so punishable,[1] nor does the affirmance of an order of expulsion by a higher tribunal within the union on appeal validate the order.[2] By enumerating certain offenses for which the penalty of expulsion may be imposed, the right to inflict such penalty for any other offense is impliedly excluded.[3] Remedies provided for within the union must be exhausted before appeal to the courts for relief can be had.[4] Unions have a right to prescribe the lines of

87. Pope Motor Car Co. v. Keegan, 150 F. 148. Evidence held insufficient to connect the members of the executive committee of a labor union with overt acts of violence committed by the members. Johnson v. People, 124 Ill. App. 213.

88. Piano & Organ Workers' International Union v. Piano & Organ Supply Co., 124 Ill. App. 353.

89. Gen. St. 1902, Conn. § 1296, makes it a criminal offense to threaten or use any means to intimidate any person to compel him to do or abstain from doing against his will any act which such person has a right to do. Wyeman v. Deady [Conn.] 65 A. 129.

90. Threats and intimidations by a walking delegate with the consent and authority of the union render both liable. Wyeman v. Deady [Conn.] 65 A. 129.

91, 92. Wyeman v. Deady [Conn.] 65 A. 129.

93. Tex. Pen. Code, p. 581, Act March 20, 1903; St. 1903, p. 289, c. 235. Goldberg, Bowen & Co. v. Stablemens' Union, Local No. 8,760 [Cal.] 86 P. 806.

94. Goldberg, Bowen & Co. v. Stablemens' Union, Local No. 8,760 [Cal.] 86 P. 806.

95. See 6 C. L. 1719.

96. Dingwall v. Amalgamated Ass'n [Cal. App.] 88 P. 597.

97. Where the by-laws provided that no member should be deprived of membership or otherwise punished except upon written charges and after a fair trial on notice, the imposition of a fine, and requiring the accused to give up his place of employment for a definite period in the absence of compliance with such provisions, is without authority. Brennan v. United Hatters [N. J. Err. & App.] 65 A. 165.

98. Where the action of a vigilance committee in imposing a fine upon a member was void because of a failure to comply with the by-laws, an appeal to the union is not an assent to the jurisdiction of such committee. Brennan v. United Hatters [N. J. Err. & App.] 65 A. 165.

99. Conspiracy against the union and its president. Dingwall v. Amalgamated Ass'n [Cal. App.] 88 P. 597.

1, 2. Dingwall v. Amalagamated Ass'n [Cal. App.] 88 P. 597.

3. And a further provision that "for all other offenses" the penalty shall be a fine is a positive declaration that an unnamed offense is punishable by a fine only. Dingwall v. Amalgamated Ass'n [Cal. App.] 88 P. 597.

4. Where complainant appealed to a higher tribunal within the union from an order of a local union expelling him for refusal to pay a fine imposed, he is not entitled to an injunction restraining the local

work which shall constitute their trade [5] and to refuse to admit to membership persons who do not possess all qualifications to the trade as prescribed by them.[6] The action of a trade union in procuring the discharge from his employment of one of its members because of his refusal to pay a fine unlawfully imposed by it is actionable,[7] and the fact that the union constituted a monopoly does not render such a member in pari delicto so as to deprive him of his right to damages.[8]

TRADING STAMPS; TRANSFER OF CAUSES; TRANSITORY ACTIONS, see latest topical index.

TREASON.[9]

TREASURE TROVE, see latest topical index.

TREATIES.[10]

The United States may acquire territory by treaty,[11] and it is not essential that it contain technical words of conveyance,[12] or that the description be definite as to boundaries if sufficient for identification.[13] The Isle of Pines, however, did not become domestic territory under the treaty of peace with Spain but was merely held in trust for the inhabitants thereof.[14] An unauthorized treaty entered into by the executive department may be rendered valid by ratification.[15] Where the time fixed by a convention for the treaty to become operative is changed by a Senate amendment, the latter controls,[16] and where such amendment leaves it to congress to make the treaty effective, a congressional act in respect thereto is determinative of the question.[17] One voluntarily rendering services under a void contract of employ-

union from informing his employer of his expulsion, the appeal being still pending and the fine not having been paid. Harris v. Detroit Typographical Union No. 18, 144 Mich. 422, 108 N. W. 362.

5. Stone masons and bricklayers may include pointing as part of their trade and declare that it shall not be considered a separate trade. Pickett v. Walsh [Mass.] 78 N. E. 753.

6. Bricklayers and stonemasons may refuse to allow pointers to join the union, though pointing is declared part of the trade where they do not possess other necessary qualifications. Pickett v. Walsh [Mass.] 78 N. E. 753.

7. Fine imposed and accused required to give up his place of employment for one year without a trial upon written charge and notice as required by the by-laws. Brennan v. United Hatters [N. J. Err. & App.] 65 A. 165.

8. All hat manufacturers in a certain district had agreed to employ none but union men, and upon being unlawfully deprived of membership in a union plaintiff was discharged pursuant to that agreement. Brennan v. United Hatters [N. J. Err. & App.] 65 A. 165.

9. No cases have been found during the period covered by this volume.

10. See 6 C. L. 1720. See, also, Extradition, 7 C. L. 1639; Indians, 8 C. L. 179.

11. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.

12. Treaty of November 18, 1903 (33 Stat. at L. 2234), conferring on the United States perpetual use, occupation, and control of the Panama Canal zone, held to pass title. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.

13. Treaty of November 18, 1903 (33 Stat. at L. 2234), held to sufficiently describe the Panama Canal Zone to pass title though it failed to define the exact boundaries thereof, especially in view of the practical identification by the interested states. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.

14. Ceded as a part of Cuba under the treaty of peace (30 Stat. at L. 1754), and hence held in trust for the inhabitants thereof and not domestic territory within the Dingley act. Pearcy v. Stranahan, 205 U. S. 257, 51 Law. Ed. 793.

15. If it be conceded that the Act of June 28, 1902 (32 Stat. at L. 481, c. 1302, U. S. Comp. Stat. Supp. 1905, p. 707), authorizing a treaty with the "Republic of Columbia" did not authorize one with the Republic of Panama, such treaty has been duly ratified by 33 Stat. at L. 2234, and subsequent acts. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.

16. Treaty of December 11, 1902 with Cuba provided that it should become operative on the 10th day after exchange of ratifications, amended by the Senate to take effect when approved by congress. United States v. American Sugar Refining Co., 202 U. S. 563, 50 Law. Ed. 1149.

17. Act of December 17, 1903 (33 Stat. at L. 3, c. 1), held not to make the Treaty of December 11, 1902 with Cuba retroactive, but it was to take effect ten days after the president isued the proclamation declaring that he had received satisfactory evidence that Cuba had made provision to give full

ment,[18] or whose contract has been fully executed,[19] is still a member of a ship's crew within the treaty with Germany whereby controversies between captains and crews of vessels of the high contracting parties are within the exclusive jurisdiction of their respective consuls. Under the extradition treaty of 1889 with Great Britain, a surrendered fugitive cannot be imprisoned under an existing sentence for an offense other than that for which he was extradited.[20] A treaty repeals by implication only those existing statutes which are clearly incompatible therewith.[21]

TREES, see latest topical index.

TRESPASS.[22]

§ 1. **Acts Constituting Trespass and Right of Action Therefor (2147).** It is Trespass to the Person (2148). Right of Entry and Matters of Justification (2148). Parties in the Tort (2149).
§ 2. **Actions (2150).**
A. At Law (2150). Actual Possession or Title (2150). Joint Actions (2151). Pleading, Issues, and Proof (2151). Evidence (2152). Instructions and Jury Questions (2153). Verdict and Judgment (2153).
B. In Equity (2153).
§ 3. **Damages and Penalties (2155).** Punitive (2156). Multifold (2156).
§ 4. **Criminal Liability (2156).**
§ 5. **Trespass to Try Title (2157).**

§ 1. *Acts constituting trespass and right of action therefor.*[23]—Trespass to property is the unlawful invasion[24] of another's possessory rights therein,[25] and

effect to the convention. United States v. American Sugar Refining Co., 202 U. S. 563, 50 Law. Ed. 1149.

18. Treaty of December 11, 1871 (17 Stat. 928). The Bound Brook, 146 F. 160.

19. The Bound Brook, 146 F. 160.

20. Omission of the words "or be punished" after the words no person "shall be liable or tried," etc., held not to authorize such imprisonment, being insufficient to overcome the positive provisions of U. S. Rev. Stat. §§ 5272, 5275, U. S. Comp. Stat. 1901, pp. 3595, 3596, and the manifest scope and object of the treaty. Johnson v. Browne, 205 U. S. 309, 51 Law. Ed. 816.

21. Johnson v. Browne, 205 U. S. 309, 51 Law. Ed. 816. Omission from the extradition treaty of July 12, 1889 (26 Stat. at L. 1508) of the words "or be punished" of the provision that the person extradited shall not be tried for any other offense than that for which he was surrendered, held not to repeal U. S. Rev. Stat. §§ 5272, 5275, U. S. Comp. Stat. 1901, pp. 3595, 3596, prohibiting such punishment. Id.

22. As to trespasses resulting from a violation of the duties of a particular relation, see, also, such topics as Adjoining Owners, 7 C. L. 28; Landlord and Tenant, 8 C. L. 656; Tenants in Common and Joint Tenants, 8 C. L. 2114.

23. See 6 C. L. 1721.

24. If a city negligently permits a sewer vent to become closed causing water to back upon abutting property, it is liable in trespass. Herr v. Altoona, 31 Pa. Super. Ct. 375. Incidental injury resulting from a lawful use of adjoining property, in the absence of negligence, gives no cause of action (Thurmond v. Ash Grove White Lime Ass'n [Mo. App.] 102 S. W. 617), as where a railroad company in constructing a roadbed turned a stream aside and flooded plaintiff's land upon the giving way of the embankment (Gordon v. Ellenville & K. R. Co., 104 N. Y. S. 702). Evidence of negligence in blasting, creating vibrations, which loosened plaster on plaintiff's house and cistern, held to make a case for the jury. Thurmond v. Ash Grove White Lime Ass'n [Mo. App.] 102 S. W. 617.

25. Owner of realty is entitled to its possession undisturbed, and every entry thereon, at common law, constitutes trespass. Wood v. Snider [N. Y.] 79 N. E. 858. Evidence held sufficient to sustain a finding that plaintiff had failed to establish an exclusive right of possession against defendants. Country Club Land Ass'n v. Lohbauer [N. Y.] 79 N. E. 844.

Held trespass: Entry of beasts on the land of another. Wood v. Snider [N. Y.] 79 N. E. 858. A trustee in bankruptcy holding over after the expiration of a lease. In re Hunter, 151 F. 904. Master appointed to sell, seizing property not embraced in a decree foreclosing a mortgage. Perry v. Tacoma Mill Co. [C. C. A.] 152 F. 115. Eviction of a tenant under process issued under Act March 21, 1772 (1 Smith's Laws, p. 370), upon a complaint failing to state jurisdictional facts. Sperry v. Seidel [Pa.] 66 A. 853. Invasion of boundaries marked by the return of processioners after the same has been made the judgment of the superior court on protest thereto. Martin v. Patillo, 126 Ga. 436, 55 S. E. 240. Entry of a corporation having power to condemn before exercising the right (Ingleside Mfg. Co. v. Charleston Light & Water Co. [S. C.] 56 S. E. 664), as the entry and erection of telegraph poles by a telegraph company (Postal Telegraph Cable Co. v. Kuhnen [Ga.] 55 S. E. 967). Where defendant, claiming authority from the owner of the land on which plaintiff was conducting a refreshment stand, forcibly and unlawfully removed plaintiff's chattels from the land but exercised no further dominion, he is liable in trespass and not in conversion. Hammond v. Sullivan, 112 App. Div. 788, 99 N. Y. S. 472.

A petition construed as alleging a cause of action in trespass for taking away per-

hence plaintiff must have possession [28] and it must be disturbed by defendant.[27] Generally title is only incidentally involved,[28] but it may be litigated in some states under appropriate pleadings.[29] Where the invasion is wrongful in itself, negligence,[30] force,[31] malice or good faith,[32] extent of the damage,[33] and the nature of the entry,[34] are not material to the rights of action. An inadvertant entry upon adjoining lands [35] by animals being driven along a public highway creates no common-law liability,[36] and the right of action generally for entry upon unenclosed lands has been limited by statute in many states.[37] Trespass lies to recover mesne profits accruing during the adverse possession of another,[38] and for the destruction of the estate.[39] Frequently the action of trespass may be waived and another remedy pursued.[40]

It is trespass to the person [41] to commit any assault or direct physical injury.[42]

Right of entry and matters of justification.[43]—No liability attaches for an entry under an easement [44] or license [45] voluntarily given [46] by one having authority to grant the same,[47] if the entry is for the licensed purpose [48] and the authority is not

sonal property and not an action for malicious use of process. Gray v. Joiner [Ga.] 56 S. E. 752.

26. The attornment of plaintiff's tenant to the defendant without notice to plaintiff does not destroy plaintiff's posession. Buford v. Christian [Ala.] 42 So. 997. An owner not in possession cannot recover for mere entry (Thurmond v. Ash Grove White Lime Ass'n [Mo. App.] 102 S. W. 617), but he may recover for injury to the freehold (Id.). The gist of the action of trespass to personal property being the disturbance of possession, plaintiff is not bound to show that the legal title is in him or that it was not in any other person. Terry v. Williams [Ala.] 41 So. 804.

27. Where goods are loaded on cars by the shipper, the railroad company is not liable in trespass for shipping the same, even after notice. Nashville, etc., R. Co. v. Walley [Ala.] 41 So. 134.

28. Where plaintiff relies on possession alone in trespass before a justice, title to realty is not involved so as to require a transfer under 2 Mills' Ann. St. § 2630, to the district court. Patrick v. Brown [Colo.] 85 P. 325. Does not involve boundary or title though a plea of liberum tenementum is imposed, so that a writ of error will lie from the supreme court of appeals. Dickinson v. Mankin [W. Va.] 56 S. E. 824.

29. Boundary dispute. Fincannon v. Sudderth [N. C.] 57 S. E. 337. Where, in trespass for cutting trees brought by one against another claiming the adjoining land by adverse possession, the only dispute is as to the boundary, defendant's ownership to the entire tract is not in issue. Clay City Nat. Bk. v. Townsend, 30 Ky. L. R. 1219, 100 S. W. 1196.

30. Telephone company unlawfully cut a tree in front of plaintiff's premises. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207.

31. Where immediate possession of goods is obtained under a void writ to show cause why possession should not be given by threats, it is not material that force was not used in obtaining the keys. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108.

32. Seizing property under an illegal process. Gray v. Joiner [Ga.] 56 S. E. 752.

33. Direct invasion is actionable without regard to actual damages, nominal being presumed. Whittaker v. Stangvick [Minn.] 111 N. W. 295.

34. Falling of shot on plaintiff's land from guns fired on a lake held trespass. Whittaker v. Stangvick [Minn.] 111 N. W. 295.

35. Exemption does not apply to lands not adjoining. Wood v. Snider [N. Y.] 79 N. E. 858.

36. Owner must immediately pursue and drive them back to the highway. Wood v. Snider [N. Y.] 79 N. E. 858.

37. Failure to fence renders the owner remediless under Laws 1890, p. 1224, c. 569, § 100, as amended by Laws 1892, p. 140, c. 92, and Laws 1890, p. 1225, c. 569, § 101, only for trespasses by cattle lawfully upon the adjoining property, and hence recovery may be had for cattle escaping from the highway onto the adjoining property and hence onto the property. Wood v. Snider [N. Y.] 79 N. E. 858. As to liability of owners of trespassing animals generally, see Animals, 7 C. L. 120.

38. Trespass, and not use and occupation (Carrigg v. Mechanics' Sav. Bank [Iowa] 111 N. W. 329), or assumpsit, is the proper remedy in favor of a successful ejectment plaintiff (Reilly v. Crown Petroleum Co., 213 Pa. 595, 63 A. 253).

39. Recovery in ejectment being limited by Code 1896, § 1555, to mesne profits, plaintiff may thereafter maintain trespass for the destruction of trees. Henry v. Davis [Ala.] 43 So. 122.

40. Where a railroad company trespasses upon land by taking a right of way, the owner may waive the trespass and institute condemnation proceedings. Clark v. Wabash R. Co. [Iowa] 109 N. W. 309.

41. See 6 C. L. 1722.

42. See Assault and Battery 7 C. L. 274; False Imprisonment, 7 C. L. 1643.

43. See 6 C. L. 1722.

44. See Easements, 7 C. L. 1203.

45. See Licenses, 8 C. L. 734.

46. Evidence held to show that plaintiff surrendered possession of his store to defendants under compulsion. Chicago Title & Trust Co. v. Core, 126 Ill. App. 272.

47. Right of entry and occupation from a stranger to the title is no defense. Remington v. State, 101 N. Y. S. 952. Railroad company has no power to grant the privi-

exceeded.[49] A power in a chattel mortgage to take possession upon default does not authorize a forcible taking.[50] A state may, in cases of exigency and overwhelming necessity,[51] and in the exercise of eminent domain,[52] invade private property without incurring a liability in trespass, nor is it liable for incidental and preliminary damages resulting in the prosecution of a public work,[53] nor can governmental acts be the subject of an action.[54] Where a trespass has been committed by its agents, a state cannot ratify the same and relieve them from their personal liability,[55] and the party injured is not limited by the New York Act of 1904 to a presentment of his claim to the court of claims.[56] The extending of the branches of a tree over the boundary line does not authorize the removal of the trunk standing wholly upon the owner's land.[57] An officer voluntarily acting[58] or exceeding his authority in executing a writ is liable ab initio,[59] unless the tort is waived.[60] The fact that one who actively directed a trespass was acting as an agent of another does not relieve him.[61] The right of one cotenant to maintain trespass against another is elsewhere treated.[62]

Parties in the tort.[63]—One whose act ordinarily and naturally causes a trespass is liable therefor,[64] though one advising a constable that he has a right to levy has

lege of its right of way to a private telephone company. Pittock v. Telegraph Co., 31 Pa. Super. Ct. 589. A special plea by a telegraph company that plaintiff had granted trackage, etc., to a certain railroad, and permission from its successor to construct the line, held not to justify. Western Union Tel. Co. v. Dickens [Ala.] 41 So. 469.

48. Owner of land over which a railroad right of way passes may maintain trespass against a telephone company using the right of way. Pittock v. Tel. Co., 31 Pa. Super. Ct. 589.

49. In Maryland, one entering under authority to do particular acts becomes a trespasser ab initio if he exceeds his authority, and recovery may be had in quare clausum fregit. Haines' Exr's v. Haines [Md.] 64 A. 1044. Grant to a telephone company of the right to construct and maintain a line "over and along" a tract, "including necessary poles along the roads adjoining the track," held to give a right to construct along highways running through the tract and not across the land. Morrison v. American Tel. & T. Co., 101 N. Y. S. 140.

50. As breaking into a building to obtain the property. Gilliland v. Martin [Ala.] 42 So. 7.

51. Where a county line boundary dispute had existed for over a hundred years, though involving the jurisdiction of courts, the right of franchise, and the power of taxation, it presents no such exigency or necessity as to authorize an arbitrary invasion of private property in settling the dispute. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

52. Laws 1902, p. 1125, c. 473, directing the state engineer to "locate, establish, and permanently mark on the ground" a boundary line between certain counties, held not to authorize the taking of private property by eminent domain. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. A statute authorizing the taking of property under eminent domain is no defense to a trespass committed prior thereto. Remington v. State, 101 N. Y. S. 952. See Eminent Domain, 7 C. L. 1276.

53. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Cutting of a slash three and one-half miles in length and from five to twenty-five feet in width, as a permanent base line for the survey of a county line, held not a mere incidental and preliminary damage. Id. Injury to property from grading of street must be recovered in the statutory remedy. Herr v. Altoona 31 Pa. Super. Ct. 375. A city is not guilty of trespass in removing sidewalks in the laying of sewers. City of Chicago v. Noonan, 121 Ill. App. 185.

54. See Municipal Corporations, 8 C. L. 1056.

55. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719. Laws 1903, p. 698, c. 348, providing for the making of surveys and performing of the work deemed necessary by the state engineer in locating a certain county boundary dispute and authorizing entry upon private lands and the performance of all acts necessary to complete the survey, subject to liability for all damages, held not retroactive. Id.

56. Where a state engineer and assistants threaten to commit an unjustifiable trespass in locating a county line, injunction will lie. Litchfield v. Pond, 186 N. Y. 66, 78 N. E. 719.

57. Morgan v. Langford, 126 Ga. 58, 54 S. E. 818.

58. Ministerial officers laying out a road without an order from the township board. Mulligan v. Martin [Mo. App.] 102 S. W. 59.

59. Where an officer under a writ to attach goods to the amount of $110 proceeded to a lunch room of the debtor, ordered the debtor and her agent out of the store, excluded customers, and locked the place, he is a trespasser. Walsh v. Brown [Mass.] 80 N. E. 465.

60. Where an officer commits trespass in levying an execution, the debtor does not waive the wrong by giving a bond to dissolve the writ. Walsh v. Brown [Mass.] 80 N. E. 465.

61. Morgan v. Langford, 126 Ga. 58, 54 S. E. 818.

62. See Tenants in Common and Joint Tenants, 8 C. L. 2114.

63. See 6 C. L. 1723.

64. Assumed to sell timber of another as his own. Burns v. Horkan, 126 Ga. 161, 54 S. E. 946.

been held not liable for a wrongful levy.[65] An agent or servant who commits a trespass [66] and the master, if the act is within the limits of the servant's employment [67] or done under his express direction,[68] are liable therefor.

§ 2. *Actions. A. At law.*[69]—The procurement of an injunction does not deprive plaintiff of his right of action for damages accruing during the life thereof from the former trespass.[70] Where a trespass is a continuing one, recovery may be had for acts done on different days.[71] In Arkansas trespass cannot be maintained where there is a pending condemnation proceeding in which the same damages may be awarded.[72] While a life tenant cannot maintain trespass de bonis for the cutting and removing of trees,[73] he may bring quare clausum fregit.[74] A conveyance does not destroy an existing right of action for trespass to the property,[75] and the grantee cannot recover therefor.[76]

Trespass to realty is a local action and must generally be brought in the county where the land lies.[77]

The action must be brought within the statutory period of limitations,[78] and, where the trespass is of a permanent character,[79] a right of action for the entire damage arises at once.[80]

Cotenants should join in actions for trespass to the common property.[81]

Actual possession or title.[82]—Plaintiff must show actual possession [83] or title [84]

65. Stallings v. Gilbreath [Ala.] 41 So. 423.

66. Baker v. Davis [Ga.] 57 S. E. 62. One who commits a trespass for or on behalf of a corporation is himself liable therefor. Burns v. Horkan, 126 Ga. 161, 54 S. E. 946.

67. Although a master instructed his servants to cut trees of a certain size, he is liable for smaller trees cut, it not appearing that it was not necessary to cut them in the removal of the larger ones. Avery v. White [Conn.] 66 A. 517.

68. Baker v. Davis [Ga.] 57 S. E. 62; Gilliland v. Martin [Ala.] 42 So. 7. See Master and Servant, 8 C. L. 840; Agency, 7 C. L. 61.

69. See 6 C. L. 1723.

70. An injunction restraining one from further destruction of a drain held not to relieve him from overflows occurring during the life of the injunction caused by the obstruction already interposed. Miller v. Rambo [N. J. Err. & App.] 64 A. 1053.

71. Property taken on different days. Gilliland v. Martin [Ala.] 42 So. 7.

72. Under Kirby's Dig. § 6096, providing that the pendency of another action between the same parties for the same cause shall be a ground of demurrer. Board of Directors of St. Francis Levee Dist. v. Redditt [Ark.] 95 S. W. 482.

73, 74. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 So. 858.

75. Clark v. Wabash R. Co. [Iowa] 109 N. W. 309.

76. Though the trespass is a continuing one. Clark v. Wabash R. Co. [Iowa] 109 N. W. 309.

77. City of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co [Md.] 65 A. 35. Action must be so brought though defendant is a municipality. Id.

78. Action for trespass in Georgia is not barred if brought within four years. Burns v. Horkan, 126 Ga. 161, 54 S. E. 946. Trespass to real property within Ballinger's Ann. Codes & St. § 4800, subd. 1, allowing actions to be brought within three years, is direct physical invasion, and not consequential injuries resulting from a change of grade. Denney v. Everett [Wash.] 89 P. 934. An action for trespass is not changed in character so as to render Code Civ. Proc. § 338, subd. 2, fixing the period of limitations for trespasses inapplicable, by a prayer for alternative injunctive relief. Williams v. Southern Pac. R. Co. [Cal.] 89 P. 599.

79. Construction of a railroad. Williams v. Southern Pac. R. Co. [Cal.] 89 P. 599.

80. Being permanent in character, the trespass is not regarded as a continuing one so as to authorize a recovery for damages accruing within the period of limitations without regard to the time of original entry. Williams v. Southern Pac. R. Co. [Cal.] 89 P. 599.

81. While tenants in common must join in actions for trespass, a nonjoinder can be taken advantage of only by plea in abatement or by way of apportionment of damages. Cummings & Co. v. Masterson [Tex. Civ. App.] 16 Tex. Ct. Rep. 33, 93 S. W. 500.

82. See 6 C. L. 1723.

83. Patrick v. Brown [Colo.] 85 P. 325; Paraffine Oil Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 93 S. W. 1089. Or constructive. Gordner v. Blades Lumber Co. [N. C.] 56 S. E. 695. Actual possession is good as against a trespasser who has no title and no prior possession or claim under one having such possession. Maxfield v. White River Lumber Co. [N. H.] 65 A. 832. A grantee under a void deed who goes upon the land and finds trespassers thereon cutting timber does not have actual possession. Gordner v. Blades Lumber Co. [N. C.] 56 S. E. 695.

84. A chain of title not originating in one shown to have had title does not, in the absence of twenty-one years of continuous possession thereunder, show title so as to give constructive possession. Gordner v. Blades Lumber Co. [N. C.] 56 S. E. 695. Evidence held insufficient to sustain a survey under which plaintiff claimed title. Kim-

at the time of trespass,[85] proof of true ownership being required of a plaintiff out of possession by statute in Georgia.[86] Title may be shown by proof of a superior title from a common grantor.[87]

Joint actions.[88]—In quare clausum fregit, allegations of acts amounting to a a trespass vi et armis, which form a compentent part of the wrong, may be joined therewith.[89]

Pleading, issues, and proof.[90]—Counts in trespass de bonis asportatis substantially in the form of the Alabama statute are sufficient.[91] The property trespassed upon must be identified,[92] but the ownership thereof may be pleaded by implication.[93] All ultimate facts[94] must be pleaded, but not evidentiary facts.[95] Plaintiff need not attach an abstract of title to his petition.[96]

Matters of justification or excuse must be specificially pleaded,[97] but not facts which do not justify but go merely in mitigation of damages.[98] A license may be shown under the general issue on the issue of damages.[99] A plea of not guilty is generally held to put in issue plaintiff's title,[1] but the contrary rule seems to prevail in Texas.[2] Inconsistent defenses must not be alleged.[3]

ball v. McKee [Cal.] 86 P. 1089. Evidence of the boundaries held so indefinite as to authorize a finding that defendant committed no trespass on plaintiff's land. Taylor v. Woolum, 30 Ky. L. R. 378, 98 S. W. 1006. Ownership and possession of a house on the land of another being shown, it will not be presumed that it was wrongfully located thereon so as to vest title in the land-owner. Jones v. Great Northern R. Co. [Minn.] 110 N. W. 260.

85. A grant from the state does not give constructive possession prior thereto. Gordner v. Blades Lumber Co. [N. C.] 56 S. E. 695. A judgment in ejectment only shows a right of possession in plaintiff as of the date of commencing the action, hence plaintiff cannot rely thereon as proof of right to possession prior thereto. Henry v. Davis [Ala.] 43 So. 122. Evidence that plaintiff made arrangements with a third party to hold the land for him as a tenant, but which does not fix the time of the year when made, or when possession was taken by the tenant, does not show actual possession at the time of trespass. Gordner v. Blades Lumber Co. [N. C.] 56 S. E. 695.

86. Civ. Code 1895, § 3877. Moore v. Vickers, 126 Ga. 42, 54 S. E. 814. Ownership of timber is not shown by proof that plaintiff and defendant's grantor were asserting independent title to the land upon which the timber was growing, and that as a compromise plaintiff conveyed the land to defendant's grantor reserving title to the timber, parties not claiming under the same grantor. Id.

87. Makes at least a prima facie case. Garbutt Lumber Co. v. Wall, 126 Ga. 172, 54 S. E. 944. Where plaintiff makes it affirmatively appear by his pleadings and proof that defendant claims title from one from whom plaintiff has a superior title, and further proves an act of trespass, it is error to grant a nonsuit. Id.

88. See 6 C. L. 1724.

89. Haines' Ex'rs v. Haines [Md.] 64 A. 1044. Hence plaintiff need not show that defendant was a trespasser ab initio. Id.

90. See 6 C. L. 1724.

91. Code 1896, p. 947, form 23. Gilliland v. Martin [Ala.] 42 So. 7.

92. A count of the complaint alleging that a trespass was committed on the property of plaintiff, "a description of which is hereto attached, marked 'Exhibit A' and made a part hereof, that portion of the same which lies adjacent to the road bed of the S. Railroad Company," sufficiently describes the property though it does not specify what portion of the premises was trespassed upon. Western Union Tel. Co. v. Dickens [Ala.] 41 So. 469.

93. Ownership of land in street pleaded by alleging ownership of abutting lot. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207.

94. Petition alleging that defendant has had exclusive possession and use of plaintiff's land for a stated time held to allege a cause of action, especially where the question was raised by motion to exclude all evidence. Simmonds v. Richards [Kan.] 86 P. 452.

95. Not necessary to plead the evidence by which plaintiff expects to prove that the trespass was on his land. McConahy v. Allegheny R. R. Co., 31 Pa. Super. Ct. 215. Plaintiff may show cancellation of title bond under which defendant claims without pleading the same. Asher v. Helton [Ky.] 101 S. W. 350.

96. Burns v. Horkan, 126 Ga. 161, 54 S. E. 946; James v. Saunders [Ga.] 56 S. E. 491. Civ. Code 1895, § 4927, has reference only to applications for injunction. Id. Hence error to dismiss an action for injunction and damages for failure to attach such abstract where plaintiff abandoned his claim for injunction. Id.

97. License. Chicago Title & Trust Co. v. Core, 126 Ill. 272. Easement. Hatton v. Gregg [Cal. App.] 88 P. 594. Consent of plaintiff held not admissible under general plea of not guilty. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108. And the fact that distinctions between trespass and action on the case have been abolished by statute held not to change the rule. Id.

98. Western Union Tel. Co. v. Dickens [Ala.] 41 So. 469.

99. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108.

1. Under the plea of not guilty in trespass quare clausum fregit, defendant may

Preliminary statements that defendant is informed and believes plaintiff's complaint to be untrue do not vitiate a positive denial.[4]

If defendant pleads a prescriptive right in justification, plaintiff may reply by alleging acts in excess thereof.[5]

Plaintiff must prove all the material allegations of the complaint[6] including title to the land[7] and a trespass by defendant,[8] unless admitted by the answer.[9] In New York one may raise a presumption of ownership to unoccupied lands by showing an unbroken chain of title thereto for thirty years next preceding,[10] which can only be overcome by proof of ownership in another.[11] The burden of impeaching a license is on plaintiff.[12]

Evidence.[13]—The general rules of evidence respecting relevancy,[14] primary and secondary evidence,[15] opinion testimony,[16] res gestae,[17] and proof of value,[18] are applicable. Where the trespass is alleged to consist of acts in excess of a prescriptive right, evidence characterizing the trespass is admissible.[19] Trespasses subsequent to the filing of the petition cannot be shown.[20] Evidence of fraud impeaching an instrument under which defendant justifies is admissible.[21] Nonresponsive answers[22] may be stricken.

prove a freehold in himself. Dickinson v. Mankin [W. Va.] 56 S. E. 824.

2. Hence defendant cannot show an outstanding title. Paraffine Oil Co. v. Berry [Tex. Civ. App.] 15 Tex. Ct. Rep. 715, 93 S. W. 1089.

3. Denied the cutting of the tree but alleged that if defendant did cut it, such action was necessary. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207.

4. An answer to plaintiff's allegations of ownership and trespass that defendant is advised, informed, and believes that plaintiff's complaint is not true, and therefore denies the same, is sufficient to raise the issue of ownership and trespass. Gordner v. Blades Lumber Co. [N. C.] 56 S. E. 695.

5. Especially under Pub. Gen. Laws, art. 75, § 24, subsec. 78. Haines' Ex'rs v. Haines [Md.] 64 A. 1044.

6. In trespass for the destruction of a wall alleged to stand upon the land of plaintiff, failure to so prove, the fact being put in issue, defeats recovery. Howie v. California Brewery Co. [Mont.] 88 P. 1007.

7. The only issue being the location of the boundary line between the parties' land, the burden is on plaintiff to show title to the property trespassed upon. Clark v. Case, 144 Mich. 148, 13 Det. Leg. N. 193, 107 N. W. 893.

8. Testimony of defendant that he never authorized any one to go upon plaintiff's land held insufficient to overcome the presumption that the wagons used in the trespass and bearing his name were in his employ, especially where his foreman was not called. Leubuscher v. Bailey, 102 N. Y. S. 756.

9. Where defendants answer by a joint plea of justification, neither can complain that he was not connected with the trespass. Asher v. Helton [Ky.] 101 S. W. 350.

10. One may claim the presumption of ownership afforded by Code Civ. Proc. § 960, although the original deed in his chain was not exact as to one boundary, where the land was of so little value as to render it improbable that all the land was not conveyed. Cravath v. Baylis, 113 App. Div. 666, 99 N. Y. S. 973.

11. Mere isolated acts of user held insufficient. Cravath v. Baylis, 113 App. Div. 666, 99 N. Y. S. 973.

12. Claimed to have been procured by fraud. Mason v. Postal Tel. Cable Co., 74 S. C. 557, 54 S. E. 763.

13. See 6 C. L. 1725.

14. In an action for cutting trees, evidence as to the size of trees cut on adjoining lots, of which defendant claimed plaintiff's lot was a part, and of what he paid the choppers, is inadmissible. Avery v. White [Conn.] 66 A. 517.

15. In trespass for taking away property under a void process, the plaintiff may testify as to the goods taken, but he cannot testify as to the contents of the paper under which it was taken. Gray v. Joiner [Ga.] 56 S. E. 752.

16. A surveyor cannot give his opinion as to a certain supposed monument found by him. Clark v. Case, 144 Mich. 148, 13 Det. Leg. N. 193, 107 N. W. 893.

17. Where, in trespass for taking of furniture, defendants claim plaintiff consented to the removal, evidence that she was sitting in one corner of the house crying at the time, is admissible as res gestae and on the issue of consent. Terry v. Williams [Ala.] 41 So. 804.

18. Where defendant's attorney, acting under a void writ, took possession of goods and inventoried the same, the inventory is admissible to show value. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108. Where in trespass for cutting vines plaintiff has given evidence of their value and ornamental effect, defendant may introduce evidence to the same point. Martin v. Erwin [N. J. Law] 65 A. 888.

19. In trespass for widening a race under a prescriptive right to clean the same, evidence as to the uses to which the water was put and the manner in which the race was cleaned is admissible. Haines' Ex'rs v. Haines [Md.] 64 A. 1044.

20. Gulf & C. R. Co. v. Hartley [Miss.] 41 So. 382.

21. Evidence that plaintiff was induced by false representation to use the description in the deed, and which included the timber

Instructions and jury questions.[23]—Instructions should correctly submit the issues involved [24] but no others,[25] and must not be misleading,[26] or pretermit the consideration of material evidence.[27] Instructions need not be given as to matters not in issue,[28] or unsupported by evidence.[29] Where an act was unlawful, if committed at all, it is not error to use the word "unlawfully" without defining it.[30] A general instruction as to facts which the jury must find to authorize a verdict for plaintiff need not include a fact not in issue.[31]

Where defendant admits the act of alleged trespass by answer, he is not entitled to go to the jury thereon.[32] Questions of fact are usually for the jury.[33]

Verdict and judgment.[34]—In trespass the court may issue a mandate preventing future trespass, the order being conformable to the prayer and issues found.[35]

(§ 2) *B. In equity.*[36]—While the granting of an injunction to restrain trespass rests in the sound discretion of the court,[37] it will usually issue to restrain waste [38] or destruction of the estate,[39] to prevent a trespass which is continuing,[40]

cut. Goodwin v. Fall [Me.] 66 A. 727. Where defendants justify a taking of furniture under claim of ownership under a conditional sale contract, while plaintiff contends that the paper executed by her was to secure a loan on the furniture, evidence that defendants were pawnbrokers and dealers in secondhand furniture is admissible. Terry v. Williams [Ala.] 41 So. 804.

22. In trespass for the taking of goods, defendant was asked to state the circumstances under which he got the "stuff," an answer that he told a certain person to collect a debt secured by the property taken and to take possession under legal proceedings, was properly stricken as not responsive. Gilliland v. Martin [Ala.] 42 So. 7.

23. See 6 C. L. 1726.

24. Defendant having denied that it appropriated any of plaintiff's land, an instruction so stating, but adding, "or if they have appropriated any of it, it is a very small amount," is erroneous (Postal Tel. Cable Co. v. Kuhnen [Ga.] 55 S. E. 967), and was not corrected by adding that defendant did not admit owing any damages (Id.).

25. Submitted question of license not raised. Howie v. California Brewing Co. [Mont.] 88 P. 1007. Where in trespass for removing a wall, the issue was whether it stood on plaintiff's land, an instruction authorizing a recovery for negligence in removing it, though it stood on defendant's lot, is erroneous. Id. An instruction as to the rights after condemnation is erroneous where there is no evidence of such a proceeding. Postal Tel. Cable Co. v. Kuhnen [Ga.] 55 S. E. 967.

26. A charge that if defendant erected its line along a public highway, plaintiff would have no right of recovery, "unless the right of way that he talks of, twenty feet wide, would reach over beyond the road," held misleading in that the jury might think that even if no entry was made on plaintiff's land, yet if some "right of way" which "he talks of" extended over the road, a recovery could be had. Postal Tel. Cable Co. v. Kuhnen [Ga.] 55 S. E. 967. A further charge that under the evidence it was for the jury to determine whether the defendant's right of way extended beyond the public highway, held erroneous for the same reason. Id.

27. Instruction on liability of a master for his servant's trespass held to pretermit consideration of evidence that defendant was present and also evidence that he participated. Gilliland v. Martin [Ala.] 42 So. 7. Pretermitted consideration of evidence of taking of goods not embraced in the mortgage under which defendant justified. Id.

28. Where, in trespass for cutting trees, defendant admitted that the cutting was done by his servants and no question was raised as to a master's liability for acts of his servants, nor as to the distinction between the relation of master and servant and employer and contractor, the court need not instruct in respect thereto. Avery v. White [Conn.] 66 A. 517.

29. Instructions as to adverse possession rightfully refused where defendant's acts were mere trespasses. Buford v. Christian [Ala.] 42 So. 997.

30. Betz v. Kansas City Home Tel. Co. [Mo. App.] 97 S. W. 207.

31. Rightful possession of plaintiff not disputed. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108.

32. Cravath v. Baylis, 113 App. Div. 666, 99 N. Y. S. 973.

33. Evidence of acts by defendant in excess of his prescriptive right held to make a case for the jury. Haines' Ex'rs v. Haines [Md.] 64 A. 1044.

34. See 6 C. L. 1726.

35. In trespass for water cast from the roof of defendant's building onto plaintiff's court properly directed defendant to provide gutters and drains. Davis v. Smith [N. C.] 56 S. E. 940.

36. See 6 C. L. 1726.

37. Acts of complainant prior to and subsequent to the erection of a dam held to constitute an election to accept a money award for the damage caused by overflow and not to entitle him to an injunction. Andrus v. Berkshire Power Co. [C. C. A.] 147 F. 76.

38. Cutting down trees. Hatton v. Gregg [Cal. App.] 88 P. 594.

39. Where a plaintiff is in possession of property which the defendant claims by adverse title, and the defendant is threatening acts which will tend to the destruction of the estate, the prayer of the plaintiff for an injunction will be granted until such time as the defendant establishes his title by an action at law. Harding v. Perin, 8 Ohio C. C.

or which threatens to become permanent,[41] and to prevent a multiplicity of suits.[42] But petitioner must be without adequate remedy at law,[43] and threatened with irreparable injury.[44] Hence a mere technical trespass will not be enjoined.[45] Mere failure of petitioner to object to a trespass,[46] or the fact that it is of benefit to the public,[47] will not prevent its abatement. A widow may restrain a trespass upon lands in which she has an unassigned dower interest.[48]

Facts and not a mere conclusion that the threatened trespass will result in irreparable injury,[49] a multiplicity of suits,[50] or in the acquisition of an easement,[51] must be alleged.

Failure of defendant to answer does not authorize a decree against him where the answer of an intervenor states a complete defense.[52]

One claiming to be the true owner of the property may intervene.[53]

In an action to restrain trespass to realty, plaintiff has the burden [54] of showing title in himself,[55] but it is sufficient to prove a superior title from a common source.[56]

Where injunctive relief is granted of common law right, an accounting may be had as incident thereto,[57] but not where it is granted under the Florida statute.[58] Under appropriate pleadings, title may be adjudicated.[59]

(N. S.) 533. Where cotenants are about to proceed to cut timber in disregard of their mutual rights, an injunction is proper restraining such action until partition can be made. Baxter & Co. v. Camp, 126 Ga. 354, 54 S. E. 1036.

40. Martin v. Patillo, 126 Ga. 436, 55 S. E. 240. The maintenance and use of a telephone along a highway without the consent of the fee owner is a continuing trespass justifying an injunction. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 N. E. 705.

41. Construction of a roadbed and abutment for a bridge. McConahy v. Allegheny R. R. Co., 31 Pa. Super. Ct. 215.

42. To authorize an injunction on such ground in Florida, there must be several persons threatening to act and not one person threatening many trespasses. Cowan v. Skinner [Fla.] 42 So. 730.

43. Cowan v. Skinner [Fla.] 42 So. 730. Will not restrain a mere trespass in taking turpentine from trees when the trespass may be compensated at law. Id. An allegation in a bill to restrain trespass in taking turpentine "that almost the entire value of said lands consists in said pine trees and their product * * * that your orator * * * was induced to purchase such lands in order to get the product of said trees and that defendants * * * are destroying the value of said lands for the purpose for which they were acquired," does not show an inadequate remedy at law. Id.

44. Baker v. Davis [Ga.] 57 S. E. 62. Shooting of guns over a duck pass on plaintiff's land held to cause sufficient damage to sustain an injunction. Whittaker v. Stangvick [Minn.] 111 N. W. 295. Equity may, independent of statute, enjoin injury to or destruction of growing trees where their value and use as a part of the land is of a character as to result in irreparable injury to the owner in the use and enjoyment of the estate. Cowan v. Skinner [Fla.] 42 So. 730.

45. Trespasses upon uncultivated lands. Percy Summer Club v. Astle, 145 F. 53.

46. One failing to object to the construction of a telephone line along a highway of which he is the fee owner, is not estopped from invoking an injunction to abate it. Burrall v. American Tel. & T. Co., 224 Ill. 226, 79 N. E. 705.

47. Telephone line. Especially where defendant may resort to condemnation proceedings. Burrall v. American Tel. & T. Co., 224 Ill. 266, 79 N. E. 705.

48. Need not join the other tenants. Delaney v. Manshum [Mich.] 13 Det. Leg. N. 876, 109 N. W. 1051.

49. Petition examined and held insufficient to show irreparable injury because of failure to allege the nature of the threatened trespass. Bishop v. Owens [Cal. App.] 89 P. 844.

50. Allegations construed as a mere conclusion. Bishop v. Owens [Cal. App.] 89 P. 844.

51. Allegations held to constitute a mere legal conclusion. Bishop v. Owens [Cal. App.] 89 P. 844.

52. Intervenor asserted title in himself with authority to defendant to cut. Lemayne v. Anderson, 29 Ky. L. R. 1017, 96 S. W. 843.

53. And allege title in himself and license to defendant to commit the acts sought to be enjoined. Lemayne v. Anderson, 29 Ky. L. R. 1017, 96 S. W. 843.

54. Lemayne v. Anderson, 29 Ky. L. R. 1017, 96 S. W. 843.

55. Plaintiff must recover on the strength of his own title. Lemayne v. Anderson, 29 Ky. L. R. 1017, 96 S. W. 843. Deraignment under a patent to a large tract excepting lands previously conveyed is not proof of title unless the land is shown to be within the boundaries of the tract and not within the exceptions. Id.

56. Source of common grantor's title is immaterial and evidence in respect thereto is inadmissible. Corker v. Stafford, 125 Ga. 428, 54 S. E. 92.

57. Cowan v. Skinner [Fla.] 42 So. 730.

58. Would deny the defendant the right to a jury contrary to the constitution. Cowan v. Skinner [Fla.] 42 So. 730.

59. Pleadings with the amendments in a suit for an injunction and for damages for cutting timber, in view of the scope of the case, held to authorize an adjudication of title. Baxter v. Camp, 126 Ga. 354, 54 S. E. 1036.

Trial.—It is not an abuse of discretion to refuse to permit evidence to be withdrawn where the other party could and would introduce the same,[60] or to suggest that it was to the interest of a party to admit a contention of his adversary.[61]

§ 3. *Damages and penalties.*[62]—A technical trespass carries nominal damages.[63] Where growing trees are destroyed, the owner may sue for the value thereof [64] if they have a detached value,[65] or for the injury to the land.[66] In the former case, the detached value of the trees,[67] and, in the latter, the difference in the value of the land before and after the trespass [68] for the purpose for which it is being used,[69] is the measure of damages. Where trespass results in a permanent injury to realty, the diminution in the present value [70] of the entire tract [71] from the trespass sued for [72] is the criterion. Where a trespass may be abated, damages cannot be awarded for future maintenance.[73] One wrongfully withholding possession is liable for an agreed rent lost because of the owner's inability to give possession,[74] if the same is properly pleaded.[75] While plaintiff cannot recover for damages which he might have prevented by reasonable diligence,[76] defendant will not be heard to say that if plaintiff's house had been properly constructed the damages would have been lessened.[77] A prayer for damages in a specific amount does not limit the court thereto in North Carolina.[78]

Plaintiff must prove all facts necessary to authorize an assessment,[79] and the award must correspond to the damages shown.[80] Where a trespass is of a character

60. Deed. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

61. That the land was within a certain grant. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

62. See 6 C. L. 1727.

63. Postal Tel. Cable Co. v. Kuhnen [Ga.] 55 S. E. 967. Error to dismiss. Wing v. Seske [Iowa] 109 N. W. 717. Where a grantee in a conveyance of standing timber entered and removed the same after the expiration of the time limited, but no appreciable damage was done to the soil or to the grantor's possession, only nominal damages may be recovered in quare clausum fregit. Zimmerman Mfg. Co. v. Daffin [Ala.] 42 So. 858.

64. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600.

65. If trees have no detached value, action must be brought for injury to the realty. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600.

66, 67, 68. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600.

69. Tort feasor will not be heard to say that the land will produce as much revenue if put to a different use. Galveston, etc., R. Co. v. Warnecke [Tex. Civ. App.] 15 Tex. Ct. Rep. 746, 95 S. W. 600.

70. In trespass for an entry and construction of a telephone line, the depreciation in the present value of the land and not a conjectural future value is the measure of damages. Mason v. Postal Tel. Cable Co., 74 S. C. 557, 54 S. E. 763.

71. Cutting a strip through a forest. Morrison v. American Tel. & T. Co., 101 N. Y. S. 140.

72. Error to permit plaintiff to testify to deterioration from trespasses after the filing of the petition. Gulf & C. R. Co. v. Hartley [Miss.] 41 So. 382.

73. Trespass for constructing a telephone line. Morrison v. American Tel. & T. Co., 101 N. Y. S. 140.

74. Broussard v. Hinds [Tex. Civ. App.] 101 S. W. 855.

75. An allegation that plaintiff entered into a contract of lease with a third party for a stated sum, which contract was lost by reason of defendants refusal to surrender possession, renders the contract admissible. Broussard v. Hinds [Tex. Civ. App.] 101 S. W. 855.

76. Plaintiff held not entitled to recover for discomfort in living for several weeks in a house the doors and windows of which had been wrongfully removed by defendant, where they could have been speedily replaced. Davis v. Poland [Me.] 66 A. 380.

77. Water cast from defendant's building onto plaintiff's. Davis v. Smith [N. C.] 56 S. E. 940.

78. Davis v. Wall, 142 N. C. 450, 55 S. E. 350.

79. Failed to show that the trees cut were on the part to which he succeeded in establishing title. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278. In trespass for removing stone, proof of the amount that would be required to fill the hole held to sustain a finding that such amount was removed, in the absence of evidence by defendant as to the exact amount. Chesapeake Stone Co. v. Fossett, 30 Ky. L. R. 1175, 100 S. W. 825. In trespass for unlawfully removing a stock of goods which were subsequently returned, evidence as to the value of the goods when returned held too meager to require an instruction that the measure of damages was the difference in value of the goods when removed and when returned. Keroes v. Weaver, 27 App. D. C. 384.

80. Excessive: Where the only testimony was that the fence and chicken house injured was worth $125 and $30 respectively, and that of a carpenter that the injury could be repaired for $25, a verdict for $600 is excessive. Spencer v. San Francisco Brick Co. [Cal. App.] 89 P. 851.

to create an adverse title, a dismissal must be reversed though plaintiff is only entitled to nominal damages.[81]

Damages must be properly pleaded.[82]

Punitive.[83]—Statutes in some states prescribe the circumstances under which punitive damages may be awarded,[84] but in the absence thereof they are usually authorized when the trespass is wanton or malicious or accompanied by circumstances of aggravation.[85]

The petition must contain appropriate allegations.[86]

Multifold.[87]—The Kansas statute allowing treble damages for digging up and carrying away gravel, etc., is treble the injury to the gravel,[88] and multifold damages are not allowable for injuries to the land resulting from the use to which the gravel is thereafter put.[89]

§ 4. *Criminal liability.*[90]—In North Carolina, one wrongfully entering[91] upon the premises of another after notice and without a bona fide claim of right[92] is criminally liable though an injunction might not lie to restrain the act.[93] The fact that a tenant has not taken possession under his lease does not prevent him from giving notice under the South Carolina statute where his lease has started.[94]

As in other crimes, there must be a criminal intent.[95] A license legally terminated,[96] or a permission to a third person to enter,[97] is no defense.

81. Fenced in some of plaintiff's land with his own. Wing v. Seske [Iowa] 109 N. W. 717.

82. An allegation that defendant cut and removed trees from plaintiff's land "to his great damage" is sufficient to authorize recovery for the value of timber so cut together with damages for the injury done to the land in removing it therefrom. Davis v. Wall, 142 N. C. 450, 55 S. E. 350.

83. See 6 C. L. 1728.

84. Civ. Code, § 3294, authorizing punitive damages in case of fraud, oppression, or malice, does not authorize such damages for trespasses resulting from mere negligence. Spencer v. San Francisco Brick Co. [Cal. App.] 89 P. 851. And failure to repair after notice the damage done by such negligence does not constitute oppression thereunder. Id.

85. Sperry v. Seidel [Pa.] 66 A. 853; Western Union Tel. Co. v. Dickens [Ala.] 41 So. 469; Terry v. Williams [Ala.] 41 So. 804. Malice. Miller v. Rambo [N. J. Err. & App.] 64 A. 1053.

Punitive damages authorized: Where defendant's attorney in company with a United States marshal demanded immediate possession of a stock of goods under a writ to show cause why possession should not be given, and by threats of arrest obtained possession. Chicago Title & Trust Co. v. Core, 223 Ill. 58, 79 N. E. 108. In an action against a telegraph line for trespasses committed while repairing its line, there was evidence that it destroyed plaintiff's fence in several places and that it was unnecessary so to do. Western Union Tel. Co. v. Dickens [Ala.] 41 So. 469.

Not allowed: Evidence held to show no willful, reckless, or wanton negligence in the construction of a bulkhead, the giving way of which resulted in injury to plaintiff's property. Spencer v. San Francisco Brick Co. [Cal. App.] 89 P. 851.

86. Prayer alone insufficient. Board of Directors of St. Francis Levee Dist. v. Redditt [Ark.] 95 S. W. 482.

87. See 4 C. L. 1705.

88. Gen. St. 1901, 7862. Atchison, etc., R. Co. v. Grant [Kan.] 89 P. 658. Its value is determined as an appurtenance and not as a severed object. Id.

89. Injuries to the farm from the building of a dike not trebled. Atchison, etc., R. Co. v. Grant [Kan.] 89 P. 658.

90. See 6 C. L. 1729.

91. The right of entry conferred by Rev. 1905, § 2575, upon a railroad and logging company to lay out its road and building sites, does not authorize an entry for the purpose of construction. State v. Wells, 142 N. C. 590, 55 S. E. 210. Nor does § 2587, authorizing it to proceed with construction work after paying into court the amount of the appraisal by the commissioners, authorize such entry before payment. Id.

92. A conviction for willful trespass under Revisal 1905, § 3688, cannot stand where it appears that the question of an entry under a bona fide claim of right was not passed upon, there being some evidence in support thereof. State v. Wells, 142 N. C. 590, 55 S. E. 210. In a prosecution under Revisal 1905, § 3688, for unlawful entry after notice, the fact that defendant was acting under a superior who had been legal advised, that the railroad and logging company could proceed to construct its line before payment of the appraisement, held no justification. State v. Mallard [N. C.] 57 S. E. 351.

93. State v. Wells, 142 N. C. 590, 55 S. E. 210.

94. Where one leases lands for a calendar year and the landlord does nothing to prevent him from taking possession on January 1st, he then becomes a tenant within Cr. Code 1902, § 186, making an entry after notice from a tenant a misdemeanor, though he does not take possession until later. State v. Gay [S. C.] 56 S. E. 668.

95. The presumption of criminal intent from the act of trespass is rebutted where it appears that defendant merely cut a few trees over an obscure division line, and the prosecutor himself admits not knowing the exact boundary line and it appears that he had also crossed over the line in posting notices. Campbell v. State [Ga.] 56 S. E. 417.

An affidavit for trespass must identify the tract trespassed upon, but it need not specify the particular part thereof.[98] Indictment should allege that the entry was without the consent of the owner.[99]

Where defendant offered evidence that the road used was the only way to reach a certain place, it is not error to admit evidence in rebuttal thereof though it is immaterial.[1] In a prosecution for cutting and removing timber, evidence tending to connect defendant therewith is admissible.[2]

§ 5. *Trespass to try title.*[3]—A remainderman is a proper party,[4] but a wife having only a community interest is not a necessary party to an action against her husband,[5] though the property constitutes their homestead.[6]

Laches cannot be urged against the holder of the legal title,[7] nor against the heirs of a grantor by one claiming under a void alienation of land located under a donation warrant.[8]

Pleading and procedure.[9]—All ultimate facts essential to a complete cause of action or defense,[10] but not evidentiary facts,[11] must be pleaded. Petition must not assert inconsistent rights.[12] A plea of not guilty admits possession in defendant,[13] and a prior dispossession of plaintiff,[14] and under such plea, in an action by a county to recover school lands, defendant may show abandonment of location and estoppel to assert title.[15] Plaintiff need not specifically plead an erroneous forfeiture by the land commissioner of a sale of school lands under which he claims.[16] Coverture as a defense to a plea of limitations must be alleged.[17] A defendant seeking to re-

96. Where a contract employing a contractor to repair a dwelling is terminated in the manner specified therein, the contractor cannot justify thereunder in a prosecution for trespass after notice. Davis v. State [Ala.] 41 So. 681.

97. Cross v. State [Ala.] 41 So. 875. In a prosecution for trespass after warning in using a road over prosecutor's land, evidence that prosecutor agreed with another to leave the road open until his right to close it was determined is inadmissible, as it did not justify defendant's trespass after warning. Id.

98. An affidavit which alleges that accused entered on the lands of a person named as trustee, described as "N. W. 1-4, S. W. 1-4, N. 1-2, N. E. 1-4 and N. W. 1-4, S. E. 1-4, in section 13," etc., and cut timber growing thereon, is in conformity to the form prescribed by Code 1896, § 4600, as amended by Acts 1903, p. 283, and sufficiently describes the land, though it does not specify the 40 acre tract upon which it was committed. Mayhall v. State [Ala.] 41 So. 290.

99. Indictment under Acts 1897, p. 257, c. 106, charging a "malicious" entry, held sufficient as against an objection after verdict. Whinn v. State [Tenn.] 94 S. W. 674.

1. Cross v. State [Ala.] 41 So. 875.

2. Evidence that stumps of trees had been seen around where defendant's wagon had been seen, and that within a few feet of the wagon a tree had been cut into three stocks. Mayhall v. State [Ala.] 41 So. 290.

3. See 6 C. L. 1729.

4. Combest v. Wall [Tex. Civ. App.] 102 S. W. 147.

5. Judgment against the husband binds her. Hamilton v. Blackburn [Tex Civ. App.] 15 Tex. Ct. Rep. 721, 95 S. W. 1094.

6. Especially where the homestead character constituted no defense. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. '23.

7. Where upon the close of bankruptcy proceedings the legal title to undisposed of lands reverted to the bankrupt, defense of stale demands cannot be asserted by one claiming under a deed thereafter executed by the assignee. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex. Ct. Rep. 110, 95 S. W. 637.

8. Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131.

9. See 6 C. L. 1730.

10. An answer and cross bill alleging that plaintiff purchased the land under a foreclosure sale under a deed of trust executed by defendant, and by agreement plaintiff loaned to defendant the amount of the bid and took the deed from the trustee as security for the loan, held good as against a general demurrer. Delaney v. Campbell [Tex. Civ. App.] 97 S. W. 519.

11. Facts relied upon to show defendant's tenancy. Berry v. Jagoe [Tex. Civ. App.] 100 S. W. 815.

12. A petition alleging title under a deed to take effect upon the death of the grantor, and an oral contract whereby immediate possession was given, is not inconsistent, the contract not relating to title. McCurry v. McCurry [Tex. Civ. App.] 16 Tex. Ct. Rep. 182, 95 S. W. 35.

13. Hence where defendant thereby admits possession of the entire tract sued for and the court finds that plaintiff's patent was prior to defendant's, it is error to render judgment for less than the whole tract. Earnest v. Lake [Tex. Civ. App.] 101 S. W. 479.

14. A special traverse is necessary to put in issue plaintiff's possession or right thereto. Cummings & Co. v. Masterson [Tex. Civ. App.] 16 Tex. Ct. Rep. 33, 93 S. W. 500.

15. Lamar County v. Talley [Tex. Civ. App.] 94 S. W. 1069.

16. May prove without pleading. Bumpass v. McLendon [Tex. Civ. App.] 101 S. W. 491.

17. Proof without pleading does not ren-

cover for improvements made in good faith must allege the basis of such faith,[18] and a demurrer stating that defendant's answer "shows no facts constituting good faith" is sufficient.[19]

Plaintiff must recover on the strength of his own title,[20] unless defendant is estopped to deny it.[21] Hence where he claims by gift,[22] or descent,[23] or under a particular grant[24] or deed,[25] he must show all facts necessary to vest title in him, though proof of prior possession makes a prima facie case against a mere trespasser.[26] A common source of title[27] excuses deraignment from the government,[28] but it does not preclude defendant from showing a title superior to the common source.[29] A deed introduced to show common source of title is limited to that purpose.[30] Plaintiff may recover on a title acquired pendente lite if such title was being asserted by its owner in the case.[31] The presumption of a grant from long

der it available. Lawder v. Larkin [Tex. Civ. App.] 15 Tex. Ct. Rep. 809, 94 S. W. 171.

18. General allegation of good faith is insufficient. Campbell v. McCaleb [Tex. Civ. App.] 99 S. W. 129.

19. Not objectionable as not pointing out the facts desired. Campbell v. McCaleb [Tex. Civ. App.] 99 S. W. 129.

20. Hence defendant may prove a superior outstanding title in defense. Mann v. Hossack [Tex. Civ. App.] 16 Tex. Ct. Rep. 835, 96 S. W. 767.

Plaintiff has the burden of showing a superior title. Fellers v. McFatter [Tex. Civ. App.] 101 S. W. 1065. Must locate and identify the land as a part of his grant. McDonald v. Downs [Tex. Civ. App.] 99 S. W. 892. Where defendants claim under the older title from the common source, plaintiff must break down such title. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587.

Under Rev. St. 1895, art. 5259, the location and survey of land by virtue of a bounty warrant gives sufficient title to authorize the maintenance of an action of trespass. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406. Where an administrator gives possession of land not included in his deed, heirs have sufficient title to recover the same though the unpaid debts of the insolvent estate exceed its value. Fowler v. Agnew [Tex. Civ. App.] 16 Tex. Ct. Rep. 180, 95 S. W. 36. A tenant in common may recover as against one having no title at all (Hughes v. Wright [Tex. Civ. App.] 16 Tex. Ct. Rep. 122, 97 S. W. 525), and hence where plaintiffs show their right to inherit a part through the paternal ancestors of the last owner, their right to recover is not defeated by failure to prove that his maternal kindred are extinct (Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665).

21. Plaintiff need not prove title if defendant claims as his tenant. Berry v. Jagoe [Tex. Civ. App.] 100 S. W. 815.

22. Where defendant interposed a general denial to a petition alleging a parol gift followed by possession and valuable improvements, plaintiff must prove the gift together with the possession and improvements thereunder. Wallis v. Turner [Tex. Civ. App.] 16 Tex. Ct. Rep. 92, 95 S. W. 61.

See Gifts, 7 C. L. 1878.

23. Gorham v. Settegast [Tex. Civ. App.] 17 Tex. Ct. Rep. 432, 98 S. W. 665. Must show that his ancestor was the patentee in the grant under which he claims. Dorsey v. Olive Sternenberg & Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 860, 94 S. W. 413. Evidence held to require a finding that plaintiff's ancestor and not defendant's ancestor was the patentee. Id. See Descent and Distribution, 7 C. L. 1137.

24. Evidence held to authorize a finding that the survey of plaintiff's pre-emption was not included in a survey of defendant's tract. Warner v. Sapp [Tex. Civ. App.] 16 Tex. Ct. Rep. 892, 97 S. W. 125.

25. Plaintiff and defendants claim under deeds executed on the same day by an assignee in bankruptcy. One deed was to one of the bankrupts and the other to his attorneys. Evidence held to sustain finding that the deed to the attorneys was only in the interest of the client. Beall v. Chatham [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 94 S. W. 1086.

See Deeds of Conveyance, 7 C. L. 1103.

26. Merely a rule of evidence and the inference of ownership therefrom may be overcome by proof of outstanding title. Mann v. Hossack [Tex. Civ. App.] 16 Tex. Ct. Rep. 835, 96 S. W. 767.

27. Where an adjoining owner purchased from a common vendor and each claims that his tract extends over that of the other, they claim under a common grantor. Young v. Trahan [Tex. Civ. App.] 16 Tex. Ct. Rep. 956, 17 Tex. Ct. Rep. 20, 97 S. W. 147. Defendants claiming as a purchaser at an execution sale under a judgment against O. S. Sutton, and plaintiffs claiming as heirs of Oliver Sutton, claim under a common source where the land sold was that of Oliver Sutton, though O. S. Sutton and Oliver Sutton are in fact different persons. Lutcher v. Allen [Tex. Civ. App.] 16 Tex. Ct. Rep. 149, 95 S. W. 572.

28. Young v. Trahan [Tex. Civ. App.] 16 Tex. Ct. Rep. 956, 17 Tex. Ct. Rep. 20, 97 S. W. 147.

29. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406. An agreement by both parties that a certain person is a common source of title does not estop one from showing that the wife of such person had an equitable interest in one-half of the land, which he now asserts. Taylor v. Doom [Tex. Civ. App.] 16 Tex. Ct. Rep. 172, 95 S. W. 4.

30. Hence introduction of a deed to defendant from the common source antedating plaintiff's deed does not prove superior title in defendant. Young v. Trahan [Tex. Civ. App.] 16 Tex. Ct. Rep. 956, 17 Tex. Ct. Rep. 20, 97 S. W. 147.

31. Where a defendant filed a cross action against all the plaintiffs and defend-

peaceable possession is one of fact only.[32] Where a landlord in an action by the tenant to recover from a third person prays for possession for the use of the tenant, he is entitled to recover though the lease is void.[33]

Lack of jurisdiction in the land commissioner forfeiting a sale of school lands under which a party claims may be shown,[34] as may also an error in a grantee's name in a deed,[35] but a deed cannot be given effect according to the intention of the parties unless a mistake in pleading and reformation asked.[36] An agreement by the parties to abide by the result of another case involving the same issue is binding.[37]

The burden of establishing particular titles,[38] and evidence in proof thereof, as by adverse possession, deed,[39] descent,[40] acquisition from the public domain,[41] etc., are elsewhere treated. Evidence tending to show a conveyance material to the case is admissible,[42] subject to the general rules of materiality,[43] hearsay,[44] declarations and admissions.[45] A deed under which plaintiff asserts no interest is not admissible

ants, plaintiffs may acquire his title and recover thereon (Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406), especially where plaintiffs filed an amended petition thereafter (Id.).

32. To go to the jury. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192.

33. Lechenger v. Merchants' Nat. Bank [Tex. Civ. App.] 16 Tex. Ct. Rep. 620, 96 S. W. 638.

34. Need not cancel such forfeiture in an equitable action. Bumpass v. McLendon [Tex. Civ. App.] 101 S. W. 491.

35. Need not first reform the deed. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. Error may be shown by parol. Id. Where a deed designated the grantee as the "Odd Fellows' Building & Savings Association," and in a subsequent proceeding to partition the defendant was named as the "Odd Fellows' Building & Exchange Association," testimony of the secretary of state that the records of his office show no such a corporation is admissible to show that the Odd Fellows' Building & Exchange Company of Texas was intended (Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513), as is the testimony of the attorney for defendant in the partition proceeding that the latter corporation was the real defendant (Id.).

36. The described starting point of the description claimed by plaintiff not to be the one had in mind by the parties at the time of partition. Brodbent v. Carper [Tex. Civ. App.] 100 S. W. 183.

37. County estopped by an adverse decision therein. Lamar County v. Talley [Tex. Civ. App.] 94 S. W. 1069.

38. See Notice and Record of Title, 8 C. L. 1169; Adverse Possession, 7 C. L. 41; Mortgages, 8 C. L. 1022, etc.

39. See Deeds of Conveyance, 7 C. L. 1103.

40. See Descent and Distribution, 7 C. L. 1137.

41. See Public Lands, 8 C. L. 1486.

42. Both the agreement of plaintiff's grantor to convey to her and the conveyance are admissible to show title. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513. On the issue whether McKim had conveyed property to Ryan, proof of general notoriety of Ryan's claim to the land is admissible to show that McKim knew of the latter's claim. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. Where a deed is admissible in evidence, recitals therein are also admissible as a part thereof. Sydnor v. Texas Sav. & Real Estate Inv. Ass'n [Tex. Civ. App.] 15 Tex. Ct. Rep. 100, 94 S. W. 451.

43. Held immaterial: Consideration supporting an executed deed. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. A deed prior to plaintiffs against which she is protected as a bona fide purchaser. Loring v. Jackson [Tex. Civ. App.] 95 S. W. 19. Homestead character of the land, the deed being sufficient to pass title in any event. Broom v. Herring [Tex. Civ. App.] 101 S. W. 1023. Plaintiff's incapacity to contract where defendant does not claim under any transaction with him. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587. On the issue whether McKim had conveyed certain land to Ryan, a statement by a third person in the presence of Ryan at the time Ryan made a deed to the land that such third person would like to get the property out of McKim's hands. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. As is evidence that when a third person told the daughter of Ryan that he was going to sell the Ryan land and in response to her question as to what land stated that it was the land called the McKim gore, and that she replied that he had better let that land alone as he might get into trouble. Id.

44. Testimony of a witness that the children of a certain person told him that their mother claimed the land is hearsay and not admissible to prove title in her. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192.

45. Where an heir as independent executor of his ancestor executes a deed in which he acknowledges that the ancestor held the land conveyed thereby in trust for the person under whom the defendants claim, such deed is admissible as declarations against interest though not valid as a conveyance. Sydnor v. Texas Sav. & Real Estate Inv. Ass'n [Tex. Civ. App.] 15 Tex. Ct. Rep. 100, 94 S. W. 451. Declarations of an ancestor as to the corners of his pre-emption are admissible against his heirs, the survey being in dispute. Warner v. Sapp [Tex. Civ. App.] 16 Tex. Ct. Rep. 892, 97 S. W. 125. As are admissions in a pleading of the ancestor. Id. An answer by one McKim and Ryan in a suit that they owned and possessed the land under a certain certificate did not estop the heirs of McKim in trespass to try title against persons claiming under Ryan

to limit him to a common source of title.[46] The statutory affidavit of forgery to put a party to proof of execution of a deed in his claim is not admissible on the fact.[47] A contract to sell found among the papers of the grantor is not admissible without proof of delivery,[48] nor is a deed from one not shown to have title or authority to execute the same.[49] One claiming under a sale by an assignee in bankruptcy may introduce the material parts of the proceedings without introducing all.[50] One offering evidence of a bona fide purchase to defeat a prior conveyance cannot object to rebuttal evidence on the ground that no issue was made by the pleadings in respect thereto.[51]

Instructions must not be misleading[52] or upon the weight of the evidence.[53] Instructions should be given upon issues duly raised by the evidence.[54]

A defendant who has made improvements in good faith[55] is entitled to the value thereof upon judgment in plaintiff's favor,[56] against which may be offset the value of the use and occupation and damages to the property.[57]

A judgment against several defendants for possession by plaintiff upon payment of a specific sum to each for improvements should specify the part in possession of each.[58] Where both parties claim the land as a part of their respective grants, failure of plaintiff to locate his grant does not authorize a judgment vesting title in defendant where it is not shown to be included in his grant.[59]

Where defendant puts in issue by his pleadings plaintiff's right to the entire tract and plaintiff recovers a part thereof, costs cannot be awarded to defendant as a successful party, though in fact the only dispute was as to the remainder.[60]

TRESPASS ON THE CASE; TRESPASS TO TRY TITLE, see latest topical index.

from claiming the land, but was a circumstance to consider in determining whether Ryan had an interest. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. Where an assignee in bankruptcy made two sales, one to a bankrupt and the other to his attorneys, on the same day, a report of the assignee to the court showing that the only consideration came from the bankrupt is not inadmissible as against the bankrupt's attorneys as a declaration of a vendor after sale, especially where the attorneys knew of the report and took no action in respect thereto. Beall v. Chatham [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 94 S. W. 1086.

46. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406.

47. Sydnor v. Tex. Sav. & Real Estate Inv. Ass'n [Tex. Civ. App.] 15 Tex. Ct. Rep. 100, 94 S. W. 451.

48. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099.

49. In the absence of evidence to show that the grantors in a deed were executors of the estate of the deceased owner of the land conveyed, or that they had an interest in the estate or were authorized to execute such deed, the deed is inadmissible. Stubblefield v. Hanson [Tex. Civ. App.] 16 Tex. Ct. Rep. 36, 94 S. W. 406. Where it is contended that plaintiff's ancestor held the legal title in trust for defendant's remote grantor, a chain of deeds from such grantor are admissible, the objection that it was not connected with evidence showing title in a common source or from the government going to its legal effect and not its admissibility. Sydnor v. Texas Sav. & Real Estate Inv. Ass'n [Tex. Civ. App.] 15 Tex. Ct. Rep. 100, 94 S. W. 451.

50. Beall v. Chatham [Tex. Civ. App.] 16 Tex. Ct. Rep. 325, 94 S. W. 1086.

51. Cobb v. Bryan [Tex. Civ. App.] 17 Tex. Ct. Rep. 12, 97 S. W. 513.

52. An instruction that the jury must find that a certain person "granted or conveyed" his interest held misleading in that the jury might have thought a written conveyance necessary, an oral one being sufficient. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192. Refusal of a requested instruction respecting a verbal sale held erroneous. Id.

53. Where defendants contend that a deed under which plaintiff claims is in fact a mortgage, a charge that the proof must be clear and satisfactory is upon the weight of the evidence. Irvin v. Johnson [Tex. Civ. App.] 17 Tex. Ct. Rep. 343, 98 S. W. 405.

54. Evidence held to require a charge on the issue of a mistake as to description of a scrivener who wrote a conveyance in plaintiff's chain, so as to make the chain perfect. Rankin v. Moore [Tex. Civ. App.] 101 S. W. 1049. Evidence examined and held to require an instruction respecting a conveyance from the original owner to a third person, under whom a party claimed. Carlisle v. Gibbs [Tex. Civ. App.] 17 Tex. Ct. Rep. 405, 98 S. W. 192.

55. One making improvements, knowing that his title to school lands was invalid, cannot recover. Fellers v. McFatter [Tex. Civ. App.] 101 S. W. 1065.

56. Heirs recovering land supposed by the administrator and defendant to be included in the administrator's deed. Fowler v. Agnew [Tex. Civ. App.] 16 Tex. Ct. Rep. 180, 95 S. W. 36.

57. Ingram v. Winters [Tex. Civ. App.] 102 S. W. 432.

58. So that plaintiff can recover possession separately. Campbell v. McCaleb [Tex. Civ. App.] 99 S. W. 129.

TRIAL.

§ 1. Joint and Separate Trials (2161).
§ 2. Course and Conduct of Trial (2162).
§ 3. Reception and Exclusion of Evidence (2164). The Order of Proof (2165). Timely Objection (2166). Cumulative Testimony (2166). Stipulations or Admissions (2166). Evidence Admissible for One Purpose Only (2166).
§ 4. Custody and Conduct of the Jury (2167). It is Largely Discretionary With the Trial Court What Papers Shall Be Taken Out by the Jury (2168). Allowance of a View (2168). View by Court (2168).

Scope of article.[61]—Many important and really distinct matters of trial procedure are given separate treatment in Current Law. Thus the law relating to dockets, calendars, and trial lists,[62] continuance and postponement,[63] argument of counsel and the right to open and close the same,[64] examination of witnesses,[65] making of objections and taking of exceptions,[66] trial by jury,[67] questions of law and fact,[68] instructions,[69] directing verdict and demurrer to evidence,[70] discontinuance, dismissal, and nonsuit,[71] verdicts and findings,[72] has been excluded from this article, which includes principally only such matters as do not readily lend themselves to such separate treatment. The subjects of evidence,[73] pleading,[74] and witnesses,[75] are also fully treated elsewhere. As to the hearing in equity, see article on Equity,[76] and for matters peculiar to criminal trials, see Indictment and Prosecution.[77]

§ 1. *Joint and separate trials.*[78]—Separate suits involving the same issues and affecting the same parties should be consolidated and tried together, if one trial will dispose of all the issues in both cases.[79] Under the common law, a court has no power over the objection of defendant and to his prejudice to consolidate two separate and distinct and improperly joined causes of action, the issues should be united by the plaintiff in one petition had he chosen to do so.[80] Several actions may frequently be tried jointly by agreement of parties.[81] Where a declaration contains two distinct and improperly joined causes of action, the issues should be tried before separate juries.[82] Where two defendants are properly joined in one

59. McDonald v. Dawns [Tex. Civ. App.] 99 S. W. 892.
60. Error under Rev. St. 1895, art. 1438, authorizing the court to adjudge costs otherwise than to the successful party, and art. 5270, providing that, in trespass to try title, if defendant denies plaintiff's title to the whole and plaintiff recovers part, plaintiff shall be entitled to such part of the costs. Brown v. Humphrey [Tex. Civ. App.] 15 Tex. Ct. Rep. 742, 95 S. W. 23.
61. See 6 C. L. 1731.
62. See 7 C. L. 1192.
63. See 7 C. L. 757.
64. See 7 C. L. 257.
65. See 7 C. L. 1598.
66. See Saving Questions for Review, 8 C. L. 1822.
67. See Jury, 8 C. L. 617.
68. See 8 C. L. 1566.
69. See 8 C. L. 333.
70. See 7 C. L. 1146.
71. See 7 C. L. 1155.
72. See 6 C. L. 1814.
73. See 7 C. L. 1511.
74. See 8 C. L. 1355.
75. See 6 C. L. 1975.
76. See 7 C. L. 1323.
77. See 8 C. L. 189.
78. See 6 C. L. 1731.
79. Van Camp v. Breyer [Idaho] 89 P. 754. Order requiring suits arising out of same cause of action to be tried together within discretionary power of court. Sullivan v. Fugazzi [Mass.] 79 N. E. 775. But the consolidation of several actions should not be permitted to delay the trial thereof further than is necessary to make up the issues and take the proper proof. Gerrein's Adm'r v. Berry, 30 Ky. L. R. 978, 99 S. W. 944. In New York, actions in different courts of equal jurisdiction, between the same parties on similar claims, may be consolidated on request of the defendant and his paying the costs of the one dismissed. Goepel v. Robinson Mach. Co., 103 N. Y. S. 5.
80. Nor does the statute in Missouri confer such powers. Winters v. St. Louis & S. F. R. Co. [Mo. App.] 101 S. W. 1116. Where damages claimed by several plaintiffs against several defendants do not constitute a common grievance, they cannot be determined in one action. Burghen v. Erie R. Co., 103 N. Y. S. 292.
81. Beal-Doyle Dry Goods Co. v. Barton [Ark.] 97 S. W. 58. Where a defendant in a suit to quiet title files a separate suit for the same relief as to the same property against the plaintiff, and the two suits are consolidated by consent, the parties are in the same position as if defendant had filed a cross petition. Schallenberg v. Kroeger [Neb.] 110 N. W. 664.
82. Damages for taking for public use and damages for tortious use of premises pending the taking. Coyne v. Memphis [Tenn.] 102 S. W. 355. In South Carolina, where an action to partition property and stay waste and to set aside a deed for fraud is put on calendar 2 for trial and defendant sets up

action, neither has a right to a separate trial.[83] In some code states it is the practice to try and determine the issues made by an equitable counterclaim before going to a trial of the legal issues on the main case.[84]

§ 2. *Course and conduct of trial.*[85]—The conduct of trials, generally, is vested largely in the discretion of the trial court.[86] It is the duty of parties and counsel having business before the court to be present during the term, and proceedings of which they had notice may be held in their absence and will not be set aside except in case of surprise or other good excuse.[87] The court also has power to place the witnesses who are to testify in a case under a rule and exclude them from the court room during the course of the trial.[88] Parties to an action should not be excluded from the court room, though they are also witnesses.[89] It is in the power of the court to prevent useless delays in the course of a trial,[90] and for this purpose it may reasonably limit the number of witnesses to be examined.[91] The reception of a verdict by the clerk in the absence of the judge, under stipulation of the parties, and in presence of counsel without objection, was an irregularity which the parties could and did thereby waive.[92] Selection of interpreter is committed to the sound discretion of the trial court.[93] It is improper to examine counsel under oath as to the interest of an insurance company in the defense.[94]

title, the equity issue of fraud is properly tried first, and where the right to partition or to stay waste depends on the buyer's decision to set aside the deed for fraud, the issue of title should be tried before the other issues. DuBose v. Kell [S. C.] 56 S. E. 968.

83. Telephone and telegraph companies using same poles, properly joined as defendants in action by lineman for injuries from wires. East Tennessee Tel. Co. v. Carmine, 29 Ky. L. R. 479, 93 S. W. 903. In a suit by an insured against the insurer and an attorney who refuses to surrender policies, the issues made by their answers need not be tried separately. Citizens' Ins. Co. v. Herpolsheimer [Neb.] 109 N. W. 160.

84. If, in such case, the decree in equity renders unnecessary the trial of the legal issues, such decree is a final determination of the action. Cotton v. Butterfield [N. D.] 105 N. W. 236. A defendant cannot split a counterclaim so as to use a portion of it as a defense and leave the remainder as a separate cause of action. Palm's Adm'rs v. Howard [Ky.] 102 S. W. 267, 1199.

85. See 6 C. L. 1732.

86. Wilson v. Johnson [Fla.] 41 So. 395. Section 4910 of Mississippi Code held unconstitutional as infringing on judicial power of courts. Yazoo & M. V. R. Co. v. Wallace [Miss.] 43 So. 469.

87. Flournoy v. Munson Bros. Co. [Fla.] 41 So. 398. Improper for court to try case out of its natural order without any order setting it for trial or notice to party or his attorney. Gardell v. Gardell [Tex. Civ. App.] 15 Tex. Ct. Rep. 117, 94 S. W. 457. Absence of counsel during part of examination of jurors, but permission by the court to proceed with the examination when he arrived, does not show a refusal of opportunity for such examination. McFern v. Gardner [Mo. App.] 97 S. W. 972.

88. Though other witnesses have been excluded from the court room, it is discretionary with the court to allow the president of defendant company to remain and assist in managing the case, though he was also a witness. Warden v. Madisonville, etc., R. Co. [Ky.] 101 S. W. 914. In such case the court may exclude a physician, though summoned for the purpose of hearing the testimony and giving his opinion thereon. Atlantic & B. R. Co. v. Johnson [Ga.] 56 S. E. 482. Where a witness placed under the rule unintentionally violated it on account of deafness and remained in the court room without the knowledge of counsel, it is no abuse of discretion to permit him to testify, he having heard very little of the testimony. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000.

89. But only the party excluded has a right to complain, and it is no error to refuse to order the party excluded to come into the court room at the instance of the opposing party. Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706.

90. State v. Caron [La.] 42 So. 960. The granting of delays in the course of the trial rests in discretion. Van Vlissingen v. Roth, 121 Ill. App. 600. The court is not bound to suspend the trial to enable a litigant to produce additional evidence. Zipperer v. Savannah [Ga.] 57 S. E. 311.

91. Limiting the number of witnesses as to damages to land, which was the principal issue, to four on each side, is held arbitrary and erroneous. St. Louis, etc., R. Co. v. Aubuchon [Mo.] 97 S. W. 867. Party cannot object, for the first time on appeal, to the lower courts limiting the number of witnesses. Warden v. Madisonville, etc., R. Co. [Ky.] 101 S. W. 914. Where issues involve the amount of a bid at a public sale, where more than two hundred persons were present, it is not an abuse of discretion for the court to limit the number of witnesses to five. Austin v. Smith [Iowa] 109 N. W. 289.

92. Too late to repudiate stipulation on appeal. Dubuc v. Lazell, 182 N. Y. 482, 75 N. E. 401.

93. American Brake Shoe & F. Co. v. Jankus, 121 Ill. App. 267.

94. Not reversible error if such proceeding was not conducted in the jury's presence. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

Remarks and conduct of judge.[95]—It is highly improper for a judge in the jury's presence to comment on the evidence, make statements of fact, or discuss conclusions from facts proven.[96] Communication by the judge with the jury during their deliberations, contrary to statute, and without consent of parties, is reversible error.[97] When objections to testimony are persistently made, the judge may inform counsel what he considers is or is not proper evidence.[98] Though a court may take evidence to refresh its memory as to matters of judicial notice, it should not take testimony as to the regularity of the adoption of a constitutional amendment which is prima facie law, where the pleadings do not put such regularity in issue.[99] Where a judge is doubtful concerning his jurisdiction because of defective service of summons, he should not arbitrarily refuse to try the case but should call attention of counsel to the defects in order that they might be remedied.[1] An appellate court will not interfere because of misconduct of the trial judge or of counsel, unless from the whole situation it appears likely a different result would have been reached but for such misconduct.[2]

95. See 6 C. L. 1732.

96. McKissick v. Oregon Short Line R. Co. [Idaho] 89 P. 629. Sending jury back to reconsider an insufficient verdict without instructions that amount was for them to determine is reversible error. Douglas v. Metropolitan St. R. Co., 104 N. Y. S. 452. Remarks directing attention of jury to supposed contradictiory statement of witness held error. Merritt v. Bush, 122 Ill. App. 189. It is error for the judge during the trial of a case and in the hearing of the jury to express or intimate an opinion as to what has or has not been proved. Atlantic Coast Line R. Co. v. Powell [Ga.] 56 S. E. 1006. Where plaintiff's physician testified that he hoped plaintiff would be able to walk with a cane, a remark by the court that "You expect what is probable, your hope may be very improbable" was not error as showing bias. Devlin v. New York City R. Co., 102 N. Y. S. 430. A statement by the court, after a question asked a witness, that "He cannot tell anything about it," is not error, where the question was objectionable. Lederman v. Rahaim, 102 N. Y. S. 526. Remarks by the court in the jury's presence, reflecting upon the credibility of an expert witness, are not prejudicial if his testimony is not applicable to the issue. Haddix v. State [Neb.] 107 N. W. 781. Where the question of exemplary damages is not submitted, it is error for the court to intimate that they may be found by informing the jury that fines imposed may be considered in mitigation of exemplary damages. Holland v. Williams, 126 Ga. 617, 55 S. E. 1023. A remark or the demeanor of the judge in the jury's presence as to the truthfulness of material testimony is reversible error. City of Newkirk v. Dimmers [Okl.] 87 P. 603. A remark by the trial judge in admitting evidence that plaintiff was not traveling for his health, etc., which was a fact defendant could not fail to infer, is not erroneous. Webb v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 954. Where counsel in argument correctly states the testimony of a witness, it is error for the court, on objection by opposing counsel, to remark that such was not the testimony. Rose v. Kansas City [Mo. App.] 102 S. W. 578. A statement by the court, in refusing a continuance, that counsel had stated he would be ready, is not prejudicial as leading the jury to believe counsel acted in bad faith. McFern v. Gardner [Mo. App.] 97 S. W. 972. Error to instruct or express opinion on the weight of the evidence. Thomson v. Kelly [Tex. Civ. App.] 16 Tex. Ct. Rep. 637, 97 S. W. 326. Remark by court that witness, in testifying that a person had a purpose in stating an untruth, made a very ugly insinuation, unless explained, is improper. Levels v. St. Louis & H. R. Co., 196 Mo. 606, 94 S. W. 275. Remarks of court in colloquy with counsel amounting to exclusion of evidence. Stroker v. St. Joseph, 117 Mo. App. 350, 93 S. W. 860. The court in rebuking counsel for prejudicial misconduct is warranted in saying, "That is not a remark you should make; it is improper language." Tingley v. Times Mirror Co. [Cal.] 89 P. 1097.

97. Holliday v. Sampson [Tex. Civ. App.] 15 Tex. Ct. Rep. 232, 95 S. W. 643. It is reversible error for a judge, in the absence of counsel, to go to the doorway of the jury room and answer questions asked by the jury, as all proceedings should be conducted in open court. Hurst v. Webster Mfg. Co., 128 Wis. 342, 107 N. W. 666.

98. Fleming v. Pullen [Tex. Civ. App.] 16 Tex. Ct. Rep. 891, 97 S. W. 109.

99. State v. Silver Bow County Com'rs [Mont.] 87 P. 450.

1. State v. Murphy [Nev.] 85 P. 1004.

2. Hannestad v. Chicago, etc., R. Co. [Iowa] 109 N. W. 718.

Held harmless: Admonition of judge to witness not in presence of jury held unprejudicial. Zink v. Lahart [N. D.] 110 N. W. 931. A plaintiff who has wholly failed to make out a case cannot claim to have been prejudiced by instructions or remarks of the court to the jury. Yates v. Huntsville Hoop & Heading Co. [Ala.] 39 So. 647. Remarks by the court in the jury's presence are rendered harmless by a proper peremptory charge. Wilson v. Johnson [Fla.] 41 So. 395. Remark of court in admitting testimony held harmless in view of charge. Leonard v. Gillette [Conn.] 66 A. 502. An erroneous expression of opinion by the court during the discussion of the admissibility of evidence is not ground for reversal, except in case of obvious prejudice, where the final ruling and instruction to the jury on the evidence are correct. McGowan v. Watertown [Wis.] 110 N. W. 402.

§ 3. *Reception and exclusion of evidence.*[3]—An offer of evidence which taken in its entirety fails to show a cause of action should be rejected.[4] After the competency of a witness has been already passed on, it is discretionary with the court to thereafter allow the question of his competency to be reopened.[5] The court may in its discretion exclude, of its own motion and without formal objection, evidence offered to contradict or discredit a witness but having no tendency to do so.[6] The rejection of testimony which is incompetent unless other evidence be supplied is not erroneous, in the absence of any offer to supply such deficiency.[7] Where the question does not disclose the matter sought to be elicited,[8] the court may require a specific[10] offer of proof, but the court may, instead of allowing counsel to state what he expects a witness to testify, cause the jury to retire and allow the witness to answer.[11] A party is not entitled as a matter of right to withdraw competent evidence voluntarily introduced by him which is favorable to his adversary.[12] If it appears to the court that a juror, for any cause, has failed to hear the evidence of a witness, such testimony should be required to be repeated, but the court is not bound on its own motion to require such repetition, unless it plainly appears that the evidence has not been heard by all the jurors.[13] Where improper evidence, which may be rendered admissible by amendment of the pleading, is admitted over objection, the court cannot thereafter disregard such evidence on the ground that its admission was error without notice to the party producing it.[14] The rule requiring a party to introduce the best evidence available is not rigid and inflexible but may, under proper circumstances, be relaxed.[15] A paper, to have the effect of evidence, must be formally offered and introduced.[16] An offer of proof in the absence of the witness is properly excluded.[17] It is improper to strike out all the evidence of a witness because of his failure to return to court and bring a certain memorandum book.[18] Where an instrument is excluded because void on its face, it is not material that it was offered out of order.[19] The refusal or permission of repetition of testimony is discretionary with the court, which if reasonably exercised is not error.[20]

3. See 6 C. L. 1733.

4. Logan v. McMullen [Cal. App.] 87 P. 285. Refusal to permit defendant's attorney to read a deposition containing no evidence that could benefit is not prejudicial error. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340.

5. Refusal to reopen question of privileged communication. State v. Louanis [Vt.] 65 A. 532.

6. Chany v. Hotchkiss [Conn.] 63 A. 947.

7. Pier v. Speer [N. J. Err. & App.] 64 A. 161.

8. Question held to indicate what was expected to be elicited. Eaton v. Blackburn [Or.] 88 P. 303.

9. May on request require an offer of proof. Kershner v. Kemmerling, 24 Pa. Super. Ct. 181.

10. An offer of proof must be specific and not mere statement of conclusion. Court of Honor v. Dinger 123 Ill. App. 406.

11. Holland v. Williams, 126 Ga. 617, 55 S. E. 1023.

12. Zipperer v. Savannah [Ga.] 57 S. E. 311. It is within the court's discretion to refuse to permit the withdrawal of a paper, though put in evidence at the court's suggestion, where the other party would have been entitled to introduce it. Berry v. Ritter Lumber Co., 141 N. C. 386, 54 S. E. 278.

13. Haddix v. State [Neb.] 107 N. W. 781.

14. Ewald v. Poates, 107 App. Div. 242, 94 N. Y. S. 1106.

15. Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517. In discretion of court to allow witness to testify to receipt and contents of letter which has been lost. Gulliford v. McQuillen [Kan.] 89 P. 927.

16. Mere placing letter upon files of court insufficient. Liberty v. Haines, 101 Me. 402, 64 A. 665.

17. Benes v. People, 121 Ill. App. 103.

18. Such failure was not the fault of the party for whom he testified. City of Chicago v. Powers, 117 Ill. App. 453.

19. Treasury Tunnel, Min. & Reduction Co. v. Gregory [Colo.] 88 P. 445.

20. Gracy v. Atlantic Coast Line R. Co. [Fla.] 42 So. 903. It is within the court's discretion to refuse to allow a question on redirect examination which has been asked and answered on the direct examination. Laucheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55. Not improper to refuse permission to restate testimony already fully gone over. Stern v. Bradner 225, Ill. 430, 80 N. E. 307. After the evidence for both parties has been introduced and argument commenced, it is within the sound discretion of the court whether or not he will allow the introduction of material additional evidence. Watson v. Barnes, 125 Ga. 733, 54 S. E. 723. Where a motorman had left the employ of a street railway company and his deposition was taken in another state, and witnesses at the trial testified to a statement of the

The order of proof [21] rests in discretion,[22] and the court may permit in rebuttal matters proper in chief,[23] or allow the case to be reopened for additional proofs.[24]

motorman at the time the accident occurred hostile to the company, upon the president of the company filing an affidavit that the company was surprised by such evidence, and could show by the motorman that he did not make the statements, the court should have discharged the jury and continued the case, to give the company a chance to rebut the plaintiff's evidence. Lexington St. R. Co. v. Strader 28 Ky. L. R. 157 89 S. W. 158.

21. See 6 C. L. 1733.

22. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; Seaboard Air Line R. Co. v. Scarborough [Fla.] 42 So. 706; Bynum v. Brady [Ark.] 100 S. W. 66. In a suit to quiet title, where plaintiff claimed under a prescriptive right of his grantor, deeds from his grantor to him may be admitted before proof of grantor's title. Bashore v. Mooney [Cal. App.] 87 P. 553. Not error to admit ordinance before foundation for same is laid when its violation is one of the grounds relied on. Southern R. Co. v. Stockdon [Va.] 56 S. E. 713. Court may admit document, needing additional proof to make it proper evidence, on statement of counsel promising to furnish such proof, and if it is not afterwards furnished the party objecting to the introduction of the deed should move for its exclusion. Henry v. Frohlichstein [Ala.] 43 So. 126.

23. Duncansville B. & L. Ass'n v. Ginter, 24 Pa. Super. Ct. 42; Concordia Fire Ins. Co. v. Bowen, 121 Ill. App. 35; Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48; Tinkle v. Wallace [Ind.] 79 N. E. 355; People v. Wiemers, 225 Ill. 17, 80 N. E. 45; Morena v. Winston [Mass.] 80 N. E. 473; Bolton v. Western Union Tel. Co. [S. C.] 57 S. E. 543; Standard Cotton Mills v. Cheatham, 125 Ga. 649, 54 S. S. 650; Minard v. West Jersey & S. R. Co. [N. J. Law.] 64 A. 1054; Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788; Terry v. Williams [Ala.] 41 So. 804; Hoodless v. Jernigan [Fla.] 41 So. 194. Relevant evidence for plaintiff may be admitted in the court's discretion either as direct, on cross-examination, or in rebuttal. May permit plaintiff to offer in rebuttal evidence in support of cause of action. Moody v. Peirano [Cal. App.] 88 P. 380. Plaintiff may be restricted on rebuttal to testimony strictly in rebuttal of that of defendant. Cutcliff v. Birmingham R., Light & Power Co. [Ala.] 41 So. 873. The order of proof, and permitting of testimony on rebuttal which was part of the original case, are, to a certain extent, matters of discretion, and do not justify a reversal unless causing a miscarriage of justice. Blickley v. Luce [Mich.] 14 Det. Leg. N. 121, 111 N. W. 752; Birmingham R., Light & Power Co. v. Martin [Ala.] 42 So. 618. Expert testimony for plaintiff may be admitted in rebuttal of expert testimony on same subject for defendant. Grace Co. v. Larson [Ill.] 81 N. E. 44. Discretionary with court to permit plaintiff, while introducing evidence in rebuttal, to read from the stenographer's report the cross-examination of defendant's witnesses. International & G. N. R. Co. v. McVey [Tex. Civ. App.] 102 S. W. 172. After evidence has been closed for both sides, it is not erroneous to refuse to permit witnesses to testify concerning plaintiff's case in chief, where it does not appear that they were absent or ill, or that there was any surprise, accident, or mistake. Wilkie v. Richmond Trac. Co., 105 Va. 290, 54 S. E. 43. Where the testimony of an absent witness given on a former trial was read to the jury, but was open to attack because the foundation of unavoidable absence was not laid, it is proper to allow proof of such unavoidable evidence in rebuttal. Doyle v. St. Louis Transit Co. [Mo. App.] 101 S. W. 598. The court may in its discretion refuse to permit in rebuttal a deposition taken by the adverse party. Morehead's Trustee v. Anderson, 30 Ky. L. R. 1137, 100 S. W. 340. Plaintiff allowed to introduce evidence in rebuttal of theory advanced by defendant. Meyer Bros. Drug Co. v. Madden, Graham & Co. [Tex. Civ. App.] 99 S. W. 723; Wells v. Gallagher, 144 Ala. 363, 39 So. 747. Though a plaintiff has testified to possessing considerable cash, and having considerable earning capacity at the time of his injury, it is proper to refuse, after the evidence is closed, proof that he made a pauper's affidavit at time of filing suit. St. Louis, S. W. R. Co. v. Johnson [Tex. Civ. App.] 15 Tex. Ct. Rep. 813, 94 S. W. 162. Where defendant in action for personal injury applied certain tests as to whether plaintiff had curvature of the spine, plaintiff may in rebuttal require of an expert whether such tests were fair and proper. Rowe v. Whatcom County R. & Light Co. [Wash.] 87 P. 921. A party, who having summoned a witness, who was present throughout the trial, without calling him, cannot have the case reopened to introduce his testimony or have his deposition read in rebuttal, because of surprise when not introduced by his opponent. In re Dolbeer's Estate [Cal.] 86 P. 695. Though a witness for plaintiff has testified on direct examination to conversations with defendant on matter in controversy, yet if latter afterwards testifies to a defensive claim, to which the witness had not referred, the witness may be called in rebuttal to state that such claim was never mentioned in the conversations. Green v. Dodge [Vt.] 64 A. 499. Under Virginia Code, § 3367, after demurrer to evidence by defendant, plaintiff may read a deposition taken by the defendant and not before read, and the latter may introduce further evidence and renew demurrer. Pocahontas Collieries Co. v. Williams, 105 Va. 708, 54 S. E. 868.

24. Hock v. Magerstadt, 124 Ill. App. 140. A case should not be reopened for the introduction of further evidence which is merely cumulative. Kataoka v. Hanselman [Cal.] 89 P. 1082. May allow evidence during and after argument, and even after submission of case to jury. Wilson v. Johnson [Fla.] 41 So. 395. It is discretionary with the court to refuse to allow a plaintiff to testify after the case is closed for both sides and judgment rendered. Lewis v Helm [Colo.] 90 P. 97. Under California Code of Civ. Proc. § 607, it is proper to refuse to allow defendant to open case by introducing evidence in support of pleas in abatement and in bar. Watkins v. Glas [Cal. App.] 89 P. 840. Court may in its

Timely objection [25] must be made to improper questions,[26] but where the inadmissibility first appears by the answer,[27] or the witness answers despite a ruling,[28] a motion to strike should be made.

Cumulative testimony.[29]—Mere cumulative evidence may be excluded.[30] The admission of cumulative evidence in surrebuttal is within the trial court's discretion.[31]

Stipulations or admissions.[32]—While an extra judicial admission may be withdrawn before it is acted upon, it is still to be received as evidence of the fact admitted, and its withdrawal goes only to its weight.[33] It is not error to exclude evidence of facts which are admitted and hence not in issue.[34] Judicial stipulations do not exclude evidence on matters not included within their scope.[35] An admission by counsel in objecting to testimony that only a certain question arises gives the court the right to treat the case as proceeding on that theory alone.[36]

Evidence admissible for one purpose only.[37]—If evidence is competent for any purpose it should be admitted, and, if the opposing party desires its effect to be limited, he should ask an instruction for that purpose.[38] Pleadings offered in evi-

discretion permit plaintiff to reopen case and submit further proof even after motion for nonsuit, and ruling will not be reviewed on appeal unless discretion has been abused Richardson v. Agnew [Wash.] 89 P. 404. The reopening of a case to allow evidence on a particular point does not compel the court to allow the introduction of evidence generally. Bridger v. Exchange Bk., 126 Ga. 821, 56 S. E. 97. It is no error to refuse to reopen a case after trial to receive additional evidence as to the commission of champerty when the letter offered as additional evidence was considered in evidence on the trial. Emerson v. McDonnell [Wis.] 107 N. W. 1037. Proper exercise of discretion for court to refuse to reopen case for admission of immaterial evidence. Potsdam Elec. Light & Power Co. v. Potsdam, 112 App. Div. 810, 99 N. Y. S. 551. Even after judgment, in a trial by the court without a jury, a party may be permitted in furtherance of justice to withdraw his rest and introduce additional evidence. Cochran v. Moriarity [Neb.] 111 N. W. 588. Also after refusal of nonsuit. Anderton v. Blais [R. I.] 65 A. 602. The court may allow a party to introduce additional evidence after resting his case if required in furtherance of justice, and no undue advantage is thereby acquired over the adverse party. Union Pac. R. Co. v. Edmondson [Neb.] 110 N. W. 650.

25. See 6 C. L. 1734.

26. See Saving Questions for Review 8 C. L. 1822.

27. Irresponsive and improper answers to proper questions should be remedied by motion to strike out. Shaw v. New York El. R. Co. [N. Y.] 79 N. E. 984. Where in an answer "No sir; I did not have time," the words "no sir" were clearly responsive to the question, an indefinite motion to strike out should be overruled. Pittsburg, etc., R. Co. v. Collins [Ind.] 80 N. E. 415. Where a hypothetical question is admitted, with an understanding that missing elements would be supplied, a failure to supply those elements is waived by a failure to move that the answer be struck out. Flint & Walling Mfg. Co. v. Beckett [Ind.] 79 N. E. 503. The competency of evidence should be determined by the substance of the answer rather than by the form of the question. When the answer might or might not be competent, before excluding the question, the court should ask counsel what he expects to prove, or learn the answer from the witness in the absence of the jury. Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106.

28. Where a witness answers despite the sustaining of an objection, the answer should be stricken. Birmingham Rolling Mill Co. v. Rockhold, 143 Ala. 115, 42 So. 96.

29. See 6 C. L. 1735.

30. In action against railroad company for injuries, rule of defendant as to duty of conductors excluded, after it had already been shown that such rule was in force at time of injury. Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318.

31. Wysong v. Seaboard Air Line R. Co., 74 S. C. 1, 54 S. E. 214.

32. See 6 C. L. 1735.

33. Admission by counsel that he wrote letter. Liberty v. Haines, 101 Me. 402, 64 A. 665.

34. McGraw v. O'Neil [Mo. App.] 101 S. W. 132. A permit to excavate a street is admissbile as evidence, notwithstanding an offer by the adverse party to admit such permission. Stevens v. Citizens' Gas & Elec. Co. [Iowa] 109 N. W. 1090.

35. Provident Nat. Bank v. Webb [Tex. Civ. App.] 95 S. W. 716.

36. Murray v. Butte [Mont.] 88 P. 789. In action to recover penalty against telephone company for obstructing highway with poles proposition by plaintiff that if public use of highway was incommoded the statute was violated, and proposition by defendant that they were authorized to erect them so as not to interfere with proper use of highway, narrowed the issue to whether defendant so erected its poles as to interfere with the other proper uses of the highway. Interstate Independent Tel. & T. Co. v. Towanda, 221 Ill. 299, 77 N. E. 456. Admissions by one defendant, which the attorney making them stated and the court charged, were not to be taken as evidence against a joint defendant, do not constitute error as to the latter. Postal Tel. Cable Co. v. Likes, 225 Ill. 249, 80 N. E. 136.

37. See 6 C. L. 1735.

38. Stoebier v. St. Louis Trac. Co. [Mo.] 102 S. W. 651; Emory v. Eggan [Kan.] 88

dence for one purpose cannot be considered as proof of another entirely different fact.[39]

§ 4. *Custody and conduct of the jury.*[40]—In the absence of statute, it is discretionary with the court to permit the jury to separate during the recesses of a civil trial.[41] A new trial will not be granted for misconduct of jurors unless the circumstances raise a reasonable suspicion that the verdict was improperly influenced thereby.[42] Statements made in the presence of jurors and conversations with them, concerning the case on trial, which are not intended to and do not influence their decision, will not vitiate the verdict.[43] Litigants and their attorneys should refrain from seeking the companionship or courting the favor of jurors during the recesses of a trial, but unavoidably encounters without improper design are not ground for a new trial.[44] The court is not bound to order the retirement of the jury during an argument on the admissibility of evidence.[45]

P. 740; Washington-Times Co. v. Downey, 26 App. D. C. 258. Evidence which is admissible only for a particular purpose should be limited to that purpose by proper instructions. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712; Galveston, etc., R. Co. v. Worcester [Tex. Civ. App.] 100 S. W. 990. Where evidence is admitted generally, without request that it be limited to the special purpose for which it was offered, a party cannot complain that it was not subsequently limited, and it is discretionary with the court either to submit or withhold such evidence. Paquette v. Prudential Ins. Co. [Mass.] 79 N. E. 250.

39. Especially where such pleadings are self-serving declarations. Breiner v. Nugent [Iowa] 111 N. W. 446. Where an original answer was offered to show that the issues involved had been litigated, its admission cannot be considered for any other purpose. Deering & Co. v. Mortell [S. D.] 110 N. W. 86.

40. See 6 C. L. 1735.

41. No statutory requirement in Texas. International, etc. R. Co. v. McVey [Tex. Civ. App.] 102 S. W. 172.

42. Jurors drinking intoxicants in saloons during trial. Easterly v. Gater [Okl.] 87 P. 853. Judgment of lower court will not be disturbed for misconduct of a juror regarding which the evidence is conflicting. Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591. The mere fact that a juror, in the absence of a caution to the contrary, took notes of the testimony during the progress of the trial, does not constitute misconduct on his part and is not ground for a new trial. Palmer v. Cowie, 7 Ohio C. C. (N. S.) 46. A statement of a fact not in dispute or material, made by a juror in the jury room, of his personal knowledge, is not misconduct requiring a new trial. Douglas v. Smith [Neb.] 106 N. W. 173. An affidavit that a juror was heard to refer to a witness as having gone into bankruptcy and left the state without showing that his evidence was rejected, fails to show misconduct of the jurors. Austin v. Smith [Iowa] 109 N. W. 289. That certain jurors casually saw the barn in dispute, in an action by the owner against the architects, was not ground for a new trial where they were not influenced. Dysart-Cook Mule Co. v. Reed, 114 Mo. App. 296, 89 S. W. 591. Affidavits charging misconduct of jury made solely on information and belief are valueless as evidence, and affidavits of jurors in reply cannot be deemed proof of misconduct except so far as affirmatively showing it. People v. Feld [Cal.] 86 P. 1100. Where the jury brings in a verdict for plaintiff in an action for breach of contract, without assessing any damage, it is proper for the court to instruct them to retire and assess the damages according to the charge. Woodbury v Winestine [Conn.] 64 A. 221. A new trial will not be granted an accused on the ground of misconduct of the jury in reading newspaper articles commenting adversely on him, unless it be shown that the articles came to the knowledge of the jurors. There is no presumption that newspaper accounts are read by the jury. People v. Feld [Cal.] 86 P. 1100: Though a juror know of a newspaper article commenting on his connection with the trial, it is not prejudicial error, in the absence of proof that he was influenced thereby. Id.

43. Meriwether v. Publishers: Knapp & Co., 120 Mo. App. 354, 97 S. W. 257. The presence of a person not a member of the jury in the jury box and also in the jury room during a temporary retirement is not ground for a mistrial, when it affirmatively appears that his presence was due to a mistake on his part, and no communication passed between him and any member of the jury. Southern R. Co. v. Brown, 126 Ga. 1, 54 S. E. 911. A verdict for defendant should be set aside where, during trial, the foreman was entertained by defendant's agent, and after the verdict several jurors were treated to liquor and thanked for what they had done by the agent. McGill Bros. v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 216.

44. It is not fatal error for a party to converse with and laugh at the jokes of jurors during recess in the absence of attempted or resulting influence. McGraw v. O'Neil [Mo. App.] 101 S. W. 132. It is imprudent and improper for counsel to drink with jurors during the course of a trial. But in the absence of attempted or resulting influence of the jurors by such means, mere drinking of counsel with the jurors is not reversible error, where opposing counsel knew of it without raising any objection until near end of trial. Louisville & N. R. Co. v. Masterson, 29 Ky. L. R. 829, 96 S. W. 534. It is improper for the foreman of the jury to try to find out how the jury stood on a former trial of the case. Prewitt v. Southwestern Tel. & T. Co.]Tex. Civ. App.] 101 S. W. 812.

45. Illinois Central R. R. Co. v. White-

It is largely discretionary with the trial court what papers shall be taken out by the jury,[46] and they may be permitted to take the pleadings to their room,[47] and also written instructions.[48] The discretion of the court as to whether papers in evidence shall be taken out by the jury on retiring is not reviewable unless abused.[49] But an erroneous refusal to permit the jury to take proper papers to their room will be presumed by the appellate court to be prejudicial.[50] It is not error to refuse a request that each party give to jury memoranda of amounts claimed.[51]

Allowance of a view.[52]—In most states it is within the discretion of the court to permit a view,[53] but where a view of premises by the jury might aid them in determining a material question, it is error to overrule a motion therefor.[54]

View by court.[55]—It is erroneous for a judge in an injunction proceeding to inspect the premises in question without the consent of the parties, if such inspection forms part of the proceedings and affects his judgment.[56]

TROVER; TRUST COMPANIES; TRUST DEEDS, see latest topical index.

aker, 122 Ill. App. 333; Slaughter v. Heath [Ga.] 57 S. E. 69.

46. See 6 C. L. 1736.

47. This practice is criticized by the supreme court of Minnesota, which in a recent dictum said it should not be done without a special reason. Mattson v. Minnesota & N. W. R. Co., 98 Minn. 296, 108 N. W. 517. Where the court has stated the issues raised by the pleadings, it is not error to suggest to the jury that they read over the pleadings to see clearly what issues are raised. Franklin v. Atlanta & C. Air Line R. Co., 74 S. C. 332, 54 S. E. 578. Pleadings. Hanchett v. Haas, 125 Ill. App. 111.

48. Under the North Carolina statute providing that written instructions may be taken out by the jury on request of either party, it is proper to permit them to be taken out on request of one of jurors, and where some of them are omitted by oversight, without attention being called thereto, or exception at the time, such omission will be considered waived. Gaither v. Carpenter [N. C.] 55 S. E. 625. But a refusal to permit the jury to take the general charge to the jury room is not error, where the court was not requested to reduce the charge to writing, but did so for his own convenience and protection. Kauffman Brew Co. v. Betz, 8 Ohio C. C. (N. S.) 64.

49. Reports, checks, and weight cards of agent showing shortage, may be taken out by jury, if helpful in deciding question of embezzlement. Stone Mill. Co. v. McWilliams [Mo. App.] 98 S. W. 828. It is not error for the court to allow the jury to take to their room a volume of reported decisions containing mortality and annuity tables, with the caution that it was not before them for any other purpose, in the absence of request for instructions on the subject. Atlantic Coast Line R. Co. v. Taylor, 125 Ga. 454, 54 S. E. 622. Where it appeared after the jury had retired that certain models, which had not been placed in evidence, were in the jury room, the court immediately recalled the jury, and finding that they had already reached their verdict before obtaining the models, properly refused to set aside the verdict. Lewis v. Crane, 78 Vt. 216, 62 A. 60. See 4 Mich. L. R. 400. Not error to permit exhibit to be taken out because it contains excluded matter. Warth v. Loewenstein, 121 Ill. App. 71. Map which was not exact not allowed to go out. Commonwealth v. Philadelphia, etc., R. Co., 23 Pa. Super. Ct. 235.

50. Under § 3717 of Iowa Code, providing that the jury may take papers, etc., to their room, pamphlets put in evidence should be permitted to be taken out by the jury, where there was an isue as to their "cover." State v. Young [Iowa] 110 N. W. 292.

51. Clements v. Mutersbaugh, 27 App. D. C. 165.

52. See 6 C. L. 1736.

53. In action by passenger for being thrown from street car in rounding curve, court may refuse to direct a view, and accept offer of defendant "to take the court and jury on that curve and make the turn on that car." Dupuis v. Saginaw Valley Trac. Co. [Mich.] 13 Det. Leg. N. 767, 109 N. W. 413; Alberts v. Husenetter [Neb.] 110 N. W. 657. Discretionary with court under Kentucky statute to permit jury to view dangerous machinery. Cohankus Mfg. Co. v. Rogers' Guardian, 29 Ky. L. R. 747, 96 S. W. 437. Under statute authorizing view in discretion of court, refusal to permit view of machinery, where diagrams were presented by both parties, is not an abuse of discretion. McCarley v. Glenn-Lowry Mfg. Co. [S. C.] 56 S. E. 1. Inspection of car and controller by jury proper in action for ejection of passenger for interfering with the controller. Dobbins v. Little Rock R. & Elec. Co. [Ark.] 95 S. W. 794. Under Massachusetts Rev. Laws, c. 176, § 35, providing that view can only be granted on motion of party, a requesting by jury after defendant's counsel expressed desire therefor construed as application by defendant, and mere fact that he did not advance expenses therefor is no ground for giving other party a new trial. Yore v. Newton [Mass.] 80 N. E. 472.

54. Mier v. Phillips Fuel Co., 130 Iowa 570, 107 N. W. 621.

55. See 6 C. L. 1736.

56. Atlantic & B. R. Co. v. Cordele, 125 Ga. 373, 54 S. E. 155. But in a trial by the court without a jury, knowledge gained by a view of the premises, taken by request and consent of parties, is independent evidence to be taken into consideration in determining the issues. Hatton v. Gregg [Cal. App.] 88 P. 592.

TRUSTS.

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This article does not treat of trust deeds, so called, given as security for a debt or, more accurately, security deeds with power of sale,[57] or of charitable gifts,[58] or the construction of the trust as violating the laws of perpetuities and accumulations.[59] Trustees of bankrupts[60] and of incompetents[61] are also treated elsewhere.

§ 1. *Definitions and distinctions.*[62]—A trust is a right of property, real or personal, held by one party for the benefit of another,[63] and must be distinguished from other fiduciary relations,[64] and from assignments for the benefit of creditors.[65]

57. See Chattel Mortgages, 7 C. L. 634; Foreclosure of Mortgages on Land, 7 C. L. 1678; Mortgages, 8 C. L. 1022.
58. See Charitable Gifts, 7 C. L. 624.
59. See Perpetuities and Accumulations 8 C. L. 1348.
60. See Bankruptcy, 7 C. L. 387.
61. See Infants, 8 C. L. 267; Insane Persons, 8 C. L. 319; etc.
62. See 6 C. L. 1737.
63. Cyc. Law. Dict. "Trusts."
64. Agreement whereby complainant was to advance to another goods, office equipment, and money to start in business of selling complainant's instruments, and such other was to diligently devote his time to interests of the business, repay advances, to sell such instruments only under agreement while it lasted, etc., held not to make such other persons complainant's trustee. Mahler v. Sanche, 121 Ill. App. 247. See Estates of Decedents, 7 C. L. 1386; Guardianship, 7 C. L. 1899; Infants, 8 C. L. 267; Parents and Child, 8 C. L. 1225, etc.
65. Agreement of purchase and sale, the purchase price to be applied to certain debts of the seller and his wife and the buyer to account for the balance, held to create a

There is implied in a trust two estates or interests, one equitable and one legal; one person as trustee holding legal title, while another is cestui que trust.[66] Though no particular formality is required in the creation of a trust, yet the transaction out of which it is claimed to arise must show a confidence reposed in another as distinguished from a legal right.[67] The elements of the various kinds of trusts will be specifically treated later.

§ 2. *Express trusts. Nature and elements.*[68]—In order to have a valid trust there must be a designated and certain trust fund,[69] a designated beneficiary[70] or purpose,[71] and herein a trust is to be distinguished from an absolute conveyance for certain purposes,[72] and hence it follows that the fact, that property given a corporation is to be devoted to the furtherance of the corporate purposes does not create a trust.[73] A trust will not, however, be declared void because of some future contingency which will render its object uncertain.[74] As a general rule, equity will not permit a trust to fail for want of a trustee.[75] While delivery of the subject-matter of the trust to the beneficiary is not essential,[76] still there must be an actual delivery or legal assignment to the trustee with the intention of passing title to the trustee as such,[77] though the passing of such title may be deferred

trust and not an assignment for the benefit of creditors. Ives v. Sanguinetti [Ariz.] 85 P. 480. See Assignments for Benefit of Creditors, 7 C. L. 286.

66. Held no trust where on sale of land it was provided that on sale at increased price grantor was to have one third of increase. Allen v. Rees [Iowa] 110 N. W. 583. That one agreed to pay for land in necessaries furnished to the grantors during their lives up to a stated amount, any unpaid portion at their death going to their heirs in installment payments, held no trust. Maxwell v. Wood [Iowa] 111 N. W. 203.

67. Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508. Where defendant conveyed land to railroad company for plaintiff's benefit for which plaintiff agreed to pay certain sum as soon as railroad accepted proposition to build to certain town, held that further agreement that if plaintiff paid money and railroad failed to build line defendant would refund money, or make or cause to be made to plaintiff a deed to the land, did not create express trust in favor of plaintiff, but merely a legal right. Id. Deed in which grantors warranted title generally except as against dower interest of former owner's widow, which claim for dower grantee was required to procure without cost to grantors, held not to create trust in favor of widow or lien upon lot as security for value of lien dower interest. Cain's Adm'r v. Kentucky & I. Bridge & R. Co. 30 Ky. L. R. 593, 99 S. W. 297.

68. See 6 C. L. 1737.

69. Bateman v. Ward, [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508.

70. A devise of land to the vestry of a church to be used for such church purposes as the rector of the church should direct held not a devise in trust. Doan v. Vestry of Parish of Ascension, 103 Md. 662, 64 A. 314. Instrument must directly and expressly point out person. Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508.

71. Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508. Trust for the benefit of settler and her child held not void for uncertainty as to the objects thereof. Keyes v. Northern Trust Co. [Ill.] 81 N. E. 384. Where, in an action against defendant for an accounting as to moneys paid to him, to be used for the benefit of plaintiff, it is alleged that the moneys were to be used for purposes unknown to plaintiff, such allegation imports a gift rather than the creation of a trust. New York Life Ins. Co. v. Hamilton, 102 N. Y. S. 771. Deed conveying land to one in trust, to be by him sold and conveyed to corporation in consideration of such amount of company's stock as he might deem proper, held to sufficiently designate the trust. Stith v. Moore [Tex. Civ. App.] 15 Tex. Ct. Rep. 462, 95 S. W. 587.

72. Deed conveying land to city for money consideration "for the uses and purposes of a burial place," and for no other purpose, held not to make city trustee of an express trust. Thornton v. Natchez [Miss.] 41 So. 498.

73. A devise of land to the vestry of a church, to be used for such church purposes as the rector of the church should direct, held not a devise in trust. Doan v. Vestry of Parish of Ascension, 103 Md. 662, 64 A. 314.

74. Provision that if beneficiary died before certain age, new beneficiaries were to be selected. Keyes v. Northern Trust Co. [Ill.] 81 N. E. 384.

75. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014.

76. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

77. Evidence that decedent while on his death bed delivered property to plaintiff with directions to give it to third person in case he died held insufficient to show express trust, since there was no present parting with title or intention to vest same immediately in trustee. Godard v. Conrad [Mo. App.] 101 S. W. 1108. Where an insurance policy is enclosed in an envelope and delivered with instructions not to open until something happened to the donor, being subject to recall, does not constitute a declaration of trust. Northwestern Mut. Life Ins. Co. Collamore, 100 Me. 578, 62 A. 652.

until the happening of an event certain.[78] While a time for termination is not essential,[79] still neither a limitation of the term of the trust not conflicting with the law of perpetuities [80] nor a power of revocation [81] will affect its validity, nor will the fact that there is no limitation.[82] The absence of a power of revocation creates no presumption against the validity of the settlement.[83] That large discretionary powers are conferred on the trustee,[84] and that he is, under the terms of the will, relieved from giving a bond or accounting,[85] does not invalidate the trust. Like any other transaction, the creation of the trust must be free from fraud and it may be questioned in this regard, in the absence of ratification, at any time and by any one interested.[86] So long as one retains control over the property, he may fasten a trust upon it.[87]

An express trust is one created by agreement, and is one which defines and limits the uses and purposes to which certain property shall be devoted, and defines the duties of the trustee as to its control, arrangement, and disposition.[88] It follows that where a person accepts money or property to be used by him for the benefit of some other person or persons, or for the advancement of some lawful enterprise, such money or property constitutes an express trust.[89] While there must be some unequivocal act or declaration showing an intention to create a trust,[90] no particular

78. Passing of title upon donor's suicide is ineffectual, as uncertain. Northwestern Mut. Life Ins. Co. v. Collamore, 100 Me. 578, 62 A. 652.

79. Burke v. O'Brien, 100 N. Y. S. 1048.

80. Trust may be limited to the life time of the trustee. In re Spring's Estate [Pa.] 66 A. 110. See Perpetuities and Accumulations, 8 C. L. 1348.

81. Seaman v. Harmon [Mass.] 78 N. E. 301; People v. Wells, 103 N. Y. S. 874.

82. In re Spring's Estate [Pa.] 66 A. 110.

83. Sande v. Old Colony Trust Co. [Mass.] 81 N. E. 300.

84. Sell and invest property and funds and appropriate as much as he deemed necessary for the education of testatrix's children. Keeler v. Lauer [Kan.] 85 P. 541.

85. Keeler v. Lauer [Kan.] 85 P. 541.

86. In an action by a trustee for the **settlement of his accounts** and the construction of the deed of trust and to determine the interests of the parties, the **legatees and devisees** of a former owner of the property who was also the beneficiary under the trust deed, may contest the validity of the deed from such former owner and the trust deed which was given by his grantee, but they cannot demand an accounting by the trustee as executor of the father of their testator; all parties interested not being before the court. Bushe v. Bedford, 103 N. Y. S. 403.

87. Where insured in a mutual benefit certificate caused a certain person to be made the beneficiary, and after her designation it was agreed between them that a portion of the proceeds should be given by the beneficiary to plaintiff, there was a valid trust, notwithstanding that the agreement was subsequent to the designation; insured having the right to change the beneficiary at any time. Clark v. Callahan [Ind.] 66 A. 618. See, also, Coyne v. Supreme Conclave I. O. H. [Md.] 66 A. 704.

88. Instrument held not to create express trust. Dexter v. McDonald, 196 Mo. 373, 95 S. W. 359.

89. Holmes v. Dowie, 148 F. 634. Money or property contributed by his followers to the founder of a church, who is professedly engaged in extending and building up such church, cannot be advanced by him as his individual property, but is impressed with a trust which binds him as trustee to use it for such purpose. Id. So held where founder held property in his own name. Id. A foreign executor who, pursuant to a written agreement signed by himself, his coexecutor, and the beneficiaries of the estate, purchased property in his own name for the benefits of the estate holds the same as trustee of an express trust. Ballinger's Ann. Codes & St. § 4825, considered. Doe v. Tenino Coal & Iron Co. [Wash.] 86 P. 938. Allegations of the delivery of collateral to a third party for sale at a stated price or better, and the conversion by him of the same pursuant to a scheme with the debtor, held to declare an express trust. Schlieder v. Wells, 99 N. Y. S. 1000. Agreement between executor and legatee that former should hold amount of legacy and pay it to latter in monthly installments held to create an express trust between parties. Glennon v. Harris [Ala.] 42 So. 1003. One receiving goods for the purpose of selling them as agent and accounting for the proceeds is a trustee of an express trust. Allsopp v Joshua Hendy Mach. Works [Cal. App.] 90 P. 39.

90. Undisclosed agreement of parties that if wife survived husband she would deed certain land to a certain corporation held no trust, the parties subsequently abrogating it and entering into an agreement binding the wife to transfer the property to their son. Webb's Academy & Home for Shipbuilders v. Hidden, 103 N. Y. S. 659. Where a gift fails for want of delivery, the court cannot generally construe the transaction as a trust. In re King's Will, 101 N. Y. S. 279. Instrument reciting that person signing it thereby agreed to allow plaintiff half net profits of sale of certain land bought by former held not to create express trust whereby former was to hold legal title for plaintiff for half interest in said land. Dexter v. MacDonald, 196 Mo. 373, 95 S. W. 359.

form of words is necessary,[91] it being sufficient if the expressions used unequivocally show the intention to create a trust.[92] The use of the words "trust" or "trustee" is not essential.[93] The intention of the settler governs,[94] hence it is immaterial that the provisions of a will creating the trust follow an absolute devise of the estate to the beneficiaries.[95] If the settler, even if there be no valuable consideration, makes an explicit declaration of a trust, duly executed, with the intention of being obligatory upon him, equity will enforce such trust;[96] but if it be a mere agreement, without consideration, to execute an agreement declaratory of a trust, courts will not enforce it.[97] And this rule should apply with special force to a mere promise to execute an agreement out of which a trust relation might arise between the settler and the promise, when the promise is conditioned upon the promisee executing on his part a collateral obligation, which he refuses to do.[98] While as a general rule notice to the beneficiary is not essential to the validity of the trust,[99] still a mere declaration of trust by a voluntary settler, not communicated to the donee and assented to by him, is not sufficient to perfect a trust, especially where the settler retains possession and control over the property,[1] and in this regard notice to the parent of a minor is not notice to the latter.[2]

Validity of purpose.[3]—A trust may be created for any purpose not illegal which the settler may deem wise or expedient in order to carry out his intentions.[4] The validity of a trust is frequently to be determined by the laws of the state where it is to be administered.[5] A trust to pay an annuity is valid.[6]

Spendthrift trust.[7]—While ordinarily an active trust may be created as a protection to the beneficiary because of his inexperience, improvidence, or inabliity to manage his estate,[8] still a trust under which the beneficiary is entitled to the corpus of the estate whenever he wants it is void as to his creditors.[9] In the absence of words expressly creating a spendthrift trust, it must appear that the donor's intention will be frustrated by the subjection of the income to the claims of creditors.[10]

91. In re King's Will, 101 N. Y. S. 279.

92. Dexter v. MacDonald, 196 Mo. 373, 95 S. W. 359. A will providing that the residue of the estate, both real and personal, should go to the executrix, in trust for the husband of the testatrix, constitutes a valid trust. In re Royce's Will, 50 Misc. 671, 100 N. Y. S. 636. Conveyance of land to a city for public library and park purposes held in trust, and not a deed on condition subsequent. Ashuelot Nat. Bank v. Keene [N. H.] 65 A. 826. Investments by father in bank stock as trustee for his children held in view of all the circumstances to constitute an irrevocable trust in favor of the children. Fowler v. Gowing, 152 F. 801. That one expects another to have the property is not conclusive of an agreement to convey to him. Watson v. Watson, 225 Ill. 412, 80 N. E. 332. An instrument executed by a decedent reciting "I hereby declare * * * that I hold" certain stock "in trust for my daughter C. to be delivered to her at my death," and further reserving a life interest in the dividends to which instrument was attached the certificates, and found in the possession of the husband of the beneficiary at decedent's death, held to pass title to the stock. In re King, 100 N. Y. S. 1089.

93. Robinson v. Cogswell [Mass.] 78 N. E. 389. Is not necessary that words "trust," or "trustee," or equivalent, be employed if clear intention to create trust appears from facts and circumstances of case. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

94. Where owner of property conveyed it to one of her sons, intending that he should give a portion to his brother if he saw fit, but expressly refusing to engraft a trust on the deed, held no trust was created. Boyer v. Robison [Wash.] 86 P. 385.

95. In re Spring's Estate [Pa.] 66 A. 110.

96, 97, 98. Cella v. Brown [C. C. A.] 144 F. 742.

99. Clark v. Callahan [Md.] 66 A. 618; Bath Sav. Inst. v. Fogg, 101 Me. 188, 63 A. 731.

1, 2. Boynton v. Gale [Mass.] 80 N. E. 448.

3. See 6 C. L. 1740.

4. In re Spring's Estate [Pa.] 66 A. 110. Trust to pay income to daughter during lifetime of her husband held not in violation of law, or contrary to public policy. Lannes v. Fletcher [Tex.] 101 S. W. 1076.

5. Where a trust deed appointed a Pennsylvania corporation trustee, and ths fund was to be there held and administered, whether the trust was valid or invalid should be determined by the laws of Pennsylvania. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

6. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

7. See 6 C. L. 1740.

8. In re Spring's Estate [Pa.] 66 A. 110.

9. Ullman v. Cameron, 186 N. Y. 339, 78 N. E. 1074.

10. Will held not to create spendthrift trust for daughter so as to prevent attach-

The trust being void as to creditors, a judgment debtor may, even after the appointment of a receiver in supplementary proceedings, sue to have the trust declared invalid.[11]

Establishment by parol and extrinsic evidence.[12]—In order to establish an express trust by parol the evidence must be full, clear, and convincing.[13]

Bank deposits in trust.[14]—Opening a bank account in trust for another not a fictitious person[15] will, when coupled with corroborating statements of the settler, often create a trust.[16] While not controlling, still failure of the depositor to give the beneficiary notice of the trust,[17] and the retention of the deposit book,[18] are facts to be considered as tending to show a lack of intention to create a trust.

Construction.[19]—The construction of testamentary trusts is treated elsewhere.[20] In construing deeds creating trusts the intent of the parties, to be derived from the entire instrument, controls.[21] Where the instrument is ambiguous the court

ment of income accruing after her divorce and remarriage for her debts. Kunkel v. Kemper, 32 Pa. Super. Ct. 360.

11. Execution had been issued. Ullman v. Cameron, 186 N. Y. 339, 78 N. E. 1074.

12. See 6 C. L. 1741.

13. Dexter v. MacDonald, 196 Mo. 373, 95 S. W. 359. Evidence should be very clear and satisfactory to establish that title to real property purchased by one with his own funds, in his own name, and ostensibly for his own benefit, is held in trust for the benefit of another to whom the purchaser, in respect of the transaction, sustains no fiduciary relation. Neely v. Boyd [C. C. A.] 145 F. 172. Evidence considered, and held insufficient to establish a parol agreement by a purchaser of land at an execution sale to hold the title for the benefit of the judgment defendant, and to permit the latter to redeem at any time. Id. Where grantor sues fourteen years after alleged trust agreement on the part of his absolute grantee, he must present such proofs as to satisfy fully the judgment and conscience of the court, both of the existence of the trust and the essential terms thereof. Reed v. Munn [C. C. A.] 148 F. 737. On an issue as to whether there was a contract between a husband and wife whereby the wife was obligated to dispose of the property, deeded to her by the husband, as indicated by his will, evidence held insufficient to show such contract. Trustees of Hillsdale College v. Wood, 145 Mich. 257, 13 Det. Leg. N. 456, 108 N. W. 675. Where creditor insured debtor's life, statements by creditor that balance after paying indebtedness should go to the insured's widow held insufficient to create a parol trust to such effect. Dewey v. Fleischer [Wis.] 109 N. W. 525. Evidence where deed described grantee as agent held sufficient to show that conveyance was in trust for the benefit of the grantee and his family. Fleming v. Wood [Mich.] 111 N. W. 80. Evidence held insufficient to show that absolute conveyance made eleven years before suit was in trust. Bluett v. Wilce [Wash.] 86 P. 853. Evidence held to show that attorney taking title to land did so as trustee. Pansing v. Warner [Wash.] 86 P. 667. Evidence held to show that one held the legal title to certain property in trust for another. Latham v. Scribner [Wash.] 88 P. 203. Evidence held insufficient to establish parol trust in favor of heirs of husband in land conveyed to wife for which husband paid. Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794.

14. See 6 C. L. 1741.

15. A deposit in the name of the depositor in trust for "Johanna Sheedy," that being his married sister's maiden name, held no trust, the depositor retaining complete control and his sister dying before he did. Garvey v. Clifford, 99 N. Y. S. 555.

16. Where a person deposits money in a bank in trust for another, and dies, and there is evidence that the depositor stated that she intended the moneys to be for the benefit of the person in whose name it was put in trust, and such intention is consistent with the scheme of her will, a trust is established. In re King's Will, 101 N. Y. S. 279. A deposit, with an entry in the book signed by the depositor, "In case of my death pay to the order of (for her own use) E. H. only," coupled with admissions of the deceased depositor, is sufficient to establish a trust. Id. Where money is deposited in a bank in the name of another, with the statement "subject to the control" of the depositor, and the depositor has declared that she intended the money to be for the benefit of such person, it is sufficient to establish a trust. Id. A bank deposit in the name of the depositor in trust for another established a trust. Id. Evidence that an intestate had deposited money in a savings bank in her own name in trust for her sister, after whose death she stated to the daughters of such sister that the money belonged to their mother and went to them, held to establish a trust by way of gift, though she retained the deposit book. McMahon v. Lawler, 190 Mass. 343, 77 N. E. 489.

17. Bath Sav. Inst. v. Fogg, 101 Me. 188, 63 A. 731.

18. Bath Sav. Inst. v. Fogg, 101 Me. 188, 63 A. 731. Where deposit was payable to either of two parties, evidence held not to show trust by depositor in favor of other party. Id. A deposit in the name of the depositor in trust for Johanna Sheedy, that being his married sister's maiden name, held no trust, the depositor retaining complete control, and his sister dying before he did. Garvey v. Clifford, 99 N. Y. S. 555. But see McMahon v. Lawler, 190 Mass. 343, 77 N. E. 489.

19. See 6 C. L. 1741.

20. See Wills, 6 C. L. 1880.

21. Trust held intended to continue during lives of all or either of the beneficiaries, so that it did not terminate at the death of last of named trustees, though parts of deed

may consider all the facts and circumstances surrounding its execution [22] and the construction placed upon it by the parties in interest.[23] It seems that the parties may by their practical construction of a doubtful instrument affect the creation or validity of a trust.[24] The general rule is well established that when property at a future date is to pass to a certain class of persons it will be distributed amongst the persons who compose such class at the date of distribution.[25] In construing a deed of trust conveying land in trust with a remainder interest to the life beneficiary's heirs, it will be assumed that the grantor knew that the lines of inheritance were governed by statute and subject to change at any time, and that he intended to throw the responsibility of selection of heirs on the law existing at the time of the death of the life beneficiary.[26] Where a trust is created in mixed property for the benefit of the "heirs at law" of a certain person, only those who would take the real estate if the ancestor were intestate can be considered "heirs at law."[27] In most states a legally adopted child of a deceased person will be deemed an heir of such person,[28]

seemed to so indicate. Parrish v. Mills [Tex. Civ. App.] 102 S. W. 184. Word "descendants" held to signify issue of a deceased person and as used in connection with remainder to show intention that trust should not terminate until after death of beneficiaries. Id. Railroad company held to hold lot, except 100 feet on each side of railroad, in trust for town for purposes specified in deed conveying land to it. City of Hickory v. Southern R. Co. [N. C.] 53 S. E. 955. Where deed conveyed land in trust for grantor for life, with remainder to her heirs if she died intestate, but subject to any disposition she might make by will or by deed in nature of a last will and testament, held that grantor had only life estate, with power of appointment, and no reversionary interest, and she and trustee could not convey fee. Fehr Brew. Co. v. Johnston, 30 Ky. L. R. 211, 97 S. W. 1107. Reservation of power of appointment by deed in nature of will, that is by deed in nature of gift to take effect at grantor's death, held not to authorize disappointment of remaindermen by deed not partaking of that nature. Id. Where a deed appropriated certain securities in trust to apply the income to designated objects during the grantor's life, and to other objects after his death, it should be construed as creating two independent, successive, and not concurrent, trusts; the invalidity of one having no effect on the other. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359. Children of decedent conveyed certain of his realty to widow in fee, and she executed deed therefor to one of them in trust for her benefit for life, with remainder in fee to children, issue of deceased children to take parent's share. Deed provided that property was not to be sold by trustee without written consent of life tenant and children. Held that intention was to limit right to veto sale to beneficial owners at time of contemplated sale, and that death of one of the children intestate leaving widow, but without issue, did not terminate power of sale, but sale with consent of survivors, to whom deceased child's interest descended, subject to widow's dower, and widow, passed good title. Easy Payment Property Co. v. Vonderheide, 29 Ky. L. R. 782, 96 S. W. 449. In any event, if trustee and four beneficiaries were regarded as joint donees of power of sale under trust deed, power being one coupled with an interest would survive to remaining donees on death of one of them. Id. Provision in deed of trust held to create relation of landlord and tenant between purchaser at sale under such deed and grantor, and to entitle latter to month's notice to surrender possession, it being presumed that, as owner, he was in possession at time of sale. Parsons v. Palmer [Mo. App.] 101 S. W. 609.

22. Evidence as to surrounding circumstances and contemporaneous declarations of grantor held admissible. Parrish v. Mills [Tex. Civ. App.] 102 S. W. 184.

23. Parrish v. Mills [Tex. Civ. App.] 102 S. W. 184.

24. In re Oltman's Estate, 104 N. Y. S. 472. Where a person interested in an estate left to him in trust by a will acquiesces in the validity of the trust, and there has been a long continued course of contemporaneous construction, wherein the court disposed of matters upon the theory that the trust existed, an action brought by him to repudiate the validity of the trust is not one that appeals to a court of equity. Cushman v. Cushman, 102 N. Y. S. 258.

25. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697. A deed of trust conveyed land to a trustee in trust for a beneficiary named for life, "and after her decease to her heirs at law," held that the heirs at the time of the beneficiary's death, and not her heirs at the time of the execution of the deed, were entitled to the remainder. Id. In the absence of a plain intent to the contrary, a trust for the heirs at law of a testator will be construed as meaning those who are such at the decease of the life tenant. Gardner v. Skinner [Mass.] 80 N. E. 825. Where a trust was created for the benefit of one for life, and after her death, if she left a husband, to her appointee, and, in default of appointment, to the husband for life, and on his decease or on the life beneficiary's death, leaving no husband, in trust for her heirs at law, held the heirs should be determined as of the life beneficiary's death. Id.

26. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697.

27. Gardner v. Skinner [Mass.] 80 N. E. 825.

28. Domestic Relations Law, §§ 60, 64, as amended by Laws 1897, p. 333, c. 408, construed. Gilliam v. Guaranty Trust Co., 186 N. Y. 127, 78 N. E. 697.

but, the grantor being a third party, an adopted child is not an "heir" of the grantee.[29] Where the deed of trust contains two clauses repugnant to each other, the first prevails, and the grantor is not allowed by any subsequent part of the deed to restrict the grant made.[30]

Active and passive trusts.[31]—A trust is active when the interposition of the trustee is necessary to carry out its purpose with respect to immediate or remote beneficiaries.[32] A trust is passive when the trustee has no duty to perform, or when the trust serves no purpose, or none that would not be equally served without it.[33]

The instrument declaring or creating the trust and the sufficiency thereof.[34]—Except as controlled by the statute of frauds,[35] it is not necessary that the trust should be declared in any particular form, or that a writing should have been framed for the purpose of acknowledging the trust; but such a declaration may be found in letters, memoranda, or writings of the most informal nature, provided the object and nature of the trust appear with sufficient certainty therefrom.[36] A written, sealed declaration of trust is certainly sufficient.[37] That the trust is not to take effect until after the creator's death does not render it a testamentary disposition requiring an execution as such,[38] and this is true though the trust instrument contains a power of revocation.[39]

29. Where an estate for life is given in a deed of trust to the grantee, with remainder to her heirs at law, her adopted daughter has no interest in the remainder. Kettell v. Baxter, 50 Misc. 428, 100 N. Y. S. 529.

30. Pritchett v. Jackson, 103 Md. 696, 63 A. 965. Trust deed authorizing trustee to sell and convey property held not affected by a subsequent clause wherein the grantor reserved the right to dispose of the property by will, and declared that the conveyance should not affect any prior or subsequent will. Id.

31. See 6 C. L. 1742.

32. Where trustee has entire control and management of certain assets, held an active trust. Bay State Gas Co. v. Rogers, 147 F. 557. Trust to keep money invested and pay interest to beneficiary. Lannes v. Fletcher [Tex.] 101 S. W. 1076. Trust to invest and reinvest, and to collect rents and profits, and pay income to certain persons, held an active trust. People v. Wells, 103 N. Y. S. 874. An instrument appointing an agent to receive all sums to which the person executing the instrument might thereafter become entitled as residuary legatee, and to invest and reinvest the same, creates an active, continuing, express trust. Anderson v. Fry, 102 N. Y. S. 112. Where claimants of conflicting locations of mining property, in order to adjust the controversy among themselves, conveyed to a designated trustee, under a written agreement specifying the proportion of the respective interests of the owners, with authority in the trustee to lease or sell the property upon the written request of two-thirds in value of the beneficial owners, held an active trust. Reed v. Munn [C. C. A.] 148 F. 737. Testamentary trust held not a dry one, since trustee was required to manage estate, pay taxes, etc., and had discretionary power, with written consent of beneficiary, to sell property only on condition that he reinvest proceeds. Adair v. Adair's Trustee, 30 Ky. L. R. 859, 99 S. W. 925. Testamentary trust to sell and dispose of property according to best interests of beneficiaries, etc., held an executory one, within meaning of Civ. Code 1895, § 3156, during lifetime of testator's wife, so that it did not become executed as to her by virtue of married woman's act, and she took no vested legal interest in property which she could convey by deed. Middlebrooks & Co. v. Ferguson [Ga.] 55 S. E. 34.

33. Obtaining property to hold in trust for the owner held to create a passive trust. Mullin v. Mullin, 104 N. Y. S. 323. Trust to hold for others, trustee having power of sale, held passive. Everett v. Jordan [Ala.] 43 So. 811. A will leaving property in trust to the widow, to be used by her until the testator's youngest child should become twenty-one years old, when it should be divided between the widow and children equally, creates a passive trust. Jacoby v. Jacoby, 188 N. Y. 124, 80 N. E. 676. Where beneficiary had equitable estate in fee with right to possession, trust held passive one. Morgan v. Morgan [W. Va.] 55 S. E. 389. Where land was conveyed to one "as trustee" with habendum to "his own use and behoof," held that grantee took legal and equitable title in fee, word "trustee" being surplusage, and his conveyance passed fee, though not signed as trustee. McAfee v. Green [N. C.] 55 S. E. 828. Deed to one as trustee for named person held to confer no title upon trustee, but legal title passed to beneficiary. Hinton v. Farmer [Ala.] 42 So. 563.

34. See 6 C. L. 1742.

35. Within the meaning of the statutes of fraud of most estates, it is not essential that the instrument passing title and that creating the trust be one. So held under Burns' Ann. St. 1901, § 3392. Ellison v. Ganlard [Ind.] 79 N. E. 450.

36. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667. Certain letters held to show a taking of property in trust. Id. Letters reciting a turning over of property by a third party to the writer, "and all these moneys he has charged me to pay you with," held a declaration of trust as to the personalty. Kremer v. Mette [Mich.] 14 Det. Leg. N. 195, 111 N. W. 1086.

37, 38, 39. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

Necessity of writing.[40]—An express trust in personalty need not be in writing,[41] and in a few states the same is true of realty, though in most states, in the absence of fraud or mistake,[42] an express trust in realty must be evidenced by a written instrument,[43] unless dispensed with by part performance.[44] There is a conflict as to whether a conveyance absolute in form may be shown by parol to be in trust.[45] Though express trust cannot be added to absolute deed of realty by parol evidence, it is good defense to suit to set aside conveyance as in fraud of creditors that land was conveyed to debtor by deed absolute, but with parol direction to hold same in trust for debtor's grantee.[46] Parol declarations, when competent for purpose of establishing a trust in realty conveyed, must clearly indicate an intention to attach to the legal title, at the time it passes to the grantee, a trust, the terms of which should be sufficiently definite to enable the court to enforce its execution.[47] If enforceable at all, an oral trust in land is only enforceable in equity.[48]

Recording.—The applicability of various recording acts are shown in the notes.[49]

40. See 6 C. L. 1742.

41. Coyne v. Supreme Conclave I. O. H. [Md.] 66 A. 704; Hurley v. Walter [Wis.] 109 N. W. 558; In re King's Will, 101 N. Y. S. 279; Pearlstine v. Phoenix Ins. Co., 74 S. C. 246, 54 S. E. 372; Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754. Where will stated that testator was insured in certain fraternal benefit association in specified sum in favor of specified person, who was authorized to distribute same according to directions previously given by him, held that such fund was no part of assets of estate, and its inclusion in executor's account was erroneous, parol trust for its distribution being entirely lawful. Kelley's Estate, 29 Pa. Super. Ct. 106.

42. Holton v. Holton [N. J. Eq.] 65 A. 481.

43. Dexter v. McDonald, 196 Mo. 373, 95 S. W. 359 Express trust in realty can be proven only by written evidence, signed by party sought to be charged. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613. Parol evidence is inadmissible to establish an express trust in land. So held where husband purchased land, taking title in his wife's name under the promise that it should be held for their joint benefit. There was no evidence of fraud. Kinley v. Kinley [Colo.] 86 P. 105. Where one paid his own money for land and took title in his own name under an agreement that he was to hold it for the use of another and later convey it to him, the agreement created an express trust which could not be proved by parol, but which to be valid must be executed in the same manner as deeds are executed. Krebs v. Lauser [Iowa] 110 N. W. 443. Parol evidence held inadmissible on behalf of forced heirs to show agreements whereby holder of legal title to realty held same in trust for their ancestor. Wells v. Wells, 116 La. 1065, 41 So. 316.

44. In order to justify enforcing an oral trust in lands where the statute of frauds is pleaded, the complainant must establish by clear proof that he took possession under the terms of the promise and made valuable and lasting improvements on the lands with his own means, relying upon the promise, with the knowledge of the promisor. Watson v. Watson, 225 Ill. 412, 80 N. E. 332. Evidence held insufficient to show such improvements as to take the matter out of the statute. Id.

45. That it can. Jennings v. Demmon [Mass.] 80 N. E. 471. Contemporaneous parol agreement made at time of execution and delivery of conveyance of realty, absolute upon its face, that vendee will hold property in trust for certain person, is not within statute of frauds, and, aside from rights of creditors of original vendor and innocent purchasers from vendee, vests in beneficiary of trust valid equitable title to property conveyed, which court of equity will enforce. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

That it cannot. In re Hall's Estate [Iowa] 110 N. W. 148. When a deed of conveyance is executed and delivered, the intention that the grantee is not to enjoy the beneficial estate, but that a trust is to result, must appear expressly or by implication from the terms of the deed, and no extrinsic evidence of the grantor's intention is admissible unless fraud or mistake is averred. Holton v. Holton [N. J. Eq.] 65 A. 481. If the deed recites a pecuniary consideration, though only nominal, that recitation raises a conclusive presumption of an intention that the grantee is to take the beneficial estate and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence will be admitted to show that there was in fact no consideration, unless fraud or mistake is shown. Id.

46. Creditors having no legal right to ask him to hold property to which he has no moral right. Smith v. Ellison [Ark.] 97 S. W. 666.

47. Faust v. Faust [N. C.] 57 S. E. 22. Even if admissible, held that declarations made after execution of deed to children of one of grantor's sons, in consideration of son's promise to pay one of his sisters a specified sum, were insufficient to show intention to make such children trustees to secure performance of son's promise. Id.

48. Chase v. Chase, 191 Mass. 556, 78 N. E. 115.

49. Act Pa. June 8, 1881 (P. L. 84), which provides that a deed absolute on its face shall not be reduced to a mortgage except by a defeasance in writing signed, sealed, and delivered at the time, and recorded within sixty days, does not render void or ineffective an unrecorded declaration of trust executed by an absolute grantee to the grantor merely because one of the purposes of the trust was to sell some property and from the proceeds repay the trustee for certain advances. Linton v. Safe Deposit & Title Guaranty Co., 147 F. 824.

§ 3. *Implied trusts.*[50]—Words of desire or request are generally [51] but not always [52] deemed insufficient to create a trust. A specific trust is not to be lightly imposed upon mere words of recommendation and confidence, or which simply declare the motive for making the deed.[53]

§ 4. *Constructive trusts. A. Trusts raised where property is held or obtained by fraud.*[54]—A constructive trust is one not created by any words either expressly or impliedly evincing an intention to create a trust, but only by the construction and operation of equity in order to satisfy the demands of justice,[55] and are generally implied from fraud on the part of the alleged trustee.[56] Fraud in securing the

50. See 6 C. L. 1743.

51. Words "wish and desire" held not to create a trust. Holmes v. Dalley [Mass.] 78 N. E. 513. Where husband and wife held by an estate by entirety and the husband's will provided for certain legatees in case he survived his wife, and if he did not he requested his wife to give or will the property as indicated, held, on his dying before his wife, no precatory trust was created. Trustees of Hillsdale College v. Wood, 145 Mich. 257, 13 Det. Leg. N. 456, 108 N. W. 675.

52. Request. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

53. Where deed conveyed property for purpose of keeping and maintaining a church for worship, held that lease of portion of lot for commercial purposes, rent to be applied to use of church, did not so contravene controlling purpose of trust as to authorize interference of court of equity. Hayes v. Franklin, 141 N. C. 599, 54 S. E. 432. A specific trust will not be superimposed on title conveyed to religious corporation authorizing courts to interfere and control their management and disposition of the property unless such is clear intent of grantor expressed in language which should be construed as imperative. Id.

54. See 6 C. L. 1744.

55. Grantee of trust property under absolute deed, with knowledge of trust, held constructive trustee. Newman v. Newman [W. Va.] 55 S. E. 377. One who assumes to act as guardian of minor without authority is liable as trustee in invitum. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

56. Allegations that one fraudulently took and retained possession under an absolute deed given in trust held to allege a trust ex maleficio. Bluett v. Wilce [Wash.] 86 P. 853. Evidence held to show that patentee of mining claim had taken whole title to defraud co-owner and hence was sufficient to show a constructive trust. Delmoe v. Lang [Mont.] 88 P. 778. One obtaining property in trust by undue influence may be held to account in equity as a trustee ex maleficio. Mullin v. Mullin, 104 N. Y. S. 323. The grantee in a deed given to cure a defective title obtaining the same by fraudulently representing himself as the agent or attorney of the party claiming under the defective title is a trustee for the benefit of the person in whose favor the grantor intended the deed to operate. Gates v. Kelley [N. D.] 110 N. W. 770. Evidence held to show such a trust. Id. One taking legal title agreeing to hold part thereof in trust for patentee held a constructive trustee. Morris v. Unknown Heirs of Hamilton [Tex. Civ. App.] 16 Tex. Ct. Rep. 327, 95 S. W. 66. One who redeems from a tax sale agreeing that title shall be taken in the former owner held a trustee, he taking title in himself. Openshaw v. Rickmeyer [Tex. Civ. App.] 102 S. W. 467. Evidence held to support finding that sale of property held by one to whom plaintiff had conveyed his interest therein, under agreement that he should share in profits of sale thereof, to grantee's son was fraudulent, so that plaintiff was entitled to share in profits resulting from subsequent sale by grantee and his son. Chambers v. Thompson [Ark.] 100 S. W. 79. Payee of draft fraudulently issued by employe of bank held to hold proceeds under constructive trust for bank, where he was not shown to be bona fide holder. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527. Evidence held to sustain finding that certain property was purchased by defendant at trustee's sale for joint benefit of himself and plaintiffs, so that latter were entitled to recover their respective interests therein. Haywood v. Scarborough [Tex. Civ. App.] 102 S. W. 469. Fact that money borrowed from plaintiffs and defendant, for which deed of trust was given as security, was applied by borrower to different purpose from that for which it was borrowed, held to afford no excuse for violation by defendant of agreement with plaintiff to purchase property at trustee's sale for benefit of all parties. Id. Purchase of land by plaintiff at public sale pursuant to agreement between himself and other joint owners thereof that he should bid therefor for benefit of all held to create a trust by operation of law for joint benefit of all enforceable against plaintiff at suit of all or any of the beneficiaries. Griffin v. Schlenk [Ky.] 102 S. W. 837. Where creditor became party to contract between heirs of decedent and certain other persons, whereby land of decedent was to be conveyed to certain person in trust to divide proceeds arising from its sale among heirs after paying certain deeds of trust and other claims of the estate, held that he could not, while such agreement was in force, by purchasing land at administrator's sale, destroy heirs' right under contract, but, as respected rights of parties to such contract, administrator's deed conveyed title to him in trust for purposes in that contract expressed, and he became trustee instead of trustee therein named. Howard v. Brown, 197 Mo. 36, 95 S. W. 191. Same held true of purchase by him at sale of land by trustee under one of such deeds of trust. Id. Though a mere parol agreement, without consideration, to buy in land at execution sale and reconvey it to the judgment debtor upon payment of purchase price and interest may not create trust in favor of judgment

property is the essential element.[57] One who occupies a fiduciary relation to another in respect to business or property, and who by the use of the knowledge he obtains through that relation or by the betrayal of the confidence reposed in him under it, acquires a title or interest in the subject-matter of the transaction antagonistic to that of his correlate, thereby charges his title or interest with a constructive trust for the latter.[58] The test of such trust is the fiduciary relation and a betrayal of the confidence reposed or some breach of duty imposed under it.[59] It is essential that the alleged trustee consents to assume the relation, though in this connection

debtor, where there is in the transaction an element of equity arising from fraud, confidential relation, refraining from bidding at sale, or from further protection of property from sale, gross inadequacy of purchase price, supplying by debtor of part of purchase money, or otherwise, such circumstances may be shown by parol and establish a trust. Patrick v. Kirkland [Fla.] 43 So. 969. Where lessees of land for turpentine purposes, upon being applied to for loan to prevent sale of land on execution, orally agreed with heirs of execution debtor that lessees would bid in land, and, upon repayment by heirs of purchase price with interest, would reconvey it to heirs and pay them usual rent for time during which they held it, and land was sold to lessees for inadequate price and profitably used by them and it was agreed that amount due as rent at time of sale should be credited on purchase price, held that trust in favor of heirs was thereby created, which equiy would enforce. Id.

57. The violation of a parol promise made by a grantee to the grantor to hold land in trust or convey it to a person designated by the grantor does not create a constructive trust in the absence of fraud in procuring the conveyance. Crossman v. Keister, 223 Ill. 69, 79 N. E. 58. Breach of mere verbal promise to purchase land, both parties to have a half interest, held not to raise a constructive trust though claimant had money on deposit with defendant at the time latter purchased land in his own name, the defendant not using any of such funds. Scribner v. Meade [Ariz.] 85 P. 477. Where parties were unable to buy land for lack of money and one of the parties subsequently raised the money on his own note and bought the land, held no constructive trust. Davis v. Davis [Pa.] 65 A. 622. Possession and control of an estate by a surviving spouse with the consent of the executors, who render account therefor, does not though the possession is alleged to be wasteful and without right, render the widower a trustee de son tort. Clark v. Peck [Vt.] 65 A. 14.

58. Steinbeck v. Bon Homme Min. Co. [C.C. A.] 152 F. 333. Oral agreement that beneficiary in mutual benefit certificate shall apply the proceeds to a certain purpose held to create a trust. Coyne v. Supreme Conclave of I. O. of H. [Md.] 66 A. 704. Daughter acquiring property from parents on agreeing to support them and pay mortgage, such agreement being fraudulent on her part, held a trustee of a constructive trust. Crabtree v. Potter [Cal.] 89 P. 971. Evidence held to show fraud where father delivered unrecorded deed to a daughter on the latter's parol agreement to convey the land to another daughter. Crassman v. Keister, 223 Ill. 69, 79 N. E. 58. Where father delivered unrecorded deed to a daughter on the latter's parol agreement to convey the land to another daughter. Id. Partner purchasing land in own name and with his own funds, but in violation of a partnership agreement whereby land should belong to the partner, held to create a constructive trust. Koyer v. Willman [Cal.] 90 P. 135. Where on the settlement of partnership affairs on dissolution it is understood that the succeeding partners are to acquire the retiring member's interest in partnership land, and the legal title is not conveyed to them according to the agreement, the title to such interest rests in trust for their benefit. Kyle v. Carpenter [Wis.] 110 N. W. 187. Tenant investigating conditions as to taxes and lessor requesting him to pay same and deduct from rent the amount so paid, held a constructive trust arose where tenant took land in his own name at a purchase made at a tax sale and the lessor was entitled to have the land conveyed to him on payment of amount paid by lessor with interest. Frost v. Perfield [Wash.] 87 P. 117. Where a company executed an assignment of accounts and sold goods to a bank, providing the bank should collect the one and sell the other and apply the proceeds to the payment of the company's notes to the bank, and the president of the bank concealed from the bank such fact, and without authority of his codirectors took possession of the property and used the proceeds for other debts of the company of which he was a stockholder, he constituted himself a trustee de son tort for the bank. Huntington Nat. Bank v. Huntington Distilling Co., 152 F. 240. Complainant who falsely represented that he held an option for a part of a tract of land and agreed to take a part interest as compensation for turning the option over to the defendants held not entitled to recover of defendants who obtained the entire tract at the same price. Barrett v. Miller, 144 Mich. 454, 13 Det. Leg. N. 289, 108 N. W. 396. Letter from one of the defendants to owner of land directing him to make a deed to him as trustee held not to alter complainant's rights. Id.

59. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. Where an attorney advised his client as to the necessity of purchasing certain land, and the client refused to take any action, whereupon the attorney purchased the title for himself, he did not hold it in trust for the client. Webber v. Wannemaker [Colo.] 89 P. 780. To charge a person as trustee by reason of his purchase of land on the theory that when he purchased he was attorney at law for a party claiming the land in a suit involving it, it must appear that he was attorney during the pending of the suit as to such land. Bill held demurrable. Jackson v. Strader [W. Va.] 56 S. E. 177.

acquiescence and acceptance are, however, equivalent to consent.[60] One chargeable with a trust of this nature is a trustee de son tort,[61] wrongdoing being of the essence of the trust relation.[62] There is, however, an exception to the general rule stated in that an agent or trustee may lawfully buy the property of his principal or beneficiary at a judicial sale caused by a third party which he has no part in procuring and over which he has no control.[63] Where an express passive trust is obtained by undue influence, the beneficiary may elect to avoid the entire transaction and hold the trustee under a trust ex maleficio, or to affirm it and insist that the legal title vested in him.[64] Where one holds property from a parent as constructive trustee for other heirs, the fact that he, after the parent's death, agrees to take such property in full for all his interest in the parent's estate does not affect the trust,[65] nor does the fact that, the legal title being in the parent, the trustee inherits an undivided interest therein affect the case.[66]

(§ 4) *B. Trusts by equitable construction in the absence of fraud.*[67]—When necessary to prevent injustice, equity will construct a trust, though there be no fraud.[68] Equity will not aid one in perpetrating a fraud.[69] Money paid under a mistake of fact will be deemed impressed with a constructive trust.[70] Funds raised by special taxation are deemed impressed with a trust for the purposes of the tax.[71] Where property is conveyed inter vivos subject to a charge in favor of third parties, a corresponding constructive trust arises in favor of such third party.[72] A vendor in a contract of sale is, in equity, a trustee for the vendee from the time of the execution of the agreement,[73] as is also a grantee of the vendor who takes with notice of

60. Crossman v. Keister, 223 Ill. 69, 79 N. E. 58.

61. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333.

62. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. Allegations that at the time defendant procured a quitclaim deed to certain land he was acting for the plaintiff's grantor and was attorney for and agent of the grantor in procuring it, and procured it for the grantor's use and benefit, and held it in trust for the plaintiff as grantee of the whole title without any allegation concerning the fraud or wrong of the defendant, is not sufficient to constitute a cause of action. Webber v. Wannemaker [Colo.] 89 P. 780.

63. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. So held as to agent acquiring tax title to property. Id.

64. Mullin v. Mullin, 104 N. Y. S. 323. Where on death of beneficiary his administratrix, next of kin and heir at law instituted an action for an accounting in which they asserted title to the real estate, held an election to affirm the transaction and claim under a positive trust. Id.

65. Where parent gave child back unrecorded deed. Crossman v. Keister 223 Ill. 69, 79 N. E. 58.

66. Crossman v. Keister, 223 Ill. 69, 79 N. E. 58.

67. See 6 C. L. 1746.

68. Where bank took funds to pay a note, having no authority to collect for said note, held a trust. Smith v. Mottley [C. C. A.] 150 F. 266. Where county treasurer was also cashier of a bank and he deposited funds derived from taxation in the bank without authority, held a trust was created. Board of Com'rs of Crawford County v. Patterson, 149 F. 229. That a conveyance was from a father to his daughter, and that the father retained possession of the property and received its revenues, held insufficient to raise a presumption of a constructive trust. Holton v. Holton [N. J. Eq.] 65 A. 481. Where a creditor purchased property on foreclosure in trust for himself and other creditors, the property is impressed with a trust in favor of the trustee's coereditors. Eisert v. Bowen, 102 N. Y. S. 707. A trust company coming into possession of the residuum of a fund merely from its relation to transactions with the owners of the original fund deposited with it as collateral held a trustee and not merely a stockholder. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 194, 107 N. W. 1109. An agent of an insurance company collected insurance money under a power of attorney from the beneficiary and deposited it with a third person who refused to deliver it to the beneficiary unless the beneficiary would give him one-half thereof to pay the agent pursuant to an alleged beneficiary and the agent. Held the beneficiary could maintain an action in equity against the agent and third person to impress the funds with a trust in his favor. Mazzolla v. Wilkie [N. J. Eq.] 66 A. 584.

69. Where one conveyed land for the purpose of defrauding his wife of her dower, in the absence of an agreement to the contrary, equity will not import a trust in the property in favor of such grantor. Jolly v. Graham, 220 Ill. 550, 78 N. E. 919.

70. In re Berry [C. C. A.] 147 F. 208.

71. Tax to pay coupons on county railroad aid bonds. Board of Com'rs of Onslow County v. Tollman [C. C. A.] 145 F. 753.

72. Fox v. Fox [Neb.] 110 N. W. 304.

73. Saldutti v. Flynn [N. J. Eq.] 65 A. 246; Wood v. Schoolcraft, 145 Mich. 653, 13 Det. Leg. N. 655, 108 N. W. 1075. Parol executed sale. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A. 719.

such contract.[74] Where a joint owner of property deeds the same to his co-owner voluntarily and without consideration, the latter holds the legal title to his co-owner's interest in trust for security of the purchase price.[75]

The title of a purchaser chargeable with a constructive trust is merely voidable at the option of the beneficiary.[78]

A constructive trust is not within the statute of frauds.[77]

A constructive trust is only available, either as a cause of action or defense, in equity.[78]

The proof to establish a constructive trust must be so clear, unequivocal, cogent, and compelling, as to exclude every reasonable doubt from the chancellor's mind.[79]

§ 5. *Resulting trusts.*[80]—The general rule is that where the purchase money is paid by one person and the legal title to the property is conveyed to another, a trust results in favor of the person furnishing the consideration,[81] and the rule applies to personalty as well as realty,[82] and the purchases made by one's ancestor, title never being conveyed to him.[83] The doctrine of resulting trusts is founded on a presumption of the parties arising from and shown by their acts at the time of the transaction.[84] Hence, where one claims a resulting trust in land held in another's name, it must appear by clear proof that the claimant's money went into the

74. So held where husband agreed to convey land free from incumbrances and tendered deed signed by himself alone, the tender being refused vendor and wife conveyed to third person who had notice of contract of sale. Saldutti v. Flynn [N. J. Eq.] 65 A. 246. The vendee being in actual possession, a subsequent purchaser of the legal title assumes the position of trustee. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A. 719.

75. Wood v. Schoolcraft, 145 Mich. 653, 13 Det. Leg. N. 655.

76. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333.

77. Crossman v. Keister, 223 Ill. 69, 79 N. E. 58; Crabtree v. Potter [Cal.] 89 P. 971. Since they are bottomed on doctrine of estoppel. Griffin v. Schlenk [Ky.] 102 S. W. 837. Agreement between joint owners of realty that one should bid on it at public sale for benefit of all held enforceable, though oral. Id. So held where grantee in deed at judicial sale agreed to purchase the land and hold it as security for a debt of the land owner. McElroy v. Allfree [Iowa] 108 N. W. 116.

78. Not available as a defense to ejectment at law. Atlantic City R. Co. v. Johanson [N. J. Eq.] 65 A. 719.

79. Bunel v. Nester [Mo.] 101 S. W. 69. Evidence held insufficient to establish trust on theory that certain land was purchased by guardian at foreclosure sale with ward's money. Id.

80. See 6 C. L. 1746.

81. Pearce v. Dyess [Tex. Civ. App.] 101 S. W. 549. Evidence held to show that second husband of plaintiff's mother had purchased property with proceeds of property belonging to community estate of their mother and deceased father, half of which belonged to them, and had taken title in his own name. Id. That community property had been exhausted in payment of claims due wife on account of her separate property held matter of defense to be proved by defendants if relied on. Id. Resulting trust where one paid part of purchase price taking entire title to himself, the agreement between the parties being that he was to have merely a proportionate share. Miller v. Saxton [S. C.] 55 S. E. 310. Where are purchased lot with money belonging to another, taking title in his own name, held a trustee. Wilson v. Edwards, 79 Ark. 69, 94 S. W. 927. Evidence held to show that son purchased land at commissioner's sale at request of and with money furnished by his father, and that only thing furnished by son toward paying for it was labor in getting out timber, proceeds of which were applied on purchase price, so that son would be decreed to hold title for benefit of father to extent of that part of it previously conveyed by latter to his daughters, it being father's intention that land should be divided among children. Combs v. Combs, 30 Ky. L. R. 873, 99 S. W. 919. Where a partner misrepresented purchase price of property and induced copartner to advance the entire purchase money in the belief that she was only advancing a part, and a corporation was organized to take over the property, each partner receiving a proportionate share according to the misrepresented value, held a resulting trust was created in the property a stock representing it and held by the deceiving partner. Mattern v. Canavan [Cal. App.] 86 P. 618.

82. Thompson v. Bank of California [Cal. App.] 88 P. 987.

83. Where land was purchased and paid for by one who took title bond therefor and died before obtaining deed, leaving widow and children, and widow procured vendor to convey land to her, held that she would be treated in equity as trustee holding legal title for heirs, equitable title thereto having vested in them subject to widow's dower immediately upon death of ancestor. Gentry v. Poteet, 59 W. Va. 408, 53 S. E. 787. Rule not changed by fact that husband before his death verbally stated to vendor that he wanted same conveyed to his wife. Id.

84. Byers v. Ferner [Pa.] 65 A. 620.

property, that the purchase was made by the claimant or for his account, and that the placing of the title in another was in violation of an agreement between the parties.[85] It is not, however, necessary that the party purchasing the land and taking title in his own name shall intend at the time to hold the equitable title for the other party.[86] A trust will not be raised in opposition to the declaration of the person who advances the money, or the obvious purpose and design of the transaction.[87] Where one buys property taking title as trustee for another and the statute of uses executes such trusts the law will raise a resulting trust in favor of the one advancing the consideration.[88] The trust is not within the statute of frauds.[89] In some states by statute, an agreement between the parties or fraud is essential to the existence of a resulting trust.[90] That the transaction was without fraud in its inception does not prevent its becoming fraudulent upon the subsequent refusal of the trustee to perform.[91]

The consideration[92] must be furnished by or on behalf of the beneficiary.[93]

85. Byers v. Ferner [Pa.] 65 A. 620. In order that a resulting trust may arise, the payment by the cestui must have ben made for the conveyance of the title. Where a father took money belonging to his two minor sons without their consent and used it in making partial payments of the purchase price of a farm, the title to which he took in his own name, held a resulting trust did not arise. Merrill v. Hussey, 101 Me. 439, 64 A. 819.

86. Trust results regardless of intention. Pearce v. Dyess [Tex. Civ. App.] 101 S. W. 549.

87, 88. Wolters v. Shraft [N. J. Eq.] 66 A. 398.

89. Smith v. Smith [Iowa] 109 N. W. 194; Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794. Payment of part of purchase money by plaintiffs' ancestor may be shown by parol. Miller v. Saxton [S. C.] 55 S. E. 310. Where commissioner's deed is obtained in judicial proceeding upon agreement of grantee to hold title for owner and as security for money, the resulting trust may be shown by parol. McConnell v. Gentry, 30 Ky. L. R. 548, 99 S. W. 278.

90. Indiana: Where title was taken in another from whom money had been borrowed to pay the purchase price, he to deed the property over as soon as the money was repaid either directly or by rentals from the land, held a trust was created. Homer's Ann. St. 1901, §§ 2976, 2974, construed. Holliday v. Perry [Ind. App.] 78 N. E. 877.

Kentucky: Under Ky. St. 1903, § 2353, resulting trusts are forbidden except where grantee shall have taken deed in his own name without consent of person paying consideration, or where, in violation of some trust, he shall have purchased land deeded with money or property of another person. Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794. Under said statute fact that husband paid part of purchase price of land to which title was taken in wife's name held not to raise resulting trust in favor of his heirs where it did not appear that payment was made because of any agreement on her part that she would take title to land charged with a trust. Id. Rule that, under this section, where consideration is paid by one person, and deed, by consent, is made to another, no trust results, in absence of fraud, mistake, or violation of some trust, held not to apply to case where purchaser of land at commissioner's sale by writing directed commissioner to make conveyance to third person as security for money advanced to purchaser to pay purchase price, since purchaser already had equitable title to land. McConnell v. Gentry, 30 Ky. L. R. 548, 99 S. W. 278. Order which purchaser signed for commissioner to make conveyance held not such writing as is embraced by statute which applies only to deeds and not to contracts for equitable interests. Id.

New York: Under Real Property Laws, Laws 1896, p 592, c. 547, § 207, held no resulting trust where purchaser used his own money but took title in another's name and the latter subsequently gave the purchaser a blank deed and mortgage, the funds realized from the latter being used in improving the property, and this though the purchaser and his heirs used the premises for twenty-two years. Fagan v. McDonnell, 100 N. Y. S. 641.

91. Holliday v. Perry [Ind. App.] 78 N. E. 877.

92. See 6 C. L. 1748.

93. Koyer v. Willmon [Cal.] 90 P. 135; Scribner v. Meade [Ariz.] 85 P. 477. The party seeking to have a resulting trust declared in his favor must show a payment of the purchase price by him. Miller v. Saxton [S. C.] 55 S. E. 310. Held no trust where two persons agreed to buy land together or "in partnership," and one furnished all the money and took title in his own name. Norton v. Brink [Neb.] 110 N. W. 669. No trust, husband paying price and taking title to land bought at commissioner's sale, though deed was made in wife's name. Noel v. Fitzpatrick, 30 Ky. L. R. 1011, 100 S. W. 321. Where husband conveyed land to wife by warranty deed and thereafter the property is sold and his wife receives the consideration and takes a deed to other land and pays therefor by her check on funds, held no resulting trust in husband's favor in the lost land. Oliver v. Sample, 72 Kan. 582, 84 P. 138. Where husband purchased realty with money and proceeds of other personalty belonging to his wife, at time when common-law rule giving him title to all her personalty was in force, held that he would not be regarded as holding it in trust for her or her heirs in absence of clear proof of election on his part to waive his marital rights. Jones v. Jones

In order to create a resulting trust, the payment of the purchase price must have been made before or at the time of the purchase.[94] The common-law rule that a consideration is necessary in a deed of bargain and sale in order to prevent a resulting trust is abrogated by statutes declaring that all conveyances shall pass the fee unless a contrary intention is clearly expressed therein.[95]

Presumption of gift or advancement.[96]—In the absence of evidence to the contrary, where the purchase is under a legal, or in some cases even a moral, obligation to support the grantee named in the deed, equity raises the presumption that the purchase is intended as a gift or advancement,[97] but this presumption is not conclusive and may be overthrown.[98] This rule is only applied, however, where the deed is so taken to the knowledge of the owner of the land,[99] and the latter is sui juris.[1] The doctrine of advancement to an heir applies only in case of intestacy.[2]

Property purchased with trust funds,[3] or with funds held by one by reason of a fiduciary relation, may result,[4] but the mere fact that one loans money to another

[Ark.] 97 S. W. 451. Evidence held to sustain finding that defendant purchased land at execution sale for plaintiff pursuant to an agreement with him and with money furnished by him, so that decree vesting title in plaintiff was proper. Beloate v. Hennessee [Ark.] 99 S. W. 681. Bond for title executed by administrator held sufficient to form basis of resulting trust in favor of heirs of one of the purchasers where conveyance was made to other purchaser after his death, though it did not bind estate represented by such administrator where it bound latter personally. Scranton v. Campbell [Tex. Civ. App.] 101 S. W. 285. Recitals in bond for title taken by decedent and another, and in release executed by latter when he procured final deed after decedent's death, held sufficient to show payment of part of purchase money by decedent. Id.

94. A subsequent payment will not, by relation, attach a trust to the original purchase. Evidence held not to establish resulting trust. Coons v. Coons [Va.] 56 S. E. 576. Mere payment of money, subsequently, for lands or improvements thereon, creates no lien. Butterfield v. Butterfield, 79 Ark. 164, 95 S. W. 146. Transaction held mere loan. Id. In order to create resulting trust in lands, is not necessary that purchase money be paid on precise date of execution or delivery of deeds. Pearce v. Dyess [Tex. Civ. App.] 101 S. W. 549. Since deed does not take effect until delivery, payment of purchase money made upon such delivery, though at date subsequent to date of execution of deed, is part of original transaction of purchase, and such payment out of funds of another raises resulting trust in his favor. Id. If one contracts for purchase of land in his own name, intending to pay for it out of funds in his hands belonging to another, and at the time pays part of purchase money out of such funds and balance when deed is executed and delivered at a later date, the contract, payment, and execution and delivery of deeds constitute one entire original transaction and resulting trust arises. Id. Fact that payment was made when bond was given about two years before execution of deed passing title held not to prevent it from forming basis of resulting trust. Scranton v. Campbell [Tex. Civ. App.] 101 S. W. 285.

95. Campbell v. Noble [Ala.] 41 So. 745.

96. See 6 C. L. 1748.

97. Husband and wife. Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794; Simpson v. Belcher [W. Va.] 56 S. E. 211. Where husband bought land taking title in wife in order that she might have a home if anything happened to him, held a gift and no trust resulted. Foster v. Berrier [Colo.] 89 P. 787. Evidence held sufficient to show that parties were husband and wife. Id. Where husband purchased property taking title in his wife's name in order that his children by a former marriage might not get any of the property at his death, evidence held insufficient to rebut the presumption that the wife took the property by irrevocable gift. Lipp v. Fielder [N. J. Err. & App.] 66 A. 189. Where the title to real estate is in a wife, evidence that the funds for its purchase and improvement were furnished by the husband does not afford ground for declaring that she holds in trust for him and his heirs. Bernhardt v. Bernhardt, 7 Ohio C. C. (N. S.) 517.

98. Where a husband purchased lands with the wife's money taking title in his own name and told her that it was so arranged that she should have it on his death, held a resulting trust. Smith v. Smith [Iowa] 109 N. W. 194.

99. The rule that, where a parent furnishes the purchase money and takes a conveyance in the name of the child, an advancement is presumable has no application where the child takes title without the knowledge of the parent. Moore v. Scruggs [Iowa] 109 N. W. 205. So held where owner testified that he did not know of purchase and hence there was no presumption of gift in favor of intestate by reason of character and use of property. Wilson v. Edwards, 79 Ark. 69, 94 S. W. 927.

1. Where purchaser of land is insane and pays purchase money and has deed made to child, latter will be held to be trustee, there being no presumption of gift in such case. Couch v. Harp [Mo.] 100 S. W. 9. Evidence held insufficient to show that one of defendants derived title to land through title bond given him by former record owner, particularly as it was not pleaded. Id.

2. In re Hall's Estate [Iowa] 110 N. W. 148.

3. See 6 C. L. 1748.

4. Where funds are given another for investment and he invests them in his own name, a resulting trust is created. Water-

wherewith to buy land gives the lender no equity in the land bought therewith by the borrower.[5]

Evidence to establish[6] a resulting trust must be clear and satisfactory.[7]

§ 6. *The beneficiary.*[8] *Who may be.*—The beneficial donee of property cannot take as a cestui que trust, if he is prohibited from taking the legal title to that property.[9]

His estate, rights, and interests.[10]—The beneficiary takes merely an equitable estate,[11] and the property being conveyed for the benefit of the beneficiary for life and giving him an absolute and unlimited power of disposition and sale, he holds an equitable estate in fee.[12] The interest of the beneficiary is limited by the terms of the instrument creating the trust,[13] and he takes subject to conditions therein stated.[14] In the absence of consent, the trustee of a resulting trust cannot impose any conditions upon the beneficiary's rights of alienation.[15] A provision that the net income from land is in any event to go to the cestui, with power to collect and without any discretionary control in the trustee, conveys to the cestui an equitable estate which, under the rule in Shelley's case, is an equitable fee with the power of appointment merged in the power of alienation.[16] While in most states the rule in Shelley's case has been abolished, there is even in those states some conflict as to

man v. Buckingham [Conn.] 64 A. 212. Partner has resulting trust in property purchased by copartner with partnership funds in his possession. Deaner v. O'Hara [Colo.] 85 P. 1123. Where on the settlement of partnership affairs on dissolution it is understood that the succeeding partners are to acquire the retiring member's interest in partnership land, and the legal title is not conveyed to them according to the agreement, the title to such interest rests in trust for their benefit. Kyle v. Carpenter [Wis.] 110 N. W. 187. Where an agent invests his principal's money in real estate with his knowledge, but takes title in himself without the consent of the principal, a resulting trust arises. Moore v. Scruggs [Iowa] 109 N. W. 205.

5. Fike v. Ott [Neb.] 107 N. W. 774.

6. See 6 C. L. 1748.

7. Deaner v. O'Hara [Colo.] 85 P. 1123; Gilbreath v. Farrow [Ala.] 41 So. 1000; Bunel v. Nester [Mo.] 101 S. W. 69; Smith v. Smith [Mo.] 100 S. W. 579. Evidence held insufficient to establish trust in favor of wife on theory that trust provision in deeds conveying land to her husband was omitted by mistake. Id. To establish a resulting trust in land through a verbal agreement the evidence must be clear and conclusive. So held where deed was absolute. Oliver v. Sample, 72 Kan. 582, 84 P. 138. Evidence held to show that attorney taking title to land did so as trustee. Pansing v. Warner [Wash.] 86 P. 667. Evidence held insufficient to establish resulting trust in favor of grantor of land purporting to convey absolute title. Foster v. Beidler, 79 Ark. 418, 96 S. W. 175. Evidence held insufficient to show agreement by wife to hold property which was conveyed to her, but was purchased with money in part furnished by her husband, in trust. Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794. Evidence held insufficient to establish resulting trust on theory that father used money of daughter as trustee in purchase of land. Mason v. Harkins [Ark.] 102 S. W. 228. Evidence held insufficient to show that land to which husband took title in his own name was purchased with money belonging to wife. Holloway v. Wilkerson [Ala.] 43 So. 731. Evidence held to support finding that part of purchase money was paid by ancestor of plaintiffs. Miller v. Saxton [S. C.] 55 S. E. 310.

8. See 6 C. L. 1749.

9. Slave prohibited from holding property. Wright v. Nona Mills Co. [Tex. Civ. App.] 17 Tex. Ct. Rep. 620, 98 S. W. 917. Evidence held insufficient to show that negress was freedwoman. Id.

10. See 6 C. L. 1749.

11. Allen v. Rees [Iowa] 110 N. W. 583; Reardon v. Reardon [Mass.] 78 N. E. 430.

12. Morgan v. Morgan [W. Va.] 55 S. E. 389. Attempted limitation over after wife's death held void for uncertainty and repugnancy. Id.

13. Property owned by corporation in which defendant held stock was sold on foreclosure sale and purchased with money furnished by stockholders. Purchaser executed declaration of trust making stock held by those furnishing said money measure of their interest in proceeds which might arise from sale of property held by him. Held that, though such stockholders had no interest in property by virtue of their stock, they had an interest under declaration of trust in proportion to amount of their stock. Riordan v. Schlicher [Ala.] 41 So. 842.

14. Where the will of a mother provided that her child should be supported from the income of her residuary estate if it was necessary, held a motion for an order directing such application was insufficient, it not disclosing the inability of the father to adequately support his child. Suesens v. Daiker, 102 N. Y. S. 919.

15. Where resulting trustee conveyed trust property to another trustee for use of the beneficiary and her heirs, held the beneficiary took an absolute estate in the land which she could alienate. Griffith v. Eisenberg [Pa.] 64 A. 368.

16. Bates v. Winifrede Coal Co., 4 Ohio N. P. (N. S.) 265.

whether or not the rule is still applicable to trusts in personal property, the general rule being that in the construction to be given to the trusts created by a settlement of personal property, whether executed voluntarily or upon valuable consideration, there is no inflexible rule of law requiring the application of the rule in Shelley's case but the court should ascertain and carry out the intention of the settlor or donor as expressed in the instrument itself.[17]

The statute of uses,[18] which is a part of the law of almost all states, operates to convey the legal as well as the equitable title to the beneficiary of a passive trust.[19]

Rights between beneficiaries.[20]

Income and principal.[21]—There would seem to be no conflict as to whether surplus earnings of a corporation that are not divided at the date of the trust deed belong to the corpus of the trust as a part of the capital or trust fund, or are income.[22] Dividends declared out of surplus earnings that have accrued since the date of the trust deed are income.[23] If the dividend or surplus is found, in whole or in part, to represent the natural growth and increase in the value of the corporate plant and business, whether the growth and increase took place before or after the trust was created, it is to that extent capital,[24] but if it is found to represent the excess of revenue remaining after the payment of dividends it will be regarded as capital.[25] The court in these transactions concerns itself with the substance of the transaction, and not the form in which the corporation has seen fit to clothe it.[26] As a general rule, cash dividends on corporate stock are regarded as income passing to the life tenant, while stock dividends are treated as capital inuring to the benefit of the remainderman.[27] The declaration of a stock dividend involves the creation and issue of new shares of stock.[28] It follows that a distribution of treasury stock must be treated as a cash dividend.[29] As between remaindermen and life tenants, distribution of assets among stockholders, by corporations in process of liquidation, after dissolution, is to be regarded as capital.[30]

Charges on income.[31]—As a general rule, premiums paid upon bonds are chargeable to the income,[32] but, where the trust estate consists of securities, the trustee cannot establish a sinking fund from the income and profits to provide for depreciation in the securities' values.[33] The cost of preserving unproductive property should be charged to the principal of the estate,[34] but permanent improvements in-

17. Sands v. Old Colony Trust Co. [Mass.] 81 N. E. 300. Rule held inapplicable to irrevocable trust. Id.

18. See 6 C. L. 1750.

19. See Uses, 6 C. L. 1773.

20, 21. See 6 C. L. 1750.

22. Capital. Holbrook v. Holbrook [N. H.] 66 A. 124. Where a corporation issued bonds to its treasurer obligating the repayment of money transferred from the income account to the improvement account, shares of stock and cash distributed by the corporation on payment of such bonds is income, though the obligations of the company were incurred before the trust was created. Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938.

23, 24. Holbrook v. Holbrook [N. H.] 66 A. 124.

25. Evidence held to show that cash surplus of corporation was the excess of revenue remaining after the payment of annual dividends, and hence was income. Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938.

26. The fact that the dividend is distributed in cash or stock is of little, if any, importance. Holbrook v. Holbrook [N. H.] 66 A. 124.

27, 28. Green v. Bissell [Conn.] 65 A. 1056.

29. Though designated in the resolution as a stock dividend. Green v. Bissell [Conn.] 65 A. 1056.

30. Curtis v. Osborn [Conn.] 65 A. 968. Where trust funds are invested in corporate stock, and thereafter the corporation is dissolved and a large sum received for its good will, held the proportionate part of such sum coming to the estate should be treated as an increase to the capital of the trust. In re Stevens, 187 N. Y. 471, 80 N. E. 358.

31. See 6 C. L. 1750.

32. Curtis v. Osborn [Conn.] 65 A. 968. Where trust funds are invested by the trustee in bonds having a term of years to run and purchase at a premium, such a proportionate deduction should be made from the nominal interest as will, at the maturity of the bonds, make good the premium paid. In re Stevens, 187 N. Y. 471, 80 N. E. 358.

33. Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 838.

34. Where trustees invested a sum in a mortgage and were compelled to foreclose

creasing the rental value of the property should be paid out of the income.[35] Commisions for the sale of property should be paid from the income.[36] As a general rule the expense of accounting goes against the corpus of the trust estate.[37] Whether, upon the conversion of unproductive property into productive, life tenants are entitled to a sum equal to the income which should have been paid had the property been productive all the time depends upon the intent of the creator.[38] Where expenses chargeable against the income are by reason of the insufficiency of the income paid out of the capital, they should be made good out of the subsequent income.[39]

Rights of creditors, grantees, mortgagees, and assignees of beneficiary.[40]—Unless prohibited by statute,[41] by express provisions of the instrument creating the trust, or by implication from the nature of the trust,[42] the beneficiary is generally deemed to have an alienable,[43] mortgagable,[44] and, in some cases, a devisable[45] estate, and consequently one subject to seizure and sale under execution.[46] Except where the trustee is given a discretionary power to withhold all benefit from him,[47] the beneficiary's interest is generally liable for his debts,[48] even though the settlor

it and buy in the property which was unproductive and involved actual expense for its preservation, such expense should be charged to the corpus of the estate. In re Pitney, 113 App. Div. 845, 99 N. Y. S. 588

35. Repairs to buildings. Jordan v. Jordan [Mass.] 78 N. E. 459.

36. A broker's commission for the sale of a parcel of real estate. Jordan v. Jordan [Mass.] 78 N. E. 459.

37. Chisolm v. Hammersley, 100 N. Y. S. 38.

38. Jordan v. Jordan [Mass.] 78 N. E. 459. Under a mill directing a trustee to divide part of the decedent's estate into equal shares in trust for the benefit of certain persons, providing that if such division were inconvenient it need not be made, but that the proportionate share of the income should be paid to each of the persons named, where a part of the estate was unproductive, but was sold at a profit, the trustee was not required to treat any part of the sum received as income because of the delay in producing income. Id.

39. In re Hurlbut's Estate, 51 Misc. 263, 100 N. Y. S. 1098.

40. See 6 C. L. 1751.

41. An agreement whereby the beneficiary of the income of certain property released the estate to the owner of the estate, taking a personal bond of such owner, secured by a mortgage on part of the property, as security for the payment of annuity, held not within the prohibition. In re Kirby's Will, 113 App. Div. 705, 100 N. Y. S. 155. But an assignment by the beneficiary of such bond and mortgage is prohibited. Id.

42. Where a trust is created to pay an annuity, the annuity is inalienable. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359. Where a trust is created for the support and maintenance of the beneficiary, the latter cannot mortgage the trust estate unless such power is expressly conferred in the instrument creating the trust. Reed Co. v. Klabunde [Neb.] 108 N. W. 133.

43. Where deed creating trust gave wife an equitable estate in fee and right of possession, held that she had full power as incident to such estate to convey same by deed, in which her husband joined as provided by statute, without direction to or intervention of trustee, through deed provided that trustee should dispose of property at such time and in such manner as wife should direct in writing. Morgan v. Morgan [W. Va.] 55 S. E. 389. Deed made by wife and her second husband after death of first husband and trustee, conveying all their right, title, and interest in land, held to give grantee equitable estate in fee. Id.

44. Cestui que trust held to have right to transfer his interest in trust fund to creditor as security for debt, and such transfer was valid as against other creditors. Riordan v. Schlicher [Ala.] 41 So. 842.

45. Under a declaration of trust that the land was held one-half for the creator and one-half for another as tenants in common until a copartnership existing between the two should be dissolved, and on the termination of the trust the legal title should be made to stand one-half in the creator and one-half in his co-partner, held the latter acquired an equitable fee in the land which he could devise. Reardon v. Reardon [Mass.] 78 N. E. 430.

46. Trust in mining location. Colorado statute considered. Reed v. Munn [C. C. A.] 148 F. 737.

47. Hubbard v. Hayes, 30 Ky. L. R. 406, 98 S. W. 1034; Ratliff's Ex'rs v. Com. [Ky.] 101 S. W. 978.

48. Where the cestui que trust has any substantial right in trust property that a chancellor can enforce, it may be made liable for his debts. Trust estates of every kind are subject to debts of cestui que trust unless will or other instrument creating trust gives trustee discretionary power to withold all benefit from him. Hubbard v. Hayes, 30 Ky. L. R. 406, 98 S. W. 1034. Held proper to order land rented and rent applied to payment of beneficiary's debts, under circumstances. Id. Devise in trust to pay net profits to one for life, with provision that trustee could not sell property without written consent of beneficiary, held not to put beneficiary'e, interest out of reach of his creditors. Adair v. Adair's Trustee, 30 Ky. L. R. 857, 99 S. W. 925. Bill in equity held maintainable under Code 1896, § 764,

provides otherwise.[49] Where the income of the estate is left for the support and benefit of the beneficiaries, creditors of the latter cannot reach it,[50] though, no valid directions as to accumulations being given, they may reach the surplus,[51] and this applies to an attorney's lien for recovering such surplus by action on behalf of the beneficiaries.[52] Where a beneficiary is entitled to so much of the income as is necessary for his support, and the trustees allow him an excessive amount, it would seem that unpaid balances thereof in the hands of the trustees, and which exceed the amounts necessary for the beneficiary's support, might be reached by his creditors.[53] In this connection, statutes relating to the income of realty are sometimes held applicable to trusts in personalty.[54] In some states, the right of a beneficiary to enforce the performance of a trust to receive the income of personal property, and to apply it to the use of any person, cannot be assigned.[55] A provision that the beneficiary should not sell property without the trustee's consent applies only to the beneficiary's power to sell his estate or interests,[56] and in such a case a deed by the trustee and beneficiary purporting to convey the fee is a valid deed of the beneficiary's interest.[57] The beneficiary taking an equitable estate in fee, grantee may compel the trustee to convey the legal title.[58] Where a spendthrift trust is terminated before the maturity of a note and mortgage given by the beneficiary on his interest, the note must be paid or the beneficiary must allow sufficient of the trust fund to be set aside to meet it at maturity.[59]

Liability of beneficiary for use of funds.—A life beneficiary wrongfully using and losing the trust funds is liable for the shortage thus created,[60] but having made good such shortage his liability ceases.[61]

to attach by process of garnishment interest of cestui que trust in lands held by trustee under declaration of trust, and to subject same to plaintiff's debt. Riordan v. Schlicher [Ala.] 41 So. 842.

49. Interest held liable. Ky. St. § 2355, construed. Ratliff's Ex'rs v. Com. [Ky.] 101 S. W. 978.

50, 51, 52. In re Williams [N. Y.] 79 N. E. 1019.

53. Where the beneficiary is entitled to such amount from the income as the trustees deem necessary for his support, and a complaint in a suit on a judgment against the beneficiary alleging such facts and that the trustees had fixed upon the sum of $18,000 per year and that $3,000 was sufficient for the beneficiary's support, held an answer alleging that the trustees had fixed on $18,000 as a proper sum, and had turned over the balance to the persons entitled thereto, did not state a defense as it did not allege that the whole $18,000 had been paid to the legatee as fast as it accumulated, and that no part thereof remained in the trustee's possession. Harts Bros. v. Tiffany 102 N. Y. S. 1047.

54. See In re Williams [N. Y.] 79 N. E. 1019.

55. So held under Laws 1897, p. 508, c. 417, § 3, where testator bequeathed certain money in trust to pay the net income to two sisters equally and the whole income to the survivor and the principal to such person as the survivor might designate. Garrett v. Duclos, 104 N. Y. S. 289.

56. Not to permit him to dispose of larger estate than that vested in her. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287.

57. Where deed creating trust provided that beneficiary should not dispose of her interest without the consent of the trustee, held that deed by her and trustee purporting to convey fee was valid execution of power of sale to extent of her interest, and grantee's possession up to time of her death, at which time her interest ceased and passed to her children under terms of deed, was rightful. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287.

58. Where beneficiary having equitable estate in fee conveyed same after trustee's death, held that her grantee was entitled to conveyance of legal title by trustee appointed in suit brought for that purpose. Morgan v. Morgan [W. Va.] 55 S. E. 389.

59. Huntress v. Allen [Mass.] 80 N. E. 949.

60. Where a life beneficiary gave to her husband, as trustee, a note in settlement of a shortage in the trust estate which she had received to her own use above the securities on hand, and it requires the entire amount of the note to make the trust estate good for devastavit that has been occasioned, and many of the securities of the trust estate stand in the life beneficiary's name, and large amounts thereof were sold with her personal knowledge, and the money received by her and deposited in a joint bank account, her estate was liable to the remaindermen for the amount of the note. Putnam v. Lincoln Safe Deposit Co., 104 N. Y. S. 4. Modifying 49 Misc. 578, 100 N. Y. S. 101.

61. Where the life beneficiary of a trust estate sold securities standing in her name, and the proceeds were used in the purchase of new securities, which are treated as part of the trust estate, and the life beneficiary gives a note on which her estate is charged to balance a shortage, the proceeds of the sale should not be considered a part of the

§ 7. *The trustee. Judicial appointment.*[62]—The appointment of trustees by the courts is "administering relief" within the meaning of statutes providing for the submission of controversies.[63]

Who may be trustee.[64]—It is sometimes held that the beneficiary of the trust may act as trustee.[65] A married woman may, in most states, act as a trustee,[66] and a husband may act as trustee for his wife.[67]

Who is trustee.—While equity will not permit a trust to fail for want of a trustee[68] still one being given the powers and duties of a trustee he will be so regarded though not specifically called a trustee.[69] The fact that the trustees under a will are also the executors thereof does not affect their character as trustees, the two offices being entirely separate.[70]

Death of trustee.—Upon the death of the trustee before the termination of the trust, the trust follows the legal title[71] subject to the power of the court to appoint a successor.[72]

Succession and judicial appointment of new trustee.[73]—Selection of a new or substituted trustee rests in the discretion of the courts[74] and is not subject to review on appeal.[75] In the absence of an exception the regularity of the proceedings cannot be reviewed on appeal.[76] In the absence of a provision for successorship, the entire estate devolves on the survivor of joint trustees.[77]

Resignation.[78]—When a trust is annexed to the office of executor, resignation of the latter office carries the relinquishmnt of the former.[79]

Removal.[80]—Courts of equity have power to remove trustees on sufficient cause.[81] What is sufficient cause being a matter peculiarly within the discretion of the court,

trust estate in favor of the remaindermen. Putman v. Lincoln Safe Deposit Co., 104 N. Y. S. 4, modifying 49 Misc. 578, 100 N. Y. S. 101.

62. See 6 C. L. 1752.

63. Court and Practice Act 1905, p. 93, c. 18, § 323, so construed. In re Guild [R. I.] 65 A. 605. See Submission of Controversies, 8 C. L. 2040.

64. See 6 C. L. 1752.

65. Testator's widow, the beneficiary of the trust, could act as trustee, and was entitled to receive the same commission as her cotrustees. Robertson v. De Brulatour, 188 N. Y. S. 301, 80 N. E. 938.

66. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

67. Substitution of husband of beneficiary as trustee on resignation of original trustee held permissible and valid. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287.

68. See ante § 2.

69. Where trust was created and no trustee appointed by name but the executrix was given the duties of the trustee held she was the trustee. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014.

70. West v. Bailey, 196 Mo. 517, 94 S. W. 273. Fact that one executor declined to qualify and other was removed by probate court held not to justify court in directing administrator to hold trust fund to be paid to beneficiary as court might direct, in violation of terms of will. Id.

71. Where a trust in personalty devolved on intestate in his life by the decree of a court of competent jurisdiction, and he accepted the trust, it devolved on his personal representatives on his death. Kauffman v. Foster [Cal. App.] 86 P. 1108. Where by the terms of a will an executor, as such, is made the trustee of a trust for distribution of the estate among the testator's children, upon the death of such trustee before the execution of the trust his adminstrator de bonis non is entitled to the fund. In re Sheets' Estate [Pa.] 64 A. 413. That the trust was for the distribution of an estate and was by the terms of the will postponed until the death of the testator's children held not to affect the case. Id. On death of trustee, land held to have descended to his heirs subject to trusts declared by deed conveying it to him. McAfee v. Green [N. C.] 55 S. E. 828.

72. The trustees being dead the court may appoint a trustee to sell the property for the purpose of distribution. Noble v. Birnie's Trustee [Md.] 65 A. 823. Circuit court has concurrent jurisdiction with the orphans' court in such matter. Id. On death of trustee held competent for court on application of all parties in interest, to appoint new trustee to hold legal title to preserve contingent remainders. McAfee v. Green [N. C.] 55 S. E. 828.

73. See 6 C. L. 1753.

74. In re Pitney, 186 N. Y. 540, 78 N. E. 1110. Refusal to appoint life beneficiary's nominee an appointment of trust company held proper. In re Pitney, 113 App. Div. 845, 99 N. Y. S. 588.

75. In re Pitney, 186 N. Y. 540, 78 N. E. 1110.

76. Wilson v. Kent [Colo.] 88 P. 461.

77. La Forge v. Binns, 125 Ill. App. 527.

78. See 2 C. L. 1939.

79. Cushman v. Cushman, 102 N. Y. S. 258.

80. See 6 C. L. 1753.

81. Lamp v. Homestead Bldg. Ass'n [W. Va.] 57 S. E. 249.

which should be guided by considerations of the welfare of the beneficiaries and of the trust estate.[82] A trustee will not be removed for every violation of duty or even breach of the trust, if the fund is in no danger of being lost.[83] There must be a clear necessity for interference to save trust property[84] though, except where resulting from a misconception of his duties,[85] a trustee refusing to act and thereby defeating the very object of the trust will be removed.[86] While mere absence from the state does not disqualify a trustee from acting,[87] still the fact of nonresidence being coupled with lack of interest and charges of excessive fees will warrant the removal of a trustee.[88]

§ 8. *Establishment and administration of the trust. A. Nature of trustee's title and establishment of estate.*[89]—The trustee of an active trust takes the legal title to the trust estate[90] during the life of the trust,[91] and this is true though the instrument creating the trust contains provisions for revocation.[92] This of course includes the right to possess and use the trust fund for the purposes thereof.[93] But though he has the legal title yet he has no leviable interest in the estate,[94] and the latter, upon the trustee becoming bankrupt, does not pass to his trustee.[95] Until repudiation brought home to the beneficiary the possession of the trustee[96] or his

82. Removal of trustee appointed by building association to wind up its affairs, and appointment of receiver, held poper. Lamp v. Homestead Bldg. Ass'n. [W. Va.] 57 S. E. 249.

83. In re Thieriot, 102 N. Y. S. 952.

84. In re Thieriot, 102 N. Y. S. 852. Where the executor and trustee of an estate greatly depreciated the propety thereof by unauthorizedly continuing speculations begun by decedent, caused himself to be elected president of a corporation of which the estate owned the majority of the stock at a salary of $12,000 a year, and in addition to his salary during the time he was president presented bills for legal services for $24,000 held he should be removed, his own interests being antagonistic to those of the beneficiaries. In re Hirsch's Estate, 101 N. Y. S. 893.

85. Where a testamentary trustee was directed by will to expend whatever in his judgment was necessary for the support and education of an infant and refused to make such expenditure, it was ground for his removal, but where the act was caused by his misconception of his duties, and resulted in no serious harm, an application therefor will be denied on condition that the trustee reimburse petitioners for expenses of the application. In re Rothaug's Estate, 101 N. Y. S. 973.

86. Where a trust called for the maintenance of a beneficiary during his life, if the trustees fail to perform their duty to set aside a sum sufficient to secure such maintenance, the beneficiary is entitled to a removal of the trustees and to have the trust administered by others who would carry out ite terms. Robinson v. Cogswell [Mass.] 78 N. E. 389.

87. LaForge v. Binns, 125 Ill. App. 527.

88. Testamentary trustee holding property in trust for benefit of cemetery association, removed where he was nonresident, took no personal interest in maintenance of cemetery, and charged grossly excessive sum as commission. Barkley Cemetery Ass'n v. McCune, 119 Mo. App. 349, 95 S. W. 295.

89. See 6 C. L. 1754.

90. Allen v. Rees [Iowa] 110 N. W. 583. Under a trust of personalty to invest and reinvest and to collect rents and profits; to foreclose and take title in trustee as such held trustee took the legal title for purposes of taxation. People v. Wells, 103 N. Y. S. 874.

91. Where deed created trust for use of married woman for life, with remainder in fee to her children in case she predeceased husband leaving children, held that, on happening of contingency, use became executed, and legal title vested in children. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287.

92. People v. Wells, 103 N. Y. S. 874.

93. Testamentary trustees have right to trust fund and to invest and use it as will directs until they refuse to act or are removed. West v. Bailey, 196 Mo. 517, 94 S. W. 273. Testamentary trust must be administered according to terms of will creating it, and court has no right to direct fund to be held by administrator d. b. u. c. t. a. subject to its orders instead of paying it to trustees appointed by testator merely because it believes that application of money to designed uses can be better secured thereby. Id.

94. So held where father conveyed land in trust, because of the father's desire to make some provision for the son and his family. Fleming v. Wood [Mich.] 111 N. W. 80. Attaching creditors cannot take the trust estate. Complaint held to state a cause of action. Cunningham v. Bank of Nampa [Idaho] 88 P. 975. Property cannot be levied upon and sold under judicial process by any of his creditors in satisfaction of their debts or claims. Burns' Ann. Stat. 1901, §§ 3392, 3393, construed. Ellison v. Ganiard [Ind.] 79 N. E. 450.

95. Ellison v. Gainard [Ind.] 79 N. E. 450.

96. Where trustee entered into possession of land without any other title than that conferred upon him by the deed creating the trust, held that he would be presumed to have taken possession as trustee by virtue of said deed, and not adversely to beneficiary, and that his possession could not become adverse to latter and her heirs without some unequivocal act brought to her knowledge, or knowledge of heirs after her death, show-

wife[97] is not adverse to the beneficiary or trust estate. Where necessary for the protection of the estate the court may require the trustee to give security before receiving the estate.[98] The omission to name successors in a trust deed is without significance so far as sales by the original trustee are concerned, and should a new trustee be appointed, he can be empowered to carry out the purpose of the trust so far as is found necessary.[99]

A reconveyance to a trustee as such renders the property part of the trust estates.[1]

(§ 8) *B. Discretion and general powers of trustees and judicial control.*[2]—While a court of equity will not interfere with a trustee's exercise of discretionary powers unless he abuses such discretion,[3] still, even though the trustee be given almost unlimited discretion and though he be relieved from giving a bond or accounting, a court of equity has full power to prevent mismanagement and to correct any abuses of the trust,[4] and to see that the exercise of the discretion is such as to reasonably benefit the beneficiary and, in some cases, his creditors.[5] It follows that where the size of an annuity fund is left to the discretion of the trustees and the amount settled upon becomes larger than is necessary to produce the surviving annuities, equity can reduce it to a proper amount transferring the excess to the residuary fund.[6] In the exercise of discretionary powers the trustees may avail themselves of the judgment and wishes of the testator.[7] Though as a general rule where the administration of a trust is vested in several trustees, they must all co-

ing that he claimed title in opposition to her or their title, or occupation and user so open and notorious and inconsistent with their rights that law would authorize therefrom the presumption of such knowledge by them. Houghton v. Pierce [Mo.] 102 S. W. 553. Evidence held insufficient to show that trustee's possession was ever changed to adverse holding in repudiation of beneficiary's right. Id.

97. Possession of the wife of a trustee cannot be considered adverse to her husband, or to his cestui que trust, without the most unequivocal assertion of claim of a separate estate hostile to both, and brought home to their knowledge. There being no evidence tending to show that wife of deceased trustee claimed possession of land adversely to husband, and no evidence as to how she came into possession of note and mortgage evidencing debt which was prior lien thereon, held that her possession of note and mortgage was insufficient foundation for claim of adverse holding. Houghton v. Pierce [Mo.] 102 S. W. 553.

98. Where, on petition by trustee for order compelling executor to turn over trust fund to him, orphans' court found that trustee was wholly insolvent, held proper for orphans' court, or in any event for appellate court, to order payment to be made only after trustee gave security. Deaven's Estate, 32 Pa. Super. Ct. 205. In suit to construe will held not necessary for court to require testamentary trustees to give bond and security for faithful performance of their duties, since that could, if necessary, be required of them in proceeding instituted under Rev. St. 1899, § 4582, for that purpose. West v. Bailey, 196 Mo. 517, 94 S. W. 273.

99. Vaughan v. Zitscher, 4 Ohio N. P. (N. S.) 90.

1. Where the holder of the title to land as a purchaser at a foreclosure sale under a power of sale in a mortgage to a trustee under a will reconveys to the mortgagee in his capacity as trustee, he will hold the land as part of the trust estate. Atkins v Atkins [Mass.] 80 N. E. 806.

2. See 6 C. L. 1755.

3. Exercise of discretion will not be interfered with by the court so long as he acts in good faith according to his best judgment and uninfluenced by improper motives. Kimball v. Blanchard, 101 Me. 383, 64 A. 645. Where a power of judgment as to the fulfillment of a condition is lodged solely in the trustees the trust cannot be enforced in that regard if the trustees refuse or neglect to exercise such power, unless the refusal proceeded from a vicious, corrupt, or unreasonable cause. Cushman v. Cushman, 102 N. Y. S. 258. Held no abuse of discretion in selling property. Browning v. Stiles [N. J. Eq.] 65 A. 457. Courts will not interfere with trust in favor of charity unless there is substantial abuse or misuse of funds, which amounts to a perversion of the charity. Hayes v. Franklin, 141 N. C. 599, 54 S E. 432.

4. Keeler v. Lauer [Kan.] 85 P. 541.

5. Though discretion may be given trustee in management of estate, and as to amount of profits therefrom to be paid to cestui que trust, such discretion is to be exercised reasonably for benefit of latter, or his creditors, and is always subject to control of court of equity. Hubbard v. Hayes, 30 Ky. L. R. 406, 98 S. W. 1034. Court in which judgment against cestui que trust was rendered held to have jurisdiction of action to satisfy it out of trust property, it not being action to settle trust. Id.

6. Griffen v. Keese, 187 N. Y. 454, 80 N. E. 367, modifying 100 N. Y. S. 903.

7. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

operate in the exercise of the powers of their office, and cannot act separately or independently of each other, one may often act as agent for all, and there may be a ratification of the act of one by his associates.[8] Specific powers of trustees depend on the intent of the settlor as evidenced by the wording of the instruments creating the trust.[9]

Judicial instructions.[10]—Where the trustee applies for instructions as to the performance of his duties, acts which he has power to perform, the court will not ordinarily entertain jurisdiction unless some other equity is brought before the court to give a clear jurisdiction in the case.[11] He is not entitled to have the title to land established under the guise of asking for such instructions,[12] and where he is uncertain whether funds in his hands constitute income or principal, he should file an account and have the controverted questions raised by exceptions.[13] Until the determination of such question it is error for the court to order him to pay out such funds as either income or principal.[14]

(§ 8) *C. Management of estate and investments.*[15]—It is the duty of the trustee to exercise reasonable care in the management of the trust fund, and he is responsible for any loss resulting from his failure to do so.[16] He should protect the trust estate and where possible pay off prior liens out of the income,[17] and where necessary to protect the estate it will be presumed that he has done his duty in this regard.[18] Statutes and rules of law limiting the character of investments for trust funds have no application to a trust voluntarily created by a donor in prohibited investments.[19] The trustee has no right to speculate with trust property,[20] and a power to invest does not confer authority to continue a speculation commenced by the testator,[21] and the good faith of the trustee does not excuse such action.[22] Trustees who purchase land without authority take the title to the same as individuals though the deed runs to them as trustees.[23] It already appearing that the trustee entered

8. Ubhoff v. Brandenburg, 26 App. D. C. 3. Where, after two trustees under deed of trust given to secure note had bid in property on sale under such deed, one trustee agreed with indorser of note that, if he would procure purchaser for property for sum sufficient to pay note with interest and costs, trustee would surrender note to such indorser and release him from further liability, and indorser procured such a purchaser, held that sale of property to latter by both trustees was ratification by both of agreement with indorser who was entitled to surrender of note. Id.

9. Where trustees had power to use money for support and maintenance of beneficiary held they had power upon advancing beneficiary to obtain a promise of repayment. Perry v. Avery [Mich.] 14 Det. Leg. N. 110, 111 N. W. 746. Will held to rest in the trustee the discretion of determining upon the amounts and times of payment to beneficiary. Kimball v. Blanchard, 101 Me. 383 64 A. 645. Where testator's will gave certain property to his widow for life and the balance to named trustees, to apply the same on the widow's death to the creation of a charitable institution, the trustees had power to dispose of their interests in the trust property and execute the trust during the lifetime of the life tenant. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

10. See 6 C. L. 1756.

11. Browning v. Stiles [N. J. Eq.] 65 A. 457.

12. Goetz v. Siekel [N. J. Eq.] 63 A. 1116 So held where it was asserted that trust was void and the trustee filed a bill to obtain a decree that the trust should be performed and all necessary directions given for that purpose and for further relief. Id.

13, 14. In re Scott's Estate [Pa.] 64 A. 549.

15. See 6 C. L. 1756.

16. Garth v. State St. Baptist Church, 29 Ky. L. R. 1176, 96 S. W. 1124.

17. Houghton v. Pierce [Mo.] 102 S. W. 553.

18. It being duty of trustee to protect trust estate, and to pay off prior lien thereon out of rents and profits, held that, in absence of any evidence as to how his widow obtained possession of note and mortgage, evidencing such prior lien, it would be presumed that he had satisfied them out of rents which were shown to have gone to him and his family. Houghton v. Pierce [Mo.] 102 S. W. 553.

19. National bank stock. Fowler v. Gowing, 152 F. 801.

20. Where one holds title as trustee for the security of another, he has no right to speculate with the property by selling or pledging it and such transactions cannot be the subject of an accounting against complainant in a suit by him for the purchase price. Wood v. Schoolcraft, 145 Mich. 653, 13 Det. Leg. N. 655, 108 N. W. 1075.

21. Using trust funds to "protect" stock purchased on margins. In re Hirsch's Estate, 101 N. Y. S. 893.

22. In re Hirsch's Estate, 101 N. Y. S. 893

23. Paolicchi v. American Tel. & T. Co., 104 N. Y. S. 162

into contract as trustee and for the benefit of the estate, the estate, and not the trustee individually, is bound thereby,[24] and such contract may be enforced in equity against such estates, though such estates are not legal entities.[25] Where trustee contracts as such it will be presumed that he is acting for the estate.[26] Additions to capital are subject to the terms of the trust the same as the original principal.[27] Mere discussion by trustees and apparent agreement of majority as to the exercise of discretionary powers is insufficient to constitute an execution of the trust.[28]

Estoppel of beneficiaries to question acts.[29]—The fact that no objections have been made to the trustee's disregard of the provisions of the trust will not justify the trustee in further disregarding the explicit directions of the will.[30]

(§ 8) *D. Creation of charges, mortgage and lease of estate.*[31]—A trustee stands upon a different footing from an executor or administrator as regards the transfer of securities.[32] Administration is no part of his duties; his office is to hold and safely keep the trust funds in accordance with the terms of the instrument creating the trust.[33] If he transfers or pledges securities, it must be in pursuance of an express authority contained in the trust itself,[34] or by virtue of an authority implied from the nature of said trust or the character of the securities in his hands.[35] It follows that one taking a pledge of securities from a trustee does so at his peril,[36] and the trustee's act being unauthorized and he failing to account for the proceeds, the pledgee may be compelled to reassign the securities to the trust estate.[37] Where the beneficiaries of an express trust expressly authorize the incurring of certain liabilities and agree to pay therein they are liable therefor and may be sued direct.[38]

Power to lease.[39]—A power to sell does not include a power to lease or license.[40]

Mortgages.[41]—Where a trust is created for the support and maintenance of the beneficiary the trustee has no power to assign or mortgage the trust estate in the absence of express authority authorizing him so to do.[42] A trustee being authorized to sell and dispose of trust property and reinvest the proceeds, he can give a mortgage for the purchase money or any part thereof,[43] but this does not authorize the giving of a second mortgage for the unpaid portion of the purchase price with accrued interest and other debts not effective as against the interest of the beneficiary.[44] Though a trustee has no power to mortgage the premises, still money paid the estate under a mortgage executed by him may, it seems, be recovered of the estate.[45]

24, 25. Empire Fire Proofing Co. v. Comstock, 121 Ill. App. 518.

26. Presumption that goods were purchased by defendant in his capacity as trustee arising from fact that he signed note given for purchase price as trustee held not overcome by his statement that at time goods were bought nothing was said about his buying them as trustee. Riggins v. Boyd Mfg. Co., 123 Ga. 232, 51 S. E. 434. Even if he could show undisclosed intention to buy part of goods for trust estate and part for himself individually, in order to relieve estate he was bound to show how much he bought for each, and what contract price was. Id.

27. Where part of the trust estate consists of stock in corporations which increase their stock and allow each stockholder the privilege of a proportionate share of the new stock, stock so taken by the trustee is subject to the same provisions of the trust as the original stock. Curtis v. Osborn [Conn.] 65 A. 968.

28. Rothschild v. Schiff, 188 N. Y. 327, 80 N. E. 1030.

29. See 6 C. L. 1757.

30. Curtis v. Osborn [Conn.] 65 A. 968.

31. See 6 C. L. 1757.

32, 33. Kenworthy v. Levi, 214 Pa. 235, 63 A. 690.

34. Kenworthy v. Levi, 214 Pa. 235, 63 A. 690. Under a deed of trust giving the trustee the power to sell and convey any part of the trust estate in fee simple, "provided, however, that the principal of the estate shall not become impaired or incumbered," held trustee had no power to pledge a mortgage belonging to the estate as security for a loan. Id.

35, 36. Kenworthy v. Levi, 214 Pa. 235, 63 A. 690.

37. So held where trustee embezzled proceeds of pledge. Kenworthy v. Levi, 214 Pa. 235, 63 A. 690.

38. Poland v. Beal [Mass.] 78 N. E. 728.

39. See 6 C. L. 1757.

40. Paolicchi v. American Tel. & T. Co., 104 N. Y. S. 162.

41. See 6 C. L. 1757.

42. Reed Co. v. Klabunde [Neb.] 108 N W. 133.

43, 44. Stump v. Warfield [Md.] 65 A. 346.

45. Sprague v. Betz [Wash.] 87 P. 916.

(§ 8) *E. Sale of property.*[46]—The rights of the trustee to sell the property depends upon the intention of the settlor,[47] and hence a power of sale is implied where the manifest intent of the settlor requires that the property be sold in order to carry out the provisions of the will.[48] Where provision is made for the use of the income and property is received as income the trustee is authorized to sell the same.[49] So also a power to hold property invested and pay over income confers a power to sell.[50] Where the trust instrument indicates an intention that certain property shall he held and used to produce income during the lives of stated persons while other property might be sold after the expiration of a short period of time, the latter should be sold first to pay debts.[51] A power of sale vested in the trustee of a passive trust, executed by the statute of uses, is of no effect.[52] As to what constitutes a valid exercise of a power of sale largely depends upon the facts of the case.[53] While the trustees cannot delegate the power of sale to an agent it seems that they may by ratification validate a sale so made.[54] Trustees holding the legal title to land can only act jointly in making deeds or agreements for the sale thereof,[55] the consent or ratification of the majority being essential to the validity of the act.[56] In some states, where a married woman is trustee she may convey the property without her husband joining.[57] An illegal conveyance conveys no title,[58] but where a trustee is clothed with the legal title, and is not restrained by the terms of the trust, a conveyance by him, although in violation of the trust, carries the legal title and the beneficiaries must seek their remedy in equity.[59] And in a suit by heirs of the beneficiaries attacking the conveyance, the plaintigs have the burden of showing that the trustee violated the terms of his trust.[60] Where a sale of property is constructively fraudulent as to the beneficiaries,[61] a suit may be maintained if reason-

46. See 6 C. L. 1758.

47. Where property is devised for certain purposes the fulfillment of which has become impossible or improbable and the trust instrument contemplates a right in the trustees to sell after the expiration of a certain time, it is proper for the court to allow the sale of such property after the expiration of the time. Robinson v. Cogswell [Mass.] 78 N. E. 389. Where a testator authorized a final sale of all of his property when his daughters were dead or married, the fact that all died unmarried could not prevent a sale. Noble v. Binne's Trustee [Md.] 65 A. 823. Will devising property to certain persons and appointing another to sell and dispose of same in such manner as to him seems to best interest of such devisees, and to invest proceeds for their benefit, held to constitute such other person trustee, with power to sell and convey property, and when he did so by proper deed, it passed to vendee entire interest of devisees. Hagan v. Holderby [W. Va.] 57 S. E. 289.

48. So held where will required "paying over" to beneficiarfes and mentioned the fact that purchasers need not look to application of proceeds. Burnham v. White, 102 N. Y. S. 717. Will held to give trustees power to sell realty during life of infant life tenant. McDonald v. Shaw [Ark.] 98 S. W. 952.

49. Corporate stock received as income. Green v. Bissell [Conn.] 65 A. 1056.

50. Browning v. Stiles [N. J. Eq.] 65 A. 457.

51. Robinson v. Cogswell [Mass.] 78 N. E. 389.

52. Attempted sale by trustee does not pass title. Everett v. Jordan [Ala.] 43 So. 811.

53. Where a trustee having no power to mortgage makes a fictitious sale and the grantee mortgages the premises the money going to the estate and subsequently an agreement is entered into between the trustee, mortgagee, and legatees whereby the trustee deeded the property to the mortgagee the legatees having a right of redemption, held this latter transaction was a valid exercise of a power of sale. Sprague v. Betz [Wash.] 87 P. 916.

54. Hill v. People [Ark.] 95 S. W. 990.

55. Nesbitt v. Tarbrake, 30 Pa. Super. Ct. 460.

56. Where land was devised to three trustees with power to sell and convey same, held that it required concurrence of two of them to make valid sale. Hill v. People [Ark.] 95 S. W. 990. Evidence held to authorize finding that other two trustees ratified sale by one of them, particularly where trustees permitted purchaser to make improvements and accepted payments from him. Id.

57. In Tennessee married woman may accept, hold, and execute trust relating to realty, and has power, in execution thereof, to convey realty without concurrence of her husband or his joinder in conveyance, and this rule extends to trusts in which husband is beneficiary, and to conveyances made in its execution directly to him. Insurance Co. v. Waller [Tenn.] 95 S. W. 811.

58. Conveyance by one holding property in trust for a certain person to such person and his wife jointly held to vest no title in wife. Gross v. Jones [Miss.] 42 So. 802.

59, 60. Davidson v. Mantor [Wash.] 89 P. 167.

61. Where a trustee under a will conveys trust property to another, and it is imme-

ably brought,[62] to set the sale aside. Mere inadequacy of price is not in itself sufficient ground for vacating the sale.[63] One may become estopped to question the validity of the sale.[64] A court of chancery in a suit to set aside a sale has power to take an accounting between the parties and to fix the terms upon which relief is granted, though there be only a general prayer for relief and no prayer specifically asking for an accounting.[65] Deeds by trustees not delivered until their authority has expired by limitation are void.[66] Except where the power of sale is absolute,[67] confirmation by the court is generally required.[68]

Under the statutes of most states a sale may be ordered by the court on the application of all parties in interest,[69] and where beneficial to the parties the court may order that it be sold at private sale.[70] Such a sale is a judicial one, even though made prior to the obtaining of the order,[71] and hence the purchaser failing to comply therewith he may be ordered to show cause why the property should not be resold at his expense and risk.[72] In such case the decree ordering resale must be certain as to the amount to be paid and in this connection that is certain which can be made so.[73] Cases dealing with the evidence are shown below.[74]

diately reconveyed to him individually, the transaction is a constructive fraud, voidable at the election of the beneficiaries under the will. Chorrmann v. Bachmann, 104 N. Y. S. 151. Where a trustee under a will who was not bound to sell land devised for a trust fund at any specific time and there was no necessity for haste, sold the land at a time when he knew a contest of the will was impending, whereby the land sold for a grossly inadequate sum to purchasers who knew they were buying trust property and of the pending will contest, the sale was such a constructive fraud on the right of the cestuis que trustent named in the will as entitled them to have the same vacated. Beall v. Dingman [Ill.] 81 N. E. 366. Evidence in suit to set aside sale held sufficient to show that the purchasers knew at the time of the purchase of a proposed contest of the will, and that on account of such pending contest, it was an unfavorable time to sell the land. Id. Also that rumors of the contest had seriously depreciated the value of the property. Id.

62. Nearly two years' delay in bringing suit to set aside the sale held not such laches as to bar the suit where during such time a contest over the will was instituted and determined. Beall v. Dingman [Ill.] 81 N. E. 366. A suit to set aside a conveyance by the trustee as a constructive fraud must be brought within 10 years from the making thereof. Code Civ. Proc. § 388. Chorrmann v. Bachmann, 104 N. Y. S. 151.

63. Starkweather v. Jenner, 27 App. D. C. 348. Price obtained for property held not inadequate. Browning v. Stiles [N. J. Eq.] 65 A. 457.

64. In an action by the beneficiary under a will to set aside a sale of land made by the trustee thereof named in the will who was also appointed executor, held that the beneficiary was not estopped to maintain the action by the approval of the sale by the probate court; the money having been received in the capacity of trustee and not in that of an executor. Beall v. Dingman [Ill.] 81 N. E. 366. One requesting sale, agreeing to indemnify trustee, and giving mortgage back for part of the purchase price, held estopped to attack such transaction especially after joining in a request for confirmation by the probate court. Richards v. Keyes [Mass.] 80 N. E. 812.

65. Beall v. Dingman [Ill.] 81 N. E. 366.

66. Anderson v. Messinger [C. C. A.] 146 F. 929.

67. The trustee being vested with an absolute discretion as to selling the property confirmation by the court will not be required. Murphy v. Union Trust Co. [Cal. App.] 89 P. 988.

68. Rev. Laws c. 148, § 24, providing for confirmation by the probate court applies not only when there is an alleged irregularity or want of notice, but also where the want of authority is drawn in question. Richards v. Keyes [Mass.] 80 N. E. 812. Such act is constitutional. Id.

69. Where, on death of original trustee, new one had been appointed to hold legal title to preserve contingent remainders created by deed creating trust, held that, on application of all parties in interest, court could direct sale of land both under Revisal 1905, § 1590, authorizing sale where there is vested interest and contingent remainders, and independently thereof. McAfee v. Green [N. C.] 55 S. E. 828.

70. McAfee v. Green [N. C.] 55 S. E. 828.

71. Sale made by substituted trustee and special commissioner under order of court, he having no authority, as trustee, to sell, held judicial one though made privately, and though land was sold at price and on terms proposed by purchaser before order of sale was obtained. Richardson v. Jones [Va.] 56 S. E. 343.

72. Where purchaser at judicial sale by trustee and special commissioner failed to comply with terms of his purchase, held that rule to show cause why property should not be resold at his costs and risk was proper proceeding to compel him to do so. Richardson v. Jones [Va.] 56 S. E. 343.

73. Decree directing resale unless purchaser paid specified sum with interest, and half costs and commission and specified sum which was half fee of attorney who instituted and prosecuted suit, held sufficiently definite as to amount to be paid. Richardson v. Jones [Va.] 56 S. E. 343.

74. Evidence held to show that defendant

(§ 8) *F. Payments or surrender to beneficiary.*[75]—Where trustee accounts for proceeds of sale, neither he nor his grantees are responsible for the disposition of the funds by the beneficiaries.[76]

§ 9. *Liability of trustee to estate and third person.*[77]—While a trustee is liable for a breach of trust,[78] he is not liable for honest mistakes of judgment.[79] By acquiescence or concurrence, an adult beneficiary or co-trustee may become estopped to question acts constituting a breach of trust.[80] A trustee is personally liable upon contracts for services entered into by him as trustee.[81] A trustee of corporate stock does not personally incur a stockholder's liability.[82] The trustee of a resulting trust arising from the fact that he has purchased lands with the funds of another is not entitled to the value of improvements made by him on such lands.[83] Except for fraud or negligence,[84] a cotrustee is only liable for the assets coming into his hands.[85] A trustee cannot recover from his cotrustee half the amount of a surcharge made by the court on accounting in the absence of a showing that he has actually paid the amount thereof out of his own funds.[86] The right of action accruing by reason of the trustee's wrongful conduct belongs to the beneficiaries.[87] A substituted trustee does not become personally liable for debts incurred by his predecessor unless he assumes them.[88]

§ 10. *Liability on trustee's bond.*[89]

§ 11. *Personal dealings with estate.*[90]—Equity will look with great suspicion into transactions between trustees and their cestuis que trustent, and, if there is

agreed to pay trustees specified sum per acre for land. Hill v. People [Ark.] 95 S. W. 990.

75. See 6 C. L. 1759.

76. Beneficiaries were husband and wife and husband retained all of fund. Davidson v. Manton [Wash.] 89 P. 167.

77. See 6 C. L. 1759.

78. One holding land as trustee for another and for the latter's security, it is a breach of trust for him to sell or mortgage the land and appropriate the proceeds to his own purposes and thereby destroy the security. Wood v. Schoolcraft, 145 Mich. 653, 13 Det. Leg. N. 655, 108 N. W. 1075.

Trustee who is guilty of actual misconduct or unreasonable negligence in performance of his duty becomes responsible to person for whom trust property is held, and is chargeable in equity with all damages caused to the estate by his breach of trust. Pledgee converting pledged property. Demars v. Hudon [Mont.] 82 P. 952.

79. A trustee does not become liable to his beneficiaries merely because an adverse decision is rendered, against him in an action brought by him in the interest of the estate, but only when it is shown by competent evidence that he suffered defeat by his own fraud or negligence. Held not liable where court believed countervailing witnesses and consequently referee lost his suit. In re Gilroy, 104 N. Y. S. 716.

80. Where an adult beneficiary or cotrustee has assented to or concurred in the breach of trust, or has subsequently acquiesced in it, he cannot afterwards proceed against those who would otherwise be liable therefor. Vohmann v. Michel, 185 N. Y. 420, 78 N. E. 156. Where co-trustee fraudulently satisfied mortgage and embezzled proceeds and trustees and adult beneficiaries released all parties from liability, held satisfaction would only be vacated to the extent of the interest of infant beneficiaries. Id.

81. Hiring real estate broker to make sale. McGovern v. Bennett [Mich.] 13 Det. Leg. N. 853, 109 N. W. 1055.

82. Trustee of National bank stock. Fowler v. Gowing , 152 F. 801.

83. Pearce v. Dyess [Tex. Civ. App.] 101 S. W. 549.

84. Where funds were directed to be invested in a particular manner, held trustee was negligent in not seeing that funds in the hands of a cotrustee were so invested. In re Beatty's Estate, 214 Pa. 449, 63 A. 975.

85. In re Beatty's Estate, 214 Pa. 449, 63 A. 975. Where suit was brought to recover profits made by one of three trustees, there being no claim that defendant shared the gains and profits sought to be recovered with his cotrustees, they are not necessary parties to the bill. Rev. St. § 737, and Equity Rules, 22, 47, and 53 construed. Bay State Gas Co. v. Rogers, 147 F. 557.

86. Mansfield v. Mansfield, 32 Pa. Super. Ct. 119.

87. Since, if property was transferred to defendant for benefit of grantor's heirs, it created trust of which defendant was trustee and grantor's heirs the beneficiaries, held that, if such was case, any right of action accruing after grantor's death by reason of wrongful conduct of trustee belonged to heirs as beneficiaries of trust and not to grantor's administrator. Griesel v. Jones [Mo. App.] 99 S. W. 769.

88. Foote v. Cotting [Mass.] 80 N. E. 600. Where trustee of undivided interest in land and having entire management of interests of other owners used money of plaintiff to pay taxes thereon, held that substituted trustee was not bound to repay amount assessed on trust estate. Id.

89. See 4 C. L. 1749.

90. See 6 C. L. 1760.

any overreaching, will place the parties in statu quo.[91] Transactions whereby the trustee acquires an interest in the trust estate are generally deemed constructively fraudulent as to the beneficiary,[92] and hence voidable by the latter,[93] but, being merely voidable, the transaction is deemed valid until the beneficiary elects to avoid it.[94] From this it follows that such a transaction may be ratified and when once ratified an action cannot be maintained by the beneficiary or his personal representatives to avoid it.[95] The presumption of fraud arising from a purchase of trust property by the trustee is an equitable presumption and is not available at law.[96] A trustee may purchase the trust property at a judicial sale brought about by a third party, which he has taken no part in procuring and over which he can have no control.[97] The sole holder of joint interests left in his exclusive control is bound to the underlying rule that neither directly nor indirectly, nor by any artifice whatever, can the beneficiary be deprived of his share in the net profits of the result of the working out the joint interests,[98] and where the common properties of the trustee and beneficiary have been dealt with together, the burden rests on the trustee to vindicate the transaction and the courts will scrutinize it with great severity.[99] Where a trustee conveys property as such to secure a personal obligation, his grantee acquires no title by which he can question the title of the cestuis que trustent.[1] A trustee using the trust funds for its own profit, he is liable for the legal rate of interest irrespective of the fact that he did not make that much,[2] and noninterference will not estop them to claim such interest.[3] A suit to recover profits arising out of a trust even though the trust has worked itself into cash, thus affording a covenant remedy at law.[4] Upon a recovery being awarded as against the trustee, interest should be added at a fair market rate.[5] As between trustees and cestuis que trustent, laches can hardly ever be said to afford a defense unless for the time when the facts are fully known and understood.[6] The action being based on fraud, limitations do not generally start to run until the discovery of the fraud.[7]

91. Land claimed by trustee to have been purchased by him from cestuis que trustent ordered sold for their benefit and trustee required to account for profits derived from use of land. Sullivan v. Sullivan, 30 Ky. L. R. 541, 99 S. W. 254.

92. Where foreclosure proceedings cut off interest of remaindermen and the purchaser at the sale was the wife of one of the trustees and the property was shortly after the sale conveyed for an expressed consideration of four times as great as the sum paid at the sale, held question of fraud was for the jury. Mead v. Darling [C. C. A.] 151 F. 1006. Where trustee conveyed property to third person and it was immediately reconveyed to trustee, held constructively fraudulent as to beneficiaries and voidable by them. Chorrmann v. Bachmann, 104 N. Y. S. 151.

93. Chorrmann v. Bachmann, 104 N. Y. S. 151. A deed or conveyance by which a trustee acquires an interest in the trust property is merely voidable at the election of the beneficiary or cestui que trust. Bushe v. Bedford, 103 N. Y. S. 403.

94. Bushe v. Bedford, 103 N. Y. S. 403.

95. Bushe v. Bedford, 103 N. Y. S. 403 Evidence held to show such ratification. Id. A beneficiary who consents, or with knowledge of the transaction subsequently acquiesces in the purchase of a portion of a trust estate, or of property in which the estate is indirectly interested, by the attorney for the trustee for the purpose of aiding the trustee in settling the estate, will not be heard to question the propriety of the transaction. Turner v. Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229.

96. In ejectment fraud must be proved. Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F. 998. Where mortgage on property was foreclosed and interests of remaindermen destroyed, held no presumption of fraud by trustees would be presumed. Id. A purchase by a trustee of trust property for his own benefit is merely voidable and in the absence of proof of actual fraud will be sustained in an action at law as distinguished from a suit in equity. So held in an action of ejectment. Id.

97. Starkweather v. Jenner, 27 App. D. C. 348. The rule that a pledgee who is a trustee cannot become the purchaser at his own sale of the pledge is inapplicable to a judicial sale conducted by an officer of the law. Anderson v. Messinger [C. C. A.] 146 F. 929.

98. Bay State Gas Co. v. Rogers, 147 F 557. Trustee dealing with his own property simultaneously with that of the trust held liable to account to the beneficiary for an equitable proportion of the profits derived from the sale of his own interests. Id.

99. Bay State Gas Co. v. Rogers, 147 F. 557.

1. Taylor v. Draper [N. J. Eq.] 63 A. 844.

2, 3. Union Trust Co. v. Preston Nat. Bank, 144 Mich. 106, 13 Det. Leg. N. 194, 107 N. W. 1109.

4, 5, 6. Bay State Gas Co. v. Rogers, 147 F. 557.

§ 12. *Actions and controversies by and against trustees.*[8]—In most states the trustee of an express trust may sue in his own name[9] without joining the beneficiaries, the suit in no way affecting the trustee's relation with the beneficiary.[10] A foreign trustee may sue without previous authority from the courts.[11] Trustees may be sued in their representative capacity for money received by them in that capacity under a contract for the sale of premises coming to them as part of the trust estate and to which they are unable to give good title,[12] but such rule does not authorize an action against them for damages on account of counsel fees, and the examination of title to property which, without having good title, they contracted to sell.[13] The general rules of pleading apply.[14] In a suit by the trustee the complaint should show the nature of the trust and that it is an active one.[15] A court of equity has inherent power, independent of statutory provisions, in the administration of a trust estate to make allowances therefrom to parties engaged in litigation in respect thereto when such litigation is beneficial to the fund,[16] but such allowances are made only to persons acting en autre droit for faithful discharge of their trusts.[17] Generally, in the absence of mismanagement or bad faith, costs are chargeable against the estate.[18]

§ 13. *Compensation and expenses.*[19]—The trustee is entitled to reasonable compensation for his services. The compensation of trustees is to be determined by the responsibility incurred and the service and labor performed, requiring the amount of the estate and the responsibility thereby imposed to be considered.[20] Trustees are generally entitled to commissions on the entire property passing through

7. Under Code Civ. Proc. § 382, subd. 5, an action to set aside an assignment of the fund to the trustee as fraudulent is not barred until six years after the discovery of the fraud. Anderson v. Fry, 102 N. Y. S. 112.

8. See 6 C. L. 1760.

9. Where undisputed testimony of plaintiff was that he was in charge of certain lot as trustee for another with full power to make contracts and bring suits in regard to it, held that he should be regarded as trustee of express trust with authority, under Rev. St. 1899, § 541, to prosecute in his own name action on contract regarding such lot made by him as trustee. Johnston v. O'Shea, 118 Mo. App. 287, 94 S. W. 783.

10. So held under B. & C. Comp. § 29. In a foreclosure suit by trustee, issues as to who were the beneficiaries held foreign to the object of the suit. Wright v. Conservative Inv. Co. [Or.] 89 P. 387. A trustee may sue in behalf of the cestuis que trustent where there is no conflict of interests or controversy between the trustee and the beneficiaries to embarass the court in rendering a decree which will bind all parties having rights or claims. Woodward v. Davidson, 150 F. 840.

11. Differs in this respect from an executor. Doe v. Tenino Coal & Iron Co. [Wash.] 86 P. 938.

12, 13. Scheibeler v. Albee, 99 N. Y. S. 706.

14. In an action to subject a trust fund to the payment of services rendered, it is necessary to allege not only the existence of the trust fund but that some amount remains due for such services. Leyda v. Reavis [Neb.] 110 N. W. 642. A complaint is not subject to dismissal which states a good cause of action against executors and trustees in their representative capacity for a sum specific and separable from another amount demanded for which they are not liable in that capacity. Scheibeler v. Albee, 99 N. Y. S. 706.

15. Bill to enjoin construction of telegraph line over certain land which merely alleged that complainant was trustee of the owners thereof held bad on demurrer in failing to set out nature of trust and to allege facts showing that it was an active and not a mere naked one, since, in latter case, legal title would vest in cestui que trust and alleged trustee would not be proper party to maintain bill. Roman v. Long Distance Tel. & T. Co. [Ala.] 41 So. 292.

16. In re Mankowski, 49 Misc. 606, 99 N. Y. S. 1058.

17. In re Mankowski, 49 Misc. 606, 99 N. Y. S. 1058. Will not be made to trustees and remaindermen who successfully opposed motion by foreign committee of lunatic life beneficiary for order directing transmission of surplus income to said committee. Id.

18. Under the express provisions of Code Civ. Proc. § 1031, where plaintiff, suing as trustee of an express trust, is unsuccessful and there is no showing of mismanagement or bad faith on his part, the costs are to be made chargeable only on the estate. Sterling v. Gregory [Cal.] 85 P. 305.

19. See 6 C. L. 1761.

20. In re Harrison's Estate [Pa.] 66 A. 354. Allowance to trustee appointed by court on death of one named in will is not necessarily limited to 5 per cent, allowed by statute to executors and administrators. Berry v. Stigall [Mo. App.] 102 S. W. 585. Allowance held reasonable. Id. Trustee held, under circumstances, entitled to commission of five per cent on income in addition to cost of services of agent. Wilder v. Hast, 29 Ky. L. R. 1181, 96 S. W. 1106.

their hands, though statutes and circumstances frequently alter the rule.[21] In the case of a continuous trust the trustee, except in extraordinary circumstances or when the instrument whereby the trust is created so indicates, cannot diminish the fund which is to create the income during the life of the trust.[22] Hence, while fees for collecting and paying over the increase are a fit charge upon such increase and may properly be deducted from it,[23] still the compensation for the labor, care, and responsibility pertaining to the conservation of the capital itself are properly charged to it and can be deducted therefrom only on the termination of the trust or the particular trustee's relation to it.[24] Where real estate has increased in value above its assessment at the death of the testator by the natural growth of the city, testamentary trustees who received their regular commissions on the sale of the real estate are not entitled to additional compensation based on such increase.[25] In Pennsylvania a trustee is not entitled to commissions on the capitalized amount of a ground rent which is an incumbrance on the property and which is included in the price of the real estate sold out of which it is payable.[26] The court may, in its discretion, withhold compensation from the trustee for misconduct resulting in loss to the cestui que trust.[27]

Attorney's fees and expenses.[28]—Frequently the reasonable expenses of litigation are chargeable to the estate.[29] The trustee is entitled to reasonable counsel fees,[30] but in the absence of a special contract, counsel for a trustee cannot generally recover for services other than legal ones.[31] Other reasonable necessary expenses should be allowed.[32]

21. Where testamentary trustees sell real estate free from all incumbrances and receive the amount of a mortgage and pay it over to the mortgagee, they are entitled to commissions on all money passing through their hands. In re Brennan's Estate [Pa.] 64 A. 537. Under Code Civ. Proc. §§ 2730, 2802 and 3320, as amended in 1904, where trustees received securities in 1893 and accounted after the amendment, they were entitled to commission on the entire capital of the trust received. Robertson v. De Brulatour, 188 N. Y. 301, 80 N. E. 938. A trustee for the benefit of creditors, who purchased property on foreclosure sale for the benefit of such creditors, was entitled to be reimbursed what he had paid to acquire the property and not merely so much thereof as was required to satisfy the mortgage. Elsert v. Bower, 102 N. Y. S. 707. Under Code Civ. Proc. § 3320, as amended by Laws 1904, p. 1921, the value of unsold real estate held in trust cannot be considered in determining whether or not the trust fund exceeds $100,000 in value for the purpose of determining the trustee's commission. Chisolm v. Hammersley, 100 N. Y. S. 38.

22. Cannot deduct commissions from corpus as soon as it comes into his hands. Mylin's Estate, 32 Pa. Super Ct. 504.

23, 24. Mylin's Estate, 32 Pa. Super. Ct. 504.

25. In re Brennan's Estate [Pa.] 64 A 537.

26. In re Harrison's Estate [Pa.] 66 A. 354. A will gave trustees power to sell real estate with a reservation of the ground rent. The trustees effected such a sale through a real estate agent who paid a commission and the trustees also received commissions on the rentals. Held that they would not be awarded commissions on the capitalized principal of the ground rents. Id

27. Claim of trustee for compensation disallowed where he failed to keep proper account, failed and refused to account for and turn over property in reasonable time after demand, and failed to file account when directed to do so by referee, and put plaintiff to trouble and expense of suing to enforce her rights. Folk v. Wind [Mo. App.] 102 S. W. 1. Where trustee was removed for causes for which he alone was responsible, before termination of trust, held that he was not entitled to compensation out of corpus of estate in addition to commissions on income. Mylin's Estate, 32 Pa. Super. Ct. 504.

28. See 6 C. L. 1762.

29. Suit by beneficiary to have trustee pay her money. Kimball v. Blanchard, 101 Me. 383, 64 A. 645. So held under Code Civ. Proc. § 1031, there being no evidence of mismanagement or bad faith on the part of the trustee. Sterling v. Gregory [Cal.] 85 P. 305.

30. Where counsel for trustees supervises twelve annual accounts and gives advice as to investment and leases and as to the sale of real estate he will be entitled to a $350 fee for services rendered. In re Brennan's Estate [Pa.] 64 A. 537. Allowance of reasonable attorney's fee to trustee held proper Berry v. Stigall [Mo. App.] 102 S. W. 585. Held that charge for attorney's fees should have been allowed even if it was for filing account. Mylin's Estate, 32 Pa. Super. Ct. 504.

31. Where counsel for a testamentary trustee effected a sale of the real estate, he is not entitled to a commission in the absence of evidence that he contracted to act as agent, and where his statement that he found a purchaser is contradicted. In re Brennan's Estate [Pa.] 64 A. 537.

32. Where will authorized trustee to em-

§ 14. *Accounting, distribution, and discharge.*[33]—The right to an accounting is not an absolute one but is based on equitable principles.[34] Where a beneficiary of an annuity has been paid his annuities in full, he is not entitled to an accounting.[35] A trustee must account regardless of the regularity of his appointment.[36] Where trustees under a will sold real estate for part cash and part reservation of ground rent, there was no conversion of the real estate represented by the ground rent and the trustees must account for it as real estate and not as personalty.[37]

Jurisdiction of accounting and distribution.[38]—Where the trust is created before or at the time of the receipt of money by the trustee, an action at law for money had and received will not lie, and hence an equitable action for an accounting can be maintained.[39] The jurisdiction of specific count is largely regulated by statute [40] or former proceedings in the matter.[41] Lapse of time does not bar an action for accounting against the trustee of an active, continuing trust,[42] nor is the time for bringing such action affected by a void or fraudulent assignment of the fund to the trustee.[43]

Credits and charges.[44]—The trustee is chargeable with the entire estate less proper credits.[45] He must also account for all profits made.[46] Payments made with the beneficiary's consent may properly be allowed him.[47] Where business

ploy agents, etc., including a particular trust company, held that services of such company should be paid for out of income of estate and not out of commission allowed trustee. Wilder v. Hast, 29 Ky. L. R. 1181, 96 S. W. 1106. Held that charge for fees of clerk of orphans' court for filing trustee's account should have been allowed. Mylin's Estate, 32 Pa. Super. Ct. 504.

33. See 6 C. L. 1763.

34. Allegations of conversion by trustee held to warrant an accounting. Schlieder v Wells, 99 N. Y. S. 1000. Trustee receiving property on account of the trust estate and claiming the same as his own can be compelled to account. Wilson v. Kent [Colo.] 88 P. 461. Where a husband sold hay cut from land belonging to his wife under an agreement with the buyer to pay a portion of the proceeds to the creditors of both husband and wife, the buyer's failure to conform to such agreement gave rise to a cause of action to compel him to account, maintainable by the husband and wife jointly and not by the husband alone. Ives v. Sanguinette [Ariz.] 85 P. 480. Bill in equity for an accounting held proper remedy to compel trustee of express trust to account for trust fund where he represented variety of interests and accounts were complicated and involved. Horine v. Mengel, 30 Pa. Super. Ct. 67.

35. In re Kirby's Will, 113 App. Div. 705, 100 N. Y. S. 155.

36. Noble v. Birnie's Trustee [Md.] 65 A. 823.

37. In re Harrison's Estate [Pa.] 66 A. 354.

38. See 6 C. L. 1763.

39. Anderson v. Fry, 102 N. Y. S. 112.

40. The supreme and surrogate's courts have concurrent jurisdiction to require trustees, and in case of their death their legal representatives, to account for their acts so far as property has come into their hands, but the supreme court's jurisdiction will not ordinarily be exercised if the jurisdiction of the surrogate is adequate. In re Fogarty's Estate, 102 N. Y. S. 776. Surrogate's court has no jurisdiction where the accounting involves the trying of titles to real estate. Id.

41. Where trustee had accounted in surrogate's court, held such court was the proper place to have subsequent accountings and to afford relief for fraud in prior accountings. Meeks v. Meeks, 100 N. Y. S. 667.

42. Anderson v. Fry, 102 N. Y. S. 112.

43. Anderson v. Fry, 102 N. Y. S. 112. Assignment when set up as a defense may be fraudulent. Id.

44. See 6 C. L. 1763.

45. Where mortgage was assigned to testamentary trustees which have interest at the rate of 5 per cent and they failed to record the assignment for three years, they cannot say that the investment was only at the rate of four and four-tenths per cent where there is no legal proof of a reduction in interest. In re Brennan's Estate [Pa.] 64 A. 537. Where an entire estate was put in trust, the income to be paid to the widow until remarriage, the trustees could not, on such remarriage, diminish the corpus of the estate by deducting therefrom money paid by the widow for the support of her daughter during the existence of the trust. In re Johnson's Estate, 50 Misc. 99, 100 N. Y. S. 373. Where agent for sale testified goods were worth and had been previously sold for $5,050, held a finding that they were worth $4,040 would be sustained. Allsopp v. Joshua Hendy Mach. Works [Cal. App.] 90 P. 39.

46. Where corporation was developed by means of loans made by the stockholders and a stockholder sold some of his stock to another, holding such stock as trustee, held on the corporate property being sold at a profit he must account for the profits in proportion to their respective holdings of the capital stock and not according to the amount of money invested in the enterprise, whether borrowed on the company's notes or paid for stock. Donner v. Donner [Pa.] 66 A. 147.

47. Payments made with the beneficiary's consent for goods bought by the beneficiary

property is left in trust to continue the business, the trustee need not charge himself with the rent of the plant [48] and is entitled to credits for the customary expenses incurred in entertaining buyers, though unaccompanied by vouchers.[49] In such a case the trustee is not chargeable with a shrinkage in the business due to the beneficiary.[50]

Procedure and accounting.[51]—All parties having an interest in the fund are proper parties plaintiff in a suit for an accounting.[52] No one but the personal representative of the beneficiary, on the latter's death, is entitled to be joined in an action to compel a trustee ex maleficio to account.[53] The death of the beneficiary does not abate an action for an accounting if the trustee is still under the duty to collect and hold the trust fund until it can be paid over to those entitled to receive it.[54] A cause of action for money had and received and one for an accounting may be joined in one action.[55] A trustee accounting on the theory that enterprises engaged in by him were authorized by the trust agreement cannot, over objection, amend such account as to be liable on the theory that the enterprises were unlawful without proving such facts.[56]

Costs and appellate expenses.[57]—Where the proceedings show that the trust has been honestly administered, costs should be awarded the trustee out of the fund and directions given for his guidance in the future administration of the trust.[58]

Decree.[59]—The right to order a partial distribution of assets depends on the statutes of the various states.[60] In New York the decree of a surrogate is not conclusive on the parties in establishing a rule of law which will control in the later administration of the estate, but, if not appealed from, is a complete protection to the accounting trustee.[61]

An action for money had and received is a proper remedy by the cestui que trust against the trustee of an express trust only when the trust is fully executed and the amount settled, and nothing remains to be done but for the trustee to pay over the amount to the cestui que trust.[62]

and for interest in the latter's notes held properly allowed the trustee. In re Sheldon's Estate, 101 N. Y. S. 729.

48. Where business property is left in trust to continue the business until the profits fall below a certain amount, the trustee need not charge himself with the rent of the plant and pay the amount thereof into the residuum of the estate. In re Froelich's Estate, 50 Misc. 103, 100 N. Y. S. 436.

49. Where testator in his lifetime in carrying on a business made certain expenditures for the entertainment of buyers to secure their good will, a trustee who under the will continued the business after the death of the testator was entitled to credit for such entertainment continued by him though unaccompanied by vouchers. In re Froelich's Estate, 50 Misc. 103, 100 N. Y. S. 436.

50. Where business property was left in trust to continue the business and the trustee, who is also a beneficiary and testator's widow, hires a manager and finally marries him and starts a rival business, held a substituted trustee is not chargeable with a shrinkage in the business during his administration. In re Froelich's Estate, 50 Misc. 103, 100 N. Y. S. 436.

51. See 6 C. L. 1764.

52. Parties advancing money for the benefit of the beneficiaries to redeem property from a sale held to show a sufficient interest to be parties plaintiff in a suit for an accounting. Wilson v. Kent [Colo.] 88 P. 461.

53. Code Civ. Proc. § 446. Mullin v Mullin, 104 N. Y. S. 323.

54. Farmers' Loan & Trust Co. v. Pendleton, 101 N. Y. S. 340.

55. Though cause of action for money had and received by defendant as plaintiff's guardian de son tort and cause of action in equity for an accounting against same defendant for money earned by plaintiff after coming of age and held by defendant as trustee of an express trust may be joined in same complaint as arising out of same transaction, they may not be joined in one count. Zeideman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

56. In re Byrnes, 114 App. Div. 532, 100 N. Y. S. 12.

57. See 6 C. L. 1764.

58. In re Sheldon's Estate, 101 N. Y. S. 729.

59. See 6 C. L. 1764.

60. Surrogate has no authority to order partial distribution of assets on judicial settlement of accounts of a testamentary trustee, but assets of trust should remain in custody of truetee until final decree. In re Hunt, 110 App. Div. 533, 97 N. Y. S. 403. Surrogate has no authority to fix value of property for purpose of distribution. Id.

61. In re Hurlbut's Estate, 51 Misc. 263, 100 N. Y. S. 1098.

62. Will not lie when trust is still open nor until final account is settled and a balance ascertained, but remedy in such case is by bill in equity for an accounting. Zeid-

Discharge; procedure and issues.—On the application of trustees to be discharged, they are not required to construe the will creating the trust so as to determine what shall become of the trust estate after the termination of the interests of the life beneficiary.[63] Where the same person is executor and also trustee, his final discharge as executor does not affect his status as trustee.[64]

§ 15. *Establishment and enforcement of trust and remedies of beneficiary. A. Express trusts. Jurisdiction.*[65]—Every beneficiary is entitled to the aid of a court of equity to avail himself of the benefit of the trust, and the forbearance of the trustee may not prejudice him.[66] A trust being contingent, suit to establish it cannot be maintained before the happening of the contingency.[67] Upon breach of the trust the proper remedy is by proceeding in equity to enforce the trust,[68] and the trustee may be compelled to carry out the trust agreement.[69] As a general rule, equity will not decree a forfeiture.[70] When deemed best for the interests of the beneficiaries, a court of equity has the power to take the trust funds into its hands for the administration thereof at any stage of a suit to enforce the trust.[71]

The district courts of Nebraska have jurisdiction in cases involving the ownership of property held in trust, though in the possession of and claimed by the administrator of the estate of a deceased person.[72]

Laches, limitations, and estoppel.[73]—Laches may be invoked against an express trust.[74] In a suit to enforce an express trust, equity does not follow the analogies of the statute of limitations.[75] Limitations do not run against the beneficiary of an express trust until repudiation brought to the knowledge of the beneficiary.[76] One may become estopped to assert the trust.[77]

Pleadings.[78]—In the case of a deposit of property the bill must set out the

eman v. Molasky, 118 Mo. App. 106, 94 S. W. 754.

63. Question is properly determinable only when time to dispose of the estate arrives. In re Pitney, 113 App. Div. 845, 99 N. Y. S. 588.

64. Subsequent final settlement of accounts by executor and his final discharge held not to have changed trust relation as to amount of legacy remaining in his hands. Glennon v. Harris [Ala.] 42 So. 1003. Nor was such relation changed by payment of such amount to residuary legatee by mistake. Id.

65. See 6 C. L. 1764.

66. Funds deposited by corporation with state officials for protection of creditors. Morrill v. American Reserve Bond Co. of Kentucky, 151 F. 305.

67. Persons claiming that defendant holds land subject to a trust in favor of such of plaintiffs as may survive a certain person, may not maintain a suit to have such trust declared and the rents impounded for their benefit before the death af such certain person. Allen v. White [Colo.] 85 P. 695.

68. Ashuelot Nat. Bank v. Keene [N. H.] 65 A. 826. Where a trust has been diverted the beneficiaries may sue in equity to enforce the trust even though the matter will ultimately have to be referred to the probate court for an accounting. Holmes v. Holmes [Mass.] 80 N. E. 614.

69. Trust in personalty. Hurley v. Walter [Wis.] 109 N. W. 558.

70. Ashuelot Nat. Bank v. Keene [N. H.] 65 A. 826.

71. Funds deposited by corporation with state officials for protection of creditors. Morrill v. American Reserve Bond Co., 151 F. 305.

72. Bently v. Jun [Neb.] 107 N. W. 865.

73. See 6 C. L. 1764.

74. Held no laches where trust was not denied until shortly before suit. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667. Fourteen years' delay in failing to sue to enforce trust held laches. Reed v. Munn [C. C. A.] 148 F. 737. Delay of eight years in instituting suit for an accounting against trustee of express trust held not a bar. Horine v. Mengel, 30 Pa. Super. Ct. 67.

75. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667. Statute of limitations has no application to express trusts cognizable in equity. Horine v. Mengel, 30 Pa. Super. Ct. 67.

76. Allsopp v. Hendy Mach. Works [Cal. App.] 90 P. 39; Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 509; Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326. Trust relationship between heir and administrator, to whom heirs had given power of attorney to convey lands, etc., held to have ceased on date when such heir sold and conveyed to administrator all his interest in estate, so that limitations against right to sue to set aside conveyance began to run on that date. Jolly v. Miller, 30 Ky. L. R. 341, 98 S. W. 326. Where executor held legacy under agreement to pay it in monthly installments, held that limitations did not begin to run until after a demand and refusal to pay. Glennon v. Harris [Ala.] 42 So. 1003.

77. Where defendant purchased certain land in trust for complainants, the fact that the complainants referred to payments representing the interest on the cost of the land as rent did not create a relation of landlord and tenant and estop them to prove the trust. Whetsler v. Sprague, 224 Ill. 461, 79 N. E. 667.

78. See 6 C. L. 1765.

terms of the deposit so as to render it inconsistent with a mere bailment.[79] The issues framed must be such as to authorize the enforcement of the trust.[80] A material variance is fatal.[81]

Evidence.[82]—The general rules as to the materiality of evidence apply.[83] Burden of proving trust is on claimant.[84]

The judgment[85] *must conform to the pleadings.*[86]

(§ 15) *B. Implied trusts.*[87]

(§ 15) *C. Constructive trusts. Jurisdiction.*[88]—The jurisdiction covering the enforcement of constructive trust is equitable,[89] and hence is not available where there is an adequate remedy at law.[90]

Laches and limitations.[91]—Laches[92] and elapse of the period of limitations[93]

79. Allegation that defendant held property in trust held insufficient. Young v. Mercantile Trust Co. [C. C. A.] 145 F. 39.

80. In replevin, an intervener claimed the property under a bill of sale which plaintiff claimed was procured by the intervener's fraudulent representations. Plaintiff asked that the bill of sale be set aside and adjudged to be a power of attorney. The evidence failed to establish the fraud. Held that the question as to the creation of a trust in the property transferred by the bill of sale might be tried in the action. Hurley v. Walter [Wis.] 109 N. W. 558.

81. Held fatal variance between allegations showing oral trust to convey in the future on condition of the beneficiary's taking possession, making improvements and supporting the creator of the trust and proof that upon the beneficiary telling the creator he was going to get married the creator of the alleged trust said it was right and that he would live with the beneficiary and that the property was the latter's. Watson v. Watson, 225 Ill. 412, 80 N. E. 332.

82. See 6 C. L. 1765.

83. In a proceeding by a wife as executrix of her deceased husband, to recover a fund deposited by his father, since deceased, in a bank in his own name, in trust for the husband, evidence that the husband's mother contributed some of the money which the father thus deposited was immaterial. In re United States Trust Co., 102 N. Y. S. 271.

84. In suit to establish trust in land in favor of heir of grantor against one claiming under purchaser at execution sale pursuant to judgment recovered against grantee, plaintiff held not entitled to recover where plaintiff's witness testified that grantor himself contracted debt for which land was sold, and that grantee held title to land as trustee for grantor and executed notes evidencing debt in that capacity, since equity would not, in such case, permit burden to be shifted onto trustee. Foster v. Beidler, 79 Ark. 418, 96 S. W. 175.

85. See 6 C. L. 1765.

86. Where a bill seeks to enforce an unrecorded trust interest in a mining claim, held error to decree a revocation and to revest the title of the mine in the beneficiaries. Reed v. Munn [C. C. A.] 148 F. 737.

87. See 4 C. L. 1755.

88. See 6 C. L. 1766.

89. Complaint alleging that one fraudulently took and retained possession under an absolute deed given in trust and praying that plaintiff might be reinstated in ownership held an action for cancellation of the deed as establishment of a trust ex maleficio and hence equitable. Bluett v. Wilce [Wash.] 86 P. 853.

90. Suit dismissed where bill alleged that mortgagor had agreed to set aside his equity in the property to secure an indebtedness to plaintiff; that defendant then conveyed the property to the mortgagee who with knowledge of the mortgagor's agreement with plaintiff sold the property for more than the amount of the mortgage. Van Selver v. Churchill [Pa.] 64 A. 322. Where a county, having issued certain railroad aid bonds, claimed that the bonds were void, and instituted proceedings in a state court to restrain the county treasurer from paying money collected from taxes levied for the payment of coupons on the bonds, the remedy of the holder of such coupons at law was inadequate, and he was therefore entitled to maintain a suit in equity to compel the application of the taxes so collected to the payment of the coupons. Onslow County Com'rs v. Tollman [C. C. A.] 145 F. 753.

91. See 6 C. L. 1766.

92. Newman v. Newman [W. Va.] 55 S. E. 377; Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. Six years' delay in commencing a suit after discovery by principal of a tax title in its agent to mining property, held to bar enforcement of any trust. Steinbeck v. Bon Homme Min. Co. [C. C. A.] 152 F. 333. Where co-owners jointly applied for patent to land and one fraudulently got the entire title in his own name, held seven years' delay did not constitute laches coowner not knowing of such fact. Delmoe v. Long [Mont.] 88 P. 778. Where a bank's president concealed from it the facts giving it right to have him account as a trustee de son tort, but a year after his death and the discovery of the facts it commenced suit, the defense of laches is not available. Huntington Nat. Bank v. Huntington Distilling Co., 132 F. 240. Six years' delay while another dealt with the property in a manner inconsistent with the existence of a trust held to bar right. Brown v. Kemmerer, 214 Pa. 521, 63 A. 822. Where one located land and obtained patent in name of another pursuant to agreement that latter would hold legal title to one-third of it in trust for him, held that neither plea of stale demand nor statute fixing limitation upon suits for specific performance was available as defense to suit by locator's successor to recover said one-third. Morris v. Unknown Heirs of Hamilton [Tex. Civ. App.] 16 Tex. Ct. Rep. 327, 95 S. W. 66.

93. A suit to enforce a constructive trust

will prevent the beneficiary enforcing the trust. As a general rule the statute of limitations begins to run from the time of the discovery of the fraud or wrong.[94]

Procedure.—An action for money had and received will lie to reach money held under a constructive trust.[95]

Parties.—The beneficiary of a constructive trust may maintain an action to enforce the same in his own name.[96] The personal representative, next of kin, and heir at law of the beneficiary may, on the latter's death, join in suing to enforce the trust.[97]

Conditions precedent must be performed.[98] The general rule that he who asks the aid of equity must do equity applies.[99]

Evidence.[1]—General rules as to the admissibility of the evidence apply.[2] Within statutes governing the competency of witnesses there would seem to be a conflict as to whether or not the assertion of a trust against the personal representatives of a decedent is an assertion of a claim against his estate.[3] Burden is on claimant to show trust.[4]

Relief granted.[5]—The relief granted must conform to the issues made.[6]

(§ 15) *D. Resulting trust. Jurisdiction.*[7]—Equity has jurisdiction to enforce the trust.[8]

arising in fraud is within Code Civ. Proc. § 524, subd. 4, setting the limitations at two years. Delmoe v. Long [Mont.] 88 P. 778.

94. Hanson v. Hanson [Neb.] 111 N. W. 368. Period of concealment of trust held not to be computed in determining limitations under Code W. Va. 1906, § 3511, providing that where a debtor obstructs the prosecution of a right the time of such obstruction shall not be computed in the limitation period. Huntington Nat. Bk. v. Huntington Distilling Co., 152 F. 240.

95. Money held by payee of fraudulent and forged drafts. Clifford Banking Co. v. Donovan Commission Co., 195 Mo. 262, 94 S. W. 527.

96. So held in the case of a charge on a givt inter vivos while giver was still alive. Fox v. Fox [Neb.] 110 N. W. 304.

97. Where one procured property to hold in trust by undue influence and the beneficiary died and his administratrix, next of kin and heir at law sued defendant for an accounting and for a judgment declaring that the real estate vested in the heir, held there was no misjoinder of parties plaintiff within Code Civ. Proc. § 446. Mullin v. Mullin, 104 N. Y. S. 323.

98. Where defendant purchased a lot in controversy in his own name, in violation of an agreement to purchase as the property of a firm of which plaintiff and defendant were members, and refused to recognize plaintiff's interest in the property, plaintiff was not bound to make a formal tender of one-half of the purchase price as a condition precedent to his right to enforce a trust in the property. Koyer v. Willmon [Cal.] 90 P. 135. Where defendant purchased property at trustee's sale pursuant to agreement that he was to purchase and hold it for joint benefit of himself and plaintiffs, and paid no money therefor, amount of his bid being credited on indebtedness secured by deed of trust under which sale was made, held that it was not essential that plaintiffs should pay or tender him anything in order to recover their respective interests in the property from him. Haywood v. Scarborough [Tex. Civ. App.] 102 S. W. 469. Especially where payment is prevented by trustee's repudiation of trust, and court has power to require them to contribute ratably. Id.

99. Held that if it should be shown that defendant had agreed to pay city amount due for taxes on plaintiff's land, which had previously been purchased by city at tax sale, and to procure from it a deed reconveying land to plaintiffs, but bad instead made payment and had land conveyed to himself, he would hold it in trust for plaintiffs, and they would be entitled to have title decreed in them on repaying him amount paid by him to city. Openshaw v. Rickmeyer [Tex. Civ. App.] 102 S. W. 467.

1. See 6 C. L. 1766.

2. In a suit to enforce a constructive trust against the estate of a decedent held statements by the decedent showing plaintiff's interest and leases of the property executed jointly by decedent and plaintiff were admissible in evidence. Delmoe v. Long [Mont.] 88 P. 778.

3. That it is. Delmoe v. Long [Mont.] 88 P. 778. See case for cases pro and con.

4. Where it appeared that a person other than person in whom legal title stood paid part of purchase money, held that burden was on latter to show that it was intention that he should take land absolutely, and not by way of resulting trust for former. Miller v. Saxton [S. C.] 55 S. E. 310.

5. See 6 C. L. 1766.

6. Under issues asking for the cancellation of an absolute deed for fraud or the incompetency of the grantor held validity of deed as a trust could not be determined. Ripperdan v. Weldy [Cal.] 87 P. 276.

7. See 6 C. L. 1766.

8. Object of bill being to enforce trust in favor of heirs in land conveyed to widow of one who had purchased it but had died before obtaining deed, held that matter was one which could only be set up in court of equity, and demurrer on ground of adequate remedy at law was properly overruled. Gentry v. Poteet, 59 W. Va. 408, 53 S. E. 787.

Laches, limitations, and estoppel.[9]—Laches will bar enforcement of the trust.[10] Limitations do not run until repudiation of the trust by the trustee.[11]

Pleading.[12]—The general rules of pleading apply.[13] The bill must aver the facts out of which the trust is claimed to have originated with distinctness and precision.[14]

§ 16. *Following trust property.*[15]—A court of equity will enforce a trust against all persons who with notice of the trust came into possession of the trust property, in the same manner and to the same effect as against the original trustee.[16] Hence where the true trustee gambles away trust funds, the beneficiary may recover the funds with interest of the one winning the same.[17] In the absence of notice, a trustee being allowed to deal in his own name, a sale by him passes all the rights of the beneficiaries.[18] Except where an attaching creditor has given credit in reliance upon the apparent ownership, the beneficiary's rights are paramount to those of an attaching creditor of the trustee of a resulting trust,[19] though this rule is of course somewhat affected by the operation of the recording act.[20] Where the trust

9. See 6 C. L. 1767.

10. Forty-five years' delay held to constitute laches. Elliott v. Clark [Cal. App.] 89 P. 455. Heirs and those claiming under them held not guilty of laches in seeking to establish trust in their favor in land conveyed to widow of vendee who died before obtaining deed. Gentry v. Poteet, 59 W. Va. 408, 53 S. E. 787. Claim of beneficiary under alleged resulting trust held not barred by laches, where no attempt was made to show any settlement between him and trustee. Miller v. Saxton [S. C.] 55 S. E. 310.

11. Smith v. Smith [Iowa] 109 N. W. 194; Pearce v. Dyess [Tex. Civ. App.] 101 S. W. 549; Hanson v. Hanson [Neb.] 111 N. W. 368. Limitations against right of action in wife to have land deeded to husband declared to be held in trust for her, on theory that trust provision was omitted by mistake, held not to begin to run until his death, where, at time he acquired title, common-law rule giving husband seisin and right to possession of wife's land was in force. Smith v. Smith [Mo.] 100 S. W. 579. There must be an adverse holding by the trustee of a resulting trust to set the statute of limitations in operation in his favor against the beneficiary. Evidence held not to show adverse holdings. Miller v. Saxton [S. C.] 55 S. E. 310.

12. See 6 C. L. 1767.

13. In suit to establish resulting trust in favor of plaintiffs on theory that second husband of their mother invested proceeds of property belonging to community of their mother and deceased father, half of which belonged to them, in land in question, to which he took title in his own name, held that allegations of petition that mother and second husband continued to exercise care, custody, control, and management over all community property, and to exercise care and authority of parents over plaintiffs during their minority, were proper as matter of inducement as showing fiduciary relation of second husband. Pearce v. Dyess [Tex. Civ. App.] 101 S. W. 549. Held no inconsistency between allegations that second husband paid for land with community estate and took title in his own name, and allegation that he and his wife admitted that he held undivided half interest therein in trust for plaintiff. Id. Held unnecessary to allege that either husband or wife agreed to convey to plaintiffs any interest in land, since obligation to do so arose as matter of law. Id. Allegations of petition held sufficiently specific. Id.

14. Cross-bill by wife seeking to establish resulting trust in land conveyed by husband's mortgage to complainant, on theory that husband used her money in paying for land, held insufficient. Gilbreath v. Farrow [Ala.] 41 So. 1000. Allegations of bill to establish resulting trust held sufficiently definite. Patrick v. Kirkland [Fla.] 43 So. 969.

15. See 6 C. L. 1767.

16. Thompson v. Bank of California [Cal. App.] 88 P. 987. Rule applied to bank collecting note with knowledge of interest of third party in funds. Id. All persons who knowingly take part or aid in committing a breach of trust are responsible for the money thus withdrawn from the trust estate and they may be compelled to replace the fund which they have been instrumental in diverting. Where funds raised by corporation for building purposes were checked out by president for his own use, the building committee authorizing it and the drawee of the check knowing the facts held the funds could be recovered of any or all of the above. Basshor Co. v. Carrington [Md.] 65 A. 360. One buying land with notice of the existence of the trust takes subject thereto. Atkins v. Atkins [Mass.] 80 N. E. 806. One converting payments made upon accounts given it for collection, the owner of the accounts may follow the funds into whosesoever hands they may be found. So held where employe collecting money took same. Morris v. North American Mercantile Agency Co., 103 N. Y. S. 761.

17. Bucket shop deal. Joslin v. Downing, Hopkins & Co. [C. C. A.] 150 F. 317.

18. Where trustee of preferential right to purchase tide lands died and his heirs assigned all his rights in the premises to others, held the assignment passed all the beneficiaries' rights, subject to their right, however, to follow the trust property. Hotchkin v. Bussell [Wash.] 89 P. 183.

19. Waterman v. Buckingham [Conn.] 64 A. 212.

20. Recording act held not to affect case, trust not being created by writing. Waterman v. Buckingham [Conn.] 64 A. 212.

property has been segregated by the trustee from his personal estate, it is unnecessary for the beneficiaries of the trust on the trustee's death to present a claim against the trustee's estate in order to recover the fund.[21] In a suit to recover trust funds levied on by attaching creditors of the trustee, the trustee and beneficiaries may properly join as coplaintiffs.[22] The beneficiary by presenting a claim against the trustee's estate does not estop himself from recovering trust funds in the hands of a third party.[23] All persons interested in the object of the suit may join in suing for its recovery.[24]

Identification of fund.[25]—It is essential that the trust property can be identified in its altered or substituted form.[26] When trust money becomes so mixed up with the trustee's individual funds that it is impossible to trace and identify it as entering into some specific property, the trust ceases.[27] Identificaton of a trust fund is complete where moneys are found in the hands of a trustee who has mingled his own funds with the trust fund, and such moneys up to the amount of the trust fund will be deemed to belong thereto,[28] the total of such funds never going below the amount of the trust fund;[29] or where the trust fund has been mingled with the body of the trustee's estate and the trust fund, or any part of it, has been converted into other specific forms of property which can be discovered and followed;[30] or where the trust fund has been mingled with the funds of the trustee and has been invested, along with trust funds, in assets, then the trust fund is made a charge against the entire mass of the assets in the acquisition of which the trust fund, together with the other property of the trustee, was used,[31] except so far as the trustee may be

21. Kauffman v. Foster [Cal. App.] 86 P. 1108.

22. Cunningham v. Bank of Nampa [Idaho] 88 P. 975.

23. Thompson v. Bank of California [Cal. App.] 88 P. 987.

24. Where funds of a company are deposited as a trust fund to be used for a special purpose, the trustee under a trust deed which secured the payment of such funds could join with the receiver of the company owning the funds in a suit to compel the return of the money when paid out for an improper purpose. Basshor Co. v. Carrington [Md.] 65 A. 360.

25. See 6 C. L. 1768.

26. Where trust funds were segregated by trustee and invested in certain securities, held sufficiently ear-marked to allow tracing. Kauffman v. Foster [Cal. App.] 86 P. 1108. A trust fund may be pursued by the beneficiary as long as the same can be identified into any land or other form of investment made by the trustee. Law raises implied trust in such property in his behalf. Newman v. Newman [W. Va.] 55 S. E. 377. Doctrine applies in every case of a trust relation and as well to moneys deposited in a bank, and to debt thereby created, as to every other description of property. Hutchinson v. National Bank of Commerce [Ala.] 41 So. 143. Fund derived from collection of draft held traced into hands of assignee of bank to which draft was sent for collection, and to have been accompanied into his hands with trust character with which it was originally impressed. Id.

27. Lowe v. Jones [Mass.] 78 N. E. 402. A trust will not be declared against the insolvent estate of a deceased person on the ground that the proceeds of trust property went into the general assets and thereby increased the amount in the hands of the administrator. Id. Where the trust property is pledged as security, the beneficiary is not entitled to have the administrator of the insolvent estate use the general assets of the estate to exonerate the stock from its liability. Id.

28. Smith v. Mottley [C. C. A.] 150 F. 266; Crawford County Com'rs v. Patterson, 149 F. 229. So held where county treasurer who was also cashier of bank deposited, without authority, in the bank funds derived from taxation. Crawford County Com'rs v. Patterson, 149 F. 229.

29. Money, impressed with a trust, may be recovered though deposited to the trustee's credit in the bank, this deposit never going below the amount of the trust fund. In re Berry [C. C. A.] 147 F. 208.

30. Crawford County Com'rs v. Patterson, 149 F. 229. So held where county treasurer who was also cashier of bank deposited, without authority, in the bank funds derived from taxation, and the funds were used in making loans subsequently collected. Id. Where a life beneficiary of a trust estate and her husband, as trustee, had a joint bank account, and the proceeds of insurance of a building belonging to the beneficiary were placed to its credit and afterwards invested in corporate stock, but further sums were drawn from the joint account in excess of the amount of the insurance for the rebuilding of the place insured, held the stock should be treated as part of the trust estate in favor of the remaindermen. Putnam v. Lincoln Safe Deposit Co., 104 N. Y. S. 4, modifying 49 Misc. 578, 100 N. Y. S. 101.

31. Hutchinson v. National Bank of Commerce [Ala.] 41 So. 143; Crawford County Com'rs v. Patterson, 149 F. 229. So held where county treasurer who was also cashier of bank deposited, without authority, in the bank funds derived from taxation and the funds were used in making loans subsequently collected. Id.

able to distinguish what is his.[32] Where trust funds are mingled with those of the trustee on deposit in a bank and the depositor is depleted by certified checks in the favor of and retained by the trustee, but the bank account is brought above the amount of the trust fund prior to the transferring of such certified checks, held the trust could be enforced as a charge on the fund.[33] An investment once proven to exist will be presumed to continue as long as is usual with things of that nature.[34] The burden of showing that his property has been wrongfully mingled in a mass of the property of the wrongdoer is upon the owner, but when this is done the burden shifts to the wrongdoer and it is upon him to distinguish between his property and that of the innocent party.[35]

Bona fide purchasers.[36]—In order to be protected as a bona fide purchaser, one must not have either actual or constructive notice.[37]

§ 17. *Termination and abrogation of trust. Acts of the settlor.*[38]—A voluntary settlement which has been fully executed without the reservation of any power of revocation cannot be revoked without proof of mental unsoundness, mistake, fraud, or undue influence.[39] A power of revocation is not inconsistent with the creation of a valid trust.[40] When the duration of the trust is expressly limited, the authority of the trustee expires according to the limitations.[41] The trust agreement may provide for the termination of the trust upon the happening or fulfillment of some condition.[42] A tentative trust is terminable at the pleasure of the settlor and beneficiary.[43]

32. Hutchinson v. National Bank of Commerce [Ala.] 41 So. 143.

33. In preference to trustee's general creditors. Weiss v. Haight & Freese Co., 152 F. 479.

34. Where trustee is shown to have invested the trust funds in certain securities and such securities came into the hands of the trustee's administrator, held to authorize a finding that they were trust securities. Kauffman v. Foster [Cal. App.] 86 P. 1108.

35. Smith v. Mottley [C. C. A.] 150 F. 266. If a man mixes trust funds with his, the whole will be treated as trust property except so far as he may be able to distinguish what is his. Where trustee of money deposited in his own bank account which at all times exceeded the amount entrusted to him, held beneficiary could recover of trustee's trustee in bankruptcy. In re Royea's Estate, 143 F. 182. Where the relations of a trustee and life beneficiary were such that each must have been fully advised of all the acts and dealings of the other with relation to the trust estate, and there was a commingling by them of the trust moneys with their individual funds, and no rights of creditors or other equities of innocent third parties intervened, the burden of proof is on their representatives to show that property was purchased with the money of the life beneficiary and not with that of the estate. Putnam v. Lincoln Safe Deposit Co., 104 N. Y. S. 4, modifying 49 Misc. 578, 100 N. Y. S. 101.

36. See 6 C. L. 1769.

37. One acquiring trust property from a trustee with notice of the trust is himself a trustee, holding the property on the same trust under which his grantor held it. Newman v. Newman [W. Va.] 55 S. E. 377. Evidence held to show that vendee of real property had notice that the vendor held the legal title in trust for another. Latham v. Scribner [Wash.] 88 P. 203. Claim of notice of trust agreement on the part of an absolute grantee to subsequent creditors and purchasers is greatly weakened where it appears from successive bills of complaint that when the suit was first brought the facts sworn to failed to state sufficient grounds for relief and set out a claim inconsistent with that ultimately pleaded, as it should not be expected that subsequent purchasers and creditors should have notice of more or different facts than were known to the suitor when he swore to the first bill. Reed v. Munn [C. C. A.] 148 F. 737.

38. See 6 C. L. 1769.

39. Sands v. Old Colony Trust Co. [Mass.] 81 N. E. 300.

40. Seaman v. Harmon [Mass.] 78 N. E. 301.

41. Anderson v. Messinger [C. C. A.] 146 F. 929. Where testator directed that his trustees should deliver a settlement of their trust to each of his two sons on their reaching the age of 21 years respectively, and then put them in possession of one-half of the property, except that there might be a reservation of a fraction of the moiety until the sons should respectively arrive at the age of 25 years, when the remaining part should be delivered to them, the trustee's authority as such expired by limitation on the arrival of the youngest son at 25 years of age. Id.

42. Where by the terms of the trust it was to terminate upon the beneficiary being assured, at a certain time, of a certain income for life, the assurance of such income during such time as she remained a widow does not terminate the trust. Tudor v. Vail [Mass.] 80 N. E. 590. Where another clause in the same trust deed provided for the termination of the trust if the beneficiary should be assured of a certain income per annum and accept the same in writing, held trust was terminated by her accepting in writing a provision giving her the stated income so long as she remained a widow. Id.

43. Arrangement whereby attorney man-

Acts of the beneficiary.—An active trust cannot be terminated at the will of the beneficiary.[44] The trust cannot be terminated by consent where so to do might defeat its purpose.[45]

Acts of trustee.[46]—A passive trust may be terminated by the execution of a deed by the trustee to the beneficiary.[47] A resulting trust may be discharged by a deed to the beneficiary.[48]

The death of the beneficiary terminates a tentative trust.[49]

The death of the trustee does not terminate the trust.[50]

The trustee[51] cannot terminate the trust by surrendering possession to the donor.[52]

Termination for failure or completion of purpose.[53]—It is sometimes broadly stated that a trust terminates when the purpose for which it has been created is fulfilled,[54] but not before,[55] and while courts will sometimes decree the termination of a trust where it is passive, or where the purposes of the trust have been accomplished, or where no good reason is shown why the trust should continue, if all the persons interested are sui juris and desire that the trust be terminated,[56] it will not be so done unless these conditions exist.[57] A direction to trustees to convey after the termination of a trust does not continue the legal estate in them and make them trustees of the persons to whom they are directed to convey.[58]

aged client's property held to establish a trust terminable at client's pleasure, so that it was defendant's duty to render accounting and relinquish property in reasonable time after demand. Folk v. Wind [Mo. App.] 102 S. W. 1.

44. Kimball v. Blanchard, 101 Me. 383, 64 A. 645.

45. Where will gave property, subsequently invested in securities, in trust for woman for life with remainder to her children, held that it could not be turned over to her though all her children consented, and though she was 63 years old, it being possible that she might have other children who would be entitled to share. May v. Walter's Ex'rs, 30 Ky. L. R. 59, 97 S. W. 423. Where will gave property in trust for woman for life with remainder to her children, held that she and her children, who were all of age, could not have trust discharged and property distributed during her lifetime, though she was 60 years old, it being possible that she might have other children for whom remainder would open. Bailey's Trustee v. Bailey, 30 Ky. L. R. 127, 97 S. W. 810.

46. See 6 C. L. 1770.

47. Where a deed to a public officer in trust for certain unincorporated societies named beneficiaries and employs words of perpetuity to convey the fee, but does not invest the trustee with any other duty than that of being the mere repository of the legal title, it is competent for such trustee to execute the trust at the instance of the cestuis que trustent by conveying such property to them or their nominee. New England Lodge No. 4 v. Weaver, 8 Ohio C. C. (N. S.) 529.

48. Evidence held to show that deed was intended and treated as discharge of resulting trust. Scranton v. Campbell [Tex. Civ. App.] 101 S. W. 285.

49. Deposit in bank. In re United States Trust Co., 102 N. Y. S. 271.

50. Testamentary trust held to continue after death of trustee where will provided that if trustee thereby appointed should die, or for any cause should become unable to act, circuit court should appoint another, so that trusts thereby created should be at all times preserved and carried into effect. Cruit v. Owen, 203 U. S. 368, 51 Law. Ed. 227. See ante, § 7.

51. See 6 C. L. 1770.

52. A perfected gift of stock certificates in trust is not terminated by a surrender of possession by the trustee to the donor. Especially where he reserved a life interest in the dividends and there was no intention to terminate the trust. Larimer v. Beardsley, 130 Iowa, 706, 107 N. W. 935.

53. See 6 C. L. 1770.

54. Burke v. O'Brien, 100 N. Y. S. 1048. Though statute of uses does not apply to personalty, when all the purposes of a testamentary trust in personalty have ceased or are at an end, absolute estate is in person entitled to last use, unless is apparent intention to the contrary. Vogt v. Vogt, 26 App. D. C. 46. Trust to pay income to certain person, principal to be paid to his heirs after his death, held to terminate at death of life beneficiary. Id.

55. Where on the death of a life beneficiary in a trust fund the first remainderman takes a vested remainder in fee subject to be divested by his death without issue, the trustee should continue to hold the fund, unless the first remainderman elects to take it on giving security. In re Farmers' Loan & Trust Co., 51 Misc. 162, 100 N. Y. S. 862.

56. Kimball v. Blanchard, 101 Me. 383, 64 A. 645. A court of equity may decree the determination of a trust where all its purposes have been accomplished, the interests under it have all vested, and all parties beneficially desire that it be ended. Sands v. Old Colony Trust Co. [Mass.] 81 N. E. 300.

57. Kimball v. Blanchard, 101 Me. 383, 64 A. 645. Testamentary trust held an active one during life of beneficiary's husband so that court had no authority to terminate it before husband's death. Lanius v. Fletcher [Tex.] 101 S. W. 1076.

58. Testamentary trust in personalty. Vogt v. Vogt, 26 App. D. C. 46.

The union of the legal and equitable estates[59] in one person terminates the trust.[60]

TURNPIKES; TURNTABLES; ULTRA VIRES, see latest topical index.

UNDERTAKINGS.[1]

UNDUE INFLUENCE; UNFAIR COMPETITION; UNION DEPOTS, see latest topical index.

UNITED STATES.

§ 1. Proprietary Rights (2207).
§ 2. Contracts (2207).
§ 3. Officers and Employes (2208).
§ 4. Claims (2209).
§ 5. Actions by and Against (2209).

Scope of title.—The powers of the United States nearly if not always depend upon questions of constitutional law.[2] They are further discussed in cases dealing with treaties,[3] territories and Federal possessions,[4] extradition,[5] and the like. Property rights in the public domain are also treated elsewhere.[6]

§ 1. *Proprietary rights.*[7]—While the United States may reclaim arid lands in the territories,[8] it cannot reclaim such lands in the states,[9] except as to lands owned by it.[10] It has undoubted power to construct railroads and canals in territory over which it has acquired exclusive jurisdiction by treaty.[11] During its military occupation of Cuba the United States occupied the position of a trustee of the island for the benefit of its inhabitants.[12]

§ 2. *Contracts.*[13]—A statute is valid which is in effect a contract whereby railroad companies in the District of Columbia are paid a sum of money to be raised by taxation of property in the district in consideration of the elimination of grade crossings and other expenditures by them, for the public benefit.[14] When officers of the United States are authorized by statute to issue what is in form commercial paper, and do issue it, the relations of the United States thereto are the same as those of individuals.[15] An assignment by a government contractor of an

59. See 6 C. L. 1770.

60. Where land was conveyed to one "as trustee" with habendum to "his own use and behoof," held that he took both legal and equitable title in fee, and hence, where he conveyed all of the estate which he had, legal title did not descend to his heirs on his death. McAfee v. Green [N. C.] 55 S. E. 828.

1. No cases have been found for this subject since the last article. See 4 C. L. 1760.

2. See Constitutional Law, 7 C. L. 691.

3. See Treaties, 8 C. L. 2146.

4. See Territories and Federal Possessions, 8 C. L. 2121.

5. See Extradition, 7 C. L. 1639.

6. See Public Lands, 8 C. L. 1486. The right of the United States to prescribe regulations for the grazing of cattle on public lands cannot be impaired by any state policy permitting stock to run at large. United States v. Shannon, 151 F. 863.

7. See also Territories and Federal Possessions, 8 C. L. 2121.

8. Const. art. 4, §3. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law. Ed. 956.

9. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law. Ed. 956.

10. And as to such lands congress may not override state laws on the general reclamation of arid lands. State of Kansas v. State of Colorado, 206 U. S. 46, 51 Law. Ed. 956.

11. Treaty with Republic of Panama and ratification by subsequent action thereunder held to confer power to construct Panama Canal. Wilson v. Shaw, 204 U. S. 24, 51 Law. Ed. 351.

12. Importer of goods from United States into Cuba not entitled to recover duties paid on theory that island was United States territory. Galban v. U. S., 40 Ct. Cl. 495.

13. See 6 C. L. 1771. See, also, Public Contracts, 8 C. L. 1473.

14. Acts of Feb. 12, 1901, and Feb. 28, 1903, not revenue bills required to originate in house of representatives and did not appropriate public funds for private use. Millard v. Roberts, 202 U. S. 429, 50 Law. Ed. 1090.

15. Pension checks or warrants issued by a pension agent on an assistant treasurer are commercial paper, and right of United States to recover from one to whom such check was paid on a forged indorsement is governed by the ordinary rules applicable to such paper. National Exchange Bk. v. U. S. [C. C. A.] 151 F. 402. Could not recover where there was unreasonable delay in giving notice of forgery. Id.

interest in a building contract cannot affect the rights of the United States or of laborers and materialmen.[16]

The will of congress as to the construction and effect of bonds executed to the United States cannot be defeated by considerations applicable to agreements improvidently made between individuals, nor by the practice of department officials to give such bonds a different construction.[17] The Federal statute of 1894 requiring a government contractor to give a bond conditional on proper performance and payment for labor and materials is broad enough to include within the protection of the bond one who supplies coal for hoisting or pumping engines used in the work.[18] One who takes charge of the work under an arrangement which simply amounts to an advancement of money with the right to superintend its disbursement is not protected,[19] and the bond will not protect materialmen if given in a case not contemplated by the statute.[20] The bond is in effect two separate instruments, one securing performance to the United States and the other payment for labor and materials,[21] and a variation of the contract which might relieve the surety from liability to the United States does not relieve it as against laborers and materialmen.[22] A materialman may not sue on the bond in the name of the United States unless some Federal statute authorizes it.[23] The action is controlled by the statute of limitations governing actions on account and not by that governing actions on contract.[24]

§ 3. *Officers and employes.*[25]—Though a departmental practice is not rendered valid by having been followed for a long period of time, yet due regard should be given to it where it has admittedly prevailed in proceedings of a judicial nature for a period of more than twenty-five years, even should there be a reasonable doubt as to the proper construction to be placed upon a statute.[26] While a power conferred by law upon executive officers of the government to make regulations in aid of the execution of a law or for the better administration of powers

16. Assignment of claim against the United States for money accruing on a building contract is void as against the United States, the contractor's surety, the laborers and the materialmen. Rev. St. §§ 3477, 3737. Henningsen v. U. S. Fidelity & Guaranty Co. [C. C. A.] 143 F. 810. While an assignment by two members of a firm of their interest in a contract to a third is valid as between the parties, it cannot effect the rights of the United States. Operated only as assumption by assignee of debts in consideration of benefits from execution of agreement. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465. Contract by contractor held to constitute a corporation neither an assignee nor a subcontractor but a mere agent of contractor. United States v. Axman, 152 F. 816.

17. United States v. U. S. Fidelity & Guaranty Co., 151 F. 534. Surety of mail contractor held liable for full amount specified in bond which though in usual form, incorporated within it the provision of Act June 23, 1874, 18 Stat. 235, c. 456, § 245. (U. S. Comp. St. 1901, p. 2695) that on default bidder and surety shall be liable for amount of said bond "as liquidated damages." Id.

18. Act Aug. 13, 1894 (28 St. 278). City Trust, Safe Deposit & Surety Co. v. U. S. [C. C. A.] 147 F. 155.

19. Contract construed and held not to constitute claimant a subcontractor so as to authorize him to resort to the bond. Hardaway v. National Surety Co. [C. C. A.] 150 F. 465. Even if regarded as subcontractors they were such only for a fixed price, viz., funds earned by completion of contract and use of contractor's plant. Id.

20. Subcontractor could not recover for material furnished to contractor to construct lifeboats for the government, statute of 1894 relating only to construction of public buildings and works. United States v. Empire State Surety Co., 100 N. Y. S. 247. The words "public works" as used in Act Aug. 13, 1894, c. 280 (28 St. 278), relate only to fixed improvements such as river and harbor improvements, etc., and does not include a movable article such as a seagoing dredge, and one supplying material for such dredge is not protected by the bond. Penn Iron Co. v. Trigg Co. [Va.] 56 S. E. 329.

21. Act Aug. 13, 1894, c. 282 (28 St. 279). United States v. California Bridge & Const. Co., 152 F. 559.

22. United States v. California Bridge & Const. Co., 152 F. 559.

23. Viewed as a common-law bond it belongs only to the United States. Penn Iron Co. v. William Trigg Co. [Va.] 56 S. E. 329; United States v. Empire State Surety Co., 100 N. Y. S. 247.

24. Two-year California statute controlled and not the four-year statute. United States v. Axman, 152 F. 816.

25. See 6 C. L. 1772.

26. Patent proceedings. Allen v. U. S., 26 App. D. C. 8.

committed to them does not extend to making a violation of one of these regulations a criminal offense,[27] this rule does not apply in a prosecution of one for perjury consisting in making a false answer under oath to questions propounded in the application required by the civil service regulations.[28] The civil and criminal liability of public officers and employes is elsewhere discussed.[29]

§ 4. *Claims.*[30]—An act of congress providing for the determination of claims is not an admission that such claims are meritorious.[31] The Federal statute provides for disallowing in toto claims, vouchers, or accounts, relating to the Indian service knowingly presented by an officer and containing any material misrepresentation of fact.[32] This statute is penal in its nature and as to valid portions of an account is not enforceable as against the sureties on the bond of an Indian agent.[33] One may recover for the use and occupation of his private premises by the United States for military purposes, the government not claiming to own the property.[34] A bill setting forth a claim for the use and occupation of real estate by the military forces of the United States and referring the claim to the court of claims for adjudication is equivalent to a bill "for the payment of a claim against the United States." [35] Neither an owner of an Indian depredation claim nor his administrator has power to contract to pay for prosecuting the claim, an amount in excess of the fifteen per cent allowed for such purpose by the court of claims and the Indian Depredation Act.[36] A contract between an attorney and one having a claim against the United States whereby the attorney is given a lien for his fee upon any check which may be issued by the United States in settlement of the claim is not prohibited as an assignment of claims against the United States.[37]

§ 5. *Actions by and against.*[38]—Suits by the United States may be barred by limitations.[39] In suits involving the delinquency of a revenue officer or any person accountable for public money, a transcript from the books and proceedings in the treasury department certified as required by law is admissible[40] as prima facie,[41] though not conclusive evidence in favor of the government,[42] and it is no objection

27, 28. Johnson v. U. S., 26 App. D. C. 128.

29. See Officers and Public Employes, 8 C. L. 1191.

30. See 6 C. L. 1772.

31. Provision of Indian appropriation act of March 3, 1903, for presentation to court of claims for decision on their merits, of claims of registers of the land office for commissions for selling lands ceded by Osage Indians to United States by treaty of Sept. 29, 1865, to be sold for their benefit, held not admission that there was anything due claimants. Stewart v. U. S. 206 U. S. 185, 51 Law. Ed. 1017.

32. Act Cong. July 4, 1884, c. 180, § 8 (23 St. 97). Recovery on bond of disbursing agent held authorized where agent certified that certain work had been completed and that he had paid out a certain amount therefor whereas this was contradicted by his own testimony. Act Cong. July 4, 1884, c. 180, § 8 (23 St. 97). Ewing v. U. S. [Ariz.] 89 P. 593. Pleadings also held to contain an admission that agent presented a claim of the character mentioned in § 8. Id.

33. United States v. Pierson [C. C. A.] 145 F. 814.

34. Occupation of private property in Philippines, the country having been reduced to subjection before the taking. Philippine Sugar Estates Development Co. v. U. S., 40 Ct. Cl. 33.

35. So as to authorize court of claims to take jurisdiction, though bill did not expressly provide for payment of the claim. Leahy v. U. S., 41 Ct. Cl. 265.

36. Friend v. Boren [Tex. Civ. App.] 16 Tex. Ct. Rep. 54, 95 S. W. 711.

37. Not prohibited by Rev. St. § 3477 (U S. Comp. St. 1901, p. 2320). Jones v. Rutherford, 26 App. D. C. 114.

38. See 6 C. L. 1772.

39. Under Act March, 3, 1891, c. 559 (26 St. 1093), providing that suits by the United States to vacate patents theretofore issued must be brought within five years from the passage of the act, possession by the grantee is not necessary to the running of limitations (United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F. 25), and the limitation will protect a patent though the land had been reserved from sals where such reservation was only for a temporary purpose which was accomplished long before the patent was issued though technically the reservation had not been withdrawn (Id.).

40. In suit on bond of Indian agent not essential that transcript be certified by secretary of treasury or his assistant as per Act March 2, 1895, c. 177, § 10 (28 St. 809), enacted after filing of transcript and in force at time of trial but relating only to certificates "thereafter made." United States v. Pierson [C. C. A.] 145 F. 814.

41, 42. United States v. Pierson [C. C. A.] 145 F. 814.

that it contains some items of debit or credit concerning which it is not competent evidence,[43] or that it contains unnecessary explanatory memoranda and evidence showing the grounds of rulings concerning rejected items.[44] The propriety of employing the attorney for a private party to assist in the prosecution of a suit by the United States in the public interest is addressed to the judgment and discretion of the attorney general,[45] and there would seem to be no sound objection to such employment if the object of the private party and that of the United States are the same.[46] In an action by the United States, defendant cannot recover an affirmative judgment on a set-off or counterclaim though a balance may be found in his favor,[47] nor can he insist that the government continue the action so as to enable him to extinguish any claim that may be established against him.[48]

The United States may not be sued without its consent [49] either by an individual or by a state,[50] and a suit against the United States cannot be maintained in the supreme court where a state is made plaintiff merely for the prosecution of a claim of a railway company.[51]

UNITED STATES COURTS, see latest topical index.

UNITED STATES MARSHALS AND COMMISSIONERS.[52]

The jurisdiction of a United States commissioner as ex officio probate judge to appoint guardians for incompetent persons is wholly statutory and it must appear that the essential provisions of the statute were complied with.[53] The act of April 20, 1904, relative to the offenses committed in the Hot Springs reservation in Arkansas, did not confer on any regular United States commissioner in that district or elsewhere jurisdiction to try any offenses,[54] but contemplated the creation of a new office of commissioner clothed with special jurisdiction.[55] A commissioner is not entitled to compensation for services rendered in connection with complaints in civil right's cases in which there was no arrest or examination,[56] nor can he be allowed fees for certifying complaints in such cases to himself as chief superivsor of elections.[57]

UNIVERSITIES, see latest topical index.

43. In suit on bond of Indian agent transcript was not evidence of receipt by agent of moneys not coming into his hands through the ordinary channels of the department. United States v. Pierson [C. C. A.] 145 F. 814.

44. United States v. Pierson [C. C. A.] 145 F. 814.

45, 46. United States v. Chandler-Dunbar Water Power Co. [C. C. A.] 152 F. 25.

47. United States v. Gillies, 144 F. 991.

48. United States v. Gillies, 144 F. 991. Time during pendency of action not counted on question of limitations. Id.

49. Suit to restrain secretary of interior from carrying out the act of June 27, 1902 (32 St. 400, c. 1157), controlling the disposition of pine lands ceded by Minnesota Indians under act of January 14, 1889 (25 St. 642, c. 24), to the United States for their benefit, is in effect a suit against the United States. Naganab v. Hitchcock, 202 U. S. 473, 50 Law. Ed. 1113.

50. United States may not without its consent be sued by a state. State of Kansas v. U. S. 204 U. S. 331, 51 Law. Ed. 510.

51. Suit to enforce rights of railway company in lands held by state as trustee. State of Kansas v. U. S., 204 U. S. 331, 51 Law. Ed. 510.

52. See 6 C. L. 1773.

53. Could not appoint guardian under Code Alaska, § 896, without personal notice on person affected. Martin v. White [C. C. A.] 146 F. 461.

54. 33 St. 187 (U. S. Comp. St. Sup. 1905, p. 365), entitled "An act conferring jurisdiction upon United States Commissioners," etc. Rider v. U. S. [C. C. A.] 149 F. 164.

55. There being no provision in the statute for the appointment of such special commissioner, the act was inoperative, and the title could not be resorted to to show that existing commissioners were intended. Rider v. U. S. [C. C. A.] 149 F. 164.

56. Fee of $10 allowed by Rev. St. § 1986, "for services in each case inclusive of all services incident to arrest and examination," covers all services clerical and judicial, when there is a "case" and he gets no other fee. Allen v. U. S. 204 U. S. 581, 51 Law. Ed. 634, afg. 40 Ct. Cl. 170.

57. Allen v. U. S. 40 Ct. Cl. 170; Id., 204 U. S. 581, 51 Law. Ed. 634.

UNLAWFUL ASSEMBLY.[58]

USAGES; USE AND OCCUPATION, see latest topical index.

USES.[59]

The statute of uses executes passive trusts.[60] What constitutes active and passive trusts is treated elsewhere.[61] Where an express passive trust is obtained by undue influence, the beneficiary may elect to avoid the entire transaction and hold the trustee under a trust ex maleficio, or to affirm it and insist that the legal title vested in him.[62]

USURY.

§ 1. Elements and Indicia (2211). There Must Be an Intention (2211). There Must Be a Loan or Forbearance (2212). The Aggregate of the Exactions Must Exceed the Legal Rate (2212). Discounts, Bonuses, Commissions and Other Deductions and Charges (2212). The Parties May Remove the Taint of Usury (2213). Usury Statutes (2213). Conflict of Laws (2213). Usury Laws as Applied to Building and Loan Association Contracts (2213).
§ 2. The Defense of Usury (2214).
§ 3. The Effect of Usury (2214).
§ 4. Affirmative Relief and Procedure (2214). Recovery of Usury (2215). Crimes and Penalties (2215).

§ 1. *Elements and indicia.*[63]—At common law a contract for the payment of any rate of interest not unconscionable is valid.[64]

There must be an intention [65] to exact an unlawful rate,[66] and the charging of excessive interest through mistake does not constitute usury,[67] but an actual intention

58. No cases have been found during the period covered.

59. See 6 C. L. 1773.

60. Mullin v. Mullin, 104 N. Y. S. 323. Laws 1896, p. 570, c. 547, § 73, construed. Jacoby v. Jacoby, 188 N. Y. 124, 80 N. E. 676; Adams v. Bristol, 114 App. Div. 390, 100 N. Y. S. 145. Passive trust for grantor during life, then to intended wife so long as she remained his widow and unmarried, then to trustee, held effective as a conveyance of a future estate to the wife for life or widowhood and a remainder in the trustee. Adams v. Bristol, 114 App. Div. 390, 100 N. Y. S. 145. Such estate in remainder held sufficiently limited on the precedent life estate of the wife under the provisions of § 29 of the statutes of uses and trusts (Vol. 2 Rev. St. [1st Ed.] pt. 2, c. 1, tit. 2, art. 1 § 10). Id. The statute of uses operates to convey the legal title to the beneficiary when it is no longer required to remain in the trustee to serve the purposes of the trust. Where holder of legal title in trust for use of mother for life with remainder in fee to daughter conveyed such estates to them, held that their grantee took full legal and equitable title, at least after death of mother, and did not hold title in trust, whether deed of trustee did or did not convey legal title. Smith v. Moore, 142 N. C. 277, 55 S. E. 275. Where deed created trust for benefit of married woman for life, with remainder in fee to her children in event that she predeceased her husband leaving children, held that, on happening of such contingency, her interest ceased, and, as purpose of trust was fully accomplished, use became executed and legal title vested in children. Cherry v. Cape Fear Power Co., 142 N. C. 404, 55 S. E. 287. The statute of uses will not execute a passive trust where the beneficiaries may include persons not in esse. Trust to woman for life; remainder in trust for her children. May v. Walter's Ex'rs, 30 Ky. L. R. 59, 97 S. W. 423.

61. See Trusts, 8 C. L. 2169.

62. Mullin v. Mullin, 104 N. Y. S. 323. Where on death of beneficiary his administratrix, next of kin, and heir at law instituted an action for an accounting in which they asserted title to the real estate, held an election to affirm the transaction and claim under a passive trust. Id.

63. See 6 C. L. 1774.

64. Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77.

65. See 6 C. L. 1774.

66. A note in the hands of one who had no knowledge that a bonus was taken for the loan is not tainted with usury (Ferguson v. Bien, 101 N. Y. S. 100), nor is a note reserving interest which at the time the note was made, the parties supposed was a lawful rate (Armijo v. Henry [N. M.] 89 P. 305). That the amount received by the debtor is less than the apparent principal, so that of the amount actually received be treated as the principal the transaction would be usurious, does not of itself establish usury unless the creditor when he received the interest knew it was usurious and had the purpose to take more than the lawful rate. Bennett v. Best, 142 N. C. 168, 55 S. E. 84.

67. Including days of grace in figuring interest on a non-negotiable note, by the use of an interest table which included days of grace, was held not to render the contract usurious. Sullins v. Farmers' Exch. Bk. [Okl.] 87 P. 857. When in calculating interest the amount charged is by mistake slightly greater than allowed by law, it is not usurious. Western Bank & Trust Co. v. Ogden [Tex. Civ. App.] 15 Tex. Ct. Rep. 594, 93 S. W. 1102.

to collect the excessive rate, although under a belief of a right to do so, renders the transaction usurious[68] The contract will if possible be construed as reserving a valid rate, where it was drawn by the party asserting that it is usurious.[69]

There must be a loan or forbearance.[70]

The aggregate of the exactions must exceed the legal rate.[71]—The payment of interest on overdue interest coupons does not constitute usury,[72] and where the parties had settlements from time to time bringing in new items, and new obligations were given including interest on past due amounts, the transaction was not usurious.[73] A provision that the principal and "interest" shall become due on default in payment of any interest instalment contemplates that only accrued interest shall become due and is not usurious.[74]

Discounts, bonuses, commissions, and other deductions and charges.[75]—Payment of a commission by a borrower to a third person who procures the loan does not render the loan usurious,[76] nor does a payment of interest in advance;[77] but a conveyance made to the lender, to induce the loan on which the full legal rate of interest is charged, is usury,[78] as is a charge of interest on advances where a note given for the advances to be made had been already discounted.[79] Exacting building association rates and deferring payment of the money,[80] or providing in a policy loan for a surrender charge in case of default, is usury;[81] and the collection of interest in excess of the legal rate constitutes usury, although the contract provided for only the legal rate.[82] Where a transaction is not usurious on its face, but is claimed to be a device to cover up usury, the question is one of fact,[83] and the evidence of usury should be clear and satisfactory.[84]

68. Where a creditor collects compound interest, believing that he has a right to do so under the terms of the note, he is guilty of collecting usurious interest. Plyler v. McGee [S. C.] 57 S. E. 180.

69. The contract for payment of a certain sum at the end of three years with interest at the rate of fifteen per cent was construed to call for fifteen per cent interest at the end of three years and not for fifteen per cent per annum. Ayars v. O'Connor [Wash.] 88 P. 119.

70. See 4 C. L. 1765. A contract for the sale of land with a guaranty of a resale within a year at a certain profit to the purchaser was a **contract of sale and not a loan** at usurious rate. Heinrich v. Jenkins, 98 Minn. 489, 108 N. W. 877.

71. See 6 C. L. 1775.

72. Graham v. Fitts [Fla.] 43 So. 512.

73. Hamilton v. Stephenson [Va.] 55 S. E. 577.

74. The provision that if default be made on any interest coupon note, "then all of said principal and interest" shall become due at the option of the payee, was held to provide for payment only of the amount of interest which had accrued at the time the option should be exercised. Graham v. Fitts [Fla.] 43 So. 512.

75. See 6 C. L. 1775.

76. Reich v. Cochran, 102 N. Y. S. 827; Graham v. Fitts [Fla.] 43 So. 512. But if commission is paid to the lender's agent in addition to the maximum rate of interest paid to the lender, although the commission is paid without the lender's knowledge, the transaction is usurious under a statute providing that when usury is pleaded as a defense judgement shall be for only the principal and legal interest after deducting all payment of usurious interest "whether paid as commission or brokerage, or as payment upon the principal, or as interest." Little v. Hooker Steam Pump Co. [Mo. App.] 100 S. W. 561.

77. Bramblett v. Deposit Bank, 28 Ky. L. R. 1228, 92 S. W. 283.

78. Davisson v. Smith [W. Va.] 55 S. E. 466.

79. Crittenden v. Ragan [Miss.] 42 So. 281.

80. Wineman v. First Mortgage Loan Co., 117 Ill. App. 302.

81. Penn Mut. Life Ins. Co. v. Barnett's Adm'r, 30 Ky. L. R. 434, 99 S. W. 228.

82. Collection of compound interest on a note not authorizing it. Under a statute providing for forfeiture when excessive interest has been "charged or contracted for." Plyler v. McGee [S. C.] 57 S. E. 180.

83. A requirement by a life insurance company, making a loan at the highest lawful rate of interest, that the borrower take out a policy in the company on his life and assign the same as additional security for the loan was held to be not usurious as a matter of law. Virginia-Carolina Chem. Co. v. Provident Sav. Life Assur. Soc., 126 Ga. 50, 54 S. E. 929. Where the lender required a contract by which the borrower was to consign cotton to the lender to be sold by the latter on commission, it was held that if the lender was engaged in the business of a cotton factor the transaction would be legitimate, but if made to conceal an usurious design the contract would be usurious. Western Bank & Trust Co. v. Ogden [Tex. Civ. App.] 15 Tex. Ct. Rep. 594, 93 S. W. 1102. Where a building and loan association required a prospective borrower to subscribe for stock on which he was to

The parties may remove the taint of usury.[85]

Usury statutes.[86]—A statute imposing a penalty for the exacting of usury is a a valid exercise of the police power of a state,[87] but being penal should be strictly construed.[88] Usury laws must be of uniform operation, and must not deny equal protection of the laws, nor grant class privileges and immunities.[89] A statute changing the effect of usury is constitutional even as to contracts already made.[90] State banking laws prescribing rates of interest chargeable by banks govern loans by state banks as against general usury laws of the state.[91]

Conflict of laws.[92]—The law of the place where the loan is made governs its validity.[93] The Federal courts are governed by the state laws in proceedings for relief.[94]

Usury laws as applied to building and loan association contracts.[95]

pay a monthly sum in addition to the interest on the loan, and to immediately surrender the certificate of stock, and to sign a statement that the stock was withdrawn and the full withdrawal value received, a finding that the transaction was usurious was upheld. Guarantee Sav. Loan & Inv. Co. v. Mitchell [Tex. Civ. App.] 99 S. W. 156. A provision for a payment to a bank of a commission in addition to the maximum interest, as a consideration for its trouble in making the collections and keeping its accounts with the borrower, was held to be a legitimate charge, not making the transaction usurious. Citizens' Bank v. Murphy [Ark.] 102 S. W. 697. When in consideration for an additional loan of $12,500 a contract previously entered into for the sale of land for $2,000 was canceled, and a deed to the land executed for a consideration of $2,500, for which together with the amount of additional loan a mortgage and note were given, the transaction could not be held invalid as a matter of law in the absence of evidence of an intention to evade the usury laws. Gould v. St. Anthony Falls Bk., 98 Minn. 420, 108 N. W. 951.

84. Citizens' Bank v. Murphy [Ark.] 102 S. W. 697.

85, 86. See 6 C. L. 1776.

87. State v. Wickenhoefer [Del.] 64 A. 273.

88. An act providing that one who shall make a loan secured by a chattel mortgage, in which the sum loaned is stated to be greater than the amount actually loaned, or in which the rate of interest charged is greater than the rate allowed by law, shall be fined or imprisoned, and that the mortgage and note shall be void, is penal, and hence should be strictly construed. Morin v. Newbury [Conn.] 65 A. 156. A bill of sale, absolute in form, is not a mortgage within the meaning of a statute making void a chattel mortgage securing an usurious loan (Id.); but a penal statute limiting the rate of interest to "eight per centum per annum" on certain obligations, and providing in a subsequent paragraph that in contracts "twelve per centum" may be charged, was construed to mean twelve per centum per annum on contracts (Hemple v. Raymond [C. C. A.] 144 F. 796).

89. A statute authorizing certain associations to charge certain rates of interest, and prescribing a certain penalty for a violation of its provisions by such associations, and a different penalty against other persons who violate its provisions, is unconstitutional. Ex parte Sohncke, 148 Cal. 262, 82 P. 956. Statute which regulates interest on loans secured by certain kinds of chattels only, invalid. Ex parte Sohncke, 148 Cal. 262, 82 P. 956. Statute authorizing small loans in a certain county at a rate of interest in excess of the legal rate, by persons who procure a certificate from the clerk of the peace in such county, is not unconstitutional on the ground that it applies to the one county only; or on the ground that it discriminates against those making loans in amounts in excess of the sum named therein; or on the ground that a provision therein excepting banks and trust companies from its operation, it violates section 1 art. 14 of the amendment to the constitution of the United States, or on the ground that it violates said section by prohibiting the exaction of interest in excess of the rate named, whether said additional sum be in the form of interest, or for services rendered, or expenses incurred. State v. Wickenhoefer [Del.] 64 A. 273.

90. The statute in question was one abolishing the equity rule that a borrower seeking affirmative relief must tender payment of interest at the legal rate. Barclift v. Fields [Ala.] 41 So. 84.

91. And where the state banking act places state banks in an equality with national banks, the national banking act governs (Schlesinger v. Lehmeier, 102 N. Y. S. 630), and this is true in regard to a loan made by a third person and discounted by the bank (Schlesinger v. Lehmeier, 49 Misc. 419, 99 N. Y. S. 819).

92. See 6 C. L. 1776.

93. A statute providing that all usurious contracts shall be invalid does not render void a mortgage on property situated in the state, given at a rate unlawful in the state, where the notes secured thereby are executed and payable in another state. Manhattan Life Ins. Co. v. Johnson, 188 N. Y. 108, 80 N. E. 658; Id., 101 N. Y. S. 65. When the usury statute of another state is pleaded, it must be proven that it was in force at the time the contract was made in that state, in the absence of proof; the presumption being that the right to interest was governed by the common law. Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77.

94. In the Federal court complainant seeking a cancellation of an usurious mortgage, need not offer to pay the principal with legal interest where the state laws did not require it. Olds v. Curlette, 145 F. 661.

95. See 6 C. L. 1777. See, also Building & Loan Associations, 7 C. L. 500.

§ 2. *The defense of usury.*[96]—Only parties to the usurious contract may set up the defense of usury thereto,[97] and a prior mortgagee cannot set up a defense of usury against the prior mortgage where the mortgagor had not the right to do so,[98] but the defense is available to the debtor's trustee in bankruptcy.[99] Usury cannot be urged as a defense to a note in the hands of a bona fide purchaser.[1] The wife of a mortgagee, to whom the property is conveyed without consideration to prevent her husband from dissipating it, is not estopped to set up usury as a defense to the mortgage;[2] and the doctrine of equitable estoppel cannot be invoked to prevent an inquiry into an usurious transaction.[3]

Pleading and proof.[4]—A plea of usury must set forth the facts and the terms and nature of the contract with certainty.[5] The burden of proving usury is on the party alleging it.[6]

§ 3. *The effect of usury.*[7]—Where the lender sues for the amount of usurious interest he forfeits all interest under the Missouri statutes.[8]

Forfeitures.[9]

Application of usurious payments.[10]

§ 4. *Affirmative relief and procedure.*[11]—Equity will grant relief against any form of usurious contract either to the debtor or to one not a party to the contract who has been injured thereby,[12] and will set aside a conveyance of land made to induce a loan on which the full legal rate of interest is charged.[13] One seeking

96. See 6 C. L. 1778.

97. A defense that a contract for the sale of land and the giving of a mortgage for the purchase price was tainted with usury cannot be set up by one who, on taking from the purchaser an assignment of the contract, and assuming to pay the purchase price named therein to the seller, executed a mortgage for the amount to the seller as a defense on a scire facias on the mortgage. Industrial Sav. & Loan Co. v. Hare [Pa.] 65 A. 1080. Purchaser of mortgaged land who assumes the mortgage cannot claim as against the mortgagee that the mortgage was tainted with usury. Stuckey v. Middle States Loan, Bldg. & Const. Co. [W. Va.] 55 S. E. 996. One who owes salary which has been assigned as part of a contract for an usurious loan cannot set up that defense in an action agaist him by the assignee. Western Union Tel. Co. v. Ryan, 126 Ga. 191, 55 S. E. 21.

98. Under a statute providing that no corporation shall plead usury in any action to recover damages, or enforce a remedy on any obligation executed by said corporation, a holder of a mortgage subsequent to the bonds issued by a corporation cannot urge that under the usury act the bond holders are entitled only to the amount, less than par, which they paid for them. Lembeck v. Jarvis Terminal Cold Storage Co. [N. J. Err. & App.] 64 A. 126.

99. In re Stern [C. C. A.] 144 F. 956.

1. Wood v. Babbitt, 149 F. 818.

2. First Nat. Bank v. Drew, 226 Ill. 622, 80 N. E. 1082.

3. A debtor who gives to his creditor a security deed which has the taint of usury may at any time thereafter repudiate the fiction that the relation of landlord and tenant exists between them without first yielding possession of the premises described in the deed, notwithstanding an agreement to attor to his creditors as landlord and to pay him rent therefor. Brown v. Bonds, 125 Ga. 833, 54 S. E. 933.

4. See 6 C. L. 1778.

5. A plea containing no distinct statement of the terms and circumstances of the contract, and no allegation of a corrupt intent, was held to be defective. Wood v. Babbitt, 149 F. 818. An affidavit that the consideration mentioned included both the purchase money and interest thereon for a term of years, but not showing the proportions of each, nor the rate of said interest, and not showing affiant's inability to procure such information, was insufficient. Industrial Sav. & Loan Co. v. Hare [Pa.] 65 A. 1080.

6. Wood v. Babbitt, 149 F. 818; Reich v. Cochran, 102 N. Y. S. 827; Citizens' Bank v. Murphy [Ark.] 102 S. W. 697.

7. See 6 C. L. 1779.

8. By so doing he waives his right to claim legal interest under Rev. St. 1899, § 3705, providing that creditors are entitled to interest of six per cent. per annum on contracts where no rate is agreed upon, "and on accounts after they become due and demand of payment is made," and that "the commencement of a suit is a sufficient demand." Citizens' Nat. Bank v. Donnell, 195 Mo. 564, 94 S. W. 516.

9. See 4 C. L. 1768.

10, 11. See 6 C. L. 1779.

12. Bill by indorser of numerous notes, some alleged to have been discounted at usurious rates, to compel accounting and to enjoin actions at law on the notes. Horner v. Nitsch, 103 Md. 498, 63 A. 1052. Neither the borrower nor one who, without receiving any portion of the usurious charges, procures the discount of notes at usurious rates, is in pari delicto with the lender, so as to deprive him of the right to equitable relief. Id.

13. Plaintiff will not be limited to a recovery of the money value of the land at the time of the conveyance, even under a statute which nullifies a contract only to the extent of the interest taken in excess of the legal rate, nor will the court treat the con-

affirmative relief against an usurious mortgage, who admits some uncertain sum be due thereon, must tender some safe sum to cover the amount due;[14] but a borrower seeking to redeem an usurious mortgage need not tender interest at the legal rate, under a statute providing that no such borrower shall be required to pay more than the principal sum.[15] A suit in equity to cancel a conveyance tainted with usury is not barred by the statute of limitations.[16]

Recovery of usury.[17]—Payments made on a contract, void for usury, may be recovered back unless voluntarily made.[18] In Maryland, usurious interest paid on a mortgage cannot be recovered after the mortgage has been paid and released.[19]

Actions under statute.[20]

Crimes and penalties.[21]—The action to recover the penalty for receiving usury is one of debt, not tort, and must therefore be brought in the county of defendant's residence,[22] and the petition must state when and to whom the payments of usurious interest were made.[23] The penalty may be recovered against one who purchases a note with knowledge that it is usurious,[24] but not against the lender where the usury is collected by an assignee of the note.[25] In Alaska double the amount of the entire interest paid may be recovered when the rate was usurious.[26] An averment in an indictment that defendant, as agent of a corporation, exacted interest at a usurious rate, is a sufficient allegation that the corporation violated the usury law.[27]

VAGRANTS.[28]

Where power is given to a municipality to define vagrancy and punish "vagrants," the power to punish follows the power to define and is not limited to those who were vagrants at common law.[29] Vagrancy ordinarily consists in habitual idleness and want of visible means of support,[30] and is not inconsistent with a fixed

veyance as a payment on the principal, and the subsequent payments made to discharge the loan as the payment of the usurious interest. Davisson v. Smith [W. Va.] 55 S. E. 466.

14. Suit by second mortgagee against first mortgagee for an accounting of indebtedness due under first mortgage alleged to be usurious, and for a resale of the mortgaged premises, the allegation being that repeated demands for an itemized account had not been complied with. Crittenden v. Ragan [Miss.] 42 So. 281.

15. The provision so construed was an amendment to Code 1896, § 2630, declaring that contracts for the payment of usurious interest cannot be enforced except for the principal, passed after the supreme court had decided that under such section a borrower seeking affirmative relief in equity must tender interest at the legal rate. Barclift v. Fields [Ala.] 41 So. 84.

16. Nor will three years' delay constitute such laches as against the lender as will bar a suit to cancel a conveyance made to induce a loan at the full legal rate of interest, where the increase in the value of the land was not due to any expenditure or effort on the part of the lender. Davisson v. Smith [W. Va.] 55 S. E. 466.

17. See 6 C. L. 1780.

18. Collections made on collaterals given to secure the usurious loan, made after the receiver of the debtor had demanded the return of the collaterals, cannot be considered voluntary payments. Murphy v. Citizens' Bank [Ark.] 100 S. W. 894.

19. Where the mortgagor, under a mortgage to a building and loan association, at the time he made his last payments asked for a release, which was later mailed to his wife and received by her, and never returned to the mortgagee, although not recorded, the mortgage was held to be released and "redeemed or settled for by the obligor" within the meaning of the statute. Lovett v. Calvert Mortgage & Deposit Co. [Md.] 66 A. 708.

20, 21. See 6 C. L. 1780.

22. This was held to be especially true under a statute providing that if usurious interest is paid, the person paying the same "may by action of debt" recover double the amount so paid. Wartman v. Empire Loan Co. [Tex. Civ. App.] 101 S. W. 499.

23. Western Bk. & Trust Co. v. Ogden [Tex. Civ. App.] 15 Tex. Ct. Rep. 594, 93 S. W. 1102.

24. Schlesinger v. Lehmeier, 102 N. Y. S. 630.

25. The action was brought under a statute providing that where usurious interest is collected the person paying it may recover "from the person receiving the same" double the amount of the interest. Western Bk. & Trust Co. v. Ogden [Tex. Civ. App.] 15 Tex. Ct. Rep. 594, 93 S. W. 1102.

26. A statute providing that if "usurious interest" is received the person paying the same may recover "double the amount of the interest so received or collected" was so construed. Hemple v. Raymond [C. C. A.] 144 F. 796.

27. State v. Wickenhoefer [Del.] 64 A. 273.

28. See 6 C. L. 1780.

29. Nichols v. Salem [Or.] 89 P. 804. See 6 C. L. 1781, n. 56.

30. One who wanders and strolls about in idleness, with no lawful purpose or ob-

place of abode.[31] A minor is not without a means of support unless his parents are unable to support him.[32] Various acts such as desertion of family [33] and being a common gambler [34] are specially denounced as vagrancy by some statutes. Conclusions of witnesses as to defendant's occupation and status are inadmissible.[35]

VALUES; VARIANCE; VENDITIONI EXPONAS, see latest topical index.

VENDORS AND PURCHASERS.[36]

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C. Remedies (2235).
§ 13. Enforcement of the Contract of Sale (2235).

§ 1. *The contract for the sale of land. A. General nature, requisites, and validity.*[37]—A contract of sale transfers for money the right to the title of the land, and therein is distinct from an option,[38] an agreement for brokerage,[39] an exchange,[40]

ject whatever, as an habitual loafer, idler, and vagabond, who is able to work, has no property, no reasonably continuous employment, and no regular income, is a vagrant under the Georgia statutes. Especially when his loafing and loitering is about poolrooms, barrooms, dives, lewd houses and the like. Carter v. State, 126 Ga. 570, 55 S. E. 477. One who is an habitual loafer and loiterer, both morning and evening, in the "tenderloin" district of a city, who is able to work and has no property, no reasonably continuous employment, and no regular income, is a vagrant within the Georgia statutes. Darby v. State [Ga.] 56 S. E. 91. Evidence that defendant, a woman, was frequently seen loitering at all hours and in the company of lewd persons held sufficient. Glover v. State, 126 Ga. 567, 55 S. E. 403.

31. Carter v. State, 126 Ga. 570, 55 S. E. 477.

32. In Georgia the inability of the parents to support their child, over sixteen and under twenty-one years of age, is essential to the validity of a conviction of the child for vagrancy. Collins v. State, 125 Ga. 15, 53 S. E. 809.

33. Remaining away from one's wife and children after having left them without means, prior to the passage of the Alabama statute, declaring one who quits his house and leaves his wife and children without means guilty of vagrancy, is not such a continuing offense as to fall within the statute. Crawley v. State [Ala.] 41 So. 175.

34. Where defendant was charged with vagrancy and in another count with being a professional gambler living in idleness, the refusal of a request to charge that under the law of vagrancy the gist of the offense is the failure, or refusal of the offender to work when work is necessary to support himself was not erroneous. Simmons v. State, 126 Ga. 632, 55 S. E. 479.

35. Testimony that defendant "was a professional gambler" held inadmissible on a prosecution for vagrancy in that defendant was a professional gambler. Leatherman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 75, 95 S. W. 504.

36. **Scope of title** is confined to contracts for sale of land and excludes Notice and Record of Title (see 8 C. L. 1169) and Deeds of Conveyance (see 7 C. L. 1103).

37. See 6 C. L. 1781.

38. An option contract is distinguishable from a contract of purchase and sale, in which a vendor is bound to convey and the vendee is bound to pay the purchase price. Hanschka v. Vodopich [S. D.] 108 N. W. 28. After negotiations a deed was deposited in escrow to be delivered to the purchaser on payment of notes given by him to the vendor. Held, a contract not a mere option. Bonanza Min. & Smelting Co. v. Ware [Ark.] 95 S. W. 765.

39. A contract for the sale of lands at an agreed price is not a mere brokerage contract by reason of a clause providing that the purchaser should plat and sell the land and giving him an opportunity for profit above the stipulated price to the vendor. Whirple v. Lee [Wash.] 89 P. 712.

40. A contract to "sell" lands and to accept other lands "as part payment," both at an agreed price, is an exchange, not a sale. Steere v. Gingery [S. D.] 110 N. W. 774.

a mortgage,[41] or a lease.[42] Like other contracts [43] it must be on consideration [44] and free from fraud [45] or inherent illegality, such as secret usury.[46]

Form of contract.[47]—The contract may be various in form [48] subject to the necessity of a writing,[49] and may be in several parts or papers;[50] but if a formal contract be contemplated the contract is to be found therein.[51] Other agreements may be incorporated in the same writing.[52] A modification does not destroy the original contract.[53]

Certainty and definiteness.[54]—A contract must be definite and certain as to time of performance and the amount to be paid,[55] and must definitely bind some person to sell.[56]

Offer and acceptance.[57]—The offer must be accepted without modification,[58] and acceptance is not presumed.[59] The acceptance of an option may be also the acceptance of the contract of sale tendered thereby.[60]

41. Facts held to show an absolute sale with option to repurchase, and not a mortgage. Jeffreys v. Charlton [N. J. Eq.] 65 A. 711.

42. An agreement for the rental of land with a provision that if the rent is paid when due and, also, any other sums which may be agreed upon by the parties, the vendor will convey the land, is a lease and not a contract of sale. Thomas v. Johnson [Ark.] 95 S. W. 468.

43. See Contracts, 7 C. L. 761.

44. An agreement to reconvey expressing no consideration was held valid in spite of an expressed consideration in the deed, where the transfer was intended to be temporary and both instruments were part of the same transaction. McAllen v. Raphael [Tex. Civ. App.] 96 S. W. 760.

45. A contract between the owner and brokers, with whom he has listed property for sale, for the sale of it to them, may be enforced if there is no fraud. Woodward v. Davidson, 150 F. 840.

46. A contract for the sale of land, in the usual form, contained this clause: "The parties of the first part agree to sell the within described land at a net profit of $500 for the party of the second part * * * and if not sold the parties of the first part agree to refund the down payment of $1,000 and $500 additional to the party of the second part." Held, on its face the agreement appeared to be a contract for the sale of land and not an attempt to evade the usury laws. Heinrich v. Jenkins, 98 Minn. 489, 108 N. W. 877.

47. See 6 C. L. 1782.

48. Executed contract of sale embodied in a bond for a deed. Abercrombie v. Shapira [Tex. Civ. App.] 15 Tex. Ct. Rep. 864, 94 S. W. 392. A lease provided that in case of renewal, according to the terms of the lease, and on full payment of the rent, the owner would convey to the lessee. Held, on completion of the payments this became a sale. Heard v. Heard [Ala.] 41 So. 827. An agreement signed by the vendor acknowledging the receipt of earnest money to be applied to the purchase price of certain lots, the price to be $150 per lot, and conditioned on furnishing a good title within thirty days, is a contract to convey. Newell v. Lamping [Wash.] 88 P. 195.

49. See post, § 1 C.

50. A deed to be delivered on payment of a note placed in escrow and a memorandum of the agreement for sale of the land, with a prior mortgage referred to in the deed, held to constitute the contract. Ditchey v. Lee [Ind.] 78 N. E. 972. Written instructions to bank by vendee at time of payment became, on acceptance of its conditions by vendors, merged in contracts between parties, and contracts so merged and modified were to be construed as a whole. Hunt v. Capital State Bank [Idaho] 87 P. 1129, modifying [Idaho] 86 P. 786 [advance sheets only].

51. Letters held to show that parties intended not to be bound until a formal contract was executed. Scott v. Fowler [Ill.] 81 N. E. 34.

52. Whippee v. Lee [Wash.] 89 P. 712.

53. Contract remained binding although modified. Husted v. Insley [Ark.] 94 S. W. 708.

54. See 6 C. L. 1782.

55. Statements of plaintiff's father that the land in controversy was his, that it would be his when he the father, got through with it, and that he intended him to have it, if disputed, are not sufficient to establish a contract to convey it. Watson v. Watson, 225 Ill. 412, 80 N. E. 332. Contract held definite as to time and amount; the amount depending on commissions susceptible of computation, and the time being on delivery of deed. Whittier v. Gormley [Cal. App.] 86 P. 726. An offer to sell land "to be paid for in either cash or commissions within three years from the date hereof, you to obtain purchasers for such of our lands as we place at your disposal, this agreement to sell to others, except yourself, to remain in force for twelve months," held unambiguous as to price. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883.

56. Agreement to furnish a deed, etc., held bad. Kingsbury v. Cornelison, 120 Ill. App. 495.

57. See 6 C. L. 1782.

58. Where an offer is accepted with modification, the party making the offer must accept the modification before the contract can become binding. Sharp v. West, 150 F. 458.

59. Sennett v. Melville [Neb.] 107 N. W. 991.

60. Such acceptance is binding, though made after the execution of the option by the vendor and not in his presence. Goldberg v. Drake, 145 Mich. 50, 13 Det. Leg. N. 383, 108 N. W. 867.

Mutuality.[61]—A contract may be mutual though signed only by the vendors,[62] and not every person interested in the title must sign the contract of sale.[63] It must run to the purchaser or some legal successor to his right.[64]

Construction.[65]—The contract may be interpreted by parol evidence,[66] and the price and conditions may be supplied by extrinsic evidence.[67] When the agreement is bilateral in form this will be done only on the clearest proof.[68]

(§ 1) *B. Reformation and cancellation.*[69]

(§ 1) *C. Statute of frauds.*[70]—The statute covers all contracts for the sale of land;[71] but the authority of an agent who executes the contract need not be in writing.[72] In those states which require such agent to have written authority, a verbally authorized agent can not delegate it.[73] To fulfill the requirements of the statute the land must be sufficiently described to be identified.[74] A memorandum of sale if signed suffices,[75] but its acceptance may be oral[76] unless it is sought to enforce it against the vendee.[77] Execution of the statute by part payment or entry and possession or both will take the contract out of the statute.[78] Damages for fraudulent failure to perform a contract may be recovered in spite of the fact that the statute has not been complied with.[79]

(§ 1) *D. Options to buy or sell.*[80]—An option is a contract whereby one purchases the right for a certain time, at his election, to make a contract for the sale of lands at a certain price,[81] but which passes no interest in the land;[82] hence, a

61. See 6 C. L. 1783.

62. A contract reciting that the vendors agree to convey in consideration of certain sums paid, and to be paid, and signed only by the vendors, is binding on both parties. East Jellico Coal Co. v. Carter, 30 Ky. L. R. 174, 97 S. W. 768.

63. A contract with a clause for the conveyance of vendor's homestead may be enforced by him, even though not signed by the wife, provided the wife is ready to join in the deed. Johnson v. Higgins [Neb.] 108 N. W. 168.

64. When a corporation purchaser has become dissolved before the performance by it, the contract is not enforceable by another corporation for the same purpose but not a successor. Seven Mile Beach Co. v. Dolley [N. J. Err. & App.] 66 A. 191.

65. See 6 C. L. 1783.

66. A contract providing that part of the price shall be secured by a mortgage or mortgages may be interpreted by parol evidence to show details of mortgages agreed upon by the parties. Portman v. Oppenheim, 50 Misc. 614, 99 N. Y. S. 537.

67. Landvoigt v. Paul, 27 App. D. C. 423. If necessary, evidence is admissible to explain recitals in a title bond as to consideration. Scranton v. Campbell [Tex. Civ. App.] 101 S. W. 285.

68. Foster v. Lowe [Wis.] 110 N. W. 829.

69. See 6 C. L. 1783. See, also, Reformation of Instruments, 8 C. L. 1708; Cancellation of Instruments, 7 C. L. 517.

70. See 6 C. L. 1783.

71. A contract to convey land for a railroad right of way is within the statute. Cape Girardeau & C. R. Co. v. Wingerter [Mo. App.] 101 S. W. 1113.

72. Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880.

73. Husband who has no written authority from wife to sell her land can give none in writing to an agent to do so. Kirkpatrick v. Pease [Mo.] 101 S. W. 651.

74. Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880.

75. Under the New York Real Property Law, Laws 1896, p. 602, c. 547, § 224, a signed memorandum stating that part payment had been received, with a description of the land and the price is sufficient. Boehly v. Mansing, 102 N. Y. S. 171.

76. If vendor executes a memorandum sufficient to satisfy the statute of frauds, purchaser may make the contract mutually binding by an oral acceptance. Boehly v. Mansing, 102 N. Y. S. 171.

77. Kingsbury v. Cornelison, 122 Ill. App. 495.

78. Under Ala. Code of 1896, § 2152, both payment and possession are necessary in order to fulfill the requirements of the statute of frauds, but they need not be contemporaneous. City Loan & Banking Co. v. Poole [Ala.] 43 So. 13. An oral agreement to purchase land in addition to that covered by a prior agreement, followed by possession for more than a year, is binding on the purchaser. Urich v. Watts [N. J. Eq.] 66 A. 432. Taking possession of land and making lasting and valuable improvements upon it under a parol agreement of sale takes the case out of the statute. Abrams v. Abrams [Kan.] 88 P. 70.

79. "A party to a parol contract which would ordinarily fall within the statute of frauds, who has so far performed the same as to render it a fraud for the other party to repudiate the agreement, is not prevented by the statute from recovering damages for its breach." McLeod v. Hendry, 126 Ga. 167, 54 S. E. 949. See, also, post, § 10, as to measure of damages.

80. See 6 C. L. 1784.

81. Evidence held to show option. Seidman v. Rauner, 99 N. Y. S. 862; Murphy v. Hussey, 117 La. 390, 41 So. 692. A receipt on account of the purchase price of land, describing it, and stating the time within which the deal was to be closed, is an op-

lessee with an option to purchase does not on exercising the option, acquire the rights of an innocent purchaser.[83] A contract to purchase options is not itself optional.[84] The option must have a consideration like other contracts [85] and may be lost by default in payments agreed.[86] Upon the acceptance of the option both parties are bound by it as a valid contract.[87] A junior option holder cannot complain that an option to which he was subject was closed on better terms than the buyer was entitled to.[88] The option must be accepted according to its terms [89] and within the time specified.[90] If, however, no time is specified, it is terminable at any time on reasonable notice by the vendor,[91] or the option may be withdrawn by a sale to a third person,[92] or by an action to recover the property.[93] In case of an option contract, refusal of vendor to perform before any demand is made by the vendee is not a renunciation or effective to determine vendee's rights to require performance.[94] It can be accepted but once [95] and if the acceptance be broad enough a contract of sale may be made thereby.[96] A deposit under the option contract may amount to a

tion and not a contract. Indiana & Arkansas Lumber & Mfg. Co. v. Pharr [Ark.] 102 S. W. 686. A contract of exchange giving the purchaser an opportunity of rejecting vendor's title because of bay window encroachments, in which event the deposit money should be returned, will be construed as an option. Hough v. Baldwin, 50 Misc. 546, 99 N. Y. S. 545.

82. An agreement that owners of mining lands would procure a patent and then on demand and the payment of $100 convey the property created merely an option and gave purchasers no equitable interest. Stevens v. McChrystal [C. C. A.] 150 F. 85.

83. Storms v. Mundy [Tex. Civ. App.] 101 S. W. 258.

84. An agreement to pay a certain price for options held by the vendor within nineteen months from the date of the contract, the vendor to cause a deed to be delivered to purchaser who was to assume all liabilities on the options, is a contract to purchase the option and not an option to do so. Baraboo Land, Min. & Leasing Co. v. Winter [Wis.] 110 N. W. 413.

85. **A mere offer to sell** which is without consideration has no binding force until accepted. A gratuitous option is a mere nudum pactum. Kirby-Carpenter Co. v. Burnett [C. C. A.] 144 F. 635. A consideration of $1 for an option to purchase coal being merely nominal is not sufficient to prevent option from being withdrawn before acceptance. Murphy, Thompson & Co. v. Reid [Ky.] 101 S. W. 964. The expense incurred by a possible purchaser in obtaining information about land offered to him is not good consideration and will not give a mere offer the character of an option. Comstock Bros. v. North [Miss.] 41 So. 374.

86. In an option contract upon failure to make payments at the time or times specified, the contract is terminated and the rights of the party holding the option at an end. Hanschka v. Vodopich [S. D.] 108 N. W. 28.

87. Boston & W. St. R. Co. v. Rose [Mass.] 80 N. E. 498; Murphy, Thompson & Co. v. Reid [Ky.] 101 S. W. 964.

88. Where lease gave lessee preference right to purchase property at price offered by any third person, fact that terms of final contract of sale to lessees differed somewhat from provisions of the option was immaterial so far as rights of third person making offer to purchase subject to prior option was concerned. Slaughter v. Mallet Land & Cattle Co. [C. C. A.] 141 F. 282.

89. Unless one or more of the conditions are waived. Fulton v. Messenger [W. Va.] 56 S. E. 830. Terms must be exactly complied with by the vendee. Trogden v. Williams [N. C.] 56 S. E. 865. If an option provide that unless it be accepted and payment made within a certain time it will be void, it must be accepted according to its terms before an executory contract is consummated. Pollock v. Brookover [W. Va.] 53 S. E. 795.

90. Time is of the essence of an option contract even if not expressly made so by its terms. Hanschka v. Vodopich [S. D.] 108 N. W. 28. A letter stating that the purchaser would "be ready to close the option" after the time limited by the agreement is not such an acceptance as will bind the vendor. Indiana & Arkansas Lumber & Mfg. Co. v. Pharr [Ark.] 102 S. W. 686. An option with an agreement to convey coal within eighteen months, payment to be made at the rate of one-third in nine months and the balance in eighteen months, must be exercised within nine months. Weaver v. Sides [Pa.] 65 A. 666. An option in a lease gave lessee the privilege of purchasing within a certain time. The lessee gave notice of his desire to purchase one day after the time had expired, held, notice too late. Frey v. Camp [Iowa] 107 N. W. 1106.

91. Stone v. Snell [Neb.] 109 N. W. 750.

92. Sprague v. Schotte [Or.] 87 P. 1046.

93. It is proper to terminate an indefinite extension of an option by an action to recover property. Beckman v. Waters [Cal. App.] 86 P. 997.

94. Solomon Mier Co. v. Hadden [Mich.] 111 N. W. 1040.

95. In a contract for supplying a city with water was a clause giving the city the right to purchase the waterworks at an appraisal value. The city gave notice within the stipulated time that it would purchase but refused to appoint appraisers or carry out the contract. Held, the city had but one option and, having exercised it, was bound by a valid contract. Castle Creek Water Co. v. Aspen [C. C. A.] 146 F. 8.

96. If an option have added to it a clause signed by the vendee agreeing to the terms mentioned and promising to pay for the premises within the time limited by the op-

payment on account of the purchase price if so intended.[97] An option will not be specifically enforced if such action will produce an inequality not foreseen by the defendant.[98]

§ 2. *Condition, quantity, and description of lands. What land.*[99]—The contract will be construed to include only those lands and appurtenances as were intended to be included by the parties or reasonably to be inferred from the contract itself.[1] Mere convenience will not establish an easement.[2]

Description.[3]—The description must be sufficient for identification.[4] A description may be controlled by a map annexed to the deed[5] or by reference to a certain block on a map in the vendor's office.[6] The purchaser according to survey takes what was intended to be included, though the description by mistake will not include all.[7] A notice of boundary lines may be given by fences[8] or by plans and deeds.[9]

What acreage or quantity.[10]—If the sale is by the tract no deficiency in acreage justifies a reduction from the price,[11] also if the statement of the quantity of acres is mere matter of description,[12] and, even where land is described as containing an exact number of acres, there is no implied warranty of quantity.[13]

§ 3. *Title, deed, and encumbrances. What title was sold.*[14]—The rights which the purchaser acquires depend upon the terms of the contract,[15] and accordingly he

tion, it becomes a binding contract. Goldberg v. Drake, 145 Mich. 50, 13 Det. Leg. N. 383, 108 N. W. 367. For form of an agreement which was originally an option but subsequently modified into a contract see Libby v. Parry, 98 Minn. 366, 108 N. W. 299.

97. Moore v. Beiseker [C. C. A.] 147 F. 367.

98. Starcher Bros. v. Duty [W. Va.] 56 S. E. 524.

99. See 6 C. L. 1785.

1. A contract for the sale of a "plant used for the collection and disposal of garbage, including the crematory, buildings, wagons or other appurtenances thereto," will not cover articles not part of the plant and used only in emergencies. City of Waterbury v. Rigney [Conn.] 63 A. 775.

2. The right to take water from a pond on land adjoining that described in a deed, though it be more convenient so to take it than from brooks and springs on the land conveyed, will not pass as an appurtenance to that land. City of Waterbury v. Rigney [Conn.] 63 A. 775.

3. See 6 C. L. 1786.

4. Description sufficient: "The property and all improvements thereon situated in square bounded by St. Louis, Toulouse, Rampart and Basin streets, and known as Nos. 500 to 506 Basin street." Girault v. Feucht, 117 La. 276, 41 So. 572. A description of land for a railroad right of way in the terms "one hundred feet wide, the centre line thereof to be the center line of the roadbed as the same may be finally located," is adequate. Cape Girardeau & C. R. Co. v. Wingerter [Mo. App.] 101 S. W. 1113. All that owned by defendant lying on the waters of Long Fork of Miller's Creek in Pike County, Ky., "which lies back of the land of said B." Cox v. Burgess, 29 Ky. L. R. 972, 96 S. W. 577.

Description insufficient: "All that certain tract or parcel of land situate in McDowell county, West Virginia, on Rings Branch, Peggy's Fork and Laurel Creek, all tributaries of the Dry Fork of Tug river supposed by estimation to contain one hundred acres, be the same more or less." Webb v. Ritter [W. Va.] 54 S. E. 484.

5. Railsback v. Leonard [La.] 43 So. 548.

6. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883.

7. In order to reconcile or make clear the calls of a survey or to more nearly harmonize the quantity of land with that called for in the grant, the calls may be reversed and the lines run in the opposite direction. Newbold v. Condon [Md.] 64 A. 356.

8. The location of a boundary line by the building of a fence will be binding on the parties establishing the line and notice to an intending purchaser of the land on one side that the fence may be the boundary line. Adams v. Betz [Ind.] 78 N. E. 649.

9. If a lot of land is shown on a recorded plan and deeds as part of a public way, the purchaser will be held to have notice of that fact though he have no notice of any use by the public. Street v. Leete [Conn.] 65 A. 373.

10. See 6 C. L. 1786.

11. A deed describing land as "all that tract" in a certain location "containing 320 acres more or less and bounded as follows" is a conveyance by the tract and not by the acre, and in the absence of fraud no recovery may be had for deficiency in acreage. Goette v. Sutton [Ga.] 57 S. E. 308. A sale of land described as containing a certain number of acres with a further description by metes and bounds, is a sale by the tract and not by the acre, and in the absence of fraud a deficiency in the number of acres is no ground for a deduction from the price. Kendall v. Wells, 126 Ga. 343, 55 S. E. 41. See further **infra**, § 10; **Deficient quantity or other partial failure of consideration.**

12. Whenever it appears by definite boundaries, or by words of qualification as "more or less" or as containing by estimation, or the like, that the statement of the quantity of acres in the deed is mere matter of description, or not of the essence of the contract, the buyer takes the risk of the quantity, if there be no intermiture of fraud in the case. Cohen v. Numsen [Md.] 65 A. 432.

13. Winton v. McGraw [W. Va.] 54 S. E. 506.

14. See 6 C. L. 1787.

15. Under an agreement to sell "all the

may become liable for incumbrances.[16] No greater title can pass than the vendor has,[17] but what he has from a former vendor may be claimed by any subsequent purchaser though not in the deeds.[18]

Sufficiency of title tendered.[19]—If there is no express or implied warranty the purchaser gets what title the vendor has and may not complain thereof, and a sale avowedly of just what the vendor has implies no warranty that he has a good title.[20] But ordinarily the purchaser is entitled to a marketable title, that is to say one free from incumbrance of a character detrimental to the salability of the land[21] from lis pendens[22] and from outstanding claims of title or right casting doubt on that offered.[23] If fixed beyond a doubt title by adverse possession is good.[24] The burden

premises" and to execute a quitclaim deed therefor, vendor may be required to give a title free from incumbrances. Wallach v. Riverside Bk., 104 N. Y. S. 661. Facts held to show that an agreement by a married woman to convey all her interest in land owned by her and her brother jointly was understood by the purchaser to include her husband's interest and, therefore, that it must be so construed. Noecker v. Wallingford [Iowa] 111 N. W. 37. A reservation by the owner of land of the use of a railroad siding in a lease with an option of purchase, the title to be "clear of all incumbrances," will not justify him in reserving the use of the siding in the deed to the lessee. Holmes v. Dowler [Pa.] 65 A. 1088.

A contract to give a buyer a title satisfactory to him makes the buyer the sole judge of the reasonableness of his refusal to carry out the agreement. Liberman v. Beckwith [Conn.] 65 A. 153.

16. Vendee held liable to the payee of a note signed by the vendor and secured by a deed of trust of the land which he has agreed to pay. Hastings v. Pringle [Colo.] 86 P. 93. The failure of a recorded mortgage to show the maturity of the debt and the rate of interest will not justify vendee's failure to perform under a contract stating that the mortgage was at the rate of five per cent. and due in about five years. Halpern v. Fisch, 101 N. Y. S. 1019. Vendee is bound by the terms of a mortgage to which his purchase is subject. Feist v. Block, 100 N. Y. S. 843.

17. If the grantor of land has no title he can convey none, and the purchaser cannot claim as a purchaser for value without notice. Lindblom v. Rocks [C. C. A.] 146 F. 660.

18. An agreement between owner and purchaser of land, imposing restrictions thereon, may be enforced by subsequent purchasers, though no deeds contain any reference to it. Boyden v. Roberts [Wis.] 111 N. W. 701.

19. See 6 C. L. 1787. Necessity of furnishing abstract see post, § 6.

20. Norton v. Stroud State Bank [Okl.] 87 P. 848.

21. Delinquent water charges not an incumbrance. Linne v. Bredes [Wash.] 86 P. 858. An annual charge on lands known to the purchaser is not such an incumbrance as to render the title unmarketable. Ditchey v. Lee [Ind.] 78 N. E. 972. A judgment entered subsequent to the conveyance in question, followed by the discharge of that judgment in bankruptcy, constitutes no defect in the title. Russell v. Wales, 104 N. Y. S. 143. If regular proceedings in bankruptcy were had against a former owner within a month from the recovery of a judgment against him, and the premises were sold by trustee, no objection to title. Kennedy v. Holl, 103 N. Y. S. 231.

Held an incumbrance: Mechanics' liens. Sands v. Stagg, 105 Va. 444, 64 S. E. 21; Davis v. Roller [Va.] 56 S. E. 4.

22. If a lis pendens to compel observance by the vendor of municipal regulations is canceled before the date for closing the contract, the purchaser cannot object to title. Kennedy v. Holl, 103 N. Y. S. 231.

Proceedings by a railway company **to condemn** part of the premises **are a defect** such as justifies refusal to take title. Miller v. Calvin Phillips & Co. [Wash.] 87 P. 264.

23. Evidence that grantor had a wife two years after the conveyance is no ground for the assumption that he had one at the time. Russell v. Wales, 104 N. Y. S. 143. Mortgagees in possession after time for redemption has expired have a marketable title, although they might be subject to ejectment based on the disability of insanity or imprisonment. Messinger v. Foster, 101 N. Y. S. 387.

Encroachments which are merely the ornamental parts of a stoop and removable may, under the N. Y. Code, be regarded as existing by leave and constituting no defect in the title. Van Horn v. Stuyvesant, 50 Misc. 432, 100 N. Y. S. 547. The projection of a step, four inches beyond the building limits prescribed for streets, continuing for twenty years without objection on the part of city officials, will not be held to be such an incumbrance as will make the title unmarketable. Van Horn v. Stuyvesant, 50 Misc. 432, 100 N. Y. S. 547. A clause in a contract that "vendee has the privilege of a **party** wall as per agreement now in possession of A" indicates an addition to the contract and not an incumbrance. Samuelson v. Glickman, 113 App. Div. 654, 99 N. Y. S. 886.

Held to show doubt: Evidence showed that premises were incumbered by a bad foreclosure, a doubtful quitclaim deed, and a possible escheat, hence vendee should not be obliged to take them. Lowenfeld v. Ditchett, 99 N. Y. S. 724. The act of a broker having an **option to purchase** land in filing his contract for record creates such a cloud on the title as will justify one having a contract directly with the owner in refusing to perform and, also, deprives the broker of any right to a commission which he might otherwise have had. Woolf v. Sullivan, 224 Ill. 509, 79 N. E. 646.

Conveyance of infant's land by special guardian **to his mother** will create a doubt as to validity of title. Feller v. Mitchell, 103 N. Y. S. 269.

Lease expiring after date for delivery of

is on the one who objects to the title.[25] Defects in title may be supplied by the vendor at any time before conveyance is required.[26]

The deed tendered should be a good legal conveyance free from patent defects [27] and with such covenants as are stipulated or impliedly promised.[28] It must be properly signed [29] and acknowledged, [30] but the recording of the deed is not necessary to give grantee a good title.[31] If the purchaser has actual or constructive notice of defects in the title, he cannot hold the vendor responsible,[32] which notice the deed or contract may impart,[33] but the defects may be waived.[34] In proper cases the purchaser may have reformation of the deed.[35]

§ 4. *Price and payment.*[36]—If it is stipulated by the parties that time shall

deed held an incumbrance. Sugarman v. Goldberg, 100 N. Y. S. 1012. The right of a tenant to occupy premises from year to year constitutes such an incumbrance as will justify the purchaser in refusing to perform a contract for the sale of the property free from incumbrances. Eppstein v. Kuhn, 225 Ill. 115, 80 N. E. 80. A title will be held unmarketable where the owner's rights depend upon a **decree** rendered in a suit in which the rights of **unborn children** were not considered. Downey v. Seib, 185 N. Y. 427, 78 N. E. 66.

Violation of building restrictions such as apartment houses, prohibited. Altman v. McMillin, 100 N. Y. S. 970. Purchaser's **covenant** that he will not carry on upon the premises any noxious, offensive, or dangerous trade or business is **restrictive** and amounts to an incumbrance. Dieterlen v. Miller, 99 N. Y. S. 699. A covenant not to use any offensive business on the premises in question and not to place on the land anything which might be objectionable to a neighbor is such a restriction as will justify a refusal to perform a contract to convey free of incumbrances. Goodrich v. Pratt, 100 N. Y. S. 187.

24. Twenty years uninterrupted possession of land under a mortgage gives a good title to convey. Ocean City Ass'n v. Cresswell [N. J. Err. & App.] 65 A. 454. A title resting on the statute of limitations will support an action for specific performance if it is so clearly established as to be matter of law. Greer v. International Stock Yards Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 672, 96 S. W. 79. A continuous, notorious, adverse, and uninterrupted possession of land for forty-three years by the trustees of a church gives them such title as a purchaser is bound to accept. Dickerson v. Franklin Street Presbyterian Church Trustees [Md.] 66 A. 494.

25. A purchaser who rejects a title on the ground that a lease of the premises had not been properly terminated has the burden of proving the irregularity. Weintraub v. Weil, 103 N. Y. S. 229.

Evidence held sufficient to prove a lost deed necessary to complete title. New Orleans Real Estate Mortg. & Security Co. v. Carrollton Land Co. [La.] 43 So. 641.

26. Thompson v. Hoppert, 120 Ill. App. 588.

27. A deed requiring judicial construction is not a "proper deed" as stipulated by contract. Wadick v. Mace, 103 N. Y. S. 889.

28. If contract reads "to be paid when deed is made," a warranty deed will be presumed in Kentucky. Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880.

29. A signature by initials will be held sufficient where grantor's christian name is set out in the body of the deed in full. Woodward v. McCollum [N. D.] 111 N. W. 623.

30. Moran v. Stader, 103 N. Y. S. 175.

31. Levi v. Mathews [C. C. A.] 145 F. 152. The possession of a valid deed, with valuable consideration, gives a title superior to one without valuable consideration, although the latter is recorded first. Deen v. Williams [Ga.] 57 S. E. 427.

32. See, generally, Notice and Record of Title, 8 C. L. 1169.

33. As to notice of defects to be had from deeds see Schmidt v. Olympia Water, Light & Power Co. [Wash.] 90 P. 212. A deed conveying only the grantor's interest is insufficient to bring the purchaser within the protection of Texas Rev. St. 1895, art. 4640, making a prior unrecorded conveyance void as to subsequent purchasers for value without notice. Woody v. Strong [Tex. Civ. App.] 100 S. W. 801.

Purchaser under a quitclaim deed takes subject to all equities against his grantor. Reed Co. v. Klabunde [Neb.] 108 N. W. 133. An agreement to convey by a good and sufficient quitclaim deed means that vendor is to convey only his interest in the land. McNellis v. Hilkrowski, 98 Minn. 127, 107 N. W. 965. The use of the word "quitclaim" in a deed does not restrict the conveyance if other language shows an intention to convey the land itself. Allen v. Anderson [Tex. Civ. App.] 16 Tex. Ct. Rep. 343, 96 S. W. 54. Under statutes of Indiana a quitclaim deed is notice to a purchaser that he is accepting a doubtful title. Aetna Life Ins. Co. v. Stryker [Ind. App.] 78 N. E. 245.

34. Hayward v. Campbell [La.] 43 So. 910. It is a good defense to an action for the purchase money of real estate, under an agreement to convey free of all easements, that the property is subject to easements, even though they were known to the defendant at the time of purchase. Patterson v. Freihofer [Pa.] 64 A. 326.

35. Purchaser entered on property pointed out by vendor's agent and made improvements. Held, he might have the deed offered by the vendor so corrected as to cover those lots. Wright v. Isaacks [Tex. Civ. App.] 15 Tex. Ct. Rep. 991, 95 S. W. 55. Vendors are relieved from performance of a promise to do certain work required by tenement house regulations if they are subsequently so modified as to require less. **Rogers v.** Wilkenfeld, 102 N. Y. S. 637.

36. See 6 C. L. 1789.

be of the same essence of the contract, payment must be made within the time specified, but where there is no stipulation that time shall be of the essence of the contract the purchaser has a reasonable time for payment.[37] If part of the consideration was the transfer of other property, it must be transferred as agreed.[38] When release of obligations is a consideration the time of their actual surrender is not essential.[39] Payment may be made independent upon the happening of various conditions making it absolute.[40] It is frequently stipulated that the purchase price may be deposited in a bank pending the examination [41] or perfecting of the title,[42] during which time it is not subject to exclusive control of either party.[43] A note given as part payment for incumbered land is due at maturity only if the incumbrances have been removed.[44] The payments cannot be withheld for defect in title which the vendor is not yet bound to make good.[45]

§ 5. *Time.*[46]—Time is not of the essence of a contract to sell land unless expressly so stipulated by the parties,[47] but the contrary is true of an option.[48] Where time is of the essence of the contract, the terms must be literally complied with [49] unless waived.[50]

37. Montgomery v. Montgomery [Tex. Civ. App.] 99 S. W. 1145.

38. Facts held to show that the promise of the vendee to furnish certain vehicles to the vendor was part of the agreement for the sale of land. Newburn v. Hyde [Iowa] 107 N. W. 604.

39. An agreement entered into at the time of a contract of sale, whereby a note against the seller and held by the purchaser was to be surrendered as a part of the payment to be made at that time, may be treated by the court as fully executed, notwithstanding the note was not as a matter of fact surrendered until the day the deed was delivered. Warns v. Reeck, 8 Ohio C. C. (N. S.) 401.

40. Plaintiff agreed to purchase claim from intervenor, paid part of purchase price in cash, and agreed to pay $7,000 on certain date, together with cost of securing patent. Deed was deposited with bank in escrow to be delivered if payment was made on specified date, time being of essence of contract. $7,000 was deposited on date specified but, obtaining of patent having been delayed, vendee instructed bank in writing to hold it until receiver's receipt was issued. Held that payment was absolute, and, on production of receiver's receipt by vendors, bank was justified in paying money to them. Hunt v. Capital State Bk. [Idaho] 87 P. 1129, modifying [Idaho] 86 P. 786 [advance sheets only].

41. Money for the purchase price of land, deposited in a bank pending the examination of the title, may be paid out only by direction of both parties. Holliday v. Hammond State Bk., 116 La. 890, 41 So. 198.

42. Money deposited in a bank for the purchase of land, the title to which is defective, cannot be withdrawn by the purchaser until the vendor has had a reasonable time to cure the defect. Holliday v. Hammond State Bk., 116 La. 890, 41 So. 198. The deposition of the price agreed upon for a mining claim with the bank specified by the parties held to be sufficient payment, although the purchaser instructed the bank not to pay the money over until it had received a patent to the claim. Hunt v. Capital State Bk. [Idaho] 87 P. 1129.

43. See preceding two notes.

44. Neely v. Williams [C. C. A.] 149 F. 60.

45. He may perfect it at any time till conveyance is due. Thompson v. Hoppert, 120 Ill. App. 588.

46. See 6 C. L. 1790.

47. Kaufmann v. Brennan, 103 N. Y. S. 912. That part of the contract specifying the time within which the deed should be delivered is within the ordinary rule that time is not of the essence unless expressly made so, or unless circumstances show that it was deemed important by the parties and was intended to be made the subject of a stipulation to be performed literally, or unless there is such change of conditions after the time fixed for performance that the enforcement of the contract would be inequitable. Boston & W. St. R. Co. v. Rose [Mass.] 80 N. E. 498. If in a suit to compel specific performance of a contract to convey land the complaint is verified eight days after the date of the contract, and service made four days later, the court will not infer that a reasonable time for the delivery of the abstract has expired. Cummings v. Wilson, 99 Minn. 502, 110 N. W. 4. Where conveyance depends upon the procuring of a patent to lands, and no time for demand and tender is specified, purchaser may have a reasonable time after issue of patent within which to make demand. Stevens v. McChrystal [C. C. A.] 150 F. 85. Time will not be regarded of the essence in regard to contracts for the actual sale and purchase of land. Hanschka v. Vodopich [S. D.] 108 N. W. 28.

48. See ante, § 1 D.

49. Contract of purchase and sale contained an express condition that a single failure to pay the amounts due under the option of purchase at the dates named therein should render the same absolutely null and void. Collins v. Delaney Co. [N. J. Eq.] 64 A. 107. A contract dated April 15, 1903, for the payment of a sum "at the end of three years" on delivery of a deed, is satisfied by delivery on April 14, 1906. Ayars v. O'Connor [Wash.] 88 P. 119. The doctrine that equity will not permit parties to stipulate respecting the time of performance, so as to fix their respective obligations, has never been adopted in New Jersey. Collins v. Delaney Co. [N. J. Eq.] 64 A. 107.

50. Where vendor delivers an abstract twenty-one days after the expiration of the

§ 6. *Conditions, covenants, and warranties.*[51]—There is no right to an abstract implied from an agreement to give a good title,[52] but, when required, the abstract furnished must show the character of title bargained and sold.[53] Nor does an incomplete abstract eked out by the vendor's conclusions that the title is good constitute "satisfactory evidence" of title.[54] In case of a discrepancy between abstract and contract which the seller does not remedy, the abstract will be taken as correct,[55] but defects in the abstract furnished may be waived by retention.[56] A contract may be made subject to the approval of the title,[57] or the vendor may bind himself by warranty[58] or representation,[59] or by agreement as to the specific terms of the deed or purchase-money mortgage,[60] or concerning the time and terms of incumbrances assumed.[61] A covenant of a railroad company to maintain a ditch to prevent the overflow of land, the owners of which agreed not to claim damages for the diversion of a creek, is binding and runs with the land.[62] A covenant forbidden by the contract of sale may not be inserted in the deed.[63] Covenants are not superseded by later agreements unless so intended.[64] Whatever conditions were in the

agreed time for the completion of the contract, the purchaser is not in default if he tenders the price seven days later. Newell v. Lamping [Wash.] 88 P. 195. A clause in a contract for the sale of land providing that time is of the essence of the contract is waived by the vendor's waiting for payments of interest and rent thirteen days after they are due. The vendor must then allow the vendee a reasonable time within which to comply with the terms of the contract. Keator v. Ferguson [S. D.] 107 N. W. 678.

51. See 6 C. L. 1791.

52. An agreement to give a good and perfect title does not require the vendor to furnish an abstract. Smith v. First Nat. Bk. [Tex. Civ. App.] 16 Tex. Ct. Rep. 729, 95 S. W. 1111.

53. An obligation to furnish an abstract of title showing marketable title in complainant is not performed by tendering an abstract showing outstanding judgment liens against the land, though at the time of its delivery complainant's agent informs defendant that they are satisfied. Russell v. Wales, 100 N. Y. S. 785. A purchaser under a contract requiring the vendor to give him an abstract showing good title may refuse to buy if the abstract shows unsatisfied judgments against the premises, though they have in fact been paid. Id.

54. A contract providing that the vendor shall furnish the purchaser "satisfactory evidence" of his title is not fulfilled where he furnishes an incomplete abstract and affidavits based on information and belief and stating conclusions without the facts. Clark v. Jackson, 222 Ill. 13, 78 N. E. 6.

55. Variance in the description of lands between the abstracts furnished and the contract. Moore v. Beiseker [C. C. A.] 147 F. 367.

56. Failure of vendor to deliver an abstract of title within specified time is waived by its acceptance and retention for months without complaint. Kentucky Distilleries & Warehouse Co. v. Blanton [C. C. A.] 149 F. 31.

57. If a contract for the sale of land is subject to the approval of the title by the vendee's solicitor, and the solicitor in good faith refuses to accept the title, the vendor may not enforce specific performance. Greer v. International Stock Yards Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 672, 96 S. W. 79. An agreement by the vendor to refund the deposit in case the title is insufficient is valid and enforceable in case he has no title. Board of Directors of St. Francis Levee Dist. v. Myers [Ark.] 94 S. W. 716.

58. Olschewske v. King [Tex. Civ. App.] 16 Tex. Ct. Rep. 635, 96 S. W. 665. A contract with the words "title guarantied" must be taken to mean that vendor will convey all his interest in the land in question. Goldstein v. Hensley [Cal. App.] 88 P. 507.

59. Representations made by the vendor that land near that purchased would be kept open as a park are binding on him. Marshall v. Columbia, etc., R. Co. 73 S. C. 241, 53 S. E. 417.

60. Under a contract providing that vendee shall execute a second mortgage with "all usual clauses," he cannot be required to execute one with the condition that the mortgagor shall pay all taxes assessed on the mortgage, otherwise that the debt shall immediately mature. Feist v. Block, 100 N. Y. S. 843. A clause in an agreement for sale of land for the securing of part of the purchase price by mortgage with an allowance to the mortgagor of seventeen per cent discount for prepayment provides for a voluntary anticipation of the payment, and not for payment enforced because of default in the terms of the mortgage. Industrial Sav. & Loan Co. v. Hare [Pa.] 65 A. 1080.

61. A purchaser who agrees to take property subject to a mortgage which he may pay off at any time on thirty days' notice cannot be compelled to take it if the mortgage gives the mortgagee the privilege of demanding payment, on a certain contingency, in thirty days. Oppenheim v. McGovern, 100 N. Y. S. 712.

62. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34.

63. A contract providing for certain covenants "which do not prevent the erection of stores" is violated by the insertion in the deed of a covenant against the erection of a building less than two stories in height, or without a cellar, or costing less than $2,500. Levin v. Hill, 102 N. Y. S. 690.

64. Evidence held to show that an escrow agreement was not intended to supersede the

contract [65] must be exactly performed.[66] When performance is become impossible through no fault of either party, it may be excused.[67] The remedy on the warranty is against the warrantor alone.[68]

§ 7. *Demand, tender, and default.*[69]—Either party who seeks to enforce a contract must prove performance of its conditions [70] or offer or tender of performance.[71] A qualified or conditional tender is insufficient,[72] but a tender may be made in court,[73] and when tender has been excused by the conduct of a defendant in an equity proceeding, plaintiff's offer in his bill to bring the money into court is sufficient.[74] It will be excused if unavailing and futile, or if the other party refuses to perform,[75] or if otherwise waived.[76] The bond for title should be surrendered or its nonenforceability shown.[77]

§ 8. *Forfeiture, rescission, and waiver. Forfeiture.*[78]—It is not a forfeiture of vendee's rights to contract with claimants, adverse to vendor's title.[79] The right of forfeiture must be found in the contract [80] and does not arise on mere default,[81]

prior agreement between the parties as to payment of interest. Womble v. Wilbur [Cal. App.] 86 P. 921.

65. A promise by the vendor at the time of payment that if the place was not right he would make it so cannot be construed to mean that he would repair damage due to animals. Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781. Whether later contracts were modifications or substitutes for the original option so as to include or exclude, a condition held for the jury. Tallman v. Edwards, 32 Pa. Super. Ct. 273.

66. An agreement to convey land on condition that the purchasers would conduct a bona fide summer school for three years, and erect such buildings as would be required, will not be enforced if no buildings are erected. Seven Mile Beach Co. v. Dolley [N. J. Err. & App.] 65 A. 991.

67. Delay of officials and litigation which prevent vendor from procuring patents to the land sold will excuse him from furnishing such to the purchaser. Cook v. Southern Pac. R. Co. [Cal. App.] 88 P. 1100. A contract for the conveyance of land and buildings, the latter constituting a large part of the value of the whole estate, the premises to be conveyed in the same condition in which they were at the time the contract was made, has an implied condition that performance is excused in case it becomes impossible through no fault of either party. Hawkes v. Kehoe [Mass.] 79 N. E. 766.

68. Land subject to annuities created by will was sold in separate parcels by warranty deeds to different purchasers. Held the last grantee, who has paid the proportion of the annuities chargeable on his land, cannot collect from prior purchasers, but has his remedy against the grantor on his covenant. Neely v. Williams [C. C. A.] 149 F. 60.

69. See 6 C. L. 1792.

70. If vendor fails to pay rent, as agreed, for part of the land, he cannot enforce a cancellation for vendee's failure to pay interest on deferred payments. Womble v. Wilbur [Cal. App.] 86 P. 916.

71. To enforce a contract vendee must show performance of conditions not in dispute and readiness to perform those in dispute. Cook v. Dane [Wash.] 86 P. 947. An agreement to furnish an abstract and, if the title is good, the vendor to execute a deed, gives the purchaser an opportunity of demanding a good title before tendering payment. Bowles v. Umberson [Tex. Civ. App.] 101 S. W. 842. If purchaser agrees to pay absolutely in consideration of vendor's promise to convey, the former's liability is absolute, and no tender of conveyance need be made in order to entitle the vendor to recover. Foster v. Lowe [Wis.] 110 N. W. 829.

72. It is not a sufficient tender for the vendor's agent to say to the purchaser that the deed has been signed and is in the agent's pocket. Lefferts v. Dolton [Pa.] 66 A. 527.

73. Tender of deed of reconveyance in suit to rescind, where plaintiff was mentally deficient, might be made at trial. Owings v. Turner [Or.] 87 P. 160.

74. Sharp v. West, 150 F. 458.

75. Landvoigt v. Paul, 27 App. D. C. 423; Sharp v. West, 150 F. 458. If the agent of the vendor refuse to deliver the deed, the purchaser need not tender the money. Douglas v. Hustead [Pa.] 65 A. 670. The repudiation of an obligation before tender can be made excuses tender. Sharp v. West, 150 F. 458. Tender of performance by vendee in contract for conveyance of land held not condition precedent to suit for specific performance. Guillaume v. K. S. D. Fruit Land Co. [Or.] 86 P. 883.

76. Facts showing waiver of condition as to tender of purchase price. Moore v. Beiseker [C. C. A.] 147 F. 367. The purchaser who does not say he will not accept a deed for the property, and does not in terms refuse to pay the balance of the purchase price, will not be held to have waived a tender of the deed. Lefferts v. Dotton [Pa.] 66 A. 527.

77. A bond to secure the execution of a deed must be surrendered by the vendee or shown to be unenforceable before he can demand his deed. Hardin v. Neal Loan & Banking Co., 125 Ga. 820, 54 S. E. 755.

78. See 6 C. L. 1793.

79. Cook v. Dane [Wash.] 86 P. 947.

80. See 6 C. L. 1793, n. 33, 34. If time is of the essence, vendor may cancel the contract for failure of the purchaser to furnish him with a power of attorney, to accompany a mortgage executed under the power, within the time specified. Sleeper v. Bragdon [Wash.] 88 P. 1036.

81. Failure of purchaser to pay the bal-

but will be sustained if clearly stipulated, even though no notice be given.[82] It is always possible for the vendor to waive his right to regard the contract as forfeited,[83] and equity may relieve against a forfeiture on protection of the other party.[84] The exclusive privilege of deciding whether the vendee has lost his rights by default may be reserved to the vendor,[85] but he cannot claim that his assignment of his contract to sell operates to make the contract void.[86]

Rescission.[87]—A contract may be rescinded for material misrepresentations which amount to statements of fact as distinguished from expressions of opinion, on which the party had a right to rely,[88] and even though the truth was of record, but where there was fraud in concealing the fact.[89] A full disclosure of facts materially affecting the value of the property sold is required of the vendor,[90] and the buyer will not be prejudiced by his delay in discovering facts which were concealed from him at the time of making the contract.[91] A trivial defect or irregularity in the title tendered, but which is not a doubt thereon, is not a ground for rescission,[92] nor is ignorance of conditions chargeable to the party's notice.[93] Entire or partial failure of title is sufficient ground.[94] The purchaser may hold the vendor to a literal compliance with the terms of the contract,[95] and is held to a reasonable degree of accuracy in describing the premises when they are conveyed.[96] The discovery of a very old in-

ance due on a contract does not terminate it if there is no forfeiture clause and no action by the vendor. Norris v. Hay [Cal.] 87 P. 380.

82. Vendor in granting purchaser an extension of time for payment stipulated that if payment were not made as provided the contract would be canceled. Held that on expiration of the time limit the contract was canceled without further notice. Sleeper v. Bragdon [Wash.] 88 P. 1036. A contract providing that time shall be of its essence, and that on default the land shall be forfeited, will be enforced unless grossly inequitable. Cue v. Johnson [Kan.] 85 P. 598.

83. Norris v. Hay [Cal.] 87 P. 380. The acceptance of payments made not according to contract prevents the vendor from declaring a forfeiture under the terms of the contract, except by notice that the balance must be paid within a reasonable time. Barnett v. Sussman, 102 N. Y. S. 287.

84. A bond executed by the owner of land provided that on the failure of the purchaser to perform certain conditions in regard to the payment of interest and taxes the owner might take possession. Held, on compensation being made to the owner within a reasonable time, equity would give the purchaser relief against the condition. Mead v. Morse [Mass.] 80 N. E. 513.

85. A contract providing that if payments are not made as stipulated it shall be void and all payments forfeited, subject to be revived in writing by the vendor, gives the vendor the right to say whether it shall be void or not. Foster v. Lowe [Wis.] 110 N. W. 829.

86. Foster v. Lowe [Wis.] 110 N. W. 829.

87. See 6 C. L. 1794.

88. Reilly v. Gottlieb [Wash.] 85 P. 676. Not for false representations as to janitor's salary, and payments of gas bills by tenants. Kranz v. Lewis, 100 N. Y. S. 674. Not for misrepresentations as to the rate of interest in a mortgage on the property. Id.

89. Fraud in concealing fact of sale of coal rights, though the deed thereof was ascertainable of record. Vernam v. Wilson, 31 Pa. Super. Ct. 257. An agent's statement that the land to be conveyed is twenty-five feet wide and sixty-five feet deep, and that there is a five-year lease upon it, when in fact the dimensions are twenty-three feet by sixty feet, and but four months of the term have expired, is not ground to attribute fraud to him. Kafka v. Grant [N. J. Law] 63 A. 900.

90. Burrows v. Fitch [W. Va.] 57 S. E. 283.

91. Purchaser who is delayed for three months, on account of the weather, in having her land surveyed, and then discovers that she was deceived as to the boundaries, may then rescind her contract. Freeman v. Gloyd [Wash.] 86 P. 1051.

92. Rescission will not be permitted because the deed does not specify the source of title as required by statute. McPherson v. Gordon, 29 Ky. L. R. 826, 1073, 96 S. W. 791.

93. Ignorance of unusual conditions in a mortgage, the existence of which mortgage the buyer knew. Schnitzer v. Bernstein, 103 N. Y. S. 860.

94. The purchaser is entitled to the bargain which he supposed he was getting and is not to be put off with any other, however good. Mather v. Barnes, 146 F. 1000. Rescission shown by refusal of vendee to pay on ground of want of title in the vendor. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178. A contract for the conveyance of all the coal in certain land may be rescinded by the purchaser on his learning that the vendor has only an undivided interest. Farber v. Blubaker Coal Co. [Pa.] 65 A. 651.

95. Where the time within which the deed must be deposited is made of the essence of the contract, the purchaser is entitled to rescind for failure of the vendor to do so, although he has suffered no damages. Boulware v. Crohn [Mo. App.] 99 S. W. 796.

96. Rescission by the vendee is permitted if the premises described in the deed are not

cumbrance, unknown to either party, is not ground for rescission till reasonable opportunity to clear it.[97] A purchaser may not rescind if he has not availed himself of the opportunities for examination,[98] provided he is not prevented from doing so by the vendor.[99] If rights of third parties have intervened, rescission may not be permitted.[1] An express repudiation of the contract by one party excuses the other from making a formal tender, and entitles him to rescind.[2] A rescission must be clear,[3] prompt,[4] and the burden is on the party rescinding to prove it.[5] An agreement for the rescission of a title bond is valid, though not in writing.[6] A mere refusal to receive payment is not a cancellation which must be more formal and accompanied by a return of the purchase money.[7]

Rights of vendee after rescission.[8]—Each party must be placed in the position in which he was before the contract was made.[9] If security has been given it must be returned before the holder may recover his payment on account of the price.[10] After a breach of the contract by either party and rescission, the court will seek to restore each to his original position.[11]

the same as those in the contract, and the bounds given in the deed are so complicated as not to be located without a surveyor. Shaw v. O'Neill [Wash.] 88 P. 111.

97. Ground rent 140 years old and unpaid for 55 years, and which vendor took immediate steps to discharge. Hausman v. Johnson, 32 Pa. Super. Ct. 339.

98. A misrepresentation with regard to material facts by which the purchase of property is induced vitiates the transaction; but purchaser must avail himself of means of knowledge which are at hand, and he cannot complain if he has undertaken an independent investigation of the property. Mather v. Barnes, 146 F. 1000. One who knows that land is in the possession of heirs is not subsequently estopped from rescinding for breach of warranty. Olschewske v. King [Tex. Civ. App.] 16 Tex. Ct. Rep. 635, 96 S. W. 665.

99. An investigation of property by an intending purchaser if perverted by the fraud or concealment of the vendor amounts to no examination at all. Mather v. Barnes, 146 F. 1000.

1. Held that a contract with one who had an interest in land owned by an insolvent firm, whereby part of the land was to be conveyed to him, should not be rescinded after all of the land had been mortgaged, but the land sold to pay the sum due on the mortgage. Bray v. Carroll [Ark.] 100 S. W. 744. Evidence held to show that vendors could not enforce reconveyance of all of certain tracts of land acquired under an agrement with the purchaser. Clutter v. Strange, 41 Wash. 86, 82 P. 1028.

2. Armstrong v. Ross [W. Va.] 55 S. E. 895; Johnson v. Higgins [Neb.] 108 N. W. 168.

3. Vendee's apparent rescission may simply amount to a request for further negotiations. A letter from the vendee stating that he thereby rescinded the contract declared it no longer in force and demanded return of the guaranty payment and that he should hold the vendors responsible for all damages, is to be regarded simply as a notice that further negotiations would be necessary, and not as a rescission. Moore v. Beiseker [C. C. A.] 147 F. 367. Vendor and purchaser conducted oral negotiations for the sale of land which were consummated by a vote of the board of directors of the vendor corporation sufficient to satisfy the statute of frauds. The purchaser then requested a confirmatory vote. Held, this action not a rejection of contract. Western Timber Co. v. Kalama River Lumber Co., 42 Wash. 620, 85 P. 338.

4. Seven months delay in rescinding a contract voidable for fraud will prevent purchaser from recovering back his payment on account. Mestler v. Jeffries, 145 Mich. 598, 13 Det. Leg. N. 600, 108 N. W. 994. After a delay of six months vendee may not rescind a contract voidable by reason of vendor's misrepresentations as to his title. Annis v. Burnham [N. D.] 108 N. W. 549. Delay of purchasers in giving notice of rescission for five months after the discovery of alleged fraud in the sale of mines, with their operation of the mines for two years, and long after the beginning of a suit to foreclose a mortgage given as part payment, will be such laches as will deprive them of their rights to rescind. Richardson v. Lowe [C. C. A.] 149 F. 625. A vendee who tries to sell after failure of vendor to furnish an abstract of title within the prescribed time loses his right to rescind on that ground. Boulware v. Crohn [Mo. App.] 99 S. W. 796.

5. In an action to recover back a deposit on account of the purchase price of land, the burden is on the plaintiff to prove that on the day set for the sale he was dissatisfied with the title and demanded the deposit. Saldutti v. Flynn [N. J. Eq.] 65 A. 246.

6. Asher v. Helton [Ky.] 101 S. W. 350.

7. Crawford v. Meyrovitz [Ala.] 48 So. 789.

8. See 6 C. L. 1796.

9. Where a contract is to be set aside for fraud, it is sufficient that each party gives up what he got unchanged, even though the purchaser has been to considerable incidental expense. Mather v. Barnes, 146 F. 1000. If there is no forfeiture clause in a contract for the sale of real estate, the party who rescinds must place the other in statu quo, the vendor must return payments made. Frederick v. Davis [Iowa] 110 N. W. 611.

10. McLean v. Wedell [Utah] 88 P. 414.

11. Rights of joint purchasers, in a suit to set aside a sale for fraud as to the value of an option, considered. Lazier v. Cady [Wash.] 87 P. 344.

Abandonment [12] is a question of fact to be determined by the acts of the parties and the circumstances surrounding the transaction.[13]

§ 9. *Interest in the land created by, and rights and liabilities under the contract.*[14]—Except where the terms of the contract are impeachable for fraud [15] or mistake, it is the measure of the parties' rights, and on fulfillment by one side the other's obligation is complete.[16] A complete new contract is necessary to cover extrinsic matters.[17] An agreement to pay charges means only such as are lawful.[18] The rights of strangers to a contract for the sale of land or an option are governed by the date on which the actual transition of the property occurred.[19] But in dealing with a third person a vendor may not assume that a prior contract for the sale of the same land has been abandoned unless it has in fact been terminated.[20] Unless his rights are limited by agreement, the purchaser is entitled to complete possession of the premises [21] and to all fixtures thereon.[22] Creditors of the vendor are not to be entitled to precedence unless they have a lien on the land.[23] The rights of a lessee on purchasing are limited by his knowledge of adverse equities,[24] but he may keep continuous possession under two contracts.[25] The legal title remains in the vendor till conveyance and if vendor assigns his contract he holds the land in trust for the two parties to the contract, and such trust continues until the land is conveyed to a purchaser for value without notice.[26] The vendee who is bound to purchase is in equity regarded as the owner,[27] and loss as in case of fire, occurring after the exe-

12. See 6 C. L. 1796.

13. Abandonment found. Hanschka v. Vodopich [S. D.] 108 N. W. 28.

14. See 6 C. L. 1797.

15. Where vendor is deceived by vendee as to the contents of the contract, he is bound by his understanding of the agreement and not by the contract as recorded. Brock v. Tennis Coal Co., 29 Ky. L. R. 1283, 97 S. W. 46.

16. See ante, §§ 7, 8; post, §§ 10-12. If a joint contract to reside with the owners of land and work for them is fulfilled by one of the parties, the liability of the owners is complete. Reilly v. Reilly [Iowa] 110 N. W. 445.

17. After the sale of a farm, a promise to repair damages to the land must be supported by a new consideration. Riley v. Stevenson, 118 Mo. App. 187, 94 S. W. 781.

18. Vendor who agrees to pay water bills may make against the purchaser the same defenses that he might have made against the water department. Williams v. Fraade, 102 N. Y. S. 806.

19. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952. A vendee who accepts an option indeterminate as to time takes the land subject to the rights of a tenant who has been let in while the option continued. Stone v. Snell [Neb.] 109 N. W. 750. A railroad company upon purchasing a right of way across leased premises cannot enter upon the same without first compensating the tenant. Ft. Smith Suburban R. Co. v. Maledon [Ark.] 95 S. W. 472.

20. Norris v. Hay [Cal.] 87 P. 380.

21. "To deliver such ranch" to the vendee means to turn over the actual physical possession to him. Pierce v. Edwards [Cal.] 89 P. 600.

22. A heating plant with boilers and pipes, intended to be the only method of heating a building, may by agreement of parties and as to themselves remain personalty until paid for, but as to a bona fide purchaser it becomes part of the realty. Kirk v. Crystal, 103 N. Y. S. 17.

23. As against a grantee who has been in possession under claim of ownership, purchasers under an execution sale on a claim not a lien on the land have no rights as bona fide purchasers. Chandler v. Dixon [Ky.] 101 S. W. 939. "Attaching creditors, even without notice of the equitable claims of third parties, who, in the transactions in which the debts sought to be collected were incurred, gave no credit to and had no knowledge of the apparent or record title of the debtor to the property attached, do not, as to the equitable owners of such property, stand in the position of bona fide purchasers for value, unless by force of some statute law to that effect." Waterman v. Buckingham [Conn.] 64 A. 212. Where a creditor obtains judgment and levies execution on property of the debtor, during the interval between a sale of the property by the debtor and execution of a deed and its delivery, the purchaser will be entitled, on distribution of the fund arising from the sale on execution, to the protection of the court to the extent of the amount he paid down at the time the contract of sale to him was made. Warns v. Reeck, 8 Ohio C. C. (N. S.) 401.

24. See Notice and Record of Title, 8 C. L. 1169.

25. One who is in possession under a contract to purchase land and who enters into a new contract whereby he surrenders all rights under the old and becomes a tenant of the owner is not obliged to make a physical vacation, under the former contract and a re-entry under the contract of lease, in order to enter into the new relation. Chambers v. Irish [Iowa] 109 N. W. 787.

26. Foster v. Lowe [Wis.] 110 N. W. 829.

27. Majors v. Maxwell, 120 Mo. App. 281, 96 S. W. 731. A purchaser who is in possess-

cution of the contract and before the passing of title falls on the purchaser.[28] The rights remaining in the vendor are subject to the lien of a judgment.[29]

Taxes.[30]—A purchaser is liable for taxes from the beginning of his possession [31] or from the time he was entitled to a conveyance.[32] The vendor may recover taxes paid which were assessed against him after contract of purchase, though no seizure of his goods was made or demand on the purchaser.[33]

Interest, rents, and profits.[34]—A vendee who enters before the price is paid or a sufficient deed tendered is liable for interest,[35] but if he pays a deposit he is in equity entitled to interest on his deposit and to a lien on the land for both, whether vendor is solvent or bankrupt.[36] When the purchaser agrees to pay interest on advances to be made for construction, he is not in default until the former makes demand for an accounting.[37] On finally accepting a deed once refused, the purchaser who has had possession must pay interest on the unpaid purchase money from the first tender.[38]

Rents and profits belong to the purchaser who is in possession of the premises unless the contract is repudiated.[39]

Standing timber.[40]—On a sale of land with standing timber, all rights of the vendor to the trees ceases.[41] Under a contract for the sale of standing timber, if purchaser refuses to pay the instalments of purchase price when due, vendor may, in equity, hold the manufactured product remaining on the premises;[42] but if the vendee's title is defective he is liable to the true owner for the trees which he has cut.[43]

sion under a bond and who has been making payments on the purchase price has an equitable title unless a forfeiture has been declared. Fitzgerrell v. Turner, 223 Ill. 322, 79 N. E. 76. The vendee's equitable interest in lands on which he has paid part of the purchase price descends to his heirs. In re Grandjean's Estate [Neb.] 110 N. W. 1108. A promise of sale which is duly recorded gives to the purchaser such a real right as is prior to that acquired by a subsequent deed. Lehman v. Rice [La.] 43 So. 639.

28. Where vendor agrees to convey a title clear of all incumbrances and a loss by fire occurs before he can do so, the loss must fall on him. Eppstein v. Kuhn, 225 Ill. 115, 80 N. E. 80. After the execution of the contract, vendee has the equitable title and, although he may not be in possession, loss by fire falls on him. Manning v. North British & Mercantile Ins. Co. [Mo. App.] 99 S. W. 1095. The loss due to the burning of a barn on the land to be conveyed, after the execution of the contract, where neither party is in fault, must fall on the purchaser. Woodward v. McCollum [N. D.] 111 N. W. 623.

29. Assignment by him of purchase money for benefit of his creditors held to extinguish all lienable interest. McCleery v. Stoup, 32 Pa. Super. Ct. 42.

30. See 6 C. L. 1799.

31. Spies v. Butts, 59 W. Va. 385, 53 S. E. 897.

32. On the theory that it was held by the vendor in trust. Seven Mile Beach Co. v. Dolley [N. J. Err. & App.] 66 A. 191.

33. Mangold v. Isabella Furnace Co., 31 Pa. Super. Ct. 276.

34. See 6 C. L. 1800.

35. Hatcher v. Fitzpatrick [Ky.] 101 S W. 933. Where a purchaser of real estate goes into possession and enjoys the rents and profits during a period of several months while the title is being perfected, he is liable for interest on the purchase money from the time of going into possession until the delivery of the deed. Carey v. Taylor, 8 Ohio C. C. (N. S.) 198. If purchaser had reasonable ground to defend a suit for specific performance, he should pay interest only from the date of judgment. Fluker v. DeGrange, 117 La. 331, 41 So. 591.

36. Everett v. Mansfield [C. C. A.] 148 F. 374.

37. Mead v. Morse [Mass.] 80 N. E. 513.

38. Kearney v. Kane, 32 Pa. Super. Ct. 236.

39. Rent received by an intending purchaser in possession must be accounted for on rescission of the contract. Moline Plow Co. v. Bostwick [N. D.] 109 N. W. 923. Rents and profits may not be set off for the benefit of a vendor except by authority of statute. Murray v. Murray, 30 Ky. L. R. 586, 99 S. W. 301. On accounting for rents collected after conveyance should have been made, the vendor must render not only the ground value but also the rental value of buildings thereon which were the purchaser's. Naughton v. Elliott [N. J. Eq.] 65 A. 858.

40. See 6 C. L. 1800.

41. Vendor who cuts trees on land after selling it is liable to vendee under Miss. Ann. Code 1892, § 4412. Smith v. Forbes [Miss.] 42 So. 382.

42. Spies v. Butts, 59 W. Va., 385, 53 S. E. 897.

43. A grantee who holds under a void deed and cuts timber on the land cannot compel the true owner to take payment for the timber and give him a deed to the land. Lodwick Lumbr Co. v. Robertson [Tex. Civ. App.] 102 S. W. 141.

§ 10. *Liability consequent on breach. Rights of the vendor.*[44]—The vendor may sue on the contract for damages due to the failure of the purchaser to perform.[45] The vendor must, if the contract requires it, show a clear title to the premises, but he need meet only such objections as the purchaser makes where the latter specifies them.[46] The vendor may maintain a bill to cancel the contract of sale and quiet his title where the purchaser has no right in law or equity to enforce it.[47] In an action to set aside the sale, all interested persons must be parties,[48] and this action, when brought by the vendor after repudiation of the contract by the vendee, is in the nature of one to quiet title.[49]

Rights of vendee.[50]—If the vendor is unable to give a good title,[51] or conveys the wrong property,[52] or deceives the vendee as to the values,[53] the vendee may recover back any payments which he made,[54] and in some cases has a lien;[55] but such lien does not coyer all expense incurred[56] and may be barred by laches.[57] Though the right to rescind be lost, the defense of fraud may remain.[58] The purchaser may refuse to perform because of unreasonable conditions imposed by the vendor,[59] or in case there is a defect in grantor's title.[60] A wife's failure to join in a conveyance may subject the husband to a liability for damages.[61] The purchaser may re-

44. See 6 C. L. 1800.

45. A vendor who sues for a payment due on a contract must regard the contract as still in force. Norris v. Hay [Cal.] 87 P. 380. Vendor who covenants that land is free from incumbrances and agrees to give a warranty deed cannot demand payment or declare the contract forfeited while a mortgage remains on premises. Bartlett v. Smith [Mich.] 13 Det. Leg. N. 713, 109 N. W. 260.

46. Vendor to defend suit by vendee need meet only the objections to the title which the vendee points out. Cowdrey v. Greenlee, 126 Ga. 786, 55 S. E. 918.

47. Whiteford v. Yellott [Md.] 64 A. 936.

48. In an action to dissolve a sale of community property for nonpayment of the price, after the death of the vendor, both widow and children are necessary parties, and the action will not be allowed if the widow is estopped by her admissions or if the result will not be to restore both sides to their original position. Bankston v. Owl Bayou Cypress Co., 117 La. 1053, 42 So. 500.

49. Beckman v. Waters [Cal. App.] 86 P. 997.

50. See 6 C. L. 1801.

51. Plaintiff not allowed to recover liquidated damages on the exchange of property because he could not show an unclouded title. Denser v. Gunn [Kan.] 87 P. 1132.

52. If vendor sells that which he did not intend to, vendee may rescind contract and recover his payment. Lee v. Laprade [Va.] 56 S. E. 719.

53. A mere opinion, as to value, by the vendor, if purchaser may investigate for himself, is not ground for an action of deceit. Long v. Kendall [Okl.] 87 P. 670. Evidence insufficient to show that purchaser was entitled to recover his deposit. Kroshinsky v. Klein, 101 N. Y. S. 13.

54. Frederick v. Davis [Iowa.] 110 N. W. 611. If vendor has no title, vendee may sue at any time to recover the price paid. Bonvillain v. Bodenheimer, 117 La. 793, 42 So. 273. When the contract is unenforceable and the vendor refuses to convey, the purchaser may recover whatever he has paid on account. Larson v. O'Hara, 98 Minn. 71, 107 N. W. 821. A deposit made to bind a bargain which was subsequently to be embodied in a written contract may be recovered when parties fail to agree on terms. Morris v. Lurie, 103 N. Y. S. 213.

55. Selkir v. Klein, 50 Misc. 194, 100 N. Y. S. 449. Where deed of vendor is void and the consideration is given to her husband, vendee has no lien. Wright v. Begley [Ky.] 101 S. W. 342.

56. Vendee has an equitable lien for his deposits on account of the price, but may not include in the lien cost of examination of the title. Occidental Realty Co. v. Palmer, 102 N. Y. S. 648.

57. A delay of more than three years after the alleged contract is made is unreasonable and will justify the court in refusing equitable relief to the vendee. Sharp v. West, 150 F. 458.

58. A purchaser who has lost, by laches, right to receive a contract for the sale of land, may still set up the fraud of the vendor as a defense to an action for part of the purchase price if he has himself fully performed his part of the contract. Richardson v. Lowe [C. C. A.] 149 F. 625.

59. If vendee is entitled to refuse to execute a mortgage because of unreasonable conditions therein, he is not bound to tender a mortgage which he will execute before refusing to complete the sale. Feist v. Block, 100 N. Y. S. 843.

60. If there is a tax against the land, vendee need not offer to perform, and may have relief in equity against the vendor who contracts to sell to another. Lese v. Lawson, 103 N. Y. S. 303. The incorporation of vendor's grantor was void; hence, vendee was justified in rejecting the title and might maintain a lien on the land for his deposit and expenses. Selkir v. Klein, 50 Misc. 194, 100 N. Y. S. 449.

As to what is a defective title see **supra,** § 3.

61. In the case of a contract binding a husband to convey the homestead during the life of the wife. Krebs v. Popp [Tex. Civ. App.] 15 Tex. Ct. Rep. 658, 94 S. W. 115.

cover for expenses the seller caused him by violation of building laws.[62] The vendee may waive his rights by dealings inconsistent therewith,[63] as where he continues in possession after the vendor fails to perform,[64] or may lose them by a premature refusal to perform,[65] for in order to recover damages the purchaser must be able to show compliance with the terms of the contract.[66] On a contract for exchange, neither party may recover unless he can show ability to perform, but this rule does not apply where a contract is given in exchange for an option.[67] Sums expended by the purchaser to remove incumbrances, which the vendor refused to remove will be allowed him on account of the purchase price.[68] The purchaser is not subrogated to incumbrances discharged with the purchase money.[69]

Measure of damages.[70]—The measure of damages on failure of vendor to perform is the difference between the contract price and the market value,[71] taking into consideration the reasonable value of improvements made and use of the premises,[72] and reasonable expenses for examination of title,[73] but not of securing title.[74] In Pennsylvania there may be recovery for vendor's breach of a parol contract, but unless there is fraud in the breach the damages are limited to the purchase money

62. In order to recover for repairs required by a tenement house violation, purchaser must show that the requirements of the tenement house department had not been modified or the violation dismissed within the time allowed the vendors to make the repairs. Vucci v. Pellettieri, 103 N. Y. S. 104.

63. Vendee's attempts to sell property of which he receives an insufficient abstract are not sufficient to show a waiver of his right to demand a perfect abstract. Lillienthal v. Bierkamp [Iowa] 110 N. W. 152. If purchaser is to have possession before completion of the contract, the fact that he enters and remains in possession after receiving an abstract which is defective does not estop him from refusing to pay the price. Id.

64. If vendor fails to perform his contract to deliver a perfect abstract and purchaser continues in possession, the latter cannot recover of vendor the penalty imposed by a bond for the faithful performance of the contract. Lillienthal v. Bierkamp [Iowa] 110 N. W. 152.

65. A contract was made subject to the determination of a cause relating to the title; if adversely to the vendor, purchaser to be entitled to the repayment of all sums paid. Held, that purchaser could not recover unless his payments had been regularly made. Jennings v. Dexter Horton & Co. [Wash.] 86 P. 576.

66. An agreement to surrender the land if the purchase-money was not paid is binding, and vendee may not compel vendor to give him a deed after the time for paying the note has expired. Poteet v. Miller [Ky.] 101 S. W. 360. Purchaser cannot recover deposit made under a preliminary agreement for the execution of a formal contract when he fails to appear at the appointed time and place for the execution of the contract. Roth v. Goodman, 102 N. Y. S. 683.

67. Where plaintiff made two contracts with defendant, one for a conveyance to him and the other for an option for reconveyance to defendant, and he is obliged to sue, the fact that he has no title to the land will not defeat his right to maintain his action. Curtis v. Sexton [Mo.] 100 S. W. 17.

68. Whittier v. Gormley [Cal. App.] 86 P. 726.

69. Where the purchase price has been used in the payment of pre-existing mortgages, which were extinguished and canceled on the record such payment gives no right of subrogation to the purchaser or his assigns, since the price thus used was the money of the vendor. Abbeville Rice Mill v. Shambaugh, 115 La. 1047, 40 So. 453.

70. See 6 C. L. 1801.

71. Cowdrey v. Greenlee, 126 Ga. 786, 55 S. E. 918; Whitworth v. Pool, 29 Ky. L. R. 1104, 96 S. W. 880. Relying on defendant's false representations, plaintiff orally agreed to purchase of defendant a farm for $1,200, giving him in payment a mortgage for $1,200 which the defendant sold and from the proceeds retained $600 on account of the purchase price of the farm. To satisfy plaintiff, defendant then promised to give him all he could get for the farm above $1,350, besides the $600. Defendant sold the farm for $1,500. Held, plaintiff entitled to recover the $750. Schamper v. Ullrich [Wis.] 111 N. W. 691.

72. After breach of a contract for the sale of land, the measure of damages is the payments made and the reasonable value of the improvements made in good faith less the value of the use of the premises. Bartlett v. Smith [Mich.] 13 Det. Leg. N. 713, 109 N. W. 260. In making a decree setting aside a sale, the court will consider the value of the property, the amounts paid on account of the price, and the value of the improvements made by the purchaser. Owings v. Turner [Or.] 87 P. 160. A purchaser who is induced to enter into a contract by fraud may have the contract rescinded in equity, and may recover back his deposit, less an allowance for the use of the premises. Pedley v. Freeman [Iowa] 109 N. W. 890.

73. Measure of damages, no bad faith of defendant, payment on account, and reasonable expenses for examination of title. Blate v. Clarry, 50 Misc. 668, 99 N. Y. S. 463; Samuelson v. Glickman, 113 App. Div. 654, 99 N. Y. S. 886.

74. Under Montana Civ. Code, § 4806, in absence of bad faith on part of vendor. Willard v. Smith [Mont.] 87 P. 613.

paid and actual damage.[75] In both written and oral contracts free from fraud, this is the measure.[76] On rescinding, the measure is the price paid with the value of improvements made before discovery of the fraud.[77] Installments paid under an option contract cannot be recovered back in case of default by the vendee.[78] If the vendee fails to perform, his deposit may be forfeited under the contract.[79] If a sale be of options and, if they be exercised, a profit to be paid to the seller of the options, his recovery will be according to whether they were exercised.[80] Money deposited by the vendor to cover the cost of work made necessary by violation of the tenement house law may be recovered by the vendee only on his showing compliance, and then only to cover expense incurred in removing the violation.[81]

Deficient quantity or other partial failure of consideration.[82]—If the amount of land is expressly stated in the deed, the purchaser may recover the excess of purchase price where the land in fact falls short of the amount stated,[83] but not in case the vendor agrees to convey an approximate amount;[84] but the fact that a sale of land is in gross and not by the acre will not prevent the purchaser from having an abatement of the purchase price.[85] Vendee is entitled to a deduction from the agreed price equivalent to the loss caused by the existence of an unexpired lease,[86] and, in case of a partial ejection, the relative value of the part from which the purchaser has been evicted should be considered.[87] If buildings are destroyed by fire and purchaser insists on deed, he may have no reduction from the price.[88] The fact that consideration was not entirely adequate is not sufficient to set aside sale.[89] The right to complain for deficiency in quantity may be waived,[90] and may be lost by delay.[91] The burden is on the purchaser to prove deficiency.[92]

§ 11. *Rights after conveyance.*[93]—The general rule is that the rights of the

75. Stephens v. Barnes, 30 Pa. Super Ct. 127. Nonperformance in such case by reason of a husband's refusal to join is presumptively free from fraudulent motive. Id.

76. Glasse v. Stewart, 32 Pa. Super. Ct. 385.

77. Vernam v. Wilson, 31 Pa. Super. Ct. 257.

78. Hanschka v. Vodopich [S. D.] 108 N. W. 28.

79. Pinkston v. Boyd [Tex. Civ. App.] 16 Tex. Ct. Rep. 759, 97 S. W. 103. If time is of the essence of a contract, a provision that on forfeiture by the vendee the vendor may retain payments made is binding. Palmer v. Washington Securities Inv. Co. [Wash.] 86 P. 640. An agreement for the sale of land in the future, accompanied by a payment on account, may be receded from by either party, he who has paid by forfeiting it and he who has received the earnest by returning its double. Smith v. Hussey [La.] 43 So. 902.

80. The owner of coal land agreed to sell "all the coal and land owned and optioned by him," the purchaser to pay the difference between the optioned price and $40 an acre to the seller, and to the farmers the prices stipulated in the options. The purchaser accepted the option but failed to exercise his right to purchase from the farmers. Held, the agreement was a contract for the sale of options, and the seller should recover the difference between the option price and $40 an acre. Strasser v. Steck [Pa.] 66 A. 87.

81. Rogers v. Wilkenfeld, 102 N. Y. S. 637.

82. See 6 C. L. 1802. See, further, supra, § 2, What Acreage or Quantity.

83. Where land is sold by the acre, a deficiency of 6.49 acres will entitle purchaser to recover the excess of purchase price. Rathke v. Tyler [Iowa] 111 N. W. 435.

84. A contract to sell 171.25 feet "more or less" is not broken by a vendor who has record title to 170 feet and probably right by adverse possession to 1.25 feet. Beardmore v. Barry, 103 N. Y. S. 353.

85. Helden v. Reed [Tex. Civ. App.] 101 S. W. 288.

86. Eppstein v. Kuhn, 225 Ill. 115, 80 N. E. 80.

87. Bonvillain v. Bodenheimer, 117 La. 793, 42 So. 273.

88. Purchaser took possession of property, insured it, and gave a note for the price. Before the note was paid or the deed delivered to him the building was destroyed by fire. Sutton v. Davis [N. C.] 55 S. E. 844.

89. Shepherd v. Turner, 29 Ky. L. R. 1241, 97 S. W. 41.

90. After payment with knowledge of deficient quantity, vendee may not recover damages from vendor. Fields v. Fields, 105 Va. 714, 54 S. E. 888. Where evidence shows that parties have agreed that the deed shall be the final agreement between them, the purchaser cannot recover or the original contract for a deficiency of land in the deed. Hampe v. Higgins [Kan.] 85 P. 1019.

91. If grantee's attorneys have seen the deed and it has no warranty of acreage, grantee may not set up partial failure of consideration when the last notes for the price are due, because of deficient quantity. Latta v. Schuler [Tex. Civ. App.] 100 S. W. 166.

92. Ward v. Moore [W. Va.] 55 S. E. 743. Vendor's remedy in case land conveyed is in excess of that sold, see infra, § 11.

93. See 6 C. L. 1803.

parties are governed by the deed. The original agreement may, however, continue to govern their rights.[94] The grantee is not charged with latent defects of title of which he has no notice, actual or constructive,[95] but, if the purchaser has knowledge of defects in title, he succeeds to the position of his grantor,[96] and the same rule applies if the grantee takes in trust for the grantor.[97] Subject to the foregoing, the title of the purchaser depends not upon his knowledge but upon the title of the grantor.[98] The purchaser may waive his right to take advantage of defects in the title offered him,[99] or he may perfect his title by taking advantage of the statute of limitations.[1] He may be held to hold the land in trust,[2] or if the evidence shows that a conveyance was made to secure a debt it is a mortgage.[3] If the land conveyed be greatly in excess of that intended to be sold, the vendor may not rescind but must sue for the additional price.[4] A sale will not be set aside at the suit of a grantor who acted intelligently, advised with her son and son-in-law, and had a chance to withdraw from the trade.[5]

94. For construction of a deed to give effect to the true meaning of the parties see Bergeron v. Daspit [La.] 43 So. 894, 1023. If necessary to do justice between the parties to an agreement for the sale of land, the actual transfer will be held to relate back to the date of the agreement, as far as the parties themselves are concerned. Evans v. Crawford County Farmers' Mut. Fire Ins. Co. [Wis.] 109 N. W. 952.

95. Vendees are protected against an equitable claim of which they have no notice. Green v. Clyde [Ark.] 97 S. W. 437. The grantee under a deed of general warranty who has no knowledge of fraud practiced upon the wife of the grantor, by which she was induced to sign the deed, and whose record title is good, is fully protected. Causey v. Handley [Tex. Civ. App.] 17 Tex. Ct. Rep. 578, 98 S. W. 431. A husband sold community property after the death of his wife. Held, purchasers would be protected from claims of heirs of the wife in absence of evidence that they had notice of the character of the property. Milby v. Hester [Tex. Civ. App.] 15 Tex. Ct. Rep. 495, 754, 94 S. W. 178. A purchaser is not chargeable with the notice that his grantors had, in the absence of evidence tracing to him a knowledge of some fact calculated to put him upon inquiry as a purchaser for value without notice of his grantor." Kendrick v. Colyar, 143 Ala. 597, 42 So. 110. A purchaser is not chargeable with notice of defects in his title because he is a joint tenant or tenant in common with his grantor. Id.

96. Lufkin Land & Lumber Co. v. Beaumont Timber Co. [C. C. A.] 151 F. 740. In the case of an easement. Rittenhouse v. Swango, 30 Ky. L. R. 145, 97 S. W. 743. Purchaser had notice of a trust. Latham v. Scribner [Wash.] 88 P. 203; Mead v. Chesbrough Bldg. Co. [C. C. A.] 151 F. 998. Under statutes of Alaska the record of a deed which is not entitled to record is not constructive notice to a subsequent purchaser. Alaska Exploration Co. v. Northern Min. & Trading Co. [C. C. A.] 152 F. 145. A quitclaim deed, given to secure part of the purchase price, which was furnished by a third party, amounts to a mortgage as to all persons having a knowledge of the transaction. Texas Southern R. Co. v. Harle [Tex. Civ. App.] 101 S. W. 878.

97. Black v. Skinner Mfg. Co. [Fla.] 43 So. 919.

98. "A purchaser of land from one who was a bona fide purchaser without notice acquires all the title held by such bona fide purchaser, regardless of what notice the second purchaser may have." Laffare v. Knight [Tex. Civ. App.] 101 S. W. 1034. A purchaser from a bona fide purchaser for value under a warranty deed is entitled to claim the bona fides of his vendor and have the same protection he would have had if he had not sold. Allen v. Anderson [Tex. Civ. App.] 16 Tex. Ct. Rep. 343, 96 S. W. 54. A purchaser from a vendee who is bound to make certain payments or lose his rights under his contract must show that the price has been paid. Davis v. Ragland [Tex. Civ. App.] 15 Tex. Ct. Rep. 615, 93 S. W. 1099. A covenant in a lease to return the premises in as good condition as received is enforceable by the purchaser. Knutsen v. Cinque, 113 App. Div. 677, 99 N. Y. S. 911. One who takes a quitclaim deed of land and redeems it from a foreclosure holds it free from the claims of the owner of the foreclosed mortgage who continues to hold a second mortgage. Henry v. Maack [Iowa] 110 N. W. 469. A county held a lien on land sold by it for which it had taken a note in payment. The county court then unlawfully reduced the rate of interest on the note and the vendee sold to a third party with a general warranty. Held, the land was liable for the full rate of interest, and the third party on payment might recover the difference between the two rates from his grantor. Delta County v. Blackburn [Tex.] 15 Tex. Ct. Rep. 908, 93 S. W. 419.

99. The fact that a purchaser knew of one defect in a title of which he took no advantage does not justify those having a claim on the land constituting another defect in claiming that as to them he was not a purchaser in good faith. Allen v. Anderson [Tex. Civ. App.] 16 Tex. Ct. Rep. 343, 96 S. W. 54.

1. Having done so he cannot then refuse to pay the purchase price on the ground that his vendor's title was bad. Overby v. Johnston [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 131.

2. If title is taken by the assignee of one of several persons having a contract for the purchase of land, he will be held to hold in trust for himself and the others. Ocean City Ass'n v. Cresswell [N. J. Err. & App.] 65 A. 454.

3. See Mortgages, 8 C. L. 1022.

4. Citizens' Bk. v. Lenoir [La.] 43 So. 385.

5. Thurman v. Ellinor [Ark.] 101 S. W. 1154.

§ 12. *Vendor's liens and their enforcement. A. Express.*[6]—The form of expression reserving the lien is not material so long as the intention is evident.[7] All of the land need not necessarily be covered.[8] While vendor's lien continues, vendee has right of possession as against a stranger.[9] The statute of frauds does not cover an agreement to release a vendor's lien.[10]

(§ 12) *B. Implied.*[11]—A lien is implied in every case where the full consideration has not been paid,[12] unless the lien is waived either expressly or by the taking of other security for the price.[13] If there is no money consideration there is no lien,[14] neither is there any where one without authority buys land in the name of another and gives his own note in payment and where there is no ratification by the third party.[15] The payment may, however, be made indirectly.[16] The lien may exist in spite of the nonperformance of conditions by the grantor.[17] The lien may continue against the land in the hands of a third party.[18]

6. See 6 C. L. 1803.

7. A deed providing that the grantee shall not encumber the property during the five years following its execution gives the grantor a lien for the unpaid purchase price. Portland Chem. & Phosphate Co. v. Blodgett [C. C. A.] 152 F. 929.

8. A vendor may specify in his deed what part of the land is to be covered by his lien. Broom v. Herring [Tex. Civ. App.] 101 S. W. 1023.

9. Mason v. Bender [Tex. Civ. App.] 97 S. W. 715.

10. McKinley v. Wilson [Tex. Civ. App.] 96 S. W. 112.

11. See 6 C. L. 1804.

12. "A vendor's lien is that lien which in equity is implied to belong to a vendor for the unpaid purchase price of land sold by him, where he has not taken any other lien or security for the same, beyond the personal obligation of the purchaser." Rewis v. Williamson [Fla.] 41 So. 449. Part of the consideration for a deed was $2,500 to be paid from the first gross profits of a stone plant which the vendees expected to erect. Held, there was a lien on the land for the $2,500, although no plant had been constructed. Burroughs v. Gilliland [Miss.] 43 So. 301.

13. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591. Where contract is executory, the superior title remains with the vendor, and in default of payment he may recover the land. Smith v. Owen [Tex. Civ. App.] 97 S. W. 521. A vendor's lien arises from the fact that a vendee has received from his vendor an estate for which he has not paid the full consideration and it is not dependent for existence on the expressed agreement of the parties. Eubank v. Finnell, 118 Mo. App. 535, 94 S. W. 591. A vendor does not waive his lien by taking the unsecured note or bond of the vendee to evidence the deferred payment. Id. The taking by a vendor of an independent security for the payment of the purchase price is prima facie evidence of a waiver of his lien. Griffin v. Smith [C. C. A.] 143 F. 865. There is no lien on land for the purchase price if vendor takes personal collateral security as a pledge or mortgage. Spears v. Taylor [Ala.] 42 So. 1016. Vendee who gives a chattel mortgage as part payment for land is entitled to have the security afforded by the mortgage exhausted before the vendor proceeds against the land. Gates v. Green [Cal.] 90 P. 189.

14. If a lost deed is shown not to have been made for a money consideration, the vendor has no lien on the land for the consideration named therein. Shugars v. Shugars [Md.] 66 A. 273. Vendor may claim a lien only when the amount remaining to be paid is a liquidated sum. Ross v. Clark, 225 Ill. 326, 80 N. E. 275. Vendor who deeds to a railroad company a right of way for a nominal consideration, and relying on the promise of a third party to pay, has a lien for the price. Matthews v. Delta Southern R. Co. [Miss.] 43 So. 475.

15. Jones v. Laird [Ala.] 42 So. 26.

16. A vendor who pays part of a mortgage which was to be assumed by the purchaser as part of the price for the surveyance has a lien on the land sold for the payment. Bach v. Kldansky, 186 N. Y. 368, 78 N. E. 1088.

17. Vendor who agrees to convey land and erect a house thereon has a lien for the balance of the purchase price, although he conveys before he erects the house. Shaw v. Tabor [Mich.] 13 Det. Leg. N. 856, 109 N. W. 1046.

18. A vendor's lien which is not waived continues against the land in the hands of a purchaser with notice from the original vendee. Rewis v. Williamson [Fla.] 41 So. 449. Burden is on purchaser from vendee to show that he had no notice of the vendor's lien. Bates v. Bigelow [Ark.] 96 S. W. 125. Plaintiff sold to K. who assigned the contract to M. K. assigned to plaintiff M.'s check given in part payment. The check was not paid in full and a note was given for the balance. Held, plaintiff continued to hold the lien acquired from K. Majors v. Maxwell, 120 Mo. App. 281, 96 S. W. 731. A remote purchaser of premises, subject to a vendor's lien of which he has no notice, is not personally liable on the note; but the land may still be held. Malone's Committee v. Lebus, 29 Ky. L. R. 800, 96 S. W. 519. If a purchaser knows that a debt forming part of the consideration for a prior conveyance has not been paid, he cannot complain of the creditor's enforcing his lien against the land. Eisman v. Whalen [Ind. App.] 79 N. E. 514. After bankruptcy the vendor's lien on timber contracted for by the bankrupt and to be paid for as fast as cut continues against the trustee. In re Muncie Pulp Co. [C. C. A.] 151 F. 732. A creditor having a lien on land is not estopped from enforcing his claim by the bankruptcy of his debtor and a compromise entered into between the

(§ 12) *C. Remedies.*[19]—A vendor's lien may be transferred to a third party and by him enforced,[20] if his position is such that equity can grant him such relief.[21] The sale provided by statute for the enforcement of a vendor's lien must be made exactly as provided,[22] and the superior title of the vendor passes to the purchaser.[23] After the sale the vendor still retains his original contract rights.[24] In an action to enforce a vendor's lien, plaintiff may show title by adverse possession.[25] A vendor's lien is prior to the rights of an execution creditor of the vendee.[26]

§ 13. *Enforcement of the contract of sale.*[27]—If a valid contract for the sale of land has been entered into by both parties, the purchaser is entitled to specific performance.[28] In this connection it is important to distinguish between contracts which are executory and executed.[29] The purchaser may not have a decree for specific performance of a contract requiring the defendant to select a lot belonging to the plaintiff as part of the consideration.[30] Only the strongest reasons will justify the invalidating of a long recognized title,[31] and even when time is not of the essence a default with circumstances of abandonment will deprive the purchaser of his equity to specific performance.[32] Third parties are bound by the contract if they have notice of it,[33] but a grantee with notice is bound only to the extent of what he took.[34] One who is in possession under a contract of sale is a trustee for

trustee and the debtor's wife to which he was not a party. Eisman v. Whalen [Ind. App.] 79 N. E. 514. A tenant in common who, for convenience only, conveys his interest to his cotenant, who contracts for its sale to a third person, may enforce in equity his lien for the price, and must join the cotenant in the suit. Wood v. Schoolcraft, 145 Mich. 653, 13 Det. Leg. N. 655, 108 N. W. 1075.

19. See 6 C. L. 1805.

20. Malone's Committee v. Lebus, 29 Ky. L. R. 800, 96 S. W. 519. The owner of notes secured by a vendor's lien on lands may foreclose his lien when owner of equity acts in fraud of his rights. Jones v. Byrne, 149 F. 457.

21. One who holds unpaid purchase-money notes does not thereby become a privy of either the vendor or vendee. Mason v. Bender [Tex. Civ. App.] 97 S. W. 715. A third party to whom a vendor's lien note has been transferred and who has notice that the premises are subject to homestead rights takes it as a mortgagee of the homestead. Adams v. Bartell [Tex. Civ. App.] 102 S. W. 779. One who pays vendor's lien notes with the understanding that he is to have the same right as the vendor is subrogated to the latter's rights. Mergele v. Felix [Tex. Civ. App.] 99 S. W. 709.

22. Gauley Coal Land Ass'n v. Spies [W. Va.] 55 S. E. 903.

23. Flack v. Braman [Tex. Civ. App.] 101 S. W. 537.

24. Under Idaho statutes, vendor of mining claims who retains title until payment is fully made stands as a mortgagee, and on failure to get full satisfaction from sale of the property may have a deficiency judgment for the balance due. Ferguson v. Blood [C. C. A.] 152 F. 98.

25. Bradbury v. Dumond [Ark.] 96 S. W. 390.

26. Leak v. Williams, 30 Ky. L. R. 782, 99 S. W. 630.

27. See 6 C. L. 1806.

28. A contract signed by the vendor only and valid under the statute of frauds may be enforced against him. Caren v. Liebovitz, 113 App. Div. 674, 99 N. Y. S. 952. Payment of $7,000 not being payment of full sum due when it was made, receipt and acceptance by vendors of that sum and their refusal to return or surrender same entitled vendee to deed, and legally relieved him from payment of cost of procuring patent. Hunt v. Capital State Bk. [Idaho] 87 P. 1129, modifying [Idaho] 86 P. 786 [advance sheets only]. Entry under oral contract, seven years' possession and making of improvements held sufficient. Evins v. Sandefur Jullan Co. [Ark.] 98 S. W. 677. Evidence held to show the precedent making of improvements and performance of a contract relative to advances of the purchase price. Scott v. Boen [Ky.] 101 S. W. 917.

29. An agreement reciting that "I have this day sold my house for the sum of $2,300, ten per cent. paid, balance when act of sale is passed," is only a promise of sale and will not be specifically enforced. Capo v. Bugdahl, 117 La. 992, 42 So. 478. Where the parties enter into an agreement providing that the plaintiff shall secure the title to certain land, and that then they will make a contract for its sale on certain terms specified, the original agreement will not be construed as a contract for the sale of land, and in order to entitle himself to any part of the price the plaintiff must show that he has title and has delivered the new contract to the purchaser. Stammer v. Harmon, 112 App. Div. 794, 99 N. Y. S. 519.

30. Freeburgh v. Lamoureux [Wyo.] 85 P. 1054.

31. Warner v. Hamill [Iowa] 111 N. W. 939.

32. Whiteford v. Yellott [Md.] 64 A. 936.

33. Payment under an escrow agreement entitles the purchaser to a deed which relates back and cuts off any rights of an intervening third party with notice. Whitmer v. Schenk, 11 Idaho, 702, 83 P. 775. After the death of a husband who has contracted to sell land his widow and children, who on his death take their respective interests in fee, cannot be compelled to convey. Free v. Little [Utah] 88 P. 407.

34. Specific performance may be enforced against a purchaser from the vendor, but if

the vendor, and if he acquires an adverse title he may be compelled to transfer it to the vendor.[35] The rights under the contract may be enforced only by the real parties in interest,[36] and the rights cease entirely if the vendor's title is fraudulent or otherwise defective.[37] The bill for specific enforcement must not show on its face a default under a contract of which time is of the essence.[38]

VENDOR'S LIENS, see latest topical index.

VENUE AND PLACE OF TRIAL.

§ 1. **The Proper Venue (2236).**
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§ 1. *The proper venue. A. The nature of the action.*[1]

(§ 1) *B. Local or transitory actions.*[2]—The principal question involved in a case is the one which determines whether the action is local or transitory.[3]

Actions regarding real estate, such as actions to set aside mortgage foreclosure on sale and to redeem,[4] or forcible entry and detainer suits,[5] or an action for damages from trespass to real property,[6] or for damages to land from closing a drain causing an overflow,[7] or to enforce a vendor's lien,[8] or an action by subcontractors, on a bond given by a contractor for a public building,[9] should be brought in the county where the land is situated. A suit to have property of a railroad, situated in different Federal districts, administered for the benefit of all creditors, is local and may be brought in either district.[10] In an action on a note given for a deficiency on foreclosure, a counterclaim seeking to set aside the foreclosure for fraud does not necessitate the trial of the action in the county where the land is situated.[11]

he obtains a quitclaim deed he cannot be compelled to convey by warranty. Peterson v. Ramsey [Neb.] 110 N. W. 728.

35. Patroski v. Minzgohr, 144 Mich. 356, 13 Det. Leg. N. 241, 108 N. W. 77.

36. One who as an alleged agent of a corporation contracts for the sale of property to be used as a factory cannot compel the vendor to convey it to him without disclosing the purchaser. Balkwill v. Mohr [Wash.] 88 P. 938. A corporation having the same name and same president as another but which assumes none of the latter's obligations is not liable for the price of land sold to the president in his capacity as an officer of the latter. Bonanza Min. & Smelter Co. v. Ware [Ark.] 95 S. W. 765.

37. A defect on which purchaser relies for refusing to take title must be proved by him. Baecht v. Hevesy, 101 N. Y. S. 413. It is no defense to a suit on notes for the purchase of land that a suit has been brought to try title. Broocks v. Lee [Tex. Civ. App.] 102 S. W. 777. In order to recover the purchase price of land sold to the plaintiff, it is necessary for him to show that he was in no default and that the defendant was to blame. Cave v. Osborne [Mass.] 79 N. E. 794. The burden of showing that a conveyance to one in a confidential relation with the grantor is fair is on him who claims title under such conveyance. Jackson v. Grissom, 196 Mo. 624, 94 S. W. 263. The purchaser of an equity who has not paid the purchase money has no right to call for the legal title when he has notice that his vendor's title was got by fraud. Wasserman v. Metzger, 105 Va. 744, 54 S. E. 893.

38. Collins v. Delaney Co. [N. J. Eq.] 64 A. 107.

1. See 6 C. L. 1806.

2. See 6 C. L. 1807, 1808.

3. Columbia N. S. D. Co. v. Morton, 28 App. D. C. 288.

4. Casserly v. Morrow [Minn.] 111 N. W. 654.

5. Municipal court has no jurisdiction over such suit involving land lying partly outside the county where the court is situated. Bunker v. Hanson, 99 Minn. 426, 109 N. W. 827.

6. City of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co. [Md.] 65 A. 35.

7. Such being a trespass, and an act of commission rather than omission, need not be brought where defendant corporation is domiciled. Brown v. Louisiana & N. W. R. Co. [La.] 42 So. 656.

8. Jones v. Byrne, 149 F. 457.

9. Code 1897, § 3098, providing for such venue in actions to enforce mechanic's liens, held to apply to such claims. Thompson v. Stephens [Iowa] 107 N. W. 1095.

10. Horn v. Pere Marquette R. Co., 151 F. 626.

11. Although Rev. St. 1899, § 564, requires suits whereby title to real estate may be effected, to be brought where land is situated. Hewitt v. Price [Mo.] 102 S. W. 647.

A court having acquired jurisdiction over a suit concerning lands in two counties does not lose it by dismissal as to the land in the county where the court sits.[12] An action for specific performance of contract to sell land and an accounting as to payments on purchase price and to recover excess payments must be brought where the land is situated,[13] but in Georgia may be brought in a county where any necessary defendant resides.[14] A constitutional provision that all civil and criminal business arising in any county must be tried in such county does not change the common-law rule in regard to transitory actions.[15] An action in assumpsit for trespass on lands [16] or a suit to cancel contract for sale of land is transitory,[17] and so are suits arising under copyright laws.[18] An action to recover possession of personal property,[19] or on a fidelity bond,[20] or an action by state to recover money received by the medical superintendent of the state insane asylum, may be brought where defendant resides.[21] In Texas an action for fraud may be brought in the county where the fraud was committed,[22] and an action for injury from drugs sold by defendant to plaintiff, in the county where the drugs were received,[23] and an action on a contract to execute a note payable in a certain county, may be maintained in such county.[24] A statute localizing actions for killing livestock, to the county where the killing occurred, does not apply where the stock was killed in another state.[25] A suit involving less than $50,[26] or an action by a nonresident of New York City, who has a place of business within the city, need not be brought in the district where defendant resides.[27] An action, not local, against codefendants, can be brought only in a county where one of the defendants resides,[28] and may be brought in a county where only one of them resides,[29] or, if a corporation,

12. Suit by administrator to set aside conveyance made by decedent. Long v. Garey Inv. Co. [Iowa] 110 N. W. 26.

13. Held to be an action for recovery of interest in real estate within Code Civ. Proc. § 392, subd. 1, but not an action "for the recovery of the possession of a quieting title to real estate" within Const. Art. 6, § 5. Grocers' Fruit Growing Union v. Kern County Land Co. [Cal.] 89 P. 120. Held not to be action "for the recovery of possession of land within Const. Art. 6, § 5, question as to its being action for recovery of interest in real estate, under Code Civ. Proc. § 392, not being raised. Wood v. Thompson [Cal. App.] 90 P. 38.

14. In suit by certain substituted heirs of joint purchaser, the other heirs were held to be necessary parties. Jackson v. Jackson [Ga.] 56 S. E. 318.

15. Sanipoli v. Pleasant Valley Coal Co. [Utah] 86 P. 865.

16. Under statute providing that owner may waive the tort and bring assumpsit. Watkins Co. v. Kalamazoo Circuit Judge, 144 Mich. 142, 13 Det. Leg. N. 166, 107 N. W. 875.

17. Jones v. Byrne, 149 F. 457.

18. Act September 24, 1879, § 11, and not Act March 3, 1897, § 1, applies. Lederer v. Ferris, 149 F. 250.

19. Though joined with cause of action affirming a trade of said property and seeking to recover tort money, and another alleging fraud in obtaining such property. Edgerton v. Games, 142 N. C. 223, 55 S. E. 145.

20. Continental Life Ins. & Inv. Co. v. Jones [Utah] 88 P. 229.

21. Although Pol. Code § 433, provides that in suits by the controller against person who has become possessor of public money the courts "of Sacramento county have jurisdiction, without regard to the residence of defendants." State v. Campbell [Cal. App.] 86 P. 840. Code Civ. Proc. § 395, relating to place of trial of civil actions controls over Pol. Code, § 433, relating to duties of controller, and fixing jurisdiction of actions brought by him. State v. Campbell [Cal. App.] 86 P. 840.

22. Under express provisions of Sayles' Ann. Civ. St. 1897, art. 1194. Karner v. Ross [Tex. Civ. App.] 16 Tex. Ct. Rep. 737, 95 S. W. 46; Winter v. Terrill [Tex. Civ. App.] 16 Tex. Ct. Rep. 62, 95 S. W. 761.

23. Under Rev. St. 1895, § 1194, providing that an action for trespass may be brought in county where trespass was committed. Winter v. Terrill [Tex. Civ. App.] 16 Tex. Ct. Rep. 62, 95 S. W. 761.

24. Held to be contract to pay the money in such county. Parr v. McGowan [Tex. Civ. App.] 98 S. W. 950.

25. Kansas City Southern R. Co. v. Ingram [Ark.] 97 S. W. 65.

26. Hackney v. Asbury & Co., 124 Ga. 678, 52 S. E. 886.

27. But a nonresident merely working at a place in the city has not a place "for the transaction of business therein" within the meaning of the statute. Schiller v. Hardenburg, 102 N. Y. S. 529.

28. Goldberg v. Harney, 122 Ill. App. 106; Mills v. Starin, 104 N. Y. S. 230.

29. Hudgins v. Low [Tex. Civ. App.] 15 Tex. Ct. Rep. 845, 94 S. W. 411; Myrick Bros. Co. v. Jackson [Tex. Civ. App.] 99 S. W. 143. Action for damages for trespass on land and to enjoin further trespass. Master ordering servant committing trespass, held properly joined. Evidence held sufficient to show residence of servant in county where sued.

operates or has an agent;[30] but an unnecessary party cannot be joined for the sake of giving the court jurisdiction over a nonresident of the county.[31] Such an action cannot be maintained, in a county where plaintiff only resides, against a defendant residing in the state.[32] When defendant in a transitory action dies pending the action, his legal representatives may be brought into the action, although they live in another county.[33]

(§ 1) *C. Special actions and proceedings and equitable proceedings.*[34]—An action against an administrator by a creditor of decedent for alleged wrongful payment of assets must be brought where defendant qualified,[35] and an action against a succession for slander of title may be brought in the county where the land is situate,[36] but a demand for damages cannot be coupled with it unless brought in the county where the succession is being administered.[37] An action against an administrator individually for damages must be brought in the county of his domicile.[38] A suit to annul a marriage must be brought in the county where defendant resides unless the right to annulment is based on fraud committed in another county.[39] Interpleader may be filed in the county of residence of any claimant.[40] A petition for habeas corpus should be addressed to the judge of the division in which is located the prison in which petitioner is confined,[41] and a petition for return of stocks in the hands of receivers must be made to the receiver in the state where the stock was purchased.[42]

Actions for penalties.—An action to recover a penalty for usury may be brought in the county where defendant resides.[43] The municipal court in New York has jurisdiction of an action for a penalty if either party resides in the district although the transaction occurred in another district.[44]

Baker v. Davis [Ga.] 57 S. E. 62. Acts 1905, p. 597, § 4, dividing U. County into two districts and providing no citizen or resident of one should be liable to be sued in another, must be construed with § 6, providing that to determine which district the suit is triable in, the districts are to be considered as counties and place of trial determined by "the general law applicable to different counties." Pryor v. Murphy [Ark.] 96 S. W. 446. Drawer and drawee of draft held properly joined as defendants in suit thereon by one who discounted it and drawee is therefore, not entitled to be sued in county of his residence. Provident Nat. Bank v. Hartnett Co. [Tex. Civ. App.] 100 S. W. 1024.

30. Action for injury to passenger carried over two connecting lines held properly brought against both carriers jointly. Texas Cent. R. Co. v. Marrs [Tex. Civ. App.] 101 S. W. 1177.

31. Gilvin v. Missouri, etc., R. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 766, 94 S. W. 130; Marshall v. Saline River Land & Mineral Co. [Kan.] 89 P. 905. In action by materialman, nonresident contractor cannot be joined with owner of property in district where latter resides. Mauck v. Rosser, 126 Ga. 268, 55 S. E. 32. Where the action is dismissed as to the resident defendant, it must also be dismissed as to the nonresident. Louisville Home Tel. Co. v. Beeler's Adm'r [Ky.] 101 S. W. 397. In action on promise to execute a note jointly with another, such promisor cannot be joined in a county other than that of his residence, in a suit on the note, executed by the other defendant. Adams v. Williams, 126 Ga. 430, 54 S. E. 99.

32. Under Rev. St. 1895, art. 1194, subd. 3, authorizing suit against nonresident, in county where plaintiff resides, and subd. 4, providing that where defendants reside in different counties suit may be brought where one defendant resides, an action against a resident and nonresident of the state cannot as against former be brought in county where he does not reside. Hudgins v. Low [Tex. Civ. App.] 15 Tex. Ct. Rep. 845, 94 S. W. 411.

33. Nixon v. Malone [Tex.] 17 Tex. Ct. Rep. 278, 490, 98 S. W. 380; Id. [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

34. See 6 C. L. 1809.

35. Civ. Code, §§ 65, 66, providing that actions to settle or distribute estates of deceased persons must be brought where representative qualified, held to govern, and not § 78, providing that actions not regulated by foregoing sections may be brought in any county where defendant resides or is summoned. Dinning v. Conn's Adm'r, 30 Ky. L. R. 855, 99 S. W. 914.

36, 37, 38. Williams' Heirs v. Zengel, 117 La. 599, 42 So. 153.

39. Schneider v. Rabb [Tex. Civ. App.] 100 S. W. 163.

40. Bank of Tifton v. Saussy [Ga.] 56 S. E. 513; Nixon v. Malone [Tex. Civ. App.] 16 Tex. Ct. Rep. 715, 95 S. W. 577.

41. Under Code 1896, § 4817, providing that such petition must be addressed to judge of city court, or nearest circuit judge, or chancellor. State v. Fuller [Ala.] 41 So. 990.

42. Bowker v. Haight & Freese Co., 140 F. 797.

43. Held to be action of debt and not action of tort, which Rev. St. 1895, art. 1585, subd. 6, requires to be brought in county where injury was inflicted. Wartman v. Empire Loan Co. [Tex. Civ. App.] 101 S. W. 499.

44. Municipal Court Act, Laws 1902, p.

Injunctions.[45]—An action for injunction against closing of an undergrade crossing of railroad is transitory.[46] Suit to enjoin an execution on a void judgment may be maintained in a county where the execution is sought to be levied,[47] and a suit to restrain a sale under a judgment foreclosing a mechanic's lien may be brought where the levy on the real estate is made and one defendant resides,[48] but a petition to join the levy of an execution until the judgment could be set aside must be brought in the county where the judgment plaintiff resides,[49] and a suit to enjoin foreclosure sale may be brought in the county where the agent of nonresident plaintiff resides.[50] A suit to restrain by trespass upon land where the title to such land is in issue, must be brought in the county where the land is situated.[51]

(§ 1) *D. Suits against corporations* [52] are regulated by statute and may usually be maintained in any county where it has an agency on a cause growing out of the business of such agency,[53] or where it is required to hold its directors and stockholders' meetings,[54] or in any county in which the cause of action arose [55] and in which plaintiff resided,[56] or in which an executory contract was to be performed.[57] An action against a railroad company for negligence may be brought in any county through which it operates its road and has a place for transacting business [58] unless its charter limits suits to the county of its domicile.[59] An action against a domestic

1496, c. 580, § 20, held to govern over Code Civ. Proc. c. 10, tit. 1, art. 2, § 983. Gormley v. Brooklyn Heights R. Co., 102 N. Y. S. 692.

45. See 6 C. L. 1809.

46. Held not to be for recovery of interest in land nor for determination of right therein. Chicago, etc., R. Co. v Wynkoop [Kan.] 85 P. 595.

47. Rev. St. 1895, art. 2996, requiring suits to restrain execution to be tried in court where judgment was rendered, held not to apply. Ketelsen v. Pratt [Tex. Civ. App.] 100 S. W. 1172.

48. Although the judgment was rendered in a different county. Kinsey v. Spurlin [Tex. Civ. App.] 102 S. W. 122.

49. Under constitutional provision that equity cases shall be tried in couty where defendant, against whom substantial relief is prayed, resides. Malsby & Co. v. Studstill [Ga.] 56 S. E. 988.

50. Such agent being a defendant against whom substantial relief was sought. Sellers v. Page [Ga.] 56 S. E. 1011.

51. Cannot be maintained in another district where defendant resides, notwithstanding principle that equity acts in personam and not in rem. Columbia, etc., Co. v. Morton, 28 App. D. C. 288; Irrigation L. & I. Co. v. Hitchcock, 28 App. D. C. 587.

52. See 6 C. L. 1809.

53. Mitchell v. Lang & Co. [Iowa] 112 N. W. 87. Coal mining and shipping corporation with principal place of business in W. county, held to have an agency in A. county where its secretary resided, the contract for purchase of coal by it being negotiated in the latter county and the coal to be delivered there, although payments were to be made in W. county. Thistle Coal Co. v. Rex Coal & Min. Co. [Iowa] 109 N. W. 1094. Transaction through traveling purchasing agent who remained in county for week or two during rice purchasing season, held not to be maintaining of agency. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605.

54. Under Rev. Laws 1905, § 424, providing for suit in county of defendants' residence, and § 422, making principal place of business of corporation its residence. Garrett & Co. v. Bear [N. C.] 56 S. E. 479.

55. Action for breach of contract to sell rice for plaintiff held to arise in county where defendant's traveling agent made the negotiations with plaintiff. Mangum v. Lane City Rice Mill. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 739, 95 S. W. 605. An action against a railroad company for illness of a passenger resulting from failure to heat the car could be brought when journey was begun under allegation that plaintiff suffered from the cold while still in said county; the statute of Georgia providing that railroad company may be sued in any county where it may tortiously injure person or property of another. Atlantic Coast Line R. Co. v. Powell [Ga.] 56 S. E. 1006.

56. Under Act 27th Leg., p. 31, c. 27. Residence held to mean fixed and permanent abode as distinguished from place of returning to former domicile. International & G. N. R. Co. v. Elder [Tex. Civ. App.] 99 S. W. 856.

57. Need not be brought where defendant is domiciled and where contract was entered into. Houston Rice Mill. Co. v. Wilcox [Tex. Civ. App.] 100 S. W. 204.

58. Mole v. New York, etc., R. Co., 102 N. Y. S. 308. Evidence held sufficient to show that defendant had an agency in the county where it was sued. Southern Pac. Co. v. Craner [Tex. Civ. App.] 101 S. W. 534. Corporation, having agents in a county to solicit business but with no power to bind it, held not to be doing business so as to subject it to suit in such county, its line not being situated therein. Abraham Bros. v. Southern R. Co. [Ala.] 42 So. 837. A statute providing that actions against a railroad company "may be brought" in any county through which the road passes is mandatory and excludes the right to bring in other counties authorized as to corporations generally. Spratley v. Louisiana & A. R. Co., 77 Ark. 412, 95 S. W. 776.

59. Special charter provision to that effect held not repealed by general act. Hayes v. Morgan's Louisiana, etc., S. S. Co., 117 La. 593, 42 So. 150.

insurance company must be tried in a county where it has its office,[60] and against a foreign beneficial association in any county in the state.[61] When a corporation is situated in one county, has its principal office in another, and its chief officer resides in a third, it may be sued in either.[62] A statute authorizing suits against certain corporations in certain counties is not affected by a subsequent charter to such a corporation providing for suits in different counties.[63] The right to sue nonresident corporations in any county of the state exists only when there are no resident defendants joined.[64] A municipal corporation may be sued in a local action in a court other than its own.[65]

(§ 1) *E. Effect of improper venue and taking of objections.*[66]—Objection that a motion or a proceeding in a case was had in the wrong county may be waived by acquiescence,[67] and the statutory right to be sued in a certain district is waived by appearance and answer to the merits [68] or by filing a general demurrer,[69] but not by a motion to dissolve a temporary injunction which was not acted upon at the time the plea of privilege was filed,[70] nor by filing an answer both to the jurisdiction and to the merits.[71] Under a statute providing that an action for removing mortgaged property may be brought in the county where it was situated, the question whether a nonresident defendant could be so sued is on the jury where it is a question of fact whether such defendant assisted in the removal of the property.[72]

§ 2. *When change is allowable, necessary, or proper.*[73]—The granting or refusing of a change of venue rests in the discretion of the trial court when the determination of a question of fact is involved,[74] but when defendant is entitled to a change as of right,[75] or where a party has brought himself within the statute, the court has no discretion in the matter but must grant the applicaion, based on prejudice.[76] A change should not be granted on the motion of one nonresident defendant when the other who was a resident did not join [77] unless the statute author-

60. Nixon v. Piedmont Mut. Ins. Co., 74 S. C. 438, 54 S. E. 657.

61. Loyal Mystic Legion v. Brewer [Kan.] 90 P. 247.

62. Under Kirby's Dig. § 6067. Spratley v. Louisiana & A. R. Co., 77 Ark. 412, 95 S. W. 776.

63. Civ. Code 1895, § 2004, authorizing suits against express companies in counties to which or from which lost goods were consigned, not affected by charter provision of Southern Express Co. that it may be sued in any county where it may tortiously injure property of another or where its contracts are made or to be performed. Southern Exp. Co. v. B. R. Elec. Co., 126 Ga. 472, 55 S. E. 254.

64. Ludington Exploration Co. v. La Fortuna Gold & Silver Min. Co. [Cal. App.] 88 P. 290.

65. City of Baltimore v. Meredith's Ford & Jarrettsville Turnpike Co. [Md.] 65 A. 35.

66. See 6 C. L. 1810. For questions as to taking objections to venue by motion to dismiss or plea in abatement, see Jurisdiction, 8 C. L. 579, and Pleading, 8 C. L. 1407.

67. Motion to pass accounts of receiver made in county other than where action was pending. People v. Anglo-American Sav. & Loan Ass'n, 101 N. Y. S. 270.

68. Horn v. Pere Marquette R. Co., 151 F. 626.

69. Ballard v. American Hemp Co., 30 Ky. L. R. 1080, 100 S. W. 271.

70. Schneider v. Rabb [Tex. Civ. App.] 100 S. W. 163.

71. Louisville Home Tel. Co. v. Beeler's Adm'r [Ky.] 101 S. W. 397.

72. American Nat. Bank v. First Nat. Bank [Tex. Civ. App.] 14 Tex. Ct. Rep. 569, 92 S. W. 439.

73. See 6 C. L. 1811.

74. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389; Rand, McNally & Co. v. Turner, 29 Ky. L. R. 696, 94 S. W. 643. Local prejudice. Warden v. Madisonville, etc., R. Co. [Ky.] 101 S. W. 914.

Prejudice of citizens: On affidavits of defendant's attorney and seven citizens, and counter affidavits of plaintiff's attorney and fourteen citizens, refusal to grant application held not abuse of discretion. Croft v. Chicago, etc., R. Co. [Iowa] 109 N. W. 723. Convenience of witnesses. Bird v. Utica Gold Min. Co., 2 Cal. App. 672, 86 P. 509; Garrett & Co. v. Bear [N. C.] 56 S. E. 479.

75. A statute permitting suit on note in county where payable will not prevent change to county of defendant's residence where county where action was brought was not where note was payable. Ashton v. Garretson [Colo.] 85 P. 831. Removal to county where land involved is situated. North Shore Industrial Co. v. Randall, 108 App. Div. 232, 95 N. Y. S. 758.

76. Affidavit for change in suit against county for local prejudice need only show that suit is against county, and, by oath of affiant, that local prejudice exists, and need not satisfy court that such prejudice exists. Little v. Wyoming County, 214 Pa. 596, 63 A. 1039; Brittain v. Monroe County, 214 Pa. 648, 63 A. 1076; State v. Dabbs, 118 Mo. App. 663, 95 S. W. 275.

77. Action against parents to compel support of child. Paxton v. Paxton [Cal.] 89

izes a change on the application "of either party," [78] and then not if the removal is opposed to the codefendant,[79] and a second removal might be had on application of another defendant.[80] Change of venue is proper in proceeding for incorporation of a drainage district [81] or in mandamus proceedings,[82] but cannot be had pending a motion for a new trial as of right.[83]

When a cause is not brought in the proper county the court, independent of statute, may transfer the cause.[84] A belief in the dishonesty of defendant so general that he cannot obtain a new trial is ground for a change,[85] and so is prejudice or interest of the judge,[86] but mere apprehension that a judge is prejudiced is not sufficient.[87] A change of venue should be granted when a large number of the inhabitants of the county in which such cause is pending have an interest in the question involved therein adverse to the applicant,[88] but the mere fact that the recovery would be for the benefit of the county does not constitute such interest.[89] Convenience of witnesses is a ground,[90] and a change may be had therefor to a county other than where the cause of action arose.[91] A second charge for prejudice of the judge will not ordinarily be granted to the same party [92] even though the first charge was on other grounds,[93] but, after a change taken by defendant to the county of his residence, plaintiff is entitled to another change for convenience of witnesses.[94]

P. 1083. The change should be granted when all the defendants are nonresidents of the county where the action is brought, although one opposes it. Ludington Exploration Co. v. La Fortuna Gold & Silver Min. Co. [Cal. App.] 88 P. 290.

78. Dill v. Fraze [Ind. App.] 77 N. E. 1147; Id. [Ind.] 79 N. E. 971.

79. Diamond State Tel. Co. v. Blake [Md.] 66 A. 631.

80. Although the statute provides further that only one change shall be granted to the same party. Dill v. Fraze [Ind. App.] 77 N. E. 1147.

81. Held to be "civil suit" within meaning of Rev. St. 1899, § 818. State v. Riley [Mo.] 101 S. W. 567.

82. Held to be "civil action" within meaning of statute providing for change of venue in civil actions. Woodworth v. Old Second Nat. Bank, 144 Mich. 338, 13 Det. Leg. N. 174, 107 N. W. 905.

83. Bonham v. Doyle [Ind. App.] 79 N. E. 458.

84. Transfer of cause and not dismissal should be remedy. Sanipoli v. Pleasant Valley Coal Co. [Utah] 86 P. 865.

85. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 S. W. 614.

86. Under Rev. St. 1887, § 4125 providing for change when "from any cause the judge is disqualified from acting." Day v. Day [Idaho] 86 P. 531. Interest of county judge as material witness in application to sell real estate to pay debts of decedent is ground. Roberson v. Tippie 126 Ill. App. 579. That the presiding judge is a property owner in defendant county does not make him "personally" interested. Within meaning of act March 30, 1875, § 1, par. 1. Brittain v. Monroe County, 214 Pa. 648, 63

87. It must appear that prejudice actually exists. In re Smith [Kan.] 85 P. 584.

88. Showing that persons confined to a particular locality are interested held insufficient. Everson v. Sun Co. [Pa.] 64 A. 365.

89. Action on bond given for benefit of schools of county. Graziana v. Burton, 30 Ky. L. R. 180, 97 S. W. 800.

90. Particularly when the cause of action arose in the county to which change is sought. Lutfy v. Sullivan, 104 N. Y. S. 177. An order that plaintiff admit signatures to certain documents held by defendants did not justify a denial of the motion for a change of venue. Nichols v. Riley, 112 App. Div. 102, 98 N. Y. S. 346. Convenience of witnesses in employ of party is not given same consideration as that of other witnesses. Hays v. Faatz Reynolds Felting Co., 112 App. Div. 487, 98 N. Y. S. 386. But in absence of showing as to convenience of plaintiff's witnesses, the fact that most of defendant's witnesses are in his employ should not defeat the motion. Rieger v. Pulaski Glove Co., 99 N. Y. S. 558. Venue should be changed to county where defendant resides, where contract for sale of goods was made, where goods were received and examined, and where witnesses as to condition of goods reside. Shaff v. Rosenberg, 101 N. Y. S. 892. Where both parties to contract reside in the county where transaction took place, and plaintiff, assignee of one of them, is in business there but resides where action was brought, motion to change should have been granted. Brady v. Hogan, 102 N. Y. S. 962.

91. Supreme Court Rule No. 48, that place where transaction arose must be taken into consideration and if it arose in New York City must be regarded as potential, may be overborne where showing is that convenience of witnesses will be subserved by disregarding it. Lewis Co. v. Phoenix Car Co., 100 N. Y. S. 669.

92. American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784; State v. Dabbs, 118 Mo. App. 663, 95 S. W. 275; Priddy v. Boice [Mo.] 99 S. W. 1055.

93. Under Pub. Acts 1905, p. 483, § No. 309, authorizing change of venue on affidavit showing one or more specified causes. Schmid v. Wexford Circuit Judge, 144 Mich. 679, 13 Det. Leg. N. 267, 108 N. W. 355.

94. Mills v. Starin, 104 N. Y. S. 230.

A suit to cancel a mortgage should be changed to the county where the land is situated on motion of the mortgagee, although another defendant has not yet appeared or been given notice of the application.[95] A statute providing that a change may be had as of right where plaintiff instituted the suit in a county other than that of his residence, or of the county where the occurrence took place, does not state two distinct grounds, and, where the suit is brought in either of such counties, the right to change does not exist.[96] A corporation may take a change of venue in a local action to the county where the land involved is situated, although it was properly commenced in another county.[97] Another judge has "attended," within a statute providing for attendance by another judge within the term as an alternative to change of venue, where he presides and hears a motion in the case which prevents a trial at that term.[98]

A change to the county where the cause of action arose or for convenience of defendant's witnessess will be denied where by reason of his poverty plaintiff's cause of action would be defeated thereby.[99]

Right to a change of venue is waived by stipulating to set the case for trial,[1] or that the hearing should be adjourned to a future day before a certain court,[2] or by entry of appearance and participation in the trial without objection after denial of a change of venue,[3] or by an agreement extending time to answer,[4] but not by answer to the merits where the court has no jurisdiction of the subject-matter;[5] and a stipulation to waive challenges to jurors for implied bias from financial interest does not waive a right to apply for a change of venue for such cause on a second trial.[6]

On appeal from inferior courts.[7]—Venue by appeal from the justice court to the county court may be changed to the district court where the county judge is disqualified.[8] The Michigan act of 1905 applies to appeals from justice courts.[9]

§ 3. *Procedure for change.*[10]—In Minnesota change of venue in municipal courts in cities of over 2,000 inhabitants must be according to practice in the district court.[11] The statutory demand for removal of the action to the proper county is essential to a compulsory change,[12] and a motion for change can be had only on

95. North Shore Industrial Co. v. Randall, 108 App. Div. 232, 95 N. Y. S. 758.

96. St. Louis S. W. R. Co. v. Furlow [Ark.] 99 S. W. 689.

97. Under Const. art. 12, § 16, providing that corporation may be sued where particular business thereof is situated, "subject to the power of the court to change the place of trial as in other cases." Grocers' Fruit Growing Union v. Kern County Land Co. [Cal.] 89 P. 120.

98. Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809.

99. Mole v. New York, etc., R. Co., 102 N. Y. S. 308; Bird v. Utica Gold Min. Co., 2 Cal. App. 672, 86 P. 509.

1. Held waived in case commenced by writ of capias which was placed on April and November 1905 dockets, and by stipulation continued over term, to be set as first case on following term. No excuse for delay given except that necessity for change was not known earlier. Peterson v. St. Clair Circuit Judge, 143 Mich. 79, 12 Det. Leg. N. 923, 106 N. W. 394.

2. People v. State Racing Commission, 103 N. Y. S. 955.

3. Phoenix Indemnity Co. v. Greger [Colo.] 88 P. 1066.

4. Under Revisal 1905, § 425, requiring motion for change as matter of right before expiration of time to answer. Garrett & Co. v. Bear [N. C.] 56 S. E. 479.

5. Court held to have no jurisdiction over subject-matter of suit against insurance company in county where it had no office. Nixon v. Piedmont Mut. Ins. Co., 74 S. C. 438, 54 S. E. 657.

6. Multnomah County v. Willamette Towing Co. [Or.] 89 P. 389.

7. See 6 C. L. 1812.

8. Mills' Ann. St. § 1092, providing venue shall be changed from county court to district court, not being repealed by § 2679, providing that no appeal shall lie from the justice court to the district court, nor by Laws 1899, c. 91, authorizing county judges to interchange. Town of Del Norte v. Weiss [Colo.] 88 P. 581.

9. Moreland v. Lenawee Circuit Judge [Mich.] 107 N. W. 873.

10. See 6 C. L. 1812.

11. Laws 1899, c. 143, p. 146, held to repeal by implication. Gen. St. 1894, § 5191. Clark v. Baxter, 98 Minn. 256, 108 N. W. 838.

12. Under Rev. St. 1898, § 2621, providing that defendant may demand that trial be

notice;[13] but members of a corporation are not entitled to notice in receivership proceedings.[14] A petition for change of venue, not verified as required by statute, is of no effect,[15] and, on a motion to change the venue of an action, transitory in its nature, to the county of defendant's residence, plaintiff must bring his case clearly within the statute authorizing a different venue.[16] An affidavit for change for convenience of witnesses must state that the facts can be proven by the said witnesses or disclose grounds showing that they can probably be so proven.[17] The affidavit may be made by the attorney for the party.[18] The petition must show diligence in making application for change,[19] and a motion for change as of right must be made in them and in the district where the action is pending,[20] and in Michigan must be entered within ten days after the cause is at issue.[21] An application made after the jury is sworn to answer as to their qualifications is too late,[22] but, where a case is not brought in the proper county, the court may change the place of trial although the motion therefor is not made within the statutory time.[23] Where the last day for entering the motion is on Sunday, a motion entered the following day is in time.[24] The motion may be made after a reversal and order for a new trial.[25] An application may be made when the case is at issue as to all defendants who have been brought in.[26] A notice of motion, motion, and affidavit filed on the same date are one proceeding although bearing different dates.[27] A stipulation made after the motion that the case might be tried by another judge operates as a withdrawal of the motion.[28]

Application for change for convenience of defendant's witnesses may be met by affidavits showing that the change will inconvenience plaintiff's witnesses,[29] but not

had in proper county, that plaintiff may consent to change, or, if he do not consent, that a motion may be made to change place of trial. Anderson v. Arpin Hardwood Lumber Co. [Wis.] 110 N. W. 788. Such demand must show that county where action is brought is not proper county and state, which is the proper county, and, when action against corporation may be brought in one of several counties, a demand that the trial be had in a certain county because the corporation and its principal place of business is located there was insufficient. Id.

13. Under statute requiring application for change, and court rule requiring notice of motions to be given. Peterson v. St. Clair Circuit Judge, 143 Mich. 79, 12 Det. Leg. N. 923, 106 N. W. 394; State Road Bridge Co. v. Saginaw Circuit Judge, 143 Mich. 337, 12 Det. Leg. N. 1015, 106 N. W. 394.

14. Held impracticable to give notice where there were 9,000 members. Nichol v. Murphy 145 Mich. 424, 108 N. W. 704.

15. Rand, McNally & Co. v. Turner, 29 Ky. L. R. 696, 94 S. W. 643.

16. Mills' Ann. Code, § 27, providing that actions for tort may be commenced in county where tort was committed. Plaintiff must show that tort was committed in county where suit was brought. Byram v. Pigott [Colo.] 89 P. 859.

17. Mole v. New York, etc., R. Co., 102 N. Y. S. 308.

18. Affidavit by attorney held sufficient, although motion stated that it was based on files and affidavit of party. Moreland v. Lenawee Circuit Judge [Mich.] 107 N. W. 873.

19. Where delay is apparent on face of petition, it must show when knowledge of alleged prejudice of judge was received. Hunt v. Pronger, 126 Ill. App. 403.

20. Garrett & Co. v. Bear [N. C.] 56 S. E. 479.

21. Filing of demurrer to information in quo warranto held to bring cause at issue within court rule requiring motion within ten days after issue. State Road Bridge Co. v. Saginaw Circuit Judge [Mich.] 14 Det. Leg. N. 232, 111 N. W. 1084.

22. McArthur v. Kansas City El. R. Co. [Mo. App.] 100 S. W. 62.

23. State Board of Pharmacy v. Rhinehardt, 101 N. Y. S. 769.

24. Moreland v. Lenawee Circuit Judge [Mich.] 107 N. W. 873.

25. Where the act specifying the grounds for change was passed after judgment rendered in original action, and, pending appeal, a court rule was adopted that motion must be entered within ten days after case is at issue. Detroit Nat. Bank v. Brooke [Mich.] 13 Det. Leg. N. 937, 110 N. W. 137.

26. But on showing that steps are being taken to bring in other defendants, no laches being shown, the court properly declined to order the change at that time. Detroit Portland Cement Co. v. Genesee Circuit Judge [Mich.] 14 Det. Leg. N. 82, 111 N. W. 744.

27. Moreland v. Lenawee Circuit Judge [Mich.] 107 N. W. 873.

28. Although the stipulation afterwards fails because the judge refused to try the case. Leslie v. Chase & Son Mercantile Co. [Mo.] 98 S. W. 523.

29. Such affidavit must give the names, addresses, and occupations of individual witnesses, and the particular members of partnerships who are to be used, and must al-

when the change is asked on other grounds.[30] The place of trial should not be changed upon an answer which does not state a defense or counterclaim.[31] When the petition or affidavit contains a statement of facts, the court may take testimony to determine their truth,[32] and the burden is on applicant to prove facts entitling him to a change of venue for local prejudice.[33] A clear showing must be made to warrant a change on grounds not provided by statute,[34] but it need not be conclusively shown that a fair trial cannot be had in the county where the suit is brought.[35]

Where there is more than one judge in a district, the cause cannot be removed to another district on affidavit of prejudice of the judges.[36]

Where a change is by operation of law, the statute relating to costs does not apply.[37] A condition to the denial of a motion in a jury case that plaintiff consent to a reference is improper.[38] Error in refusing to change venue cannot be raised by appeal from a default judgment.[39]

§ 4. *Results of change of venue.*[40]—After granting a change of venue court has no further jurisdiction in the case,[41] and transfer of a cause over defendant's objection to a district other than that in which it was properly brought loses the court its jurisdiction.[42] After a motion filed for change of venue for interest of the county judge as a witness, such court cannot enter any other order.[43] The court to which the cause is removed may vacate an injunction granted before the removal.[44] A change of venue granted by a judge having jurisdiction is not a nullity, although made without cause, and the court to which the case is sent cannot dismiss it.[45] An order changing venue in receivership proceedings can only be questioned in a direct proceeding,[46] and an irregularity in proceedings for change of venue is waived by appearance before the court to which change is had and application for a continuance and new trial.[47]

VERBAL AGREEMENTS, see latest topical index.

lege that plaintiff is advised by counsel that certain expected testimony is material and necessary. Ritger v. Pulaski Glove Co., 99 N. Y. S. 558.

30. Mills v. Starin, 104 N. Y. S. 230.

31. Hurley v. Roberts, 102 N. Y. S. 963; Lewis Co. v. Phoenix Car Co., 100 N. Y. S. 669. Action against police officer for false arrest. Application made under Code Civ. Proc. § 983, subd. 2, providing that action against public officer for act done by virtue of his office must be tried in county where cause of action arose. Philips v. Leary, 100 N. Y. S. 200.

32. That many inhabitants of defendant county have an interest in the question involved. Brittain v. Monroe County, 214 Pa. 648, 63 A. 1076; Everson v. Sun Co. [Pa.] 64 A. 365; Presbyterian Church v. Philadelphia, etc., R. Co. [Pa.] 66 A. 652. Motion based on prejudice and undue influence. St. Louis S. W. R. Co. v. Furlow [Ark.] 99 S. W. 689; Leslie v. Chase & Son Mercantile Co. [Mo.] 98 S. W. 523.

33. Trimble v. Burroughs [Tex. Civ. App.] 14 Tex. Ct. Rep. 753, 95 S. W. 614.

34. Prejudice of judge. Refusal held proper where application was supported only by affidavit of defendant's attorney that judge was prejudiced against affiant. State v. Smith [Neb.] 110 N. W. 557.

35. Showing that practically whole town is arrayed against defendant on question of ownership of land, that struggle has been bitter and subject of public meetings, and comment and agitation in newspapers, held sufficient. Jacob v. Oyster Bay, 104, N. Y. S. 275.

36. Under Acts 1879, p. 80, § 11 (Guy v. Kansas City, etc., R. Co., 197 Mo. 174, 93 S. W. 940), and under Laws 1901, p. 120 (State v. Dabbs, 118 Mo. App. 663, 95 S. W. 275; American Car & Foundry Co. v. Hill, 226 Ill. 227, 80 N. E. 784; Leslie v. Chase & Son Mercantile Co. [Mo.] 98 S. W. 523; Priddy v. Boice [Mo.] 99 S. W. 1055).

37. Robertson v. Tippie, 126 Ill. App. 579.

38. Lewis Co. v. Phoenix Car Co., 100 N. Y. S. 669.

39. Schiller v. Hardenburg, 102 N. Y. S. 529.

40. See 6 C. L. 1814.

41. Priddy v. Boice [Mo.] 99 S. W. 1055

42. Federal Sign System Elec. v. Bloyen, 103 N. Y. S. 205.

43. Robertson v. Tippie, 126 Ill. App. 579.

44. It is not necessary to apply to the court granting the injunction for leave to make the motion to vacate it. McGorle v. McAdoo, 49 Misc. 601, 99 N. Y. S. 1107.

45. Coffey v. Carthage [Mo.] 98 S. W. 562.

46. Question cannot be raised in action by receiver against stockholder to collect assessment. Nichol v. Murphy, 145 Mich. 424, 108 N. W. 704.

47. Tammen v. Schaefer [Tex. Civ. App.] 101 S. W. 468.

VERDICTS AND FINDINGS.

§ 1. **Definitions and Nature (2245).**
§ 2. **General Verdicts (2245).**
§ 3. **Special Interrogatories and Verdicts (2246).** When Proper (2246). Request for and Submission of Special Issues or Interrogatories (2246). Form and Requisites of Special Interrogatories (2247). Form and Requisites of Special Verdict (2247). Interpretations and Construction (2248).
§ 4. **Conflicts Between Verdicts and Findings (2249).** General Verdicts (2249). General Verdicts and Special Findings (2249). Between Special Findings (2250).
§ 5. **Separate Verdict as to Different Counts, Causes of Action, or Parties (2250).**
§ 6. **Submission to Jury, Rendition, and Return (2251).**
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§ 8. **Recording, Entry, and Effect of Verdict (2252).**
§ 9. **Findings by Court or Referee (2252).** Referee (2252). Findings by the Court (2252). Interpretation and Construction (2253). Signing, Filing, and Entering (2254). The Amendment of Findings (2254). Conclusions of Law (2254). Propositions of Law Under the Illinois Practice (2254).
§ 10. **Objections and Exceptions (2255).**

§ 1. *Definitions and nature.*[48]—A verdict is the decision made by a jury and reported to the court on the matters lawfully submitted to them in the trial of a cause.[49] In some states a verdict may be rendered by nine jurors.[50] It should be in writing and signed by the foreman if unanimous [51] and by the concurring jurors where a majority verdict is authorized.[52]

§ 2. *General verdicts.*[53]—A verdict must be responsive to the issue [54] and authorized by the pleadings,[55] and must be determinative of all the issues submitted [56] and sufficiently definite that judgment thereon can be enforced.[57] If upon direction, it must conform thereto.[58] Informal verdict will stand if reference to the pleadings and record will cure the deficiency.[59] It must also be sustained by the

48. See 6 C. L. 1814.

49. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368.

50. Louisville, etc., R. Co. v. Lucas' Adm'r, 30 Ky. L. R. 359, 98 S. W. 308.

51. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368; Louisville & N. R. Co. v. Lucas' Adm'r, 30 Ky. L. R. 359, 98 S. W. 308. Texas statute requiring signature of foreman is directory only. Dunlap v. Raymond Rice Canal & Mill. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 86, 95 S. W. 43.

52. A verdict signed by nine jurors, the first of whom attached "foreman" to his name, is sufficient. Peterson v. St. Louis Transit Co., 199 Mo. 331, 97 S. W. 860. A verdict by less than twelve must in Kentucky be signed by each juror making it. Louisville, etc., R. Co. v. Lucas' Adm'r, 30 Ky. L. R. 359, 98 S. W. 308.

53. See 6 C. L. 1815.

54. Anderson v. Wood, 50 Misc. 595, 99 N. Y. S. 474; Deaner v. O'Hara [Colo.] 85 P. 1123. In case involving counterclaim, general verdict irresponsive to issue is unsustainable. La Rosa v. Wilner, 101 N. Y. S. 193. Instruction that plaintiff was not entitled to recover larger amount than that claimed in petition held proper where evidence would have authorized larger verdict, though jury allowed plaintiff all that he claimed. International, etc., R. Co. v. Slusher [Tex. Civ. App.] 15 Tex. Ct. Rep. 518, 95 S. W. 717. A verdict for a greater sum than claimed is erroneous. Dick v. Biddle Bros. [Md.] 66 A. 21. One cannot complain that he was not granted relief not asked for in his pleadings, though evidence might otherwise have authorized it. Harris v. Cain [Tex. Civ. App.] 14 Tex. Ct. Rep. 327, 91 S. W. 866.

55. Martin v. Nichols [Ga.] 56 S. E. 995. A general verdict for plaintiff, in an action to recover goods by assignee for the benefit of creditors, concludes the question of assignment. Reddy v. Raymond [Mass.] 80 N. E. 484.

56. A general verdict for plaintiff in a personal injury case implies a finding of absence of contributory negligence. Grass v. Ft. Wayne & W. U. Trac. Co. [Ind. App.] 81 N. E. 514. Verdict should in terms dispose of all issues submitted. Woods v. Latta [Mont.] 88 P. 402.

57. So, in an action for the recovery of the furniture in a barber shop including four barber chairs "all of the value of $59.70," a verdict in plaintiff's favor for three barber chairs or $59.70" is sufficiently definite. Phoenix Furniture Co. v. Jauden [S. C.] 55 S. E. 308. Judgment for foreclosure may be rendered on a verdict for mortgagee, though the verdict fails to state the amount of the debt, where such amount is shown by the uncontroverted evidence. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100. Sufficiency of verdict "we, the jury, find the defendant guilty." Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275. A verdict that "we the jury in the above case sustain the validity of the contract sued upon and fix the damages at ten dollars" is fatally defective. Pressed Steel Car Co. v. Steel Car Forge Co. [C. C. A.] 149 F. 182.

58. Where the court directs a verdict in favor of individuals sued with a city and the verdict was "for the plaintiff," judgment against the city would be reversed. Dailey v. Columbia [Mo. App.] 97 S. W. 954.

59. Did not alone identify the land awarded. Cohues v. Finholt [Minn.] 112 N. W. 12. Verdict in action of dower sufficient though the words used might be sufficient to confer a fee, since the nature of the estate given is fixed by statute. McFadden v. McFadden, 32 Pa. Super. Ct. 534. An objection to the verdict based on an un-

evidence and must not be contrary to law.[60] The rule of idem sonans is applicable to the form of a verdict.[61]

§ 3. *Special interrogatories and verdicts. When proper.*[62]—In some states the parties in certain suits are entitled upon request to special findings on relevant questions,[63] while in other states it is within the discretion of the court to deny requests to submit a case on special issues.[64] Matters not in issue should not be submitted,[65] nor those regarding which there is no conflict of evidence.[66] A refusal to propound special interrogatories which are covered in substance by others submitted is not improper.[67] Where a general verdict is returned on several issues submitted, the court may interrogate the jury to specialize the verdict and state on what issues it is based.[68]

Request for and submission of special issues or interrogatories.[69]—As a general rule it is not obligatory upon the court to submit special issues in the absence of a request therefor[70] in writing;[71] but under some statutes the court may, in its discretion direct a special verdict on its own motion, though no request is made by

substantial discrepancy will not be sustained. During pendency of proceeding by adminstratrix, substituted administrator appointed, and verdict for "plaintiff," naming former adminstratrix. Gibson v. Swofford [Mo. App.] 97 S. W. 1007.

60. Hesselgrave v. Butler Bros. Const. Co., 101 N. Y. S. 103. Verdict contrary to the law of case as stated in court's charge is erroneous. Paine v. Geneva, etc., Trac. Co., 101 N. Y. S. 204; Van Alstine v. Standard Light, Heat & Power Co., 101 N. Y. S. 696. As to review and setting aside for lack of evidence to support, see Appeal and Review, 7 C. L. 128.

61. The fact that defendant's name is spelled "Brown" instead of "Braun" in the verdict does not vitiate. Braun & Ferguson Co. v. Paulson [Tex. Civ. App.] 15 Tex. Ct. Rep. 564, 95 S. W. 617. So, in an action by J. M. Sims, a verdict for Jas. M. Sms is sufficient. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365.

62. See 6 C. L. 1816.

63. Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275. In action for price of cattle sold, where dispute exists as to number, special interrogatory proper as to whether one of them has been turned from sale yard before bid. Curkeet v. Steinhoff [Wis.] 109 N. W. 975.

64. In Texas the court may submit such request in general charge. Ross v. Moskowitz [Tex. Civ. App.] 16 Tex. Ct. Rep. 381, 95 S. W. 86. Under the Kentucky statute, where only one issue before jury, it is no abuse of discretion for the court to refuse to submit special interrogatories. Jones & Co. v. Moore, 30 Ky. L. R. 603, 99 S. W. 286; Holcomb-Lobb v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813. Where parties agree on single issue no error to refuse to submit case on special issues. Johnson v. Scrimshire [Tex. Civ. App.] 15 Tex. Ct. Rep. 949, 93 S. W. 712. Where, in an action for injuries to an employe for alleged failure to equip cars with automatic couplers, the evidence as to whether he was injured in the course of employment or while acting under orders of a superior was conflicting, the issue was properly submitted as a separate question. Hairston v. U. S. Leather Co. [N. C.] 55 S. E. 847.

65. In trespass for removal of wall and no issue as to license to use same, questions as to license improper. Howle v. California Brew. Co. [Mont.] 88 P. 1007. Issue of settlement cannot be submitted when not pleaded. Clark v. Patapsco Guana Co. [N. C.] 56 S. E. 858. Finding no consideration for a release is outside of the pleadings when denial of same is only made to support charges of fraud in procurement. Probate Court v. Enright [Vt.] 65 A. 530. An alleged variance consisting of a finding that a fire started in a manure pile instead of in an adjoining barn cannot be raised in an answer to interrogatories. Lake Erie & W. R. Co. v. Ford [Ind.] 78 N. E. 969.

66. Bereiter v. Abbotsford [Wis.] 110 N. W. 821. Not objectionable for failure to include admitted facts. Chicago Title & Trust Co., v. Core, 223 Ill. 58, 79 N. E. 108. Evidence undisputed as to retention of title to goods shipped, error to submit same for adverse finding. Cragun Bros. v. Todd [Iowa] 108 N. W. 450. Findings are not necessary in relation to separate defenses in support of which no evidence was offered. Moneta Canning & Preserving Co. v. Martin [Cal. App.] 88 P. 369.

67. Party not prejudiced. Chicago City R. Co. v. Foster, 226 Ill. 288, 80 N. E. 762; Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441. Refusal to question as to unavoidable accident covered by other questions. Hocking v. Windsor Spring Co. [Wis.] 111 N. W. 685. As to defective condition of highway. McGowan v. Watertown [Wis.] 110 N. W. 402. Refusal to submit issue of easement vel non, when under another issue jury found there was no easement. Clark v. Patapsco Guano Co. [N. C.] 56 S. E. 858.

68. Where verdict is for plaintiff in an action on note, he is not injured by submission of issue as to misrepresentations. Rockefeller v. Wedge [C. C. A.] 149 F. 130.

69. See 6 C. L. 1817.

70. Gans & Klein Inv. Co. v. Stanford [Mont.] 88 P. 965; Upton v. Santa Rita Min. Co. [N. M.] 89 P. 275; Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265; Plyer v. Pac. Portland Cement Co. [Cal. App.] 87 P 395.

71. Gans & Klein Inv. Co. v. Stanford [Mont.] 88 P. 955; Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

either party.[72] After a case is submitted with special issues, a charge calling for a general verdict is improper.[73] Only material,[74] ultimate[75] questions of fact[76] should be submitted.

Form and requisites of special interrogatories.[77]—Special interrogatories should be clearly and concisely stated so that the jury can give a direct answer thereto,[78] and should not be propounded in a negative or leading,[79] double or misleading[80] form. But as a general rule, if the issues submitted present the material matters in dispute, they need not be in any particular form.[81] Only a sufficient number of questions to single the material matters in controversy should be submitted.[82]

Form and requisites of special verdict.[83]—The verdict must be explicitly responsive to the questions submitted.[84]

72. Rev. St. 1898, § 2858. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

73. Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 99 S. W. 409. A party desiring a general verdict as well as special findings must ask for it before the jury is discharged. Smyser v. Fair [Kan.] 85 P. 408. General instructions should not be given where a case is submitted for a special verdict. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

74. Drumm-Flato Commission Co. v. Edmisson [Okl.] 87 P. 311; City of Indianapolis v. Keeley [Ind.] 79 N. E. 499; Hart v. Brierley, 189 Mass. 598, 76 N. E. 286.

75. The court is not required to submit a special interrogatory unless it relates to ultimate facts of such character that it would control a general verdict. Springfield Coal Min. Co. v. Gedutis [Ill.] 81 N. E. 9; Grace & Hyde Co. v. Sanborn, 124 Ill. App. 472. Whether negligent act sued on was in violation of "well known rule" of defendant. Chicago & Alton R. Co. v. Seevers, 122 Ill. App. 558. They must also be material and pertinent and relate to ultimate rather than evidentiary facts, so as to involve legal consequences and have a controlling force in reaching a conclusion. Should ask a response as to the existence of some particular fact, and not embrace a series of facts not necessarily included in the determination. City of Stillwater v. Swisher, 16 Okl. 585, 85 P. 1110. In an action where issue was whether plaintiff's injuries were proximately caused by incompetency of defendant's engineer, the question whether the injury was caused by "incompetency or want of skill" is erroneous; the proper inquiry being whether the injury was proximately caused by incompetency, and if the words "want of skill" meant "incompetency" they were surplusage, otherwise they rendered the question double. Nor is a question accurate which inquires whether the majority of owners would have foreseen that the engineer's incompetency would be likely to cause injury to plaintiff; the proper question being only whether they would have foreseen that it would be likely to cause injury to any one. Odegard v. North Wisconsin Lumber Co. [Wis.] 110 N. W. 809. In action by servant for injuries claimed to have been caused by negligence of master in allowing hole to remain in floor after it should have been discovered and repaired, special interrogatories as to whether the hole existed and if so whether the defendant could have known of it and should have repaired it should have been submitted, instead of the general question as to whether defendant was negligent. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48. In action for injuries from fall alleged to have been caused by smoke and absence of guards, special issues under the California statute should refer to the combination of the two dangers, and not limit the cause of injury to them separately. Plyler v. Pacific Portland Cement Co. [Cal. App.] 87 P. 395. Interrogatories not calling for findings of essential facts properly rejected. People's State Bank v. Ruxer [Ind. App.] 78 N. E. 337. A question as to whether principal would have sustained loss had agent not been negligent is rendered immaterial by findings to other questions, that agent was not negligent. McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472.

76. Matters of law should not be submitted. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 N. E. 518.

77. See 6 C. L. 1817.

78. Drumm-Flato Commission Co. v. Edmisson [Okl.] 87 P. 311. Susceptible of affirmative or negative answer. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

79. Chicago, etc., R. Co. v. Lost Springs Lodge No. 494 [Kan.] 85 P. 803.

80. Gronlund v. Forsman, 124 Ill. App. 362.

81. Clark v. Patapsco Guano Co. [N. C.] 56 S. E. 858. Sufficiency of application for finding In re Clark [Conn.] 64 A. 12. Submission requiring joint findings as to interest of several, on representation made to them separately and not jointly, not erroneous where, at their instance, separate findings as to each were required and not returned under special issues. Bridgeport Coal Co. v. Wise County Coal Co. [Tex. Civ. App.] 99 S. W. 409. In action by one of several persons, jointly liable on a contract for the support of a third party, against the others for contribution, a question requesting a finding of the reasonable value of the support of the third party, over and above the services received by him, is not objectionable as covering two separate issuable facts. Payne v. Payne [Wis.] 109 N. W. 105.

82. Howard v. Beldenville Lumber Co. [Wis.] 108 N. W. 48.

83. See 6 C. L. 1818.

84. Submission of question of what amount will compensate for personal injuries does not necessitate itemizing for nursing, medical attendance, etc. Johnson v. St. Paul & W. Coal Co. [Wis.] 111 N. W. 722. Where in an action on a note the answer alleged that defendant became liable to a third party at plaintiff's instance, a finding that under an agreement between the third

Interpretations and construction.[85]—A finding by the jury upon a specific and controlling question is deemed to be as full and definite an answer as the testimony will warrant.[86] Findings of fact, to which no amendments are proposed and no alleged defects called to the attention of the court, will be aided by all reasonable intendments.[87] Generally an answer "Do not know" is construed as showing that the party having the burden of establishing the fact involved has failed in his proof.[88] So a special finding which is silent on a material point is deemed to be found against the party having the burden of proof.[89] The failure to find on an allegation, the truth of which is established, will be regarded on appeal as equivalent to an affirmative finding.[90] Where special interrogatories are to be submitted to

party and defendant, made in plaintiff's presence, a certain sum was to be paid when defendant was able, is not erroneous as being outside of the pleadings. Ruzeoski v. Wilrodt [Tex. Civ. App.] 15 Tex. Ct. Rep. 783, 94 S. W. 142. In an action to restrain defendant from interfering with a pipe line or the water therein, a finding that plaintiff had an interest in line for purpose of conveying water, in connection with a finding as to the extent of such interest, constitutes a sufficient finding that plaintiff had an easement and ownership in same to extent claimed. Collins v. Gray [Cal. App.] 86 P. 983. Verdict held not to so present the facts that only an issue of law remained. Coburn Cattle Co. v. Small [Mont.] 88 P. 953.

85. See 6 C. L. 1819.

86. Where a finding is too indefinite, and the jury is required to answer more specifically but fails to do so, it is not to be presumed that a still further effort will obtain any better results. Missouri Pac. R. Co. v. Dorr [Kan.] 85 P. 533.

87. Scheleske v. Orange Tp. [Mich.] 13 Det. Leg. N. 988, 110 N. W. 506. A finding as to the customary flow of water without specifying any standard of measurement is not fatally defective, since it would be construed according to the customary measurement of the locality. Collins v. Gray [Cal. App.] 86 P. 983. A finding that a testator died possessed of a will which was afterwards mislaid or destroyed without referring to any particular will, though there were apparently two wills in existence, is not res judicata of an issue to determine whether one of the wills had been destroyed by testator. In re Lappe's Estate [Pa.] 64 A. 607. In an action for injury on any alleged defective highway, a finding that it was dangerous should be treated as including a finding that there was an unwarranted obstruction, and that it was not reasonably safe. Schelske v. Orange Tp. [Mich.] 13 Det. Leg. N. 988, 110 N. W. 506. Where the issues were whether a deed was a mortgage, and if not whether an agreement to purchase existed, and the jury found that it was not a mortgage but an agreement to purchase, the court may consider all the findings in rendering judgment. Beale's Heirs v. Johnson [Tex. Civ. App.] 99 S. W. 1045. A question not uncertain because referring to a fact set out in an amended answer, though the case was tried on a second amended answer, when the same fact was set out in both. Wallace v. Skinner [Wyo.] 88 P. 221. After a party's request to submit cause on special issues was granted, a request by the other party to submit whole cause upon general charge involving general verdict is not a request for the submission of issues within the issues. Moore v. Pierson [Tex.] 16 Tex. Ct. Rep. 191, 94 S. W. 1132. Where nothing to the contrary appears, it will be presumed in the support of findings on an amended complaint that the original complaint presented the same issues, and that the findings answered the questions put in the original complaint. Collins v. Gray [Cal. App.] 86 P. 983. An affirmative answer to an interrogatory asking whether an accident would have happened simply on account of the condition of a highway should be construed to mean that it would have happened on account of the condition without reference to other circumstances. Chicago, etc., R. Co. v. Gallion [Ind. App.] 80 N. E. 547. Where jury found on every allegation of negligence contained in the first paragraph of a complaint except one, the verdict was based on such paragraph, though there were additional findings on allegations of the second paragraph. Bedford Quarries Co. v. Turner [Ind. App.] 77 N. E. 58. Finding that insurer had "information" of certain facts not stated in the application is a sufficient finding of notice. Metcalf v. Mutual Fire Ins. Co. [Wis.] 112 N. W. 22. A finding that no consideration was ever paid does not fully negative a consideration, since there may have been one other consideration than by a payment. Probate Court v. Enright [Vt.] 65 A. 530. A special question submitted to the jury whether a person fraudulently induced plaintiff to sign a release does not call for a conclusion of law. Wallace v. Skinner [Wyo.] 88 P. 221.

88. But the construction of such findings depends upon the form of the question answered. Croan v. Baden [Kan.] 85 P. 532; Wichita R. & Light Co. v. Lippincott [Kan.] 85 P. 1135.

89. Donaldson v. State [Ind.] 78 N. E. 182. A finding that a contract was substantially complied with, though to questions twice thereafter submitted the jury replied "not to the letter," amounts to a finding of substantial compliance. Carnegie Public Library Ass'n v. Harris [Tex. Civ. App.] 97 S. W. 520. Where questions submitted required findings of amount of crops actually raised, and amount that would have been raised had defendant complied with contract to furnish water, a finding merely as to cost of raising and harvesting crop is insufficient to base amount of damages on. Dunlap v. Raywood Rice Canal & Mill. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 86, 95 S. W. 43.

90. Allen v. Bryant [Cal. App.] 88 P. 294.

the jury, counsel may read and comment on them and array the evidence necessary to be considered in answering them.[91]

§ 4. *Conflicts between verdicts and findings. General verdicts.*[92]—Where a special verdict only is called for, a general verdict, returned with the answers to questions submitted as special issues, should be ignored.[93]

General verdicts and special findings.[94]—Special findings should always be reconciled with the general verdict where possible; but if there be necessary inconsistency the special findings prevail, and on proper application the general verdict must be set aside.[95] Inconsistency will only overthrow the general verdict when it is so direct that no state of facts provable under the issues could remove it,[96] and the evidence actually received will not be looked to.[97] Failure to answer special interrogatories material to the conclusions of the general verdict is not ground for rendering judgment non obstante[98] the general verdict controlling as to all matters not specially found.[99] Presumptions and intendments should be indulged in favor

91. Pittsburg, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033.

92. See 6 C. L. 1819.

93. Dunlap v. Raywood Rice Canal & Mill. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 86, 95 S. W. 43.

94. See 6 C. L. 1819.

95. Awde v. Cole, 99 Minn. 357, 109 N. W. 812; City of Roswell v. Davenport [N. M.] 89 P. 256; Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436; Pittsburg, etc., R. Co. v. Brough [Ind.] 81 N. E. 57; National Biscuit Co. v. Wilson [Ind. App.] 80 N. E. 33; Wichita R. & Light Co. v. Lippincott [Kan.] 85 P. 1135; Inland Steel Co. v. Smith [Ind.] 80 N. E. 538; Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Findings as to public highway. People v. McCue [Cal.] 88 P. 899. Negligence in operation of saw. Tucker & Dorsey Mfg. Co. v. Staley [Ind. App.] 80 N. E. 975. Special finding that defendant did not know of defect does not overthrow general verdict for plaintiff, if defendant could have known of it. Atchison, etc., R. Co. v. Allen [Kan.] 88 P. 966. Special findings only override special verdict when both cannot stand, and the antagonism is apparent on the face of the record beyond the possibility of removal by legitimate evidence. Indianapolis Traction & Terminal Co. v. Kidd [Ind.] 79 N. E. 347; Chicago, etc., R. Co. v. Gallion [Ind. App.] 80 N. E. 547; Kafka v. Union Stock Yards Co. [Neb.] 110 N. W. 672; Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441. If reconcilable upon any supposed state of facts, general verdict prevails. Indianapolis Traction & Terminal Co. v. Richey [Ind. App.] 80 N. E. 170; Pittsburgh, etc., R. Co v. Rose [Ind. App.] 79 N. E. 1094. Special verdict not showing contributory negligence so as to render same inconsistent with general verdict for plaintiff. Chicago & E. R. Co. v. Lawrence [Ind.] 79 N. E. 363. Findings reconcilable with verdict that plaintiff was a passenger. Indianapolis Traction & Terminal Co. v. Romans [Ind. App.] 79 N. E. 1068. In action by passenger of street car for injuries, no conflict between general verdict and certain findings. Louisville & S. I. Trac. Co. v. Leaf [Ind. App.] 79 N. E. 1066. Special answers not equivalent to finding of no negligence, in action for fire set by locomotive. Cleveland, etc., R. Co. v. Hayes [Ind.] 79 N. E. 448. Special finding sustained by evidence is sufficient to justify verdict. Nicholls v. American Steel & Wire Co., 102 N. Y. S. 227. General verdict for plaintiff in action for injury while obeying special orders of superior, though special verdict was that he was working under "the general order" of superior. Indianapolis St. R. Co. v. Kane [Ind.] 80 N. E. 841. Special finding, in action by distributee for bank deposit of his intestate, that latter's debts were paid, amounts to finding that no liabilities existed, and supports general verdict for plaintiff. Merchants' Nat. Bk. v. McClellan [Ind. App.] 80 N. E. 854. Special finding that plaintiff could have discovered danger if he had looked in certain direction at certain time does not overcome general verdict that he exercised due care, since fact specially returned does not exclude existence of circumstances warranting general conclusion. Baltimore, etc., R. Co. v. Rosborough [Ind. App.] 80 N. E. 869. Irreconcilable conflict. Farmers' Mut. Fire Ins. Ass'n v. Stewart [Ind.] 79 N. E. 490; Crowley v. Northern Pac. R. Co. [Wash.] 89 P. 471; Hardy v. Curry [Kan.] 89 P. 19. General findings in nature of conclusions contradicted by special findings of fact in detail. Chicago, etc., R. Co. v. Laughlin [Kan.] 87 P. 749. A general verdict that plaintiff recover under common law is in such conflict with a special finding that sole cause of injuries was defendant's violation of statutory duty as to entitle defendant to judgment. Bemis Indianapolis Bag Co. v. Krentler [Ind.] 79 N. E. 974. Special finding of facts showing contributory negligence control general verdict for plaintiff. American Smelting and Refining Co. v. Hoke [Kan.] 85 P. 804. Remedy where court sets aside special findings inconsistent with general verdict, and entitles judgment on latter, is by motion for new trial. Martin v. Butte [Mont.] 86 P. 264.

96. Grass v. Ft. Wayne & W. Valley Trac. Co. [Ind. App.] 81 N. E. 514.

97. Only pleadings, verdict, and answers to interrogatories. Grass v. Ft. Wayne & W. Trac. Co. [Ind. App.] 81 N. E. 514. On appeal the court can only look to the complaint, answer, general verdict, and the interrogatries and findings, in determining whether the special findings are in irreconcilable conflict with the general verdict. Bemis Indianapolis Bag Co. v. Krentler [Ind.] 79 N. E. 974.

98. Connell v. Keokuk Elec. R. & Power Co. [Iowa] 109 N. W. 177.

99. So a general verdict is controlling as

of general verdict, but none can be indulged in favor of answers to special interrogatories.[1]

Between special findings.[2]—Conflicting special findings by the jury nullify each other and will not overthrow the general verdict if the findings are not inconsistent with it.[3] But where findings upon two special issues are clearly contradictory, a judgment dependent on the verdict upon either issue cannot be sustained.[4]

§ 5. *Separate verdict as to different counts, causes of action, or parties.*[5]—Where two defendants are sued jointly, a verdict that only one is liable, is not without the issue, but sustains a judgment against him.[6] Nor does a verdict in favor of one sued as joint tort feasor relieve the other defendant of such liability as the evidence might establish against him.[7] But a verdict for a specified sum against one of two joint defendants should be construed as a verdict in favor of the other.[8] Where only one defendant has been served with process, and he alone appears and defends, the verdict in plaintiff's favor should be construed against him, though not specifically named.[9] In an action by a husband claiming in his own right, and also for himself and wife for injury to latter, a verdict for a single sum cannot stand, it being impossible of application or appropriation.[10] A verdict against two

to any issue of fact properly submitted, and not covered by special findings. Connell v. Keokuk Elec. R. & Power Co. [Iowa] 109 N. W. 177. Assault by servant. General verdict controlling. Goodwin v. Greenwood, 16 Okl. 489, 85 P. 1115. All facts in issue which are not specially found should be presumed to have been determined by the jury in accordance with their general verdict. Omitted facts. Samson v. Zimmerman [Kan.] 85 P. 757; Webb v. National Bk. of Republic [C. C. A.] 146 F. 717.

1. Finding of negligence in not instructing employe of danger. Inland Steel Co. v. Smith [Ind.] 80 N. E. 538; Lake Erie & W. R. Co. v. Hobbs [Ind. App.] 81 N. E. 90. Answer to ambiguous question. Burke v. Bay City Trac. & Elec. Co. [Mich.] 13 Det. Leg. N. 974, 110 N. W. 524. Answers must be construed in favor of the general verdict. Erie Crawford Oil Co. v. Meeks [Ind. App.] 81 N. E. 518. No inferences can be drawn against the general verdict. Hence, in action for injuries for defective elevator, a special finding that it was furnished with usual safety appliances does not form basis for inferences that verdict for plaintiff did not rest on negligence, the condition of the appliances not being shown. National Biscuit Co. v. Wilson [Ind. App.] 78 N. E. 251. In California it is held that a finding of ultimate fact prevails in support of judgment, notwithstanding a finding of probative fact tending to show ultimate fact against evidence. Forsythe v. Los Angeles R. Co. [Cal.] 87 P. 24.

2. See 6 C. L. 1821.

3. Indianapolis St. R. Co. v. Fearnaught [Ind. App.] 79 N. E. 217; Oolitic Stone Co. v. Ridge [Ind. App.] 80 N. E. 441; Atchison, etc., R. Co. v. Bishop [Kan.] 89 P. 668; Inland Steel Co. v. Smith [Ind. App.] 80 N. E. 538. So if they are inconsistent or so uncertain that their meaning cannot be ascertained, they antagonize each other. Pittsburgh, etc., R. Co. v. Lightheiser [Ind.] 78 N. E. 1033. Special findings that there is no evidence denying the administration of an estate, and that no administrator had been appointed, are so inconsistent as to have no effect on general verdict. Merchants' Nat. Bk. v. McClelland [Ind. App.] 80 N. E. 854. Consistency of special verdicts in action alleging libel, slander, false imprisonment, and negligence, in examination for insanity. Lufkin v. Hitchcock [Mass.] 80 N. E. 456. Consistent answers as to knowledge by boy of peril, and exercise of ordinary care. Horn v. La Crosse Box Co. [Wis.] 111 N. W. 522. As to wanton negligence. Foot v. Seaboard Air Line R., 142 N. C. 52, 54 S. E. 843. Affirmative answer to question whether contracting party was afflicted with "any" weakness of mind does not conflict with finding upholding the contract. Haight v. Haight [Cal.] 90 P. 197.

4. Appellate court will remand such case for new trial. Brown Hdwr. Co. v. Catrett [Tex. Civ. App.] 101 S. W. 559.

5. See 6 C. L. 1822.

6. Mckee v. Cunningham, 2 Cal. App. 684, 84 P. 260.

7. Chambless v. Melton [Ga.] 56 S. E. 414.

8. James v. Evans [C. C. A.] 149 F. 136; Texas & P. R. Co. v. Huber [Tex. Civ. App.] 16 Tex. Ct. Rep. 154, 95 S. W. 568. A railroad company codefendant with its engineer cannot complain of a verdict for the plaintiff fixing damages only against the company, where evidence sufficient to warrant judgment against both. Illinois Cent. R. Co. v. Murphy's Adm'r, 30 Ky. L. R. 93, 97 S. W. 729. In action against hospital and its manager for negligence, verdict against hospital and in favor of manager cannot be regarded as a general verdict inconsistant with special finding. Hewett v. Woman's Hospital Aid Ass'n, 73 N. H. 556, 64 A. 190. But under the Missouri Statute, where the verdict is in favor of one defendant without reference to the other, the court should require a verdict as to both. Crow v. Crow [Mo. App.] 100 S. W. 1123.

9. Thomas v. Clarkson, 125 Ga. 72, 54 S. E. 77.

10. Spencer v. Haines [N. J. Law] 62 A. 1009.

defendants sued jointly should not assess several damages.[11] If different causes of action are pleaded in separate counts, there should be a separate finding on each count, but, if all the count present only one cause of action, a single finding is sufficient.[12] If there be separate findings on several counts, they must be consistent.[12a]

§ 6. *Submission to jury, rendition and return.*[13]—Forms of verdict submitted to the jury must not be misleading or disguised to control their design.[14] A verdict arrived at by the "quotient process" is void[15] if an agreement was made to abide the result so obtained, but the presumption is that there was no such agreement.[16] The verdict must be declared on its return.[17] The court may in the absence of counsel receive a verdict[18] or authorize the return of a sealed verdict.[19]

§ 7. *Amendment and correction.*[20]—As a general rule a fatally defective verdict is incapable of amendment after the separation of the jury.[21] But where an error in a verdict is attributable to a mistake of the jury, the court may correct it without ordering a new trial.[22] In some states the court may correct the verdict so as to conform to the real determination of the jury, though they have been discharged, if motion is made at the same term.[23] The court has power to instruct the jury before dismissal to make necessary formal corrections in verdict,[24] and on opening a sealed verdict, the court may send the jury out to make it definite as to amount.[25] In some states, a jury may be recalled and sent back by the court to correct a manifest error in form, or supply an omission of matter necessary to the verdict.[26] A verdict cannot be reduced by the court without the consent of the party

11. But the court may grant new trial to one and render judgment against the other. Nashville R. & Light Co. v. Trawick [Tenn.] 99 S. W. 695.

12. Sain v. Rooney [Mo. App.] 101 S. W. 1127. There may be a single verdict on a declaration in several counts on the same transaction. Shearer v. Hill [Mo. App.] 102 S. W. 673. An entire verdict may ordinarily be rendered on several counts. Mercantile Trust Co. v. Hensey, 27 App. D. C. 210.

12a. Verdict for plaintiff on count for negligently signing a certificate whereon plaintiff was committed to the insane asylum held not inconsistent with verdict for defendant on counts for libel, slander and false imprisonment based on the same transaction. Lufkin v. Hitchcock [Mass.] 80 N. E. 456.

13. See C. L. 1822.

14. Where defendant's plea admits owing part of amount sued for, there is no error in giving to the jury a form of verdict adapted only to finding some amount for the plaintiff. Howard Supply Co. v. Bunn [Ga.] 56 S. E. 757.

15. Williams v. Dean [Iowa] 111 N. W. 931; Ward v. Marshalltown Light, Power & Ry. Co. [Iowa] 108 N. W. 323.

16. State v. Cowell [Mo. App.] 102 S. W. 573; Birmingham R. Light & Power Co. v. Moore [Ala.] 42 So. 1024.

17. Paper purporting to be verdict, in a package delivered by foreman after jury dismissed without rendering verdict, cannot be considered as a verdict, there being no opportunity to poll jury and determine whether it was the unanimous decision. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368.

18. Kuhl v. Supreme Lodge [Okl.] 89 P. 1126.

19. Grace & Hyde Co. v. Sanborn, 124 Ill. App. 472.

20. See 6 C. L. 1823.

21. Pressed Steel Car Co. v. Steel Car Forge Co. [C. C. A.] 149 F. 182.

22. Misapprehension as to amount. Richardson v. Agnew [Wash.] 89 P. 404. Verdict incorrect in form for failing to directly decide issue, may be corrected by court in entering judgment. Kebabian v. Adams Exp. Co. [R. I.] 66 A. 201.

23. But it is improper to amend a verdict by adding interest when there is nothing to show from what time the jury intended to allow it. Schnaufer v. Ahr, 103 N. Y. S. 195. Verdict for full amount of claim should be construed as including interest from the date of demand, but cannot be corrected after term ended. Fleming v. Jacob, 103 N. Y. S. 209. In Wisconsin it is held that a verdict on its face contrary to the undisputed evidence may be changed to correspond to the state of the case. Hay v. Baraboo, 127 Wis. 1, 105 N. W. 654. So a verdict may be amended by the addition of interest where the affidavits of all the jurors show conclusively that such was their intention. Elliott v. Gilmore, 145 F. 964. Where the value of property sued for is fixed by the pleadings at a certain sum, a finding in the verdict of a different sum is surplusage and may be struck out. Frank v. Symons [Mont.] 88 P. 561. Effect of rule. McKone v. Metropolitan Life Ins. Co. [Wis.] 110 N. W. 472. "De minimis lex non curat" on amount of verdict.

24. Verdict for plaintiff in action against two defendants corrected by the addition of words "and against the defendants and each of them." Lacey v. Bentley [Colo.] 89 P. 789.

25. King v. McKinstry, 32 Pa. Super. Ct. 34.

26. Where jury returns general verdict for defendant on plea of counterclaim, court should require them to determine and state the amount thereof. Oxford Junction Sav. Bk. v. Cook [Iowa] 111 N. W. 805. Under the Texas Statute where a verdict is in-

in whose favor it was rendered, but, if injustice has been done, it may be set aside.[27] It is not error to refuse to require more specific answers to interrogatories which are fully covered by other answers.[28]

§ 8. *Recording, entry, and effect of verdict.*[29]—A clerical error in copying a verdict does not invalidate the judgment.[30] If a juror cannot sign his name the court may write his name to the verdict and cause him to make his mark.[31] After a verdict of the jury, determinative of the issue and adopted by the court, there is no necessity for a further finding by the court.[32] Where a statute allows a successful party to recover a sum which is determined by multiplying the actual damage sustained a specified number of times, it is immaterial whether the jury return in their verdict the sum which plaintiff is entitled to recover by virtue of the statute or whether they returned the actual damage, and the court directs the judgment to be entered in accordance with the statute.[33]

§ 9. *Findings by court or referee. Referee.*[34]—Findings by a referee must be explicitly made in his report.[35]

Findings by the court.[36]—Findings by the court must be within the issues raised by the pleadings and must cover all of them that are material,[37] but where the admitted facts establish a defense no finding thereon is necessary,[38] and where the primary facts found lead to but one conclusion the court is not required to make a specific finding of ultimate fact.[39] In an equity suit the court may disregard a special verdict of the jury and make its own findings of fact and conclusions of law.[40]

formal and not responsive to the charge, the court may decline to receive it and direct a correction. Roche v. Dale [Tex. Civ. App.] 15 Tex. Ct. Rep. 832, 95 S. W. 1100. Before acception of a verdict the court may give charge covering different phase of case, and send jury back for further consideration. Cockrell v. Egger [Tex. Civ. App.] 99 S. W. 568. Substitution by consent of jury of proper verdict for one returned by mistake where latter not filed and jury not discharged. Hary v. Speer, 120 Mo. App. 556, 97 S. W. 228. Application to rectify appeal by making changes in findings. McCarthy v. Consolidated R. Co. [Conn.] 63 A. 725.

27. Isley v. Virginia Bridge & Iron Co. [N. C.] 55 S. E. 416. Accepted reduction. Vlou v. Brooks-Scanlon Lumber Co., 99 Minn. 97, 108 N. W. 891; Phoenix Assur. Co. v. Maryland Gold Min. & Devel. Co. [C. C. A.] 146 F. 501. When erroneous verdict not cured by remitting part. Connelly v. Illinois Cent. R. Co., 120 Mo. App. 652, 97 S. W. 616.

28. Indianapolis St. R. Co. v. Taylor [Ind. App.] 80 N. E. 436.

29. See 6 C. L. 1824.

30, 31. Moore v. Woodson [Tex. Civ. App.] 99 S. W. 116.

32. Hoyt v. Hart [Cal.] 87 P. 569.

33. Richards v. Sanderson [Colo.] 89 P. 769.

34. See 6 C. L. 1825.

35. Holmes v. Seaman, 102 N. Y. S. 616, citing Elterman v. Hyman, 102 N. Y. S. 613. And see Reference, 8 C. L. 1702.

36. See 6 C. L. 1825.

37. Whether arising on allegations and denials in answer, or on affirmative defense, or on counterclaim. Dillon Impl. Co. v. Cleveland [Utah] 88 P. 670. A failure by the court to find on all the material issues made by the pleadings is reversible error, unless findings upon such issues would not affect the judgment. State v. Baird [Idaho] 89 P. 298. There must be a finding on every material issue. Bell v. Adams [Cal.] 90 P 118. In suit for specific performance, findings giving plaintiff right to conveyance by verbal gift and possession are irresponsive. Price v. Lloyd [Utah] 86 P. 767. No judgment can properly be rendered until there is a finding on all material issues. Dillon Imp. Co. v. Cleveland [Utah] 88 P. 670; Wood v. Broderson [Idaho] 85 P. 490. It is error to refuse a request to make findings on a material issue which are sustained by undisputed evidence to or by such a preponderance thereof that findings to the contrary cannot stand. Turner v. Fryberger, 99 Minn. 236, 108 N. W. 1118, 109 N. W. 229. Under the New York statute a refusal to make findings of fact for the defendant is not equivalent to a finding against the fact, but it results in a mistrial. Morehouse v. Brooklyn Heights R. Co., 185 N. Y. 520, 78 N. E. 179. In an action for sale and partition of land where the court found no partnership existed in relation to the land, it is not necessary to find whether there was a business partnership. Contaldi v. Errichetti [Conn.] 64 A. 219. In action by tenant against a cotenant for improvements to property, a finding that the relation between them did not include the ownership and management of the property is sufficient to dispose of the difference, without a finding as to whether a copartnership existed. Contaldi v. Errichetti [Conn.] 64 A. 211. Finding that plaintiff's services were of a specified value held to dispose of an affirmative defense based on their lack of value Prince v. Kennedy [Cal. App.] 85 P. 859.

38. Bell v. Adams [Cal.] 90 P. 118.

39. Mount v. Montgomery County Com'rs [Ind.] 80 N. E. 629.

40. Suit for specific performance. Ostrom v. De Yoe [Cal. App.] 87 P. 811. The adopt-

Where a Federal court tries a case without a jury by consent, whether special findings shall be made rests in discretion,[41] and, generally, where a jury is waived, the court is not called upon to make special findings in the absence of a request therefor.[42] Where a case is tried on an agreed statement of facts, it is not necessary that the court should make separate findings of fact and law.[43] Where several actions are consolidated, a single set of findings is sufficient,[44] though one of the findings was general on a fact which some of the complaints did not allege.[45] Findings should be positive and definite,[46] and of ultimate [46a] facts rather than mere conclusions.[47]

Interpretation and construction.[48]—Findings by the court must be construed so as to uphold rather than defeat the judgment rendered thereon, and, for the purpose of supporting the judgment, they must be liberally construed, and any ambiguity must be resolved in favor of the judgment;[49] and when from the facts found other facts supporting the judgment may be inferred, the inference will be presumed to have been made by the lower court.[50] In the absence of specific findings of facts to the contrary, it must be presumed that the trial court found those facts which are responsive to the issue and essential to the judgment.[51] A finding of fact by the court should stand unless inconsistent with other facts found.[52] A failure to find in accordance with an averment of the plaintiff is in legal effect a finding to the

ing or disregarding of the findings of the jury is in the discretion of the court. Wisdom v. Nichols-Shepherd Co., 29 Ky. L. R. 1128, 97 S. W. 18.

41. Rev. St. § 649. School Dist. No. 11, Dakota County v. Chapman [C. C. A.] 152 F. 887.

42. Bank of Commerce v. Baird Min. Co. [N. M.] 85 P. 970. Where no declarations of law are asked or given and the case submitted to the court on agreed statement of facts, such agreed case occupies the same footing as a special verdict, and the trial court should give judgment on the facts so found or agreed upon. Graham v. Ketchum, 192 Mo. 15, 90 S. W. 350.

43. Cincinnati, etc., R. Co. v. Hansford & Son, 30 Ky. L. R. 1105, 100 S. W. 251.

44, 45. Union Lumber Co. v. Simon [Cal. App.] 89 P. 1077.

46. Sufficiency of finding as use of water claimed to have been acquired by prescription. Bartholomew v. Fayette Irr. Co [Utah] 86 P. 481. The term "continuing contract" in a finding by the court is not objectionable for indefiniteness. In re Myer [N. M.] 89 P. 246. A remark, in the opinion of the trial judge, to the effect that a contestee was born in a foreign jurisdiction, "if the fact of the nativity of contestee can be definitely found from the evidence," is not a finding of fact that he was so born. Buckley v. McDonald, 33 Mont. 483, 84 P. 1114. Construction and sufficiency of findings as to tax sale. Cantwell v. Nunn [Wash.] 88 P. 1023.

46a. A finding that a grantor was in full possession of his faculties necessarily implies a finding that he was not "entirely without understanding." Ripperdan v. Weldy [Cal.] 87 P. 276.

47. A finding that excessive fees were collected and taxed is a finding of fact and not a mere conclusion of law. State v. Williams [Ind. App.] 77 N. E. 1137. A finding that certain resolutions were passed should be regarded as a finding of fact rather than as conclusions of law. Pacific Pav. Co. v. Diggins [Cal. App.] 87 P. 415. A finding that there was no evidence showing residence of mortgagee, where there is substantial evidence from which it may be inferred that he resided in county where mortgage recorded, must be treated rather as conclusion of law than issue of fact, authorizing appellate court to assume that mortgagee lived where mortgage recorded, in accordance with judgment. Kansas City Wholesale Grocery Co. v. McDonald, 118 Mo. App. 471, 95 S. W. 279.

48. See 6 C. L. 1828.

49. Leist v. Dierssen [Cal. App.] 88 P. 812. To be liberally construed to support the judgment. Haight v. Haight [Cal.] 90 P. 197.

50. Griffin v. Pacific Elec. R. Co., 1 Cal. App. 678, 82 P. 1084; Treadwell v. Clark, 114 App. Div. 493, 100 N. Y. S. 1. Finding that claim had been due forty years and was never before prosecuted held sufficient finding of bar by limitations. Marshutz v. Seltzor [Cal. App.] 89 P. 877.

51. Deaner v. O'Hara [Colo.] 85 P. 1123. Where, under a contract, a contractor cut certain lumber for the plaintiff and other lumber for himself, it will be presumed that lumber sold by him was his own, in the absence of findings to the contrary. Rice v. Knostman [Wash.] 88 P. 194.

52. A finding that a person killed in collision with a street car could have remained where he stopped his horse, some distance from the track, is properly drawn from a finding that he was driving at a walk when he stopped. McCarthy v. Consolidated R. Co. [Conn.] 63 A. 725. Bill charging building of double track to irreparable damage, and answer admitted building but denying irreparable damage, do not warrant finding of fact that track was a turnout. Borough of Bridgewater v. Beaver Valley Tract. Co., 214 Pa. 343, 63 A. 796. A finding that there was no "adequate" consideration for a transfer will not be construed as finding that there was any consideration, when by so doing it would be brought into conflict with another finding. Haight v. Haight [Cal.] 90 P. 197. A finding that an ordinance granting a privilege created a "franchise" construed to mean

contrary.[53] After sustaining a demurrer to plaintiff's evidence, special findings by the court are surplusage.[54] A recital, where the facts are agreed, the court finds the issues with the defendant, shall be construed to refer to the issues of law.[55]

Signing, filing, and entering.[56]—A statute providing that findings of fact by the court shall be in writing and filed contemplates that they shall also be signed.[57] Under the New York statute in an equitable action to enforce an attorney's lien, the court should sign and file a decision as a prerequisite to entering judgment.[58] In equity the findings were embodied in the decree, and this practice prevails in several states.[59] In Pennsylvania requests for findings need not be entered of record.[60]

The amendment of findings.[61]—The court findings of fact may be amended so as to conform to the facts stipulated by the parties.[62] The court is not, however, usually authorized to modify its findings in substance [63] or restate its conclusions of law,[64] and cannot, after entering a finding, set it aside and make a different one.[65]

Conclusions of law.[66]—By statute in some states, conclusions of law and findings of fact are required to be separately stated.[67] A finding considerd as a conclusion of law cannot aid the findings of fact, and it is often difficult to determine what are findings of fact and what conclusions of law.[68] The conclusion of law need not be stated in any particular form.[68a]

Propositions of law under the Illinois practice [69] need only be presented where a jury trial is of right and has been waived.[70]

operated as a franchise only. Western Union Tel. Co. v. Visalia [Cal.] 87 P. 1023. Inconsistent findings as to seepage of water cannot be implied. Beaverhead Canal Co. v. Dillon Elec. Light & Power Co. [Mont.] 85 P. 880. Inconsistency between special findings as to lack of notice of mortgagee. Hamilton v. Fleckenstein, 103 N. Y. S. 631. Special findings made by the court, stating certain allegations of the plaintiff's petition are not sustained by the evidence, do not warrant a reversal of the judgment for the plaintiff where there are allegations of fraud in the plaintiff's petition not negatived by the special findings and supported by the general findings. Smith v. Smith [Kan.] 89 P. 896. Where there is an inconsistency between the findings and decision of a court and its written opinion, the findings and decision control. Opinion that each party pay own costs, but findings and decision that plaintiff recover costs. Wadleigh v. Phelps [Cal.] 87 P. 93. Where the court has made a separate special finding of facts upon which judgment has been rendered, the recital of facts in the opinion constitutes no part of the finding, and cannot be invoked to assail it. Webb v. National Bk. of Republic [C. C. A.] 146 F. 717.

53. Soule v. Soule [Cal. App.] 87 P. 205.

54. Darlington v. Cloud County Com'rs [Kan.] 88 P. 529. Ruling on demurrer to petition after hearing evidence. Thompson v. Mills [Tex. Civ. App.] 101 S. W. 560.

55. The agreement of facts being equivalent to a finding thereof by the court. Anderson v. Messinger [C. C. A.] 146 F. 929.

56. See 6 C. L. 1829.

57. Wisconsin Rev. St. 1898, § 2863. Sackett v. Price County [Wis.] 110 N. W. 821.

58. Wise v. Cohen, 113 App. Div. 859, 99 N. Y. S. 663.

59. Not altered by Rev. St. 1899, par. 695. Patterson v. Patterson, 200 Mo. 335, 98 S. W. 613.

60. Commonwealth v. Monongahela Bridge Co. [Pa.] 64 A. 909.

61. See 6 C. L. 1830.

62. Burgi v. Rudgers [S. D.] 108 N. W. 253.

63. It is held in Indiana that there is no rule of practice authorizing a motion to modify special findings, and find other facts and other conclusions of law; nor is an assignment that certain findings are not sustained by sufficient evidence a proper one. In motion for new trial. Scott v. Collier [Ind.] 78 N. E. 184.

64. The Indiana Code of Procedure does not recognize a motion that the court restate its conclusions of law. Merica v. Burget, 36 Ind. App. 453, 75 N. E. 1083.

65. Beard v. American Type Founders Co., 123 Ill. App. 50.

66. See 6 C. L. 1830.

67. Findings of fact and conclusions of law clearly segregated by separate statement and paragraph are separately stated, though written on the same page. Pierce v. Wheeler [Wash.] 87 P. 361. In New York judgment is reversible unless the trial court complies with Code, § 1022, as amended by Laws 1903, p. 237, c. 85, providing that the decision of the court upon trial of the whole issues of fact must state separately the facts found and the conclusions of law. Wander v. Wander, 111 App. Div. 189, 97 N. Y. S. 586. The statute requiring findings of fact and conclusions of law to be separated does not apply to equitable actions. Pierce v. Wheeler [Wash.] 87 P. 361. Under Equity Rule 62, findings of facts and law need not be set forth in separate numbers. Zebey v. Allen [Pa.] 64 A. 587.

68. Lupton v. Taylor [Ind. App.] 78 N. E. 689; Dillon Impl. Co. v. Cleveland [Utah] 88 P. 670.

68a. Conclusion "That plaintiff recover $100.00" is sufficient. Western Union Tel. Co. v. Sanders [Ind. App.] 79 N. E. 406.

§ 10. *Objections and exceptions.*[71]—An objection to the form of a verdict,[72] on its failure to find as to parties or issues,[73] must be taken on the coming in of the verdict. Exceptions to findings must be specific and to the precise point.[74] A motion for a new trial is the proper remedy where special findings are contrary to, or not sustained by, the evidence.[75]

VERIFICATION.

Necessity.[76]—Statutes in many states require a verified denial to put in issue the genuineness of the instrument sued on,[77] and most of such statutes apply equally to instruments set up by answer.[78] Failure to deny under oath ordinarily admits the execution and genuineness of the instrument sued,[79] though under some statutes such failure merely admits the instrument in evidence and does not preclude its impeachment,[80] and though the effect is to absolutely confess execution, it does not preclude a showing of want of consideration,[81] nor conclude the defendant as to the damage resulting from breach of the contract.[82] The failure to deny the execution of an administrator's deed under oath does not admit the validity of the court proceedings on which it is based.[83] A statute requiring each pleading subsequent to a

69. See 6 C. L. 1831.

70. Christy v. Christy, 125 Ill. App. 442.

71. See 6 C. L. 1831. See, also, Saving Questions for Review, 8 C. L. 1822.

72. Unsigned verdict. Dunlap v. Raywood Rice Canal & Mill. Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 86, 95 S. W. 43.

73. Agreement by jury as to one defendant without agreeing as to other, and jury dismissed before verdict received without objection by counsel. Union Pac. R. Co. v. Connolly [Neb.] 109 N. W. 368. Error if any waived. Objection to failure of jury to answer interrogatories must be made below. Bauman v. National Safe Deposit Co., 124 Ill. App. 419. Failure of jury to make specific answer to interrogatories must be objected to when the verdict comes in. Kuhl v. Supreme Lodge [Okl.] 89 P. 1126. But after an unsuccessful attempt to obtain a more specific answer to a question, a party does not waive his right to object to the finding by failure to request a repetition of the effort. Missouri Pac. R. Co. v. Dorr [Kan.] 85 P. 533.

74. In the absence of objection, exception, or request for declaration of law, an exception "to each, all, and every one of said findings, conclusions, and judgment" is futile. Webb v. National Bk. of Republic [C. C. A.] 146 F. 717. Following exception sufficient: "each of the findings proposed by defendant and given by the court was excepted to by plaintiff, and each of the findings proposed by the plaintiff and given by the court was excepted to by defendant." Smith v. Glenn, 40 Wash. 262, 82 P. 605.

75. Omission to find the facts on all the issues, and refusal to sign special findings tendered, as ground for new trial. Walters v. Walters [Ind.] 79 N. E. 1037.

76. See 6 C. L. 1832.

77. An averment that one is the owner of premises in controversy "under a valid and legal deed of conveyance duly executed" describes no writen instrument whose execution is admitted unless denied under oath. O'Keefe v. Behrens [Kan.] 85 P. 555. Signature to receipt, indorsed on contract sued on, held not part of such contract so as to require to be denied by verified pleading. Bateman v. Ward [Tex. Civ. App.] 15 Tex. Ct. Rep. 933, 93 S. W. 508.

78. A statute declaring that all allegations of the execution of written instruments shall be taken as true unless denied under oath applies to a contract set up in an answer, the execution of which is not denied by a verified reply. St. Louis & S. F. R. Co. v. Phillips [Okl.] 87 P. 470. The Alabama statutory provision that defendant need not prove the execution of a contract set up by plea in bar unless its execution is denied by verified replication applies to a plea relying on a contract averred to have been executed by plaintiff's agent. Alley v. Jesse French Piano & Organ Co. [Ala.] 42 So. 623. An answer in an action on a life insurance policy referring to the application therefor, wherein the defendant pleads a breach of warranty in the application as a defense and sets up provisions of the application purporting to make the medical examiner or persons writing the answers agents of the insured must be met by verified denial. Mutual Reserve Life Ins. Co. v. Jay [Tex. Civ. App.] 101 S. W. 545. Burns' Ann. St. 1901, § 2479, providing that an administrator need not plead defensively in any action against the estate, dispenses with verified plea of non est factum by him. Digan v. Mandel [Ind.] 79 N. E. 899.

79. Contract signed by one as "President of Board of Control" held admissible in action against the Supreme Lodge of Knights of Pythias. Kennedy v. Supreme Lodge, K. of P., 124 Ill. App. 55. Contract of jointer with city held conclusively established by failure of city in action thereon to deny its execution on oath. Van Camp v. Huntington [Ind. App.] 78 N. E. 1057. In Missouri an exhibit which is the foundation of the plaintiff's action and which contains what purports to be the defendant's signature stands confessed unless denied under oath. Brown Mfg. Co. v. Gilpin, 120 Mo. App. 130, 96 S. W. 669.

80. St. Louis, I. M. & S. R. Co. v. Smith [Ark.] 100 S. W. 884.

81. Johnson v. Sovereign Camp Woodmen of the World [Mo. App.] 95 S. W. 951.

82. Van Camp v. Huntington [Ind. App.] 78 N. E. 1057.

83. O'Keefe v. Behrens [Kan.] 85 P. 555.

verified one to be verified does not apply when the plaintiff files a verified complaint, but thereafter serves an unverified amended complaint.[84] Requirement of verified denial of a verified account does not apply where petition, not verification, avers the correctness of the account,[85] and only when defendant seeks to dispute its correctness.[86] Under some statutes matters peculiarly within the knowledge of defendant, such as agency for or partnership with him, must be denied on oath.[87] The verification of the complaint in divorce proceedings is jurisdictional in North Carolina.[88]

In equity.[89]—Bills in chancery must be verified if they seek discovery or interlocutory relief,[90] but otherwise verification is unnecessary.[91] Pleas or answer by way of denial [92] need not be verified in the absence of rule or statute so requiring,[93] and the provision of the Illinois practice act that no person shall be permitted to deny on the trial the execution of any instrument in writing upon any "action" which may have been brought in the absence of verified plea does not apply in equity cases.[94] The procedure obtaining in chancery courts relative to the verification of pleadings is not in vogue in Texas.[95] In Texas the procedure relating to the verification of pleadings is purely statutory, and unless required by statute a pleading in chancery need not be verified.[96]

Form and positiveness.[97]—Verification must be direct and positive,[98] but may in the absence of statute to the contrary be aided by the affidavit of a third person.[99] Where the affidavit is not by the person primarily bound to verify, the facts entitling another to do so in his stead must appear.[1] The jurat imports signature and oath

84. Answer held not required to be verified. Brooks Bros. v. Tiffany, 102 N. Y. S. 626.

85. Sawyer & A. Lumber Co. v. Champlin Lumber Co., 16 Okl. 90, 84 P. 1093.

86. Where defendant in an action on a verified account admitted the correctness of the account and set up by way of counter claim a demand for damages, his answer was not required to be verified. Sawyer & A. Lumber Co. v. Champlin Lumber Co., 16 Okl. 90, 84 P. 1093.

87. In an action against a railroad for injuries to a servant, answer of defendant held insufficient to entitle defendant to prove that persons alleged in petition to be its superintendent and foreman were not such. McCabe & Steen Const. Co. v. Wilson [Okl.] 87 P. 320. In Texas the failure of defendant to deny under oath allegations of agency and partnership is an admission of the allegations. Western Union Tel. Co. v. Carter [Tex. Civ. App.] 15 Tex. Ct. Rep. 657, 94 S. W. 205.

88. Suit for annulment of marriage held a suit for divorce requiring a verified complaint in the absence of which a decree rendered therein is void. Johnson v. Johnson, 142 N. C. 462, 55 S. E. 341.

89. See 6 C. L. 1832.

90. A bill for injunction must be verified (Godwin v. Phifer [Fla.] 41 So. 597), and where any of the material allegations of the bill are stated on information, there should be annexed to the bill the additional affidavit of the person from whom the information is derived, verifying the truth of the information given (Id.).

91. When no relief is asked except by judgment at the end of trial, the bill need not be verified. Nixon v. Malone [Tex. Civ. App.] 95 S. W. 577. A pleading calling in parties at interest and praying that they be required to litigate their conflicting claims need not be verified. Id.

92. An answer in denial in a suit, to set aside a judgment on the ground that it was procured by purjury, need not be verified. Lee v. Hickson [Tex. Civ. App.] 14 Tex. Ct. Rep. 91, 91 S. W. 636.

93. Town of New Decatur v. Scharfenberg [Ala.] 41 So. 1025. Under the statutes of California pleas in equity must be verified as "true in point of fact." Turpin v. Derickson [Md.] 66 A. 276.

94. The term "action" is never properly applied to an equity suit. Clokey v. Loan & Homestead Ass'n, 120 Ill. App. 214.

95, 96. Nixon v. Malone [Tex. Civ. App.] 95 S. W. 577.

97. See 6 C. L. 1832.

98. Bill for injunction. Godwin v. Phifer [Fla.] 41 So. 597.

99. A plea in abatement otherwise sufficient, verified by the party swearing to the best of his knowledge and belief as to the facts relating to a previously dismissed action for the same cause, the costs in which were unpaid, is sufficiently verified by an affidavit of a deputy clerk of the court swearing positively and directly that the costs had not been paid. Dougherty v. Dougherty, 126 Ga. 33, 54 S. E. 811.

1. When a complaint is verified by a person other than the party himself without showing why the party himself did not make the verification, judgment cannot be entered thereon as by admission of the defendant on proof that the party resided in another county, under the New York statute permiting judgment to be entered as on admission of the defendant for his failure to answer a verified complaint. Boyce v. Dumars, 99 N. Y. S. 769. In Ohio when a pleading is verified by an agent or attorney, the affiant must in all cases state in the affidavit that the case is one included in one or more of the classes of conditions under which an agent or attorney may verify a pleading (Bullock Beresford Mfg. Co. v.

before the officer,[2] but when no oath is in fact administered and the officer's jurat is merely attached to the purported oath by the typewriter without being signed by the officer, there is no sufficient verification of a pleading.[3]

By whom.[4]—Verification by one of several joint parties is ordinarily sufficient.[5] Absence of the real party in interest entitles an attorney to verify, though a nominal party is within the jurisdiction.[6]

Defects, objections, and amendments; waiver.[7]—The objection that a bill for injunction is not sufficiently verified to warrant the issuance of the injunction cannot be raised for the first time on appeal.[8] In Texas the objection of want of verification of a pleading can only be raised by special demurrer or exception.[9] A party present in court at the time of a ruling against the sufficiency of the verification of his pleading to raise an issue who fails to ask leave of court to make a proper verification, waives his right.[10] Where verification of the complaint is prerequisite to the right to make a default judgment without proof, a judgment on an insufficiently verified complaint must be set aside.[11]

VETO; VIEW; VOTING TRUSTS; WAIVER, see latest topical index.

WAR.[12]

The existence of war is to be determined primarily by the political department of the government,[13] but the actual existence of a state of unsolemn war will be recognized by the courts.[14] Though held in trust for the benefit of its inhabitants by the United States, the Island of Cuba during the period of its military occupation by the United States was foreign conquered territory, hence the power to levy custom's duties was determinable by the laws of war.[15]

French spoliation claims.[16]—The liability of the United States depends upon the primal and original liability of France,[17] and defenses which would have been available to France at the time of the seizure are available to the United States.[18] Where the prize court established the illegality of the seizure of a vessel and the captors appealed, it was the duty of the owners to stand by the appeal to protect their rights.[19] The seizure by France must have been unlawful[20] and proved by

Hedges [Ohio] 81 N. E. 171), and if the case is one within his personal knowledge, he may add in his affidavit the statement that he believes that the facts stated in the pleading are true (Id.).

2. Such facts need not otherwise appear. Lord v. Rowse [Mass.] 80 N. E. 822.

3. Answer in action on note held not properly verified so as to put in issue the execution of the note. Betz v. Wilson [Okl.] 87 P. 844.

4. See 6 C. L. 1833.

5. In Michigan the verification of a bill by one or more of the complainants, though not by all, is sufficient. Ewing v. Lamphere [Mich.] 111 N. W. 187. A bill by a corporation and a person claiming to be its treasurer for injunction is sufficiently verified by the oath of the alleged treasurer. First Baptist Soc. in Brookfield v. Dexter [Mass.] 79 N. E. 342.

6. Arkansas Southern R. Co. v. Wilson [La.] 42 So. 976.

7. See 6 C. L. 1833.

8. First Baptist Soc. in Brookfield v. Dexter [Mass.] 79 N. E. 342.

9. Nixon v. Malone [Tex. Civ. App.] 95 S. W. 577.

10. Defendant in action on note held to have waived his right to verify his answer so as to put in issue the execution of the note. Betz v. Wilson [Okl.] 87 P. 844.

11. Boyce v. Dumars, 99 N. Y. S. 769.

12. See 4 C. L. 1818.

13. Warner, Barnes & Co. v. U. S., 40 Ct. Cl. 1.

14. Opposing armed forces in the field resulting in numerous engagements, treating captives as prisoners of war, the concession of belligerent rights, and the application of the laws of war to the conflicting forces, are facts sufficient to establish the existence of war. Conflict between the United States and the Filipinos subsequent to the ratification of the treaty with Spain held to constitute war. Warner, Barnes & Co. v. U. S., 40 Ct. Cl. 1.

15. Galban & Co. v. U. S., 40 Ct. Cl. 495. See, also, Territories and Federal Possessions, 8 C. L. 2121.

16. See 4 C. L. 1819.

17. Schooner Maria, 40 Ct. Cl. 72.

18. The Ship Hiram, 41 Ct. Cl. 12.

19. Where a vessel was seized and upon an adverse decision by the French prize court the captors appealed, a compromise between

competent [21] and sufficient evidence,[22] and the acts of the captors subsequent to the seizure must not have been such as to work a forfeiture.[23] Neither search nor seizure are necessarily illegal, the presumption being that the right of search followed by seizure were rights lawfully exercised.[24] The admissibility of evidence is determinable by the rules of law municipal and international and the treaties applicable thereto;[25] and where the decree of the French prize court was destroyed by fire, secondary evidence is admissible;[26] but a newspaper clipping published at the time is not admissible for that purpose,[27] nor is such a clipping admissible on an ancient writing to prove the illegality of the seizure by the French.[28] The record title to a ship and its cargo must control in the absence of evidence to the contrary,[29] and where the title to a vessel appears to have been in a firm and an individual, the presumption is that each owned an undivided half.[30] Where a vessel was seized in Swedish waters by the French, the United States has the right to present a claim for its wrongful seizure to Sweden, who owed the vessel protection or to France,[31] and the action of the master of the vessel, and a United States consul, in endeavoring to secure the intervention of Sweden to procure the restoration of the vessel was not an election to hold that government responsible;[32] but where a claim filed in the department of state by the owners shows a clear intention to hold Sweden, it will be considered an election,[33] and the claim being filed against Sweden and not against France will not by implication alone be held to have been one of the claims relinquished by the United States to France in consideration of the latter's relinquishment of its claims against the United States.[34] Rule 26 of the court of claims allowing persons having a common interest in a French spoliation claim to unite in one petition does not extend to an individual owner where a partnership title is set up in the petition,[35] and where such owner did not present his claim within the two years jurisidictional period, he cannot set up an adverse personal title under the partnership petition.[36]

WAREHOUSING AND DEPOSITS.

Definitions and elements.[37]—A carrier is usually held to become a warehouseman of goods which the consignee has failed to remove within a reasonable time,[38]

the owners and the captors whereby in consideration of the payment of a certain sum the appeal was abandoned by the latter relieved France from liability. Schooner Maria, 40 Ct. Cl. 72.

20. The captor has a right to suppose that property consigned to a belligerent port is the property of a belligerent and hence subject to seizure. None of the papers on board the vessel showed the cargo to be the property of a citizen of the United States and not that of a British subject, the goods being consigned to a British port. Held a seizure by France was lawful. The Ship Hiram, 41 Ct. Cl. 12.

21. Where a vessel seized by a French privateer was recaptured by a British warship which proceeded against it by libel for salvage, the decree of English court of admiralty is not competent evidence against France except on the measure of damages. The Ship Hiram, 41 Ct. Cl. 12.

22. A ship's manifest being a mere declaration of a general character and a summary of what the cargo consists without showing the particulars is not sufficient evidence of the ownership of neutrality of the cargo. The Ship Hiram, 41 Ct. Cl. 12.

23. Where a prize master was placed on board a vessel with instructions to take it to a certain port in France, directions that if compelled to put into a port in Spain he was to choose the port of passage did not work a forfeiture of the right of detention. The Ship Hiram, 41 Ct. Cl. 12.

24. The Ship Hiram, 41 Ct. Cl. 12.

25, 26. The Brig Juno, 41 Ct. Cl. 106.

27. Clipping from a paper published in Boston in 1798 showing the seizure, that the captain's papers were in the hands of the privateersmen for some time, and that the role d'equipage was missing, is inadmissible. The Brig Juno, 41 Ct. Cl. 106.

28. The Brig Juno, 41 Ct. Cl. 106.

29, 30. Brig Sally, 41 Ct. Cl. 431.

31, 32. Schooner Reliance, 41 Ct. Cl. 67.

33. A claim after reciting the facts of the illegal seizure concluded: "We believe that according to the treaty between the King of Sweden and the United States it is in the power of our government under these circumstances to obtain satisfaction from the Swedish Government and are fully assured that the proper officers will readily surrender to us and to every injured citizen that assistance which they have the right to claim." Schooner Reliance, 41 Ct. Cl. 67.

34. Schooner Reliance, 41 Ct. Cl. 67.

35, 36. Brig Sally, 41 Ct. Cl. 431.

37. See 6 C. L. 1834.

38. Brunson v. Atlantic Coast Line R. Co.

though it is said in Georgia that the liability as warehousemen begins from the time the goods are put into the freight house at destination.[39] The landlord cannot by notice make himself a warehouseman as to goods left on the premises by a departing tenant.[40]

Licensing and public regulation.[41]—A railroad storing only goods uncalled for by the consignees is not subject to warehouseman's license law,[42] nor can such part of its business be segregated by a municipality not authorized to tax railroads.[43] The police power to regulate in the interest of purity and just weight of commodities extends to their regulation in storage,[44] but interstate commerce cannot be burdened under guise of such regulation.[45]

Warehouse receipts.[46]—Though statutes in many states make warehouse receipts negotiable,[47] such statutes not only carry all the exceptions relating to other negotiable instruments,[48] but are said not to annex to such negotiation all the consequences which follow the endorsement of a note.[49] Thus the warehouseman is not entitled to deliver without quesiton to anyone presenting the receipt,[50] and a custom to treat receipts as to bearer will not avail where the warehouseman had notice that the receipts were pledged to another.[51] A purchase of warehouse receipts for produce must take notice of a recorded crop mortgage given by the depositor.[52]

Contracts of warehousing in general.[53]—A warehouseman cannot by contract exempt himself from liability for his own negligence,[54] and an exemption in case value is not stated in the receipt is unavailing where the value is plainly marked on the goods.[55] A contract for storage in a particular room is broken by the warehouseman's removal of the goods to another room without the bailor's consent.[56] A

[S. C.] 56 S. E. 538; Kressin v. Central R. Co., 103 N. Y. S. 1002.

39. Kight v. Wrightsville & T. R. Co. [Ga.] 56 S. E. 363.

40. Brunswick-Balke-Collender Co. v. Murphy [Miss.] 42 So. 288.

41. See 6 C. L. 1835.

42, 43. Town of Arlington v. Central of Georgia R. Co. [Ga.] 56 S. E. 1015.

44. The ordinance of the city of Chicago providing for the inspection of food products in storage and authorizing summary seizure and destruction of putrid, decayed, poisoned, and infected food is valid. Within the police power and hence not repugnant to the 14th amendment of the Federal constitution. North American Cold Storage Co. v. Chicago, 151 F. 120. The Wisconsin statutes of 1905, as amended, creating the Superior Grain & Warehouse Commission, have been held not to deny the equal protection of the laws (Globe El. Co. v. Andrew, 144 F. 871), nor to be violative of the Wisconsin constitution prohibiting the grant of corporate power by special act (Id.).

45. In so far as the Wisconsin act of 1905 requires all grain sold, delivered, stored, or reshipped, at Superior to be in accordance with the weights and grades established by the commission, it is void as a burden on interstate commerce. Globe El. Co. v. Andrew, 144 F. 871.

46. See 6 C. L. 1835.

47. Citizen's Bk. v. Arkansas Compress & Warehouse Co. [Ark.] 96 S. W. 997. In Tennessee warehause receipts are by statute placed on the same footing as negotiable instruments. National Bk. v. Chatfield, Woods & Co. [Tenn.] 100 S. W. 765.

48. Burden of proof held to be on bank as holder of warehouse receipt to show that it was holder in good faith without notice of fraud in purchase of the property. National Bk. v. Chatfield, Woods & Co. [Tenn.] 101 S. W. 765.

49. Citizen's Bk. v. Arkansas Compress & Warehouse Co. [Ark.] 96 S. W. 997.

50. A warehouseman is protected in taking up receipts issued by him in favor of a particular person only by delivering the property to the owner unless the owner consents to the use of the receipts by another. Citizens' Bk. v. Arkansas Compress & Warehouse Co. [Ark.] 96 S. W. 997. Evidence held to sustain finding that owners of receipts did not consent to their use by another in obtaining the property represented thereby from the warehouseman. Id. The fact that a warehouse receipt is made out in the name of a person other than the bailor is no justification for the warehouseman's delivery of the goods to the person named in the receipt unless the warehouseman is induced thereby to make such delivery. Evidence held to show that warehouseman was not induced by erroneous name in warehouse receipt to deliver goods to person other than the owner. Schroeder v. Reinhardt [Mo. App.] 100 S. W. 538.

51. Warehouseman is by statute forbidden to remove or allow to be taken from him property for which he has given his receipt without the written assent of the person holding the receipt. Citizens' Bk. v. Arkansas Compress & Warehouse Co. [Ark.] 96 S. W. 997.

52. Haynes v. Gray & Co. [Ala.] 41 So. 615.

53. See 6 C. L. 1836.

54. Herzig v. New York Cold Storage Co., 100 N. Y. S. 603.

55. Gannon v. Seehorn [Wash.] 86 P. 1116.

56. McRae v. Hill, 126 Ill. App. 349.

warehouseman is estopped to deny the title of his bailors when no paramount title has intervened.[57]

Care and protection of goods stored.[58]—A warehouseman is bound to the exercise of due care,[59] and damage or loss casts on him the burden of explanation.[60] A warehouseman falsely representing the character of his building is liable for the damage caused by the deceit.[61] Where the right to compensation exists, the warehouseman cannot claim the status of a gratuitous bailee, until it has disclaimed the right to charge.[62] Where the depositor retains any rights of access and control, he must likewise exercise ordinary care.[63]

Insurance.[64]—An agreement to effect insurance on goods stored being incident to a contract for storage is within the apparent authority of an agent authorized to receive for storage.[65]

Damages.[66]—Where a bailor contracted for storage in a particular room, but his goods were without his consent removed to another room, and were subsequently destroyed by a fire, whilst had they remained in the room contracted for they would have been but slightly damaged, the fire and not the removal was the proximate cause of the loss,[67] and the warehouseman is not liable for the loss.[68] The general rules as to measure of damages apply.[69]

Charges and lien therefor.[70]—A carrier holding undelivered goods for the consignee is entitled to compensation [71] and lien [72] as a warehouseman, but a landlord cannot by notice make himself a warehouseman as to chattels left on the premises by a departing tenant so as to have a lien thereon.[73] A warehouseman cannot sell for charges until the expiration of a reasonable time, if no time is fixed by statute or contract,[74] and is usually required to give notice to the depositor if his address is known [75] of the time and place of sale. He may sell no more than is necessary

57. Barker v. Lewis Storage & Transfer Co. [Conn.] 65 A. 143.

58. See 6 C. L. 1836.

59. Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538. Railroad Company holding to await delivery. Kight v. Wrightsville & T. R. Co. [Ga.] 56 S. E. 363. Whether warehouseman was guilty of negligence in failing to take proper care to prevent the destruction of his warehouse held a question for the jury. Clifford v. Universal Storage Warehouse & Exp. Co., 102 N. Y. S. 460. Evidence held to show exercise not only of ordinary care but extraordinary care as well by safe deposit company. Bauman v. National Safe Deposit Co., 124 Ill. App. 419.

60. Where plaintiffs in an action against a railroad for failure to deliver goods on arrival showed that they were the owners of the goods and that defendant failed to surrender to them the actual possession thereof after arrival at destination, it was then incumbent on defendant in order to escape liability as a warehouseman to show that it had exercised ordinary care. Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538. Evidence held insufficient to exculpate warehouseman. Herzig v. New York Cold Storage Co., 100 N. Y. S. 603.

61. Whether a warehouseman was guilty of deceit in falsely and fraudulently representing the warehouse to be a fireproof building, whereby plaintiff, the same believing, was induced to store his goods therein, held a question for the jury. Clifford v. Universal Storage Warehouse & Exp. Co., 102 N. Y. S. 460.

62. Carrier holding for consignee. Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538.

63. Whether plaintiff in action against a safe deposit company for loss of deposit exercised ordinary care in the premises held a question for the jury. Bauman v. National Safe Deposit Co., 124 Ill. App. 419.

64. See 2 C. L. 2031.

65. General Cartage & Storage Co. v. Cox, 74 Ohio St. 284, 78 N. E. 371.

66. See 4 C. L. 1822.

67, 68. McRae v. Hill, 126 Ill. App. 349.

69. See Damages, 7 C. L. 1029; Conversion as Tort, 7 C. L. 856.

70. See 6 C. L. 1837.

71. Brunson v. Atlantic Coast Line R. Co. [S. C.] 56 S. E. 538.

72. In New York a carrier as to baggage of a passenger, who has taken his baggage with him on the trip and on arrival at his destination left it with the carrier is entitled to the benefit of the statute giving warehousemen a lien for storage. Kressin v. Central R. Co., 103 N. Y. S. 1002.

73. Brunswick-Balke Collender Co. v. Murphy [Miss.] 42 So. 288.

74. On undisputed facts the question whether a passenger has had a reasonable time to remove his baggage from the possession of a carrier on completion of the journey is one of law. Kressin v. Central R. Co., 103 N. Y. S. 1002. Evidence held to show that passenger had reasonable time to remove baggage. Id.

75. A statute requiring notice by a warehouseman to a bailor of the time and place of sale of goods for storage "if his address

to pay the charges, and to that end he should furnish to prospective purchasers reasonable opportunity to examine the property.[78] Where the warehouseman acts also as factor, he may be entitled to commissions as such,[77] and whether he is chargeable with samples used for purposes of sale depends on statute or custom.[78]

Trover and conversion.[78]—Sale of more than is necessary to pay charges is a conversion as to the excess[80] and no demand is essential to the maintenance of trover.[81] Disclaimer of intention to claim for the conversion may work an estoppel if it induces one to act to his detriment.[82] An attempt by the depositor to purchase the goods of a third person into whose hands they have come does not affect his right against the warehouseman for conversion.[83] A warehouseman's admission of a joint delivery of the goods to him by plaintiff in trover for conversion thereof authorizes a joint recovery on proof of the conversion.[84] Plaintiff in trover against a warehouseman for the conversion of the goods need not aver ownership,[85] and an unnecessary averment thereof need not be proved.[86]

Actions and procedure.[87]—A trust company renting safe deposit boxes may, under the District of Columbia Code, be required to answer in attachment or garnishment proceedings as to whether it has such box rented in the name of the defendant,[88] or any alleged fraudulent transferee of the defendant.[88] In Georgia a petition for loss of goods by a gratuitous bailee must aver the particular facts constituting negligence to render it sufficient as against special demurrer, though it is otherwise as to a bailee for hire in a suit for failure to deliver the goods on demand.[91] A special contract or arrangement for warehousing must be pleaded.[92]

Crimes and penalties.[93]

WARRANT OF ATTORNEY; WARRANTS; WARRANTY, see latest topical index.

WASTE.[94]

Waste consists in any unauthorized act of one whose estate is less than of inheritance[95] which works injury to the inheritance,[96] and whether particular acts

is known" means "if known or could be ascertained by reasonable inquiry." Ward v. Morr Tranfer & Storage Co., 119 Mo. App. 83, 95 S. W. 964. Evidence held insufficient to show knowledge of bailor's address by warehouseman at time of sale of goods for storage charges so as to require notice under Rev. St. 1899, § 10,571. Id.

76. Ward v. Morr Transfer & Storage Co., 119 Mo. App. 83, 95 S. W. 964.

77. In Kentucky a tobacco warehouse is entitled to commissions on sales of tobacco for its customers. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 S. W. 225.

78. In Kentucky a tobacco warehouseman is not liable for the value of samples taken out of its customer's tobacco sold by it. Orr v. Louisville Tobacco Warehouse Co., 30 Ky. L. R. 457, 99 S. W. 225.

79. See 6 C. L. 1837.

80, 81. Ward v. Morr Transfer & Storage Co., 119 Mo. App. 83, 95 S. W. 964.

82. Whether plaintiff in an action to recover the value of goods delivered by warehouseman to deliver to a third person made statements such as to induce defendants to believe that he would not seek to recover the goods or their value from defendants held a question for the jury. Schroeder v. Reinhardt [Mo. App.] 100 S. W. 538.

83. Schroeder v. Reinhardt [Mo. App.] 100 S. W. 538.

84. Marriage relation of plaintiffs impertinent. Barker v. Lewis Storage & Transfer Co. [Conn.] 65 A. 143. The admission of a joint delivery carried with it an estoppel against a denial of a corresponding title and a concession of a joint right of action if any there was. Id.

85. The present right of possession is sufficient to sustain the action. Barker v. Lewis Storage & Transfer Co. [Conn.] 65 A. 143.

86. Barker v. Lewis Storage & Transfer Co. [Conn.] 65 A. 143.

87. See 6 C. L. 1838.

88. Washington Loan & Trust Co. v. Susquehanna Coal Co., 26 App. D. C. 149.

89. His wife or son. Washington Loan & Trust Co. v. Susquehanna Coal Co., 26 App. D. C. 149.

90. Petition held subject to special demurrer on the ground that it failed to set forth any act of negligence. Kight v. Wrightsville & T. R. Co. [Ga.] 56 S. E. 363.

91. Under Civ. Code 1895, § 2930. Kight v. Wrightsville & T. R. Co. [Ga.] 56 S. E. 363.

92. Barker v. Lewis Storage & Transfer Co. [Conn.] 65 A. 143.

93. See 6 C. L. 1838.

94. See 6 C. L. 1838.

95. Tenant for years, no matter how long his term, may not commit waste. Moss Point Lumber Co. v. Harrison County Sup'rs

constitute such an injury is to be determined according to conditions at the time of their commission.[97] Likewise, it has been held that a remainderman is liable for cutting of trees where the life tenant's right of estovers is thereby impaired.[98] By statute in many states, and in some independently of statute,[99] a tenant in common may recover against his cotenant for waste.[1] There is some conflict as to whether the provision of the statute of Gloucester forfeiting life estates for waste is in force as part of the common law,[2] but such rule in a modified form has been enacted in many states.[3] The remedy is either by injunction, which will lie though the damage is not irreparable,[4] or by action for damages the measure thereof being the difference in value of the premises before and after the waste.[5]

Instruction that "detriment to land" might be recovered is not misleading, though the waste complained of consisted in removal of fixture.[6] The owner of a contingent interest may enjoin waste but cannot recover damages.[7] Equity will not take cognizance to prevent waste by an executor, the remedy being by proceedings for his removal.[8] On a bill to foreclose, recovery may be had for waste by the mortgagor's receiver.[9] An action by a devisee to enjoin waste is not one for the construction of the will, and a copy thereof need not be set out.[10]

WATERS AND WATER SUPPLY.

§ 1. Definition and Kinds of Waters (2263).
§ 2. Sovereignty Over Waters and Lands Beneath (2263).
§ 3. Rights in Natural Watercourses (2264). Interference and Obstruction (2265). Nuisance and Pollution (2267). Diversion (2268). Bridges and Culverts (2269).
§ 4. Rights in Lakes and Ponds (2270).
§ 5. Rights in Subterranean and Percolating Waters (2270).
§ 6. Rights in Tide Waters (2271).
§ 7. Rights in Artificial Waters (2271).
§ 8. Ice (2271).
§ 9. Surface Waters and Drainage or Reclamation (2271). Common-Law Rule (2271). Civil-Law Rule (2272). Railroad Companies (2273). A Landowner Has No Right to Collect Surface Water in a Body (2274). Storm Sewers (2275).
§ 10. Lands Under Water (2275).
§ 11. Levees, Drainage, and Reclamation (2275).
§ 12. Milling and Power and Other Nonconsuming Privileges; Dams, Canals, and Races (2276).
§ 13. Irrigation and Water Supply; Common-Law Rights and the Doctrine of Appropriation (2278).
A. Rights in the Water (2278). Common-Law Rule (2278). An Appropriation (2279). What May Be Appropriated (2279). Method of Appropriating (2280). Right to Sup-

[Miss.] 42 So. 290, 873. Removal of timber by a life tenant is waste. McCartney v. Titsworth, 104 N. Y. S. 45. Cutting of timber by life tenant who was also executrix held waste. Linzy v. Whitney, 110 App. Div. 462, 96 N. Y. S. 1075. Failure of life tenant to keep up taxes is waste. Magness v. Harris [Ark.] 98 S. W. 362.

96. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873, discussing at great length the common law of waste.

97. Cutting of timber for commercial purposes by tenant for 99 years held waste. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

98. Cutting of timber needed for current repairs. Brugh v. Denman [Ind. App.] 78 N. E. 349.

99. See Tiffany, Real Prop. p. 579.

1. Sinking of oil or gas well by tenant in common is waste for which recovery may be had in West Virginia under Code 1906, § 3390. Dangerfield v. Caldwell [C. C. A.] 151 F. 554.

2. Magness v. Harris [Ark.] 98 S. W. 362. See, also, as to operation of other provisions of such statute. Moss Point Lumber Co. v. Harrison County Sup'rs [Miss.] 42 So. 290, 873.

3. Kirby's Dig. § 7132, forfeiting life estates if the land is allowed to be sold for taxes and is not redeemed in one year, superseded the common law. Magness v. Harris [Ark.] 98 S. W. 362. Under the New York statute where waste by a life tenant exceeds the value of the life estate, forfeiture is properly ordered. Code Civ. Proc. § 1655. McCartney v. Titsworth, 104 N. Y. S. 45.

4. Brigham v. Overstreet [Ga.] 57 S. E. 484.

5. McCartney v. Titsworth, 104 N. Y. S. 45. The measure of damage to a mortgage is the diminution of the security measured by value at time of sale on foreclosure as compared with value at such time had waste not been committed. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694. Evidence held to show diminution of security by removal of fixtures. Id. Not the price received for what was removed, nor the cost of replacing it. Id.

6. Erbes v. Smith [Mont.] 88 P. 568.

7. Pavkovich v. Southern Pac. R. Co. [Cal.] 87 P. 1097.

8. Clark v. Peck [Vt.] 65 A. 14.

9. Prudential Ins. Co. v. Guild [N. J. Eq.] 64 A. 694.

10. Cross v. Hendry [Ind. App.] 79 N. E. 531.

ply From Water Companies (2281). Limit, Measure, and Extent of Right (2282). A Water Right May be Acquired by Adverse User or Prescription (2285). The Right of Appropriation Can be Lost Only by Abandonment or Adverse Possession (2285).
B. Right in Ditches and Canals (2285).
C. Remedies and Procedure (2287).
§ 14. Irrigation Districts and Irrigation and Power Companies (2289).
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§ 16. Water Service and Rates (2295). Service Contracts (2295). Injuries From Deficient Supply or Equipment, and Negligence (2296). Rules and Regulations of Service (2296). Water Rates (2296).
§ 17. Grants, Contracts and Licenses (2298).
§ 18. Torts Relating to Waters (2300). Damages (2300).
§ 19. Crimes and Offenses Relating to Waters (2301).

The scope of this topic [11] includes the general law of waters and the use and supply thereof except as other topics below cited [12] cover necessary exclusions.

§ 1. *Definition and kinds of waters.*[13]—The elements of a watercourse are well defined banks,[14] an obvious bed or channel,[15] and a permanent source of supply,[16] but great age [17] and length are not essential, nor is the outlet of controlling importance.[18]

§ 2. *Sovereignty over waters and lands beneath.*[19]—The use of water in navigable streams is subject to legislative control [20] in states where the common-law doctrine of riparian rights has been abrogated and the doctrine of appropriation introduced.[21] The control of fresh water running in streams and in lakes and ponds having outlet in streams subject to the interests of riparian owners, resides

11. See 6 C. L. 1840.

12. See Bridges, 7 C. L. 460; Ferries, 7 C. L. 1655; Navigable Waters, 8 C. L. 1083; Shipping and Water Traffic, 8 C. L. 1903. Wharves, 6 C. L. 1879.

13. See 6 C. L. 1840.

14. Where water runs in a well defined channel, with bed and banks, made by the force of the water, and has a permanent source of supply, it is to be regarded as a natural watercourse though small and short. Rait v. Furrow [Kan.] 85 P. 934. The overflow waters of a stream, especially where they run in a well defined course and reunite with the stream at a lower point, must be regarded as part of the watercourse and not as surface waters. Brinegar v. Copass [Neb.] 109 N. W. 173. Whether a slough was a natural watercourse, held for the jury. Webb v. Carter [Mo. App.] 98 S. W. 776. Pleading for obstructing a slough alleging that it was a swale or ditch which received overflow water from a creek held insufficient to raise an issue as to whether it was a natural watercourse. Id. In an action to enjoin construction of certain dikes, evidence held sufficient to show that certain sloughs which constituted a natural watercourse had sufficient capacity to carry the water off. Wills v. Babb, 222 Ill. 95, 78 N. E. 42. Where water flowed through a slough having well defined banks, such slough constituted a watercourse though at some points the channel spread out and the water was quite shallow. Cederburg v. Dutra [Cal. App.] 86 P. 838.

15. In its more restrictive sense a "watercourse" is such a waterway as gives rise to riparian rights in the flow of water, and excludes a depression which merely carries water in rainy seasons. St. Louis Merchants' Bridge Terminal R. Ass'n Co. v. Schultz, 226 Ill. 409, 80 N. E. 879. Land forming part of a wide bottom extending between higher lands on either side of a stream and underlaid by a flow which is part of a surface stream is not a part of the bed of the stream, nor is it nonriparian where it has been irrigated for several years. Anaheim Union Water Co. v. Fuller [Cal.] 88 P. 978. A depression or slough separating an island from the Mississippi River so that in time of high water it became an arm of the river is a natural watercourse. St. Louis Merchants' Bridge Terminal R. Ass'n Co. v. Schultz, 226 Ill. 409, 80 N. E. 879.

16. The source of supply may be springs, surface water, or a pond, but whatever the source, if it has an element of permanence, it becomes a natural watercourse where it flows in a well defined channel. Rait v. Furrow [Kan.] 85 P. 934.

17. While the element of permanence is necessary, great age is not an essential attribute. Rait v. Furrow [Kan.] 85 P. 934.

18. A stream may be a natural watercourse though its outlet be over the unchannelled surface of low land and not into another watercourse. Rait v. Furrow [Kan.] 85 P. 934.

19. See 6 C. L. 1841.

20. Under the Mexican Laws the use of water of navigable streams was subject to legislative control which right was transferred to the United States, which could confer upon one holding under a Mexican grant common-law riparian rights or might establish the doctrine of appropriation. Boquillas Land & Cattle Co. v. Curtis [Ariz.] 89 P. 504.

21. The common doctrine that only riparian owners may divert water from a stream for irrigation purposes is repugnant to the statutes of Arizona and was not adopted by that state. Boquillas Land & Cattle Co. v. Curtis [Ariz.] 89 P. 504. If the provision of the Arizona Code adopting the common law could be construed as adopting the common-law doctrine of riparian rights, any right granted by the statute was not intended to become property in the sense that it could not be abrogated by statute before use was made of the water. Id.

in the state for the benefit of the people, and the legislature may prohibit the abstraction of such water saving for riparian uses and for authorized purposes.[22] The legislative policy of New Jersey is to preserve and administer water rights for the benefit of people of the state to whom by right of proximity and sovereignty they naturally belong.[23] The state or people of New York have no inherent right to withdraw a supply of water from New Jersey by artificial means.[24] The state may authorize improvement of a stream.[25] The legislature cannot impress on a nonnavigable stream the character of navigability.[26]

§ 3. *Rights in natural watercourses.*[27]—A riparian proprietor is entitled to the natural and unobstructed flow of the stream,[28] unimpaired in quantity[29] or quality[30] except by reasonable use by upper proprietors, but he has no property rights in the water itself.[31] The primary right of each proprietor to the natural flow of the stream is modified by the right of every proprietor to make reasonable use of it.[32] What is a reasonable use depends on the nature of the stream, the customs and uses of the community, and other surrounding circumstances.[33] The

22. Act May 11, 1905, forbidding transportation of such water, does not violate the commerce clause of the Federal constitution. McCarter v. Hudson County Water Co. [N. J. Err. & App.] 65 A. 489. Act May 11, 1905, making it unlawful for any person or corporation to transport through pipes the water of fresh water lakes or streams to a point outside the state, is constitutional. Id. Lakes and ponds covering more than ten acres are "great ponds" under the ownership and control of the state for the benefit of the public. The state can authorize division of their waters for public purposes without providing compensation to riparian owners. American Woolen Co. v. Kennebec Water Dist. [Me.] 66 A. 316. Where the state grants such authority the grantee may commence diversion of water at once, and such diversion will not be enjoined though no provision has been made for compensating riparian owners. Id.

23. McCarter v. Hudson County Water Co. [N. J. Err. & App.] 65 A. 489. The general corporation act of 1896 does not authorize the incorporation of companies for the purpose of diverting water from the streams and storing and selling it. Id. A charter granted under the general corporations laws of a state for the purpose of damming rivers, and storing, transporting, and selling water, does not authorize the depletion of streams of the state for the purpose of conveying water beyond its borders. Id. If such right was acquired under such laws it was repealed by the act of May 11, 1905. Id.

24. McCarter v. Hudson County Water Co. [N. J. Err. & App.] 65 A. 489.

25. Ballinger's Ann. Codes & St. § 938, authorizing cities of the third class to improve rivers flowing through or adjoining the same, authorizes condemnation of land within or without corporate limits for the purpose of straightening a stream. City of Puyallup v. Lacey [Wash.] 86 P. 215. Under Rev. St. 1887, § 5210, the power of eminent domain may be exercised for the purpose of improving the floatability of streams. Potlatch Lumber Co. v. Peterson [Idaho] 88 P. 426.

26. Potlatch Lumber Co. v. Peterson [Idaho] 88 P. 426.

27. See 6 C. L. 1841.

28. A riparian owner has a right to reasonably use the water of a stream, but he cannot deprive his coriparian owners of like use. Morris v. Bean, 146 F. 423. Where an upper owner constructs a reservoir for use during the dry season, the additional quantity which comes during the day in the in the dry season is to be regarded as part of the natural flow as to a lower owner, but the owner of the reservoir is not required to hold back water during the night so that lower owners may use it next day. Mason v. Whitney [Mass.] 78 N. E. 881.

29. A riparian owner may have wrongful diversion of the water of the stream enjoined though plenty remains for his own use. Anaheim Union Water Co. v. Fuller [Cal.] 88 P. 978. Such relief will be granted to prevent the use from ripening into a right. Id. A lower owner has the right to the natural flow of a stream which originates on the land of an upper owner, and the latter has no right to deprive him of such flow in the absence of prior appropriation. May not divert the water from a stream by an irrigation ditch which is so porous that none of the water is returned to the stream. Nielson v. Sponer [Wash.] 89 P. 155.

30. A riparian owner is entitled to the natural and unpolluted flow of the stream. City of Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453. A riparian proprietor is entitled to the natural flow of the stream, unimpaired in quality except by reasonable use. Brown v. Gold Coin Min. Co. [Or.] 86 P. 361. See post, this section, Nuisance and Pollution.

31. Limited to reasonable use of the water. City of Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453.

32. Mason v. Whitney [Mass.] 78 N. E. 881 The fact that reasonable use by an upper owner leaves the flow of the stream more beneficial to those on the stream below may be considered in determining what is a reasonable use for an intermediate owner in reference to those further down. Id. The rights of lower owners against an upper owner are not enlarged by their suing jointly the upper owner, and the question as to each lower owner is whether the upper owner is making a reasonable use of the water. Id.

33. Each riparian proprietor has the right to a reasonable use of the stream determined by a consideration of its nature, the several

legislature has no power to deprive a riparian owner of his rights.[34] He may lose them by prescription [35] but not by mere disuse.[36]

Only owners of land which is riparian are entitled to riparian privileges,[37] and land once divested of its riparian character cannot again be invested with it.[38] The state as owner of the bed of a navigable stream is entitled to riparian rights.[39] Indians never had riparian rights, and one claiming under them acquires none as against prior appropriators.[40]

Interference and obstruction.[41]—A lower riparian proprietor may not obstruct the flow of the stream to the injury of an upper proprietor.[42] Nor may he con-

mill privileges, the wants of the community, the customs and usages of the people and hours of labor; and the fact that owners have for many years used water in a certain way does not enlarge the right. Mason v. Whitney [Mass.] 78 N. E. 881. Where use of a proprietor's reservoir on a stream was a part of his use of the stream, his entire use should be considered in determining its effect on the natural flow of the stream to lower proprietors. Id. Riparian proprietors may divert water from its channel for any lawful use provided it is not unreasonably detained, does not overflow land of an upper owner, and is returned to its channel in substantially the same condition before it reaches the land of the next lower owner. Roberts v. Claremont R. & Lighting Co. [N. H.] 66 A. 485. The reasonableness of the detention of running water by dams by a riparian proprietor depends on the nature and size of the stream as well as the use to which it is subservient. A use followed by detention which would be reasonable in a pond which would fill in one day would not be reasonable in one where it would take days or months to fill. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915.

Held reasonable: Use for mill power. Henderson Estate Co. v. Carroll Elec. Co., 99 N. Y. S. 365.

Use during the nighttime of water stored in a reservoir, held not unreasonable. Mason v. Whitney [Mass.] 78 N. E. 881. It is not unreasonable to use the water during the nighttime so long as the nautral flow is not interfered with during the daytime. Id. It is not unreasonable for a mill owner, though water above him is used during the day, to use a part of it in his business at night if he leaves as much as the natural flow of the stream pass during the day. Id.

34. 1 Ball. Ann. Codes & St. § 4114, providing that one on whose lands spring or seepage water rises has a prior right to its use, is unconstitutional in so far as it affects rights of a lower riparian owner to the use of the water of the stream. Nielson v. Sponer [Wash.] 89 P. 144.

35. Evidence insufficient to show that one had acquired the right to use all the water of a stream by adverse user. Burson v. Percy [Neb.] 110 N. W. 544. The right of a riparian owner to the natural flow of the stream may be lost by prescription. Marshall Ice Co. v. La Plant [Iowa] 111 N. W. 1016.

36. A riparian right to use the water of a stream is not acquired nor lost by mere disuse. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. The fact that lower owners have enjoyed for many years the gratuitous benefit of an upper owner's dam does not give them a right to future use. Mason v. Whitney [Mass.] 78 N. E. 881.

37. Land not within the watershed of a stream is not riparian thereto though it may be part of an entire tract which does extend to the stream. Anaheim Union Water Co. v. Fuller [Cal.] 88 P. 978. The fact that land lies contiguous to a subterranean flow connected with the surface stream does not give riparian rights in the surface stream. Id. A city located seven miles from a stream, from which a portion of its water supply was taken by a water company, but owning no land abutting on the stream, is not a riparian owner. City of Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453. Where two streams unite, each is considered as a separate stream in so far as concerns riparian rights of lands abutting thereon above the junction, and land lying within the watershed of one stream above the junction is not riparian to the other though both lie in one drainage basin and are separated only by low tableland. Anaheim Union Water Co. v. Fuller [Cal.] 88 P. 978.

38. Where an owner of land abutting on a stream conveys the portion not contiguous to the stream, he thereby deprives such portion of riparian rights which can never be regained though it is subsequently purchased by the person who owns the portion adjacent to the stream. Anaheim Union Water Co. v. Fuller [Cal.] 88 P. 978.

39. The state of New Jersey, as owner of the bed of Passaic River where flowed by the tide, has a proprietary right to the continued flow of the stream paramount to the rights of upper riparian owners to withdraw water except for riparian uses. McCarter v. Hudson County Water Co. [N. J. Err. & App.] 65 A. 489.

40. Appropriations can be made of water running through a reservation, which rights are superior to rights of persons who subsequently become riparian owners. Morris v. Bean, 146 F. 423.

41. See 6 C. L. 1843.

42. One may not obstruct the flood channel of a river by a dam which throws water back and breaks another dam which has been constructed by another owner to keep waters off his land. Clark v. Patapsco Guano Co. [N. C.] 56 S. E. 858. Where the act of one in constructing a dam across the flood channel of a stream concurs with other causes in producing an injury, he is liable as though it was the sole cause. Id. On the question of whether the construction of one dam was the cause of the breaking of another, evidence that it had never broken before such later dam was constructed is

struct dams in such manner as to turn the current of the stream against another owner's bank.[43] But an upper owner may by his acts be estopped to object to the maintenance of a dam,[44] and precluded from obtaining injunctive relief.[45] The right to maintain a dam and flood lands of an upper proprietor may be acquired by prescription.[46] One who asserts a prescriptive right to flow lands has the burden to prove it.[47] In many states it is provided by statute that railroad companies in constructing their roadbeds provide sufficient drainage facilities[48] and are liable for obstructing a watercourse, regardless of the question of negligence.[49]

admissible. Id. Where a lower owner erects a dam which backs water and debris upon the premises of an upper proprietor and prevents him from discharging debris from his mine into the stream, he may enjoin maintenance of the dam. Kane v. Littlefield [Or.] 86 P. 544. Where a railroad in constructing its roadbed along a canal tore down the tow path and constructed an embankment with the dirt. The embankment narrowed the canalbed near where a stream entered but provision was made to care for the stream, a freshet occurred and the bank gave way and flooded lands. Held, the company was not liable as the injury resulted from a lawful use of his own property. Gordon v. Ellenville & K. R. Co., 104 N. Y. S. 702. Damages may be recovered for the obstruction of a natural watercourse regardless of the care with which the work was done. Webb v. Carter [Mo. App.] 98 S. W. 776. The mere establishment of a ditch through a channel between a shore and an island which did not make the place a channel of the river gives no right to erect a dam in the other channel to the injury of upper riparian owners. Mindnich v. Kline [Ind. App.] 78 N. E. 86. Whether a roadbed was negligently constructed, held a question for the jury. St. Louis, etc., R. Co. v. Saunders [Ark.] 94 S. W. 709. An ordinance under which a street railway constructed its tracks required it to provide for the flow of water under the same. The company built its road across a depression without putting in a culvert and this forced more water into a creek which passed under a bridge which partially obstructed the flow in the creek. It was further obstructed by brush and dirt, and during a heavy rain overflowed and damaged a building. Held, the company was liable as it having altered the flow of water it was bound to see that the creek was not further obstructed. Ft. Smith Light & Trac. Co. v. Soard [Ark.] 96 S. W. 121. A purchaser of the railroad assumed the burden of complying with the ordinance and was bound to see that the proper openings had been constructed and that they were not allowed to become obstructed. Id. Where in constructing an embankment over a stream sufficient culverts were not put in, the fact that the embankment had afforded protection to the land prior to the time the plaintiff purchased it, and that he relied on the fact that it would continue to do so, would not defeat his right to recover for injuries to his crops resulting from negligence in the construction of the embankment. San Antonio & A. P. R. Co. v. Dickson [Tex. Civ. App.] 15 Tex. Ct. Rep. 51, 93 S. W. 481. Under Rev. St. 1887, § 835, the construction of any boom or dam in any creek or river that will unreasonably delay or hinder floating of timber down the same is prohibited. Potlatch Lumber Co. v. Peterson [Idaho] 88 P. 426. Obstruction of natural watercourse gives right of action without regard to the source from which the waters therein came. Slough collecting surface water and flowing it into stream. St. Louis Merchants' Bridge Terminal R. Co. v. Schultz, 126 Ill. App. 552.

43. Where a riparian owner's land was washed away by deflection of water by wing dams erected by an opposite owner, successive actions may be maintained for successive injuries. Gulf, etc., R. Co. v. Mosely [Ind. T.] 98 S. W. 129. Where land of a reparian owner was washed away because of the erection of wing dams by the opposite owner, interest may be recovered on the amount of damages from date. Id. Where a railroad company obtained the right from an owner to construct jetties into the river and after the channel of a river was changed by a freshet constructed another jetty, the effect of which was to cause the water to flow against the land of the licensor at right angles. Held, the jetty was an unlawful obstruction which could be abated. Morton v. Oregon Short Line R. Co. [Or.] 87 P. 151. The order for abatement could be modified where it appeared that demolition of the entire jetty was unnecessary. Id.

44. An upper owner who acquiesces in the building of a dam by a lower owner, and states to such owner that he will "wait and see" what he would do in case of overflow, is estopped to enjoin the maintenance of the dam which would result in stopping operation of manufacturing plants. Andrus v. Berkshire Power Co. [C. C. A.] 145 F. 47.

45. Where an upper owner made no objection to the erection of a dam below his property but refused to discuss the amount of damages until after the dam had been built and they could ascertain the extent of injury, and the dam was completed without notice that he intended to enjoin its construction, held that his acts amounted to an election to accept damages for injuries sustained and was not entitled to an injunction. Andrus v. Berkshire Power Co. [C. C. A.] 147 F. 76.

46. A prescriptive right to flood lands is acquired only where they have been flooded for the limitation period adversely with the knowledge of the owner. Wills v. Babb 222 Ill. 95, 78 N. E. 42. A mere notice of an upper by a lower owner of a claim to maintain a dam at a certain height, or even actual maintenance at such height, does not give a prescriptive right; limitations run only from the commencement of overflow. Dutton v. Stoughton [Vt.] 65 A. 91.

47. Dutton v. Stoughton [Vt.] 65 A. 91. Evidence insufficient to show that one owner had acquired a prescriptive right to have the flood waters of a stream flow over the land of another person. Wills v. Babb, 222 Ill. 95, 78 N. E. 42.

Nuisance and pollution.[50]—An upper owner may not deposit in a stream refuse matter which renders the water unfit for domestic uses by a lower proprietor.[51] This rule applies to municipal corporations which deposit sewage in a stream,[52] unless they do so by virtue of statutory authority.[53] The pollution of a watercourse may be enjoined by a lower owner[54] though he sustains no injury because of such pollution,[55] and though the pollution does not amount to a nuisance;[56] and an action for damages may be maintained for injury suffered.[57] An injunction

48. See post, § 9, Surface Waters and Drainage or Reclamation.

49. Under Rev. St. 1895, Arts. 4426, 4436, the obstruction of a watercourse by a railroad embankment is unlawful per se, and negligence in the work need not be shown. International etc., R. Co. v. Walker [Tex. Civ. App.] 17 Tex. Ct. Rep. 268, 97 S. W. 1081.

50. See 6 C. L. 1844.

51. The upper proprietor may not discharge into a natural drain the waste oil and salt water proceeding from wells sunk on his premises. McFarlain v. Jennings-Heywood Oil Syndicate [La.] 43 So. 155. A riparian proprietor has no right to pollute the water and make it unfit for domestic use by a lower owner. Parker v. American Woolen Co. [Mass.] 81 N. E. 468. Where the upper owner divests the mixed oil and water into a natural drain closed by a dam, for the purpose of saving the oil, it is liable for damages caused by the escape of oil and salt water over or through the dam. Id. Where a mine owner deposited polluted water in a ditch from which it flowed naturally into a stream, and rendered the water of the stream unfit for domestic use, and injurious to the boilers of the mill of a lower owner, he was liable for damages caused though such disposal of the water was essential to the operation of his mine. Bowling Coal Co. v. Ruffner [Tenn.] 100 S. W. 116. A mining company which deposits refuse into a stream, which is carried by the water onto the land of a lower owner to his damage, is liable. Day v. Louisville Coal & Coke Co. [W. Va.] 53 S. E. 776. Such cause of action accrues at the time the material is deposited on the land. Id. Where refuse was deposited in a canal, the water of which was discharged into a river the unnecessary discharge of the water from the canal into the river and not the deposit of refuse into the canal was the proximate cause of the pollution of the waters of the river. Morris Canal & Banking Co. v. Diamond Mills Paper Co. [N. J. Eq.] 64 A. 746. The injury to a lower owner, caused by an upper owner's acts in depositing refuse in the stream, is to the possession; but an allegation of ownership and permanent injury to the fee does not render the complaint demurrable. Tutwiler Coal, Coke & Iron Co. v. Wheeler [Ala.] 43 So. 15. In an action for damages for pollution of a stream, a release of other damages than those claimed is not admissible. Texas & N. O. R. Co. v. Moers [Tex. Civ. App.] 17 Tex. Ct. Rep. 400, 97 S. W. 1064. Evidence held sufficient to show pollution of stream by dumping residuum from stone quarry. Bricker v. Conemaugh Stone Co., 32 Pa. Super. Ct. 283.

52. A municipal corporation which deposits sewage in a stream and creates a nuisance which injures a lower riparian owner is liable in damages. Markwardt v. Guthrie [Okl.] 90 P. 26. The use by a city of a sewer emptying into a creek, for sewage purposes, as distinguished from the draining of surface water, even in a slight degree, would be in derogation of the rights of an abutting landowner whose property would be traversed by the stream into which the sewer empties; and unless the right has been acquired by appropriation, such use may be enjoined by a landowner thus situated without waiting until the threatened injury has resulted in material damage. Whitney v. Toledo, 8 Ohio C. C. (N. S.) 577. Evidence that there had been numerous cases of typhoid fever in a building, the drainage of which was conducted into the filtration beds, was admissible in connection with evidence that the stream continued to be contaminated after the filter was installed. Gorham v. New Haven [Conn.] 66 A. 505. An action against a county for polluting a stream by constructing a dam whereby cattle became infected with a disease held to state no cause of action against the county. Howard v. Bibb County [Ga.] 56 S. E. 418. Pollution caused by leakage of sewer pipe held negligent. Connolly v. New York, 100 N. Y. S. 673.

53. Chapter 41, Laws 1899, authorizing the board of health to enjoin the pollution of potable waters, was repealed by Laws 1900, c. 73, in cases where pollution occurs by reason of operation of a municipal sewer system. Board of Health of New Jersey v. Vineland [N. J. Eq.] 65 A. 174.

54. A lower riparian owner may sue to enjoin several upper proprietors acting independently from polluting a stream where the acts of all concurred in creating a nuisance. Warren v. Parkhurst, 186 N. Y. 45, 78 N. E. 579. An injunction restraining pollution of a watercourse will not be denied because other causes contributed to the pollution. Parker v. American Woolen Co. [Mass.] 81 N. E. 468. Nor because of the magnitude of defendant's business and importance of his interests. Id.

55. Where an upper proprietor pollutes the waters of a stream, a lower owner was entitled to enjoin such act in order to prevent the acquisition of a prescriptive right, though such pollution did not interfere with any use to which he put the water. Parker v. American Woolen Co. [Mass.] 81 N. E. 468.

56. The pollution of streams is sometimes enjoined, when the pollution does not constitute a nuisance, to prevent the acquisition of an adverse right. Kenilworth Sanitarium v. Kenilworth, 220 Ill. 264, 77 N. E. 226.

57. A complaint for pollution of a stream which states fully and concisely the nature and amount of damage, and that it was caused by the unlawful and negligent acts of a party, is sufficient. Hill v. Standard Min. Co. [Idaho] 85 P. 907. One who purchases riparian land with knowledge that the stream was polluted by sewage is not

pendente lite will not issue when it appears that no material injury is being suffered, and that the evil is about to be abated.[58] The state may in the exercise of the police power prohibit the discharge of sewage into a stream from which a public supply of drinking water is taken.[59] A lower owner may be estopped to object to the pollution of a stream,[60] but the fact that he also deposits refuse material into it or is negligent is no defense.[61] An action for polluting a stream must be commenced within the limitation period.[62] All actual damages sustained may be recovered [63] and punitive damages may be.[64]

Diversion.[65]—The common law recognizes no right in the riparian owner, as such, to divert water from the stream for mercantile purposes.[66] Co-owners of a

estopped from suing therefor. Virgina Hot Springs Co. v. Grose [Va.] 56 S. E. 222.

58. Where a city was sued for polluting a watercourse by draining sewage into it, an injunction pendente lite would not be awarded where it appeared that the sewage was not overtaxing the stream, and that the city had nearly completed a sewer system which would prevent drainage into the stream. Penfield v. New York, 101 N. Y. S. 442. Evidence insufficient to warrant the granting of an injunction pendente lite in an action to restrain pollution of a stream where it did not clearly appear that the water was polluted at the intake pipe of the plaintiff. City of Durham v. Eno Cotton Mills, 141 N. C. 615, 54 S. E. 453.

59. A statute prohibiting the discharge of sewage into any stream from which a public supply of drinking water is taken without reference to the distance from the place of such discharge to the place of intake is a valid exercise of the police power, and not a deprivation of property of a riparian owner without due process. City of Durham v. Eno Cotton Mills, 141 N. C. 615, 64 S. E. 453. Laws 1903, c. 159, providing that water companies which take their supply from lakes or small streams not more than fifteen miles long shall provide for specified sanitary inspection, and that sewage shall not be discharged into any river from which a public supply of drinking water is taken unless it shall have passed through some system of sewage purification, held, the latter provision prohibited the discharge of sewage into such a stream above the point of intake regardless of distance therefrom. Id. Dyestuff and feculent matter from open waterclosets washed into a river by surface drainage do not constitute sewage, within Revisal 1905, § 3051, prohibiting discharge of sewage into a stream from which a public supply of drinking water is taken. Id. Injunction will not issue to enjoin such deposit unless it appears that water was contaminated at the point of intake. Id.

60. Where a lower owner was employed in an upper owner's quartz mill and made no objection to his preparations for dumping tarling into the stream, held to estop him from restraining such deposit. Brown v. Gold Coin Min. Co. [Or.] 86 P. 361. A plea that one was estopped by his acquiescence in the construction of a sewer system which polluted a stream from maintaining action which fails to allege duty on his part to interpose objection is bad. Virginia Hot Springs Co. v. McCray [Va.] 56 S. E. 216.

61. Where an upper proprietor pollutes a stream by depositing refuse in it, the fact that the lower owner has also cast foul matter into the stream during the same period is no defense to his recovery against the upper owner for the injury occasioned by his acts. Bowman v. Humphrey [Iowa] 109 N. W. 714. A city which discharges sewage into a stream without statutory authority is liable to a lower riparian owner who suffers material injury regardless of the care exercised or the contributory negligence of the lower owner. Vogt v. Grinnell [Iowa] 110 N. W. 603. All damages sustained for the five years preceeding the action could be recovered. Id. Contributory negligence of the lower owner is no defense to his action for the pollution of the stream by an upper owner. Vogt v. Grinnell [Iowa] 110 N. W. 603.

62. One who sues for injuries incurred because of pollution of a watercourse by sewage, which nuisance was created more than the limitation period before action brought cannot avoid the bar of the statute by asserting that he did not discover the character of the injury, nor its cause, within the period. Virginia Hot Springs Co. v. McCray [Va.] 56 S. E. 216. A plea of limitations. In an action for polluting a stream by depositing sewage therein, which alleges that the sewer system was established at great cost, that its use was indispensable to the enjoyment of the defendant's property, and that it had been constructed for more than the statutory period, warrants a finding that the injury was permanent from the date of construction. Id. A plea of limitations, in an action for polluting a stream by depositing sewage therein, that it had existed for five years, the sewer system had been constructed at great cost, held proper as raising the issue as to whether the injury was of a permanent character, resulting from a permanent structure. Id. A verbal protest against discharging refuse into a canal is insufficient to arrest limitations for the purposing of acquiring such right by prescription. Morris Canal & Banking Co. v. Diamond Mills Paper Co. [N. J. Eq.] 64 A. 746.

63. In an action for polluting a stream, evidence of the extent of the dairy business of the person injured was held admissible on the question of damages. Gorham v. New Haven [Conn.] 66 A. 505.

64. In an action for pollution of a watercourse, the record of a former injunction suit brought to restrain the same acts, and the judge's testimony respecting the efficiency of certain filters installed after commencement of the first action, were admissible on the question of punitive damages. Gorham v. New Haven [Conn.] 66 A. 505.

65. See 6 C. L. 1846.

66. McCarter v. Hudson County Water

right to divert water from a stream may have it divided and their share assigned in severalty where such partition is possible.[67] The diversion of a water course from its channel and causing its waters to flood adjacent property is a tort for which the person whose property is injured may recover.[68] A watercourse may be diverted when so authorized by statute.[69] Where a freshet caused a stream to form a new channel, a riparian owner may within a reasonable time restore the flow to its original bed.[70]

Bridges and culverts.[71]—A railroad company in constructing its embankment across streams must construct bridges and culverts sufficient to accommodate the waters which flow through them at ordinary flood or high water,[72] and in some states

Co. [N. J. Err. & App.] 65 A. 489. This rule is not changed by statutes in New Jersey except for a limited class of purposes beneficial to the public. Id.

67. Roberts v. Claremont R. & Lighting Co. [N. H.] 66 A. 485. Where, in an action by a riparian proprietor to enjoin his co-owner of the right to use the water of a stream and to have the extent of his right determined, the other party filed a petition for partition and it was determined that the latter had received a certain benefit from the use of the former's right, he was bound to account for it at such price. Id.

68. Where a railroad company digs a ditch along its right of way leading into a creek, and, in times of high water, water from the creek flows up it and, through openings in the embankment, floods adjacent land, the company is liable regardless of negligence in making the excavations. Lindsey v. Southern R. Co. [Ala.] 43 So. 139. Complaint held sufficient though not alleging that the excavations were negligently constructed, nor was it objectionable because alleging that the injury occurred during high water as the company would be liable for damages done by ordinary floods. Id. A complaint in an action for negligent diversion of a watercourse should state explicitly how and where the diversion occurred, the injuries caused, and damages sought. Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394. One action can be prosecuted against a railway company for the wrongful construction of a ditch involving diversion of a creek, and also for the negligent manner in which the ditch was maintained. Louisville & N. R. Co. v. Whitsell [Ky.] 101 S. W. 334.

69. Burns' Ann. St. 1901, §§ 3598, 3606, providing that when it is necessary for the successful drainage of a city to construct an inlet or outlet, etc., held to authorize diversion of a natural watercourse so as to constitute an inlet or outlet. City of Huntington v. Amiss [Ind.] 79 N. E. 199.

70. Morton v. Oregon Short Line R. Co. [Or.] 87 P. 151. Where a railroad company built jetties into the river from the bank of a riparian owner with his consent and thereafter a freshet caused a new channel to be formed, the licensor being a riparian owner on the new channel, the company had the same right to change the flow of the current that his licensor had. Id. Courts will take judicial notice of the effect of waters of a stream during a flood turned nearly at right angles to the land of a riparian owner. Id.

71. See 6 C. L. 1847.

72. A railroad which constructs a bridge over a stream though not liable for damages caused by overflow of surface water is liable for obstructing the stream causing it to overflow and become surface water. Standley v. Atchison, etc., R. Co. [Mo. App.] 97 S. W. 244. Instruction that the company was not liable for damages caused by surface water should have been modified so as to apply to surface water not caused by the act of the company. Id. Where one conveyed to a railroad a strip of land together with the right to alter watercourses thereon, and the company constructed an embankment through which it placed a culvert, and constructed an embankment along its right of way at the lower end of the culvert, held, if such embankment was so negligently constructed that water broke through and flooded plaintiff's land, he could recover Gebhardt v. St. Louis, etc., R. Co. [Mo. App.] 99 S. W. 773. In an action for damages caused by an insufficient culvert through a railroad embankment, a plea that the injury resulted from water and debris from the streets of a certain town was objectionable as not showing that the ditch was not the natural outlet for such water, and that the culvert was sufficient to carry off the natural flow of water. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. In an action for injuries from overflow resulting from an insufficient culvert under a railroad embankment, a plea that the flood was caused by a town turning water into the ditch held demurrable because not showing that the culvert could not reasonably have been enlarged. Id. Complaint alleging that because of insufficiency of a sewer under a railroad embankment the water rose in the open ditch and overflowed plaintiff's land sufficiently alleges that water was diverted from its natural course. Id. Where a sewer under a railroad embankment was insufficient to carry off the water likely to be in it so that the water would dam up and spread from its natural course, and with knowledge of such fact the railroad maintained it, it was immaterial to the liability of the railroad that it did not construct the sewer. Id. If a railway company in bridging a stream fails to leave ample passageway for the water and it is dammed back and floods land, the company is liable. Atchison, etc., R. Co. v. Herman [Kan.] 85 P. 817. An instruction requiring the company to provide for such unusual and extraordinary freshets as might be expected to flow held not erroneous when taken in connection with other portions of the charge. Id.

this duty is imposed by statute.[73] But they are not required to provide for unusual or unprecedented floods.[74]

An action for injuries must be brought within the limitation period.[75] The measure of damages recoverable depends on the nature of the injury sustained [76] and the cause of action alleged,[77] but only such injury as was occasioned by obstructing the natural flow of the stream can be recovered.[78]

§ 4. *Rights in lakes and ponds.*[79]

§ 5. *Rights in subterranean and percolating waters.*[80]—The law of correlative rights applies to the use by adjoining landowners of waters drawn from an artesian basin.[81] The extent to which landowners may use subterranean waters depends on the nature and necessities of the environment.[82] Waters from beneath arid lands may be taken to supply the needs of a city [83] where there is no subterranean connec-

73. See Post, § 9, Surface Waters and drainage or reclamation.

74. Where a railroad constructs its embankment across a stream, it is not liable if injuries result from flooding caused by extraordinary rains and high water. Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394. One who constructs a fence, gate, and culverts over a watercourse in such manner as not to obstruct the natural flow of the stream, including times of usual high water, is not liable for injuries caused by backwater during an unprecedented flood. American Locomotive Co. v. Hoffman, 105 Va. 343, 54 S. E. 25. Instruction disapproved as imposing too high a duty. Id. Nor is he liable where an unusual flow caused by the breaking of an upper dam over which he has no control causes the flooding. Id.

75. Where a railroad constructs an embankment across a stream and land is injured by flooding, the negligent construction was a continuing wrong an action for which might be maintained more than six years after it was constructed and damages recovered for the preceding six years. Lawton v. Seaboard Air Line R. Co. [S. C.] 55 S. E. 128.

76. Evidence of the rental or market value of the land just prior to the overflow is admissible. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. The measure of damages is the rental value and not the value of a probable crop if the flood had not occurred. Where land is damaged by overflow the proper way to prove damages sustained was to show usual rental value of land overflowed for similar years, and not by proof of what the crop might have been. Standley v. Atchison, etc., R. Co. [Mo. App.] 97 S. W. 244. In an action for damages caused by overflow of drains, evidence of other overflows before suit brought, but after defendant commenced to maintain the drains, was competent to prove consequences of the overflow under similar circumstances. Central of Ga. R. Co. v. Keyton [Ala.] 41 So. 918. Evidence that after the overflow subsided a stench was left in the houses was admissible. Id. Where because land was overflowed its value of $20 per acre was reduced to $5 per acre, the difference was the measure of damages though the owner abandoned the land. Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394. In an action caused by overflowing lands resulting from obstruction of a stream, it was error not to permit the defendant to show on cross-examination of plaintiff that at the time that the lands were filled up and rendered useless the conditions were general throughout the county. Southern R. Co. v. Ward, 125 Ga. 361, 54 S. E. 151.

Evidence that the effect of the overflow was to damage the property a very great deal was objectionable as an opinion. Central of Georgia R. Co., v. Keyton [Ala.] 41 So. 918. A question asking a witness to state the effect of an overflow on premises did not call for an opinion. Id.

77. Damages caused by other overflows than the one set up in the complaint cannot be recovered. Central of Ga. R. Co. v. Keyton [Ala.] 41 So. 918.

78. Where evidence showed that the actual capacity of a stream had been diminished by construction of a bridge, and that the overflow was more extensive than it would have been had the bridge not been constructed, an instruction limiting the recovery to damages occasioned by the negligence of the defendant, though the flood causing the overflow was extraordinary. Standley v. Atchison, etc., R. Co. [Mo. App.] 97 S. W. 244.

79, 80. See 6 C. L. 1848.

81. Such proprietors must use their wells so as not to unreasonably injure their neighbors. Erickson v. Crookston Waterworks, Power & Light Co. [Minn.] 111 N. W. 391.

82. The fundamental principles upon which the common law is founded, and which its administration is intended to promote, leads to the adaption of rules concerning the use of subterranean waters to the nature and necessities of environment. Erickson v. Crookston Waterworks, Power & Light Co. [Minn.] 111 N. W. 391. A water company acquired title to lands on which wells were flowing from an underground basin which supplied many wells in the vicinity. Held, the water company could not pump water to supply a neighboring community to the injury of the owners of other wells. Id. The circumstances may render it unlawful for such landowner to make merchandise of such supply in a particular manner. Id.

83. Mandatory injunction will not issue to prevent taking water from beneath arid land to supply the needs of a town. Newport v. Temescal Water Co. [Cal.] 87 P. 372. Evidence sufficient to show that the land from beneath which water was drawn was arid. Id.

tion between such land and other arable lands.[84] Wells bored by prospectors on the public domain and abandoned by them revert with the land to the government.[85]

§ 6. *Rights in tide waters.*[86]—The condemnation and opening of a street and public wharf and the payment of substantial damages to the owners gives the city riparian rights to land which abutted on the street side of the harbor.[87] The rights of one who plants oysters on state tide lands may be settled in an action to quiet title.[88]

§ 7. *Rights in artificial waters.*[89]

§ 8. *Ice.*[90]—A right under a parol license to take ice from a pond is an easement in gross or a profit a prendre.[91]

§ 9. *Surface waters and drainage or reclamation.*[92]—A landowner may convert to his own use all surface water which flows naturally onto his land.[93] The owner of an easement to discharge surface water through a ditch may not increase the amount of water so as to increase the burden on the servient estate.[94] Where flooding is caused by the acts of public officers in an effort to protect public roads,[95] or where a freshet is an apparently adequate cause,[96] proof of negligence must be clear.

Common-law rule.[97]—Under the common-law rule surface water is regarded as the common enemy of mankind and each owner may protect his land therefrom.[98]

84. Evidence in an action to enjoin pumping and carrying off waters of a valley held sufficient to show that there was no subterranean connection between such valley and another. Newport v. Temescal Water Co. [Cal.] 87 P. 372.

85. Where an oil company bored two artesian wells on the public domain and abandoned them, the wells reverted with the land to the government. Wolfskill v. Smith [Cal. App.] 89 P. 1001. Where an oil company bored wells on the public domain and abandoned the land its rights terminated when it ceased work, and its deeds to the wells or water passed no title. Id.

86. See 6 C. L. 1848.

87. City of Baltimore v. Baltimore & Philadelphia Steamboat Co. [Md.] 65 A. 353. The right of a riparian owner to wharf out to the deep-water line must be exercised with side lines at right angles to a straight line shore, or, if the shore be concave, with converging lines. Id.

88. Under Cal. Code Civ. Proc. § 738, and Act Cal. March 30, 1874, one who plants an oyster bed on state tide lands and marks its extent may maintain action to quiet title to his rights. Smith Oyster Co. v. Darbee & Immel Oyster Land Co., 149 F. 555.

89. See 4 C. L. 1831.

90. See 6 C. L. 1848.

91. Carville v. Com. [Mass.] 78 N. E. 735. Where one had acquired a right by oral permission to take ice from a pond but had not exercised the right for the statutory period before the pond was taken for a public use, he had not acquired a right to adverse possession. Id.

92. See 6 C. L. 1849.

93. Pohlman v. Chicago, etc., R. Co. [Iowa] 107 N. W. 1025. The overflow from a stream which can be stepped over in dry weather is surface water. Chicago, etc., R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166. Since no distinction is made between surface waters and running streams, in the rights of dominant and servient owners, as to the obstruction of the water, no distinction can be drawn in such connection as to flood waters. Id.

94. Where a village has an easement to discharge surface water through a ditch, it could not increase the amount of water so as to increase the burden on the servient estate. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27.

95, 96. Taylor v. Canton Tp., 30 Pa. Super. Ct. 305.

97. See 6 C. L. 1849.

98. An owner of land may protect himself against surface water by obstructing its flow. Darlington v. Cloud County Com'rs [Kan.] 88 P. 529. An owner may protect his land from surface water diverted onto it by artificial means. Matteson v. Tucker [Iowa] 107 N. W. 600. Where waters of a stream are diverted from their channel and cast onto the land of an owner, he was entitled to repel the same by the construction of levees in such manner as to divert them into a slough on his own land as against the rights of adjoining owners. Wills v. Babb, 222 Ill. 95, 78 N. E. 42. May construct drains which do not change the course of surface water over the lands of others but bring it to such lands by a shorter route and in increased volume though damage results therefrom. Fenton & Thompson R. Co. v. Adams, 122 Ill. App. 234. May construct a levee which will drain his land into a natural watercourse though quantity of flow on land of others is increased. Wills v. Babb, 123 Ill. App. 511. Where a lower owner by means of drains accelerates the flow of surface water so that more soil is carried away from the land of the upper proprietor than would have occurred otherwise, and the acceleration resulted in the formation of a ditch on the higher land, the lower owner is liable in damages. Pohlman v. Chicago, etc., R. Co. [Iowa] 107 N. W. 1025. Railroads may construct barriers against the flowage of surface water onto or across their right of way. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420.

He may rid his land of it by causing it to flow off in the natural course of drainage,[99] but such right is inferior to the right of an adjoiner to lateral support.[1] A landowner has the right to construct a drain to carry water from his land in the natural course onto the land of another unless the quantity is increased.[2] He may not, however, remove natural barriers.[3] Cities and towns may in the construction of streets erect barriers to prevent surface water coming onto them, and may turn it from such streets onto abutting lands if unreasonable injury is not thereby done,[4] but may not do so to the unnecessary and unreasonable injury of abutting owners,[5] or change natural channels.[6]

Civil-law rule.[7]—Under the civil law an upper proprietor is entitled to have surface water flow uninterruptedly onto the land of a lower proprietor,[8] but he may do nothing to render the servitude more burdensome[9] except that he may accelerate

99. Shaw v. Ward [Wis.] 111 N. W. 671.

1. One adjoining owner's right to lateral support is not subordinate to any right of the other to repel surface water from the land. Where one digs a ditch so near the boundary for the drainage of surface water, in such manner as to cause his neighbor's land to cave in, he is liable. Simon v. Nance [Tex. Civ. App.] 100 S. W. 1038.

2. Sheker v. Machovec [Iowa] 110 N. W. 1055. Chapter 70, p. 75, Laws. 30th Gen. Assem., providing that owners may construct dralns into natural watercourses. Held, where a landowner constructed a ditch for drainage purposes and acquisced in its use for eight years, it became a watercourse to which the owner of adjoining land might conduct surface water from his own land. Id. Where one's land contained a natural depression which collected surface water from a draw flowing from another's land and a town drain was constructed along the old course so as to drain the depression, but during the following season the servient estate was damaged by the flow, and a year later the action of the town was declared void, if the person on whose land the depression existed was liable, an action for damages could not be enforced in an equitable proceeding independent of one to compel restoration of former conditions. Shaw v. Ward [Wis.] 111 N. W. 671. Where the person whose land was injured assisted in the construction of the drain, he was estopped to assert an action for relief. Id.

3. Owner of dominant land may not remove natural barrier or watershed Hickory Grove Drainage Dist. v. Mason & Tazewell Special Drainage Dist., 125 Ill. App. 548.

4. Daley v. Watertown [Mass.] 78 N. E. 143. Where in opening streets and building houses there is an increased flow of surface water, the city is not liable to a landowner whose property is injured. Strauss v. Allentown [Pa.] 63 A. 1073.

5. Evidence sufficient to show such deflection of surface water unreasonable. Daley v. Watertown [Mass.] 78 N. E. 143.

6. Owner of dominant lands cannot change natural channels. Taylor v. Canton Tp., 30 Pa. Super. Ct. 305.

7. See 6 C. L. 1849.

8. The owner of upper land is entitled to have surface water flow uninterruptedly onto the land of a lower proprietor. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. The owner of upper land has an easement over lower land to discharge surface water over the same as it is accustomed naturally to flow. Cederburg v. Dutra [Cal. App.] 86 P. 838. A landowner is required to receive on his land water which naturally flows there from the land of an upper proprietor. Pohlman v. Chicago, etc., R. Co. [Iowa] 107 N. W. 1025. Evidence sufficient to show that the owner of the dominant estate had not materially increased the flow of surface water onto the servient estate. Wirds v. Vierkandt [Iowa] 108 N. W. 108. Const. § 242, providing that corporations and others vested with the power of eminent domain shall make just compensation, etc., does not relieve corporations not authorized to exercise such power from liability to the owner of a dominant estate where surface water is backed up onto it. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873. A cause of action for flooding lands because of negligent construction of levee accrues when the overflow occurs. Barnett v. St. Francis Levee Dist. [Mo. App.] 102 S. W. 583. Where a levee did not cause a continuous or even periodical overflow of lands, the fact that it had been maintained for ten years did not give a prescriptive right to flood lands. Id. Where a railway embankment becomes a nuisance only at intervals by diverting water from rainfalls from its natural course, the cause of action arises upon receipt of each injury, and successive actions may be brought. International, etc., R. Co. v. Kyle [Tex. Civ. App.] 101 S. W. 272. Must be brought within two years. Id. A complaint for diversion of surface water alleging that the water was concentrated as a result of building a railroad, in consequence of which land was injured, states a cause of action. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 16 Tex. Ct. Rep. 16, 94 S. W. 381. Two railroads and a city who jointly contribute to detain surface water so as to flood land are joint tort feasors and may be joined in a suit for damages under Civ. Code Proc. § 83. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873.

9. An upper owner can do nothing whereby the servitude of natural drain is rendered more burdensome by diverting the waters of one drain into another. No prescription is applicable. Savoie v. Guillory [La.] 43 So. 49. A municipality has no right by artificial drains to divert surface water from the course it would otherwise take and cast it in a body of sufficient volume to do injury on land where it would not otherwise go. Kehoe v. Rutherford [N. J. Err. & App.] 65 A. 1046.

the flow.[10] The owner of the servient estate is bound to receive the natural flow of surface water from upper land.[11] An owner who has for thirty years maintained an embankment to prevent surface water from flowing onto his land may continue to maintain it.[12]

Railroad companies[13] in constructing embankments must provide culverts to carry off the natural flow of surface water,[14] and may be enjoined from maintaining an embankment not provided with culverts.[15] In some states it is required by statute that the embankment be provided with such drainage facilities as the natural lay of the land requires,[16] but they need not provide against extraordinary rainfalls.[17]

10. The owner of lower land must receive the natural flow of surface water from upper land. The upper owner may accelerate the flow but cannot divert it. Where one owned land on both sides of a railroad embankment and surface water flowed from the north side of the track towards it and, side ditches being filled up, the track was flooded and ponded on the south side of the track, held, the owner had no cause of action against the railroad company. Greenwood v. Southern R. Co. [N. C.] 57 S. E. 157.

11. The owner of a servient estate may not fill up his lot in order to fit it for occupancy if the effect of such act is to retard the flow of surface water and cause it to flow back on upper ground. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873. An easement consisting of a right to water naturally issuing or flowing from the servient land may not be impaired or cut off by constructions on the servient estate. Johnson v. Gould [W. Va.] 53 S. E. 798. A natural watercourse or artificial drainage channel which exists upon the land when condemnation proceedings are commenced cannot, after the land has been taken, be closed to the injury of the person who owns the remainder of the tract. Reed v. Winona Park Com'rs [Minn.] 110 N. W. 1119. If such channel is allowed to become obstructed, the owner of adjoining land who is entitled to have the channel kept open may enter upon the land for the purpose of removing the obstruction. Id.

12. Matteson v. Tucker [Iowa] 107 N. W. 600. Maintenance for such period is a defense to an action for its removal by an adjacent owner. Id. An owner who sues for the removal of an embankment on his neighbor's land has the burden to show that his land is the highest and that surface water will naturally flow over such adjacent land. Id.

13. See 6 C. L. 1850.

14. In constructing an embankment a railroad company must provide culverts to carry off the natural flow of surface water. Central of Georgia R. Co. v. Keyton [Ala.] 41 So. 918. A railroad may not by its embankment obstruct the flow of surface water to the injury of a higher owner. Alabama Great Southern R. Co. v. Prouty [Ala.] 43 So. 352. A railway company may not in the use of its right of way injure lands of upper owners by flooding them with surface water which had previously passed over the right of way when by reasonable care a free passage for the water might have been constructed. Little Rock & Ft. S. R. Co. v. Wallis [Ark.] 102 S. W. 390. Where a railroad company in constructing its road fails to put in sufficient culverts, an adjacent owner whose land is flooded may recover damages though he has also recovered for the location of the road, as the damages then recovered were based on the theory that the road would be constructed in a skillful manner. Chicago, etc., R. Co. v. Ely [Neb.] 110 N. W. 539. Where a railroad company in constructing its road diverts surface water, it is a question of fact under the circumstances whether a new permanent outlet should be provided. Block v. Great Northern R. Co. [Min.] 112 N. W. 66. Whether the act of a railroad company in diverting the flow of surface water was the proximate cause of injury to crops was not established where it appeared that another had constructed a ditch which carried the water so diverted, together with other water, onto the land injured. Id.

15. Injunction will lie to restrain the maintenance of a railroad embankment which obstructs the flow of surface water permanently and continuously. Alabama Great Southern R. Co. v. Prouty [Ala.] 43 So. 352.

16. A statute requiring the construction of such culverts as the natural lay of the land requires for necessary drainage applies not only to surface water but to flood water of a stream during an ordinary rise. Gulf, etc., R. Co. v. Pearce [Tex. Civ. App.] 95 S. W. 1133. A railroad which constructs ditch and excavations which collects surface water is liable where such water escapes by percolation and injures adjacent land. International & G. N. R. Co. v. Slusher [Tex. Civ. App.] 15 Tex. Ct. Rep. 518, 95 S. W. 717. Under Rev. St. 1895, art. 4436, a company constructing an embankment and switchtracks without providing such drainage facilities as the natural lay of the land requires is liable for damages resulting. Houston, etc., R. Co. v. Barr [Tex. Civ. App.] 99 S. W. 437. A railroad which by constructing its embankment obstructs the natural flow of surface water is liable for injuries resulting. Missouri, etc., R. Co. v. Arey [Tex. Civ. App.] 100 S. W. 963. An instruction which only requires that a railroad constructing its embankment provide such drainage facilities as the natural lay of the land requires is correct. Id. Sayles' Ann. Civ. St. 1897, art. 4436, requiring a railroad in constructing its embankment to provide for the natural flow of surface water, renders the company liable where if the embankment had not been constructed the water would not have reached the land injured. Id. In an action against a railroad for causing surface water to flood adjacent land because of failure to provide necessary drainage facilities as required by statute, where it appeared that a third person cut a ditch so as to turn water onto the right

If such statute is violated the question of negligent construction is immaterial.[18]

A contract to construct and maintain a ditch to prevent overflow of adjacent lands runs with the land.[19]

An action for damages must be brought within the limitation period.[20] Such an action does not involve title to land.[21] The complaint must describe the land damaged.[22] The general rules of precedure apply.[23]

A landowner has no right to collect surface water in a body[24] and cast it in undue and unnatural quantities upon the land of another.[25] Injunction will issue

of way, but it did not appear that the water would not have reached the right of way regardless of the ditch, an instruction that the railroad was liable if the water would not have reached the right of way except for the ditch was erroneous. Id. It may be shown that the land overflowed frequently after the construction of the road and that it did not overflow prior to that time. International, etc., R. Co. v. Foster [Tex. Civ. App.] 100 S. W. 1017. Under Rev. St. 1899, § 1110, requiring railroad companies to construct drains along their roadbeds to connect with drains or watercourses so as to afford outlet for water obstructed, it is immaterial whether the outlet be a stream, another ditch, or lake, if it is adequate to receive the waters to be drained. Cooper v. St. Louis, etc., R. Co. [Mo. App.] 100 S. W. 494. A complaint under such statute that the company did not construct a ditch to convey surface water to a natural water drain which was sufficient to carry off the water shows that there was a drain into which obstructed water could have been carried by ditches. Id. Under Hurd's Rev. St. 1905, c. 114, requiring a railroad to construct necessary culverts through its embankment, a transferee of a road which rebuilt an embankment with knowledge that the culverts were insufficient is liable for damages caused by flooding though not notified by adjacent owners. Tetherington v. St. Louis, etc., R. Co., 226 Ill. 129, 80 N. E. 697. Where a railroad constructs an embankment without constructing sufficient culverts, as required by statute, and transfers to another company which maintained the embankment with knowledge of the deficiency, the transferee has the burden to excuse noncompliance with the statute. Id. Under Burns' Ann. St. 1901, § 5153, authorizing construction of railroads across watercourses, a drainage ditch fed by no spring or course and used exclusively for draining off surface water is not a watercourse which the company is bound to preserve. New Jersey, etc., R. Co. v. Tutt [Ind.] 80 N. E. 420. Where a railroad company has been notified that outlets through its embankment are insufficient to care for surface water, each overflow is a separate nuisance though the company did not construct the embankment. Chicago, etc., R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166.

17. Whether a flood was caused by an unprecedented rainfall, held for the jury, in an action against a railroad for failure to construct necessary drainage facilities. Baugh v. Gulf, etc., R. Co. [Tex. Civ. App.] 100 S. W. 958. Whether an overflow was an act of God or should have been foreseen is a question of fact. Chicago, etc., R. Co. v. Reuter, 223 Ill. 387, 79 N. E. 166.

18. Under a statute requiring a railroad in construeting an embankment to provide such culverts as the lay of the land requires for necessary drainage, if an embankment cause adjacent land to be overflowed the company is liable regardless of the question of negligence. Missouri, etc., R. Co. v. Crow [Tex. Civ. App.] 15 Tex. Ct. Rep. 839, 95 S. W. 743. Where a railroad in constructing its embankment failed to provide for the unrestricted flow of the flood waters of a stream, as required by statute, it was liable for damages regardless of negligence. Missouri, K. & T. R. Co. v. Dubose [Tex. Civ. App.] 15 Tex. Ct. Rep. 714, 95 S. W. 588. The question of negligence is immaterial if the statute is not complied with. Baugh v. Gulf, etc., R. Co. [Tex. Civ. App.] 100 S. W. 958.

19. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34.

20. Where injury results from flooding because of failure to remove debris accumulated under a trestle, the cause of action accrues at the date of the damage. St. Louis, etc., R. Co. v. Hoshall [Ark.] 102 S. W. 207.

21. An action for damages for breach of contract to construct and maintain a ditch to prevent overflow of lands does not involve title to land. Withers v. Wabash R. Co. [Mo. App.] 99 S. W. 34.

22. Where a rice crop was injured by overflow from a canal, complaint held not uncertain or indefinite as to the manner of destruction or damages. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. Held also to sufficiently describe the land. Id.

23. Under a complaint for obstructing the natural flow of water westerly, it may be shown that its natural flow was in another direction, as the direction of the flow was immaterial. International, etc., R. Co. v. Foster [Tex. Civ. App.] 100 S. W. 1017. Where there was no evidence that the overflow resulted from water brought down by artificial drains, such fact need not be made the subject of an instruction. International, etc., R. Co. v. Stewart [Tex. Civ. App.] 101 S. W. 282.

24. See 6 C. L. 1851.

25. Under Hurd's Rev. St. 1905, c. 47, a city may be restrained from doing so until damages are ascertained and paid. Elser v. Gross Point, 223 Ill. 230, 79 N. E. 27. A railroad acquiring a right of way by condemnation may not collect surface water by the construction of a solid bed and discharge the same onto adjacent land. Albright v. Cedar Rapids, etc., R. & Light Co. [Iowa] 110 N. W. 1052. The owner of the dominant estate may not collect it and cast it upon the servient estate in a different manner from which it naturally flowed. Wirds v. Vierkandt [Iowa] 108 N. W. 108. One who diverts surface water from the natural course of drainage and by ditching casts

to restrain the accumulation of surface water and its discharge onto adjacent land, though an action for damages may also be maintained.[26] It is no defense to an action for damages that the person whose land was injured was negligent.[27] Where a city constructs streets in such manner as to cause surface water to accumulate which would otherwise escape, it must provide an outlet for it.[28] And the duty is not obviated by a statute which imposes upon towns the duty of building and repairing highways.[29]

Storm sewers[30] must be of sufficient capacity to carry off the ordinary flow of surface water.[31]

§ 10. *Lands under water.*[32]—A riparian owner takes all accretions whether the water course be navigable or not.[33] His title extends to the thread of a non-navigable stream and to high-water mark of a navigable one.[34] A riparian owner on an inland lake, the water of which alters with the seasons, takes only to high-water mark.[35] Whether title to the soil under the bed of a lake or stream passes to a grantee of the shore land is to be determined by the laws of the state where the land lies.[35, 37]

§ 11. *Levees, drainage, and reclamation.*[38]—The formation of levee districts[39]

it upon the land of his neighbor is liable in damages. Nye v. Kahlow, 98 Minn. 81, 107 N. W. 733. Surface waters may not be collected and thrown onto lands of a private owner in unnatural and unreasonable quantities. Dennis v. Osborn [Kan.] 89 P. 925. The owner of the dominant estate may not divert the flow of surface water so as to cause it to flow onto the servient estate at a different point, nor can he collect in one channel water which naturally flows onto the servient estate by several channels. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873.

26. Albright v. Cedar Rapids & I. C. R. & Light Co. [Iowa] 110 N. W. 1052. Evidence insufficient to warrant the granting of an injunction to restrain the casting of surface water on the land of another. Perry v. Reed [Mich.] 13 Det. Leg. N. 979, 110 N. W. 529. Where one's property was injured during each recurring rainfall by the accumulation of surface water because of street improvements, he was entitled to enjoin future recurrence of such injury. Cromer v. Logansport [Ind. App.] 78 N. E. 1045

27. Where one's property is injured because of the accumulation of surface water, the fact that his own negligence aggravated the injury may be considered in mitigation of damages, but is no defense. Cromer v. Logansport [Ind. App.] 78 N. E. 1045.

28. A city which so constructs its streets as to accumulate surface water which would otherwise escape without doing injury is in duty bound to provide an adequate outlet for it. City of Houston v. Richardson [Tex. Civ. App.] 15 Tex. Ct. Rep. 107, 94 S. W. 454. Where surface water was collected and precipitated against a wall, failure of the contractor to so build the wall as to withstand the action of the water is no defense to an action for damages. Id.

29. Statutes imposing on towns the duty of repairing and building highways do not authorize them, for the purpose of protecting highways from surface water, to turn accumulated surface water onto private property. Rudnyai v. Harwinton [Conn.] 63 A. 948. Where owners of property are injured because of accumulation of surface water caused by street improvements, in a suit to enjoin such injury, it was improper to allow the city eight months to remedy the defect. Cromer v. Logansport [Ind. App.] 78 N. E. 1045. A city is liable for failure to provide an outlet for surface water accumulated through its street improvements from a larger extent of territory, where it would not in the natural course of things have accumulated there. Id.

30. See 6 C. L. 1852.

31. A city is liable for injuries resulting where it constructs drains insufficient to carry off surface water and an owner's property is overflowed, unless such overflow is the result of extraordinary rainfalls. Campbell v. Vanceburg, 30 Ky. L. R. 1340, 101 S. W. 343. Evidence insufficient to show that overflow of property was caused by failure of a city to provide adequate facilities to carry off surface water. Id.

32. See 6 C. L. 1853.

33. In Arkansas. Harrison v. Fite [C. C. A.] 148 F. 781. Evidence sufficient to show that land had been formed on the bank of a river by imperceptible accumulations and rescession of the river. Hattom v. Gregg [Cal. App.] 88 P. 592.

34. Harrison v. Fite [C. C. A.] 148 F. 781.

35. State v. Thompson [Iowa] 111 N. W. 328.

36. Harrison v. Fite [C. C. A.] 148 F. 781.

37. See 4 C. L. 1836.

38. See 6 C. L. 1854.

39. An order of the county court establishing a levee district which is regular and contains necessary jurisdictional recitals prima facie shows the validity of the establishment of the district. Overstreet v. Conway County Levee Dist. [Ark.] 97 S. W. 676. Act Feb. 15, 1893, p. 34, creating a levee district to reclaim swamp lands, and providing for the acquisition of land by condemnation does not violate the constitutional provision against taking private property until compensation is first paid. Board of Directors of St. Francis Levee Dist. v. Redditt [Ark.] 95 S. W. 482. A complaint, in an action to recover a de-

and the extent of its powers are governed by statute.[40] In assessing land within a levee district for benefits, statutory requirements must be complied with.[41] All lands benefited may be assessed therefor.[42] An assessment cannot be vitiated by a false statement of one of the directors of the district at a meeting regularly called.[43] The board of equalization in raising an assessment acts judicially.[44] One who asserts that an assessment is excessive has the burden of proof.[45] Delinquency in payment of such assessments may be penalized.[46] Owners of a private drainage ditch are entitled to have the waters thereof protected from pollution.[47]

§ 12. *Milling and power and other nonconsuming privileges; dams, canals, and races.*[48]—The owner of the dam controlling the water must not only see existing conditions but he must foresee probable consequences.[49] The owner of a dam

linquent levee assessment, alleging generally that land was duly assessed as provided by statute, and taxes were duly extended, is sufficient, in the absence of a demurrer or other objection that it did not allege that an election of land owners was held before the levee, and a majority voted in favor of the project. Jonesboro, etc., R. Co. v. St. Francis Levee Dist. Directors [Ark.] 97 S. W. 281. Commissioners forming a drainage district may include benefited lands not described in the petition and exclude described lands which are not benefited. Barnes v. Divernon Drainage Com'rs, 123 Ill. App. 621. That the clerk did not in person mail the notice for the formation of a drainage district is immaterial. Id.

40. Under the statutes of Arkansas a levee district created by special act may contract debts in excess of $300,000 in the construction of a levee and execute evidence of indebtedness bearing interest at the rate of six per cent. Altheimer v. Plum Bayou Levee Dist. [Ark.] 95 S. W. 140.

41. Where a statute requires that the board of inspectors ascertain what lands would be benefited, and to cause a descriptive list thereof to be filed with the clerk of court, an attempted ascertainment and extension of taxes by the clerk on failure of the inspectors to comply with the statute was void. Redford Levee Dist. v. St. Louis, etc., R. Co. [Ark.] 96 S. W. 117. Acts 1905, p. 543, providing for the assessment of railroad lands within a certain levee district, held not to apply to the Redford district of Disha County. Id.

42. Under Rev. St. 1899, § 8441, requiring the assessment of all lands in a levee district benefited by a levee, an assessment is not void because it does not cover land in the district which in the judgment of the assessor were not benefited. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333. Under Rev. St. 1899, § 8437, providing for the assessment of land in a levee district for benefits, an assessment is not void because land within the district not benefited is not assessed. The statute implies that there may be lands in the district not benefited. Id. The fact that all lands benefited are not assessed does not ipso facto render the assessment void as against lands legally and properly assessed. Id. Under Kirby's Dig. § 6873, declaring all property except that exempted subject to taxation, and Act Feb. 15, 1893, p. 29, creating the St. Francis levee district, and providing that all lands therein shall be subject to taxation, unsurveyed lands within such district are subject to taxation for levee purposes. Buckner v. Sugg [Ark.] 96 S. W. 184. Under the statutes of Missouri, lands within a levee district and benefited by the levee are subject to taxation therefor at the first annual assessment after the levee district is formed. Under Rev. St. 1899, § 8441, where a district was organized in 1892 and was assessed in 1899, the assessment was valid. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333.

43. A director of a levee district cannot vitiate an assessment by misrepresentations to one of the landowners at a meeting called according to statute as to the amount of assessment against the land owner. Overstreet v. Conway County Levee Dist. [Ark.] 97 S. W. 676. Where, at a meeting of the directors of a levee district, a director informed a landowner that the cost of the proposed work would be a certain amount and it afterwards proved to be greater, held the statement if binding on the levee district could not be material, in so far as it influenced the vote of the landowner, where his vote was not essential to a majority, and the statement did not affect the validity of the assessment. Id. The fact that the landowner to whom the misrepresentation was made was not present at a meeting to correct assessments did not avoid the assessment. Id.

44. The board of equalization in equalizing and raising assessments on land in a levee district benefited by a levee as authorized by statute acts judicially, and its act in raising an assessment is not subject to collateral attack. State v. Three States Lumber Co., 198 Mo. 430, 95 S. W. 333.

45. One who asserts that a levee assessment on his land is excessive has the burden of overcoming the prima facie fairness of it, established by the returns of the assessors. Overstreet v. Conway County Levee Dist. [Ark.] 97 S. W. 676. The records of a board of directors of a levee district reciting that a meeting to revise and adjust the assessments made and reported to the board was duly held after notice given establishes a prima facie case. Id.

46. Where a statute imposes a penalty if assessments of a levee district are not paid within a specified time, equity may enforce the penalty in a suit to recover assessments. Overstreet v. Conway County Levee Dist. [Ark.] 97 S. W. 676.

47. Kenilworth Sanitarium v. Kenilworth, 220 Ill. 264, 77 N. E. 226.

48. See 6 C. L. 1854.

49. He must not lower the water in the dam so that in order to give lower owners the natural flow he must deprive grantees

lawfully maintained across a river to raise a head of water for generating power has the exclusive right to the use of such head for that purpose, but for no other.[50] The right of any other person to draw water from a lawful dam for power purposes is derived solely from grant and is defined and limited by the terms of such grant,[51] but he is not precluded from exercising his right because of the fact that a lower owner is a public service corporation charged with the performance of public duties.[52] Under a grant of the use of water, unlimited as to the number of hours used, the grantee may use the water as many hours a day as he pleases.[53]

The rights of flowage in one claiming under a grant rests in the terms of the grant.[54]

If a right to use power from a dam has been acquired and affixed to a particular mill or parcel of land, it passes with a grant of such land as an appurtenant; but if it is not an appurtenance it will not pass though the grantor had a right to use it at the time of the grant.[55] A right to discharge waste water from a canal into a tailrace does not authorize it to be turned on in such abundance as to flood the building and premises of the owner of the tailrace.[56] A court of equity has jurisdiction to determine the respective rights of the owners of water power developed by a dam.[57] A mill owner whose rights are not adjudicated in a proceeding determining rights in a stream is not bound by the decree.[58]

of water from his own dam of what they are entitled to. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915. Under Priv. Laws 1903, p. 277, c. 174, §§ 10 15, the method of determining the amount of water the owner of a dam was required to let go, determined. Penobscot Log Driving Co. v. West Branch Driving Reservoir Dam Co. [Me.] 66 A. 542.

50. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. Where it has been determined that a certain amount of extra water in a reservoir belonged to a certain person to be used by him whenever he pleased, he was entitled to withdraw it at any time, or permit it to remain there to maintain a desired head at certain dams. Hutchins v. Berry, 73 N. H. 611, 63 A. 787. Refusal to limit the discharge at a particular point to sixty-nine cubic feet per second is not erroneous as a matter of law where it cannot be said that such limitation is necessary for the protection of the mill owner's rights. Id.

51. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67. Contracts for water for power purposes construed, and rights of parties determined. Id. Grants of water rights construed and rights thereunder determined. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915. Grants construed and held not of water power but only of water for power, and the grantee was entitled to draw a certain fixed quantity of water and not a certain amount of power. Union Water Power Co. v. Lewiston, 101 Me. 564, 65 A. 67.

52. Where upper proprietors had the rights under grants from the owner of a lower dam to use water for operating a mill, they were entitled to such use though the riparian proprietor below, also owner of a dam, was a public service corporation charged with the performance of public duties. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915.

53. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915.

54. Evidence sufficient to show a grant of the right to overflow lands by the maintenance of a mill dam. Schlag v. Gooding-Coxe Co., 98 Minn. 261, 108 N. W. 11. Evidence sufficient to show that the owner of a dam and mill pond was entitled to maintain it free from obstructions. Sebranke v. Kohlmeyer [Wis.] 110 N. W. 224.

55. Muscogee Mfg. Co v. Eagle & Phenix Mills, 126 Ga. 210, 54 S E. 1028. Where a city under statutory authority laid off water lots and sold them, and a water lot company was incorporated with power to hold and sell the lots, such statute did not restrict the right of the purchaser of all the lots or the corporation from covenanting as to the rights purchasers under them should have in the water or water power to be used by each purchaser from a race running through the lots. Id. Water rights running in favor of some of the lots in a subdivision for the benefit of others held merged when one person purchased all the lots. Id. Where owners of a dam with a perpetual right to maintain it sold land bordering on the stream for use in connection with the ice business, which was dependent on continuance of the dam, and received the enhanced value of the property, the conveyance was held to imply an easement in the continuance of the dam. Marshall Ice Co. v. La Plant [Iowa] 111 N. W. 1016. The grantees did not part with such easement by granting away an equal right in common in the dam and the right to enter and repair it. Id.

56. Colonial Woolen Co. v. Trenton Water Power Co. [N. J. Law.] 63 A. 759.

57. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me., 198, 63 A. 915.

58. Where a mill owner had a prior right to use waters of a stream which had been improved with a reservoir, and was not before the court when an order was made as to the use of water by other owners of water rights, his rights were not subject to such order. Hutchins v. Berry, 73 N. H. 611, 63 A. 787.

To acquire a prescriptive right of flowage it must appear that the land was flooded for the statutory period,[59] continuously,[60] and to the injury of the owner of the land flooded.[61] A prescriptive right of flowage does not entitle the owner to raise his dam and cause flowage of a greater area.[62]

One who constructs a dam which results in the flooding of upper land is liable in damages whether the flooding occurs during high or low water,[63] but the owner of a dam is not liable where, because of unusual floods, a bridge is swept away, though the dam is one of the contributing causes of such loss.[64] The question of negligence in constructing a dam is immaterial where it is constructed under statutory authority rendering the builder liable for all damages caused.[65]

Legal rights of the parties may be determined in ejectment where one claims a perpetual right to maintain a dam.[66] Where owners of a mill site and flowage leased the property to a corporation in which they were stockholders the owners and corporation could recover jointly for obstruction of the flowage.[67] Where one owner of rights in a millrace diverts water from another race to the injury of other rights, other proprietors need not be joined in an action for damages where it does not appear that they assisted in the wrongful act.[68] Equity has concurrent jurisdiction with courts of law to protect a landowner against frequent recurring injuries from the wrongful diversion of water without regard to ability to respond in damages.[69]

§ 13. *Irrigation and water supply; common-law rights and the doctrine of appropriation. A. Rights in the water. The common-law rule.*[70]—Each riparian proprietor has an equal right to the natural flow of the stream,[71] unimpaired in quality.[72]

59. In an action for damages caused by flooding, evidence held insufficient to shew that a prescriptive right had been acquired to the extent of territory damaged, and that the water had been raised twenty inches above its usual height Reason v. Peters [Mich.] 14 Det. Leg. N. 275, 112 N. W. 117. Under the circumstances of this case a delay of three years in enforcing lowering of a dam held not to bar the right to have it lowered where a suit had been commenced and dismissed pursuant to agreement to lower the dam, and a waste gate had been put in. Miller v. Bank of Belleville [Mich.] 14 Det. Leg. N. 191, 111 N. W. 1062. One is not barred from enjoining maintenance of a dam except by lapse of the limitation period. Cobia v. Ellis [Ala.] 42 So. 751.

60. In order to acquire a prescriptive right of flowage the use must be continuous but not necessarily constant in the sense of daily occupancy. Reason v. Peters [Mich.] 14 Det. Leg. N. 275, 112 N. W. 117.

61. Unless use of water for power is in excess of right and is continuous for twenty years, and is adverse, and is shewn to have occasioned actual injury, no prescriptive right arises. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915.

62. Miller v. Bank of Belleville [Mich.] 14 Det. Leg. N. 191, 111 N. W. 1062. Evidence sufficient to show that a later constructed dam was higher than ones formerly maintained. Id. One who has maintained a dam at a certain height for several years does not acquire such a prescriptive right as entitles him to raise it. A prescriptive right can be acquired only where the increased height has been maintained for ten years. Cobia v. Ellis [Ala.] 42 So. 751.

63. Allen v. Thornapple Elec. Co., 144 Mich. 370, 13 Det. Leg. N. 263, 108 N. W. 79. In an action for flooding land by obstructing a watercourse, the proof was held to correspond to the allegations of the complaint. St. Louis Merchants' Bridge Terminal Ry. Ass'n v. Schultz, 226 Ill. 409, 80 N. E. 879.

64. Inhabitants of Palmyra v. Waverly Woolen Co. [Me.] 66 A. 646.

65. Under 23 Stat. at Large, p. 207, authorizing a power company to dam a certain navigable stream provided it should be liable for all damages caused by building such dam, it is liable for injuries caused to a riparian owner, whether negligent or not. Sutten v. Catawba Power Co. [S. C.] 66 S. E. 966. Question of damages held for the jury where it appeared that, because of the dam, flood waters were precipitated against the bank. Id.

66. An action in ejectment for the purpose of determining the legal rights of the parties may be maintained for land overflowed by the erection of a dam in the river adjacent to the land, where the defendant claims a perpetual right of flowage. Reynolds v. Munch [Minn.] 110 N. W. 368.

67. Andrews v. Weckerman, 144 Mich. 199, 13 Det. Leg. N. 163, 107 N. W. 870. Under Code Civ. Proc. § 448, owners in severalty of water rights on a millrace have such a common or general interest as authorizes one to sue for all where water is cut off. Climax Specialty Co. v. Seneca Button Co., 103 N. Y. S. 822.

68. Climax Specialty Co. v. Seneca Button Co., 103 N. Y. S. 822.

69. Cobia v. Ellis [Ala.] 42 So. 751.

70. See 6 C. L. 1856.

71. Where parties acquired their respec-

An appropriation[73] consists of the diversion of water and its application to some beneficial use.[74] Mere permissive use of water does not constitute an appropriation.[75] An assertion of water rights by appropriation is not antagonistic to and a waiver of rights arising out of riparian ownership.[76]

What may be appropriated.[77]—All waters not subject to prior appropriation may be appropriated,[78] but water subject to vested rights in another may not be,[79] nor is water which escapes from an irrigation ditch on the land of another subject to appropriation.[80] The Federal Desert Land Act authorizes appropriation only

tive tracts of land from the Federal government before any attempt was made to acquire rights in a stream running through the land, their rights in the stream are common-law ones, and where each owns the same area of practically the same character of land they are entitled to equal distribution of the water remaining after each has used what is necessary for domestic purposes. Nesalhous v. Walker [Wash.] 88 P. 1032.

72. Where because of the insufficiency of an upper owner's dam the dumping of tailings from a quartz mill into the stream during irrigation season would destroy the crop, held the lower owner was entitled to enjoin such deposit during the irrigating season. Brown v. Gold Coin Min. Co. [Or.] 86 P. 361. Evidence held to show that pollution of a watercourse was caused by the closing of a head gate of a dam when the water was not needed for irrigation. Id.

73. See 6 C. L. 1856.

74. Morris v. Bean, 146 F. 423. Evidence that one diverted waters of a stream into a ditch which had a twenty year old growth of brush in it is not evidence that his predecessors in title had ever divested water from the stream for irrigation purposes. Rogers v. Overacker [Cal. App.] 87 P. 1107.

75. Where one had mere permission to use a water right on his land, a conveyance by him of his land does not pass the water right. Pew v. Johnson [Mont.] 88 P. 770. A settler on land of another took possession of a ditch constructed by a third person and divested water to land occupied by him. No consent to divert water was ever obtained. Held a grantee of the settler and owner did not acquire any water right by appropriation. MacRae v. Small [Or.] 85 P. 503.

76. Nesalhous v. Walker [Wash.] 88 P. 1032.

77. See 6 C. L. 1857.

78. The right to appropriate water under the Civil Code of California exists wherever water can be found which has not been appropriated and is not confined to streams running over the public domain. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. Where as soon as a grantee of riparian lands commenced to use waters of a lake notice was served on him of a claim to the water under a deed from his grantor, such notice was effective to prevent any estoppel arising because of subsequent improvements. Id.

Water flowing from artesian wells on the public domain is subject to appropriation under Civ. Code, § 1410. Wolfskill v. Smith [Cal. App.] 89 P. 1001. Under Mill's Ann. St. § 3177, providing that water flowing from mines into any natural water course may be appropriated, one who conducts **water from mines** to a natural stream with intent to and who does actually appropriate it is entitled to it. Ripley v. Park Center Land & Water Co. [Colo.] 90 P. 75. Such right relates back to the time when he first sought to utilize the water, though it became necessary from time to time to construct new drainage tunnels. Id.

A lake which with its tributaries and outlet constituted a running stream during the rainy season is a "running stream" subject to appropriations for irrigation purposes though it did not continue to flow to the sea. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. Under B. & C. Comp. § 5019, providing that one on whose land **spring or seepage water** rises has the right to use it, where a spring has its origin on land its waters may be appropriated there. Morrison v. Officer [Or.] 87 P. 896.

79. An appropriation merely vests in the appropriator such rights as have not previously become vested in another by some riparian right or appropriation. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. A subsequent appropriator who makes his diversion under the belief that a senior appropriator will continue to use the water as at the time the later appropriation was made acquires a vested right to insist on the continuance of such conditions. Baer Bros. Land & Cattle Co. v. Wilson [Colo.] 88 P. 265. A lower owner cannot acquire a right to water of a stream either by prior appropriation or adverse user as against an upper owner whose rights antedated such appropriation and user. Rogers v. Overacker [Cal. App.] 87 P. 1107. The volume of water and visible supply is notice of all waters appropriated and a subsequent appropriator cannot invoke the doctrine of estoppel as against a prior one on the ground that he has stood by and permitted him to make improvements on strength of the diversion. Id. One who diverts water from a stream must take notice of all prior appropriations whether made pursuant to statutory notice or otherwise. Morris v. Bean, 146 F. 423. Evidence sufficient to show violation of an injunction restraining one from interfering with the flow of water in a stream. State v. Frost [Or.] 86 P. 177. Where one appropriated water under Act Cong. July 26, 1886 (14 Stat. 253), and the land was subsequently granted to the state which sold a lot which was overflowed by the dam, held the rights of the successors of the original appropriator were protected though a patent did not reserve any water right. Parkersville Drainage Dist. v. Wattier [Or.] 86 P. 775.

80. Where one collects in a ditch and uses for irrigation water brought by another onto his land which escapes onto the land of the

of waters of the United States.[81] Water rights reserved to the Indians by treaty are not subject to appropriation.[82] The rights of an irrigation company which constructs a ditch on government land after the filing of a homestead entry but before patent issued are not superior to the rights of the patentee.[83]

Method of appropriating.[84]—Appropriation may be made either by common law or statutory method,[85] and where the statutory method of appropriation is not exclusive, an appropriation may be made in a different manner.[86] If appropriation is made by a statutory method, statutory requirements as to posting [87] and recording notice,[87a] and prosecuting the work, must be complied with.[88] Statutory requirements as to

person who constructs the ditch, he makes no appropriation as against the person who fetches the water though done with his consent as he is entitled to intercept such water. Burkart v. Melberg [Colo.] 86 P. 98.

81. Desert Land Act (Act Cong. March 3, 1877, amended by Act Cong. March 3, 1891), authorizing appropriation of water by holders of land acquired under such acts, applies only to waters of the United States. Winters v. U. S. [C. C. A.] 143 F. 740.

82. The Indian Treaty of May 1, 1888, making the northern boundary of the Ft. Belknap Reservation the middle channel of Milk River, by implication reserved to the Indians the right to a portion of the water of such river for irrigation purposes, which right is superior to the rights of persons who subsequently took desert claims adjacent to such river. Winters v. U. S. [C. C. A.] 148 F. 684. Indian Treaty construed and held that it reserved a portion of the water of Milk River for the use of the Indians where the land bordering on such river reserved for them was arid and useless without irrigation. Id. A portion of the waters of Milk River having been reserved for the benefit of certain Indians, grantees of land outside the reservation had not the right to appropriate all of the water of such river under the Desert Land Act. Id.

83. Under Rev. St. U. S. §§ 2339, 2340. Atkinson v. Washington Irr. Co. [Wash.] 86 P. 1123. The fact that a homestead entryman made no objection to the construction of an irrigation ditch until after he obtained his patent did not estop him to assert that his patent was not subject to the company's rights. Id.

84. See 6 C. L. 1857.

85. An appropriation is shown where one made a cut in a levee and diverted water into an excavation along the outside of the levee and made use of the excavation to conduct water to his land. Lower Tule River Ditch Co. v. Angiola Water Co. [Cal.] 86 P. 1081. An appropriation and the damming of a stream so as to overflow public lands of the United States in 1849 for manufacturing purposes was an appropriation within Act Cong. July 26, 1866 (14 Stat. 253). Parkersville Drainage Dist. v. Wattier [Or.] 86 P. 775. Courts will take judicial notice of a custom of appropriation. Id. One appropriated water from a stream for irrigation purposes and also for the purpose of drawing flood water off other land owned by him. Held the purpose to drain one tract did not destroy his appropriation. Lower Tule River Ditch Co. v. Angiola Water Co. [Cal.] 86 P. 1081.

86. Lower Tule River Ditch Co. v. Angiola Water Co. [Cal.] 86 P. 1081. Where a resident of Wyoming without complying with the statutes diverted water from a stream and the statute precluding the giving of evidence in a proceeding to enforce such claim was repealed, held the effect of the statute was not to deny the right to appropriate and its repeal removed the only obstacle to the assertion of his rights in the courts. Morris v. Bean, 146 F. 423.

87. Where notices of appropriation were located within 500 feet of each other and were identical, it was not necessary to record more than one of them. Wolfskill v. Smith [Cal. App.] 89 P. 1001. Where three artesian wells were driven within 500 feet of each other, notices of appropriation posted at the wells describing them sufficiently designated the point of diversion. Id. Under the statutes of California and Federal laws where a person posted notices of appropriation of water from abandoned artesian wells on the public domain and within 60 days commenced to dig ditches, her rights to the water were superior to one who entered the land as a homestead after the notice was posted. Id. A posted notice of a claim to the waters of a lake for irrigation stating that the water claimed was to be used on the land of a certain person describing it was sufficient, though it was also stated that it was also to be used on other land not described. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. Where notice of appropriation stated that the water was to be conveyed to the place of use by a "6 inch pipe or pipe of other dimensions," it was sufficient to authorize diversion of a quantity that could be carried in a six inch pipe. Id.

87a. Under Civ. Code, § 1415, the copy of the notice of appropriation intended for record need not be signed by the appropriator but may be filled out by a stranger. Wolfskill v. Smith [Cal. App.] 89 P. 1001. Such copy need not be acknowledged. Id.

88. Where one who had posted notice and commenced work on ditches in appropriating the water from abandoned artesian wells on the public domain but was prevented from continuing work by one who entered the land as a homestead, such entryman was estopped to claim that the work was not prosecuted with sufficient diligence. Wolfskill v. Smith [Cal. App.] 89 P. 1001. Where an act of congress giving an irrigation company the right to take water from a navigable river provided for forfeiture if the ditch was not completed within five years, a forfeiture was properly declared where more than five years elapsed after dissolution of an injunction restraining prosecution of the work. United States v. Rio Grande Dam & Irr. Co. [N. M.] 85 P. 393.

posting notice do not preclude the acquisition of rights by another method.[89] In making an appropriation any natural or artificial channel or ditch may be used,[90] and it is not essential that a headgate be constructed at the point of diversion.[91] In the absence of statute, if the work is prosecuted with reasonable diligence, the right of the appropriation relates to the beginning of the work.[92]

Right to supply from water companies.[93]—An irrigation company can excuse failure to furnish water according to its contract only by showing that it was due to inevitable accident which could not be foreseen,[94] and if it willfully fails to furnish water it is liable for resulting damages.[95] Where a company is entitled to notice, it is not liable if injury results because of failure to give such notiec,[96] nor is it liable for injuries resulting from failure of the user to perform other conditions required of him.[97] The delivery of water in accumulated quantities may not be enforced by mandamus.[98] Where several parties unite in interest and apply as one applicant for water to use in rotation, the facts of joinder and rotation are not grounds upon which the water company may refuse to supply them with water.[99]

89. Where appropriation is under a statute, the recording of the claim is constructive notice, but such statutes do not preclude the taking of water for beneficial uses by other methods than those prescribed. Their effect is to preclude an appropriator from claiming by relation to the time work was commenced as against one who complies with the statute and prosecutes his work in accordance therewith. Morris v. Bean, 146 F. 423.

90. Ditch or pipe line constructed solely for that purpose is not essential. Lower Tule River Ditch Co. v. Angiola Water Co. [Cal.] 86 P. 1081.

91. If a simple cut will answer the purpose it is sufficient. Lower Tule River Ditch Co. v. Angiolo Water Co. [Cal.] 86 P. 1081.

92. Morris v. Bean, 146 F. 423. Where a person in 1899 settled on unsurveyed public land and opened an old ditch which had been constructed by a prior settler, put in a head gate and conveyed water 150 feet to his land, and the following year extended the ditch, the water right so acquired is entitled to date from the time it was delivered on the ground. Brown v. Newell [Idaho] 85 P. 385. Where the area of land for the irrigation of which water has been appropriated varies with the lapse of time, the additional application of water to meet the augmented demand, provided the appropriation is completed within a reasonable time, causes the appropriation to relate back to the time of its inception. Seaweard v. Pacific Live Stock Co. [Or.] 88 P. 963.

93. See 6 C. L. 1858.

94. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400. In an action for breach of contract to furnish water for irrigation, evidence as to the amount of depletion of water by evaporation in the fields held admissible on the amount of water required to be furnished. Id.

95. An irrigation company which willfully fails to furnish water according to its contract is liable for resulting injuries to crops. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400. In an action for injury to crops because of failure of an irrigation company to furnish water according to its contract, evidence as to what other lands similarly situated yielded is admissible. Id. In an action by a landowner for breach of contract to furnish water for irrigation of land in possession of a tenant, where the owner was chargeable with expense of horses, feed, etc., in estimating damages, the total expense should be deducted from his share of the crops after division with the tenant. Barstow Irr. Co. v. Cleghon [Tex. Civ. App.] 15 Tex. Ct. Rep. 218, 93 S. W. 1023. For breach of contract to furnish water for irrigation damages for crops lost because of inability to plant through failure to furnish water as well as for injury to crops may be recovered. Id. Where an irrigation company contracted to furnish water to a landowner and the owner contracted to furnish it to his tenant the tenant is not a necessary party in an action by the owner for breach of his contract. Id.

96. Where a contract for water for irrigation required five days' notice when water was desired, the company is not liable where injury occurs to a crop because of failure to give such notice. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

97. Where at the time a contract to furnish water for irrigation was made it was understood that the company was not to furnish means of conveying water to the land, but that it was to be carried through a lateral owned by the user's landlord, evidence that failure to furnish water was due to the landlord's failure to keep the lateral in repair did not vary the contract to furnish water. Gravity Canal Co. v. Sisk [Tex. Civ. App.] 15 Tex. Ct. Rep. 984, 95 S. W. 724.

98. Under a contract with an irrigation company for a certain amount of water during a given period and providing that the flow might be accumulated at any one month or more of the period, mandamus will not lie to compel the delivery in accumulated quantities twice a month, mandamus lies only to compel performance of acts specifically enjoined by law. Perrine v. San Jacinto Valley Water Co. [Cal. App.] 88 P. 293.

99. Helphery v. Perrault [Idaho] 86 P. 417. The times and order of use and application of water by several owners under the same lateral to their respective tracts are matters of no concern to the water company where such owners have agreed among themselves as to the use of the water. Id.

They may join in an action to compel the company to deliver to them the quantity applied for.[1]

The right to water from an irrigation company follows a transfer of the corporate stock [2] but a purchaser of land who does not obtain such transfer is not entitled to the water.[3] A stockholder is entitled only to his share of the water represented by the stock held by him.[4]

A purchaser of the rights of a colonization company which is under contract to supply purchasers of land with water may be enjoined from shutting off water in violation of the contract.[5]

Jurisdiction of a district court to appoint a distributer in partnership ditch does not depend on consent of the parties but on the filing of a petition alleging the required facts.[6] A water distributer acts officially and until removed from office has exclusive control of the ditch.[7] One who alleges that he is deprived of water by collusion between a distributor and others has the burden of proving joint action.[8]

Limit, measure and extent of right.[9]—The general doctrine of appropriation applies regardless of state lines.[10] The rights of an appropriator are governed by the laws of the state where the appropriation is made.[11] No person can acquire a right to more than he can beneficially use,[12] nor may he impede the flow of the

1. Where several owners contract among themselves to construct their own ditch and lateral and make joint application to the ditch company for sufficient water for all their lands, they may join in an action to compel the company to deliver the quantity applied for. Helphery v. Perrault [Idaho] 86 P. 417.

2. Where irrigation stock was transferred on the books of the corporation under a deed of trust and the purchaser at foreclosure of the trust deed sold to one who gave a trust deed back for the purchase price, the stock remaining in the name of the trustee, no further transfer was necessary to entitle the last purchaser to rights of a stockholder. Oligarchy Ditch Co. v. Farm Inv. Co. [Colo.] 88 P. 443. Though a deed of trust conveying stock of an irrigation company was a chattel mortgage and was not foreclosed within five years, it was good as between the parties and the corporation could not question its validity without showing that it had in some way been injured. Id. Where land of an owner of stock in an irrigation company was sold in foreclosure proceedings but the stock was not transferred, the grantor in the trust deed foreclosed and the present owners of the stock are necessary parties in an action to enforce stockholders' rights of the original grantor. Id.

3. Where a ditch company owned a main ditch and an extension company an extension from which only stockholders in such extension were entitled to draw water, and land of a stockholder in both companies was sold under a deed of trust, and stock in the ditch company was transferred but not stock in the extension company, the latter company could not be compelled to furnish water to the purchaser. Oligarchy Ditch Co. v. Farm Inv. Co. [Colo.] 88 P. 443.

4. Where one was by contract entitled to so much water as twenty shares of corporate stock represented, subject to be prorated in case of shortage, and thereafter the company acquired other water rights, held that the contract did not entitle its holder to a portion of the water rights subsequently acquired, and that in case of shortage he was required to prorate with other stockholders. True v. Rocky Ford Canal Reservoir & Land Co. [Colo.] 85 P. 842.

5. Where a colony association sold land and water rights and agreed to furnish water at a certain price, and thereafter sold all its remaining land and water rights to another, held the purchaser took with notice of the covenant to furnish water at specified rates and could be enjoined from shutting off water in violation of the contract. Hunt v. Jones [Cal.] 86 P. 686.

6. Mau v. Stoner [Wyo.] 87 P. 434. In a proceeding to appoint a distributor under Rev. St. 1899, §§ 908, 916, amended by Laws 1903, p. 122, denial of joint ownership will not oust the court of jurisdiction, nor will the determination of the question adjudicate titles and rights. Id.

7. A distributor of water appointed under Rev. St. 1899, §§ 908, 916, acts officially and has exclusive control of the ditch for the division of water until removed from office. Mau v. Stoner [Wyo.] 87 P. 434.

8. Mau v. Stoner [Wyo.] 87 P. 434. That persons entitled to water from a partnership ditch received what was apportioned to them does not import knowledge that the distributor was acting unfairly to others. Id.

9. See 6 C. L. 1858.

10. A citizen of Wyoming sued in the Federal circuit court in Montana to enjoin citizens of that state from diverting water from a stream rising in that state and flowing into Wyoming. Held that citizens of Montana could not justify their acts on the ground that the laws of Montana authorize appropriation of water, also that the general doctrine of appropriation applies regardless of state lines. Morris v. Bean, 146 F. 423.

11. Morris v. Bean, 146 F. 423.

12. In Idaho appropriators are required to divert use and apply waters so as to secure the largest duty and greatest service. Van

surplus to the injury of lower owners.[13] The extent of his right is measured by the extent of his appropriation[14] and the amount of water in the stream.[15] If, however, the water is used for irrigation, the amount is not limited to that used at the time of the appropriation, but extends to such other amount within the capacity of the ditch[16] as may be required for the improvement and cultivation of lands for which the appropriation was made,[17] unless he is precluded by estoppel from asserting his rights.[18] One who appropriates water is entitled to the full amount appropriated to the exclusion of all subsequent appropriators,[19] and his rights may be

Camp v. Emery [Idaho] 89 P. 752. An appropriator acquires a right to water only to the extent to which it is applied to a beneficial use and cannot claim more than is necessary for the purpose of his appropriation. Where during a portion or all of the mining season there was more water in the creek than a prior appropriator could use, but during the remainder of the season there was not enough, held the taking of a small quantity of water from the stream during the spring and flush season did not injure him. Mann v. Parker [Or.] 86 P. 598.

13. A prior appropriator may divert and use the amount of water to which he is entitled but may not impede the flow of the remaining water to the injury of a lower owner. Van Camp v. Emery [Idaho] 89 P. 752.

14. The fact that a landowner has for years used water beyond the limits of a district under a claim of right to do so gives him no right to continue such unwarranted use. Jenison v. Redfield [Cal.] 87 P. 62. Extent of water right held not to have been formerly adjudicated in a prior proceeding to foreclose a mortgage on the land. Schmidt v. Olympia Water, Light & Power Co. [Wash.] 90 P. 212. In an action to determine rights to water alleged to have been appropriated, evidence held to show the appropriator entitled to 184 inches. Twaddle v. Winters [Nev.] 89 P. 289. Evidence sufficient to show that one was entitled to divert 25 inches of water for irrigation of his land. Pew v. Johnson [Mont.] 88 P. 770.

15. Where it was admitted that an upper and lower owner had equal rights to the use of waters of a stream, the latter could restrain the former from using all the water at times when there was not sufficient quantity for the needs of both. Rogers v. Overacker [Cal. App.] 87 P. 1107. Where a tunnel was driven into a mountain for the purpose of increasing the volume of water in a stream, the water inured to the benefit of all appropriators and one whose point of diversion was thirty miles below the point of inflow who had not assisted in building the tunnel could not segregate from the stream a volume of water equal to that flowing from the tunnel and assert exclusive right to it. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042. Where spring and surface water flowed with the waters of a creek at all times above the head of a canal, the prior right of the owner of the canal to a certain amount of water from the river did not entitle him to the spring and surface water as against a subsequent appropriator in case the creek became dry below the spring and above the head of the canal. Beaverhead Canal Co. v. Dillon Elec. Light & P. Co. [Mont.] 85 P. 880. In a suit to restrain interference with waters of an irrigation ditch where it was found that plaintiff was entitled to a certain amount of water and was awarded the right to carry it over land of another, and the landowner was given a right to use the ditch subject to such use, held that the owner was entitled to use the water only to such extent as would not deprive plaintiff of her share. Hoyt v. Hart [Cal.] 87 P. 569. Provisions of a decree restraining interference with waters of an irrigation ditch held not inconsistent, and sufficient to protect an easement. Id.

16. Where in a suit to establish water rights it was alleged that a ditch could at no time carry more than 600 inches per second and that the excess had been abandoned, a complaint previously filed containing a statement that the ditch could carry 800 inches was admissible. Boulder & White Rock Ditch Co. v. Leggett Ditch & Reservoir Co. [Colo.] 86 P. 101.

17. The fact that a stream in its native condition is so dammed as to cause water to percolate through and sub-irrigate meadow land will not justify the owner of the land in maintaining such condition to the injury of other appropriators but may be sufficient to initiate a right for a quantity of water sufficient for irrigation of the surface of the lands sub-irrigated. Van Camp v. Emery [Idaho] 89 P. 752.

18. Where an appropriator for five years made no attempt to extend the area of his cultivated land, whereby his purpose to expand the appropriation might have been disclosed, and no cause for such delay is apparent, he could not thereafter extend the use of the water to more of the land as against intervening appropriators. Seaweard v. Pacific Live Stock Co. [Or.] 88 P. 963. In such case where it appeared that a trespasser made an appropriation and thereafter sold his right to one who secured a lease from the owner of the land, the use of the water was properly allotted to him. Id.

19. Equity will not deprive him of his rights by distributing the water among subsequent appropriators though the general benefits would be thereby increased. Morris v. Bean, 146 F. 423. Where one purchased a squatter's claim and the water rights used with it, paid the purchase price and took possession which he held for two years when he received a deed from the squatter, his claim of title was not broken so as to allow an intervening appropriator of water a priority over his water right. Brown v. Newell [Idaho] 85 P. 385. Where prior to posting notice of appropriation of water from abandoned artesian wells on the public domain another had taken steps to obtain a pipe line right of way to such wells, and the boundaries of the right of way included the wells, such acts did not confer any rights

preserved and protected by injunction,[20] if definitely established [21] and it appears that he is equitably entitled to such relief.[22] An appropriator's right can be disputed only by one who has or claims a superior right, and then only to the extent to which such rights conflict.[23] Neither a riparian proprietor nor an appropriator has title to the waters of a stream before it reaches his land or point of diversion;[24] and where a stream which forms the outlet of a lake becomes dry, he is not entitled to water standing in the lake or in pools above his land.[25] The right of an appropriator of water for irrigation purposes to have the water flow in the river to the head of its ditch is an incorporeal hereditament to the ditch and coextensive with the right to the ditch itself.[26] An appropriator of the water of abandoned artesian wells on the public domain acquires no right to enter the land to bore additional wells.[27]

An appropriator may change the point of diversion if in so doing the rights of others are not injured.[28] In some states the method by which such change may be effected is prescribed by statute.[29]

to the water. Wolfskill v. Smith [Cal. App.] 89 P. 1001. A prior appropriator of a certain amount of water is entitled to such quantity or so much thereof as naturally flowed in the stream, unimpaired by subsequent changes therein by spring or seepage water finding its way into a tributary of the stream in the course of nature unaffected by artificial works constructed by a subsequent appropriator. Beaverhead Canal Co. v. Dillon Elec. Light & Power Co. [Mont.] 85 P. 880.

20. Application by owner of a dam for an injunction held to show that irreparable injury would result if a subsequent appropriator carried out his plans. Trade Dollar Consol. Min. Co. v. Fraser [C. C. A.] 148 F. 585. The fact that the defendant who claimed a right to take water in accordance with plans approved by the state would be compelled to condemn right of way for a ditch over complainant's land does not bar injunctive relief. Id. Where a prior appropriator has made an appropriation in accordance with the laws of the state and has built a dam so that he may utilize his water for power, he may enjoin a subsequent appropriator from ditching so as to carry water below his dam for power purposes, where the effect would be to lessen his head and endanger his dam by the proximity of the ditches. Id. Where a lower owner sued an upper proprietor to restrain him from using all the water of a stream but alleged no priority of user for domestic purposes, it was not necessary for the court to find on the allegation in the answer that it was necessary for the upper owner to use the water for irrigation and if it was not used to a reasonable extent defendant would suffer irreparable injury. Rogers v. Overacker [Cal. App.] 87 P. 1107. An original settler on land in 1868 appropriated water of a stream flowing through it which he used continuously. In 1905 owners further up constructed a dam for the purpose of storing water which they claimed was waste or seepage. The court found against these contentions. Held the lower owner could enjoin the maintenance of the dam. Desmond v. Sander [Wash.] 89 P. 179.

21. Where after one commenced to divert water a prior appropriator objected but offered to sell him the water, the prior appropriator was not entitled to enjoin the later one on the theory that it was necessary for all the water of the stream to flow through his ditch at all seasons in order to keep it open to carry the flush waters of the spring season. Mann v. Parker [Or.] 86 P. 598.

22. Where in a suit to enjoin diversion of water the injury sustained by plaintiff would be hardly appreciable in comparison with that suffered by defendant if the injunction was granted and defendant was able to respond in damages, an injunction would not issue. Mann v. Parker [Or.] 86 P. 598.

23. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. Where a water company was using water of a lake not as riparian proprietor but as an appropriator for the irrigation of nonriparian lands, it was not concerned with the disposition of surplus water so long as a reasonably ample supply remained in the lake throughout the season. Id.

24. Therefore a riparian owner on an outlet to a lake has no title to the waters of the lake. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338.

25. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338.

26. Rickey Land & Cattle Co. v. Miller [C. C. A.] 152 F. 11.

27. One who appropriates water from abandoned artesian wells on the public domain acquires the right to enter the land only to avail himself of the water and not to bore additional wells. Wolfskill v. Smith [Cal. App.] 89 P. 1001.

28. One entitled to divert water from a stream may change the point of diversion where rights of others will not be injured. Baer Bros. Land & Cattle Co. v. Wilson [Colo.] 88 P. 265. Where there is a several user of an appropriation by the owners, the water to which either is entitled may be changed both in point of diversion and place of use unless it injures rights of the others. Hallett v. Carpenter [Colo.] 86 P. 317. The pro rata interests of the owners of a mutual ditch using the water severally and the right to change the point of diversion may be determined in one proceeding. Id. It is no objection to a decree authorizing change of point of diversion of a portion of an appropriation that the amount adjudicated to be transferred was a definite quantity be-

A water right may be acquired by adverse user or prescription.[30]—A prescriptive right is limited to the extent of the use during the limitation period.[31]

The right of appropriation can be lost only by abandonment or adverse possession,[32] the elements of which must be clearly established.[33] Mere nonuse of the water by an upper owner and the fact that he permitted it to pass down the stream cannot make a lower owner's use adverse or strengthen his claim of appropriation or prescription.[34] The Wyoming statute providing that failure to use water for two years is an abandonment applies only to voluntary and not to enforced discontinuance.[35] Gradual and imperceptible encroachments by subsequent appropriators upon the rights of a prior appropriator will not permit the working of prescription against the latter.[36]

(§ 13) *B. Rights in ditches and canals.*[37]—A right of way for an irrigation ditch is an easement[38] which may attach to other lands as an appurtenant[39] and

cause if the supply became deficient the decree would be construed as permitting the transfer of the appropriator's proportionate share only. Id. A stockholder in a mutual ditch company may change his point of diversion if rights of others are not injured. Wadsworth Ditch Co. v. Brown [Colo.] 88 P. 1060. An application for a change of point of diversion which shows that the water is to be applied to a greater acreage does not establish that more water will be diverted, and hence does not show an injury to vested rights of others. Fulton Irr. Ditch Co. v. Meadow Island Irr. Co. [Colo.] 86 P. 748.

29. Laws 1899, p. 235, and Laws 1903, p. 278, prescribing the procedure where an owner desires to change point of diversion is not void though applying to a point of diversion already changed. Ashenfelter v. Carpenter [Colo.] 87 P. 800. Under Laws 1899, p. 235, the owner of a water right may not change the point of diversion until the provisions of the statute as to notice to other parties interested have been complied with. New Cache & La Poudre Irr. Co. v. Arthur Irr. Co. [Colo.] 87 P. 799. In a proceeding by an owner under Laws 1903, p. 278, to change the point of diversion, owners below the point of original intake cannot object that owners between the original and new point of diversion will be injured. Crippen v. Glasgow [Colo.] 87 P. 1073.

30. See 6 C. L. 1859. A finding that one had used a pipe line for more than five years as often as it was necessary for conveying water for irrigating purposes is a sufficient finding as to continuous use. Collins v. Gray [Cal. App.] 86 P. 983. A finding that a pipe line had been used for more than five years to carry water necessary for irrigation purposes and that the customary flow was 40 inches was not defective for failing to state the standard of measurement. Id. Where for 8 years a water company pumped sufficient water from a lake to irrigate certain gardens, a finding that it had never exercised water rights derived by certain deeds was erroneous. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338.

31. Adverse use of waters of a lake for watering stock do not carry right to use water for irrigating purposes. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. Evidence insufficient to show that an adverse right to use waters of a lake for irrigation purposes had been acquired. Id.

32. See 6 C. L. 1860. Where one had never abandoned his prior rights under a decree awarding him a certain quantity but for several years had not used all of the water, a subsequent decree confirming his right to the entire amount was not objectionable as conferring a greater right than he had appropriated as against junior appropriators. Boulder & White Rock Ditch Co. v. Leggett Ditch & Reservoir Co. [Colo.] 86 P. 101. On an issue as to abandonment of water rights, evidence as to intent or purpose to abandon is admissible. Id. Evidence sufficient to show that owners of a water right did not relinquish it. MacRae v. Small [Or.] 85 P. 503.

33. A prior appropriator of all the water of a stream can be deprived of his right by adverse user only where such user is established by clear evidence. MacRae v. Small [Or.] 85 P. 503. Evidence sufficient to show adverse user as against a portion of the water right of a prior appropriator. Id.

34. Rogers v. Overacker [Cal. App.] 87 P. 1107. Under Civ. Code, § 1411, the rights of water of a lake for irrigating purposes acquired by appropriation depends on use and ceases with disuse. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338.

35. Morris v. Bean, 146 F. 423. One is not guilty of laches where he complains of diversion hostile to his rights and receives water when it is turned down to him, or who is prevented from using the water by gradual diminutions through hostile diversion, unless such diversion continue with his consent. Id.

36. Morris v. Bean, 146 F. 423.

37. See 6 C. L. 1861.

38. Blake v. Boye [Colo.] 88 P. 470.

39. A right of way for an irrigation ditch, and to receive water from or discharge it upon land, are easements which may attach to other lands as appurtenances. Jones v. Deardorff [Cal. App.] 87 P. 213. A provision in a deed that the grantee should not use an irrigation ditch except to convey water to the north half of a certain section for use thereon is an easement which by use became appurtenant to such section. Id. Laws 1889, p. 116, providing that none of the parties interested in a ditch constructed by mutual consent or agreement shall without consent of the others cause the same to be filled or obstructed, converted parol licenses for the maintenance of drains into a perpetual easement if not revoked within a limited period, and secures joint owners of such

constitutes realty within the statute of frauds.[40] It may be acquired by adverse possession.[41] A right to use a ditch may be acquired by prescription though the owner of the land also uses the ditch for his own benefit.[42] The fact that a ditch is supplied with water from another ditch does not preclude the acquisition of a prescriptive right.[43] Where rights in a ditch depend on contract, the limits of the right must be found in the terms of the contract.[44] Where joint owners of a ditch incorporate, the corporation cannot impose extra burdens upon an owner who did not participate in the organization of the corporation.[45] Owners of a canal may be estopped to object to the deposit of refuse material therein.[46] In Ohio, county commissioners may not convert a living stream into a ditch.[47]

In many of the western states the power of eminent domain may be exercised in requiring ditch rights of way,[48] especially if the parties cannot agree as to the

ditch individual rights for the protection of such easement. Snyder v. Baker, 221 Ill. 608, 77 N. E. 1117. Such act has no relation to ditches controlled by drainage districts, and the landowner's right of action if any for filling the ditch under control of such district was against the drainage commissioners. Id.

40. A right of way for a ditch is real property within the statute of frauds. Bashore v. Mooney [Cal. App.] 87 P. 553.

41. Where one constructed an irrigation ditch across lands of another and used it adversely for sixteen years, when he made a slight change in it and used it for eight years longer, he acquired a prescriptive right to maintain it. McEwen v. Preece [Wash.] 88 P. 1031. One who constructs a ditch on land of another may acquire a right to it by adverse possession. Bashore v. Mooney [Cal. App.] 87 P. 553. A finding that one has been in actual adverse possession of a ditch for the statutory period, and had paid all taxes levied against it, and the right of way shows a prescriptive right. Id.

42. Such right may be acquired though another had the right to use the ditch for his own purposes to the extent of the remaining capacity. Bashore v. Mooney [Cal. App.] 87 P. 553. Evidence sufficient to show a prescriptive right to a ditch. Id. Evidence that the owner of land over which a ditch was constructed was asked concerning it, and made no claim to it, is admissible. Id. It is also admissible to show attempts to sell the ditch to the owner of the land. Id. One who constructs a ditch over land of another may acquire a prescriptive right to maintain such ditch for conveying a certain quantity of water, though the owner of the land was also using the ditch to carry water to his own land. Smith v. Hampshire [Cal. App.] 87 P. 224.

43. The fact that a ditch is supplied with water from another ditch instead of from a stream does not preclude the acquisition of a prescriptive right to maintain it. Bashore v. Mooney [Cal. App.] 87 P. 553.

44. In ejectment to recover possession of a ditch, evidence held insufficient to show a right granted to plaintiff's grantor to use the ditch and water without limit as to time, place, and quantity, but to show an agreement that defendant might use the water for specified purposes. Dondero v. O'Hara [Cal. App.] 86 P. 985. Where one was entitled to use another's ditch on condition that he enlarge it, in the absence of proof of noncompliance with the condition, it is presumed that his acts of shutting off the water in order to repair the ditch were reasonable. Mau v. Stoner [Wyo.] 87 P. 434. In an action for trespass on a ditch, a contract between plaintiff and defendant relative to enlarging the ditch was admissible to show plaintiff's title and the extent of it. Id. Where one bore part of the expense of constructing a drain on land of another, as well as the entire expense of constructing it on his own land, he acquired the right to have it kept open in the absence of proof of a violation of the contract between the parties. Thompson v. Normanden [Iowa] 108 N. W. 315. A finding that there was no prescriptive right to maintain an irrigation ditch across the land of another is not necessarily inconsistent that a right existed to maintain it during the existing irrigation season. Tew v. Powar [Colo.] 86 P. 342.

45. Where landowners constructed a ditch and, by custom prior to the formation of a corporation to operate the ditch, contributed to cost of maintenance above but not below the point of diversion, the corporation could not compel an owner not a member to contribute to the cost of maintenance below his point of diversion. Arroyo Ditch & Water Co. v. Bequette [Cal. 87 P. 10. Where in an action to recover entire cost of improvement there was no evidence of his share of cost above his point of diversion, judgment was properly rendered for him. Id.

46. The owners of a canal who stand by for several years and see refuse thrown into the canal, and permit the expenditure of large sums of money in reliance on the right to do so, are estopped to object to the deposit in the canal of a much less quantity of refuse. Morris Canal & Banking Co. v. Diamond Mills Paper Co. [N. J. Eq.] 64 A. 746.

47. The word "watercourse" as used in the county ditch law is synonymous with "drain," and the county commissioners are without authority to convert a living stream into a ditch by proceedings for locating and constructing a ditch. Greene County Com'rs v. Harbine, 74 Ohio St. 318, 78 N. E. 521.

48. Plaintiff in a suit to condemn a ditch right of way cannot be required to pay defedant's attorneys fee. Schneider v. Schneider [Colo.] 86 P. 347. In proceedings to condemn a right of way for an irrigation ditch, a complaint alleging that plaintiffs were owners of certain agricultural lands in a certain county, range, and township, and

compensation.[49] Statutes providing for such right must be complied with.[50] It is no defense to a proceeding to condemn a ditch right of way that plaintiff has no vested right to the water which the ditch was intended to carry.[51]

(§ 13) *C. Remedies and procedure.*[52]—A suit to determine a landowner's right to divert water from a stream for irrigation purposes, and to quiet title thereto, is in the nature of a suit to quiet title.[53] A citizen of one state may maintain suit in a Federal circuit court in another state to enjoin the unlawful diversion of water in the state, where suit is brought which prevents its flowing into his lands in the state where he resides,[54] or to quiet his title thereto.[55] A Federal court sitting in Nevada which acquires jurisdiction of a suit to quiet title to an appropriation of water from a stream in that state as against a resident of California, will maintain such jurisdiction against subsequent similar actions brought for the same purpose in California by defendant.[56] The district courts of Colorado have general jurisdiction of proceedings to adjudicate water rights.[57] Owners of several water rights may not join in an action to enforce them.[58] A complaint to restrain un-

that the water of a certain river which the proposed ditch was intended to carry were necessary for the irrigation of such land, is sufficient under Sess. Laws 1899, p. 261. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. Under Alaska Code, c. 22, § 204,. providing that land may be condemned for canals, flumes, etc., for mines and farms, land may be condemned for the ditch to carry water to work mines. Miocene Ditch Co. v. Jacabsen, 146 F. 680. Where a person acquired certain water rights and commenced construction of ditch in 1901, its right to acquire a right of way over mining claims located in 1902 was not affected by the fact that the ditch was not completed over such claims until after such location. Id. See, also, Eminent Domain, 7 C. L. 1276.

49. An allegation that the parties have been unable to agree as to the damages for the reason that the owner of the land will not make a stated demand, nor allow the use of his land for a ditch, sufficiently shows inability to agree. Fulton v. Methow Trading Co. [Wash.] 88 P. 117.

50. A complaint which describes a definite route and the dimensions of the ditch sufficiently describes the quantity of land, within Act 1899, p. 262, § 6. Fulton v. Methow Trading Co. [Wash.] 88 P. 117. Any informality, in a decree in proceedings to condemn a ditch right of way, not exactly conforming to Acts 1899, p. 262, requiring that the damage be paid to the clerk of court before work was commenced is cured by a supplemental transcript showing that it had been paid. Id. In a proceeding to condemn a ditch right of way to convey waste water from defendant's to plaintiff's land, the statute relative to enlarging ditches and their use by others than the owner does not apply. Schneider v. Schneider [Colo.] 86 P. 347. Mills' Ann. St. §§ 2256, 2257, relative to the use of water for irrigation and the securing of ditch rights of way, do not apply. Id.

51. Schneider v. Schneider [Colo.] 86 P. 347. Failure to prove that he was the owner of a water right did not require a nonsuit. Id. In a proceeding to condemn such a ditch, the fact that plaintiff may not be entitled to appropriate the water, that there may not be sufficient water for his use, or that his plan for using it is impracticable, is not of importance. Id.

52. See 6 C. L. 1863.

53. Rickey Land & Cattle Co. v. Miller, 152 F. 11.

54. Morris v. Bean, 146 F. 423.

55. A prior appropriator of a certain part of the flow of a river to irrigate land in Nevada who claims that his rights are being interfered with by an appropriator in California who resides in such state may sue in a Federal Court sitting in Nevada to quiet his title. Rickey Land & Cattle Co. v. Miller 152 F. 11. The jurisdiction of the Nevada court is not defeated by the fact that the defendant set up in his cross bill that it had an appropriation from the same stream in California for the purpose of irrigating lands in that state. Id. In a suit to quiet title to a prior appropriation in Nevada against an appropriator from the same stream in California, a codefendant who does not deny the priority of complainant's appropriation, but prays that his priority over other defendants be settled, is defensive as to such defendant, and not objectionable as not germane to the original bill. Rickey Land & Cattle Co. v. Wood [C. C. A.] 152 F. 22. Cross bills between defendants in a suit in the Federal court to determine rights of appropriators of which the court has jurisdiction because of diversity of citizenship between complainant and defendants are ancilliary, and the court has jurisdiction regardless of citizenship. Miller v. Rickey, 146 F. 574.

56. Rickey Land & Cattle Co. v. Miller, 152 F. 11. Where a Federal court has obtained jurisdiction of a suit to determine rights of appropriators, it is its duty to protect such jurisdiction, and it will enjoin a defendant from prosecuting a later suit in a state court. Miller v. Rickey, 146 F. 574.

57. The district courts of Colorado have general jurisdiction of procedings to adjudicate water rights, and, where a decree recites that statutory notice was given, mere absence from the judgment roll of proof thereof which should have been included does not affirmatively show absence of jurisdiction. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042.

58. A complaint by fourteen owners of water rights to compel a water company to deliver to them sufficient water to irrigate their lands, pursuant to the several contracts of each party with the water com-

lawful diversion should state facts showing the complainant's prior appropriation.[59] A cross bill setting up only matters of defense and praying affirmative relief is demurrable.[60] Where various persons along a stream divert water in violation of the rights of a prior appropriator, without any community of action, nothing more than nominal damages can be awarded in a suit in equity to restrain them from diverting the water.[61] In a suit by a prior appropriator to restrain diversion of water by others above him where no damages are claimed it is no defense to one defendant that others who have rights inferior to his are diverting more water than is claimed by plaintiff.[62] A statute prescribing a general chancery procedure may be enforced in a Federal court of equity.[63]

In Colorado the procedure by which a change in point of diversion may be obtained is prescribed by statute.[64] A mutual ditch company is entitled to institute such a proceeding.[65] Only the right to change the point of diversion can be determined in such proceeding,[66] but the decree may be made on such conditions as will prevent injury to other users.[67]

In statutory proceedings only the rights contemplated by the statute can be adjudicated.[68] A decree determining water rights should be definite.[69] Except as

pany, is demurrable for misjoinder of parties and causes of action. Creer v. Bancroft Land & Irr. Co. [Idaho] 90 P. 228.

59. A complaint by a senior appropriator to restrain unlawful diversion must state facts showing plaintiff's appropriation and its priority; it is insufficient to merely allege that he was a prior appropriator and that his rights were being interfered with. Carroll v. Vance [Colo.] 88 P. 1069. A complaint by a prior appropriator to restrain unlawful diversion, though demurrable for uncertainty, was held cured by the answer raising issue as to priority, and alleging that plaintiff used the water wastefully or there would be sufficient for both. Id.

60. In a suit to enjoin diversion of water, a cross bill alleging priority of right and praying affirmative relief sets up only matter of defense, which may be taken by answer, and is demurrable. Miller v. Rickey, 146 F. 574.

61. Morris v. Bean, 146 F. 423.

62. Miller v. Rickey, 146 F. 574.

63. Civ. Code Mont. § 1891, providing that in actions for the protection of water rights all persons who have diverted water may be joined and the rights and priorities settled by a single judgment, establishes a procedure consistent with genral chancery proceedings, and may be enforced in a Federal court of equity. Ames Realty Co. v. Big Indian Min. Co., 146 F. 166. In a suit to protect certain rights in a stream against other proprietors residing in different states, cross bills by all of such owners may be entertained regardless of citizenship. Id.

64. Sess. Laws 1903, p. 278, prescribing procedure in a proceeding to obtain a change in the point of diversion, requiring notice of the proceeding to be published in a newspaper "in such county into which such water district may extend," means the county of the court in which the proceeding was instituted, and where the district extends over two counties it must be published in the county in which the proceeding was instituted. Wadsworth Ditch Co. v. Brown [Colo.] 88 P. 1060. One who contracts to purchase stock in a mutual ditch company upon condition that he obtain a decree changing the point of diversion, and the contract requires him to institute such a proceeding, is within Sess. Laws 1903, p. 278. Id. A motion to dismiss a proceeding to change a point of diversion, based on a question which has been met by legislative enactment since the initiation of the proceeding, will not be ruled upon. Roberson v. Wilmoth [Colo.] 90 P. 95.

65. Sess. Laws 1903, p. 278, giving the right to change the point of diversion from a natural watercourse, gives such right to mutual ditch companies and shareholders who are consumers. Wadsworth Ditch Co. v. Brown [Colo.] 88 P. 1060.

66. In a proceeding under Sess. Laws 1903, p. 278, to change the point of diversion from a natural stream, only the right to such change can be determined a decree in a former proceeding as to the right to the water is conclusive on that point. Wadsworth Ditch Co. v. Brown [Colo.] 88 P. 1060.

67. Under Sess. Laws 1903, p. 278, providing that where the point of diversion from a stream is changed in proceedings under such statute the court may decree the change upon conditions which prevent injury to other users, it may provide in a proceeding by a stockholder in a mutual ditch company that the stock of the petitioner should still be subject to assessment, and that he should also be subject to all the liabilities of a stockholder. Wadsworth Ditch Co. v. Brown [Colo.] 88 P. 1060.

68. The irrigation statutes of 1879 and 1881 do not contemplate a determination of of the rights of the different owners of the ditch as between themselves to any particular quantity of water, the object being to determine priorities, therefore a decree under such statutes cannot be made to quiet title to any certain amount of the aggregate quantity of water in a ditch. Evans v. Swan [Colo.] 88 P. 149.

69. A judgment in a suit by a lower owner against an upper restraining the latter from using all the waters of a stream should fix the amount that should be permitted to flow down to the lower owner. A judgment restraining the upper owner from diverting such water in a manner that

provided by statute, or in case of fraud, decrees establishing water rights in statutory proceedings are conclusive [70] and are not subject to modification for the purpose of establishing an additional priority which could not be established at the time of the original proceeding but to which it subsequently became entitled.[71] A commissioner may be appointed to carry a decree into effect.[72] A water commissioner is not an officer of the court, and it is not contempt to interfere with him in the performance of his duties.[73] One not a party is not bound by a decree determining water rights.[74] In Montana a decree rendered in one county may be enforced in another where the boundaries of an irrigation district have been changed.[75]

§ 14. *Irrigation districts and irrigation and power companies.*[76]—Irrigation districts may be formed under various statutes prescribing the method of formation and the powers and duties of officers.[77] In the organization of irrigation districts, statutes prescribing the procedure must be complied with.[78] Where statutes conflict the latter one controls.[79] Statutes providing for the organization and government of irrigation districts impose special burdens and are to be strictly construed and, in cases of doubt, in favor of the taxpayer.[80] A landowner within one dis-

would prevent sufficient water flowing down to supply the lower owner's needs is fatally defective. Rogers v. Overacker [Cal. App.] 87 P. 1107. Such judgment did not constitute a complete determination of the rights of the parties, and could not be pleaded as an estoppel. Id.

70. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042. Where a decree under Sess. Laws 1879, p. 99, and Sess. Laws 1881, p. 142, relating to adjudications concerning priority of appropriations has been rendered, distribution of water cannot be made otherwise than under the decree, and a party thereafter receiving water cannot claim that he did not recognize the decree. Combs v. Farmers' High Line Canal & Reservoir Co. [Colo.] 88 P. 396. A decree in proceedings under such statutes is conclusive on the person receiving water from the company organized to carry water for hire. Id.

71. Farmers' Union Ditch Co. v. Rio Grande Canal Co. [Colo.] 86 P. 1042.

72. A decree determining the rights of parties to water of a river, appointing a commissioner to distribute the water, and authorizing him to enter on canals, dams, etc., and make rules as to distribution, held the appointment of the commissioner was a proper method of carrying the decree into effect, and his discretion in the matter was administrative and not judicial. Montezuma Canal Co. v. Smithville Canal Co. [Ariz.] 89 P. 512.

73. A decree adjudicating priority of rights, under Mills' Ann. St. §§ 2403, 2408, being in rem and containing no order to any one to do or refrain from doing any act, and the water commissioner not being an officer of the court, it is not contempt of court to interfere with him in the discharge of his official duties. Roberson v. People [Colo.] 90 P. 79.

74. Where the rights of all parties in waters of a creek are determined by final decree, and all parties enjoined from interfering with the rights of others, the court is without jurisdiction in a summary proceeding on less than twenty-four hours notice to enjoin a person not made a party, whether he be a trespasser or claim an independent right from using waters of the creek. State v. District Ct. of First Judicial Dist. [Mont.] 85 P. 525.

75. Where, after a decree enjoining interference with water, the county in which the water was situated and the decree rendered was made a part of another county and judicial district, the court of the new district has jurisdiction to enforce the decree by contempt proceedings. Sess. Laws. 1897, p. 48. State v. District Ct. of Ninth Judicial Dist. [Mont.] 86 P. 798.

76. See 6 C. L. 1865.

77. Irrigation district law (Laws 1901, p. 198, c. 87) is not repugnant to the constitutional provision requiring bills to contain but one subject which shall be clearly expressed in the title. Anderson v. Grand Valley Irr. Dist. [Colo.] 85 P. 313. Irrigation district law (Laws 1901, p. 198, c. 89) does not violate the due process clause of the constitution. Id. Nor does it violate the constitutional provision that waters of streams are property of the public, subject to appropriation. Id.

78. Published notice of time and place of first meeting held insufficient because not signed. Ahern v. High Line Irr. Dist. Directors [Colo.] 89 P. 963. Notice held defective because misleading. Id. Where, in special proceedings by the directors of an irrigation district to determine the validity of its organization, an issue is made as to the qualifications of the signers of the petition, the board must prove their qualifications. Id.

79. Where statutes creating irrigation districts conflict as to the territory included therein, the later statute controls and a water commissioner having no jurisdiction outside his own district cannot claim compensation for services performed in the territory within the lapse. Fravert v. Mesa County Com'rs [Colo.] 88 P. 873.

80. Ahern v. High Line Irr. Dist. Directors [Colo.] 89 P. 963. Under St. 1897, pp. 254, 272, where an irrigation district publishes notice for bids for construction work, such notice must describe the work substantially according to the plans and specifications. Healy v. Anglo-Californian Bk. [Cal. App.] 90 P. 54.

trict has no right to use water beyond the limits of the district.[81] In changing the boundaries of a district, statutory requirements must be complied with.[82]

Where a major portion of the tenants in common of a water right incorporates, such corporation cannot control the distribution of water without the consent of owners not joining in the organization of such corporations.[83] What property is taxable for benefits depends on the statute authorizing taxation.[84] Irrigation companies authorized to exercise the power of eminent domain are quasi public corporations and cannot limit their liability to the public by contract.[85] The power of an irrigation company to levy assessments on stock depends on statute or by law of the company.[86] An assessment not regularly levied may be ratified.[87]

§ 15. *Water companies and water supply districts. Water companies.*[88]—A corporation formed for the purpose of supplying water or water power is a quasi public corporation and is bound to serve the public without unjust discrimination.[89] A clause in a contract of a corporation of that character which would prevent such service to the public is void.[90] Its rights and duties under its franchise or contract must be determined from the entire contract and not from any particular portion of it.[91] It possesses such powers as are conferred by statute.[92] As a taxpayer,

81. Under St. 1887, p. 29, providing for the organization of irrigation districts, the object of which is to enable owners whose lands are susceptible of irrigation from a common source to form a district, a land owner though part of his rights are as assignee, has no right to water for use beyond the limits of the district. Jenison v. Redfield [Cal.] 87 P. 62.

82. Laws 1901, p. 199, providing that county commissioners may modify the boundaries of a proposed district, but shall not exclude territory susceptible to irrigation by the system of works, does not give the commissioners power to refer requests for the exclusion of land to a committee of petitioners and act on their determination without investigation. Ahern v. High Line Irr. Dist. Directors [Colo.] 89 P. 963. Laws 1901, p. 199, providing that county commissioners may modify the boundaries of a proposed irrigation district as described in the petition, held the action of the board in excluding certain lands could be reviewed in special proceedings by the directors of the irrigation to determine the validity of its organization. Id.

83. Where persons owning in common a right to use a certain quantity of water agreed among themselves as to the manner of use, and owners representing the major portion of the right incorporated, held such corporation had no right without the consent of other owners to control the distribution of the water. Bartholomew v. Fayette Irr. Co. [Utah] 86 P. 481.

84. Poles and wires of a telegraph company placed in railroad land under a contract reserving them as personal property cannot be assessed by an irrigation district under St. 1887, p. 29. Not real property. Western Union Tel. Co. v. Modesto Irr. Co. [Cal.] 87 P. 190. Nor can they be assessed under Pol. Code, §§ 3617, 3663, and St. 1897, p. 267. Id.

85. Colorado Canal Co. v. McFarland [Tex. Civ. App.] 15 Tex. Ct. Rep. 848, 94 S. W. 400.

86. In an action to recover assessments on fully paid irrigation stock, evidence held to show that statutory notice of the meetings at which the assessment was levied was given. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123. A stockholder cannot object to assessments on fully paid stock which he either voted for or paid, though it is provided by statute that such assessments may be levied only where stock has been fully subscribed, and this requirement had not been complied with. Id. Both by by-laws of an irrigation company and by 3 Mills' Ann. St. Rev. Supp. § 481, public and personal notice was required of stockholder's meetings. A stockholder ratified a meeting by paying an assessment levied on fully paid stock. Held that no notice of an adjourned session of such meeting was required to render the stockholder liable for another assessment levied at the adjourned meeting by paying an assessment levied on by an irrigation company to defray expenses for a season was held excessive and partially void because to be used in part in carrying out an illegal contract, the action of the directors in reducing the assessment was in effect the making of a new one not effected by the judgment holding the first one void. Grand Valley Irr. Co. v. Fruita Imp. Co. [Colo.] 96 P. 324.

87. Payment of an assessment levied on fully paid stock of an irrigation company, as authorized by 1 Mills' Ann. St. § 569, is ratification of the meeting levying the assessment. Callahan v. Chilcott Ditch Co. [Colo.] 86 P. 123.

88. See 6 C. L. 1866.

89. Sammons v. Kearney Power & Irr. Co. [Neb.] 110 N. W. 308. A water company is bound to comply with its duty under its franchise and contract to furnish water, though its supply is from a source different from that originally contemplated. People v. New Rochelle Water Co., 104 N. Y. S. 92.

90. Sammons v. Kearney Power & Irr. Co. [Neb.] 110 N. W. 308.

91. People v. New Rochelle Water Co., 104 N. Y. S. 92.

92. Act June 26, 1895, is supplemental to Act April 29, 1874, and authorizes water companies organized thereunder to lease their property to each other. Moore v. Chartiers Valley Water Co. [Pa.] 65 A. 936.

it has all the rights of one.[93] A water company may not, without first obtaining proper authority, lay its mains in the streets.[94] Where a water company acquires property in consideration of its agreement to make certain improvements, it is bound to make such improvements [95] or other equitable compensation.[96] The necessity of resort to condemnation proceeding for the acquisition of land is a question for the court.[97] Public use and necessity are elements to be considered in condemning land for the purpose of increasing the water supply of a city.[98] A water company's contract rights under the franchise and enabling ordinances are covered by a mortgage on its general property.[99] Such rights pass to the purchaser on foreclosure, or pass under a quitclaim deed of all its property.[1]

Water franchises.[2]—A franchise to construct waterworks is quasi public and can be conferred only through authority delegated from the state.[3] The mere grant of a franchise raises no implication that the municipality will not construct a competing plant.[4] A water company placing its pipes in the streets under a franchise does so in subordination to the superior rights of the public to construct sewers in the same streets whenever public interests so demand.[5] A requirement in the fran-

93. A private waterworks company which is a taxpayer may maintain a suit to restrain the diversion of funds raised by the taxation for the specified purpose of constructing a waterworks plant. Owensboro Waterworks Co. v. Owensboro, 29 Ky. L. R. 1118, 96 S. W. 867.

94. Under the statutes and general policy of the state of Maryland, a water company may not lay its pipes in the highway without first obtaining the consent of the authorities controlling the highways. Baltimore County Water & Elec. Co. v. Baltimore County Com'rs [Md.] 66 A. 34.

95. Where a water company desiring to lay a main through certain land contracted to grade the strip as a highway, and two of the deeds recited that they were made in consideration of the contract and others recited a nominal consideration and the advantage to be derived from the main. The company opened the strip for part of the distance, held, on its acquisition of land through which the way was not opened, it was required to open it. Bell v. Louisville Water Co., 29 Ky. L. R. 866, 96 S. W. 572. Where a water company received a strip of land in consideration of opening a way over it and part of the way was opened, but several years later the grantors learned that the company was about to build a permanent structure at a place where the way was not opened and brought suit, held not barred by laches. Id.

96. Where a water company acquired a strip of land for a main in consideration of opening it as a way, and erected on the way a permanent structure obstructing travel, held the removal of the structure would not be enjoined but the company would be required to pay the difference in the value of the land opened as a way and closed. Bell v. Louisville Water Co., 29 Ky. L. R. 866, 96 S. W. 572.

97. Under Acts 1889, p. 1371, authorizing the city of Rome to increase its water supply, and declaring that condemnation proceeding may be resorted to if land cannot be acquired by purchase, the necessity of resort to condemnation proceedings is a question for the court. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 247, 100 N. Y. S. 357. Acts 1899, p. 1367, c. 624, authorizing the city of Rome to increase its water supply by taking water from Fish Creek, operated to give the city a preference right to such waters so that the filing by another of a map and survey of a location, as required by Laws 1880, p. 1151, prior to an election by the city, did not give it a prior right to the waters of the stream. Id.

98. City of Rome v. Whitestown Waterworks Co., 113 App. Div. 247, 100 N. Y. S. 357. In proceedings to condemn land to increase the water supply of a city, evidence held sufficient to show a necessity. Id. Where land was appropriated by a municipality for water supply purposes, it was proper to admit evidence showing that the land at the time of the appropriation was burdened with an easement in the city to dig ditch, and lay pipes. Creighton v. Charlotte Water Com'rs [N. C.] 55 S. E. 511.

99, 1. City of Vicksburg v. Vicksburg Waterworks Co., 202 U. S. 453, 50 Law. Ed. 1102.

2. See 6 C. L. 1866.

3. Washburn Waterworks Co. v. Washburn [Wis.] 108 N. W. 194.

4. A company organized subsequent to Act June 2, 1887, has no exclusive privilege to the use of the streets in the absence of agreement, and the mere grant of a right to lay pipes does not prevent the city from thereafter installing its own waterworks. Hastings Water Co. v. Hastings Borough [Pa.] 65 A. 403. Where a water company was incorporated as provided by St. 1882, p. 101, c. 142, it enjoyed no vested rights giving it immunity from competition by the construction of a municipal plant as authorized by statute. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. A statute authorizing a town to construct a waterworks system is not a taking of the property of an existing water company without due process. Id. A contract between a city and water company by which the latter is granted a franchise to lay pipes and furnish water to the inhabitants does not by implication preclude the city from constructing a system. Tillamook Water Co. v. Tillamook City [C. C. A.] 150 F. 117.

5. If as a consequence of such improvement the water company is required to relay its pipes, it may not recover the ex

chise that water be furnished free of charge to certain public institutions is based on a consideration.[6]

Water boards and districts.[7]—A water district is a public municipal corporation.[8] A board of water commissioners which acts wholly independent of the municipality is not subject to the statutory regulations relative to debts of municipalities.[9] A board of waterworks with authority to own stock of water companies, and to take possession of and operate their properties, is not a corporation created to carry on private business.[10] A sewage board with exclusive control over ponds and reservoirs may prohibit anything which is likely to pollute the water supply.[11] Statutory grants to water districts are subject to general rules of construction.[12]

Public ownership.[13]—Whether public interests would be served by conferring on towns authority to furnish their inhabitants with water is a matter for the exclusive determination of the legislature.[14] A city exercises its business or proprietary function in purchasing waterworks or contracting for their construction or operation.[15] A city owning and operating a waterworks system may supply water outside the city if there is sufficient water to do so after supplying the inhabitants,[16] but may not contract to extend its waterworks system to an adjoining city.[17] The requirements of a statute authorizing a municipality to lease or purchase a water plant must be substantially complied with.[18] A municipality in purchasing a water-

pense from the city. Anderson v. Fuller [Fla.] 41 So. 684.

6. Where the grant of a waterworks franchise required the company to furnish water to schools and churches free of charge, held the agreement to furnish such water was based on a consideration. Independent School Dist. v. Le Mars City Water & Light Co. [Iowa] 107 N. W. 944.

7. See 6 C. L. 1867.

8. The Augusta water district is a public municipal corporation, and by virtue of Rev. St. c. 9, § 6, its property, appropriated to public use, is exempt from the taxation. City of Augusta v. Augusta Water Dist., 101 Me. 148, 63 A. 663.

9. Act April 4, 1867 (P. L. 768), creating the commissioners of the city waterworks of Erie, makes them wholly independent of the city authorities, and they may contract to improve the waterworks to be paid out of their own funds without regard to the constitutional provision requiring an appropriation before incurring a liability. Saltsman v. Olds [Pa.] 64 A. 552.

10. Acts 1906, p. 52, creating a board of waterworks with authority to own all the stock of waterworks companies, and to take possession of property and franchises and operate them for the benefit of the city, did not create a corporation to carry on private business contrary to the constitutional provision forbidding creations of such corporations by special acts. Kirch v. Louisville, 30 Ky. L. R. 1356, 101 S. W. 373.

11. Under a statute providing for the appointment of a sewerage board to operate a system of waterworks and protect purity of the water and have exclusive control over ponds and reservoirs, the board may prohibit boating on a great pond which is part of the water supply system, though boating might have been conducted without injury to the water. Sprague v. Minon [Mass.] 81 N. E. 284.

12. Acts 1902, c. 486, authorizing the South Deerfield water district to take water from Roaring Brook and its tributaries, construed, and held to authorize the taking of all the waters of the brook except a certain portion described. McLeod v. South Deerfield Water Supply Dist. [Mass.] 78 N. E. 764.

13. See 6 C. L. 1868.

14. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

15. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. The legislature authorized the city of Omaha to contract for the construction and operation of waterworks on such terms and regulations as could be agreed upon. The city by ordinance offered the contract for the construction of the works and their operation for twenty-five years at such prices as the company should make with consumers. Such ordinance was accepted. Held it was a contract and the city could not reduce the rates. Id.

16. Rogers v. Wickliffe, 29 Ky. L. R. 587, 94 S. W. 24.

17. Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25. Under Ball. Ann. Codes & St. § 739, a city of the first class has authority to supply water to its own citizens, but not to another municipality. Farwell v. Seattle [Wash.] 86 P. 217. A borough may construct a reservoir and furnish water to its inhabitants, but not to persons outside the borough limits. Stauffer v. East Stroudsburg Borough [Pa.] 64 A. 411. In assessing damages for the taking of water from a stream for a borough reservoir, they are to be assessed as to the date of appropriation. Id.

18. Act June 19, 1893, authorizing towns to purchase or lease waterworks, and providing that before a contract shall be binding the council shall pass an ordinance including its terms, is sufficiently complied with by an ordinance for the leasing of a system setting forth the lease in the preamble and referring to it in the body of the ordinance. Gault v. Glen Ellyn, 226 Ill. 520,

works plant takes it subject to the burdens upon it [19] and cannot discontinue to supply water to persons entitled to it.[20] A statute authorizing a city to purchase a water plant authorizes the company to sell.[21] A completed contract for the purchase of an equity of redemption of a water plant is not invalidated by the execution by the grantor of a warranty deed to a third person.[22] Where the grant of a franchise reserves to the city the option to purchase at the end of a certain period, an election to exercise the option constitutes a complete contract.[23] If the measure of compensation is fixed by statute it must be determined by a construction of such statute.[24] A statute authorizing a town to construct an independent system or requiring it to purchase the plant of an existing company if it desired to sell, upon conditions which can come into existence only on the initiative of the town, is valid.[25] Where the town accepts such statute and the existing company gives notice of its desire to sell, the town must act on such offer within a reasonable time.[26] After the offer of the company has been accepted, specific performance of the contract may be decreed.[27] As a general rule a proposition to purchase a water plant must be submitted to the voters.[28] The vote of a town rejecting a water company's offer to sell its

80 N. E. 1046. Under such statute an ordinance authorizing the leasing of the waterworks was not void because it contained an option from the water company to the village to purchase the plant. Id.

19. Where a city purchases land and water rights previously reduced to private ownership, the property is not relieved from the burden upon it by virtue of the appropriation of the water to public use to which it was subject at the time of the purchase. Fellows v. Los Angeles [Cal.] 90 P. 137.

20. A city after acquiring a water system cannot discontinue its operation, cease to furnish water to persons entitled to it, retain title and control of the property, and permit water previously devoted to public use to go to waste unless circumstances absolve it from the duty to furnish water. Fellows v. Los Angeles [Cal.] 90 P. 137.

21. Rev. St. 1898, §§ 951-959, authorizing a city to purchase a water plant, authorizes the corporation to sell and so disable itself from performing the service. Connor v. Marshfield, 128 Wis. 280, 107 N. W. 639. Contract for purchase of an equity of redemption in a water plant, construed. Id.

22. Connor v. Marshfield, 128 Wis. 280, 107 N. W. 639. Under Rev. St. 1898, §§ 951-959, the purchase by a city of the equity of redemption in a water plant is not void for want of popular vote. Id.

23. Under a franchise to construct and operate waterworks for twenty years, but giving the city the option to purchase at the end of fifteen years, the price to be determined by the court if it could not be agreed upon, where the city elected to exercise its option to purchase, the contract was complete from such date, and rights of the parties should be adjusted as of that date. Galena Water Co. v. Galena [Kan.] 87 P. 735. In determining the price in such case, the fact that the system is established, in operation, and has an unexpired franchise, is to be considered. Id.

24. Under St. 1887, p. 715, providing that a town might buy the plant of a water company by paying the total cost, including interest on each expenditure from its date, and that the excess of expenditures over income for any year should be added, and vice versa, held the company's investment as decreased or increased in any year was the basis for computing interest for the next year. Inhabitants of Tisbury v. Vineyard Haven Water Co. [Mass.] 79 N. E. 256.

25. A statute authorizing the construction of an independent system in towns supplied by private corporations, and also providing that the supplying company shall be left unrestricted in its business, or sell to the town which is required to purchase under certain conditions which can come into existence only in the initiative of the town, is valid. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Where a water company elected to sell its plant to the town, as authorized by St. 1905, p. 488, and the town voted to purchase, the elements of compensation to be considered in determining the price should not be estimated until title passes. Id.

26. Where, after acceptance by a town of a statute authorizing it to establish an independent water system, the existing water company notified the selectmen of its desire to sell, the town was required to act on such offer within a reasonable time. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Where a town accepted St. 1905, p. 488, authorizing towns to establish an independent water system in July, 1905, and an existing water company immediately offered to sell its plant but its proposition was rejected on Sept. 25, 1905, but was accepted on Nov. 23, 1907, held the last vote constituted an acceptance within a reasonable time. Id.

27. Where a water company's proposition to sell to a town had been accepted under St. 1905, p. 488, c. 477, requiring the town to purchase within thirty days, specific performance of the contract could be decreed at the suit of either party. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Specific performance will not be denied because there exists an adequate remedy at law for damages. Id. St. 1905, p. 488, c. 477, providing that after acceptance by a town of a water company's proposition to sell its plant to the town the company shall complete the conveyance within thirty days, only provided a minimum limit of time, and did not preclude a transfer subsequent to that period. Id.

28. Under Rev. Laws, c. 25, § 31, provid-

plant did not exhaust the town's right to vote again on the proposition.[29] Under a statute providing that a town cannot purchase the plant of a waterworks company without the consent of a majority of the selectmen, the assent required is the affirmative act of the selectmen acting as a board.[30] A city is entitled to compensation where its waterworks property is taken in condemnation proceedings.[31]

Contract for public supply.[32]—Municipalities may be authorized to contract for a water supply [33] and, in the exercise of its police power, may contract for a supply for fire extinguishment purposes.[34] An ordinance under which a water company is to furnish a supply is a contract,[35] and if unreasonable and oppressive and passed in the interests of the company may be set aside,[36] but not if it appears fair [37] and does not render the city liable for acts of the company.[38] A taxpayer

ing that a town, by action of its selectmen, ratified by a majority of the voters, may purchase a water supply or plant, a proposed contract to purchase a water company's plant must be ratified by the voters before it is enforceable. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Where voters were called upon to vote on a proposition to purchase a water plant, the warrant of the town meeting was the only authorized source the voters could look to to ascertain what subjects were presented for their decision, and no action could be taken by them in the absence of an article covering such proposed purchase. Id. Where the vote was void, and the town thereafter refused to ratify the action of the selectmen, the fact that it accepted a deed and took possession did not estop it to deny that title passed. Id. Where the vote of the electors was void, subsequent acts and acceptance of deed and possession did not pass title nor obligate the town to pay the purchase price. Id.

29. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497.

30. Revere Water Co. v. Winthrop [Mass.] 78 N. E. 497. Such assent is not to be implied from a recital in the contract authorizing selectmen to execute a contract on behalf of the town, the board in existence at the time it is made having declined to assent. Id. Where the vote of selectmen of a town to purchase a waterworks plant was void because of failure of a majority of the selectmen to assent as required by statute, it was ineffective as foundation for a bill for specific performance by the water company. Id. Rev. Laws, c. 25, § 31, providing that a town by action of its selectmen, ratified by the voters, may purchase a waterworks system, contemplates that the question of initiative public policy of such purchase shall have first been passed on by the selectmen. Id.

31. Under Laws 1901, p. 423, where city waterworks property is taken for a street, the city is entitled to an award of damages to the same extent as other owners. In re Van Cortlandt Ave. [N. Y.] 78 N. E. 952.

32. See 6 C. L. 1868.

33. Act Ohio May 12, 1886, authorizing cities of the fourth grade of the second class to contract for water supply, superseded all prior legislation on the subject and rendered inapplicable 82 Ohio Laws, p. 11, requiring such contracts to be submitted to the voters. City of Defiance v. McGonigale [C. C. A.] 150 F. 689.

34. A city in the exercise of its police power may contract for a supply of water for fire extinguishment to be furnished either by the municipality or by another under contract with it. Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25.

35. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622.

36. An ordinance contracting for a water supply showing on its face that it is unreasonable and passed in the interest of the grantee of the franchise will be set aside. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. Court will inquire at the instance of a taxpayer whether there has been actual or intentional fraud in the enactment of an ordinance contracting for a municipal water supply. Id. The fart that the president of a water company seeking to obtain a franchise held various interviews with members of the council, endeavored to procure as an advantageous contract as possible, employed counsel and told the council that they did not need any, does not show fraud. Id. A contract by a city for a water supply provided that the company should supply the streets, alleys, and public squares with water, enlarge the capacity of the plant to meet growing demands, water should be the purest obtainable, with provisions as to pressure, afforded the city ample protection as to quality and quantity. Id.

37. It is presumed that in contracting for a water supply a city council made proper investigation to determine what would be reasonable hydrant rentals. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. The fact that the amount a city contracted to pay for hydrant rentals, with other expenses, would absorb all the current revenues at the time, is not objectionable on the ground that it appropriated all revenue of the city in advance of levy. Id. The fact that a contract by a city for a water supply netted the company a profit of $25 for furnishing additional hydrants does not show that the charge was so exorbitant as to avoid the contract. Id. An annual rental of $35 per hydrant is not so excessive on its face as to render the contract void. Id. Where a contract for water supply provided that if the supply should at any time cease, the city might take temporary charge of the plant and make the expense incurred a lien on the earnings of the company, a contention that the city was at the mercy of the water company as to the amount of water to be supplied was untenable. Id.

38. Taxpayers may not enjoin enforcement of a contract for a water supply on

may sue to enjoin the execution of a contract on the ground that it is ultra vires.[39] The contract may be made for a reasonable term.[40] A contract by a water company to furnish a town with water for domestic and fire purposes and other lawful uses does not authorize the company to furnish water for power purposes to the prejudice of the town for domestic and fire uses.[41] A succeeding municipal corporation which uses the water contracted for by its predecessor is bound by its contract.[42] A contract to furnish water free of charge for fire extinguishment purposes does not require the company to furnish water free of charge in a private system of fire protection.[43] A company is entitled to compensation for services rendered,[44] and, when it complies with its contract to furnish a certain number of free taps,[45] it may make a reasonable charge for other taps installed.[46] The mere receipt and consumption of water by a city does not show acceptance of such service as performance of the contract.[47]

§ 16. *Water service and rates.*[48] *Service contracts.*[49]—A statute giving a city power to authorize the construction of water works and fix rates by contract makes every consumer privy to the contract to such extent as enables him to enforce his rights under it.[50]

the ground that it required the construction of a dam and that, no right of way having been obtained, lands of private owners would be flooded and the city liable, as the city would not be liable in such case. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622.

39. A taxpayer may sue to enjoin a city from executing a contract for a water supply on the ground that it is ultra vires. Dyer v. Newport, 29 Ky. L. R. 656, 94 S. W. 25.

40. An ordinance by which a city contracted for a water supply was not unreasonable or unjust on account of the term of the franchise where the ordinance merely extended the term of the franchise for nine years. Lackey v. Fayetteville Water Co. [Ark.] 96 S. W. 622. An ordinance fixing hydrant rentals for ten years, and the minimum charge to consumers, does not violate Kirby's Dig. §§ 5445, 5447, authorizing the council to reduce exorbitant rates by tying the hands of future councils, as the ordinance was passed after the statute took effect. Id. Power in a city to contract for the construction and operation of waterworks "on such terms and under such regulations as may be agreed upon" constitutes authority to the municipality to agree with the contractor upon the rates to be collected from consumers during a reasonable term of years. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. The legislature may empower a city by contract to suspend for a reasonable term its power to fix or regulate rates which a water company may collect from consumers. Id. Neither the power of a municipality to contract with a third person for the construction and operation of a system of waterworks, nor the rights of the latter under the contract, constitutes a special privilege or immunity within a constitutional provision prohibiting any irrevocable grant of special privileges or immunities. Id.

41. Town of Boonton v. United Water Supply Co. [N. J. Err. & App.] 64 A. 1064.

42. Under the statutes of Wisconsin it was held, where a town contracts for a water supply and was subsequently merged into a city, the inhabitants of which continued to use the water, that the city or later municipal corporation was liable on the contract for the water. Washburn Waterworks Co. v. Washburn [Wis.] 108 N. W. 194.

43. A contract by which a water company agrees to furnish water free of charge for the purpose of extinguishing fires does not require the furnishing of water free of charge to be used in a private system of fire protection instituted by a private corporation for protection of its own property. Cox v. Abbeville Furniture Factory [S. C.] 54 S. E. 830.

44. Where a contract with a water company for use of a fire hydrant provided for an annual rent to be paid semi-annually on May first and November first, life of contract to be one year commencing January first and thereafter until the expiration of thirty days' notice, the cutting off of water for default in payment of rent did not estop the company to sue for rent due up to the time water was cut off. Bienville Water Supply Co. v. Hieronymus Bros. [Ala.] 43 So. 124.

45. Contract between a municipality and water company construed, and held that the water company had complied with its provisions as to furnishing certain free taps. Public Works Co. v. Old Town [Me.] 66 A. 723.

46. Where a city under its contract with a water company had the right to a certain number of free faucets but used more and refused to elect which should be free ones, the water company had a right to make the election and charge for the others. Public Works Co. v. Old Town [Me.] 66 A. 723. There being no contract to the contrary, the company was entitled to put on meters and charge fair meter rates. Id.

47. The mere receipt and consumption of water, under a contract by which a water company agrees to furnish a municipal corporation with a sufficient supply of potable water for domestic and fire purposes, does not conclusively show acceptance of the service as performance of the contract, as considerable time might be required to ascertain whether imperfect service was the result of unavoidable accident excepted in the contract. Skowhegan Water Co. v. Skowhegan Village Corp. [Me.] 66 A. 714.

48. See 6 C. L. 1869.

49. See 6 C. L. 1870.

50. Independent School Dist. v. Le Mars City Water & Light Co. [Iowa] 107 N. W.

Injuries from deficient supply or equipment, and negligence.[51]—It is generally held that a water company which contracts to furnish a supply of water for fire protection is not liable to a citizen whose property is destroyed because of its failure to do so,[52] though a different rule prevails where such damages were contemplated by the parties,[53] and in Florida it is held that a taxpayer may recover in tort for such injury.[54]

Rules and regulations of service.[55]—A water company may preserve reasonable rules and regulations of service.[56]

Water rates.[57]—Water companies are entitled to charge just and reasonable rates for their services,[58] which they may fix or change within prescribed limits.[59] Where it is provided by statute that water rates shall be reasonable, a consumer is not bound by a contract between the municipality and the water company fixing rates alleged to be unreasonable.[60] Where water is furnished for use in a special private system of fire protection, a reasonable rate may be charged though water is not used.[61] The published rate will be read into an application for a supply of water.[62] The legislature has general power to provide for the regulation of rates [63]

944. Where the grant of a franchise required the company to furnish water free of charge to an independent school district, such district may maintain mandamus to enforce the company to furnish the water. Id.

51. See 6 C. L. 1870.

52. A water company supplying water to a city under an ordinance which requires it to provide a sufficient supply for fire purposes is not liable to an owner whose building is destroyed because of its negligent failure to do so. Metz v. Cape Girardeau Water Works & Elec. Light Co. [Mo.] 100 S. W. 651. A water company is not liable to a resident for loss by fire, though it had agreed with the township to and was negligent in not providing an adequate supply of water for fires. Thompson v. Springfield Water Co. [Pa.] 64 A. 521. A resident of a city cannot recover for loss by fire occasioned by failure of the company to furnish a supply of water for fire extinguishment according to its contract. Lovejoy v. Bessemer Waterworks Co. [Ala.] 41 So. 76.

53. Under a contract for water service for fire purposes, loss by fire as a consequence of the breach of such contract may be reasonably supposed to have been within the contemplation of the parties. Hunt Bros. Co. v. San Lorenzo Water Co. [Cal.] 87 P. 1093. Under the circumstances of this case, damages caused by fire prior to installation of the hydrant held not within the contemplation of the parties. Id.

54. Where a water company by the terms of its contract enjoys extensive franchises and privileges, and assumes the duty of furnishing water for the extinguishment of fires, it is liable to a taxpayer whose property is burned because of its negligence in not furnishing water according to its contract. Mugge v. Tampa Water Works Co. [Fla.] 42 So. 81.

55. See 6 C. L. 1871.

56. Where a city owns and operates a water plant, a regulation that where two or more persons use the same tap the supply may be shut off for nonpayment, notwithstanding some of the parties have paid their proportion, is reasonable. Cox v. Cynthiana, 29 Ky. L. R. 780, 96 S. W. 456. In such case it is immaterial to the parties who paid whether the city offered to the others a printed contract or application stating its scheme of furnishing water. Id.

57. See 6 C. L. 1871.

58. A rate of $2.25 per thousand cubic feet against boarding house keepers is not unreasonable, nor is it a discrimination against such users where it appears that such rate is about equal per capita with the rate of private consumers. Woodruff v. East Orange [N. J. Eq.] 64 A. 466. A borough having a water system of its own can impose reasonable charges for supplying water to residents. Jolly v. Monaca Borough [Pa.] 65 A. 809. The term "minimum charge" in water supply contracts where a meter system is used usually signifies rate of compensation for expense of being ready to supply water at the will of the consumer, though the supply is not used at all. Cox v. Abbeville Furniture Factory [S. C.] 54 S. E. 830.

59. Under Laws 1890, p. 1150, providing that water companies shall supply water at reasonable rates, held, where an agreement between the city and a corporation prescribed maximum and minimum rates, the city could not maintain an action to reform the contract by striking such provisions on the ground of ultra vires. City of Mt. Vernon v. New York Interurban Water Co., 101 N. Y. S. 232.

60. City of Mt. Vernon v. New York Interurban Water Co., 101 N. Y. S. 232.

61. A water company which furnishes water for use in a special private system of fire protection without a contract fixing liability therefor is entitled to reasonable compensation whether the water was used or not. Cox v. Abbeville Furniture Factory [S. C.] 54 S. E. 830. A property owner who has installed such a system and connected it with the water mains, although he may not take water except in case of fire, enjoys a beneficial use of the water not common to the general public. The water board may make a reasonable charge for such special privilege. Gordon v. Doran [Minn.] 111 N. W. 272.

62. Where a consumer has applied for and received water from a borough, the water rates are the price paid for the water on the terms and conditions made public by the city, which by his application the consumer

but may not enforce an unreasonably low rate.[64] The water board will not be permitted to enforce illegal rates by severing connection with a fire sprinkling device.[65] In the absence of statutory authority, a city may not compel a subsequent owner or occupant of premises to pay delinquent water charges which he did not contract to pay.[66] A municipality authorized to contract for a water supply may require water to be furnished free for public purposes.[67] Where a city is authorized by statute to fix water rates, rates establishd cannot be controlled by the courts except for inequality or some similar reason.[68] The power of a city to regulate water rates partakes of the nature of a governmental power, and also of the nature of a business power.[69] A city may suspend its power to regulate rates for a reasonable period.[70] A contract for a specified rate will not be required during the term of the contract.[71] The discretion of the board of supervisors in refusing to fix or add to an established water rate until future action cannot be controlled by mandamus.[72] Water users may be classified according to their lines of business.[73] Dwelling houses may be classified according to the number of rooms.[74] A specified rate for dwellings does

has agreed to pay. Jolly v. Monaca Borough [Pa.] 65 A. 809.

63. Under the constitution of California, declaring that use of all water for sale or distribution is a public one, and providing that the board of supervisors may fix water rates where it is furnished in counties, other than cities, held to apply, where the place of distribution was outside any city, though the supply was obtained from a natural source within a city. Fellows v. Los Angeles [Cal.] 90 P. 137.

64. The enforcement of a water rate fixed by county commissioners which was so low that the water company could make no profit may be enjoined. Water company held not precluded from maintaining proceedings to restrain enforcement of such rate because of delay in petitioning. Board of Com'rs of Montezuma County v. Montezuma Water & Land Co. [Colo.] 89 P. 794.

65. Gordon v. Doran [Minn.] 111 N. W. 272. Rules of a water board, giving credit for water consumed through small pipes supplied with meters upon charges for unmetered connections of a building using an automatic sprinkling device with mains, held discriminatory because lacking uniformity in principle and operation. Id. Injunction will issue to protect the public and individuals entitled to water service against unreasonable charges or discrimination. Order granting injunction affirmed. Id.

66. Linne v. Bredes [Wash.] 86 P. 858. A vendor who has agreed to pay water bills is liable only for legal bills, and may make the same defense against his purchaser, who has paid an improper bill, that he could against the water department. Williams v. Fraade, 102 N. Y. S. 806.

67. Under Code 1873, § 471, giving a municipality power to construct waterworks or authorize the construction by another, and § 473, authorizing it to make the grant of the right inure for a term, and authorize the grantee to charge such rates as may be agreed upon, a municipality may contract for the water supply and the rates to be charged, and require the grantee of the franchise to furnish water to schools and churches free of charge. Independent School Dist. of Le Mars v. Le Mars City Water & Light Co. [Iowa] 107 N. W. 944. Under a franchise requiring the company to furnish water at specified rates, and to schools free of charge, subsequent to the grant of which a sewer system was constructed, held the company was bound to furnish water for the sewer system at the specified charges, and to furnish water for the water closets at the schools free of charge. Id.

68. Woodruff v. East Orange [N. J. Eq.] 64 A. 466. The reasonableness of rates could be questioned in the supreme court only in the exercise of its supervisory jurisdiction by means of writ of certiorari. Id.

69. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

70. The making of a municipal contract to suspend for twenty-five years the power of a city to regulate the rates a water company can collect in consideration of construction of the waterworks system is not unreasonable. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1.

71. An accepted ordinance providing for such rates as may be agreed upon between the water company and consumer is a contract that the city will not reduce the rates during the term of the contract. Omaha Water Co. v. Omaha [C. C. A.] 147 F. 1. Foreclosure of a mortgage on the rights of a water company passes its contract right to collect rates specified in a contract between it and the city. Id.

72. Berger v. Justice [Cal. App.] 88 P. 591.

73. A city authorized to fix water rates may classify water users with reference to their lines of business. Woodruff v. East Orange [N. J. Eq.] 64 A. 466. Where a city maintaining a waterworks system supplied water at a rate determined by the quantity used, furnished water to one who owns several buildings within one inclosure, and put in several meters for the convenience of determining the quantity of water furnished, held that the charge must be made as if all water had been supplied through one meter. Scovill Mfg. Co. v. Kilduff [Conn.] 64 A. 218.

74. Where a company was required to furnish water at specified rates per dwelling, determined by the number of rooms, in computing the number of rooms it was not entitled to count reception halls. City of Birmingham v. Birmingham Waterworks Co. [Ala.] 42 So. 10. Where a single house was divided into apartments occupied by different families, a water company entitled to

not include water for sprinkling lawns[75] or gardens.[76] Under the charter of Greater New York, the measurement of water used as shown by meters is conclusive in the absence of fraud, mistake or accident.[77] Rates specified in a contract are applicable to extension of the city.[78] A municipal corporation has not such an interest in the relations of a waterworks company and a consumer as warrants it in bringing action to determine the reasonableness of rates charged.[79] A municipality has no sufficient interest to maintain an action to determine the reasonableness of rates charged to individual consumers.[80] Payment of an unjust rate under threat of shutting off supply is not voluntary,[81] and the amount paid may be recovered back in assumpsit.[82]

§ 17. *Grants, contracts and licenses.*[83]—Contracts relating to water rights are within the statute of frauds when such rights are classified as realty.[84] The usual rules of construction apply to grants of and contracts pertaining to water and water rights.[85] A water right, if appurtenant, passes with a conveyance of the land.[86] Effect will be given to the intention of the parties as determined from the terms of the instrument and surrounding circumstances.[87] The rights and

charge for each dwelling according to the number of rooms was not entitled to treat each separate room as a dwelling. Id. Where a water company was entitled to charge rates for dwellings according to the number of rooms, it is entitled to charge for a single house as two or more dwellings where it was occupied by several families occupying apartments separated by partitions without common halls, entrances, or exits. Id. Where a water company was entitled to charge a specified rate for dwellings according to the number of rooms, it could include servants' houses within the curtilage in determining the number of rooms, though there were no hydrants in such houses. Id. Where a contract authorized the water company to charge for water closets in private families, it is entitled to charge each family occupying an apartment house for use of a closet whether they used one used by another family or not. Id.

75. Where a water company was authorized to charge specified rates for dwellings and meter rates for other purposes, the rate for dwellings did not include water used for sprinkling lawns, etc. City of Birmingham v. Birmingham Water Works Co. [Ala.] 42 So. 10.

76. Under a contract between a city and a water company prescribing specified rates for domestic uses, and authorizing the company to charge meter rates for other purposes, the company was not required to furnish water at domestic rates for use on vegetable gardens. City of Birmingham v. Birmingham Water Works Co. [Ala.] 42 So. 10.

77. Pabst Brew. Co. v. Oakley, 100 N. Y. S. 794. Evidence insufficient to justify disturbing the record of water used as shown by a meter installed, under Greater New York Charter, Laws 1887, pp. 164, 165. Id.

78. Persons residing beyond the city limits at the time the contract with the water company was made, but who subsequently are brought within city limits by extension, are entitled to water at the rates specified in the contract. City of Birmingham v. Birmingham Water Works Co. [Ala.] 42 So. 10.

79, 80. City of Mt. Vernon v. New York Interurban Water Co., 101 N. Y. S. 232.

81, 82. City of Chicago v. Northwestern Mut. Life Ins. Co., 120 Ill. App. 497.

83. See 6 C. L. 1873.

84. Though by statute water rights are classified as realty, an oral agreement relating thereto may be performed to such an extent as to be enforceable. Bree v. Wheeler [Cal. App.] 87 P. 255. An agreement settling water rights which is carried into effect and acquiesced in for a considerable period is not within the statute of frauds. Id.

85. Grant construed and held to pass certain rights of flowage. Grothe v. Lane [Neb.] 110 N. W. 305. Where a grant is made of the right to draw water from a dam for the purpose of carrying on a certain business, in the absence of recitals in the grant or other explanatory conditions it should be held that a definite head of water was to be maintained and that it would be sufficient for the purposes of the grant. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915. A grant of a right to take water from a flume "for carrying on every branch of a tannery business" is not a grant of an indefinite quantity of water, but only a grant of enough to carry on the business as it existed at the time or was then contemplated. Id. A contract by which the owner of waters of a creek sold a portion of them to another and made the right appurtenant to his land construed and held not to limit the use of the water to such land, and that the purchaser was entitled to sell the surplus. Calkins v. Sorosis Fruit Co. [Cal.] 88 P. 1094. Where one was under contract to furnish water, evidence that the grantor of the seller had cut off the water so that it could not be furnished held insufficient to show damage to the full amount of the contract price. Id.

86. A mortgage on land and appurtenant water company stock conveys the stock. San Gabriel Valley Bk. v. Lake View Town Co. [Cal. App.] 89 P. 360. A covenant to supply a residence with water for domestic purposes runs with the land. Atlanta, etc., R. Co. v. McKinney, 124 Ga. 929, 53 S. E. 701.

87. A grant of a lot with an undivided third part of a mill dam and a right to use one-third of the water after deducting the right to use water for a certain enterprise was not also subject to the deduction of the water used by a mill on the ground that the

liabilities of the parties rest in the terms of the contract,[88] and one who asserts rights under a contract cannot acquire a right by prescription.[89] All grants of water power are subject to the right of lower riparian owners to have the natural flow of the stream transmitted to them after reasonable use or detention.[90] When the owner of a dam and water privileges grants a portion of the water power thereby developed, the right of the grantee to the extent of the grant is superior to the rights of the grantor.[91] But if the grantee is not using the water, the grantor or those holding under him may use the entire flow or permit it to flow down stream.[92] A riparian owner may not as such convey to another the right to use water on any land except that to which the right originally attached as against third persons also entitled to use the water.[93] Rights may be acquired by prescription [94] but not

mill was excepted from the conveyance. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915. A grant by the owner of a dam of the right to use 500 inches of water as a substitute for a prior grant in which the head was not mentioned carried by implication the right to draw water from the dam at the head at which water was ordinarily taken under the prior grant. Id. When the amount of water in an ancient grant was measured by the power required at its date and there remains no evidence of the power then required, the continued use by the grantee for a long period of time of a certain amount is sufficient evidence of the extent of the grant. Id.

88. A landlord who agrees to furnish water for irrigating a crop of the tenant or so much water as can be furnished from a well on the premises is not unconditionally bound to furnish sufficient water to irrigate the crop, but if the well supplied enough he was bound to furnish it. Duson v. Dodd [Tex. Civ. App.] 101 S. W. 1040. A contract by which an owner granted the right to erect and maintain a dam on a river for irrigation purposes to constitute an easement so long as the grantee should desire to use it held not to create an exclusive right in the grantee to the waters impounded by the dam. Metcalfe v. Faucher [Tex. Civ. App.] 99 S. W. 1038. There was reserved a right to use impounded water for irrigation purposes subject to an equitable apportionment as between the owners and holders of the easement. Id. A deed by a riparian owner of all water and riparian rights pertaining to certain land did not limit the rights of the grantee to water then standing in the lake. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. The privity with a deed of one who holds land adjacent to a lake, the water rights to which had been conveyed to another by his grantor, does not estop him from making an appropriation of water in the lake subject thereto, nor from demanding that the grantee of the riparian rights should not make greater use of the water than his deed entitled him to. Id. Where a riparian owner conveyed his water rights in a stream reserving sufficient amount for domestic purposes and afterwards conveyed the land, the grantees could not object to the use to which the owners of the water right applied the water. Id. A grantee of water rights which belonged to or in any manner pertained to certain land except water enough for domestic purposes and for watering stock passed the right to use all the waters of the lake except sufficient for the purposes excepted. Id. Under a deed of the right to the unobstructed use of the waters of certain springs and a pond, with the right to maintain a ditch across the grantor's land, the grantee has the right to so locate his ditch as to draw all the waters from the springs or pond but cannot require the grantor to maintain the pond in the condition it was at the time of the grant nor store water in the pond for his use, and the grantor may use only the surplus water after the grantee has used what he wants. Royster Guano Co. v. Fowles [S. C.] 56 S. E. 11. In a suit to restrain diversion setting forth means of diversion and also further threatened diversion in violation of the grant, held that the court might consider acts done after the action was brought by extending a ditch referred to in the pleading as a method of diversion and grant complete relief. Id. Where parties agreed on a division of water rights, one who was forced to defend his rights could rely on his original claim and also upon the agreement. Bree v. Wheeler [Cal. App.] 87 P. 255. Where parties agreed as to water rights and one put in a measuring box which was twice taken out by the other after which the latter used all the water, such subsequent use did not affect the rights under the agreement. Id.

89. The holder of a contract easement for taking water from a stream for irrigation purposes who always asserts his rights under his contract cannot acquire a right by prescription. Metcalfe v. Faucher [Tex. Civ. App.] 99 S. W. 1038.

90, 91, 92. Oakland Woolen Co. v. Union Gas & Elec. Co., 101 Me. 198, 63 A. 915.

93. Duckworth v. Watsonville Water & Light Co. [Cal.] 89 P. 338. A conveyance by an owner whose land abutted on a stream which formed the outlet of a lake of all riparian and other water rights which he possessed passed only the right to use water when it flowed in the stream and not to take water as against third persons having rights in the water of the lake. Id.

94. Where a deed reserved an easement of flowage and improvements in the method and extent of the use were made for 43 years without objection, its continued use in the same manner will not be enjoined. Henderson Estate Co. v. Carroll Elec. Co., 99 N. Y. S. 365. Evidence sufficient to show a prescriptive right to use water of a spring located on land of another and flowing through a pipe to claimant's land. Higuera v. Del Ponte [Cal. App.] 88 P. 808.

by permission [95] or interrupted use.[96] An easement of flowage is not lost by mere nonuser.[97] A license to drain onto the land of another may be revoked at the pleasure of the licensor.[98] It is a personal privilege and does not run with the land.[99]

§ 18. *Torts relating to waters.*[1]—A water company is liable in damages for its breach of duty in cutting off the water supply from a patron.[2] One who releases water from its channel and causes it to flood adjacent property [3] or who fills a drain [4] is liable. A contractor who negligently constructs a water main is liable where water escapes and floods a cellar.[5] One who deposits waste material into a ditch constructed to drain land, and thereby injures crops on adjacent land is liable.[6]

Damages.[7]—Where land is flooded by the overflow, the principle of actual compensation governs.[8] If the injury to the land is permanent, the measure of damages is the depreciation in the value of the land.[9] If temporary the measure is the decreased rental value or decreased value of use and occupancy.[10] Other special

95. No prescriptive right to drain land onto the premises of another is acquired where such use is permissive. Jones v. Stover [Iowa] 108 N. W. 112.

96. Bree v. Wheeler [Cal. App.] 87 P. 255.

97. A reservation in a deed to riparian lands if the right of flowage "as heretofore" is sufficient to reserve a privilege in the nature of an easement which is not lost by mere nonuser. Henderson Estate Co. v. Carroll Elec. Co., 99 N. Y. S. 365.

98. A gratuitous license to drain land onto the land of another may be revoked at the pleasure of the licensor. Jones v. Stover [Iowa] 108 N. W. 112.

99. Jones v. Stover [Iowa] 108 N. W. 112.

1. See 6 C. L. 1875.

2. A private corporation in the exercise of its franchise conferring upon it the right to lay mains in the streets and furnish water at fixed rates, which engages in the business of furnishing water to the general public, becomes liable as a public service corporation for its wrongful act in cutting off the water supply which it is under duty to furnish to a patron as a member of the public. The fact that there was sickness in the family from whom the water was cut off cannot be considered on the question of damages unless the agents of the water company had knowledge of such fact. Freeman v. Macon Gas Light & Water Co. [Ga.] 56 S. E. 61.

3. Mere trespassers who release water from a ditch and cause overflow of lands are liable though they did not own the land on which the ditch was maintained nor have an easement therein. Reams v. Clopine [Neb.] 110 N. W. 550.

4. Evidence sufficient to show one liable who filled up a drain and caused water to be turned down into a basement. Mulrone v. Marshall [Mont.] 88 P. 797.

5. Where owing to improper calking of joints, a water main leaked and flooded a cellar, the owner was entitled to recover from the contractor who constructed the main. Kirk & Co. v. Cunningham & Kearns Contracting Co., 99 N. Y. S. 879.

6. Discharge of acids and waste from an oil mill into a ditch originally constructed to drain land and extending through land of an adjoining owner, by which he suffers injury to his crops and from unwholesome odors, constitutes a private nuisance. Exley v. Southern Cotton Oil Co., 151 F. 101.

7. See 6 C. L. 1876. See, also, Damages, 7 C. L. 1029.

8. Evidence insufficient to show total destruction of the land. Young v. Extension Ditch Co. [Idaho] 89 P. 296. The rental value is the measure where land is not injured, but the owner is prevented from raising a crop. Id. If land is temporarily injured, the amount necessary to repair the injury with interest is the measure. Id. If totally destroyed, the measure is the value at the time with interest. Id. If permanently injured but not totally destroyed, the measure is the difference between the value immediately prior to and immediately after the flood. Id. Treble damages cannot be recovered for flooding land. Atchison, etc., R. Co. v. Grant [Kan.] 89 P. 658.

9. Where land is injured by overflows occuring from time to time and in washing Johnson grass seed into plaintiff's land, the measure of damages is the depreciation in value of the land from the time of the wrongful act to date of trial. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 94 S. W. 381. Damages for permanent injuries to land caused by negligence in constructing ditches and in allowing roots and seeds of Johnson grass to be washed onto the land may be recovered. Id. The measure of damages for injuries resulting from flooding because of defective culverts on the land of an adjoining proprietor if the injury is permanent is the depreciation in the value of the land. Missouri, etc., R. Co. v. Green [Tex. Civ. App.] 99 S. W. 573. In an action against a railroad company for maintaining a ditch along its right of way where the court instructed that the measure of damages was different if the injury was permanent instead of temporary, it was not proper to refuse to instruct the jury to state in their verdict whether damages allowed was for permanent or temporary injuries, since the right to maintain future actions depended on the character of the verdict. Louisville & N. R. Co. v. Whitsell [Ky.] 101 S. W. 334. A claim for damages for permanent injury to land by overflow is inconsistent with a claim for loss of annual crops or rents. St. Louis S. W. R. Co. v. Terhune [Tex. Civ. App.] 16 Tex. Ct. Rep. 16, 94 S. W. 381.

10. If the injury is permanent the measure is the depreciation in value of the land, if temporary it is the decreased rental value,

damages may be recovered [11] if not too remote.[12] Punitive damages may be recovered in case of gross negligence.[13] Where crops are injured or destroyed, the measure of damages varies.[14]

§ 19. *Crimes and offenses relating to waters.*[15]—In Washington it is a crime to cause an aperture to be made in any structure erected to conduct water for irrigating purposes.[16] Some cities in the exercise of the police power make it an offense to permit water mains to be out of repair for more than a specified period [17] regardless of the cause of such condition.[18]

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or decreased value of use and occupancy. Pickerill v. Louisville, 30 Ky. L. R. 1239, 100 S. W. 873. The measure for injuries caused by obstructing the flow of surface water where the owner is in possession is the diminution in the value of the use together with cost of repairing the same. Id. The measure of damages where ditches, culverts and grades constructed by a city causes land cisterns and cellars to overflow is the depreciation in rental value, or use and occupancy together with the cost of cleaning out and repairing the property after each flood. Hutchison v. Maysville, 30 Ky. L. R. 1173, 100 S. W. 331. The measure of damages for flooding a mining claim which lessees were working is the value of the use of the claim during the time work therein was prevented. Dalton v. Moore [C. C. A.] 141 F. 311.

11. Where a railroad embankment caused overflow of adjacent land and the landowner was compelled to wade through it and contracted rheumatism, each issue together with contributory negligence in wading through such water should be submitted. International & G. N. R. Co. v. Stewart [Tex. Civ. App.] 101 S. W. 282. An action for permanent injuries to land by flooding and for special damages in that the flood plaintiff was required to travel by a circuitous route to reach his land may be joined. International & G. N. R. Co. v. Walker [Tex. Civ. App.] 17 Tex. Ct. Rep. 268, 97 S. W. 1081. An instruction that the cost of extirpating Johnson grass, the seed and roots of which were washed on land held not erroneous as allowing recovery for the cost of removing such foul grass as was not the result of the flooding. Missouri, etc., R. Co. v. Merritt [Tex. Civ. App.] 102 S. W. 151.

12. Damagee resulting from obstruction and concentration of the flow of water over a railroad right of way causing an overflow of adjacent land and the deposit thereon of Johnson grass seed are too remote. Gulf, etc., R. Co. v. Ondrej [Tex. Civ. App.] 99 S. W. 176.

13. Punitive damages may be recovered where a railroad is grossly negligent in obstructing the flow of surface water. Central of Ga. R. Co. v. Keyton [Ala.] 41 So. 918.

14. The measure where matured or nearly matured crops are destroyed is the market value at the time the overflow occurred. International & G. N. R. Co. v. Foster [Tex. Civ. App.] 100 S. W. 1017. An instruction that the measure of damages was the difference between what was produced and what would have been produced had the flood not occurred, less the difference in cost of producing what was and what would have been produced is not so far variant from the rule that actual value of the crop destroyed can be recovered, ae to require reversal where no other instruction was requested. St. Louis, etc., R. Co. v. Hoshall [Ark.] 102 S. W. 207. Where crops are flooded the measure is compensation with interest. Little Rock & Ft. Smith R. Co. v. Wallis [Ark.] 102 S. W. 390. Instruction though not clearly expressed held equivalent to one that the measure of damages for flooding a rice crop was the difference in value of the rice in good condition and its value in its injured condition. Colorado Canal Co. v. Sims [Tex. Civ. App.] 15 Tex. Ct. Rep. 944, 94 S. W. 365. In an action for injuries to a rice crop by overflow from a canal, it was error to submit the reasonableness of expenditures made in protecting the crop where there was no evidence that the sums paid were reasonable. Id. Where a rice crop was flooded by overflow from a canal, the measure of damages for the rice destroyed was its market value less cost of threshing. Id. Measure of damages is the value at time it was destroyed. Id. The measure of damages for flooding growing crops is the value of the crops at the time together with the value of the right to gather them when matured. St. Louis Merchants' Bridge Terminal R. Ass'n v. Schultz, 226 Ill. 409, 80 N. E. 879.

15. See 6 C. L. 1876.

16. An indictment under Ball. Ann. Codes & St. § 7154, making it a crime to "willfully or maliciously" cause an aperture in any structure erected to conduct water for agricultural purposes, is sufficient where it charges that the act was done "unlawfully and willfully." State v. Tiffany [Wash.] 87 P. 932. An information is sufficient which charges that the structure was erected to conduct water for irrigation purposes. State v. Tiffany [Wash.] 87 P. 932. Such statute includes a dam constructed for storing water for irrigation purposes. Id.

17. An ordinance prohibiting any person or corporation operating a waterworks system from permitting its pipes to be out of repair for more than two days in succession is valid. Crumpler v. Vicksburg [Miss.] 42 So. 673. Such statute was based on a valid classification and was not objectionable for nonuniformity. Id. In a prosecution for violation of such ordinance, evidence as to the condition of the street in which the leaky pipe was located, prior to the date prosecution was commenced, was admissible. Crumpler v. Vicksburg [Miss.] 42 So. 673.

18. In such a proceeding it was no defense that the leaky condition was due to vibrations caused by locomotives passing over the streets. Crumpler v. Vicksburg [Miss.] 42 So. 673.

WEAPONS.

§ 1. The Crime of Carrying or Pointing Weapons (2302).
§ 2. Other Police Regulations Concerning Weapons (2303).
§ 3. Indictment and Prosecution (2303).
§ 4. Civil Liability for Negligent Use of Weapons (2304).

§ 1. *The crime of carrying or pointing weapons.*[19]—Failure of the legislature to regrade the offense pursuant to constitutional mandate did not invalidate the Louisiana act of 1906.[20] It therefore repealed all former acts [21] and, being without a saving clause, terminated pending prosecutions thereunder.[22]

The offense is statutory and the statutes prescribe what weapons may be carried,[23] and in some states prohibit only the carrying of concealed weapons,[24] carrying on or about the person,[25] or carrying at certain places of public resort,[26] or the display of weapons to the public terror.[27] Statutory exceptions are often made in favor of officers,[28] persons threatened with violence,[29] or travelers,[30] or authorizing mere transportation with no view to use.[31] To be within the last mentioned exception, one must ordinarily proceed to his destination with reasonable dispatch and

19. See 6 C. L. 1876.

20. The failure of the legislature of 1902 to regrade the offense of carrying concealed weapons pursuant to Const. art. 155 did not render the act of 1906 unconstitutional. State v. Robira [La.] 42 So. 792.

21. Act No. 61, p. 86, of 1902, Rev. St. 932, and Act No. 107, p. 163, of 1902, held repealed by inconsistency with Act of 1906. State v. Smith [La.] 42 So. 791; State v. Dueffechaux [La.] 43 So. 60; State v. Robira [La.] 42 So. 792.

22. State v. Smith [La.] 42 So. 791.

23. The Georgia statute of 1898 amending the law relating to carrying concealed weapons so as to include any kind of metal knucks is valid. Not repugnant to constitutional provision requiring act to distinctly describe the law amended. Cunningham v. State [Ga.] 57 S. E. 90.

24. A pistol is concealed if it is so wrapped in a bundle that it cannot be seen and recognized. Edwards v. State, 126 Ga. 89, 54 S. E. 809. Whether a weapon is carried in such manner as not to be discernible by ordinary observation is a question for the jury. Hainey v. State [Ala.] 41 So. 968. Evidence held to sustain a verdict finding that defendant carried a weapon concealed. State v. Miles [Mo. App.] 101 S. W. 671; Millner v. State [Ala.] 43 So. 194.

25. A pistol carried under the seat of a buggy in which one is driving, from whence it is taken and pointed at another, is carried "on or about the person." Hill v. State [Tex. Cr. App.] 100 S. W. 384. The act of a hack driver in carrying a pistol under the driver seat of his hack is a violation of the law. Kendall v. State [Tenn.] 101 S. W. 189.

26. A statute forbidding the carrying of a pistol into a social gathering is not violated by carrying a pistol into the bar room of a social club adjacent to the club's ballroom, in which a ball or social gathering is taking place. Schroeder v. State [Tex. Cr. App.] 99 S. W. 1003.

27. Evidence held to warrant conviction for exhibiting a deadly weapon in a rude, angry, and threatening manner. State v. Heffernan [Mo. App.] 101 S. W. 618. Evidence held insufficient to make out a case of rudely displaying a pistol in a manner calculated to disturb the inhabitants residing along or upon a public road. Taylor v. State [Tex. Cr. App.] 102 S. W. 409.

28. An exception in favor of officers' right to carry concealed weapons while discharging their official duties does not attend them while not in the actual performance of the duties of the office. Game warden held not to have any right to carry concealed weapon while not in actual performance of his duties. State v. Simmons [N. C.] 56 S. E. 701. One cannot justify carrying a pistol as a deputized arresting officer in a special case when he is found in possession of the weapon while on a different mission. Brown v. State [Tex. Cr. App.] 102 S. W. 406.

29. Threats against one's life communicated to him justify him in carrying a concealed weapon. State v. Kelly [Mo. App.] 101 S. W. 155. If threats were made it is immaterial that there was in fact no danger. State v. Venable, 117 Mo. App. 501, 93 S. W. 356. Defendant must have believed himself in danger. State v. Casto, 119 Mo. App. 265, 95 S. W. 961.

30. An exception of travelers, as entitled to carry concealed weapons, protects only while they are in pursuit of their journey or some business connected therewith. Evidence held to show loss of defense by stopping or turning aside of journey. Navarro v. State [Tex. Civ. App.] 17 Tex. Ct. Rep. 86, 96 S. W. 932. One cannot claim the defense of being a traveler through the state as justifying the carrying of a concealed weapon unless he is traveling peaceably. Evidence held insufficient to show defendant to have been traveling peaceably (State v. Miles [Mo. App.] 101 S. W. 671), nor will a deflection from the journey to procure medical assistance for members of one's family have that effect (Irvin v. State [Tex. Cr. App.] 100 S. W. 779).

31. It is not unlawful in Texas to purchase and carry home a pistol. Granger v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 S. W. 836; Cordova v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 90, 97 S. W. 87. One carrying concealed a pistol while looking for some one to fix a broken mainspring, which renders it useless as a deadly weapon, is not guilty of the crime of carrying concealed weapons under the Missouri statute. State v. Casto, 119 Mo. App. 265, 95 S. W. 961.

directness,[32] but reasonable stops en route for a lawful purpose do not deprive him of the benefit of the statute.[33] Carrying of weapons at one's place of business is sometimes permitted [34] but, in the absence of an exception in the statute, one may not carry weapons on his own land.[35] As in other statutory offenses, criminal intent is not ordinarily essential unless the statute makes it so,[36] nor does the erroneous advice of the clerk of the court that one has the right to carry a weapon excuse the criminality of the act.[37] One who has used a weapon in self defense is guilty of unlawfully carrying the same if he unnecessarily pursues his assailant therewith.[38]

§ 2. *Other police regulations concerning weapons.*[39]—The Charleston, South Carolina, ordinance prohibiting the firing of arms within the city limits,[40] the District of Columbia police regulation prohibiting the discharge of firearms in the District without a special permit from the superintendent of police,[41] and the Washington statute inhibiting the organization, maintenance, or employment of an armed body of men by individuals or corporations, have been held valid.[42] It is not essential to conviction under the last mentioned statute that the relation of master and servant existed between defendant and those he was charged with having employed.[43] A statute denouncing the crime of shooting at random in a public highway is not violated by shooting at a mark.[44]

§ 3. *Indictment and prosecution.*[45]—An indictment describing the weapon as a "firearm" is sufficient.[46] An exception in the enacting part of the statute must be negatived by the prosecution.[47] Where intent is essential, the burden is on the

32. Cordova v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 90, 97 S. W. 87. He would not have the right to make unnecessary departure from his direct route (Id.), or to visit places with his pistol not necessary to be visited (Id.). There may be a degree of delay in pursuit of the journey which does not deprive one of the defense. Irvin v. State [Tex. Cr. App.] 100 S. W. 779.

33. Merely stopping at a lunch counter to eat a meal is not such a deflection from one's journey as to deprive him of the defense that he was merely carrying the weapon home. Mays v. State [Tex. Cr. App.] 101 S. W. 233. One believing his wife has been insulted by a third person held to have the right to stop and demand of the latter an explanation and defend himself with the pistol if attacked (Quinn v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 687, 96 S. W. 33), and this is no less true if the wife has told him that she has been insulted when in fact she has not. (Id.).

34. In Texas one has a right to carry a pistol at his place of business, but not elsewhere. Evidence held to show a carrying of a pistol elsewhere than at defendant's place of business. Hutchins v. State [Tex. Cr. App.] 101 S. W. 795. One's right to carry a pistol while at his place of business does not, when he has separate places of business, make lawful the carrying of the pistol while going from one to the other even though he uses the public road in so doing. Banks v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 387, 98 S. W. 242.

35. State v. Venable, 117 Mo. App. 501, 93 S. W. 356.

36. Criminal intent is not an essential element of the offense of carrying a pistol. Cordova v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 90, 97 S. W. 87. Instruction on theory of innocent purpose to transport held properly refused. Edwards v. State, 126 Ga. 89, 54 S. E. 809. Evidence that defendant did not intend to conceal weapon held inadmissible. State v. Simmons [N. C.] 56 S. E. 701. But see Huff v. State [Tex. Cr. App.] 102 S. W. 407, holding that absence of criminal intent is fatal to conviction, and Schroeder v. State [Tex. Cr. App.] 99 S. W. 1003, holding that absence of criminal intent is a defense on a prosecution for carrying a pistol in a social gathering.

37. State v. Simmons [N. C.] 56 S. E. 701.

38. Evidence held to show unnecessary pursuit. Woodroe v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 682, 96 S. W. 30.

39. See 4 C. L. 1860.

40. Within charter power of city (State v. Johnson [S. C.] 56 S. E. 544), and not discriminatory in favor of coopers (Id.), but assuming it void in part in that respect, such invalidity does not affect its enforceability as to firing within city limits (Id.).

41. It is not an attempt to delegate legislative powers (District of Columbia v. Lewis, 26 App. D. C. 133), but is a reasonable exercise of the right of the municipal authorities to delegate their administrative functions (Id.), nor does the fact that the discretion of the superintendent may be arbitrarily exercised render it unreasonable (Id.).

42. Not repugnant to Const. art. 1, declaring the right of the individual citizen to bear arms in defense of himself or the state shall not be impaired. State v. Gohl [Wash.] 90 P. 259.

43. State v. Gohl [Wash.] 90 P. 259.

44. Callahan v. Com., 30 Ky. L. R. 596, 99 S. W. 296.

45. See 6 C. L. 1877.

46. Hughes v. State [Ala.] 41 So. 427.

47. Under the Arkansas statute making it an offense to wear or carry any weapon except an army or navy pistol, the burden is on the state to show that a pistol alleged to have been unlawfully carried was not an army or navy pistol. McDonald v. State [Ark.] 102 S. W. 703. Obiter, it is also said that when it appears that the weapon

prosecution to show it,[48] and to that end it may prove that accused had been shortly before engaged in an altercation;[49] but evidence of defendant's intoxication is inadmissible.[50] Proof that defendant armed himself after the communication of threats to him is prima facie sufficient that he in good faith believed himself in danger.[51] Admission of carrying the weapon coupled with a claim of right as a peace officer is not a "confession" in open court which will support a conviction without proof of the corpus delicti.[52] Every defense which there is evidence to sustain must be submitted by appropriate instructions.[53] Instructions must not invade the province of the jury.[54]

§ 4. *Civil liability for negligent use of weapons.*[55]

WEIGHTS AND MEASURES.[56]

It is within the police power of a state to adopt and compel the use of a uniform system of weights and measures[57] and to regulate weighing in industries where employes are paid by weight of product.[58] A petition by a public weigher in Texas for statutory penalties and damages for defendant's weighing cotton for others in plaintiff's territory and charging fees states no cause of action where it fails to allege that defendant was a commission merchant or engaged in a similar business.[59] A statute making it a penal offense to sell provisions or produce for a weight "less" than the true weight is not violated by a sale for a weight greater than the true weight.[60]

WHARVES.[61]

There being no common-law right in a riparian owner to extend wharves into a navigable water,[62] a municipality, though it owns but an easement in a street intersecting a navigable stream, invades no right of the fee owner in extending a public wharf therefrom,[63] and, for a like reason, a right to wharf not granted in connection with a conveyance of riparian lands is limited to the terms of the grant.[64]

carried was an army or navy pistol, the burden is on the state to show that it was not carried in the hand. Id.

48. Schroeder v. State [Tex. Cr. App.] 99 S. W. 1003. Evidence held to show lack of criminal intent. Huff v. State [Tex. Cr. App.] 102 S. W. 407.

49. To rebut testimony of accused that he was about to go on a journey. Irwin v. State [Tex. Cr. App.] 100 S. W. 779. One's conduct in another state prior to reaching the state where he is prosecuted for carrying concealed weapon is admissible in the issue whether he is traveling peaceably through the state. State v. Miles [Mo. App.] 101 S. W. 611.

50. Harnez v. State [Ala.] 41 So. 968.

51. State v. Casto, 119 Mo. App. 265, 95 S. W. 961.

52. State v. Abrams [Iowa] 108 N. W. 1041.

53. Threats against defendant. State v. Venable, 117 Mo. App. 501, 93 S. W. 356.

54. Instruction on prosecution for carrying a pistol as to what constitutes a place of business held properly refused as on the weight of the evidence. Hutchins v. State [Tex. Cr. App.] 101 S. W. 795. Instruction on prosecution for carrying a pistol as to defendant's apprehension of danger to his person held erroneous as invading the province of the jury. Christian v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 275, 97 S. W. 694.

55. See 6 C. L. 1878.

56. See 6 C. L. 1879.

57. McLean v. State [Ark.] 98 S. W. 729. Held proper to reduce a verdict in favor of a plaintiff who had not had his weights and measures tested in accordance with the law. Carter v. Pitts, 125 Ga. 792, 54 S. E. 695.

58. Laws 1905, p. 558, forbidding owners or operators of mines where ten or more men are employed under ground and mining by quantity to screen the coal before it is weighed and credited to the employe, is valid and constitutional. McLean v. State [Ark.] 98 S. W. 729.

59. Gray v. Eleazer [Tex. Civ. App.] 16 Tex. Ct. Rep. 13, 94 S. W. 911.

60. Sale of chickens weighing only six pounds for eight pounds not violative of Act Cong. June 20, 1906, amending § 10 of Act March 2, 1895. District of Columbia v. Gant, 28 App. D. C. 185.

61. See 6 C. L. 1879.

62. Western Pac. R. Co. v. Southern Pac. R. Co. [C. C. A.] 151 F. 376.

63. Williams v. Intendant & Town Council of Gainsville [Ala.] 43 So. 209, citing Backus v. Detroit, 49 Mich. 110, 43 Am. Rep. 447, where the authorities are exhaustively discussed.

64. Limited right given in conveyance of shore lands by municipality to which general right to wharf was given by statute. Western Pac. R. Co. v. Southern Pac. R. Co. [C. C. A.] 151 F. 376.

Public wharves are under the control of appropriate officers, whose powers and duties are elsewhere treated,[65] and, like all property charged with a public easement, cannot be devoted to a use inconsistent therewith.[66] A wharfinger must use reasonable care to avoid injury to a vessel being unloaded.[67] There is no implied assumption by the lessee of a wharf of the owner's obligation to repair appurtenant docks.[68]

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WILLS.

§ 1. Right of Disposal and Contracts Relating to It (2305). Contracts to Devise or Bequeath (2306).
§ 2. Testamentary Capacity, Fraud, and Undue Influence (2307).
A. Essentials to Capacity (2307).
B. Constituents of Fraud, Mistake, and Undue Influence (2311).
§ 3. The Testamentary Instrument or Act (2314).
A. Requisites, Form, and Validity (2314).
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§ 1. *Right of disposal and contracts relating to it.*[69]—Any interest or estate which is or may become one of inheritance,[70] belonging to testator at the time of his

65. See Officers and Public Employes, 8 C. L. 1191.

66. Ordinance granting right to construct railroad tracks on public landing held void. Chicago, etc., R. Co. v. People, 222 Ill. 427, 78 N. E. 790. While from the purposes of its creation and dedication a public landing includes the free and unobstructed passage of travelers and vehicles, its function is much broader and more important than that of a mere street, and considerations which would forbid the occupation of a street by a railway structure are of commanding application in the case of such a landing. Louisville & Nashville R. Co. v. Cincinnati, 4 Ohio N. P. (N. S.) 497. Ordinance granting right to maintain viaduct over public landing held void. Id.

67. Evidence held to sustain finding that sinking of vessel was due to its unseaworthy condition. Bush Co. v. Central R. Co. [C. C. A.] 149 F. 734.

68. Haley v. American Agricultural Chem. Co. [Pa.] 66 A. 559.

69. See 6 C. L. 1880.

70. A spendthrift trust entitling beneficiary to corpus on marriage or in case of becoming competent gives a devisable estate. Bransfield v. Wigmore [Conn.] 66 A. 778.

71. Devisees held to take no title to land under will where testator's rights therein

death [71] and not given by statute to his surviving spouse,[72] is subject of testamentary disposition. Where a married woman may hold a separate estate, she may dispose of it by will.[73] Where property belonging to a devisee is attempted to be disposed of or dower rights are impaired, the devisee or surviving spouse may be put to an election.[74] In the absence of statute there is no limitation on the power to dispose of property for charitable purposes,[75] except such as may rest in the corporate power of a beneficiary to take,[76] and want of power to take can be urged only by the state.[77] Statutes in some states, however, limit the right of gift for religious or charitable purposes [78] by one who leaves dependents or near relatives surviving him,[79] and the right to attack a will for violation of such a statute is not limited to the descendants named therein.[80] In many states a share of the estate is given to children of testator who are not mentioned [81] or provided for [82] in the will, or where the omission to provide is unintentional,[83] but except as limited by such statutes the testator has full power of disinherison.[84]

Contracts to devise or bequeath.[85]—One may by contract bind himself to a particular disposition of his property,[86] and such an agreement, if fair and on consideration,[87] mutual,[88] and sufficiently definite,[89] will be enforced in equity [90] by

were barred by limitations at time of his death. Dangerfield v. Williams, 26 App. D. C. 508.

72. A statute providing that the homestead of a married man shall not be subject of devise is valid. Saxon v. Rawls [Fla.] 41 So. 594.

73. Under Code 1860, §§ 2, 3, held that married woman could dispose of after-acquired separate estate, though she had no separate estate when will was made. Tarrant v. Core [Va.] 56 S. E. 228.

74. See post, § 5 D, as to intent to require an election; Estates of Decedents, 7 C. L. 1386, as to operation thereof.

75. Only limitation is statutory right of surviving spouse. Hubbard v. Worcester Art Museum [Mass.] 80 N. E. 490.

76. Charitable corporation held not restricted in power to take. Smith v. Havens Relief Fund Soc., 103 N. Y. S. 770.

77. A devise to a charitable corporation of a sum greater than it is legally entitled to hold is valid except as against the state. Hubbard v. Worcester Art Museum [Mass.] 80 N. E. 490.

78. Laws 1903, c. 623, p. 1412, continued in force the rule against bequests to charity by will executed less than two months before testator's death. Pearson v. Collins, 113 App. Div. 657, 99 N. Y. S. 932.

79. A statute forbidding gift of more than a moiety to charity by one "having" a wife, applies only where the wife survives testator. St. John v. Andrews Institute, 102 N. Y. S. 808. One seeking to avoid a will for violation of a statute forbidding gift of more than moiety to charity by one having a wife surviving him has the burden of proving that the wife survived. Id.

80. Moser v. Talman, 100 N. Y. S. 231.

81. Where a life estate to testator's wife was limited to her "issue," an after-born child of testator and his wife is "mentioned" in the will and not entitled to take as on intestacy. Stachelberg v. Stachelberg, 101 N. Y. S. 178.

82. The New York statute as to rights of pretermitted children has no application to a child provided for by settlement. Cushman v. Cushman, 102 N. Y. S. 258.

83. Mention of testator's deceased daughter held to show that pretermission of child of such daughter was not unintentional. Fugate v. Allen, 119 Mo. App. 183 95 S. W. 980. Whether omission to provide for a child of testator was intentional is a question of fact. Woodvine v. Dean [Mass.] 79 N. E. 882.

84. The fact that a testator having several children devises and bequeaths all his property to one son cannot defeat or invalidate the will, if the testator had the necessary mental capacity, and was free from undue influence, when he executed it. Kelly v. Kelly, 103 Md. 548, 63 A. 1082.

85. See 6 C. L. 1882.

86. **Contract of adoption** making adopted child heir of the foster parent is valid. Fugate v. Allen, 119 Mo. App. 183, 95 S. W. 980.

87. A provision in a formal marriage settlement whereby the groom's father agrees to devise certain property to his son rests on a sufficient consideration. Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943. Conveyance by husband to wife is sufficient consideration for her promise to will the property to a third person. Mueller v. Batcheler [Iowa] 109 N. W. 186. Compromise and termination of family controversy held sufficient consideration. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

88. Contract adopting child and agreeing to him as equal heir held lacking in mutuality because parent of child did not join. Fugate v. Allen, 119 Mo. App. 183, 95 S. W. 980.

89. Contract to bequeath something to a niece because she was named after the promisor is too indefinite to be enforced and a revoked bequest of a specific sum does not make it definite. Freeman v. Morris [Wis.] 109 N. W. 983.

90. Oral contract to devise in consideration of services may be specifically enforced after performance by the promisee. Berg v. Moreau, 119 Mo. 416, 97 S. W. 901. May be enforceable in equity though it would not support an action at law. Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943. See, also, Specific Performance, 8 C. L. 1946.

charging property agreed to be devised with a trust,[91] but cannot be enforced at law [92] or in probate,[93] though services rendered under promise to compensate by will may sometimes be recovered for in assumpsit.[94] The cause of action accrues on the death of the promisor.[95] Since a contract to devise can only be specifically enforced by fastening a trust on the property in the hands of the persons receiving the same, it is essential that the will violating such contract be first probated,[96] and a contract to bequeath is not waived by failure to object to the probate of a will in violation of it.[97] Possession under contract to devise gives an equitable ownership.[98] If the agreement is within the statute of frauds, it must be in writing [99] or must have been partly performed.[1] One who has as survivor received the benefit of an agreement by which joint wills were made cannot avoid the effect by voluntary conveyance of property during his life.[2] In an action on a promise by husband and wife that the survivor of them should make a will in favor of plaintiff, failure of proof that the husband agreed thereto is immaterial where the wife was survivor.[3] A conveyance before death to one whom grantor had promised to compensate by will is presumptively payment pro tanto.[4] If oral, the contract must be established not merely by a preponderance but by clear and cogent evidence.[5]

§ 2. *Testamentary capacity, fraud, and undue influence. A. Essentials to capacity.*[6]—In order to have testamentary capacity the testator must have sufficient

91. Agreement to devise is enforceable against sole heir at law by treating him as trustee and compelling him to convey property in accordance with contract. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81. Where contract is entire and embraces both realty and personalty, and there has been no administration on decedent's estate, estate owes no debts, and heir is in possession of all said property, is not necessary to have administrator appointed and make him party, but, equity having obtained jurisdiction over subject-matter and over heir for purpose of enforcing contract as to land against him, will enforce whole contract. Id. Allegation that decedent gave direction regarding turning over property to petitioner held not demurrable for failure to state to whom direction was given, nor because such direction would not authorize recovery or justify representative in turning over property to plaintiff, it being wholly immaterial as pleading. Id. Petition held not demurrable for failure to attach copy of or set out substance of destroyed will of defendant's deceased husband, compromise of controversy over which was consideration for contract sued on, right sought to be enforced being based on compromise agreement solely. Id.

92. An action at law will not lie on a contract to bequeath. In re Peterson [Neb.] 111 N. W. 361.

93. In re Peterson [Neb.] 107 N. W. 993. Where a will made in performance of a contract to devise is revoked by a later will, the agreement cannot be enforced by setting aside the probate of the later will and probating the former. Allen v. Bromberg [Ala.] 41 So. 771. The probate court in Kansas and the district court on appeal from refusal to probate has no equity power to relieve one who by contract was entitled to have the rejected will made in his favor. Ross v. Wollard [Kan.] 89 P. 680.

94. Recovery may be had by a daughter for services rendered to her parent under an express promise to pay for them by will. Griffith v. Robertson [Kan.] 85 P. 748. See, also, Implied Contracts, 8 C. L. 155.

95. Where decedent promised his daughter that if she would live with him and keep house for him he would leave her certain property, it was held that he had the whole of his life in which to perform and there could be no breach until after his death. Lawson v. Mullinix [Md.] 64 A. 938. Limitations do not run against an action on a contract to compensate by will until promisor's death. Chambers v. Boyd, 101 N. Y. S. 486.

96. Allen v. Bromberg [Ala.] 41 So. 771.

97. Phalen v. U. S. Trust Co., 186 N. Y. 178, 78 N. E. 943.

98. Entitled to possession as against executor subject to any debts of decedent whose equities are precedent. Koslowski v. Newman [Neb.] 105 N. W. 295.

99. Not necessary to plead that contract was in writing, as law will presume that it was if necessary for it to be. Belt v. Lazenby, 126 Ga. 767, 56 S. E. 81.

1. Performance of agreement to support. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134. See, also, Frauds, Statute of, 7 C. L. 1826.

2. Bower v. Daniel, 198 Mo. 289, 95 S. W. 347.

3. Mueller v. Batcheler [Iowa] 109 N. W. 186.

4. McNamara v. Michigan Trust Co. [Mich.] 111 N. W. 1066.

5. Berg v. Moreau, 199 Mo. 416, 97 S. W. 901.

Evidence held insufficient. Russell v. Sharp, 192 Mo. 270, 91 S. W. 134; Ostrom v. De Yoe [Cal. App.] 87 P. 811; Smith v. Humphreys Md.] 65 A. 57. Evidence of contract by wife to make irrevocable will in favor of husband held insufficient. Lipp v. Fielder [N. J. Err. & App.] 66 A. 189. Evidence held insufficient to establish contract to bequeath in compensation for services to testator. Murphy v. Murphy, 102 N. Y. S. 1117. Contract in connection with adoption of child. In re Peterson [Neb.] 107 N. W. 993.

6. See 6 C. L. 1884.

mind and memory to intelligently understand the nature of the business in which he is engaged, to comprehend generally the nature and extent of his property and to recollect the objects of his bounty.[7] Capacity to contract is not the test.[8] Capacity may exist notwithstanding great age and feebleness [9] or extreme illness,[10] and is consistent with the utmost eccentricity.[11] Belief in spiritualism is not of itself sufficient to show incapacity.[12] Delusion to render one incompetent must be insane and the will must be affected by it.[13, 14] There being no fixed test or certain indicia, the question is ordinarily one of fact to be determined according to the circumstances of each case.[15]

Admissibility of evidence.—On the issue of capacity, insanity of testator's ancestors may be shown,[16] as may his history, including past illness or injury [17] and financial condition,[18] if not too remote,[19] and, under the same limitation, his condition after the making of the will.[20] That the disposition made is unreasonable or unnatural is relevant on capacity,[21] and likewise every circumstance tending to vindicate its reasonableness is admissible,[22] as are the circumstances attending exe-

7. Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834; Dowie v. Sutton, 126 Ill. App. 47. Person has capacity who understands nature of a will, viz., that it is disposition of property to take effect after death, and who is capable of remembering generally property subject to disposition, and persons related to him by ties of blood and affection, and also of conceiving and expressing by words, written or spoken, or by signs or by both, any intelligible scheme of disposition. Slaughter v. Heath [Ga.] 57 S. E. 69. Is sufficient if he has sufficient intellect to enable him to have decided and rational desire as to disposition of his property. Id. Disposing mind and memory defined. In re American Board of Com'rs [Me.] 66 A. 215.

8. Barnes v. Waterman, 104 N. Y. S. 685.

9. Finding that woman 82 years old and seriously ill had testamentary capacity sustained. Hill v. Boyd, 199 Mo. 438, 97 S. W. 918. Aged and infirm man held incompetent. In re Rogers' will, 103 N. Y. S. 423.

10. Evidence of capacity held sufficient. In re Muellenschlader's Will, 128 Wis. 364, 107 N. W. 652. That testator by reason of illness could not make himself understood except to a few persons familiar with him does not impair his capacity where those who prepared his will understood him. Bradshaw v. Butler, 30 Ky. L. R. 1249, 100 S. W. 837.

11. Old and eccentric man generally regarded as irresponsible held competent. Wood v. Salter [La.] 43 So. 281. Mere eccentricities, prejudices, or resentment against one or more relatives, without more, cannot invalidate the will. Robinson v. Duvall, 27 App. D. C. 535.

12. In re Dunahugh's Will, 130 Iowa, 692, 107 N. W. 925; Steinkuehler v. Wempner [Ind.] 81 N. E. 482.

13, 14. Johnson v. Johnson [Md.] 65 A. 918. If it appears that there is a real controversy as to the fact which is alleged to be the subject of an insane delusion, a mere preponderance against its existence will not support a finding that testator's belief therein was delusory. Opinion of testators as to son's lack of affection. Bean v. Bean, 144 Mich. 599, 13 Det. Leg. N. 355, 108 N. W. 369. Evidence of delusions of persecution admissible. Dowie v. Sutton, 126 Ill. App. 47. Belief in spiritualism not ipso facto insane delusion. Steinkuehler v. Wempner [Ind.] 81 N. E. 482.

15. See post, this section, Sufficiency of Evidence.

16. Insanity of relatives may be shown without proof that it was of a hereditary type. Dillman v. McDanel, 222 Ill. 276, 78 N. E. 591. The fact of a father's mental vigor is admissible to rebut evidence of hereditary insanity. In re Dolbeer's Estate [Cal.] 86 P. 695.

17. Evidence of injury to testator eight years before making the will and resulting impairment of mind is admissible. In re Wharton's Will [Iowa] 109 N. W. 492.

18. In proceedings to set aside probate, plaintiffs' evidence as to testatrix's financial condition when she married defendant, 17 years before execution of will, held properly stricken as having no bearing on issues. Smith v. Ryan [Iowa] 112 N. W. 8.

19. Evidence of illness ten years before too remote. Sibley v. Morse [Mich.] 13 Det. Leg. N. 878, 109 N. W. 858.

20. Evidence of testator's condition after execution of will relevant on issue of capacity. Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592.

Suicide may be considered on the question of sanity at a prior time. In re Dolbeer's Estate [Cal.] 86 P. 695.

21. Reasonableness or unreasonableness of disposition of property may be considered as evidence bearing on question of capacity. Slaughter v. Heath [Ga.] 57 S. E. 69. Evidence as to advancements made to children before execution of will held admissible as tending to show that will was unnatural. Meier v. Buchter, 197 Mo. 68, 94 S. W. 883. Absolute disinherison of testator's children is to be considered on the issue of capacity. Hardenburgh v. Hardenburgh [Iowa] 109 N. W. 1014.

22. That the will made reasonable provision for all the natural objects of testator's bounty and that it executed an expressed purpose of long standing are strong circumstances in favor of his capacity. Bradshaw v. Butler, 30 Ky. L. R. 1249, 100 S. W. 837. The correspondence of the disposal made to the testator's situation and

cution which tend to show comprehension of the testamentary act or lack of it.[23] Except as affected by the rules previously stated, the evidence as to capacity must be addressed to the time of making the will.[24] Opinions of experts are admissible,[25] and nonexperts acquainted with testator may state their opinions in connection with the facts on which they are based.[26] Entries in the account book of an attending

to his express designs is admissible. In re Shapter's Estate [Colo.] 85 P. 688. Where will assigned as reason for small bequest to daughter that her husband had not treated testator justly, evidence to show transaction between them, or conduct of son-in-law in respect thereto, in so far as it was known to him, was admissible as tending to show what operated on his mind. Slaughter v. Heath [Ga.] 57 S. E. 69. If son-in-law withheld money from him and this was known to him, such fact was admissible as throwing light on reason assigned in will. Id. For same reason evidence that testator asked son-in-law for bond, to which he claimed title, and that son-in-law replied, with an oath, that he would give it to him when he pleased, was admissible. Id. Evidence of intemperance of a legatee, without showing testator's knowledge thereof, irrelevant. Sibley v. Morse [Mich.] 13 Det. Leg. N. 878, 109 N. W. 858. Testimony of testatrix's husband as to his own embarrassed financial condition, ill health, and expenditures on his wife's property, held admissible as tending to show reasonableness of disposition of her property. Smith v. Ryan [Iowa] 112 N. W. 8.

23. Reading of will and intelligent comment thereon held to show capacity of a blind and enfeebled testator. In re Pickett's Will [Or.] 89 P. 377. Statements, declarations, or conduct of testatrix tending to throw light on her mental condition at time will was executed may properly be considered by jury on issue of capacity and undue influence, in connection with other facts and circumstances attending or surrounding execution of will. Smith v. Ryan [Iowa] 112 N. W. 8. Possession of the draft of the will and his calling for witnesses shows knowledge or opportunity for knowledge of its contents. In re Shapter's Estate [Colo.] 85 P. 688. Where female witness had testified that testator had applied to her to write his will and she had refused, held competent to show that she had drawn other wills, if that fact had been communicated to him, but not for her to state generally that that fact was known to him. Slaughter v. Heath [Ga.] 57 S. E. 69.

24. The want of testamentary capacity must when urged as a ground for the invalidity of a testamentary act in a given case, relate to the time of the act. Baughar v. Gesell, 103 Md. 450, 63 A. 1078. Unless want of capacity, permanent in character, be established by proof as existing at a time prior to the act called in question, the presumption of capacity attends the act and must be overcome by evidence that affords a rational basis for an inference of the want of it at the very time of the execution of such act. Id. Evidence held insufficient to afford a rational basis for an inference of the want of testamentary capacity at the time of the execution of a will. Id. On a caveat to a will, evidence as to the capacity of the testator is inadmissible if it is not limited to the question of capacity at the date of the execution of the will. Kelly v. Kelly, 103 Md. 548, 63 A. 1082. The presumption of law being in favor of sanity and testamentary capacity, the evidence to support a caveat on the issue of insanity must ordinarily tend to show either that the testator was of unsound mind at the time of the execution of the will or that he was affected with permanent insanity prior to the execution. Id.

25. Opinion cannot be asked on capacity to make will. In re Cheney's Estate [Neb.] 110 N. W. 731. Questions to experts as to testator's capacity "to transact business" properly excluded. Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592. Upon the question of a testator's testamentary capacity, a **hypothetical question** propounded to an expert was held not to be admissible where it recited as a basis of the opinion to be given evidence which was legally insufficient to be submitted to the jury for the purpose of showing testamentary incapacity. Baugher v. Gesell, 103 Md. 450, 63 A. 1078. Evidence held not to warrant assumption in hypothetical question as to administration of opiates to testator. Robinson v. Jones [Md.] 65 A. 814. On the subject of testamentary capacity a hypothetical question asked a medical expert, which contains assumption of facts founded upon hearsay testimony, assumes other facts not supported by the evidence, and also contains the conclusions and inferences of witnesses, is inadmissible. Kelly v. Kelly, 103 Md. 548, 63 A. 1082.

26. May give opinion as to condition of man's mind but not as to his capacity to make will. Opinion evidence held proper. Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979. Opinion of nonexpert that testator was easily influenced held inadmissible without stating facts on which it was based. Slaughter v. Heath [Ga.] 57 S. E. 69. Is not competent to ask nonexpert to state whether, in his opinion, decedent had a decided and rational desire, or whether his desires were like ravings of madman or pratings of an idiot, or a childish whim. Id. Nonexpert may state all facts known by him in relation to testator bearing on state of latter's mind, and on this basis may give his opinion of condition of testator's mind. Id. Nonexpert may state his conclusions as to capacity only as based upon facts of his own knowledge detailed by him in evidence. Questions held proper. Smith v. Ryan [Iowa] 112 N. W. 8. Held competent for proponent to show by witnesses intimately acquainted with testatrix, and familiar with her conduct and habits, how she talked and acted in particular respects, as tending to show that she was not afflicted with senile dementia when will was executed, as claimed and attempted to be shown by plaintiffs. Id. Where upon a caveat to a will a sheriff, who it did not appear had any personal knowledge of testatrix, testified that from the evidence adduced at a lunacy inquisition he believed that she was then a lunatic with

physician are admissible to show the disease for which testator was treated.[27] On the question of capacity of one who later committed suicide, the coroner's verdict is inadmissible;[28] likewise a verdict on the suicide of testator's mother.[29] Declarations of a legatee are inadmissible on capacity.[30] The mere fact that a person present expresses an apprehension that testator will die before signing the will does not tend to prove mental incapacity.[31] An adjudication as to the sanity of testator at another time or with respect to other acts is admissible[32] but not conclusive.[33]

Sufficiency of evidence.—Insanity of testator's ancestors,[34] or the provisions of the will itself,[35] may afford evidence of incapacity but are never sufficient alone to establish it. The standard of capacity is a question of law, but whether capacity exists is for the jury,[36] and the finding will not be disturbed unless clearly against the weight of the evidence.[37] The testimony of the subscribing witnesses as to

lucid intervals, it was not error for the court to refuse to allow the further question to be asked him: "Now what did you consider her?" Packham v. Glendmeyer, 103 Md. 416, 63 A. 1048. Lay witness not entitled to state whether acts of testator narrated by him were rational or irrational. In re Small's Will, 103 N. Y. S. 705. Intimate acquaintance may testify generally to opinion that testator was of sound mind, but contrary opinion must be based on facts observed and narrated. In re Wilson's Estate [Neb.] 111 N. W. 788.

27. Knapp v. St. Louis Trust Co., 199 Mo. 640, 98 S. W. 70.

28, 29, 30. In re Dolbeer's Estate [Cal.] 86 P. 695.

31. On issue of devisavit vel non on petition for probate, evidence that wife of testator, while will was being executed, ran into kitchen where witness was and got some water for deceased, and stated that she was afraid her husband would die before they could get the business fixed, held inadmissible as declaration against interest, it not appearing that will had been executed when declaration was made or that any person in interest was claiming under wife, since deceased. In re Murray's Will, 141 N. C. 588, 54 S. E. 435. Unsworn declaration of one of several caveatees as to testator's incapacity held inadmissible except for purpose of impeaching him as witness. Robinson v. Duvall, 27 App. D. C. 535. Nor was it admissible as part of res gestae, it not being made in presence of testator or any person connected with will or its execution. Id.

32. Decrees setting aside for incapacity deeds executed at about the same time as the will are admissible though proponent was not in priority. In re Hendershott's Estate [Iowa] 111 N. W. 969. The finding of a jury upon a caveat to a will that the testator was without testamentary capacity at the time of making the will is not admissible upon a caveat to a prior will made by the same testator to show want of testamentary capacity at the time of making such prior will. Packham v. Glendmeyer, 103 Md. 416, 63 A. 1048.

33. Inquisition of lunacy and return that person sought to be declared insane or an imbecile was not so, with entry of ordinary confirming such return, is not conclusive evidence against third persons not parties to proceeding, though notified thereof as next of kin. Slaughter v. Heath [Ga.] 57 S. E. 69. Adjudication of insanity is only presumptive evidence of incapacity. In re American Board of Com'rs [Me.] 66 A. 215. A finding on an inquest of sanity that insanity antedated the time of beginning the proceeding is unauthorized. In re Preston's Will, 113 App. Div. 732, 99 N. Y. S. 312.

34. Proof of ancestral insanity without any showing of irrational conduct of testator is insufficient. Pringle v. Burroughs, 185 N. Y. 375, 78 N. E. 150.

35. Horner v. Buckingham, 103 Md. 556, 64 A. 41.

36. Johnson v. Johnson [Md.] 65 A. 918.

37. If there is substantial evidence of capacity, the finding will not be disturbed on appeal. Hill v. Boyd, 199 Mo. 438, 97 S. W. 918. Evidence held to raise such doubt as to surrogate's ruling on capacity as to require a reversal that the question may be submitted to a jury. In re Finch's Will, 101 N. Y. S. 135.

Held sufficient to sustain or require finding of capacity. McGown v. Underhill, 101 N. Y. S. 313; In re Winne's Will, 50 Misc. 113, 100 N. Y. S. 376; Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592; Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289. Finding that testator was not incapacitated by administration of opiates sustained. Armstrong v. Armstrong [N. J. Err. & App.] 66 A. 399. Evidence held to sustain a finding that will was executed during a lucid interval. In re Brannan's Estate [Minn.] 107 N. W. 141. Testatrix aged and of impaired mind, but knew what she wanted done with her property. In re Mulholland's Estate [Pa.] 66 A. 150. Finding on conflicting evidence that aged and infirm woman had testamentary capacity sustained. In re Parker's Estate [Neb.] 111 N. W. 119. Evidence held insufficient to sustain finding that elderly man of strong mentality but who had latterly manifested much eccentricity had not testamentary capacity. Archambault v. Blanchard, 198 Mo. 384, 95 S. W. 834. No evidence legally sufficient to show that testator was mentally incapable of executing a valid will at the date of the execution thereof. Kelly v. Kelly, 103 Md. 348, 63 A. 1082.

Sufficient to sustain finding of incapacity. Leonard v. Burtle, 226 Ill. 422, 80 N. E. 992. Evidence held sufficient to authorize submission of issue of capacity to jury. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200; Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979; Meier v. Buchter, 197 Mo. 68, 94 S. W. 883. Evidence held sufficient to show want of capacity. Dillman v. McDanel, 222 Ill.

capacity, other things being equal, is entitled to more weight than that of witnesses not present at the execution of the will.[38] Opinions of persons acquainted with testator will ordinarily prevail over those of experts testifying on hypothetical questions,[39] and opinion evidence will yield to proof of facts indicative of understanding.[40]

Instructions[41] should state the test of competency,[42] define insane delusion,[43] and confine the jury to the issues without entering into a discussion of the validity of particular provisions of the will.[44]

(§ 2) *B. Constituents of fraud, mistake, and undue influence.*[45]—The influence to invalidate a will must be such as to destroy the free agency of testator.[46] Neither kindness and affection[47] nor resentment, though unfounded,[48] is sufficient; nor is it sufficient that the will is different from what is would have been but for interested advice,[49] or but for a promise to a deceased person.[50] The undue influence need not be exerted at the time of the execution of the will if it was then operative,[51] nor need it be exerted by the beneficiary.[52]

276, 78 N. E. 591. Evidence that testatrix being of an advanced age had a stroke of paralysis and symptoms of senile dementia; working a radical change in her appearance and habits, held to make a case for the jury. Knapp v. St. Louis Trust Co., 199 Mo. 640, 98 S. W. 70. Evidence of extreme illness held to make a case for the jury as to capacity. In re Willsey's Will [Iowa] 109 N. W. 776. Evidence held to show incapacity by enfeeblement and great age. In re Wetmore's Estate [Wash.] 87 P. 1151.

Insane delusion: Evidence of insane delusion as to illegitimacy of children held sufficient. Johnson v. Johnson [Md.] 65 A. 918. Instruction that there was no evidence justifying finding that will was result of an insane delusion held proper. Robinson v. Duvall, 27 App. D. C. 535. Evidence held to show insane delusion of testator as to the unchastity of his daughters. Hardenburgh v. Hardenburgh [Iowa] 109 N. W. 1014. Evidence held for the jury on issue whether testatrix had an insane delusion that she had personally made a gift to her daughter of a just share in the estate. Knapp v. St. Louis Trust Co., 199 Mo. 640, 98 S. W. 70. Evidence held insufficient to show that testator who was separated from his wife was under insane delusion as to attitude toward him of children whom he disinherited. Reichert v. Reichert, 144 Mich. 295, 13 Det. Leg. N. 234, 107 N. W. 1057.

38. Instruction approved. Robinson v. Duvall, 27 App. D. C. 535.

39. Opinions of many persons who knew testator opposed to opinions of experts on hypothetical question. In re Isaac's Estate [Neb.] 107 N. W. 1016. Weight of expert opinions discussed, particularly in view of failure to discriminate between legal and medical standards. In re American Board of Com'rs [Me.] 66 A. 215.

40. A physician's opinion as to capacity based only on the probable result of a disease with which testator was afflicted held insufficient against evidence of apparent competency. Horner v. Buckingham, 103 Md. 556, 64 A. 41. Where the overwhelming weight of the testimony as to facts shows testamentary capacity on the part of a testator, it cannot be overcome by the opinions of persons who did not know testator, who undertake to testify as experts. In re Draper's Estate [Pa.] 64 A. 520.

41. Instructions on testamentary capacity approved. Dowie v. Sutton [Ill.] 81 N. E. 395.

42. Instruction that if jury found that testatrix, at time of executing will, was so completely prostrated in body and mind by wasting effects of fatal illness as to be unable to understand business in which she was then engaged, they should find that she was not of sound mind and disposing memory, held proper. Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979.

43. Court should define insane delusion and instruct as to conditions under which it would invalidate will. Johnson v. Johnson [Md.] 65 A. 918.

44. On issue as to capacity, held not error to refuse to instruct that as matter of law children of deceased niece were not entitled to any portion of the estate under the will, and that if they were natural objects of testator's bounty, and he did not have mind sufficient to recall them, and for that reason alone refused to provide for them, will was invalid, court not being called upon to construe will and inform jury as to legality of its provision, only issue being whether paper was will of testator and requested instruction also being misleading. Robinson v. Duvall, 27 App. D. C. 535.

45. See 6 C. L. 1889.

46. In re Miller's Estate [Utah] 88 P. 338.

47. Influence secured by kindness and affection is not "undue." Waters v. Waters, 222 Ill. 26, 78 N. E. 1.

48. Will is not invalidated merely because testator was led to cut off legatee through resentment, whether well or ill founded. Robinson v. Duvall, 27 App. D. C. 535.

49. Hayes v. Moulton [Mass.] 80 N. E. 215.

50. That testatrix disposed of her property in a manner other than she desired, in performance of a promise made to her husband on his deathbed four years before, is not sufficient to invalidate the will (Henderson v. Jackson [Iowa] 111 N. W. 821), though coupled with a belief that she would in some manner suffer from his displeasure in future life if she broke the promise (Id.).

51. Wales v. Wales, 30 Ky. L. R. 948, 99 S. W. 969.

52. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289.

Fraud and mistake.—Testator's knowledge of the contents of the will is presumed from execution,[53] but if he did not know what he was signing or was misled as to its contents the will is avoided,[54] unless the will as executed conformed to his intent.[55]

Indicia of influence and admissibility of evidence.[56]—On an issue of undue influence the reasonableness or unreasonableness of the will [57] and its conformity or lack of conformity to previous testamentary design [58] are material, as are testator's health and condition of mind,[59] and his relations with the persons disinherited [60] and with the person by whom the influence is alleged to have been exerted,[61] the surroundings and circumstances under which the will was executed,[62] and the subsequent conduct of the parties.[63] Where persons are alleged to have conspired to influence testator, facts showing such conspiracy and acts of conspirators pursuant to it are admissible.[64]

53. If person of sound mind executes will, and same is his voluntary act, law presumes knowledge on his part of its contents, even though he is unable to read or write. Lipphard v. Humphrey, 28 App. D. C. 355. Refusal to direct verdict for caveators on ground that will was not read to testatrix at time of execution and attestation held proper. Id.

54. If testator, who was illiterate and feeble, told scrivener to write will one way and he wrote it another, and it was signed under belief that it was written as directed, held that it was not testator's will. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200. Evidence held to justify submission of question whether such was fact to jury. Id. Evidence that testator did not know the contents of the will when he signed it is not admissible under averments of undue influence and want of capacity. Waters v. Waters, 222 Ill. 26, 78 N. E. 1. Where mental capacity was clearly proved, declarations of testatrix as to its contents, made after its execution, and which had no tendency to show want of capacity, held inadmissible to show that she did not know its contents at time of execution. Lipphard v. Humphrey, 28 App. D. C. 355.

55. Will signed by testator under assurance that it would accomplish a certain disposition is valid if the will in connection with the statute of descents accomplishes such purpose. Residuary clause directed by testator, but omitted, gave residue to the person who would inherit it on intestacy. In re Brannan's Estate [Minn.]107 N. W. 141.

56. See 6 C. L. 1890, n. 71 et seq.

57. Testimony of testatrix's husband as to his own embarrassed financial condition, ill health, and expenditures on his wife's property, held admissible as tending to show reasonableness of disposition of testatrix's property. Smith v. Ryan [Iowa] 112 N. W. 8. In proceedings to set aside probate, plaintiffs' evidence as to testatrix's financial condition when she married defendant, seventeen years before execution of will, held properly stricken as having no bearing on issues. Id. Evidence as to advancements made to children before execution of will held admissible as tending to show an unnatural will. Meier v. Buchter, 197 Mo. 68, 94 S. W. 883. Unjustness and unreasonableness of provisions may be considered. Id. Slight inequalities in disposition of property held not to show undue influence. Armstrong v. Armstrong [N. J. Err. & App.] 66 A. 399.

58. Similarity or dissimilarity between wills is material on issue of undue influence. Johnson v. Johnson [Iowa] 111 N. W. 430. Held negatived by the fact of a formed scheme of disposal in testator's mind before he came in contact with the chief beneficiary. In re Pickett's Will [Or.] 89 P. 377.

59. Physical condition may be shown. In re Wiltsey's Will [Iowa] 109 N. W. 776. Mental and physical condition of testator may be considered by jury on issue of undue influence. Linebarger v. Linebarger [N. C.] 55 S. E. 709.

60. Friendly relations between testator and disinherited relatives admissible on issue of undue influence. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289.

61. Conduct of the influencing person is admissible when tending to show opportunity. In re Miller's Estate [Utah.] 88 P. 338. Admission of evidence that testatrix's husband, by whom undue influence was alleged to have been exerted, had been divorced from the other wives for cruelty held harmless in connection with evidence of cruelty to testatrix. Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 S. W. 840.

62. Making of will at time and place remote from beneficiary. In re Rathjens' Estate [Wash.] 87 P. 1070. That the subscribing witnesses were friends of the person alleged to have exerted undue influence, and strangers to testatrix. Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 S. W. 840. Officiousness of the beneficiary is an unfavorable circumstance. Dictating is as bad as writing the will. In re Miller's Estate [Utah] 88 P. 338. Evidence that will was drawn by one in confidential relation to testatrix, making him executor without bond and with extensive powers, and that it was executed at his home in the absence of testatrix's husband and relatives, and with an appearance of haste, held to throw on him the burden of rebutting undue influence. In re Marlor's Estate, 103 N. Y. S. 161.

63. That will was immediately delivered to friend of person exerting influence. Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 S. W. 840.

64. Will of testator's wife leaving bulk of property left her by testator to her daughter held admissible as tending to show result, and therefore motive, of alleged conspiracy between wife, daughter, and another, to divert property from testator's family to that of his wife. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200. Where conspiracy between beneficiaries was alleged, state-

The finding of a jury upon a caveat to a will that there was fraud in respect to the execution thereof is not admissible upon a caveat to a prior will made by the same testator, for the purpose of showing fraud in a similar transaction, where the parties to the two proceedings are not the same.[65] Declarations of testator are not admissible as evidence of the facts stated or an issue of undue influnce,[66] at least in the absence of direct testimony of undue influence,[67] but if material they may be admitted to show the state of testator's mind;[68] and declarations of inconsistent testamentary intent are likewise held inadmissible.[69] Declarations or implied admissions [70] of a legatee are inadmissible if made before the execution of the will [71] or if there are several legatees,[72] but admissions of a sole legatee after the making of the will are admissible.[73]

Sufficiency of evidence.—The burden is on one asserting undue influence,[74] but confidential relations between testator and one substantially benefiting by the will is prima facie evidence thereof.[75] Undue influence may be shown by circumstantial evidence,[76] and the sufficiency of the proof is ordinarily for the jury.[77]

ments and admissions of one held admissible after introduction of evidence tending to show privity of design. Meier v. Buchter, 197 Mo. 68, 94 S. W. 883.

65. Packham v. Glendmeyer, 103 Md. 416, 63 A. 1048.

66. Wetz v. Schneider [Tex. Civ. App.] 16 Tex. Ct. Rep. 660, 96 S. W. 59. Declarations of testator prior to execution of will and tending to show undue influence held admissible. Linebargar v. Linebarger [N. C.] 55 S. E. 709.

67. Johnson v. Johnson [Iowa] 111 N. W. 430.

68. Wetz v. Schneider [Tex. Civ. App.] 16 Tex. Ct. Rep. 660, 96 S. W. 59.

69. Cheney v. Goldy, 225 Ill. 394, 80 N. E. 289; Waters v. Waters, 222 Ill 26, 78 N. E. 1.

70. Silence of beneficiary under declarations of testatrix that the will was made to please him and not as she wanted it held inadmissible. Johnson v. Johnson [Iowa] 111 N. W. 430.

71. Not declarations against interest if made before he becomes legatee. Linebarger v. Linebarger [N. C.] 55 S. E. 709.

72. On issue of devisavit vel non, where there are several devisees. Linebarger v. Linebarger [N. C.] 55 S. E. 709. Are, however, admissible where special issue is submitted as to validity of will as to particular devisee. Id.

73. In re Miller's Estate [Utah] 88 P. 338.

74. Hoffman v. Hoffman [Mass.] 78 N. E. 492.

75. Undue influence in nuncupative will is shown prima facie by confidential relation between testator and beneficiary. Isham v. Bingham, 126 Ill. App. 513. Bequest of slight value to one in confidential relation raises no inference of undue influence. Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592. The presumption from the fact that the will was drawn by a legatee who stood in a confidential relation to testator is not rebutted by the fact that testator read the will before signing and was then in possession of his senses. In re Thompson's Will, 50 Misc. 222, 100 N. Y. S. 492. That a legatee was testator's partner, and that he saw him several times the day the will was made, raises no inference of undue influence. In re Muellenschlader's Will, 128 Wis. 364, 107 N. W. 652. That one who was named as executor was testator's advisor and accompanied him on the occasion of making the will, held not to show undue influence. Sibley v. Morse [Mich.] 13 Det. Leg. N. 878, 109 N. W. 858.

76. Hoffman v. Hoffman [Mass.] 78 N. E. 492; Meier v. Buchter, 197 Mo. 68, 94 S. W. 883; Walls v. Walls, 30 Ky. 948, 99 S. W. 969; Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 S. W. 840.

77. Evidence of undue influence sufficient. Cheney v. Goldey, 225 Ill. 394, 80 N. E. 289; Leonard v. Burtle, 226 Ill. 422, 80 N. E. 992; Steinkuhler v. Wempner [Ind.] 81 N. E. 482. Evidence that will was drawn pursuant to alleged communication received the night before from a spiritualistic medium held to make a case for the jury. Testator was 89 years old, intemperate, and eccentric. About eight weeks before his death he went to proponent's house and remained there until he died, proponent acting as his nurse and adviser. Two days before testator's death a man unknown to him, at proponent's request, drew up a will which was executed by testator. The will made proponent sole executor and the residuary legatee after a bequest of $5 to contestant, testator's nephew. Contestant's relations with testator had been pleasant but not intimate. It was held that these circumstances raised a presumption of undue influence by proponent, and that it was for the jury to determine whether such presumption had been overcome by counter proof. In re White's Will, 78 Vt. 479, 63 A. 878. Will unjust to children held obtained by undue influence of wife. Hoffman v. Hoffman [Mass.] 78 N. E. 492. Acquiescence of beneficiary and her daughter, in purpose of another, to exercise undue influence over testator, and their assistance in his efforts, held sufficient to invalidate will, though they thought such beneficiary was entitled to more than others. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200. Evidence held sufficient to authorize submission of question of undue influence to jury. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200; Linebarger v. Linebarger [N. C.] 55 S. E. 709. Evidence held not to justify direction of verdict in favor of will. Meier v. Buchter, 197 Mo. 68, 94 S. W. 883. Evidence of undue influence against

Instructions should define the proof required [78] and apprise the jury of the presumptions arising as a matter of law on the evidence.[79] A special issue may be submitted as to influence by one of several legatees.[80] While the question of undue influence depends largely on the capacity of testator, an instruction that the questions of influence and capacity "cannot be separated" is properly refused.[81] Contestant is not prejudiced by instruction requiring fraud "and" undue influence,[82] and error in submitting undue influence is harmless where want of capacity is found.[83]

§ 3. *The testamentary instrument or act. A. Requisites, form, and validity.*[84]—A will is a declaration of the maker's intention with respect to his property which he wills to be performed after his death.[85] It must be complete in itself and cannot be aided,[86] nor is it invalidated [87] by subjoined non-testamentary writings. A will may be conditional but an intention to make it so will not be inferred.[88] Whether an instrument in the form of a deed,[89] contract,[90] direction,[91] deposit in

children of testator, who was ill and much exercised in mind over divorce obtained by his wife, held sufficient to sustain finding against will. Walls v. Walls, 30 Ky. L. R. 948, 99 S. W. 969. Evidence held sufficient to sustain finding that will was procured by undue influence of testatrix's husband, exerted through cruelty and violence. Livering's Ex'r v. Russell, 30 Ky. L. R. 1185, 100 S. W. 840. Evidence of importunity and extreme illness of testator held to make a case for the jury. In re Wiltsey's Will [Iowa] 109 N. W. 776.

Evidence insufficient. Waters v. Waters, 222 Ill. 26, 78 N. E. 1; Robinson v. Duvall, 27 App. D. C. 535; Baugher v. Gesell, 103 Md. 450, 63 A. 1078. Finding against undue influence sustained. Trubey v. Richardson, 224 Ill. 136, 79 N. E. 592. Testator on bad terms with collateral relatives left his property to one who had for many years been manager of his farm. In re Isaac's Estate [Neb.] 107 N. W. 1016. Will of person found to be possessed of sound mind and memory is not to be set aside on evidence tending to show only possibility of suspicion of undue influence. Robinson v. Duvall, 27 App. D. C. 535.

78. Instruction that before caveators could recover they must prove that undue influence was in fact exerted upon testator by other evidence than his own declarations approved. Linebarger v. Linebarger [N. C.] 55 S. E. 709.

79. Where in proceedings to establish a will the court charged the jury that under the circumstances of the case the law raised the presumption of undue influence by the proponent, who was the residuary legatee, and that such presumption was evidence and established prima facie the fact of undue influence, it was not error to refuse to charge that the jury were at liberty to infer that the proponent had practiced fraud and exercised undue influence, or either, to procure the execution of the instrument. In re White's Will, 78 Vt. 479, 63 A. 878. Where in proceedings to establish a will the circumstances were such as to raise a presumption of undue influence on the part of the proponent, and it was a question for the jury to determine whether or not such presumption had been overcome by counter proof, it was not error to refuse to instruct the jury that the facts and circumstances constituted fraud and deception, in law, on the part of proponent, and that therefore the instrument was not the last will of testator. Id.

80. Where evidence was sufficient to present issue as to exertion of undue influence by one devisee, but not by others, held special issue could be submitted as to validity of will as to him. Linebarger v. Linebarger [N. C.] 55 S. E. 709.

81. Hayes v. Moulton [Mass.] 80 N. E. 215.

82. In re Parker's Estate [Neb.] 111 N. W. 119.

83. In re Wharton's Will [Iowa] 109 N. W. 492.

84. See 6 C. L. 1895.

85. In re Beaumont's Estate, 214 Pa. 445, 63 A. 1023.

86. Instrument executed with testamentary formality providing that property shall be disposed of as provided in a certain trust deed is insufficient under Gen. St. 1902, §§ 392-317. Hatheway v. Smith [Conn.] 65 A. 1058. Testator directed his executors to pay all his debts outstanding at a certain date without naming the persons to whom payment was to be made, but merely referring to "a list of all debts I wish paid" inclosed with the will. Hartwell v. Martin [N. J. Eq.] 63 A. 754.

87. Matter not testamentary following signature does not invalidate will. In re Beaumont's Estate [Pa.] 65 A. 799.

88. Recital of perils of intended journey held not to make will conditional. In re Forquer's Estate [Pa.] 66 A. 92.

89. Held testamentary: Instrument in form of deed executed by an old man shortly before his death. Aldridge v. Aldridge [Mo.] 101 S. W. 42. Instrument designated a "deed" but passing no beneficial interest during the lifetime of the grantor. In re Beaumont's Estate, 214 Pa. 445, 63 A. 1023. A deed by wife to her husband deposited with her husband's will in her favor and to take effect at her death (Sappingfield v. King [Or.] 89 P. 142), nor are the deed and the husband's will mutual and reciprocal so as to be irrevocable (Sappingfield v. King [Or.] 90 P. 150). Instrument in form of deed to be placed in escrow and delivered on grantor's death. Wilson v. Carter [Iowa] 109 N. W. 886. Instrument in form of deed in terms effective on testator's death and not until then to be delivered. Leonard v. Leonard, 145 Mich. 563, 13 Det. Leg. N. 612, 108 N. W. 985. Deed accom-

bank,[92] or declaration of trust[93] is in fact testamentary depends on whether it is designed to pass a present interest or to take effect only on the death of the maker and be revocable until then. The burden is on one claiming that an instrument in form of a deed is a will,[94] and an instrument will not be held testamentary and thereby invalidated unless such interpretation is imperative.[95]

(§ 3) *B. Execution of will.* 1. *Mode of execution.*[96]—The requirements are statutory and vary in the different states, the more common being that the will must be signed by the testator or some one for him at his discretion[97] in the presence of[98] the statutory number of disinterested and competent witnesses,[99] who must

panled by directions for disposal after grantor's death under which grantee claimed no title. Oswald v. Caldwell, 225 Ill. 224, 80 N. E. 131.

Held not testamentary: Freeman v. Jones [Tex. Civ. App.] 16 Tex. Ct. Rep. 158, 94 S. W. 1072; Venters v. Wickens, 224 Ill. 569, 79 N. E. 946. An instrument in form a deed but becoming operative three days after grantor's death. Pentico v. Hays [Kan.] 88 P. 738. An instrument in form of a deed to be delivered on grantor's death held not testamentary, though grantor told the draughtsman that he wished to make a will. Griswold v. Griswold [Ala.] 42 So. 554. Deed on valuable consideration to take effect on grantor's death. Rogers v. Rogers [Miss.] 43 So. 434. Instrument in form of absolute deed presently effective. Jones v. Jones [S. D.] 108 N. W. 23. Deed conveying fee in presenti but with reservation to grantor for life. Anspach v. Lightner, 31 Pa. Super. Ct. 218. Revocable deed with power of attorney back to the grantor to collect and use rents and profits. Stamper v. Venable [Tenn.] 97 S. W. 812. An instrument executed as a deed and containing operative words of present conveyance will not be held testamentary because the phrase "I will" is used therein in limiting a remainder. Brinson v. Sandifer [Miss.] 42 So. 89.

90. Instrument of form of contract whereby son was to work farm during his mother's life and receive it on her death **held** testamentary. Williams v. Claunch [Tex. Civ. App.] 16 Tex. Ct. Rep. 813, 97 S. W. 111. An agreement whereby an adopted child is given full right of inheritance is not testamentary. Chehak v. Battles [Iowa] 110 N. W. 330.

91. A signed statement "to be seen when I am gone" that one should be paid for work according to agreement is not testamentary. King v. McKinstry, 32 Pa. Super. Ct. 34. Writing ordering maker's executor to pay plaintiff certain sum one year from maker's death held testamentary in character and void for want of proper execution as a will. Haines v. Rogers [N. J. Law] 62 A. 272.

92. Deposit in bank in joint names of depositor and another held not a gift but an invalid attempt at testamentary disposition. Turnbull v. Turnbull, 103 N. Y. S. 499. Testatrix who was a depositor in a bank left a paper writing, signed, sealed, and delivered which read as follows: "This is to certify that, in case of my death, any money in the bank (naming it) at the time of my decease, standing in my name, shall be the sole property" of a person named. It was held insufficient as a testamentary disposition. White v. Crossman [N. J. Eq.] 64 A. 168.

93. Declaration of trust to be executed after maker's death held to vest in the beneficiaries from delivery of the deed, and according need not be executed with testamentary formalities. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

94. Fellbush v. Fellbush [Pa.] 65 A. 28.

95. A provision that it shall not take effect till death will ordinarily be referred to the enjoyment of what was conveyed and not to the validity of the deed, and it will not be assumed that conditions precedent to delivery were intended to make the deed testamentary if they might have performed during life. Nolan v. Otney [Kan.] 89 P. 690.

96. See 6 C. L. 1897.

97. "I cannot write, you will have to sign it for me," held sufficient direction. In re Isaac's Estate [Neb.] 107 N. W. 1016. Is not necessary to validity of will executed by illiterate person that he should sign it by his mark, but is sufficient if he authorizes and directs some other person to sign his name in his presence. Civ. Code 1895, § 3272, and hence absence of cross mark between words "her mark" does not necessarily show failure to execute. Robertson v. Hill [Ga.] 56 S. E. 289. Blindness alone will not invalidate a signature made at testator's direction and in his presence. In re Pickett's Will [Or.] 89 P. 377.

98. A will was executed in the presence of a witness where he was in an adjoining room separated only by a railing and actually saw the testator sign. Bogert v. Bateman [N. J. Eq.] 65 A. 238.

Acknowledgment of signature out of presence of witnesses: Not sufficient acknowledgment of signature out of presence of witnesses where testatrix was silent when scrivener stated that signature was hers. Manners v. Manners [N. J. Eq.] 66 A. 583. Where testator did not sign in the presence of the witnesses and was silent when the scrivener stated the nature of the instrument requested the witnesses to sign, there is no sufficient publication. Id. Immaterial that signature of illiterate was affixed out of presence of witnesses where he made his mark and adopted the signature in their presence. Robinson v. Jones [Md.] 65 A. 814. Where the will is not signed in the presence of the witnesses, it must be published and the signature acknowledged in their presence. In re Rogers' Will, 103 N. Y. S. 423.

99. Signature of a testamentary instrument in form of a deed by the maker's husband as joint maker and by a notary at the end of a certificate of acknowledgment is not an attestation by two witnesses. Gump v. Gowans, 226 Ill. 635, 80 N. E. 1086. The incompetency of husbands and wives

be informed that the instrument is the will of testator [1] and who must thereupon [2] sign in his presence [3] and in some states at his request.[4] Attestation is not impaired by witnesses' testimony that he believed testator was at the time unconscious.[5]

(§ 3 B) 2. *Nuncupative and holographic wills.*[6]—Nuncupative wills will be closely scrutinized and statute authorizing them strictly construed.[7] A holographic will is one entirely written by the testator, attestation being in some states dispensed with as to such wills.[8] A holographic codicil good as such and written on the back of a will not a legal holograph so incorporates the will as to validate both.[9]

(§ 3) *C. Revocation and alteration.*[10]—A will is revocable at pleasure [11] unless the testator be estopped,[12] contracts against revocation being generally ineffective in probate,[13] though enforceable in equity.[14] Express revocation can only be made in the manner provided by statute,[15] and a writing purporting to revoke a will on account of the existence of a certain fact does not release if there be no such fact.[16] Whether cancellation was made animo revocandi is ordinarily a ques-

as witnesses for and against each other applies to the attestation of wills. Rev. St. ch. 51, § 8, expressly provides that the relaxation of the rule in some cases shall not apply to the attestation of wills. Id. The person named as executor is a competent subscribing witness. Davenport v. Davenport, 116 La. 1009, 41 So. 240. Only direct and beneficial interest will disqualify a subscribing witness. Dowie v. Sutton, 126 Ill. App. 47. A beneficiary may be a competent subscribing witness if so at the time of attestation, but by statute in Montana he cannot take if he was then a contingent beneficiary and is a necessary subscribing witness. In re Klein's Estate [Mont.] 88 P. 798. A direction to the executor to advise with an attorney named does not constitute a beneficial appointment of the attorney disqualifying him to attest. In re Pickett's Will [Or.] 89 P. 377.

1. It is sufficient publication that the will was read aloud to testator in the presence of the witnesses and that he then expressed his satisfaction therewith. Bogert v. Bateman [N. J. Eq.] 65 A. 238. Is not necessary that will be read to testator or by him in presence of witnesses. Code, § 3274. Smith v. Ryan [Iowa] 112 N. W. 8.

2. Witnesses must sign after testator has signed and not before. Smith v. Ryan [Iowa] 112 N. W. 8. **Contra.** In re Shapter's Estate [Colo.] 85 P. 688.

3. Whether will signed by witnesses in the same room with testator was in fact signed in his presence held a question of fact. In re Brannan's Estate [Minn.] 107 N. W. 141. Under Rev. St. 1899, § 4604, subscribing witnesses must sign in testator's presence. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200.

4. Declaration and request immediately before signing by testator held good. In re Gambler's Will, 104 N. Y. S. 476.

5. In re Shapter's Estate [Colo.] 85 P. 688.

6. See 6 C. L. 1901.

7. Isham v. Bingham, 126 Ill. App. 513. Statutory requirements as to nuncupative wills must be followed to validate verbal deathbed bequests which have not the essentials of a gift causa mortis. Godard v. Conrad [Mo. App.] 101 S. W. 1108.

8. Letter to wife written in contemplation of suicide held a valid will. Arendt v. Arendt [Ark.] 96 S. W. 982. Testimony held sufficient to establish under statute requiring testimony of three unimpeached witnesses to handwriting. Id.

9. In re Plumel's Estate [Cal.] 90 P. 192.

10. See 6 C. L. 1901.

11. In re Beaumont's Estate, 214 Pa. 445, 63 A. 1023. Testamentary instrument, though in form of contract, is subject to revocation. Williams v. Claunch [Tex. Civ. App.] 16 Tex. Ct. Rep. 813, 97 S. W. 111.

12. Where joint wills provide for distribution on the death of the survivor, such survivor, having received the benefits of the agreement, cannot revoke his will. Bower v. Daniel, 198 Mo. 289, 95 S. W. 347.

13. Revocation by a later will is none the less effective because the revoked will was in performance of a contract to devise which the later one violated. Allen v. Bromberg [Ala.] 41 So. 771.

14. See ante, § 1.

15. Under a statute declaring that revocation can be accomplished only by destruction or by a writing executed with testamentary formality, an endorsement signed by testator is ineffective. In re Miller's Estate, 50 Misc. 100 N. Y. S. 344.

Proof of express revocation: On issue as to whether purported written revocation was in fact made by testator, evidence of testator's declarations as to how he was going to leave his property, made after execution of will and before alleged revocation, held inadmissible, there being no question of fraud in factum of will itself. In re Shelton's Will [N. C.] 55 S. E. 705. Declarations of testator, made after date of purported revocation, tending to show that he did not execute or write alleged revocation appearing on margin of will, held admissible, particularly in view of Revisal 1905, § 3115, requiring written revocation to be entirely in testator's handwriting unless attested by witness. Id. Verdict answering "yes" to issue whether writing propounded for probate, and every part thereof, was testator's last will, held not ambiguous, though will bore purported revocation on margin, revocatory words not being part of writing as introduced by proponent. Id.

16. Appeal of Strong [Conn.] 63 A. 1089. It is immaterial whether the mistake under which the act of revocation was done was one of fact or law. Id.

tion of fact.[17] At common law a woman's will was revoked by marriage,[18] and a man's by marriage and birth of issue,[19] and statutes in some states have extended these rules.[20] A subsequent will does not work revocation in the absence of a revocatory clause or an inconsistent disposition.[21] One seeking to show revocation by a lost subsequent will must show not only its execution but its contents.[22] A power of attorney respecting the testator's estate being revoked by his death does not revoke his will.[23] Where a lost will was last seen in the possession of the testator, the presumption arises that it was destroyed by him animo revocandi.[24] In Wisconsin a will is revoked if the testator knowing of its loss or destruction fails after reasonable time and opportunity to reproduce it.[25] At common law a conveyance of devised lands operated as a revocation but this rule is changed by statute in most jurisdictions.[26]

(§ 3) *D. Republication and revival.*[27]—Destruction of will does not revive former one in the absence of circumstances showing such intent.[28] Verbal declara-

17. Whether provisions are revoked by the drawing of a line through them by testator depends on his intent. Home of the Aged v. Bantz [Md.] 66 A. 701. Cancellation of signature and inscription "Am going to make a new will" held to show revocation. In re Miller's Will, 51 Misc. 156, 100 N. Y. S. 849. Pencil interlineations in holographic will apparently made to indicate changes intended on preparation of new will held not to show intent to revoke. In re Raisbeck's Will, 102 N. Y. S. 967. After testator's death a typewritten will was found torn in two, with the words in testator's handwriting at the top of the first page, "Superseded by written one." In the same envelope was an unsigned draft of a will in testator's handwriting. It was held that the will was not revoked, the attempted act of revocation being evidently made under a mistake of law as to the effect of the unsigned draft. Appeal of Strong [Conn.] 63 A. 1089.

18. The rule that a woman's will is revoked by marriage applies, though the will was made in contemplation of marriage and provides for her intended husband. In re Mann's Estate, 51 Misc. 315, 100 N. Y. S. 1100.

19. Implied revocation of will "of testator's whole estate" by marriage and birth of issue is not affected by the lapse of certain legacies in testator's lifetime. In re Rossignot's Will, 50 Misc. 231, 100 N. Y. S. 623. Such lapse could not in any event be proved for that purpose in view of the statute prescribing what evidence may be received on the issue of revocation. Id.

20. By statute in South Dakota marriage revokes a will not providing for the wife. Griffing v. Gislason [S. D.] 109 N. W. 646. Under Revisal 1905, § 3116, will of married woman held revoked by her remarriage after death of first husband, notwithstanding constitutional guaranty of right of married woman to make will. Means v. Ury, 141 N. C. 248, 53 S. E. 850.

21. In re Dunahugh's Will, 130 Iowa 692, 107 N. W. 925. The rule in the construction of wills that, if a testator makes a testamentary disposition of the whole estate in any property, a devise over of any remainder in that property is inoperative, because nothing is left which can be the subject of a devise over, is not applicable when the inconsistent devises are contained one in the original will and the other in a subsequent codicil, as then the testator is presumed to have changed the intention which he had at the time of making the first testamentary disposition of the property in question, and his last will, that is the codicil, will take effect. Williams v. Dearborn, 101 Me. 506, 64 A. 851. In such case the insertion in the codicil of the words "hereby confirming my last will" will not be construed as showing an intention on the part of the testator to confirm the will in full, but only an intention to confirm it except as modified by the codicil. Williams v. Dearborn, 101 Me. 506, 64 A. 851, overruling in part Pickering v. Langdon, 22 Me. 413.

22. In re Dunahugh's Will, 130 Iowa, 692, 107 N. W. 925.

23. In re Kilborn [Cal. App.] 89 P. 985.

24. In re Fallon's Estate, 214 Pa. 584, 63 A. 889. This presumption is strengthened where it is shown that testator's habits were methodical. Id.

25. Rev. St. 1898, § 3791. Parsons v. Balson [Wis.] 109 N. W. 136. Knowledge by testator for three years and change in his circumstances. Id.

26. Conveyance of land held a revocation of a testamentary disposition in the form of a contract. Williams v. Claunch [Tex. Civ. App.] 16 Tex. Ct. Rep. 813, 97 S. W. 111. In view of Code, § 1626, subsequent conveyance of land devised does not operate to revoke will. McGowan v. Elroy, 28 App. D. C. 188. The doctrine of implied revocation that existed at common law prior to the English Wills Act of 1837 does not obtain in Ohio as to after-acquired property devised by will, or to devised specific property conveyed by a testator after the execution of the will and reconveyed to him before his death. Ridenour v. Callahan, 8 Ohio C. C. (N. S.) 585. Where R. made a will in 1900, devising specific real estate, and thereafter conveyed such real estate to another, and later and before the death of R. the same was reconveyed to the testatrix, said devise passes under the original will and is not revoked. Id.

27. See 6 C. L. 1904.

28. In re Moore's Will [N. J. Eq.] 65 A. 447. Facts held not to show intent to revive. Id. In Kansas the revocation of a

tions will not ordinarily republish a will revoked by operation of law.[29] Republication of a contingent will after contingency has failed re-establishes it as an unconditional will.[30]

§ 4. *Probating, establishing, and recording. A. Place of probate and jurisdiction and powers of courts.*[31]—The jurisdiction of courts of probate attaches when the will is filed for probate [32] and terminates with distribution.[33] It extends to all matters relating to the factum of the will,[34] and, as incident thereto, the standing of contestants,[35] but not to issues arising from breach of a contract to devise.[36] The primary jurisdiction of probate is at the domicile of the testator,[37] which domicile the court, where the will is offered, must primarily determine.[38] A court of ancillary probate may enjoin one from prosecuting a suit in the domicile to contest the will.[39]

(§ 4) *B. Parties in will cases and the right to contest.*[40]—Any person who under a prior will [41] or under the statute of descents [42] would take a share of the

later will does not revive an earlier one revoked by the later. Gen. St. 1901, § 7976. Ross v. Wallard [Kan.] 89 P. 680.

29. Where will of married woman was revoked by subsequent remarriage after death of first husband, held that her verbal declaration that it was her last will and testament, without anything further, did not constitute re-execution and republication. Means v. Ury, 141 N. C. 248, 53 S. E. 850.

30. In re Forquer's Estate [Pa.] 66 A. 92.

31. See 6 C. L. 1905.

32. Orphans' Court has no jurisdiction under will until it is presented for probate. Cannot until then send issue of fact as to testator's residence to law court. Bridge v. Dillard [Md.] 65 A. 10. When caveats are filed against the probate of a will, service of citations upon the caveators and upon those propounding the will for probate vests in the orphans' court of the proper county complete jurisdiction over the question of probate. In re Myers' Estate [N. J. Err. & App.] 64 A. 138.

33. A will had been admitted to probate, and the executors, after payment of debts, had passed the estate over to trustees, and it was ready for distribution. It was held that prior to a decree of distribution by the probate court the court of chancery had no jurisdiction, under the Vermont act of 1896, of a bill filed by legatees praying for a construction of the will. Harris v. Harris [Vt.] 64 A. 75.

34. Whether erasures were with animo revocandi relates to the factum of the will not to its interpretation and are within the exclusive jurisdiction of the orphans' court. Home of the Aged v. Bantz [Md.] 66 A. 701.

35. The probate court may decide whether a contestant has aliened his interest. In re Edelman's Estate, 148 Cal. 233, 82 P. 962.

36. See ante, § 1.

37. Evidence held sufficient to show that the residence of testatrix, as fixing the jurisdiction of the court to admit her will to probate, was in Baltimore County and not in Baltimore City. Oberlander v. Emmel [Md.] 64 A. 1025. Domicile is not changed by mere absence, however long, without intention to remain. Absences of 3 and 12 years held not a change. Pickering v. Winch [Or.] 87 P. 763. Under the Maryland statute, Code Pub. Gen. Laws, Art. 93, §§ 14, 334, making the right to admit a will to probate depend upon the residence of the testator at the time of his death, the orphans' court of Baltimore City has jurisdiction to determine the preliminary question of residence of testator in order to determine whether it has jurisdiction to admit a will to probate. Oberlander v. Emmel [Md.] 64 A. 1025.

38. In Pennsylvania the orphans' court has jurisdiction to determine the domicile of the testator notwithstanding the action of the probate court of another state in admitting his will to probate and granting letters testamentary. In re Dalrymple's Estate [Pa.] 64 A. 554.

39. Will of testator domiciled in Oregon was admitted to probate in Washington, one of the executors being a resident of the latter state and the other two residents of the former. Widow, who had moved to Washington, made no objection to probate proceedings, accepted her legacy under the will, and for an additional valuable consideration released all claims against the estate. All the property was in Washington except one tract of realty. Held that Washington courts had jurisdiction to enjoin widow from prosecuting suit in Oregon courts attacking the will and the probate proceedings and seeking to have will probated in that state. Rader v. Stubblefield [Wash.] 86 P. 560.

40. See 6 C. L. 1906.

41. Where a will with erasures is probated without contest one who would take under an erased provision has sufficient interest to file a caveat for the revocation of probate. Home of the Aged v. Bantz [Md.] 66 A. 701. One to whom nothing is left by an earlier valid will is not entitled to contest a subsequent one. Cowan v. Walker [Tenn.] 96 S. W. 967. Proponents are not estopped to rely on an earlier will to debar the contestant. Id. Next of kin who in no event can take have no standing to attack the validity of a trust for the purpose of establishing an intestacy. McClellan v. Weaver [Cal. App.] 88 P. 646.

42. Widow may contest will where there are no children, since renunciation of will would not, in such case, give her same interest as successful contest. Freeman v. Freeman [W. Va.] 57 S. E. 292. Code 1899, c. 78, § 11, relating to right of widow to renounce will, held not to change rule,

estate if the will presently propounded were set aside has interest sufficient to contest. Invalidity for violation of a statute providing that no person leaving a wife, child or parent, shall bequeath more than one-half his estate to charity may be asserted by any heir.[43] One who has taken under the will [44] or has entered into an agreement not to contest [45] is precluded from attacking the will. A transfer in anticipation of heirship may be valid and cut off the right.[46] Where a contest is pending, all persons desirous of contesting should be required to join therein and not file separately.[47] In Montana a special provision for representation of minors by guardian ad litem exists which is exclusive of any other such representation.[48]

(§ 4) *C. Duty to produce will.*[49]

(§ 4) *D. Probate and procedure in general.*[50]—In the absence of a statutory provision to the contrary there is no limit upon the time after a testator's death within which a will may be proven.[51] Though a will does not operate to pass title until proven according to law, when so proven it relates back to the death of the testator so as to vest title from that date as between the parties who claim under it.[52]

since it presupposes a valid will which has passed through and survived ordeals of probate and contest. Id. The widow and sole legatee of an heir is a person interested and entitled to contest. Rainey v. Ridgway [Ala.] 41 So. 632. The son of a direct heir of testator who died after him but before probate is a person interested. Henry v. Wert [Ala.] 42 So. 405. The public administrator is not one interested in the estate. State v. District Court of Second Judicial Dist. [Mont.] 85 P. 1022.

43. Robb v. Washington & Jefferson College, 185 N. Y. 485, 78 N. E. 359.

44. Lanning v. Gay [Kan.] 85 P. 407; Rader v. Stubblefield [Wash.] 86 P. 560. One accepting a devise cannot attack another devise on the ground that he and not testator owned the property thereby disposed of. Beetson v. Stoops, 186 N. Y. 456, 79 N. E. 731. By permitting his creditors to levy on and sell devised lands, devisee held to have accepted under the will. Torno v. Torno [Tex. Civ. App.] 15 Tex. Ct. Rep. 789, 95 S. W. 762. Joinder by an heir in a conveyance of property devised to his wife estops him to attack the will. Starkey v. Starkey [Ind.] 76 N. E. 876. Acceptance of a voluntary conveyance from a devisee of lands acquired under the will precludes contest. Holland v. Couts [Tex. Civ. App.] 17 Tex. Ct. Rep. 254, 98 S. W. 233. Party to suit to recover land claiming under deed of devisee cannot question validity of probate. Steadman v. Steadman [N. C.] 55 S. E. 784.

45. A promise in consideration of an agreement not to contest rests on a sufficient consideration (Grochowski v. Grochowski [Neb.] 109 N. W. 742), and where no rights of others than the contracting parties are involved violates no rule of public policy (Id.). A settlement agreement precluding heirs from contest may be asserted in proceedings for probate and resort to equity is not necessary. Bean v. Bean, 144 Mich. 599, 13 Det. Leg. N. 355, 108 N. W. 369.

46. Though law did not give effect to transfers, releases, or extinguishments of heirship, they were always cognizable in equity, and in proper cases afforded a complete defense by way of estoppel, and such equitable defense is cognizable by the court of probate. In re Edelman's Estate, 148 Cal. 233, 82 P. 962. Where heir seeks to transfer his interest to third person, latter is bound to show the good faith and fairness of the transaction, but this rule does not apply in case of a release made directly to the ancestor by the heir. Id. Proof of fairness is even less necessary in the case of a separation agreement between husband and wife whereby they mutually release all property rights and rights of succession and inheritance, mutually lived up to during the wife's lifetime, and sought to be questioned by the husband after her death when set up as a defense to his right to contest her will. Id. Agreement held to bar husband's right to contest will. Id.

47. Rainey v. Ridgway [Ala.] 41 So. 632.

48. The general procedure does not apply to probate. State v. District Court of Second Judicial Dist. [Mont.] 85 P. 1022.

49. See 4 C. L. 1890.

50. See 6 C. L. 1907.

51. Steadman v. Steadman [N. C.] 55 S. E. 784. While statutes regulating probate provide no time within which probate shall be applied for, yet they contemplate that this shall be speedily done. Code §§ 1635a, 830. McGowan v. Elroy, 28 App. D. C. 188.

52. Steadman v. Steadman [N. C.] 55 S. E. 784. An unprobated will is capable of conveying an interest in property devised, and if a conveyance be made under a power in the will before probate, subsequent probate will validate the conveyance. Mackey v. Mackey [N. J. Eq.] 63 A. 984. Unprobated will made after Act June 8, 1898, is inadmissible in evidence to show title to realty. McGowan v. Elroy, 28 App. D. C. 188. Where a will has been probated in common form, and the sole heir at law, by petition to the court of ordinary, has called upon the executor to probate it in solemn form, and has filed a caveat, a suit by the executor against such heir to recover property devised may in proper case, be enjoined until the issue devisavit vel non has been determined. Foster v. Case, 126 Ga. 714, 55 S. E. 921. Not an arbitrary rule, but matter resting in discretion of court in view of particular circumstances. Id. Held not an abuse of discretion to refuse injunction, and instead to enjoin executrix from paying out or disposing of assets un-

The fact that an executor is appointed is sufficient to authorize the admission of a will to probate if properly executed, regardless of whether there is any beneficiary named therein, or any person who can take under it.[53] The husband's consent that the wife may dispose of all her estate need not be probated with the will.[54] Judicial annulment in independent proceeding of letters of administration previously granted on the supposition of intestacy is not a necessary prerequisite to the subsequent admission of a will to probate and the grant of letters testamentary.[55] In some states a formal probate is made on examination of the subscribing witnesses only,[56] and the will authenticated thereby is then eligible to record,[57] and the probate is conclusive of due execution until set aside [58] by appeal or suit to contest or revoke.[59] The application for probate is by petition [60] on notice.[61] An ineffectual attempt to probate a will does not in any way affect a subsequent probate in all things complying with existing law.[62] Where contest in the first instance is permitted, it is usually instituted by the filing of objections [63] within the time limited by statute,[64] whereon testimony is taken [65] or an issue at law ordered.[66] The right of the

til further order. Id. Act Cong. June 8, 1898, § 8, re-enacted in D. C. Code § 141, providing that parties interested in any will filed in office of register of wills prior to June 8, 1898, may offer same for probate as will of realty, held permissive only, and not mandatory, so that act does not prevent admission in evidence of will of one dying before that date to show title to realty in action of ejectment, after proof of due execution, though same has not been probated as will of realty. Young v. Peters Co., 27 App. D. C. 140.

53. In re Murray's Will, 141 N. C. 588, 54 S. E. 435.

54. It is no part of the will. Keeler v. Lauer [Kan.] 85 P. 541.

55. Probate operates as revocation of administration. In re Mears' Estate [S. C.] 56 S. E. 7.

56. In Illinois no evidence can be heard on application for probate except that of the subscribing witnesses. Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105. Under Rev. Code 1856, c. 119, § 15, held that proof of will signed by testator's mark by one of subscribing witnesses, without more, was invalid. Steadman v. Steadman [N. C.] 55 S. E. 784. The execution need not be proved solely by the attesting witnesses. In re Shapter's Estate [Colo.] 85 P. 688. Where a subscribing witness signs a name slightly different from that by which he is described, parol evidence is admissible to show identity. Davenport v. Davenport, 116 La. 1009, 41 So. 240. A subscribing witness who does not remember the circumstances of execution cannot state that he would not have signed except in presence of testator (Greene v. Hitchcock, 222 Ill. 216, 78 N. E. 614), nor that in his judgment the requirements of the attestation clause were complied with (Id.).

57. Certified copy of records of ordinary is only proper evidence of contents of will duly probated and admitted to record in court of ordinary. Smith v. Stone [Ga.] 56 S. E. 640. Is no ground of objection to admission in evidence of certified copy, in due form, that original will is different therefrom. Id. See, also, Robertson v. Hill [Ga.] 56 S. E. 289. Since will cannot be legally recorded by ordinary until it has been duly probated, exemplified copy of will from ordinary's office is presumptive proof of due probate. Robertson v. Hill [Ga.] 56 S. E. 289.

58. Probate of will is conclusive that it was duly executed, until such probate is set aside by direct or appellate proceeding. Code, § 3296. Smith v. Ryan [Iowa] 112 N. W. 8.

59. See part of this section as to appeals and suits to contest or revoke.

60. Liberality should be exercised in allowing amendments to petitions for probate. Refusal to allow amendment as to residence of testator held error. In re Rubens' Will, 102 N. Y. S. 795.

61. The proceeding being in rem any reasonable constructive notice is due process of law. Goodrich v. Ferris, 145 F. 844. The enacting of a law for probate on only ten days' notice does not lack due process because of the impossibility of an appearance by nonresidents in that time. In re Davis' Estate [Cal.] 86 P. 183. The Danish consul is not authorized to waive citation for an infant subject of his sovereign. In re Peterson's Will, 101 N. Y. S. 285.

62. Proof of will in 1906 in compliance with Revisal 1905, § 3127, cl. 3, held not affected by attempt in 1857 to prove same will which was invalid for failure to comply with Rev. Code 1856, c. 119, § 15. Steadman v. Steadman [N. C.] 55 S. E. 784.

63. Objection to probate for want of capacity held too indefinite. Henderson v. Jackson [Iowa] 111 N. W. 821. Demurrer to objections to probate held sufficiently specific. Henderson v. Jackson [Iowa] 111 N. W. 821.

64. Time to institute contest is governed by law in force when contest is filed, not that in force when will was probated. Clowry v. Nolan, 123 Ill. App. 562.

65. Evidence taken in writing on contest may be used by surrogate's successor to whom the decision of such contest is submitted. In re Nolan' Will [N. J. Eq.] 63 A. 618. The Kansas statute permitting the examination of witnesses against the will by the opponent of probate does not change the proceedings into a contest. Wright v. Young [Kan.] 89 P. 694. The extent of examination in opposition allowable in Kansas on common probate is in the discretion of the court. Id. A contestant who

caveator to dismiss is not absolute.[67] It has been held that a special law curative of defects in probate is valid.[68]

(§ 4) *E. Burden of proof on the whole case.*[69]—Some courts presume, on presentation for probate, the capacity of the testator and freedom from undue influence,[70] the attestation clause being said to be prima facie evidence of due execution;[71] while in other jurisdictions the burden is on the proponent,[72] but the testimony of the subscribing witnesses is at least prima facie sufficient.[73] Where there has been great delay in presenting the will for probate increased certainty of proof is requisite.[74] The rule that a prima facie showing suffices in the probate court was not abrogated by the Kansas statute allowing the calling of witnesses in opposition.[75] The effect of adjudications on inquest of sanity[76] and of confidential relations between testator and beneficiary[77] to create presumptions are treated in another section. An adjudication of insanity after execution of the will does not change the burden of proof.[78] Slight interlineations not altering the disposition of property will be presumed to have been made before execution.[79] The burden of proving

failed to call his own witness cannot contend that he was surprised by proponent's failure to call the witness as contestant expected. In re Dolbeer's Estate [Cal.] 86 P. 695.

66. An issue as to the genuineness of a will is of right when subscribing witness testifies to due execution. Crawford v. Schooley [Pa.] 66 A. 743. A statute requiring an issue at law as to whether the will is in fact that of testator is complied with by submission of that issue together with that of capacity. Leonard v. Burtle, 226 Ill. 422, 80 N. E. 992. Evidence to prove that the first page or pages of will had been destroyed and a page substituted after the will had been signed, considered, and held not sufficient, as against the presumption of innocence, to warrant the court in granting an issue devisavit vel non. In re Keil's Estate [Pa.] 64 A. 638.

67. Dismissal after issues had been sent to the Circuit Court denied where a new caveat was immediately afterward filed and an intention to ask issues thereon announced. Bennett v. Bennett [Md.] 66 A. 706.

68. Priv. Laws 1885, p. 892, c. 52, curing defects in probate of will of John Strother, and ratifying and validating orders of probate courts in regard thereto, held valid and effectual for that purpose. Vanderbilt v. Johnson, 141 N. C. 370, 54 S. E. 298.

69. See 6 C. L. 1909.

70. Sanity of testator presumed on presentation for probate. In re Dunahugh's Will, 130 Iowa, 692, 107 N. W. 925; In re Preston's Will, 113 App. Div. 732, 99 N. Y. S. 312. Code Civ. Proc. § 1312. In re Dolbeer's Estate [Cal.] 86 P. 695. The burden of proof of incapacity is on caveators. Johnson v. Johnson [Md.] 65 A. 918. An unnatural will throws on the proponent the burden of explanation. Walls v. Walls, 30 Ky. L. R. 948, 99 S. W. 969. In an action to contest a will after probate, the burden is throughout upon proponents to show proper execution and attestation, and that testator was of sound mind. Burden is not shifted by practice requiring contestants to put in their case after proponents of will have made out prima facie case. Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979. The burden is on one seeking to set aside a will because the universal legatee was a minister of religion in attendance on testator in his last illness must negative that he was related to testator. Succession of Herber, 117 La. 239, 41 So. 559. Where undue influence and testamentary capacity are the only issues submitted, contestant is entitled to open and close. In re Wharton's Will [Iowa] 109 N. W. 492.

71. Manners v. Manners [N. J. Eq.] 66 A. 583; In re Robertson's Estate [Neb.] 109 N. W. 506; Bogert v. Bateman [N. J. Eq.] 65 A. 238.

72. Burden of proving sanity rests on proponent. In re American Board of Com'rs for Foreign Missions [Me.] 66 A. 215; In re Small's Will, 103 N. Y. S. 705; Steinkuehler v. Wempner [Ind.] 81 N. E. 482. Upon trial of an issue arising upon propounding of a will and caveat thereto, burden in first instance is upon propounder to make out prima facie case by showing factum of will, and that at time of its execution testator had sufficient mental capacity to make it, and in making it acted freely, and, when this is done, burden shifts to caveator. Slaughter v. Heath [Ga.] 57 S. E. 69. The burden must be sustained by proponent though there is no opposition. In re Hayden's Estate [Cal.] 87 P. 275.

73. Probate allowed though subscribing witnesses failed to testify directly that testator declared instrument to be his will. In re Moore's Will, 46 Misc. 537, 95 N. Y. S. 61. Certificate of the oaths of the subscribing witnesses makes a prima facie case. Waters v. Waters, 222 Ill. 26, 78 N. E. 1.

74. Probate denied where will was offered many years after testator's death and the evidence as to its custody and discovery is of a suspicious character. In re Duffy's Will, 101 N. Y. S. 974.

75. Probate should be granted unless conclusively shown to be improper. Wright v. Young [Kan.] 89 P. 694.

76. See ante § 2 A.

77. See ante § 2 B.

78. In re Mulholland's Estate [Pa.] 66 A. 150.

79. Jersey v. Jersey [Mich.] 13 Det. Leg. N. 906, 110 N. W. 54.

revocation is on the contestant.[80] After probate the burden is ordinarily on the contestant [81] though there are contrary holdings.[82]

(§ 4) *F. Establishment of lost will.*[83]—Proof of the contents of a lost will and of the testator's signature thereon is not sufficient, but there must be proof of due execution and of the signatures of deceased subscribing witnesses.[84] The contents of a lost will cannot be proved by one witness who is interested.[85] Under the Wisconsin statute, a destroyed will cannot be established if testator knew of its loss in time to have reproduced it.[86, 87] A lost codicil will not be established which if it did exist was revoked by a later one.[88] A finding that there is no will concealed need so state to a reasonable certainty only.[89]

(§ 4) *G. Judgments and decrees.*[90]—The judgment should not go outside the issues tried.[91] An order of probate becomes conclusive of execution and validity by failure to contest within the time limited,[92] and it cannot be collaterally attacked [93] by one in privity,[94] and a foreign will when admitted to probate has the conclusiveness which it had in the domicile, and if no longer contestable there is not contestable where recorded.[95] By statute in Pennsylvania, probate without caveat or action at law for five years is conclusive.[96] Revocation of probate once become

80. The burden is on a contestant claiming revocation by a subsequent will. In re Dunahugh's Will, 130 Iowa, 692, 107 N. W. 925. Burden held on contestant to prove that written revocation and signature thereto were in testator's handwriting and that revocation was in secure place, though writing appeared on margin of will offered by proponent, offer of will in evidence by latter not being necessarily or in fact an offer of revocatory words on margin. In re Shelton's Will [N. C.] 55 S. E. 705. Placing burden on proponent held not prejudicial to contestant. Id.

81. Steinkuhler v. Wempner [Ind.] 81 N. E. 482. Burden of showing incapacity is on one suing after probate to set aside the will. McGown v. Underhill, 101 N. Y. S. 313. Testimony of subscribing witnesses denying due execution held insufficient to overcome presumption from probate. Wyman v. Wyman, 103 N. Y. S. 64. Since, under Code § 3296, probate of will is conclusive that it was duly executed until such probate is set aside by direct or appellate proceeding, in action to set aside probate burden is on plaintiff to prove allegations that will was not properly executed. Smith v. Ryan [Iowa] 112 N. W. 8. Issue as to due execution held properly withheld from jury where there was no evidence tending to support allegation that it was not properly executed. Id.

82. In an action to contest a will after probate, the burden is on those seeking to maintain it to prove every affirmative fact essential to the execution of a valid will, even though contestants offer no evidence at all. Must prove due execution and mental capacity, though they are not required to prove a negative, as that there was no fraud or undue influence. Cowan v. Shaver, 197 Mo. 203, 95 S. W. 200. Hence if, in their efforts to prove due execution, proponents themselves show that the paper offered is not what testator was made to believe it was when he signed it, it cannot be adjudged to be his will, even in the absence of any averment to that effect in the petition of the contestants. Id. Instruction that if testator signed will with understanding and belief that it gave wife only a life estate, with remainder to his children in equal parts, then it was not his will, held proper. Id.

83. See 6 C. L. 1911.

84. In re Halstead's Estate, 101 N. Y. S. 971. Its execution, substance, and that it was not revoked, must be clearly established. Bradshaw v. Butler, 30 Ky. L. R. 1249, 100 S. W. 837.

85. In re Fallon's Estate, 214 Pa. 584, 63 A. 889.

86, 87. Rev. St. 1898, § 3791. Parsons v. Balson [Wis.] 109 N. W. 136.

88. Pardee v. Kuster [Wyo.] 89 P. 572.

89. In re Hayden's Estate [Cal.] 87 P. 275. Finding that "F nor W" concealed held good. Id. It suffices to find that proponent's "allegations [that the will was concealed] are untrue." Id.

90. See 6 C. L. 1911.

91. Verdict that will presented for probate was not last will, but that one probated elsewhere was, will be amended by eliminating reference to other will. Rhome v. Morris, 31 Pa. Super. Ct. 254.

92. Keeler v. Lauer [Kan.] 85 P. 541. Judgment conclusive as to factum after seven years unless appears on face of will that it was not executed pursuant to law. Absence of cross mark between words "her mark" in signature in handwriting of person other than testatrix held not to render instrument nullity on its face, and hence judgment admitting it to probate was not open to collateral attack after seven years. Civ. Code 1895, § 3283. Robertson v. Hill [Ga.] 56 S. E. 289.

93. An opposition to distribution of the estate based on an allegation that the will was forged and the probate fraudulent is a collateral attack. In re Davis' Estate [Cal.] 86 P. 183. It is presumed that proper continuances of hearing for probate were made. Id.

94. A stranger to a will contest and to the compromise thereof is not bound. In re Dominici's Estate [Cal. App.] 87 P. 389.

95. State v. District Court of Twelfth Judicial Dist. [Mont.] 85 P. 866, construing statutes of Montana and California, and the "Full faith and credit" clause.

96. Cannot thereafter be impeached because testator was not of age. Stout v. Young [Pa.] 66 A. 659.

a finality does not divest rights thereunder acquired in good faith.[97] In Montana, when probate has become final as to all but an infant whose right to contest is saved, his successful contest does not reopen the matter as to those others who are concluded.[98]

(§ 4) *H. Revocation of probate.*[99]—Revocation is not ordinarily allowed for mere errors,[1] but will be allowed where a later will is found [2] or at the instance of an infant whose guardian failed to protect his rights,[3] and it has been held that want of jurisdictional facts may be shown on petition to revoke.[4] A statutory proceeding to revoke probate of a will "of personal property" may be maintained against a will disposing of both real and personal property.[5] Where the original petition for revocation was sufficient to give jurisdiction, an amendment setting up additional claims may be allowed.[6]

(§ 4) *I. Suits to contest.*[7]—Suits to contest a will when authorized must be brought within the time limited.[8] Contestants are not foreclosed of their remedy in equity by the judgment admitting to probate.[9] Complainant is not confined to one ground of contest,[10] but the facts constituting the grounds alleged must be specifically averred.[11] It is not a fatal defect in a bill to contest that it alleges that there were not two subscribing witnesses, while the copy of the bill attached showed signatures of two.[12] The Illinois statute limiting contestant's proof to the subscribing witnesses applies only to proceedings to admit to probate.[13] The proceeding to contest is in Missouri an action at law, and where there is substantial, though conflicting, evidence upon a proposition, it should be submitted to the jury, and its finding will not be disturbed on appeal.[14]

(§ 4) *J. Suits to establish.*[15]

(§ 4) *K. Suits to set aside.*[16]—In Utah a suit to revoke probate is a suit at law.[17] Equity has no jurisdiction to set aside probate except in an extraordinary case of fraud extraneous to the proceeding.[18] The provision that in an action to try the validity of probate the surrogate shall transmit a certified copy of the record is not jurisdictional, and where both parties aver the admission of the will to pro-

97. Sale by a devisee is not impaired by a subsequent revocation of probate. Geary v. Rumsey, 30 Ky. L. R. 86, 97 S. W. 400.

98. Spencer v. Spencer, 31 Mont. 631, 79 P. 320.

99. See 6 C. L. 1912.

1. The proceeding before a surrogate to open a decree by him does not lie to correct mere errors. In re Gaffney's Estate, 101 N. Y. S. 882.

2. Where an alleged later will is produced on appeal from probate the appellate court will open the decree of probate and remand the whole matter to the registrar. Will not allow issue on alleged lost will. Crawford v. Schooley [Pa.] 66 A. 743.

3. Failure of the guardian ad litem of an infant next of kin to show in his behalf a revocation of the will held to entitle the infant to have the probate set aside. Parsons v. Balson [Wis.] 109 N. W. 136.

4. Judgment of court of ordinary admitting copy of lost will to probate may be contradicted, in proper proceeding instituted for that purpose by heir, in court which rendered it, as to facts necessary to give court jurisdiction on ground of fraudulent misrepresentations as to residence of testator by party obtaining judgment, and judgment will be set aside if it is shown that necessary jurisdictional facts did not exist, though it recites that they did exist. Davis v. Albritton [Ga.] 56 S. E. 514.

5. In re Mann's Estate, 51 Misc. 315, 100 N. Y. S. 1100.

6. Parsons v. Balson [Wis.] 109 N. W. 136.

7. See 6 C. L. 1913.

8. The jurisdiction of suits to contest being statutory, commencement within the time limited is jurisdictional and cannot be waived. Waters v. Waters, 225 Ill. 559, 80 N. E. 337. That some of the heirs were minors without guardians does not prevent the running of limitations against heirs able to contest. Ellis v. Crawson [Ala.] 41 So. 942.

9. Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105.

10. Ellis v. Crawson [Ala.] 41 So. 942.

11. Averment that will was procured by fraud, without stating any facts constituting same, is bad. Ellis v. Crawson [Ala.] 41 So. 942.

12. Ellis v. Crawson [Ala.] 41 So. 942.

13. Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105.

14. Question of capacity. Goodfellow v. Shannon, 197 Mo. 271, 94 S. W. 979.

15. See 6 C. L. 1914.

16. See 6 C. L. 1915.

17. In re Miller's Estate [Utah] 88 P. 338.

18. Goodrich v. Ferris, 145 F. 844.

bate the action will not be dismissed.[19] Undue influence as a ground must be pleaded by constituent facts and not by conclusions.[20] The person named as executor is not a proper party where he has not qualified.[21] Where property is devised to the head of a voluntary unincorporated association and his successors, the association need not be made a party to a bill to set aside.[22] Any person who would take a share of the estate had testator died intestate may sue.[23] The complaint must show his interest.[24] Leave to amend must be seasonably sought.[25]

(§ 4) *L. Appeals. Appeals from probate courts.*[26]—Appeal is usually allowed from final orders,[27] notice, bond, etc., being usually required as on other appeals,[28] and the time for taking being limited by statute.[29] Except where trial de novo is authorized, the usual rules as to saving questions for review,[30] restriction to the record [31] and to the scope of the order made below [32] and appealed from,[33] and as to reversal for immaterial errors,[34] obtain on such appeals. On a further appeal from an order in an appeal, the record must contain copies of the papers in the first appeal.[35] Contest of a will disposing of realty in a manner other than it would have gone by the statute of descents involves a freehold.[36] In Illinois on

19. Code Civ. Proc. § 2653a. Smith v. Holden, 102 N. Y. S. 366.

20. In re Sheppard's Estate [Cal.] 85 P. 312.

21. Simpson v. Lorsch, 50 Misc. 398, 100 N. Y. S. 535.

22. Dowie v. Sutton [Ill.] 81 N. E. 395, afg. 126 Ill. App. 47.

23. Moser v. Talman, 100 N. Y. S. 231.

24. Complaint not alleging absence of all relatives nearer in degree than plaintiff held insufficient. Moser v. Talman, 100 N. Y. S. 231. Averment that plaintiff was "heir," mere conclusion. Id.

25. Fifteen months after probate and five after filing petition for revocation too late. In re Sheppard's Estate [Cal.] 85 P. 312.

26. See 6 C. L. 1915.

27. Refusal of probate by probate court is appealable to district court. In re Paige's Estate [Idaho] 86 P. 273. Issue may be joined on the interest of a contestant and an appeal taken from the order thereon before hearing of the contest. Cowan v. Walker [Tenn.] 96 S. W. 967. Order vacating probate and setting the matter for hearing at a future date is not final. Schofield v. Thomas, 226 Ill. 631, 80 N. E. 1085.

28. The notice of appeal being required to state the reasons thereof, reasons not assigned cannot be urged. Jersey v. Jersey [Mich.] 13 Det. Leg. N. 906, 110 N. W. 54. Undertaking from probate to district court must be conditioned among other things to pay damages and costs awarded against appellant "on a dismissal thereof." In re Paige's Estate [Idaho] 86 P. 273. While technical precision of statement and pleading are not required in probate appeals to the same extent as in actions at law, two things are indispensable: First, the appeal must show what order, sentence, decree, or demand of the judge of probate is appealed from. Second, taking all allegations in the appeal and the reasons therefore to be true, it must appear that there was error. In re Gurdy, 101 Me. 73, 63 A. 322. Under the New Jersey statute §§ 201, 202 (P. L. 1898, p. 799), an appeal from the surrogate's order of probate must be taken by a petition filed with the surrogate, and not in the orphans', court. Waldron v. Layton [N. J. Eq.] 63 A. 1105.

29. Leave to appeal after time may be allowed in Massachusetts. Leave denied to one claiming under deceased heir. Cawley v. Greenwood [Mass.] 78 N. E. 304. Must be taken within time limited. In Indian Territory under Act Cong. March 3, 1905, c. 1479, § 12, and Act Cong. March 3, 1891, c. 517, § 11, must be taken within six months. In re Terrell's Estate [Ind. T.] 98 S. W. 143. An unexplained delay of more than two years in prosecuting an appeal from an order of probate constitutes such laches as will justify dismissal of the appeal. Waldron v. Layton [N. J. Eq.] 63 A. 1105.

30. Objection that probate proceedings were continued without appointment of an administrator, on death of the beneficiary who was proponent, cannot be raised for the first time on appeal. Jersey v. Jersey [Mich.] 13 Det. Leg. N. 906, 110 N. W. 54. A trial de novo on appeal being provided, failure to object to probate below does not preclude an heir from contesting on appeal. Bovee v. Johnson [Wis.] 110 N. W. 212.

31. On appeal no extraneous matter of explanation can be considered but what the record shows. McClellan v. Weaver [Cal. App.] 88 P. 646.

32. The district court in Kansas on appeal has no greater powers than had the probate court. Ross v. Wollard [Kan.] 89 P. 680.

33. An appeal from a judgment refusing to set aside probate brings up the whole matter, and it is not necessary to appeal from the order assigning real estate. Parsons v. Balson [Wis.] 109 N. W. 136.

34. Unauthorized finding of want of capacity not ground for reversal where finding of undue influence is supported by evidence. In re Wiltsey's Will [Iowa] 109 N. W. 776.

35. Notice of appeal, judgment appealed from, and papers used at hearing of first appeal. Rev. St. 1887, § 4819. In re Paige's Estate [Idaho] 86 P. 273. Minutes of court of first appeal should not be returned. Id.

36. Gottmanshausen v. Wolfing, 224 Ill. 270, 79 N. E. 611.

appeal from grants of probate, both parties are confined to the subscribing witnesses,[37] while, on appeal from refusal of probate, proponent is not so confined but contestant is,[38] except as to the statutory exception of fraud or compulsion, which does not include like of testamentary capacity.[39] Where taking of additional testimony is permitted, the court will not allow testimony on appeal as to additional ground of contest which was deliberately withheld below.[40]

Appeal from decree on bill to contest [41] a will disposing of realty lies directly to the supreme court.[42]

(§ 4) *M. Costs.*[43]—In the absence of statute [44] it is discretionary to allow costs out of the estate to an unsuccessful proponent [45] or contestant.[46] Costs and attorney's fees of a successful defense of the will should usually be allowed.[47] Fees of an attorney employed by a legatee defending a contest are not ordinarily payable from the estate,[48] The power of the court to set aside an adjudication charging costs against the estate and charge them against contestant may be exercised on motion to retax costs.[49]

(§ 4) *N. Recording foreign wills.*[50]—Statutes usually provide for the recording of foreign wills admitted to probate in the state of testator's domicile,[51] and filing in counties other than that where probate is granted is sometimes authorized.[52] It

37. Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105. On appeal from an order admitting to probate only the testimony of the subscribing witnesses can be considered, and if it does not meet the requirements of the statute the order must be reversed. Greene v. Hitchcock, 222 Ill. 216, 78 N. E. 614.

38, 39. Stuke v. Glaser, 223 Ill. 316, 79 N. E. 105.

40. Bogert v. Bateman [N. J. Eq.] 65 A. 238.

41. See 6 C. L. 1918.

42. Dowie v. Sutton [Ill.] 81 N. E. 395.

43. See 6 C. L. 1918.

44. Action to annul will disposing of realty is not one in which a claim of title to real estate arises on the pleadings, within Code Civ. Proc. § 3228, regulating costs. Larkin v. McNamee, 109 App. Div. 884, 96 N. Y. S. 827.

45. Where probate is refused for incapacity, costs may be taxed against proponent. Unsuccessful party under Code, § 3853. In re Hendershott's Estate [Iowa] 111 N. W. 969. Estate should be charged with attorney's fees of executor in defending will set aside for incapacity. Succession of Morere, 117 La. 543, 42 So. 132. Where a will is set aside, costs should be awarded against the executor. Dowie v. Sutton [Ill.] 81 N. E. 395. Where a will is set aside for undue influence of the executor, he may be charged individually with the costs. Leonard v. Burtle, 226 Ill. 422, 80 N. E. 992.

46. Where an unsuccessful appeal by contestants is prosecuted in good faith and presents questions worthy of consideration, costs will be allowed from the estate. In re Bierke's Will [Wis.] 111 N. W. 1128; In re Davis' Will [Wis.] 111 N. W. 1129. Costs from estate were denied to defeated contestant who had propounded a different will from that probated. In re Rathjen's Estate [Wash.] 87 P. 1070.

47. Decedent's estate is properly chargeable with fees paid counsel for services rendered in successfully defending the will against attack, and this rule should not ordinarily be departed from in a case where the contest is instituted by the person named in the will as executor, and the defense is conducted by counsel employed on behalf of the legatee. In re Creighton's Estate [Neb.] 107 N. W. 979. After an execution has been discharged and distribution of the estate made, proctor's fees in proceedings to open the probate of the will cannot be imposed by the orphans' court upon property remaining in the hands of the executor as trustee under the will. In re Meyers' Estate [N. J. Eq.] 64 A. 137. Under the New Jersey statute, P. L. 1898, p. 789, the orphans' court was without jurisdiction to order proctor's fees to be paid out of testator's estate, where after admission of the will to probate the proctors procured an order, afterwards reversed, to show cause why the probate should not be opened, on the ground that some of the next of kin or heirs at law had not been cited upon the application for probate, and that the withdrawal of caveat had been induced by fraud. Id.

48. In re Creighton's Estate [Neb.] 110 N. W. 626.

49. Coulton v. Pope [Neb.] 110 N. W. 630.

50. See 6 C. L. 1918.

51. Foreign will made in accordance with the law of Missouri need not be proved anew, but a certified copy may be recorded. Stevens v. Oliver, 200 Mo. 492, 98 S. W. 492. It is not necessary to prove that the will was not probated in accordance with the law of testator's domicile, proof of execution according to such law sufficing. In re Coope's Will, 103 N. Y. S. 431. Certified copy of foreign will and probate thereof in foreign state held to comply with Code, § 1071, and to be admissible in evidence. Scott v. Herrell, 27 App. D. C. 395.

52. Rights of parties claiming title under wills held not prejudiced by failure to file same in county where land was situated, they having legal title and there being no adverse possession. Hunter v. Hodgson [Tex. Civ. App.] 15 Tex. Ct. Rep. 110, 95 S. W. 637.

is not necessary in Washington that a nonresident's will have been first probated in the domicile.[53] Neither the admission of a foreign will to record nor the foreign judgment admitting it to probate is open to collateral attack.[54] In the absence of statute, filing of a foreign will is not essential to its use as muniment of title.[55]

§ 5. *Interpretation and construction.*[56]

Scope of section.—There are numerous rules applicable to interpretation which may be called general. To them the first subsection applies. The four subsections following indicate four general classes of objects to which the terms of a will are addressed.

(§ 5) *A. General rules.*[57]—The purpose of interpretation is to effectuate if possible the expressed intent of the testator[58] as gathered from the whole will,[59] which is to be if possible effectuated as a whole,[60] but in case of repugnancy of provisions the last controls.[61] The will and the codicil in that they respect the same property must be construed in pari materia.[62] The heir must not be disinherited unless it is done by the express terms of the will or by necessary implication,[63] but where a son is expressly disinherited, the will must if possible be so construed as to avoid any part of the estate falling into intestacy.[64] A will cannot be construed on mere conjecture as to testator's intention,[65] and an indefinite general intent cannot change or control a devise express in its terms and without doubt as to its meaning,[66] nor can the court make a new will for testator.[67] Substitution of words will not be resorted to unless clearly required.[68] Where precatory words must necessarily be followed to carry out the testator's intent, they will be regarded as words of command.[69] Unless a contrary intention appears,[70] words are to be given their ordinary meaning and technical words a technical meaning.[71] A gift clearly made will not

53. Ball. Ann. Codes & St. § 6087. Rader v. Stubblefield [Wash.] 86 P. 560.

54. Stevens v. Oliver, 200 Mo. 492, 98 S. W. 492.

55. The various sections of the Tennessee Code relating to registration of wills outside the state apply only to wills executed in other of the United States, and a foreign will need not be probated in Tennessee to be used there as a muniment of title. Kiernan v. Casey [Tenn.] 93 S. W. 576.

56, 57. See 6 C. L. 1919.

58. King v. Savage Brick Co., 30 Pa. Super. Ct. 582; In re Duckett's Estate, 214 Pa. 362, 63 A. 830; Perry v. Hackney, 142 N. C. 368, 55 S. E. 289; Richards v. Morrison, 101 Me. 424, 64 A. 768; Williams v. Dearborn, 101 Me. 506, 64 A. 851; In re Reed's Estate [Del.] 64 A. 822.

59. Rogers v. Highnote [Ga.] 56 S. E. 93.

60. Operation to be given to, every part of will taken as whole, if this can be done without violating its terms or intention of testator. Rogers v. Highnote [Ga.] 56 S. E. 93; Tooker v. Tooker [N. J. Eq.] 64 A. 806. Repugnancy not to be raised by construction. Martley v. Martley [Neb.] 108 N. W. 979.

61. Rogers v. Highnote [Ga.] 56 S. E. 93; Martley v. Martley [Neb.] 108 N. W. 979. Clause for distribution held to control one violative of rule against perpetuities. Foster v. Stevens [Mich.] 13 Det. Leg. N. 742, 109 N. W. 265. Clause that realty was to be divided among sons, excepting one, held not to be a mere reiteration of a previous disinherison of such one but to be repugnant to a previous provision for division among sons and daughters. Martley v. Martley [Neb.] 108 N. W. 979.

62. In re Noon's Estate [Or.] 88 P. 673.

63. Realty not mentioned held to descend under intestate laws. Coberly v. Earle [W. Va.] 54 S. E. 336. At common law the heir at law is not to be disinherited except by express words in the will, or by necessary implication arising from them. In re Reed's Estate [Del.] 64 A. 822.

64. In re Arensberg's Will, 102 N. Y. S. 971.

65. Coberly v. Earle [W. Va.] 54 S. E. 336. Inquiry is not what testator meant to express but what do words used express. Wills v. Foltz [W. Va.] 56 S. E. 473.

66. Steadman v. Steadman [N. C.] 55 S. E. 784.

67. In re Pearce's Estate, 104 N. Y. S. 469.

68. Held that word "and" would not be substituted for "or" in provision for disposition of estate in case son should die "without leaving a wife or child," whole context of will not requiring it in order to effectuate intention. Travers v. Reinhardt, 205 U. S. 423, 51 Law. Ed. 865.

69. Wolbert v. Beard, 128 Wis. 391, 107 N. W. 663.

70. Where in two different clauses of a will the testator uses the words "issue" and "children" interchangeably, and it is clear that in both instances he means children, the word "issue" again used in the residuary clause should be construed to mean children, in the absence of anything to show that other meaning was intended. In re Duckett's Estate, 214 Pa. 362, 63 A. 830. Fact that will was drawn by testatrix, evidently an unskilled person, may be given limited weight in its construction. Atkins v. Best, 27 App. D. C. 148.

71. Jacobs v. Prescott [Me.] 65 A. 761. Ordinary meaning to be given to language

be impaired by subsequent ambiguous disposition.[72] In case of conflicting provisions a bequest on consideration prevails over one by way of gift,[73] and likewise the primary purpose of testator will, if possible, be effectuated though a secondary intent is thereby impaired,[74] and where the general and particular intent are inconsistent, the latter must be sacrificed to the former.[75] Where two interpretations are open, that should be adopted which prefers those of testator's blood to strangers,[76] though the upholding of charitable bequests is likewise favored.[77] Interpretation acted on by mutual assent will ordinarily be adopted,[78] and one who has received a substantial legacy under a certain construction of the will is estopped to assert a different construction.[79] The statute of distribution governs, in all cases where there is no will, and where there is one and the testator's intention is in doubt, the statute is a safe guide.[80]

As to time.[81]—A will is to be construed as speaking from the time of testator's death.[82] Words relating to time of payment or distribution are, if possible, to be so construed as to effectuate all provisions relating to the property.[83]

Extrinsic evidence [84] is not admissible to explain the language used except in case of latent ambiguity,[85] but all the circumstances and conditions surrounding the testator at the time of making the will may be shown.[86] Declarations of testator as to intent are not admissible [87] unless part of the res gestae[88]

unless context shows that such meaning was not intended. Wood v. Schoen [Pa.] 166 A. 79.

72. Ballantine v. Ballantine, 152 F. 775; In re Teller's Estate [Pa.] 64 A. 525; Hurley v. Rosensteel [Md.] 64 A. 1041.

73. Legacy in lieu of dower. Ballantine v. Ballantine, 152 F. 775.

74. Bequest of half of income to wife held paramount to provision for payment of part of principal to son on attaining majority so as to postpone such payment during life of wife. Ballantine v. Ballantine, 152 F. 775.

75. Davison v. Safe Deposit & Trust Co., 103 Md. 479, 63 A. 1044.

76. In re Edie, 102 N. Y. S. 424.

77. St. John v. Andrews Institute, 102 N. Y. S. 808.

78. Will was ambiguous as to whether trust was intended, but it was assumed that such was the intent and trustee was appointed. Held that after his death on application to appoint successor that the same interpretation would be given. In re Oltman's Estate, 104 N. Y. S. 472.

79. In re Marx, 103 N. Y. S. 446.

80. Where under a will it was doubtful whether testatrix's intention was to give per capita or per stirpes. Sipe's Estate, 30 Pa. Super. Ct. 145.

81. See 6 C. L. 1923.

82. Ridenour v. Callahan, 8 Ohio C. C. (N. S.) 585. Wills of realty and personalty, under Code 1887, § 2521. Kent v. Kent [Va.] 55 S. E. 564.

83. Bequest remainder "subject to" legacies held to make legacies payable on death of life tenant. Newcomb v. Pine Grove Cemetery Trustees [Mass.] 78 N. E. 125. On a bequest to be paid to the legatees when they reach a certain age if males or when they marry if females, a female legatee reaching the specified age is entitled to her share though she has not married. May v. Walter's Ex'rs, 30 Ky. L. R. 59, 97 S. W. 423.

84. See 6 C. L. 1924.

85. Parol declarations of testator held inadmissible to show intention. App v. App [Va.] 55 S. E. 672. Parol evidence is admissible to show that a devise of a lot includes a contiguous lot enclosed with it. Clark v. Goodridge, 51 Misc. 140, 100 N. Y. S. 824. Bequest to "legal heirs in Germany" when it appeared that only one heir resided in Germany and testator believed that all resided in Switzerland. Giger v. Busch, 122 Ill. App. 13. Bequest of income only to one child and absolute bequests to all others does not suggest any such intention to make a spendthrift trust that extrinsic evidence is admissible to support it. Shoup's Estate, 31 Pa. Super. Ct. 162. Oral evidence to identify bank in which money was deposited, there being no such bank as that named in will. In re Snyder's Estate [Pa.] 66 A. 157. Parol evidence is admissible to identify object of testator's bounty. Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730. Cannot under guise of explaining ambiguity change disposition by parol. Succession of Quinlan [La.] 43 So. 249. Parol evidence is admissible on the issue whether a bequest was intended to forgive a debt due from the legatee: Bromley v. Atwood, 79 Ark. 357, 96 S. W. 356.

86. Evidence of such extrinsic circumstances as testator's relation to persons, or the amount, character, and conditions of his estate, is sometimes admissible to explain ambiguities of description, but never to determine construction or extent of devises. Atkins v. Best, 27 App. D. C. 148. Relation of testator to beneficiaries to be considered. Grace v. Perry, 197 Mo. 550, 95 S. W. 875. Parol evidence to show the situation and surroundings of testator and the objects and persons with whom he was familiar, and upon whom his affections were resting, is competent to show what testator understood to be signified by the words used in his will. German Pioneer Verein v. Meyer [N. J. Eq.] 63 A. 835.

87. Lowe v. Whitridge [Md.] 65 A. 926.

88. Declarations of testatrix, made at time

(§ 5) *B. Of terms designating property or funds.*[89]—Words will carry any property which in common use they import,[90] and either real or personal property will pass by an inappropriate word of designation or gift if such an intent is apparent.[91] Likewise, property within the terms of a gift may be deemed excluded if it clearly appears that such was the intention.[92] All that is incident to a thing goes with it,[93] but gift of an incident will not carry another analogous incident.[94] While the will speaks from testator's death, conditions at the time of its execution may be looked to in aid of interpretation.[95] A gift of specific property may carry that into which it is converted in testator's life.[96] Particular description may be rejected if erroneous where the general description is adequate.[97] Gift of residuum to several in the proportion which specific legacies to them bore to each other is not void for uncertainty because such proportion is difficult of ascertainment.[98] Quantity, although less reliable and last to be resorted to of all descriptions of boundaries,

of giving money to her son and shortly thereafter, that it would be deducted from his share of her estate at her death held part of res gestae, and hence admissible on question whether legacy to him was thereby adeemed. Miller v. Payne, 28 App. D. C. 396. Testator's written statement of the condition of his business may be admitted when relevant. In re Palnter's Estate [Cal.] 89 P. 98.

89. See 6 C. L. 1925.

90. Devise in will duly probated and recorded, of "all of my lands" held to contain sufficient description to operate as color of title to lands in county of testator's residence to which he had recorded deeds and which formed part of plantation known by his name and of which he died in possession. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59. "Wearing apparel" construed not to include jewelry. Dox's Estate, 30 Pa. Super. Ct. 393. Bequest by manufacturer of product "on hand" includes that in hands of a selling agent in another city. Brown v. Clothey [Mass.] 79 N. E. 269. Provision that all testators' "belongings should belong to" his wife for her use held a devise of all his property to her in fee. Lee v. Moore's Ex'r, 29 Ky. L. R. 495, 93 S. W. 911. Bequest of a specific part of income to one purpose and "a part" to another imports that all that remains from the first purpose is to be devoted to the latter. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014.

91. Word "property" includes real property where there is no indication of its use in a restricted sense. Held to do so in residuary clause. Young v. Norris Peters Co., 27 App. D. C. 140. Residuary disposal of "personal property, money and effects" does not carry land. Andrews v. Applegate, 223 Ill. 535, 79 N. E. 176. Where words of inheritance are dispensed with by statute, "bequeath" will carry fee of land. Centenary Fund & Preachers' Aid Soc. v. Lake [N. J. Eq.] 66 A. 601. "Bequeath" is a word naturally applicable to the transmission by will of personal property, but when it is associated with the word "give" it may be capable of transmitting real property. Campbell v. Cole [N. J. Eq.] 64 A. 461. In the absence of a manifest intention to the contrary, the word "lend" will pass the property to which it applies in the same manner as if the word give or devise had been used. Word "lend" held equivalent to devise. Sessoms v. Sessoms [N. C.] 56 S. E. 687.

92. Lot containing building at each end held so divided that one building passed by residuary clause and not by devise of other building and land appurtenant. Smith v. Metzger, 32 Pa. Super. Ct. 596. Two lots held to be devised as separate though jointly occupied by one building. Clark v. Goodridge, 51 Misc. 140, 100 N. Y. S. 824.

93. Bequest of "glue" on hand by manufacturer thereof held to include "gelatine." Brown v. Clothey [Mass.] 79 N. E. 269. Profits from carrying on by executor of business of deceased partner held to pass by bequest of testator's share of firm assets. In re Marx's Estate, 49 Misc. 280, 99 N. Y. S. 334. Devise of lots held to carry wharfage and bulkhead rights. Ennis v. Grover, 103 N. Y. S. 1088. Devise of real estate and all personalty thereon, excepting notes and securities, does not carry notes and mortgage received on subsequent sale of part of the devised land. Chase v. Moore, 73 N. H. 553, 64 A. 21.

94. Surplus and undivided profits apportioned to shares of corporate stock do not pass as "income" thereof. Tubb v. Fowler [Tenn.] 99 S. W. 988.

95. Bequest of all personal property on land of testator carries personalty on the land at the time of executing the will, but stored elsewhere on the sale of the land. Chase v. Moore, 73 N. H. 553, 64 A. 21.

96. Widow held entitled to proceeds of sale by her as committee for her husband of land devised by him to her. Brandreth v. Brandreth, 103 N. Y. S. 1074. Where testator makes a subsequent contract to sell devised lands, which is not performed during his life, the purchase price goes to the devisee. Van Tassel v. Burger, 104 N. Y. S. 273. Where testator after making a specific bequest of property puts it into a corporation, receiving stock therefor, the stock passes by the bequest. In re Moran's Will, 104 N. Y. S. 473. Realty directed to be converted into money is to be regarded as if it were money at time of testator's death. Vogt v. Vogt, 26 App. D. C. 46; Iglehart v. Iglehart, 26 App. D. C. 209. Sale of devised land held to work a conversion so that proceeds passed by the residuary clause and not by the devise. In re Bernhard's Estate [Iowa] 112 N. W. 86. Devise of land subject to a contract of sale is a gift of the purchase price due under said contract. Covey v. Dinsmoor, 226 Ill. 438, 80 N. E. 998.

97. "My Kansas City property at No. 705 Olive Street," the number being wrong. Methodist Episcopal Church Trustees v. May [Mo.] 99 S. W. 1093.

98. Leask v. Hoagland, 188 N. Y. 291, 80 N. E. 919.

may, nevertheless, in doubtful cases have weight as a circumstance in aid of other descriptions, and in the absence of other definite description it may have a controlling force.[99, 1] A bequest of dividends or income does not ordinarily carry that accruing in testator's life.[2] Bequest of dividends "as declared" does not give dividends earned but not declared.[3]

(§ 5) *C. Of terms designating or describing persons or purposes.*[4]—The intent governs precise means in ascertaining what takers were meant [5] and as of what date the members of a designated class are to be ascertained,[6] if such intent is expressed with sufficient certainty to be ascertained,[7] and particular liberality is exercised in determining the taker of a bequest to charity,[8] or the nature of a charitable purpose annexed to a gift.[9] Names used merely as description and repugnant to other certain particulars of description may be disregarded.[10] The words heirs, issue, children, and the like may be used as words of purchase, but more often the question is whether they are words of limitation. To avoid confusion and unnecessary repetition the cases construing them have been collected elsewhere.[11]

99, 1. Where a testator having 12,600 square feet of land at or near the corner of B. and C. streets, that directly at the corner being leasehold, devised to S. his "real estate" corner of B. and C. streets, and added the words "containing about fifteen hundred square feet of land and the buildings thereon," it was held, construing the devise in connection with all the facts and circumstances of the case, that a part of the leasehold property containing 1,534 square feet and containing buildings was intended. O'Brien v. Clark [Md.] 64 A. 53.

2. Bequest of income does not carry that which accrued before testator's death. Tubb v. Fowler [Tenn.] 99 S. W. 988.

3. Howell v. Westbrook [N. J. Eq.] 66 A. 417.

4. See 6 C. L. 1928.

5. Division of residue among beneficiaries "named" held inclusive of those described as well as those named by name. In re Klein's Estate [Mont.] 88 P. 798. Devise to the heirs of specified persons construed to mean to such persons "or" their heirs. Edmonds v. Edmonds' Devisees & Heirs [Ky.] 102 S. W. 311.

Employes: "Who shall have been in the employ * * * one year or more previous thereto" held to designate only those in service at testator's death who had been so for a year or more previous. In re Klein's Estate [Mont.] 88 P. 798. Employes of the firm of G. & K. at several named places held to mean a partnership by that name and also the corporation formed to succeed a different partnership of nearly the same membership. Id. One who had been employed regularly, then intermittently, and who later served as manager for a corporation in which testator was interested, was held not an employe of testator's firm. Id. A piece worker held not in the "employ" of testator's firm. Id.

6. Gift to grandchildren held to be such as were living at testator's death, including one born after the will was made. In re Butler's Estate, 50 Misc. 229, 100 N. Y. S. 487.

7. A devise to the person who should take care of testator during his last illness is invalid for indefiniteness. Harrington v. Abberton, 100 N. Y. S. 681. Evidence held insufficient to bring claimant within terms of will even if it was valid. Id.

8. Bequest to Iowa institution conducted by the state held not to pass to the state of Iowa. Catt v. Catt, 103 N. Y. S. 740. Charitable institutions intended will be ascertained from language used and extrinsic evidence where designation was inaccurate. In re Pearson's Estate, 102 N. Y. S. 965; In re North, 103 N. Y. S. 574. Bequest to "Diocese of New York," which is not incorporated but whose temporalties are held by a corporation of another name, held to go to such corporation. Kingsbury v. Brandegee, 113 App. Div. 606, 100 N. Y. S. 353. Bequest to a named hospital will pass to the charitable corporation which owns and conducts such hospital. Johnson v. Hughes, 187 N. Y. 446, 80 N. E. 373. Bequest to charitable corporation, sufficiently identified and having valid charter, held sufficiently definite to be enforced in equity. Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730. Bequest to "the Trustees of the Presbyterian Home for Old Ladies situated in Richmond, Va.," held intended for the "Richmond Home for Ladies." Id. Inaccuracy in designation of beneficiary will not cause bequest to fail if the intention can be gathered with reasonable certainty from the instrument aided by extrinsic evidence. Bequest to convent. McDonald v. Shaw [Ark.] 98 S. W. 952. The misnomer of a corporation will not defeat a devise or bequest to it, if its identity is otherwise sufficiently certain. Doan v. Vestry of Parish of Ascension of Carroll County, 103 Md. 662, 64 A. 314. Parol evidence held sufficient to prove that a legacy to the "German Turner Home Jersey City" was intended to be given to the German Pioneer Verein of Jersey City. German Pioneer Verein v. Meyer [N. J. Eq.] 63 A. 835. A bequest to the pastor of a church for a specified continuing purpose is a bequest to the pastors of the church in succession. McDonald v. Shaw [Ark.] 98 S. W. 952.

9. Trust for education of poor white children in certain county held sufficiently definite to be sustained as charity. In re Murray's Will, 141 N. C. 588, 54 S. E. 435. See, also, Charitable Gifts, 7 C. L. 624.

10. To S's "sister my niece whose name is Marie K.". In re Dominici's Estate [Cal. App.] 87 P. 389.

11. See § 5 D post, Particular Words and Forms of Expression.

(§ 5) *D. Of terms creating, defining, limiting, conditioning, or qualifying the estates and interests created. Particular words and forms of expression.*[12]—The words "heirs," [13] "right heirs," [14] "bodily heirs," [15] "children," [16] "issue," [17] "lawful issue," [18] "brothers," [19] "nephews and nieces," [20] "representatives," [21] will be given their ordinary meaning unless a contrary intention appears. Bequest to two or survivor of them is referable to condition at testator's death,[22] as is limitation over on death of devisee without issue,[23] unless a contrary intent appears,[24]

12. See 6 C. L. 1929.

13. When used in gift of personalty should primarily be held to refer to those who would be entitled to take under statute of distributions. Vogt v. Vogt, 26 App. D. C. 46. "Heirs" or "heirs and assigns" are words of limitation and not of substitution and do not prevent lapse. Farnsworth v. Whiting [Me.] 66 A. 831. "My heirs by my family" does not include relatives by marriage. Jacobs v. Prescott [Me.] 65 A. 761. Where a remainder is given to certain persons or their heirs if deceased, "heirs" is a word of limitation and not of purchase. Ortmayer v. Elcock, 225 Ill. 342, 80 N. E. 339. Bequest over to "heirs" on termination of trust is to those who are heirs of testator at the time of such termination. In re Southworth's Estate, 102 N. Y. S. 447. On a bequest in trust for a term of five years and absolute to the beneficiary's heirs if he die during the term, his heirs are to be determined as at the date of his death. Holmes v. Holmes [Mass.] 80 N. E. 614. In provision for distribution among heirs of testator's children, "heirs" held to mean children. Kalbach v. Clarke [Iowa] 110 N. W. 599. A bequest to the relatives of testator and wife according to "heirship," means according to kinship. Bowser v. Mosier, 125 Ill. App. 565. In a remainder to one and his heirs, "heirs" is a word of limitation and not of purchase and the remainderman takes in fee. Underwood v. Magruder, 27 Ky. L. R. 1165, 87 S. W. 1076.

14. "Right heirs" does not include an adopted child. Brown v. Wright [Mass.] 80 N. E. 612.

15. The rule that "bodily heirs" is to be construed as words of limitation and not of purchase does not apply when a contrary intent is manifested. Held to create a life estate in first taker with remainder to heirs. Adair v. Adair's Trustee, 30 Ky. L. R. 857, 99 S. W. 925.

16. Is word of purchase and not of limitation unless different intent plainly appears. Wills v. Foltz [W. Va.] 56 S. E. 473. Devise to three named daughters "and their children," daughters having children at testator's death, held to give daughters and children joint estate in fee and not to vest fee in daughters alone. Id. Under Code 1899, c. 77, § 10, providing that will is to be construed to speak and take effect at testator's death, point of time for inquiry as to whether children are living, for purpose of determining whether devise to named person and his children gives such person fee, or gives joint estate to him and his children, is date of testator's death. Id. "Children" is primarily a word of purchase and is never to be construed otherwise except where the testator has clearly used it as a word of limitation. Hoover v. Strauss [Pa.] 64 A. 333. A remainder to "children" vested in the children as a class on the death of testator subject to open for afterborn children. May v. Walter's Ex'rs 30 Ky. L. R. 59, 97 S. W. 423. Remainder to "the children, the lawful heirs" of the life tenants, is not within the rule in Shelley's case, and the life tenants do not take an inheritance in remainder. Reilly v. Bristow [Md.] 66 A. 262. An adopted child is not a "lawful child" within a limitation over in event of the first taker dying without lawful children. Cochran v. Cochran [Tex. Civ. App.] 16 Tex. Ct. Rep. 1, 95 S. W. 731. In a bequest to one for life with remainder in fee to his children if he leave any, the word "children" is a word of purchase and not of limitation (King v. Savage Brick Co., 30 Pa. Super. Ct. 582), and the will does not give to the first taker a fee tail which the statute would enlarge to a fee simple (Id.).

17. "Issue" held not word of limitation but to have been used in sense of "children" so that rule in Shelley's case had no application. Fraison v. Odum [N. C.] 56 S. E. 793.

18. Children legitimatized by a marriage of their parents after a divorce of one of them valid where granted, but not in New York, are entitled to take as "lawful issue" in New York. Olmsted v. Olmsted, 102 N. Y. S. 1019.

19. Gift to brothers held to include brothers of the half blood. Watkins v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 336, 94 S. W. 1116. Children of brothers who died before execution of will held not to come within terms of gift to testator's brothers and sisters. Id.

20. A residuary bequest to "nephews and nieces" in the proportion which specific legacies to them bore to each other includes grand nephews and grand nieces to whom specific legacies were given. Leask v. Hoagland, 188 N. Y. 291, 80 N. E. 919; Leask v. Richards, 101 N. Y. S. 652.

21. In bequest to "brothers and sisters and their representatives," the word "representatives" is substitutionary, meaning next of kin. Howell v. Westbrook [N. J. Eq.] 66 A. 417.

22. Holmes v. Stanhope [Pa.] 66 A. 146. The rule of construction that where a devise is made to one, and in case of his death to another, the expression will be confined to the event of the death happening before the death of the testator, does not obtain when from the context of the will it can be reasonably ascertained that testator contemplated the contingency of death at a later period of time. Fisher v. Eggert [N. J. Eq.] 64 A. 957.

23. Mull v. Mull, 50 Misc. 362, 100 N. Y. S. 523. Provision that should any of testator's children, to whom he gave property in equal shares, "die without leaving surviving children" his share should be equally divided among survivors held, under law of Pennsylvania, to refer to death during tes-

and a like interpretation has been given to a condition of marriage.[25] Provision in case legatee should die before testator or "at about the same time" is not applicable where he dies nearly six months after testator.[26]

Gifts by implication.[27]—While it is possible for testator to dispose of property not by any formal disposition in his will, but by necessary implication from the will taken as a whole, there is strong presumption against his having intended any devise or bequest not therein set forth.[28]

Quality of estate, whether legal or equitable, use, trust, or power.[29]—Full legal ownership may be implied from a gift with words ordinarily indicative of a trust or beneficial ownership,[30] and on the other hand a trust may be found without the

tator's lifetime so that children surviving him took fee. App v. App [Va.] 55 S. E. 672.

24. Fact that testator was 84 years old and children were past middle age when will was made held not to change rule. App v. App [Va.] 55 S. E. 672. Remainder to those "who would be entitled thereto" under statute of descent held to go to heirs living at time of determination of particular estate not those living at testator's death. Wood v. Schoen [Pa.] 66 A. 79. Where a remainder over to heirs of testator is contingent on death of life tenant without issue, the heirs who are to take are to be determined as of the time of the life tenant's death. Brown v. Wright [Mass.] 80 N. E. 612.

25. To G. "if she remains unmarried" referred to her nonmarriage at testator's death; hence gift over did not take effect. In re Alexander's Estate [Cal.] 85 P. 308.

26. In re Redmond, 50 Misc. 74, 100 N. Y. S. 347.

27. See 6 C. L. 1933.

28. Coberly v. Earle [W. Va.] 54 S. E. 336. Necessary implication means so strong a probability of intention that contrary intention cannot be supposed. Id. A bequest to the relatives of testator and his wife according to "heirship" means according to kinship, which being ascertainable in the lifetime of the wife does not imply a life estate to her. Bowser v. Mosier, 125 Ill. App. 565. Bequest of life estate to wife in all testator's property, "except as otherwise disposed," negatives any implication of a life estate to her in the only tract specifically devised. Id. Expression of a desire for a speedy settlement of the estate negatives any implication of an intent to give a life estate in the entire property. Id.

29. See 6 C. L. 1934.

30. A bequest to the trustees of an institution for a certain purpose is to such trustees absolutely in their official capacity and not upon trust where the purpose stated is within the powers and purposes of the institution. Morgan v. Durand, 101 N. Y. S. 1002. A bequest to a charity for the benefit of a certain fund thereof is absolute to the charity where there is no such fund. Johnston v. Hughes, 187 N. Y. 446, 80 N. E. 373. Provisions respecting use and management following a bequest in fee held to create a trust, though that word is not used. Robinson v. Cogswell [Mass.] 78 N. E. 389. A provision following a gift absolute to testator's wife that at her death all real and personal estate belonging to her should go to her children does not impair the absolute character of the gift. Hume v. McHaffie [Ind. App.] 81 N. E. 117. Devise of "use" of land during life creates a life estate and not a trust (Little v. Colman [N. H.] 66 A. 483), and a like result follows a bequest of income of lands for life without naming a trustee (Id.). Gift of entire estate to widow to be used and managed by her for mutual benefit of herself and children, with provisions that should she remarry she should take only what law allows widow, that she was desired to make advances to children, etc., and that, after her death, what she had not disposed of was to be divided among children, held to give widow whole estate during life or widowhood, and that with respect to rents and income there was no trust in favor of children. Trout v. Pratt [Va.] 56 S. E. 165. Fact that will was an exact copy of another with construction of which testator expressed himself as highly pleased, and that he stated he desired his will to be construed in same manner, held no ground for giving different construction. Id. A testatrix devised land to the vestry of a church to be used for such church purposes as the rector should direct, stating that it was her purpose and desire that the property should be under the control of the rector and should be used for such church work as he might deem for the best interest of the church. It was held that no trust estate was created, but that the vestry took an absolute estate in fee simple, and that the power attempted to be conferred on the rector was a revoked collateral power repugnant to the fee and therefore void. Doan v. Vestry of Parish of Ascension, 103 Md. 662, 64 A. 314. A plenary power to sell on named conditions and to divide proceeds held a naked power and hence not creative of a trust. In re Campbell's Estate [Cal.] 87 P. 573. Perishable part of personalty held to have become absolute property of widow on bequest to her of all the personalty for life. Medlin v. Simpson [N. C.] 57 S. E. 24. Gift of "the use, and benefit, and profit of all my estate" held devise of land itself. Perry v. Hackney, 142 N. C. 368, 55 S. E. 289. Trust for investment and payment of income to one and his issue held not spendthrift trust. Kunkel v. Kemper, 32 Pa. Super. Ct. 360.

Precatory words: Recital of confidence that wife as sole legatee would adequately provide for children held not to create precatory trust. Rector v. Alcorn [Miss.] 41 So. 370. Precatory words in bequest to wife as to disposition to be made by her of property on her death held not to create a trust. Hillsdale College v. Wood, 145 Mich. 257, 13 Det. Leg. N. 456, 108 N. W. 675. Language in bequest to widow indicating a desire for

artificial words of one.[31] Bequest subject to trust becomes absolute when trust is performed.[32]

Estates or interests created.[33]—Words of inheritance are not necessary to pass a fee, but any words suffice which carry that intent.[34] So, too, no particular words

sale and use for benefit of children when they reached their majority held to create no trust. Courtenay v. Courtenay [Miss.] 43 So. 68. Provision that testator wished all his property kept together and used as he had used it during life of his wife, she and executors to have privilege to set off parts of it to children as they became of age or married, held when construed, in light of agreed statement of facts as to testator's use to create estate during life of widow with title held by executors and with direction that property be cultivated as plantation for support of family living upon it. Toombs v. Spratlin [Ga.] 57 S. E. 59.

31. Bequest to executors absolutely held charged with trust by letter of instructions appointing a beneficiary. Erdman v. Meyer, 102 N. Y. S. 197. A bequest to one for life followed by directions to the executor for investment and management creates a trust for the life tenant. In re Freel, 99 N. Y. S. 505. The rule that a devise of land subject to a contract to sell makes the devisee a trustee to carry out such contract is not affected by the fact that the devisee is a corporation not authorized to sell its land. Edelstein v. Hays, 50 Misc. 130, 100 N. Y. S. 403. Bequest of personalty to wife for life with right to use of the principal if needed makes her trustee for the heirs of the residue. In re Trelease, 100 N. Y. S. 1051. Bequest of income to charitable purpose held to create a trust, though no trustee was named. Welch v. Caldwell, 226 Ill. 488, 80 N. E. 1014. Devise held to give the naked legal title to one, a life use to another, and her equitable fee to the issue of the latter. Clay v. Chenault, 29 Ky. L. R. 1085, 96 S. W. 1125. A charge on life tenant to be by him accumulated for children held to make him a trustee. In re Haines' Estate [Cal.] 89 P. 606. Devise held to pass entire estate charged with a trust to sell twenty acres and pay the proceeds to designated persons. Barksdale v. Capital City Realty Co. [Miss.] 42 So. 668. Devise in trust to wife for joint use of herself and children with power of sale, etc., held to create trust which was executory during wife's life so that, as she took no vested legal interest, she could not, in her individual capacity, convey any by deed. Middlebrooks & Co. v. Ferguson, 126 Ga. 232, 55 S. E. 34.

32. In bequest to daughter-in-law for support of her family, "family" means children by testator's son. Stone v. McLain [Me.] 66 A. 375.

33. See 6 C. L. 1936.

34. Devise of house for life, "and one-third of all other property," gives such one-third in fee. Stepheuson's Estate, 30 Pa. Super. Ct. 97. Will held to give fee in tract to son and daughter subject to life estate given other children by subsequent clause, so that, on death of latter, property did not pass as intestate, particularly in view of Revisal 1905, § 3138. Steadman v. Steadman [N. C.] 55 S. E. 784. A testator devised land to two persons as tenants in common, subject to the condition "that in the event of the death of either * * * without heirs of their bodies begotten the survivor shall inherit the share of the one so dying." It was held that the entire estate in fee vested in the two tenants in common, and when one conveyed his whole interest to the other the latter would have the entire title. Benedict v. Zimmerman [Pa.] 64 A. 333. Devise to granddaughter for life, and to her issue in fee, in case she died leaving living issue, or, in case of her death without issue, to testator's son, with residuary devise in fee to son, held to vest in latter fee after life estate, with the contingent remainders limited thereon. McCreary v. Coggeshall, 74 S. C. 42, 53 S. E. 978. Gift to daughters equally held in fee despite a spendthrift restraint on alienation by one of them. Kinkead v. Maxwell [Kan.] 88 P. 523.

Rule in Shelley's case: Testator devised a house to his grandson A. for life, charged with a valuation of $1,200, and after his death to his "children, their heirs and assigns forever." In a subsequent clause of the will directing the division of the general estate, testator bequeathed one-fifth thereof to the children of his daughter, A. being one, but A "to have $1,200 less than the others, the amount I charged against him for the house and lot which I have given to him during his lifetime as before mentioned, their heirs or legal representatives." It was held that devise to A. did not come within the rule in Shelley's Case, and that he only took a life estate. Hoover v. Strauss [Pa.] 64 A. 333. Devise to one and the lawful heirs of his body forever held to give first taker an estate tail converted by Revisal 1905, § 1578, into fee simple. Sessoms v. Sessoms [N. C.] 56 S. E. 687. Limitation over to another and her lawful heirs in case first taker died without lawful heirs of his body held not qualification of estate of first taker, but separate estate which, on contingent event, would pass direct from testator under doctrine of shifting uses, and by way of executory devise. Revisal 1905, § 1581, merely establishes rule of construction whereby such limitations may be sustained, and does not change nature of first estate, or make second qualification of first.. Id. Devise to one for life "and to the lawful heirs of her body after her death" held to give fee to first taker. Perry v. Hackney, 142 N. C. 368, 55 S. E. 289. Both of the estates must be of same quality, that is both must be legal or both equitable. Vogt v. Vogt, 26 App. D. C. 46. Even if rule applies to personalty, held that it was inapplicable to case where will directed fund to be held in trust for one for life, the principal to be paid to his heirs after his death. Id. Rule is one of property and not of construction. Id. Though intention will be unavailing to exclude operation of rule where technical language used is directly within its application, yet, if there are explanatory and qualifying expressions from which it appears that import of technical language is contrary to clear and plain

are necessary to create a life estate.[35] An express limitation to life cannot be en-

intent, latter will prevail. Id. Bequest to he held in trust for one and his direct descendants does not create an estate tail in the first beneficiary entitling him to possession of the corpus. Ballantine v. Ballantine, 152 F. 775. Devise to one, with provision that the property should descend to her "bodily heirs," creates an estate tail which the statute will convert into a fee. Edwards v. Walesby, 30 Ky. L. R. 251, 98 S. W. 306. Devise for life with remainder to heirs gives fee. Pease v. Davis, 225 Ill. 408, 80 N. E. 249. A bequest of income to one for life, principal to be divided among his children on his death, gives him a life interest only. Xander v. Easton Trust Co. [Pa.] 66 A. 759. A devise to one for life with remainder to the "heirs of her body," notwithstanding a remainder over in event of her dying without children. Hastings v. Engle [Pa.] 66 A. 761. Where freehold estate is, either jointly, severally or successively given to two persons who are capable of having a common heir with remainder to their heirs, rule operates, and they take a joint inheritance in fee. Walker v. Taylor [N. C.] 56 S. E. 877. Devise to be held in trust for testator's three daughters for life, and for survivors or survivor for their or her lives, with remainder to their heirs at law, held to give daughters joint estate of inheritance in fee, and survivor was not entitled to entire tract. Id. Devise for life with remainder to bodily heirs gives a life estate only, and on death without bodily heirs the remainder passes by the residuary clause. Webb v. Sweet [N. Y.] 79 N. E. 1024. Rule in Shelley's Case does not apply to a bequest of personalty. In re Dull's Estate [Pa.] 66 A. 567. A bequest to several persons and their heirs, but with a provision that the share of one should vest in others in trust for his support during minority, does not as to such minor come within the rule in Shelley's case. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163.

35. A devise followed by a direction for holding by the executor for the benefit of the devisee and his widow and heirs gives a life estate only. Mee v. Gordon, 187 N. Y. 400, 80 N. E. 353. Clause following bequest "after the decease of (the legatee) I will that" held an operative limitation over, and not a mere precatory phrase. Hume v. McHaffie [Ind. App.] 79 N. E. 377. Income of lands is not an estate therein within a statute providing that a devise of any estate in lands if not expressly limited shall be deemed a devise in fee. Rev. St. 1874, C. 30, § 13. Pease v. Davis 225 Ill. 408, 80 N. E. 249; In re Vreeland's Estate [N. J. Eq.] 65 A. 902. Devise to take effect on death of a certain person held not to give him a life estate. Devise held to give widow a life estate terminable by her remarriage, a life estate to a daughter thereupon, and a vested remainder in fee to the heirs of the daughter. Haab v. Schneeberger [Mich.] 14 Det. Leg. N. 13, 111 N. W. 185. Codicil held to give to son's widow his share in income of trust estate for life, instead of during widowhood as provided in original will. In re Davis' Will [Wis.] 111 N. W. 503. Bequest to "have and enjoy" for life with remainder over held to give life estate only. Scott v. Scott [Iowa] 109 N. W. 293. Civ. Code 1902, § 2483, held not to require gift to wife to be considered gift in fee where will showed intention that she should take only life estate. Joyce v. Bode, 74 S. C. 164, 54 S. E. 239. Will held to give wife life estate at most, bequests and residuary clause to become effective under administration of named executor on her death, as well as if she remarried, so that on her death without remarriage property did not pass to her heirs. Id. Gift of lands to have full control for life, but to put out a certain sum per year to accumulate, held a life estate subject to a charge. In re Haines' Estate [Cal.] 89 P. 606. Devise of equitable estate to one for life with equitable estate in fee "to his issue forever," with limitation over in default of issue, held to give first taker life estate only with remainder in fee to his children, word "issue" not being used in sense of "heirs," but as correlative term for children, and hence rule in Shelley's case having no application. Faison v. Odum [N. C.] 56 S. E. 793. Will held not to give wife absolute fee, but to vest in her life estate and to create trust in her as trustee for benefit of children, though giving her absolute power of disposal "for the benefit of the family." Newman v. Newman [W. Va.] 55 S. E. 377. Though simple devise, without any words of limitation or description of interest devised, creates estate for life only, any words sufficiently indicating intent to create greater estate will be given that effect, no matter what their form may be, and whole will may be looked to to ascertain such intention. Young v. Norris Peters Co., 27 App. D. C. 140. Even if devise without words of limitation did not pass fee, held that it passed under residuary clause devising to same person any other property not otherwise devised. Id. Tendency of latest decisions, in jurisdictions where rule has not been abrogated by statute, is to search entire will closely for sufficient indication of intention which will prevent operation of rule. Atkins v. Best, 27 App. D. C. 148. Will held to show intention to pass fee. Id. Devisee held to have life estate only in certain tract of land which he elected to take under will, and fee simple in balance which he elected to take at its appraised value as authorized by will. Fitzpatrick v. Wylie [S. C.] 56 S. E. 364. Item "I desire that all my negroes, as also other property, be appraised and equally divided among my sons, * * and at their death to go to their children," held to give sons life estate in whatever land testator died seized of, so that objection to its introduction in evidence on ground that it did not bequeath, or convey title to, any land, and was therefore irrelevant, was properly overruled. Hicks v. Webb [Ga.] 56 S. E. 307. Gift of money to daughter, and appointment of sons to purchase home for her therewith for her life, then over to her children, held life estate and remainder in fee. Lohmuller v. Mosher [Kan.] 87 P. 1140. In Delawaro, prior to the act of Feb. 20, 1849, a devise without words of limitation passed a life estate only, unless there was something in the will which clearly showed that it was the intention of the testator that a greater estate should pass. Such an intention was not clearly shown in this case.

larged by words of doubtful meaning.[36] Likewise, a fee clearly given will not be cut down by subsequent words of doubtful import,[37] and in such case a limitation over is void for repugnancy.[38] A limitation by an executory devise is valid,[39] and

In re Reed's Estate [Del.] 64 A. 822. Terms of will and codicil construed and held to give testator's wife a life estate with right to dispose of any portion of the property during her lifetime. Williams v. Dearborn, 101 Mo. 506, 64 A. 851. A testator gave the residue of his estate to trustees for certain uses, and provided that pending their settlement of the estate 10-27 of the income should be paid to his wife "during her lifetime," if the estate was not sooner settled, "to her sole use and benefit, and upon final settlement the same fraction of the corpus of the trust estate was to be delivered to her, she to have the "entire use and income during her lifetime of all said portion" of the residuary estate, with power of sale "for her sole use and benefit" of any part of the property. It was held that the wife took a life estate only in the 10-27 with power of sale for the purpose stated, and upon her decease what of it remained belonged to the estate of the testator to be held by his trustees. Richards v. Morrison, 101 Me. 424, 64 A. 768. All the provisions in a paragraph in a will construed together and held to confer upon testator's widow only a life estate in certain stock. Id. A testator devised certain real property to his daughter "during her lifetime," and provided that at her death it should be divided equally among her "children, should she have any living," and in case she should die without living issue that it should revert to his estate. It was held that the daughter took only a life estate. West v. Vernon [Pa.] 64 A. 686. Terms of will construed and held to confer on a devisee only a life estate, with a limitation over upon her death. Campbell v. Cole [N. J. Eq.] 64 A. 461. Legacy substituted for life estate held to be of life interest only. Roats's Estate, 30 Pa. Super. Ct. 521.

36. "In fee simple" for life with remainder over gives life estate only. Wallace v. Bozarth, 223 Ill. 339, 79 N. E. 57, afg. 123 Ill. App. 624. Power to dispose by will does not enlarge a life estate. Schoyer v. Kay [Pa.] 66 A. 141.

37. Held to cut down fee: Absolute devise to children held cut down by provision in following paragraph for joint use by them as a home and inhibiting sale until the minority of the youngest. Holden v. Rush, 104 N. Y. S. 175. Gift over of what may be left held to impart life estate. Grennwalt v. Keller [Kan.] 90 P. 233. Provision following absolute devise to children of testator held sufficiently definite to cut down the share of one of them to a life estate. Cochran v. Cochran [Tex. Civ. App.] 16 Tex. Ct. Rep. 1, 95 S. W. 731. A power of disposition in fee is not repugnant to a gift of a life estate with remainder over. Grace v. Perry, 197 Mo. 550, 95 S. W. 875. Where in a will property was given to testator's brother and it was provided that at his death "what remains" should go to his children, it was held that the brother took only a life estate, the words "what remains" not giving him an unlimited power of disposition enlarging his estate into a fee simple. Tooker v. Tooker [N. J. Eq.] 64 A. 806.

Held not to cut down fee: Bequest to wife for life with power of disposition held absolute and not cut down by provision for distribution of what remained at her death. Farney v. Weirich, 103 N. Y. S. 38. Expression of desire as to manner in which residue should be disposed of held not to cut down bequest with full power of disposition. Bennett v. McLaughlin, 103 N. Y. S. 256. Where a life estate is given in express terms, power of disposition annexed does not enlarge it to a fee. Cross v. Hendry [Ind. App.] 79 N. E. 531. Gift over of what was left at death of wife held not to cut down absolute devise to her. Killefer v. Bassett [Mich.] 13 Det. Leg. N. 663, 109 N. W. 21; Conlin v. Sowards [Wis.] 109 N. W. 91. Devise of estate for life, coupled with absolute power of alienation, either express or implied, gives devisee the fee. Bing v. Burrus [Va.] 56 S. E. 222. Desire and direction that in case of sale certain persons should be given preference held not to deprive devisees of absolute power of sale. Id. Estate given in clear and decisive terms cannot be cut down or taken away by any subsequent words not equally clear and decisive. In re Pearce's Estate, 104 N. Y. S. 469. Where estate is conferred by plain words in one part of the will, it cannot be subsequently divested except by express words or necessary implication. Wills v. Foltz [W. Va.] 56 S. E. 473. "Power to use the principal" given a life tenant includes power to sell land where realty and personalty are blended in the devise. Kennedy v. Pittsburgh & L. E. R. Co. [Pa.] 65 A. 1102. Remainder over after life estate with power of disposition held to carry only what remained after the exercise of the power. Dodin v. Dodin, 101 N. Y. S. 488.

38. Gift over on death of legatee of a bequest declared by will to be absolute is null. Stimson v. Rountree [Ind.] 78 N. E. 331. Where estate is devised to one generally or indefinitely, devisee takes fee, and any limitation over is void as remainder or as executory devise. Bing v. Burrus [Va.] 56 S. E. 222. Power of disposition held so essential as to avoid remainder over. Young v. Robinson [Mo. App.] 99 S. W. 20. A gift over of what should remain is not repugnant to a life estate with power of disposal. Reed v. Reed [Mass.] 80 N. E. 219. Under a will containing a devise to A generally, with no power of disposal expressed, but followed by a devise to B of what shall remain undisposed of at A's death, A takes an estate in fee simple and the attempted limitation over is void. Steuer v. Steuer, 8 Ohio C. C. (N. C.) 71. Remainder over of all that was undisposed of at the death of one to whom the property had been in a previous paragraph absolutely given held a nullity. Bernstein v. Bramble [Ark.] 99 S. W. 682.

39. A devise to one with a provision that it should vest in trust in another for the support of the devisee during minority gives a fee simple subject to a limitation by executory devise. Johnson v. Buck, 220 Ill. 226, 77 N. E. 163. An estate which can take effect as a contingent remainder will never be construed as an executory devise. Mc-

a devise with gift over on death of the first taker without issue is usually held to create a defeasible fee,[40] though sometimes it is construed as giving a fee tail [41] or a life estate only.[42] Condition subsequent to a power of sale is inoperative against title arising under its exercise.[43]

"Interest" and "income." [44]—A bequest of income does not ordinarily carry other accretions to the corpus.[45] The rule that when time of payment is postponed by the will interest or other income will not be paid until the specified time may be departed from.[46] A gift of income ordinarily passes only a life estate.[47] A bequest of the income of an investment in United States bonds is not to be charged with deduction to the fund by shrinkage of premiums.[48] From and to what time the share of a particular legatee of income is to be computed depends on the intent.[49]

Legacies.[50]—A general legacy is one payable out of the general assets of testator's estate.[51] A specific legacy is a gift of a specific and identified part of testator's personalty.[52] A demonstrative legacy is a gift of a certain sum payable out of a particular fund.[53]

Creary v. Coggeshall, 74 S. C. 42, 53 S. E. 978. Devise to granddaughter for life, and to her issue in fee, in case she died leaving living issue, or, in default or issue, to testator's son, held to create a contingent remainder with a double aspect, and not an executory devise. Id.

40. Where a devise is limited to take effect on the death of one without issue it will ordinarily be construed to mean issue surviving him. In re Korn's Will, 128 Wis. 428, 107 N. W. 659. Devise held to give an estate in fee subject to be defeated by devisee dying without issue. Whalin v. Bailey, 29 Ky. L. R. 1048, 96 S. W. 1105. Devise to two, the share of either dying without issue to go to the survivor and gift over if both died without issue gives a fee subject to the divesting condition. Gannon v. Pauk, 200 Mo. 75, 98 S. W. 471.

41. A remainder to one and her heirs, subject to divest if she die without issue, gives a fee tail which the statute enlarges to a fee simple. Hannon v. Fliedner [Pa.] 65 A. 944. Devise to two the share of either dying without issue to go to the survivor and limitation over if both died without issue does not create a fee tail by implication. Gannon v. Pauk, 200 Mo. 75, 98 S. W. 471.

42. A devise to one and her children and to another if she died childless gives a life estate only, though such devise was limited on a precedent life estate. In re Williams' Estate [Pa.] 65 A. 757. Will held to give a life estate with remainder to children of first taker and not a fee deposible on death without issue. Reeves v. Morgan, 30 Ky. L. R. 1158, 100 S. W. 836.

43. Centenary Fund Soc. v. Lake [N. J. Eq.] 66 A. 601.

44. See 6 C. L. 1941.

45. Stock issued by way of dividend passes to a legatee of "income." In re Harteau's Will, 104 N. Y. S. 586. The use of $40,000, etc., and whatever is not used to go to children, held to mean a gift of the corpus and not only the use. In re Mayhew's Estate [Cal. App.] 87 P. 417. "Dividends, rents, and profits" bequeathed to life tenant do not include accretions to the corpus. Right to participate in new stock issues and increase in valuations go to remainderman. Boardman v. Mansfield [Conn.] 66 A. 169.

46. Income of bequest payable at maturity of legatee allowed for his support when no other provision therefor was made. In re Rafferty's Estate, 102 N. Y. S. 432. Bequest of income to widow held to include income of all of testator's property and to postpone distribution till her death. Mosier v. Bowser, 226 Ill. 46, 80 N. E. 730.

47. Stearns v. Stearns [Mass.] 77 N. E. 1154. Son held to take life estate only in income of trust fund set apart for his support, principal to be kept intact and pass, on his death, as part of residuary estate, so that principal could not be kept and maintained after his death and income arising therefrom applied to payment of his debts. Sherrard v. Western State Hospital [Va.] 54 S. E. 1001.

48. Lynde v. Lynde, 113 App. Div. 411, 99 N. Y. S. 283.

49. A bequest to children of proportionate share of a fund to be annually ascertained does not entitle the estate of a deceased child to the part of such share accruing since the last annual settlement. Green v. Bissell [Conn.] 65 A. 1056. Where a sum "with interest" is allowed the wife by agreement, and the will provides for an increased sum to be paid "as provided in said agreement," she is entitled to interest on the whole. In re Bostwick, 104 N. Y. S. 69. Bequest of income for life held to contemplate payment of entire income, so that income accrued and not paid over at the death of the beneficiary belonged to his estate. In re Hoyt, 101 N. Y. S. 557.

50. See 6 C. L. 1943.

51. A devise of "all the remainder" of testator's property is general, since it may carry after acquired goods. Cooney v. Whitaker [Mass.] 78 N. E. 751.

52. A bequest of all that is recovered in a certain action is specific and not subject to abatement for debts if the property bequeathed generally is adequate. Robinson v. Cogswell [Mass.] 78 N. E. 389. Legacy of bank stock held general so that legatee was entitled to value in money where stock was disposed of before death. In re Snyder's Estate [Pa.] 66 A. 157. A specific bequest is one which identifies the very property given from all others like it. In re

An annuity [54] is a grant of a fixed sum of money payable at the expiration of fixed consecutive periods.[55] They are frequently made by the will a charge on land.[56]

Advancements.[57]—The doctrine of advancements applies only in case of intestacy.[58]

Support.[59]—A large discretion is usually allowed in the making of trusts for support and there may, unless a contrary intent appears, be discrimination between beneficiaries,[60] and resort to the corpus in case of need.[61] Such bequests usually contemplate only present needs [62] and determine upon the death of the beneficiary.[63] A bequest to be paid over to legatee if he needed it for his own use is absolute, no given use being specified and no person designated to determine his needs.[64]

Noons' Estate [Or.] 88 P. 673. Gift of "all stock" of a named corporation is specific. Id. Gift of dividends of stock held not specific. Id.

53. While a demonstrative legacy will be more readily found than a specific one, it will not be found unless the legacy be charged on without being a gift of a fund. Nusly v. Curtiss [Colo.] 85 P. 846. Legacy of any insurance moneys to become thereafter payable held specific. Id. Legacies held to be payable out of proceeds of certain claim of testator against United States. Matthews v. Taragona [Md.] 65 A. 60.

54. See 6 C. L. 1943.

55. Property devised to son for life held to pass to trustee of second son, on death of life tenant without issue, subject to be administered on precisely same trusts as property originally given in trust for second son's benefit, so that latter's annuity was not increased by enlargement of fund from which it was to be paid. McCurdy v. O'Rourke [Va.] 56 S. E. 573. Period during which annuity was to be paid held limited to five year period allowed for sale of realty. Willcox v. Willcox [Va.] 56 S. E. 588. Interest held properly allowed on items composing arrears of annuity from end of year at which each was payable. Id. In an action for annuities against one who accepted a devise charged with their payment, interest on unpaid instalments is proper. Stringer v. Stephens' Estate [Mich.] 13 Det. Leg. N. 732, 109 N. W. 269.

56. See post, this section, Charges, Exonerations, and Funds for Payment.

57. See 6 C. L. 1943.

58. In re Hall's Estate [Iowa] 110 N. W. 148. An advancement is not to be charged against a devise in the absence of testamentary expression to that effect. Bowran v. Kent, 51 Misc. 136, 100 N. Y. S. 768. Where a will provides for a specific deduction on account of payments on an antenuptial contract, other payments on account of such contracts are not to be deducted. Sayer v. Gunn [Mich.] 13 Det. Leg. N. 899, 110 N. W. 63.

59. See 6 C. L. 1944.

60. Will held to give widow large discretionary power as to making advancements to children, and mere fact that she saw fit to make advancement to one child did not operate of its own vigor to create right in others to demand equal advancement which court of equity would enforce, but equity would not interfere in absence of showing of fraud or bad faith. Trout v. Pratt [Va.] 56 S. E. 165. Direction for use of income by executor for support of children held not to intend that they share equally but that it be applied as necessary. Pray v. Railer, 144 Mich. 208, 13 Det. Leg. N. 247, 107 N. W. 1076. Power of trustees to discriminate in exercise of power to use property for support of testator's children held not to be limited to the condition of such children at testator's death. Albert v. Sanford [Mo.] 99 S. W. 1068. Terms of a will creating a trust estate for the support and maintenance of a named beneficiary construed, and held to vest in the trustee the discretion of determining upon the amounts and times of the payments to be made to the beneficiary, and that the exercise of such discretion was not subject to revision by the court so long as he exercised it in good faith and according to his best judgment, and that such discretion had been properly exercised. Kimball v. Blanchard, 101 Me. 383, 64 A. 645.

61. The successor to a trustee to pay so much of the income as was needed for the support of the beneficiary cannot pay to him surplus income accrued during the administration of his predecessor. In re Harwood, 102 N. Y. S. 444. Gift of a sum sufficient for support and education and to set apart a sum certain for that purpose, the balance remaining therefrom to be turned back into the general estate, entitles the trustees to use the corpus. Trustees of Elizabeth Speers Memorial Hospital v. Makibben's Guardian [Ky.] 102 S. W. 820. Bequest to wife held to give her the income for her support with resort to the corpus in case of need, not support out of the corpus in addition to the income. In re Hibbard's Estate, 104 N. Y. S. 583.

62. Where testator charged estate with maintenance and support of widow, but fixed no specific sum which she should receive for that purpose, and court later decreed fixed sum as reasonable annual allowance, held that her right to such sum depended on her using it during her life, and it could not be charged against estate in favor of her devisee or personal representatives. Brown v. Cresap [W. Va.] 56 S. E. 603. Decree held to limit her to amount fixed thereby, but not to be an adjudication that such amount constituted debt against estate which she could accumulate. Id.

63. Charged for support of testator's daughters held to continue only during life estate created by previous item, so that estate was subject to division among remaindermen after death of life tenant. Rogers v. Highnote [Ga.] 56 S. E. 93.

64. In re Bouck's Will [Wis.] 111 N. W. 573.

Release of debts.[65]—Where a legacy recites that it is to satisfy all claims of the legatee for services to the testator, it is presumptively designed as a business settlement with the legatee and forgives a debt of legatee to testator.[66]

Cumulative legacies.[67]—Where two bequests are given by distinct instruments, as by will in one case and codicil in another, even if the amounts are alike, the presumption is in favor of both bequests and the burden of overthrowing the presumption is on the executor.[68]

Vesting.[69]—A legacy is vested or contingent, accordingly, as time is attached to the gift or to the payment of it,[70] and the interest of primary and secondary legatees vest simultaneously.[71] Except where a contrary result is necessary to save the bequest,[72] the law favors the early vesting of estates, and hence remainders will be held vested rather than contingent,[73] unless the language of the will clearly shows a different intention,[74] and to that end words of designation of the taker will if

65. See 6 C. L. 1914.

66. Bromley v. Atwood, 79 Ark. 357, 96 S. W. 356.

67. See 6 C. L. 1945.

68. In this case the will gave a certain sum to each of the children of a certain person and a codicil gave a like sum to one of such children and revoked the former legacy to another child who had since died. It was held that the bequest in the codicil was an additional gift. Hartwell v. Martin [N. J. Eq.] 63 A. 754. In a will was a bequest of a certain sum to each of the children of J. L. A codicil bequeathed to each of such children then living a like sum and revoked a number of legacies of a like sum to persons who had died since the execution of the will, and also bequeathed a like sum to other legatees named in the will. It was held that the bequest in the codicil to the children of J. L. was an additional gift to that contained in the will. Id.

69. See 6 C. L. 1945.

70. Ferguson's Estate, 31 Pa. Super. Ct. 422. Remainder to designated devisees to take effect on the youngest of them reaching maturity held vested. Shafer v. Tereso [Iowa] 110 N. W. 846. Legatee held not to take until such time as a conversion directed by the will could be made and his share apportioned. March v. March, 186 N. Y. 99, 78 N. E. 704. Limitation to heirs at law of life tenant on death of his widow or on his death without wife or issue vests in such heirs on his death subject to be postponed in enjoyment by the survivorship of his widow. Gray v. Whittemore [Mass.] 78 N. E. 422. Remainder is vested where present interest passes to certain definite person, though enjoyment is postponed. Vogt v. Vogt, 26 App. D. C. 46.

71. Legacy in event of another dying before majority held to be vested. Ferguson's Estate, 31 Pa. Super. Ct. 422.

72. In order to save bequest to charitable corporation to be formed by executors, the bequest will if possible be construed as providing for a vesting in the corporation, when formed, an ineffectual interest for vesting in presenti not being prevented. St. John v. Andrews Institute, 102 N. Y. S. 808.

73. Remainder to one and over in event of his death without issue is vested in the first remainderman subject to divest on his death without issue. In re Farmers' Loan & Trust Co., 51 Misc. 162, 100 N. Y. S. 862. Remainder limited on devisees surviving testator held to vest absolutely and not subject to divest in case he failed to survive the life tenant. In re Allison, 102 N. Y. S. 887. A trust limited to the heirs of the beneficiary on his death before the termination of the trust gives him a vested interest subject to divesting by his death before such termination. In event of his death his heir takes free from assignments by him. Huntress v. Allen [Mass.] 80 N. E. 949. Bequest in trust for daughters held to give vested interest subject to be divested on death before marriage only in favor of a married daughter. Noble v. Birnie's Trustee [Md.] 65 A. 823. Where it is provided that at the termination of a life estate land shall be sold and the proceeds used in the payment of certain equalizing legacies, the legatees took at testator's death a vested interest in such proceeds. Miller's Ex'r v. Sageser, 30 Ky. L. R. 837, 99 S. W. 913. Under provision for distribution at termination of life estate, the legatees take a vested remainder. Tubb v. Fowler [Tenn.] 99 S. W. 988. Provisions for payment of distributive shares out of certain amounts as the same should be realized by sales under a power held to vest the interest at once. In re Campbell's Estate [Cal.] 87 P. 573. When a power but no trust is created, the shares may vest at once. Id. Law favors vesting of legacies and will not hold them contingent unless will shows testator intended to make them so. Stakely v. Executive Committee [Ala.] 39 So. 653. A will gave a life estate to A. with remainder to his children, but if he should die without issue one-half the property was to be divided between certain specified persons. It was held that such persons took a vested interest on the death of the testator subject to its being divested should the life tenant die leaving issue. Van Houten v. Hall [N. J. Eq.] 64 A. 460. Rule same in case of personalty. Vogt v. Vogt, 26 App. D. C. 46.

74. Provision for life estate in lands and a conversion and distribution within a stated time from the life tenant's death does not give a vested estate in remainder in the lands. Darst v. Swearingen, 224 Ill. 229, 79 N. E. 635. Where will gave life estate in all testatrix's property, and certain specific sums out of bonds, notes, and money "should there be any remaining," and "the balance, if any," to plaintiff, held that plaintiff's legacy was contingent on there being any balance, and its right was that of a residuary

possible be referred to the time of testator's death,[75] and where the persons who shall take in remainder are then certain subject to death or after the birth of persons entitled, the remainder will vest subject to divesting or opening.[76]

Possession and enjoyment[77] should not be found other than is appurtenant to the estate or interest given unless a contrary intent is plain.[78]

Individual rights in gifts to two or more.[79]—Right of survivorship will not be implied in a gift to several.[80] A gift to a class is a gift to those coming within that description at testator's death,[81] but if the time of distribution is postponed, only those answering the description at the time of diversion will share,[82] though a similar gift to named individuals vests on testator's death.[83] The law favors a construction which will give per stirpes [84] but where the devise is to children as in-

legatee. Stakely v. Executive Committee [Ala.] 39 So. 653. Limitation over in event the remainderman should die without issue before determination of particular estate gives contingent remainder only. Schell v. Carpenter, 50 Misc. 400, 100 N. Y. S. 554. Life estate with remainder to be converted and divided among children and issue of deceased children gives contingent interest to remaindermen. Blaney v. Sin Clair [Pa.] 65 A. 662. Life estate to children with remainder on the death of the last survivor of them to grandchildren gives contingent remainder only, which will not vest unless there are grandchildren living at the death of such survivor. Reilly v. Bristow [Md.] 66 A. 262.

75. "Upon final distribution" stated as time of payment of a legacy, held referable to distribution after disposition of land and not to the distribution of personalty. McDevitt v. Hibben, 123 Ill. App. 438. Limitation of remainder to surviving children held referable to survivorship at testator's death. Runyon v. Grubb, 103 N. Y. S. 949. Designation of recipients of trust fund on a deferred distribution as a class, no vesting till time for distribution. Heirs. In re Lewis' Will, 104 N. Y. S. 480. Limitation of remainder on condition of death of remainderman without issue held referable to time of testator's death. Burton v. Carnahan [Ind. App.] 78 N. E. 682. Provision that on death of life tenant property should be divided between remaindermen held to refer only to distribution and not to defer vesting. Jonas v. Weires [Iowa] 111 N. W. 453.

76. On a devise to one for life and remainder to his children, the children living at testator's death took a remainder in fee subject to opening to let in afterborn children. Gilman v. Stone, 29 Ky. L. R. 591, 94 S. W. 28. Legacies of equal shares to children and grandchildren on maturity held to vest at death of testator subject to opening to admit after-born grandchildren, and not to divest by death of any before maturity. Irvine's Estate, 31 Pa. Super. Ct. 614. Provision that at death of testator's wife property was to be equally divided among children, share of any children dying without children to revert to others, held to give children vested remainders subject to be divested as to any dying childless. Toombs v. Spratlin [Ga.] 57 S. E. 59.

77. See 6 C. L. 1952.

78. Gift of a homestead to daughter but with leave to testatrix's mother to live there free of all charge and care for family held to absolve mother from payment of rent, though her occupancy was not immediate on the death of testatrix. Clift v. Newell [Ky.] 102 S. W. 832. Where there is a specific bequest of money to one for life with remainder over, the principal should not be paid to the life tenant, unless the will shows with reasonable certainty a contrary intention, but the executor should invest it and pay over to him the interest only. Will held not to show contrary intention. Payne v. Robinson, 26 App. D. C. 283.

79. See 6 C. L. 1953.

80. Provision of trust fund for life of several held to make each one's share of the principal pass on his death to his legal heirs. In re Carter's Estate [Pa.] 66 A. 767. Devise held to give life estate in severalty to two with remainder for life to the survivor in the molety of the other, and remainder over if such survivor died without lineal descendants. Anderson v. Messinger [C. C. A.] 146 F. 929. Under a trust for two for a term of years providing for payments from the principal at certain intervals, and that the share of one dying go to the survivor, such survivor takes only such part of the share as remains from previous payments out of the principal. Holmes v. Holmes [Mass.] 80 N. E. 614.

81. In devise to children as a class by way of remainder, children in esse at death of testator take vested interests, and this rule is equally applicable to an executory devise, in which case class is fixed by conditions existing at testator's death, and interest of any dying before period of distribution passes to their heirs. Irvin v. Porterfield, 126 Ga. 729, 55 S. E. 946.

82. A gift in trust to pay income to one for life and the corpus to his children on his death is contingent on such children surviving him, failing which it passes as residue. United States Trust Co. v. Baker, 102 N. Y. S. 194. A bequest of income to several and on their death to the children of each gives to such children likewise an interest divested by death. Twaites v. Waller [Iowa] 110 N. W. 279. Will held to show intention that all of testator's children should share equally in enjoyment of property loaned widow on latter's remarriage or death. Willcox v. Willcox [Va.] 56 S. E. 588.

83. Erdman v. Meyer, 102 N. Y. S. 197. Gift to three named children held gift to them severally and not collectively or as a class, and on death of one of them before testator his legacy lapsed. Kent v. Kent [Va.] 55 S. E. 564.

84. Under a residuary bequest to heirs at law "to share equally," they take per stripes. Allen v. Boardman [Mass.] 79 N.

dividuals and not to a class, they take per capita.[85] On a devise to "children" they take distributively and not as a class and accordingly the issue of a deceased child takes his share.[86] Where a ratio of distribution is provided, it will so far as is consistent with the testamentary intent be brought into accordance with the statute of descents.[87]

Conditions.[88]—No precise words are necessary to create a condition,[89] but conditions are not favored and will not be implied unless the intent is clear.[90] A

E. 260. Under bequest indicating an intent of equality between brothers and sisters, heirs of one deceased take per stirpes. Erdman v. Meyer, 102 N. Y. S. 197.

85. Under devise to three named daughters "and their children," where daughters had children at testator's death, held that daughters and children took as joint purchasers and per capita, though one daughter had more children than others. Wills v. Foltz [W. Va.] 56 S. E. 473. Terms of will construed and held to require a per capita distribution among the children of testator's children. In re Duckett's Estate, 214 Pa. 362, 63 A. 830. A provision for division among the heirs of testator's children entitles them to take per capita and not per stirpes. Kalbach v. Clark [Iowa] 110 N. W. 599.

86. Schneider v. Heilbron, 101 N. Y. S. 152. Where will gave property in trust for daughters, share and share alike, "for and during their respective lives, and from and after their death in trust for the child or children of" said daughters in fee, children to take parent's share, and provided that if any daughter should die unmarried her share should pass to surviving daughters for life, etc., held not to create joint tenancy in daughters, or give surviving daughter property to exclusion of children of deceased daughter, but such children took mother's share. Cruit v. Owen, 203 U. S. 368, 51 Law. Ed. 227. Where an estate in remainder was to be divided between the brothers and sisters of testator, the issue of one dying during the life tenancy took by representation. Buckler v. Robinson, 29 Ky. L. R. 1174, 96 S. W. 1110. On devise of a remainder to children, the issue of a child dying after testator take his share. May v. Walter's Ex'rs, 30 Ky. L. R. 59, 97 S. W. 423. A will provided that upon the death of a life tenant without issue certain property should "be equally divided between Caty" and if she be dead, her children, and the child or children of George in fee." Caty died before the life tenant, who subsequently died without issue. It was held that the property should be distributed per stirpes between the children of Caty and the representative of the only child of George. Van Houten v. Hall [N. J. Eq.] 64 A. 460.

87. Where certain land is specifically devised to one and the residue of testator's land to him and others to be equally divided, the land specifically devised is to be reckoned in computing the share of the devisee thereof, except that he must receive it all, though its value amounts to more than his equal share. In re Hall's Estate [Iowa] 110 N. W. 148. On sale by testator of the land specifically devised, the general devise is to be executed as if there had been no specific devise. Id. On a gift of residuum to several in the proportion which specific legacies to them bear to each other, the share of one to whom the income of a trust fund is bequeathed is to be computed on the basis of the principal. Leask v. Hoagland, 188 N. Y. 291, 80 N. E. 919. Residuary legacy to heirs of testator and of his widow according to their heirship, the heirs of each took a moiety divided as in case of intestacy. Mosier v. Bowser, 226 Ill. 46, 80 N. E. 730. Terms of a will construed and held to confer upon the children of testator's daughter three-fifths of the property passing under the residuary clause, and upon the children of his son two-fifths of such property, and the absolute estate so conferred was not divested and the whole property on the death of both children made equally divisible among all the grandchildren and their descendants by a clause in the will providing that if both children "leave children or descendants living, they are to take the property hereby devised and bequeathed to them in equal proportions, share and share alike." Hurley v. Rosensteel [Md.] 64 A. 1041. Bequest held to make division into three parts and division of one of them between two not division into four parts. In re Bouck's Will [Wis.] 111 N. W. 573.

88. See 6 C. L. 1955.

89. Performance or violation of conditions: Where bequest was on condition that legatee pay the funeral expenses of a third person, and such expenses were in fact paid by the executor of testatrix without notice to the legatee, legatee was entitled to the bequest on reimbursing the estate. Morath's Ex'r v. Weber's Adm'r, 30 Ky. L. R. 284, 98 S. W. 321. A condition of "reconciliation and amity" among beneficiaries imparts a mental state rather than an acute condition of association. Condition held performed. Alexander v. Page, 30 Ky. L. R. 1362, 101 S. W. 346. Devise on condition that devisee support testator's widow during her life becomes absolute on the death of the devisee before the widow. Wood v. Ogden [Mo. App.] 97 S. W. 610. A testator gave $100 to a cemetery association, the income thereof to be expended, if needed, in caring for his burial lot. It was held that the legacy was absolute and it was the duty of the executors to pay it, although in their opinion the income would not be sufficient to take care of the lot. Harris v. Ingalls [N. H.] 64 A. 727. Violation of condition against remarriage held to throw devised lands into intestacy. Weyler v. Weyler, 30 Ky. L. R. 465, 99 S. W. 222.

90. Power of life tenant to dispose of remainder by will held not conditioned on his having issue. Preston v. Willett [Md.] 66 A. 257. That legatee should be in testator's employ at his death held not a condition. Lowe v. Whitridge [Md.] 65 A. 926. Gift of property to a church to be used as a parsonage and for nothing else held not

condition is waived if it is inadvertently broken during the life of testator who, with knowledge of the breach, makes no change in the will.[91]

Intent to require election[92] may be found from gifts in the alternative,[93] or where property is so disposed of that statutory[94] or contract rights are necessarily cut off by taking under the will,[95] or where testator disposes of property not his own and also confers benefits on the owner thereof.[96]

Charges, exonerations, and funds for payment.[97]—Legacies are not a charge on the realty[98] unless an intent that they shall be is expressed or distinctly implied.[99]

on condition. Adams v. First Baptist Church [Mich.] 14 Det. Leg. N. 111, 111 N. W. 757.

91. Donaldson v. Pettit, 31 Pa. Super. Ct. 567.

92. See 6 C. L. 1956.

93. Where one of two bequests to the same person was conditional, the doctrine of equitable election was held not to apply. In re Appleby's Estate [Minn.] 111 N. W. 805. Provision that legacies to certain persons, who were also residuary legatees under will of testator's wife, should be in payment of distributive share to which such persons might be entitled in residue of life estate given testator by his wife's will, held to refer only to accumulation of testator's interest in such life estate, and not to require legatees to elect whether they would take under his will or that of his wife. In re Pearce's Estate, 104 N. Y. S. 469.

94. A testamentary allowance does not put the widow to an election between it and a statutory allowance of $500 unless the will expressly states that the allowance is in lieu of that given by statute. Bowman v. Olrick, 165 Ind. 478, 75 N. E. 820. Specific devise of certain realty and residue to wife held not to put wife to election but to entitle her to dower in the lands specifically devised. Casey v. McGowan, 50 Misc. 426, 100 N. Y. S. 538. Where there is no statement that a devise is in lieu of dower, the widow not put to an election. Devise of life estate in all property for life held not to put widow to election. Warner v. Hamill [Iowa] 111 N. W. 939. A widow is entitled to her statutory right to all exempt property without being put to an election against the will. Rowlett v. Rowlett [Tenn.] 95 S. W. 821. Acceptance of the statutory allowance of household goods to the amount of $400 does not preclude taking a bequest stated to be in lieu of dower. Ellis v. Ellis, 119 Mo. App. 63, 96 S. W. 260.

95. Devise held in lieu of rights under a contract whereby a policy held by testator on the life of devisee should be payable to his estate if he survived testator. Morath's Ex'r v. Weber's Adm'r, 30 Ky. L. R. 284, 98 S. W. 321.

96. Where the will attempts to dispose of property belonging to the devisees, they are put to an election. Will held to dispose of homestead which belonged to testator's children. Bonnie's Guardian v. Haldeman [Ky.] 102 S. W. 308.

97. See 6 C. L. 1957.

98. An annuity does not become a charge on lands merely because the personalty is insufficient to pay it. Robinson v. Kelso, 103 N. Y. S. 1098. When during life a beneficiary was entitled to the income from a portion of an ancestor's estate, but had no interest in the corpus thereof, her debts and funeral expenses cannot be charged against such corpus. Brown v. Castle, 118 Ill. App. 346. Real estate which passes under the residuary clause of a will is subject to payment of pecuniary legacies in case the personal estate is not sufficient. Reynolds v. Reynolds, 27 R. I. 520, 63 A. 804. Provision for deduction from share of one held to apply to specific legacy, and not to his share in residue. In re Shepard, 113 App. Div. 785, 99 N. Y. S. 377.

99. Condition as to payment of taxes attached to right to occupy certain premises held to apply to him to whom the right was primarily given, as well as those entitled on his election not to occupy. In re Sower's Estate [Pa.] 66 A. 318.

Held to charge realty: Annuity held charge on land though appropriation from personalty was also directed. Irwin v. Teller, 101 N. Y. S. 853. Devise "on condition" that devisee pay a certain legacy. In re Korn's Will, 128 Wis. 428, 107 N. W. 659. A devise "on condition" that certain debts be paid, without limitation over on failure, merely creates a charge on the land and is not a condition. Ditchey v. Lee [Ind.] 78 N. E. 972. Where the payment of annuities is charged on land sufficient thereto, and distribution of personalty is provided for, the personalty is exonerated from payment of the annuities. In re Boury's Estate, 49 Misc. 389, 99 N. Y. S. 511. All realty owned at testator's death is charged with legacies which are a lien on land. Irwin v. Teller, 188 N. Y. 25, 80 N. E. 376. Residuary devise of realty and personalty held to make an annuity a charge on the realty, notwithstanding a provision for the appropriation of a part of the personalty thereto by the legatee. Id. Where a residuary legatee of personalty charged with debts refuses to accept it so charged, the debts exceeding its value, the remainder of the debts after application of the personalty should be charged pro rata against all devises and bequest, not solely against a devise to the residuary legatee. Frost v. Wingate, 73 N. H. 535, 64 A. 19. A devise charged with a certain payment which should become part of the residuary estate makes such payment part of the residuum only for distribution, and not for the payment of debt. Monjo v. Woodhouse, 185 N. Y. 295, 78 N. E. 71. Sum which will provided should be paid to plaintiff monthly for life held charge on entire estate, so that, personalty and other realty having been exhausted, it was charge on lot in possession of stranger tracing title through remainderman and with constructive notice of will. Dixon v. Roessler [S. C.] 57 S. E. 203. Annuity held charge on entire estate, except that loaned by testator to his wife, to exclusion of all other objects of his bounty. Willcox v. Willcox [Va.] 56 S. E.

A blending of real and personal property in a general gift charges both with the specific legacies.[1] Where there is a general direction to pay debts, a devise of land without mention of a mortgage thereon is construed as free thereof.[2] Charges on devised land for the benefit of other heirs may be proportionately reduced where the widow elected to take against the will and the devise was thereby reduced.[3]

Trust estates and interests.[4]—The kind of a trust created,[5] its terms,[6] its duration,[7] the powers and duties of its trustees,[8] and the distribution to be made on termination,[9] are all questions of intention.

588. A legacy "reserved out of" a devise of both realty and personalty is a charge on the realty if the personalty is insufficient. Kettell v. Baxter, 50 Misc. 428, 100 N. Y. S. 529. A devise "provided" the devisee pay a certain sum makes the payment a charge on the devised land. Warner v. Bullen, 123 Ill. App. 138, collating many cases as to language making payment a charge. Certain money legacies held to be generally chargeable on whole estate and not alone on personalty. In re Ratto's Estate [Cal.] 86 P. 1107. "After payment of legacies" held to refer to both realty devised and personalty bequeathed. Id. Following devise of her half of the community realty to the wife, a devise of the "remaining half" and of all the residue of personalty after paying legacies was held general and not specific. Id. If legacies are made a personal charge on a devisee, an acceptance of the devise imposes a personal liability on him to pay them. Where will directed devisees to pay annuity to certain person for life, and devisees went into possession, held that annuitant could maintain bill in equity to compel payment, though will further provided that annuity should not be a charge on testator's realty or personalty. Spearman v. Foote, 126 Ill. App. 370. Where will gave son entire fee title to land in remainder subject to charge to pay daughter half appraised value thereof, held that latter, having no title or right to possession, was not entitled to an accounting for rents, but, son having gone into possession immediately on death of life tenant, and land being agricultural land, legatee was entitled to interest on legacy from first of year after son took possession, though there had not yet been an appraisement. Bowen v. True, 74 S. C. 486, 54 S. E. 1018.

Held not to charge realty: Realty specifically devised is never charged with the payment of legacies unless such an intention is expressly declared or is to be necessarily implied from the context of the will or from the facts and circumstances of the case. Morisey v. Brown [N. C.] 56 S. E. 704. Direction to legatee to pay debts held precatory and not to work a charge on his share. In re King's Estate [Pa.] 65 A. 942.

1. Where real and personal property are blended in a residuary clause, both are charged with the payment of a specific bequest. Lacey v. Collins [Iowa] 112 N. W. 101. Where realty and personalty are blended in a residuary clause, the whole is charged with debts and legacies. Todd's Estate, 32 Pa. Super. Ct. 187.

2. Jacobs v. Button [Conn.] 65 A. 150.

3. McGuire v. Luckey, 129 Iowa, 559, 105 N. W. 1004.

4. See 6 C. L. 1958.

5. See ante, this section. Quality of estate, etc., as to whether trust is created.

6. Spendthrift trust held not restricted by its terms to "debts and liabilities," but to avoid an assignment in anticipation by the devisee. Hartman's Estate, 31 Pa. Super. Ct. 152. Where a testator bequeathed his property to his wife in trust for her own use for life, with power "to use and to expend from time to time not merely the income, but any part of the principal, should she deem it for the best interest of herself and our children to do so," and after her death bequeathed the remainder to a trustee for the benefit of the children, it was held that the power given the widow did not authorize her to make absolute conveyances of substantial parts of the corpus of the estate to the children. Davison v. Safe Deposit & Trust Co., 103 Md. 479, 63 A. 1044.

7. A trust for one's life and then to be distributed according to the residuary clause is to be distributed at the beneficiary's death, though the residuary clause creates a trust for two lives in the property thereby disposed of. In re Title Guarantee & Trust Co., 46 Misc. 544, 95 N. Y. S. 59. Where all the purposes of a trust in personalty have ceased or are at an end, absolute estate is in person entitled to last use unless there is apparent intention to contrary. Vogt v. Vogt, 26 App. D. C. 46. Trust to pay income to certain person, principal to be paid to his heirs after his death, held to terminate at death of life beneficiary. Id. Direction to trustee to convey after termination of trust does not continue legal estate in them, or make them trustees of persons to whom they are directed to convey. Id.

8. Devise in trust for support of beneficiary from the income held to authorize trustee to mortgage part of land in order to make improvements which would increase income. In re Lueft [Wis.] 109 N. W. 652. A testator left property in trust during the lives of his two sons, and provided that if either of them died before the expiration of the trust leaving lawful issue the trustee should "in his discretion pay over to such issue, or any of them, or expend or appropriate for his or her use and benefit such sum or sums at such times and in such manner as he shall consider expedient and necessary for his or her support and maintenance during the remainder of the term of said trust. It was held that upon the death of one of the sons leaving an adopted daughter it was the duty of the trustee to provide reasonably for the support and maintenance of such child, with due regard both to the needs of the child and the condition of the estate. In re Olney, 27 R. I. 495, 63 A. 956.

9. Undisposed of income of property held in trust for life goes to the person presumptively entitled to the next eventual es-

Powers of appointment and beneficial powers of sale.[10]—Whether a life tenant has a power of sale,[11] and the extent thereof,[12] are questions of intention. Whether such a power is repugnant to a remainder over is elsewhere treated.[13] Bequest of the proceeds of the sale of testator's real and personal property does not authorize sale of land not disposed of by the will.[14]

Lapse, failure, and forfeiture.[15]—A gift may fail because of failure of the conditions on which it is predicated.[16] Ordinarily a legacy or devise will lapse by the death of the legatee or devisee during testator's life.[17] For the purpose of preventing such lapses, the statutes in many states give the share of one so dying to his heirs or issue,[18] and if the devise be to two as tenants in common, the heir substituted as devisee for one takes as a tenant in common with the other;[19] if he die without heirs within the statute, the devise lapses.[20] Unless so provided by the will a legacy does not lapse by death of the legatee after testator's death but before probate.[21] If the widow renounce the will, gifts to her lapse into intestacy.[22] A gift over in the event of the death of testator and the first taker "at the same time" contemplates only their mutual decease.[23] Where a testatrix adopts the course

tate. St. John v. Andrews Inst., 102 N. Y. S. 808.

10. See 6 C. L. 1960.

11. Bequest to wife for life with gift over of what might remain held to give her power of disposition. McCann v. McCann's Ex'x, 29 Ky. L. R. 537, 93 S. W. 1045. Bequest for life with limitation over of "whatever remains" held to give no power to dispose of the corpus. Vanatta v. Carr, 223 Ill. 160, 79 N. E. 86.

12. Gift with full power of disposal and remainder over of residue gives power to dispose by will. Hayes v. Gunning, 101 N. Y. S. 875. Devise held to give life estate with power of disposition only in case of necessity for support. Offutt v. Beall, 30 Ky. L. R. 247, 97 S. W. 1113. Power of disposition for support with remainder over of all that might remain held not to give a power of disposition at will, irrespective of necessity. Embry's Ex'x v. Embry's Devisees [Ky.] 102 S. W. 239.

13. See ante, this section. Estates and interests created.

14. Andrews v. Applegate, 223 Ill. 535, 79 N. E. 176.

15. See 6 C. L. 1961.

16. A provision for distribution on the termination of a trust for the minority of the beneficiary does not fail because the beneficiary comes of age during testator's life. In re Arenberg's Will, 102 N. Y. S. 971. Bequest of annual sum to maintain a devised residence terminates on the abandonment of the residence. Clark v. Goodridge, 51 Misc. 140, 100 N. Y. S. 824. Failure of trust held to pass life estate and remainder freed from conditions. McClellan v. Weaver [Cal. App.] 88 P. 646. A bequest for the maintenance of a homestead conditionally devised lapses if the devise fails. In re Appleby's Estate [Minn.] 111 N. W. 305. The coming of age of sons held to abrogate a direction that testator's brother and sister should receive the income till sons were of age. In re Painter's Estate [Cal.] 89 P. 98.

17. Share of one of several residuary legatees without issue. Kent v. Kent [Va.] 55 S. E. 564. Legacy to sister who died before testator. Watkins v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 336, 94 S. W. 1116. Bequest to one with limitation over on death without issue surviving does not lapse on death of first taker before testator leaving issue, but there is an implied bequest to the issue. In re Disney's Will, 103 N. Y. S. 391. Where the life tenant predeceases the testator, the remainder held to accelerate so that the remainderman took in fee. Farnsworth v. Whiting [Me.] 66 A. 831.

18. "Brother" in a statute providing against lapse of legacies to certain relatives includes a half brother. Gen. St. 1902, § 296. Seery v. Fitzpatrick [Conn.] 65 A. 964. A wife is not a "relative" within a statute preventing lapse of bequests to relatives who leave lineal descendants. Farnsworth v. Whiting [Me.] 66 A. 831. Rev. St. 1895; art. 5347, applies only to lineal descendants of testator, and does not prevent lapse of legacy to sister who dies before testator. Watkins v. Blount [Tex. Civ. App.] 16 Tex. Ct. Rep. 336, 94 S. W. 1116. A statute of substitution in case of legatees dying before the testator applies to a legatee who died before the will was executed. Lewis v. Corbin [Mass.] 81 N. E. 248.

19. Schneider v. Heilbron, 101 N. Y. S. 152.

20. A devise to one who dies without issue before testator lapses. Howard v. Harrington, 27 R. I. 586, 65 A. 282. Where a trust fund is limited to the heirs of the beneficiary on his death without issue, it falls into intestacy. Grinnell v. Howland, 51 Misc. 132, 100 N. Y. S. 765.

21. Jersey v. Jersey [Mich.] 13 Det. Leg. N. 906, 110 N. W. 54.

22. Where a will containing a bequest in lieu of dower has a residuary clause and the widow renounces, only the interest assigned her under the will passes as in intestacy. Lewis v. Sedgwick, 223 Ill. 213, 79 N. E. 14. A sum devised in trust to pay income to testator's wife and at her death to be divided among children goes to the children direct on her renunciation of the will. Callicott v. Callicott [Miss.] 43 So. 616.

23. Gift is operative if first taker having survived testator thereafter dies. Sanger v. Butler [Tex. Civ. App.] 101 S. W. 459.

of descent provided by the statute in so far as it coincides with her wishes, and then adds certain modifications for the purpose of carrying out her wishes, a testamentary disposition is made of her property and her heirs take nothing by descent.[24]

Partial invalidity.[25]—Valid gifts will if possible be preserved,[26] but where the provisions are so interdependent as to constitute one scheme of disposition, all must fall on the invalidity of an integral part.[27] Where the contingency specified in an invalid provision never becomes effective, the alternative provision is not affected.[28]

Residuary clauses.[29]—All property not otherwise given,[30] or as to which an invalid gift has been attempted,[31] passes by the residuary clause, but the presumption is toward a specific rather than a residuary gift.[32] Where a will contains two residuary clauses, one providing in detail for the disposition of the property except in certain remote contingencies and the other general, the latter will be deemed to apply only on a contingency unprovided for in the former.[33]

Property not effectually disposed of[34] passes as upon intestacy,[35] in the ab-

24. Huber v. Carew, 7 Ohio C. C. (N. S.) 609.

25. See 6 C. L. 1962.

26. Invalidity of a provision for accumulation of surplus income of a trust fund does not affect either the trust or the direction for distribution on its termination. Endress v. Willey, 102 N. Y. S. 71. A provision for accumulation of income to a trust fund being invalid, the income goes as it accrues to the persons appointed to receive the corpus. Id. Devise of fee held independent of attempted trust so as not to fall by reason of its invalidity. Johnson v. Preston, 226 Ill. 447, 80 N. E. 1001. Devise coupled with invalid prohibition against alienation held to give a life estate to the devisee with remainder in fee to his issue. Robsion v. Gray, 29 Ky. L. R. 1296, 97 S. W. 347. Bequest given effect according to intent, though invalid as made because providing for accumulation of income. Fischer v. Langlotz, 100 N. Y. S. 678. A testamentary appointment of a guardian for minor children with directions as to the custody and use of their shares is valid as a power in trust, though invalid as an appointment of a guardian because testator's wife survives him. Kellogg v. Burdick, 187 N. Y. 355, 80 N. E. 207. Direction to accumulate till youngest child was 20 years old, though invalid as to period when the others should have reached majority, was valid as to all till they came of age. In re Haines' Estate [Cal.] 89 P. 606. The invalidity of remainder over in default of issue does not affect the gift to such issue. Denison v. Denison, 185 N. Y. 438, 78 N. E. 162. Invalidity of trust for benefit of grandchildren held not to affect trust to pay niece income from specified piece of property excepted from general scheme, though trustees were directed to keep amount thereof up to certain sum from other property in their hands. Landram v. Jordan, 203 U. S. 56, 51 Law. Ed. 88.

27. Provisions for purchase of cemetery lot and the removal of testator's family dead thereto held to fail by invalidity of provision of care and maintenance of the lot. In re De Witt's Will, 113 App. Div. 790, 99 N. Y. S. 415. Where invalidity of certain provisions destroys testator's apparent plan of equality, the whole property involved falls into intestacy. Lepard v. Clapp [Conn.] 66 A. 780.

28. In re McCoy's Estate, 101 N. Y. S. 539.

29. See 6 C. L. 1962.

30. Plaintiff's legacy held contingent on there being any balance after payment of certain other legacies, and its right was that of a residuary legatee. Stakely v. Executive Committee [Ala.] 39 So. 653. Property devised for life without remainder over held to pass by the residuary clause subject to the life estate. Hinzie v. Hinzie [Tex. Civ. App.] 100 S. W. 803. Charitable institution held residuary legatee. Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730.

31. In California by statute a void devise passes under the residuary clause. It is not limited as at common law to personalty. In re Russell's Estate [Cal.] 89 P. 345. Held to cover land attempted to be but not effectually conveyed to residuary devise and not mentioned in will. Ostrom v. De Yoe [Cal. App.] 87 P. 811. Code 1887, § 2524, providing that realty comprised in "any devise" which shall fail, etc., shall be included in residuary devise, held to refer to devises other than those contained in residuary devise itself, and not to change rule that subject of lapsed residuary devise passes as intestate property, particularly in view of § 2521 making wills of realty, as well as personalty, speak from testator's death. Kent v. Kent [Va.] 65 S. E. 564. Bequest of certain sum annually in perpetuity to care for cemetery lot. Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730.

32. Additional bequest "for life" in codicil without remainder over held to pass on beneficiary's death to her issue according to limitation of a bequest in the original will and not to pass by the residuary clause. In re Edie, 102 N. Y. S. 424. "Residuary" held not to mean the entire residue but only certain accretions thereto. In re Riley [N. Y.] 80 N. E. 944. Devise of "all the residue of my lands in S. county" held not a residuary devise but a specific one. Morisey v. Brown [N. C.] 56 S. E. 704.

33. In re Faile, 51 Misc. 166, 100 N. Y. S. 856.

34. See 6 C. L. 1964.

35. Void remainders fall into intestacy and vest under the statute at testator's death. Grant v. Stimpson [Conn.] 66 A. 166. Void remainder falls into intestacy and vests

sence of a residuary clause, but if possible a construction will be adopted which will avoid partial intestacy.[36]

(§ 5) *E. Of terms respecting administration, management, control, and disposal.*[37]—Precatory words[38] and powers of administration[39] will be liberally construed to admit of the most advantageous administration. Where the method of partition provided by the will has become unjust or impracticable, the court will substitute the statutory method[40] and may appoint new trustees,[41] but the fact that

at once in heirs. Harmon v. Harmon [Conn.] 66 A. 771. Where the will disposes of a portion only of a fund on the termination of a trust, the remainder falls into intestacy. In re Blake's Estate, 50 Misc. 672, 100 N. Y. S. 627. Realty not mentioned in will held to descend to heirs under intestate laws and to be subject to partition between them. Coberly v. Earle [W. Va.] 54 S. E. 336. Share of residuary devisee who died before testator. Kent v. Kent [Va.] 55 S. E. 564. Testatrix after bequeathing certain legacies gave the residue of her property to her executor in trust for the execution of her will with power to sell and dispose of the same. It was held that as to all her estate except the legacies the testatrix died intestate. White v. Crossman [N. J. Eq.] 64 A. 168. In such case if the testatrix has sufficient personal property to pay debts and legacies and also real property, the fact that the executor sold part of the latter did not convert it into personal property or give the husband of testatrix any right thereto. Id.

36. Presumption against intestacy. Steadman v. Steadman [N. C.] 55 S. E. 784. That a bequest is stated to be the legatee's fair share does not show an intention not to die intestate as to any property so as to require a forced construction of another bequest to prevent it. Schell v. Schuler [Mass.] 80 N. E. 523. Where will disposes of all testator's personalty and specifically devises a single parcel of realty to one of his heirs, and makes no mention of several other tracts owned by him, is strong presumption that he intended latter to descend under statute. Coberly v. Earle [W. Va.] 54 S. E. 336. Bequests held not conditioned on remarriage of wife only, but on remarriage or death, so that there was no intestacy on her death without remarriage. Joyce v. Bode, 74 S. C. 164, 54 S. E. 239. Construction favors testacy. McClellan v. Weaver [Cal. App.] 88 P. 646. Where testator gave income from certain bonds to two legatees so long as they remained unmarried, and income of balance of property to third person for life, and provided that, on death of the three, income should be paid to charitable institution held that death of third person did not result in partial intestacy as to his share, but it passed immediately to charitable institution. Jordan's Adm'x v. Richmond Home for Ladies [Va.] 56 S. E. 730. Residuary clauses will be so construed as to prevent partial intestacy unless there is an apparent intention to the contrary. Young v. Norris Peters Co., 27 App. D. C. 140.

37. See 6 C. L. 1965.

38. Precatory words will not be given binding effect unless such an intent is apparent. In re Thistlewaite, 104 N. Y. S. 264. Precatory words as to the attorney who should be consulted by the executors held not to bind them. Id. A will gave all testator's estate to his wife absolutely, coupled, however, with precatory words, but coupled also with an express declaration that she was not to be fettered in her disposition of the estate given. A subsequent codicil provided that if she should die before making a will different from any already made, "then and in such case" certain additional legacies and bequests should be given. It was held that the widow could not be required to enter security for the protection of such rights, if any, as might be conferred by the codicil. In re Teller's Estate [Pa.] 64 A. 525.

39. Where will gave certain sum to testator's executor to be given to another when executor thought best, held that interest did not begin to run until date of demand upon him for payment of same. Harrison v. Watkins [Ga.] 56 S. E. 437. Trustee of farm property to support children from rents and profits held empowered to make necessary repairs from such profits. Berry v. Stigall [Mo. App.] 102 S. W. 585.

Powers of sale and directions to convert: Will held to confer power of sale on executors. Trogden v. Williams [N. C.] 56 S. E. 865. Power of sale granted executors held not to give them power to execute contract giving one 90 day option on land. Id. Will held to give executor absolute power to sell or otherwise dispose of realty, and to invest or dispose of proceeds as to him seemed best for interest of devisees, so that his sale thereof by proper deed passed to vendee entire interest of devisees. Hagan v. Holderby [W. Va.] 57 S. E. 289. Discretion of executors as to advisability of sale cannot be collaterally questioned. Purchaser need not show that it was well exercised to recover possession from one entitled under the will to occupy until sale. Eisenbrown v. Burns, 30 Pa. Super. Ct. 46. Power to executors to sell lands "as they shall deem best" gives them full discretion as to advisability of selling. Id. Where the purposes of the will can only be carried out by the exercise of a power of sale, an equitable conversion results. Keyser v. Mead, 103 N. Y. S. 1091; In re Tasker's Estate [Pa.] 64 A. 527. A legacy of a specified sum "when the property is disposed of" is payable when sufficient property has been disposed of to pay the debts and bequests. White v. Crossman [N. J. Eq.] 64 A. 168. Use of terms "funds," "pay over," etc., in reference to distribution of devise in trust, held to imply a direction to convert. Burnham v. White, 102 N. Y. S. 717. Express power of sale and pecuniary legacies to which the personalty was inadequate held to work an equitable conversion. Boehmcke v. McKeon, 103 N. Y. S. 930. A direction in a will to sell real estate situated in another state works an immediate conversion of it into personalty. In re Dalrymple's Estate [Pa.] 64 A. 554.

40. In re King's Estate [Pa.] 65 A. 942.

41. Where will provided that if trustee named therein should die trustee should be

the trustees named in a trust to invest for support do not qualify does not justify the court in nullifying the provisions for investment by a decree that the executor hold the fund and pay it over as the court may direct,[42] nor is such an order warranted because the purpose of support could thereby be better carried out.[43] The will may make a distribution of sole powers among several,[44] but a power conferred on several must be exercised by them jointly.[45] A provision for substitution of trustees does not apply to acts of administration preliminary to the trust.[46]

(§ 5) *F. Abatement, ademption and satisfaction. Abatement.*[47]—As a general rule, where the payment of debts is charged on the personalty either by the will or by operation of law, personal property at large must first be taken, then the residuary legacy, then general pecuniary legacies, then specific legacies, and lastly realty devised by the will.[48] Legacies in payment are generally exempt from proportional abatement.[49] Where several legacies are given from the same fund, no preference is presumptively intended in case of shortage thereof.[50]

Ademption.[51]—A legacy is adeemed if the testator during his life pays the full value of it,[52] or what is accepted as such,[53] to the legatee. Where mortgaged land is devised without mention of the mortgage, a conveyance of the land to the devisee does not adeem the implied bequest of a sum sufficient to satisfy the mortgage.[54]

Satisfaction of debts by legacies.[55]—Where a legacy was given to one who had rendered services to testator and for which he had promised compensation in his will, the will providing that it should be in full payment and discharge of claims

appointed by court, so that trusts created should be at all times preserved and carried into effect, held that trust survived death of named trustee. Cruit v. Owen, 203 U. S. 368, 51 Law. Ed. 227.

42, 43. West v. Bailey, 196 Mo. 517, 94 S. W. 273.

44. Will held to show that defendant was to be executor alone and that he was to be trustee of portion of estate devised to himself and his wife, while plaintiff was to be trustee of portion devised to certain minors. Crawford v. Hord [Tex. Civ. App.] 14 Tex. Ct. Rep. 71, 89 S. W. 1097.

45. Power of sale conferred on two executors must be executed by them jointly. Trogden v. Williams [N. C.] 56 S. E. 865.

46. Trustee of fund not appointed to complete sale by executor. In re Walker [Cal.] 85 P. 310.

47. See 6 C. L. 1969.

48. Where realty has been specifically devised and personalty specifically bequeathed, both must contribute ratably to the payment of debts. Bashaw v. Temple, 115 Tenn. 596, 91 S. W. 202. Where all the realty is specifically devised and is not charged with payment of pecuniary legacies, latter abate ratably in case there is insufficient personalty to pay them in full. Morisey v. Brown [N. C.] 56 S. E. 704. Residuary legacy general. Lewis v. Sedgwick, 223 Ill. 213, 79 N. E. 14. Pecuniary legacies not made a charge on realty abate if the personal estate is insufficient for their payment. Shuld v. Wilson, 225 Ill. 336, 80 N. E. 259. Liability of a partner to contribution on account of a payment of firm indebtedness by his copartner is a "debt" within a clause making a charge for payment of debts. Schnell v. Schnell [Ind. App.] 80 N. E. 432. Gift of described real estate held specific though coupled with gift of all other real estate and money at interest where personalty would pay all debts and legacies. In re Painter's Estate [Cal.] 89 P. 98. Unless a contrary intent is expressed, only the personalty can be resorted to for payment of legacies though it is inadequate thereto. Moerlein v. Heyer [Tex.] 17 Tex. Ct. Rep. 164, 97 S. W. 1040.

49. To be entitled to immunity from a proportional abatement, legacies must be in payment of a legal and not merely a moral obligation of testator. Matthews v. Targarona [Md.] 65 A. 60. Evidence held insufficient to show that legacy stated to be in payment was such in fact. Id.

50. Matthews v. Targarona [Md.] 65 A. 60.

51. See 6 C. L. 1970.

52. Payment to legatee of amount of legacy, a receipt being taken by testator as in full of her share of the estate, held to adeem the legacy. Callicott v. Callicott [Miss.] 43 So. 616. A devise is not satisfied by conveyance of the devised property to devisee's wife. In re Hall's Estate [Iowa] 110 N. W. 148. Advancement of money to son by testatrix before her death held ademption of his legacy, whether Code, § 1630, was applicable or not, where she took no security or evidence of indebtedness from him, and stated to various persons at the time that money given him would be deducted from his share of her estate at her death. Miller v. Payne, 28 App. D. C. 396. Receiving an insurance benefit and commingling it with other moneys held an ademption of a specific legacy of such fund. Nusly v. Curtiss [Colo.] 85 P. 846. Provision creating a trust fund is not satisfied by deposit of bonds whose par value equals the stated fund but whose market value does not. In re Sandrock's Estate, 49 Misc. 371, 99 N. Y. S. 497.

53. Gift of $600 to purchase a piano held satisfied by purchase of piano for less which was accepted by legatee. Clift v. Newell [Ky.] 102 S. W. 832.

54. Jacobs v. Button [Conn.] 65 A. 150.

55. See 6 C. L. 1971.

of every kind the legatee might have against the estate, such legatee was held entitled to be paid in full as against ordinary general legatees.[56]

(§ 5) *G. Proceedings to construe wills.*[57]—Courts of equity may at the instance of a person interested,[58] and where there is no adequate remedy at law or in probate,[59] entertain a suit to construe a will so far as may be necessary to the interests of the parties.[60] A foreign ancillary decree of distribution is not controlling.[61] Delay does not bar a suit by an heir to determine the validity of a legacy if such legacy has, under the terms of the will, remained in the hands of a trustee.[62] Where a testamentary trust has been fully executed, the trustee is not a necessary party to a suit to determine its validity.[63] Action by remainderman against life tenant to enjoin waste is not one to construe a will so that a copy of the will must be attached to the complaint.[64] An appeal is permitted in Montana as to part of an order determining "the persons entitled to share" in the estate.[65] Costs rest in discretion[66] but should ordinarily be allowed against the unsuccessful party.[67] Where four persons whose interests are identical appear by separate attorneys, but one bill of costs will be allowed.[68]

§ 6. *Validity, operation, and effect in general.*[69]—As title is ordinarily held to pass by the will and not by any decree thereunder, it passes by an unprobated will,[70] but lack of genuineness or of testamentary capacity may be asserted against it.[71] Conditions in restraint of marriage are void.[72] An extravagant sum may be bequeathed for a monument to a third person.[73] Provisions designed to prevent a legacy from becoming available to the legatee's creditors are valid.[74]

56. Reynolds v. Reynolds, 27 R. I. 520, 63 A. 804.

57. See 6 C. L. 1971.

58. One who has purchased land from the executor and paid for it cannot sue to construe the will as to the power of the executor to sell. Clark v. Carter, 200 Mo. 515, 98 S. W. 594. A surviving spouse who has elected not to take under the will has not sufficient interest to sue for its construction. Clark v. Peck [Vt.] 65 A. 14.

59. On petition for probate of will, courts of probate have no other jurisdiction than to inquire into its execution, and cannot construe it, or determine validity of particular bequests. In re Murray's Will, 141 N. C. 588, 54 S. E. 435. Where the question may be determined in a suit by the executor against one devisee, a bill for interpretation should not be brought. Jacobs v. Button [Conn.] 65 A. 150.

60. Where devisees were living, and their estate for life at least was conceded, held that court would not decide whether they had life estate or fee. McGowan v. Elroy, 28 App. D. C. 188.

61. In re Campbell's Estate [Cal.] 87 P. 573.

62. Tincher v. Arnold [C. C. A.] 147 F. 665.

63. Miller v. Ahrens, 150 F. 644.

64. Cross v. Hendry [Ind. App.] 79 N. E. 531.

65. Code Civ. Proc. § 2841. In re Klein's Estate [Mont.] 88 P. 798.

66. Suit for the interpretation of a will is an equitable proceeding, within a statute giving discretion in allowance of costs. St. 1898, § 2918. In re Davis' Will [Wis.] 111 N. W. 503.

67. Costs on appeal in suit to construe will taxed against unsuccessful appellants, where executor did not appeal. Iglehart v. Iglehart, 204 U. S. 478, 51 Law. Ed. 575. An heir who unsuccessfully sues wholly for his own interest, to have a charitable bequest in trust declared void, is not entitled to have costs allowed from the trust fund. Tincher v. Arnold [C. C. A.] 147 F. 665.

68. Brown v. Wright [Mass.] 80 N. E. 612.

69. See 6 C. L. 1974.

70. Smith v. Ryan, 101 N. Y. S. 1011. A devise of land under a will duly recorded may give color of title. Harriss v. Howard, 126 Ga. 325, 55 S. E. 59. Judgment on appeal held to so vacate probate that title to land cannot be claimed under the will. Overton v. Overton, 29 Ky. L. R. 736, 96 S. W. 469. But see as to an Indian will. Peters v. Tallchief, 102 N. Y. S. 972.

71. Where title is asserted in a real action under an unprobated will, lack of testamentary capacity may be shown. Smith v. Ryan, 101 N. Y. S. 1011. Code 1895, § 3628, providing that party against whom registered deed is offered in evidence may file affidavit that it is forgery, and that issue as to genuineness shall then be made up and tried, held not applicable to certified copy of a will, duly probated and admitted to record in court of ordinary. Smith v. Stone [Ga.] 56 S. E. 640.

72. Conditions in restraint of marriage are void, by statute in Massachusetts, whether realty or personalty be involved. In re Alexander's Estate [Cal.] 85 P. 308.

73. Direction to expend certain sum in erecting monument over grave of testatrix's husband in certain cemetery held valid, though amount was greater than ordinarily expended for such a purpose by those in same condition of life as decedent. Iglehart v. Iglehart, 26 App. D. C. 209.

74. A bequest of income for life with a provision that it should not be subject to the debts of the legatee, and that if any

What law governs.[75]—Statute in force at time of testator's death governs as to rights of pretermitted child.[76] As a general rule the law of testator's domicile governs as to gifts of personalty,[77] and the lex rei sitae as to devise.

WINDING UP PROCEEDINGS; WITHDRAWING EVIDENCE; WITHDRAWING PLEADINGS OR FILES, see latest topical index.

WITNESSES.

§ 1. Capacity and Competency of Witnesses in General (2347). Chinamen (2349). Children (2349). Deaf and Dumb Persons (2349). Persons Convicted or Accused of Crime (2350). Persons Acting in Official Capacity at Trial (2350). Insanity (2351).
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The competency, materiality, and relevancy of testimony,[1] the manner of eliciting the same from witnesses,[2] and the qualification and examination of experts,[3] are treated elsewhere.

§ 1. *Capacity and competency of witnesses in general.*[4]—The competency of a witness in so far as fixed by statute is ordinarily a question for the court,[5] to be determined by an examination of the witness and any other available evidence.[6]

court should hold it so subject, his interest therein should cease and another have the income, is valid. Bottom v. Fultz, 30 Ky. L. R. 479, 98 S. W. 1037.

75. See 6 C. L. 1975.

76. Saving clause as to impairment of "validity" of previously executed wills does not prevent application of statute. Obecny v. Goetz, 102 N. Y. S. 232.

77. Stock in foreign corporation deemed personalty, in the absence of proof that the bulk of its property was real. Putnam v. Lincoln Deposit Co., 104 N. Y. S. 4. Validity of particular bequests depends upon law of legatee's domicile, unless expressly prohibited by law of testator's domicile. Rule against perpetuities. Iglehart v. Iglehart, 26 App. D. C. 209. Laws of state where testator died and where his will was probated, his executors qualified, and his estate was distributed, held controlling in construing will. App v. App [Va.] 55 S. E. 672. Interest on legacies is governed by law of testator's last domicile. In re Kucielski's Estate, 49 Misc. 404, 99 N. Y. S. 828. Disposition of personalty construed according to laws of testator's domicile, unless contrary intent appears. Evidence held to show intent that trust should be executed according to lex rei sitae. Lanius v. Fletcher [Tex.] 101 S. W. 1076, rvg. [Tex. Civ. App.] 99 S. W. 169. The law of the testator's domicile governs the construction of a disposition of personalty wherever situated. Lanius v. Fletcher [Tex. Civ. App.] 99 S. W. 169. Requisites of will of personal property are determined by law of testator's domicile at the time of his death. In re Beaumont's Estate [Pa.] 65 A. 799.

1. See Evidence, 7 C. L. 1511.

2. See Examination of Witnesses, 7 C. L. 1598.

3. See Evidence, 7 C. L. 1511.

4. See 6 C. L. 1976.

5. Is question of law to be determined by trial court. State v. Simes [Idaho] 85 P. 914. Is for court and not for jury. State v. Cremeans [W. Va.] 57 S. E. 405. Is a preliminary question for the trial judge and rests largely in his discretion. Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817. Where witnesses called to testify to market value of goods showed sufficient familiarity in general with subject of market value of such goods so as to require court to decide as to their qualification, its decision that they were qualified will not be reversed on appeal. American Foundary & Furnace Co. v. Settergren [Wis.] 110 N. W. 238.

6. Court should himself examine the wit-

The competency of witnesses in the Federal courts is to be determined by the Federal statutes on the subject.[7] Possession or lack of personal knowledge of the facts in regard to which a person is called to testify is sometimes applied as a test of his competency.[8] One cannot contradict as a witness what he has certified to in his official capacity.[9] Objections on the ground of incompetency may[10] and must be made when the witness is offered.[11] As a general rule belief in God and in divine

ness and may call and examine other witnesses. State v. Simes [Idaho] 85 P. 914. Refusal of court to examine witness held harmless where evidence in record clearly showed that she was competent. Id. Where party objecting to witness offers to show that he has been confined in asylum for insane and also put in jail on charge of lunacy, and has not been discharged from his lunacy, he should not be allowed to testify until court has made careful examination as to facts and the witness' condition of mind at the time. State v. Cremeans [W. Va.] 57 S. E. 405. Is duty of trial court, where infant of tender years is offered as witness, especially in criminal case, to examine him and ascertain whether he has sufficient intelligence and understanding of nature of oath to be competent, and such investigation should be carried far enough to make competency apparent. Clinton v. State [Fla.] 43 So. 312. Where competency of witness, whose testimony as to conversation was objected to on ground that defendant understood at time that witness was his attorney, was inquired into, passed upon, and his testimony admitted, held that it was discretionary with court to thereafter allow question to be reopened, and his refusal to allow further testimony on subject was not subject to exception. State v. Louanis [Vt.] 65 A. 532.

7. Competency of parties to be determined by U. S. Rev. St. § 858, regardless of state statutes. Huntington Nat. Bank v. Huntington Distilling Co. 152 F. 240. Competency to testify as to transactions with decedent. Smith v. Au Gres Tp. [C. C. A.] 150 F. 257.

8. Under Code Civ. Proc. § 1845, providing that, with certain exceptions, witness can testify only to facts which he knows of his own knowledge, held that it was error to permit mother to testify that son had no knowledge of dangers of electricity, particularly where it appeared that she had no means of knowing his knowledge other than his silence. Sneed v. Marysville Gas & Elec. Co. [Cal.] 87 P. 376. Witness cannot testify that no administration has ever been had on particular estate until it appears that he has examined record. Wilson v. Wood [Ga.] 56 S. E. 457. Partial examination held insufficient. Id. Witness may testify to part of conversation which he heard, though he did not hear all of it. State v. Freddy, 117 La. 121, 41 So. 436. Witness held competent to testify as to lumber market at certain places. Cleveland v. Rowe, 99 Minn. 444, 109 N. W. 817. Though witness was incompetent to testify as average width of cars for lack of knowledge, held that his evidence as to his measurements of cars at place where injury occurred was admissible, in absence of knowledge on part of plaintiffs as to particular car on which deceased was killed. Charlton v. St. Louis & S. F. R. Co. [Mo.] 98 S. W. 529. Question whereby coroner was asked to describe duties of certain clerk, claimed to have been wrongfully discharged, held properly excluded, it not being apparent that coroner, who took office sometime after clerk's removal, had any knowledge as to duties performed by him. People v. Cahill [N. Y.] 81 N. E. 453. Where it was not shown that witness had any knowledge whatever of chattel mortgage records, or of any records of register of deed's office, except that he had inspected them, and he was not register of deeds or deputy, held not error to refuse to allow him to testify that certain mortgage was not recorded. Buxton v. Alton-Dawson Mercantile Co. [Okl.] 90 P. 19. Held not error to permit plaintiff to testify to performance of certain work about his place by his wife, though he may have been absent at times when she was performing it. Gulf, etc. R. Co. v. Booth [Tex. Civ. App.] 16 Tex. Ct. Rep. 948, 97 S. W. 128. Witness who saw cattle weighed held qualified to testify as to their weight, though he did not weigh them himself. St. Louis, etc., R. Co. v. Dodson [Tex. Civ. App.] 16 Tex. Ct. Rep. 109, 97 S. W. 523. Testimony held to show that witness was sufficiently informed to testify as to authority of agent in certain particular. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061. Testimony of motorman **as to custom** for trolley cars to stop to let funeral processions pass held inadmissible where he was not employed until year after accident, which was basis of action, occurred. White v. Wilmington City R. Co. [Del.] 63 A. 931. Testimony of cab driver as to such custom held admissible only when connected with time of injury sued for. Id. Witness not shown to be familiar with custom of particular business nor of the locality held not competent to testify thereto, it not being shown that alleged custom was universal as to both locality and business. Schultz v. Ford [Iowa] 109 N. W. 614.

General reputation of a person can only be testified to by member of community in which such person lives. Tingley v. Times Mirror Co. [Cal.] 89 P. 1097. Knowledge of witness as to plaintiff's reputation for truth and veracity held not shown to have been too imperfect to preclude court from considering his testimony. Spotswood v. Spotswood [Cal. App.] 89 P. 362. Witness cannot testify to general reputation of a person until he shows that he knows reputation of such person in the given community and as to trait or qualification in question. Tingley v. Times Mirror Co. [Cal.] 89 P. 1097. Testimony as to general reputation of witness for truth and veracity held properly stricken where it appeared that it was based on witness' own transactions with such witness. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78.

9. What he has officially certified to as a member of appeal tail court. State v. Baltimore [Md.] 65 A. 369.

10. State v. Simes [Idaho] 85 P. 914.

11. See, also, §§ 3, 4, post. Otherwise

punishment is no longer requisite.[12] By statute in some states the relatrix in bastardy proceedings, if of sound mind, is made a competent witness.[13]

Chinamen are competent in the absence of statutory provisions to the contrary.[14]

Children.[15]—The law fixes no precise age at which children are absolutely incompetent, intelligence rather than age being the test,[16] and the matter being one largely within the discretion of the trial court.[17] The court also has discretionary power to permit an infant who does not sufficiently understand the nature and obligations of an oath to be properly instructed in that respect before being sworn, provided he is of sufficient age and intelligence to receive instruction.[18] Children of tender years are sometimes allowed to testify without being sworn,[19] but such a course is not permissible in the absence of a statute to that effect.[20]

Deaf and dumb persons[21] are competent if otherwise possessed of sufficient intelligence.[22]

waived. State v. O'Malley [Iowa] 109 N. W. 491. Objection that codefendant was not competent to testify for government held waived, when no objection on ground of incompetency was made when he was sworn or at any time during trial. Bise v. U. S. [C. C. A.] 144 F. 374.

12. Not under Const. 1885, Declaration of Rights, § 5, and Gen. St. 1906, § 1503. Clinton v. State [Fla.] 43 So. 312.

13. Burns' Ann. St. 1901, § 992. Where relatrix is a married woman, she may testify to nonaccess of her husband when conception must have taken place. Evans v. State, 165 Ind. 369, 74 N. E. 244, 75 N. E. 651.

14. Under Code Civ. Proc. § 3161, providing that all persons, except those specified in next two sections, who, having organs of sense, can perceive, and perceiving, can make known their perceptions to others, may be witnesses, Chinaman held competent though unable to "tell the nature" of the oath administered to witnesses, there being no attempt to show that he did not understand obligation of his oath or penalty for perjury. State v. Lu Sing [Mont.] 85 P. 521.

15. See 6 C. L. 1977.

16. State v. Werner [N. D.] 112 N. W. 60. Where it appears that he had sufficient intelligence to receive just impressions of facts respecting which he is to testify, and sufficient capacity to relate them correctly, and has received sufficient instruction to appreciate nature and obligations of an oath, he should be admitted to testify. Clinton v. State [Fla.] 43 So. 312. Child twelve years old held properly allowed to testify, where her other answers showed sufficient knowledge of obligations of an oath, though she did not understand question whether she "knew the nature of a judicial oath." Gordon v. State [Ala.] 41 So. 847. Youth of child and memory of facts held to go merely to her credibility. Id. Boy seven years old held competent. Birmingham R. Light & Power Co. v. Wise [Ala.] 42 So. 821. Court held not to have erred in permitting witness twelve years old to testify. Gabler v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 428, 95 S. W. 521. In order to authorize child over nine years old to testify as witness, he must manifest sufficient intelligence to convince court that nature and obligation of oath administered is understood. Moore v. State [Tex. Cr. App.] 96 S. W. 327. Failure of witness nine years old, who understood nature of an oath, to answer certain questions held not to have established his inability to make such coherent detailed statement of facts as disqualified him. St. Louis S. W. R. Co. v. Kennedy [Tex. Civ. App.] 96 S. W. 653.

17. Birmingham R., Light & Power Co. v. Wise [Ala.] 42 So. 821. Ruling will not be disturbed on appeal except in case of manifest abuse of discretion, or where witness is rejected or accepted upon erroneous view of a legal principle. Clinton v. State [Fla.] 43 So. 312. Whether child eight years old possesses sufficient knowledge to comprehend nature of oath. State v. Werner [N. D.] 112 N. W. 60.

18. Clinton v. State [Fla.] 43 So. 312.

19. Code Cr. Proc. § 392, authorizing admission in evidence in criminal case of unsworn statement of child under twelve years of age, where court is of opinion that such child does not understand nature of an oath but is possessed of sufficient intelligence to justify reception of the evidence, but providing that no person shall be convicted on such evidence unsupported by other evidence, held not unconstitutional as depriving defendant of life or liberty without due process of law. People v. Johnson, 185 N. Y. 219, 77 N. E. 1164. Statute held not in derogation of any constitutional right of a citizen. People v. Sexton, 187 N. Y. 495, 80 N. E. 396. Statute applies to grand jury as well as to courts and magistrates, and it may make examination therein provided for, so that, where jury conducted examination strictly according to statute, it was no ground for dismissing indictment that children had not been examined by presiding justice before their unsworn evidence was received. Id.

20. Held error to permit child seven years old to testify without being sworn, there being no statute authorizing it, and if incompetent under Bail. Ann. Codes & St. § 5993, providing that children under ten who appear incapable of receiving just impressions of facts respecting which they testify, or of relating them truly, shall not be competent to testify, it being error to permit her to testify at all. Hodd v. Tacoma [Wash.] 88 P. 842.

21. See 2 C. L. 2165.

22. Deaf and dumb girl possessing intelligence of child about nine or ten years old held competent. State v. Smith [Mo.] 102 S. W. 526.

Persons convicted or accused of crime.[23]—The common-law disqualification for conviction of an infamous crime has been removed by statute in many states,[24] though it may still be shown as affecting credibility.[25] In jurisdictions where the disqualification still obtains it does not attach until sentence has been pronounced.[26] In some states persons convicted of felony are incompetent until they have been pardoned or punished.[27] As a general rule conviction can only be shown by the record.[28] In the absence of a statutory provision to the contrary, an accomplice, separately indicted and separately tried, after conviction is a competent witness either on behalf of the defendant or for the prosecution.[29] The matter is regulated by statute in some states.[30]

Persons acting in official capacity at trial.[31]—Attorneys[32] and jurors in the case at bar[33] are not necessarily incompetent. One is not disqualified by having been arbitrator concerning the dispute at bar[34] and a juror in another case may testify to facts coming to his knowledge while viewing, under order of court, the

23. See 6 C. L. 1977.

24. Mere fact that witness has been indicted for crime held not of itself sufficient ground to reject his testimony. Kincaid v. Price [Ark.] 100 S. W. 76. Under Rev. St. 1899, § 4680, held that an accomplice not jointly prosecuted with defendant is competent witness for state, though he has previously been convicted of same crime, where no promise of lighter sentence has been made him to induce him to testify, even though he expects such lighter sentence by reason thereof. State v. Myers, 198 Mo. 225, 94 S. W. 242. Under Pub. St. 1901, c. 224, § 26, fact that plaintiff admitted committing, or was proved to have committed, perjury at former trial held not to render her incompetent, but merely to go to her credibility. Trafton v. Osgood [N. H.] 65 A. 397.

25. See § 5 B. 2, post.

26. One convicted of felony but not sentenced held not incompetent, though three days had elapsed since judgment of conviction and no motion for new trial had been filed. Rice v. State [Tex. Cr. App.] 100 S. W. 771.

27. Person who had been sentenced to be imprisoned and pay fine, had served sentence of imprisonment, and had been held in jail for an additional period on a capias pro fine, but had not paid fine or costs, held not to have been fully punished in view of Code 1904, § 4075, providing that imprisonment on capias pro fine shall not prevent issue of writ of fieri facias after release, and hence he was incompetent under Code 1904, § 3898. Quillen v. Com., 105 Va. 874, 54 S. E. 333. Code 1904, §§ 3879, 3903, construed, and held that offense of unlawfully shooting with intent to maim, etc., denounced by Code 1887, § 3671, Code 1904, p. 1965, is felony, so that one convicted thereof, though sentenced to imprisonment in jail and to pay fine, was within § 3898. Id.

28. In absence of statute cannot be shown upon witness' examination. Bise v. U. S. [C. C. A.] 144 F. 374; Thrash v. State [Ark.] 96 S. W. 360. Cross-examination of defendant to show conviction held properly limited to purpose of impeachment on objection that it was not best evidence, sufficient foundation not having been laid for introduction of secondary evidence as to contents of record. Grabill v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 374, 97 S. W. 1046.

29. Barbe v. Ter., 16 Okl. 562, 86 P. 61.

30. Held that person charged with misdemeanor may be used by state as witness against codefendant jointly charged with same offense, though latter has previously been convicted and has not satisfied judgment, Code Cr. Proc. 1895, arts. 771, 777, relating to testimony of codefendants and accomplices, applying only to testimony on behalf of defendant. Burdett v. State [Tex. Cr. App.] 101 S. W. 988. On prosecution for kidnapping held not error for court to refuse to discharge codefendants so that they might become witnesses for defendant, matter being one, based on sufficiency of evidence, within court's discretion under B. & C. Comp. § 1397. State v. White [Or.] 87 P. 137.

31. See 6 C. L. 1977.

32. Though it is professional impropriety for one to appear as both willing witness and as attorney for prosecution in criminal case, held that fact that he did so would not alone be ground for reversal. Wilkinson v. People, 226 Ill. 135, 80 N. E. 699. Witness held not incompetent to testify as to loss of certain books by reason of fact that he was attorney in case in connection with prosecuting witness. State v. Shour, 196 Mo. 202, 95 S. W. 405.

33. Fact that witness was one of jurors summoned to try case, and did not disqualify himself as juror, and defendant was required to exhaust a peremptory challenge upon him, held not to disqualify him. Bernal v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 581, 95 S. W. 118. When it is sought to use as witness juror who has not been summoned as a witness, it should be made to clearly appear that party offering him exercised proper diligence before he was impaneled, and was not appraised of fact that he knew anything material to case. International & G. N. R. Co. v. Foster [Tex. Civ. App.] 100 S. W. 1017. Refusal to allow defendant to have juror sworn as witness held not an abuse of discretion, where counsel merely stated that he did not know, and had no intimation, when juror was impaneled that he knew any fact material to issues, and it did not appear that any diligence whatever was used to ascertain what he knew about matter, and there were many other persons who could have been called to prove same facts, etc. Id.

34. Eastern Texas R. Co. v. Moore [Tex. Civ. App.] 16 Tex. Ct. Rep. 29, 94 S. W. 394.

premises involved.[35] A judge having charge of the drawing of a jury may be called as a witness when a question as to the regularity of such drawing is presented by a challenge to the panel.[36]

Insanity is not necessarily a disqualification, the test being capacity to comprehend the obligations of an oath and to give a fairly correct account of things seen or heard.[37] Incapacity to give intelligent and legal consent to the commission of an act does not necessarily imply incapacity to thereafter correctly and truthfully narrate the facts constituting its commission.[38] The examination of such a witness for the purpose of testing his competency should be made with special reference to the scope of inquiry and subject-matter about which he is to testify.[39]

§ 2. *Disqualification on ground of interest.*[40]—The common-law rule disqualifying persons having any pecuniary interest in the result of the suit has been generally abrogated by statute.[41] A partner is a competent witness to prove the fact of partnership.[42]

§ 3. *Disqualification of one party to transaction or communication, on death or disability of the other.*[43]—The disqualification of a party or other interested person to testify as to conversations or transactions with persons since deceased, or who have become insane, is regulated entirely by statute and varies in the different states.

The adverse party, or party against whom the witness is offered, must ordinarily represent the decedent, or derive his interest from the decedent.[44]—Thus, the

35. Jurors in another case against same defendant for injury to another person who examined place where accident occurred held competent to testify as to condition of timber in trestle which fell. Hull v. Seaboard Air Line R. Co. [S. C.] 57 S. E. 28.

36. State v. District Ct. of Silver Bow County [Mont.] 85 P. 870.

37. Under Rev. St. 1887, § 5957, providing that "persons of unsound mind at the time of their production" cannot be witnesses, one who can apprehend obligation of an oath and is capable of giving a fairly correct account of the things he has seen or heard is competent witness though he may be afflicted with some form of insanity. State v. Simes [Idaho] 85 P. 914.

38. Fact that state accuses defendant of rape, in having intercourse with female who was of unsound mind and incapable of consenting, does not per se establish incompetency of such female to testify against accused, but her competency is to be determined by court in same manner as that of any other witness. State v. Simes [Idaho] 85 P. 914.

39. State v. Simes [Idaho] 85 P. 914.

40. See 6 C. L. 1978.

41. Code Civ. Proc. § 1879. Ripperdan v. Weldy [Cal.] 87 P. 276.

42. Franklin v. Hoadley, 101 N. Y. S. 374.

43, 44. See 6 C. L. 1978. Code Civ. Proc. § 329, does not prohibit party from testifying unless his adversary represents a deceased person in issue that is being tried. Jacob North Co. v. Angelo [Neb.] 110 N. W. 570. In action against partnership on a contract held that plaintiff was not incompetent to testify as to conversations and transactions between herself and person since deceased who was member of firm when original contract was made, case having been tried on theory that liability of reorganized partnership depended solely upon contracts made by it since such reorganization, and that in order to recover plaintiff was bound to prove that she had entered into contract with firm as reorganized by which it made itself liable for her claim. Id. In action to recover land which plaintiff claimed under conveyance from her deceased father held that it was proper to permit her to testify as to transaction with him in regard thereto, where defendant had testified that he did not claim land as heir, devisee, or assignee of said decedent, Code Civ. Proc. 1902, § 400, being inapplicable to such a case. Brucke v. Hubbard, 74 S. C. 144, 54 S. E. 249. In action by heirs of husband and wife against certain other heirs and executor of wife to recover and have partitioned among plaintiff's husband's share of community property conveyed by wife, before her death and after husband's death, to one of the defendants, only issue being right of wife to convey more than her half of such property and plaintiffs claiming nothing as her heirs, held proper to permit defendant to whom conveyance was made to testify as to delivery of deed to her, particularly where delivery was otherwise sufficiently proven. Rev St. art. 2302. Jennings v. Borton [Tex. Civ. App.] 17 Tex. Ct. Rep. 53, 98 S. W. 445. Where defendants claimed that wife had, by payment of community debts out of her separate means, enlarged her interest in community estate to extent of full value of property conveyed, and grantee set up no claim except under such conveyance, and wife's executor conceded grantee's right to entire tract, held that testimony of certain of defendants, called by plaintiffs, as to agreement made by wife and heirs after husband's death whereby she was to retain possession and control of community property for life in consideration of paying debts and keeping property intact, was not inadmissible. Id.

statutes are usually applicable in proceedings by or against executors or administrators,[45] heirs, devisees, or legatees,[46] or other persons who derive their interest in

In action on benefit certificate defended on ground of false representations, held that Pierce's Code § 197, Ball. Ann. Codes & St. § 5991, did not prevent beneficiary from testifying to transaction with insured tending to prove truth of such representations. Erickson v. Modern Woodmen of America [Wash.] 86 P. 584.

45. Under Mills' Ann. St. § 4816, in suit to cancel note as barred by limitations and trust deed given to secure it, and to remove cloud on title to which administrator of deceased payee was party defendant, held proper to refuse to permit plaintiffs, who were makers of note, to testify. Sartor v. Wells [Colo.] 89 P. 797. In action by legatee against executor and testamentary trustee and his grantee to compel them to account for securities, etc., alleged to have been fraudulently witheld and converted, testimony by plaintiff and defendants as to declarations and statements of deceased during his lifetime held inadmissible under Acts 1902, p. 718, c. 495. Gerting v. Wells, 103 Md. 624, 64 A. 298, 433. Testimony of plaintiff as to statements by and transaction with, decedent, in suit in which decree was sought against administrator and distributees, held inadmissible under Laws 1904, p. 1168, c. 661. Smith v. Humphreys [Md.] 65 A. 57. Action against administrator to enforce a trust in mining claim, it being alleged that plaintiff and decedents were tenants in common thereof and that decedent wrongfully procured patent therefor in his own name, held one to enforce a "claim or demand" against decedent's estate within meaning of Code Civ. Proc. § 3162, as amended by Laws 1897, p. 245, so that plaintiff was incompetent to testify as to conversations and transactions with decedent and other matters occurring before latter's death. Delmoe v. Long [Mont.] 88 P. 778. Under Laws 1900 (P. L. 362), in suit by husband against executor and devisee of deceased wife to enforce specific performance of alleged verbal promise made by him to her that on death of either of them certain land purchased by him in her name should become property of survivor, husband held not a competent witness; executor, who was made party in representative capacity both because he had power of sale under will, and because he might need proceeds of sale of land to pay debts, being a necessary, or at least a proper, party. Lipp v. Fielder [N. J. Err. & App.] 66 A. 189. Complainant held not entitled to testify against either defendant because record showed that on defendant side there was a party sued in representative capacity, so that it was unnecessary to determine whether devisee was sued in such a capacity. Id. In proceedings to surcharge account of executrix with money claimed by her personally, held that she could not testify as to statements by, and transactions with, testator in support of her claim. Carlin v. Carlin [N. J. Eq.] 64 A. 1018. Under Rev. St. 1899, § 3683, providing that party is an executor, but that rule shall not apply to actions involving the validity of a deed or will, and that when case is within reason and spirit of statute, though not within strict letter, its principles shall be applied, held that one seeking to establish parol gift causa mortis as against executor of deceased donor was incompetent to testify as to transactions with latter, there being marked distinction between deeds and wills and such gifts. Hecht v. Shaffer [Wyo.] 85 P. 1056.

Statute held inapplicable: In an action against administrator and purchaser of land at administrator's sale, in which plaintiff alleged that he had purchased said land from decedent, had paid debt secured by mortgage thereon as consideration for sale, and that note and mortgage had been assigned to him, and prayed that title be quieted in him or the mortgage foreclosed, held that he could testify as to assignment, suit being against purchaser. Strayhorn v. McCall, 78 Ark. 209, 95 S. W. 455. Where, in suit to enjoin obstruction of lane across defendant's land on ground that it was public highway in which title to land was involved, defendant died, pending new trial after reversal on appeal, and his surviving wife and children were made defendants, held that testimony of wife as to conversation between plaintiff and decedent before the obstruction as to ownership of land was admissible in so far as it affected her rights, land being community property in which she therefore had absolute half interest, and she not being sued as executrix, not asserting any right as heir of her husband, and not administering property as surviving wife, though inadmissible as to children under Rev. St. 1895, art. 2302, since their claim to land was as heirs. Evans v. Scott [Tex. Civ. App.] 16 Tex. Ct. Rep. 885, 97 S. W. 116. Code Civ. Proc. § 1880, providing that parties or assignors of parties to action against executor or administrator on claim or demand against estate of a decedent cannot testify as to any fact occurring before death of such decedent held to apply only to actions upon such claims or demands against decedent as might have been enforced against him in his lifetime by personal action for recovery of money and upon which money judgment might have been rendered, and not to suit against executrix to have deeds given to decedent declared mortgages and to redeem therefrom. Wadleigh v. Phelps [Cal.] 87 P. 93.

46. Plaintiff held disqualified under Code Pub. Gen. Laws, art. 35, § 3, in suit against heirs of deceased husband to enforce claim for money advanced to him and used in purchasing land under oral agreement to convey part to her. Cross v. Iler, 103 Md. 592, 64 A. 33. Under Rev. St. 1895, art 2302, in action by plaintiff as sole heir of her deceased mother against sole legatee, devisee, and executor of her father to charge certain land with proceeds of mother's separate estate alleged to have been expended thereon and for value of certain community property, held that defendant could not testify as to statements made by mother in regard to ownership of property in question in conversations between herself and her husband. Tison v. Gass [Tex. Civ. App.] 102 S. W. 751.

Statute held inapplicable: True criterion

the action from the deceased.[47] One having a claim against another and seeking to recover thereon in an action against the estate of a third person, deceased, may testify as to transactions with the original debtor showing that his claim is just.[48] In some states the statute is held to apply to actions by or against corporations.[49]

Persons disqualified as witnesses [50] by statutes of this character are parties to the action, interested therein,[51] other persons not parties interested in the event of

is whether judgment or decree asked for by plaintiff seeks to charge heir at law with personal liability by reason of his being heir at law, or whether he is made party simply because he is in possession as terretenant of land claimed by plaintiff, substantially as a grantee of original owner might be in possession claiming title. Cowdrey v. Cowdrey [N. J. Eq.] 64 A. 98. In action by widow to establish her equitable title to land, which she claimed by virtue of instrument signed by her deceased husband, against heirs at law in possession, held that she was competent witness as to conversations and transactions with decedent, she not seeking to charge heirs with personal liability. Id. Even if Rev. St. 1898, § 3413, were applicable to will contest between heirs and devisees, held that it would not disqualify heir from testifying as to statements made by, or transactions with, sole beneficiary under such will, since deceased, or as to matters of fact equally within her knowledge, though her sole heir was party defendant and adverse to plaintiff in the action, such heir not being guardian, assignee, or grantee of such beneficiary whose estate was not involved. In re Miller's Estate [Utah] 88 P. 338.

47. In action to recover money alleged to have been delivered by person since deceased to defendant for plaintiff, held that defendant could not testify as to transaction with decedent or donee, being an assignee within meaning of Code § 4604. McAleer v. McNamara [Iowa] 112 N. W. 85. Where both parties in ejectment claimed under common deceased grantor, held that testimony of defendant as to acts and conduct of grantor at time of measuring off defendant's land was incompetent under Miller's Comp. Laws, § 10,212. Rix v. Smith, 145 Mich. 203, 13 Det. Leg. N. 508, 108 N. W. 691. Code 1881, § 389, held not to relate to or impair contractual or vested property rights but to relate merely to remedy and to declare rule of evidence, so that Laws 1800, p. 91 (2 Ball. Ann. Codes & St. § 5991), enlarging it so as to include persons deriving right or title through a decedent, is constitutional though it clearly applies to conversation had with decedent before its adoption. Samuel & Jessie Kenney Presbyterian Home v. Kenney [Wash.] 88 P. 108. Affidavit filed in county auditor's office alleging that affiant and decedent were partners, that certain property standing in decedent's name had been purchased with partnership funds, and that affiant owned undivided half interest therein, held a self-serving declaration, and inadmissible in favor of affiant in suit to quiet title to such land brought against him by one claiming under decedent's will. Id.

48. In action by creditors of corporation against estate of deceased stockholder to subject his unpaid subscription to payment of their debts, held that such creditors could testify as to validity and correctness of their claims against corporation. Williams v. Chamberlain, 29 Ky. L. R. 606, 94 S. W. 29.

49. San Antonio Light Pub. Co. v. Moore [Tex. Civ. App.] 101 S. W. 867.

50. See 6 C. L. 1979.

51. **Witness held incompetent:** Under Code 1896, § 1794, in action to establish gift of note, plaintiff held incompetent to testify as to transaction between himself and deceased donor. Thomas v. Tilley [Ala.] 41 So. 854. In action against administrator to recover for services alleged to have been rendered decedent, testimony of plaintiff tending to show that it was within contemplation of parties that she should receive compensation held inadmissible. Patteson v. Carter [Ala.] 41 So. 133. In suit by lunatic by her guardian against administrators of her deceased husband for purpose of having resulting trust declared in certain lands alleged to have been purchased by decedent with her money, held that guardian was incompetent to testify as to transactions with or statements by decedent, since he would be liable for costs if unsuccessful and entitled to commissions in management of property if trust was declared. Holloway v. Wilkerson [Ala.] 43 So. 731. Executor held party to proceedings to contest probate of will and hence incompetent to testify as to communications made to him by decedent under 2 Mills' Ann. St. § 4816. In re Shapter's Estate [Colo.] 85 P. 688. Interested party held incompetent to testify in proceeding to contest probate of will. Id. Physician seeking to enforce claim for medical services rendered decedent against his estate held incompetent to testify at all over objection of administrator. Temple v. Magruder [Colo.] 85 P. 832. Claimant in proceeding for allowance of claim against estate of decedent being incompetent, self-serving declaration in form of letter written by claimant after death of decedent, in which he set forth amount and character of services for which he was seeking compensation, held inadmissible in his behalf. Butler v. Phillips [Colo.] 88 P. 480. Under Code, § 4604, no party to action against administrator, whether interested or not, is competent to testify as to transactions and communications with decedent. Culbertson v. Salinger [Iowa] 108 N. W. 454. In action on notes against maker and administrator of one who it was alleged had agreed to sign them as surety and ultimately to pay them in consideration of the transfer to him of certain property by the maker, in which plaintiff claimed that in reliance on representations of maker he had surrendered certain collateral, held that maker was party interested in the event and hence incompetent to testify as to agreement between himself and decedent. Id. Maker held also interested by reason of fact that certain of the property which was to have been transferred to decedent under alleged agree-

the action,[52] and persons from whom a party derives his interest.[53] It is sometimes

ment was held by plaintiff as collateral to renewal of notes in suit. Id. Witness being interested in action because if judgment was in favor of defendant administrator plaintiff would have right of action against him for value of certain collaterals obtained by him through false representations, held that fact that such right of action was barred by limitations did not render witness competent, court not being authorized to assume that nothing had been done to toll statute or that it would be pleaded. Id. In any event held not conclusive that action was barred since, if based on fraud or mistake, statute would not begin to run until it was discovered by injured party (Code, § 3448), and there was no evidence that plaintiff had notice. Id. In action against administrator and another, filing of stipulation for judgment against latter held to remove bar of statute as to him, he no longer being a party. Id. Cross petitioner held party to suit and hence incompetent. Id. Defendant held incompetent in action on notes by legatee of payee. Chapman v. Chapman [Iowa] 109 N. W. 300. In suit by wife of decedent to set aside deed made by him before his marriage, held that her testimony as to statements made by him at time of subsequent conveyance of other land was incompetent. Beechley v. Beechley [Iowa] 108 N. W. 762. In suit by receiver of bank against administrator to have title to certain land standing in name of decedent declared to be held in trust for said bank, one filing cross petition claiming that he was owner of land and had conveyed it to decedent as security for loan only held incompetent. McElroy v. Allfree [Iowa] 108 N. W. 116. In action by children of first wife of decedent against his second wife and her children to recover certain of his land, second wife held incompetent to testify as to conversations and transactions had by her with decedent. Moore v. Moore, 30 Ky. L. R. 383, 98 S. W. 1027. In suit by heir of deceased married woman against grantee of latter's husband to set aside commissioner's deed made to decedent's husband pursuant to assignment to him of her bid, held that husband was incompetent to testify as to verbal transactions between himself and decedent. Noel v. Fitzpatrick, 30 Ky. L. R. 1011, 100 S. W. 321. Widow suing heirs and administrator of deceased husband and seeking decree against them held incompetent under Code Pub. Gen. Laws, art. 35, § 3, to testify as to any transaction had with or statement made by her deceased husband. Cross v. Iler, 103 Md. 592, 64 A. 33. In suit to establish gift causa mortis against administrator of a decedent's estate, plaintiff held incompetent, under Revision 1900 (P. L. p. 363, § 4), to testify as to transaction between himself and decedent. Van Wagenen v. Bonnot [N. J. Eq.] 65 A. 239. In suit to quiet title to land for which plaintiff had executed deeds to her deceased husband which she claimed were never delivered, her testimony as to statements made to her by him respecting such conveyances held inadmissible under Code Civ. Proc. § 829. Hamlin v. Hamlin, 102 N. Y. S. 571. Executrix and sole legatee seeking to recover fund deposited by her testator's deceased father in his own name in trust for testator held incompetent to prove personal transactions with father showing that fact of deposit had been communicated to testator or her by him. In re United States Trust Co., 102 N. Y. S. 271. In action of trespass to try title brought by heirs of decedent against widow, held that, under Rev. St. 1895, art. 2302, one of the plaintiffs was incompetent to testify as to statement by deceased as to arrangement between himself and his wife as to descent of their property. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198.

Witness held competent: Payee of note held not disqualified by schedule to const. 1874, § 2, from testifying in suit thereon by his assignee against administrator of deceased maker as to transactions with such maker. Collier v. Trice, 79 Ark. 414, 96 S. W. 174. Laws 1904, p. 1168, c. 661, does not except a nominal party. Smith v. Humphreys [Md.] 65 A. 57. Mother instituting will contest as next friend of her minor children held not a party. Johnson v. Johnson [Md.] 65 A. 918. In action against an administratrix, general manager of plaintiff corporation held not incompetent under Rev. St. 1906, § 5242. Cockley Mill. Co. v. Bunn, 75 Ohio St. 270, 79 N. E. 478.

52. Witness held incompetent: In action by administratrix for damages for unlawful killing of her intestate, decedent's son held incompetent, under Code 1896, § 1794, to testify as to any statement by or transaction with decedent. Cobb v. Owens [Ala.] 43 So. 826. On proceedings in probate for allowance of claim against estate of a decedent for money alleged to have been taken by him from bank, of which he was cashier, and to have been used and converted by him and a third person, notes for the amount thereof having been given to the bank of such third person, held that third person was incompetent under Code, § 4604. McElroy v. Allfree [Iowa] 108 N. W. 119. In action by administrator to settle estate of decedent, persons interested in claims against estate filed by administrator of another estate held incompetent under Civ. Code Prac. § 606, subsec. 2, to testify as to statements of and transactions with deceased. Owsley v. Boles' Adm'r, 30 Ky. L. R. 1016, 99 S. W. 1157. In action by legatee against executor to recover legacy, held that residuary legatee being incompetent to testify as to declarations of testator tending to show that payment made to plaintiff by him was in satisfaction of legacy, her husband was also incompetent to testify as to such declarations. Bright's Ex'rs v. Bright's Legatees, 30 Ky. L. R. 834, 99 S. W. 901. In suit to contest probate of will, wife of caveatee held incompetent, under Revisal 1905, § 1631, to testify to declarations of decedent, since, if caveators succeeded in their contention, husband of witness would, as an heir of decedent, become owner of undivided interest in his realty in which wife would immediately become entitled to an inchoate right of dower. Linebarger v. Linebarger [N. C.] 55 S. E. 709. Where husband managed wife's business as if it was his own, title being in her name to evade payment to his creditors, held that, in proceeding to sell realty of a decedent to pay a note purporting to have been indorsed by him which was held by wife, husband could not, under Code Civ. Prac. § 829, testify as to circumstances attending alleged indorsement. In re Neufeld's Estate, 50 Misc. 215, 100 N. Y. S. 444.

Witness held competent: Husband held to have no estate by the curtesy in separate

provided that a witness incompetent on the ground of interest may become competent by a release of that interest, made in good faith.[54] Other witnesses than

property of wife, so that he had no such pecuniary interest in result of suit to subject it to payment of debt of grantee thereof under alleged void conveyance as would disqualify him. Harper v. Hays Co. [Ala.] 43 So. 360. Legacy designed to compensate legatee for services and to reimburse him for expenses incurred as executor held not to make him a beneficiary under the will so as to render him incompetent under 2 Mills' Ann. St. § 4816. In re Shapter's Estate [Colo.] 85 P. 688. Where joint obligor on promissory note gave mortgage to secure its payment, held that, in suit in nature of foreclosure of mortgage instituted after his death, surviving co-obligor was not incompetent under Civ. Code 1895, § 5269, to prove execution of mortgage where at time he testified note as to him had become barred by limitations, such testimony being against his own interest. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62. In suit against remaindermen to quiet title and remove cloud, held not error to admit evidence of life tenant who was not party to the record or in interest in such sense as to render her incompetent, and who would not be bound by result, though persons alleged to have dealt with her were dead. Morehead v. Allen [Ga.] 56 S. E. 745. In suit by heirs of decedent to recover realty, brothers of defendant held not disqualified from testifying as to acquisition of land by their father, since deceased, where latter had before his death conveyed all such land to defendant. Blackburn v. Hail, 30 Ky. L. R. 134, 97 S. W. 399. Mere fact that defendant was named as executor in will held not to render him incompetent to testify in will contest. Rev. St. 1899, § 4367. Hogan v. Hinchey, 195 Mo. 527, 94 S. W. 522. In proceeding to compel former administrator to turn over to his successor money claimed by him as a gift from decedent, interest of former administrator's wife is not a direct legal interest within meaning of Code Civ. Proc. § 329, and she was not incompetent. Foster v. Murphy [Neb.] 107 N. W. 843. Husband held competent witness in behalf of wife in action brought by her in equity to establish ownership to property claimed by her and held in trust by administrator of his mother's estate. Bently v. Jun [Neb.] 107 N. W. 865. Where son, on receiving certain property from father as gift, agreed to pay his sister certain sum as her share of father's estate, but died without doing so, held that parent had no such direct legal interest in action by sister against son's estate on such promise as to disqualify him as witness for plaintiff. Fox v. Fox [Neb.] 110 N. W. 304. Husband's interest in his wife's property does not disqualify him from being witness in her favor, even when other party is administrator who does not elect to testify. White v. Poole [N. H.] 65 A. 255. True test of interest of witness is that he will either gain or lose by direct legal operation and effect of judgment, or that record will be legal evidence for or against him in some other action. Talbot v. Laubheim [N. Y.] 81 N. E. 163. Interest must be present, certain, and vested, and not uncertain, remote, or contingent. Id. In action to recover for goods sold and delivered in which administrator was substituted for one of the defendants who died pending suit, held that officer of corporation which acted for plaintiff's assignor in making sale was not disqualified by Code Civ. Proc., § 829, to testify as to conversation with decedent because if plaintiff failed to recover by reason of any mistake or fault on part of corporation resulting damage would be charged to it, where corporation had stopped business and its assets had been sold by sheriff. Id. Son of defendant in mortgage foreclosure suit brought by representative of deceased mortgagee has, by reason of his residing on mortgaged premises without payment of rent, no legal interest in event of action within Revisal 1905, § 1631, and may testify to transaction with deceased mortgagee. Bennett v. Best, 142 N. C. 168, 55 S. E. 84. In action against person adjudged insane, and for whom guardian ad litem was appointed, for damages for breach of covenants if deed to land, held that witness not interested in event of suit was not disqualified, though interested in land. Lemly v. Ellis [N. C.] 55 S. E. 629. Exclusion of minutes of defendant corporation on ground that secretary who produced them was a stockholder, and therefore interested, held improper. Morgan v. Lehigh Valley Coal Co. [Pa.] 64 A. 633. Wife of plaintiff held competent witness for him in action against administrator to recover money alleged to have been held by intestate payable to plaintiff on demand, she not being "interested in the subject of the action" within meaning of Rev. Code Civ. Proc. §486. Guillaume v. Flannery [S. D.] 108 N. W. 255. In action of trespass to try title by church corporation against executrix held that members of church were not disqualified to testify as to conversations had by them with decedent. Crosby v. First Presbyterian Church [Tex. Civ. App.] 99 S. W. 684. Under U. S. Rev. St. § 858, officers, directors, and stockholders of plaintiff bank, who were not themselves parties to suit against administratrix but were interested in result, held competent to testify as to transactions and communications had by them with defendant's intestate. Huntington Nat. Bank v. Huntington Distilling Co., 152 F. 240.

53. In action against maker of notes and administrator of another who it was alleged had agreed to sign them as surety and ultimately to pay them in consideration of the transfer to him of certain property by the maker, in which it was sought to recover amount of notes from estate of decedent as damages for breach of such agreement, held that maker was not incompetent under Code, § 4604, on ground that plaintiff obtained his interest through him. Culbertson v. Salinger [Iowa] 108 N. W. 454.

54. Act May 23, 1887, § 6 (P. L. 160). Assignment by party to controversy made only for purpose of enabling him to sustain suit by his testimony is not made in good faith and is ineffectual to accomplish that purpose. Morgan v. Lehigh Valley Coal Co. [Pa.] 64 A. 633.

participants in the transaction between a party and decedent are not prohibited from testifying thereto.[55] Under some statutes parties to contracts with a decedent are incompetent to testify in regard thereto,[56] and an agent who makes a contract for his principal is incompetent to testify in regard thereto after the death of the principal.[57] The statute does not exclude the living party from testifying where the evidence relates to transactions and conversations had with others to which deceased was not a party, and with which he had no connection, and of which he had no knowledge.[58] The rule that if the transaction is had with an agent of the decedent, and the agent is still living, the other party may testify, has no application where the agent is himself, for any reason, incompetent to testify.[59]

Transactions and communications to which disqualification extends.[60]—The disqualification extends to all personal transactions between the witness and deceased,[61]

55. Questions asked third person as to where he had seen check drawn by plaintiff in favor of deceased, and as to whose indorsement it bore held not objectionable as calling for personal transactions between plaintiff and deceased. Campbell v. Collins [Iowa] 110 N. W. 435. Same held true as to questions as to who had check on certain day when he saw it, and as to whether he participated in any way in transaction between plaintiff and deceased on said day. Id. In action against administrator to recover overpayment alleged to have been made to decedent on note, question as to what third person said in presence of decedent on certain occasion held not objectionable as calling for transaction with decedent. Id. Code § 4604, does not prohibit introduction of any evidence of communications or transactions between party to claim of deceased and latter during his lifetime, but merely declares certain witnesses incompetent to make such proof. Id. In proceeding for settlement of executors' accounts, held not error to permit witnesses not parties to action to testify as to declarations of testator's widow, since deceased, in presence of her husband, to show her ownership of certain property included in executors' accounts. Medlin v. Simpson [N. C.] 57 S. E. 24.

56. Under Rev. St. 1899, § 4652, in suit to set aside a sale of realty under a deed of trust given to secure an indebtedness to defendant, member of plaintiff corporation held incompetent to testify to conversations and oral agreements with manager of defendant company, since deceased, concerning the loan. Green Real Estate Co. v. St. Louis Mut. House Bldg. Co., 196 Mo. 358, 93 S. W. 1111.

57. Note presented against estate of deceased maker bore indorsement of part payment signed with name of maker by a third person as his agent and attorney in fact, who had written power of attorney. Held that, under Pub. Acts 1903, p. 36, No. 30, such third person was not competent to testify as to the collection and indorsement, since it operated as a continuation of the contract Locklund v. Burman's Estate [Mich.] 13 Det. Leg. N. 712, 109 N. W. 255.

58. Rev. St. 1899, § 4652, does not preclude living party to contract from testifying to transactions and conversations with assignee of deceased party in action by assignee against him to recover on same, it being only where administrator is party to action that surviving party is disqualified for all purposes until will has been probated or representative appointed. Weiermueller v. Scullin [Mo.] 101 S. W. 1088.

59. Rev. St. 1899, § 4652. In action on note by widow of deceased payee who had become owner thereof in course of administration, held that fact that agent of decedent, who transacted business in course of which note was given and took note for deceased, was living did not authorize defendant to testify where such agent had himself signed the note as surety and hence was himself incompetent because an interested party, though not a party to the action. Lyngar v. Shafer [Mo. App.] 102 S. W. 630.

60. See 6 C. L. 1982.

61. Administrator seeking to enforce personal claim on promissory note against estate of his decedent held incompetent under Code 1896, § 1794, to give his opinion as to genuineness of decedent's signature on note. Ware v. Burch. [Ala.] 42 So. 562. Under Schedule Const. § 2, plaintiff in proceeding against administrator to recover on contract, express or implied, for services claimed to have been rendered decedent, held incompetent to testify in his own behalf as to rendition of such services. Williams v. Walden [Ark.] 100 S. W. 898. In action against administrator to establish gift inter vivos, held that plaintiff was incompetent, under Kirby's Dig. § 3093, to testify that decedent had given her package, stated that it was hers, etc. Wilson v. Edwards, 79 Ark. 69, 94 S. W. 927. In action by administrator to recover money of decedent alleged to have been converted by defendants, in which existence of such money was denied, held that, under Burns' Ann. St. 1901, § 506, defendants could not testify as to habits, business methods, and possessions of decedent for purpose of showing nonexistence of money, that being "a matter involved." Zimmerman v. Beatson [Ind. App.] 79 N. E. 518. Under Civ. Code Prac. § 606, plaintiff in suit for division of lands of decedent held incompetent to testify as to consideration which he agreed with decedent to pay for certain land deeded to him and his wife, and which defendants claimed was advancement to latter. Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325. In action against decedent's estate to recover for services rendered decedent in his last illness, plaintiff held incompetent to testify as to length of time he waited upon deceased, and character of his services. Green's Adm'r v. Teutschmann, 29 Ky. L. R. 1149, 97 S. W. 7.

but not to communications or transactions between decedent and a third person in which the witness took no part,[62] or between witness and a third person,[63] or between a party and a representative of a decedent who is also a party,[64] nor to facts occurring after decedent's death.[65] The presence of third parties at the time of the transaction does not render a party a competent witness.[66] In some states an interested party may testify as to conversations with a deceased party whose testimony given before his death as to such conversations has been preserved and can be produced.[67] Matters obnoxious to the statute cannot be proven by indirect means,[68]

Laws 1904, p. 1168, c. 661, does not make parties incompetent to testify as to all matters but expressly limits incompetency to statements made by, or transactions with, decedent. Smith v. Humphreys [Md.] 65 A. 57. In action to set aside deed to defendant's deceased husband, held that, under Revisal 1905, §§ 1629, 1631, plaintiff was incompetent to testify as to what was said to her by decedent's attorney in decedent's presence when he and decedent were present at her home for purpose of having deed executed and as to what was done at that time, particularly where attorney was also dead, statements of attorney being regarded as those of decedent. Smith v. Moore, 142 N. C. 277, 55 S. E. 275. Under Rev. St. 1895, art. 2302, in action by grantee in deed against heirs of deceased grantor for breach of warranty, held that one of the defendants could not testify that amount paid to decedent by grantee was not amount recited in deed, but less sum. Sachse v. Loeb [Tex. Civ. App.] 101 S. W. 450. That witness proposed to testify from his own knowledge, and not from any statement made to him by decedent, held immaterial. Id. In action by children and heirs of married woman to recover her interest in certain community property, held that defendant was incompetent to testify that he was never married to deceased, never agreed to become her husband, etc. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126, afd. [Tex.] 100 S. W. 129. Ball. Ann. Codes & St., § 5991, held not to disqualify party from being witness, but merely to prohibit him from testifying as to transactions had by him with, or statements made to him by, decedent. Kauffman v. Baillie [Wash.] 89 P. 548. In action by heirs to set aside deed executed by person since deceased, held that grantee could not, under Rev. St. 1898, § 4069, testify to private interview with grantor in which latter expressed wish to make arrangement consummated by deed, etc. Quinn v. Quinn [Wis.] 110 N. W. 488.

Statute held inapplicable: Heirs of grantor suing to set aside deed held not rendered incompetent by Burns' Ann. St. 1901, § 507, to testify to facts and circumstances in life of decedent from which they testified to their opinion as to unsoundness of her mind. Studebaker v. Faylor [Ind. App.] 80 N. E. 861. Rev. St. 1899, § 4652, does not render incompetent any person who would have been competent at common law. Jenkins v. Emmons, 117 Mo. App. 1, 94 S. W. 812. Hence in proceedings to procure allowance of claim on lost note against estate of a decedent held that, contents of lost note having been proved, plaintiff was competent to prove fact and circumstances of its loss. Id. In action by children and heirs of married woman to recover her interest in certain community property, held that a plaintiff could testify as to conduct of decedent and defendant tending to show that they were husband and wife, it not appearing that they received their knowledge from decedent. Rev. St. 1895, art. 2302. Edelstein v. Brown [Tex. Civ. App.] 16 Tex. Ct. Rep. 338, 95 S. W. 1126.

62. McElroy v. Allfree [Iowa] 108 N. W. 116. Code, § 4604, held not to preclude one plaintiff from testifying to conversation between deceased and coplaintiff in which witness took no part. Powers v. Crandall [Iowa] 111 N. W. 1010. One prosecuting claim against estate of decedent held competent to testify as to conversations between deceased and third person in presence and hearing of witness. Griffith v. Robertson [Kan.] 85 P. 748.

63. In action against administrator and purchaser of land at administrator's sale, in which plaintiff alleged that he had purchased such land from decedent, had paid debt secured by mortgage thereon as consideration for sale, and that note and mortgage had been assigned to him, and prayed that title be quieted in him or the mortgage foreclosed, held that plaintiff could testify as to assignment of note and mortgage to him. Strayhorn v. McCall, 78 Ark. 209, 95 S. W. 455. Party may testify as to any communications he may have had before decedent's death with persons representing her. Guillaume v. Flannery [S. D.] 108 N. W. 255. In action against heirs, legatees, and executor to recover interest in certain lands from a decedent's estate pursuant to an agreement with decedent whereby plaintiff was to have certain share of profits resulting from sale of such land if he procured a conveyance thereof to decedent, testimony of plaintiff that he had had possession of contract since its date, and as to transactions between himself and original owner of land, in absence of decedent, to show services performed in securing conveyance of property, held admissible. Kauffman v. Baillie [Wash.] 89 P. 548.

64. Questions as to transactions between defendant and executor himself held not to come within purview of Revisal 1905, § 1631. Bennett v. Best, 142 N. C. 168, 55 S. E. 84.

65. Goddard v. Enzler, 123 Ill. App. 108. Under Hurd's Rev. St. c. 51, § 2, calling of interested person to testify in action by administrator as to possession of certain bonds of decedent sought to be recovered, held not to have made him a witness as to all questions. Merchants' Loan & Trust Co. v. Egan, 222 Ill. 494, 78 N. E. 800.

66. Smith v. Moore, 142 N. C. 277, 55 S. E. 275.

67. Rev. Laws 1905, § 4663. Plaintiff held properly permitted to testify as to conver-

but evidence not itself obnoxious is not excluded because inferences may be drawn therefrom as to what was done between the parties.[69] Testimony negativing the existence of a transaction in issue is as much within the inhibition of the statute as testimony affirming its existence.[70] In some states evidence of facts which occurred prior to decedent's death,[71] or evidence as to matters equally within decedent's knowledge,[72] is excluded. In others only evidence in favor of the interested party or witness,[73] or against the interest of the decedent,[74] is incompetent.

sations with a deceased defendant who had testified to such conversations on former trial, issues on two trials being substantially the same. Myrick v. Purcell, 99 Minn. 457, 109 N. W. 995.

68. In action by administratrix for damages for unlawful killing of her intestate, held that, since under Code 1896, § 1794, defendant could not testify as to the difficulty between himself and decedent, it was improper to allow him to testify as to facts, the only purpose of which was to show that he was not the aggressor. Cobb v. Owens [Ala.] 43 So. 826. Code Civ. Proc. § 829 not only forbids direct testimony by a survivor that a personal transaction did or did not take place and what was said, but also any attempt by indirection to prove the same thing. Little v. Johnson, 102 N. Y. S. 754. In action on quantum meruit for services rendered defendant's testator in preparing preliminary architectural studies for a house, held that plaintiff was improperly allowed to testify as to fact of his having had certain consultations with decedent and his wife in regard to such studies, and as to the number of such consultations, a large part of the services for which compensation was sought consisting of such consultations, and his testimony therefore being an attempt to prove by himself facts as to personal relations between himself and deceased from which inference of employment and promise was to be drawn. Id.

69. In action against administrator to recover overpayment alleged to have been made to decedent on a note by mistake, plaintiff's testimony that note was in hands of decedent on certain date held not objectionable as involving personal transaction, though when coupled with other facts, personal transaction might have been inferred therefrom. Campbell v. Collins [Iowa] 110 N. W. 435. In action against administrator to recover overpayment alleged to have been made on note to decedent by mistake, plaintiff's testimony that he saw note at bank at same time he saw decedent there held not objectionable as showing personal transaction with decedent. Id. Objections to inquiries of plaintiff as to whose signatures were attached to note held improperly sustained. Id.

70. Under Const. Sched. 2, and Kirby's Dig. § 3093, in action against estate of decedent on lost note signed by decedent and executor but in which estate alone was sought to be charged, held that executor could not testify that he did not execute and deliver such a note, purpose being to negative existence of note sued on. Jarvis v. Andrews [Ark.] 96 S. W. 1064.

71. In suit by widow against heirs of deceased husband to set aside ante-nuptial contract, plaintiff held incompetent witness as to facts occurring before husband's death. Murdock v. Murdock, 121 Ill. App. 429. Under Burns' Rev. St. 1901, §§ 507, 510, in suit by one heir against another, who was also a devisee, to recover half interest in land of ancestor conveyed to latter by his wife but which it was alleged ancestor and his wife had agreed by post-nuptial contract should be held in trust for both heirs, held an abuse of discretion to require plaintiff, over objection, to testify as to contents of such contract, which was not produced, and circumstances surrounding making of it. Jonas v. Hirshburg [Ind. App.] 79 N. E. 1058. In action of ejectment defendant held incompetent to testify as to matters occurring in lifetime of decedent through whom plaintiff claimed title. Weaver v. Oberholtzer, 31 Pa. Super. Ct. 425.

72. In suit against heirs of vendor of land for specific performance of contract of sale, persons who, as agents, negotiated with decedent for the contract held incompetent witnesses as to such negotiations, under Comp. Laws § 10,212, as amended by Pub. Act 1903, p. 36, No. 30. Detroit United R. Co. v. Smith, 144 Mich. 235, 13 Det. Leg. N. 228, 107 N. W. 922.

73. Under Civ. Code 1895, § 5269, subsec. 1, held not competent for plaintiff to testify as to transaction between himself and decedent, effect of which would be to impeach right of decedent to convey property in controversy to another, whose representative was party defendant. Hendricks v. Allen [Ga.] 57 S. E. 224. Where joint obligor on note gave mortgage to secure its payment held that, in suit in nature of foreclosure of mortgage instituted after his death, surviving co-obligor was not incompetent to prove execution of mortgage under Act Dec. 21, 1897 (Acts 1897, p. 53), providing that where suit is instituted against joint defendants, one of whom is representative of a deceased person, living party defendant shall not be permitted to testify as to any transaction or communication with decedent, where his evidence would tend to relieve or modify liability of witness and to make estate of decedent primarily liable for debt or default, particularly where limitations have run against liability of such co-obligor. Hawes v. Glover, 126 Ga. 305, 55 S. E. 62. Under Civ. Code Prac. § 606, no person will be permitted to give testimony in his behalf against estate of decedent which will have tendency to strengthen or make good his claim, or that will leave impression on court or jury that his demand must be just and reasonable. Northrip's Adm'r v. Williams, 30 Ky. L. R. 1270, 100 S. W. 1192. In action against administrator to recover on alleged oral contract for services rendered decedent, held error to permit plaintiff to testify as to decedent's poor health, nature, and character of her ailments, and amount of care which she required, though she did not testify directly to the services rendered. Id.

Fact that decedent's condition was known to a number of persons who could have described her condition held immaterial. Id. In action for specific performance of sale of land, an intervenor claiming title under same vendor, since deceased, held incompetent to testify as to transactions with such vendor. Jones v. Tennis Coal Co., 29 Ky. L. R. 623, 94 S. W. 6. In action by widow for allotment of dower in deceased husband's land held that she was incompetent to testify to marriage. Bartee v. Edmunds, 29 Ky. L. R. 872, 96 S. W. 535. Under Rev. St. 1899, § 4652, held that widow suing estate of deceased husband on claim for services rendered him before marriage could not testify that note given by decedent for such debt was destroyed and had not been in her possession since date of appointment of administrator. Dawdy v. Dawdy's Estate, 118 Mo. App. 336, 94 S. W. 767. In suit against grantors to reform deeds, plaintiff claiming that conveyance was not intended to be made to grantee personally but to him in trust for her, and that provision creating trust was omitted by mistake, held that, grantee being dead, defendant grantors were incompetent to testify in behalf of plaintiff as to intended trust. Smith v. Smith [Mo.] 100 S. W. 579. In action on promissory note against living maker and executor of deceased co-maker, held that plaintiff was incompetent to testify that decedent had made partial payment so as to toll limitations, which was denied by defendant, or even to mere physical fact that indorsement of payment on note was made at time it purported to have been. Crow v. Crow [Mo. App.] 100 S. W. 1123. Under Code Civ. Proc. § 829, in action against executrix and others to have will declared void, held that testimony of plaintiff as to transactions with decedent were inadmissible either on her own behalf or in behalf of defendants who also sought to have will declared void, though plaintiff claimed under former will and defendants under intestate laws. Pringle v. Burroughs, 185 N. Y. 375, 78 N. E. 150.

Statute held inapplicable: Rev. St. 1899, § 4652, does not disqualify witness to testify concerning matters about which he can have no interest, even though other party is dead. Thompson v. Brown [Mo. App.] 97 S. W. 242. In action on note against estate of deceased payee, defendant pleaded limitations and plaintiffs sought to toll statute by payments made by indorser of note who was not a party to action. Held that such indorser was competent to testify that he signed as guarantor, he having no interest in outcome of action since payments would keep note alive as to him whether he was guarantor or co-maker, and since judgment could be recovered against him regardless of outcome of action, and since, even if he was guarantor, statute of limitations had run against his right to recover payments previously made by him from makers, and, as his payments as guarantor could not keep note alive as against makers, it was no longer subsisting claim against latter and hence he could not recover from them any payments he might make in future. Id. One having a direct legal interest, as one of several joint heirs or co-legatees, in action against representative of decedent, is not by Ann. Code 1901, § 329, rendered incompetent to testify as to transactions and conversations between deceased and an adverse party in whose right, claim, or demand witness has no interest. Hageman v. Powell's Estate [Neb.] 107 N. W. 749. In proceedings to surcharge account of executrix with money claimed by her personally, certain of her testimony as to statements by, and transactions with, testator held admissible as being against her interest and tending to reduce her claim. Carlin v. Carlin [N. J. Eq.] 64 A. 1018. 2 Bal. Ann. Codes & St. § 5991, held not to disqualify an interested witness on the part of the estate, so that, in action against widow as executrix of deceased husband on certain notes indorsed by him during his lifetime, she could testify as to what took place between decedent and plaintiff when indorsement was made. O'Connor v. Slatter [Wash.] 89 P. 885. Under Rev. St. § 858, trustee in bankruptcy being privy with bankrupt, held competent to testify, after death of bankrupt, as to admissions concerning his estate made by bankrupt while he was still its owner. Smith v. Au Gres Tp. [C. C. A.] 150 F. 257

74. Witness called on behalf of defendant administrator held not incompetent under Code, § 4604, to testify as to transactions with decedent. Dean v. Carpenter [Iowa] 111 N. W. 815. In action by executor against testator's grantee to recover purchase price of land, defended on ground of payment before delivery of deed, held that persons interested in estate could testify that decedent had sent oral messages by them to grantee to pay purchase price or return deed. Moore v. Moore's Adm'r, 30 Ky. L. R. 1370, 101 S. W. 358. A defendant called as a witness by plaintiff held called by "opposite party" and hence competent under Code Pub. Gen. Laws, art. 35, § 3, though her interest was identical with that of plaintiff, competency being determined in such case by her legal relation to the cause. Cross v. Iler, 103 Md. 592, 64 A. 33. Husband held competent witness in behalf of his wife in action brought by her in equity to establish ownership to property claimed by her and held in trust by administrator of his mother's estate, his interest not being adverse to administrator whether he was legatee or heir. Bently v. Jun [Neb.] 107 N. W. 865. On proceedings by executors for settlement of their accounts, held that one of such executors was not disqualified by Revisal 1905, § 1631, from testifying as to personal transactions and communications between testator's widow, since deceased, and such executors, where his testimony was not against her interest. Medlin v. Simpson [N. C.] 57 S. E. 24. Fact that an executor was also administrator of testator's widow held not to render him incompetent. Id. In action to enforce vendor's lien for unpaid purchase money where bond had been given to make title to realty on payment of purchase price, plaintiff owning debt and holding legal title as successor to rights of vendor, and defendants claiming under the vendee, held that testimony as to what plaintiff heard original vendee, since deceased, testify to concerning notes in suit on a trial before a referee was admissible. Worth v. Wrenn [N. C.] 57 S. E. 388. Rev. St. 1898, § 3413, held intended to protect estates of deceased persons from assaults and to relate to proceedings wherein decision sought by party testifying would tend to

In some states a party cannot testify as to conversations or transactions with the deceased agent of the other party,[75] though such testimony is admissible in others.[76] A transcript of the evidence of a party given at a former trial and relating to transactions with the adverse party is inadmissible on a second trial occurring after the death of the latter.[77] The fact that a party has testified in the case before his death does not render the other party competent, particularly where the former was called to testify for his adversary.[78] Where a wife elects to have her husband testify in her behalf in a suit to which she is a party, pursuant to a statute authorizing either, but not both, to testify in such case, he cannot testify as to transactions with a decedent as to which she would have been an incompetent witness.[79]

Waiver or removal of disqualification.[80]—The disqualification is waived where the adverse party fails to make proper or timely objections,[81] or himself calls[82] or

reduce or impair estate, and not to relative rights of heirs or devisees as to distribution of estate in proceeding by which estate itself is in no event to be reduced or impaired. In re Miller's Estate [Utah] 88 P. 338. Held not to apply to action to revoke will on ground of undue influence which was contest between heirs and devisees or legatees, and hence all parties interested were competent to testify to any fact relevant and material to issue involved. Id. In suit by holder of note to set aside for fraud decree releasing deed of trust given to secure it, held that complainant, though note had been transferred to him by person since deceased, was competent to testify on issue whether he was in good faith the owner and holder of said note for value, the only question being whether note had in fact been paid to original holder. Morgan v. Booker [Va.] 56 S. E. 137.

75. Rev. St. c. 51, § 4. Admissions and conversations. Grand Lodge A. O. U. W. v. Young, 123 Ill. App. 628. Civ. Code Prac. § 606. Transactions. Loomis v. Mullins [Ky.] 101 S. W. 913. As to what was said when contract was made. Holcolmb-Lobb Co. v. Kaufman, 29 Ky. L. R. 1006, 96 S. W. 813. In action by corporation on note given for purchase price of goods sold, held that defendant could not testify that plaintiff's agent, who died before the trial, made false representations in effecting the sale. Comp. Laws 1897, § 10,212. Kessler & Co. v. Zacharias, 145 Mich. 698, 13 Det. Leg. N. 658, 108 N. W. 1012.

76. Under Hurd's St. 1903, c. 51, § 4, p. 935, party in interest may testify as to a transaction with defendant's agent since deceased, such as payment to him of premium on insurance policy, word "transaction" not appearing in such statute. Helbig v. Citizens Ins. Co. 120 Ill. App. 58. Code Civ. Proc. § 829, held not to prohibit party from testifying to personal transactions and communications with an agent in making or modifying a contract though principal and agent are both deceased. Warth v. Kastriner, 100 N. Y. S. 279. On scire facias sur judgment where both judgment plaintiff and defendant were dead, legatees and executor of judgment defendant held competent to testify to payment of judgment by executor of defendant to executor and testamentary trustee of judgment plaintiff after latter's death, though such executor and trustee was also dead, their interest not being adverse to judgment defendant, and deceased executor and trustee not being party to the contract and no right or interest of his, or derived through him, being involved if payment had been made to him as agent of judgment plaintiff. Norristown Trust Co. v. Lentz, 30 Pa. Super. Ct. 408.

77. Under Code, § 4604. Greenlee v. Mosnat [Iowa] 111 N. W. 996. Acts 27th Gen. Assem. p. 16, c. 9 (Code Supp. 1902, § 245a), providing for admission of transcript of evidence given on original trial or retrial of any case when material and competent, held not to make transcript equivalent to a deposition and hence admissible under Code, § 4605, authorizing party to have his own deposition, or that of any other person, read in evidence in all cases where his evidence would be incompetent under § 4604, if taken and filed in prescribed manner. Id.

78. Under Code 1904, § 3346, held that where plaintiff in suit to enjoin sale of property under deed of trust, after giving notice to take depositions, called defendant to testify on his behalf and his deposition was accordingly taken, and at subsequent day plaintiff was introduced as witness in his own behalf, but defendant died pending plaintiff's examination in chief, plaintiff was incompetent, and his deposition taken after revival of suit against defendant's administrator, and over latter's objection, was incompetent. Puckett v. Mullins [Va.] 55 S. E. 676. Code 1904, § 3349, providing that where original party to contract or transaction with whom it was solely made or had, or his agent, has been examined as witness orally or in writing at time when he is competent to testify, and afterwards dies, his testimony may be proved or read in evidence, and adverse party may testify to same matters, held to apply where deceased party has been examined in his own behalf, or, in case of an agent, in behalf of his principal, and those representing his side of controversy prove his oral testimony or read his deposition in evidence, and not where decedent died after being examined on behalf of his adversary. Puckett v. Mullins [Va.] 55 S. E. 676.

79. Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544.

80. See 6 C. L. 1984.

81. General objection that defendant was incompetent, without stating specific grounds of objection, held sufficient to raise question that he was incompetent under Code § 4604. McAleer v. McNamara [Iowa] 112 N. W. 85. Exception to testimony of witness as a whole on ground of incompetency held not open to consideration, he

examines [83] the interested witness, or goes on the stand himself [84] to testify to matters within the protection of the statute, or otherwise brings out such matters.[85] Vol-

being competent for some purposes, and having testified as to some facts not within the prohibition of the statute. Smith v. Humphreys [Md.] 65 A. 57. Defendant held to have waived objection to plaintiff's competency by failing to interpose it when he was put on stand as witness, and by drawing out facts in regard to transaction with decedent on cross-examination. Stuyvaert v. Arnold [Mo. App.] 99 S. W. 529. Incompetency of evidence held not so raised as to require reversal because of its admission. Hamlin v. Hamlin, 102 N. Y. S. 571.

82. Objection waived where witness was called to testify by persons to whom his interest was opposed. Harper v. Hays Co. [Ala.] 43 So. 360. In suit by administrator for an accounting between estate of decedent and defendant, etc., where plaintiff offered in evidence certain admissions of defendant in his testimony in another case which went to merits of entire case made by the bill, held that defendant might be examined on the whole case, and his complete testimony in other case was admissible, notwithstanding Comp. Laws 1897, § 10,212. Cady v. Burgess, 144 Mich. 523, 13 Det. Leg. N. 324, 108 N. W. 414. Under Code Civ. Proc. § 2709, where plaintiff was called as witness by administratrix in proceeding before surrogate to compel plaintiff to make discovery of assets of estate of a decedent in her possession, and was examined as to transactions between herself and decedent regard to certain property in her possession, held that administratrix thereby waived right to object, in subsequent action by plaintiff against her to compel specific performance of an alleged contract between plaintiff and decedent in regard to said property, to competency of plaintiff to testify as to transactions and conversations with decedent in regard to such property. Killian v. Heinzerling, 99 N. Y. S. 1036. Fact that in proceeding before surrogate particular questions eliciting proof of transaction with decedent were put by surrogate, and not by counsel for administratrix, held immaterial. Id. Where, in action by executor to compel defendant to account for moneys and property alleged to have been obtained by her from testatrix by undue influence and fraud, plaintiff read defendant's evidence, taken before surrogate on exceptions by residuary legatee to executor's accounts based on his failure to recover same money and property, held that he thereby waived right to object that under Code Civ. Proc. § 829, defendant was incompetent to testify as to whole of transaction to which her evidence related, residuary legatee being real party in interest. Cole v. Sweet, 187 N. Y. 488, 80 N. E. 355.

83. Party cannot object to witness testifying as to conversations where he himself brings out such conversations on cross-examination. Grand Lodge A. O. U. W. v. Young, 123 Ill. App. 628. Though in will contest on ground of incapacity and undue influence a contestant was incompetent under Code, § 4604, to testify in behalf of contestants as to conversations and declarations of testator, where effect of his cross-examination was to secure from him statement that he had conversations with testator in which latter "talked all right," held that on redirect examination it was competent, for purpose of overcoming effect of such evidence, for him to testify as to what testator said which led witness to testify that conversations were such as to indicate sound mind. In re Wharton's Will [Iowa] 109 N. W. 492. Cross-examination of administrator as to his accounts, etc., held to render him competent under Act May 23, 1887, § 7 (P. L. 158), to testify in his own behalf as to transactions with decedent. Yeager's Estate, 31 Pa. Super. Ct. 202. Party called for cross-examination as to matters occurring in lifetime of a decedent becomes competent witness for other party as to other relevant matters whether occurring before or after death of decedent, though such examination was not very extended or important. Shadle'e Estate, 30 Pa. Super. Ct. 151. Where judge reserved right to pass upon questions arising on objection to witness' competency, and both court and counsel examined her as to matters occurring before decedent's death, held that adverse party by cross-examining as to such matters did not waive objection. De Silver's Estate, 32 Pa. Super. Ct. 174. Cross-examination of plaintiff on presentation of claim in probate court, after objection to his competency had been overruled, held not waiver of right to object to his competency in subsequent suit on note between different parties. Crow v. Crow [Mo. App.] 100 S. W. 1123.

84. In action on notes by legatee of payee, mere fact that plaintiff testified as to how she obtained the notes and identified certain letters written by defendants held not to make defendants competent witness as to transactions with testator. Chapman v. Chapman [Iowa] 109 N. W. 300. Under Civ. Code Prac. § 606, permitting person to testify for himself as to transaction with decedent when some one interested in latter's estate shall have testified against such person with reference thereto, held that plaintiff could not make his testimony competent by bringing out testimony against himself as new matter on cross-examination of person interested in the estate. Crafton v. Inge, 30 Ky. L. R. 313, 98 S. W. 325. Where widow's only interest in estate was that given her by statutes of descent and those relating to dower so that her rights could in no way be affected by plaintiff's claim to share in estate, held that she was not a person interested in decedent's estate within meaning of statute, and hence fact that she testified that certain conveyance of land to plaintiffs was an advancement did not authorize one of them to testify as to agreement with decedent in regard to consideration therefor. Id.

85. In suit by infant heirs of decedent against his widow to establish parol trust in their favor in certain of his realty standing in her name, held that her deposition was in the main competent where it was for most part made up of denials and explanations in contradiction of evidence brought out by plaintiffs in respect to acts and statements attributed to her, though

untary statements of the survivor as to transactions with decedent may be proved against him as admissions without waiving any right under the statute.[88]

§ 4. *Privileged communications, and persons in confidential relations. A. Attorney and client.*[87]—Confidential communications between attorney and client, and knowledge acquired by the attorney by reason of the relation, are privileged and cannot be testified to by the attorney without the client's consent.[88] The relation of attorney and client must, however, have existed when the communication was made,[89] and the communication must have been in fact confidential.[90] If the

she would otherwise have been an incompetent witness owing to infancy of plaintiffs. Nelson v. Nelson, 29 Ky. L. R. 885, 96 S. W. 794.

86. Cole v. Sweet, 187 N. Y. 488, 80 N. E. 355. Introduction by executor of defendant's testimony taken at hearing on citation in probate court in proceeding for discovery of property under Hurd's Rev. St. 1905, p. 118, c. 3, §81, held not calling him as witness by adverse party within meaning of Hurd's Rev. St. 1905, c. 51, § 2, so that his incompetency as a witness, outside of admissions made on such examination, was not thereby affected. Merchants' Loan & Trust Co. v. Egan, 222 Ill. 494, 78 N. E. 800. Hurd's Rev. St. 1905, c. 51, § 2, refers only to calling by adverse party as witness in pending suit, and in any event proceeding under c. 3, § 81, is not a suit, nor is the executor a necessary party thereto. Id. Evidence taken in probate court should be classed and treated as mere admission, to which same rules of evidence would apply as to any admission made out of court. Id.

87. See 6 C. L. 1985.

88. Communications held privileged under Kirby's Dig. § 3095. Fox v. Spears, 78 Ark. 71, 93 S. W. 560. Under Code Civ. Proc. § 1881, subd. 2, held that letters written by plaintiffs to attorney, pending negotiation for conveyance of land by them and in relation thereto were inadmissible over their objection in subsequent suit to set aside such conveyance though relation of attorney and client had ceased to exist when conveyance was made. Hardy v. Martin [Cal.] 89 P. 111. Information obtained by attorney from client as to purpose of entering judgment on note, held privileged so that its omission over client's objection was error. Holmes v. Horn, 120 Ill. App. 359. Witness held properly prohibited from testifying to contents of letter placed in his hands by plaintiff as her attorney. Lindahl v. Supreme Court I. O. F. [Minn.] 110 N. W. 358. Attorney employed by prosecuting witness to assist in criminal prosecution held incompetent, both under Rev. St. 1899, § 4659, and at common law, to testify against his employer in subsequent action against latter for malicious prosecution as to communication in regard to prosecution. Pinson v. Campbell [Mo. App.] 101 S. W. 621. Under Rev. Code Civ. Proc. § 538, in action by assignee of account against, and indorsee of notes executed by, defendant, held that plaintiff's attorney could not be required to answer question whether or not he had advised assignor and indorser, foreign corporations and his clients, to make assignment and indorsement for purpose of evading laws relating to foreign corporations. Dewey v. Komar [S. D.] 110 N. W. 90. Letter, in relation to issue arising at trial received by local counsel of defendant railroad from defendant's general counsel, who employed him, held privileged. Missouri, etc., R. Co. v. Williams [Tex. Civ. App.] 16 Tex. Ct. Rep. 847, 96 S. W. 1087. Held proper to refuse to require attorney to testify as to conversation between himself and person who consulted him in regard to bringing an action against defendant, though plaintiff testified that he had never consulted such attorney, particularly where attorney did not identify plaintiff as party with whom he had such conversation. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469.

89. Communications to one who was merely acting as conveyancer or friendly advisor to defendant, and who had never been admitted as attorney in any court, and was not shown to have ever been employed by defendant as legal advisor in matter in controversy, held not privileged under Rev. St. 1887, § 5958, subd. 2. Later v. Haywood [Idaho] 85 P. 494. Attorney acting as mere scrivener in preparation of instruments under directions given him is not within scope of Code, § 4608. Mueller v. Batcheler [Iowa] 109 N. W. 186. Where attorney was employed merely as an attorney in fact to negotiate sale of realty to third person, and not in his professional capacity, held that letter and cablegrams sent to him by client showing extent of his authority were not privileged. Avery v. Lee, 102 N. Y. S. 12.

90. Attorney held not precluded from testifying that from his acquaintance with handwriting of plaintiff, he was of opinion that she signed certain deed, by reason of fact that he became acquainted with her handwriting through privileged communications from her. Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390. One who had been attorney for defendant in other matters, but did not represent him in criminal prosecution, held competent to testify as to his knowledge of defendant's condition of mind, his testimony not relating to any matter growing out of professional relations, and being in no sense of confidential character. Bischoff v. Com., 29 Ky. L. R. 770, 96 S. W. 538. Statement made by attorney to client of facts testified to by third person at public hearing at which client was not present held not privileged so that attorney could testify as to what he told client in regard to such testimony. Temple v. Phelps [Mass.] 79 N. E. 482. Report of accident made by official of defendant company in course of his ordinary duty immediately after accident, and before any action had been brought or threatened, held not privileged though original or copy was afterwards sent to defendant's attorneys. Virginia-Carolina Chem. Co. v. Knight [Va.] 56 S. E. 725.

relation exists when the communication is made the privilege is not removed by its subsequent termination.[91] The privilege is not lost by reason of the fact that it is in regard to a suit which must be brought in a court before which the attorney to whom it is made is not authorized to practice.[92] Knowledge derived by the attorney from his own act in creating the fact sought to be disclosed is not privileged.[93] The rule of privilege is generally held not to apply to communications between a testator and the attorney employed to prepare his will in a subsequent suit between legatees and beneficiaries to test its validity,[94] nor to preclude an attorney signing a will, deed, or other instrument as an attesting witness from testifying as to the mental condition of the person executing it, and the facts and circumstances surrounding its execution.[95] The privilege does not ordinarily extend to communications made in the presence of a third person,[96] nor is a third person precluded from testifying as to confidential communications which he overhears either by accident or design.[97] Communications to an attorney employed by two or more persons for their mutual benefit are not privileged as between them[98] but are as to third persons.[99] The privilege has been held to extend to communications by a witness or friend of the client acting with the attorney for his benefit.[1] The burden is on the objecting party to prove that the relation existed when the communication was made.[2]

The privilege is waived where the client himself testifies to,[3] or otherwise publishes,[4] the communications, or fails to interpose a proper and sufficient objection

91. Hardy v. Martin [Cal.] 89 P. 111.

92. Attorney having license authorizing him to practice before justices of peace only held improperly permitted to testify as to confidential communications of client in regard to institution of suit beyond jurisdiction of justices. English v. Ricks [Tenn.] 95 S. W. 189.

93. Contract between client and attorney as to fee to be paid for professional services, and assignment of interest in judgment recovered in payment for services rendered, held not privileged. Strickland v. Capital City Mills, 74 S. C. 16, 54 S. E. 220.

94. Attorney held competent to testify, in suit to contest probate, as to directions given him by testator concerning will, so that it could be determined whether or not instrument presented was in fact his will. In re Shapter's Estate [Colo.] 85 P. 688.

95. Provisions of Code Civ. Proc. § 333 may be waived, and party permitting attorney who prepares his will to sign it as an attesting witness thereto thereby impliedly consents that latter may disclose facts and circumstances attending its execution when it is offered for probate or subsequently. Brown v. Brown [Neb.] 108 N. W. 180. Attorney who drew deed and agreement and signed same as witness held competent to testify as to mental condition of person executing them at time of their execution. Boyle v. Robinson [Wis.] 109 N. W. 623. Fact that attorney was attesting witness to document executed contemporaneously with deed sought to be set aside, and stating terms of agreement pursuant to which deed was executed, held not waiver of clients' right to object to introduction in evidence against them of previous statements made by them to him as their attorney. Hardy v. Martin [Cal.] 89 P. 111.

96. Code Civ. Proc. § 853, construed. In re Simmons' Estate, 48 Misc. 484, 96 N. Y. S. 1103.

97. State v. Falsetta [Wash.] 86 P. 168.

98. Since to constitute privileged communication there must be some element of confidence imposed, or presumed to be imposed, in attorney himself. Mueller v. Batcheler [Iowa] 109 N. W. 186. Directions given attorney as to drafting mutual conveyances of property between husband and wife, and conversation between parties in his presence as to obligations thereby assumed, held not confidential communications within meaning of Code, § 4608. Id.

99. Held proper to refuse to compel attorney, who was retained by wife to procure divorce, but subsequently acted for both she and her husband in effecting reconciliation, and drew deed conveying certain of husband's land to her as part of means to that end, to testify as to writing of said deed and its delivery to him in action on insurance policy defended on ground that husband had conveyed property covered thereby to his wife. Phoenix Ins. Co. v. Wintersmith, 30 Ky. L. R. 369, 98 S. W. 987.

1. On prosecution for perjury based on affidavit of defendant made for purpose of procuring new trial for third person who had been convicted of crime, held that testimony of attorney for such third person as to reading over and explaining to defendant such affidavit, which was signed by defendant with his mark, was inadmissible. Rosebud v. State [Tex. Cr. App.] 98 S. W. 858.

2. Phelps v. Root, 78 Vt. 493, 63 A. 941.

3. Where client on cross-examination repeated confidential conversations with attorney. Pinson v. Campbell [Mo. App.] 101 S. W. 621. Held not error to compel attorney for accused to testify as to what latter testified to at former trial, even though such attorney originally came to his knowledge of witness' statement by reason of relationship to him as attorney. Yardley v. State [Tex. Cr. App.] 100 S. W. 399.

4. Party to cause who voluntarily solicits and procures reading of his unfiled plead-

to the testimony of the attorney.[5] It has been held that the privilege may be waived by the client's representatives after his death.[6]

(§ 4) *B. Physician and patient.*[7]—By statute in most states, information acquired by a physician in his professional capacity for the purpose of treating or prescribing for a patient is privileged.[8] The essentials of a privileged communication between physician and patient are the confidential relation of physician and patient,[9] the necessity and propriety of the information to enable the physician to treat the patient skillfully in his professional capacity,[10] and its acquisition by the physician from the patient during the existence of the relation, and while attending him professionally.[11] The fact that the relation is established at the instance of a third party is immaterial.[12] A physician signing an instrument as an attesting witness may testify as to the mental condition of the person executing it at the time of such execution.[13]

The privilege may be waived by the patient either expressly,[14] or by failure to interpose a timely and sufficient objection to the testimony,[15] or by himself voluntarily producing or introducing at the trial evidence of the confidential communi-

ing by nonprofessional stranger, publishes its contents in newspaper interview, and spreads substance of it upon record of court of general jurisdiction in pleading filed against attorney who assisted in preparing it, thereby waives its privileged character, and such attorney may produce it for use as evidence in subsequent proceeding against him. In re Burnette [Kan.] 85 P. 575.

5. Objection to evidence as incompetent does not go to competency of witness. Brown v. Brown [Neb.] 108 N. W. 180.

6. On will contest, proponent held entitled to introduce evidence of attorney who prepared will as to mental capacity of testatrix. In re Parker's Estate [Neb.] 111 N. W. 119.

7. See 6 C. L. 1986.

8. Testimony of physician who attended deceased grantor in last illness that he did not have sufficient mental capacity to execute certain deeds held within prohibition of Code, § 4608. Long v. Garey Inv. Co. [Iowa] 110 N. W. 26. Family physician, who acquired knowledge while attending testator in professional capacity, held incompetent, under Code Civ. Proc. § 834, to testify as to his mental capacity to make will. In re Preston's Will, 113 App. Div. 732, 99 N. Y. S. 312.

9. Communication held privileged. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365. Testimony of physician as to communications with accused, who was not the patient, and which in no way disclosed information received from patient other than that to which she testified, held not barred by Code, § 4608. State v. Bennett [Iowa] 110 N. W. 150. Statement made by defendant to physician, who examined him on behalf of people at request of court, held not privileged. People v. Furlong [N. Y.] 79 N. E. 978.

10. Communication held privileged. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365. Under Rev. St. 1899, § 4659, held that physician employed by defendant to whom it sent injured employe was incompetent to testify, in action by employe for such injuries, as to any statements made by employe to him in conversation in which physician sought to ascertain his condition for purpose of treating him, and also to obtain admissions from him that would be advantageous to employer. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Code Civ. Proc. § 834 held not to render inadmissible testimony of physician that patient told him that she carelessly got her hand into machine, since such information was not necessary to enable him to treat injury. Travis v. Haan, 103 N. Y. S. 973.

11. Communications held privileged. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365. Permitting prosecution in criminal case to prove by physician a conversation between witness, defendant, and state's attorney, for purpose of showing admission of defendant that he had certain disease, held not to violate Rev. Codes 1905, § 7304, physician not being examined as to any information acquired while attending defendant professionally. State v. Werner [N. D.] 112 N. W. 60.

12. Obermeyer v. Logeman Chair Mfg. Co., 120 Mo. App. 59, 96 S. W. 673. Information which is necessary and proper to enable physicians of railroad company to treat an injured person, and which is acquired by them from her for that purpose while endeavoring to treat her professionally, though against her protest, is privileged under Neb. Comp. St. 1901, § 5907. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365.

13. Physician signing deed as witness, particularly where it did not appear that answers to questions asked him involved disclosure of any communications received by him while attending her as a physician. Boyle v. Robinson [Wis.] 109 N. W. 623.

14. Statement made by party during cross-examination, without opportunity to advise with his counsel, and without full understanding of his legal rights, that he had no objection to physician who had treated him testifying to his legal rights, should not be treated as waiver of his privilege which cannot afterwards be withdrawn after he has consulted and been advised by counsel. Ross v. Great Northern R. Co. [Minn.] 111 N. W. 951.

15. Where physician testified on two trials without objection, held that patient could not object to his giving substantially same testimony on third trial. Elliott v. Kansas City, 198 Mo. 593, 96 S. W. 1023.

cation.[16] But testimony that is not voluntarily given, and evidence that does not recite the communication, does not work a waiver,[17] nor does the commencement of an action, nor the voluntary testimony of the plaintiff as to his physical condition.[18] In the absence of a statutory provision to the contrary, the waiver may be made by contract before the relation of physician and patient arises.[19] In New York the privilege can only be waived in open court on the trial of the action or proceeding,[20] or by the stipulation of the attorneys for the respective parties before trial.[21] As a general rule the privilege may be waived by the representative of a deceased patient[22] and is usually held not to apply in the case of disputes between heirs and beneficiaries under the will of the decedent.[23]

(§ 4) *C. Husband and wife. In civil cases.*[24]—Confidential communications between husband and wife are privileged both at common law and by statutes in many states.[25] The privilege does not, however, generally extend to conversations in the presence of a third person,[26] and the latter may ordinarily testify as to communications overheard by him.[27] The competency of such evidence is of course to

16. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365. Where patient testified to suggestion of physician that she should go home, held that she thereby waived privilege to that extent. State v. Bennett [Iowa] 110 N. W. 150.

17. Privilege held not waived. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365.

18. Union Pac. R. Co. v. Thomas [C. C. A.] 152 F. 365.

19. Provision in application for life insurance whereby applicant waived for himself and beneficiaries privilege or benefits of all laws making any physician incompetent held valid, since Rev. St. 1887, § 5958, subd. 4, authorizes waiver, and fixes no specific time at which it may or must take place. Trull v. Modern Woodmen of America [Idaho] 85 P. 1081. Benefits of waiver held equally available to beneficiary, so that he could examine physician who attended deceased in his last illness as to matters which would otherwise have been privileged. Id.

20. Code Civ. Proc. § 836, as amended by Laws 1899, p. 69, c. 53, does not operate to prevent waiver by calling physician and examining him at trial or by not objecting if other party calls him. Clifford v. Denver & R. G. R. Co., 188 N. Y. 349, 80 N. E. 1094. Examination of physician under a commission which plaintiff caused to be issued after issue joined held waiver, it being part of trial within meaning of statute. Id.

21. Code Civ. Proc. § 836, as amended by Laws 1899, p. 69, c. 53. Where plaintiff, after issue joined, caused commission to issue to take testimony of physician, and her attorneys either signed notice of motion or stipulation for that purpose, and signed interrogatories, and cross interrogatories were prepared by defendant and annexed to commission, held that attorneys thereby stipulated waiver of privilege. Clifford v. Denver & R. G. R. Co., 188 N. Y. 349, 80 N. E. 1094. Stipulation waiving privilege should be signed by patient's attorney. Geis v. Geis, 101 N. Y. S. 845.

22. Administrator suing to set aside conveyances made by his intestate on ground of mental incapacity held to so far represent deceased that he could waive privilege of latter by calling physician who attended him in last illness to testify as to his mental capacity. Long v. Garey Inv. Co. [Iowa] 110 N. W. 26. Does not so represent deceased in so far as deeds are sought to be set aside for fraud. Id. Privilege given by Gen. St. 1894, § 5662, subd. 4; Rev. Laws 1905, § 4660, subd. 4. Olson v. Court of Honor [Minn.] 110 N. W. 374. Where bylaws of fraternal benefit society provided that benefits of members committing sucide would not be paid except in case of unintentional self destruction while under treatment for insanity held that beneficiary could prove by attending physician that insured was under treatment for insanity when she committed suicide. Id. On will contest, proponent held entitled to introduce evidence of physician who attended testatrix in her last sickness as to her mental capacity. In re Parker's Estate [Neb.] 111 N. W. 119.

23. 2 Mills' Ann. St. § 4824 construed and held that, on proceeding between beneficiaries and heirs to contest probate of a will, physician was competent to testify as to testator's condition, though he acquired his information while attending him. In re Shapter's Estate [Colo.] 85 P. 688.

24. See 6 C. L. 1988.

25. In action on life insurance policy, wife of deceased insured held competent witness in behalf of beneficiary to testify as to health of her husband or as to what he did, or as to any other matters not involving communications between herself and him growing out of the marital relation. Illinois Life Ins. Co. v. De Lang, 30 Ky. L. R. 753, 99 S. W. 616. In action on life insurance policy by beneficiary who was wife of deceased insured, held that she was incompetent to testify as to conversations with him in regard to payment of premiums. Dakan v. Union Mut. Life Ins. Co. [Mo. App.] 102 S. W. 634.

26. Testimony of defendant's wife as to conversation between herself, defendant, and deceased, in which she detailed to latter previous abuse by husband of herself, held not privileged under White's Ann. Code Cr. Proc. art. 774. Cole v. State [Tex. Cr. App.] 101 S. W. 218.

27. Commonwealth v. Everson, 29 Ky. L. R. 760, 96 S. W. 460.

be determined by the substance of the witness' answer rather than the form of the question.[28]

In many states neither spouse is competent to testify for or against the other,[29] the disqualification in such case terminating with the termination of the marriage relation.[30] In some states the husband may testify in all cases where the litigation concerns the separate property of the wife unless the wife is herself incompetent by reason of the capacity in which the opposite party sues or defends.[31] In others, either spouse is a competent witness for the other in proceedings growing out of transactions wherein he or she acted as the agent of such other.[32] In Kentucky,

28. In proceeding by widow to recover dower, held error to exclude question asked plaintiff as to whether she left her husband of her own volition; whether she left his home of her own volition or through compulsion, being an inquiry not necessarily involving a transaction or communication with her husband which disqualified her as witness under Revisal 1905, § 1631. Hicks v. Hicks, 142 N. C. 231, 55 S. E. 106.

29. Mills' Ann. St. §§ 4816, 4822, construed and held that wife was competent witness for husband in proceeding by him to enforce claim against estate of decedent, to which she was not a party and in which she was not directly interested. Butler v. Phillips [Colo.] 88 P. 480. In suit by transferee of note to foreclose deed of trust given by maker and his wife to secure it, wife held not a competent witness as to defense of payment by execution of another note and trust deed. Gemkow v. Link, 225 Ill. 21, 80 N. E. 47. In action against husband and wife to recover for household goods purchased by wife, wife held incompetent to testify in behalf of plaintiffs. Stoutenborough v. Rammel, 123 Ill. App. 487. Showing that wife wrote receipt for money paid, usually did her husband's writing, and sometimes did other business for him, held not sufficient to render her competent witness in action against her husband, to prove admission by plaintiff that money paid him by defendant was all that was due; it being necessary to render her competent by reason of acting as husband's agent to show that she was in fact engaged in settlement of accounts between parties, and had general or special authority, either express or implied, from him to do so. Gulliford v. McQuillen [Kan.] 89 P. 927. Maker of note, originally joined as defendant, held to have interest in outcome of action by payee against indorser, since if latter was held liable she could recover amount of note and costs of action from him, and hence his wife was incompetent as witness. Oexner v. Loehr, 117 Mo. App. 698, 93 S. W. 333. Act May 23, 1887 (P. L. 158, 1 Purd. Dig. P. 817), and Act June 8, 1893 (P. L. 345, 2 Purd. Dig. p. 1304), held not to make either husband or wife competent witness in suit in equity by wife against her husband to cancel a deed and compel a reconveyance of her separate property. Heckman v. Heckman [Pa.] 64 A. 425. Where trial took place before passage of Acts 1904, No. 60, p. 78, defendant's wife, who had acted as his bookkeeper during time items covered by his specifications in offset occurred, held incompetent to testify as to such item. Boyce v. Bolster [Vt.] 64 A. 79. Wife held competent witness in action by husband as administrator of son to recover for wrongful death, recovery in such case going equally to father and mother. Civ. Code, § 606. Mitchell's Adm'r v. Brady, 30 Ky. L. R. 258, 99 S. W. 266. For purpose of proving that she was in fact surety of her husband on a note sued on, husband and wife are each competent. Italo French Produce Co. v. Thomas, 28 Pa. Super. Ct. 293. Mere fact that husband and wife each claimed ownership of chattels in severalty held not to make him incompetent to testify in support of his claim of exclusive ownership, in action brought by him against third party to recover damages for an alleged tortious conversion thereof. Sayler v. Walter, 30 Pa. Super. Ct. 370. Mere fact that defendant subsequently, and in development of his own case, testified that he took chattels by direction of plaintiff's wife, held not to render exclusion of husband's evidence harmless. Id.

30. Where defendant objected to one of plaintiff's witnesses testifying on ground that she was plaintiff's wife, held not error to admit in evidence decree of divorce for purpose of showing that marital relations had been dissolved, and that she was therefore competent. Easterly v. Gater [Okl.] 87 P. 853. Act June 8, 1893, § 4, P. L. 344, relating to competency of spouse who has been deserted, held inapplicable to proceeding to which only husband was party and in which no judgment could be rendered which could be pleaded as res adjudicata in subsequent controversy between them involving same subject-matter. Sayler v. Walter, 30 Pa. Super. Ct. 370.

31. Levine v. Carroll, 121 Ill. App. 105. Husband held competent, under Starr & C. Ann. St. 1896, p. 1837, c. 51, § 5, to testify in wife's behalf in suit to partition land in which wife claimed interest as her separate property. Linkemann v. Knepper, 226 Ill. 473, 80 N. E. 1009.

32. Wife may testify for husband as to her transactions as his agent, whole or some part of which took place in his presence. Bloch v. American Ins. Co. [Wis.] 112 N. W. 45. Husband held competent in action against his wife where knowledge of facts to which he testified came to him directly from his acts of agency in and about her business, and related to contract in dispute in such action, which was entered into by him as her agent. Thornton v. Muus, 120 Ill. App. 422. Husband who becomes tenant of house, with guaranty against vices and defects, does not act as agent of his wife within meaning of Act 1888, No. 59, p. 61, where she is not party to lease, and is not competent witness in action by her against lessor for damages for injuries due to latent defects which defendant had promised to repair. Bianchi v. Del Valle, 117 La.

in actions by or against the wife which might have been brought by or against her if unmarried, either she or her husband, but not both, may testify.[33] In Louisiana the husband cannot be a witness for or against his wife in matters affecting her paraphernal rights.[34] The statutes of South Dakota provide that no evidence shall be excluded merely because the witness is the husband or wife of a party.[35]

In criminal prosecutions[36] against one spouse the other is not usually a competent witness,[37] with certain statutory exceptions as in the case of crimes[38] or any bodily injury or violence inflicted by one against the other.[39] Requiring accused to identify a woman as his wife in the presence of the jury has been held not to be a violation of the rule.[40] In some states one spouse may testify for, but not against, the other.[41] In others the privilege extends to confidential communications only.[42] Where one spouse cannot be required to testify against the other, in case one calls the other as a witness in his or her behalf, the cross-examination of the witness must be strictly confined to his or her examination in chief.[43] The burden is on the accused to prove the existence of the relation.[44] Divorce operates to terminate the

587, 42 So. 148. Fact that husband acted as wife's agent in management of her farm and cattle, and had examined some of latter after they were killed, held not to render him competent witness in her behalf under Rev. St. 1899, § 4656, in action by her against railroad for killing cattle. Gardner v. St. Louis, etc., R. Co. [Mo. App.] 101 S. W. 684. Evidence held not to show that plaintiff's wife acted as his agent in furnishing care and support to third person for which he claimed contribution from defendant. Payne v. Payne [Wis.] 109 N. W. 105.

33. Civ. Code Prac. § 606. In suit against corporation and married woman to cancel certain shares of stock in former held by latter, and compel issuance of stock to plaintiff, held that woman's husband could testify in her behalf where she did not testify. Taylor v. Johnson, 30 Ky. L. R. 656, 99 S. W. 320. If wife elects to have husband testify, he cannot testify as to transactions with decedent as to which she would be incompetent witness. Doty v. Dickey, 29 Ky. L. R. 900, 96 S. W. 544. In action by married woman to cancel note and mortgage on ground that another note and mortgage had been given as substitute therefor, held that, though both plaintiff and her husband could not testify as to same matter, she could testify as to all transactions had with her personally, and husband, in addition thereto, could testify as to those things which he did as agent for her and as to which she did not testify. Leigh v. Citizens' Sav. Bk. [Ky.] 102 S. W. 233.

34. Bianchi v. Del Valle, 117 La. 587, 42 So. 148.

35. Rev. Code Civ. Proc. § 486. Guillaume v. Flannery [S. D.] 108 N. W. 255.

36. See 6 C. L. 1991.

37. Letters written by husband to wife held inadmissible on prosecution of former for bigmay. Hearne v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 372, 97 S. W. 1050. On prosecution for murder, deposition of defendant's wife in his behalf held properly excluded. Joseph v. Com., 30 Ky. L. R. 638, 99 S. W. 311.

38. Bigamy held crime against marriage relation and not a crime committed by one spouse against other within meaning of 2 Ball. Ann. Codes & St. § 5994, so that it was error to allow first wife to testify against husband accused of that crime. State v. Kniffen [Wash.] 87 P. 837.

39. On prosecution of defendant for assault with intent to murder his wife, latter held competent, under statute, to testify against him. Purdy v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 295, 97 S. W. 480. In any criminal proceeding against the husband or wife for any bodily injury or violence inflicted by the one on the other, the latter is competent and may be compelled to testify. Husband held competent on prosecution of divorced wife for assault with intent to murder him. Williams v. State [Ala.] 43 So. 720. Under Civ. Code, § 331, wife may testify as to crime committed against her by her husband, and it is proper for her to state all of the facts relating to the commission of such crime, though evidence may tend to convict him of another and different offense committed at same time and in same transaction. Miller v. State [Neb.] 111 N. W. 637.

40. Held not error to have mother of prosecutrix come before jury and to have accused on cross-examination identify her as his wife. Barra v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 171, 97 S. W. 94.

41. Common-law rule forbidding husband or wife from testifying against each other held not modified to extent of permitting first wife from testifying against her husband, who has married another woman and is on trial for bigamy. State v. Bates, 4 Ohio N. P. (N. S.) 502.

42. On prosecution for bigamy, letters written by defendant in which he called addressee his wife, coupled with testimony of witness who saw them delivered, held admissible to show relation of husband and wife, where they disclosed no fact of private or confidential nature. Caldwell v. State [Ala.] 41 So. 473.

43. Jones v. State [Tex. Cr. App.] 101 S. W. 993. Held error to require wife to give certain testimony against husband on cross-examination in criminal case, it not being pertinent or germane to her evidence in chief. Id.

44. Objection by accused to witness testifying against him on ground that she was his wife held properly overruled, where there was nothing in record at the time to show that she was his wife and he offered

incompetency except as to confidential communications.[45] Evidence as to privileged communications is generally held to be competent if obtained from some other source than the testimony of one of the parties.[46] The privilege is ordinarily deemed waived by failure to interpose a proper and timely objection to the competency of the witness.[47]

(§ 4) *D. Miscellaneous relations.*[48]—Statements made to a clergyman are not ordinarily privileged unless made to him in his professional character in the course of the discipline enjoined by the rules of practice of religious denomination to which he belongs.[49]

§ 5. *Credibility, impeachment, and corroboration of witnesses. A. Credibility in general.*[50]—The credibility of witnesses,[51] and whether they have been success-

no evidence to prove it, it not being incumbent on court to direct production of proof on the matter. State v. Frye [Wash.] 89 P. 170.

45. Witness who was wife of accused when crime was alleged to have been committed, but had been divorced before trial, held competent witness against him, notwithstanding provision of Code, § 4606. State v. Mathews [Iowa] 109 N. W. 616.

46. In criminal case where letter written and sent by defendant to his wife is not in custody or control of either defendant or his wife, or of any agent or representative of either, but is in custody and control of third person called as witness for prosecution, it may be used as evidence against defendant. Connella v. Ter., 16 Okl. 365, 86 P. 72.

47. Testimony given by defendant's wife against him without objection on trial for forgery held admissible against him on trial for perjury charged to have been committed by him in the forgery case, in so far as it tended to show materiality of his testimony which was basis of perjury charge, particularly where he made no objection thereto. People v. Chadwick [Cal.] 87 P. 389, afg. [Cal. App.] 87 P. 384. If defendant desires to object to witness testifying against him on ground that she is his wife, he must challenge her competency when she is sworn and try question out before court as an independent fact, so that where competency was not challenged it was not error to exclude evidence to show that prosecutrix in rape case was defendant's wife at time of trial. State v. Falsetta [Wash.] 86 P. 168. Where objection on ground that witness was defendant's wife was rightly overruled because there was nothing in evidence to show that such was the fact, held that on witness subsequently stating on cross-examination that she was his wife it was duty of defendant to move to strike her testimony, and, not having done so, he could not complain of her incompetency on appeal. State v. Frye [Wash.] 89 P. 170.

48. See 6 C. L. 1992.

49. Statement held not privileged under Rev. St. 1899, § 4659. State v. Morgan, 196 Mo. 177, 95 S. W. 402.

50. See 6 C. L. 1992.

51. After court has determined that person is competent to testify as witness. State v. Simes [Idaho] 85 P. 914. Whether parties, who were only witnesses, were of equal credibility. Murphy v. Hiltibridle [Iowa] 109 N. W. 471. Where is sharp conflict in testimony, is province of jury to give credence to those witnesses regarded by them as the more credible. Houston, etc., R. Co. v. Davis [Tex. Civ. App.] 100 S. W. 1013. Held that if jury disbelieved testimony of certain witnesses on account of inconsistencies and contradictions therein, they were warranted in disregarding it. St. Louis S. W. R. Co. v. Hutchison, 79 Ark. 247, 96 S. W. 374. Mere fact that plaintiff positively identified wrong person as conductor on car on which she alleged she was hurt held not to necessarily prove that her testimony as to injury was false, question being merely one which affected her credibility, and hence for jury. Plattor v. Seattle Elec. Co. [Wash.] 87 P. 489. Question asked witness on cross-examination as to whether she told truth in making certain statement held improper, that being question for jury, and question also calling for conclusion. Wright v. State [Ala.] 43 So. 575. In determining weight to be given evidence, jury should consider interest of witnesses, opportunity to know facts, apparent fairness or bias, etc. Evans v. Barnett [Del.] 63 A. 770. On prosecution for homicide, held that requested instruction that if any of state's witnesses had exhibited malice or anger against defendant, or had testified to contradictory statements and thereby satisfied jury that they had not testified truly and were not worthy of belief, and jury thought that their testimony should, on those accounts, be disregarded, they might disregard it, should have been given. Hammond v. State [Ala.] 41 So. 761. Also instruction that, if upon all the evidence jury believed that testimony as to good character of two named witnesses was sufficient to overcome impeaching testimony against them, they should weigh their testimony in light of proof of good character along with all other evidence in case. Id. Also instruction that, if jury did not believe that a named witness made statements which another witness testified he made to him, then first witness was not impeached. Id. Court should not give instructions designed to influence jury as to credit to be given to particular witness. Instruction held erroneous. Godair v. Ham Nat. Bk., 225 Ill. 572, 80 N. E. 407. Requested instruction that jury should be very cautious and careful as to weight and credence given child's testimony held properly refused. Gordon v. State [Ala.] 41 So. 847. Instruction intimating that prominent and striking contradictions in testimony of different witnesses should be attributed to deliberate perjury, and that coincidence in all particulars in stories of two or more witnesses always casts suspicion upon their evidence, held erroneous. State v. Allen

fully impeached,[52] are questions for the jury. The jury may disregard[53] the testimony of a witness who has willfully[54] sworn falsely[55] to a material fact,[56] except in so far as he has been corroborated by other credible evidence.[57]

[Mont.] 87 P. 177. Held error to direct verdict on ground that witness was not worthy of belief. Waters v. Davis [C. C. A.] 145 F. 912. Under Rev. Laws, c. 173, § 80, providing that court shall not charge with respect to matters of fact, held that judge has no right to tell jury that evidence of witness is open to the gravest doubt. Hayes v. Moulton [Mass.] 80 N. E. 215. Committing magistrate has sams right to judge of credibility of witnesses as jury would at trial, and, where thers is conflict of testimony, court cannot do so on application for writ of habeas corpus. Ex parte Vandiveer [Cal. App.] 88 P. 993. How far credibility of witness is affected by his interest held question for trial court, where case was tried to court without jury. Ripperdan v. Weldy [Cal.] 87 P. 276.

52. Georgia R. & Banking Co. v. Andrews, 125 Ga. 85, 54 S. E. 76. Whether statements of witness out of court as to her age, inconsistent with her evidence, tended to discredit her testimony, and, if so, to what extent testimony was discredited thereby. Instruction approved. Raymond v. People, 226 Ill. 483, 80 N. E. 996. Where witness is contradicted as to a material matter, or evidence is offered showing that he hae made statements at another time inconsistent with his testimony as to a material matter, he is not thereby impeached unless jury believe therefrom that he has wilfully sworn falsely as to such matter. Chicago City Ry. Co. v. Ryan, 225 Ill. 287, 80 N. E. 116. Instruction that if jury believed that any witness had been successfully impeached, or had sworn falsely as to any material matter, they were at libsrty to disregard his entire testimony except in so far as it had been corroborated, held improper under circumstances, as leading jury to believe that they might disregard uncorroborated testimony of witnesses who had been contradicted though they might not believe that they had wilfully testified falsely as to a material matter, or although contradiction was as to immaterial matter, there being no instruction defining "successfully impeached." Id.

53. Where witness is impeached in one particular, is within province of court or jury to disregard his testimony on that account on other points. Sebree v. Rogers [Ky.] 102 S. W. 841. Does not require jury to cut out of evidence everything that has been said by a witness who they believe has willfully testified falsely as to one fact. Shupack v. Gordon [Conn.] 64 A. 740. Instruction held not objectionable as not applying maxim to facts. Id. Rule only authorizes jury to disregard testimony and does not require them to do so. Commonwealth v. Ieradi [Pa.] 64 A. 889. Minot v. Boston & M. R. Co. [N. H.] 66 A. 825. Is not mandatory rule of evidence, but permissible inference. Addis v. Rushmore [N. J. Err. & App.] 65 A. 1036.

54. Rule applies only where witness has knowingly and willfully given false testimony. Instruction held erroneous. Godair v. Ham Nat. Bk., 225 Ill. 572, 80 N. E. 407. Testimony must have been corruptly or designedly false. Instruction held erroneous. Gibson v. Yazoo, etc., R. Co. [Miss.] 43 So. 674; Bell v. State [Miss.] 43 So. 84. Instruction that if jury found witnesses false in one thing presumption was that they were false in everything testified held not error requiring new trial, where only testimony to which it could apply must necessarily be either true or knowingly false. Glenn v. Augusta R. & Elec. Co., 121 Ga. 80, 48 S. E. 684. Where witness testifies falsely as to fact in respect to which he cannot be presumed liable to mistake, courts are bound to apply maxim. Alexander v. Blackman, 26 App. D. C. 541. Fact that plaintiff in action on partnership notes alleged in sworn statement that firm was composed of certain named persons, and that he later presented verified petition based on later information asking for an amendment of his record did not warrant application of doctrine, partnership not having registered names of its members. Daniel v. Lance, 29 Pa. Supsr. Ct. 454.

55. Instruction approved. Alabama Steel & Wire Co. v. Griffin [Ala.] 42 So. 1034; Parham v. State [Ala.] 42 So. 1; Prior v. Territory [Ariz.] 89 P. 412. Code Civ. Proc. § 2061, subd. 3, providing that a witness false in one part of his testimony is to be distrusted in others, held not to require absolute rejection of whole of witness' testimony because certain facts testified to by her on cross-examination were apparently physically impossible. Ex parte Vandiveer [Cal. App.] 88 P. 993. Instruction authorizing jury to disregard testimony of witnesses who they believed had been guilty of willful or gross exaggeration as to any material thing held not reversible error, though not commendable. Sedoff v. City R. Co., 120 Ill. App. 609. Corroborated and uncontradicted testimony of plaintiff that he was refused transfer held not rendered improbable so as to authorize court to disregard it because he testified that he saw stenographer drawing up complaint which was in record, when in fact such complaint was mimeograph copy, mimeograph complaint being blank form which must be properly filled out before it can be used, and it being reasonably inferable and reconcilable with his testimony that he may have seen stenographer filling in blanks. Berus v. New York City R. Co., 101 N. Y. S. 748.

56. Testimony must be material. Instruction held erroneous. Gibson v. Yazoo etc., R. Co. [Miss.] 43 So. 674. Evidence held contradictory of testimony of witness on material point so that if jury believed it and found that witness was successfully impeached on such point they might disregard his entire testimony. Georgia R. & Banking Co. v. Andrews, 125 Ga. 85, 54 S. E. 76.

57. Instruction that if jury believes any witness has willfully testified falsely in a material matter they may disregard his entire testimony need not make an exception in favor of such portion thereof as is corroborated. Burgess v. Alcorn [Kan.] 90 P. 239. Instruction authorizing jury to disregard testimony of any witness whom they

Impeaching and discrediting in general.[58]—The extent to which the cross-examination of a witness may be carried for the purpose of testing his credibility[59] or discrediting his evidence[60] is largely discretionary with the trial court. The more usual methods of impeaching or discrediting a witness are more particularly

believed had willfully sworn falsely as to any material matter, except in so far as he had been corroborated by other credible evidence, "which they do believe," held prejudicially erroneous, since jury cannot disregard evidence of such a witness who has been corroborated by other credible evidence. Sedoff v. City R. Co., 124 Ill. App. 609.

58. See 6 C. L. 1993.

59. Regester v. Regester [Md.] 64 A. 286. Matters brought out on cross-examination, which are legitimate for purpose of enabling jury to determine credibility of a witness, are not objectionable, though they may relate to questions not in issue in the case. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. In action for damages for injury to realty resulting from grading of abutting sidewalk, where plaintiff testified that lot was worth certain sum before grading was done, held proper to ask him whether he had not offered to sell it to named person for less sum for purpose of testing accuracy of his knowledge, reasonableness of his estimate of value, and, in consequence, credibility of his testimony. Town of Eutaw v. Botnick [Ala.] 43 So. 739. On prosecution for homicide, held proper to allow state to cross-examine witnesses who had testified as to deceased's bad character as to particular instances within their knowledge. Weaver v. State [Ark.] 102 S. W. 713. Where accident resulting in injuries for which action was brought occurred in Nov. 1898, and action was not commenced until summer of 1899, and it appeared that plaintiff had not made any claim against defendant for the injury, held not an abuse of discretion to refuse to allow certain questions as to whom he first made complaint of his injury, etc. Chicago etc., R. Co. v. Steckman, 224 Ill. 500, 79 N. E. 602. Not improper to ask witness whether he realizes what will happen to him in another world if he testifies falsely, and whether he knows nature of an oath, and penalty for false swearing. State v. Armstrong [La.] 43 So. 57. In action for personal injuries received in railroad wreck, held proper to require physician who was witness for defendant, and who stated that he had examined plaintiff at place and time of wreck, to testify as to confusion existing at wreck and its effect upon witness, since it tended to prove conditions in which witness acquired knowledge of facts in regard to which he testified, and which would be liable to affect the fullness and accuracy of his observation and impressions. Southern R. Co. v. Lester [C. C. A.] 151 F. 573. See, also, Examination of Witnesses, 7 C. L. 1593.

60. On prosecution for homicide, question asked for purpose of showing enmity on part of witness for deceased, and thus contradicting his claim of special friendship, held proper. Glass v. State [Ala.] 41 So. 727. In action for breach of promise where defendant denied promise, seduction, etc., held proper to ask him whether he had received certain letter which plaintiff testified she wrote him, since fact that he received it and remained silent under charges which it contained might tend to contradict or discredit his testimony. Lanigan v. Neely [Cal. App.] 89 P. 441. On prosecution for murder, extent of cross-examination of witness as to what was said by members of decedent's family at a family meeting as to what their testimony would be. State v. Blee [Iowa] 111 N. W. 19. Refusal to allow certain questions asked prosecutrix in rape case as to her associations with other men held not abuse of discretion. State v. Gereke [Kan.] 86 P. 160. On prosecution for homicide, where witness testified to defendant's good reputation for morality and peaceableness, held proper to bring out, for purpose of discrediting him only, that he had heard of defendant drawing pistol on third person. Newton v. Com. [Ky.] 102 S. W. 264. Witness for defense may be cross-examined on all matters brought out on his direct examination, and it is no objection that his answers may affect his credibility and character, cross-examination being one of modes of impeaching credibility of witness. State v. Brown [La.] 42 So. 969. Defendant held entitled to ask witness for state as to an asserted offer by him to swear to anything which would be of benefit to his brother who had previously been charged with larceny. State v. Caron [La.] 42 So. 960. Where subscribing witness to will merely testified as to certain physical acts of testator and did not express any opinion as to his sanity and was not qualified to do so, held that court was justified in refusing to allow him to be asked whether he had not stated on day will was executed that it was a shame to make testator make a will, and that they might as well have a dead man, as being so vague and indefinite as not to have any tendency to contradict him. Gleason v. Daly [Mass.] 80 N. E. 486. On trial of policeman before police commission on charges of drunkenness and neglect of duty, held that it was proper to show that he had been previously tried several times for similar derelictions, as affecting credibility of excuse that he took whiskey because of disease which he claimed to be suffering from. People v. Lewis, 111 App. Div. 375, 97 N. Y. S. 1057. In action against carrier for injuries to passenger, held proper to ask motorman and conductor if they had not made certain statement as to how accident occurred, since, if it appeared that they had done so, it modified and discredited stories told by them on examination in chief. Sperbeck v. Camden & S. R. Co. [N. J. Law] 64 A. 1012. Question whether witness did not tell certain person, with whom he testified to having a conversation, that he did not know anything about certain occurrences to which he had testified, held proper, either as contradicting witness or as basis for impeachment. Earley v. Winn [Wis.] 109 N. W. 633. See, also, Examination of Witnesses, 7 C. L. 1593.

discussed in succeeding paragraphs.[61] In general the testimony of a witness may be discredited by proving facts contrary to those testified to by him,[62] or that he made statements which he denies having made,[63] or did not make statements which he claims to have made,[64] or by showing acts [65] or statements [66] of the witness, or other circumstances,[67] inconsistent with his testimony. Inconsistency between the

61. See § 5, subsecs. B, C, D.

62. Evidence held admissible: Evidence contradicting witness for defendant who denied that he had attempted corruptly to dissuade witness for prosecution from giving certain evidence. People v. Yee Foo [Cal. App.] 89 P. 450. State held entitled to contradict material statements of defendant with reference to alleged payment of money by him to third person to induce latter not to testify against him. Commonwealth v. Hargis, 30 Ky. L. R. 510, 99 S. W. 348. Where witness testified that defendant was member of firm to which he belonged, and that all of the members of said firm had signed certain mortgage given by it, mortgage which was not signed by defendant. Rector v. Robins [Ark.] 102 S. W. 209. Where defendant in murder trial claimed that killing was in self-defense, and testified that, before killing, he had heard that deceased who was a marshal had clubbed and seriously injured an old man in arresting him, and that he died shortly afterwards, but did not remember who told him, evidence that said old man died from senility and alcoholism, and that there were no bruises or marks on his person. Knapp v. State [Ind.] 79 N. E. 1076. Convictions of crime held provable in contradiction of answers of witness. State v. Griggsby, 117 La. 1046, 42 So. 497. Where witness testified that track was in same condition at time of accident as at time of trial, and that it had not been repaired, held that it was proper to allow opposite party to prove by certain witnesses that they had seen defendant making repairs. Schloemer v. St. Louis Transit Co. [Mo.] 102 S. W. 565. Testimony by plaintiff that physician dragged her up and down hall of hospital, and that nurse told him to bring her to bed, etc., to impeach such physician who had testified to contrary. Stoebler v. St. Louis Transit Co. [Mo.] 102 S. W. 651.

Evidence held inadmissible: In action against street railway for death of plaintiff's son, where motorman testified on cross-examination that he had been present at coroner's inquest, but had not testified, transcript of evidence at inquest showing that witness had been sworn but had declined to testify on ground that he might incriminate himself was inadmissible, witness' statement being substantially true, and plaintiff not being entitled to have jury draw inference to prejudice of defendant from his refusal. Masterson v. St. Louis Transit Co. [Mo.] 98 S. W. 504.

63. State v. Darling [Mo.] 100 S. W. 631; Sperbeck v. Camden & S. R. Co. [N. J. Law] 64 A. 1012; State v. Sanders [S. C.] 56 S. E. 35; Myers v. State [Tex. Cr. App.] 101 S. W. 1000. Where witness testified that he had no recollection of making certain statement. Rector v. Robins [Ark.] 102 S. W. 209. Where witness in criminal case denied having made certain statements to prosecuting witness, held proper for state to show that he did make them for purpose of indicating his interest in case, though defendant was not present when they were made. State v. Mulhall, 199 Mo. 202, 97 S. W. 583.

64. Maxey v. Fairbanks Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 300, 95 S. W. 632.

65. Since, under Kirby's Dig. § 3138, where defendant in criminal case introduces an accomplice as a witness he subjects him to same rules for impeachment as are applicable to all other witnesses, held not error to admit evidence as to accomplice doing certain acts and making certain statements which he denied. Benton v. State, 78 Ark. 284, 94 S. W. 688. On claim by tenant against estate of deceased landlord for damages caused by collapse of leased building while in course of reconstruction followed by fire occasioned thereby, held that fact that claimant had previously sued insurance companies for loss could not be considered as bearing on consistency of his conduct and credibility of his testimony, in view of his testimony that such action was commenced merely to protect his interests at time when he did not know what caused building to collapse. Blickley v. Luce [Mich.] 14 Det. Leg. N. 121, 111 N. W. 752. In condemnation proceedings where witness, who had been one of the commissioners who had assessed damages, testified that in his opinion construction of railroad through defendant's property did not damage it to any extent, held proper to require him, on cross-examination, to state how much commissioners had awarded to owner of property near that of defendant for purpose of showing inconsistency of low estimate of defendant's damages with his own estimate of damage to other property. St. Louis, etc., R. Co. v. Continental Brick Co., 198 Mo. 698, 96 S. W. 1011.

66. In action against railroad to recover value of cotton destroyed by fire which it was claimed resulted from negligent burning of ties by section foreman, held proper to show by such foreman on cross-examination that he had asked plaintiff not to refer to fact that ties had been set on fire near cotton if he could collect claim without doing so, as affecting credibility of his testimony that it was impossible for fire to have been communicated to cotton from coals left after ties were burned. St. Louis, etc., R. Co. v. Clements [Ark.] 99 S. W. 1106. See, also, § 5 D, post.

67. Evidence held admissible: Where witness testified that defendant was member of firm to which he belonged, and denied that at time certain letter heads were printed for firm he gave printer names of members and told him how to print them, testimony of printer that witness gave him names to go on letter heads, and that defendant's name was not on list and letter heads themselves. Rector v. Robins [Ark.] 102 S. W. 209. here witness testified that certain notes were signed by all signers as members of firm, notes in which word "security" followed defendant's signature. Id.

testimony of a witness on direct examination and his testimony on cross-examination is not ground for excluding his evidence, but merely goes to his credibility.[68] Evidence that a witness has kept silence as to material facts which in the natural order of things he would have disclosed had he known of them is, if not too remote, generally admissible as being contradictory of his testimony as to such facts.[68]

A party cannot ordinarily impeach his own witness,[70] even though he is afterwards called by the adverse party,[71] except in so far as that result may be incidentally accomplished by proving a state of facts differing from that sworn to by him,[72]

Where witness testified that defendant told him that he was going into business with certain members of said firm and wanted his timber, and that witness subsequently entered into contract with him therefor, held that it was proper to cross-examine him as to contract, and to introduce contract which was signed by defendant as "security." Id. Where witness had testified that plaintiff made certain statements as to her injuries immediately after they occurred, that evidence of proprietor of store where she was at the time that he did not hear her make them. South Covington, etc., R. Co. v. Core, 29 Ky. L. R. 836, 96 S. W. 562. Where witness testified that he was able to tell cost price of certain goods in certain town from his general knowledge, independent of any marks thereon, evidence of certain other persons as to their ability as experienced merchants to tell cost thereof in absence of cost mark and invoice. Inlow v. Bybee [Mo. App.] 99 S. W. 785.

Evidence held inadmissible: Where fact that witness, by whom threats were proved, did not speak of them at coroner's inquest at which he was member of jury, was brought out, held not error to refuse to allow him to be asked on cross-examination if coroner's jury was not instructed to look up all evidence they could bearing on question. Parham v. State [Ala.] 42 So. 1. Evidence as to custom of police officers in examining and searching prisoners held inadmissible to affect credibility of state's witnesses who had testified as to examination and search of defendant. State v. Barrington, 198 Mo. 23, 95 S. W. 235. Disposition of charges made against certain other persons arrested at same time as defendant held inadmissible as tending to impeach testimony of officers who arrested defendant by showing that they made unwarranted arrests and did not know who was guilty, in absence of some admission by officer making arrest. People v. Way, 104 N. Y. S. 277.

68. Fact that on prosecution for homicide witness testified on direct examination that he saw cutting and on cross-examination that he did not see killing. Benjamin v. State [Ala.] 41 So. 739.

69. On prosecution for homicide, deceased having been killed in house by shot fired from outside, and sole question being as to identity of assassin, and witness for state having testified to seeing accused concealed with gun near house just before shot was fired, held competent to prove that witness, while speaking of murder on night of its occurrence, had not mentioned fact of having so seen defendant. State v. Armstrong [La.] 43 So. 57. Evidence that witness never told facts in regard to decedent to which he testified being admissible, held that evidence as to rumors, newspaper reports, and suspicions in regard to manner of decedent's death were admissible to strengthen inference that if witness had known facts he would have spoken of them. Gulf, etc., R. Co. v. Mathews [Tex.] 15 Tex. Ct. Rep. 957, 93 S. W. 1068. Where witness claimed to have told certain person of facts to which he testified, held that evidence tending to show that he could not have done so was admissible to sustain defendant's contention that he had never told anyone, that fact being relevant. Id. Where defendant in criminal case testified in his own behalf, held proper to elicit from him on cross-examination that he had never before mentioned certain transaction in regard to which he testified. Henderson v. State [Tex. Cr. App.] 101 S. W. 208.

70. See 6 C. L. 1995. Womble v. Wilbur [Cal. App.] 86 P. 916; Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876; Jones v. State [Tex. Cr. App.] 101 S. W. 993. In action on contract where plaintiff called defendant's husband, who was alleged to have signed contract as defendant's attorney, held that he was bound by his testimony on direct examination that he had no authority to sign. Alcolm Co. v. Brenack, 96 N. Y. S. 1055. Question whether witness had not made certain statement held not objectionable as impeachment by party calling him. State v. Barrett, 117 La. 1086, 42 So. 513. Party who has cross-examined witness held not, by recalling him for purpose of asking impeaching questions, to have made him his own witness. Schultz v. Reed, 122 Ill. App. 420. Held discretionary with court to allow solicitor for state to recall witnesses for defendant for purpose of laying foundation for their impeachment by proof of contradictory statements, and, by so doing, state did not make them its witnesses. Hammond v. State [Ala.] 41 So. 761. Where plaintiff had not offered certain person as witness in case at bar, held that he could show by his deposition taken by plaintiff in another case that he had made statements contrary to his testimony. Carp v. Queen Ins. Co. [Mo.] 101 S. W. 78.

71. In absence of special circumstances. Johnston v. Marriage [Kan.] 86 P. 451. Plaintiff having called witness and elicited material testimony from him, held not entitled to impeach him as to evidence given by him when subsequently called as witness for defendant. O'Doherty v. Postal Tel. Cable Co., 113 App. Div. 636, 99 N. Y. S. 351.

72. Chicago City R. Co. v. Gregory, 221 Ill. 591, 77 N. E. 1112. Party cannot impeach a witness voluntarily called by him, except as that result may be incidentally accomplished by proving a state of facts differing from that sworn to by the witness in question. Id. Though plaintiff made defendant her own witness, and hence could not impeach him by showing previous admissions

or unless he has been entrapped or misled by some trick or artifice by the other party, or by the witness, into calling him and making him his own.[73] A party surprised by the evidence of his own witness, however, is generally allowed to interrogate him as to inconsistent statements previously made by him, for the purpose of refreshing his memory and inducing him to correct his testimony,[74] and, in some states, may, in the discretion of the court, be allowed to cross-examine him, and, after laying a proper foundation, show his previous contradictory statements.[75] Statutes in some states authorize proof of contradictory statements made by a witness giving testimony unfavorable to the party calling him.[76] The mere faliure of a witness to testify as expected will not, however, entitle the party introducing him to show that he stated out of court that such fact existed.[77]

at variance with his testimony, held that such admissions were competent evidence against him of facts contained therein. Gould v. John Hancock Mut. Life Ins. Co., 99 N. Y. S. 833. Plaintiff held not bound by answers of defendant's agent simply because he called him as a witness, but he could contradict him. Kohl v. Bradley, Clark & Co. [Wis.] 110 N. W. 265.

73. Mere fact that other party issued subpoena for same witness, whom he did not put on stand, held not such a trick or artifice. Beier v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876. Where defendant made no affidavit of surprise, and did not show that, during long lapse of time between making of certain ex parte statements by witness and the trial, it had made any effort to ascertain whether such statements were remembered or would be sustained by witnesses under oath, and there was no attempt to show collusion between plaintiff and such witnesses to toll plaintiff into snare, held that defendant was not entitled to introduce such statements to impeach such witnesses. Id.

74. In prosecution for selling liquor without license, where witness for state was reluctant and testified that he was not certain that he paid for whiskey or whether it was purchased by him within a year preceding prosecution, held not an abuse of discretion to allow state's attorney to refresh his memory by asking whether he had not previously made certain statements to him and grand jury in regard to matter. Thomasson v. State [Ark.] 97 S. W. 297. On prosecution for assault with intent to kill, where prosecuting witness stated on cross-examination that he did not know who shot him, held not error to allow state to ask him on redirect if he had not stated to certain person that defendant shot him. People v. Smith, 113 App. Div. 396, 99 N. Y. S. 118. Held within discretion of court to allow prosecuting attorney to ask witness certain questions on direct examination. Territory v. Livingston [N. M.] 84 P. 1021. Where district attorney called father of defendant who had been witness for defendant at former trial, but not at trial in question, held that there was no justification for getting before jury his testimony on former trial and then subjecting him to severe cross-examination for purpose of discrediting him, even though fact that he was unwilling or adverse might have justified calling attention to his former testimony. People v. Dixon, 103 N. Y. S. 186.

75. Lindquist v. Dickson, 98 Minn. 369, 107 N. W. 958. Rule applies in criminal as well as civil cases. State v. Sederstrom, 99 Minn. 234, 109 N. W. 113. Held not abuse of discretion on prosecution for homicide to permit state to interrogate its witness as to his testimony at coroner's inquest, and to admit such testimony in evidence, for purpose of showing that state was taken by surprise. State v. Waldrop, 73 S. C. 60, 52 S. E. 793. Exception on ground of refusal to allow plaintiff to show that his witness had made contrary statements just before trial not passed on, but case affirmed. Pooler v. Smith, 73 S. C. 102, 52 S. E. 967. Though under Rev. St. 1887, § 6080, a party producing a witness may contradict him by other evidence and show that at other times he has made statements inconsistent with his present testimony, prosecutor in criminal case should not propound questions for mere purpose of discrediting him where he is not prepared to show such inconsistency. State v. Fowler [Idaho] 89 P. 757.

76. Under Code Civ Proc. §§ 2049, 2052, held that prosecution could cross-examine witness called by it as to previous contradictory statements, where she denied facts which she was called to prove. People v. Cook, 148 Cal. 334, 83 P. 43. Under Civ. Code Prac. § 596, where witness states fact prejudicial to party calling him, latter may show that fact does not exist by proving that witness has made statements to others inconsistent with his testimony. Dukes v. Davis, 30 Ky. L. R. 1348, 101 S. W. 390. Where, on prosecution for homicide, witness for state professed to narrate all facts which occurred at certain time and her testimony tended to corroborate that of defendant, held that state could show that she made different statements as to the matter to other persons just after the homicide. Garrison v. Com., 29 Ky. L. R. 411, 93 S. W. 594. Testimony of witness for state in criminal case being clearly prejudicial to theory of prosecution and affecting merits of case, held that, under B. & C. Comp. § 850, prosecution had right to show that witness had at other times made statements inconsistent with his evidence. State v. Jennings [Or.] 87 P. 524.

77. Garrison v. Com., 29 Ky. L. R. 411, 93 S. W. 594. Where state's witness testified to nothing against state's interest, but merely failed to tell facts as he had previously told them to other people, held prejudicial error to permit state to examine witness as to statements previously made

A witness cannot ordinarily be contradicted or impeached as to collateral matters,[78] though the court is sometimes held to have discretionary power to allow such a course.[79]

by him, to prove such statements when witness denied making them, etc. Ozark v. State [Tex. Cr. App.] 100 S. W. 927. State held not entitled to impeach its own witness, where there was no claim of surprise, or that he gave testimony of an affirmative character hurtful to it, though he failed to testify to some facts it desired to prove by him. Quinn v. State [Tex. Cr. App.] 101 S. W. 248.

78. See 6 C. L. 1996. Southern R. Co. v. Hobbs [Ala.] 43 So. 844; Moody v. Peirano [Cal. App.] 88 P. 380; Boles v. People [Colo.] 86 P. 1030; Atlantic Coast Line R. Co. v. Crosby [Fla.] 43 So. 318; French v. Com., 30 Ky. L. R. 98, 97 S. W. 427; State v. Freddy, 117 La. 121, 41 So. 436; State v. Caron [La.] 42 So. 960; State v. Valle, 196 Mo. 29, 93 S. W. 1115; State v. Murphy [Mo.] 100 S. W. 414; State v. Jones, 74 S. C. 456, 54 S. E. 1017; Norfolk & W. R. Co. v. Carr [Va.] 56 S. E. 276; Brundige v. State [Tex. Cr. App.] 95 S. W. 527; Barbee v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 377, 97 S. W. 1058; Prewitt v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812; State v. McLain [Wash.] 86 P. 390; Earley v. Winn [Wis.] 109 N. W. 633; Dunham v. Salmon [Wis.] 109 N. W. 959. Refusal to admit letter written by witness held proper. Brackett & Co. v. Americus Grocery Co. [Ga.] 56 S. E. 762. On prosecution for carnally knowing female under sixteen, fact that defendant, on cross-examination, and without objection, denied that he had ever been upstairs in restaurant where offense was claimed to have been committed held not to entitle state to prove by another witness that he had been up there with her. Dalton v. People, 224 Ill. 333, 79 N. E. 669. In action on case for negligence, statement of defendant's foreman, on cross-examination, that he had not requested newspaper not to publish account of accident held to have been in response to question involving a collateral matter. Finn v. New England Tel. & T. Co., 101 Me. 279, 64 A. 490. In action for damages for negligent killing of child by street car, location of wagon held material, so that evidence of contradictory statement of witness in regard to it was admissible. Mullin v. St. Louis Transit Co., 196 Mo. 572, 94 S. W. 288. Evidence that witness had previously stated that machine was fixed, etc., held inadmissible to contradict his statement on direct examination that nut was not off from bolt at time of accident or previously, such purpose being too remote to sustain statement otherwise incompetent and of character to be very influential with jury. Loughlin v. Brassil [N. Y.] 79 N. E. 854. On prosecution for homicide where deceased's wife testified that she had been sick and nervous, evidence of physician who had examined her that he did not consider her sick held inadmissible. Keith v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 516, 94 S. W. 1044. On prosecution for homicide, held prejudicial error to permit witness to testify that before homicide he had stated, in absence of defendant, that deceased would be killed within three days. Woodward v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 128, 97 S. W. 499. Where witness testified that there was no one keeping lookout on rear of backing train, evidence that on day of accident he had stated that it was railroad company's fault because it had no such lookout, and that plaintiff had good cause of action, held inadmissible. Houston, etc., R. Co. v. Adams [Tex. Civ. App.] 17 Tex. Ct. Rep. 58, 98 S. W. 222. Question as to conduct of defendant's wife held collateral in prosecution for murder. Jones v. State [Tex. Cr. App.] 101 S. W. 993. Held proper to refuse to allow defendant to show that plaintiff had testified in another case that she only had one child while in one at bar she testified that she had four. Western Cottage Piano & Organ Co. v. Anderson [Tex. Civ. App.] 101 S. W. 1061. Evidence bearing upon story of a witness with sufficient directness and force to give it appreciable value in determining whether or not such story is true cannot be said to be addressed to an irrelevant or collateral issue. Gulf, etc., R. Co. v. Mathews [Tex.] 15 Tex. Ct. Rep. 957, 93 S. W. 1068. Evidence that witness did not disclose facts when he naturally would have been expected to do so. Id. Whereabouts of third person held material on prosecution for homicide. Green v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 781, 98 S. W. 1059. Admission of evidence of contradictory statements held not objectionable. Stark v. Burke [Iowa] 109 N. W. 206. Testimony of witness on examination in chief to explain how he happened to be where he could hear conversation held not collateral, so that evidence tending to contradict it was improperly stricken. Levine v. Carroll, 121 Ill. App. 105. In action for criminal conversation where witness testified that she discovered plaintiff's wife and defendant in a compromising position, held that evidence of statements made by witness tending to show understanding between plaintiff's wife and herself to get money out of defendant was admissible, proper foundation having been laid. Smith v. Hockenberry [Mich.] 13 Det. Leg. N. 684, 109 N. W. 23. Motives, interest, or animus of witness are not collateral matters and may be shown and considered in estimating credibility. Pittman v. State [Fla.] 41 So. 385. See, also, § 5 C, post.

79. Where there is a direct conflict of testimony in criminal case, trial court may, within reasonable discretion, admit any declarations or matters otherwise collateral which would tend to characterize or corroborate credibility of either party. State v. Callahan [Minn.] 110 N. W. 342. On prosecution for rape alleged to have been committed in a boat, where defendant admitted that prosecutrix was with him alone in boat at night, but denied commission of crime, held proper, to lay foundation for impeachment, as well as to characterize subsequent conduct and test credibility of his denial, to ask him if he had not, two years before, made certain statements to third person in regard to getting prosecutrix out alone in boat, and, on his denial, to prove by such party that statement was made. State v. Callahan [Minn.] 110 N. W. 342. Question on cross-examination held proper in view

(§ 5) *B. Character and conduct of witnesses.* 1. *In general.*[80]—Proof of the general moral character of a witness is usually held incompetent,[81] though it is admissible in some jurisdictions.[82] When admissible it is usually confined to general reputation,[83] though in some states the witness may be asked as to the commission of particular crimes.[84] Attacks on the character of a witness must ordinarily be limited to his personal turpitude.[85] In some states the general character of a defendant in a criminal case, who testifies in his own behalf, cannot be attacked unless he first puts it in issue.[86] In others only so much of his moral character as reflects on his credibility as a witness is open to assault by its state in the first instance.[87]

The reputation of a witness for truth and veracity [88] may be shown,[89] though he cannot be himself interrogated in regard to it.[90]

of Code Civ. Proc. § 3376. Mahoney v. Dixon [Mont.] 87 P. 452. How far party may go in contradicting witness as to collateral matter developed on cross-examination is within discretion of trial court. Salem News Pub. Co. v. Caliga [C. C. A.] 144 F. 965.

80. See 6 C. L. 1997.

81. Female witness cannot be impeached by an attack upon her chastity. State v. Romero, 117 La. 1003, 42 So. 482; Perry v. State [Ala.] 43 So. 18. Bad reputation, as a basis for impeaching testimony, must be limited to reputation as to truth and veracity. State v. Grove [W. Va.] 57 S. E. 296.

82. Evidence of general character of prosecuting witness held admissible. State v. Freddy, 117 La. 121, 41 So. 436. Where defendants offered themselves as witnesses, held that state had right to attack their general reputation for morality in neighborhood where they resided. State v. Barnett [Mo.] 102 S. W. 506. In action for damages for personal injuries, evidence that plaintiff's reputation for chastity was bad held admissible. York v. Everton [Mo. App.] 97 S. W. 604.

83. Under Civ. Code Prac. § 597, evidence of particular wrongful acts is inadmissible to impeach defendant, except that it may be shown that he has been convicted of felony, and hence on prosecution for homicide it was reversible error to examine accused as to his having killed a man in another state and fled from there to avoid prosecution after indictment. Britton v. Com., 29 Ky. L. R. 857, 96 S. W. 556. On prosecution for whipping certain persons, held improper to require defendant on cross-examination to answer questions as to whether he had previously belonged to certain lawless band, and whether he had not been shot while on raid with them. Hensley v. Com. [Ky.] 102 S. W. 268. Special instances of crimes attempted or committed cannot be proved against defendant in criminal case. Powers v. State [Tenn.] 97 S. W. 815. Rule is otherwise when defendant himself is asked on cross-examination as to independent matters of kind to impeach his character for truthfulness, or general moral character, or where any other witness is, upon cross-examination, asked such things for purpose of testing his own trustworthiness, such inquiry cannot extend beyond witness' denial. Id. Exclusion of question as to witness being dead beat held not error, particularly where other evidence tending to show that fact was admitted without objection. State v. Grubb [Mo.] 99 S. W. 1083. B. & C. Comp. § 852. Evidence that witnesses who were sailors had deserted from certain ship held inadmissible. State v. White [Or.] 87 P. 137.

84. Held not error to permit witness for defendant to be asked on cross-examination if he had not committed a detestable crime in a certain month, where he made no claim of privilege. State v. Long [Mo.] 100 S. W. 587.

85. Such as to indicate such moral depravity or degeneracy on his part as would likely render him insensible to obligations of an oath to speak truth. Miller v. Ter. [C. C. A.] 149 F. 330. On prosecution for cattle theft, questions whether witness had a sweetheart who was niece of fugitive from justice, and whether he had not at times consulted with persons reputed to be cattle thieves, etc., held improper, particularly where no foundation was laid. Id.

86. Though, when defendant offers himself as witness, he thereby puts himself on same footing as any other witness, and may be examined, cross-examined, and impeached in same manner. Clinton v. State [Fla.] 43 So. 312.

87. Though rule that witness may be impeached by assailing his general moral character applies. Powers v. State [Tenn.] 97 S. W. 815. On prosecution for homicide, held error to admit evidence tending to show defendant's reputation for violence, otherwise inadmissible, for purpose of impeaching him as witness. Id.

88. See 6 C. L. 1998.

89. Where accused in criminal case testified in his own behalf, held competent for state to introduce evidence as to his general character, and his character for truth and veracity, and hence not error to allow properly qualified witness to testify that he would not believe him under oath. Mitchell v. State [Ala.] 42 So. 1014. Rule applies to defendant in criminal case who takes stand. Maloy v. State [Fla.] 41 So. 791. Inquiry should be confined to general reputation as affecting defendant's testimony in any and all cases in which he may be called as witness. Id. On prosecution for crime, held that testimony as to credibility of defendant "as a witness in the case being tried" was properly stricken; that being question for jury. Id. Where witness had testified that he knew general reputation for truth and veracity of prosecuting witness in community where he lived, and

(§ 5 B) 2. *Accusation and conviction of crime.*[91]—The previous conviction of a witness of a felony[92] or infamous crime,[93] if not too remote,[94] may be shown as affecting his credibility, even though it does not render him incompetent as a witness.[95] In some states the crime must be one involving moral turpitude.[96] Proof of conviction of a misdemeanor is generally inadmissible,[97] though allowable in some jurisdictions.[98] Usually mere arrest[99] or accusation by indictment or otherwise[1] cannot be shown, though a contrary rule prevails in some states.[2] Conviction may

that it was bad, held error not to permit him to answer question whether from such reputation he could be believed, and was entitled to credibility, upon oath. Douglass v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 817, 98 S. W. 840.

90. Glass v. State [Ala.] 41 So. 727.

91. See 6 C. L. 1999.

92. Conviction for crime made felony by statute, though not a crime at common law, may be shown under Code, § 1795. Fuller v. State [Ala.] 41 So. 774. Witness held properly asked whether he had not been convicted of aiding prisoner charged with murder to escape from jail, that being a felony under Code 1896, § 4711. Id. Where defendant in criminal case voluntarily testified in his own behalf, held competent for prosecution to show either by his cross-examination or the record that he had theretofore been convicted of felony. Code Civ. Proc. § 2051. People v. Soeder [Cal.] 87 P. 1016. Held proper to allow accused to be asked on cross-examination whether he had not previously been convicted of crime under another name, and why he used such other name. State v. Clark, 117 La. 920, 42 So. 425. Where defendant was witness, records to prove that he had been convicted of crime held admissible. People v. De Camp [Mich.] 13 Det. Leg. N. 862, 108 N. W. 1047. Questions asked witness as to whether he had not been arrested, tried, and convicted of assault and battery held proper. People v. Tubbs [Mich.] 13 Det. Leg. N. 959, 110 N. W. 132. Under Rev. St. 1899, § 4680, where defendant in criminal case testified in his own behalf, held that state was properly allowed to introduce record of his previous conviction and sentence for felony. State v. Brooks [Mo.] 100 S. W. 416. Where defendant in criminal case took stand as witness, held competent to impeach him by showing that he had been charged with, and prosecuted for, felonies or misdemeanors involving moral turpitude. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533.

93. Gaming by any means is not such an infamous crime as may be shown in evidence to discredit witness. Mitchell v. State [Ala.] 42 So. 1014.

94. Evidence that witness has been prosecuted for crime should be limited to prosecutions of recent date. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 S. W. 496. On prosecution for homicide, evidence that defendant had been convicted of burglary four years previously held not too remote Hull v. State [Tex. Cr. App.] 100 S. W. 403.

95. See § 1, ante.

96. On prosecution for assault, held error to allow state to show by defendant on cross-examination that he had previously paid fines for fighting, that not being an offense involving moral turpitude. Pollok v. State [Tex. Cr. App.] 101 S. W. 231.

97. Not under Civ. Code Proc. § 597. Wells v. Com., 30 Ky. L. R. 504, 99 S. W. 218. On prosecution for misdemeanor, held error to allow state to show by defendant on his cross-examination that he had committed other misdemeanors. Ball v. Com., 30 Ky. L. R. 600, 99 S. W. 326. Record of plaintiff's previous conviction in federal court held properly excluded, where it showed that, though indictment contained count for felony and one for misdemeanor, former was dismissed and defendant pleaded guilty to latter. Missouri, etc., R. Co. v. Dumas [Tex. Civ. App.] 15 Tex. Ct. Rep. 638, 93 S. W. 493.

98. State v. Griggsby, 117 La. 1046, 42 So. 497. May show that witness has been charged with, and prosecuted for, felonies or misdemeanors involving moral turpitude. Turman v. State [Tex. Civ. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533. Carter's Code Alaska, p. 4, §§ 669, 675, held not to preclude introduction of record of previous conviction of witness of misdemeanor. Ball v. U. S. [C. C. A.] 147 F. 32.

99. Witness cannot be asked whether he has ever been "arrested" or "indicted" for crime, but question should be asked as to his "conviction." State v. Barrett, 117 La. 1036, 42 So. 513.

1. Mere accusation or indictment is inadmissible. Glover v. U. S. [C. C. A.] 147 F. 426. Question whether stolen property had not been found in witness' possession, which he had been forced to pay for, held improper. Miller v. Ter. [C. C. A.] 149 F. 330. Held not error to refuse to allow defendant to show that plaintiff had been indicted for perjury. Kansas City So. R. Co. v. Felknap [Ark.] 98 S. W. 366. Under Code 1906, § 1923, held prejudicial error to require defendant in criminal case to answer question whether he had ever been "charged" with any offense, where he answered that he had, but had not been convicted. Starling v. State [Miss.] 42 So. 798. Requiring witnesses to answer questions whether they had not been charged with crime, and if informations or indictments had not been returned against them, held error under Rev. St. 1899, § 4680. State v. Wigger, 196 Mo. 90, 93 S. W. 390. Defendant cannot be asked on cross-examination whether he has been indicted for crime, or whether he was tried, unless it appears that he was convicted or actually guilty. People v. Gascone, 185 N. Y. 317, 78 N. E. 287.

2. On prosecution for homicide, where witness testified that accused fired fatal shot, held that indictment against such witness charging him with the homicide, returned by same grand jury that indicted accused, was admissible to discredit witness, but for no other purpose, and it was not error to instruct jury that it was not to be considered for any other purpose. Hayes v. State, 126 Ga. 95, 54 S. E. 809. On prosecution for larceny, held proper to ask ac-

generally be shown by the record,[3] or on cross-examination,[4] and, as a rule, by one of these means only,[5] though this rule does not seem to be universal.[6] In some states the record is the only competent evidence for that purpose.[7]

(§ 5) *C. Interest and bias of witnesses.*[8]—Interest in the event of the action,[9] or in its prosecution,[10] or any facts tending to show bias or prejudice on the

cused how many larceny cases there had been in the court against him, and whether one which he admitted having been brought against him was cotton stealing case. McCoy v. U. S. [Ind. T.] 98 S. W. 144. On prosecution for homicide, held proper to introduce evidence of former indictments for felonies against defendant and another, though as to one of the charges therein there was conviction of aggravated assault. Cecil v. State [Tex. Cr. App.] 100 S. W. 390.

3. Copy of judgment and sentence showing that witness had been convicted of felony held admissible. Gulf, etc., R. Co. v. Gibson [Tex. Civ. App.] 15 Tex. Ct. Rep. 153, 93 S. W. 469. Admission of record of conviction of defendant in Federal court of another district for different offense for purpose of affecting his credibility as witness held not objectionable, as giving extraterritorial effect and force to judgment of such court. Ball v. U. S. [C. C. A.] 147 F. 32. Judgment of conviction of person of same name as witness is admissible without showing that witness was person so convicted, identity of names affording ground for prima facie presumption of identity of persons, which presumption may be rebutted, whether it has been rebutted being question for jury. Boyd v. State [Ala.] 43 So. 204. Record showing sentence on plea of nolo contendere held admissible, under Rev. St. c. 84, § 119, as showing a conviction, such a plea being an implied confession, and a judgment of conviction following it as well as plea of guilty, and it not being necessary that court should adjudge party guilty. State v. Herlihy [Me.] 66 A. 643.

4. Proof of conviction may be made by oath of the witness without production of record. Code 1896, § 1796. Fuller v. State [Ala.] 41 So. 774. Under Rev. St. 1899, § 4680, held proper, on prosecution for homicide, to ask defendant who had offered himself as witness, on cross-examination, as to his having been convicted of misdemeanor and sent to workhouse. State v. Barrington, 198 Mo. 23, 95 S. W. 235. Where defendant indicted for assault offered himself as a witness, held that he was properly required upon cross-examination to testify as to his previous conviction of similar crime, but further cross-examination as to particulars of offense upon which such conviction was based, tending to show propensity to acts of violence, was improper and prejudicial. State v. Mount [N. J. Err. & App.] 64 A. 124. Where defendant in criminal case offered himself as witness, held that he might be asked on cross-examination whether he had not been previously convicted of a certain other crime in different state, and under another name. Ball v. U. S. [C. C. A.] 147 F. 32. See, also, cases previously cited in this section.

5. Fact that defense showed that witness was living in meretricious relations held not to authorize proof that defendant had caused her to live as a harlot. People v. Cascone, 185 N. Y. 317, 78 N. E. 287. Evidence that defendant told witness that he had been previously imprisoned for burglary held inadmissible as original impeaching evidence. Fanin v. State [Tex. Cr. App.], 100 S. W. 916.

6. Conviction proved by judge of city court. State v. Griggsby, 117 La. 1046, 42 So. 497.

7. Cannot be shown by parol. Green v. State, 125 Ga. 742, 54 S. E. 724; O'Donnell v. People, 224 Ill. 218, 79 N. E. Held error to permit defendant to show on cross-examination of plaintiff that he had been confined in jail on charge pending in Federal court, and had partially served a sentence on said charge. Missouri, etc., R. Co. v. Dumas [Tex. Civ. App.] 93 S. W. 493.

8. See 6 C. L. 2000.

9. In action by servant against master for personal injuries, where defendant pleaded a release which it appeared had been procured by agent of company which had insured defendant, and such agent was offered as witness to prove execution of release, and there was conflict of testimony with respect to circumstances under which it was obtained, held not error to permit plaintiff to bring out on cross-examination of agent that any judgment recovered against defendant would have to be paid by insurance company, to show interest of witness. Vindicator Consol. Gold Min. Co. v. Firstbrook [Colo.] 86 P. 313. Wide range of cross-examination is permitted as matter of right in regard to motives, interest, or animus as connected with cause or parties thereto, upon which matters witness may be contradicted by other evidence. Pittman v. State [Fla.] 41 So. 385. Rule applies to cross-examination of defendant in criminal case who voluntarily offers himself as witness. Id. In action to recover possession of mare, held proper to ask witness, who testified that he had purchased mare and sold her to plaintiff and that he had no interest in case, on cross-examination whether, if person from whom he purchased her turned out not to be owner, he would not have to make good to plaintiff. Frank v. Symons [Mont.] 88 P. 561. In action by railway mail clerk against railroad for personal injuries, held error to refuse to allow defendant to prove by plaintiff that, on former trial of case and while witness in his own behalf, plaintiff testified that he believed that any man working for corporation or interested in a matter would bend his testimony according to his interest. St. Louis, etc., R. Co. v. Sproule [Tex. Civ. App.] 101 S. W. 268. Refusal to permit defendant to prove that witness for plaintiff, who was also one of his attorneys, was pecuniarily interested in suit, because employed on contingent fee, held prejudicial error, though jury knew that he was of counsel in case. Pecos River R. Co. v. Harrington [Tex. Civ. App.] 99 S. W. 1050. In criminal case, fact that defendant was interested in result held circumstance affect-

part of a witness,[11] such as his relations with [12] or hostility toward a party,[13] may be shown and considered as affecting his credibility. Evidence bearing on the motives of the prosecuting witness in a criminal case is also admissible.[14]

ing his credibility which could be considered by jury. Shelton v. State, 144 Ala. 106, 42 So. 30. Instruction approved. Hammond v. State [Ala.] 41 So. 761; Prior v. Ter. [Ariz.] 89 P. 412.

10. Question whether witness had not advised plaintiff to bring damage suit against defendant held proper on cross-examination. Atlantic Coast Lins R. Co. v. Powell [Ga.] 56 S. E. 1006. Held competent for defense in criminal case to ask witness on cross-examination if he had not contributed money to aid in prosecution, and what his purpose was in so doing (Miller v. Ter. [C. C. A.] 149 F. 330), and to show that witness, who was an attorney, had received retainer to assist in prosecution, and to show in what capacity he was retained (Id.).

11. On prosecution for homicide, held proper to question witness who did actual killing as to conversation with third party in which he made threats against deceased. Morris v. State [Ala.] 41 So. 274. Where witness for defendant denied making threats against deceased, and testified that he and deceased were friendly, held that evidence that he made such threats long before homicide was admissible to show his hostility to prosecution and bias for defendant. Hanners v. State [Ala.] 41 So. 973. Evidence held immaterial on question of bias of witness. Parham v. State [Ala.] 42 So. 1. Refusal to allow defendant to prove by son of decedent that he had trouble with decedent's children on day of homicide held harmless, since jury knew that he was son of deceased and such trouble could not have added to bias growing out of his relationship. Gregory v. State [Ala.] 42 So. 829. Fact that witness was jointly indicted with defendant for killing deceased's brother held matter proper to be considered in passing on his credibility, deceased and his brother both having been killed in same difficulty with defendant, under same circumstances, and at almost same time, and it being impossible to develop circumstances of one killing without those of other. Smith v. State, 79 Ark. 25, 94 S. W. 918. Instruction that jury should receive testimony of defendant's employes same as that of any other witness, and determine their credibility by same tests and principles, held erroneous, and properly refused. Murray v. Llewellyn Iron Works Co. [Cal. App.] 87 P. 202. Fact that witness' employer had insured defendant, if admissible at all in personal injury case, held admissible only for purpose of showing bias, so that it was error to permit him to be cross-examined as to nature of insurance. Capital Const. Co. v. Holtzman, 27 App. D. C. 125. On prosecution for homicide where it clearly appeared that certain witnesses were holding county positions and were active and ardent supporters of deceased and engaged in political club election, at which homicide took place, as such, held not error to refuse to allow defendant to show that they were political henchmen of deceased, as county commissioner, and that one of them was retained in his position by deceased's brother, there being nothing to be gained by further investigation as to their interest or prejudice. Roberts v. People, 226 Ill. 296, 80 N. E. 776. Opposite party may, on cross-examination, show bias, prejudice, bad feeling, or hostility of witness who testifies to a controverted fact, but questions designed to impeach credibility are inadmissible where no attempt is made to contradict testimony, and facts necessary to make out prima facie case are admitted by pleadings. Regester v. Regester [Md.] 64 A. 286. Evidence offered by defendant, for purpose of showing that witness was partisan for plaintiff, that at former trial he had attended court only three days but had arranged with counsel for plaintiff to make claim for sixteen days attendance, held improperly excluded. Briscoe v. Metropolitan St. R. Co., 118 Mo. App. 668, 95 S. W. 276. Held proper to prove on cross-examination of witness in criminal case that he asked another witness what he swore to in grand jury room, as showing animus or interest in favor of defendant. Owens v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 685, 96 S. W. 31. Refusal to allow defendant to show that one of plaintiff's witnesses had suit against it similar to suit of plaintiff held error. Missouri, etc., R. Co. v. Cherry [Tex. Civ. App.] 17 Tex. Ct. Rep. 29, 97 S. W. 712. Declarations of witnesses made out of court are admissible in criminal case to show their bias, prejudice, or favoritism, though made out of defendant's presence. Porch v. State [Tex. Cr. App.] 99 S. W. 1122. In action for damages against carrier for assault committed on passenger by another passenger, held that, though it would have been proper to permit plaintiff to be asked on cross-examination whether he had not appeared as witness against other passenger on his prosecution for the assault, refusal to permit question was harmless under the circumstances. Norfolk & W. R. Co. v. Birchfield, 105 Va. 809, 54 S. E. 879. May be shown that witness agreed to testify for money consideration. Routledge v. Rambler Automobile Co. [Tex. Civ. App.] 16 Tex. Ct. Rep. 386, 95 S. W. 749. Question whether witness had been paid by defendant for attending court held prima facie admissible, but when answer disclosed that defendant had done nothing further than to pay certificates formerly issued to him as witness in case, which was necessary under Code 1896, § 1341, in order to secure his attendance, motion to exclude should have been sustained. Southern R. Co. v. Morris, 143 Ala. 628, 42 So. 17. Plaintiff held properly allowed to ask witnesses of defendant railroad on cross-examination whether defendant had furnished them with free transportation. Kansas City So. R. Co. v. Belknap [Ark.] 98 S. W. 366. Where witnesses testified that plaintiff had offered them suits of clothes if they would testify in his behalf, provided he won his case, held that examination of such witnesses and plaintiff as to what was said, surrounding circumstances, and effect of what was said, tending to show that no harm was intended, and that testimony of wit-

(§ 5) *D. Proof of previous contradictory statements.*[15]—Prior statements of witnesses inconsistent with their testimony [16] upon material issues are always competent as impeaching evidence when a proper predicate has been laid therefor.[17] Thus, oral [18] or written statements out of court,[19] statements in letters,[20] affidavits,[21]

nesses was not influenced, was proper. Dupuis v. Saginaw Valley Trac. Co. [Mich.] 13 Det. Leg. N. 767, 109 N. W. 413. Testimony of witness for state that witness for defendant had attempted to induce him not to testify held admissible. State v. Cook [Idaho] 88 P. 240.

12. Party on cross-examination should be allowed to show witness' relations with and disposition toward plaintiff or defendant, whether friendly or hostile. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654. On trial for homicide, evidence that female witness who testified in defendant's behalf was his paramour held admissible. Perdue v. State, 126 Ga. 112, 54 S. E. 820. On prosecution for homicide, evidence that witness for state was concubine of deceased, which fact she denied on cross-examination, held admissible to show animus, matter not being collateral one. State v. Craft, 117 La. 213, 41 So. 550. May be shown that witness has written letters to other party in interest of party for whom he testifies. Toledo, etc., R. Co. v. Stevenson, 122 Ill. App. 654, and to prove which letter was not competent evidence, where court properly discriminated between its proper and improper use, and struck parts of it from record. People v. Thorne [Mich.] 14 Det. Leg. N. 66, 111 N. W. 741. Letter admitted to have been written to defendant by witness held admissible to discredit latter by showing his friendly relations with defendant even though it contained statements which were hearsay. In summary proceedings to dispossess tenant for alleged holding over, where there was sharp conflict in evidence as to term of hiring, held proper, on cross-examination of tenant and one of his witnesses, to attempt to show improper relations between them. Sakolski v. Schenkel, 50 Misc. 151, 98 N. Y. S. 190. On prosecution for homicide, objection to question asked state witness as to whether deceased was not father of an illegitimate child by daughter of witness held properly sustained on ground of irrelevancy and immateriality. Du Bose v. State [Ala.] 42 So. 862.

13. Accused may show feeling of hatred toward him on part of any of witnesses for prosecution. State v. Barber [Idaho] 88 P. 418. In action for assault and battery, evidence that witness had said that he would do everything in his power to ruin the father of defendants, and other testimony showing that witness was hostile to him, held inadmissible. McQuiggan v. Ladd [Vt.] 64 A. 503. Admission by witness of ill feeling toward party renders proof of circumstances tending to establish that fact unnecessary, and therefore inadmissible. Proctor v. Pointer [Ga.] 56 S. E. 111. Where witness admitted on stand that her feelings toward defendant were not good, held proper to exclude evidence that such witness first informed her of the slander for which damages were sought. Id.

14. Refusal to allow prosecutrix to be asked on cross-examination whether any inducement or threat had been held out or made to her to get her to sign complaint against defendant held error under Code Civ. Proc. § 1847. People v. Mitchell [Cal. App.] 89 P. 853.

15. See 6 C. L 2001.

16. Though declarations of a person be excluded as substantial evidence, yet this does not render them inadmissible to impeach such person who afterwards testifies. Hoyt v. Zumwalt [Cal.] 86 P. 600. Where witness denied knowledge of deed, evidence of contradictory statements held merely to discredit her testimony and not to be substantive evidence of existence of deed. Hutchins v. Murphy [Mich.] 13 Det. Leg. N. 901, 110 N. W. 52.

17. As to necessity of laying foundation, see § 5 E, post.

18. **Evidence held admissible:** On prosecution for homicide, that witness had stated after difficulty with deceased that latter had not hurt him, where he testified that deceased had knocked him down. Morris v. State [Ala.] 41 So. 274. As to statement made by witness to third person in conflict with his testimony. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. In action against administrators to recover for services alleged to have been rendered decedent, where witness testified that, so far as he knew, no services had been rendered, evidence that witness had stated to plaintiff that he would not object to her claim, etc. Leonard v. Gillette [Conn.] 66 A. 502. Where witness for state on trial for homicide testified that defendant did the shooting, evidence that she admitted that she herself did it. Perdue v. State, 126 Ga. 112, 54 S. E. 820. Statement made to police by one of several persons accused of murder. McCann v. People, 226 Ill. 562, 80 N. E. 1061. Where nonexpert had given his opinion as to defendant's insanity, proof that witness had previously expressed an inconsistent opinion. State v. Hogan, 117 La. 863, 42 So. 352. Where witness testified that he had transferred certain notes to plaintiff, evidence that he had stated to certain persons that he still owned them. Carey v. Nissle, 145 Mich. 383, 13 Det. Leg. N. 490, 108 N. W. 733. Held proper to ask motorman of street car if he had not made certain statements as to condition of track inconsistent with his testimony and to prove that he had made them. Schloemer v. St. Louis Transit Co. [Mo.] 102 S. W. 565. Statement made by defendant to physician who examined him on behalf of people at request of court held admissible as an admission, or for purpose of showing that defendant's statements made at different times were contradictory and inconsistent. People v. Furlong [N. Y.] 79 N. E. 978. In action against railroad company for killing person walking on track, where engineer had testified that he did not realize deceased's peril, and proceeded on assumption that he would leave track in ample time, his declaration, immediately after accident, that deceased made him angry because he would not get off track. International & G. N. R.

pleadings,[22] and depositions,[23] and statements made under oath at a former trial,[24] or at a coroner's inquest,[25] have been held competent. Prior statements amounting merely to the expression of an opinion cannot ordinarily be shown.[26] Writings[27] or statements of third persons are not admissible unless the witness has in some manner authorized or adopted them as his own.[28] Failure to volunteer evidence cannot discredit a witness, particularly when such evidence would be irrelevant.[29]

Co. v. Munn [Tex. Civ. App.] 102 S. W. 442. State held properly allowed to impeach testimony to effect that another than defendant did shooting by showing contrary statements, etc. McIntyre v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 544, 94 S. W. 1048. In action for assault and battery, evidence that witness had stated that plaintiff's wife knew nothing and saw nothing of the affray in question, such witness having testified differently, and wife having testified that she did see it. McQuiggan v. Ladd [Vt.] 64 A. 503.

19. Written statement of witness as to how accident occurred. Miller v. Detroit United R. Co., 144 Mich. 13 Det. Leg. N. 140, 107 N. W. 714.

20. Letter written by witness to discredit his testimony that he had procured a certain contract, that defendants had agreed to pay him for his services, and that, so far as he knew, plaintiff had no part in the transaction and had not been promised any compensation by defendants. Richards v. Richman [Del.] 64 A. 238.

21. Stinson v. Com., 29 Ky. L. R. 733, 96 S. W. 463. Affidavit which witness admitted having made, though he claimed to have signed it while drunk. New v. Young [Ala.] 41 So. 523. Affidavit made by defendant in support of motion for continuance. Weaver v. State [Ark.] 102 S. W. 713. Affidavit which witness did not deny having made, though she denied knowledge of its contents. New v. Young [Ala.] 41 So. 523.

22. Answer which witness admitted signing and bill, the allegations of which were admitted thereby. New v. Young [Ala.] 41 So. 523. Petition in another suit in which witnesses had been parties plaintiff, it appearing that they had authorized such suit and were present at trial thereof, and that at least one of them had testified. Texas & N. O. R. Co. v. Moers [Tex. Civ. App.] 17 Tex. Ct. Rep. 400, 97 S. W. 1064. Fact that, in suit by lessor of certain land to cancel lease, lessee admitted in answer lessor's ownership, held not to discredit his testimony as to previous execution of deeds to premises by lessor under agreement that they should not be recorded until his death in subsequent action in ejectment by grantee in deeds. Ranken v. Donovan, 100 N. Y. S. 1049. Summons out of small cause court held erroneously admitted, nothing appearing in bill of exceptions which it tended to contradict. Gunn v. Mumford [N. J. Err. & App.] 65 A. 989.

23. Where defendant on cross-examination stated that when a young man his hair was dark held proper, under Code Civ. Proc. § 2052, after showing him a deposition previously taken but which could not be used, to ask him whether he had not testified, when giving such deposition, that when young his hair was auburn. Lanigan v. Neely [Cal. App.] 89 P. 441. Agent sued on contract in his own name without disclosing that he acted as agent only. On appeal principals were substituted as plaintiffs. Held that agent's deposition used on trial in lower court had no tendency to contradict his deposition used on appeal, in which he stated that he acted as agent in making contract, merely because in first deposition he failed to state that he was so acting, and hence was inadmissible to discredit or contradict him. Chany v. Hotchkiss [Conn.] 63 A. 947.

24. Under Code, § 5258, relating to preservation of minutes of proceedings of grand jury, such minutes, when read over to and signed by witness, may be used at trial for impeachment purposes. State v. Hoffman [Iowa] 112 N. W. 103. Where stenographer who took testimony of witness at former trial swore to accuracy of his notes, held that he was properly allowed to read excerpts therefrom Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 S. W. 496. Fact that plaintiff testified differently at former trial as to his physical or mental status at time of injury, or as making any statement as to cause or manner of receiving injuries, held not to affect competency of his testimony, though it might be matter for consideration of jury as to effect to be given it. International & G. N. R. Co. v. Hugen [Tex. Civ. App.] 100 S. W. 1000. Transcript of official stenographer's notes of testimony at former trial held inadmissible to impeach witness who had not signed it or otherwise certified that it was correct. Prewitt v. Southwestern Tel. & T. Co. [Tex. Civ. App.] 101 S. W. 812.

25. Witness having denied correctness of statements contained in written notes of evidence given by him before coroner, introduced for purpose of impeachment, held that statement of coroner as to his testimony at inquest was admissible. State v. Jennings [Or.] 87 P. 524. Question asked stenographer to coroner as to certain question asked policeman at inquest held properly excluded as not tending to contradict his testimony at trial. People v. Way, 104 N. Y. S. 277.

26. Where witness had testified to facts tending to show that killing was in self-defense, held error to permit proof of his previous statements that accused had shot deceased for nothing. Watson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 587, 95 S. W. 115.

27. Entries in stock book showing that stock had been sold at par held not admissible to contradict witness who testified that in his opinion stock was not worth 50 cents on dollar, where he did not make them. Lemly v. Ellis [N. C.] 55 S. E. 629. Letter of third person which witness had never approved or even heard of held inadmissible. Virginia-Carolina Chem. Co. v. Knight [Va.] 56 S. E. 725.

28. Witness in criminal case cannot be impeached by showing statements made by third parties in his presence not shown to

(§ 5) *E. Foundation for impeaching evidence.*[30]—A proper predicate must be laid for the introduction of impeaching evidence,[31] and this is usually done upon the cross-examination of the witness sought to be impeached.[32] A predicate for proof of inconsistent oral statements is usually laid by inquiring of the witness whether he made a certain statement,[33] specifying the time and place thereof, the person to whom made, and the language used.[34] If the witness then denies making the statement,[35] or makes an evasive answer,[36] it may be shown by other evidence

have been authorized by him. Tucker v. Ter. [Okl.] 87 P. 307. Statement of government's attorney to court in which he asked leniency in sentence of person previously convicted, who was to be witness for government in another case, held not admissible in latter case as bearing on credibility of such witness, it not appearing that witness heard such statement. Thompson v. U. S. [C. C. A.] 144 F. 14.

29. Fact that, in suit by lessor of certain land to cancel lease, lessee did not testify that lessor had previously conveyed land to others under agreement that deeds were not to be recorded until grantor's death, held not to discredit his testimony as to such conveyance and agreement in subsequent action of ejectment brought by grantee. Ranken v. Donovan, 100 N. Y. S. 1049.

30. See 6 C. L. 2002.

31. Clinton v. State [Fla.] 43 So. 312; Opet v. Denzer [Tex. Civ. App.] 16 Tex. Ct. Rep. 118, 93 S. W. 527; Earley v. Winn [Wis.] 109 N. W. 633. Impeaching question held properly excluded. Boles v. People [Colo.] 86 P. 1030. Sufficient foundation held to have been laid to entitle defendant to contradict testimony of witness as to how he described defendant to police. People v. Murphy, 113 App. Div. 363, 99 N. Y. S. 110. Memoranda in time books as to capacity and place where witnesses worked held not original evidence and hence inadmissible except in individual instances where attention of witnesses was directed to such memoranda and opportunity afforded them to explain or deny same. Eureka Hill Min. Co. v. Bullion Beck & Champion Min. Co. [Utah] 90 P. 157. Sufficient foundation held to have been laid. Maxcy v. Fairbanks Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 300, 95 S. W. 632.

32. Where accused in criminal case testified in his own behalf, held not error to allow state to recall him for purpose of laying predicate for his impeachment, though he had previously been cross-examined and excused as witness. Hays v. State [Tex. Cr. App.] 100 S. W. 926.

33. On prosecution for homicide, held proper to ask defendant on cross-examination if he did not state after difficulty with deceased that latter had not hurt him, where he had testified that deceased had knocked him down, etc. Morris v. State [Ala.] 41 So. 274. On prosecution for carrying concealed pistol, where accused denied carrying it, held that state had right to lay predicate to contradict him by proving admissions or confessions by him of having so carried it without showing that such confessions were voluntary. Burgess v. State [Ala.] 42 So. 681. Evidence as to statements held inadmissible where she was not asked whether she made them. Robinson v. Jones [Md.] 65 A. 814.

34. Before a witness can be impeached by proof of oral contradictory statements out of court, he must first be asked as to the time, place, and person involved in the supposed contradiction. Hirsch & Sons Iron & Rail Co. v. Coleman [Ill.] 81 N. E. 21. Otherwise declarations cannot be shown, even though he answers insufficient questions as to such statements without objection. Chicago & A. R. Co. v. Jennings, 120 Ill. App. 195. Must first be interrogated, with sufficient particularity of person, time, and place to call his attention thereto, as to whether or not he did make such contradictory statements. People v. Mallon, 101 N. Y. S. 814. Where witness understood circumstances of time and place of alleged conversation to which his attention was called, held that sufficient foundation was laid though his attention was not called to persons present. People v. Yee Foo [Cal. App.] 89 P. 450. Question held too indefinite, obscure, and vague, and not to have sufficiently informed witness as to time, place, and person involved. Clinton v. State [Fla.] 43 So. 312. Question whether witness had not made certain statement to named person at certain time held proper impeaching question. Bowen v. Sierra Lumber Co. [Cal. App.] 84 P. 1010. Witness' attention held not sufficiently called to occasion when statements were alleged to have been made. Loughlin v. Brassil [N. Y.] 79 N. E. 854. Sufficient foundation held to have been laid. Stoebier v. St. Louis Transit Co. [Mo.] 102 S. W. 651. New trial should not be granted solely because of admission of proof of contradictory statement without notice to witness of time, place, and person, where there was opportunity for witness to be recalled and explain contradiction. Newell v. Taylor, 74 S. C. 8, 54 S. E. 212. Where plaintiff brought out from his witness that he had not made certain representations, held not an abuse of discretion to allow defendant, on cross-examination of another witness whose evidence was taken before trial, to discredit first witness by proving that she said in his presence that plaintiff did make such representations. Id.

35. Where witness admitted having a conversation with another person in regard to contents of pocket on or about a certain date and explained same but denied making certain statement, held that such other person might be asked whether witness had met him on said date and made such statement to him, though he fixed date of conversation eleven days earlier. Evans v. Barnett [Del.] 63 A. 770.

36. Proof of contradictory statement, held competent where witness stated that he did not remember having made it. Campos v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 76, 97 S. W. 100. Cross-examination of witness in criminal prosecution as to whether he had testified to certain facts at the coroner's inquest which he testified to at trial, to which he answered that he did not remember, held improper where it was not pre-

that he did make it. If he admits making it, however, other proof that he did so is usually inadmissible.[37] The proper way to introduce a writing containing a contradictory statement for the purpose of impeaching a witness is to present it to him and prove by him that he signed it and then read it to the jury.[38] The hostility of a witness toward a party against whom he is called may ordinarily be proved by any competent evidence without previous cross-examination of the witness upon the subject,[39] but this rule does not authorize proof of mere utterances of the witness to show hostility without previous cross-examination as to such utterances.[40] It is generally held that, where facts set forth in an affidavit for continuance are taken as the evidence of an absent witness, evidence of his previous contradictory statements is inadmissible,[41] though there seems to be some conflict of authority in this regard.[42] The impeaching testimony must be confined to the predicate laid.[43] The impeaching witness should be asked the precise question put to the principal witness,[44] and the exact words claimed to have been used by the latter should be incorporated in the question.[45]

(§ 5) *F. Corroboration and sustentation of witnesses.*[46]—Where no attempt has been made to impeach a witness, evidence which is merely corroboratory of his testimony is inadmissible,[47] even though other witnesses have testified to a different state of facts.[48] It has, however, been held that, where an attempt has been made

viously shown that he was specifically interrogated as to such matters at the inquest, or that he was directed, invited, or given an opportunity to testify to them, and prejudicial error when taken in connection with remarks of counsel. Larrance v. People, 222 Ill. 155, 78 N. E. 50.

37. Refusal to allow witnesses to testify as to such statements held not error. Bice v. State [Tex. Cr. App.] 100 S. W. 949. Where prosecutrix in rape case testified that defendant had intercourse with her, and that she had made different statements to county attorney and grand jury because of threats to send her to jail if she did not, held prejudicial error to permit state to introduce her statements to county attorney and grand jury either for impeachment or as substantive evidence. Skeen v. State [Tex. Cr. App.] 100 S. W. 770.

38. Sufficient foundation held to have been laid for introduction of affidavit previously made by witness and inconsistent with his testimony. Stinson v. Com., 29 Ky. L. R. 733, 96 S. W. 463.

39. People v. Mallon, 101 N. Y. S. 814.

40. Admission of evidence that witness had stated that he would give false testimony held error where no foundation was laid. People v. Mallon, 101 N. Y. S. 814.

41. Since he has not been asked concerning it as required by Civ. Code Prac. § 598. Clay v. Goldstein [Ky.] 102 S. W. 319. Party who, for purpose of avoiding a continuance, admits that a certain witness would, if present, testify to matters stated in the affidavit, thereby waives his right to impeach such witness by a method which requires him to lay a foundation for such impeachment. Helbig v. Citizens Ins. Co., 120 Ill. App. 58.

42. Under Rev. St. 1899, § 687, where facts set forth in affidavit for continuance are read as evidence of an absent witness, opposite party may prove any contradictory statements made by such absent witness in relation to matter in issue. Beler v. St. Louis Transit Co., 197 Mo. 215, 94 S. W. 876.

43. Objection to impeaching question held properly sustained. Williams v. State [Ala.] 41 So. 992.

44. Hanselman v. Broad, 113 App. Div. 447, 99 N. Y. S. 404.

45. If it is sought to show that defendant, who testifies in his own behalf in a criminal case, has made statements out of court inconsistent with his testimony, statement supposed to have been made by him and to which his attention has been called must be incorporated in impeaching question so that question can be answered yes or no by impeaching witness. Haddix v. State [Neb.] 107 N. W. 781. Failure to object to question on that ground held waiver. Id.

46. See 6 C. L. 2003.

47. Evidence of previous statements consistent with his testimony. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533. Fact that state had offered other accounts given by defendant as to how defendant came by property alleged to have been stolen, as original and inculpatory evidence, and not for purpose of impeaching him as to his statements on stand, held not to authorize defendant to prove that he gave other accounts similar to his testimony. Welch v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 522, 95 S. W. 1035. Neither did fact that after his testimony state placed witness on stand who testified that account given by defendant as witness was untrue, it being merely evidence contradicting defendant's evidence on same subject. Id. On criminal prosecution, testimony as to account of transaction given to witness by person arrested for complicity in offense after such arrest held properly excluded where such person was present in court and defendant stated that he proposed to examine him about the transaction. Lewis v. State [Ala.] 39 So. 928. Objection to question as to what witness testified to on trial of one arrested with defendant for complicity in offense held properly sustained. Id.

48. State held not entitled to prove consistent statements by witness who was not

to show that the testimony of a witness is false in certain particulars, evidence tending to show its truth in other particulars is admissible.[49] As a general rule a witness cannot be corroborated by showing previous consistent statements,[50] though there seems to be some conflict of authority in this regard.[51] Where, however, he is charged directly or inferentially with testifying under the influence of some motive prompting him to make a false statement, it may be shown that he made a similar statement when the imputed motive did not exist, or when motives of interest would have induced him to make a different statement.[52] So, too, where it is attempted to be established that his statement is a recent fabrication, evidence of his having given the same account of the matter at a time when no motive existed to misrepresent the facts is admissible.[53]

impeached, though defendant testified in contradiction of testimony of said witness. McKnight v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 681, 95 S. W. 1056. Mere conflict between two or more witnesses does not authorize corroboration of one by his former statements. Inman Bros. v. Dudley & Daniels Lumber Co. [C. C. A.] 146 F. 449.

49. Where credibility of prosecuting witness was sought to be impeached by evidence tending to show that he had sworn falsely as to one of the articles taken at time of robbery, held that testimony tending to show that he was not mistaken as to other articles was admissible in rebuttal. State v. Easley [La.] 43 So. 279.

50. Evidence held properly excluded. People v. Wright [Cal. App.] 89 P. 364. Inadmissible where witness is shown to have made statements of fact contradictory to those made at trial. Cincinnati Traction Co. v. Stephens, 75 Ohio St. 171, 79 N. E. 235. Where witness has denied making statements contradictory of his testimony, and testimony tending to establish such statements is admitted. Burks v. State, 78 Ark. 271, 93 S. W. 983. Mere fact that admissions of party to suit may have been proved and that they do not accord with testimony given by him as a witness, examined by interrogatories, does not render such statements admissible. McBride v. Georgia R. & Elec. Co., 125 Ga. 515, 54 S. E. 674. Where witness on cross-examination denied that he had made certain statements to policeman, held error to allow him on redirect to state what he told such policeman. Zuckerman v. New York City R. Co., 102 N. Y. S. 641. Letter or report by agent to principal about latter's business held inadmissible to corroborate agent's evidence. Inman Bros. v. Dudley & Daniels Lumber Co. [C. C. A.] 146 F. 449. Fact that agent was stranger and surrounded by friends of defendants, and that latter used indefensible threats, and that it was claimed that they had conspired to testify as to what he did and said, held not to make report admissible, it appearing that threats were made long after transaction in controversy and to the principal. Id.

51. Where opposite party proves statements made by witness out of court contradictory to his testimony on trial, court may permit party calling him to prove that he made statements in line and in consonance with his testimony, provided said statements are contemporaneous. Rice v. State [Tex. Cr. App.] 100 S. W. 771. Accomplice stands in same position as any other witness in this regard, though conviction cannot be had upon his testimony unless corroborated. Id. Evidence of statements held admissible to corroborate accomplice. Id. Where state proved that witness had committed various offenses and had made contradictory statements, held that defendant could show that immediately after crime had been committed witness made similar statements to one he made at trial. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 S. W. 496. Where defendant on cross-examination of an accomplice who appeared as witness for state showed that such witness had for a time denied all connection with the crime, held error to admit evidence that, after inducements had been held out to him, he made statements admitting his complicity and incriminating defendant which was similar to his testimony on trial. Anderson v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 633, 95 S. W. 1037.

52. Commonwealth v. Miller, 31 Pa. Super. Ct. 317. Statements of defendant showing knowledge of existence of deed to her from her husband held admissible. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198.

53. Commonwealth v. Miller, 31 Pa. Super. Ct. 317. Is not necessary that party directly charge that evidence is fabrication, but rule applies where by contradictory evidence, or from nature of case, testimony is indirectly claimed to be fabricated. In re McClellan's Estate [S. D.] 111 N. W. 540, modifying [S. D.] 107 N. W. 681. Letter written by witness and evidence of his statements to third person held admissible, it appearing that denial of claims of certain parties was based on theory that testimony of witness was recent fabrication for reason that he had motive for coloring or falsifying his evidence. Id. After introduction of impeaching evidence tending to show that plaintiff had been silent concerning his claims when most likely he would have asserted them had grounds existed, and leading to inference that they were of recent fabrication, held that he could be corroborated by proof of previous consistent claims and statements made and consistent conduct exhibited at time when their ultimate effect could not in nature of things have been foreseen. National Cereal Co. v. Alexander [Kan.] 89 P. 923. Statements of defendant showing knowledge of existence of deed to her from her husband held admissible. Davis v. Davis [Tex. Civ. App.] 17 Tex. Ct. Rep. 286, 98 S. W. 198.

The subsequent acts or declarations of a witness are ordinarily inadmissible to fortify his testimony.[54] In prosecutions for rape, however, evidence that the prosecutrix made complaint after the commission of the offense is admissible.[55]

The party calling a witness sought to be impeached may re-examine him for the purpose of giving him an opportunity to explain contradictory statements or circumstances proved against him.[56]

Testimony to sustain the character of a witness is inadmissible unless he has been impeached,[57] but where his character has been attacked, proper evidence in rebuttal is, of course, admissible.[58] As a general rule a witness whose reputation has been directly assailed, or whose credit has been impeached by showing that he has made statements contradictory of his evidence, may be sustained by proof of his general good character for truth and veracity,[59] and such evidence may also be ad-

54. New v. Young [Ala.] 41 So. 523.

55. See, also, Rape, 8 C. L. 1667. In corroboration of her testimony. State v. Werner [N. D.] 112 N. W. 60. Particulars of complaint held admissible where her testimony has been attacked or her credibility questioned, and cross-examination aimed at impeachment of prosecutrix as to such statement entitles state to show all the particulars. Id.

56. Where impeaching conduct of a party, which might indicate long standing hostility against other party, was brought out on cross-examination, held error to refuse to permit him to explain conduct. Lenfest v. Robbins, 101 Me. 176, 63 A. 729. Where witness on cross-examination admitted giving inconsistent testimony on former trial, held proper on redirect to permit him to explain his motive in so doing. Hoggan v. Cahoon [Utah] 87 P. 164. Where witness' evidence as to facts surrounding injury sued for differed from previous written statement made out of court, held that he was properly allowed to explain how he happened to make such former statement. Hirsch & Sons Iron & Rail Co. v. Coleman [Ill.] 81 N. E. 21. Where state introduced part of witness' testimony at former trial for purpose of impeaching him, held that defendant was entitled to introduce any other part of such testimony which explained, modified, or contradicted part introduced by state. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 S. W. 496. Where witness for state was asked if he did not make certain statement on examining trial, which was reduced to writing and read to him and which tended to contradict his testimony, and he stated that he thought he did, held proper to permit state on redirect to read another statement to him, made and found in same examining trial evidence, in regard to same matter qualifying previous statement and tending to show that he was not entirely clear as to the matter. Lahue v. State [Tex. Cr. App.] 101 S. W. 1008. Witness who denies making contradictory statements cannot be asked what he did say until evidence that he did make such statements has been introduced. Cathcart v. Webb, 144 Ala. 559, 42 So. 25.

57. Mere fact that two witnesses differ in their statements as to any fact does not tend to impeach either. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. Where reputation of witness for truth and veracity is not attacked, evidence to prove his good reputation in that respect is inadmissible. Casey v. State [Tex. Cr. App.] 17 Tex. Ct. Rep. 169, 97 S. W. 496.

58. On prosecution for homicide, though district attorney stated that he did not intend to attack defendant's reputation for peace and quiet, whereupon court limited number of defendant's witnesses to prove his reputation to eight, held not error to permit district attorney to cross-examine such witnesses as to their knowledge of defendant's reputation. People v. Wright [Cal. App.] 89 P. 364. Refusal to allow evidence that general reputation of witness for defense was good held not error though state had previously been allowed to show that it was bad, where her original testimony was inadmissible as hearsay. Clark v. People, 224 Ill. 554, 79 N. E. 941. Where effort is made on cross-examination to discredit witness, evidence of his good character is admissible in rebuttal. Minton v. La Follette Coal, Iron & R. Co. [Tenn.] 101 S. W. 178. Fact that defendant in criminal case claimed and undertook to show that charge was blackmailing scheme on part of prosecuting witness and her husband to get possession of defendant's property held not to authorize state to show that husband's reputation for honesty and fair dealing was good, as reputation in that respect was not in issue. Smith v. State [Tex. Cr. App.] 100 S. W. 924.

59. Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 94 S. W. 227. Where evidence of conflicting statements was introduced to impeach accused who testified in his own behalf. Dunlap v. State [Tex. Cr. App.] 17 Tex Ct. Rep. 444, 98 S. W. 845. Where witness was contradicted by proof that he made statements which he denied. Myers v. State [Tex. Cr. App.] 101 S. W. 1000. Where defendant introduced evidence to show that plaintiff had made statements at variance with his testimony, and evidence tending to show that he had simulated injury complained of. Missouri, etc., R. Co. v. Dumas [Tex. Cr. App.] 15 Tex. Ct. Rep. 538, 93 S. W. 493. Where defendant showed that plaintiff had been confined in jail on misdemeanor charge and had partially served sentence therefor. Id. Where evidence was admitted to show that plaintiff had made statements and admissions in conflict with his testimony. Browning v. Chicago, etc., R. Co., 118 Mo. App. 449, 94 S. W. 315. Where reputation of witness for truth and veracity has been impeached and it is sought to support his reputation by testimony of other witnesses, predicate must first be laid by showing that such witnesses are acquainted with his general reputation in neighborhood where he lives for truth and veracity before they can testify to what it is. Wolff v.

mitted in a criminal case on particular discrediting facts being developed against the witness in his cross-examination, particularly when he is in the situation of a stranger testifying to isolated facts.[60] In some states, however, general good reputation for truth and veracity is inadmissible in support of the testimony of a witness impeached by proof of conflicting statements.[61] There seems to be a conflict of authority as to whether a witness shown to have been convicted of crime may prove his innocence.[62]

§ 6. *Privilege of witnesses.*[63]—Under the Federal and state constitutions no person, in a criminal case,[64] may be compelled to give evidence against himself,[65] and no witness in any legal proceeding can be compelled to give evidence that will tend to incriminate him.[66] The privilege does not operate to excuse the witness from incriminating a corporation whose officer he is.[67]

Western Union Tel. Co. [Tex. Civ. App.] 15 Tex. Ct. Rep. 420, 94 S. W. 1062. Question asking as to "character" of witness instead of his "general character" held improper. Southern R. Co. v. Hobbs [Ala.] 43 So. 844. Question whether witness "thought" character of another witness was good or bad held improper. Id.

60. As where state's witness was subjected to most rigid cross-examination, which tended to bring him into disrepute before jury, and indirectly seriously attacked his testimony. Harris v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 247, 94 S. W. 227. Where witness for state in criminal case has been attacked by laying predicate for his subsequent impeachment, or where his character has been assailed in any manner, state may introduce evidence sustaining that reputation before witnesses for defense have been placed upon stand directly to impeach. Id. In any event admission of sustaining evidence held harmless where witnesses for defense were subsequently introduced who seriously attacked his character. Id. Refusal to limit evidence of general reputation of state's witness to purpose of impeachment held not error where it was not calculated in any manner to affect merits of case or defendant's rights before jury. Id.

61. State v. Hoffman [Iowa] 112 N. W. 103.

62. Where witness admitted that he had been convicted of felony, testimony that he was not guilty held inadmissible. Fuller v. State [Ala.] 41 So. 774. Where defendant was erroneously allowed to show on plaintiff's cross-examination that he had been convicted of a misdemeanor, held not reversible error to permit plaintiff on recross-examination to give testimony tending to show that he was not guilty of the charge. Missouri, etc., R. Co. v. Dumas [Tex. Civ. App.] 15 Tex. Ct. Rep. 538, 93 S. W. 493.

63. See 6 C. L. 2005.

64. Proceeding to punish one for contempt for violating injunction held not "a criminal prosecution" within meaning of Const. art 1, § 12, and hence B. & C. Comp. § 670, authorizing examination of defendant in such proceedings, is not unconstitutional, and defendant may be required to testify as to violation of injunction, subject to his right to refuse to answer questions tending in any manner to incriminate him. State v. Sieber [Or.] 88 P. 313. Proceedings to punish for contempt for disobeying injunction held not a criminal case within U. S. Const. Amend. 5, or a criminal prosecution within Pa. Const. art. 1, § 9, so as to preclude order requiring production of books and papers of organization enjoined. Patterson v. Wyoming Dist. Council, 31 Pa. Super. Ct. 112. Proceeding for deportation of Chinaman is a civil and not a criminal one so that defendant may be sworn and examined as a witness for the government and order of deportation based on his evidence against himself. Law Chin Woon v. U. S. [C. C. A.] 147 F. 227; Low Foon Yin v. U. S. Immigration Com'rs [C. C. A.] 145 F. 791.

65. Statement made by defendant to physician who examined him on behalf of people at request of court held not within constitutional prohibition. People v. Furlong [N. Y.] 79 N. E. 978. Order issued pursuant to Laws 1906, p. 79, no. 95, requiring corporation to produce certain books, etc., before grand jury, held violation of Const. art. 10, company not being a party nor charged with any crime, and having right to claim privilege after it had appeared with such books. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

66. Persons voting illegally at an election are protected against disclosing for whom their illegal ballots were cast. Scholl v. Bell [Ky.] 102 S. W. 248. On examination of defendant before a referee before trial to enable plaintiff to prepare complaint in action to recover property of estate of a decedent alleged to have been fraudulently obtained and disposed of by defendant, held that, under Const. Art. 1, § 6, Code Civ. Proc. § 837, and U. S. Const. Art. 5, defendant was entitled to refuse to answer questions on ground that answer would tend to accuse him of crime. Chappell v. Chappell, 101 N. Y. S. 846. General manager for retail liquor dealer who was shown to have been present in saloon and saw bartenders under his control selling liquor on Sunday in violation of law held, under Const. art. 1, § 10, not required to answer question put to him by grand jury as to whether such bartenders were on duty and selling liquor on said day, since he could not have done so without making himself a principal in the transaction. Ex parte Merrell [Tex. Cr. App.] 95 S. W. 1047. Held that proceeding for punishment of defendant for contempt for violation of injunction would not be quashed because petition showed that many of the facts set forth therein were obtained from him while testifying in obedience to a subpoena in another case, and hence they should not be permitted to be used against him in violation of privilege

The statement of the witness that the answer will tend to criminate him is not necessarily conclusive, the question being one for the court, to be determined from all the circumstances of the particular case, and the nature of the evidence sought to be elicited;[68] but if the question has a possible incriminating tendency, the witness is the sole judge as to whether such is the fact.[69] The same rule applies to the production of books and papers in response to a subpoena duces tecum.[70]

The privilege is purely personal to the witness and he alone can claim it.[71] The time for asserting it is when the examination takes place,[72] and, since it is not violated by the mere summoning and swearing of the witness,[73] he must obey his subpoena and be sworn before he can claim it.[74]

The privilege is not violated by admitting the voluntary statements of one accused of crime,[75] and one charged with crime who voluntarily testifies to any

secured to him by Rev. St. § 860, it not appearing that contempt might not be shown by other evidence. Hammond Lumb. Co. v. Sailors' Union of the Pacific, 149 F. 577.

67. Meade v. Southern Tier Masonic Relief Ass'n, 104 N. Y. S. 523.

68. In re Consolidated Rendering Co. [Vt.] 66 A. 790; Ex parte Butt, 78 Ark. 262, 93 S. W. 992. Witness examined before grand jury held not guilty of contempt in refusing to answer questions in regard to dynamiting of certain gambling house, where answers might have tended to incriminate him by showing that he himself did dynamiting or assisted others in doing so, or that he was guilty of criminal libel in accusing another of doing it, and it did not appear what crime jury was investigating. Ex parte Andrews [Tex. Cr. App.] 100 S. W. 376.

69. Chappell v. Chappell, 101 N. Y. S. 846. If there is reasonable ground to apprehend that answer may tend to criminate witness. Ex parte Butt, 78 Ark. 262, 93 S. W. 992. If question asked witness is such that direct answer may or may not criminate him according to purport of answer, it must rest with him to answer such question or not, and if he says upon his oath that answer would criminate him, court can demand no other testimony of the fact. In re Mark [Mich.] 110 N. W. 61. Question held such that direct answer might criminate witness, so that his statement that it would was conclusive. Id. Rule that witness is sole judge is subject only to further rule that party aggrieved may prove, if he can, in an action for damages, that reason given was false and refusal to testify willful. In re Avery C. Lowe, 3 Ohio N. P. (N. S.) 641.

70. Mere statement of witness that books he is required to produce contain matter tending to incriminate him will not excuse him from obeying subpoena duces tecum, but court must be able to perceive that there is reasonable ground to apprehend danger to him. United States v. Collins, 145 F. 709, 146 F. 553. Mere fact that witness had been jointly indicted with his copartners and others for conspiracy to defraud government held not tantamount to showing that books of firm which he was required to produce were self-incriminating. Id.

71. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Cannot be claimed for him by a party to the suit. Beauvoir Club v. State [Ala.] 42 So. 1040. Where witness claims privilege, but court rules he must answer, and he does so without further protest, evidence is not illegal as to defendant, and he cannot review action of court on appeal though he objects and excepts to ruling. Id. Motion to set aside information on ground that accused did not have statutory preliminary examination, because accomplice called as witness refused to answer certain questions on cross-examination that in her opinion would tend to criminate her, and that objection was made by counsel rather than witness, denied, there being sufficient evidence to authorize magistrate to hold defendant for trial. State v. Bond [Idaho] 86 P. 43. Is not duty of court upon interposition of party against whom he is called, and independent of any objection of witness, to inform latter of such privilege. State v. Mungeon [S. D.] 108 N. W. 552. Manner of examination of witnesses being largely discretionary with court, held not error to allow counsel to repeatedly request court to instruct witness that he need not answer incriminating questions unless he wished to do so, nor for court to so instruct witness. Lauchheimer v. Jacobs, 126 Ga. 261, 55 S. E. 55.

72. Hence order for examination of adverse party before trial should not be refused because witness may be privileged. Meade v. Southern Tier Masonic Relief Ass'n, 104 N. Y. S. 523.

73. Failure to produce books as required by subpoena duces tecum not excused by claim that they contain incriminating matter, it not being infraction of Const. Amend. 5, to merely bring them, and he not being in position to claim exemption until called upon to disclose incriminating evidence. United States v. Collins, 145 F. 709, 146 F. 553.

74. United States v. Collins, 145 F. 709, 146 F. 553. Cannot disobey a subpoena duces tecum, and refuse to produce books and papers called for, and still claim privilege that, if produced, they would tend to criminate him. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Question of privilege cannot be raised by motion to dismiss petition for punishment of corporation for contempt for failure to obey order issued pursuant to Laws 1906, p. 79, No. 95, requiring it to produce certain books, etc., before grand jury, where petition contains no allegation relating to any claim of privilege or any testimony appearing to be incriminating. Id. Question could have been raised before grand jury and reported to court for its action. Id.

75. Testimony given by accused in his

matter connected with the transaction may be fully cross-examined with regard to it,[76] but cannot be compelled to undergo experiments before the jury, even though he has offered himself as a witness.[77] The privilege is waived if not seasonably asserted,[78] and the question of privilege is not open to review where the witness answers.[79]

Statutes abridging the constitutional privilege against giving self-incriminating evidence are valid provided the immunity thereby granted is as broad as that granted by the constitution itself. In many jurisdictions it is held that the immunity granted by statutes providing that the witness may be compelled to give self-incriminating testimony, but that the testimony given by him shall in no case be used against him in any criminal prosecution, is sufficiently broad.[80] In others it is held that the witness cannot be compelled to give self-incriminating evidence unless the immunity granted is an absolute one from future prosecution for the offense to which the testimony relates.[81]

own behalf on hearing of petition for writ of habeas corpus to secure his discharge from insane hospital, and after he had been informed by district attorney that he would be prosecuted for homicide if discharged, held admissible against accused on his subsequent trial for homicide, defended on ground of insanity, since it was voluntary and hence its introduction did not compel defendant to be witness against himself contrary to Const. art. 1, § 13, and U. S. Const. art. 5, particularly where there was nothing in such testimony which could be construed as a confession or admission of guilt. People v. Willard [Cal.] 89 P. 124. In criminal case held error to admit testimony as to what accused said under oath as witness before grand jury, where he was then in custody on charge of committing same crime, and there was evidence that he was induced to make statement by precedent undue influence. Cooper v. State [Miss.] 42 So. 601.

76. Defendant who takes stand is bound to answer any pertinent inquiry on cross-examination. State v. Heffernan [R. I.] 65 A. 284. On prosecution for practicing medicine without a certificate, held that defendant was properly required to answer question as to what was ingredient of nerve food used by him. Id. Where two parties are separately charged with a felony, and, upon preliminary examination of one, other is called as a witness by prosecution, he may refuse to answer any questions, either direct or cross-examination, that would tend in least to incriminate him, he not being voluntary witness. State v. Bond [Idaho] 86 P. 43.

77. Held error to require defendant to place cap on his head for purpose of identification by prosecutrix. Turman v. State [Tex. Cr. App.] 16 Tex. Ct. Rep. 409, 95 S. W. 533.

78. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Fact that witness gave testimony on ex parte examination before justice which fully sustained charge against defendant held not a waiver of right to decline to answer questions on defendant's preliminary examination. In re Mark [Mich.] 110 N. W. 61.

79. Taylor v. U. S. [C. C. A.] 152 F. 1.

80. Kirby's Dig. § 3087, providing that in all cases where two or more persons are jointly or otherwise concerned in commission of any crime or misdemeanor either may be sworn as witness in relation to such crime or misdemeanor, but testimony given by such witness shall in no case be used against him in any criminal prosecution for same offense, is valid. Ex parte Butt, 78 Ark. 262, 93 S. W. 992. Statute protects witness against use of incriminating testimony only in prosecutions for offense of which defendant was accused and in relation to which witness was called to testify. Id. Under such statute participant can be compelled to testify as to facts tending to incriminate himself only to the extent of the protection thereby afforded him, and in cases in which statute does not provide for protection, he may refuse to answer all questions, the answers to which may criminate him. Id. Held error to require member of legislature to answer questions as to his acceptance and use of free railroad transportation, since such acceptance would have been misdemeanor under Kirby's Dig. §§ 6694, 6695, 6697, and answer might criminate him, and § 3087 would not prevent use if his testimony on prosecution therefor. Id. Witness before grand jury held properly required to answer questions purpose of which was to show that certain room was used as meeting place for purpose of bribery, since if answer would criminate him, he would be protected by § 3087. Id. Witness required to answer questions seeking information as to bribery of members of legislature, since, if he was concerned therein, it must have been in connection with others and hence he was within protection of § 3087. Id. Witness required to answer questions as to mileage books delivered to him, since if delivered to him as an inducement to commit a crime, and he committed it, he would be jointly liable with person delivering it and would be protected by § 3087, while if it was delivered to him for a lawful purpose, or if no crime was committed in consequence of such delivery, answer could not criminate him. Id. In form in which certain questions were propounded held that witness should not have been compelled to answer them. Id.

81. Held that even if Pen. Code, § 142, providing that in certain civil cases no person shall be excused from testifying to certain facts on ground that testimony might tend to convict him of crime but that his evidence shall not be received against him

The constitutional provision against unreasonable searches and seizures cannot ordinarily be invoked to justify the refusal of an officer of a corporation to produce its books and papers in obedience to a subpoena duces tecum[82], unless the subpoena is so sweeping in its demands as to be unreasonable.[83]

Refusal to answer proper questions renders the witness liable to punishment for contempt.[84] A witness is not excused from answering a question otherwise

in a criminal prosecution, was applicable to case at bar, it did not deprive him of right to refuse to answer, since it did not grant him complete immunity. Chappell v. Chappell, 101 N. Y. S. 846. Statute held inapplicable to action by administrator to recover property of decedent alleged to have been fraudulently obtained by defendant. Id. Section 837 applies to civil as well as criminal cases and is controlling. Id. Acts 1903, p. 122, c. 94, § 15, providing that witness in proceeding before justice of peace for violation of anti-trust act may be compelled to testify and relieving him from prosecution, held not to apply to investigation by grand jury. Ex parte Andrews [Tex. Cr. App.] 100 S. W. 376. Witness held not guilty of contempt in refusing to answer questions as to boycott propounded to him by grand jury, where any knowledge he might have must have been acquired by participating therein, particularly where no immunity was offered him. Id.

Bankruptcy Act: Immunity granted bankrupt by Act July 1, 1898, c. 541, § 7, sub. 9; 30 St. 548, held to relate only to criminal proceedings arising out of bankrupt's conduct of his business, disposition of his property, and other past transactions, about which alone statute authorizes his examination, and not to protect him from prosecution for making false oath in giving his testimony. Edelstein v. U. S. [C. C. A.] 149 F. 636. Immunity given by said section is not sufficient to supplant privilege conferred by constitution if latter is claimed, but where bankrupt consented to answer an obviously self-incriminating question without objection, held that section was no defense to prosecution for false swearing in examination on objection to discharge. Id. Testimony given by bankrupt on his examination in bankruptcy proceedings cannot be admitted in a subsequent criminal proceeding against him if timely objection is interposed. United States v. Simon, 146 F. 89. Hence, though statute does not in terms grant immunity from prosecution, it does preclude conviction of bankrupt for perjury for false testimony given by him in support of claim filed against his estate. Id. Proviso of Rev. St., § 860, that such section shall not exempt any party or witness from prosecution or punishment for perjury committed in testifying as therein provided cannot be read into said section of the Bankruptcy Act. Id. Demurrer to indictment sustained, it being notice to court that defendant would not waive privilege. Id.

82. In aid of grand jury investigation. Santa Fe Pac. R. Co. v. Davidson, 149 F. 603. Laws 1906, P. 79, No. 95, requiring corporations, on notice, to produce before any court grand jury, etc., books, papers, etc., bearing on pending actions, inquiries, etc., held not in contravention of Const., art. 11, since it limits order to such documents as contain information concerning subject of inquiry, and is sufficiently definite and limited in its operation. In re Consolidated Rendering Co. [Vt.] 66 A. 790. Order made pursuant thereto held not an unreasonable search or seizure, it being sufficiently definite as to what was to be produced, requiring no undue and improper inquisition into company's affairs, and a compliance therewith involving no hardship or detriment to company's business. Id. Order provided for is, in effect, a subpoena duces tecum, except that it is addressed to corporation rather than to an officer thereof. Id. Statute is not in contravention of Const. art. 10, providing that no one can be compelled to give evidence against himself. Id. Not in contravention of U. S. Const. Amend. 14, as arbitrarily discriminating between artificial and natural persons, and denying the former the equal protection of the laws (Id.), nor as depriving corporation of its property without due process of law in that it authorizes fine for disobedience of order (Id.), or in failing to provide compensation for time, trouble, and expense in producing documents in other states, the statutes relating to fees and mileage being applicable and loss due to inadequacy is incidental to exercise of legitimate powers of government (Id.). Foreign corporation which has complied with state statutes and is doing business in state held amenable to statute. Id. Not excused from obeying order by reason of fact that it had sent books demanded to home office. Id. Corporation may be required by subpoena to produce within reasonable limits its books and papers before grand jury engaged in investigating its acts. United States v. American Tobacco Co., 146 F. 557.

83. Subpoena requiring production of minute books for three years and copy letter books for three months held not too broad, though not confined to documents relating to definitely specified transactions. United States v. American Tobacco Co., 146 F. 557. Subpoena held not unreasonable. Santa Fe Pac. R. Co. v. Davidson, 149 F. 603. Subpoena calling for production of books and papers admittedly in possession of witness held not a violation of 4th Const. Amend., there being nothing unreasonable in the quantity of books called for or the description of those wanted. United States v. Terminal R. Ass'n, 148 F. 486.

84. Is duty of witness examined before master to answer such questions as latter may direct after objections thereto have been overruled, and he may be punished for contempt for refusal to do so unless he himself interposes some personal privilege which would excuse refusal. Bowker v. Haight & Freese Co., 146 F. 256. Under Rev. St. § 1342, 86th Article of War, court-martial has no final jurisdiction over civilian witness and no power to punish him for contempt for refusal to answer questions, its authority being limited to certification of facts to U. S. district attorney. United States v. Praeger, 149 F. 474.

proper on the ground that he will thereby be required to violate the implied confidence of a private conversation,[85] or to disclose his personal affairs,[86] nor from answering a question as to the ingredients of a medicinal compound on the ground that it is his personal property,[87] nor does the fact that questions asked a witness are irrelevant prevent his commitment for contempt for refusal to answer them.[88] Where the secrecy of the ballot is held to be a personal privilege of the voter, he may, when examined as a witness, disclose how he voted or not, as he sees fit.[89] The right of a juror or others to testify as to the deliberations of the grand jury is treated elsewhere.[90]

§ 7. *Subpoenas, attendance, and fees.*[91]—A court of equity has power to compel the production of books and papers in virtue of its inherent and general jurisdiction, and this power is not confined to the parties to the suit but extends to third persons.[92] The manner of issuing [93] and serving subpoenas,[94] and the compensation of witnesses,[95] is regulated entirely by statute and varies in the different states. Since the service of subpoenas outside the jurisdiction of the court is without force or effect, a witness so served is not entitled to mileage though he attends the trial,[96] but this rule does not apply to a witness residing within the jurisdiction but outside the limit of distance within which attendance is compulsory.[97] It is the duty of a witness summoned on behalf of the state in a criminal case to appear according to the summons without a preliminary tender of his fees.[98] The Federal and state

85. Witness before legislative investigation committee. Ex parte Parker, 74 S. C. 466, 55 S. E. 122.

86. Complainant in suit in equity held entitled to require witness to disclose extent of his interest in another corporation which owned a controlling interest in the stock of defendant railroad company. Telier v. Tonopah & G. R. Co., 151 F. 607.

87. On prosecution for practicing medicine without a certificate, defendant held not excused from answering question as to the ingredient of a nerve food used by him. State v. Hefferman [R. I.] 65 A. 284.

88. Where court or officer has jurisdiction of subject-matter, fact that questions are irrelevant furnishes no reason for impeaching commitment of witness for contempt for refusing to answer them. Ex parte Butt, 78 Ark. 262, 93 S. W. 992.

89. Provision of primary election law (Del. Laws vol. 20, p. 357, § 393), for secret ballot held to give voter privilege of disclosing how he voted or not, so that voter's testimony as to how he voted was competent. State v. Matlack [Del.] 64 A. 259. Court held not required to instruct witness that he need not testify as to how he voted at primary election, it not being a criminal matter. Id.

90. See Grand Jury, 7 C. L. 1884.

91. See 6 C. L. 2009.

92. United States v. Terminal R. Ass'n, 148 F. 486.

93. Where no sufficient foundation was laid by plaintiff for reading under Rev. St. 1899, §§ 2904, 3149, from bill of exceptions of evidence of physician given for him on former trial, held error to refuse defendant's request for subpoena for such physician made at proper time. Doyle v. St. Louis Transit Co. [Mo. App.] 101 S. W. 598. Under Code Civ. Proc. § 854, subpoena for witness in supplementary proceedings must be issued by justice or other person before whom such proceedings are pending, and cannot be issued by attorney for judgment creditor. Lowther v. Lowther, 100 N. Y. S. 965. § 2444, providing that on such proceedings either party may be examined as witness in his own behalf, and may produce and examine other witnesses as upon the trial of an action, relates to manner of examining witnesses properly summoned and not to manner of summoning them. Id.

94. Under Code Cr. Proc. 1895, art. 515, subpoena cannot be served by reading it to person to whom it is addressed over telephone. Ex parte Terrell [Tex. Cr. App.] 95 S. W. 536.

95. Wife of a litigant is entitled to mileage and per diem same as any other witness would be for same travel and attendance. Anderson v. Ferguson-Bach Sheep Co. [Idaho] 86 P. 41. Witnesses residing in city where court was held, held not entitled to per diem allowances during periods of adjournment. Smith v. Smith [Mich.] 14 Det. Leg. N. 60, 111 N. W. 342. Proper allowance for per diem and mileage determined. Id. Statutes relating to fees and allowances of witnesses held applicable to corporation served with order to produce books, etc., before grand jury pursuant to Laws 1906, p. 79, No. 95. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

96. Buckman v. Missouri, etc. R. Co. [Mo. App.] 98 S. W. 820. Under Rev. St. 1899, §§ 3259, 3260, witnesses served with subpoenas at their residences in foreign state held not entitled to mileage. State v. Wilder, 196 Mo. 418, 95 S. W. 396.

97. Though under Rev. St. 1887, § 6039, witness residing in adjoining county and more than 30 miles from place of trial is not obliged to attend in response to subpoena, privilege of disobeying it is a personal one, and if he sees fit to waive it and attend and testify, he is entitled to mileage for actual and necessary travel within the state same as any other witness who has attended under compulsory process. Anderson v. Ferguson-Bach Sheep Co. [Idaho] 86 P. 41.

98. Order issued pursuant to Laws 1906,

constitutions give persons accused of crime the right to compulsory process to compel the attendance of witnesses in their behalf,[99] and statutes frequently provide for procuring the attendance of such witnesses at the cost of the county.[1] In some states the accused is not entitled to summon more than a specified number without making a prescribed showing.[2] Statutes authorizing the refusal of a continuance because of the absence of accused's witnesses, on the admission by the state that they would testify as claimed, are valid.[3]

When a witness has been duly summoned it is his duty to appear at the time and place named in the subpoena.[4] If he is required to produce documentary evidence by a subpoena duces tecum, it is his duty to produce what is called for if it is in his possession or under his control.[5] In Louisiana it is discretionary with the trial judge whether a witness shall be required to attend from another parish than that in which the trial takes place.[6] The failure to obey a valid subpoena[7] is, in the absence of a good and sufficient excuse,[8] a contempt of court and may be punished as such, the practice in such cases being largely statutory.[9] The Federal statutes

p. 79, No. 95, requiring corporation to produce certain books and papers before grand jury, and proceedings in contempt for violation thereof, held not an infringement of Const. art. 11, because no tender was made to company covering its fees and expenses. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

99. Constitutional right of accused to compulsory process is right to demand issuance of subpoenas and their service, and he is entitled to have attachments issued to compel attendance of witnesses only when circumstances and conditions are such as to call legally for that writ. State v. Stewart, 117 La. 476, 41 So. 798. Held not error to refuse attachments where subpoenas had not to have been personally served. Id.

1. Laws 1903, c. 5132, p. 71, prescribing requisites to be complied with by parties charged with crime in applications for procurement of witnesses for their defense at cost of county, held not to violate Declaration of Rights of Const. 1885, §§ 11, 14, providing that accused shall have compulsory process for obtaining witnesses. Pittman v. State [Fla.] 41 So. 385. U. S. Const. amend. 6, held inapplicable, it having reference only to powers exercised by Federal government. Id. Applications under said statute should be seasonably made at earliest reasonable opportunity and not withheld until case is called for trial (Id.), and statutory requirements should be complied with (Id.). Is within sound judicial discretion of trial judge to determine whether statutory provisions have been properly complied with and the bona fides of the application, and his action will not be disturbed unless abuse is clearly shown. Id. Refusal to direct issuance of subpoenas for witnesses in behalf of insolvent defendant held not abuse of discretion under circumstances. Id.

2. Where accused has made required oath, he is entitled to summon witnesses beyond statutory six as a matter of right. State v. Freddy, 117 La. 121, 41 So. 436.

3. Where district attorney made admissions demanded by Acts 1894, No. 84, p. 117, held that court properly refused continuance because of abuse of defendant's witnesses. Statute held constitutional. State v. Stewart, 117 La. 476, 41 So. 798.

4, 5. In re Consolidated Rendering Co. [Vt.] 66 A. 790.

6. Under Rev. St. § 1036. State v. Romero, 117 La. 1003, 42 So. 482.

7. Subpoena reciting that magistrate issuing it had "reason to suppose an offense has been committed and for the purpose of investigating whether it has been committed," commanding witness to appear before him "for that purpose," but not naming or describing any person as defendant as required by Code Cr. Proc. § 612, and not stating what the crime was, but showing that it was issued solely for purpose of ascertaining whether crime had been committed or not, held void on its face and not sufficient to require obedience. People v. Wyatt, 186 N. Y. 383, 79 N. E. 330. Where magistrate was acting without jurisdiction in issuing subpoena, and subpoena was void on its face, held that witness was not bound to obey it, and any attempt to punish him for refusing to do so would be unlawful, and he would have absolute right to relief through writ of habeas corpus, so that he was not entitled to writ of prohibition to prevent magistrate from proceeding with examination. Id.

8. Court held justified in refusing to punish witness for failure to obey subpoena duces tecum where he was not afforded sufficient time in which to comply therewith. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139. Refusal of witness to produce books called for by subpoena held not excused by showing merely that they are books of partnership of which he is a member only, and that they are not under his control or in his custody except as one of the members of the firm. United States v. Collins, 145 F. 709. Secretary of corporation cannot be punished for contempt for failure to produce before grand jury certain of its books in response to subpoena duces tecum directed to him, where such books have never been in his possession or under his control, but are in exclusive possession of another officer, remedy in such case being to issue and serve subpoena on corporation. United States v. American Tobacco Co., 146 F. 557.

9. Under Code Cr. Proc. 1895, arts. 516-519, court held not authorized to in first instance render final judgment against witness for contempt in failing to obey sub-

provide that a witness summoned before a general court-martial of the army who willfully refuses to testify shall be guilty of a misdemeanor.[10]

Neither the immateriality of the evidence to be elicited nor the insufficiency of the pleadings will justify a witness in disobeying a subpoena.[11] So, too, a witness is ordinarily not excused from obeying a subpoena duces tecum on the ground that the documents called for are immaterial and not proper evidence in the case,[12] or that they would tend to incriminate him if produced,[13] though a showing as to their materiality and propriety is sometimes required before he may be punished for contempt,[14] or on motion to quash the subpoena.[15]

The exemption of nonresident witnesses from service of process while in attendance upon judicial proceedings is treated elsewhere.[16]

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poena, but proper practice was to enter judgment nisi, and final judgment only after citation to the party and a hearing on evidence. Ex parte Terrell [Tex. Cr. App.] 95 S. W. 536.

10. Act Cong. March 2, 1901, c. 809, 31 St. 950, providing that any civilian duly subpoenaed to appear as a witness before a general court-martial of the army, who "willfully" refuses to testify, shall be guilty of a misdemeanor, but that no witness shall be compelled to incriminate himself, etc., construed, and held that refusal of witness to answer question and produce certain document would not be a violation of the act where he had reasonable grounds to believe that to do so would criminate him, though refusal was based on erroneous conception of rules of evidence. United States v. Praeger, 149 F. 474. Witness held not to have violated act where it appeared that he was not actuated by any evil motive or bad intent, that he acted under legal advice of reputable counsel, and that he had reasonable grounds to believe that answers would tend to incriminate him. Id. Where it appeared that documentary evidence which subpoena required witness to produce had been destroyed, held that his failure to produce it was not a violation of the act. Id. Decision of court-martial that answer to question would not tend to incriminate witness held not conclusive in prosecution of witness under Act March 2, 1901, c. 809, 31 St. 950, for refusal to answer. Id.

11. Suit in equity in Federal court. Fairfield v. U. S. [C. C. A.] 146 F. 508.

12. Question is one for court and not for witness. In re Consolidated Rendering Co. [Vt.] 66 A. 790; United States v. Terminal R. Ass'n, 148 F. 486.

13. See § 6, ante.

14. Must be a proper averment by affidavit of facts showing that the books and papers called for are material and proper evidence in the case. Consolidated Coal Co. v. Jones & Adams Co., 120 Ill. App. 139.

15. Is not necessary to satisfy court beyond any reasonable doubt that books and papers called for are relevant and material, but a showing that there is reasonable ground to believe that they may be relevant and material is sufficient. United States v. Terminal R. Ass'n, 148 F. 486. Showing held sufficient. Id.

16. See Process, 8 C. L. 1449.

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